



CITY OF ALBUQUERQUE
OFFICE OF ADMINISTRATIVE HEARINGS
ZONING HEARING EXAMINER
NOTIFICATION OF DECISION

THERESE MARTINEZ-LONER requests a special exception to Section 14-16-2-6(B)(3)(a): a VARIANCE of 3' to the required 3' setback for an existing carport in the side yard setback area for all or a portion of Lot 11, Block 1, CHERRY HILLS UNIT 1 zoned R-1, located on 8305 CHERRY HILLS DRIVE NE (E-19)

Special Exception No:.....14ZHE-80299
Project No:Project# 1010313
Hearing Date:January 23, 2015
Closing of Public Record:January 23, 2015
Date of Decision:.....02-06-15

On the 23rd day of January, 2015 (hereinafter "Hearing") THERESE MARTINEZ-LONER (hereinafter "Applicant") appeared before the Zoning Hearing Examiner (hereinafter "ZHE") requesting a Variance of 3' to the required 3' setback for an existing carport in the side yard setback area (hereinafter "Application") upon the real property located at 8305 CHERRY HILLS DRIVE NE ("Subject Property"). Below are the findings of facts:

FINDINGS:

1. Applicant is requesting a Variance of 3' to the required 3' setback for an existing carport in the side yard setback area.
2. The City of Albuquerque Zoning Code of Ordinances Section § 14-16-4-2 (C) (2) "SPECIAL EXCEPTIONS – VARIANCE" reads in part: "*A variance application shall be approved by the Zoning Hearing Examiner, if and only if, the Zoning Hearing Examiner finds all of the following:*
 - a. *The application is not contrary to the public interest or injurious to the community, or to property or improvements in the vicinity;*
 - b. *There are special circumstances applicable to the subject property which do not apply generally to other property in the same zone and vicinity such as size, shape, topography, location, surroundings, or physical characteristics created by natural forces or government action for which no compensation was paid;*
 - c. *Such special circumstances were not self-imposed and create an unnecessary hardship in the form of a substantial and unjustified limitation on the reasonable use or return on the property that need not be endured to achieve the intent and purpose of the Zoning Code (§14-16-1-3) and the applicable zoning district; and*
 - d. *Substantial justice is done.*

3. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that the Application is not going to be: (i) contrary to the public interest, (ii) injurious to the community; or (iii) injurious to the property/improvements located in the nearby vicinity of the Subject Property. Specifically, the Applicant provided evidence that the existing carport will not be injurious to the adjacent property, neighborhood, or the community because the existing carport has been there for "years" and was installed prior to the current property owner (Applicant) purchasing this Subject Property and there have not been any maintenance or safety problems that were disclosed to the ZHE. The carport does have two posts located on the property line of the neighboring parcel (8301 Cherry Hills Drive NE that is owned by Melissa and Eric Kennedy). Mr. and Mrs. Kenned authored an email to the ZHE dated January 10, 2015 which states in part "*this carport was in place when we purchase our home (and before Therese Martinez-Loner purchased her home) and we have no objection to the carport remaining in place.*" There is however, a neighbor that is located behind the rear yard wall (8309 Cherry Hills Road) that is owed by Julie Neerken, and she authored an email to the ZHE (and attended the Hearing) that states in part "*the carport structure interferes with the fresh air and sunlight reaching our property.*" The City of Albuquerque DMD Traffic Engineer reviewed the carport and made a determination that it does not interfere with clear sight triangle regulations of the City. The Cherry Hills Civil Association Board of Directors reviewed the carport and authored an email on Nov. 30, 2014 which states that they have "*no objection to the structure*". The ZHE has weighed all the evidence presented on this Application and believes that "on the balance" the evidence demonstrates that the existing carport is not injurious to the neighborhood. The ZHE notes that the Cherry Hills Civic Association has "no objection" to the carport and the most impacted neighbor (Mr. and Mrs. Kennedy) has authored an email/letter of support for the carport. It is only the neighbor behind the rear wall (Ms. Neerken) that expresses concerns about the "fresh air" and "light" that is accessible to her property. The ZHE believes that Mrs. Neerken's concerns are mitigated by three factors: (i) the carport has existed on this subject property in its current design for well over 18 years without any complaints from other neighbors; (ii) there appears from a casual observation of the site plan ample "fresh air" and "sunlight" that can reach Ms. Neerken's back yard; and (iii) the surrounding neighborhood association (Cherry Hills) and immediate neighbor (Mr. and Mrs. Kennedy) don't believe that the carport is injurious to the community.
4. The file contains "Exhibit A" which is photos of the carport and neighboring property.
5. PROCEDURAL APPROACH TO CURRENT LITIGATION ON SUBJECT PROPERTY: The ZHE notes that there is currently litigation affecting the Subject Property. The ZHE believes that this application is ripe for consideration despite the ongoing litigation.
6. PROCEDURAL APPROACH TO A VARIANCE OF ONE OF THE CONDITIONAL USE CRITERIA FOR A CARPORT (SECTION 14-16-2-6 B): The ZHE notes that the Conditional Use criteria for a carport has three elements as promulgated in Section 14-16-2-6 (B), and the first element states that "*no part (of the carport) is within three feet of a property line*". The carport on the Subject

- Property has two "legs" that are located on the property line of the neighboring property owned by Mr. and Mrs. Kennedy. The ZHE discussed this subsection (a) with legal counsel at the Hearing and has reached the conclusion that this current "variance" application, requesting relief from an element of the conditional use criteria is allowable and therefore the ZHE will issue the Notice of Decision on the variance (14ZHE - 80299) prior to the issuance of the Notice of Decision on the conditional use (14ZHE - 80298). This NOD for the Variance application shall be relied upon in reviewing the subsequent Conditional Use application.
7. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that there are "special circumstances" applicable to the Subject Property which do not apply generally to other property in the same zone and vicinity. Specifically, the Applicant provided testimony that the Subject Property is located in an oddly shaped "corner lot" that is fronting Cherry Hills Drive and Cherry Hills Road. The unique orientation of the corner lot is a special circumstance that is the reason for the location of the carport along the side yard of the Subject Property [as required pursuant to Section § 14-16-4-2 (C) (2) (b)]
 8. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that the special circumstances presented hereinabove were not "self-imposed", and that those special circumstances create an unnecessary hardship upon the Applicant. Specifically, the Applicant provided testimony that the uniquely shaped corner lot was not self-imposed and that the existence of the carport for over 18+ years was not self-imposed as well. The Applicant stated if they were required to remove the posts from the side yard setback (3') that the entire carport would need to be demolished which would constitute an "unjustified limitation on the reasonable use of the Subject Property" [as required pursuant to Section § 14-16-4-2 (C) (2) (c)]
 9. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that substantial justice will be done if this Application is approved. [as required pursuant to Section § 14-16-4-2 (C) (2) (d)]
 10. Applicant testified at the Hearing that the yellow "Notice of Hearing" signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 (B) (4).

CONCLUSIONS OF LAW:

The Applicant has met their burden of submitting an Application that provides evidence that satisfies the elements required within §14-16-4-2 (C) (2) of the Albuquerque Zoning Code.

DECISION:

APPROVAL WITH CONDITIONS of a VARIANCE of 3' to the required 3' setback for an existing carport in the side yard setback area.

CONDITIONS OF APPROVAL:

- A. The Applicant shall ensure that no building wall is ever built on the carport within a required setback area.
- B. The Applicant shall ensure that the carport is colored and maintained such that it is in harmony with the home on the Subject Property.
- C. The Applicant shall ensure that all storm water is capture from the roof of the carport and discharged on the Subject Property.

If you wish to appeal this decision, you may do so by 5:00 p.m., on February 23, 2015 in the manner described below:

Appeal is to the Board of Appeals within 15 days of the decision. A filing fee of \$105.00 shall accompany each appeal application, as well as a written explanation outlining the reason for appeal and a copy of the ZHE decision. Appeals are taken at 600 2nd Street, Plaza Del Sol Building, Ground Level, Planning Application Counter located on the west side of the lobby. **Please present this letter of notification when filing an appeal.** When an application is withdrawn, the fee shall not be refunded.

An appeal shall be heard by the Board of Appeals within 45 days of the appeal period and concluded within 75 days of the appeal period. The Planning Division shall give written notice of an appeal, together with a notice of the date, time and place of the hearing to the applicant, a representative of the opponents, if any are known, and the appellant.

Please note that pursuant to Section 14. 16. 4. 4. (B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

You will receive notice if any other person files an appeal. If there is no appeal, you can receive building permits any time after the appeal deadline quoted above, provided all conditions imposed at the time of approval have been met. However, the Zoning Hearing Examiner may allow issuance of building permits if the public hearing produces no objection of any kind to the approval of an application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

Successful applicants are reminded that other regulations of the City must be complied with, even after approval of a special exception is secured. This decision does not constitute approval of plans for a building permit. If your application is approved, bring this decision with you when you apply for any related building permit or occupation tax number. Approval of a conditional use or a variance application is void after one year from date of approval if the rights and privileges are granted, thereby have not been executed or utilized.



Joshua J. Skarsgard, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
Therese Martinez-Loner 8305 Cherry Hills Dr NE Albuquerque NM 87111
Julie Nerkin jpneerken@yahoo.com



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THERESE MARTINEZ-LONER requests a special exception to Section 14-16-2-6(B)(3): a CONDITIONAL USE to allow an existing carport in the side yard setback area for all or a portion of Lot 11, Block 1, CHERRY HILLS UNIT 1 zoned R-1, located on 8305 CHERRY HILLS DRIVE NE (E-19)

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FINDINGS:

1. Applicant is requesting a Conditional Use to allow an existing carport in the side yard setback area.
2. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (1) (a) "SPECIAL EXCEPTIONS" reads in part: "*A conditional use shall be approved if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed will not be injurious to the adjacent property, the neighborhood, or the community.*"
3. Applicant testified at the Hearing that the Conditional Use, if approved, will not be injurious to the adjacent property, neighborhood, or the community because the existing carport has been there for "years" and was installed prior to the current property owner (Applicant) purchasing this Subject Property and there have not been any maintenance or safety problems that were disclosed to the ZHE. The carport does have two posts located on the property line of the neighboring parcel (8301 Cherry Hills Drive NE that is owned by Melissa and Eric Kennedy). Mr. and Mrs. Kenned authored an email to the ZHE dated January 10, 2015 which states in part "*this carport was in place when we purchase our home (and before Therese Martinez-Loner purchased her home) and we have no objection to the carport remaining in place.*" There is however, a neighbor that is located behind the rear yard wall (8309 Cherry Hills Road) that is owed by Julie Neerken, and she authored an email to the ZHE (and attended the Hearing) that states in part "*the carport structure interferes with the fresh air and sunlight reaching our property.*" The City of Albuquerque DMD Traffic Engineer reviewed the carport and made a determination that it does not interfere with clear sight triangle regulations of the City. The Cherry Hills Civil Association Board of Directors reviewed the carport and authored an email on Nov.

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 7. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (1) (b) “SPECIAL EXCEPTIONS” reads in part: “*A conditional use shall be approved if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed will not be significantly damaged by surrounding structures or activities.*”
 8. Applicant testified at the Hearing that the proposed conditional use, will not be significantly damaged by the surrounding structures or activities. The ZHE notes that despite the concerns raised by Mrs. Neerken that the carport will not be “materially” damaging surrounding activities of the neighboring property owners. There is a belief from the ZHE that adequate “fresh air” can access Ms. Neerken’s property despite the existence of this carport that is 18+ years old.

9. The yellow "Notice of Hearing" signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.
10. The Applicant has adequately justified the Conditional Use request pursuant to City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

APPROVAL WITH CONDITIONS of a **CONDITIONAL USE** to allow an existing carport in the side yard setback area.

CONDITIONS OF APPROVAL:

- A. The Applicant shall ensure that no building wall is ever built on the carport within a required setback area.
- B. The Applicant shall ensure that the carport is colored and maintained such that it is in harmony with the home on the Subject Property.
- C. The Applicant shall ensure that all storm water is capture from the roof of the carport and discharged on the Subject Property.

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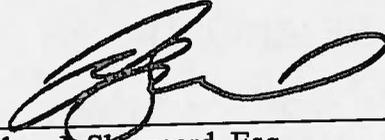
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application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

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