



Planning Department
Suzanne Lubar, Director
Urban Design & Development Division
600 2nd Street NW – 3rd Floor
Albuquerque, NM 87102

CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Paul P. Bennett requests a special exception to Section 14-16-2-14(D) and 14-16-2-6(E)(4)(a): a VARIANCE of 3 feet to the required 5 foot side yard setback for all or a portion of Lot 18-A-P1, Paseo de Estrella Subdivision, zoned R-D, located at 1123 Diamondback Dr. NE (D-16)

Appeal No:..... 17BOA-20006
Special Exception No: 17ZHE-80101
Project No:..... 1011237
Hearing Date:..... 10/05/2017

In the matter of **17BOA-20006**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal, thereby **REVERSING** the Zoning Hearing Examiner’s (ZHE’s) decision based on the following findings:

FINDINGS:

- PO Box 1293
Albuquerque
NM 87103
www.cabq.gov
1. This is an APPEAL of the Zoning Hearing Examiner’s (ZHE) APPROVAL of a SPECIAL EXCEPTION pursuant to Zoning Code §14-16-4-2(C)(2), Variance Criteria: a variance of 3 feet to the required 5 foot side yard setback [Zoning Code §14-16-2-6(E)(4)(a)] to allow for an existing playhouse (the “application”).
 2. The subject site is described as Lot 18-A-P1, Paseo de Estrella Subdivision, containing approximately 0.24 acre and located at 1123 Diamondback Dr. NE (the “subject property”). The subject property is not within the boundaries of a sector development plan.
 3. The subject property, developed with a single-family home, is located in the Vista del Norte Subdivision, which is generally located west of the North Diversion Channel and north of Osuna Rd. NE. The applicant for the variance 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-D, Residential and Related Uses Zone- Developing Area (Zoning Code §14-16-2-14). Pursuant to Subsection D, permissive uses in areas not covered by an adopted Sector Development Plan are the same as uses permissive in the R-1 zone, and are subject to all controls of the R-1 zone.
 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 applicant requested a variance of 3 feet to the minimum 5 foot requirement because an elevated playhouse was partially built and it encroaches into the side yard setback area.

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 ZHE found 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 §14-16-4-2(C)(2)(a). The playhouse does not change the intensity or nature of the use of the subject property, and the structure is substantially screened by mature trees and is attractively and appropriately designed.
9. The ZHE found that special circumstances, such as size, shape, topography, location, surroundings, or physical characteristics created by natural forces or government action for which no compensation was paid, apply to the subject property that do not apply generally to other property in the same zone and vicinity because the size and shape of the subject property constitute special circumstances [§14-16-4-2(C)(2)(b)].

Specifically, the subject property is funnel-shaped and very narrow in the front, allowing for little more than the width of the driveway, gradually increasing in width to maybe 40% of its depth, at which point it angles north and continues gradually widening, up to a width of 80 feet in the rear, abutting Vista del Norte Dr. NE.
10. The ZHE found that 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 district, as required by §14-16-4-2(C)(2)(c). The Applicant had no responsibility for creating the size or shape of the subject property, or the size and location of the house on the property, and even paid extra for a lot with a reasonably sized back yard.
11. The ZHE also found that substantial justice will be done if the variance is approved [§14-16-4-2(C)(2)(d)]. The applicants testified that they were misled by the builder regarding the size of the rear yard, which would have been the logical location for a playhouse.
12. 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, the Vista del Norte Homeowners Association (HOA), does not specifically refer to any of the above reasons for appeal. Rather, they state that approval of the variance is injurious to the covenants of the Vista del Norte HOA. Modifications, including the playhouse, were made to the subject property without the consent of the HOA's architectural committee. The applicant's special circumstances are self-imposed and create an unnecessary hardship for the HOA by setting a precedent of conflict with the covenants. Also, a representative of the HOA arrived at 9:16 am to attend the ZHE hearing on June 20, 2017, but the variance request had already been heard so they were not able to participate in the hearing (Record, p. 4-5).

13. A neighbor who attended the ZHE hearing indicated that her questions were answered, and that she had no objection to the application. The applicant testified that the abutting neighbors on the affected side of the subject property do not oppose the application.
14. The BOA finds that the size and shape of the subject property do not constitute special circumstances particular to the subject property pursuant to §14-16-4-2-(C)(2)(b). The size of the subject property is comparable to two other lots in the same subdivision, one to the west and the other to the southwest (Record, p. 33). Like the subject property, these two lots, and the lot adjacent east, are long in depth and narrow at the front facing the street. This creates a shared circumstance, not unique to the subject property, where the driveway is long and the home is pushed back onto the lot.
15. The BOA finds that the applicant's special circumstances were self-imposed, contrary to §14-16-4-2-(C)(2)(c). The applicant could have decided not to purchase the subject property due to his desire for a larger back yard. Though often a playhouse is located in the back yard area, the applicant has a pool in the back yard (Record, p. 25), a decision that resulted in the side yard becoming the desired location for the playhouse.
16. Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE in approving the special exception (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 **October 20, 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

cc: Catalina Lehner, Planning Department- clehner@cabq.gov
Lorena Patten-Quintana, Planning Department- lpatten-quintata@cabq.gov
Brennon Williams, Planning Department- bnwilliams@cabq.gov
Andrew Garcia, Zoning Enforcement Division- agarcia@cabq.gov
Christopher Tebo/Legal Department, City Hall, 4th Floor- ctebo@cabq.gov
Kevin Morrow/Legal Department, City Hall, 4th Floor- kmorrow@cabq.gov
Nicholas Bullock/Legal Department, City Hall, 4th Floor- nbullock@cabq.gov
BOA File
stonewahl1@aol.com
shelleymund@yahoo.com
vistadelnorte@me.com
jamesouter@msn.com