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

APPEAL NO. AC-24-18
PR-2024-009765 RZ-2024-00001

APPEAL NO. AC-24-19
PR-2024-009765 SI-2023-00468

Santa Barbara-Martineztown Neighborhood Association,

Appellants,

and,

Tierra West, LLC, Inc., agent for Cross Development,

Appellees.

PROPOSED DISPOSITION

I. INTRODUCTION

The Appellants, Santa Barbara-Martineztown Neighborhood Association (SBMNA), are appealing a zone-change decision from the Environmental Planning Commission (EPC) to change an existing MX-M zoned tract of land to an MX-H zone. The SBMNA also appealed a subsequent but separate EPC decision approving a site plan for a 48-bed rehabilitation hospital use at the newly MX-H zoned tract. Because both EPC decisions and subsequent

appeals concern the same tract of land and the same landowners, by stipulation of the parties through their respective legal counsel, the individual appeals have been consolidated and were heard together in the quasi-judicial Land Use appeal hearing.[1]

As explained in more detail below, after reviewing the records, hearing witness testimony and arguments from the parties' counsel, I respectfully recommend that the City Council deny both appeals. The findings and decisions of the EPC are well-supported by substantial evidence in the consolidated record. Furthermore, I specifically find that the EPC's interpretation and its application of the Integrated Development Ordinance (IDO) and relevant Comprehensive Plan policies was rational and reasonable. Conversely, the Appellants have not met their burden under the IDO; they have not shown that the EPC erred in applying the IDO, or in another basis under IDO, § 6-4(V)(4).

II. BACKGROUND

The application site is an approximately 2.78-acre vacant tract of land located at the corner of Woodward Place, NE and Mountain Road **[R. 50]**. The application site is part a larger site plan for subdivision that encompasses approximately 24 acres of land that was previously approved by the city as the Gateway Center Site Plan for Subdivision (Gateway Center Plan); it is an approved site plan for subdivision that dates back to March, 1994 **[R. 446, 528-539]**. When the EPC approved the Gateway Center Plan in 1994, it was approved with specific development performance standards for height, building maximum floor area ratios (FAR),

1. The records have been joined and re-Bates stamped for easier reference in this consolidated appeal matter. Unfortunately, the consolidation creates a 1404-page record that encompasses many duplications of documents.

gross building square footages, and restrictions on internal circulation and access for each of the tracts within the entire subdivision, including the application site in this matter **[R. 206]**. The Gateway Center Plan pre-approved standards have meaningful consequences, are the basis of many of the issues presented in both appeals and are discussed in detail below. In addition, general land uses within the site plan for subdivision where generally limited to include office, retail, and restaurant uses **[R. 206]**.

After the city's 1994 approval of the Gateway Center Plan, the Plan was subsequently amended and approved by the Development Review Board in 1997 **[R. 386].** Then, in August 2000, the EPC approved a site development plan for the tracts South of the current application site but within the Gateway Center Plan on which the Embassy Suites Hotel, the Tricore Laboratory now sit, and for the development of the spine street in the Gateway Center Plan, now known as Woodward Place. **[R. 441-445]**. Consequently, it is undisputed that currently, the Woodward Place roadway, the Embassy Suites Hotel, and the Tricore Laboratory are fully developed **[R. 279]**. The development that has occurred within the Gateway Center Plan contributes to the access of existing infrastructure for the 2.78-acre application site in this matter **[R. 126]**.

Prior to the IDO's enactment the application site was zoned SU-2 for C-3 **[R. 130]**. When the IDO became effective in 2018, the application site converted to MX-M zoning (Mixed Use, Moderate Intensity) **[R. 446]**. A hospital use is a permissive use in an MX-M zone. However, under IDO, § 4-3(C)(4), in an MX-M zone hospital uses are limited to no more than 20 overnight beds.

In January 2024, the landowner through its agents submitted their application for a

zone-change from the MX-M zone to a MX-H zone for the 2.78-acre application site **[R. 964]**. In February 2024, at a public hearing, the EPC subsequently approved the zone change **[R. 956]**. That decision was timely appealed by the SBNMA **[R. 948]**. A quasi-judicial appeal hearing was held on the appeal, and the matter was remanded back to the EPC to revisit specific findings that conflicted with the evidence in the record regarding the IDO's Character Protection Overlay Zone regulations **[R. 424]**. Because the matter concerned a key appeal issue and was significant to the EPC's overall decision, the EPC was instructed to rehear the zone-change application *de novo* (anew) **[R. 429-430]**.[2]

Meanwhile, on April 4, 2024, the applicants applied for a Major Amendment to the amended 1997 Gateway Center Site Plan for Subdivision **[R. 449]**. The proposed Major Amendment applied only to the 2.78-acre zone-change site and included a proposed amended site plan for the rehabilitation hospital land use that will have a capacity of 48 overnight beds **[R. 449]**. Because a 48-bed hospital of any kind cannot be approved in an MX-M zone, the application was contingent on the EPC's approval of the zone-change application. The record reflects that the applicants resubmitted their zone-change application because they apparently decided to amend their zone-change request to reflect the intended purpose of the zone-change--a 48-bed hospital facility, and not what was previously submitted (a 60-bed facility) **[R. 110]**.[3]

Although these consolidated appeals do not raise any issues regarding notice, I note for the City Council that there is substantial evidence in the record revealing that all notices under

2. The record of that appeal (AC-24-11), as well as the appeal hearing transcript are also included in the consolidated appeal record.

3. In the first zone-change application, the applicants disclosed that the zone-change was for a 60-bed hospital facility which was reduced in the site plan application to a 48-bed facility.

the IDO were met **[R. 494-525]**. On July 18, 2024, the EPC reheard and reapproved the zone-change application **[R. 276-331]**. After approving the zone-change, in a separate subsequent hearing on the same day, the EPC heard and approved the applicant's Site Plan Major Amendment application for the 48-bed hospital use **[R. 785-808]**.

On July 23, 2024, the SBMNA filed a timely appeal to each EPC decision **[R. 12, 343]**. Because the application site is within the neighborhood boundary of the SBMNA, the Appellants as a city recognized neighborhood association have standing to appeal the EPC decisions under IDO, § 6-4(V)(2).

In their appeal of the zone-change, Appellants argue 19 points of alleged error **[R. 16-23]**. And in the appeal of the site plan, they presented 14 allegations of error **[R. 346-350]**. Many of the allegations can be combined under the same general issues of alleged error. Generally, Appellants challenge the EPC's zone-change findings that the proposed MX-H zone is not a spot zone. In addition, Appellants contend that the applicants failed to demonstrate to the EPC that the zone-change satisfies specific applicable IDO criteria; they contend that the applicants failed to show "substantial changes" in the area since the MX-M zoning was established on the site in 2018 **[R. 19]**. Next Appellants contend that a MX-H zone and a hospital use will be harmful to the area. Conversely, Appellants claim that there is insufficient evidence in the record that a 48-bed hospital use will not be harmful to the area **[R. 19-21]**. Appellants further claim that the applicants do not have a vested right to the 1997 amended Gateway Center Plan, and specifically to the height standards approved in that plan. Specifically, Appellants argue that height standards approved by the City in the 1997 amended Gateway Center Plan cannot prevail over the IDO's CPO-7 height regulations. As a

consequence, Appellants claim that EPC findings 11 through 18 are erroneous.

Appellants also raise general complaints regarding process; they generally claim that the Planning Staff Report for both the zone-change and the site plan applications were made available to the public too late---just a day before the EPC hearings **[R. 17, 347]**. Appellants further contend, presumably because of the Staff recommendation of approval to the EPC, that the City Planner Staff Reports amount to impermissible "advocacy" **[R. 17, 347]**. And, finally, Appellants generally argue that the remand was inappropriate **[R. 20]**.

III. REVIEW STANDARD UNDER THE IDO

The IDO provides for how appeals under the IDO are to be evaluated. Review of an appeal under the IDO is a whole record review to determine whether a decision appealed is fraudulent, arbitrary, or capricious; or whether the decision is not supported by substantial evidence; or if the requirements of the IDO, a policy, or a regulation were misapplied or overlooked. See IDO, § 6-4(V)(4). The Land Use Hearing Officer (LUHO) has been delegated the authority by the City Council to hold a quasi-judicial hearing on the appeal issues presented, make proposed findings, and propose to the City Council a disposition of an appeal, including whether the decision should be affirmed, reversed, or otherwise should be modified to bring the decision into compliance with the standards and criteria of the IDO.

If the record and decision is supported with substantial evidence in the record and the decision is not otherwise erroneous, the appeal should be denied under IDO, § 6-4(V)(4). Under New Mexico law, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Village of Los Ranchos de Albuquerque v.*

City of Albuquerque, 1994-NMSC-126, ¶ 21. The issue is not whether substantial evidence may exist to support an Appellant's interpretation of the facts or the IDO. *Huning Castle Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-123, ¶ 15.

IV. DISCUSSION

As previously indicated above, Appellants' separately raise multiple claims of error regarding the zone-change and site plan decisions. However, many of the claims in each appeal overlap and will be discussed together. For example, Appellants raised the CPO-7 regulations of the IDO, vested rights, and the application of the Comprehensive Plan in both appeals. Thus, for efficiency and economy both appeals are discussed together in relation to Appellants' allegations.

A. Although Appellants generally challenge the EPCs multiple findings relating to the application of the Comprehensive Plan policies to the zone-change and hospital use, there is substantial evidence in the record to support that the decisions will facilitate the Comp. Plan.

In both appeals, Appellants vaguely contend that the EPC erred in its multiple findings that the goals of the Comprehensive Plan will be facilitated by the zone-change and by the hospital use **[R. 20-22 and 350]**. First, Appellants broadly theorize that as a matter of policy, because presumably the Comprehensive Plan's goals and polices supported the SU-2-C-3 zoning conversion of the application site to an MX-M zine in 2018, these same policies cannot now be again utilized by the EPC, just six years later, as support for another rezoning of the site to an MX-H zone; Appellants essentially contend that the EPC now lacks authority to utilize the Comprehensive Plan to support the zone-change to MX-H **[R. 20]**. The underlying presumption buttressing this theory is an assumption that the Comp. Plan cannot be utilized to

support the appropriateness of differing zones at the same application site, just six years apart.

Appellants' broad theory advances little to the relevant analysis required in IDO, § 6-7(G)(3)(a). What is relevant to the analysis is whether substantial evidence in the record supports the EPC's conclusions regarding the eighteen policies it says are advanced or facilitated by the zone-change and hospital use. The fact that the Comp. Plan (and its goals and policies) presumably supported the 2018 rezoning conversion doesn't render the EPC without power to now "reinterpret the Comp Plan provisions which led to the 2018 IDO" as Appellants contend **[R. 20]**. Appellant's theory all but ignores the specific findings by the EPC that the zone-change in fact does facilitate multiple policies of the Comp. Plan **[R. 25-29]**. Appellants also failed to provide a legal basis to support their vague theory that the same Comp. Plan policies cannot support consecutive zone-changes over time to the same property.

Notwithstanding, it is clear that what connects the application of the same Comp. Plan policies in 2018 and again in this matter is the permissiveness of the hospital use in both the MX-M and MX-H zones. It is undisputed that a hospital use is a permissive use at the application site regardless of the zone-change in this matter; the difference between the MX-M and the MX-H is the overnight bed capacity--28 overnight beds. Said another way the zone-change allows the applicants to a hospital use with 28 more overnight beds at the application site than what was allowed when the application site was an MX-M zone which permissively allows only 20 overnight beds. Thus, the hospital use is the nucleus for the same multiple Comp. Plan policies that presumably support the MX-M zone and now the MX-H zone. Otherwise, Appellants' theory is academic and lacks merit.

Also significant under the Comp. Plan is the undisputed fact that the application site is

in a designated area of change **[R. 42]**. In addition, the adjacent Mountain Rd., and the I-25 frontage are designated transit corridors; so too is Lomas Blvd., which is within 660 feet of the application site **[R. 42]**. All these undisputed facts were significant in the EPC's policy findings. Notably too, because the application site remains vacant, there is substantial evidence in the record showing that the infill as well as the new employment the hospital use will bring will facilitate regional growth along the three major transit corridors which are significant policy objectives in the Comp. Plan **[R. 132]**.

Although Appellants believe that growth and specifically that the hospital use will detract from the community character of the area, the evidence in the record shows otherwise; the immediate area is encompassed with land uses that are not inconsistent with the hospital use, including an eight-story hotel, a four-story medical laboratory, and other office uses adjacent to the application site **[R. 136]**. This is undisputed. The facts show that the area character is not residential but is more aligned with mixed office uses that are similar to the proposed hospital use. Moreover, the building structure of the proposed 55-foot-tall hospital use is consistent with the building structures and building heights of the adjacent land uses. And, although Appellants oppose and disagree that the surrounding character or nature of the land uses are mixed uses, the issue is not whether substantial evidence may exist to support Appellants' interpretation of the facts, it is whether there is substantial evidence in the record that supports the EPC's findings. *Huning Castle Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-123, ¶ 15. There is substantial evidence in the record to support that the hospital use is consistent with its surrounding land uses.

In addition, the applicants presented evidence at the appeal hearing which further

corroborates what was generally concluded by the EPC; that because there are three major hospitals within a 2-mile radius of the application site, the site is distinctly appropriate for the rehabilitation hospital use. That is, locating the rehabilitation hospital at the application site will support and maximize an economy of scale that elevates patient care **[R. 818-819; 823-824]**. Thus, it was rational and reasonable for the EPC to generally agree that the hospital use at the application site benefits the at-large community **[R. 26. Fndg. 11; 356, Findg. 11.D]**.

All these facts were not lost on the EPC; they are essentially incorporated in the eighteen Comp. Plan policies that the EPC referenced in their decision. Other than voicing opposition to the facts and presenting their vague theory comparing the 2018 zone-change with the current one, Appellant failed to rebut, with any specificity, the EPC's specific findings regarding the multiple Comp. Plan goals and policies which the EPC concluded were in fact facilitated by the zone-change and site plan.

Appellants next vaguely contend that there is insufficient evidence in the record to show that the zone-change is more advantageous to the community **[R. 19]**. Under the IDO, because the application site is within a designated area of change under the Comp. Plan, the applicants must demonstrate one of three criteria under IDO, § 6-7(G)(3)(c). the Applicants argued to the EPC that:

> A different zone district is more advantageous to the community ***as articulated by the ABC Comp Plan***, as amended (including implementation of patterns of land use, development density and intensity, and connectivity), and other applicable adopted City plan(s).

IDO, § 6-7(G)(3)(c)(3). (Emphasis added).

Under § 6-7(G)(3)(c)(3), the "more advantageous to the community" criterion is judged against the policies in the Comp. Plan that are furthered by the zone-change and not

whether the community wants the zone-change or the hospital use.[4] As indicated previously and above, the unrebutted evidence in the record shows that eighteen applicable Comp. Plan policies are furthered by the zone-change. These eighteen policies that the EPC concluded are furthered qualifies as substantial evidence that the zone-change is more advantageous to the community as articulated in the Comp. Plan. Appellants have not shown otherwise.

B. The Appellants' claims regarding the Planning Staff Report, their Recommendations to the EPC, and the remand is not error under § 6-4(V)(4).

Next, Appellants object that the city Planning Staff's report to the EPC was made public only a day before the EPC hearing and that it amounts to inappropriate "advocacy" on behalf of the applicants **[R. 17, 347]**. Regarding the public distribution of the Staff Report, Appellants have not shown how its timing harmed their opposition or otherwise violated their due process rights, and the argument does not show error under the IDO. Thus, it must be rejected. Regarding the argument of Staff's alleged advocacy, it is undisputed that in the two respective written staff reports to the EPC (for the zone-change and site plan), Planning Staff recommended approval of both applications **[R. 042, 376]**. However, under IDO, § 6-2(B)(1)(d), Planning Staff have a duty to make recommendations to the EPC.[5] In making their recommendations to the EPC, planning staff are carrying out their obligation under the IDO.

4. Notably under the second alternative standard of § 6-7(G)(3)(c)(2), an applicant must show that there have been "significant change in neighborhood or community conditions." Notwithstanding, § 6-7(G)(3)(c)(2) is inapplicable to this zone-change because the applicants elected to prove, and did prove, the third standard which is the "more advantageous" standard.

5. See also IDO, Table 6-1-1. Staff are responsible to review and make recommendations on Zone-change applications and site plan applications that go before the EPC.

Absent evidence to support the claim of bias, a recommendation based on Planning Staff's independent analysis under the IDO should not be conflated with advocacy for a party.[6] Without conjecture, there is no evidence to support Appellants' claim.

Appellants next claim that the remand to the EPC in the previous appeal (AC-24-11) was erroneous and suggest that the previous appeal of the zone-change application should have been denied instead of remanded. As indicated in the remand itself, there was good cause for the remand because when the EPC approved the zone-change application in the first hearing it relied on a significant finding that was based on inaccurate facts about the CPO-7 regulations. The EPC was instructed to revisit that issue in a *de novo* hearing. Notwithstanding, Appellants failed to show how the remand harmed them or their due process rights and therefore it is not a basis of error which can overturn the decision of the EPC in this matter.

C. The EPC did not err when it concluded that the MX-H zone is not a spot zone.

Next regarding the zone-change, Appellants argue that the MX-H zone is a spot zone and therefore the EPC erred. Under the IDO, a spot zone is:

> "a zone district different from **surrounding** zone districts to one small area or one premises…"

IDO, § 6-7(G)(3)(h). (Emphasis added).

Spot zones under the IDO are not unlawful; if it is determined that the zone will create a spot zone, it can still be approved if the application site is different from surrounding land

6. Notably, as discussed below, the record shows that the EPC in fact rejected Planning Staff's spot zone analysis. This demonstrates that the EPC acted independently in its review of the applications.

and functions as a transition between *adjacent* zone districts, or the application site is unsuitable for the uses allowed in any adjacent zone district because of topography, traffic, or special adverse land uses nearby, or if the nature of the structures that exist on the application site are unsuitable for the uses allowed in any adjacent zone district.[7] See IDO, § 6-7(G)(3)(h)1-3. In this matter however, the EPC concluded in its finding number 13.H that:

> The request **would not result in a spot zone** because it would not apply a zone different from surrounding zone districts as evidenced by the existing MX-H zoned parcel directly east of the subject site, on the other side of Interstate 25, as well as south of Lomas Blvd. The record also reflects several similar medical and hospital uses in the surrounding area. The applicant has shown how the request would clearly facilitate a preponderance of applicable Comprehensive Plan goals and policies as shown in the response to Criterion A. The response to Criterion H is sufficient.
> **However, if the commission had determined that it was a spot zone, the commission further finds that it would have been a justifiable spot zone**.

[R. 30]. (Emphasis added).

Before getting into the evidence, a brief but more expansive discussion of IDO, § 6-7(G)(3)(h) (the spot zone provision) is in order. To determine whether a particular application site can be considered a spot zone under IDO, § 6-7(G)(3)(h), the EPC must consider the "surrounding zone districts." Implicit in the EPC's conclusion in finding number 13.H is that the surrounding zone districts includes more than just the bordering or adjacent zones around the application site. Also implicit in the EPC's finding is that the land uses or "premises" within the surrounding area are compared to the proposed land use in the proposed zone to determine their compatibility or "differences" with what is proposed. This broad interpretation of a spot

7. Notably, it is only after it is determined that the zone-change will create a spot zone when the "*adjacent*" zones are analyzed under § 6-7(G)(3)(h)2. To determine if a spot zone will be created, the broader term of "*surrounding*" is the focus of the analysis.

zone is altogether consistent with the precise language of IDO, § 6-7(G)(3)(h) and it is consistent with New Mexico common law on spot zones.

In the spot zone case of *Bennett v. City Council for the City of Las Cruces*, 1999-NMCA-015, ¶ 22, the New Mexico Court of Appeals adopted the reasoning of the Pennsylvania Supreme Court, and held:

> "When examining a charge of spot zoning, courts look not only at the zoning of the immediately adjacent properties, but also to the surrounding area. **[A] reviewing court cannot take too constrained a view of the surrounding neighborhood.** To discuss a zoning measure by merely looking at the nature of the particular city block on which the rezoned land is located, is simply incorrect."

Id. (Emphasis added). In analyzing the surrounding area, the *Bennett* Court further instructed that the land uses must also be considered in the overall spot zone analysis; the court considered whether the "mixed uses" in the surrounding area would be disharmonious with the proposed zone and use. *Bennett*, 1999-NMCA-015, ¶ 23. See also *Watson v. Town Council of Bernalillo*, 1991-NMCA-009 in which the New Mexico Court of Appeals held that another spot zoning consideration in the analysis is "whether the rezoning was primarily for the benefit of the [applicant]… or whether it was done for the benefit of the community." *Watson*, ¶ 19. With these principals, a brief discussion of the facts in the record that support the EPC finding 13.H follows.

The record reveals that the applicants showed the EPC that there are two other MX-H zones in the surrounding area **[R. 162]**. If the interstate right-of-way is excluded from the analysis, the two other MX-H zones can be considered next to the application site **[R. 128]**.[8]

8. Note that the IDO does not give public right-of-way a zone designation. See IDO, § 7-1, Definitions, Public Right-of-way.

For purposes of argument, however, even if the interstate right-of-way is not excluded from the analysis, the two other MX-H zones directly east from the application site on the opposite side of Interstate-25 are within 660-feet of the application site **[R. 126]**. This evidence was undisputed. Presumably the EPC considered these MX-H zones in their analysis, and I respectfully find that it was not unreasonable to do so.

Next, as indicated above, the facts further show that the application site is surrounded by mixed uses, not unlike the use that is proposed; they are similar in scale and density to the proposed hospital use that is intended for the application site. Finally, the applicants demonstrated, and the EPC concluded, that the MX-H zone will be more advantageous to the community as articulated by the Comp. Plan as previously described above. I find that all these facts in the record, including the eighteen Comp. Plan policies that the EPC held would be furthered by the MX-H zone, support the EPC's interpretation of IDO, § 6-7(G)(3)(h), and its ultimate conclusion that the MX-H zone at the application site is not a spot zone. I further find that the EPC's interpretation of IDO, § 6-7(G)(3)(h) was rational and reasonable, and consistent with the law of both *Bennett v. City Council for the City of Las Cruces*, 1999-NMCA-015 and *Watson v. Town Council of Bernalillo*, 1991-NMCA-009.

D. The 1997 amended Gateway Center Site Plan for Subdivision qualifies under IDO § 1-10 as a prevailing prior approved site plan and therefore it's development standards overrides any conflicting provisions in the IDO.

It is undisputed that the 26-foot building height limitation in IDO, § 3-4(H)(4)(a) (CPO-7 height regulation) conflicts with the building height that was previously approved by the city in the 1997 amended Gateway Center Site Plan for Subdivision which allows a 180-foot

building height at the application site **[R. 206]**.[9] In both appeals, Appellants contend that the applicants do not have a "vested right" to the 1997 amended Gateway Center Site Plan for Subdivision and specifically to the 180-foot building height which was approved in that plan.

Appellant's challenges the validity of the Gateway Center Site Plan for Subdivision, arguing that there is insufficient evidence in the record showing that it did not expire, and they further claim that it is not a "site development plan" as that term is defined in the IDO **[R. 348]**. Appellant also generally contends that the 1997 amended Gateway Center Site Plan for Subdivision does not grant development rights to the landowners under the common law vested rights doctrine described in *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*, 1993-NMCA-013.

i. There is substantial evidence in the record demonstrating that the Gateway Center Site Plan for Subdivision did not expire, and therefore the applicants have a development right to the standards encompassed in it.

The provisions in § 1-10 of the IDO establish how prior city land use approvals that predate the IDO are considered under the IDO. It states in relevant part:

> 1-10(A) PRE-IDO APPROVALS
> 1-10(A)(1) **Any approvals granted prior to the effective date of this IDO shall remain valid**, subject to expiration pursuant to Subsection 14-16-6-4(X) (Expiration of Approvals) and to amendment pursuant to Subsection 14-16-6-4(Y) (Amendments of Approvals) or 14-16-6-4(Z) (Amendments of Pre-IDO Approvals), as applicable, until they are replaced with an approval subject to allowable uses and development standards in this IDO pursuant to the procedures in Part 14-16-6 (Administration and Enforcement).
> 1-10(A)(2) **Any use standards or development standards associated with any pre-IDO approval or zoning designation establish rights and limitations and are exclusive of and prevail over any other provision of this IDO.** Where those approvals are silent, provisions in this IDO shall apply, including but not limited to the following:

9. Notably, the newly amended site plan for the hospital use has a 55-foot total building height not the 180-foot which is allowed under the Gateway Center Plan**[R. 540].**

> 1-10(A)(2)(a) Subsection 14-16-4-1(E) (Previously Allowed Uses) for the continuity of conditional uses.
> 1-10(A)(2)(b) Subsection 14-16-6-4(Z) (Amendments of Pre-IDO Approvals) for amending pre-IDO approvals.
> 1-10(A)(2)(c) Section 14-16-6-8 (Nonconformities) for information about expansions when the use or structure is nonconforming under this IDO.
> …
>
> 1-10(A)(5) When referencing pre-IDO approvals, **the most recent approval, including any amendments, shall apply** unless specified otherwise.

Relevant sections of IDO, § 1-10. (Emphasis added).

In addition, IDO, § 6-4(X)(3) is also applicable because the undisputed facts show that development of the 1997 Gateway Center Plan is 87% developed. IDO, §§ 6-4(X)(1) and 6-4(X)(3) stand for the propositions that "approvals run with the land" and if the "amount of development" on a site plan that was approved by the EPC is developed to at least a 75% threshold, the site plan does not expire.[10]

As detailed above in the Background section, the 1997 overall amended Gateway Center Plan encompasses approximately 24 acres of land. The record includes the EPC's originating, 1994 approved Gateway Center Plan **[R. 446, 528-539]**. It is indisputable that when the EPC approved the Gateway Center Plan in 1994, it was approved with specific development performance standards for building height, building maximum floor area ratios (FAR), gross building square footages, and restrictions on internal circulation and access for each of the parcels within the entire subdivision **[R. 206]**.

The record further shows that after the city's 1994 approval of the Gateway Center

10. IDO § 6-4(X)(3) is the corresponding IDO section passed from the Pre-IDO provisions in the Comprehensive Zoning Code in §14-16-3-11(C)(1) that essentially provides development rights upon a threshold of substantial completion of development including infrastructure. In the now defunct Comprehensive Zoning Code, that threshold was 50%.

Plan, in 1997, the Development Review Board approved amendments to the Gateway Center Plan **[R. 386]**. The amendments did not change the standards relating to building height from what was initially approved in 1994 **[R. 386]**. The record also encompasses the 1997 amendment signatures of the city officials who approved the amendments of which are contained on the face of the 1994 Gateway Center Plan site plan for subdivision **[R.206]**.

Next the record clearly shows that in August 2000, the EPC approved a separate site development plan for the tracts within the Gateway Center Plan area on which the Embassy Suites Hotel and the Tricore land uses are currently located, as well as for the spine roadway (Woodward Place). **[R. 441-445]**. However, the most substantial evidence that the 1997 amended Gateway Center Plan did not expire is the actual development that has occurred on the tracts within the Plan. The undisputed record shows that 87% of the Gateway Center Plan became fully developed as of 2005; the completed developments within the Gateway Center as shown from the record currently include the roadway of Woodward Place, the Embassy Suites Hotel, and the Tricore Laboratory **[R. 279]**. This fact was confirmed in the appeal hearing with the testimony of the applicants' civil engineer, Ron Bohannon. This is substantial evidence that the applicants' development rights under IDO § 1-10 and § 6-4(X)(3) has fully matured (vested) and cannot expire. These development rights necessarily include the building height development standard encompassed in the 1997 amended Gateway Center Plan.

Although it is clear that under the above IDO provisions the applicants' developments rights have vested under the IDO, Appellants nevertheless claim that under the common law of New Mexico, the applicants do not have a vested right to the standards of what was approved in the 1997 amended Gateway Center Plan. I find that the common law vested rights doctrine

is not inconsistent with IDO §§ 1-10, 6-4(X)(1) and 6-4(X)(3). It deserves reemphasis, that the because there is substantial evidence in the record that 87% of the 1997 amended Gateway Center Plan is fully developed, including its infrastructure, it is reasonable to presume that substantial investment in reliance on the approvals has matured. This is the very nature of a common law vested development right.[11]

Because the 180-foot building height standard is a component of the approval in 1997, the applicants have a vested right to that standard in developing the hospital use. Irrespective of the permissiveness of a 180-foot building height, the hospital use in the amended site plan was approved with only a 55-foot building height.

Appellants also contends that the EPC erred when it approved the 55-foot building height of the hospital use because they say it violates the 26-foot height limitation of the CPO-7 regulations of the IDO. There is no disagreement that the hospital use, and application site are within the boundaries of the CPO-7. However, despite the conflict with the CPO-7 height restriction, the 180-foot building height at the application site is an exception that essentially prevails over the CPO-7. As indicated above under IDO, § 1-10(A)(2), "[w]here those [vested] approvals are silent, provisions in this IDO shall apply." The converse is also true.

ii. The Gateway Center Plan for Subdivision substantially satisfies the IDO's definition of a site development plan.

Appellants next contend that the 1997 Gateway Center Plan is not a "site development

11. Under the common law, in order to establish a vested right, a developer must show (1) "approval by the regulatory body" and (2) a substantial change in position in reliance on that approval. *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*, 1993-NMCA-013.

plan" under the IDO and therefore the Site Plan EPC Major Amendment review process of IDO, §6-4(Z)(1)(b) that the EPC utilized to review the hospital use site plan was unauthorized by the IDO. I respectfully disagree. A site development plan is clearly defined in the IDO and is:

> A term used prior to the effective date of the IDO for a scaled plan for development on one or more lots that ***specifies*** at minimum the site, proposed use(s), pedestrian and vehicular access, any internal circulation, maximum building height, building setbacks, maximum total dwelling units, and/or nonresidential floor area. A more detailed site development plan would also specify the exact locations of structures, their elevations and dimensions, the parking and loading areas, landscaping, and schedule of development. The equivalent approval in the IDO will be determined based on the level of detail provided in the prior approval.

IDO, § 7-1, Definitions, Site Development Plan. (emphasis added).

Although the 1997 Gateway Center Plan was created and approved many years before the IDO was enacted, I find that it minimally satisfies the IDO's current definition of a site development plan. Notably, under the definition, a site development plan need not show the footprints and dimensions of buildings, setbacks, internal circulation, vehicular and pedestrian access; these elements only need to be "*specified*." Upon a close review of the 1997 Gateway Center Plan, I find that it does indeed "specify" each of the minimally necessary elements described in the IDO's definition of a site development plan. In addition, the tracts are scaled and identified in the Gateway Center Plan.

Moreover, the applicants' retained certified civil engineer, Ron Bohannon testified at the appeal hearing that in the 1990's site development plans were sometimes loosely identified as site plans for subdivision in the same manner as in the 1997 Gateway Center Plan. Appellants did not rebut this testimony. Accordingly, for all material purposes under the IDO,

the 1997 Gateway Center Plan is a site development plan, and the EPC followed the correct process under the IDO in its review of amending it as a site development plan for the hospital use.

E. There is substantial evidence in the record demonstrating that the hospital use will not create adverse impacts to the surrounding roadway system and intersections.

In this consolidated appeal, Appellants generally claim that the zone-change and the hospital use will harm the community with the encroachment of increased traffic and density **[R. 20]**. Citing to a history of multiple crashes at the intersection of Mountain Rd. and the south frontage road to Interstate-25, Appellants contend the hospital use is too "intense" for the area **[R. 20-21]**.

Taking the contention of traffic first, the applicants' civil engineers performed a Crash Analysis of the surrounding street intersections which revealed five recommendations for improvements to mitigate any adverse impacts caused by new traffic **[R. 787-788]**. The applicants have agreed to make all five improvements **[R. 788]**.[12] In addition, it was concluded that the additional peak period traffic created by the hospital use will not adversely affect the existing levels of services at the surrounding intersections **[R. 396]**. This evidence is substantial evidence that the public will not be harmed by any increase in automobile traffic caused by the hospital use. The evidence was not rebutted.

Appellants also contend that the applicants should perform a new Traffic Impact Study

12. Appellants seem to praise the road improvements that the applicants will make to the adjoining roadway system, claiming that these improvement would be "extortionate." **[R. 19]**.

(TIS) or at least update the one that was completed for the area in 2010 for the Gateway Center. Yet, the record shows that an updated TIS is currently being reviewed by engineers with the New Mexico State Department of Transportation (NMDOT) and the applicants will be responsible to satisfy any further recommendations after the City Traffic Engineers review the NMDOT recommendations **[R. 362, EPC condition number 11]**.[13] Other than anecdotal testimony regarding automobile crashes in the area, Appellants did not rebut any of the above traffic evidence which shows that the use will not adversely impact traffic.

Appellants next generally contend without any supporting evidence that the zone-change, and presumably the hospital use, will cause "urban blight" **[R. 20]**. This argument lacks evidence. Appellants also argue that the applicants have not sufficiently shown that there is a community need for the hospital use and asserts that the community does not want another hospital in the area. **[R. 20]**. I respectfully point out that what is or is not more advantageous to the community in terms of what specific land uses are appropriate is principally judged in the IDO through the Comp. Plan; it's essentially a policy-based analysis. See the above discussion in Section A; the unrebutted evidence shows that eighteen Comp. Plan policies are furthered with the zone-change and the hospital use. In addition, as shown above, the applicants have shown that there is a city need for the rehabilitation hospital **[R. 132, 818-819; 823-824]**. This evidence was not rebutted and is substantial evidence that the hospital will provide a benefit to the community at the application site.

13. The record shows that the City Traffic Engineers will review the NMDOT recommendations and require that any additional mitigation measure be agreed to prior the final approvals of the site plan by the City Development Facilitation Team (DFT) **[R. 400]**.

V. PROPOSED FINDINGS

In conclusion, after hearing the two appeals in a consolidated hearing, poring over the record as well as the written arguments of the parties, reviewing the IDO, as well as applicable policies of the Comprehensive Plan, and after evaluating the appeal issues, I respectfully recommend that both appeals be denied. As further detailed above, each individual proposed finding and conclusion below is supported by substantial evidence in the record.

1. The Appellants filed timely appeals under the IDO.

2. The Appellants have standing to appeal the EPC decisions in this matter.

3. Because the appeal of the zone-change decision and the appeal of the decision on the site plan involve the same land and landowners, the appeals were appropriately consolidated.

4. A quasi-judicial appeal hearing at which the Appellants were given an opportunity to present arguments, bring witnesses to testify, and cross examine witnesses, was held on September 18, 2024.

5. City Planning Staff's recommendations to the EPC was not biased advocacy on behalf of the applicants; the IDO requires Staff to analyze applications and make recommendations to the EPC.

6. The EPC's decision approving the zone-change is supported by substantial evidence in the record.

7. The EPC's decision approving the site plan for the hospital use is supported by substantial evidence in the record.

8. The Appellants did not meet their burdens of proof under IDO, § 6-4(V)(4) for

both appeals;

a. Appellants did not demonstrate that the EPC acted fraudulently, arbitrarily, or capriciously in approving the zone-change and in approving the site plan in this matter.

b. Appellants did not show that the decisions appealed are not supported with substantial evidence in the records.

c. Appellants did not show that the EPC erred in interpreting the IDO or in applying the facts in the records to the IDO.

9. The facts in the record support the EPC's finding that the MX-H zone is not a spot zone.

10. There is substantial evidence in the record supporting the EPC's decisions that the zone-change furthers a preponderance of Comprehensive Plan Goals and Policies.

11. There is substantial evidence in the records showing that the zone-change is more advantageous to the neighborhood and larger community of the City because it facilitates and furthers a preponderance of Goals and Policies in the Comprehensive Plan.

12. There is substantial evidence in the record demonstrating that the 1997 amended Gateway Center Plan is a site development plan as that term is defined in the IDO.

13. The 1997 amended Site Plan for Subdivision qualifies under IDO § 1-10 as a prevailing prior City approved site plan and therefore it's development standards override any conflicting provisions of the IDO including the CPO-7 height restriction.

a. There is substantial evidence in the records and in the IDO showing that because the 1997 amended Gateway Center Plan did not expire and as a

matter of law prevails as a prior approved site plan,

b. The 1997 amended Gateway Center Plan building height standards are applicable to the application site, not the CPO-7 building height standards in the IDO.

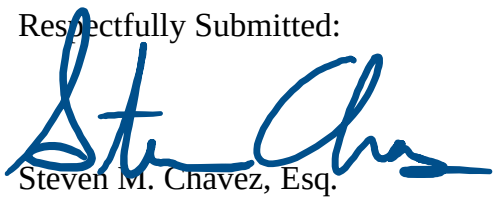
c. There is substantial evidence in the record demonstrating that the 1997 amended Gateway Center Site Plan for Subdivision did not expire.

14. Other than Appellants' allegations, there is insufficient evidence in the record that the MX-H zone and hospital use will create urban blight to the area.

15. Other than Appellants' allegations, there is insufficient evidence in the record that the MX-H zone or hospital use will harm the area.

16. There is substantial evidence in the record that any adverse traffic conditions caused by the 48-bed hospital use will be sufficiently mitigated by the applicants.

Respectfully Submitted:



Steven M. Chavez, Esq.
Land Use Hearing Officer
October 1, 2024

Copies to:
City Council
EPC
Appellants through Counsel
Appellees through Counsel