

**Notice of Decision
City Council
City of Albuquerque
March 8, 2016**

AC-15-6 (Project# 1010582/15EPC-40051) Peggy Norton appeals 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 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

Decision

On March 7, 2016, by a vote of 9 FOR, 0 AGAINST, the City Council voted to remand AC-15-6 to the EPC by accepting the recommendation and findings of the Land Use Hearing Officer.

IT IS THEREFORE ORDERED THAT AC-15-6 IS REMANDED TO THE ENVIRONMENTAL PLANNING COMMISSION.

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

Decision

On March 7, 2016, by a vote of 9 FOR, 0 AGAINST, the City Council voted to remand AC-15-7 to the EPC by accepting the recommendation and findings of the Land Use Hearing Officer.

IT IS THEREFORE ORDERED THAT AC-15-7 IS REMANDED TO THE ENVIRONMENTAL PLANNING COMMISSION.

Attachments

1. Land Use Hearing Officer's Recommendation and Findings on consolidated appeals
2. Action Summary from the March 7, 2016 City Council meeting

Appeal of Final Decisions

A person aggrieved by a final decision of the City Council may appeal the decision to the Second Judicial District Court by filing in the Court a notice of appeal within thirty (30) days from the date the decision is filed with the City Clerk.



Dan Lewis, President
City Council

Date: _____

Received by: _____
City Clerk's Office

Date: 3-15-16

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MAYOR ROBERT CRIVELLO

2016 MAR 15 PM 2:57



City of Albuquerque

Albuquerque/Bernalillo
County
Government Center
One Civic Plaza
Albuquerque, NM 87102

Action Summary

City Council

Council President, Dan Lewis, District 5
Vice-President, Klarissa J. Peña, District 3

Ken Sanchez, District 1; Isaac Benton, District 2
Brad Winter, District 4; Patrick Davis, District 6
Diane G. Gibson, District 7; Trudy E. Jones, District 8
Don Harris, District 9

Monday, March 7, 2016

5:00 PM

Vincent E. Griego Chambers
One Civic Plaza NW
Albuquerque/Bernalillo County
Government Center

TWENTY-SECOND COUNCIL - SEVENTH MEETING

1. ROLL CALL

Present 9 - Dan Lewis, Klarissa Peña, Ken Sanchez, Isaac Benton, Brad Winter, Patrick Davis, Diane Gibson, Trudy Jones, and Don Harris

2. MOMENT OF SILENCE

Pledge of Allegiance - Isaac Benton, Councilor, District 2

3. PROCLAMATIONS & PRESENTATIONS

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

A motion was made by Vice-President Peña that the February 17, 2016 Journal be Approved. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

Deferrals/Withdrawals

- a. O-15-2 Amending The Balloon Fiesta Park Commission Ordinance, Chapter 10, Article 10 Of The Revised Ordinances Of Albuquerque (Jones)

A motion was made by Councilor Jones that this matter be Postponed to March 21, 2016. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

9. GENERAL PUBLIC COMMENTS

10. ANNOUNCEMENTS

11. CONSENT AGENDA: {Items may be removed at the request of any Councilor}

- a. EC-16-20 Submission Of The Five-Year Forecast

A motion was made by Vice-President Peña that this matter be Receipt Be Noted. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- b. EC-16-30 Lease Agreement for Hangar Space at Double Eagle Airport Between Bode Aero Services Inc. and the Albuquerque Police Department

A motion was made by Vice-President Peña that this matter be Approved. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- c. EC-16-56 Mayor's Recommendation of Van H. Gilbert Architect, for Architectural Consultants for Citywide On-Call Architectural Services

A motion was made by Vice-President Peña that this matter be Approved. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- d. EC-16-58 Mayor's Appointment of Mrs. Shelley Kleinfeld to the EMS Providers Advisory Committee

A motion was made by Vice-President Peña that this matter be Confirmed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- e. EC-16-59 Mayor's Reappointment of Mrs. Valerie S. Cole to the Greater

Albuquerque Recreational Trails Committee

A motion was made by Vice-President Peña that this matter be Confirmed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

f. EC-16-60

Mayor's Appointment of Ms. Patricia J. Salisbury to the Transit Advisory Board

A motion was made by Vice-President Peña that this matter be Confirmed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

g. R-16-8

Authorizing The Mayor To Execute An Amended Contract Agreement With The New Mexico Department Of Children, Youth And Families And Providing An Appropriation To The Department Of Family And Community Services/Division Of Child And Family Development, Early Pre-Kindergarten Program (Jones, by request)

A motion was made by Vice-President Peña that this matter be Passed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

h. R-16-18

Approving A Grant Application For The FY2017 EMS Act Grant With The New Mexico Department Of Health And Providing For An Appropriation To The Fire Department In Fiscal Year 2017 (Jones, by request)

A motion was made by Vice-President Peña that this matter be Passed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

i. O-15-43

Amending The Merit System Ordinance Relating To Classified And Unclassified Service (Jones, Sanchez)

A motion was made by Vice-President Peña that this matter be Died on Expiration. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

j. OC-16-8

Reappointment of Dr. Jeannette Baca to the Police Oversight Board

A motion was made by Vice-President Peña that this matter be Withdrawn. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

k. EC-16-50

Lease Agreement for City Property between Mark Elrick. and the City of Albuquerque

A motion was made by Vice-President Peña that this matter be Withdrawn by Administration. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

12. PUBLIC HEARINGS: {Appeals, SAD Protest Hearings}

- a. AC-15-6 (Project# 1010582/15EPC-40051) Peggy Norton appeals 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 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
- A motion was made by Councilor Jones To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- b. 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
- A motion was made by Councilor Jones To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

13. APPROVALS: {Contracts, Agreements, and Appointments}

- a. OC-16-9 Reappointment of Mr. Eric H. Cruz to the Police Oversight Board
- A motion was made by President Lewis that this matter be Confirmed. The motion carried by the following vote:**
- For:** 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- b. OC-16-10 Staff Recommendation of Appointment of Carlotta A. Garcia to the Police Oversight Board
- A motion was made by President Lewis that this matter be Confirmed. The motion carried by the following vote:**
- For:** 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- *c. OC-16-11 Staff Recommendation of Appointment of Dr. Lisa M. Orick-Martinez to the Police Oversight Board
- A motion was made by President Lewis that this matter be Confirmed. The motion carried by the following vote:**
- For:** 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

14. FINAL ACTIONS

- b. O-16-3 F/S Amending The Traffic Code, Chapter 10, Article 5, Part I Of The Revised Ordinances Of Albuquerque To Decrease The Required Buffer Between Mobile Food Units And Site-Built Restaurants And To Authorize Mobile Food Units To Operate Within That Buffer After Those Establishments' Business Hours (Benton)
- A motion was made by Councilor Benton that this matter be Amended. Councilor Benton moved Amendment No. 1. The motion carried by the following vote:**
- For:** 8 - Lewis, Peña, Benton, Winter, Davis, Gibson, Jones, and Harris
- Against:** 1 - Sanchez
- A motion was made by Councilor Benton that this matter be Passed as Amended. The motion carried by the following vote:**
- For:** 8 - Lewis, Peña, Benton, Winter, Davis, Gibson, Jones, and Harris
- Against:** 1 - Sanchez
- c. O-16-8 C/S Amending The Public Purchases Ordinance; Requiring City Council Approval Of Sole Source Contracts In Excess Of \$75,000 (Sanchez)
- A motion was made by Councilor Sanchez that this matter be Amended. Councilor Sanchez moved Amendment No. 1. The motion carried by the following vote:**
- For:** 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

A motion was made by Councilor Sanchez that this matter be Passed as Amended. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

e. R-16-16

C/S Directing The Administration To Publish Information On All Sole Source Procurements To The ABQ View Website For The Purpose Of Governmental Transparency And Accountability To Taxpayers (Sanchez)

A motion was made by Councilor Sanchez that this matter be Amended. Councilor Sanchez moved Amendment No. 1. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

A motion was made by Councilor Sanchez that this matter be Passed as Amended. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

d. R-15-262

C/S Amending The Text Of The Huning Highland Sector Development Plan's Corridor Revitalization Zone (SU-2/CRZ) To Allow The Sale Of Beer And Wine For On-Premise Consumption For Establishments With A "Small Brewer's License" Or A "Winegrower's License" Which Are Not Restaurants, And Alcohol Sales For Off-Premise Consumption For Establishments With A "Small Brewer's License" Or A "Winegrower's License" As A Permissive Use (Benton)

A motion was made by Councilor Benton that this matter be Passed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

f. R-16-20

Adopting An Employee Recognition Program For The City Of Albuquerque (Peña)

A motion was made by Vice-President Peña that this matter be Passed. The motion carried by the following vote:

For: 9 - Lewis, Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

There being no further business, the meeting adjourned at 9:26 p.m.

1 **LAND USE HEARING OFFICER'S RECOMMENDATION**

2
3 **APPEAL NO. AC-15-6 and AC-15-7**

4
5 **Project# 1010582, 15EPC-40051 Zone Map Amendment (Zone Change)**
6 **15EPC-40052 Site Development Plan for Building Permit**
7

8
9 **Greater Gardner Neighborhood Association, Guy Conway and Carolyn Conway**
10 **(Conway Electric), Pat and Mary Beth Maloy (Maloy Mobile Storage Inc.), Larry Stepp**
11 **(Step's American Marine), Rombin & Wright (William V Rombin), Dennis and Debra**
12 **Hardy (Fleet Maintenance), Lorenzo Rameriz (Cross Connection), Steve Collins (Collins**
13 **Engine Generator Service), Grande Heights NA, The Inter-Coalition Panel, WSCONA**
14 **(Westside Coalition of Neighborhood Associations), Oxbow Village Homeowners**
15 **Association, Appellants of AC-15-6.**
16

17 **Peggy Norton on behalf of the North Valley Coalition, Appellants of AC-15-7.**
18

19
20 **Wilson & Company, Inc., Agents for the City of Albuquerque Department of Municipal**
21 **Development, Party Opponents.**
22

23
24 **I. BACKGROUND**

25 This is a consolidated appeal (AC-15-6 & AC-15-7) from a decision of the Environmental
26 Planning Commission (EPC) granting a zone change from M-1 to SU-1 for specified M-1 uses
27 (a solid waste transfer station and convenience center) on several consolidated tracts of land
28 comprising approximately 22-acres. The land at issue is located at 4600 Edith Blvd. N.E. and is
29 owned by the city of Albuquerque. The applicant for the zone change and building permit is the
30 Albuquerque Department of Municipal Development. The record reflects that on August 27,
31 2015, the City's agent Wilson & Company, Inc., submitted an application to the Planning
32 Department for a zone change and for a building permit for its site development plan (site plan).
33 The application was originally scheduled to be considered by the EPC at its October 8, 2015
34 public hearing. However due to a lack of a quorum, the hearing was rescheduled for November
35 5, 2015. On November 5, 2015, the EPC, with a quorum, took up the City's application in a
36 quasi-judicial public hearing. On the following day, November 6, 2015, the EPC issued its

37 Official Notification of Decision, granting the zone change and approving the building permit
38 and accompanying site plan. The Appellant of AC-15-6 filed their timely appeal on November
39 15, 2015 and the Appellants of AC-15-7 filed their timely appeal on November 20, 2015. The
40 appeals were consolidated because the two appeals involve common questions of facts and of
41 law regarding the single zone change, building permit, and site plan approval by the EPC. The
42 City Council delegated the appeals to this Land Use Hearing Officer (LUHO). An extended
43 LUHO public hearing was held on January 29, 2016.
44

45 II. STANDARD OF REVIEW

46 A review of an appeal is a whole record review to determine if the EPC erred:

- 47 1. In applying adopted city plans, policies, and ordinances in arriving at the decision;
- 48 2. In the appealed action or decision, including its stated facts;
- 49 3. In acting arbitrarily, capriciously or manifestly abusive of discretion.

50 At the appeal level of review, the decision and record must be supported by a
51 preponderance of the evidence to be upheld. The LUHO is advisory to the City Council. The
52 LUHO has authority to recommend that the City Council grant the appeal in whole or in part,
53 deny, or remand the appeal for reconsideration if the remand would be necessary to clarify or
54 supplement the record, or if the remand would expeditiously dispose of the matter.”¹
55

56 III. DISCUSSION

57 After a thorough review of the entire record of these consolidated matters, hearing arguments of
58 the parties, testimony, and allowing cross-examination of witnesses in an extended 2-hour
59 hearing, I respectfully recommend that the City Council remand the zone change request,
60 building permit, and site plan to the EPC because the EPC failed to address benchmark issues
61 under Enactment 270-1980, failed to adequately resolve significant contradicting evidence in the
62 record, and, therefore, the record is not supported with sufficient evidence to support the zone
63 change. The record before the EPC was perpetuated by shortcoming from its Planning Staff when

¹ See Rules of the Land Use Hearing Officer adopted by the City Council, February 18, 2004. Bill No. F/S OC-04-6 and codified in Section 14-16-4-4 of the Zoning Code.

64 Staff recommended that the EPC approve the zone change without themselves resolving several
65 key issues required for a zone change. The record shows that the Staff and the EPC failed to
66 conduct any meaningful analysis of the zone change request against the requirements of R-270-
67 1980, Section 1.D and E. Thus, there is insufficient evidence in the record that the zone change
68 satisfies R-270-1980. There are other deficiencies regarding conflicting factual questions which
69 the EPC must also resolve. A remand to the EPC will compel the EPC (and Staff) to address the
70 deficiencies in the record, including under R-270-1980.

71
72 As stated above, Appellants raise a number of substantive challenges to the EPC decision.
73 Foremost is that the zone change does not satisfy City Enactment 270-1980. More specifically,
74 Appellants claim that Section 1.D. of Enactment 270-1980 is not satisfied because the City
75 applicant did not meet its burden to demonstrate that the existing M-1 zoning is in any manner
76 inappropriate, necessitating the zone change. Appellants also claim under Enactment 270-1980,
77 the City applicant did not respond to, nor did the EPC resolve, questions and evidence submitted
78 from opponents of the zone change regarding alleged harmful effects to adjacent residential
79 property owners, or to the neighborhood. In relation to the alleged deficiencies under Enactment
80 270-1980, Appellants also claim that the EPC failed to make fact-specific findings regarding the
81 proposed use. Appellants claim that many findings are conclusory and unsupported by the
82 record. Finally, Appellants contend that the EPC ignored or disregarded expert opinions and
83 reports that allegedly rebut key EPC findings regarding traffic and environmental effects caused
84 by the proposed use. There are no issues presented regarding notice to adjacent property owners
85 or to neighborhood associations, and I find no notice deficiencies in the record.

86
87 I begin with the City's applications. After a January, 2015 pre-application conference with City
88 Planning Staff, the record reveals that on August 27, 2015, the Department of Municipal
89 Development submitted to the Planning Staff an application for the zone change and building
90 permit. With the application, Wilson and Company, Inc., project engineer submitted a detailed
91 project summary describing the existing site, zoning, and the details of, and the justifications for,

92 the proposed use.² In the summary, the engineer wrote that the proposed use is distinctly similar
93 with the existing use. There is apparently no dispute that the City of Albuquerque Solid Waste
94 Management Department (SWMD) is currently physically located on the subject site, and has
95 been operating there since the 1980's. The record substantiates that there is no existing site
96 development plan for the existing site. There is, however, a proposed site plan for the proposed
97 uses which was submitted to the EPC with the application. The applicant's summary states that
98 the "*proposed use of the site would remain very similar to its current use.*"³ Further in the
99 summary, the applicant wrote that the proposed transfer station use is:

100 defined by the Environmental Protection Agency (EPA) as a light
101 industrial type facility where trash collection trucks discharge their loads so
102 trash can be compacted and then reloaded into larger vehicles (e .g. trucks)
103 for shipment to a final disposal site, typically a landfill or waste-to-energy
104 facility (EPA, January 2001).⁴ (emphasis added)
105

106 There is no evidence aside from the conclusory evidence in the summary that the proposed uses
107 and the existing uses are similar. There are likely some similarities between the SWMD's current
108 operation and the proposed transfer station and convenience center uses, but the record should
109 include at a minimum what those similarities are so that the EPC can make appropriate findings.
110 For example, it is obvious from the record that the uses are similar to some extent simply because
111 they each involve the transportation of solid waste. However, the record is not so clear on other
112 site-specific elements of the two uses that may or may qualify as similarities. For example, does
113 the fact that a transfer station involves the accumulation and processing of solid waste make it
114 dissimilar to the existing uses when the existing use does not include any accumulation of solid
115 waste at the site? There are no facts in the record from which the EPC could make a meaningful
116 comparison to determine if the uses are indeed similar. A meaningful comparison would assist
117 the EPC in accurately determining if the proposed use is a permissive use (as Staff contend)
118 under the existing M-1 zone. Such an analysis would also be helpful to all involved as Staff
119 conducts its threshold analyses under Enactment 270-1980 (described below).

2 See Page 170 of the record.

3 See Page 170 of the record.

4 Id.

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A. Enactment 270-1980, Section 1.D.

Enactment 270-1980 has significant prominence in the zoning review process for the City of Albuquerque. It is a City resolution of zone change policies that are separate and apart from Comprehensive Plan (Comp. Plan) and other Rank Plan policies. For the City of Albuquerque, it is the guiding policy document from which zone change applications are judged by the Planning Staff, by the EPC and ultimately by the City Council in their review of zone change applications. Any zone change application must first satisfy the applicable policies therein before a zone can be changed under the City’s Comprehensive Zoning Code (Zone Code). Certainly, there are other policy imperatives in the Rank Plans and elsewhere, but Enactment 270-1980 is always foremost in the analysis. With regard to Appellants’ argument that the EPC failed to evaluate the existing zone, the relevant part of Enactment 270-1980, Section 1.D states:

D. 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. (emphasis added).

With regard to the applicants’ justification for the zone change under Enactment 270-1980, it can be found on Pages 10-12 of the applicant’s summary/application to the EPC.⁵ In the application summary, while neglecting to reconcile the zone change with subsections D., and E. of Section 1., the applicant only justified the zone change under Enactment 270-1980, Section 1. A., B., and C.

In the planning staff report to the EPC, Planning Staff wholly adopted the applicant’s failings in the application summary. Staff failed to address how the “existing zone is inappropriate” under Section 1.D. In the Staff report to the EPC, without further analysis, Staff declared that “[t]he requested Zone Map Amendment is generally consistent with the requirements of R270-1980...”⁶

⁵ Page 187-188 of the record.

⁶ Record, Page 50.

150 Staff wrote in the Staff report and testified at the EPC hearing that “[a] Zone Map Amendment
151 is not required for this use because the current zoning allows for the propose use.”⁷ At the EPC
152 hearing, Planning Staff further testified that the proposed use is a permissive use under the
153 existing M-1 zone as a “public utility.”⁸ These conclusory contentions are the linchpin for the
154 necessity of a remand.

155

156 First, Enactment 270-1980 is not vague or ambiguous. Subsection D of Enactment 270-1980,
157 Section 1 requires that the applicant demonstrate that the existing M-1 zone is inappropriate
158 either because there was some mistake in the zoning classification, or the conditions in the area
159 have changed (necessitating the zone change), or that a new zone classification will be more
160 advantageous to the community, in some regard under one or any of the City Rank land use
161 plans. These three criteria are disjunctive; any one of the three can be shown for the applicant to
162 meet their burden. The record is clear that without clear evidence, the EPC was led to believe
163 that the proposed transfer station and accessory uses are permissive under the existing zone
164 classification of M-1. EPC finding 6 concludes this fact. EPC Finding 14 also appertains to
165 Enactment 270-1980. There are no findings, however, showing that the existing M-1 zone is
166 inappropriate for any reason.

167

168 Although raised before the EPC by the opposition, the obvious question that was never resolved
169 by the applicant, the Staff, or by the EPC is: If the proposed use is permissive in the existing M-
170 1 zone, in what manner is the M-1 zone “inappropriate” under Enactment 270-1980, Section
171 1.D? That is, why is a zone change necessary? There was argument in the record that the
172 proposed zone (SU-1 for M-1) would make a better zone for the transfer station uses. But that is
173 a far cry from what is required.⁹ The plain language of Section 1.D demands that the applicant
174 focus on the inappropriateness of the existing zone not on the appropriateness of the newly
175 proposed zone. Again the question, although a threshold issue, went unanswered during the

7 Record, Page 51.

8 See Record, EPC Minutes, Page 378.

9 Planning Staff also justified the zone change as an attempt by the City to be transparent.

176 application review and approval process. The record before the EPC is barren of any analysis
177 of the inappropriateness of the existing zone. As eluded to above, there is evidence in the record
178 that planning Staff did advise the EPC that in their review of the zone change, the proposed SU-
179 1 zone would be more appropriate or advantages to the community for the proposed use for
180 various reasons, including that the use is unique and that there are more rigorous standards under
181 the SU-1 zone than under the M-1 zone. Whether these contentions are true or not, or whether
182 or not these contentions even are enough for a zone change, Staff have put the proverbial cart
183 before the horse because these contentions do not directly address the threshold question of
184 whether or not the existing zone is inappropriate under one or any of the three criteria described
185 above.

186
187 In addition to the inappropriateness of the existing zone, another important unresolved question
188 that must be resolved by the EPC is whether or not a transfer station and accessory uses are
189 actually permissive uses under the M-1 zone. The applicant, Planning Staff, and the EPC made
190 conclusions without investigation on the permissiveness of a transfer station in the M-1 zone.
191 Moreover, there is conflicting evidence in the record as to what the proposed uses are categorized
192 as in the Zone Code. An analysis of the permissiveness of the uses first demands that the uses be
193 defined and categorized under the Zone Code if it is to be classified as a M-1 use. The Zone
194 Code does not define or reference a “transfer station” or a “convenience center” in any zone or
195 in the Definitions Section. Further, the record shows that there was no clear attempt at evaluating
196 the uses in terms of their actual physical characteristics against the pre-defined use categories in
197 the Zone Code to determine what use category the proposed uses most closely resemble in the
198 M-1 zone. An analysis of the similarities of the existing use and the proposed uses would assist
199 the EPC in resolving the question of the permissiveness of the proposed use in the M-1 zone.

200
201 The evidence in the record demonstrates that the Planning Staff assumed and concluded without
202 consideration that the transfer station and convenience center meets the prescriptive “public
203 utility” category under the M-1 zone. Notwithstanding the conclusion, there is also evidence in
204 the record that the proposed uses are more closely aligned and similar to the manufacturing uses

205 category under the M-1 zone.¹⁰ There is also evidence in the record, raised by Appellants, that
206 the uses are neither manufacturing nor public utility uses—potentially making the proposed uses
207 not permissive uses in the M-1 zone.

208

209 Clearly defining the use category will assist the EPC in determining if and how the existing zone
210 is inappropriate under Enactment 270-1980, Section 1.D. Because there is conflicting evidence
211 on what the uses are under the Zone Code, I find that there is not substantial evidence supporting
212 Finding Six that the transfer station and convenience center uses are permissive in the M-1 zone.
213 Because the EPC’s decision is to a large extent supported by the presumption that a transfer
214 station and accessory uses are permissive in the existing zone, a remand is necessary so that the
215 EPC can resolve this fundamental question.

216

217 **B. Enactment 270-1980, Section 1.E.**

218 Appellants also contend that the EPC failed to determine if the proposed use would be harmful
219 to adjacent property or the neighborhood. Again, the relevant part of Enactment 270-1980 is as
220 follows:

221 E. A change of zone shall not be approved where some of the permissive uses in
222 the zone would be harmful to adjacent property, the neighborhood or the
223 community. (emphasis added).
224

225 EPC Finding 10. C, E, and F are factually inaccurate insofar as these findings relate to residential
226 uses or neighborhoods not being near the proposed transfer station site. First, Staff wrote and
227 testified to the EPC that “[t]he proposed use will be located in an industrially zoned area and *not*
228 *located near a residential area.*” (emphasis added). Yet, Staff also informed the EPC in its report
229 that “[t]he nearest residential neighborhood is located approximately 1300 ft. west of the subject
230 site.”¹¹ Furthermore, there is unrebutted evidence in the record that there are six residential
231 dwellings within 100 to 200 feet from the proposed transfer station at the corner of Edith Blvd

10 In the LUHO hearing testimony and argument from City Staff categorized the proposed uses as a public utility and as manufacturing.

11 Record, Page 53.

232 and Rankin Road. The fact that these are nonconforming residential uses is irrelevant.
233 Nonconforming uses are generally permissive uses like any other permissive use. The fact that
234 there are six residential dwelling across the street from the proposed site contradicts Staff's
235 report and makes the analysis of harms suspect and misleading. Because the underlying facts as
236 to the proximity of residential uses is inaccurate, the matter must be reexamined. The EPC must
237 reexamine the residential neighborhood under Enactment 270-1980, Section 1.E, and under
238 Policy II.B.5.e. of the Comp. Plan.

239

240 The EPC was presented with inconsistent reports by Staff about the proximity of residential uses
241 to the proposed uses, and it failed to resolve the issue with any substantial evidence to support
242 Findings 10. C and E. in the EPC's Official Notification of Decision. Equally inadequate is
243 Finding 14.E. as it is factually inaccurate and is conclusory, without sufficient evidence in the
244 record to support it. There is no evidence in the record that the EPC addressed the accurate
245 evidence of the proximity of the residential dwellings and how the residential uses are impacted
246 as a result of their proximity to the proposed uses. Because there is inaccurate, insufficient, and
247 inconsistent evidence in the record regarding the neighborhood residential uses, and because the
248 EPC did not address Enactment 270-1980, Section 1.E as it relates to the potential harm to the
249 adjacent residential uses, a remand is necessary so that the EPC may clarify the matter.

250

251 **C. Traffic Impacts of the Proposed Uses**

252 The EPC must clarify its decision regarding traffic impacts. The evidence demonstrates that
253 currently the SWMD operates 54 commercial and 45 residential solid waste collection trucks
254 from the subject site from the hours of 6:20 am to 2:30 pm. on a daily basis. The applicant claims
255 that various other support vehicles are used in the current SWMD operations from the subject
256 site but these vehicles are not well accounted for in the assessment of impacts. The applicant also
257 claims that the proposed transfer station's operation will add 208 commercial transfer station
258 truck trips to and from the site. It is not clear if these are new additional trips for the 54
259 commercial trucks or if these are converted trips from the existing trips which would otherwise
260 go from the SWMD site directly to the landfill after their daily routes.

261

262 The record also shows that the residential truck trips will increase by 90 trips.¹² In addition, the
263 proposed Convenience Center will add an estimated 225 new “public self-haulers” to the site
264 (450 trips total). It is not clear in the record if, and how many, additional trucks will be added
265 to the operation and whether the “public haulers are semi-truck traffic. These issues appear to be
266 glossed over in the Staff report to the EPC.

267

268 The applicant argued in its application and at the EPC hearing that the site generated traffic of
269 the proposed transfer station and convenience center will not meet the warranting criteria for a
270 Traffic Impact Study (TIS) because the proposed uses will not produce 100 or more additional
271 (new) peak direction, inbound or outbound vehicle trips to or from the site in the morning or
272 evening peak period of the adjacent roadways. The applicant claims it did complete a TIS to
273 further demonstrate that the proposed use did not meet the threshold requirements and that the
274 addition of the new trips will not change the existing levels of services (LOS) at the peak hours
275 on the adjacent streets.¹³ Under the DPM, the minimum standard level of service cannot be less
276 than a LOS D on roadway elements where the level of service is controlled by traffic control
277 devices.¹⁴ The evidence in the record suggests that the intersections most impacted by the
278 transfer station are already operating at a LOS D. Apparently, the applicant argued that because
279 the new trips associated with the proposed development occur primarily outside of the morning
280 and afternoon peak hour times (for those intersections) and that the LOS for the surrounding
281 intersections will remain at LOS D. However, I must point out that that is not the only criteria
282 for a TIS. The precise criteria warranting a TIS under the City Development Process Manual is:

283 [s]ite generated traffic of 100 or more additional (new) peak direction, inbound
284 or outbound vehicle trips to or from the site in the morning *or* evening peak
285 period of the adjacent roadways *or the developments peak hour*. (emphasis
286 added).¹⁵

287

12 See Page 172-173 of the record.

13 A summary of the applicants TIS conclusions can be found on Page 175 of the record.

14 DPM, Section 8.C.1.b.2.

15 DPM, Section 8.A.2.

288 Whether this discrepancy is minor or has any impact on the peak periods studied is not clear. The
289 peak periods for the intersections studied were defined for the AM (6:30-9:30), Mid-Day (11:00-
290 1 :30) and PM (3:00-6:30). The primary question becomes if the new trips occur “*primarily*”
291 outside of the peak periods for the intersections studied, how do the new trips that occur within
292 the peak periods impact those peak periods. A related question that was unresolved is how are
293 these new trips disbursed throughout the peak periods? The applicant’s conclusion that the
294 threshold is not met seems to rely on a careful, perhaps fragile, distribution of truck trips
295 throughout the day to avoid exceeding the DPM threshold.
296

297 It is clear from the record that the transfer station will have peak periods which overlap into the
298 morning, lunch, and some into evening peak periods for the intersections studied. There are
299 factual issues that were presented by Appellants before the EPC and in this appeal regarding how
300 the new trips and the overlapping peak trips affect these peak periods. The assumptions for the
301 distribution of the new trips is central to these issues and is not explained in any manner.
302 Further, Staff did not appear to scrutinize, dispute or evaluate, the applicant’s appraisal that the
303 new trips added from the proposed use will not impact peak traffic conditions for the transfer
304 stations peak periods or for the standard morning or evening peak periods. The fragile distribution
305 of trips to avoid the threshold was never evaluated by Staff.
306

307 Instead, Staff reported conflicting information to the EPC. Staff wrote that “[t]he diagram
308 submitted by the applicant shows new truck traffic associated with the proposed use *occurring*
309 *outside* of the AM and PM peak hours.”¹⁶ (emphasis added). This conclusion is plainly
310 inaccurate. Perhaps recognizing the gaffe, in the same Staff report, Staff took a somewhat
311 contradicting position on this crucial subject of how the proposed traffic will impact peak traffic
312 times. Staff wrote “[n]ew trips associated with the proposed use will still maintain a level of
313 service D designation meaning that the new trips associated with the use will occur *primarily*
314 *outside* of the AM and PM peak hour time frames.”¹⁷ (emphasis added). What’s more, other than

16 Record, Page 53.

17 Record, Page 54.

315 the totals, the EPC did not have the overlapping or distribution numbers or assumptions to review
316 and none were in the record except for the totals.¹⁸

317

318 On behalf of the North Valley Coalition, the Appellants submitted to the EPC a site specific study
319 of the proposed transfer station titled the North Valley Health Impact Assessment (HIA). It
320 appears that the HIA was created by the those opposing the proposed uses “to assess the impacts
321 of a Waste Transfer Station (WTS) on the health of residents and others who live, work, attend
322 school, or play in neighborhoods that are located near the site.”¹⁹ In the 130-page HIA, the
323 study’s authors allege several deficiencies in the applicant’s application. With regard to the
324 applicant’s TIS, Appellants point to the HIA findings that the TIS fails to “include the additional
325 volume of garbage trucks coming into and out of the impacted community because the study
326 assumed that garbage truck traffic would occur during off-peak hours.”²⁰

327

328 In response, the applicant’s agent submitted to the EPC its argument that the Appellant’s HIA
329 with regard to the TIS was misleading. Doubling down on their original contentions, they claim
330 that “the impact to adjacent roadways (to the transfer station use) by the DPM is considered to
331 be insignificant and does not require a TIS.”²¹ Apparently, the applicant is claiming that less
332 than 100 new peak period inbound/outbound new vehicle trips threshold will be generated from
333 the proposed uses. Yet, there is no clear data in the record distinguishing for the EPC the actual
334 numbers of the new trips that will be generated during the peak periods—only the threshold
335 numbers (totals). And, the manner of distribution to avoid the threshold is not clear in the record.
336 In addition, as stated above there was no analysis on the development’s peak periods which
337 arguably overlap into the morning and possibly the evening peak periods. This analysis is equally

18 I note however, that the TIS was not made a part of the appeal record, only the summary conclusions.

19 See Record, Pages 478; *North Valley Health Impact Assessment of the Proposed Edith Transfer Station*, August 2015; Prepared by: William Hudspeth, Ph.D., Kitty Richards, MS, MPH and Kristine Suozzi, MS, Ph.D. In collaboration with The North Valley Health Impact Assessment Committee and the North Valley Coalition.

20 Record, Pages 485-486.

21 Record, Page 925.

338 significant under the DPM if it is going to be the basis for not requiring a TIS. It should be
339 noted that the applicant also concluded that the estimated 45 residential truck trip were not
340 relevant to the analysis because they will occur after the morning peak hour and before the
341 afternoon peak hour.²² Yet the record has no findings or conditions (regarding the distribution
342 of trips) that these trips will occur outside of peak periods. These are all significant issues that
343 were raised by Appellant for which there is insufficient evidence in the record. Transparency
344 requires that these issues be fleshed out and resolved.

345
346 I also note for the City Council that the TIS was not included in the record and it is not clear to
347 me if the EPC had the benefit of reviewing the TIS. There is no evidence in the record that the
348 EPC resolved the conflict or resolved how the added trips during peak periods impact the
349 neighborhood. The totality of the evidence demonstrates that the EPC did not have sufficient
350 evidence before it, and it shows that the EPC was not well-informed on the overlapping, or on
351 the assumptions for disbursing the new trips. On remand, the EPC should resolve these issues
352 because they are significant for determining if the threshold is met or not.

353
354 **D. Other Issues**

355 Next, the Appellants generally claim that economic considerations were the determining factor
356 in selecting the SWMD site for the transfer station. Under Enactment 270-1980(G), the cost of
357 land or other economic considerations pertaining to the applicant shall not be the determining
358 factor for a change of zone. I find that there is no evidence that economics drove the decision,
359 or was the determining factor for selecting the SWMD site. The record shows that the applicant
360 selected the subject site (4600 Edith, NE) based on seven defined “criteria that are key to the
361 success of this type of facility.”²³ Certainly economics is clearly a consideration in any taxpayer
362 or government funded project. But, of the numerous feasibility criteria in the listed site selection
363 criteria in the applicants’ summary, economics does not appear to be the “determining factor.”

22 Record, Page 926.

23 Record, Page 171.

364 Without evidence to support Appellants' claim that economics was the determining factor which
365 drove site selection, I find that their claim is based in speculation and should be denied.

366

367 Appellants raised various other issues relating to specific Comprehensive plan policies. They
368 claim that Comp. Plan Policy II.C.1.k was either ignored or not furthered. Comp. Plan Policy
369 II.C.1.k states that "Citizens shall be protected from toxic air emissions." EPC Finding 10.N.
370 states that this policy is furthered because of various mitigation measures that will be put in place
371 to reduce emissions from leaving the site and the enclosed buildings on the site. I find that the
372 Appellants have not met their burden of proof with this appeal issue. The evidence in the record
373 demonstrates the City will take appropriate measures to mitigate emissions and, other than their
374 assertions, the Appellants have not shown that the Policy is not being furthered.

375

376 Accordingly, based on all the evidence, I respectfully recommend that the City Council remand
377 the application to the EPC to address the significant deficiencies in the record outlined above.
378 The record is not supported with substantial evidence. Conversely, Appellants have met their
379 burden of proof in these appeals as described above and have shown that the EPC erred in
380 applying adopted city plans, policies, and ordinances in arriving at the decision, including its
381 stated facts. In addition, the evidence supports that the EPC acted arbitrary, capriciously or
382 manifestly abusive of discretion in approving the zone change at least with regard to Enactment
383 270-1980. A recommendation of a remand is warranted so that the EPC can address what is
384 required under the Zone Code and under Enactment 270-1980.

385

386



387 Steven M. Chavez, Esq.

388 Land Use Hearing Officer

389

390 February 8, 2016