



Planning Department
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Albuquerque, NM 87102

CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Carl Reazin & Brian Ryan (Agent) appeal the Zoning Hearing Examiner’s Approval of a special exception, with conditions, to Zoning Code §14-16-3-19(A)(3)(a): a Variance of 3 feet to the required 3 foot fence height to allow for a proposed 6 foot fence in the required front yard setback for all or a portion of Lots 8-11, Block 24, Waggoman Denison Addition, zoned SU-2/C-2, located at 340 Wyoming Blvd. NE. (K-20)

Appeal No:..... 17BOA-20003
Special Exception No: 17ZHE-80003
Project No: 1011106
Hearing Date:..... 5/23/2017

In the matter of **17BOA-20003**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal, thereby reversing the decision of the Zoning Hearing Examiner (ZHE) based on the following findings:

PO Box 1293

FINDINGS:

Albuquerque

NM 87103

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1. This is an APPEAL of the Zoning Hearing Examiner’s (ZHE’s) APPROVAL 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)(3)(a)] to allow for a 6 foot fence (the “application”).
2. The subject site is described as Lots 8-11, Block 24, Waggoman Dennison Addition, containing approximately 0.5125 acre and located at 340 Wyoming Blvd. NE, and zoned SU-2/C-2 (the “subject property”). The subject property is within the boundaries of the East Gateway Sector Development Plan.
3. The subject property, developed with an automobile sales business and an off-premise sign, is located at the southeastern corner of the intersection of Wyoming Blvd. NE and Copper Ave. The applicant for the variance owns the subject property.
4. The Albuquerque/Bernalillo County Comprehensive Plan, the East Gateway Sector Development Plan, and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.
5. The applicant for the variance wants to install a six-foot tall fence along the western and northern property lines, which face Wyoming Blvd. NE and Copper Ave. NE. A six foot tall wrought iron fence exists along a small portion (distance unspecified) of the Wyoming Blvd. side of the subject property.

6. Pursuant to Zoning Code §14-16-3-19(A)(3)(a), Height/Design Regulations for Walls, Fences and Retaining Walls, a wall, fence, retaining wall, or vertical combination of these in a non-residential zone is not limited as to height except within five feet of the public street right-of-way (ROW), where these shall not exceed three feet in height above the abutting grade on the street side. 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 heard at the February 21, 2017 ZHE hearing and deferred to the March 17, 2017 ZHE hearing to: (a) allow the applicant time to provide information regarding the proposed fence; (b) so Staff could research a variance case for a fence on the subject property in 2001; and (c) so Staff could check with the Traffic Engineer regarding what the clear sight triangle requirements are on the subject property (Record, p. 25).
9. The ZHE found that the variance request 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 §14-16-4-2(C)(2)(a). However, despite the ZHE finding, no substantial support was articulated to support this decision; nor could any testimony be found in the record.
10. The ZHE found that special circumstances apply to the subject property that 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, as required by §14-16-4-2(C)(2)(b). The ZHE stated that the subject property is a corner lot on a busy intersection, in a location that attracts significant trespassing, littering, and theft. The Board does not find that these conditions meet the criteria of a special circumstance. The ZHE did not present any additional substantial support for this conclusion.
11. Zoning Code §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 the proposed fence would be two feet over the property line and into the public right-of-way, which is the same location as the fence installed by a previous property owner and later removed. Re-installation of the fence at the proposed location constitutes a public nuisance and a danger to the community, and would create a dangerous and deadly traffic hazard (Record, p. 3).

12. The drawing at Record, p. 33 is not a site plan. Rather, it is an illustrative exhibit. The exhibit is not scaled or dimensioned and does not show the following: (a) the relationship between the location of the proposed fence and the public Right-of-Way; (b) the clear sight triangle; and (c) the length of the existing fence along a small portion of the subject site's western side.
13. The applicant did not meet the burden for a variance as requested.
14. Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE in approving the variance request was incorrect. Therefore, the appeal is granted and the decision of the ZHE is reversed.

If you wish to appeal this decision, you must do so by **June 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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