

Planning Department

Suzanne Lubar, Director

Urban Design & Development Division

600 2nd Street NW – 3rd Floor

Albuquerque, NM 87102

CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

David Marquez appeals the Zoning Hearing Examiner's **APPROVAL WITH CONDITIONS** of a special exception to Section 14-16-2-15(B)(5): a Conditional Use to allow instruction in music or dance in an existing building for all or a portion of Lot 5, Block 8, Gilchrist Sub zoned O-1, located on 222 Truman Street NE (K-17).

Appeal No: 15BOA-20003
Special Exception No: 15ZHE-80054
Project No: 1010366
Hearing Date: 07/07/15
Decision Date: 07/07/15

In the matter of **15BOA-20003**, the Zoning Board of Appeals (BOA) voted to **DENY** the Appeal, thereby **UPHOLDING** 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 WITH CONDITIONS of a CONDITIONAL USE, pursuant to §14-16-4-2(C)(1)(a) and (b), Conditional Use Criteria, to allow for "instruction in music, dance, fine arts, or crafts" in the O-1 zone [14-16-2-15(B)(5)].
2. The Zoning Hearing Examiner (ZHE) approved the abovementioned conditional use, subject to two conditions, as elaborated in the May 4, 2015 Notice of Decision. The case was heard at the April 21, 2015 ZHE hearing.
3. The subject site is described as a Lot 5, Block 8, Gilchrist Subdivision (the "subject property"). The subject property is located at 222 Truman Street NE, between Copper Avenue NE and Grand Avenue NE. A building exists on the subject property.
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 is zoned O-1 Office and Institution Zone (Zoning Code §14-16-2-15). The applicant proposes to open a dance studio specializing in adult ballet and movement classes for spinal health. Physical therapy, massage therapy and acupuncture services would also be available.
6. The intent of the O-1 Zone is to provide suitable sites "for office, service, institutional, and dwelling uses." "Instruction in music, dance, fine arts, or crafts" is a conditional use pursuant

to §14-16-2-15(B)(5). The other uses, physical therapy, massage therapy and acupuncture, are permissive office uses pursuant to subsections (A)(9) and (A)(10).

7. Zoning Code §14-16-4-2(C)(1)(a) and (b) specifies the tests that must be met for a conditional use, a type of special exception, to be approved:
 - (1) A conditional use shall be approved if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed:
 - (a) Will not be injurious to the adjacent property, the neighborhood, or the community;
 - (b) Will not be significantly damaged by surrounding structures or activities.

At the April 21, 2015 hearing, the applicant testified that the conditional use would not be injurious to the adjacent property, the neighborhood or the community, because the intention is to remodel the interior of the building to accommodate several uses that are already permissive, that there will be no expansion of the building footprint, and that plenty of parking will be available. The applicant indicated that he is requesting a conditional use “for a portion of the building”, as indicated in the May 4, 2015 ZHE Notification of Decision.

8. The ZHE found that the conditional use “will not be injurious to the community or neighbors” (Finding #3, ZHE Notification of Decision) based on the reasons as elaborated by the applicant at the hearing and summarized in Finding #8, above. For clarification, a conditional use cannot be granted “for a portion of the building”. Rather, a conditional use runs with the land and would be applied to the subject property.
9. The ZHE found that the conditional use will not be significantly damaged by surrounding structures or activities (Finding #6, ZHE Notification of Decision) as based on the applicant’s testimony at the April 21, 2015 hearing.
10. Subject to two conditions, the ZHE APPROVED, the request for a CONDITIONAL USE to allow for “instruction in music, dance, fine arts, or crafts” in the O-1 zone [§14-16-2-15(B)(5)].
11. The conditions of approval are:
 - A. The applicant shall ensure that the parked cars are setback at least 10 feet from 219 Truman (Mr. Marquez property).
 - B. The applicant shall add insulation to the dance class walls to help buffer the effects of the music.

Code Enforcement Division Staff believe that Condition A is unenforceable. The General Parking Regulations (§14-16-3-1) and the Landscaping Regulations (§14-16-3-10) of the Zoning Code are not triggered by the request (see Findings #13 and #14, herein), so no striping or buffering of the parking lot is required.
12. Zoning Code §14-16-4-4(B)(4) states that an appellant to a special exception action shall specifically cite and explain one or more errors of the ZHE in rendering his decision, and allege that the ZHE erred:

- 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 did not specifically cite any of the three reasons for an appeal. However, he elaborated the following and requests that the appeal be granted for two main reasons:

- 1) there should be some sort of barrier to prevent vehicles from coming within 10 feet of his property; and
- 2) a business designated as “adult” entertainment with “massage therapy” does not conform with the surrounding neighborhood and community and is detrimental to property values.

The appellant is also concerned that the vacant lot at 215 Truman St. NE, to be used as parking for the applicant’s business, does not have striping, handicap spaces or landscaping. The appellant also believes that the applicant’s business will be noisy and take away from nearby residents’ privacy and peace.

- 13. The applicant’s business would occupy an existing building, which would be remodeled on the inside. There are no changes to building square footage. The General Regulations of the Zoning Code do not apply unless there is a change of building square footage of at least 200 sf. Therefore, Zoning Code General Regulations (ex. parking, landscaping) do not apply to this request.
- 14. Furthermore, the General Parking Regulations, Zoning Code §14-16-3-1, are not triggered when one permissive use takes over a building used by another permissive use and the zoning remains the same (ex. O-1). No parking is required for the existing building, so no new parking is required.
- 15. The Landscaping Regulations (Zoning Code §14-16-3-10), which contain buffering requirements, do not apply. Subsection (E)(4) requires special buffer landscaping when a non-residential zone is developed after April 2, 1990 for a non-residential purpose and the site abuts a residential zone. The subject property is zoned O-1, which is not a residential zone by definition.
ZONE, RESIDENTIAL. The RO-1, RO-20, R-1, MH, R-T, R-LT, RG, R-2, R-3, RA-1, RA-2, RC, and RD zones; and the segments of the SU-1, SU-2, and SU-3 zones where the predominant use allowed in a subarea is residential.
- 16. Zoning Code §14-16-1-5, Definitions, defines an adult amusement establishment (adult use) as follows:

ADULT AMUSEMENT ESTABLISHMENT. An establishment such as an auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other commercial establishment that provides amusement or entertainment featuring one or more of the following:

- (1) A live performance, act or escort service distinguished or characterized by an emphasis on the depiction, description, exposure, or representation of specified anatomical areas or the conduct or simulation of specified sexual activities; or
- (2) Audio or video displays, computer displays, films, motion pictures, slides or other visual representations or recordings characterized or distinguished by an emphasis on the depiction, description, exposure or representation of specified anatomical areas or the conduct or simulation of specified sexual activities.

The applicant's business would be a center for health and dance, specializing in adult ballet and movement classes for spinal health. Physical therapy, massage therapy and acupuncture services would also be available. None of the activities mentioned in (1) or (2) above would occur; therefore, the applicant's business does not meet the Zoning Code definition of an adult amusement establishment (adult use).

17. Based on these findings, the Zoning Board of Appeals (BOA) concludes that the decision of the Zoning Hearing Examiner (ZHE) to APPROVE the conditional use permit was CORRECT. Therefore, the appeal is DENIED and the conditional use permit is APPROVED.

If you wish to appeal this decision, you must do so by **July 22, 2015**, 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.

Suzanne Lubar, Planning Director

cc: Catalina Lehner/Planning Department- clehner@cabq.gov
Brennon Williams, Zoning Enforcement Division- bnwilliams@cabq.gov
Jenica Jacobi/Legal Department, City Hall, 4th Floor- jjacobi@cabq.gov
BOA File
Daniel Boardman, 116 Edith SE 87102, emailboardman@gmail.com
Orlando Correa, 411 Buena Vista Dr. SE 87106, property@data-basis.com
David Marquez, P.O. Box 82881, 87198, dmarquez777@gmail.com
Bianca Juganaru, 1205 High St. SE 87102, abqbianca@gmail.com
Chris Marquez, 7217 Springfield Dr. NE 87109, bigbearcm@gmail.com