

**Notice of Decision
City Council
City of Albuquerque
January 25, 2021**

AC-20-13 Project PR-2020-004198, VA-2020-00246: Walter Gallegos, appeals the Zoning Hearing Examiner's decision to approve a variance of 3 ft to the 3 ft maximum wall height upon the real property located at 3812 Zion Ct NE

Decision


On January 4, 2021, by a vote of 9 FOR and 0 AGAINST the City Council voted to reverse the decision of the zoning hearing examiner by accepting and adopting the recommendation and findings of the Land Use Hearing Officer

IT IS THEREFORE ORDERED THAT WALL HEIGHT VARIANCE IS DENIED

Attachments

1. Action Summary from the January 4, 2021 City Council Meeting
2. Land Use Hearing Officer's Decision

A person aggrieved by this decision may appeal the decision to the Second Judicial District Court by filing in the Court a notice of appeal within thirty (30) days from the date this decision is filed with the City Clerk.



Cynthia D. Borrego, President
City Council

Date: 1-25-21

Received by: 

City Clerk's Office

Date: 01/25/21

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CITY CLERK'S OFFICE
JAN 26 2021 PM 1:07



City of Albuquerque

Albuquerque/Bernalillo
County
Government Center
One Civic Plaza
Albuquerque, NM 87102

Action Summary

City Council

Council President, Cynthia D. Borrego, District 5
Vice-President, Diane G. Gibson, District 7

Lan Sena, District 1; Isaac Benton, District 2
Klarissa J. Peña, District 3; Brook Bassan, District 4
Pat Davis, District 6; Trudy E. Jones, District 8
Don Harris, District 9

Monday, January 4, 2021

3:00 PM

Via Zoom Video Conference

TWENTY-FOURTH COUNCIL - TWENTY-FOURTH MEETING

1. ROLL CALL

Present 9 - Brook Bassan, Isaac Benton, Cynthia Borrego, Patrick Davis, Diane Gibson, Don Harris, Trudy Jones, Klarissa Peña, and Lan Sena

2. MOMENT OF SILENCE

Councilor Borrego led the Council in the Pledge of Allegiance in English and Spanish.

3. PROCLAMATIONS & PRESENTATIONS

Presentation of Gifts

President Davis thanked the 2020 Committee Chairs for their service, Councilor Gibson for serving as Chair of the Finance & Government Operations Committee, Councilor Sena for serving as Chair of the Public Safety Committee, Councilor Jones for serving as Chair of the Land Use, Planning & Zoning Committee, and Councilor Benton for serving as Chair of the Committee of the Whole.

President Davis also thanked Councilor Gibson for serving as Vice-President of the Council in 2020.

Vice-President Gibson thanked Councilor Davis for serving as President of the Council in 2020.

15. OTHER BUSINESS: {Reports, Presentations, and Other Items}

a. Election of President and Vice-President

President Davis read the rules for the election of President, Vice-President and Chair

of the Committee of the Whole.

President Davis opened the floor for nominations for Council President.

Councilor Benton nominated Councilor Davis.

Councilor Peña nominated Councilor Borrego.

Councilor Borrego was elected President by the following 5-4 vote:

Councilor Davis:

Isaac Benton

Patrick Davis

Diane Gibson

Trudy Jones

Councilor Borrego:

Brook Bassan

Cynthia Borrego

Don Harris

Klarissa Peña

Lan Sena

Councilor Davis opened the floor for nominations for Council Vice-President.

Councilor Peña nominated Councilor Bassan.

Councilor Benton nominated Councilor Gibson.

Councilor Gibson was elected Vice-President by the following 5-4 vote:

Councilor Bassan:

Brook Bassan

Cynthia Borrego

Don Harris

Klarissa Peña

Councilor Gibson:

Isaac Benton

Pat Davis

Diane Gibson

Trudy Jones

Lan Sena

b. Election of Chair of the Committee of the Whole

Councilor Davis opened the floor for nominations for Chair of the Committee of the Whole.

President Borrego nominated Councilor Peña.

Councilor Davis nominated Councilor Benton.

Councilor Peña was elected Chair of the Committee of the Whole by the following 5-4 vote:

Councilor Peña:

Brook Bassan

Cynthia Borrego

Don Harris

Klarissa Peña

Lan Sena

Councilor Benton:

Isaac Benton

Pat Davis

Diane Gibson

Trudy Jones

c. Approval of Committee Appointments

A motion was made by President Borrego that the rules be suspended for the purpose of deferring the Approval of the Committee Appointments to the January 20, 2021 Council meeting and that the current make-up of the Council Committees remain in place until the new Committee Appointments are approved. The motion carried by the following vote:

For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

4. ECONOMIC DEVELOPMENT DISCUSSION

5. ADMINISTRATION QUESTION & ANSWER PERIOD

6. APPROVAL OF JOURNAL

December 7, 2020

7. COMMUNICATIONS AND INTRODUCTIONS

8. REPORTS OF COMMITTEES

Public Safety Committee - December 15, 2020

Deferrals/Withdrawals

- b. O-20-46 Adding Article 20 Of Chapter 13 Of The Revised Ordinances Of Albuquerque To Add Part 1 Creating The Albuquerque Tax Preparers And Consumer Rights Ordinance (Davis, by request)
- A motion was made by Councilor Davis that this matter be Postponed to February 1, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- d. R-20-18 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 5609 Everitt Rd NW 87120 Within The City Limits Of Albuquerque, New Mexico Is So Ruined, Damaged And Dilapidated As To Be A Menace To The Public Comfort, Health, Peace Or Safety And That It Is To Be Required To Be Removed (Borrego, by request)
- A motion was made by Councilor Sena that this matter be Postponed to February 1, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- e. R-20-22 A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 412 Georgia St SE Within The City Limits Of Albuquerque, New Mexico Is So Ruined, Damaged And Dilapidated As To Be A Menace To The Public Comfort, Health, Peace Or Safety And That It Is To Be Required To Be Removed (Davis, by request)
- A motion was made by Councilor Davis that this matter be Postponed to March 1, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- f. R-20-85 Supplementing Priorities For The Capital Implementation Program Of The City Of Albuquerque By Implementing A Racial Equity Criterion To Be Used In The Development Of The Plan (Peña, Sena)
- A motion was made by Councilor Peña that this matter be Postponed to January 20, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- a. O-20-41 Amending Sections 14-7-1-1, 14-7-1-2, 14-7-1-3, 14-7-1-4, 14-7-1-5, 14-7-2-2, And 14-7-2-3 Of The Selection Advisory Committee Ordinance To Incorporate Design-Build Services Into The Selection Advisory Committee Process (Benton, by request)
- A motion was made by Councilor Benton that this matter be Postponed to February 1, 2021. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

9. CONSENT AGENDA: {Items may be removed at the request of any Councilor}

- a. EC-20-214 By Request for CSD Media Resources Approval of the Second Supplemental Agreement with Proview Networks, LLC
- A motion was made by Vice-President Gibson that this matter be Approved.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- b. EC-20-215 Mayor's Appointment of Mrs. Yvette Nunez to the Albuquerque Housing Authority Board
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- c. EC-20-216 Mayor's Appointment of Mr. Bill Miera to the Albuquerque Development Commission
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- *d. EC-20-227 Mayor's Recommendation of Award to McGriff, Seibels & Williams, Inc. for "Group Benefits Consultant"
- A motion was made by Vice-President Gibson that this matter be Approved.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- e. OC-20-17 Reappointment of Joseph T. Griego to the Information Services Committee
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- f. OC-20-20 Correction of Joseph Cruz to the Environmental Planning Commission
- A motion was made by Vice-President Gibson that this matter be Approved.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- g. OC-20-21 Reappointment of Richard Meadows to the Environmental Planning Commission
- A motion was made by Vice-President Gibson that this matter be Confirmed.
The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

- h. OC-20-22 Reappointment of David Shaffer to the Environmental Planning Commission
- A motion was made by Vice-President Gibson that this matter be Confirmed. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

10. GENERAL PUBLIC COMMENTS

11. ANNOUNCEMENTS

12. PUBLIC HEARINGS: {Appeals, SAD Protest Hearings}

- a. AC-20-13 Project PR-2020-004198, VA-2020-00246: Walter Gallegos, appeals the Zoning Hearing Examiner's decision to approve a variance of 3 ft to the 3 ft maximum wall height upon the real property located at 3812 Zion Ct NE
- A motion was made by Councilor Benton that this matter be To Accept the Land Use Hearing Officer Recommendation and Findings. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena

13. APPROVALS: {Contracts, Agreements, and Appointments}

14. FINAL ACTIONS

- c. O-20-47 Amending The Albuquerque Human Rights Ordinance To Prohibit Discrimination Based On Racial And Cultural Attributes Associated With Hair Types, Styles, And Headresses ("Crown Act Amendments") (Sena)
- A motion was made by Councilor Sena that this matter be Passed. The motion carried by the following vote:
- For: 9 - Bassan, Benton, Borrego, Davis, Gibson, Harris, Jones, Peña, and Sena
- g. R-20-113 Establishing Federal Programming And Policy Priorities For The City Of Albuquerque For Federal Fiscal Years 2021/2022 (Peña)
- A motion was made by Councilor Peña that this matter be Amended. Councilor Peña moved Amendment No. 1. The motion carried by the following vote:
- For: 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena
- Excused: 1 - Gibson
- A motion was made by Councilor Peña that this matter be Amended. Councilor Peña moved Amendment No. 2. The motion carried by the following vote:
- For: 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena

Excused: 1 - Gibson

A motion was made by Councilor Peña that this matter be Passed as Amended. The motion carried by the following vote:

For: 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena

Excused: 1 - Gibson

h. R-20-119

Requiring Communication Of Intra-Year Administrative Rate And Fee Adjustments To The City Council Prior To Implementation (Davis)

A motion was made by Councilor Davis that this matter be Passed. The motion carried by the following vote:

For: 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena

Excused: 1 - Gibson

i. R-20-120

Considering Whether R-19-217 (Enactment R-2020-078), Which Determined That A Nuisance, Substandard Dwelling Or Structure In Need Of Abatement At 318 Mesilla St NE 87108 Within The City Limits Of Albuquerque, New Mexico, Is So Ruined, Damaged And Dilapidated As To Be A Menace To The Public Comfort, Health, Peace Or Safety And That It Is To Be Required To Be Removed, Should Be Enforced Or Rescinded (Davis)

A motion was made by Councilor Davis that this matter be Passed. The motion failed by the following vote:

For: 1 - Peña

Against: 7 - Bassan, Benton, Borrego, Davis, Harris, Jones, and Sena

Excused: 1 - Gibson

j. R-20-121

Requesting That The City Of Albuquerque And The New Mexico Department Of Transportation Establish The Development Of New Mexico State Highway 45, (Coors Road) Between Central Avenue And The Intersection With Old Coors Road As A Priority. Requiring The City Of Albuquerque To Develop And Enter Into An Agreement To Upgrade This Segment Of Coors To Urban Arterial Standards (Peña)

A motion was made by Councilor Peña that this matter be Substituted. Councilor Peña withdrew her motion.

A motion was made by Councilor Peña that this matter be Postponed to January 20, 2021. The motion carried by the following vote:

For: 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena

Excused: 1 - Gibson

***k. R-20-126**

Amending The Adopted Capital Implementation Program Of The City Of Albuquerque By Supplementing Current Appropriations (Benton)

A motion was made by Councilor Benton that this matter be Passed. The motion carried by the following vote:

For: 8 - Bassan, Benton, Borrego, Davis, Harris, Jones, Peña, and Sena

Excused: 1 - Gibson

**BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER**

APPEAL NO. AC-20-13

PR-2020-004198; VA-2020-00246,

Walter Gallegos and Yvonne Gonzalez, Appellants,

And,

Ramona Segura and Philip Segura, Party Opponents.

1 This is an appeal of a decision from the Zoning Hearing Examiner (ZHE) who approved
2 a height variance for a new front yard and side-yard fence on a corner residential lot.
3 Specifically, the ZHE granted a 3-foot variance to a 3-foot height restriction for a 6-foot-tall
4 plastic vinyl fence on the residential lot owned by Ramona Segura and Phillip Segura [R. 003].
5 The Appellants are the abutting property owners at 3805 Glen Canyon Road, N.E. [R. 006].

6 After reviewing the record of this appeal, including the supplemental evidence
7 submitted by the parties, hearing arguments and testimony, I find that the ZHE erred in his
8 findings on the facts and in applying the IDO to the facts. Thus, deference should not be
9 accorded to his decision. In addition, I find that a remand would be futile because under any
10 reasonable interpretation of the IDO requirements for approving a height variance for fences,
11 Mrs. and Mr. Segura cannot satisfy at least one prong of the four-prong test in the IDO for
12 approving a variance. As such, and as further explained below, I therefore have no choice but
13 to respectfully recommend that the City Council reverse the ZHE's decision and deny the
14 variance.

15

I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

The record demonstrates that Mrs. and Mr. Segura reside in a home on a corner lot at Zion Court and Glen Canyon Road, NE [R. 038]. Their corner lot is less than one-half acre in size [R. 037 and LUHO hrg.]. The Segura's lot is classified as zoned Residential (R-1C) in the IDO [R. 017]. The Segura's home faces Zion Ct., and its Southeast side affronts Glen Canyon Rd. [R. 035]. It is undisputed that both Zion Ct. and Glen Canyon Rd. are local roads under the City Long Range Transportation System (LRTS) [LUHO hrg.]. Mr. Segura testified that before he and his wife erected the 6-foot-tall fence on their property, they razed an existing cinderblock wall that separates their side yard affronting Glen Canyon Rd. with their back yard [R. LUHO hrg.]. Mr. Segura claims that the cinderblock wall had decayed and was inadequate for their need for privacy [LUHO hrg. See also survey depicting wall, R. 037 and photo at 058, 065]. The record further reveals that the cinderblock side wall was set back from Glen Canyon Rd. equal to the house' setback [R. 058]. The record also indicates that the plastic vinyl fence was placed further out from the footprint of the cinderblock wall portion that affronts Glen Canyon Rd. and it extends out to the front yard facing Zion Ct. [Compare R. 058 and 059]. Mr. Segura testified that he extended the plastic vinyl fence to within 7-feet of the property line that faces Glen Canyon Rd. [R.084]. In addition, it is undisputed that the plastic white vinyl fence is 6 feet tall [R. 087].

In any low-density residential zone, whether on a corner lot or not, front and side yard walls (fences) cannot exceed 3-feet in height without a variance [IDO, § 5-7(D)(1)].¹ The

1. In the IDO, "walls" and "fences" are treated alike and are collectively referenced as "walls" [IDO, § 5-7(A)].

36 Seguras constructed their 6-foot-tall fence without first obtaining a variance and they
37 constructed it on a portion of the *front* and side yards of their lot [R. LUHO hrg.]. I note that
38 Mr. Segura testified under oath to the ZHE and at the LUHO appeal hearing that he had
39 obtained a City “permit” for the fence, but not only is there is no evidence of a “permit” for
40 the fence in the record, the claim raises a question of the necessity for a variance if Mr. Segura
41 has a valid “permit” for constructing the fence.²

42 The record shows that the Seguras applied to the ZHE for a height variance for the
43 fence on July 2, 2020 [R. 017]. The ZHE’s hearing was then scheduled for September 15, 2020
44 [R. 024]. On July 6, 2020, the Seguras were advised by City Planning Staff that they needed
45 to notify neighbors of their intent to seek the variance [R. 18-20]. On or about July 14-15,
46 2020, the neighboring residents were sent certified mail notices of the variance proposal and
47 the upcoming ZHE hearing [R. 24-29]. A short time later, four neighbors voiced their
48 objections in letters sent to the ZHE, and one neighbor endorsed the variance proposal [R. 039,
49 054, 057, 061; See also Applnt. Supp. evidence, Ltr. of David Miller and Linda Winters].

50 Although, the Seguras had no lawful right to do so, while their application was pending
51 a hearing, on July 24-25, 2020, they went ahead and constructed the fence without having first
52 obtaining the variance [R. 061]. The ZHE held a public hearing on the variance on September
53 15, 2020, and on September 30, 2020, the ZHE approved the variance [R. 003]. The
54 Appellants, Mrs. Yvonne Gonzales and Mr. Gallegos, filed their timely appeal on October 13,
55 2020 [R. 006]. A LUHO appeal hearing was held via remote Zoom video on November 20,

2. Perhaps Mr. Segura is confusing or conflating the approval of his application to proceeding to the ZHE for a hearing on the variance with what he claims is a permit to construct the fence. In the variance application form, there is a section that states “approved for acceptance” and signed by the City employee that Mr. Segura claims approved his permit. This form is not a permit to construct the fence [R. 17].

2020. The parties supplemented the record with additional argument and evidence which was all admitted into the record.

II. STANDARD OF REVIEW

A review of an appeal is a whole record review to determine whether the ZHE acted fraudulently, arbitrarily, or capriciously; or whether the ZHE's decision is not supported by substantial evidence; or if the ZHE erred in applying the requirements of the IDO, a plan, policy, or regulation [IDO, § 14-16-6-4(U)(4)]. At the appeal level of review, the decision and record must be supported by substantial evidence to be upheld. The LUHO may recommend that the City Council affirm, reverse, or otherwise modify the lower decision to bring it into compliance with the standards and criteria of this IDO [IDO § 6-4(U)(3)(d)(5)]. The City Council also delegated authority to the LUHO to independently remand appeals [IDO, § 14-16-6-4(U)(3)(d)].

III. DISCUSSION

In this appeal, Appellants claim that the ZHE erred in the facts and erred in applying the facts to the IDO requirements for a variance. Specifically, they assert that the applicants (Mrs. and Mr. Segura) woefully failed to show that they can meet any of the criteria in IDO in § 6-6(N)(3)(c). As stated above, I agree that the evidence is genuinely inadequate with three of the four prongs. And, because under the IDO an applicant for a wall or fence height variance must satisfy all four of the prongs, the record is clear that the ZHE should have denied the variance.

I initiate the discussion with the IDO requirements for the variance issued by the ZHE,

and then I will analyze the evidence in the record against the IDO requirements. Beginning with the IDO, the ZHE cannot grant a height variance for a front yard or a side yard fence in a residential neighborhood unless an applicant can satisfy all four tests (prongs) in the IDO.³ All the requirements are restated below:

An application for a Variance for a wall in the front or street side yard of a lot in a Residential zone district or on a lot with low density residential development abutting a Residential zone district that meets the requirements in Subsection 14-16-5-7(D)(3)(d) (Exceptions to Maximum Wall Height) and Table 5-7-2 shall be approved if it *meets all* of the following criteria:

1. The proposed wall would strengthen or reinforce the architectural character of the surrounding area.
2. The proposed wall would not be injurious to adjacent properties, the surrounding neighborhood, or the larger community.
3. The wall is proposed on a lot that meets any of the following criteria:
 - a. The lot is at least ½ acre.
 - b. The lot fronts a street designated as a collector or above in the LRTS Guide.
 - c. At least 20 percent of the properties within 330 feet of the lot where the wall or fence is being requested have a wall or fence over 3 feet in the front yard.
4. The design of the wall complies with any applicable standards in Section 14-16-5-7 (Walls and Fences), including but not limited to Subsection 14-16-5-7(E)(2) (Articulation and Alignment) and Subsection 14-16-5-7(E)(3) (Wall Design), and all of the following:
 - a. The wall or fence shall not block the view of any portion of any window on the front façade of the primary building when viewed from 5 feet above ground level at the centerline of the street in front of the house.
 - b. The design and materials proposed for the wall or fence shall reflect the architectural character of the surrounding area [IDO, § 6-6(N)(3)(c) (Emphasis added)].

In reviewing each of the four prongs of IDO, § 6-6(N)(3)(c), the first and second prongs requires that an applicant demonstrate that the height variance “strengthen or reinforce the

3. The IDO version in effect at the time the ZHE reviewed the Segura’s application is the IDO, amended as of May 2018. On November 2, 2020, a newer version of the IDO became effective, however this newer version is inapplicable to this matter.

architectural character of the surrounding area” and that the variance not cause injury to the neighboring property owners respectively. At first glance, these requirements appear less objectively straight forward than the third prong is. The third prong requires a reckoning of mostly simple arithmetic at its core. The first and second prongs complement each other because if it is determined that a variance does not reinforce or strengthen the architectural character of the neighborhood, the variance, to some degree, could be considered as injurious to the neighborhood. Yet it cannot be overemphasized that all four prongs must be satisfied and if one prong cannot be met, a variance should not be granted. Under the third prong, there are three alternative, disjunctive tests—only one of which need be met to fulfill that prong [§ 6-6(N)(3)(c)3]. And, although, I agree with Appellants that the evidence in the record shows that the Segura’s failed to satisfy the first three prongs, because the third prong’s three disjunctive tests arguably requires no discretionary judgments to determine whether the Segura’s fulfilled it, I will start the analysis there.

A. The evidence in the record contradicts the ZHE’s finding that at least 20-percent of the properties within 330-feet of the Segura’s lot have a wall or a fence taller than 3-feet in height in the front yard.

As stated above, the third prong of IDO, § 6-6(N)(3)(c) includes three separate tests, only one of which need be satisfied by an applicant. Under the third prong, Mrs. And Mr. Segura must show either (1) that their lot is one-half acre or larger, or (2) that their lot “*fronts* a street designated as a collector or above in the LRTS Guide,” or (3) that at “least 20 percent of the properties within 330 feet” of their lot “have a wall or fence over 3 feet in the *front yard*” [IDO, § 6-6(N)(3)(c)3].

I note that it is undisputed that the Segura’s lot is less than one-half acre in size and that

Zion Court and Glen Canyon Rd. are both local streets, not collector streets and therefore both the first and second tests (therein the third prong) are unattainable and inapplicable in this matter.⁴ The record reflects that the Segura's based their application on the third disjunctive test—that 20-percent of homes within 330-feet have *front* yard fences or walls that are taller than 3-feet. In their application, the Segura's appeared to claim that they have met this requirement. [R. 048].

The record shows that in preparation for the ZHE's review of the application for the third prong, City Planning Staff sent Mrs. and Mr. Segura an aerial map of their neighborhood [R. 048]. On the aerial map, 42-lots are highlighted in yellow [See R. 048]. Presumably for the Segura's to comment on, at the bottom of the page, Staff included the following instructions:

Only submit photos of properties that are within the linear area up to 330 feet
(Only along the yellow lines).
Take a picture of any fence/wall that is over 3 feet
Write the address on the front.
Mark the address on the map.
Print all and submit to the ZHE.
29 properties 20% = 5.8

[R. 48].

If these instructions were intended to track what is required under IDO, § 6-6(N)(3)(c)3.c (the third prong), the instructions are flawed. Assuming that the highlighted lots are within 330-feet of the Segura's lot, the author of the instructions advised the Seguras to take photos of "any" walls or fences over 3-feet in height. Yet, only *front* yard walls and fences over 3-feet tall can be considered as qualifying walls or fences under IDO, § 6-6(N)(3)(c)3.c. If the ZHE

4. Under the IDO a "local" street "is primarily for access to abutting properties. It carries low traffic volumes. It may further be defined as a Normal Street or Access Street." Whereas, a "collector" street "carries traffic from local streets to the principal and minor arterial streets" [IDO, § 14-16-7, Definitions, p. 494].

or Planning Staff took it upon themselves to distinguish the photographs submitted to determine on their own if there are sufficient front yard walls or fences to satisfy the 20-percent rule, this instruction would not be flawed. Unfortunately, as discussed below, I find no evidence in the record that the ZHE distinguished what was depicted in the photographs submitted by the Seguras. As shown in more detail below, for one reason or another, none of the walls or fences shown in the photographs provided by the applicants satisfy what is required in § 6-6(N)(3)(c)3.c.

Next, if the highlighted lots in the aerial map are intended to represent the lots that are all within 330-feet of Mrs. and Mr. Segura's lot, then the last statement in the instructions is a fatal flaw because the aerial map depicts 42 highlighted lots, not 29. This error is consequential because 20% of 42 is vastly different than 20% of 29.⁵

Notwithstanding these errors, the evidence submitted by the Segura's presumably to fulfill the 20-percent criteria of § 6-6(N)(3)(c)3.c is grossly inadequate on two fronts. First, the Segura's identified only four lots that they contend satisfy IDO, § 6-6(N)(3)(c)3.c. Second, neither of the four lots are "*front*" yard walls or fences. It is irrefutable that IDO, § 6-6(N)(3)(c)3.c requires that 20-percent of the lots have *front* yard fences or walls within 330-feet of the Segura's lot for them to satisfy that prong.

Even using Staff's generous, yet erroneous count, 5.8 (rounded to 6) are necessary, but the Seguras only identified four lots on the map that they claim satisfy the 20-percent rule [R. 048]. Thus, the ZHE erred in his Finding 9 in which he wrote:

Based on evidence presented by Applicant, at least 20 percent of the properties within 330 feet of the lot where the wall or fence is being requested have a wall

5. Twenty percent of 42 is 8.4. Thus, based on Staff's aerial map, there must be at least 8-lots that meet the 20-percent rule.

187 or fence over 3 feet in the front yard. No evidence to the contrary was submitted
188 [R. 04].
189

190 Again, under § 6-6(N)(3)(c)3.c, it must be shown that at least 20-percent of the
191 properties within 330-feet of the Segura' s lot have *front* yard walls or fences that are *taller*
192 than 3-feet in height. The evidence shows that of the four lots Mrs. and Mr. Segura claim meet
193 § 6-6(N)(3)(c)3.c, three lots in fact depicts side yard fences or walls, and the fourth one is
194 arguably a front yard wall, but it is not taller than 3-feet in height [R. 049 – 053 and 071 –
195 073].

196 Accordingly, I find that that there is a glaring lack of evidence in the record to support
197 a finding that the Seguras satisfied the 20-percent rule. Therefore, ZHE Finding 9 is erroneous.
198 As such, Mrs. and Mr. Segura's application should have been denied on that basis alone.
199 However, because this recommendation is just that—a recommendation—as further delineated
200 below, I also come to the conclusion, that the ZHE also erred on the first and second prongs
201 of § 6-6(N)(3)(c).
202

203 **B. There is insufficient evidence in the record demonstrating that the fence would in**
204 **fact strengthen or reinforce the architectural character of the surrounding area.**
205

206 In this appeal, Appellants through their attorney contend that the evidence in the record
207 clearly shows that the 6-foot, white plastic vinyl fence cannot under any rational manner
208 strengthen or reinforce the existing architectural character of the surrounding residential
209 neighborhood because the architectural features of the fence are vastly dissimilar from the
210 architectural features of the homes and fences in the area. To the extent that in the
211 neighborhood there are no similar fences with the same massing and dimensionality, I agree.

212 Although the first prong of § 6-6(N)(3)(c) of the IDO can appear to comprise somewhat

213 subjective qualities, I find that there is a clear objective means to apply it. For example, the
214 material, design, height, color, and dimensionality (massing of the entire fence) of the Segura's
215 fence can be objectively compared with corresponding elements or qualities of walls/ fences
216 and with architectural elements of area homes to ascertain the similarities. It is those
217 similarities and or differences that should be the benchmark for judging whether the Segura's
218 fence strengthens or reinforces the existing architectural character of the area. That is, if there
219 are more architectural similarities than not, then arguably the similarities can be said to
220 reinforce and or strengthen the architectural character of the surrounding area. If so, then the
221 ZHE's decision deserves deference and should not be disturbed.

222 In his decision, the ZHE expressly found:

223 Based on evidence presented by Applicant, the proposed wall would strengthen
224 or reinforce the architectural character of the surrounding area. Specifically, the
225 wall is constructed in harmony with the home on site and neighboring properties.
226 No evidence to the contrary was submitted [R. 004, Fndg. 7].
227

228 The ZHE had before him an abundance of photographic evidence of the fence at issue in this
229 matter, as well as photographs of the neighborhood homes, including fences and walls from
230 which he could ascertain and compare the architectural context of the neighborhood, if any.
231 However, in his decision, the ZHE did not identify, with any specificity, what evidence he
232 relied on to form the basis of Finding 7.

233 In their application for the variance, Mrs. and Mr. Segura argued that the white vinyl
234 plastic fence matches their home's window "shutters and the garages of our neighbors" [R.
235 038]. This is the only testimony that they presented to prove that their fence reinforces or
236 strengthens the architectural character in the area. I agree that some neighboring homes have
237 shutters and garages that arguably match in color with the white color of the vinyl fence [R.

238 015 and 016]. There is also a white *side* boundary fence nearby that is constructed of vinyl
239 material [R. 072]. Its massing, however, is vastly distinguishable from the Segura fence
240 because it does not comprise of a front yard fence, nor does it extend as far from the house as
241 does the Segura fence does. However, color of garages and shutters and the single white vinyl
242 side fence shown in the photographs are where the similarities end. Weighed against the
243 evidence to the contrary in the record, I find that the Segura’s presented insufficient evidence
244 to meet their burden.

245 At the ZHE hearing, one witness testified that “[e]verything in this neighborhood is
246 *block or stucco or gravel and grass and trees* [R. 092]. This testimony was undisputed, and
247 I find that this testimony is corroborated by the photographic evidence in the record. In
248 addition, Yvonne Gonzales, Walter Gallegos, and Linda Waters testified at the ZHE hearing
249 that they believed that the fence is not harmonious with the neighborhood [R. 087-092].

250 I note that the record also shows that there are at least three other homes in the area that
251 have 6-foot tall *side* yard fences—one is a wooden slate fence and the other two are constructed
252 of cinderblock; but neither of them extend to the front yards as much as the Segura fence does.
253 In addition, the materials and colors of these walls and fences have no matching features with
254 the Segura fence [R. 049-050, 061]. Moreover, the dimensionality (massing) of Mrs. and Mr.
255 Segura’s fence extends out in their side yard and out into the front yard of their lot and its
256 articulation is constant in a manner that is dissimilar from the other walls or fences in the area,
257 including the single white vinyl side yard fence depicted in R. 072. Thus, the Segura fence is
258 more dissimilar than not from the other walls and fences depicted in all the photographic
259 evidence in the record. I note that there are also several photographs in the record showing
260 nearby lots with 2- to 3-foot-tall landscape retaining walls, a single split rail wood fence, and

261 a fence with vertical pilasters and wrought iron—both appearing to be approximately 3-feet
262 tall in the vicinity; none of which are vaguely similar to the Segura’s plastic, vinyl fence. [R.
263 063, 064, 066, 067, 072, 073].

264 I find that with regard to the photographic evidence in the record, the Segura 6-foot tall,
265 white, plastic vinyl fence is objectively more dissimilar than not in its massing, color, material,
266 height, design, and dimensionality to all other homes and fences (other than the single side
267 yard fence/ partition at 072). The evidence in the record shows that Segura’s fence clearly has
268 little to no harmonious or matching features with any other fences or architectural features in
269 the neighborhood. Thus, it is more antonymous than not with any other fencing components
270 and home features in the area. As one witness put it aptly; the massing, materials, and its
271 location sticks out like a proverbial “sore thumb” [R. 092].

272 The burden to show that the fence strengthens or reinforces the architectural character
273 of the surrounding area rests with the applicants. It cannot be ignored that Mrs. and Mr.
274 Segura’s fence is conspicuously discordant or unconnected to most of the architectural
275 elements in the neighborhood. Consequently, when compared to the opposing evidence in the
276 record, despite the ZHE’s finding on the first prong, the record contains very little evidence to
277 support a finding that the fence actually strengthens or reinforces the architectural character in
278 the surrounding area. Thus, I agree with Appellants in this regard. I similarly find that, other
279 than the photographic evidence, the weight of the testimonial evidence in the record supports
280 that the Segura fence does not reinforce or strengthen the architectural character of the area.

281

282

283

284 **C. There is evidence in the record, which was not considered, that demonstrates the**
285 **fence is injurious to adjacent properties and the neighborhood.**
286

287 The second prong of § 6-6(N)(3)(c), requires proof that the variance “would not be
288 injurious to adjacent properties, the surrounding neighborhood, or the larger community.”
289 Again, as with any variance application, those seeking a variance have the burden of proof
290 [IDO, § 6-4(F)(2)]. In this matter, in his Finding 8, the ZHE expressly found that:

291 Based on evidence presented by Applicant, the proposed wall would not be
292 injurious to adjacent properties, the surrounding neighborhood, or the larger
293 community. Specifically, applicant provided testimony that the wall would
294 enhance the safety of both the subject property and neighboring properties by
295 discouraging trespassers from coming into the community and property, as
296 apparently has occurred. No evidence to the contrary was submitted.
297

298 The record shows that Mrs. and Mr. Segura, testified that they believe their fence will not harm
299 anyone, but they failed to present any evidence to support that conclusion. And, despite that
300 the parties quarreled about whether the fence obstructs views from the roadways, the City’s
301 traffic engineer submitted a brief report to the ZHE concluding that the fence does not obstruct
302 views from the roadways [R. 043]. The expert report from the Traffic Engineer was not
303 disputed with comparable expert analysis. However, any analysis of harm to the neighborhood
304 is necessarily a broad inquiry of all evidence that may or may not impact the neighborhood
305 either injuriously or beneficially.

306 The record also included testimony from three neighbors who claimed that because the
307 fence is so dissimilar from other fences or walls in the area, it is harmful. Appellant, Yvonne
308 Gonzales, whose common property boundary line is shared with the Segura’s fence, testified
309 that because the fence is discordant with all other fences or walls in the area it causes harm
310 [087]. And although the ZHE correctly advised Mrs. Gonzales that the City cannot enforce
311 restrictive covenants, she further testified that the restrictive covenants applicable to the

neighborhood do not allow fences standing taller than 3-feet in front yards or so close to the street [R. 087]. Ms. Gonzales also submitted the covenants in the record [R. 074-076].

I agree with the ZHE, that as a matter of law, the City doesn't have jurisdiction over enforcing restrictive covenants; restrictive covenants are private contracts between neighbors, and they are enforceable only in private legal actions. But in an analysis of harm under § 6-6(N)(3)(c), their enforceability is immaterial, but that does not make them also irrelevant. I find that for the limited purposes of determining injury, the ZHE erred in dismissing the restrictive covenants as not relevant. Restrictive covenants are a relevant inquiry to assess the second prong of § 6-6(N)(3)(c). If a covenant is potentially offended by a variance, and that issue is presented to the ZHE, and there is no evidence contradicting that evidence or testimony, the ZHE should apportion evidential weight to it accordingly in the overall analysis of harm to the neighborhood. Thus, the ZHE erred on this evidence.

As shown above, there is ample evidence in the record that demonstrates that the Segura fence lacks harmony with the architectural character of the neighborhood. This should have been considered by the ZHE as evidence of injury to the neighborhood. This evidence should have been weighed accordingly. In doing so here, I find that there is sufficient evidence showing that the variance adversely impacts the Appellants as abutting neighbors, and it is injurious to the neighborhood.

IV. CONCLUSION

In conclusion, I find that the ZHE erred in the facts and in applying those facts to the requirements of § 6-6(N)(3)(c). Moreover, I find that there is overwhelming evidence in the record that demonstrates that Mrs. and Mr. Segura cannot satisfy the third prong of the four-

335 prong analysis for a variance. (the 20-percent rule). I also find that the ZHE erred in his analysis
336 of the first and second prongs of § 6-6(N)(3)(c) (architectural character and injury prongs)
337 because the evidence supports a finding that the 6-foot tall, white vinyl plastic fence is not
338 sufficiently connected to any architectural features in the neighborhood, that it potentially
339 offends the restrictive covenants, and therefore not only does it not reinforce the architectural
340 character, but it also causes harm to the neighborhood.

341 Hence, there is strong evidence that the fence does not satisfy three of the four prongs
342 of § 6-6(N)(3)(c). Conversely, the weight of the evidence in the record shows that the
343 applicants cannot satisfy three of the four prongs to obtain a variance under the IDO. Because
344 all four prongs must be satisfied before a variance can be approved, I respectfully recommend
345 that the City Council grant the appeal, adopt the findings herein, reverse the ZHE's decision,
346 and deny the variance.

347 Respectfully Submitted:

348 

Steven M. Chavez, Esq.
Land Use Hearing Officer
December 4, 2020

Copies to:

Appellants and their Counsel
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