



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

PATRICIA WHELAN (DON WHELAN, AGENT) requests a special exception to Section 14-16-3-19(A)(2): a VARIANCE of 2' to the maximum allowed 3' high wall for a proposed 5' wall in the required front yard setback for all or a portion of Lot 11, MONTANO VISTA zoned R-LT, located on 5319 MONTANO PLAZA DR NW (E-11)

Special Exception No:..... **15ZHE-80061**  
Project No:..... **Project# 1010411**  
Hearing Date:..... 05-19-2015  
Closing of Public Record:..... 05-19-2015  
Date of Decision: ..... 05-29-2015

On the 19th day of May, 2015 (hereinafter “**Hearing**”) DON WHELAN, (hereinafter “**Agent**”) acting as agent on behalf of the property owner PATRICIA WHELAN (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a Variance of 2' to the maximum allowed 3' high wall for a proposed 5' wall in the required front yard setback (hereinafter “**Application**”) upon the real property located at 5319 MONTANO PLAZA DR NW (“**Subject Property**”). Below are the findings of facts:

**FINDINGS:**

1. Applicant is requesting a Variance of 2' to the maximum allowed 3' high wall for a proposed 5' wall in the required front yard setback.
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 and photos of neighboring properties that have similar “courtyard walls” located in the required front yard setback area and made a compelling case that this type of wall design would be relatively consistent with the neighborhood design [as required pursuant to Section § 14-16-4-2 (C) (2) (a)]. Further, the Application and testimony of the Applicant at the Hearing suggest that there is no neighborhood opposition to the Application. The Applicant was asked by the ZHE to provide photos that this 5’ tall wall was established in the surrounding community. The Applicant successfully submitted a letter dated May 20<sup>th</sup>, 2015 with photos of similar walls in the surrounding neighborhood. The ZHE also believes that as a result of the wall being setback 7’ from the property line (edge of the sidewalk) that this wall will not have an injurious impact on the surrounding neighborhood.

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 this property has some grade changes (slopes) to the property and is located in front of a busy street. The ZHE disagrees that the busy street is a justification for the variance, but does agree that the property natural topography plus the location of the property line (on the far edge of the sidewalk) are special circumstances that meet the intent of the Zoning Code variance criteria [as required pursuant to Section § 14-16-4-2 (C) (2) (b)].
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 if she were required to construct only a 3 foot wall (as zoning code permits) that she would not have the safety and aesthetic needs met which constitutes 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 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 2’ to the maximum allowed 3’ high wall for a proposed 5’ wall in the required front yard setback.

## **CONDITIONS OF APPROVAL:**

- A. The Applicant shall ensure that the wall is setback 7' (seven feet) from the property line (and edge of the sidewalk).
- B. The Applicant shall ensure that the wall does NOT exceed 5' (five feet) in height in any location of the courtyard wall.
- C. The Applicant shall ensure that the color of the wall is "earth toned" and is similar with the home on the Subject Property.

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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Joshua J. Skarsgard, Esq.  
Zoning Hearing Examiner

cc: Zoning Enforcement  
ZHE File  
donwhln@aol.com