

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

APPEAL NO. AC-19-16

Project # 2019-002496; S1-2019-00180; SD-2019-0016; VA-2019-00323

**RANDOLPH AND SHANNON BACA and 80 other Individuals and Four
Neighborhood Associations, Appellants,**

and,

**CONSENSUS PLANNING, agent(s) for PHILIP LINDBORG and BELLA TESORO
LLC, Party Opponents.**

1 I. Background and History

2 This is an appeal of a decision approving a site plan by the Development Review Board
3 (DRB). Beginning with the relevant history, sequentially, the record reveals that in late April,
4 2019, Consensus Planning, agents for Phillip Lindborg and Bella Tesoro, LLC (collectively,
5 the “developers”) notified the Nor Este Neighborhood Association, the Vineyard Estates
6 Neighborhood Association, and the District Four Coalition of Neighborhood Associations of
7 their intent to submit an “application for a Subdivision of Land (plat) and Site Plan” to the
8 DRB [R. 86]. In doing so, the developers also generally described the proposed project as
9 being a 93-dwelling unit multi-family development and inquired from the association
10 officers if they wished to meet to further discuss the project [R. 86]. Soon thereafter,
11 officers from the Vineyard and the District Four Coalition associations responded and sought
12 a City-sponsored facilitated meeting with the developers [R. 87-88]. The City-sponsored
13 facilitated meeting was arranged and held on May 21, 2019, at which the developers,

14 neighborhood residents, and association representatives attended and presumably discussed
15 the details of the application [R. 92-105].

16 On June 17, 2019, the developers and the City Planning Staff met under § 6-4(B) of the
17 Integrated Development Ordinance (IDO) for a mandatory pre-application meeting to go
18 over the review process and application requirements [R. 81-84].¹ On the same day as the
19 pre-application meeting, the developers also submitted their application to the City Planning
20 Department for subdivision plat and for site plan review [R. 65-80]. Apparently, the
21 developers' application was deemed complete at the time of submission because it was
22 immediately scheduled for the July 17, 2017 DRB public meeting [R. 65, 300]. See § 6-
23 4(H)(4).²

24 Between July 1, and July 17, 2017 the DRB received comments from governmental
25 agencies regarding the application, including from the Albuquerque Public Schools,
26 Albuquerque Police Department, New Mexico Department of Transportation, Mid-Region
27 Metropolitan Planning Organization, Albuquerque Department of Municipal Development,
28 Albuquerque Metropolitan Arroyo Flood Control Authority, as well as from various Staff
29 from sections of the City Planning Department [R. 316-326]. At the July 17, 2019 DRB
30 meeting, after allowing multiple speakers to comment on the developers' application, the

1. Notably, the discussions that are to occur in a pre-application meeting are mandatory and consequential to the review process. See § 6-4(B)(1) through (3).

2. I note that there are no written findings by the Planning Director that the application was complete. However, Appellants have not claimed that the application was incomplete when the application was scheduled for a meeting with the DRB. Moreover, the IDO makes it clear that an application will not be scheduled for a hearing/ meeting until it is deemed complete by the Planning Director. The presumption is that the application was deemed complete on June 17, 2019. The presumption was not rebutted.

31 DRB through the Chair deferred a decision and notified attendees that the application would
32 again be heard at the DRB's August 14, 2019 public meeting [R. 314-315].

33 The record reflects that on August 7, 2019, the Appellants' attorney notified the DRB
34 in writing that on August 5, 2019, the City Council approved the Phase 2, Batch 1 conversion
35 zone-changes, which included a R-1B zoned property that abuts the application site [R. 285].
36 Mr. Yntema, Appellants' attorney, advised the DRB in his written communication that the
37 R-1B zone-change meant that the Neighborhood Edges provisions of § 5-9 of the IDO must
38 be applied to the application site and that the newly zoned R-1B lot qualifies as a "protected
39 lot" [See IDO, § 5-9(B)(2)].

40 On August 14, 2019, the DRB revisited the developers' application. The DRB reopened
41 the floor and allowed additional public comments at the Meeting, including unsworn
42 testimony from the developers' agents [R. 173-189]. Appellants' attorney made an oral
43 presentation, again advising the DRB about the R-1B lot conversion, and he again advised
44 the DRB that the Neighborhood Edges provisions of the IDO must be applied to the site plan
45 [R. 176-177]. Additional written comments from the City's Traffic Engineer, Staff from the
46 Water Utility Authority, and from the City Zoning Department Staff were submitted to the
47 DRB regarding the application [R. 191-194]. At the meeting, the DRB Chair again deferred
48 their decision on the developers' application because of deficiencies in the application [R.
49 188]. The DRB Chair notified meeting attendees that the matter would be taken up at the
50 DRB's September 11, 2019 public meeting to give additional time for the developers to
51 address the deficiencies [R. 188-190].

52 At the September 11, 2019 public meeting, the DRB approved the developers' site plan
53 and replat proposal [R. 161 and 6-7]. However, before doing so, the record shows that the

54 DRB again opened the floor to the public for commentary [R. 153-155].

55 On September 24, 2019, Appellants filed their timely appeal to the City Council of
56 which was referred to the Land Use Hearing Officer (LUHO) [R. 10]. A LUHO appeal
57 hearing was held on October 31, 2019.

58 In this appeal, the Appellants make numerous individual claims of error. Appellants
59 first contend that the DRB did not afford the public the due process required for conducting
60 its meetings. They essentially contend that the DRB is a “quasi-judicial” board and its
61 members cannot have *ex parte* communications with the developers; must swear in witnesses
62 and allow for cross-examination; and each member must publicly vote on actions such as
63 deferrals and decisions they collectively make as a board. Appellants also generally claim
64 that the DRB board did not act as a decision-making board under the New Mexico Open
65 Meetings Act (OMA). Second, they argue that the density of dwelling units allowed by the
66 site plan exceeds what should be allowed in an MX-L zone. Third, Appellants loosely
67 contend that the DRB should have required a traffic impact study for the density proposed
68 on the site plan. Fourth, Appellants believe the developers have not mitigated any significant
69 adverse impacts on the surrounding residential uses to the maximum extent practicable. Fifth,
70 Appellants contend that because 20% of abutting landowners within 100-feet of the site plan
71 project object to the proposed uses, under NMSA 1978, § 3-21-6(C), only the City Council
72 can approve the application. Sixth, Appellants claim that the DRB erred because it failed
73 to apply the Neighborhood Edges provisions of the IDO to the site plan. Finally, Appellants
74 raised other appeal issues in their written brief, but ostensibly either abandoned them or
75 incorporated them in the six above-mentioned contentions at the LUHO hearing.

76

77

78 **II. Standard of Review**

79 A review of an appeal is a whole record review to determine whether the DRB acted
80 fraudulently, arbitrarily, or capriciously; or whether the DRB’s decision is not supported by
81 substantial evidence; or if the DRB erred in applying the requirements of the IDO, a plan,
82 policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision
83 and record must be supported by substantial evidence to be upheld. The Land Use Hearing
84 Officer (LUHO) may recommend to the City Council that an appeal be affirmed in whole or
85 in part or reversed in whole or in part. The City Council delegated its authority to the LUHO
86 to remand appeals [IDO, § 14-16-6-4(U)(3)(d)].

87

88 **III. Discussion**

89 **A. The DRB and Due Process**

90 Appellants claim that the DRB substantially deprived them of due process when it had
91 *ex parte* contacts with the developers, failed to swear in witnesses, excluded cross-examination
92 of witnesses, and did not publicly vote on substantive actions it took during the three public
93 meetings on the developers’ application. Curiously, Appellants have not identified specific *ex*
94 *parte* communications in their claims. Notwithstanding, there is no real factual dispute that
95 individual DRB members had contacts with the developers outside of the public meetings, did
96 not swear in witnesses or permit cross examination at its public meetings on the application.
97 In addition, although no DRB member indicated opposition to the Chair’s decisions, the record
98 of the DRB meetings also substantiate that during the public meetings, the DRB members did

99 not publicly cast individual votes as a board when it took substantive actions on the application,
100 such as deferring its decision or approving the application.

101 The nucleus of Appellants' due process contentions is that the DRB as a "decision-
102 making board" under IDO § 14-16-6-4(M)(3) necessarily exercises discretion and makes
103 "decisions that would result in changes to property rights or entitlements on a particular
104 property or affecting a small area" and is therefore performing traditional quasi-judicial
105 functions without meeting minimum due process requirements. See IDO, § 6-4(M)(3).

106 However, Appellants' appeal implicates City Council Resolution 2019-035 (Bill # R-
107 2019-150 herein as "R-2019-035"). In R-2019-035, the City Council clearly circumscribed
108 considerable DRB discretion and, to some extent, redefined the DRB's function, reconstituting
109 it as a "staff board for technical reviews" rather than as a quasi-judicial board that conducts
110 hearings [R-2019-035, Ex A.]. A stated intent of R-2019-035 is to permit DRB members to
111 meet with developers because it is "*not practical for technical City Staff members to operate*
112 *in such a manner that prohibits them from communicating with members of the public outside*
113 *of a public hearing*" [R-2019-035]. Thus, it is the clear intent of the City Council to not confine
114 DRB members to merely reading the record or hearing presentations at public meetings.
115 Apparently to exempt it or to insulate it from acting as a quasi-judicial administrative board,
116 another principal purpose of R-2019-035 is to eliminate or sharply curtail the DRB's functions,
117 specifically its exercise of substantive discretionary decision-making authority over property
118 rights [R-2019-035, Ex. A].³ Prior to the enactment of R-2019-035, it was an inescapable

3.It is a cornerstone of New Mexico law that when administrative decision makers "investigate facts, weigh evidence, draw conclusions as a basis for official action, and exercise discretion of a judicial nature" they are acting

119 conclusion that the DRB engaged in obvious substantive discretionary decision-making
120 functions and was acting in a quasi-judicial nature. Moreover, previously, the DRB was
121 included under the IDO as a quasi-judicial decision-making board.

122 Appellants suggest that despite R-2019-035, the nature of the DRB’s role has not
123 materially changed, claiming its functions remain quasi-judicial in nature, and as such must
124 still satisfy minimum due process required of a quasi-judicial board. To the extent that the
125 DRB remains a “decision-making body.” I agree. However, the larger question, that R-2019-
126 035 only made superficial changes to the DRB’s functions, and whether the nature of its role
127 has changed, I leave to the City Council to resolve. My authority is limited to questions of
128 whether the DRB erred under the facts of the record or under the existing ordinances, which
129 includes R-2019-035.

130 About whether R-2019-035 allows the DRB to have *ex parte* contacts, I find that this
131 is a legislatively intended consequence of R-2019-035. The necessity of *ex parte*
132 communications is well-supported. Such contacts are anticipated and permissible under R-
133 2019-035. However, Appellants claim that at a minimum, DRB member *ex parte* contacts with
134 the developers should be disclosed at its meetings. I agree. Just because the DRB is permitted
135 to have such communications, does not mean that the DRB is insulated from openness and
136 other minimal due process protections. After all, the DRB, although a “technical review”
137 board, remains a public board--one that investigate facts and draws conclusions in open

in a quasi-judicial in nature and “must adhere to fundamental principles of justice and procedural due process.”
(Emphasis added.) *State Ex Rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶ 16, quoting from *Duke City
Lumber Co. v. New Mexico Envntl. Improvement Bd.*, 1980-NMCA-160, ¶ 6

138 meetings. Despite R-2019-035, fundamental principles of fairness are still applicable to the
139 DRB review processes. The risk and the basic fairness issue at stake is whether DRB members
140 are relying on information obtained through an *ex parte* communication rather than what is in
141 the record in making their decision. *Ex-parte* communications can lead to a deprivation of a
142 fairness at public meetings. When an administrative body, whether quasi-judicial in nature or
143 not, utilizes evidence outside the record to reach a conclusion, disclosure is a necessary
144 minimum safeguard to protect the City and the integrity of the DRB public process under the
145 IDO. At a minimum, fairness requires that if *ex parte* information is not already in the record,
146 it should be contemporaneously noted by the decision maker and disclosed at the start of its
147 meetings.

148 Regarding swearing in of witnesses and denying cross examination of witnesses at the
149 DRB public meetings, I find that there is no indication in R-2019-035 that the City Council
150 intended for the DRB to circumscribe the swearing-in of witnesses and prevent the cross
151 examination of witnesses who testify. In the IDO, there is a distinct demarcation between
152 “public meetings” and “public hearings.” Under the IDO, the latter are labeled explicitly quasi-
153 judicial, requiring a less flexible, greater degree of administrative due process than what is
154 required in “public meetings.” IDO § 6-4(M)(3)(b) lays out the compulsory processes due in
155 quasi-judicial hearings, while IDO § 6-4(L) describes a flexible and, ironically, a discretionary
156 manner of due process for public DRB meetings. IDO § 6-4(L) states:

157 A public meeting is less formal than a public hearing. Where Table 6-1-1
158 indicates that a public meeting is required, the review or decision-making
159 body shall discuss the application in a public meeting, but it shall be up to
160 the discretion of the reviewing body whether public questions, statements,
161 or discussion on the application shall be allowed.
162

163 There is no question that the City Council through R-2019-035 intended that the DRB
164 engage in the type of public meetings described in § 6-4(L) rather than in public hearings which
165 are clearly intended to have quasi-judicial protections. Notwithstanding the discretionary
166 manner in which due process is exercised under § 6-4(L), as stated above, a principal intent of
167 R-2019-035 is to eliminate or sharply circumscribe the discretion that the DRB exercises in its
168 meetings, presumably to reconstitute it as a “staff board for technical reviews.” Whether R-
169 2019-035 accomplishes that task, specifically when it leaves the DRB some substantive
170 discretion that impacts due processes, cannot be decided at this level. However, because § 6-
171 4(L) impacts due process protections it must be strictly construed. Under § 6-4(L) the DRB is
172 permitted to restrict questioning, presumably from the public. And because the legislative
173 intent of R-2019-035 is to restrain the DRB’s use of substantive discretion, the discretion
174 allowed in § 6-4(L) must be sparingly exercised. However, I find that § 6-4(L) permits the DRB
175 to use reasonable discretion to constrain questions which includes cross-examination. I
176 respectfully caution the DRB that it should not exercise this meaningful discretionary authority
177 flippantly or only for purposes of expediency. At all times it should be exercised prudently,
178 sparingly, and consistently.

179 However, the facts in the record of this appeal substantiate that the DRB allowed
180 multiple unsworn witnesses for the developers to testify on substantive matters and issues that
181 relate directly to issues raised in this appeal. Although under § 6-4(L), the DRB has the
182 authority to curtail “questions” and “discussions,” if it allows the developers’ witnesses to
183 testify on substantive facts that support the site plan, the testimony must be sworn, and fairness
184 requires that that testimony is also subject to cross examination. Cross examination

185 complements sworn testimony, and in an appeal, it strengthens the record for review. For this
186 purpose, a remand is necessary.

187

188 **B. Procedural Voting Irregularities**

189 Appellants next claim that the DRB violated the Open Meetings Act (OMA) when it
190 failed to vote as a board on the two deferrals in the record and on finally approving the site
191 plan. Although the OMA clearly applies to policy-making bodies, it can also apply to public
192 bodies who perform the kind of tasks the DRB performs in reviewing site plans. However, I
193 need not resolve this question because I find that the DRB failed to adhere to its own Rules of
194 Procedure during its three meeting. The DRB’s Rules of Procedure require the DRB to vote
195 on certain actions. The DRB Rules state in relevant part:

196 “The DRB may defer the agenda item to a specific date, time, and place by
197 majority vote...” [DRB Rules, p. 8].

198

199 Thus, the DRB must vote when a deferral is considered. In addition, the DRB must approve a
200 site plan in a similar fashion [DRB Rules, p. 7]. The DRB may suspend its rules, but only by
201 majority vote [DRB Rules, p. 9]. DRB meetings, though arguably not quasi-judicial in nature
202 under R-2019-035, they are still performing public decision-making functions that require
203 minimum due process protections.

204 The record of the three DRB meetings on the developers’ application demonstrates that
205 the DRB did not vote on the two deferrals and on the final approval. Although these technical
206 violations may seem trivial, especially since no objections were noted by its members, the
207 violations can have meaningful consequences in an appeal. The rules, in part, are meant to
208 preserve the high integrity the public expects in the public review process. When the DRB

209 observes its own Rules of Procedure, it honors the important public decision-making process
210 in which it is engaged. I hesitate to use the important authority that the City Council delegated
211 to the LUHO to remand the application just to take formal votes, especially when the record
212 reflects a consensus on those votes. Put another way, there is no evidence that the DRB did not
213 have a consensus when the Chair deferred the meetings and approved the application.
214 However, because a remand is necessary for other process violations, in a remand, the DRB
215 must follow its own rules it adopted.

216

217 **C. Density**

218 Next, Appellants generally claim that “the site plan exceeds the appropriate density
219 under [the existing] MX-L zoning” [R. 56]. Specifically, they argue that one of the stated
220 purposes of the MX-L zone is to “provide...low-density multi-family residential
221 dwellings...to serve the surrounding area,” and they claim that the developers’ proposed
222 apartment buildings are not low density [IDO, § 2-4(B)(1)]. However, Appellants fail to
223 indicate what they believe is the “appropriate” density in an MX-L zone and what provision
224 of the IDO they claim is contravened.

225 Although not a defined term in the IDO, density in land use and zoning generally refers
226 to the ratio and intensity of land use over a given area of land. It is undisputed that the IDO
227 is silent on placing numeric ratios or limits on density in any of the MX zones. Instead of
228 defining density constraints with numeric values, densities in any MX-L zone are a function
229 of and determined by the numerous standards and constraints referenced in IDO Tables 2-4-3
230 and 2-4-4. Thus, density can vary from lot to lot because, in general terms, it is primarily a
231 function of how much land is available after the multiple restrictions on building height,

232 setbacks, landscaping, parking, and other constraints referenced in the tables 2-4-2 and 2-4-3
233 are applied to the site. This is undisputed.

234 With regard to density, Appellants have not shown that the DRB misapplied or
235 otherwise erred in applying the Use and Development Standards of Tables 2-4-2 and 3. Thus,
236 although Appellants believe the density of the proposed apartment buildings in the site plan
237 are exceeded, Appellants have not brought forth any evidence (with the exception of the
238 Neighborhood Edges provisions, as discussed below), that the density exceeds what is
239 permitted in the IDO.

240

241 **D. Traffic Impact Study & Adverse Impacts**

242 Appellants further contend that the DRB or the City Traffic Engineer should have
243 required the developer to perform a traffic impact study (TIS) of the affected roads near the
244 project site. They also contend that the placement of the commercial trash dumpsters near the
245 single-family residential dwellings to the South demonstrates that the developer did not
246 mitigate adverse effects as required under the IDO.

247 Taking the TIS first, the evidence in the record demonstrates that the number of
248 dwelling units proposed does not meet the threshold warranting a TIS [R. 163]. Appellants
249 have not supplemented the record with credible evidence to rebut this finding. Instead they
250 suggest that a TIS “should” be required. An appeal cannot be sustained on a desire for a
251 different result.

252 Regarding the placement of the commercial solid waste dumpsters, Appellants claim
253 this is an adverse impact, but fail to show how it is so under the IDO. They have not pointed
254 to any specific regulation that is violated. The record reflects that many of the Appellants have

255 consistently complained to the DRB about the proposed placement of the solid waste
256 dumpsters near the site’s southern border and nearby the residential homes [R. 241, 276, 292,
257 295]. At the August 14, 2019 DRB meeting, the issue was raised [R. 188]. Apparently, City
258 Planning Department Staff also requested that the solid waste dumpsters be moved away from
259 the single-family dwellings [R. 329]. An agent of the developer gave *unsworn* testimony to the
260 DRB that the Staff with the City Solid Waste Department “dictated the location of the two
261 southern dumpsters...” [R. 188]. Appellants have not rebutted this testimony with substantial
262 evidence or have not otherwise shown that a standard or criteria in the IDO is violated. Thus,
263 the issue should be denied. However, in a remand hearing, the DRB must reconsider this
264 substantive evidence, giving less weight to it than if it were sworn testimony. It should also
265 use the opportunity to take remedial actions to rehear sworn testimony and allow its cross
266 examination.

267

268 **E. Twenty-Percent Rule Under NMSA, 1978 § 3-21-6(C)**

269 Appellants next contend that NMSA, 1978 § 3-21-6(C) applies to the DRB decision
270 and the City Council, not the DRB, must stand in the shoes of the DRB and approve or deny
271 the developers’ application. For purposes of this appeal, I assume that Appellants can meet the
272 20% threshold required that triggers the statute.⁴ Notwithstanding, I must respectfully disagree
273 with Appellants that the statute is applicable on its face to DRB decisions on site plans.
274 Notably, on its face, § 3-21-6(C) applies to “areas...changed by zoning regulations.” In this

4. In the appeal, Appellants did not expressly demonstrate that the 20% rule of § 3-21-6(C) is satisfied for this site plan.

275 appeal, there is no area that is being changed by a zoning regulation. NMSA, 1978, § 3-21-
276 6(C) state in full:

277 If the owners of twenty percent or more of the area of the lots and [of] land
278 included in the area proposed to be changed by a zoning regulation or within
279 one hundred feet, excluding public right-of-way, of the area proposed to be
280 changed by a zoning regulation, protest in writing the proposed change in
281 the zoning regulation, the proposed change in zoning shall not become
282 effective unless the change is approved by a majority vote of all the members
283 of the governing body of the municipality or by a two-thirds vote of all the
284 members of the board of county commissioners.
285

286 Appellants generally contend that New Mexico case law supports an expansive
287 interpretation of § 3-21-6(C) that any change in the status quo of land under the IDO qualifies
288 as a change under the statute. And, in its most broad terms, the developers are attempting to
289 change the status quo on their land through the IDO. Broadly, the IDO arguably incorporates
290 zoning regulations. The City Council, however, in enacting the IDO restricted the twenty-
291 percent rule of § 3-21-6(C) to only zone map amendments. See § 6-7(G). Because the
292 developers' application does not implicate a zone map amendment, I find that IDO § 6-7(G)
293 is not applicable and therefore § 3-21-6(C) is equally inapplicable to the developers' site plan
294 review.

295

296 **F. Applicability of the Neighborhood Edges Provisions of the IDO**

297 Appellants also challenge the DRB's decision on the basis that the DRB failed to apply
298 the Neighborhood Edges provisions of the IDO to the site plan. On this appeal basis, at the
299 LUHO hearing the issue seemed clear and simple. The analysis of this issue is admittedly
300 more complex than it appears at the surface. I am compelled to find that DRB did not err as
301 it appears that the City Council intended for IDO § 1-10(B) to encompass the zoning map.

302 The context of how this issue arose is meaningful. It is undisputed that just days before
303 the September 11, 2019 DRB decision, on September 5, 2019, the City Council’s
304 legislatively approved Phase 2, Batch 1 zone map conversions became effective. Among the
305 conversions it approved, a lot located at 8419 Tierra Morena Place, NE, which converted
306 from an MX-T to R-1B zone (the R-1B lot) is included. This R-1B lot abuts the project site.
307 This is also undisputed. The effective date of this conversion predates the DRB decision on
308 the developers’ site plan and therefore gave rise to the question of whether the Neighborhood
309 Edges provisions of the IDO, § 5-9 is applicable to the site plan. Put another way, Appellants
310 contend that on the date the conversion became effective, the R-1B lot qualified as a
311 “protected lot” and the lots depicted in the site plan become “regulated lots” both under § 5-
312 9(B)(1) and (2).⁵

313 The developers argue, however that IDO § 1-10(B) gives them somewhat of a protected
314 status that acts to preempt the imposition of the Neighborhood Edges provisions from
315 applying to the proposed development. Specifically, they contend that they have a right under
316 the IDO to have their application reviewed according to the “standards and criteria” in effect
317 at the time their application was deemed complete. See § 1-10(B). They claim that the
318 “standards and criteria” of § 1-10(B) includes the status of zoning districts in the IDO Zone
319 Map as of the date the application was deemed complete. For purposes of this appeal,
320 because the application was scheduled for a public meeting as early as June 17, 2019, I

5. I note that Appellants also argued that the owner of the R-1B lot, as a protected lot for purposes of the Neighborhood Edges provisions has a common law vested right to the protection as of September 5, 2019. Common law vested rights, however, applies to development rights. Whether it extends further is not for me to decide.

321 assume the application was deemed complete by at least June 17, 2019.⁶ It is undisputed
322 that the phase 2, Batch 1 conversions did not change the zone map or otherwise effect the lot
323 at 8419 Tierra Morena Place, NE, until September 8, 2019. Thus, under the developers
324 interpretation of § 1-10(B), their application was deemed complete just over 2-months before
325 the effective date of the R-1B lot conversion. Therefore, the Neighborhood Edges provisions
326 are inapplicable.

327 To confuse matters more, it is undisputed that the developers and that the DRB knew
328 or had reason to know that the Phase 2, Batch 1 conversions were soon to be adopted. In the
329 LUHO hearing the Developers’ Planner, James Strozier testified that he became aware that
330 the lot owner of 8419 Tierra Morena Place, NE, had applied for the conversion at the May
331 21, 2019 facilitated meeting, nearly a month before submitting the application to the Planning
332 Department. In addition, the record of the DRB’s second public meeting on August 14, 2019
333 demonstrates that Appellants made the DRB aware of the zone conversion status of the lot
334 at 8419 Tierra Morena Place, NE [R. 176].

335 The pivotal question becomes one of interpretation of the term “standards and criteria”
336 in § 1-10(B). Applying the well-established rules of statutory construction brings some
337 clarity to the apparent conflict. The first rule is that “the plain language of an [ordinance] is
338 the primary indicator of legislative intent.” *High Ridge Hinkle Joint Venture v. City of*
339 *Albuquerque*, 1998-NMSC-050, ¶ 5. Under this rule language cannot be read into an
340 ordinance provision that is not there “particularly if it makes sense as written.” *Id.* The second

6. This is so because under the IDO an application cannot go forward to a public hearing/ meeting until an application is deemed complete by the Planning Director [IDO § 6-4(H)(4)].

341 rule requires that “persuasive weight” is to be accorded to “long-standing administrative
342 constructions of [ordinances] by the agency charged with administering them.” Id. No party
343 has proffered any evidence one way or the other from which persuasive weight can be
344 accorded to long-standing administrative gloss of how § 1-10(B) has been applied.⁷ Section
345 1-10(B) is relatively new as the IDO has been effective for under two years. The third rule
346 of statutory construction “dictates that where several sections of an [ordinance] are involved,
347 they must be read together so that all parts are given effect.” Id.

348

349 The applicable IDO provision states in full:

350 Any application that has been accepted by the City Planning Department
351 as complete prior to the effective date of this IDO, or any amendment to
352 this IDO, shall be reviewed and a decision made based on the standards
353 and criteria in effect when the application was accepted as complete.
354

355 The practical question must be resolved: does the “standards and criteria” term in § 1-
356 10(B) accord the developers with a guarantee that if the IDO is amended or if a zone district
357 changes after the application is deemed complete, can either of those changes be applicable
358 to how the City reviews the complete application? I find that the term “standards and criteria”
359 in § 1-10(B) is ambiguous. If an ordinance’s language is unclear or ambiguous, further
360 statutory analysis must be performed “by looking to the history, background, and overall
361 structure of the [ordinance].” See *State v. Almanzar*, 2014-NMSC-001, ¶ 15.

7. When administrative agencies have interpreted an “ambiguous” ordinance “in a consistent manner and apply [the interpretation] to similarly situated applicants over a period of years without legislative interference” the doctrine of administrative gloss permits the continuation of that interpretation if it is rational. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 9.

362 There is no help in the general heading under which the ambiguous term is placed in
363 the IDO. The general heading of IDO § 1-10 generally addresses changes and “Transitions
364 from Previous Regulations” [IDO, § 1-10]. In addition, there is no other language in the IDO
365 which expressly (or even by implication) encompasses or incorporates the zone districts with
366 the regulations of the IDO such that the zone map is included in the term “standards and
367 criteria” in § 1-10(B). And, as stated above, there is a lack of administrative gloss from which
368 can be applied to any interpretation of the term.

369 However, there is support for the developers’ position in the enabling ordinance which
370 enacted the IDO. Looking to the legislative intent of the IDO, I take notice that the City
371 Council’s enabling ordinance of its enactment of the IDO provides legislative intent on the
372 subject. City Council Ordinance 2017-025 (O-2017-25) states in relevant part:

373 Section 2. The City hereby repeals the existing zoning map and replaces it
374 with the Integrated Development Ordinance zoning conversion map.
375

376 The Council, through this enabling ordinance, repealed the previous Zoning Code and
377 replaced it with the IDO. In doing so, the Council also acknowledged that the previous
378 Zoning Code had incorporated the Zoning Map by reference to it [See O-2017-025, p. 15].
379 The above-stated Section 2 evidently represents the Council’s intent to do the same with IDO
380 and the Zoning Map. In interpreting § 1-10(B), although it is an imperfect coalescing of the
381 zone map and the IDO, it nonetheless accomplishes the task and cannot be ignored.

382 Because there is a clear legislative intent for the proposition that the IDO incorporates
383 the Zoning Map, logically the term “standards and criteria” in § 1-10(B) includes or
384 integrates the zone map into its fold. Thus, under the IDO, when reviewing an application §
385 1-10(B), it is to be reviewed against the “standards and criteria” in effect at the time the

386 application was deemed complete, which includes the status of the zone districts depicted in
387 the IDO zone map. This is so because it is the legislative intent that the IDO zone map is
388 incorporated into the IDO as part of its “standards and criteria.” According, I have no choice
389 but to find that the DRB did not err when it reviewed the developers’ site plan without
390 applying the Neighborhood Edges provisions because at the time the application was deemed
391 complete the Neighborhood Edges provisions were inapplicable.

392

393 **IV. Conclusion**

394 Because the DRB allowed substantive unsworn witness testimony regarding facts and
395 conclusions from the developers’ agents but prevented that testimony from being tested
396 through cross examination, the DRB erred. And because the DRB failed to follow its own
397 rules of conduct in deciding on the application, it further impaired the process due to the
398 public. Although seemingly minor when viewed independently of one another, the totality
399 of the impact of these infractions on due process and on the perception of fairness in the
400 review process must not be ignored. Regrettably, the fairness and high integrity of what is
401 expected of the DRB’s public decision-making process requires that the DRB rehear this
402 application. The application is remanded to the DRB to rehear the application to redress its
403 due process infractions.


Steven M. Chavez, Esq.
Land Use Hearing Officer

November 15, 2019

Copies to:

City Council
Appellants,
Party Opponents,
City Staff