BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-19-9
PR-2019-002184; VA-2019-00086; VA-2019-00176

OSO GRANDE NEIGHBORHOOD ASSOCIATION, Appellants,

SL JUAN TABO LAND, LLC and GUARDIAN STORAGE, Party Opponents.

I. BACKGROUND

This is an appeal of a decision from the Zoning Hearing Examiner (ZHE) granting a conditional use permit to construct an indoor storage facility in an MX-L zone in the Northeast Heights. The proposed location of the indoor storage facility is on a 2.37-acre vacant, undeveloped lot at the Southeast corner of Osuna Road and Juan Tabo Boulevard. The following background is relevant to this appeal.

There is no dispute that an indoor storage use is a conditional use in an MX-L zone and that the site is a 2.37-acre vacant, undeveloped lot that is zoned MX-L [R. 143]. It is also undisputed that the site is in a designated Area of Consistency as referenced in the Comprehensive Plan. On the East side of Juan Tabo Blvd., and East of the site is the John B. Robert Dam and the Bear Canyon Arroyo [R. 144]. The Arroyo and Dam are designated as Major Public Open Space (MPOS) in the City's Comprehensive Plan. Abutting the site to the West is the El Oso Grande Park which includes a trial system that runs adjacent on the South

side of the site. The Dam and Arroyo to the East, along with the Park on the West side are zoned NR-PO-A and B, respectively [R. 168]. On the South side of the site is a lot owned by the City of Albuquerque Water Utility. The land directly North of the site and on the North side of Osuna Rd. is zoned RT and encompasses townhome uses. There are smaller mixed-use zones and commercial uses to the North and Southeast of the site [R. 168].

It appears from the record that the applicants (Party Opponents in this appeal) through their agents, Planners with Consensus Planning, met with City Planning Staff on January 15, 2019 for a pre-application meeting, required under IDO, § 6-4(B) [R. 146]. A City sponsored Facilitated Meeting then took place between the applicants, their agents, and with the Oso Grande Neighborhood Association (OGNA) on February 7, 2019 [R. 62].[1] Thereafter, on March 7, 2019, Consensus Planning submitted their conditional use application to the ZHE [R. 139].

Before the ZHE hearing took place, the OGNA submitted to the ZHE what they considered to be a statement of impacts from the proposed use [R. 285]. On April 16, 2019, the ZHE held a public hearing on the application [R. 322]. On May 1, 2019, the ZHE approved the conditional use application [R. 29]. The OGNA filed their timely appeal and a LUHO hearing was held on July 1, 2019.

In their appeal, the OGNA present twelve issues in their appeal which they claim supports a reversal of the ZHE's decision [R. 15].[2] After careful consideration of their oral and written

1. Apparently the OGNA is not the only association in the area. There is also the Amberglen Homeowners Association (AHOA). However, the record demonstrates it was only the OGNA that requested the Facilitated Meeting [R. 156].
2. Many of appeal issues raised by Appellants concern IDO standards for variances, of which are inapplicable to this appeal.

arguments, and after reviewing the record, I find that the ZHE did not err in his decision because his decision is well supported with substantial evidence in the record. As described in detail below, I recommend that the City Council deny the appeal.

II. STANDARD OF REVIEW

At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. A review of an appeal is a whole record review to determine whether the ZHE acted fraudulently, arbitrarily, or capriciously; or whether the ZHE's decision is not supported by substantial evidence; or if the ZHE erred in applying the requirements of the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)].

III. DISCUSSION

As stated above, after reviewing the record of the evidence in this appeal, the decision of the ZHE is well-supported by the record. Although Appellants claim that the ZHE erred, I can find no such error. And although the Appellants claim that the use will materially and adversely impact surrounding neighborhoods from traffic and from the Bear Canyon Arroyo's flood water runoff, their claims are unsupported and are contrary to the existing evidence in the record. I will take up the applicable appeal issues raised by Appellants individually. However, it is appropriate to first comment on the criteria in the IDO on which the ZHE based his decision. The use, an indoor storage facility, is a conditionally permissive use in the zone in which it is proposed. As stated above this is undisputed. Pursuant to § 6-6(A)(3) of the IDO, a conditional use "shall" be approved if the application meets all of the

following criteria:

6-6(A)(3)(a)	It is consistent with the adopted ABC Comp Plan, as amended.
6-6(A)(3)(b)	It complies with all applicable provisions of this IDO, including but not limited to any Use-specific Standards applicable to the use in Section 14-16-4-3; the DPM; other adopted City regulations; and any conditions specifically applied to development of the property in a prior permit or approval affecting the property.
6-6(A)(3)(c)	It will not create significant adverse impacts on adjacent properties, the surrounding neighborhood, or the larger community.
6-6(A)(3)(d)	It will not create material adverse impacts on other land in the surrounding area through increases in traffic congestion, parking congestion, noise, or vibration without sufficient mitigation or civic or environmental benefits that outweigh the expected impacts.
6-6(A)(3)(e)	It will not increase non-residential activity within 300 feet of a lot in any Residential zone district between the hours of 8:00 P.M. and 6:00 A.M.
6-6(A)(3)(f)	It will not negatively impact pedestrian or transit connectivity without appropriate mitigation.

The ZHE expressly found that the proposed conditional use satisfies each of the above criteria. Appellants generally claim that there is evidence to support a denial of the application. But, because this is an appeal of a decision from the ZHE, the question is not whether substantial evidence exists to support the opposite result, but rather, the question is whether the evidence in the record supports the result reached. Notwithstanding, I alo find however, that there is insufficient evidence to support the opposite result or Appellants' claims.

Appellants however broadly and somewhat abstractly contend that any development of the 2.37-acre lot will cause significant negative impacts to surrounding property owners. I note for the City Council that Appellants have not submitted any factual evidence or evidence

prepared by any experts that support Appellants' broad contentions.

In this appeal, Appellants first claim that the IDO requires that 20% of neighborhood association members must give their approval of the application. In making this claim, they mischaracterize the application as a variance request. Notwithstanding, that the application is for a conditional use not a variance, there is no 20% rule in the IDO that is applicable to the conditional use.

Appellants next contend that the ZHE erred because he failed to include in the record what Appellants have characterized as "rebuttal documents" that they claim were submitted by various opponents of the application prior to the ZHE hearing. At the LUHO hearing, OGNA representative Alicia Quinones argued that at least 30 members of the community submitted letters opposing the application and that the ZHE or his Staff refused or failed to include the letters in the record. When queried about the alleged missing materials, Mrs. Quinones could not provide any more detail other than there is an email from the ZHE or his Staff demonstrating that the letters were submitted. I gave the Appellants (OGNA) an additional five days to submit the email and the alleged missing materials in this record. The OGNA did submit what appeared to be what they claimed to be the alleged missing materials and they have been included in the record. Many of the materials were already in the record. However, the materials that where not already in the record, I note that those materials appear to have been submitted only to the OGNA and not to the ZHE or his Staff. That is the email communications are clearly addressed only to the OGNA. I cannot find that there is evidence that the ZHE received and then refused these communications. Thus, there is insufficient evidence to support the Appellants' contention that the ZHE did not allow evidence in the

record. I also note that, although Appellants characterize the email communications as "rebuttal documents," the substance of the materials do not rebut any fact in the record. "Rebuttal" as the term is typically used, is specific evidence or argument, based on facts, that tends to refute or contradict other evidence. The substance of the communications are voices of opposition. The ZHE was already aware that there existed opposition to the request—he noted it in his decision [R. 31]. Thus, adding more voices of opposition would not have changed any of the ZHE's findings regarding the conditional use criteria in the IDO. There was no prejudice as Appellants seem to imply.

Next the Appellants claim that because the ZHE "allowed the applicant to change their application after the submission deadline" the ZHE erred [R. 25]. Appellants generally claim that the changed application was unfair to the OGNA. Appellants have not shown how the changes were unfair and they have not shown that the changes impacted or prejudiced the process or their rights in any manner. Appellants have not even identified what the changes they are referencing were. In an appeal, it is the Appellants that must meet the substantial evidence burden of proof.

I note that there is nothing in the IDO that prevents applicants from modifying various aspects of their applications to satisfy certain neighborhood or City Staff concerns. In fact, oftentimes after applicants meet with neighborhood association members, application details regarding setbacks, landscaping, height, design and other use specific issues are modified specifically to address matters raised at facilitated meetings. Without more evidence from Appellants, such as when the modifications were done, what the modifications were, and how they were unfair, general unsupported arguments alone without supporting explanation

or evidence do not satisfy the burden of proof in an appeal hearing.

The OGNA next generally claim that the materials they submitted to the ZHE, namely a document they contend is an "Impact Statement," was not considered by the ZHE or acknowledged in the ZHE's decision.[3] They further contend that this is a basis for reversal or remand. There is a document in the record labeled "*Oso Grande Conditional Use – Impact Statement*" ("Impact Statement") which was submitted by the Appellants [R. 87].

Although not required, I note that in his official decision, (Findings 32 and 59), the ZHE expressly referenced the "Impact Statement" that the OGNA submitted into the record [R. 32]. The presumption is that the ZHE had familiarity with the record that he was deciding on and unless Appellants can prove with substantial evidence otherwise, the claim cannot withstand scrutiny. Said another way, without meaningful evidence to rebut the presumption that the ZHE reviewed the record, the argument in of itself is insufficient to disturb the ZHE's decision. Appellants have submitted no such evidence to support their allegation that the ZHE did not review the document. Thus, the argument alone cannot survive an appeal.

Appellants also contend that the substance of the "Impact Statement" demonstrates that the proposed use will cause negative impacts on the surrounding area. After reviewing the entirety of the "Impact Statement," I find that the document's primary conclusions are unsupported. There are four main arguments and conclusions in the document. First, it is argued that the proposed 120,000 sq. ft. building will adversely affect and alter the flood

3 The document labeled "Impact Statement" is in quotes because in land use matters, an impact statement is typically prepared by professionals in the subject of study of the matters analyzed. For example, a traffic impact statement or an environmental statement is prepared by an engineer and or an expert in environmental issues respectively. This is so because the detail of analysis required on the issue requires highly technical engineering analysis. There is no evidence that the Appellants' "Impact Statement" is supported by expert analysis.

water runoff and drainage in the area from the Bear Canyon Arroyo and the nearby Dam. Second, Appellants claim that the use will adversely impact traffic in the area. Third, the Appellants argue that the proposed 35-foot tall building will negatively impact the views of nearby residents. And, fourth, Appellants contend that the proposed storage use does not satisfy the Comprehensive Plan's goals and policies.

Regarding the flood issues Appellants generally claim that the 2.37-acre lot is in a designated flood plain [R. 93]. They also broadly claim that the 2.37-acre lot is "unsuitable" for development because it is in a flood plain and the lot serves as runoff drainage for the Dam and the Arroyo [R. 103]. Yet, there is literally no evidence to support Appellants' claims. In fact, their claim belies the evidence in the record.

Determining how flood waters and runoff water drains, in urban areas is a fact intensive, technical process. It is generally a matter that requires expert analysis based on many variables having to do with the details of soils, topography, contour elevations, and drainage resources in the area. Normally, certified professional engineers perform the analyses required for determining runoff and drainage matters, including drainage management.

In this matter, the analysis will not be complete until the applicants submit detailed plans showing detailed elevations, placement of impervious elements, and how drainage will be managed on the 2.37-acre lot. These issues have not yet been analyzed with the level of detail required for approval at this stage in the IDO review process. The details of grading and drainage is required to be reviewed by the City's Hydrologist and the Development Review Board (DRB) subsequent to conditional use approval. Thus, many of Appellants general concerns are not ripe and unproven. Drainage cannot be resolved because the DRB

has not reviewed the numerous plans that must be submitted to the DRB before drainage plans are rejected or approved by the DRB. At this stage in the application process, the ZHE reviews drainage issues in a general way that revolves around the conditional use criteria restated above in § 6-6(A)(3) of the IDO. The ZHE acknowledged this in his decision [R. 31, Finding 53].

In addition, there is substantial evidence in the record that Appellants' general claims that development of the 2.37-acre lot will cause flooding are erroneous. Although much of Appellants' assumptions and claims of flooding rests on their claims that the site is in a flood zone and is a designated watershed, the evidence in the record does not support either claim. The lot is not in a flood plain as designated by FEMA or the City [R. 274]. In addition, the 2.37-acre lot is not in the designated Arroyo and it is not designated MPOS [R. 325]. The site is adjacent to the Arroyo and the MPOS.

The facts in the record demonstrate that the development of the lot will increase stabilization of the existing erosion that is taking place at the site [R. 263]. Appellants may disagree, but they have not rebutted the expert opinions of the applicant's engineer. The applicants' certified professional engineer opined that:

> The existing storm water from the site leaves the site along the western property line and is currently causing some minor erosion on the adjacent property owned and maintained by the Albuquerque Bernalillo County Water Utility Authority. The storm water runoff from the proposed site will be directed via storm drain directly to the Bear Canyon Arroyo in a non-erosive manner acceptable to the City of Albuquerque. This will benefit the downstream properties.
>
> The development of this site will have no impact on the John Robert Dam.
>
> In closing, I can with certainty state that the development of this property as proposed will generate no adverse impact with respect to grading and drainage [R. 263].

I find that without competent evidence to rebut the engineer's opinion on the issue of flooding and drainage, Appellants have not met their burden of proof.

Next, Appellants claim that the proposed storage use will adversely impact traffic in the area and specifically on Osuna Road [R. 94]. However, virtually all development creates some impacts on traffic. That is why the standard for a conditional use permit is that there must be substantial evidence in the record that the proposed use will not create "*material* adverse impacts… without sufficient mitigation or civic or environmental benefits that outweigh the expected impacts" [IDO, § 6-6(A)(3)(d)]. Appellants have not supplemented the record or their broad allegations with evidence that the proposed use will create material adverse impacts on the streets. They rely only on their assertion.

In this matter, the ZHE found that the indoor storage use generates 5 to 6 vehicles per hour even at peak times and the daily average trip generations amount to approximately 50 trips per day [R. 31]. The ZHE also found that the use generates less traffic that many other permissive uses allowed in an MX-L zone [R. 31]. This evidence was based on Consensus Planning's statement that the proposed indoor storage use is deemed a "low intensity, low traffic generating use" when compared to other permissive uses described in the IDO [R. 59]. I reviewed the list of permissive uses in a MX-L zone from Table 4-2-1 in the IDO. An indoor storage use is a less intensive of a use, in terms of traffic generation than many of the permissive uses allowed in the zone. Many types of the permissive kinds of restaurant uses that are also allowed in the MX-L use generally generate many more vehicle trips per day than an indoor storage use. There is also evidence in the record that Juan Tabo Blvd carries approximately 24,000 vehicle trips per day [R. 328]. This was undisputed. The ingress and

egress to the proposed use will be placed only on Osuna Rd. where traffic is less prominent [R. 328].

During the DRB's review, the City's Traffic Engineer will review street access to assure that it mitigates any traffic concerns of the Engineer [R. 328]. Appellants did not rebut this evidence. Instead they just ignore it and speculate that traffic will create adverse impacts. Without any evidence, they also speculate that the proposed access will create safety issues but have not identified what safety issues will occur. [R. 94]. They claim the use will generate illegal activity and undue noise [R. 94]. Yet, there is no evidence in the record to support these broad claims.

Next Appellants claim that because the proposed indoor storage facility will be 35 feet tall, it will impair views of residents in the residential communities West of the site. There is evidence in the record that supports Appellants contentions insofar as views "might" be impaired. In the record, there is a memorandum that was submitted to the ZHE by Christine Sandoval, the City's Parks and Recreation Department's Principal Planner [R. 207]. Mrs. Sandoval wrote that "[v]iews from El Oso Grande Park may be impacted" and she seemed to recommend that the building not be 35-feet tall [R. 207]. Mrs. Sandoval also wrote that the views from above the site at the John B. Robert Dam will not be impacted by the 35-foot-tall building [R. 207]. The ZHE acknowledged this evidence and responded with a finding that the proposed height (35 feet) is permissive in the IDO [R. 31]. I would add that the City Parks and Recreation Planner's opinion that views from the El Oso Grande Park "may be impacted" is not the standard in the IDO for judging whether a conditional use can be denied. Again, the standard is whether the proposed use will "create significant" or "material adverse

impacts" under 6-6(A)(3)(c) or under 6-6(A)(3)(d) respectively without acceptable "mitigation." Appellants, for whatever reason did not demonstrate to the ZHE that views looking up East from the El Oso Grande Park will be materially or significantly impacted. Thus, it is not enough to reverse the ZHE.

Notwithstanding, there is evidence in the record that there will be mitigation from the natural elevation of the lot on which the use will be placed. The evidence in the record demonstrates that the grade of the storage site "has an approximately 17-foot slope down from Juan Tabo Boulevard to the site floor" [R. 54]. Apparently, the finished floor of the building will be approximately 18 feet below the base elevation of Juan Tabo Boulevard [R. 328]. This is undisputed. And because the height is permissive at this location, the ZHE did not err.

Finally, in the Impact Statement submitted by Appellants, they argued that the proposed use does not satisfy the policies of the Comprehensive Plan. In their "Impact Statement" they contend that the proposed use or conditional use permit is contrary to several policies in the Comprehensive Plan. They generally contend that the use is "inconsistent with the character and community identity of the neighborhood" and that it will "destroy the natural setting" in the area [R. 90]. These arguments are based on the change of use at the site from its current undeveloped state to a developed state. Appellants also claim that the 2.37-acre site is or should be designated as "sensitive land" under the IDO and the Comprehensive Plan. These arguments are based on Appellants' desire to keep the 2.37-acre lot vacant and undeveloped. Appellants ignore the rights of the landowner, the fact that the land is private property, and that the IDO allows, with the proper safeguards, development on private property.

Other than their subjective belief that the land should remain undeveloped, there is no support in the Comprehensive Plan or in the IDO for preventing vacant land from being developed. As stated above, the land is not in a flood zone or flood plain. There is no support for their contention that the land is or should be a designated "sensitive land" under the Comprehensive Plan and Appellants have not objectively identified the neighborhood's "character" or "identity" that they contend is inconsistent with the proposed use. They merely contend that development of any kind is inconsistent with the area. There is no objective support in the record or in the Comprehensive Plan for Appellants' subjective broad claims.

I find that the use is an infill project and infill within the City's boundaries is a major priority policy goal of the Comprehensive Plan [Comp. Plan, 1-6, 1-8, 5-2, and 5-6]. Reducing urban sprawl and reducing burdens on existing infrastructure are just two of many demonstrated benefits described in the Comprehensive Plan regarding infill [Comp. Plan, 5-3, 5-4]. I also find that there is insufficient evidence to support a finding that the proposed indoor storage use is incompatible with the area's identity and character. This is because, as stated above, the Appellants have not identified what that identity or character is which they believe is contrary to the use. Nor, have they shown how the ZHE erred in this regard. The burden is theirs to meet, and they have not done so. Again, in an appeal, the question is not whether substantial evidence exists to support the opposite result, but rather whether the evidence in the record supports the result reached. I find that the evidence in the record supports the result reached by the ZHE.

IV. CONCLUSION

The ZHE made 77 findings that are supported by the record. Although Appellants disagree, they have not rebutted any of the ZHE's findings with meaningful and substantial evidence. For all the reasons described above, I respectfully recommend that Appellants' appeal be denied in full.

Steven M. Chavez, Esq.
Land Use Hearing Officer

July 12, 2019

Copies to:
Appellants
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