

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

APPEAL NO. AC-22-1

**PR-2019-002496, SI-2019-00180, VA-2021-00456,
Associated with AC-19-16 and AC-20-2**

KAREN BAEHR, et al.,

Appellants,

and,

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

Party Opponents.

1 This appeal matter has a long and sorted history in the Development Review Board’s
2 (DRB) review process. Consequently, that process recently drew added scrutiny from a
3 Second Judicial District Court Judge who ordered that the DRB’s decision be reversed. In
4 doing so, the Court remanded the entire matter back to the DRB to rehear the case
5 application. This appeal specifically concerns the Court ordered DRB remand hearing which
6 was held on December 3, 2021.

7 Because the DRB erred, not only in its process for conducting the hearing, but in failing
8 to address what the Court ordered the DRB to address, it must again be remanded.
9 However, under Article XVII of the City Charter, the City Council is the “ultimate planning
10 and zoning authority” specifically in “individual cases” such as this matter; the Council has
11 authority to substitute the DRB with a hearing officer to decide this case. Thus, rather than

12 directly remanding this case to the DRB to rehear this matter anew yet again, I respectfully
13 recommend that the City Council consider as an alternative, remanding this case to an
14 independent hearing officer.

15

16 **I. PROCEDURAL HISTORY**

17 This appeal began with an application for site plan approval [R1. 86].¹ Sequentially,
18 the undisputed relevant history is as follows. In late April, 2019, Consensus Planning, agents
19 for Phillip Lindborg and Bella Tesoro, LLC (collectively, the “applicants”) notified the
20 affected neighborhood associations, including Nor Este Neighborhood Association,
21 Vineyard Estates Neighborhood Association, and the District Four Coalition of
22 Neighborhood Associations of their intent to submit an “application for a Subdivision of
23 Land (plat) and Site Plan” to the DRB [R1. 86]. In doing so, the developers generally
24 described the proposed project as being a 93-dwelling unit multi-family development and
25 inquired from the association officers if they wished to meet to further discuss the project
26 [R1. 86]. Soon thereafter, officers from the Vineyard and the District Four Coalition
27 associations responded by requesting a city-sponsored facilitated meeting with the applicants
28 [R1. 87-88]. The facilitated meeting was arranged and held on May 21, 2019, at which time
29 the applicants, neighborhood residents, and neighborhood association representatives
30 discussed the details of the application [R1. 92-105].

31 On June 17, 2019, the applicants and the City Planning Staff met under § 6-4(B) of the
32 May 2018 Integrated Development Ordinance (IDO) for a mandatory pre-application

1. There are three separate records relating to this appeal—AC-19-16, AC-20-2, and this AC-22-1 record. Each will be referenced by R1, R2 or R3 respectively.

33 meeting to go over the review process and application requirements [R1. 81-84]. On the
34 same day as the pre-application meeting, the applicants submitted the application to the City
35 Planning Department for subdivision plat and for site plan review [R1. 65-80]. As indicated
36 on a “DRB Tracking Sheet” and in the DRB “Application” form, City Planning Staff
37 scheduled the first DRB hearing for July 17, 2019 [R.1 64-65].

38 Between July 1, and July 17, 2017, the DRB received comments from governmental
39 agencies regarding the application, including from the Albuquerque Public Schools,
40 Albuquerque Police Department, New Mexico Department of Transportation, Mid-Region
41 Metropolitan Planning Organization, Albuquerque Department of Municipal Development,
42 Albuquerque Metropolitan Arroyo Flood Control Authority, as well as from various Staff
43 from sections of the City Planning Department [R1. 316-326]. At the July 17, 2019, DRB
44 hearing, after taking testimony from the applicants and the public, the DRB via the Chair
45 deferred a decision and notified attendees that the DRB would be rescheduled for August 14,
46 2019 [R1. 315]. The DRB Chair explained the reasons, stating that there were multiple
47 reasons. She expressly said:

48 Alright, thank you. Parks had no comments. You received a copy of our
49 comments, I won't go through every detail but for the site plan, we talk
50 about motorcycle spaces, clarify the match line, key note 32 doesn't appear
51 on the plan, just clarify that this is fencing, I believe that's what it was.
52 Relocate dumpster away from residential use on the south side. You'll have
53 to coordinate that with Solid Waste. Clarify bicycle parking, On site
54 pedestrian walkway needs to meet the minimum width requirement per the
55 DPM, on site shall connect to the following: a sidewalk median the
56 standard, the DPM along at least one lot frontage that extends to the
57 boundary of the subject parcel. There's one section that the entrances, it's
58 14-16-5-11 (0)(1) where the entrances aren't clear, I believe that pedestrian
59 entrances need to be clarified per that section. Also (E)(2)(A), you did
60 submit a supplemental email, but again pertaining to the building, the
61 ground floor is supposed to be different than the upper floors through
62 architectural features and we got a narrative but I think the language or the
63 coordination on that needs to continue. Again section 14-16-5-7(0)(1) shall

64 allow wall height, confirm height and location of walls and fences. And
65 then there's some minor comments about the landscaping. The street trees
66 need to be clarified, as well as the parking spaces. Of course, the
67 requirement of 14-15-5-6(F)(2)(C) is that no parking space will be more
68 than a hundred feet from a tree, which is why you put the trees along that
69 south boundary, I think there's five. And there seems to be concern about
70 the width of that landscaping but because of the trees, I think Mr. Griffee
71 brought up that point in his narrative that he submitted but those are in an
72 area that is larger than or wider than the minimum 5 ½ feet, I just wanted
73 that on the record, from your site plan, so there's a little more space there.
74 And maybe needs to be conversation about the type of trees because there
75 seems to be concern about roots under the south wall because that is an
76 existing wall on the south boundary of your property [R1. 313-314].
77

78 Moving forward in time, the record reflects that on August 7, 2019, the Appellants'
79 attorney notified the DRB in writing that on August 5, 2019, the City Council approved the
80 Phase 2, Batch 1 conversion zone-changes, which included R-1B zoned property that abuts
81 the application site [R1. 256, 285]. Hessel Yntema, Appellants' attorney, specifically advised
82 the DRB that the R-1B zone-conversion change meant that the Neighborhood Edges
83 provisions of § 5-9 of the IDO must be applied to the application site because the conversion
84 became effective on August 5, 2019, and at least one the R-1B lot qualifies as a "protected
85 lot" within 100-feet of a proposed building depicted in the site plan [R1. 284].²

86 On August 14, 2019, the DRB revisited the applicants' application in its public hearing,
87 reopened the floor, and allowed additional public comments, including unsworn testimony
88 from the applicants' agents [R1. 173-189]. Appellants' attorney again advised the DRB
89 about the R-1B lot conversion, explaining that he believed that the Neighborhood Edges

2. Although City Council Enactment O-19-65 (which is the legislation creating the zone batch conversions) is remedial in nature partly to correct "mismatches" in the City-wide enactment of the IDO and rezoning in May 2017, the City Council did not explicitly make the conversions retroactive to May 2017 [R1. 257-271].

90 provisions of the IDO must be applied to the site plan because the application was not
91 complete under IDO, § 1-10(B) when the Batch zoning conversions became effective on
92 August 5, 2019. [R1. 176-177].

93 During the August 14, 2019 hearing, additional written comments from the City’s
94 Traffic Engineer, Water Utility Authority, and from the City Zoning Department Staff were
95 submitted to the DRB regarding the application [R1. 191-194]. Since additional issues
96 needed to be addressed by the applicants, and since a plat was missing in the application at
97 the August 14, 2019 hearing, the DRB Chair again deferred a decision on the applicants’
98 application, this time to the September 11, 2019 docket [R1. 189-190].

99 At the September 11, 2019 public hearing, the DRB approved the site plan and replat
100 application [R1. 161]. Appellants filed a timely appeal, and a quasi-judicial Land Use appeal
101 hearing was held on October 31, 2019. On November 15, 2019, finding due process related
102 discrepancies in how the DRB dealt with the matter in a public hearing, the DRB was
103 instructed to rehear the application.

104 On January 8, 2020, the DRB held a remand public hearing on the application and
105 approved it [R2. 10A]. Raising multiple appeal issues, Appellants again filed a timely appeal
106 soon after [R2. 58A- 65A]. A LUHO appeal hearing was held on April 16, 2020.³ With some
107 exceptions regarding the recommendation to deny the appeal, the City Council denied the
108 appeal and approved the applicants’ application.

109 Appellants filed a timely appeal to the District Court. In a 19-page decision on the
110 appeal, concluding that the DRB’s hearings were “*not in accordance with the law and must*

3. See AC-20-2, LUHO recommendation, dated April 25, 2020.

111 *be remanded for a quasi-judicial hearing,”* the Court remanded the case matter to the DRB
112 to address specific deficiencies in the hearing process and to make findings related to the
113 Neighborhood Edges questions in the appeal [R3. 629]. The DRB held its remand hearing
114 on December 3, 2021 [R3. 163- 218]. Raising 17 issues of alleged error, Appellants again
115 filed a timely appeal. A quasi-judicial LUHO appeal was held on February 24, 2022.

116

117 II. DISCUSSION

118 Although Appellants suggest that the most recent construction of the IDO is applicable
119 to the issues presented in this matter, applying a more recent version of the IDO not in effect
120 when the DRB first considered the application (in 2019) would contravene the IDO, and it
121 would be contrary to the Court’s Remand Order. Under all versions of the IDO, but
122 particularly under the version of the IDO applicable in 2019 (May 2018 IDO), all
123 applications must be reviewed under the provisions in effect at the time the application is
124 deemed complete [See IDO § 1-10(B)]. Moreover, the Court clearly concluded “*the 2018*
125 *IDO, prior to any amendment to that IDO, would appear to apply*” [R. 630].

126 Under the 2018 IDO, review of an appeal is a whole-record review to determine
127 whether the DRB acted fraudulently, arbitrarily, or capriciously; or whether the DRB’s
128 decision is not supported by substantial evidence; or if the DRB erred in applying the
129 requirements of the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the
130 appeal level of review, the decision and record must be supported by substantial evidence to
131 be upheld. The Land Use Hearing Officer (LUHO) may recommend to the City Council that
132 an appeal be affirmed in whole or in part, or reversed in whole or in part. The City Council

133 delegated its authority to the LUHO to remand appeals to reconsider matters in the record
134 [IDO, § 14-16-6-4(U)(3)(d)].

135 During the February 24, 2022 LUHO appeal hearing, Appellants requested that the
136 records of the previous appeals connected with this matter (AC-19-16 and AC-20-2), as well
137 as the Court record be included with the record of this appeal. In addition, Appellants also
138 requested that the Zoom video/audio file of the DRB’s December 3, 2021 hearing and the
139 Zoom chat program record also be included in this record. The Applicants did not object to
140 Appellants’ requests to supplement the record. Thus, the record should be supplemented
141 accordingly to reflect all the history in this case.

142 After going back and reviewing the above-referenced city appeal records regarding this
143 case, as well as hearing arguments and testimony, I regrettably find that the matter must
144 again be sent back for another rehearing of the entire application requests anew. The precise
145 necessity of this remand stems from self-inflicted failures of the DRB to satisfy what the
146 Court clearly required of the DRB in the remand Court Order [R.3 621].

147 Other than the process deficiencies, a major rationale for the Court’s remand concerned
148 how the DRB concluded that the Neighborhood Edges protections in IDO, § 5(9) is
149 inapplicable to the site plan application. The Court expressly ruled that the DRB must get to
150 the bottom of “*the Neighborhood Edges issue to assure that the City fully considers, analyzes*
151 *and explains the interaction of the IDO, the zoning of Appellants' property, and the*
152 *applicable facts*” [R3. 629]. Consequently, the Court further Ordered that:

153 On remand, the City is directed to *explicitly* set out the date upon which
154 the Developers' application was deemed complete, as this fact was subject
155 to some confusion, with *further explanation* as to the finding by the DRB
156 following the July 17, 2019, meeting that there were comments made by
157 the DRB which needed to be addressed prior to any action on the

158 application, as well as outstanding issues, including grading and drainage
159 plans, infrastructure list, and other comments that necessitated deferring
160 action from the August 14, 2019, DRB meeting, requiring further
161 supplementation of their application (Emphasis added) [R3. 631].
162

163 Although in its December 3, 2021 hearing, the DRB made findings about the dates the
164 application was submitted and when the application was scheduled for hearing and deemed
165 complete, the DRB still failed to address how the finding of completeness was or wasn't
166 impacted by the subsequent July 17, 2019 and August 14, 2019 DRB deferrals.⁴ For the
167 Court, this was the crux of what was missing in the record regarding the Neighborhood Edges
168 issue. The basis of these deferrals, for the Court, presents a question whether the application
169 was in fact complete at the time the DRB concluded it was complete. The assumption is that
170 the application was, in fact, incomplete as late as mid-August 2019 because the DRB found
171 as late as August 14, 2019, that the applicants needed to supplement the record and
172 application with additional documentation/information for the DRB to make a final decision
173 on the application. It was the deferral actions and the lack of evidence regarding these
174 deferral actions as they relate to IDO § 1-10(B) with which the Court was concerned about,
175 partly necessitating the remand.

176 The Court explicitly ordered the DRB to analyze and explain how the application could
177 be considered complete in June or July 2019 when the DRB deferred the matter twice to
178 allow the applicants more time to supplement its application. Although at the February 24,
179 2022 LUHO appeal hearing, Planning Staff offered more detail on possible answers to this
180 open question, there is insufficient evidence in the DRB's records to support the explanations
181 offered by Planning Staff. Put another way, there remains a lack of substantial evidence in

4. See DRB Findings 1-5 [R3. 014].

182 the record regarding the issues the Court explicitly wanted resolved by the DRB. Again, this
183 issue was a major issue in the Appellants' appeal and in the Court's rationale for remanding
184 the matter for a new hearing.

185 If the City Council concludes that this matter should again be placed in the hands of the
186 DRB, the DRB must not merely adopt an explanation by Planning Staff. Rather than make
187 conclusory findings, as it did in the previous records and in this record, the DRB must allow
188 evidence and cross examination, and it should make or adopt findings on the record, based
189 on that evidence and fully explain the basis supporting its decision.

190 Next, the evidence shows that, although after the Court remanded the entire matter back
191 to the DRB, the DRB scheduled its remand hearing for December 3, 2021. While that hearing
192 was pending, Staff knew or had clear reasons to know that all the Appellants were represented
193 by legal counsel. Despite these facts, the city Planning Staff person who also acted as the
194 DRB's chair sent the DRB's collective "comments" regarding the application only to the
195 applicants' agents the day before the December 3, 2021 DRB remand hearing [R3. 375]. This
196 important communication excluded Appellants' counsel, creating yet another easily
197 preventable, appealable issue and self-inflicted failure of the DRB. I find that excluding
198 Appellants (through their counsel), under the circumstances in this case was unnecessary,
199 inappropriate, and unfair. Under the circumstances, this action was incongruous with the due
200 process and quasi-judicial protections explicitly discussed in the Court's Order.

201 Any further supplements to the record, including Staff comments and
202 recommendations (required under the IDO) must also be sent to Appellants' attorney at the
203 same time these documents are sent to the applicants' representatives and to the DRB. *Ideally,*

204 these significant documents should be sent as early as possible before the hearing so that the
205 parties can adequately prepare to respond to them at the hearing.

206 Next, the evidence in the remand hearing shows that the City Planning Staff wore two
207 hats in this matter: They acted as Staff who made recommendations to the DRB as required by
208 the IDO, while also serving as DRB decision makers. In addition, during the DRB hearing,
209 each Planning Staff-DRB member, testified to the facts of the matter that they were deciding.
210 During the December 3, 2021 hearing, Planning Staff-DRB members testified by announcing
211 their individual departmental expert analyses (comments) regarding the technical criteria of
212 the IDO as this criteria applies to the application [R.3 190-201]. Presumably, because there
213 were no other Staff recommendations, these “comments” served to satisfy the mandatory
214 provision in IDO, § 6-6(G)(2)(a) regarding Staff recommendations [R.3 190].

215 Quasi-judicial decision makers who merely discuss the facts of an application on
216 which they are deciding during a public hearing is distinguishable from DRB members who
217 decide on the facts that they are also creating for the record. The difference is meaningful. In
218 this case, the latter is what occurred. It is unmistakable the evidence shows that the DRB
219 augmented the record with facts about how the application meets or does not meet the IDO to
220 satisfy IDO, § 6-6(G)(2)(a), and subsequently proceeded to vote on the facts that they partly
221 created as witnesses [R.3 190-201]. The Staff-DRB testimony was all unsworn testimony and,
222 as such, unmistakably violated the Court’s Order and due process under *State Ex Rel.*
223 *Battershell v. City of Albuquerque*, 1989-NMCA-045.

224

225

226

227 **A. Remand to DRB**

228 If the City Council concludes that the matter should be remanded to the DRB, I
229 respectfully offer the following additional recommendations to give the *process* of a quasi-
230 judicial hearing before the DRB the appropriate decorum it deserves. Other than lawyers
231 representing the City or the parties, in the next remand hearing, all persons who testify about
232 the facts, and specifically those testifying to satisfy IDO, § 6-6(G)(2)(a), shall be sworn in as
233 witnesses. Allowing witnesses to self-affirm should be avoided.⁵ Although the formalities of
234 a quasi-judicial hearing are less stringent in process than the process in the judicial courts,
235 administering the oath is a simple task that should not be flippantly omitted. The oath should
236 be administered to testifying witnesses by a single person.

237 To fully satisfy the minimal due process protections required for a quasi-judicial
238 hearing, in the remand hearing, there must be an appropriate screening or “wall” between the
239 DRB decision makers, and the Staff designated for making recommendations under the IDO
240 so that there is no meaningful communication regarding the issues of the application outside
241 of the hearing context.

242

243 **B. Remand to Hearing Officer as an Alternative to DRB**

244 If an appropriate wall cannot be established, in the alternative to remanding this
245 matter back to the DRB, I respectfully recommend that the City Council consider appointing
246 an independent hearing officer to decide the issues in this case, not in an appellate capacity,
247 but in place of the DRB, as a fact finder and decision maker. The appellate process would

5. In the December 3, 2012¹ remand hearing, rather than administering the oath to witnesses, the DRB merely allowed witnesses to self-affirm their oath to tell-the-truth.

248 remain. The hearing would be conducted anew, and in a quasi-judicial manner, allowing
249 evidence and testimony as necessary to make a decision under the applicable IDO.

250 The DRB has heard this matter several times and presumably to mitigate issues of bias
251 in the decision-making process, multiple Planning Staff members were interchanged into the
252 DRB decision maker role. However, in the December 3, 2022 hearing, Planning Staff
253 essentially still made recommendations to themselves as DRB decision makers. Avoiding that
254 circumstance in another hearing is arguably difficult to achieve under the current
255 circumstances. Whether the DRB can now be assembled another time with Planning Staff who
256 have not in some way already acted on the application and which would not compromise due
257 process protections may require that a hearing officer be appointed. Although appointing an
258 independent hearing officer in this matter does not address the broader problems associated
259 with the DRB, it will address many of the bias issues that have been alleged in this specific
260 appeal case since 2019.

261

262 **C. Additional recommendations**

263 Going forward, I recommend that the records of this matter beginning from the
264 records of AC-19-16, AC-20-2, AC-22-1, and the record of this remand be consolidated with
265 appropriate markers for each record in one sequentially Bates stamped record so that its
266 further review, including, if necessary, by the City Council, is less cumbersome for everyone.

267 In addition, regarding evidence involving IDO § 1-10(B) as outlined above, Appellants'
268 counsel requested the tracking log(s) (audit trail or meta-data) from the Planning Department's
269 electronic data tracking system. Presumably, the electronic audit trail might shed light on how
270 (and when) the application migrated to a complete application. It is arguably relevant, material

271 evidence and, if available, it should be turned over to the parties' representatives and placed
272 into the record of this matter. Proprietary data regarding the software can easily be redacted
273 and should be redacted or excluded entirely from disclosure.

274 Finally, because this recommendation includes essentially an indirect remand (by
275 recommendation to the City Council), the appeal issues presented by Appellants in their
276 appeal have not been addressed in any comprehensive way. Those appeal issues and defenses
277 presented at the LUHO appeal hearings should be preserved.⁶

278 
Steven M. Chavez, Esq.
Land Use Hearing Officer

March 3, 2022

Copies to:

City Council
Appellants,
Party Opponents,
City Staff/ DRB

6. If the Council decides not to appoint a hearing officer, the matter should go back to the DRB with the instructions herein.