

**Notice of Decision
City Council
City of Albuquerque
March 7, 2023**

AC-23-1 Michael T. Voorhees; Martin Kowemy, Jr. Governor, Pueblo of Laguna; Rene Horvath, Westside Coalition of Neighborhood Associations; and Baxter L. Sosebee appeal the Development Review Board decision to approve a Site Plan Amendment (to remove a Site Plan), a Preliminary Plat, and a new Site Plan, for all or a portion of Tract 1, Block 2 And Lots 4 & 5, Block 6, Unit 26, Volcano Cliffs Zoned MX-L & MX-M, Located On Rosa Parks Rd NW Between Paseo Del Norte And Rosa Parks Rd Containing Approximately 18.79 Acre(s). (M-10)

Decision

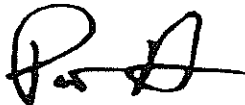
On March 6, 2023, by a vote of 9 FOR 0 AGAINST the City Council voted to accept the Land Use Hearing Officer Recommendation and Findings.

IT IS THEREFORE ORDERED THAT THIS APPEAL IS DENIED, THE DECISION OF THE DEVELOPMENT REVIEW BOARD IS UPHeld, AND THE SITE PLAN AMENDMENT, PRELIMINARY PLAT, AND NEW SITE PLAN ARE APPROVED.

Attachments


1. Land Use Hearing Officer's Recommendation
2. Action Summary from the March 6, 2023 City Council Meeting

A person aggrieved by this decision 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 this decision is filed with the City Clerk.



Pat Davis, President
City Council

Date: 3/7/2023

Received by: 
City Clerk's Office

Date: 3/7/2023

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**BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER**

APPEAL NO. AC-23-1

Project No. 2022-007712, SI-2022-1875, SD-2022-00143, & SI-2022-1874

MICHAEL VOORHEES, JR. GOVERNOR, PUEBLO OF LAGUNA, and RENE HOVATH, WESTSIDE NEIGHBORHOOD ASSOCIATION, Appellants,

and,

CONSENSUS PLANNING, agent(s) for JUBILEE DEVELOPMENT, LLC, and GROUP II U26 VC, LLC, Party Opponents.

I. BACKGROUND & HISTORY

This appeal concerns a decision of the Development Review Board (DRB) approving a Site Plan-DRB for a multi-family development, a revised Preliminary Plat, and a Major Amendment to reconfigure the plat and to substitute a previously approved Site Plan for Subdivision with an updated Site Plan to meet the requirements of the Integrated Development Ordinance (IDO).¹ In their appeal, Appellants do not dispute the DRB's findings that the Party Opponents (Applicants) have satisfied any of the multiplicity of regulations and requirements in the IDO and in the Development Process Manual (DPM) for

¹ Formally, prior to the adoption of the Integrated Development Ordinance (IDO), the City approved a Site Plan for subdivision for the subject site. That Site Plan was subject to the Design Guidelines of the now repealed Volcano Cliffs Sector Plan. The Site Plan-Major Amendment part of the application in this matter substitutes those antiquated Design Guidelines carried over into that previous Site Plan with the development regulations of the IDO. The DRB also approved a revised Preliminary Plat to reconfigure 18.2557 acres of the site.

9 the multi-family development proposed in the Site Plan. Instead, Appellants base their appeal
10 on the contention that the DRB erred when it neglected to apply the City's Comprehensive
11 Plan in the analysis of the application. Appellants also claim that the DRB violated due
12 process in various ways. Each of these issues is discussed in detail below.

13 After reviewing the record, the IDO, including New Mexico case law, hearing
14 testimony from the parties and arguments from attorneys at an extended quasi-judicial Land
15 Use appeal hearing in which the opportunity for cross examination was allowed, I find that
16 Appellants' appeal is not grounded in the law; Appellants' arguments are based on a
17 misreading and misapplication of various laws and on a general misunderstanding of the role
18 of the DRB. As explained in more detail below, the appeal should be denied on all appeal
19 grounds.

20 21 **I. UNDISPUTED FACTS AND PROCEDURE HISTORY**

22 The July 2022 Integrated Development Ordinance (IDO) update is applicable to this
23 appeal. In addition, the Applicants through counsel stipulated that all the Appellants have
24 standing to appeal the Site Plan decision of the DRB in this matter, and the appeal is timely
25 filed.²

26 Before getting into the substantive merits of the appeal, a brief description of the site
27 and Site Plan use is in order. The Applicants are proposing to construct a 238-unit, three
28 story, multi-family residential unit housing development on 9.56 acres of the 18.25-acre Site

² Appellants, however, do not have standing to appeal the DRB's decision regarding the Preliminary Plat as a preliminary plat is not considered an appealable final decision under the IDO [IDO, § 6-4(U)(1)].

Plan [R. 052, 182]. The 238-unit development is shown to encompass 15 stand-alone buildings spread out over the 9.56 acres of the site [R. 153]. Presumably to mitigate visual impact to the single-family community on the South side of the project site, the three-story buildings include step-down elements to two stories [R. 155 – 158]. The site is located at the northwest corner of Kimmick Drive and Rosa Parks, NW [R. 052]. The site is zoned MX-L, a low intensity zone allowing for neighborhood-scale non-destination retail, commercial, and multi-family uses, including townhouses [IDO, § 2-4(B)(1)]. The proposed multi-family uses, and heights of the buildings depicted in the applicants' Site Plans are *permissive* in the MX-L zone district.

In addition, as stated above, the DRB made unchallenged findings that the proposed multi-family use, building height of 37.8-feet, building step back, scale and density, building placement, design and layout, infrastructure layout, including landscaping and connectivity elements, all satisfy the DPM and the IDO in all respects.³ Again, it must be emphasized that, except for the appeal issues raised by Appellants and discussed below, the factual findings of the DRB were not challenged by the Appellants. Thus, they have waived appealing those findings and the DRBs' factual findings regarding the regulations in the IDO and in the DPM are not at issue [See IDO, § 6-4(V)(3)(a)].

Notably, the site is located within the Volcano Mesa, Character Protection Overlay zone 13 (CPO-13) and it is within the Northwest Mesa Escarpment View Protection Overlay Zone (VPO-2) [See IDO, §§ 3-4(N) and 3-6(E) respectively]. The record, however, further

³ The Applicants did not request any variances, conditional uses, or waivers for the multi-family use.

demonstrates that City Code Enforcement Staff concluded that because the multi-family residential use is not a “low density residential development” as that term is defined by the IDO, the restrictions of CPO-13 are inapplicable because those restrictions apply only to low-density residential development [R. 260 and 307-308, IDO, § 3-4(N)]. Low residential development is defined in the IDO [See IDO, § 7-1, Definitions, p. 555]. The precise definition of “low density residential development” in the IDO is unambiguously distinctive from the definition of “multi-family residential development” [See IDO Definitions, § 7-1, p. 556]. It is undisputed that the latter is what this matter encompasses. Zoning Staff similarly concluded that the VPO-2 height restrictions in IDO, § 3-6(E)(3) are inapplicable because the site is not within the Height Restrictions Sub-Area as depicted in the Map at IDO, § 3-6(E)(1). I find that the DRB and the City Code Enforcement Officer did not error in these findings.

As discussed below, although Appellants do not challenge that the building height is permissive in the MX-L zone, the crux of their grievance with the DRB’s decision is a contention that the height of the proposed buildings conflict with Comprehensive Plan policies aimed to protect the visual and scenic views of the nearby Petroglyphs National Monument.

The record reflects that prior to the effective date of the IDO, the City approved a Site Plan for subdivision in September 2017 for the subject site [R. 161-162]. That Site Plan was subject to the Design Guidelines of the now repealed Volcano Cliffs Sector Plan. The Site Plan-Major Amendment part of the application in this matter reconfigures the lots from three to two lots. In addition, it substitutes the repealed Design Guidelines included on the previous

71 Site Plan with the applicable development regulations of the IDO.⁴ And although the replat
72 of the site includes two newly identified tracts (tracts 1-A and 1-B) of Block 2 in the Volcano
73 Cliffs Subdivision of Unit 26 as depicted on the new proposed Site Plans in the record, the
74 DRB only approved the multi-family development land use on tract 1-B of the overall Site
75 Plan [See R. 253-254 for context].⁵

76 The evidence in the record reveals that there are two neighborhood associations whose
77 physical boundaries are affected by the application site. These neighborhood associations are
78 the Westside Coalition of Neighborhood Associations (WCNA) and the Paradise Hill Civic
79 Association (PHCA) [R. 137]. On August 24, 2022, the PHCA requested a that the applicants
80 participate in a City sponsored facilitated meeting [R. 088]. The facilitated meeting was held
81 on September 14, 2022 [R. 097]. As required by IDO, § 6-4(K)(3)(b) and (c), on September
82 30, 2022, the Applicants sent individualized notice of the pending DRB hearing to
83 neighboring property owners and to the two affected neighborhood associations [R. 119 –
84 131].

85 On October 26, 2022, the DRB held its first hearing on the application [R. 294]. After
86 taking evidence and comments from the public, the applicants, and from City Staff, the DRB
87 voted to defer its approval of the application to allow the applicants time to make changes to
88 the Site Plan notes; to better depict sidewalk routes, new easement dedication and prior

4. In this matter, the DRB also approved a revised Preliminary Plat to reconfigure 18.2557 acres of the site. However, under IDO, § 6-4(U)(1), a “preliminary plat is not considered a final decision that can be appealed.”

5. This is a significant detail in this matter because there is a pending proposal before the Zoning Hearing Examiner for a storage facility as a conditional use on tract 1-A which is unrelated to what was approved by the DRB inasmuch as land use development is concerned. Appellants raised this issue in the appeal, and it is discussed below.

89 easement vacations; and to address issues with the infrastructure list in the application [R.
90 315]. Then on November 9, 2022, the DRB took up the applicants' application in its
91 subsequent scheduled public hearing. Although the DRB allowed for comments from the
92 public at its first hearing, the DRB again allowed the public to testify at the second hearing
93 [R. 323-329]. After another extended hearing on the issues relating to the Site Plan, the
94 DRB voted to approve the application on a 6-0 vote [R. 362-364].

95 Appellants filed a timely appeal on November 28, 2022 [R. 027].⁶ And as indicated
96 above, it is a stipulated facts that the Appellants have standing to file this appeal. A quasi-
97 judicial appeal hearing was held on February 6, 2023.

98 In their appeal, Appellants raise six points of alleged error. Three points of error
99 concern the DRB not applying the comprehensive Plan to their Site Plan review. It is
100 undisputed that the DRB did not apply any Comprehensive Plan policies in their review of
101 the application. Essentially, Appellants argue that the Comprehensive Plan policies should
102 have been analyzed and applied to the Site Plan, specifically to determine if the height of the
103 proposed buildings conflicts with Comprehensive Plan policies designed to protect the visual
104 aesthetics of culturally significant areas in the Volcano Cliffs area [R. 031-034].

105 In another alleged point of error, Appellants vaguely contend that the DRB failed to
106 comply with the Petroglyph National Monument Establishment Act of 1990 when it failed
107 "to consider the concerns and objections of the lawfully designated representative of the
108 Secretary of Interior" [R. 033]. Appellants also argue that because the project site is in the

6. Because there are two holidays between the date of decision and the date of the filed appeal, pursuant to IDO, § 6-4(V)(3), the appeal was timely filed.

vicinity of Native American tribal lands, under R.O.A. § 2-6-6-4, the DRB is required to “consult” with affected tribal governments before acting on the Site Plan. Specifically, Appellants contend that because the DRB failed to consult with the Pueblo of Laguna government, the DRB erred.

Next, Appellants claim that the DRB Chair suppressed public comment when the Chair asked speakers to not repeat previous speakers’ comments when they testify during the hearing. Finally, Appellants claim that the DRB erred when it did not defer a final decision on the Site Plan until a view study for a proposed conditional use on tract 1-A of Block 2 in the Volcano Cliffs Subdivision of Unit 26 was completed. Each of these issues will be discussed below.

II. STANDARD OF REVIEW

A review of an appeal is a whole record review to determine whether the DRB acted fraudulently, arbitrarily, or capriciously; or whether the DRB’s decision is not supported by substantial evidence; or if the DRB erred in applying the requirements of the IDO, or DPM regulation [IDO, § 14-16-6-4(V)(4)]. In an appeal, the decision and record must be supported by substantial evidence to be upheld. Under the IDO, the Land Use Hearing Officer (LUHO) has been delegated the authority to hold quasi-judicial hearing on an appeal and to determine the merits of the appeal, make findings, and to then make a recommendation to the City Council to affirm, reverse, or otherwise modify the appealed decision to bring it into compliance with the standards and criteria of the IDO. The City Council has also delegated authority to the LUHO to independently remand appeals if additional evidence is necessary.

131 **III. DISCUSSION**

132 **A. The DRB's function is limited to assuring that permissive uses under a**
133 **corresponding zone satisfy the development standards in the IDO and in the**
134 **DPM; conversely, the DRB does not engage in land use planning or policy**
135 **analysis.**
136

137 The crux of Appellants' claims of error in this appeal are based on their belief that the
138 DRB was required to evaluate the Site Plan, particularly the proposed building height against
139 the backdrop of policies in the Comprehensive Plan. As support for their theories, Appellants
140 point generally to NMSA, 1978, § 3-21-5 and to broad language in the Comprehensive Plan,
141 Chapter 1-7.

142 The Applicants through their attorney, on the other hand, argue that Appellants'
143 contention that the Comprehensive Plan must be considered when the DRB evaluates Site
144 Plans "*reflect[s] a fundamental misunderstanding of the role and the authority of the DRB*"
145 [Supp. Feb. 2, 2023 Ltr.]. I respectfully agree. The DRB was not delegated authority from the
146 City Council to engage in policy analysis under the Comprehensive Plan. Nor is it
147 contemplated in the IDO that the DRB engage in policy analysis under the Comprehensive
148 Plan for any purpose.

149 Since this appeal concerns a Site Plan, it is fitting that this analysis begin with the
150 definition of a Site Plan. A "Site Plan" is sometimes used interchangeably with "site
151 development plan." Both terms are well defined in the IDO as:

152 **Site Development Plan**

153 A term used prior to the effective date of the IDO for a scaled plan for
154 development on one or more lots that specifies at minimum the site,
155 proposed use(s), pedestrian and vehicular access, any internal circulation,
156 maximum building height, building setbacks, maximum total dwelling
157 units, and/or nonresidential floor area. A more detailed site development
158 plan would also specify the exact locations of structures, their elevations

and dimensions, the parking and loading areas, landscaping, and schedule of development. The equivalent approval in the IDO will be determined based on the level of detail provided in the prior approval.

Site Plan

An accurate plan that includes all information required for that type of application, structure, or development [IDO, § 7-1, Definitions].

A Site Plan is characterized in the IDO to only include the technical requirements of the IDO for already permitted uses. In these definitions, it is presumed that the use or uses depicted in a Site Plan are permissive. This is discussed in detail below.

To state it succinctly, the DRB is a Board with limited authority and comprised of members with highly specialized expertise in specific areas of the land use development contemplated in the IDO for the review of Site Plan applications (as in this matter) to assure that a Site Plan application satisfies the myriad of applicable technical requirements before building permits can be issued. DRB review of Site Plans is one of the last reviews of development in a long series of fact-finding and analyses engaged in by the City before an applicant may proceed with construction of a proposed development.

However, as stated above, Appellants' theory rests on a New Mexico statute and on language in the Comprehensive Plan and in the IDO. As shown below, Appellants are misreading all the references they cite.

Appellants first claim that NMSA 1978, § 3-21-5 stands for the proposition that the Comprehensive Plan must be considered in *any* development review of the City, including by the DRB [R. 031]. Appellants are plainly wrong. Although the plain language of NMSA 1978, § 3-21-5 applies only to the adoption of regulations it is worth briefly discussing to emphasize the point. It is restated below in full:

3-21-5. Zoning; conformance to comprehensive plan.

A. The regulations and restrictions of the county or municipal zoning authority are to be in accordance with a comprehensive plan and be designed to:

- (1) lessen congestion in the streets and public ways;
- (2) secure safety from fire, flood waters, panic and other dangers;
- (3) promote health and the general welfare;
- (4) provide adequate light and air;
- (5) prevent the overcrowding of land;
- (6) avoid undue concentration of population;
- (7) facilitate adequate provision for transportation, water, sewerage, schools, parks and other public requirements; and
- (8) control and abate the unsightly use of buildings or land.

B. The zoning authority in adopting regulations and restrictions shall give reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and to conserving the value of buildings and land and encouraging the most appropriate use of land throughout its jurisdiction.

Although the language of NMSA 1978, § 3-21-5 is plainly clear, statutes must be read in context of other statutes; they cannot be interpreted in isolation of the statutory framework that encompasses them. Briefly, Article 21 of Chapter 3 is that framework, and it establishes city councils and county commissions (local governments) as final zoning authorities in their respective government entities, delegates to local governments various land use zoning powers and duties. See NMSA 1978, § 3-21-1.A. Under this framework, the City Council is unmistakably the “Zoning Authority” for the City of Albuquerque, not the DRB.⁷ For example, NMSA 1978, § 3-21-6(A)(1) designates that “[t]he zoning authority within its jurisdiction shall provide by ordinance for the manner in which zoning regulations, restrictions and the boundaries of the district are . . . enforced.” Next, § 3-21-10(A) states “any ordinance adopted pursuant to [The Zoning Statute in Article 21 shall be enforced . . . as municipal

⁷ And as shown in another section below, the City Council has delegated only limited powers to the DRB, none of which includes discretionary policy analysis.

ordinances are enforced.” See also generally *Miller v. City of Albuquerque*, 1976-NMSC-052, 89 N.M. 503, 554 P.2d 665; and *Cerrillos Gravel Prods. v. Board of Cnty. Comm'rs*, 2005-NMSC-023.

Consequently, the plain language of NMSA, 1978 § 3-21-5 decidedly demonstrates that when a zoning authority enacts a zoning regulation, such regulations are required to be in accordance with a comprehensive plan. It is well established that NMSA, 1978 § 3-21-5 is intended to be relevant only to the legislative functions local governments (City Council in this case) perform in enacting zoning regulations or ordinances—not to their application, administration, or enforcement. *City of Albuquerque v. Paradise Hills Special Zoning Dist. Comm'n*, and 1983-NMSC-039, *Temple Baptist Church, Inc. v. City of Albuquerque*, 1982-NMSC-055. Appellants have not argued or shown that the IDO as an ordinance does not conform to the Comprehensive Plan. Furthermore, they have not even demonstrated that they have standing to challenge the IDO’s enactment or its efficacy in this appeal [See City Council Ordinance 2017-025].

Accordingly, I find that NMSA, 1978 § 3-21-5 is inapplicable to this appeal and specifically to the DRB and to the role it functions in under the IDO. To state the obvious, the DRB has no authority to legislate any ordinances or regulations, nor did it do so under the facts of this appeal.

Next, Appellants claim that a “clear directive” is expressed in Comprehensive Plan, Chapter 1, subsection 7 (1-7) under the heading “How will it be used,” that supports their argument that the DRB must consider Comprehensive Plan policies in judging Site Plans. Comprehensive Plan, 1-7 does not provide support for Appellants misguided theory. It states

237 in full:

238 The Comp Plan will be used to analyze zone change requests and
239 *development proposals* and to shape other planning efforts made by the
240 City and County, including as representatives to regional bodies such as
241 MRCOG and the Albuquerque Water Utility Authority (ABCWUA). The
242 Comp Plan includes policies that address many potentially conflicting
243 challenges, issues, and opportunities for development. Staff and
244 decision-makers must weigh all applicable policies on a case-by case
245 basis. The Comp Plan can also guide how the City and County prioritize
246 infrastructure investments, and how they should coordinate with other
247 public agencies and private partners to harness the necessary resources to
248 implement and fulfill the community vision.
249

250 Appellants suggest that the term “development proposals” in the above paragraph in
251 Comprehensive Plan 1-7 exhibits a “directive” to the DRB that it must consider
252 Comprehensive Plan policies when it evaluates Site Plans that include development proposals.
253 Furthermore, Appellants broadly speculate that the term “development proposals” as that term
254 is used in Comprehensive Plan 1-7 necessarily subsumes all City processes and stages of
255 development review under the IDO. Appellants’ theory is misplaced and assumes too much.
256 This theory also presupposes that the Comprehensive Plan, and any language in it carries the
257 weight of law and enjoins or takes precedence over the IDO. However, the reverse is correct.
258 The Comprehensive Plan and particularly Chapter 1-7 is not an ordinance or even a directive
259 as Appellants contend. Put another way, it does not have the force of law. Comprehensive Plan
260 1-7 is merely a *general* and broad description of how the Comprehensive Plan is envisioned to
261 be used.

262 Under New Mexico law, a Comprehensive Plan is not a substitute for applicable law,
263 nor can it supplant otherwise applicable law. *Dugger v. City of Santa Fe*, 1992-NMCA-022, ¶
264 27 (*Writ denied*). For the DRB the applicable law flows only from the IDO not the
265 Comprehensive Plan. The IDO establishes a clear and unequivocal process for reviewing Site

266 Plan applications. Under the IDO the DRB is:

267 A board made up of City and Agency staff, as described in Section 14-16-
268 6-2(D) (Development Review Board), that makes decisions about
269 development in the city based on zoning and technical standards [IDO, §
270 7-1, Definitions].
271

272 It is responsible to “*ensure that technical standards, including but not limited to those*
273 *regarding land use, zoning, infrastructure, and transportation, have been met*” in Site Plan
274 applications [IDO, § 6-2(D)]. Under the IDO, the DRB reviews applications for compliance
275 of a multitude of regulations encompassed under the general procedures of § 6-4, the applicable
276 zoning district standards of § 2-3, regulations for sensitive lands, if applicable under § 5-2, and
277 deviations, if applicable, under §§ 5-3 through 5-5. In addition, the DRB evaluates whether the
278 Site Plan satisfies the regulations encompassed in any applicable overlay protection zones.
279 Furthermore, under the IDO, when the DRB reviews a Site Plan application, it “*shall*” approve
280 it if an applicant satisfies all the following criteria:

281 6-6(I)(3)(a) The Site Plan complies with all applicable provisions of this IDO,
282 the DPM, other adopted City regulations, and any conditions
283 specifically applied to development of the property in a prior
284 permit or approval affecting the property.

285 6-6(I)(3)(b) The City's existing infrastructure and public improvements,
286 including but not limited to its street, trail, drainage, and sidewalk
287 systems, have adequate capacity to serve the proposed
288 development, and any burdens on those systems have been
289 mitigated to the maximum extent practicable.

290 6-6(I)(3)(c) If the subject property is within an approved Master
291 Development Plan, the Site Plan shall meet any relevant
292 standards in the Master Development Plan in addition to any
293 standards applicable in the zone district the subject property is in.
294

295 It is indisputable that all the above referenced regulations and criteria subject to DRB review
296 under IDO § 6-6(I) are technical regulations regarding implementation of development through
297 Site Plans.

298 Conversely, under the IDO, policy decisions implicating the Comprehensive Plan are
299 reserved under the IDO for conditional use approvals under IDO § 6-6(A), for applications
300 subject to review by the Environmental Planning Commission (EPC), and the Landmarks
301 Commission (LC) under IDO, § 6-7, entitled “Policy Decisions.” Despite that the DRB cannot
302 weigh Comprehensive Plan policies in its review and evaluation of Site Plans, Comprehensive
303 Plan policies have not been “ignored” in the review process as Appellants contend in this
304 appeal. For example, when the underlying MX-L zoning district was established for the
305 application site in this matter, all applicable policies of the Comprehensive Plan were
306 thoroughly vetted to determine if the MX-L zone, and all that is permissive in that zone district,
307 are appropriate for the site and for the surrounding area on which the zone was proposed and
308 finally established. As explained in the below, this is a function of the EPC and the City
309 Council, not the DRB.

310 Although not precisely on point for Tract 1-B, which is the proposed location of the
311 multi-family uses on the proposed new plat, the record of this appeal includes City Planning
312 Staff’s and the EPC’s detailed analyses of the zone change request for the adjoining tract to
313 the north of the proposed multi-family use (formerly Lot 1 and Tract 1A-1) [R. 432 – 487].⁸
314 The City Planning Staff and the EPC analysis for that zone change application demonstrates
315 that Comprehensive Plan policies are not ignored in the development process. In fact, in that
316 zone change matter, the Comprehensive Plan policies were utilized to accurately judge the
317 suitability of the land for the zone sought at the time; there was a robust appeal that followed

⁸. Tract 1-A although not part of the multi-family uses proposed in the Site Plan is part of the replating action that was included in the application.

318 that zone change which was finally resolved and can no longer be challenged.

319 In this matter, in similar fashion as the zone change request for the northern tract, the
320 zone change, and the analysis of the Comprehensive Plan policies foreshadowed the Site Plan
321 application to establish the MX-L zone. Put another way, the policy analyses required by IDO,
322 § 6-7 have been integrated and subsumed in that zone change process. Appellants cannot now
323 utilize the Comprehensive Plan to challenge the permissiveness of the uses, including building
324 height, under the MX-L zone. That process is settled and is not subject to appeal. Because
325 the zoning is in place, subject to the technical requirements of the IDO and of the DPM for
326 development, the applicants have a lawful entitlement to the permissive uses allowed in the
327 MX-L zone.

328

329 **C. The Petroglyph National Monument Establishment Act of 1990 is inapplicable**
330 **in this matter.**

331

332 Appellants next argue that the DRB ignored their repeated requests to consult with and
333 involve the Superintendent of the Petroglyph National Monument. As a result, Appellants now
334 contend that the DRB violated the Petroglyph National Monument Establishment Act of 1990
335 (Petroglyph Act). In support of their argument, they cite Section 106 of the Petroglyph Act
336 which states in full:

337 SEC. 106. LAND USE AND TRANSPORTATION PLANNING.

338 The Secretary may participate in land use and transportation management
339 planning conducted by appropriate local authorities for lands adjacent to the
340 monument and may provide technical assistance to such authorities and
341 affected landowners for such planning.

342

343 In addition, in a letter to the DRB, National Park Service Acting Superintendent, Susanna

344 Villanueva wrote to the DRB that the National Park Service did not receive formal notice of

345 the DRB hearing, nor did the DRB consult with them regarding the “*planning for the proposed*
346 *project*” [R. 489-490]. Acting Superintendent Villanueva also recommended that the City
347 Council “*revisit the zoning in the Subject Property area, and the area north of Paseo del Norte*
348 *adjacent to Petroglyph National Monument...*”[R. 489-490].

349 Section 106 of the Petroglyph Act’s plain language refers only to “land use and
350 transportation management planning *conducted by* appropriate local authorities.” (Emphasis
351 added.) It must be emphasized that the City Council has not delegated any authority to the
352 DRB to perform land use or transportation planning for the City. Nor does the DRB engage in
353 discretionary decision-making over any land use or transportation policy. I agree with the
354 applicants’ legal counsel that the Site Plan application and the review process that the DRB
355 engaged in to review the application is only a technical review under the IDO and not land use
356 or transportation management planning.

357 Land use and transportation planning is conducted by the City Council and in some
358 cases delegated to the EPC. In the same degree that the DRB does not engage in
359 Comprehensive Plan policy analysis when reviewing Site Plans, the DRB does not engage in
360 land use or transportation planning.

361 Appellants are conflating the duties of the DRB with those of the EPC and the City
362 Council in the zone change process. Although somewhat repetitive, it cannot be
363 overemphasized that the DRB engages in technical reviews of proposed Site Plans that only
364 include permissive land uses under the IDO. It is fundamental in the IDO that the evaluation
365 of the zone which includes weighing the appropriateness of potential uses, densities, and
366 building height in the zone has already been done before any proposed development is

367 considered for the technical review function engaged in by the DRB. In other words, except
368 for the technical requirements for siting and constructing permissive uses allowed in the zone,
369 the policy considerations under the Comprehensive Plan for the propriety of a use has been
370 adjudicated and resolved all before a Site Plan can be reviewed by the DRB. These important
371 distinctions are significant.

372 In this case, the multi-family uses shown on the applicants' Site Plan are an entitlement;
373 the development of which is only conditioned on the applicants satisfying the myriad of
374 technical regulations of the IDO and DPM.⁹ Again, generally see IDO, § 6-7. Therefore, the
375 Petroglyph National Monument Establishment Act of 1990 is not relevant or applicable to the
376 DRB in its review of Site Plan applications and specifically in this case.

377
378 **D. The DRB did not have a duty to consult with the Commission on American**
379 **Indian and Alaska Native Affairs.**
380

381 Appellants next vaguely contend that under City Ordinance § 2-6-6-4, the DRB was
382 required to notify and consult with Native American tribal governments of the DRB hearing
383 and Site Plan proposal [R. 034]. To a similar degree that the Petroglyph Act is inapplicable to
384 the DRB, City Ordinance § 2-6-6-4 is also inapplicable.

385 City Ordinance § 2-6-6-4 is part of a larger ordinance entitled the "Commission on
386 American Indian and Alaska Native Affairs" in which the City acknowledges tribal

⁹ There are too many technical requirements to describe all of them here. However, as stated above these regulations are in IDO, §§ 2-3, 6-4, 5-2, and if applicable 5-3 to 5-5, which essentially concern dimensional standards for land, buildings and fencing, site and building design, avoidance of sensitive lands, access and connectivity for automobiles and pedestrians, traffic considerations, site layout, infrastructure improvements, impact fees, grading and drainage issues, including dust control, and many others, including the extensive special requirements for lands in the VPO-2 and in the CPO-13 overlay zones (IDO §§ 3-6(E) and 3-4(N) respectively).

sovereignty and creates a Commission (a Board) of which is comprised of nine members appointed by the Mayor [§ 2-6-6-1 to 3]. The Board has specific duties that they are charged with fulfilling. The Ordinance states in full that the Board shall:

(A) *Consult with tribal governments prior to taking actions that affect federally recognized tribal governments and shall assess the impact of City programs on tribal communities.*

(B) Take appropriate steps to remove impediments to working directly and effectively with tribal governments.

(C) Bring American Indian/Alaska Native concerns to the City's attention by educating the City on the challenges, concerns, and resolutions of American Indian/Alaska Native citizens of Albuquerque; and by evaluating the social, economic, environmental, health, educational, and governmental challenges affecting American Indian/Alaska Native peoples.

(D) Encourage employment opportunities of Indians in the City's public and private sectors.

(E) Work with the American Indian/Alaska Native community to increase awareness of and access to services and programs in the City of Albuquerque; and advise the Mayor regarding the number of American Indian/Alaska Native citizens accessing City services.

(F) Support economic development for Indian entrepreneurs.

(G) Make recommendations to the Mayor for placement of American Indian/Alaska Natives on City boards, committees, and commissions.

(H) Provide an opportunity for the presentation and exchange of ideas in respect to American Indian/Alaska Native affairs of the City by all interested persons.

(I) Submit annually a written report of its activities and an evaluation of the effectiveness of §§ 2-6-6-1 et seq. to the Mayor and the City Council with recommendations for changes.

(Emphasis added) [Ord. 20-1995; Am. Ord. 2019-004, § 2-6-6-4].

Simply stated, Appellants are conflating the Commission on American Indian and Alaska Native Affairs with the DRB. This ordinance is clearly inapplicable to the DRB. Although the DRB is a "Board" it is clearly not the Board that is assigned the multiple duties regarding tribal governments stated in § 2-6-6-4. Thus, § 2-6-6-4 is inapplicable to the DRB and the DRB is not required to satisfy any of the duties listed in § 2-6-6-4.

424 **E. The record does not support Appellants' claim that the DRB Chair chilled or**
425 **suppressed public comment or otherwise acted improperly regarding public**
426 **comment in the hearings.**
427

428 Next, Appellants contend that in the DRB hearings DRB Chair Jolene Wolfley "*acted*
429 *improperly when she requested that concerned members of the public only speak if their*
430 *comments were not repetitious of a previous speaker*" [R. 035]. Appellants suggest that the
431 admonishment had the effect of silencing public comment and violated the IDO. The evidence
432 in the record demonstrates that Chair Wolfley did make such a request to speakers. However,
433 I find no evidence in the record that Chair Wolfley adversely impacted speech in any manner.
434 Said another way, Appellants are speculating that the Chair's request adversely impacted the
435 right to speak. Below is what the DRB minutes reflect on what Chair Wolfley advised
436 speakers:

437 CHAIR WOLFLEY: 1-B is what – so those are the matters before the
438 DRB today. And those are the matters that you should comment on if
439 you give public comment.

440 And now let me turn and see if there's any member of the public that
441 wishes to speak on Item 2. If you could raise your hand or indicate as
442 best you can that you would like to speak, and I'll see who – who is here
443 and how to take you in order.

444 Okay. Let's see. The firsthand I see is from Mike Voorhees. And when
445 you come to comment, I'm going to ask you to give your name, your
446 address, and then I'll swear you in. And then you can proceed to give
447 your comments.

448 *Please – I'm not going to give you a time limit, but please be judicious*
449 *in use of all of our times. And please try not to repeat things that have*
450 *been said by another speaker.*

451 ...

452 CHAIR WOLFLEY: Okay. Please give us your comments. And, like I
453 said, *it will help us if we don't repeat comments* from a previous speaker,
454 so go ahead.

455 ...

456 CHAIR WOLFLEY: Thank you. Go ahead with your comments. And
457 if you can, try to not repeat information that's already been shared with
458 the DRB.

459 [R. 297-298, 300, and 302 respectively].

460

461 The record shows that during the first hearing on the Site Plan (October 26, 2022), DRB
462 Chair Jolene Wolfley requested from each speaker that they try not to repeat comments that
463 have already been made. There is nothing wrong with this admonishment. DRB Chair
464 Wolfley has the discretionary authority to manage public hearings efficiently in a manner that
465 does not unfairly prevent the public from being heard.

466 Under New Mexico law, it is a universally accepted canon that a quasi-judicial body
467 “must adhere to fundamental principles of justice and procedural due process” [*State Ex Rel.*
468 *Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶ 17]. The process due to the public is
469 fairness and the right to be heard. In addition, under the IDO:

470 A party to the hearing shall be afforded an opportunity to present
471 evidence and argument and to question witnesses on all relevant issues,
472 but the decision-making body may impose reasonable limitations on the
473 number of witnesses heard, *and on the nature and length* of their
474 testimony and questioning
475 (Emphasis added) [IDO, § 6-4(N)(3)(b)].

476

477 Thus, the Chair has the discretionary authority to set reasonable rules of decorum
478 including on the “nature and length” of testimony. Appellants speculate and unreasonably
479 assume that Chair Wolfley’s request unfairly suppressed the speech of people “who otherwise
480 may have wished to appeal the decision of the DRB” [R. 035]. Appellants’ due process
481 argument is essentially unsupported speculation that the words of the Chair asking people to
482 try to not be repetitive impacted the opportunity to be heard. I therefore find that there is no
483 evidence that the Chair prevented anyone from voicing their concerns at the public hearing. I
484 also find that the Chair’s request was not a violation of due process.

485

F. The pending conditional use application is a separate application pending before the ZHE and is not relevant to the DRB's evaluation of the Site Plan of the proposed multi-family development use.

The last appeal issue raised by Appellants has to do with an application pending before the ZHE for a proposed conditional use on Tract 1-A (the abutting tract to the north of the tract with the multi-family use). Appellants contend that the DRB erred when they did not defer their decision until the ZHE decides on the conditional use application proposed on Tract 1-A.

I find that the DRB did not err when they used their discretion to deny Appellants' request for a deferral. The conditional use application before the ZHE is a separate application and concerns an entirely different use that is *conditionally* permissive in the MX-L zone. Because the proposed use pending to be heard by the ZHE is a conditional use, not a permissive use, its permissiveness under the IDO is subject to an entirely different review process before a Site Plan can reach the DRB for that use. Further, although the application which is the subject of this appeal concerns in part on the reconfiguring of what are now Tracts 1-A and 1-B, the application reviewed in this case, does not include any land uses on Tract 1-A. That is, the only land use contemplated by the DRB in this appeal case is the permissive multi-family use on Tract 1-B. Moreover, the DRB's decision on the multi-family land use does not trigger any conditional use review criteria which the DRB must evaluate to approve the multi-family use. And, finally, the DRB's approval of the preliminary plat which shows Tract 1-A, has no impact on the ZHE's decision making functions or analysis on the conditional use application. All that was approved by the DRB *regarding* Tract 1-A is a non-appealable preliminary plat—nothing else.¹⁰ Consequently, the ZHE's evaluation and findings regarding the proposed

¹⁰ See footnote 2 above.

conditional use on Tract 1-A would be inapplicable to the analysis and findings of the DRB with the multi-family use. The DRB did not err in rejecting Appellants request for a deferral.

IV. CONCLUSION

In conclusion, Appellants generally contend that the DRB's findings are not supported by substantial evidence. However, they did not identify any factual deficiencies in the record regarding the DRB's findings of facts on the multitude of the technical requirements in the IDO or DPM. Regarding Appellants' specific theories of error, I find, as described in detail above, that the Appellants have not met their burden of proof on all the issues they raised. The IDO, the Comprehensive Plan, nor do any of the statutory references cited by Appellants, support their claims of error. I therefore respectfully recommend that the City Council deny Appellants' appeal in its entirety.

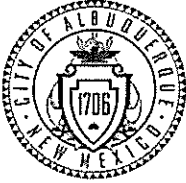


Steven M. Chavez, Esq.
Land Use Hearing Officer

February 17, 2023

Copies to:

City Council
Appellants
Party Opponents
DRB
City Staff



City of Albuquerque

City of Albuquerque
Government Center
One Civic Plaza
Albuquerque, NM 87102

Action Summary

City Council

Council President, Pat Davis, District 6
Council Vice-President, Renée Grout, District 9

Louie Sanchez, District 1; Isaac Benton, District 2
Klarissa J. Peña, District 3; Brook Bassan, District 4
Dan Lewis, District 5; Tammy Fiebelkorn, District 7
Trudy E. Jones, District 8

Monday, March 6, 2023

5:00 PM

Vincent E. Griego Chambers
One Civic Plaza NW

City of Albuquerque Government Center

TWENTY-FIFTH COUNCIL - TWENTY- SIXTH MEETING

1. ROLL CALL

Present 9 - Brook Bassan, Isaac Benton, Pat Davis, Tammy Fiebelkorn, Renee Grout,
Trudy Jones, Dan Lewis, Klarissa Peña, and Louie Sanchez

2. MOMENT OF SILENCE

Councilor Bassan led the Pledge of Allegiance in English.
Councilor Sanchez led the Pledge of Allegiance in Spanish.

3. PROCLAMATIONS & PRESENTATIONS

4. ADMINISTRATION QUESTION & ANSWER PERIOD

5. APPROVAL OF JOURNAL

February 22, 2023

6. COMMUNICATIONS AND INTRODUCTIONS

7. REPORTS OF COMMITTEES

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

- a. EC-23-223 Approving the Downtowner Development & Disposition Agreement for
housing projects in the Downtown and Railroad Metropolitan
Redevelopment Areas

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

b. [EC-23-236](#)

Land Lease and Agreement between the City of Albuquerque and High Flying Hangars LLC

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

d. [EC-23-244](#)

Mayor's appointment of Ms. Caryn Wagner to the Arts Board

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

e. [EC-23-245](#)

Mayor's re-appointment of Dr. Bernadine Hernandez to the Arts Board

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

f. [EC-23-247](#)

Mayor's appointment of Mr. Rodrigo L. Eichwald to the Balloon Museum Board of Trustees

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

g. [EC-23-248](#)

Mayor's Recommendation of Award (ROA) to Evergreen Solutions, LLC. for "Classification and Compensation Consulting Services"

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

h. [EC-23-249](#)

Authorization of Social Service Agreement with Crossroads for Women to Provide Outpatient Case Management Services to Women Court Ordered into Assisted Outpatient Treatment

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

- *i. [EC-23-257](#) Mayor's appointment of Mr. Victor J. Segura to the Balloon Museum Board of Trustees
A motion was made by Vice-President Grout that this matter be Confirmed. The motion carried by the following vote:
For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez
- j. [OC-23-25](#) Appointment of Mr. Giovanni Coppola to the Environmental Planning Commission
A motion was made by Vice-President Grout that this matter be Confirmed. The motion carried by the following vote:
For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez
- k. [OC-23-27](#) Appointment of Ms. Leslie McAhren to the Civilian Police Oversight Advisory Board
A motion was made by Vice-President Grout that this matter be Withdrawn. The motion carried by the following vote:
For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez
- l. [OC-23-28](#) Appointment of Mr. Aaron Calderon to the Civilian Police Oversight Advisory Board
A motion was made by Vice-President Grout that this matter be Confirmed. The motion carried by the following vote:
For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez
- m. [R-22-75](#) Establishing A Tip Line Program Specifically For The Reporting Of Illegally Used Or Possessed Firearms, Adjusting Fiscal Year 2023 Appropriations To Support The Program (Sanchez)
A motion was made by Vice-President Grout that this matter be Postponed to March 20, 2023. The motion carried by the following vote:
For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

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

- c. [EC-23-239](#) Legal Department's Quarterly Litigation Report for the 2nd Quarter of FY 2023 (Greater than 10,000)
A motion was made by Councilor Sanchez that this matter be Receipt Be Noted. The motion carried by the following vote:
For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

9. ANNOUNCEMENTS**10. FINANCIAL INSTRUMENTS****11. GENERAL PUBLIC COMMENTS****12. APPEALS**

- a. [AC-23-1](#) Michael T. Voorhees; Martin Kowemy, Jr. Governor, Pueblo of Laguna; Rene Horvath, Westside Coalition of Neighborhood Associations; and Baxter L. Sosebee appeal the Development Review Board decision to approve a Site Plan Amendment (to remove a Site Plan), a Preliminary Plat, and a new Site Plan, for all or a portion of Tract 1, Block 2 And Lots 4 & 5, Block 6, Unit 26, Volcano Cliffs Zoned MX-L & MX-M, Located On Rosa Parks Rd NW Between Paseo Del Norte And Rosa Parks Rd Containing Approximately 18.79 Acre(s). (M-10)

A motion was made by Councilor Lewis that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

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

- a. [EC-23-246](#) Appointment of Deputy Chief Emily V. Jaramillo to the position of Chief of the Albuquerque Fire Department

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

14. FINAL ACTIONS

- c. [R-23-97](#) Prioritizing The Maintenance, Restoration, And Active Use Of The Atchison, Topeka, And Santa Fe Railway Fire Station (Benton)

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and Sanchez

- b. [R-22-80](#) A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 629 San Mateo Blvd SE Within The City Limits Of Albuquerque, New Mexico Is So Ruined, Damaged And Dilapidated

As To Be A Menace To The Public Comfort, Health, Peace Or Safety
And That It Is To Be Required To Be Removed (Davis, by request)

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

For: 7 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, and Sanchez

Against: 2 - Lewis, and Peña

d. R-23-112

City Of Albuquerque Project Recommendations To The Mid-Region
Council Of Governments For Inclusion In The 2040 And 2045
Metropolitan Plan And For Consideration For Federal Funding In The
Proposed FY 2020 To FY 2025 Transportation Improvement Program
For The Albuquerque Metropolitan Planning Area (Peña)

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

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and
Sanchez

A motion was made by Councilor Peña that this matter be Postponed as
Amended to March 20, 2023. The motion carried by the following vote:

For: 9 - Bassan, Benton, Davis, Fiebelkorn, Grout, Jones, Lewis, Peña, and
Sanchez

a. O-22-60

C/S Adopting A New Article In Chapter 11 Of The Revised Ordinances
Of Albuquerque 1994 To Be Known As The "Residential Tenant
Protection Ordinance" (Fiebelkorn)

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

For: 4 - Benton, Davis, Fiebelkorn, and Peña

Against: 5 - Bassan, Grout, Jones, Lewis, and Sanchez

15. OTHER BUSINESS: {Reports, Presentations, and Other Items}