



**Environmental  
Planning  
Commission**

**Agenda Number: 07  
Project Number: 1011247  
Case Number: 17EPC- 40014  
Hearing Date: April 12, 2018**

**Staff Report**

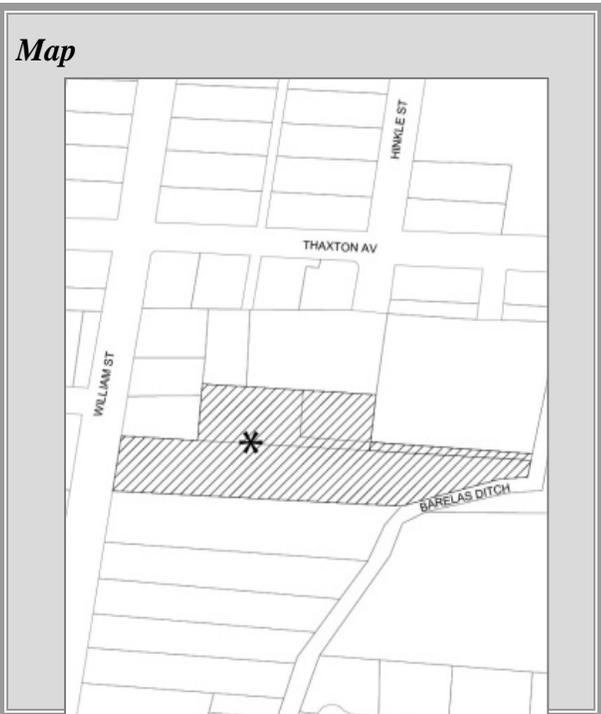
<b>Agent</b>	Garcia / Kraemer & Associates
<b>Applicant</b>	Community Dental Services, Inc.
<b>Request</b>	<b>Sector Development Plan Map Amendment (Zone Change)</b>
<b>Legal Description</b>	All or a portion of Lots 307B, 308A, 308B, and 310
<b>Location</b>	2116 Hinkle Street SE
<b>Size</b>	1.4 Acres
<b>Existing Zoning</b>	SU-2 MR Mixed Residential
<b>Proposed Zoning</b>	SU-2 LCR Limited Commercial Residential

**Staff Recommendation**

Withdrawal of Project # 1011247  
Case # 17EPC-40014  
based on the Findings  
included within this report

**Staff Planner  
Cheryl Somerfeldt**

- Findings:**
1. The EPC voted to approve this case on October 12, 2017. The case was deferred 3 times for 30 days each time before the EPC voted to approve the case.
  2. The EPC decision was appealed by the San Jose Neighborhood Association on October 26, 2017.
  3. At a hearing on December 5, 2017 the Land Use Hearing Officer for the City recommended that the matter be remanded back to the EPC to address the R-270-1980 justification and clarify the options for zoning on the site. The City Council accepted the recommendation on January 3, 2018.
  4. The applicant asked to withdraw the case on March 22, 2018.





## Somerfeldt, Cheryl

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**Subject:** FW: Community Dental Services Zone Change

**From:** Tyler Gerard [<mailto:tyler@nmcapitalpartners.com>]

**Sent:** Thursday, March 22, 2018 12:09 PM

**To:** Somerfeldt, Cheryl

**Subject:** Re: Community Dental Services Zone Change

Cheryl,

I am writing to formally request to withdraw from the EPC project #1011247 Case #17EPC-40014; Community Dental Inc.'s request for a zone change from SU-2 MR to SU 2 LCR ..

thank you , I'll pick this back up at a later date..

**BEFORE THE CITY OF ALBUQUERQUE  
LAND USE HEARING OFFICER**

**APPEAL NO. AC-17-14; 17-EPC-40014; Project No. 10112247**

**San Jose Neighborhood Association, Appellants, and  
Community Dental Services, Inc., Party Opponents.**

**1 I. BACKGROUND**

2 This is an appeal from a decision of the Environmental Planning Commission (EPC)  
3 approving a zone map amendment (zone-change) and sector development plan amendment to  
4 change the zoning category of approximately 1.4-acres of land in the San Jose neighborhood  
5 from the existing SU-2, MR (Mixed Residential) to a SU-2, LCR (Limited Commercial-  
6 Residential) zone. The zone-change site consists of three abutting parcels and its address is  
7 2116 Hinkle Street SE just South of Thaxton Avenue SE, between John Street SE to the East  
8 and William Street SE to the West.

9 The record is not complete, but the following are relevant facts. The landowner of the  
10 zone-change parcels also owns and operates the Community Dental Clinic which abuts the  
11 zone-change site immediately to the North [R. 116]. The Community Dental Clinic lot is  
12 approximately 1-acre of land [R. 43-p]. The zone change site is largely vacant land, however,  
13 between 2010 to 2012, some of the land was utilized for parking [R. 22]. Apparently, the land-  
14 owner, without seeking City approval, developed a portion of two of the three lots for the

15 Dental Clinic’s parking needs. [R. 19, 21]. As a result, sometime in early 2016, the City  
16 Zoning Enforcement Staff issued a citation to the landowner (presumably the Community  
17 Dental Clinic), informing the landowner that the parking lots are not allowed in the SU-2, MR  
18 zone (which is the existing zoning of the lots) [R. 22].

19 On April 28, 2017, the Community Dental Clinic, through its agent, Jonathan Turner  
20 submitted their application to the City for the zone-change and sector plan amendment [R.  
21 112].<sup>1</sup> On May 17, 2016, the landowner and City Planning Staff met in a “Pre-application  
22 Review Team Meeting (PRT) to discuss the zoning citation and the zone-change for the three  
23 lots [R. 22-23, 103-104]. The PRT record indicates that Planning Staff advised the applicant  
24 to consolidate all the abutting lots in ownership, including the lot with the Dental Clinic, in a  
25 replat to create one lot. In addition, the PRT notes indicate that the applicant was also  
26 advised to rezone the SU-2MR lots (three lots) to SU-2, LCR to accommodate the parking  
27 lots [R.104].

28 The record indicates that City Planner Cheryl Somerfeldt notified the applicant on June  
29 15, 2017 that the zone-change application was deficient in certain respects [R. 160]. The  
30 applicant was specifically advised to better clarify the justification supporting the zone-  
31 change and to demonstrate that all the permissive uses in the proposed zone would not be  
32 harmful to the neighborhood [R. 160]. Because a straight zone is proposed, theoretically any  
33 of the uses allowed in a SU-2, LCR zone can be developed at the site. City policy (R-270-  
34 1980) requires that all the permissive uses be justified by the applicant.

35 The zone-change application was scheduled for hearing before the EPC on July 13,

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1 Because the site is within the South Broadway Neighborhood Sector Development Plan boundaries, a zone change also requires amending the sector plan.

36 2017, but it was deferred because the applicant requested more time to meet with area  
37 residents and better justify the application [R. 166]. The EPC hearing was rescheduled for  
38 August 11, 2017, and then deferred a second time [R. 61]. The EPC hearing was again  
39 rescheduled for September 15, 2017, and again deferred because the San Jose Neighborhood  
40 Association requested more time so that a facilitated meeting could be held with the applicants  
41 [R. 53]. On October 13, 2016, the EPC held a hearing on the merits of the application, and  
42 voted to approve the application for the zone-change and sector plan amendment [R. 3]. There  
43 is no evidence in the record that the applicant, City Planning Staff, or the EPC considered or  
44 took any steps regarding the replat guidance that was discussed at the May 17, 2017, PRT  
45 meeting.

46 On October 26, 2017, the San Jose Neighborhood Association (SJNA) filed their timely  
47 appeal [R. 1]. The City Council accepted the appeal and referred it to this LUHO. An appeal  
48 hearing was held on December 5, 2017. At the LUHO hearing, eight exhibits submitted by  
49 Appellants' counsel were included in the record. The Appellants claim that the applicant did  
50 not satisfy the standards under R-270-1980 to justify the zone-change. They also allege that  
51 the straight-zone was approved without any clear plan for development. Specifically, it gives  
52 the Dental Clinic a "blank check" to develop the 1.4-acre site with higher-density apartments  
53 rather than a parking lot. Appellants contend that because apartments can be developed on the  
54 1.4-acre site, the EPC should have evaluated how the potential uses allowed in the straight  
55 zone can harm the neighborhood as required by R-270-1980. In the alternative, they contend,  
56 the EPC should have required a site-plan for the use that the applicant contends justifies the  
57 new zone—parking. They request that the EPC reconsider these issues in a remand or that the

58 City Council reverse the EPC decision on the basis that the application and the EPC decision  
59 is not supported with substantial evidence.

60 The record demonstrates that the applicant justified the zone-change in two ways. The  
61 first stated purpose for the zone-change is so the Community Dental Clinic can expand its  
62 Clinic services, including its parking lot [R. 70]. The second stated purpose is to open access  
63 to the Community Dental Clinic from the zone-change site, on Williams Street [R. 116].  
64 Apparently, the Dental Clinic and an abutting landowner (Anthony Garcia, at 2111, Hinkle  
65 St.) are involved in litigation over an easement which has been the Dental Clinic's only access  
66 for many years. The disputed access for the Dental Clinic is where Hinkle Street appears to  
67 meet and terminate at the Dental Clinic's entrance to its parking lot. The applicant claims that  
68 the zone-change will resolve the Hinkle Street access dispute if access can be opened at  
69 Williams Street. It is not clear from the record whether the disputed access is a private  
70 easement or if it is part of Hinkle Street. In addition, there is no indication in the record  
71 whether or not the zone-change accomplishes either of the stated justifications supporting the  
72 zone-change.

73 Zone changes and development of the site are controlled by the South Broadway  
74 Neighborhoods Sector Development Plan (SBNSDP) which was adopted in 1986 [R. 21]. The  
75 existing zoning of all three lots (SU-2, MR) corresponds, with some exceptions, to the R-1  
76 zone district in the Zoning Ordinance [SBNSDP, 45]. The proposed zone for the three lots,  
77 and the existing zone of the lot upon which the Dental Clinic sits is SU-2, LCR (Limited  
78 Commercial-Residential) [R. 21]. The SU-2, LCR zone corresponds to the RC  
79 (Residential/Commercial) zone in the Zoning Ordinance [SBNSDP, 45]. The rest of the

80 surrounding lots are zoned SU-MR and consists of single-family residential uses [R. 65]. The  
81 record also shows that the entire surrounding neighborhood is zoned for, and *appears* to be  
82 primarily single-family residential use [R. 65]. Other than the Zoning Map depicted in the  
83 record (R. 65), the record lacks analysis of the land uses in the area beyond the lots that  
84 immediately abut the zone-change site. What is clear is that the zone change site (all three  
85 lots) are a designated Area of Consistency in the Comprehensive Plan [R. 21].

86

### 87 **I. STANDARD OF REVIEW**

88 A review of an appeal is a whole record review to determine if the EPC erred:

89 1. In applying adopted city plans, policies, and ordinances in arriving at

90 the decision;

91 2. In the appealed action or decision, including its stated facts;

92 3. In acting arbitrarily, capriciously or manifestly abusive of discretion.

93 At the appeal level of review, the decision and record must be supported by a preponderance  
94 of the evidence to be upheld. The Land Use Hearing Officer is advisory to the City Council.

95 If a remand is necessary to clarify or supplement the record, or if the remand would  
96 expeditiously dispose of the matter, the Land Use Hearing Officer has authority to recommend

97 that the matter be remanded for reconsideration by the EPC. The City Council may grant the

98 appeal in whole or in part, deny it, or remand it to the Land Use Hearing Officer or to the

99 EPC."<sup>2</sup>

100

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2. See Rules of the Land Use Hearing Officer adopted by the City Council, February 18, 2004. Bill No. F/S OC-04-6 and codified in Section 14-16-4-4 of the Zoning Code.

101 **III. DISCUSSION**

102 In this appeal, Appellants claim that the applicant did not satisfy the standards under  
103 R-270-1980 to justify the zone-change. And, as stated above, they claim that the justifications  
104 for the zone-change are vague; there is little evidence in the record that the zone-change will  
105 accomplish what the applicants contend they want to accomplish with the zone-change. As  
106 a result, they believe that the EPC granted the applicant a “blank check” to develop the lots  
107 with any of the various land-uses allowed in a SU-2, LCR zone, including apartments which  
108 would not be consistent with the existing densities in the area. The San Jose Neighborhood  
109 Association Appellants request either a remand or a reversal of the EPC decision. After  
110 reviewing the record, and hearing arguments and testimony I find that the record does not  
111 support some significant findings the EPC made regarding the R-270-1980 standards. As  
112 shown below, a remand is appropriate.

113 City Resolution R-270-1980 sets out the standards for analyzing zone-changes in the  
114 City. Under R-270-1980, a “proposed zone change must be found to be consistent with the  
115 health, safety, morals, and general welfare of the City” [R-270-1980, Sec. 1.A]. Second, the  
116 proposed zone-change cannot be found to be in significant conflict with policies in the  
117 Comprehensive Plan or applicable sector plans [R-270-1980, Sec. 1.C]. Third, the applicant  
118 must show with substantial evidence that the existing zoning of the zone-change site is  
119 “inappropriate” because (1) there was a mistake in the existing zoning; or (2) that “changed  
120 neighborhood or community conditions justify” the zone-change; or (3) that a different use  
121 category is more advantageous to the community as articulated in the Comprehensive Plan or  
122 in an applicable City rank plans [R-270-1980, Sec. 1.D]. Only one of the three needs to be

123 shown. Fourth, a zone-change cannot be approved where some of the permissive uses in the  
124 zone would be harmful to adjacent property, the neighborhood or the community [R270-1980,  
125 Sec. 1.E]. Finally, the applicant proposing a zone-change bears the burdens of proof [R-270-  
126 1980, Sec. 1.B].

127 The applicant's justification to support its zone-change was based on the "more  
128 advantageous" standard under R-270-1980, Sec.1.D.3. There are several highly relevant  
129 policies and goals in the City's Comprehensive Plan that were overlooked or ignored by the  
130 EPC, the Planning Staff, and the applicant in the overall analysis of the "more advantageous"  
131 requirement in R-270-1980. As a result, the EPC based its finding that the zone-change is  
132 more advantageous to the neighborhood on four land use policies in the Comp. Plan [R. 15].  
133 The EPC specifically found that the zone-change will further Comp. Plan policy 5,2.1.a, e  
134 and n, and policy 5.3.1.f and g. These policies generally concern creating sustainable  
135 communities and favoring infill development [Comp. Plan, 5-33 and 5-36]. Yet, there are  
136 other Comp. Plan policies and goals that are more specific to existing residential  
137 neighborhoods that were ignored. For example, Comp. Plan Policies 5.3.7. a-g and Policies  
138 5.6.3. a-j are aptly relevant to this zone change because these multiple policies deal with  
139 residential uses and areas of consistency.

140 It is important to note that in the City Staff Planner's first Staff Report to the EPC, it  
141 was recommended that the zone-change be denied, advising the EPC that several  
142 Comprehensive Plan policies and goals were not furthered by the zone-change proposal [R.  
143 75-78]. Yet, these policies and goals, as well as the Staff analysis regarding them, were  
144 conspicuously excluded in a subsequent Staff Report in which the Planner recommended that

145 the EPC approve the zone-change. There is no new evidence in the record from which the  
146 change in recommendation can be explained.

147 In addition, although Staff correctly identified that the zone-change site is a designated  
148 Area of Consistency in the Comp. Plan, the applicant failed to meaningfully address this  
149 exceptionally significant issue. It must be addressed. To fairly evaluate whether the zone-  
150 change is more advantageous to the neighborhood as articulated in the Comprehensive Plan,  
151 the zone-change must be properly weighed against all the relevant policies in the Plan. The  
152 EPC's decision lacks a fair analysis of all the policies its Planning Staff considered for  
153 relevancy. In this case, more than half of the relevant policies were not properly evaluated.  
154 Thus, the EPC's decision regarding the R-270-1980, Sec. 1.D(3) (the more advantageous  
155 requirement) is not supported with substantial evidence in the record.

156 Next, I agree with the Appellants that EPC Findings 9.B and E are arbitrary and  
157 capricious findings because there is no factual evidence to support them. EPC Findings 9.B  
158 and E are not insignificant findings; they are the only findings that the EPC chose to show  
159 that R-270-1980, Sec. 1.E is satisfied. R-270-1980, Sec. 1.E requires the EPC to deny a  
160 zone-change if "some of the permissive uses in the zone would be harmful to adjacent  
161 property, the neighborhood or the community." Finding 9.B and E states in relevant parts:

162 The San Jose Neighborhood Association has expressed concerned (sic)  
163 over higher density multi-family use, however, multi-family is not typically  
164 a conflicting use in residential neighborhoods. furthermore, the Zoning  
165 Hearing Examiner found that apartments would not be injurious to the  
166 neighborhood, in a Conditional Use Permit case for adjacent properties  
167 [EPC Finding 9.B, R. 15].  
168

169 The EPC also found that:

170 [p]ermissive uses in the SU-2 LCR (Limited Commercial Residential) zone  
171 would not be harmful to adjacent property, the neighborhood, or the  
172 community because in a previous Conditional Use Case on the adjacent  
173 properties, the Zoning Hearing Examiner found that multi-family would not  
174 be injurious to the surrounding neighborhood. Since the neighborhood  
175 appealed the recent Conditional Use Permit for an apartment complex on  
176 the adjacent property, potential projects with multi-family housing could be  
177 controversial; but are not typically considered harmful [EPC Finding 9.E,  
178 R. 15].

179  
180 These two findings are meant to demonstrate that apartments at 20-dwelling units per acre,  
181 which is one of the permissive uses in the proposed SU-2, LCR zone, will not be harmful to  
182 the neighborhood. The EPC chose to borrow a finding from a decision of the Zoning Hearing  
183 Examiner (ZHE) regarding a conditional use as the only basis of fact to support that R-270-  
184 1980, Sec. 1.E is satisfied. However, the evidence in the record clearly shows that the Zoning  
185 Hearing Examiner (ZHE) decision, which is referenced in the findings, was entirely vacated  
186 by the City Council [R. 11]. The City Council action of vacating the ZHE’s decision means  
187 that the EPC cannot rely on the ZHE’s decision, because the ZHE decision is legally void.

188 Even if the ZHE’s decision had not been vacated, the finding is erroneous for another  
189 reason. ZHE’s findings and decision are specific to special exceptions, not zone changes  
190 under R-270-1980, Sec. 1.E. In addition, a closer review of ZHE decision relied on by the  
191 EPC, demonstrates that that the ZHE did not rule “*multi-family would not be injurious to the*  
192 *surrounding neighborhood*” as the EPC concluded in its Finding 9.E. The ZHE limited his  
193 analysis and his ruling to the facts he was reviewing. The ZHE ruled that “*...the proposed use*  
194 *will not be injurious...to the neighborhood*” [16ZHE-80069, dated 5-4-16] (emphasis added).  
195 There is no evidence in the record that the facts upon which the ZHE based his decision are  
196 comparable to the facts in this zone-change application. It is undisputed that the facts of each

197 application concern different applicants, different properties and different standards. It is  
198 undisputed that the ZHE primarily evaluates only special exceptions, nor does he make  
199 findings under R-270-1980. The standards for a conditional use and the standards for R-270-  
200 1980 are not the same. To avoid substantive and procedural due process concerns, each zone-  
201 change application must be considered on their own merits, and based on the facts presented  
202 in each application.

203           Nonetheless, because the City Council had vacated the ZHE decision, the EPC's  
204 reliance on it to support its finding that uses allowed in the proposed zone are not harmful to  
205 the residential neighborhood is erroneous, arbitrary, and capricious. In the absence of EPC  
206 Finding 9.B and 9.E (ZHE's decision), the record lacks substantial evidence to support the  
207 zone-change, specifically under R-270-1980, Sec. 1.E.

208           Next, in her first Staff Report to the EPC for the August 10, 2017 EPC hearing, City  
209 Staff Planner Somerfeldt advised the EPC that:

210                     ...the neighborhood has expressed that they are opposed to apartments  
211                     which would be a permitted use in the requested SU-2 LCR zone. *The*  
212                     *zone change has not been justified by the applicant* (Emphasis added) [R.  
213                     79].  
214

215 In that report, the Staff Planner recommended that the zone-change be denied [R. 83]. In a  
216 later report, Staff Planner Somerfeldt recommended that the EPC approve the zone-change.  
217 Yet, as indicated above, there is no new evidence in the record which would shed light on the  
218 change in recommendations by Staff. The applicant's "*sound justification*" for the zone-  
219 change is significant to any analysis and is required under R-270-1980, Sec. 1.B (emphasis  
220 added). The evidence in the record submitted by the applicant to justify the zone change lacks  
221 clarity and its soundness has been challenged by Appellants.

222 As stated above, the applicant’s stated justification for the zone-change is two part: (1)  
223 So the Community Dental Clinic can expand its parking lot [R. 70]; and (2) because the access  
224 to the Dental Clinic from Hinkle Street has become an issue of contention with neighbors, the  
225 second stated purpose is to open access to the Community Dental Clinic from the zone-change  
226 site on Williams Street [R. 116]. The applicant, went so far as to argue to the EPC that the  
227 zone-change is good for the neighborhood because the Dental Clinic will no longer need  
228 access from Hinkle Street [R. 43-b-c]. In its Finding 7.e, the EPC expressly found that *moving*  
229 the Dental Clinic’s access from Hinkle Street to Williams Street partially furthers Comp. Plan  
230 Policy 5.3.1.f [R. 4]. However, the record does not have substantial evidence that the zone-  
231 change will have any effect on the Hinkle Street access. I find that there is no evidence which  
232 would support EPC Finding 7.e, because there is no evidence that the Hinkle Street access  
233 will be closed-off when the Dental Clinic obtains access from Williams Street.

234 Finally, the EPC had at least one basic, relevant question for which it was given  
235 inaccurate information. At its October 13, 2017 public hearing, after the floor had closed,  
236 Chairwoman Hudson was discussing denying the application. In her discussion, she asked  
237 City Planning Staff if there were other more appropriate zones to achieve parking on the lots,  
238 specifically a parking zone (P-Zone). Chairwoman Hudson was struggling with approving a  
239 straight zone which gives the applicant that “blank-check” Appellants contend was granted.  
240 Chairwoman Hudson was concerned that there are better alternatives to achieve the  
241 applicant’s stated justifications. I find that Chairwoman Hudson’s inquiry was relevant. It was  
242 relevant because the answer would help the EPC in their deliberations of the application. As  
243 a Planning body, the EPC needs to know if an applicant’s asserted justifications for a zone-

244 change can be achieved in other ways. The Staff Planner’s response to Chairwoman’s  
245 Hudson’s question was that it was her understanding that a “*P-zone would not be a permitted*  
246 *zone...because it's within the sector development plan*” [R. 43-z.1]. This is categorically not  
247 accurate. The SBNSDP unmistakably allows parking zones within its boundaries [SBNSDP,  
248 p. 44-45]. I find that EPC Chairwoman’s question presented a significant, valid inquiry, and  
249 that the inaccurate answer in the record is another strong reason warranting a remand. The  
250 EPC should weigh or reweigh the matter as it sees fit, but it must have accurate information  
251 to meaningfully consider the soundness of the justification for the zone-change.

252

253 **III. CONCLUSION**

254 For all the reasons described above, I respectfully recommend that Appellants’ appeals  
255 be partially granted. The EPC’s decision and key findings are not supported with substantial  
256 evidence. In addition, the EPC did not have relevant, accurate information it inquired about  
257 in its consideration of whether the zone-change is justified. In my opinion, a remand to the  
258 EPC to specifically address the deficiencies described above is necessary.



Steven M. Chavez, Esq.  
Land Use Hearing Officer

December 14, 2017