

CITY OF COLORADO SPRINGS PLANNING COMMISSION

RECORD-OF-DECISION

NEW BUSINESS CALENDAR

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ITEM NO.	PROJECT DESCRIPTION
ITEM NO. 4 CPC CA 15-00128 (Legislative) PLANNER: Ryan Tefertiller	A request by the City of Colorado Springs for approval of an amendment to Sections 7.2.201 and 7.4.102 of the Code of the City of Colorado Springs, 2001, to address multiple changes in the definitions and standards for fences and accessory structures.

NEW BUSINESS CALENDAR

DATE: December 17, 2015
ITEM: 4
STAFF: Ryan Tefertiller
FILE NO.: CPC CA 15-00128
PROJECT: Fence & Accessory Structure Code Change

STAFF PRESENTATION

Mr. Ryan Tefertiller, Planning Manager, presented PowerPoint slides (**Exhibit A**).

Questions of staff:

Commissioner Shonkwiler stated if you have a lot of room it seems in an urban setting and you have a 5-foot setback on both properties on the property then if you're required to set back 3 feet that leaves you with only 2 feet between your house and the fence; So that gap where weeds can grow no one will take care of it. Why would we want something like this especially in a side set back area to leave a property owner with only 2 feet between their own house and a fence? This is especially concerning when you have a narrow lot and every square foot is used for urban living. Commissioner Shonkwiler stated he felt they were moving in the wrong direction.

Mr. Tefertiller stated he agreed that construction of a 6 foot fence with three foot back from a retaining wall providing minimal separation is not the ideal situation. This is not their only option. They can have a shorter fence on top of the retaining wall which allows you to have full use of that 5 foot side yard area. Mr. Tefertiller stated that the intent of these restrictions is to provide air, light, circulation, and openness between those properties. Or to meet accessory structures setbacks you could push that fence back 3 feet or even 5 feet to meet setbacks.

Commissioner Shonkwiler stated he felt that fences make good neighbors but because of what you're saying one property owner is not allowed to have a portion of another property owner's property as a zone for your own privacy. You are entitled to have privacy on your own property. If you have an entirely flat property that is can be acceptable, but we have a lot of places especially in urban areas that are not that way.

Commissioner Shonkwiler also asked if you put a three or four foot fence instead of six then you can go ahead and proceed without a variance. Mr. Tefertiller stated that was correct. Mr. Tefertiller stated if the fence was within 3 feet of a retaining wall the height of the fence is measured from the bottom of the retaining wall to the top of the fence. So the height of the retaining wall will determine the height of your fence.

Commissioner Shonkwiler said if you have a 6 foot retaining wall could you put anything on it according to this ordinance. Mr. Tefertiller said you could. You can put landscaping something like shrubs, but as far as a fence or wall no you could not do that not without a variance. Mr. Tefertiller stated in urban settings it's rare to see a six-foot retaining wall between two homes that are only 10 feet apart. Retaining walls between property owners are rare but they are out there. The other point he would make is that typically homes that are 10 feet apart are designed so that they do not have a lot of windows or privacy concerns on the side of the house. Mr. Tefertiller stated he thought the bigger the privacy issues are more likely to be in the back yard. Commissioner Shonkwiler stated he felt maintenance was also an issue.

Commissioner Gibson stated her concern was maintenance as well. So she wondered if there is communication between the neighbors regarding a fence that is going up or any kind of agreement that is signed between the neighbors. Mr. Tefertiller said communication would be great, but there was nothing in code that would require the two neighbors to work together.

Commissioner Smith asked at what height is a guardrail required on a retaining wall. Mr. Tefertiller stated he was not aware that City Zoning code has any provision on that. That would be more building code situation but he is speculating about that. It could be that the homeowner's insurance provider could have some type of interest in providing some sort of guardrail. However if a retaining wall is more than 6 feet in height it needs to be setback and meet accessory structure setback standards.

Commissioner Markewich stated that the intent for this is if all items are parallel to one another. But if they are perpendicular to one another the face of the retaining wall is toward the front of the wall and there could be a conflict with this code. If that was the case you couldn't put a certain height of fence in that area.

Mr. Tefertiller stated that if that perpendicular fence was on top of the retaining wall then yes, as that fence gets within 3 feet of the top of that wall, then that fence would have to taper down. Commissioner Markewich would prefer it would say if it was within 3 feet of a parallel retaining wall to clarify it in order that the perpendicular face does not interfere with any one building there.

Mr. Tefertiller stated he has a hard time envisioning a situation where there was a retaining wall going along a side property line and you would want to do a rear 6 foot fence and wanted to take it all the way to the top of that retaining wall then turn 90°. So if I was a property owner I would stop short 3 feet from that retaining wall then turn 90° and have my 6 foot fence continue parallel to that wall. Mr. Tefertiller said practically speaking he did not see anyone wanting to put a perpendicular fence that all the way to the top of a retaining wall.

Commissioner Markewich stated that what they were trying to do is create clarity and the way he reads it was that the face of the wall whether it's perpendicular or parallel it is the face of the wall and then you have to build a fence accordingly. So if it said parallel there will be no issues. Mr. Tefertiller stated working with zoning codes no code will ever be perfect. There will always

be some situation out there that cannot be accommodated through a few sentences of regulation.

Commissioner Markewich asked could there be a drawback by adding a statement that says fences within 3 feet of a parallel face, would that cause a problem. Mr. Tefertiller stated he didn't know but the more specific you get the potential is actually to have it become more confusing.

Commissioner Shonkwiler stated that if this could be changed to the way that he is suggesting under an item number two, on page two – “if the fence was located within 3 feet of the face of the retaining wall and the height of the fence is measured from the top of the fence to the finish grade at the top of the retaining wall,” would that accomplish his theory. What he's trying to do, especially in urban areas, is not taking property rights away from one property owner and give them to another. Mr. Tefertiller stated he understood and he also stated that zoning codes are to protect the rights of one property owner from another property owner.

Commissioner Henninger stated a fence less than 6 feet does not require a building permit correct? Mr. Tefertiller said that was correct. Commission Henninger ask why is it 6 feet. Ryan stated he did not know. Commissioner Henninger stated a 6 foot retaining wall is a grounded management structure; we don't have any restriction on heights of retaining walls. Mr. Tefertiller stated he disagreed that they do. Because if a retaining wall is over 6 feet in height it is considered an accessory structure has to meet accessory structure setbacks. Commissioner Henninger again asks why 6 feet. Mr. Tefertiller said cities use 6 feet as a limit to fences to provide some level of privacy along the adjacent properties.

Commissioner Henninger asked if there is anything in our zoning as far as if you put a fence along a property line how it should look. He also said if this is a visual thing, and there are a lot of visual things we need to think about.

Commissioner Donley offered an example on Commissioner Markewich's comment. The scenario could be a retaining wall that runs along the property line, and then a perpendicular property line happens to run along that and you are trying to manage a dog or some other sort of security. In his mind you probably come and ask for a variance because you have a specific situation and you probably go with it, but he does believe that is a legitimate question we need to have thought through before they go too far.

Commissioner Donley stated the rest of his comments are more grammatical in nature. He wants to make sure that they get this right. Commissioner Donley stated he is reading the accessory structure definition and at the end of it, it says, “and that of other similar buildings and fences and walls that exceed 6 feet in height.” Commissioner Donley stated it reads to him, because there is no comma there, that it is saying 6 feet in width for the buildings. Because with no comma it infers that 6 feet refers to both of those. Commissioner Donley stated he would suggest that maybe there is a new sentence that states fences and walls that exceed in width are accessory structures. You see where the confusion could happen? Mr. Tefertiller stated first to clarify you said width a couple of times where I think my editorial may have confused you and it should be height. Commissioner Donley agreed it should be height. Mr. Tefertiller stated that he could see where confusion could happen, so an additional comma after the word buildings or as you suggested a period and a new sentence would be fine. Commissioner Donley stated he thought it would help.

Commissioner Donley stated the next one was very minor but the word detached putting 3 feet in parentheses would make it consistent with how you have done it elsewhere. You have the word three feet and the everywhere else you've done a 3 foot in parentheses. Mr. Tefertiller stated they can correct that. Commissioner Donley wanted clarification regarding a breeze way, that it can be any length? Because he has seen one in Italy that is 2 miles long. So is there a limit of how long a breeze way can be? Tefertiller said no, the current code does not put a maximum length of a breeze way; but if the breeze way is open and less than 12 feet in height and less than 6 feet in width, it is considered detached. Commissioner Donley stated to be clear it could be 100 feet long. Mr. Tefertiller stated yes, but it would still be detached. Ryan stated now if it was enclosed and wide and tall, then it's basically a room. It would become a corridor of your house connecting to two separate wings

Commissioner Donley stated the last one under the definitions of fences and wall, the latest building materials for fences is plastic; we should have that in the list of materials. He would like to exclude it but he does not believe that is going to happen. So for materials you have listed wood, brick, stone, stucco, concrete, wrought-iron, chain link; plastic is almost as common as anything else. Mr. Tefertiller agreed he thought plastic could certainly be added. Commissioner Donley stated that or a composite is another suggestion that Commissioner Henninger made and he was fine with either of those. Mr. Tefertiller said they do have a statement of other similar product, however Commissioner Donley was correct.

Commissioner Donley said his final item with regard to editing was that he had to agree with Mr. Tefertiller that a fence is about privacy and perhaps to some extent security. As it gets in excess of 6 feet in height he stated he felt it imposes on someone else, it's a negative impact. But he has no problem putting a fence on top of a wall otherwise so let's push it back and realized if you are in tight conditions by putting it that high you are really affecting the pedestrian environment, you are creating an enclosed difficult space. So those were his observations.

Commissioner McDonald stated she wanted to clarify that Mr. Tefertiller stated that with any code someone can find an error or it might not apply to every situation, is that correct? Mr. Tefertiller said yes. Commissioner McDonald said the variance process is for those types of situations in the event that there is an extraordinary circumstance. Mr. Tefertiller said that was correct.

Commissioner Walkowski stated he is assuming that the examples that were showed and other areas around the city are grandfathered in. Mr. Tefertiller stated that was correct. Mr. Tefertiller said fences that were legally built under an old or unclear section of code they would be legal non-conforming under this proposed change. Commissioner Walkowski asked about repair or upkeep of those that are non-conforming, what does that look like? Mr. Tefertiller said the non-conforming section of code allows for maintenance and upkeep of legal non-conforming structures including fences. If you were to entirely knock down your whole fence and want to replace it with a brand new fence you would have into compliance with the current code.

Commissioner Walkowski said all of this is regulated by code enforcement, correct. Mr. Tefertiller said yes.

Commissioner Markewich asked is there ever specific language in the code that says that prior to a specific date fences are grandfathered in or do we do that or not do that? Mr. Tefertiller stated the code does not establish specific dates for before or after as far as compliance. But if something was established legally under the code it existed at the time then its legal nonconforming. So it's up to the planning staff to research to understand when something was

built. We look at a zoning code for that time frame to determine whether it was built legally or not.

City Attorney Marc Smith stated to Commissioner Markewich that Mr. Tefertiller did a great job describing it. There are certain, usually very controversial circumstances, where we might put a specific date in that could give people time to comply. However, if we were to put that kind of language in every single code change it would become more confusing.

Commissioner Markewich stated if I have a very long fence, but only three panels has fallen down. Do I have to replace the entire fence in order for it to then rise to the new code? Or if I replace just those panels a portion of my fence am I still able to keep it at the previous level? Mr. Tefertiller said zoning code establishes a 50% value threshold. So if a legal non-conforming structure is damaged to more than 50% of its value for replacement and its replaced, when it's replaced it needs to meet current code. It depends on the percentage of damage if it's less than 50% you can just replace the area that was damaged and have it remain current to the code at the time it was originally built.

Supporters of the application:

Leland Pilger stated he approved of good work Mr. Tefertiller and the zoning code department has done. They spoke with a lot of people in different areas of about the overall benefit of good code regarding fences and structures.

Opponents of the application:

None

Additional Comments / Questions of Staff:

Commissioner Smith stated with regard to what was handed out, he's looking at page one under the definitions of detached, and the bottom sentence says, "if an unenclosed breeze way shall be considered detached the breeze way is less than 12 feet in height and less than 6 feet in width and you wanted to change that to height, correct? Mr. Tefertiller said no; the version he handed out this morning had the correction that was necessary and that was that the last word of the accessory structure definition. The version that was in their packets inadvertently had that last word as width and it should've been height. Mr. Tefertiller clarified he was speaking about the accessory structure definition.

DECISION OF THE PLANNING COMMISSION

Commissioner Phillips stated to the Commissioners that if they were going to make a motion to be sure that it was clear so that they would not have to make a lot of amendments to what was stated.

Commissioner Markewich said there have been a number of things have come to light in hearing and he was not sure if by motion and amendment they would be able to consider those various things. He would like to see the parallel language in their he's just not sure how difficult this is going to get with the motion and he does not know if this is a time sensitive item. It's an amendment to the code, a legislative item.

Commissioner Henninger stated he felt we were manipulating something that they don't totally have their hands around and thought what they currently had worked for the majority. They are addressing this for a particular situation and he did not see the value addressing it for a unique

situation if a unique situation is not part of the decision. The randomness of what we have in fences is probably phenomenal. However, we need fences, they can be a problem but he is not sure they having anything of substance here to vote on today.

Commissioner Gibson thanked Ryan for his work on this item. She respectfully disagrees with her fellow commissioners, she believes there is enough to move forward to and make a motion on this at this time. They have the variance process for isolated specific situations. She is concerned about maintenance; it could present a futuristic problem. But she is ready to move forward on the item.

Commissioner Donley stated that if staff wanted to table the item, he would be open to that but he is not sure that it is necessary at this stage. He recognizes the power of variances and they do take care of those individual situations, and while he understands Commissioner Markewich's comment he thinks the variance is the way to take care of that particular an amendment or edit to the text. In terms of retaining walls and fences combined that are in excess of 6 feet he thinks that is inappropriate. He thinks that 6 feet provides adequate privacy, screening and security. It could be an affront to neighbors if it's taller than that and it limits light and air. Commissioner Donley stated he did have the three text and grammatical amendments, so if were headed toward a motion he hopes they can be incorporated and if he needs to make that motion to let him know. But otherwise he is supportive of the idea and thinks they can proceed. Finally, it would be useful if in every one chimed in on these particular amendments so they can start to craft a motion that can pass on the first reading.

Commissioner Shonkwiler stated he was in agreement with several of the Commissioners that they have adequate information to move forward. He felt the changes that were suggested by Commissioner Donley is acceptable. However, he really feels that the flaw is the question of retaining walls. He would offer maybe a compromise perhaps on the retaining wall for it to read, "If the retaining wall exceeds 4 feet in height, and then the overall the height of the fence would not exceed 10 feet in height with a retaining wall." But the whole question is of property rights to him. He would propose either in the motion or a proposed amendment to the motion that they change the maximum height of a retaining wall and a fence to 10 feet and this would be a way to take care of some of the maintenance issues also the ownership issues.

Commissioner McDonald stated she felt that Mr. Tefertiller had done a lot of homework on this and talked to a lot of different people and she is sure he had many suggestions on how to word this change. They could send it back again and again and never ever hit every scenario. She is fully prepared to move forward as written, if Commissioner Donley wants to add some comments that would be fine.

Commissioner Walkowski stated they could make a motion and add a clarification that the board looks at. He is intrigued a little bit about the compromise that Commissioner Shonkwiler mentioned but he is still thinking that through. But then Commissioner Markewich's comments about the parallel makes some sense, but it could really muddy the water so he probably would not support the parallel language, but he is still considering Commissioner Shonkwiler's interesting proposal.

Commissioner Smith stated he was ready to move forward with the ordinance as written. He agrees with other Commissioners and does not have anything else to add. If we can have a motion that approves it as written and then that is the way he would propose.

Commissioner Phillips stated he was also in agreement they should move forward with this to include the changes Commissioner Donley suggested.

Commissioner Donley prefaced his statement regarding the motion that he would not include Commissioner Shonkwiler's proposed amendment. He suggested he make his motion with the three items that he had, then Commissioner Shonkwiler could make a proposed amendment to that, then they can vote on it, and precede to voting on the whole thing. Did that make sense to everyone?

Moved by Commissioner Donley, 2nd by Commissioner Smith to approve **Item 4 CPC CA 15-00128 – Fence and Accessory Structure Code Change**, based on the fact that the procedures described in 7.5.602 have been met with three amendments:

1. That the accessory structure definition will have a new sentence at the conclusion that references only fences and walls and their 6 feet height.
2. The definition of detached will add a numeric 3 feet in parentheses added to the text that says three feet.
3. That the fence and wall definition shall add materials that include plastic, composite, vinyl.

Mr. Tefertiller wanted to clarify that the changes that were made were to Figure 1 that was handed out this morning and not the one in the packet. Commissioner Donley said that correct. Moved by Commissioner Shonkwiler and 2nd by Commissioner Walkowski for a proposed amendment to the motion that would make paragraph two on page 2 say "if the fence is located within 3 feet of the face of a retaining wall exceeding 4 feet in height; the height of the fence is measured from the top of the fence to the finish grade at the bottom of the retaining wall."

Mr. Tefertiller adds that if the Commission wishes to accept Commissioner Shonkwiler's change, he would request for a postponement so he could take this proposed change back to their stakeholder group – specifically CONO and HBA to understand whether they would support that that change. Because it is a fairly different than the communication he had with them. They would also probably want to work with the attorney's office to make sure that the proposed language meets their needs and has all the clarity that is needed on it.

Commissioner Phillips asked City Attorney Marc Smith regarding their first motion; do they need to vote on that first? Mr. Smith said they needed to vote on the motion as amended.

Commissioner Markewich asked for clarification if they vote on the amendment as Commissioner Shonkwiler presented it and it passes then staff is going to request that this be tabled and go back so we would not be voting on the primary motion. Commissioner Phillips stated that was correct.

Motion as amended: 3 – 6; Motion failed.

Original Motion by Commissioner Donley and 2nd by Commissioner Smith,

Motion passes 7 – 2.

December 17, 2015
Date of Decision

Planning Commission Chair