



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

Ashwani Sharma requests a variance of 11 ft and 3.25 inches to the required 15 ft rear setback for Lot 14, Block 1, Bear Canyon Village, located at 7524 Bear Canyon RD NE, zoned R-1D [Section 14-16-5-1(C)]

Special Exception No: **VA-2022-00258**

 Project No: **Project#2022-007582**

 Hearing Date: 10-18-22

 Closing of Public Record: 10-18-22

 Date of Decision: 11-02-22

On the 18th day of October, 2022, property owner Ashwani Sharma (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 11 ft and 3.25 inches to the required 15 ft rear setback (“Application”) upon the real property located at 7524 Bear Canyon RD NE (“Subject Property”). Below are the ZHE’s finding of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 11 ft and 3.25 inches to the required 15 ft rear setback.
2. The City of Albuquerque Integrated Development Ordinance, 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.”*
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. Ashwani Sharma, property owner and Applicant, appeared and gave evidence in support of the application.
5. All property owners within 100 feet of the subject property and the affected neighborhood associations were notified.
6. Bear Canyon Neighborhood Association and District 4 Coalition of Neighborhood Associations are the affected neighborhood associations.
7. The address of the subject property is 7524 Bear Canyon Road. NE, located on Lot 14, Block 1, within Bear Canyon Village residential development.
8. The property is located in an Area of Consistency in the ABC Comp Plan, as amended.
9. There are no applicable Protective Overlay Zones required by the IDO.
10. The subject property is currently zoned R-1D.
11. Residential Zone Districts standards are regulated by the **IDO, Part 14-16-5, Development Standards**, and specifically §14-16-5-1(C), *Residential Zone Districts* and *Table 5-1-1, Residential Zone Dimensional Standards*.
12. The required minimum rear yard setback from any structure is 15 feet.
13. There is an existing, non-conforming, non-permitted, illegal structure on the subject property.
14. This structure converts a previous outdoor “swimming” pool into an indoor pool.
15. The swimming pool was never issued a building permit from the City of Albuquerque and was illegally constructed on the subject property.
16. The pool and enclosing structure were illegally constructed at an unknown date prior to 2017.
17. The pool is fiberglass, has no drain, and is set in concrete.
18. Applicant must use an external electric pump and filter to drain and service the pool.
19. The existing rear setback resulting from the non-conforming structure is 3 feet 9 inches (44.76 inches), which is in violation of the minimum required 15 foot rear setback and results in a setback violation of 11 feet and 3.25 inches.
20. The existing side setback resulting from the non-conforming structure is 3 feet 9 inches (26.4inches), which is in violation of the minimum required 10 foot rear setback and results in a violation of 7 feet and 5 inches.
21. There is a Public Utilities Easement (PUE) which runs parallel to the east property line and requires a 7 foot easement. Since Bear Canyon Development has all utilities running underground, this includes gas, electric, water, sewer, cable and broadband.
22. The non-conforming, non-permitted and illegal structure intrudes into the PUE 3.27 feet at the greatest point. This is the east wall of the structure enclosing the swimming pool.
23. Applicant, Ashwani Sharma, purchased the subject property on February 15, 2017.
24. Applicant testified that he was promised by the sellers and various professionals hired for the transaction that there were documents evidencing that the pool and enclosing structure were permitted and properly approved and constructed.
25. He stated that he proceeded with the purchase of the subject property, based upon these promises.
26. Applicant filed a request for variance of 7.89 feet from the required minimum rear setback requirement of 15 feet on or about August 3, 2017 (previous variance requests) (17-ZHE-80200).
27. Applicant filed a request for variance of 5 feet from the required minimum side setback requirement of 10 feet on or about August 3, 2017 (previous variance requests) (17-ZHE-80199).

28. The Application for Requests for Variances was filed by Derek Archuleta, of ARCH + PLAN, who properly filed his Letter signed by Mr. Sharma, authorizing his appointment as agent for Mr. Sharma.
29. Mr. Archuleta's Letter justifying the request had been previously filed with the Applications and is part of the Record Proper for the 2017 ZHE NODs and subsequent appeals of the ZHE denials of both the requested variances in the Applicant's previous Requests for variances he filed in 2017.
30. Archuleta states in the justification letter: *"A request revolves around the property owner to construct an addition to an existing single family residence on the property. The proposed location of the addition affects the ability to achieve rear yard setback regulations of 15 feet. The existing rear-yard setback is at 7 feet, 11 inches."*
31. Applicant identified three (3) special circumstances: the size of the lot, its shape, and its location the middle of a cul de sac.
32. ZHE Graeser NOD Finding #6 states "In reviewing the City of Albuquerque Zone Atlas, page E-19-Z, it does not appear that the subject property is smaller than others in the same zone (R-1) and vicinity (Bear Canyon Village). The lot may be slightly smaller than the others on the same cul de sac, but it is fact larger than the bulk of the nearby properties across Bear Canyon Road."
33. Finding #7: The lot is regularly shaped, and in fact much more so than the nearby lots on the cul de sac, and adjoining cul de sacs."
34. Finding #8: The lot is located in a typical R-1 circumstance, that is, fronting the street (cul de sac), with neighboring residential lots on both sides and the rear. It is the same circumstance faced by most other lots in the zone and vicinity, and even considering its location in the middle of the cul de sac is shared by several other lots in the immediate vicinity."
35. Finding #9: "The ZHE finds that there are no special circumstances associated with the subject property." Applicant filed a request for variance of 7.89 feet from the required minimum rear setback requirement of 15 feet on or about August 3, 2017, (17-ZHE-80200).
36. Finding #10: "The ZHE is unable to approve a variance request without making a finding of special circumstances and therefore further analysis is unnecessary."
37. ZHE Graeser issued his Notice of Decision dated October 4, 2017 in which he denied the two (2) requests for setbacks. Applicant's request for variances of 7.89 feet from the required minimum rear setback of 15 feet and 5 feet from the required 10 foot side setbacks.
38. ZHE Graeser's Finding #9 of his NOD specifically states that "there are no special circumstances associated with the subject property.
39. The ZHE found he was unable to approve the variance and declined further analysis of the remaining factors, since Applicant failed to meet his burden required to show special circumstances,
40. Applicant filed an appeal of ZHE Graeser's NODs to the City of Albuquerque, Board of Appeals on or about October 17, 2017.
41. The Board issued its Notification of Decision dated January 23, 2018.
42. It denied the Appeal and affirmed the Zoning Hearing Examiner's (ZHE's) decisions denying the requests for the variances, and stated its decision was based upon a number of findings.
43. BOA Finding #1: This is an APPEAL of the Zoning Hearing Examiner's (ZHE) DENIAL of a SPECIAL EXCEPTION pursuant to Zoning Code §14-16-4-2(C)(2)(b), a variance of 5 feet to the required 10 foot side yard setback [Zoning Code 14-16-2-6(E)(4)(b)] to allow for a

- proposed addition to an existing home and the installment of handicap ramps (the subject application”).
44. BOA Finding #2: The subject site is described as Lot 14, Block 1, Bear Canyon Village Addition, containing approximately 0.26 acre and located at 7424 Bear Canyon Road NE, (the “subject property”). The subject property is not within the boundaries of a sector development plan.
 45. BOA Finding #3: The subject property is located in the Bear Canyon Neighborhood and is developed with a single-family home, which is located on the eastern side of a cul de sac that extends southward from Bear Canyon Road NE. The Applicant owns the subject property.
 46. BOA Finding #9: The applicant identified three (3) special circumstances that pertain to the subject property: the size of the lot, its shape and its location in the middle of a cul de sac.
 47. BOA Finding #10: The ZHE found no special circumstances apply to the subject property that do not apply generally to other property in the same zone and vicinity, as required by section 14-16-4-2(C)(2)(b), because the subject property faces the same circumstances as most other lots in the same zone and vicinity. The subject property is not smaller than other properties in the same zone (R-1) and vicinity (size), it is regularly shaped (shape), and is located in typical R-1 circumstance, fronting a street with neighboring residential lots on both sides and the rear (location). (Record Page 25)
 48. BOA Finding #11: Therefore, because the ZHE was unable to find that special circumstances apply to the subject property, test b of the Zoning Code § 14-16-4-2(C)(2). Since all tests (a through d) are required to be met for a variance to be granted, the ZHE denied the subject application.
 49. The Board then shifted its focus to the appeal.
 50. BOA Finding #13: The appellant believes that the evidence of special circumstances was provided via oral testimony at the September 19, 2017 ZHE hearing. Specifically, the special circumstances that applies to the subject property and not to other properties in the same zone and vicinity is that appellant is planning to construct an addition to the house to care for 4 to 5 seniors with disabilities, and that the setback variance became necessary due to the need for the addition to have ADA compliant handicap ramps for accessibility (Record, p. 13). The appellant further states that the property is smaller and less wider (sic) towards the back than other properties in the same cul de sac.
 51. BOA Finding #14: The appellant claims that the subject property is smaller and less wide towards the back than other properties in the same cul de sac. The test in §14-16-4-2(C)(2)(b), however requires a comparison of the subject property and “other properties in the same zone and vicinity”. As shown on the relevant Zone Atlas page (E-19), the subject property is a similar size to many other R-1 zoned properties in the Bear Canyon Village Addition (Record, p. 58).
 52. BOA Finding #15: The appellant’s plans to construct an addition to the subject property, regardless of how the addition would be used or who would live in it, does not constitute a special circumstance pursuant to Zoning Code §14-16-4-2(C)(2)(b) because the circumstance is self-imposed.
 53. BOA Finding #16: The BOA finds that the ZHE’s decision to deny the subject application based on the lack of special circumstances applicable to the subject property, which do not apply generally to other property in the same zone and vicinity [§14-16-4-2(C)(2)(b)] is supported with substantial evidence in the record.

54. BOA Finding #17: Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE in denying the special exception (variance) request was CORRECT. ZHE is AFFIRMED.
55. Sharma did not appeal the Board of Appeals Decision.
56. City of Albuquerque, Planning Department, Building Safety Division, inspected the subject property on or about December 21, 2017 and issued a Correction Notice for construction without a Building Permit.
57. The Notice, dated January 3, 2018, lists a number of violations, including, electrical, plumbing, and construction without permits, and contains the notation “Excessive Violations.”
58. Applicant filed civil litigation in the Second Judicial District Court for Bernalillo County, May 2, 2018.
59. He sued the co-trustees of the trust, which was the seller of the subject property, and alleged theories of negligent and intentional fraud against the sellers. He also alleged various professional liability theories against the real estate agents and brokers.
60. He testified at the hearing that he settled with and received some monetary compensation from the sellers and the litigation continues against the professionals.
61. Applicant filed these requests for variances on September 7, 2022
62. Applicant is again requesting variances from the side and rear setback requirements, requesting a variance of 11 feet and 3.25 inches from the rear requirement of 15 feet, and 7 feet 5 inches from the side requirement of 10 feet.
63. The 2022 requests are identical, except applicant is requesting more footage on his variance requests (an additional 3 feet 6.25 inches on the rear and additional 2 feet 7 inches on the side).
64. Applicant’s justification letter lists as special circumstances: “The special circumstances that affect this particular site revolve around the shape, size and location of the lot in efforts to achieve required setbacks for the existing residential- large poolroom that was illegally built (nonconforming and unpermitted) and violated two setbacks. The parcel is not as wide, as others in the vicinity, especially toward the rear of the lot. Some neighboring lots are larger in the rear because of their shape. The combination of the shape, size and location of the property in the cul de sac along with the interest of the homeowner to fix, in the most economical way, the existing nonconformities along with the technical code violations and safety violations of the southeast room of the residence, results in the inability to achieve R-1D zone setbacks.”
65. Applicant’s application and Variance Justification letter for the requested setback is at 7 feet, 11 inches states: “The problem succinctly is that the house has an existing nonconforming the and unpermitted large room on the south-east corner, which is built over two setbacks.” Inside this large room exists on an unpermitted heated indoor pool without proper plumbing and no drain. Specifically, the indoor pool room has been cited for several violations, including (i) violation of Section 109.1 of the Uniform Administrative Codes, Technical Codes, Uniform Swimming Pool Codes, and (ii) Zoning violations of §14-16-2 for the R-1D south side-setback and rear-setback regulations. **Attachment #1** contains some of the cited violations. Additionally, in the spirit of full disclosure, in 2017, the homeowner had previously applied for two (2) variance applications for an addition, but both were denied, and the appeal for both were denied. (See **Attachment #2**).

66. Applicant states in his application for the requests “The request for variances revolve around a non-conforming large room on the southeast corner of the subject site which encloses an unpermitted heated indoor pool. This room + indoor pool has been cited for numerous building code, safety violations and zoning violations. Financially, the lowest cost solution would be to ask the city for these two variances and then fix the building code and safety violation pursuant to all code violations listed in attachment #1 of this email. In order to meet all the combined technical codes listed in attachment #1 some additional clearances on the rear and southeast side are necessary therefore some demo and reconstruction will be required. A copy of the site plan is included in Attachment #1.”
67. A Land Use Facilitation Meeting was conducted by Phillip Crump, Mediator on August 17, 2022 and included Applicant, District 4 Coalition of Neighborhood Associations (D4C) and Bear Canyon NA. and other interested parties.
68. Primary objections expressed by the participants were related to safety issues already created by the nonconforming building enclosing the indoor pool, and the narrow passageway caused by the intrusion into the side setback and the inability of emergency and fire personnel being able to obtain access to the back area through an approximate 30 inch wide corridor.
69. Applicant’s response to this safety issue was he did not have an answer to this question, as he was not an expert in this area, however stated his belief that the question can be best answered by the ZHE, who will determine, based upon my (Applicant’s) variance justification letter, whether there is enough required space or not for AFD to do their job.
70. Applicant’s response to a question asked if he had obtained any written approval from PNM or any of the other utilities for taking 53% of their easement on the rear of the property, was that he was notified by PNM that it would be better for applicant to first apply for the variance.
71. Applicant’s response to a question involving his expansion of his variance requests from the 2017 requests, Applicant stated that it was necessary, acknowledging that the poolroom was already in violation of two setbacks, as fully explained in his justification letter, unfortunately, there is no other way to comply with all the *technical* required uniform administrative codes and uniform swimming pool codes unless the sidewall is moved an additional 1.9 foot. This 1.9 foot would be added to the existing 5 foot and 6 inch violation. This is why he is asking for the variance of 7.8 feet to the required side-yard setback of 10 feet. Alternately the whole poolroom would need to be fully demolished and rebuilt, which is very expensive.
72. The Meeting Report prepared by Mr. Crump was submitted and is part of the voluminous record of these requests.
73. Written comments in opposition to Application dated October 6, 2022, prepared by D4C and Applicant’s responses were submitted as part of the record for this application.
74. A written letter in opposition to the Application dated October 12, 2022, prepared and submitted by David Ring, Attorney for the Bear Canyon Neighborhood Association was submitted as part of the record for this application.
75. The letter points again that there are no special circumstances related to the Applicant’s site, and that applicant presents no facts to support his claim that his property is unique beyond its nonconforming, enclosed pool, and again point out that his previous claims of size, shape and location on the cul de sac, were ruled on in the previous ZHE findings.
76. It also points out that applicant makes no claim that the property is unique with regard to topography, surroundings, or other physical characteristics, and that applicant’s own supporting documentation shows that the property is substantially identical to most of the rest of the properties in the neighborhood.

77. Applicant admitted in the hearing on these requests that the special circumstances were again based upon essentially the same stated facts asserted for special circumstances in the 2017 ZHE hearing. When pressed during the hearing, the only other factor he was submitting for consideration was the financial cost to the homeowner if his requests are again denied.
78. Nancy Haze, John Haze, Patsy Beck and Dave Ring, appeared and gave testimony in opposition to the requests.
79. Applicant was given an opportunity to make a final response to questions and objections raised by the speakers.
80. Applicant again pointed out that it would be financially in his best interests if the variances were granted which would allow him to bring all the violations into compliance.
81. The ZHE finds there are no special circumstances associated with the subject property.
82. The ZHE is unable to approve a variance request without making a finding of special circumstances and therefore further analysis is unnecessary.
83. The proper "Notice of Hearing" signage was posted for the required time period as required by Section 14-16-6-4(K)(3).
84. The Applicant has authority to pursue this Application

CONCLUSIONS OF LAW

The criteria within § 14-16-4-2(C)(2) of the IDO are not satisfied.

DECISION:

DENIAL of a variance of 11 ft and 3.25 inches to the required 15 ft rear setback.

APPEAL:

If you wish to appeal this decision, you must do so by November 17, 2022 pursuant to Section 14-16-6-4(V), 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.



Stan Harada, Esq.
Zoning Hearing Examiner

cc:

ZHE File
Zoning Enforcement
Ashwani Sharma, aksharma_01@yahoo.com
Dave Ring, dave@davering.net
John Hayes, 2828 San Pablo, 87110
Patsy Beck, patsybeck@aol.com
Timothy Beck, 7518 Bear Canyon, 87109



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

Ashwani Sharma requests a variance of 7 ft and 5 inches to the required 10 ft side setback for Lot 14, Block 1, Bear Canyon Village, located at 7524 Bear Canyon RD NE, zoned R-1D [Section 14-16-5-1(C)]

Special Exception No: **VA-2022-00260**
.....
Project No: **Project#2022-007582**
.....
Hearing Date: 10-18-22
.....
Closing of Public Record: 10-18-22
.....
Date of Decision: 11-02-22
.....

On the 18th day of October, 2022, property owners Ashwani Sharma (“Applicant”) appeared before the Zoning Hearing Examiner (“ZHE”) requesting a variance of 7 ft and 5 inches to the required 10 ft side setback (“Application”) upon the real property located at 7524 Bear Canyon RD NE (“Subject Property”). Below are the ZHE’s finding of fact and decision:

FINDINGS:

1. Applicant is requesting a variance of 7 ft and 5 inches to the required 10 ft side setback.
2. The City of Albuquerque Integrated Development Ordinance, 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.*”
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. Ashwani Sharma, property owner and Applicant, appeared and gave evidence in support of the application.
5. All property owners within 100 feet of the subject property and the affected neighborhood associations were notified.
6. Bear Canyon Neighborhood Association and District 4 Coalition of Neighborhood Associations are the affected neighborhood associations.
7. The address of the subject property is 7524 Bear Canyon Road. NE, located on Lot 14, Block 1, within Bear Canyon Village residential development.
8. The property is located in an Area of Consistency in the ABC Comp Plan, as amended.
9. There are no applicable Protective Overlay Zones required by the IDO.
10. The subject property is currently zoned R-1D.
11. Residential Zone Districts standards are regulated by the **IDO, Part 14-16-5, Development Standards**, and specifically §14-16-5-1(C), *Residential Zone Districts* and *Table 5-1-1, Residential Zone Dimensional Standards*.
12. The required minimum side yard setback from any structure is 10 feet.
13. There is an existing, non-conforming, non-permitted, illegal structure on the subject property.
14. This structure converts a previous outdoor “swimming” pool into an indoor pool.
15. The swimming pool was never issued a building permit from the City of Albuquerque and was illegally constructed on the subject property.
16. The pool and enclosing structure were illegally constructed at an unknown date prior to 2017.
17. The pool is fiberglass, has no drain, and is set in concrete.
18. Applicant must use an external electric pump and filter to drain and service the pool.
19. The existing rear setback resulting from the non-conforming structure is 3 feet 9 inches (44.76 inches), which is in violation of the minimum required 15 foot rear setback and results in a setback violation of 11 feet and 3.25 inches.
20. The existing side setback resulting from the non-conforming structure is 3 feet 9 inches (26.4inches), which is in violation of the minimum required 10 foot rear setback and results in a violation of 7 feet and 5 inches.
21. There is a Public Utilities Easement (PUE) which runs parallel to the east property line and requires a 7 foot easement. Since Bear Canyon Development has all utilities running underground, this includes gas, electric, water, sewer, cable and broadband.
22. The non-conforming, non-permitted and illegal structure intrudes into the PUE 3.27 feet at the greatest point. This is the east wall of the structure enclosing the swimming pool.
23. Applicant, Ashwani Sharma, purchased the subject property on February 15, 2017.
24. Applicant testified that he was promised by the sellers and various professionals hired for the transaction that there were documents evidencing that the pool and enclosing structure were permitted and properly approved and constructed.
25. He stated that he proceeded with the purchase of the subject property, based upon these promises.
26. Applicant filed a request for variance of 7.89 feet from the required minimum rear setback requirement of 15 feet on or about August 3, 2017 (previous variance requests) (17-ZHE-80200).
27. Applicant filed a request for variance of 5 feet from the required minimum side setback requirement of 10 feet on or about August 3, 2017 (previous variance requests) (17-ZHE-80199).

28. The Application for Requests for Variances was filed by Derek Archuleta, of ARCH + PLAN, who properly filed his Letter signed by Mr. Sharma, authorizing his appointment as agent for Mr. Sharma.
29. Mr. Archuleta's Letter justifying the request had been previously filed with the Applications and is part of the Record Proper for the 2017 ZHE NODs and subsequent appeals of the ZHE denials of both the requested variances in the Applicant's previous Requests for variances he filed in 2017.
30. Archuleta states in the justification letter: *"A request revolves around the property owner to construct an addition to an existing single family residence on the property. The proposed location of the addition affects the ability to achieve rear yard setback regulations of 15 feet. The existing rear-yard setback is at 7 feet, 11 inches."*
31. Applicant identified three (3) special circumstances: the size of the lot, its shape, and its location the middle of a cul de sac.
32. ZHE Graeser NOD Finding #6 states "In reviewing the City of Albuquerque Zone Atlas, page E-19-Z, it does not appear that the subject property is smaller than others in the same zone (R-1) and vicinity (Bear Canyon Village). The lot may be slightly smaller than the others on the same cul de sac, but it is fact larger than the bulk of the nearby properties across Bear Canyon Road."
33. Finding #7: The lot is regularly shaped, and in fact much more so than the nearby lots on the cul de sac, and adjoining cul de sacs."
34. Finding #8: The lot is located in a typical R-1 circumstance, that is, fronting the street (cul de sac), with neighboring residential lots on both sides and the rear. It is the same circumstance faced by most other lots in the zone and vicinity, and even considering its location in the middle of the cul de sac is shared by several other lots in the immediate vicinity."
35. Finding #9: "The ZHE finds that there are no special circumstances associated with the subject property." Applicant filed a request for variance of 7.89 feet from the required minimum rear setback requirement of 15 feet on or about August 3, 2017, (17-ZHE-80200).
36. Finding #10: "The ZHE is unable to approve a variance request without making a finding of special circumstances and therefore further analysis is unnecessary."
37. ZHE Graeser issued his Notice of Decision dated October 4, 2017 in which he denied the two (2) requests for setbacks. Applicant's request for variances of 7.89 feet from the required minimum rear setback of 15 feet and 5 feet from the required 10 foot side setbacks.
38. ZHE Graeser's Finding #9 of his NOD specifically states that "there are no special circumstances associated with the subject property.
39. The ZHE found he was unable to approve the variance and declined further analysis of the remaining factors, since Applicant failed to meet his burden required to show special circumstances,
40. Applicant filed an appeal of ZHE Graeser's NODs to the City of Albuquerque, Board of Appeals on or about October 17,2017.
41. The Board issued its Notification of Decision dated January 23, 2018.
42. It denied the Appeal and affirmed the Zoning Hearing Examiner's (ZHE's) decisions denying the requests for the variances, and stated its decision was based upon a number of findings.
43. BOA Finding #1: This is an APPEAL of the Zoning Hearing Examiner's (ZHE) DENIAL of a SPECIAL EXCEPTION pursuant to Zoning Code §14-16-4-2(C)(2)(b), a variance of 5 feet to the required 10 foot side yard setback [Zoning Code 14-16-2-6(E)(4)(b)] to allow for a

- proposed addition to an existing home and the installment of handicap ramps (the subject application”).
44. BOA Finding #2: The subject site is described as Lot 14, Block 1, Bear Canyon Village Addition, containing approximately 0.26 acre and located at 7424 Bear Canyon Road NE, (the “subject property”). The subject property is not within the boundaries of a sector development plan.
 45. BOA Finding #3: The subject property is located in the Bear Canyon Neighborhood and is developed with a single-family home, which is located on the eastern side of a cul de sac that extends southward from Bear Canyon Road NE. The Applicant owns the subject property.
 46. BOA Finding #9: The applicant identified three (3) special circumstances that pertain to the subject property: the size of the lot, its shape and its location in the middle of a cul de sac.
 47. BOA Finding #10: The ZHE found no special circumstances apply to the subject property that do not apply generally to other property in the same zone and vicinity, as required by section 14-16-4-2(C)(2)(b), because the subject property faces the same circumstances as most other lots in the same zone and vicinity. The subject property is not smaller than other properties in the same zone (R-1) and vicinity (size), it is regularly shaped (shape), and is located in typical R-1 circumstance, fronting a street with neighboring residential lots on both sides and the rear (location). (Record Page 25)
 48. BOA Finding #11: Therefore, because the ZHE was unable to find that special circumstances apply to the subject property, test b of the Zoning Code § 14-16-4-2(C)(2). Since all tests (a through d) are required to be met for a variance to be granted, the ZHE denied the subject application.
 49. The Board then shifted its focus to the appeal.
 50. BOA Finding #13: The appellant believes that the evidence of special circumstances was provided via oral testimony at the September 19, 2017 ZHE hearing. Specifically, the special circumstances that applies to the subject property and not to other properties in the same zone and vicinity is that appellant is planning to construct an addition to the house to care for 4 to 5 seniors with disabilities, and that the setback variance became necessary due to the need for the addition to have ADA compliant handicap ramps for accessibility (Record, p. 13). The appellant further states that the property is smaller and less wider (sic) towards the back than other properties in the same cul de sac.
 51. BOA Finding #14: The appellant claims that the subject property is smaller and less wide towards the back than other properties in the same cul de sac. The test in §14-16-4-2(C)(2)(b), however requires a comparison of the subject property and “other properties in the same zone and vicinity”. As shown on the relevant Zone Atlas page (E-19), the subject property is a similar size to many other R-1 zoned properties in the Bear Canyon Village Addition (Record, p. 58).
 52. BOA Finding #15: The appellant’s plans to construct an addition to the subject property, regardless of how the addition would be used or who would live in it, does not constitute a special circumstance pursuant to Zoning Code §14-16-4-2(C)(2)(b) because the circumstance is self-imposed.
 53. BOA Finding #16: The BOA finds that the ZHE’s decision to deny the subject application based on the lack of special circumstances applicable to the subject property, which do not apply generally to other property in the same zone and vicinity [§14-16-4-2(C)(2)(b)] is supported with substantial evidence in the record.

54. BOA Finding #17: Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE in denying the special exception (variance) request was CORRECT. ZHE is AFFIRMED.
55. Sharma did not appeal the Board of Appeals Decision.
56. City of Albuquerque, Planning Department, Building Safety Division, inspected the subject property on or about December 21, 2017 and issued a Correction Notice for construction without a Building Permit.
57. The Notice, dated January 3, 2018, lists a number of violations, including, electrical, plumbing, and construction without permits, and contains the notation "Excessive Violations."
58. Applicant filed civil litigation in the Second Judicial District Court for Bernalillo County, May 2, 2018.
59. He sued the co-trustees of the trust, which was the seller of the subject property, and alleged theories of negligent and intentional fraud against the sellers. He also alleged various professional liability theories against the real estate agents and brokers.
60. He testified at the hearing that he settled with and received some monetary compensation from the sellers and the litigation continues against the professionals.
61. Applicant filed these requests for variances on September 7, 2022
62. Applicant is again requesting variances from the side and rear setback requirements, requesting a variance of 11 feet and 3.25 inches from the rear requirement of 15 feet, and 7 feet 5 inches from the side requirement of 10 feet.
63. The 2022 requests are identical, except applicant is requesting more footage on his variance requests (an additional 3 feet 6.25 inches on the rear and additional 2 feet 7 inches on the side).
64. Applicant's justification letter lists as special circumstances: "The special circumstances that affect this particular site revolve around the shape, size and location of the lot in efforts to achieve required setbacks for the existing residential- large poolroom that was illegally built (nonconforming and unpermitted) and violated two setbacks. The parcel is not as wide, as others in the vicinity, especially toward the rear of the lot. Some neighboring lots are larger in the rear because of their shape. The combination of the shape, size and location of the property in the cul de sac along with the interest of the homeowner to fix, in the most economical way, the existing nonconformities along with the technical code violations and safety violations of the southeast room of the residence, results in the inability to achieve R-1D zone setbacks."
65. Applicant's application and Variance Justification letter for the requested setback is at 7 feet, 11 inches states: "The problem succinctly is that the house has an existing nonconforming the and unpermitted large room on the south-east corner, which is built over two setbacks." Inside this large room exists on an unpermitted heated indoor pool without proper plumbing and no drain. Specifically, the indoor pool room has been cited for several violations, including (i) violation of Section 109.1 of the Uniform Administrative Codes, Technical Codes, Uniform Swimming Pool Codes, and (ii) Zoning violations of §14-16-2 for the R-1D south side-setback and rear-setback regulations. **Attachment #1** contains some of the cited violations. Additionally, in the spirit of full disclosure, in 2017, the homeowner had previously applied for two (2) variance applications for an addition, but both were denied, and the appeal for both were denied. (See **Attachment #2**).

66. Applicant states in his application for the requests “The request for variances revolve around a non-conforming large room on the southeast corner of the subject site which encloses an unpermitted heated indoor pool. This room + indoor pool has been cited for numerous building code, safety violations and zoning violations. Financially, the lowest cost solution would be to ask the city for these two variances and then fix the building code and safety violation pursuant to all code violations listed in attachment #1 of this email. In order to meet all the combined technical codes listed in attachment #1 some additional clearances on the rear and southeast side are necessary therefore some demo and reconstruction will be required. A copy of the site plan is included in Attachment #1.”
67. A Land Use Facilitation Meeting was conducted by Phillip Crump, Mediator on August 17, 2022 and included Applicant, District 4 Coalition of Neighborhood Associations (D4C) and Bear Canyon NA. and other interested parties.
68. Primary objections expressed by the participants were related to safety issues already created by the nonconforming building enclosing the indoor pool, and the narrow passageway caused by the intrusion into the side setback and the inability of emergency and fire personnel being able to obtain access to the back area through an approximate 30 inch wide corridor.
69. Applicant’s response to this safety issue was he did not have an answer to this question, as he was not an expert in this area, however stated his belief that the question can be best answered by the ZHE, who will determine, based upon my (Applicant’s) variance justification letter, whether there is enough required space or not for AFD to do their job.
70. Applicant’s response to a question asked if he had obtained any written approval from PNM or any of the other utilities for taking 53% of their easement on the rear of the property, was that he was notified by PNM that it would be better for applicant to first apply for the variance.
71. Applicant’s response to a question involving his expansion of his variance requests from the 2017 requests, Applicant stated that it was necessary, acknowledging that the poolroom was already in violation of two setbacks, as fully explained in his justification letter, unfortunately, there is no other way to comply with all the *technical* required uniform administrative codes and uniform swimming pool codes unless the sidewall is moved an additional 1.9 foot. This 1.9 foot would be added to the existing 5 foot and 6 inch violation. This is why he is asking for the variance of 7.8 feet to the required side-yard setback of 10 feet. Alternately the whole poolroom would need to be fully demolished and rebuilt, which is very expensive.
72. The Meeting Report prepared by Mr. Crump was submitted and is part of the voluminous record of these requests.
73. Written comments in opposition to Application dated October 6, 2022, prepared by D4C and Applicant’s responses were submitted as part of the record for this application.
74. A written letter in opposition to the Application dated October 12, 2022, prepared and submitted by David Ring, Attorney for the Bear Canyon Neighborhood Association was submitted as part of the record for this application.
75. The letter points again that there are no special circumstances related to the Applicant’s site, and that applicant presents no facts to support his claim that his property is unique beyond its nonconforming, enclosed pool, and again point out that his previous claims of size, shape and location on the cul de sac, were ruled on in the previous ZHE findings.
76. It also points out that applicant makes no claim that the property is unique with regard to topography, surroundings, or other physical characteristics, and that applicant’s own supporting documentation shows that the property is substantially identical to most of the rest of the properties in the neighborhood.

77. Applicant admitted in the hearing on these requests that the special circumstances were again based upon essentially the same stated facts asserted for special circumstances in the 2017 ZHE hearing. When pressed during the hearing, the only other factor he was submitting for consideration was the financial cost to the homeowner if his requests are again denied.
78. Nancy Haze, John Haze, Patsy Beck and Dave Ring, appeared and gave testimony in opposition to the requests.
79. Applicant was given an opportunity to make a final response to questions and objections raised by the speakers.
80. Applicant again pointed out that it would be financially in his best interests if the variances were granted which would allow him to bring all the violations into compliance.
81. The ZHE is unable to approve a variance request without making a finding of special circumstances and therefore further analysis is unnecessary.
82. The ZHE is unable to approve a variance request without making a finding of special circumstances and therefore further analysis is unnecessary.
83. The proper "Notice of Hearing" signage was posted for the required time period as required by Section 14-16-6-4(K)(3).
84. The Applicant has authority to pursue this Application

CONCLUSIONS OF LAW

The criteria within § 14-16-4-2(C)(2) of the IDO are not satisfied.

DECISION:

DENIAL of a variance of 7 ft and 5 inches to the required 10 ft side setback.

APPEAL:

If you wish to appeal this decision, you must do so by November 17, 2022 pursuant to Section 14-16-6-4(V), 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.



Stan Harada, Esq.
Zoning Hearing Examiner

cc:

ZHE File

Zoning Enforcement

Ashwani Sharma, aksharma_01@yahoo.com

Dave Ring, dave@davering.net

John Hayes, 2828 San Pablo, 87110

Patsy Beck, patsybeck@aol.com

Timothy Beck, 7518 Bear Canyon, 87109