BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER
REMAND

APPEAL NO. AC-20-12

PR-2020-004030
SI-2020-00540
VA-2020-00356

MARSHA KEARNEY and MIKE MIRABAL, Appellants,

and,

TIERRA WEST, LLC, agent(s) for CALABACILLAS GROUP, Party Opponents.

This is an appeal of a site plan approval by the Development Review Board (DRB). After reviewing the record, as well as applicable State law and City ordinances, and hearing arguments and testimony during a two-hour extended Land Use appeal hearing, I find that this matter must be remanded back to the DRB because of a violation of IDO, § 6-4(K)(2)(b). As described below in more detail, all property owners within 100-feet of the proposed development, excluding the AMAFCA Black Arroyo drainage channel, were not properly sent notice of the application. Because the only remedy to this process failure is a remand, making recommendations on the other multiple appeal issues raised by Appellants not having to do with due process and notice would be tantamount to an inappropriate advisory opinion.

The site plan approved by the DRB is for a 208 dwelling unit development encompassing four, four-story buildings on an 8.7-acre parcel of land located at Golf Course Road, N.W. between Black Arroyo and Westside Blvd., N.W. The Appellants, Mike Mirabal and Marsha Kearney, both reside in the subdivision immediately East of the proposed development [R. 148].

I. BACKGROUND & HISTORY

Relevant to this appeal, the undisputed history and facts gathered from the record and from the appeal hearing are as follows: Sequentially, it appears that on March 9, 2020, land use planners and engineers with Tierra West, LLC, (agents for Calabacillas Group, herein referred collectively as "Applicants" or "TW") met with City Planning Staff in a pre-application review team meeting (PRT) to discuss the proposed site plan and IDO requirements [R. 113]. Then, on April 30, 2020, Staff with the City Office of Neighborhood Coordination (ONC) advised the Applicants of the registered neighborhood associations with which to request a neighborhood meeting under the IDO [R. 115-116].[1] Presumably, at this time, the Applicants also obtained a mailing list of property owners within 100-feet of the project site and a map showing these properties [R. 147-149] On May 13, 2020, the record shows that Tierra West, LLC sent notification to the two affected neighborhood associations of their intent to seek DRB approval of the site plans and requested a neighborhood facilitated meeting to discuss the proposed development [R. 118-130].

Because the site plan encompasses more than five acres of land, under the IDO, § 6-5(A), the applicant must first demonstrate that the development will not have any archeological impact. The record shows that a Certificate of No Effect was issued to the applicants by an archeological investigator with Lone Mountain Archeological Services, Inc. on May 6, 2020 [R. 109]. Then. on May 19, 2020, the City Traffic Engineer determined that a Traffic Impact Study (TIS) was not required or warranted for the development because the

1. Under IDO, § 6-4(C), the applicant must request a meeting with any neighborhood association members "whose boundaries include or are adjacent to the subject project site before" they can file their application.

development would not increase daily traffic "thresholds" [R. 110-111].[2]

Next, the record shows that the Applicants met with representatives from the West Side Coalition and the Taylor Ranch Neighborhood associations in a City sponsored Facilitated Meeting on May 21, 2020 [R. Supp. Rec., TW, Item 2].[3] A second facilitated meeting was held with a larger group of neighboring residents on June 18, 2020 [R. 385-390].

The record further reveals that on June 26, 2020 the Applicants submitted their proposed site plans to City Planning Staff and then sent notice of the DRB hearing to the two affected neighborhood associations and to the property owners listed on the mailing list they obtained from City Staff as required by the IDO [R. 134-163]. In the meantime, a DRB meeting to review Tierra West's site plans was scheduled for July 22, 2020. The record reflects that all persons on the mailing list were sent notice of the DRB Meeting [R. 350-361].

Between June 26, 2020 and July 21, 2020, the Applicants and several neighbors corresponded to each other and to City Planning Staff via email, apparently to address inquiries about the proposed development, notice, and the virtual Zoom format of the upcoming DRB Meeting [R. 397-399, 411-416, 446, 516-527, 542, 694-697].[4]

Between July 20 to July 22, 2020 the DRB received written comments from representatives from the Albuquerque Public Schools (APS), the Mid-Region Metropolitan

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2. The City's Development Process Manual (DPM) lays out the traffic study warranting criteria.

3. TW engineer, Richard Stevenson, submitted additional documents prior to the LUHO hearing to supplement the record. Each document was labeled Items 1 through 4. The Facilitated Meetings were held remotely via Zoom.

4. The email strings account for approximately 100 pages of the record and are not in order by date; some are duplicates. Thus, the citations herein may also include email strings subsequent to the first DRB Meeting or are duplicates.

Planning Organization (MRMPO), the New Mexico Department of Transportation (NMDOT), the Albuquerque Metropolitan Flood Control (AMAFCA), and the City Code Enforcement Department [respectively, R. 331, 336, 329, 330, 194]. Then, on July 22, 2020, the DRB held its first Meeting on the site plans and heard testimony and comments but deferred a decision until it could review a water availability study for the proposed development that was not yet in the record [R. 269, 305]. During the Meeting, DRB Chairwoman Jolene Wolfley, advised the attendees/participants that the Meeting would be deferred to the August 5, 2020 meeting date [R. 306].[5]

On August 5, 2020, the DRB reconvened on the proposed site plans and took additional testimony and comments, but again deferred a final decision [R. 264]. The third and final DRB Meeting on the site plans was held on September 30, 2020, at which time the DRB took additional testimony and comments before it finally approved the site plans with conditions [R. 209-234; 009-011].

This appeal was timely filed on October 13, 2020 [R. 013]. A quasi-judicial Land Use Appeal Hearing was held remotely via virtual Zoom on December 21, 2001, wherein the Appellants and the Party Opponents stipulated on supplementing the record with additional documents.

II. Standard of Review

A review of an appeal is a whole-record review to determine whether the DRB acted

5. Chair Wolfley also appropriately advised the public during the Meeting that after the initial Meeting for which notice was made pursuant to the IDO, *"it is up to the public to continue following the case. You can do that by contacting Ms. Gomez, and the phone number that is on the website. You can also find these agendas on the website….it will kind of be up to you to keep track of this case and follow it as you choose to"* [R. 306].

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)]. Substantial evidence is relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 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 LUHO has been delegated the authority to remand an appeal and set out the matters to be reconsidered [IDO, § 14-16-6-4(U)(3)(d)].

III. Discussion

To avoid handing down an advisory opinion, I will address only the issues raised that concern the procedural processes due under the IDO and under New Mexico law, including Appellants' Open Meetings Act allegation. Appellants claim that the DRB has violated due process in various manners. First, Appellants allege that they and others residing within 100-feet of the proposed development were not notified of the City's zoning conversion of the site from C-2 to the existing zone of MX-M; they challenge the efficacy of the MX-M zone district. Second, ostensibly, it appears that Appellants are also challenging the IDO's process for DRB review of site plans. Apparently, Appellants believe that the EPC should be reviewing the site plan rather than the DRB. This is a process issue, and I summarily find that this contention has no basis in law because the IDO is unambiguously clear that the Applicants' site plan is well within the DRB's jurisdiction [IDO, § 6-6(G)(1)(b)]. Third, Appellants claim that the remote

format of the DRB meetings violates the New Mexico Open Meetings Act. Fourth, Appellants contend that not all property owners within 100-feet of the proposed development were sent notices as required by the IDO. On this claim, Appellants first contend that two property owners on Caretta Drive NW were not sent notice. Appellants make a similar argument for property owners on Benton Avenue NW. Regarding Benton Ave., Appellants further contend that the City wrongly categorized the AMAFCA Black Arroyo diversion channel as private property and that this mis-categorization led to curtailing the measurement and notice required under IDO, § 6-4(K)(2)(b), resulting in the exclusion from the mailing list of residential property owners on Benton Avenue, South of the AMAFCA channel.

A. MX-M Zone

There is no dispute that the 8.7-acre parcel where the proposed development sits is zoned MX-M and that TW's application did not include altering that status. Prior to 2017, under the preceding Comprehensive Zoning Code the land was zoned C-2. When the City Council enacted the IDO on November 13, 2017, it concurrently repealed the preceding Zoning Code, and that enactment concurrently converted all zoning districts throughout the City from their previous zones (under the Zoning Code) to new zone district categories under the IDO. The City Council accomplished this action through Ordinance No. 2017-025.[6]

Under New Mexico law, the City-wide zone changes that occurred through the IDO conversion was unequivocally a legislative action because it reflected a City-wide, public policy decision "relating to matters of a permanent or general character." *Albuquerque*

6. I note for Appellants that this did not occur in a time vacuum as Appellants seem to suggest. The Planning Staff held dozens of widely publicized neighborhood meetings over the course of many months and the City Council and several of its agencies and boards held dozens of similar widely publicized public hearings, all culminating in the IDO's enactment.

Commons Partnership v. City Council, 2008-NMSC-025, ¶ 32. Legislative actions, in this case the City-wide conversion of new zones, required notice to the general public and not individualized "direct" notice as claimed by Appellants. Appellants are conflating what is required for quasi-judicial zone-changes with the former.

In this appeal, the distinguishing characteristics in New Mexico between quasi-judicial versus legislative zone-changes is the nature of the notice required. Quasi-judicial zone-changes require individualized notice to property owners within 100-feet of the area proposed to be changed. A quasi-judicial zone-change is defined as involving "a determination of the rights, duties, or obligations of *specific* individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the *particular interests* in question" (Emphasis added) *Albuquerque Commons*, 2008-NMSC-025, ¶ 32.

Because the site was converted to an MX-M zone through a City-wide legislative process, "direct," individualized notice to property owners within 100-feet of the proposed development was legally unnecessary. This is black-letter law. Thus, Appellants' argument lacks merit.

B. Open Meetings Act Allegation

Appellants claim that the remote virtual, Zoom DRB Meeting format violates the New Mexico Open Meetings Act (OMA). Without making reference to any particular provision of the OMA, Appellants suggest that the purpose of the Zoom format was to "push" the application process through in a manner that impairs public input.

A brief history of the circumstances requiring remote hearings/ Meetings is in order.

On March 11, 2020, the New Mexico Governor issued an Executive Order declaring a public emergency of which was followed by a March 23, 2020 Public Health Order from the State Department of Health which directed, among other things, social distancing and cancelation of in-person hearings.[7] Subsequently, the State Attorney General (AG) gave guidance to municipalities, on how to hold time-sensitive adjudicatory hearings in a remote format. Therein, the AG advised that time sensitive hearing may proceed:

> …with a virtual meeting, provided its notice of meeting contains detailed information (password, phone number, etc.) about how members of the public may attend and listen via telephone, live streaming or other similar technologies [AG, Open Government Division advisory during covid-19 state of public health emergency].

Because the DRB acts in a quasi-judicial adjudicatory manner when it reviews applications for approval of site plans, it necessarily impacts specific individual interests and rights under law. When it acts in this way, the DRB is well within its duties to not delay adjudicating those interests even if it must do so remotely. Accordingly, I find that the virtual format was an appropriate lawful balance between safeguarding both the Appellants' and the developers' due process rights to be heard while meeting the intent and letter of the AG's and the Department of Health's public emergency guidance criteria. Appellants' objection to the remote hearing format lacks merit.

C. Allegation Regarding Lack of Notice Under IDO, § 6-4(K)(2)(b) for the Site Plan Application.

Next, Appellants' contend that the mailing list provided to the Applicants by City Staff was incomplete; not all property owners within 100-feet of the land (excluding public right-

7. Supplemental Orders have been issued since then that have essentially extended the termination of the emergency to this date.

of-way) on which the proposed development site "received" individualized mailed notice of the DRB Meetings. The record shows that Appellants raised the issue after the first DRB hearing [R. 364]. The record further shows that the Applicants had a similar concern and raised the issue with Planning Staff. I will take the issues raised with property owners on Carreta Dr. first.

Specifically, Appellants claimed that two individuals who reside on Carreta Drive, NW were not sent the required notice. In comparing the City list with the evidence in the record, I find that insofar as one of the property owners on Caretta Drive was not *sent* individualized notice, Appellants are correct.[8] The name and address for Larry Sandoval is not on the mailing list. The other person Appellants claim did not receive notice is Morgan Kristen. However, Ms. Kristen is on the mailing list, and there is evidence in the record showing that Ms. Morgan was *sent* a notice of the DRB Meeting [R. 348 and 358 respectively]. I note for Appellants, that what is required under New Mexico law and in the IDO is that notice be *sent* (not received) and that there is sufficient evidence of the transmittal [See IDO, § 6-4(K)(2)(c)].

With regard to Mr. Sandoval, I find that, although the City's mailing list did not include him, there is ample evidence in the record that Mr. Sandoval had in fact corresponded about the application with the City Staff Planners and the Applicants' engineers via email while the application was pending before the DRB [R.225, 364, 378, 418, 459].[9] In legal parlance, the email correspondence unequivocally demonstrates that Mr. Sandoval had *actual* notice of the

8. As explained below, although Mr. Sandoval was sent on the list or sent notice about the initial DRB Meeting, there is evidence in the record that he knew of the application and the Meetings, and thus, had *actual* notice.

9. DRB Chair Wolfley explained at the August 5, 2020 DRB Meeting that the DRB was aware Mr. Sandoval's name and address were not on the City list, that it was an unintentional "computer glitch."

DRB Meeting in which the DRB approved the site plans. Thus, contrary to Appellants' claims regarding Mr. Sandoval and Ms. Kirsten, I cannot find that the DRB erred or that these two people were not noticed of the application; they clearly were.

Next, Appellants argue that at least two property owners along Benton Ave. NW were not noticed of the pending application and DRB Meetings [See Appll't. map, R. 653]. They take the position that the City wrongly included the AMAFCA Black Arroyo Diversion Channel (located between Benton Ave. and the application site) as private property in the 100-foot measurement for notice under § 6-4(K)(2)(b). Appellants believe that the AMAFCA Channel should have been considered as public right-of-way; thus, it should have been excluded from the 100-ft measurement from the proposed development site to the property owners on Benton Ave. I agree.

The City Planning Staff and the DRB were plainly wrong when they allowed or acquiesced to allow the drainage facility to be excluded [R. 227].[10] The AMAFCA Channel is unmistakably a public right-of-way, and it should have been excluded from the calculation under IDO, § 6-4(K)(2)(b).

The IDO's definition of public right-of-way is as follows:

> That area of land deeded, reserved or dedicated by plat or otherwise acquired by *any unit of government* for the purposes of movement of vehicles, bicycles, pedestrian traffic, and/or *for conveyance of public* utility services and *drainage*. This land generally does not have established zoning and is instead designated as "unclassified" in the Official Zoning Map. See also Alley, Street, and Trail (Emphasis added) [IDO, § 7-1, Public Right-of-Way].

10. This matter could have easily been avoided. Presumably, out of an abundance of caution, the evidence in the record shows that the Applicants' engineers questioned City Planning Staff about the completeness of the ONB mailing list.

It cannot be disputed that AMAFCA is a subdivision of the State and thus it is a "unit of government" [See definition of AMAFCA in IDO, § 7-1]. In addition, the Black Arroyo diversion channel is a drainage facility for "conveyance of public…drainage" into an open space arroyo [R. 254]. Any other reading of this definition would be a stretch of the imagination, and it would be of the variety that New Mexico Courts routinely strike down because of how Staff's limiting interpretation infringes upon notice and ultimately due process protections. When it comes to the issue of notice, the IDO cannot and must not be finessed. Doing so almost always leads to further unfortunate delays in finalizing appeals.

In this appeal, City Staff wrongly concluded that because the AMAFCA channel is not owned by the City, it is not an instrument of public right-of-way. I respectfully advise the DRB that ownership of the channel is not what is determinative. The use of the right-of-way is what is determinative under the IDO's definition of a public right-of-way. AMAFCA itself may or may not act for the public benefit—that is, legally it can be argued that it acts for its own benefit on certain matters (see *Gallagher v. Albuquerque Metro. Arroyo Flood Control Auth.*, 1977-NMCA-029), but its drainage channels unquestionably convey stormwater for the public good. For purposes of IDO, § 6-4(K)(2)(b), the Black Arroyo drainage channel categorically is a public right-of-way.

The failure to exclude the arroyo as public right-of-way resulted in notices that were not reasonably calculated to fairly apprise some people who met the criteria in IDO, § 6-4(K)(2)(b) of their opportunity to comment on the application. Although only a few people are perhaps impacted by the failure, and it is likely that the entire neighborhood had knowledge of the application, the failure is nevertheless significant to the process due under the IDO.

Particularly when the cause of error is no fault of the Applicants or the Appellants, remands seem punitive to some. The parties have a right to finality, but procedural due process infractions that impact notice must be remedied as soon as they are spotted. The alternative, kicking the proverbial can down the road generally only leads to greater delays in the judicial system.

Unfortunately, the only remedy is a remand back to the DRB to cure the deficiency. City Planning staff must assure that notice under the IDO is complete. Furthermore, to fully remedy the error and assure that the processes due are justly accomplished, the DRB's remand Meeting must be *de novo*; all property owners contemplated under IDO, § 6-4(K)(2)(b) must be noticed anew of the Meeting. Specifically, Staff and the Applicant must assure that all persons listed on the mailing list (R. 148-149), including Mr. Sandoval and those property owners within 100-feet South of the development (excluding the AMAFCA Black Arroyo channel and the streets) must be sent notice of the remand Meeting. On the details of how the DRB treats duplicate and recurring testimony at their remand Meeting, I leave to them to work out fairly.

Steven M. Chavez, Esq.
Land Use Hearing Officer

December 30, 2020

Copies to:

City Council
Appellants,
Party Opponents,
City Staff