



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

Gary F. Hoffman requests a variance of 3 feet to the 3 foot maximum wall height for Lot 1, Block 39, University Heights, located at 202 Richmond DR SE, zoned MX-T [Section 14-16-5-7-D]

Special Exception No:..... **VA-2020-00379**  
Project No: ..... **Project#2020-004657**  
Hearing Date: ..... 04-20-21  
Closing of Public Record: ..... 04-20-21  
Date of Decision: ..... 05-05-21

On the 20th day of April, 2021, property owner Gary F. Hoffman (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 3 feet to the 3-foot maximum wall height (“Application”) upon the real property located at 202 Richmond DR SE (“Subject Property”). Below are the ZHE’s finding of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 3 ft to the 3 ft maximum wall height.
2. This matter comes before the ZHE on remand from the City Land Use Hearing Officer (LUHO), pursuant to the LUHO notice of decision dated March 16, 2021.
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 14-16-6-4(N)(1).
4. Agent appeared and gave evidence in support of the application.
5. All property owners within 100 feet of the subject property and the affected neighborhood association were notified. City Transportation submitted a report stating no objection.
6. The proper “Notice of Hearing” signage was posted for the required time period as required by Section 14-16-6-4(K)(3).
7. The Applicant has authority to pursue this Application.
8. The Pre-November 2, 2020 version of the City of Albuquerque Integrated Development Ordinance (IDO), applicable to the Application, at Section 14-16-6-6(N)(3)(a) (Variance-Review and Decision Criteria) reads: “... *an application for a Variance-ZHE shall be approved if it meets all of the following criteria:*
  - (1) *There are special circumstances applicable to the subject property that are not self-imposed and that 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. Such special circumstances of the property either create an extraordinary hardship in the form of a substantial and unjustified limitation on the reasonable use or return on the property, or practical difficulties result from strict compliance with the minimum standards.*
  - (2) *The Variance will not be materially contrary to the public safety, health, or welfare.*

- (3) The Variance does not cause significant material adverse impacts on surrounding properties or infrastructure improvements in the vicinity.*
  - (4) The Variance will not materially undermine the intent and purpose of the IDO or the applicable zone district.*
  - (5) The Variance approved is the minimum necessary to avoid extraordinary hardship or practical difficulties.”*
9. Based on evidence submitted by or on behalf of Applicant, it appears that there are special circumstances applicable to the Subject Property that are not self-imposed and that 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 14-16-6-6(N)(3)(a)(1).
  - a. Applicant submitted evidence on appeal to the LUHO that there is heavy pedestrian, bicycle, and automobile traffic on Silver Avenue along the Subject Property, and that 18-wheeled trucks and other large delivery trucks regularly utilize the Silver Avenue curb next to the Subject Property as parking for deliveries. Applicant states that these heavy trucks are often left with engines idling (sometimes for long periods) as the drivers load and unload their trucks, all occurring within feet of his yard. Applicant submitted evidence that the idling trucks cause unbearable noise and presumably carbon monoxide fumes enter his yard space. Further, Applicant submitted evidence that Silver Avenue is a well-trafficked commercial thoroughfare that causes out-of-proportion negative impacts on residential properties fronting it in this area, in the form of litter, high pedestrian traffic and trespassing by members of the public. These heavy commercial and public uses constitute “special circumstances applicable to the Subject Property that are not self-imposed.”
  - b. Neighbors argued that these commercial and public uses apply generally to other properties in the general vicinity. While that may be the case, Agent submitted evidence that the impact of these commercial and public uses falls disproportionately on the Subject Property, because it is one of very few MX-T zoned properties in the vicinity that is used for residential purposes. Further the location of the Subject Property as a corner lot adjacent to these commercial and public uses make such uses uniquely harmful to the Subject Property.
  - c. These special circumstances create an extraordinary hardship in the form of a substantial and unjustified limitation on the reasonable use on the Subject Property, because while the commercial impacts may be appropriate on an MX-T property used for commercial purposes, they are inappropriate when impacting MX-T property used for residential purposes, such as the Subject Property. Further, practical difficulties result from strict compliance with the minimum standards, because the three-foot wall that would be allowed without a variance would be insufficient to mitigate the negative impact of the special circumstances, as further described, below.
10. Based on evidence submitted by or on behalf of Applicant, the variance will not be contrary to the public safety, health and welfare of the community as required by Section 14-16-6-6(N)(3)(a)(2).
  - a. Opponents point out that having “eyes on the street” increases public safety by allowing the public and first responders to view into and out of the Subject Property to assess whether any dangerous condition may exist. The lattice view fencing that

exists on the top approximately 2 feet of the fence allows such views. Although opponents argue that this lattice is less than 50% opaque, there is no bright-line threshold for opacity under the variance criteria in Section 14-16-6-6(N)(3)(a), and based on the photographs and testimony submitted, the ZHE finds that the view fencing provides sufficient “eyes on the street” in this particular case.

- b. While opponents argued that the vinyl fence that is the subject of this Application is of unprecedented construction in the area, Agent points out that just because something is different does not make it bad, and evidence was submitted that the fence is of high-quality construction. incorporating specialty materials that Applicant had to obtain out of state. The fence is in harmony with the color and architecture of the Subject Property and does not have a negative impact on the public safety, health, and welfare of the community by virtue of its architectural style, materials, or construction.
11. Based on evidence submitted by or on behalf of Applicant, the variance will not cause significant adverse material impacts on surrounding properties or infrastructure improvements in the vicinity as required by Section 14-16-6-6(N)(3)(a)(3). According to the site plan and testimony submitted by Applicant, the proposed fence is set back approximately 13 feet along Silver Avenue and approximately 24 feet along Richmond Drive, thereby providing plenty of room for pedestrians and transit connectivity to use rights of way without having the fence in close proximity.
  12. Based on evidence submitted by or on behalf of Applicant, the variance will not materially undermine the intent and purpose of the IDO or applicable zone district as required by Section 14-16-6-6(N)(3)(a)(4). The MX-T zone district is a transition zone “*between residential neighborhoods and more intense commercial areas.*” See IDO, § 14-16-2-4(A)(1). Here, obvious intense commercial uses appear to be interfering with Applicant’s residential use. The proposed variance addresses the intent of MX-T serving as a transitional zone by having the proposed fence help the Subject Property serve as a functional buffer between the commercial and residential uses. Indeed, the proposed fence runs parallel to adjacent fences of the same or substantially similar height on properties adjacent to the Subject Property on either side.
  13. Based on evidence submitted by or on behalf of Applicant, the variance approved is the minimum necessary to avoid extraordinary hardship or practical difficulties as required by Section 14-16-6-6(N)(3)(a)(5). Specifically, Applicant submitted evidence that any smaller setback variance would be ineffective to provide for the safety and usability of the site and the intended use. While opponents argued that a three-foot fence would discourage trespassers, such a fence would be easy to cross over and would not provide the same security and buffer against the intense commercial and public uses present. Applicant submitted evidence that any shorter fence would be ineffective in that regard. Thus, Applicant is not requesting more than what is minimally necessary for a variance.

DECISION:

APPROVAL of a variance of 3 feet to the 3 feet maximum wall height.

APPEAL:

If you wish to appeal this decision, you must do so by May 20, 2021 pursuant to Section 14-16-6-4(U), of the Integrated Development Ordinance, you must demonstrate that you have legal standing to file an appeal as defined.

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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