



CITY OF ALBUQUERQUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
ZONING HEARING EXAMINER  
NOTIFICATION OF DECISION

JOHNNY R ROBINSON (GARCIA/KRAEMER & ASSOCIATES, AGENT) requests a special exception to Section 14-16-2-6(E)(5)(a): a VARIANCE of 14' to the minimum required 15' rear yard setback for an existing addition for all or a portion of Lot 27, Block 5, DESERT TERRACE ADDN UNIT 1 zoned R-1, located on 4400 BOONE ST NE (F-18)

Special Exception No:..... **15ZHE-80125**  
Project No:..... **Project# 1010433**  
Hearing Date:..... 05-19-2015  
Closing of Public Record:..... 05-19-2015  
Date of Decision: ..... 05-29-2015

On the 19th day of May, 2015 (hereinafter “**Hearing**”) GARCIA/KRAEMER & ASSOCIATES, (hereinafter “**Agent**”) acting as agent on behalf of the property owner JOHNNY R ROBINSON (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a Variance of 14' to the minimum required 15' rear yard setback for an existing addition (hereinafter “**Application**”) upon the real property located at 4400 BOONE ST NE (“**Subject Property**”). Below are the findings of facts:

**FINDINGS:**

1. Applicant is requesting a Variance of 14' to the minimum required 15' rear yard setback for an existing addition.
2. **Background to the Application:** The ZHE was made aware through the Application and testimony during the Hearing that the Applicant received a building permit from the City of Albuquerque to construct a two story addition on the Subject Property, that was red tagged by the City “*5 years earlier but ordered that all work must stop until an approved variance to setback was obtained by City Zoning Hearing Examiner*” (See Justification Letter by Mr. Turner dated April 16, 2015 – hereinafter referred to as “Justification Letter”). The ZHE heard the application in 2011 (ZHE Case No. 1009062) for a variance and was issue a Notice of Decision “Denial” for allegedly failing to meet the “exceptionality” test as articulated in the Zoning Code [The City of Albuquerque Governing Body “City Council” has since amended the criteria for consideration applied to a Variance, and this Notice of Decision will be implementing the new adopted criteria as provided in City of Albuquerque Zoning Code of Ordinances Section § 14-16-4-2 (C) (2)]. According to the Agent, the City of Albuquerque originally issued the building permit to the Applicant based upon the opinion by staff that the proposed addition would be located in the “*side yard setback*” area. The City later reversed that opinion and determined that this proposed addition was in fact oriented in the “*rear yard setback*”. The Applicant received from the City of Albuquerque the “AGREEMENT AS TO SIDE SETBACK” and presented it to the neighboring property owner, Mr. Paul Hughes. Mr. Hughes

executed the “AGREEMENT TO SIDE SETBACK” on the 17<sup>th</sup> day of May, 2007 (See ZHE File Exhibit D). The attorney representing Mr. Hughes (and his wife) spoke at the Hearing and suggested that his clients were unaware that the “AGREEMENT AS TO SIDE SETBACK” was going to empower the Applicant to construct the proposed addition to within one foot of their property line. The Applicant testified that the neighbor (Mr. Hughes and his wife) were very aware of the design of the proposed addition and even helped him during his construction efforts (while being full aware that the proposed addition was located 1 foot from the property line). The Agent also made aware to the ZHE that there currently exists an appeal of the original ZHE decision to deny the variance that is being considered by the New Mexico Court of Appeals (although the ZHE received no documentary evidence of the appeal or the motions, pleadings, etc. from that case).

3. **ZHE Procedural Approach.** The ZHE has reviewed the background of the Application (Item No. 2 above) and has reached the conclusion that the Applicant has the right to re-apply for the Variance application after waiting one year from the issuance of the prior denial from the ZHE. All the parties agree that this Application exceeds the one year waiting period required prior to issuance of a new Application. The ZHE will apply the new variance criteria - Albuquerque Zoning Code of Ordinances Section § 14-16-4-2 (C) (2) - to the set of facts contained in the Application and presented at the Hearing. The ZHE has chosen to weigh the dispute centered between the Applicant and his neighbor (Mr. Hughes and his wife) regarding their understanding as to what setback distance was contemplated within the “AGREEMENT AS TO SIDE SETBACK” as merely one factor (among many presented) as to whether this Application will be injurious to the community - as required in Albuquerque Zoning Code of Ordinances Section § 14-16-4-2 (C) (2) (a). The ZHE is going to assume that he has the authority to issue a decision on this new variance Application despite the fact that the Agent represented that there is currently an appeal taking place on the prior ZHE Notice of Decision within the New Mexico Court of Appeals.
4. The City of Albuquerque Zoning Code of Ordinances Section § 14-16-4-2 (C) (2) “SPECIAL EXCEPTIONS – VARIANCE” reads in part: “A variance application shall be approved by the Zoning Hearing Examiner, if and only if, the Zoning Hearing Examiner 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.”

5. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that the Application is not going to be: **(i)** contrary to the public interest, **(ii)** injurious to the community; or **(iii)** injurious to the property/improvements located in the nearby vicinity of the Subject Property. Specifically, the Applicant provided testimony that he believes this two story addition that was approved by the City of Albuquerque for issuance of a building permit over seven years ago (if allowed to finish the construction) will increase property values in the neighborhood because it is currently “half finished” and exposed to the elements and detracting from the aesthetics of the community. It is overwhelmingly apparent to the ZHE that the vast majority of the neighbors support the Applicant’s efforts to complete the construction of the proposed addition (see the ZHE File Exhibit A and Exhibit B – petitions signed by over 75 neighbors prepared by Ms. Jennifer Volek). In fact, of all the folks that testified, signed petitions and submitted written documents on this Application... the only neighbor that opposed the completion of the construction of the two story addition is the next door neighbor to the east (Mr. Hughes and his wife). It has also become obvious to the ZHE that this Applicant relied upon the City issuance of a building permit (over 7 years ago) and invested thousands of dollars on the construction of the proposed addition only to be red tagged prior to completion. The ZHE believes that it would be contrary to the public interest to deny this variance and require this Applicant to demolish the addition that he has worked so hard to construct [as required pursuant to Section § 14-16-4-2 (C) (2) (a)]. Further, the Application and testimony of the Applicant at the Hearing suggest that there is no neighborhood association opposition to the Application (Del Norte Neighborhood Association). Further, the neighbor located directly north of the Subject Property testified that he thinks the Applicant is a good neighbor and wants badly to see him finish the project and complete the addition for the benefit of the community. The ZHE Hearing in May received testimony from Jennifer Volek, Marie Kenny, Irene Magallanez, Manuel Gonzales, Eduardo Martin, Harry Drake, and others that this Variance should be approved and it will NOT be injurious to the community to complete the addition. The ZHE Hearing also experienced one neighbor that opposed the Application, Ms. Madeline Edgar (and her attorney Mr. Joseph Karnes), the wife of Mr. Hughes and neighbor to the east of the Subject Property, who stated that the addition may make it difficult for emergency personnel to access her property and the Subject Property and that the proposed addition by the Applicant is making it difficult for her to sell her home. The ZHE believes that as a whole the overwhelming sentiment from the neighbors (other than Ms. Edgar and Mr. Hughes and their attorney) is that this proposed addition should be allowed to be completed and it would be beneficial to the community.
6. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that there are “special circumstances” applicable to the Subject Property which do not apply generally to other property in the same zone and vicinity. Specifically, the Applicant provided testimony that indicate to the ZHE that the special circumstances applicable to the Subject Property are as follows: (i) the Applicant was previously issued a building permit to construct the addition nearly seven years ago (and even received a few “green tags” during the construction process) that was later rescinded by the City of Albuquerque as a result

of the City's error in interpretation as to which side of the home was the "rear" and which side was the "side yard"; (ii) the property is located on a corner lot that is fronting on two sides by public right of way which provides unique and special setback requirements and confusion regarding side yard and rear yard setbacks. The ZHE believes that the previously issued building permit (and green tags during the construction process) and the location of the property on a corner lot with unique setback requirement that confused the City of Albuquerque constitute special circumstances [as required pursuant to Section § 14-16-4-2 (C) (2) (b)].

7. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that the special circumstances presented hereinabove were not "self-imposed", and that those special circumstances create an unnecessary hardship upon the Applicant. Specifically, the Applicant made a compelling argument that forcing the Applicant to demolish the previously authorized construction of the addition would constitute an "*unjustified limitation on the reasonable use of the Subject Property*" [as required pursuant to Section § 14-16-4-2 (C) (2) (c)]. It is also clear to the ZHE that the special circumstances were imposed by the City of Albuquerque (rescinding the issuance of a building permit and requiring a variance approval to complete the construction of the addition) and not self-imposed by the Applicant.
8. The ZHE finds that the Applicant has met its burden of providing evidence (both oral testimony and written material) that establishes that substantial justice will be done if this Application is approved [as required pursuant to Section § 14-16-4-2 (C) (2) (d)].
9. Applicant testified at the Hearing that the yellow "Notice of Hearing" signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 (B) (4).

#### **CONCLUSIONS OF LAW:**

The Applicant has met their burden of submitting an Application that provides evidence that satisfies the elements required within §14-16-4-2 (C) (2) of the Albuquerque Zoning Code.

#### **DECISION:**

**APPROVAL WITH CONDITIONS** of a VARIANCE of 14' to the minimum required 15' rear yard setback for an existing addition.

#### **CONDITIONS OF APPROVAL:**

- A. The Applicant shall ensure that the proposed addition meets current building and fire codes prior to the completion of construction (and receipt of a certificate of occupancy).
- B. The Applicant shall ensure that the exterior of the addition has similar color and material as used on the home located on the Subject Property (to provide an aesthetically congruent appearance between the existing home and the addition).

If you wish to appeal this decision, you may do so in the manner described below:


Appeal is to the Board of Appeals within 15 days of the decision. A filing fee of \$105.00 shall accompany each appeal application, as well as a written explanation outlining the reason for appeal and a copy of the ZHE decision. Appeals are taken at 600 2nd Street, Plaza Del Sol Building, Ground Level, Planning Application Counter located on the west side of the lobby. **Please present this letter of notification when filing an appeal.** When an application is withdrawn, the fee shall not be refunded.

An appeal shall be heard by the Board of Appeals within 45 days of the appeal period and concluded within 75 days of the appeal period. The Planning Division shall give written notice of an appeal, together with a notice of the date, time and place of the hearing to the applicant, a representative of the opponents, if any are known, and the appellant.

Please note that pursuant to Section 14. 16. 4. 4. (B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

You will receive notice if any other person files an appeal. If there is no appeal, you can receive building permits any time after the appeal deadline quoted above, provided all conditions imposed at the time of approval have been met. However, the Zoning Hearing Examiner may allow issuance of building permits if the public hearing produces no objection of any kind to the approval of an application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

Successful applicants are reminded that other regulations of the City must be complied with, even after approval of a special exception is secured. This decision does not constitute approval of plans for a building permit. If your application is approved, bring this decision with you when you apply for any related building permit or occupation tax number. Approval of a conditional use or a variance application is void after one year from date of approval if the rights and privileges are granted, thereby have not been executed or utilized.

  
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Joshua J. Skarsgard, Esq.  
Zoning Hearing Examiner

cc: Zoning Enforcement  
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