

**Notice of Decision  
City Council  
City of Albuquerque  
October 12, 2020**

**AC-20-8** AC-20-8, AC- 20-6, AC-19-18, Project PR-2018-002811 SI-2019-00158 VA-2019-00288: Richard Chavez, appeals the decision of the Environmental Planning Commission (EPC) to deny an appeal of the Development Review Board's (DRB) decision to deny of a variance for sidewalk installation for all or a portion of Lots 7-10, Block 44, Perea Addition, zoned R-1A, located at the northeast corner of 15th St. NW and Granite Ave. NW, containing approximately 0.32 acre(s). (J-13)

**Decision**

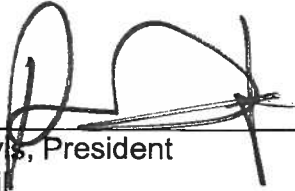
On September 21, 2020, by a vote of 9 FOR and 0 AGAINST the City Council affirmed the decision of the Environmental Planning Commission by accepting and adopting the recommendation and findings of the Land Use Hearing Officer.

**IT IS THEREFORE ORDERED THAT THE SIDEWALK VARIANCE IS DENIED**

**Attachments**

1. Action Summary from the September 21, 2020 City Council Meeting
2. Land Use Hearing Officer's Decision

A person aggrieved by this decision may appeal the decision to the Second Judicial District Court by filing in the Court a notice of appeal within thirty (30) days from the date this decision is filed with the City Clerk.

  
\_\_\_\_\_  
Patrick Davis, President  
City Council

Date: 10-20-20

Received by: Camille Cordora Date: 10/20/20  
City Clerk's Office

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# City of Albuquerque

Albuquerque/Bernalillo  
County  
Government Center  
One Civic Plaza  
Albuquerque, NM 87102

## Action Summary

### City Council

*Council President, Pat Davis, District 6*  
*Vice-President, Diane G. Gibson, District 7*

*Lan Sena, District 1; Isaac Benton, District 2*  
*Klarissa J. Peña, District 3; Brook Bassan, District 4*  
*Cynthia D. Borrego, District 5; Trudy E. Jones, District 8*  
*Don Harris, District 9*

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Monday, September 21, 2020

3:00 PM

Via Zoom Video Conference  
See Special Procedures below  
for viewing this meeting.

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### TWENTY-FOURTH COUNCIL - EIGHTEENTH MEETING

#### 1. ROLL CALL

**Present** 9 - Brook Bassan, Isaac Benton, Cynthia Borrego, Patrick Davis, Diane Gibson, Don Harris, Trudy Jones, Klarissa Peña, and Lan Sena

#### 2. MOMENT OF SILENCE

**Pledge of Allegiance in English and Spanish and any other language as determined by the Council**

#### 3. PROCLAMATIONS & PRESENTATIONS

**Presentation from the Abandoned and Dilapidated Abatement Property Team (ADAPT)**

#### 4. ECONOMIC DEVELOPMENT DISCUSSION

#### 14. FINAL ACTIONS

- f. O-20-32 Approving A Project Involving Advanced Optical Technologies Incorporated Pursuant To The Local Economic Development Act And City Ordinance F/S O-04-10, As Amended, The City's Implementing Legislation For That Act, To Support The Operations Of Advanced Optical Technologies Incorporated, A Business Operating In Albuquerque, New Mexico; Authorizing The Execution Of A Project Participation Loan Agreement And Other Documents In Connection With The Project; Making Certain Determinations And Findings Relating To The Project Including The Appropriation Of Funds; Ratifying Certain Actions Taken Previously; And Repealing All Actions Inconsistent With

This Ordinance (Harris)

**A motion was made by President Davis that this matter be Passed. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

**Excused:** 1 - Harris

- g.**     O-20-33            Approving A Project Involving 3D Glass Solutions, Incorporated Pursuant To The Local Economic Development Act And City Ordinance F/S O-04-10, As Amended, The City's Implementing Legislation For That Act, To Support The Operations Of 3D Glass Solutions, Incorporated, A Business Operating In Albuquerque, New Mexico; Authorizing The Execution Of A Project Participation Loan Agreement And Other Documents In Connection With The Project; Making Certain Determinations And Findings Relating To The Project Including The Appropriation Of Funds; Ratifying Certain Actions Taken Previously; And Repealing All Actions Inconsistent With This Ordinance (Bassan, by request)

**A motion was made by Councilor Bassan that this matter be Passed. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

**Excused:** 1 - Harris

- h.**     O-20-34            Approving A Project Involving Bayotech Incorporated Pursuant To The Local Economic Development Act And City Ordinance F/S O-04-10, As Amended, The City's Implementing Legislation For That Act, To Support The Operations Of Bayotech Incorporated, A Business Operating In Albuquerque, New Mexico; Authorizing The Execution Of A Project Participation Agreement And Other Documents In Connection With The Project; Making Certain Determinations And Findings Relating To The Project Including The Appropriation Of Funds; Ratifying Certain Actions Taken Previously; And Repealing All Actions Inconsistent With This Ordinance (Bassan, by request)

**A motion was made by Councilor Bassan that this matter be Passed. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

**Excused:** 1 - Harris

## **5. ADMINISTRATION QUESTION & ANSWER PERIOD**

## **6. APPROVAL OF JOURNAL**

**September 9, 2020**

September 16, 2020 Special Council Meeting

## 7. COMMUNICATIONS AND INTRODUCTIONS

## 8. REPORTS OF COMMITTEES

Finance and Government Operations Committee - September 14, 2020

Public Safety Committee - September 15, 2020

### Deferrals/Withdrawals

- d. O-20-18 Imposing A Municipal Gasoline Tax Of Two Cents Per Gallon Conditional Upon Voter Approval; Dedicating The Revenue Generated By The Municipal Gasoline Tax To Rehabilitate Public Streets And Roadway Systems For The Benefit Of The City (Benton)

A motion was made by Councilor Benton that this matter be Postponed to October 5, 2020. The motion carried by the following vote:

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- i. R-20-18 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 5609 Everitt Rd NW 87120 Within The City Limits Of Albuquerque, New Mexico Is So Ruined, Damaged And Dilapidated As To Be A Menace To The Public Comfort, Health, Peace Or Safety And That It Is To Be Required To Be Removed (Borrego, by request)

A motion was made by Councilor Sena that this matter be Postponed to October 5, 2020. The motion carried by the following vote:

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 9. CONSENT AGENDA: {Items may be removed at the request of any Councilor}

- b. EC-20-6 Report on Uses of 3/8 Hold Harmless Tax

A motion was made by Vice-President Gibson that this matter be Receipt Be Noted. The motion carried by the following vote:

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- c. EC-20-139 Mayor's Recommendation of SMPC Architects for Architectural Consultants for AIS Air Cargo Expansion

A motion was made by Vice-President Gibson that this matter be Approved. The motion carried by the following vote:

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- d. EC-20-140 Mayor's Recommendation of Parametrix for Engineering Consultants for Unser Blvd. Widening - Kimmick Dr. to Paradise Blvd.

**A motion was made by Vice-President Gibson that this matter be Approved.  
The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- e. EC-20-141 Mayor's Recommendation of Wood for Engineering Consultants for City Wide On-Call Geotechnical Services

**A motion was made by Vice-President Gibson that this matter be Approved.  
The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- f. EC-20-142 Mayor's Recommendation of Bohannon Huston for On-Call Engineering Consultants for the Albuquerque BioPark

**A motion was made by Vice-President Gibson that this matter be Approved.  
The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- g. EC-20-143 Mayor's Recommendation of Consensus Planning, Groundwork Studio, and Sites Southwest for City Wide On-Call Landscape Architectural Design for the Department of Parks and Recreation

**A motion was made by Vice-President Gibson that this matter be Approved.  
The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- h. EC-20-145 Mayor's Recommendation of FBT Architects for Architectural Consultants for AIS Concessions, Checkpoint, and TSA Secure Side Renovations

**A motion was made by Vice-President Gibson that this matter be Approved.  
The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- i. EC-20-146 Sole Source Purchase of Digital Radiography Machines and Required Accessories

**A motion was made by Vice-President Gibson that this matter be Approved.  
The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- j. OC-20-5 2018 Civilian Police Oversight Agency (CPOA) Semi-Annual Reports

**A motion was made by Vice-President Gibson that this matter be Receipt Be Noted. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 10. GENERAL PUBLIC COMMENTS

## 11. ANNOUNCEMENTS

## 12. PUBLIC HEARINGS: {Appeals, SAD Protest Hearings}

- a. AC-20-8 (AC-20-6, AC-19-18, Project PR-2018-002811 SI-2019-00158 VA-2019-00288) Richard Chavez, appeals the decision of the Environmental Planning Commission (EPC) to deny an appeal of the Development Review Board's (DRB) decision to deny of a variance for sidewalk installation for all or a portion of Lots 7-10, Block 44, Perea Addition, zoned R-1A, located at the northeast corner of 15th St. NW and Granite Ave. NW, containing approximately 0.32 acres
- A motion was made by Vice-President Gibson that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 13. APPROVALS: {Contracts, Agreements, and Appointments}

- a. EC-19-487 Transmitting Year End Status Report on FY/19 Priority Objectives for the Albuquerque Police Department (APD)
- A motion was made by Councilor Bassan that this matter be Receipt Be Noted. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- a. EC-20-112 FY20 Status Update for Goal 7, Objective 4 (Council Bill No. R-19-139, Enactment No. R-2019-037) - Completed New Sidewalk Notices
- A motion was made by President Davis that this matter be Receipt Be Noted. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- b. EC-20-115 Declaring 1701 5th Street NW, Albuquerque NM 87102 Not Essential for Municipal Purposes
- A motion was made by Councilor Benton that this matter be Approved. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 14. FINAL ACTIONS

- a. O-19-82 Adding A New Section To Chapter 12, Article 2 Of The Revised

Ordinances Of Albuquerque Relating To Responsible Firearm Storage  
(Davis)

**A motion was made by President Davis that this matter be Passed. The motion failed by the following vote:**

**For:** 3 - Benton, Davis, and Gibson

**Against:** 6 - Bassan, Borrego, Harris, Jones, Peña, and Sena

**b.** O-19-83

Adding A New Section "31" To Chapter 12, Article 2 Of The Revised Ordinances Of Albuquerque To Prohibiting Firearms At City Facilities  
(Davis, Benton, Gibson)

**A motion was made by President Davis that this matter be Postponed to October 19, 2020. The motion failed by the following vote:**

**For:** 4 - Benton, Davis, Gibson, and Sena

**Against:** 5 - Bassan, Borrego, Harris, Jones, and Peña

**A motion was made by President Davis that this matter be Passed. The motion failed by the following vote:**

**For:** 3 - Benton, Davis, and Gibson

**Against:** 6 - Bassan, Borrego, Harris, Jones, Peña, and Sena

**c.** O-19-84

Amending Chapter Twelve, Article Two, Section Twenty-Nine Of The Revised Ordinances Of Albuquerque Offenses Relating To Public Order And Safety Within The Criminal Code Of Albuquerque To Proscribe Criminal Threats Of Mass Violence (Davis)

**A motion was made by President Davis that this matter be Passed. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

**Excused:** 1 - Harris

**e.** O-20-27

Establishing Community Policing Councils; Community Policing Council Membership; Requirements And Duties (Peña)

**A motion was made by Councilor Bassan that this matter be Amended. Councilor Bassan moved Amendment No. 1. The motion carried by the following vote:**

**For:** 6 - Bassan, Benton, Davis, Gibson, Harris, and Jones

**Against:** 3 - Borrego, Peña, and Sena

**A motion was made by Councilor Bassan that this matter be Amended. Councilor Bassan moved Amendment No. 2. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

**Excused:** 1 - Harris

**A motion was made by Councilor Bassan that this matter be Amended. Councilor Bassan moved Amendment No. 3. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, and Sena

**Against:** 1 - Peña

**A motion was made by Councilor Peña that this matter be Passed as Amended. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**j. R-20-81**

**A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 8411 Central Ave NE 87108 Within The City Limits Of Albuquerque, New Mexico Is So Ruined, Damaged And Dilapidated As To Be A Menace To The Public Comfort, Health, Peace Or Safety And That It Is To Be Required To Be Removed (Davis, by request)**

**A motion was made by President Davis that this matter be Passed. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**k. R-20-86**

**Creating A Task Force To Explore Options For Implementing Minimum Sick Leave Requirements In The City (Gibson)**

**A motion was made by Councilor Sena that this matter be Amended. Councilor Sena moved Amendment No. 1. The motion carried by the following vote:**

**For:** 5 - Benton, Davis, Gibson, Peña, and Sena

**Against:** 4 - Bassan, Borrego, Harris, and Jones

**A motion was made by Vice-President Gibson that this matter be Passed as Amended. The motion failed by the following vote:**

**For:** 4 - Benton, Davis, Gibson, and Sena

**Against:** 5 - Bassan, Borrego, Harris, Jones, and Peña

**l. R-20-89**

**Creating A Grace Period For The Implementation Of The 2018 International Energy Conservation Code; And Designating Fiscal Year 2021 Appropriations To Provide For An Energy Efficiency Retrofit Assistance Program For Low Income Households (Peña)**

**A motion was made by Councilor Benton that this matter be Amended. Councilor Benton moved Amendment No. 1. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Peña that this matter be Passed as Amended. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena



- m. R-20-92 Approving Fiscal Year 2021 Appropriations To Provide Economic Relief To Small And Local For-Profit Organizations Negatively Impacted By The COVID-19 Pandemic Through The Coronavirus, Aid, Relief, And Economic Security Act (CARES Act) (Bassan, Jones)

**A motion was made by Councilor Bassan that this matter be Amended. Councilor Bassan moved Amendment No. 1. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by President Davis that this matter be Postponed as Amended. The motion failed by the following vote:**

**For:** 4 - Borrego, Davis, Peña, and Sena

**Against:** 5 - Bassan, Benton, Gibson, Harris, and Jones

**A motion was made by Councilor Bassan that this matter be Passed as Amended. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- n. R-20-96 Amending The Adopted Capital Implementation Program Of The City Of Albuquerque By Approving New Projects, Supplementing Current Appropriations And Changing The Scope Of Existing Projects (Benton, by request)

**A motion was made by Councilor Benton that this matter be Amended. Councilor Benton moved Amendment No. 1. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Borrego that this matter be Amended. Councilor Borrego moved Amendment No. 2. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena

**Against:** 1 - Gibson

**A motion was made by Councilor Borrego that this matter be Amended. Councilor Borrego moved Amendment No. 3. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Peña that this matter be Amended. Councilor Peña moved Amendment No. 4. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Peña that this matter be Amended. Councilor Peña moved Amendment No. 5. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Benton that this matter be Passed as Amended. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**o.**     R-20-100

Approving And Authorizing The Acceptance Of Grant Funds From The Department Of Commerce Minority Business Development Agency And Providing An Appropriation To The Economic Development Department For Fiscal Years 2021 And 2022 (Peña)

**A motion was made by Councilor Peña that this matter be Passed. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**p.**     M-20-4

Urging The Legislature Of The State Of New Mexico To Repeal Statutory Provisions Preempting Stricter County And Municipal Regulation Of The Sale Of Cigarettes, Tobacco Products, And Electronic Smoking Devices (Benton, Borrego)

**A motion was made by Councilor Borrego that this matter be Passed. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**BEFORE THE CITY OF ALBUQUERQUE  
LAND USE HEARING OFFICER**

APPEAL NO. AC-20-8, related to AC- 20-6, AC-19-18,  
Project PR-2018-002811 SI-2019-00158 VA-2019-00288

RICHARD CHAVEZ, Appellant,

1           This appeal is associated with two previous appeals concerning the same application  
2           and the same facts and issues. Appellant is attempting to replat his four lots which affront  
3           15<sup>th</sup> Street and Granite Ave. Except for sidewalks, the lots are fully developed. Because the  
4           four lots lack sidewalks affronting the two City streets, the Development Review Board  
5           (DRB) required that the Appellant install sidewalks before it would approve Appellant’s  
6           minor subdivision replat application. To avoid having to install sidewalks altogether,  
7           Appellant applied for a waiver. The DRB heard and denied the waiver request (AC-18-19).  
8           The Appellant then appealed the DRB’s decision to the Environmental Planning  
9           Commission (EPC). In a public hearing, the EPC upheld the decision of the DRB (denying  
10          the waiver), but it failed to make any findings to support its decision. Appellant appealed  
11          the EPC decision (AC-20-6), and the City Council delegated the matter to this Land Use  
12          Hearing Officer (LUHO). After a LUHO hearing in April 2020, the matter was remanded to  
13          the EPC with instructions to make findings and resolve an issue having to do with the  
14          Integrated Development Ordinance (IDO)—whether or not the lack of sidewalks is a non-  
15          conforming site feature.

16          The EPC held its remand hearing on June 11, 2020. In its remand hearing, the EPC  
17          made findings to support its decision, and the EPC also considered whether the lack of

18 sidewalks at the site is nonconforming. Appellant again timely appealed the EPC's remand  
19 decision (AC-20-8).

20 As alluded to above, there are three separate records associated with this appeal, all of  
21 which are relevant. For whatever reason, the records were not consolidated, nor were they  
22 Bates stamped in a singular manner that connects or associates the records. Because there  
23 are three separate unconnected records, I will reference them as R1, R2, and R3 for the  
24 records of AC-18-19, AC-20-6, and AC-20-8, respectively.

25 The records show that Appellant own four abutting lots and there are two houses on  
26 the lots that straddle the internal lots lines [R1, 5, R3, 26]. The two homes (and lots) are  
27 located at the northeast corner of Granite Ave. and 15th Street, NW [R2, 44]. Appellant  
28 sought to replat the four lots to create one lot for each home. The evidence further shows that  
29 one of the homes was constructed before 1947 (purchased by Appellant's parents in 1947),  
30 and Appellant constructed the second home in 2004 [R2, 49]. These facts are undisputed.

31 When Appellant applied for the replat reconfiguration, he was told by City Planning  
32 Staff that because there are no sidewalks on his lands affronting Granite Ave. and 15<sup>th</sup> Street,  
33 to approve the replat under the City's ordinances, the Appellant must install sidewalks.  
34 Rather than install the sidewalks, Appellant applied for the waiver from having to install  
35 sidewalks which was denied by the DRB, and subsequently upheld by the EPC [R1, 49].

36

### 37 **A. Standard of Review**

38 A review of an appeal is a whole record review to determine whether the EPC acted  
39 fraudulently, arbitrarily, or capriciously; or whether the EPC's decision is not supported by  
40 substantial evidence; or whether the EPC erred in applying the requirements of the IDO, a

41 plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the  
42 decision and record must be supported by substantial evidence to be upheld. The LUHO has  
43 the authority to make findings and recommendations to the City Council that an appeal be  
44 affirmed in whole or in part or reversed in whole or in part. [IDO, § 14-16-6-4(U)(3)].

45 After reviewing the record of this appeal and the records of the previous appeals,  
46 hearing Appellant’s arguments and testimony, and testimony from Planning Staff, I find that  
47 the EPC’s decision is supported with substantial evidence. I also find that Appellant did not  
48 meet his burdens of proof as outlined above. Appellant’s arguments are primarily based on  
49 irrelevant *ad hominem* attacks on the process and the applicable ordinances. For all the  
50 reasons explained below, I respectfully recommend that Appellant’s appeal should be  
51 denied, and the decision of the EPC should be upheld.

52

53 **B. Appellant’s Replat Application Sets in Motion the City Requirement for the**  
54 **Installation of Sidewalks.**

55

56 First, under the IDO, any replat of lands, whether to reconfigure existing developed  
57 lots or to develop undeveloped lots is clearly defined as a minor subdivision of land because it  
58 is the creation of “10 or fewer lots on any single lot that has been recorded as a single lot for at  
59 least 3 years previously” [IDO, § 6-6(I)(1)]. Appellant did not contend otherwise. In addition,  
60 any application for a minor subdivision under the IDO triggers a slew of requirements, including  
61 the installation of sidewalks.

62 First, the IDO states applicants for minor subdivisions must satisfy “*all applicable*  
63 *provisions of this IDO, the DPM, other adopted City regulations, and any conditions specifically*  
64 *applied to development of the property in a prior permit or approval affecting the property*” [ §  
65 6-6(I)(3)(a)]. There are exceptions, but I will discuss those below. One of the IDO’s “applicable

66 provisions” that must be satisfied stems from the “access and connectivity” requirements of the  
67 IDO which expressly requires that “[p]erimeter sidewalks shall be provided in accordance with  
68 the DPM” in residential areas [§ 5-3(D)(1)(a)].<sup>1</sup> It is undisputed that Appellant’s lots are in a  
69 residential area of residential development. Thus, § 5-3(D)(1)(a) is applicable to Appellant.  
70 Appellant did not dispute this.

71 Second, independent of the IDO, there is a separate City Ordinance, the "Sidewalk, Drive  
72 Pad, Curb and Gutter Ordinance" (Hereinafter “Sidewalk Ordinance”) which expressly requires  
73 that “[a]ll properties within the city shall have sidewalk, drive pad, curb ramps, curb and  
74 gutter...” [§ 6-5-5-3]. Relevant to the discussion and to the facts (as shown below), the  
75 Sidewalk Ordinance further states that “[c]ompliance with the provisions of §§ 6-5-5-1 et seq.  
76 shall be the responsibility of the property owner” and that the “cost of installing sidewalk shall  
77 be borne by the abutting property’ owner. Again, there are exceptions, of which Appellant  
78 sought which will be discussed below.

79 At the EPC remand hearing, the EPC made specific finding regarding these ordinances  
80 and provisions restated above [See EPC findings 5-7, R. 15-16]. Appellant did not dispute  
81 the findings, nor did he dispute the applicability of the above referenced ordinances. I find  
82 that the EPC did not err in concluding that Appellant’s replat is a minor subdivision replat  
83 action, that the IDO, the DPM, and the Sidewalk Ordinance are therefore applicable to him  
84 and to his minor subdivision application, and that these provisions clearly require Appellant  
85 to install sidewalks.

86

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1. Under the Development Process Manual (DPM), the principal detailed design standards are reconciled and cross referenced with the IDO.

87 **C. There are Exceptions to the Installation of Sidewalks, But the Facts Show that**  
88 **Appellant Does Not Meet the Standards.**  
89

90 Notwithstanding that the replat action triggers the a requirement for the installation of  
91 sidewalks, as stated above, there are exceptions to the Sidewalk Ordinance and to the IDO  
92 concerning sidewalks. There are essentially three exceptions which could be applicable to  
93 any requirement for sidewalks. The first is a variance to the width and potentially to the  
94 design requirements for the installation of sidewalks in the DPM. The grant of a variance  
95 does not eliminate any requirements to install sidewalks; it only allows for a narrower  
96 sidewalk or a change in engineering design under certain circumstances. As discussed below,  
97 Appellant did not satisfy the variance criteria to qualify for a variance. The second exception  
98 are waivers for the design standards or for the installation of the sidewalks altogether. Like  
99 a variance, an applicant seeking a waiver must meet certain criteria under the DPM. The  
100 facts in this appeal show that Appellant also did not qualify for a waiver. His request for a  
101 waiver was denied by the DRB and upheld by the EPC, which is the basis for this appeal.

102 The third exception is a finding that the lack of sidewalks affronting Appellant's lots  
103 are nonconforming site features under IDO, § 6-6(C) and § 6-8(A). If the lack of sidewalks on  
104 Appellant's developed lots are deemed nonconforming site features under the IDO, Appellant  
105 would not be required to install sidewalks unless he expanded the nonconformity.<sup>2</sup> This was one  
106 of the remand instructions the EPC was charged to investigate and resolve. As discussed below,  
107 the EPC found that the lack of sidewalks affronting Appellant's lots are not nonconforming site  
108 features under the IDO.

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2. Although Appellant did not argue that his lots qualify as nonconforming, because the matter needed to be remanded to the EPC on other grounds (to make findings), I asked the EPC to address the issue in its remand.

109           The earlier records (AC-18-19 and AC-20-6) show that Appellant applied for a waiver to  
110 the Sidewalk Ordinance for the installation of *any* sidewalks. [R2, 5A]. Appellant claims that his  
111 application was wrongly processed as an application for a variance [R2, 5A]. In this appeal,  
112 Appellant claims because his application was considered as a variance application rather than as  
113 a waiver application, his rights were violated. I disagree. Notwithstanding that Appellant has not  
114 identified how an alleged mishandling of his application violated his rights, or what rights were  
115 violated, I find that Appellant did not apply for both a waiver and a variance—he only applied  
116 for a waiver from having to install sidewalks altogether. Moreover, Appellant’s application was  
117 correctly reviewed by the EPC as a waiver and under the correct standards in the DPM.

118

119           **i.       Appellant does not Qualify for a Waiver**

120           The record reveals that when Appellant applied for a deviation to the Sidewalk Ordinance,  
121 the City Council had recently enacted Resolution R-19-150 of which extinguished the authority  
122 that the DRB had to review and decide variances for sidewalks. Despite Appellant’s arguments,  
123 the facts show that when the DRB reviewed the application at its October 30, 2019 public  
124 meeting, it reviewed it as an application for a waiver, yet it found that the Appellant failed to  
125 meet IDO § 6-6(L)(3) [R1, 5]. I note for the City Council that IDO § 6-6(L)(3) are the criteria  
126 for a sidewalk variance, not a waiver. I also note that the R-19-150, expressly extinguished  
127 sidewalk variances under IDO § 6-6(L)(3) from the jurisdiction of the DRB. Although the DRB  
128 erred, I find this to be harmless error because the EPC correctly adjudicated this matter under  
129 the correct applicable City ordinance provisions. And although the EPC failed to make any  
130 findings in its first hearing, it did so in its remand hearing.

131           In adjudicating the application of Appellant for an exception to having to install sidewalks,  
132 the EPC judged the application using the applicable DPM standards, which I find are the correct



133 standards for judging an application for a waiver to the Sidewalk Ordinance requirements. Under  
134 the DPM (which was recodified with the same standards but under a different numbering system  
135 in June, 2020), there are nine disjunctive criteria (Appellant only needs to demonstrate he  
136 qualifies for one of the nine criteria) [DPM, Chapter 12]. The nine criteria are:

- 137 1. The area is one which is subject to site development plan review as a  
138 planned unit development as provided in the Zoning Code, Article 7-14 R.O.A.  
139 1994), or
- 140 2. The area is one in which, because of special functional conditions, it is  
141 desirable to maintain or develop a design plan not consistent with uniform  
142 sidewalk installation as set forth in Section 14 of the Sidewalk Ordinance, or
- 143 3. The area or site has been recognized as having historical, archeological,  
144 and/or architectural significance by the City of Albuquerque, the State of New  
145 Mexico, or the United States of America and in order to maintain such historical,  
146 archeological, and/or architectural significance a variance is appropriate, or
- 147 4. **The area is of low intensity land use to an extent that the normal**  
148 **installation of sidewalks will not contribute to the public welfare,** or
- 149 5. The City's right-of-way is insufficient in width to permit the  
150 construction of a sidewalk of standard dimension and placement, or
- 151 6. A sidewalk variance would preserve trees possessing the following  
152 characteristics:
  - 153 (1) Adaptability to the particular soil, climate, and moisture conditions  
154 of this City;
  - 155 (2) High resistance to gas, smoke, and disease;
  - 156 (3) Freedom from litter and offensive odors;
  - 157 (4) Wood that is not brittle and thereby easily broken by wind and sleet;
  - 158 (5) A root structure compatible with planting in confined areas;
  - 159 (6) Long normal life; or
- 160 7. There are pre-existing obstructions that cannot be easily or  
161 economically relocated or should not be altered, such as grades, fills, water  
162 courses, natural topographic features or man-made obstructions, or
- 163 8. The adjoining sidewalks are non-standard as to width and/or location,  
164 or
- 165 9. The established neighborhood character or mature landscaping on the  
166 site would be damaged to a degree that outweighs the public utility of the normal  
167 sidewalk requirement. (Emphasis added.) [DPM, Ch. 12].  
168

169 Although the burden to prove he qualifies for a waiver exception under the DPM rests with  
170 Appellant, he failed to meet his burden with any substantive proof. In this appeal, Appellant  
171 and Planning Staff focused their attention and arguments on the fourth prong requiring proof that  
172 “the area is of low intensity land use to an extent that the normal installation of sidewalks will  
173 not contribute to the public welfare.” Appellant contends that the area has few pedestrians and

174 that because, as he contends, his block is a patchwork of sidewalks, installing sidewalks would  
175 be more dangerous to pedestrians than the current condition. I note for the City Council that  
176 Appellant has a heavy burden on the “public welfare” aspect to the fourth criteria because the  
177 Council has already made a legislative finding that general “sidewalk design criteria promotes  
178 mobility, safety and comfort of the pedestrian and allows adequate pedestrian access to abutting  
179 property” [DPM, Ch 12 and Ch. 23].

180 Planning Staff however showed that the area is not of low intensity, and that the area  
181 contributes to the public welfare because the area has substantially more sidewalk than lacks  
182 sidewalk. In support of their contention, Staff supplemented the record with an exhibit and the  
183 testimony of the City Traffic Engineer. Staff produced a satellite map of the area in which  
184 Appellant’s lots sit [R3, 40]. On the map is an overlay drawing showing all the areas where  
185 sidewalks exist, including *around* Appellant’s four lots [R3. 40]. At the LUHO hearing,  
186 Appellant disputed that sidewalks existed in a small area next to his property, claiming that this  
187 small area was a driveway, not a sidewalk. Notwithstanding his characterizations, I find that on  
188 close examination of the exhibit, the area in dispute is clearly a concrete driveway pad. I further  
189 find that the distinction is irrelevant because concrete driveway pads are a part of the sidewalk  
190 system under the DPM. With regard to Appellant’s safety claims, a City Traffic Engineer  
191 testified that sidewalks can and should be designed to meet Americans with Disabilities Act  
192 (ADA) requirements at transitions and slopes, including when the sidewalk transitions to non-  
193 sidewalk pedestrian areas. I find that the Traffic Engineer is an expert on the subject of sidewalk  
194 design and is qualified to opine on the subject. Appellant did not rebut this testimony with expert  
195 testimony.

196 Regarding the “intensity” or lack thereof under the fourth prong of the DPM analysis, I  
197 find, and take notice, that the entire area as shown in the satellite image exhibit [at R3, 40]

198 demonstrates that the neighborhood is fully developed with residential homes. Thus, because it  
199 is developed to its maximum intensity of residential land uses that exist in the neighborhood,  
200 “the area is [not] of low intensity land use to an extent that the normal installation of sidewalks  
201 will not contribute to the public welfare” under the DPM.

202

203 **ii. The lack of sidewalks Affronting Appellant’s Developed Lots are not**  
204 **Nonconforming under the IDO.**

205

206 Next, because there are two existing dwellings on Appellant’s lots, the lots are developed  
207 lots. The issue of whether the existing condition (a lack of sidewalks) affronting Appellant’s  
208 developed lots are a nonconforming site feature under the IDO is an issue I instructed the EPC  
209 to address in the remand hearing. The issue is important, because under the IDO, if a use, or in  
210 this case, the lack of sidewalks as a site feature, meets the criteria for being nonconforming, then  
211 Appellant would not be required, (under certain circumstances) to eliminate the nonconformity  
212 and install sidewalks [See IDO, § 6-8].

213 In the EPC remand hearing, the EPC made a specific finding that *before* 2004, the lack of  
214 sidewalks as a site feature could have been characterized as a nonconformity because that  
215 condition (lack of sidewalks) pre-existed the Sidewalk Ordinance.<sup>3</sup> However, in 2004, when  
216 Appellant constructed the second house on the property, he was required to install sidewalks as  
217 part of a building permit, and because he did not, the nonconforming site feature converted into  
218 a noncompliance matter [See EPC Finding, 11, R3. 16]. Thus, he lost whatever nonconforming  
219 feature that existed regarding sidewalks. Appellant did not rebut this conclusion with any

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3. Planning Staff assert a different date; however, the legislative history of the enactment demonstrates that the Sidewalk Ordinance was enacted by the City Council in 1972 as Ord. 219-1972.

220 competent evidence. I would also add that under the totality of the circumstances, the new  
221 construction of the additional home in 2004 could also be characterized as an *expansion* of the  
222 nonconformity, extinguishing any nonconformities that existed under the previous  
223 Comprehensive Zoning Ordinance and under the current IDO [See IDO, § 6-8(C)(3)]. Appellant  
224 did not dispute these facts but suggests that the City is to blame for the lack of sidewalks,  
225 presumably because it did not enforce its Sidewalk Ordinance in 2004.

226 The fact that the City did not enforce its Sidewalk Ordinance when the second home was  
227 constructed is inconsequential because under the Sidewalk Ordinance, “[c]ompliance with the  
228 provisions of §§ 6-5-5-1 et seq. shall be the responsibility of the property owner” [Sidewalk  
229 Ord., § 6-5-5-3]. Thus, it was Appellant’s responsibility to install sidewalks. Just because, for  
230 whatever reason, the City did not enforce its Sidewalk Ordinance in 2004, is not a legitimate  
231 reason that it cannot do so now with the replat application. Therefore, the lack of sidewalks today  
232 is not a nonconformity, EPC Finding 11 is not erroneous, and it is supported by the facts in  
233 evidence.

234 Accordingly, I find that the City may indeed require that Appellant install sidewalks to  
235 replat his lots. I also conclude that Appellant has not met his burden of proof to show that he  
236 qualifies for a waiver to the Sidewalk Ordinance. I therefore respectfully recommend that the  
237 City Council deny the appeal and uphold the EPC’s decision.

238   
Steven M. Chavez, Esq.  
Land Use Hearing Officer

September 3, 2020

Copies to: Appellant, City Council, City Staff