

**CITY OF COLORADO SPRINGS PLANNING COMMISSION**

**MINUTES / RECORD-OF-DECISION**

**THURSDAY, June 16, 2016  
CITY HALL COUNCIL CHAMBERS  
107 NORTH NEVADA AVENUE  
COLORADO SPRINGS, COLORADO 80903  
CHAIRMAN PHILLIPS CALLED THE MEETING TO ORDER AT 8:33 A.M.  
THE MEETING ADJOURNED AT 4:30 A.M.**

**PRESENT:**

Phillips  
Henninger  
Shonkwiler  
Smith  
Walkowski  
Gibson  
Graham  
McDonald  
Markewich

**ABSENT:**

**ALSO IN ATTENDANCE:**

Mr. Peter Wysocki, Planning and Development Director  
Mr. Marc Smith, City Senior Corporate Attorney

**NEW BUSINESS CALENDAR**

**DATE:** June 16, 2016  
**ITEM:** 6.A  
**FILE NO.:** CPC AP 16-00071  
**PROJECT:** Appeal of Notice to Abate at 2215 N. Farragut  
**STAFF:** Dennis Wolf, Land Use Inspector

**STAFF PRESENTATION:**

Dennis Wolf, Land Use Inspector gave a Power Point presentation

**APPLICANT PRESENTATION:**

William Luis representing Mr. Devon Bowen. Mr. Luis gave a PowerPoint Presentation. They discussed what Ordinance 16-19 said prior to changes.

Mr. Luis stated Mr. Bowen checked with Regional Building before constructing the fence and the pergola and was told a building permit wasn't required.

A meeting in June 2015 was held between Mr. Wysocki and Mr. Tefertiller to discuss the complaint. After that meeting Mr. Luis's understanding was City Planning would not prosecute Mr. Bowen for the fence issue due to the gap in city ordinances. Mr. Wysocki

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didn't get back to Mr. Luis regarding this but directed his staff to correct the ordinance. Mr. Luis said the change to the ordinance was the city's acknowledgement there was a gap in the existing ordinance and the new ordinance would correct that.

Ordinance 16-19 doesn't apply because the fence and pergola were built before the Ordinance was adopted. So was the fence a violation prior to the new ordinance. In the previous ordinance referenced natural grade, the new ordinance says finished grade. Thus the ordinance isn't a clarification it's a new ordinance. The city's position is the wall and the fence is one in the same.

The ordinance doesn't define both sides of the property line. His client's fence is on his side of the property, if you measure on his property on both sides and at the highest part of the fence you get 6 feet. You don't measure over the retaining wall because that isn't his property. The fence is not uniformly 6 feet; at its highest point its 6 feet.

Mr. Luis discussed measuring the fence from the top of the fence to the grade; and then stated how planning measured with a flat plane. The Ordinance says nothing about a flat plane or going across of the property line to measure. Mr. Luis said the illustration didn't show crossing the property line. If the fence and the property line were in the same geometric plane you could cross it. There is nothing in the ordinance that says you combine the wall and the fence and nothing to indicate how it's measured. So the inspector has no standards from which to measure. Before the change in the ordinance the public didn't know how it was measured, but now they do.

The setback is to ensure structures aren't too close to a neighbor's property and doesn't interfere with light and air movement. The fence doesn't do this. Neighborhood is on a hillside. The previous code required the measurement was to the natural grade but it doesn't define natural grade. City has the ability to see what the natural grade was pre-subdivision. If the city meant finished grade they should've said so, that is what they meant, so they changed the ordinance to say that now. If the city can't show what the natural grade was there is not violation. Staff needs direction on how to measure fences prior to the change in 2016 ordinance.

Mr. Luis shows pictures of the pergola. Mr. Luis said pergolas were not regulated before the 2016 ordinance. They concede the pergola is a structure under city code because it's permanently affixed to the ground.

This issue is not whether it's an accessory structure but whether the pergola is a setback violation. So the issue is what is an accessory structure. Mr. Luis's references pictures from the code and reads the definition from the code.

Regarding the dispute about the pergola it comes down to a phrase in the code – "Contributes to the comfort, convenience or necessity of the occupants". His client says

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the pergola is a decoration. It's not comfort, convenience or a necessity. It's not a safety issue, it's attractive and there is no point in removing it.

#### **Citizens in Support**

Mr. Bowen said he is in support he acted in good faith and called regional building and tried to comply with what was required.

Commissioner Shonkwiler asked about the block wall that runs north/south. Mr. Luis said that wall was not an issue and the city has not cited it as an issue.

#### **Citizens in Opposition**

Liam Pegler lives next door to the fence to the south. Mr. Pegler read from a letter he wrote in rebuttal. He referenced Mr. Luis's statements of different fences and such in the area saying those items are violations and they have to go. Code enforcement and look around for issues to cite it's done on a complaint basis. If none they don't go out.

The cracks in the wall don't show up in the pictures. There are three large vertical cracks in different segments of the wall. The wall is leaning 6 or 8 inches and makes it either on the original property line or over it. This is not an ongoing neighbor dispute it's a code enforcement issue. The pergola is a safety issue due the lack of hurricane clips to keep the cross members on top attached to the side beams. What is attached to the side beams is by one or two sheet rock screws.

#### **Questions of Staff:**

Commissioner Shonkwiler asked what was the code regulation regarding abandoned vehicles. Mr. Wolfe said he does land use enforcement, code enforcement officers deal with abandoned vehicles. Mr. Peter Wysocki said if vehicles are unregistered they have to be screened from view. Commissioner Shonkwiler asked what about from an alley. Mr. Wysocki said from the alley too. Commissioner Shonkwiler commented on the number of vehicles in the back of the property and said the fence was a technical issue.

Commissioner Phillips asked if this had anything to do with the fence issue. City Attorney Marc Smith said for the record the Planning Commission needed look at the notice and order because that's what was being appealed and to analyze based on that.

Commissioner Markewich confirmed involvement was from a complaint. Commissioner Markewich asked if the complaint was specific to the fence and pergola or once you are there do you look for other possible violations. Mr. Wolf said the original complaint was about the fence height and does look for other violations unless mentioned.

Commissioner Markewich asked how the pergola got involved. Mr. Wolf said when he went out the second time the complainant questioned the pergola and that's how it became part of the entire complaint. Commissioner Markewich asked Mr. Wolf what

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was his opinion on the fence to the north of the pergola and that it was much higher than 6 feet. Mr. Wolf discussed the height dimension of that fence, what he measured. Commissioner Markewich said measurement was to the bottom of the grade. Mr. Wolf said yes and that he did not make a finding regarding the fence to the north of the pergola

Commissioner Smith said his question was about the gap because if it was something they'd have to deal he wanted to know what staff's position was because the appellant had a good point that a gap existed before the ordinance was clarified. Mr. Wolf said today's decision would help him in the future to determine if there is a violation. So regarding this case, Mr. Wolf said he looked at the diagram and the notes for the property line. The complainant said the retaining wall was the property line. Based on that and when he looked at 5 feet either side and that's what he used. He also asked planners and used his past experience in other communities that used a similar fence regulation as Colorado Springs to provide guidance.

Ms. Meggan Herrington, Planning Manager said she didn't believe they had a gap because they have always measured the fence and the wall the same way. So she disagreed there was a gap prior to Ordinance 16-19 and that the ordinance was just a cleanup because we've always measured the same.

Commissioner McDonald said looking at notice and order sent May 4, 2016, in paragraph 3 it refers to the height limit established in Code 7.4.102 and the maximum 6-foot height violation in 7.3.105. If you forget the change, was the fence in violation of the zoning code – yes. Just to clarify the fence was in violation prior to revisions it was in violation – yes; the pergola was also in violation – yes, regardless of any changes they were both in violations from the beginning – yes.

Mr. Wysocki clarified some of the points brought out by Mr. Luis. The understanding was they would stop enforcement until the ordinances were brought before Planning Commission and City Council. The ordinance changes were brought to you and to the City Council to let you vet how we measure the height of fences and if they're based on walls and pergolas. Unfortunately Mr. Luis and the owner didn't show for hearings regarding changes in the ordinance because the changes directly because of this violation. Mr. Wysocki said they agreed it needed clarification and if the Council adopts an ordinance and that brings your property into compliance then they are done. But the Commission and Council didn't change anything in Mr. Luis's client's favor. The agreement wasn't that we wouldn't move forward with the violation it was that we would suspend enforcement until the city vetted the issue and clarified the code.

Commissioner Phillips clarified that any violations are by a complaint basis.

Commissioner Shonkwiler said if anyone was in violation now, no matter when it was built then it's a violation. Mr. Wolf said based on his understanding, there is no grandfathering of non-compliance. There may be grandfathering of zoning changing.

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Commissioner Shonkwiler said if he built a fence 10 years ago and it met the code then, but if someone complained now it's in violation, you'd make me take it down. Mr. Wolf said he researches old language in zoning ordinances, development plans and other documents to try and determine what existed prior to the complaint. Mr. Wysocki said we'd treat those as legal non-conforming and you'd have to comply with the legal non-conforming use ordinance. If a fence was built and conformed at the time of building, but was destroyed today it would have to come into compliance for today's standard if it was rebuilt.

Commissioner Shonkwiler said if this fence was built before the change in the ordinance why wouldn't it be considered a legal non-conforming use. Mr. Wolf clarified when the fence was built. Commissioner Shonkwiler said that was before the change in the ordinance.

Commissioner Shonkwiler had a question about what the natural grade was before the houses were built so that would be the same natural grade for the retaining wall. So who was responsible for building the retaining wall and whose property was it built on because whichever side of the property line it's on, it belongs to that person. Mr. Wolf said he didn't do surveying and no ask for it to be done. The complainant told Mr. Wolf what he knew and he assumed the complainant knew where the property line was. Commissioner Shonkwiler asked would it make any difference in terms of the violation whether the retaining wall was on one side or the other. Mr. Wolf answered by saying he applied the diagram he had and conversations he had with the planners because he was confused about the language it appeared from the face 5 feet either side is what was applied.

Commissioner Shonkwiler discussed damage to the wall cause by the fence and if Mr. Wolf knew about any damage caused by the fence. Mr. Wolf said he couldn't answer the question. But offered that if the fence post was set in concrete wind could make cause some movement which might cause some.

Commissioner Walkowski said based on what Mr. Wolf said, no matter what the ordinance says, how you measure was to take it out 5-feet from the top of the fence and measure down from there. Mr. Wolf said that was the approach that he used based on the information he got from planners that were knowledgeable about fence definitions.

Mr. Wysocki clarified that historically the department used the interpretation made a number of years ago that you can go up 6 feet if you were 5 feet away from the retaining wall. That policy was used for a number of years. Commissioner Walkowski said it's not very exact because that is not what the ordinance says, but that was staff's interpretation. Mr. Wysocki agreed. Ms. Herrington said that it wasn't codified but it's what was used in the policy manual by staff. Mr. Wolf reiterated that he used was what was in the policy manual.

Commissioner Markewich asked if that policy manual was accessible to the public. Ms. Herrington said no, it's an internal document. Commissioner Markewich said from a

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citizen standpoint they will look at the code and how it's written not how it's been interpreted. Ms. Herrington said that was correct and explained if someone called and had questions about process, staff would look at the manual. When was that interpretation adopted officially, 2007. Commissioner Markewich said it was possible a previous planning director could have interpreted this completely differently. Ms. Herrington said she couldn't comment on that because she only had documentation back to 2007.

Commissioner Markewich asked City Attorney Marc Smith – if we uphold the appeal and allow fence and pergola to stay we're saying it's a legal non-conforming fence and doesn't it set precedence for all the other fences in a similar situation. City Attorney Marc Smith said ultimately it could be appeal to council, so the Council could give different directions. Mr. Smith said he didn't advise on code enforcement. But thought these each item should be looked at individually so he wasn't sure how precedential it could be. Council could offer changes based on decisions that are made so a variety things could happen for the future.

Commissioner Markewich reiterated if they approved the appeal it made it legal non-conforming. City Attorney Marc Smith said it sounded like that but he didn't have all the legal non-conforming ordinances in front of him to look at. What they would be saying is the administrative decision didn't meet one of the following and they had to look at 7.5.906 – 4A, B, and C and that is what they'd base their decision on. That the decision the enforcement officer made wasn't appropriate based on that review criteria. He can't say what effect that would have on legal non-conforming going into the future.

Commissioner Gibson asked why they were looking at the items together. In her mind they are two separate things. Why can't separate the two. City Attorney Marc Smith said he thought the appeal statement has them as separate items. Ms. Herrington said they are also separate sections of code.

Commissioner Shonkwiler said it was his understand that a fence under 6 foot didn't require a building permit so why would a person go to get a building permit or a policy manual if they didn't understand it. There clearly is a misunderstanding as to what was interpreted because if someone called regional building to ask if they needed a building permit to build a 6 foot fence and were told no, how can someone know what to do because they are told something different and protect themselves from doing something wrong when someone tried to do something in good faith.

Mr. Wolf said if someone calls regional build they could say there isn't a permit required for a fence up to 6 feet but that they would also need to check with zoning and sometimes people don't hear the entire answer.

Ms. Herrington said they work with regional building to make sure they know there are codes that are separate from what regional building requires but also that people should go to the second floor over at the Development Review Enterprise and discuss if what

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they want to do meets with the code. It can be hard for staff to determine if you don't ask the right questions or they're not directed to check with the city zoning code.

#### **Rebuttal:**

Mr. Luis said there was ambiguity in the code and when you read that language that is only supported by an illustration there's no ambiguity. You can't look at that and form an inference that this is measure 5 foot back. They could have drafted the language different or made the illustration differently. The ordinance is what drives the interpretation, is the enabling document and tells them what the regulations means. The average person will not have anything that tells them they need to go to the planning department.

The photos of the wall do not show that the wall's in bad shape. Regarding the property line he referenced the chain link fence because it's clearly within the property line.

Mr. Luis said he disagreed with what Mr. Wysocki said. He said an old fence would be a non-conforming use. If an ordinance has been on the books for many years and you look at the ordinance then a fence would be in violation and the property owner would be responsible if there was a complaint. But there is nothing in the code that grants you that non-conforming status. What Mr. Bowen has done isn't a threat, it esthetically pleasing, and adds to the neighborhood.

Commissioner Phillips asked Mr. Bowen if the fence was set in any concrete base. Mr. Bowen said it's just post-hole digger size, there are metal posts that are down 2 ½ feet. Commissioner Phillips said but not set in concrete. Mr. Bowen said yes they are set in concrete 2 ½ feet down. Mr. Luis asked Mr. Bowen if it went to the property line and Mr. Bowen said no.

Commissioner Graham said from the street it looked like the retaining wall was leaning to the south a little bit but the pictures don't show that. So he was curious if the fence had put pressure on the retaining wall. Mr. Bowen said not at all, the retaining wall had been there since the houses were built back in 1953 and the retain wall was there before they built the houses that was part of the development. It's the Bonneville Subdivision and the retaining wall was put there then.

Commissioner McDonald asked Mr. Bowen if the retaining wall falls down whose responsibility is it to fix it. Mr. Bowen says he didn't know but he thought it would be between the property owners. Mr. Luis said the retaining wall would not fall down because of a two foot pillar of concrete that doesn't reach the property line.

Commissioner Smith said he didn't know why they don't know who the retaining wall belongs to; it's either on his or on his neighbors. Mr. Luis said from a legal perspective the retaining wall benefits both properties. So if something were to happen, unless it can be show that Mr. Bowen is exclusively responsible for knocking it down, but it deteriorates over time and falls down, then he'd say the neighbors should try to get together and work something out to fix it.

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Commissioner Markewich said if the fence was 4 feet tall with posts and concrete and in compliance with the measurement the city gave us, you'd have the same situation as to whether or not the fence posts and footings would cause adverse effects to the adjoining retaining wall. Mr. Luis said this was a poured concrete wall. When have you of that type of fence having that type a fence make a retaining wall fall down made no sense.

Commissioner Smith said he had a solution. Why can't the appellant cut off two feet of that fence because he didn't see why the fence needed to be that high in the first place, just do that and they'd be done with it. Mr. Luis said it wouldn't solve the problem according to the way city planning measures because in some places it's as much as 10 feet high. So if you took 2 feet off – it's still 8 feet and still a problem. It's a potential solution but it wouldn't work because you'd still have to take the fence down much farther. Commissioner Smith said it would work if the two parties could get together. Mr. Luis said they can't, Commissioner Smith have they tried a compromise. Mr. Luis offered a recess to see if they could. Commissioner Phillips said no they would go off the fact findings of the application in front of them and go from there.

City Attorney Marc Smith stated he wanted to make it clear that they needed to make their decision based on the specific review criteria in city code section 7.5.906, 4A, B, C and finding on all of those would be great. Also make sure it's based on the testimony that is in the record. So what you received today and what is in their packets.

#### **DISCUSSION AND DECISION OF THE PLANNING COMMISSION:**

Commissioner Markewich said he was looking for that section in the packet and they do not have that. It was clarified that it was Figure 2 on page 7 of 31. Commissioner Markewich said the problem he was having was the suggested action on their screen and the item text is that the two items are tied together. So if they were to decide the ambiguous nature of the ordinance would allow the fence to stay but not the pergola, saying it is an accessory structure and against the setback rules, he wasn't sure how to separate those.

City Attorney Marc Smith said you could handle both items separately. You could bifurcate the motion.

Commissioner McDonald said if she was reading it correctly under the appeal section 7.5.906 she would have to be able to say that Mr. Wolf did not make the correct decision based on the language of the zoning ordinance or that it was against the expressed intent of the zoning ordinance and she won't be able to find that to be true. She thought Mr. Wolf did the best he could with the code he had at the time. And she is going to support what Mr. Wolf previously requested.

City Attorney Marc Smith said for clarification that language it's any of those under B. It's if you make a finding on any of those, whether it was against the express language of zoning ordinance or against the expressed intent of the zoning ordinance or it was

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unreasonable or it was erroneous or it was clearly contrary to law. He also asked the Commissioners analyze paragraph C which is identify benefits and adverse impacts of the decision. That's the review criteria, if you were to make a finding based on one of those five that would be enough under the code.

Commissioner Markewich said he thought the ordinance was written ambiguously and it was interpreted over a period of time a certain way by staff. He thought the city's actions to change the ordinance was an admission the previous language was ambiguous. So in this case specifically related to the fence he would uphold the appeal, in favor of the appellant on the fence but not on the pergola. He believes the pergola is an accessory structure; it doesn't meet the setback rules. The ambiguity of the ordinance and just being a regular citizen he wouldn't expect the deep research into the policy manual at regional building. So he would like to separate the two items. And vote for the fence and against the pergola based on justification in Section 7.5.906.9 he believes the administrative decision was incorrect because it was against the expressed language of zoning ordinance and then C identify it's adverse impact – he doesn't believe there is a lot of adverse impact on the neighbor. So he didn't think there were adverse impacts to this decision.

Commissioner Walkowski said he'd agreed with Commissioner Markewich on his analysis that the ambiguity of the ordinance language was not expressed well or its intent wasn't outlined well. The policy manual has dictated a lot of what code enforcement does. He also agreed that fence is something he will uphold; the pergola he thinks is a structure and falls within the denial of the appeal. The adverse impacts for the decision on the fence he thought the testimony of the appellant described what happened with the rest of the fences potentially around the city but he thought that was something the policy will have to address maybe based on this new updated code, that could be the policy statement from here on out. So he agrees with Commissioner Markewich.

Commissioner Shonkwiler said he agreed with both Commissioner Markewich and Commissioner Walkowski and will vote appropriately.

Commissioner Gibson said she also concurs with her other Commissioners. She thinks this is what she was trying to get too previously so she was glad of the clarification to keep the two items separate.

Commissioner Smith said he agreed with Commissioner Markewich and his other fellow Commissioners who expressed his same concerns.

Commissioner Markewich clarified from City Attorney Marc Smith if he should make two separate motions. Mr. Smith said two separate motions would be the clearest.

Motion by Commissioner Markewich, 2nd by Commissioner Walkowski to CPC AP 16-00071 to uphold the appeal of the notice and violation to abate fence height at 2215 N. Farragut St.

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Mr. Williams Luis offered some thoughts on some technical language. If you uphold the appeal that could be confusing so he suggested they vote to grant the appeal on the fence and deny the appeal on the pergola.

Commissioner Markewich said he'd withdraw his previous motion and start again.

Motion by Commissioner Markewich, 2nd by Commissioner Walkowski regarding CPC AP 16-00071 he would vote to grant the appeal on the notice and order to abate fence height at 2215 N. Farragut St.

Aye: Graham, Markewich, Henninger, Phillips, Shonkwiler, Walkowski, Gibson, Smith  
No: McDonald  
Motion Passed: 8-1

A 2nd Motion by Commissioner Markewich, and seconded by Commissioner Graham regarding CPC AP 16-00071 to deny the appeal of the notice of violation and order to abate placement of the accessory structure in the front yard setback at 2215 Farragut St.

Aye: Graham, Markewich, Phillips, Shonkwiler, Walkowski, Gibson, Smith, McDonald  
No: Henninger  
Motion Passed: 8-1

Mr. Wysocki stated that since they bifurcated the motions both parties can file an appeal. The appellant can file an appeal for the Commission's denial of the appeal on the structure and the adjoining property owner can file an appeal for your granting the appeal on the fence

June 16, 2016  
Date of Decision

Eric Phillips  
Commission Chair