BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-20-2

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.

This appeal arises from a decision of the Development Review Board (DRB) who approved a site plan for a 93-dwelling unit apartment facility at the corner of Alameda Blvd. and Barstow St., NE. This is the second appeal regarding this matter; the first appeal resulted in a remand back to the DRB to rehear the factual testimony, redress DRB Rules of Procedure infractions, allow the parties to disclose its *ex parte* communications, and allow for cross examination of testimony.[1]

As in AC-19-16, this appeal presents a number of fundamental legal issue regarding interpretation of the IDO. There are few facts in dispute. Appellants have by-and-large raised the same legal issues in this appeal as the ones they raised in AC-19-16. Appellants first contend that the DRB meetings on the developers' application were not conducted as quasi-judicial hearings and therefore violate New Mexico law. While I agree that the DRB meeting format is at odds with New Mexico law and even with the IDO as to how quasi-judicial hearing are to be conducted, the legislative intent of the City Council as memorialized in Resolution 2019-035 carved out an

1. In reviewing this recommendation, for background on the remand issues and the appeal issues, I respectfully recommend that the City Council also review the LUHO remand order of AC-19-16 which is incorporated in this recommendation by reference to it.

exception for DRB meetings that exempts the DRB from performing its decision-making duties as a quasi-judicial administrative board. Whether R-2019-035 is inconsistent with New Mexico case law is an issue I will leave to someone else to decide.

With regard to New Mexico law, Appellants also challenge the DRB's authority to approve the site plan because they claim, under the facts in this case, NMSA 1978, § 3-21-6(C) acts to divest this authority from the DRB and places it with the City Council to decide. Regarding this claim, I affirm my previous recommendation memorialized in AC-19-16; there I found NMSA 1978, § 3-21-6(C) is inapplicable and I recommend that the City Council deny the appeal on this challenge.

Appellants next contend that the DRB ignored the LUHO remand instructions. Appellants also claim that the "advisory" decisions made in the remand instructions of AC-19-16 unduly influenced the DRB's decision-making process in its remand hearing. Appellants further claim that because of the "advisory decisions" on their appeal issues, the DRB ignored new evidence that Appellants submitted at the DRB's January 8, 2020 remand rehearing. The implication they suggest, is that the alleged "new" evidence should have shed a new light on the core issues in the case, but because of the advisory decision in the remand instructions, the DRB ignored that evidence. As explained below in greater detail, Appellants' arguments teeter on unsupported factual assumptions and misstate the law. As detailed below, I find that the "new" evidence Appellants submitted has no bearing on the analysis required to decide this matter under the IDO. Thus, as discussed below in more detail, these challenges should also be denied.

With regard to the site plan requirements in the IDO, Appellants present several claims. Appellants contend that the DRB should have applied the protections in the Neighborhood Edges provisions of the IDO to protect abutting R-1B lots on Tierra Morena Place, NE. Appellants also believe that the density of the project site depicted in the site plans exceeds what should be

allowed in an MX-L zone. Appellants also claim that the DRB should have required a traffic impact study. Appellants next contend that the DRB erred in not considering and applying the Vineyard Sector Development Plan to the site plan. Appellants also generally claim that there is inadequate City infrastructure to serve the proposed development, and that the developers have not adequately mitigated the adverse impacts of the proposed development. Finally, Appellants allege that the DRB's decision was not supported by substantial evidence in the record.

As shown in more detail below, after reviewing the record and hearing arguments from the parties, I find that the appeal should be denied on all grounds alleged by Appellants. With regard to the factual contentions, I find that Appellants have not met their burdens of proof. I similarly find that Appellants have misapplied the IDO and the law of New Mexico. Further, I find that the DRB did not err in approving developers' site plans as the decision is well-supported with substantial evidence in the record and in the IDO.

I. Background and History

The factual and procedural history of this matter is mostly undisputed. What is disputed is described below. In AC-19-16, I laid out the relevant history of which I adopt below with minor modifications. The record of AC-19-16 is incorporated with this appeal.[2] In late April 2019, Consensus Planning, agents for Phillip Lindborg and Bella Tesoro, LLC (collectively, the "developers") notified the affected neighborhood associations of their intent to submit the site

2. The record of this appeal is deficient because the City Planning Staff did not include the record of the AC-19-16 which is still relevant and should have been merged with the record of this appeal. In this appeal I reference the record of AC-19-16 with "R. page #" and the record of this appeal as "R. page #A."

plans for DRB review.[3] [R. 86]. In their notice to the affected neighborhood associations, the developers generally described the proposed project as being a 93-dwelling unit multi-family development and inquired from the association officers if they wished to meet to further discuss the project [R. 86]. Soon thereafter, officers from the Vineyard Estates Neighborhood Association and the District Four Coalition of Neighborhood Associations responded and sought a City-sponsored facilitated meeting with the developers [R. 87-88]. The City-sponsored facilitated meeting was arranged and held on May 21, 2019, at which the developers, neighborhood residents, and association representatives discussed the details of the application [R. 92-105]. On June 17, 2019, the developers and the City Planning Staff held a meeting for a mandatory pre-application discussion to go over the review process and application requirements [R. 81-84].[4] On the same day as the pre-application meeting (June 17, 2019), the developers also submitted their application to the City Planning Department for subdivision plat and for site plan review. The application was accepted by City Planning Staff and scheduled for the next DRB public meeting--July 17, 2019 [R. 65, 300].[5] [R. 65-80]. There is disagreement as to whether the application was deemed complete in June or July 2019. However, as explained below, whether it was in June or July 2019 makes no difference in the analysis.

Between July 1, and July 17, 2019 the DRB received comments from governmental agencies regarding the application, including from the Albuquerque Public Schools,

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3. The Nor Este Neighborhood Association, the Vineyard Estates Neighborhood Association, and the District Four Coalition of Neighborhood Associations are the effected associations that were entitled to notice.

4. 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).

5. Under the IDO, § 6-4(H)(4), an application will not be scheduled for a hearing/ meeting until it is deemed complete by the Planning Director. The presumption is that by accepting the application and setting it on the DRB's meeting docket, it was deemed complete on June 17, 2019.

Albuquerque Police Department, New Mexico Department of Transportation, Mid-Region Metropolitan Planning Organization, Albuquerque Department of Municipal Development, Albuquerque Metropolitan Arroyo Flood Control Authority, as well as from various Staff from sections of the City Planning Department [R. 316-326]. At the July 17, 2019 DRB meeting, after allowing multiple speakers to comment on the developers' application, the DRB through the Chair deferred a decision and notified the attendees that the application would again be heard at the DRB's August 14, 2019 public meeting [R. 314-315].

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

On August 14, 2019, the DRB revisited the developers' application. The DRB reopened the floor and allowed unsworn testimony from the developers' agents but did not allow for cross examination. [R. 173-189]. The DRB was advised by Appellants' attorney about the R-1B lot conversion, and he again advised the DRB that the Neighborhood Edges provisions of the IDO must be applied to the site plan [R. 176-177]. The DRB allowed additional written comments from the City's Traffic Engineer, Staff from the Water Utility Authority, and from the City Zoning Department Staff [R. 191-194]. Noting deficiencies in the site plan, the DRB Chair again deferred a decision on the developers' application [R. 188]. The DRB Chair notified meeting attendees that the matter would be taken up at the DRB's September 11, 2019 public meeting to give additional time for the developers to address the issues that were raised in the DRB meeting

[R. 188-190].

At the September 11, 2019 public meeting, the DRB approved the developers' site plan and replat proposal [R. 161 and 6-7]. On September 24, 2019, Appellants filed their timely appeal to the City Council of which was referred to the Land Use Hearing Officer (LUHO) [R. 10]. A LUHO appeal hearing was held on October 31, 2019. In a written remand order dated November 15, 2019, I requested that the DRB rehear the application, so that it can properly swear-in witnesses, allow cross examination, disclose its *ex parte* communications, and follow its own Rules of Conduct as it is taking action on the application [R. 291-A]. Because Appellants presented a number of legal issues in their appeal arguments, many of which implicate interpretation of the IDO, I narrowed down the issues by making recommendations on the *legal* issues.[6]

On January 8, 2020, the DRB reheard the developers' application (the remand hearing), and in a unanimous decision, the DRB voted to approve the site plan [R. 66A]. This timely appeal followed. The City Council again referred this matter to its LUHO, and the LUHO appeal hearing was scheduled to be heard on March 24, 2020. However, during the pendency, our New Mexico State Governor issued a Public Emergency declaration and the March hearing was cancelled. Because under the IDO, appeal hearings are time sensitive, a remote LUHO appeal hearing was scheduled for April 16, 2020. In email communications through the Office of City Council, Appellants through counsel raised objections to the remote format for LUHO hearings. The Party Opponents did not object to the format. After considering Appellants' objections, I

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6. After reviewing the remand record, I now believe I should not have analyzed the *legal* issues in the first appeal until after the DRB reheard the application in the remand. In short, I should have remanded the matter without commenting on the legal issues presented. As explained in detail below, although I find that it was ultimately harmless to do so, by making recommendations on the *legal* issues presented and then remanding the factual issues to the DRB, I only further complicated an already complicated appeal.

denied the objections and the hearing was held remotely.[7]

II. Standard of Review

A review of an appeal is a whole record review to determine whether the DRB acted fraudulently, arbitrarily, or capriciously; or whether the DRB's decision is not supported by substantial evidence; or if the DRB 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. The City Council delegated its authority to the LUHO to remand appeals [IDO, § 14-16-6-4(U)(3)(d)].

III. Discussion

A. The DRB Hearing Process, Open Meetings Act, and Due Process

Appellants claim that in all the DRB hearings, including in the January 8, 2020 remand hearing, the DRB substantially deprived them of due process when it had *ex parte* contacts and "refused" to disclose these contacts it had with the developers. Appellants further contend that allowing the DRB to have *ex parte* communications with the developers violates the New Mexico Open Meetings Act. Similarly, Appellants also claim that the DRB's hearing format is in contravention of how a quasi-judicial board under New Mexico law is required to function.

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7. All the communications regarding the objections are included in the record. With the assistance of City Council Staff, I adopted special case management rules, specifically for the remote hearing format to safeguard the hearing from unauthorized access, and to assure that basic due process was satisfied and to allow representatives of the parties to present new evidence and any live witness testimony if desired.

As I stated in AC-19-16, Appellants' appeal implicates City Council Resolution 2019-035 (Bill # R-2019-150 herein as "R-2019-035"). Moreover, as I previously found in AC-19-16, *ex parte* contacts are a legislatively intended consequence of R-2019-035 and are expressly permissible therein.

In reviewing the record of the January 8, 2020 hearing, I find that the DRB substantially complied with that instruction. The record shows that during the January 8, 2020 DRB remand hearing, all the *ex parte* communications were elicited from the developers' Land Planner, James Strozier, during cross-examination. In that dialogue, Mr. Strozier identified his out-of-hearing contacts with City Staff DRB members regarding the development proposal [R. 363A-364A]. In addition, included in the record are several email communications between the DRB Chair and Mr. Strozier [R. 222A – 225A].

Substantively, the email communications between the developers and the City Staff appear to be nothing more than procedural inquiries and inquiries about dates and submissions for the DRB hearing(s). I note that there are also email communications between the DRB Chair and an Appellant in this appeal [See R. 265A]. Appellants have not presented any evidence challenging or rebutting Mr. Strozier's testimony. Similarly, there is no evidence in the record from which one can rationally infer, as Appellants do, that the DRB ignored the remand instruction regarding disclosure of *ex parte* contacts.

Regarding the OMA, chiefly because the contacts appear to be procedural inquiries rather than substantive discussions about the merits of the application, I find nothing about the contacts that violates the Open Meeting Act (OMA). These contacts were not to formulate public policy; nor were they decision-making discussions regarding the DRB's duties; and there is no indication that any DRB members communicated any decision-making on the application off the record. Appellants make these contacts to be much more than what they are: impartial communications

about process. Other than Appellants' broad assertions, I find that Appellants have not satisfied their burden of proof on this issue.

Regarding Appellants due process arguments relating to the DRB's meeting procedures, a step back is in order to understand the Appellants' claims and the manner in which the DRB operates. Appellants due process contentions boil down to a claim that the DRB continues to operate as a "decision-making board" under IDO § 14-16-6-4(M)(3) because, even under City Council Resolution 2019-035, the DRB necessarily exercises discretion and makes "decisions that would result in changes to property rights or entitlements on a particular property or affecting a small area" and is therefore performing traditional quasi-judicial functions without meeting minimum due process requirements.[8] See also IDO, § 6-4(M)(3). Appellants' argument has not changed on this contention.

In R-2019-035, the City Council clearly circumscribed considerable DRB discretion and, to some extent, redefined the DRB's function, reconstituting it as a "staff board for technical reviews" rather than as a quasi-judicial board that conducts hearings [R-2019-035, Ex A.]. A stated intent of R-2019-035 is to permit DRB members to meet with developers because it is *"not practical for technical City Staff members to operate in such a manner that prohibits them from communicating with members of the public outside of a public hearing"* [R-2019-035]. Thus, as exhibited by the plain language in R-2019-035, it is the clear intent of the City Council to not confine DRB members to merely reading the record or hearing presentations at public meetings. Apparently to exempt it or to insulate it from acting as a quasi-judicial administrative board, it is

8. 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 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 Envtl. Improvement Bd*., 1980-NMCA-160, ¶ 6.

a principal purpose of R-2019-035 to eliminate or sharply curtail the DRB's functions, specifically its exercise of substantive discretionary decision-making authority over property rights [R-2019-035, Ex. A]. Prior to the enactment of R-2019-035, it was an inescapable conclusion that the DRB engaged in obvious substantive discretionary decision-making functions and was acting in a quasi-judicial nature. Moreover, previously, the DRB was included under the IDO as a quasi-judicial decision-making board.

Appellants suggest that despite R-2019-035, the nature of the DRB's role has not materially changed, claiming its functions remain quasi-judicial in nature, and as such must still satisfy minimum due process required of a quasi-judicial board. As I indicated in AC-19-16 to the extent that the DRB remains a "decision-making body," I agree with Appellants. However, despite R-2019-035, the larger question that this appeal raises, of which is beyond my authority, is whether R-2019-035 is lawful and whether the DRB can operate outside of the quasi-judicial context and requirements under New Mexico case law. My authority concerns whether the DRB satisfied R-2019-035.

I therefore reaffirm my previous recommendation in AC-19-16. In the IDO, there is a distinct demarcation between "public meetings" and "public hearings." Under the IDO, the latter are labeled explicitly quasi-judicial in nature, requiring a less flexible, greater degree of administrative due process than what is required in "public meetings." IDO § 6-4(M)(3)(b) lays out the compulsory processes due in quasi-judicial hearings, while IDO § 6-4(L) describes a flexible and, ironically, a discretionary manner of due process for public DRB meetings. IDO § 6-4(L) states:

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

There is no question that the City Council through R-2019-035 intended that the DRB engage in the type of public "meetings" described in § 6-4(L) rather than in public "hearings" which are clearly intended to have the kinds of quasi-judicial protections under New Mexico law. Notwithstanding the discretionary manner in which due process is exercised under § 6-4(L), as stated above, a principal intent of R-2019-035 is to eliminate or sharply circumscribe the discretion that the DRB exercises in its meetings, presumably to reconstitute it as a "staff board for technical reviews." I find that the DRB adhered to the intent of R-2019-035.

Next, Appellants challenge the DRB remand decision on a new ground. Appellants contend that because I found that the DRB's September 11, 2019 hearing lacked due process protections necessitating a remand, I should not have simultaneously commented on the numerous legal issues presented in that appeal. Appellants suggest that adjudicating the legal issues influenced the DRB in the remand hearing to ignore their arguments. More specifically, Appellants suggest that because I commented, or as they claim "decided" the legal issues, and remanded the matter back to the DRB, I essentially put my finger on the proverbial scales. As a result, Appellants contend, the DRB did not act independently, but instead relied on my "decisions" in the remand hearing. More specifically however, citing New Mexico case law, Appellants further claim that if the September 11, 2020 hearing was invalid on due process grounds, I should not have concluded that the DRB decision was valid on other grounds.[9]

First, I note that it is no secret that the LUHO has no substantive decision-making authority. LUHO decisions are in fact recommendations to the City Council, advisory and not final [See IDO, § 6-2(I)]. Certainly, the DRB members are aware of this limitation. Second, Appellants'

9. In AC-19-16, I determined that the DRB's decisions regarding the applicability of various IDO provisions to the site plan were supported by substantial evidence. See AC-19-16, dated November 15, 2019.

argument paints with a very broad stroke how New Mexico law may apply, ignoring the details. In doing so, Appellants cite *Nesbit v. City of Albuquerque*, 1977-NMSC-107 for the general proposition that "when an underlying decision is void [on due process grounds] further proceedings based on the voided decision are invalid." The due process defect in *Nesbit* was jurisdictional; notice of the quasi-judicial administrative hearing was never afforded to the public. In this matter, the due process defects were technical violations in how the DRB conducted its hearing. The matter was remanded to correct the technical deficiencies on how the meeting was conducted.[10] The recommendations which Appellants mischaracterize as "advisory decisions" were recommendations based on interpretation of the law of the case---mostly the IDO. Thus, *Nesbit* is distinguishable.

Appellants read too much into the remand order of AC-19-16. The remand was intended to allow the Appellants to make a better record of their appeal regarding the *factual* testimony that was presented in the September 11, 2019 DRB hearing. Because that testimony was unsworn and not subject to cross examination, remand is the antidote to cure those defects. The law of the case and the interpretation of the law of the case has never changed. Although Appellants used the remand to supplement the record with what they call "new" evidence," as stated above, the 21 additional exhibits included in the remand record have no effect on how the IDO is applied to the facts.

Although perhaps it would have been much more appropriate for me to remand the matter back to the DRB without any analysis of Appellants' legal challenges in the remand instructions, I find that no harm was caused because the interpretations of the IDO by the DRB and subsequently by this LUHO remain unchanged. Put another way, the purpose of the remand had nothing to do

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10. See *Nesbit* at ¶ 3 where the Court suggested that New Mexico does not take a strict position regarding technical due process violations.

with the DRB's interpretation of the IDO regarding density, Neighborhood Edges provisions of the IDO, and whether a traffic study was necessary. Accordingly, the first DRB decision can and was invalid on grounds having to do with the DRB's actions in handling fact testimony, but it was valid on the grounds regarding its interpretation of the IDO. Moreover, interpretations of the IDO by the LUHO are not final; they are recommendations and are subject to be overruled by the City Council. Because those matters did not impact the factual testimony or "new" evidence submitted by Appellants, I find Appellants were not prejudiced.

B. Density

Next, just as Appellants argued in the AC-19-16 appeal, Appellants generally claim that "the site plan exceeds the appropriate density under [the existing] MX-L zoning" [R. 56]. Specifically, they argue that one of the stated purposes of the MX-L zone is to "provide…*low-density* multi-family residential dwellings…to serve the surrounding area," and they claim that the developers' proposed apartment buildings are not low density used (Emphasis added.) [IDO, § 2-4(B)(1)].

The harsh realities underlying the IDO and Appellants' impassioned plea for fairness is not unnoticed by this Hearing Officer. I agree the nomenclature of the term "low" in the MX-L zone district heading and in its description in the IDO can be interpreted by some to be illusory. However, and despite the nomenclature, the IDO includes very clear criteria that creates a hierarchy of sorts, distinguishing densities among the five labeled MX zones of the IDO. Riddled in Appellants' argument is a plea to give new meaning to the MX-L zone district criteria in the IDO, new meanings that would in turn unfairly have a disparate impact on the other side of this appeal—the developers. In this regard, Appellants suggests that the City Council should read terms into the MX-L, zone district provisions that are not there in order to reduce the density of the

apartment development to what Appellants subjectively consider is low density.[11] Fairness requires the opposite of what Appellants seek; the IDO must be interpreted to bring predictability to how the IDO is administered. Without regard to subjective criteria, interpretation of the IDO must always be based only on the plain language in the IDO.

As indicated in the AC-19-16 remand order, there is no dispute that the IDO is silent on placing numeric ratios on density in any of the MX zones. Instead of defining density constraints based on ratios, density is a function of and determined by the standards and constraints referenced in IDO, Tables 2-4-3 and 2-4-4. Density can vary from MX-L zone to MX-L zone because, in general terms, it is primarily a function of how much land is available after the multiple restrictions on building height, setbacks, landscaping, parking, and other constraints referenced in the tables 2-4-2 and 2-4-3 are applied to the site. This is undisputed. I find that the word "low" in MX-L, although somewhat deceiving to Appellants, is unambiguously clear and rationally related to the criteria in Tables 2-4-3 and 2-4-4 of the IDO of which is also unambiguous. Put another way, the labeling of the zone is only misleading if one chooses to ignore IDO Tables 2-4-2 and 2-4-3.

Appellants have not shown that the DRB misapplied or otherwise erred in applying the Use and Development Standards of Tables 2-4-2 and 3 to the facts presented. Nor have they brought forth any evidence (with the exception of the Neighborhood Edges provisions, as discussed below), that the density exceeds what is permitted in the IDO.[12]

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11. Density in land use and zoning, although not a defined term in the IDO, generally refers to the ratio and intensity of land use over a given area of land---for example, 20 dwelling per acre means that only 20 dwelling are allowed in an acre. This manner of setting density limits is not in the IDO.

12. Appellants argument is that as a matter of policy because the previous Comprehensive Zoning Ordinance, of which was superseded by the IDO, included numerical values on density in particular zones, the City Council disregard the IDO and apply those now defunct density values on developers' site plan.

Appellants also contend that the DRB erroneously ignored applying the Comprehensive Plan to the site plan. They contend that because the site is in an "area of consistency" as defined by the Comprehensive Plan, Appendix C and D of the Comprehensive Plan, applies to the application. Appellants claim that the Comprehensive Plan "incorporates the Vineyard Sector Development Plan" and therefore the Vineyard Sector Plan should have been applied to the application [R. 63A].

Appellants' argument lacks support. The Vineyard Sector Plan has been subsumed by the IDO and by the Comprehensive Plan. Any applicable policies that were in the Vineyard Sector Plan are merged into the policies of the Comprehensive Plan [Comp. Plan, 1-9]. In addition, in Appendix E, "In the case of Sector Development Plans (SDPs) with goals and policies (see Table A-3), the goals and policies have been integrated into the Comprehensive Plan…" [Comp. Plan, Appdx. E, A-32]. The Vineyard Sector Plan is inapplicable. Moreover, Appellants have not shown how the "Area of Consistency" designation in the Comprehensive Plan impacts the DRB's review of the site plan under the IDO. Appellants' vague arguments do not satisfy the appellate review criteria and cannot be sustained. Thus, Appellants' vague arguments should be denied.

C. Traffic Impact Study

Appellants further contend that the DRB or the City Traffic Engineer should have required the developer to perform a traffic impact study (TIS) of the affected roads near the project site. These same arguments were presented in AC-19-16 and I again respectfully find that the DRB did not err on this issue.

The expert evidence in the record did not change between the September and January 2020 hearings. The City's Traffic Engineer testified in two DRB meetings that the number of dwelling units proposed does not meet the threshold warranting a TIS [R. 163, and 351A]. Appellants have

not supplemented the record with expert evidence to rebut this finding. Instead, they continue to suggest that a TIS "should" be required because of the existing traffic conditions.

Appellants supplemented the record with additional testimony from neighboring residents and representatives of neighborhood associations who testified in the January 2020 remand meeting that the traffic conditions in the area are deplorable [R. 341A, 344A-346A]. Assuming that the testimony was based on facts and not merely opinion testimony, the testimony is insufficient to rebut the expert testimony of the City Traffic Engineer. Put another way, assuming that the traffic conditions in the nearby area are intolerable, the evidence showing that a traffic study is not warranted by the IDO or by the Development Process manual (DPM) was not overcome with the testimony about traffic conditions. Thus, the DRB did not err in concluding that a TIS was not required.

Regarding traffic conditions, the record further shows that the developers intend to make improvements to the Alameda/Barstow intersection, including:

> …an east bound lane along the frontage, a northerly lane on Barstow, a 12-foot trail along the south side of Alameda in accordance with the master plan for bike facilities and a bike lane to tie in with improvements to the south as well as sidewalk along Barstow. And that should improve the capacity of that particular intersection. Traffic would be distributed, obviously to Barstow and to Ventura but it's minimal enough that it's not requiring a traffic impact study [R. 351A].

And, although the Traffic Engineer did not dispute that the existing traffic conditions are imperfect, the facts remain that for this site plan, a traffic study was not warranted under the IDO or under the DPM. The rational presumption, of which was not rebutted, is that the road widening will not adversely impact the current traffic conditions. Although the developers' road improvements have no bearing on the question regarding a TIS, the improvements impact road conditions.

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

As they did in the first LUHO hearing on this matter, Appellant maintain that NMSA, 1978 § 3-21-6(C) applies to how the developers' site plan application must be decided. Assuming that Appellants can meet the 20% threshold required that triggers the statute, I again respectfully disagree with Appellants that the statute is applicable to DRB decisions on site plans.[13] NMSA, 1978, § 3-21-6(C) applies to "areas…changed by zoning regulations." In this appeal, there is no area that is being changed by a zoning regulation. NMSA, 1978, § 3-21-6(C) state in full:

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

The matters in this appeal concerns only a site plan review of which the DRB clearly has been delegated authority by the City Council to decide. Thus, because the developers' application does not implicate the amendment of a zoning regulation, I find that NMSA 1978, § 3-21-6(C) is inapplicable to the developers' site plan review. In addition, the City of Albuquerque is a home-rule municipality. And under the State Constitution, by adopting its Charter, the City is authorized to exercise its legislative powers and perform all functions not expressly denied by State statute or by its own Charter. N.M. Const. art. 10, § 6, subd. D. Under its planning and platting authority, the City lawfully adopted regulations that govern how land is used within its municipal jurisdiction. Accordingly, under Statute the City lawfully adopted the IDO and lawfully

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

delegated site plan review to the DRB in the IDO. I find that, despite Appellants' contentions, the DRB was duly authorized to decide the developers' site plan under the IDO.

E. Under IDO § 1-10(B), the Neighborhood Edges Provisions of the IDO are Inapplicable to the Site Plan Application as it Relates to the Tierra Morena Place Lots.

Appellants next contend that despite IDO § 1-10(B), the DRB was required to apply IDO's Neighborhood Edges provisions to the developer's application to protect the abutting R-1B zoned lots on Tierra Morena Place, NE. Appellants make alternative arguments, some of which are labyrinthine interpretations of the zoning conversion process established by the City Council.

The developers argue, however, that IDO § 1-10(B) gives them somewhat of a protected status that acts to preempt the imposition of the Neighborhood Edges provisions from applying to the proposed development. Specifically, they contend that they have a right under the IDO to have their application reviewed according to the "standards and criteria" in effect at the time their application was deemed complete. See § 1-10(B). They claim that the "standards and criteria" of § 1-10(B) includes the status of zoning districts in the IDO Zone Map as of the date the application was deemed complete. I agree principally because the IDO § 1-10(B) clearly embodies a legislative intent that applications be treated in the manner argued by the developers.

Before delving into the details of the arguments, a short discussion of the purpose for the Neighborhood Edges provisions of the IDO is helpful. Under § 5-9(A) of the IDO, the Neighborhood Edges provisions of the IDO are:

> "intended to preserve the residential neighborhood character of established low-density homes *in any Residential zone district* on lots adjacent to any Mixed-use or Nonresidential zone district. It is undisputed that the Neighborhood Edges protections only apply to protect residential uses in "any residential zone district" [IDO § 5-9(A)] (Emphasis added.)

Protected" lots are "lots in any R-A, R-1, R-MC, or R-T zone district that contains low density residential development" [IDO, § 5-9(B)(1)]. Thus, it is a prerequisite that lots must be zoned residential before they can be availed to the protections of the Neighborhood Edges provisions. "Regulated lots" under the IDO are "all those [lots] in any R-ML, R-MH, Mixed-use, or Non-residential zone district that are adjacent to a Protected Lot" [IDO, § 5-9(B)(2)]. The protections contemplated in the Neighborhood Edges regulations include additional height stepdown, lighting height, screening, buffering, parking, and loading regulations.

In the September 2019 DRB meeting, the DRB concluded that the Neighborhood Edges provisions of the IDO cannot be applied to further regulate the apartment development because the residential uses on Tierra Morena Place, NE were zoned R-1B *after* the developers' application was accepted, deemed complete, and scheduled for a DRB meeting. The DRB reasoned that under IDO, § 1-10(B), once an application is accepted by the Planning Department Staff "as complete," the application must be reviewed based on the "standards and criteria in effect when the application was accepted as complete" [IDO, § 1-10(B)]. It is a fact that the Tierra Morena Place lots at issue were not zoned R-1B until August 5, 2019, and after the developers' application was accepted and deemed complete. This is an undisputed fact that cannot be over-emphasized.

IDO § 1-10(B) states in full:

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

As stated above, it is undisputed that the residential lots on Tierra Morena Place, NE carried an MX-T zone district designation at the time when developers submitted the application which was

accepted and scheduled for a public meeting with the DRB on June 17, 2019.[14] However, it is also undisputed that on August 5, 2019, the MX-T zoned lots on Tierra Morena Place were converted to R-1B in the City Council's Batch 2 conversions.

Turning now to Appellants alternative arguments, Appellants first claim that because the Batch 2 conversions changed the zones of the Tierra Morena Place lots *before* the DRB finally approved the developers' site plan, the DRB was required to apply the Neighborhood Edges provisions of the IDO to protect the newly converted R-1B zoned lots on Tierra Morena Place. Appellants contend that under the New Mexico common law vested rights doctrine, developers cannot acquire a "vested right" to immunize itself from changes of circumstances, such as the conversions of the Tierra Morena Place lots, until *after* the DRB approved its site plan. They claim that a vested right is one that can only be claimed after the City approves the site plan. Appellants further argue that under the common law, the City can freely change the rules on developer any time prior to the time it acquires a vested right. Thus, under the Appellants' interpretation of the law, although the Tierra Morena Place lots were zoned MX-T when the Planning Department accepted the developers application, because the developers did not have vested rights, the subsequent zone changes to R-1B of the Tierra Morena Place lots, required the DRB to apply the Neighborhood Edges provisions.

In New Mexico, the vested rights doctrine protects a developer from shifting governmental regulations, but only after the City has given final approval of the application and only after certain milestones can be shown. *KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶ 14, 137 N.M. 388, 111 P.3d 708. After a development has begun under one regulatory scheme, the doctrine

14. Although there is now a discrepancy regarding the exact date the application was deemed complete under IDO § 1-10(B), the discrepancy does not change that the Tierra Morena Place lots converted from MX-T to R-1B zones after the developers' application was deemed complete.

restricts government from modifying that scheme or imposing another prior to the development's completion. Id. ¶ 13. Under the common law, in order to establish a vested right, a developer must prove two elements: (1) "approval by the regulatory body" and (2) a substantial change in position in reliance on that approval. *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*, 1993-NMCA-013.

Appellants are misapplying New Mexico's common law vested rights doctrine to the undisputed facts in this case. I find that the common law vested rights doctrine is inapplicable to the facts. In this appeal, the dispute regarding applicability of the Neighborhood Edges provisions has nothing to do with either element of the common law vested rights doctrine. In AC-19-16, I found that IDO, § 1-10(B) is the applicable law. I affirm that finding.

It can't be over-emphasized that IDO § 1-10(B) expressly establishes that an application that has been accepted by the City Planning Department as complete "prior to the effective date of… any amendment to the IDO," must be reviewed by the DRB based on "the standards and criteria in effect when the application was accepted as complete." In AC-19-16, I specifically found that the term "standards and criteria" in IDO § 1-10(B) incorporates the status of the existing zone districts as stood at the time when the application was deemed complete [See R. 304A – 309A]. This is the unambiguous legislative intent of the city Council declared in IDO § 1-10(B). I see no new facts in the record that would change this outcome.

In this appeal, Appellants present new arguments. Appellants now claim that IDO § 1-10(B) must be a legislative mistake. Specifically, they speculate that if the City Council intended to vest rights to an applicant at the time the application is submitted, it would not have done so in such a haphazard way—through a short phrase in the IDO. Appellants refer to the phrase in § 1-10(B) that states "…or any amendment to this IDO…" I find no evidence in the record, or in the IDO from which this hearing Officer can conclude that the City Council adopted IDO § 1-10(B)

mistakenly. Section 1-10(B) cannot be ignored or brushed off as merely a legislative mistake. To do so would be arbitrary and capricious conduct.

Appellants next argue that § 1-10(B) infringes on New Mexico's common law vested rights doctrine and is therefore void or voidable. I disagree. As shown above, the vested rights doctrine is factually inapplicable to this matter. Either of the elements to establish vested rights is not at issue. The issue in this matter revolves around the question of whether the application should be reviewed and judged on the state of zoning districts at the time the application was accepted and deemed complete or whether it should be judged on the subsequent zone conversions to the Tierra Morena Place lots. Section 1-10(B) makes it clear that the former applies.

In the New Mexico Court of appeals case of *Andalucia Dev. Corp. v. City of Albuquerque*, 2010-NMCA-052, the Court dealt with a similar issue having to do with the City's Impact Fee Ordinance. The Court concluded that vested rights may accrue under the City's ordinance even if it does not under the common law vested rights doctrine. The *Andalucia* case, make it clear that the City has authority to legislate a type of vesting that gives earlier protections than what the common law vested rights doctrine conveys to applicants. IDO § 1-10(B) is not the kind of vested rights ordinance that the impact fee ordinance considered in *Andalucia,* but § 1-10(B) represents a clear legislative intent for how a development application will be judged—not approved. Moreover, as a home-rule municipality, the City has authority to adopt a rule that exceeds what the common law establishes. And, Appellants have not shown that IDO § 1-10(B) conflicts with any general law or that it is expressly denied by statute, thus, it is presumptively a valid provision.

Appellants next argue that the City Council's act of converting the MX-T to R-1B lots at Tierra Morena Place (on August 5, 2019) retroactively applies to the date when the City Council adopted the IDO through City Ordinance 2017-025 (November 17, 2017) [R. 95A]. Appellants' rationalize that in enacting the IDO, the City Council also simultaneously enacted a conversion

mechanism and process that contemplates changing zones districts in the future to correct mistakes that may have occurred in mis-categorizing zone districts during the legislatively City-wide conversions. Appellants believe that because the Tierra Morena Place lot owners availed themselves of this conversion process to change the zones of their lots to R-1B zones, their zone changes should also retroactively be applied to the date when the IDO was enacted. Under Appellants' theory, the R-1B conversions of the Tierra Morena Place lots would predate the date that the Planning Department Staff accepted the developers' application as complete under § 1-10(B) of the IDO. Appellants' theory is flawed, lacking any support in law.

Appellants' theory is kindred to an *ex post facto* law; the August 2019, R-1B conversions apply *ex post facto* to the IDO's adoption. It is black letter law that *ex post facto* laws are prohibited by the United States and New Mexico Constitutions [See U.S. CONST. ART. 1, § 10, CL. 1; N.M. CONST. ART. 2, § 19]. There are rare exceptions that allow for the retroactive application of civil law. In such a rare case, at the very least, there must be a clear intent exhibited from the City Council that it intended for all conversions under the conversion rules to be retroactively applied. Even then, it may not pass Constitutional muster. Regardless, I find there is no language in City Council Ordinance 2019-025 expressing such an intent. Moreover, there is no language in the IDO itself that would lend any support for Appellants' novel theory.

Appellants' arguments that the Neighborhood Edges provisions applies to the developers' site plan should be denied on all grounds. IDO § 1-10(B) controls the question. Simply stated, under § 1-10(B), the Tierra Morena Place lots were zoned MX-T at the time the developers' application was accepted as complete, therefor the Tierra Morena Place lots did not qualify for the protections of the Neighborhood Edges provisions of the IDO. Accordingly, the DRB did not err when it did not apply the Neighborhood Edges provisions to the Tierra Morena Place lots in this case.

F. Appellants Have Not Met Their Burden of Proof to Demonstrate that the DRB Erred Regarding its Storm Water Infrastructure Findings.

Appellants claim that the existing storm water and road infrastructure at and around the site "may" be inadequate, and therefore the DRB erred when it concluded that infrastructure is adequate for the proposed development [R. 64A]. In support of their contentions, Appellants submitted a newspaper article, dated March 9, 2020, in which the author reported that the Governor vetoed infrastructure funding for what the author described as "deficient infrastructure near Barstow and Alameda" [R. Appellants' Supp., dated March 13, 2020].[15]

It is undisputed that on behalf of the City, the DRB decides whether or not there is adequate infrastructure in and around any proposed development project that it reviews [R. 7A]. The standards by which technical standards regarding availability of infrastructure in any particular location are judged stems from the City's DPM [R. 108A, City Ordinance-2017-025]. The DRB member responsible for reviewing the adequacy of storm water drainage is the City's Hydrologist who is a New Mexico certified engineer. In the DRB's Official Notification of Decision it expressly concluded:

> The City's existing infrastructure and public improvements, including but not limited to its street, trail, drainage, and sidewalk systems, have adequate capacity to serve the proposed development. The site has access to a full range of urban services including utilities, roads, and emergency services. The ABCWUA issued an availability statement for the site. A Traffic Impact Study was not required, but the applicant has committed to street improvements for Alameda and Barstow. A grading and drainage plan for the entire site has been approved by Hydrology [R. 11A, Finding 12.b].

At the January 8, 2020 DRB meeting, the City's Hydrologist Earnest Armijo gave his approval to the adequacy of infrastructure for the proposed development [R. 350A]. The record shows that

15. Another exhibit tendered by Appellants is an unidentified page of which has no description of its source. It states that $595,000 "to acquire rights of way and upgrade deficient infrastructure, including replacing storm drain at… Barstow Street and Alameda Blvd" as well at other locations.

Mr. Armijo stated that there is an existing master plan for drainage in that area and that there is downstream capacity in the existing stormwater system, and that flooding is not an issue [R. 351A].

Other than the newspaper article and the unidentified page, both describing public funding deficiencies, Appellants have not otherwise challenged the DRB's finding that the proposed project satisfies the DPM and the IDO requirements having to do with storm water discharge.

Nor have Appellants rebutted the City Hydrologist's conclusions regarding the same. The newspaper article is not substantial evidence to rebut the DRB's conclusions. Appellants have not sufficiently linked the alleged deficiency in infrastructure and funding to show that the DRB erred in its Finding 12.b regarding infrastructure.

G. Adverse Impacts

Appellants next argue that the developers have not mitigated adverse impacts of the proposed uses depicted in the site plan. Specifically, Appellants claim that the locations of the enclosure for commercial trash dumpsters near the single-family residential dwellings to the South on Tierra Morena Place demonstrates that the developer failed to mitigate adverse effects as required under the IDO. However, Appellants have not pointed to any specific regulation that is violated with the placement.

The record shows that the location of the two dumpsters and their enclosures at issue was discussed at length by the DRB, presumably to mitigate the impact of the dumpsters being placed to the South of the proposed development. The record further shows that the DRB and the developers attempted to address the issue in different ways. First, the record substantiates that the City's Solid Waste Department Staff determined the location of the two commercial bin dumpsters—not the developers [R. 215A]. This was not rebutted, so I accept it as true. Second,

the record shows that to mitigate odors, the two commercial bin dumpsters on the South side, near the backyards of Tierra Morena Place lots, are for recycling materials only [R. 215A].

To further mitigate their adverse impacts on the Tierra Morena Place lot owners, the record shows that the developers proposed to amend their landscaping plan specifically to include adding evergreen trees and shrubs to further screen the enclosures, but that the neighboring residents were concerned that the trees and shrubbery might grow to over-hang into their backyards [R. 358A]. The developers scaled back the proposal apparently to balance the neighbors' concerns while still providing added mitigation for the dumpsters [R. 357A – 359A].

Appellants did not rebut these mitigation efforts. Instead they merely claim that the DRB erred because it did not mitigate the impacts of the dumpsters. Although the locations of the two recycling dumpsters impact the residents of Tierra Morena Place, I find that the DRB did sufficiently address mitigation. Appellants have not shown that the DRB through the City Solid Waste Staff could have relocated the dumpster bins in a different location. Thus, the evidence of mitigation in the record is substantial evidence of mitigation.

Appellants raised other issues of which they suggest exhibited adverse impacts, such as the color scheme of the exterior proposed building at the development site, lighting, and noise. Appellants presented no competent evidence to support these vague claims. Appellants, however, did present testimony from neighboring residents who gave opinion testimony about their concerns with these issues.

It is the general rule in New Mexico, that unless it is supported by substantiated facts, opinion testimony from a lay person is not competent evidence. That is because "witnesses must testify to facts, and not to opinions." *Dick v. City of Portales*, 1994-NMSC-092, ¶ 7. Appellants vague claims regarding light, noise, and the color of the exterior proposed buildings is woefully inadequate to be sustained.

IV. Conclusion

For all the reasons described above, I respectfully recommend that Appellants' appeal be denied in full. The Appellants did not meet their burdens on any of the challenged issues presented. Conversely, as shown above the DRB did not err, and otherwise followed its rules and minimum due process requirements regarding testimony and cross examination. I similarly find that there is no evidence (accept conjecture) that the DRB was influenced by anything other than the evidence before it at its meetings regarding the site plan. The DRB's decision is supported with substantial evidence in the record and should be sustained.

Steven M. Chavez, Esq.
Land Use Hearing Officer

April 25, 2020

Copies to:

City Council
Appellants,
Party Opponents,
City Staff