

Planning Department
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**CITY OF ALBUQUERQUE
BOARD OF APPEALS
NOTIFICATION OF DECISION**

Louise Miller appeals the Zoning Hearing Examiner's Approval with Conditions of a special exception to section 14-16-3-19(A)(2)(a): a Variance of 3' 6" to the maximum 3' height to allow an existing fence on the front yard setback area for all or a portion of Lot 21, Block 5, Mesa Arriba zoned R-1, located on 9813 Mesa Arriba Ave NE (G-21).

Appeal No:..... 15BOA-20004
Special Exception No:..... 15ZHE-80145
Project No: 1010467
Hearing Date: 09/29/15
Decision Date:..... 09/29/15

In the matter of **15BOA-20004**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal, thereby **OVERTURNING** the Zoning Hearing Examiner's (ZHE's) decision based on the following findings:

FINDINGS:

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, 6 inches to the maximum 3 feet height allowed for a wall or fence in the front yard setback in the R-1 zone [Zoning Code §14-16-2-6(E)(1)], to allow for an existing fence.
2. The subject site is described as Lot 21, Block 5, Mesa Arriba Addition, containing approximately 0.17 acre and located at 9813 Mesa Arriba Ave. NE (the "subject property"). The subject property is not within the boundaries of a sector development plan or a recognized neighborhood association.
3. The subject property is zoned R-1 and is developed with a single-family home. It is surrounded by single-family residential properties that are also zoned R-1.
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. The required front yard setback is a minimum of 20 feet [§14-16-2-6(E)(1)]. A 3 foot wall or fence is allowed permissively. The associated fee is \$25, charged through Zoning. A five foot wall or fence that is primarily open (ex. 3 foot

wall with two feet of wrought iron) is allowed as a conditional use [§14-16-2-6 (B)(14)]. The associated fee is \$25, charged through Zoning. A ZHE hearing would be required.

6. Pursuant to Zoning Code §14-16-3-19, Height/Design Regulations for Walls, Fences and Retaining Walls, a 6 foot wall or fence is allowed if not otherwise limited by the underlying zone (as is the case here). A variance of 3 feet to the allowed 3 foot wall or fence height would result in a 6 foot wall or fence, which would be subject to the \$25 Zoning fee.

The requested variance of 3 feet, 6 inches would result in a wall or fence over 6 feet tall. Walls or fences exceeding 6 feet tall are regulated by the Building and Safety Division of the Planning Department. In addition to the \$25 Zoning fee, fees charged by the Building and Safety Division apply and engineering information is required.

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 Zoning Hearing Examiner (ZHE) found that the applicant has met its burden of providing evidence (both oral testimony and written material) to establish that the proposed variance would not be contrary to the public interest, injurious to the community, or injurious to the property or improvements in the vicinity of the subject property [§14-16-4-2(C)(2)(a)]. The applicant testified that numerous comments in support of the fence were received (see Finding #12). The applicant also stated that the fence does not limit pedestrian or vehicular visibility and submitted photographic evidence. The record contains signatures of 25 individuals who support the variance application.

9. The ZHE also found that the applicant has met its burden of providing evidence (both oral testimony and written material) to establish that special circumstances apply to the subject site that do not apply generally to other property in the same zone and vicinity [§14-16-4-2(C)(2)(b)]. The applicant testified that the abutting neighbor (Ms. Miller's) sprinklers regularly overspray onto vehicles parked in the adjacent parking area of the subject property, causing paint and glass damage due to hard water. The neighbor's bamboo thicket is expanding toward the subject property and sheds a significant amount of plant debris.

10. The ZHE also found that the applicant has met its burden of providing evidence (both oral testimony and written material) to establish that special circumstances presented herein were not self-imposed, and that those special circumstances create an unnecessary hardship upon the applicant [§14-16-4-2(C)(2)(c)]. The applicant provided testimony that the portion of the subject property adjacent to the fence is unusable for its intended purpose of parking vehicles because the sprinklers over-spray hard water, causing paint damage to vehicles, and that there is encroachment and debris from the bamboo thicket. Neither is under applicant's control and constitutes an "unjustified limitation on the reasonable use of the subject property.
11. Finally, the ZHE found that the applicant has met its burden of providing evidence (both oral testimony and written material) to establish that substantial justice will be done if the application is approved [§14-16-4-2(C)(2)(d)].
12. The ZHE approved the variance subject to two conditions of approval, as follows:
 - A. The Applicant shall remove or lower the portion of the fence that currently conflicts with the required 11' mini clear sight triangle, as directed by Traffic Engineering, so that the fence is no more than three feet tall at 11 feet back from the curb.
 - B. The Applicant shall adhere to the design guidelines for walls and fences as set forth in the City of Albuquerque Zoning Code.
13. One party, Ms. Louise Miller, the neighbor adjacent east of the subject property, provided testimony and written material to demonstrate her opposition to the variance application. She is now appealing the ZHE's approval of the variance application.
14. This case was continued from the June 16, 2015 ZHE hearing in order to allow time for a facilitated meeting to occur. The meeting was held on July 11, 2015. According to the facilitated meeting report, the parties seemed intractable in their positions.
15. 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 states that the ZHE decision contains numerous errors in applying City plans, policies and ordinances (a), in the appealed decision, including its stated facts (b), and that the ZHE acted arbitrarily, capriciously, and outside the scope of jurisdictional powers (c). The facts presented in the record did not adequately establish the required burden of proof for approval of a special exception/variance.

16. The appellant contends that the restrictive covenants for the neighborhood apply, and that the ZHE did not give them adequate weight in determining injury. The appellant also states that the alleged sprinkler over-spraying and encroaching bamboo thicket are not sufficient to make the subject property special under the Code, and that the 3'7" [sic] additional height requested for the fence was arbitrary and was not shown to be necessary.
17. The issue of sprinkler overspraying does not constitute a special condition as described by the code. Further, the record includes no substantial evidence to support a finding that any sprinkler overspraying by the appellant has caused or will cause damage to the applicants' vehicles, or that this portion of the property is therefore unusable, such that it requires the wall that would be allowed by the variance.
18. The issue of bamboo encroachment does not constitute a special condition as described by the code. Further, the record includes no substantial evidence to support a finding that the neighbor's bamboo has caused or will cause damage to the applicants' property, such that it requires the wall that would be allowed by the variance.
19. While the record includes substantial evidence of bad neighbor relations in this case, such relations do not constitute a special circumstance. The matter of neighbor relations is not in and of itself a land use issue subject to adjudication through the variance process.
20. The record includes no substantial evidence of an unjustified limitation on the reasonable use of the applicants' property without the variance.
21. The decision of the ZHE is not supported by the record or by the controlling provisions of the Zoning Code.
22. Because there is no substantial evidence either of special circumstances or of an unnecessary hardship as defined in Section 14-16-4-2 (Special Exceptions) of the Comprehensive City Zoning Code, the requested variance cannot be approved.
23. In approving this variance without substantial evidence of special circumstances or hardship in the record, the ZHE erred in applying the code in arriving at the decision, and acted arbitrarily.
24. Based on these findings, the Zoning Board of Appeals concludes that the decision of the Zoning Hearing Examiner (ZHE) in approving the variance request was INCORRECT. Therefore, the appeal is GRANTED and the decision of the ZHE is OVERTURNED.

If you wish to appeal this decision, you must do so by **October 14, 2015**, 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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BOA File