



Land Use Hearing Officer Summary & Analysis

Date: 7/20/2022
File Number LUHO-22-015
Request Type: Variance - Regarding an existing fence/retaining wall
Parcel ID: 16-33-204-004
Address: 1736 East Millcreek Way
Zone: R-1-10, Single-Family Residential Zone
Applicant : Sloan Benson
Planner: Brad Sanderson, AICP
Current Planning Manager

SUMMARY DESCRIPTION

The applicant is seeking a variance to allow a standard six-foot-tall fence on top of a recently constructed retaining wall along the west property line of the applicant's property located at 1736 East Millcreek Way. Per the approved plans a retaining wall was permitted along the west property line however it was noted that "an additional permit is required if fencing of any height is to be installed on top of or adjacent to the retaining wall" which further references "Millcreek Ordinance Title #19.95.090". It appears that the applicant has constructed a fence on top of or immediately next to the approved retaining wall

Millcreek Code states "Retaining walls are considered a part of the fence height. No fences shall be installed on the top of a front yard retaining wall or within four (4) feet parallel to the top of a retaining wall." Millcreek Code §19.95.090 E.4

Moreover, since retaining walls are considered as a part of the fence height, as stated above, Millcreek Code 19.95.040 states "For all properties, fencing in interior side or rear yards may not exceed eight (8) feet in height, subject to the visual obstruction standards found in MKZ 19.95.030.". Per the visual obstruction standards, found in Table 19.95-1, the total combined fence/wall height, for "single family uses", should not exceed a "maximum fence height" of "[four] 4 feet", when located "within 10 feet of a front property line".

The City's code allows the Land Use Hearing Officer to grant a variance from the terms of Title 19, based on certain criteria, as stated below:

MKC 19.92.050:

A. The authority shall have the following powers to authorize on appeal in specific cases a variance from the terms of this title. The authority may grant a variance only if:

1. Literal enforcement of this title would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of this title;
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2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;
 3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;
 4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
 5. The spirit of this title is observed, and substantial justice is done.
- B. In determining whether enforcement of this title will cause unreasonable hardship, the authority may not find an unreasonable hardship unless the alleged hardship is located on or associated with the property for which the variance is sought and comes from circumstances particular to the property, not from conditions which are general to the neighborhood. In determining whether or not enforcement of this title would cause an unreasonable hardship, the authority may not find an unreasonable hardship if the hardship is self-imposed or economic. In determining whether or not there are special circumstances attached to the property, the authority may find that special circumstances exist only if special circumstances relate to the hardship complained of and deprive the property of the privileges granted to other properties in the same district. The applicant shall bear the burden of proving that all the conditions justifying a variance have been met.
- C. In granting a variance, the authority may impose additional requirements on the applicant that will mitigate any harmful effects of the variance or serve the purpose of the standard or requirement that is waived or modified.

The applicant has provided a response to the above listed criteria (**see attached**).

STAFF FINDINGS , ANALYSIS , & SUPPORTING DOCUMENTS

Staff Findings:

1. **The burden of justifying a request for a variance rest on the applicant. Utah Code § 10-9a-702(3) and Millcreek Code §19.92.050**
 2. The property is somewhat rectangular in shape being between 120 feet and 150 feet deep by 102 feet wide with the Millcreek waterway running abutting and parallel along the rear property line; causing a portion of the rear yard to be located within a floodplain.
 3. The property appears to have originally had a gradual natural slope from side to side or from east to west.
 4. The property grade has since been altered (somewhat flattened) with the installment of an approved retaining wall along the west property line.
 5. The retaining wall along the west property line varies in height ranging from one to two feet near the front of the lot and then increasing in height, to as much as four to five feet tall towards the back of the property.
 6. Despite being noted on the retaining wall permit, the applicant later installed a fence on top of the retaining wall, without obtaining a permit from the city.
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7. The City was made aware of the additional fence installment upon inspection of the retaining wall and/or upon receiving complaints.

Staff Analysis:

1. **Literal enforcement of this title would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of this title; City Code §19.92.050.B**

Staff Response:

The applicant's response suggests there is a "significant grade variation" along the west property line, which "creates a safety risk". The grade change seems to have been historically gradual across the property, particularly from east to west, which would seem to be general and even common for most properties within the surrounding neighborhood. The grade change only became what the applicant describes as "significant" along the west property line, as a result of the installed retaining wall.

It is important to note that the City's code does not require a retaining wall, but rather, when a property owner choosing to alter their grade, the City's code allows a retaining wall or even a combination of retaining walls; known as retaining wall terracing. Furthermore, the City's code does not prohibit an additional barrier such as a landscaped hedge or fence, as long as the fence is offset from the top of retaining wall and meets clear vision site areas requirements in terms of height and location, when located within ten feet of the front property line or street right of way.

2. **There are special circumstances attached to the property that do not generally apply to other properties in the same district; City Code §19.92.050.B**

Staff Response:

The property is within the same R-1-10 single-family residential zone as other properties within the vicinity and the property appears to be somewhat "regular" in terms of shape and size, in comparison to other nearby residential lots. The property does have a slight change in grade from east to west however the change in grade does not appear to be substantially different from most properties within the neighborhood. The Millcreek stream does run adjacent to and parallel along the back property line (south) whereupon a small portion of the rear yard area is encumbered with a designated flood plain; however, this would not seem to have much relevance to this variance application with respect to the request to maintain the already installed fence along the west property line.

3. **Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;**

Staff Response:



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Gradual sloping and terracing are common methods for dealing with grade change across properties with slope and are generally not prohibited by the City so long as a permit is obtained.

The City does not prohibit a fence or other barriers from being installed along or near a property line, for reasons of safety, aesthetics, security, and privacy, as long as they are the appropriate height and location. The fence may not create an additional safety, aesthetic or any other adverse impact to another property owner or the general public. Per the retaining wall permit, the city noted, among other things, that “an additional permit if fencing of any height is to be installed on top of or adjacent to the retaining wall”. The City has no record of any additional fence permit being sought for or obtained.

4. The variance will not substantially affect the general plan and will not be contrary to the public interest;

Staff Response:

General Plan Goal N-1 “Strategy 1.5: Ensure that new infill development is compatible with existing neighborhoods by regulating structure sizes and heights; building forms and materials; yard setbacks; streetscape character; height and bulk transitions; buffering; and other factors.”

General Plan Goal N-2 “Strategy 1.5: Promote the maintenance and improvement of the existing housing stock and allow for remodeling, expansion, and additions as appropriate in the area to accommodate the changing sizes and varieties of household types.

According to City Code Enforcement, there appears to have been several complaints pertaining to this particular fence and wall.

5. The spirit of this title is observed, and substantial justice is done.

Staff Response:

The purpose for the allowing terracing and requiring a four foot off set, as it pertains to City code, is to create a balance which would allow for fences and retaining walls, for several reason, to be installed along property lines while alleviating a “walled in” affect, imposed onto adjacent landowners.

Supporting Documents:

- **Exhibit A** - Vicinity Map
 - **Exhibit B** - Applicant’s Response
 - **Exhibit C** - Zoning/Flood Plain Map
 - **Exhibit D** - Approved Plans
 - **Exhibit E** - Google Street View (April 2021)
 - **Exhibit F** - Photographs (winter/spring 2022)
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