



# City of Albuquerque

## Planning Department

Timothy M. Keller, Mayor

### Interoffice Memorandum

February 11, 2026

**To:** Klarissa J. Peña, President, City Council

**From:** Alan Varela, Director, Planning Department

<sup>DS</sup>  
AMV

**Subject:** AC-26-03, VA-2025-00154: Matthew Cunningham ("Applicant") appeals the Zoning Hearing Examiner's decision to DENY a variance to install a 5-foot 10-inch perimeter steel fence in the front yard of the property located at 2513 4th Street NW, zoned MX-M and NR-C

#### OVERVIEW

On December 16, 2025, property owner Matthew Cunningham ("Applicant") appeared before the Zoning Hearing Examiner ("ZHE") requesting a Variance of 2 feet and 10 inches to install a 5-foot 10-inch perimeter steel fence in the front yard of the property located at 2513 4th Street NW.

The ZHE denied the Applicant's requests in a written decision dated December 31, 2025.

The Appellant timely filed an appeal of the ZHE's decisions prior to the appeal deadline of January 15, 2026. As the property owner and applicant for the original applications that were denied, the appellant has standing to appeal the decision.

#### BASIS FOR APPEAL

Pursuant to Integrated Development Ordinance (IDO) §14-16-6-4(U)(4), the applicable criteria for the appeal shall be whether the ZHE made 1 of the following mistakes:

1. The ZHE acted fraudulently, arbitrarily, or capriciously.
2. The decision being appealed is not supported by substantial evidence.
3. The ZHE erred in applying the requirements of the IDO (or a plan, policy, or regulation referenced in the review and decision-making criteria for the type of decision being appealed).

## STAFF RESPONSE

The Appellant argues that the ZHE Findings 12, 13, 17, 18 are in error and that the ZHE acted arbitrarily in denying this variance when other tall walls exist on nearby properties.

The reasons for the appeal, excerpted from the Appellant's letter, are listed below in quotation marks, accompanied by italicized responses from ZHE staff.

### "A. Contested Findings of Fact

- (ii) Finding of Fact No. 12 is contested in part. Finding of Fact No. 12 states that the Subject Property is located in the MX-M zone district. According to the enclosed IDO Zone Look-Up Map (attached Appeal Exhibit D), the Subject Property is only partially located in an MX-M zone. Other portions of the Subject Property are located in an NR-C zone. Accordingly, it is not clear whether the characteristics and/or restrictions of zone MX-M or NR-C, or both, control Applicant/Appellant's variance request."

*Although not stated in the staff report, the subject site includes lots with two different zone districts:*

- *MX-M (Mixed-use – Medium Intensity)*
- *NR-C (Non-residential – Commercial)*

*The maximum height of a wall/fence is 3 feet in the front yard for both zone districts. The requested variance to height is for the portion of the site within the MX-M zone district.*

"(iii) Finding of Fact. No. 13 is contested insofar as the findings stated are not factual, but are instead a recitation of the IDO at Part 14-16-6-6(O)(3)(a), which is a legal conclusion."

*Finding #13 restates the decision criteria for a Variance – ZHE and does not appear to be a legal conclusion.*

"(v) Finding of Fact. No. 17 is contested... [because] the ZHE denied Applicant/Appellant's request for variance based ... on the erroneous finding that there were no special circumstances applicable to the Subject Property....According to the ZHE in Finding of Fact No. 17, the higher fence requested by the variance 'sought to increase security of the Subject Property, because trespassers including unhoused persons and drug users have come onto the Subject Property repeatedly.'

The ZHE concluded that such security concerns are so prevalent in the surrounding area that the need for security-based variances is not unique to the Subject Property."

*The first decision criterion [IDO § 14-16-6-6(O)(3)(a)1] is that there are special circumstances that apply to the subject property. ZHE Finding #17 determined that the security concerns are not special circumstances that apply to the subject property.*

"(vi) Finding of Fact. No. 18 is contested on two grounds. First, the findings stated are not factual, but legal.

Second, the legal conclusion(s) stated in Finding of Fact No. 18 are erroneous.”

*The Appellant argues that Finding #18 is erroneous because the IDO review and decision criterion that “a variance shall be approved if ALL [emphasis added] of the following criteria are met” [IDO § 14-16-6-6(O)(3)(a) leaves open the possibility that a variance MAY be approved even if only some of the criteria are met. Review and decision criteria for multiple applications in the IDO use this construction. ZHE Finding #18 construes the common sense understanding of the wording used throughout IDO Part 6, which has been the consistent interpretation of this language since the IDO was adopted.*

“C. Constitutional Considerations

Constitutional considerations over equal protection are also implicated by the denial of Applicant/Appellant’s requested variance. ... The prevalence of fences on other properties in the area surrounding the Subject Property demonstrates:

- (1) there cannot be any plausible basis to deny approval of the requested variance for a similar fence; and
- (2) the denial of the variance here demonstrates an unequal, arbitrary, capricious and/or discriminatory application of the IDO against Applicant/Appellant as compared to other similarly situated property owners.”

*How other fences nearby got approved is not part of the decision criteria for the requested variance. The decision criteria for this request is pursuant to IDO § 14-16-6-6(O)(3), which the ZHE found the applicant did not satisfy because no special circumstances apply to the lot [Finding #17]. It is the burden of the applicant in each application to present evidence that satisfies their application’s decision criteria. The approval of one application in an area does not guarantee that other applications from the same area will be approved if their applicants fail to present sufficient evidence to satisfy their application’s decision criteria. Moreover, as the criteria considered here concern the special circumstances of the applicant’s property as opposed to conditions applicable to the area as a whole, any approvals received on other nearby properties cannot be used to satisfy this application’s decision criteria.*

*Properties in MX-M may have a 5-foot wall if set back at least 10 feet from the lot line if all the requirements of IDO § 14-16-5-7(D)(3)(c) are met.*

*Properties in NR-C may have a 6-foot wall if set back 5 feet from the property line and view fencing is used for portions of the wall above 3 feet [IDO § 14-16-5-7(D)(3)(d).*

/ Adam Sena /

Adam Sena, Senior Planner  
City of Albuquerque Planning Department

/ Leslie Najj /

Leslie Najj, Principal Planner  
City of Albuquerque Planning Department

