

Minutes

County Council – Special Session

*Randall Ryti, Council Chair, James Robinson, Council Vice-Chair,
Denise Derkacs, David Izraelevitz, David Reagor, Sara Scott,
and Sean Williams, Councilors*

Friday, December 16, 2021

6:00 PM

Due to COVID-19 concerns, meeting will be
conducted remotely.
<https://us06web.zoom.us/j/86182885011>

1. OPENING/ROLL CALL

The Council Chair, Randall Ryti, called the meeting to order at 6:00 p.m.

The following Councilors were in attendance:

Present: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz,
Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

2. APPROVAL OF AGENDA

A motion was made by Councilor Scott, seconded by Councilor Reagor, that the agenda be approved as presented.

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz,
Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

3. HEARING

- A. CASE NO. APL-2021-0019. An appeal to the Los Alamos County Council of the Planning and Zoning Commission's revised Final Order approving Application, Findings of Fact and Conclusions of Law in the matter of SUP-2020-0014 and SUP-2020-0015 - Special Use Permits for an in-home daycare for up to 12-children and Home Business to employ more than one non-family member at 113 B La Senda Rd, White Rock, NM 87547

Councilor Ryti outlined the procedure for the hearing and listed all parties involved.

Councilor Ryti called for Councilors to disclose any conflicts of interest, and ex parte communication.

Councilor Ryti disclosed ex parte communication.

Councilor Scott disclosed ex parte communication.

Councilor Derkacs disclosed possible conflicts.

Mr. Kevin Powers, Assistant County Attorney, spoke.

Councilor Ryti outlined the second part of his opening remarks.

Mr. Alvin Leaphart, County Attorney, spoke.

The following individuals appeared for the parties:

Mr. Kevin Powers appeared on behalf of the Community Development Department.

Mr. David North appeared on behalf of Appellant, Patricia A. Thames, Barham Smith, and Marilyn Smith.

Mr. Kevin Powers, Assistant County Attorney, provided opening remarks.

Mr. David North, Attorney, provided opening remarks.

Ms. Denise Matthews, Applicant, provided opening remarks.

A motion was made by Councilor Scott, seconded by Councilor Reagor, that the County Council enter into closed session pursuant to New Mexico Statute 10-51-1(H)(3) for the purposes of deliberation in connection with this administrative adjudicatory proceeding.

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz, Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

RECESS

Council recessed into closed session at 6:25 p.m. Council returned from closed session at 6:57 p.m.

A motion was made by Councilor Scott, seconded by Councilor Izraelevitz, that the County Council exit the closed session and that the following statement be included in the minutes. The matters discussed in the closed session were limited only to those specified in the motion for closure and no action was taken in the closed session.

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz, Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

Mr. Alvin Leaphart, County Attorney, read the draft order into the record.

A motion was made by Councilor Scott, seconded by Councilor Robinson, that the written order regarding the postponement is read into the record and approved by the County Council and further move to authorize the Chair of the County Council to sign this order and enter the written order into the record of the proceeding.

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz, Councilor Reagor, and Councilor Williams

Absent: 1 - Councilor Williams

B. Closed Session for Deliberations of a Public Body in Connection with an Administrative Adjudicatory Proceeding Pursuant to NMSA § 10-51-1 (H) (3)

Ms. Patricia Thames, Appellant, provided opening remarks.

Mr. Kevin Powers, Assistant County Attorney, provided opening remarks

Ms. Denise Matthews, Applicant, provided opening remarks.

A motion was made by Councilor Scott, seconded by Councilor Derkacs, that the County Council enter into closed session pursuant to New Mexico Statute 10-51-1(H)(3) for the purposes of deliberation in connection with this administrative adjudicatory proceeding.

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz, Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

RECESS

Council recessed into closed session at 7:16 p.m. Council returned from closed session at 7:55 p.m.

A motion was made by Councilor Scott, seconded by Councilor Robinson, that the County Council exit the closed session and that the following statement be included in the minutes, "The matters discussed in the closed session were limited only to those specified in the motion for closure and no action was taken in the closed session."

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz, Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

C. Possible Final Action on this Proceeding

Mr. Alvin Leaphart read the proposed order into the record.

A motion was made by Councilor Scott, seconded by Councilor Derkacs, that the written order regarding the notice issue is read into the record and be approved by the County Council and further move to authorize the Chair of the County Council to sign this order and enter a written order into the record of the proceeding.

The motion passed with the following vote:

Yes: 6 - Councilor Ryti, Councilor Robinson, Councilor Derkacs, Councilor Izraelevitz, Councilor Reagor, and Councilor Scott

Absent: 1 - Councilor Williams

4. ADJOURNMENT

The meeting adjourned at 7:58 p.m.

INCORPORATED COUNTY OF LOS ALAMOS

Randall T. Ryti, Council Chair

Attest:

Naomi D. Maestas, County Clerk

Meeting Transcribed By: Victoria N. Montoya, Senior Deputy Clerk

**COUNTY OF LOS ALAMOS
BEFORE THE LOS ALAMOS COUNTY COUNCIL**

**IN THE MATTER OF AN APPEAL
OF PLANNING AND ZONING
COMMISSION APPROVAL OF
SPECIAL USE PERMITS SUP-2020-
0014 AND SUP-2020-0015, 113B LA
SENDA, LOS ALAMOS COUNTY**

CASE NO. APL-2021-0019.

ORDER ON REQUESTS FOR POSTPONEMENT

COMES the County Council and issues these findings and rulings on the request for postponement filed after the completion and furnishing of the record of the underlying proceeding to the County Council and finds and orders as follows:

Three parties to this proceeding—Marilyn Smith, Barham Smith, and David North (“Appellants”)—have filed a request for postponement. Appellants argue that the County Council may not hear this appeal on December 16, 2021, based on their reading of Rule No. 9 of the Council Procedures for Development Code Appeals. Rule No. 9 provides,

CDD will provide a complete copy of the record, as may have been corrected, any timely filed brief or statement of argument and any timely filed response, to the Council and the parties not later than two (2) weeks before the appeal.

Appellants argue that since additional motions and requests were filed after CDD provided the complete copy of the record of the underlying proceeding before the Planning and Zoning Commission (“Commission”) and the substantive briefs and responses filed pursuant to Rules Nos. 7 and 8 of the Council Procedures for Development Code Appeals, the County Council has prohibited itself from hearing this matter until two (2) weeks go by without any additional motions being filed.

The Council rejects the Appellants reading and interpretation of our procedures.

Enumerated Rule No. 9 must be taken in the context of the preceding rules, in particular the briefing schedules and requirements outlined Rules Nos. 7 and 8. Rule No. 9 requires the CDD to provide the complete copy of the record of the underlying proceeding before the Commission, as provided in Rule No. 4, in addition to the timely filed substantive briefs and responses filed

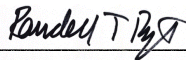
pursuant to Rules Nos. 7 and 8. Rule No. 9 refers to these the substantive briefs and responses provided for by Rules Nos. 7 and 8 by referencing “any timely filed brief . . . and any timely filed response” The Council Procedures for Development Code Appeals provide for no other scheduled briefs or responses other than what is described in Rules Nos. 7 and 8. Thus, the CDD is only required to provide the complete record, provided by Rule No. 4 and corrected, and the briefs and responses contemplated by Rules Nos. 7 and 8 at least two weeks before the appeal. Supplemental briefing, motions, or request beyond the completed briefing cycle provided by Rules Nos. 7 and 8 does not affect the Council’s ability to hear an appeal.

If the Appellants’ interpretation of Rule No. 9 were accepted, it would lead to an unreasonable result. All the Appellants would have to do to keep this matter from ever being heard and resolved would be to keep filing motions. This would continue to delay resolution of this matter to a time determined by the Appellants, thereby depriving the Appellee, Denise Matthews, of her right to have this matter heard and resolved. This result defeats the intended purpose of our procedures which is to resolve appeals made to the County Council. We do not construe our rules to defeat their intended purpose. *Padilla v. Montano*, 1993-NMCA-127, ¶ 23, 116 N.M. 398, 862 P.2d 1257.

Based on the above the request for postponement is DENIED.

SO DECIDED THIS 16th DAY OF DECEMBER 2021.

BY:



Randall T. Ryt, Chair of the County Council
Incorporated County of Los Alamos

**COUNTY OF LOS ALAMOS
BEFORE THE LOS ALAMOS COUNTY COUNCIL**

**IN THE MATTER OF AN APPEAL
OF PLANNING AND ZONING
COMMISSION APPROVAL OF
SPECIAL USE PERMITS SUP-2020-
0014 AND SUP-2020-0015, 113B LA
SEND, LOS ALAMOS COUNTY**

CASE NO. APL-2021-0019

**FINAL ORDER VACATING THE DECISION OF THE PLANNING AND ZONING
COMMISSION'S APPROVAL OF SPECIAL USE PERMITS SUP-2020-2014 AND SUP-
2020-2015 AND REMANDING THE MATTER BACK TO THE PLANNING AND
ZONING COMMISSION FOR REHEARING**

THIS APPEAL came before the Los Alamos County Council ("Council") pursuant to Section 16-493 of the County's Code of Ordinances for a public hearing at a properly noticed Special Meeting of the Council on December 16, 2021.

NOW THEREFORE, pursuant to Section 16-493(a), the decisions by the County's Planning and Zoning Commission ("Commission") in Case No. SUP-2020-0014 and Case No. SUP-2020-0015 are hereby VACATED and REMANDED to the Commission for rehearing.

In support of this Final Order, the Council finds as follows:

I. STANDARD OF REVIEW AND SUMMARY NATURE OF ORDER

Los Alamos County, New Mexico Code of Ordinances Section 16-493(a) provides:

By the affirmative vote of the majority of all its members, the appellate body may, without a full hearing, remand an appeal to the decision-making authority that heard the application for rehearing and decision if it finds that rehearing would be likely to serve public policy or resolve the appeal. If the appellate body remands the appeal without a full hearing, the appellate body shall make findings of fact on which that action is based.

Pursuant to the above and as provided below, the Council finds that issues with notice are dispositive of this appeal. The record demonstrates that notice of the Commission's June 10, 2020, public hearing where Special Use Permit Application #2020-0014 for the operation of an in-home daycare facility and the Special Use Permit Application #2020-0015 for a Home Business for the

parcel located at 113 B La Senda Road, White Rock, New Mexico 87547 on June 10, 2020 (“Public Hearing”) were approved was materially deficient.

As shown below, since Notice of the Public Hearing was materially deficient, the Commission lacked jurisdiction to hear the matter, which renders the Commission’s decisions in this matter void as a matter of law. As such, the Council finds that a full hearing on this matter is not required because remanding this issue to the Commission to rehear after proper notice to the property owners will resolve the notice issue. Further, since the decision rendered by the Commission at the public hearings were and are void as a matter of law, there is no substantive decision by the Commission for the Council to review.

II. FINDINGS OF FACT

1. The Commission held a Public Hearing for Special Use Permit Application #2020-0014 for the operation of an in-home daycare facility and the Special Use Permit Application #2020-0015 for a Home Business for the parcel located at 113 B La Senda Road, White Rock, New Mexico 87547 on June 10, 2020. (See Section 4.1 of the Record, *Planning and Zoning Agenda for its June 10, 2020, hearing.*)

2. The property located at 115 La Senda Road abuts the property located at 113 B La Senda Road. (See Section 1.3 of the Record, Site Plan) As such, the property is within 100 yards of 113 B La Senda Road and will be affected by the proposed daycare facility to some extent. (Id.)

3. The County published Notice of the Public Hearing in the Los Alamos Daily Post and posted such Notice at the County Municipal Building. (See Section 12.2 of the Record, *CDD Reply Brief in Support of Commission Decision, Attachment I, Affidavit of Desirae J. Lujan*, Oct. 22, 2021.)

4. Notice was sent by U.S. mail to George A. Baker, 115 La Senda Road on May 26, 2020. (Id.)

5. George A. Baker was no longer a resident of 115 La Senda Road and had filed a change of address with the U.S. Postal Service, and such notice addressed to Mr. Baker was forwarded. (See Section 12.1 of the Record, *Appellant’s Brief Challenging Personal Notification of all Property Owners Within 100 Yards of the Day Care Proposed in SUP 2020-0014/15*, Page 1.)

6. Appellant Patricia Thames (“Appellant”) was a resident and owner of 115 La Senda Road on or before May 26, 2020, which is the date of the mailing of the Notice to 115 La Senda Road. (Id.)

7. Appellant, as an owner of the real property within 100 yards of 115 La Senda Road that will be affected by the proposed daycare facility, did not receive the notice via U.S. mail. (Id.)

8. There is no evidence or assertion in the Record that the Appellant was either present at the Public Hearing or received any timely actual notice of the Public Hearing. (See generally Section 4.5 of the Record, *Transcript of Los Alamos Planning & Zoning Commission Meeting*).

III. CONCLUSIONS OF LAW

1. To provide proper statutory notice for public hearings on a special use permit application, the County must: (1) publish notice in a newspaper of general circulation in the County at least ten days prior to the public hearing that sets forth the request, the specific parcel of property affected, and the date, time and place of the public hearing; and (2) post notice “in a conspicuous place at the County Municipal Building at least ten days prior to the public hearing.” Sec. 16-192(b)(1) and (3). Here, the notice requirements of Section 16-192(b)(1) and (3) were met via the timely publication of the notice in a newspaper of general circulation and the posting of the notice in municipal building.

2. However, when a special use permit application affects a specific parcel or parcels of property, as it does here, the County must also give notice “by U.S. mail to the owners of real property within 100 yards of the exterior lot lines of the property or properties affected at least ten days prior to the public hearing.” Sec. 16-192(b)(2). Here, the statutory notice requirements were not met because the notice was mailed to a specific former owner of the property who had moved from 115 La Senda Road and filed a change of address notice with the U.S. Post Office resulting in the then current owner, Appellant, not receiving the Notice.

3. A minor and technical defect in providing the required statutory notice for a public hearing will not invalidate the actions taken at the public hearing when there is substantial compliance with the Code such that the purpose of notice requirements - ensuring that affected parties may attend the hearing and state their views - is achieved. *Hawthorne v. City of Santa Fe*, 1975-NMSC-033, ¶ 8, 88 N.M. 123, 537 P.2d 1385; *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 3, 91 N.M. 455, 575 P.2d 1340. However, substantial compliance requires some actual notice of the hearing, evidenced by facts such as the affected property owner’s presence at the

public hearing for which there was defective notice. *Hawthorne*, 1975-NMSC-033, ¶ 8; *Nesbit*, 1977-NMSC-107, ¶ 3. Here, the substantial notice requirements were not met, as there is no evidence or assertion in the Record that Appellant was present at the hearing or received actual notice of the hearing in some other manner.

4. Lack of notice is generally held to be a jurisdictional defect which renders the action taken by the zoning authority void. *Nesbit*, 1977-NMSC-107, ¶ 8. Since statutory notice was not provided to Appellant, and substantial notice was not achieved due to Appellant not having actual notice of the Public Hearing, the approval of these Special Use Permits at the Public Hearing is void.

5. In conclusion, the Public Hearing which considered and approved Special Use Permit Application #2020-0014 for the operation of an in-home daycare facility and Special Use Permit Application #2020-0015 for a Home Business did not comply with the Code's notice requirements. Additionally, because there is no evidence that Appellant had actual notice of Public Hearing, the Hearing did not substantially comply with the Code's notice requirements. Since adequate notice was not provided to Appellant at the Public Hearing, the Commission did not have jurisdiction to hear these matters on June 10, 2020, therefore the approval of both Special Use Permits is void.

THEREFORE, the County Council finds and orders as follows:

(a) The Commission's approval of Special Use Permit Application #2020-0014 for the operation of an in-home daycare facility and the Special Use Permit Application #2020-0015 for a Home Business are invalid, void, and therefore VACATED.

(b) Rehearing of this matter by the Commission, after adequate notice to the required property owners, will resolve the defective notice issue. Therefore, this matter is REMANDED back to the Commission for rehearing.

SO ORDERED THIS 16th DAY OF DECEMBER 2021 IN LOS ALAMOS COUNTY

BY:



Randall T. Ryti, Chair of the County Council
Incorporated County of Los Alamos