



**Environmental  
Planning  
Commission**

**Agenda Number: 2  
Project Number: 1001620  
Case #'s: 07EPC 00170  
March 13, 2008**

**Supplemental Staff Report**

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

**Staff Recommendation**

***That a Recommendation of APPROVAL be forwarded to the City Council, based on the findings on page 5, and subject to the conditions of approval on page 6.***

**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*. This Bill is a Committee Substitute of the original Bill that was introduced to the City Council in February 2007 and heard by the EPC from April to June of 2007. The EPC recommended denial of the first version of the Bill because it replaced well-established criteria for deciding a variance with an entirely new set of criteria. There was strong opposition to the original Bill and as a result, the City Council revised the Bill substantially to address concerns regarding inconsistency with established procedures and loopholes that could encourage unscrupulous behavior on the part of the applicant. 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 current version of the Bill leaves the current provisions for Special Exceptions intact and proposes a fourth category of Special Exception for non-compliant buildings. On January 17, the EPC deferred this case to February 21 in order for Staff to address written concerns that were raised at the hearing. On February 21 the EPC began to hear this case but had to Continue the case to March 13 due to a lack of quorum. The only instruction given to Staff by the EPC was to re-notify Recognized Neighborhood Associations regarding this matter, which Staff has done. Staff has received no new comments.

Based on comments received from various sources, Staff is recommending revisions to the proposed language and is recommending that the EPC recommend approval of the revised Bill to the City Council.

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

City Departments and other interested agencies reviewed this application from 12/10/07 to 12/21/07.

***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. On January 17, 2008, the EPC deferred this case at Staff's request in order for staff to address comments received late in the process and to prepare additional revisions as recommended by City Legal.

***New Information since February 21, 2008***

On February 21, the EPC CONTINUED this case to March 13 due to a lack of quorum. Staff was instructed to re-notify Recognized Neighborhoods, which Staff has done. The Office of Neighborhood Coordination sent out notices to all Neighborhood Associations via email on 2/26/08. The notice read as follows:

**Zoning Code Amendment.**

**Project #1001620, Proposed Amendments to the Zoning Code, §14-16-4-2, Special Exceptions**

The EPC is considering amendments to the Zoning Code to add a fourth category of special exception regarding buildings that are non-compliant as to setback or height. The case was heard by the EPC on February 21 and was continued to the **EPC Study Session on Thursday, March 13, 2008**, beginning at **3:30 p.m.** in order to give neighborhood associations the opportunity to review staff-recommended changes to the proposed language. The recommended changes are listed as a Condition of Approval in the February 21 Staff Report. You may access the Staff Report by going to [www.cabq.gov/planning/epc/pdf/1001620variance.pdf](http://www.cabq.gov/planning/epc/pdf/1001620variance.pdf) or you may contact Carmen Marrone, Senior Planner at **505-924-3814**, e-mail: [cmarrone@cabq.gov](mailto:cmarrone@cabq.gov) for more information.

A similar notice was posted on the City's Planning website. No new comments have been received. Staff's recommended Findings and Conditions remain unchanged from February 21.

Since this case was CONTINUED, the entire record of the February 21 EPC hearing is attached for the benefit of those Commissioners that were not at the hearing.

***New Information since January 17, 2008***

On January 16, the Planning Department received a memo from Mick McMahan, Chair of the Board of Appeals. The Board of Appeals is established by City Ordinance and consists of five members appointed by the Mayor for a specific term. The Board of Appeals is the appellate Committee responsible for hearing appeals of Zoning Hearing Examiner Decisions on Special Exceptions to the Zoning Ordinance.

Mr. McMahan expressed great concern with the proposed legislation. Staff met with Mr. McMahan on 1/23/08 to discuss some of his concerns. Mr. McMahan's letter and Staff's response is included at the end of this staff report.

Mr. McMahan brought up many good points that staff would like to address in this report:

1. Non-compliant buildings vs. nonconforming buildings: The current request deals with non-compliant buildings not nonconforming buildings. The Zoning Code defines “nonconforming” as follows:

NONCONFORMING. A structure or use of structure or land which does not conform to the Zoning Code and which was in conformity with any zoning ordinance in effect at the time it was created.

NON-COMPLIANT (not defined) is a building or structure that does not comply with the current regulations of the underlying zone.

The biggest difference between a nonconforming building and a non-compliant building is that a nonconforming building was compliant or in conformance with the zoning ordinance at some point in the past whereas a non-compliant building was never compliant or conforming with the Zoning Code. The Zoning Enforcement Manager has confirmed this differentiation.

The other difference between nonconforming and non-compliant is the Zoning Code contains procedures for dealing with nonconforming properties, whereas there is no procedure for dealing with non-compliant buildings. An owner of a nonconforming use can apply for a special exception to expand such a use per §14-16-4-2(C)(3) of the Zoning Code or the owner can seek status established building approval per §14-16-4-13 of the Zoning Code (see attached). A **status established building** is a building nonconforming as to use, which is approved to maintain its nonconforming use status. Such approval applies only to buildings for which the existing use is prohibited upon expiration of its nonconformance amortization period. Such approval shall not be available to nonconforming uses that resulted from Zoning Code text amendments. Approval of a status established building can only occur on or before the expiration of its nonconformance amortization period. The City Council recently extended the amortization period to 2012.

2. Building height: The current request would allow a special exception to be granted where a building is non-compliant as to setback or height. “Height” was added by the City Council when the Bill was being discussed at LUPZ late last year (2007). Mr. McMahan expressed concerns with this new allowance, claiming that exceptions to building height could substantially change the character of a neighborhood and set a bad precedent. Staff agrees. Staff spoke to Council staff to determine why building height was added to the proposed amendment. Council staff could not give a clear answer and agreed with Mr. McMahan’s concern. Staff is recommending that “height” be deleted from the proposed amendment.

In addition, staff is recommending additional language to ensure that the granting of a special exception for non-compliant buildings be consistent with the character of the adjacent neighborhood

3. Unscrupulous builders/developers/real estate agents/owners: Mr. McMahan and other members of the public have expressed concern that the language, as proposed, will encourage

unscrupulous behavior. In the January 17 Staff Report, Staff recommended language that would require an applicant to demonstrate due diligence and the absence of fraudulent misrepresentation when requesting a special exception. Staff was also recommending that an applicant not be allowed to claim ignorance when requesting a special exception, as is currently proposed. Further discussions with City Legal have caused this language to be replaced with more defensible language. Instead, Staff is recommending that if the owner, the owner's contractor, developer or agent knew or should have known of the non-compliant situation based on their knowledge and experience during the building permit process or during the time of construction, then their request for a special exception should not be approved.

4. Mortgage Financing: Mr. McMahan questions whether the ability to obtain mortgage financing is a real problem and requests further evidence from bankers and mortgage brokers. Staff spoke to a real estate agent (name withheld) and to former EPC Commissioner Valenzuela who is in the banking industry regarding mortgage lending. Based on these conversations, Staff has concluded that the ability to obtain financing is a real problem if a building is non-compliant. The mortgage company could choose not to issue mortgage insurance if the property is non-compliant, in which case the lending institution would not likely extend a loan to the property owner. Another scenario might be that the mortgage company chooses to issue mortgage insurance, *with an exception*. In this case, the lending institution still has the option to grant or not grant a loan. In either case, there is no guarantee that a property owner of a non-compliant building will get mortgage financing.
  
5. Criteria for approving a special exception: Mr. McMahan comments that the proposed language does not give clear guidance for determining due diligence. At the advice of City Legal, Staff has deleted "due diligence" and "fraudulent misrepresentation" from Staff's previous recommendation since these types of actions are difficult to prove. Instead, Staff is proposing other language that puts the responsibility on the property owner for "knowing" about the non-compliant situation.

## **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 because it replaced a well-established variance procedure of the Zoning Code with an entirely new procedure. 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, Zoning Hearing Examiner and the Chair of the Board of Appeals have expressed concern that the proposed language is too vague and could encourage unscrupulous behavior on the part of a property owner or his contractor. Staff is recommending minor revisions to the proposed language to address these concerns. In addition, Staff is recommending additional language to ensure consistent neighborhood character when a request for a building exception is approved.

***FINDINGS – 07EPC 00170, March 13, 2008***

1. This is a request to amend a portion of the Zoning Code, **Section 14-16-4-2**, per Council Bill C/S O-07-70. This Bill 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. The current Bill is a Committee Substitute of the original Bill that was introduced to the City Council in February 2007 and heard by the EPC from April to June of 2007. The EPC recommended denial of the first version of the Bill because it replaced a well-established procedure for deciding a variance with an entirely new procedure. There was strong opposition to the original Bill and as a result, the City Council revised the Bill substantially and requests a second review by the EPC.
3. The revised ordinance does not impact current provisions for Special Exceptions.
4. The revised ordinance will limit the ability to obtain a special exception when the violation of the Zoning Code was an intentional action of the applicant, his contractor or his agent.
5. The request would allow a special exception to be granted where a building is non-compliant as to height. Exceptions to permissive building heights could substantially affect the character of a neighborhood and set a bad precedent. The Planning Department is requesting that “height” be eliminated from the proposed amendment and that additional criteria be provided to require consistency with existing neighborhood character.
6. Neighborhood Associations were notified of this request. Letters of support and opposition have been received.

***RECOMMENDATION - 07EPC 00170, March 13, 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, March 13, 2008***

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1. The EPC recommends the following changes in **bold text** to the City Council regarding Council Bill C/S O-07-70:

Section 1. Section 14-16-4-2(A)(1) is amended as follows:

(A) Application and Fee

(1) Special exceptions to this Zoning Code which may be applied for are:

(a) Conditional use;

(b) Variance; [~~and~~]

(c) Expansion of nonconforming use [and]

[(d) The existence of a building non-compliant as to setback.] [~~or height.~~]

Section 2. A new Section 14-16-4-2(C)(4) is added as follows:

(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~~] [or] any construction contractor employed by the current owner [~~and~~] [or] the current owner's agents were [~~all ignorant of~~] [not responsible for] the non-compliance [based on their knowledge and experience] 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, [unless by reason of knowledge and experience] [~~and where~~] the owner, construction contractor, developer [~~and~~] [or] their agents [~~were all ignorant of the error~~] [knew or should have known of the non-compliance] during the [building permit process or 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, [unless by reason of knowledge and experience] [~~and where~~] the owner, construction contractor, developer [-

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~~and-~~ [or] their agents [~~were all ignorant of the error-~~] [knew or should have known of the non-compliance] during the [building permit process or 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 will be consistent with the character of the surrounding neighborhood];

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

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

[~~(iv)-~~] [v] 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-~~] [any] provision of the building codes adopted by the City of Albuquerque.

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*Carmen Marrone*  
*Senior Planner*

cc:



***Attachments***

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## ***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.