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**CITY OF ALBUQUERQUE  
BOARD OF APPEALS  
NOTIFICATION OF DECISION**

Michael Silbert appeals the Zoning Hearing Examiner's **APPROVAL WITH A CONDITION** of a **CONDITIONAL USE** to allow outside activity for a proposed vending truck for all or a portion of Lots D1 & D2, Tracts D1 & D2, St Anthony's Orphanage zoned C2(SC), located on 2001 & 2011 12<sup>th</sup> St NW.

Appeal No: ..... 14BOA-20005  
Special Exception No: ..... 13ZHE-80699  
Project No: ..... 1009906  
Hearing Date: ..... 07/22/14  
Decision Date: ..... 07/22/14

In the matter of **14BOA-20005**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal, thereby **OVERTURNING** the Zoning Hearing Examiner's (ZHE's) decision based on the following findings:

**FINDINGS:**

1. This is an APPEAL of the Zoning Hearing Examiner's (ZHE) APPROVAL WITH A CONDITION of a CONDITIONAL USE, pursuant to Section 14-16-4-2(C)(1)(a) and (b), Conditional Use Criteria, to allow outside activity for a proposed food vending truck.
2. The Zoning Hearing Examiner (ZHE) approved the abovementioned conditional use, subject to one condition, as elaborated in the April 30, 2014 Notice of Decision. This case has been in the ZHE process since December 2013. It was deferred for 60 days at the January 21, 2014 hearing. At the March 18, 2014 hearing, the case was deferred for a month. Both deferrals were at the applicant's request. The case was heard at the April 15, 2014 hearing.
3. The subject site is described as a Lot D1 and D2, Tracts D1 and D2, St. Anthony's Orphanage (the "subject property"). The subject property is located at 2001 and 2011 Twelfth St. NW, at the SW corner of the intersection of Indian School Road NW and Twelfth Street.
4. The subject property is zoned C-2/SC (Neighborhood Commercial with a Shopping Center designation). A large retail facility specializing in home improvement exists on Lot D1 and a franchise retail/pharmacy exists on Lot D2.
5. The Albuquerque/Bernalillo County Comprehensive Plan and the North Valley Area Plan and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.

6. The intent of the C-2 (Neighborhood Commercial Zone) is to “provide suitable sites for offices, for most service and commercial activities, and for certain specified institutional uses.” “Outdoor storage or activity” is a conditional use in the C-2 zone pursuant to Section 14-16-2-17(B)(13). The SC designation means that the subject properties are part of a designated shopping center site.
7. Zoning Code Section 14-16-4-2(C)(1)(a) and (b) specifies the tests that must be met for a conditional use, a type of special exception, to be approved:
  - (1) 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.

At the April 15, 2014 hearing, the applicant testified that the conditional use would not be injurious to the adjacent property, the neighborhood or the community, and that the conditional use would not be significantly damaged by surrounding structures or activities.

8. The ZHE found that the conditional use would not be injurious to adjacent property, the neighborhood or the community because the surrounding land use is largely commercial, retail and/or institutional and the food vending truck will provide a desired service, as stated in the applicant’s testimony.
9. The ZHE found that the conditional use will not be significantly damaged by surrounding structures or activities because the food vending truck provides a desired service to the area and will operate independent of existing structures and activities.
10. The ZHE APPROVED, subject to one condition, the request for a CONDITIONAL USE to outside activity for a proposed food vending truck.
11. Zoning Code Section 14-16-4-4(B)(4) states that an appellant to a special exception action shall specifically cite and explain one or more errors of the ZHE in rendering his decision, and allege that the ZHE erred:
  - 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 did not specifically cite any of the three reasons for an appeal. However, he elaborated the following and requests that the appeal be granted for three reasons: 1) the ZHE’s decision was based upon an incomplete and deficient application; 2) the Notice of Decision contains numerous errors and omissions; and 3) the ZHE acted arbitrarily by relying almost exclusively upon the applicant’s verbal testimony and not addressing our concerns.

12. The proposed conditional use, while a temporary structure, was proposed as a semi-permanent use. As such, scaled site plans, locating the trailer, tables and chairs, etc., are required by the City of Albuquerque ZHE application. Additionally, proof of owner

approval was not provided in the record. The location of the trailer as described in the application is no longer relevant based on the testimony of Mr. Stewart today. Finally, the ZHE raised environmental concerns during the hearing that were not answered by the applicant nor addressed in the ZHE's conditions.

13. Based on these findings, the Zoning Board of Appeals (BOA) concludes that the decision of the Zoning Hearing Examiner (ZHE) to APPROVE the conditional use permit was INCORRECT. Therefore, the appeal is GRANTED and the conditional use permit is DENIED.

If you wish to appeal this decision, you must do so by **August 6, 2014**, 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.

Suzanne Lubar, Planning Director

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