

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

PARKING COMPANY OF AMERICA-ALBUQUERQUE, LLC., (DANIEL CHAVEZ, AGENT) request(s) a special exception to Page 5, Paragraph 3 of the 2010 Downtown Sector Development Plan: a VARIANCE of 3' to the required 3' west side landscape buffer for all or a portion of Lot(s) 18-24, Block(s) 2, ARMIJO--PERFECTO BRO ADDN zoned SU-3 GOV/FIN/HOS FOCUS, located on 600 MARQUETTE AVE NW (J-14)

Special Exception No:..... **13ZHE-80418**
Project No: **Project# 1009561**
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, Parking Company of America (hereinafter "**Applicant**") appeared before the Zoning Hearing Examiner (hereinafter "**ZHE**") requesting a Variance of 3' to the required 3' west side landscape buffer (hereinafter "**Application**") upon the real property located at 600 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 require the removal of 5+/- parking stalls adjacent to the 3’ parking “buffer”. 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.

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 a relocation of the landscape buffer into the adjacent 7th Street right-of-way (See the Exhibit A attached to this Notice of Decision for location of the landscaping within the 7th street right-of-way). The Sector Plan (Page 5 and Paragraph 3) states in part: *“compliance with this requirement may be met, in whole or in part, by providing street trees within the landscape strip or in the public right-of-way adjacent to a commercial surface parking lot. The ground area occupied by a street tree for the purposes of coverage percentage shall be calculated by determining the spread of the trees at 30 years.”* The ZHE finds that the Applicant can satisfy the 3’ landscaping buffer “in whole” by planting street trees within the public right-of-way (7th Street) adjacent to the Subject Property.
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”). The DNA authored a letter on March 7, 2013 which stated in part: *“lack of adequate landscaping presents a negative environment and one people do not relate to. Trees are one of the main reasons people give for moving into our area and make our city not only beautiful but healthy.”*
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 planting of juniper bushes, in lieu of street trees, (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 adjacent 7th Street right-of-way. 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 7th street right-of-way that complies with the trees 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 the Sector Plan allows for 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 to be satisfied *by providing street trees within the landscape strip or in the public right-of-way adjacent to a commercial surface parking lot.* The street trees will have to comply with the list permitted in the Sector Plan. This result will significantly enhance the appearance of the Subject Property, meet the landscaping objectives of the Sector Plan, and also not significantly damage the Applicant in their efforts to comply with the Sector Plan.
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 install and maintain 5 street trees within the adjacent 7th Street right-of-way.
- B. The trees planted within the adjacent 7th Street right-of-way shall be consistent with the species prescribed within the Downtown 2010 Sector Development Plan.
- C. The Applicant shall not use juniper bushes upon the Subject Property.

- D. The trees planted within the 7th Street right-of-way shall cover at least 75% of the required landscape area. Coverage will be calculated from the mature spread of these live trees.

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
Daniel Chavez, PO Box 27701, 87125
Susan Deichsel, 508 14th St NW, 87104
Dr. Reba Eagles, 1500 Lomas Blvd NW, Ste B, 87104

600.
MARQUETTE AVE

7th St
right of
way
(cross
hatched)

7TH STREET

16' ALLEY

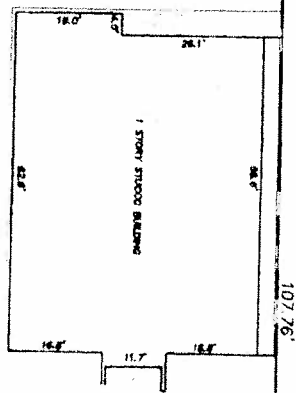
UNDERGROUND
UTILITY VAULT

EXISTING
ASPHALT
PARKING
LOT

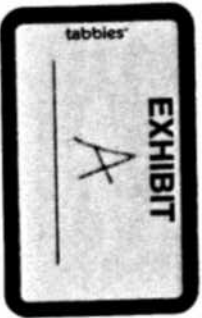
EXIST.
PAY
STATION

NEW
LS

6TH STREET



1 SITE PLAN
1"=20'-0"





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NOTIFICATION OF DECISION

PARKING COMPANY OF AMERICA-ALBUQUERQUE, LLC., (DANIEL CHAVEZ, AGENT) request(s) a special exception to Page 5, Paragraph 2 of the 2010 Downtown Sector Development Plan: a VARIANCE of 12 trees to the required 12 street trees for all or a portion of Lot(s) 18-24, Block(s) 2, ARMIJO--PERFECTO BRO ADDN zoned SU-3 GOV/FIN/HOS FOCUS, located on 600 MARQUETTE AVE NW (J-14)

Special Exception No:..... **13ZHE-80420**
Project No:..... **Project# 1009561**
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, Parking Company of America (hereinafter "**Applicant**") appeared before the Zoning Hearing Examiner (hereinafter "**ZHE**") requesting a Variance of 12 trees to the required 12 street trees (hereinafter "**Application**") upon the real property located at 600 MARQUETTE AVE NW ("**Subject Property**"). Below are the findings of facts:

FINDINGS:

1. Applicant is requesting a Variance of 12 trees to the required 12 street trees, 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.2 of the Sector Plan states in part: "*Street trees meeting the requirements of Section 6-6-2-1 are required along all street frontages. Additionally, for lots that exceed 50 parking spaces, a minimum of one (1) tree must be planted, either in ground or in above ground planters, for every ten (10) parking spaces that are not adjacent to the public Right-of-Way.*" The Sector Plan states in Section 5C.2(c.): "*trees that are installed and maintained in the adjacent public right-of-way, such as an existing parkway, may count towards this requirement.*"
4. Based on a calculation received from staff the Applicant is currently required to provide the following number of trees based upon Section 5C.2 of the Sector Plan:
 - a. West Side of Subject Property (7th Street): 92' of frontage, requiring 3 trees.
 - b. North Side of Subject Property (Marquette Ave.): 120' of frontage, requiring 4 trees.
 - c. East Side of Subject Property (6th Street): 65' of frontage, requiring 2 trees.
 - d. 54 Parking Spaces are not adjacent to a public right-of-way, requiring 5 trees.
 - e. Total Amount of Street Trees Required by Section 5C.2 of the Sector Plan: **14 Trees.**

5. The ZHE finds that the Subject Property is subject to Section 5C.2 ("Trees") of the Sector Plan.
6. This specific Application was advertised as a variance to the required 12 parking lot trees. This is in reference to Section 5C.2 which reads in part "*Street trees meeting the requirements of Section 6-6-2-1 are required along all street frontages.*" The ZHE counted the length of frontage within the Subject Property and arrived a conclusion that 9 trees are required to comply with this section of the amended Sector Plan:
 - a. West Side of Subject Property (7th Street): 92' of frontage, requiring 3 trees.
 - b. North Side of Subject Property (Marquette Ave.): 120' of frontage, requiring 4 trees.
 - c. East Side of Subject Property (6th Street): 65' of frontage, requiring 2 trees.
 - d. The Total Number of Trees Required pursuant to this Section: **9 trees**.

NOTE: There are 54 Parking Spaces on the Subject Property that are not adjacent to a public right-of-way, requiring 5 trees (this is part of a separate Variance Application before the ZHE). Therefore, the total amount of Street Trees Required by Section 5C.2 of the Sector Plan is **14 Trees** (which includes 9 trees for the "*frontage*" requirement and 5 trees for the "*parking stalls not adjacent to the public right-of-way*").

7. The Subject Property is currently non-conforming as to the regulations provided in Section 5C.2 of the Sector Plan. 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.
8. The Subject Property (parking lot) was originally constructed prior to the adoption of the Sector Plan (including its most recent update).
9. 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.
10. 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*"

11. 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”*.
12. 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”*
13. Applicant testified at the Hearing that as a result of the exceptionality of the Subject Property that the Sector Plan Section 5C.2 (“Street Trees”) regulation produces an unnecessary hardship upon the Applicant and the Subject Property, because the Applicant would have to plant and maintain trees in the adjacent public right-of-way (including the installation of an irrigation system). The Applicant testified that, if forced to comply with the street tree requirements (promulgated by the updated Sector Plan) that the Applicant would lose “tens of thousands of dollars” in construction expense.
14. 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.”*
15. Applicant testified at the Hearing that the variance Application (street trees replaced by juniper bushes) if approved, would be appropriate to prevent the unnecessary hardship. In reality, the Application proposed by the Applicant is an offer to switch juniper bushes for street trees. The Applicant argued that the juniper bushes can be watered with trucks until they are “rooted” after which, they do not require watering in this New Mexican high desert climate. The Applicant argued that the juniper bushes would provide for a larger vegetative coverage than the street trees. (See the ZHE File - site plan submitted by the Applicant demonstrating the locations of the proposed juniper bushes). The Sector Plan (Page 5 and Paragraph 2) states in part: *“trees that are installed and maintained in the adjacent public right-of-way, such as an existing parkway, may count towards this requirement.* The ZHE finds that the

- Sector Plan explicitly allows for compliance of this section by planting “trees” and not “juniper bushes” within the public right-of-way adjacent to the Subject Property.
16. 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.”*
 17. 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.
 18. 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”). The DNA authored a letter on March 7, 2013 which stated in part: *“lack of adequate landscaping presents a negative environment and one people do not relate to. Trees are one of the main reasons people give for moving into our area and make our city not only beautiful but healthy.”*
 19. 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.
 20. At the July Hearing, the ZHE inquired of the DNA representative whether their board of directors supported the planting of juniper bushes, in lieu of street trees, (as proposed by the Applicant), to which the representative indicated “no”.
 21. 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.”*
 22. The Applicant proposed juniper bushes as the landscaping within the adjacent public right-of-way. 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 trees within the adjacent public right-of-way that complies with the trees list provided within the Sector Plan.
 23. 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.
 24. **Rationale for ZHE Decision.** The ZHE finds that the Applicant can readily solve the Street Trees requirement within the Sector Plan (Section 5C.2) by *“providing street trees within the public right-of-way”* adjacent to the Subject Property. The street trees will have to comply with the list permitted in the Sector Plan. This result will significantly enhance the appearance of the Subject Property, meet the landscaping

objectives of the Sector Plan, and also not significantly damage the Applicant in their efforts to comply with the Sector Plan (due to the fact that the Applicant will not be required to jack hammer out any existing parking stalls, by utilizing the adjacent public right-of-way).

ZHE NOTE: The Conditions of approval attached herein will include the requirements to plant 14 street trees on the three sides of the Subject Property (which includes the requirement of 5 trees for the parking stalls not adjacent to the public right-of-way, and 9 trees for the frontage along public right-of-way). The ZHE has merged these two variance applications for purposes of drafting an understandable condition of approval and distributed the number of required trees for each specific side of the Subject Property.

25. 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 12 trees to the required 12 trees required within the Sector Plan.

CONDITIONS OF APPROVAL:

- A. The Applicant shall install and maintain 14 street trees in the following locations:
 - a. 5 street trees within the adjacent 7th Street right-of-way.
 - b. 6 street trees within the adjacent Marquette Ave.
 - c. 3 street trees located within the adjacent 6th Street.
- B. The trees planted within the right-of-way shall be consistent with the species prescribed within the Downtown 2010 Sector Development Plan.
- C. The Applicant shall not use juniper bushes upon the Subject Property.

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.

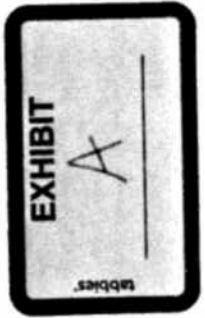
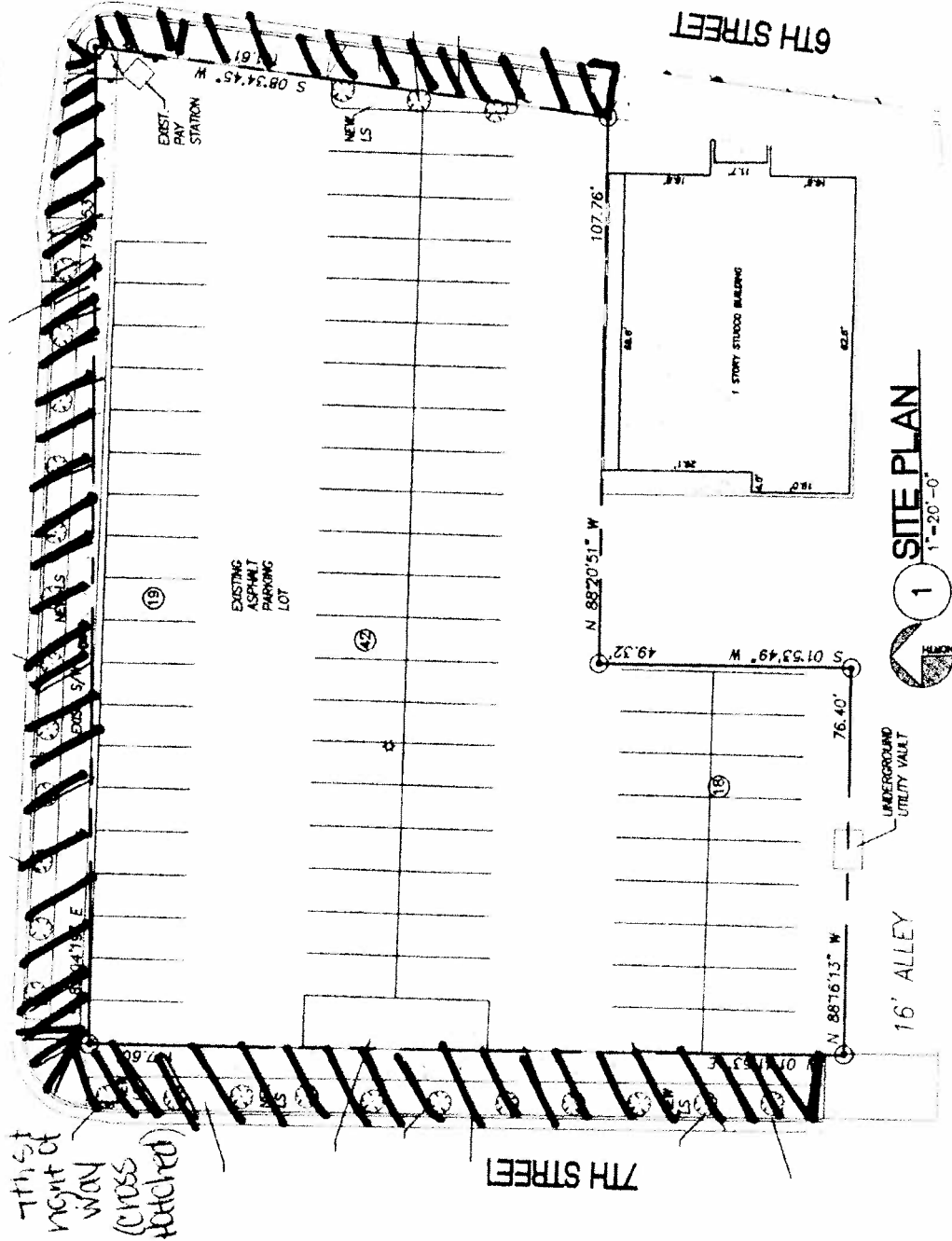
Successful applicants are reminded that other regulations of the City must be complied with, even after approval of a special exception is secured. This decision does not constitute approval of plans for a building permit. If your application is approved, bring this decision with you when you apply for 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.

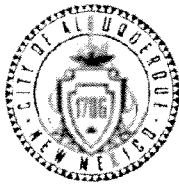


Joshua J. Skarsgard, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
Ron Taylor, 708 Marquette NW, 87102
Daniel Chavez, PO Box 27701, 87125
Susan Deichsel, 508 14th St NW, 87104
Dr. Reba Eagles, 1500 Lomas Blvd NW, Ste B, 87104

600
MARQUETTE AVE





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

PARKING COMPANY OF AMERICA-ALBUQUERQUE, LLC., (DANIEL CHAVEZ, AGENT) request(s) a special exception to Page 5, Paragraph 2 of the 2010 Sector Development Plan: a VARIANCE of 6 trees to the required 6' parking lot trees for all or a portion of Lot(s) 18-24, Block(s) 2, ARMIJO--PERFECTO BRO ADDN zoned SU-3 GOV/FIN/HOS FOCUS, located on 600 MARQUETTE AVE NW (J-14)

Special Exception No:..... **13ZHE-80421**
Project No:..... **Project# 1009561**
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, Parking Company of America (hereinafter "**Applicant**") appeared before the Zoning Hearing Examiner (hereinafter "**ZHE**") requesting a Variance of 6 trees to the required 6 parking lot trees (hereinafter "**Application**") upon the real property located at 600 MARQUETTE AVE NW ("**Subject Property**"). Below are the findings of facts:

FINDINGS:

1. Applicant is requesting a Variance of 6 trees to the 6 parking lot trees, 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.2 of the Sector Plan states in part: "*Street trees meeting the requirements of Section 6-6-2-1 are required along all street frontages. Additionally, for lots that exceed 50 parking spaces, a minimum of one (1) tree must be planted, either in ground or in above ground planters, for every ten (10) parking spaces that are not adjacent to the public Right-of-Way.*" The Sector Plan states in Section 5C.2(c): "*trees that are installed and maintained in the adjacent public right-of-way, such as an existing parkway, may count towards this requirement.*"
4. Based on a calculation received from staff the Applicant is currently required to provide the following number of trees based upon Section 5C.2 of the Sector Plan (which includes 9 trees for the "frontage" requirement, and 5 trees for the "parking stalls not adjacent to the public right-of-way":
 - a. West Side of Subject Property (7th Street): 92' of frontage, requiring 3 trees.
 - b. North Side of Subject Property (Marquette Ave.): 120' of frontage, requiring 4 trees.
 - c. East Side of Subject Property (6th Street): 65' of frontage, requiring 2 trees.
 - d. 54 Parking Spaces are not adjacent to a public right-of-way, requiring 5 trees.

e. Total Amount of Street Trees Required by Section 5C.2 of the Sector Plan: **14 Trees.**

5. The ZHE finds that the Subject Property is subject to Section 5C.2 ("Trees") of the Sector Plan.
6. This specific Application was advertised as a variance to the required 6 parking lot trees. This is in reference to Section 5C.2 which reads in part *"Additionally, for lots that exceed 50 parking spaces, a minimum of one (1) tree must be planted, either in ground or in above ground planters, for every ten (10) parking spaces that are not adjacent to the public Right-of-Way."* The ZHE counted the number of parking spaces that are "not adjacent to the public right-of-way" and found 54 parking spaces. If these are divided by 10, the ZHE finds that the Sector Plan required 5 additional parking spaces, pursuant to this section of the updated Sector Plan.
7. The Subject Property is currently non-conforming as to the regulations provided in Section 5C.2 of the Sector Plan. 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.
8. The Subject Property (parking lot) was originally constructed prior to the adoption of the Sector Plan (including its most recent update).
9. 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.
10. 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"*
11. 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".*

12. 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"*
13. Applicant testified at the Hearing that as a result of the exceptionality of the Subject Property that the Sector Plan Section 5C.2 ("Street Trees") regulation produces an unnecessary hardship upon the Applicant and the Subject Property, because the Applicant would have to plant and maintain trees in the adjacent public right-of-way (including the installation of an irrigation system). The Applicant testified that, if forced to comply with the street tree requirements (promulgated by the updated Sector Plan) that the Applicant would lose "tens of thousands of dollars" in construction expense.
14. 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."*
15. Applicant testified at the Hearing that the variance Application (street trees replaced by juniper bushes) if approved, would be appropriate to prevent the unnecessary hardship. In reality, the Application proposed by the Applicant is an offer to switch juniper bushes for street trees. The Applicant argued that the juniper bushes can be watered with trucks until they are "rooted" after which, they do not require watering in this New Mexican high desert climate. The Applicant argued that the juniper bushes would provide for a larger vegetative coverage than the street trees. (See the ZHE File - site plan submitted by the Applicant demonstrating the locations of the proposed juniper bushes). The Sector Plan (Page 5 and Paragraph 2) states in part: *"trees that are installed and maintained in the adjacent public right-of-way, such as an existing parkway, may count towards this requirement".* The ZHE finds that the Sector Plan explicitly allows for compliance of this section by planting "trees" and not "juniper bushes" within the public right-of-way adjacent to the Subject Property.
16. 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."*
17. 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.
18. 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"). The DNA authored a letter on March 7, 2013 which stated in part: *"lack of adequate landscaping presents a negative environment and one people do not relate to. Trees are one of the main reasons people give for moving into our area and make our city not only beautiful but healthy."*
 19. 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.
 20. At the July Hearing, the ZHE inquired of the DNA representative whether their board of directors supported the planting of juniper bushes, in lieu of street trees, (as proposed by the Applicant), to which the representative indicated "no".
 21. 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."*
 22. The Applicant proposed juniper bushes as the landscaping within the adjacent public right-of-way. 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 trees within the adjacent public right-of-way that complies with the trees list provided within the Sector Plan.
 23. 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.
 24. **Rationale for ZHE Decision.** The ZHE finds that the Applicant can readily solve the Street Trees requirement within the Sector Plan (Section 5C.2) by *"providing street trees within the public right-of-way"* adjacent to the Subject Property. The street trees will have to comply with the list permitted in the Sector Plan. This result will significantly enhance the appearance of the Subject Property, meet the landscaping objectives of the Sector Plan, and also not significantly damage the Applicant in their efforts to comply with the Sector Plan (due to the fact that the Applicant will not be required to jack hammer out any existing parking stalls, by utilizing the adjacent public right-of-way).

ZHE NOTE: The Conditions of approval attached herein will include the requirements to plant 14 street trees on the three sides of the Subject Property (which includes the requirement of 5 trees for the parking stalls not adjacent to the public right-of-way, and 9 trees for the frontage along public right-of-way. The ZHE has

merged these two variance applications for purposes of drafting an understandable condition of approval and distributed the number of required trees for each specific side of the Subject Property.

25. 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 6 trees to the required 6 parking lot trees.

CONDITIONS OF APPROVAL:

- A. The Applicant shall install and maintain 14 street trees within the public right-of-way in the following locations:
 - a. 5 street trees within the adjacent 7th Street right-of-way.
 - b. 6 street trees within the adjacent Marquette Ave.
 - c. 3 street trees located within the adjacent 6th Street.
- B. The trees planted within the right-of-way shall be consistent with the species prescribed within the Downtown 2010 Sector Development Plan.
- C. The Applicant shall not use juniper bushes upon the Subject Property.

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.



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cc: Zoning Enforcement
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