



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

JOHNATHON POHL request(s) a special exception to Section 14-16-2-16(B)(6) and Page 4, Paragraph B1 of the Huning Highland Sector Development Plan: a CONDITIONAL USE for an existing drive thru for all or a portion of Lot(s) 11, Block(s) 22, HUNING HIGHLANDS ADDN zoned SU-2 CRZ, located on 501 CENTRAL AVE NE (K-14)

Special Exception No: **13ZHE-80398**
Project No: **Project# 1009548**
Hearing Date: 05-21-13
Closing of Public Record: 05-21-13
Date of Decision:

On the 21st day of May, 2013 (hereinafter “**May Hearing**”) Wells Fargo Bank, N.A. a banking institution (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a Conditional Use for an existing drive thru (hereinafter “**Application**”) upon the real property located at 501 Central Ave NE (“**Subject Property**”). Attached herein below are the following: (I.) Defined Terms; (II.) Findings of Fact; (III.) Conclusions of Law; and (IV.) Decision.

I. DEFINED TERMS

1. “**Applicant**” – Wells Fargo Bank, N.A. a national banking association
2. “**Agent**” – Jonathan Pohl
3. “**Applicant’s Counsel**” – Mr. Michael J. Cadigan (Cadigan Law Firm, P.C.)
4. “**Queuing Analysis**” – The Queuing Analysis prepared by Terry O. Brown, P.E. (Traffic Engineer) on the 13th day of May, 2013.
5. “**Subject Property**” – 501 Central Avenue NE (existing Pop N’ Taco restaurant).
6. “**Application**” - a Conditional Use Application for an existing drive thru
7. “**HHSDP**” – Huning Highland Sector Development Plan
8. “**UCOZ**” – Huning Highlands – East Downtown Urban Conservation Overlay Zone
9. “**CMP**” – Central Millennium Partnership, a non-profit development company for New Mexico
10. “**BCCP**” – Broadway Central Corridors Partnership, Inc. a New Mexico non-profit corporation.
11. “**BCCP’s Counsel**” – Mr. J. Matthew Myers, Esq. (Myers, Oliver & Price, P.C.)
12. “**April Hearing**” – The ZHE Hearing in April 19th, 2013.
13. “**May Hearing**” – The ZHE Hearing on May 21st, 2013.
14. “**Zoning Code**” – The City of Albuquerque Comprehensive Zoning Code

II. FINDINGS OF FACT

PROCEDURAL FINDINGS OF FACT:

1. Procedural History. The Application was deferred from the February ZHE Hearing and March ZHE Hearings. The Application was heard by the ZHE at the April ZHE Hearing and continued to the May ZHE Hearing.
2. Procedural Issues. During the April ZHE Hearing, the ZHE received oral argument from the Applicant's Counsel (and counter arguments from the BCCP's Counsel) regarding three procedural matters (see argument below):
 - a. **Non-Conforming Structure/Building**. The Applicant's Counsel argued that the Subject Property was a "non-conforming building/structure" and therefore subjected to different treatment within the Zoning Code (and perhaps a longer amortization period); and
 - b. **"Discontinuance Period" of the Drive-Up Service Window** - The Applicant's Counsel argued that the Subject Property's "discontinuance period" or "abandonment period" (as it relates to use of the drive-up service window) was not appropriately timed by the City Zoning Enforcement Office (Applicant submitted into the record three sheets of paper entitled "Section 25.193 MUNICIPAL CORPORATIONS" that provided analysis regarding "abandonment period" and "discontinuance period"; and
 - c. **Drive-Up Service Window Use upon the Subject Property predated the adoption of the Zoning Code** - The Applicant's Counsel argued that age of the drive thru window (Pop N' Taco) predated the adoption of the Zoning Code and therefore was a vested right pursuant to Section 14-16-2-16 C-1 (6) which reads in part *"Drive-up service windows in existence upon the effective date of this Zoning Code shall be considered as approved conditional uses."*

The ZHE during the April Hearing encouraged the Applicant's Counsel to raise those procedural issues with the Zoning Enforcement Office (Mr. Brennon Williams) in the form of a "declaratory ruling." The Applicant's Counsel sent a letter to Mr. Williams (a copy of which was not in the record upon the drafting of this Notice of Decision). Mr. Williams responded in an email to the Applicant's Counsel on May 14th which stated in part, *"Please be aware that recent instruction to our office from the Albuquerque City Council disallows the issuance of a declaratory ruling when it would affect matters pending review by a city board or commission. As such, I cannot consider your request at this time..."*

ZHE Finding Regarding the Procedural Issues Raised by Applicant's Counsel: The ZHE apologizes to the Applicant for requesting that they seek a Declaratory Ruling regarding their procedural issues raised in the April Hearing. At that time, the ZHE was unaware that the City Council had recently instructed the Office of Zoning Enforcement to not issue Declaratory Rulings on a "pending case." Unfortunately, the ZHE Office has also received instructions to consider all cases placed on the Agenda, to be properly admitted by City Staff, and therefore "ripe" to be considered for a Conditional Use application. Therefore, the ZHE chooses not to address the procedural issues raised by the Applicant's Counsel. However, the

ZHE would like to preserve the procedural issues raised by the Applicant (in the event of an appeal or a subsequent Declaratory Ruling request by the Applicant).

Scope of the Notice of Decision. The ZHE finds that this Notice of Decision shall be limited in its scope to an analysis of the Application according to the criteria for a Conditional Use Application as promulgated within § 14-16-4-2 (C) of the Zoning Code.

CONDITIONAL USE APPLICATION FINDINGS OF FACT:

1. The Applicant is requesting a Conditional Use for an existing drive thru upon the Subject Property.
2. The Subject Property is zoned SU-2 CRZ.
3. The Applicant is coming before the ZHE for a Conditional Use because the City was made aware that the Applicant failed to use the “drive-up service” window for more than one year in duration, and pursuant to Zoning Code Section 14-16-4-2-(D)-(1) it is now void (“*An approved special exception shall be void one year after the date approval vested if the rights and privileges granted thereby have not been utilized.*”) Mr. Jonathan Turner, City Zoning Enforcement Official, testified at the April ZHE Hearing expanding on this section and making the determination that it was appropriate for this Applicant to apply for a Conditional Use Application.
4. The Subject Property is within the jurisdiction of the HSDP and UCOZ.
5. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (1) (a) “SPECIAL EXCEPTIONS” reads in part: “*A conditional use shall be approved if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed will not be injurious to the adjacent property, the neighborhood, or the community.*”
6. Applicant testified at the Hearing that the Conditional Use, if approved, will **not** be injurious to the adjacent property, neighborhood, or the community because of the following reasons:
 - a. Queuing Analysis – At the May ZHE Hearing, the Applicant submitted the Queuing Analysis into the record. The Queuing Analysis indicated in part that there was a “95% probability that no more than 7 vehicles will be waiting in the drive-up lane during the peak period, and there is a 98.3% probability that no more than 13 vehicles will be waiting in the drive up lane queue during the peak period. City policy requires that a drive-up facility be designed to accommodate the 95th percentile queue length, which in this case is seven (7) vehicles including the vehicle being served.” The Queuing Analysis attached two potential site plans: (i) single drive-up lane; and (ii) double drive-up lane. The Applicant did not take a firm position as to the intentions of the Subway operator... whether they would be employing the “double drive-up lane” approach, or the “single drive-up” lane approach. Regardless, the Queuing Analysis provided substantial evidence into the record that the traffic generated by the Subway restaurant had a 5% likelihood of “backing up” vehicles into Central Ave. (with a “single drive-up” site plan), and a 2.7% likelihood of “backing up” vehicles into Central Ave. (with a “double drive-up analysis).
 - b. Reduction in Crime & Stabilization of Subject Property. The Applicant argued that the currently vacant Subject Property was an “eye sore” and subjected to vandalism, loitering, and even crime. The Applicant indicated that by approving the Conditional Use, the Applicant would rehabilitate the Subject Property and once again make it a

stabilized property which would in turn reduce crime, and increase property values and gross receipt taxes for the City of Albuquerque.

- c. Precedent of Drive Up Windows in the Surrounding Neighborhood – The Applicant’s Counsel argued at the April Hearing that there was a precedent for existing Drive Up Service windows in the surrounding community that did not disrupt the pedestrian orientation of the neighborhood or cause any injuries to the community (Starbucks on Lomas Blvd., Carl’s Jr. on Broadway, etc.). The Applicant argued that this Subway restaurant would be consistent with some of the existing Drive-Up service windows nearby.
 - d. Distinction Between Existing Drive-Up Windows, and Newly Permitted/Constructed Drive-Up Windows. The Applicant, upon receiving arguments from BCCP’s Counsel regarding the HHS DP and the UCOZ, made a distinction between “existing” drive-up service windows, and “newly constructed” drive-up service windows. The Applicant’s Counsel stated that the HHS DP and the UCOZ do not have sections that prohibit the *existing* drive-up service windows along east Central Ave., but admittedly have taken policy steps towards prohibiting those uses for land owners newly seeking “zone map amendments” or “building permits” to bring those uses anew into the East Central/Huning Highland neighborhood.
7. The Applicant submitted a copy of the West Bluff Neighborhood Assoc. vs. City of Albuquerque, 132 N.M. 433 case into the record, to provide a legal backdrop to the force of law applied to a Rank III Sector Development (in particular, the HHS DP).
 8. The Huning Highlands Historic District Association (HHHDA) submitted a letter dated February 12, 2013 into the record which stated in part “*At our Board meeting on February 6, 2013, the HHHDA voted unanimously to oppose the request from Jonathan Pohl for conditional use for drive-up service for his new Subway restaurant... We are concerned that having a drive-up service window at this location would be injurious to the neighborhood. As the only Subway in the city with a drive-up service window, we expect the traffic would be an issue... we hope you will consider our opposition when making your decision.*”
 9. CMP submitted a letter of opposition to the Application on February 15, 2013 which stated in part:
 - a. [There are] “unaddressed vehicular traffic concerns, turning movement issues, queuing for drive-up services and their effects on pedestrian safety”
 - b. “supporting information was not identified or referenced by the Applicant to the overall impact to the goals and objectives of the approved zoning updated in 2005 (UCOZ). We request the ZHE recognize the living changes in the affected area to which the referenced site is a part.”
 - c. “both immediate neighborhoods since 2003 [have been] working towards a transformation of both the transportation corridor and the pedestrian needs to effect a more urban and retail environment. The [local community] has been continually focused upon the need for more urban character wit hopes to manifest both quality living environments, public safety and services that support a park and walk environment.”
 - d. “SU-2 CRZ zoning is specific in allowing commercial activities such as retail and service uses that serve the surrounding neighborhood. This is not the characterization for the applicants request including drive up service windows... which would impair the safety of the Neighborhood objectives stated above.”

10. Ron Holmes (attorney at law) authored a letter of support on April 4, 2013 which stated in part “I have no particular opposition to Mr. Pohl’s vision as his plan would rehabilitate the property and provide a tenant to address two very common problems in this neighborhood, graffiti and vagrancy.”
11. Ali Moore, resident within the Huning Highland neighborhood, authored an email of support dated April 15th which read in part “I have lived there since October, and as a mother of an 11 month old, my main concern as a resident of the neighborhood has been working to improve the safety of the area. I am in full support of the (Conditional Use) Subway as the constant drive thru traffic will serve as a deterrent for the criminal activity to continue.”
12. State Representative Rick Miera wrote a letter of support to the Application dated April 15th, 2013 which stated in part “This type of business will help boost the economy of the area. This property has been vacant for many years and as a result, been vandalized and eye sore. I support this business as it could be an asset to the neighborhood.”
13. Mr. and Mrs. Tom and Allison Coe authored a letter of support dated April 14, 2013 which stated in part “we have put much thought into what a drive thru business would bring to our neighborhood and we believe that no harm will come to the neighborhood with the addition of a drive through subway.... Heavy traffic already exists at this corner. This traffic existed when the Pop N Taco was up and running and brought no harm to us. Our hope is that cars pulling into a drive thru might actually slow down... and these commuters may actually see all that our neighborhood does have to offer. The most important change that we hope comes with the arrival of [subway], is that the activity of the business will move along many of the transients that hang out and squat at this corner.”
14. Ms. Angela P. (neighbor on Walter Street) authored a letter that stated in part “I am writing this in an effort to support putting a drive through Subway at the abandoned location. I feel that having this business there would not only attract people not necessarily likely to come to the area and provide jobs for locals, but would also help in transforming a drug infested lot for vagrants into a business that would benefit all in the area. Having a well known establishment like a Subway will attract people to the neighborhood, and also leave me feeling more at ease about my safety.”
15. Mr. Pat (resident that lives on Walter SE) wrote a hand written letter that simply stated “I think a drive thru Subway is a good idea.”
16. The BCCP’s Counsel stated at the May Hearing that the very fact that a drive-up service window is not a permissive use in the Subject Property’s underlying zoning (SU-2 CRZ) is evidence enough, that if approved for a conditional use, it would be injurious to the neighborhood.
17. Mr. Dickson testified at the April ZHE Hearing and indicated that Central Avenue has some unique characteristics. Namely, there is a plan for bicycle lanes in both directions (east and west) along Central Ave. He added that by allowing a Conditional Use in a zoning designation (that allows them only “conditionally” pursuant to a conditional use) that this would create economic harm to the surrounding neighborhood.
18. A representative of the BCCP also added that the HHSDP and the UCOZ are manifestations of the wishes and hopes of the constituents in this neighborhood... and it is clear that those two documents support pedestrian friendly uses, of which, a drive-up service window was not desired.
19. The record includes a document submitted by the BCCP entitled “Summary of Goals, Regulations and Policies Found in the 2005 Regulatory Plan for the Huning Highland – East”

Downtown Urban Conservation Overlay Zone (UCOZ)” This document reads in part “Pedestrian First Policy – No Drive Thrus”. The document adds “Resolution 2005-033 which amended the Plan stated that “traffic mitigation” was a primary concern of residents of the area.” The Document added that Page 1 of the Plan refers to “pedestrian first, outdoor dining, traffic speeds compatible with urban villages, more pedestrians, fewer accidents and injuries, park once and walk, parking behind buildings, daily needs within walking distance.” Page 5 of the Plan “Corridor Preservation category #2G Drive Thru type buildings not allowed in this category.”

20. The ZHE read the UCOZ, and finds that Page 1 does not say “no drive thrus” under the policy of “Pedestrian First.”
21. The ZHE also notes that the “Corridor General” zone of the UCOZ allows for drive thru windows (Page 7) provided that they are located on the sides or rears of the property (which indicates that the UCOZ contemplates some drive thru windows within the boundaries of its plan).
22. Mr. Nevin Harwick PE, authored a letter on April 15, 2013 on behalf of CMP stating in part “as a profession traffic operations engineer, I am concerned about the potential traffic safety and operations deficiencies which might result from the proposed land-use within this planned pedestrian oriented neighborhood.”
23. Mr. David Malman (President of the EDO Neighborhood Association) testified at the ZHE Hearing in April and indicated that their board unanimously voted to oppose the Application. He indicated concern about the increased traffic upon the Subject Property from changing to an underutilized Pop N’ Taco to a (likely popular) Subway restaurant. He indicated that there was a very real possibility that cars would “queue” into Central Avenue which has rapid transit bus lines, bicycles and pedestrians traveling on sidewalks. He indicated that the Subject Property’s minimal parking spaces and three curb cuts makes the site un-welcoming for safe pedestrian orientation.
24. Mr. Owens testified at the ZHE Hearing and indicated that a drive thru window would be a “slap in the face” to the neighborhood’s efforts to establish a pedestrian friendly corridor. He doesn’t think this drive thru meets the “vision” of the sector plan and overlay zone.
25. Mr. Tim McGiver (occupies space in surrounding community) and indicated that he believes that this drive thru would also compromise the pedestrian friendly amenities desired for this corridor. He desires to establish a great urban neighborhood and doesn’t think this is a fit.
26. Mr. Daniels testified that he thinks that a drive thru subway at this location would queue cars into Central Avenue. He added there is no way that this can be safe. He thinks the cars will clog up the access and block the sidewalks and bike lanes.
27. Mr. Jim Maddox testified that he opposes the Subway drive thru lane because it will back cars up into Central Avenue. He doesn’t oppose all drive thru windows, but does feel that this will create traffic problems into Central Avenue and block the access from the side street.
28. Mr. Moises Gonzales testified at the April Hearing that he can see the Pop N Taco from his yard and move here 8 years ago. He added that the “primacy of vehicles would put the neighborhood at risk”. He opposes the conditional use application.
29. Ms. Randy McGinn testified at the April Hearing that she opposes the conditional use application because the cars will queue into Central Avenue (and create congestion on the side streets). She added that many pedestrians use the sidewalks nearby for the library and bus lines and that this traffic would create safety issues for this neighborhood.

30. Mr. Joe Sabatini testified that he had the privilege of working at the library for years, and he expressed his concern about the impact that the drive thru would have on this neighborhood.
31. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (1) (b) “SPECIAL EXCEPTIONS” reads in part: “*A conditional use shall be approved if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed will not be significantly damaged by surrounding structures or activities.*”
32. Applicant’s Counsel testified at the Hearing that the proposed conditional use, will not be significantly damaged by the surrounding structures or activities. Some of the various opponents to the Application argued that the surrounding traffic congestion and queuing into Central Ave. may actually damage the conditional use (drive-up service window).
33. 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.

ZHE ANALYSIS OF THE FINDINGS OF FACT:

The ZHE finds that this was a very challenging Application with large amounts of written evidence, testimony and passion displayed by the proponents of the Application, as well as the opponents of the Application. Additionally, the Application was made more challenging by the fact that the drive-up service window has been on the Subject Property for over 60+ years (and only recently terminated its drive-up service window sales in conjunction with the Pop N’ Taco restaurant closure). The ZHE poured over the evidence within the record (including the HHSDP and UCOZ) attempting to analyze whether this drive-up service window (if approved) would be “injurious” to the community. This analysis was further complicated by the Applicant’s presentation of two different iterations of site plans (within the Queuing Analysis). As a result of not knowing which of the site plans was intended by the Applicant for the Subject Property the ZHE had to analyze both iterations herein below:

“Double Drive-Up Lane Site Plan” – This site plan iteration apparently accommodates 12-13 vehicles “on-site” (contained within the Subject Property) before the vehicles would queue into Central Avenue right-of-way. Upon further review of this site plan iteration it becomes clear that the narrowness of the site (coupled with two drive-up lanes stacked adjacent to one another) would preclude vehicles from safely accessing the Subject Property from the westerly curb cut located on the side street west of the restaurant. It appears that these vehicles would likely not have enough area to navigate around the double drive-up lanes without conflict points within the parking lot. Additionally, the parking spaces located on the east edge of the Subject Property would have limited space to enter and exit the parking spaces if there were two drive-up lanes located along the east end of the restaurant (which also would present conflict points entering the site from Central Ave.).

The ZHE finds that this site plan iteration falls short of meeting its burden of proving that it would not be injurious to the community (and in particular, customers of the restaurant attempting to safely navigate the traffic circulation within the Subject Property);

“Single Drive-Up Lane Site Plan” – This site plan iteration apparently has the ability to queue 6-7 cars “on-site” before vehicles would stack into the sidewalk, bicycle lane and west bound lanes of Central Avenue. It is important to note that there are three areas of potential vehicle

conflict readily visible upon analyzing the single drive-up lane site plan iteration: (a.) vehicle & pedestrian conflict at the sidewalk located on the south edge of the Central Ave. right of way; (b.) vehicle & bicycle conflict within the south edge of the Central Ave. right of way; and (c.) vehicle & vehicle conflict in the event of vehicles “queuing” off-site and into Central Avenue. The ZHE is also mindful that Central Avenue is a historically significant, high-traffic, major arterial roadway system in the City of Albuquerque. The ZHE recognizes and appreciates that the Applicant submitted a professional Queuing Analysis which demonstrates only a 5% chance that vehicles will queue into Central Avenue during the peak hours (the Queuing Analysis suggested that 6-7 cars could be absorbed on-site safely without queuing traffic into Central Avenue). The ramifications of vehicles queuing into Central Avenue (at this location) would cause: (a.) pedestrians to walk around vehicles into Central Avenue or on to the Subject Property; (b.) bicycles to navigate around the vehicles into Central Avenue or on to the Subject Property; and (c.) vehicles queued into Central Avenue to run the risk of being rear-ended by oncoming west bound traffic.

The ZHE is uncomfortable with the risk that this site plan iteration (single drive-up lane) will result in cars queuing into Central Ave. and putting pedestrians, bicycles and motorists in a compromised safety position. Accordingly, the ZHE finds that this site plan iteration falls short of meeting its burden of proving that it would not be injurious to the community.

III. CONCLUSIONS OF LAW

The Applicant has not adequately justified the Conditional Use request pursuant to City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.

IV. DECISION

DENIAL of a CONDITIONAL USE for an existing drive thru.

If you wish to appeal this decision, you may do so by 5:00 p.m., on June 21, 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