

## 48 HOUR STAFF INFORMATION

**Lehner, Catalina L.**

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**From:** Armijo, Ernest M.  
**Sent:** Monday, February 10, 2020 11:22 AM  
**To:** Lehner, Catalina L.  
**Cc:** Biazar, Shahab; Brito, Russell D.  
**Subject:** RE: Poole property site plan comment

Catalina,  
This is still Hydrology's position on this issue.



ERNEST ARMIJO, P.E.  
principal engineer  
o 505.924.3986  
e [earmijo@cabq.gov](mailto:earmijo@cabq.gov)  
[cabq.gov/planning](http://cabq.gov/planning)

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**From:** Lehner, Catalina L.  
**Sent:** Monday, February 10, 2020 11:20 AM  
**To:** Armijo, Ernest M.  
**Cc:** Biazar, Shahab; Brito, Russell D.  
**Subject:** Poole property site plan comment  
**Importance:** High

Hi Ernest,

I'm checking in regarding the Poole property case at EPC this Thursday. There's a comment from Hydrology in the record, from the March 2019 Official Notification of Decision, which reads as follows:

*The City Hydrology Division states "The City has no plans to stabilize the slope and does not want to be burdened with the cost of such improvements. Bank Protection may be constructed to prevent lateral migration of the river, and erosion of the slope." Subsequent to EPC review, the project should be reviewed for technical issues such as this by the Development Review Board (DRB).*

Does this comment still reflect Hydrology's position? Please let me know ASAP. Thank you.



CATALINA LEHNER  
senior planner  
o 505.924.3935  
e [clehner@cabq.gov](mailto:clehner@cabq.gov)

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

**APPEAL NO. AC-19-6 and AC-19-7**

**Project #PR-2018-001402; SI-2018-00171; VA-2019-00103**

**THOMAS P. GULLY, Appellant in AC-19-6,**

**TAYLOR RANCH NEIGHBORHOOD ASSOCIATION,  
Appellants in AC-19-7,**

**And**

**GAMMA DEVELOPMENT, LLC, and  
CONSENSUS PLANNING, Party Opponents.**

**1     I.     BACKGROUND & HISTORY**

2            This matter concerns two separate appeals that arise from the same facts, a single  
3   application and decision of the Environmental Planning Commission (EPC). Other than  
4   consolidation herein, each appeal was heard individually at the Land Use appeal hearing.  
5   Based on proximity to the application site, which is the subject of the EPC's decision, the  
6   Appellants have standing to appeal. Mr. Gully is representing himself in his appeal. The Taylor  
7   Ranch Neighborhood Association (TRNA) is represented by separate counsel. Gamma  
8   Development, LLC (Gamma) is the purchaser or owner of the application site which  
9   encompasses 22.75 acres of land located between La Bienvenida Place NW and the Oxbow

Open Space (the “application site”). The Oxbow Open Space is designated as City Major Public Open Space (MPOS). Gamma’s planning agent is Consensus Planning, and both are represented by counsel in these consolidated appeals.

The record of these consolidated appeals is remarkable for its size and for the substantive issues of presented in these appeals.<sup>1</sup> The relevant and undisputed factual history begins in July 2018. Because Appellants have raised several issues regarding the processes of City Staff’s handling of the application, the relevant and undisputed factual history is comprehensively laid out below.

On July 23, 2018 Gamma’s planning team (which included planners with Consensus Planning) met with City Planning Staff for a Pre-Application Meeting regarding a proposal for a “cluster development” project [R. 698]. Under IDO § 14-16-6-4(B), pre-application meetings are required for any subdivision of land and for applications for site plans that are submitted to the EPC [IDO, § table 6-1-1]. Subsequently, on August 13, 2018, City Zoning and Planning Staff, the City Engineer, a representative from the City Open Space Division (OSD), and Consensus Planning Staff and their team of builders all met to discuss “Site Plan and IDO Process Review” issues [Supp. R. 16-17].<sup>2</sup> The specific details of the meeting discussion were memorialized in the “Meeting Minutes” [Supp. R. 16-17]. Notably, the record includes over 100 email communications between City Staff and Consensus Planning Staff. More will be discussed regarding the substantive content of these email communications [Supp. R. 2-487].

After the first two meetings with City Staff, Consensus Planning and the seven affected

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1. As describe below, at the Land Use Appeal hearing, TRNA’s counsel was allowed to supplement the record with an additional 595 pages. The supplemented material comprises mostly email communications between the City Planning Staff and Consensus Planning Staff from August 8, 2018 to March 30, 2019.

2. In this second meeting, the Zoning Enforcement Officer (ZEO) also was included.

neighborhood associations met to discuss the proposed project(s) in a Facilitated Meeting on August 20, 2018 [R. 739].<sup>3</sup> Under the IDO, § Table 6-1-1, because of the components of the proposed site plan, a Facilitated Meeting is mandatory.

Because the application site is larger than 5-acres in size and is adjacent to a City designated MPOS, and because EPC review is required, the Planning Director must first “concur with the request” presumably for the completeness of the application and for EPC review [IDO, § 14-16-6(H)(1)(b) 3 and 4]. Accordingly, on September 4, 2018, Consensus Planning Staff sought the approval from the City Planning Director to present the site plan for EPC review [R. 19]. On September 17, 2018, the Planning Director gave his approval to proceed to the EPC [R. 703]. At this time, the EPC hearing on the site plan application was scheduled for November 8, 2018 [R. 1286]. It should be noted for the City Council that in early September 2018 email communications between the applicant, City Staff, including OSD Staff, and Staff from the City’s Hydrology Division demonstrates that concerns were raised regarding effects of the proposed projects on the abutting MPOS [Supp. R. 38 - 116].

On September 27, 2018, Consensus Planning submitted its application to the EPC for site plan review and for a connectivity variance to the proposed internal street layout [R. 692].<sup>4</sup> The initial site plan comprised of two “projects” within the 22.75-acre site plan [R. 693]. One project was for a cluster development of 50 single family dwelling units lots on 14.36-acres with 4.37 acres designated for open space. The second project on the site plan consisted of 23-

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3. The seven neighborhood associations are: Andalucia HOA, La Luz Landowners Association, Oxbow Village HOA, Rancho Sereno Neighborhood Association, SR Marmon Neighborhood Association, TRNA, West Side Coalition of Neighborhood Associations.

4. The street connectivity variance was ultimately sent to the Development Review Board (DRB) and was the subject of a separate appeal (AC-18-20) that was ultimately remanded back to the DRB. That remand order is in the record at Supp. R. 567.

single family dwelling lots with a minimum square footage of 10,890 on 8.39 acres within the project site [R. 691].

On October 10, 2018, the record reveals that Consensus Planning, City Staff and representatives of the La Luz and Bosque Montano homeowners associations held a meeting to discuss the site plan [R. 749]. A similar meeting took place on October 23, 2018 but with the representatives of the TRNA [R. 769]. On October 24, 2018, Brandon Gibson, Associate Director and Acting Open Space Superintendent of the City Parks and Recreation Department submitted a letter to the EPC outlining several concerns and made several recommendations for the protection of the sensitive lands on the site and in the abutting MPOS [R. 642-647].

The record shows that the EPC had conflicting City Planning Staff Reports at its November 8, 2018 public hearing on the subject application. The City Planner recommended in one Staff Report that the EPC defer its hearing and in another similar report she recommended that the EPC approve the application [R. 1288 and Supp. R. 496]. Notwithstanding the conflicting Reports, the EPC deferred its public hearing [R. 1286]. I note that in an October 31, 2018 email to City Planning Staff, the record shows that Consensus Planning requested a deferral so that its Staff can more “adequately address” the issues raised by City Staff [R. 1289]. Notably, too, a primary basis for the deferral appears to be because the applicant “needs to fully address Sensitive Lands issues prior to the EPC hearing...” including protection of the adjacent waterway, presumably from water-runoff [R. Supp. R. 81, 83].

Apparently, the EPC hearing was deferred to the December 13, 2018 EPC docket [R. 1274]. The record in this matter is confusing for events that occurred between the first and

71 second EPC scheduled hearing in this matter. Before the December 2018 hearing, however,  
72 City Planning Staff submitted its supplemental updated Report to the EPC and recommended  
73 that the EPC approve the amended application with numerous conditions [Supp. R. 503-522].  
74 Regarding the amendments to the original application, the December 2018 City Planner's Staff  
75 Report shows that applicant modified the plan from one cluster development on the site with  
76 23 additional RA zone-sized lots to an application with four cluster developments and four RA  
77 zone-sized lots at the project site [Supp. R. 504].<sup>5</sup> The apparent purpose for the modification  
78 was to increase space for buffering the MPOS.

79 Before the EPC hearing, on December 5, 2018, the City Development Review Board  
80 (DRB) approved a variance for the proposed street layout in the site plan. In the interim, the  
81 record reflects that City Planning Staff, Staff from OSD, Staff from the Parks and Recreation  
82 Department and Consensus Planning's team held a meeting on December 12, 2018 to discuss  
83 the application [Supp. R. 246-249]. Despite the recommendation of approval with conditions  
84 in the Staff Report, on December 13, 2018 the EPC again deferred its hearing on the matter,  
85 this time for 60 days until its February 14, 2018 docket [R. 1274-1275]. Apparently, although  
86 not clear from the record, issues regarding City Staff's recommended conditions of approval,  
87 as well as details of the site plan, needed to be resolved [Supp. R. 263-267].

88 As a result of the issues raised and the recommendations of City Staff, Consensus  
89 Planning again amended the site plan, presumably to address the concerns, and its Staff sought  
90 to again meet with City Staff to discuss the new site plan and the issues raised [Supp. R. 263-  
91 267]. The supplemental record reflects that City Staff again met with Consensus Planning Staff

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5. RA zone-size lots are lots that are 10,890 sq. ft. or less in size.

92 in early January 2019 to discuss OSD recommendations and City Staff's recommended  
93 conditions to the EPC [Supp. R. 286].

94 On January 17, 2019, Consensus Planning submitted its amended site plan to all City  
95 Staff involved in the review process for their review before the February 14, 2019 EPC public  
96 hearing [Supp. R. 295]. At this time, along with review by the City's Engineers, Staff from  
97 OSD, Staff from the various sections of the Planning Department, and the Parks and Recreation  
98 Department, the City Forester also became involved in the review process for review of the  
99 extent to which existing trees and vegetation at the site can and should be preserved [Supp. R.  
100 301].

101 The Supplemental Record reflects that on or about February 5, 2019, documents labeled  
102 "public comments" were submitted to City Planning Staff by the TRNA's counsel and were  
103 placed in the record for EPC review [Supp. R. 323]. The record shows that at about this time  
104 the City Forester conducted a site inspection to "evaluate the condition of existing trees on the  
105 property" and to ascertain which trees can and should be preserved and or replaced [R. 442,  
106 Supp. R. 349]. Apparently, after the site evaluation and after a meeting between the City  
107 Forester and Consensus Planning Staff on February 6, 2019, Consensus Planning Staff  
108 supplemented the record with additional documentation including exhibits identifying  
109 sensitive areas at and around the site [Supp. R. 325, 329, 331]. It is clear from the record that  
110 the site plan had been again modified by February 7, 2019 [Supp. R. 333].

111 Over objections from Consensus Planning Staff, by February 8, 2019, the City Planning  
112 Director advised Consensus Planning (via email) that because the additional documentation  
113 and modified plans were submitted late, City Planning will recommend to the EPC that it again



114 defer a public hearing of the merits of the application [Supp. R. 339, 340-347]. The record  
115 shows that Consensus Planning objected to another deferral. [Supp. R. 340]. In the meantime,  
116 City Staff continued their review of the modified site plan [Supp. R. 348-424, R. 456]. At the  
117 EPC's February 14, 2019 public hearing on the application, the EPC deferred its merits review  
118 and hearing on the matter to its March 14, 2019 public hearing docket [R. 435].

119 Then, on March 4, 2019, in a letter dated March 1, 2019, presumably as a result of the  
120 numerous ongoing reviews and issues raised by City Staff and others, including Appellants,  
121 Consensus Planning again modified its site plan, changing the cluster designs to create  
122 additional open space at the site and an increased buffer along the eastern and southern edges  
123 of the site, presumably to better protect a steep bluff in the MPOS [Supp. R. 426, R. 151-161].  
124 The final site plan submitted to the EPC includes two abutting cluster developments (Clusters  
125 "A" and "B") that have increasing densities on the western side of the development. The two  
126 cluster developments have lot densities ranging from 5,500 to 12,000 [R. 101] and have an  
127 overall density of 3.2 lots per acre on the 22.75-acre site plan [R. 429]. Cluster "A" has 36 lots  
128 and Cluster "B" has 40 lots [ R. 429]. Each cluster has private open space totaling 7.38 acres  
129 of land which primarily sits at the eastern side of the application site. [See color coded site  
130 plan at R. 428-430.]

131 Before the March 14, 2019 EPC hearing, City Planning Staff submitted to the EPC its  
132 revised Staff Report [96-137]. In the Report, City Planning Staff recommended that the EPC  
133 approve the site plan but with nearly 50 conditions [R. 127-129]. On March 14, 2019, the EPC  
134 held its public hearing, and after hearing testimony and arguments, it adopted the conditions  
135 recommended by Planning Staff and approved the site plan [R. 87-93]. As described below,

136 the EPC's approval requires that the site plan be modified. These two timely appeals followed  
137 [R. 19 and 47]. A Land Use appeal hearing on both appeals was held on May 20, 2019. At  
138 the hearing, the TRNA Appellants supplemented the record with an additional 595 pages of  
139 documents.

140 In their appeals, Appellants raise over 20 issues of error. Many of the points of alleged  
141 error can be merged into a dozen or so general categories. Beginning with the issues raised in  
142 AC-19-6, Mr. Gully claims that the EPC erred as a matter of law when it approved the site  
143 plan's two cluster developments. Specifically, Mr. Gully claims that because the land use type  
144 of "cluster development" is stated in the IDO in its singular form as a noun rather than in its  
145 plural form "cluster developments," the IDO prohibits multiple cluster developments in a  
146 single site plan. He claims that the rules of statutory construction as described in the New  
147 Mexico Supreme Court case of *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-  
148 NMSC-050, supports his argument. The TRNA joins in Mr. Gully's appeal.

149 TRNA claims a wider array of appellate issues and errors. Because it is undisputed that  
150 the application includes sensitive lands as defined by the IDO, and abuts MPOS, the TRNA  
151 claims that the applicant and/ or the City Staff are required to begin the subdivision and site  
152 design processes and the review evaluation with an analysis of site constraints related to  
153 sensitive lands. The TRNA claims that the City failed to start the review process with an  
154 analysis of site constraints and this failure is appealable error. In addition, the TRNA claims  
155 that the record is devoid of any analysis of material environmental impacts on the visual,  
156 recreational, or habitat value of the abutting MPOS which they claim is required under IDO §  
157 14-16-5-2(H)(2)(b)2. TRNA also alleges that the construction plans as shown in the grading

and drain plans provide inadequate mitigation measures for protecting the MPOS.

TRNA also alleges several other deficiencies with the site plan. They claim that the proposed streets have insufficient access to the adjacent subdivision, the streets contravene the block size requirements of the IDO, that the proposed lots violate density requirements of the IDO, and that portions of the designated open space cannot qualify as open space because of size and/ or because of its proposed use on the spaces reserved for open space.

The next general category of errors alleged by TRNA are alleged Open Meeting Act (OMA) violations. Specifically, the TRNA alleges that City Staff necessarily made policy decision regarding the site plan that brings it into the fold of the OMA. Similarly, Appellants contend that City Staff engaged in meetings with the applicant as a policy-making body which violates the OMA. The TRNA also claims that at the March 14, 2019 EPC hearing, the EPC violated the OMA when it “closed” its meeting and considered the site plan off the record. Finally, the TRNA alleges that the EPC denied the opponents of the application due process because the Chair did not allow adequate cross-examination at the hearing.

As discussed in more detail below, I find that the City Staff did not acted inappropriately in their review, evaluation, and in working with the public and the applicants. The supplemental record entered into the record by the TRNA is a rare inside look of the internal operational and managerial review processes City Staff engaged in from July 2018 to days before the EPC finally approved the application on March 14, 2019. What these internal email communications also show is that City Staff were not only fully engaged in the MPOS issues and the IDO issues the application presented, but that City Staff did not act as a policy making body under the OMA. This is so because of the simple fact that decisions made at the meetings

180 between staff and applicant, if any, were clearly non-binding on the EPC. Appellants have  
181 not shown otherwise.

182 I also find that the EPC findings and its approval of the final site plan is well supported  
183 by the record. Contrary to Appellants' contentions, the record is extensive and includes what  
184 is necessary to support the EPC's decision. And, while the record does not include a singular  
185 formal comprehensive analysis of all site constraints and environmental impacts of the  
186 sensitive lands in and around the application site, the record does include multiple evaluations  
187 of the various site constraints from various City agencies that together satisfy what is required  
188 in the IDO. Moreover, I find that the record provided adequate information and evidence from  
189 which the EPC could determine that *material* impacts of the site on the MPOS are adequately  
190 mitigated.

191 Regarding the alleged OMA and Due Process allegations having to do with the EPC, I  
192 find that the EPC did not violate the OMA in the manners claimed. As described in greater  
193 detail below, the EPC's meeting satisfied what is minimally necessary under the OMA. I also  
194 find that because the EPC gave advanced notice of how it would allow cross-examination at  
195 the hearing, the manner it was allowed was reasonable under the circumstances (described in  
196 greater detail below).

## 198 II. STANDARD OF REVIEW

199 In an appeal, review of a decision from the EPC is a whole record review to determine  
200 whether the EPC acted fraudulently, arbitrarily, or capriciously; or whether the EPC's decision  
201 is not supported by substantial evidence; or if the EPC erred in applying the requirements of

the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. The Land Use Hearing Officer (LUHO) has authority to recommend that the City Council affirm, reverse, or otherwise modify the lower decision to bring it into compliance with the standards and criteria of the IDO, applicable City regulations, and any prior approvals related to the property [IDO, § 14-16-6-4(U)(3)(d)5]. The LUHO has authority to remand an appeal and set out the matters to be reconsidered [IDO, § 14-16-6-4(U)(3)(d)6].

### **III. DISCUSSION**

#### **A. Multiple Cluster Developments Can be Placed in a Single Site Plan Provided Each Development Has the Required Setbacks.**

It is undisputed that the single site plan approved and modified by the EPC includes two cluster developments. Appellants contend that the IDO prohibits this. Although Appellants agree that there is no explicit prohibition in the IDO for placing multiple cluster developments in a single site plan, they contend that such a prohibition is implied in the terms “cluster development” in the IDO. Specifically, Appellants contend that because all references in the IDO to a cluster development are in the singular form of the land use type, under the rules of statutory construction, a “cluster development” must mean that only one cluster development can be allowed in any single site plan.

Is undisputed that there is no express prohibition in the IDO preventing two cluster developments in a single application site or site plan. To suggest that such a probation is *implied* merely from how a land use type is characterized in the IDO is unreasonable and it requires that language be read into the IDO that is not otherwise there.

226 The term “cluster development” in the IDO refers to a type of land use.<sup>6</sup> There are over  
227 50 other land use types and sub-types of land uses identified in the IDO’s Table of Allowable  
228 *Uses* and most of them are specified in their singular forms [IDO, table § 4-2-1]. Certainly,  
229 one cannot realistically apply Appellants’ logic that there is an implied prohibition for each of  
230 the singular forms of land uses referenced in Table § 4-2-1. To do so would lead to absurd  
231 results.

232 Appellants have an answer though. They contend that there are some land uses that are  
233 characterized in their singular forms such as “townhouse” in table § 4-2-1 that are also defined  
234 in other parts of the IDO in their plural forms. It is true that the land use type of “townhouse”  
235 is used both in a singular and in a plural form in various sections of the IDO. Appellants seem  
236 to suggest that if a land use is characterized in a plural form anywhere in the IDO, the implied  
237 prohibition is therefore inapplicable to that land use type. Following Appellants’ logic,  
238 Appellants’ argument fails because the term “cluster development” is also characterized in the  
239 IDO in its plural form in § 14-16-5-4(F)(3)(d).

240 But there is a more practical reason Appellants’ logic is flawed. As mentioned above  
241 under the rules of statutory construction we must refrain from reading language into an  
242 ordinance that is not there. The crux of Appellants’ argument is that in the IDO there is a latent  
243 prohibition hidden in a land use type that is specified in its singular form. Appellants’ argument  
244 runs awry of, and conflicts with, the rules of statutory construction laid out in *High Ridge*  
245 *Hinkle*, 1998-NMSC-050.

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6. In the IDO there are two distinctive definitions used for the term “cluster development.” One is a noun phrase that defines it as a land use type. The other definition is defined as a design technique. See IDO, Definitions, § 14-16-7-1. I presume Appellants are characterizing the use of the former.

At the March 14, 2019 EPC hearing, the City's Zoning Enforcement Officer (ZEO) testified that two cluster developments can be placed next to each other in a single site plan or application site [R. 329-330]. The ZEO is the City's designated person who has the delegated authority to interpret the IDO [IDO, § 14-16-6-4(A)]. The basis of his opinion is that if each cluster development satisfies all provisions in the IDO there are no limiting provisions in the IDO to prevent multiple cluster developments from being placed next to each other [R.330]. I find that the ZEO's interpretation is consistent with the statutory rules of statutory interpretation established by the New Mexico Supreme Court and described in *High Ridge Hinkle*. Accordingly, despite Appellants' best efforts in arguing that there is an implied prohibition, there is no prohibition that can be gleaned merely from the term "cluster development."

Next, Appellants claim that the site plan reviewed by the EPC at its March 14, 2019 public hearing violates the IDO. I agree with the Appellants that the site plan reviewed by the EPC at its March 14, 2019 hearing, without the modifications ordered by the EPC, is in form and in substance a single cluster development that exceeds the allowed number of dwelling units allowed under the IDO. If the EPC had not adopted its Condition Number 5 relating to setbacks, the EPC would have erred. Condition Number 5 essentially requires that the site plan be modified to include RA zone setbacks and that the setbacks must be applied to each of the two cluster developments independently. To the extent that the EPC's conditions, specifically those regarding setbacks, require that the site plan be modified to meet the IDO, I find that the EPC did not err in approving the site plan.

To understand this admittedly complex issue, the relevant IDO provisions must be put

in context. The IDO has numerous regulatory provisions for cluster developments. As stated above, a cluster development is a design technique and it is also a land use type of development [IDO, Part 14-16-7]. As a design technique its purpose is to “concentrate[] buildings in specific areas on a site to allow the remaining land to be used for recreation, open space, or preservation of sensitive lands.” As a development type, it is the concentration of “single-family or two-family dwellings on smaller lots than would otherwise be allowed in the zone district in return for the preservation of common open space within the same site, on a separate lot, or in an easement.” Under the IDO, a cluster development requires a minimum of 1-acre of land [IDO, § 4-3(B)(2)(a)]. Curiously though, there is no maximum land size for cluster developments. A maximum of 50-dwelling units in a cluster development is allowed [IDO, § 4-3(B)(2)(c)]. There are many provisions regarding lot design and layout of cluster developments that brings perplexity into the issue and which the applicant relied on in creating their two-cluster development site plan.

First, it is clear that the application site is in a RA zone where lots may not exceed 10,890 square feet [IDO, Table 5-1-1]. However, the application site also is in the Coors Boulevard Character Protection Overlay zone (CPO-2). In a CPO-2 zone, “Cluster development design on land above the flood level shall be used to the *maximum extent practicable*, and the floodplain shall be used as open space” (emphasis added) [IDO, § 3-4(C)(5)(a)]. Notably, I find that this provision broadly provides strong policy support for placing multiple cluster developments that meet site design and layout provisions within the CPO-2 Character Overlay Zone and particularly at the application site.

Next, regarding site design and layout requirements, in IDO § 14-16-4-3(B)(2)(b), “zone



district lot and setback requirements, including contextual standards in Subsection 14-16-5-1(C)(2), *shall apply to the project site as a whole, but not to individual dwellings.*” (Emphasis added). At the LUHO hearing, the applicants’ Planner, James Strozier testified that it was this provision that he believed allows the two cluster developments in the site plan to be merged for purposes of setbacks. [See R. 433 for a rendering of the setbacks proposed by the applicants.] This application of setbacks raises a fundamental question regarding what is the “project site.” The applicants believe that the project site is synonymous with the 22.75-acre application site. In support, they point to the definition of a project site in the IDO. In the IDO a project site is:

A lot or collection of lots shown on a Subdivision – Minor or Major or on a Site Plan. This term refers to the largest geography specified in the earliest request for decision on the first application related to a particular development. For example, if a large parcel is subdivided and submitted for development in phases, any regulation referring to the project site would apply to the entirety of the land in the original parcel included in the Subdivision application [IDO, § 14-16-7].

However, it is undisputed that there is no intent to phase the developments at the application site [R. 398]. Thus, the example regarding phasing in the above definition is inapplicable. We are left with the definition of “a collection of lots shown on a subdivision” as the project site. It is also undisputed that a “site area” cannot exceed 50-dwelling units in § 4-3(B)(2)(c). In fact, the cluster development regulations of § 4-3(B)(2), including the 50-dwelling unit limit are limitations for the “project site.” Thus, if setbacks apply to a project site, then isn’t it reasonable that the 50-dwelling unit-limit equally be applicable to a project site as a whole? The answer is yes, because the term must be applied in one consistent manner.

Appellants are correct to cry foul in this regard because the applicants’ rendering of its

site plan manipulates the “project site” to maximize density. They applied the term “project site” to the 22.75 acres as a whole in order to avoid the setbacks required for each cluster development separately, but then they applied the term “project site” to each individual cluster development for purposes of the 50-dwelling unit limitation. EPC Condition Number 5 prevents this manipulation.

It cannot be emphasized enough that without Condition Number 5, the 50-dwelling unit limitation for cluster developments in the IDO would be rendered meaningless with the site plan’s two-cluster developments. EPC Condition Number 5 brings the site plan into conformance with the 50-dwelling unit limit and with the setback regulations for cluster developments in the IDO. Thus, I find that the EPC did not err in its final decision with regard to the clustering of dwelling lots and with approving two cluster developments side-by-side. However, the setbacks for each development must be established and the site plan must be modified to satisfy EPC Condition Number 5.

Appellants also challenge the cluster *design* depicted in each of the cluster developments. They suggest that the lots are not arranged as a true clustering of lots and therefore the design violates the intent, purpose, and meaning of a cluster development. Specifically, they claim that the design is nothing more than an “arithmo-geographic exercise to maximize density somewhat akin to gerrymandering a political map.” While I agree that the design is awkward, I remind Appellants that the design accomplishes several significant policy goals in the IDO and in the Comprehensive Plan. Notably, the overall purpose of clustering lots is to bunch up lots to create more space for recreation, or preservation of sensitive lands and open space. This is a significant purpose that is immensely important at the

338 application site. And because the application site is in the CPO-2 overlay zone clustering is  
339 intended “*to the maximum extent practicable*” [IDO, § 3-4(C)(5)(a)]. Moreover, there are  
340 numerous Comprehensive Plan policy goals and policies encouraging the siting of cluster  
341 developments to preserve sensitive lands and for creating open space. In its final decision, the  
342 EPC identified numerous goals that are satisfied, or were furthered in this case. Appellants did  
343 not challenge any of them in their appeals. I find that they are all applicable [R. 88-89].

344 Appellants, however, have submitted no support for their arguments that the designs of  
345 clusters in the site plan are erroneous under the IDO. After reviewing the IDO, I find that  
346 there are no design standards for how lots are to be assembled and located in a cluster  
347 development. Thus, they can be aligned in a “serpentine” manner. I also find that the design  
348 of each cluster (other than the setback discrepancies resolved with Condition Number 5)  
349 demonstrate that the design satisfies the policy goals noted above in the Comprehensive Plan.

350 It is undisputed that the south-eastern portion of the application site includes sensitive  
351 lands because there is a watershed, and the topography is sensitive land for various reasons.  
352 Among them, there is a steep bluff that is adjacent to the MPOS. The western side of the  
353 application site is less sensitive and is closer to adjacent subdivisions that have higher densities.  
354 The lots in the western portion of the site plan emulate the lot densities to the west, while  
355 creating lower densities for lots that are closer to the MPOS. In addition, the design of the  
356 clusters allows a large portion of private land to be preserved as open space. This open space  
357 abuts the MPOS. Thus, as the EPC found, regardless of the site plan’s “serpentine” design, it  
358 remains undisputed that the design accomplishes the numerous goals and policies of the  
359 Comprehensive Plan.

**B. Site Constraints Related to Sensitive Lands Issues Raised.**

Appellants next claim that the evidence demonstrates that the City and presumably the applicants did not “begin” the subdivision site design and review process with an analysis of the site constraints related to the sensitive lands at or adjacent to the application site. Appellants contend that the Planning Staff abused its discretion.

However, an abuse of Staff discretion is not a legitimate basis for an appeal. Under the IDO, “[t]he criteria for review of an appeal shall be whether the decision-making body” erred [IDO, § 6-4(U)(4)]. The City Council has not delegated to the LUHO authority to review alleged abuses of discretion regarding Staff’s review processes. In this matter, as discussed in more detail in Section H below, for purposes of an appeal, Staff were engaged in their responsibilities as fact finders for the EPC and not as final decision makers. However, because it is undisputed that the application site includes sensitive lands and abuts the MPOS, the issue of analysis of the site constraints of sensitive lands is of great public importance, and it should be explored to determine if there were failures in the review processes that may have boiled over into the EPC’s decision making authority over the application.

It is undisputed that IDO § 5-2(C)(1) requires that sensitive land site constraints be the beginning point of any subdivision site design and review process. Presumably, the purpose of IDO § 5-2(C)(1) is to ensure that the ten identified types or categories of sensitive lands listed in IDO § 5-2(C)(1) can be avoided or protected. These ten categories of sensitive lands are why site constraints must be considered in the subdivision and site design review process.

In general, the totality of the record in this appeal demonstrates that as the application review process progressed, opponents of the application became more engaged in the process.

382 So, too, did City Planning Staff, specifically with issues related to preservation of the sensitive  
383 lands at the site, buffering the MPOS, and identifying and protecting environmental elements  
384 at the site. It may not have happened as quickly as (or in the manner) Appellants contend it  
385 should have; nevertheless, it did happen before the EPC began its substantive public review at  
386 the March 14, 2019 hearing on the matter.

387 The record does reflect however, that even at the initiatory PRT meeting that took place  
388 on July 23, 2018, issues pertaining to sensitive lands was a topic of discussion at least in form  
389 [R. 689-690]. It is undisputed that the “Site Information” portion of the PRT Meeting Notes  
390 has the hand-written word “yes” written next to the line that states “MPOS or Sensitive Lands”  
391 [R. 689]. Moreover, in the 595 pages of supplemental documents submitted by Appellants,  
392 there are well over 100 email communications between the Consensus Planning Staff and City  
393 Staff. Of the 100 plus emails, there are over 50 communications that relate to the applicable  
394 listed sensitive land categories identified in IDO § 5-2(C)(1).

395 After the initial PRT Meeting, as early as August 10, 2018, City Staff made numerous  
396 queries to Consensus Planning about a host of issues related to site constraints at the  
397 application site [Supp. R. 7-12]. As laid out in the history section above, the August 13, 2019  
398 meeting involved discussions about the MPOS regulatory requirements in the IDO [See Supp.  
399 R. 17]. It cannot be disputed that the MPOS to the East and South of the application site  
400 includes at least five of the listed sensitive lands categories in IDO § 5-2(C)(1). The MPOS is  
401 a site constraint because it includes at least five sensitive lands category types listed in IDO §  
402 5-2(C)(1).

403 The mission of the Staff with City Parks and Recreation Department is to protect and to

maintain the MPOS. The Open Space Division (OSD) of the Parks and Recreation Department is particularly tasked with overseeing the MPOS. The record in this appeal demonstrates that City Planning Staff required that the applicants contact and submit their plans to OSD early in the process [Supp. R. 9 and R. 664]. Later in the review process (October 2018), OSD Staff evaluated the site for its sensitive lands, identified issues of concern, negotiated greater protections to the MPOS, and obtained increased open space at the site [R. 642].

In early 2019, the City Forester had become involved in evaluation of the site for one category of sensitive lands listed in IDO § 5-2(C)(1)—large stands of mature trees [§ 5-2(C)(1)(i)]. The City Forester works in the Parks Management Division of the OSD [R. 42]. After a site evaluation, the City Forester drafted a brief report to the City Planner assigned to reviewing the application [R. 442]. Upon receiving the report, the record shows that the City Planner then advised the applicants on February 11, 2019, that the large stands of mature trees must be clearly demarcated for the EPC presentation and the grading plan needs to be reviewed for preservation of trees [Supp. R. 348].

In addition, a clear pattern emerges in the evolution of site plan iteration modifications throughout the entire review process. One need only compare the first proposed site plan with the final one to see that the MPOS, the applicable sensitive lands types listed in IDO § 5-2(C)(1), and open space requirements impacted the design and review process. A comparison of the sketch plan and site plan at R. 425 and R. 426 respectively with the most recent site plan, Open Space exhibit at R. 429 and R. 430 respectively proves this point. As the review process progressed, the site plan was modified several times and with each modification land for open space increased at the site. As open space increased, buffer protection for the sensitive

land types also increased. I find that the sensitive land constraints generally guided the review process and was the primary basis for at least two EPC deferral recommendations from City Planning Staff.

I think it is noteworthy that the record reflects an additional element that may have forced better protections to the sensitive lands in the review process. Early in the process, a vocal public also became involved in the review of the site plan [R. 749-795]. The public's involvement clearly impacted the progress of modifications to the various site plan versions.

**C. Appellants have Not Shown that the Proposed Cluster Developments Will Create Material Negative Environmental Impacts on the Visual, Recreational, or Habitat Values of the Major Public Open Space.**

Appellants next assert that there should have been an analysis of “material negative impacts” as required under IDO, § 5-2(H)(2)(b)2. They further claim that the EPC erred because there was no such analysis. Appellants’ argument assumes that IDO, § 5-2(H)(2)(b)2 requires a formal type analysis of negative impacts. It does not. What the IDO explicitly and clearly requires is that material negative impacts are not created by the proposed subdivision.

The EPC explicitly made several findings regarding how the subdivision impacts the MPOS. First, it found that “[t]he adjacent Major Public Open Space is protected by the Site Plan's private open space buffer” [R. 88]. Next, it found that:

the natural features on the eastern portion of the site adjacent to Major Public Open Space are being preserved via the private open space buffer on the proposed Site Plan, which will also help preserve views into and from the Major Public Open Space [R. 89].

In addition, the EPC found that:

grading is designed to direct stormwater away from the steep slopes at

the southeast of the project site, which will help reserve the adjacent Major Public Open Space for future generations [R. 89].

In addition, it found that the “Bosque will be undisturbed or revegetated to a natural setting” [R. 89]. The EPC also found that the “project has appropriate buffers and transitions from the Major Public Open Space that meet or exceed what is required [ R. 89]. Finally, the EPC found that the site plan “mitigates any significant adverse impacts on the surrounding area to the maximum extent practicable” [R. 90]. I also note that these findings were not disputed by Appellants in these appeals. These findings all concern issues related to how the site plan and subdivision impacts the “visual, habitat or recreational values of Major Open Space” under § 5-2(H)(2)(b)2. Moreover, I find that these findings are supported in the voluminous record with substantial evidence, [See R. 99-122; 138-143; and 153-161.] The record of the hearing also demonstrates that individual EPC members had a robust discussion about the environmental concerns and specifically about protecting the MPOS.

Thus, there is substantial evidence in the record that shows that the EPC considered impacts on the MPOS, and that negative *material* impacts which could be created by the subdivision were either not found, will be resolved, or sufficiently mitigated. I also note that in their appeals the Appellants have not identified or otherwise alleged with any specificity that there are negative material impacts created by the subdivision. In the face of the contrary substantial evidence in the record, without more, Appellants’ claims of error falls short.

**D. Street Connectivity Issues Raised by Appellants Are Matters Properly Before the DRB.**

Appellants have generally raised issues pertaining to the street connectivity requirements



of the IDO as they relate to the site plan. Citing to IDO, § 5-3(E)(2)(a), Appellants generally claim that the IDO requires access to the adjacent subdivisions and that the EPC should reconsider the single access shown on the site plan.

I note for the City Council that the issue of street connectivity was the basis for a variance application regarding the application site in an earlier appeal (AC-18-20). In that matter, the DRB approved a variance to street connectivity. However, in the appeal, the City Council delegated it to the LUHO and after an appeal hearing, the variance decision was vacated and remanded to the DRB with instructions to consider in a new hearing. Moreover, the EPC has the authority to delegate to the DRB technical issues of regarding the internal proposed streets, drainage issues, and many other technical issues of subdivision construction [IDO, § 6-6(H)(2)(d)]. In its decision in these consolidated appeals, the EPC unmistakably was aware of the DRB's actions taken on the street connectivity questions. [See R. 90, Finding 9]. I find that street connectivity issues and issues of the internal streets in general, if any, presented by the site plan are properly before the DRB and not the EPC. These issues are not ripe for appellate review because the DRB has not made any final decision about them that are appealable.

**E. The EPC Erred Regarding Block Length Questions Only Because it did Not Clearly Delegate that Matter to the DRB. The Decision Can be Modified to Remedy the Error.**

Appellants next claim that the block length of the proposed internal local streets depicted in the site plan are contrary to what is allowed in the IDO. Appellants ask that the site plan be remanded to the EPC to address the discrepancies.

A subdivision block is defined as “[a]n area that is bounded but not crossed by streets, railroad rights-of-way, waterways, unsubdivided areas, or other barriers” [IDO, § 5-4(F)(3)]. In addition, the IDO sets general limitations to subdivision block lengths and establishes a ≤600 length as a *guideline* [IDO, Table 5-4-1]. It is apparent however, that the ≤600 length is not an unyielding maximum number as Appellants seem to suggest. Table 5-4-1 in the IDO is only a guideline summary “for reference only” and the Development Review Manual (DPM) criteria for lengths “shall prevail” in cases of conflict [See IDO § 5-4(E)(3)(a)].

In its decision, the EPC set many conditions of approval, and it delegated to the DRB several well-defined tasks related to many technical site plan issues. In doing so however, the EPC failed to explicitly delegate to the DRB review of the block length questions regarding length under the DPM. It cannot be disputed that the DRB is the appropriate body to address DPM matters regarding block length. The EPC did not address block length in its review of the site plan nor did it expressly delegate this review to the DRB.

Arguably, however, as City Planning Staff have argued, the EPC did delegate *all* technical issues to the DRB. However, it is not clearly apparent in the official decision of the EPC that this includes block lengths. Thus, I find that the EPC erred by not explicitly delegating the issue of block length to the DRB. However, a remand for this single issue is not recommended or even necessary. In the IDO, the LUHO has authority to recommend that the City Council “modify the lower decision to bring it into compliance with the standards and criteria of the IDO” [IDO, § 14-16-6-4(U)(3)(d)5]. I therefore respectfully recommend that the City Council modify the EPC’s decision to include an additional condition requiring the DRB to evaluate block length under the DPM standards.

**F. The Site Plan Does Not Violate the IDO requirements for its Designated Area of Consistency**

Next, Appellants allege that because the application site currently has two existing “platted, taxed assessed lots” and residential dwellings, IDO, § 5-1(C)(2)(b) is applicable to the site and the EPC erred because it failed to apply this section of the IDO. Section 5-1(C)(2)(b) states in relevant part:

In any Residential zone district in an Area of Consistency, the minimum and maximum lot sizes for construction of new low density residential development *shall be based* on the size of the Bernalillo County Tax Assessor’s lot, or a combination of adjacent Tax Assessor’s lots, in the block where the new low-density residential development is to be constructed, rather than on the size of the individual subdivision lots shown on the existing subdivision plat. (Emphasis added.)

However, this section is inapplicable to the application site because the paragraph that precedes this paragraph in the IDO, expressly exempts cluster development subdivision types from the contextual lot size requirements of § 5-1(C)(2)(b) [See § 5-1(C)(2)(a)]. Thus, the EPC did not err.

Regarding the designated Area of Consistency, Appellants also allege that because the application site is within a designated area of consistency, the proposed residential developments, must, but do not, reinforce the character and intensity of existing development in the area as required by IDO, § 6-7(F)(3)(b). However, I find that there exists substantial evidence in the record to support the EPC’s finding that the proposed densities and residential uses in the application site are homogenous with the uses and the densities of the adjacent subdivisions around the application site. There is unchallenged substantial evidence in the record to support this finding. City Planner Somerfeldt did the comparable analysis and found:

552 The request for a site zoned R-A is consistent with Goal 4.1, Policy 4.1.1  
553 and Policy 4.1.2. To the west lies the R-1 B zone with a minimum lot size  
554 of 5,000 square feet. To the north lies the R-1 C zone with a minimum lot  
555 size of 7,000 square feet. To the south and the northeast lies the R-ID zone  
556 with a minimum lot size of 10,000 square feet. The subject project's lot  
557 sizes range from approximately 5,500 square feet to over 12,000 square  
558 feet [R. 101].

559  
560 The EPC adopted these findings in its decision and Appellants did not dispute them in these  
561 consolidated appeals. Because the uses are the same (residential), and the densities are similar  
562 to the adjacent subdivisions' densities, the proposed developments in the site plan do not  
563 conflict with the established character or intensities in the areas. Appellants have not put forth  
564 any evidence that would tend to show otherwise. Thus, the EPC did not err in evaluating the  
565 site plan against the backdrop of the designated Area of Consistency requirements.

566  
567 **G. Alleged OMA and Due Process Violations at the EPC Hearing.**

568 As for the OMA, Appellants claim that the EPC defied the OMA when it “closed” its  
569 public hearing to “apparently...facilitate discussions among Commissioners” outside of the  
570 public’s eye [Appl. Arg., p. 10]. The Open Meetings Act is a State law designed generally to  
571 keep meetings by decision-making bodies open to the public. Appellants are correct that the  
572 EPC is a “public body” and that the OMA applies to the EPC. However, after reviewing the  
573 record transcript of the March 14, 2019 public hearing, I find that the EPC did not “close” the  
574 hearing to meet privately about the application as Appellants suggest. I also find that without  
575 guesswork, there is insufficient evidence in the record that EPC members had an off the record  
576 discussion regarding the site plan.

577 The record transcript establishes that the EPC took a total of three “breaks” during the

578 extended hearing on the application [R. 401]. And although one can speculate, as do  
579 Appellants, that the purpose of the break was to have an off record “discussion” about the  
580 application, speculation is not the standard to support an appeal. It is substantial evidence,  
581 and the words used by Commissioner McCoy just before the questionable break was taken  
582 requires conjecture to establish an impermissible OMA violation.

583 Appellants do not contend that the transcribed minutes are inaccurate. Commissioner  
584 McCoy stated the following at the public hearing:

585 Commissioner Hudson earlier made a request that we might have a brief  
586 period of time to get our notes together and have a brief discussion before  
587 all of us weighed in finally. And with your very kind remembrance, I  
588 was trying to get a word in. I’d wait until then if that were the will of the  
589 commission [R. 401].

590  
591 Then Chairman Serrano announced that a “break” would be taken [R. 401]. Without  
592 conjecture, this evidence is insufficient to establish that the meeting was closed for an off-the-  
593 record discussion. Commissioner McCoy’s comment can have multiple implications and  
594 meanings, and without additional evidence, it would be inappropriate to engage in speculation  
595 as to intent, and as to what genuinely occurred on the break. I note also that when the EPC  
596 reconvened the meeting, there is nothing in the record that could support Appellants’  
597 allegation.

598 Regarding alleged due process violations, Appellants contend that the EPC Chair did  
599 not allow reasonable cross-examination at the hearing, that representatives of neighborhood  
600 associations were not allowed adequate time to speak under the EPC’s own rules of conduct,  
601 and that these alleged transgressions amount to due process violations. Provided that  
602 fundamental principles of justice and procedural due process are followed, the EPC as a quasi-

judicial body is allowed more flexibility than courts in the judicial branch are allowed with rules that impact due process.

After review of the record, I find that the EPC Chair did fail to follow its own Rules of Conduct regarding the time the Chair is required to give neighborhood association representatives to speak at hearings. In short, EPC Rule B.5, expressly requires that the Chair allow neighborhood representatives five-minutes to speak at hearings. During the March 14, 2019 hearing on the application, it is undisputed that the Chair accorded less than five-minutes to four neighborhood representatives who spoke at the hearing [R. 357, 375, 376, and 377]. When the association representatives protested, the Chair evaded the issue and in one case during the speaker's protest to the two-minute time decision, the Chair advised the speaker that "the clock is running" [R. 357]. Appellants seek a remand for the transgressions.

In reviewing the record, however, I find that the EPC did give advance notice that all speakers would be allowed two-minutes [R. 333]. Perhaps, it was because of the number of interested people that showed up at the hearing that caused the Chair to modify the rules. That is unclear from the record. What is clear is that the EPC hearing in this matter was inordinately long, and the EPC heard from a total of 50 speakers at the hearing. The totality of the record demonstrates that the opponents of the project made their criticisms known. And although the EPC truncated some speakers' time, a remand will not change the outcome just because four speakers did not have all the time they needed to speak. Despite Appellants' arguments, I find that minimal due process was satisfied. I also find that under the circumstances, the EPC balanced due process with making sure the hearing progressed efficiently. In my earnest opinion, a remand will not substantively change the outcome or decision of the EPC. If the

625 EPC had truncated speaker time further and did not give the public advance notice of the  
626 change in rules, a remand perhaps would be necessary. But that was not the case here.  
627 Therefore, a remand is not recommended.

628         Next, Appellants claim that the EPC Chair refused “reasonable” cross-examination. I  
629 respectfully disagree. Cross-examination was allowed only by written questions submitted to  
630 the Chair. Under the circumstances, because there were 50 speakers total, and because the  
631 hearing was very long, the Chair exercised his authority over the hearing in a manner that did  
632 not substantially affect the due process rights of the public or the parties. As with speaking  
633 time, the Chair of the EPC has authority to establish an orderly manner of cross-examination  
634 that is efficient and reasonable. The record shows that the Chair gave advance notice to the  
635 public of how cross-examination would proceed [R. 333]. In fact, the Chair gave advanced  
636 notice of the written cross-examination process a second time just before the second break was  
637 taken [R. 381]. I find that those who engaged in cross-examination had adequate time to write  
638 questions and submit them to the Chair. Although the Chair “vetted” questions before reading  
639 the questions on the record, in comparing the questions to the transcript, it appears the vetting  
640 was primarily to weed out duplicate questions [R. 381-385 and Supp. R. 584-595].<sup>7</sup> I find that  
641 under the circumstances, reasonable cross-examination was allowed.

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7. Notably, the Appeal record did not include the written cross-examination questions. The Appellants supplemented the record with the questions [Supp. R. 584-595].

646 **H. Alleged OMA Violations and Other Allegation Having to Do with City Staff**  
647 **Meetings and Use of Discretion.**

648 *i. Decision-Making Authority of City Staff*  
649

650 Appellants next allege that the EPC delegated “unbridled” discretion to the City  
651 Planning Staff to negotiate deviations and requirements under the IDO in violation of New  
652 Mexico law. They further claim that Staff made technical decisions regarding the IDO for the  
653 EPC and that the discretion that is wielded by Staff at the EPC hearing circumvented the EPC’s  
654 authority to be the final decision-maker. Appellants also generally assert that the EPC must  
655 not allow the City Staff to accept incomplete applications, make decisions regarding  
656 interpretation of the IDO, and negotiate deviations and waivers of requirements of the IDO.  
657 Appellants’ arguments assume too much under the law and under the facts in the record.

658 We must not lose sight that in an appeal, it is not the discretion of the City Staff that  
659 is appealable in this matter. The focus necessarily must remain on the final decision-maker  
660 [IDO, § 6-4(M)(4)(b)].<sup>8</sup> In this matter it was the EPC who was the final decision-maker prior  
661 to the appeals.

662 There are, however, other more substantive matters in which City Staff are expressly  
663 authorized to decide on, and which are appealable [See IDO, Part 14-16-6, Table 6-1-1].  
664 Notwithstanding, in this matter, there are no facts in the record that can support that City Staff  
665 exercised its substantive decision-making authority under the appealable matters described in  
666 Table 6-1-1 of the IDO. Thus, in these appeals, Appellants are challenging Planning Staff’s  
667 day-to-day type of decision-making responsibilities.

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8. In some appeals, City Staff decisions are appealable. [See IDO, § 6-4(U)(1)(a) and (b).] The record in these appeals does not support that there were City Staff appealable decisions.



Staffs' ministerial functions encompassing discretionary decision-making authority are not appealable under the IDO. These non-appealable decisions and functions concern the day-to-day administration of the Planning Department Staff under the IDO [§ 6-2(B)(1)]. The IDO does not establish a right to appeal decisions Staff make during their day-to-day performance of their responsibilities in the review of land use applications. Moreover, Appellants have not demonstrated such a right exists for these functions.

Regarding these functions, Appellants claim first that the EPC erred because the City Staff accepted an incomplete application from Consensus Planning in July 2018. Although the decision to accept a site plan is not appealable, the issue is moot for another reason: The EPC did not decide on the first site plan that was accepted by Planning Staff in July 2018. The evidence in the record shows that the application and site plan evolved over many months, and the EPC had in its record the various site plans, but it ultimately decided on the final site plan that was submitted in early March 2019.

Appellants' other claims regarding City Staff exercising power over waivers and deviations of the IDO requirements are unsupported with factual support from Appellants. There is no evidence that City Planning Staff waived IDO requirements. There is evidence that City Staff advised the EPC regarding IDO requirements and made recommendations regarding such requirements under the IDO. However, in doing so, the evidence shows that Staff also clearly advised the EPC that the ultimate decision regarding IDO requirements remained with the EPC [R. 303, 345, 385, 388, 389, 390]. Thus, I find that the evidence supports that at the EPC hearing, Planning Staff only made "recommendations" to the EPC regarding substantive IDO requirements. The fact that City Planning Staff obviously have

influence with the EPC and the EPC obviously relies on the professional training and guidance of City Planning Staff is not evidence of error or abuse of discretion.

*ii. Staff Meetings with Applicants Are Not OMA Meetings.*

Appellants also claim that City Staff violated the Open Meetings Act when they engaged in “closed meetings” regarding the Gamma Development, LLC application. The basis of their argument is that City Planning Staff act as a “policy making body” in these meeting and in the review processes, presumably before the application gets to the EPC. Although Appellants’ argument is very creative and nuanced, the facts, the OMA, and the IDO do not support Appellants’ underlying characterization of City Staff’s involvement.

In support of their argument, Appellants first cite to § 6-2(B)(1) and particularly § 6-2(B)(1)(b) and (1)(c) regarding the “overall responsibilities of the Planning Director and the ZEO respectively.”<sup>9</sup> Section § 6-2(B)(1)(1) b) states in full:

The Planning Director has overall responsibility for the decisions of City Planning Department staff and may delegate authority as necessary to any staff member.

And, the relevant section of 6-2(B)(1)(c) states:

1. The Zoning Enforcement Officer (ZEO) is a member of the City Planning Department staff and has authority to interpret this IDO pursuant to Subsection 14-16-6-4(A) (Interpretation).
2. The ZEO has responsibility for making formal determinations as to how this IDO applies to specific situations, proposed development projects, and parcels of land.

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9. Appellants also cite to the ZEO’s authority regarding issuing Declaratory Rulings, but this section is not applicable principally because it is undisputed that an application for an official declaratory ruling was not submitted to the City in this matter.

Appellants claim that these provisions in the IDO demonstrate that Planning Staff are making decisions as a policy-making body does under the OMA, subjecting them to the OMA. I fail to see how these provisions lend support to Appellants' contentions. As stated above, unless Appellants can show that Staff exercised their decision-making authority under one of the appealable functions shown in Table 6-1-1 of the IDO, the focus is on the EPC. And, unless Appellants can demonstrate that Staff, in fact, usurped the decision-making authority of the EPC, Staff's day-to-day decisions and meetings with the applicants' planners cannot be considered policy-making decisions that were/ are binding on the EPC.<sup>10</sup> And if such decisions are not binding on the EPC, Staff cannot qualify as a policy-making body under the OMA.

Again, there are circumstances in which Staff decisions can be considered policymaking, but under the circumstances and facts in these appeals, there is no evidence to support that Staff exercised authority to an extent that bound or usurped the EPC's authority. Although Appellants generally claim that City Planning Staff make "critical decisions" regarding the application, without any specificity as to what those decision were, I can find no facts or decisions made by City Staff that bound the EPC in any manner. And, Appellants have not put forth specific facts in the record to support their contentions.

There are facts in the record that demonstrates City Staff were fully engaged in the process as factfinders and as advisors to the EPC. As described in the history above, the Supplemental Record of email communications show that Planning Staff were in constant communication with the applicant regarding the application and deficiencies thereof, and

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10. I note for the City Council, that the Attorney General's Eighth Edition *Open Meetings Act Compliance Guide* includes three fact pattern examples to show how fact-finding, advisory functions of staff are distinguishable from functions that are subject to the OMA. See Examples 6, 7, and 11 therein.

736 regarding requirements of the IDO. And, again, the EPC's reliance on the expertise and  
737 recommendations of the City Planning Staff is not in of itself evidence of a usurpation of the  
738 EPC's authority.

739 In addition, I find nothing inappropriate with the meetings between the applicant and  
740 City Staff. By all appearances in the record, those meeting had everything to do with fact-  
741 finding. The meetings were not subject to the OMA because there is no evidence offered or in  
742 the record that such meetings bound the EPC's authority in any manner. How can Planning  
743 Staff administer their day-to-day responsibilities, review, and respond to inquiries from  
744 applicants and from the public without sometimes meeting with developers and or the public?  
745 Certainly, if a meeting occurred for some illicit purpose, then such a meeting can cross the  
746 boundary of lawfulness, but that is not alleged or supported by the facts. In general, meetings  
747 with developers and with the general public to discuss IDO requirements cannot be  
748 legitimately characterized as OMA violations.

749  
750 **IV. SUMMARY OF FINDINGS AND RECOMMENDATION**

751 In conclusion, except for block size, I find that the EPC did not error in its decisions  
752 regarding the site plan. Regarding block size, I recommend that the City Council modify the  
753 EPC's March 14, 2019 Official Notification of Decision, and add a new condition that requires  
754 the DRB, during its eventual review of the site plan, to also review and decide on the question  
755 whether the blocks satisfy the DPM.

756 Except for the modification of the EPC's decision stated in the preceding paragraph, I  
757 further recommend that Appellants' appeals should be denied. The record and decision of the

758 EPC is supported with substantial evidence. The EPC did not abuse its discretion, and it did not  
759 misapply or misinterpret the facts or the IDO requirements. The numerous conditions of  
760 approval, especially Condition Number 5, set by the EPC are essential to these findings.

761 The record shows that to appropriately satisfy the EPC conditions, the EPC and the  
762 applicant understood at the EPC hearing that a subsequent hearing before the EPC may be  
763 necessary if the site plan changes substantially. The IDO includes clear language that allows  
764 the Planning Director to determine what qualifies as a substantial (Major) change, necessitating  
765 another EPC hearing.



Steven M. Chavez, Esq.  
Land Use Hearing Officer

May 31, 2019

Copies to:

Appellants,  
Party Opponents,  
City Staff