

21 Marland non-use variance

AR NV 20-00678

Presenter: David Surofchek

Purpose for non-use variance:

- **To allow for a retaining wall to support my expanded driveway. This expanded driveway allows me to utilize my garage more effectively (See videos on pages 10 -13 of this presentation)**
- **To allow for a retaining wall to mitigate water flowing from my north downward sloping driveway to my neighbors at 17 Marland**
- **To allow for reasonable use of my entire property as surveyed**
- **To allow for a 6 foot fence near the retaining wall providing necessary privacy to allow us to live in our home in peace. (See pictures showing need for privacy on pages 14-16)**
- **To prevent the fence to be moved in front of our new trees (Planted over a year before code violation notice) so we can maintain the property and the trees. (See page 19)**

Important points of consideration

- **Our HOA has approved my fence and retaining wall. They determined my retaining wall was necessary to support my concrete driveway. The HOA has recently stated after the city planning commission meeting that they will support the City Councils decision today regardless of outcome. This includes allowing my wall and retaining wall to remain as is based on the granting of the original non-use variance by the City Planning department or to uphold the appeal supported by a split decision at the city planning commission.**
- **Our HOA wrote a letter to the residence at 17 Marland and 21 Marland on January 25th, 2020 stating they will honor the City Planning Commissions decision to enforce the 6 foot height requirement despite this height requirement not being a HOA covenant. I then notified them of my intent to appeal this ruling to the City Council and they have informed me after this letter was sent out that they will honor whatever the City Council decides in our case.**
- **My retaining wall and fence was in existence for 2 years before there was a code enforcement complaint filed against me. To this date no other fence/retaining wall in our neighborhood that is violating the same fence height code has received a code enforcement complaint.**
- **The water drainage from my driveway ran directly onto my neighbors property before the retaining wall existed. Now the retaining wall prevents this from happening. (See picture on page 20)**
- **The water drainage onto 17 Marland from 21 Marland was primarily due to the gutter runoff from my detached garage that existed well before I purchased the property. I have recently mitigated this run off by installing French drains from the detached garage re-directing the water to the north east corner of my lot where the water is naturally flowing**
- **The retaining wall is made up of high PSI cement and the pickets on my fence are 1 inch thick. This is a well constructed fence and wall and there are no signs of deterioration after 2+ years of existence.**
- **There are numerous homes within our neighborhood and within our home owners association that have similar retaining walls and fences violating the same code. To my knowledge no one has filed a complaint about these other walls and fences in the now or in the past.**

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- **Nonuse Variance:** The nonuse variance justification to allow a fence exceeding 6' (six feet) in height is outlined below. The record of decision with staff comments is attached as **Record of Decision**.
- **7.5.802 (B.1) Exceptional or Extraordinary Conditions**
- Due to the topography of this lot the homeowner was required to construct a retaining wall in order to stabilize the driveway apron needed for proper access and adequate use of the existing attached garage. Due to the topography of the lot requiring a retaining wall for the driveway, the homeowner is unable to place a 6' (six foot) fence further than 3' (three feet) from the existing retaining wall. Because the driveway is so close to the required retaining wall, the fence also serves as privacy and safety for the area adjacent to the driveway. It serves as a protective barrier for vehicles and anyone recreating in the driveway. Placement of the fence closer than 3 feet to the retaining wall also eliminates any dead space that would then fall on the opposite side of the fence between the retaining wall and the fence that would be the responsibility of the owner of 21 Marland. **If the fence were setback more than 3 feet the space between the retaining wall and the fence could become a maintenance issue.**
- **7.5.802 (B.2) No Reasonable Use of Property**
- The use of a fence for security at this property is a reasonable use allowed within the zoning district. The driveway is also a reasonable use to allow access to the single-family dwelling. Due to the architectural design of the home with an attached garage facing west and existing driveway dimensions, the homeowner cannot properly access attached garage without the driveway apron which requires the retaining wall in order to be properly constructed and stabilized. **The location of the fence is required to be located within 3 feet of the retaining wall to prevent access issues for the driveway.**
- **7.5.802 (B.3) No Adverse Impact to Surrounding Property**
- **Multiple properties adjacent have similar retaining walls within 3' (three feet) of a fence that exceeds 6' (six feet) from top of fence to the finish grade at the bottom of the retaining wall. (see attached Fence Photos on pages 23 -26) No adverse impacts are anticipated through the design and location of the fence.**
- **A drainage complaint was received during review of this request. The drainage complaint and alleged drainage issues have little to do with the fence height. However, since the complaint was made the applicant took corrective measures to minimize drainage issues to neighboring properties. City Engineering was asked to comment and provided that although lot-to-lot drainage is a concern, it is a private matter that City Engineering does not have jurisdiction or funding to correct. This was not considered as part of staff's approval of the nonuse variance. The retaining wall itself is not an issue at the current placement and is permitted to be where it is located. The issue at hand is the placement of the 6-foot wooden fence in relationship to the retaining wall. The fence height itself has no adverse impact to neighboring properties.**

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- **Appeal Review Criteria:** *The appeal letter states that the applicant provided erroneous information as part of the nonuse variance request.* Erroneous information stated by the appellant reads as: “the applicant provided incorrect measurements and inaccurate drawing of the retaining wall.” And “at its highest, the retaining wall is 22” to 23” – not 18” as drawn. The cedar fence measures 6’ to 6’-3”. This results in much of the wall/fence being over 7’-6”, which was the height administratively approved.
- Once the appeal was filed with this information, Code Enforcement staff verified that the retaining wall is taller than 18 inches at the highest point, making the fence closer to approximately 8 feet at its tallest section. **However, this information does not change staff’s recommendation.** Whether the fence is 7 feet 6 inches or 8 feet at the tallest section is a minimal issue. Staff considered the requirement and need for the retaining wall and the space for the fence, as well as fact that the fence is not at a consistent height of over 7 feet, has existed for 2 years, and there are other similar fences and walls in the area.
- Other points from the appeal letter are listed below with staff input on each:
- - ***Appellant states the construction of retaining wall and fence in 2018 was not needed and no structural engineer has stated it was needed for stabilizing the new driveway apron.***
- **A retaining wall under 4’ feet in height does not require building permit, therefore engineering and zoning review was not required for this construction.** However the fence does not meet code, which resulted in the code enforcement citation and nonuse variance application. **Since a building permit was not required for construction of the retaining wall or fence, the property owner was unaware of the height issue or need for a nonuse variance until 2 years after construction.**
- - ***El Paso County Land Development Code 6.2.1D.4 states: the fence and wall shall not be established within an easement in a manner where the use of the easement is unnecessarily impeded.***
- **Staff notes that this property falls under the City of Colorado Springs jurisdiction, therefore this section not pertain to this application.**
- **Additionally: Todd Sturtavant at CSU comments on 21 Marland Wall/Fence: “From what I can tell, there is no side lot utility easement here. I don’t see an easement by separate agreement, and I didn’t see a reference in the plat. I would say CSU does not have an easement interest for the area of the wall/fence. Typically CSU does allow for these things within easement so long as they are not impacting utilities (they are not considered “structures”). Fencing is normal along lot lines regardless of the presence of easement, and no permits are required. Similarly, retaining walls under 4’ do not require permitting either. Without the presence of a Utility Easement, I don’t see any action the property owner would need to do on our end.”**

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- *-Appellant states retaining wall and fence have led to runoff on site resulting in adverse impact to surrounding properties.*
- **Stormwater Enterprise (SWENT) was emailed during review process to ensure no historical drainage documents existed on site. SWENT confirm no historical drainage reports exist and provided code that confirmed site to site runoff issues is a civil issue.**
- *There are several points made in the appellant letter that staff cannot comment on including:*
- *- Fence on site blocks homeowner from seeing retaining wall unlike surrounding retaining walls in the area that face inward and are not shielded by a solid fence.*
- **Additionally: Surrounding retaining wall/fences referenced in the appeal are all on the south end of the owners property, resulting in the retaining wall/fence facing the owners property. My retaining wall and fence is on the north end of my lot therefore the retaining wall is facing the property to the north of my lot.**
- *- The cutting of the fence to a total height of 6 feet would not impact the applicant's ability to access the garage.*
- **Additionally: Reducing my fence height by 1-2 feet will severely impact our ability to maintain the level of privacy we need to be able to live in our home in peace and with enjoyment. In addition a shorten fence would prevent my kids from being able to play basketball in our driveway without a high probability of their ball going over the shorten fence and not being able to retrieve on our neighbors property.**
- *- Fence within 3' of retaining wall that do exceed a total height of 6' after top of fence to bottom of retaining wall exists at 28 Marland Road, but was only constructed to hide abandoned house to the South at 34 Marland Road.*
- **Additionally: This is not accurate, the height of the retaining wall and fence that is within 3 feet of each other at 28 Marland is well over the 6 foot height restriction when you combine the height of the fence and wall. In addition the abandon property at 34 Marland only impacts 1 out of the 4 of the retaining wall/fences similar to mine that are over 6 feet on Marland and Cheyenne Mountain road.**

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- **3. Conformance with the City Comprehensive Plan**

- Staff has evaluated the proposed application is consistent with the City's current comprehensive plan (herein referred to as "PlanCOS"). According to PlanCOS, it is important to maintain vibrant neighborhoods. For neighborhoods to thrive it is essential to protect, enhance or revitalize the character and functions within each area. The project site is identified on PlanCOS Vibrant Neighborhoods Framework map (**see attached Framework Map**) as part of the Old Broadmoor. The predominant typology is an established historic neighborhood. The goal of this neighborhood typology is to recognize, support, and enhance the existing character while supporting their ongoing investment and improved adaptation.
- The proposal supports this idea with careful consideration regarding placement, minimal land and vegetation disturbance within an established neighborhood and improving investment to the property value. This proposal also maintains the character of the existing home.
- Specific policies of PlanCOS that appear to support the project are listed below:
- Policy VN-2.A: Promote neighborhoods that incorporate common desired neighborhood elements.
- Strategy VN-2.A-3: Projects that provide a variety of housing types and sizes and meeting the needs of residents and families through various life stages and income levels.
- Policy VN-3.A: Preserve and enhance the physical elements that define a neighborhood's character.
- **City Planning staff finds the nonuse variance to be in conformance with PlanCOS and its guidance.**

- **4. Conformance with the Area's Master Plan**

- **No master plan exists for this site.**

- **STAFF RECOMMENDATION**

- **AR NV 20-00678 – Nonuse Variance**

- **Deny the appeal and uphold the administrative approval of the nonuse variance to City Code Section 7.4.102.A.2, based on the finding that the nonuse variance meets the criteria for granting a nonuse variance in City Code Section 7.5.802.B and that the appellant has not substantiated that the appeal satisfies the review criteria outlined in City Code Section 7.5.906.A.4.**

Letter from the HOA on January 25th

- January 25, 2021
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- Dear Surofcheks and Tracys,
- As part of 1/23/21 Count Pourtales HOA Board of Directors meeting, we discussed the dispute regarding your shared property line and reviewed the most recent submitted documents. Below are our findings:
- The Board recommends that the drainage on the east of the end of the driveway and at the coach house be mitigated by the Surofcheks. The Board understands that some drainage infrastructure has already been installed but further evaluation after new rainfall will need to take place to ensure this has been adequately managed.
- **Regarding the property dividing structure, the Board supports the city's ruling that it should not exceed 6 feet from the lowest grade on the northern side. This height restriction is mentioned within the "Fence Guidelines" of the HOA documents, but it is important to note that these guidelines are not part of the association Covenants.**
- We hope that this situation can conclude with a mutually agreeable solution.
- Respectfully,
- Nancy Barber, President
- On behalf of the Count Pourtales HOA Board

Video showing difficulty entering garage with old driveway marked by cones

Video showing difficult exiting driveway with old driveway marked by cones

Video showing improvement in entering garage due to expanded driveway, which needs the retaining wall

Video showing improvement in exiting garage due to expanded driveway, which needs the retaining wall

Need for privacy provided by the 6 foot picket fence.

- **Spot lights and cameras stating were watching you directed toward our home from 17 Marland**















George and Amy Tracy
17 Marland Rd
Colorado Springs, CO 80906

July 20, 2019

Dear George and Amy:

As you know, the board is obligated to operate within the known facts. In regard to the washout of mulch in your backyard being caused by Surofchek's retaining wall, these are the facts as we know them.

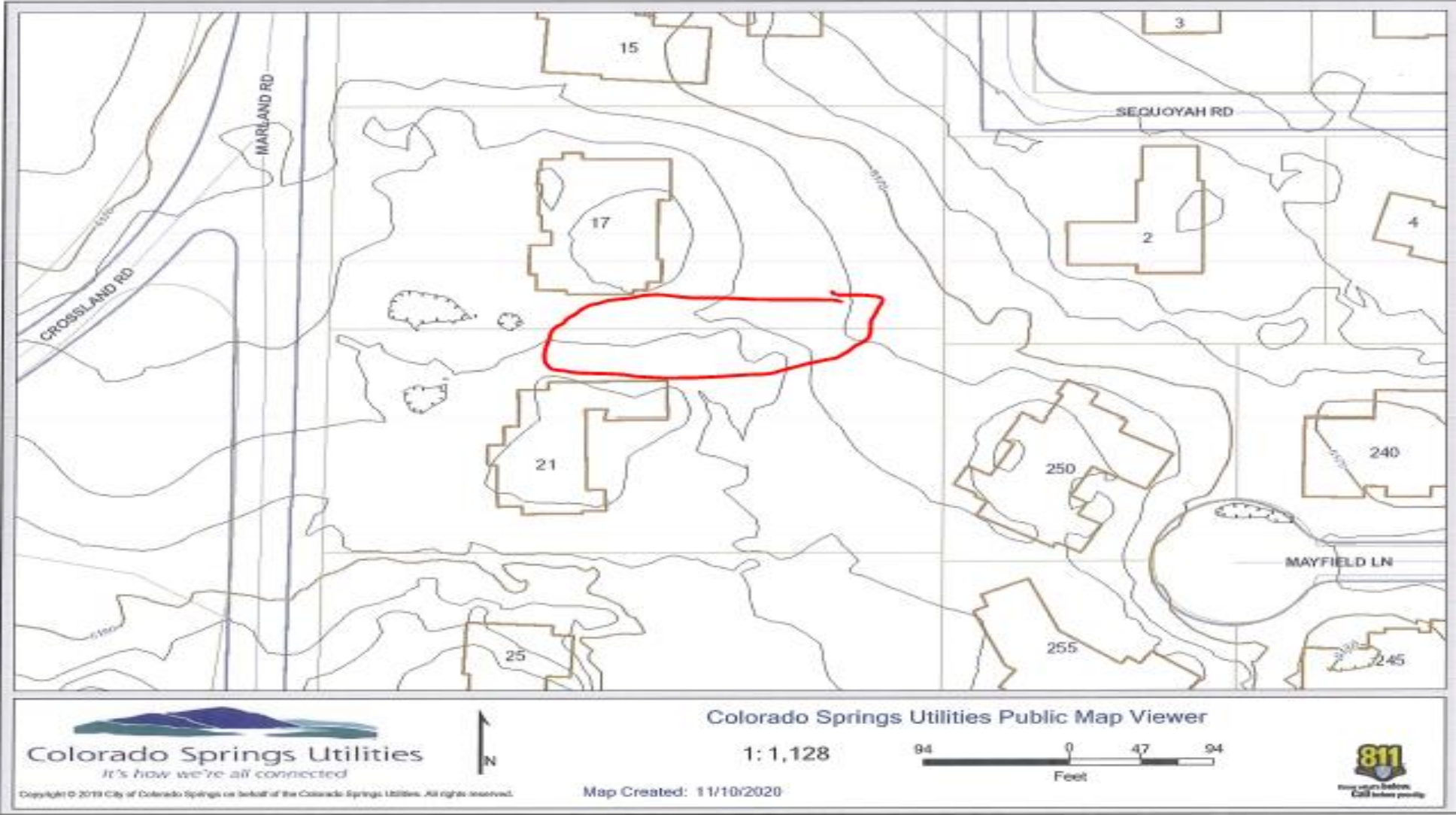
1. the retaining wall is technically a covenant violation, but the board, along with ARC recommendation that it was necessary for the driveway, all decided it was unenforceable because of the fact that there are 3 other ones on that same side of Marland that were previously approved, along with some on Cheyenne Mtn. Blvd.
2. The fence and wall guidelines are for the ARC to use in their approval process. The fence was approved by the ARC. The two parties are in a dispute over where the actual property line is. Surofchek had his property surveyed twice by legitimate surveyors. His fence is built on his side of the property line markers and therefore does not fulfill the definition of the "common property line." Unless there is some sort of legal declaration that says the fence is not on Surofchek's property, the board has to use what we currently know as our baseline.
3. I have a copy of an approval letter from Janene McCann, as co-chair of the ARC, dated 4/18/19, telling Surofchek "No, you don't need to have ARC approval for planting a bush or tree, as long as it is on your property and not encroaching on your neighbors in any way. (Planting a bush or tree is considered a minor change to a home.)" Nancy talked to Surofchek about the mulch washout in Tracy's back yard and he told her that he is planting the trees in the area next to his detached garage to hold the soil that is currently located in the area where Tracys are complaining about drainage.
4. This was an unusually heavy rain storm that caused flooding and washout problems all over the neighborhood, so your incidence is not the only one.

We understand your frustration and acknowledge that the frustration goes both ways. As you are upset with various things at 21 Marland, they are also upset over various things at 17 Marland. None of these things are covenant related and therefore not within the duties of the board, but simply stated so that perhaps you both may be able to reconcile your differences.

The board is willing to review this if any of the facts as we know them have changed.

On behalf of the board,
Nancy Barber

This is a contour map of 17 & 21 Marland from 2011 showing the water has drained downhill since this map was done in 2011:



Almost all of those who have responded in favor of appealing the granting of my non-use variance state the same case. They state the HOA has covenants against walls that violate city code, no fence or wall should be over 6 feet and they don't want the city to set a precedent for this type of wall and fence. The fact is the precedent has already been set many times for other retaining walls and fences all over our neighborhood and HOA. To my knowledge no one has found issue in the past with these similar structures. I've provided in the next several pages other homes with retaining walls on my street that also violate the same code I've violated. I don't want any of these neighbors to have to go through the same process I've had to undertake to get a non-use variance but I think I should be treated fairly and allowed to keep my fence and retaining wall in place like everyone else.

- **29 Marland:**



5 Marland:



28 Marland:



6 Cheyenne Mountain Blvd (First house off of Marland Road near 5 Marland)



New Water drainage mitigation from detached garage, which was draining on 17 Marland well before I purchased this property.



Option 1: Cutting down the fence to the height indicated by the chalk mark in the picture would result in meeting the code requirement of 6 feet. However, doing this would greatly impact not only our privacy but our neighbors privacy by reducing the barrier between us. Before we built the fence and retaining wall my neighbors at 17 Marland expressed their dismay about our lantern lights (which are original to the home) on our garage shining directly into their bedroom at night. By reducing the height of the fence it would only cause these lights to shine even more into their bedroom at night. Taking into consideration our current dispute, reducing the privacy wall between us may cause more harm than good in trying to co-exist as neighbors.



Option 2: Moving the fence in front of the trees in the picture below. This would make it difficult to maintain the land and trees since they will be on the other side of the fence. It would also limit my ability to use my entire driveway to access my garage.



Option 3: Uphold the City Planning Departments granting of the non-use variance in December of 2020 based on meeting all the criteria outlined in the staff report. This will allow me to keep my fence as is, providing my family with the necessary privacy and more importantly allowing us to use our entire driveway to access our garage.



Conclusion:

Due to extraordinary and exceptional conditions caused by the proximity of the houses, the slope of land and the necessity of the retaining wall to support our driveway, the location of our neighbors as well as the windows in our house, and the need for privacy especially due to the actions to prevent this privacy by our neighbors at 17 Marland, the retaining wall and fence within 3 feet of it are necessary for the reasonable enjoyment of our property.

Thank you for considering my request to uphold the non-use variance that was granted by the City Planning Department.

David Surofchek