



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

SHAWN BOYLE (RBA ARCHITECTURE PC, RICK BENNETT, AGENT) requests a special exception to Section 14-16-2-23(A) Pg 47 SOUTH BROADWAY SDP and 14-16-2-20(B)(1)(f) : a CONDITIONAL USE to allow feed or fuel storage or sales in a SU-2 HM zone for all or a portion of Lot 2B, Broadway Industrial Center Unit 2 zoned SU-2 HM, located on 2811 KARSTEN CT SE (M-14)

Special Exception No:..... **16ZHE-80115**
Project No:..... **Project# 1010821**
Hearing Date:..... 06-21-16
Closing of Public Record:..... 06-21-16
Date of Decision: 07-06-16

On the 21st day of June, 2016, RBA ARCHITECTURE PC, RICK BENNETT (“Agent”) acting as agent on behalf of the property owner SHAWN BOYLE (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow feed or fuel storage or sales in a SU-2 HM zone (“Application”) upon the real property located at 2811 KARSTEN CT SE (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a conditional use to allow feed or fuel storage or sales in a SU-2 HM zone.
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 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) so long as the approval is limited by the following conditions of approval.
5. The analysis of injury to the adjacent property, neighborhood and community necessarily entails review of both the use and of the area in which it is to be situated.
6. The use is for a bulk fuel and oil storage facility. Specifically, there will be 12,000 square feet of warehouse for packaged products and 3,000 square feet of office serving approximately nine employees. There will be three, 20,000 gallon above-ground storage tanks (two for diesel, one for gasoline).
7. The proposed facility is subject to significant state and federal regulation, and will include the following features:
 - a. warehouse spill-containment curb

- b. double walled tanks with a sensor between the walls
 - c. vapor recovery system
 - d. loading area spill collection system
8. The proposed use is located in an HM (heavy manufacturing) zone. This implies significant, intense and concentrated industrial uses.
 9. The zoned industrial park abuts the San Jose residential neighborhood.
 10. The opponents, residents of San Jose, are understandably concerned about their safety and the environmental impacts of the facility.
 11. A primary concern of the opponents relates to the potential for leaks, implosions/explosions and the release of volatile organic compounds (VOC's).
 12. The level of detail and specific knowledge required to analyze these concerns is well beyond the typical land use analysis and admittedly well beyond the knowledge of the ZHE.
 13. As to bulk and packaged storage systems design, operation and regulation the ZHE must defer to existing appropriate regulations so long as those regulations appear adequate to protect the community and avoid injury.
 14. Federal regulations, found at 40 CFR 112, include design, management and testing/monitoring requirements.
 15. State regulations, found at NMAC Title 20 Chapter 5 contain extensive regulations promulgated by the New Mexico Petroleum Storage Tank Bureau including:
 - a. registration of tanks (NMAC 20.5.2)
 - b. design, construction and installation of tanks (NMAC 20.5.4)
 - c. operating requirements (NMAC 20.5.5)
 - d. release detection (NMAC 20.5.6), reporting and inspection (NMAC 20.5.7)
 - e. financial responsibility (NMAC 20.5.9)
 - f. corrective action (NMAC 20.5.12)
 - g. installer certification (NMAC 20.5.14) and operator training (NMAC 20.5.18)
 16. The combination of state and federal regulations, including certification and training, appear to cover the range of concerns related to tank installation and operation.
 17. Moreover, the level of detail of the state and federal regulations indicates potential implied preemption of conflicting regulation by the ZHE.
 18. The opponents do pose a number of concerns that reasonable conditions of approval, imposed pursuant to this order, can address. Those concerns include hours of operation, traffic impact, insurance coverage, spills from bulk trucks and other issues related to driver and operator training. The concerns are addressed by the conditions of approval imposed herein.
 19. Opponent concerns regarding ownership and other facility operators are not issues the ZHE can readily address. Even if the LLC members were known, and if they were considered "bad actors" the conditional use permit criteria do not appear to allow for such consideration.
 20. Fuel storage facilities are allowed as a conditional use in the zone, subject to determination that the use will not be injurious. This zoning scheme implies that the City determined that bare use itself is not *ipso facto* injurious, an implication further supported by the treatment of feed storage and sales in the same manner.

21. Therefore, the primary protection the ZHE can offer is to appropriately condition the use (the conditional use permit).
22. The opponents' objections include concerns of environmental justice; that is, that their neighborhood is being targeted for polluting uses. Resolution of this question necessarily must consider both the developed industrial park with heavy manufacturing zoning designation as well as the cost of land. The Applicants' determination to locate at the Subject Property may be as much a function of the zoning and land cost as it is any desire to avoid the scrutiny of residents that may be better organized, better funded or have access to better, more sophisticated resources to oppose such proposals.
23. In any event, the environmental justice question is more applicable to the decision to impose the heavy manufacturing zoning designation with fuel storage as a conditional use than it is to the current application.
24. The ZHE understands opponents' desire that the analysis should be on the benefit to the community of the proposed use, but that standard is not contained in the applicable regulations governing the ZHE's analysis.
25. The ZHE finds that the proposed use will not be significantly damaged by surrounding structures or activities as required by Section 14-16-4-2(C)(1)(b) so long as the approval is conditioned as follows.
26. The surrounding industrial park, heavy manufacturing and residential uses have no apparent potential to harm the proposed fuel storage facility.
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 feed or fuel storage or sales in a SU-2 HM zone.

CONDITIONS OF APPROVAL

1. There will be no retail sales on site.
2. Hours of operation will be limited to 7 AM to 5 PM, Monday through Friday.
3. Truck traffic will be limited as follows:
 - a. No more than two truck trips per day with a capacity of over 4,000 gallons.
 - b. No more than six truck trips per day with a capacity of 4,000 gallons or less.
 - c. No more than one truck trip per day delivering products to the warehouse.
 - d. No more than 3 truck trips per day delivering products from the warehouse.
4. All required state and federal permits shall be obtained and maintained in good standing.

5. The Applicant shall construct and maintain the concrete containment area for truck transfers able to contain the total amount of the largest truck using the facility.
6. The bulk tanks shall have double walls with a sensor between the walls that will shut down the total system and sound an alarm if a leak or seepage occurs.
7. There shall be a raised concrete curb around the perimeter of the warehouse to contain spills.
8. The building shall be fully alarmed and the entire site shall be fenced.
9. All operators shall undergo all required storage tank operator training and periodic retraining programs
10. All trucks shall be maintained so that there is no leakage of bulk materials from the truck onto the road.
11. All drivers shall possess any required tanker commercial driver licenses (CDL's) and receive all required DOT initial and recurrent training.
12. Any additional outdoor bulk storage tanks will require an amendment to the conditional use permit.
13. Errors and omissions insurance in commercially reasonable amounts shall be in place at all times.

If you wish to appeal this decision, you must do so by July 21, 2016, 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
rick@rba81.com
sboyle@bradhallfuel.com
sjnal@live.com
stevenabeta@gmail.com
salvatorperdomo@gmail.com