

21 Marland Road Appeal

- 6.D. [AR NV 20-00678](#) Postpone an appeal of the City Planning Commission's decision to uphold the appeal of the administrative approval for a nonuse variance allowing a retaining wall/fence combination at a height of 7 feet 6 inches where 6 feet is the maximum height for a fence within the side-yard setback located on an R (Estate Single-Family Residential) zoned property addressed as 21 Marland Road.

(Quasi-Judicial)

Presenter:

Meggan Herington, Assistant Director, Planning and Community Development

Peter Wysocki, Director, Planning and Community Development

There were technical issues with the audio/video of this meeting and due to that, some of the words might be missing from the minutes.

Staff presentation:

Alex Osborne, City Planning, presented a PowerPoint with the scope and intent of this project.

Appellant Presentation:

George and Amy Tracy, 17 Marland Road, presented a PowerPoint outlining the reasons they are appealing the nonuse variance.

1. We feel the variance decision clearly goes against PlanCOS for Old Broadmoor: **to recognize, support, and enhance existing character.**
2. Allowing a fence/wall that's not in compliance with City Code 7.4.102.A.2 **is harmful to our property and to the Count Pourtales neighborhood.**

City Zoning:

3. Fences/walls over 6' are considered accessory structures and must meet accessory structure setback and height requirements. In R-Estate, the setback is **10 feet from the side property line.** Moving 3 feet back, fence becomes a 6' fence.

Structural Engineer:

4. Three feet of soil between a wall and a fence prevents overturning forces to the back of the wall. Utilizing the resistance from the soil between wall and fence post footings reduces this force.

Contrary to City Code 7.5.802.B.2

By the City allowing the fence to remain where it is *at the height it is*, the poorly constructed wall will eventually be in our yard.

- Deterioration of wall will create an unstable driveway for 21 Marland

- Deterioration of wall will add to the existing drainage issue
- Applicants can't maintain because the wall is inches from property line
- Applicants don't have to look at it deteriorating - we do!

Harms the Pourtales Neighborhood

- Allows a nonconforming fence that is atypical to a historical neighborhood of high-end homes
- Makes it difficult for Count Pourtales Association (HOA) to enforce covenants-- "21 Marland got away with it"
- City will use as a comparable in the future to grant 3' variances and allow fences taller than 6' - just as City did in this decision

7.5.802.B.1 Exceptional Conditions

City: "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."

According to 7.5.802 (C.1): The unique physical conditions of the property may be the size or location of existing structures on the property if **such structures are not self-imposed conditions**.

According to 7.5.802 (A.1): The physical conditions shall not be conditions general to surrounding properties.

Under Reasonable Use 7.5.802 (B.1 and B.2)

Staff Analysis:

- Applicants need retaining wall to stabilize driveway
- Cannot access garages without new cement apron and retaining wall
- Fence must stay 3 feet within retaining wall for applicants to access garages

What does any of this have to do with height?

Code 7.3.105A Code Enforcement: ***Lower the height to meet 6' height requirement***

We and our neighbors hope the City will support the appeal of the variance and enforce the height restriction:

If applicants do not want to move back three feet, other options:

- Remove the fence
- Lower to six feet (same as south side of applicants' yard)
- Remove the retaining wall and place next to driveway--and restore the previous natural topography

Applicant Presentation:

David Surofchek, 21 Marland Road, presented a PowerPoint outlining the need for the nonuse variance.

- To allow for a retaining wall to support expanded driveway. This expanded driveway allows for utilization to the garage more effectively
- To allow for a retaining wall to mitigate water flowing from the north

downward sloping driveway to the neighbors to the north

- To allow for reasonable use of the 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 with the privacy anyone would expect in their own home. This privacy has been violated in several ways by our neighbors to the north of us

Important Points of Consideration:

- HOA approved the fence and retaining wall
- Fence/Retaining Wall existed for 2 years before the code enforcement complaint was filed
- Water drainage before retaining wall ran onto neighbor's property
- Numerous homes within the neighborhood have similar retaining walls and fences

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 above it as it stands today are necessary for the reasonable enjoyment of our property.

Questions:

Commissioner Rickett asked Mr. Osborne if the fence was out of code, and Mr. Osborne confirmed it was.

As a point of clarification, Ms. Meggan Herington, Assistant Director of Planning and Community Development, informed the commissioners that the code section is a fairly newer section of code from around 2015 or 2016 that was vetted through the City Planning Commission and City Council. Commissioner Rickett thanked her for the clarification and giving the perspective of the timing.

Commissioner Rickett commented that this fence went up in 2018 and said that we don't not know when the other comparable fences in the neighborhood went up and asked if that was correct. Ms. Herington said that was correct, we would not know, but the other piece of why we would not know is that a retaining wall less than four feet does not require a building permit. So, there is nothing directing anyone to come in and speak with planning or the Regional Building Department. There are no records for those or for fences 6-feet or less.

Commissioner Almy said since there is no formal requirement to review for a retaining wall less than 4-feet, does that imply the engineering required is not nearly as stringent, or the risk is not nearly as bad for a short retaining wall like this? Ms. Herington said she was not sure from a Land Use Review

perspective that she could answer that. The Regional Building has determined that a permit was not required, therefore, no engineering is required for the wall.

Commissioner Hente said that would be correct, if there was no permit required, then there would be no need for engineering.

Supporters:

None

Opponents:

None

Questions of Staff:

N/A

Rebuttal:

Appellant Rebuttal:

Mr. Tracey requested that the commissioners stick to the code and rely on the facts, and that is all he was asking for.

Applicant Rebuttal:

Mr. Surofchek did not have any comments.

DISCUSSION AND DECISION OF PLANNING COMMISSION:

Commissioner Rickett said this might be something between neighbors and for that he was sorry. Commissioner Rickett said he was looking at this from a code standpoint, and variances can be granted to codes all day long. He said he has gotten them in construction and it is something that is used from time to time. Commissioner Rickett said in this case, he was going to stick with the code. The fence could be trimmed to keep the site line to make it continue to look nice (inaudible), and reiterated he would be sticking with the code.

Motion by Commissioner Rickett, seconded by Commissioner Slattery, to uphold the appeal and deny the administrative approval of the nonuse variance to City Code Section 7.4.102.A.2, based on the finding that the nonuse variance does not meet the criteria for granting a nonuse variance in City Code Section 7.5.802.B and that the appellant has substantiated that the appeal satisfies the review criteria outlined in City Code Section 7.5.906.A.4. The motion passed by a vote of 4:3:2:0

Aye: 4 - Commissioner Slattery, Commissioner Rickett, Commissioner Almy and Commissioner Eubanks

No: 3 - Commissioner Wilson, Vice Chair Hente and Chair Graham

Absent: 2 - Commissioner Raughton and Commissioner McMurray