



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

DAVID PINO requests a special exception to Section 14-16-3-3 (B)(2)(e) : a VARIANCE of 10 ft to the required 10 ft separation of an accessory building for all or a portion of Lot 11B, Williams Dora A Addn zoned R-1, located on 2310 DORA AV NW (J-12)

Special Exception No:..... **16ZHE-80248**
Project No: **Project# 1010992**
Hearing Date: 11-17-16
Closing of Public Record: 11-17-16
Date of Decision: 11-30-16

On the 17th day of November, 2016, DAVID PINO (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 10 ft to the required 10 ft separation of an accessory building (“Application”) upon the real property located at 2310 DORA AV NW (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 10 ft to the required 10 ft separation of an accessory building.
2. The City of Albuquerque Zoning Code of Ordinances Section 14-16-4-2 (C)(2) (Special Exceptions – Variance) reads: “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.*”
3. The Applicant bears the burden of ensuring there is evidence in the record supporting a finding that the above criteria are met under Section 14-16-4-2(C).
4. The first required finding is that Application is not: (i) contrary to the public interest, (ii) injurious to the community; or (iii) injurious to the property or improvements located in the vicinity as required by Section 14-16-4-2 (C)(2)(a).
5. Here, the Applicant states that “the proposed variance will not harm other properties in the area because the shed in question, replaces an older, poorly constructed shed in the same location.”
6. The abutting neighbor objects that the shed (which has been substantially constructed) is visually intrusive, and blocks her views.

7. The Applicant confirms that the shed as constructed is approximately 10 feet high, replacing a shed that was approximately 5 feet high.
8. It has hard to see how the shed is injurious to the community or contrary to the public interest. However, blocking views or light can be considered injurious, and it does appear that the shed to some extent blocks the neighbor's views.
9. One mitigating option might be to approve the shed, but condition the approval on reducing its height to that of the original, or perhaps the abutting wall, which appears to be 6 feet high, although this would seem to substantially limit its utility.
10. The neighbor also asserts that the shed is actually connected to the house, and is therefore not a separate structure. The Applicant states that the shed is constructed separately from the house, but also seeks a 10' variance to a 10' separation requirement, which would be a zero separation and may support the neighbor's position. It is not possible from the evidence in the record to make this determination, nor is it necessary to do so to resolve the variance request (there may be a code enforcement issue).
11. The next required finding is that 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, as required by Section 14-16-4-2(C)(2)(b).
12. The Applicant states, "The properties in the same area as the property in question are basically the same size and shape. The one thing that makes the property different from the others is that the house was built towards the rear of the property which leaves little back yard." There is no other evidence that the special circumstances do not apply generally to other properties, but this point is also not disputed.
13. The little back yard is thus the special circumstance asserted by the Applicant in support of reducing the otherwise-required 10-foot separation.
14. This circumstance does not constitute "size, shape, topography, location, surroundings, or physical characteristics created by natural forces or government action for which no compensation was paid." However, the list contained in Section 14-16-4-2(C)(2)(b) is also not exhaustive and the property layout may qualify.
15. The final requirement is that ZHE find 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 Section 14-16-4-2(C)(2)(c).
16. The limiting factor here is the lack of evidence that there is no other suitable location on the Subject Property for the shed. The Subject Property has a large front yard, and Applicant has not addressed why the front yard might not contain a suitable location for the shed. In the absence of this information, the ZHE cannot determine if the special circumstances create an unnecessary hardship on the reasonable use or return of the property.
17. It is worth noting that the fact that the shed has already been constructed does not enter into the required analysis, and the ZHE gives the pre-existing status no consideration and does not apply a more stringent analysis because of any unpermitted construction.

18. The ZHE finds that the proper “Notice of Hearing” signage was posted for the required time period as required by Section 14-16-4-2(B)(4).
19. The ZHE finds that the Applicant has authority to pursue this Application.

CONCLUSIONS OF LAW:

The criteria within Section 14-16-4-2(C)(2) of the Albuquerque Zoning Code are not satisfied.

DECISION:

DENIAL of a variance of 10 ft to the required 10 ft separation of an accessory building.

If you wish to appeal this decision, you must do so by December 15, 2016, 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 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.

A handwritten signature in black ink, appearing to read "Chris L. Graeser", written over a horizontal line.

Christopher L. Graeser, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
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