



City of Albuquerque

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

Action Summary

City Council

Council President, Cynthia D. Borrego, District 5
Vice-President, Diane G. Gibson, District 7

Lan Sena, District 1; Isaac Benton, District 2
Klarissa J. Peña, District 3; Brook Bassan, District 4
Pat Davis, District 6; Trudy E. Jones, District 8
Don Harris, District 9

Monday, April 5, 2021

3:00 PM

Via Zoom Video Conference

TWENTY-FOURTH COUNCIL - THIRTIETH MEETING

1. ROLL CALL

Present 7 - Brook Bassan, Isaac Benton, Patrick Davis, Diane Gibson, Don Harris,
Trudy Jones, and Lan Sena
Excused 2 - Cynthia Borrego, and Klarissa Peña

2. MOMENT OF SILENCE

Councilor Bassan led the Pledge of Allegiance in English.

Councilor Benton led the Pledge of Allegiance in Spanish.

3. PROCLAMATIONS & PRESENTATIONS

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

March 15, 2021

7. COMMUNICATIONS AND INTRODUCTIONS

Deferrals/Withdrawals

- a. O-20-39 Enacting The Healthy Families And Workplaces Ordinance To Require
That Employers In The City Provide Paid Leave To Employees (Sena,
Davis)

A motion was made by Councilor Sena that this matter be Postponed to April 19, 2021. The motion carried by the following vote:

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- b. R-21-130** Establishing A City Healthy Communities, Public Health, And Sustainability Policy Committee (Borrego)

A motion was made by Vice-President Gibson that this matter be Postponed to June 7, 2021. The motion carried by the following vote:

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

8. REPORTS OF COMMITTEES

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

- a. EC-21-263** Approval of a Professional Service Agreement with Boomalli Consulting Pty, Ltd. to Commission Art on Exhibit at the Albuquerque BioPark

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- b. EC-21-268** Goal 8, Objective 7, Energy and Sustainability Goals

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- c. EC-21-271** Mayor's Recommendation of Award to Embodied Spirit Therapies for "Onsite Mindfulness Based Stress Reduction Employee Program"

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- d. EC-21-272** Mayor's Recommendation of Award to Quest Diagnostics Clinical Laboratories for "Alcohol and Drug Testing Services"

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- e. EC-21-273 Mayor's Recommendation of Award to Presbyterian Health Plan, Inc. for "Counseling Services - Employee Assistance Program Re-Issue" Increase Request

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- f. EC-21-274 First Amendment to the Lease and Agreement between the City of Albuquerque and Celco Partnership d/b/a Verizon Wireless

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- g. EC-21-276 Approval of the First Supplemental Agreement to add monies for FY21 outside Counsel Legal Services between Kennedy, Moulton & Wells, P.C. and the City of Albuquerque

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- h. EC-21-279 Mayor's appointment of Mrs. Jolene O. Wolfley to the Affordable Housing Committee

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- i. EC-21-280 Mayor's appointment of Dr. Joseph P. Sanchez to the ABQ Volunteers Advisory Board

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- j. EC-21-281 Mayor's appointment of Mr. Mitchel B. Graham to the Youth Advisory Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:**
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
- k. EC-21-282 Mayor's appointment of Mr. Ryan Lee Haack to the Transit Advisory Board
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:**
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
- l. EC-21-283 Mayor's appointment of Ms. Zoe E. Romans to the Youth Advisory Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:**
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
- m. EC-21-284 Mayor's appointment of Mr. Eli Hi Crowley to the Youth Advisory Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:**
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
- n. EC-21-285 Mayor's appointment of Mr. Gabriel S. Pacyniak to the Albuquerque Energy Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:**
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
- o. EC-21-286 Mayor's appointment of Mr. Grant W. Leigh to the Youth Advisory Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:**

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- p.** EC-21-287 Mayor's appointment of Ms. Kaylee S. Huston to the Youth Advisory Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.**
The motion carried by the following vote:
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
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- q.** EC-21-288 Mayor's re-appointment of Mx. Daniel M. Strones to the Americans with Disabilities Act Advisory Council
- A motion was made by Vice-President Gibson that this matter be Confirmed.**
The motion carried by the following vote:
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
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- r.** EC-21-289 Mayor's appointment of Ms. Markie Anderle to the Transit Advisory Board
- A motion was made by Vice-President Gibson that this matter be Confirmed.**
The motion carried by the following vote:
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
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- s.** EC-21-290 Mayor's appointment of Mr. Rikk Murphy to the Transit Advisory Board
- A motion was made by Vice-President Gibson that this matter be Confirmed.**
The motion carried by the following vote:
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
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- t.** EC-21-291 Mayor's appointment of Mr. Matthew Pinson to the Affordable Housing Committee
- A motion was made by Vice-President Gibson that this matter be Confirmed.**
The motion carried by the following vote:
- For:** 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena
- Excused:** 2 - Borrego, and Peña
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- u.** EC-21-292 Mayor's appointment of Dr. Timothy B. Krebs to the Indicators Progress Commission

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- v. EC-21-294** Mayor's appointment of Mr. Dan Turnham to the Municipal Golf Advisory Board

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

- w. EC-21-295** Mayor's appointment of Ms. Jessica D.R. DuVerneay to the Indicators Progress Commission

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

10. GENERAL PUBLIC COMMENTS

11. ANNOUNCEMENTS

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

- a. AC-21-2** Project-2019-003219, VA-2020-00386, VA-2021-00007: Garcia Kraemer & Associates, agent for Charter School Solutions, appeals the Zoning Hearing Examiners decision to Deny a variance of 120 feet to the minimum required 660-foot distance from the outer edge of Tramway Blvd right-of-way for a proposed electronic sign for Lot E1A2, Panorama Heights Addn, located at 99999 Lomas Blvd NE, zoned MX-M [Section 14-16-5-12(H)(2)(c)]

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

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

- *a. OC-21-30** Staff Recommendation to Appoint Mr. Richard Johnson to the Civilian

Police Oversight Agency Board

A motion was made by Councilor Benton that this matter be Postponed to April 19, 2021. The motion carried by the following vote:

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

14. FINAL ACTIONS***c. R-21-144**

Establishing A Temporary Halt To The Creation Of New Residential Parking Permit Areas; Directing That The City Stay Enforcement Of The Residential Parking Permit Area Established For That Area Of Trellis Drive And Decker Road Between Campbell Road And Candelaria Road (Benton)

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

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

For: 7 - Bassan, Benton, Davis, Gibson, Harris, Jones, and Sena

Excused: 2 - Borrego, and Peña

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

APPEAL NO. AC-21-2

PR-2019-003219, VA-2020-00386, VA-2021-00007

Garcia, Kramer & Associates, agent for Charter School Solutions, Appellant

1 The Appellant, Garcia, Kramer & Associates, agent for Charter School Solutions,
2 appealed the decision of the Zoning Hearing Examiner (ZHE) who denied Appellant's
3 variance application to place an LED electronic freestanding sign in a place that is prohibited
4 by the IDO. After reviewing the record, the IDO, hearing arguments and testimony in the quasi-
5 judicial public Land Use appeal hearing, I find that the ZHE did not err. As explained below,
6 the ZHE's decision is well-supported by the IDO and by law.

7
8 **I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

9 The Appellant in this matter is the agent for Charter School Solutions [R. 008]. Charter
10 School Solutions is a limited liability company and owns the lot and improvements located at
11 99999 Lomas Blvd, NE [R. LUHO hrg.]. The lot encompasses 4.99 acres of land, and 2-main
12 buildings comprising 96,000 sq. ft. and it is located at the corner of Tramway Blvd. and Lomas
13 Blvd. [R. 026, 031]. The lot was previously the location of an Albertson's grocery store [R.
14 030]. Appellant proposes to locate on site, a new 26-foot-tall freestanding signpost with a 120-

15 square foot non-electronic sign on top of a 55-square foot LED electronic sign within 540 feet
16 of the Tramway Blvd. [R. 29, 31]. It is an undisputed fact that the proposed LED electronic
17 sign will be located within 660-feet of the outer edge of the public ROW of Tramway Blvd.
18 [R. 031]. Under the November 2020 IDO, electronic signs at the precise location proposed is
19 prohibited [IDO, § 5-12(H)(2)(c)].

20 On November 3, 2020, Appellant applied for a 120-foot variance to the prohibition in
21 IDO, § 5-12(H)(2)(c) [R. 016]. On that same day (November 3, 2020), City Planning Staff
22 scheduled Appellant's application on the ZHE's December public hearing docket [R. 016].
23 The ZHE held a quasi-judicial public hearing on Appellants' application on December 15,
24 2020 [R. 056]. On December 30, 2020, the ZHE issued his decision denying the variance [R.
25 006]. The ZHE found that because the proposed use is prohibited in the area proposed, issuing
26 the variance would "materially undermine the intent and purpose of the IDO" [R. 007, Fndgs.
27 8-9].¹

28 Appellant filed a timely appeal on January 15, 2021 [R. 008]. Just prior to the LUHO
29 hearing, Appellant supplemented the record with additional evidence [R. 071-082]. A public
30 quasi-judicial LUHO appeal hearing on the record was held on March 18, 2021. In the appeal,
31 Appellant argues that the ZHE failed to sufficiently explain the rationale for the denial; that
32 the variance sought in the application is a dimensional variance and not a use variance and
33 therefore the 5-prong analysis under IDO, § 6-6(N)(3)(a) should have been applied by the
34 ZHE. Appellant believes the ZHE erred. Appellant asks that this matter be remanded to the
35 ZHE or in the alternative that I recommend that the City Council reverse the ZHE's decision.

1. I note that this finding is one of the criteria in the 5-prong test for a variance under IDO, § 6-6(N)(3)(a).

II. STANDARD OF REVIEW

A review of an appeal is a whole record review to determine whether the ZHE acted fraudulently, arbitrarily, or capriciously; or whether the ZHE's decision is not supported by substantial evidence; or if the ZHE erred in applying the requirements of the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. The LUHO may recommend that the City Council affirm, reverse, or otherwise modify the lower decision to bring it into compliance with the standards and criteria of this IDO [IDO § 6-4(U)(3)(d)(5)]. The City Council also delegated authority to the LUHO to independently remand appeals [IDO, § 14-16-6-4(U)(3)(d)].

III. DISCUSSION

As indicated above, I find that the ZHE did not err. Despite being succinctly stated, I also find that the basis for the ZHE's denial is clearly expressed, and rooted in the unambiguous prohibition contained in IDO, § 5-12(H) [See R. 007, Fndg. 8]. Moreover, I find that the ZHE's unwillingness to apply the entirety of the variance test under IDO, § 6-6(N)(3)(a) was not erroneous because under the facts presented to the ZHE, as a matter of law under the IDO, it is evident that issuing a variance for the use and location contemplated is contrary to the fourth prong of the variance test and the IDO's prohibition of electronic signs. To be specific, I agree with the ZHE that granting the variance under the facts in this matter would "materially undermine the intent and purpose of this IDO."

In this appeal however, Appellants broadly contend that a variance could be allowed even for an electronic sign because the variance requested is variance for a 120-foot--a

dimensional variance—of the 660-foot prohibition of § 5-12(H)(2)(c). Appellants broadly contend that the 660-foot prohibition in § 5-12(H)(2)(c) is more like a setback rather than a prohibition and variances can be granted for setbacks. Appellants’ assertion and supporting argument is plainly wrong because they neglect and side-step the very significant fact that electronic signs are an expressly prohibited use within 660-feet from the ROW of Tramway Blvd.²

The analysis begins with some definitions in the IDO starting with electronic signs. There are various types of signs and all types are well-defined and well-regulated in the IDO. Section 5-12(H) encompasses the regulations for electronic signs. There, an electronic sign is defined as:

A sign that is internally lit to display messages and images that are changed electronically. The lit sign area may be of various types, including but not limited to flat screen, active display matrix, or a board with a single or multiple lines of text or graphics. The light source may vary but is typically Light Emitting Diodes (LED). Any sign that meets the definition of a neon sign is not considered to be an electronic sign. See also Sign Definitions for Neon Sign [IDO, § 14-16-7, Sign Definitions].

Although it is undisputed that electronic signs are prohibited in the precise location Appellant proposes placing one, the language of the prohibition is also helpful to understand the basis of the ZHE’s decision. Section 5-12(H)(2) expressly declares that “[e]lectronic signs are prohibited in the following areas,” and § 5-12(H)(2)(c) proclaims “within 660 feet of the outer edge of the public right-of-way of the following streets: ...Tramway Blvd.” [§ 5-12(H)(2)(c)].

2. Appellant also broadly claims that an electronic sign is not a “use” under the IDO because it is not listed in the IDO Table 4-2-1 of Allowable Uses. Appellant’s claim is baseless principally because a freestanding sign is not an intangible object. See “Use Definitions.” Moreover, there is acknowledgement in the IDO that Table 4-2-1 is not an exhaustive list of uses. See § 4-1(B), Unlisted Uses.

Again, there is no dispute that the proposed location of the electronic sign is within the prohibited area contemplated in IDO, § 5-12(H)(2)(c).

The definitions of a variance and of an allowable use under the IDO are meaningful to the question raised in this appeal and ultimately on why a variance cannot be granted. In the IDO variances are:

Exceptions to dimensional standards or variations from the strict, literal application of standards in this IDO or the DPM. Variances from IDO standards are reviewed and decided by the ZHE or EPC, while Variances from technical standards in the DPM or related to projects in public rights-of-way are decided by the DRB. ***The allowable use of premises may never be changed via a Variance.*** See also Waiver and Use Definitions for Allowable Use (Emphasis added) [IDO, § 14-16-7, Variance].

In the IDO, although a variance is an exception to applicable standards, it is not without limits.

A variance cannot be utilized to alter “allowable uses” on a premise (lot). As a matter of simple logic, if allowable land uses cannot be changed (created) with a variance, then conversely a prohibited use cannot also be allowed through a variance.³ Otherwise, it would make little sense if prohibited uses can be allowed through a variance while allowable uses cannot be created through a variance. To summarize, the only rational interpretation of the language describing what a variance cannot be utilized for in the above definition is that a variance cannot be utilized to create an allowable use that is otherwise not allowed in a particular location. Because variances cannot be utilized to create new allowed uses on a premise under the above definition, it is rational and reasonable to conclude that the City Council intended

3. In *Gould v. Santa Fe County*, 2001-NMCA-107, ¶ 12 (overruled on other grounds), the New Mexico Supreme Court weighed in on what a use variance is (the kind in which is expressly prohibited in the IDO’s definition of a variance). The Court observed that an example of a use variance is a commercial establishment, such as a auto-garage used to repair vehicles being located in a residential zone. *Id.*

for “use variances” to be impermissible. However, variances for dimensions of height, size, setbacks, and other similar variations of allowed uses are sanctioned under the IDO.⁴

Furthermore, the 660-foot prohibition on electronic signs cannot be considered merely as a “setback” from which a variance can be sought. Under the IDO, the fundamental definition of a setback is “*the shortest distance between a structure and a lot line*” [IDO, § 7-1, Definition of Setback].⁵ Contrastingly, the 660-foot prohibition in § 5-12(H)(2) and (2)(c) is the separation distance between a right-of-way (in this case Tramway Blvd.) and a particular use (LED electronic signs). I realize that this is a fine distinction, but it is a significant distinction, and it helps illustrate that the electronic sign prohibition is not a setback within the traditional meaning of a setback in the IDO. Rather, the 660-foot prohibited areas in § 5-12(H)(2) and (2)(c) are plainly and simply defined areas in which electronic signs are unambiguously prohibited.

In addition, the variance Appellant seeks is not for the dimension of the sign itself; nor is it for the setback of an allowed electronic sign use. Indispensable to a dimensional variance is that the use be allowed or authorized by the IDO, in the location proposed, before a variance can be granted for its variation. For example, it is a necessary condition that a wall first be allowed for the ZHE to grant a variance for its height. Appellants cannot escape the

4. In the IDO there are numerous examples of the IDO allowing specific variances for height, setbacks, and variations to other attributes of various allowed uses. For example, see Sections 3-6(D)(10) and 3-6(E)(3) for structure height in view protection areas; 4-3(E)(11) for wind generators; 5-7(B) for walls. This is not an exhaustive list; there are numerous other examples in the IDO of allowed dimensional variances.

5. In the IDO, there are various general definitions of a setback. A setback is generally defined on page 552, but for purposes of “*measurement definitions for setbacks*” a setback is more particularly defined on page 537. The commonality in the various definitions is that setbacks are general measurements in relation to or inside lots.

fact that electronic signs are prohibited uses within 660-feet of Tramway ROW. To put it another way, although the prohibition language in § 5-12(H)(2) has a dimensional component to it, it is incontrovertible that the variance Appellant is seeking in substance is a variance for a prohibited use (electronic signs) in a prohibited area (within 660-feet of Tramway ROW).⁶

Moreover, the ZHE's decision and the general prohibition of use variances in the IDO are consistent with applicable New Mexico law. In the New Mexico Supreme Court case of *Paule v. Santa Fe Cnty. Board of Cnty. Comm'rs*, 2005-NMSC-021, the Court was confronted with an issue having to do with a variance. Although principally because the variance sought was not for a prohibited use, the Court discussed the differences between use and dimensional variances. The Court said:

a use variance seeks to change the character of the land by permitting a use otherwise prohibited by zoning regulations. An area or dimensional variance, on the other hand, involves a permitted use but seeks an exemption from zoning regulations with regard to physical limitations. Thus, an area or dimensional variance does not seek to change the use of the land, but rather to use the land as allowed under zoning regulations. 2005-NMSC-021, ¶ 37.⁷

The Court's description of a use variance is consistent with the IDO's description of a use variance in the definition of an impermissible variance---that the "*allowable use of premises may never be changed via a Variance.*" Unlike the facts in *Paule v. Santa Fe Cnty. Board of Cnty. Comm'rs*, it is an unmistakable fact that in the IDO, the City Council carved out an unambiguous exception for LED Electronic signs and expressly made them prohibited uses in

6. Compare how the IDO treats conversions of existing non-electronic signs into electronic signs. IDO § 6-8(F)(3)(b) expressly renders such conversions forbidden if the existing non-electronic sign is located within a prohibited area under 5-12(H)(2)(c).

7. Although, in *Paule v. Santa Fe Cnty. Board of Cnty. Comm'rs*, 2005-NMSC-021, the Santa Fe zoning code made no distinction between use and dimensional variances, as shown above, the IDO does.

certain areas of the City. And although obscured by the 660-foot dimensional aspect of the prohibitive language in § 5-12(H)(2)(c), it cannot be over-emphasized that the fundamental and substantive fair import of what Appellant seeks is a variance for a use in an area that the use (electronic sign) is expressly not allowed.

Finally, Appellant supplemented the record with a 2017 ZHE decision in which a ZHE granted a variance for an electronic sign within the 660-foot prohibited area on Rio Grande Blvd.⁸ Appellant suggests that the 2017 decision should be seen as precedent in how the City treats variances in prohibited areas, and that the 2017 ZHE decision should be considered as “administrative gloss” in how to apply the variance in this case.

I first note that the judicially created doctrine of administrative gloss is a rule of statutory construction and it is only applicable when a particular zoning ordinance is deemed ambiguous. See *High Ridge Hinkle v. City of Albuquerque*, 1998-NMSC-050, ¶ 9. In such a case, the court(s) may accept the administrative body’s interpretation of the ambiguous ordinance language as an “administrative gloss.” *Id.*

I find that there is nothing ambiguous about the definition of a variance in the IDO or about the electronic sign prohibition in § 5-12(H)(2) and (2)(c). Consequently, the doctrine of administrative gloss is inapplicable to the ZHE’s 2017 ruling. I next note that in that 2017 ZHE decision, the ZHE utterly failed to recognize or otherwise cite to § 5-12(H)(2) and (2)(c) in that 2017 ruling. That is to say, the ZHE wholly disregarded the prohibition in the decision and in effect granted an impermissible use variance in violation of the IDO. Perhaps more importantly though, that 2017 decision was never appealed to the City Council or otherwise

8. I note that the ZHE in that 2017 decision involved a different ZHE than the one in this case.

168 reviewed by the City Council and therefore it has minimal significance in this matter. Ergo, it
169 is immaterial as precedential authority, and it is not legally binding on the City Council. To
170 put it concisely, just because a former ZHE in a previous decision ignored the electronic sign
171 prohibition it does not obligate an appellate reviewing body to repeat the same glaring error.

172 Therefore, in this matter, I find that the ZHE did not act arbitrary or capricious in
173 finding that the request, if granted, would “materially undermine the intent and purpose of the
174 IDO. Furthermore, I find that the decision of the ZHE is well-supported with substantial
175 evidence. “Substantial evidence is such relevant evidence as a reasonable mind might accept
176 as adequate to support a conclusion.” *Embudo Canyon Neighborhood Ass’n v. City of*
177 *Albuquerque* - 1998-NMCA-17, ¶8. The ZHE’s decision was not irrational such that a
178 reasonable mind cannot accept it as adequate to support the result reached. *Id* at ¶8. Thus,
179 under law, the ZHE’s decision should be accorded deference.

180 Accordingly, in conclusion I respectfully find that the ZHE in this appeal matter
181 reached a decision that is consistent with the IDO and was the correct result. Allowing an
182 impermissible electronic sign within a prohibited area would in effect fundamentally change
183 what is allowed (and not allowed) in a prohibited area via a variance. In the end, allowing use
184 variances could lead to absurd results under the IDO. In summary, use variances are not
185 permitted under the IDO. Accordingly, I respectfully recommend that the City Council deny
186 the appeal and find that the ZHE in this appeal, made the correct decision under the IDO.

187 Respectfully Submitted:

188 

Steven M. Chavez, Esq.
Land Use Hearing Officer
March 21, 2021

Copies to:

Appellant and his Agent
City Council and Staff
ZHE
City Planning Staff