



## Legislation Text

---

**File #:** AR NV 20-00678, **Version:** 3

---

An appeal of the City Planning Commission's decision to uphold the appeal of the administrative approval of a nonuse variance allowing a fence/retaining wall combination at a height of 7 feet 6 inches within the side-yard setback addressed as 21 Marland Road.

(Quasi-Judicial)

Related Files:

**Presenter:**

Meggan Herington, Assistant Director, Planning and Community Development  
Peter Wysocki, Director, Planning and Community Development

**Summary:**

Owner/Applicant: David Surofchek at 21 Marland Road  
Appellant to CPC: Amy and George Tracy at 17 Marland Road  
Location: 21 Marland Road; near the intersection of Crossland Road and Marland Road.

The owner of 21 Marland Road is appealing the City Planning Commission's decision to uphold the nonuse variance appeal filed by the owner of 17 Marland Road. This original appeal to the City Planning Commission was an appeal of the administrative approval of a nonuse variance for a retaining wall/fence at a height of approximately 7 feet 6 inches where a maximum fence height of 6 feet is permitted in the side-yard setback when within 3 feet of a retaining wall (City Code Section 7.4.102.A.2). The City Planning Commission, by a vote to uphold the appeal, thus denied the administrative approval of the nonuse variance for the existing retaining wall/fence.

Shortly after the appeal was filed, a formal request was made by the neighboring property owner, 17 Marland Road, to postpone this item to the City Council hearing on March 9, 2021.

**Background:**

The retaining wall/fence combination was installed by the owner of 21 Marland Road in October of 2018. The retaining wall is a tapered retaining wall located on (or just to the inside) of the property line between 21 Marland Road and 17 Marland Road. The approved site plan depicts the retaining wall as approximately 60 feet long and ranges from approximately 8 inches tall at each end and tapers up to approximately 18-24 inches at the tallest peak in the middle of the wall. Just to the inside of the wall is a 6-foot cedar privacy fence; making this fence 6 feet 8 inches at its lowest to between 7 feet 6 inches to 8 feet in height at the tallest point as illustrated on the approved nonuse variance plan. The retaining wall and fence were constructed to support a driveway expansion and create a buffer from the adjacent neighbor.

City Code Section 7.4.102.A General Standards, Fences or Walls, specifies design, height, and

location standards for fences and walls. In the case of the retaining wall and fence at 21 Marland, 7.4.102.A.2 was varied by the nonuse variance request. This sub-section reads:

*If the fence is located within three feet (3') 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.*

Because the 6-foot fence is adjacent to the face of the retaining wall (not 3 feet or more from the face of the retaining wall) the “fence” is considered to be the height of the combination of the retaining wall and fence for an overall “fence” height of approximately 7 feet 6 inches to 8 feet.

The nonuse variance submittal was necessitated by a Code Enforcement complaint and subsequent Notice and Order issued to the owner of 21 Marland Road on September 17, 2020. After the standard internal review, staff approved the nonuse variance on December 15, 2020. The appeal of administrative approval was filed on December 28, 2020, by the adjacent property owner (17 Marland Road). The City Planning Commission heard the appeal of the nonuse variance at their hearing on January 21, 2021, and voted to uphold the appeal, thus denying the nonuse variance. The owner of 21 Marland Road appealed that Planning Commission decision to City Council on February 1, 2021.

The original appellant and owner at 17 Marland submitted a detailed appeal letter as part of the City Planning Commission hearing. That letter is attached to the City Planning Commission packet and provided as an attachment to this memo. The letter outlines several reasons for the appeal and why the appellant feels that the administrative nonuse variance approval does not meet the nonuse variance criteria of City Code Section 7.5.802.B including (but not limited to):

- Incorrect measurements on the nonuse variance application site plan - the retaining wall is 22 inches to 23 inches at the tallest point, not 18 inches as represented by the applicant.
- Physical conditions due to topography were self-imposed and therefore do not meet the nonuse variance criteria. The retaining wall was constructed by the current owner when a concrete driveway was poured replacing the gravel driveway.
- No structural engineering was submitted stating the retaining wall was necessary to stabilize the driveway apron. Other driveways in the neighborhood don't require retaining walls.
- The site plan shows a 5-foot easement on the applicant's property and the retaining wall is on the property line within that easement. The fence can be moved 3 feet from the retaining wall or cut down to meet City Code without impacting the driveway.
- Disagrees that the fence is needed for security; 6 feet is adequate for security.
- Disagrees that there are other similar retaining walls/fence combinations in the neighborhood.
- Disagrees that there is no negative impact. The property at 17 Marland (CPC appellant) is on the downhill side and there is an adverse impact because they see the retaining wall. The wall is crumbling and eroding and is a safety concern. The retaining wall is causing drainage issues.

The appellant to City Council and owner at 21 Marland submitted an appeal of the Planning Commission's decision to deny the nonuse variance (by their upholding of the appeal). The appeal letter is attached (See attached City Council Appeal\_21 Marland Letter and Exhibits A-N). The letter states that the City Planning Commission's decision to uphold the original appeal and thus deny the nonuse variance was unreasonable per the appeal criteria in City Code Section 7.5.906.A.4 and that the request meets the nonuse variance criteria of City Code Section 7.5.802.B. Those reasons

outlined in the appeal letter include (but are not limited to):

- The ability to access the garage with a large SUV; the expansion of the driveway necessitates that needed access. Because of expanding the driveway towards the property line, the retaining wall was required. It cannot be setback 3 feet from the retaining wall because an overhang is still needed for vehicle maneuvering.
- The fence serves as a buffer to the neighboring property; keeps balls from bouncing into the neighbor's yard, and keeps 3 boys and 2 dogs in the yard. Provides privacy and security. If cut down to meet code, the cedar fence would only be 4 feet and would not adequately serve its purpose.
- Moving the fence in 3 feet from the retaining wall creates 3 feet of property that is impossible to access and maintain adjacent to the neighbor's property.
- It took 2 years for the neighbors to complain, if it was causing an adverse impact why did it take 2 years to file a formal complaint with the City?
- Drainage is not impacted by the fence height as the retaining wall is permitted where it has been constructed.
- Because no building permits were required, the owner did not know of the fence height regulations and was not advised as such by the contractor.

Staff approved the nonuse variance in December of 2020 finding that the request meets the nonuse variance criteria as established in City Code Section 7.5.802.B in the following ways:

*Property has extraordinary or exceptional physical conditions that do not generally exist in nearby properties in the same zoning district.*

The unique physical condition staff considered related to this criterion is the size and location of the existing home and attached garage related to the owner's ability to reasonably access the garage. The attached garage is facing the side property line (side-loaded garage). There is approximately 35 feet from the face of the garage to the property line. Due to the tight turning radius of the garage, the owner expanded the driveway into that 35 feet for better maneuverability (The attached aerial map shows the current layout and layout prior to 2018 with dimensions). The fence is needed for maneuvering safety and overall use of the driveway; serving as a buffer and blocking the neighboring property from the use of the driveway. The nonuse variance states that the fence cannot be moved closer to the driveway (thus 3 feet from the retaining wall) because overhang space is required for maneuvering. Due to the property at 21 Marland sitting higher than the neighboring property to the north, the 6-foot cedar fence also serves to block any negative impact from vehicles and activities occurring in the driveway.

Staff specifically considered City Code Section 7.5.801.E., Guidelines for Review of a Nonuse Variance. Below are excerpts from Code based on the specific guidelines that staff made findings on:

*7.5.801.E.1 - Extraordinary Or Exceptional Physical Conditions:*

- a. The physical conditions of the property shall not be conditions general to the neighborhood or surrounding properties.*

- b. The unique physical conditions of the property may be its size, shape, location, topography, soils.*
- c. 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.*

**7.5.801.E.2 - No Reasonable Use:**

- b. The concept of less reasonable use may be considered if a neighborhood standard exists and if it is demonstrated that the property in question has a less reasonable use by comparison with proximate and similar properties in the same zoning district.*
- d. Self-imposed conditions such as prior voluntary rezoning, platting, or building in violation of City codes and ordinances do not constitute evidence of no reasonable use.*
- e. Knowledge, or lack of knowledge, of zoning restrictions and physical site constraints at the time the property is purchased is immaterial to evidence of no reasonable use of the property.*

*The extraordinary or exceptional physical condition of the property will not allow reasonable use of the property in its current zone in the absence of relief.*

Staff found that the maneuvering and use of the garage space is a condition that is reasonable to mitigate by extending the driveway and allowing vehicle overhang by stacking the 6-foot cedar fence on top of the retaining wall. If the fence were lowered, it would then be approximately 4 feet tall facing 21 Marland. A 4-foot cedar fence would not mitigate noise or light impacts to the neighboring property to the north. Staff cannot speak to if the retaining wall was required in order to stabilize the driveway construction. Staff can only speak to the decision to allow the fence adjacent to the retaining wall for screening and safety of maneuvering due to this property being higher than the neighbor to the north. Because a building permit is not required for a retaining wall of this height, staff has no way to evaluate any impacts to the wall based on the location of the fence not being 3 feet away.

*The granting of the variance will not have an adverse impact upon surrounding properties.*

Staff found that not granting the variance could have an adverse impact. Staff specifically considered City Code Section 7.5.801.D.2.b, Additional Criteria and Guidelines for Regulations of Vehicle Parking and Storage, Guidelines for Review of Variances, No Adverse Impact:

*(5) Visual barriers may be existing on-site, or proposed by the applicant, such as vegetation, opaque walls, or fencing which have a positive effect toward screening of the vehicle.*

There are no regulations in Code for how far a driveway can be from a property line or neighboring home. The home to the north, 17 Marland, is approximately 20 feet from the adjacent property line and approximately 27 feet from the edge of the driveway. The owner of 21 Marland is using all of that drive area to maneuver in and out of the garage. Due to the grade difference (21 Marland is higher than 17 Marland) the 6-foot fence serves as mitigation and a buffer to the adjacent property. While drainage issues were mentioned in the original appeal, retaining walls less than 4 feet in height are permitted to be constructed on or adjacent to a property line without a building permit. The granting of the variance does not impact the location of the retaining wall and the wall would not need to be removed if the nonuse variance is denied.

There are similar examples of this condition in the area; several short retaining walls with a fence within 3 feet. These examples are used in differing applications but the visual effect is similar. The home directly to the north (17 Marland) was constructed in 2007 and has the same side-loaded garage as 21 Marland. This driveway is approximately the same width and distance from the northern property line. While a retaining wall may not have been needed due to the grade, it is reasonable to assume the construction of a similar scenario for 21 Marland and the mitigation required due to grade differences is reasonable and not adverse to the neighborhood.

When the nonuse variance application and plan were submitted by the property owner the plan showed that the retaining wall was 40 feet long and between 8 inches and 18 inches tall. Based on this information as submitted by the applicant, staff approved the nonuse variance. However, at the City Planning Commission hearing, the appellant (17 Marland) stated that was false; that the wall is 60 feet long and between 8 inches and 24 inches at the tallest point, thus changing the maximum height of the fence. After review by the owner (21 Marland), the information provided at the City Planning Commission appears to be accurate and the original nonuse variance included erroneous information. The owner of 21 Marland is willing to update the approved site plan showing that the fence, at the tallest point, is 8 feet tall. This is a 6-inch difference in the overall height; the cedar fence remains 6-foot tall. If Council upholds the nonuse variance, staff will work with the owner to correct the site plan.

Two proposed motions are being included below. A motion to deny the appeal and uphold the City Planning Commission decision and a motion to uphold the appeal, thus approving the nonuse variance based on the original approval by staff.

**Previous Council Action:**

N/A

**Financial Implications:**

N/A

**City Council Appointed Board/Commission/Committee Recommendation:**

The City Planning Commission held an appeal hearing on January 21, 2021. At the hearing, the City Planning Commission voted 4-3 to uphold the appeal, thus denying the nonuse variance for the existing fence. Commissioners Ricket, Slattery, Almy, and Eubanks voted to uphold the appeal, while Hente, Graham, and Wilson voted to deny the appeal (Raughton and McMurray excused).

There was very little discussion on the appeal and how the commissioners felt the appeal did or did not meet the review criteria. Commissioner Ricket made the motion to uphold the appeal and stated that he understands that variances from code can be granted, but felt that there were several options for this fence and stated that he was voting to stick with code on this one. Commissioner Wilson voted to deny the appeal stating that she felt like the approval of the nonuse variance was legitimate.

Minutes from the hearing are attached.

**Stakeholder Process:**

The public process involved with the review of the nonuse variance application included posting the

site and sending postcards to neighbors within 150 feet of the property in question. A total of 9 property owners were notified. A nonuse variance public notification poster was posted in the front yard for ten days. During the internal review stage, staff received several comments in opposition as well as a voicemail message of support. The site was again be posted and notification sent prior to the public hearings.

**Alternatives:**

1. Deny the appeal and uphold the action of the City Planning Commission - denying of the appeal will essentially disapprove the project as proposed;
2. Modify the decision of the City Planning Commission;
3. Grant the appeal and reverse the action of the City Planning Commission - granting the appeal will essentially approve the project as proposed; or
4. Refer the matter back to the City Planning Commission for further consideration.

**Proposed Motion:**

Uphold the appeal, thus upholding the administrative approval of the nonuse variance for a 6-foot fence within 3 feet of the face of a retaining wall, based upon the findings that the appeal meets the appeal criteria set forth in City Code Section 7.5.906.A.4 and the nonuse variance criteria in City Code Section 7.5.802.B.

Deny the appeal, thus denying the administrative approval of the nonuse variance for a 6-foot fence within 3 feet of the face of a retaining wall, based upon the findings that the appeal does meet the appeal criteria set forth in City Code Section 7.5.906.A.4 and does not meet the nonuse variance criteria in City Code Section 7.5.802.B.

N/A