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

AC-20-1 Project #2018-001402, SI-2018-00171, VA-2020-00004: Hessel Yntema III, Yntema Law Firm P.A, Agent for Taylor Ranch Neighborhood Association, and property owners appeal the April 22, 2019 declaratory ruling that a single site plan may show multiple project sites and that each proposed Dwelling, Cluster Development shall meet the requirements established by Integrated Development Ordinance §14-16-4-3(B)(2).

Decision

On August 3, 2020, by a vote of 7 FOR and 0 AGAINST 2 RECUSED, the City Council voted to set aside and void declaratory ruling by accepting and adopting the recommendation and findings of the Land Use Hearing Officer

For: Bassan, Benton, Davis, Gibson, Harris, Jones, Peña
Recused: Borrego, Sena

IT IS THEREFORE ORDERED THAT THE DECLARATORY RULING IS SET ASIDE AND VOID

Attachments

1. Action Summary from the August 3, 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: 8/6/20

Patrick Davis, President
City Council

Received by: Stephanie Gonzales Date: 8/10/20
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

Lan Sena, 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, August 3, 2020 **3:00 PM** **Via Zoom Video Conference**
See Special Procedures below
for viewing this meeting.

TWENTY-FOURTH COUNCIL - FOURTEENTH MEETING

1. ROLL CALL

Present 9 - Isaac Benton, Klarissa Peña, Brook Bassan, Cynthia Borrego, Patrick Davis, Diane Gibson, Trudy Jones, Don Harris, and Lan Sena

2. MOMENT OF SILENCE

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

3. PROCLAMATIONS & PRESENTATIONS

Presentation from the Complete Count Committee regarding the 2020 Census

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

June 29, 2020 Special Meeting

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

Public Safety Committee - July 16, 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 the rules be suspended for the purpose of preventing EC-19-436 from expiring and extending its expiration to November 2, 2020 and it be postponed until October 5, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

d. 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 Councilor Peña that the rules be suspended for the purpose of preventing R-19-178 from expiring and extending its expiration to November 2, 2020 and it be postponed until September 9, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

e. R-19-189 — C/S Amending The Composition Of The Board Of Housing Commissioners For The Albuquerque Housing Authority (Peña, Benton)

A motion was made by Councilor Peña that this matter be Postponed to August 17, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

i. R-20-47 — Appropriating Funds To Implement Third Phase Of The Transportation Infrastructure Tax, And Amending The Capital Implementation Program Of The City Of Albuquerque By Approving New Projects (Benton, by request)

A motion was made by Councilor Benton that this matter be Postponed to August 17, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

j. R-20-67 — Renaming The Four Hills Park In Four Hills Village To The Barsis-Mickelson Park (Located At Running Water Circle Southeast And Stagecoach Road Southeast) To Honor Edwin Barsis And Roger Mickelson, Two Four Hills Leaders Who Earnestly Championed The Four Hills Neighborhood And The City Of Albuquerque (Harris)

A motion was made by Councilor Harris that this matter be Postponed to October 5, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

k. M-20-1 Urging The United States Congress To Amend The National Trails System Act To Designate The Route 66 National Historic Trail (Harris, Davis, Peña, Benton)

A motion was made by Councilor Harris that this matter be Postponed to October 5, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

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-20-4 Project #2018-001402 SI-2018-00171 VA-2019-00100 VA-2020-00061 VA-2020-00064: Thomas P. Gulley, appeals the decision of the Environmental Planning Commission (EPC) to Approve a Site Plan for all or a portion of Lots 1 through 3, Block 1, Plat of West Bank Estates together with Tract A1, Lands of Suzanne H Poole, and Tracts C-1 and Lot 4-A of Plat of Tracts C-1, C-2 and Lot 4-A, Lands of Suzanne H Poole being a Replat of Tract C, Lands of Suzanne H Poole, Tract C, Annexation Plat Land in Section 25 and 36, T11N R2E, Lot 4, Block 1 West; zoned R-A, located at 5001 Namaste Rd. NW, between LaBienvenida Pl. NW and the Oxbow Open Space, containing approximately 23 acres

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

For: 3 - Bassan, Jones, and Harris

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

Recused: 2 - Borrego, and Sena

A motion was made by President Davis that this matter be To Reject the Land Use Hearing Officer Recommendation. The motion failed by the following vote:

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

Against: 3 - Bassan, Jones, and Harris

Recused: 2 - Borrego, and Sena

This matter will have a full hearing on August 17, 2020.

b. AC-20-5

Project #2018-001402 SI-2018-00171 VA-2019-00100 VA-2020-00061 VA-2020-00064: AC-20-5- Project #2018-001402 SI-2018-00171 VA-2019-00103 VA-2020-00061 VA-2020-00064: Hessel Yntema III, Yntema Law Firm P.A, agent for the Taylor Ranch Neighborhood Association, eight other associations, and six other property owners and interested parties, appeals the decision of the Environmental Planning Commission (EPC) to approve a Site Plan for all or a portion of Lots 1 through 3, Block 1, Plat of West Bank Estates together with Tract A1, Lands of Suzanne H Poole, and Tracts C-1 and Lot 4-A of Plat of Tracts C-1, C-2 and Lot 4-A, Lands of Suzanne H Poole being a Replat of Tract C, Lands of Suzanne H Poole, Tract C, Annexation Plat Land in Section 25 and 36, T11N R2E, Lot 4, Block 1 West; zoned R-A, located at 5001 Namaste Rd. NW, between La Bienvenida Pl. NW and the Oxbow Open Space, containing approximately 23 acres

This matter will have a full hearing on August 17, 2020.

c. AC-20-1

Project #2018-001402, SI-2018-00171, VA-2020-00004: Hessel Yntema III, Yntema Law Firm P.A, Agent for Taylor Ranch Neighborhood Association, and property owners appeal the April 22, 2019 declaratory ruling that a single site plan may show multiple project sites and that each proposed Dwelling, Cluster Development shall meet the requirements established by Integrated Development Ordinance §14-16-4-3(B)(2).

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

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

Recused: 2 - Borrego, and Sena

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

14. FINAL ACTIONS

a. 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 the rules be suspended for the purpose of preventing O-19-72 from expiring and extending its expiration to February 1, 2021 and it be postponed until September 9, 2020. The motion carried by the following vote:

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

b. O-20-6

Designating The Main Library Located At 501 Copper Avenue NW As A

City Landmark (Benton)

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

For: 9 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, Harris, and Sena

c. O-20-12 Adopting A Uniform Administrative Code And Technical Codes Prescribing Minimum Standards Regulating The Construction, Alteration, Moving, Repair And Use And Occupancies Of Buildings And Structures And Building Service Equipment And Installations Including Plumbing, Swimming Pools, Electrical, Mechanical, Signs, Solar, Energy Conservation, Building Conservation And The Abatement Of Dangerous Buildings Within The City Of Albuquerque; Providing For The Issuance Of Permits And Collecting Fees Therefore; Repealing Chapter 14, Article 1, ROA 1994, The Present Uniform Administrative Code And Technical Codes Including The Building Code, The Plumbing Code, The Swimming Pool Code, The Mechanical Code, The Solar Energy Code, The Electrical Code, Providing For Penalties For Violation Of The Code (Jones, by request)

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

A motion was made by Councilor Peña that this matter be Postponed as Amended to September 9, 2020. The motion failed by the following vote:

For: 3 - Peña, Bassan, and Jones

Against: 5 - Benton, Borrego, Davis, Gibson, and Sena

Excused: 1 - Harris

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

For: 6 - Benton, Peña, Borrego, Davis, Gibson, and Sena

Against: 2 - Bassan, and Jones

Excused: 1 - Harris

f. R-19-216 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 615 Arno St SE 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: 7 - Benton, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Against: 1 - Peña

Excused: 1 - Harris

g. R-19-217

A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 318 Mesilla 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 President Davis that this matter be Passed. The motion carried by the following vote:

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

Against: 1 - Peña

Excused: 1 - Harris

h. R-20-28

Adopting The Silver Avenue Bike Boulevard Review, Making The Recommendations Within The Plan Policy Priorities For The Silver Avenue Bike Boulevard Between Yale Boulevard And The Paseo Del Bosque Trail (Benton)

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

***I.** R-20-77

Amending Appropriations For The Coronavirus Support And Recovery Program (Sena, Gibson)

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

***m.** R-20-78

Approving Fiscal Year 2021 Appropriations To Provide For Outdoor Dining And Outdoor Retail Grants To Local Businesses During The Public Health Emergency (Borrego, Gibson)

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

***p.** R-20-87 Directing The Administration To Expand The "Active Streets Initiative" Established By R-20-59 In Order To Also Facilitate Safe, Socially-Distanced Outdoor Commercial Food And Beverage Service Opportunities On Certain Streets During The Present Public Health Emergency; Approving The Use Of Cares Act Funding For Related Costs (Benton)

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

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

For: 8 - Benton, Peña, Bassan, Borrego, Davis, Gibson, Jones, and Sena

Excused: 1 - Harris

***n.** R-20-80 Establishing A Community Based Process To Find Solutions For The La Jornada Installation (Peña)

A motion was made by Councilor Borrego that this matter be Postponed to September 9, 2020. The motion carried by the following vote:

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

Against: 3 - Benton, Peña, and Sena

Excused: 1 - Harris

BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-20-1

PR-2018-001402; S1-2018-00171; VA-2019-00103; VA-2020-00004

Taylor Ranch Neighborhood Association, Westside Coalition of Neighborhood Associations, District Four Coalition, Alameda North Valley Association, Knapp Heights Neighborhood Association, La Luz Landowners Association, Grande Heights Neighborhood Association, Inter-Coalition Panel, West La Cueva Neighborhood Association, West Blluff Neighborhood Association, Kevin Dullea, Barbara Tegtmeier, Susan Chaudoir, Kathy Adams, Becky Davis, Kenneth Churchill, Terri Godfrey, and William Godfrey, Appellants,

And

Gamma Development, LLC, and Consensus Planning, Party Opponents.

I. BACKGROUND

This is an appeal of an April 22, 2019 declaratory ruling issued by the City Zoning Enforcement Officer (ZEO). As described in more detail below, I find and respectfully recommend that the declaratory ruling should be set aside (voided).

The ZEO issued the declaratory ruling because the requesting party (applicants and Party Opponents herein) requested it just after the Environmental Planning Commission (EPC) issued a decision regarding their development application. Furthermore, when the request was made to the ZEO there were two pending appeals regarding that development application. The development application, the request for the declaratory ruling, and the ruling, directly concern the applicants' (Party Opponents herein) residential development

known as the Overlook at Oxbow project (Oxbow project) [R. 43]. Specifically, the declaratory ruling concerns an interpretation of the IDO regarding "what constitutes a project site..., a site plan," and "how should setbacks...be applied" in cluster developments under the IDO and at the Oxbow project site [R. 43]. It cannot be over emphasized that the question sought to be resolved by the declaratory ruling was considered, decided by the EPC, and was under appeal to the City Council.

The record shows that in July 2018, Gamma Development, LLC through Consensus Planning, who are the Party Opponents herein, submitted an application to the EPC for site plan review and approval of the Oxbow project.[1] The Oxbow project site plan evolved over time and was finally submitted to the EPC as a single site plan that theoretically included two residential cluster developments of residential lots. The EPC approved the site plan with conditions on March 14, 2019. One condition concerned how setbacks are to be applied to the clustering of lots shown on the site plan. In late March 2019 the EPC's decision was appealed by some of the Appellants in this matter (AC-19-6 and AC-19-7). While those appeals were pending, on April 3, 2019, the applicants (Party Opponents herein) requested that the ZEO issue the above referenced declaratory ruling (hereinafter referred as "DR") [R. 11].

On April 22, 2019, during the pendency of the two appeals, the ZEO issued the DR to the applicants, Party Opponents herein [R. 43]. Notwithstanding that the two appeals and the DR were entangled because they both involved some of the same substantive issues of

1. Appellants requested that the record of this appeal be supplemented with the record for the Oxbow project, which includes the two above referenced appeals. Without objection from the Party Opponents, the record now included the record of Project #PR-2018-001402.

IDO interpretation regarding clustering, the ZEO issued the DR only to Gamma Development, LLC and Consensus Planning.[2]

The record is not clear as to how and when the Appellants herein obtained a copy of the April 22, 2019 DR, however, in the record of this appeal there is a December 2019 email from a citizen to the City Planning Department Staff apparently requesting a copy of the DR [R. 13]. There is also a City Planning Staff memorandum in the record wherein it is claimed that the City Planning Staff did not receive any requests for copies of the DR until December 22, 2019 [R. 6]. Appellants did not dispute this evidence thus it must be accepted as true. Regardless, declaratory rulings have no appeal deadline in the IDO [IDO, § 6-4(U)(3)(a)2].

The record further shows that the Appellants herein appealed the DR on January 15, 2020 [R. 15]. The City Council referred this appeal to its Land Use Hearing Officer (LUHO), and a Land Use Appeal hearing was held on March 4, 2020. As indicated above, the record was supplemented with the Oxbow project record (and appeals AC-19-6, AC-19-7) as well as with the City Council's August 27, 2019 Notice of Decision regarding those appeals.[3]

In this appeal, Appellants argue 12 separate reasons why this appeal should be sustained [R. 38]. However, their arguments can be consolidated into six points of alleged error.

Appellants first contend that I should not hear this appeal essentially because I heard appeals AC-19-6 and AC-19-7. Without any evidence whatsoever, Appellants broadly

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2. I note that there is no IDO provision requiring the ZEO to issue a declaratory ruling to anyone other than to the party requesting it.

3. The two Appeals made their way to a consolidated LUHO hearing and subsequently LUHO recommendations were made to the City Council. Some of those recommendations regarding interpretation of clustering were rejected by the City Council. After a hearing on the appeals, the City Council issued a decision on August 27, 2019 which included a remand to the EPC with detailed instructions.

speculate that because the City Council did not adopt all my recommended findings in those appeals, I am now biased to make recommendations on this appeal. Appellants next allege that the City Planning Staff "fraudulently" conspired to not disclose the DR to Appellants, to the LUHO, and to the City Council after the DR was issued to the Party Opponents on April 22, 2019. Appellants generally allege that this conduct violated their due process rights. As explained below, I find that the record does not support Appellants very serious contention. Appellants next allege that the declaratory ruling process under § 6-5(B) of the IDO violates the State's Open Meetings Act (OMA). Appellants generally believe the formulation and delivery of declaratory rulings should be done in open meetings. Next, Appellants allege that the DR is not supported with substantial evidence and or the ZEO misapplied the applicable provisions of the IDO in his analysis. Appellants also generally contend that the application requesting a declaratory ruling was "incomplete" as that term is used in IDO, § 6-4(H)(4) and therefore the DR should not have been issued. Finally, Appellants contend that under NMSA 1978, § 3-21-8(B), the AC-19-6 and AC-19-7 appeals should have acted as "a stay on all proceedings in furtherance of the action appealed" including on the issuance of any declaratory rulings. The Appellants ask that the DR be voided. In this regard, the Party Opponents stipulate that the DR should be voided, but only on a basis that the DR is now a moot issue because the City Council's subsequent August 27, 2019 decision requires that the EPC reconsider the issues sought to be clarified through the declaratory ruling process.

II. STANDARD OF REVIEW

A review of an appeal is a whole record review to determine whether the ZEO acted fraudulently, arbitrarily, or capriciously; or whether the ZEO's decision is not supported by substantial evidence; or if the ZEO erred in applying the requirements of the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. The Land Use Hearing Officer (LUHO) may recommend to the City Council that an appeal be affirmed in whole or in part or reversed in whole or in part. [IDO, § 14-16-6-4(U)(3)].

III. DISCUSSION

A. Hearing Officer Bias

Beginning with the argument of bias, I take Appellants' allegation that I am biased as a polite request that I recuse myself from hearing this appeal because Appellants believe I cannot judge their appeal impartially. Primarily because Appellants' theory of bias is baseless on the facts and on the law, at the LUHO hearing I respectfully declined Appellants' request.[4] Appellants' argument of hearing officer bias entirely rests on the contention that my previous recommendations which were rejected by the City Council disqualifies me from hearing the same issues in another appeal.[5] Without say it, Appellants insinuate that I am no longer disinterested and free from any form of bias or predisposition.

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4. I note to the City Council that if I believed I was biased one way or the other or if there is evidence to support even an appearance of bias, I would recuse myself from hearing any matter.

5. The general question of what constitutes a cluster development under the IDO is the general question that the previous appeals dealt with and which is an issue raised in the DR.

Under New Mexico law, the inquiry is not whether the factfinder is actually biased or prejudiced, but whether "there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented." *Reid v. N.M. Bd. of Examiners in Optometry*, 1979-NMSC-005, ¶ 7. A prior statement by a factfinder "indicating . . . bias and prejudgment of the issues" is a valid basis for disqualification, and failure to disqualify under those circumstances may violate a person's right to procedural due process. Id. ¶ 9. See also *Erica, Inc. v. N.M. Regulation & Licensing Dep't*, 2008-NMCA-065, ¶ 43 (rejecting a claim that a hearing officer was biased based on adverse pre-hearing rulings). In *Erica, Inc. v. N.M. Regulation & Licensing Dep't,* one allegation of hearing officer bias that was considered by the Court was similar to what Appellants allege in this appeal----that previous rulings predisposed the hearing officer to be unfair. However, in *Erica Inc.* the Court found that the hearing officer's previous rulings were based on legal rulings rather than factual determinations and were unconvincing arguments to show bias or a predisposition to be unfair. *Id* at 43.[6]

I note for the City Council, other than the formal recommendations in the previous appeals, Appellants have not suggested that I have actually expressed any biased views from which they can claim I favor one party or the other. Instead, Appellants seem to vaguely suggest (without any facts in support) that my *formal* recommendations in AC-19-6 and 7 is a sufficient basis for my disqualification. Or more specifically, because the City Council rejected some of those formal recommendations, I am now predisposed to make the same or

6. Without indulging in Appellants' theory or the previous record too much, I note for the City Council (similar to the *Erica, Inc, v. N.M. Reg. & Lic.* case) much, if not all, of what was rejected in the LUHO's recommendation on AC-19-6 and 7 were legal interpretations of the IDO based on stipulated facts rather than factual determinations.

similar findings despite the City Council's rejection thereof. Appellants have not presented any evidence whatsoever from which one can rationally perceive as meeting the standard for disqualification for prejudgment or bias.

Under Appellants' broad theory, any hearing officer or judge would be incapable of hearing an appeal if that judge or hearing officer made previous findings on the matter appealed. Appellants' expansive theory would prevent any judge or hearing officer from rehearing matters that are remanded back to them by a higher authority. Notably, there are many occasions at which the LUHO is required to revisit appeals that were remanded either by the Court, by the City Council, or by the LUHO under the IDO. As in *Erica, Inc. v. N.M. Regulation & Licensing Dep't*, 2008-NMCA-065, pre-hearing rulings do not in themselves indicate a prejudgment of the case. Appellants have not met their burden to demonstrate hearing officer bias.

B. Disclosing the Declaratory Ruling

Next, to support Appellants' allegation that the DR was surreptitiously not disclosed to Appellants, to the LUHO, and to the City Council, Appellants supplemented the record with their Exhibits A through K, which were included in the record by stipulation of the parties. These exhibits include previous memorandums and transcript pages from the records of the AC-19-6 and 7 appeals. After reviewing the record and Appellants' exhibits, I find that there is insufficient evidence in the record to support Appellants' contentions that there was "constructively fraudulent" behavior on the part of the Planning Department to not advise Appellants, the LUHO, and the City Council about the DR as Appellants claim. The

evidence shows that during the May 2019 LUHO hearing regarding appeals AC-19-6 and 7, and again at the City Council hearing, the issuance of the DR was briefly discussed by all parties at the various levels of the appeals [Ex. G, p.1; Ex. I, page 2; Ex. L].[7] The fact that the DR was discussed at all stages of those appeals is substantial evidence that the Appellants appreciated the existence of the DR as early as May 20, 2019, and it shows that the DR was not concealed as Appellants claim. [See Ex. G].

Curiously, Appellants have not claimed that the City Planning Staff failed to provide a copy of the DR to Appellants when a copy was requested. It appears from the record that a copy of the DR was first requested in December 2019 [R. 13]. Appellants did not dispute this evidence thus it is accepted as true.[8] I find that the Appellants have not supported their allegation with substantial evidence that the DR was fraudulently concealed.

C. Applicability of the Open Meeting Act and other Statutes and or Ordinances Alleged to Apply to the Declaratory Ruling Process.

Appellants next contend that the process by which a declaratory ruling was issued violated the OMA. Appellants' argument rests on the theory that declaratory rulings constitute official City policy and as such must satisfy the OMA. However, for the OMA to be applicable, more than just the formulation of public policy is required.

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7. I note that Ex. G encompasses selected pages from the May 20, 2019 LUHO hearing. Exhibit I includes selected pages from the August 5, 2019 City Council hearing. Although there is conflicting testimony in Exhibit I, Gamma Development, LLC's attorney specifically advised the City Council that there was indeed a declaratory ruling issued [See Ex. I]. Exhibit L is a staff report from City Planning Staff to the EPC on the remand of AC-19-6 and 7.

8. Again, the only evidence in the record on this issue is Planning Staff's assertion that the first request for a copy of the DR was on December 22, 2019. However, Appellants did not dispute this allegation.

NMSA 1978, §§ 10-15-1 to 10-15-4, encompasses the State's OMA and it is recognized by New Mexico as the State's "sunshine law." The OMA generally requires that public business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public bodies be open to the public [OMA, § 10-15-1]. Furthermore, the applicability of the OMA depends upon whether there is a "public body" and a "meeting" of the public body at which policy is formulated. [OMA, § 10-15-1]. A "meeting" under the OMA means "a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body" [OMA, § 10-15-2(C)]. Accordingly, OMA expressly applies to meetings of public bodies.[9]

The ZEO cannot seriously be considered a "public body" who holds "meetings" to formulate declaratory rulings under the OMA. Although a declaratory ruling is arguably the formulation of policy, there are no provisions in the IDO that lend any support to Appellants expansive view of the ZEO's duties requiring open public meetings for the formulation of declaratory rulings. Under the IDO, the issuance of a declaratory ruling rests only with the ZEO [IDO, § 6-4(A) and § 6-5(B)]. And under the IDO the ZEO is defined not as a "public body" but as:

> A City Planning Department employee or his/her authorized representative who interprets the provisions of this IDO, reviews applications for decisions related to this IDO, and may make administrative decisions [IDO Definitions, § 14-16-7-1].

The types of administrative decisions that the ZEO carries out are well described in the IDO,

9. See Page 1, Eighth Edition, "OPEN MEETINGS ACT COMPLIANCE GUIDE, provided by the Office of the New Mexico Attorney General

§ 6-2(B)(1)(c) and concerns formal administrative ministerial matters.

Accordingly, the issuance of a declaratory ruling cannot be subject to the requirements of the OMA. Without distorting the facts, I find that there is no evidence in the record showing that the ZEO was required to hold a meeting with the public to formulate or to disseminate a declaratory ruling. Under the IDO, responding to a request for a declaratory judgment is the performance of a lawful ministerial administrative function in accordance with the IDO.[10] In other words, in responding to a request for declaratory ruling, the ZEO is effectively carrying out an administrative task which has been delegated to him/her alone by the IDO (subject to appeal) to interpret the IDO [IDO § 6-2(B)(1)(c)].

In terms of whether a meeting was required for issuing a declaratory ruling, Appellants also generally claim that a declaratory ruling can only be issued in a quasi-judicial hearing setting. In support of this contention Appellants suggest that because the DR in this case results in a "changing of property rights," and therefore the act of formulating it was quasi-judicial in nature under IDO § 6-4(M)(3), requiring a public hearing.

However, the IDO does not describe any of the ZEO's duties to include conducting "administrative hearings which investigate facts, weigh evidence, draw conclusions as a basis for official action, and exercise discretion of a judicial nature, are quasi-judicial in nature." *State Ex Rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶ 16 (citing *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 1984-NMCA-058).

Furthermore, Appellants' belief that a declaratory ruling "changes property rights" is

10. Under Appellants overly broad view of the OMA, the Planning Director's ministerial act of determining "that a development application is complete or incomplete would require a public meeting. See IDO, 6-4(H)(1) to (3).

flawed. Although the DR in this case (if sustained), in its broadest sense, could impact how clustering occurs at the Oxbow project, by definition a declaratory ruling under the IDO is a "ruling as to the applicability of the IDO to a proposed development or activity" [IDO, § 6-5(B)]. Put another way, it is simply an official interpretation of specific IDO provisions—nothing more. Declaratory rulings are not approvals or entitlements to approvals, and for purposes of IDO § 6-5(B), declaratory rulings are not the kinds of decisions that require a quasi-judicial public hearing.

Appellants also contend that the declaratory ruling process is subject to the notice provisions of NMSA 1978, § 3-21-6(B) which essentially requires notice and a hearing before zoning regulations, boundaries, amendments and or supplements to zoning regulations are enacted. Appellants' argument presupposes that a declaratory ruling is akin to a zoning regulation or amendment thereof. As described above, a declaratory ruling is an interpretation of the IDO, not the enactment or amendment of a zoning regulation. Because declaratory rulings are not the adoption or enactment of regulations, I find that NMSA 1978, § 3-21-6(B) on its face is inapplicable to declaratory rulings.

D. Appellants have not shown how the request for declaratory ruling is "incomplete" under the IDO.

Appellants next contend that the request for the declaratory ruling was an "incomplete application" under § 6-4(H)(4) and therefore it should not have been considered until it was deemed complete by the Planning Director. Notwithstanding, I find that § 6-4(H) on its face applies to "development applications," and not to declaratory rulings. [See § 6-4(H)(1)].

Correspondingly, a request for a declaratory ruling is a request for an interpretation of the "applicability of the IDO to a proposed development or activity" [IDO, § 6-5(B)]. Therefore § 6-4(H) is inapplicable in this matter.

E. The ZEO failed to fairly evaluate key applicable IDO provisions.

Appellants next claim that in issuing the DR, the ZEO failed to apply and evaluate applicable provisions of the IDO. Therefore, Appellants contend that the DR lacks substantial evidence to support it. On this contention, I agree. Specifically, I find that the ZEO neglected to reconcile the applicability and the definition of a "project site" in the IDO with his conclusion that the Oxbow project site may include two cluster developments in it.

By including the IDO definition of a project site in the DR, it is rational to presume that the ZEO believes that it is applicable to his interpretation of "what constitutes a project site and a site plan for the proposed cluster projects" [R. 9]. It is clear from the request for the declaratory ruling that the applicants (Party Opponents) were seeking clarification of the question as it applies to the Oxbow project. Thus, the IDO definition of a project site *as it applies* to the Oxbow project is necessarily significant to evaluate the questions posed to the ZEO. Yet, there is no indication in the ruling that the ZEO applied the definition to the questions presented when he concluded that "a single site plan may show multiple project sites..." [R. 9]. Furthermore, there is no indication in the DR that the ZEO analyzed or evaluated the IDO definition of a project site as it applies to the Oxbow project facts.

Under the IDO, the term "project site" is defined as "*refer[ing] to the largest geography specified in the earliest request for decision on the first application related to a particular*

development" (Emphasis added) [IDO, § 14-16-7-1]. There is evidence in the record from which one could conclude that the "largest geography specified in the earliest application related" as it applies to the Oxbow project is 22.75 acres [Ex. C]. This was not disputed. As Appellants contend, the ZEO's conclusion that a single site plan may have multiple project sites appears to be incongruent with the IDO definition of a project site as it applies to the Oxbow project. At the very least, the ZEO should have reconciled the obvious alleged contradiction in his DR with supporting facts and analysis. Without facts or analysis to support his conclusions, the ZEO's conclusions lack substantial evidence. Accordingly, the DR should be voided for its lack of analysis.

F. **The Declaratory ruling should be voided on other grounds.**

Appellants argue that the City Council should void the declaratory ruling because the applicants/ Party Opponents should not have sought a declaratory ruling just days after the EPC decided the substantive matters requested to be reviewed by the ZEO through the declaratory ruling process. Appellants further claim that because there were two pending appeals of the EPC's decision (appeals which concerned the same substantive matters at issue in the DR) the DR should not have been issued by the ZEO. They claim that under these circumstances the request for declaratory ruling and resulting DR operated as an end-run around the EPC's decision and to the pending appeals to the City Council, impacting their due process rights. Although, surprisingly there are no provisions in the IDO to prevent this circumstance, I agree that it was somewhat inappropriate for the applicants to seek a declaratory ruling on matters that were just decided by the EPC and under appeal to the City

Council.

Despite that there is no IDO provision to prevent this occurrence, under New Mexico law, specifically under NMSA 1978, § 3-21-8(B), when there is a pending appeal of a decision the appeal acts as a stay on all "proceedings in furtherance of the action appealed" unless there is proof by certification that the stay would cause "imminent peril of life or property." Appellants contend that NMSA 1978, § 3-21-8(B) is applicable in this matter.

Specifically, because the issues raised by the DR and the issues raised in the EPC and in the resulting appeals of the EPC decision were substantially similar, I find that the request for the declaratory ruling under these circumstances was a "proceeding in furtherance of the action appealed" from the EPC. I also note that in this matter and in the appeals AC-19-6 and 7 there are no claims of imminent peril. The Party Opponents did not dispute this or otherwise rebut the applicability of NMSA 1978, § 3-21-8(B) to the facts in this appeal, nor did they raise the New Mexico Constitution's Home Rule provisions as a defense to the applicability of the statute. Thus, I find that NMSA 1978, § 3-21-8(B) is an independent alternative basis by which the City Council can void the DR.

Regardless, both parties agree that the DR should be voided. The Party Opponents contend however that the DR should be voided because the above referenced appeals (AC-19-6 and 7) ran their course resulting in the August 27, 2019 decision of the City Council making the DR moot. I respectfully recommend that the City Council void the DR on this stipulated basis as an alternative to the statutory basis described above.

283

Steven M. Chavez, Esq.
Land Use Hearing Officer

March 16, 2020

Copies to:

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