

**Notice of Decision
City Council
City of Albuquerque
October 22, 2019**

AC-19-14 Project PR-2019-002629/ 1011232/ VA-2019-00270: Anaya Law, Agents for Darlene M. Anaya, Appeals the Environmental Planning Commission Decision to Approve a Zone Map Amendment for all or a Portion of Tracts 22403B, 225B2AIAI & 226C2B, 225B2AIA2, 225B2B, 225B2C, 225B20, 225B2E, 225B2F & 225B2A2, 225B2G, 225B2H, 225821, 226A, 227, 228, 232, 233A, 236-A, 236-B, and Land of J A Garcia Tract A, MRGCD Map #35, zoned M-I and R-I to C-2 and R-2, located North of I-40 and East of Rio Grande Blvd. between the Alameda Drain and Campbell Ditch, containing approximately 20 acres

Decision

On October 21, 2019, by a vote of 8 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.

Excused: Sanchez

**IT IS THEREFORE ORDERED THAT THE APPEAL IS GRANTED, AND THIS MATTER IS
REMANDED TO THE ENVIRONMENTAL PLANNING COMMISSION**

Attachments

1. Land Use Hearing Officer's Recommendation
2. Action Summary from the October 21, 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: 10-22-19
Klarissa J. Peña, President
City Council

Received by:  Date: 10/22/19
City Clerk's Office

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

CONSOLIDATED APPEALS. AC-19-14 and AC-19-15

**Project: PR-2019-002629 (1011232);
VA-2019-00270; VA-2019-00274;17EPC-40011**

**DARLENE ANAYA (AC-19-14),
NORTH VALLEY COALITION (AC-19-15), Appellants,**

and,

**GARCIA REAL ESTATE INVESTMENTS, LLC,
G3 INVESTORS, LLC, DOS VIENTOS, LLC, and
SINCLAIR PROPERTIES, LLC, Party Opponents.**

1 In this matter, the Appellants filed separate appeals of a single zone-change decision from
2 the Environmental Planning Commission (EPC). Because the individual appeals concern the
3 same zone-change application and the same decision of the EPC, for expediency and efficiency
4 the appeals were consolidated. The zone-change application has an extensive history that
5 includes two previous consolidated appeals, and one District Court appeal that resulted in the
6 matter being remanded back to the EPC to “consider” two issues. The appeals in this matter
7 concern the EPC’s subsequent handling of the District Court’s remand.

8 Appellants first challenge the EPC decision on procedural grounds having to do with
9 notice. They also challenge the substantive merits of the decision. On the grounds having to do
10 with notice, or lack thereof, it would be convenient to overlook or finesse the validity of the
11 defect alleged by Appellants. However, although there is already a protracted history to this

12 matter, it would be a mistake to compound the EPC error by explaining it away. I have no choice
13 but to find and to recommend to the City Council that there is a notice defect in this matter that
14 strikes at the core of the EPC's burden to the public—fairness, transparency, and due process.¹

15 The undisputed evidence demonstrates that the EPC ostensibly intended to perform a
16 closed record review of the District Court remanded issues, but in doing so, it concurrently
17 opened the floor to three citizens to testify in support of the application in the process.² It did
18 this without affording notice “to all owners of property within the area proposed to be changed
19 and to all owners of property within 100 feet of the exterior boundaries of the area proposed to
20 be changed, excluding public right-of-way” [Comprehensive Zoning Code, § 14-16-4-
21 1(C)(6)(b)]³ Regrettably, as explained below in more detail, the EPC erred, and it is for this
22 reason, another remand to the EPC is unavoidable. Because of the notice defect, the substantive
23 challenges to the EPC's reconsideration are not ripe for review until the EPC record can be closed
24 or until the City Council decides otherwise.

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

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

1. I note that I mistakenly informed the parties at the LUHO hearing that the IDO standard of LUHO review applies rather than the standard under the Comp. Zoning Code (there is a significant difference in in how remands are handled). I correct that mistake herein.

2. For purposes of these consolidated appeals, the term “opening the floor” means allowing testimony from the public and adding new evidence in the record.

3. Because the zone-change application was decided under the previous Comp. Zoning Code, the Integrated Development Ordinance (IDO) is inapplicable in all respects.

30 At the appeal level of review, the decision and record must be supported by a preponderance
31 of the evidence to be upheld. The Land Use Hearing Officer is advisory to the City Council.
32 If a remand is necessary to clarify or supplement the record, or if the remand would
33 expeditiously dispose of the matter, the Land Use Hearing Officer has authority to
34 recommend that the matter be remanded for reconsideration by the EPC. The City Council
35 may grant the appeal in whole or in part, deny it, or remand it to the Land Use Hearing
36 Officer or to the EPC.⁴

37 As stated above, the history of the zone-change application is protracted. Briefly, after a
38 July 13, 2017 public hearing, on July 14, 2017, the EPC issued its Official Notification of
39 Decision approving the zone-change application. That decision was appealed by the same
40 Appellants. The City Council referred the appeals to the Land Use Hearing Officer (LUHO). A
41 LUHO hearing was held on both appeals in September of that same year of which the City
42 Council adopted as its own decision. The City Council's decision was subsequently appealed to
43 the Second Judicial District Court by Appellant, Darlene Anaya only. On January 7, 2019, the
44 District Court Judge assigned to the appeal, rendered her decision. On all but two issues, the
45 Court upheld the City Council's decision. Specifically, on the two remaining issues, the Court
46 held and remanded:

47 "the following two issues for additional consideration and reasoned
48 decision making in accordance with Resolution 270-1980, §§ 1(C) and 1(E):
49 (1) whether the proposed C-2 zone is in significant conflict with purported
50 NV AP limitations on commercial development; and (2) whether some of
51 the permissive uses of the proposed C-2 zone would be harmful to adjacent
52 property, the neighborhood or the community" [Court Order].
53

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

54 Because the EPC is delegated the task of the finder of fact in zone-change applications, and
55 because this matter originated at the EPC, after the District Court remand, the City Council
56 referred the matter back to the EPC to take up the two issues remanded by the District Court.
57 The EPC took the remand issues up at its scheduled public hearing on August 8, 2019. It is
58 undisputed that before the August 8, 2019 public hearing, the City Planning Department Staff
59 caused a generalized public notice of the zone-change application and hearing to be posted in
60 the Albuquerque Journal Newspaper [R. 423].⁵ It is also undisputed that individual notices to
61 neighboring residents who qualify under § 14-16-4-1(C)(6)(b) was not afforded.

62 No one disputes that because the zone-change proposal affects a relatively small number
63 of citizens, the EPC's role in judging the applicants' application is adjudicative rather than
64 legislative. In short, there is no question that the EPC is held to a quasi-judicial standard in
65 judging the applicants' zone-change application. And no one disputes that among the specific
66 processes exercised by the EPC when it performs its quasi-judicial role, it "must adhere to
67 fundamental principles of justice and procedural due process" [*State Ex Rel. Battershell v. City*
68 *of Albuquerque*, 1989-NMCA-045, ¶ 17]. In doing so, it need not "comport with the same
69 evidentiary and procedural standards applicable to a court of law" [*Albuquerque Commons*
70 *Partnership v. City Council*, 2008-NMSC-025, ¶ 34]. However, there can be no shortcuts to
71 notice and affording the right to be heard in quasi-judicial hearings. This is because "fundamental
72 fairness is the essence of due process" [*N.M. Dep't of Workforce Solutions v. Garduño*, 2016-
73 NMSC-002, 363 P.3d 1176, ¶ 39]. Notice is an indispensable component for achieving fairness
74 in the process. Thus, it should not be surprising that the right to notice flows from the right of an

5. Notably, the newspaper notice had no information to distinguish that the hearing would be a closed record review of the zone-change application.

75 opportunity to be heard. This right and opportunity are at the core of fairness in the quasi-judicial
76 processes [*Los Chavez Cmty. Assn. v. Valencia Cnty.*, 2012-NMCA-044, ¶ 23]. These core
77 principles apply to determining what notice was required in the EPC's remand hearing.
78 Generally, because the EPC is a factfinder and was performing its fact-finding tasks in a quasi-
79 judicial capacity, in zone-change hearings individual notice under § 14-16-4-1(C)(6)(b) is the
80 default notice required to area residents (under the Comp. Zoning Code).

81 However, the Party Opponents contend that the EPC's fact-finding role was truncated or
82 altered by the District Court's remand order. In short, they contend that because the EPC already
83 heard the zone-change application in July 2017, and because the remand was only for two issues,
84 the right to notice and the opportunity to be heard at the second remand hearing is inapplicable
85 to property owners within 100-feet of the zone-change sites. Accordingly, they contend that
86 notice under § 14-16-4-1(C)(6)(b) was not necessary. Moreover, City Planning Staff asserted
87 at the EPC hearing that the August 8, 2019 remand hearing was similar in nature to a routine
88 EPC deferral or continuance matter [R. 93]. In those instances, notice under § 14-16-4-1(C)(6)(b)
89 for the deferred or continued hearing is apparently not given. However, what differentiates a
90 deferral or a continuance from the August 8, 2019 hearing is that in a routine deferral or
91 continuance the EPC opens the hearing and give actual notice of the deferral or continued date
92 when the matter will be heard at the hearing. This fact pattern, however, is not what occurred in
93 this case because at the July 2017 EPC hearing the EPC did not defer or continue its hearing, nor
94 did it give notice of the August 8, 2019 hearing date at that July 2017 hearing. In short, the EPC
95 never gave individualized notice to neighboring residents of the August 8, 2019 hearing. That is
96 undisputed.

97 Because notice and an opportunity to be heard is a bedrock of the quasi-judicial processes,
98 we must look to the nature of the acts performed at the EPC remand hearing, rather than merely
99 calling it a closed record, remand hearing to determine whether § 14-16-4-1(C)(6)(b) notice was/
100 is necessary. The record shows that the EPC apparently embraced the remand hearing as a record
101 review of the zone-change application, not requiring § 14-16-4-1(C)(6)(b) notice. But it is a fact
102 that it also allowed some neighboring residents to testify. Opening the floor to allow the three
103 neighboring residents who coincidentally spoke in support of the zone-change has the practical
104 impact of supplementing the record with new evidence, and in doing so, it reshaped the process.
105 [R. 91, 103-105].

106 It cannot be overstated that the EPC allowed this testimony even though it did not give §
107 14-16-4-1(C)(6)(b) notice. The testimony may have been considered by the EPC to be
108 extraneous, or it may not have assisted the EPC in making their decision, but that is not what is
109 important because what is meaningful is the nature of the process allowed and what in fact
110 transpired at the hearing. Fundamental fairness requires that a record cannot be selectively
111 opened to a few attendees while bypassing others. Although the EPC may have intended their
112 review to be a closed record review, that intent was unmistakably abrogated by their conduct.
113 For all practical purposes, but for the remand from District Court, the nature of the EPC's hearing
114 was in fact anything but a closed record hearing, giving rise to the need for § 14-16-4-1(C)(6)(b)
115 notice to qualifying property owners.

116 Because of the protracted history of this matter, I respectfully find it regrettable to
117 recommend a remand, but the most expedient path to finality is to cure the defects at the time
118 when they are discovered. In so finding, I also respectfully offer these suggestions to the City
119 Council. In a remand, the EPC cannot treat the hearing of the two remand issues as a closed

record review anymore. It cannot close what it already partially opened. It cannot merely strike the testimony from the record, as that is no different than ignoring it. To achieve the greatest transparency and fairness to the public, at least regarding testimony from affected neighbors who have a right to notice under § 14-16-4-1(C)(6)(b), the EPC must now open the hearing and the record. That is the most transparent and fair manner to appropriately cure the error. Because the record was supplemented in the EPC hearing with some witness testimony, the basic principles of fairness require a new hearing and that all qualifying property owners within 100-feet of the project site (the entire project site) must be given an opportunity to be heard.⁶ Accordingly, I respectfully recommend that if the City Council remands this matter to the EPC, the EPC must, at a minimum give § 14-16-4-1(C)(6)(b) notice and allow testimony.



Steven M. Chavez, Esq.
Land Use Hearing Officer

October 4, 2019

Copies to:

Appellants
Party Opponents
City Staff

6. The Party Opponents argue that because not all the zone-changes in the application are challenged, the notices should be similarly limited in scope. However, Section 14-16-4-1(C)(6)(b) does not limit notice according to what is challenged. It expressly requires that “all” owners surrounding the zone-changes in the application have right to notice.



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 21, 2019

5:00 PM

Vincent E. Griego Chambers

One Civic Plaza NW

Albuquerque/Bernalillo County Government Center

TWENTY-THIRD COUNCIL - FORTY-FIFTH 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 - Klarissa J. Peña, President, District 3

3. PROCLAMATIONS & PRESENTATIONS

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

October 7, 2019

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

Finance and Government Operations Committee - October 14, 2019

Land Use, Planning and Zoning Committee - October 16, 2019

Deferrals/Withdrawals

- *f.** R-19-201 Requiring The Department Of Municipal Development To Install Speed Humps On Dover Street Northwest To Improve Public Safety (Borrego)
- A motion was made by Vice-President Borrego that this matter be Postponed to November 18, 2019. The motion carried by the following vote:**
- For:** 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
-
- a.** EC-19-473 Request to Approve Supplemental Agreement with the Albuquerque Hispano Chamber of Commerce to Oversee the Creation and Launch of a Public Engagement Campaign
- A motion was made by President Peña that this matter be Postponed to November 4, 2019. The motion carried by the following vote:**
- For:** 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

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

10. GENERAL PUBLIC COMMENTS

11. ANNOUNCEMENTS

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

- a.** AC-19-14 Project PR-2019-002629/ 1011232/ VA-2019-00270: Anaya Law, Agents for Darlene M. Anaya, Appeals the Environmental Planning Commission Decision to Approve a Zone Map Amendment for all or a Portion of Tracts 22403B, 225B2AIA1 & 226C2B, 225B2AIA2, 225B2B, 225B2C, 225B20, 225B2E, 225B2F & 225B2A2, 225B2G, 225B2H, 225821, 226A, 227, 228, 232, 233A, 236-A, 236-B, and Land of J A Garcia Tract A, MRGCD Map #35, zoned M-I and R-I to C-2 and R-2, located North of I-40 and East of Rio Grande Blvd. between the Alameda Drain and Campbell Ditch, containing approximately 20 acres
- A motion was made by Councilor Benton that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**
- For:** 8 - Peña, Borrego, Benton, Winter, Davis, Gibson, Jones, and Harris
- Excused:** 1 - Sanchez
-
- b.** AC-19-15 Project PR-2019-002629/ 1011232/ VA-2019-00274: Peggy Norton, North Valley Coalition, Appeals the Environmental Planning Commission Decision to Approve a Zone Map Amendment for all or a Portion of

Tracts 22403B, 225B2AIA1 & 226C2B, 225B2AIA2, 225B2B, 225B2C, 225B20, 225B2E, 225B2F & 225B2A2, 225B2G, 225B2H, 225821, 226A, 227, 228, 232, 233A, 236-A, 236-B, and Land of J A Garcia Tract A, MRGCD Map #35, zoned M-I and R-I to C-2 and R-2, located North of I-40 and East of Rio Grande Blvd. between the Alameda Drain and Campbell Ditch, containing approximately 20 acres

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

For: 7 - Peña, Borrego, Benton, Winter, Davis, Gibson, and Harris

Against: 1 - Jones

Excused: 1 - Sanchez

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

14. FINAL ACTIONS

a. O-19-80

F/S 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 \$20,800,000 To Provide Funds To Finance The Acquisition, 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; Making Certain Determinations And Findings Relating To The Bond And The Project (Benton, by request)

A motion was made by Councilor Benton 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 Benton 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

b. R-19-155

A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 600 Dallas St NE 87108 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 Councilor Davis that this matter be Postponed to November 18, 2019. The motion carried by the following vote:

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

- c. R-19-156 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 8400 Chico Rd NE 87108 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 Councilor Davis that this matter be Passed. The motion carried by the following vote:**
- For:** 8 - Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- Against:** 1 - Peña
- d. R-19-199 F/S Adjusting Fiscal Year 2020 General Fund Appropriations To Provide Funding For The Albuquerque Police Department Party Intervention Team (PIT) Program (Winter, Jones, Sanchez)
- A motion was made by Councilor Sanchez 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 Sanchez that the rules be suspended for the purpose of allowing R-19-199 to be adopted the same evening it is substituted. The motion carried by the following vote:**
- For:** 6 - Sanchez, Winter, Davis, Gibson, Jones, and Harris
- Against:** 3 - Peña, Borrego, and Benton
- A motion was made by Vice-President Borrego that this matter be Postponed to November 4, 2019. The motion failed by the following vote:**
- For:** 4 - Peña, Borrego, Benton, and Gibson
- Against:** 5 - Sanchez, Winter, Davis, Jones, and Harris
- A motion was made by Councilor Davis that this matter be Amended. Councilor Davis moved 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 President Peña that this matter be Amended. President Peña moved 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 Benton that this matter be Amended. The motion died for a lack of a second.**
- A motion was made by Councilor Sanchez that this matter be Passed as Substituted, as Amended. The motion carried by the following vote:**
- For:** 7 - Borrego, Sanchez, Winter, Davis, Gibson, Jones, and Harris
- Against:** 2 - Peña, and Benton
- *e. R-19-196 Changing The Name Of Gallatin Place Northwest Between Fortuna Road And Los Volcanes Road To Ben E. Keith Way (Sanchez)

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