

**Notice of Decision  
City Council  
City of Albuquerque  
October 5, 2021**

**AC-21-12** Project-2019-002291, CA-2021-00292, CA-2021-00132: Frank Comfort, Laurelwood NA, appeals the Zoning Hearing Examiners decision to approve a conditional use to allow a drive-through facility for Lot 5A1C2, El Rancho Atrisco Phase 3, located at 1901 Ladera DR NW, zoned MX-L [Section 14-16-4-2]

**Decision**

On October 4, 2021, by a vote of 6 FOR 3 AGAINST the City Council voted to accept the Land Use Hearing Officer Recommendation and Findings.


For: Bassan, Benton, Davis, Gibson, Harris, Jones  
Against: Borrego, Peña, Sena

**IT IS THEREFORE ORDERED THAT THE ZONING HEARING EXAMINER IS AFFIRMED,  
AND THE CONDITIONAL USE IS APPROVED WITH CONDITIONS**

**Attachments**

1. Action Summary from the October 4, 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: 10-7-21

Received by:   
City Clerk's Office

Date: 10/7/21

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# 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*

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Monday, October 4, 2021

3:00 PM

Via Zoom Video Conference

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#### TWENTY-FOURTH COUNCIL - FORTY-SECOND 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

Pledge of Allegiance in English and Spanish and any other language as determined by the Council

#### 3. PROCLAMATIONS & PRESENTATIONS

#### 10. GENERAL PUBLIC COMMENTS

#### 4. ECONOMIC DEVELOPMENT DISCUSSION

#### 5. ADMINISTRATION QUESTION & ANSWER PERIOD

#### 6. APPROVAL OF JOURNAL

September 20, 2021

#### 7. COMMUNICATIONS AND INTRODUCTIONS

#### 8. REPORTS OF COMMITTEES

Finance and Government Operations Committee - September 27, 2021

Public Safety Committee - September 28, 2021

**Deferrals/Withdrawals**

- c. [R-21-182](#) Establishing Corridor Improvements For 118th Street From Interstate 40 To Senator Dennis Chavez Boulevard As A Priority For The City Albuquerque Funding Processes, Encouraging The New Mexico Department Of Transportation To Prioritize The Approval And Construction Of An Interchange At Interstate 40 And 118th Street (Peña)
- A motion was made by Councilor Peña that this matter be Postponed to November 3, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- f. [M-21-11](#) F/S The City Of Albuquerque Reaffirms Its Strong Commitment To End The Drivers Of Crime, Including Criminal Firearm Use And Recidivism (Borrego)
- A motion was made by President Borrego that this matter be Postponed to October 18, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

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

- \*a. [EC-21-431](#) Approval of an Application for State Grid Modernization Grant
- A motion was made by Vice-President Gibson that this matter be Approved. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- b. [EC-21-437](#) Mayor's re-appointment of Ms. Leah Nauman (Black) to the Lodgers' Tax Advisory Board
- A motion was made by Vice-President Gibson that this matter be Confirmed. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- c. [EC-21-438](#) Mayor's reappointment of Mr. T. Zane Reeves to the Personnel Board
- A motion was made by Vice-President Gibson that this matter be Confirmed. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- d. [EC-21-439](#) Mayor's re-appointment of Mr. Tushar Patel to the Lodgers' Tax Advisory Board
- A motion was made by Vice-President Gibson that this matter be Confirmed. The motion carried by the following vote:

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

- e. [R-21-196](#) Determining Reasonable Notice Of Public Meetings Of The City Council (Borrego)

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

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

- f. [R-21-197](#) Setting The Official List Of City Council Meetings From January 2022 Through December 2022 (Borrego)

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

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

- \*g. [R-21-198](#) C/S Approving And Authorizing The Acceptance Of Grant Funds From The Department Of Commerce Minority Business Development Agency And Providing An Appropriation To The Economic Development Department For Fiscal Years 2022 Through 2026 (Borrego, by request)

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

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

- \*h. [R-21-201](#) Approving Submittal Of Grant Applications By The Parks And Recreation Department To The New Mexico Finance Authority, Water Trust Board And Providing An Appropriation To The Parks And Recreation Department For Fiscal Year 2022 (Benton, Davis, Sena, by request)

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

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

## 11. ANNOUNCEMENTS

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

- a. [AC-21-12](#) Project-2019-002291, VA-2021-00292, VA-2021-00132: Frank Comfort, Laurelwood NA, appeals the Zoning Hearing Examiners decision to approve a conditional use to allow a drive-through facility for Lot 5A1C2, El Rancho Atrisco Phase 3, located at 1901 Ladera DR NW, zoned MX-L [Section 14-16-4-2]

A motion was made by Councilor Benton To Reject the Land Use Hearing Officer Recommendation. Councilor Benton withdrew the motion.

A motion was made by Councilor Sena To Reject the Land Use Hearing Officer Recommendation. The motion failed by the following vote:

**For:** 3 - Borrego, Peña, and Sena

**Against:** 6 - Bassan, Benton, Davis, Gibson, Harris, and Jones

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

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

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

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

**\*b.** [OC-21-45](#)

Staff Recommendation to Appoint Mr. Jesse Crawford 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:** 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

### **14. FINAL ACTIONS**

**a.** [O-21-69](#)

F/S Enacting The Albuquerque Automated Speed Enforcement Ordinance To Monitor The Speed Of Travel And Enforce The Speed Limit Through Speed Enforcement Cameras (Peña, Sena, Bassan, Benton)

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

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

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

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

**A motion was made by Councilor Peña that the rules be suspended for the purpose of allowing O-21-69 to be adopted the same evening it is substituted. The motion carried by the following vote:**

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

**Against:** 1 - Davis

**a.** [O-21-69](#)

F/S Enacting The Albuquerque Automated Speed Enforcement Ordinance To Monitor The Speed Of Travel And Enforce The Speed Limit Through Speed Enforcement Cameras (Peña, Sena, Bassan, Benton)

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

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

**Against:** 1 - Davis

**b. [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 November 3, 2021. The motion carried by the following vote:**

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

**d. [R-21-195](#)**

Directing That The Civilian Police Oversight Agency Provide A Training Compliance Report For Members Of The Civilian Police Oversight Agency Board With Respect To The Training Requirements Under The Court Approved Settlement Agreement With The United States Department Of Justice, And The Civilian Police Oversight Ordinance (Borrego, Sena)

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

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

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

**For:** 7 - Bassan, Benton, Borrego, Davis, Harris, Peña, and Sena

**Against:** 2 - Gibson, and Jones

**e. [R-21-202](#)**

F/S Approving The Petition Of The Regents Of The University Of New Mexico By And Through Lobo Development Corporation, A New Mexico Nonprofit Corporation Formed Under The Research Park And Economic Development Act, And The City Of Albuquerque, New Mexico For Formation Of The South Campus Tax Increment Development District (The "District" Or "TIDD") Pursuant To The Tax Increment For Development Act, Sections 5-15-1 Through 5-15-29, NMSA 1978 And City Council Ordinance, Chapter 4, Article 10; Making Findings In Connection With The Petition And Supporting Documentation Requesting Approval Of The Formation Of The TIDD; Determining The Real Property To Be Included Within The TIDD And The Purposes For Which The TIDD Is Being Formed; Approving The Joint Application, Petition, And Financial Feasibility Study For The TIDD; Ratifying The Tax Increment Development Plan Approved For Consideration In Connection With The Formation Of The TIDD; Dedicating 75% Of The Gross

Receipts Tax Increment And 75% Of The Property Tax Increment Generated Within The Boundaries Of The District For The Financing Of Public Improvements For The TIDD, And Related Purposes Under The TIDD Act; Approving Parameters For The Issuance Of Tax Increment Bonds By The TIDD; Providing For Governance Of The TIDD Through The Appointment Of Members Of The Governing Body Of The TIDD; Providing That Tax Increment Bonds Of The TIDD And Other Obligations Of The TIDD Shall Not Be Obligations Of The City Of Albuquerque Or The University Of New Mexico; Ratifying Certain Actions Heretofore Taken; Repealing All Actions Inconsistent With This Resolution (Benton, Davis)

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

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

**Excused:** 1 - Harris

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

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

**Excused:** 1 - Harris

**\*g.** [R-21-205](#)

Approving The Petition Of The Regents Of The University Of New Mexico By And Through Lobo Development Corporation, A New Mexico Nonprofit Corporation Formed Under The Research Park And Economic Development Act, And The City Of Albuquerque, New Mexico For Formation Of The South Campus Tax Increment Development District (The "District" Or "TIDD") Pursuant To The Tax Increment For Development Act, Sections 5-15-1 Through 5-15-29, NMSA 1978 And City Council Ordinance, Chapter 4, Article 10; Making Findings In Connection With The Petition And Supporting Documentation Requesting Approval Of The Formation Of The TIDD; Determining The Real Property To Be Included Within The TIDD And The Purposes For Which The TIDD Is Being Formed; Approving The Joint Application, Petition, And Financial Feasibility Study For The TIDD; Ratifying The Tax Increment Development Plan Approved For Consideration In Connection With The Formation Of The TIDD; Dedicating 75% Of The Gross Receipts Tax Increment And 75% Of The Property Tax Increment Generated Within The Boundaries Of The District For The Financing Of Public Improvements For The TIDD, And Related Purposes Under The TIDD Act; Approving Parameters For The Issuance Of Tax Increment Bonds By The TIDD; Providing For Governance Of The TIDD Through The Appointment Of Members Of The Governing Body Of The TIDD; Providing That Tax Increment Bonds Of The TIDD And Other Obligations Of The TIDD Shall Not Be Obligations Of The City Of Albuquerque Or The University Of New Mexico; Ratifying Certain Actions Heretofore

Taken; Repealing All Actions Inconsistent With This Resolution (Benton, Davis)

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

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

Excused: 1 - Harris



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

**APPEAL NO. AC-21-12**

**PR-2019-002291, VA-2021-00292, VA-2021-00132**

**Frank Comfort in his capacity as President of the  
Laurelwood Neighborhood Association, Appellants,**

**Consensus Planning, agents for  
Unser & Ladera, LLC, Party Opponents.**

1           Frank Comfort filed this appeal on behalf of the Laurelwood Neighborhood Association  
2 (LNA, collectively “Appellants”) [R. 010]. Appellants are appealing the Zoning Hearing  
3 Examiner’s (ZHE’s) decision granting a permit for a drive-up facility as an accessory  
4 conditional use on land owned by Unser & Ladera, LLC (Applicants/ Party Opponents).  
5 Because of the LNA’s proximity to the site at which the conditional use was granted, the LNA  
6 have standing to appeal the ZHE’s decision under IDO § 6-4(V)(2)(a)(5) in the November  
7 2020 update which is applicable to this appeal.

8           After reviewing the record, listening to the arguments of the parties, and carefully  
9 considering the issues, the facts in the record, and the ZHE’s findings and conditions of  
10 approval, I respectfully recommend that the City Council deny the appeal. Succinctly stated,  
11 although somewhat veiled in the ZHE’s decision (which seems to have been somewhat  
12 misunderstood by both parties), the ZHE did in fact find that there is substantial evidence that  
13 the proposed use will create material adverse impacts to the roadway system near the site, and  
14 in so doing the ZHE prescribed a mandatory manner of mitigating the impacts; he required the  
15 applicants to perform a traffic impact study (TIS) for the drive-up use. As shown below, under

the circumstances, the ZHE did not abuse his discretion or otherwise err in applying the IDO to the facts presented. Contrastingly, the Appellants did not demonstrate that the ZHE's decision regarding mitigation (requiring a mandatory TIS) is not sufficient mitigation under the IDO.

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

As stated above, the November 2020 IDO is the applicable update from which the application is to be evaluated.<sup>1</sup> The address of the site at which the proposed drive-up use will be located is 1901 Ladera Drive, NW [R. 136]. The site encompasses approximately 1.588 acres of vacant land and is physically on the Northeast side of the intersection of Unser Blvd. and Ladera Drive [R. 136]. The entire 1.588-acre parcel is zoned MX-L [R. 103]. The Heritage Neighborhood Marketplace development (Heritage Marketplace) is located directly across the street on the South side of Ladera Drive [R. 086]. One of two access driveways for the Heritage Marketplace (on Ladera Drive) is also an unsignalized intersection, which will be shared, but on the opposite side of Ladera Drive (separated only by a center median). This unsignalized intersection (Driveway "A") is also the single access driveway for the conditional use [depicted in R. 082,].

In their application to the ZHE, the applicants, through their agent, Consensus Planning, represented the applicants throughout the application process for the conditional use [R. 059]. The record includes an approved site plan for subdivision in which the drive-up facility is

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1. As shown below, the application was submitted, scheduled for hearing, and a hearing was held when the November 2020 IDO update was still in effect. The subsequent IDO, effective, July 30, 2021 is inapplicable in this appeal.

described and contemplated at the site. Although the site plan for subdivision is not an approval of the drive-up facility use, it does include three modest design standards for the drive-up use [R. 152].

The record also includes a previous June 19, 2019 decision in which the ZHE granted a similar conditional use approval for a similar drive-up facility use at the same project site, presumably with the same building footprint at the site where the drive-up facility is proposed in this matter [R. 146]. Apparently because no development of the land had commenced pursuant to § 6-4(W)(2)(a) (the IDO in effect in June 2020), the 2019 conditional use approval expired one year after it was approved and is no longer valid.<sup>2</sup> It's worth emphasizing that there is no dispute that the previous conditional use that was approved by the ZHE in June 2019, is now expired and invalid [R. 136].

In mid-March 2021, Consensus Planning sent the affected neighborhood associations, including the LNA Appellants, notice of the impending new application for the conditional use [R. 074].<sup>3</sup> In the Consensus Planning email notice to the associations, the proposed use was disclosed as a *"drive-up service window in conjunction with a restaurant as an Accessory Conditional Use"* [R.074].<sup>4</sup> At approximately the same time, the applicants' agent also

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2. The May 2018 IDO update was in effect when the conditional use expired. The provisions regulating expiration of conditional uses has essentially remained unchanged in the November 2020 IDO update which was in effect at the time when the ZHE approved the use appealed herein this matter.

3. Along with Appellants, the affected neighborhood associations also include the Tres Volcanes Neighborhood Association, the Westside Coalition of Neighborhood Associations, and the Ladera West Neighborhood Association [R.081].

4. The applicants' agent advised the ZHE, that because the applicants do not have a tenant for either the drive-up use or the primary restaurant use, the *uses* may change when a tenant is found (primary and accessory) [R. 174].

52 requested a neighborhood facilitated meeting with the affected neighborhood associations [R.  
53 078-081]. A City sponsored facilitated meeting was held with the applicants and the  
54 neighborhood associations on April 6, 2021 [R. 093-098]. I note that the facilitator reported  
55 that at the facilitated meeting, the applicants again described the proposed drive-up use as  
56 being necessary for a preferred restaurant use [R. 096].

57 Then, presumably to discuss reapplying for the drive-up use, on April 7, 2021, the  
58 applicants through their agents met with City Planning Department Staff in a required pre-  
59 application review team meeting (PRT) [R. 063]. The record of the PRT meeting demonstrates  
60 that a City Transportation Planner/ Engineer advised the applicants that a TIS may be  
61 warranted [R. 070]. Thereafter, on May 3, 2021, a new application for the conditional use was  
62 submitted to the ZHE [R. 059]. On June 3, 2020, City Senior Traffic Engineer, Matt Grush,  
63 P.E., notified the ZHE in an interoffice memorandum that the Transportation Development  
64 Review Section Staff of the city Planning Department did not have any objections to the  
65 conditional use request for the drive-up use proposed in the application [R. 155]. In the  
66 application narrative, explaining the purpose for the drive-up service window, the applicants'  
67 agent wrote that they are:

68 ...proposing a drive-through for one of the buildings to support a  
69 proposed **restaurant** use, which is the subject of this application  
70 [R. 136]. (Emphasis added).  
71

72 With the application, a conceptual site plan was also submitted to the ZHE showing the  
73 proposed use, the automobile stacking/queuing for the drive-up use, the building footprint for  
74 the prospective restaurant use, the single Driveway "A" access from Ladera Drive, and the  
75 parking for the restaurant use [R. 150-152]. It is undisputed that subject to the Use Specific

Standards in the applicable IDO, restaurants, as primary uses, are permissive uses in a MX-L zone and drive-up facilities are conditional accessory uses [IDO, Table 4-2-1].

On June 15, 2021, the ZHE held a public hearing on the application [R. 171-188]. On June 30, 2021, the ZHE issued his official decision granting the conditional use with conditions [R. 005-008]. The LNA filed their timely appeal on July 15, 2021 [R. 009]. An appeal hearing was held on September 10, 2021.

## **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(V)(4)]. At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. Under the IDO, the Land Use Hearing Officer (LUHO) has been delegated the authority to make recommendations to the City Council to affirm, reverse, or otherwise modify the appealed decision to bring it into compliance with the standards and criteria of the IDO. The City Council has also delegated authority to the LUHO to independently remand appeals.

## **III. DISCUSSION**

In their appeal, the LNA contend that the applicants should have completed a TIS *before* presenting their application to the ZHE. Because the ZHE did in fact conclude that the drive-up use will create material adverse impacts, Appellants did not explain how a TIS

98 preceding the application, as opposed to later in the city review process, would have assisted  
99 the ZHE in his decision. Curiously though, Appellants did not make any attempt in this appeal  
100 to explain how the ZHE erred by requiring the TIS as the means for mitigating the impacts.  
101 Perhaps, because Appellants are asking that the City Council deny the conditional use,  
102 Appellants believe that there can be no means of sufficiently mitigating the impacts. To the  
103 point, Appellants seem to speculate that if the ZHE had the TIS findings in hand while deciding  
104 on the application, the application would have been denied. However, as explained below,  
105 Appellants not only did not make this argument, but they also failed to present any evidence  
106 to demonstrate that the impacts cannot be mitigated.

107         The applicants through counsel contend however, that the ZHE's condition of approval  
108 which requires a TIS in the aftermath of the ZHE's approval but before a building permit can  
109 be issued, addresses what is required in the IDO, specifically in § 6-6(A)(3)(d).<sup>5</sup> Principally  
110 because the ZHE concluded that the drive-up use will create material adverse impacts, and that  
111 Appellants' theory regarding mitigation is based only on speculation, I agree with the  
112 applicants that the purpose of requiring a prospective TIS is to ensure that the impacts will be  
113 mitigated if the applicants seek a building permit for the drive-up use.

114         Thus, the real issue buried in Appellants' argument is not whether the applicants should  
115 have performed a TIS *before* the applicants presented their application to the ZHE or whether  
116 the drive-up use will create adverse impacts to the roadway system at the site. The evidence  
117 shows that the Appellants already demonstrated this, and that the ZHE in fact found (although

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5. It should be noted that the requirement of a TIS was not the only condition of the ZHE's approval. The ZHE also required that the applicants satisfy other requirements in the IDO. These other conditions (which can be found at R. 008) were not challenged by Appellants in their appeal and are not discussed further.

somewhat ill-defined in the decision), that the drive-up use will create material adverse impacts to the road system. The underlying issue is whether requiring a TIS satisfies the IDO as a means to sufficiently mitigate the impacts. This is so because in the IDO, when the ZHE finds a use will create material adverse impacts, and if the ZHE approves the use, the ZHE is obligated to require that those impacts are sufficiently mitigated.

Denying the application is an option but only if mitigation cannot be shown to be achieved. In this appeal, although Appellants failed to present any evidence to support a finding that the material impacts cannot be mitigated, it is prudent to discuss the ZHE's condition requiring a TIS, and to further discuss what a TIS entails. However, before discussing the TIS as a method of mitigation, the evidence in the record must be briefly discussed to add context to, and to identify, what the precise material adverse impacts are that need to be mitigated.<sup>6</sup>

As stated above, there clearly exists substantial evidence in the record that the roadway system providing ingress and egress to the proposed site exists in a state of significant congestion and that the proposed drive-up use at the site will only exacerbate the system. Significant proof of this is in the ZHE's Finding Number 16 and in Condition Number 3 in which the ZHE generally declared with the finding and then with a condition of approval, the following:

16. Based on evidence submitted by the Applicant, the requested conditional use 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. While neighbors offered evidence and testimony that traffic would increase,

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6. Although not a fatal flaw, the ZHE did not make any *specific* finding(s) identifying what the precise adverse material impacts are that must be mitigated.



the City Traffic engineer did not object to the Application. Further, the Applicant proposed to take steps to mitigate any material adverse impact; namely, to condition further development approvals on providing a traffic impact study and to limit the Subject Property to only one (1) drive-through facility [R. 007]. (Emphasis added.)

ZHE Condition number 3 states in full:

3. Further development approvals are conditioned on Applicant or its agent providing a traffic impact study pursuant to Article 7-5(D) of the Development Process Manual, *notwithstanding the thresholds* or mitigation requirements in the Development Process Manual, which the City may use as the basis to require further mitigation of the traffic generated by the use through conditions of approval [R. 008]. (Emphasis added.)

Although perhaps not plainly apparent in the way it is written (because it starts out with the phrase “*will not create...*”), logically by concluding that there will be “*sufficient mitigation*” and that the applicants will “*take steps to mitigate any material adverse impacts,*” the ZHE unquestionably concluded that there is substantial evidence the drive-up facility will create material adverse impacts requiring mitigation. Otherwise, the ZHE’s mitigation verbiage in Finding Number 16 and, for that matter, in Condition Number 3 would be superfluous. See IDO, § 6-6(A)(3)(d); Mitigation is only necessary if material adverse impacts are found. Just so there is not any question on this issue, or on the ZHE’s expressed intent in his decision, for context regarding the seriousness of the impacts and what those impacts are, it is worth briefly going over the evidence in the record that clearly supports the ZHE’s underlying, but somewhat hidden, premise regarding the impacts.

At the ZHE hearing, the Appellants and other witnesses who testified primarily focused on *automobile traffic* in the area and specifically at a particular unsignalized driveway intersection—Driveway “A.” To demonstrate that the traffic problems at the adjacent unsignalized Driveway “A” on the South side of Ladera Drive is already adversely impacted



172 by neighboring uses, Appellants supplemented the record with a 2014 Traffic Impact Study  
173 (TIS) regarding the nearby Heritage Marketplace development.<sup>7</sup> The 2014 TIS provides  
174 context regarding the seriousness of the problems raised by Appellants at the ZHE hearing.  
175 There were no objections to including the 2014 TIS into the record. Among the various use  
176 assumptions studied by the Traffic Engineer in the 2014 TIS was that the 20-acre Heritage  
177 Marketplace site would include (among other uses) four restaurant uses, two of which would  
178 also have accessory drive-up facilities [R. 023]. Although the 2014 TIS is inapplicable to the  
179 site at which the conditional use is located in this matter, Appellants used it to specifically  
180 demonstrate that (1) the unsignalized access driveways to Ladera Drive and to Unser Blvd.  
181 near the intersection of Unser Blvd. and Ladera Drive are already heavily overburdened, and  
182 (2) that restaurant drive-up facilities in general produce nearly double the number of  
183 automobile trips than do restaurant uses without drive-up facilities [See TIS, R. 033-037 for  
184 intersection queuing, and R. 023 for trip generation]. The 2014 TIS also demonstrates that the  
185 adjacent unsignalized Driveway “A” access intersection on Ladera Drive (on the South side)  
186 is overburdened. It is also worth mentioning that testimony from the applicants’ Engineer in  
187 the appeal hearing confirmed that none of the several mitigation measures recommended in  
188 the 2014 TIS have been implemented. Coupled with the high number of trips produced with  
189 drive-up facilities, the 2014 TIS illustrates that another drive-up facility in the area will likely

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7. The 2014 TIS was completed by a Traffic Engineer in December 2014 and its scope included several unsignalized access driveways and streets as well as the signalized intersection of Unser Blvd. and Ladera Drive. Its purpose was to “*identify the impacts of the [Heritage Neighborhood Marketplace] development*” which is located on the Southeast Corner of the Unser Blvd. and Ladera Drive intersection and directly across the street from the proposed conditional use site in this matter [R. 019].

190 make the traffic conditions worse, particularly at Driveway “A.”

191 In addition, at the ZHE’s hearing, using anecdotal evidence, four lay witnesses, who  
192 presumably reside nearby and drive these streets, testified that there have been several recent  
193 automobile crashes at or near Driveway “A,” and that adding another drive-up facility to the  
194 area, will only add significantly more congestion to the already overburdened road systems in  
195 the area, and again, particularly to Driveway “A” [R. 178 185].

196 In response, at the ZHE hearing, the applicants, through their agents, argued that the  
197 traffic conditions have not changed much from when the ZHE approved the drive-up use in  
198 2019 (now expired) [R. 173]. However, I find that even if traffic conditions from 2019 have  
199 not changed, this fact does not weaken Appellants’ argument or diminish that there is  
200 substantial evidence supporting a finding that the traffic congestion on Driveway “A” is an  
201 existing problem and that adding another drive-up use will make the traffic problem there  
202 worse. On this issue, the traffic congestion testimony was not rebutted. In fact, the applicants’  
203 agent, James Strozier, candidly *“acknowledge[d] that there is a lot of traffic at the*  
204 *intersection”* of Unser Blvd. and Ladera Drive [R. 187].

205 Accordingly, there is substantial evidence in the record supporting the shrouded  
206 premise in ZHE Finding Number 16 that the conditional use will create material adverse  
207 impacts. The fact that the ZHE did not expressly state it more clearly, or precisely identify  
208 what the impacts are is not grounds for reversal or for remand because the ZHE’s intent to  
209 mitigate the impacts is clearly expressed and once the ZHE finds that a use will create adverse  
210 impacts, the ZHE’s goal (and the objective in the IDO) shifts to mitigation.

211 As stated above, the Appellants did not challenge the ZHE’s requirement of a TIS as a

mitigation measure. Regarding the TIS, Appellants only contend that a TIS should have been required earlier in the review process. I find that the ZHE did not abuse his discretion or otherwise err by not requiring a TIS with the application before the ZHE heard the matter in a hearing. In fairness, even when the evidence supports a finding of adverse impacts under IDO, § 6-6(A)(3)(d), there is no requirement in the IDO in which demands that a TIS be submitted with a conditional use application, nor have Appellants identified such a precondition. The ZHE has the reasonable discretion, and he exercised it prudently, to require that the applicants perform a TIS later in the city review process specifically as a means for mitigation.

Considering that producing a full-scale TIS is expensive and potentially not necessary if the applicants do not seek a building permit for the *drive-up use* because a tenant is never acquired at the site, the ZHE's condition is reasonably calculated to address the issues of mitigation at the building permit phase. Notably though, the parties on both sides to this appeal are under a misconception that a TIS may not be necessary if the *primary* use is changed from a restaurant use to a less intensive use, not meeting the trip thresholds in the DPM. As shown below, the ZHE made a TIS mandatory "*notwithstanding thresholds.*" That is, regardless of the primary use, if there will be a drive-up use, a TIS must be completed.

Oftentimes the ZHE routinely sets conditions of approval requiring that an applicant take affirmative steps to meet certain conditions before a building permit can be issued. The ZHE's review is not the end of the city's review process. In this matter, before a building permit can be issued for the drive-up use, the mandatory requirement of a TIS triggers additional levels of expert review. This is permissible and anticipated in the IDO. In IDO, § 6-4(Q)(2), the ZHE may "*impose conditions on the approval necessary to bring the application*

234 *into compliance” with what is required in the IDO or in the DPM or both.”* In fact, conditions  
235 that are rationally related to fulfilling the IDO and the ZHE’s intent in setting the conditions,  
236 including a mandatory condition to mitigate the “negative impacts of the proposed  
237 development” are expressly contemplated and even anticipated under IDO, § 6-4(Q)(2) and in  
238 § 6-6(A)(3)(d). Without proof from Appellants demonstrating otherwise, I find that a  
239 prospective but mandatory TIS is rationally related to the fulfillment of the IDO and in turn  
240 satisfies § 6-6(A)(3)(d). Again, Appellants did challenge the ZHE’s condition requiring a TIS  
241 as a means of mitigation.

242 As referenced above, although not challenged specifically, the implicit underlying issue  
243 in this appeal is whether the condition requiring a TIS stands up to the necessity of “sufficient  
244 mitigation” under the IDO. As stated above, when material adverse impacts are found with a  
245 proposed conditional use, it must then be shown that the use can be sufficiently mitigated  
246 [IDO, § 6-6(A)(3)(d)].<sup>8</sup> Regarding the proposed use, the third prong in IDO, § 6-6(A)(3)(d)  
247 states in full:

248 It will not create material adverse impacts on other land in the  
249 surrounding area through increases in traffic congestion, parking  
250 congestion, noise, or vibration *without sufficient mitigation* or civic  
251 or environmental benefits that outweigh the expected impacts [IDO,  
252 § 6-6(A)(3)(d)]. (Emphasis added.)

253  
254 It bears repeating that if a proposed conditional use is found to “create material adverse  
255 impacts” the ZHE has two options: The ZHE may deny the use or approve the use but not  
256 “without” ensuring that either “sufficient mitigation” or that there are “civic or environmental

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8. There are a total of five prongs in which applicants must satisfy in IDO, § 6-6(A)(3). Appellants’ appeal rests on only the fourth prong which requires “sufficient mitigation.”

benefits that outweigh the expected impacts” of the use are in place. In this matter, the ZHE required “sufficient mitigation” to address the material impacts.

Unfortunately, the term “sufficient mitigation” is nowhere defined in the IDO. In § 6-6(A)(3)(d), the word “sufficient” is used as an adjective, and the most common dictionary definition of it means “*enough to meet the needs of a situation or a proposed end.*”<sup>9</sup> The legal definition is similar to the ordinary meaning above which is “*adequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object.*”<sup>10</sup> With these definitions in mind, the question becomes: Is performing a TIS adequate or enough as may be necessary to accomplish the object of “mitigating” the material adverse impacts of the drive-up use at the site?

The TIS is mandatory for the conditional drive-up use in Condition Number 3, and it is specifically to be utilized to “*require further mitigation of the traffic generated by the use through conditions of approval*” [See above, Condition Number 3, and in R. 008]. Thus, regardless of the speculative primary use which the applicants admitted might change, mitigation must be thoroughly reviewed through a TIS. Stated another way, if a drive-up use goes to a building permit phase at the site, regardless of the primary use, a TIS must be performed to assess impacts and it may be used to “*require further mitigation*” through the review and evaluation process by city Planning Staff. That is the clear stated intent expressed as a condition of the ZHE’s approval.

The mandatory nature of the ZHE’s Condition number 3 is significant as a starting point

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9. See <https://www.merriam-webster.com/dictionary/sufficient>.

10. See <https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionary.pdf>.

for mitigation measures because it is the first step to a comprehensive evaluation of how to appropriately mitigate the impacts of the use [See generally DPM, Article 7-5]. And although under certain circumstances, the City Traffic Engineer ordinarily could waive a TIS under criteria in the DPM, in this matter a TIS cannot be waived if the applicants wish to go to the building permit phase of review for the drive-up use.

Noting the ordinary meaning of “sufficient” detailed above, I find further that under the circumstances, a mandatory TIS qualifies as “sufficient mitigation” under IDO, § 6-6(A)(3)(d) because realistically it is the most appropriate method to “*require further mitigation of the traffic generated by the use through conditions of approval*” [ZHE Condition No. 3]. Without a TIS and without its evaluation by experts in traffic engineering, a clear understanding of how to mitigate the material adverse impacts on Driveway “A” cannot be properly accomplished. There are many specialized processes involved in creating a TIS that involves not only the applicants’ retained traffic engineer(s), but the process necessarily also involves the city’s traffic engineers as well.<sup>11</sup> Furthermore, sufficient mitigation measures may take various forms including offsite and or onsite roadway improvements and onsite and or offsite infrastructure changes or improvements [DPM, § 7-5(E)(9)]. The DPM lays out an elaborate process for how a TIS is to be competed, interpreted, and negotiated by the city’s experts. A TIS will reveal the best options available to the city traffic engineers so that they can better assess how to mitigate the impacts. Under the circumstances, after finding that the drive-up use will create material adverse impacts, it was not unreasonable or an abuse of discretion for

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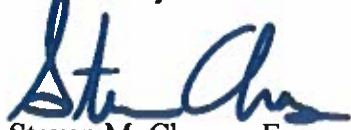
11. See the DPM, Part 7-5 for the many all-encompassing specialized steps involved that require very focused expert analyses by experts in traffic engineering.

the ZHE to hand-over the specialized tasks involved with a TIS to the City's experts for their input and evaluation.

#### IV. CONCLUSION

Despite Appellants' contentions, the ZHE did not err in requiring a TIS when he did. He correctly concluded that the conditional use does create material adverse impacts on the roadways, and he appropriately addressed the impacts by requiring the applicants to perform a mandatory TIS as the method for identifying what measures will sufficiently mitigate those impacts. Connecting the TIS requirement to the drive-up use, rather than to the primary use is a permissible condition under IDO, § 6-4(Q)(2). Furthermore, under the circumstances, requiring a TIS is the best manner of making sure that the appropriate mitigation is achieved under IDO, § 6-6(A)(3)(d). Allowing the experts to evaluate appropriate and sufficient mitigation through a TIS achieves the goal of mitigation without undue expense in the event the applicants do not proceed to the building permit phase for the drive-up use. Accordingly, I respectfully recommend that the appeal be denied and that the ZHE's decision be upheld.

Respectfully Submitted:



Steven M. Chavez, Esq.  
Land Use Hearing Officer  
September 24, 2021

Copies emailed to:

Appellants and Party Opponents  
ZHE  
City Council and Staff