

Planning Department

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CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Debra & Robert Cranwell appeal the Zoning Hearing Examiner's **APPROVAL WITH CONDITIONS** of a **VARIANCE** of 10' to the required 15' rear yard setback for a proposed addition for all or a portion of Lot 17, Block 2, East Range Addition, zoned SU-1 PRD, located on 14353 Marquette Dr. NE.

Appeal No:.....14BOA-20004
Special Exception No:14ZHE-80026
Project No:.....1009962
Hearing Date:.....05/27/14
Decision Date:05/27/14

In the matter of **14BOA-20004**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal, thereby **OVERTURNING** the Zoning Hearing Examiner's (ZHE's) decision based on the following findings:

FINDINGS:

1. This is an APPEAL of the Zoning Hearing Examiner's (ZHE's) **CONDITIONAL APPROVAL** of a **SPECIAL EXCEPTION** to Zoning Code Section 14-16-2-6(E)(5)(b), R-1 Residential Zone: a **VARIANCE** of 10 feet to the required 15 foot rear yard setback (the "subject request").
2. The subject site is described as Lot 17, Block 2, East Range Addition (the "subject site"). It is located at 14353 Marquette Drive NE, which is generally north of Copper Avenue and east of Tramway Boulevard.
3. The Albuquerque/Bernalillo County Comprehensive Plan, the Sandia Foothills Area Plan and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.
4. The subject site is zoned SU-1 PRD (Planned Residential Development) and is developed with a single-family home. It is surrounded by single-family residential properties that are also zoned SU-1 PRD and, further east, R-1 Residential.
5. The subject site's zoning was obtained in 1975 as part of a 292 acre rezoning (Z-75-112). However, there is no associated SU-1 site development plan- which is sometimes the case with developments in the 1970s. Therefore, setbacks were not established via an SU-1 site development plan. In January 1978, the Environmental Planning Commission (EPC) approved a site development plan for an approximately 12.5 acre area that contained the subject site (also found under Z-75-112). The approval was subject to three conditions,

one of which was that “All R-1 restrictions must be adhered to.” Therefore, R-1 setbacks apply to the subject site.

6. Zoning Code Section 14-16-2-6(E)(5)(b), R-1 Residential Zone-Setback, states that “There shall be a rear-yard setback of not less than 15 feet”.
7. On January 22, 2014, the City Council adopted Bill No. O-13-57 (Enactment No. O-2014-004), which amended the variance criteria. The bill became effective February 7, 2014, which is after the applicant filed the special exception application on February 6, 2014. Therefore, the new variance criteria do not apply to the subject request.
8. Zoning Code 14-16-4-2(C)(2), Special Exceptions, specifies the tests that must be met for a variance to be approved: (a) exceptionality of the property, and (b) unnecessary hardship caused by the regulations because of said exceptionality. The ZHE found that the applicant had met the burden of proof by testifying that the subject site “is exceptional as it relates to other properties in the community” (see ZHE Notice of Decision, Finding #3).
9. The ZHE further found that “The applicant’s irregular shaped lot pre-dates the adoption of the Albuquerque Zoning Code”. This statement is incorrect. The subject site was platted in 1975 (see Finding #5), which is after the establishment of the Zoning Code in 1959.
10. The ZHE also found that that the application, and applicant’s testimony at the hearing, suggest that financial gain/loss was not the sole, determining factor and that the applicant had adequately justified the application pursuant to Zoning Code 14-16-4-2 (see ZHE Notice of Decision, Findings #10 and #13).
11. The ZHE Approved the variance request subject to the following Conditions of Approval:
 - A. The Applicant shall ensure that the proposed addition meets all City, State and Federal building codes, and fire code.
 - B. The Applicant shall ensure that the proposed addition does not exceed two stories in height.
 - C. The Applicant shall ensure that the stucco color of the proposed addition matches the stucco color of the existing residence to ensure congruent design.
 - D. The Applicant shall ensure that the proposed addition does not violate any of the Clear Sight Triangle (CST) for a residential driveway (as reviewed by the Department of Municipal Development of the City of Albuquerque).
12. Zoning Code Section 14-16-4-4(B)(4) states that an appellant to a special exception action shall specifically cite and explain one or more errors of the ZHE in rendering his decision, and allege that the ZHE erred in:
 - A. applying adopted city plans, policies and ordinances in arriving at his decision;

- B. the appealed action or decision, including its stated facts; and
 - C. acting arbitrarily or capriciously or manifestly abusive of discretion.
13. The appellant claims that the applicant's property is not exceptional, that the zoning ordinances do not impose undue hardship on the subject property, and that the variance significantly interferes with the enjoyment of other land in the vicinity. The appellant further claims that the ZHE's failure to consider the neighborhood's plat constitutes an error in the Decision's stated facts warranting reversal, and that in determining that a hardship exists, the ZHE acted arbitrarily and capriciously.
 14. Finding #3 of the Notice of Decision states: "The ZHE finds that the Applicant has met his burden of proving that the Subject Property is exceptional as it relates to other properties in the community."
 15. Finding #3 does not state what this proof consists of, or why the property is exceptional. Finding #3 refers to a written statement by a neighbor that the property is uniquely shaped, and that all of the surrounding lots vary widely in size and shape. The finding implies that this statement is the justification for a finding of exceptionality. The neighbor's statement later avers: "While the geometry of the lot is 'unique', it is NOT exceptional..." (page 64 of the record).
 16. Pages 17 and 48 of the record show that while many of the lots in the vicinity have different shapes and dimensions, an apparent characteristic of this subdivision, the subject property appears substantially consistent in size and shape with the majority of them, including the majority of corner lots.
 17. The property is neither irregular nor unusually narrow or shallow in shape as compared with other properties in the vicinity.
 18. Other than the reference to the neighbor's statement about unique shape, the NOD refers to no substantial evidence and provides no basis for the ZHE's determination that the lot is exceptional.
 19. If it can be demonstrated that the subject property is exceptional, the ZHE must then find that without the variance, the regulations would produce an unnecessary hardship. An unnecessary hardship is one that either creates an exceptional, substantial, and unjustified limitation of the property owner's reasonable use of his property, or deprives the owner of a reasonable return on the property under any use permitted by its existing zone.
 20. The Notice of Decision (NOD) does not provide any indication of the nature of the hardship that would be experienced by the property owner if the variance were not granted, or how it would exceptionally, substantially, and unjustifiably limit a reasonable use of the property or deprive the owner of a reasonable return on it. Except to state broadly in Finding 13 of the NOD that the applicant has adequately justified the variance application, the ZHE does not affirm in the NOD that a hardship exists.

21. The record does not include substantial evidence that the property is exceptional, or that there is a hardship, as defined in the Code.
22. In approving the variance without reference to substantial evidence or findings of exceptionality or hardship, the ZHE erred in applying the adopted city code in arriving at the decision, and acted arbitrarily and capriciously.
23. Based on these findings, the Zoning Board of Appeals concludes that the decision of the ZHE to approve the variance request was **INCORRECT**. Therefore, the appeal is **GRANTED** and the variance request is **DENIED**.

If you wish to appeal this decision, you must do so by **June 11, 2014**, 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 TO THE CITY COUNCIL: Any person aggrieved with any determination of the Board of Appeals acting under this ordinance may file an appeal to the City Council by submitting written application on the Planning Department form to the Planning Department within 15 days of the Board of Appeals decision. The date the determination in question is issued is not included in the 15-day period for filing an appeal, and if the fifteenth day falls on Saturday, Sunday or holiday as listed in the Merit System Ordinance, the next working day is considered as the deadline for the filing of the Appeal.

The City Council may decline to hear the Appeal if it finds that all City plans, policies and ordinances have been properly followed. If it decides that all City plans, policies, and ordinances have not been properly followed, it shall hear the Appeal. Such an appeal, if heard, shall be opened within 60 days of the expiration of the appeal period.

Should you have any questions regarding this action, please call our office at (505) 924-3860.

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BOA File
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