



## Planning Department

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### CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

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)(b), a variance of 5 feet to the required 10 foot rear yard setback [Zoning Code §14-16-2-6(E)(5)(a)] for Lot 14, Block 1, Bear Canyon Village Addition, located at 7524 Bear Canyon Rd. NE (E-19).

Appeal No:..... 17BOA-20008  
Special Exception No: ..... 17ZHE-80199  
Project No:..... 1011343  
Hearing Date:..... 01/23/2018

In the matter of **17BOA-20008**, 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:

PO Box 1293

#### 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)(b), a variance of 5 feet to the required 10 foot side yard setback [Zoning Code §14-16-2-6(E)(4)(b)] to allow for a proposed addition to an existing home and the installation of handicap ramps (the “subject application”).
2. The subject site is described as Lot 14, Block 1, Bear Canyon Village Addition, containing approximately 0.26 acre and located at 7524 Bear Canyon Rd. 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 Bear Canyon Neighborhood and is developed with a single-family home, which is located on the eastern side of a cul-de-sac that extends southward from Bear Canyon Rd. NE. 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 2,405 sf single-family home, with a 981 sf indoor pool room, exists on the subject property (Record, p. 108).
6. Pursuant to Zoning Code §14-16-2-6(E)(4)(b), the R-1 Residential Zone requires a minimum of 10 feet for the side yard setback on one side of the property and a minimum of 5 feet for the side yard setback on the other side of the property. This applies to lots 70 feet or wider, such as

the subject property, which measures approximately 90 feet from northern to southern property line (Record, p. 108).

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.

Pursuant to Zoning Code §14-16-4-2(C)(2), all of the tests (a, b, c, and d) must be met for a variance to be approved.

8. The ZHE found that the applicant bears the burden of ensuring that there is evidence in the record to support findings that the above criteria are met pursuant to §14-16-4-2(C).
9. The applicant identified three special circumstances that pertain to the subject property: the size of the lot, its shape, and its location in the middle of a cul-de-sac.
10. The ZHE found that no special circumstances apply to the subject property that do not apply generally to other property in the same zone and vicinity, as required by §14-16-4-2(C)(2)(b), because the subject property faces the same circumstances as most other lots in the same zone and vicinity. The subject property is not smaller than other properties in the same zone (R-1) and vicinity (size), it is regularly shaped (shape), and is located in a typical R-1 circumstance, fronting the street with neighboring residential lots on both sides and the rear (location) (Record, p. 25).
11. Therefore, because the ZHE was unable to find that special circumstances apply to the subject property, test b of Zoning Code §14-16-4-2(C)(2) was not met. Since all tests (a through d) are required to be met for a variance to be granted, the ZHE denied the subject application.
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 does not specifically refer to the above reasons for appeal. Rather, he states that the ZHE's decision is not supported by substantial evidence in the record, that the ZHE did not act in accordance with Zoning Code §14-16-4-2(C)(2) [Variance Criteria], and that the ZHE acted prejudicially because of a conflict of interest with the appellant (Record, p. 12).

13. The appellant believes that evidence of special circumstances was provided via oral testimony at the September 19, 2017 ZHE hearing. Specifically, the special circumstance that applies to the subject property and not to other properties in the same zone and vicinity is that the appellant is planning to construct an addition to the house to care for 4-5 seniors with disabilities, and that the setback variance became necessary due to the need for the addition to have ADA compliant handicap ramps for accessibility (Record, p. 13). The appellant further states that the subject property is smaller and less wider (sic) towards the back than other properties in the same cul-de-sac.
14. The appellant claims that the subject property is smaller and less wide towards the back than other properties in the same cul-de-sac. The test in §14-16-4-2-(C)(2)(b), however, requires a comparison of the subject property and "other properties in the same zone and vicinity". As shown on the relevant Zone Atlas page (E-19), the subject property is a similar size to many other R-1 zoned properties in the Bear Canyon Village Addition (Record, p. 58).
15. The appellant's plans to construct an addition to the subject property, regardless of how the addition would be used or who would live in it, does not constitute a special circumstance pursuant to Zoning Code §14-16-4-2-(C)(2)(c) because the circumstance is self-imposed.
16. The BOA finds that the ZHE's decision to deny the subject application based on the lack of special circumstances applicable to the subject property, which do not apply generally to other property in the same zone and vicinity [§14-16-4-2-(C)(2)(b)], is supported with substantial evidence in the record.
17. Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE in denying the special exception (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 07, 2018**, 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.

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