STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

WESTSIDE COALITION OF NEIGHBORHOOD ASSOCIATIONS and MICHAEL T. VOORHEES,

Appellants,

v. **No. D-202-CV-2023-02637**

CITY OF ALBUQUERQUE, a New Mexico municipal corporation,

Appellee,

and

CONSENSUS PLANNING, INC., agent(s) for JUBILEE DEVELOPMENT, LLC, and GROUP II U26 VC, LLC,

Interested Parties.

FINAL MEMORANDUM OPINION AND ORDER

THIS MATTER is an appeal under NMSA 1978, Section 3-21-9 (1999) and Rule 1-074 NMRA, of an order of the Albuquerque City Council ("Council"). Consensus Planning, Inc., on behalf of Jubilee Development, LLC, and Group II U26 VC, LLC (collectively, "Applicants"), submitted an application to the Council's Development Review Board ("DRB") concerning a property in northwest Albuquerque. The Applicants requested and DRB approved the following: (1) a site plan amendment; (2) a preliminary plat; and (3) a new site plan. Westside Coalition of Neighborhood Associations and Michael T. Voorhees (collectively, "Appellants") appealed DRB's decision to the Council's Land Use Hearing Officer ("LUHO"). The LUHO held a hearing on the matter and thereafter submitted a written report to the Council recommending that Council uphold DRB's decision. The Council's Order accepted the recommendation and findings of the LUHO and approved the Applicants' application. The Appellants challenge the Council's Order.

The Court **AFFIRMS** the Council's Order.

I. BACKGROUND

This appeal concerns an application submitted on September 30, 2022 to DRB by the Applicants. The ordinance applicable to the application is the July 2022 version of the City of Albuquerque's Integrated Development Ordinance or IDO. ALBUQUERQUE, N.M., CODE OF ORDINANCES, ch. 14, art. 16 ("IDO") (July 2022). The IDO describes DRB as "a board made up of staff members from City Departments and Agencies relevant to reviewing private development to ensure that technical standards . . . have been met." IDO § 6-2(D).

Generally, the application relates to a proposed multi-family development in northwest Albuquerque. The subject site is located on the northwest corner of the intersection of Kimmick Drive, NW, and Rosa Parks Road, NW. **[RP 39.]** The subject site is zoned MX-L. **[RP 60, 101].** Per the IDO, MX-L means a mixed-use, low intensity zone district. IDO § 2-4(B). The MX-L zone permits "low-density multi-family" development. *Id*. §§ 2-4(B), 4-2-1.

The Applicants made several different requests of DRB pursuant to the IDO. First, Applicants sought a "Major Amendment to Site Plan — DRB," *i.e.*, a request to remove an old site plan from 2017 that was in place prior to the enactment of the IDO. **[RP 57, 94.]** Applicants also sought a "Site Plan — DRB," *i.e.*, a new site plan for the proposed development. **[RP 60, 94.]** Finally, Applicants made an associated request for a preliminary plat. **[RP 105.]**

DRB held two public meetings with respect to the application. DRB held the first public meeting on October 26, 2022. DRB held another public meeting on November 9, 2022. At the end of the second meeting, DRB voted to approve the application with delegations to the Parks and Recreation Department and the Planning Department to address some matters raised during the meeting. **[RP 72–73, 411–413.]**

After the November public meeting, DRB issued its written notification of decision. **[RP 71–74.]** Appellants filed a timely appeal of DRB's decision to the Council through the LUHO.

[RP 76.] The LUHO held a quasi-judicial hearing on Appellant's appeal on February 6, 2023. **[RP 602, 624.]** The LUHO recommended that DRB's decision be upheld and submitted a written report with findings and conclusions to the Council on February 17, 2023. **[RP 695.]**

The Council considered the LUHO's recommendation and voted unanimously to approve the recommendation on March 6, 2023. As a result, the Council denied the Appellant's appeal and upheld the decision of DRB. The Council therefore approved the site plan amendment, the preliminary plat, and the new site plan. **[RP 1–2.]**

Appellants appealed the Council's Order to this Court pursuant to Section 3-21-9 and Rule 1-074. Appellants seek reversal of the Council's Order or reversal and remand to hold a quasi-judicial hearing on the Applicants' application.

II. LEGAL STANDARDS

The Court reviews final decisions of the applicable zoning authority. *See* § 3-21-9 ("A person aggrieved by a decision of the zoning authority or any officer, department, board or bureau of the zoning authority may appeal the decision pursuant to the provisions of Section 39-3-1.1 NMSA 1978"). The Court may "set aside, reverse or remand the final decision" if it determines that: (1) the agency acted fraudulently, arbitrarily or capriciously; (2) the final decision was not supported by substantial evidence; or (3) the agency did not act in accordance with law. NMSA 1978, § 39-3-1.1(D) (1999). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion. *Gonzales v. N.M. Bd. of Chiropractic Exam'rs*, 1998-NMSC-021, ¶ 9, 125 N.M. 418.

The Court must review the whole record to ascertain whether the administrative agency has acted without proper consideration or disregard of the facts and circumstances. *Vill. of Angel Fire v. Wheeler*, 2003-NMCA-041, ¶ 11, 133 N.M. 421. The Court reviews the evidence in the

light most favorable to the agency decision. *Paule v. Santa Fe Cnty. Bd. of Cnty. Comm'rs*, 2005-NMSC-021, ¶ 32, 138 N.M. 82.

III. DISCUSSION

A. The Council's finding that the subject site is not "adjacent" to a major public open space is supported by substantial evidence.

Appellants argue that the Council found that the subject site was not "adjacent" to a major public open space. Under the IDO, development on a site "adjacent" to a major public open space must meet a number of specific conditions. *See* IDO § 5-2(J)(2). Further, development on lots greater than five acres and adjacent to a major public open space must be reviewed by the Council's Environmental Planning Commission. *Id*. § 5-2(J)(2)(b). Appellants assert that the Council's finding on adjacency is not based on substantial evidence. The Council and Applicants argue that the finding is supported by maps contained in the record.

As an initial matter, Appellants failed to clearly raise this argument before the Council in the proceedings below. Issues not raised in administrative proceedings will generally not be considered for the first time on appeal to a district court. *N.M. State Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 21, 133 N.M. 362; *see also Wolfley v. Real Estate Comm'n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187. However, as explained below, Appellants' argument also fails based on the record of the proceeding.

Substantial evidence in the record supports the finding that the subject site and the major public open space are not "adjacent." Under the IDO, "adjacent" means "abutting or separated only by a street." IDO § 7-1. A map in the record shows that Kimmick Drive is to the east of the subject site and Rosa Parks Road is to the south of the subject site. **[RP 39.]** The nearby major public open space is to the southeast of the subject site and is described as "diagonally opposite" from the subject site. **[RP 432–33, 700.]** The map is substantial evidence supporting the finding

that there is at least an intersection, *i.e.*, more than one street, between the subject site and the major public open space.

B. The Council's finding that the subject site is not within the height restriction subarea is supported by substantial evidence.

The IDO identifies a "View Protection Overlay Zone" for the "Northwest Mesa Escarpment" also known as "VPO-2." IDO § 3-6(E). Certain building height standards apply to the height restriction subarea identified by a map in the IDO. *Id*. §§ 3-6(E)(1)–(3). Appellants argue that the Council's finding that the subject site is not within a height restriction subarea is not supported by substantial evidence. The Council and Applicants argue that the Council's finding is supported by the record.

As with the issues concerning adjacency of the site to a major public open space, Appellants did not raise the height restriction issues in the proceedings below. Nevertheless, substantial evidence in the record supports the finding that the subject site was not in the VPO-2 height restriction subarea. A map in the record shows the subject site highlighted in blue. **[RP 39.]** Another map in the record shows that the height restriction subarea touches the intersection of Paseo Del Norte and Kimmick Drive (north northeast of the subject site). **[RP 39 (showing the subject site); RP 478 (showing a vicinity map for the old site plan including the height restriction subarea).]** The IDO itself also contains a map showing the extent of the height restriction subarea. IDO § 3-6(E)(1). This information is substantial evidence supporting the Council's finding that the subject site is not within the height restriction subarea.

C. The Council's conclusion that the application met the requirements of the IDO is not fraudulent, arbitrary or capricious.

Appellants provide a lengthy list of information and regulations that the Council allegedly failed to consider in reaching its final decision. Appellants further allege that specific actions of

the Council are arbitrary and capricious. The Council and the Applicants argue that the Council did not act fraudulently, arbitrarily, or capriciously.

Upon whole record review, the Court discerns no arbitrary and capricious conduct. The criteria for approving a "Site Plan — DRB" generally concern: (1) whether the site plan complies with all applicable provisions of the IDO; (2) whether the city's existing infrastructure is sufficient; and (3) whether the subject property meets the relevant standards in the Master Development Plan (as applicable). *See* IDO, §§ 6-6(I)(3)(a)–(c). Amendments to pre-IDO site plans generally require following the current IDO procedures. *See id*. § 6-4(Z)(1)(b). Preliminary plat approvals generally must follow the requirements of the IDO, the Development Process Manual, and other city regulations. *See id*. § 6-6(L)(3)(b).

The Court finds no error in the Council's conclusion that the Applicants' application met the requirements of the IDO. The record reflects that the Council, through DRB, thoroughly considered the myriad of requirements in the IDO. **[RP 331-37 (Applicants' response to DRB Comments).]** DRB found that the application, as supplemented, met all the requirements of the IDO. DRB issued a written decision explaining its findings and conclusions. **[RP 71–74.]** Appellants did not challenge DRB's findings before the LUHO. **[RP 5.]** Appellants also did not challenge most of DRB's findings in their appeal to this Court. The Council's approval of the application flows from DRB's findings that the application met the requirements of the IDO.

Appellants argue that the Council failed to consider the major public open space regulations. The record contradicts this claim. DRB discussed the major public open space regulations at the November 9, 2022 public meeting. This discussion addressed the major public open space adjacency regulations (IDO § 5-2(J)(2)) and the proximity regulations (IDO § 5-2(J)(1)). **[RP 382, 384–391.]** DRB again discussed the application of the major public open space proximity regulations to the site plan in its official decision. **[RP 72–73.]** Appellants had an

opportunity to discuss and comment on the adjacency issue before the LUHO, but Appellants did not raise the issue in any detail.

Appellants also argue that the Council failed to consider the VPO-2 height restriction subarea regulations. However, the record contradicts this claim. DRB addressed this matter in public meetings. In the October 26, 2022 meeting, DRB listened to public comment regarding the height of the proposed development. **[RP 349.]** DRB specifically considered and discussed the applicability of the VPO-2 height restrictions. **[RP 356–57.]** DRB discussed the height restriction regulations again at the November 9, 2022 meeting. **[RP 405–407.]**

The record reflects that the Council carefully considered matters relating to the application in public meetings before DRB and a quasi-judicial hearing before the LUHO. Appellants were allowed several opportunities to provide comment and argument. The Council, through DRB and the LUHO, discussed the points raised and, as appropriate, addressed the issues in written decisions. Appellants' arguments present no basis to conclude that the Council arbitrarily and capriciously or failed to consider relevant information in its final decision.

Appellants also argue that certain parts of the decision process were arbitrary and capricious. However, the Court's review is limited to the final decision of the zoning authority. *See* § 39-3-1.1(D). Appellants' arguments regarding the adequacy of pre-application meetings, the initial (non-final) approval of the Applicant's application, and DRB's decision not to further defer proceedings do not speak to the subject of the Court's review in this appeal, *i.e.*, the final agency decision.

D. The Council's final decision is in accordance with law.

1. The Council did not consider additional testimony prior to reaching the final decision.

Appellants contend that the Council, in its March 6, 2023 meeting, violated its rules of procedure by accepting and considering new testimony from Councilor Dan Lewis before reaching

its final decision. The Council and the Applicants respond that Councilor Lewis' comments were not testimony and had nothing to do with the merits of the appeal.

The Council did not act contrary to law. The Council held a meeting on March 6, 2023 in which it considered whether to accept or reject the recommendation of the LUHO. **[RP 1–2, 729.]** During the meeting, Councilor Dan Lewis responded to allegations of bias and impropriety and commented that the allegations were untrue. **[RP 734.]** The record reflects that the Council did not further discuss Councilor Lewis' comments. **[RP 734–36.]** There is no indication that the Council deviated from the stated purpose of the meeting, which was to vote on whether to accept or reject the LUHO's written recommendation. **[RP 732–36.]** The Council then voted unanimously to accept the LUHO's recommendation and findings. **[RP 736.]** The Court discerns no way in which the Council acted contrary to law in this matter.

2. The Council acted in accordance with law in rejecting the allegations of bias and impropriety against Councilor Lewis.

Appellants allege that Councilor Lewis engaged in improper ex-parte communications and exhibited bias requiring recusal from the vote on the Applicant's application. Specifically, Appellants allege that Councilor Lewis sponsored an amendment to the IDO to ease the VPO-2 building height restrictions and was involved in ex-parte communications with Consensus Planning, Inc., representative of the landowners in this case, regarding the height restriction proposal. Appellants also argue that Councilor Lewis' comments responding to certain accusations of bias and impropriety evinced animus toward appellant Michael Voorhees ("Mr. Voorhees"). The Council and the Applicants argue that the allegations were not properly before the Council. Additionally, the Council and the Applicants argue that Councilor Lewis' actions were not improper and did not create the appearance of impropriety.

Councilor Lewis' statements and actions do not merit recusal. First, Councilor Lewis' comments do not evince disqualifying personal animus against Mr. Voorhees. Councilor Lewis

made statements that the allegations of impropriety against him were untrue; he did not mention Mr. Voorhees. **[RP 734.]** Asserting that allegations are untrue does not evince a strong personal animus and such comments are not disqualifying. *Cf. Las Cruces Pro. Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 24, 123 N.M. 239 (indicating personal bias may be disqualifying when it is strong enough).

Second, the general allegations regarding Councilor Lewis' views on the IDO's height restriction regulations do not merit recusal. It is not disqualifying for members of a tribunal to hold policy views that are pertinent to a case before the tribunal. *See id*. ¶ 29; *see also U.S. West Commc'ns v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶¶ 39–41, 127 N.M. 254 (indicating general statements or actions regarding a case's subject matter may not be disqualifying). The Appellants did not identify any specific disqualifying conduct of Councilor Lewis concerning this case. *Cf. Reid v. N.M. Bd. of Exam'rs of Optometry*, 1979-NMSC-005, ¶¶ 4, 9, 92 N.M. 414 (indicating specific statements pre-judging a case can be disqualifying).

Lastly, the Court sees no merit in Appellant's allegations with respect to Councilor Lewis' alleged ex-parte communications. Appellants do not identify any evidence of ex-parte communications related to the proceedings in this case.

3. The Council held a quasi-judicial hearing in accordance with law.

Appellants argue that the Council's decision was not in accordance with law because DRB failed to hold a quasi-judicial hearing on the application. Appellants allege that DRB was not a neutral decision maker and do not identify any other deficiencies in the Council's process. **[Appellant's Statement of Appellate Issues, filed June 2, 2023, 24–25.]** The Council and the Applicants respond that DRB was not required to hold a quasi-judicial hearing.

A quasi-judicial hearing requires an opportunity to be heard, an opportunity to present and rebut evidence, and an impartial tribunal. *See Benavidez v. Bernalillo Cnty. Bd. of Comm'rs*, 2021-

NMCA-029, ¶ 32. An impartial tribunal must have no pre-hearing or ex parte contacts concerning the question at issue and it must make an adequate record with appropriate findings. *Id*.

The Council, through the LUHO, held a quasi-judicial hearing on the application. It is undisputed that the LUHO held a hearing on DRB's decision to approve the application. During the hearing, the parties had the opportunity to present their respective cases. The LUHO heard sworn testimony, allowed for the parties to present new evidence, and allowed cross examination of witnesses. **[RP 606, 624.]** Appellants do not assert that the LUHO is biased, engaged in improper ex-parte communications, or otherwise acted improperly. After the hearing, the LUHO submitted a written recommendation with findings of fact and conclusions of law to the Council. Council therefore held a quasi-judicial hearing on the application.

The Court concludes that the Council's final decision is in accordance with law. Appellants' argument presents no basis to conclude otherwise. Appellants do not explain how the quasi-judicial hearing held by the Council through the LUHO is inadequate. Nor do Appellants explain why in this case that DRB must hold a quasi-judicial hearing rather than the LUHO.

IV. CONCLUSION

The Court affirms the Council's Order.

IT IS SO ORDERED.

Nancy J. Franchini

NANCY J. FRANCHINI
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was mailed and/or otherwise delivered to the following on November 14, 2023.

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