

RESOLUTION NO. 84-97

This resolution is adopted in order to comply with the District Court's order of November 18, 1997, in the case of *Atlantic Fidelity v. City*, 97 CV 110, Mesa County District Court, a Rule 106 action.

The City Council makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. The proposed 13 lot residential, single-family dwelling, subdivision is located just north of the intersection of F.5 and 25.5 roads. The proposed development is in an area of rapidly developing residential uses. Record 15 (Seligman), 29 (Grisier). Grisier, Record 73. Based on prior hearings before the Council, the records of the Planning Department and the minutes of various Planning Commission hearings (which the Council regularly receives), over 250 lots have been finally approved or were being considered in the immediate area of the proposed Sunset Village. Seligman, for Plaintiff, described some of these near subdivisions in his comments on December 18. Record 16 and 17. The names of such other development proposals, with the number of proposed residential units shown in parentheses, include: Fall Valley (109), Cimarron North (11), Valley Meadows East (44), Valley Meadows (32), Moonridge Falls (40), Kay (31). These developments have all occurred within the last few years. Also see, Record 16.
2. Neighbors in the area (roughly all properties within a 1/2 mile radius from the intersection of 25.5 and F.5 roads) have routinely expressed concerns about the quality of the developments which have been approved. The City Council is obligated, in order to protect the quality of life of our citizens, to consider aesthetic concerns, open space concerns, and compatibility of a proposed development with the surrounding neighborhood, in addition to the "technical" concerns which are the primary focus of the City's codes and requirements. Record 31 (Maupin). While the record in this matter doesn't reflect all of those discussions and concerns in as much detail as is possible, the City Council have heard these issues discussed, at length, in various public hearings during the review processes of developments in this, and other, areas of the City.
3. The City has classified 25.5 Road as a collector street. This classification means that 25.5 road will have higher traffic speeds and volumes since it is an important 'through' street for the area, and thus 25.5 Road is more dangerous to the residents of the local neighborhood than are residential streets. Because of its proposed lower speeds and volumes, the proposed Sunset Court is classified as a residential street.
4. The City has adopted a Growth Plan, the provisions of which apply to this area and to the proposed Sunset Village subdivision. The Council has determined that the public

welfare, safety and health are promoted if all development complies with the goals and policies adopted by the Growth Plan. As particularly relevant in this instance, compatibility of land uses and visual appeal of major roads are adopted City goals (Growth Plan, page ii). Neighborhood quality of life, another adopted Growth Plan goal, is improved by ensuring that land uses are compatible (Growth Plan, page III.27) and safety is considered (Growth Plan, page III.23). Also see Chapter V of the Growth Plan.

5. The Council required, as a condition of the approval, that the developer construct a specified cedar fence along the western boundary of those lots adjacent to 25.5 Road (the “western tier”). Record 59 (Volkman). The Council finds that such a fence, given the lot configuration chosen by the developer, will serve to limit direct pedestrian access onto 25.5 Road from the rear yards of the western tier of lots. The Council finds, based on its collective experience and knowledge of human behavior, that such a fence will protect the residents, and especially the children, who will reside in the western tier of lots because, without a barrier of some sort, the natural activities of children is such that they would otherwise run from their yards onto 25.5 road, exposing them to significant danger from the 25.5 Road. The required fence is an excellent example of such a safety barrier which will protect our citizens and our children. Record 25 (Cron.)
6. The way this developer proposes to subdivide the property will result in two “front” yards, as the Code defines such things, for those lots bordering 25.5 road. As a practical matter, however, the western “front” yard of each such lot will actually serve as a rear yard. Building a fence at the time of platting guarantees that 25.5 Road is not viewed or used as an extension of the rear yards of the western tier of lots. Given the particular configuration proposed by the developer and giving due consideration to aesthetic concerns, the Council deems the fence to be the only reasonable way of satisfying the community goals of providing safe and aesthetically pleasing developments, in these circumstances.
7. Uniformity of appearance over time of the fence, which is an example of a ‘quality of life and development’ concern (Record 25, Cron), along the western boundary of the property (adjacent to 25.5 road), is a concern of the Council and the neighborhood. Record 59 (Volkman). Aesthetics of the fence is a concern of neighbors who live to the north and to the west. Record 73 (Grisier), 74 (Boumatar) and 75 (Boumatar). Other properties in the area already have fences. Record 74 (Grisier) and 35 (Achen). For specifics and detailed plans, the various subdivision and development files of the City’s Community Development Department are available and are public records. The “look” of the fence is important to the identity and compatibility of an area. Record 74 (Boumatar). If the developer’s proposal (to impose fence standards but allow the fences to be built at different times), were adopted, “...the sections...will age and color differently, and that will lose whatever aesthetic appeal the fence would otherwise have as a unit.” Record 80 (Graham).
8. Based on the testimony of the neighbors, the staff, the developer, and the Council’s knowledge of this neighborhood, the fence will: continue an already existing “theme” in the neighborhood of using fences to define each particular neighborhood/development; present an aesthetically pleasing view from the major

thoroughfare, 25.5 Road (Record 25, Cron); make this relatively high density development (Record 3, Nebeker) be more compatible with the rest of the neighborhood; avoid a “hodge-podge” appearance over time, as the wooden fence weathers. Record 73 (Grisier), 74 (Boumatar), 80 (Theobold and Graham).

9. Plaintiff’s counsel’s comments led some members of the City Council to believe that the 25.5 Road fence was a minor issue. Based on the demeanor of the Plaintiff and its counsel and the words which were used, and not used, the Council believed that the fence requirement, while not preferred by the developer was, if not consented to, at least acquiesced in.
 - (a) Council heard Plaintiff’s counsel comments, Record 58-59, to mean only that the developer *preferred* not to build the fence, not that such a requirement would be the basis for a lawsuit. Council thought this was a reasonable conclusion because it was obvious that the fence would assist in creating uniformity in the neighborhood and Council had heard that the developer also held uniformity as a proper value. Record 78 (Volkman). Council concluded this since it was apparent that the Plaintiff was not familiar with the area, since part of its statement was that “[the fence requirement]...doesn’t match anything else that’s happened out there or anywhere else that I’m aware of.” (Record 58). The Kay, Moonridge Falls and Valley Meadows subdivisions all have defining exterior fences. Record 73 (Grisier), 74 (Boumatar). Council concluded, therefore, that if the plaintiff knew that other fences were a part of the other subdivisions in the area, and because plaintiff acknowledged that uniformity of appearance was a valid goal, given the actual facts the plaintiff would agree that the fence requirement was within the Council’s power. Council did not read Plaintiff’s comments as being completely averse to building the fence as a part of the subdivision improvements.¹
 - (b) Plaintiff made no response to Councilman Graham’s comments, Record 67, that one of the options facing the City Council that evening was: “Unless, of course, the Council were to decide, just the sake of hypothetical arguments, to resolve the two-thirds street improvements, but to require the fence...” Plaintiff did not respond except to indicate “The fence is not identified at all in the litigation.”² Because Plaintiff’s counsel had several other opportunities to respond but declined to do so, we concluded that while a fence requirement was not preferred, it was acceptable.
 - (c) Nor did plaintiff object to, or correct, Councilman Theobold’s statement, Record 75: “I don’t think the fence issue is necessarily the big thing tonight.” Plaintiff’s counsel did say, Record 78: “...And I’m just saying we’ll have a uniform height, materials and the whole thing, and we won’t have the problem that I think was the basis for the concern.” Hearing that response that evening, Council concluded that the fence *requirement* was not a problem for the developer, although not preferred.
10. While the plaintiff’s expressed preference was to enforce uniform specifications of the fence through the proposed covenants, based on the Council’s prior experience, it is too likely that one or more Sunset Village residents will construct a fence without obtaining permission. While nearly all such illegal improvements are done in ignorance of the law, they occur with regularity throughout the City. Rather than face

¹ We recognize now that we exhibited “wishful thinking,” although at the time it was not so clear.

² Plaintiff had filed a complaint in the federal district court which plaintiff later voluntarily dismissed.

the reality of after-the-fact enforcement of such covenants, the City's and neighbors' concerns are best addressed if the developer simply builds the fence initially, thus avoiding any chance of lack of uniformity or lack of the ability to enforce the covenants. "...[I]t should be done as part of the development rather than leaving it to be hit and miss..." Record 80.

11. The developer's site plan proposal was unusual, as noted by Councilman Theobold. Record 62: "You're still going to have roughly half the lots with this odd concept of a double front yard [because the lots adjoin both 25.5 road and the proposed Sunset Court]." The unusual lot configuration proposed by the developer (*i.e.*, the fact that each of the lots adjacent to 25.5 Road would have two 'front' yards, one of which would be directly accessible to 25.5 road), was a significant factor in the Council's decision to impose the fence requirement.

CONCLUSIONS OF LAW.

1. The City's authority to regulate the use of land, including subdivisions and other development, derives from the Constitution of the State of Colorado, the City Charter, various state statutes, the City Code of Ordinances, and adopted regulations. The City's Zoning and Development Code ("Z&D Code"), published separately, is Chapter 32 of the City Code.
2. Part 2, Article 23, Title 31 of Colorado's Revised Statutes, allows the City to make plans for, and to regulate and restrict, land uses and improvements thereon. See 31-23-206(1)(d), C.R.S. and 31-23-207, C.R.S. ["...in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare...including...adequate provision for traffic, safety from ...other dangers, ...promotion of good civic design and arrangement..."]. The Council believes that such legislation indicates the Legislature's direction that discretion and the exercise of judgment inheres in land use planning.
3. The Council knows from experience that it must retain, and judiciously exercise, the ability to impose conditions on proposed subdivision on a case-by-case basis because not every circumstance can be anticipated by the City's ordinances and regulations. The Council must be guided by general principles, set forth in the ordinances, regulations, and planning documents such as the Growth Plan. The Council must apply those principles in a reasonable manner to a particular set of facts, circumstances, in light of neighborhood concerns.
4. The City's laws contemplate that, while specificity is good where it can be obtained, flexibility is necessarily preserved to be exercised by the City Council. The Council believes that standards of review are satisfied where a proper goal, within the sweep of the traditional 'police power,' is articulated and a reasonable attempt is made to accomplish the goal by the imposition of a condition which reasonably relates to the accomplishment of the goal.
5. Section 5-1-5 (A) of the Z&D Code is a specific basis upon which Council may impose the fence condition, in this case. A residential zone, such as is pertinent to the proposed Sunset Village, is a standard 'straight' zone in this City. Council interprets section 5-1-5 as allowing the City to impose fences, as a condition of a 'straight zone'

subdivision approval, where necessary because of neighborhood character, future development in the area, proximity to roads, buffering needs, *etc.* Council's intent, in adopting section 5-1-5, was to indicate that the specified standards do not have to apply, if the public hearing process approves some other standard. Council concludes that the offending condition is such an otherwise approved standard, as specifically contemplated by section 5-1-5, and approved during the public review process.

6. Section 5-1-5 (A)(5.) is another, specific, provision which allows the City to require a fence where circumstances dictate, in order to provide for a functional, safe, and pleasing development. It reads: "The height and location requirements of this section shall not apply to fencing for screening or buffering approved as part of a subdivision, planned development, and special or conditional uses..."
7. Section 5-4-10 of the Z&D Code means that where particular circumstances warrant, the City can require "other improvements" to benefit the public. The Council believes that the "other improvements" are those which apply in unusual or special circumstances, to address particular concerns of the neighborhood and/or the development proposal at hand. In this case, the Council required the fence to address concerns about aesthetics, community character and safety.
8. If the Court finds that the fence requirement cannot be properly imposed, the Council finds that the public welfare can only be served if the conditional subdivision approval is remanded, so that the City may address the aesthetic, safety and compatibility concerns described herein another way, in accordance with the Z&D Code.

PASSED and ADOPTED this 3rd day of December, 1997.

/s/ Janet Terry

Janet Terry, Mayor

Attest:

/s/ Stephanie Nye

Stephanie Nye, City Clerk