Staff Report

Agent: Garcia / Kraemer & Associates
Applicant: Community Dental Services, Inc.
Request: Sector Development Plan Map Amendment (Zone Change)
Legal Description: All or a portion of Lots 307B, 308A, 308B, and 310
Location: 2116 Hinkle Street SE
Size: 1.4 Acres
Existing Zoning: SU-2 MR Mixed Residential
Proposed Zoning: SU-2 LCR Limited Commercial Residential

Staff Recommendation

Withdrawal of Project # 1011247 Case # 17EPC-40014 based on the Findings included within this report

Staff Planner: Cheryl Somerfeldt

Findings:

1. The EPC voted to approve this case on October 12, 2017. The case was deferred 3 times for 30 days each time before the EPC voted to approve the case.
2. The EPC decision was appealed by the San Jose Neighborhood Association on October 26, 2017.
3. At a hearing on December 5, 2017 the Land Use Hearing Officer for the City recommended that the matter be remanded back to the EPC to address the R-270-1980 justification and clarify the options for zoning on the site. The City Council accepted the recommendation on January 3, 2018.
4. The applicant asked to withdraw the case on March 22, 2018.
Cheryl,

I am writing to formally request to withdraw from the EPC project #1011247 Case #17EPC-40014; Community Dental Inc.'s request for a zone change from SU-2 MR to SU 2 LCR..

thank you, I'll pick this back up at a later date..
BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-17-14; 17-EPC-40014; Project No. 10112247

San Jose Neighborhood Association, Appellants, and
Community Dental Services, Inc., Party Opponents.

I. BACKGROUND

This is an appeal from a decision of the Environmental Planning Commission (EPC) approving a zone map amendment (zone-change) and sector development plan amendment to change the zoning category of approximately 1.4-acres of land in the San Jose neighborhood from the existing SU-2, MR (Mixed Residential) to a SU-2, LCR (Limited Commercial-Residential) zone. The zone-change site consists of three abutting parcels and its address is 2116 Hinkle Street SE just South of Thaxton Avenue SE, between John Street SE to the East and William Street SE to the West.

The record is not complete, but the following are relevant facts. The landowner of the zone-change parcels also owns and operates the Community Dental Clinic which abuts the zone-change site immediately to the North [R. 116]. The Community Dental Clinic lot is approximately 1-acre of land [R. 43-p]. The zone change site is largely vacant land, however, between 2010 to 2012, some of the land was utilized for parking [R. 22]. Apparently, the landowner, without seeking City approval, developed a portion of two of the three lots for the
Dental Clinic’s parking needs. [R. 19, 21]. As a result, sometime in early 2016, the City Zoning Enforcement Staff issued a citation to the landowner (presumably the Community Dental Clinic), informing the landowner that the parking lots are not allowed in the SU-2, MR zone (which is the existing zoning of the lots) [R. 22].

On April 28, 2017, the Community Dental Clinic, through its agent, Jonathan Turner submitted their application to the City for the zone-change and sector plan amendment [R. 112]. On May 17, 2016, the landowner and City Planning Staff met in a “Pre-application Review Team Meeting (PRT) to discuss the zoning citation and the zone-change for the three lots [R. 22-23, 103-104]. The PRT record indicates that Planning Staff advised the applicant to consolidate all the abutting lots in ownership, including the lot with the Dental Clinic, in a replat to create one lot. In addition, the PRT notes indicate that the applicant was also advised to rezone the SU-2MR lots (three lots) to SU-2, LCR to accommodate the parking lots [R.104].

The record indicates that City Planner Cheryl Somerfeldt notified the applicant on June 15, 2017 that the zone-change application was deficient in certain respects [R. 160]. The applicant was specifically advised to better clarify the justification supporting the zone-change and to demonstrate that all the permissive uses in the proposed zone would not be harmful to the neighborhood [R. 160]. Because a straight zone is proposed, theoretically any of the uses allowed in a SU-2, LCR zone can be developed at the site. City policy (R-270-1980) requires that all the permissive uses be justified by the applicant.

The zone-change application was scheduled for hearing before the EPC on July 13,

---

1 Because the site is within the South Broadway Neighborhood Sector Development Plan boundaries, a zone change also requires amending the sector plan.
2017, but it was deferred because the applicant requested more time to meet with area residents and better justify the application [R. 166]. The EPC hearing was rescheduled for August 11, 2017, and then deferred a second time [R. 61]. The EPC hearing was again rescheduled for September 15, 2017, and again deferred because the San Jose Neighborhood Association requested more time so that a facilitated meeting could be held with the applicants [R. 53]. On October 13, 2016, the EPC held a hearing on the merits of the application, and voted to approve the application for the zone-change and sector plan amendment [R. 3]. There is no evidence in the record that the applicant, City Planning Staff, or the EPC considered or took any steps regarding the replat guidance that was discussed at the May 17, 2017, PRT meeting.

On October 26, 2017, the San Jose Neighborhood Association (SJNA) filed their timely appeal [R. 1]. The City Council accepted the appeal and referred it to this LUHO. An appeal hearing was held on December 5, 2017. At the LUHO hearing, eight exhibits submitted by Appellants’ counsel where included in the record. The Appellants claim that the applicant did not satisfy the standards under R-270-1980 to justify the zone-change. They also allege that the straight-zone was approved without any clear plan for development. Specifically, it gives the Dental Clinic a “blank check” to develop the 1.4-acre site with higher-density apartments rather than a parking lot. Appellants contend that because apartments can be developed on the 1.4-acre site, the EPC should have evaluated how the potential uses allowed in the straight zone can harm the neighborhood as required by R-270-1980. In the alternative, they contend, the EPC should have required a site-plan for the use that the applicant contends justifies the new zone—parking. They request that the EPC reconsider these issues in a remand or that the
City Council reverse the EPC decision on the basis that the application and the EPC decision is not supported with substantial evidence.

The record demonstrates that the applicant justified the zone-change in two ways. The first stated purpose for the zone-change is so the Community Dental Clinic can expand its Clinic services, including its parking lot [R. 70]. The second stated purpose is to open access to the Community Dental Clinic from the zone-change site, on Williams Street [R. 116]. Apparently, the Dental Clinic and an abutting landowner (Anthony Garcia, at 2111, Hinkle St.) are involved in litigation over an easement which has been the Dental Clinic’s only access for many years. The disputed access for the Dental Clinic is where Hinkle Street appears to meet and terminate at the Dental Clinic’s entrance to its parking lot. The applicant claims that the zone-change will resolve the Hinkle Street access dispute if access can be opened at Williams Street. It is not clear from the record whether the disputed access is a private easement or if it is part of Hinkle Street. In addition, there is no indication in the record whether or not the zone-change accomplishes either of the stated justifications supporting the zone-change.

Zone changes and development of the site are controlled by the South Broadway Neighborhoods Sector Development Plan (SBNSDP) which was adopted in 1986 [R. 21]. The existing zoning of all three lots (SU-2, MR) corresponds, with some exceptions, to the R-1 zone district in the Zoning Ordinance [SBNSDP, 45]. The proposed zone for the three lots, and the existing zone of the lot upon which the Dental Clinic sits is SU-2, LCR (Limited Commercial-Residential) [R. 21]. The SU-2, LCR zone corresponds to the RC (Residential/Commercial) zone in the Zoning Ordinance [SBNSDP, 45]. The rest of the
surrounding lots are zoned SU-MR and consists of single-family residential uses [R. 65]. The record also shows that the entire surrounding neighborhood is zoned for, and appears to be primarily single-family residential use [R. 65]. Other than the Zoning Map depicted in the record (R. 65), the record lacks analysis of the land uses in the area beyond the lots that immediately abut the zone-change site. What is clear is that the zone change site (all three lots) are a designated Area of Consistency in the Comprehensive Plan [R. 21].

I. STANDARD OF REVIEW

A review of an appeal is a whole record review to determine if the EPC erred:

1. In applying adopted city plans, policies, and ordinances in arriving at the decision;

2. In the appealed action or decision, including its stated facts;

3. In acting arbitrarily, capriciously or manifestly abusive of discretion.

At the appeal level of review, the decision and record must be supported by a preponderance of the evidence to be upheld. The Land Use Hearing Officer is advisory to the City Council. If a remand is necessary to clarify or supplement the record, or if the remand would expeditiously dispose of the matter, the Land Use Hearing Officer has authority to recommend that the matter be remanded for reconsideration by the EPC. The City Council may grant the appeal in whole or in part, deny it, or remand it to the Land Use Hearing Officer or to the EPC.”

III. DISCUSSION

In this appeal, Appellants claim that the applicant did not satisfy the standards under R-270-1980 to justify the zone-change. And, as stated above, they claim that the justifications for the zone-change are vague; there is little evidence in the record that the zone-change will accomplish what the applicants contend they want to accomplish with the zone-change. As a result, they believe that the EPC granted the applicant a “blank check” to develop the lots with any of the various land-uses allowed in a SU-2, LCR zone, including apartments which would not be consistent with the existing densities in the area. The San Jose Neighborhood Association Appellants request either a remand or a reversal of the EPC decision. After reviewing the record, and hearing arguments and testimony I find that the record does not support some significant findings the EPC made regarding the R-270-1980 standards. As shown below, a remand is appropriate.

City Resolution R-270-1980 sets out the standards for analyzing zone-changes in the City. Under R-270-1980, a “proposed zone change must be found to be consistent with the health, safety, morals, and general welfare of the City” [R-270-1980, Sec. 1.A]. Second, the proposed zone-change cannot be found to be in significant conflict with policies in the Comprehensive Plan or applicable sector plans [R-270-1980, Sec. 1.C]. Third, the applicant must show with substantial evidence that the existing zoning of the zone-change site is “inappropriate” because (1) there was a mistake in the existing zoning; or (2) that “changed neighborhood or community conditions justify” the zone-change; or (3) that a different use category is more advantageous to the community as articulated in the Comprehensive Plan or in an applicable City rank plans [R-270-1980, Sec. 1.D]. Only one of the three needs to be
shown. Fourth, a zone-change cannot be approved where some of the permissive uses in the
zone would be harmful to adjacent property, the neighborhood or the community [R270-1980,
Sec. 1.E]. Finally, the applicant proposing a zone-change bears the burdens of proof [R-270-
1980, Sec. 1.B].

The applicant’s justification to support its zone-change was based on the “more
advantageous” standard under R-270-1980, Sec.1.D.3. There are several highly relevant
policies and goals in the City’s Comprehensive Plan that were overlooked or ignored by the
EPC, the Planning Staff, and the applicant in the overall analysis of the “more advantageous”
requirement in R-270-1980. As a result, the EPC based its finding that the zone-change is
more advantageous to the neighborhood on four land use policies in the Comp. Plan [R. 15].
The EPC specifically found that the zone-change will further Comp. Plan policy 5.2.1.a, e
and n, and policy 5.3.1.f and g. These policies generally concern creating sustainable
communities and favoring infill development [Comp. Plan, 5-33 and 5-36]. Yet, there are
other Comp. Plan policies and goals that are more specific to existing residential
neighborhoods that were ignored. For example, Comp. Plan Policies 5.3.7. a-g and Policies
5.6.3. a-j are aptly relevant to this zone change because these multiple policies deal with
residential uses and areas of consistency.

It is important to note that in the City Staff Planner’s first Staff Report to the EPC, it
was recommended that the zone-change be denied, advising the EPC that several
Comprehensive Plan policies and goals were not furthered by the zone-change proposal [R.
75-78]. Yet, these policies and goals, as well as the Staff analysis regarding them, were
conspicuously excluded in a subsequent Staff Report in which the Planner recommended that
the EPC approve the zone-change. There is no new evidence in the record from which the
change in recommendation can be explained.

In addition, although Staff correctly identified that the zone-change site is a designated
Area of Consistency in the Comp. Plan, the applicant failed to meaningfully address this
exceptionally significant issue. It must be addressed. To fairly evaluate whether the zone-
change is more advantageous to the neighborhood as articulated in the Comprehensive Plan, the zone-change must be properly weighed against all the relevant policies in the Plan. The
EPC’s decision lacks a fair analysis of all the policies its Planning Staff considered for
relevancy. In this case, more than half of the relevant policies were not properly evaluated.
Thus, the EPC’s decision regarding the R-270-1980, Sec. 1.D(3) (the more advantageous
requirement) is not supported with substantial evidence in the record.

Next, I agree with the Appellants that EPC Findings 9.B and E are arbitrary and
capricious findings because there is no factual evidence to support them. EPC Findings 9.B
and E are not insignificant findings; they are the only findings that the EPC chose to show
that R-270-1980, Sec. 1.E is satisfied. R-270-1980, Sec. 1.E requires the EPC to deny a
zone-change if “some of the permissive uses in the zone would be harmful to adjacent
property, the neighborhood or the community.” Finding 9.B and E states in relevant parts:

The San Jose Neighborhood Association has expressed concerned (sic)
over higher density multi-family use, however, multi-family is not typically
a conflicting use in residential neighborhoods. furthermore, the Zoning
Hearing Examiner found that apartments would not be injurious to the
neighborhood, in a Conditional Use Permit case for adjacent properties

The EPC also found that:
[permissive uses in the SU-2 LCR (Limited Commercial Residential) zone would not be harmful to adjacent property, the neighborhood, or the community because in a previous Conditional Use Case on the adjacent properties, the Zoning Hearing Examiner found that multi-family would not be injurious to the surrounding neighborhood. Since the neighborhood appealed the recent Conditional Use Permit for an apartment complex on the adjacent property, potential projects with multi-family housing could be controversial; but are not typically considered harmful [EPC Finding 9.E, R. 15].

These two findings are meant to demonstrate that apartments at 20-dwelling units per acre, which is one of the permissive uses in the proposed SU-2, LCR zone, will not be harmful to the neighborhood. The EPC chose to borrow a finding from a decision of the Zoning Hearing Examiner (ZHE) regarding a conditional use as the only basis of fact to support that R-270-1980, Sec. 1.E is satisfied. However, the evidence in the record clearly shows that the Zoning Hearing Examiner (ZHE) decision, which is referenced in the findings, was entirely vacated by the City Council [R. 11]. The City Council action of vacating the ZHE’s decision means that the EPC cannot rely on the ZHE’s decision, because the ZHE decision is legally void.

Even if the ZHE’s decision had not been vacated, the finding is erroneous for another reason. ZHE’s findings and decision are specific to special exceptions, not zone changes under R-270-1980, Sec. 1.E. In addition, a closer review of ZHE decision relied on by the EPC, demonstrates that that the ZHE did not rule “multi-family would not be injurious to the surrounding neighborhood” as the EPC concluded in its Finding 9.E. The ZHE limited his analysis and his ruling to the facts he was reviewing. The ZHE ruled that “…the proposed use will not be injurious...to the neighborhood” [16ZHE-80069, dated 5-4-16] (emphasis added).

There is no evidence in the record that the facts upon which the ZHE based his decision are comparable to the facts in this zone-change application. It is undisputed that the facts of each
application concern different applicants, different properties and different standards. It is
undisputed that the ZHE primarily evaluates only special exceptions, nor does he make
findings under R-270-1980. The standards for a conditional use and the standards for R-270-
1980 are not the same. To avoid substantive and procedural due process concerns, each zone-
change application must be considered on their own merits, and based on the facts presented
in each application.

Nonetheless, because the City Council had vacated the ZHE decision, the EPC’s
reliance on it to support its finding that uses allowed in the proposed zone are not harmful to
the residential neighborhood is erroneous, arbitrary, and capricious. In the absence of EPC
Finding 9.B and 9.E (ZHE’s decision), the record lacks substantial evidence to support the
zone-change, specifically under R-270-1980, Sec. 1.E.

Next, in her first Staff Report to the EPC for the August 10, 2017 EPC hearing, City
Staff Planner Somerfeldt advised the EPC that:

…the neighborhood has expressed that they are opposed to apartments
which would be a permitted use in the requested SU-2 LCR zone. The
zone change has not been justified by the applicant (Emphasis added) [R.
79].

In that report, the Staff Planner recommended that the zone-change be denied [R. 83]. In a
later report, Staff Planner Somerfeldt recommended that the EPC approve the zone-change.
Yet, as indicated above, there is no new evidence in the record which would shed light on the
change in recommendations by Staff. The applicant’s “sound justification” for the zone-
change is significant to any analysis and is required under R-270-1980, Sec. 1.B (emphasis
added). The evidence in the record submitted by the applicant to justify the zone change lacks
clarity and its soundness has been challenged by Appellants.
222 As stated above, the applicant’s stated justification for the zone-change is two part: (1) So the Community Dental Clinic can expand its parking lot [R. 70]; and (2) because the access to the Dental Clinic from Hinkle Street has become an issue of contention with neighbors, the second stated purpose is to open access to the Community Dental Clinic from the zone-change site on Williams Street [R. 116]. The applicant, went so far as to argue to the EPC that the zone-change is good for the neighborhood because the Dental Clinic will no longer need access from Hinkle Street [R. 43-b-c]. In its Finding 7.e, the EPC expressly found that moving the Dental Clinic’s access from Hinkle Street to Williams Street partially furthers Comp. Plan Policy 5.3.1.f [R. 4]. However, the record does not have substantial evidence that the zone-change will have any effect on the Hinkle Street access. I find that there is no evidence which would support EPC Finding 7.e, because there is no evidence that the Hinkle Street access will be closed-off when the Dental Clinic obtains access from Williams Street.

234 Finally, the EPC had at least one basic, relevant question for which it was given inaccurate information. At its October 13, 2017 public hearing, after the floor had closed, Chairwoman Hudson was discussing denying the application. In her discussion, she asked City Planning Staff if there were other more appropriate zones to achieve parking on the lots, specifically a parking zone (P-Zone). Chairwoman Hudson was struggling with approving a straight zone which gives the applicant that “blank-check” Appellants contend was granted. Chairwoman Hudson was concerned that there are better alternatives to achieve the applicant’s stated justifications. I find that Chairwoman Hudson’s inquiry was relevant. It was relevant because the answer would help the EPC in their deliberations of the application. As a Planning body, the EPC needs to know if an applicant’s asserted justifications for a zone-
change can be achieved in other ways. The Staff Planner’s response to Chairwoman’s
Hudson’s question was that it was her understanding that a “P-zone would not be a permitted
zone...because it's within the sector development plan” [R. 43-z.1]. This is categorically not
accurate. The SBNSDP unmistakably allows parking zones within its boundaries [SBNSDP,
p. 44-45]. I find that EPC Chairwoman’s question presented a significant, valid inquiry, and
that the inaccurate answer in the record is another strong reason warranting a remand. The
EPC should weigh or reweigh the matter as it sees fit, but it must have accurate information
to meaningfully consider the soundness of the justification for the zone-change.

III. CONCLUSION

For all the reasons described above, I respectfully recommend that Appellants’ appeals
be partially granted. The EPC’s decision and key findings are not supported with substantial
evidence. In addition, the EPC did not have relevant, accurate information it inquired about
in its consideration of whether the zone-change is justified. In my opinion, a remand to the
EPC to specifically address the deficiencies described above is necessary.

Steven M. Chavez, Esq.
Land Use Hearing Officer

December 14, 2017