

**Notice of Decision  
City Council  
City of Albuquerque  
October 20, 2020**

**AC-20-9** Project PR-2020-003906, VA-2020-00140, VA-2020-00275: JAG Planning & Zoning, agents for Jesus Apodaca, appeal the Zoning Hearing Examiner's decision to deny a conditional use to allow self-storage for Lot 1D, MRGCD Map 37, located at 1718 Broadway Blvd NE, zoned MX-M [Section 14-16-4-3(D)(28)]

**Decision**

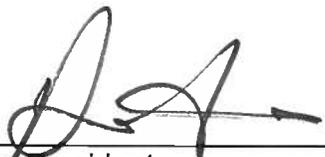
On October 19, 2020, by a vote of 9 FOR and 0 AGAINST the City Council voted to affirm the decision of the Zoning Hearing Examiner by accepting and adopting the recommendation and findings of the Land Use Hearing Officer.

**IT IS THEREFORE ORDERED THAT THE CONDITIONAL USE PERMIT IS DENIED**

**Attachments**

1. Action Summary from the October 19, 2020 City Council Meeting
2. Land Use Hearing Officer's Decision

A person aggrieved by this decision may appeal the decision to the Second Judicial District Court by filing in the Court a notice of appeal within thirty (30) days from the date this decision is filed with the City Clerk.

  
\_\_\_\_\_  
Patrick Davis, President  
City Council

Date: 10-29-20

Received by: Camille C. Condova Date: 10/29/20  
City Clerk's Office

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# City of Albuquerque

Albuquerque/Bernalillo  
County  
Government Center  
One Civic Plaza  
Albuquerque, NM 87102

## Action Summary

### City Council

*Council President, Pat Davis, District 6*  
*Vice-President, Diane G. Gibson, District 7*

*Lan Sena, District 1; Isaac Benton, District 2*  
*Klarissa J. Peña, District 3; Brook Bassan, District 4*  
*Cynthia D. Borrego, District 5; Trudy E. Jones, District 8*  
*Don Harris, District 9*

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Monday, October 19, 2020

3:00 PM

Via Zoom Video Conference  
See Special Procedures below  
for viewing this meeting.

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#### TWENTY-FOURTH COUNCIL - TWENTIETH MEETING

#### 1. ROLL CALL

**Present** 9 - Brook Bassan, Isaac Benton, Cynthia Borrego, Patrick Davis, Diane Gibson, Don Harris, Trudy Jones, Klarissa Peña, and Lan Sena

#### 2. MOMENT OF SILENCE

*President Davis led the Pledge of Allegiance in English and Spanish.*

#### 10. GENERAL PUBLIC COMMENTS

#### 3. PROCLAMATIONS & PRESENTATIONS

#### 4. ECONOMIC DEVELOPMENT DISCUSSION

#### 5. ADMINISTRATION QUESTION & ANSWER PERIOD

#### 6. APPROVAL OF JOURNAL

October 5, 2020

#### 7. COMMUNICATIONS AND INTRODUCTIONS

#### 8. REPORTS OF COMMITTEES

**Finance & Government Operations Committee - October 12, 2020****Committee of the Whole - October 15, 2020****DEFERRALS/WITHDRAWALS**

- a. [EC-20-144](#) Mayor's Recommendation of Award to the New Mexico BioPark Society for "BioPark Admissions"
- A motion was made by President Davis that this matter be Postponed to November 2, 2020. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- b. [OC-20-10](#) Appointment of Mr. Wilton Rogers III to the Accountability in Government Oversight Committee
- A motion was made by President Davis that this matter be Postponed to November 2, 2020. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- c. [OC-20-11](#) Selection of the City Auditor
- A motion was made by President Davis that this matter be Withdrawn. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**9. CONSENT AGENDA: {Items may be removed at the request of any Councilor}**

- a. [EC-20-159](#) Mayor's Recommendation of Huitt-Zollars, Inc. for Architectural Consultants for North Domingo Baca Aquatic Center Design
- A motion was made by Vice-President Gibson that this matter be Approved. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- b. [EC-20-160](#) Mayor's Recommendation of Vigil & Associates, Dyron Murphy Architects, P.C., and SMPC Architects for City Wide On-Call Architectural Services
- A motion was made by Vice-President Gibson that this matter be Approved. The motion carried by the following vote:**
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- c. [EC-20-161](#) Mayor's Recommendation of Molzen Corbin, Smith Engineering, and WSP USA Inc. for City Wide On-Call Engineering Services for

## Transportation and Storm Drainage

**A motion was made by Vice-President Gibson that this matter be Approved.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

d. [EC-20-162](#)

Mayor's Recommendation of Bohannan Huston Inc., Lee Engineering, and Souder Miller, & Associates for Engineering Consultants for City Wide On-Call Traffic Engineering

**A motion was made by Vice-President Gibson that this matter be Approved.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

e. [EC-20-163](#)

Mayors Re-appointment of Dr. Dorothy Habrat to the EMS Medical Control Board

**A motion was made by Vice-President Gibson that this matter be Confirmed.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

f. [EC-20-164](#)

Mayors Re-appointment of Dr. Gurujot Khalsa to the EMS Medical Control Board

**A motion was made by Vice-President Gibson that this matter be Confirmed.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

g. [EC-20-168](#)

Mayor's Recommendation of RoVolus for On-Call Engineering for Aviation Sustainability and Environmental Services

**A motion was made by Vice-President Gibson that this matter be Approved.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

h. [EC-20-169](#)

Mayors Re-appointment of Dr. Kimberly M. Pruet to the EMS Medical Control Board

**A motion was made by Vice-President Gibson that this matter be Confirmed.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

i. [EC-20-171](#)

Mayor's Re-appointment of Mr. Scott B. Wilson to the EMS Providers Advisory Committee

**A motion was made by Vice-President Gibson that this matter be Confirmed.**

**The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

j. [EC-20-172](#)

Mayor's Appointment of Mr. Joel Trujillo to the Human Rights Board

**A motion was made by Vice-President Gibson that this matter be Confirmed.  
The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

k. [EC-20-173](#)

Mayors Re-appointment of Dr. Randall D. Lahr to the EMS Medical Control Board

**A motion was made by Vice-President Gibson that this matter be Confirmed.  
The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

l. [EC-20-175](#)

Mayor's Re-appointment of Ms. Kelly Garvin to the EMS Providers Advisory Committee

**A motion was made by Vice-President Gibson that this matter be Confirmed.  
The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

m. [EC-20-176](#)

Mayor's Appointment of Mrs. Denisha Pierre to the Human Rights Board

**A motion was made by Vice-President Gibson that this matter be Confirmed.  
The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

n. [R-20-103](#)

Designating Workforce Housing Trust Funds For The Acquisition Of Single-Family Residence On The Sawmill Community Land Trust (Benton, by request)

**A motion was made by Vice-President Gibson that this matter be Passed. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

o. [R-20-106](#)

Approving Submittal Of Grant Applications By The Parks And Recreation Department To The New Mexico Finance Authority, Water Trust Board (Davis, by request)

**A motion was made by Vice-President Gibson that this matter be Passed. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 11. ANNOUNCEMENTS

## 12. PUBLIC HEARINGS: {Appeals, SAD Protest Hearings}

a. [AC-20-9](#)

Project PR-2020-003906, VA-2020-00140, VA-2020-00275: JAG Planning & Zoning, agents for Jesus Apodaca, appeal the Zoning Hearing Examiner's decision to deny a conditional use to allow

self-storage for Lot 1D, MRGCD Map 37, located at 1718 Broadway Blvd NE, zoned MX-M [Section 14-16-4-3(D)(28)]

**A motion was made by Councilor Jones that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 14. FINAL ACTIONS

- \*f. [R-20-107](#) Making Findings In Connection With The Resolution Of Winrock Town Center Tax Increment Development District 1 Authorizing The Issuance And Sale Of Subordinate Lien Tax Increment Bonds; Ratifying And Approving The Issuance And Sale Of The Winrock Town Center Tax Increment Development District 1 Subordinate Lien Gross Receipts Tax Increment Bonds, Series 2020; Authorizing Amendments To The Operation Agreement And The Construction Agreement Previously Entered Into By The City With Respect To Such District; And Repealing City Council Enactment No. R-2020-013 (Gibson)

**A motion was made by Vice-President Gibson that this matter be Passed. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 13. APPROVALS: {Contracts, Agreements, and Appointments}

- d. [OC-20-12](#) Appointment of Member to the Open Space Advisory Board (Ms. Tasia Young was selected)

**A motion was made by President Davis that this matter be Tabled. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

## 14. FINAL ACTIONS

- a. [O-20-28](#) F/S Repealing The City Of Albuquerque Code Of Ordinances Sections 13-6-1 Through 13-6-99, The "Pawnbroker Ordinance," And Replacing It With A New Ordinance Amending Existing Regulations Applicable To Pawnbrokers And Extending Regulations To Precious Material Dealers, Secondhand Retailers, And Automated Consumer Electronic Kiosks (Gibson)

**A motion was made by Vice-President Gibson that this matter be Substituted. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Vice-President Gibson that this matter be Postponed as Substituted to November 2, 2020. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

### 13. APPROVALS: {Contracts, Agreements, and Appointments}

- d. [OC-20-12](#) Appointment of Member to the Open Space Advisory Board (Ms. Tasia Young was selected)

**A motion was made by President Davis to remove OC-20-12 from the table. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by President Davis to Confirm the Selection of Dr. Tasia Young. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

### 14. FINAL ACTIONS

- b. [O-20-38](#) Adopting A Uniform Administrative Code And Technical Codes Prescribing Minimum Standards Regulating The Construction, Alteration, Moving, Repair And Use And Occupancies Of Buildings And Structures And Building Service Equipment And Installations Including Plumbing, Swimming Pools, Electrical, Mechanical, Signs, Solar, Energy Conservation, Building Conservation And The Abatement Of Dangerous Buildings Within The City Of Albuquerque; Providing For The Issuance Of Permits And Collecting Fees Therefore; Repealing Chapter 14, Article 1, ROA 1994, The Present Uniform Administrative Code And Technical Codes Including The Building Code, The Plumbing Code, The Swimming Pool Code, The Mechanical Code, The Solar Energy Code, The Electrical Code, Providing For Penalties For Violation Of The Code (Benton, by request)

**A motion was made by Councilor Benton that this matter be Passed. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- c. [R-20-18](#) A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 5609 Everitt Rd NW 87120 Within The City Limits Of Albuquerque, New Mexico Is So Ruined, Damaged And Dilapidated As To Be A Menace To The Public Comfort, Health, Peace Or Safety And That It Is To Be Required To Be Removed (Borrego, by request)

**A motion was made by Councilor Sena that this matter be Postponed to December 21, 2020. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- d. [R-20-104](#) Adopting The 2020 Update Of The Neighborhood Traffic Management Program Manual (Davis, Benton)

**A motion was made by Councilor Harris that this matter be Postponed to November 2, 2020. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, and Sena

**Excused:** 1 - Peña

- e. [M-20-5](#) Recognizing The Senior Corp Volunteers Composed Of Foster Grandparents, Senior Companions And Retired And Senior Volunteer Program Volunteers For Their Exemplary Service During The Time Of The COVID-19 Pandemic To The Senior Citizen Population Of The City Of Albuquerque (Borrego, Peña)

**A motion was made by Councilor Borrego that this matter be Passed. The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- \*j. [R-20-85](#) Supplementing Priorities For The Capital Implementation Program Of The City Of Albuquerque By Implementing A Racial Equity Criterion To Be Used In The Development Of The Plan (Peña, Sena)

**A motion was made by Councilor Borrego that this matter be Postponed to December 21, 2020. The motion carried by the following vote:**

**For:** 6 - Benton, Borrego, Davis, Gibson, Harris, and Jones

**Against:** 3 - Bassan, Peña, and Sena

- \*g. [O-20-37](#) Amending Sections 9-10-1-3, 9-10-1-6(E)(2), 9-10-1-8(C)(4), 9-10-1-8(D)(5), 9-10-1-8(F), 9-10-1-8(F)(2), 9-10-1-9(B), 9-10-1-10(B)(1), 9-10-1-10(B)(4), 9-10-1-11(A), 9-10-1-11(B), 9-10-1-11(H), Section 2, Section 3, And Section 4, ROA 1994 Of The Municipal Solid Waste Ordinance, To Update Effective Date Of Rate Change; Amending Rate Table Appendix To Incorporate Residential Rate Increase In The Rate Appendix; And Amending Rate Table To Incorporate The FY21 Rate Increase In The Rate Appendix (Benton, by request)

**A motion was made by Councilor Benton that this matter be Passed. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, and Peña

**Against:** 1 - Sena

- \*h. [R-20-98](#) C/S Adjusting Appropriating Funds For Operating The Government Of The City Of Albuquerque For Fiscal Year 2021, Beginning July 1, 2020 And Ending June 30, 2021 And Appropriating Capital Funds (Benton, Borrego, Davis, Gibson)

**A motion was made by Councilor Benton that this matter be Amended. Councilor Benton moved Amendment No. 1(A). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Benton that this matter be Amended. Councilor Benton moved Amendment No. 2(B). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Benton that this matter be Amended. Councilor Benton moved Amendment No. 3(C). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Peña that this matter be Amended. Councilor Peña moved Amendment No. 4(D). The motion carried by the following vote:**

**For:** 6 - Bassan, Borrego, Harris, Jones, Peña, and Sena

**Against:** 3 - Benton, Davis, and Gibson

**A motion was made by Councilor Sena that this matter be Amended. Councilor Sena moved Amendment No. 5(E). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Bassan that this matter be Amended. Councilor Bassan moved Amendment No. 6(F). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Vice-President Gibson that this matter be Amended. Vice-President Gibson moved Amendment No. 7(G). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by President Davis that this matter be Amended. President Davis moved Amendment No. 8(H). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Jones that this matter be Amended. Councilor Jones moved Amendment No. 9(I). The motion carried by the following vote:**

**For:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Benton that this matter be Passed as Amended. The motion carried by the following vote:**

**For:** 8 - Bassan, Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

**Excused:** 1 - Harris

**\*i. R-20-99**

Establishing One-Year Objectives For The City Of Albuquerque In Fiscal Year 2021; To Meet Five-Year Goals (Benton, by request)

**A motion was made by Councilor Jones that this matter be Amended. Councilor Jones moved Amendment No. 1(A). The motion carried by the**

following vote:

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Peña that this matter be Amended. Councilor Peña moved Amendment No. 2(B). The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Borrego that this matter be Amended. Councilor Borrego moved Amendment No. 3(C). The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**A motion was made by Councilor Benton that this matter be Passed as Amended. The motion carried by the following vote:**

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

**BEFORE THE CITY OF ALBUQUERQUE  
LAND USE HEARING OFFICER**

**APPEAL NO. AC-20-9**

**PR-2020-003906; VA-2020-00140; VA-2020-00275**

**JAG Planning & Zoning, agents for Jesus Apodaca, Appellant,**

**And,**

**Loretta Naranjo Lopez, in her official capacity as President of, and on behalf of the  
Santa Barbara Martineztown Neighborhood Association, Party Opponents.**

1           This is an appeal from a decision of the Zoning Hearing Examiner (ZHE) denying a  
2 proposed conditional use application for a use the Appellant contends is a “self-storage”  
3 facility. After reviewing the record, listening to arguments and testimony, I find that the ZHE’s  
4 decision should be upheld and that the appeal should be denied. Although, objectively one of  
5 the ZHE’s findings is not well-explained, as discussed below, I find, as the ZHE similarly did,  
6 that the Appellant failed to adequately support the application with the necessary analysis  
7 required in the IDO for a conditional use application.

8           In addition, I find that there are other compelling grounds, not contemplated by the  
9 ZHE, to deny the application. In short, Appellant’s proposal, if approved, would be an  
10 abrogation of, and a departure from, the IDO’s detailed “use definitions.” As explained in more  
11 detail below, Appellant’s proposal would render the important distinction between a “primary  
12 conditional use” and an “accessory use” meaningless in the IDO.

13 **I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

14 The record reflects the following relevant facts. The Appellant, Jesus Apodaca, owns a  
15 construction business [R. 175]. Approximately five years ago, the Appellant purchased a  
16 .5732-acre lot that is located at 1718 Broadway Boulevard NE to utilize as the main offices for  
17 his construction business [R. 009, and LUHO hrg.]. The lot contains two existing dwelling  
18 units (buildings) [R. 179]. Appellant converted the larger of the two buildings for the exclusive  
19 office use of the construction business [R. LUHO hrg.]. Appellant’s lot is zoned MX-M under  
20 the IDO [R. 175]. Because the lot is zoned MX-M, it is undisputed that the lot can be utilized  
21 for office uses. [IDO, Table 4-2-1, p. 132].

22 The second dwelling is dilapidated and apparently Appellant desires to raze it and  
23 replace it with a 3,000 sq. ft. building structure to warehouse materials and supplies for his  
24 construction business [R. 178]. Currently, Appellant stores construction materials and  
25 equipment used in his construction business on the lot [R. 184]. It is an undisputed fact that in  
26 an MX-M zone, operating a “construction contractor facility and yard” is not allowed, even by  
27 conditional use [IDO, Table 4-2-1, p. 132]. In late 2019, Staff with the City Zoning Code  
28 Enforcement Division cited Appellant for utilizing the lot as a construction contractor facility  
29 and yard because he was storing construction equipment and materials thereon the lot [R.  
30 LUHO hrg.]. There is unrebutted evidence that Appellant’s lot is still in violation of the IDO  
31 because the lot continues to be used in some manner to store construction equipment for  
32 Appellant’s business [R. 022, 184, and LUHO hrg.].

33 On April 3, 2020, the Appellant through his agents met with City Planning Staff in a  
34 Pre-application Review Team Meeting (PRT) [R. 040-041]. Then on June 2, 2020, Appellant

35 through his agents, submitted an application to the City Planning Department for a “conditional  
36 use to allow self-storage” on the premises [R. 033 - 034]. The purpose of the conditional use,  
37 according to Appellant is to “allow the site to come into compliance” [R. 022].

38 At the ZHE hearing, Appellant’s agents submitted a petition signed by seven  
39 neighboring residents including some abutting residents who expressed support for the  
40 proposed conditional use application [R. 084 - 086]. The Santa Barbara Martineztown  
41 Neighborhood Association (SBMNA) opposed the conditional use application and is a party  
42 to this appeal [LUHO Hrg.]. In their opposition to the proposed use, the SBMNA through its  
43 Board of directors submitted to the ZHE a letter and other documentation regarding the history  
44 of the SBMNA neighborhood including information regarding the site for the proposed use  
45 [R. 087 - 164].

46 On July 21, 2020, the ZHE held a quasi-judicial hearing on the application [R. 174].  
47 On August 5, 2020, in an Official Notification of Decision, the ZHE made twenty findings of  
48 fact and law, and denied the proposed use [R. 004 – 008]. Appellant filed his timely appeal  
49 and the City Council delegated the appeal to its LUHO [R. 009]. A quasi-judicial land use  
50 appeal hearing was held via remote video on October 2, 2020.<sup>1</sup>

51

## 52 **II. STANDARD OF REVIEW**

53 A review of an appeal is a whole record review to determine whether the ZHE acted  
54 fraudulently, arbitrarily, or capriciously; or whether the ZHE’s decision is not supported by  
55 substantial evidence; or if the ZHE erred in applying the requirements of the IDO, a plan,

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1. At the time of the LUHO hearing the City was under a public health emergency order from the State and from the City.

56 policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision and  
57 record must be supported by substantial evidence to be upheld. The LUHO may recommend  
58 that the City Council affirm, reverse, or otherwise modify the lower decision to bring it into  
59 compliance with the standards and criteria of this IDO [IDO § 6-4(U)(3)(d)(5)]. The City  
60 Council also delegated authority to the LUHO to remand appeals [IDO, § 14-16-6-4(U)(3)(d)].

61

### 62 **III. DISCUSSION**

63 Appellant claims that two of the ZHE’s findings (Fndgs. # 16 and 18) are not supported  
64 by the evidence in the record and therefore his decision should be reversed or remanded back  
65 to the ZHE to redress the alleged errors. Only to the extent that at least one finding (Findg.  
66 #18) is not *well-explained*, I agree. However, I find that this error does not warrant a reversal  
67 or a remand because the evidence in the record supports that the proposed conditional use  
68 application should still be denied. I find that ZHE Finding #16 is an independent basis  
69 supporting denial.

70 In addition, because under IDO § 6-4(U)(3)(d)(5), the LUHO has authority to  
71 “modify” the ZHE findings, I also find that there are grounds that were not contemplated by  
72 the ZHE that also supports a denial of the application. I begin the analysis with the ZHE’s  
73 decision, the reasons for the appeal, and the requirements in the IDO for a conditional use.

74 The ZHE correctly noted that under § 14-16-6-4(F)(2), the applicant bears the burden  
75 to satisfy all the IDO requirements to support an application [R. 005, Fndg. #14]. Under §  
76 14-16-6-6(A)(3) of the IDO, an applicant must satisfy all the threshold criteria for a conditional  
77 use including:



115 general intent of the Comp. Plan to keep compatible, allowable uses together [R. 015].  
116 Appellant argued to the ZHE that because the proposed use is permitted (as a conditional use)  
117 in the MX-M zone, the conditional use generally furthers the Comp. Plan [R. 015]. Appellant  
118 also argues that it was arbitrary for the ZHE to rely on the opposing evidence submitted by the  
119 SBMNA to find that the proposed use is inconsistent with the Comp. Plan.<sup>2</sup>

120       Regarding their first argument, to satisfy the first prong of the analysis required in §  
121 14-16-6-6(A)(3)(a) of the IDO, Appellant woefully assumes that there is a presumption that  
122 the use proposed “will not materially undermine the intent and purpose of  
123 the...Comprehensive Plan” merely because self-storage is an allowable conditional use [R.  
124 016]. Yet, in reviewing the IDO and the Comp. Plan, I find that there is no such generalized  
125 presumption which can be gleaned from the IDO and the Comp. Plan. I also find that the use  
126 proposed by Appellant under the facts in this matter actually does undermine the IDO because  
127 what Appellant is proposing is in fact not a “primary conditional use.” This issue will be  
128 discussed in detail further below.

129       For purposes of the ZHE’s findings, however, the six criteria of §14-16-6-6(A)(3) of  
130 the IDO requires (1) a site-specific analysis of the project site and (2) an analysis of specific  
131 goals and policies of the Comp Plan. In written arguments supporting the appeal, Appellant  
132 conceded that specificity regarding the Comp. Plan was not presented to the ZHE to meet the  
133 requirements of the first prong [R. 015]. Thus, I find that the ZHE did not err in finding that

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2. Appellant contends that a 2013 “Impact” study of the neighborhood submitted by the SBMNA is generally erroneous and inapplicable to the issues of this matter, and as such the ZHE should not have relied on it to form the basis for Finding #18. I don’t disagree, but as shown below, the conditional use should and can be denied without relying on the study evidence that Appellant challenges in this appeal.

134 Appellant’s reliance on the site’s MX-M zoning and the obscure generalization that a self-  
135 storage use is presumptively compatible as a permissive, conditional use is insufficient to  
136 satisfy § 6-6(A)(3)(a).<sup>3</sup> Moreover, in reviewing the record before the ZHE, including  
137 Appellant’s concession that he failed to make any policy arguments based on specific goals  
138 and policies of the Comp. Plan, I find that there exists substantial evidence supporting the  
139 ZHE’s Finding #16.

140 As indicated above, Appellant also alleges that the ZHE’s Finding #18 is based on the  
141 Impact Study evidence submitted by the SBMNA. I disagree. Appellant assumes that the ZHE  
142 found that the ZHE’s Finding #18 is based on evidence submitted by the SBMNA only because  
143 the ZHE did not adequately explain his finding. ZHE’s Finding #18 is vague, and the ZHE  
144 should have better explained with objective specificity the basis for his finding that  
145 “*substantial evidence exists in favor of a conclusion that the proposed conditional use would*  
146 *be inconsistent with the ABC Comp. Plan...*” [R. 007]. To sum things up, the ZHE did not  
147 clearly identify what evidence he considered as substantial evidence to support the legal  
148 conclusion in Finding #18. However, because I find that the ZHE did not err with his Finding  
149 #16, and because there is substantial evidence supporting Finding #16, as described above,  
150 Appellant’s appeal cannot be upheld regardless of the outcome on ZHE Finding #18. In  
151 addition, as alluded to above, there is another more significant reason for upholding the ZHE’s  
152 decision; a reason that the ZHE did not consider of which I now consider below.

153 I find that the proposed conditional use on Appellant’s lot is contrary to the express

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3. I note for the City Council, that although there are mixed uses in the area around the site, including residential uses abutting Appellant’s lot, Appellant failed to clarify to the ZHE what the zoning of the abutting uses are. The abutting zoning is essential information to analyze compliance with the Comp. Plan.

154 language and to the intent of the IDO regarding self-storage facilities as *primary* conditional  
155 uses in the MX-M zone district. As a starting point, there is no dispute that an office use is a  
156 permissible use in the MX-M zone [IDO, Table 4-2-1, p. 132]. And, it is unmistakably clear  
157 that since Appellant purchased the lot, the primary use on the lot is the construction business  
158 office. The main structure on the lot houses the offices of the business [R. 014]. Moreover,  
159 at the LUHO hearing, Appellant’s agent confirmed that the *primary use* of the lot is the  
160 construction business [LUHO hrg.]. Furthermore, there is no evidence in the record that the  
161 Appellant intends to discontinue the primary office use if the conditional use is approved.

162         However, the evidence in the record also demonstrates that Appellant continues to  
163 utilize the yard of the lot to store his construction business’ equipment, materials, and supplies  
164 [R. 014]. This is an undisputed fact. In effect, Appellant has been utilizing the lot as an  
165 impermissible “construction contractor facility and yard,” a use that is not allowed in the MX-  
166 M zone. The fact that Appellant was cited with a zoning violation for maintaining construction  
167 equipment on the premises underscores this inescapable conclusion [R. 014]. What is more,  
168 this fact was also conceded at the ZHE hearing and at the LUHO hearing [R. 176, and LUHO  
169 hrg.].

170         There is also substantial evidence in the record that Appellant intends to obtain the  
171 conditional use permit so that he can erect a building to warehouse the construction materials  
172 used with the primary use on the lot---the construction business use [R. 014, 184]. Thus,  
173 Appellant’s clear intent is to continue the *primary* office use while creating a storage building,  
174 not as a primary use, but only as an *accessory use* for the existing office use.

175         Yet, self-storage facilities as conditional uses are only allowed in the MX-M zone

176 district as “*primary* conditional uses” and not as “*accessory* conditional uses” [See IDO, Table  
177 4-2-1, p. 132]. This subtle, yet significant distinction is meaningful to the analysis of this  
178 matter.

179 Under the IDO, there are three types of conditional land “uses” that are contemplated.  
180 These are “conditional primary,” “conditional accessory,” and “conditional if structure [is]  
181 vacant for five years” [See IDO, Table 4-2-1, p. 132]. There can be no question that in the  
182 MX-M zone, “self-storage” is permissible only as a “conditional *primary* use” [IDO, Table 4-  
183 2-1, p. 132]. I also note in Table 4-2-1 of the IDO, a self-storage facility is not listed as an  
184 accessory use in the accessory uses part of the list in Table 4-2-1 [See IDO, Table 4-2-1, p.  
185 133-134]. Thus, it is clear from the IDO, that a “self-storage” facility is not allowed as an  
186 accessory use. There is a strong public policy rationale supporting the distinction.

187 If allowed, Appellant’s purported “self-storage” building will effectively transform  
188 both uses (the primary and accessory use) into a *de facto*, yet impermissible, “construction  
189 contractor facility and yard.” The only difference from what is currently taking place at the  
190 site (and which is a zoning violation) compared to what is proposed by Appellant is that he  
191 intends to add the storage building to warehouse materials inside a building.

192 Moreover, Appellant’s proposed arrangement is consistent with the *definition* in the  
193 IDO of a “construction contractor facility and yard.” [See IDO, Definitions, p. 455].  
194 Accordingly, I find that substantial evidence supports the conclusion that what Appellant is  
195 currently operating on his lot and what he wishes to preserve with the conditional use is an  
196 impermissible *de facto* “construction contractor facility and yard.”

197 I therefore find that the ZHE correctly denied Appellant’s application. Under the facts

198 of this matter, Appellant's proposed conditional use is contrary to the IDO because the  
199 proposed use would achieve and circumvent the IDO's prohibition of construction contractor  
200 facility and yards in an MX-M zone district. I therefore respectfully recommend, for the  
201 reasons stated herein this recommendation, that the City Council uphold the ZHE's decision  
202 denying Appellant's application.

203

204 Respectfully Submitted:

205



Steven M. Chavez, Esq.  
Land Use Hearing Officer  
October 8, 2020

Copies to:

Appellant (through his Agents)  
Party Opponents  
City Staff