



CITY OF SANTA FE
CITY ATTORNEY

Date: December 6, 2024

To: Governing Body

From: Rebecca Mnuk-Herrmann, Assistant City Attorney *Rm*

Via: Erin K. McSherry, City Attorney EKM

RE: 27794 W I-25 Frontage Road
2024-8995-APPL The Bungalows on Cerrillos Setback Variance Request
(Case No. 2023-7662)
2024-8996-APPL The Bungalows on Cerrillos Slope Variance Request (Case
No. 2023-7662)

Appellant Advanced Acquisitions, LLC c/o Brian Nenninger, Orion-West LLC (“Appellant”) appeals the Planning Commission’s decision to deny variances to the City of Santa Fe’s (“City’s”) Code requiring 45-foot setbacks in the Cerrillos Road Highway Corridor protection district (CRHC) (“Setback Variance”) and prohibiting disturbances to natural 30% slopes (“Slopes Variance”). The Planning Commission (“Commission”) denied both the Setback Variance and the Slopes Variance on the grounds that the requested variances did not meet the Code’s mandatory criteria for variances. *See* Findings of Fact and Conclusions of Law (Setback) and Findings of Fact and Conclusions of Law (Slopes) (together, “Findings and Conclusions”).

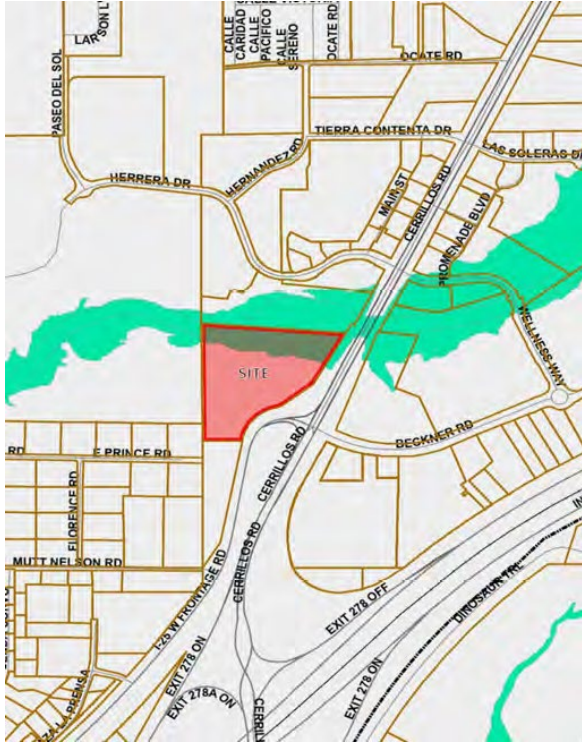
Appellant’s position is that the Commission improperly denied the Setback Variance and Slopes Variance, and that Appellant satisfied all mandatory criteria. *See* Appeal Petition - 2024-8995-APPL – Setback Variance and Appeal Petition - 2024-8996-APPL - Slopes Variance.

In this “de novo” appeal, the Governing Body may uphold, reverse, or modify the Commission’s decisions to deny the Setback Variance and Slope Variance. “De novo” means that the Governing Body conducts an independent review of evidence in the record and any new evidence presented during its hearing and then independently applies the law to the facts. The Governing Body may take the Commission’s experience and expertise into account when deciding this appeal but is not required to do so.

I. BACKGROUND AND PROCEDURAL HISTORY

A. The Property

The subject property is an approximately 19-acre vacant lot located in the northwest quadrant of the intersection of Cerillos Road and I-25 W Frontage Road (the “Property”). *See* Staff Report to Commission, p. 6.



B. The Project

Applicant asked the Commission to approve a development plan for a 141-unit, detached, one- and two-story multi-family residential development. *See* Staff Report to Commission, p. 1. While the development plan proposes multi-family housing, it is not a dense apartment building, but rather multiple individual units. *Id.* The development plan was premised on the Commission’s approval of both the Setback Variance and Slope Variance that are the subjects of this appeal, and therefore requires conditions of approval, however, no appeals regarding the development plan are currently before the Governing Body.

C. Applicable Law

Chapter 14 of the Santa Fe City Code (“SFCC” or “Code”) only allows variances to be issued when special circumstances exist. “Special circumstances” are defined as “unusual physical characteristics... that existed at the time of the adoption of the regulation from which the variance is sought, or that were created by natural forces or by government action for which no compensation was paid”, a pre-Code legally nonconforming lot, an unresolvable conflict between applicable Code provisions, or historic designation. *See* SFCC 1987, § 14 -3.16 (C)(1).

If the adjudicator (the land use board or Governing Body) finds that any of the special circumstances described above exist, then the Code only allows for a variance if the adjudicator also finds that:

1. “The special circumstances make it infeasible, for reasons other than financial cost, to develop the property in compliance with the standards of Chapter 14.” SFCC 1987, § 14 -3.16 (C)(2);
2. The variance would not exceed the intensity of development allowed on other properties in the vicinity (SFCC 1987, § 14 -3.16 (C)(3));
3. The variance is the “minimum variance that will make possible the reasonable use of the land or structure” (SFCC 1987, § 14 -3.16 (C)(4)); and

4. “The variance is not contrary to the public interest”. SFCC 1987, § 14 -3.16 (C)(5)).

All four findings are required.

The Code is designed to apply uniformly to all property. Section 14-1.4, “Uniform Application” provides that “[t]he provisions of Chapter 14 are minimum requirements that apply uniformly to land within the same zoning districts and structures of the same type.” Additionally, Chapter 14 states that its purposes are as follows:

[C]reate conditions favorable to the health, safety, convenience, prosperity and general welfare of the residents of Santa Fe by coordinating streets within proposed subdivisions with existing or planned streets or other features of the general plan; providing parks and trails; providing sewer, water and other infrastructure; providing adequate open space for traffic, recreation, drainage, light and air; and providing for the appropriate distribution of population and traffic.

Consequently, the Code applies uniformly to property and structures, regardless of an applicant’s intentions or product design, with the above-referenced goals in mind.

D. The Requested Variances

The Setback Variance would be an eleven (11) foot reduction to the 45 feet setback that is generally required in a Zone 4 CRHC District, which is the applicable zone for this area of the Cerrillos Road Right-of-Way. *See* Commission Exh. E, p. 11. The result of the Setback Variance approval would be a 34-foot setback for this property. *See* Commission Exh. E, p. 11

The Slope Variance would be a deviation from Section 14-8.2(D)(2)(b) (“Terrain Management”), which prohibits disturbance of thirty percent (30%) natural slopes. *See* Staff Report to Commission, p. 17. The Applicant proposes to disturb 30% slopes on the Property occupy approximately 4,800 square feet on the far northeastern edge of the Property. *See* Staff Report to Commission, p. 17. The Arroyo de los Chamisos floodplain intersects with the Property’s northern portion. *See* Commission Attachment D, Maps and Photos, p. 2.

E. Planning Commission Hearing

City Land Use and Planning Department Staff (“Staff”) and the Applicant presented to the Commission on May 16, 2024. *See* Planning Commission Meeting, 5/16/2024, available at <https://www.youtube.com/watch?v=r91fWnnCcJw>. Staff recommended that the Commission deny the variances and grant a modified version of the development plan that did not require variances. *Id.* at 33:20-34:25. The Applicant asked the Commission to grant the variances. *Id.* at 39:07-39:22. Commissioner Mirando expressed a concern about how the residents in the development would be adequately screened from Cerrillos Road if the Commission approved the Setback Variance. *Id.* at 02:30:58-02:39:04. The Applicant then stated support for postponing a decision on the requested variances in order for the Applicant to provide the Commission more information and try address Commissioner Mirando’s concerns. *Id.* at 03:11:21-03:11:50. The Commission voted to postpone the remainder of the hearing until June 20, 2024. *Id.* at 03:15:55.

The June meeting was then cancelled due to a lack of a quorum. *See* Notice of Cancellation Meeting 6-20-24

The Commission reconvened to hear the case on July 11, 2024. The Applicant provided additional diagrams, videos, and information about the project. *See* Planning Commission Meeting, 7/11/2024, 00:10:03-00:29:45. In further support of the request for the Setback variance, the Applicant testified that there was another development along Cerrillos that appeared only to have a 24-foot setback. *Id.* at 00:25:34-00:25:58. The Applicant also said that the design would allow outdoor space for the residents. *Id.* at 00:28:48-00:29:14. The Applicant's attorney argued that if the setback variance were not granted, the project would lose about sixteen (16) units (*Id.* at 00:32:32), due to about a third of the site being in a flood plain or on otherwise undevelopable land, thereby, he testified, making it infeasible to develop the Property without the Setback Variance and Slopes Variance (*Id.* at 00:32:58-00:34:58).

Senior City Planner Dan Esquibel, responding to questions from the Commission, explained that the project's design, including the elements that deviate from the Code compliance and therefore required variances, was the result of the Applicant's choices, and that the Applicant could reduce sprawl without reducing the number of housing units by building vertically. *Id.* at 00:37:01-00:37:50. Therefore, there were options for a developer to develop the Property in compliance with the Code and without building in the setback or disturbing the natural 30% slopes.

Following discussion, the Commission voted to approve the development plan subject to conditions of approval, but denied the Setback Variance and Slopes Variance. *See* Meeting Minutes, July 11 2024, page 2. The Commission determined that there were no special circumstances, and that development was not infeasible without a variance. *See* Findings and Conclusions.

II. GROUNDS FOR APPEAL TO THE GOVERNING BODY

Under the SFCC 1987, Section 14-3.17(A)(2), an appeal of a BOA decision may be filed for one or more of the following reasons only:

- (1) The Commission's final action does not comply with SFCC 1987, Chapter 14 or the Zoning Enabling Act, NMSA 1978, Sections 3-21-1 to -14;
- (2) The Commission misapplied SFCC 1987, Chapter 14; or
- (3) The Commission's decision is not supported by substantial evidence.

III. ISSUES ON APPEAL

The Applicant asserts that the Commission misapplied Chapter 14. Therefore, the Applicant has grounds for appeal to the Governing Body.

The only issues in dispute are whether 1) there are special circumstance and 2) whether said special circumstances make it infeasible to develop the property in conformity with the Code.

On appeal, with respect to the criteria in dispute, the Applicant makes the following arguments:

That there are special circumstances because the Property “is uniquely burdened by the expansive Arroyo de los Chamisos, a naturally occurring feature that renders approximately 22% of the property undevelopable.” *See* Appeal Petition - 2024-8995-APPL – Setback Variance, Exhibit A, p. 1. The Applicant further asserts that there are NMDOT improvement requirements that burden the property. *Id.* at p. 2.

That said special circumstances reduce the usable site and constrain the project (*Id.*) and that “The inability to grade the remnant of portion of this slope of the Arroyo de los Chamisos will render it infeasible to develop a substantial portion of the property because of the grade that will occur north of the remnant bank (*See* Appeal Petition - 2024-8996-APPL – Slopes Variance, Exhibit A, p. 2).

That the Setback and Slopes Variances are the minimum variances that would permit the proposed development.

That the Setback Variance and Slope Variance are in the public interest because the Applicant takes the position that they will have not impact the surrounding neighborhoods.

IV. ANALYSIS

In this case, the Governing Body should consider whether the Arroyo de Los Chamisos and the requirement to comply with NMDOT requirements constitute special circumstances. While the Arroyo de Los Chamisos is naturally occurring and the NMDOT requirements are created by government action, the Governing Body may wish to elicit testimony or other evidence from the Applicant regarding 1) whether these circumstances “distinguish the land from others in the vicinity that are subject to the same relevant provisions of Chapter 14” (*see* SFCC 1987, § 14-3.16 (C)(1)(a)) and 2) whether the Applicant received any benefit from the government in exchange for the agreement to develop the property with applicable NMDOT requirements (*Id.*).

If the Governing Body determines that special circumstances exist, then the next step is to determine whether those circumstances make it infeasible, for reasons other than financial cost, to develop the property in compliance with the standards of Chapter 14. *See* Section 14-3.16(C)(2), Appendix I.

The Applicant argues that the existence of a floodplain and an arroyo on the northern portion of the Property make it infeasible to develop the Property with the detached-home style product that the Applicant designed.

The Applicant’s arguments regarding whether development is infeasible without a variance are tied to their arguments that the requested variances are the minimum variances needed to facilitate the Applicant’s planned development. The Commission need only discuss whether the Setback Variance and Slopes Variance are not in the public interest if all other criteria are met.

The record reflects Staff’s conclusion that neither the Arroyo, nor any requirements from NMDOT, preclude residential development on the Property in compliance with the Code and that the same number of units could even be built by using vertical construction. Vertical

construction would be consistent with the Code and would not require the Setback Variance or Slopes Variance. If the Governing Body determines that the Property could be developed without the requested variances, then the Setback Variance and Slope Variance should be denied.

V. CONCLUSION

If the Governing Body concludes that special circumstances do exist, that the development is infeasible without a variance, and that all other Code criteria are met, the Governing Body should reverse the Commission's decision and grant the Appeal. If the Governing Body concludes that no special circumstances exist, or, that, if special circumstances do exist, they do not make it infeasible to develop the property in compliance with the Code; or that the Setback or Slopes Variance does not meet any of the other Code criteria, the Governing Body should uphold the Commission's decision, deny the Appeal and deny the variances. The Governing Body could also modify the Commission's decision in part by reaching different legal or factual conclusions, for example, by determining that special circumstances do exist, but that development remains feasible without a variance.

VI. RECOMMENDATION (MOTION OPTIONS)

There are three options for motions in this case. Sample motions follow:

Motion Option 1: I move to grant the appeal, reverse the Commission's decision to deny the variances, and direct staff to prepare Findings of Fact and Conclusions of Law consistent with this motion.

Motion Option 2: I move to deny the appeal, affirm the Commission's decision to deny the variances, and direct staff to prepare Findings of Fact and Conclusions of Law consistent with this motion.

Motion Option 3: I move deny the variances on a separate basis from the basis described in the Commission's findings of fact and conclusions of law, in particular if the Governing Body determines that the Setback Variance or Slopes Variance failed to meet Code criteria different than those the Commission identified, and direct staff to prepare Findings of Fact and Conclusions of Law consistent with this motion.

VII. DOCUMENTS REFERENCED

- Findings of Fact and Conclusions of Law (Setback)
- Findings of Fact and Conclusions of Law (Slopes)
- Appeal Petition - 2024-8995-APPL – Setback Variance
- Appeal Petition - 2024-8996-APPL - Slopes Variance
- Planning Commission Packet
 - Planning Commission Staff Report
 - Attachment A -Technical Corrections
 - Attachment B-Development Review Team (DRT)
 - Attachment C-Early Neighborhood Notification
 - Attachment D - Maps and Photos
 - Attachment F - May-16-2024 PC presentation

- Attachment G - July-11- 2024 PC presentation
 - Attachment H - July -11-24 PC Presentation video
- Hearing Meeting Minutes 5-16-24
- Notice of Cancellation Meeting 6-20-24
- Hearing Meeting Minutes 7-11-24

APPENDIX I: RELEVANT CODE SECTIONS

14-3.16 – Variances, approval criteria

Subsections 14-3.16(C)(1) through (5) and, if applicable, Subsection 14-3.15(C)(6), are required to grant a variance.

(1) One or more of the following special circumstances applies:

- (a) unusual physical characteristics exist that distinguish the land or structure from others in the vicinity that are subject to the same relevant provisions of Chapter 14, characteristics that existed at the time of the adoption of the regulation from which the variance is sought, or that were created by natural forces or by government action for which no compensation was paid;
- (b) the parcel is a legal nonconforming lot created prior to the adoption of the regulation from which the variance is sought, or that was created by government action for which no compensation was paid;
- (c) there is an inherent conflict in applicable regulations that cannot be resolved by compliance with the more-restrictive provision as provided in Section 14-1.7; or
- (d) the land or structure is nonconforming and has been designated as a landmark, contributing or significant property pursuant to Section 14-5.2 (Historic Districts).

(2) The special circumstances make it infeasible, for reasons other than financial cost, to develop the property in compliance with the standards of Chapter 14.

(3) The intensity of development shall not exceed that which is allowed on other properties in the vicinity that are subject to the same relevant provisions of Chapter 14.

(4) The variance is the minimum variance that will make possible the reasonable use of the land or structure. The following factors shall be considered:

- (a) whether the property has been or could be used without variances for a different category or lesser intensity of use;
- (b) consistency with the purpose and intent of Chapter 14, with the purpose and intent of the articles and sections from which the variance is granted and with the applicable goals and policies of the general plan.

(5) The variance is not contrary to the public interest.

(6) There may be additional requirements and supplemental or special findings required by other provisions of Chapter 14.

APPENDIX II: VARIANCE FLOW CHART

