



**CITY OF ALBUQUERQUE**  
**Albuquerque, New Mexico**  
**Planning Department**

Mayor Richard J. Berry

**INTER-OFFICE MEMORANDUM**

**December 17, 2015**

**TO:** Dan Lewis, President, City Council

**FROM:** Suzanne Lubar, Planning Director

**Subject:** AC-15-7 –Project# 1010582/15EPC-40051 & 40052 Timothy Flynn-O’Brian on behalf of the Greater Gardner Neighborhood Association, Gun & Carolyn Conway, Pat & Mary Beth Maloy, Larry Step, William V. Rombin, Dennis & Debra Hardy, Lorenzo Ramirez, Steve Collins the Westside Coalition of Neighborhood Associations, the Inter-Coalition Panel, Oxbow Village Homeowners Association and the Grande Heights Neighborhood Association appeal the Environmental Planning Commission’s (EPC’s) APPROVAL of a Zone Map Amendment (Zone Change) from M-1 to SU-1 for M-1, Solid Waste Transfer Station and Convenience Center, and a Site Development Plan for Building Permit for a northerly portion of Tract 107B1A1, Tract 107B1A1 excluding portion to right-of-way & excluding a northerly portion, Tract 107B1A2 excluding portion to right-of-way, Tract in the SW corner-Tract 107B1B, Tract 108A3A1A, Tract 108A3A1B, and Tract 108A3B, Tracts 108A1A2B1B & 108A1A2B2, Tract 108A1A2B1A, Tract 107B2A2 excluding portion to the right-of-way, Tract 107B2A1 excluding portion to the right-of-way, MRGCD MAP #33 containing approximately 22 acres, (G-15). Staff Planner: Vicente Quevedo.

**REQUEST**

This appeal seeks to reverse the Environmental Planning Commission’s (EPC’s) approval of a zone change and associated site development plan for building permit for an approximately 22-acre City-owned site located at the intersection of Comanche Rd. NE and Edith Blvd. NE (the “Subject Site”). The appeal is submitted by Timothy Flynn-O’Brian on behalf of the Greater Gardner Neighborhood Association, et all.

**BACKGROUND**

The EPC approved a zone change from M-1 (Light Manufacturing) to SU-1 for M-1, Solid Waste Transfer Station and Convenience Center and an associated Site Development Plan for Building Permit that would allow the applicant to construct a transfer station / convenience center building, an administrative building, vehicle maintenance building, household hazardous waste building and a parking structure on the subject site.

The EPC application was submitted on August 27, 2015, and was initially scheduled to be heard at the October 8, 2015 EPC hearing. However, there were not enough EPC Commissioners present at the October 8, 2015 hearing to constitute a quorum. A special meeting was subsequently scheduled for November 5, 2015. The requested zone change and associated site development plan for building permit were heard and approved by the EPC on November 5, 2015.

### **THE ENVIRONMENTAL PLANNING COMMISSION DECISION**

Subject to seventeen findings and one condition, the EPC approved the zone change at the November 5, 2015 public hearing. Additionally, subject to twelve findings and ten conditions of approval, the EPC approved the site development plan for building permit on November 5, 2015.

The EPC found that the zone change request was adequately justified pursuant to the policies and criteria of R270-1980 and that both requested actions furthered a preponderance of applicable goals and policies in the Comprehensive Plan, North Valley Area Plan and Bikeways & Trails Facility Plan. There was no significant conflict with an adopted element of the aforementioned plans (Section 1C of R-270-1980) and there was no significant conflict with any other subsection of R270-1980. This EPC agenda item was considered and conducted as a quasi-judicial matter.

### **ZONING**

The Subject Site is zoned M-1 (*see* Zoning Code §14-16-2-20). M-1 zoning allows all uses first listed as permissive and as regulated in the C-3 zone and uses permissive and as regulated in the IP zone. Additional permissive M-1 uses include but are not limited to: Automotive sales, service, repair and dismantling, commercial agricultural activity, concrete or cement manufacturing, gravel, sand or dirt removal, stockpiling, processing or distribution.

The requested zone change to SU-1 for M-1, Solid Waste Transfer Station and Convenience Center zoning (*see* Zoning Code §14-16-2-22) provides suitable sites for uses which are special because of infrequent occurrence, effect on surrounding property, safety, hazard, or other reasons, and in which the appropriateness of the use to a specific location is partly or entirely dependent on the character of the site design. The applicant also submitted an associated site development plan for building permit as required by the SU-1 Special Use Zoning designation.

The Code Enforcement Division submitted agency comments on September 16, 2015 stating that “the Use would currently be allowed under the M-1 Zoning that the property is currently zoned. M-1 would refer back to IP Zoning and under 14-16-2-19(A)(19) the use would be allowed in accord with an approved site development plan,.....an adopted facility plan would not be required for this Use as that would only be a requirement for something such as a PNM substation where facility plans are already a requirement.” Although not required, the applicant submitted an application for a zone change to allow the community and EPC opportunity to provide input.

### **GROUND(S) & REASON FOR APPEAL**

Pursuant to Zoning Code §14-16-4-4(B)(4), the Appellant must articulate the reason(s) for the appeal and show that the EPC erred:

- a. In applying adopted City plans, policies, and ordinances in arriving at the decision.
- b. In the appealed action or decision, including its stated facts.

c. In acting arbitrarily or capriciously or manifestly abusive of discretion.

The Appellants raise the following issues, in summary:

- 1) The existing M-1 zoning for the subject site is not inappropriate;
- 2) The existing zoning requires a facility plan approved by the planning commission;
- 3) Finding No. 14(D) misconstrues Res. 270-1980(D);
- 4) Finding 14(D) is erroneous in its statement that a different use category is more advantageous as articulated in the Comprehensive Plan or North Valley Area Plan;
- 5) By changing the zoning to SU-1 the limitation outlined in the North Valley Area Plan regarding the development of transfer stations cannot be met because the M-1 zoning designation will no longer be in effect;
- 6) The EPC erred by assuming that the more advantageous criteria of Res. 270-1980 is satisfied if a proposed use is “good” or “advantageous”;
- 7) The EPC misapplied Res. 270-1980 by misstating the requirement of Section G.;
- 8) The EPC did not consider issues raised by the community or opponents;
- 9) The decision fails to make the required findings regarding issues raised by the community;
- 10) The decision is not supported by substantial evidence;
- 11) The EPC acted arbitrarily and capriciously by failing to evaluate the argument and evidence fairly and critically;
- 12) The findings demonstrate the arbitrary nature of the decision;
- 13) The EPC did not enter any findings acknowledging the testimony of approximately 34 speakers at the hearing;
- 14) Without the zone change the site plan application is inappropriate because it is premised on a change to SU-1.

Additional issues are raised by the Appellant, each of which is outlined in more detail in the subsequent section below.

## RESPONSE TO APPELLANT’S ARGUMENTS

- 1) *The existing M-1 zoning for the subject site is not inappropriate*

The existing M-1 zone is not inappropriate because it provides suitable sites for heavy commercial and light manufacturing uses, and the proposed use would currently be allowed under the existing M-1 zoning because M-1 refers back to the uses of the IP zone (14-16-2-19(A)(19)). However, the SU-1 zone is more appropriate because it provides suitable sites for uses which are special, such as the proposed use, because of infrequent occurrence, effect on surrounding property, safety, hazard, or other reasons, and in which the appropriateness of the use to a specific location is partly or entirely dependent on the character of the site design. Based on staff analysis and Finding 8 of the Official EPC Amended Notice of Decision (N.O.D.) for the requested zone change, the solid waste transfer station and convenience center uses more closely match the overall intent of the SU-1 zone and is therefore more appropriate than the existing M-1 zone.

2) *The existing zoning requires a facility plan approved by the planning commission*

The Code Enforcement Division submitted agency comments on September 16, 2015 stating that “the Use would currently be allowed under the M-1 Zoning that the property is currently zoned. M-1 would refer back to IP Zoning and under 14-16-2-19(A)(19) the use would be allowed in accord with an approved site development plan,.....an adopted facility plan would not be required for this Use as that would only be a requirement for something such as a PNM substation where facility plans are already a requirement.”

Finding 14(D) of the EPC N.O.D. states: “Based on a priority objective by the Albuquerque City Council to conduct an analysis of potential sites for a transfer and resource recovery park in order to address the growing public need for a more efficient, economical and environmentally sound method of solid waste disposal (EC-10-183), staff agrees that this proposed use fulfills this public need and therefore is more advantageous to the community as articulated in the Comprehensive Plan and North Valley Area Plan.”

This finding is supported by the twenty-five Comprehensive Plan and the nine North Valley Area Plan goals, policies and issues that are furthered by the requested zone change request which meets the requirement of Section D.3. of R270-1980.

3) *Finding No. 14(D) misconstrues Res. 270-1980(D)*

The EPC did not misconstrue R-270-1980, Section D, which states:

“The applicant must demonstrate that the existing zoning is inappropriate because:

- (1) There was an error when the existing zone map pattern was created; or
- (2) Changed neighborhood or community conditions justify the change; or
- (3) A different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other city master plan, even though (D)(1) or (D)(2) above do not apply.”

The M-1 zone provides suitable sites for heavy commercial and light manufacturing uses. The SU-1 zone provides suitable sites for uses which are special because of infrequent occurrence, effect on surrounding property, safety, hazard, or other reasons, and in which the appropriateness of the use to a specific location is partly or entirely dependent on the character of the site design. Based on staff analysis and Finding 8 of the Official EPC Amended Notice of Decision (N.O.D.) which states:

“The Albuquerque/Bernalillo County Comprehensive Plan, North Valley Area Plan, Bikeways & Trails Facility Plan and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes”

The requested zone change, the solid waste transfer station and convenience center uses more closely match the overall intent of the SU-1 zone and is therefore more appropriate.

Finding 14(D) of the EPC N.O.D. which states:

“Based on a priority objective by the Albuquerque City Council to conduct an analysis of potential sites for a transfer and resource recovery park in order to address the growing public

need for a more efficient, economical and environmentally sound method of solid waste disposal (EC-10-183), staff agrees that this proposed use fulfills this public need and therefore is more advantageous to the community as articulated in the Comprehensive Plan and North Valley Area Plan.”

This finding is directly based on the twenty-five Comprehensive Plan and the nine North Valley Area Plan goals, policies and issues that are furthered by the requested zone change request which meets the requirement of Section D.3. of R270-1980.

The City Council is the legislative authority of the City with the power to adopt all ordinances, resolutions, or other legislation conducive to the welfare of the people of the city. On June 1, 2009 the Albuquerque City Council approved (per its authority) a priority objective for the Solid Waste Management Department to conduct an analysis of potential sites for a transfer station and resource recovery park (Council Bill R-09-225, Enactment # R-2009-077). On September 8, 2010 the Albuquerque City Council accepted the Integrated Waste Management Plan per an executive communication action (EC-10-183) which also recommends the development of a solid waste transfer station. A total of six potential sites for a transfer station were identified per City Council’s directive according to the following criteria:

1. The site should contain between eight (8) and twelve (12) acres (This is criteria for a transfer station only.) with minimum dimensions of 500 to 600 feet in one direction and approximately 700 feet in the other direction.
2. The site should be zoned for light or heavy industry or commercial uses.
3. The site should be located at the center of waste generation, which in this case translated into within a 3-mile proximity to the Big I.
4. The site should have access to major or minor arterials or highways.
5. The site should have topographic features including a natural slope of 6 to 10 feet.
6. The site should have availability of utilities.
7. The site should meet the State’s siting criteria for transfer stations in 20.9.4.12 NMAC.

The subject site meets the required selection criteria. The fact that the City Council directed the Solid Waste Department to evaluate the need for a more efficient system of transferring waste demonstrates that there is a public need for the proposed zone change and use. And, the fact that the subject site was selected among the six identified potential sites shows that this need is best served by the subject site compared to the five other sites.

- 4) *Finding 14(D) is erroneous in its statement that a different use category is more advantageous as articulated in the Comprehensive or North Valley Area Plan*

Finding 14(D) (see response to item 3 for citation) is not erroneous because the finding is directly based on the additional twenty-five Comprehensive Plan and the nine North Valley Area Plan goals, policies and issues that are furthered by the requested zone change request which meets the requirement of Section D.3. of R270-1980 per the EPC’s adoption of findings and conditions for the case.

Section 7 of the adopting legislation for the NVAP (R-255, Enactment# 60-1993) states:

“Solid Waste Transfer Stations shall be allowed in the North Valley Plan area only on land zoned for manufacturing uses and only if after thorough investigation of relative benefits and costs,

such location is deemed appropriate and the potential impacts on adjacent residential land can be mitigated through proper site design.”

Staff notes that the above language closely mirrors the intent of the SU-1 Special Use Zone of the Zoning Code which states:

“This zone provides suitable sites for uses which are special because of infrequent occurrence, effect on surrounding property, safety, hazard, or other reasons, and in which the appropriateness of the use to a specific location is partly or entirely dependent on the character of the site design.

This similarity in intent further demonstrates that the requested SU-1 zoning is more appropriate by retaining the manufacturing uses and requiring site plan review of potential impacts on the surrounding area.

- 5) *By changing the zoning to SU-1 the limitation outlined in the North Valley Area Plan regarding the development of transfer stations cannot be met because the M-1 zoning designation will no longer be in effect*

The limitation outlined in Section 7 of the North Valley Area Plan adopting legislation Council Bill R-255 (Enactment No. 60-1993) which state that “Solid Waste Transfer Stations shall be allowed in the North Valley Plan area only on land zoned for manufacturing uses....” is still in effect and is met because the approved zoning designation still maintains the M-1 land uses for the subject site as required by Council Bill R-255. The City Council is the legislative authority of the City with the power to adopt all ordinances, resolutions, or other legislation conducive to the welfare of the people of the city. Additionally, the Albuquerque City Council approved a priority objective for the Solid Waste Management Department on June 1, 2009 (Council Bill R-09-225, Enactment # R-2009-077) to conduct an analysis of potential sites for a transfer and resource recovery park.

- 6) *The EPC erred by assuming that the more advantageous criteria of Res. 270-1980 is satisfied if a proposed use is “good” or “advantageous” (Appellant miss-numbered this item as a secondary #5 in the justification letter)*

The test for whether a new zoning designation is more advantageous to the community (City) per Section D.3. of the R270-1980 is whether the proposed zoning category fulfills a public need and fulfills this public need best on the subject site when compared to other property. The Albuquerque City Council is the legislative authority of the City with the power to adopt all ordinances, resolutions, or other legislation conducive to the welfare of the people of the city. The City Council approved a priority objective for the Solid Waste Management Department to conduct an analysis of potential sites for a transfer and resource recovery park and also approved the 2010 Integrated Waste Management Plan which also recommends the development of a transfer station. The City Council provided the basis per its legislative authority to develop criteria for site selection for a transfer station. A total of six potential sites for a transfer station were identified per City Council’s recognition of the need and the directive to assess various locations to fulfill the need (R-2009-077 & EC-10-183). The proposed zoning best fulfills this public need for a transfer station at this site, when compared to other properties.

- 7) *The EPC misapplied Res. 270-1980 by misstating the requirement of Section G.*

The direct language for Finding 14(G) states “Staff agrees that the cost of land or other economic considerations pertaining to the applicant are not the sole determining factor for the

change of zone.”

Appellant claims that the inclusion of the term “sole” as part of staff’s analysis and EPC adopted Finding 14(G) misstate the requirements of this section of R270-1980. However, the inclusion of this language directly reflects the language of Section G. of R270-1980 that economic considerations shall not be the determining factor for a zone change. The addition of the term “sole” as part of the analysis actually strengthens the justification provided in order to meet the requirement under this portion of the resolution.

The cost of land or other economic considerations are just one of many factors for this change of zone.

8) *The EPC did not consider issues raised by the community or opponents*

Appellant claims that the EPC did not consider whether the existing zoning was inappropriate or the impact of increases in traffic volumes because the use is already permitted by the existing M-1 zoning. The existing zoning is not inappropriate, but based on staff analysis and Finding 8 (see response to item 3 for citation) of the Official EPC Amended Notice of Decision (N.O.D.) for the requested zone change, the solid waste transfer station and convenience center uses more closely match the overall intent of the SU-1 zone and is therefore more appropriate, which indicates that this item was considered by the EPC.

A Traffic Impact Study (T.I.S.) Form was submitted by the applicant to the Traffic Engineering Division on August 20, 2015 inquiring as to whether a T.I.S. would be required for the requested actions. The form was analyzed by the Traffic Engineering Division and it was determined that the requested actions did not meet the threshold for requiring a T.I.S. The threshold for a T.I.S. is 100 or more additional/new peak direction, inbound or outbound vehicle trips to or from the site in the morning or evening peak period of the adjacent roadways. The T.I.S. shows that the majority of the 653 additional inbound and outbound trips that may be generated by the proposed use occur primarily outside of the AM and PM peak hours.

The form was analyzed and signed off on by the City Engineer on August 20, 2015. In addition, the Traffic Engineering Division submitted agency comments stating that according to City standards the site development does not warrant a traffic study. The T.I.S. form and Traffic Engineering Division comments were presented to the EPC for consideration in this case. The EPC subsequently adopted a corresponding finding as part of their decision to approve the request (Finding 7. “According to City standards the requests do not warrant a traffic study”).

9) *The decision fails to make the required findings regarding issues raised by the community*

Appellant incorrectly cites requirements for the Landmarks & Urban Conservation Commission (LUCC)(14-12-8(C)(3)(b)) as part of appellant’s response to item 9 regarding the EPC decision. The LUCC requirements do not apply to EPC. Section 14-13-3-3 – Organization & Meetings (B) – Conduct of Business states: “The EPC shall adopt such rules and regulations for the conduct of business...”. EPC has complied with this requirement by adopting Rules of Conduct. Section B. – Hearing Procedures 1-7 outline the procedures required for the EPC to reach a decision on a proposed action(s). The regulations governing the conduct and business do not require the EPC to adopt findings specific to issues raised by the community.

EPC Rules, B. Hearing & Procedures, 7.d. states:

“When approving a motion to approve, deny, continue or defer an application, the EPC will adopt findings of fact, based on the record, upon which it has based its decision. (emphasis added)”

10) *The decision is not supported by substantial evidence*

The decision is supported by the adopted findings and conditions of approval, which are in turn based on the official record for the case, as well as staff analysis and agency comments, which include substantial evaluation by the Environmental Health Department with regard to the claims made by the North Valley Health Impact Assessment.

Also, City Council bill number R-09-225 (Enactment # R-2009-077) directs the Solid Waste Management Department to explore development of a transfer station with specific criteria that has guided the site selection and design of the facility per adopted Findings 4 & 5 of the EPC N.O.D. for the requested zone change. The subject site meets the criteria that were accepted by the City Council. This is part of the record that was considered by the EPC.

11) *The EPC acted arbitrarily and capriciously by failing to evaluate the argument and evidence fairly and critically*

Appellant claims that the EPC failed to evaluate the argument and evidence fairly and critically. However, the EPC held an approximately 6 hour public hearing in order to fully evaluate the arguments and evidence fairly and critically. EPC Commissioners heard from Planning staff, the applicant and the public to ensure that adequate additional information was gathered from each party, and that adequate debate and discussion occurred prior to a motion being made and considered, all of which is evidenced by the record. Cross-examination and rebuttals further informed the EPC and their decision. Ultimately, the EPC did not vote unanimously to approve the requested actions which also demonstrate that the EPC evaluated the arguments and evidence fairly and critically.

12) *The findings demonstrate the arbitrary nature of the decision*

The City of Albuquerque is a chartered municipality. The Citizens of Albuquerque ratified the City Charter in 1971. Applicable articles include:

Article IX, Environmental Protection

“The Council (City Commission) in the interest of the public in general shall protect and preserve environmental features such as water, air and other natural endowments, ensure the proper use and development of land, and promote and maintain an aesthetic and humane urban environment. To affect these ends the Council shall take whatever action is necessary and shall enact ordinances and shall establish appropriate Commissions, Boards or Committees with jurisdiction, authority and staff sufficient to effectively administer city policy in this area.”

The EPC is a formally recognized Commission established by the City Council with the authority to approve or deny zone change requests within the City of Albuquerque.

The Planning Department is charged with conducting an analysis of a proposed action and making a recommendation for approval, denial, deferral or a continuance (see response to item 9). The EPC heard and considered all submittals and testimony from the appellant, staff and the public. The EPC weighed the facts, the claims, and the recommendations from all parties.



The EPC has the sole authority to adopt findings and conditions for each case, as applicable. Once a motion (which is based on applicable findings and conditions) regarding a specific project and any associated case numbers is made, the findings and conditions become those of the EPC. The votes on each motion were not unanimous. Therefore, the findings and conditions for each action adopted for this project are not arbitrary or capricious.

13) *The EPC did not enter any findings acknowledging the testimony of approximately 34 speakers at the hearing*

The Staff analysis of written public comments received by the Planning Department prior to the case being distributed to the EPC on October 29, 2015 is part of the Neighborhood/Public section of the staff report beginning on Page 27. All written public comments received after October 29, 2015 were forwarded from the Planning Department to the EPC in accordance with section B.12. of the EPC Rules of Conduct (*See attached*) for consideration by the Commission. Finding 17 of the EPC N.O.D. for the zone change request acknowledges the written public comments received by the Planning Department opposing the request. The public testimony at the hearing closely mirrored the comments that were already on the record in the case file and therefore Finding 17 of the EPC N.O.D. is sufficient.

14) *Without the zone change the site plan application is inappropriate because it is premised on a change to SU-1*

The Code Enforcement Division submitted agency comments on September 16, 2015 stating that “the Use would currently be allowed under the M-1 Zoning that the property is currently zoned. M-1 would refer back to IP Zoning and under 14-16-2-19(A)(19) the use would be allowed in accord with an approved site development plan for building permit,....an adopted facility plan would not be required for this Use as that would only be a requirement for something such as a PNM substation where facility plans are already a requirement”. Section 14-16-2-22(A)(1) of the SU-1 Special Use Zone states that “Development within the SU-1 zone may only occur in conformance with an approved Site Development Plan”.

The comments by the Code Enforcement Division demonstrates that a site development plan for building permit is required and appropriate, regardless of whether the subject site remains zoned M-1 or is re-zoned to the more appropriate SU-1 for M-1, Solid Waste Transfer Station and Convenience Center zoning. However, the level of oversight and discretion that the EPC has over the criteria to approve a site development plan for building permit under each zone differs in the following ways:

- M-1 Zone: EPC’s authority/discretion is limited to verifying whether or not a site development plan for building permit meets the minimum requirements outlined in the M-1 zone. The EPC has no use or design discretion for a site development plan under “straight” M-1 zoning.
- SU-1 Zone: The EPC has full discretion to impose all requirements as may be necessary to implement the purpose of the Zoning Code. The EPC can condition an approval on changes to the design and layout of the site to ensure compliance with or furthering of adopted regulations and policies. More specifically, the EPC has full discretion over the following items: Parking, Signage, Building Height, Access, and Circulation. The EPC can also deny a zone change to SU-1 based on a deficient, accompanying site development plan and/or deny an SU-1 site development plan based on design deficiencies if they cannot be addressed with conditions of approval.

The record shows that the EPC had extensive discussion about, and fully considered, all of the relevant items pertaining to the requested zone change, such as land uses and whether or not the request was justified pursuant to the criteria set forth in R270-1980. The EPC also reviewed the site development plan knowing that the appropriateness of the use to this specific location is partly or entirely dependent on the character of the site design. The EPC voted 6-3 to approve both the zone change request and the associated site development plan for building permit.

The EPC's decision was within its authority and is supported by the record. The Planning Department supports the EPC's decision and recommends denial of the appeal.

APPROVED:



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Kym Dicome, Manager  
Current Planning Section  
Planning Department