

Planning Department

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Urban Design & Development Division

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Albuquerque, NM 87102

CITY OF ALBUQUERQUE BOARD OF APPEALS AMENDED NOTIFICATION OF DECISION

Southwest Convenience Stores, LLC Convenience Stores, LLC (Joshua Skarsgard-Retail SW, Agent) requests a special exception to Section 14-16-2-17(B)(18): a CONDITIONAL USE to allow the retail sale of alcoholic drink for consumption off-premise within 500 feet of a residential zone for all or a portion of Lot 32-A1-A, Block 32, Heights Reservoir Addition, zoned C-2, located at 4510 Lomas Blvd. NE (K-17).

Appeal No: 17BOA-20005
Special Exception No: ... 17ZHE-80006
Project No: 1011109
Hearing Date: 8/1/2017
Decision Date: 8/1/2017

PO Box 1293
In the matter of **17BOA-20005**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal, thereby **REVERSING** the Zoning Hearing Examiner’s (ZHE’s) decision based on the following findings:

Albuquerque, NM 87103
FINDINGS:

1. This is an APPEAL of the Zoning Hearing Examiner’s (ZHE) DENIAL of a SPECIAL EXCEPTION to the Section 14-16-2-17(B)(18): a Conditional Use to allow the retail sale of alcoholic drink for consumption off-premise within 500 feet of a residential zone (the “subject request”).
2. The subject site is described as Tract 32-A1-A, Block 32, Heights Reservoir Addition, containing approximately 1.14 acres and located at 4510 Lomas Blvd. NE (the “subject property”). The subject property is within the boundaries of the Nob Hill-Highland Sector Development Plan (NHHSDP).
3. The subject property is developed with a convenience store and is zoned C-2 Community Commercial Zone, which is Section 14-16-3-17 of the Zoning Code. The retail sale of alcoholic drink for consumption off-premise within 500 feet of a residential zone is a conditional use pursuant to subsection (B)(18).
4. The subject property is approximately 55 feet from a residential zone at its southwestern and southeastern corners. Therefore, a conditional use permit is necessary to allow alcohol sales at the subject property. The existing convenience store does not currently sell alcohol.

5. The Albuquerque/Bernalillo County Comprehensive Plan, the NHSDP, and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.
6. The subject request first entered the ZHE process for the February 21, 2017 hearing. The request was deferred to the March 17, 2017 hearing, and then deferred again to the April 17, 2017 hearing. At the April hearing, the request was deferred to the May 16, 2017 hearing. The matter was heard at the May hearing.
7. Zoning Code Section 14-16-4-2(C)(1)(a) and (b) specifies the tests that must be met for a conditional use, a type of special exception, to be approved:
 - (1) 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. Regarding the subject request, the ZHE found that the proposed conditional use will be injurious to the adjacent property, the neighborhood, or the community pursuant to Section 14-16-4-2(C)(1)(a). It is unclear from the ZHE report what evidence and/or testimony was relied on to substantiate this conclusion.
9. After articulating substantial public testimony in the ZHE report, the ZHE finds in Finding #53 that expressions of concern, speculation as to impacts, or unsupported assertions of fact do not typically arise to the level of substantial evidence on which a decision may be based. The ZHE, in Finding #54, goes on to state that much of the public comment cannot be considered substantial evidence.
10. The ZHE states that his decision is based on the totality of the evidence in the record and that, although all evidence and testimony is admitted and considered by the ZHE, each piece of evidence and testimony is given only the weight it is due.
11. The ZHE generally summarized evidence that he considered relevant:
 - A. Police call for service data indicating substantially elevated calls for service in particular categories for similar stores that sell alcohol as compared to those that do not.
 - B. Scientific papers addressing alcohol establishment density and consumption, including underage consumption, crime, including assault, suicide and domestic violence, and health and societal effects.
 - C. Evidence regarding existing impacts on the neighborhood from alcohol abuse that can be reasonably expected to be exacerbated by the current Application.
 - D. That although the Applicant appears to have a good record as a responsible operator, I cannot condition the approval on ownership or operation by this particular Applicant. Mechem v. City of Santa Fe, 96 N.M. 668.
 - E. That conditions of approval, particularly those suggested by Applicant regarding size and type of sales, were found by Judge Baca to be “likely not enforceable.” Sanchez v. City of Albuquerque, CV 2010-0316.

12. The ZHE failed to note the substantial evidence related to this site that he relied on in arriving at his decision. It is unclear from the ZHE report if evidence that was not determined to be substantial evidence was relied upon in arriving at the decision.
13. The ZHE found (Finding #58, Record at 19) that in the proposed use will not be significantly damaged by surrounding structures or activities as required by Section 14-16-4-2(C)(1)(b).
14. 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.

The appellant argued that the ZHE erred in his decision, including its stated facts. The appellant contended that the ZHE erred because he mistakenly relied on evidence, such as police call for service data, scientific papers, evidence presented by individuals, and a court ruling that conditions of approval related to another alcohol sales case were unenforceable. The appellant believes that police service calls were not elevated for other stores that sell alcohol for off-premise consumption, that the scientific papers are irrelevant to the City of Albuquerque, and that the ZHE didn't factor into his decision the applicant's willingness to accept conditions of approval had the request been approved. The appellant also believes that the ZHE erred by not applying the "clear policies" outlined in the Highland Commercial District and the Comprehensive Plan (Record at 5).

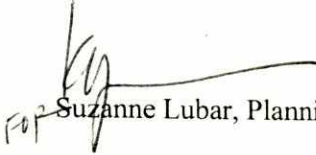
15. Based on these findings, the Zoning Board of Appeals concludes that the decision of the Zoning Hearing Examiner (ZHE) in denying the conditional use request was INCORRECT. Therefore, the decision of the ZHE is REVERSED and the appeal is GRANTED.

If you wish to appeal this decision, you must do so by **August 16, 2017**, 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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