



Planning Department

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CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Tammie Lamphere appeals the Zoning Hearing Examiner’s Denial of a special exception to Section 14-16-2-6(E)(4)(a): a Variance of 5 feet to the required 5 foot side yard setback to allow for an existing addition for all or a portion of Lot 30, Block 4, Country Club Addition, zoned R-1, located at 424 Sycamore St. NE (K-15).

Appeal No:..... 16BOA-20019
Special Exception No: 16ZHE-80218
Project No:..... 1010960
Hearing Date:..... 1/24/2017

In the matter of **16BOA-20019**, the Zoning Board of Appeals (BOA) voted to the Zoning Board of Appeals (BOA) voted to **DENY** the Appeal, thereby **AFFIRMING** the Zoning Hearing Examiner’s (ZHE’s) decision based on the following findings:

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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 5 feet to the required 5 foot side yard setback [Zoning Code §14-16-2-6(E)(4)(a)] to allow for an existing addition (the “current application”).
2. The subject site is described as Lot 30, Block 4, Country Club Addition, containing approximately 0.14 acre and located at 424 Sycamore St. NE (the “subject property”). The subject property is not within the boundaries of a sector development plan.
3. The subject property is located in the Spruce Park area and is developed with a single-family home, which is on the eastern side of Sycamore St. NE, between Roma Ave. NE and Dr. Martin Luther King, Jr. Blvd. The applicant owns the subject property.
4. The Albuquerque/Bernalillo County Comprehensive Plan and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.
5. The subject site is zoned R-1 Residential zone. A single-family home, with an approximately 570 sf addition that encroaches into the required, 5 foot side yard setback, exists on the subject property.
6. Pursuant to Zoning Code §14-16-4-2(C)(2), the R-1 Residential Zone, a minimum of 5 feet is required for the side yard setback. The appellant requested a variance of five feet to the minimum 5 foot requirement because the existing addition was built in the setback area and abuts the property to the east.

7. There is a history of variance applications on the subject property in the 1990s. The first request, for a variance to turn a carport into a garage (ZA-90-146), was withdrawn. A request for a variance to allow a garage with bath facilities (ZA-90-221) was denied, mainly because the subject property was found to not be exceptional. A request for a “green room” (ZA-92-012) was denied.
8. On July 20, 2010, the ZHE heard a request for a variance of 5 feet to the required 5 foot side yard setback for the subject property (Project #1008383/10ZHE-80217). The request was denied because the ZHE found that the parcel was not exceptional compared to other parcels. The property owner appealed the decision. On September 28, 2010, the BOA heard the appeal and upheld the ZHE’s decision.
9. 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.
10. Regarding the current application, the ZHE found that the applicant has not met her burden of submitting substantial evidence that the application is not contrary to the public interest, injurious to the community, or injurious to the property or improvements located in the vicinity as required by Zoning Code §14-16-4-2(C)(2)(a). The ZHE also found that no special circumstances apply to the subject property that do not apply generally to other property in the same zone and vicinity [§14-16-4-2(C)(2)(b)], and that substantial justice will be done if the variance is denied [§14-16-4-2(C)(2)(d)].
11. 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 in her October 17, 2016 letter. Rather, she states that the ZHE’s decision is not supported by evidence she presented and that his determination was based on an incorrect interpretation of special circumstances. She explains that the situation is not of her own making because she purchased

the property with the addition already built. She is trying to sell the property, but has not been able to because the title is not clear due to the illegally built addition (Record, p. 19).

12. At the November 22, 2016 hearing, at the appellant's request, the BOA DEFERRED this case because it was scheduled during Thanksgiving week and the appellant had already planned a family trip for the holiday (Record, p. 35).

13. At the January 24, 2017 BOA hearing, the appellant is presenting an offer of proof for remand. BOA Rules of Procedure B.16, states the following:

The Board shall remand the matter to the Zoning Hearing Examiner for further testimony and/or evidence if a party is able to demonstrate by an offer of proof that:

- (a) There is newly discovered evidence which, with due diligence, could not have been discovered prior to the original hearing in front of the Zoning Hearing Examiner; and
- (b) An injustice would occur if the newly discovered evidence were not allowed to be heard.

The appellant believes that she has uncovered new evidence that will serve as reason for a remand: a document showing that a building permit was issued in 1991 and a letter from a local architect certifying that the addition complies with applicable building codes (Record, p. 5, 8 and 14).

14. The appellant provided a property record and appraisal card, which indicates that a building permit was issued on August 9, 1990 for the home addition and on September 19, 1990 for the garage addition (Record, p. 5). A City-issued receipt for the garage addition building permit is found at Record, p. 8. What appears to be a City-issued receipt for the home addition, which is the subject of the variance request, is found at Record, p. 9.

15. Even if building permits were issued, the necessary requests for variances appear to not have been approved. In 1990, a request for a variance to turn a carport into a garage was withdrawn (ZA-90-146). Also in 1990, a request for a variance to allow a garage with bath facilities was denied (ZA-90-221). The appellant has not provided evidence that a variance to the required 5 foot side yard setback was applied for and approved in order to allow the existing addition.

16. The BOA finds that the new evidence presented by the appellant is insufficient to serve as reason for a remand. The appellant was notified in writing that a variance was being sought prior to closing on the purchase of the property in 2010. With due diligence, the evidence could have been discovered prior to the original hearing before the ZHE (B.16.a), and an injustice would not occur if the evidence was not allowed to be heard because a building permit issued in error is void (B.16.b).

17. Based on these findings, the Zoning Board of Appeals concludes that the appellant's offer of proof is insufficient to warrant a remand. The Board of Appeals concludes that the decision of the ZHE in denying the variance request was CORRECT. Therefore, the appeal is DENIED and the decision of the ZHE is AFFIRMED.

If you wish to appeal this decision, you must do so by **February 8, 2017**, 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.

Catalina Lehner

for Suzanne Lubar, Planning Director

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