BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-19-16

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.

I. Background and History

This is an appeal of a decision approving a site plan by the Development Review Board (DRB). Beginning with the relevant history, sequentially, the record reveals that in late April, 2019, Consensus Planning, agents for Phillip Lindborg and Bella Tesoro, LLC (collectively, the "developers") notified the Nor Este Neighborhood Association, the Vineyard Estates Neighborhood Association, and the District Four Coalition of Neighborhood Associations of their intent to submit an "application for a Subdivision of Land (plat) and Site Plan" to the DRB [R. 86]. In doing so, the developers also 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 and the District Four Coalition 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 attended and presumably discussed the details of the application [R. 92-105].

On June 17, 2019, the developers and the City Planning Staff met under § 6-4(B) of the Integrated Development Ordinance (IDO) for a mandatory pre-application meeting to go over the review process and application requirements [R. 81-84].[1] On the same day as the pre-application meeting, the developers also submitted their application to the City Planning Department for subdivision plat and for site plan review [R. 65-80]. Apparently, the developers' application was deemed complete at the time of submission because it was immediately scheduled for the July 17, 2017 DRB public meeting [R. 65, 300]. See § 6-4(H)(4).[2]

Between July 1, and July 17, 2017 the DRB received comments from governmental agencies regarding the application, including from the Albuquerque Public Schools, 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

1. 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).

2. I note that there are no written findings by the Planning Director that the application was complete. However, Appellants have not claimed that the application was incomplete when the application was scheduled for a meeting with the DRB. Moreover, the IDO makes it clear that an application will not be scheduled for a hearing/ meeting until it is deemed complete by the Planning Director. The presumption is that the application was deemed complete on June 17, 2019. The presumption was not rebutted.

DRB through the Chair deferred a decision and notified 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 R-1B zoned property that abuts the application site [R. 285]. Mr. Yntema, Appellants' attorney, advised the DRB in his written communication that the R-1B zone-change meant that the Neighborhood Edges provisions of § 5-9 of the IDO must be applied to the application site and that the newly zoned R-1B lot qualifies as a "protected lot" [See IDO, § 5-9(B)(2)].

On August 14, 2019, the DRB revisited the developers' application. The DRB reopened the floor and allowed additional public comments at the Meeting, including unsworn testimony from the developers' agents [R. 173-189]. Appellants' attorney made an oral presentation, again advising the DRB 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]. Additional written comments from the City's Traffic Engineer, Staff from the Water Utility Authority, and from the City Zoning Department Staff were submitted to the DRB regarding the application [R. 191-194]. At the meeting, the DRB Chair again deferred their decision on the developers' application because of deficiencies in the 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 deficiencies [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]. However, before doing so, the record shows that the

DRB again opened the floor to the public for commentary [R. 153-155].

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 this appeal, the Appellants make numerous individual claims of error. Appellants first contend that the DRB did not afford the public the due process required for conducting its meetings. They essentially contend that the DRB is a "quasi-judicial" board and its members cannot have *ex parte* communications with the developers; must swear in witnesses and allow for cross-examination; and each member must publicly vote on actions such as deferrals and decisions they collectively make as a board. Appellants also generally claim that the DRB board did not act as a decision-making board under the New Mexico Open Meetings Act (OMA). Second, they argue that the density of dwelling units allowed by the site plan exceeds what should be allowed in an MX-L zone. Third, Appellants loosely contend that the DRB should have required a traffic impact study for the density proposed on the site plan. Fourth, Appellants believe the developers have not mitigated any significant adverse impacts on the surrounding residential uses to the maximum extent practicable. Fifth, Appellants contend that because 20% of abutting landowners within 100-feet of the site plan project object to the proposed uses, under NMSA 1978, § 3-21-6(C), only the City Council can approve the application. Sixth, Appellants claim that the DRB erred because it failed to apply the Neighborhood Edges provisions of the IDO to the site plan. Finally, Appellants raised other appeal issues in their written brief, but ostensibly either abandoned them or incorporated them in the six above-mentioned contentions at the LUHO hearing.

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 and Due Process

Appellants claim that the DRB substantially deprived them of due process when it had *ex parte* contacts with the developers, failed to swear in witnesses, excluded cross-examination of witnesses, and did not publicly vote on substantive actions it took during the three public meetings on the developers' application. Curiously, Appellants have not identified specific *ex parte* communications in their claims. Notwithstanding, there is no real factual dispute that individual DRB members had contacts with the developers outside of the public meetings, did not swear in witnesses or permit cross examination at its public meetings on the application. In addition, although no DRB member indicated opposition to the Chair's decisions, the record of the DRB meetings also substantiate that during the public meetings, the DRB members did

not publicly cast individual votes as a board when it took substantive actions on the application, such as deferring its decision or approving the application.

The nucleus of Appellants' due process contentions is that the DRB as a "decision-making board" under IDO § 14-16-6-4(M)(3) 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. See IDO, § 6-4(M)(3).

However, Appellants' appeal implicates City Council Resolution 2019-035 (Bill # R-2019-150 herein as "R-2019-035"). 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, 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, another principal purpose of R-2019-035 is 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].[3] Prior to the enactment of R-2019-035, it was an inescapable

3.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

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. To the extent that the DRB remains a "decision-making body." I agree. However, the larger question, that R-2019-035 only made superficial changes to the DRB's functions, and whether the nature of its role has changed, I leave to the City Council to resolve. My authority is limited to questions of whether the DRB erred under the facts of the record or under the existing ordinances, which includes R-2019-035.

About whether R-2019-035 allows the DRB to have *ex parte* contacts, I find that this is a legislatively intended consequence of R-2019-035. The necessity of *ex parte* communications is well-supported. Such contacts are anticipated and permissible under R-2019-035. However, Appellants claim that at a minimum, DRB member *ex parte* contacts with the developers should be disclosed at its meetings. I agree. Just because the DRB is permitted to have such communications, does not mean that the DRB is insulated from openness and other minimal due process protections. After all, the DRB, although a "technical review" board, remains a public board--one that investigate facts and draws conclusions in open

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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

meetings. Despite R-2019-035, fundamental principles of fairness are still applicable to the DRB review processes. The risk and the basic fairness issue at stake is whether DRB members are relying on information obtained through an *ex parte* communication rather than what is in the record in making their decision. *Ex-parte* communications can lead to a deprivation of a fairness at public meetings. When an administrative body, whether quasi-judicial in nature or not, utilizes evidence outside the record to reach a conclusion, disclosure is a necessary minimum safeguard to protect the City and the integrity of the DRB public process under the IDO. At a minimum, fairness requires that if *ex parte* information is not already in the record, it should be contemporaneously noted by the decision maker and disclosed at the start of its meetings.

Regarding swearing in of witnesses and denying cross examination of witnesses at the DRB public meetings, I find that there is no indication in R-2019-035 that the City Council intended for the DRB to circumscribe the swearing-in of witnesses and prevent the cross examination of witnesses who testify. In the IDO, there is a distinct demarcation between "public meetings" and "public hearings." Under the IDO, the latter are labeled explicitly quasi-judicial, 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 quasi-judicial protections. 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." Whether R-2019-035 accomplishes that task, specifically when it leaves the DRB some substantive discretion that impacts due processes, cannot be decided at this level. However, because § 6-4(L) impacts due process protections it must be strictly construed. Under § 6-4(L) the DRB is permitted to restrict questioning, presumably from the public. And because the legislative intent of R-2019-035 is to restrain the DRB's use of substantive discretion, the discretion allowed in § 6-4(L) must be sparingly exercised. However, I find that§ 6-4(L) permits the DRB to use reasonable discretion to constrain questions which includes cross-examination. I respectfully caution the DRB that it should not exercise this meaningful discretionary authority flippantly or only for purposes of expediency. At all times it should be exercised prudently, sparingly, and consistently.

However, the facts in the record of this appeal substantiate that the DRB allowed multiple unsworn witnesses for the developers to testify on substantive matters and issues that relate directly to issues raised in this appeal. Although under § 6-4(L), the DRB has the authority to curtail "questions" and "discussions," if it allows the developers' witnesses to testify on substantive facts that support the site plan, the testimony must be sworn, and fairness requires that that testimony is also subject to cross examination. Cross examination

complements sworn testimony, and in an appeal, it strengthens the record for review. For this purpose, a remand is necessary.

B. Procedural Voting Irregularities

Appellants next claim that the DRB violated the Open Meetings Act (OMA) when it failed to vote as a board on the two deferrals in the record and on finally approving the site plan. Although the OMA clearly applies to policy-making bodies, it can also apply to public bodies who perform the kind of tasks the DRB performs in reviewing site plans. However, I need not resolve this question because I find that the DRB failed to adhere to its own Rules of Procedure during its three meeting. The DRB's Rules of Procedure require the DRB to vote on certain actions. The DRB Rules state in relevant part:

> "The DRB may defer the agenda item to a specific date, time, and place by majority vote…" [DRB Rules, p. 8].

Thus, the DRB must vote when a deferral is considered. In addition, the DRB must approve a site plan in a similar fashion [DRB Rules, p. 7]. The DRB may suspend its rules, but only by majority vote [DRB Rules, p. 9]. DRB meetings, though arguably not quasi-judicial in nature under R-2019-035, they are still performing public decision-making functions that require minimum due process protections.

The record of the three DRB meetings on the developers' application demonstrates that the DRB did not vote on the two deferrals and on the final approval. Although these technical violations may seem trivial, especially since no objections were noted by its members, the violations can have meaningful consequences in an appeal. The rules, in part, are meant to preserve the high integrity the public expects in the public review process. When the DRB

observes its own Rules of Procedure, it honors the important public decision-making process in which it is engaged. I hesitate to use the important authority that the City Council delegated to the LUHO to remand the application just to take formal votes, especially when the record reflects a consensus on those votes. Put another way, there is no evidence that the DRB did not have a consensus when the Chair deferred the meetings and approved the application. However, because a remand is necessary for other process violations, in a remand, the DRB must follow its own rules it adopted.

C. Density

Next, 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 [IDO, § 2-4(B)(1)]. However, Appellants fail to indicate what they believe is the "appropriate" density in an MX-L zone and what provision of the IDO they claim is contravened.

Although not a defined term in the IDO, density in land use and zoning generally refers to the ratio and intensity of land use over a given area of land. It is undisputed that the IDO is silent on placing numeric ratios or limits on density in any of the MX zones. Instead of defining density constraints with numeric values, densities in any MX-L zone are a function of and determined by the numerous standards and constraints referenced in IDO Tables 2-4-3 and 2-4-4. Thus, density can vary from lot to lot 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.

With regard to density, 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. Thus, although Appellants believe the density of the proposed apartment buildings in the site plan are exceeded, Appellants have not 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.

D. Traffic Impact Study & Adverse Impacts

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. They also contend that the placement of the commercial trash dumpsters near the single-family residential dwellings to the South demonstrates that the developer did not mitigate adverse effects as required under the IDO.

Taking the TIS first, the evidence in the record demonstrates that the number of dwelling units proposed does not meet the threshold warranting a TIS [R. 163]. Appellants have not supplemented the record with credible evidence to rebut this finding. Instead they suggest that a TIS "should" be required. An appeal cannot be sustained on a desire for a different result.

Regarding the placement of the commercial solid waste dumpsters, Appellants claim this is an adverse impact, but fail to show how it is so under the IDO. They have not pointed to any specific regulation that is violated. The record reflects that many of the Appellants have

consistently complained to the DRB about the proposed placement of the solid waste dumpsters near the site's southern border and nearby the residential homes [R. 241, 276, 292, 295]. At the August 14, 2019 DRB meeting, the issue was raised [R. 188]. Apparently, City Planning Department Staff also requested that the solid waste dumpsters be moved away from the single-family dwellings [R. 329]. An agent of the developer gave *unsworn* testimony to the DRB that the Staff with the City Solid Waste Department "dictated the location of the two southern dumpsters…" [R. 188]. Appellants have not rebutted this testimony with substantial evidence or have not otherwise shown that a standard or criteria in the IDO is violated. Thus, the issue should be denied. However, in a remand hearing, the DRB must reconsider this substantive evidence, giving less weight to it than if it were sworn testimony. It should also use the opportunity to take remedial actions to rehear sworn testimony and allow its cross examination.

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

Appellants next contend that NMSA, 1978 § 3-21-6(C) applies to the DRB decision and the City Council, not the DRB, must stand in the shoes of the DRB and approve or deny the developers' application. For purposes of this appeal, I assume that Appellants can meet the 20% threshold required that triggers the statute.[4] Notwithstanding, I must respectfully disagree with Appellants that the statute is applicable on its face to DRB decisions on site plans. Notably, on its face, § 3-21-6(C) applies to "areas…changed by zoning regulations." In this

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

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.

Appellants generally contend that New Mexico case law supports an expansive interpretation of § 3-21-6(C) that any change in the status quo of land under the IDO qualifies as a change under the statute. And, in its most broad terms, the developers are attempting to change the status quo on their land through the IDO. Broadly, the IDO arguably incorporates zoning regulations. The City Council, however, in enacting the IDO restricted the twenty-percent rule of § 3-21-6(C) to only zone map amendments. See § 6-7(G). Because the developers' application does not implicate a zone map amendment, I find that IDO § 6-7(G) is not applicable and therefore § 3-21-6(C) is equally inapplicable to the developers' site plan review.

F. Applicability of the Neighborhood Edges Provisions of the IDO

Appellants also challenge the DRB's decision on the basis that the DRB failed to apply the Neighborhood Edges provisions of the IDO to the site plan. On this appeal basis, at the LUHO hearing the issue seemed clear and simple. The analysis of this issue is admittingly more complex than it appears at the surface. I am compelled to find that DRB did not err as it appears that the City Council intended for IDO § 1-10(B) to encompass the zoning map.

The context of how this issue arose is meaningful. It is undisputed that just days before the September 11, 2019 DRB decision, on September 5, 2019, the City Council's legislatively approved Phase 2, Batch 1 zone map conversions became effective. Among the conversions it approved, a lot located at 8419 Tierra Morena Place, NE, which converted from an MX-T to R-1B zone (the R-1B lot) is included. This R-1B lot abuts the project site. This is also undisputed. The effective date of this conversion predates the DRB decision on the developers' site plan and therefore gave rise to the question of whether the Neighborhood Edges provisions of the IDO, § 5-9 is applicable to the site plan. Put another way, Appellants contend that on the date the conversion became effective, the R-1B lot qualified as a "protected lot" and the lots depicted in the site plan become "regulated lots" both under § 5-9(B)(1) and (2).[5]

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. For purposes of this appeal, because the application was scheduled for a public meeting as early as June 17, 2019, I

5. I note that Appellants also argued that the owner of the R-1B lot, as a protected lot for purposes of the Neighborhood Edges provisions has a common law vested right to the protection as of September 5, 2019. Common law vested rights, however, applies to development rights. Whether it extends further is not for me to decide.

assume the application was deemed complete by at least June 17, 2019.[6] It is undisputed that the phase 2, Batch 1 conversions did not change the zone map or otherwise effect the lot at 8419 Tierra Morena Place, NE, until September 8, 2019. Thus, under the developers interpretation of § 1-10(B), their application was deemed complete just over 2-months before the effective date of the R-1B lot conversion. Therefore, the Neighborhood Edges provisions are inapplicable.

To confuse matters more, it is undisputed that the developers and that the DRB knew or had reason to know that the Phase 2, Batch 1 conversions were soon to be adopted. In the LUHO hearing the Developers' Planner, James Strozier testified that he became aware that the lot owner of 8419 Tierra Morena Place, NE, had applied for the conversion at the May 21, 2019 facilitated meeting, nearly a month before submitting the application to the Planning Department. In addition, the record of the DRB's second public meeting on August 14, 2019 demonstrates that Appellants made the DRB aware of the zone conversion status of the lot at 8419 Tierra Morena Place, NE [R. 176].

The pivotal question becomes one of interpretation of the term "standards and criteria" in § 1-10(B). Applying the well-established rules of statutory construction brings some clarity to the apparent conflict. The first rule is that "the plain language of an [ordinance] is the primary indicator of legislative intent." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5. Under this rule language cannot be read into an ordinance provision that is not there "particularly if it makes sense as written." Id. The second

6. This is so because under the IDO an application cannot go forward to a public hearing/ meeting until an application is deemed complete by the Planning Director [IDO § 6-4(H)(4)].

rule requires that "persuasive weight" is to be accorded to "long-standing administrative constructions of [ordinances] by the agency charged with administering them." Id. No party has proffered any evidence one way or the other from which persuasive weight can be accorded to long-standing administrative gloss of how § 1-10(B) has been applied.[7] Section 1-10(B) is relatively new as the IDO has been effective for under two years. The third rule of statutory construction "dictates that where several sections of an [ordinance] are involved, they must be read together so that all parts are given effect." Id.

The applicable IDO provision 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.

The practical question must be resolved: does the "standards and criteria" term in § 1-10(B) accord the developers with a guarantee that if the IDO is amended or if a zone district changes after the application is deemed complete, can either of those changes be applicable to how the City reviews the complete application? I find that the term "standards and criteria" in § 1-10(B) is ambiguous. If an ordinance's language is unclear or ambiguous, further statutory analysis must be performed "by looking to the history, background, and overall structure of the [ordinance]." See *State v. Almanzar*, 2014-NMSC-001, ¶ 15.

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7. When administrative agencies have interpreted an "ambiguous" ordinance "in a consistent manner and apply [the interpretation] to similarly situated applicants over a period of years without legislative interference" the doctrine of administrative gloss permits the continuation of that interpretation if it is rational. High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 9.

There is no help in the general heading under which the ambiguous term is placed in the IDO. The general heading of IDO § 1-10 generally addresses changes and "Transitions from Previous Regulations" [IDO, § 1-10]. In addition, there is no other language in the IDO which expressly (or even by implication) encompasses or incorporates the zone districts with the regulations of the IDO such that the zone map is included in the term "standards and criteria" in § 1-10(B). And, as stated above, there is a lack of administrative gloss from which can be applied to any interpretation of the term.

However, there is support for the developers' position in the enabling ordinance which enacted the IDO. Looking to the legislative intent of the IDO, I take notice that the City Council's enabling ordinance of its enactment of the IDO provides legislative intent on the subject. City Council Ordinance 2017-025 (O-2017-25) states in relevant part:

> Section 2. The City hereby repeals the existing zoning map and replaces it with the Integrated Development Ordinance zoning conversion map.

The Council, through this enabling ordinance, repealed the previous Zoning Code and replaced it with the IDO. In doing so, the Council also acknowledged that the previous Zoning Code had incorporated the Zoning Map by reference to it [See O-2017-025, p. 15]. The above-stated Section 2 evidently represents the Council's intent to do the same with IDO and the Zoning Map. In interpreting § 1-10(B), although it is an imperfect coalescing of the zone map and the IDO, it nonetheless accomplishes the task and cannot be ignored.

Because there is a clear legislative intent for the proposition that the IDO incorporates the Zoning Map, logically the term "standards and criteria" in § 1-10(B) includes or integrates the zone map into its fold. Thus, under the IDO, when reviewing an application § 1-10(B), it is to be reviewed against the "standards and criteria" in effect at the time the

application was deemed complete, which includes the status of the zone districts depicted in the IDO zone map. This is so because it is the legislative intent that the IDO zone map is incorporated into the IDO as part of its "standards and criteria." According, I have no choice but to find that the DRB did not err when it reviewed the developers' site plan without applying the Neighborhood Edges provisions because at the time the application was deemed complete the Neighborhood Edges provisions were inapplicable.

IV. Conclusion

Because the DRB allowed substantive unsworn witness testimony regarding facts and conclusions from the developers' agents but prevented that testimony from being tested through cross examination, the DRB erred. And because the DRB failed to follow its own rules of conduct in deciding on the application, it further impaired the process due to the public. Although seemingly minor when viewed independently of one another, the totality of the impact of these infractions on due process and on the perception of fairness in the review process must not be ignored. Regrettably, the fairness and high integrity of what is expected of the DRB's public decision-making process requires that the DRB rehear this application. The application is remanded to the DRB to rehear the application to redress its due process infractions.

Steven M. Chavez, Esq.
Land Use Hearing Officer

November 15, 2019

Copies to:

City Council
Appellants,
Party Opponents,
City Staff