

LAND USE HEARING OFFICER'S RECOMMENDATION

APPEAL NO. AC-12-17

Project # 1003859

11-EPC-40067

11-EPC-40068

SILVER LEAF VENTURES, LLC, Appellants.

1 Silver Leaf Ventures, LLC (Appellants) appeals a decision of the Environmental
2 Planning Commission (EPC) denying an application to amend a site development plan and
3 a site development plan for a building permit. The appeal is timely filed. The Appellants
4 claim that the decisions of the EPC were (1) arbitrary and capricious, (2) not based on
5 substantial evidence, and (3) contrary to the applicable zoning code ordinance provisions.¹
6 The record of this appeal is well over 7,000 pages of documents. I reviewed the entire
7 record and held an extended seven-hour appeal hearing. I conclude as described in detail
8 below, that the EPC's decisions denying the site development plan amendments and the site
9 development plan for a building permit were well-supported by the record. I further
10 conclude with a recommendation that the City Council uphold the decisions of the EPC and
11 deny the appeal.

12 13 I. BACKGROUND

14
15 The history of the appeal, the applicable Large Retail Facility (LRF) Ordinance, and
16 the historical development of the Appellants' real property is well-briefed by the parties. The
17 City Council referred the appeal to this Land Use Hearing Officer (LUHO) and an extended
18 appeal hearing was held on December 21, 2012. At the hearing, the parties were allowed to
19 supplement the already extensive record with additional materials which included documents

¹ See Appellants' "Reasons for the Appeal and Basis of Standing," page 15 of the Record.

1 relating to the history of the LRF Ordinance, other site development plans of which the City
2 approved LRFs under the LRF Ordinance, and final written arguments.

3
4 The relevant history is outlined here. In 2001, the City approved “Andalucia at La
5 Luz,” a master plan of mixed uses that comprise 228 acres of mostly undeveloped land near
6 Coors Boulevard and Montano Road. In 2003, the City rezoned a portion of the master
7 planned site to SU-1 for C-2, O-1, and PRD uses. The EPC allowed increases in residential
8 densities in a portion of the master planned area near the Northern end of the planned site.

9
10 In 2005, the city approved a site plan for the subdivision of Andalucia at La Luz into
11 two subdivisions that were marked and separated by Learning Road. North Andalucia at La
12 Luz (North Andalucia) was created on the North side of Learning Road which was an
13 approximately 60-acre portion of the master plan. In addition, the City and the land owners
14 of Andalucia at la Luz approved design standards for all future development of the master
15 plan areas. Appellants in this appeal are the owners and developers of North Andalucia.

16
17 In 2005, the City approved a site plan for building permit for a portion of North
18 Andalucia allowing the development of 138,555 total square feet of various commercial and
19 retail land uses contained on 11 stand-alone pad-sites on about 12.25 acres of the 60-acre
20 North Andalucia site.² The largest of the 11 structures that the City approved included a
21 45,720 commercial/retail use. The record indicates, and it was not disputed, that Appellants
22 expended over \$2 Million on traffic mitigation measures required by the City in approving
23 the 2005 site plan for building permit. The Appellants did not develop the site according to
24 the 2005 approved site plan for building permit and site plan for subdivision. There have
25 been two substantive amendments to the 2005 site plan. In September, 2007, the City
26 approved an amendment that created a traffic mitigation measure—a street round-about
27 throughway at the intersection of Learning Road and Antequera Road. In addition, the site
28 plan was modified to clearly show verified locations of archeological sites. Then, in June,
29 2008, three tracts (tracts 7,8, and 9) were consolidated and separated out of the site plan for
30 subdivision to reflect their ownership into the Bosque School site development plan for
31 subdivision. The 2007 site development plan with the 11 building pads is unaffected by the

² See Andalucia Tract 6B, Site Development Plan for Building Permit, January, 2006.

1 denial of Appellants application for amendments described below in this appeal.

2
3 In early 2007, the City Staff and the EPC began developing textual amendments to the
4 City zoning ordinance to better address what it considered to be a problem in the City of
5 Albuquerque: inadequate zoning regulations for development of large retail building
6 structures encompassing 75,000 square feet or more of retail or commercial space. These
7 “Large Retail Facility” structures are also known as “big box” buildings. The zoning
8 ordinance is also known as the “LRF Ordinance” and it was intended to address the “*unique*
9 *problems related to traffic congestion, architectural scale, compatibility with the adjoining*
10 *neighborhoods, and noise that have adversely impacted the neighborhoods, where they have*
11 *been located.*”³ The City Council promulgated its “big box,” LRF ordinance in 2007, and
12 it is effective City-wide.

13
14 Notably, the 2007 LRF ordinance had no effect on Appellants’ approved 2005 site
15 plan for subdivision and site plan for building permit because the approved plans did not
16 include any single building structures for commercial or retail uses that triggered the LRF
17 ordinance regulations. The 2007 LRF Ordinance did not have retroactive effect on approved
18 plans.

19
20 On October 26, 2011, Appellants applied to the City to amend its 2005 site plan for
21 subdivision (2011 application).⁴ The record shows that the Appellants held Pre-Application
22 Review Team meetings (PRT meetings) with City Zoning Enforcement Staff and Planning
23 Staff before it submitted its application.⁵ Generally, in their 2011 application, Appellants
24 sought to modify the approved 2005 plan with amendments that reconfigure the tracts, the
25 number of retail/ commercial building sizes, uses, and locations of the pad sites.⁶ All
26 vehicular access routes and internal roads remained the same as in the 2005 approved plan.

³ See record, “EPC Final Draft, Council Bill No. F/S 0-06-53.”

⁴ See Record page 1457.

⁵ See Record page 1500.

⁶ See January 19, 2012, Staff Report, Sec. IV, pages 1325-1326 of the Record for a detailed discussion of the 2011 amendments proposed by the Appellants.

1 Specifically, a consequential distinction of the 2011 application from the 2005 approved plan
2 is that the 2011 application includes, among the changes of pad site locations and parking lot
3 changes, a single LRF structure on a single pad-site comprising 98,901 sq. ft. of retail space.
4 Thus, the 2011 proposed amendments to the 2005 site plan must comply with the 2007 LRF
5 ordinance.

6
7 At its January 19, 2012, public hearing, the EPC first took up Appellants' 2011
8 application.⁷ After a lengthy discussion, the EPC voted to continue the matter for 60 days
9 at the request of the City Planning Staff.⁸ City Planning Staff offered as a basis for the
10 continuance (for both the subdivision and building permit) that it needed time to:

11
12 "address instances of non-compliance with the applicable design standards
13 and regulations; doing so would also improve compliance with applicable
14 Goals and policies. Several significant issues remain; some were brought to
15 Staff's attention in recently received correspondence....the city is undecided
16 about the proposed access from Montano Rd. conflicts with the primary goal
17 of the site development plan for subdivision design standards to create a
18 village character emerge due to the site layout and excessive parking..."⁹

19
20 Shortly after the January 19, 2012, EPC hearing, an appeal regarding the approval of
21 the five-year extension was filed to the City Council and was eventually referred to this
22 LUHO. That appeal was later denied by the City Council.¹⁰ Then, as result of City Staff
23 testimony at the January 19, 2012, EPC hearing regarding the access requirements of the LRF
24 Ordinance, on February 24, 2012, the Taylor Ranch Neighborhood Association (TRNA) and

⁷ Although immaterial to the issues presented in this appeal, it is noteworthy that at this hearing, the EPC also reviewed and approved Appellants' application for a five-year extension of its approved 2005 site development plan. See Record page 1770.

⁸ See EPC Minutes of the January 19, 2012 hearing, page 1770-1911 of the Record. The 60-day continuance was extended to allow the resolution of pending administrative appeals.

⁹ See EPC "Official Notification of Decision," Finding No. 20, January 20, 2012, Page 1774 of the Record. A similar findings was also adopted by the EPC for the site plan for building permit portion of the application.

¹⁰ That appeal was AC-12-06.

1 other neighborhood associations sought a declaratory ruling from the City's Zoning
2 Enforcement Officer (ZEO) on the issue of access.¹¹
3

4 The EPC held its second substantive merits hearing regarding Appellants' application
5 on October 18, 2012. At this time, the two appeals (AC-12-06 and AC-12-10) had been
6 resolved as described above. After considerable testimony and discussion over the
7 Appellants' applications, the EPC voted to deny both the application for amendments to the
8 site plan for subdivision and the application for site plan for building permit. The official
9 basis for the denials is memorialized in the EPC Official Notification of Decision, dated
10 October 22, 2012. In its final decision, the EPC made 19 findings in support of its denial of
11 the site development plan for subdivision amendments and 25 findings regarding the site
12 development plan for building permit.
13

14 Appellants claim generally that the EPC decisions were arbitrary, capricious, not
15 supported in the record with substantial evidence, and contrary to law and City precedent.
16 Among the reasons for the appeal, Appellants argue that the EPC analysis and decision on
17 the access requirements of the LRF Ordinance contradicted and dismissed the City Zoning
18 Staff's analysis of the access requirements. The EPC found that the proposed LRF included
19 in the amended site plan does not satisfy the access requirements. Yet, the ZEO expressly
20 advised the EPC in both public hearings and in written memoranda to the Appellant that the
21 proposed LRF does satisfy the access requirements. The Appellants also argue that the EPC
22 misapplied the access requirements to their site plan. Their misapplication of the access
23 requirements argument is twofold. First, they take the position that the EPC's conclusion that
24 the proposed LRF must have "direct" access is plainly wrong. Second, Appellants argue that
25 the EPC erroneously concluded that the proposed LRF, for purposes of the access
26 requirement, is not the entire 60-acre site, but instead it is only the tract (proposed tract 2-A)
27 on which the LRF structure sits. Appellants contend that the access requirements should
28 have been applied to the entire 60-acre site because the entire 60-acre site is the LRF.
29 Appellants support this contention on the alleged manner in which the EPC and City

¹¹ The declaratory ruling appeal was AC-12-10. The City Council ultimately remanded the appeal to the EPC with a specific instruction "request[ing], but does not order, that the EPC adopt findings that fully explain its determination of this issue together with the facts that justify that determination." See Record page 2177.

1 Planning Staff have interpreted the access requirements in two previous City approvals of
2 LRFs since the 2007 LRF Ordinance was passed. In addition, Appellants take issue with the
3 EPC's findings that the 2011 proposed amendments, namely the proposed LRF, is discordant
4 or inconsistent with certain policies and goals of the City's Comprehensive Plan (Comp.
5 Plan), the West Side Strategic Plan (WSSP), and the design standards for the Andalucia at
6 La Luz master plan. Appellants maintain these decisions were contrary to precedent and
7 contrary to law because they were applied arbitrarily and capriciously. They also argue that
8 the design standards for North Andalucia at La Luz are too vague and subjective to be used
9 as a basis for denial.

10 11 **II. STANDARD OF REVIEW**

12
13 A review of an appeal from the EPC is a whole record review to determine if there is
14 error:

- 15 1. In applying adopted city plans, policies, and ordinances in arriving at the decision;
- 16 2. In the appealed action or decision, including its stated facts;
- 17 3. In acting arbitrary, capriciously or manifestly abusive of discretion.

18 The EPC decision and record must be supported by a preponderance of the evidence to be
19 upheld. The Land Use Hearing Officer may reweigh the evidence. The Land Use Hearing
20 Officer's opinion is advisory to the City Council. The Land Use Hearing Officer may
21 recommend that the Council grant, in whole or in part, an appeal, deny, in whole or in part,
22 an appeal, or remand an appeal for reconsideration if the remand is necessary to clarify or
23 supplement the record, or if the remand would expeditiously dispose of the matter.¹²

24 25 26 **III. DISCUSSION**

27
28 The EPC denied the Appellants' applications on several independent bases, some
29 having to do with the applicable goals and policies of the Rank I, II, and III plans in effect.
30 Other reasons for denial had to do with the approved Andalucia at La Luz design standards.
31 The leading basis for denial that spurned the most debate at the EPC hearings (and between

¹² See Rules of the Land Use Hearing Officer adopted by the City Council, February 18, 2004. Bill No. F/S OC-04-6.

1 City Staff) can be found in the Official Notification of Decision, and having to do with the
2 site development plan for the building permit, findings numbered 15, 16, 17, 19, and 20.
3 Each of these findings concern the access requirements of the LRF Ordinance.¹³ I will
4 address the EPC denials based on the LRF Ordinance first, and then take up the other reasons
5 for denials.

6
7
8 **1. The Evidence and the Applicable Regulations Support the EPC Finding**
9 **that the LRF is only Tract 2-A and not the 60-acre Site Development Plan**
10

11 The Appellants do not dispute EPC finding number 15.¹⁴ It is clear to everyone that
12 the LRF Ordinance requirements are applicable to Appellants' application. The threshold
13 issue under the LRF Ordinance is defining the physical boundaries and attributes of the LRF.
14 Hundreds of pages in the record, and many hours of testimony at the hearings were dedicated
15 to this aspect of Appellants' application. The EPC resolved this doorstep question with
16 finding number 16. The EPC found that the tract on which the LRF structure is situated
17 (Tract 2-A) is the entire LRF site by which site access, division, phasing, design, and
18 maintenance requirements are evaluated under the LRF Ordinance.¹⁵ Appellants vigorously
19 dispute this finding. As stated above, Appellants claim the EPC should have evaluated the
20 entire 60-acre site for compliance under the LRF Ordinance. Precisely, Appellants claim the
21 entire 60-acre site is the LRF and it was error to find otherwise. I disagree. I find that the
22 EPC decision defining the LRF site as tract 2-A is neither arbitrary, capricious, contrary to
23 law, or an abuse of their discretion. The finding is not irrational, and it is well-supported by
24 the record. Moreover, there is insufficient proof that finding 16 is contrary to how the EPC
25 previously interpreted the LRF Ordinance. I address this argument (previous LRF rulings)
26 in a separate section below.

¹³ Note that the EPC findings regarding the LRF Ordinance requirements are not found in its findings relating to the site developments plan for subdivision amendments and so in this part of the discussion regarding the access requirements I am only considering the site development plan for building permit. But the same analysis and conclusions are equally applicable to the site development plan for subdivision.

¹⁴ See official Notification of Decision, dated October 22, 2012, page 391 of the record.

¹⁵ Id.

1 The LRF ordinance requires that a large retail facility be “located adjacent to and have
2 primary and full access to a street designated as at least a collector in the Mid-Region
3 Council of Governments' Metropolitan Transportation Plan and having at least four through
4 traffic lanes.”¹⁶ In addition, the LRF site must also satisfy site division and site design
5 provisions of the LRF Ordinance. Before it can be determined if the site meets this criteria,
6 demarcating the physical boundaries of the LRF site is necessary. The EPC, with guidance
7 from Planning Staff and the ZEO evaluated all the appropriate Zoning Code definitions. The
8 EPC began this process by applying the precise definition of a large retail facility in the
9 Zoning Code to the facts.¹⁷ The definition of a large retail facility is:

10
11 “A single tenant structure with at least 75,000 square feet of net leasable area
12 for the purpose of retailing. A shopping center site with a main structure of
13 75,000 square feet or more is a **LARGE RETAIL FACILITY**. Refer to § 14-
14 16-3-2 for Large Retail Facility Regulations.”¹⁸

15
16 The definition of a LRF at the very least is a “single tenant structure.” But, a LRF can also
17 be (at the very most) a “shopping center site with a main structure of 75,000 square feet or
18 more.” Although, not an express finding, the evidence supported a finding that Appellants’
19 60-acre site development plan for subdivision does not satisfy the definition of a “shopping
20 center site.” The record shows that the EPC critically evaluated the meaning of a “shopping
21 center.” The definition of a “shopping center site” is:

22
23 A premises containing five or more acres; zoned P, C-1, C-2, C-3, M-1, M-2,
24 or a combination thereof; or a large retail facility; but excluding premises used
25 and proposed to be used only for manufacturing, assembling, treating,
26 repairing, rebuilding, wholesaling, and warehousing. Shopping center sites are
27 subject to the shopping center regulations of the Zoning Code, § 14-16-3-2.¹⁹

¹⁶ §14-16-3-2(D)(2)(b)(2).

¹⁷ See Official Notification of Decision, dated October 22, 2012, Finding No. 15, page 391 of the record.

¹⁸ §14-16-1-5, Definitions.

¹⁹ Id.

1 Notably, and recognized by the EPC, Special Use zone districts (SU) are not included among
2 the zone districts listed in the Zoning Code definition of a shopping center site. Appellants'
3 60-acre site development plan is zoned SU-1 and the zone designation allows land uses
4 identified in the C-2, O-1, and PRD zone districts. Its primary zoning is SU-1. Contrary to
5 Appellants' theory, the SU-1 zone is not an overlay zone. The purpose of SU-1 zoning is to
6 "*provide[] suitable sites for uses which are special because of infrequent occurrence, effect*
7 *on surrounding property, safety, hazard, or other reasons, and in which the appropriateness*
8 *of the use to a specific location is partly or entirely dependent on the character of the site*
9 *design.*"²⁰ The SU-1 zone designation over Appellants' entire 60-acre site, as Appellants
10 correctly point out, allows developers flexibility with regard to the designated uses.²¹ Rather
11 than designating zones in the SU-1 zone for uses, the SU-1 zone allows uses identified by
12 specific zones. The designated uses in Appellants 60-acre site plan for subdivision are those
13 uses that are allowed in the C-2, the O-1, and the PRD zone districts. This does not change
14 the underlying zoning of the site. The 60-acre site is not zoned C-2, O-1, or PRD. Thus, the
15 zoning designation of the 60-acre site does not meet the definition of a shopping center site.
16 In addition, there is no evidence in the record to support a contention that the EPC or the City
17 has ever designated the site as a shopping center site.

18
19 In addition, the EPC considered the term "premises" in the definition of a "shopping
20 center site." A premises under the Zoning Code is "any lot or combination of contiguous lots
21 held in single ownership, together with the development thereon; there may be multiple
22 occupancy."²² The precise meaning of "contiguous" under the Zoning Code is "[a]butting
23 or separated by nothing more than an alley."²³ In finding that the 60-acre site is not the LRF,
24 the EPC had within its record, evidence that Mirandela Rd., an existing public street in the

²⁰ §14-16-2-22.

²¹ See also City Planning Staff's January 19, 2012, Report, Page 1306 of the record. The site is zoned SU-1 and allows C-2, O-1 and PRD uses. See also transcript of October 18, 2012 EPC hearing, page 810 of the record at which Staff Planner Lehner described the purpose for the SU-1 zone district on Appellants site plan for subdivision amendments. Note also that PRD is not a zone district. It is a term that identifies various residential uses.

²² §14-16-1-5, Premises.

²³ Id, Contiguous.

1 site, eliminates the necessary contiguity required to join the tracts South of Mirandela Rd.
2 with the tracts North of Mirandela Rd. to meet the definition of a premises. Because there
3 is a lack of contiguity between the proposed Tract 2-A with the tracts South of Mirandela
4 Rd., it is rational to find that the 60-acre site is not a single premises for defining it as a
5 shopping center site.

6
7 In addition, if the EPC were to find that the entire 60-acre site was a shopping center,
8 and therefore is the LRF, the EPC would have had to designate the already approved
9 residential uses South of Mirandela Rd. and North of Learning Rd. as a shopping center or
10 a LRF. There is evidence in the record that the EPC understood this consequence. These 24
11 acres (Tracts 4 and 6) have been previously designated for multi-family residential uses.
12 Moreover, it is undisputed that the residential uses in Tract 4 and 6 of the 60-acre site
13 development plan are already approved and included in the site development plan for
14 subdivision amendments not for any substantive purpose other than for referencing the
15 roads.²⁴ There is also evidence in the record that was not rebutted that the owner(s) of the
16 residential uses on tract 6 have not applied to the City to have their tract 6 designated as a
17 LRF.²⁵

18
19 Finally, if the entire 60-acre site were to be classified by the EPC as an LRF, the
20 division and design requirements of the LRF Ordinance would also be forced onto the entire
21 site.²⁶ There is substantial evidence that Planning Staff evaluated Appellants application
22 under these terms in defining the boundaries of LRF site. The site division and site design
23 requirements can be found in §14-16-3-2(D)(3) and (D)(5) respectively. An applicant's
24 proposed LRF must:

25
26 "subdivide or plan the site as follows:

27 (a) The entire site shall be planned or platted into maximum 360 foot by 360
28 foot blocks except as provided in Items (c) and (d) of this division (D)(3).

²⁴ In addition, Tract 5 located at the Southeast corner of Coors Blvd. and Learning Rd. is being developed pursuant to an approved building permit.

²⁵ See the October 18, 2012, hearing cross examination of Ms. Garcia (City ZEO), page 790 of the record.

²⁶ See §14-16-3-2(D)(3), (4), and (5).

(b) Primary and secondary driveways (or platted roadways) that separate the blocks shall be between 60 feet and 85 feet wide and shall include the following:

1. Two ten-foot travel lanes;
2. Two parallel or angle parking rows or a combination of such on both sides of the driveway rights of way are permitted but not required;
3. Two six-foot landscaped buffers with shade trees spaced approximately 30 feet on center;
4. Two eight-foot pedestrian walkways constructed of material other than asphalt;
5. Pedestrian scale lighting that provides at least an illumination of 1.2 to 2.5 foot candles or the equivalent foot lamberts; and
6. Standup curb.

(c) One block can be expanded to approximately 790 feet by 360 feet if a main structure (including retail suite liners) covers more than 80% of the gross square footage of a block.

(d) If the site dimensions result in irregular block sizes, blocks of different dimensions are allowed provided:

1. The block sizes achieve the intent of this section;
2. Approval is granted by the EPC;
3. The narrow side of the block abuts the adjacent street that provides the **primary access**; and
4. The center of the long side has a major entrance, including a forecourt.²⁷

Planning Staff expressly informed the EPC that the Appellants did not submit their site development plan for subdivision amendments with the entire 60-acre site divided to meet these site division provisions of the LRF Ordinance. Only Tract 2-A was. I find City Staff Planner Marrone's testimony on this issue persuasive and substantial evidence that Appellants never intended for the 60-acre site to be the LRF.²⁸ Marrone advised the EPC:

"So again,[if] the entire site is a 60-acre site that is determined to be the LRF,

²⁷ §14-16-3-2(D)(3).

²⁸ See also page 1457 of the record. This is Appellants' October 26, 2011, "Development Plan Review Application" to the EPC, and which clearly describes Appellants' application as including only tracts 1-3, and totaling +/-23.89 acres, not 60-acres.

1 then the entire site must meet LRF requirements. And that means that the area
2 between Mirandela and Montano, ...would have to be platted or planned into
3 360-by-360 blocks and would have to meet the site design requirements. The
4 site plan for subdivision would need to be amended to accommodate these
5 blocks...The applicant applied the LRF regulations to Tract 2-A **alone** and did
6 not apply them to the rest of the site.”²⁹ (Emphasis added)
7

8 Appellants never attempted to rebut this evidence. The EPC acted reasonably. Discharging
9 the clear purpose the LRF Ordinance is designed to achieve requires that reasonable limits
10 must be placed on the attributes of an LRF. It was not unreasonable, considering the
11 supporting evidence, for the EPC to find that Tract 2-A is the LRF. Accordingly, there is
12 substantial evidence in the record supporting the decision of the EPC that Tract 2-A is the
13 LRF site and not the entire 60-acre site.
14
15
16

17 **2. The EPC’s Finding that the LRF does not satisfy The Access**
18 **Requirements of §14-16-3-2(B)(2) is Not Erroneous or Irrational and is**
19 **supported by the evidence in the record**
20

21 Having resolved the threshold issue (defining the LRF site), I turn to the EPC’s
22 finding that the LRF site possesses inadequate access under the LRF Ordinance. Two
23 separate provisions of the LRF Ordinance expressly form the applicable rules to evaluate
24 access. The first can be found under §14-16-3-2(D)(2), and it states in relevant part:
25

26 These regulations are necessary for the proper functioning and enjoyment of
27 the community. They protect the quality of life within surrounding residential
28 areas, support efficient traffic flows, and provide consistent regulations for
29 such facilities. Large retail facilities **shall** be located to secure adequate street
30 capacity to transport pedestrians and vehicles to and from large retail
31 facilities, and discourage traffic from cutting through residential
32 neighborhoods. The regulations result in efficient and safe access for both
33 vehicles and pedestrians from roadways in the Metropolitan Transportation

²⁹ See EPC Transcript of October 18, 2012 EPC hearing, page 428-429 of the record.

1 Plan to neighborhoods in the vicinity of large retail facilities.”³⁰ (Emphasis
2 added).

3
4 The second provision can be found under §14-16-3-2(D)(2)(b)2, and it states that the LRF
5 is:

6 “[r]equired to be located **adjacent to and have primary and full access** to
7 a street designated as at least a collector in the Mid-Region Council of
8 Governments’ Metropolitan Transportation Plan and having at least four
9 through traffic lanes.” (Emphasis added).

10
11 These two provisions establish the rules for evaluating whether or not the LRF site has
12 sufficient access. The EPC employed both provisions in its analysis and in concluding that
13 the LRF does not have “primary and full access” to a collector street.³¹ In doing so, the EPC
14 made use of various dictionary definitions of the term “primary” to guide it in evaluating
15 access under the LRF Ordinance.

16
17 First, it was uncontested that the term “full access” means “an intersection that
18 contains four turning movements: right-in, right-out, left-in, and left-out.”³² Appellants also
19 did not contest that the only full access intersection to Tract 2-A (or to the larger 60-acre site)
20 is at the intersection of Coors Blvd. and Learning Rd.³³ The Planning Staff made it clear
21 to the EPC that there were other vehicular access routes to Tract 2-A, but none had full
22 access but for the Coors Blvd./Learning Rd. intersection. Moreover, the functional
23 classifications of Coors Blvd. and Learning Rd. was not disputed. Coors Blvd. is a “principal

³⁰ See City Comp. Zoning Code, §14-16-3-2(D)(2), Location and Access of Large Retail Facility.

³¹ See October 22, 2012, EPC Official Notification of Decision, Finding No. 17, page 392 of the record.

³² See October 22, 2012, Official Notification of Decision, Finding No. 17, Page 392 of the record.

³³ Id.

1 arterial,” Learning Rd. is a “local street,” Montano Rd. is a “Urban Minor Arterial.”³⁴ In
2 addition, Montano Rd. is classified as a limited access roadway because new access
3 roadways are only permitted by the MRCOG between Coors Blvd. and just East of Rio
4 Grande Blvd.³⁵ Mirandela St. has access onto Coors Blvd. on one end and on Montano Rd.
5 at the other end, but neither ends of the Mirandela St. are full access intersections because
6 they lack left-out access routes. Mirandela St., Antequera St., and Learning Rd. are each
7 classified as “Local Streets” by the MRCOG. Learning Rd. and Antequera Rd. are two lane
8 roads (one lane for each direction of traffic). In addition there is a proposed road separating
9 Tract 2-A and Tracts 1-A through G that also would provide limited access onto Coors Blvd.
10 (only right-in and right-out). None of this evidence was challenged.³⁶

11
12 Because it was undisputed that the intersection of Coors Blvd and Learning Rd.
13 constitutes the only full access to Tract 2-A, the EPC evaluated the intersection in relation
14 to Tract 2-A and found in finding number 17 that from the full access intersection “traffic
15 must take *two local roads*, Learning Road and Antequera Road” to access the LRF.(My
16 emphasis added). As stated above, there is no dispute that Learning Rd. and Antequera Rd.
17 are both classified as “local streets” by the MRCOG.³⁷ The EPC concluded that the full
18 access intersection was too far removed (by the two local roads) from the LRF to constitute
19 the “primary” access for the LRF.

20
21 It is apparent that the EPC adopted two meanings for the term “primary” as it relates
22 to access. As stated above, the EPC employed dictionary definitions of the term “primary”
23 to assist it in defining access. It defined “primary” to mean “direct.”³⁸ Appellants contend

³⁴ These classification have been previously established by the Mid-Region Council of Government (MRCOG).

³⁵ Access onto Montano Rd. has to be approved, not only by the City, but also by the MRCOG.

³⁶ See Appellants’ Traffic Impact Study Update, November 22, 2011, Pages 7032, 7048-7056.

³⁷ Id.

³⁸ See Official Notification of Decision, dated October 22, 2012, Finding No. 17, page 392 of the record.

1 the term “primary” in the LRF Ordinance cannot mean direct access because the term
2 “direct” is actually used in another section of the LRF Ordinance. They argue that if the City
3 Council had wanted to use the term “direct access” rather than “primary access” it would
4 have done so, as it did in subsection §14-16-3-2(D)(c)4. I need not take up this statutory
5 construction argument, because if the EPC erred in employing the term “direct access” for
6 “primary access,” it was harmless error. Although not expressly stated as an alternate finding
7 on this question, there is substantial evidence in the record that the full access intersection
8 of Coors Blvd. and Learning Rd. is not the “primary access” under any definition of the term
9 “primary.”

10
11 Although the EPC concluded that access to the LRF was “indirect,” it was merely
12 stating a fact. The evidence demonstrates that to get to the LRF from the Coors
13 Blvd./Learning Rd. full access intersection, a motorist has to drive on Learning Rd. to
14 Antequera Rd. and then on Antequera Rd across the only driveway intersections to Tracts 4
15 and 6, (residential housing) before getting to the LRF site.³⁹ This factual evidence was
16 unchallenged. The fact that the full access intersection is factually indirect access to the LRF
17 because of (1) its proximity to the LRF, and (2) because two local streets must be traversed
18 to reach it does not necessarily, in itself, resolve the question regarding “primary access.”
19 However, before resolving that issue, I want to make it clear that this evidence is sufficient
20 to support EPC finding 17 that the full access intersection is an indirect access route to the
21 LRF. It is supported by the evidence and therefore it is not erroneous as Appellants contend.

22
23 In assessing whether or not the full access intersection was sufficient to be the
24 “primary” access for the LRF, Planning Staff found that the other access intersections
25 (Mirandela Rd./ Coors Blvd. intersection and Mirandela Rd./Montano Rd. intersection)
26 established the primary access points of entry and exist to and from the LRF. In doing so,
27 Planning Staff concluded that the only full access intersection (Coors Blvd./Learning Rd.)
28 is not the primary or main access to the site.⁴⁰ Note that the Planning Staff and the EPC
29 employed various dictionary definitions interchangeably to assist them in understanding the

³⁹ This is a distance of over 1300 feet. See the Appellants’ Conceptual Site Plan, Sheet 3CA in the record.

⁴⁰ See Transcript of October 18, 2012, EPC hearing, testimony of Staff Planner Marrone, pages 430-434 of the record.

1 LRF Ordinance requirement for “primary access.”⁴¹ Planning Staff reasoned that the direct
2 (but not full) access intersection connections on Mirandela Rd., provide the main (primary)
3 access to and from the LRF because these limited access intersection do provide direct access
4 as compared to the indirect access but full access intersection (Coors blvd./Learning Rd.).
5 Staff Planner Marrone summarized her analysis with regard to Mirandela Rd. and the other
6 two proposed driveways this way:

7
8 “There are three, possibly four other intersections that are near and more
9 convenient to use to access Tract 2-A...So if traffic is coming in from the
10 east, there’s a left turn access here at Mirandela. They could access Tract 2-A
11 from that point or come to the intersection of Coors and Montano and access
12 over here because this does contain a left turn before having to go to Learning
13 Road, the signal. And by the same token, if traffic were heading east down
14 Montano, it’s most likely that the traffic would take the shortest and most
15 convenient route...So the indirect circuitous access via the Learning Road
16 intersection by its nature makes this intersection of lesser importance, so one
17 cannot actually factually state that Coors and Learning intersection is the
18 primary access to Tract 2-A, if its found that Tract 2-A is the LRF.”⁴²
19
20

21 Marrone’s testimony was bolstered by the Appellants’ own traffic engineer who concluded
22 that primary access to the LRF site and the commercial uses is through both ends of
23 Mirandela Rd. at Coors Blvd. and at Montano Rd.⁴³ As stated above the Mirandela Rd.
24 intersections do not provide full access but because they provide direct access they are the
25 primary access points for the LRF. As such, they are insufficient to satisfy the LRF
26 Ordinance. Accordingly, there is substantial evidence in the record supporting the technical
27 non-compliance issues of access under the LRF Ordinance. The primary access intersections

⁴¹ Although Appellants “hang their hat” on the EPC use of the terms “direct” and “indirect,” in their argument that the EPC erred in defining the word “primary,” it is clear from the record that the EPC used various definitions of the word “primary” interchangeably, among them, “main.”

⁴² See Transcript of October 18, 2012 EPC hearing, pages 430-431 of the record.

⁴³ See Appellants’ Traffic Impact Study Update, Pages 7052 and 7207 of the record.

1 claimed by the Appellants do not have full access as expressly required. And the full access
2 intersection is not the primary access for the LRF. Finally, I agree with legal counsel for the
3 TRNA that these deficiencies, independent of the other EPC findings are sufficient to deny
4 Appellants' applications on their own.
5

6 Planning Staff believed, and the EPC agreed that there should be a limit to how local
7 streets are to be employed as connections between the LRF and the full access required by
8 the LRF Ordinance. This is a rational application of the LRF Ordinance. The intent of the
9 LRF Ordinance is well defined in the Ordinance itself. Finding 17 with regard to the lack
10 of compliance with the LRF purposes is also supported in the record with substantial
11 evidence in which the EPC could have employed to support the finding.⁴⁴ In finding that the
12 "proposed site development plan for building permit does not comply with §14-16-3-
13 2(D)(2)(b)2" it can reasonably be inferred that the following declared purposes of the LRF
14 Ordinance were not achieved by employing the two local roads (Antequera Rd. and Learning
15 Rd.).⁴⁵ Among the relevant purposes highlighted and applied by the EPC and Staff include:
16 (1) that the LRF requirements "are necessary for the proper functioning and enjoyment of the
17 community;" (2) "They protect the quality of life within surrounding residential areas;" (3)
18 the LRF requirements are intended to "support efficient traffic flows;" (4) LRF's "shall be
19 located to secure adequate street capacity;" (5) They are intended to "discourage traffic from
20 cutting through residential neighborhoods;" (6) "The regulations result in efficient and safe
21 access for both vehicles and pedestrians from roadways...to neighborhoods in the vicinity of
22 large retail facilities."⁴⁶ Staff Planner Marrone added in her analysis that many of the
23 purposes that the LRF Ordinance were designed to achieve would be circumvented to some
24 extent by Appellants' proposal. It is clear that the EPC factored into the analysis the clearly
25 declared purposes in LRF Ordinance in evaluating access. The EPC Findings regarding
26 access are well-supported by the record.
27
28

⁴⁴ Transcript of October 18, 2012 EPC hearing, pages 430-436, of the record.

⁴⁵ See October 22, 2012, Official Notification of Decision, Finding No 17, Page 392 of the record.

⁴⁶ See §14-16-3-2(D)(2).

3. Noncompliance with the North Andalucia at La Luz Design Standards

An independent basis for denial of Appellants' applications can be found in EPC Findings numbers 13 and 14.⁴⁷ The design standards were founded, adopted, and are applicable to the North Andalucia at La Luz subdivision and Appellants proposed amendments date back to Appellants' 2005 site development plan for subdivision of which was approved by the EPC on May 20, 2005.⁴⁸ It is significant to note that the record identifies Appellants as the party that originally proposed the design standards—not the City. This is significant, because Appellants are now claiming the design standards are too subjective. The design standards are contained on Sheets No. C2 and C3 of Appellants' 2005 site development plan.

Returning to the October 22, 2012, EPC decision, the EPC expressly concluded that the "mass and scale of proposed buildings and [the] associated parking lot" are inconsistent with the "village character" requirement of the design standards.⁴⁹ As indicated, Appellants claim that the term "village character" is too vague, "subjective, and therefore necessarily arbitrary in its application and enforcement."⁵⁰ I disagree.

There are at least two well-defined examples of massing, scale of buildings and parking lots that are in the record and that clearly demonstrate "village character." These examples directly relate to Appellants' site. Both examples are renderings Appellants adopted in 2005. The first is the actual site development plan that was approved by the EPC in its May 20, 2005 public hearing. That plan formed the basis for Appellants' 2011 application and arguably for the term "village character." The second example is a sketch drawing entitled "Outdoor Areas" on Sheet C2 of the 2005 site development plan.

⁴⁷ The EPC made similar findings in Findings numbers 10 and 11 regarding the site development plan for subdivision. October 22, 2012, Official Notification of Decision, pages 385, and 391 of the record.

⁴⁸ See Page 1406 of the record, May 20, 2005, EPC Official Notification of Decision, Finding No. 3.

⁴⁹ October 22, 2012, Official Notification of Decision, pages 385, and 391 of the record.

⁵⁰ See page 28 of Appellants' "Reasons for the Appeal and Basis of Standing."

1 In addition, it is clear that the written guidelines that comprise the design standards
2 are collectively intended to define the term “village character.” Village character, then, is
3 defined by the combined design standards. The design standards begin with the following
4 preface that states in full:

5
6 “The purpose of these design standards is to provide a framework to assist
7 the architects, landscape architects, and designers in understanding the
8 vision and development goals for the property. The primary goal for this
9 property is to achieve a vibrant, mixed-use community that fosters
10 pedestrian accessibility and maintains a village type character.”
11

12 It is clear that the primary goal of village character is to be achieved by employing all the
13 design standards. They are building blocks, a roadmap of how buildings and parking lots are
14 to be oriented and situated to create a village character. Village character is not, as
15 Appellants argue, undefined. The sketch drawings, including the sketch drawing titled
16 “Outdoor Areas,” in the design standards are there to guide the experts with producing
17 massing and scale that represents “village character.”
18

19 The approved 2005 site development plan arguably achieved village character when
20 Appellants created it. The 2005 plan clearly depicts a similar massing, scaling of building
21 patterns, and parking lot design and placement to what is illustrated in the design standards.
22 Appellants’ own 2005 approved site development plan is a luminous example of “village
23 character.” Its approval was partly dependent on satisfaction of the design standards.
24

25 There are marked differences depicted in the proposed massing and scale of building
26 pads and parking lot design of the 2011 proposed amendments with what is depicted and
27 approved in the 2005 site development plan and in the sketch drawings of the design
28 standards. Planning Staff addressed these differences in the Staff report to the EPC,
29 describing in detail what “village character” means and what the deficiencies were in
30 Appellants’ proposal with regard to village character. Planning Staff wrote:

31
32 “Village type character comes from a development that has incorporated
33 small-scale, compact urban form with walkability as a principal component
34 and not as an afterthought. The 98,901 sf proposed LRF does not fulfill this

1 goal because a village type character does not result from a site with one
2 disproportionately large building, dominated by parking and functionally
3 disconnected to future buildings on the site. Therefore, the proposed site
4 development plan for subdivision amendment does not fulfill the design
5 standards' primary goal."⁵¹

6
7 Staff's description of the 2011 site development plan design deficiencies are
8 consistent with EPC Finding 14. It is also consistent with the design standards and with
9 Appellants' 2005 approved site development plan which arguably established village
10 character. The 2005 site development plan included 11 buildings and parking lots that are
11 oriented in much the same patterns as depicted in the sketch drawings included in the design
12 standards. However, the 2011 amended site development plan does not. The crucial
13 distinction is proportionality, the relationship between mass, scale, and orientation of
14 buildings and parking lots(s). The EPC found that the buildings and parking lots were
15 disproportionate and thus, inconsistent with what is defined in the design standards as
16 "village character."

17
18 Accordingly, I find that "village character" is well-defined by Appellants' own
19 approved examples of it and by Appellants' numerous design standards of North Andalusia
20 at La Luz established in 2005. I also find that Finding number 14 is supported in the record
21 with substantial evidence.⁵²

22 23 24 **5. The EPC was Free to Reject Staff Opinions**

25
26 Appellants generally argue that because City Staff submitted to the EPC (at various
27 times in the proceedings) inconsistent opinions, that the EPC somehow erred in its denial
28 of Appellants' application. City Planning Staff did submit a Staff report to the EPC prior

⁵¹ See October 18, 2012, Planning Staff Report, page 68 of the record.

⁵² In addition to the design standards, the EPC made findings with respect to the Comprehensive plan and the WSSP. These findings do not, in my opinion provide strong independent bases for denial. But, they do support the findings with respect to design standards and are not necessary for my recommendation of upholding the decision of the EPC.

1 to the January 19, 2012 public hearing that “directly contrad[icted]” the Staff Report issued
2 to the EPC for its October 18, 2012 public hearing. Planning Staff in its first Staff report
3 advised the EPC that “[s]taff believes that the signalized intersection at Learning Rd
4 provides primary and full access to this shopping center (SC) site and to Coors Blvd...”⁵³
5 Then in its second Staff report (supplemental report), dated October 18, 2012, Staff reversed
6 the finding. Appellant has not shown how Staffs backpedaling equates to EPC error. I do
7 not find that Staff’s reversal means that the EPC erred. The EPC had the benefit of both
8 conflicting opinions and, as I have shown above, there is substantial evidence to support the
9 EPC findings. Moreover, it is clear that Staff, in opining on access in the first Staff Report
10 also advised the EPC in that same report in the next paragraph that Staff had received new
11 evidence and that “Staff has not had adequate time to consider and evaluate all information
12 submitted.”⁵⁴ It is a reasonable to infer that a reason for the reversal had to do with the
13 subsequent dissemination and evaluation of the new evidence. Without proof, it is
14 unreasonable to infer that Planning Staff’s reversals tainted the EPC’s decision.
15

16 A similar issues was presented by Appellant regarding testimony from the City’s
17 ZEO. The City’s ZEO testified at both EPC hearings that she believed Appellants’ LRF
18 satisfied the access requirements of the LRF Ordinance. There is no authority that
19 Appellants have pointed to, requiring the EPC to accept the interpretations of the Zoning
20 Code given by Staff, including the ZEO. Certainly the EPC is free to reject extraneous
21 interpretations of the Zoning Code given by City Staff and even from Appellants’ own
22 experts. As long as the final decision of the EPC is supported by the law, not arbitrary or
23 capricious, and supported by the factual record, rejecting Staff interpretations of the Zoning
24 Code is not error.
25

26 The EPC alone was delegated the arduous duty to approve or deny Appellants’
27 application. The City Council created the EPC and delegated to it broad powers including
28 the power to administer the Zoning Code. It is clear that “[t]he EPC has such other duties,
29 responsibilities, and powers as may be delegated to it by the City Council, including but not

⁵³ January 19, 2012, Planning Staff Report, page 1349 of the record.

⁵⁴ Id.

1 limited to powers delegated by the Zoning Code and Subdivision Regulations.⁵⁵ One
2 conclusion to appeal AC-12-10 was a recognition of the express delegation by the City
3 Council to the EPC to interpret the Zoning Code. Hence, Appellants' theory that the EPC
4 is somehow obligated to follow the recommendations of the ZEO is misplaced. In addition,
5 Appellants' ancillary argument that the EPC changed the rules when it rejected the ZEO's
6 advice, is similarly amiss. There is no evidence or authority, and Appellants have not
7 pointed to any, that ZEO Zoning Code opinions trump EPC rulings.

8
9
10
11 **6. I Find No Clear Inconsistency in How The EPC Applied the Access**
12 **Provisions Compared with How it Applied them to The Unser Crossing**
13 **and Hotel Circle LRFs.**
14

15 Appellants argued to the EPC, and supplemented the record for this appeal,
16 attempting to demonstrate City precedent in interpreting and applying the LRF Ordinance.
17 With regard to defining the LRF site, Appellants included portions of the records of two
18 LRF projects known as "Unser Crossing" and "Hotel Circle." The LRF Ordinance was
19 applied to these project proposals by the EPC. Appellants first claim "[i]t is consistent with
20 precedent set by these [previous] projects to interpret the "site" to be larger than just the
21 main structure's lot."⁵⁶ Appellants also compared the EPC Findings of Unser Crossing,
22 Hotel Circle and this matter and generally argue that there are glaring differences in how the
23 EPC treated this matter as compared to the other two LRF proposals. They conclude that the
24 application of City Plans and Zoning Code provisions in the two previous LRF approvals
25 was either loosely applied or overlooked, while the EPC in this matter applied the same
26 plans and provisions differently, more restrictively, and as a result, acted arbitrarily and
27 capriciously in this matter.

28
29 As shown above, the record and evidence supports the EPC Findings in this case.
30 With regard to the two previous EPC matters having to do with LRFs, Appellants' argument

⁵⁵ Se §14-13-3-2(A)(6), "Duties, Responsibilities and Powers" of the EPC.

⁵⁶ Record page 34.

1 and conclusions are unsupported with facts. For purposes of defining the LRF site, it is
2 clear from the LRF site plan approvals of both Unser Crossing and from Hotel Circle that
3 the EPC applied the LRF Ordinance to the site development plans for building permits just
4 as it did to Appellants' site plan for building permit of which is all of Tract 2-A.⁵⁷ I find no
5 inconsistency with how the EPC defined Appellants' LRF site.

6
7 Moreover, after reviewing the supplemented record, including the EPC official
8 decisions of Unser Crossing and Hotel Circle, there is insufficient evidence that would
9 support a finding that the EPC applied the access provisions of the LRF Ordinance or
10 applicable plans differently in this case than it did in the Unser Crossing and Hotel Circle
11 cases. There is only speculation regarding the facts of each case as compared to the facts
12 of this case. No two cases are the same. The only substantive similarity in which there is
13 sufficient proof, is that the LRF Ordinance was applicable to each proposal.

14
15 It is easy, however, to isolate particular facts from each of the three applications and
16 find similarities and differences. For example, the zoning district for the entire Unser
17 Crossing site was changed from SU-1 to C-2.⁵⁸ Unser Crossing and Hotel Circle site
18 development plans were not governed by the North Andalusia at La Luz design standards.
19 The primary access to the Unser Crossing site is distinguishable, identified as 86th Street and
20 is less than 350 feet from Central Avenue—an Urban Principal Arterial.⁵⁹ In addition,
21 another “major” but direct entrance to the Unser Crossing LRF is Central Avenue.⁶⁰

22
23 Arguably, the approval of the Hotel Circle site development plan is similar to
24 Appellants' project in one respect—full access employing at least one local street. Access

⁵⁷ See Transcript of October 18, 2012, EPC hearing, Page 807 of the record.

⁵⁸ Recall the discussion above regarding zoning and shopping center sites.

⁵⁹ See May 15, 2008, EPC Official Notice of Decision, Finding No. 8, and see page 3274 of the record.


⁶⁰ Id.

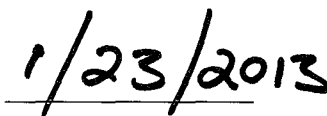
1 to the Hotel Circle LRF is by way of 700 feet of a local street (Hotel Circle Street).⁶¹ But
2 the length of local street access in Appellants' proposal is distinguishable—almost twice the
3 length of the Hotel Circle plan and it includes two local streets.
4

5 It is fruitless to isolate and compare the EPC findings of the three cases. One can
6 speculate, as Appellants are doing, that the detail included in the EPC's Findings in this
7 matter as compared to the asserted lack of detail in the EPC findings in the previous matters,
8 represents "bias" or a change in the rules.⁶² To do so, however requires the use of
9 conjecture. There is no competent evidence to support this allegation.
10

11 12 **IV. CONCLUSION**

13
14 After reviewing the entire record, hearing arguments and testimony in an extended
15 7-hour appeal hearing at which the Appellants and opponents were allowed to supplement
16 the record, I conclude that the EPC decision is supported by the record. I respectfully
17 recommend that the City Council deny the appeal in full. As explained in detail above, the
18 decision of the EPC is supported by the record and it should be upheld.
19

20
21
22 
23 _____
24 Steven M. Chavez, Esq.
25 Land Use Hearing Officer
26



Date

⁶¹ See September 18, 2008, EPC Official Notice of Decision, Finding No. 12, page 1554 of the record.

⁶² Appellants argued that the EPC showed bias by the level of scrutiny and detail it applied to Appellants' application.