



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

GUY GEMMER requests a special exception to Section 14-16-3-3(B)(2)(e) : a VARIANCE of 3 ft 6 in to the 10 ft separation required for all or a portion of Lot 2, Block 39, University Heights zoned OR-1, located on 204 RICHMOND DR SE (K-16)

Special Exception No:..... **16ZHE-80311**  
Project No:..... **Project# 1011060**  
Hearing Date:..... 02-21-17  
Closing of Public Record:..... 02-21-17  
Date of Decision: ..... 03-08-17

On the 21st day of February, 2017, GUY GEMMER (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 3 ft. 6 in. to the 10 ft. separation required (“Application”) upon the real property located at 204 RICHMOND DR SE (“Subject Property”). Below are the ZHE’s findings of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 3 ft. 6 in to the 10 ft. separation required.
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. Comments were received from an abutting neighbor expressing concern about several aspects of the proposal. First among those concerns is the spread of fire, fire hazard (deck) and access for emergency personnel. City of Albuquerque Enactment 0-2012-029 adopts the 2009 Uniform Fire Code and requires that all new construction

comply with the 2009 UFC. The UFC prescribes detailed requirements for fire separation distance and access. In the absence of evidence to the contrary the ZHE cannot find that compliance with the UFC in these respects does not protect the public interest and avoid injury. It is also worth noting that the Nob Hill Neighborhood Association, Inc. had initial concerns about this issue but determined that those concerns were addressed by the existence of both street and alley access.

6. The next concern expressed was that the space taken for the variance would interfere with green space/open space and parking. As to open space, the Applicant does not seek a variance from FAR, lot coverage or setback requirements. Therefore, there is no evidence tending to show that the 3'6" variance requested will result in any diminution in open space. The proposed structure includes a two-car garage, in addition to the existing 12' by 92' driveway and existing garage. Parking appears to be more than adequate.
7. A noise concern was expressed regarding the existing deck, apparently asserting that it is built within the required setback. There is no evidence that the existing deck, whether legal, legal nonconforming or illegal (in which case a complaint may be registered), has any relationship to the requested separation variance.
8. The requested variance will not interfere with the views, light or access of other residents or impact neighborhood character or security. There is no resultant increase in intensity of use, noise or traffic. The site plan as proposed is appropriate in the context of the surrounding development.
9. In addition, the support of the neighborhood association indicates the absence of potential injury to the surrounding area.
10. The ZHE finds 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).
11. Specifically, the ZHE finds that a primary goal of the Nob Hill Highland Sector Development Plan is historic preservation (NHHS DP, p. 10). In this context, the Applicant states that granting the variance will allow the existing historic structures and walls that are original to the neighborhood to remain in place and unattached to the new structure, preserving their historic footprint. This arrangement is unique to this property and constitutes special circumstances.
12. Additionally, the separation requirement functions similarly to a setback requirement, and in this context it is worth noting that Section 14-16-3-3(A)(3)(b) would be applicable to a setback variance: "A setback variance may be approved... even though there is only a minimal showing as to exceptional physical conditions [for] Houses located on lots created when side-yard setback requirements were less severe and the lot's dimensions make it unreasonable to require the current side-yard setback requirements."
13. The ZHE finds 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).

14. Specifically, the ZHE finds that the Applicant did not impose the combination of the existing historic construction and the protective plan provisions. Requiring compliance with the full 10' of separation would impose an unreasonable limitation.
15. The ZHE finds that substantial justice will be done if this Application is approved, as required pursuant to Section 14-16-4-2 (C)(2)(d).
16. 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).
17. 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 satisfied.

#### DECISION:

APPROVAL of a variance of 3 ft. 6 in. to the 10 ft separation required.

If you wish to appeal this decision, you must do so by March 23, 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.



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