



Mayor Timothy M. Keller

# CITY OF ALBUQUERQUE

Albuquerque, New Mexico

## Planning Department

### INTER-OFFICE MEMORANDUM

April 9, 2021

**TO:** Cynthia Borrego, President, City Council

**FROM:** Brennon Williams, Planning Director *BWilliams*

**SUBJECT:** AC-21-5, Project-2020-003911, VA-2020-00144, VA-2021-00073:  
Modulus Architects, agents for Jose Alfredo and Ailda Martinez, appeals the Zoning Hearing Examiners decision to deny a request for conditional use approval to allow for a light vehicle fueling station adjacent to a residential zone district for a parcel legally described as Lot Commercial Tract, Block 5, Los Altos Subdivision, located at an unaddressed parcel on Bridge Blvd. SW, (near the NW corner of Bridge Blvd. & Tower Rd. SW), zoned MX-M Mixed-Use Medium Intensity [Section 14-16-4-3(D)(36)(c) of the Integrated Development Ordinance]

### OVERVIEW

The Applicant, Modulus Architects on behalf of Jose Alfredo and Ailda Martinez, filed a request for conditional use approval to allow for liquor sales within 500 feet of residential zone district. The request was scheduled and heard at the July 21, 2020, Zoning Hearing Examiner (ZHE) public hearing.

In the Notice of Decision issued August 5, 2020, the ZHE found that the matter should be continued to allow the Applicant and the public to timely submit additional evidence.

The matter was later heard at the August 18, 2020, public hearing and on September 2, 2020, the ZHE approved the request with conditions.

On September 17, 2020, the decision was appealed by the Los Altos Civic Association, and on October 29, 2020, the Land Use Hearing Officer (LUHO) heard the appeal and recommended that the City Council uphold the ZHE's decision and conditions, thereby denying the Appellant's appeal.

On December 7, 2020, the City Council heard the LUHO's recommendation and on December 16, 2020, issued a Notice of Decision to remand these matters to ZHE to address and enter findings on the IDO requirement that the light vehicle fueling use not increase non-residential activity within

300 feet of the adjacent residential zone districts between the hours of 8:00 pm – 6:00 am, as well as reevaluate the enforceability of the conditions of approval limiting liquor sales, and limiting the conditional use permit approval to a single operator.

On January 19, 2021, the matter was heard again by the ZHE. The resulting Notice of Decision, dated February 2, 2021, outlined the ZHE's determination that the application should be continued to allow the Applicant and the public to present evidence and legal argument regarding whether the ZHE's conditions of approval to be considered on remand may infringe upon the State of New Mexico's preemption of the field of the regulation of alcoholic beverage sales.

On February 16, 2021, the matter was again heard by the ZHE and his March 2, 2021, Notice of Decision determined that because the proposed conditions of approval would be required to mitigate the negative impacts of the requested use and because those conditions of approval would impermissibly infringe upon the State of New Mexico's preemption of the field of the regulation of alcoholic beverage sales, the Application should be denied.

On March 17, 2021, the Applicant's agent, Saucedo Chavez PC, appealed the ZHE's denial.

## **BASIS FOR APPEAL**

Section 14-16-6-4(V)(4) outlines the applicable criteria for the appeal in determining whether the Zoning Hearing Examiner erred in their decision:

### **6-4(V)(4) Criteria for Decision**

The criteria for review of an appeal shall be whether the decision-making body or the prior appeal body made 1 of the following mistakes:

- 6-4(V)(4)(a) The decision-making body or the prior appeal body acted fraudulently, arbitrarily, or capriciously.
- 6-4(V)(4)(b) The decision being appealed is not supported by substantial evidence.
- 6-4(V)(4)(c) The decision-making body or the prior appeal body erred in applying the requirements of this IDO (or a plan, policy, or regulation referenced in the review and decision-making criteria for the type of decision being appealed).

## **STAFF RESPONSE**

The reason for the appeal, excerpted from Appellant's letter, is listed below, with a bulleted, italicized response from the Planner for the Zoning Hearing Examiner. Please see the Appellant's letter and submittal packet for additional details.

**The ZHE erred in determining that the Applicant's own decision to limit the sale of alcohol to ensure compliance with the requirements of IDO section 14-6-6(A)(3) equates to an infringement of the State of New Mexico's preemption in the field of regulation of alcoholic beverage sales.**

- *The City Council remanded the case back to the ZHE to evaluate the enforceability of the conditions of approval limiting liquor sales.*
- *An applicant may volunteer limitations to obtain approval but it is incumbent on the ZHE to reduce those limitations to conditions of approval.*
- *The IDO empowers the ZHE to create conditions of approval to mitigate adverse impacts which then carry the force of law.*
- *The ZHE reasoned that because of the “Miniatures Case” (Lee Investments Inc., et al., v. City of Albuquerque, Case No, D-202-CV-2008-02996; Memorandum Opinion and Order dated May 22, 2008), and New Mexico Attorney General Opinion 80-23 (June 13, 1980), the conditions necessary for mitigation would be unenforceable by the City.*

/ Lorena Patten-Quintana /  
Lorena Patten-Quintana, ZHE Planner  
Office of the Zoning Hearing Examiner  
City of Albuquerque Planning Department





# AC-21-5

Final Audit Report

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