

Case: AR NV 20-00678

City Planner: Meggan Herrington (Previously Alex Osborne)

Non-use variance applicant: David Surofchek (Owner 21 Marland)

Non-use variance approval: 12/11/2020

Non-use variance appellants: Amy and George Tracy (Owners 17 Marland)

City Planning Commission upheld appeal date by 4-3 vote: 01/21/2021

Appellant under code 7.5.906.A.4: David Surofchek

January 31, 2021

City Council Members,

On December 11, 2020 the Colorado Springs Planning department granted me a non-use variance due to my retaining wall and fence violating COS city code 7.4.102.A.2. This code states if a fence is located within 3 feet of the face of a retaining wall, the height of the fence is measured from the top of the fence to the finished grade at the bottom of the retaining wall. The retaining wall and fence related to this dispute was built in October 2018 by my contractor at 21 Marland road. It wasn't until November 2020 that my neighbors at 17 Marland filed a code enforcement violation complaint with the City of Colorado Springs. At this time I applied for a non-use variance with the City of Colorado Springs Planning department to allow my wall and fence as is. On December 11, 2020 the Colorado Springs Planning department granted me the non-use variance based on meeting the required criteria, which I will review later in this letter. My neighbors at 17 Marland then appealed this non-use variance approval based on city code 7.5.906.A.4. On January 21, 2021 the planning commission reviewed this case and upheld this appeal with a split decision of 4-3. It is now my right to appeal this decision based on option 1 of the city code 7.5.906.A.4 application requesting a stay of the administrative decision for the reason of **unreasonable**, which is the intent of this application and letter. In this letter I intend to discuss the benefits and adverse impacts created by this appeal decision by the planning commission, describe the distribution of the benefits and impacts between the community and the appellant, and show that the burdens placed on the appellant outweigh the benefits accrued by the community.

I've included below in italics the basis the non-use variance was granted to me by the city. This information can be found in the planning department's staff report.

***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 a 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) 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.*

When we bought this home in December 2016 one of our main concerns was our ability to access the garages with our larger SUV. During our due diligence in buying the home we thought one of the options to remedy this concern was to expand our driveway approximately 6 – 7 feet to the north of the garage to allow us to better access the garage. In March 2018 I reached out to the chairman of the architecture review committee (ARC), Nick Moore, within our HOA and provided drawings of our proposed driveway. In April 2018 we poured our driveway with approval from our HOA to the point it reached the old chicken wire boundary fence (See exhibit A showing the old chicken wire fence) on my property to the north of our property between 17 & 21 Marland road. When we poured the driveway the result was a drop off approximately 8 – 10 inches due to the unique slope of our lot to the north. See picture below. Shortly after the driveway project was approved I submitted my project plans to the ARC to put a 6 foot picket fence around my property to be placed on or near the property line. However, based on my ILC and after uncovering tremendous overgrowth on my property on the north property line I thought it was necessary to have a survey to determine the actual property line. After the survey was completed in May 2018 it was determined that the chicken wire fence was not an indicator of the property line. The same picture below shows the survey stakes indicating how much more property was mine.



In order to use the entire concrete driveway without driving one of our vehicles over the cliff to better access our garage and at the same time to accomplish our objective of putting the fence near the staked property line the contractor, COL, determined it was necessary to build a retaining wall on or near the property stakes. To be sure we did not encroach on our neighbors at 17 Marland's property we built the retaining wall several inches off of the staked property line toward 21 Marland. The retaining wall was less than 4 feet in height (8 inches on both ends and peaking at ~23 inches in the middle) so it didn't require a permit through the regional building department or require a structural review by an engineer. Regardless, the retaining wall was built with high PSI concrete and is reinforced with rebar. My neighbors at 17 Marland claim the retaining wall isn't built soundly but after being in existence for over 2 years there are no signs of it moving or deteriorating what so ever. After constructing the retaining wall and fence we then filled in the gap with dirt in expectation to plant shrubs in this area. As a result we were now able to use our entire concrete driveway to access our garage. The area between the end of the concrete and the retaining wall allows the 3+ feet of the overhang of our vehicle the space needed to fully back up on the concrete driveway which makes it much more practical to access our garage. I've included in my exhibit B our ILC drawing which shows the expanded driveway versus the old driveway. I've provided videos in exhibits C, D, E & F showing the difference our expanded driveway has made in accessing our garage. These videos show the previous driveway outline and the current driveway with the additional space beyond the end of the concrete.



It's important to note at the beginning of 2020 we agreed to a settlement with our neighbors at 17 Marland for the disputed property. Although I can't go into the details of the settlement I can say our neighbors at 17 Marland no longer have any legal claim to the disputed property. As a result the fence and retaining wall can no longer be disputed that it's not on our property at 21 Marland.

Our new driveway was completed in April 2018 and the survey indicating the property line for a fence was completed in May 2018. However, the fence and retaining wall was not constructed until October 2018 due to a property line legal dispute that began shortly after the survey showed the actual property line boundary was anywhere between 3 to 5 feet further north than the end of our concrete driveway. In an effort to find common ground between our neighbors at 17 Marland I delayed the construction of the retaining wall and fence. Unfortunately no common ground was found during this timeframe and I was instructed by my attorneys hired by our title company to proceed with the building of my fence and retaining wall. The retaining wall and fence construction began and ended in October 2018. Important points to consider, when building the retaining wall and fence I asked my contractor if the height of the retaining wall and fence is allowable under the 6 foot fence code. Patrick Harr from Colorado Outdoor Living told me the two are considered separate structures and the height is not counted together. I accepted his answer and didn't learn this wasn't the case until later in 2020 after the retaining wall and fence was in existence for over 2 years.

Our purpose for the 6 foot picket fence around our property was to provide privacy and security. We have three young boys and 2 dogs and we wanted them to be able to use our property while not disturbing the neighbors and keeping our pets contained at the same time. In addition the fence not only provided security from uninvited people on our property it also mitigates wild animals from entering our property including fox, bobcat, coyotes, deer and other unwanted animals from threatening our family and pets. The 6 foot fence attached to our retaining wall helps prevent basketballs and other toys our kids play with from going onto the property to the north of our property.

Since the beginning of the property line legal dispute the need for privacy on our north property line is very necessary for us to enjoy our property to the extent anyone would expect. Our neighbors at 17 Marland have used several tactics to prevent us from enjoying our home and up until November 2020 they made it very difficult for us to move into it. These tactics include shining two spot lights from their upstairs window onto our home during the day and night. I've included several pictures in exhibits G of these spot lights that were in place for over 7 months. These spot lights were turned on almost every time we pulled into our driveway at 21 Marland night and day. There was one incident my wife, Amy Surofchek, pulled into the driveway and she saw Amy and George Tracy tracking her with the spot lights at dusk while in the room upstairs. In the same upstairs window our neighbors put signs stating they are watching us with cameras, "smile we are watching you".

The most recent act the Tracy's have done to make it difficult to live in our home comfortably is put LGBTQ rainbow stickers in the upstairs window (See exhibit H). Amy Tracy stated in a recent deposition that these were directed toward our 18 year old son who has chosen an alternatively sexual identity. In addition to these LGBTQ stickers on the window they placed a sticker on a no trespassing sign right next to our mailbox for everyone who walks on Marland to see. Amy Tracy stated in a recent deposition that she put these stickers in place as support for my son, which is absurd considering they've done nothing but harass us the past 2+ years. My son certainly doesn't see the stickers as support.

They've also placed two camera's facing our home where you can see into our home, which makes it very difficult to hang out in our kitchen at night. Last but not least it's important to maintain the height of our fence that is attached to the retaining wall in place to prevent our youngest son Charlie from losing his basketball. When Charlie was 8 years old in August of 2019 his basketball went over the retaining wall and fence. It just so happen that George Tracy was on the other side of the fence. Charlie asked him for his ball back and George Tracy told him it was now his ball. I was right next to Charlie when his ball went over the fence. I told Charlie to say "please" give me my ball back but by that time Charlie was crying uncontrollable and I told him to get into the car and then I pulled out my camera phone and started pleading for his ball back. George Tracy finally through back the ball while calling me the most evil person he knows but the damage was done for Charlie. My 8 year old not only didn't wanted to play basketball in our driveway again for the longest time he didn't want to move into the home and didn't come over to visit the home for a very long time. Please find the video of this incident in exhibit I. This can't happen again to my son.

To mitigate this harassment by my neighbors, I invested over \$10,000 into 4 blue spruces and 10 Royal Oak trees beginning in June 2019 which were planted in between the retaining wall and concrete driveway. I've included a picture



below of the trees we planted. The hope is these will provide further blockage of the spot light, camera and the ability for things to go over the fence. These have now been planted over a year since the code violation was filed by my neighbors at 17 Marland and still need constant watering to help their root system integrate into the soil.

If City council decides not to uphold my original non-use variance I basically have 3 options. First I can remove the fence from my property line, which would result in a huge loss on our part financially due to the original cost of installing the fence but also removing it would make living at our home almost impossible with the situation we have faced with our neighbors actions. Second, we could trim down our existing fence to meet the 6 foot height requirement but that would not allow us to use our property to the enjoyment any homeowner would expect. The chance for balls to go over the fence with another incident would be certain and we would lose the privacy we need to avoid interaction. The third option is to move our fence 3 feet into our driveway which would eliminate our ability to use our entire driveway making access to our garage more difficult. It would also create an area difficult to access on the other side of the fence making it very difficult for me to maintain the trees I recently planted. Watering trees in a very small area putting me at risk of stepping onto my neighbor's yard. This could put me at risk of being sued for trespassing, which they are already suing for trespassing with no evidence to prove this claim. I'm asking the City Council to allow me to maintain my fence and retaining wall as it has been in place for over 2 years by upholding the original non-use variance the city granted me.



In the planning commission meeting I believe some statements were made by my neighbors at 17 Marland that misrepresent some of the facts. I'd like to address these and other concerns they stated in their presentation.

- George & Amy Tracy state the retaining wall is not structurally sound but they provide no structural engineer report determining the wall is not sound or safe. As I mentioned earlier this wall has been in place for over 2 years and to this date it hasn't moved or shown signs of bad construction yet and I don't expect it will.

- George & Amy Tracy stated during the planning commission presentation that the spot lights were put into place to deter construction workers from working late at night. This is not true and even Amy Tracy recognized in her deposition this was done to aggravate us. The fact is the spot lights went on during the day and night whenever we came to our home at 21 Marland.
- George & Amy Tracy originally stated in their appeal to my non-use variance that I did not receive approval from the HOA for both my fence and retaining wall. I did receive approval from the HOA for both my retaining wall and fence so this statement is false.
- George & Amy Tracy stated and provided evidence of areas of the fence that were washed out after a significant rain storm. They expressed these concerns to the HOA and the HOA responded to the Tracy's with the letter in exhibit J stating "This was an unusual heavy rain storm that caused flooding and wash out problems all over the neighborhood, so your incident is not the only one".
- George & Amy Tracy had a letter written by Russ Acuff who built both of our homes indicating there has never been an issue in the past with water drainage but the washed out area of mulch the Tracy's show in their presentation was also washed out before the fence and retaining wall project began (See exhibit N). This area washes out due to the drainage coming off of the detached garage. I've since added French drains to the detached garage redirecting this water away from the Tracy's property, which hasn't been done since this building was built well before I bought the property in 2016. See pictures in exhibit K.
- George & Amy Tracy have repeatedly stated I can't build a retaining wall and fence in the 5 foot easement I own despite almost every fence and/or wall in our neighborhood/HOA has these structures built in the 5 foot easement due to CSU restrictions. I was recently informed by Todd Sturtavant at CSU the following in italics.

*"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."*

- George & Amy Tracy claim the other retaining walls shown in exhibit L in our neighborhood are acceptable despite the fact that each of them also violate the same code (7.4.102.A.2) I'm violating based on information I received from former city planner, Alex Osborne. This violation by these existing fences and retaining walls is based on city code pre & post 2016 City council clarifications. I'm making this point that my retaining wall and fence does NOT set a precedent by the City if they allowed me a stay in my approved non-use variance for my retaining wall & fence. There's multiple fence and walls in our neighborhood that have set this precedent well before I did.
- George & Amy Tracy claim my fence and wall are not aesthetically the same as others and/or face the home owner so therefore I should not receive a variance. I have not found in the city code that the direction the wall faces or how it is aesthetically built is a factor in deciding whether a non-use variance is granted. Either way my retaining wall and fence are similar to other fences and walls in our neighborhood (See exhibit L on page 17). **What makes my property different than the other retaining walls and fences shown in exhibit L is my driveway is on the north end of my property therefore the retaining wall and fence can't face my property like the walls and fences at 5 Marland and 29 Marland which have their retaining walls and fence on their south property line. This is a unique characteristic of my property versus the others I've listed.**
- George and Amy Tracy claim I removed foliage to build the fence that was detrimental to their property. It needs to be noted that all of this foliage was removed from my property not their property. It's also important to note that much of this was dead shrubs which was a fire hazard. In addition when removing this over growth on my

property we found multiple rabbit carcasses in the cut down area. I believe it's my right to maintain my property so it mitigates fire damage to my structures and doesn't provide a place for wildlife to harbor.

- George & Amy Tracy claim they are offended when the city stated my fence is necessary for security. As I mentioned this security entails keeping my pets contained and not allowing other animals to threaten my pet's safety. They also claim we live in a very nice neighborhood so the need for a fence for security is not necessary despite almost every neighbor in our neighborhood having a fence. I believe there is definitely a need for security in our neighborhood from personal experience. For instance, shortly after I had my north property line surveyed in May 2018, on August 2018 someone trespassed onto my property removing all of the property stakes and then throwing them into a trash can on my property (See exhibit N), which is a misdemeanor. A police report was filed for this incident. I had to re-survey the property again and then someone removed the survey stakes again causing me to have to pay for a survey 3 times.
- George & Amy Tracy state my home has been vacant for 4 years. This was only the case because of the difficulty of moving into a house when your neighbors are continuing to harass you. Amy Tracy has stated on Facebook and to my face that she "Prays every day that I don't move in". She didn't dispute these comments during her deposition under oath. Despite these efforts I and my 3 sons have recently moved into 21 Marland but my wife to this day is waiting for this issue to be resolved. She is very uncomfortable being at the house knowing our neighbors are doing all they can to prevent us from moving into it. She has yet to spend one overnight in the house since we bought it strictly due to the harassment by our neighbors.
- George & Amy Tracy state I have portable bathrooms on my residence. I'm not sure why this is relevant but I will address it. In mid-2020 I started a backyard landscaping project which is still ongoing. I need the portable bathrooms for my contractors. It was originally placed in front of our home but I asked to move it onto our property so others in the neighborhood won't use it.
- George & Amy Tracy claim in their appeal that there is no need for a retaining wall for my driveway based on the fact they don't have a retaining wall for their driveway. I think this is an example of how our properties are different. In order for me to use my entire concrete driveway without driving off the 8-10 inch cliff and having the ability to use the entire property beyond my concrete driveway I need a retaining wall to retain the fill dirt between the driveway and the retaining wall. This space between the concrete driveway and the retaining wall is important for me to pull out of my garage.
- George & Amy Tracy claim I changed the topography causing water to drain onto their property. The drainage direction between our properties has been in place since at least 2011. I've attached a contour map from 2011 showing the downslope of our property. See exhibit M
- George & Amy Tracy claim I didn't communicate with them regarding the fence before building it. This is patently false. Not only did I communicate with them I was willing to work with them until they hired an attorney to pursue a different approach. See exhibit O

I'd like to now address the public comments that have been received by the city since the application of my non-use variance. I've received several comments in my favor and my neighbors at 17 Marland have received more in their favor. My only explanation for this is my neighbors are established in this neighborhood and we are not. The neighbors to the south of my home have lived there since 1944 and have supported my case by leaving a voicemail to the city on an unsolicited basis. On the other hand my neighbors, based on the planning commission meeting, seem to know who is supporting them based on their comments and emails to the city asking them at the planning commission meeting if they have received certain people's responses yet. This may not be relevant but it shows the Tracy's effort to solicit support in the community from people that aren't even aware that other walls nearby are also violating the same code.

There seems to be one general theme in all of the responses which is the request by the city not to set a precedent to allow my retaining wall and fence remain as is, due to the violation in code. My response to all of these claims has been the city is not setting the precedent by allowing my fence and retaining wall. The precedent has already been set by many other neighbors with similar fence and walls that are closer than 3 feet together and have a height greater than 6 feet. It's important to state I have no interest in having these residence go through the same non-use variance process as I am or do I want anyone including me to file a complaint related to these fences. If my fence is adversely impacting these neighbors who have expressed their concerns of setting precedent, some of which don't even live on our street, because my fence and retaining wall don't meet code then why haven't the other 4 fences (see exhibit L) also adversely impacted them due to a similar code violation? I hope the precedent by the city that will be set in my case is not to choose which fences & retaining walls who also violate 7.4.102.A.2 in our neighborhood should be allowed and which ones shouldn't. To my knowledge I'm the only one in our neighborhood who has received a non-use variance for their fence and wall over 6 feet tall.

There have been a couple comments regarding the "eyesore" from the road regarding the retaining wall. The former city planner, Alex Osborne, and I agreed it's very difficult to see the retaining wall from the road, even in the winter months with no leaves to see my retaining wall.

Last but not least someone responded in their letter that I'm abusing the process by stating there are other fences and walls in the neighborhood that are similar to mine with similar violations. I don't think I'm abusing this process and if anyone is, I believe it's my neighbors who are using this process to further harass me and deter my entire family in moving into our home at 21 Marland.

In summary, I believe there is a strong and prudent case to uphold my non-use variance granted by the city planning department on December 11<sup>th</sup>, 2020. I think my options (As detailed at the bottom of page 4) without the variance put my family into a situation where it's very difficult to enjoy our property let alone continue to live here.

I appreciate your patience in reading this lengthy letter and hope you take into consideration all of the facts and points I've made in making your decision.

Sincerely,

David Surofchek

21 Marland home owner



