



CITY OF ALBUQUERQUE
OFFICE OF ADMINISTRATIVE HEARINGS
ZONING HEARING EXAMINER
NOTIFICATION OF DECISION

ALLEN MINER; CIC, LLC (JEREMY ORTIZ / ARCHIS DESIGN LLC, AGENT) requests a special exception to Section 14-16-2-17(B)(18): a CONDITIONAL USE to allow the retail sale of alcoholic drinks for consumption off premises for all or a portion of Lot 1A, Block 2A, Vista Larga zoned C-2, located on 2800 INDIAN SCHOOL RD NE (H-16)

Special Exception No:**18ZHE-80013**
Project No:**Project# 1011500**
Hearing Date:02-20-18
Closing of Public Record:02-20-18
Date of Decision:03-07-18

On the 20th day of February, 2018, JEREMY ORTIZ / ARCHIS DESIGN LLC (“Agent”) acting as agent on behalf of the property owner ALLEN MINER; CIC, LLC (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow the retail sale of alcoholic drinks for consumption off premises (“Application”) upon the real property located at 2800 INDIAN SCHOOL RD NE (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a conditional use to allow the retail sale of alcoholic drinks for consumption off premises
2. The City of Albuquerque Code of Ordinances Section 14-16-4-2(C)(1) (Special Exceptions – Conditional Use) reads: “*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.*
3. The Applicant bears the burden of ensuring there is evidence in the record supporting a finding that the above criteria are met under Section 14-16-4-2(C).
4. The ZHE finds that in the proposed use will not be injurious to the adjacent property, the neighborhood, or the community as required by Section 14-16-4-2(C)(1)(a).
5. This Application is one of three submitted for the same proposed business, and comments were received about all three applications at the same time. This order will address those comments that are relevant to this Application.
6. Applicant proposes a small-batch distillery and farm-to-table restaurant concept for the former Alpine Sausage Kitchen property, now vacant.
7. Applicant wishes to offer take-out service primarily for existing customers who wish to take home a partially consumed bottle or purchase some product for home consumption.

8. The take-out service is intended to be ancillary to the main business and projected to be no more than 1-5% of sales.
9. Bottles of Applicant's product are anticipated to cost in the \$50 to \$75 range.
10. Applicant confirms that it will necessarily comply with all alcohol service and sales requirements.
11. Those statutes/regulations prohibit sales to intoxicated individuals (NMSA 60-7A-16) and require all servers to have permits (NMAC § 15.11.31.8) certifying the servers have current training in recognizing intoxicated individuals (NMSA 60-6E-5).
12. Concerns were expressed about parking and traffic.
13. Those concerns must be seen in the context of the conditional use requested.
14. Given the focus of Applicant's business, the cost of the limited, specialty, single brand product and the availability of alternative outlets, Applicant's expectation of minimal sales to non-table service, walk-in purchasers is reasonable. Such sales can truly be expected to be negligible.
15. Therefore, the associated marginal additional traffic and parking requirements can reasonably be expected to be equally negligible.
16. Concerns were expressed about individuals leaving with alcohol, in conjunction with nearby school, park and church uses. Although the specific nature of the concern was not expressed, it can be inferred to be related to public consumption and public intoxication.
17. There is no evidence in the record to support such a concern however, such as an analysis of similar business and any attendant problems of that sort.
18. Without such evidence I cannot connect the proposal to sell small amounts of expensive liquor with any real threat of such activities.
19. The concern about accidents seems primarily addressed to the table service aspect of the business, although it may address concerns of off-premises customers drinking in their cars and then driving.
20. As noted above, there are state-mandated checks in place to limit the potential for intoxicated drivers leaving the property.
21. Beyond that, the same lack of evidence of injury as discussed above must come into my analysis as to the potential for traffic accidents.
22. To the extent concerns expressed at the hearing are not considered herein it is because they are not relevant to the required analysis under the code of the potential for injury from off premises sales.
23. I also note that several individuals spoke in favor of the Application, and the Netherwood Neighborhood Association offered its support, which I find relevant as it is presumed to represent the general position of its members.
24. After due consideration, and balancing the factors, I find that the proposed use will not be injurious to the adjacent property, the neighborhood, or the community.
25. I do recognize that my analysis relies on certain assumptions, and that if those assumptions are incorrect there could be some, albeit limited, potential for injury. The conditions imposed on this approval are designed to address that potential.
26. The ZHE finds that in the proposed use will not be significantly damaged by surrounding structures or activities as required by Section 14-16-4-2(C)(1)(b).
27. The ZHE finds that the proper "Notice of Hearing" signage was posted for the required time period as required by Section 14-16-4-2(B)(4).

28. The ZHE finds that the Applicant has authority to pursue this Application.

DECISION:

APPROVAL WITH CONDITIONS of a conditional use to allow the retail sale of alcoholic drinks for consumption off premises.

CONDITIONS OF APPROVAL:

1. There shall be no off-premise sales after 10:00 PM.
2. This approval will expire one year after Applicant receives its certificate of occupancy. Applicant is responsible for re-applying in advance of the expiration of this one year period. If no evidence of injury is presented at the hearing on re-approval then permanent approval will be considered.

If you wish to appeal this decision, you must do so by March 22, 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 is to the Board of Appeals within 15 days of the decision. A filing fee of \$105.00 shall accompany each appeal application, as well as a written explanation outlining the reason for appeal and a copy of the ZHE decision. Appeals are taken at 600 2nd Street, Plaza Del Sol Building, Ground Level, Planning Application Counter located on the west side of the lobby. **Please present this letter of notification when filing an appeal.** When an application is withdrawn, the fee shall not be refunded.

An appeal shall be heard by the Board of Appeals within 45 days of the appeal period and concluded within 75 days of the appeal period. The Planning Division shall give written notice of an appeal, together with a notice of the date, time and place of the hearing to the applicant, a representative of the opponents, if any are known, and the appellant.

Please note that pursuant to Section 14. 16. 4. 4. (B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

You will receive notice if any other person files an appeal. If there is no appeal, you can receive building permits any time after the appeal deadline quoted above, provided all conditions imposed at the time of approval have been met. However, the Zoning Hearing Examiner may allow issuance of building permits if the public hearing produces no objection of any kind to the approval of an application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

Successful applicants are reminded that other regulations of the City must be complied with, even after approval of a special exception is secured. This decision does not constitute approval of plans for a building permit. If your application is approved, bring this decision with you when you apply for any related building permit or occupation tax number. Approval of a conditional use or a variance application is void after one year from date of approval if the rights and privileges are granted, thereby have not been executed or utilized.



Christopher L. Graeser, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
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Jeremy Ortiz, PO BOX 90218, 87199
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NOTIFICATION OF DECISION

ALLEN MINER; CIC, LLC (JEREMY ORTIZ / ARCHIS DESIGN LLC, AGENT) requests a special exception to Section 14-16-2-17(B)(19): a CONDITIONAL USE to allow a retail business in which products may be manufactured for all or a portion of Lot 1A, Block 2A, Vista Larga zoned C-2, located on 2800 INDIAN SCHOOL RD NE (H-16)

Special Exception No:**18ZHE-80014**
Project No:**Project# 1011500**
Hearing Date:02-20-18
Closing of Public Record:02-20-18
Date of Decision:03-07-18

On the 20th day of February, 2018, JEREMY ORTIZ / ARCHIS DESIGN LLC (“Agent”) acting as agent on behalf of the property owner ALLEN MINER; CIC, LLC (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow a retail business in which products may be manufactured (“Application”) upon the real property located at 2800 INDIAN SCHOOL RD NE (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a conditional use to allow a retail business in which products may be manufactured.
2. The City of Albuquerque Code of Ordinances Section 14-16-4-2(C)(1) (Special Exceptions – Conditional Use) reads: “*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.*
3. The Applicant bears the burden of ensuring there is evidence in the record supporting a finding that the above criteria are met under Section 14-16-4-2(C).
4. The ZHE finds that in the proposed use will not be injurious to the adjacent property, the neighborhood, or the community as required by Section 14-16-4-2(C)(1)(a).
5. This Application is one of three submitted for the same proposed business, and comments were received about all three applications at the same time. This order will address those comments that are relevant to this Application. As explained below, much of the objections expressed are beyond the scope of the ZHE’s authority to address.
6. Applicant proposes a small-batch distillery and farm-to-table restaurant concept for the former Alpine Sausage Kitchen property, now vacant.
7. The building will be remodeled, and the parking and access will be reconfigured.
8. Manufacturing of alcoholic beverages will be in small batches, of less than 100 gallons.

9. Bottles of Applicant's product are anticipated to cost in the \$50 to \$75 range.
10. The majority of the business will be indoors, and there will be a small outdoor patio.
11. Applicant intends the business to be a community gathering place.
12. Applicant confirms that it will necessarily comply with all alcohol service and sales requirements.
13. Those statutes/regulations prohibit sales to intoxicated individuals (NMSA 60-7A-16) and require all servers to have permits (NMAC § 15.11.31.8) certifying the servers have current training in recognizing intoxicated individuals (NMSA 60-6E-5).
14. A valet service will be offered, which will allow Applicant's employees another point of contact with drivers before they operate their vehicles.
15. The business will be oriented to the north, away from the neighbor to the south.
16. There was testimony that the Subject Property is currently underutilized and an "eyesore" and that improving it will be beneficial to the community, as will the amenity it provides, and that it will be an appropriate use and scale.
17. On this evidence Applicant has met its burden of ensuring there is evidence in the record that the use will not be injurious.
18. Specific issues raised by parties at the hearing are as follows:
19. Parking. Concerns were expressed that parking will be inadequate and that the seat/parking space ratio used to calculate parking is not accurate.
20. Parking requirements are calculated pursuant to Section 14-16-3-1 and I have no basis on which I could look beyond those code requirements. The Board of Appeals has clearly stated that it is the responsibility of the code enforcement division to interpret the code's parking requirements and that "it is not the purview of the Applicant or the ZHE to decide how parking is calculated."
21. To be sure, Applicant proposes to be five spaces short of the requirement, however that deficiency is addressed by the accompanying parking variance.
22. Traffic. Concerns were expressed that the proposed use would overburden the already-congested roadways and intersections in the area.
23. The determination of whether a traffic analysis is required and, if so, whether improvements to mitigate the impacts will be required, is the province of the City Traffic Engineer, not the ZHE. A condition will be imposed to ensure review.
24. In the context of an Application that does not meet the threshold requirements for a traffic impact analysis, and in the absence of a traffic report or expert testimony, I have no basis to find that the proposed use would be injurious on that basis.
25. It is worth noting that peak traffic hours of uses like that proposed tend to be different than the traffic peak times overall.
26. Proximity of School, Park and Church. Concerns were expressed about individuals leaving with alcohol, in conjunction with nearby school, park and church uses. Although the specific nature of the concern was not expressed, it can be inferred to be related to public consumption and public intoxication.
27. There is no evidence in the record to support such a concern however, such as an analysis of similar business and any attendant problems of that sort.
28. Without such evidence I cannot connect the proposal to sell small amounts of expensive liquor with any real threat of such activities.
29. As to the specific proximity of those uses, the City's authority is constrained by state statute, § 60-6B-10, and may not exceed it.

30. Traffic Safety/Accidents. Significant concern was expressed about accidents and the potential for intoxicated drivers.
31. As noted above, there are state-mandated checks in place to limit the potential for intoxicated drivers leaving the property.
32. Also as addressed already, a valet service will allow Applicant's employees another point of contact with drivers before they operate their vehicles.
33. Given the focus of Applicant's business and the cost of the limited, specialty, single brand product no significant intoxicated driver problem is to be expected.
34. Beyond that, the same lack of evidence of injury as discussed above must come into my analysis as to the potential for traffic accidents.
35. Amount of Seating/ Site Size. Concerns were expressed over the amount of seating; specifically, that there would be too many seats for the property. The amount seating allowed is a function of life safety codes, in particular the City of Albuquerque Fire Code ordinance, which is administered by the Fire Marshal.
36. From the perspective of the ZHE there is no evidence in the record on which a condition limiting the number of seats could reasonably be based.
37. Noise. There were concerns expressed about noise from the outdoor patio seating area and from patrons leaving the premises.
38. As to the patio area, given the proximity of the closest residence, the concerns are reasonable. The conditions of approval of this Application seek to address those conditions.
39. As to patrons exiting the premises, the limited size of the business and limited amount of parking indicate that there is unlikely to be any significant injury.
40. Conditions of approval limiting hours of operation will also help address noise concerns.
41. Safety of Distilling Operation. Parties presented evidence of explosions at distilleries. It is unclear how real this danger is, particularly given the small batch operation proposed. However to address the potential for injury reasonable conditions of approval are imposed.
42. Feasibility of the Business/Potential for Replacement by Other Businesses. The ZHE has no evidence in the record on which to base a finding that the proposed business is infeasible, and even if that were the case feasibility is not a part of the conditional use analysis. The ZHE prefers to leave this analysis to the business owner, who presumably knows the best as to whether the project is worth the investment. Under Section 14-160-4-2(G), "An approved special exception shall be void one year after the date approval vested if the rights and privileges granted thereby have not been utilized... An approved special exception shall be void if it is utilized in a way materially in violation of the terms of approval for a continuous period of one year or more... [and] An approved conditional use shall be void if, after the use has begun, it ceases on the approved site for a continuous period of one year or more."
43. Nature of the Business. Objections were entered based on the nature of the business itself. However, my inquiry must be on the impacts of a business; specifically whether those impacts will be injurious. I have no basis to find that a restaurant/distillery will be *per se* injurious.
44. Traffic Circulation, Solid Waste Pickup. Concerns related to traffic circulation and solid waste pickup will be addressed by the conditions of approval.

45. To the extent concerns expressed at the hearing are not considered herein it is because they are not relevant to the required analysis under the code of the potential for injury from off premises sales.
46. After due consideration, and balancing the factors, I find that the proposed use will not be injurious to the adjacent property, the neighborhood, or the community.
47. The ZHE finds that in the proposed use will not be significantly damaged by surrounding structures or activities as required by Section 14-16-4-2(C)(1)(b).
48. The ZHE finds that the proper "Notice of Hearing" signage was posted for the required time period as required by Section 14-16-4-2(B)(4).
49. The ZHE finds that the Applicant has authority to pursue this Application.

DECISION:

APPROVAL WITH CONDITIONS of a conditional use to allow a retail business in which products may be manufactured.

CONDITIONS OF APPROVAL

1. The business shall close by 10:00 PM Sunday through Thursday and 11:00 PM Friday and Saturday.
2. Applicant shall request review from the City of Albuquerque Traffic Engineering Division of the proposed use and shall comply with any requirements of the Division.
3. There shall be no amplified music on the patio or exterior of the building.
4. Applicant shall post a sign visible to, and easily readable by, exiting patrons reading "Please keep noise down in the parking lot."
5. Applicant shall conduct a risk assessment of the distillery operation and shall employ best safety practices in its operation.
6. Applicant shall request review from the City of Albuquerque Solid Waste Management Department of the proposed site plan and shall comply with any requirements of the Division.

If you wish to appeal this decision, you must do so by March 22, 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.

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shall give written notice of an appeal, together with a notice of the date, time and place of the hearing to the applicant, a representative of the opponents, if any are known, and the appellant.

Please note that pursuant to Section 14. 16. 4. 4. (B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

You will receive notice if any other person files an appeal. If there is no appeal, you can receive building permits any time after the appeal deadline quoted above, provided all conditions imposed at the time of approval have been met. However, the Zoning Hearing Examiner may allow issuance of building permits if the public hearing produces no objection of any kind to the approval of an application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

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NOTIFICATION OF DECISION

ALLEN MINER; CIC, LLC (JEREMY ORTIZ / ARCHIS DESIGN LLC, AGENT) requests a special exception to Section 14-16-3-1(A)(26): a VARIANCE of 5 off street parking spaces to the required 21 to allow a proposed change of use for all or a portion of Lot 1A, Block 2A, Vista Larga zoned C-2, located on 2800 INDIAN SCHOOL RD NE (H-16)

Special Exception No:**18ZHE-80016**
Project No:**Project# 1011500**
Hearing Date:02-20-18
Closing of Public Record:02-20-18
Date of Decision:03-07-18

On the 20th day of February, 2018, JEREMY ORTIZ / ARCHIS DESIGN LLC (“Agent”) acting as agent on behalf of the property owner ALLEN MINER; CIC, LLC (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 5 off street parking spaces to the required 21 to allow a proposed change of use (“Application”) upon the real property located at 2800 INDIAN SCHOOL RD NE (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 5 off street parking spaces to the required 21 to allow a proposed change of use.
2. The City of Albuquerque Zoning Code of Ordinances Section 14-16-4-2 (C)(2) (Special Exceptions – Variance) reads: “*A variance application shall be approved by the Zoning Hearing Examiner, if and only if, the Zoning Hearing Examiner 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.*”
3. The Applicant bears the burden of ensuring there is evidence in the record supporting a finding that the above criteria are met under Section 14-16-4-2(C).
4. The ZHE finds that 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 Section 14-16-4-2 (C)(2)(a).

5. Applicant addressed the potential for injury due to inadequate parking (i.e., on-street parking in the residential neighborhood) by committing to providing additional off-site parking in excess of the deficiency.
6. The ZHE finds that the additional parking will more than address the on-site deficiency so long as conditions are imposed to ensure that the off-site parking is provided and used.
7. In addition, Applicant and other speakers noted the availability of bike trails and public transportation in the area.
8. The ZHE finds that 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, as required by Section 14-16-4-2(C)(2)(b).
9. Specifically, the ZHE finds that the Subject Property is small, in the context of its zoning category, and irregularly shaped, with multiple access points preventing additional parking.
10. Additionally, the Subject Property is a “peninsula” surrounded on three sides by streets.
11. The ZHE finds 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 Section 14-16-4-2(C)(2)(c).
12. Specifically, the ZHE finds that the size, shape and location of the Subject Property make providing the required parking an unnecessary hardship, and that this would be the case for most permissive or conditional uses of the Subject Property.
13. The ZHE finds that substantial justice will be done if this Application is approved, as required pursuant to Section 14-16-4-2 (C)(2)(d).
14. The ZHE finds that the proper “Notice of Hearing” signage was posted for the required time period as required by Section 14-16-4-2(B)(4).
15. The ZHE finds that the Applicant has authority to pursue this Application.

CONCLUSIONS OF LAW:

The criteria within Section 14-16-4-2(C)(2) of the Albuquerque Zoning Code are satisfied.

DECISION:

APPROVAL WITH CONDITIONS of a variance of 5 off street parking spaces to the required 21 to allow a proposed change of use.

CONDITIONS OF APPROVAL

1. Applicant shall provide at least 6 additional off-site, off-street parking spaces.

2. The additional parking spaces shall be available at all times during business hours for parking the personal vehicles of employees and customers for which the spaces are required.
3. The additional parking spaces shall, during business hours, be unobstructed and shall not be used for storage, display, sales or parking of vehicles unrelated to the use of the Subject Property.
4. If the additional parking spaces are leased from another landowner, Applicant shall submit documentation of a lease of a minimum of two years and that the lease of such parking will not cause the lessor property to be in noncompliance with parking requirements. This variance is conditional on Applicant maintaining such a lease.
5. Applicant shall ensure that at least six parking spaces on the Subject Property are available at any time that the additional parking is not at capacity. This may be accomplished by dedicated employee parking, valet parking, parking monitoring, or other means of the Applicant's choosing.

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Please note that pursuant to Section 14. 16. 4. 4. (B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

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Successful applicants are reminded that other regulations of the City must be complied with, even after approval of a special exception is secured. This decision does not constitute approval of plans for a building permit. If your application is approved, bring this decision with you when you apply for any related building permit or occupation tax number. Approval of a conditional use or a variance application is void after one year from date of approval if the rights and privileges are granted, thereby have not been executed or utilized.



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