

CITY OF ALBUQUERQUE
PLANNING DEPARTMENT
ZONING HEARING EXAMINER
NOTIFICATION OF DECISION

TIM AND RAMONA JARVIS
(GARCIA/KRAEMER & ASSOCIATES)
request(s) a special exception to Section 14-16-1-5: a VARIANCE of 3' to the allowed 14' height for an existing accessory building for all or a portion of Lot(s) 30, Block(s) 2B, COUNTRY CLUB ADDITION zoned R-1, located on 1310 MARQUETTE NE (K-15)

Special Exception No:..... **12ZHE-80355**
Project No: **Project# 1009491**
Hearing Date: 11-19-12
Closing of Public Record: 11-19-12
Date of Decision: 12-06-12

On the 19th day of November, 2012 (hereinafter "**Hearing**") Mr. Bill Kraemer (hereinafter "**Agent**") acting as agent on behalf of the property owner, Mr. and Mrs. Tim and Ramona Jarvis (hereinafter "**Applicant**") appeared before the Zoning Hearing Examiner (hereinafter "**ZHE**") requesting a Variance of 3' to the allowed 14' height for an existing accessory building (hereinafter "**Application**") upon the real property located at 1310 MARQUETTE NE ("**Subject Property**"). Below are the findings of facts:

FINDINGS:

1. The Agent (on behalf of the Applicant) is requesting a Variance of 3' to the allowed 14' height for an existing accessory building.
2. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (a) "SPECIAL EXCEPTIONS" reads in part: "*Variance. A variance shall be approved if and only if the following tests are met: (a) The property is exceptional*"
3. The Agent (on behalf of the Applicant) testified at the Hearing that the Subject Property is exceptional for the following reasons:
 - a. Exceptionality Reason #1: The Applicant purchased the property in 2010 at which time the building envelopes of the residence and accessory building were already established.
 - b. Exceptionality Reason #2: The Subject Property received a building permit in 2010, wherein, the City of Albuquerque did not request that the Applicant change the building envelope, setback(s) to adjoining properties/dwellings, location of the accessory building, height of the accessory building, or percentage of gross floor area within the accessory building.
 - c. Exceptionality Reason #3: The Subject Property is not a flat lot and has an elevation change throughout the lot.
4. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (b) "SPECIAL EXCEPTIONS" reads in part: "*A variance shall be approved if*

and only if the following tests are met: (b) as a result of the exceptional aspect of the property, the regulations produce unnecessary hardship”

5. The Agent (on behalf of the Applicant) testified at the Hearing that as a result of the exceptionality (sloped lot, prior building permit issuance, etc.) that the City of Albuquerque Code of Ordinances Section 14-16-1-5 creates a regulation (14' height for an existing accessory building) that produces an unnecessary hardship upon the Applicant that in order to remedy the unnecessary hardship the Applicant would be required to either: (i) demolish 3 feet of the existing accessory building to bring it down to 14 feet in height; or (ii) construct a higher parapet to the personal residence adjacent to the accessory building in order to make the accessory building the same height as the personal residence.
6. Prior to the Hearing, the Agent attempted unsuccessfully to convince the Zoning Enforcement Office of the City of Albuquerque that this Variance Application was not required because the Zoning Code allows for an accessory building up to 17 feet in height.
7. The Agent stated in his Application that Section 14-16-3-3 (B) (2) (a) “clearly allows accessory buildings to be up to 18 feet in height.” Additionally, the Agent indicated that the R-1 zoning category provides for a maximum building height of 26 feet. The Agent admitted that the personal residence is 14 feet tall, and the accessory building is 17 feet tall.
8. Section 14-16-1-5 of the Zoning Code provides the definition of Accessory building: “***BUILDING, ACCESSORY.*** *A building detached from and smaller than the main building on the same lot; the use of an accessory building shall be appropriate, subordinate, and customarily incidental to the main use of the lot.*”
9. The ZHE finds that the reference to “smaller” within Section 14-16-1-5 of the Zoning Code shall be read to be consistent with the height regulations provided within Section 14-16-3-3 (B) (2) (a) which states the following:

“Accessory Structures.

(a) Unless approved under a Site Development Plan, an accessory building on a lot, the principal use of which is a house or town house, shall not be located in the required front yard setback and shall not occupy over 25% of the side-plus-rear-yards. An accessory structure in any required yard shall not exceed either 18 feet in height, or any applicable height limitations imposed by division (A)(7) of this section, except if it is in a required side-yard setback on a corner, it shall not exceed the height of the fence allowed by (A)(4) of this section.”

10. The ZHE finds that the accessory building is not situated within the “side-yard setback on a corner” [and therefore not subject to subsection (A) (4)].
11. The ZHE finds that the accessory building does not trigger the regulations imposed by subsection (A) (7) because the accessory building is not located near the northern property line of the Subject Property (Solar Access).

12. As a result, the ZHE finds that the accessory building on the Subject Property shall not exceed 18 feet in height as promulgated by Section 14-16-3-3 (B) (2) (a) of the Zoning Code.
13. The ZHE, applying the common held rules of statutory construction, is required to read both: (i) Section 14-16-1-5; and (ii) 14-16-3-3 (B) (2) (a) such that they do not reach a conflicting result. After reading both sections of the Zoning Code the ZHE reaches the conclusion that the reference to “*smaller*” in Section 14-16-1-5 does not require the accessory building to be smaller in height than the “*main building on the same lot*”, but rather, that the accessory building shall be smaller in square footage than the “*main building on the same lot.*” In short, if the City of Albuquerque desired for the height of all accessory buildings to not exceed the height of the “*main building on the lot*” then the City would have explicitly promulgated that limitation within Section 14-16-3-3 (B) (2) (a) of the Zone Code where the height regulations of accessory buildings resides.
14. The Agent indicated that this Subject Property was subject to a contentious Conditional Use application (11 ZHE 80055) that was denied in March of 2012 (City Council upheld the recommendations of the LUHO). That previous conditional use application was attempting to change the “accessory building” into an “accessory living quarters”. The Agent indicated at the Hearing that some of the concerns from the neighbors opposed to the current Application were in fact related to the efforts of the Applicant’s Conditional Use application (11 ZHE 80055) denied in March of 2012.
15. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (c) “SPECIAL EXCEPTIONS” reads in part: “*A variance shall be approved if and only if the following tests are met: (c) a particular variance is appropriate to prevent the unnecessary hardship.*”
16. Applicant testified at the Hearing that the variance Application (3 feet above the 14 foot height requirement), if approved, would be appropriate to prevent the unnecessary hardship.
17. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (d) “SPECIAL EXCEPTIONS” reads in part: “*A variance shall be approved if and only if the following tests are met: (d) financial gain or loss shall not be the sole determining factor in deciding a variance.*”
18. The Application and the testimony provided by the Agent of the Applicant at the Hearing both suggest that financial gain/loss was not the sole determining factor of the Application.
19. The Agent testified at the Hearing that the Subject Property was currently subject to a criminal complaint filed by the City of Albuquerque in August of 2012 (Metro Court).
20. The Application, File and testimony of the Agent (on behalf of the Applicant) at the Hearing suggests that there is neighborhood opposition to the Application.
21. Ms. Maggie Gombos testified in opposition to the Application. She indicated that she believed that the property was not exceptional. She made reference to

- Ms. Concetta Trujillo's letter of February 25, 2011 among other points of opposition.
22. Mr. Joseph Noter (neighbor to the east) testified that the property was not exceptional and a fire hazard, and that he believed it was less than 10 feet to the garage boundary.
 23. Mr. Harold Anderson (corner lot 2 houses down from the Subject Property) expressed concern that the accessory building did not have a proper building permit nor did it receive a plumbing permit. Mr. Anderson also was concerned about a fire hazard from the accessory building. Mr. Anderson also authored an email on November 25, 2012 that indicated that the ZHE, Board of Appeals and City Council believed that the property was not exceptional, and as a result that the current ZHE was bound by those rulings.
 24. The ZHE finds that the previous ruling in the *Conditional Use* matter (11 ZHE 80055), does not bind the ZHE on this current *Variance* Application. The current Application is a wholly separate special exception application with vastly different criteria required by the Zoning Code. Furthermore, "exceptionality" [as used within Section § 14-16-4-2 (C) (2) (a)] is not a required element to be proven by any applicant in a Conditional Use application before the ZHE. "Exceptionality" is only a required element to be proven in a variance application.
 25. The Agent testified that the Applicant currently lives in Austin Texas.
 26. The Agent testified that nobody sleeps or eats in the accessory building and that it does not have a kitchen.
 27. Applicant testified at the Hearing that the yellow "Notice of Hearing" signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.
 28. The ZHE finds that the Applicant has adequately justified the variance Application upon the Subject Property pursuant to City of Albuquerque Code of Ordinances Section § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

APPROVAL WITH CONDITIONS of a VARIANCE of 3' to the allowed 14' height for an existing accessory building upon the real property located at 1310 MARQUETTE NE.

CONDITIONS OF APPROVAL:

1. The Applicant shall demolish that portion of the Accessory building to make it 805 square feet in area and comply with the 25% regulation (See Section 14-16-3-3 (B) (2) (a) of the Zoning Code).
2. The Applicant shall demolish that portion of the Accessory building to allow 5' passage in the rear yard for an existing accessory building (See Section 14-16-3-3(B)(2)(F) of the Zoning Code).
3. The Applicant shall not use the Accessory building as an "Accessory Living Quarters" (as defined in Section 14-16-1-5 of the Zone Code) without an

approved Conditional Use application, as required by its underlying zoning designation.

If you wish to appeal this decision, you may do so by 5:00 p.m., on December 21, 2012 in the manner described below:

Appeal is to the Board of Appeals within 15 days of the decision. A filing fee of \$50.00 shall accompany each appeal application, as well as a written explanation outlining the reason for appeal and a copy of the ZHE decision. Appeals are taken at 600 2nd Street, Plaza Del Sol Building, Ground Level, Planning Application Counter located on the west side of the lobby. **Please present this letter of notification when filing an appeal.** When an application is withdrawn, the fee shall not be refunded.

An appeal shall be heard by the Board of Appeals within 45 days of the appeal period and concluded within 75 days of the appeal period. The Planning Division shall give written notice of an appeal, together with a notice of the date, time and place of the hearing to the applicant, a representative of the opponents, if any are known, and the appellant.

Please note that pursuant to Section 14.16.4.4.(B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

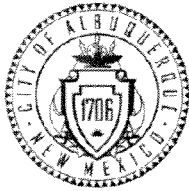
You will receive notice if any other person files an appeal. If there is no appeal, you can receive building permits any time after the appeal deadline quoted above, provided all conditions imposed at the time of approval have been met. However, the Zoning Hearing Examiner may allow issuance of building permits if the public hearing produces no objection of any kind to the approval of an application. To receive this approval, the applicant agrees in writing to return the building permit or occupation tax number.

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.



JOSHUA J. SKARSGARD, ESQ.
Zoning Hearing Examiner

cc: Zoning Enforcement
ZHE File
Garcia/Kraemer & Associates, 600 1st Street NW, Ste 211, 87102
Tim and Ramona Jarvis, 1506 West 32nd Street, Austin TX, 78703
Diane Marshall, 1305 Marquette NE, 87106
Martha Brown, 1315 Marquette NE, 87106
Maggie Gombos, 422 Ridge Circle NE, 87106
Dr. Harold M. Anderson and Maryanne A. Danfelser, 1300 Marquette NE, 87106
Joe Riter, 1320 Marquette NE, 87106
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Kathryn Simnacher, 1220 Marquette NE, 87106



CITY OF ALBUQUERQUE
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NOTIFICATION OF DECISION

TIM AND RAMONA JARVIS
(GARCIA/KRAEMER & ASSOCIATES)
request(s) a special exception to Section 14-16-3-3(B)(2)(a): a VARIANCE of 86 square feet to the allowed 805 square feet for an existing building for all or a portion of Lot(s) 30, Block(s) 2B, COUNTRY CLUB ADDITION zoned R-1, located on 1310 MARQUETTE NE (K-15)

Special Exception No:..... **12ZHE-80356**
Project No: **Project# 1009491**
Hearing Date: 11-19-12
Closing of Public Record: 11-19-12
Date of Decision: 12-06-12

On the 19th day of November, 2012 (hereinafter “**Hearing**”) Mr. Bill Kraemer (hereinafter “**Agent**”) acting as agent on behalf of the property owner, Mr. and Mrs. Tim and Ramona Jarvis (hereinafter “**Applicant**”) appeared before the Zoning Hearing Examiner (hereinafter “**ZHE**”) requesting a VARIANCE of 86 square feet to the allowed 805 square feet for an existing building (hereinafter “**Application**”) upon the real property located at 1310 MARQUETTE NE (“**Subject Property**”). Below are the findings of facts:

FINDINGS:

1. The Agent (on behalf of the Applicant) is requesting a VARIANCE of 86 square feet to the allowed 805 square feet for an existing building.
2. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (a) “SPECIAL EXCEPTIONS” reads in part: “*Variance. A variance shall be approved if and only if the following tests are met: (a) The property is exceptional*”
3. The Agent (on behalf of the Applicant) testified at the Hearing that the Subject Property is exceptional for the following reasons:
 - a. Exceptionality Reason #1: The Applicant purchased the property in 2010 at which time the building envelopes of the residence and accessory building were already established.
 - b. Exceptionality Reason #2: The Subject Property received a building permit in 2010, wherein, the City of Albuquerque did not request that the Applicant change the building envelope, setback(s) to adjoining properties/dwellings, location of the accessory building, height of the accessory building, or percentage of gross floor area within the accessory building.
 - c. Exceptionality Reason #3: The Subject Property is not a flat lot and has an elevation change throughout the lot.
4. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (b) “SPECIAL EXCEPTIONS” reads in part: “*A variance shall be approved if and*

only if the following tests are met: (b) as a result of the exceptional aspect of the property, the regulations produce unnecessary hardship”

5. The Agent (on behalf of the Applicant) testified at the Hearing that as a result of the exceptionality (sloped lot, prior building permit issuance, etc.) that the City of Albuquerque Code of Ordinances Section 14-16-3-3(B)(2)(a) creates a regulation that produces an unnecessary hardship upon the Applicant.
6. Section 14-16-3-3 (B) (2) (a) states the following:

“Accessory Structures.

(a) Unless approved under a Site Development Plan, an accessory building on a lot, the principal use of which is a house or town house, shall not be located in the required front yard setback and shall not occupy over 25% of the side-plus-rear-yards. An accessory structure in any required yard shall not exceed either 18 feet in height, or any applicable height limitations imposed by division (A)(7) of this section, except if it is in a required side-yard setback on a corner, it shall not exceed the height of the fence allowed by (A)(4) of this section.”

7. The ZHE finds that the accessory building on the Subject Property shall not exceed 25% of the side-plus-rear yards as promulgated by Section 14-16-3-3 (B) (2) (a) of the Zoning Code.
8. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (c) “SPECIAL EXCEPTIONS” reads in part: *“A variance shall be approved if and only if the following tests are met: (c) a particular variance is appropriate to prevent the unnecessary hardship.”*
9. Applicant testified at the Hearing that the variance Application, if approved, would be appropriate to prevent the unnecessary hardship.
10. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (d) “SPECIAL EXCEPTIONS” reads in part: *“A variance shall be approved if and only if the following tests are met: (d) financial gain or loss shall not be the sole determining factor in deciding a variance.”*
11. The Application and the testimony provided by the Agent of the Applicant at the Hearing both suggest that financial gain/loss was not the sole determining factor of the Application.
12. The Agent testified at the Hearing that the Subject Property was currently subject to a criminal complaint filed by the City of Albuquerque in August of 2012 (Metro Court).
13. The Application, File and testimony of the Agent (on behalf of the Applicant) at the Hearing suggests that there is neighborhood opposition to the Application.
14. Ms. Maggie Gombos testified in opposition to the Application. She indicated that she believed that the property was not exceptional. She made reference to Ms. Concetta Trujillo’s letter of February 25, 2011 among other points of opposition.
15. Mr. Joseph Noter (neighbor to the east) testified that the property was not exceptional and a fire hazard, and that he believed it was less than 10 feet to the garage boundary.

16. Mr. Harold Anderson (corner lot 2 houses down from the Subject Property) expressed concern that the accessory building did not have a proper building permit nor did it receive a plumbing permit. Mr. Anderson also was concerned about a fire hazard from the accessory building. Mr. Anderson also authored an email on November 25, 2012 that indicated that the ZHE, Board of Appeals and City Council believed that the property was not exceptional, and as a result that the current ZHE was bound by those rulings.
17. The ZHE finds that the previous ruling in the *Conditional Use* matter (11 ZHE 80055), does not bind the ZHE on this current *Variance* Application. The current Application is a wholly separate special exception application with vastly different criteria required by the Zoning Code. Furthermore, "exceptionality" [as used within Section § 14-16-4-2 (C) (2) (a)] is not a required element to be proven by any applicant in a Conditional Use application before the ZHE. "Exceptionality" is only a required element to be proven in a variance application.
18. The Agent testified that the Applicant currently lives in Austin Texas.
19. The Agent testified that nobody sleeps or eats in the accessory building and that it does not have a kitchen.
20. Applicant testified at the Hearing that the yellow "Notice of Hearing" signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.
21. The Agent (on behalf of the Applicant) testified at the Hearing that the Applicant would accept the demolition of a minimum of 86 square feet along the west edge of the accessory building in an effort to bring the accessory building into compliance with the Zoning Code.
22. The ZHE accepts the Applicant's offer to demolish a portion of the accessory building and therefore finds that the unnecessary hardship element was not proven by the Applicant and therefore the Application is denied pursuant to the City of Albuquerque Code of Ordinances Section § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

DENIAL of the VARIANCE of 86 square feet to the allowed 805 square feet for an existing building located at 1310 MARQUETTE NE.

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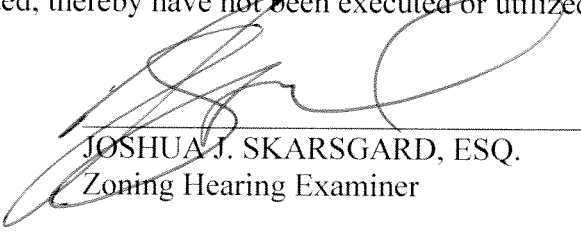
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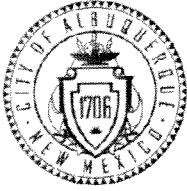
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FINDINGS:

1. The Agent (on behalf of the Applicant) is requesting a VARIANCE of 6" to the required 10' separation from a dwelling for an existing accessory building.
2. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (a) "SPECIAL EXCEPTIONS" reads in part: "*Variance. A variance shall be approved if and only if the following tests are met: (a) The property is exceptional*"
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5. The Agent (on behalf of the Applicant) testified at the Hearing that as a result of the exceptionality (sloped lot, prior building permit issuance, etc.) that the City of Albuquerque Code of Ordinances Section 14-16-3-3(B)(2)(e) creates a regulation (10’ setback between accessory building and residence) that produces an unnecessary hardship upon the Applicant that in order to remedy the unnecessary hardship the Applicant would be required to demolish either 6 inches of the existing accessory building or of the personal residence to bring it within the 10 foot setback.
6. The Agent indicated that this Subject Property was subject to a contentious Conditional Use application (11 ZHE 80055) that was denied in March of 2012 (City Council upheld the recommendations of the LUHO). That previous conditional use application was attempting to change the “accessory building” into an “accessory living quarters”. The Agent indicated at the Hearing that some of the concerns from the neighbors opposed to the current Application were in fact related to the efforts of the Applicant’s Conditional Use application (11 ZHE 80055) denied in March of 2012.
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8. Applicant testified at the Hearing that the variance Application (six inches to the required 10 foot separation between buildings), if approved, would be appropriate to prevent the unnecessary hardship of having to demolish six inches of an existing residence or six inches off of the corner of the existing accessory building.
9. The Agent testified at the Hearing that he believes that if the City measured the “separation” from the building slab to the building slab of the accessory building that it would in fact comply with the Zoning Code and this variance application would not be required. In short, the Applicant made the argument that there are a number of different ways to measure the “separation” between the accessory building and the personal residence.
10. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (d) “SPECIAL EXCEPTIONS” reads in part: *“A variance shall be approved if and only if the following tests are met: (d) financial gain or loss shall not be the sole determining factor in deciding a variance.”*
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21. The ZHE finds that the Applicant has adequately justified the variance Application upon the Subject Property pursuant to City of Albuquerque Code of Ordinances Section § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

APPROVAL WITH CONDITIONS of a VARIANCE of 6" to the required 10' separation from a dwelling for an existing accessory building upon the real property located at 1310 MARQUETTE NE.

CONDITIONS OF APPROVAL:

4. The Applicant shall demolish that portion of the accessory building to make it 805 square feet in area and comply with the 25% regulation (See Section 14-16-3-3 (B) (2) (a) of the Zoning Code).
5. The Applicant shall demolish that portion of the accessory building to allow 5' passage in the rear yard for an existing accessory building (See Section 14-16-3-3(B)(2)(F) of the Zoning Code).
6. The Applicant shall not use the Accessory building as an "Accessory Living Quarters" (as defined in Section 14-16-1-5 of the Zone Code) without an

approved Conditional Use application, as required by its underlying zoning designation.

If you wish to appeal this decision, you may do so by 5:00 p.m., on December 21, 2012 in the manner described below:

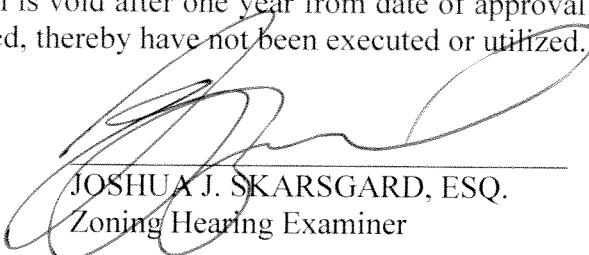
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Please note that pursuant to Section 14.16.4.4.(B), of the City of Albuquerque Comprehensive Zoning Code, you must demonstrate that you have legal standing to file an appeal as defined.

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JOSHUA J. SKARSGARD, ESQ.
Zoning Hearing Examiner

cc: Zoning Enforcement

ZHE File

Garcia/Kraemer & Associates, 600 1st Street NW, Ste 211, 87102

Tim and Ramona Jarvis, 1506 West 32nd Street, Austin TX, 78703

Diane Marshall, 1305 Marquette NE, 87106

Martha Brown, 1315 Marquette NE, 87106

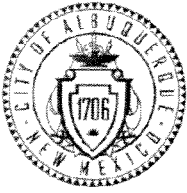
Maggie Gombos, 422 Ridge Circle NE, 87106

Dr. Harold M. Anderson and Maryanne A. Danfelser, 1300 Marquette NE, 87106

Joe Riter, 1320 Marquette NE, 87106

Stan and Inez Campbell, 1306 Marquette NE, 87106

Kathryn Simmacher, 1220 Marquette NE, 87106



CITY OF ALBUQUERQUE
PLANNING DEPARTMENT
ZONING HEARING EXAMINER
NOTIFICATION OF DECISION

TIM AND RAMONA JARVIS
(GARCIA/KRAEMER & ASSOCIATES)
request(s) a special exception to Section 14-16-3-3(B)(2)(F): a VARIANCE of 3.5" to the required 5' passage in the rear yard for an existing accessory building for all or a portion of Lot(s) 30, Block(s) 2B, COUNTRY CLUB ADDITION zoned R-1, located on 1310 MARQUETTE NE (K-15)

Special Exception No:..... **12ZHE-80358**
Project No: **Project# 1009491**
Hearing Date: 11-19-12
Closing of Public Record: 11-19-12
Date of Decision:..... 12-06-12

On the 19th day of November, 2012 (hereinafter "**Hearing**") Mr. Bill Kraemer (hereinafter "**Agent**") acting as agent on behalf of the property owner, Mr. and Mrs. Tim and Ramona Jarvis (hereinafter "**Applicant**") appeared before the Zoning Hearing Examiner (hereinafter "**ZHE**") requesting a VARIANCE of 3.5" to the required 5' passage in the rear yard for an existing accessory building (hereinafter "**Application**") upon the real property located at 1310 MARQUETTE NE ("**Subject Property**"). Below are the findings of facts:

FINDINGS:

1. The Agent (on behalf of the Applicant) is requesting a VARIANCE of 3.5" to the required 5' passage in the rear yard for an existing accessory building.
2. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (a) "SPECIAL EXCEPTIONS" reads in part: "*Variance. A variance shall be approved if and only if the following tests are met: (a) The property is exceptional*"
3. The Agent (on behalf of the Applicant) testified at the Hearing that the Subject Property is exceptional for the following reasons:
 - a. Exceptionality Reason #1: The Applicant purchased the property in 2010 at which time the building envelopes of the residence and accessory building were already established.
 - b. Exceptionality Reason #2: The Subject Property received a building permit in 2010, wherein, the City of Albuquerque did not request that the Applicant change the building envelope, setback(s) to adjoining properties/dwellings, location of the accessory building, height of the accessory building, or percentage of gross floor area within the accessory building.
 - c. Exceptionality Reason #3: The Subject Property is not a flat lot and has an elevation change throughout the lot.
4. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (b) "SPECIAL EXCEPTIONS" reads in part: "*A variance shall be approved if and only if the following tests are met: (b) as a result of the exceptional aspect of the property, the regulations produce unnecessary hardship*"

5. The Agent (on behalf of the Applicant) testified at the Hearing that as a result of the exceptionality (sloped lot, prior building permit issuance, etc.) that the City of Albuquerque Code of Ordinances Section 14-16-3-3(B)(2)(F) creates a regulation that produces an unnecessary hardship upon the Applicant.
6. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (c) “SPECIAL EXCEPTIONS” reads in part: “*A variance shall be approved if and only if the following tests are met: (c) a particular variance is appropriate to prevent the unnecessary hardship.*”
7. Applicant testified at the Hearing that the variance Application, if approved, would be appropriate to prevent the unnecessary hardship.
8. The City of Albuquerque Code of Ordinances Section § 14-16-4-2 (C) (2) (d) “SPECIAL EXCEPTIONS” reads in part: “*A variance shall be approved if and only if the following tests are met: (d) financial gain or loss shall not be the sole determining factor in deciding a variance.*”
9. The Application and the testimony provided by the Agent of the Applicant at the Hearing both suggest that financial gain/loss was not the sole determining factor of the Application.
10. The Agent testified at the Hearing that the Subject Property was currently subject to a criminal complaint filed by the City of Albuquerque in August of 2012 (Metro Court).
11. The Application, File and testimony of the Agent (on behalf of the Applicant) at the Hearing suggests that there is neighborhood opposition to the Application.
12. Ms. Maggie Gombos testified in opposition to the Application. She indicated that she believed that the property was not exceptional. She made reference to Ms. Concetta Trujillo’s letter of February 25, 2011 among other points of opposition.
13. Mr. Joseph Noter (neighbor to the east) testified that the property was not exceptional and a fire hazard, and that he believed it was less than 10 feet to the garage boundary.
14. Mr. Harold Anderson (corner lot 2 houses down from the Subject Property) expressed concern that the accessory building did not have a proper building permit nor did it receive a plumbing permit. Mr. Anderson also was concerned about a fire hazard from the accessory building. Mr. Anderson also authored an email on November 25, 2012 that indicated that the ZHE, Board of Appeals and City Council believed that the property was not exceptional, and as a result that the current ZHE was bound by those rulings.
15. The ZHE finds that the previous ruling in the **Conditional Use** matter (11 ZHE 80055), does not bind the ZHE on this current **Variance** Application. The current Application is a wholly separate special exception application with vastly different criteria required by the Zoning Code. Furthermore, “exceptionality” [as used within Section § 14-16-4-2 (C) (2) (a)] is not a required element to be proven by any applicant in a Conditional Use application before the ZHE. “Exceptionality” is only a required element to be proven in a variance application.
16. The Agent testified that the Applicant currently lives in Austin Texas.
17. The Agent testified that nobody sleeps or eats in the accessory building and that it does not have a kitchen.
18. Applicant testified at the Hearing that the yellow “Notice of Hearing” signs were posted for the required time period as articulated within City of Albuquerque Code of Ordinances § 14-16-4-2 SPECIAL EXCEPTIONS.

19. The Agent (on behalf of the Applicant) testified at the Hearing that the Applicant would accept the demolition of a minimum of 86 square feet along the west edge of the accessory building in an effort to bring the accessory building into compliance with the Zoning Code five foot (5') setback requirements laid out within Section 14-16-3-3(B)(2)(F).
20. The ZHE accepts the Applicant's offer to demolish a portion of the accessory building on the west side of the structure (minimum of 3.5") and therefore finds that the unnecessary hardship element was not proven by the Applicant and therefore the Application is denied pursuant to the City of Albuquerque Code of Ordinances Section § 14-16-4-2 SPECIAL EXCEPTIONS.

DECISION:

DENIAL of the VARIANCE of 3.5" to the required 5' passage in the rear yard for an existing accessory building located at 1310 MARQUETTE NE.

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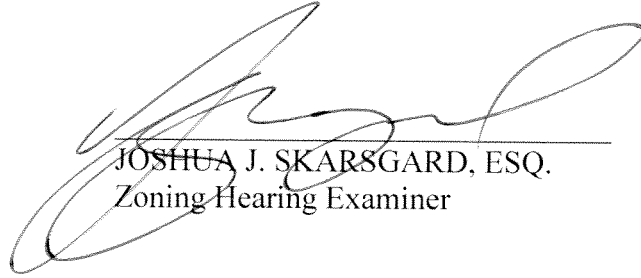
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