



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

CHARLES & KATHERINE MORGAN requests a special exception to Section 14-16-2-6(E)(4)(a) : a VARIANCE of 5 ft to the required 5 ft side yard setback for an existing shade structure for all or a portion of Lot 4, Block 13, Volcano Cliffs Unit 5 zoned R-1, located on 8005 EMERALD DR NW (E-10)

Special Exception No:..... **17ZHE-80142**
Project No:..... **Project# 1011293**
Hearing Date:..... 08-15-17
Closing of Public Record:..... 08-15-17
Date of Decision: 08-30-17

On the 15th day of August, 2017, CHARLES & KATHERINE MORGAN (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 5 ft to the required 5 ft side yard setback (“Application”) upon the real property located at 8005 EMERALD DR NW (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 5 ft to the required 5 ft side yard setback
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 ZHE finds 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. Specifically, the ZHE finds that the subject construction reasonably protects the Subject Property against winds, dust and weeds blown from the West side escarpment

at the edge of the City without impinging on the views, light, use, access or safety of surrounding properties.

6. The Applicants have constructed an attractive, functional recreation area adjunct to their home in a manner that can be open in nice weather and protected in inclement weather.
7. The area has become a neighborhood meeting place, and in fact the Applicants have submitted written comments in support from a number of neighboring residents (there are a number of vacant lots), indicating a degree of community consensus that the use is not injurious.
8. The house retains its existing footprint and the existing yard wall remains, with the requested variance applying only to the acrylic roof and windows that allow the area to be closed in.
9. The Applicants have been forthright as to what they have constructed and clear about what they are requesting, contrary to suggestions in opposition that they are engaging in some type of subterfuge.
10. In short, the ZHE cannot find that the use is or would be injurious.
11. That said, there was testimony that the construction violates applicable private covenants. The ZHE has no authority to enforce such covenants, but the New Mexico Supreme Court has directed that such covenants should be considered. *Singleterry v. Albuquerque*, 96 NM 468.
12. The next requirement is that the ZHE find 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).
13. Applicants describe the Subject Property as being irregularly shaped, which in context of the location of the improvements on the property causes space constraints not generally existing in other parts of the neighborhood. Unfortunately, the ZHE cannot agree.
14. Reviewing the neighborhood plan, the Application, and the materials submitted, the ZHE cannot find that the Subject Property suffers from special conditions such as “size, shape, topography, location, surroundings, or physical characteristics created by natural forces or government action for which no compensation was paid.”
15. To be sure the shape of the Subject Property is necessarily unique, inasmuch as no other property appears to have the exact same shape. However, it is similarly generally rectangular, and larger than many others, and its shape does not constitute a special circumstance of the sort contemplated by a zoning ordinance.
16. Moreover, even if such special circumstances exist, the ZHE must 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).
17. It would be difficult to find that denial of weather protection for a patio is a substantial and unjustified limitation on the reasonable use of the property.

18. The ZHE does finds that substantial justice would be done if this Application is approved, as required pursuant to Section 14-16-4-2 (C)(2)(d), but unfortunately that finding does not carry the day.
19. 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).
20. 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 have not been satisfied.

DECISION:

DENIAL of a variance of 5 ft to the required 5 ft side yard setback.

If you wish to appeal this decision, you must do so by September 14, 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 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.



Christopher L. Graeser, Esq.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
charlieandkat@msn.com
martina776@comcast.net
gpchap@yahoo.com