



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

City of Albuquerque Family and Community Services (Agent, Consensus Planning) requests a conditional use to allow an overnight shelter for Lot 1, Swift Addn, located at 5006 Gibson BLVD SE, zoned MX-H [Section 14-16-4-2]

Special Exception No:..... **VA-2021-00317**  
Project No: ..... **Project#2021-005834**  
Hearing Date: ..... 06-21-22  
Closing of Public Record: ..... 06-21-22  
Date of Decision: ..... 07-06-22

On the 21st day of June, 2022, Consensus Planning, agent for property owners City of Albuquerque Family and Community Services (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a conditional use to allow an overnight shelter (“Application”) upon the real property located at (“Subject Property”). Below are the ZHE’s finding of fact and decision:

FINDINGS:

1. Applicant is requesting a conditional use to allow an overnight shelter.
2. The Application came before the ZHE at the June 21, 2022 ZHE hearing, upon remand from the Land Use Hearing Officer (“LUHO”), pursuant to the “LUHO Remand to ZHE” in AC-22-8 and AC-22-9, dated May 26, 2022 (the “May LUHO Remand”)
3. The May LUHO Remand arose from an appeal of the ZHE Notification of Decision on the Application, dated March 30, 2022 (the “March ZHE NOD”).
4. The Application previously had come before the ZHE at the March 15, 2022 ZHE hearing, upon remand from the Land Use Hearing Office (“LUHO”), pursuant to the “LUHO Remand to ZHE and Recommendation to City Council” in AC-21-15 and AC-21-16, dated February 18, 2022 (the “February LUHO Remand”)
5. The February LUHO Remand arose from an appeal of the ZHE Notification of Decision on the Application, dated November 3, 2021 (the “November ZHE NOD”).
6. The February LUHO Remand requires, among other things, that the ZHE was to conduct the June 21, 2022 ZHE hearing as though the March 15, 2022 ZHE hearing had not occurred, because of what the LUHO perceived as notice issues pertaining to the March 15, 2022 ZHE hearing. The ZHE conducted the June 21, 2022 ZHE hearing accordingly.
7. All findings and conclusions of the November ZHE NOD are incorporated by reference as though fully set forth in this Notification of Decision. However, if there is a conflict between this Notification of Decision and the November ZHE NOD, this Notification of Decision prevails and controls.
8. The May LUHO Remand directed that all parties to the appeal of the March ZHE NOD must be sent reasonable notice of the date, time of the ZHE’s remand hearing so that they can prepare, present evidence, and make arguments if they so choose. The ZHE finds that reasonable and sufficient notice was provided to all parties to the appeal of the March ZHE

NOD in accordance with the May LUHO Remand's instructions and the City Integrated Development Ordinance (the "IDO").

9. The May LUHO Remand also directed James M. Aranda, City Zoning Enforcement Officer (the "ZEO"), to issue a declaratory ruling as to whether the proposed use is properly categorized as an overnight shelter use under the IDO.
10. The ZEO emailed his Declaratory Ruling dated June 15, 2022 (the "ZEO Declaratory Ruling"), to the parties to the appeal of the March ZHE NOD and their respective legal counsel, and to City Council and Planning Department staff.
11. The ZEO Declaratory Ruling is included in the ZHE record in this matter, and the ZHE makes the following findings related to the ZEO Declaratory Ruling:
  - a. IDO Section 14-16-7-1 defines Zoning Enforcement Officer (ZEO) as "[a] City Planning Department employee or his/her authorized representative who interprets the provisions of this IDO, reviews applications for decisions related to this IDO, and may make administrative decisions."
  - b. IDO Section 14-16-6-2(B)(1)(c) states, in pertinent part:
    - i. *The Zoning Enforcement Officer (ZEO) is a member of the City Planning Department staff and has authority to interpret this IDO pursuant to Subsection 14-16-6-4(A) (Interpretation).*
    - ii. *The ZEO has responsibility for making formal determinations as to how this IDO applies to specific situations, proposed development projects, and lots.*
  - c. In turn, IDO Section 14-16-6-4(A) (Interpretation) states that "[t]he ZEO has authority to interpret this IDO, including the authority to determine its applicability to specific properties or situations."
  - d. IDO Section 14-16-4-1(B) (Unlisted Uses) provides in pertinent part that "[w]hen a proposed land use is not explicitly listed in Table 4-2-1, the Zoning Enforcement Officer (ZEO) shall determine whether or not it is included in the definition of a listed use or is so consistent with the size, scale, operating characteristics, and external impacts of a listed use that it should be treated as the same use."
  - e. IDO Section 14-16-6-4(S)(1) (Declaratory Ruling) provides in pertinent part:

*6-4(S)(1)(a) Upon request, the ZEO shall issue a written declaratory ruling as to the applicability of the IDO to a proposed development or activity. In determining whether a use not specifically allowed by this IDO can be considered as allowable in a particular zone, the similarity to and compatibility with other allowable uses in that zone shall be determining factors.*
  - f. Taken together, the ZHE reads these above-cited provisions of the IDO regarding the ZEO to mean that the ZEO's interpretations and formal determinations, including without limitation as set forth in declaratory rulings, are binding on the ZHE.
  - g. The ZEO Declaratory Ruling stated the questions posed by the LUHO, presented factual background regarding the questions, reviewed IDO definitions, and summarized the ZEO's analysis, concluding that "[t]he proposed Gateway facility is considered an Overnight Shelter under the IDO. In light of this determination, the proposed Gateway facility is subject to all Use Specific Standards for

*Overnight Shelters in IDO Subsection 14-16-4-3(C)(6), as well as all applicable Development Standards in Part 5 of the IDO – including all edge buffer landscaping requirements included in IDO Section 14-16-5-6(E).”*

12. The May LUHO Remand directed the ZHE to determine whether factually the proposed conditional use meets the use category of overnight shelter or any other use category under the IDO. Given the ZEO Declaratory Ruling conclusion that the proposed conditional use is considered an Overnight Shelter under the IDO, and the conclusion of the ZHE analysis in accord with the same, as discussed more fully, below, this NOD summarizes the ZHE’s analysis and conclusion that the proposed conditional use should be and hereby is approved as an overnight shelter.
13. Agent Consensus Planning, Applicant representative Director Carol Pierce, and Lawrence M. Wells, legal counsel for Applicant, appeared at the June 21, 2022 ZHE hearing and provided testimony and legal argument, and Mr. Wells conducted cross examination of the ZEO, who testified at the June 21, 2022 ZHE hearing.
14. Leslie M. Padilla, counsel for the appellants in the appeal of the March ZHE NOD, appeared and provided legal argument as well as conducted cross examination of the ZEO, who testified at the June 21, 2022 ZHE hearing.
15. Representatives of the Parkland Hills, Elder Homestead, and Siesta Hills Neighborhood Associations appeared at the June 21, 2022 ZHE hearing and provided testimony, as did representatives of several organizations characterized as overnight shelters.
16. Evidence was presented that more than 30 community residential facilities and group homes exist in City Council District 6, in which the Subject Property is located. The existence of more than 30 of such facilities in District 6 would violate IDO Section 14-16-4-3(B)(9)(c), which is a Use-Specific Standard pertaining to group homes. However, because of the ZEO and ZHE determinations that the requested conditional use is properly categorized as an overnight shelter, the arguments pertaining to group homes are inapposite.
17. Applicant asserts that it correctly characterized the proposed use requested in the Application as an Overnight Shelter, and that the City has historically and continuously interpreted the term “Overnight Shelter” to include facilities that provide housing for multiple consecutive nights.
18. Applicant asserts that the definitions of “Overnight Shelter” and “Group Home, Large” in IDO Section 7-1 are ambiguous as they apply to the phrase “24 hours”.
19. Counsel for Applicant states that “a period of less than 24 hours,” as used in the definition of Overnight Shelter, is shorthand for “temporary,” while by contrast the phrase “a period of more than 24 hours” in the definition of Group Home is shorthand for more permanent housing of persons who could not be housed on their own without the assistance of a Group Home.
20. Further, counsel for Applicant notes that “a period of less than 24 hours” does not prohibit multiple overnight stays -- there is no requirement for a person to stay only overnight and never come back.
21. Counsel for Applicant cites the New Mexico Supreme Court case of *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599.
22. In *Hinkle*, the New Mexico Supreme Court stated that “persuasive weight is to be given the long-standing construction of ordinances by the agency.” *Id.* ¶ 7.

23. *Hinkle* discussed that an “administrative gloss” applies to an ordinance “when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an administrative gloss is indeed found to have been placed on a clause, the municipality may not change such a de facto policy, in the absence of legislative action, because to do so would presumably violate legislative intent.” *Id.* ¶ 9. It appears from the evidence in the record that for all the years that the IDO has been in effect, the City has consistently interpreted overnight shelters to include the uses requested in the Application. The ZHE finds that this constitutes interpretation of the relevant IDO language in a consistent manner and application of it to similarly situated applicants over a period of years without legislative interference, as required by *Hinkle*.
24. Further, the *Hinkle* court relied on the interpretation by the City Zoning Enforcement Officer (“ZEO”) in that case, whom was the “person designated by the Zoning Code to enforce the Code and issue declaratory rulings as to its applicability,” as conclusive of the City’s interpretation of its zoning ordinance. *Id.*
25. Although *Hinkle* was decided under the pre-IDO City zoning ordinances, as stated, above, the ZEO remains under IDO Section 6-2(B)(1)(c) “a member of the City Planning Department staff and has authority to interpret this IDO . . . .” See also IDO Section 6-4(A) (“The ZEO has authority to interpret this IDO, including the authority to determine its applicability to specific properties or situations . . . .”). IDO Section 6-9(C)(1)(a) (“The ZEO has the authority and duty to enforce this IDO . . . .”); IDO Section 7-1 (Defining the ZEO as “[a] City Planning Department employee or his/her authorized representative who interprets the provisions of this IDO . . . .”).
26. The rationale of *Hinkle* appropriately applies to this case.
27. Evidence was provided by managers and directors of facilities providing housing for multiple nights per stay, substantiating that such facilities have operated continuously within City limits for decades as Overnight Shelters, as well as that the terms “Overnight Shelters” and “Emergency Shelters” have been used interchangeably by both the City and operators of such shelters. These facility representatives also distinguished overnight shelters from group homes based on the types of services provided and the skills that persons utilizing overnight shelters and group homes, respectively, must possess (e.g., abilities to perform activities of daily living are required for staying in overnight shelters, but not for staying in group homes).
28. James Aranda, ZEO, advised that the City has consistently interpreted overnight shelter to be consistent with the uses described, above, by the organizations represented by persons who testified at the hearing and others, each of which is characterized and identified as an overnight shelter and each of which allows multiple consecutive overnight stays.
29. Counsel for appellants of the March ZHE NOD cross examined the ZEO, including in part by questioning whether the ZEO relied on testimony presented at the March 2022 ZHE hearing, which testimony the May LUHO Remand directed the ZHE to disregard. It appears to the ZHE that while the May LUHO Remand certainly prohibits the ZHE from considering testimony presented at the March 2022 ZHE hearing, the May LUHO Remand expressed no such prohibition to the ZEO, nor any requirement that the ZEO not consider any other evidence outside the ZHE record in this matter. Rather, the IDO directs the ZEO to examine extrinsic evidence, stating that “[i]n determining whether a use not specifically allowed by this IDO can be considered as allowable in a particular zone, the similarity to

*and compatibility with other allowable uses in that zone shall be determining factors.” 14-16-6-4(S)(1)(a) (re Declaratory Ruling).*

30. Public comment and City representative’s testimony addressed that the Good Neighbor Agreement discussed in City Council Resolution R-21-141 is still in progress, and it appears to the ZHE from that testimony that both the City and Neighborhood Association stakeholders continue to work in good faith toward finalizing that agreement.
31. Director Pierce testified that the characterizations of Overnight Shelters as providing multi-night temporary housing, in contrast to Group Homes as providing permanent housing, are consistent with U.S. Department of Housing and Urban Development (HUD) definitions.
32. In light of the testimony regarding historic and continuous Overnight Shelter uses and the ZEO’s confirmation of the City’s consistent interpretation of Overnight Shelters, the City has established an “administrative gloss” under *Hinkle*, which constitutes a de facto policy that Overnight Shelters may allow persons to stay for multiple consecutive nights, as is proposed in the Application.
33. Given the totality of the circumstances discussed, above, and as further contained in the record, Applicant has established upon substantial evidence that the conditional use requested in the Application qualifies as an Overnight Shelter under the IDO.

DECISION:

APPROVAL of a conditional use to allow for an overnight shelter.

APPEAL:

If you wish to appeal this decision, you must do so by July 21, 2022 pursuant to Section 14-16-6-4(V), 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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Zoning Hearing Examiner

cc:

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