MEETING DATE: November 8, 2018

REQUEST: Appeal of a decision by the Zoning Administrator determining subdivision plats for Phases 3-17 of Inspiration Heights Subdivision have expired.

CASE No: AP18-005

PURPOSE: Submittal of construction drawings for Phases 3-17 of Inspiration Heights.

PROPERTY OWNER/ Kenneth R. Thurston

LOCATION: Intersection of Holman Rd. and Arroyo Rd.

PROPERTY SIZE: 150 acres

PARCEL ID NO.: R0316316, R0316315, R0328056, R0329042.

RECOMMENDATION: Uphold the Zoning Administrators Decision

CASE MANAGER: Luis Marmolejo
Senior Planner

Case #AP18-005 Submitted by Kenneth Thurston, an Appeal of a decision by the Zoning Administrator determining that Phases 3-17 of the Inspiration Heights Subdivision have expired; therefore, requiring the submission of a new subdivision application. The property is located within Section 6, Township 22 South, Range 3 East, east of the intersection of Holman Road. The deeds were recorded in the Office of the Doña Ana County Clerk on January 12, 2018 with Instrument # 1801066 and can be further identified by Parcel ID #316316, R0316315, R0328056, R0329042.

REPORT CONTENTS: (1) Case Analysis (2) Zoning Administrator Letter (3) Appellants Letter (4) Inspiration Heights Master Plan
SURROUNDING ZONING AND LAND USE:

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EXISTING CONDITIONS AND ZONING:
The 150 acre site is composed of 5 separate properties all zoned D3 (High Density Residential) Zone that permits triplex, fourplex, and multiple-family apartment complexes at a relatively high density of dwelling units per acre. The properties are vacant. Access to the property is from Holman Rd. and Arroyo Rd. Phase 1-2 are built out and are located in the southwest corner of the Inspiration Heights Master Plan

THE REQUEST:
An Appeal to overturn a decision by the Zoning Administrator (ZA) determining that Phases 3-17 of the Inspiration Heights Subdivision have expired and have no vested rights, therefore, requiring submission of a new subdivision application to comply with the UDC development standards. The Appellant’s basis for the Appeal is:

1) The Inspiration Heights Master Planned Community was originally submitted under the Extra Territorial Zoning Authority and Subdivision Codes with subsequent approval of Zoning, Sketch Plan, and Preliminary Plat for the entire 175 acres of property approved at a public hearing,
2) Following this approval, Phase 1 and 2 of the subdivision received final plat approval with all required infrastructure completed in 2007.
3) On June 5, 2008, the City of Las Cruces Community Development Department authored a letter by then staff member Vince Banegas that confirmed that filings of the first two phases of the subdivision, the preliminary plat was vested, and the preliminary plat would not expire.
4) On November 27, 2017, the Assistant County manager drafted a e-mail outlining reasons that the “Rawson Amendments” are not allowable under state law as it is applicable to the UDC.

See Appellants attached letter in Exhibit “A”. The Appellant disagrees with this interpretation, see letter to ZA is attached in Exhibit “B”.

BACKGROUND:
The Inspiration Heights Subdivision consisted of 17 Phases that was approved under the Extra-Territorial Zone Subdivision Ordinance (“Ordinance”) with the first two phases of the subdivision receiving Final Plat approval in 2007 and to date is subsequently nearly built out. The Ordinance provided for the expiration of a preliminary subdivision plat. Specifically, Section 2.2D of the ETZ Ordinance provided that, “Preliminary plat approval shall be effective for no more than one (1) year from the date of
approval.” Section 2.3 of the Ordinance provided that within one (1) year after the approval of the preliminary plat a final plat may be prepared and, “Each year thereafter, a final plat must be submitted to continue preliminary plat approval status”. To date and since 2007, no further action has been taken on the remaining Phases 3-17 therefore there are no vested rights to the remaining phases. Further, the Appellant mentions background information such as a Vincent Banegas letter dated 05 June 2008, the ETZ Subdivision Ordinance, the “Rawson Amendment” to the Unified Development Code and NMSA 1978 §47-6-11.1., is provided in the Zoning Administrators letter dated September 26, 2018 explaining the reason for denial, See Exhibit A.

**APPLICABLE PLANS, POLICIES, AND CRITERIA FOR APPROVAL:**

**Ordinance No.287-2016, Unified Development Code**

§ 350-216 **Appeals:** Appeal of a decision of the Zoning Administrator must be within 30 days of the written decision.

§ 350-501 Table 5.1 Land Use Classification Matrix Zoning Districts (see attached).


§ 350-104 Administrative Authority and Duties. A. Decision-making authorities. The following positions and bodies are listed in a hierarchy of review, for approval or denial, with the Zoning Administrator being the first level of action succeeded by each entity as listed below:

(1) Zoning Administrator;
(2) Planning and Zoning Commission (P&Z)

§ 350-104 B. Zoning Administrator. The Community Development Department (CDD) Director shall act as Zoning Administrator or appoint a designee to administer this chapter, and while performing that function, the Zoning Administrator shall:

(3) Receive, review, analyze, and present to the P&Z applications for zone changes, community types, special use permits, variances, appeals, and site plans for review and disposition in accordance with this chapter; and

(5) Receive and present to the P&Z appeals by persons aggrieved by any decision of the Zoning Administrator.

§ 350-104 C. Planning and Zoning Commission. The P&Z shall:

(6) Hear and decide appeals of actions taken by the Zoning Administrator. The P&Z may affirm, modify or reverse actions of the Zoning Administrator;

§ 350-201 General public hearings:

B. General quasi-judicial hearing procedures.

C. Specific rules of due process for quasi-judicial hearings.

**NOTICE / NOTIFICATION:**

- 70 letters of notification were mailed to the property owners within the area of notice on October 17, 2018.
- Legal Ad was placed in the Las Cruces Sun-News on October 17, 2018.
- Signs were posted on the property in a timely manner.
- Agenda posted on the DAC Web site.
STAFF ANALYSIS:

The Inspiration Heights Subdivision consisted of 17 Phases that was subject to approval under the Extra-Territorial Zone Subdivision Ordinance (“Ordinance”) with the first two phases of the subdivision receiving Final Plat approval in 2007. The ETZ Ordinance provided for the expiration of a preliminary subdivision plat. Specifically, Section 2.2D of the Ordinance provided that, “Preliminary Plat approval shall be effective for no more than one (1) year from the date of approval.” Section 2.3 of the Ordinance provided that within one (1) year after the approval of the Preliminary Plat a Final Plat may be prepared and, “Each year thereafter, a Final Plat must be submitted to continue Preliminary Plat approval status”. To date, no further action has been taken on the remaining Phases 3-17 therefore there are no vested rights to the remaining phases. The ETZ Ordinance provisions regarding expiration of Preliminary Plats were lapsed and the Ordinance has been repealed and replaced with the UDC. In addition, current statutory regulations NMSA 1978 §47-6-11.1 also provide provisions for Preliminary Plat expirations that also been lapsed therefore deeming the Phases 3-17 of Inspiration Heights expired.

STAFF RECOMMENDATION:

Based on the first two phases of the Inspiration Heights subdivision receiving final plat approval under Extra-Territorial Zone Subdivision Ordinance (“Ordinance”) in 2007 with no further action being taken on the remaining Phases 3-17 therefore there are no vested rights to the remaining phases, therefore, require the submission of a new subdivision application. Staff recommends that the Planning and Zoning Commission uphold the decision of the Zoning Administrator therefore denying the appeal.

STAFF FINDINGS:

1. The property is outside of any incorporated municipal zoning authority and is within Doña Ana County.
2. The appeal application process follows the following applicable sections of the UDC:
   a. § 350-104 Administrative authority and duties.
      A. Decision-making authorities. The following positions and bodies are listed in a hierarchy of review, for approval or denial, with the Zoning Administrator being the first level of action succeeded by each entity as listed below:
         (1) Zoning Administrator; and
         (2) Planning and Zoning Commission (P&Z).
      b. § 350-104 B. Zoning Administrator. The Community Development Department (CDD) Director shall act as Zoning Administrator or appoint a designee to administer this chapter, and while performing that function, the Zoning Administrator shall:
         3) Receive, review, analyze, and present to the P&Z applications for zone changes, community types, special use permits, variances, appeals, and site plans for review and disposition in accordance with this chapter; and
         (5) Receive and present to the P&Z appeals by persons aggrieved by any decision of the Zoning Administrator.
   c. C. Planning and Zoning Commission. The P&Z shall:
      (6) Hear and decide appeals of actions taken by the Zoning Administrator. The P&Z may affirm, modify or reverse actions of the Zoning Administrator.
   d. § 350-201 General public hearings:
      B. General quasi-judicial hearing procedures.
      C. Specific rules of due process for quasi-judicial hearings.
3. The Inspiration Heights Subdivision consisted of 17 Phases that was subject to approval under the Extra-Territorial Zone Subdivision Ordinance (“Ordinance”) with the first two phases of the subdivision receiving Final Plat approval in 2007.

4. The ETZ Ordinance provided for the expiration of a preliminary subdivision plat. Specifically, Section 2.2D of the Ordinance provided that, “Preliminary Plat approval shall be effective for no more than one (1) year from the date of approval.”

5. The ETZ Ordinance provisions regarding expiration of Preliminary Plats were lapsed and the Ordinance has been repealed and replaced with the UDC. In addition, current statutory regulations NMSA 1978 §47-6-11.1 also provide provisions for Preliminary Plat expirations that also been lapsed therefore deeming the Phases 3-17 of Inspiration Heights expired.
EXHIBIT A
ZONING ADMINISTRATOR LETTER

DOÑA ANA COUNTY
COMMUNITY DEVELOPMENT DEPARTMENT
BUILDING SERVICES • ADVANCE PLANNING • CURRENT PLANNING • GIS

26 September 2018

Paul J. Pompeu, President
Southwest Engineering, Inc.,
475 Archuleta Road
Las Cruces, NM 88005

Subject: Inspiration Heights, Preliminary Plat Phases 3-17

Dear Mr. Pompeu,

I am writing to you in response to your 10 September 2018, letter regarding Phases 3-17 of the Inspiration Heights Subdivision. I have determined that the preliminary subdivision plats for Phases 3-17 of Inspiration Heights Subdivision have expired and therefore, require the submission of a new subdivision application. I have instructed staff to be available to discuss the procedures and requirements to continue the development of this property.

In making my determination I reviewed your letter of 10 September 2018, the letter from Vincent Banegas dated 05 June 2008, the ETZ Subdivision Ordinance, the “Rawson Amendment” to the Unified Development Code and NMSA 1978 §47-6-11.1.

My determination is based on the following:

The Inspiration Heights Subdivision consisted of 17 Phases, with the first two phases of the subdivision receiving final plat approval in 2007. To date, no further action has been taken on the remaining Phases 3-17.

Vincent Banegas, Planning and MPO Administrator with the City of Las Cruces, provided a letter dated 05 June 2008, to you regarding status of the preliminary phases of the Inspiration Heights Subdivision. Mr. Banegas’ letter provided that, “...when a minimum of one phase of an otherwise multi-phased preliminary plat is ultimately approved (final plat) and developed without expiration of established time periods, said preliminary plat becomes vested....” His letter further provides that, “...the preliminary plat is hereby subject to the same application of rule assuming final plat approval in part has not expired” (emphasis added). Mr. Banegas’ letter does not say that the preliminary plat would not expire and nor is Mr. Banegas’ letter a perpetual preliminary plat approval; it confirmed what was in place pursuant to the ETZ Subdivisoin Ordinance—that preliminary plats in multi-phased subdivisions were considered approved when one or more phases
were completed and a final plat was approved subject to the established time periods (emphasis added).

The Extra-Territorial Zone Subdivision Ordinance ("Ordinance") provided for the expiration of a preliminary subdivision plat. Specifically, Section 2.2D of the Ordinance provided that, "Preliminary plat approval shall be effective for no more than one (1) year from the date of approval." Section 2.3 of the Ordinance provided that within one (1) year after the approval of the preliminary plat a final plat may be prepared and, "Each year thereafter, a final plat must be submitted to continue preliminary plat approval status." Reading the Ordinance and Mr. Banegas' letter together would indicate that one year after the final plat approval of Phases 1 and 2 of Inspiration Heights Subdivision, the remaining preliminary plat Phases 3-17 expired in 2008.

The UDC was amended by the County Commission on 14 November 2017. One of the so-called "Rawson Amendments" provided that, "Multi-phased subdivisions that have been previously approved by the ETZ shall be deemed as valid preliminary plats under the UDC. These preliminary plats shall not expire if one phase of the preliminary plat has received final plat approval and recorded prior to the adoption of the UDC."

The UDC amendment does not address ETZ subdivisions where the preliminary plat has already expired. However, in those instances where an unexpired preliminary plat from an approved ETZ subdivision exists, County staff have processed those subdivisions in accordance with the UDC amendment.

The UDC amendment may be in conflict with the statute if one reads the amendment to mean that a preliminary plat never expires if one phase of the preliminary plat has received final plat approval and been recorded (emphasis added). This reading would be in conflict with the provisions of §47-6-11.1 that set out the maximum expiration date of a preliminary plat and all extensions thereof.

Finally, the statute that regulates the expiration of preliminary subdivision plats is NMSA 1978 §47-6-11.1, which provides:

A. An approved or conditionally approved preliminary plat shall expire twenty-four months after its approval or conditional approval, or after any additional period of time as may be prescribed by county regulation, not to exceed an additional twelve months. However, if the subdivider proposes to file multiple final plats as provided for under county regulations governing phased development, each filing of a final plat shall extend the expiration of the approved or conditionally approved preliminary plat for an additional thirty-
six months from the date of its expiration or the date of the previously filed final plat, whichever is later. The number of phased final plats shall be determined by the board of county commissioners at the time of the approval or conditional approval of the preliminary plat.

B. Prior to the expiration of the approved or conditionally approved preliminary plat, the subdivider may submit an application for extension of the preliminary plat for a period of time not exceeding a total of three years. The period of time specified in this subsection shall be in addition to the period of time provided in Subsection A of this section.

C. The expiration of the approved or conditionally approved preliminary plat shall terminate all proceedings on the subdivision, and no final plat shall be filed without first processing a new preliminary plat.

You may appeal this decision within thirty (30) days from the date of this letter to the Planning and Zoning Commission and follow the procedures listed in Section 350-216 “Appeals” of the Unified Development Code, Chapter 350 of the Code of Doña Ana County. If you decide to appeal, please contact Luis Marmolejo, Senior Planner, at your earliest convenience to assist you with this process; he may be reached at luism@donaanacounty.org or 575-525-6128.

Sincerely,

[Signature]

Angela R. Roberson
Interim Director, Community Development Department and Zoning Administrator
EXHIBIT B
APPELANTS LETTER

September 10, 2018

Mr. Chuck McMahon
Dona Ana County Assistant County Manager
845 North Motel Boulevard
Las Cruces, New Mexico  88005

Mr. Robert Armijo, P.E.
Dona Ana County Public Works Director
845 North Motel Boulevard
Las Cruces, New Mexico  88005

Mr. Luis Marmolejo
Dona Ana County Community Development Department
845 North Motel Boulevard
Las Cruces, New Mexico  88005

Re:  Inspiration Heights Subdivision, Phase 5 Construction Drawings
     Submittal Requirements

Gentlemen:

This letter is prepared and forwarded to you on behalf of KT Development, Inc. (KTD). This
developer has acquired the rights to complete the Inspiration Heights Master Planned Community
located off of Holman Road in Dona Ana County.  In a recent Dona Ana County (DAC) Pre-
Submittal meeting, representatives of KTD asked the DAC Staff to accept the subdivision
construction drawings and supporting documents for construction permitting.  DAC Staff
expressed reservations in accepting this subdivision for permitting and asked KTD to submit a
letter supporting its position that the subdivision can be submitted for permitting.  The following
is a summary of KTD’s position.

The Inspiration Heights Master Planned Community was originally submitted under the Extra
Territorial Zoning Authority Zoning & Subdivision Codes with subsequent approval of Land
Zoning, Sketch Plan and Preliminary Plat of the entire 175 acre property was approved at public
hearings.  Following this approval, Phase 1 and 2 of the subdivision received final plat approval
with all required infrastructure completed in 2007.  On June 5, 2008, the City of Las Cruces
Community Development Department authored a letter by staff member Vincent Banegas, AICP
that confirmed that with the filings of the first 2 phases of the subdivision, the preliminary plat

PLANNING AND ZONING COMMISSION
AP18-005* October 11, 2018
was vested, and the preliminary plat would not expire. At this point it should be noted the DAC Staff has approved all major elements of the Inspiration Heights Master Plan Community to include the Traffic Impact Analysis, individual phases of final construction drawings and the final drainage report for the entire phased development on 3 separate review submittals.

In late 2016, the Unified Development Code of Dona Ana County (UDC) was adopted by the Dona Ana County Board of Commissioners (DAC BOCC). This document was authored without any contemplation of addressing the status of previous and ongoing developments within the area of the ETZ Zone around the City of Las Cruces, including Inspiration Heights. From the official adoption date of the UDC in February of 2017, the DAC Staff had taken the position the no actions of the ETZ Authority are binding under the UDC despite the fact that 3 of the 5 members of the ETZ Authority were DAC BOCC members.

Throughout the 2017 year, several meetings with DAC Staff were held on this and other previous ETZ developments. As a result of the UDC’s shortcomings regarding the status of existing and ongoing ETZ phased subdivisions, the “Rawson Amendments” to the UDC were adopted by the DAC BOCC in late 2017. One of these amendments clarified that multi-phased developments approved by the ETZ and in effect on the date of the adoption of the UDC would be deemed approved for the purpose of the UDC. This would mean that the Inspiration Heights Subdivision Preliminary Plat would be considered approved by the DAC Staff under the UDC and that KDT could move forward to permitting of the next phase of that development.

On November 27, 2017, the DAC Assistant County Manager drafted an email outlining reasons that the “Rawson Amendments” are not allowable under state law as it applies to the UDC. We respectfully disagree with the opinions contained in this email. If there was truly legal problems with the Rawson Amendments, the County Attorney would have sent an opinion to the DAC BOCC expressing those findings or a subsequent action by the DAC BOCC to correct the illegal action taken. To date, other than DAC Staff opinion, we have not been made aware of any action taken on the above.

For the DAC Staff not to recognize the Inspiration Heights Preliminary Plat as currently approved is in error. First, on the date prior to the adoption of the UDC, the developer had vested rights in a multi-phased preliminary plat. The next day after the UDC was adopted, these rights are completely dismissed by DAC Staff. This is nothing short of a “taking”, as property rights established for this area are seized due to a poorly written document that did not account for the specific situation. This error must fall to the DAC Staff for their oversight and not to the developer. Second, the Rawson Amendments did not grant the developer any “new” rights under the UDC but rather clarified the previously outlined error in the UDC. In other words, KDT asserts that on the day prior of adoption on the UDC, a preliminary plat existed under the ETZ. The developer believes that on the day the UDC was adopted, the 2-year time clock for preliminary plat expiration should have started for the Inspiration Heights Subdivision. This means the developer would have until February 2019, with possibility of a 1-year extension to 2020, to complete the next phase of this development. This opinion seems to be reasonable under these circumstances and consistent with the previous ETZ regulations for phased development as addressed by the “Rawson Amendments” approved by the DAC BOCC.
I would again reiterate that this development has been reviewed numerous times by DAC Staff with all approvals being granted. The underlying zoning for this project was approved allowing for this type of development. The DAC BOCC must still act on this development for the approval of any future final plat within this development. Innumerable DAC Staff hours representing significant taxpayers’ dollars have been spent reviewing and amending these project documents ultimately resulting in approval for this project. Along with this public expenditure, considerable monies on behalf of the developer have been spent in the preparation, submittal and approval of the project related surveying and engineering documents. There can be no reasonable public or private benefit or interest to again review these documents as the previous submittals have met the standards of scrutiny to obtain the necessary DAC Staff approvals. Additionally, we believe that the DAC BOCC acted lawfully and justly in adopting the “Rawson Amendments” to correct the obvious UDC omissions in dealing with previously approved and currently approved ETZ phased subdivisions at the time of adoption.

KTD looks forward to a favorable response to this summary letter so that we can move forward with the development of the subdivision to provide much needed first-time homebuyer affordable housing in the East Mesa Area of Dona Ana County. Should you have any questions or require any further information, please do not hesitate to contact our office.

Sincerely,

SOUTHWEST ENGINEERING, INC.

[Signature]

Paul J. Pompeo, P.E.
President
June 5, 2008
L-08-236

Southwest Engineering
Attn: Mr. Paul Pompeo, Jr.
475 North Archuleta Road
Las Cruces, NM 88005

Dear Mr. Pompeo,

Pursuant to your request, I am hereby submitting for your consideration the practice that the City of Las Cruces, Community Development Department has practiced and continues to practice regarding the vesting of multi-phased preliminary plats via the approval of final plans for one or more phases therein identified.

It is the position of the Community Development Department as administrative agent for the Extra-Territorial Zone subdivision process that when a minimum of one phase of an otherwise multi-phased preliminary plat is ultimately approved (final plat) and developed without expiration of established time periods, said preliminary plat becomes vested and therefore in full force and effect until revision of same is made. That said, please note that design standards are subject to change through the amendment process and that preliminary plat may need to reflect those changes. Said effort should in no way infer that the preliminary plat is void and subject to reconsideration in its entirety.

Inasmuch as this scenario applies to an ETZ development known as Inspiration Heights, the preliminary plat is hereby subject to the same application of rule assuming final plat approval in part has not expired.

Should you have any further question regarding this matter, please advise.

Sincerely,

[Signature]

Vincent Banegas, AICP
Planning and MPO Administrator

cc: Cheryl Rodriguez, Development Services Administrator
    Gary Hambree, Planner
INSPIRATION HEIGHTS MASTER PLAN
AREA OF NOTIFICATION

NOTIFICATION TABLE
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