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January 2, 2020

VIA E-MAIL – agomez@cabq.gov

Jolene Wolfley, Chair
Development Review Board
City of Albuquerque

c/o Angela Gomez
DRB Meeting Monitor

Project: #PR-2019-002496
Alameda Luxury Apartments Complex
DRB Remand Hearing on January 8, 2020

Dear Chair Wolfley and DRB Members:

This firm represents Appellants following and in connection with the decision of the Land Use Hearing Officer ("LUHO") to remand the applicant's site plan approval to the Development Review Board ("DRB"). Appellants continue to oppose this project as currently designed. Appellants hope that the applicant will revise its project to better fit with the neighborhood. This letter is intended to provide evidence and argument for the remand hearing scheduled for January 8, 2020, at the DRB. Please place this letter in the record for the DRB remand hearing.

1. Background

The LUHO decision dated November 15, 2019 ruled that the DRB decision of September 11, 2019 violated due process in various respects, and remanded the site plan approval to the DRB "to rehear the application to redress its due process infractions" (LUHO Decision p. 19).

The LUHO also made various other rulings, beyond the decision to remand due to violations of due process.

Appellants request that the transcript of the LUHO hearing and all materials submitted for the LUHO hearing be admitted into the record for the DRB remand hearing.

Appellants also submit additional materials (Exhibits 1-21) with this letter and request that these exhibits be entered into evidence at the DRB remand hearing. The exhibits include demonstrative exhibits, e-mail strings obtained through the Inspection of Public Records Act ("IPRA"), City enactments, materials from the City's website, and records of some Appellants.

It appears that the attorney who represented the applicant at the LUHO hearing and preliminarily before the DRB remand hearing, Peter Lindborg, may

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not be a licensed active attorney in New Mexico. From Appellants' perspective, if Mr. Lindborg is not properly licensed, his arguments as counsel should be not be allowed, and should be stricken from the record, including his arguments before the LUHO, and the matter should be reconsidered in a new hearing before the LUHO.

When possible, references in this letter are to the "LUHO Record", i.e. the paginated record before the LUHO, in the absence of a paginated record for the DRB remand hearing at the time of this letter.

Appellants request that the DRB members who have had ex parte contacts with the applicant or the applicant's representatives recuse themselves from this matter.

Appellants note that the Development Process Manual ("DPM") is pre-IDO, does not contemplate the IDO, proceeds with Sector Development Plans in mind, and apparently is in the process of an extensive rewrite. For this matter, deferral until the DPM conforms to the IDO would be justified.

2. The DRB is not an impartial decision-maker for this matter

Appellants object to the DRB, as presently constituted and operated, deciding this matter, because the DRB is not an impartial decision-maker for this matter. The configuration of this matter at this point appears to be that the DRB is to conduct a hearing with "due process" for approval of the applicant's site plan, when the LUHO has ruled that the DRB's prior decisions to approve the site plan were substantively correct. This configuration mocks the requirements of due process which include that the parties will have an impartial decision-maker. Procedural due process requires a fair and impartial hearing before a trier of fact who is "disinterested and free from any form of bias or predisposition regarding the outcome of the case". New Mexico Bd. of Veterinary Medicine v. Riegger, 2007-NMSC-044, ¶27, 142 N.M. 248. Parties are entitled to an impartial tribunal, i.e. having had no pre-hearing or ex parte contacts concerning the question at issue. Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 2008-NMSC-025, ¶34, 144 N.M. 99. In this case, the substantive decisions to approve the site plan apparently have already been made by the DRB and the LUHO.

Further, the DRB is not independent of the Planning Department. The DRB is chaired by the City Planning Department Director or its assignee and the Zoning Enforcement Officer ("ZEO") also is a member, under IDO Section

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6-2(D)(1). As discussed below, Planning Department staff and even DRB members appear to have had significant ex parte contacts with the applicant's representatives.

It appears that there may be financial incentives for the City to approve an intense development at the subject site based on the infrastructure improvements required for the project.

3. The DRB conducts its business contrary to quasi-judicial standards and the New Mexico Open Meetings Act

According to the LUHO, the DRB remains a public board, which investigates facts and draws conclusions in open meetings (LUHO Decision pp. 7-8). However, the DRB's methods of operation and structure are incompatible with the Open Meetings Act ("OMA") as well as the requirements for quasi-judicial proceedings.

For example, in response to Appellants' request for disclosure of the DRB members' ex parte contacts for the January 8, 2018 remand hearing, the DRB Chair ruled in her December 6, 2019 e-mail:

> DRB is a technical board comprised of City staff and ABCWUA staff who work with applicants and neighborhood associations during the review and approval of the applications. Therefore, DRB will not submit written disclosure of communications beyond DRB case comments.

This closed process posture is supported by current enactment and practice. Enactment R-2019-35 (p. 1) states: "it is not practical for technical City Staff members to operate in such a manner that prohibits them from communications with members of the public outside of a public hearing", and (in various places) "DRB is a staff board for technical reviews and does not make discretionary decisions or hold quasi-judicial hearings". As stated by the Planning Director and the then DRB Chair to the LUHO (Record at 2): "The DRB is a staff board for technical review, as defined in the IDO, and does not hold quasi-judicial hearings".

The DRB essentially conducts its business in a "rolling quorum" method. See NM Attorney General's Open Meetings Act Compliance Guide (2015), pp. 7-8. The DRB's methods allow an applicant to obtain separate, private persuasion of or approvals from the DRB members outside of the public

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hearing. The quorum is acting outside of an open public meeting even as the members are separated physically.

The DRB and the Planning Department's views of the DRB process are incompatible with the OMA and quasi-judicial proceedings. As stated by the Planning Director and the then DRB Chair to the LUHO (Record at pp. 3-4):

> The DRB was created to offer efficient considerations of technical standards, a one-stop shop for property owners and developers alike, which would have otherwise required an applicant to meet individually with the City staff experts from divisions and departments across the city. The DRB streamlines the application process by bringing together key department staff responsible for the specialized/expert review of projects as the[y] relate to the IDO in a forum where the staff and applicant meet to discuss projects and the public can ask questions and share input for those decisions. The DRB is not a policy making board and performs no administrative adjudicatory functions regarding individual legal rights, duties or privileges. As such, the DRB staff communicates with the public and the applicants….
>
> Again, the DRB is a technical review board of the City staff and does not hold quasi-judicial hearings. By definition of the DRB and its purpose, the DRB staff members are required to communicate with the public and applicants. The DRB is a consensus board and requires each designated staff member, an expert in a specific area, to have no objections to an application. For each application, each member is asked whether they object. If there are no objections, meaning the application follows the requirements of the IDO, the application is approved with a consensus vote. The remaining alleged Open Meeting Act violations ("going in and out of public meetings and effectively into smaller group closed meetings") are fabrications of Appellant.

Appellants' Exhibit 2, an e-mail string (last dated June 27, 2019) involving the then DRB Chair and the applicant's representative, indicates that the application was not complete as of June 27, 2019. The ex parte communications were noted to be "privileged and confidential". Appellants' Exhibit 3, an e-mail string (last date July 17, 2019) also involving the then DRB

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Chair, indicates that the City has gone back and forth as to whether the DRB is "quasi-judicial", and that apparently different standards are applied to ex parte communications at the DRB level and the City Council level. Appellants' Exhibits 19, 20, and 21, being IPRA records of communications between Planning staff (including the then DRB Chair) and the applicant's representative, indicate that there were significant ex parte communications back and forth, including after the site plan approval by the DRB, which should be part of the public record. It appears from the IPRA records that substantive approval of the application by the DRB was a foregone conclusion, privately communicated, before the DRB hearings.

Under these circumstances, the DRB as currently constituted and operated should not be the quasi-judicial, OMA compliant decision-maker for this site plan application.

4. Portions of the LUHO Decision are not binding on the DRB

Appellants submit that the LUHO decisions, other than the remand order to conduct a hearing in accordance with due process, should not be binding and should be reconsidered, based on due process considerations and additional evidence apparently not considered by the LUHO.

IDO Section 1-2 states that "In enacting this IDO, the City intends to comply with the provisions of state law on the same subject, and the provisions of this IDO should be interpreted to achieve that goal." Under New Mexico law, land use decisions that violate due process are void. In Miller v. City of Albuquerque, 1976-NMSC-052, ¶¶ 21, 22, by failing to follow statutory procedures (including denial of the right to an impartial decision-maker), due process of law was violated and no subsequent act could correct the defect. Under Nesbit v. City of Albuquerque, 1977-NMSC-107, ¶10, when an underlying decision is void, further proceedings based on the voided decision are invalid; development plan decisions, including court decision of reversal, were declared invalid due to the underlying decision lacking due process. Under Zuni Indian Tribe v. McKinley County Board, 2013-NMCA-041, ¶21, the applicant takes the risk that an appealed underlying decision will be void, thus voiding all subsequent governmental actions dependent on that approval. These cases apply to the validity of the LUHO decision. The DRB decision cannot be invalid on due process grounds and still be valid on other grounds. Under this line of reasoning, the LUHO's various advisory rulings about density, applicability of the Neighbor Edges provisions of the IDO, application of Section 3-21-6(C) NMSA 1978 and other points are not binding, being based on a decision which was void.

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The LUHO ruled that the IDO's Neighborhood Edges provisions do not apply to the site plan, based on analysis undertaken by the LUHO and not on any line of reasoning advanced by the parties. The Planning Department in its written submissions and oral presentation to the LUHO agreed that the Neighborhood Edges provisions applied (after not applying the provisions at the DRB hearing). The Planning Department did not submit any analysis for its contradictory conclusions (first, apparently, that the "Neighborhood Edges" provisions did not apply, and then that those provisions should have been applied). The applicant did not submit any written analysis and argued through (apparently inactive) counsel that the Neighborhood Edges provisions did not apply. Under those circumstances, Appellants should be allowed an opportunity to respond to the novel and sinuous line of analysis of the LUHO. Under IDO Section 6-4(T)(2) (p. 354), however, a remand order is not a final decision and cannot be appealed. The LUHO decisions, other than the findings that the DRB violated due process, violate due process because they make purportedly binding but unappealable substantive decisions.

The LUHO's decisions, other than the due process remand order, also are "advisory" and "dicta", that is, they constitute holdings that are unnecessary to the holding of the case and therefore not binding as a rule of law. See Kent Nowlin Construction v. Gutierrez, 1982-NMSC-123, ¶8, 99 N.M. 389. Some deference is appropriate from a lower tribunal to dicta from a higher tribunal, but the circumstances should be considered by the lower tribunal. See State v. Johnson, 2001-NMSC-001, ¶16, 130 N.M. 6.

5. The IDO "Neighborhood Edges" Provisions Apply to the Applicant's Site Plan

The LUHO apparently did not consider important underlying facts and circumstances about the Neighborhood Edges provisions. The LUHO relied upon and interpreted IDO Section 1-10(B), within the "Transitions from Previous Legislation" Section, which states:

> 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.

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The LUHO interpreted this provision to mean that the IDO or the neighboring zoning were frozen, for the applicant's application, as of the date the Planning Department considered that the applicant's application was "complete". The LUHO's interpretation is problematic because the provision, located in the "Transitions from Previous Legislation" Section and addressing initially applications submitted before the effective date of the IDO, does not appear to be intended to have the far reaching consequences ascribed by the LUHO, that no amendments to the IDO or other City regulations may apply once a "complete" application is submitted. "Completeness" of an application is considered at IDO Section 6-4(H) (p. 343), and contemplates a determination by the Planning Director that an application is "complete", which does not appear to have happened in this case. If the Planning Director's determination of "completeness" of an application is a date which triggers a freeze on all IDO amendments or other City enactments as to that application, that date is important and should be identified, in the record.

The LUHO ruled that the application was "deemed complete" as of June 17, 2019 (pp. 15-16); however Appellants' Exhibit 2 demonstrates that the application was not complete as of June 27, 2019, at least according to the then DRB Chair in her ex parte contacts with the developer's agent. Effectively the LUHO held that the applicant had vested rights in its development plan free of any text amendments or zoning map changes made after the date the Planning Department scheduled the application for hearing, even if by oversight.

The LUHO also interpreted that the "Official Zoning Map" was incorporated into the IDO (p.18 of the LUHO decision). However, under the IDO, the "Official Zoning Map" is a separate instrument. IDO Section 1-6, Official Zoning Map, states:

> 1-6(A) The standards and regulations in this IDO applicable to specific zone districts or Overlay zones apply to the areas of the City shown with those zone districts or Overlay zones on the Official Zoning Map.

IDO Section 1-6(B) indicates that the City Council intended the Official Zoning Map to be separate from the IDO, and separately amendable:

> The Official Zoning Map is the latest version of the zoning map as approved or amended by City Council and maintained in electronic form by the City Planning Department.

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The most restrictive provisions of the IDO should apply to the applicant's proposal, if there is any conflict between IDO provisions and City regulations or state law. IDO Section 1-8(B) states:

> 1-8(B) If any regulation in this IDO conflicts with other applicable laws or regulations of the City, or conflicts with applicable state or federal law, the more restrictive provision shall prevail, unless the provisions of state or federal law, as interpreted by the courts, prevent that result.

The lots of various Appellants on Tierra Morena NE adjacent to the subject property, set out on Appellants' Exhibit 1, are zoned "R-1B". Under the IDO's "Neighborhood Edges" sections, these lots are entitled to certain protections which are not provided in the applicant's site plan.

The LUHO's analysis that the "Neighborhood Edges" provisions do not apply to this site plan is in error for several reasons: the Tierra Morena voluntary zoning conversions were not "amendments" to the IDO; the IDO process contemplated the zoning conversions on Tierra Morena NE as an integral component of the IDO process; and the LUHO's interpretations conflict with settled state law as to "vested rights". The LUHO also did not consider the equities of the situation in which existing homeowners are faced with a highly sophisticated applicant team, well connected to the Planning Department and the City Council, which seeks maximum density and profit from a new adjacent development.

Review of the various enactments for the "voluntary zoning conversions" (undertaken by various Tierra Morena Appellants), indicates that the "voluntary conversions" were not "amendments" to the IDO, and that the "zone conversion process" was contemplated and initiated even before the effective date of the IDO. Appellants' Exhibits 4 through 14 set out some of the applicable enactments and related papers.

Enactment 0-2017-025 (Appellants' Exhibit 4) shows that the IDO and the IDO Zoning Conversion Map were enacted together. Page 21of O-2017-025 provides that "the Planning Department intends to submit and sponsor a series of zone changes". The City's website discusses the post-IDO Voluntary Zone Conversion Process (Appellants' Exhibit 5). Enactment R-2017-01 (Appellants' Exhibit 6) shows that the voluntary conversion process was started before the IDO became effective.

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Section 3(D) of Enactment R-2018-19 (Appellants' Exhibit 7) page 6, states:

> D. Final Decision Making Authority. The Phase II zoning conversion called for by this resolution is part of the comprehensive, City-wide rezoning associated with the IDO, and becomes effective only upon a final legislative action by the City Council. Property owners that are not eligible for the process outlined by this resolution, or that are otherwise unsatisfied with the zoning on their respective properties notwithstanding the results of this phase II process, may seek an individual zone map amendment through the relevant IDO zone map amendment process outlined in Section 14-16-7.

Appellants' Exhibit 8 and Exhibit 9 show that "Batch 1" of the "Phase 2 Zoning Conversion Effort" was not a text or other amendment to the IDO, but was an "updating" of the Official Zoning Map. As stated on page 3 of Exhibit 8, "the Official Zoning Map is used to apply land use regulations in the IDO to development throughout the City and in decision-making for zoning map amendments and long-range planning"; the conversion "will help preserve neighborhood stability and land predictability". Appellants' Exhibit 10 and Exhibit 11 show that "Batch 2" similarly also was not a text amendment to the IDO but was an "updating" of the Official Zoning Map. Appellant's Exhibit 12 shows that the Planning Department was following up on the zoning conversion requested by Appellant Marialuz Scarpa (8427 Tierra Morena) as of May 14, 2018. Appellants' Exhibit 13 shows Appellant Juanita Duran's (8419 Tierra Morena) zoning conversion request of October 26, 2018, confirmed by the Planning Department on November 5, 2018. Appellants' Exhibit 14 shows the zoning conversion request of Appellant Stephen Wray (8505 Tierra Morena) on April 9, 2019.

In sum, the various enactments and related papers demonstrate that the zoning conversions for Tierra Morena NE to "R-1B" zoning were not IDO "amendments", were contemplated before the IDO became effective and were part of the IDO process, and were put in process well before the applicant submitted its application on June 17, 2019 or the date that the Planning Director determined that the applicant's application was "complete" if that happened.

The LUHO interpreted that the applicant's rights to develop under the property's MX-L zoning vested as of the date the Planning Department considered that the application was "deemed complete". This interpretation is

contrary to "vested rights" analysis under applicable New Mexico case law. As set out in Brazos Land, Inc. Board of County Commissioners of Rio Arriba County, 1993-NMCA-013, 115 N.M. 168, a developer achieves vested rights in a project not upon submission of a complete application, but only when the project has been finally approved and the developer has relied substantially on that approval. The concept of "complete application" as applied by the LUHO to this case limits the City from exercising its legislative authority to amend zoning, the DPM or other City enactments as to cases in the pipeline, and sets the point of determination of rights up to the sometimes subjective, uncertain and in this case closed determination by the Planning Director that an application is "complete".

The applicant's representative was aware of the timing and status of the "voluntary conversions", for example stating at the May 21, 2019 Facilitated Meeting (LUHO Record p. 102):

> Q: What is the latest word from the City on the free zone conversion program?
> (1) The Agent stated that he understands that the City is processing the voluntary zoning conversions in batches. Batch 1 hasn't yet made it to City Council. When this project application is submitted, it's the conditions in effect at that time of application that apply. The second batch is taking longer than people expected and may be in a few batches.

6. The Project Exceeds the Density Allowed by MX-L Zoning

The applicant's agent in its submittal letter dated June 17, 2019 (p.1) described the project as "moderate density multi-family development":

> The development of moderate density multi-family development helps to further a number of Comprehensive Goals and Policies related to infill development, adding to the range of land use and residential housing options in the area, and locating moderate density housing adjacent to bicycle and transit facilities encouraging multi-modal transportation options.

Under New Mexico law, an ordinance such as the IDO is to be constructed so that every word in the IDO has meaning. Baker v. Hedstrom, 2013-NMSC-043, ¶24. "Low Density" and "Moderate Density" residential development do not appear to be specifically defined in the IDO; however, they

are used ostentatiously in separate zoning categories, such as MX-T, MX-L and MX-M. Whatever "low density multi-family" means under the IDO, it does not mean "moderate density multi-family". Appellants' Exhibit 16, an EPC decision, demonstrates that the MX-L and MX-M zones are distinct and that the applicant's representative, the Planning Department and the EPC are knowledgeable about the differences. An application for "moderate density multi-family" development should not have been allowed to proceed under the MX-L zoning category. Allowing this application to proceed under MX-L is simply a category error.

7. The Site Plan Violates IDO's "Area of Consistency" Provisions and the Comprehensive Plan

Appellants from the start of this matter have argued that this moderate density apartment project does not fit with their neighborhood and violates the "Area of Consistency" concepts of the IDO. See Letter to the DRB dated July 14, 2019, DRB Record, pp. 357-376. Appellants' Exhibit 18 shows that "Area of Consistency" apparently was a Planning Department concern as of June 10, 2019, when a different applicant (with the same agent) had submitted for development at the site. The Comprehensive Plan in Appendices C and D incorporates the Vineyard Sector Development Plan, but the Vineyard SDP was not considered by the Planning Department or the DRB for evaluation of this project. Insofar as the zoning of the parcels at issue is involved, the IDO and its initial conversion zone map are contrary to the intent of the Comprehensive Plan concerning the Vineyard SDP area. The DPM references Sector Plans for development process purposes.

8. Section 3-21-6(C) NMSA 1978

Appellants invoke the 20% rule of Section 3-21-6(C) NMSA 1978. Substantially more than 20% of adjacent owners have protested the proposed site plan in writing. See Record pages 369-373 and the map provided by Appellants (Exhibit 17).

9. Significant Adverse Impacts

Appellants and other concerned persons have identified a number of significant adverse impacts of the project as currently proposed. The Project Meeting Report from the May 21, 2019 meeting under the City's Land Use Facilitation Program summarized the concerns expressed at that meeting as follows:

> Meeting participants raised concerns about many topics, including parking, light pollution, population density, traffic congestion, proximity to the school, safety, and impacts on existing property values. A number of neighbors expressed the concern that the number of units would result in unacceptable resident density in the context of the overall area and asked that the developer consider lowering the buildings to two stories, which would help address their parking and traffic concerns and ameliorate the impacts of light pollution, loss of privacy, and loss of mountain views. A summary of all concerns is included in the meeting specifics.

The density of the project and the impact on traffic and safety are priority concerns for Appellants. Three schools, La Cueva High School, Desert Ridge Middle School, and Altura Preparatory Charter School, are each within a quarter mile of the proposed 93-unit site. Approximately 2,900 students travel to and from school each day in the area. Per IDO Section 6-4(J) (p. 344), "the location of the project, the amount of traffic generated from the development, and the existing conditions in the project area" are important for the extent of a traffic study. A traffic study for the project should be undertaken under these circumstances.

The DRB should consider the concerns expressed in the various public meetings for the site plan application and mitigate the adverse impacts.

The IDO indicates that building height, parking, spacing, screening and buffering may have a significant adverse effect on neighboring residential properties, by establishing the protections for "Neighborhood Edges" in Section 5-9 (pp. 286-287). Section 5-6(E)(2) (p. 260) also indicates that buffering is appropriate for development next to low density residential zone districts. Features of the site plan at issue generate significant adverse effects for adjacent residential neighbors, for which the DRB should require mitigation.

10. <u>Appellants Do Not Waive Their Other Issues Presented in Prior Hearings</u>

Appellants restate and do not waive any of their other arguments presented in this proceeding.

11. Findings

Appellants request the following findings by the DRB:

1. The DRB is a quasi-judicial body for this matter but has not followed the requirements for quasi-judicial hearings or the OMA.

2. The DRB as presently constituted and operated is not compatible with quasi-judicial decision-making and OMA decision-making compliance.

3. The IDO's "Neighborhood Edges" provisions apply to this Site Plan.

4. The Site Plan does not satisfy the IDO's "Neighborhood Edges" provisions.

5. The project as currently proposed is "moderate density" and "moderate density" multi-family development is not authorized in the MX-L zone.

6. The Site Plan violates the "Areas of Consistency" requirements of the IDO.

7. The IDO and its initial conversion zone map are contrary to the intent of the Comprehensive Plan concerning the Vineyard SDP area.

8. The current DPM does not authorize development under the IDO.

9. The Site Plan does not comply with all applicable provisions of the IDO, the DPM and City regulations and does not mitigate significant adverse impacts on the surrounding area to the maximum extent practicable.

10. The Planning Director did not make a determination that the applicant's application was "complete" and the DRB is not able to determine when the applicant's application became "complete".

Appellants again request that the subject "moderate density" apartment project be redesigned to conform to their neighborhood's low density residential character and the intent and standards of the IDO and the Vineyard

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SDP. Several of Appellants may present comments and objections to the proposed site plan at the scheduled January 8, 2020 DRB remand hearing.

Very truly yours,

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By
Hessel E. Yntema III

cc (by e-mail): Consensus Planning, Inc.
Peter Lindborg, Esq.
Nicole Sanchez, Esq.

Enclosures: Exhibits 1-21