



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

MASADA, LLC (JOHN KOEHLER, AGENT) requests a special exception to Section 14-16-3-24(A)(2) : a VARIANCE of 5200 ft to the required 5280 ft to allow a proposed small loan business for all or a portion of Lot 1, Block B, Towner Addn zoned C-2 or SU-2NFTOD, located on 2501 4TH ST NW (H-14)

Special Exception No:..... **15ZHE-80189**  
Project No:..... **Project# 1010524**  
Hearing Date:..... 08-18-15  
Closing of Public Record:..... 08-18-15  
Date of Decision: ..... 08-27-15

On the 18th day of August, 2015 (hereinafter “**Hearing**”) JOHN KOEHLER (hereinafter “**Agent**”) acting as agent on behalf of the property owner MASADA, LLC (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a Variance of 5200 ft to the required 5280 ft to allow a proposed small loan business (hereinafter “**Application**”) upon the real property located at 2501 4TH ST NW (“**Subject Property**”). Below are the findings of facts:

**FINDINGS:**

1. Applicant is requesting a Variance of 5200 ft to the required 5280 ft to allow a proposed small loan business.
2. The City of Albuquerque Zoning Code of Ordinances Section § 14-16-4-2 (C) (2) “SPECIAL EXCEPTIONS – VARIANCE” reads in part: “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 Application is to permit location of a small loan business within approximately eighty (80) feet of an existing small loan business.
4. City of Albuquerque Ordinance O-2015-002 requires: “No Small Loan Business shall commence operation until such time as it demonstrates... It is not located on the same parcel as another Small Loan Business, nor closer than one mile (5,280 ft), as

measured in a straight line from property line to property line, to any other parcel on which another Small Loan Business is located.”

5. Ordinance O-2015-002 permits small loan businesses “in operation” prior to the effective date of the ordinance to remain in operation as a nonconforming use.
6. The effective date of the ordinance is February 11, 2015.
7. The Agent submitted his business license application on May 15<sup>th</sup>, 2015.
8. Thus, under the terms of the ordinance the proposed use is not permitted and a variance is necessary.
9. A closer analysis of the facts indicates both a tighter relevant timeframe and that the Agent was acting in good faith throughout.
10. Agent signed the lease for the subject property on March 11, 2015 unaware of the ordinance becoming effective just one month prior (Agent’s landlord and realtor were also unaware of its passage).
11. After signing the lease, Applicant proceeded to spend approximately \$75,000 on tenant improvements for the subject property preparing to open July 2<sup>nd</sup>, 2015.
12. Agent was notified of the denial of the business license on June 22<sup>nd</sup>, 2015.
13. Applicant asserts that the proposed business will provide needed services, will offer competition benefitting consumers, will provide employment for several individuals and will be preferable to the building sitting vacant as with numerous other buildings in the immediate vicinity (the building was previously vacant).
14. Representatives of the Near North Valley Neighborhood Association and the 4<sup>th</sup> Street Task Force testified in opposition to the application, focusing on the language and intent of the ordinance, the preferred type of development on the 4<sup>th</sup> Street corridor and the effect of the business on its customers.
15. The ZHE finds that the Applicant has met not its burden of providing evidence (both oral testimony and written material) that establishes that the Application is not going to be: **(i)** contrary to the public interest, **(ii)** injurious to the community; or **(iii)** injurious to the property/improvements located in the nearby vicinity of the Subject Property.
16. The language of the ordinance is clear, and the City Council made its intent in passing it clear. The intent was to limit what the Council perceived as the pernicious effects of small loan businesses in general, and the concentration of small loan businesses in particular.
17. The Council made a finding that “clustering of small loan establishments tend (*sic*) to not only serve as an indicator of economic distress within a community, but also as an exacerbating factor in that distress by circulating and cycling greater debt amongst proximate small loan businesses and exporting the interest and fees on that debt out of the community.”
18. The Council made further findings relating to the incompatibility of economic development and small loan business clustering.
19. The Council’s ultimate finding was that “a separation requirement of one-mile between small loan businesses is necessary to help minimize continued expansion in the City’s low income areas where clusters presently exist.”
20. Thus, the record reflects recent findings by the City Council as to what the public interest is and what types of uses are injurious to the community or nearby properties.

21. The proposed use is indisputably among those uses that the City Council deems to be both injurious and against the public interest.
22. The ZHE adopts this reasoning and feels constrained by the recent unanimous fact finding and analysis by the City Council.
23. The Agent's primary supporting argument is that he will directly benefit consumers by providing services to the "unbanked" who demand those services. Although there are already numerous options within the immediate vicinity, the Agent explains that additional competition will benefit consumers.
24. Given the concentration of existing business (the "clustering" the City Council seeks to avoid), it is hard to see that there will be a significant benefit from making additional, similar services available.
25. The ZHE finds that the Applicant has not met its burden of providing evidence (both oral testimony and written material) that establishes that there are "special circumstances" applicable to the Subject Property which do not apply generally to other property in the same zone and vicinity.
26. The Agent explains that his good faith in believing that he was in compliance with the code constitutes such special circumstances.
27. The ZHE does not contest that the Agent was acting in good faith or doubt the sincerity of his belief that he was in compliance.
28. The ZHE, however, is also constrained to follow the terms of the Code.
29. The necessary showing by the Applicant, and finding by the ZHE, is that "there are special circumstances applicable to the subject property, which do not apply generally to other property in the same zone."
30. Agent's mistaken, and unfortunate, belief and subsequent expenditure in furtherance of that belief do not constitute special circumstances applicable to the property.
31. There is in fact no indication in the record that the subject property is materially different from any of the other 30 available buildings referenced by the Agent.
32. The ZHE finds that the Applicant has not met its burden of providing evidence (both oral testimony and written material) that establishes that the special circumstances presented hereinabove were not "self-imposed", and that those special circumstances create an unnecessary hardship upon the Applicant.
33. The unnecessary hardship that will be suffered by the Applicant is loss of a tenant, and by the Agent is significant financial hardship due to loss of investment in the remodel and additional time required to open the business in a new location.
34. To some degree the circumstances were not self-imposed, as they result from the City Council's approval of an ordinance at the very time Agent was securing a location and getting ready to open. However, the other side of that coin is that the circumstances are very much self-imposed, as the Agent failed to keep abreast of legal changes directly affecting his business and signed a lease and incurred improvement costs despite an ordinance rendering the proposed use illegal. The latter is necessarily the stronger argument.
35. Traditionally in New Mexico "unnecessary hardship" was understood to refer to "circumstances in which no reasonable use can otherwise be made of the land. .. it is clear that a showing that the owner might receive a greater profit if the variance is granted is not sufficient justification in itself for a variance." *Downtown Neighborhoods Association v. City of Albuquerque*, 1989-NMCA-091, ¶ 27.

36. Under this standard, the instant facts would be inadequate to support a variance.
37. More recently, New Mexico has relaxed the law regarding area variances, as distinct from use variances, allowing for consideration of multiple factors, including economic detriment. *Paule v. Santa Fe County Board of County Commissioners*, 2005-NMSC-021 ¶42.
38. Under that standard, a variance supported by the facts the Application here presents might be approvable assuming compliance with the remaining variance requirements and assuming that it is in fact an area variance.
39. This Application presents an interesting question of whether the Applicant seeks a use variance or an area variance.
40. The requested variance is strictly a dimensional one – a variance of 5,200 feet to a 5,280 foot separation requirement. However, unlike other separation requirements found in the code, the intent of the instant one really functions as a use prohibition, and a variance to it would permit a use not otherwise allowed in the vicinity.
41. On balance, the ZHE must determine that any special circumstances would be both self-imposed and not constituting an unnecessary hardship.

#### **CONCLUSIONS OF LAW:**

The Applicant has not met their burden of submitting an Application that provides evidence that satisfies the elements required within §14-16-4-2 (C) (2) of the Albuquerque Zoning Code.

Specifically, Applicant failed to demonstrate that the proposed use would not be contrary to the public interest or injurious to the community, that there are special circumstances applicable to the property or that even if there were special circumstances that they are not self-imposed or work an unnecessary hardship on Applicant.

#### **DECISION:**

**DENIAL** of a **VARIANCE** of 5200 ft to the required 5280 ft to allow a proposed small loan business.

If you wish to appeal this decision, you may do so in the manner described below:

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  
[mjplaman@msn.com](mailto:mjplaman@msn.com)  
[john.a.koehler@gmail.com](mailto:john.a.koehler@gmail.com)  
[lrobertson@nmrea.com](mailto:lrobertson@nmrea.com)  
[mike@americantitleloans.com](mailto:mike@americantitleloans.com)  
[jsabatini423@gmail.com](mailto:jsabatini423@gmail.com)  
[blujun2031@gmail.com](mailto:blujun2031@gmail.com)  
[queenann@spinn.net](mailto:queenann@spinn.net)  
[rkcole@swcp.com](mailto:rkcole@swcp.com)