CITY OF ALBUQUERQUE
City Council

P.O. Box 1293
Albuquerque, NM 87103
Tel: (505) 768-3100
Fax: (505)768-3227
www.cabq.gov/council

President Brook Bassan
District 4

Vice President Klarissa J. Peña
District 3

Isaac Padilla
Council Director

Louie Sanchez	Joaquín Baca	Dan Lewis	Nichole Rogers	Tammy Fiebelkorn	Dan Champine	Renée Grout
District 1	District 2	District 5	District 6	District 7	District 8	District 9

March 24, 2025

To all interested parties:

The following appeal is on the agenda of the **April 7, 2025** City Council meeting, which will begin at 5:00 p.m. in the Vincent E. Griego Chambers at the City of Albuquerque Government Center, Basement Level, 1 Civic Plaza NW. Final details and instructions will be available on the published agenda, which can be found at https://cabq.legistar.com/Calendar.aspx on the Friday prior to the meeting date.

AC-24-28 - The Westside Coalition Of Neighborhood Associations Appeal The Development Hearing Officer Decision To Approve A Preliminary Plat, For All Or A Portion Of Lot 1-A, Block 2, Volcano Cliffs Unit 26 Zoned MX-M Located On Paseo Del Norte NW And Kimmick Dr NW Containing Approximately 8.2578 Acre(S) (C-11)

Notice Regarding City Council Rules

This item will come before the City Council for an “accept or reject” hearing in which the City Council will choose to either accept or reject the Land Use Hearing Officer’s recommendation and findings.

Verbal testimony from the appellant, party opponent, or any other member of the public is not permitted at the City Council Meeting on Monday, April 7, 2025. The Council will make its decision to accept or reject based solely on the record before it and shall not hear from the parties or any other person, other than its staff, at its hearing on this question.

While verbal testimony is not permitted, written comments may be entered into the record for consideration regarding the “accept or reject” decision. The parties may submit comments to the Council through the Clerk of the Council (mmmontoya@cabq.gov) regarding the Hearing Officer’s decision and findings provided such comments are in writing and received by the Clerk of the Council and the other parties of record four (4) consecutive calendar days (April 3, 2025) prior to the Council “accept or reject” hearing. Parties submitting comments in this manner must include a signed, written verification that the comments being submitted were delivered to all parties of record within this time frame, and shall list the individual(s) to whom delivery was made. Comments received by the Clerk of the Council that are not in conformance with these requirements will not be distributed to Councilors.

If the City Council accepts the recommendation and findings, then this matter is closed pursuant to the recommendation from the Land Use Hearing Officer. If the City Council rejects the recommendation, the City Council will hold a full hearing on this matter at the next City Council meeting, on April 21, 2025.

If you have any questions, please feel free to contact me at (505) 768-3100.

Sincerely,
Michelle Montoya
Clerk of the Council

Attachments:
Land Use Hearing Officer's Recommendation
Excerpt from the Council's Rules of Procedure

CITY OF ALBUQUERQUE
LAND USE APPEAL UNDER THE IDO
BEFORE AN INDEPENDENT
LAND USE HEARING OFFICER

APPEAL NO. AC-24-28
PR 2022-007712, SD-2024-00097
Related to AC-23-01

Westside Coalition of Neighborhood Associations,

Appellants,

and,

Group II U26 VC, LLC,

Appellees/ Applicants.

PROPOSED DISPOSITION

I. INTRODUCTION

Under the procedures of the Integrated Development Ordinance (IDO), the circumstances and history of the land associated with this appeal is arguably extensive, culminating with the presentation of a not so unique, but a somewhat nuanced legal issue regarding notice. Because the IDO contemplates an incremental, piecemeal approval process for the subdivision of land, this appeal cannot be easily disentangled without first dissecting the background facts, as well as the IDO's processes for subdivisions of land.

These facts will be laid out in more detail in the next section, but in summary, a preliminary plat for a larger tract of 18.79 acres of land which also contained the smaller tract that's involved in this appeal was approved in late 2022. That larger preliminary plat essentially subdivided the Appellees' land into two tracts—tracts 1-A and 1-B.[1] In the meantime, during the Summer of 2023, while the litigation regarding this preliminary plat was working through the courts, the Appellees attempted to gain final plat approval of that preliminary plat. That application was subsequently withdrawn, and because (under the IDO) preliminary plats can expire, the landowners applied to extend its expiration.

In December 2023, the Development Hearing Officer (DHO) approved the application for a one-year extension. Two months later, (February 2024), a second final plat application regarding the preliminary plat was submitted and approved by the DHO in a public hearing. Although the preliminary plat of this land was appealed by the WSCONA appellants and pending in a Court at the time, the WSCONA appellants were not notified of both the extension hearing or of the second final plat hearing.[2] Subsequently, in another public hearing in June 2024, the DHO approved an application for a second preliminary plat involving only tract 1-A of the site. The WSCONA was notified of that hearing and filed a timely appeal of that hearing.

1. This original preliminary plat decision was appealed by these Appellants to the City Council and after the Council denied the appeal, that decision was appealed to the District Court. The District Court denied the appeal and that decision was appealed to the New Mexico Court of Appeals (COA). The COA appeal regarding the original preliminary plat is pending on the COA's general calendar at this time.

2. An intervening, complicating fact to this saga is that the city Planning Staff accords notice of public hearings for extensions and final plats incongruously from notice for preliminary plat hearings. This is discussed in great detail below.

However, in this appeal, the Appellants are not challenging the findings of the DHO regarding the second preliminary plat subdivision of tract 1-A; they instead contend that the unnoticed hearings held December 2023 and in February 2024 are both invalid (void) because the WSCONA Appellants were not notified of them, leaving them without an opportunity to be heard at these hearings. They argue that because those decisions are invalid for lack of notice, tract 1-A was never lawfully created, and therefore the DHO did not have authority to approve the further subdivision of tract 1-A. The Appellants are essentially utilizing the June 2024, DHO decision to concurrently appeal the unnoticed hearings, which is defined under law as a collateral challenge of those previous hearings.

After reviewing the record, hearing testimony, allowing for cross examination, in a quasi-judicial public hearing, and after carefully reviewing the applicable law and ordinance provisions, I find that although the appellants have exposed some troubling aspects to how Planning Staff deal with notice under the IDO, the collateral challenge was untimely filed. It is a harsh result, but the collateral challenge expired on June 27, 2024, and the appeal was submitted for filing on July 1, 2024. Furthermore, because Appellants have not shown that the DHO's decision approving the preliminary plat for tract 1-A was otherwise erroneous, the City Council should deny the underlying appeal of the June 12, 2024, hearing as well as the concurrent collateral challenge.

The timeline is significant to resolve this matter, so these facts are laid out in much more detail below in the next section. The issue of notice as it exists in the IDO is then discussed as well as the collateral challenge. Finally, proposed findings supported by the record and law are proposed in the last section.

II. BACKGROUND

To better understand the legal issues and how they are entangled with the intricate facts, additional detail is necessary. A detailed timeline of the relevant events follows. First, the original tract of land included an 18.79 acre site, and that site is located at the northwest corner of Kimmick Drive and Rosa Parks, NW; the site is bounded by Paseo del Norte Blvd. on the north side and Rosa Parks on the south side **[R. 005]**.

The parties agree that the first application to the city regarding the property was in 2017 **[R. 017]**.[3] Group II U26 VC, LLC and Volcano Cliffs, Inc. are the Appellees and own the 18.79 acre parcel as it exists today **[R. 026]**. In that 2017 application, the Appellees obtained approval from the Development Review Board (DRB) of a site plan and of a preliminary plat subdivision creating three tracts **[R. 003-004]**.[4] Then in 2019, the Environmental Planning Commission (EPC) approved a rezoning of most of the site (approximately 16-acres) directly south of Paseo del Norte Blvd. **[R. 004]**. These DRB and EPC approvals were not appealed.

Then in November 2022, the DRB approved an application for preliminary plat encompassing the entire site **[R. 005]**.[5] That preliminary plat action reconfigured the tracts from what was previously approved in the earlier DRB approved site plan, creating two tracts—tract 1-A and tract 1-B (instead of three, which was formally created) **[R. 017, see**

3. The appellants did not dispute the timeline that the city Planning Staff created in the record at page 17.

4. The DRB was a five member board that included various city employees from the various city departments responsible for reviewing the intricacies of development. In 2023, the DRB was replaced with the DHO.

5. Presumably, because of some land that was dedicated to the city for right-of-way, the larger tract was reduced to 18.23 acres of land.

also figure 4 at R. 005]. Thereafter, the WSCONA appellants filed a timely appeal—AC-23-01. After an administrative, quasi-judicial Land Use hearing and recommendation, the AC-23-01 appeal was eventually denied by the City Council **[R. 017]**.[6] The WSCONA then appealed the Council's decision to the District Court and eventually, the District Court upheld the Council's decision **[R. 017]**. The matter was further appealed to the New Mexico Court of Appeals (COA), and at this time, the appeal of the preliminary plat is pending resolution **[R. 017]**.

In the meantime, during the pendency of the appeal, in July 2023, the DHO held a hearing and approved the Appellees' final plat application for both tracts 1-A and 1-B (hereinafter, *"first final plat"*) **[R. 017]**. Subsequently, the WSCONA filed a timely appeal (AC-23-14) of the first final plat decision. Consequently, an administrative quasi-judicial Land Use appeal hearing was held, but before the City Council could render a final decision on the appeal recommendation, the applicants withdrew their final plat application **[R. 006]**. Presumably, the voluntary withdrawal of the application by the Appellees in that matter also effectively nullified or expunged the first final plat decision.

Next, because the first final plat decision was apparently nullified, the preliminary plat was about to expire, so later that year, on December 6, 2023, the DHO approved the Appellees' application for a one year extension of time to apply for a new final plat approval

6. Notably, the Appellees of AC-23-1 are the same Appellees of this mater and in the Land Use administrative appeal hearing over that appeal, the Appellees through counsel stipulated that the WSCONA have standing to appeal that matter.

[R. 017].[7] Although the extension was done in a public hearing that required the DHO, under the IDO, to determine whether good cause exists to grant the extension, it is undisputed that notice to the WSCONA was not accomplished. It is also undisputed that the WSCONA appellants did not attend the DHO's extension hearing.

After the preliminary plat expiration date was extended another year, on February 7, 2024, in a public hearing, the DHO approved a new final plat for the creation of tract 1-A and tract 1-B (for clarity, hereinafter, "*second final plat"*) **[R. 017]**. Again, although the hearing on the second final plat was done in a public hearing in which public comment is contemplated under the IDO, it is undisputed that notice to the WSCONA was again not accomplished. It is also undisputed that the WSCONA appellants did not attend the second final plat hearing.[8]

Then, on April 3, 2024, the Appellees' architect agents met with the city's Development Facilitative Team (DFT) (which is comprised of city Planning Staff) to discuss a new preliminary plat to further subdivide tract 1-A into six smaller parcels **[R. 199-202, 209]**.[9] After the DFT meeting, the Appellees next notified abutting landowners and the affected

7. Under the applicable IDO, effective July 2022, preliminary plats expire after one year. See IDO, Table 6-4-3. A preliminary plat may be extended by the body that approved the preliminary plat upon a showing of "good cause." Also see IDO, § 6-4(X)(4).

8. It is important to note that in reviewing a final plat, the DHO is charged with more than ministerial tasks; the DHO must exercise discretion to determine if the final plat "includes all changes, conditions, and requirements contained in the Preliminary Plat approval." In addition, the fact that the DHO set conditions of approval further illustrates that the DHO is not simply performing ministerial acts. See IDO, § 6-6(L)(3)(b) and compare it with the DHO decision approving the second final plat **[R. 024].** This is discussed in detail below.

9. The record shows that along with creating six new parcels from tract 1-A, the Appellees proposed dedicating additional land for right-of-way to an abutting street. A DFT meeting is similar to a pre-application meeting contemplated in the IDO.

neighborhood associations of the application. The WSCONA is one of the two neighborhood associations entitled to notice of the preliminary plat application **[R. 212]**.[10] On May 6, 2024, the Appellees mailed notice of the tract 1-A preliminary plat application and of the June 12, 2024, hearing to officers of the WSCONA **[R. 217-221, 242]**.[11]

Although there is no documentation in the record, apparently a facilitated meeting was requested because the facilitated meeting occurred on May 28, 2024 **[R. 133-134]**. On June 12, 2024, the DHO held a hearing on the new preliminary plat application subdividing tract 1-A **[R. 323-345]**. In an undated decision, the DHO approved the application **[R. 019-021]**. In the notice of decision, the DHO advised the public that an appeal of that decision must be filed no later than July 1, 2025 **[R. 021]**.

On July 1, 2025, the WSCONA filed this appeal **[R. 086]**. In filing their July 1, 2024, appeal, the WSCONA representative who filled out the city appeal form indicated that the appeal was of the "final plat" **[R. 087]**. Specifically, in an email, presumably to send the appeal application to the city for processing on July 1, 2024, the President of the WSCONA indicated that the appeal was *"of DHO, Project# PR-2022-007712 Application# SD-2024-00019 FINAL PLAT."*[12]

In a letter dated July 18, 2024, the City Planning Director rejected the appeal on the

10. The fundamental reason notice was not sent to the WSCONA for the extension and final plat hearings but was sent for the preliminary plat hearings is that Planning Staff contend that the IDO requires it for the later and not the former. As shown below this is based on an exceptional narrow, but misguided misunderstanding of the IDO and New Mexico law.

11. Emailed notice to the WSCONA was also sent **[R. 225]**.

12. The subject line of the July 1, 2024, email also stated that the appeal was of the DHO's decision of the final plat **[R. 385]**.

basis that the appeal application incorrectly stated that it was the final plat that was being appealed when it was the new preliminary plat that was heard by the DHO on June 12, 2024 **[R. 383]**. The rejection of the appeal was followed by a direct appeal to the District Court which eventually concluded when on October 22, 2024, the parties stipulated, by Court Order, to the Court remanding the matter back to the city to *"accept an amended appeal"* **[R. 396]**.

The WSCONA through their attorney of record filed an amended appeal application form with the city on November 1, 2024 **[R. 031-032]**. The amended appeal application indicated that the appeal concerned both the DHO's June 12, 2024, decision as well as the preceding final plat decision (which was unnoticed to the WSCONA) **[R. 031 - 032]**. The administrative quasi-judicial Land Use appeal hearing on the appeal was initially scheduled for January 2025, but the parties requested that the hearing be rescheduled. A quasi-judicial appeal hearing in which the parties were allowed to present arguments, testimony, and in which cross examination was allowed was held on March 11, 2025.

III. ISSUES PRESENTED

Appellants raise many alleged points of error, some of which have no direct relationship to what is in the record and cannot be considered in this appeal. However, for added clarity to the labyrinthine background of this matter, the issues that Appellants presented in their amended appeal are restated next. Specifically, in a supplemental letter, dated January 3, 2025, the Appellants through counsel presented their claims of error.

Appellants first contend that the lack of notice to the extension hearing and to the

second final plat hearing violated procedural due process and violated substantive due process under federal and New Mexico law. Regarding due process, Appellants also argue that procedural due process was violated when a decision label as "the 2022 ZEO VPO-2 Decision" was made by the Zoning Enforcement Officer (ZEO). Appellants also contend that the 2022 ZEO VPO-2 Decision violated the New Mexico Open Meetings Act because it was made outside of a public hearing. Appellants also argue that a City Councilor should not hear the recommendation of this appeal because of alleged bias.

Next, Appellants argue that the previous withdrawal of the first final plat application somehow also invalidates the underlying November 9, 2022, preliminary plat approval and all approvals thereafter. Appellants also contend that submission of the second preliminary plat application while the AC-23-14 appeal was pending (presumably before the first final plat was withdrawn), violated a provision in NMSA 1978, § 3-21-8(B) requiring a stay when there is a pending appeal. Appellants also generally argue that because the larger 18.23 acre site is adjacent to Major Public Open Space (MPOS), the Appellees must first obtain site plan approval from the EPC before submitting any of the preliminary plats to the DHO.

Conversely, as a threshold matter, the Appellees argue that the WSCONA does not have standing to appeal the June 12, 2024, DHO decision regarding the new preliminary plat regarding tract 1-A. They further argue that because the WSCONA failed to have "formal" representation at the June 12, 2024, hearing, the WSCONA cannot appeal the decision under the IDO. The Appellees further argue that the collateral challenge of the extension hearing and or of the second final plat hearings were both untimely and should be denied.

IV. STANDARD OF REVIEW

The administrative standard for reviewing appeals under the IDO is well-described in the IDO. It coincides with what New Mexico law prescribes for administrative, quasi-judicial reviews. A review of an appeal is a whole record review to determine whether the DHO acted fraudulently, arbitrarily, or capriciously; or whether the DHO's decision is not supported by substantial evidence; or if the DHO erred in applying the requirements of the IDO or other law. IDO, § 14-16-6-4(V)(4). In an appeal, the decision and record must be supported by substantial evidence to be upheld. Under the IDO, the Land Use Hearing Officer (LUHO) has been delegated the authority to a hold quasi-judicial hearing on an appeal and to determine the merits of the appeal, make findings, and to then propose a disposition of the appeal to the City Council to affirm, reverse, or otherwise modify the appealed decision to bring it into compliance with the standards and criteria of the IDO. The City Council has also delegated authority to the LUHO to independently remand appeals if additional evidence is necessary. A remand is not necessary in this matter.

V. DISCUSSION

The first issue is to resolve is question of standing raised by the Appellees. The Appellees contend that the WSCONA does not have standing to appeal the June 12, 2024, decision. Specifically, the argument is that although the WSCONA was notified of the DHO's June 12, 2024, hearing, they failed to formally appear at the hearing and therefore, under IDO, § 6-4(V)(2)(b), they cannot appeal the decision. The Appellees point to the DHO's finding which they claim is a recognition by the DHO that "no official comment from

a neighborhood association" occurred at the June 12, 2024, hearing. I find that this DHO finding was made in error because it is contradicted by the record.

The facts from the DHO hearing show that Michael Voorhees, an executive committee member of the WSCONA not only was an active participant in the June 12, 2024, hearing, but he advised the DHO that he was "*speaking on behalf of the West Side Coalition of Neighborhood Associations"* **[R. 326]**. If the DHO or the Appellees were unconvinced that Mr. Voorhees lacked authority from the WSCONA to speak for it, Mr. Voorhees should have been asked if he was authorized to speak for the WSCONA. The testimony was not cross-examined. Without any evidence otherwise, I find that the testimony of Mr. Voorhees as an Executive Committee member of the WSCONA was sufficient for standing to appeal that hearing.

Standing in this matter has an unusual twist, however, because the appeal filed on July 1, 2024, concurrently involves both the collateral challenge and the appeal of the June 12, 2024, DHO hearing. The Appellees do not take the position that the WSCONA did not have standing to appeal the previous unnoticed decisions. Instead, they argue, as discussed below that the appeal on those matters was untimely filed. This standing issue is discussed in much more detail below.

However, before reaching the timeliness of the concurrent collateral challenge, a brief discussion of many of the issues presented by Appellants is warranted. Several issues presented by Appellants are either not relevant to the record of this appeal, are not in the record, or are issues not within the province of the LUHO under the IDO and cannot be substantively considered. The allegations regarding the VPO-2 have no bearing on this

appeal or even to the collateral challenges associated with this appeal. The collateral challenge is not over the substantive decisions made in those unnoticed hearings. As discussed below, the issue is whether those unnoticed hearings are void or voidable because they were unnoticed. Thus, the substantive merits of those decisions cannot be reached in this concurrent collateral challenge. Moreover, the records of those unnoticed hearings are not in this record and cannot be reopened for any manner of substantive review. Next, the alleged "2022 ZEO VPO-2 Decision" is not in the record and cannot be considered in this appeal; it concerns the substantive merits of the unnoticed hearings. Next, the issue presented having to do with the Appellees' withdrawal of the first final plat related to the AC-23-14 appeal, has no merit under law or the IDO, and is a moot point. In addition, appellants have not shown that the voluntary withdrawal of the first final plat application during a pending appeal violates any law or ordinance. It cannot be considered in this appeal.

The issue and argument that a Site Plan-EPC is necessary because the 18.3 acre tract is "adjacent" to major public open space (MPOS) is a moot issue because it already has been resolved by the District Court in previous litigation regarding the 18.23 acre site. Moreover, the appeal regarding the subdivision of tract 1-A is clearly far removed from any hint of adjacency to MPOS because it is separated from the MPOS by tract 1-B which was not part of the DHO's June 12, 2024, decision. Next, the alleged bias of a city councilor is outside the province of this administrative appeal and will not be considered. That is a matter for the City Council.

Accordingly, the only issues left concern whether the two unnoticed hearings can be voided and if not whether there is a basis supporting the appeal of the June 12, 2024, hearing.

As briefly touched on above, in this appeal, the Appellants do not argue that the DHO erred in his findings regarding the new preliminary plat application regarding tract 1-A; instead, they contend that the DHO lacked authority to approve the plat as a result of the unnoticed previous hearings. Fundamentally, without the extension of the preliminary plat of the 18.23 acre site and without the approval of the second final plat, the new preliminary plat of tract 1-A could not be approved. Put another way, if the extension hearing is void for lack of notice, so too is the preliminary plat that created tracts 1-A and 1-B, because it would have expired. And, if the preliminary plat had expired, the DHO would not have had authority to approve the second final plat on February 7, 2024. Furthermore, like falling dominos, if the DHO did not have authority to approve the second final plat, because of the lack of notice, the new preliminary plat further subdividing tract 1-A could not have been approved on June 12, 2024, because it cannot lawfully exist without the approval of the second final plat.

Therefore, the next issue in this matter concerns whether Appellants can now collaterally challenge the lack of notice of those two previous unnoticed hearings; and, if the Appellants can collaterally challenge these hearings, did the Appellants timely do so. The first issue implicates the IDO and New Mexico law regarding what notice is due and is considered below.

A. At a minimum, because the WSCONA appellants are parties to the pending lawsuit regarding the overall 18.23 acre site, as a matter of due process and as a matter of the IDO, the WSCONA appellants were entitled to notice of the extension hearing and the hearing on the second final plat.

In this matter, Planning Staff suggest that the DHO performed only non-discretionary, ministerial functions during the December 6, 2023, extension hearing and, in the February

7, 2024, second final plat hearing **[R. 8-9]**. Consequently, they contend *"there is no requirement for public notice from the IDO nor in administrative practice."* Respectfully, the binary distinction between two types of "administrative" hearings is illusory and is not supported in the IDO. Moreover, the oversimplified distinction Staff contends exists contravenes clearly established New Mexico law.

Although the IDO does not explicitly state that notice is required in extension hearings or in final plat hearings, the IDO does in fact explicitly require notice in DHO hearings regarding subdivisions of land. It is unmistakable that the unnoticed hearings materially and explicitly concerned the subdivision of land. However, and more importantly, the fact that the DHO is performing an "administrative" function in a hearing does little to resolve the question of whether notice to the WSCONA, or to any other entity or person was necessary. The question as to what process is due in the decision-making process is tied to the nature and to the character of the process and functions being performed, not to how the process is simply labeled. That is, the appropriate inquiry for determining what process is due in terms of notice revolves around what is involved in the DHO hearings at issue.

Thus, under law, the question is: Was the DHO charged with taking testimony, reviewing and then drawing conclusions from that evidence, making factual findings, and then rendering a decision? See **Montoya v. Dep't of Fin. & Admin**., 1982-NMCA-051 (observing that quasi-judicial capacity involves "the taking of evidence and testimony and the rendering of a decision including findings of fact and conclusions of law"). See also, **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 1984-NMSC-042 (Administrative hearings wherein facts are investigated, evidence weighed, inferences drawn

and conclusions are made as a basis for official action, is the exercise of discretion in a judicial nature and is quasi-judicial in nature). Accordingly, in a hearing, if the DHO is fundamentally exercising discretion, the DHO is performing quasi-judicial functions, necessitating minimal procedural due process protections including notice to all parties, as well as to neighboring property owners and affected neighborhood associations.

It is a fundamental tenet that in conducting a quasi-judicial hearing, an administrative body is not required to observe the same strict evidentiary standards normally applied by the courts. **State Ex Rel. Battershell v. City of Albuquerque**, 1989-NMCA-045, ¶ 17. However, when conducting quasi-judicial hearings, the adherence to minimal fundamental principles of justice and procedural due process is always necessary. **State Ex Rel. Battershell,** ¶ 18. It cannot be argued that notice and the right to be heard are not indispensably intwined components of what is minimally due in quasi-judicial hearings. **West Bluff Neighborhood Ass'n v. City of Albuquerque**, 2002-NMCA-075. There is no dispute from anyone that the WSCONA appellants were not notified of both the DHO's preliminary plat extension hearing and of the hearing on the second final plat held on December 6, 2023, and February 7, 2024, respectively.

Notably, under the IDO, a hearing before the DHO is labeled as a "public hearing." See IDO, § 6-4(M). There is no mistake that the DHO conducted a public hearing on both the extension and on the second final plat. Public hearings under the IDO allow for "public comment." See Table 6-1.

Implicit in Staff's position is that the type, or manner of public hearing that the DHO conducted regarding the extension was unlike a quasi-judicial public hearing as defined

under IDO, § 6-4(M)(3). They seem to suggest that there is a distinction between the two because in a non-quasi-judicial public hearing, the DHO performs a non-discretionary, purely ministerial role---approving or denying an extension, and in a quasi-judicial hearing, the DHO must exercise discretion.[13] Staff opine that notice is not required for the former type of hearing while notice is required for the later. As shown above the distinction is illusory because in an extension public hearing, the threshold issue that the DHO must assess and decide on before granting an extension is whether there is *"good cause"* and whether the preliminary plat is *"required to come into compliance with any applicable standards adopted since the application was submitted."* See IDO, § 6-4(X)(4)(c). These threshold issues clearly require the DHO to exercise discretion, review and weigh evidence, and ultimately decide if good cause exists, and if the plat must come into compliance with new standards.[14] In addition, the record shows that the DHO made factual findings under the IDO in extending the preliminary plat and in approving the second final plat **[R. 026 and 023]**. Presumably, these factual findings were based on sworn testimony, assessment of witness credibility, review of the record, and interpretation and the application of the IDO. These functions all require the exercise of judgement and discretion and are not ministerial functions.

Under IDO, § 6-4(M)(3), because the DHO must exercise discretion to satisfy the duties pronounced in § 6-4(X)(4)(c) (extension hearing), the hearing is demonstrably a quasi-

13. Staff also argue that because the preliminary plat cannot be altered in an extension hearing, the DHO decision is somehow a non-discretionary act.

14. Notably, the IDO is required to be routinely updated and because the subdivision approval process is incremental, the IDO could change between the preliminary plat approval and the final plat approval.

judicial hearing. The same manner of discretion is similarly exercised in hearings regarding final plat applications. They are unquestionably quasi-judicial in nature. In the IDO, a quasi-judicial hearing is defined as one in which "discretionary decisions" are made. § 6-4(M)(3). As shown above, this is supported by New Mexico law.

Moreover, aside from the illusory distinction between a "public hearing" and a "quasi-judicial public hearing" or simply an "administrative hearing," the IDO also contemplates that "public testimony is allowed" in both types of hearing. See the preamble to Table 6-1 in the IDO. In simple terms, allowing public testimony in a public hearing necessitates a public that was notified of the hearing.

Staff also suggest in their Staff Memorandum in the record, that because extension hearings and hearings on final plats are not among the listed "application types" listed in Table 6-1, notice is not required for these types of hearings. This theory *ignores* that the extension hearing, and that the second final plat hearing at issue in this matter fundamentally involved subdivisions of land which is a clearly stated "application type" listed in Table 6-1. Furthermore, in Table 6-1, email and mailed notices to neighborhood associations and to neighboring property owners within 100-feet of the subdivision of land is required for DHO hearings. See Table 6-1.[15]

Therefore, because the extension hearing (and the second final plat hearing) was quasi-judicial in nature, under the IDO, and because these hearing clearly involved the subdivision of land, individual notice to the affected neighborhood associations and to the neighboring

15. As depicted by a "<D>" in the column for the DHO in Table 6-1, it is clearly contemplated that the DHO "reviews and decides" subdivisions of land for major and minor subdivisions, regardless of whether it is a preliminary plat, an extension, or a final plat. See also § 6-6(L).

property owners within 100-feet of the application site was necessary. See Tabe 6-1. Specifically, notice under § 6-4(K)(2) through (6) is essential and indispensable in DHO hearings involving the subdivisions of land. If these reasons aren't enough, there is another significant reason for requiring notice to the WSCONA appellants in this matter.

Not only is the WSCONA an affected neighborhood association whose boundaries are impacted by the application site, but they are also known parties in a lawsuit regarding the preliminary plat of the larger 18.23 acre site. The Appellees submitted their application for an extension to the preliminary plat in November 2023 and their application for the second final plat approval in January 2024. **[R. 288 and 248 respectively]**. While these applications were pending and heard by the DHO in public hearings, the appeal of the City Council's November 14, 2023, decision regarding AC-23-01 was pending in the Courts. The Court appeal of AC-23-01 concerned the preliminary plat that was extended and finally approved by the DHO during the unnoticed hearings. Regarding all actions having to do with that plat, which includes the extension and second final plat approvals, the WSCONA were clearly parties for purposes of notice. As parties to the litigation, the Appellants were fairly entitled to notice of those DHO hearings. Having resolved the issue whether Appellants should have been notified of the previous December 6, 2023, hearing and of the February 6, 2024, hearing, the next question is the crux of this matter and involves whether the Appellants have timely challenged those notice-defective hearings on the basis that they were not notified?

B. The unnoticed hearings are voidable under law, but because the Appellants did not timely submit or file the collateral challenge, it should be denied.

The July 1, 2024, appeal constitutes the WSCONA appellants' appeal challenge of the

two defective hearings. Despite that under § 6-4(V)(3)(a), an appeal must be filed within fifteen calendar days after the DHO's decision was made and that period has obviously elapsed, under New Mexico law, because Appellants had no notice of the hearings, they can nevertheless file their appeal (collateral challenge) under limited circumstances. See **VanderVossen v. City of Espanola**, 2001-NMCA-016 and **Bogan v. Sandoval County Planning & Zoning Comm'n**, 1994-NMCA-157. Both of these cases stand for the proposition that a notice deficient hearing is voidable, not automatically void. That is, once the challenger learns that the defective hearing(s) took place, a collateral challenge of a defective hearing must be made in a timely manner thereafter. A timely appeal under **VanderVossen** is "within the time frame set by the zoning ordinance" and begins to run when the challenger first learns of the defective hearing. Id at ¶ 23.[16] IDO, § 6-4(V)(3)(a) prescribes a fifteen day timeframe to file an appeal. Thus, under **VanderVossen**, The WSCONA's collateral challenge would be timely if they filed their appeal within 15 days from the time that they learned of the DHO's hearing of the second final plat (or the extension hearing).

Furthermore, in **VanderVossen**, the Court cited to **Bogan v. Sandoval County Planning & Zoning Comm'n**, 1994-NMCA-157 for the proposition that even when a challenger fails to be notified of a hearing, that challenger has a duty to make reasonable inquiries when:

> the *circumstances* are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonable inquiry would have revealed.

16. During the appeal hearing on March 11, 2025, the Appellants and Appellees through counsel agreed that **VanderVossen v. City of Espanola** was applicable to this collateral challenge.

(Emphasis added) **VanderVossen**, ¶ 23, referencing **Bogan**. As was in **VanderVossen**, the crux issue in this collateral appeal revolves around the question of when the WSCONA appellants knew or should have known of the DHO's unnoticed decisions. Unfortunately, what the Appellants knew and when they knew it, is a disputed matter.

The appeal was submitted to the city Planning Department Staff on July 1, 2024 **[R. 086]**. Although this appeal was within the timeframe for filing an appeal to the underlying DHO decision regarding tract 1-A only, it also concurrently served as the appeal, collaterally challenging the earlier unnoticed hearings.

In the Land Use appeal hearing, which was held on March 11, 2025, the Appellants claim that they didn't know of the previous hearings until the DHO's June 12, 2024, hearing. The Appellees, on the other hand, contend that the WSCONA knew or should have known of the previous unnoticed hearings on May 28, 2024, during the facilitated meeting regarding the new preliminary plat application.

In the appeal hearing, the Appellees' architect agent, Angela Piarowski testified that during the May 28, 2024, facilitated meeting, WSCONA representatives who attended the meeting were advised that the final plat of the site (the larger 18.23 acre site) was recorded with the County Clerk **[R. LUHO appeal hrg.]**.[17] The record shows that a copy of the recorded plat was also available at the facilitated meeting **[R. 130]**. The record further includes a memorandum, dated May 28, 2024, labeled *"Facilitated Meeting Request - Applicant Response to Questions for Major Preliminary Platting Action - Project# PR-2022-007712"* **[R. 127]**. A reduced copy of the recorded plat is included in the body of the

17. At this writing the Court Reporter's official transcript was unavailable.

memorandum which clearly depicts the entire 18.23 acre site encompassing both tracts 1-A and 1-B **[R. 130]**. Above the plat indicates that it was recorded on March 4, 2024. Above that includes an "applicant Response" to a question presumably posed at or before the facilitated meeting by Michael Voorhees **[R. 129]**. In answering Mr. Voorhees' question about the propriety of the application (for further subdividing tract 1-A), Ms. Piarowski wrote that the site was already replated and recorded in the County Clerk's office on March 4, 2024 **[R. 129]**. The Appellees contend that this evidence supports a reasonable inference that on May 28, 2024, the WSCONA knew of the unnoticed hearing approving the second final plat. I respectfully disagree.

Knowing that a final plat had been recorded is not the same as knowing that an unnoticed hearing took place to approve it. It is the unnoticed hearings that are at issue here, not merely the recording of the plat. See **VanderVossen v. City of Espanola**, 2001-NMCA-016, ¶ 24. I find that it is not reasonable to infer that an unnoticed hearing took place from the recorded plat and from the discussions at the facilitated meeting about the recorded plat. Based on the testimony and the record of the facilitated meeting, nobody actually brought up that hearings too place or that these hearings were held without notice to the WSCONA. Although, on May 28, 2024, after learning of the recorded plats, the WSCONA appellants had a duty to make a reasonable inquiry about them, despite the considerable history in this matter involving these litigants, there is insufficient evidence in which it would be reasonable to impute the requisite knowledge unto the WSCONA that the recorded plats were the result of defective hearings.

However, there is substantial evidence in the record that the WSCONA appellants knew

on June 12, 2024, that the DHO had held an unnoticed hearing on February 7, 2024, regarding the second final plat. The record minutes from the June 12, 2024, DHO hearing on the subdivision of tract 1-A, confirms that the WSCONA was advised by Jolene Wolfley, Associate Planning Director, that the DHO approved the second final plat in a public hearing on February 7, 2024 **[R. 333]**. Later in the hearing, Mr. Voorhees asked Associate Planning Director Wolfley in cross examination why the WSCONA did not receive notice of the February 7, 2024, hearing **[R. 338]**. There can be no mistake that this evidence demonstrates that on June 12, 2024, Mr. Voorhees (who is a WSCONA representative) knew of the defective, unnoticed hearing and when it was held.

Thus, under **VanderVossen v. City of Espanola**, 2001-NMCA-016, the 15-day time to appeal with a collateral challenge to the defective hearings began to run on June 12, 2024.[18] Not counting June 12, 2024, fifteen days from June 12, 2024, was Thursday, June 27, 2024. The appellants filed the appeal on Monday, July 1, 2024.[19] Accordingly, excluding the intervening weekend, the collateral challenge was filed two weekdays after the appeal timeframe expired. The appeal collaterally challenging the unnoticed hearings was not timely and should be denied.

18. The 15-day timeframe for a collateral challenge under the **VanderVossen** case should not be conflated with the appeal deadline for appealing the DHO's decision to further subdivide Tract 1-A which was July 1, 2024. See DHO decision, in which the DHO gave July 1, 2024, as the deadline to appeal the June 12, 2024, decision **[R. 021]**.

19. Although the appeal was rejected by the Planning Staff and later amended by stipulation of the parties through a court order, July 1, 2024, is nevertheless the filing date for the concurrent collateral challenge.

C. The Appellants did not demonstrate that the DHO's June 12, 2024, decision was erroneous under any of the criteria of IDO, § 6-4(V)(4) and therefore, that appeal should be denied.

Finally, because the collateral challenge of the previous decisions was untimely, the preliminary plat application further subdividing tract 1-A was properly before the DHO on June 12, 2024. There is substantial evidence in the record that the WSCONA was properly advised of the June 12, 2024, hearing, and although *that* appeal was timely, other than the collateral challenges to the unnoticed hearings, independent of the collateral challenge, the Appellants have not raised any substantive issues of error pertaining to the DHO's approval of the application subdividing tract 1-A. For these reasons, the appeal of the DHO decision relating to the subdivision of tract 1-A should be denied.

V. CONCLUSION

As shown above, despite that the December 6, 2023, and the February 7, 2024, DHO hearings were defective because the WSCONA were not notified of them, under law, these challenges should be denied by the City Council on the basis that the appeals were not timely submitted. As for the concurrent appeal of the June 12, 2024, DHO hearing approving the subdivision of tract 1-A, that appeal should be denied on the basis that the WSCONA appellants failed to meet their burden of proof under IDO, § 6-4(V)(4). The following findings are supported by the evidence in the record.

Proposed Findings

1. The WSCONA were not notified of the previous DHO hearings held on December 6, 2023, and on February 7, 2024, regarding the Appellees' applications and DHO

hearings.

2. Under New Mexico law and under the IDO, because the DHO was charged with taking testimony, reviewing evidence, drawing conclusions from that evidence, making factual findings, and then rendering decisions, the two unnoticed hearings were both quasi-judicial in nature.

3. Quasi-judicial hearings under the IDO, and under New Mexico law, require notice to those persons or entities entitled to such notice.

4. The two unnoticed hearings directly implicated and concerned the subdivision of land under the IDO.

5. Under IDO, table 6-1, DHO hearings involving the subdivision of land requires notice.

6. The WSCONA was entitled to notice of the DHO hearings that were held on December 6, 2023, and on February 7, 2024.

7. At the time when the two unnoticed hearings occurred, the WSCONA appellants were parties to a lawsuit regarding the preliminary plat of the land regarding the subject matter in the two unnoticed hearings.

8. Because the WSCONA appellants were parties to the pending litigation that involved the land that was the subject of the DHO's unnoticed hearings, the WSCONA was entitled to notice of those hearings under New Mexico law.

9. The two unnoticed DHO hearings that were held on December 6, 2023, and on February 7, 2024, were defective because the WSCONA appellants were not notified of them.

10. Under New Mexico law and under IDO, § 6-4(V)(2), the Appellants have standing to collaterally challenge the two unnoticed hearings.

11. The undisputed evidence in the record demonstrates that the WSCONA first learned of the two unnoticed hearings on June 12, 2024, during the DHO's hearing to review the Appellees' application to subdivide tract 1-A.

12. The WSCONA submitted to the city their appeal of the two unnoticed hearings on July 1, 2024.

13. Under the applicable law of **VanderVossen v. City of Espanola**, 2001-NMCA-016, the collateral challenge of the two unnoticed hearings was not timely submitted to the city and the appeals of them should be denied.

14. With their collateral challenge, the WSCONA appeal also concurrently appealed the June 12, 2024, DHO hearing regarding the Appellees' preliminary plat application to further subdivide only tract 1-A of the land.

15. The appeal of the DHO's June 12, 2024, hearing and decision was timely filed under the IDO.

16. The appellants failed to satisfy their burden of proof that the DHO erred in approving the preliminary plat application regarding tract 1-A.

17. The appeal of the DHO's decision approving the preliminary plat application regarding tract 1-A should be denied.

18. The collateral challenge and the concurrent appeal of the decision regarding the preliminary plat of tract 1-A are denied.

509

Steven M. Chavez, Esq.
Independent Land Use Hearing Officer

March 23, 2025

Copies to:
City Council
Appellants, through Counsel
Party Opponents through Counsel
DHO
City Staff

Excerpt from the City Council's Rules of Procedure (2/2025)* Regarding the Hearing of the Land Use Hearing Officer's Recommended Decision by the City Council

9. The Hearing Officer shall enter his or her findings and recommended decision ("decision") and forward the decision and findings to the parties and the Council within 15 days of the close of the hearing.

10. The Hearing Officer shall base his or her decision on a preponderance of the evidence. He or she may reweigh the evidence in the record.

11. The Hearing Officer may decide to recommend that the Council grant or deny an appeal in whole or in part, if the Hearing Officer determines that the matter should be remanded, such remand may be ordered consistent with Section 14-16-6-4(U)(3)(d)(6) of the Integrated Development Ordinance.

12. When the Council receives the Hearing Officer's findings and decision, the Council shall place the decision on the agenda of the next regular full Council meeting provided that there is a period of at least 10 days between the receipt of the decision and the Council meeting. The parties may submit comments to the Council through the Clerk of the Council regarding the Hearing Officer's decision and findings provided such comments are in writing and received by the Clerk of the Council and the other parties of record four (4) consecutive days prior to the Council "accept or reject" hearing. Parties submitting comments in this manner must include a signed, written attestation that the comments being submitted were delivered to all parties of record within this time frame, which attestation shall list the individual(s) to whom delivery was made. Comments received by the Clerk of the Council that are not in conformance with the requirements of this Section will not be distributed to Councilors.

13. The Council shall vote whether to accept or reject the Hearing Officer's decision and findings. The Council will make its decision to accept or reject based solely on the record before it, and shall not hear from the parties or any other person, other than its staff, at its hearing on this question. A motion to reject or accept the Hearing Officer's decision and findings must be approved by a majority of the membership of the Council.

14. The Council may accept the decision and amend the findings of the Hearing Officer if such an amendment is consistent with the decision of the Hearing Officer.

15. If the Hearing Officer's decision is rejected, or if the Council fails to either accept or reject the recommendation, the City Council may take any one of the actions identified in Section 14-16-6-4(U)(3)(e)(4) of the Integrated Development Ordinance.

16. If the Hearing Officer rules are in conflict with the Integrated Development Ordinance, the Integrated Development Ordinance shall prevail. If the Hearing Officer

rules are silent regarding an area that is addressed by the Integrated Development Ordinance, the Integrated Development Ordinance shall apply.

*For the complete set of rules that apply to land use appeals, see the City Council Rules of Procedure, which can be viewed on the Council's website at http://www.cabq.gov/council