APPELLANTS' ORAL ARGUMENT
FOR DRB REMAND HEARING IN
PR-2019-002496
(Alameda Luxury Apartments)
January 8, 2020

Madame Chair, my name is Hessel E. Yntema III, I am the lawyer for the Appellants in this remand hearing. I have submitted written materials including exhibits by a letter dated January 2, 2020 on behalf of Appellants. We request that the letter and the exhibits be included in the record for this hearing. Some of the Appellants have submitted their own letters and materials which we also request be included in the record. Also, Appellants request that they be allowed to cross-examine witnesses in this hearing.

The submissions are lengthy and I will not read them point by point for this presentation. However, I would like to highlight briefly some of the issues. Here is a copy of my argument for today which I request also be included in the record.

1. Appellants object to the procedure of this remand to the DRB because the DRB is not a proper quasi-judicial and Open Meetings Act compliant forum for this hearing. As discussed in various submissions, the DRB has not historically acted as a quasi-judicial, OMA compliant decision-making body, as the DRB does much of its business, including for this remand hearing, outside the hearing, without a proper record, with numerous ex parte communications, and is effectively controlled by the Planning Department. The site plan approval decision in this matter requires an impartial, quasi-judicial, OMA compliant forum.

2. The LUHO decisions, beyond the remand decision based on the DRB's violations of due process in the prior hearing, are in error and should not be binding on the DRB, because the DRB's prior decision was void due to violation of due process, and the LUHO lacked all the relevant evidence to consider and plowed new ground with his decision, to which Appellants

should be able to respond. The DRB, if it acts in this matter, should consider all issues related to the application beginning anew from the start and with impartiality as to all issues, or "de novo" to use lawyers' wording.

3. The "Neighborhood Edges" requirements of the IDO apply to this matter and those provisions require a reworking of the site plan. Admittedly the issue of determining what zoning applies when may appear complicated. The issue deserves a full record and an impartial decision-maker. As set out in Appellants' submissions, the "Neighborhood Edges" provisions apply because the Tierra Morena lots abutting the site currently are and have been for months zoned "R-1B", and such "R-1B" zoning was a legislative rezoning and was contemplated as such by the IDO, and the LUHO's interpretation as to how the IDO applies the legislative zoning conversions to pending applications is not correct. The Planning Department should explain the analyses for its reverse turns on this issue. A major problem with the LUHO's interpretation is that under the LUHO's interpretation the City Council gives up its authority to make legislative decisions which are effective, across the board, to pending applications. From Appellants' perspective, while the issue may appear complicated, the solution, under New Mexico law, is fairly simple: Appellants' abutting properties' existing "R-1B" zoning as of today January 8, 2020 is the legislatively enacted zoning that applies for review today of this site plan.

4. Appellants also submit, again, that the subject project is on its face "moderate intensity" as stated by the developer in its submission of its site plan. This "moderate density" project is not authorized in the MX-L zone which authorizes multi-family residential development only for "low density".

5. The site plan also violates the "Area of Consistency" provisions and the sector development plan provisions of the Comp Plan and the current Development Process Manual. The project is oversized for the single family residential neighborhood.

6. Appellants request, again, that the City apply the 20% protest rule of Section 3-21-6(C) NMSA 1978 for this matter. Practically all abutting owners are united in opposition to this site plan. Under state law, in this type of neighbor protest situation, the zoning action is not valid unless approved by a majority of the City Councilors in a public vote.

7. Appellants also submit that, regardless of other issues, the subject project has significant adverse impacts on the neighborhood with regards to density, privacy, odors, noise, traffic, lighting, views, quality of life and other problems and those impacts should be mitigated pursuant to the IDO. A traffic study would be helpful and appropriate.

Appellants have requested specific findings set out in my January 2, 2020 letter. I ask to add a finding that the zoning as of the date of the final hearing on the site plan approval is the applicable zoning under the IDO to apply for the IDO's Neighborhood Edges provisions, in other words that the abutting properties' zoning as of today January 8, 2020 is the zoning that applies for review today of this site plan.

Briefly I want to walk through Appellants' exhibits and why they are relevant for and should be considered in connection with this remand hearing.

Exhibit 1 sets out the Tierra Morena NE lots zoned R-1B through the legislative zoning conversion process undertaken with the IDO. These are the lots which trigger the IDO's "Neighborhood Edges" provisions.

Exhibit 2 is an IPRA produced e-mail showing that the site plan was not complete as of June 27, 2019. The LUHO's interpretation of the IDO focuses on the date that an application is "deemed complete", which is not a clear point in this case.

Exhibit 3 is an IPRA produced e-mail string which shows that ex parte contacts from neighbors are controlled strictly at the City Council level (by comparison ex parte contacts with the DRB decision-makers are common).

Exhibit 4 is the 2017 Ordinance enacting the IDO. This enactment included enactment of the "zoning conversion map" on p. 23 and that various zone change requests were contemplated with the IDO on p. 21.

Exhibit 5 is from the City's website concerning the zoning conversion process under the IDO.

Exhibit 6 is a Resolution from 2017 which sets up the IDO-related zone map amendments.

Exhibit 7 is the 2018 Resolution which replaced the 2017 (Exhibit 6) Resolution, which shows that the IDO zone conversion process was started before the IDO became effective. Page 6 indicates that the zoning conversions are part of the IDO rezoning and are legislative.

Exhibit 8 is the 2019 Ordinance for the Batch 1, Phase II conversions.

Exhibit 9 is the record of that enactment on August 5, 2019.

Exhibit 10 is the Ordinance adopting the Batch 2, Phase 2 zoning conversions.

Exhibit 11 is the record of that enactment on November 18, 2019.

Exhibit 12 is an email from the City to one of Appellants, Marialuz Scarpa, stating that the zone conversions were being considered before the effective date of the IDO for a follow up process.

Exhibit 13 is a letter dated November 5, 2018 from the City to Appellant Juanita Duran concerning the zoning conversion process for 8419 Tierra Morena NE. Ms. Duran's zone conversion request was received October 26, 2018.

Exhibit 14 is the zoning conversion request from Stephen Wray, 8505 Tierra Morena Pl. NE, submitted April 9, 2019.

Exhibit 15 is R-2019-035, also known as R-19-150, which appears to attempt to amend the IDO by resolution, and which recites that the BRD has discretionary authority but then enacts that the DRB does not make discretionary decisions and does not conduct quasi-judicial hearings. It's not exactly clear to me how but it appears the City claims that this enactment controls the DRB proceedings today. If this is the case, then the DRB cannot comply with the LUHO's remand instruction for a quasi-judicial hearing and this matter should be deferred until a quasi-judicial form is established.

Exhibit 16 is a copy of the EPC decision in Project 2019-002663, not the project at issue today. This decision for a zone change from MX-L to MX-M shows that there is a difference between MX-L and MX-M zoning, and the applicant and the Planning Department are aware that the zoning categories are distinct.

Exhibit 17 is a sketch map by Appellants showing that nearly all adjacent property owners have protested in writing against this site plan. This is submitted for Section 3-21-6(C), NMSA 1978, the 20% rule.

Exhibit 18 are IPRA produced documents showing that the Planning Department apparently considered that the project site address is within an "Area of Consistency", and that some other applicant (Dragonfly Development) presented a site plan for this site for a June 17, 2019 meeting.

Exhibit 19 is an IPRA produced e-mail string showing ex parte communications between Planning Staff including the then DRB Chair and the applicant's representatives concerning revisions to the site plan application.

Exhibit 20 is an IPRA produced e-mail string showing ex parte assistance by the DRB Chair to the applicant.

Exhibit 21 is an IPRA produced e-mail string which apparently shows that after the prior DRB approval, a 10 ft. adjustment to the west of the entire project was made ex parte.