

**Notice of Decision
City Council
City of Albuquerque
October 9, 2019**

AC-19-12 Project PR-2018-001198/ VA-2019-00247/ VA-2019-00188/ VA-2019-00190:
Rene Horvath Appeals the Decision of the Environmental Planning Commission (EPC) to
Approve Two Variances for all or a portion of Tract 1 and Tract 2, Bulk Land Plat of The
Trails Unit 3A, zoned R-1B and R-1D, located on Woodmont Ave. NW, between the
Petroglyph National Monument and Paseo del Norte Blvd. NW, containing approximately
20.4 acres

Decision

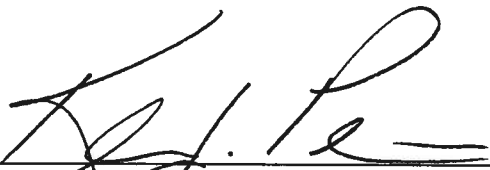
On October 7, 2019, by a vote of 9 FOR, 0 AGAINST, the City Council voted to grant the
appeal by accepting and adopting the recommendation and findings of the Land Use
Hearing Officer.

**IT IS THEREFORE ORDERED THAT THE APPEAL IS GRANTED, THE DECISION OF
THE EPC IS REVERSED, AND THE VARIANCES ARE DENIED**

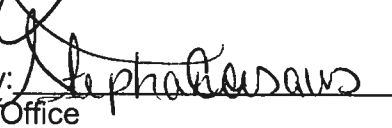
Attachments

1. Land Use Hearing Officer's Recommendation
2. Action Summary from the October 7, 2019 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.

 Date: 10-10-19

Klarissa J. Peña, President
City Council

Received by:  Date: 10/10/19

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RECEIVED
ALBUQUERQUE CITY CLERK

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

APPEAL NO. AC-19-12

PR-2018-001198; VA-2019-00247; VA-2019-00190; VA-2019-00188

Rene Horvath and Josh Beulter on behalf of the West Side Coalition of Neighborhood Associations, Appellants,

And

PV Trails Albuquerque, LLC, and Consensus Planning, Inc., Party Opponents.

1 This is an appeal from a decision of the Environmental Planning Commission (EPC).
2 The EPC granted relief to the applicants (Party Opponents in this appeal) with variances to
3 the height and garage set-back standards of the Volcano Mesa Character Protection Overlay
4 Zone 12 (CPO-12) of the Integrated Development Ordinance (IDO). The EPC also approved
5 the applicants' site plan. The Appellants are the West Side Coalition of Neighborhood
6 Associations (Appellants). Appellants claim that the EPC erred in granting the variances.
7 After reviewing the record, hearing arguments of the parties, and City Staff at the appeal
8 hearing, and after reviewing all the IDO requirements, I respectfully recommend that that the
9 City Council reverse the EPC's decision regarding the variances. As explained in detail
10 below, I find that the EPC misapplied the variance criteria of the IDO. Ordinarily, a remand
11 would be appropriate to allow the EPC to redress the matter. However, after reweighing the
12 evidence, I also find that the record lacks minimal evidence to support approving the
13 variances and therefore a remand would be futile.

14 **I. BRIEF RELEVANT HISTORY**

15 The record in this matter shows that representatives with PV Trails, LLC, and Planners
16 with Consensus Planning, Inc. (the applicants) met with City Planning Department Staff in
17 a mandatory pre-application meeting on November 5, 2018 to discuss a proposed site plan
18 and three variances, one for building height, another for garage setbacks, and the third for
19 façade design standards [R. 82-84]. At the meeting, the proposed variances were apparently
20 discussed, but City Staff took the position that the property “does not seem exceptional at
21 this time” [R. 83]. The record next shows that in April 2019, the applicants through
22 Consensus Planning gave notice to the West Side Coalition of Neighborhood Associations
23 regarding the proposed application for the site plan approval and for the variances [R. 113-
24 116]. Consensus Planning submitted their application to the EPC on May 28, 2019 [R. 75-
25 79]. A City-sponsored facilitated meeting with the affected neighborhood associations was
26 held on May 29, 2019 [R. 117-120]. The matter was scheduled for the EPC’s July 11, 2019
27 public hearing [R. 126]. On June 25, 2019, Consensus Planning amended their application,
28 withdrawing the third variance request regarding design elements of the street facade in the
29 site plan [R. 86].

30 Just prior to the EPC hearing, City Planning Staff submitted their Report to the EPC
31 recommending that the EPC approve the site plan but deny the two variance requests because
32 the applicants could not demonstrate that there are special circumstances applicable to the
33 property within the site plan [R. 45]. On July 25, 2019, the EPC took up the application in
34 their scheduled public hearing [R. 135]. In a lengthy hearing, the EPC approved the site plan
35 and the variances, but limited the applicability of the variances to a smaller area than what

36 had been requested by the applicants [R. 14-24]. This timely appeal followed on July 26,
37 2019 [R. 5]. The appeal is limited to the variances approved by the EPC and not to the
38 approved site plan [R. 9-13].¹ The City Council referred this appeal to the Land Use Hearing
39 Officer (LUHO), and a LUHO hearing on the record was held on September 13, 2019.

40 A review of an appeal is a whole record review to determine whether the EPC acted
41 fraudulently, arbitrarily, or capriciously; or whether the EPC's decision is not supported by
42 substantial evidence or if the EPC erred in applying the requirements of the IDO, a plan,
43 policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision
44 and record must be supported by substantial evidence to be upheld. The LUHO may
45 recommend to the City Council that an appeal be affirmed in whole or in part or reversed in
46 whole or in part. The LUHO has authority to remand an appeal in whole or in part [IDO, §
47 14-16-6-4(U)(1)(d)].

48 49 **II. DISCUSSION**

50 In their appeal, the Appellants claim that the EPC erred in granting the two variances
51 for building height of the homes and for the garage setbacks in the site plan. Specifically, the
52 Appellants claim that the applicants failed to demonstrate that they qualify for the variances
53 because they could not show that there are "special circumstances" applicable to the subject
54 property that do not apply generally to other property—a requirement of the IDO for the
55 variances. Notably, the City's Planning Department Staff Planners recommended to the EPC
56 that the variances should be denied because the Staff Planners also contend that the applicants

1. However, the approved site plan includes in its General Note #4 a description of the variances. Thus, in a reversal, that language should also be stricken from the site plan.

were unable to show the requisite special circumstances under the IDO [R. 45]. In addition, Appellants contend that the applicants could not meet the extraordinary hardship criteria or practical difficulties requirements in the variance test. Because I agree with the City Staff Planners and the Appellants regarding the requisite special circumstances question, it is not necessary to determine if there is an extraordinary hardship, because without the requisite special circumstances showing, the EPC lawfully cannot grant the variances. In addition, under the variance ordinance, an applicant logically cannot meet the extraordinary hardship (or the practical difficulty counterpart) without a valid qualifying special circumstance because the hardship must also arise from the special circumstance. However, before a discussion of the variance requirements and how they apply to the applicants' site plan, a brief discussion of the proposed site plan and the variances the applicants requested are in order.

As stated above, in its July 11, 2019 hearing, the EPC approved the applicants' site plan and two of the three variances requested. The site plan contains a total of 78 lots on 20.45-acres of undeveloped land. The land that encompasses the site plan is located on the west side of Woodmont Ave. NW, west of Rainbow Boulevard NW. It is immediately north of the Petroglyph National Monument Major Public Open Space (MPOS) and south of Paseo del Norte NW [R. 35-36]. The existing zoning on the site includes two zones that were previously approved by the EPC with a site plan in July 2018. The difference between the previously approved site plan and the one that is the subject of this appeal ostensibly concerns the variances. The area of the site plan that is located within 200-feet of the MPOS is zoned R-1D with a minimum lot size of 10,000 square feet. From the site plan, it appears that ten of the 78-lots are subject to the R1-0D zoning [R. 130]. The remainder 68-lots to the north are zoned R-

79 1B with a minimum lot size of 5,000 square feet [See map at R. 36, 131]. All 78 lots within
80 the site plan have the CPO 12 zone designation as well. The entire site is designated as an
81 “Area of Consistency” in the Albuquerque/Bernalillo County Comprehensive Plan (Comp.
82 Plan). Under the IDO, an Area of Consistency is defined as an area in which “development
83 must reinforce the character and intensity of existing development” [IDO, § 14-16-7,
84 Definitions]. Because the property that comprises the site plan is located adjacent to a MPOS,
85 the property is also subject to the Northwest Mesa View Preservation Overlay zone (VPO-2)
86 under the IDO [R. 41].²

87 Relevant to the application and to this appeal, among the various restrictions in the
88 CPO-12 zone, there is a building height restriction and a garage setback restriction from which
89 the applicants sought relief. Under § 3-4(M)(4)(b) of the CPO-12, “[b]uilding height may be
90 increased to 26 feet on a maximum of 50 percent of the building footprint.” In their application
91 to the EPC, Consensus Planning, Inc, requested a variance to increase the second-story
92 footprint from 50% of the building footprint to 75% of the building footprint for all 68 lots in
93 the site plan that have the R1-B zoning designation [R. 100]. The EPC however, approved the
94 two-story height variance (75% of the building footprint) for only 60% of the lots in the R1-B
95 zone on the site plan [R. 17].³ The exact lots in the R1-B zone for which the EPC approved
96 the height variance is not demarcated anywhere in the record. The EPC also didn’t identify the
97 41 lots (60%) in the R1-B zone to which the height variance applies.

2. Property in the site plan is not located in the “Height Restriction Sub-Area” of the VPO-2, § 3-6(E)(2) of the IDO.

3. As to the extent of the height variance that was approved for 60% of the lots in the R1-B zone, there apparently was some confusion in the EPC’s Official Notification of Decision in Finding Number 3, However, the Party-Opponents (applicants) stipulated that the height variance approved is a two-story height for 75% of the building footprint and only for 60% of the lots zoned R1-B.

The second variance requested concerns the garage setback requirements of the CPO-12 zone. In IDO § 3-4(M)(5)(c), garage side-yard setbacks in the CPO-12 zone are 5-feet. In their application, Consensus Planning, Inc, sought a 3-foot variance reduction of the 5-foot garage side-yard setback requirement for all the lots in the R1-B zone which amounted to a 2-foot setback [R. 98]. The EPC approved the requested 2-foot garage side-yard setback, apparently for all 78 lots depicted in the site plan, not just the R1-B zoned lots [R. 33, 86].

As stated above, in this appeal, Appellants claim first (and Planning Staff agree) that there are no special circumstances applicable to the property (the land in the site plan) that are not generally applicable to the other property in the same zone district and vicinity. Appellants essentially allege that the applicants have failed to demonstrate all the requirements of the first prong of § 14-16-6-6(M)(3)(a) restated above.

Turning now to the variance regulations, under § 14-16-6(M) of the IDO, the EPC has authority to grant variances from “any development standard.” In the IDO, variances, however, are intended to be “[e]xceptions to dimensional standards or variations from the strict, literal application of standards in [the] IDO” (Emphasis added) [IDO, § 14-16-7, Definitions]. The EPC’s authority for granting variances is limited by the terms of the variance ordinance/regulation. Under the variance ordinance, an applicant seeking a variance as a remedy from the “strict” application of the standards in the IDO must satisfy a five-prong test. *All* five parts of the variance ordinance/ regulation requirements must be satisfied before the EPC can grant a variance, and they include:

1. There are special circumstances applicable to the subject property that are not self-imposed and that do not apply generally to other property in the same zone district and vicinity, including but not limited to size, shape, topography, location, surroundings, and

physical characteristics, and such special circumstances were created either by natural forces or by government eminent domain actions for which no compensation was paid. Such special circumstances of the property either create an extraordinary hardship in the form of a substantial and unjustified limitation on the reasonable use or return on the property, or practical difficulties result from strict compliance with the minimum standards.

2. The Variance will not be materially contrary to the public safety, health, or welfare.
3. The Variance does not cause significant material adverse impacts on surrounding properties or infrastructure improvements in the vicinity.
4. The Variance will not materially undermine the intent and purpose of this IDO or the applicable zone district.
5. The Variance approved is the minimum necessary to avoid extraordinary hardship or practical difficulties.

[IDO, § 14-16-6-6(M)(3)(a)].

The first prong of the variance analysis requires that “there are special circumstances applicable to the property.” To qualify as a “special circumstance,” the alleged circumstance must also have certain attributes. First, the circumstances must be attributable to the subject property and the circumstance must not have been “self-imposed.” Second, the special circumstance must also “not apply generally to other property in the same zone district and vicinity.” In short, in comparison to other properties in the area with the same zoning designation(s), the special circumstance must be unique to the property on which the variance is applied and must not have been created by the applicant(s). Section § 14-16-6-6(M)(3)(a) lists six possible attributes that qualifies as a special circumstance. A special circumstance can be related to the “size, shape, topography, location, surroundings, and physical characteristics”

of the property. However, under the first prong, the special circumstance need not be limited to these six possible physical attributes.

Next, still under the first prong, if there is an attribute that can be shown on the property that qualifies as a special circumstance that meets all the attributes described above, the attribute (special circumstance) must have been created “either” by “natural forces or by government eminent domain actions for which no compensation was paid” (emphasis added). This requirement is logically related to and highlights that the special circumstance cannot have been “self-imposed.” By the plain meaning of this requirement, it necessarily and clearly excludes the possibility of someone using a zoning designation (requirement) as the basis for a special circumstance to obtain a variance because the only variety of government actions that qualify as special circumstances are uncompensated “eminent domain actions.” As explained in detail below this is the crucial issue in the appeal and it is the basis for the EPC’s error.

Finally, still under the first prong of the five-prong analysis, it must also be shown that the special circumstance creates an “extraordinary hardship” or “practical difficulties.” The extraordinary hardship must be “in the form of a substantial and unjustified limitation on the reasonable use or return on the property.” Likewise, the “practical difficulties” must be the “result from strict compliance with the minimum standards” presumably of the IDO.⁴ This first prong of the IDO’s variance requirements in § 14-16-6-6(M)(3)(a) is understandably the most difficult to satisfy to obtain a variance because there are multi-layered requirements that all must be satisfied.

4. However, by the clear terms of the first prong, it is the “special circumstances,” that must “*create*” the extraordinary hardship or practical difficulties, and without a qualifying special circumstance, an applicant cannot therefore meet the hardship or difficulty part of the first prong of the variance ordinance.

175 In summary, the key take-aways from the first prong is that the special circumstance
176 must not be “self-imposed,” and must be “applicable to the subject property.” Further, special
177 circumstance cannot “apply generally to other property in the same zone and vicinity,” and if
178 it was created by government action it can only be of the “eminent domain” variety of action
179 that was uncompensated.⁵ The other four prongs of the analysis concern how the proposed
180 variance impacts surrounding properties and the policies of the City, and whether the variance
181 sought is the minimum necessary to avoid the hardship or difficulties required to be shown in
182 the first prong. Because I find that the applicants failed to satisfy the first prong, it is
183 unnecessary to discuss the other four prongs of the regulation.

184 In their application, the applicants argued to the EPC that a special circumstance is due
185 to the “location” of the property that comprises the site plan. [R. 169]. Their argument is
186 somewhat serpentine, but they specifically contend that the surrounding developed
187 subdivisions in the Trails Master Plan area establish the design character in the vicinity. Next,
188 they rationalized that the imposition on the site plan properties of the subject CPO-12 zone
189 regulations for building height and garage setbacks would cause the development of homes (in
190 the site plan) that do not meet the existing design character of developed subdivisions in the
191 Trails Master Plan areas in the vicinity of the site plan properties. Specifically, they claim that
192 the CPO-12 building footprint height regulations do not match or do not reflect the existing
193 design character of the developed area—resulting in special circumstances. The applicants

5. Under basic eminent domain law, the government is allowed only to “take” the least amount of property it needs for the asserted public purpose and only to the extent necessary. Because of this, occasionally, properties are split up—part for the public use (eminent domain), and sometimes as a result of the eminent domain action, the remaining property left to the landowner can be unusually shaped, small, or non-conforming in some other physical manner. In these instances, the government pays the landowner a reasonable value for the land it took for the public purpose but does not compensate the landowner for the remnant land left to the landowner. Thus, because of the eminent domain action, the remainder (remnant) piece might have physical attributes that meet the variance test.

194 further contend that the building footprint height limitation and the garage setback regulation
195 in the CPO-12 zone should never have been imposed on the R1-B properties of the site plan
196 because these properties are located far enough from the MPOS to not impact views. They
197 argue that the imposition of the CPO-12 zone height and garage setback regulations on the R1-
198 B lots depicted in the site plan were a “mistake” that was made when the City Council enacted
199 the IDO [R. 140].

200 Although City Planning Staff contend that there are no special circumstances applicable
201 to the subject site, the Staff Planners do agree with the applicants that the CPO-12 zone height
202 regulation is inconsistent with the existing character in the general area. The Appellants did
203 not dispute this. I note for the Council that the applicants presented substantial evidence to
204 support the contention that the 50% building footprint height regulation of the CPO-12 is
205 inconsistent with the character of the developed area.

206 Finally, the applicants contend that the purpose of the variances is to provide relief from
207 the application of the CPO-12 regulations [R. 138-139]. They further contend that the City’s
208 enactment of the CPO-12 is the kind of “government action” that meets the first prong of the
209 variance test [R. 140]. The EPC apparently agreed because it approved the variances. In doing
210 so, the EPC found that:

211 Similar properties in the same zone district and vicinity (Ventana Ranch
212 and Ventana West) are not subject to the restrictions imposed by CPO-
213 12 [R. 17, Finding 7].
214

215 In addition, the EPC found that:

216 The property is unique and has special circumstances due to its location
217 and surroundings within The Trails master-planned community and
218 Public Improvement District, and the adjacency to the Petroglyph
219 National Monument [R. 17, Finding 8].

220

221 In this appeal, at the LUHO hearing, the applicants presented another theory on which
222 they base their argument that the property's location qualifies it as a special circumstances.
223 They now contend that the land within the site plan is subject to the Trails Public Improvement
224 District (PID) levy assessments, and these levies also qualify the site plan properties as a
225 special circumstance for the variances.

226 Although, the applicants adamantly argue that it is the "location" of their property that
227 qualifies and not the CPO-12 or the PID that are the special circumstances alleged for the
228 variances, I find that their arguments and the evidence in the record suggest otherwise. This is
229 so because, other than its proximity to the MPOS and being subject to the CPO-12 zone
230 regulations (and now the PID), there is nothing about the property encompassed in the site plan
231 that makes it unique as a special circumstance. A special circumstance must be something
232 about the property "including but not limited to size, shape, topography, location,
233 surroundings, and physical characteristics." In this case it is loosely argued that what makes
234 the subject property special is the properties' surroundings and location in relation to the
235 developed areas in the vicinity. Yet the only distinguishing characteristics are that the
236 surrounding (already developed subdivisions) properties pre-date the CPO-12 regulations. And
237 because these surrounding properties pre-dated the CPO-12 regulations, many of the homes in
238 the area do not meet the 50% height rule in the CPO-12 zone. Again, the CPO-12 it is the glue
239 that binds the novel theory together, and it is the definitive basis for the special circumstances.
240 However, as shown above, by the clear language of the variance ordinance, the only
241 government action that can rationally and reasonably qualify as causing the special

242 circumstances are eminent domain actions—not zoning actions.

243 There is no evidence in the record, nor did the applicants contend that the property in
244 the site plan is special because of its “size, shape, topography, location, surroundings, and
245 physical characteristics.” The only asserted unique or special circumstance the applicants
246 identified as a special circumstance that is applicable to their site plan relates directly to the
247 CPO-12 regulations (and now the PID). In all respects, the essential thread that binds their
248 arguments is how the CPO-12 zone regulations seemingly impair the applicants’ ability to
249 develop their lots in-tune with the asserted design character of the area. Other than the
250 imposition of the CPO-12 zone on the site plan lots, the 78-lot site plan is generally no different
251 than any other R1-B zoned subdivision in the Trails Master Plan area. The applicants have not
252 argued or demonstrated otherwise. The special circumstances that are applicable to the subject
253 property is the imposition of a zoning designation (CPO-12 zone), and nothing else. This is,
254 and it has been the crux of the applicants’ arguments. Moreover, as shown above in the EPC’s
255 Findings 7 and 8, it was the focus of the EPC’s decision regarding the required special
256 circumstances findings.

257 Thus, the pivotal issue in this appeal is whether a zoning designation (CPO-12 zone)
258 can serve as the special circumstances for obtaining variances from that same designation’s
259 regulations. I find that it cannot because not only is it contrary to the plain meaning of the
260 variance ordinance, if zoning can be the qualifying special circumstance, the clear limitation
261 expressed in the purpose and meaning of a variance would be irreparably eroded.⁶ In short,
262 the “exception” as it is described in § 14-16-7, of the IDO would be swallowed by the rule.

6. I note that the same analysis is equally applicable to the applicants’ novel arguments regarding the imposition of the PID.

Regarding the meaning of the variance ordinance regulation, in interpreting the language of an ordinance, the first rule is that the plain language and the ordinary meaning of words in an ordinance is the primary indicator of legislative intent. Second, words or the exclusion of words must not be read into the language of an ordinance, particularly if the ordinance makes sense as written.⁷ Applying these basic rules of construction to § 14-16-6-6(M)(3)(a), I find that the phrase “*such special circumstances were created either by natural forces or by government eminent domain actions for which no compensation was paid*” makes sense as written without reading language into it (see footnote 3 above). It is inescapable that under any rational interpretation of the first prong of the variance ordinance, the only variety of government action that is sanctioned for variances are “eminent domain actions for which no compensation was paid.” The legislative enactment and imposition of the CPO-12 zone by the City Council cannot be considered as an eminent domain action or as a qualifying government action. However, this is exactly what the applicants argued in front of the EPC [R. 140]. They contend that the CPO-12 zone enactment and now the PID is the kind of government action that qualifies them for the variances [R. 139-141]. The applicants’ interpretation of the variance ordinance, and the EPC’s disregard of the government action limitation stated therein, is a fundamental contravention of unambiguous language that was well-established by the City Council.

Moving to the CPO-12 zone, it is more than just a design regulation in the IDO---it is an overlay zone. And like “base zones,” it has its own set of regulations that apply. In the IDO, overlay zone regulations are defined as “[r]egulations that prevail over other IDO regulations

7. These rules of statutory construction are widely utilized by all New Mexico Courts.

to ensure protection for designated areas” [IDO, § 14-16-7, Definitions]. Thus, overlay zones are given priority and are essentially zone districts. Next, it is a fact that all private property in the City of Albuquerque is subject to zoning. Character overlay zones are not unique or special to the City. There are a dozen classes of character overlay zones that apply to large areas of land throughout Albuquerque [See IDO, § 14-16-3-1]. In addition, the CPO-12 zone is applicable to the site plan properties as well to a large area of lands surrounding the site plan properties. See IDO, § 3-4(M)(1) where there is a map showing the areas that the CPO-12 applies.

While the EPC did not expressly find that the CPO-12 zone is the basis for the special circumstance, it was the cornerstone of the applicants’ arguments to support the variances. And, although the EPC failed to expressly identify the particular special circumstances which qualify the land for the variances, in its findings the EPC drew a straight line connecting the site plan land with the CPO-12 as the essential ingredient, the cause for the special circumstances. It is the special circumstance. [R. 17, Findings 7 and 8].⁸ In doing so, the EPC erred because it misapplied the first prong of the variance ordinance. The EPC’s decision is more like a legislative text amendment to the application of the CPO-12 zone rather than the granting of variances. Masked in the variance process, the EPC virtually carved out certain CPO-12 standards and nullified their application of them unto a large area of land on the basis that those regulations may be inconsistent with the existing design character of the developed area. Many of the EPC’s findings regarding the variances are policy-based rationales why the

8. I note that the applicants drafted EPC Findings 7 and 8 and submitted them to the EPC which the EPC adopted verbatim. As part of their appeal, Appellants challenge that the applicants were able to submit proposed findings to the EPC. I find that the EPC did not violate its own rules or otherwise violate the IDO by allowing the applicants to submit their own requested findings [R. 165].

304 CPO-12 regulations are arguably inappropriate for the area.

305 The EPC's policy-based conclusions that the height and garage setback regulations of
306 the CPO-12 are incompatible or out of character with the area may be appropriate for the
307 second, third and fourth prongs of the variance analysis. But the "inappropriateness" of
308 certain CPO-12 regulations cannot be the basis for special circumstances under the first prong.
309 When an applicant cannot satisfy the variance test, the variance process cannot lawfully be
310 utilized to redress perceived inequities of a zone regulation on a large area. There are other
311 remedies available that would not result in distorting the variance process. In this regard, the
312 EPC erred.

313 Removing the CPO-12 out of the analysis as a special circumstance, I find that there
314 are no facts that can demonstrate that the properties depicted in the site plan area meet the
315 special circumstances requirement of the variance test. Therefore, I find that the City Planners
316 were correct that the applicants have not presented any evidence in the record to satisfy the
317 first prong of § 14-16-6-6(M)(3)(a). Accordingly, I also find that based on the evidence in the
318 record, there are no "special circumstances applicable to the subject property" that are not also
319 applicable to other similarly situated properties in the vicinity. I also find that the CPO-12 zone
320 designation (and the PID levy) on the site plan property is not and cannot be a special
321 circumstance for granting variances. The evidence in the record, supported by the IDO,
322 demonstrates that the CPO-12 zone designation and its regulations are applicable to the site
323 plan area in the same manner as it is applicable to similarly situated property in the R1-B zone
324 in the vicinity. The fact that the design character in the area is not consistent with the CPO-12
325 zone regulation regarding height is irrelevant to the analysis required for and by the first prong

326 of § 14-16-6-6(M)(3)(a). Accordingly, I respectfully recommend that the EPC's decision be
327 reversed as to the variances. The variances should be denied.



Steven M. Chavez, Esq.
Land Use Hearing Officer

September 24, 2019

Copies to:

Appellants,
Party Opponents,
City Staff



City of Albuquerque

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

Action Summary

City Council

Council President, Klarissa J. Peña, District 3

Vice-President, Cynthia D. Borrego, District 5

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, October 7, 2019

5:00 PM

Vincent E. Griego Chambers

One Civic Plaza NW

Albuquerque/Bernalillo County Government Center

TWENTY-THIRD COUNCIL - FORTY-FOURTH MEETING

1. ROLL CALL

Present 9 - Klarissa Peña, Cynthia Borrego, 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

September 18, 2019 Special Meeting

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

A motion was made by Councilor Benton to accept the September 25, 2019 Land Use, Planning and Zoning Committee reports. The motion failed by the following vote:

For: 2 - Sanchez, and Benton

Against: 6 - Peña, Borrego, Winter, Gibson, Jones, and Harris

Excused: 1 - Davis

A motion was made by Councilor Jones to reject the September 25, 2019 Land Use, Planning and Zoning Committee reports for R-19-190 and R-19-191. The motion carried by the following vote:

For: 7 - Peña, Borrego, Sanchez, Winter, Gibson, Jones, and Harris

Against: 1 - Benton

Excused: 1 - Davis

Pursuant to Council Rules of Procedure, this action resulted in the failure of these bills.

R-19-190

Establishing A Process For The City Council To Consider Re-Adoption Of The Goals And Policies Of Sector Development Plans Listed In Appendix D Of The Comprehensive Plan Until The First Community Planning Area Assessment Cycle Is Complete And The Comprehensive Plan Is Updated (Benton, Peña)

R-19-191

Establishing A Process For The City Council To Consider Reenactment Of The Sector Development Plans Listed In Appendix D Of The Comprehensive Plan, Including The Regulatory Aspects Of The Plans (Benton and Peña, by request)

Deferrals/Withdrawals

c. O-19-72

Amending §14-20, The "Dilapidated Commercial Buildings And Properties Ordinance" To Implement Permanent Procedures Following The Conclusion Of A 24-Month Pilot Project (Harris)

A motion was made by Councilor Harris that this matter be Postponed to November 4, 2019. The motion carried by the following vote:

For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris

Excused: 1 - Davis

- h. O-19-80 Authorizing The Issuance And Sale Of The City Of Albuquerque, New Mexico Taxable Industrial Revenue Bond (Arrive Albuquerque Hotel Project) Series 2019 In The Maximum Principal Amount Of \$22,000,000 To Provide Funds To Finance The Redevelopment, Renovation, Rehabilitation And Equipping Of A Hospitality Project; Authorizing The Execution And Delivery Of An Indenture, Lease Agreement, Bond Purchase Agreement, Bond, And Other Documents In Connection With The Issuance Of The Bond And The Project (Benton, by request)

A motion was made by Councilor Benton that this matter be Postponed to October 21, 2019. The motion carried by the following vote:

For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris

Excused: 1 - Davis

- i. R-19-178 Amending The Adopted Capital Implementation Program Of The City Of Albuquerque By Supplementing Current Appropriations For The Arenal/Crestview Bluff Open Space Land Acquisition (Peña)

A motion was made by President Peña that this matter be Postponed to November 4, 2019. The motion carried by the following vote:

For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris

Excused: 1 - Davis

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

- a. EC-19-455 Mayor's Recommendation of Award to Paper Plane Branding and Marketing for "Citywide Website Design Services"

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

For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris

Excused: 1 - Davis

- b. EC-19-457 Mayor's Appointment of Jonathan R. Hollinger to the Environmental Planning Commission

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

For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris

Excused: 1 - Davis

- c. EC-19-471 Approval of Supplement Agreement with MyDatt Services Inc. d.b.a Block By Block for a Clean, Safe and Friendly Downtown
- A motion was made by Vice-President Borrego that this matter be Approved.
The motion carried by the following vote:
- For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris
- Excused: 1 - Davis
- d. EC-19-472 Mayor's Appointment of Mr. Scott Forrester to the Open Space Advisory Board
- A motion was made by Vice-President Borrego that this matter be Confirmed.
The motion carried by the following vote:
- For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris
- Excused: 1 - Davis
- e. OC-19-40 Appointment of Ms. Barbara Taylor to the Open Space Advisory Board
- A motion was made by Vice-President Borrego that this matter be Confirmed.
The motion carried by the following vote:
- For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris
- Excused: 1 - Davis
- f. R-19-185 Approving And Authorizing The Acceptance Of Grant Funds Based On Applications For Federal And State Assistance For The Senior Corps Programs Including The Foster Grandparent Program (FGP), The Retired And Senior Volunteer Program (RSVP), And The Senior Companion Program (SCP), With The Corporation For National And Community Service (CNCS) And The New Mexico Aging And Long Term Services Department (ALTSD) And Providing For An Appropriation To The Department Of Senior Affairs In Fiscal Year 2020 (Gibson)
- A motion was made by Vice-President Borrego that this matter be Passed. The motion carried by the following vote:
- For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Gibson, Jones, and Harris
- Excused: 1 - Davis

10. GENERAL PUBLIC COMMENTS

11. ANNOUNCEMENTS

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

- a. AC-19-11 Project #2018-001924/RZ-2018-00063: Land Development Consultants LLC, Agents for Circle K Stores, Inc., appeals the decision of the Environmental Planning Commission (EPC) to deny a zone map amendment for Tract A and Tract B, a plat of Tracts, A, B, and C, Lands of Romero-Page Etal., zoned M-XL, to NR-C, located at 1100 Old Coors Dr. SW, between Bridge Blvd. SW and San Ygnacio Rd. SW, containing approximately 4.5 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: 8 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, and Jones
- Excused: 1 - Harris
- b. AC-19-12 Project PR-2018-001198/ VA-2019-00247/ VA-2019-00188/ VA-2019-00190: Rene Horvath Appeals the Decision of the Environmental Planning Commission (EPC) to Approve Two Variances for all or a portion of Tract 1 and Tract 2, Bulk Land Plat of The Trails Unit 3A, zoned R-1B and R-1D, located on Woodmont Ave. NW, between the Petroglyph National Monument and Paseo del Norte Blvd. NW, containing approximately 20.4 acres
- A motion was made by Councilor Benton To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

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

14. FINAL ACTIONS

- a. O-19-56 C/S Amending Article XII, Sections 2, 3, 5, And 8 Of The City Charter, And Amending Article XIII, Section 4, Of The City Charter (Peña, Harris, Sanchez, Borrego)
- A motion was made by Councilor Sanchez that this matter be Passed. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- b. O-19-57 C/S Amending The Lobbyist And Lobbyist Organization Registration And Disclosure Ordinance At Sections 2-3-2, 2-3-3, 2-3-4, 2-3-5, AND 2-3-7 (Peña, Harris, Sanchez, Borrego)
- A motion was made by Councilor Davis that this matter be Amended. Councilor Davis moved Floor Amendment No. 1. The motion carried by the following vote:**

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

d. O-19-73

Relating To The Redevelopment, Leasing And Sale Of A Metropolitan Redevelopment Project And The Issuance Of Metropolitan Redevelopment Revenue Bonds Payable From Rental Payments Therefor; Approving The Metropolitan Redevelopment Application Entitled "Broadstone Nob Hill Metropolitan Redevelopment Bond Application"; Authorizing The Acquisition Of Land And Existing Improvements And Construction Of A Building Within The Central/ Highland/ Upper Nob Hill Metropolitan Redevelopment Area; Authorizing The Disposition By Lease And Sale Of The City's Interest In Such Project To Broadstone Nob Hill, LLC, Its Successors And Assigns; Authorizing The Issuance And Sale Of The City Of Albuquerque, New Mexico Metropolitan Redevelopment Revenue Bonds Series 2020 In The Maximum Principal Amount Of \$21,500,000 To Provide Funds To Finance A Portion Of The Costs Of The Construction Of The Project (Davis, by request)

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

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

e. O-19-76

C/S Amending Chapter 2, Article 6, Part 11 Of The Revised Ordinances Of Albuquerque, The "Public Safety Tax Advisory Board Ordinance", To Redefine The Composition, And Roles And Responsibilities Of The Public Safety Tax Review Board (Benton)

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

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

f. R-19-197

Amending The Adopted Capital Implementation Program Of The City Of Albuquerque By Approving New Projects From The Proceeds Of City Of Albuquerque, New Mexico Gross Receipts Tax/Lodgers' Tax Refunding And Improvement Revenue Bonds Series 2019A (Peña)

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

For: 5 - Peña, Borrego, Sanchez, Winter, and Harris

Against: 4 - Benton, Davis, Gibson, and Jones

Councilor Winter moved Floor Amendment No. 2.

A motion was made by Councilor Sanchez to Table Floor Amendment No. 2. The motion carried by the following vote:

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

A motion was made by Councilor Sanchez that this matter be Amended. Councilor Sanchez moved Floor Amendment No. 3. The motion carried by the following vote:

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

A motion was made by President Peña to take Floor Amendment No. 2 from the Table. The motion carried by the following vote:

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

A motion was made by President Peña that this matter be Amended. Councilor Peña moved Amendment No. 1 to Floor Amendment No. 2. The motion carried by the following vote:

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

A motion was made by Councilor Winter that this matter be Amended. Councilor Winter moved Floor Amendment No. 2, as Amended. The motion carried by the following vote:

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

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

For: 8 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, and Harris

Against: 1 - Jones

g. O-19-77

F/S Authorizing The Issuance And Sale Of The City Of Albuquerque, New Mexico Tax Refunding And Improvement Revenue Bonds In Two Series In An Aggregate Principal Amount Not To Exceed \$47,000,000: (I) Gross Receipts Tax/Lodgers' Tax Refunding And Improvement Revenue Bonds, Series 2019A In The Maximum Principal Amount Of \$37,000,000, And (II) Gross Receipts Tax Refunding Revenue Bonds, Series 2019B In The Maximum Principal Amount Of \$10,000,000 For The Purpose Of (A) Financing The Cost Of Refunding The City's Outstanding Gross Receipts Tax/Lodgers' Tax Refunding Revenue Bonds, Series 2009A And The City's Outstanding Gross Receipts Tax Refunding Revenue Bond, Series 2009B, And (B) Studying, Designing, Developing, Constructing, Reconstructing, Rehabilitating, Renovating, Modernizing, Signing, Enhancing And Otherwise Improving The City's Convention Center And Other Tourist-Related Facilities and Attractions (Davis, by request)

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

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

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

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

j. R-19-186

Extending The Moratorium Established For The Section Of Irving Boulevard From Kayenta Place To Rio Los Piños Drive Through December 31st 2020 (Borrego)

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

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

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

a. OC-19-37

Internal Audit's Annual Report for Fiscal Year 2019

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

For: 8 - Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

Excused: 1 - Borrego

b. OC-19-38

The Office of Inspector General's Annual Report for Fiscal Year 2019

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

For: 8 - Peña, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

Excused: 1 - Borrego