



# CITY OF ALBUQUERQUE

*Albuquerque, New Mexico*

**Planning Department**

Mayor Timothy M. Keller

## INTER-OFFICE MEMORANDUM

September 12, 2023

**TO:** Pat Davis, President, City Council

**FROM:** Alan Varela, Planning Director   
Alan Varela (Sep 12, 2023 10:47 MDT)

**SUBJECT:** AC-23-14, (VA-2023-00196) PR-2022-007712, SI-2023-00127

The Westside Coalition of Neighborhood Associations and Michael Voorhees appeal the Development Hearing Officer decision to approve a final plat, for all or a portion of LOT 5, BLOCK 6 VOLCANO CLIFFS UNIT 26 & LOT 1, BLOCK 2, VOLCANO CLIFFS UNIT 26 zoned MX-L & MX-M, located on ROSA PARKS RD between PASEO DEL NORTE and ROSA PARKS RD containing approximately 18.23 acre(s). (C-11)

### REQUEST

This is an appeal of the Development Hearing Officer (DHO) decision to approve a Final Plat for 18.23 acres on July 12, 2023. The subject parcels are bounded by Paseo del Norte on the north, Kimmick on the east, Rosa Parks Drive on the south, and a residential development on the east.

The applications would divide the subject parcel according to the zoning boundaries approved by the EPC and the replat is a condition of the EPC approved rezoning. The application was deemed complete and subject to review under the IDO Effective Date of December 2022.

The appellants made a timely appeal of the application. The appellants claim to have standing as they appeared before the DHO and they are specially and adversely affected by the decision.

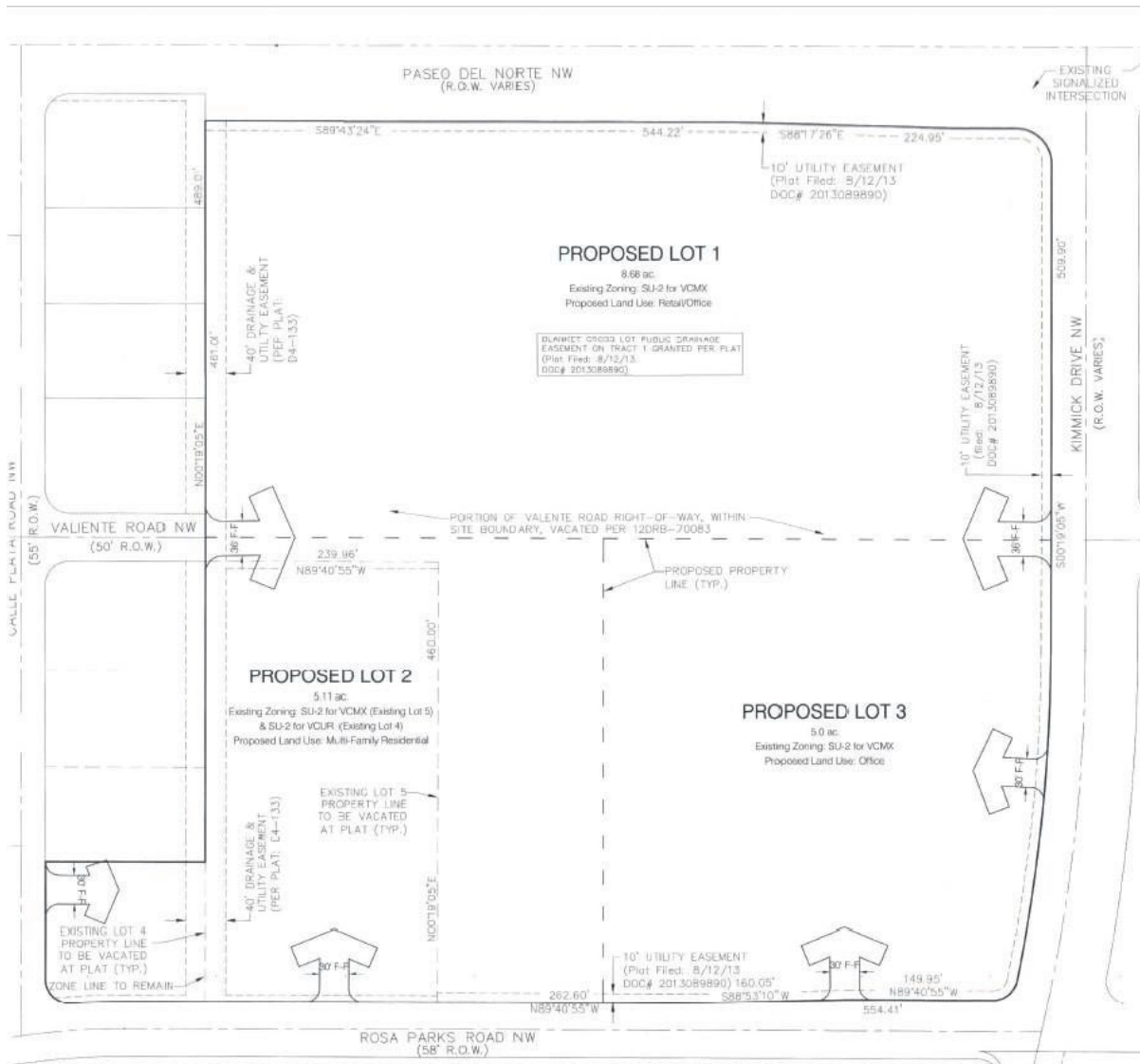
## BACKGROUND

### A. Prior Approvals

Site Plan for Subdivision 2017. In September 2017, the DRB approved a site plan for subdivision for 18.79 acres plus an additional Lot 4 (less than 1 acre at the southwest corner of the subject parcel).

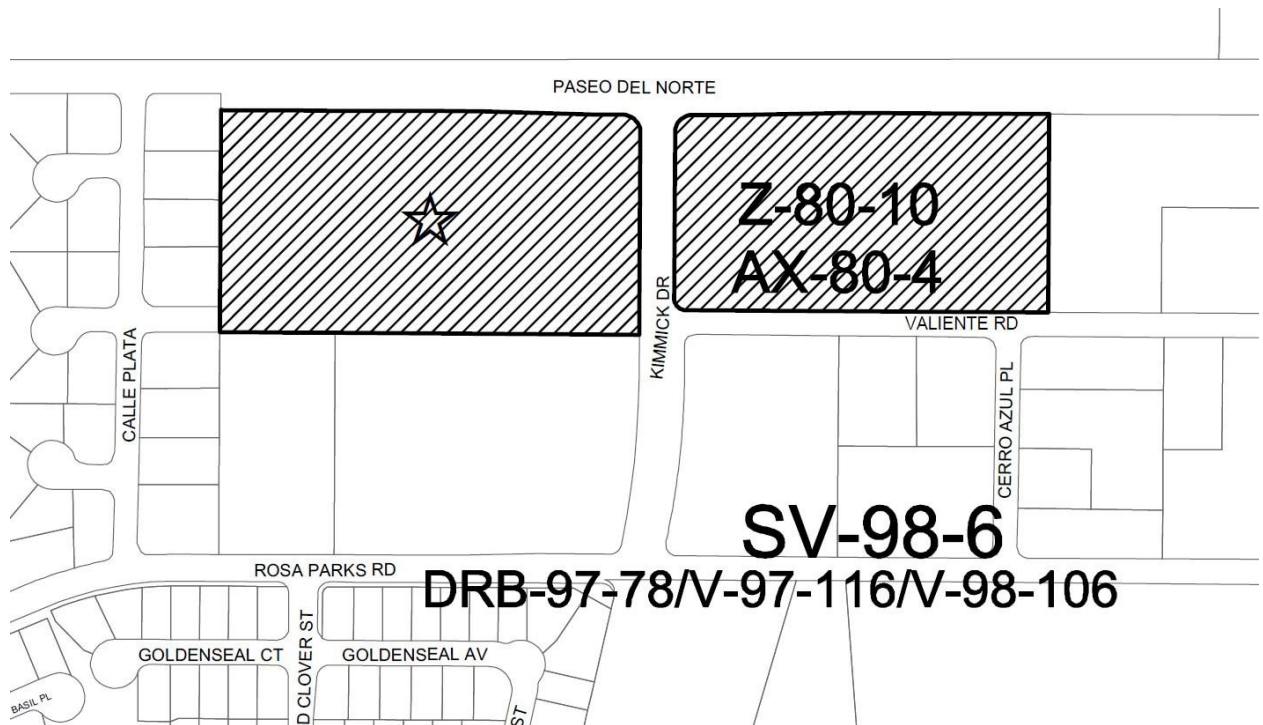
The Site Plan for Subdivision was approved by the DRB in September 2017 and was reviewed according to the Volcano Heights Sector Development Plan because the site plan application was made prior to enactment of the IDO.

Figure 1. 2017 Area involved in Site Plan for Subdivision



Rezoning of 2019 (PR 2019-02263). The Environmental Planning Commission (EPC) approved a rezoning of a portion of the subject site on October 10, 2019. The rezoning request included 16 acres directly south of Paseo del Norte. The two parcels were east and west of Kimmick. See the figure below identifying the land that was rezoned by the striping pattern. The parcel west of Kimmick of 8.7 acres is the only parcel from that rezoning that is included this appeal (noted with a ‘star’ in the figure below).

Figure 2. 2019 Rezoning Exhibit PR-2019-02263



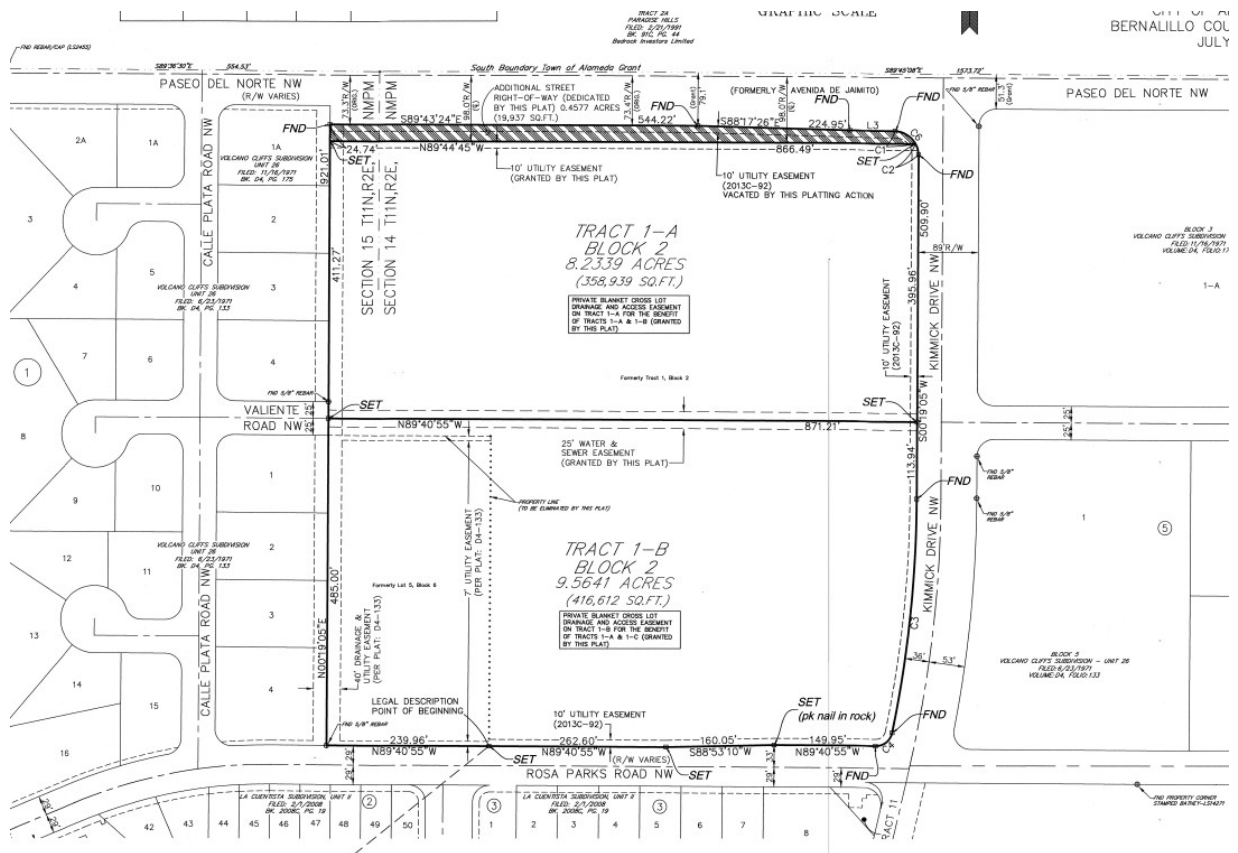
The EPC established the following condition of approval for the rezoning:

Condition 1. ‘The zone map amendment shall not become effective until Lot 1, Block 2 is replatted and a lot line is created that corresponds to the proposed zone boundary, located at 436.01 feet south of the Paseo del Norte Blvd. NW right-of-way, and the plat is recorded.’ (EPC NOD Oct. 10, 2019)

The Preliminary Plat application of November 9, 2022. The DRB approved a Preliminary Plat (PR-2022-7712, SD-22022-143) for 18.23 acres. The Preliminary Plat was reviewed according to IDO (effective date of July 2022) Section 6-6(L)(3) Subdivision of Land- Major and is accompanied by an Infrastructure List. The application was approved because it met the requirements of the IDO and DPM as outlined in staff comments.

The figure below identifies the two tracts that were the subject of the Preliminary Plat.

Figure 3. Preliminary Plat Application



Vacations of Public Easements. The DRB approved three applications for vacations of private easements as part of the Preliminary Plat application on the November 9, 2022. These vacation approvals were not appealed and were included in the Final Plat as settled matters.

The Preliminary Plat was the first step for the applicant to fulfill the EPC condition from the rezoning case. A Final Plat would be the second step needed to fulfill this EPC condition for the rezoning.

## B. DHO Approval Under Appeal:

The DHO reviewed an application for a Final Plat at its hearing of July 12, 2023. The application for a Final Plat was the completion step to reconfigure the two existing tracts into two different tracts what would create a north and south tract. The boundary of the tracts is according to the EPC conditionally approved rezoning: MX-M zone district for the northern parcel, Tract 1-A, Block 2 (8.23 acres) and the MX-L zone district for the southern parcel, Tract 1-B, Block 2 (9.56 acres).

## REASONS FOR THE APPEAL

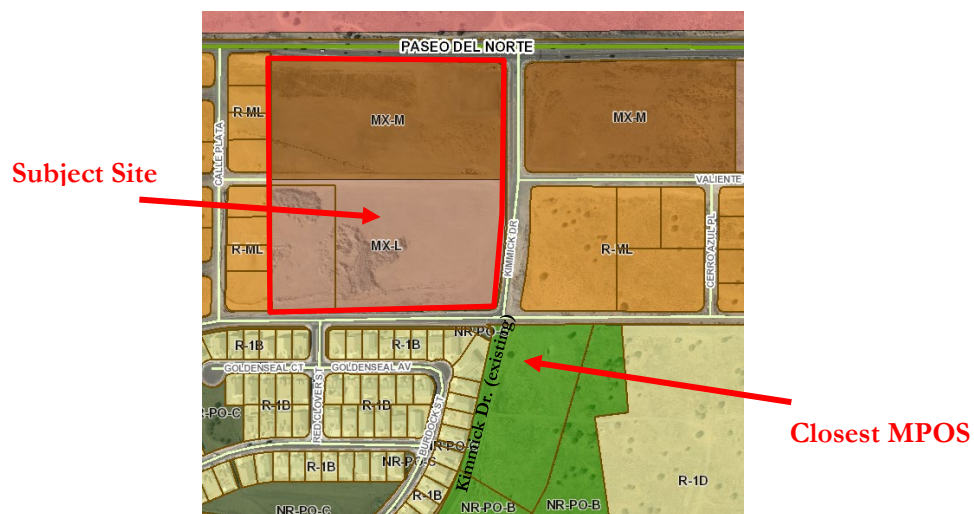
1. **Appellant:** The Final Plat is invalid if the Preliminary Plat approved by the DRB is invalid. The Preliminary Plat is invalid under the IDO because it was not approved in a quasi-judicial hearing. IDO Table 6-1-1; IDO Section 6-4(M)(3).

**Staff Response:** The Preliminary Plat for PR-2022-007712 / SD-2022-00143 was accepted for completeness and processed on October 6, 2022, and was approved by the Development Review Board (DRB) on November 9, 2022. At the time of approval of PR-2022-007712 / SD-2022-00143, the applicable IDO had the effective date of July 2022. Table 6-1-1 of the IDO effective July 2022 confirms that the DRB was responsible approving body for Preliminary Plat applications.

2. **Appellant:** The Preliminary Plat is invalid as contrary to the IDO because the subject site of 18.23 acres is “adjacent” to the La Cuentista Major Public Open Space (“MPOS”) as the subject site and the La Cuentista MPOS are separated only by a street and under IDO Section 5-4(C)(6) such an adjacent site must have an approved Site Plan – EPC prior to any platting action. The subject site does not have an approved Site Plan – EPC.

**Staff Response:** The nearest MPOS, NR-PO-B zoning, is located at the southeast corner of Kimmick Drive (existing) and Rosa Parks Road (to be built) (see the figure below).

Figure 4. Zoning of the Subject Site and Neighboring Properties



The Final Plat was reviewed under the IDO effective date of December 2022. The definition of “adjacent” in the IDO effective dates of July 2022 and December 2022 is the same and states: ‘those properties that are abutting or separated only by a street, alley, trail, or utility easement, whether public or private.’

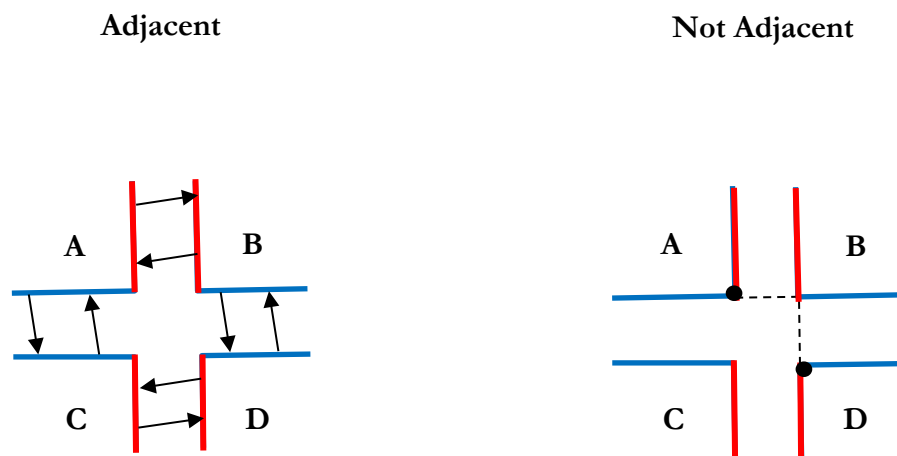
Figure 5 below, on the left, shows properties that considered *adjacent* based on the above definition, ‘separated by only a street’:

- The red property line of Parcel A is adjacent to the red property line of Parcel B.
- The red property line of Parcel C is adjacent to the red property line of Parcel D.
- The blue property line of Parcel A is adjacent to the blue property line of Parcel C.
- The blue property line of Parcel B is adjacent to the blue property line of Parcel D.

Figure 5 below, on the right, shows properties that are ***not considered adjacent*** based on the definition, ‘separated by only a street.’

- One point (shown in black) on Parcel A is across an intersection of two streets from one point (shown in black) of Parcel D. The two points are separated by an intersection of two streets; the points are not ‘separated by only a street.’ Furthermore, no property lines of Parcel A is adjacent to Parcel D. Therefore, Parcel A is not adjacent to Parcel D.

Figure 5. Adjacent Properties Versus Properties that are not Adjacent



The subject site is in the location of Parcel A above. The MPOS is in the position of Parcel D. The alignment of these parcels does not meet the definition of ‘adjacent’ in the IDO as the parcels are not ‘separated by only a street.’

As the subject site is not ‘adjacent’ to MPOS, the application did not meet the applicability test to be processed as a Site Plan – EPC process per IDO 6-6(J)(1)(c)(3) prior to the review of a plat.

3. **Appellant:** The Development Hearing Officer (“DHO”) did not make any finding about the adjacency of the subject site to the La Cuentista MPOS, despite that Appellants presented that issue to the DHO. Any implied finding that the subject site is not adjacent to the La Cuentista MPOS is not supported by substantial evidence.

**Staff Response:** As stated in staff's response to the Appellants' reasoning, the subject site was not considered to be adjacent to MPOS, and staff explained to the DHO why the site was not 'adjacent' to MPOS in the hearing. There is no requirement in the IDO or the Rules of Procedure of the DHO that the DHO make a finding regarding matters that are not deemed to be applicable to the application. The list of non-applicable items would be exhaustive.

4. **Appellant:** The decision of the DHO which apparently assumes that the subject site is not adjacent to the La Cuentista MPOS appears to be based on a declaratory ruling type decision of the Planning Department or the Zoning Enforcement Officer. This declaratory ruling type decision required a quasi-judicial hearing but was not made in a quasi-judicial hearing.

**Staff Response:** The Zoning Enforcement Officer makes a Declaratory Ruling upon request per IDO 6-4(S)(1). No Declaratory Ruling request was made on 'adjacency or non-adjacency' of the subject site to MPOS. The DRB determined that the site was not adjacent to MPOS during the review of the Preliminary Plat application and Site Plan applications in the DRB approval of November 9, 2022. That determination was reaffirmed by the DHO decision on the Final Plat, in a quasi-judicial hearing.

5. **Appellant:** The Preliminary Plat approval is under appeal in a SCRA 1-074 appeal of the City's denial of AC-23-1, Bernalillo County District Court No. D-202-CV-2023-02637, and the DHO should have deferred its hearing until that appeal is resolved. Proceeding on the Final Plat during the pending court appeal on the Preliminary Plat issues is arbitrary and capricious.

If the Preliminary Plat approval is reversed by the District Court, the parties and the City will have wasted substantial time and resources on the DHO decision and whatever may be decided in this appeal.

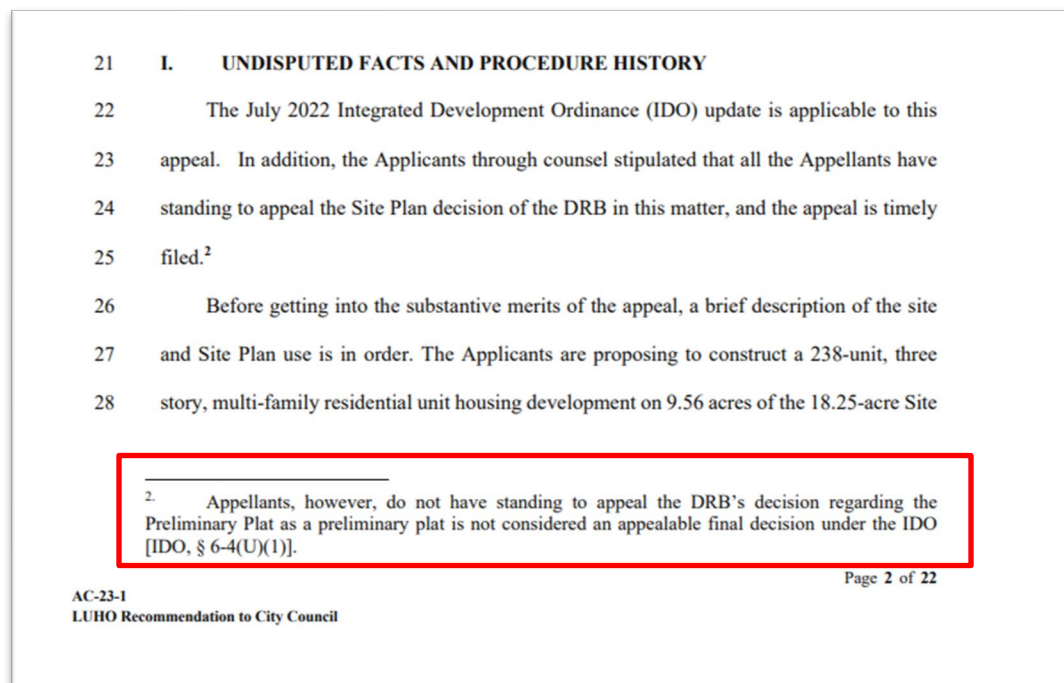
**Staff Response:** Section 6-4 (U)(1) of the IDO effective July 2022 states the following:

A decision on any application type **other than Preliminary Plat** by any decision-making body shown in Table 6-1-1 is final unless appealed in which case it is not final until the appeal has been decided by the last appeal body. **As a preliminary approval, a Preliminary Plat is not considered a final decision that can be appealed.**

Therefore, a Preliminary Plat was not an appealable application per the IDO in effect when the Preliminary Plat was approved and, therefore, the matter is settled. That that Preliminary Plat was not appealable was affirmed in the LUHO's recommendation to the City Council from an earlier appeal on the subject site, AC-23-1 (see footnote #2 in the figure below).



Figure 6. Excerpt from the LUHO Recommendation to City Council for AC-23-1



Additionally, the District Court may stay enforcement of the order or decision under review. The City has not received an order staying enforcement for the Preliminary Plat, therefore, the Final Plat application is also not stayed.

6. **Appellant:** The Preliminary Plat is invalid, and the Final Plat is invalid because they do not comply with the 2017 site plan and possibly other prior approvals for the property which impose “conditions specifically applied to development of the property in a prior permit or approval affecting the property,” IDO Section 6-6(L)(3).

**Staff Response:** On November 9, 2022, the DRB approved the Preliminary Plat PR-2022-007712/ SD-2022-00143. The Review and Decision Criteria for approving a Final Plat per IDO 6-6(L)(3)(b) is: ‘A Final Plat shall be approved if it includes all changes, conditions, and requirements contained in the Preliminary Plat approval.’ This Review and Decision Criteria is silent with regard to a site plan on the subject site when a Preliminary Plat has already been approved.

7. **Appellant:** The DHO denied Appellants due process by not specifically addressing and making decisions on Appellants’ objections set out in writing and in testimony, including Appellant Voorhees’s objection that the DHO was biased against Appellant Voorhees and should recuse himself.

**Staff Response:** Mr. Voorhees, an appellant, sent written comments after office hours the day before the July 12, 2023 DHO hearing (at 5:13 PM on July 11, 2023). Those comments were forwarded to the DHO prior to the start of the hearing. The DHO Rules of Procedure do not require the DHO to respond orally to written comments

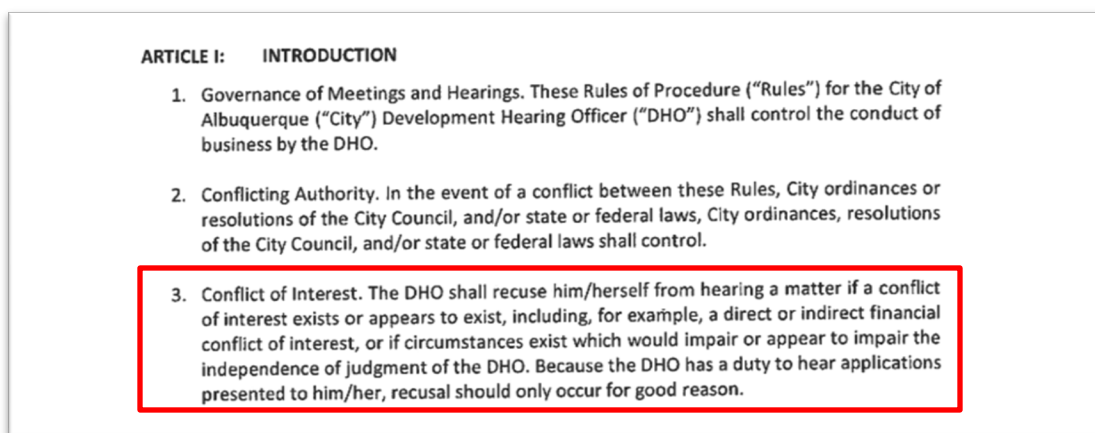


submitted prior to any hearing.

During the July 12, 2023 DHO hearing for the Final Plat application for PR-2022-007712 / SD-2023-00127, the DHO, David Campbell, conversed with the appellants at length about any objections they had (see Hearing transcript, pp. 3-5).

In response to the assertions of the appellants, Mr. Campbell requested that Managing City Attorney, Nicole Sanchez explain the recusal requirement that the DHO operates under, and Ms. Sanchez stated that under Article I, Subsection 3 of the DHO Rules of Procedure, the DHO shall recuse himself if there are the following two types of conflicts as follows (see the figure below):

Figure 8. Excerpt from the DHO Rules of Procedure



Mr. Campbell responded in the hearing that he did not have either a direct or indirect financial conflict or any personal animus against Mr. Voorhees (the requirements of Article I, Subsection 3 of the DHO Rules of Procedure). Pages 3 through 5 of the transcripts from the July 12, 2023 DHO hearing for the Final Plat details the complete/full dialog between Mr. Voorhees and Mr. Campbell. The DHO Rules of Procedure are publicly-available online at the following location/link:

<https://documents.cabq.gov/planning/development-hearing-officer/DHO%20Rules%20of%20Procedure.pdf>

8. **Appellant:** Upon information and belief, the Planning Department and/or the applicant presented incorrect and misleading information at the DHO hearing, for example presenting an outdated map that did not adequately shown the location of the subject site relative to the La Cuentista MPOS, and misciting the definition of “adjacent” in the IDO.

It appears that there was no sensitive lands analysis under IDO Section 5-2(C). Under these circumstances the Final Plat application was not complete and the DHO had inaccurate information for his decision, and the decision should be reversed.



9. **Appellant:** The DHO's written decision was defective because no copy was sent to Appellants who requested notice of the decision in writing. Such notice is required under NMSA 1978, Section 39-3- 1.1 and IDO Section 6-4(M)(6). The City Council should require compliance with notice of decision requirements.

**Staff Response:** After receipt and review of the appeal application, staff discovered that the Appellants (Michael Voorhees and Rene' Horvath) had requested via their comment emails that they be timely notified in writing of the DHO's decision with notice of appeal rights. Staff did not discern the requests for the DHO's written decision because they were both featured in extensive emails featuring multiple and various topics of concern. (The emails from Mr. Voorhees and Ms. Horvath are included in the record).

Staff notes, however, that the notice of decision was posted online on the DHO website (see website below) and made publicly-available on Monday, July 17<sup>th</sup> per standard operating procedure and per the requirements of 6-4(N)(6) of the IDO. Staff also notes that the appeal application submitted by the Appellant(s) featured the notice of decision, and the application was submitted in a timely manner. DHO notices of decision are posted online and are publicly-available at the following location:

<https://www.cabq.gov/planning/boards-commissions/development-hearing-officer/development-hearing-officer-agendas-archives>

10. **Appellant:** The Preliminary Plat and Final Plat approvals do not address the applicable review and decision criteria under the IDO.

**Staff Response:** In the notice of decision for the Final Plat (PR-2022-007712 / SD-2023-00127), Finding #4 noted that the Final Plat is consistent with the approved Preliminary Plat (SD-2022-00143). In the Planning comments memo for the Final Plat dated July 11<sup>th</sup>, 2023, staff noted that per 6-6(L)(3)(b) of the IDO, the Final Plat is reviewed on the basis that it is consistent with the Preliminary Plat approved by the Development Review Board (DRB) on November 9, 2022 per PR-2022-007712 / SD-2022-00143, and the Final Plat was consistent with the Preliminary Plat. Additionally, the DHO orally stated his finding in the hearing that the Final Plat was approved because the application meets all the applicable requirements of the IDO, DPM, and other adopted city regulations.

## CONCLUSION

The DHO review was solely of the application for a Final Plat. The DHO reviewed the application according to the IDO Review and Decision for a Final Plat, which is that the Final Plat be consistent with the Preliminary Plat. The DHO clarified in the hearing that he did not have a conflict of interest that would require his recusal from the review of the case. The staff shared the correct requirements of the IDO with the DHO and corrected a momentary error in presenting the zoning of a parcel across the intersection of two streets from the subject site. The DHO did not act arbitrarily or capriciously. The DHO did not err in applying the IDO and DPM. The decision was supported by substantial evidence as documented in the Notice of Decision and staff review comments.


# AC-23-14\_Memo\_NS\_JW\_JR


Final Audit Report


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