

City of Greeley, Colorado
ZONING BOARD OF APPEALS PROCEEDINGS

July 27, 2021

I. Call to Order

Chair Yeater called the remote meeting to order at 3:00 p.m. via the City's Zoom platform following adjournment of the Planning Commission meeting.

II. Roll Call

The hearing clerk called the roll.

PRESENT

Chair Justin Yeater
Commissioner Louisa Andersen
Commissioner Larry Modlin
Commissioner Chelsie Romulo
Commissioner Christian Schulte

ABSENT

Commissioner Erik Briscoe
Commissioner Brian Franzen

III. Approval of Agenda

The agenda was approved during the Planning Commission meeting.

IV. Approval of April 13, 2021 Minutes

Commissioner Andersen moved to approve the minutes dated April 13, 2021. Commissioner Romulo seconded the motion. Motion carried 5-0.

V. Public hearing to consider a variance request to allow up to a 9.6-foot fence/wall in the R-L (Residential Low Density) zone district

Project: 2015 27th Avenue Height Variance
Case No.: VAR2021-0005
Applicant: Jared Mortell
Location: 2015 27th Avenue
Presenters: Kira Stoller, Planner II

Kira Stoller addressed the Board and introduced the request for a height variance. She noted that the agenda and notices reference a 9.6-foot wall and clarified that it only applies to the area along the northern property line, adding that more details would be provided during the presentation. She presented a map of the site and described the surrounding land uses.

By way of background, Ms. Stoller advised that the applicant is requesting a variance to install a fence on top of a concrete wall that would have a combined height of 8 to 10.6 feet. She noted that the height difference is due to a change in grade on the site, which decreases about 5 feet from the south side of the lot to the north. Ms. Stoller stated that fences over 6 feet in height require approval of a variance measured on the grade that exists at the time of construction. Any wall constructed for the purpose of increasing the height of a fence is considered part of a fence or wall. Ms. Stoller advised that the concrete retaining wall, already constructed and less than 6 feet in height, does not trigger the need for a variance on its own. She added that since the retaining wall is over 4 feet tall, a building permit is required. A building permit submitted after construction of the wall has not yet been approved.

Ms. Stoller presented several photographs of the retaining wall already constructed along the northern property line that depicted the gradual slope on the site. Other photographs included the previous site conditions along the northern property line and the retaining wall that has historically existed along the rear property line situated on a neighboring property to the west. She presented photographs showing the retaining wall that has been constructed along the northern property line with fence posts installed to secure a 5-foot vinyl fence on top of the wall for a combined height of 9.6 feet, beginning at the leading edge of the garage and moving west toward the rear property line. Ms. Stoller advised that the fence and wall are not proposed to extend beyond the front of the house. She noted that the area between the home and the wall would be filled with dirt, leaving 7 inches of the retaining wall visible from the subject site. She added that up to 56 inches of the wall would be visible from the neighboring property to the north. Ms. Stoller reported that, on its own, the wall is less than six feet and may be allowed to remain in place, whether or not a variance request is approved, if other conditions are met as part of the building permit. Ms. Stoller presented photographs showing a portion of the retaining wall already constructed along the western property line and stated that the applicant proposes to construct a 6-foot vinyl fence on the new retaining wall for a combined total of 10.6 feet along the rear property line with up to 56 inches of the wall visible to the neighboring property to the west.

Ms. Stoller advised that the wall may remain in place provided that, at a minimum, the following is completed in conjunction with approval of a building permit: 1) engineered plans for the full wall to be submitted for review, 2) easement encroachment to be approved by all applicable utility providers as a portion of wall is situated within 15 feet of drainage and utility easements on the property, 3) exposed sections of concrete wall to be improved with a decorative finish, 4) fence posts currently shown on top of the wall to be removed.

Ms. Stoller presented a site plan provided by the applicant and pointed out the areas where the retaining wall had already been constructed along the north property line and a portion of the western boundary. She added that nothing has been constructed on the southern property line, but noted an existing fence that exceeds six feet in height that would not be permitted to be rebuilt without a variance. Based on code regulations, the combined height of the retaining

wall and fence would be 9.6 feet on the north, 10.6 on the west and 8 feet on south property lines. Ms. Stoller advised that the site plan differs from existing field conditions as it only makes note of measurements as viewed from the subject site.

Mr. Stoller described the approval criteria in Section 24-516(f) and advised that the request does not meet variance consideration criteria 1, 2, 3, 4 or 5. She added that the request does not meet mandatory criteria 1, 2 or 3. Notice of the hearing was accomplished with one citizen voicing opposition (included as part of the staff report). Staff recommended denial of the request.

Commissioner Andersen asked whether building the wall without a permit was an oversight. Ms. Stoller reported that the applicant had reached out to staff in the summer of 2020 asking whether a permit was required to erect a fence. She noted that a permit is not required for a fence, but is required for a retaining wall that exceeds 4 feet in height. She opined that the plans changed between last summer and now which lead to the current situation. Upon question by Chair Yeater, Ms. Stoller reported that she believed the wall was built by a contractor, adding that the applicant could confirm.

Upon question by Commissioner Andersen, Ms. Stoller stated that the city became aware of the situation when a building inspector was doing rounds and discovered that there was not a permit on file and a stop work order was issued. Commissioner Andersen asked whether it is common for a contractor to pour concrete without a permit. Ms. Stoller reported that there have been occasions when flatwork is poured and a resident expresses that they are unaware of the requirement for a permit. Chair Yeater noted the obvious changes to the grade and asked whether a new drainage plan had been submitted. Ms. Stoller reported that the applicant was proposing some drainage improvements to the site, adding that the presentation of the next item would address the drainage issue in more detail. She advised that Lauren Hillmer was available to speak to the question.

Lauren Hillmer, formerly with Engineering Development Review, addressed the Board and indicated that there was not a drainage plan as part of the variance request, but would become a condition if the applicant were able to keep the retaining plan in place. Chair Yeater observed that it appeared water historically traveled along the back property lines of all properties and that the change in grade now impacted properties on both sides of the subject property. Ms. Hillmer stated that historical flows from the subject property flowed to the street on 27th Avenue and believed that was part of the applicant's proposal. She agreed that building the wall is changing the historic drainage on the site.

Commissioner Andersen noted that if the wall meets building permit standards, Planning staff is requesting a decorative wall. She asked whether that would be on the portion facing the applicant's property or on the portion facing away from the applicant's property. Ms. Stoller advised that the way the code is written, the decorative finish would apply to the exterior side facing away from the applicant's property.

Commissioner Schulte asked for clarification that the process to decide on a retroactive building permit was not the issue before the Board. Ms. Stoller confirmed that to be the case. She added that because the wall does not exceed 6 feet in height, it is not part of the variance request. The variance is only because the applicant proposes to install a fence on top of the existing retaining wall. Ms. Stoller stated that because the wall is over the 4-foot measure, a building permit is required with conditions as part of that approval process to ensure that it is improved appropriately. She explained that the Board consideration does not have to do with whether the wall can remain in place, but is whether or not a fence can be placed on top of the wall. Commissioner Schulte asked why the placement of a fence is being considered before it is determined that the wall is allowed to remain. Ms. Stoller stated that the reason planning staff did not sign off on the building permit that was submitted retroactively was because the applicant indicated a desire to place a fence on top of the wall which triggered the application for a variance. She added that until there was clarity on that issue, staff did not want to approve a building permit.

Chair Yeater asked whether some type of fence or railing would need to be in place to meet any safety codes based upon the height of the wall if the wall were to remain in place and the Board denies the height of the fence. Ms. Stoller was not aware of anything in the development code standards. Brad Mueller, Community Development Director, addressed the Board indicating that this falls under the building code and stated that Tim Swanson, Chief Building Official, was in attendance and could respond. Mr. Swanson advised that since this is not a typical walking surface, but more of a landscape feature, the building code does not come into play.

Upon question by Commissioner Andersen, Ms. Stoller advised that the applicant intends to remove the existing fence posts from the front of the garage to the street and no longer wishes to proceed with any fencing in front of the house. She added that the applicant proposes fencing to begin at the front of the garage and move back toward the rear of the lot.

Referencing the information in the packet that the proposal does not meet any of the criteria, Commissioner Romulo asked whether the process to build the wall would stop if the height variance is denied. Ms. Stoller advised that staff paused approval of the permit for the wall until it could be established whether other elements would be proposed. She added that staff sought action by the Board in order to determine what requirements might be applied to the building permit. Upon question by Commissioner Schulte, Ms. Stoller advised that the permit for the wall could be approved administratively if the applicant met all conditions associated with the building permit.

Chair Yeater invited the applicant to share any further details. The applicant declined the opportunity to address the Board.

Chair Yeater opened the public hearing at 3:20 p.m. There being no comments, the public hearing was closed at 3:20 p.m.

Commissioner Schulte observed that ordinarily when there is a variance request, there has usually been a recommendation for approval and there is discussion in the mandatory criteria section that the Board implicitly adopts as findings for approval. He suggested that if any commissioner was contemplating a recommendation of approval, it might be incumbent upon them to address each of the mandatory criteria in the motion prior to a vote. Assistant City Attorney, Michael Axelrad, agreed. Commissioner Schulte stated that any motion recommending approval would need to include for the record the mandatory criteria that had been met. Mr. Mueller advised that a motion can be in any format desired by the Board and that the motion in the packet is only a recommendation. He agreed with Commissioner Schulte that if there is a motion other than the recommended motion, it is a best practice to list all of the criteria.

Commissioner Andersen moved that, based on the application received and the preceding analysis, the Zoning Board of Appeals finds that the requested variance to allow for up to a 10.6 foot tall fence/wall, where 6 feet is allowed, does not comply with Section 24-516(f) or (g) of the Development Code; and, therefore, denies the request. Commissioner Schulte seconded the motion.

Commissioner Schulte expressed that the information in front of the Board does not provide evidence to support the underlying criteria and that he would have to vote in favor of the motion being presented. He added that he typically errs on the side of a landowner's right, but in this case, there is an aggrieved neighbor. Commissioner Romulo confirmed that the issue pertains specifically to the height and that the building of the wall can proceed.

Motion carried 5-0.

VI. Public hearing to consider a variance request to allow for a 3-foot reduction from the required interior side parking setback, from three to zero feet in the R-L (Residential Low Density) zone district

Project: 2015 27th Avenue Setback Variance

Case No.: VAR2021-0011

Applicant: Jared Mortell

Location: 2015 27th Avenue

Presenters: Kira Stoller, Planner II

Ms. Stoller addressed the Commission and described the request for a setback variance. She presented a map showing the site and surrounding area.

Ms. Stoller advised that the request is to reduce the required 3-foot interior side parking setback to zero feet. Ms. Stoller stated that the applicant indicated the property has experienced erosion issues along the northern side of the house which has also damaged the existing driveway. She added that a retaining wall has been constructed along the northern property line and the applicant wishes to extend the driveway up to the wall to address the erosion problem.

Ms. Stoller presented photographs showing the area of the proposed driveway extension, noting that it would extend to the retaining wall. She presented a drawing of the proposed driveway extension showing the slope and added that the applicant proposes to install a drainage pipe under the driveway extension to route water away from the site.

Ms. Stoller presented the approval criteria and reported that the variance request does not meet any of the consideration criteria. She explained the rationale used by staff to determine that each criteria had not been met. Ms. Stoller reported that the request meets all of the mandatory criteria.

Notice of the hearing was accomplished. Staff recommended approval based on the request meeting all of the mandatory criteria.

Chair Yeater asked for clarification about the request, observing that but for the retaining wall that was already installed, the mandatory requirements might not have been met. Ms. Stoller stated that if the retaining wall was not in place, the discussion might be slightly different, adding that because of the retaining wall, there was potential for negative drainage impacts. Staff determined that it was in the best interest to approve the setback request to extend the driveway rather than require a 3-foot separation between the driveway and the wall. Chair Yeater again sought to clarify that the mandatory criteria had been met only because of the location of the retaining wall that had already been installed. Ms. Stoller affirmed and stated that the reason for keeping the requests separate was that, while they might have been considered together, the drainage matter applies more to the second request. She added that if there is a way for the wall to remain in place with a corresponding building permit, that should be factored into the second request.

Commissioner Schulte observed that the applicant might have constructed the retaining wall due to accumulating erosion issues that may not have been present when the house was built. Ms. Stoller expressed that was her understanding, but noted that staff was not provided with much documentation to confirm. She stated that the applicant could describe how the property has changed over time. Commissioner Schulte noted that it would seem odd to incur an expense if the owner did not perceive a problem that needed to be addressed.

Commissioner Andersen asked whether the recommendation for approval was intended to allow a simpler remedy than to tear out the wall. Ms. Stoller advised that in the event the request is denied, there are other drainage options that might not require tearing out the wall. She added that staff saw a potential for more problems in the future if the request is not granted. Commissioner Andersen asked whether the concrete would extend all the way along the north side of the house to the back yard. Ms. Stoller reported that the request pertained to the front of the house to service the driveway extension, adding that code allows paving closer than three feet to a property line if it is not associated with a driveway extension.

Upon question by Commissioner Romulo, Ms. Stoller advised that staff would obtain clarity on a proposed drainage plan before a building permit is issued. Upon question by Commissioner Schulte, Ms. Stoller reported that the driveway extension would cover most of the sloping area from the house to the street, allowing water to flow toward the street.

Commissioner Andersen expressed her understanding that there would be an engineered drain structure underneath driveway and Ms. Stoller stated that was correct. Chair Yeater asked if that was to capture gutter water, or to capture runoff that goes around the house, hits an elevated driveway, and comes around to the front, or both. Ms. Stoller understood that it was to catch gutter water, but could not speak to the other component. Ms. Hillmer expressed her understanding that it was only to capture water from the gutter. Chair Yeater asked if staff could envision any other way to get water from the back of the house to the front of the house if the driveway is extended across. Ms. Hiller responded that unless the area was quickly stabilized after being filled in, any runoff would cause erosion. She added that it takes a while for grass to be established.

Chair Yeater stated he could not envision any other way to drain the property without extending the retaining wall and asked whether approval of the request essentially allowed extension of the retaining wall around the rest of the property. Ms. Stoller asked whether Chair Yeater was referring to the wall as it currently stands or elsewhere on the site. Chair Yeater responded that he was speaking to both since a drainage plan was not submitted. From a review of the photographs and the retaining wall already in place, Chair Yeater stated that he could not envision drainage toward the front of the property with the existing retaining wall and driveway extension unless the plan was to take water and push it to the north toward the adjacent property and run off that side. Ms. Stoller recalled that the contours for the site allowed some drainage to the west as well, adding that water behind the house drains west and in front of the house drains toward the east. Chair Yeater agreed that was the historical flow, but noted that has changed with the retaining wall. Ms. Stoller understood that the applicant intends to have something similar to the historic pattern, but stated that staff will require more information to know what that will look like. Chair Yeater asked if an approval of the request was also an approval of the retaining wall, as he could not see another drainage plan that would work. Ms. Stoller advised that since the retaining wall is hinged upon approval of a building permit and staff sees no reason to deny the building permit, it could be assumed that the retaining wall will remain in place.

The applicant, Jared Mortell, 2015 27th Avenue, addressed the Board and spoke to the drainage concern. He stated that the north side of the house will be concrete and slope to the east, while drainage would go toward the west in the back of the house. Mr. Mortell advised that all drainage would stay off the north part of the retaining wall, adding that drainage from the back of the house to the front flows east down the driveway and drainage in the back flows west and stays off the northern retaining wall. Upon question by Chair Yeater, Mr. Mortell advised that he was trying to mirror the historical drainage. He stated the house

was over 50 years old and the foundation was starting to become exposed. Mr. Mortell explained that the retaining wall was put in place to stop the north side from eroding and drain to the west and east. Upon question by Commissioner Andersen, Mr. Mortell explained that there was not a full retaining wall across the back of the property, but only on one corner and a small section on the west with relief vents every four feet for water to pass and carry to the west.

Chair Yeater opened the public hearing at 3:46 p.m. There being no public comment, the public hearing was closed at 3:46 p.m.

Commissioner Andersen noted that the motion seemed appropriate and that keeping the wall and a properly engineered driveway would likely alleviate any erosion issues. Commissioner Schulte respectfully disagreed with the assessment of staff that none of the consideration criteria had been met, as he believed the applicant met consideration criteria 2 and 3.

Commissioner Andersen moved that, based on the application received and the preceding analysis, the Zoning Board of Appeals finds that the requested variance to allow for a three (3) foot reduction from the required interior side parking setback complies with Section 24-516(g), Items 1, 2 and 3 of the Development Code; and, therefore, approves the request. Commissioner Schulte seconded the motion.

Chair Yeater indicated that he would support the motion, but disagreed slightly with Commissioner Schulte's assessment. He stated that the action was ultimately approving the wall and felt it would have been appropriate for staff to approve or disapprove the wall and allow the Board to vote on the wall height and the driveway extension. Chair Yeater indicated that the request for a driveway extension is appropriate, but the way it was put in place essentially created an approval of the wall. He added that he would like to have seen both items put in place so that the Board could devote its attention to both. Chair Yeater stated that although he agrees with Commissioner Schulte's assessment that an owner has a right to use property as they see fit, he did not feel that this would be harmful to the adjacent property owner. For those reasons, he advised that he would support the request.

Motion carried 5-0.

VII. Staff Report

Mr. Mueller thanked the Commissioners for addressing the code update and commended them, staff and the consultant for the fantastic effort to date.

He advised that today will be his last meeting and expressed that it has been a privilege to work with this group over the years and that he appreciated how much the Planning Commission and Zoning Board dig into issues and seek a high level of educational opportunities.

Mr. Mueller introduced Becky Safarik who will serve as interim director until a permanent replacement is hired. Ms. Safarik greeted the Commission and stated that she previously held this role for a little over 35 years and intended to keep things running smoothly. She was excited to see the attention paid by the Commission in how the city takes form and expressed her intention to support the Commission and staff in their efforts to complete their work. She invited the commissioners to reach out to her if they felt there were matters requiring her attention. Chair Yeater welcomed Ms. Safarik. Commissioners Modlin, Schulte and Andersen thanked Mr. Mueller for his assistance and guidance over the years and wished him luck in his future endeavors.

VIII. Adjournment

With no further business before the Commission, Chair Yeater adjourned the meeting at 3:59 p.m.

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Justin Yeater
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Justin Yeater, Chair

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Becky Safarik, for Brad Mueller, Secretary