



## Planning Department

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### CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Geoff Ingles (Joe Cross, Agent) requests a special exception to Zoning Code Section 14-16-2-23(A) and 14-16-2-16(B)(6) : a Conditional Use to allow a drive thru lane and window in a SU-2 C-1 zone for all or a portion of Lot 8A, Block 4, University Heights zoned SU-2 C-1, located at 416 Yale Blvd. SE (K-15)

Appeal No:..... 16BOA-20018  
Special Exception No: ..... 16ZHE-80227  
Project No:..... 1010967  
Hearing Date:..... 11/22/2016  
Decision Date: ..... 11/22/2016

In the matter of **16BOA-20018**, the Zoning Board of Appeals (BOA) voted to **REMAND** the matter to the Zoning Hearing Examiner (ZHE) based on the following findings:

#### FINDINGS:

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1. This is an APPEAL of the Zoning Hearing Examiner’s (ZHE’s) APPROVAL of a SPECIAL EXCEPTION, with conditions, pursuant to Zoning Code §14-16-2-16 (B) (6) and page 74 of the University Neighborhoods Sector Development Plan (UNSDP): a CONDITIONAL USE to allow a drive-up service window associated with a restaurant, on a property zoned SU-2/C-1 (the “subject request”).
2. The subject site, described as Lot 8-A, Block 4, University Heights Addition, contains approximately 0.42 acres and is located at 416 Yale Blvd. SE.
3. The subject site is within the boundaries of the University Neighborhoods Sector Development Plan (UNSDP) area and is zoned SU-2/C-1 pursuant to the UNSDP, which states that the SU-2/C-1 zone corresponds to the C-1 Neighborhood Commercial zone of the Zoning Code (§14-16-2-16) and is subject to the same regulations as that zone.
4. A drive-up service window is a conditional use in the C-1 zone [Zoning Code §14-16-2-16 (B)(6)], which reads as follows:

Drive-up service window, except where listed as permissive in this zone, provided that the vehicle movement plan is approved by the Traffic Engineer, and further provided that the service window and any associated order board are located at least 75 feet from any residential zone. Drive-up service windows in existence upon the effective date of this Zoning Code shall be considered as approved conditional uses.

5. The Albuquerque/Bernalillo County Comprehensive Plan, the UNSDP, and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.

6. Zoning Code Section §14-16-4-4(B)(4) states that an appellant to a special exception action shall clearly articulate the reasons for the appeal by specifically citing and explaining one or more alleged errors of the ZHE in rendering his decision:
  - (a) in applying adopted city plans, policies and ordinances in arriving at his decision;
  - (b) in the appealed action or decision, including its stated facts; and
  - (c) in acting arbitrarily or capriciously or manifestly abusive of discretion.

Pursuant to Zoning Code §14-16-4-4(B)(4), the appellant articulated the reasons for the appeal in a letter. The appellant believes that the ZHE erred in applying city plans, policies, and ordinances (a) and made several inaccurate findings that have no basis in the record (b). The applicant did not meet its burden of demonstrating that the conditional use would not be injurious to the neighborhood and community. Based on these errors, the BOA should reverse the ZHE decision and not grant the conditional use (Record, p. 3).

7. Zoning Code §14-16-4-2(C)(1), Special Exceptions, states that 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.
8. The ZHE found that the proposed use would not be injurious to the adjacent property, the neighborhood, or the community because there is no compelling evidence that there will be any significant increase in intensity of use, noise, or traffic over other permissive uses and the proposed use will not detrimentally impact neighborhood character or security.
9. The UNSDP lists as one of its six basic goals the encouragement of pedestrian orientation. Particular care should therefore be taken in reviewing application for development on properties within the Plan area with regard to how they might affect this goal.
10. In his findings, the ZHE does not refer to the sector development plan or its relevance to pedestrian orientation in this neighborhood.
11. Finding 5 of the Notice of Decision states that “there is no compelling evidence that there will be any significant increase in intensity of use, noise, or traffic over other-wise permissible uses, and that the proposed use will not detrimentally impact neighborhood character or security.” Furthermore, there is no evidence in the record to demonstrate what the proposed use’s intensity, noise, or traffic impacts would be. Furthermore, there is no evidence in the record to demonstrate what the intensity, noise, or traffic impacts would be for the otherwise, permissive uses in the C-1 zone. Since there is no information to compare the relative impacts, the claim cannot be substantiated and the finding is in error.

In addition, Finding 10 states that “there is otherwise no substantial evidence in the record that danger to pedestrians or traffic will be increased beyond any permissive use that does not require a conditional use permit”. However, it is the burden of the applicant to ensure that there is evidence in the record that the conditional use will not be injurious to the adjacent property,

the neighborhood, or the community. This property is zoned the equivalent of C-1, which in all cases throughout the City lists drive-up service windows as non-permissive. With non-permissive uses, there is a presumption that a potential for such injury may exist.

12. The ZHE also found (Finding 6) that “separation from residential or other sensitive uses is adequate.” However, the ZHE does not state what he considers adequate and why. Furthermore, there is no evidence in the record to demonstrate that the drive-up service window and associated order board are located at least 75 feet from a residential zone as required pursuant to the C-1 zone [Zoning Code §14-16-2-16 (B)(6), see Finding 4].
13. There is no evidence in the record to demonstrate that the “vehicle movement plan is approved by the Traffic Engineer” as required pursuant to the C-1 zone [Zoning Code §14-16-2-16 (B)(6), see Finding 4]. If the layout on the illustrative exhibit is not approvable by the Traffic Engineer, the site layout would have to be redesigned. The ZHE relied on the illustrative exhibit as a basis for his decision.
14. The ZHE erred in stating that “the proposed use is pedestrian-oriented by design”, addressing to some extent any risk to pedestrians (Finding 8, emphasis added). Rather, a drive-up service window is inherently an auto-oriented use by definition pursuant to Zoning Code §14-16-1-5: “A building opening, including windows, doors, or mechanical devices, through which occupants of a motor vehicle receive or obtain a product or service.” Therefore, sites that contain a drive-up service window are laid out to accommodate motor vehicles by design, as a priority, and de-emphasize pedestrian-orientation. In addition, no information is provided regarding how or to what extent any risk is addressed, or what the risk might consist of.
15. The applicant provided an illustrative exhibit that lacks even minimal, standard information, such as adjacent zones, land uses, context and labeling needed to determine compliance with the requirements of the C-1 zone and the conditional use criteria. However, the ZHE relied upon this exhibit as a basis for his decision. Since the information was not presented, the ZHE could not have based his conclusions on evidence in the record and did not make a finding regarding the requirements of the C-1 zone.
16. Though a site development plan is not required with a conditional uses request, in this case a preliminary site development plan would have been helpful because information regarding traffic circulation, pedestrian circulation, ingress and egress, is needed to determine whether or not the proposed conditional use would be injurious to adjacent property, the neighborhood, or the community. Even with a site development plan, there is no mechanism to guarantee that it (or an illustrative exhibit) would correspond to what would be built on the subject site.
17. The BOA finds that the appellant did not meet the burden of proof that the proposed conditional use would not be injurious to the adjacent property, the neighborhood, or the community.
18. In the matter of 16BOA-20018, the Board remands this case to the ZHE for the purpose of providing an opportunity to clarify and expand his findings as described above.

If you wish to appeal this decision, you must do so by **December 09, 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 TO THE CITY COUNCIL:** Any person aggrieved with any determination of the Board of Appeals acting under this ordinance may file an appeal to the City Council by submitting written application on the Planning Department form to the Planning Department within 15 days of the Board of Appeals decision. The date the determination in question is issued is not included in the 15-day period for filing an appeal, and if the fifteenth day falls on Saturday, Sunday or holiday as listed in the Merit System Ordinance, the next working day is considered as the deadline for the filing of the Appeal.

The City Council may decline to hear the Appeal if it finds that all City plans, policies and ordinances have been properly followed. If it decides that all City plans, policies, and ordinances have not been properly followed, it shall hear the Appeal. Such an appeal, if heard, shall be opened within 60 days of the expiration of the appeal period.

Should you have any questions regarding this action, please call our office at (505) 924-3860.

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