

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

**FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
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CLERK OF THE COURT
Patsy Baca**

**PUBLIC SERVICE COMPANY OF NEW MEXICO,
Appellant,
v.**

**BERNALILLO COUNTY BOARD
OF COUNTY COMMISSIONERS,
Appellee,**

D-202-CV-2021-04308

Consolidated with:

**PUBLIC SERVICE COMPANY OF NEW MEXICO
Appellant,
v.**

**BERNALILLO COUNTY BOARD
OF COUNTY COMMISSIONERS,
Appellee.**

D-202-CV-2021-04312

OPINION and ORDER

Public Service Company of New Mexico (PNM) appeals from the adverse decisions of Bernalillo County Board of County Commissioners (the Board). The request for hearing is denied. Following consideration of the arguments and authority presented by the parties, as well as the record in this matter, the Court affirms the decisions of the Board.

Facts and Background

The consolidated appeals in this matter concern PNM's application for an Amendment to the Paseo del Norte-North Albuquerque Acres Sector Development Plan (Sector Plan) to construct an electrical substation designated as the "Palomas Substation," and PNM's application for a Special Use Permit for the Palomas Substation. PNM's 3.54-acre property is located in the unincorporated area of Bernalillo County at the intersection of Paseo del Norte and Browning,

described as Proposed Lot 31-A, Block 1, Tract 3, Unit 2 North Albuquerque Acres.

On January 22, 2021, PNM filed applications for an Amendment to the Sector Plan as well as for a Special Use Permit for the Substation on its property, which is currently zoned SD-RO. **RP 000037** The Substation was described as being enclosed by a fourteen-foot wall, with A-frames within the Substation reaching about forty feet. **RP 000068, 00545** There are typically two transformers onsite, each requiring mineral oil as a coolant, with about six thousand gallons of mineral oil for each transformer. **RP 000064, 000959, 002084, 002369** The County recounts that the SD-RO zoning has been in place since 2005, providing for mixed residential, office, and institutional uses, including, for lots meeting minimum area requirements, for non-residential uses, such as a clinic, institution, or office. **RP 002977** The County Planner described the current neighborhood conditions:

To the north of the site is Paseo del Norte. To the north of Paseo del Norte is A-1 zoned properties with a mix of single-family homes and vacant lots. To the east is undeveloped SD-RO zoned lots. To the south is A-1 zoned property with a mix of single-family homes and vacant lots. To the west is SD-RO developed with commercial and some vacant lots.

RP 00010-11 Unlike city residents, residents of the area rely on private wells and septic systems, and there are two water wells within about eighty-five feet of the proposed site. **RP 002374, 002555** Directly adjacent to the proposed Substation, to the west, Sandia Presbyterian Church (SPC) is located, providing for fifty children in its daily preschool; views from the Church, including from the sanctuary windows, will be impacted by PNM's Substation. **RP 002580**

PNM presented evidence that the current electric system is over capacity, and that the Substation must be constructed to avoid power outages. *See, e.g.,* **RP 00063** It designated the threatened area as the "Area of Critical Need," bounded by Wyoming Boulevard, the Pueblo of Sandia, the Sandia Mountain foothills, and San Antonio Boulevard. **RP 00678** It explains that

the Substation would additionally support future development with resulting additional electric demands, and provide redundancy, allowing for more reliable electric service. **RP 00073-80**

SPC recounts that the opposition consisted of hundreds of pages of letters and petitions from over a thousand individuals, groups, and churches from the North Albuquerque Acres community. **RP 00123-439, 02828-2901** It observes that thirty members of the public spoke in opposition during the public comment section of the Bernalillo County Planning Commission (CPC) hearing. **RP 00444-543**

The Board, on June 17, 2021, denied PNM's appeal and upheld the decision of the Commission to deny PNM's request for a Sector Plan Amendment and a Special Use Permit for the Substation. **RP 000989** Most relevant to the present matter, the Board found that PNM's request "is inconsistent with the Paseo del Norte/North Albuquerque Acres Plan as the proposed use is inconsistent with the Rural character as required by the Plan," it "is inconsistent with Resolution 116-86 in that the applicant failed to demonstrate the existing zoning is inappropriate," and it "is inconsistent with the health, safety, and general welfare of the community." *Id.* at **000990** PNM filed a timely appeal of the Board's denials of its request to this Court.

Discussion

Rule 1-074(R) NMRA sets out the standard of review for this matter. The Court must determine:

- (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
- (2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;
- (3) whether the action of the agency was outside the scope of authority of the agency; or
- (4) whether the action of the agency was otherwise not in accordance with law.

Id. PNM, as the party challenging the Board's decisions, bears the burden of showing that the

Board's decisions fall within the grounds for reversal provided by the Rule. *Cf. Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 25, 122 N.M. 173, 922 P.2d 555. "Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Oil Transp. Co. v. N.M. State Corp. Comm'n*, 1990-NMSC-072, ¶ 12, 110 N.M. 568, 798 P.2d. 169. "Arbitrary and capricious action by an administrative agency consists of a ruling . . . which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the winnowing and sifting process." *Perkins v. Dep't of Human Servs.*, 1987-NMCA-148, ¶ 19, 106 N.M. 651, 748 P.2d 24 (quoted authorities and quotation marks omitted).

"In its review, the court must view the evidence in the light most favorable to the decision." *Paule v. Santa Fe Cty. Bd. of Cty. Comm'rs*, 2005-NMSC-021, ¶ 32, 138 N.M. 82, 117 P.3d 240. This Court's review of actions of the Board is undertaken "with deference" and those decisions will be disturbed only if the Court is not satisfied that the action was authorized by law or if it is not supported by substantial evidence. *Downtown Neighborhood Ass'n v. City of Albuquerque*, 1989-NMCA-091, ¶ 15, 109 N.M. 186, 189, 783 P.2d 962. "The district court may not substitute its judgment for that of the administrative body." *Singleterry v. City of Albuquerque*, 1981-NMSC-037, ¶ 18, 96 N.M. 468, 632 P.2d 345 (quoted authority omitted).

PNM raises four issues. It argues that the Board erred in determining that the Sector Plan was inconsistent with the construction of the Palomas Substation by characterizing the Substation as inconsistent with the rural character of the area, incorrectly attributing a nonexistent requirement to the Sector Plan. PNM contends that the Board erred by failing to apply Resolution 116-86 in

its entirety. PNM argues that the Board's decisions are not based on substantial evidence, as it concluded that the proposed substation is optional and unnecessary, when PNM offered substantial evidence that the Palomas Substation is critical and required because the current system is at over capacity. Finally, PNM argues that the Board's decisions were arbitrary and capricious because it did not consider the whole record, were not based on substantial evidence, the reliance on baseless claims was unreasonable, willful and irrational, and its conclusion that the provision of electricity is inconsistent with health, safety and general welfare is contrary to logic and reason.

As an initial matter, PNM asserts that, during the public hearings before the CPC, the CPC improperly allowed unequal time for public comment and did not attempt to limit repetition in the public testimony. However, as SPC observes, PNM does not contend that it was unfairly limited in the presentation of its case and does not identify any new evidence presented. Thus, the Court does not consider these assertions as a basis for reversal. *Cf. Albuquerque Commons P'ship v City Council of City of Albuquerque*, 2008-NMSC-025, ¶ 31, 144 N.M. 99, 184 P.3d 411 (explaining that the question, when examining an administrative proceeding, whether quasi-legislative or quasi-judicial, is whether it was "fair overall," and afforded the claimant adequate due process of law). PNM further asserts that one of the Commissioners showed bias against PNM's applications during the hearing, and suggests that she may have had an undisclosed conflict of interest. As the decisions of the CPC were unanimous and the Board issued the final decision under review, the Court again does not consider this as a basis for reversal. *Cf. Siesta Hills Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-028, ¶ 19, 124 N.M. 670, P.3d ("Members of [administrative] tribunals are entitled to hold views on policy, even strong views, and even views that are pertinent to the case before the tribunal.").

As the Board observes and PNM does not dispute, Resolution 116-86(D) places the burden squarely on PNM with regard to its applications, providing: “Stability of the land use and zoning is desirable; therefore, the applicant must provide a sound justification for land use change. The burden is on the applicant to show why the change should be made.” **RP 0000602**

PNM argues that the Board acted arbitrarily and capriciously with regard to Findings 4, 5 and 6 as to its conclusions that PNM’s request is “inconsistent with the [Sector Plan] as the proposed use is inconsistent with the Rural character as required by the [Section Plan],” “inconsistent with Resolution 116-86 in that [PNM] failed to demonstrate the existing zoning is inappropriate,” and the request is “in conflict with the health, safety, and general welfare of the community.”

PNM recounts that it presented substantial evidence explaining and in support of its requests to the Board, while the opponents made unsubstantiated claims that the Substation would create traffic in the immediate neighborhood, ruin the neighbors’ views, pollute drinking water, emit dangerous levels of EMF, decrease property values, alter the rural character of the area, and that the Substation is currently unnecessary for providing electricity and the substation may be located elsewhere. *See, e.g., RP 000026-27* PNM argues that there was no evidence in the record supporting these claims, and many are false or mitigated as required by the zoning ordinance, and that it was unreasonable, willful and irrational for the Board to rely on baseless claims contrary to the substantial evidence PNM provided in support. It asserts that the Board did not consider the record as a whole, noting that Staff recommendations supported the applications. *See, e.g., RP 001016*

PNM argues that the Board’s decisions are not supported by substantial evidence and are

instead based on mistakes of fact and unsubstantiated claims. It argues that the Board made a mistake of fact, unsupported by evidence, by considering the provision of electricity as optional or unnecessary, when the Substation is necessary to ensure the continued provision of electric power to the Area of Critical Need. PNM explains that, currently, it is providing electric service to the Area through substations, transformers within the substations, and distribution feeders extending from those transformers, which are in close proximity to the Area. PNM states that there is not a backup source of electricity for the Area as well as other areas served by the systems, and the systems are operating at full, or nearly full, capacity, and the lack of backup systems create an immediate risk of catastrophic power outage for the Area of Critical Need and the surrounding areas. Relying on evidence it presented below, PNM explains that the Substation would alleviate the current load demands on the system, operating at or below seventy percent, protecting the longevity of equipment, preventing overloads, and allowing capacity for future growth in the Area. The lower level of use creates capacity in order to serve as backup in the event of a system failure, and creating redundancy avoids outages. PNM argues that it must be permitted to construct the Substation, and that it is not optional, pointing out that electricity is crucial to daily functions.

In its response, the County argues that PNM failed to provide substantial evidence of changed conditions warranting the land use change. It sets out PNM's explanation for purported changed neighborhood or community conditions that justified its request:

The Project has been planned for since the adoption of the 2005 Facility Plan and the changed conditions of increased demand from residential and non-residential growth and development, the ability to obtain a site (right-of-way) that meets technical requirements (size, access to a transmission line), and technical factors required PNM to seek and obtain the proposed station site at Paseo del Norte Frontage Road NE and Browning Street NE. PNM did not have to exercise its right of condemnation in the Eminent Domain Code to acquire the Project site.

RP 000083 (emphasis omitted) The County observes that this explanation does not address the current zoning of the subject property or how surrounding conditions have changed since the zoning was set in 2005, and that the reference to “changed conditions of increased demands from . . . growth and development” by PNM is inadequate to address Resolution 116-86. *Cf. Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 15, 89 N.M. 503, 554 P.2d 665 (explaining that a proponent of a zoning change “must show that either there was a mistake in the original zoning or that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made”). The County further argues, and the Court agrees, that Resolution 116-86(E)(2) provides for a showing that “changed neighborhood conditions justify *the* land use change,” (emphasis added), not “a” land use change, and thus must be tied to a particular piece of property, rather than a non-specific justification that could be true anywhere in the county. The County points out that zoning and land use currently is similar to 2005, with nonresidential development limited to the sites and uses set out in the Sector Plan. **RP 002937**

While acknowledging PNM provided evidence regarding the Area of Critical Need and increased electric load demands as well as the shifting of the load center eastward and growth as changes in community conditions justifying a land use change, the Board argues that PNM failed to describe how the conditions in the North Albuquerque Acres community have changed and how these changes show that the existing zoning of the subject property is inappropriate and should be changed, observing that there is no other development of the scale of the Substation, a 3.5 acre site surrounded by a fourteen-foot-high wall with structures well above twenty-six feet in height. The Board argues, and the Court agrees, that PNM’s discussion of health and safety issues focused

generally on how health and safety are related to the provision of electricity, not the concerns of the neighbors.

Section 1.1 of the Sector Plan defines the North Albuquerque Acres community as “an area approximately 3651 acres in size, [that] lies just outside the northeast limits of the City of Albuquerque in the unincorporated portion of Bernalillo County, New Mexico,” “now characterized by lots approximately 0.89 acres in size.” **RP 002944** The Board points out that any discussion relating to the community should relate back to this particular community when attempting to justify a land use change within the Sector Plan boundaries, but argues that PNM failed to establish a nexus between the purported advantages of the Substation and the North Albuquerque Acres community. *Cf. Albuquerque Commons*, 2008-NMSC-025, ¶ 30 (directing that the ““more advantageous to the community”” standard requires both that ““there is a public need for a change of the kind in question,”” and ““that need will be best served by changing the classification of the particular piece of property in question as compared with other available property””) (quoted authority omitted). The Board contends that PNM may have demonstrated public need, but did not show that the need is best served by changing the zoning on its particular property. While PNM provided evidence that the Substation is located in an area where there is load demand, and characterized opposition as “not-in-my-backyard,” it was within the Board’s discretion to make the determination as to whether the Substation would be more advantageous to the community at issue.

With regard to whether substantial evidence supported its determinations, the Board disputes PNM’s characterization of the evidence as unsubstantiated claims by the opponents, arguing that the evidence presented was voluminous, fact-based, and relevant, and the Board did

not err in relying upon it. The Court agrees that PNM has not demonstrated that the Board's determinations were not supported by substantial evidence. *Cf. e.g., Hart v. City of Albuquerque*, 1999-NMCA-043, ¶¶ 22, 24, 126 N.M. 753, 975 P.2d 366 (describing opposition by a neighboring property owner as well as other neighbors' concerns about a requested change in zoning as to noise, lights, and traffic, and concluding that there was "substantial evidence that the City Council was concerned about potential harm to neighboring residential areas in accordance with" the applicable resolution, supporting the denial of the zone map amendment); *Payne & Dolan, Inc. v. Dane Cty.*, 2000 WL 233116, at *3 (Wis. Ct. App. March 2, 2000) (unpublished decision) (concluding that area residents may "testify about the impact they believe a proposed use will have on their general welfare, and the weight to be given to such testimony lies within the discretion of zoning authorities").

Our appellate courts have emphasized that "there is the presumption that the initial determination of the type of zoning for the property is the correct one," and that property owners have "a right to rely" on the "stability of zoning classifications," "since property may be purchased and sold or uses of the property undertaken in reliance on existing classifications." *Miller*, 1976-NMSC-052, ¶ 15; *accord Albuquerque Commons*, 2008-NMSC-025, ¶ 25. As a result, PNM, as an applicant for a zoning change, bears the burden of proving why the change should be approved by the Board. *Cf. Albuquerque Commons*, 2008-NMSC-025, ¶ 25.

On this point, an area resident opposed to the project explained:

The Sector Plan created a stable land use and zoning for North Albuquerque Acres, which continues today. . . . Its rural nature is a benefit to the community and the county. The acceptance of this proposal will severely disrupt the stability of the community . . . because people will no longer be able to rely on the Sector Plan zoning . . . when building and buying houses, knowing that it can change at any time. The SD-RO zoning generates income for the County.

RP 000362 (emphasis omitted) Another opponent also emphasized the rural character of the area, and observed: “An electric substation is not a ranch, farm or single-family home. It is not even an office, shop or institution. It is an industrial use which does not help to maintain the ‘separate identity of the Rural Area[,]’” “it is quite the opposite.” **RP 02373-74** Others described the view that land and home values depreciate significantly when adjacent to power lines and substations, mentioning neighbors that had offers on their house withdrawn after prospective buyers learned of PNM’s plans, eventually dropping their home price by \$100,000. **RP 00162**

Opponents voiced concerns about EMFs. *See, e.g., RP 00124, 00279* While PNM complains that opponents’ opinions with regard to EMFs was unsubstantiated, the Board quotes the 2010/2020 Facility Plan: “Electric and magnetic fields (EMF’s) shall be considered when locating new transmission corridors and adopt measures that will minimize EMF exposures to the public. PHM shall consider schools, child care centers and residential areas.” **RP 00124** Opponents also raised questions about how ground water wells could be adversely affected by PNM’s storage of mineral oil on site in significant quantities in the event of a spill or seepage. **RP 02084**

In reply, referencing opponents’ statements that the community is stable, that property values would depreciate, concerns about EMFs, and contamination of wells, PNM argues that witness testimony is incompetent evidence if the testimony is “opinion testimony unsupported by substantiated facts.” *Dick v. City of Portales*, 1994-NMSC-092, ¶ 7, 118 N.M. 541, 883 P.2d 127 (“The testimony of the citizens focused on the general evils associated with alcohol abuse.”). As set out above, the Facility Plan directs PNM to consider EMFs and minimize exposure. Further, the Court concludes that testimony concerning whether the community is stable, whether property

values might depreciate, the effect on views, and whether 6,000 gallons of mineral oil might contaminate wells located less than 100 feet away in the event of a spill or leak are concerns within area resident's personal knowledge and observation, as well as common knowledge, distinguishable from generalized concerns with alcohol abuse in relation to a particular application for a liquor license discussed in that case. *Cf. id.* ¶ 7 ("A lay person who gives opinion testimony must show first-hand knowledge of the facts supporting his [or her] opinion and 'a rational connection between the observations made and the opinion formed.'") (quoted authority omitted).

Arguing that the Board's decisions were not in accordance with law, PNM points to the finding that its request was "inconsistent with the Paseo del Norte/North Albuquerque Acres Plan as the proposed use is inconsistent with the Rural character as required by the Plan," and asserts that the Substation is in fact consistent with the rural character of the area. PNM states that the Preface to the Comprehensive Zoning Ordinance categorizes rural areas as having severe soil or water limitations or as having agricultural or recreational potential important enough to significantly limit developments to an overall density of one dwelling unit per acre, and observes that Section 7 of the Plan directs that utility services "should provide an appropriate level of service and maintain the rural character" of the neighborhood. It recognizes that the Sector's Plan's intent is "to reinforce the unique low density, rural character of North Albuquerque Acres."

In support of its argument that the Substation is consistent with these directives, PNM notes that it would maintain native vegetation around the Substation, and the majority of its equipment would be shielded from public view by a wall. While the Sector Plan does not automatically deem utility facilities inconsistent with the rural character of an area, as PNM points out, the Board has the discretion to consider whether the proposed Substation is consistent with the rural character of

the area. Although PNM points out that the existing zoning, SD-RO, permissively allows two-story, twenty-six-foot-tall office and institutional buildings with similar setbacks, the Board could reasonably determine that the Substation's fourteen-foot wall and the equipment that may be forty-feet-tall is not comparable. PNM's argument is not that the Board's decisions were not in accordance with law, but instead is simply a disagreement as to its factual conclusions.

Referencing the Board's finding that its "request is inconsistent with Resolution 116-86 in that [PNM] failed to demonstrate that the existing zoning is inappropriate," PNM argues that the Board erred by failing to apply Resolution 116-86(E) in its entirety. Resolution 116-86, Subsection (E) provides that PNM "must demonstrate that the existing zoning is inappropriate because" "there was an error when the existing zone map pattern was created," "changed neighborhood or community conditions justify the land use change," or "a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other County Master Plan, even though" the first or second condition do not apply. **RP 000987**

The Court rejects PNM's argument. By finding that PNM "failed to demonstrate that the existing zoning is inappropriate," the Board implicitly determined that PNM did not show that "the existing zoning is inappropriate because" "changed neighborhood or community conditions justify the land use change," Resolution 116-86(E)(2). *Cf. Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 12, 13, 133 N.M. 97, 61 P.3d 806 ("[A] court may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (quoted authority and quotation marks omitted). In determining that PNM's requested "proposed land use change would be in conflict with the health, safety, and general welfare of the community," the Board necessarily found that PNM did not demonstrate that "a different land use category is more

advantageous to the community,” Resolution 116-86(E)(3).

PNM contends that the zoning is inappropriate because changed community conditions, specifically the growth of the current electric load demands in the Area of Critical Need which requires the Substation in order to ensure provision of safe and reliable electric power, justify the land use change. It asserts that the load center has shifted eastward, so the energy plan should also move eastward to accommodate the change in the load center. With regard to the third basis listed in 116-86, PNM argues its different use category is more advantageous to the community through the provision of safe and reliable electrical service to both the Area of Critical Need but also to neighborhoods surrounding the Area.

The SPC argues that the vague assertion that the load center has shifted eastward does little to demonstrate a substantial change has occurred in the community, as the area around Wyoming and Paseo del Norte is still proximate to the load center. **RP 00080, 00087-88** Further, the Court agrees that the Board had the discretion to determine that PNM did not show a substantial change in the community and that the Substation was not appropriately located on PNM’s property because the different use category would not be more advantageous to the community. *Cf. Hart*, 1999-NMCA-043, ¶ 24 (“We find substantial evidence that the City Council was concerned about potential harm to neighboring residential areas in accordance with [a resolution substantially identical to Resolution 116-86] to support the City Council’s denial of the zone map amendment.”).


PNM asserts that the Board determined that the provision of electricity is inconsistent with the health, safety and general welfare of the community. This is a mischaracterization. The Board, consistent with Resolution 116-86(E)(3), determined that PNM’s proposed land use change, not

the provision of electricity, would be in conflict with the health, safety, and general welfare of the community, as SPC observes. As PNM agrees, the Court must determine “whether the record supports the result reached, not whether a different result could have been reached.” *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-101, ¶ 11, 135 N.M. 30, 84 P.3d 78. While the Board could have, based on the evidence presented by PNM, granted the applications, PNM has not demonstrated that the Board acted fraudulently, arbitrarily or capriciously, or that its decisions were not supported by substantial evidence, were outside the scope of its authority, or were otherwise not in accordance with law.

Conclusion

The decisions of the Board are **AFFIRMED**.

IT IS SO ORDERED.


The Honorable Denise Barela Shepherd
District Court Judge

A copy of the foregoing document was e-filed
on this 14th day of March, 2022.

By /s/ Amy Ballou
Amy Ballou
Trial Court Administrative Assistant

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