



CITY OF ALBUQUERQUE
OFFICE OF ADMINISTRATIVE HEARINGS
ZONING HEARING EXAMINER
NOTIFICATION OF DECISION

Jose Alfredo and Ailda Martinez (Agent, Modulus Architects) requests a conditional use to allow for a light vehicle fueling station adjacent to a residential zone district for Commercial Tract, Block 5, Los Altos, located at 99999 Bridge Blvd SW, zoned MX-M [Section 14-16-4-3(D)(17)(i)]

Special Exception No:..... **VA-2020-00143**
Project No: **Project#2020-003911**
Hearing Date: 01-19-21
Closing of Public Record: 01-19-21
Date of Decision: 02-02-21

On the 19th day of January, 2021, Modulus Architects, agent for property owner Jose Alfredo and Ailda Martinez (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow for a light vehicle fueling station adjacent to a residential zone district (“Application”) upon the real property located at 99999 Bridge Blvd SW (“Subject Property”). Below are the ZHE’s finding of fact and decision:

FINDINGS:

1. Applicant is requesting a conditional use to allow for a light vehicle fueling station adjacent to a residential zone district.
2. This matter came before the ZHE on remand by the City Council, pursuant to the Notice of Decision issued by the City Council in Case No. DAC-20-10, December 16, 2020 (the “Remand Order”).
3. The Remand Order states that the City Council voted to remand this case to the ZHE for the ZHE to address and enter findings on the IDO requirement that the requested light vehicle fueling use not increase non-residential activity within 300 feet of the adjacent residential zone districts between the hours of 8:00 p.m. and 6:00 a.m.
4. At the January 19, 2021 ZHE hearing, the ZHE received testimony and evidence on the Application, addressing solely the non-increase non-residential activity stated in finding 3, above.
5. The ZHE incorporates all findings of its Notification of Decision dated September 2, 2020, as if fully set forth in this Notification of Decision, except as expressly stated differently in this Notification of Decision. If any conflict exists between the Notification of Decision dated September 2, 2020 and this Notification of Decision, then this Notification of Decision prevails.
6. After the Remand Order and up until the January 19, 2020 ZHE hearing, the ZHE received no written evidence from applicant, opponents, or any other party addressing the Application.

7. Agent appeared at the January 19, 2020 ZHE hearing and testified in support of the Application.
8. No other party presented testimony at the January 19, 2020 ZHE hearing.
9. Applicant stated that this request will not increase non-residential activity within 300 feet of a lot in any Residential zone district between the hours of 8:00 PM and 6:00 AM, for the following reasons:
 - a. The property to the north, east and south are commercially zoned properties with commercial operations.
 - b. The proposed Murphy gas station is not a destination location, rather, consumers are only “passerby” traffic. As such, the proposed light fueling station would not increase the activity that is already active and present at this location.
 - c. Calculations by the Mid Region Council of Governments Current estimate that daily traffic volumes on Bridge Blvd. are currently 23,900 cars traveling past this site daily, and on Old Coors more than 16,200 cars traveling past this site daily.
 - d. Applicant clarified that the proposed store and pumps would not be open 24 hours a day, but rather would be limited to hours of operation of 5AM – Midnight.
 - e. Although alcohol sales may create a destination location, prohibiting alcohol sales between the hours of 8:00 pm and 6:00 am would further ensure there would be no significant increase in nonresidential activity during those times.
10. On balance, Applicant will have met its burden of providing evidence to satisfy IDO section 14-16-6-6(A)(3)(d), which requires that the proposed conditional use “*will not increase non-residential activity within 300 feet of a lot in any residential zone district between the hours of 8:00 pm and 6:00 am,*” if liquor retail use is restricted to prohibit liquor sales between the hours of 8:00 pm and 6:00 am.
11. However, as discussed in more detail in the ZHE Notification of Decision in the companion case VA-2020-00144 dated February 2, 2021, questions have arisen regarding whether municipal restriction of the type and hours of sale of alcoholic beverages, as expressed in the ZHE conditions of approval to be considered on remand, may infringe upon the State of New Mexico’s preemption of the field of the regulation of alcoholic beverage sales.
12. The ZHE finds that this Application should be continued, to allow Applicant and the public to present evidence and legal argument regarding whether the ZHE conditions of approval to be considered on remand may infringe upon the State of New Mexico’s preemption of the field of the regulation of alcoholic beverage sales.

DECISION:

CONTINUANCE of the Application to be heard at the ZHE hearing at 9:00 a.m. on February 16, 2021.

APPEAL:

If you wish to appeal this decision, you must do so by February 17, 2021 pursuant to Section 14-16-6-4(U), of the Integrated Development Ordinance, you must demonstrate that you have legal standing to file an appeal as defined.

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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NOTIFICATION OF DECISION

Jose Alfredo and Ailda Martinez (Agent, Modulus Architects) requests a conditional use to allow for liquor sale within 500 feet of residential for Lot B, Block 5, Los Altos, located at 99999 Bridge Blvd SW, zoned MX-M [Section 14-16-4-3(D)(36)(c)]

Special Exception No:..... **VA-2020-00144**
Project No: **Project#2020-003911**
Hearing Date: 01-19-21
Closing of Public Record: 01-19-21
Date of Decision: 02-02-21

On the 19th day of January, 2021, Modulus Architects, agent for property owner Jose Alfredo and Ailda Martinez (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow for liquor sale within 500 feet of residential (“Application”) upon the real property located at 99999 Bridge Blvd SW (“Subject Property”). Below are the ZHE’s finding of fact and decision:

FINDINGS:

1. Applicant is requesting a conditional use to allow for liquor sale within 500 feet of residential.
2. This matter came before the ZHE on remand by the City Council, pursuant to the Notice of Decision issued by the City Council in Case No. DAC-20-11, December 16, 2020 (the “Remand Order”).
3. The Remand Order states that the City Council voted to remand this case to the ZHE for the ZHE to reevaluate the enforceability of the conditions of approval limiting liquor sales, and limiting the conditional use approval to a single operator.
4. At the January 19, 2021 ZHE hearing, the ZHE received testimony and evidence on the Application, addressing solely the conditions stated in finding 3, above.
5. The ZHE incorporates all findings of its Notification of Decision dated September 2, 2020, as if fully set forth in this Notification of Decision, except as expressly stated differently in this Notification of Decision. If any conflict exists between the Notification of Decision dated September 2, 2020 and this Notification of Decision, then this Notification of Decision prevails.
6. After the Remand Order and up until the January 19, 2020 ZHE hearing, the ZHE received no written evidence from applicant, opponents, or any other party addressing the Application.
7. Agent appeared at the January 19, 2020 ZHE hearing and testified in support of the Application.
8. No other party presented testimony at the January 19, 2020 ZHE hearing.
9. The ZHE September 2, 2020 Notification of Decision adopted the following conditions of approval:

- a. The approved conditional use is personal to Murphy USA and does not run with the land.
 - b. The subject property must adhere to the Use Specific Standards set forth in IDO 4-3(D)(17) Light Vehicle Fueling Station.
 - c. Murphy USA must follow the model of the Smart Policing Initiatives and adopt and comply with the CPTED (Crime Prevention through Environmental Design) crime prevention program Applicant, as described in its submittals, cited above.
 - d. Murphy USA must hire an engineering firm to conduct a photometric study that will ensure that there is no light pollution from the subject property onto neighboring properties.
 - e. Murphy USA must add landscape buffers to ensure the safety and privacy of adjacent residential neighborhoods and neighboring properties.
 - f. Murphy USA must place and monitor security cameras in indoor and outdoor areas of the subject property, and to monitor such security cameras on a 24-hours a day, 7-days a week basis.
 - g. Murphy USA may not sell any intoxicating spirit and must limit its alcohol sales to beer and wine, only.
 - h. Any liquor retail use is restricted to prohibit the sale of alcohol between 8:00 pm and 6:00 am.
10. .As to the ZHE September 2, 2020 Notification of Decision condition that “the approved conditional use is personal to Murphy USA and does not run with the land”:
- a. IDO section 14-16-6-4(W)(1) provides that, “[u]nless specified otherwise on the permit or approval document for a specific type of development approval, permits and approvals run with the land and are not affected by changes in ownership or the form of ownership of the property.” (Emphasis added).
 - b. Thus, because an approval may “specif[y] otherwise,” the IDO expressly contemplates that a particular approval may be stated to break with the default rule that approvals run with the land, and instead require that an approval be personal to the proposed operator.
 - c. Pursuant to IDO section 14-16-6-4(W)(1), the ZHE September 2, 2020 Notification of Decision on the Application expressly states that the approval is conditioned such that it is personal to Murphy USA and does not run with the land. This appears clear and unambiguous.
 - d. This condition is enforceable, because the City routinely verifies the identity of applicants and the ownership of real property that is are subjects of zoning applications, and such verification would appear to continue to be feasible and reasonable into the future.
11. The ZHE September 2, 2020 Notification of Decision condition that the “subject property must adhere to the Use Specific Standards set forth in IDO 4-3(D)(17) Light Vehicle Fueling Station” is enforceable, because the standards are expressly stated in the IDO and are definite.
12. The ZHE September 2, 2020 Notification of Decision condition that “Murphy USA must follow the model of the Smart Policing Initiatives and adopt and comply with the CPTED (Crime Prevention through Environmental Design) crime prevention program Applicant, as described in its submittals, cited above,” may pose difficulties to enforcement. This is because the CPTED by its nature is more of a policy document than a list of particular and

definite measures to be taken. However, examining the evidence and testimony submitted by Murphy regarding its proposed measures to be taken pursuant to CPTED, the following conditions are enforceable and targeted to mitigate potential harm: (a) Murphy USA must install and maintain a security monitoring system, with both interior and exterior surveillance cameras in place, that operates 24 hours a day, 7 days a week, and that is monitored by the Murphy home office; and (b) Murphy USA must maintain a constant presence of security on the premises during business hours to help prevent alcohol-related crime in the area. These conditions are enforceable, because they are definite, express, and easily verifiable with a simple physical inspection of the subject property. As to the cameras operating 24 hours a day, 7 days a week, and are monitored by the Murphy home office, a simple requirement of a certification by Murphy verifying that those conditions are satisfied would appear to suffice.

13. The ZHE September 2, 2020 Notification of Decision condition that “Murphy USA must hire an engineering firm to conduct a photometric study that will ensure that there is no light pollution from the subject property onto neighboring properties” is enforceable, because it is definite and because City enforcement staff may easily verify the same. These types of engineering studies and reports are routinely reviewed by City technical staff.
14. The ZHE September 2, 2020 Notification of Decision condition that “Murphy USA must add landscape buffers to ensure the safety and privacy of adjacent residential neighborhoods and neighboring properties” is enforceable, because it is definite and because City enforcement staff may easily verify whether Murphy has added the required landscape buffers.
15. The ZHE September 2, 2020 Notification of Decision condition that “Murphy USA must place and monitor security cameras in indoor and outdoor areas of the subject property, and to monitor such security cameras on a 24-hours a day, 7-days a week basis” is enforceable, because it is definite and City enforcement staff may easily verify by a simple physical inspection of the subject property whether the required cameras are installed, and, as to the cameras operating 24 hours a day, 7 days a week, and are monitored by the Murphy home office, a simple requirement of a certification by Murphy verifying that those conditions are satisfied would appear to suffice.
16. The ZHE September 2, 2020 Notification of Decision conditions that:
 - (i) “Murphy USA may not sell any intoxicating spirit and must limit its alcohol sales to beer and wine, only;” and
 - (ii) “any liquor retail use is restricted to prohibit the sale of alcohol between 8:00 pm and 6:00 am.;would appear enforceable from a practical perspective, because they are definite and unambiguous, and because a simple physical inspection of the subject property by City enforcement staff would reveal whether Murphy is in compliance.
17. However, questions have arisen regarding whether municipal restriction of the type and hours of sale of alcoholic beverages, as expressed in the two ZHE conditions of approval to be considered on remand cited in finding 16, immediately above, may infringe upon the State of New Mexico’s preemption of the field of the regulation of alcoholic beverage sales.
18. Specifically, the Second Judicial District Court, Bernalillo County, New Mexico, in a case striking down a municipal ban on the sale of liquor miniatures, stated that “the Supreme Court of New Mexico has recognized legislative ‘preemption in the field of the regulation

of liquor businesses.”” *Baker, et al., v. City of Albuquerque* (also cited as *Lee Investments Inc., et al., v. City of Albuquerque*), Case No. D-202-2008-02996, Memorandum Opinion and Order, May 22, 2008 (decided under prior statute) (attached for reference as EXHIBIT A) (herein the “Miniatures Case”); *see also* New Mexico Attorney General Opinion 80-23, June 13, 1980 (decided under prior statute) (available at <https://nmonesource.com/nmos/ag/en/14713/1/document.do>) (discussing impermissible municipal restriction on hours or mode of operation of New Mexico liquor license as condition to granting licensee waiver) (herein, the “AG Opinion”).

19. Essentially, the Miniatures Case and the AG Opinion appear to provide authority for the proposition that a municipality, even a home rule municipality, may not, as a condition of approval related to a liquor license, limit the types of alcoholic beverages to be sold nor the hours of sales.
20. The Applicant, appellants, and the public have not addressed the questions posed by the Miniatures Case or the AG Opinion regarding state preemption of municipal conditions on liquor licenses and sales.
21. The ZHE finds that this Application should be continued, to allow Applicant, appellants, and the public to present evidence and legal argument regarding whether the ZHE conditions of approval to be considered on remand may infringe upon the State of New Mexico legislature’s apparent preemption of the field of the regulation of alcoholic beverage sales.

DECISION:

CONTINUANCE of the Application to be heard at the ZHE hearing at 9:00 a.m. on February 16, 2021.

APPEAL:

If you wish to appeal this decision, you must do so by February 17, 2021 pursuant to Section 14-16-6-4(U), of the Integrated Development Ordinance, you must demonstrate that you have legal standing to file an appeal as defined.

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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