Notice of Decision
City Council
City of Albuquerque
June 17, 2021

AC-21-5 Project-2020-003911, VA-2020-00143, VA-2021-00072: Modulus Architects, agents for Jose Alfredo and Ailda Martinez, appeals the Zoning Hearing Examiners decision to deny a request for conditional use approval to allow retail liquor sales adjacent to a residential zone district for a parcel legally described as Lot Commercial Tract, Block 5, Los Altos Subdivision, located at an unaddressed parcel on Bridge Blvd. SW, (near the NW corner of Bridge Blvd. & Tower Rd. SW), zoned MX-M Mixed-Use Medium Intensity [Section 14-16-4-3(D)(17)(i) of the Integrated Development Ordinance]

Decision

On June 7, 2021, by a vote of 8 FOR and 0 AGAINST the City Council voted affirm he decision of the Zoning Hearing Examiner, and deny the conditional use permit by accepting and adopting the recommendation of the Land Use Hearing Officer.

Excused: Bassan

IT IS THEREFORE ORDERED THAT THE CONDITIONAL USE PERMIT IS DENIED

Attachments

1. Action Summary from the June 7, 2021 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.

Cynthia D. Borrego, President
City Council

Date: 6/17/21

Received by: Gabryella Williams Date: 6/21/21
City Clerk's Office

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City of Albuquerque

Action Summary

City Council

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

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, June 7, 2021 **3:00 PM** **Via Zoom Video Conference**

TWENTY-FOURTH COUNCIL - THIRTY-FOURTH 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

Vice-President Gibson led the Pledge of Allegiance in English.
Councilor Peña led the Pledge of Allegiance in Spanish.

3. PROCLAMATIONS & PRESENTATIONS

4. ECONOMIC DEVELOPMENT DISCUSSION

10. GENERAL PUBLIC COMMENTS

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

May 17, 2021

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

Deferrals/Withdrawals

h. R-21-130 Establishing A City Healthy Communities, Public Health, And

Sustainability Policy Committee (Borrego)

A motion was made by President Borrego that this matter be Postponed to September 8, 2021. The motion carried by the following vote:

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

Excused: 1 - Bassan

k. R-21-152 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 6816 Ina Dr NE 87109 Within The City Limits Of Albuquerque, New Mexico Is 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 (Bassan, by request)

A motion was made by President Borrego that this matter be Postponed to June 21, 2021. The motion carried by the following vote:

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

Excused: 1 - Bassan

o. R-21-156 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 832 Estancia Dr NW 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 (Sena, by request)

A motion was made by Councilor Sena that this matter be Postponed to June 21, 2021. The motion carried by the following vote:

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

Excused: 1 - Bassan

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

a. EC-21-320 Early Head Start Quarterly Report - January, February and March 2021

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

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

Excused: 1 - Bassan

b. EC-21-321 Approval of FY20 Audit

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

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

Excused: 1 - Bassan

c. EC-21-323 Building Lease and Agreement between the City of Albuquerque and 10 Tanker Air Carrier

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

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

Excused: 1 - Bassan

d. EC-21-330 4th Supplemental Agreement with New Mexico Solutions

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

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

Excused: 1 - Bassan

e. EC-21-331 Approval of the Real Estate Purchase and Sale Agreement and Approval of Lease Agreement for Rosenwald Building Condominiums First and Second Floor and segregated 2/3 of basement, limited common areas on floors one and two and proportionate use of common areas containing 15,250 sq. ft.

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

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

Excused: 1 - Bassan

f. EC-21-332 Revenue & Expense Report for Second Quarter Fiscal Year 2021

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

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

Excused: 1 - Bassan

g. EC-21-335 Agreement with DLG Accounting Advisory Services

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

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

Excused: 1 - Bassan

h. EC-21-336 Mayor's appointment of Mr. Jon Sanchez to the Biological Park Board

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

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

Excused: 1 - Bassan

i. EC-21-337 Mayor's appointment of Mrs. Paulette Marie Atencio to the Arts Board

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

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

Excused: 1 - Bassan

j. EC-21-338 Mayor's appointment of Mr. Ray Villareal 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: 8 - Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

Excused: 1 - Bassan

k. EC-21-339 Mayor's re-appointment of Ms. Isis Lopez 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: 8 - Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

Excused: 1 - Bassan

l. EC-21-340 Mayor's appointment of Ms. Diane Mourning Brown 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: 8 - Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

Excused: 1 - Bassan

m. EC-21-341 Mayor's appointment of Ms. Kerry Houlihan 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: 8 - Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

Excused: 1 - Bassan

n. EC-21-342 Mayor's re-appointment of Ms. Patricia L. Chavez 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: 8 - Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

Excused: 1 - Bassan

o. EC-21-344 One Civic Plaza Right of Way Vacation - Project# PR-2020-004748, SD-2021-00028, Tim Solinski agent(s) for City Of Albuquerque requests Vacation Of Public Right-Of-Way, for all or a portion of the alleyway 161.3 feet in length, 16 feet in width, and 483.9 square feet in size along 5th Street NW south of Marquette Avenue NW, containing approximately 2.2273 acres

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

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

Excused: 1 - Bassan

p. EC-21-345 Approving The Agreement Between Albuquerque Fire Rescue And Albuquerque Ambulance Service For The Provision Of Ambulance Services

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

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

Excused: 1 - Bassan

q. R-21-151 Approving And Authorizing The Mayor To Execute A Grant Agreement With The U.S. Department Of Health And Human Services, Early Head Start Program And Providing An Appropriation To The Department Of Family And Community Services Beginning In Fiscal Year 2022 (Peña, by request)

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

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

Excused: 1 - Bassan

r. R-21-158 Approving Renewal Awards From The U.S. Department Of Housing And Urban Development For The 2021 Continuum Of Care Grant And Providing An Appropriation To The Department Of Family And Community Services, Beginning In Fiscal Year 2021 (Bassan, by request)

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

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

Excused: 1 - Bassan

s. R-21-159 Adopting The 2021 Action Plan And Program Investment Summary For The Expenditure Of Community Development Block Grant (CDBG), Home Investment Partnerships Program (HOME) And Emergency Solutions Grant (ESG) Funds; Providing An Appropriation To The Department Of Family And Community Services For 2021 U.S Department Of Housing And Urban Development (HUD) Entitlement Funds (Bassan, by request)

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

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

Excused: 1 - Bassan

11. ANNOUNCEMENTS

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

a. AC-21-4 Project-2020-003911, VA-2020-00143, VA-2021-00072: Modulus Architects, agents for Jose Alfredo and Ailda Martinez, appeals the Zoning Hearing Examiners decision to deny a request for conditional use approval to allow for a light vehicle fueling station adjacent to a residential zone district for a parcel legally described as Lot Commercial Tract, Block 5, Los Altos Subdivision, located at an unaddressed parcel on Bridge Blvd. SW, (near the NW corner of Bridge Blvd. & Tower Rd. SW), zoned MX-M Mixed-Use Medium Intensity [Section 14-16-4-3(D)(17)(i) of the Integrated Development Ordinance]

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

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

Excused: 1 - Bassan

b. AC-21-5 Project-2020-003911, VA-2020-00144, VA-2021-00073: Modulus Architects, agents for Jose Alfredo and Ailda Martinez, appeals the Zoning Hearing Examiners decision to deny a request for conditional use approval to allow for a light vehicle fueling station adjacent to a residential zone district for a parcel legally described as Lot Commercial Tract, Block 5, Los Altos Subdivision, located at an unaddressed parcel on Bridge Blvd. SW, (near the NW corner of Bridge Blvd. & Tower Rd. SW), zoned MX-M Mixed-Use Medium Intensity [Section 14-16-4-3(D)(36)(c) of the Integrated Development Ordinance]

A motion was made by Councilor Peña that this matter be To Accept the Land

Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:

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

Excused: 1 - Bassan

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

***a.** OC-21-33 Staff Recommendation to Appoint Ms. Patricia French to the Civilian Police Oversight Agency Board

A motion was made by President Borrego that this matter be Confirmed. The motion carried by the following vote:

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

Excused: 1 - Bassan

14. FINAL ACTIONS

d. O-21-62 F/S Approving A Project Involving Affordable Solar Installation, Inc. Pursuant To The Local Economic Development Act And City Ordinance F/S O-04-10, The City's Implementing Legislation For That Act, To Support The Acquisition, Renovation, Development And Improvement Of A Facility For A Renewable Energy Production And Storage Technology Research And Development Company In Albuquerque, New Mexico; Authorizing The Execution Of A Project Participation Agreement And Other Documents In Connection With The Project; Making Certain Determinations And Findings Relating To The Project Including The Appropriation Of Funds; Ratifying Certain Actions Taken Previously; And Repealing All Actions Inconsistent With This Ordinance (Bassan, by request)

A motion was made by President Borrego that this matter be Substituted. The motion carried by the following vote:

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

Excused: 1 - Bassan

A motion was made by President Borrego that this matter be Passed as Substituted. The motion carried by the following vote:

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

Excused: 1 - Bassan

g. O-21-65 F/S Authorizing The Issuance And Sale Of The City Of Albuquerque, New Mexico Industrial Revenue Bond (El Encanto, Inc. Project), Tax-Exempt Series 2021 In The Maximum Principal Amount Of $10,000,000 To Provide Funds To Finance The Construction And Equipping Of A Manufacturing Facility; Authorizing The Execution And Delivery Of An

Indenture, Lease Agreement, Bond, Tax Regulatory Agreement And Other Documents In Connection With The Issuance Of The Bond And The Project; Making Certain Determinations And Findings Relating To The Bond And The Project; Ratifying Certain Actions Taken Previously; And Repealing All Actions Inconsistent With This Ordinance (Benton, by request)

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

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

Excused: 1 - Bassan

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

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

Excused: 1 - Bassan

a. O-21-59

Amending Chapter 14, Article 7, Part 2, Section 1 Paragraph B Of The Revised Ordinances Of Albuquerque, New Mexico, 1994, The Professional Services Ordinance (Benton, Gibson)

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

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

Excused: 1 - Bassan

c. O-21-61

Amending The City Of Albuquerque Charter, Article XIII; Repealing Voter ID Requirements For Municipal Elections (Peña and Benton, by request)

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

For: 6 - Benton, Borrego, Davis, Gibson, Peña, and Sena

Against: 2 - Harris, and Jones

Excused: 1 - Bassan

e. O-21-63

Amending The Scope Of The Greater Albuquerque Bicycling Advisory Committee, § 2-6-15 Of The Code Of Ordinances, To Include Active Transportation Users, And Amending The Title Of The Committee To Be The Greater Albuquerque Active Transportation Committee (Benton)

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

For: 7 - Benton, Borrego, Davis, Gibson, Jones, Peña, and Sena

Excused: 2 - Bassan, and Harris

f. O-21-64 Amending The Traffic Code To Clarify The Placard Or License Plate Requirements For Use Of Disabled Parking Spaces (Borrego, Gibson)

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

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

Excused: 1 - Bassan

i. R-21-132 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 5912 Sweet Water Dr NW 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 (Sena)

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

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

Against: 1 - Peña

Excused: 1 - Bassan

j. R-21-135 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 1717 Edith Blvd SE, Albuquerque NM 87102 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 (Benton, by request)

A motion was made by Councilor Benton that this matter be Postponed to June 21, 2021. The motion carried by the following vote:

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

Excused: 1 - Bassan

l. R-21-153 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 400 Mesilla St SE 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 (Davis, by request)

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

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

Against: 1 - Peña

Excused: 1 - Bassan

m. R-21-154 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 404 Mesilla St SE 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 (Davis, by request)

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

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

Excused: 2 - Bassan, and Peña

n. R-21-155

A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 1804 High St SE 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 (Benton, by request)

A motion was made by Councilor Benton that this matter be Postponed to June 21, 2021. The motion carried by the following vote:

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

Excused: 1 - Bassan

p. R-21-162

Establishing Complete Street, Pedestrian, And Streetscape Improvements On San Pedro Drive From Central Avenue To Haines Avenue As A Priority For The City Of Albuquerque (Gibson, Davis)

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

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

Excused: 1 - Bassan

***q.** R-21-175

Amending The Adopted Capital Implementation Program Of The City Of Albuquerque By Approving New Projects And Changing The Scope Of Existing Projects Relating To District 2 Council Neighborhood Set-Asides (Benton)

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

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

Excused: 1 - Bassan

15. OTHER BUSINESS: {Reports, Presentations, and Other Items}

a. EC-21-377

Veto of O-20-18, Imposing A Municipal Gasoline Tax of Two Cents Per Gallon Conditional Upon Voter Approval

A motion was made by Councilor Benton that this matter be Overridden. The

motion failed by the following vote:

For: 5 - Bassan, Benton, Davis, Gibson, and Jones

Against: 4 - Borrego, Harris, Peña, and Sena

14. FINAL ACTIONS

b. O-21-60 Adopting Text Amendments To The Integrated Development Ordinance §14-16 For The 2020 IDO Annual Update; Including Text Amendments For Small Mapped Areas (Benton, Jones)

A motion was made by President Borrego that this matter be Postponed to a Special Council Meeting on June 17, 2021. The motion carried by the following vote:

For: 5 - Bassan, Benton, Davis, Gibson, and Jones

Against: 4 - Borrego, Harris, Peña, and Sena

BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER

APPEAL NO. AC-21-4 and AC-20-1
Related to Appeals AC-20-10 and AC-20-11

VA-2020-00144, VA-2021-00073
Project-2020-003911

Modulus Architects as Agents for Jose Alfredo, Ailda Martinez, and Murphy Oil USA, Appellants.

These two consolidated appeals arise from two decisions of the Zoning Hearing Examiner (ZHE) and have been consolidated because the same facts and land are addressed in each appeal; the proposed uses are within the same proposed building structure; and the applicants are the same. Because these records result from a City Council remand order, they are inherently intertwined with the records of AC-20-10 and AC-20-11. The two former appeals are matters that were remanded back to the ZHE.[1] Because of the associations mentioned above, all four records should be joined as one record.[2]

Consistent with the analyses below, I find that Appellants' appeal should be denied. Additionally, I respectfully find that the ZHE's decisions and findings should also be rejected. Although the ZHE correctly concluded that the applications should be denied, the findings are flawed.

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1. Apparently, rather than treating the instant appeal records as addenda to the previous appeal records, the Planning Department Staff generated new appeal numbers for the remand appeal records.

2. I also note that, except for the ZHE decisions, the two former records (AC-20-10 and AC-20-11) are, for the most part, duplicates of each other. Similarly, except for the two decisions therein, the two records of the instant appeals (AC-21-14 and AC-20-15), except for the ZHE decisions, are also the same.

I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

A. Appeal Records - AC-20-10 and AC-20-11[3]

Beginning with the records of AC-20-10 and AC-20-11, the applicants, Modulas Architects as agents for Murphy Oil USA and for Jose Alfredo and Ailda Martinez, applied for two conditional use permits, one for a "Light Vehicle Fueling Station" (gas station or light fueling) and the other for the sale of "Retail Liquor Sales," both under the Integrated Development Ordinance (IDO).[4] The proposed 1.32 acre vacant land site for the proposed uses comprises two abutting lots and are located at the North West corner of Old Coors Drive and Bridge Blvd., S.W. [R-1, 134].[5] The lot that abuts Old Coors Drive, S.W. is zoned NR-C and the lot that abuts Bridge Blvd., S.W. is zoned MX-M [R-1, 093]. There is a residential zone and residential uses that abuts the North and West sides of the MX-M zoned lot [R-1, 093]. The proposed building at which business for the two conditional uses will be conducted will be located 39-feet from the nearest residential uses and the outer boundary of the abutting residential zone [R-1, 220]. Because of the proximity of the uses to residential uses and zones, it is undisputed that under the IDO, a conditional use permit is necessary for each use [See IDO, § 4-3(D)(17)(i) for light fueling and §4-3(D)(36) for retail liquor, respectively].

After consolidating the two applications, the ZHE held a public quasi-judicial hearing

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3. Because there are technically four records associated with these appeals (AC-20-10, AC-20-11, AC-21-4, and AC-21-5), for the sake of clarity, I will refer to the first two appeals as R-1 and R-2 respectively and the instant appeal records as R-3 and R-4 respectively.

4. Apparently, because the applicants submitted two separate applications, one for each conditional use request, the City Planning Department Staff and the ZHE similarly processed the applications as two separate applications.

5. Because the site encompasses two abutting lots, each lot has its own address. The record shows the site is addressed with 99999 Bridge Blvd. SW and 1021 Old Coors Dr. SW.

on the requests on July 21, 2020 which was continued the hearing on August 18, 2020 [R-1, 259 and R-1, 246, respectively]. In a written decision dated September 2, 2020, the ZHE approved the two conditional use applications and set several consequential conditions of his approval including placing limitations on the sale of liquor [R-1, 005-015]. The conditional use permits approved by the ZHE allow Murphy to operate a gas station and make available for retail sale only beer and wine and only between the hours of 6:01AM and 7:59PM [R-1, 014].

The Los Altos Civic Association (a City neighborhood association) filed a timely appeal on each decision from the ZHE, and the City Council subsequently referred the appeals to me as the City's Land Use Hearing Officer (LUHO). The neighborhood association Appellants appealed the ZHE's decision on several grounds. First, they argued that the ZHE relied on "erroneous" or "misleading" information submitted by Murphy's agents. They also argued that the adverse impacts of liquor retail and the gas station on the abutting neighborhood outweigh granting the conditional use permits. Finally, the neighborhood association Appellants took the position that it was erroneous for the ZHE to not require that Murphy rebut the testimony of residents who testified against the proposed conditional use permits [R-1, 021-022]. Appellants asked that the ZHE's decision be reversed. After a quasi-judicial appeal hearing only on the issues appealed, noting that the numerous exacting conditions set by the ZHE on both proposed conditional uses would mitigate adverse impacts on the abutting residential uses, I recommended that the City Council affirm the ZHE's decision and conditions.

B. The City Council Remand

At its scheduled public hearing on the appeals, the City Council voted to remand both

appeals to the ZHE. In doing so, the City Council ordered that the ZHE re-evaluate three distinct issues, including (1) the enforceability of the liquor sales restrictions, (2) the enforceability of limiting the conditional use permits to only Murphy Oil USA, and (3) whether the uses will increase non-residential activity between the hours of 8:00PM to 6:00AM [R-2, 033 and supplemented at the LUHO hearing].

C. Appeal Records - AC-21-14 and AC-21-15

The ZHE took up the City Council's remand order in a hearing on January 19, 2021 and again in a second hearing on February 16, 2021 [R-2, 245 and 213, respectively]. Citing sources of various statuses of New Mexico precedent, the ZHE determined first that the conditions on the retail liquor sales conditional use permit would be unenforceable under the Liquor Control Act (LCA). On the second remand issue, the ZHE concluded that he has the authority to limit a conditional use permit to only Murphy Oil USA, and therefore he concluded it was an enforceable condition. Regarding the third remand issue having to do with non-residential activity and the light fueling use, the ZHE merged his finding on the first remand issue with his rationale and decision on the third remand issue and found that without the conditions on liquor sales, the fueling use will increase non-residential activity at the site between the hours of 8:00PM and 6:00AM. As a result, the ZHE reversed his previous decisions and denied both applications [R-2, 005-0010]. The applicant-Appellants filed a timely appeal (for each decision and proposed use) and the City Council delegated the appeals back to me [See IDO, § 6-4(U)(1)(c)].

II. ISSUES PRESENTED

Initially, in their written appeal arguments, Appellants claimed that the ZHE erred in determining that the conditions he set on liquor sales are unenforceable by the City.

Appellants take the unique position that the conditions on liquor sales are not City-imposed conditions since the conditions were voluntary on the part of the Applicants. They further suggest that the conditions are merely the ZHE's attempt at memorializing the applicants' self-imposed restrictions on liquor sales at the proposed site. Appellants essentially assert that their assent to the restrictions somehow disentangle and removes the City from attempting to regulate liquor or otherwise infringe on the State's authority over regulating liquor.

At the Appeal Hearing, however, Appellants advanced a different theory that conflicts with their argument having to do with their willingness to the conditions.[6] They now broadly facially challenge the Use Specific Standard for Liquor Retail land uses in IDO, § 4-3(D)(36)(c) as it applies to their proposed liquor retail land use. Specifically, Appellants contend that on its face, the regulation infringes on, or is preempted by, the State's authority to regulate liquor. Appellants generally contend that the City cannot regulate liquor retail uses even through conditional use zoning regulations in the IDO. As support for Appellants' sweeping contention, Appellants claim that the *Baker* decision expressly supports their theory. As shown below, I find that Appellants paint with a broad brush and have overgeneralized their arguments with the law of New Mexico.

Regarding the ZHE's denial of the conditional use application for light fueling, Appellants claim that, although light fueling and/or liquor will be sold until at least midnight at the site, they claim that they have demonstrated with substantial evidence that the proposed uses will not increase non-residential activity between the hours of 8:00PM and 6:00AM at the site. On this remand issue, I find that the evidence overwhelmingly demonstrates that the

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6. In advancing their new argument at the LUHO appeal hearing, citing select statutes in the State Liquor Control Act, Appellants primarily rely on a Second Judicial District Court decision in the case of *Michael E. Baker, et al., v. City of Albuquerque*, D-202-CV-2008-02996 (The "*Baker* case").

business uses intended at the site will increase non-residential activity within 300 feet of the nearest residential lots (which are 39 feet from the building) after 8:00PM.

III. 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)].

IV. DISCUSSION

Although it goes without stating the obvious, but because this appeal concerns a conditional use process, it is worth beginning the discussion by mentioning that zoning and specifically, zoning through conditional uses, are expressly authorized in NMSA 1978, § 3-21-1(F). Moreover, utilization of conditional uses is generally reflected in the City's Comprehensive Plan [Comp. Plan Policy 5.3.7]. What follows in the next section is a review of the methodology in the IDO for how "light fueling" and "liquor retail" are in fact expressly authorized and categorized as conditional uses.

A. IDO Requirements

Beginning with the sources of authority for managing the Appellants' applications as conditional uses in the IDO, a conditional use is defined as:

> A land use that is allowable in a particular zone district **subject to conditional approval** by the ZHE based on a review of the potential adverse impacts of the use and any appropriate mitigations to minimize those impacts on nearby properties. Table 4-2-1 indicates whether a particular conditional use is primary (listed as C) or accessory (listed as CA) or allowed conditionally in a primary building that has been vacant for a specified amount of time (listed as CV) [IDO, § 14-16-7, Definitions].

(Emphasis added).

Thus, conditional uses are, by definition, land uses that have been identified by the City Council (in the IDO) as having "potential adverse impacts...on nearby properties." As discussed below, in this case, the land uses proposed by Appellants are categorized under the IDO as conditional uses because of their proximity to a residential zone and to residential uses.

Table 4-2-1 of the IDO, referenced in the above definition, further identifies the category of allowable land uses in relation to their zones, and whether they are permissive or conditional uses.[7] Relevant to this appeal, Table 4-2-1 identifies "light vehicle fueling" and "liquor retail" as permissive land uses in both the MX-M and NR-C zones (the two zone categories of the proposed site herein). A permissive use is defined as a land use that is *"allowed by right in a particular zone district"* [IDO, § 7-1, Definitions]. However, the analysis doesn't end there, because also cross-referenced in Table 4-2-1 are the applicable "Use-specific Standards."

Use-specific standards are identified in § 14-16-4-3 of the IDO. Under the IDO, all allowable land uses (those identified in Table 4-2-1), regardless of their zone(s), are subject to the Use-specific Standards of § 4-3 [See IDO, § 4-1(A) and (C)]. Table 4-2-1 cross references the Use-specific Standards of § 4-3(D)(17) for light vehicle fueling station land uses and § 4-

7. There are 123 separate and distinct uses in Table 4-2-1. There are several other classes of uses identified in Table 4-2-1 that are not relevant here.

3(D)(36) for liquor retail land uses.

For light vehicle fueling land uses, there are 14 separate Use-specific Standards that are applicable to the use [§ 4-3(D)(17)(a) through (n)]. Most of the Standards are development standards. However, one standard concerns the land uses' proximity to residential zones and states in full:

> If located adjacent to any Residential zone district, this use shall require a Conditional Use Approval pursuant to Subsection 14-16-6-6(A) [See § 4-3(D)(17)(i)].

By contrast, most of the Use-specific Standards for liquor retail as a land use concern their proposed proximity to other zones (including overlay zones and areas). Unless associated with a grocery store use, the land use category of liquor retail, whether as a primary or as an accessory use, is prohibited in certain legislatively defined areas in the City [See § 4-3(D)(36)(d)-(h)]. Notably, however, the proposed site in this matter is not within any of the defined areas stated above. For purposes of Appellants' application for a liquor retail land use, Use-specific Standard, § 4-3(D)(36)(c) is applicable, and it states in full:

> Notwithstanding other provisions in this Subsection 14-16-4-3(D)(36), this use requires a Conditional Use Approval pursuant to Subsection 14-16-6-6(A) when proposed within 500 feet of any Residential or NR-PO zone district or any group home use, as measured from the nearest edge of the building containing the use to the nearest Residential or NR-PO zone district or lot containing a group home.

Accordingly, it is clear from the Use-specific Standards for both light vehicle fueling and for liquor retail land uses that the City Council has given purpose to why and when these uses convert from permissive uses to conditional uses under the IDO—their proximity to residential zones. This is so because, as a matter of policy in the IDO, conditional uses are legislatively defined land uses that by their nature have a *"potential"* for *"adverse impacts...on nearby*

properties" of which requires further review from the ZHE of *"any appropriate mitigations to minimize those impacts on nearby properties"* [IDO, § 14-16-7, Definition of Conditional Use].

With regard to reviewing conditional uses, the IDO establishes the criteria for their evaluation in IDO, § 6-6(A)(3) which is generally applicable for the review of all conditional uses, and it states in full:

> An application for a Conditional Use Approval shall be approved if it meets ***all*** of the following criteria:
>
> | | |
> |---|---|
> | 6-6(A)(3)(a) | It is consistent with the adopted ABC Comp Plan, as amended. |
> | 6-6(A)(3)(b) | It complies with all applicable provisions of this IDO, including but not limited to any Use-specific Standards applicable to the use in Section 14-16-4-3; the DPM; other adopted City regulations; and any conditions specifically applied to development of the property in a prior permit or approval affecting the property. |
> | 6-6(A)(3)(c) | It will not create significant adverse impacts on adjacent properties, the surrounding neighborhood, or the larger community. |
> | 6-6(A)(3)(d) | It will not create material adverse impacts on other land in the surrounding area through increases in traffic congestion, parking congestion, noise, or vibration without sufficient mitigation or civic or environmental benefits that outweigh the expected impacts. |
> | 6-6(A)(3)(e) | It will not increase non-residential activity within 300 feet of a lot in any Residential zone district between the hours of 8:00 P.M. and 6:00 A.M. |
> | 6-6(A)(3)(f) | It will not negatively impact pedestrian or transit connectivity without appropriate mitigation. |

(Emphasis added.)

As stated in § 6-6(A)(3), the six-prong test is not disjunctive: An applicant must satisfy all six of the requirements of § 6-6(A)(3) to obtain a conditional use permit under the IDO. In addition, an applicant requesting a conditional use permit bears the burden to establish with substantial evidence that all six of the conditional use requirements are met [IDO, § 6-4(F)(2)]. Finally, under the IDO, in the same way that applicants bear the burden to demonstrate that they are entitled to a conditional use permit, in an appeal, the appellant bears the burden to prove with substantial evidence that the ZHE erred [See IDO, § 6-4(U)(4)].

With these regulatory standards in mind, turning to the substantive issues presented in this consolidated appeal, I will begin with the dispositive issues in the IDO before contending with Appellants' novel preemption theory. I will discuss the original conditions set by the ZHE, and then move to a discussion of the conditional use requirements. Finally, I will end with a detailed discussion of Appellants' facial challenge to the IDO.

B. Regardless of Appellants' consent to the conditions set by the ZHE on liquor sales, they are unenforceable.

As described above, because the applicants propose locating Murphy Oil USA with two conditional land uses within 39-feet of a residential zone and residential uses, the ZHE set eight conditions he believed would mitigate potential adverse impacts from the uses [R-1, 0244]. The conditions that the ZHE set appeared to explicitly mitigate the liquor land use at the site, since conditions Number Seven and Eight prohibits the sale of spirits and prohibits liquor from being sold at the proposed site between the hours of 8:00PM and 6:00AM [R-1, 244].

At the first appeal hearing, the Murphy Oil USA agents confirmed that they volunteered to stipulate to the conditions restricting liquor sales [Oct. 29, 2020, R.Tr. 46:21-25, 47:1-5].

On remand from the City Council, the ZHE reversed his previous decision and concluded that the previous conditions that he had set on the liquor retail land use at the site, were unenforceable. The ZHE then determined that, because conditions Number Seven and Eight are unenforceable, potential adverse impacts could not be mitigated, so he denied both applications [R-3, 022-023].

In this second appeal, in their written arguments, Appellants repeated that they consented to the conditions on liquor sales [R-3, 016-018]. Specifically, Appellants assert that their consent of the conditions extricates the conditions as City actions and therefore the conditions do not infringe on the State's authority to regulate liquor [R-3, 016-018]. Appellants further claimed in their written appeal arguments that the voluntary nature of the conditions essentially abates any questions of State preemption [R-3, 016-018].[8] However, at the second appeal hearing, Appellants changed course and direction with a new theory, one that directly conflicts with their written arguments. Appellants now claim that liquor land uses cannot be regulated in the IDO, specifically through the conditional use process. Those novel arguments are discussed in detail and in section E below.

In any event, I find that, regardless of Appellants consent or stipulation to the conditions restricting liquor sales, the ZHE does not have authority to grant or otherwise set conditions restricting the type of liquor that can be sold nor to limit the hours in which liquor can be sold.[9] The two conditions directly conflict with the State Liquor Control Act (LCA) and are *ultra vires*—an action beyond the authority of the ZHE. Succinctly stated, the regulation of types

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8. I note that, although Appellants made an entirely different argument, one that is utterly irreconcilable with their "consent" argument in the quasi-judicial appeal hearing, they did not expressly abandon their written argument.

9. I emphasize here that the ZHE also came to the same conclusion in his remand review.

of liquor that can be sold and the hours such liquor can be sold are expressly and exclusively regulated through the LCA. In other words, the conditions are preempted by State law. Because the conditions are unenforceable, Appellants' assent to the conditions is of no consequence and does not avoid preemption as Appellants suggested in their written arguments.

C. The ZHE condition confining the conditional use permit only to Murphy Oil USA is unenforceable.

In the City Council's first remand question, the Council asked the ZHE to determine if ZHE condition Number One is enforceable. Condition Number One makes the conditional uses invalid when Murphy Oil USA is no longer in control of operating the land uses at that site. The ZHE concluded that under the IDO, the condition is valid and enforceable [R-3, 029, Fndg. 10]. Respectfully, the ZHE is wrong, he does not have authority under law to set the condition; thus, it is unenforceable.

The New Mexico Supreme Court considered a similar condition in the zoning context and expressly ruled that *"it is not within the proper function of the zoning authority to condition an exception to the use of real property upon personal rights of ownership rather than use"* [*Mechem v. City of Santa Fe*, 1981-NMSC-104, ¶¶ 21 and 23]. Accordingly, condition Number One is contrary to law and therefore invalid.

D. There is substantial evidence in the record showing that non-residential activity will increase at the site after 8:00PM.

In the City Council's remand order, the Council ordered the ZHE to "address and enter findings on the IDO requirement that the light vehicle fueling use will, or will not, increase non-residential activity within 300 feet of the adjacent residential zone districts between the hours of 8:00PM and 6:00AM." However, the ZHE did not do so. Instead, the ZHE concluded

that because the conditions he set on liquor sales were necessary to mitigate adverse impacts, but unenforceable, he summarily denied the applications [R-2, 12-14]. I find that the rationale supporting his decisions is erroneous, and I respectfully recommend that the City Council reject the ZHE's justification and findings for denying both applications. I expressly find that the enforceability of the ZHE's conditions on liquor sales is immaterial and irrelevant to resolve the Council's remand question about whether the Appellants satisfied § 6-6(A)(3)(e). I further conclude that the findings supporting the ZHE's decision must be modified to bring it into compliance with the remand order and with the criteria of IDO, § 6-6(A)(3)(e) (the non-residential activity requirement). [See § 6-4(U)(3)(d)5 for LUHO authority to modify decisions].

To satisfy the non-residential activity requirement of § 6-6(A)(3)(e), the Appellants' agent testified that the hours of operation will be restricted to 5:00AM to 11:00PM [R-2, 267].[10] There was also considerable testimony and written argument from the Appellants' agents regarding traffic and how it impacts the site. First, a representative of Murphy Oil USA testified that Murphy Oil USA is not a "traffic creator," creating additional new traffic on the roadway; furthermore, they are a "pass-through destination" [R-2, 277]. Next, in their written arguments to the ZHE, Appellants argued that:

> "Murphy is not a destination location, rather, our consumers are passerby traffic." This will not increase the activity that is already active and present at the location" [R-1, 0147].

In the remand hearings, Appellants' agent supplemented the records and submitted Mid-

10. Although it was likely an oversight, this testimony contradicts the testimony from the Applicants' agent Angela Williamson in the instant appeal hearing at which she testified that the gas station will close at midnight.

Region Council of Government (MRCOG) daily trip traffic counts for the intersection of Bridge Blvd. and Old Coors Drive and essentially doubled-down on their previous testimony that the uses *"will not increase the activity that is already active and present at this location"* between the hours of 8:00PM and 6:00AM [R-3, 216]. In their supplemental evidence, Appellants suggest that because there are commercially zoned uses to the North and to the East of the site, and because the MRCOG data shows that there are 23,900 automobile trips per day on Bridge Blvd. and 16,200 trips per day on Old Coors Dr. near the site, development at the site will not increase non-residential activity after 8:00PM. Appellants conclude that:

> Prohibiting alcohol sales between the hours of 8PM and 6AM further ensure there would be no significant increase in nonresidential activity during those times [R-3, 216].

Appellants further claimed that:

> There is no commercial activity on the subject property currently, and therefore any commercial activity would be an increase in non-residential activity [R-3, 215].

No other evidence was presented by Appellants in response to the remanded question regarding non-residential activity between the hours of 8:00PM and 6:00AM.

First, I find that without clearly demarcated trip generation rates for the proposed uses at the proposed development, Appellants' general contention that the Murphy development will capture only pass-by traffic is meaningless and unsupported by any evidence in the record. Second, daily traffic counts, on their own, are also meaningless numbers without additional data to distinguish that the amount of traffic of the raw trip data is attributable to the various land uses identified in the area. Succinctly stated, the evidence Appellants submitted in the remand records, as well as evidence already existing from the previous records, does not amount to substantial evidence on the question remanded regarding § 6-6(A)(3)(e).

None of the evidence in the record can be utilized to extrapolate, assign, or distribute the MRCOG raw trip data to reliably determine whether the development will capture only existing pass-by traffic or create new trips to the site.[11] Without any analysis of the raw MRCOG data Appellants rely on, it is simply useless information for resolving the crux question that must be resolved under § 6-6(A)(3)(e) and within the remand. In similar fashion, Appellants' claim that the development will not increase non-residential activity after 8:00PM is based on unsupported conjecture and cannot be considered as substantial evidence.

Without reliable evidence to support Appellants' claim, I find that it is contrary to reason and common sense that the proposed business/commercial land uses will not increase non-residential activity after 8:00PM at or near the site when the evidence clearly demonstrates that there will be business/commercial activity at the site until at least midnight, when it closes for the night. Consequently, I find that the mere fact that the proposed Murphy Oil USA operation intends to be open until midnight, makes it substantially self-evident that it will increase non-residential activity at the site, and therefore within 300-feet of the residential uses after 8:00PM. Hence, Appellants cannot, and have not met their burden of proof under § 6-6(A)(3)(e).

Although Appellants technically submitted two separate applications to the ZHE—one for each conditional land use at the site—the record shows that both land uses, as a matter of points of sale for both uses, will be quartered in a single building structure. Moreover, the ZHE

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11. See *ITE Trip Generation Manual*, 10th Edition which is a reliable source referenced in the City's Development Process Manuel (DPM) and which is routinely utilized by applicants to satisfy traffic issues in the IDO. Further, it is recognized by City Engineers and Staff Land Use Planners as a primary reference source for traffic and land use trip generation analysis in the DPM of which is expressly referenced in the IDO. See DPM, page 7-168.

processed the applications as interconnected.[12] In the appeals, the matters were similarly consolidated. Furthermore, in the ZHE hearings, Appellants neither objected to merging the applications in the same quasi-judicial hearings nor to allowing testimony on both applications together as they were conjoined. Similarly, in the appeals, Appellants did not voice any objections to joining the two matters.

Furthermore, Appellants have not demonstrated that the liquor retail conditional land use can stand on its own, independent of the light fueling conditional land use. Although each proposed conditional use is listed in the IDO as a primary conditional use, realistically and functionally, the liquor retail land use is nominally a primary use at the site; it is more like an accessory use to the primary use which is operationally the sale of light vehicle fuels [R-2, 0137]. In their application to the ZHE, Appellants through their agent expressly advised the ZHE and represented that:

> "Murphy's PRIMARY business is the sale of motor vehicle sales and convenience store goods; the sale of alcoholic beverages is both complementary and SECONDARY to its primary business…" [R-2, 0137].

Murphy Oil USA cannot satisfy the fifth prong (§ 6-6(A)(3)(e)) of the six-part test of § 6-6(A)(3). Consequently, both proposed uses must be denied together.

E. Appellants' novel and sweeping facial challenge to IDO, § 4-3(D)(36)(c), as it applies to liquor retail land uses lacks support in law and should be denied.

At the LUHO appeal hearing, Appellants raised a new argument that directly undercut and contradicted their initial written appeal arguments. Nonetheless, I find after reviewing the law, that IDO, § 4-3(D)(36)(c), as it applies to liquor retail is not at odds, or otherwise

12. Despite the fact that the ZHE administered a separate decision for each application, the ZHE did not hold a separate quasi-judicial hearing for each application; they were merged and considered together in the hearings.

374 inconsistent with the Liquor Control Act. Thus, it is not preempted by it. In substance, the
375 conditional use test for liquor uses, which applies uniformly to all categories of conditional
376 uses in the same way, does not regulate liquor licenses, liquor types, or when and how liquor
377 can be sold (which is the exclusive domain of the LCA).

378 In their arguments, Appellants cite the *Baker* decision and the analysis therein as
379 support for their broad arguments. In doing so, Appellants also broadly contend that NMSA
380 1978, § 60-6B-4(F) does not allow the City to utilize zoning to restrict the *location* of liquor
381 uses in any manner that conflicts with what is allowed in NMSA 1978, § 60-6B-10.
382 Specifically, Appellants claim that converting liquor retail land uses to conditional uses in §
383 4-3(D)(36)(c) of the Use-specific Standards *"when proposed [to be located] within 500 feet of*
384 *any Residential...zone,"* has the practical effect of conflicting with what is allowed in NMSA
385 1978, § 60-6B-10 and in § 60-6B-4(F). Appellants also argue that the conditional use test itself,
386 specifically the fifth prong in IDO, § 6-6(A)(3)(e), is not contemplated in either LCA statute.
387 Therefore, they claim it is unlawful as the IDO applies to liquor retail land uses. As shown
388 below Appellants are conflating what is being regulated under the IDO with what is regulated
389 through the LCA. I will do my best to disentangle Appellants' novel theory.

390 First, I find that Appellants' sweeping indictment of the IDO's conditional use
391 framework as it applies to liquor retail land uses does not comport with the *Baker* decision nor
392 with what is expressly allowed in the LCA. I will discuss the *Baker* decision in detail in
393 Section F. In a nutshell, Appellants overly generalize the narrow holding of the *Baker* decision
394 and mischaracterize the regulatory framework of the LCA in terms of what actions the City
395 can take to review "locations" for proposed liquor retail land uses in the IDO (zoning).
396 Because the honorable Court in *Baker* cited some of the same Liquor Control Act statutes that

Appellants reference in this appeal, I start with the LCA.

Appellants cite NMSA 1978, § 60-6B-4(F) and § 60-6B-10) of the LCA as support for their theory. However, before examining these two statutes, I start with a LCA statute not referenced by Appellants in their argument but expressly cited by the *Baker* Court.

That statute is NMSA 1978, § 60-3A-2(A) (1981) which states:

> 60-3A-2. Liquor policy of state; investigation of applicants; responsibility of licensees. (1981)
> A. **It is the policy of the Liquor Control Act** [60-3A-1 NMSA 1978] that the sale, service and public consumption of alcoholic beverages in the state shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in the state; and **it is the responsibility of the director** to investigate the qualifications of all applicants for licenses under that act, **to investigate the conditions existing in the community in which the premises for which any license is sought are located before the license is issued, to the end that licenses shall not be issued to persons or for locations when the issuance is prohibited by law or contrary to the public health, safety or morals.**

(Emphasis added.)

This statute makes it clear that a primary policy rationale for the regulatory framework of the LCA is to protect the *"public health, safety and morals of every community"* in New Mexico. It also expressly declares that it is the responsibility of the Director to accomplish that policy.[13] In doing so, however, it also expressly declares that "*before*" a license can be issued, the Director is responsible to *"investigate,"* among other matters, the *"conditions existing in the*

13. Under the LCA, there are two "Directors" referenced—one for the law enforcement side and the other for the licensing and regulatory section of the Alcohol and Gaming Division of the New Mexico Regulation and Licensing Department. The latter is the applicable Director in the statutes referenced in this consolidated appeal. See NMSA 1978, § 60-3A-3(H) for the precise definitions.

community" where the proposed liquor license is proposed to be located.[14] Moreover, if the Director determines that liquor is prohibited *"by law"* or otherwise is *"contrary to public health, safety or morals"* at the *"location"* proposed, then *"that license shall not be issued"* by the Director. Thus, in reviewing whether to grant a liquor license the Director *"investigates"* first whether the city prohibits liquor uses at the proposed location at which the license will be used by the prospective licensee. If liquor uses are not permitted at the location, the Direct *"shall not"* issue the license.

It cannot be overemphasized that the Director's inquiries under § 60-3A-2(A) occur in advance of a decision to issue or allow the transfer of a liquor license for any proposed "*location.*" This is due to the fact that, under the regulatory framework of the LCA, an application for a proposed liquor license must also be anchored to a proposed "*premise*" (the location where liquor will be manufactured, served or sold) [§ 60-6B-2(2)]. This distinction is quite meaningful to the analysis of Appellants' theory because as we shall see below, although the Director has exclusive jurisdiction to regulate all aspects of a liquor license, the Director does not decide whether a particular location, or premise for that matter, is appropriate at which to anchor the license. As shown next, this decision is expressly delegated to the City.

All parts of the LCA, specifically § 60-6B-4(F) and § 60-6B-10, must be considered in context with the policy and regulatory framework declared in NMSA 1978, § 60-3A-2 above. The context of § 60-3A-2 is particularly necessary for an accurate understanding of all actions, expressly or inherently, anticipated to occur *"before"* the Director decides on issuing a liquor

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14. I emphasized the word "before" because as shown below, there is a clear distinction between regulating existing or proposed liquor licenses, as was attempted by the City in the *Baker* case and regulating *"locations"* by zoning *"before"* a liquor license has been issued by the Director as that term is used in the LCA and particularly in § 60-3A-2(A). The latter is more similar to the fact pattern in this appeal.

license under the LCA. What occurs *"before"* any liquor license can be issued by the Director necessarily involves an examination of the "*conditions existing in the community"* and whether it would be unlawful to issue a liquor license for a premise at the particular *"location"* proposed by an applicant in the City. Again, it cannot be understated that under § 60-3A-2, *"licenses shall not be issued to persons or for locations when the issuance is prohibited by law or contrary to the public health, safety or morals."* With this in mind, before the Director takes any action on the application, an applicant applying to the Director for a liquor license must also:

> obtain approval for the issuance from the governing body of the local option district in which the proposed licensed premises are to be *located* in accordance with the provisions of the Liquor Control Act [§ 60-6B-2(A)(8) (2007)].

With § 60-3A-2 and § 60-6B-2(A)(8) and their context in mind, NMSA 1978, § 60-6B-4(F) is the part of the LCA that expressly gives express meaning and coalesces the express powers and function of the City with regard to the proposed "location" of a proposed license, which is the crux of Appellants' theory.

Section 60-6B-4(F) of the LCA allows the City to review and decide if a proposed *location* in which a proposed liquor license is to be located either prohibits liquor in that particular *location*, either under State law, zoning law, or if the Director's issuance of a liquor license (presumably for a premise at the proposed location), would be contrary to the "public health, safety or morals" of residents therein the City. Section 60-6B-4(F) of the LCA states in full:

> 60-6B-4. Issuance or transfer of license; approval of appropriate governing body. (2015)
>
> ...
>
> F. The **governing body** may disapprove the issuance or transfer of the

license if:
(1) the proposed **location is within an area** where the sale of alcoholic beverages is prohibited by the laws of New Mexico;
(2) the issuance or transfer **would be in violation of a zoning** or other ordinance of the governing body; or
(3) the issuance or transfer would be detrimental to the public health, safety or morals of the residents of the local option district.

(Emphasis added).

Succinctly stated, § 60-6B-4(F) is express authority for zoning to be a basis for the City or for the Director to *"disapprove issuance or transfer."* Again, the domain in which the City is allowed to take action on a proposed liquor license includes the City's investigation of the location and the zoning of the proposed site at which any applicant wishes to locate the licensed premise. Unlike in NMSA 1978, § 60-3A-2, where the Director conducts an investigation of the same conditions before issuing a license, here it is the City that is responsible for the investigation. But there are similarities between the two statutes because both investigations concern largely the same issues—namely, the proposed location, the exiting conditions, and the zoning which my prohibit liquor at the proposed location of the license. In addition, the context of each statute is the same; the investigations occur before a license can be issued. Finally, there can be no dispute that the *"zoning"* of any location within the City is the domain of a City to control, not the State. Aside from other parts of New Mexico law that supports this conclusion, the above statutes unmistakably support this conclusion as well.

Next, Appellants also cite § 60-6B-10 which states in full:

60-6B-10. Locations near church or school; restrictions on licensing. (1997)
No license shall be issued by the director for the sale of alcoholic beverages at a licensed premises where alcoholic beverages were not sold prior to July 1, 1981 **that is within three hundred feet of any church or school.** A license may be granted for a proposed licensed premises if the owner or lessee has, prior to establishment of a church or school located within three hundred feet of the proposed licensed premises, applied for, been granted

> and maintained a valid building permit for the construction or renovation of the proposed licensed premises and has filed on a form prescribed by the director a notice of intention to apply for transfer of a license to the proposed licensed premises. **A license may be granted for a proposed licensed premises if a person has obtained a waiver from a local option district governing body for the proposed licensed premises**. For the purposes of this section, all measurements taken in order to determine the location of licensed premises in relation to churches or schools shall be the straight line distance from the property line of the licensed premises to the property line of the church or school. This provision shall not apply to any church that has been designated as an historical site by the cultural properties review committee and which does not have a regular congregation.

(Emphasis added).

Appellants cited this statute in their arguments to show that it is the only statutory authority that expressly allows the City to utilize a measurement basis to deny a proposed liquor license at a particular location. No one disputes that this section generally makes it unlawful to locate a liquor premises within 300 feet of a church or school. However, this section also allows the City to *"waive"* the general prohibition.[15]

Appellants, however, assert that the "zoning" language of § 60-6B-4(F)(2) relegates the City to, and makes allowance only for the City to, determine if a liquor use will be located within 300-feet of any church or school as specifically referenced in § 60-6B-10. I cannot agree with Appellants that § 60-6B-10 and § 60-6B-4(F)(2) speak to the same issues. The former is a process only for granting waivers (regardless of zoning) when the proposed license is proposed to be in a certain proximity to a church or school. The actions allowed in § 60-6B-4(F)(2) concern the City's responsibility to investigate whether the zoning prohibits the liquor use at a particular location (regardless of its location in proximity to a church or school).

15. I note that the City has enacted its version of the LCA in City Ordinance § 13-2-1, et al. Therein, the City has established clear criteria in which waivers under § 60-6B-10 are decided.

Appellants are conflating a waiver process in the LCA with an express action requiring that the zoning be investigated in the LCA.

However, it's worth pausing here to sum up and take stock as to where we are so far in the analysis. The issue of this appeal concerns the powers of the City to determine whether a particular location is appropriate for a liquor retail use. That is, can the City through its IDO make liquor retail land uses conditional uses? Appellants say no because they claim only the Director, through the LCA, can determine whether a location is appropriate for liquor retail land uses. Put another way, Appellants claim that among the Director's authorities of approving and regulating liquor licenses is the power to determine whether or not a "location" is appropriate for a retail liquor use. LCA statutes § 60-3A-2(A), § 60-6B-4(F), and in § 60-6B-2(A)(8) in particular, however, clearly stand for the proposition that the LCA delegated that authority to the City.

Despite Appellants' argument to the contrary, a clear pattern emerges when one considers that zoning is the domain of the City and when all the actions required and anticipated in § 60-3A-2(A), § 60-6B-4(F), and in § 60-6B-2(A)(8) are considered together. That pattern demonstrates the decision for determining the "location" of a proposed license is not within the authority of the Director; rather, there is an express recognition and an acknowledgment that zoning for liquor land uses is within the domain of the City to determine.

At the risk of sounding repetitive, there can be no mistake that the Director is charged with investigating whether there are any laws in the City that would prohibit locating the proposed liquor license at the proposed location [§ 60-3A-2(A)]. This investigation occurs before a license can be issued [§ 60-3A-2(A)]. Next, the City is authorized to take similar action. Specifically, the City is authorized to *"disapprove"* the proposed license if locating the

license at a location in which the liquor use would be prohibited by the City's zoning ordinance of which is administered and controlled by the City [§ 60-6B-4)].

To agree with Appellants' theory, one would have to conclude that the Director can bypass or disregard the City's authority over zoning, and specifically the investigations expressly referenced in § 60-3A-2(A), § 60-6B-4(F), and in § 60-6B-2(A)(8). Appellants are plainly wrong. If an area is not zoned for the proposed liquor use, the LCA expressly requires the Director to deny the license. Again, § 60-3A-2 expressly states that the Director *"shall not be issue[]"* a license *"for locations when the issuance is prohibited by law."*

Putting Appellants' theory to the test in a practical evaluation of the above referenced statutes raises these questions. If the City does not have the power to deny a conditional liquor retail land use application based on factors related to its proposed location under the IDO, why would the LCA require the Director to investigate the conditions in the community and if the location might be unlawful for locating the license? In addition, why would the LCA require the Director to deny a proposed license after it is determined that the proposed license would not be permissible at the proposed location? In addition, apart from the Director's responsibilities under § 60-3A-2, why would the LCA allow the City (under § 60-6B-4(F)) to first investigate whether issuing the license *"would be in violation of a zoning...ordinance"* if liquor uses can't be denied by a City based on the City's zoning of that location? The only rational way to reconcile these two statutes is to conclude that the City has the authority to prohibit liquor retail land uses at particular locations under the IDO. That authority rationally extends to conditionally prohibiting such land uses if the applicants cannot satisfy a test that applies uniformly and equally to any other conditional use under the IDO such as in this matter.

Appellants' arguments hinge on their subjective belief that the "zoning" language in §

60-6-B-4(F) narrowly applies only to fire codes and building codes. Not only do Appellants misconstrue important terms in § 60-3A-2 and in § 60-6B-4 as it applies to this matter, but their argument is contrary to basic principles of statutory construction. To come to the point, the investigation required under the LCA by both the Director and the City is about the *"location"* and the *"zoning."* Certainly, building and fire codes may be included, but building and fire codes are generally applicable only to the building structure. The investigations required in the LCA is broader and encompasses the *"location"* which necessarily also expressly encompasses the "*zoning.*" Furthermore, while the terms "zoning" and "location" are actually included in the LCA, the terms "fire code and "building code" are not. Thus, as a simple matter of statutory construction, Appellant's argument fails. [See *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050 for statutory construction principles.]

F. The *Baker* case does not provide support for Appellants' claims

Having identified the common principles in the LCA describing the City's function as it relates to land use zoning, I now move to the *Baker* case cited by Appellants in support of their claim of preemption. As shown below, I find that *Baker* is profoundly distinguishable on its facts, and I also find that the Court's decision is inapplicable as support for Appellants' core contentions. One of Appellants' core contentions regarding the *Baker* decision is that they contend the ordinance at issue in *Baker* is similar to the ordinance provisions at issue in this matter. However, as shown below, I find Appellants are incorrect. The ordinance provisions at issue in *Baker* are appreciably distinguishable from what is at issue in this matter. In fact, the only similarity between them is that they were and are each City ordinances.

The distinctiveness of the ordinances is fundamental to my finding that *Baker* is inapplicable to this matter. This is so because at the core of the *Baker* decision was an

ordinance that *"placed significant restrictions on [existing] licenses that were lawfully obtained, regulating the sale of specific products"* [*Baker*, at p.8]. This finding was central to the *Baker* Court's analysis and finding that the ordinance was preempted by the LCA.[16] Quoting from New Mexico precedent, the Court said that the test is *"whether the ordinance permits an act the general law prohibits, or vice versa"* [*Baker*, at p.5].

At issue in the *Baker* case was an existing 2005 City ordinance, merged in the Zoning Code that expressly prohibited distilled spirits, wines, and beer from being sold in certain-sized containers and quantities within 500 feet of any K-12 school, any religious institution, and all City-owned parks and major open spaces. The ordinance took retroactive effect in that it applied to existing liquor licensed premises.[17] It also apparently accorded the City with authority to criminally prosecute offenders if existing licensees did not comply with the ordinance after a certain date.

After arguments, the Court issued a temporary injunction, temporarily enjoining the City from enforcing the law. At the second hearing during which the Court considered whether to make the injunction permanent, the Court agreed with the plaintiffs (who were a consortium of liquor licensees) that enforcement of the law would irreparably financially harm the licensees because they would likely have to either abandon their licenses or severally curtail sales to comply with the ordinance. As a result, the Court found that the ordinance devalued the existing licenses.

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16. See *ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶ 23. Generally, fact-specific analyses comparing what is alleged to be preempted with the statutory scheme that preempts the ordinance is necessary in preemption questions.

17. One of the Plaintiffs, Charlie Lee, however, was attempting to transfer a liquor license and the City conditioned its approval of the license on compliance with the ordinance.

In deciding that the City should be permanently enjoined from enforcing the ordinance, the Court also concluded that the ordinance was preempted by the LCA because it allowed the City to regulate liquor in a manner that is preempted and regulated under the LCA. In the Court's analysis to support the decision on the LCA, the Court first concluded that under the regulatory framework of the LCA as a "general law" there is no express preemption. However, the Court found that the regulatory scheme of the ordinance *"places significant restrictions on licenses that were lawfully obtained, regulating the sale of specific products."* [*Baker*, at p.8]. The Court considered if the City ordinance is preempted by implication and cited the test in *New Mexicans for Free Enterprise*, 2006-NMCA-007 to *"determining whether an inconsistency exists as whether the ordinance permit an act that the general law (LCA) prohibits, or vice versa"* [*Baker*, at p.3]. After applying the test, the Court easily found that the ordinance clearly *"regulates package size and alcoholic content in a manner inconsistent"* with the LCA [*Baker*, at p.8]. In evaluating the ordinance, the Court referenced the "zoning" provision in NMSA 1978, § 60-6B-4(F) and distinguished it from the ordinance. The Court said, *"the Legislature has not given municipalities the power to impose limitations, restrictions, or conditions on a license"* [*Baker*, at p.8].

In the present appeal, the IDO provision at issue (Use-specific Standard, § 4-3(D)(36)(c)) is incomparable to the ordinance at issue in the *Baker* case. Appellants' contentions otherwise are unconvincing. IDO § 4-3(D)(36)(c) and § 6-6(A)(3) do not place any restrictions on existing licenses in the manners that the ordinance in *Baker* clearly did. Nor do the IDO provisions cross over into regulating the packaging of liquor or hours that can be sold as was the case in *Baker*. Thus, *Baker* is distinguishable and is not support for Appellants' theory.

V. CONCLUSION

In this appeal, Appellants stipulated that the City has the police power, through zoning, to prevent bars from locating in residential zones. Appellants must also agree, then, that zoning regulations affect where a proposed liquor license can be located. As shown in detail above, it cannot be disputed that this is exactly what LCA § 60-6B-4 and § 60-3A-2 address and allow for. Without doubt, the Director, as well as the City, must investigate what zoning prohibitions apply *"before"* considering whether a liquor license can be issued under the LCA. [See § 60-6B-4 and § 60-3A-2.] The Use-specific Standard of IDO § 4-3(D)(36)(c) is no different from any other garden-variety zoning provision that either allows or prohibits liquor uses by zoning. The only real difference in this matter is, due to the proximity of the proposed uses to residential uses and zones, there are added criteria by which the uses are uniformly judged to be found permissive or prohibited uses.[18]

The conditional use criteria by which such uses are judged is a uniform test for all conditional uses that has been legislatively deemed necessary by the City Council and deemed rationally related to the uses' impacts on nearby residential uses. The conversion of liquor retail uses to conditional uses, because of the uses' proximity to residential zones has nothing to do with the regulation of liquors or the hours during which it can be sold, as was the case in *Baker*. If the conditional use criteria are not met, to protect the residential zones, then the application is denied as is my recommendation in this appeal.

Zoning of Liquor uses is expressly and manifestly recognized to have taken place before the Director takes any action on a liquor license application under the LCA. This is

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18. Certainly, Appellants must agree that it is better to allow for a conditional use process on liquor retail uses at this particular site rather than the City, through its IDO, outright prohibit the use at the site because of its proximity to residential uses.

most evident in the language of LCA § 60-3A-2 § 60-6B-4 and § 60-3A-2.

To sum up, based on substantial evidence as described above, I find:

1. As the ZHE concluded in his remand decisions, the conditions regulating the hours and type of liquor in which could be sold are unenforceable. The conditions infringe on an area of regulation exclusive to the Liquor Control Act; and

2. The ZHE condition restricting the conditional use to Murphy Oil USA is unenforceable. The restriction is beyond a zoning function and exceeds the authority of the ZHE; the condition is commensurate to regulating ownership. Succinctly stated, the condition is contrary to law. *Mechem v. City of Santa Fe*, 1981-NMSC-104; and

3. Given that the business of Murphy Oil USA would be located 39 feet from a residential zone and uses, and the business will be open until midnight, as a consequence the business uses will increase non-residential activity within 300 feet of a lot in a residential zone in violation of IDO, § 6-6(A)(3)(e); and

4. The IDO's conversion regulation in Use-Specific Standard, § 4-3(D)(36)(c), converting liquor retail uses to conditional uses when the use is sought to be located within 500 feet of a "Residential or NR-PO zone district or any group home use," is not a regulation that facially or as it is applied undermines the Director's authority under the Liquor Control Act.

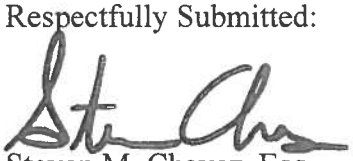
5. The IDO's conditional use test as it applies to liquor uses does not regulate liquor licenses. IDO, § 6-6(A)(3) is a uniform zoning regulation that is intended to regulate land uses.

6. Excluding the unenforceable conditions previously set by the ZHE, there are no facts in the records of this appeal that demonstrates the IDO provisions are being utilized for any purpose inconsistent with the Liquor Control Act.

I therefore respectfully recommend that the City Council deny Appellants' appeal in

full. I further recommend that the Council deny both applications for conditional uses in this matter. Finally, I recommend that the City Council reject the findings of the ZHE in his remand decisions and instead adopt the findings herein this recommendation.

Respectfully Submitted:



Steven M. Chavez, Esq.
Land Use Hearing Officer
May 11, 2020

Copies to:
Appellant (through their Attorneys)
Party Opponents
City Staff