On the 16th day of May, 2017, JOSHUA SKARSGARD-RETAIL S.W. (“Agent”) acting as agent on behalf of the property owner SOUTHWEST CONVENIENCE STORES, LLC (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow retail sale of alcoholic drink for consumption off premise within 500 feet of a residential zone (“Application”) upon the real property located at 4510 LOMAS BLVD NE (“Subject Property”). Below are the ZHE’s findings of fact and decision:

**FINDINGS:**

1. Applicant is requesting a conditional use to allow retail sale of alcoholic drink for consumption off premise within 500 feet of a residential zone.

2. The City of Albuquerque Code of Ordinances Section 14-16-4-2(C)(1) (Special Exceptions – Conditional Use) reads: “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.

3. The Applicant bears the burden of ensuring there is evidence in the record supporting a finding that the above criteria are met under Section 14-16-4-2(C).

4. The ZHE finds that the proposed use will be injurious to the adjacent property, the neighborhood, or the community pursuant to Section 14-16-4-2(C)(1)(a).

5. The ZHE decision is based on a review of all evidence and testimony in the record, including but not limited to the following.

6. In a letter from Nob Hill resident Susan Michie written April 18, 2017 in opposition to the Application, based on 269 pages of records of the Albuquerque Police Department (APD) from 1/1/2012 through 12/31/2016 for the Subject Property and for two other nearby 7 Eleven stores that do sell alcohol, in the categories of:
Disturbance; Theft/Fraud/Embezzlement; Suspicious Activity; Homeless/Transient; Fire Department (medical services), “calls to the 7 Eleven stores that sell package liquor are 4 to 10 times higher than to the Subject Property even though these three locations are only 1-1.5 miles apart.”

7. Applicant counters with data indicating a low differential in overall calls for service for stores that do and do not sell alcohol, although that data does not address the particular types of calls that were of concern.

8. The ZHE received more than 130+/- individual letters and emails expressing concern about and opposition to the Application from local business owners, religious leaders, and residents in the neighborhood, as well as from representatives of individual neighborhood associations, and representatives from the Coalition of Neighborhood Associations from District 6 and District 7. Letters stated in part that the Subject Property will bring additional: DWI; public drunkenness; vagrancy; illegal off-site sales of liquor to minors; emergency medical care; trash. These will be “injurious to the neighborhood and the community.”

9. Barbara Petersen, representing District 4 of the Albuquerque Public Schools Board of Education, wrote on March 6, 2017 that she is “very concerned” about the Application because “Zia Elementary School is two blocks away”, “children walk to school and play in the area”, and the “increase of traffic at that corner, along with the potential of increased DWI and under-aged consumption pose unnecessary dangers.” She had been contacted by constituents in the area “who are also worried about the impact on the neighborhood, school, preschool and park.”

10. Barbara Lohbeck, President of the Mark Twain Neighborhood Association wrote in opposition to the Application on March 5, 2017, stating in part that a recent conditional use application in their neighborhood was denied and “the issues appear to be similar to those raised in that case, those of close proximity to churches, schools, and parks.”

11. Laurie Kerr wrote in opposition to the application on March 5, 2017 and submitted articles about alcohol sales.

12. Maggie Hart Stebbins, Bernalillo County Commissioner for District 3, wrote in opposition to the Application stating in part that she supports “the constituents and neighborhood associations who oppose this request, including the Highland Business and Neighborhood Association, Pueblo Alto Neighborhood Association (PANA), and the Twin Parks Neighborhood Association all of whom have legitimate concerns about the sale of package liquor within such short range of their residential areas. She stated “Given the number of such community assets within a few hundred feet of this proposed location, and the significant number of children present, if this request is granted in this case it well render the zoning law close to meaningless.”

13. The ZHE received 680+/- signatures on a petition in support of the Application stating, “I do not believe that the approval of this conditional use will be injurious to the adjacent property, neighborhood, or community.”

14. Addresses were included with the signatures. The location of the signers is relevant to both their knowledge of the area forming the basis of their opinion as to injury as well as to an understanding of the considerations that might come into play in their statements. A detailed analysis was not conducted, but an informal census indicates that the list includes individuals from throughout the City and beyond.
15. In response, Mrs. Patricia Beene writes in her letter of May 5, 2017 that she was asked by a clerk in 7 Eleven store outside the neighborhood of the Subject Property to sign a petition to allow alcohol sales at the Subject Property. She then went to the Subject Property and there “was no petition at this location.” She is concerned that the petition will be presented “as evidence that the community does indeed support liquor sales.”

16. Janice E. Arnold-Jones, President of the Albuquerque City Council District 7 Coalition of Neighborhood Associations (CONA), wrote on March 6, 2017 that District 7 CONA opposes the Application, and that the following Neighborhood Associations oppose it as well: Alvarado Park; Classic Uptown; Indian Moon; Inez; La Sala Grande; Mark Twain; McDuffie-Twin Parks, McKinley; Mossman; NEAR; Pueblo Alto; Quigley; Sandia High School Area; Snow Heights. Mile-Hi responded but “because a quorum of their board could not be reached…no position was taken.” Three of the qualified neighborhoods did not respond. “For neighborhoods to have faith in the City of Albuquerque zoning regulations, the regulations must be upheld.” She submitted a report of crimes within ½ mile of 4510 Lomas between September 8, 2016 and March 6, 2017.

17. Dr. Lisa Trujillo wrote in opposition to the Application. She stated in part that “While our police work tirelessly to serve, it is well documented that APD is grossly understaffed.” APD response times are not adequate, even with an APD Real Crime Time camera in place. She said, “Permitting the sale of alcohol at the Washington/Lomas convenience store is like pouring kerosene on a 5-alarm fire.”

18. Theodosia Johnson wrote in opposition to the Application on March 9, 2017 and supplied a study done in Oregon.

19. Lisa Driscoll wrote in opposition to the Application on March 10, 2017 stating reasons of: increased traffic; increases in crime and lowered property values. She does not want to “add Washington and Lomas to the list of stops” for “addicted transients who go from one convenience store selling alcohol to another.”

20. Local business owner Jeff Erway of La Cumbre Brewing Company wrote on March 8, 2017 in support of the Application. He feels the Subject Property will improve sales at his brewery as well as at other local breweries by “being a convenient option for people in this neighborhood to purchase our local products.”

21. Mr. Thomas Ciccateri wrote on March 2, 2017 in support of the Application indicating in part “Such sales are reasonable in this type of facility and location, and our community deserves the choice shopping there. Claims of potential damage to the community are speculative and should (not) be given weight without a factual basis.”

22. Mr. Jeffery Farra wrote on March 2, 2017 in support of the Application. He feels people will just drive farther to buy alcohol, and that could result in drunk driving.

23. Ms. Kathryn Bernhard-Brizzee wrote on March 1, 2017 in support of the Application. She states that the problems people worry about already exist, and that alcohol is legal and therefore sale of it should not be restricted.

24. Applicant submitted a letter on May 10, 2017 to supplement material already given to the ZHE. The Application will not be injurious to the neighborhood because: Subject Property is “surrounded on all four sides by commercial uses which provides a buffer from homes.” The ZHE approved a Conditional Use for the neighboring
property “to have a brewery and tap room...the same rationale as to why this neighboring property was NOT INJURIOUS to the neighborhood applies ... to the Subject Property. More than 680 people signed a petition in support of the Application. Opponents “have not provided substantial evidence that the Conditional Use...would in fact be injurious to the community and neighbors.” The “opponents have provided ‘opinions’ and ‘beliefs’ and ‘theories’ as to why this Application would be injurious but have not provided evidence of injury.”

25. In the May 10, 2017 letter, Applicant stated concerns are mitigated: “package liquor is designed to be an “amenity” and Applicant will not sell “minis” and “40’s” so that customers will not “drink ON THE PREMISES.” Studies indicate traffic will not increase. Subject Property is located on a Lomas, a “major arterial road.” Subject Property is “surrounded by Commercial uses and commercial zoning – providing a buffer to residential areas.” Applicant is “experienced and responsible, and does have a history of being a responsible operator.”

26. In the May 10, 2017 letter, Applicant stated the Subject Property would further two goals of the Highland Commercial District: Economic Vitality by “creating an environment where ... locally-owned businesses can thrive” and the Vehicular Circulation Goal.

27. In the May 10, 2017 letter, Applicant stated the Application “will reduce the automobile traffic to the other locations that sell off premises alcohol.”

28. In the May 10, 2017 letter, Applicant stated the Application will further the Established Urban Policy in the Comp Plan.

29. In the May 10, 2017 letter Applicant states, there are “robust safety procedures for the sale of off premises alcohol” and provided the safety protocol to the ZHE.

30. Carol Morris, resident of Twin Parks Neighborhood and representative to the District 7 Coalition of Neighborhood Associations, in a letter dated May 9, 2017, said in part that “…the Coalition opposes the special exception request, as do 14 neighborhood associations within the coalition.” In addition, she listed items the Agent agreed on March 9, 2017 to address that had not yet been addressed. These issues included: providing data on correlation between proximity to liquor stores and property values; changes in crime levels; examples of other stores that sell alcohol near schools and churches; providing training manuals via email with local residents; percentage of store sales that come from alcohol; whether they would agree to stop selling alcohol if neighbors observed more problems.

31. Margaret Sanchez, a manager at local business Washington Speed Wash at 534 Washington St. NE, opposes the Application citing in part “The Speed Wash has suffered attempted break ins and broken front windows. We now have iron bars across the front of the store entrance and have put up security cameras. Our customers feel unsafe, and for every ‘lost’ customer our business suffers.”

32. Victor Lopez, appointed Leader of Coalition Against Alcohol Sales at the 7 Eleven on Washington and Lomas authored a letter of opposition to the Application citing in part the Applicant “cannot prove that the sale of alcohol at the Subject Property will not cause injury to our community”. He also submitted a package containing crime statistics, and numerous articles and research papers addressing alcohol outlet distribution in a community. The package items were reviewed by the ZHE and given the evidentiary weight they are due.
33. Ms. Christine Trujillo, State of New Mexico House of Representatives, District 25, authored a letter of opposition to the Application, citing “Because of its proximity to young children and a place of worship (Zia Elementary School and Park, Peppermint Stick Preschool, Adat Yeshua Messianic Congregation, and Learner’s Chess Academy), I do not believe this is an acceptable location for a retail alcohol sales.”

34. Letters of opposition from 84+/- persons and a petition signed by 85+/- persons were submitted to the ZHE stating in part “Zia Park, a major center for family activity as well as the playground for Zia Elementary School, already suffers from unpleasantries…”, the Application “will contribute to additional DWI…”, and “…will further increase the injurious social problems to a neighborhood seeking to establish a more favorable and safe environment.”

35. Cindy Newman, owner of the Peppermint Stick Preschool on March 5, 2017 authored a letter of opposition to the Application stating in part that for the first-time last year “Several trips (to Zia Park) were ended early due to public drunkenness” and “…3 employee cars were broken into.” They “had someone living under the tree” in the front yard and “had to pay to have our tree…trimmed.” She asks, “Please rethink this for the safety of our community and the ‘children’ of this community.”

36. Nancy Bearce, Board President of The District 6 Coalition of Neighborhood Associations submitted a letter in opposition to the Application by stating in part “It must be noted that our zoning code offers no criteria to measure how much cumulative or what portion of injury any community should have imposed upon it before it is found acceptable. There also is no measure provided in our code as to how many wrongs may be inflicted on our communities before they may be viewed as an applicant’s right to be inflicted.” She also cites a CDC Community Preventive Services Task Force report from 2015. Those findings recommend “limiting alcohol outlet density through the use of regulatory authority (e.g. licensing and zoning) as a means of reducing or controlling excessive alcohol consumption and related harms.”

37. Judy Jennings, president of the Summit Park Neighborhood Association wrote that the Neighborhood Association is comprised of 1100 residences and 55 commercial businesses. The Board of Directors mailed 1135 newsletters in which the Application was explained and responses solicited. Only one positive response was received. The Board of Directors opposes the Application, because the current ordinance is appropriate, and there are other places to buy alcohol on Lomas Blvd.

38. Greg Weirs, Secretary, Nob Hill Neighborhood Association, wrote on April 10, 2017 in opposition to the Application stating in part that businesses that sell alcohol “burden the community with crime and use APD to provide security for their properties that should be provided by the businesses themselves.” The Board of Directors voted 11-1 against the Application.

39. John Briscoe neighborhood resident and local business owner, wrote on March 16, 2017 in opposition to the Application. He owns an office building next door to an alcohol dispensing establishment and “we have continuing problems with people who purchase liquor and gather on the alley side of the building to consume…discard their trash and human waste on our property.” This occurs even though they installed more lights and clean the area regularly, among other remedies.
He sees “no reason to believe that the same things would not occur... If this request is approved, the neighborhood will suffer.”

40. Jay Guthrie wrote on March 21, 2017 opposing the Application citing that “adding another and more convenient place for people to buy alcohol, will further degrade the neighborhood and property values.”

41. Linda and Victor Davis wrote on April 19, 2017 to oppose the Application, stating in part that issues of DWI, public drunkenness, vagrancy, illegal sales to minors, and the needs for medical care “are already large problems in Albuquerque as reported in the media and seen by me and my fellow citizens every day.”

42. Ms. Danna Edwards wrote on April 20, 2017 in opposition to the Application. She is the Parish Administrator of Christ the King Anglican Church which shares facilities with the Adat Yeshua Messianic Synagogue, two blocks from the Subject Property. She has called the fire department many times to remove drug paraphernalia from the alley behind their offices and courtyard where children play. She has called the police to remove people who were passed out on the sidewalk in front of the church. “The neighborhood has a problem that will only be made worse by allowing liquor to be sold within the very heart of it.”

43. Robert Cronin wrote in March 10, 2017 representing the Highland Business and Neighborhood Association, which is unanimous in opposing the Application. They struggle with vagrancy, homelessness, panhandling and more, and are trying to make their neighborhood safer, and this includes places of worship, an elementary school, pre-school, and a children’s chess academy.

44. Elizabeth Vingill attended the April 18, 2017 hearing. She is opposed to the Application and provided articles.

45. Denis Hitchcock attended the April 18, 2017 meeting and has seen increasing burglaries around another 7 Eleven. He supplied articles as well. He is opposed to the Application.

46. Substantial additional testimony, both from individuals and organizations that submitted materials and those who did not, was taken at the public meetings held on April 18, 2017 and May 16, 2017. That testimony substantially duplicated the letters and other evidence otherwise contained in the record.

47. Applicant’s May 16 presentation included a description security measures, residential buffering, the operator’s business record legal limitations on certain sales and other matters.

48. Documentation of other applications and ZHE decisions over several years were also submitted, including the March 17, 2017 approval of off-premise sales at 529 Adams St., an abutting property.

49. In March, 2009 an application was made to the City of Albuquerque for a conditional use for retail alcoholic drink sales for off-premise consumption within 500 feet of a residential zone (La Mesa Subdivision) at a CVS Pharmacy retail store. The case was finally decided, after multiple appeals, by District Court Judge Ted Baca on February 1, 2011, concluding in part that “Because of the alcohol-related problems this neighborhood faces as a result of the currently availability of alcohol, the City’s decision to not grant the conditional use permit was not arbitrary and capricious and was supported by substantial evidence...Petitioners did not demonstrate that the sale of liquor at their store would not cause harm to the adjacent
community. Therefore, the decision of the City Council is AFFIRMED and Petitioners’ request for a conditional use permit…is DENIED.”

50. A review of other applications and approvals is of limited utility in the instant inquiry both because each application, property and intended use is unique and reviewed independently, and because the record in those other cases differs substantially from the record in this Application, and the ZHE is bound to make a decision based on substantial evidence in the record. NMSA 1978, Section 39-3-1.1.

51. In the May 10, 2017 letter, Applicant provided case law regarding alcohol cases in New Mexico.

52. The ZHE recognizes the existence of potential challenge to City of Albuquerque jurisdiction regulating alcohol sales in the manner provided for in code. However, any potential jurisdiction challenge does not form a part of the ZHE’s decision whether or not to grant a conditional use permit.

53. As the Applicant correctly points out, 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.

54. Much of the public comment received, while heartfelt, appreciated and indicative of genuine concern, cannot be considered substantial evidence.

55. Therefore, 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. The decision of the ZHE is based on the totality of the evidence in the record.

56. Of particular relevance in my determination are the following:
   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

57. Wherefore, based on a full review and consideration of all evidence I find that substantial evidence supports a finding that approval of the Application will be injurious to adjacent property, the neighborhood, and/or the community.

58. The ZHE finds 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).

59. The ZHE finds that the proper “Notice of Hearing” signage was posted for the required time period as required by Section 14-16-4-2(B)(4).

60. The ZHE finds that the Applicant has authority to pursue this Application.
DECISION:

DENIAL of a conditional use to allow retail sale of alcoholic drink for consumption off premise within 500 feet of a residential zone.

If you wish to appeal this decision, you must do so by June 15, 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 is to the Board of Appeals within 15 days of the decision. A filing fee of $105.00 shall accompany each appeal application, as well as a written explanation outlining the reason for appeal and a copy of the ZHE decision. Appeals are taken at 600 2nd Street, Plaza Del Sol Building, Ground Level, Planning Application Counter located on the west side of the lobby. **Please present this letter of notification when filing an appeal.** When an application is withdrawn, the fee shall not be refunded.

An appeal shall be heard by the Board of Appeals within 45 days of the appeal period and concluded within 75 days of the appeal period. The Planning Division shall give written notice of an appeal, together with a notice of the date, time and place of the hearing to the applicant, a representative of the opponents, if any are known, and the appellant.

Please note that pursuant to Section 14. 16. 4. 4. (B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

You will receive notice if any other person files an appeal. If there is no appeal, you can receive building permits any time after the appeal deadline quoted above, provided all conditions imposed at the time of approval have been met. However, the Zoning Hearing Examiner may allow issuance of building permits if the public hearing produces no objection of any kind to the approval of an application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

Successful applicants are reminded that other regulations of the City must be complied with, even after approval of a special exception is secured. This decision does not constitute approval of plans for a building permit. If your application is approved, bring this decision with you when you apply for any related building permit or occupation tax number.
Approval of a conditional use or a variance application is void after one year from date of approval if the rights and privileges are granted, thereby have not been executed or utilized.

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Zoning Hearing Examiner

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