

**Notice of Decision
City Council
City of Albuquerque
January 9, 2019**

AC-18-17 PR-2018-001293/VA-2018-00031/VA-2018-00165: David Vilar appeals the decision of the Zoning Hearing Examiner's (ZHE's) decision to deny a variance of 10 ft to the required 10 ft side yard setback upon the real property located at 12804 Piru Blvd SE

Decision

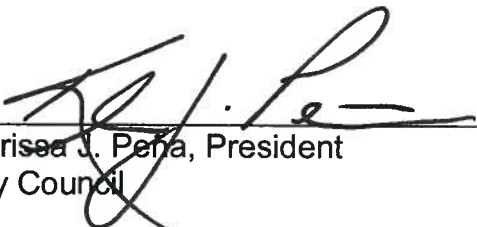
On January 7, 2019, by a vote of 9 FOR, 0 AGAINST, the City Council voted to deny the appeal and affirm the decision of the of the ZHE by accepting and adopting the recommendation and findings of its Land Use hearing officer.

IT IS THEREFORE ORDERED THAT THE VARIANCE IS DENIED; THE APPEAL IS DENIED, AND THE ZHE IS AFFIRMED

Attachments

1. Land Use Hearing Officer's Recommendation
2. Action Summary from the January 7, 2019 City Council Meeting

A person aggrieved by this decision may appeal the decision to the Second Judicial District Court by filing in the Court a notice of appeal within thirty (30) days from the date this decision is filed with the City Clerk.


Klarissa J. Peña, President
City Council

Date: 1-11-19

Received by: 
City Clerk's Office

Date: 1/11/2019

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ALBUQUERQUE CITY CLERK

**BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER**

APPEAL NO. AC-18-17

PR-2018-001293; VA-2018-00031; VA-2018-00165

DAVID VILAR, Appellant,

I. BACKGROUND & HISTORY

This is an appeal from a decision of the ZHE denying a variance for side-yard setbacks.

The Appellant, David Vilar, owns a house that he resides in at 12804 Piru Blvd. S.E. [R. 5].

Appellant's property is zoned R-1D and his residential property is in a residential neighborhood [R. 31-32]. Under the integrated Development Ordinance (IDO), 10-foot side-yard setbacks are required "between a structure and a lot line" [R. 31].¹ In 2016, Appellant

constructed and connected a structure to his home that is not setback from his property line [R. 47, 60]. In Zoning vernacular, the structure is located at "zero lot-line" which means

there is no space between the structure and the lot-line boundary or between the structure and the boundary wall separating the residential property that abuts Appellant's property.

After the structure was constructed, the City Zoning Division received multiple complaints about it [R. 96, 117]. Thereafter, on July 3, 2018, Appellant applied to the ZHE for a 10-foot

¹ The term "setback" is defined as the "shortest distance between a structure and a lot line" [IDO, § 14-16-7-1, page 475]. I note that under the previous Comprehensive Zoning Code which was superseded by the IDO in May 2017, the side-yard setback requirement was also 10-foot.

variance to the 10-foot side-yard setback requirement [R. 33-34].

A hearing on Appellant's application was scheduled for August 21, 2018, but before the hearing, Appellant apparently sought a continuance of the hearing [R. 119]. However, the hearing was not continued because several of Appellant's neighbors had shown up for the hearing, and the ZHE allowed them to testify in Appellant's absence [R.119]. Although the ZHE took testimony from several persons at the August 21, 2018 hearing (without Appellant's presence), the ZHE advised those in attendance that he would provide a transcript of the testimony to Appellant before the next hearing on the matter and allow Appellant to rebut the testimony [119]. After resolving some technical problems with providing a copy of the transcript to the Appellant, the evidence shows that the day before the second hearing on Appellant's application, the Appellant did have in his possession a working electronic copy of the transcript of the first hearing [R. 102].

The second ZHE hearing was held on September 18, 2018 [R. 101]. Appellant was present and was represented by an attorney at the hearing [R. 102]. I note that Appellant through counsel did not raise any due process issues with the unusual procedure the ZHE allowed regarding the first hearing. In addition, at the appeal hearing, Appellant's counsel stipulated on the record that he did not believe that Appellant's due process rights were impinged by the unusual process of allowing testimony without Appellant's presence. On October 3, 2018, in a written decision, the ZHE denied Appellant's variance application [R. 5]. Appellant filed a timely appeal [R. 3] and a Land Use Appeal Hearing was held on December 4, 2018.

II. STANDARD OF REVIEW

A review of an appeal is a whole record review to determine whether the ZHE acted fraudulently, arbitrarily, or capriciously; or whether the ZHE's decision is not supported by substantial evidence; or if the ZHE erred in applying the requirements of the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. The LUHO may recommend to the City Council that an appeal be affirmed in whole or in part or reversed in whole or in part. If the circumstances warrant it, the LUHO has authority to remand an appeal in whole or in part [IDO, § 14-16-6-4(U)(1)(d)].

III. DISCUSSION

After hearing testimony and arguments of Appellant and his attorney, I find that the ZHE did not err in his decision. The ZHE's crucial finding regarding the facts and the variance criteria under the IDO is well-supported by the record. In addition, I find that the ZHE applied the facts to the variance ordinance correctly. I recommend that the Appellant's appeal be denied. In doing so, I note for the City Counsel that I did not consider the testimony of the neighbors who opposed Appellant's variance application. I did not consider it because Appellant did not have an opportunity to cross examine the testimony that was presented at the first hearing. Although the ZHE attempted to cure the problem by giving Appellant a copy of the transcript and seemingly gave him an opportunity to rebut the testimony at the second hearing, Appellant should have been accorded an opportunity to cross examine witnesses at the first hearing. Normally, this would require a remand, however, even without the witness

testimony I find that there is substantial evidence to support the denial. Therefore, a remand would only prolong an inevitable denial.

In this appeal, Appellant through counsel raises many arguments. Appellant first contends that when he constructed the structure, he was unaware that there were setback requirements, and therefore deference should be accorded to him. Appellant believes that because he was unaware of the City's setback requirements he could not have and in fact did not have a bad intent to violate the law. He further believes that because he did not intend to violate the law, the ZHE should have granted the variance. I find that Appellant's subjective intent is irrelevant in this matter because it is not a consideration in §14-16-6(N)(3)(a). Whether Appellant purposefully or innocently gave no attention to the laws of the City is not an appropriate ground to judge a variance application. If it was, the resolution of that inquiry could essentially render the variance requirements of §14-16-6(N)(3)(a) meaningless.

Next, Appellant's counsel contends that the special circumstances on the property relate not to the physical characteristics of the property, but he contends that the special circumstances relate to Appellant's convenience and the feasibility of placing the structure in the location it sits. He argues that a remand is necessary because the ZHE did not consider this as a special circumstance. I find this argument utterly irrational and unresponsive to §14-16-6(N)(3)(a)1. I also remind Appellant that it was not the ZHE's responsibility to consider arguments that were not made. It was the Appellant's burden to prove his case. Thus, for all these reasons, a remand is not necessary.

There is however substantial evidence in the record that clearly supports ZHE Finding 41 which is the linchpin of the ZHE's decision. But, before discussing the ZHE decision, the

fundamental requirements of §14-16-6(N)(3)(a), specifically what does not qualify as a “special circumstance” in §14-16-6(N)(3)(a)1 will be discussed in detail. In the Integrated Development Ordinance (IDO), a variance under §14-16-6(N)(3)(a) is an exception (§14-16-7-1) to the development standards in the IDO. Under the IDO, a variance:

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 district and vicinity, including but not limited to size, shape, topography, location, surroundings, and physical characteristics, and such special circumstances were created either by natural forces or by government eminent domain actions 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 this IDO or the applicable zone district.
5. The Variance approved is the minimum necessary to avoid extraordinary hardship or practical difficulties (emphasis added) [§14-16-6(N)(3)(a)].

There can be no dispute that an applicant must fulfill “*all*” of the benchmarks or requirements of §14-16-6(N)(3)(a) to be eligible for a variance. That is, the five-prong test in §14-16-6(N)(3)(a) is not disjunctive—an applicant must show he/she satisfies all of the criteria therein.

115 The first prong of the five-part test (§14-16-6(N)(3)(a)1) is the most difficult and it is
116 the basis for denying Appellant’s application. The first prong has four subparts that are
117 essentially an inquiry into whether there is an actual special circumstance that “does not
118 apply generally” to the neighborhood, and if there is, the origin of it must be determined.
119 Under the first prong, the origin of an alleged special circumstance is significant to the
120 analysis because the special circumstance alleged cannot be a “self-imposed” condition.
121 This is clearly the plain meaning of the self-imposition subpart language. *If* there are special
122 circumstances that were not created by the applicant, the circumstances must also create a
123 considerable limitation on the reasonable use or return of the property or it creates a difficulty
124 in complying with any development standards if the variance is not granted. With these basic
125 precepts as a backdrop, Appellants arguments and the ZHE’s findings can be better
126 understood.

127 The record shows in denying Appellant’s application, the ZHE made 44 findings.
128 Although the ZHE did not expressly make a finding that there are no special circumstances
129 applicable to Appellant’s property that are not applicable generally to other similarly situated
130 property in the neighborhood, after reweighing the evidence, I find that the record
131 demonstrates clearly that Appellant has not alleged any qualifying special circumstances that
132 would or could be eligible for a variance for the side-yard setback of the accessory structure.

133 At the ZHE hearing and at the LUHO hearing, Appellant argued that the structure and
134 its location is the special circumstance for which he needs the variance [R. 18]. Appellant’s
135 argument, however, ignores and obfuscates his own conduct out of the analysis. The evidence
136 demonstrates that Appellant constructed the structure in 2016 [R. 13]. Appellant himself

137 admitted this on the record in the ZHE hearing and in the LUHO hearing. In short, under any
138 reasonable interpretation of §14-16-6(N)(3)(a)1, the structure and the location were self-
139 imposed conditions or circumstances, and therefore they do not qualify as a special
140 circumstance for a variance. The crux of this analysis and decision of the ZHE can be found
141 in his Finding 41 which states that the “*alleged special circumstances were self-imposed*”
142 (emphasis added) [R. 7]. I find that the facts in the record, as outlined above, fully supports
143 this finding. The ZHE correctly applied the facts to IDO §14-16-6(N)(3)(a)1 and did not err.
144 And, again, I note that this finding is not contingent on any of the testimony the ZHE allowed
145 without the opportunity for cross examination, and therefore, again, a remand is unnecessary
146 for this reason.

147 Notwithstanding, Appellant contends that the ZHE erred because he did not consider
148 that the structure complies with the City’s building codes, aesthetically matches the materials
149 of his home and is blocked from views from his street [R. 10-15]. He mistakenly believes
150 that because the structure matches his home and is allegedly structurally sound, it is not
151 contrary to the public welfare and there are no adverse impacts from it.² These issues are
152 appropriate inquiries to resolving the second and third prongs of the §14-16-6(N)(3)(a).
153 However, unless Appellant can demonstrate that he can fulfill the first prong of §14-16-
154 6(N)(3)(a), the resolution of the other four prongs are superfluous. All prongs of §14-16-
155 6(N)(3)(a) must be met and if Appellant cannot meet the first prong, fulfilling the second
156 and third prongs does not change the outcome.

157 Appellant next contends that many of the ZHE findings based on witness opposition

² I also note for the City Council that Appellant admitted that he constructed the structure without first obtaining a building permit from the City [R. 105].

testimony are irrelevant to the variance issues under §14-16-6(N)(3)(a). However, as shown above, the ZHE's crucial Finding (Finding 41) is independent of any opposition testimony which Appellant believes was irrelevant. I find that the relevancy of the opposition testimony is inconsequential to the analysis under the first prong of §14-16-6(N)(3)(a). And, because the denial of Appellant's application can stand on the first prong alone, Appellant's arguments on the witness testimony is pointless and do not change the outcome.

Finally, Appellant claims that deconstructing the accessory structure he built in violation of side-yard setback requirements of § 14-16-5(C)(2) will cause him financial hardship. This argument is hollow because Appellant caused the condition that he now wants relief creating. If an applicant's financial hardship to raze a structure he /she created were a valid inquiry for the ZHE, anyone would be free to build a structure in violation of setbacks and be eligible for a free-pass if there is an expense to bringing it into compliance afterward. Appellant's reasoning would allow anyone to violate the IDO's development standards without consequence, effectively rendering §14-16-6(N)(3)(a) meaningless.

IV. CONCLUSION

For all the reasons described above, I respectfully recommend that Appellants' appeal be denied. The ZHE decision is well-supported by the evidence in the record and should be upheld. And, although the ZHE should not have allowed testimony from neighbors to testify in the first hearing without Appellant having an opportunity to cross examine that testimony, I find that it was harmless error in this case because Appellant's application can and should be denied based on facts given by Appellant only. That is, there is substantial evidence in the

180 record to support the denial based exclusively on Appellant's own testimony. The decision
181 of the ZHE should stand.

182



Steven M. Chavez, Esq.
Land Use Hearing Officer
December 7, 2018

Copies to:

Appellant
Party Opponents
City Staff



City of Albuquerque

Albuquerque/Bernalillo
County
Government Center
One Civic Plaza
Albuquerque, NM 87102

Action Summary

City Council

Council President, Klarissa J. Peña, District 3
Vice-President, Cynthia D. Borrego, District 5

Ken Sanchez, District 1; Isaac Benton, District 2
Brad Winter, District 4; Patrick Davis, District 6
Diane G. Gibson, District 7; Trudy E. Jones, District 8
Don Harris, District 9

Monday, January 7, 2019

5:00 PM

Vincent E. Griego Chambers
One Civic Plaza NW

Albuquerque/Bernalillo County Government Center

TWENTY-THIRD COUNCIL - TWENTY-SIXTH MEETING

1. ROLL CALL

Present 9 - Klarissa Peña, Cynthia Borrego, Ken Sanchez, Isaac Benton, Brad Winter, Patrick Davis, Diane Gibson, Trudy Jones, and Don Harris

2. MOMENT OF SILENCE

Pledge of Allegiance - Isaac Benton, Councilor, District 2

3. PROCLAMATIONS & PRESENTATIONS

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

December 17, 2018

7. COMMUNICATIONS AND INTRODUCTIONS

Deferrals/Withdrawals

- b. O-18-36 Amending The Public Purchases Ordinance; Requiring City Council Approval Of Supplements For Professional/Technical Services And Supplements To Contracts Awarded Through The Competitive Sealed Proposal Process (Winter)

A motion was made by Councilor Winter that this matter be Postponed to February 4, 2019. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

8. REPORTS OF COMMITTEES

9. CONSENT AGENDA: {Items may be removed at the request of any Councilor}

- a. EC-18-265 Mayor's Recommendation of Award to Concentra Inc. for "Medical Health Center"

A motion was made by Vice-President Borrego that this matter be Approved.
The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- b. EC-18-282 Mayor's Recommendation of Molzen-Corbin & Associates for Engineering Consultant for Airfield Engineering On-Call Services for the Aviation Department at the Albuquerque International Sunport

A motion was made by Vice-President Borrego that this matter be Approved.
The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- c. EC-18-283 Mayor's Appointment of Ms. Camilla C. Feibelman to the Water Protection Advisory Board

A motion was made by Vice-President Borrego that this matter be Confirmed.
The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- d. EC-18-284 Mayor's Appointment of Mr. Terrence J. Brunner to the Albuquerque Development Commission

A motion was made by Vice-President Borrego that this matter be Confirmed.
The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- e. EC-18-285 Mayor's Appointment of Ms. Sarah M. Fetty to the Personnel Board

A motion was made by Vice-President Borrego that this matter be Confirmed.
The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

- f. EC-18-286 Mayor's Appointment of Dr. Karl Braithwaite to the Personnel Board

A motion was made by Vice-President Borrego that this matter be Confirmed.
The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

g. R-18-99

Approving A Grant Application For The FY2019 Fire Protection Grant With The New Mexico State Fire Marshal's Office And Providing For An Appropriation To The Albuquerque Fire Rescue In Fiscal Year 2019 (Sanchez, by request)

A motion was made by Vice-President Borrego that this matter be Passed. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

h. R-18-100

Approving And Authorizing The Filing Of A Grant Application For An Air Pollution Control Grant With The U.S. Environmental Protection Agency And Providing An Appropriation To The Environmental Health Department In Fiscal Year 2019 (Gibson, by request)

A motion was made by Vice-President Borrego that this matter be Passed. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

i. R-18-101

Approving And Authorizing The Acceptance Of Grant Funds From The New Mexico State Highway And Transportation Department And Providing An Appropriation To The Parks And Recreation Department In Fiscal Year 2019 (Davis, by request)

A motion was made by Vice-President Borrego that this matter be Passed. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

j. R-18-114

Approving And Authorizing The Acceptance Of Grant Funds From The Cities For Financial Empowerment Fund, Inc. And Providing An Appropriation To The Legal Department For Fiscal Year 2019 (Peña, by request)

A motion was made by Vice-President Borrego that this matter be Passed. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

k. O-17-1

Adding A New Article 16 To Chapter 13, ROA 1994 Mandating Employer Paid Sick Leave To Employees Within The City Of Albuquerque; Prescribing Rules And Penalties; Setting An Effective Date (Sanchez, Harris)

A motion was made by Vice-President Borrego that this matter be Died on Expiration. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

l. O-17-50

C/S(3) Amending The City Of Albuquerque Code Of Ordinances Article 6

In Chapter 13 ROA 1994, The "Pawnbroker Ordinance" (Gibson)

A motion was made by Vice-President Borrego that this matter be Died on Expiration. The motion carried by the following vote:

For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

10. GENERAL PUBLIC COMMENTS

11. ANNOUNCEMENTS

12. PUBLIC HEARINGS: {Appeals, SAD Protest Hearings}

- a. AC-18-17 PR-2018-001293/VA-2018-00031/VA-2018-00165: David Vilar appeals the decision of the Zoning Hearing Examiner's (ZHE's) decision to deny a variance of 10 ft to the required 10 ft side yard setback upon the real property located at 12804 Piru Blvd SE
- A motion was made by Councilor Harris that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:**
- For:** 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris

13. APPROVALS: {Contracts, Agreements, and Appointments}

- a. EC-18-215 Mayor's Appointment of Ms. Kara Grant to the Lodgers' Tax Advisory Board
- A motion was made by President Peña that this matter be Confirmed. The motion carried by the following vote:**
- For:** 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- b. OC-18-20 Selection of the Inspector General
- A motion was made by President Peña that this matter be Tabled. The motion carried by the following vote:**
- For:** 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- A motion was made by President Peña to take OC-18-20 off the table. The motion carried by the following vote:**
- For:** 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- A motion was made by Councilor Winter that this matter be Postponed to January 23, 2019. The motion carried by the following vote:**
- For:** 5 - Borrego, Winter, Davis, Gibson, and Jones
- Against:** 4 - Peña, Sanchez, Benton, and Harris

14. FINAL ACTIONS

- a. O-18-3 Amending The Municipal Solid Waste Collections And Disposal Rate Table To Incorporate Residential Rate Decreases In The Rate Appendix (Winter)
- A motion was made by Councilor Winter that this matter be Withdrawn by Sponsor. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- c. R-18-96 Amending The Adopted Capital Implementation Program Of The City Of Albuquerque By Supplementing Current Appropriations For An Affordable Housing Development Project Within The Boundaries Of The West Central Metropolitan Redevelopment Area And Directing The Mayor To Execute The Related Development Agreement (Peña, Sanchez)
- A motion was made by President Peña that this matter be Amended. President Peña moved Amendment No. 1. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- A motion was made by Councilor Sanchez that this matter be Passed as Amended. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- d. R-18-109 Establishing A Standard City-Wide Policy And Fee Structure For Renting Space In City Owned Community Centers, Senior Centers, And Multigenerational Centers (Winter)
- A motion was made by Councilor Winter that this matter be Passed. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris
- e. R-18-113 City Of Albuquerque Project Recommendations To The Mid-Region Council Of Governments For Inclusion In The 2040 And 2045 Metropolitan Transportation Plans, And For Consideration Of Federal Funding In The Proposed FY 2020 To FY 2025 Transportation Improvement Program For The Albuquerque Metropolitan Planning (Benton)
- A motion was made by Councilor Benton that this matter be Passed. The motion carried by the following vote:**
- For: 9 - Peña, Borrego, Sanchez, Benton, Winter, Davis, Gibson, Jones, and Harris