



**Environmental  
Planning  
Commission**

**Agenda Number: 2  
Project Number: 1001620  
Case Number: 08EPC 40009  
April 17, 2008**

**Supplemental Staff Report**

<b>Agent</b>	City of Albuquerque Planning Department
<b>Applicant</b>	City of Albuquerque City Council
<b>Request</b>	<b>Text Amendments to §14-12-10 ROA 1994, the Appeals Section of the Landmarks and Urban Conservation Ordinance, and to §14-16-4-4, the Appeal Section of the Zoning Code</b>
<b>Location</b>	City-wide
<b>Zoning</b>	NA

**Staff Recommendation**

*That a recommendation of APPROVAL of Text Amendments to Zoning Code §14-16-4-4, the portion of 08EPC 40009 over which the EPC has review authority, be forwarded to the City Council based on the Findings beginning on Page 6 and the Conditions of approval beginning on Page 8.*

**Staff Planner  
Catalina Lehner, AICP-Senior Planner**

**Summary of Analysis**

This proposal consists of text amendments to §14-12-10 ROA 1994, the Appeals Section of the Landmarks and Urban Conservation (LUCC) Ordinance, and to §14-16-4-4, the Appeal Section of the Zoning Code. The EPC’s task is to make a recommendation to the City Council regarding the proposed changes to §14-16-4-4 only, since the EPC does not have review authority regarding §14-12-10. This proposal was deferred for 30 days at the March 20, 2008 EPC hearing.

The proposed text amendments, which will address certain issues that have arisen during the appeal process, are intended to clarify: 1) who can appeal Staff decisions to the LUCC Commission, 2) submission of written information, 3) hearing officer recommendations, and 4) existing language. The proposed text amendments generally further the intent of the City Charter, the Zoning Code and the Comprehensive Plan, and will help promote citizen participation in the appeals process.

This proposal was advertised via e-mail to neighborhoods, in the neighborhood news and on the City’s website. Staff received two comment letters expressing a few concerns. Staff recommends that an Approval recommendation on the Zoning Code portion of this proposal be forwarded to the City Council.

City-wide

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City Departments and other interested agencies reviewed this application from 2/11/2008 to 2/22/2008. Agency comments used in the preparation of this report begin on Page 16 of the original March 20, 2008 Staff report (attached).

At its March 20, 2008 hearing, the Environmental Planning Commission (EPC) voted to defer this proposal for 30 days to the April 17, 2008 hearing. The EPC wanted to provide additional time so the Board of Appeals (BOA) could submit comments prior to the proposed Bill being forwarded to the City Council. The EPC also requested that City Legal, meaning the representative from Council Services, be present at the April hearing.

## ***I. INTRODUCTION***

### ***Proposal (repeated from the March Staff report)***

This proposal is for text amendments to §14-12-10 ROA 1994, the Appeals Section of the Landmarks and Urban Conservation (LUCC) Ordinance, and to §14-16-4-4, the Appeals Section of the Zoning Code, sometimes referred to as the appellate rules. The proposed text amendments are intended to clarify: 1) who can appeal Staff decisions to the LUCC Commission (§14-12-10), 2) submission of written information (§14-16-4-4), 3) recommendations and use of a hearing officer (§14-16-4-4), and 4) existing language (§14-16-4-4). The idea is to address certain issues that have arisen during the appeal process and to provide clarifications that have been needed for some time now.

### ***Environmental Planning Commission (EPC) Role (repeated from the March Staff report)***

The EPC's task is to make a recommendation to the City Council regarding the proposed changes to §14-16-4-4 of the Zoning Code *only*. The City Council is the City's Zoning Authority and the EPC is a recommending body. The City Council also has authority regarding §14-12-10, the LUCC ordinance, but in this case the EPC does not make an official recommendation because it does not have review authority.

### ***Background and Context***

⇒ Please refer to the original March 20, 2008 Staff report beginning on p. 1 (see attachment).

## ***II. ISSUES***

⇒ Please refer to the original March 20, 2008 Staff report, beginning on p. 1 (see attachment), for a discussion of the following issues: standing, submission of written information, recommendations of the hearing officer/remands and language improvements.

The following is an update regarding standing and submission of written information, since these issues have been raised in comments received during the deferral period. The "New Information" category has been added to address concerns expressed at the March EPC hearing.

### ***New Information***

At the March 20, 2008 EPC hearing, concern was expressed regarding the submission of new information. This was due to an apparent contradiction between p. 7, Lines 9-10 and p. 5, Lines 17-19 of

O-08-6. The former (p. 7) deals with new written information and the latter (p. 5) deals with new evidence at a hearing, both within the context of an appeal.

Planning Staff was tasked to find out if the intent of the Bill is to allow submission of new information or not. After consulting with Council Services staff, Planning Staff reports the following: There is no contradiction. Rather, these are separate issues. In an appeal, new written argument cannot be submitted; written information cannot be cross-examined. At a hearing, however, people can testify. If some key information can be considered new, and is critical to the decision making process, then the idea is to allow the new information at the hearing as long as it is not in written form.

***Standing*** (see also the March 20, 2008 Staff report)

In this context, standing means that a person has the right to appeal a decision. A comment was received from the Board of Appeals (BOA) regarding the definition of “party”. The suggestion is to cross-reference 14-16-4-4(B)(2), which states “the following persons shall have the right to file appeals” and then lists the five circumstances in which the persons would have standing to file an appeal. Note that (B)(2)(e) states that “any person who demonstrates a personal or pecuniary interest or property right adversely affected by the decision, which right or interest is more than merely nominal or remote” has the right to file an appeal.

Council Services staff clarifies the meaning of this language. A person who has the right to file an appeal is currently defined quite broadly in 14-16-4-4. Just because a person has the right to file an appeal, however, does not mean that they automatically become a party to an appeal. Council Services staff believes that the definition of “party” is sufficiently clear legally and does not suggest cross-referencing 14-16-4-4(B)(2) or adding a definition.

***Submission of Written Information*** (see also the March 20, 2008 Staff report)

A comment was received regarding who can submit written argument to an appellate body (see attachment). The proposed language, found on p. 7, Lines 8-16 of O-08-6, states that “any party to an appeal” may submit written argument. The individual suggests that “any party” be more inclusive and allow all affected parties to submit written argument. Council Services staff points out that the proposed language, based on New Mexico case law, is intended to ensure that non-parties to an appeal do not submit written argument in that appeal.

A comment was received from the Board of Appeals (BOA) about timing of the filing of written arguments. Currently, p. 7, Lines 9-11 of O-08-6 states that written argument shall be submitted “at least five days before the next hearing on the appeal”. The BOA comment suggests that the timeframe be lengthened. Council Services staff clarifies that the language provides a limit on last minute submissions after briefing, and does not impact any appellate body rules. Council Services staff finds that language could be added to clarify that any appellate body may, by rule or regulation, increase the five day period. A condition has been developed to address this BOA concern.

### **III. ANALYSIS OF APPLICABLE ORDINANCES, PLANS AND POLICIES**

Applicable for the policy analysis are the City Charter, the Comprehensive Plan, the Zoning Code and the Neighborhood Recognition Ordinance (O-92).

⇒ Please refer to p. 3 of the original March 20, 2008 Staff report for a full policy analysis (see attachment).

### **IV. PROPOSED AMENDMENTS & DISCUSSION**

*Background:* Regarding the proposed text amendments to §14-12-10, the Appeals subsection of the Landmarks and Urban Conservation (LUCC) Ordinance, and to §14-16-4-4, the Appeals Procedures of the Zoning Code, Planning Staff has consulted with Council Services Staff and with City Legal Staff. The language was written by Council Services Staff. Planning Staff offers a few suggestions.

New language is [+underlined and bracketed+]. Deleted language is [underlined, bracketed and struck through]. Planning Staff's explanation is included in ***Bolded Italics***. Page references are to the proposed Bill O-08-6 (see attachment to the March 20, 2008 Staff report).

⇒ Please refer to the original Staff report, beginning on p. 7 (see attachment), for a discussion of the proposed text amendments through March 20, 2008.

*Update:* The following are a few additional revisions that Planning Staff recommends. These were not in the original Staff report, but were presented as additional conditions of approval at the March EPC hearing and are explained here.

#### ***Albuquerque Code of Ordinances, Chapter 14- Zoning, Planning & Building, Article 16- Zoning Code***

##### ***Section 14-16-4-4, APPEALS***

###### ***1. Page 5, Lines 1 and 5 of O-08-6:***

The Land Use Hearing Officer shall forward the [~~decision~~][+recommendation+] and findings to the Council within five days of the [~~decision~~][+recommendation+]. The Council shall place the Land Use Hearing Officer's [~~decision~~][+recommendation+], including findings, on the agenda of the next regular full Council meeting at which land use, planning and zoning matters are heard following receipt of the Land Use Hearing Officer's [~~decision~~][+recommendation+]. At the Council meeting, the Council shall vote whether to accept or reject the Land Use Hearing Officer's [~~decision~~][+recommendation+] and findings.

***The term "recommendation" is intended to be used throughout this paragraph to clarify that the Land Use Hearing Officer (LUHO) does not make a decision but makes a recommendation to the City***

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*Council. Line 1 and Line 5 of the Bill contain an instance of “decision” that needs to be corrected to create internal consistency.*

2. Page 7, Lines 8 and 13 of O-08-6:

Staff of the appellate body, other than employees of a city division which is the appellant or the appellee, may upon request of a member of the appellate body communicate with that member at any time and by any means; copies of any written materials shall be distributed to all parties. [+In addition to appearing before the body,+] any party to an appeal may provide written argument to the appellate body by submitting it through the staff of that body. The written argument shall not include new evidence and shall be submitted at least five days before the next hearing on the appeal with copies provided to any neighborhood association entitled to notice in the case and to all parties. [+Any appellate body may, by rule or regulation, increase the five day period.+] There should be no other communication, outside a hearing, with a member of an appellate body concerning a pending appeal. Any other communication that does occur shall be disclosed by the member of the appellate body who receives the communication.+~~[-Any other person who communicates outside a hearing with a member of an appellate body concerning a pending filed appeal to that body shall do so only by printed materials and shall supply copies of said printed communications to the record, to any neighborhood association entitled to notice on the case, and to all parties; the copies shall be distributed at least five days before the next hearing on the appeal, and there shall be no communication after the five day deadline until the public hearing.-]~~

*The intent of the first proposed amendment is to specify that any party to an appeal may provide written argument in addition to appearing before the appellate body. The intent of the second proposed amendment is to allow any appellate body, such as the BOA if it chooses, to increase the five day period for submission of written information in its rules of procedure.*

3. Minor “clean up”:

A. Page 8, Lines 19-26:

It is the burden of the persons asserting the applicability of this division (a) to show that it applies through clear and convincing evidence.

(b) Unless division (a) above applies, a majority of all members of the City Council is required to reverse a determination by the Planning Commission, the Board of Appeals, the Development Review Board [+, the Planning Director+] or the Landmarks and Urban Conservation Commission.

B. Page 9, Lines 28-30:

[+(I) In any matter heard by the Council without the Land Use Hearing Officer [+,+] the Council may choose to have a Hearing Officer take testimony and make recommendations.+]

*Add a comma in these locations of O-08-6 to create internal grammatical consistency:*

## **V. COMMENTS**

### **CONCERNS OF REVIEWING AGENCIES/PRE-HEARING DISCUSSION**

- ⇒ For a discussion of reviewing agencies' concerns, please refer to p. 11 of the original March 20, 2008 Staff report (see attachment).

### **NEIGHBORHOOD/OTHER CONCERNS**

- ⇒ For a discussion of neighborhood concerns received prior to the March 20, 2008 EPC hearing, please refer to p. 11 of the original Staff report (see attachment).

*Update:* Staff received an official comment letter from the Board of Appeals (BOA), which is discussed in this supplemental report. Staff contacted the Development Review Board (DRB) chair and has received a letter. The DRB has no concerns with the proposed text amendments.

Staff also received a comment (see attachment) from an individual who is concerned about the submission of written information (see p. 10 of the March Staff report and Page 7, Lines 4-23 of the proposed Bill).

## **VI. CONCLUSION (repeated from the March Staff report)**

The proposed text amendments are to §14-12-10 ROA 1994, the Appeals subsection of the Landmarks and Urban Conservation (LUCC) Ordinance, and to §14-16-4-4, the Appeals Procedures of the Zoning Code, sometimes referred to as the appellate rules. The proposed text amendments to the LUCC ordinance allow any aggrieved party, not just the applicant, to appeal an administrative decision of City staff. The proposed text amendments to the Appeals procedures of the Zoning Code allow for and/or clarify the following: submission of written information, recommendations and use of a hearing officer, and existing language.

The idea is to address certain issues that have arisen during the appeal process and to provide clarifications that have been needed for some time now. Overall, the proposed text amendments further the intent of the City Charter, applicable Comprehensive Plan Goals and the Zoning Code. In sum, the proposed text amendments will reinforce the administrative appeal process and will promote public participation in the City's planning process in the spirit of O-92.

***FINDINGS- 08EPC 40009, April 17, 2008-Text Amendments***

1. §14-12-10 ROA 1994, the Appeals Section of the Landmarks and Urban Conservation (LUCC) Ordinance and §14-16-4-4, the Appeals Section of the Zoning Code, outline procedures that aggrieved persons can use to appeal landmarks and urban conservation decisions and land use decisions, respectively.
2. The purpose of the text amendments is to clarify: A) who can appeal Staff decisions to the LUCC Commission (§14-12-10), B) submission of written information (§14-16-4-4), C) recommendations and use of a hearing officer (§14-16-4-4), and D) existing language (§14-16-4-4). The idea is to address certain issues that have arisen during the appeal process and to provide clarifications that have been needed for some time now.
3. The EPC's task is to make a recommendation to the City Council regarding the proposed changes to §14-16-4-4 of the Zoning Code *only*. The City Council is the City's Zoning Authority and the EPC is a recommending body. The City Council also has authority regarding §14-12-10, the LUCC ordinance, but in this case the EPC does not make a recommendation because it does not have review authority.
4. Achievement of the City Charter:  
Clarifying that any party who has an interest has standing to file and pursue an appeal of an administrative decision is an exercise in local self government (Article I). This clarification expresses the Council's desire to promote and maintain an aesthetic environment and to ensure the proper use and development of land (Article IX).
5. The text amendments further the Developing and Established Urban Area Goal of the Comprehensive Plan. The Goal of creating a quality urban environment is more likely to become reality if the public understands that they can appeal decisions of both staff and boards, and that there is an inclusive appeal process available if they wish to utilize it.
6. The text amendments further the Central Urban Area Goal of the Comprehensive Plan. The objectives of recognizing neighborhood character and enhancing the importance of the City's historic center are more likely to become reality if the public understands that they can appeal decisions of both staff and boards, and that there is an inclusive appeal process available if they wish to utilize it.

7. The text amendments further the following Comprehensive Plan Goal and policy with respect to Community and Urban Design:

- A. Goal—Greater public involvement in the planning process will help to preserve and enhance the built characteristics and historical features that identify Albuquerque’s distinct communities.
- B. Policy b—A clarified appeal process will provide another avenue for people concerned about development’s effects upon the built environment, natural environment and local history.

8. The text amendments further the following Comprehensive Plan Goal and policy with respect to Historic Resources:

- A. Goal—Greater public involvement in the planning process will help to protect and enhance significant historic districts and buildings.
- B. Policy c—A clarified appeal process could help increase public and inter-agency awareness of historic resources and preservation concerns.

9. Intent of the Comprehensive City Zoning Code (Section 14-16-1-3):

The text amendments further applicable Goals, policies and intentions of the Comprehensive Plan, and therefore meet the intent of the Zoning Code.

10. Neighborhood Recognition Ordinance (O-92):

The text amendments to clarify appeal procedures will promote participation in the planning process in the spirit of O-92, since doing so will help the public to understand that there is an inclusive appeal process available if they wish to utilize it.

11. The Office of Neighborhood Coordination (ONC) provided e-mail notification to neighborhood representatives. Notification was also provided in the Neighborhood Newsletter and on the City’s website. Staff received written comments from a citizen and from the Board of Appeals (BOA) who expressed concern about certain parts of the proposed legislation.

**RECOMMENDATION**

**That a recommendation of APPROVAL of Text Amendments to Zoning Code §14-16-4-4, the portion of 08EPC 40009 over which the EPC has review authority, be forwarded to the City Council based on the preceding Findings and subject to the following Conditions of Approval.**



*(Note: Planning Staff's suggested language modifications are highlighted in grey to distinguish them from the language drafted by Council Services Staff).*

**CONDITIONS OF APPROVAL- 08EPC 40009, April 17, 2008-Zoning Code Text Amendments**

1. New definition- Insert on p. 1 of O-08-6:

[+AGGRIEVED PARTY. A party aggrieved according to §14-16-4-4 of the Zoning Code.+]

2. Make this language a new subsection 2 on Page 5, Lines 15-21 of O-08-6:

[+(2)+] [+If only a portion of the Land Use Hearing Officer's recommendation and findings are rejected, only that portion shall be scheduled for hearing before the Council.+] The Council [~~shall not~~] [+may+] accept new evidence [~~in any appeal that was first heard by the Land Use Hearing Officer~~]. [+Prior to the Council hearing a matter, following the rejection of a LUHO recommendation, the LUHO hearing shall be transcribed and made a part of the record before the City Council.+]

3. Add the following language on Page 6, Lines 5-10 of O-08-6, to create internal consistency:

(D) Fee. A filing fee of \$55 to cover reasonable expenses shall accompany each appeal application. When an application is withdrawn, the application fee shall not be refunded. There shall be no filing fee on an appeal of the Planning Commission, the Board of Appeals, Development Review Board [+, Planning Director+] or the Landmarks and Urban Conservation Commission, on a decision remanded to it by the City Council.

4. Change the following words on Page 5, Lines 1 and 5 of O-08-6 to use the same term consistently throughout this paragraph:

The Land Use Hearing Officer shall forward the [~~decision~~][+recommendation+] and findings to the Council within five days of the [~~decision~~][+recommendation]. The Council shall place the Land Use Hearing Officer's [~~decision~~][+recommendation], including findings, on the agenda of the next regular full Council meeting at which land use, planning and zoning matters are heard following receipt of the Land Use Hearing Officer's [~~decision~~][+recommendation]. At the Council meeting, the Council shall vote whether to accept or reject the Land Use Hearing Officer's [~~decision~~][+recommendation] and findings.

5. Add the following language on Page 7, Line 8 and Line 13 of O-08-6:

Staff of the appellate body, other than employees of a city division which is the appellant or the appellee, may upon request of a member of the appellate body communicate with that member at any time and by any means; copies of any written materials shall be distributed to all parties. [+In addition to appearing before the body,+] any party to an appeal may provide written argument to the appellate body by submitting it through the staff of that body. The written argument shall not include new evidence and shall be submitted at least five days before the next hearing on the appeal with copies provided to any neighborhood association entitled to notice in the case and to all parties. [+Any appellate body may, by rule or regulation, increase the five day period.+] There should be no other communication, outside a hearing, with a member of an appellate body concerning a pending appeal. Any other communication that does occur shall be disclosed by the member of the appellate body who receives the communication.+] [~~Any other person who communicates outside a hearing with a member of an appellate body concerning a pending filed appeal to that body shall do so only by printed materials and shall supply copies of said printed communications to the record, to any neighborhood association entitled to notice on the case, and to all parties; the copies shall be distributed at least five days before the next hearing on the appeal, and there shall be no communication after the five day deadline until the public hearing.-]~~

6. Minor “clean up”- Add a comma in the following locations of O-08-6 to create internal grammatical consistency:

A. Page 8, Lines 19-26:

It is the burden of the persons asserting the applicability of this division (a) to show that it applies through clear and convincing evidence.

(b) Unless division (a) above applies, a majority of all members of the City Council is required to reverse a determination by the Planning Commission, the Board of Appeals, the Development Review Board [+ , the Planning Director+] or the Landmarks and Urban Conservation Commission.

B. Page 9, Lines 28-30:

[+(I) In any matter heard by the Council without the Land Use Hearing Officer [+ ,+] the Council may choose to have a Hearing Officer take testimony and make recommendations.+]

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