

ZONING AND PLANNING LAW REPORT

Vol. 32 / No. 2

FEBRUARY 2009

HOW MUCH PROCESS OF LAW IS DUE?¹

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Introduction

Zoning and planning, due process and takings, and the tension between private property rights versus the public's interest in how and where the community will grow—are all ingredients for a great law school exam in a First Year Property Law class. Any one of these elements can trip up the most careful city attorney or provide the fodder for challenging the actions of the local zoning board. For more than a decade, a zoning case has been winding its way through the administrative and judicial review processes in New Mexico. *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*² has all of the issues mentioned above, and more.

On February 18, 2008, the New Mexico Supreme Court brought the case to an end, ruling against the City of Albuquerque.³ In a lengthy decision, the court concluded the city had downzoned the applicant's property without complying with important due process requirements.⁴ Furthermore, the city had wrongfully denied approval of the applicant's site plan. There are lessons in this case that are instructive for land use attorneys and planners in every state.

The Facts of the Case— A Long Journey for All Involved

This case began in 1987 when Albuquerque Commons Partnership (“ACP”), a general partnership, filed an application to build a mixed use, high den-

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Electronic Composition
Specialty Composition/Rochester Desktop Publishing

Zoning and Planning Law Report (USPS# pending) is issued monthly, except in August, 11 times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at Periodical rate is pending at St. Paul, MN.

POSTMASTER: Send address changes to Zoning and Planning Law Report, 610 Opperman Drive, P.O. Box 64526, St. Paul MN 55164-0526.

© 2009 Thomson Reuters
ISSN 0161-8113

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sity development on 28 acres in Albuquerque’s Uptown Urban Center on property it had leased from the Archdiocese of Santa Fe. The city’s 1981 Uptown Sector Plan (“1981 USP”) governed the uses and development standards for the property and it reflected the goals and policies contained in the Albuquerque/Bernalillo County Comprehensive Plan (“comprehensive plan”).

The Uptown Urban Center is an area containing two million square feet of retail space, two regional malls, and 1.9 million square feet of office space—23% of the total office space in Albuquerque.⁵ An urban center, as defined in the comprehensive plan, is an area “containing the highest densities and the tallest and most massive structures ... [concentrating] a wide range of community activities and intense land uses for greater efficiency, stability, image and diversity and for a positive effect on the urban form, environmental quality and the transportation network.”⁶ The goal of an urban center is “to create specially designed concentrations of high-density mixed land use and social/economic activities which reduce urban sprawl, auto travel needs, and service costs and which enhance the urban experience.”⁷

The key thing to remember as this tale unfolds is that the public (through the planning process) envisioned this urban center as an appropriate location for mixed use, high density, and pedestrian oriented development. There was even talk about building a better transit system to serve the area. Planners hoped to reduce the number of automobiles traveling to the Uptown Urban Center in the future. A big box retail center was the antithesis of what the public and the city’s planning documents envisioned for the Uptown Urban Center.

Big box retail establishment is defined as a “singular retail or wholesale user who occupies no less than 75,000 square feet of gross floor area, typically requires high parking to building area ratios, and has a regional sales market.”^{7.5}

In the city’s various sector plans, such as the 1981 USP in this case, Albuquerque planners typically combine planning goals and policies with regulatory zoning measures intended to implement the goals. Although this may seem confusing to some, it has apparently worked well in the past. The 1981 USP zoned the majority of the uptown urban center as SU-3, a special use zoning category intended to tailor future development to the goals of the sector plan.

Applicants with property in the SU-3 district were expected to prepare and obtain approval of a site development plan, keeping the goals and policies enunciated in the 1981 USP in mind.⁸ Property around the SU-3 district was zoned SU-2 for lower density mixed uses. There was also an established single-family residential neighborhood near the Uptown Urban Center.

In late 1987, ACP submitted a mixed-use, high-density site plan to the city which addressed the policies of both the city's comprehensive plan and the 1981 USP. The site plan was approved, but never built because of a slump in the real estate market for office use.

In 1991, ACP selected Opus Southwest Corporation ("Opus") to develop the property. Opus planned to either purchase the ACP lease or sublease the property if it could get a 28-acre big box retail shopping center approved. The Opus site plan included property in both the SU-3 and SU-2 districts. That portion of the property in the SU-2 district required Opus to apply for both a zone map amendment and an amendment to the 81 USP.

Residents in the neighborhood nearby, as well as the general public, opposed the big box proposal because they felt it conflicted with their expectations that the property would be part of an urban center. A big box retail shopping center with a sea of surface parking was just not consistent with the high-density mixed land use development called for in the 1981 USP.

Opus withdrew its site plan and the city council passed a memorial requesting a public review of the 1981 USP. The Opus site plan application had raised a significant concern about the apparent disconnect between the public's goals and policies for the Uptown Urban Center and the zoning restrictions which permitted a typical suburban big box retail shopping center. This disconnect needed to be mended. The American Planning Association highlighted this issue in its amicus brief filed in this case:⁹

Unfortunately, through the years, zoning and planning have been conflated in New Mexico jurisprudence as well as in the development paradigm in many communities. Rather than assuming a proactive, system-wide approach to growth and development, the reality in New Mexico is that such decisions have been reactive and piecemeal, placing city leaders in a defensive position. The consequences of this reactive approach are well-known to anyone

reading the local papers or watching the local news on television, and probably accounts for the finding that only 26% of Albuquerque city residents agreed with the statement in the 1999 Citizen Satisfaction Survey that "Albuquerque is well planned." (*Planned Growth Strategy, Part 2, p.4*).^{9.5} **Another consequence of this reactive approach is that it implicitly lodges its trust in private development to meet public goals.** (Emphasis added).

While the city was engaged in its public review and revision of the 1981 USP, Opus submitted a second site plan application for a smaller, 17.9-acre big box retail project. This second application only involved the property located within the SU-3 district; a zone change was not required. The proposal was merely a smaller version of the original submittal.

City planners invited developers, including Opus, and neighborhood leaders, landowners, and businesses to a workshop. Suggestions from the workshop included establishing a new "Intense Urban Core" in the sector plan. On a parallel track, the public hearings for Opus' revised 17.9-acre site plan were deferred. A four-month moratorium on all development in the Uptown Urban Center was passed shortly thereafter. Opus and ACP were caught in the moratorium.

By March 1995, a revised uptown sector plan was distributed for review, designating an Intense Urban Core with development standards that included floor area ratios and parking requirements which would allow only office and/or other high density uses, with retail and commercial uses on the ground floors. Parking structures, instead of surface parking, would be required except for a small number of spaces serving the ground-level establishments. The revisions included pedestrian-friendly features as well as features to reduce the number of single-occupancy vehicles—revisions certainly not friendly to big box retail shopping centers! ACP's property, upon which Opus wanted to build, was located in this proposed Intense Urban Core.

A number of public hearings were held on these proposed revisions to the Uptown Sector Plan, with Opus and ACP vehemently testifying in opposition. The city's Environmental Planning Commission ("EPC") and the Land Use Planning and Zoning Committee ("LUPZ") of the city council held a joint hearing. The EPC determined that the proposed changes did not comply with Resolution 270-1980 containing the city's standards for rezoning property.

Resolution 270-1980 states there must be either a change in the area to be rezoned, a mistake in the original zoning, or the zone change should be more beneficial to the community.¹⁰

At a subsequent public hearing, the LUPZ heard the proposed revisions and was advised by the city attorney that the proposed changes to the Uptown Sector Plan were not amendments to the zoning map, since the area would remain mapped in the SU-3 district. Instead, the proposed revisions were text amendments and Resolution 270-1980 did not apply. This was the fateful decision. Rather than undertake a quasi-judicial process requiring, among other things, an unbiased tribunal, the city decided less due process was all that was needed because updating the sector plan was a legislative matter. The revised Uptown Sector Plan (1995 USP) was adopted by the city council on June 19, 1995.

Back to the applicant—following adoption of the 1995 USP, the EPC deferred Opus' application to build a big box retail shopping center indefinitely because it did not comply with the new 1995 USP. Clearly, Opus was not pleased and sued in District Court, claiming violations of its substantive and procedural due process rights, and for inverse condemnation under state law, as well as for an unconstitutional taking in violation of the Fifth Amendment.

Each side saw this case differently. The applicant argued that the city had downzoned its property when it adopted 1995 USP; the city must follow quasi-judicial procedures to accomplish a downzoning. The city countered that no downzoning had occurred because the new 1995 USP applied to all properties in the Uptown Urban Center; it wasn't meant to target a specific property. The trial court agreed with ACP and concluded the city had downzoned the property and failed to follow its own policies and procedures under Resolution 270-1980. It declared the development restrictions contained in 1995 USP did not apply to the Opus site plan application and remanded the case back to the city with instructions to review Opus' site plan under the requirements of the 1981 USP. The court allowed the federal takings claim and the § 1983 claim to move forward.¹¹

In March 2000, the city council denied Opus' big box site plan application under the 1981 USP. On a second administrative review, the trial court reversed the city council's denial and ordered the city council to approve Opus' application.¹² Eventually, following a jury trial, a final judgment was entered against the city on the due process claim, with an award of

\$8,349,095.00.¹³ The District Court concluded that the burden of fulfilling the city's vision for the Uptown Urban Center had fallen on a single property owner - Opus; the court appeared more concerned with that impact than on the city's efforts to fulfill its vision for an Uptown Urban Center. No doubt, law students reading these facts would spot many issues to write about in their bluebooks at exam time. The multitude of attorneys involved in the case certainly did.

Appellate Judicial Review

In 2006, the New Mexico Court of Appeals reversed the District Court, concluding that the revisions embodied in the 1995 USP were text amendments, rather than amendments to the zoning map, and would apply to all future development or redevelopment in the Uptown Intense Urban Core.¹⁴ The city had properly followed a legislative, rather than quasi-judicial, process. As a result, the city had not denied ACP its right to procedural due process. (Having failed to win approval of its site plan, Opus was no longer involved in the case.)

ACP argued again that its property had been downzoned when the city adopted the more restrictive development standards contained in the 1995 USP. It believed the city's action was subject to the "change or mistake" rule and Resolution 270-1980.¹⁵ The city continued to deny that a downzoning took place. If the 1995 USP did not downzone ACP's property, there was nothing wrong with following a legislative process when it adopted the 1995 USP, and a more deferential review by the court was all that was required. The Court of Appeals held that the "change and mistake" rule did not apply, no downzoning had occurred and so there was no need to address ACP's takings claim.¹⁶

On to the New Mexico Supreme Court! Instead of evaluating the label of the city's process—whether legislative or quasi-judicial—the state's highest court decided it would look at what sort of action the city *in fact* took and

begin with whether the City's adoption of the 1995 Uptown Sector Plan Intense Core restrictions effected a downzoning of ACP's property. We view this to be the critical inquiry because its outcome will determine what processes the City was required to employ, what it was required to show, and how much discretion it had in making its decision. The effect of the City's

action on the property owner—whether it constitutes a downzoning or not—determines the degree of process due, not the label the City employs.¹⁷

Regardless of whether adoption of the 1995 USP was a legislative action, a quasi-judicial action, or in the context of a sector plan, the fact that the revisions only impacted one property owner when applied was determinative. The state's highest court was not going to be hamstrung by labels. The court noted that:

ACP's leased property was located entirely within the Intense Core zone. Only two other property owners owned land in the Intense Core, and ACP's property made up two-thirds of the affected land. Further, though all three tracts of land were vacant, only ACP had a pending site plan submitted to the City. As a practical matter, therefore, the new regulations affected primarily ACP and its leasehold interest.¹⁸

The court went on to note that the “real question here is whether the City's adoption of the 1995 Uptown Sector Plan amendments was fair overall, affording ACP adequate due process of law.”¹⁹ After reviewing the facts, including the timing of the city's decision to amend the 1981 USP (an application had already been filed and the neighbors had objected to it), the impact of the city's decision on a single property owner, and the city's “conscious decision” to follow a legislative process, the court held that the city's decision lacked procedural fairness,²⁰ and announced the following test:

When a zoning action is *specifically designed* to affect a relatively small number of properties *and* does not apply to similarly situated properties in the surrounding area or city-wide, that action is quasi-judicial, not legislative.²¹

Clearly, legislative and quasi-judicial processes are very different. The city should use the former when a planning or zoning action results in a general rule or policy which is applicable to an open class of individuals or situations; the latter is used when a land-use action involves the application of adopted policy to a specific development application, or a small number of individuals or properties.²²

A legislative proceeding limits evidence, prevents cross-examination, and makes no effort to provide an impartial tribunal by limiting ex parte contacts.

In contrast, a quasi-judicial process requires that interested parties be given individual notice, have an opportunity to be heard, present and rebut evidence to an impartial tribunal, which the court specifically noted is one which has had no pre-hearing or ex parte contacts concerning the question at issue, and to a record with adequate findings.²³

In this particular case, the court noted that the city provided no findings and, more importantly, it failed to provide an impartial tribunal. One telling piece of evidence noted in a footnote to the opinion, concerned the ex parte contact.

As an example of the legislative-type lobbying that accompanied the passage of the 1995 Uptown Sector Plan amendments, [the president of the Uptown Association], called [one of the city councilors] after she had proposed amendments to the 1995 Uptown Sector Plan that would have eased the impact on ACP. [He] encouraged the councilor not to make amendments that would allow the Opus Plan to proceed and stated his belief that if she worked at it, [she] could get the four votes needed to pass the amendments favored by the Uptown Association. [The councilor] then withdrew her proposed amendments. Such contacts and influence are common and appropriate in the normal legislative functioning of a city council. However, when a council sits in a quasi-judicial capacity, as it must to effect a downzoning, its members must be insulated from such contact.²⁴

Local public officials in every community in the country are confronted with the same quandary that confronted the Albuquerque city council when it adopted the 1995 USP. How to best balance the rights and interests of the property owner with the larger public interest expressed in the community's comprehensive plan and related planning documents? Albuquerque officials recognized that a disconnect between the plan and regulations existed—the development regulations allowed a low density big box retail center, while the plan envisioned something very different. To their credit, they sought to mend the disconnect, rather than ignore the community's goals for an Uptown Urban Center. ACP relied on the development regulations, as was to be expected. Although ACP had no vested rights in a particular zoning classification,²⁵ the court said it had a right to expect a fair process.

Lessons Learned

The ACP case was an expensive lesson for the city officials and planners involved, and ultimately for the public asked to foot the bill for damages. What lessons might be learned that could help avoid another long, expensive journey through the courts?

- 1) The city should be proactive, periodically reviewing the zoning regulations and planning documents. Neither document should collect dust or be taken for granted. Of course, the best time for amending any land use regulations is prior to submission of an application for development, not after. However, a short-term moratorium, with a clearly-defined purpose, is an appropriate tool.
- 2) City officials should join planners in requesting the State Legislature to update the state's planning and land use enabling laws. New Mexico, as is the case in the majority of states, is laboring beneath the weight of the Standard Zoning Enabling Act (SZA) written nearly a century ago. There are examples available of model land use statutes which provide much greater clarity and fairness in the land use development process than the SZA. The American Bar Association Model Statute on Local Land Use Planning Procedures,²⁶ adopted by the House of Delegates in August 2008, is one; the American Planning Association's Growing Smart Legislative Guidebook is another.
- 3) Don't mix apples and oranges—or zoning/development regulations with plans. This may be obvious, but it's worth emphasizing. Plans are the community's vision for the future, expressed in goals and policies. Zoning/development regulations are merely a tool to implement the plan. While the development regulations should be consistent with the plan, they should not be mixed together. This is especially true in a state where plans are advisory only. The ABA's Model Statute clearly distinguishes between plans and development regulations, requiring that they be consistent.²⁷
- 4) Too much due process never hurts. If in doubt, follow the procedures required for a quasi-judicial hearing—notice, opportunity to be heard, presentation of evidence with cross-examination, and an impartial tribunal. Local government attorneys in New Mexico are quaking in their

boots following the large damage award against the City of Albuquerque – wondering what procedures they should advise their clients to use. Certainly, local government officials should periodically review their land use procedures. The ABA's Model Statute mentioned above might be an appropriate guide for revisions, but certainly don't get stuck on labels. The courts will look beyond labels. Treating everyone fairly is a win-win for all.

Post Script

In early 2008, the N.M. Supreme Court remanded the case back to the Court of Appeals to decide (1) whether ACP had a constitutionally protected property interest that would satisfy the threshold requirement for a Section 1983 claim; (2) whether the 1995 USP was an unconstitutional taking of ACP's property; and (3) whether damages were properly awarded.²⁸ The Court of Appeals, in October, affirmed the jury award of damages in the amount of \$8,349,095 on the § 1983 claim; decided it didn't have to address the takings claim since it had affirmed the § 1983 award; reversed the award of post-judgment interest; and affirmed the award of attorney fees.²⁹

In November, the City of Albuquerque prevailed in a challenge to another of its sector plans—the Nob Hill-Highland Sector Development Plan.³⁰ Homeowners within the Nob Hill sector opposed the plan, objecting to the new OR-2 zoning which they felt allowed too much height and density of development in the neighborhood. The District Court concluded that *Albuquerque Commons Partnership v. City Council* did not apply because the implementation of the OR-2 zone in the Nob Hill Highland Sector Development Plan did not constitute a down-zoning. Nevertheless, the court found that the city council had complied with Reso. 270-1980 when it made findings to justify the change in zoning. Of note, there was no pending application tangled in the approval process of the Nob Hill-Highland Sector Development Plan.³¹

What became of the property at the heart of this Uptown Urban Center saga? The Archdiocese of Santa Fe sold it and “a new development was approved and built by another developer under later revisions to the 1995 Uptown Sector Plan which allowed the increased retail use and phased construction that was denied to ACP.”³²

NOTES

1. *Albuquerque Commons Partnership v. City Council of City of Albuquerque*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411 (2008)—“The ultimate question is, considering the nature, subject, and purpose of the proceeding and the constitutional rights of the participants, how much process of law is due?” *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475, 499 n. 33 (1979) (overruled on other grounds by, *Schwartz v. City of Flint*, 426 Mich. 295, 395 N.W.2d 678 (1986)) (Levin, J., for affirmance and remand) (cautioning that discussion of the labels “legislative” and “quasi-judicial” “should not be emphasized to the point of distraction from the underlying concepts [because t]he issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities” (quoted authority omitted)).
2. *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, 2003 WL 25770753 (N.M. Dist. Ct. 2003), judgment rev’d, 140 N.M. 751, 2006-NMCA-143, 149 P.3d 67 (Ct. App. 2006), rev’d, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411 (2008), reh’g denied, May 2, 2008.
3. The Supreme Court remanded the case back to the Court of Appeals to address three issues: (1) whether ACP had a constitutionally protected property interest that would satisfy the threshold requirement for a Section 1983 claim, (2) whether the 1995 USP was an unconstitutional taking of ACP’s property by the city, and (3) whether damages were properly awarded. On October 30, 2008, the Court of Appeals rendered its decision, discussed more fully at the end of this commentary. *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, No. 24,026; consolidated with 24,027; 24,042; and 24,425, slip op. (N.M. App., October 30, 2008). Available at <http://coa.nmcourts.gov/documents/opinions/Albuquerque%20Commons%20Remand%20FO.pdf>.
4. *Albuquerque Commons Partnership v. City Council of City of Albuquerque*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411 (2008).
5. *Albuquerque/Bernalillo County Comprehensive Plan*, 1988, amended 1991, p. 15.
6. *Albuquerque/Bernalillo County Comprehensive Plan*, 1988, amended 1991, p. 15.
7. *Albuquerque/Bernalillo County Comprehensive Plan*, 1988, amended 1991, p. 15.
- 7.5. *A Planner’s Dictionary*, Planning Advisory Service Report No. 521/522, American Planning Association (April 2004).
8. 1981 Uptown Sector Plan and Albuquerque Zoning Code, §14-16-2-24.
9. Amicus Brief of the American Planning Association filed April 30, 2007, p. 8. Available at <http://www.planning.org/amicus/pdf/ABQCommons2007.pdf>.
- 9.5. <http://www.cabg.gov/council/jpgs.html>.
10. *Albuquerque Resolution 270-1980*.
11. The state takings claim along with the § 1983 claim based on substantive due process were dismissed.
12. The city sought appellate review of this order, but the N.M. Court of Appeals ruled the order was not a final order because the procedural due process claim was still pending in the trial court, and so the order was not appealable. *Albuquerque Commons Partnership v. City of Albuquerque*, 133 N.M. 226, 2003-NMCA-022, 62 P.3d 317 (Ct. App. 2002).
13. Although Opus and ACP had sought damages for a “taking” of the property as one of their claims, they elected to have damages assessed against the City based on a denial of substantive due process.
14. *Albuquerque Commons Partnership v. City Council of City of Albuquerque*, 140 N.M. 751, 2006-NMCA-143, 149 P.3d 67 (Ct. App. 2006), rev’d, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411 (2008).
15. New Mexico follows the minority of states requiring a proponent of a zoning change to demonstrate that the existing zoning is inappropriate because (1) there was an error when the existing zone map was created, or (2) changed neighborhood or community conditions justify the change—commonly referred to as the “change or mistake” rule. This rule was specifically adopted by the city in its Resolution 270-1980, with one additional criterion that can justify a zoning amendment: a proponent of the change may show that a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan.
16. *Albuquerque Commons Partnership v. City of Albuquerque*, 133 N.M. 226, 2003-NMCA-022, 62 P.3d 317 (Ct. App. 2002).
17. *Albuquerque Commons Partnership v. City Council of City of Albuquerque*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411, 418 (2008).
18. *Albuquerque*, 184 P.3d 411, 416.
19. *Albuquerque*, 184 P.3d 411, 421.
20. *Albuquerque*, 184 P.3d 411, 426.
21. *Albuquerque*, 184 P.3d 411, 424.
22. See, *A Planner’s Dictionary*, Planning Advisory Service Report No. 521/522, American Planning Association (April 2004).
23. *Albuquerque*, 184 P.3d 411, 422.
24. *Albuquerque*, 184 P.3d 411, 423, n.3.
25. *Albuquerque*, 184 P.3d 411, 419.
26. Available at <http://www.abanet.org/statelocal/docs/ModelLandUseCode.pdf>.

27. Sec. 101 of the ABA Model Statute on Local Land Use Planning Procedures provides—“Consistent with the Comprehensive Plan” means that development regulations, a proposed amendment to existing land development regulations, or a proposed land-use action is consistent with the local comprehensive plan when the regulations, amendment, or action:
- (a) furthers, or at least does not interfere with, the goals and policies contained in the local comprehensive plan;
 - (b) is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan; and
 - (c) carries out, as applicable, any specific proposals for community facilities, including transportation facilities, other specific public actions, or actions proposed by nonprofit and for-profit organizations that are contained in the local comprehensive plan.
- In determining whether the regulations, amendment, or action satisfies the requirements of subparagraph (a) above, the local planning agency may take into account any relevant guidelines contained in the local comprehensive plan.
28. *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, No. 24,026; consolidated with 24,027; 24,042; and 24,425, slip op. at 3. (N.M. App., October 30, 2008). Available at <http://coa.nmcourts.gov/documents/opinions/Albuquerque%20Commons%20Remand%20FO.pdf>.
29. *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, No. 24,026; consolidated with 24,027; 24,042; and 24,425, slip op. at 3. (N.M. App., October 30, 2008). Available at <http://coa.nmcourts.gov/documents/opinions/Albuquerque%20Commons%20Remand%20FO.pdf>.
30. *Lanier v. City Council of the City of Albuquerque*, Second Judicial District Court, No. CV 2007-08258 (Nov. 21, 2008).
31. The Nob Hill Highland Sector Development Plan was enacted following years of study and planning. Members of the community, including appellant, were actively involved in the process. The planning commission indicated that the OR-2 zoning was beneficial because it would support an increase of residential density in the area, create an interface with existing residential areas bordering the proposed OR zones, and would promote a quality environment by incorporating design element that would encourage pedestrian activity. These findings, the court concluded, support the city council’s conclusion that there was sound justification for the zoning change. *Lanier v. City Council of the City of Albuquerque*, Second Judicial District Court, No. CV 2007-08258 (Nov. 21, 2008).
32. *Albuquerque Commons Partnership v. City Council of City of Albuquerque*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411, 418 (2008).