1 2 3 4	CITY OF ALBUQUERQUE LAND USE APPEAL UNDER THE IDO BEFORE AN INDEPENDENT LAND USE HEARING OFFICER
5 6 7 8	APPEAL NO. AC-24-29 PR-2024-010860, VA-2024-00262, VA-2024-00317
9 10 11 12	Faith Lutheran Church, Appellants.
13 14 15 16	PROPOSED DECISION
17 18 19 20 21	INTRODUCTION RELEVANT BACKGROUND STANDARD OF REVIEW DISCUSSION PROPOSED FINDINGS
22 23 24 25 26 27	I. INTRODUCTION This is an appeal from a decision of the Zoning Hearing Examiner (ZHE). Under the
28	Integrated Development Ordinance (IDO), effective August 2024, without a variance
29	illuminated signs, which includes electronic signs, cannot be "within 200 feet in any direction
30	of any residential zone district and visible from that zone district." IDO, § 5-12(E)(5)(c)1. In
31	this matter, the applicant-appellant applied for a variance from this provision to replace ar
32	existing nonconforming illuminated sign with an electronic sign. Finding that the applicant
33	appellant did not demonstrate sufficient facts to support the variance, the ZHE denied the
34	application.
35	At the appeal hearing the applicant-appellant supplement the record with specific

evidence to address how the proposed sign will not materially impact the surrounding neighborhood, and in doing so, I respectfully find that the applicant-appellant (Church) can now satisfy all five prongs of the variance test in the IDO. Rather than remand the appeal back to the ZHE, I respectfully recommend that the City Council reverse the ZHE's decision, grant the appeal, and approve the application with reasonable conditions that will further mitigate the impact of the sign as described below.

II. RELEVANT BACKGROUND

The Appellant is the Faith Lutheran Church, located at 10000 Spain Road NE (Church) [R. 011]. The Church is situated on a lot that encompasses 8.5689 acres [R. R. 011]. The lot is zoned MX-T (Mixed-use – Transition Zone District) [R. 126]. The Church lot is primarily surrounded by residentially zoned uses and zone districts [R. 126]. The Church has three freestanding signs on a single signpost base that is located on its frontage with Spain Road [R. 063, 070]. The unrebutted testimony is that the sign base and the three freestanding signs existed since at least 1995 [R. LUHO hearing, testimony of Hal Lewin]. All three freestanding signs are illuminated at night [R. 070]. Illuminated signs, including electronic signs under the IDO, without a variance, cannot be located within 200 feet of residential zones or uses. These issues will be discussed in more detail below.

Because all three signs preexisted the IDO, are illuminated and are within 200 feet of the nearby residential zone districts, under the IDO, they are nonconforming signs. Of the three signs, the sign in the center on the base is an old style type "reader board" sign that requires someone to physically stand on a ladder to change the message on it from time-to-time as

needed [R. 063].¹ It is the center reader board sign that the Church desires to exchange out with an electronic, LED display sign [R. 117-118]. The proposed electronic sign will be similar to the existing reader board in size and shape, but its message can be changed electronically with a computer and its ambient lighting will be better controlled electronically [R. LUHO hearing].

Procedurally, the Church through its agent, Juanita Garcia of JAG Planning & Zoning, LLC, submitted the application for the proposed variance to exchange the existing illuminated sign with the electronic sign on the Church's sign base on August 19, 2024 [R. 028]. On October 15, 2024, the ZHE held a public, quasi-judicial hearing on the application, and on October 30, 2024, the ZHE issued the decision denying the application [R. 008]. The appeal was timely filed on November 14, 2024 [R. 011]. The Church-appellants have standing to appeal under IDO, § 6-4(U)(2)(a)1 because they are the listed owners of the property at issue in this appeal [R. 028].

III. STANDARD OF REVIEW

A review of an appeal under the IDO is a whole record review to determine whether the ZHE's decision approving the variance was fraudulent, arbitrary, or capricious under the IDO; or whether the decision is not supported by substantial evidence; or if in approving the application, the ZHE erred in applying the requirements of the IDO, DPM, a plan, policy, or regulation. IDO, § 6-4(U)(4). The Land Use Hearing Officer (LUHO) has been delegated the

^{1.} Weekly messages regarding events and other relevant Church information are placed on the reader board with plastic black letters that must be altered physically [R. 063].

authority by the City Council to make findings and to propose a disposition of an appeal, including whether the decision should be affirmed, reversed, or otherwise modified to bring the decision into compliance with the standards and criteria of the IDO. The City Council has further delegated authority to the LUHO to remand appeals independently and directly for reconsideration or for further review if a remand is necessary to clarify or supplement the record or if a remand will expeditiously dispose of the matter. IDO, § 14-16-6-4(V)(1)(c)4.

IV. DISCUSSION

As stated above, the existing illuminated sign which the Church appellants intend to replace with an electronic sign is nonconforming because it is within 200 feet of a residential zone.² A nonconforming use is a use "that does not conform to the IDO requirements for land uses in the zone district where it is located, but that was an approved use at the time the use began." IDO, § 7-1, Definitions. Generally, under the IDO, a nonconforming use may continue unabated until the use is discontinued. IDO, § 6-8(C)(1). Notably, changing a nonconforming use of land to another use equally or more restrictive than the existing use is also permissible. See IDO, § 6-8(C)(5).³ In addition, under the IDO, although an illuminated sign cannot be located within 200 feet of a residential zone without a variance, an illuminated sign appears to be allowed within a residential zone. See, IDO, § 5-12(H)(2)(b).

^{2.} On the North side of Spain Rd from the Church property are R-1C zone districts and residential land uses [R. 126].

^{3.} This provision was not invoked by the applicant as it also requires approval from the City's Zoning Enforcement Officer (ZEO).

97 As stated above, because the existing illuminated, nonconforming sign is so close to 98 residential zone districts, the Church applicants applied for a variance to exchange the sign 99 with an electronic sign. Thus, this appeal necessarily involves the IDO's five-prong test for 100 approving a variance. IDO, § 6-6(O)(3) states in full: 101 102 Review and Decision Criteria 103 6-6(O)(3)(a) General 104 An application for a Variance – ZHE shall be approved if it meets all of the 105 following criteria. 106 107 1. There are special circumstances applicable to a single lot that are not self-108 imposed and that do not apply generally to other property in the same zone 109 district and vicinity, including but not limited to size, shape, topography, 110 location, surroundings, physical characteristics, natural forces, or by government actions for which no compensation was paid. Such special 111 112 circumstances of the lot either create an extraordinary hardship in the form of a substantial and unjustified limitation on the reasonable use or 113 114 economic return on the property, or practical difficulties result from strict 115 compliance with the minimum standards. 116 117 2. The Variance will not be materially contrary to the public safety, health, 118 or welfare. 119 120 3. The Variance does not cause significant material adverse impacts on 121 surrounding properties or infrastructure improvements in the vicinity. 122 123 4. The Variance will not materially undermine the intent and purpose of this 124 IDO, the applicable zone district, or any applicable Overlay Zone. 125 126 5. The Variance approved is the minimum necessary to avoid extraordinary 127 hardship or practical difficulties. 128 129 The first prong of the variance analysis requires that the applicants demonstrate that 130 "there are special circumstances applicable to the property" on which the variance is sought. 131 However, to qualify as a "special circumstance," the alleged circumstance must meet certain 132 elements or attributes. The special circumstance(s) claimed must be directly attributable to the 133 subject property at which the variance is proposed, and the special circumstance(s) must not

have been "self-imposed." The exclusion of "self-imposed" circumstances is further highlighted in the following clause of the first sentence of § 6-6(O)(3)(a)1 which lists some examples of special circumstances. Although the list of what qualifies as a special circumstance in the first prong is not exhaustive of such circumstances that qualify, it does include "physical characteristics … or government action for which no compensation was paid." See IDO, § 6-6(O)(3)(a)1.

In their application, and before the ZHE, the Church through their agent argued that Spain Rd. is a special circumstance because it is slightly curved and elevated near the existing signs. They further contend that this condition shields the existing signs from being well seen from Spain Rd., causing a special circumstance for a variance. I respectfully disagree that the nearby road conditions qualify under IDO, § 6-6(O)(3)(a)1 as a special circumstance. These road conditions generally apply to everyone located on Spain Rd. and are not due to a condition on the Church property, and as such cannot be a special circumstance for a variance under IDO, § 6-6(O)(3)(a)1.

However, there is evidence in the record that under the narrow facts of this matter, the existing sign on the Church property qualifies under IDO, § 6-6(O)(3)(a)1 as a special circumstance for a variance. Because of government action in enacting the IDO, the center sign is a nonconforming sign.⁴

^{4.} Notably, all nonconforming uses are not automatically special circumstances. However, in this case the nonconforming use is a limited exception. I note for the City Council that there are very specific and narrow facts in this matter that invoke the special circumstance for a variance—a nonconforming use that will be exchanged for a similar use and that will meet the other four prongs of the variance test, including that the remedy (a new sign) will have less of an adverse impact in ambient luminescence than the existing reader board sign. These unique facts are detailed below.

To better understand how the existing illuminated reader board, as a nonconforming use, narrowly qualifies for a variance, additional facts in the record need to be discussed. First, there is substantial evidence in the record that when the existing nonconforming, illuminated reader board sign is illuminated at night, its illumination is much brighter than the proposed electronic sign will be [R. LUHO Hrg. testimony of H. Lewyn].⁵ Not only is the existing sign outdated, but presumably because it is not an electronic sign, the ambient light it creates cannot be dimmed or controlled without turning it off at night. Currently, the existing sign is allowed to stay on through the night. Second, under the first prong of the variance test, there is evidence that the alleged special circumstance, i.e, the reader board, creates a hardship resulting in practical difficulties. The Church employees must physically change the reader board message with a ladder and at times this can be dangerous [R. LUHO Hrg. testimony of H. Lewyn]. Thus, there is unchallenged substantial evidence in the record that the act of changing the messages on the existing reader board is a hardship resulting in practical difficulties to Church employees [R. 097]. In this matter, there is a sufficient nexus between the hardship and the special circumstance.

Next, there is substantial evidence in the record that the Church applicants have testified that they intend to fully comply with the "Illumination, Brightness, and Images" regulations of IDO, § 5-12(H)(4) with the electronic sign. Under the IDO, these regulations restrict the ambient light illumination and (presumably, to significantly reduce driver distraction) it also

152

153

154

155

156

157

158

159

160

161

162

163

164

165

166

167

168

169

^{5.} Mr. Lewyn testified that the existing reader board has incandescent bulbs behind a white board face that creates bright white light at night. Whereas the proposed electronic sign has LED lights behind a black board, softening the light and ultimately reducing the reflectiveness and ambient brightness. This evidence was not rebutted.

restricts the transition between messages on all new electronic signs. See IDO, § 5-12(H)(4). Thus, under the IDO, because the illuminated reader board sign became nonconforming with the enactment of the IDO, and because under IDO, § 6-8(C)(5), a nonconformity can be changed, and the change will in fact reduce existing adverse impacts, I find that the first prong for the variance is narrowly satisfied.

As for the second and the fourth prongs of the variance test, because the existing nonconforming sign is essentially a nonconforming use, illuminates at a brighter ambient light measurement than will the proposed electronic sign, and because the ambient light produced by the new electronic sign can be dimmed and controlled electronically, I find that the variance will not be materially contrary to the public safety, health, or welfare of the neighborhood and it will not undermine the intent and purpose of the IDO. These prongs are significant to any analysis in a variance test.

Next is a brief discussion of the third prong of the variance test which is what the ZHE based his decision on to deny the variance; he found that the variance for the electronic sign "will cause significant adverse, material impacts on surrounding properties, contrary to \S 6-6(O)(3)(a)" [R. 009, ZHE Fndg. 9]. This conclusion was based on testimony from neighboring residents directly across Spain Rd. from the application site. However, the testimony was based exclusively on the ambient light produced by the *existing*, nonconforming reader board sign, not the impact from the proposed electronic sign [R. 099-102]. Because the evidence in the ZHE's record showed that the electronic sign would produce a lower ambient light than does the existing sign does, the ZHE's finding was error.

In further support of the decision denying the application, the ZHE concluded that

"[d]uring testimony, Applicant appeared unwilling to institute mitigating measures, such as dimming or turning off lights during late night hours." [R. 009]. Yet, the applicant, through their agent testified that they are "amenable to any restrictions you may have as conditions of approval in keeping with the spirit of the neighborhood" [R. 104]. I find that the ZHE erred on his conclusion that the applicants were unwilling to institute mitigating measures.

As for the fifth prong of the variance test, I find that exchanging the reader board with a similar in size and shape electronic sign that produces a lower ambient light than the existing sign, is the minimum necessary to avoid the practical difficulty of physically changing the reader board's message. In addition, significant to the analysis of the third prong of the variance test and to the issue of mitigation, there is now unrebutted evidence that the Church has agreed to completely turn of the electronic sign's lights between the hours of 10:00 PM and 6:00 AM with the exception of Christmas Eve and Holy Week. This is substantial evidence that the electronic sign (and variance) will not materially adversely impact the night-sky or the nearby residential neighbors more than the existing reader board does. The evidence shows that the proposed electronic sign will in fact mitigate the existing adverse impacts created by the existing illuminated reader board sign. In addition, all these facts show that the variance will not materially undermine the IDO or its intent.

V. PROPOSED FINDINGS

1. The decision appealed is a decision issued by the ZHE denying a distance variance from the IDO's 200-foot distance requirement between an illuminated sign and a residential zone district under § 5-12(E)(5)(c)1 of the IDO update effective August 2024.

215	2.	The appellants' appeal is timely filed under § 6-4(U)(3)(a)1.
216	3.	Under IDO, § 6-4(U)(2)(a)1, the appellant has standing to appeal the variance
217	decision b	ecause the appellants are the Church and owner of the property listed in the variance
218	application	n.
219	4.	The Appellants claims that the ZHE erred in applying the variance criteria to the
220	facts in the	e record.
221	5.	The Appellants supplemented the record with new evidence to specifically address
222	deficienci	es found by the ZHE and to mitigate the impacts of the electronic sign.
223	6.	A quasi-judicial appeal hearing was held on January 8, 2025, in which the
224	Appellant	s, the general public, and City Staff were allowed to present evidence, and cross
225	examine to	estimony.
226	7.	There is now sufficient evidence in the record to support granting the application
227	for the var	riance and reversing the ZHE's decision denying the variance.
228	8.	There is substantial evidence in the record that the existing reader board sign which
229	the Appel	lants desire to exchange for an electronic sign creates a special circumstance that
230	does not g	generally apply to other similarly situated properties in the same zone district, that it
231	creates a p	practical difficulty, and that the proposed electronic sign will remedy the practical
232	difficulty	as intended under IDO, § 6-6(O)(3)(a)1.
233	9.	The special circumstance of the existing sign is that it is nonconforming and made
234	nonconfor	rming by government action.
235	10.	Although nonconforming uses generally do not qualify for variances, under the

specific and narrow facts of this matter, a variance in this instance will not undermine the IDO

235

or be contrary to the public safety, health, or welfare:

- a. there is a sufficient nexus between the variance requested and the practical difficulties;
- b. there is substantial evidence that the variance will greatly mitigate existing adverse impacts from the existing illuminated sign.
- c. There is substantial evidence in the record that the proposed electronic sign is less intrusive to the residential zone district and its residents because it will produce less ambient light than does the existing sign it will replace, and it will be turned off between the hours of 10:00 PM and 6:00 AM with exceptions noted below.
- 11. Although the existing nonconforming sign will be replaced with another nonconforming sign (electronic sign), under the IDO, § 6-8(C)(5), a nonconforming use of land or a structure may be changed to another use "equally or more restrictive" than the immediately preceding nonconforming use.
- 12. In this appeal matter, if approved with the conditions below, the existing nonconforming illuminated sign will be changed (replaced) to another nonconforming sign that is <u>more restrictive</u> and that will have less of an adverse impact in terms of ambient lighting on the nearby residential neighbors than does the existing sign; thus, the IDO will not be undermined.
- 13. There is substantial evidence in the record that the variance is the minimum necessary to avoid the practical difficulties that exist with the existing illuminated sign reader board.

259	14. The appeal should be granted, and the ZHE's decision should be reversed with the		
260	following conditions of approval of the variance application:		
261	a. The electronic sign's illumination shall not be on or produce any light during		
262	from 10:00 PM until 6:00 AM every night except on Christmas Eve and during		
263	the entire week of Holy Week only.		
264	b. That the Appellants shall comply with the electronic sign regulations of IDO, §		
265	5-12(H)(4) in placement and use of the electronic sign.		
266	Respectfully Submitted:		
267	St. Chr		
268	Steven M. Chavez, Esq.		
269	Land Use Hearing Officer		
270	January 17, 2025		
271			
272	Copies to:		
273	City Council		
274	Appellants		
275	Appellees/ Party Opponents		
276	Planning Staff		
277			
278279	Notice December City Council Dules		
280	Notice Regarding City Council Rules When the Council receives the Hearing Officer's proposed disposition of an appeal, the Council		
281	shall place the decision on the agenda of the next regular full Council meeting provided that there		
282	is a period of at least 10 days between the receipt of the decision and the Council meeting. The		
283	parties may submit comments to the Council through the Clerk of the Council regarding the Hearing		
284	Officer's decision and findings provided such comments are in writing and received by the Clerk		
285	of the Council and the other parties of record four (4) consecutive days prior to the Council "accept		
286	or reject" hearing. Parties submitting comments in this manner must include a signed, written		
287	attestation that the comments being submitted were delivered to all parties of record within this		

time frame, which attestation shall list the individual(s) to whom delivery was made. Comments

received by the Clerk of the Council that are not in conformance with the requirements of this

Section will not be distributed to Councilors.

288