Notice of Decision
City Council
City of Albuquerque
March 4, 2020

AC-19-19 Project PR-2019-002629, 1011232/ VA-2019-00270/ VA-2019-00450: Anaya Law, agents for Darlene M. Anya, appeals the Environmental Planning Commission (EPC's) 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. MRGCOG Map #35, zoned M-1 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 March 2, 2020, by a vote of 7 FOR and 0 AGAINST, the City Council voted to deny the appeal by accepting and adopting the recommendation and findings of the Land Use Hearing Officer.

Excused: Peña

IT IS THEREFORE ORDERED THAT THE APPEAL IS DENIED, THE DECISION AND FINDINGS OF THE EPC ARE AFFIRMED, AND THE ZONE MAP AMENDMENT IS APPROVED

Attachments

1. Action Summary from the March 2, 2020 City Council Meeting
2. Land Use Hearing Officer's Decision

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: 3/4/20
Patrick Davis, President
City Council

Received by: Trina Gurule Date: 3/5/20
City Clerk's Office

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City of Albuquerque

Action Summary

City Council

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

Council President, Pat Davis, District 6
Vice-President, Diane G. Gibson, District 7

Vacant, District 1; Isaac Benton, District 2
Klarissa J. Peña, District 3; Brook Bassan, District 4
Cynthia D. Borrego, District 5; Trudy E. Jones, District 8
Don Harris, District 9

Monday, March 2, 2020 **5:00 PM** **Vincent E. Griego Chambers**
One Civic Plaza NW
Albuquerque/Bernalillo County Government Center

TWENTY-FOURTH COUNCIL - FOURTH MEETING

1. ROLL CALL

Present 8 - Isaac Benton, Klarissa Peña, Brook Bassan, Cynthia Borrego, Patrick Davis, Diane Gibson, Trudy Jones, and Don Harris

2. MOMENT OF SILENCE

Pledge of Allegiance in English and Spanish and any other language as determined by the Council

3. PROCLAMATIONS & PRESENTATIONS

Presentation by Ryan Mast, Director of Environmental Health and Kelsey Rader, Sustainability Officer, regarding the Albuquerque Energy Challenge

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

February 19, 2020

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

Public Safety Committee - February 25, 2020

Deferrals/Withdrawals

a. EC-19-436 Tony Sanchez Drive Right of Way Vacation (Project# PR-2019-002296 SD-2019-00072) Willow Wood Homeowner's Association requests Vacation Of Public Right-Of-Way for all or a portion of Tony Sanchez Drive SE located south of Jewel Cave Rd SE and north of Gibson Ave SE, containing approximately .154 acres

A motion was made by Councilor Harris that this matter be Postponed to June 1, 2020. The motion carried by the following vote:

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

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

a. EC-20-4 Mayor's Recommendation of Award to Mountain Vector Energy for "Energy Conservation Professional Technical Consulting Services"

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

b. EC-20-5 FY19 Status Update Goal 3, Objective 1 (Council Bill No. F/S R-18-25, Enactment No. R-2018-028) - Bridge Maintenance

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

c. EC-20-19 Report of Bond Sale Results for $33,830,000 Gross Receipts Tax/Lodger's Tax (GRT/LT) Refunding and Improvement Revenue Bonds, Series 2019A & $8,745,000 Gross Receipts Tax (GRT) Refunding Revenue Bonds, Series 2019B

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

d. EC-20-20 Lease Agreement between City of Albuquerque and Christopher M. Sosa-Gomez dba KJ's Café

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

e. EC-20-30 Exclusive Lease Listing Agreement for the Albuquerque Aviation Center of Excellence

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

f. EC-20-31 Mayor's Recommendation of Bohannan Huston, Inc., Daniel B. Stephens & Associates, and WHPacific, Inc. for City Wide On-Call Engineering Services (Hydrology, Hydraulics, and Storm Drainage)

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

g. EC-20-36 Tierra West agent for SWCW LLC request Vacation of Platted Alley for all or a portion of a platted alley adjacent to 1425 San Mateo Boulevard SE, part of a larger site containing approximately 0.3657 acres

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

***h.** EC-20-39 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Mile High Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

***i.** EC-20-40 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Thunderbird Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*j. EC-20-41 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Lobo Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*k. EC-20-42 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Petroglyph Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*l. EC-20-43 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Eastdale Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*m. EC-20-44 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Zia Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*n. EC-20-45 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Westgate Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*o. EC-20-46 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - West Mesa Ball Park

A motion was made by Vice-President Gibson that this matter be Approved.

The motion carried by the following vote:

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*p. EC-20-49 Little League Ball Park Agreement between the City of Albuquerque and Little League, Inc. - Roadrunner Ball Park

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

q. OC-20-1 Vacant, Abandoned, Substandard Properties (VASP) Working Group Quarterly Progress Report

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

r. R-19-154 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 200 Utah 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 Vice-President Gibson that this matter be Withdrawn. The motion carried by the following vote:

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

s. R-20-1 Approving And Authorizing The Acceptance Of Grant Funds From The New Mexico State Highway And Transportation Department And Providing An Appropriation To The Parks And Recreation Department For Fiscal Years 2020 And 2021 (Benton, by request)

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

t. R-20-6 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 225 63rd St NW 87105 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 (Peña, by request)

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

*u. R-20-16 Approving Grant Funds Awarded For The FY2020 Fire Protection Grant With The New Mexico State Fire Marshal's Office And Providing For An Appropriation To Albuquerque Fire Rescue In Fiscal Year 2020 (Peña, by request)

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

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

10. GENERAL PUBLIC COMMENTS

11. ANNOUNCEMENTS

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

a. AC-19-19 Project PR-2019-002629, 1011232/ VA-2019-00270/ VA-2019-00450: Anaya Law, agents for Darlene M. Anya, appeals the Environmental Planning Commission (EPC's) 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. MRGCOG Map #35, zoned M-1 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 Jones that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

b. AC-19-20 Project PR-2019-002629, 1011232/ VA-2019-00270/ VA-2019-00450/ VA-2019-00454: Peggy Norton, North Valley Coalition, appeals the Environmental Planning Commission (EPC's) 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. MRGCOG 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 Jones that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:

For: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Harris

Excused: 1 - Peña

14. FINAL ACTIONS

a. O-20-2 F/S 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 "1716 Central Avenue, LLC Metropolitan Redevelopment Bond Application"; Authorizing The Acquisition Of Land And Existing Improvements And Construction Of A Building Within The Historic Central Metropolitan Redevelopment Area; Authorizing The Disposition By Lease And Sale Of The City's Interest In Such Project To 1716 Central Avenue, LLC, Its Successors And Assigns; Authorizing The Issuance And Sale Of The City Of Albuquerque, New Mexico Metropolitan Redevelopment Revenue Bonds (The Franz Project), Series 2020 In The Maximum Principal Amount Of $10,000,000 To Provide Funds To Finance A Portion Of The Costs Of The Construction Of The Project; Authorizing The Execution And Delivery Of An Indenture, Lease Agreement, Bond Purchase Agreement, The Bonds, And Other Documents In Connection With The Issuance Of The Bonds And The Project; Making Certain Determinations And Findings Relating To The Bonds 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: 6 - Benton, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 2 - Peña, and Harris

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

For: 6 - Benton, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 2 - Peña, and Harris

b. R-19-214 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 5404 Alvarado Pl NE 87110 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 (Gibson, by request)

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

For: 6 - Benton, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 2 - Peña, and Harris

c. R-20-4

A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 1308 8th St SW 87102 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 (Benton, by request)

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

For: 6 - Benton, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 2 - Peña, and Harris

d. R-20-5

A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 1112 Iron Ave SW 87102 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 (Benton, by request)

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

For: 6 - Benton, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 2 - Peña, and Harris

e. R-20-20

Adjusting Fiscal Year 2020 General Fund Appropriations To Provide Funding For A Gun Buy-Back Program Through A Collaborative Effort Between The City Council, Mayor's Office, Albuquerque Police Department And Albuquerque Metro Crimestoppers (Benton, Borrego, Gibson, Peña)

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

For: 7 - Benton, Peña, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 1 - Harris

f. R-20-21

Establishing The City Council's Budget Priorities For The Fiscal Year 2021 City Budget (Davis)

A motion was made by Councilor Bassan that this matter be Amended. Councilor Bassan moved Amendment No. 1. The motion carried by the

following vote:

For: 7 - Benton, Peña, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 1 - Harris

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

For: 6 - Benton, Peña, Bassan, Borrego, Davis, and Jones

Against: 1 - Gibson

Excused: 1 - Harris

A motion was made by Vice-President Gibson that this matter be Amended. Vice-President Gibson moved Amendment No. 3. The motion carried by the following vote:

For: 7 - Benton, Peña, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 1 - Harris

A motion was made by Councilor Borrego that this matter be Amended. Councilor Borrego moved Amendment No. 1 to Floor Amendment No. 3. The motion died for lack of a second.

A motion was made by President Davis that this matter be Amended. President Davis moved Amendment No. 4. The motion carried by the following vote:

For: 7 - Benton, Peña, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 1 - Harris

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

For: 7 - Benton, Peña, Bassan, Borrego, Davis, Gibson, and Jones

Excused: 1 - Harris

g. RA-20-1 Amending Article III, Section 4 of the City Council Rules of Procedure relating to "Proclamations and Presentations." (Davis)

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

For: 3 - Peña, Bassan, and Borrego

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

Excused: 1 - Harris

A motion was made by Vice-President Gibson that this matter be Amended. Vice-President Gibson moved Amendment No. 2. The motion carried by the following vote:

For: 6 - Benton, Peña, Bassan, Davis, Gibson, and Jones

Against: 1 - Borrego

Excused: 1 - Harris

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

For: 5 - Benton, Bassan, Davis, Gibson, and Jones

Against: 2 - Peña, and Borrego

Excused: 1 - Harris

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

For: 5 - Benton, Bassan, Davis, Gibson, and Jones

Against: 2 - Peña, and Borrego

Excused: 1 - Harris

BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-19-19 and AC-19-20

PR-2019-002629 (1011232); VA-2019-00270 VA-2019-00274; VA-2019-00450; VA-2019-00454; 17EPC-40011

North Valley Coalition, Inc.,
Darlene M. Anaya,

Appellants,

Garcia Real Estate Investments, LLC,
G3 Investors, LLC, Dos Vientos, LLC,
Sinclair Properties, LLC,

Party Opponents.

I. BACKGROUND

These appeals are two separate appeals from a decision of the Environmental Planning Commission (EPC). Appeal AC-19-19 is an appeal by Darlene Anaya (Anaya) and AC-19-20 was filed by the North Valley Coalition, Inc (NVC). The two appeals were joined for efficiency and expediency because they each concern the same EPC decisions and the same facts. The issues that each appeal presents significantly overlap and will be discussed in detail below. There is an extensive history comprising three appeal records associated with these two consolidated appeals.

To understand how the EPC dealt with the narrow issues that these consolidated appeals

present, the two previous records become relevant to at least one of the narrow issues presented. I find that the two previous records (AC-17-7 and 8, and AC-19-14 and 15, respectively) are relevant and must be incorporated with the record of the appeals herein. Notably, at the Land Use appeal hearing, the parties stipulated to incorporating the two previous EPC records with these appeals.

Many of the facts are summarized in the Land Use Hearing Officer's (LUHO) recommendation in AC-17-7 and 8.[1] However, for better clarity of the facts and the history of these appeals, the relevant procedural events beginning with the submission of the application are restated below. Because the three individual records from each of the three EPC hearings and their subsequent appeals are relevant, I will reference the records from which they derive as I elaborate on the events and facts below.[2]

A. The First EPC Record

The first record demonstrates the following. The applicants submitted their zone-change application to the City in April 2017 [R1. 333]. The zone-change site is located immediately North of the Interstate-40 freeway, adjacent to it, and just East of Rio Grande Boulevard between the Alameda irrigation drain and the Campbell irrigation ditch [R1. 337]. The record demonstrates that of the 20-acres which comprises the zone-change site, 14.21

1. The LUHO's findings and recommendations in Appeals AC-17-7 and 8 where accepted by the City Council and approved by the District Court. Discussed in greater detail below, although the District Court remanded the appeals, it did so only to require "additional consideration" on the two issues decided by the EPC in these latest appeals [R2. 212].

2 The record of AC-17-7 and 8 will be referenced as R1 (record 1) and page number. The record of AC-19-14 and 15 will be references as R2 (record 2), and the record of these appeals herein will be noted as R3.

acres is zoned R-1, and 5.29 acres is currently zoned M-1(under the Comprehensive Zoning Code) [R1. 291-294].[3] The 5.29 acres of M-1 lands abut I-40 to the South and SU-2 for LDMUD zoned lands to the West [R1. 291-294].[4] The 14.21 acres of R-1 zoned land (currently 7.85 acres are zoned R-2) in the site is sandwiched by the M-1 zoned land on the South side, by R-3 zoned lands on the East side, by R-1 zoned lands on the North side, and on the West side encompasses SU-2 for LDMUD zoned lands [R1. 291-294]. Notably, although not included in the zone-change, the LDMUD zoned lands directly West of the zone-change site, abut Rio Grande Blvd. and are owned by one of the applicants (Garcia family)[5] [R1. 291-294]. The entire 20-acre site was originally zoned R-1 but in 1957 before I-40 was constructed the 5.29 acres currently abutting I-40 was rezoned to M-1and was part of a larger M-1 zoned area [R1. 298]. The evidence further shows that when I-40 was constructed, the larger M-1 zone was split by I-40 leaving only 5.29-acres of the M-1 zone North of I-40 [R1. 338]. The 5.29-acres of M-1 zoned land within the site is identified in the City's 2017 Comprehensive Plan as part of an "Area of Change" [Comp. Plan, p. 5-25]. In addition, portions of the existing R-1 zoned lands within the site are also identified in the City Comprehensive Plan as part of a larger "Area of Consistency" [Comp. Plan, p. 5-25]. Most of the 20-acre zone-change site remains vacant land, including all the M-1 zoned lands

3. Significant to the history of these appeals, as explained more below, factually, because only the C-2 zoning was remanded by the Court, the previous 7.85 acres of the R-1 one has been replaced with R-2 zoning. However, so as not to make these appeals more complicated, I continue to describe the site using the pre-application designations.

4. Notably, except for the 20-acre zone-change, the surrounding zoning converted under the IDO to different categories. For purposes of these consolidated appeals, however, for consistency the conditions of the area must be evaluated according to the zoning designations in 2017.

5. The relevance of this fact is two-fold: 1) the consolidated ownership allows the applicant to create an additional access route to the zone-change site by potentially extending Floral Rd. East of Rio Grande Blvd., and 2) the SU-2 for LDMUD zoned land is part of the study area for an evaluation of R-270-1980 criteria to justify the zone change.

[R1. 338].

After meeting with the City Planners, the City Traffic Engineer, neighbors and the affected neighborhood associations in various mandatory meetings, the EPC held its first substantive hearing on the application on July 13, 2017. Planning Staff submitted a detailed Staff report to the EPC recommending that the EPC approve the zone changes because the applicants' have satisfied their burdens of proof. The EPC concluded the extended hearing with approving the application and the zone changes. In a ten-page decision the EPC made 20 findings to support their decision [R1. 24-34].

Both Appellants herein filed separate timely appeals of the EPC's decision (AC-17-7 and AC-17-8). The City Council referred the appeals to this LUHO. An extended appeal hearing was held on September 21, 2017. On October 2, 2017, after making a number of findings, I submitted my recommendation to the City Council recommending that the Council deny both appeals. The City Council voted to accept and adopt the findings and recommendations of the LUHO.

Alleging nine issues of error, Appellant Anaya alone filed a timely appeal to the Second Judicial District Court. In a memorandum decision, the Honorable Shannon Bacon upheld the City Council's decision on seven of those issues, but remanded the appeal to the City for:

> additional consideration and reasoned decision making in accordance with Resolution 270-1980, §§ l(C) and I(E): (1) whether the proposed C-2 zone is in significant conflict with purported NVAP limitations on commercial development; and (2) whether some of the permissive uses of the proposed C-2 zone would be harmful to adjacent property, the neighborhood or the community [R2. 212].

Upon remand from the Court, the City Council referred the matter back to the EPC to hold a

public hearing "for additional consideration and reasoned decision making" on the two remaining issues ordered by the Court for resolution.

B. Second EPC Record

On August 8, 2019, the EPC held a second public hearing on the application, but this time to only address the two seemingly narrow issues from the Court's remand order. However, at the hearing there was some confusion as to whether the public hearing was a "closed" record review (not taking new evidence or testimony) or whether the hearing was open to supplement the record [R2. 93-94]. The EPC ostensibly treated the hearing as a closed record review, but it also allowed additional testimony from at least three neighboring residents [R2. 91, 103-105]. To compound the error, it was a stipulated fact that the EPC failed to give individualized notice of the hearing to residents residing within 100 feet of the zone-change site [R2. 93, 103A]. Despite this flaw, the EPC again voted to grant the zone-changes and in doing so expressly found (1) that the C-2 zone does not significantly conflict with the NVAP and (2) the C-2 permissive uses thereon the site will not be harmful [R2. 17-27]. Both Appellants herein filed timely separate appeals (AC-19-14 and AC-19-15) and the case made its way to a LUHO hearing once again [R2. 10 and 32].

A LUHO hearing on the second appeal was held on September 30, 2019 [R3. 100A]. Because notice under § 14-16-4-l(C)(6)(b) of the Comprehensive Zoning Code was not given to those qualifying for such notice the City Council upon recommendation from the LUHO remanded the appeals back to the EPC for another hearing and required that notice under the above Code section be perfected.

C. Third EPC Hearing

On Remand from the City Council, in a December 12, 2019 public hearing (with the appropriate notices to the public, neighboring residents, and associations) the EPC once again took up the narrow issues ordered by the District Court to be resolved [R3. 107A]. After hearing more witness testimony, accepting additional evidence in the record, and debating the relevant issues prescribed for resolution by the Court, in a 7-0 vote, the EPC found among other relevant matters that the C-2 zone does not significantly conflict with purported NVAP limitations on commercial development, and that the C-2 permissive uses would not be harmful to adjacent property, the neighborhood or the community [R3. 62A-71A].

Both Appellants, Anaya and the NVC, filed timely appeals of the EPC's December 12, 2019 decision [R3. 11A and 56A]. A protracted LUHO hearing on both consolidated appeals was held on February 12, 2020. As indicated above, all parties stipulated that all previous records regarding the zone-change site application should be included in the appeal record.

II. STANDARD OF REVIEW

Under the Comprehensive Zoning Code, a review of an appeal is a whole record review to determine if the EPC erred:

1. In applying adopted city plans, policies, and ordinances in arriving at the decision;

2. In the appealed action or decision, including its stated facts;

3. In acting arbitrarily, capriciously or manifestly abusive of discretion.

At the appeal level of review, the decision and record must be supported by a preponderance of the evidence to be upheld. The Land Use Hearing Officer is advisory to the City Council. If a remand is necessary to clarify or supplement the record, or if the remand would expeditiously dispose of the matter, the Land Use Hearing Officer has authority to recommend that the matter be remanded for reconsideration by the EPC. The City Council may grant the appeal or deny the appeal in whole or in part.[6]

III. DISCUSSION

I have closely reviewed the record of the EPC's December 12, 2019 hearing and I have gone back to the two previous records to reevaluate all the evidence to determine if the applicants and the EPC have adequately addressed the narrow issues remanded by the Court (remand issues). In doing so, I respectfully find that there is substantial evidence in the record (particularly in the most recent record) to support the EPC's December 12, 2019 decisions on the remand issues. Thus, as described in more detail below, the appeals should be denied.

Beginning with the Appellants' claims, Appellants first generally contend that the EPC acted arbitrarily and or capriciously when individual EPC members questioned the NVC representative, Peggy Norton about "the NVC's authority to speak" on the issues before the EPC. Appellants next claim that EPC Finding 7(g) in its Official Notification of Decision is erroneous because the EPC misconstrued and or misapplied the NVAP. Finally, Appellants generally claim that the EPC ignored various harmful impacts of that the

6. Although substantially similar in form as in the IDO, the standard of review arises from the Comprehensive Zoning Code. 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.

permissive uses in the proposed C-2 zone will cause, and therefore the applicants failed to adequately demonstrate that the permissive uses in the C-2 zone would not be harmful. In this regard, Appellants claim that EPC Finding 9.E is therefore erroneous.

A. It was not arbitrary or capricious conduct for EPC members to make inquiries of the NVC representatives about the NVC, its membership, and their voting on the matters before the EPC.

As stated above, Appellants argue that individual EPC Commissioners acted arbitrarily and or capriciously when they asked NVC representatives if they had authority to oppose the application at the hearing. In doing so, Appellant Anaya referenced seven separate instances of what he calls inappropriate questioning [R3. Presentation Overview]. Anaya claims that in the August 8, 2019 EPC hearing and again at the December 12, 2019 EPC hearing, EPC commissioners expressly questioned two NVC representatives about their authority and the authority of the NVC.

Under New Mexico law, arbitrary and or capricious conduct is action taken that "is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of the Sierra Club v. New Mexico Mining Commission*, 2003-NMSC-005, ¶ 17. Moreover, it is action taken "without proper consideration in disregard of the facts and circumstances." *Perkins v. Department of Human Services*, 1987-NMCA-148, ¶ 20.

In reviewing each of the seven instances, not only do I disagree with how Anya characterizes the EPC questioning of the NVC representatives, I disagree that the questions demonstrate arbitrary or capricious conduct. In five instances, the questions revolved around three issues. EPC commissioners were concerned with (1) how many residents in the

area were represented by the NVC; (2) what percentage or number of members supported the NVC's opposition to the application, (3) and whether the NVC membership, or just the NVC's Board voted to oppose the application [R2. 89-90; and R3. 119A-121A]. Two instances of questioning claimed by Anaya as arbitrary and capricious conduct were simply questions by EPC commissioners asking for clarification on the remand Court order [R3. 108A and 127A].

I find that inquiries of how the NVC arrived at its position of opposing the application were relevant, rational, and for a legitimate public purpose. Neighborhood associations that are registered with the City as official "recognized neighborhood associations" enjoy certain rights but also have specific reporting duties under City law. City Neighborhood Association Recognition Ordinance, § 14-8-2-5(A)(4), requires that:

> "[w]hen a neighborhood association presents its official position on an issue to the city, it shall be prepared to identify whether the decision was reached by the board, a poll of the general membership, or by a vote at a general membership meeting, and the vote for and against the position."

Thus, the questioning was not arbitrary and capricious conduct as Appellants contend. The questioning in the five instances alleged as bad conduct, were aimed to seek clarification from the NVC representatives about how the decision opposing the application was reached by the NVC. Under § 14-8-2-5(A)(4), those inquiries were legitimate and therefore not arbitrary or capricious. The other two instances concerned matters of clarification regarding the hearing, thus were also rational and legitimate.

B. Under the totality of the circumstances, including under the Comprehensive Plan, the surrounding zones and uses, and conditions at and near the site, there is substantial evidence in the record demonstrating that the proposed C-2 zone does not significantly conflict with the NVAP.

Appellants together contend that the decision of the EPC regarding the NVAP is based upon an erroneous interpretation of it. Specifically, they contend that the evidence supporting EPC Finding 7(g), that the proposed C-2 zone does not significantly conflict with the NVAP, is flawed because the EPC misapplied or misconstrued it or ignored certain other NVAP provisions dealing with commercial development. In its Finding 7(g), the EPC found that:

> The requested C-2 zone is not in significant conflict with purported NVAP limitations on commercial development because the most applicable Goal/Policy language (Goals 6 and 11, page 6) does not limit commercial development on the subject site. Any perceived or alleged limitation on commercial development in the Rank II NV AP is tempered and superseded by the Policy direction of the Rank I Comp Plan, per Section 14- 13-2-2 Rank Importance of City Plans [R3. 48A].

It is important to pause and recapitulate the appropriate standard for reviewing the EPC's decision, particularly with regard to how EPC interpretations of law and City plans are reviewed. As stated above an administrative standard of review applies to determining if the EPC erred. Under this standard, it is the general rule that the whole record must be reviewed to ascertain if there is substantial evidence to support the result reached by the EPC. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Embudo Canyon Neighborhood Ass'n v. City of Albuquerque* - 1998-NMCA-17, ¶8. Furthermore, unless it can be shown that the EPC's interpretation of the relevant NVAP language was irrational such that a reasonable mind cannot accept it as adequate to support the result reached, the EPC's interpretation is given deference under New

Mexico law. Therefore, even if Appellants can show that a contrasting interpretation of the NVAP exists, such a showing in itself is insufficient to disturb the EPC decision. Put another way, the question is not whether substantial evidence exists to support the opposite result or a different interpretation of the NVAP, but rather the question comes down to whether there is substantial evidence in the record that can support the EPC's interpretation and the result it reached.

I next note for the City Council, that the question remanded by the Court regarding the NVAP, arises from R-270-1980, § 1.C, which is one of many required tests to judge whether the change in zoning should be granted. R-270-1980, § 1.C states in full:

> A proposed change *shall not be in significant conflict* with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including privately developed area plans which have been adopted by the City (Emphasis added).

Thus, under R-270-1980, § 1.C, finding that the change in zoning conflicts with the NVAP is insufficient to deny the zone-change. A change in zoning can only be denied under R-270-1980, § 1.C if the conflict rises to a *significant conflict.* Just what a "significant conflict" is admittedly difficult to quantify. However, there is guidance in the meaning of the word. In R-270-1980, § 1.C, the word "significant" is used as an adjective and means "of a noticeably or measurably large amount"[7] To ascertain if there is significant conflict then, one must look to the NVAP as a whole to determine the extent of conflict, if any.

Appellants contend that the EPC misconstrued two of 12 goals total in the NVAP when it found that the proposed C-2 zone did not significantly conflict with the NVAP. The EPC

7. 2020, Merriam-Webster Disctionary.com.

agreed with Appellants that out of the 12 goals in the NVAP, Goals 6 and 11 are "the most applicable" goals to the zone-change. [R3. 48A]. For clarity, both goals are restated below. Respectively, NVAP goals 6 and 11 state:

> To encourage quality commercial/industrial development and redevelopment in response to area needs in already developed/ established commercial industrial zones and areas. To *discourage future commercial/industrial development on lots not already zoned commercial/ industrial* (Emphasis added) [NVAP goal 6, p. 6].
>
> To locate commercial and industrial development within the I-25 corridor, and selected areas along the I-40 corridor, especially as an alternative to extensive lower valley commercial/industrial development [NVAP goal 11, p.6].

Appellants first claim that the words "discourage commercial…development" in goal 6 is synonymous with, or corresponds to, a general prohibition on commercial development that is not within "already zoned commercial/ industrial" areas. It is a fact that of the 11.61 acres proposed to be zoned C-2, 6.32 acres were not previously commercial.[8] Appellants further contend that like Goal 6, Goal 11 essentially acts like a prohibition on new commercial zoning anywhere in the North Valley except "within the I-25 corridor and selected areas along I-40." Citing to a map on page 37 of the NVAP, Appellants claim that the proposed C-2 zone is not within one of the "selected areas [in the NVAP] along the I-40 corridor" and therefore the EPC's decision violates Goal 11.

I have reviewed the entire NVAP, and I do not find that the proposed C-2 zone significantly conflicts with the NVAP. First, the 12 goals in the NVAP, although prominent, are clearly aspirational, not prohibitions. And the NVAP requires that the meaning and intent

8. See the applicants' before and after map of the site at R2. page 62.

of each goal in the NVAP is to be gleaned from the text of the NVAP.[9] Appellants have not pointed to any language within the text of the NVAP from which they cite to judge how Goals 6 and 11 should be interpreted. I note that there is no clear language in the text of the NVAP that can assist with the interpretation of Goals 6 and 11. There is however general language from which Goals 6 and 11 can be interpreted.

The EPC interpreted the word "discouraging" in Goal 6 to not "limit commercial development on the subject site" [R3.48A]. It went further and expressly found that "any perceived or alleged limitation...is tempered and superseded by the...Rank I Comp Plan" [R3. 48A]. Consistent with the EPC's interpretation of Goals 6 and 11, I find that the words "discourage" and "encourage" in the NVAP are utilized as descriptors for "preferred scenarios" or "scenarios of choice" [NVAP, 30]. In short, they are words of aspiration for a preferred scenario. Taken as a whole these terms are meant to provide best case scenarios and not prohibitions on commercial development. Throughout the NVAP, this is clear [NVAP, p. 30, 36, 46, Appendices 6]. Accordingly, the EPC's interpretation of Goal 6 (as not being a limitation on commercial zoning) is rational and consistent with the NVAP.

I also find that the EPC's interpretation of the word "discourage" is not inconsistent with the standard dictionary meaning of the word as well. As a transitive verb in the Merriam Webster, 2020 dictionary, one definition of discourage is "to dissuade or attempt to dissuade from doing something" [Meriam-webster.com 2020 Ed.]. The fact that there are other dictionary definitions of the word is not relevant because under the administrative standard of review, it is the EPC's interpretation that is judged for reasonableness and not whether there are alternative definitions.

9. See in the NVAP, City Council Resolution 255, Enactment 60-1993, Section 1, par. C.

Although the Court remanded this seemingly narrow question to the City for "additional consideration and reasoned decision making," the resolution of this question also implicates more than just the NVAP. Because the NVAP is "subordinate" to the Comprehensive Plan, and because R-270-1980, § 1.C contemplates the interrelationship of the Comp. Plan with the NVAP (as a city master plan), proper resolution of the Court's remand inquiry, entangles the Comp. Plan in the analysis [Comp. Plan, 1-8]. It is clear that the EPC recognized this entanglement in its finding 7(g). In this regard, the EPC appears to have taken a holistic approach to interpreting the NVAP Goals 6 and 11, their meaning and applicability to the zone-change, particularly with regard to the C-2 proposed zone.

In Finding 7(g), which Appellants place their focus on regarding the first remand issue, the EPC expressly elaborated on the Comp. Plan's relevance and its relationship to the NVAP. To paraphrase, the EPC recognized that any NVAP limitations on C-2 development or zoning, whether "perceived" or not have to be judged against the backdrop of policies and goals in the Comp. Plan to determine if they are actual limitations on such development at the proposed site [See EPC Finding 7(g), R3. 48A]. Notably in the Comp. Plan there are over a dozen individual policies from which the EPC specifically found "temper" the "perceived limitations" in the NVAP on commercial development at the zone change site.

For example, in the NVAP, although ignored by Appellants, it cannot be disputed that the proposed C-2 zone is in fact situated along the I-40 corridor, and that this site is designated by the NVAP as a "central urban" area [NVAP, p. 42]. Although, as the District Court found, the central urban area designation is a "remnant" of a previous comprehensive plan, I find that because it is a category mapped out in the NVAP, it is still relevant in the analysis of the NVAP

to flesh out "significant conflicts." The EPC acknowledged that the proposed C-2 zone is mapped by the NVAP as central urban which is one of highest intensive development categories therein the NVAP.[10] In addition, in the NVAP, a designated "urban" area is an area encouraged for infill development [NVAP, p. 43]. Infill in the City is a meaningful and significant policy objective in the Comp. Plan of which was also acknowledged by the EPC [Comp. Plan, 5-27 and R3. 27-29].

Although in the 2017 Comp. Plan, the category of "central urban" was merged into the broader descriptive terms "Area of Change" and "Areas of Consistency" [Comp. Plan, 5-24]. Among other dense uses, "the Areas of Change and Consistency strategy is designed to identify places designated for higher intensity uses..." [Comp. Plan 5-24]. Thus, it is clear, as the EPC found, the proposed C-2 zone does not conflict with numerous policies in the Comp Plan [R3. 63A-68A]. Therefore, it is also clear, that if there is a perceived conflict or limitation to commercial development at the site, not only is it "tempered" by the Comp. Plan policies, but a perceived conflict is not a significant conflict because Goals 6 and 11 are aspirational, not compulsory.

Appellants next contend that a map in the NVAP stands for the proposition that C-2 uses cannot be placed at the site because the map does not show or contemplate "large scale" commercial uses at the applicants' proposed location for the C-2 zone. The map Appellants' point to is on page 37 of the NVAP.

However, to agree with Appellants, one must assume, as Appellants have, that C-2 uses

10. The evidence shows that since 1993 when the NVAP was enacted, there has been at least one update of the Comprehensive Plan. The 2017 version of the Comp. Plan is applicable to this zone change, but terms in previous versions were used in the NVAP and have changed.

are analogous to the "Large Scale Community & Regional Commercial" areas designated in the map. Yet, other than their unsupported assumption, Appellants have not presented any evidence to make this critical connection. In reviewing the language in the Zoning Code, specifically the text of the C-2 zone under § 14-16-2-17, I find no support for Appellants' argument that the term "Large Scale Community & Regional Commercial" in the map refers to C-2 uses. Absent proof to support their assumption, the argument is without merit and must be rejected.

Appellants also challenge the C-2 zoning in another manner. To show a "significant conflict" with the NVAP, Appellants also contend that the NVAP requires that all new commercial development in the North Valley be in the form of "village centers." Appellants presume that the term "village centers" is attributable to, or synonymous with zoning categories. [R3. Appellant Overview Presentation]. Or more specifically, Appellants presume that C-2 zoning conflicts with village center policies in the NVAP. Appellants further claim that because only village centers are permissible in new commercial zones in the North Valley, the EPC erred in its interpretation of the NVAP.

At best, I find Appellants' arguments to be baseless and unsubstantiated conjecture because the term "village center principles" is clearly defined in the NVAP to mean:

> a form of development which meets three principles of pedestrian accessibility, mixed use and appropriate scale and character to area setting [NVAP, Appendices-53].

Thus, a village center, as that term is used in the NVAP, relates exclusively to "principles" for (1) accessibility, (2) mixed uses, and (3) scale and character of the setting. City Planning Manager, Russel Brito testified at the LUHO hearing that these are site planning principles and

they do not implicate zones or uses in any zone category. There is very clear support for Mr. Brito's testimony. The NVAP makes it clear that village center principles can be applied "in *all* commercial development" (Emphasis added) [NVAP, p. 134]. Not only have Appellants failed to show why C-2 uses cannot satisfy small scale site planning and or satisfy the village center principles of the NVAP, but Appellants have not identified how the C-2 zone or uses therein conflict with village center principles of the NVAP. Appellants' have not satisfied their burden.

Appellants also claim that EPC Finding 7(g) significantly conflicts with the NVAP because the NVAP requires that residential uses "shall be stabilized" [NVAP, p.7]. Appellants point to at least four other parts of the NVAP that requires the stabilization of residential uses. Again, Appellants assume too much. The premise in Appellants' argument is that the proposed C-2 zone will have a destabilizing effect on residential uses. Yet again, Appellants have not supplemented the record with evidence to support their premise.

Although in the NVAP there is one specific citation to a specific circumstance in the North Valley--a general acknowledgement that commercial uses can negatively impact an *existing* residential neighborhood along Alameda Blvd [NVAP, Appendices 22], I find no support in the NVAP for Appellants' broad assumption that C-2 uses at the site will destabilize the area residential uses. The proposed C-2 zone is not in an existing residential neighborhood. More importantly however, Appellants have not put forth any substantiated facts to demonstrate how any actual residential uses or zones near the site will be destabilized

or be negatively impacted by the proposed C-2 zone.[11] Conversely, there is an abundance of evidence in the record showing that mixed use zoning and commercial zoning confer mutual benefits to the zones in terms of employment and services, and that residential uses and commercial uses coexist throughout the City, and that this coexistence in fact helps to balance and stabilize the residential uses [R3. 64A-68A]. This evidence was not rebutted by Appellants.

Therefore, regarding the first remand issue, to summarize, I find that the EPC did not err when it found that the C-2 zone does not significantly conflict with the NVAP under R-270-1980, § 1.C. Despite Appellants' claims, the NVAP does not prohibit C-2 zoning at this site. Conversely, there is inadequate evidence presented by Appellants to support their multiple arguments. They also failed to present sufficient evidence to show that the C-2 zone *significantly* conflicts with the NVAP.

C. Appellants failed to present competent substantial evidence to rebut the evidence in the record demonstrating that the permissive C-2 uses will not be harmful to the area or to the larger community. Conversely, there is substantial evidence in the records to support the EPC's findings that the permissive C-2 uses will not be harmful.

With regard to the remand issue of harm, the District Court concluded that the EPC failed to give due "consideration of the permissive uses" allowed in a C-2 zone for the purpose of ascertaining their potential for any harmful impacts to adjacent property, the neighborhood or the community as required by R-270-1980, § 1(E) [Dist. Ct. Memo, p. 12]. To satisfy the

11. As described in the next section below, Appellants rely on the opinions of residents who testified at the EPC hearings to show generalized harmful impacts.

remand issue, the applicants supplemented the record with two tables (use tables) showing that each of the permissive C-2 uses under § 14-16-2-17(A) would not be harmful at the site [R3. 197A-201A]. City Planning Manager Russel Brito reviewed the use tables, and in a supplemental report to the EPC, agreed with the applicants' analysis and conclusion that the C-2 uses would not be harmful [R3. 95A]. Planning Manager Brito's complete findings are useful to restate here. Planning Manager Brito wrote:

> The applicant's outline of each C-2 use and the explanation of no harm to the community is comprehensive and useful. Staff is in agreement with the applicant's analysis because many of the commercial uses are either already allowed in some fashion by the existing M-1 zoning and/or any adverse impacts of the C-2 uses will be addressed by site design requirements, distance separation requirements, required off-site infrastructure (vehicular access) per use and intensity, and/or by required landscape and buffering. The applicant correctly notes that C-2 zones and C-2 uses "coexist with adjacent and nearby residential neighborhoods in many areas throughout Albuquerque." It is not unusual for C-2 zoning to be next to residential neighborhoods and there are existing buffer and separation requirements when this occurs.
>
> The applicant goes further by outlining multiple M-1 uses that would be eliminated by the zone change request that would be harmful adjacent property, the neighborhood, or community including, but not limited to, C-3 permissive uses, IP (industrial park) uses, manufacturing, vehicle dismantling, truck terminal, poultry and rabbit killing, concrete batch plant, gravel stockpiling, and construction equipment sales.
>
> Given the context of the site, the proposed zoning pattern with transitions of use intensity from I-40 northward, the permissive uses of the proposed C-2 zone would not be harmful to adjacent property, neighborhood, or community (R-270-1980, (E)) [R3. 95A].

In its December 12, 2019 hearing and in its finding 9.E, the EPC specifically found that the C-2 permissive uses at the C-2 zone site would not be harmful [R3. 69A].

Appellant Anaya, however, generally claims that the EPC failed to consider harms such

as "traffic, noise, pollution, and harm[s] unique to the character of the area" [R3. 16A]. Anaya also broadly claims that the EPC failed to explain or otherwise contend with what she considers the "abundant testimony of harm" in the record and therefore the EPC erred [R3. Anaya, Overview Presentation]. The NVC makes similar arguments but essentially challenge the applicants' use table with generalized contentions that EPC finding 9.E does not satisfy R-270-1980, § 1(E) [R3. 59A].

Under R-270-1980, a zone change cannot be granted if "some of the permissive uses in the zone would be harmful to adjacent property, the neighborhood or the community" [R-270-1980, § 1(E)]. Because R-270-1980, § 1(E) speaks to "uses in the zone" and to adjacency of residents as well as the greater area in proximity to the zone-change site, the inquiry is necessarily site-specific to the proposed location of the zone-change. The investigation of harm must relate to a permissive use at the subject site where that use potentially could be located. And because it is a site-specific analysis, the analysis must necessarily be comparative, requiring a comparison of the conditions in the area and the existing permissive uses allowed in the existing zone with the permissive uses in the proposed zone to determine net harm. Thus, the precise question that must be resolved is: Did the applicants present competent substantial evidence to support EPC Finding 9.E with regard to the proposed location of the C-2 zone?

I start the discussion by noting that in the Court's decision, District Court Judge Bacon expressly found that "[s]ubstantial evidence supports the City's finding that the existing zoning at the site is inappropriate under [R-270-1980, §] 1 (D)(3). The Court also expressly found that the EPC did not err in finding that a different use category is *more advantageous to the community* as articulated in the Comprehensive Plan" (Emphasis added) [Dist. Ct. Memo,

444 P.18].

445 Although the Court's finding on the "more advantageous" requirement of R-270-1980,
446 § 1(D)(3) relates only to the Comp. Plan, this finding is relevant on Anaya's obscure and ill-
447 defined argument that the C-2 zone change harms the "character" of the North Valley.
448 Because it has already been decided that the zone change is more advantageous to the
449 community, without more, it must be accepted and put to rest that the zone change adds no
450 harm to the character of the area. Setting the Comp. Plan aside for the moment, however, I
451 find that Anaya's contention of a generalized harm to the character of the North Valley is so
452 vague and ill-defined by Anaya, without any basis to objectively evaluate it under R-270-1980,
453 § 1(E). Anaya has not met her burden to make any connection between the character of the
454 North Valley and how the alleged character is or will be harmed. For all these reasons I find
455 that Anaya's argument that the permissive uses allowed in a C-2 zone will harm the character
456 of the North Valley under R-270-1980, § 1(E) should be denied.

457 Next, I find that the use tables presented by the applicants is substantial evidence to
458 show that the C-2 permissive uses will not be harmful to the adjacent property, the
459 neighborhood, or the community. I note that the Appellants did not rebut that the tables
460 demonstrate that all the permissive C-2 uses are already permissively allowed in the M-1 zone
461 at the site.

462 Appellants, however, challenge two permissive C-2 uses shown in the use tables and
463 argued that these uses will be harmful to the area [R3. Anaya, Overview Presentation]. Anaya
464 claims that drive-in restaurants and gasoline retail, both permissive in the proposed C-2 zone,
465 would cause harm to the neighborhood because of "idling automobiles," or "rapid turn-over

traffic," and both adversely impact air quality [R3. Anaya, Overview Presentation]. The NVC makes a similar argument [R3. 59A].[12] Both Appellants, however, have not supported these arguments with evidence, only supposition. Conversely, the applicants' use tables are supported by the Zoning Code and by the City Planners' evaluation of them. Drive-in restaurants and gasoline retail uses are permissive uses in the existing M-1 zone. Thus, if these uses are harmful in the manners suggested by Appellants, the potential for these alleged harms already exists under the existing zoning at the site.

The NVC makes the same argument but takes a more nuanced approach that accounts for the permissiveness of the uses in the M-1 zone. The NVC argues that because the proposed C-2 zone encompasses roughly double the land (than does the land encompassed by the existing M-1 zone) the C-2 zone change will increase the harms by the same multiplier. For example, the NVC speculates that instead of one potential drive-in restaurant, the doubling of C-2 space allows multiple drive-in restaurants and or gasoline retail uses at the site. The NVC claims this doubling effect increases the harms by at least a multiplier of 2.

While the simple logic of this argument is seemingly rational, it is flawed in the same way Anaya's argument is flawed. The NVC identifies the same generalized harms of air pollution, noise, and traffic congestion without providing a sufficient basis to determine if there is a net harm [R3. 59A]. The overly simplified argument fails to take into account all of the considerations and mitigating factors that will take place and that were described by

12. I note that the NVC made similar arguments of harm but also with the pR-2 zone that was approved. The R-2 zone is not at issue in these appeals because all appeal issues related to the R-2 zone were decided by the City Council in 2017, and where not appealed to the District Court. The time to appeal the City Council's decision regarding the R-2 zone has expired. Thus, NVC's appeal arguments regarding alleged harm caused by the R-2 zone cannot be considered.

Planning Manager Brito in his analysis. It short, the NVC's argument lacks specificity related to the site that is required by R-270-1980, § 1(E). The argument is based on an unsupported premise built around generalized harms for which no supporting evidence is offered.

As noted by Mr. Brito in his report and elaborated on in his testimony at the LUHO hearing, there are a number of site constraints for access, including site design considerations, use separation requirements, and buffering requirements that restricts uses at the site. Moreover, just because the site is larger than the M-1 zone does not necessarily means that there will be a net harm that exceeds what could be sited there under M-1 zoning. In addition, because the site is near a major corridor, abuts a major interstate highway (I-40) where there is a significant freeway access, harms in the form of air, light, and noise pollution abound in the area. These generalized conditions are already present throughout the City of Albuquerque. On the other hand, Appellants have not brought forth any evidence to demonstrate that these conditions (noise, congestion, light pollution, etc.) or that the doubling effect asserted by the NVC will be any more harmful than what is allowed currently at the site.

Again, Appellants maintain the burden of proof in an appeal and until they bring forth sufficient evidence to show error, the burden does not shift back to the applicants. Without evidence to support the NVC's argument, I find that the NVC's arguments although seemingly rational, rests on unsupported speculation.

Both the NVC and Anaya also generally point to the opinion testimony of numerous people who were opposed to the zone-changes in the three EPC hearings since 2017. They claim that this evidence demonstrates that the C-2 uses will harm the neighborhood. While the opinion testimony from the opponents are given weight as evidence, to be competent

evidence however, the opinions of lay persons must be supported with substantiated facts rather than just opinion. *Dick v. City of Portales*, 1994-NMSC-092, ¶ 7. Competent evidence is evidence which is admissible for the purpose of proving a relevant fact. *Id.* Appellants have not pointed to any opinion testimony of which was supported by substantiated facts such that it can be considered as competent evidence to buttress their arguments.

Next, at the LUHO hearing, NVC representative Peggy Norton made generalized challenges to the draft Traffic Impact Study (TIS) in the record to demonstrate that the increased traffic will be harmful to the area residents. Both Appellants point to City Traffic Engineer Racquel Michel's testimony in the 2017 EPC hearing and contend her testimony is substantial evidence of how the C-2 uses will harm the area. However, Appellants misconstrue Ms. Michel's testimony. Ms. Michel did not testify that the C-2 permissive uses will increase harm to the area.

Although the issue of increased traffic as a focus of the analysis under R-270-1980, § 1(E) of harm is relevant to some extent, the testimony of Ms. Michel and the draft TIS does not help Appellants. The draft TIS that was submitted to traffic engineer Michel by the applicants' engineer was a draft report because it cannot be completed until the site planning stage [R1. 140]. And although Ms. Michel testified that Rio Grande Blvd is failing in terms of traffic, she also testified that this failing condition was not attributable to the change in zoning. She testified that is a condition throughout the City as a whole [R1. 180]. Ms. Michel also testified that a finalized TIS will include mitigation measures [R1. 140]. EPC finding 17 acknowledges that the "TIS shows there is sufficient capacity on Rio Grande Blvd. to handle the additional trips generated by the proposed development" [R3. 50A].

Traffic Engineer, Terry Brown performed the two draft TIS's for the applicants.[13] In the first LUHO appeal, I made several factual findings with regard to the draft TIS that are still relevant and are restated here. In the TIS, nine of the closest intersections, using actual count data taken in May 2016, where evaluated [R1. TIS]. The actual count data was adjusted with the most recent Mid-Region Council of Governments' (MRCOG) data on growth. Trip assignments were factored in based on approved trip generation calculations for growth rates [R1. TIS, p. 1-2]. The background traffic growth rates were factored into the analysis [R1. TIS, p. 5-6]. The studies isolated the effects of the anticipated new traffic. The anticipated new traffic is based on the allowed uses in a C-2 zone which are cross-referenced with established and accepted criteria from the Institute of Traffic Engineers (ITE). Mr. Brown concluded that there is sufficient capacity in the existing transportation system for the change of zones to C-2 and R-2 uses [R1. 64-65]. In addition, the draft TIS showed a moderate increase in traffic volumes to the adjacent transportation network based on 100% buildout of the potential uses in the zone-change site [R1. TIS, p. 25], resulting in an acceptable level of service (LOS) for all intersections studied [R1. 64-65]. This was pointed out in the first appeal, but it is just as relevant then as it is now. Mr. Brown concluded that:

> "The impact of the zone amendment, however, would yield a lessor impact [from existing conditions] since much of the project could be constructed under existing zoning. For example, all of the commercial uses along the east side of Rio Grande Blvd. and much of the M-1 zoned land along the north side of I-40 could be implemented with retail uses without the zone amendment. Therefore, the actual impact of the zone amendment itself would be much less than the impact indicated in the two Traffic Impact Studies" [R1. 65].

13. As I did in AC-17-17 and 18, I take notice that both Racquel Michel and Terry Brown are qualified, certified expert traffic engineers in the State of New Mexico.

Ms. Michel's testimony and Mr. Brown's conclusion of the draft TIS remains unrebutted. The Appellants have never offered any expert evidence to rebut this finding or any of Mr. Brown's other findings in the draft TIS. Mr. Brown's findings are substantial evidence supporting the EPC's finding that the zone-change will not cause any more traffic harms than will development of the existing allowed uses in the R-2 and M-1 zones.

Finally, with regard to mitigation requirements to assist in easing traffic congestion, the EPC gave special attention to pointing out that any adverse impacts that could be caused by the zone change, specifically by the C-2 zone change, can be mitigated in the site design review process [See R3. 95A and EPC Finding 9.E]. This is consistent with Planning Manager Brito's testimony at the LUHO hearing. Appellants did not challenge or rebut that mitigation measures address actual harm, if any.

Accordingly, I find that the EPC finding 9.E is well supported by the evidence in the record. As shown above, I also find that, given the context of the site's existing zoning, the R-2 buffering (which is explained in more detail in the LUHO recommendation of AC-17-7 and AC-17-8), as well as the location of the site, and the use table supplements in the record, the EPC gave careful consideration to address the remanded issue relating to R-270-1980, § 1(E). I also find that there is substantial evidence in the record to support EPC finding 9.E.

III. CONCLUSION

For all the reasons described above, I respectfully recommend that Appellants' appeals be denied in full. Both Appellants have not met their burdens of proof to sustain the appeals on any of the issues presented in both appeals. Conversely, I find that the EPC gave due

consideration to (1) whether the proposed C-2 zone is in significant conflict with purported NVAP limitations on commercial development; and (2) whether some of the permissive uses of the proposed C-2 zone would be harmful to adjacent property, the neighborhood or the community. In doing so, as described above there is substantial evidence to support the EPC's decisions on each of these issues.

Steven M. Chavez, Esq.
Land Use Hearing Officer

February 21, 2020

Copies to:
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