



**Environmental
Planning
Commission**

**Agenda Number: 13
Project Number: 1001620
Case #'s: 07EPC 00170
January 17, 2008**

Supplemental Staff Report

Agent	City of Albuquerque, Planning Dept.
Applicant	City of Albuquerque, City Council
Request	Amendment of the Zoning Code, Section 14-16-4-2, Special Exceptions
Location	City-wide
Existing Zoning	N/A
Proposed Zoning	N/A

Staff Recommendation

That a Recommendation of APPROVAL be forwarded to the City Council of 07EPC 00170, based on the findings on page 7, and subject to the conditions of approval on page 7.

Staff Planner

Carmen Marrone, Senior Planner

Summary of Analysis

This is a request to amend a portion of the Zoning Code, Section 14-16-4-2, to create a Special Exception for existing buildings that are non-compliant as to setback or height per Bill C/S O-07-70. A similar request was heard by the EPC in June of 2007. The EPC recommended denial of that request to the City Council. As a result, the City Council revised the original proposal substantially to take into account the issues raised before the EPC. Due to the substantial changes, the City Council is requesting that the EPC take a second look at the proposal and submit new comments and recommendations.

Staff is recommending some revisions to the proposed language, with the assistance of the Asst. City Attorney, in order to address concerns that were raised by the Zoning Enforcement Manager and the Zoning Hearing Examiner.

This report should be read in conjunction with previous staff reports for background information

Location Map (3" x 3")

City Departments and other interested agencies reviewed this application from 12/10/07 to 12/21/07. Agency comments were used in the preparation of this report and begin on page 9.

REQUEST

This is a request to amend a portion of the Zoning Code, **Section 14-16-4-2**, per Ordinance C/S O-07-70. The Ordinance proposes to create a fourth category of Special Exception for existing buildings that are non-compliant as to setback or height. A similar amendment was heard by the EPC in June of 2007. The EPC recommended denial of that amendment to the City Council. As a result, the City Council revised the ordinance substantially to take into account the issues raised at the EPC hearing. Due to the substantial changes, the City Council is requesting that the EPC take a second look at the proposal and submit new comments and recommendations.

Previous Request:

The previous amendment proposed a major overhaul of the variance section of the Zoning Code. It proposed to replace the current criteria for deciding a variance (§14-16-4-2.C.2) with an entirely new set of criteria in order to allow structures and buildings to be considered “special conditions” that qualify for a variance. There was general opposition to this amendment from the Zoning Hearing Examiner, the Zoning Enforcement Office, the Board of Appeals, and the general public. The biggest concerns were as follows:

1. The proposal is inconsistent with established procedures that have successfully held up over time.
2. The proposed amendment is too vague and will result in increased subjectivity on the part of decision makers.
3. The proposed amendment contains too many loopholes that could encourage illegal construction.
4. The proposed amendment could result in changed neighborhood character.

Current Request:

On November 16, 2007, the City Council submitted a revised Ordinance to address the above-mentioned concerns. The revised Ordinance adds a fourth category of special exception and associated criteria for deciding the special exception. New language is in bold type.

14-16-4-2(A)(1) Special exceptions to this Zoning Code which may be applied for are:

- (a) Conditional Use;
- (b) Variance;
- (c) Expansion of nonconforming use; **and**
- (d) – the existence of a building non-compliant as to setback or height.**

14-16-4-2 (C)

(4) A special exception may be granted approving a building non-compliant as to setback or height only under the following circumstances:

(a) An existing building, which has been non-compliant as to setback or height for a period greater than one year where the current owner and any construction contractor employed by the current owner and the current owner's agents were all ignorant of the non-compliance during the time of the construction; or

(b) An existing building, which has been non-compliant as to setback or height for a period of one year or less, where the non-compliance was the result of construction in conformity with plans erroneously approved by the City of Albuquerque, and where the owner, construction contractor, developer and their agents were all ignorant of the error during the time of the construction; or

(c) A building or portion of a building currently under construction, non-compliant as to setback or height, where the non-compliance was the result of construction in conformity with plans erroneously approved by the City of Albuquerque, and where the owner, construction contractor, developer and their agents were all ignorant of the error during the time of the construction and where the amount of construction completed prior to learning of the erroneous approval will result in substantial financial loss to the property owner; and

(d) For each of the situations listed in paragraphs (a) to (c) the special exception may be issued, if and only if, in the circumstances of the particular case and under conditions imposed;

(i) The building does not significantly interfere with the enjoyment of other land in the vicinity;

(ii) The building is not significantly damaged by surrounding buildings, structures, uses, or activities;

(iii) The building is consistent with the spirit of this Zoning Code, substantial justice, and the general public interest; and

(iv) The owner will experience unnecessary hardship and in addition will be denied a continued reasonable use of the property if the special exception is not approved.

(e) The provisions of this ordinance shall not be deemed or construed to nullify or supersede and provision of the building codes adopted by the City of Albuquerque.

ANALYSIS OF APPLICABLE ORDINANCES, PLANS AND POLICIES

Albuquerque Comprehensive Zoning Code

This is a second attempt to amend Section 14-16-4-2 of the Zoning Code to expand those situations where a special exception can be granted. Currently, there are three types of special exceptions in the Zoning Code: Conditional Use, Variance, and Expansion of nonconforming use.

A fourth type of special exception is proposed – the existence of a building non-compliant as to setback or height. The purpose of the request is to address two problems as outlined by Council staff in the April 19, 2007 staff report, page 1.

1. A building is non-compliant through no fault of the current owner. As a result, the owner may experience problems when trying to secure financing or title insurance.
2. A building is non-compliant because the City issued a building permit in error.

Section 4.a is proposed to address the first problem and Sections 4.b & 4.c are intended to address the second problem. Section 4.d contains “boiler-plate” language that is currently included in the Zoning Code when considering a request for a special exception. Each section is analyzed separately below.

Section (4)(a)

This section would allow a special exception in cases (1) where an existing building has been non-compliant as to setback or height for a period greater than one year and (2) where the current owner and any construction contractor employed by the current owner and the current owner’s agents were all ignorant of the non-compliance during the time of the construction.

The Zoning Enforcement Manager and the Zoning Hearing Examiner have both expressed concerns with the proposed language in this section. Under this section, an applicant can construct a building illegally, wait one year after construction, claim ignorance of the regulations, and apply for a special exception. New construction and building additions require the issuance of a building permit. Prior to issuance of a building permit, the applicant is made aware of the various Zoning Code regulations by city staff. Therefore, if a building is constructed illegally, it is usually because the property owner, his contractor or agent did not apply for a building permit in the first place. It is commonly understood that, “ignorance of the law does not excuse someone from breaking that law.” This proposal will allow such an excuse for buildings that are non-compliant for greater than one year.

In order to reduce fraudulent activity that could occur under this new section, the City Legal Office has recommended minor adjustments to the language as follows:

(a) An existing building, which has been non-compliant as to setback or height for a period greater than one year and where the current owner and any construction contractor employed by the current owner and the current owner’s agents [~~were all ignorant of the non-compliance~~] [must demonstrate that they exercised due diligence and did not willfully intend to create a non-compliant situation] during the time of the construction; or ...

Due diligence is “the care that a reasonable person exercises under the circumstances to avoid harm to other persons or their property” (Merriam-Webster Dictionary). This adjusted wording has been reviewed with the City Council Attorney, Bruce Thompson, and he is in support of the adjustments.

Section (4)(b)

This section would allow a special exception in cases (1) where an existing building has been non-compliant as to setback or height for a period of one year or less and (2) where the non-compliance was the result of construction in conformity with plans erroneously approved by the City and (3) where everyone was ignorant of the error.

The Zoning Enforcement Manager and City Legal agree that in instances where the City approved building permits that were non-compliant, there should be some relief to the property owner who relied on the approval and constructed the building. However, it is incumbent upon the property owner to submit accurate plans at the time of building permit and there should be no fraudulent misrepresentation on the part of the owner. According to the Encyclopedia Britannica,

- **Fraudulent misrepresentation** occurs when one makes representation with intent to deceive and with the knowledge that it is false.
- **Negligent misrepresentation** occurs when the someone carelessly makes a representation while having no reasonable basis to believe it to be true.

In order to assure that property owners are held responsible when submitting plans for building permit approval, staff is recommended the following revisions to the proposed Bill.

(b) An existing building, which has been non-compliant as to setback or height for a period of one year or less, where the non-compliance was the result of construction in conformity with plans erroneously approved by the City of Albuquerque, and where [+there was no fraudulent misrepresentation on the part of +] the owner, construction contractor, developer and their agents [~~-were all ignorant of the error-~~] during the time of the construction; or

Section (4)(c)

This section would allow a special exception in cases (1) where buildings are under construction and are non-compliant as to setback or height and (2) where the non-compliance was the result of construction in conformity with plans erroneously approved by the City and (3) where everyone was ignorant of the error and (4) where the amount of construction completed prior to learning of the erroneous approval will result in substantial financial loss to the property owner.

This section is similar to 4.b above except that it deals with buildings under construction and it considers “substantial financial loss” to the property owner. As stated earlier, it is incumbent upon the property owner to submit accurate plans at the time of building permit and there should be no fraudulent misrepresentation on the part of the owner.

With regard to “substantial financial loss”, there is no means of measuring or determining what is “substantial”. Without this measurement, decisions made by the Zoning Hearing Examiner

could be construed to be arbitrary and/or capricious. Furthermore, the proposed language will allow financial loss to be taken into consideration by the Zoning Hearing Examiner. Under the current criteria for deciding a variance, §14-16-4-2(C)(2)(d), “Financial gain or loss shall not be the sole determining factor in deciding a variance”. Given the vagueness of the last criterion under this section, staff recommends that it be deleted and the this section be revised similar to Section 4.b as follows:

(c) A building or portion of a building currently under construction, non-compliant as to setback or height, where the non-compliance was the result of construction in conformity with plans erroneously approved by the City of Albuquerque, and where [+there was no fraudulent misrepresentation on the part of+] the owner, construction contractor, developer and their agents ~~[-were all ignorant of the error-]~~ during the time of the construction ~~[-and where the amount of construction completed prior to learning of the erroneous approval will result in substantial financial loss to the property owner-];~~ and

Section (4)(d)

This section is proposed to assure consistent review by the Zoning Hearing Examiner and contains most of the same criteria used when considering a request for a special exception. Staff suggests that the language should be as similar to the current language in the Zoning Code and suggests some minor adjustments.

(i) The building ~~[-does-]~~ [+will+] not significantly interfere with the enjoyment of other land in the vicinity; (see §14-16-4-2(C)(2)(c)(2))

(ii) The building ~~[-is-]~~ [+will+] not [+be+] significantly damaged by surrounding buildings, structures, uses, or activities; (see §14-16-4-2(C)(3)(b))

(iii) The building is consistent with the spirit of this Zoning Code, substantial justice, and the general public interest; and (see §14-16-4-2(C)(2)(c)(3) and (C)(3)(c))

(iv) The owner will experience unnecessary hardship and in addition will be denied a continued reasonable use of the property if the special exception is not approved. (see §14-16-4-2(C)(3)(d))

CONCERNS OF REVIEWING AGENCIES / PRE-HEARING DISCUSSION

Staff met with the Zoning Enforcement Manager, the Zoning Hearing Examiner, the Asst. City Attorney, and Council staff regarding this request. The Zoning Enforcement Manager and the Zoning Hearing Examiner expressed concern that the proposed language is too vague and could encourage fraudulent behavior on the part of a property owner or his contractor. Staff is suggesting some revisions to the proposed language with the assistance of the Asst. City Attorney.

NEIGHBORHOOD/PUBLIC CONCERNS

This request was advertised in the daily newspaper and the Nov/Dec edition of the *Neighborhood News*. No comments have been received except from Mr. Roger Mickelson who comments that the proposed legislation is simpler and more understandable than the previous legislation submitted by the City Council.

CONCLUSIONS

This is a request to amend a portion of the Zoning Code, **Section 14-16-4-2**, per Ordinance C/S O-07-70. The Ordinance proposes to create a fourth category of Special Exception for existing buildings that are non-compliant as to setback or height. A similar amendment was heard by the EPC in June of 2007. The EPC recommended denial of that amendment to the City Council. As a result, the City Council revised the ordinance substantially to take into account the issues raised at the EPC hearing. Due to the substantial changes, the City Council is requesting that the EPC take a second look at the proposal and submit new comments and recommendations.

The Zoning Enforcement Manager and the Zoning Hearing Examiner expressed concern that the proposed language is too vague and could encourage fraudulent behavior on the part of a property owner or his contractor. Staff is recommending minor revisions to the proposed language with the assistance of the Asst. City Attorney.

FINDINGS – 07EPC 00170, January 17, 2008

1. This is a request to amend a portion of the Zoning Code, **Section 14-16-4-2**, per Ordinance C/S O-07-70. The Ordinance proposes to create a fourth category of Special Exception for existing buildings that are non-compliant as to setback or height and establishes criteria for deciding this type of special exception.
2. A similar amendment was heard by the EPC in June of 2007. The EPC recommended denial of that amendment because it replaced the variance section of the Zoning Code, Section 14-16-4-2.C.2, with an entirely new section.
3. The City Council has revised the ordinance substantially to take into account the issues raised at the June 2007 EPC hearing. The revised ordinance will address concerns regarding inconsistency with established procedures, vagueness of language resulting in subjective decisions on the part of the decision makers, and loopholes that could encourage fraudulent behavior.
4. The revised ordinance will respect neighborhood conditions and character by requiring an applicant for a special exception to meet very stringent tests.
5. No Neighborhood comments have been received regarding this request.

RECOMMENDATION - 07EPC 00170, January 17, 2008

Recommendation of APPROVAL to the City Council of 07EPC 00170, a text amendment to Section 14-16-4-2 of the Zoning Code, based on the preceding Findings and subject to the following Conditions of Approval.

CONDITIONS OF APPROVAL - 07EPC 00170, January 17, 2008

1. The following changes in bold text shall be made to Council Bill C/S O-07-70:
14-16-4-2 (C)
(4) A special exception may be granted approving a building non-compliant as to setback or height only under the following circumstances:
(a) An existing building, which has been non-compliant as to setback or height for a period greater than one year and where the current owner and any construction contractor employed by the current owner and the current owner's agents [~~- were all ignorant of the non-~~

compliance -] [+must demonstrate that they exercised due diligence and did not willfully intend to create a non-compliant situation+] during the time of the construction; or

(b) An existing building, which has been non-compliant as to setback or height for a period of one year or less, where the non-compliance was the result of construction in conformity with plans erroneously approved by the City of Albuquerque, and where **[+there was no fraudulent misrepresentation on the part of +]** the owner, construction contractor, developer and their agents **[-were all ignorant of the error-]** during the time of the construction; or

(c) A building or portion of a building currently under construction, non-compliant as to setback or height, where the non-compliance was the result of construction in conformity with plans erroneously approved by the City of Albuquerque, and where **[+there was no fraudulent misrepresentation on the part of+]** the owner, construction contractor, developer and their agents **[-were all ignorant of the error-]** during the time of the construction **[-and where the amount of construction completed prior to learning of the erroneous approval will result in substantial financial loss to the property owner-]**; and

(d) For each of the situations listed in paragraphs (a) to (c) the special exception may be issued, if and only if, in the circumstances of the particular case and under conditions imposed;

(i) The building **[-does-]** **[+will+]** not significantly interfere with the enjoyment of other land in the vicinity;

(ii) The building **[-is-]** **[+will+]** not **[+be+]** significantly damaged by surrounding buildings, structures, uses, or activities;

(iii) The building is consistent with the spirit of this Zoning Code, substantial justice, and the general public interest; and

(iv) The owner will experience unnecessary hardship and in addition will be denied a continued reasonable use of the property if the special exception is not approved.

(e) The provisions of this ordinance shall not be deemed or construed to nullify or supersede and provision of the building codes adopted by the City of Albuquerque.

Carmen Marrone
Senior Planner

cc:

Attachments

CITY OF ALBUQUERQUE AGENCY COMMENTS

PLANNING DEPARTMENT

Zoning Code Services

We recommend that the proposed text amendment not be adopted as written. The proposed language allows too many loopholes where ignorance of the rules is cause for exceptionality.

Office of Neighborhood Coordination

City-wide

12/19/07 – advertised in the “*Neighborhood News*” Newsletter and will be on the Planning Department’s ONC’s newsletter page.

Advanced Planning

No comment.

PUBLIC WORKS DEPARTMENT

Transportation Development (City Engineer/Planning Department):

- Reviewed, no comments.

Hydrology Development (City Engineer/Planning Department):

- No comments received.

Transportation Planning (Department of Municipal Development):

- Reviewed, no comments.

Traffic Engineering Operations (Department of Municipal Development):

- No comments received.

Street Maintenance (Department of Municipal Development):

- No comments received.

Utility Development (Water Authority):

- No comments received.

Water Resources, Water Utilities and Wastewater Utilities (Water Authority):

- No comments received.

New Mexico Department of Transportation (NMDOT):

- No comments received.

**RECOMMENDED CONDITIONS FROM CITY ENGINEER, MUNICIPAL DEVELOPMENT,
WATER AUTHORITY and NMDOT:**

- a. None.

ENVIRONMENTAL HEALTH DEPARTMENT

Air Quality Division

Environmental Services Division

City Forester

PARKS AND RECREATION

Planning and Design

Open Space Division

Open Space has no adverse comments

POLICE DEPARTMENT/Planning

SOLID WASTE MANAGEMENT DEPARTMENT

Refuse Division

No adverse comments

FIRE DEPARTMENT/Planning

TRANSIT DEPARTMENT

COMMENTS FROM OTHER AGENCIES

BERNALILLO COUNTY

ALBUQUERQUE METROPOLITAN ARROYO FLOOD CONTROL AUTHORITY

Reviewed, no comment.

ALBUQUERQUE PUBLIC SCHOOLS

The City of Albuquerque is amending a portion of Section 14-16-4-2 ROA 1994 to change the requirements for approval of a variance. This will have no adverse impacts to the APS district.

MID-REGION COUNCIL OF GOVERNMENTS

MIDDLE RIO GRANDE CONSERVANCY DISTRICT

PUBLIC SERVICE COMPANY OF NEW MEXICO

No comment based on the information provided to date.