



Environmental Planning Commission

***Agenda Number:
Project #:AC-20-6,
PR-2019-002811, VA-2019-00288,
AC-19-18
Hearing Date: June 11, 2020***

Staff Report

<i>Agent</i>	Richard Chavez
<i>Applicant</i>	Richard Chavez
<i>Request</i>	Remand from the LUHO to the EPC
<i>Legal Description</i>	Lots 7-10 Block 44 Perea Addition,
<i>Location</i>	NEC of 15 th St. NW and Granite Ave. NW,
<i>Size</i>	.32 acres
<i>Existing Zoning</i>	R-1A,
<i>Proposed Zoning</i>	R-1A,

Staff Recommendation

Affirm EPC DENIAL of the appeal, thereby affirming the DRB denial of a sidewalk variance.
Project # 2018-002811, VA 2019-00288
AC-20-6, AC-19-18
based on the Findings beginning on p. 14.

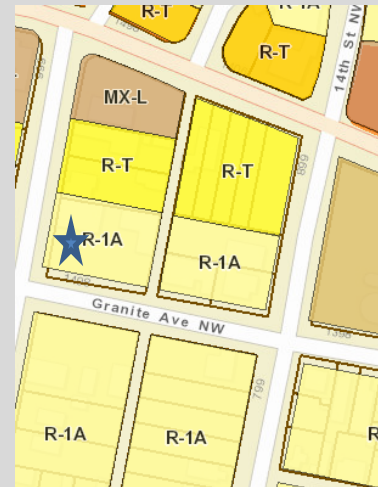
Staff Planner

Maggie Gould, Planning Manager

Summary of Analysis

This request for a Sidewalk Variance was denied by the DRB on October 30, 2019. The DRB's decision to deny a sidewalk variance was based on analysis that the installation of sidewalk at this location would provide a 'public benefit' (DPM criteria). The EPC heard the appeal of the DRB decision on February 13, 2020 and voted to deny the appeal. The applicant appealed the EPC's decision and the appeal was heard by the LUHO on April 30, 2020. The LUHO chose to remand the case back to the EPC to address: provision of findings; the authority of the DRB to require sidewalks for this type of request; and to consider if the lack of sidewalk is a non-conforming site feature and, if it is, if a lot consolidation would expand the nonconformity.

The information in this staff report and the updated findings address these issues. Staff recommends that the EPC affirm its original decision and deny the appeal.



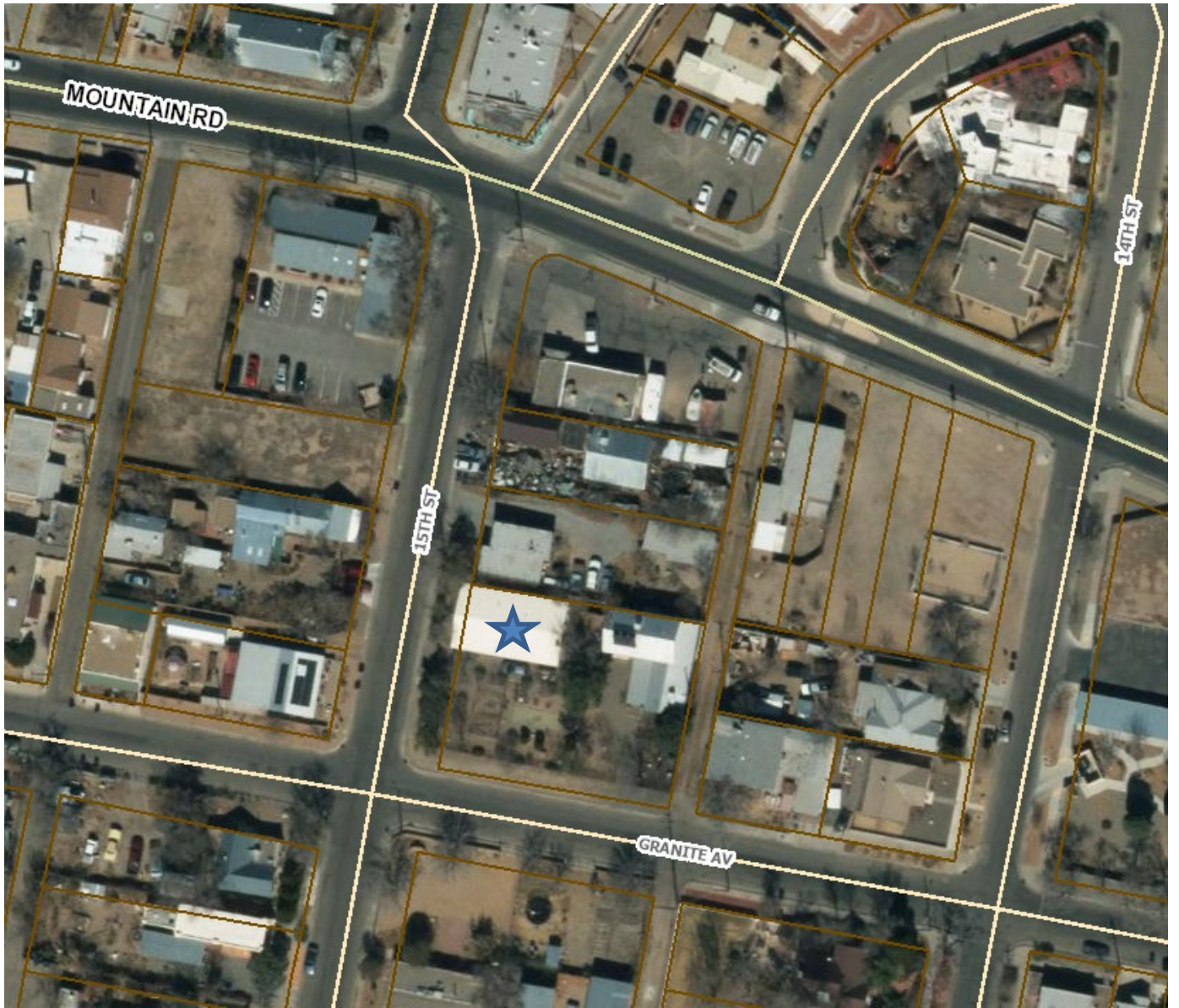


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I. INTRODUCTION

Surrounding zoning, plan designations, and land uses:

	<i>Zoning</i>	<i>Comprehensive Plan Area</i>	<i>Land Use</i>
<i>Site</i>	R1-A	Consistency	Residential
<i>North</i>	R-T	”	”
<i>South</i>	R-1A	”	”
<i>East</i>	R-1A	”	”
<i>West</i>	R-1A, R-T	”	”

Request

This appeal is being heard by the EPC because the Land Use Hearing Officer (LUHO) remanded the appeal to the EPC to address three main concerns regarding their February 13, 2020 decision.

EPC Role

The EPC is tasked with addressing the specific issues stated by the LUHO in his remand decision. The EPC does not need to re-hear the entire case, only the issues brought up by the remand instructions.

Context

The subject site is located within the Downtown Neighborhood Area, Character Protection Overlay 3.

The area is near parks, museums, historic sites, shopping, restaurants and a bike boulevard (Mountain road). The area experiences significant pedestrian traffic.

The site contains two houses on four lots. The original house has a driveway on 15th Street and includes the address of 906 15th Street. This home straddles two lots. The second house has a building permit from 2004 and appears to straddle three lots. There is a driveway to this house in use on Granite Avenue, but it is unclear if the driveway was permitted. One house per lot is allowed in the underlying zoning.

History

This request was originally heard by the Development Review Board (DRB) at multiple meetings in 2019, with final DRB decision on October 30, 2019. The decision was appealed and sent to the Land Use Hearing Officer. The LUHO and City Council became aware that the DPM makes the EPC the first appeal body for a sidewalk variance and, therefore, sent the case to the EPC to address the correct appeal procedure. On February 13, 2020, the EPC voted to deny the appeal. That decision was appealed and came before the LUHO on April 30, 2020. The LUHO decided to remand the appeal to the EPC.

II. REMAND ISSUES

The LUHO tasked the EPC with three main issues to address:

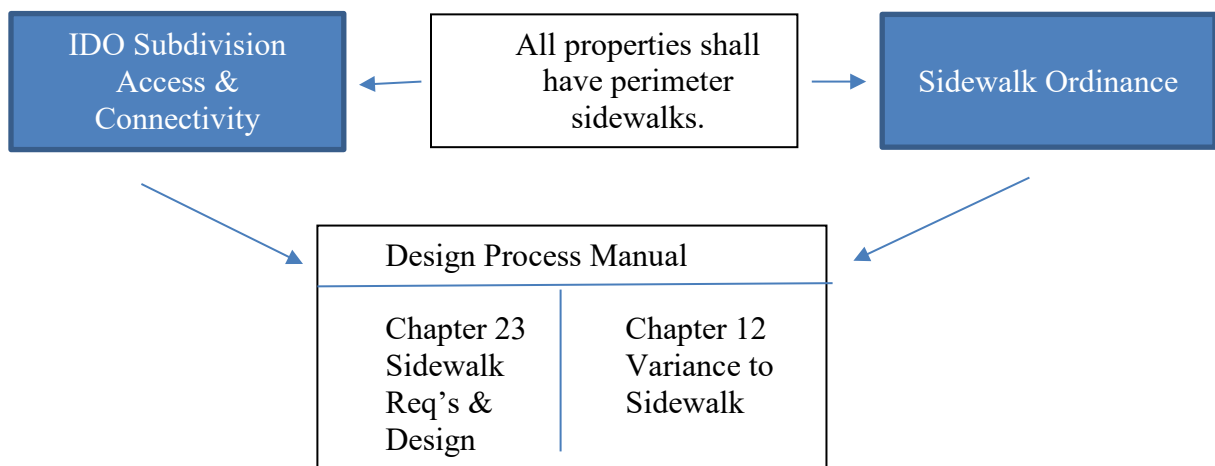
1. Provide substantive findings for the EPC decision;
2. Determine whether or not the DRB can require the applicant to construct the sidewalks; and
3. Determine if the existing lack of sidewalks is a non-conforming site feature subject to the non-conformance section of the IDO, and if it is, would a lot consolidation expand the nonconformity.

1. Provide Substantive Findings

During the February 13, 2020 EPC hearing, the EPC discussed the sidewalk variance request at length. The Sidewalk Ordinance, the DPM requirements, and IDO sidewalk requirements were all thoroughly discussed. The unfamiliar process of an appeal of the sidewalk variance before the EPC contributed to staff and EPC overlooking the need to approve findings to accompany the decision. This staff report includes findings for the EPC’s consideration and use.

2. The DRB has Authority to Require Sidewalks for a Replat (Re-subdivision) of Land

The IDO Section 14-16-5-3(D)(1)(a) (approved 2018) and the Sidewalk Ordinance, City Code of Ordinances, § 6-5-5-3 (approved 1983), require a property owner to provide perimeter sidewalks for pedestrian circulation. Each Ordinance references the Design Process Manual for sidewalk design standards (Chapter 23) and criteria for review of a variance to sidewalk installation (Chapter 12). This application for a minor subdivision—the main request is to re-divide land in order to sell one house—triggers the requirement in the IDO to provide a perimeter sidewalk.

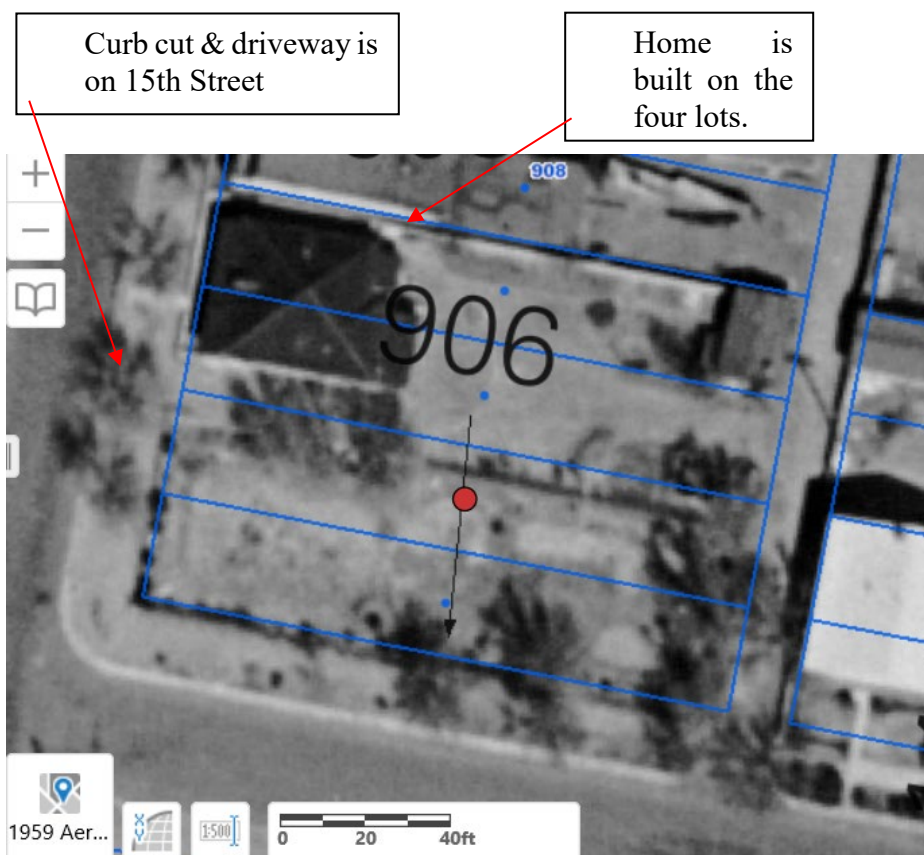


- a. The application for a Subdivision is subject to IDO Subdivision and Access and Connectivity Provisions.

The request to re-divide land at 906 15th Street NW triggers the requirements of Access and Connectivity (14-16-5-3) and, specifically, Pedestrian Circulation requirements for a perimeter sidewalk (14-16-5-3(D)(1)(a)). The applicant has four lots with lot lines running east and west. The lot lines cross the two houses on the property. The application meets the IDO definition of a subdivision for which the subdivision provisions of the IDO are applicable. The applicant wants to re-divide or replat so that there are two parcels divided by a lot line oriented north and south.

Timeline of 906 15th Street:

Pre 1983



Property from AGIS 1959 Aerial Photo.

1983

Sidewalk Ordinance goes into effect.
The lack of sidewalk for the property becomes a nonconforming site feature.

2004

Second home is built on the four lots.
Sidewalks are not installed in violation of Sidewalk Ordinance.
Lack of sidewalk and driveway pad are non-compliant site features.

Second home is built
in 2004



2014 Aer... WKID: 4326 Lat/Long ▲ Lat: 35.09604° N
Property from AGIS 2014 aerial photo
with lot lines in blue.

Unclear how curb cut on
Granite came about.

2019

Current Requests:

- (1) Re-divide land to facilitate property sale.
- (2) Variance request to not install sidewalk as sidewalk requirement is triggered by IDO Subdivision-Access and Connectivity.

- (1) The application meets the IDO definitions of subdivide and subdivision triggering the requirements for a subdivision of land. The applicant is re-dividing land into two parts for future transfer of ownership.

(a) **“Subdivide**

To divide or re-divide land into 2 or more parts by whatever means to facilitate the present or future conveyance or other transfer of incidents of ownership or use.” (IDO, § 7-1, Definitions, p. 496)

The applicant had his realtor, Cathy Olson, speak on his behalf at the first DRB meeting of September 11, 2019. Ms. Olson stated:

“I am the realtor for Richard Chavez.He is requesting a, the request is to replat 4 lots into 2 lots and a sidewalk waiver for today’s request...would like to go ahead and split the property as there are now 2 residences on the corner. So in order for him to live in one and sell the other this will be required to get that done...” (Record AC-19-18, pp. 134-5)

The applicant is re-dividing land for future conveyance or other incidents of ownership or use and therefore triggers the requirements of a subdivision of land, including sidewalks.

(b) **“Subdivision**

1. The process of subdividing land into 2 or more lots or parcels for purposes of sale or development.

2. The parcel of land subdivided.” (IDO, § 7-1, Definitions, p. 496)

- (2) When the application is for a subdivision of land that creates fewer than 10 lots, the IDO Section 14-16-6-6(I)(a)(1) identifies it as a ‘Subdivision of Land-Minor’.¹
- (3) The IDO Section 14-16-6-6(I)(3) ‘Review and Decision Criteria’ for a Subdivision of Land-Minor require compliance with the IDO, DPM, and other adopted City regulations:

6-6(I)(3) **Review and Decision Criteria**

An application for a Subdivision of Land – Minor shall be approved if it meets all of the following criteria:

¹ IDO 14-16-6-6(I)(a) Subdivision of Land – Minor. Applicability. “Approval of a subdivision of land within the City that: 1. Creates 10 or fewer lots on any single lot that has been recorded as a single lot for at least 3 years previously.”

- 6-6(I)(3)(a) All applicable provisions of this IDO, the DPM, other adopted City regulations, and any conditions specifically applied to development of the property in a prior permit or approval affecting the property.
- 6-6(I)(3)(b) Any Variances granted to development standards applicable to the subdivision in Section 14-16-5-3 (Access and Connectivity) or Section 14-16-5-4 (Subdivision of Land) and any deviations to other IDO standards granted within the thresholds established by Section 14-16-6-4(O) (Deviations) are documented in the application.

- (a) The IDO Access and Connectivity requires a perimeter sidewalk per IDO 14-16-5-3(D)(1):

Sidewalks in Residential Development

- (a) Perimeter sidewalks shall be provided in accordance with the DPM...
- b. The application for a Subdivision is also subject to the Sidewalk Ordinance which requires a perimeter sidewalk.

The ‘Review and Decision Criteria’ for a Subdivision states that the application is subject to ‘other adopted City regulations.’ The Sidewalk Ordinance, § 6-5-5-3 requires all properties to have a perimeter sidewalk:

Pedestrian Sidewalk, Drive Pad, And Curb and Gutter required:

All properties within the city shall have sidewalk, drive pad, curb ramps, curb and gutter in accordance with the standards set forth by §§6-5-5-1 et seq., unless a variance from these standards is allowed through the procedures established by §§6-5-5-1 et seq. or unless such sidewalks, curb ramps, drive pads, curbs and gutters were constructed under standards previously in force. Such previously constructed improvements shall be considered non-conforming and as such may be repaired and maintained, however, if and when replacement becomes necessary, it shall be replaced according to the current standards or variance procedures of §§6-5-5-1 et seq. Compliance with the provisions of §§6-5-5-1 et seq. shall be the responsibility of the property owner. The cost of installing sidewalk shall be borne by the abutting property. On property in residential zones where only houses and townhouses are allowed, and where the lot abuts public streets at both its front and the rear lot lines, the property does not bear the cost of constructing missing sidewalk abutting the rear lot line where the property does not have the legal right to vehicular access from that street; this exception applies only to lots platted before June 29, 1983 (the effective date of the city's Subdivision Ordinance, set forth in § 14-16-5-4). ('74 Code, §8-6-3) (Ord. 219- 1972; Am. Ord. 39-1981; Am. Ord. 77-1989; Am. Ord. 2017-025)

- c. The application for a Subdivision is subject to the Development Process Manual (DPM) which requires a perimeter sidewalk on a local street.

The DPM cross references the Sidewalk Ordinance in requiring a perimeter sidewalk in Chapter 23, Section 5:

Section 5. MISCELLANEOUS STREET DESIGN CRITERIA

A. Sidewalks

Refer to Tables 23.2.1.A and 23.2.1.B for detailed information about sidewalk widths and location.

Sidewalks must be provided for all properties within the City of Albuquerque as required by the Sidewalk Ordinance. The fundamental requirements governing sidewalk design are established by this ordinance. Sidewalk designs must provide for the mobility, safety and comfort of the pedestrian and provide for adequate pedestrian access to abutting property. Pertinent sidewalk design criteria are collected herein for the convenience of the designer.

3. The property appears to have nonconforming site features that are now non-compliant site features.

The LUHO remand asks the EPC to address:

...the threshold question Appellant raised in his appeal--whether the lack of sidewalks on a fully developed site is a “non-conforming site feature” under the IDO. Thus, the EPC must also determine if the condition of the subject site (a developed site without sidewalks) is (or is not) an existing non-conforming site feature under the IDO. If the EPC concludes that the lack of sidewalks is a non-conforming site feature as contemplated by the IDO, the EPC must also decide whether the lot consolidation is (or is not) an expansion of the nonconforming site feature under the IDO. (LUHO Recommendation, AC 20-6, lines 43-52)

- a. The lack of sidewalk for the original structure built prior to 1983 was a nonconforming site feature in the past.

The IDO, page 478, defines nonconformity:

A structure, use, lot, sign, or site feature that does not conform to applicable zoning but that did conform to applicable zoning in effect at the time it was built or developed.

The curb and gutter with no sidewalk that were constructed at 906 15th Street under previous standards would be nonconforming by 1983 when the Sidewalk Ordinance went into effect. The date of construction of the original home is unclear, but was before 1983. The driveway for this house has a curb cut on 15th Street. The house is not contained

within one platted lot. The lack of sidewalk for this structure became a nonconforming site feature in 1983.

The Sidewalk Ordinance, Section 6-5-5-3 also identifies the lack of a sidewalk as non-conforming:

...unless such sidewalks, curb ramps, drive pads, curbs and gutters were constructed under standards previously in force. Such previously constructed improvements shall be considered non-conforming.

The lack of sidewalk, or nonconforming site feature, could legally continue until new development activity occurred on the site. New activity occurred in 2004.

- b. The lack of sidewalks is no longer a non-conforming site feature, rather it is a non-compliant site feature because a sidewalk should have been constructed in 2004 when a second structure was permitted.

The second house on the property was built in 2004 (see attachments for record of building permit).² When a building permit for construction was sought, the lots should have been re-platted (a structure cannot cross lot lines) and a perimeter sidewalk should have been built per the Sidewalk Ordinance. Staff researched the building permit and found a permit was issued for the house in 2004, but staff could not find any specifics regarding the permit pertaining to sidewalks or re-plat of the lots. Also, staff did not find a permit for the curb cut on Granite Avenue which leads to the driveway for the second house. The City requires the applicant to provide evidence of that permit or obtain a proper permit for the work already done.

- c. Since the property's lack of a sidewalk is a non-compliant site feature, the nonconforming provisions of the IDO do not apply to the property.

In 2004, the entire property was subject to the rules and regulations in place at that time and should have been brought up to date with current standards, including sidewalk per the Sidewalk Ordinance. The lack of sidewalk on the property transformed into a non-compliant site feature at that time.

In addition to this non-compliance issue, the current request to replat the property to allow for the sale of one of the structures also fully triggers the requirements for all IDO, DPM, and other City regulations (Sidewalk Ordinance) to be applied to the property. (See previous discussion.) Therefore, the DRB had the authority to require the sidewalks in conjunction with this replat request. The applicant acknowledged that authority by submitting a separate application for a sidewalk variance. That variance was analyzed in the context of the property and the surrounding neighborhood. The request did not meet

² The site was zoned SU-2 TH under the 1976 Downtown Neighborhoods Sector Development Plan. This zone referenced the R-T zone which did not limit houses to one per lot. The existing houses are non-conforming structures and uses in the current R-1A IDO Zoning District.

the criteria required to allow no sidewalk installation, therefore the DRB denied the variance.

- d. The question of ‘lot consolidation’ triggering an expansion of a nonconforming site feature must be answered in context. The question is not consistent with the context of this application.

The LUHO asked the EPC to consider: if no sidewalk is an existing non-conforming site feature under IDO, then the EPC must decide whether lot consolidation is or is not an expansion of the nonconforming site feature of IDO. (See LUHO Recommendation, AC 20-6, lines 43-52)

The first part of the question was answered above in discussing how the 2004 construction at 906 15th Street transformed the lack of sidewalk to be *non-compliant* instead of *nonconforming*. Therefore, the LUHO question is moot.

The second part of the question regards ‘lot consolidation.’ The application at 906 15th Street is not a ‘lot consolidation’ in the strictest sense because the request is more precisely a re-dividing of the land: the lot lines are changing from a north-south orientation to an east-west orientation. If no sidewalk is required with this replat request and the older home is sold to a new owner, that owner would be buying the corner where the lack of sidewalk has the longest linear feet and includes frontage on both 15th and Granite Streets.

The third part of the questions regards ‘expansion’ of the ‘lack’ of a *site feature* and if the ‘lack’ of something could be an ‘expansion.’

The IDO states that a nonconforming site feature cannot be expanded:

IDO Section 14-6-6(C)

Expansion of Nonconforming Use or Structure; (1) Applicability

...Nonconforming site features may not be expanded.

This IDO Section does not seem to anticipate that an ‘expansion’ would apply to the ‘lack’ of a site feature.

It is difficult to answer the LUHO question because the elements of the questions are not the clear context of the application at 906 15th Street. The most relevant fact is that the lack of sidewalk is non-compliant and, therefore, nonconforming provisions of the IDO do not apply.

It is important to note, that if the City were to approve a variance to the sidewalk requirements at 906 15th Street with the replat action, then the non-compliant lack of sidewalk would become an approved variance for all future development activity on the property.

4. The LUHO stated that he did not receive a complete copy of the record.

The LUHO stated the record was not complete. Planning Staff conveyed the record for AC-20-6 to the Council staff. Clear communication was not given to identify that AC-19-18 was to accompany the Record of AC-20-6. Both AC-20-6 and AC-19-18 are the same appeal. Council staff was not aware that they needed to provide both records to the LUHO. This error will be corrected for all future proceedings.

III. AGENCY & NEIGHBORHOOD CONCERNS

Reviewing Agencies

The request was reviewed by all members of the DRB and was denied.

Neighborhood/Public

Staff did not receive any comments from members of the public at any point during this process.

IV. CONCLUSION

The EPC acted within its authority, although substantive findings should have been provided. This lack of substantive findings has been corrected with this remand staff report.

The DRB did not act fraudulently, arbitrarily, or capriciously. The DRB applied the requirements of the IDO, DPM, and Sidewalk Ordinance and the decision was supported by substantial evidence.

Staff recommends that the EPC affirm the original EPC decision and deny the appeal, based on the findings provided and the information in the record.

Findings, AC-20-6 (2019-002811, June 11, 2020)

1. This is a remand from the Land Use Hearing Officer to the Environmental Planning Commission.
2. The LUHO tasks the EPC with three main issues to address: the lack of substantive findings; whether or not the DRB can require the applicant to construct the sidewalks; and if the existing lack of sidewalks is a non-conforming site feature subject to the non-conformance section of the IDO. These issues are addressed as demonstrated by the following findings.
3. These findings are substantive and provide clear basis for the EPC decision pursuant to IDO §6-4(U)(3)(c)4.
4. The Applicant's request for a variance to the sidewalk standards accompany an application for a Subdivision – Minor for a an approximately 0.32-acre site at 15th and Granite NW.
5. IDO §6-6(I)(a) Review and Decision Criteria states that a Subdivision – Minor shall be approved if it meets “[a]ll applicable provisions of this IDO, the DPM, other adopted City regulations, and any conditions specifically applied to development of the property in a prior permit or approval affecting the property.” IDO §6-6(I)(a)(3). The Sidewalk Ordinance 6-5-5-3 is an adopted City regulation.
6. The DRB also has the authority to require sidewalks in association with any action on a property that comes before the DRB per the Sidewalk Ordinance, §6-5-5-3, which states that all properties within the city shall have sidewalk, drive pad, curb ramps and curb and gutter unless a variance from these standards is obtained. DRB denied the variance request to the sidewalk standards, thereby requiring a sidewalk.
7. The Development Process Manual (DPM) references the Sidewalk Ordinance and sets out the variance procedure for installation of a sidewalk. The review criteria regarding allowing no sidewalk installation in the DPM and contained in IDO (pre May 2019) are substantially similar. The Transportation Engineer stated that both sets of criteria were used to determine that the request did not meet the variance/waiver criteria. *See AC-19-18, p. 9.*
8. The R-1A zone allows one house per lot. The current platting of the site has two houses on portions of four lots. The second house on the property was built in 2004; the underlying zoning at the time a, SU-2 TH did not limit houses to one per lot.
9. The IDO Section 14-16-1-4 (A), Applicability, states that the IDO applies to all private land in the City and all owners and occupants are required to comply with standards. Additionally, all development after the IDO effective date, May 18, 2018, is subject to IDO standards.
10. The IDO defines “development” as “[a]ny activity that alters the ground on a property. Development may include construction of buildings, structures, or streets; installation of landscaping, infrastructure, utilities, or site features; and/ or activities to prepare land for such construction or installation, such as grading. For the purposes of this IDO, this term included new development and redevelopment.” The applicant states on the record that it is his intent to subdivide the property to sell off a dwelling unit on one of the proposed lots. *See AC-19-18, p. 134-5.* The applicant also has a fence in the public right-of-way which must be removed or he will have to obtain a revocable permit from the city.
11. With the new development and construction in 2004, the owner should have re-platted the lots to create new lots that did not split the buildings and should have provided a sidewalk. In

- 2004, the lack of sidewalk transformed from being a *nonconforming* site feature to become a *non-compliant* site feature.
12. The application was analyzed using the same review criteria as other similar requests to forego installation of a sidewalk.
 13. The subject site does not meet the criteria for a Sidewalk Variance under DPM Chapter 12. The subject site is in an active pedestrian area with a medium intensity land use. The provision of a sidewalk in this area will 'contribute to the public welfare.'
 14. The majority of the area has sidewalks. *See* AC-19-18, p. 10, 11.
 15. The DRB did not act arbitrarily or capriciously and acted within the authority granted by the IDO, the DPM, and the Sidewalk Ordinance.
 16. The requirement for property owners to provide and maintain sidewalks in the public right of way abutting their property per the Sidewalk Ordinance, § 6-5-5-3, is applicable to the subject site and any property that comes before the DRB for any development action. The DRB has the authority to require this public infrastructure per the Review and Decision Criteria for Subdivision – Minor (IDO Section 6-6(I)(a)).

Recommendation

DENIAL of appeal of Sidewalk Variance denial for Project #:PR- 2019-002811, VA-2019-00288, AC-20-6, AC 19-18 for Lots 7-10 Block 44 Perea Addition, located at NEC of 15th St. NW and Granite Ave. NW, based on the preceding Findings.

Maggie Gould
Planning Manager

Attachments:

1. 2004 Building permit for the second structure at 906 15th Street.
2. Map of existing sidewalks in the surrounding neighborhood.
3. LUHO decision AC-20-6
4. Appeal Record

Notice of Decision cc list:

Richard Chavez