

# Planning Department

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## CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Susan Michie appeals the Zoning Hearing Examiner's **APPROVAL** of a special exception to Section 8.B.3, p. 92 of the Nob Hill Sector Development Plan: 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 Ave. NE (K-16).

Appeal No: ..... 15BOA-20002  
Special Exception No: ..... 15ZHE-80026  
Project No: ..... 1010366  
Hearing Date: ..... 08/25/15  
Decision Date: ..... 08/25/15

In the matter of **15BOA-20002**, the Zoning Board of Appeals (BOA) voted to **REMAND** the Appeal based on the following findings:

### FINDINGS:

1. This is an APPEAL of the Zoning Hearing Examiner's (ZHE) APPROVAL of a SPECIAL EXCEPTION pursuant to Zoning Code §14-16-4-2(C)(2), Variance Criteria: a variance of 4 parking spaces to the minimum required 29 off-street parking spaces for an existing business.
2. The subject site is described as Lot 15, Block 5, Monte Vista Addition, containing approximately 0.22 acre and located at 3407 Central Avenue NE, within the boundaries of the Nob Hill Neighborhood. The Nob Hill Highland Sector Development Plan (NHSDP) applies.
3. The Albuquerque/Bernalillo County Comprehensive Plan, the NHSDP, the City of Albuquerque Zoning Code and the International Building Code (IBC) are incorporated herein by reference and made part of the record for all purposes.
4. The subject site, zoned CCR-1 pursuant to the NHSDP, is developed since 2012 with a restaurant and a motorcycle shop (Record, p. 41). The restaurant use occupies the ground floor and the motorcycle shop, a commercial use, occupies the basement.
5. With respect to parking requirements, the CCR-1 Residential Zone (NHSDP, p. 29 and Record, p. 42) states:

*Section 8.B.3 states that, for restaurants, bars or dance halls, 1 parking space is required per 6 persons of permitted fire occupancy load.*

*8.C. Commercial uses less than 3,000 square feet (sf), except those specified in Section 8.B.3, are exempt from parking requirements.*

The existing building is less than 3,000 sf, but it is not exempt from the parking requirements. Pursuant to the 8.C of the NHHSDP, parking is not required for the motorcycle shop portion of the building because it is a commercial use. However, parking is required for the restaurant use pursuant to 8.B.3, as stated above.

6. Zoning Code §14-16-3-1, Off-Street Parking Regulations, states that *“In zones where off-street parking is required, off-street parking shall be provided for all uses and buildings, except buildings constructed before October 22, 1965 need supply such parking only to the extent on-premise ground space is available.”* The applicant’s March 10, 2015 letter indicates that the building was constructed prior to 1965 (Record, p. 44). Furthermore, the NHHSDP (p. 8) states that Central Avenue, and the surrounding areas between Girard Blvd. and Carlisle Blvd., was developed in the late 1920s and 1930s.
7. In the Spring of 2014, the applicant added a 675 sf patio to the building’s northern side. Pursuant to Zoning Code §14-16-3-1, Off-Street Parking Regulations, which is part of the General Regulations: *“An applicant for a building permit for construction of a new building or building addition of 200 square feet or more shall provide parking in accordance with the general requirements of this section.”*
8. The General Regulations of the Zoning Code, including 14-16-3-1, Off-Street Parking Regulations, apply City-wide. However, when a property is within the boundaries of a sector development plan, the requirements of the sector development plan apply unless the sector development plan is silent—in which case the Zoning Code General Regulations apply.
9. Although initially the applicant did not seek a building permit prior to construction, and therefore received a Notice of Violation (NOV) regarding building without a permit, parking requirements still applied. City records (in the KIVA computer system) indicate that the NOV was issued on April 2, 2014 and that, in an effort to remedy the NOV, the applicant submitted a site development plan on May 2, 2014. The site development plan in the record (p. 43) is dated July 24, 2014 and it is unclear if it was approved or not.
10. Pursuant to the NHHSDP, parking is required for the restaurant use at the rate of 1 space per 6 people of fire occupancy load (see Finding 5). This requirement is found in Bill No. R-12-40, which amended the NHHSDP to clarify parking requirements in the CCR zones. R-12-40 became effective on October 16, 2012 and applies to the request.
11. Another amendment to the NHHSDP with respect to parking is found in Bill No. R-14-30, which states that commercial uses less than 3,000 sf are exempt from parking requirements except for those specified in Section 8.B.3 (see Finding 5). R-14-30 became effective on June 18, 2014 and applies to the request.
12. The record contains conflicting information regarding square footage of the existing building, which is either 2,811 sf (floor plan) or 2,753 sf (site development plan). Though both are less than 3,000 sf, the addition of the 675 sf patio results in a building square footage of either 3,486

or 3,428 sf. Both are over 3,000 sf. Therefore, the parking requirements of the NHSDP apply (see Finding 5).

13. The July 24, 2014 site development plan contains parking calculations (Record, p. 40), though it erroneously states that there are “*No parking requirements per Nob Hill Sector Development Plan.*” The parking calculations provided are as follows: the restaurant has a maximum of 92 occupants and the motorcycle shop has a maximum of 79 occupants, for a total of 171 occupants.  $171/6=28.5, \approx 29$  parking spaces.

14. These calculations, however, are incorrect for two reasons: First, parking for the commercial uses is not calculated based on occupancy. The NHSDP does not specify the calculation rate, so the general calculation rate for commercial uses in the Zoning Code applies. 1 space per 200 sf of commercial space is required. Therefore,  $960\text{ sf}/200= 5$  spaces. The commercial use occupies 960 sf, which is less than 3,000 sf, so no parking is required for the commercial use pursuant to the NHSDP.

Second, calculations for occupancy load were based on 1,495 sf of restaurant use, though the site development plan also indicates that the restaurant use occupies 1,793 sf (existing) plus 675 sf (patio addition) for a total of 2,468 sf of restaurant use. Occupant load for the restaurant is listed as 92, which is lower than what it should be based on the existing square footage, and even lower than what it should be when the patio area is added in.

15. The record does not contain any additional information (such as an exhibit) to show how parking for the restaurant use was calculated, specifically with respect to using a more accurate number for occupancy and demonstrating how applicable IBC categories were applied to the correct restaurant square footage. Without a definitive number for occupancy, the required parking spaces cannot be calculated with certainty.

Therefore, it is unclear how the requirement for 29 parking spaces was arrived at and, in the absence of a parking layout or notes on the site development plan, it is also unclear how the request came to be for a variance of 4 spaces. It is further unclear if granting the variance as requested would bring the applicant into compliance with all applicable Codes.

16. Zoning Code §14-16-4-2(C)(2), Special Exceptions, states that a variance shall be approved by the ZHE, if and only if, the ZHE 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.

The Zoning Hearing Examiner (ZHE) found that the applicant had met the burden of establishing that the proposed variance would not be contrary to the public interest, injurious to the community, or injurious to the property/improvements in the vicinity of the subject property [§14-16-4-2(C)(2)(a)]. The applicant provided testimony and a letter stating that 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” and that the existing building was constructed prior to 1965 and therefore predates the Off-Street Parking Regulations [[§14-16-3-1].

17. The ZHE also found that the applicant had met the burden of providing testimony and written material to establish that special circumstances apply to the subject site that “do not apply to other property in the same zone and vicinity.” The subject site is narrow and the use operates on two separate levels of service. Also, there is a regulatory “special circumstance”: the applicant decided to add a patio and therefore, unlike neighboring businesses, would be subject to the parking requirements of the NHSDP due to the change in square footage even though the building was originally approved prior to 1965.

18. 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 states that the ZHE erred in applying adopted city plans, policies and ordinances in arriving at his decision (a), and that the decision contains statements that are not factually correct (b). The appellant states that the ZHE relied heavily on testimony from the applicant. He also failed to consider that the patio addition of 675 sf would result in almost doubling the building’s occupancy and that the expansion (not an amendment to the NHSDP) triggered the parking requirements. The appellant also states that the subject site’s narrow shape is not a special circumstance, and that the dual-level restaurant/motorcycle shop is a self-imposed choice (not a special circumstance) and does not create a hardship for the business.

19. For a variance to be approved, all of the Variance Criteria found in Zoning Code §14-16-4-2(C)(2) must be met. However, the ZHE record is void of factual conclusions and/or data necessary to substantiate either the granting or the denial of this appeal. As such, the BOA, in accordance with §14-16-4-4(E)(2)(c) hereby remands to the ZHE for reconsideration on the following points:

(a) whether or not the plans used by the applicant to construct the 675 sf patio were approved by the City and, if so, on what date;

(b) the number of parking spaces existing at the subject property;

- (c) the number of parking spaces required and the methodology used to ascertain the required number of parking spaces for the subject property;
- (d) whether the requested variance of 4 parking spaces is the appropriate number of parking spaces required to bring the subject property into compliance with all applicable Codes.

If you wish to appeal this decision, you must do so by **September 11, 2015**, 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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Planning Director

SL/CLL

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BOA File