



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

STEVE AND KAREN ARMSTRONG requests a special exception to Section 14-16-3-19(A)(2)(a) : a VARIANCE of 3' 6" to the maximum 3' height to allow and existing fence in the front yard setback area for all or a portion of Lot 21, Block 5, MESA ARRIBA zoned R-1, located on 9813 MESA ARRIBA AVE NE (G-21)

Special Exception No:..... **15ZHE-80145**
Project No:..... **Project# 1010467**
Hearing Date:..... 07-21-15
Closing of Public Record:..... 07-21-15
Date of Decision: 07-31-15

On the 21st day of July, 2015 (hereinafter “**Hearing**”) STEVE AND KAREN ARMSTRONG (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a Variance of 3' 6" to the maximum 3' height to allow and existing fence in the front yard setback area (hereinafter “**Application**”) upon the real property located at 9813 MESA ARRIBA AVE NE (“**Subject Property**”). Below are the findings of facts:

FINDINGS:

1. Applicant is requesting a Variance of 3' 6" to the maximum 3' height to allow and existing fence in the front 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 testimony that they received numerous comments in support of the fence, that it is a “welcome improvement” and is “visually preferable to the bamboo obstruction present on the adjacent property... that maintains the clean and manicured appearance we have established and kept for our property.” Applicant also testified that the fence does not limit pedestrian or vehicular visibility and submitted photographic evidence in support of that contention. [as required pursuant to Section § 14-16-4-2 (C) (2) (a)]. Support from neighbors and the community is one relevant aspect of the required determination. In this case, the record includes the signatures of 25 individuals, representing 14 properties in the immediate neighborhood (in fact, on the same block) supporting the application confirming that the fence “is an appropriate and proper addition” and that “it is not an eyesore, nor does it decrease property values. Also, the fence does not block vehicle or pedestrian traffic visibility in either direction” and concluding that “I/we have no issues with the current height, design, location, or placement of the fence.”

In contrast to the widespread support for the application from residents throughout the neighborhood, there is in the record evidence of objection from the immediate neighbor to the East at 9901 Mesa Arriba Ave. NE, Louise Miller. Ms. Miller did not speak in opposition at the hearing, although the record does indicate that she received proper notice. She did, however, submit substantial written materials in opposition to the application. Ms. Miller’s fundamental opposition is that the fence blocks her views and sunlight, and that it presents a traffic/pedestrian hazard. Although no site visit was made, the ZHE has fully reviewed the photographs submitted by both parties. It does not appear that any view, except a very limited view of the street, is affected by the fence. This is in part due to the location and geometry of the fence. In addition, the large bamboo thicket on Ms. Miller’s property renders the fence somewhat irrelevant (and, in any event, as Applicant notes they can legally plant a hedge or park vehicles which would have a similar or greater effect on views). As to the sunlight shadowing in the afternoon, it does not appear from Ms. Miller’s photographs that the lawn in this area has suffered any injury. Finally, Ms. Miller is correct about the potential of the fence to interfere with clear sight triangles imposed for safety purposes, as noted by traffic engineering, and the fence should be modified to address that concern.

Ms. Miller also asserts a concern regarding property values, in contrast to other neighbors’ support of the fence on the basis that it increases property values. The ZHE finds that while property values may be relevant to an inquiry regarding the public interest, property values are a matter of expert opinion and there is no such information in the record either way.

Ms. Miller asserts that the fence’s concrete footings encroach on her property. Determination of such private property matters is not within the ZHE’s purview and would have to be resolved among the parties as a civil matter.

Finally, Ms. Miller refers to restrictive covenants prohibiting the fence as built. The ZHE has no authority to enforce such restrictive covenants. That said, they can be an

indication of what land uses might be injurious or contrary to the public interest. In this case, they do not carry substantial weight due to testimony that there is no enforcement mechanism in place and that they are old and possibly obsolete.

4. 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 abutting neighbor, Ms. Miller’s, lawn sprinklers regularly overspray onto vehicles parked in the adjacent parking area of the Subject Property, causing paint and glass damage due to hard water spray and requiring that they park the vehicle in the street where it is subject to damage and vandalism. Applicants also explain that the neighboring bamboo thicket is expanding rapidly and dramatically and they desire a fence to prevent its encroachment on their property as well as to control the significant amount of plant debris shed from the bamboo. [as required pursuant to Section § 14-16-4-2 (C) (2) (b)] Applicants testified about regular confrontations with the neighbor in the absence of the fence, and the facilitator reported animosity and highly escalated emotion. Given the support of numerous other neighbors it is apparent that this unfortunate neighbor relationship is a locally special circumstance in and of itself. This is truly a circumstance in which “good fences make good neighbors.”
5. 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 portion of the Subject Property adjacent to the fence is unusable for its designed and intended purpose of parking vehicles because the sprinklers on the adjacent property overspray hard water causing paint damage to Applicants’ vehicle and in addition the need to deal with the debris and encroachment from the bamboo thicket, neither of which are within Applicants’ control and both of which constitute an “*unjustified limitation on the reasonable use of the Subject Property*” [as required pursuant to Section § 14-16-4-2 (C) (2) (c)]
6. 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)]
7. Applicant provided evidence 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' 6" to the maximum 3' height to allow and existing fence in the front yard setback area.

CONDITIONS OF APPROVAL:

- A. The Applicant shall remove or lower the portion of the fence that currently conflicts with the required 11' mini clear sight triangle, as directed by Traffic Engineering, so that the fence is no more than three feet tall at 11 feet back from the curb.
- B. The Applicant shall adhere to the *design guidelines* for walls and fences as set forth in the City of Albuquerque Zoning Code.

If you wish to appeal this decision, you may do so 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.



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