

**CITY OF ALBUQUERQUE**  
**LAND USE APPEAL UNDER THE IDO**  
**BEFORE AN INDEPENDENT**  
**LAND USE HEARING OFFICER**

**APPEAL NO. AC-24-25**

PR-2024-010482, VA-2024-00259

George Franco on behalf of the  
Barelas Neighborhood Association,

Appellants,

and,

Tierra West, LLC, Inc., agent for  
Fazal Development Network, Inc.,

Appellees.

## PROPOSED DISPOSITION

## INTRODUCTION

## BACKGROUND

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## PROPOSED FINDINGS

## I. INTRODUCTION

This appeal concerns a conditional use application for a drive-through facility at a restaurant use (Dunkin Donuts) which will be developed at 310 Avenida Cesar Chavez SW. The application was approved by the Zoning Hearing Examiner (ZHE). The Appellant is George Franco on behalf of the Barelas Neighborhood Association (BNA), and the Appellees are Tierra West L.L.C., agents for Fazal Development Network, Inc., the landowners of the application site.

After reviewing the appeal record as well as holding a quasi-judicial appeal hearing on

the appeal, I find that the appeal should be denied in full. The Appellants have not come close to meeting their burden under the IDO to show that the ZHE erred. I further find that the ZHE's decision is well-supported by the facts in the record.

## **II. BACKGROUND**

The record shows that the application site is an approximately .8-acre semi-vacant tract that is located between 3<sup>rd</sup> Street SW and 4<sup>th</sup> Street SW, on Avenida Cesar Chavez [R. 292].<sup>1</sup> Prior to the ZHE hearing on the conditional use application, the site was recently rezoned. Specifically, on May 16, 2024, the Environmental Planning Commission (EPC) approved an application to correct a "floating zone line" on the application site; part of the .8-acre tract was zoned MX-H, and another portion was zoned NR-GM [R. 296]. The EPC approved the rezoning of the entire site to an MX-H zone designation [R. 287].

Then on June 4, 2024, the applicants applied to the ZHE for the conditional use permit to allow a drive through window to be incorporated with the development of a Dunkin Donuts restaurant use at the application site [R. 16]. Notably, the restaurant use is a permissive use in an MX-H zone. However, under the IDO, Table 4-2-1, a drive-through or drive-up facility is a conditional use in an MX-H zone.

The record includes substantial evidence that notice of the conditional use application and ZHE hearing was sent to the BNA and to all property owners within 100-feet of the application site [R. 54-97]. The record further reflects that the applicants met with BNA

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1. The site does not have a developed structure or use. The evidence in the record shows that the site is being utilized for temporary storage [R. 233].

representatives regarding the application [R. 233]. In this appeal, this evidence was not challenged by Appellants and Appellants have not alleged any error regarding notice under the IDO.

The applicants submitted to City Planning Staff a Traffic Impact Study (TIS) for the restaurant and drive-up uses at the site [R. 119-155].<sup>2</sup> The applicants also submitted a detailed site plan showing the restaurant use, landscaping, parking, automobile queuing for the drive-up component, access and exists to and from the restaurant unto Avenida Cesar Chavez and 3<sup>rd</sup> Streets [R. 29]. In addition, the record reflects that the TIS and site plan were reviewed, evaluated, and approved by the City Traffic Engineers [R. 219-220].

On July 17, 2024, the ZHE held a quasi-judicial hearing on the conditional use application [R. 230]. At that hearing, the BNA's representatives objected to the conditional use application; although they have no expertise in interpreting traffic engineering data, they generally argued at the ZHE's hearing that the automobile ingress and egress at the application site creates what they call automobile traffic "conflict points" [R. 111]. Appellants also generally claim that the traffic data collected for the area was "undercounted" by the applicant landowners' traffic engineers [R. 120].

Despite Appellants' claims, on July 31, 2024, the ZHE issued a detailed written decision approving the conditional use application. Meanwhile, on August 14, 2024, the Appellants filed their timely appeal [R. 9]. As a neighborhood association, the appellants have standing under IDO, § 6-4(V)(2)(a).

A quasi-judicial appeal hearing was held on October 3, 2024. At the appeal hearing, the

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2. The TIS was supplemented with crash data for the immediate area [R. 119].

Appellants and the Appellees supplemented the record with additional evidence. As a result the record was re-Bates-stamped for the City Council.

### **III. REVIEW STANDARD UNDER THE IDO**

The IDO provides for how appeals under the IDO are to be evaluated. Review of an appeal under the IDO is a whole record review to determine whether a decision appealed is fraudulent, arbitrary, or capricious; or whether the decision is not supported by substantial evidence; or if the requirements of the IDO, a policy, or a regulation were misapplied or overlooked. See IDO, § 6-4(V)(4). The Land Use Hearing Officer (LUHO) has been delegated the authority by the City Council to hold quasi-judicial hearings on appeals, make proposed findings, and propose to the City Council a disposition of an appeal, including whether the decision should be affirmed, reversed, or otherwise should be modified to bring the decision into compliance with the standards and criteria of the IDO.

In reviewing appeals, if the record and decision is found to be supported with substantial evidence and the decision appealed is not otherwise erroneous, the appeal should be denied under IDO, § 6-4(V)(4). Under New Mexico law, substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 21.

### **IV. DISCUSSION**

The Appellants essentially challenge the TIS but failed to present any competent evidence to show that the TIS and its conclusions are inaccurate. In the written decision

101 approving the application, the ZHE expressly found and concluded that the BNA’s “traffic  
102 concerns” are unsubstantiated and wrote:

103 Applicant has met the burden of providing evidence that establishes that  
104 the requested Conditional Use approval will not create significant adverse  
105 impacts on adjacent properties, the surrounding neighborhood, or the  
106 larger community. A neighbor and a representative of the Barelas  
107 Neighborhood Association submitted written correspondence expressing  
108 concerns that traffic and congestion may increase in the area, which could  
109 cause accidents and negatively impact pedestrians. The Letter from the  
110 Barelas Neighborhood association cited several figures and percentages  
111 regarding potential negative impacts. However, upon cross-examination  
112 by Applicant’s Agent, **it became apparent that several of the figures in**  
113 **the neighborhood correspondence were skewed, because the**  
114 **underlying data was taken from other intersections and portions of**  
115 **road.** Further, the traffic impact study submitted by Applicant was  
116 reviewed and approved by the City Transportation Section. On balance,  
117 Applicant has met its burden to establish that **the requested Conditional**  
118 **Use approval will not create significant adverse impacts** on adjacent  
119 properties, the surrounding neighborhood, or the larger community.  
120

121 **[R. 6, ZHE Fndg. #12].** (Emphasis added).

122 Upon reviewing the whole record, I find that it supports the ZHE’s conclusions. At the  
123 quasi-judicial appeal hearing, the applicant’s agents, Ron Bohannon, and Terry Brown, both  
124 certified civil engineers and experts in traffic engineering, gave testimony and elaborated on  
125 the TIS and the crash data in the record.

126 Specifically, Mr. Bohannon testified that the TIS and site plan were comprehensively  
127 reviewed and approved by the City Traffic engineers without any recommendations for further  
128 mitigation other than what was recommended in the TIS. It is an undisputed fact that the  
129 engineers who performed the TIS concluded that the proposed site plan and specifically that  
130 the drive-through facility will not materially adversely impact traffic conditions on Avenida  
131 Cesar Chavez or on Third Street **[R. 154]**. The TIS conclusions, and the testimony of both Mr.

Brown and Mr. Bohannon further validates the ZHE's decision. The Appellants did not credibly or competently dispute the conclusions reached by the multiple engineers in this matter.

As for the crash data for the immediate area near the site, Appellants' claim that the crash data was inaccurate or undercounted is not supported by the facts in the record. Other than their allegations, Appellants failed to show that the traffic engineers were wrong or that they undercounted the crash data. Appellants did submit with their appeal what appears to be webpages from the Mid-Region Metropolitan Planning Organization (MRMPO) regarding crash totals but failed to offer any testimony explaining its significance or relevancy in this appeal.

Conversely, at the appeal hearing, in his testimony, Mr. Brown, who is an expert in traffic engineering, specifically elaborated on the crash data utilized in the TIS; he testified that the data was accurate, and it showed that there were only three minor crashes within the *immediate area* of the application site within the last four years. Mr. Brown further testified that the MRMPO webpage evidence submitted by the Appellants lacked specificity to the application site and it included crashes from other areas along Fourth Street and therefore it was inapplicable and irrelevant to the immediate area of the application site. Mr. Brown's sworn testimony was not rebutted or disputed.

Finally, other than the misleading crash data from the MRMPO, Appellants presented no evidence in this appeal that lends credible support for sustaining their appeal. Said another way, just as the ZHE concluded, I specifically find that Appellants' arguments are unsupported by the facts in the record, and specifically by the TIS and by testimony of the applicants' traffic engineers. The appeal lacks merit, and it should be denied.

154   **V.     PROPOSED FINDINGS**

155           1. The Appellants filed a timely appeal under the IDO.

156           2. The Appellants have standing to appeal the ZHE decision in this matter.

157           3. A quasi-judicial appeal hearing at which the Appellants were given an opportunity  
158 to present arguments, bring witnesses to testify, and cross examine witnesses, was held on  
159 October 3, 2024.

160           4. The Appellants failed to present relevant facts or claims to support their appeal as  
161 required by IDO § 6-4(V)(3)(a); the Appeal did not “*specifically state the section of [the] IDO,*  
162 *City regulation, or condition attached to a decision that has not been interpreted or applied*  
163 *[in]correctly.*”

164           5. The Appellants did not meet their burdens of proof under IDO, § 6-4(V)(4) for  
165 both appeals;

166               a. Appellants did not demonstrate that the ZHE acted fraudulently, arbitrarily,  
167 or capriciously in approving the zone-change and in approving the site plan  
168 in this matter.

169               b. Appellants did not show that the decision appealed is not supported with  
170 substantial evidence in the records.

171               c. Appellants did not show that the ZHE erred in interpreting the IDO or in  
172 applying the facts in the record.

173           6. The facts in the record support the ZHE’s approval of the conditional use  
174 application.

175           7. There is substantial evidence in the record demonstrating that the drive-through use

will not create material adverse impacts on other roadway system.

Respectfully Submitted:



Steven M. Chavez, Esq.  
Land Use Hearing Officer  
October 9, 2024

Copies to:

City Council  
ZHE  
George Franco, Appellant  
Appellees

**Notice Regarding City Council Rules**

When the Council receives the Hearing Officer's proposed disposition of an appeal, the Council shall place the decision on the agenda of the next regular full Council meeting provided that there is a period of at least 10 days between the receipt of the decision and the Council meeting. The parties may submit comments to the Council through the Clerk of the Council regarding the Hearing Officer's decision and findings provided such comments are in writing and received by the Clerk of the Council and the other parties of record four (4) consecutive days prior to the Council "accept or reject" hearing. Parties submitting comments in this manner must include a signed, written 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.