

CITY OF ALBUQUERQUE



Planning Department

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CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Guadalupe Chavez appeals the Zoning Hearing Examiner’s Denial of a special exception to section 14-16-3-19(A)(2)(a) : a Variance of 3 feet to the 3 foot maximum wall height to allow an existing 6 foot wall in the front setback area for all or a portion of Lot 24, Block J, Desert Springs Unit 5, zoned R-LT, located at 7609 Desert Morning Rd. SW. (M-10).

Appeal No:..... 16BOA-20010
Special Exception No: 16ZHE-80059
Project No:..... 1010760
Hearing Date:..... 9/27/2016

In the matter of **16BOA-20010**, the Zoning Board of Appeals (BOA) voted to **REMAND** the Zoning Hearing Examiner’s (ZHE’s) decision based on the following findings:

PO Box 129 **FINDINGS:**

Albuquerque

NM 87103

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1. This is an APPEAL of the Zoning Hearing Examiner’s (ZHE) DENIAL of a SPECIAL EXCEPTION pursuant to Zoning Code §14-16-4-2(C)(2), Variance Criteria: a variance of 3 feet to the maximum 3 feet height allowed for a wall or fence in the front yard setback [Zoning Code §14-16-3-19(A)(2)(a)] to allow for an existing 6 foot fence (the “application”).
2. The subject site is described as Lot 24, Block J, Desert Springs Subdivision, containing approximately 0.1 acre and located at 7609 Desert Morning Rd. SW, and zoned R-LT Residential Zone (the “subject property”). The subject property is within the boundaries of the Westside Strategic Plan and the Southwest Area Strategic Action Plan.
3. The subject property is developed with a townhome and is part of the larger Desert Springs Subdivision, which is located on the eastern side of Unser Blvd. between Arenal Rd. SW and Spring Flower Rd. SW. The applicant owns the subject property.
4. The Albuquerque/Bernalillo County Comprehensive Plan, the Westside Strategic Plan, the Southwest Area Strategic Action Plan, and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.
5. A fence, six feet tall and made of split-faced block and wrought iron, exists on the subject property.
6. Pursuant to Zoning Code §14-16-3-19(A)(2)(a), Height/Design Regulations for Walls, Fences and Retaining Walls, a wall or fence that faces a public street right-of-way (ROW) may be built in the required front yard setback provided that it does not exceed 3 feet in height above grade. A variance of 3 feet, added to the allowed 3 feet, would result in a 6 foot wall or fence.

7. Zoning Code §14-16-4-2(C)(2), Special Exceptions, states that a variance shall be approved by the ZHE, if and only if, the ZHE 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.
8. The request was deferred three times. At the July 19, 2016 ZHE hearing, the ZHE asked the applicant what she wanted to do. The applicant stated that she wanted to appeal and see what happens, so the ZHE denied the request (Record, p. 16). No additional testimony appears to have been taken on the record.
9. Without substantive testimony at the July 19, 2016 hearing, the ZHE found that the clear sight triangle is a safety requirement, not simply an aesthetic requirement, and therefore it warrants increased scrutiny. Pursuant to §14-16-3-3(A)(4)(c), Supplementary Height, Area, and Use Regulations, a wall or fence cannot be erected in the clear sight triangle unless its type and location are approved by the Traffic Engineer, based on a finding that it would not be a traffic hazard.
10. The ZHE also found that Transportation Staff, from the City Engineer's office, determined that the existing fence violates clear sight triangle requirements on both sides of the appellant's driveway. The ZHE did not find a reason to question the traffic engineer's judgement.
11. The ZHE, without substantive testimony, concluded that violation of clear sight triangle requirements is contrary to the public interest, injurious to the community, and injurious to the property or improvements located in the vicinity, which is contrary to the first criterion for granting a variance in §14-16-4-2(C)(2)(a).
12. All tests in §14-16-4-2(C)(2), Variance Criteria, must be met for a variance to be granted. Since the first test (a) is not met, the ZHE denied the variance request and did not make findings regarding the remaining tests.
13. Zoning Code Section §14-16-4-4(B)(4) states that an appellant to a special exception action shall clearly articulate the reasons for the appeal by specifically citing and explaining one or more alleged errors of the ZHE in rendering his decision:
 - (a) in applying adopted city plans, policies and ordinances in arriving at his decision;
 - (b) in the appealed action or decision, including its stated facts; and
 - (c) in acting arbitrarily or capriciously or manifestly abusive of discretion.

The appellant does not specifically refer to any of the above reasons for appeal. Rather, the appellant states that she wants to keep the height of the wall for safety reasons and to protect herself and her property. The appellant testified that the ZHE told her to relay this concern to the Board of Appeals (BOA).

14. The ZHE's decision does not appear to take into account any testimony on the record. The minutes of the July 19, 2016 hearing, which consist of a single page of dialogue, open with the ZHE telling the appellant "welcome back".
15. There are no minutes of any other hearings, or conversations between the ZHE and the appellant, in the record. Appellant testified that she had spoken with whom she believed to be the ZHE. However, this testimony was not in the appeal package. Nor were there any minutes.
16. The appellant testified that she had made requests to the ZHE, and the ZHE had told her to relay her requests to the BOA.
17. The record is unclear when, or even if, the appellant actually spoke with the ZHE on the record prior to July 19, 2016.
18. Based on these findings, in accordance with 11(C) of the Rules of Conduct of Business for the Zoning Board of Appeals, the BOA hereby REMANDS this matter back to the ZHE for a rehearing to establish and make a record of all testimony given. The BOA requires that the ZHE make specific findings of fact from the hearing in his Notification of Decision.

If you wish to appeal this decision, you must do so by **October 12, 2016**, in the manner described below. A non-refundable filing fee will be calculated at the Planning Department's Land Development Coordination counter and is required at the time the Appeal is filed.

APPEAL TO THE CITY COUNCIL: Any person aggrieved with any determination of the Board of Appeals acting under this ordinance may file an appeal to the City Council by submitting written application on the Planning Department form to the Planning Department within 15 days of the Board of Appeals decision. The date the determination in question is issued is not included in the 15-day period for filing an appeal, and if the fifteenth day falls on Saturday, Sunday or holiday as listed in the Merit System Ordinance, the next working day is considered as the deadline for the filing of the Appeal.

The City Council may decline to hear the Appeal if it finds that all City plans, policies and ordinances have been properly followed. If it decides that all City plans, policies, and ordinances have not been properly followed, it shall hear the Appeal. Such an appeal, if heard, shall be opened within 60 days of the expiration of the appeal period.

Should you have any questions regarding this action, please call our office at (505) 924-3860.

Suzanne Lubar, Planning Director

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BOA File
Guadalupe Chavez, 7609 Desert Morning Rd. SW, Albuquerque, NM 87121