



West, LLC [R. 018].

The Integrated Development Ordinance (IDO), effective August 2024 is applicable to the appeal. The DHO held a public hearing on the application on November 20, 2024 [R. 059-066]. In an undated Official Notification of Decision, the DHO approved the waiver application [R. 003-004].

This appeal was timely filed by the Appellant [R. 007]. The Appellant, who is a civil engineer with the City's transportation Department, has standing to appeal under § 6-4(U)(2)(a). The Appellant contends that the record does not include substantial evidence to support a decision, and that the DHO failed to evaluate *all* the applicable requirements under the IDO for approving the waiver [R. 011]. A quasi-judicial appeal hearing was held on February 6, 2025.

After reviewing the record, hearing arguments and testimony, as explained below in more detail, I find that the applicants failed to present sufficient evidence to support the application under *all* the waiver criteria of § 6-6(P). I also find that the DHO, in turn, failed to fully evaluate the application under the IDO's waiver criteria. The matter must be remanded back to the DHO.

## **II. STANDARD FOR REVIEWING APPEALS UNDER THE IDO**

The IDO includes detailed guidelines for how appeals are to be evaluated. Review of an appeal under the IDO is a whole record review to determine whether a decision appealed is fraudulent, arbitrary, or capricious; or whether the decision is not supported by substantial evidence; or if the requirements of the IDO, a policy, or a regulation were misapplied or overlooked [IDO, § 6-4(U)(4)]. The Land Use Hearing Officer (LUHO) has been delegated

the authority by the City Council to make findings and to propose a disposition of an appeal, including whether the decision should be affirmed, reversed, or otherwise should be modified to bring the decision into compliance with the standards and criteria of the IDO. The LUHO also has express authority to directly remand appeals for reconsideration or *for further review* by the lower decision-making body if a remand is necessary to clarify or supplement the record or if a remand would expeditiously dispose of the matter.

### **III. DISCUSSION**

As stated above, the record in this matter lacks sufficient evidence to support the DHO's findings and conclusions. Principally though, the DHO's decision lacks evidential support under the ten-prong analysis of IDO, § 6-6(P)(3)(a) that is required for waivers.

Under the IDO, "Waivers -DHO" are deviations from standards in Sections 14-16-5-3 (Access and Connectivity), 14-16-5-4 (Subdivision of Land), or 14-16-5-5 (Parking and Loading) beyond the thresholds established by Table 6-4-1. The waiver applied for is specifically a waiver from the Access and Connectivity requirement of § 5-3(D)(1)(a) which requires frontage perimeter sidewalks at residentially zoned lots in accordance with the Development Process Manual (DPM). The DPM describes the precise development procedures that must be taken from initial land use proposals, through infrastructure construction, to completion of a proposed development in the city, including sidewalks, curb, and gutter requirements. See DPM, § 1-3.

In order to approve an application for a Waiver-DHO, the DHO must evaluate applications under all ten prongs of § 6-6(P)(3)(a). It deserves emphasis that all ten of the

prongs must be considered and met before a waiver can be granted. See § 6-6(P)(3)(a).<sup>1</sup>

In his written decision, although the DHO expressly concluded that the applicant “met the criteria of § 6-6(P)(3)(a), there is little factual evidence in the decision, and more importantly, there is insufficient evidence in the record to support the DHO’s broad conclusions. The record shows that the Tierra West, LLC’s Planner submitted a written argument with the application, presumably to support the waiver application [R. 025-030]. However, few facts were presented, and the written arguments lack meaningful analysis to support the application [R. 027-029]. The arguments in the written narrative are essentially conclusions that the ten prongs are met without supporting facts.

There is evidence in the record that the lot which the waiver applies to, is in a rural part of the city and that many lots in the area are not developed.<sup>2</sup> There is imprecise evidence in the record that many of the existing developed residential lots in the area were developed without sidewalks, curb, and gutter, resulting in a patchwork of a clear sidewalk network. [R. 060]. Apparently, many of the developed lots had no sidewalks when the City annexed them from the County and many more were developed with City allowed sidewalk waivers [R. 063]. In addition, there is evidence in the record that pre-IDO, the city did not always enforce requiring sidewalks with new development [R. Testimony of Appellant, LUHO Hrg]. How

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1. Note that there appears to be conflicting language in the next subsection, § 6-6(P)(3)(a)1, which suggests that “any” of the ten criteria may apply. However, under IDO, § 1-8(A), unless otherwise limited, if two or more regulations in the IDO conflict with each other, the more restrictive regulation prevails. The requirement of § 6-6(P)(3)(a) is obviously more restrictive in application than is § 6-6(P)(3)(a)1 and there are no other limitations to this in the IDO that would apply.

2. It appears that basic infrastructure including water, sewer, electricity, and roads are in place for all lots in the area. However, sidewalks, curb, and gutter in the area for lots already developed is somewhat scattershot, but it is not clear to what extent this is so.

97 these existing conditions impacts storm run-off and future planning is not clear in the record.

98         For example, there appears to be an assumption that was relied on by the DHO that  
99 there are more developed lots without sidewalks, curb, and gutter than there are undeveloped  
100 lots in the area. The assumption may be a correct assumption, nevertheless, there is insufficient  
101 evidence supporting it. The number of developed lots verses undeveloped lots in the general  
102 area is conspicuously not in evidence.<sup>3</sup> Again, if the DHO is to partially base a decision on the  
103 existing conditions, there should be substantial evidence in the record regarding what those  
104 conditions specifically are as they relate to the waiver request.

105         In addition, the fact that Modesto Ave. NE, between Barstow St. and Ventura St.  
106 encompasses numerous undeveloped lots (the number is not in evidence) as well as developed  
107 lots (with and without sidewalks) is significant evidence for appropriately evaluating at least  
108 three of the prongs in the analysis of § 6-6(P)(3)(a). Especially for sidewalk waivers this broad  
109 inquiry is significant because of the domino effect that approving or denying sidewalk waivers  
110 will undoubtedly continue to have on future and existing development in the area. How  
111 granting or denying a sidewalk waiver could adversely impact future planning of  
112 infrastructure, drainage patterns, as well as the broader issues of connectivity of existing  
113 sidewalks, curb, and gutter development in the area are all relevant and necessary inquiries  
114 encompassed in the ten-prong analysis required in § 6-6(P)(3)(a). Evidence regarding these  
115 factors should be in the record.

116         In his decision, the DHO also appears to rely heavily on alleged existing obstructions

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3. This evidence could assist the DHO in assessing the broad policy issues that are implicated by this application.

that may create economic difficulties for the owner of the lot in the application to resolve if the waiver is not granted [R. 002]. The obstructions appear to be based on drainage runoff, erosion, and the extension of storm drains. However, assuming that the obstructions are real, (there is conflicting evidence on this issue), it would seem that the topography in the area could affect all owners of undeveloped lots on Modesto Ave, NE, between Barstow St. and Ventura St. in the same manner. To put it another way, the obstructions may not be unique to the applicant. This evidence would be relevant under eight of the ten-prongs of § 6-6(P)(3)(a)1.

These broad considerations regarding existing conditions as well as how a waiver could impact future conditions and planning are all exceedingly relevant under the expansive umbrella encompassed in the ten prongs for a waiver. Moreover, the conflicting testimony from the engineer experts regarding the extent of the obstructions should be fleshed out by the parties and the DHO.<sup>4</sup> In resolving these issues in a remand, the DHO must be cognizant of all the criteria in § 6-6(P)(3)(a) and because there are so many criteria to evaluate, a balancing of all considerations in § 6-6(P)(3)(a) is implicitly necessary in order to fully evaluate and apply all ten criteria appropriately to ultimately decide on the waiver application.

#### **IV. INSTRUCTIONS**

1. Because the application lacks so much of the evidence necessary for a thorough review under the ten-prong analyses required under § 6-6(P)(3)(a), the remand hearing must be a *de novo* review.

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4. The DHO is the fact finder, and the appeal process is established as a record review to determine, among other things, whether there is substantial evidence in the record. Thus, in this matter, the DHO is better equipped to require the evidence necessary for the evaluation and to perform the evaluation.

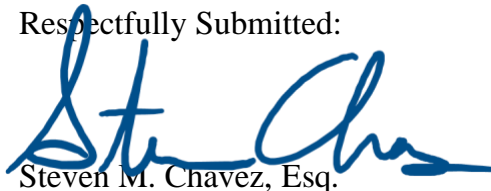
136           2. The parties must supplement the record with additional evidence consistent with  
137 the above discussion and with the ten-prongs of § 6-6(P)(3)(a).

138           3. As in any quasi-judicial administrative hearing, the DHO must afford the  
139 opportunity for cross-examination in a manner that is efficient under the circumstances and  
140 that satisfies minimum procedural due process under New Mexico law.

141           4. In addition, the procedure for Staff and agency commenting specifically required  
142 under § 6-6(P)(2)(a) should be utilized and satisfied.

143           This matter is remanded.

144   Respectfully Submitted:

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146 Steven M. Chavez, Esq.  
147 Land Use Hearing Officer  
148 February 13, 2025  
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150   Copies to:

151       Appellant  
152       Applicants-Appellees through their Agents  
153       City Council  
154       City Planning Staff  
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