

The following comments will be provided to the City Council by Council staff for the November 6, 2017 Council meeting.

AC-17-9: Appeal of the Approval of a Conditional Use Permit to for Alcohol Sales

{ACCEPT or REJECT}

I. Introduction:

A. This is an appeal of the Board of Appeals for Zoning Special Exceptions (the “BOA”) – the body charged with hearing appeals from decisions of the Zoning Hearing Examiner (the “ZHE”). The ZHE denied a Conditional Use Permit (a “CUP”) for package liquor sales within 500 feet of a residential zone finding that, in this particular instance, it would be injurious to the neighborhood.

B. The applicant for the CUP, Southwest Convenience Stores LLC., appealed the ZHE’s decision to the BOA. In its review, the BOA reasoned that the ZHE erred in its review of certain evidence and ultimately reversed the ZHE’s decisions, effectively approving the conditional use permit. The BOA’s decision was then appealed to the City Council by the Highland Business and Neighborhood Association (the “Appellant”), and referred to the Land Use Hearing Officer (the “LUHO”).

C. The LUHO determined that the BOA misunderstood its task and authority as set forth by ordinance, and erred in its reversal of the ZHE. Primarily, it misunderstood that the *applicant* for a conditional use permit bears the initial burden of showing that the proposed use will not be injurious to the surrounding area. The LUHO found minimal record evidence by the applicant as to “non-injury,” but found substantial evidence in the record supporting ZHE’s decision to deny the CUP. Specifically, opponents presented a significant amount of evidence tending to demonstrate injury to the surrounding neighborhood in this case. Accordingly, the LUHO recommends that the BOA be reversed, that the ZHE’s decision be upheld, and that the CUP for package liquor within 500 of a residential zone be denied.

II. Background:

A. The subject site is located at 4510 Lomas Boulevard N.E. (Southeast corner of Lomas and Washington). [R. AC-7] The subject site is zoned C-2, and houses a Seven-Eleven convenience store and gas station that does not presently feature liquor sales. [See R. AC-7]

B. Where a C-2 site is located within 500 feet of a residential zone, “[r]etail sale of alcoholic drink for consumption off premise . . .” (i.e. package liquor sales) is possible only through approval of a conditional use permit. [Zoning Code § 14-16-2-17(B)(18)] Here, the subject site is approximately only 55-feet from a residential zone at both its southeast and southwest corners. [R. AC-7]

C. In order for a Conditional Use Permit to be approved for this use at this location, the applicant bears the burden of showing that the proposed use “[w]ill not be injurious to the adjacent property, the neighborhood, or the community.” [Zoning Code § 14-16-4-2(C)(emphasis added)]

D. The ZHE denied the CUP at this location finding that the proposed use *would* be injurious to adjacent property or the community. [R. 19, FOF 57] This determination was based in particular on existing impacts on this neighborhood from alcohol abuse; scientific papers in

the record showing a link between alcohol-establishment density and exacerbation of such problems; and police calls for service data showing substantially elevated calls for service for similar stores that sell alcohol. [R. 19, FOF 56]

E. On appeal, the BOA determined that the ZHE erred in relying on this evidence because it wasn't site-specific enough, and did not factor in proposed "voluntary conditions" that would limit the sale of certain alcoholic products like miniatures. [R. AC-10, FOF 12, 14] The BOA reversed the ZHE, and approved the CUP. [R. AC-10, FOF 15]

III. LUHO Findings & Recommendation:

A. The LUHO determined that the BOA fundamentally erred in its review of this matter. Pursuant to the zoning code, the *applicant* for a conditional use has the burden of showing that a proposed conditional use permit will not be injurious to the neighborhood. [LUHO, 6:127 (citing Zoning Code § 14-16-4-2(C))] And on appeal, the BOA's task is to first determine whether the applicant met this burden by substantial evidence. [LUHO, 6:121 – 123] However, the BOA did not perform this task and instead only evaluated the opponent's case against the CUP, as opposed to holding the applicant to its burden. [See LUHO, 6:123]

B. When reviewing this matter as required by the zoning code (i.e. determining first whether the applicant met its burden to show non-injury) the LUHO identified "less than minimal evidence" that the use will not cause harm to the neighborhood. [LUHO, 7:131] Accordingly, the BOA did not have a basis to reverse the ZHE where there the applicant provided insufficient evidence that the proposed CUP would not be injurious.

C. On the other hand, the Appellant proffered a large body of evidence on the issue of harm which showed data and studies that: 1) the impacted neighborhood has many existing problems of DWI, higher crime compared to other areas of the City, homelessness, vagrancy, alcohol and substance abuse; 2) that the increasing availability of alcohol sales in such a neighborhood will exacerbate these problems – thus causing injury. [LUHO, 7:145 – 150; 8:168 – 172]

D. Not only did the applicant fail to show that its CUP would not injure the neighborhood, it also failed to offer competent evidence to specifically rebut the "mountain of evidence" that the CUP would worsen neighborhood problems. [LUHO, 10:203 – 208] Instead, the applicant asserted that it would upgrade its security cameras, that Seven-Eleven is a responsible alcohol seller, that the site is buffered by commercial (although still within only 55 feet of a residential zone), that laws limiting who alcohol can be sold to mitigates neighborhood concerns, that a small-brewer license was recently approved nearby which may sell growlers, and that it would voluntarily decline to sell miniatures. [LUHO, 10:209 – 11:220] The LUHO determined that this data alone does not demonstrate non-injury in this case, nor does it otherwise adequately rebut the evidence of injury proffered by Appellants.

E. The BOA's ultimate error was that it focused on whether those opposed to the CUP adequately demonstrated injury as opposed to whether the applicants adequately demonstrated non-injury. [LUHO, 13:262 – 265] And on review, there is inadequate evidence in the record that the proposed CUP will *not* be injurious to the neighborhood, and there is actually substantial evidence to the contrary. [LUHO, 13:267 – 274] Accordingly, the LUHO determined that the ZHE should be upheld and that the CUP should be denied.

Legal Standards:

- A. Requirements of the Underlying Zoning** – Within the C-2 Zone, “[r]etail sale of alcoholic drink for consumption off premises, where the portion of the building used for such business is within 500 feet of a residential zone” may be permitted only upon approval of a conditional use permit. **[Zoning Code § 14-16-2-17(B)(18)]**

- B. Conditional Uses** – A Conditional Use Permit may be approved only if the applicant presents sufficient evidence that that the use :
 - a. Will not be injurious to adjacent property, the neighborhood, or the community; [and]
 - b. Will not be significantly damaged by surrounding structures or activities.” **[Zoning Code § 14-16-4-2(C)]**

- C. Appeals** – On appeal, the Council considers whether:
 - a. There was an error in applying the above referenced ordinances or other City plans or policies;
 - b. There was an error in the action or decision, including a factual error; and/or
 - c. The decision was made arbitrarily, capriciously, or was a manifest abuse of discretion. **[Zoning Code § 14-16-4-4(B)(4)]**
 - d. The Council may decide an appeal based on whether there is a preponderance of evidence supporting the outcome, it may reweigh the evidence, or it may accept supplemental evidence when appropriate. **[Zoning Code § 14-16-4-4(E)(7)]**

Council Options:

1. Accept LUHO Recommendation & Findings – The Council may accept the LUHO recommendation and findings in which case the decision of the BOA will be reversed, the ZHE will be affirmed, and the CUP for alcohol sales will be denied;
2. Accept LUHO Recommendations & Adopt Different Findings – The Council may accept only the LUHO recommendation in which case the decision of the BOA will be reversed, the ZHE will be affirmed, and the CUP for alcohol sales will be denied pursuant to the Council’s own independent findings, adopted now or at a later meeting, based only on the evidence in the record; or
3. Reject LUHO Recommendation – The Council may reject the LUHO recommendation in which case this matter would be scheduled for a full hearing at the next City Council Meeting.