



Mayor Timothy M. Keller

CITY OF ALBUQUERQUE

Albuquerque, New Mexico

Planning Department

INTER-OFFICE MEMORANDUM

January 12, 2023

TO: Pat Davis, President, City Council

FROM: Alan Varela, Planning Director 
Alan Varela (Jan 12, 2023 16:42 MST)

SUBJECT: AC-23-1, (VA-2022-334) PR-2022-007712, SI-2022-01875, SD-2022-00143 & SI-2022-1874:

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)

REQUEST

This is an appeal of the Development Review Board (DRB) decision to approve a Site Plan Amendment for 18.79 acres to remove the 2017 Site Plan for Subdivision. The appeal is also of the DRB approval of a Preliminary Plat for 18.23 acres to re-divide the subject parcel according to a rezone in 2019. And finally, the appeal is of the DRB approval of a *new* Site Plan for 9.56 acres for the southern parcel. The subject parcels are bounded by Paseo del Norte on the north, Kimmick on the east, Rosa Parks Drive on the south, and a residential development on the east.

The applications would remove a pre-IDO site plan that included building heights associated with the parcels; meet an EPC condition to re-divide the parcels according to an approved rezoning; and establish a new site plan for the southern parcel to accommodate a 238-unit multi-family development. All applications were deemed complete and subject to review under the IDO Effective Date of July 2022.

The appellants made a timely appeal of the above three applications. The appellants have standing as

all appeared before the DRB, except the Governor of the Pueblo of Laguna. The standing for

the Governor is claimed to be established under a claim ‘alleging improper notice’ per IDO Section 6-4(V)(2)(b)(1).

An appeal of a DRB decision must show the following:

IDO 6-4(V)(4) Criteria for Decision

The criteria for review of an appeal shall be whether the decision-making body or the prior appeal body made 1 of the following mistakes.

6-4(V)(4)(a) The decision-making body or the prior appeal body acted fraudulently, arbitrarily, or capriciously.

6-4(V)(4)(b) The decision being appealed is not supported by substantial evidence.

6-4(V)(4)(c) The decision-making body or the prior appeal body erred in applying the requirements of this IDO (or a plan, policy, or regulation referenced in the review and decision-making criteria for the type of decision being appealed).

BACKGROUND

A. Prior Approvals

Site Plan for Subdivision 2017. In 2017, the DRB approved a site plan for subdivision for 18.79 acres including all of the parcels subject to this appeal plus an additional Lot 4 (less than 1 acre at the southwest corner of the subject parcel). That Site Plan established zoning for the parcel as SU-2 VCMX with the exception of the small Lot 4. The SU-2 VCMX on the Site Development Plan identifies the following requirements: a minimum height of 26 feet, a maximum height of 35 feet, square footage above 26 feet is limited to 50% the building footprint, and sites within 1500 feet of the escarpment edge is limited to 26 feet. (Record, p. 427-430)

Figure 1. 2017 Area involved in Site Plan for Subdivision (See Record, p. 427-430 for Full Site Plan)

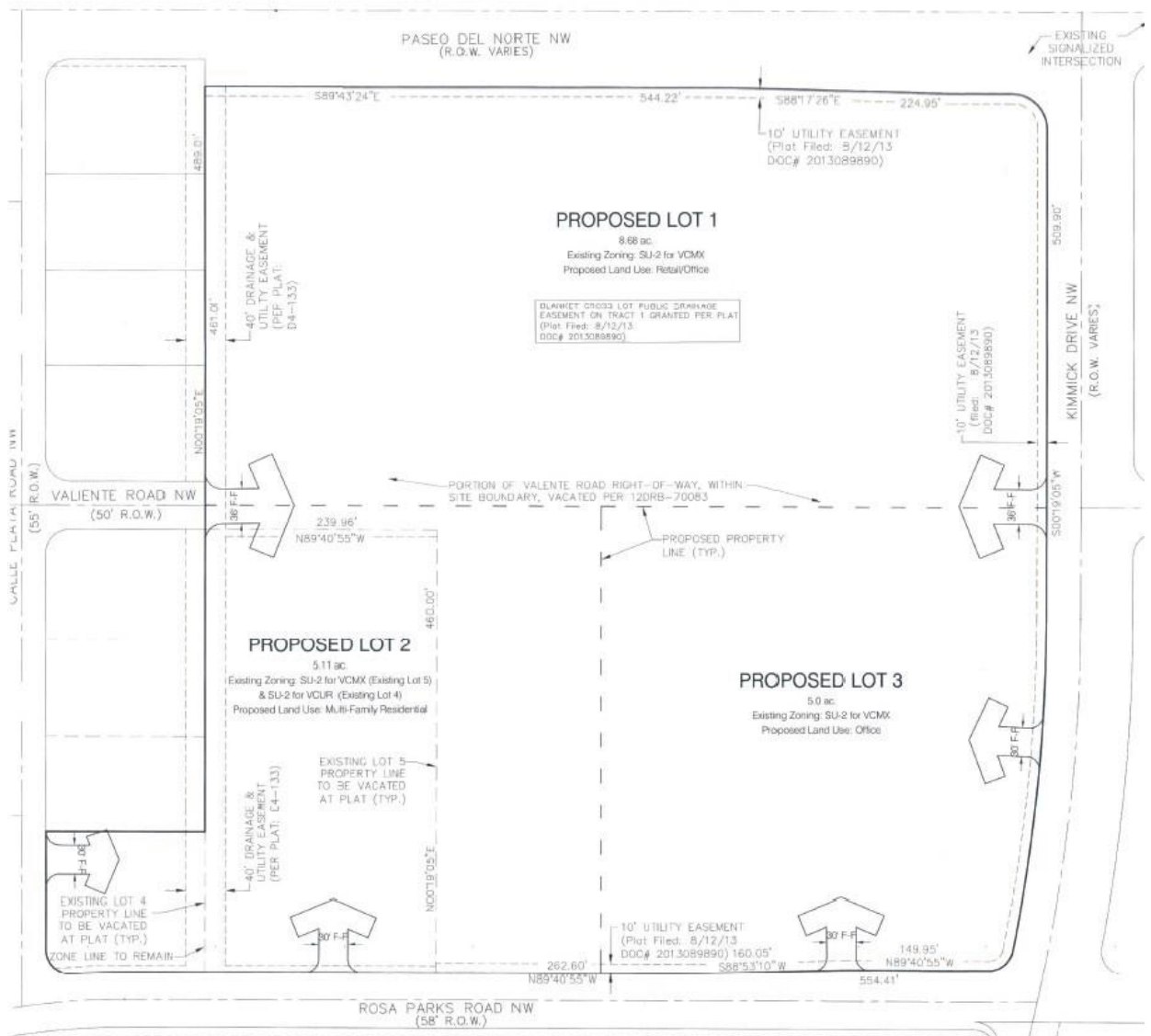
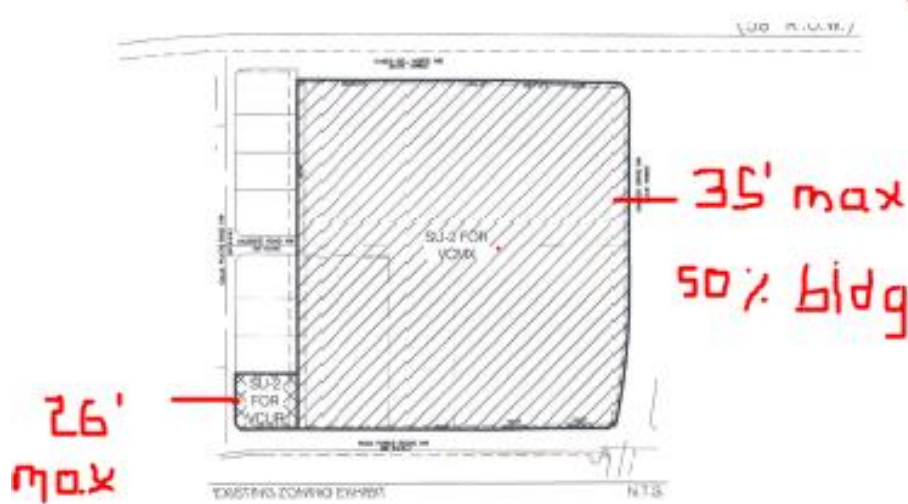
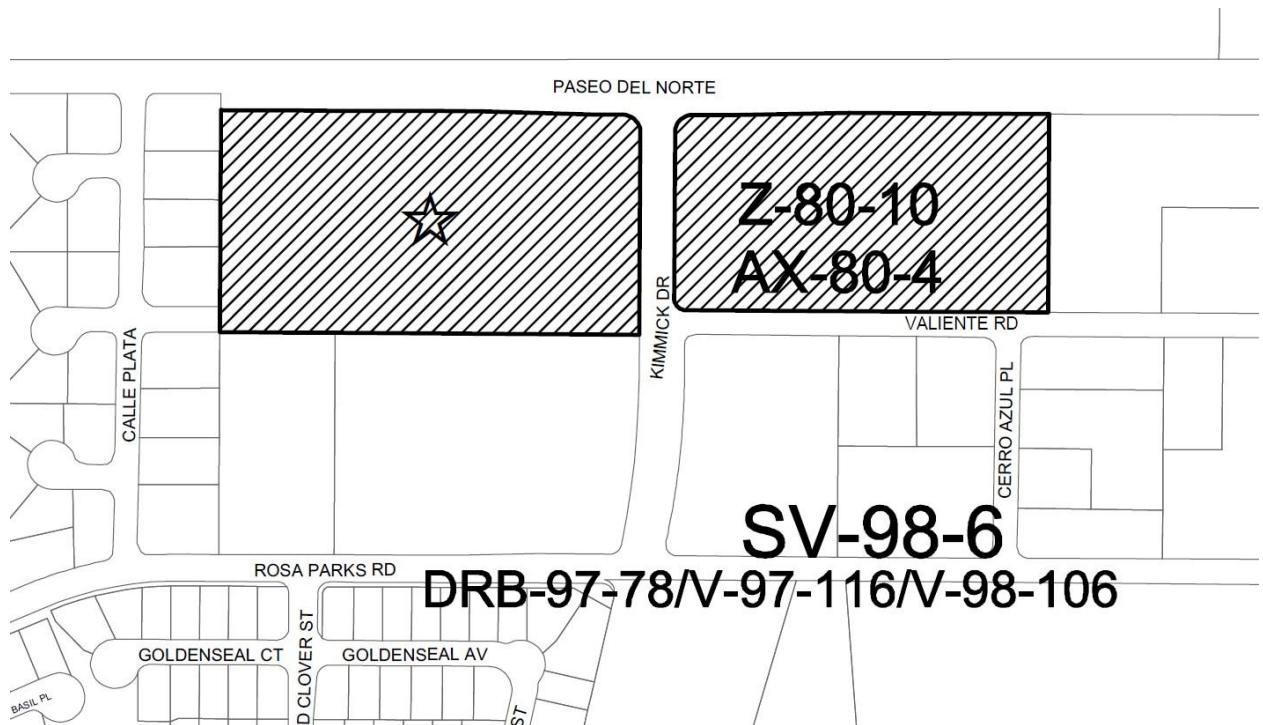


Figure 2. 2017 Site Plan for Subdivision, Exhibit showing Zoning with Height Notations



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

Figure 3. 2019 Rezoning Exhibit PR 2019-02263 (Record, p. 461)



The EPC *staff* pointed out in the staff report that the parcel west of Kimmick should be replatted prior to a rezoning of the northern portion because there was not a parcel boundary in place for the northern portion. (Record p. 440) In general, a parcel should not be rezoned with two zoning districts on one parcel. The EPC, however, moved forward to approve the rezoning for that northern portion, yet established the following condition of approval:

“Condition 1. “The zone map amendment shall not become effective until Lot 1, Block 2 is replatted and a lot line is created that corresponds to the proposed zone boundary, located at 436.01 feet south of the Paseo del Norte Blvd. NW right-of-way, and the plat is recorded.” (EPC NOD Oct. 10, 2019; Record p. 437)

The Preliminary Plat application that is part of this appeal would fulfill the EPC condition from the rezoning case for the parcel west of Kimmick.

The NOD of October 10, 2019 includes a finding related to the applicant be willing to work with National Park Service to address building heights in future site plan submittals.

“Finding #17. The National Park Service (NPS) has concerns about building height exceeding 35 feet and site lighting, which should be considered in review of future site plan submittals. The applicant has expressed a willingness to work with the NPS to address such concerns.” (EPC NOD Oct. 10, 2019, Record p. 437)

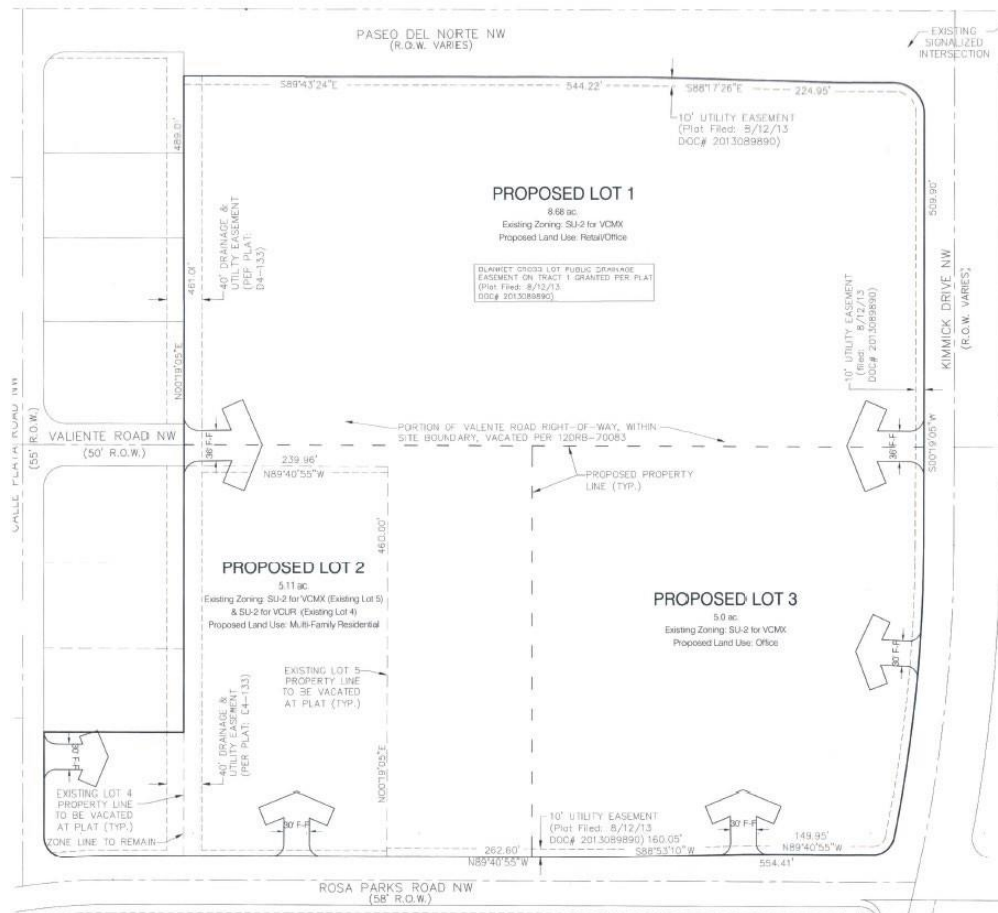
B. DRB Approvals Under Appeal:

The DRB reviewed three applications at its meeting of October 26, 2022. The DRB deferred action on all three applications to continue review and to allow the applicant to respond to DRB member comments. The DRB noted that additional applications should be submitted for the three vacations of public easements on the Preliminary Plat. The applicant continued to respond to DRB comments and submitted the applications to vacate three public easements. The DRB reviewed all the applications on November 9, 2022, and approved them in this order: Amendment of the 2017 Site Plan for Development to remove the 2017 site plan; Preliminary Plat (with associated easement vacations); and a *new* Site Plan for Tract 1-B (the Multi-family development on the southern parcel).

The applications subject to this appeal are detailed below:

- 1. Site Plan-Major Amendment Application SI-2022-1875:** (18.79 acres) The Site Plan for Subdivision was approved by the DRB in September 2017 according to the Volcano Heights Sector Development Plan. This occurred prior to the enactment of the IDO. The request before the DRB was to remove the 2017 Site Plan for Subdivision. (DRB transcript 10/26/22, p. 3)

Figure 4. 2017 Site Plan for Subdivision



IDO Section 6-6(I)(1)(b)¹ and 6-6(I)(2)(b)² establish the procedure for removing Pre-IDO site plans and establishing a new site plan where the boundaries for the two actions are different. The applicant followed that procedure by bringing the application for removal of the site plan to the body that originally approved the Site Plan, i.e, the DRB. The applicant

¹ 6-6(I)(1)(b) 'A Site Plan – DRB may be approved for property with a prior-approved Site Plan, regardless of whether the prior approved Site Plan is still valid pursuant to Subsection 14-16-6-4(X), subject to allowable uses and development standards in this IDO. If any portions of the proposed boundary overlap with a prior-approved Site Plan that will remain in place, a Major Amendment shall be required as described in Subsection 14-16-6-6(I)(2)(b) below.'

² 6-6(I)(2)(b) 'If the boundary of a proposed site plan includes only a portion of the boundary of a prior-approved Site Plan that is still valid pursuant to Subsection 14-16-6-4(X), the prior-approved Site Plan must be amended through a Major Amendment pursuant to Subsection 14-16-6-4(Y) or Subsection 14-16-6-4(Z), as applicable, to remove the overlapping area proposed in a new site plan before an application for a new site plan that includes that overlapping area can be decided, because only one site plan shall apply to any property.'

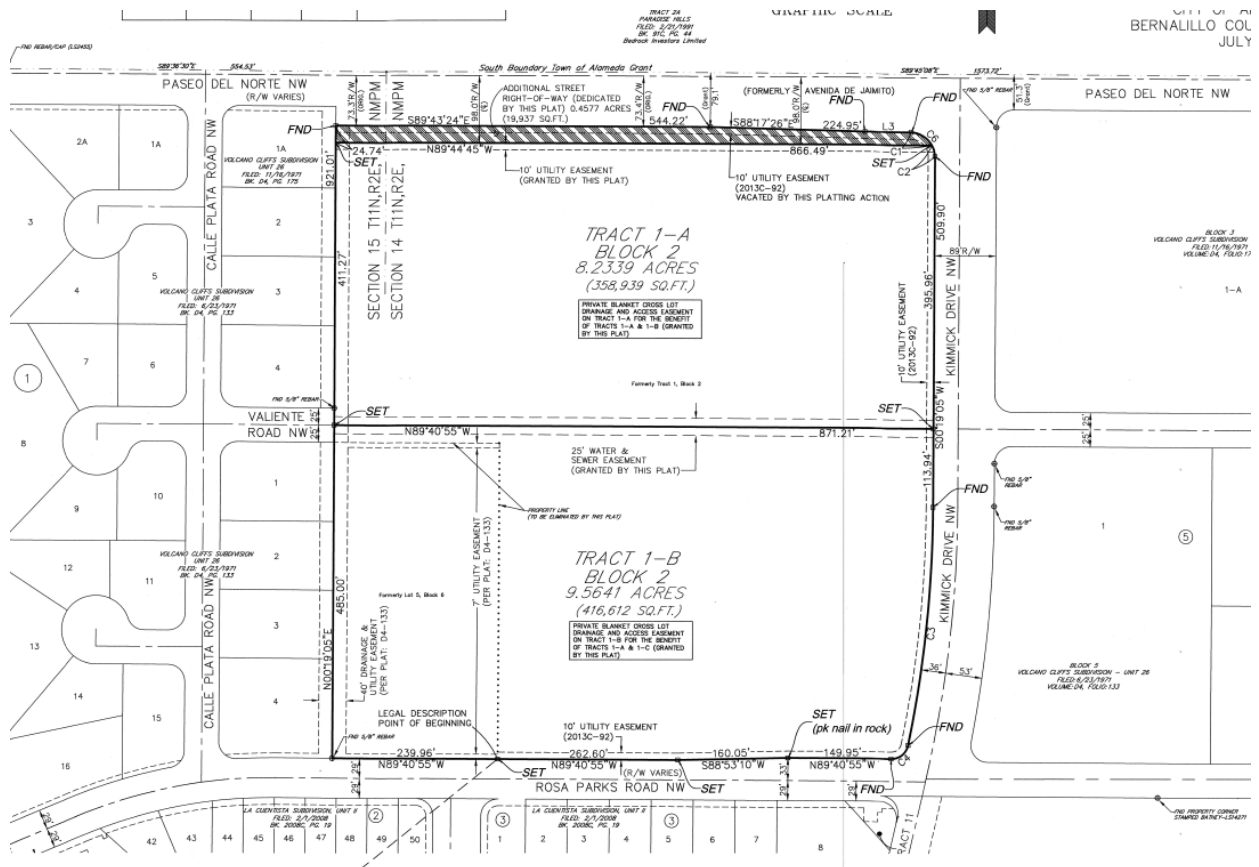
argued that producing a new site plan was “More advantageous because IDO requirements are more advantageous than use specific standards of the antiquated SDP for Subdivision.” (Applicant letter of 9/30/22, Record p. 52-58)

2. **Preliminary Plat application SD-2022-143:** (18.23 acres) The application for a Preliminary Plat was to reconfigure the two existing tracts into two different tracts what would create a north and south tract. The boundary of the tracts is according to the MX-M zone district for the northern parcel, Tract 1-A, Block 2 (8.23 acres) and the MX-L zone district for the southern parcel, Tract 1-B, Block 2 (9.56 acres).

The Preliminary Plat was reviewed according to IDO Section 6-6(L)(3) Subdivision of Land-Major and is accompanied by an Infrastructure List. The applicant complied with the requirements of the IDO and DPM as outlined in staff comments. (Record pp. 366-402)

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

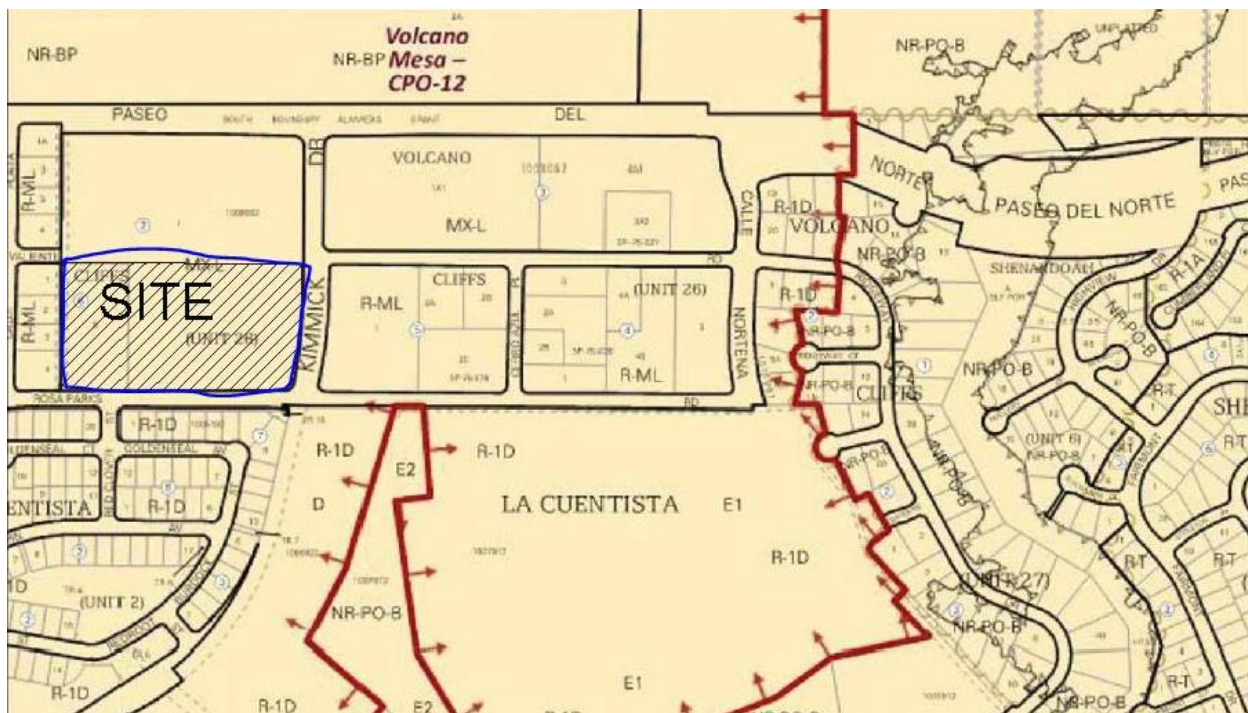
Figure 5. Preliminary Plat Application (Record p. 292)

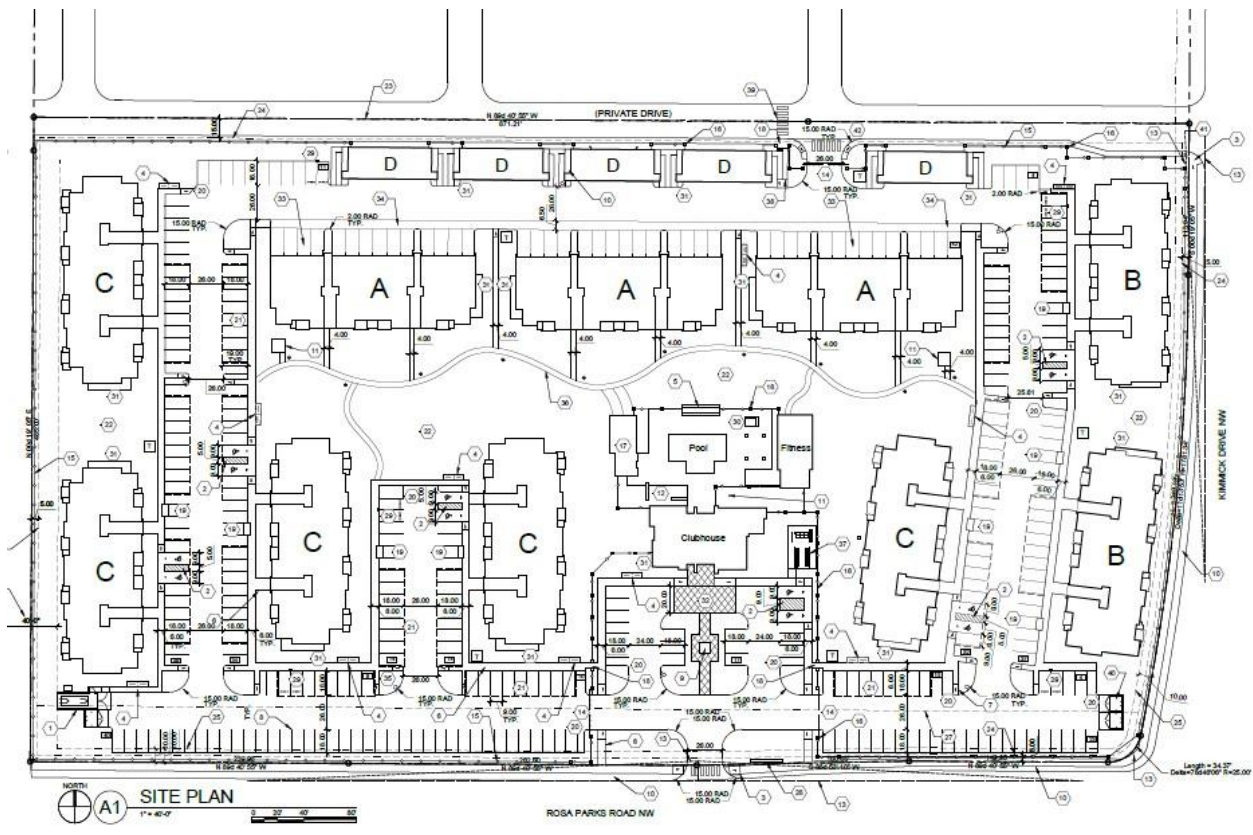


3. **Site Plan Application SI-2022-1874:** (9.56 acres) The applicant applied for a new site plan covering only the newly created Tract 1-B, Block 2 covering 9.56 acres and zoned MX-L. Multi-family housing at a height of 38 feet is permissible in the MX-L zone. The applicant noted that Special Assessment District 228 planned the infrastructure to serve this area.

The site plan is for a 238-unit multi-family development has a density just under 25 dwelling units per acre. The buildings include one-, two-, and three-story buildings all under the MX-L maximum height. All of the three-story buildings step down to two-stories at the end of the buildings. A one-story clubhouse is in the center. The figure below shows the boundary of the new site plan for the multifamily project outlined in blue.

Figure 6. New Site Plan Application (Record p. 147) with Blue Highlight added





The DRB reviewed the Site Plan according to IDO Section 6-6(I)(3) Site Plan-DRB.³ The applicant complied with the requirements of the IDO and DPM as outlined in staff comments (Record p. 366-402). The Notice of Decision summarizes how the site plan meets the requirements of the Review and Decision Criteria, including compliance with the IDO and DPM and the adequacy of existing infrastructure combined with the improvements required on the Infrastructure List associated with the Preliminary Plat. (Record p. 279-281)

4. **Vacations of Public Easements.** By the 11/9/22 DRB meeting, the applicant added three applications for vacations of private easements to the Preliminary Plat application before the DRB. These vacation applications were not appealed and will not be reviewed in this memo.

³ 6-6(I)(3) Review and Decision Criteria

An application for a Site Plan – DRB shall be approved if it meets all of the following criteria.

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

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

C. Public Notice for DRB Applications

The following table summarizes the notice given for the three applications, as disputed in the appeal:

Application	Was a Pre-submittal NA mtg offered? Did it occur?	Notice at Time of Submittal
		Electronic Mail Notice to NAs
Site Plan Major Amendment	ONC email ⁴ identified PHCA to receive notice. Notice form included site plan amendment. ⁵ Facilitated meeting minutes do not show discussion of site plan amendment.	ONC email identified PHCA and WSCONA to receive notice. ^{6, 7}
Preliminary Plat	Not required	ONC email identified PHCA and WSCONA to receive notice.
New Site Plan for Tract 1-B	ONC form identified PHCA. Notice form included new site plan; new site plan was discussed at the Facilitated Meeting.	ONC email identified PHCA and WSCONA to receive notice.

On September 14, 2022, approximately 40 neighborhood members participated in a Pre-Submittal Facilitated Meeting. The meeting notes show discussion about the *new* Site Plan and concern about the height of the new multifamily buildings. No discussion is recorded related to removal of the existing Site Development Plan of 2017. (Record p. 97-101) The developer's agent testified on November 9, 2022 that they had given notice including providing a link to Dropbox with materials for people to look at.⁸ The agent also presented some additional emails at the DRB meeting. The

⁴ An email from ONC 8/3/22 (Record p. 94-95) shows PH Civic Association should be notified.

⁵ The Neighborhood Meeting Request form shows the Site Plan and Site Plan Amendment as applications. (Record p. 87)

⁶ Email from ONC 9/28/22 shows WSCONA and PH Civic Associations should be notified. (Record p. 137-8).

⁷ Consensus Planning email of 9/30/22 to Elizabeth Haley and aboard111@gmail.com. This email lists the three applications CP is submitting. (Record p. 130)

⁸ "MS. FISHMAN: Okay. I don't know. I don't recall if we talked about it. You can look in the facilitated notes. But that was part of the application that, you know, the -- we sent -- send a link to the Dropbox for people to look in it, people that we weren't required to notify, and we notified them regardless. So, again, I don't remember a discussion about that. I think the

Chair asked that all emails be provided to staff for the case record, but the emails mentioned in the DRB meeting were not provided to the DRB to date. (DRB Transcript 11/09/22, p. 35-6)

REASONS FOR THE APPEAL

1. **Appellant:** The DRB erred by not applying the Comprehensive Plan. The Chair of the DRB repeatedly asserted in the public meetings of October 26 and November 9, 2022, that the DRB was not allowed to weigh disparities between the Comp Plan and the IDO or to analyze the development proposal in light of those stated policies, which is contrary to New Mexico Law 3-22-5 “The regulations and restrictions of the county or municipal zoning authority are to be in accordance with a comprehensive plan.”

Staff Response: The Chair stated that the review and decision criteria that the City Council authorized the DRB to use for the applications came from the IDO and were the only basis for a DRB decision. She noted that these applications and their review criteria were distinct from the Conditional Use application for a self-storage building on the northern parcel. The application for a conditional use had different review criteria that references compliance with the Comprehensive Plan and was before the ZHE, who has discretionary authority. (DRB Transcript 10/26/22, pp. 11, 21-22 and DRB Transcript 11/09/22, pp. 3,6,7)

The DRB Notice of Decision succinctly describes the basis for the decision according to the review and decision criteria of the IDO (Record p. 22-25). The Notice of Decision is the culmination of detailed Staff Comment Memos (Water Authority, Code Enforcement, Parks and Recreation, Hydrology, Transportation, and Planning) and responses from the applicants that covered the two DRB meetings for these three applications. (Record p. 366-402)

The DRB can listen to and consider public comment, but is required to make its ultimate decision based on the review and decision criteria of the IDO. The DRB chair communicated the following to the public during the DRB meeting, “I want to encourage any members of the public to try to focus on the purview of the DRB in your comments.” (DRB Transcript 11/09/22, p. 3)

2. **Appellant:** The DRB decision is not supported by substantial evidence and erred in applying the requirements of the IDO. The DRB failed to consider Comprehensive Plan policies which would have made the application subject to rejection by the DRB on the basis of inconsistency, e.g. Comprehensive Plan Policy 11.3.6 Volcano Mesa preservation; Chapter 11.1.1 Introduction regarding resource elements that should be enhanced and preserved; Chapter 1-7 “The Comp Plan is the main policy document used to guide discretionary decisions about changes to zoning and the adoption of new plans... Removal of “the existing site plan that restricted building heights to no more than 26 feet and approve a Site Plan with buildings with heights of 37’8”. No showing was made that

discussion was, as we're having today, all about the height. So that would be my response.” (DRB Transcript 11/9/22, p.38)

such a change would not negatively impact surround neighborhood or property owners nor comply with the policies of the Comp Plan.

Staff Response: The DRB did not review the applications for compliance with the Comprehensive Plan because the review and decision criteria for the three applications does not include a provision to check for compliance with the Comprehensive Plan. The IDO and DPM are intended to be regulation that implements the Comprehensive Plan. Therefore, the DRB as a staff Board applies the regulations and does not interpret policy in the Comprehensive Plan. The DRB review criteria expressly does not include a criterion to check for compliance with the Comprehensive Plan.

The appellant's reference to the Comprehensive Plan guiding discretionary decisions related to the adoption of new plans would refer to the EPC's role as a discretionary body empowered to adopt new plans, i.e., Master Plans, Framework Plans, Community Planning Assessments, etc. Site plans-DRB are established in the IDO as being approved according to staff functioning in a ministerial role to apply the rules and regulations of the IDO and DPM.

3. **Appellant:** The DRB erred in applying requirements of the IDO because the planning process failed to comply with Public Law 101-313, sections 105 and 106 AND with the Petroglyph National Monument Establishment Act of 1990, Section 106 allowing the Secretary of the Interior to participate in land use planning for lands adjacent to the Monument. No notice was provided to the Monument regarding the Facilitated Meeting, and no consideration was given to the concerns raised by the Superintendent regarding the three-story tall building.

Staff Response: The IDO requirement for public notice to the National Park Service of the Department of the Interior and the Superintendent of Petroglyph National Monument (PNM), in particular, is to provide notice regarding an application that is within 660 feet of Petroglyph National Monument. The subject parcels, in any of the applications submitted, are approximately 1790 feet from PNM. Therefore, there was no clear IDO requirement to notify PNM of the three applications.

The relevant sections of the IDO are below:

6-4(J) REFERRALS TO COMMENTING AGENCIES

Following a determination that the application is complete, the Planning Director, ZEO, or any City staff designated to review applications in Table 6-1-1 shall refer applications for comment to the following departments or agencies, as noted below. Any comments received within 15 calendar days after such a referral shall be considered with the application materials in any further review and decision-making procedures.

6-4(J)(1) City departments or agencies or other governmental or quasi-governmental agencies whose services, properties, facilities, interests, or operations may be affected...

6-4(J)(5) National Park Service and Open Space Division of the City Parks and Recreation Department for applications that include development within 660 feet of the Petroglyph National Monument.

While it appears there was no IDO requirement to notify PNM, the applicant had made a commitment in the rezoning case to contact Petroglyph National Monument about development activity on the parcel. (Record p. 437, Finding #17) Ms. Hendricks, Superintendent of PNM, testified that she was only notified by the neighborhood association about the 'meeting.' "I thank the neighborhood association for letting me know about this meeting." (DRB Transcript 11/9/22, p. 9) The applicant's agent, Ms. Fishman's testified that she sent the application to Ms. Hendricks and communicated with Ms. Hendricks regarding the application.⁹ PNM sent a letter following the DRB decision regarding the three applications (Record p. 489-490)

Ms. Hendricks made a specific request in her testimony that PNM would like to be invited to meetings like this one to represent themselves and the associated 29 tribes that consider this area sacred.¹⁰ The Planning Department will take this under advisement for future cases to determine the correct approach to take with regard to PNM and the Tribal governments. The routing of EPC site plans does include PNM, however this has not been the practice of DRB. This was the first site plan before the DRB that involved private development greater than two-stories on the Upper West Mesa in the general vicinity of PNM, and DRB staff did have a practice of sending the site plan applications to PNM for review.

4. **Appellant:** The DRB erred in applying the requirements of the IDO because the City Planning process is in violation of the Commission on American Indian and Alaska Native

⁹ **MS. FISHMAN:** "Madam Chair, the park service was not notified by Tyson Hummell. However, I have communicated with the park service about these applications, specifically to Ms. Hendricks. And so they were aware of the application. They got a copy of the application. So I -- obviously they are fully informed, otherwise they wouldn't have been at the meetings that we've held so far on this application at DRB. (DRB Transcript 11/9/22, p. 37)

¹⁰ **Nancy Hendrick, Superintendent of PNM:** "And I would like to request that we are invited that we are invited to these types after meetings. And I know DRB is on its way out, but for future meetings, when we're talking about any development next to the monument, it would be helpful for us to be present to represent the concerns of the monument and the concerns of the 29 associated tribes that consider this area sacred." (DRB Transcript 11/9/22, p. 8)

"We had a meeting a couple weeks ago with five of the pueblos that are in the area. They're always interested in things that happen in and around Petroglyph National Monument. And what I told them about the different developments that are taking place in the area, they're very concerned." (DRB Transcript 11/9/22, p. 9)

Affairs, under Section 2-6-6-4 “The Board shall: Consult with tribal government prior to taking actions that affect federally recognized tribal governments and shall assess the impact of City programs on tribal communities.” The DRB cannot reasonably claim that the Comp plan is irrelevant to their deliberations, noting Comp Plan Policies 11.1.2.3 Cultural Landscapes. A decision should not have been made without consultation of tribal governments.

Staff Response: The DRB is not required to notify the Commission on American Indian and Alaska Native Affairs. This Commission is an advisory board to the City and does not review applications submitted to DRB. Again, DRB’s authority is limited to IDO requirements.

5. **Appellant:** The DRB erred in applying the requirements of the IDO because the Chair of the DRB acted improperly when she requested that concerned members of the public only speak if their comments were not repetitious of a previous speaker...these instructions would limit their rights to appeal a decision, which is an impermissible infringement on the Constitutional right to petition the government for a redress of grievances under the First Amendment.”

Staff response: The Chair guided the proceedings according to the DRB Rules of Procedure which state:

The Chairperson’s duties include:

1. Manage and administer all meetings of the DRB to include requiring appropriate decorum, preserve order, decide all points of order and procedure. The Chairperson may restrict or limit times for the public to speak at a DRB meeting including taking steps necessary to maintain public order. This authority includes but is not limited to halt or limit repetitive, irrelevant or inappropriate comments. (DRB Rules of Procedure, p. 4)

The Chair communicated to speakers on October 26th that “it would help us if we don’t repeat comments from a previous speaker.” (DRB Transcript 10/26/22, p. 7 & 9)

The Chair said on November 9th, “...if you hear someone say something and you -- you can just say, "I agree with that," in order not to repeat the same comments.” (DRB Transcript 11/9/22, p. 4)

6. **Appellant:** The DRB acted fraudulently, arbitrarily or capriciously; decision is not supported by substantial evidence; and erred in applying the requirements of the IDO because we requested that the DRB defer any decision until after the completion of a competent and neutral view study in that case {*ZHE conditional use application*} so that any allegations of adverse impacts could be substantiated...and evaluated relative to required

compliance with the Comp Plan under State Law....This refusal to pause the DRB process....was arbitrary and capricious.

Staff Response: A property owner is authorized to withdraw a pre-IDO site plan per IDO Section 6-6(I). The DRB did not have authority to stay any matters before the DRB pending the Conditional Use application before the ZHE on the northern parcel.

The DRB Chair asked the applicant's agent if they were willing to do a view analysis of the project. Ms. Fishman responded that the view analysis they are doing for the self-storage would include the multi-family buildings and was comprehensive. She also expressed willingness to share that analysis with the public. (DRB Transcript 10/26/22, p. 13-14)

CONCLUSION

The DRB reviewed the applications for a site plan amendment to remove a pre-IDO site plan, a preliminary plat, and a new site plan for a portion of the property. The DRB reviewed the three applications according to the IDO and DPM and found that they were compliant. The DRB Chair followed the DRB Rules of Procedure in handling public testimony. Public notice was made according to the IDO. The DRB did not act arbitrarily or capriciously. The decision was supported by substantial evidence as documented in the Notice of Decision and staff review comments. The DRB did not err in applying the IDO and DPM.

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