



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

SHADE TREE CUSTOMS AND CAFE INC (GARCIA/KRAEMER & ASSOCIATES, AGENT) requests a special exception to Section 8.B.3 PG. 92 of the Nob Hill Highland SDP: a VARIANCE of 4 parking spaces to the minimum required 29 off-street spaces required for an existing restaurant. for all or a portion of Lot 15, Block 5, MONTE VISTA ADDN zoned CCR-1, located on 3407 CENTRAL AVENUE NE (K-16)

Special Exception No:..... **15ZHE-80026**  
Project No:..... **Project# 1010366**  
Hearing Date:..... 03-17-15  
Closing of Public Record:..... 03-17-15  
Date of Decision: ..... 04-01-15

On the 17th day of March, 2015 (hereinafter “**Hearing**”) GARCIA/KRAEMER & ASSOCIATES, (hereinafter “**Agent**”) acting as agent on behalf of the property owner SHADE TREE CUSTOMS AND CAFE INC (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a VARIANCE of 4 parking spaces to the minimum required 29 off-street spaces required for an existing restaurant (hereinafter “**Application**”) upon the real property located at 3407 CENTRAL AVENUE NE (“**Subject Property**”). Below are the findings of facts:

**FINDINGS:**

17. Applicant is requesting a Variance of 4 parking spaces to the minimum required 29 off-street spaces required for an existing restaurant.
18. 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.

19. The ZHE finds that the Applicant has met 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. Specifically, the Applicant provided testimony during the Hearing and in the Justification Letter (dated March 10, 2015 – see ZHE File) that the building was constructed prior to May 1965 and “predates the City Zoning Code’s Off-Street Parking Regulations.” The Applicant further added that the property was developed by Shade Tree Customs and Café as a restaurant on the First Floor and a motorcycle shop on the basement (lower level). The Applicant hired a contractor in the Spring of 2014 to install a patio on the north end of the restaurant. The City “red tagged” the patio construction and they stopped work. The plans were submitted, reviewed and approved in October of 2014 and a permit was issued by the City and inspections were completed and passed, however a subsequent review by the City Liquor Hearing Clerk indicated that the site didn’t meet its off-street parking requirements for the newly amended Nob Hill Highland Sector Development Plan, and that a variance application is required. The Applicant stated in the Justification Letter that they believed that this patio (and the parking variance Application) would not be injurious to the community because there are “*no public complaints, notices of violation for parking problems, nor mention of a deficit in off-street parking currently at the Subject Property.*” The Applicant also represented that during “peak business hours there are most always at least 5-10 available parking spaces for their customers to use.” As a result the Applicant argues that the parking variance, patio and restaurant use are not contrary to the public interest or injurious to the community [as required pursuant to Section § 14-16-4-2 (C) (2) (a)].
20. The ZHE received a letter from the Nob Hill Neighborhood Association, Inc. (date March 10, 2015) that indicated a majority of their board members voted to support the variance Application. The letter stated that the Agent and Applicant attended the regular NHNA Board meeting on 3/9/15 and presented the rationale for the Variance. The letter indicated that “*factors in favor of granting a variance are that they did receive City Approval of their plans, which was later revoked due to the parking issue, a portion of their patrons are for retail purposes and not solely for the restaurant, and that they applied on the cusp of the new sector development plan amendment with its updated parking requirements.*” The ZHE agrees with the Nob Hill Neighborhood Association in their evaluation of this variance Application. The Applicant’s request for a variance (reduction of 4 parking spaces from the required 29 spaces) does not appear to be injurious to this surrounding community or contrary to the public interest because there was testimony at the Hearing that this specific Subject Property is not experiencing a shortage of parking availability for its customers. Furthermore, the “immediate” neighbors to the east and west of the Subject Property do not oppose the Application (according to the Agent) and did not provide any testimony that indicated that this patio was injurious to their businesses or their parking inventory. However, David Peters (the property manager for the commercial development located “across Central Ave.” which contains the Starbucks and other commercial/restaurant tenants) did attend the Hearing and indicated that his property owner Client wanted to communicate their opposition to the Application

because of a concern for parking along Central Ave. During the portion of the Hearing when the Applicant received an opportunity to provide a “rebuttal”, the Agent indicated that the updated Sector Development Plan parking regulations would mean that the Starbucks and many other commercial “existing” properties along Central would not be in compliance (however those property owners enjoy a “legal non-conforming status”, whereas the Applicant is required to submit this Application only due to the fact that they constructed a new patio for their restaurant - which was permitted through the City, prior to receiving the “red tag”).

21. Additionally, the ZHE did receive testimony from Ms. Susan Michie (432 Lafayette Place), who provided some wonderful insight into the amendment to the parking regulations in the Nob Hill Sector Development Plan. Ms. Michie served as the chair of the Mainstreet Economic Development Committee during the drafting and review of the Sector Development Plan update. Ms. Michie indicated that the Sector Plan amendment to the parking policy allowed any commercial property less than 3,000 sq. ft. to be completely exempt from the parking requirements (in an effort to encourage development along Central). This policy, she indicated, created a boom of restaurants and a “hyper-competitive environment for restaurants in Nob Hill. Ms. Michie indicated concern that if the ZHE granted the variance that it may set a precedent for future variance requests “that replace off-street parking in alleyways with patio space.” The ZHE appreciated the historic perspective provided by Ms. Michie and the consequences of the amendment to the parking regulations in the Sector Development Plan. The ZHE reminded Ms. Michie that these decisions are made on a “case by case” basis and do not create any kind of binding precedence on subsequent applications. Ms. Michie did raise an important point, namely, that the 1965 “*off-street parking regulations which has been in effect since 1980’s states that buildings constructed before October 22, 1965 need supply such parking only to the extent on premise ground space is available.*” (See Ms. Michie Letter in ZHE File).
22. The ZHE finds that the Applicant has 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. Specifically, the Applicant provided testimony that the Subject Property is narrow, with two separate levels of service (motorcycle shopping and a restaurant) which does not apply to most of the commercial neighbors adjacent to the Subject Property. The majority of businesses along Central Ave. are either a retail shopping service or a restaurant (not both, as is the case with the Subject Property). Additionally, the Applicant indicated this property has a special circumstance as it relates to the fact that they originally had the patio plans submitted, reviewed and permitted by the City of Albuquerque, prior to receiving the red tag. Additionally, the Applicant indicates that the amendment to the Sector Development Plan (and its parking regulations) was a regulatory “special circumstance” that uniquely impacted this Applicant because they decided to renovate their store and restaurant (and add a patio) which subjected them to the new parking regulations that did not apply to existing commercial neighbors as a result of their legally “non-conforming use” status [as required pursuant to Section § 14-16-4-2 (C) (2) (b)]. In essence the Agent argued that the parking regulations are not met by the majority of the existing restaurant and commercial neighbors along Central Avenue, and this

Subject Property was only “red tagged” because they chose to construct some improvements to their restaurant and motorcycle shop. The ZHE agrees with the Applicant and the Nob Hill Neighborhood Association in arriving at the conclusion that this Subject Property is facing special circumstances (narrowness of the lot, dual level restaurant and motorcycle shop, permitted patio that was later “red tagged” as a result of the new Sector Development Plan parking regulations, etc.) which do not apply generally to other restaurant properties along Central Ave. The ZHE believes that the Sector Development Plan should be re-visited to establish parking regulations that can be met by the majority of the existing restaurants/shopping centers, and do not rely upon the status of “legal non-conforming” protection for the majority of the property owners. This regulatory environment (parking regulations that are not met by the majority of the existing restaurants) created by the Sector Development Plan causes unintended consequences for property owners within Nob Hill - fostering an environment where property owners choose to not renovate (or expand) their restaurants or shopping centers for fear of “triggering” the new parking regulations in the Sector Development Plan. This fear of losing your “non-conforming” status and being exposed to the new parking regulations in the Sector Development Plan discourages rehabilitation of the older buildings along Central Ave. that could be well served by renovating their buildings.

23. The ZHE finds that the Applicant has 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. Specifically, the Applicant provided testimony that the special circumstances (narrowness of the lot, dual level restaurant and motorcycle shop, permitted patio that was later “red tagged” as a result of the new Sector Development Plan parking regulations, etc.) were not self-imposed and that if the Application were to be denied the newly constructed patio would have to be either: (i) demolished or (ii) permanently unable to host customers of the restaurant... which constitutes an “*unjustified limitation on the reasonable use of the Subject Property*” [as required pursuant to Section § 14-16-4-2 (C) (2) (c)]
24. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that substantial justice will be done if this Application is approved. [as required pursuant to Section § 14-16-4-2 (C) (2) (d)]
25. Applicant testified at the Hearing that the yellow “Notice of Hearing” signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 (B) (4).

### **CONCLUSIONS OF LAW:**

The Applicant has 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.

### **DECISION:**

**APPROVAL** of a VARIANCE of 4 parking spaces to the minimum required 29 off-street spaces required for an existing restaurant.

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.



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Zoning Hearing Examiner

cc: Zoning Enforcement  
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