CITY OF ALBUQUERQUE
CITY COUNCIL

INTEROFFICE MEMORANDUM

TO: **LUPZ Committee**

FROM: **Bruce Thompson, Policy Analyst**

SUBJECT: **Response to Concerns Raised Regarding Jane Carlton Property and the Downtown Neighborhood Area Sector Development Plan**

DATE: **September 14, 2011**

INTRODUCTION: At the August 10, 2011 meeting of the LUPZ Committee a hearing was held on the adoption of the Downtown Neighborhood Area Sector Development Plan ["Sector Plan"]. At that hearing and in a written submission, Jane Carlton and her attorney made several arguments in opposition to applying the Sector Plan to her property ["Carlton Property"]. This memorandum considers each of those issues.

ISSUE 1: An argument was advanced that the Carlton property was subject to prior litigation the settlement of which precludes the inclusion of the Carlton Property in the Sector Plan

Based on the information presented at the August 10, 2011 LUPZ Committee meeting and on documents previously presented to the Environmental Planning Commission on November 30, 2010 and made a part of the record before the LUPZ Committee it is my opinion that the City is not precluded by the prior litigation from including the Carlton property within the proposed sector plan.

In March of 1991 the City Council approved the Fourth Ward Historic Overlay Zone. That overlay zone, as adopted, included the Carlton Property. Litigation followed in which it was asserted that the Carlton property should not be included in the overlay zone. Based on the materials I have received the basis for the litigation was that the Carlton's were denied due process as they did not receive adequate notice that the property could be contained within the overlay zone.

A motion for partial summary judgment was entered in that case based solely on the determination that the Carlton's did not receive adequate notice prior to their property being included in the historic overlay zone. The November 2005 Order of the court found, in relevant part, that the letter that the City claims "gave rezoning notice to the Carltons is ambiguous and insufficient to provide adequate notice as a matter of law." The court ordered that the rezoning of the Carltons' property is void because the City "unlawfully rezoned the Carltons'

property by including their non-historic property in the Fourth Ward Historic Overlay Zone without giving the Carlton's adequate notice…"

The partial summary judgment order did not resolve the entire litigation. In October of 2006 the Carlton's and the City entered into a Settlement Agreement to resolve the remaining issues. That Settlement Agreement provides that the Carlton's property is "no longer in the Fourth Ward Historic Overlay Zone…" The Settlement Agreement goes on to provide that the Carlton's property is not "subject to the Fourth Ward Historic Overlay Design Guidelines."

There is nothing in the court's order or in the Settlement Agreement that precludes the City from including the Carlton's property within a newly adopted sector plan or otherwise adopting regulations impacting the Carlton property. There is nothing in either of those documents that says that a newly adopted sector development plan cannot have some requirements similar or identical to the language that of the Fourth Ward Historic Overlay Zone. Such a prohibition could have been drafted and included in the Settlement Agreement if that was the intent of the parties. The City is not placing the Carlton property within the Fourth Ward Historic Overlay Zone or subjecting it to the Fourth Ward Historic Overlay Design Guidelines. There is nothing in the court order or Settlement Agreement that precludes the Carlton property from being included in the Sector Plan.

ISSUE 2. It is asserted that there is no rational basis for the requirements in the Sector Plan regarding setbacks, stepbacks, façade articulation, window and door requirements, glass type, balconies, entries, vehicle ingress and egress, off street parking and parking setback, usable open space, commercial uses, parking lot and demolition.

This claim does not appear to have merit. The argument for a lack of a rational basis is based on a claim of denial substantive due process. Substantive due process requires that government action be rationally related to a legitimate government interest. *Schafer v. City of New Orleans*, 743 F.2d 1086, 1089 (5th Cir.1984). Only if such government action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," may it be declared unconstitutional. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926).

The requirements imposed by the Sector Plan that are objected to by Ms. Carlton have to do both with preserving the value of property in the neighborhood and with aesthetics. There may be other reasons.

The first United States Supreme Court case to address aesthetics as a valid consideration for exercise of a municipality's police power was *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In upholding a municipality's exercise of eminent domain to remove slum areas, the Court stated:"The concept of the public welfare is broad and inclusive…The values it represents are spiritual as well as physical, aesthetic as well as monetary…It is within the power of the legislature to determine that the community should bet beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." In *Temple Baptist Church, Inc., v. City of Albuquerque*, 98

N.M. 138, 144, 646 P.2d 565, 561 (1982) the New Mexico Supreme Court upheld the right of the City of Albuquerque to adopt an ordinance based on aesthetics.

There still must be some basis for the City to justify that the regulations that are imposed are beneficial either from an aesthetic standpoint or to improve the financial condition of the community. That is an issue best left to planning staff. It need not be explained at this time.

Ms. Carlton is correct in pointing out that in *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964) the New Mexico Supreme Court upheld the City of Santa Fe's power to limit the size of panes of glass. The important point from that case is not that small windows are somehow preferred but that the regulation of window size is within the City's power as a means of protecting the general welfare of the community. That court also noted that such regulation was also within the City's power as it helped to protect property values.

ISSUE 3. It is asserted that in order to downzone property the zone change must be justified by either a "change in the surrounding community or a mistake in the original zoning." The quoted language comes from *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, 144 NM 99, 184 P.3d 411, 2008 NMSC 25. Ms. Carlton asserts without explanation that this standard has not been met. First, it must be noted that later in the same opinion the New Mexico Supreme Court recognized a third standard that would justify downzoning. The third justification is that the new zoning is "more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan."

It is difficult to respond to Ms. Carlton's general statement that these requirements for downzoning were not met. Both R-11-225 and the Sector Plan proposed to be adopted pursuant to that resolution exhaustively discuss compliance with these requirements. There is no reason to repeat that analysis here.

This matter can be revisited if specific concerns by Ms. Carlton are explained.

ISSUE 4. It is asserted that the change of zoning to the Carlton Property constitutes impermissible "spot zoning." In *City of Albuquerque v. Paradise Hills Special Zoning District Commission*, 99 N.M. 630, 632, 661 P.2d 1329, 1331 (1983) spot zoning was defined as follows:

> Spot zoning is an attempt to wrench a single lot from its environment and give it a new rating that disturbs the tenor of the neighborhood, and which affects only the use of a particular piece of property or a small group of adjoining properties and is not related to the general plan for the community as a whole, but is primarily for the private interest of the owner of the property so zoned.

In *Watson v. Town Council of Bernalillo*, 111 N.M. 374, 378, 805 P.2d 641, 645 (Ct.App.1991), the Court of Appeals stated: "The term 'spot zoning' refers to the rezoning of a small parcel of land to permit a use [that] fails to comply with a comprehensive plan or is inconsistent with the surrounding area, grants a

discriminatory benefit to the parcel owner, and/or harms neighboring properties or the community welfare."

Rather than constituting impermissible spot zoning by including the Carlson Property within the Sector Plan it would appear to be spot zoning to exclude the Carlson Property, leaving it as an island of property zoned differently and inconsistently as compared to the rest of the community.

ISSUE 5. It is asserted that treating property within the Sector Plan differently from property outside the Sector Plan, specifically with respect to glazing regulations, constitutes a denial of equal protection. Ms. Carlton correctly points out that the applicable legal standard requires a showing of a rational basis for the regulation in order to satisfy equal protection. There is extensive explanation in the sector plan as to the uniqueness of the area within the Sector Plan and why it should be treated differently from property outside the Sector Plan.

Because of the lack of explanation of Ms. Carlton's position it is difficult to analyze. It appears to be an objection to zoning in general where different property is assigned to different zones. There is no explanation as to why the Sector Plan is alleged to have erroneously pointed out the uniqueness of the neighborhood. This issue can be revisited if there is a further explanation.

STATUS OF THE PROPERTY: Ms. Carlton asserts that she has a valid building permit which has been approved. She seems concerned about the impact of any zone change on that permit. It would be important to know the current status of that permit. Ms. Carlton may well have a vested right to develop her property as set forth in that permit.