

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

DAN AND ADELINE S. CHAVEZ (RON TAYLOR, AGENT) request(s) a special exception to Page 5 C.3 of the 2010 Downtown Sector Development Plan: a VARIANCE of 3' to the required 3' west side landscape buffer for an existing parking lot for all or a portion of Lot(s) 87-94, Block(s) 8, ARMIJO--PERFECTO BROTHERS ADDN zoned SU-3 GOV/FIN/HOSPITALITY FOCUS, located on 615 MARQUETTE AVE NW (J-14)

Special Exception No:..... **13ZHE-80410**
Project No:..... **Project# 1009557**
Hearing Date:..... 07-16-13
Closing of Public Record:..... 07-16-13
Date of Decision:..... 07-31-13

On the 16th day of July, 2013 (hereinafter "**Hearing**") Mr. Ronald Taylor, (hereinafter "**Agent**") acting as agent on behalf of the property owner, Mr. Dan and Mrs. Adeline Chavez (hereinafter "**Applicants**") appeared before the Zoning Hearing Examiner (hereinafter "**ZHE**") requesting a Variance of 3' to the required 3' west side landscape buffer for an existing parking lot (hereinafter "**Application**") upon the real property located at 615 MARQUETTE AVE NW ("**Subject Property**"). Below are the findings of facts:

FINDINGS:

1. Applicant is requesting a Variance of 3' to the required 3' west side landscape buffer for an existing parking lot, as required in the amended Downtown 2010 Sector Development Plan ("Sector Plan").
2. The Subject Property is located within the jurisdiction and area of the Sector Plan (as recently amended). Additionally, the Subject Property is located within the Central Urban area of the Comprehensive Plan ("Comp Plan").
3. Page 5C.3 of the Sector Plan states in part: "*for commercial surface parking lot with greater than 60' of street frontage along the east/west arterial street immediately abutting the property, a minimum landscape strip of three feet shall be maintained between parking areas and all street right-of-way lines.*"
4. The ZHE finds that the Subject Property does in fact have more than 60' of street frontage along the east/west arterial street (Marquette Ave.), and is therefore subject to Section 5C.3 of the Sector Plan.
5. The Subject Property is currently non-conforming as to the regulations provided in Section 5C.3 of the Sector Plan. The Sector Plan states in Section 5: "*compliance with the landscaping requirements for nonconforming commercial surface parking lots shall be provided within two years of the effective date of this amendment to the Downtown 2010 Sector Development Plan. There shall be no extension of the two-year compliance timeframe.*" The Applicant's Agent (Mr. Ron Taylor) argued at the Hearing that a two-year amortization period was unjust to his client, whom had

been operating a legally compliant parking lot until the recent adoption of the amended Sector Plan. The ZHE acknowledges that there are recent cases in the State of New Mexico that provide insight into the reasonableness of amortization periods for properties that were legally permitted and constructed, however were rendered “non-conforming” by some form of governmental action (e.g. Adoption of an Amended Sector Plan, Zoning Ordinance, etc.). The ZHE chooses to render a decision on this particular Application without an analysis as to the reasonableness of the “two-year amortization period” promulgated by the updated Sector Plan.

6. The Subject Property (parking lot) was originally constructed prior to the adoption of the Sector Plan (including its most recent update).
7. The Applicant’s Agent (Mr. Ron Taylor) argued at the Hearing that the parking lot enjoyed protections from Sector Plan regulations due to the fact that the parking lot was constructed prior to the adoption of the Sector Plan (“vested rights”). The ZHE acknowledges that there are recent cases in the State of New Mexico that provide insight into properties that have “vested rights” that were legally permitted and constructed, however were rendered “non-conforming” by some form of governmental action (e.g. Adoption of an Amended Sector Plan, Zoning Ordinance, etc.). The ZHE chooses to render a decision on this particular Application without an analysis as to the “vested rights” that may (or may not) attach to the Subject Property.
8. The City of Albuquerque Code of Ordinances Section § 14-16-4-2(C) (2) (a) “SPECIAL EXCEPTIONS” reads in part: *“Variance. A variance shall be approved if and only if the following tests are met: (a) The property is exceptional”*
9. Applicant testified at the Hearing that the Subject Property is exceptional for primarily two reasons: (i) the Subject Property does not have a water supply (“installation”) available within the Subject Property (unlike surrounding properties); and (ii) the Subject Property was originally permitted and constructed in compliance with the Zoning Code, but rendered non-conforming due to the adoption of the amended Sector Plan. The ZHE disagrees with the Applicant that a lack of water “stub out” is sufficient rationale for establishing an “exceptional” property pursuant to the Zoning Code (because the Applicant can readily access water in the public streets adjacent to the Subject Property). The ZHE does find, however, that the property’s prior construction and compliance with the zoning code, which was rendered “non-conforming” as a result of the updated Sector Plan, satisfies Section 14-16-4-2 (C) (2) which states: *“The parcel is exceptional as compared with other land in the vicinity subject to the same regulations by reason of the conditions or use of the parcel or other land in the vicinity which condition or use existed at the time of adoption of the regulations”* and Section 14-16-4-2 (C) (3) which states in part: *“The parcel is irregular, unusually narrow or shallow in shape, and the conditions existed at the time of the adoption of the regulation or were created by natural forces or governmental action for which no compensation was paid”*.
10. The City of Albuquerque Code of Ordinances Section § 14-16-4-2(C) (2) (b) “SPECIAL EXCEPTIONS” reads in part: *“A variance shall be approved if and only if the following tests are met: (b) as a result of the exceptional aspect of the property, the regulations produce unnecessary hardship”*
11. Applicant testified at the Hearing that as a result of the exceptionality of the Subject Property that the Sector Plan Section 5C.3 (“3’ landscape buffer”) regulation

produces an unnecessary hardship upon the Applicant and the Subject Property, because the Applicant would have to “jack hammer” out a 3 foot strip for landscaping within a pre-existing, previously constructed, and currently operating parking lot (which leases spaces to nearby employees for parking during working hours). The Applicant testified that it would not just suffer the cost of jack hammering out the 3’ strip for landscaping (and installing plants and irrigation equipment) it would also dramatically alter the site plan spacing of the existing parking stalls (and drive aisles) in such a manner that they would likely lose the entire row of parking adjacent to the 3’ parking “strip”. The Applicant testified that, if forced to comply with the 3’ parking strip (promulgated by the updated Sector Plan) that the Applicant would lose “tens of thousands of dollars” in both construction expense and lost rental income from the parking stalls.

12. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (c) “SPECIAL EXCEPTIONS” reads in part: *“A variance shall be approved if and only if the following tests are met: (c) a particular variance is appropriate to prevent the unnecessary hardship.”*
13. Applicant testified at the Hearing that the variance Application (3’ of the 3’ landscape buffer) if approved, would be appropriate to prevent the unnecessary hardship. In reality, the Application proposed by the Applicant is not a variance (removal) of the 3’ landscape buffer, it is more precisely defined as a “**bundling**”/“**pooling**” of the 3’ landscape buffer into some planters located in the following areas within the Subject Property: (i) Planter located in the southwest corner; (ii) Planter located at the northeast corner; and (iii) planter located at the southeast corner of the Subject Property (See the Exhibit A attached to this Notice of Decision for locations of the planters). The Applicant testified that the square footage of landscaping required by the Sector Plan Section 5C.3 on the west side of the Subject Property (3’ x 140’ for a total of **420 square feet**) will be met or exceeded if the Applicant is allowed to instead “bundle” those landscaping improvements into the planter location proposed by the Applicant on the southwest corner of the Subject Property. In a letter dated June 26, 2013 received by the ZHE from the Applicant’s Agent (Mr. Ron Taylor) he indicated that the “*pooling (a.k.a. “bundling”)* of the total area to be landscaped in the attached Site Plan comprises an area of 1,197 square feet that, according to the Chavez’s architect, is in excess of the Sector Plan requirement of 1,173 square feet.”

ZHE Note: this calculation above submitted by the Applicant refers to all three sides of the parking lot adjacent to public right-of-way. The Application for variance within this particular notice of decision is limited to the west edge of the Subject Property which requires 420 square feet of landscaped material within the 3’ landscape buffer.

14. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (d) “SPECIAL EXCEPTIONS” reads in part: *“A variance shall be approved if and only if the following tests are met: (d) financial gain or loss shall not be the sole determining factor in deciding a variance.”*
15. The Application and the testimony provided by the Applicant at the Hearing both suggest that financial gain/loss was not the sole determining factor of the Application. The Applicant (and his Agent) did testify in great detail about the expense of

compliance with the updated Sector Plan, however they did indicate it was not the “sole determining factor” of the Application.

16. The Application, File and testimony of the Applicant at the Hearing suggest that there is neighborhood opposition to this Application from the Downtown Neighborhood Association (“DNA”).
17. A facilitated meeting was attended by all the parties to the Application on June 27, 2013 (See Facilitator’s Report in the file) and a consensus design of the landscaping on the Subject Property was not reached between the Applicant and attendees from the DNA.
18. At the July Hearing, the ZHE inquired of the DNA representative whether their board of directors supported the “bundling” of landscaping into planters (as proposed by the Applicant), to which the representative indicated “no”.
19. The Application, File and testimony of the Applicant at the Hearing suggest that there is commercial neighbor support to this Application. The ZHE file contains a letter of support from Mr. Paul Matteucci and Mr. John Duhigg who both stated “*I have no objection to the Variance being requested by the [Applicant], for the above parking lot with regard to the landscape to be placed on the property pursuant to the Site Plan prepared by the [Applicant].*” The ZHE also received letters of support from Peterson Properties, LLC which stated in part “*the applicants have taken care to comply with the spirit and intent of the applicable regulations and the resulting improvements will be a step forward for downtown Albuquerque.*”
20. The Applicant proposed juniper bushes as the landscaping within the “pooled” landscape area. The ZHE received information that some species of Juniper bushes are prohibited in the City of Albuquerque (because of pollen). The ZHE shall require the Applicant to provide landscaping within the “pooled” landscape area located on the southwest corner of the Subject Property that complies with the plant species list provided within the Sector Plan.
21. Applicant testified at the Hearing that the yellow “Notice of Hearing” signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.
22. **Rationale for ZHE Decision.** The ZHE finds that a strict enforcement of the 3’ landscape buffer (as contemplated within Section 5C.3 of the Sector Plan) located along the entire perimeter of the west edge of the Subject Property would create substantial financial damage (“unnecessary hardship”) upon the Applicant. Additionally, the Applicant would be required to “jack hammer” out a 3’ strip along the west edge of the Subject Property in a location where there currently exists parking stalls (which were permitted, and in compliance with City Ordinances until the amended Sector Plan was adopted). The 3’ landscape buffer would force the Applicant to relocate the parking stalls located along the west edge of the Subject Property and would compromise the viability of the entire row of parking (due to site planning and drive aisle width concerns). The ZHE finds that a more common sense approach to meeting the spirit of the Sector Plan landscaping objectives would be to allow a “pooling”/ “bundling” of the 420 square feet of landscaping in the southwest corner of the site. The plantings and landscape material will have to comply with the list permitted in the Sector Plan. This result will significantly enhance the appearance

of the Subject Property, meet some of the objectives of the Sector Plan, and also not significantly damage the Applicant.

23. The Applicant has adequately justified the variance Application (pursuant to conditions of approval promulgated below) upon the Subject Property pursuant to City of Albuquerque Code of Ordinances Section § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

APPROVAL WITH CONDITIONS of a VARIANCE of 3' to the required 3' west side landscape buffer for an existing parking lot.

CONDITIONS OF APPROVAL:

- A. The Applicant shall construct, install and maintain a minimum of 420 square feet of landscaping in the southwest corner of the site (located on Marquette Ave. and 7th Street). *Note: this may be included with the 600 square feet of landscaping required for the Variance application to the south side of the Subject Property totaling 1,020 square feet to be located in the southwest corner of the Subject Property.*
- B. The landscaping materials utilized within this 420 square feet are shall be consistent with the species of landscaping prescribed within the Downtown 2010 Sector Development Plan.
- C. The Applicant shall not use juniper bushes upon the Subject Property.
- D. The bundled landscaping shall be covered with live plants over at least 75% of the required landscape area (420 square feet). Coverage will be calculated from the mature spread of these live plants.

If you wish to appeal this decision, you may do so by 5:00 p.m., on August 15, 2013 in the manner described below:

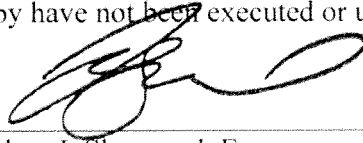
Appeal is to the Board of Appeals within 15 days of the decision. A filing fee of \$105.00 shall accompany each appeal application, as well as a written explanation outlining the reason for appeal and a copy of the ZHE decision. Appeals are taken at 600 2nd Street, Plaza Del Sol Building, Ground Level, 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.

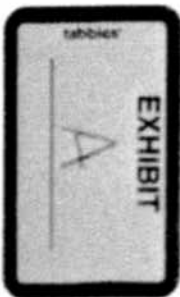
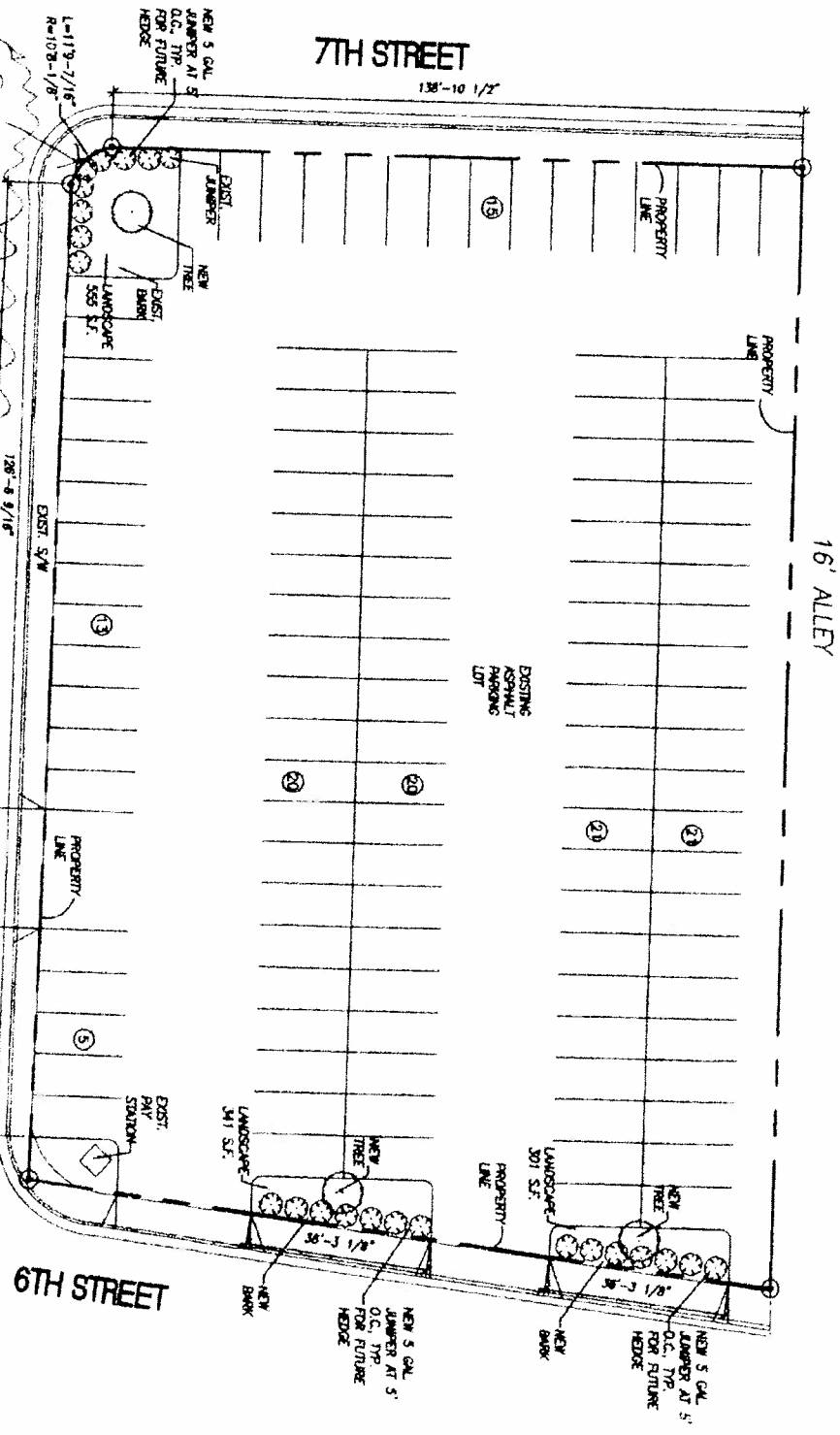


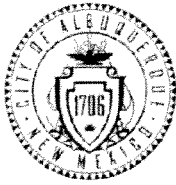
Joshua J. Skarsgard, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
Ron Taylor, 708 Marquette NW, 87102
Dan and Adeline Chavez, 1723 Stanford Dr NE, 87106
Susan Deichsel, 508 14th St NW, 87104
Dr. Reba Eagles, 1500 Lomas Blvd NW, Ste B, 87104

600 S.F. of Landscaping
 Plus an additional 4200 S.F.
 of Landscaping, totaling 10200 S.F.
 of Landscaping

MARQUETTE AVE
 2 SITE PLAN
 1-20-07





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

DAN AND ADELINE S. CHAVEZ (RON TAYLOR, AGENT) request(s) a special exception to Page 5 C.3 of the 2010 Downtown Sector Development Plan: a VARIANCE of 3' to the required 3' south side landscape buffer for an existing parking lot for all or a portion of Lot(s) 87-94, Block(s) 8, ARMIJO--PERFECTO BROTHERS ADDN zoned SU-3 GOV/FIN/HOSPITALITY FOCUS, located on 615 MARQUETTE AVE NW (J-14)

Special Exception No:..... **13ZHE-80411**
Project No:..... **Project# 1009557**
Hearing Date:..... 07-16-13
Closing of Public Record:..... 07-16-13
Date of Decision:..... 07-31-13

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- been operating a legally compliant parking lot until the recent adoption of the amended Sector Plan. The ZHE acknowledges that there are recent cases in the State of New Mexico that provide insight into the reasonableness of amortization periods for properties that were legally permitted and constructed, however were rendered “non-conforming” by some form of governmental action (e.g. Adoption of an Amended Sector Plan, Zoning Ordinance, etc.). The ZHE chooses to render a decision on this particular Application without an analysis as to the reasonableness of the “two-year amortization period” promulgated by the updated Sector Plan.
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 9. Applicant testified at the Hearing that the Subject Property is exceptional for primarily two reasons: (i) the Subject Property does not have a water supply (“installation”) available within the Subject Property (unlike surrounding properties); and (ii) the Subject Property was originally permitted and constructed in compliance with the Zoning Code, but rendered non-conforming due to the adoption of the amended Sector Plan. The ZHE disagrees with the Applicant that a lack of water “stub out” is sufficient rationale for establishing an “exceptional” property pursuant to the Zoning Code (because the Applicant can readily access water in the public streets adjacent to the Subject Property). The ZHE does find, however, that the property’s prior construction and compliance with the zoning code, which was rendered “non-conforming” as a result of the updated Sector Plan, satisfies Section 14-16-4-2 (C) (2) which states: *“The parcel is exceptional as compared with other land in the vicinity subject to the same regulations by reason of the conditions or use of the parcel or other land in the vicinity which condition or use existed at the time of adoption of the regulations”* and Section 14-16-4-2 (C) (3) which states in part: *“The parcel is irregular, unusually narrow or shallow in shape, and the conditions existed at the time of the adoption of the regulation or were created by natural forces or governmental action for which no compensation was paid”*.
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produces an unnecessary hardship upon the Applicant and the Subject Property, because the Applicant would have to “jack hammer” out a 3 foot buffer for landscaping within a pre-existing, previously constructed, and currently operating parking lot (which leases spaces to nearby employees for parking during working hours). The Applicant testified that it would not just suffer the cost of jack hammering out the 3’ strip for landscaping (and installing plants and irrigation equipment) it would also dramatically alter the site plan spacing of the existing parking stalls (and drive aisles) in such a manner that they would likely lose the entire row of parking adjacent to the 3’ parking “strip”. The Applicant testified that, if forced to comply with the 3’ parking buffer (promulgated by the updated Sector Plan) that the Applicant would lose “tens of thousands of dollars” in both construction expense and lost rental income from the parking stalls.

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ZHE Note: this calculation above submitted by the Applicant refers to all three sides of the parking lot adjacent to public right-of-way. The Application for variance within this particular notice of decision is limited to the south edge of the Subject Property which requires 600 square feet of landscaped material within the 3’ landscape buffer.

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21. Applicant testified at the Hearing that the yellow “Notice of Hearing” signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.
22. **Rationale for ZHE Decision.** The ZHE finds that a strict enforcement of the 3’ landscape buffer (as contemplated within Section 5C.3 of the Sector Plan) located along the entire perimeter of the south edge of the Subject Property would create substantial financial damage (“unnecessary hardship”) upon the Applicant. Additionally, the Applicant would be required to “jack hammer” out a 3’ strip along the south edge of the Subject Property in a location where there currently exists parking stalls (which were permitted, and in compliance with City Ordinances until the amended Sector Plan was adopted). The 3’ landscape buffer would force the Applicant to relocate the parking stalls located along the south edge of the Subject Property and would compromise the viability of the entire row of parking (due to site planning and drive aisle width concerns). The ZHE finds that a more common sense approach to meeting the spirit of the Sector Plan landscaping objectives would be to allow a “pooling”/ “bundling” of the 600 square feet of landscaping in the southwest corner of the site (along with the other pooled 420 square feet for a total of 1,020 square feet). The plantings and landscape material will have to comply with the list permitted in the Sector Plan. This result will significantly enhance the appearance of

- the Subject Property, meet some of the objectives of the Sector Plan, and also not significantly damage the Applicant.
23. The Applicant has adequately justified the variance Application (pursuant to conditions of approval promulgated below) upon the Subject Property pursuant to City of Albuquerque Code of Ordinances Section § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

APPROVAL WITH CONDITIONS of a VARIANCE of 3' to the required 3' south side landscape buffer for an existing parking lot.

CONDITIONS OF APPROVAL:

- A. The Applicant shall construct, install and maintain a minimum of 600 square feet of landscaping in the southwest corner of the site (located on Marquette Ave. and 7th Street). *Note: this may be included with the 420 square feet of landscaping required for the Variance application to the west side of the Subject Property totaling 1,020 square feet to be located in the southwest corner of the Subject Property.*
- B. The landscaping utilized within this 600 square feet are shall be consistent with the species of landscaping prescribed within the Downtown 2010 Sector Development Plan.
- C. The Applicant shall not use juniper bushes upon the Subject Property.
- D. The bundled landscaping material shall be covered with live plants over at least 75% of the required landscape area (600 square feet). Coverage will be calculated from the mature spread of these live plants.

If you wish to appeal this decision, you may do so by 5:00 p.m., on August 15, 2013 in the manner described below:

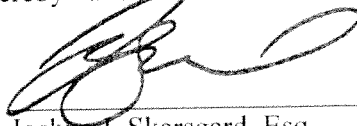
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Please note that pursuant to Section 14.16.4.4.(B). of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

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.



Joshua J. Skarsgard, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
Ron Taylor, 708 Marquette NW, 87102
Dan and Adeline Chavez, 1723 Stanford Dr NE, 87106
Susan Deichsel, 508 14th St NW, 87104
Dr. Reba Eagles, 1500 Lomas Blvd NW, Ste B, 87104

*600 S.F. of landscaping
plus an additional 420 S.F.
of landscaping totaling 1020 S.F.
of landscaping*

MARQUETTE AVE
2 SITE PLAN
1"-20'-0"

