

# Planning Department

David S. Campbell, Director

Urban Design & Development Division

600 2<sup>nd</sup> Street NW – 3<sup>rd</sup> Floor

Albuquerque, NM 87102

## CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

THAKUR ENTERPRISES, LLC (CONSENSUS PLANNING, AGENT) requests a special exception to Zoning Code Section 14-16-2-20(C)(1): a VARIANCE of 9 feet to the required 36 foot height to allow for a 45 foot high building in an M-1 zone for Tract of Land in Section 9 T10N R3E in the S/2 SW/4 SE/4 NE/4 exc the southeasterly portion out to R/W at the NW corner of Menaul and University and exc a westerly portion out to R/W at Menaul and I-25, zoned M-1, located at 1901 Menaul Blvd. NE (H-15)

Appeal No:..... 18BOA-20003

Special Exception No: ..... 18ZHE-80002

Project No:..... 1011491

Hearing Date:..... 04/24/2018

In the matter of **18BOA-20003**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal of the Zoning Hearing Examiner's (ZHE's) decision based on the following findings:

### FINDINGS:

1. This is an APPEAL of the Zoning Hearing Examiner's (ZHE) APPROVAL of a SPECIAL EXCEPTION pursuant to Zoning Code §14-16-4-2(C)(2)(b), a variance of 9 feet to the required 36 foot height [Zoning Code §14-16-2-20(C)(1)] to allow for a 45 foot high building in the M-1 zone (the "subject application").
2. The subject site is located at the NE corner of the intersection of Interstate 25 and Menaul Blvd. NE (1901 Menaul Blvd. NE) and is legally described as a Tract of Land in Section 9 T10N R3E in the S/2 SW/4 SE/4 NE/4 exc the southeasterly portion out to R/W at the NW corner of Menaul and University and exc a westerly portion out to R/W at Menaul and I-25, containing approximately 7.1 acres (the "subject property").
3. The subject property is developed with commercial building, with various small-scale tenants, near the intersection. Behind the building is parking for the commercial uses and semi-truck parking for the truck stop adjacent north of the subject site.
4. The Albuquerque/Bernalillo County Comprehensive Plan and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.

5. The subject property, zoned M-1 Manufacturing zone (Zoning Code §14-16-2-20), is designated an Area of Change in the Comprehensive Plan and is not within the boundaries of a sector development plan.
  6. The applicant was also granted a conditional use by the ZHE to allow for the retailing of self-storage units in an M-1 zone (18ZHE-20003). The appellant is not appealing the conditional use permit.
  7. Pursuant to Zoning Code §14-16-2-20(C)(1), “structure height up to 36 feet is permitted at any legal location. The height and width of the structure over 36 feet high shall fall within a 45° plane drawn from the horizontal at the mean grade along each boundary of the premises, but a structure shall not exceed a height of 120 feet.” These angle plane provisions are found in the M-1 zone and in other zones.
  8. The variance of 9 feet, needed to accommodate the proposed building height of 45 feet, applies only to a small portion of the northwestern corner of the future building. As the 45 degree angle plane descends and reaches the northern property line, it intersects the building at the 36 foot mark—making a variance of 9 feet necessary to accommodate a portion of the proposed building (Record, p. 29 & 30).
  9. Zoning Code §14-16-4-2(C)(2), Special Exceptions, states that a variance shall be approved by the ZHE, if and only if, the ZHE finds all of the following:
    - (a) The application is not contrary to the public interest or injurious to the community, or to property or improvements in the vicinity;
    - (b) There are special circumstances applicable to the subject property which do not apply generally to other property in the same zone and vicinity such as size, shape, topography, location, surroundings, or physical characteristics created by natural forces or government action for which no compensation was paid;
    - (c) Such special circumstances were not self-imposed and create an unnecessary hardship in the form of a substantial and unjustified limitation on the reasonable use or return on the property that need not be endured to achieve the intent and purpose of the Zoning Code (§14-16-1-3) and the applicable zoning district; and
    - (d) Substantial justice is done.
- Pursuant to Zoning Code §14-16-4-2(C)(2), all of the tests (a, b, c, and d) must be met for a variance to be approved.
10. The ZHE found that the applicant bears the burden of ensuring that there is evidence in the record to support findings that the variance criteria are met pursuant to Zoning Code §14-16-4-2(C).
  11. The ZHE found that the subject application is not: (i) contrary to the public interest, (ii) injurious to the community; or (iii) injurious to the property or improvements located in the vicinity as required by Zoning Code §14-16-4-2 (C)(2)(a).

12. The ZHE found that there are special circumstances applicable to the subject property that don't apply generally to other property in the same zone and vicinity such as size, shape, topography, location, surroundings, or physical characteristics created by natural forces or government action for which no compensation was paid, as required by §14-16-4-2(C)(2)(b). The location of the subject property is lower than that of abutting property. The subject property is surrounded on three sides by roadways and more intensive uses, and is irregularly shaped. These factors constitute special and uncommon circumstances.
13. The ZHE found that such special circumstances were not self-imposed and create an unnecessary hardship in the form of a substantial and unjustified limitation on the reasonable use or return on the property that need not be endured to achieve the intent and purpose of the Zoning Code (§14-16-1-3) and the applicable district, as required by §14-16-4-2(C)(2)(c). The subject property's location, shape, and topography are not self-imposed and they create unnecessary hardship.
14. The ZHE found that substantial justice will be done if this Application is approved, as required pursuant to Section 14-16-4-2 (C)(2)(d).
15. The ZHE concluded that all tests of Zoning Code §14-16-4-2(C)(2) were met, and therefore approved the subject application for a variance.
16. Zoning Code Section §14-16-4-4(B)(4) states that an appellant to a special exception action shall clearly articulate the reasons for the appeal by specifically citing and explaining one or more alleged errors of the ZHE in rendering his decision:
  - (a) in applying adopted city plans, policies and ordinances in arriving at his decision;
  - (b) in the appealed action or decision, including its stated facts; and
  - (c) in acting arbitrarily or capriciously or manifestly abusive of discretion.

The appellant believes that the ZHE's decision lacks sufficient evidence to support his findings, particularly regarding the creation of unnecessary hardship, and that the applicant did not provide evidence demonstrating hardship. The building could be constructed at the 36 foot height.

Furthermore, the appellant points out an error in Finding #6 of the ZHE's decision, which refers to the "property owner's 12 story hotel". The appellant believes that the ZHE's decision was based on the 12 story hotel (the Crowne Plaza), and not the 3 story hotel to the south (the Fairfield Inn). The appellant claims that the future, 45-foot building would block the view of the Fairfield Inn building and signage from the highway, which would adversely affect the Inn's business (Record, p. 3).

17. The BOA finds that the ZHE erred in applying Zoning Code §14-16-4-2-(C)(2), Variance Criteria, in his decision. Specifically, the BOA finds that the ZHE erred regarding Zoning Code §14-16-4-2-(C)(2)(b) because there are no special circumstances applicable to the subject property which do not apply generally to other property in the same zone and vicinity such as size, shape, topography, location, surroundings, or physical characteristics created by natural

forces or government action for which no compensation was paid, because the subject property is rectilinear and similar to other sites in the M-1 zone.

18. The subject application does not meet the test in Zoning Code §14-16-4-2-(C)(2)(b), and therefore does not fulfill the Variance Criteria so it cannot be granted.
19. Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE in granting the special exception (variance) request was INCORRECT. Therefore, the appeal is GRANTED and the decision of the ZHE is REVERSED.

If you wish to appeal this decision, you must do so by **May 9, 2018**, in the manner described below. A non-refundable filing fee will be calculated at the Planning Department's Land Development Coordination counter and is required at the time the Appeal is filed.

**APPEAL TO THE CITY COUNCIL:** Any person aggrieved with any determination of the Board of Appeals acting under this ordinance may file an appeal to the City Council by submitting written application on the Planning Department form to the Planning Department within 15 days of the Board of Appeals decision. The date the determination in question is issued is not included in the 15-day period for filing an appeal, and if the fifteenth day falls on Saturday, Sunday or holiday as listed in the Merit System Ordinance, the next working day is considered as the deadline for the filing of the Appeal.

The City Council may decline to hear the Appeal if it finds that all City plans, policies and ordinances have been properly followed. If it decides that all City plans, policies, and ordinances have not been properly followed, it shall hear the Appeal. Such an appeal, if heard, shall be opened within 60 days of the expiration of the appeal period.

Should you have any questions regarding this action, please call our office at (505) 924-3860.

David S. Campbell, Planning Director

cc: Steve Karman, Chair  
Jolene Wolfley, Vice-Chair  
Robert Rayner  
Tymn Waters  
Brennon Williams, Planning Department- [bnwilliams@cabq.gov](mailto:bnwilliams@cabq.gov)  
Catalina Lehner/Planning Department [CLehner@cabq.gov](mailto:CLehner@cabq.gov)  
Lorena Patten-Quintana/Planning Department [lpatten-quintata@cabq.gov](mailto:lpatten-quintata@cabq.gov)  
Ben McIntosh, Zoning Enforcement Division [bmcintosh@cabq.gov](mailto:bmcintosh@cabq.gov)  
Kevin Morrow/Legal Department, City Hall, 4<sup>th</sup> Floor [kmorrow@cabq.gov](mailto:kmorrow@cabq.gov)  
BOA File  
Thomas Huling, 1901 University Blvd NE, 87102  
Thakur Enterprises LLC, 1501 University Blvd NE, 87102  
Consensus Planning, 302 8<sup>th</sup> St. NW, 87102  
[Tom.Huling@oceanprop.com](mailto:Tom.Huling@oceanprop.com)  
[fishman@consensusplanning.com](mailto:fishman@consensusplanning.com)