

E CITY OF E

NEWPORT BEACH BUILDING AND FIRE BOARD OF APPEALS STAFF REPORT

September 10, 2024 Agenda Item No. 1

TO:	CHAIR AND MEMBERS OF BOARD
FROM:	Tonee Thai, Deputy Community Development Director / Chief Building Official
PREPARED BY:	Tonee Thai, Deputy Community Development Director / Chief Building Official, 949-718-1867, <u>tthai@newportbeachca.gov</u>
TITLE:	1113 Kings Road - Appeal of The Building Official's Determination to Obtain a Building Permit to Replace Wrought Iron Guardrails with Wooden Fence on Top of Existing Retaining Wall

ABSTRACT:

For the Building and Fire Board of Appeal's ("Board") consideration is an appeal of the City's Chief Building Official's determination that application for, and issuance of, a building permit is required before the Appellant, the owner of 1113 Kings Road ("Property"), may erect a wooden fence on top of a retaining wall on the west side of the Property.

ISSUE FOR CONSIDERATION:

The scope of the appeal is for the Board to decide whether the Appellant is required to apply for and obtain a building permit to erect a wooden fence on top of a retaining wall on the west side of his Property. Appellant previously removed existing wrought iron railing on top of the retaining wall, and without applying for a building permit, erected new wooden fencing on top of the retaining wall.

Although Appellant's appeal also includes a challenge to Section 20.30.040 of Title 20 (Planning and Zoning) of the Newport Beach Municipal Code (NBMC) regarding zoning standards for fences and walls, the application of Title 20 is beyond the scope of this appeal and beyond the jurisdiction of the Board. The guestion before the Board is whether or not Appellant is required to apply for a building permit to construct the new wooden fence. The issue is not whether or not the wooden fence is permissible. If this Board decides that application for a building permit is required, then Appellant would then be required to file building plans in connection with the application for a building permit, at which time the Planning Division of the Community Development Department would determine whether the wooden fencing is permissible, and whether it complies with the zoning and development standards of Title 20. In the event that the Planning Division determines that the wooden fence does not comply with the zoning and development standards of Title 20, then Appellant may pursue other options, including but not limited to, filing an application for a variance through the Planning Division. A variance application is a discretionary action that requires review and approval by the City's Planning Commission.

1

_-1

1113 Kings Road - Appeal of The Building Official's Determination to Obtain a Building Permit to Replace Wrought Iron Guardrails with Wooden Fence on Top of Existing Retaining Wall September 10, 2024 Page 2

RECOMMENDATIONS:

- a) Conduct a public hearing;
- b) Staff recommends the Board uphold the Chief Building Official's determination requiring Appellant apply for a building permit to erect a wooden fence on top of existing retaining wall in accordance with California Building Code Section 105.1 as adopted by NBMC 15.02.010.

DISCUSSION:

A permit application was submitted on October 18, 2019, under Plan Check Number 2295-2019 for a new single-family residence, garage, various accessory structures and site retaining walls. The approved project included installation of wrought iron guard railing on top of an existing retaining wall on the Property (See Attachment A, Excerpt of Plan Check Number 2295-2019 approved plans showing location of fence in question). The construction of the project was completed, including installation of the wrought iron guardrails, and related permits received final inspection on October 16, 2023.

On or about November 22, 2023, after the construction was completed and permits final, the City received a complaint regarding unpermitted construction at the subject property. Code Enforcement staff investigated and found that the previously installed and approved wrought iron guardrail on top of an existing retaining wall located on the west side of property had been replaced with a wooden fence. No application for a building permit was filled with the City. The City issued a Notice of Violation (NOV) for the unpermitted work on December 7, 2023, and followed up on December 18, 2023, with a second NOV (See Attachment B).

Subsequent communications between the City and Appellant to gain compliance led to the Building Official issuing a decision letter dated May 1, 2024, that a building permit is required for the replacement of the existing wrought iron guardrail with a wooden fence (See Attachment C).

The Appellant rebutted the Chief Building Official's determination, alleging that there is no violation of the NBMC or the California Building Code. Appellant further contended that the previously approved building plans for the wrought iron guardrail authorized replacement with the wooden fencing. Appellant's position is included in the appeal application (submitted to the Board herewith).

Chief Building Official's Determination:

Due to the height of the combined wooden fence and retaining wall, a building permit is required per California Building Code Section 105.1 prior to construction of a wooden fence on top of existing retaining wall (See Attachment D). CBC Section 105.1 states (emphasis added):

Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas,

1113 Kings Road - Appeal of The Building Official's Determination to Obtain a Building Permit to Replace Wrought Iron Guardrails with Wooden Fence on Top of Existing Retaining Wall September 10, 2024 Page 3

mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, **shall** <u>first</u> make application to the building official and obtain the required permit.

Additionally, the Chief Building Official, in his determination letter, explained that the wooden fence is not authorized by the prior approved plans, PC 2295-2019, which only authorized wrought iron railing, because California case law holds that the rights granted by a permit are limited to those specifically stated in the permit.¹ Furthermore, the determination letter explained that a guardrail is different than a fence. In particular, a guardrail is "constructed of open grillwork, wrought iron, latticework, pickets, or similar materials so that at least forty (40) percent of the fence is open."² By contrast, a "fence" is a "solid structure that is a barrier and used as a boundary or means of protection, confinement, or concealment."³ Therefore, the wooden fence is not authorized by PC 2295-2019 because it is not a guardrail.

Board Review:

The Building Official's determination regarding unpermitted construction under the NBMC and CBC Section 105.1 is appealable to this Board. In the event that this Board upholds the Building Official's determination that the Appellant is required to file for a building permit, then the Appellant will be required to submit plans for review by the City's Planning Division as part of the building permit application. If the City's Planning Division determines that the wooden fence does not comply with the City's zoning and development standards of Title 20, then the Appellant may pursue other options, including but not limited to, filing an application for a variance to be reviewed by the City's Planning Commission at that time.

NOTICING:

The agenda item has been noticed according to the Brown Act (72 hours in advance of the meeting at which the City Council considers the item).

ATTACHMENTS:

Attachment A – Plan Check 2295-2019 Approved Drawings

- Attachment B Notices of Violation
- Attachment C Building Official Determination Letter
- Attachment D CBC Section 105.1 Excerpt
- Attachment E Draft Decision
- Attachment F Appellant's Submitted Material

Supervisors of Contra Costa County, 14 Cal. App. 5th 1066 (2017).

² NBMC 20.30.040(A)(2), (C)(1), and (C)(3)(b).

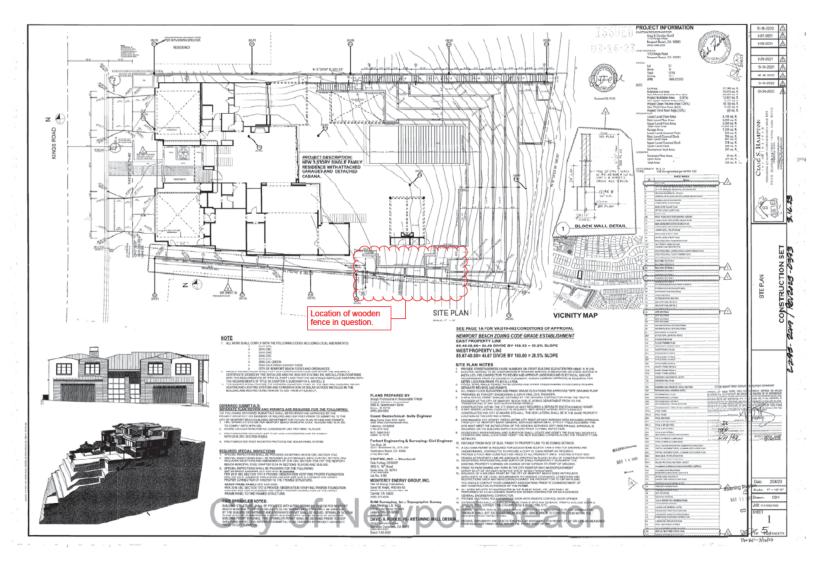
_-3

¹ Russ Bldg. Partnership v City & County of San Francisco, 44 Cal. 3d 839, 853-854 (1988) (holding that permittees had no greater rights than those granted them under the permit and stating, "[t]o the extent plaintiffs relied on their own self-serving interpretation ... such reliance must be considered unreasonable"); accord, Attard v. Board of Supervisors of Centre Centre Centre 14 Cell App. 5th 1066 (2017)

³ NBMC 20.70.20(F).

Attachment A

Plan Check 2295-2019 Approved Drawings



RESOLUTION NO. 2019-80

A RESOLUTION OF THE CITY ODLINEL OF THE CITY OF NEWFORT BLOCK, CALIFORNA, UPHOLONG AND AFT/DIRNS THE FAARING COMMISSION'S APPROVAL OF VARANCE NO, VA201902 TO ALLOW PORTIONS OF A NEW SNOLL-AMLY RESUBRICE TO EDCEED THE MAXMINI WINCHT LIMY FIRE BOARBETV I OF ATED AT 113 X003 F0.03 / PA2019602

, an application was filed by Carolyn Raed ("Applicant"), with respect to 1113 Kinge flood, and bgaily doorhood so Lot 51, Block, E, of Twart Nemeort Beach. Countred Oranos. State of California se shown on a do It Bock 38, Pages 23 and 27 of Histosthenous Mages, Into Office of Start & Bada. Country ("Property") requesting agrows of a variance tran-minic flood. (#RFCT, Boring on 2000 Beachers). and 27 of Miscellaneous lu perty') requesting approva Section 20.10.000 to allow p and covered patio on the num height limit ("Project");

WHIREAS, the Property is designated Single-Unit Residential Detached (RS-0) by anenal Plan Land Use Element and is located within the Single-Unit Residential (R-1)

WHEREAS, the Property is not located within the coastal zone:

WHEREAS, a public heating was held by the Planning Commission on May 23, in the City Council Chambers bounded 100 Cole Carbon Mercol Basch A or the April and April 2014 and April 2014 and Chamber of the MMAR Exception 2014 and Chamber of the MMAR Exception 2014 and Chamber of the MMAR Exception 2014 and Chamber and Planning Commission and an and April 2014 and Chamber of the MMAR Exception 2014 and Chamber April 2014 and Chamb

WHEREAS, on June 5, 2019, Stop Palluting Our Newport: "SPON" Illed an access Planning Commission's decision to approve the Project to the City Council;

WHEREAS, a public hearing was held on August 13, 2019, in the Chy Control Where Roaded at 100 CN/c Center Dirky. Newport Reach. A notice of thm, place and ex-of the newing-was years in accurate with the Reach M. Brown As and Chapter of the NBMC. Change, bith writter and call was presented to, and considered a City Council at this public hearing, and

Resolution No. 2018-80 Page 2 of 10

WHEREAS, pursuant to Chapter 21.64 (Appeals) of the NBMC, the City Council hearmo was conducted 'de novo.' meaning that the City Council considered all so and testimory anew. NOW, THEREFORE, the City Council of the City of Newport Beach resolves as

There are special or unique circumstances or conditions applicable to the subject property (e.g., location, shape, size, surrouncings, topography, or other physical features) that do not apply generally to other properties in the vicinity under an identical zonitic classification.

in Support of Finding:

The Property is a bifull top residence property that slopen norm to ocurs generally constants with other properties located along the such alid of Kings Duar. however, this particular Property is windlen in that a deep guilty servery constained the rothesatem corner of the kit. This guilty is an unsual Property feature that bookness the Response view multiple sloping angles and directives that does not generally apply to the other properties along Kings Road.

to the down implement along arrays found or the proposed reaction creaserum approximately. Toll fact lack, poperty line along Kriga Read. The skope efflexential and change in that along the enterin boundary line of the residence as compared down and the state of the residence and the state of the state of the state of the state of the compared of the state and the state of the st

t significant change in grade along the eastern loundary schaely occurs front 0° foot of this tea measured from the front property line, where the Resolution No. 2019-00 Page 3 410 1.

pulse the decrease point (32.85 host that). An end of the '00' of the decrease point (32.85 host that). A set that is a set of the top property in a (35.31 host MAVC). Set the decrease of the top property in a (35.31 host MAVC). Set the decrease of the decrease of the top property in a (35.31 host MAVC). Set the decrease of the decr

this variation in locooracity is a result of the gally in the northeastern corner of the $g_{\rm g}^2$ and presents a unique discumstance in comparison to other properties in its $g_{\rm g}^2m^2$ that warrant the requested variance.

Strict compliance with Zwing Code requirements would doprive the audject property of privileges anjoyed by other properties in the vicinity and under an identical zoning classification.

Fata in Support of Finling

Eirding

Due to ployakal conditions of the Prophrty incuding multiple slopi grades and angles, short compliance with Tille 20 of the NBMC ("Zonng Code") requirements would deprive the homeover ployages of a residence budnese by the incomensation, the loss of hunctionally engiged by other properties in the vicinity wherher is diverted taxing instantiation.

economics, incluse a sub-mainteners, whether is interesting insufficially table band on an approximation of the waiting path and preventing the path path and on an approximation of the waiting path and preventing the path path and on an approximation of the waiting path and preventing the path path and the path and path and the path and the path path and the path and the path and the path and the path path and the path and when the path and the path a

enjoying this same privilege of designing a two-level tenaced design across the buildate wides of the ter.

The baparselys featuring multiplies slope angles and a guily at a portion of the northeastern property comer, combined with a weldence but spare the buildable within the lot researce a values relations. Their compliance with the Joing Codemonic deprint the Applicant in the physical trading researches of uniterr tegers based the Market regardly which is a physicage tradyphics researches of uniterr tegers based to the scheder of regard weldence.

The method of the structure of the struc

holding the second states of the second states are reacted as the second second states and here are second respond administration of the react term in the second second

The granting of a variance provides while from Zoning Coale height calculations to ellow the revisions to manifest morpholic tables account both the wat and while the revisions to improve and multitable functionable in the board electric it is not interded not does it in any vary permit flatures or height increases beyond what can board board goid eleventme un the Property where physical hardenips size to topprophy are not present.

Ine appoint single-tamicy residence to the east (1101 Kings Hd), which is also impaired by the tryographic golly finitum, has been granted two valuences in the Resolution No. 2011-80 Page 5 of 10

percent VALISME Is 1973 and VALISME is (48)), a province over from ee spopperior constants allowing the hore to be exemuted. At viewel from loga Road the application average of the VALISME is the standard of the logarity of the exemption provide the standard is the standard of the logarity of the standard of the standard of the standard of the standard of the beaver, the neighborg property is not searching practic the standard visition and visition a maximum insplit of 45 the linese and each standard of the standard of the standard of the standard of the executions are accommonated to the standard of the spreaded standard orquest.

Finding С. Granting of the variance is necessary for the preservation and enjoyment of sub-stantist property rights of the applicant.

Facts in Support of Finding:

The pranting of a variance for the perservation of the applicant's rishts to enjoy a residence similar in style and character to the surroundingensidences is necessary use is the physics concentors of the Physicity notacing Varying Boography with multiple stope gades in differing directions and the steepness of the grade.

Utilities stope grades in the thermodynamic and the stope stope with the stope stope in the thermodynamic and the stope stope in the stope stope is the stope stope stope stope stope stope stope stope in the stope st

ionNo. 2019-80 5 Page 6 of 10

To avoid the topographic constraint associated with the guly, the teen room ouchs, writ covered pato assumes or the proposed resource would read to a settlexia opportunity in additional 3 the farts from assaulty isse stack (inc) of feet from easibly property lead to eliminate the need for the sufface. The mognitude of a design would efficively reduce the buildable width for approximatively paramet of the lat width to T2 present of the lat with the approximatively of paramet of the lat width to T2 present of the lat the tell. The one-height screak of the residence are bucked over a judy feature that is algolitened in bith a non-hearth disartion, as well as available disartion creates a challenge to dedge a readowned that is functional and schedule pleasing. The printing of this variance allows the applicant to preserve and from the development of a readdence that utilize the artis buildable width to tailwill in sity, wisk, and characted is surrounding homes.

5.

Finding

D a in Support of Finding:

Each signers of Korgs hoad presents works differing degrees of allow thoroparty-and provinties in the degrade hoad strange and provides and hoad and allow and allow

common a sparse sparse

Another displayed in the section of the sectin the section of the section of the section of t

Granting of the instances will not be detriment to the Ammonitory and orderly. grantif of the CR, nor endinger, Joseffich, or determine constitute a marger to the justice ammonitories, basis, strates, andre, or provide instituce of processor determines and the institution of processor ADOPTED this 10th ory of September 2169. ε

4

The gavening of the variance well alow for an increase in the host area of approximately 310 square last, unknowned to approximately 5.7 parcent of the ATTEST: the 24 foot flat roof and 29 loot sloping noot height limit. The delign of the variance with the decign good height link. The delign of the variance includes advocute and including monolution, and users to be the stand to be the decign of the variance with the requirements of the Zonny Code. The deticing of the variance with the requirements of the Zonny Code.

The avelage of the vertices with an event in the avenue of the second of the vertices of the v

Co be loated behind heich consident sortions of the structure as viewed from the street. Additionally, the over-height leafures would not be readily robiceable as viewed from Wear Coast Hylange tober due to the distance shore the highway and AD the initial state and analytich of the statuse royowand Hw ound exceed the height film. Therefore, the variance will not create a visual impact on surraunding areas or roadways.

A many the City does not have pruse view postector policies, he proper at an interpret of the postection policies, he proper at a subscription of the policy in the policy of the pol

The portion of fluctuature has exceense the height limit would be most inside from the property to the start. But is also impacted by the guty feature. To enviace the the start descense of the start descense to the start descense program. The start descense is the start descense the start descen There are no public views over or adjacent to the Property

L a walk as authorate forevice for the In Enderland and authorating. <u>Finite:</u> 9 Reaplacento preserve and Benefit Hillsm the series huildebit width of the *I*. Granding of the valence will not be in conflict with the interior and purpose of this mounting homes. Emilain Support of Finding-

removed to reaction protocol physical franchalips resulting from the unique topography and lot onfoundations that exist in the Daw and on the Procestric Daw to the topography if the lot, height and design of buildings on neighboring properties the react time scopption can be approved by the City Council through this variance request.

section 4. The CR Council that the adoption of this resolution is exempt fro

Juie Sty

Resolution No. 2019-80 Page 10 of 10

Ger of members of the City Council is sever, the foregoing resolution, being Res 0, was duly introduced testure and accepted by the City Council of said City at a regular in Council held or the 10th dau of September, 2019, and the same was so or ing vote, to will

STATE OF CALIFORNA 1 COUNTY OF ORANGE 55. CITY OF NEWFORT IEACH 1

Lialani I. Brown, City Cark of the City of Newport Beach, Calif.

AYES: Mayor Pro Tem Nill O'Nell, Council Nember Dufy Duffeld, C Hardman, Council Nember Kevin Muldicon NV/S: Mayor Dana Deor, Council Member Brad Avery, Council Member Jo wery, Courol Member Joy Tirenne INWITINESS WHEREOF, I have hereinto subscibed my name and affined the oficial ity bis 11th day of September 2019.

This Variance may be modified or revoked by the Planning Commission shi they determine that he proposed use or conditions under which it is to instructed or maintained is determined to the public health, welfare or nates liquificus to property or improvements in the vicinity of the property is constru-vanishment and as 5 constructive applic nutarease.

A copy of the Resolution, including conditions of approval (Exhibit 'A') shall be incorporated into the Building Division and field sets of plans prior to issuance of the building cermits.

Pior to the issuance of a building point, sie applicant shall pay say unput atministrative costs associated with the proceeding of this application to the

Minicipal Oxis, which resolve hows of note-generating construction activities that produce noise to between the hours of 7:00 a.m. and 6:30 p.m. Mondav through Finkay and 800 a.m. and 6:00 p.m. on Statutagy. Noise-generating construction activities are not allowed on Sundays or Holidays.

This experime shall explore and lexicine work integers exercised writen being toor (a) months from the actual deep of review authority accorovel, except where an extension of imme is approved in compliance with the provisions of NEMIC Title 20 (Planning an of the second s

d'Inte is segured in complicione that the provision of HEMC The 20 (Planterg and 2016).
The design of the provision of the provision of HEMC The 20 (Planterg and 2016).
The design of the provision of the design of the provision of the provision of the provision of the design of the provision of the provision of the provision of the design of the provision of the provision of the provision of the design of the provision of the provision of the provision of the design of the provision of the provision of the provision of the design of the provision of the provision of the provision of the provision of the design of the provision of the provision of the provision of the design of the provision of the design of the provision of the design of the design of the design of the provision of the design of the design of the design of the providing providing the design of the design of the design of the providing providing the design of the design of the design of the the providing providing the design of the design of the design of the providing providing the design of the design of the design of the design of the the the design of the design of the design of the design of the the providing providing the design of the design of the design of the design of the providing providing the design of the design of the design of the design of the the providing providing the design of the design of the design of the design of the providing providing the design of the design of the design of the design of the providing providing the design of the providing providing the design of the

Brould the Property to acid or utherwise come unter different owners future owners or assignees shall be notified of the conditions of this app either the current business owner, property owner or the leasing egent.

Construction activities shall comply with Section 10.28.040 of the News

- in-ter

81116

CRAKS S. HAMPTON DISTRICT OF A CONTRACTION DISTRICT OF A CONTRACTION OF L. QUARTER OF DISTRICT OF A CONTRACTION OF L. QUARTER OF A CONTRACTION OF A CONTRAC

E

CITY OF NEWPORT REACH RESCUTION & CONDITIONS OF AFPROVAL

CONSTRUCTION SET

2001

1A 98 seesa

ALTERAN STREET - BO ALTERAN STREET - BO ALTERAN ARIAS

Ш



Colfee State (910) CUSTOM RESIDENCE FOR JREG & CROOTN REID 1113 KDOG RCAD VECKENT FRANCE CA 2063 168 21 753 Scale: NTS Drawn: CSH W.K.M. 120 11 200

exh

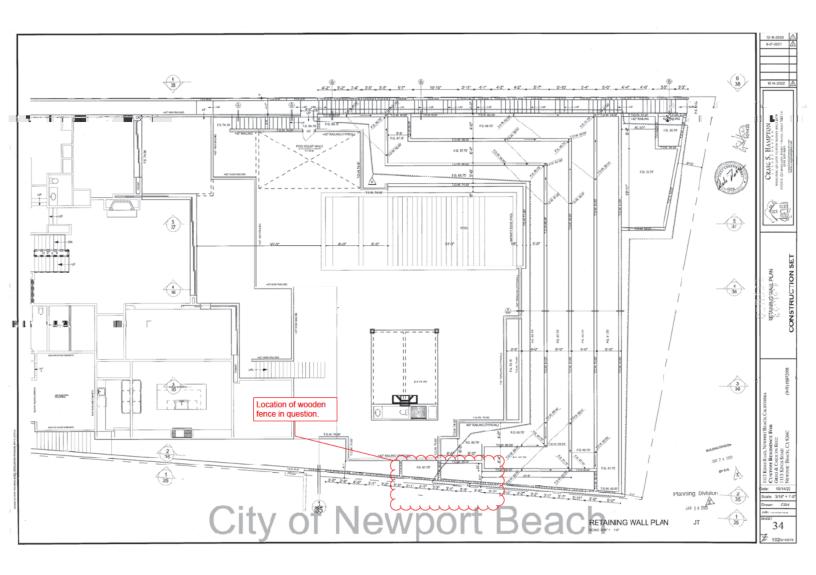


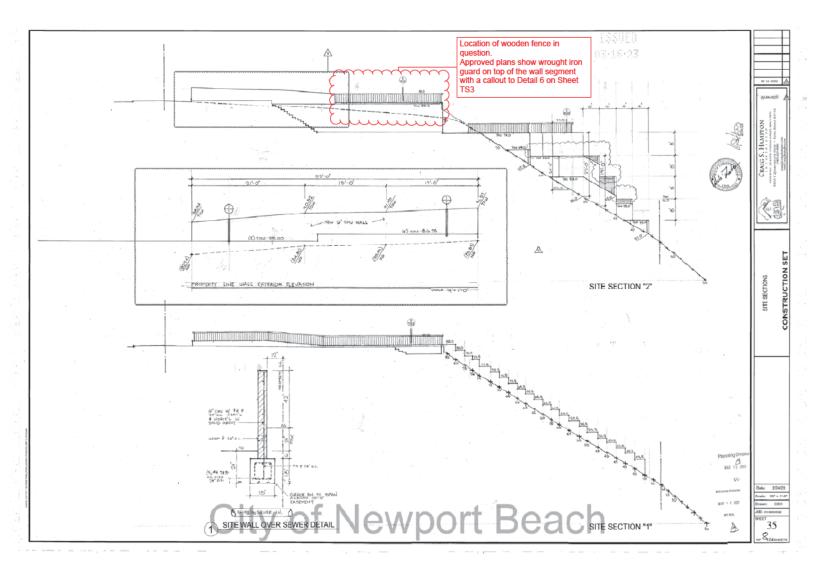


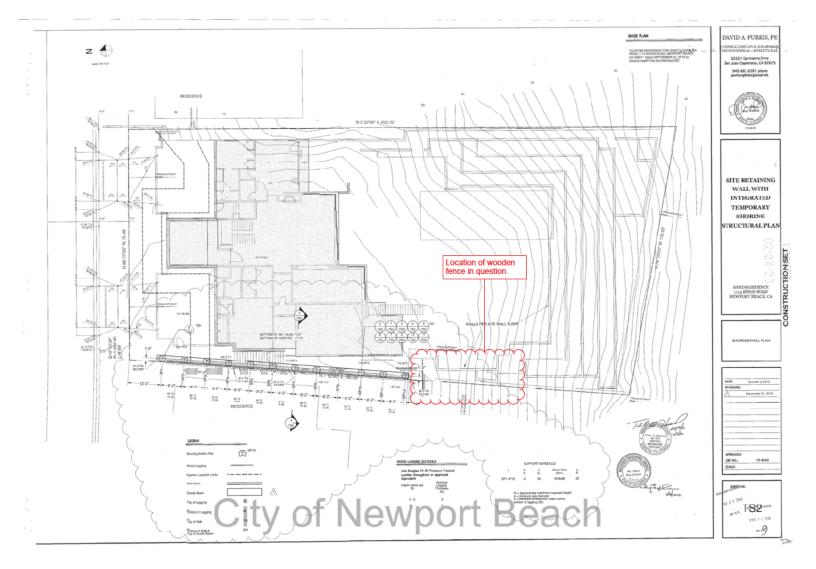


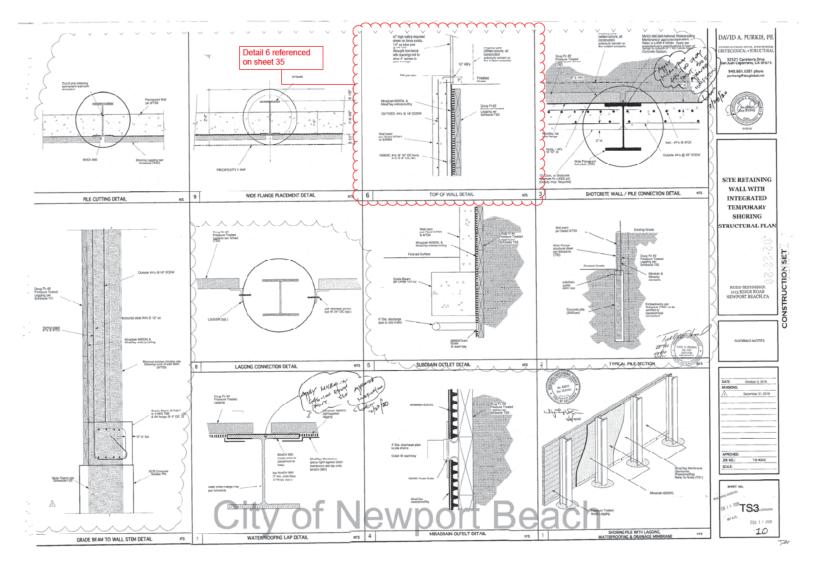
CONDITIONS OF APPROVAL

EXHIBIT 'A'









Attachment B

Notices of Violation



NOTICE OF VIOLATION

CITY OF NEWPORT BEACH COMMUNITY DEVELOPMENT DEPARTMENT Code & Water Quality Enforcement 100 Civic Center Drive, Newport Beach, CA 92660 949-644-3215

Name of Owner or Business:

GREGORY IRA CMGI REED

Case #: **I23-3980** Date Established: **11/22/2023**

PO BOX 1245 NEWPORT BEACH, CA 92659

Warning Only: X Previously Advised: Final Warning:

An inspection of the premises located at **1113 KINGS RD** on **Wednesday**, **November 22**, **2023**, revealed a violation(s) of the Newport Beach Municipal Code.

NEWPORT BEACH MUNICIPAL CODE SECTION / DESCRIPTIONS OF VIOLATION: 1) NBAC 105.1 BUILDING PERMIT REQUIRED

Correction(s) Required:

1) THE WOOD FENCE (WEST SIDE)-IS-NOT CONSISTENT WITH PC2295-2019. PLEASE REMOVE-AND REPLACE WITH MATERIALS APPROVED AND ENSURE THE FENCE DOES NOT EXCEED THE ALLOWED HEIGHT LIMIT PER THE APPROVED PLAN CHECK. FOR QUESTIONS RELATED TO YOUR PLAN CHECK PLEASE CONTACT THE PLANNING DIVISION DIRECTLY AT 949-644-3204.

ALL LISTED VIOLATIONS MUST BE CORRECTED ON OR BEFORE: Friday, December 15, 2023

If the violations are not corrected by the date specified, an ADMINISTRATIVE CITATION may be issued and penalties will begin to accrue (\$100, \$200, \$300, \$500, \$600, \$1000, \$2000, \$3000) each day. Additional enforcement actions such as administrative citations, administrative penalties, prosecution and/or civil injunction may be utilized to correct this violation(s). A REINSPECTION WILL BE MADE ON OR AFTER THE CORRECTION DATE. IF THE CORRECTION(S) IS NOT COMPLETED, AN ADMINISTRATIVE CITATION MAY BE ISSUED AND FEES WILL BEGIN TO ACCRUE.

The City of Newport Beach recognizes that oversights occur and challenges come up. We encourage you to contact the Code Enforcement Division for questions about this notice or to request an extension of time if one is needed. We understand the importance of working together and appreciate your cooperation in this matter.

Print Name of Officer: Monique Navarrete

Signature of Officer: Monique Navarrete

Officer ID#: 0398

Printed: 12/7/23



NOTICE OF VIOLATION

CITY OF NEWPORT BEACH COMMUNITY DEVELOPMENT DEPARTMENT Code & Water Quality Enforcement 100 Civic Center Drive, Newport Beach, CA 92660 949-644-3215

Name of Owner or Business:

GREGORY IRA CMGI REED

Case #: **I23-3980** Date Established: **12/07/2023**

PO BOX 1245 NEWPORT BEACH, CA 92659

Warning Only: X Previously Advised: X Final Warning: X

An inspection of the premises located at **1113 KINGS RD** on **Thursday, December 7**, **2023**, revealed a violation(s) of the Newport Beach Municipal Code.

NEWPORT BEACH MUNICIPAL CODE SECTION / DESCRIPTIONS OF VIOLATION: 1) NBAC 105.1 BUILDING PERMIT REQUIRED

Correction(s) Required:

1) THE WOOD FENCE (WEST SIDE) IS NOT CONSISTENT WITH PC2295-2019. PLEASE REMOVE AND REPLACE WITH MATERIALS APPROVED AND ENSURE THE FENCE DOES NOT EXCEED THE ALLOWED HEIGHT LIMIT PER THE APPROVED PLAN CHECK. FOR QUESTIONS RELATED TO YOUR PLAN CHECK PLEASE CONTACT THE PLANNING DIVISION DIRECTLY AT 949-644-3204.

ALL LISTED VIOLATIONS MUST BE CORRECTED ON OR BEFORE: Wednesday, December 27, 2023

If the violations are not corrected by the date specified, an ADMINISTRATIVE CITATION may be issued and penalties will begin to accrue (\$100, \$200, \$300, \$500, \$600, \$1000, \$2000, \$3000) each day. Additional enforcement actions such as administrative citations, administrative penalties, prosecution and/or civil injunction may be utilized to correct this violation(s). A REINSPECTION WILL BE MADE ON OR AFTER THE CORRECTION DATE. IF THE CORRECTION(S) IS NOT COMPLETED, AN ADMINISTRATIVE CITATION MAY BE ISSUED AND FEES WILL BEGIN TO ACCRUE.

The City of Newport Beach recognizes that oversights occur and challenges come up. We encourage you to contact the Code Enforcement Division for questions about this notice or to request an extension of time if one is needed. We understand the importance of working together and appreciate your cooperation in this matter.

Print Name of Officer: Monique Navarrete

Signature of Officer: Monique Navarrete

Officer ID#: 0398

Attachment C

Building Official Determination Letter



CITY OF NEWPORT BEACH COMMUNITY DEVELOPMENT DEPARTMENT

100 Civic Center Drive Newport Beach, California 92660 949 644-3200 newportbeachca.gov/communitydevelopment

May 1, 2024

Michael W. Shonafelt Newmeyer & Dillion LLP 895 Dove Street, Fifth Floor Newport Beach, CA 92660 Michael.Shonafelt@ndlf.com

Re: 1113 Kings Road - Unpermitted and Nonconforming Wooden Fence

Dear Mr. Shonafelt,

I am writing in response to your letter dated April 9, 2024 ("Your Letter"), in which you write on behalf of your client, Mr. Reed ("Your Client"), in regard to a number of notices of violation and administrative citations received from the City of Newport Beach ("City") due to a wooden fence built upon his property located at 1113 Kings Road. In Your Letter, you state that your office has not found any violation of the Newport Beach Municipal Code ("NBMC") or the California Building Code ("CBC") that prohibits the wooden fence.

Please note that NBMC 20.30.040(A)(1) states that the maximum height of a fence in a side setback area is six feet. The height of a fence is measured from "existing grade prior to construction." NBMC 20.30.040(D). The wooden fence at issue here, measured from *existing grade prior to construction*, exceeds six feet (being approximately nine feet) in height. Accordingly, the wooden fence at issue here violates NBMC height restrictions.

Due to the height exceeding six feet, a building permit application must be filed with the City, and approved, before the wooden fence can be built. California Building Code Section 105.1, states (emphasis added):

Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall <u>first</u> make application to the building official and obtain the required permit.

In response to your comments as to whether the wooden fence complies with a prior building permit, PC 2295-2019, which authorized "wrought iron" railing, California case law holds that the rights granted by a permit are limited to those specifically stated in the permit. *Russ Bldg. Partnership v City & County of San Francisco*, 44 Cal. 3d 839, 853-854 (1988) (holding that permittees had no greater rights than those granted them under the permit and stating, "[t]o the extent plaintiffs relied on their own self-serving

Michael W. Shonafelt May 1, 2024 Page 2

interpretation ... such reliance must be considered unreasonable"); accord, Attard v. Board of Supervisors of Contra Costa County, 14 Cal. App. 5th 1066 (2017). In this case, and as you acknowledge in Your Letter, PC 2295-2019, Sheet TS3, Detail 6, expressly authorized "wrought iron" railing, but did not authorize a 'wooden' fence. Accordingly, the authorization granted by PC 2295-2019 to construct wrought iron railing does not confer on Your Client the right to construct the wooden fence.

Additionally, the reason the wrought iron railing was approved by the Planning Division was because it was considered to be a guardrail for safety. In general, a guardrail may sometimes be approved as an exception to height limitations for safety purposes. See, e.g., NBMC 20.30.040(A)(2), (C)(1), and (C)(3)(b). Guardrails are "constructed of open grillwork, wrought iron, latticework, pickets, or similar materials so that at least forty (40) percent of the fence is open." Id. By contrast, a "fence" is defined as a "solid structure that is a barrier and used as a boundary or means of protection, confinement, or concealment." NBMC 20.70.20(F). Therefore, the wooden fence Your Client constructed is not within the scope of PC 2295-2019 because it constitutes a fence, rather than a guardrail. Likewise, your offer to install a wrought iron barrier of a "substantially closed design" would be noncompliant because it would also constitute a fence. As explained above, a fence would be prohibited because it would violate the maximum height requirement of NBMC 20.30.040(A)(1).

Even assuming, *arguendo*, that PC 2295-2019 authorized a 'fence' in the subject location, such authorization would be invalid because a permit cannot authorize a violation of applicable codes. CBC 105.4 ("[t]he issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other ordinance of the jurisdiction"); *Pettitt v. City of Fresno*, 34 Cal. App. 3d 813, 824 (1973) (holding a permit to be "invalid from the beginning because issued in violation of the zoning law for the area"); *Attard v. Board of Supervisors of Contra Costa County*, 14 Cal. App. 5th 1066, 1077 (2017) ("... a permit may insulate a party against subsequent changes in the law, [but] it cannot create a vested right to construct or use property in violation of laws in effect at the time of issuance of the permit"). In other words, if PC 2295-2019 authorized a wrought iron 'fence,' and by extension, a wooden 'fence,' then both would be invalid because a fence, constructed of either material, would be a violation of the height restrictions of NBMC 20.30.040(A)(1).

Last, we would like to point out that if Your Client's intent when requesting the wrought iron railing was privacy and concealment, Your Client should have clearly requested a substantially closed design, such as the wooden fence, in his application for building permit PC 2295-2019. Had Your Client done so, the matter could have been addressed at the outset. Instead, Your Client requested the open-faced wrought iron railing. Furthermore, Your Client did, in fact, build the wrought iron railing in conformity with building permit PC 2295-2019. It was only after this work was completed that Your Client, without notification to the City, and without applying for a new building permit, took the initiative to remove the wrought iron railing and replace it with the wooden fencing.

Michael W. Shonafelt May 1, 2024 Page 3

Although we are not accusing Your Client of any intentional misconduct, please note that a building permit is invalid if it was issued based on an applicant's misrepresentation. *Autopsy/Post Services, Inc. v. City of Los Angeles*, 129 Cal. App. 4th 521 (2005) (building permit invalid where applicant withheld from agency the intended purpose); *Stokes v. board of Permit Appeals*, 52 Cal. App. 4th 1348 (1997) (permits invalid when issued based on misrepresentation of applicant).

I hope that the forgoing sufficiently explains why a building permit is required, and why the wooden fence is noncompliant. The City respectfully requests Your Client promptly take action to correct these issues and bring his property into compliance. No building permit is required to remove the wooden fencing.

Finally, please be advised that I have consulted with the City Attorney's Office and have been instructed to inform you that if the wooden fence is not removed within <u>ten (10)</u> <u>calendar days</u> of the date of this letter, then the City will be forced to take legal action.

Cordially,

Tonee Thai Chief Building Official City of Newport Beach

cc: Aaron Harp, City Attorney

Attachment D

CBC Section 105.1 Excerpt

- 2. A determination that failure to grant the variance would result in exceptional hardship by rendering the lot undevelopable.
- 3. A determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, cause fraud on or victimization of the public, or conflict with existing laws or ordinances.
- A determination that the variance is the minimum necessary to afford relief, considering the flood hazard.
- 5. Submission to the applicant of written notice specifying the difference between the design flood elevation and the elevation to which the building is to be built, stating that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced floor elevation, and stating that construction below the design flood elevation increases risks to life and property.

[A] 104.11 Alternative materials, design and methods of construction and equipment. The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code, provided that any such alternative has been approved. An alternative material, design or method of construction shall be approved where the building official finds that the proposed alternative meets all of the following:

- The alternative material, design or method of construction is satisfactory and complies with the intent of the provisions of this code,
- 2. The material, method or work offered is, for the purpose intended, not less than the equivalent of that prescribed in this code as it pertains to the following:
 - 2.1.Quality.
 - 2.2.Strength.
 - 2.3.Effectiveness.
 - 2.4. Fire resistance.
 - 2.5.Durability.
 - 2.6.Safety.

Where the alternative material, design or method of construction is not approved, the building official shall respond in writing, stating the reasons why the alternative was not approved.

[DSA-SS, DSA-SS/CC & OSHPD 1, 1R, 2, 4 & 5] Alternative system shall satisfy ASCE 7 Section 1.3, unless more restrictive requirements are established by this code for an equivalent system.

[DSA-SS, DSA-SS/CC] Alternative systems shall also satisfy the California Administrative Code, Section 4-304.

[OSHPD 1, 1R, 2, 4 & 5] Alternative systems shall also satisfy the California Administrative Code, Section 7-104.

[A] 104.11.1 Research reports. Supporting data, where necessary to assist in the approval of materials or assem-

blies not specifically provided for in this code, shall consist of valid research reports from approved sources.

[A] 104.11.2 Tests. Whenever there is insufficient evidence of compliance with the provisions of this code, or evidence that a material or method does not conform to the requirements of this code, or in order to substantiate claims for alternative materials or methods, the building official shall have the authority to require tests as evidence of compliance to be made without expense to the jurisdiction. Test methods shall be as specified in this code or by other recognized test standards. In the absence of recognized and accepted test methods, the building official shall approve the testing procedures. Tests shall be performed by an approved agency. Reports of such tests shall be retained by the building official for the period required for retention of public records.

104.11.3 Peer review. [OSHPD 1, 1R, 2, 4 & 5] When peer review is required for new or existing buildings, it shall be performed pursuant to Section 1617A.1.41.

104.11.4 Earthquake monitoring instruments. [OSHPD 1 & 4] The enforcement agency may require earthquake monitoring instruments for any building that receives approval of an alternative system for the Lateral Force Resisting System (LFRS). There shall be a sufficient number of instruments to characterize the response of the building during an earthquake and shall include at least one tri-axial free field instrument or equivalent. A proposal for instrumentation and equipment specifications shall be forwarded to the enforcement agency for review and approval.

The instruments shall be interconnected for common start and common timing. Each instrument shall be located so that access is maintained at all times and is unobstructed by room contents. A sign stating "MAIN-TAIN CLEAR ACCESS TO THIS INSTRUMENT" shall be posted in a conspicuous location.

The Owner of the building shall be responsible for the implementation of the instrumentation program. Maintenance and service of the instruments shall be in accordance with Appendix L, Section 1.101.3 of Part 2, Volume 2 of the California Building Code.

SECTION 105 PERMITS

[A] 105.1 Required. Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall first make application to the building official and obtain the required permit.

[A] 105.1.1 Annual permit. Instead of an individual permit for each alteration to an already approved electrical, gas, mechanical or plumbing installation, the building official is authorized to issue an annual permit upon application therefor to any person, firm or corporation regularly

2022 CALIFORNIA BUILDING CODE

Copyright © 2022 ICC. ALL RIGHTS RESERVED. Accessed by Tonee Thai (thai@newportbeachca.gov), (City of Newport Beach) Order Number #101369368 on Oct 04, 2022 TroyAM (PDT) pursuant to License Agreement with ICC. No further reproduction, no further reproductions by any third party, or distribution authorized. Single user only, copying and networking prohibited. ANY UNAUTHORIZED REPRODUCTION OR DISTRIBUTION IS A VIOLATION OF THE FEDERAL COPYRIGHT ACT AND THE LICENSE AGREEMENT, AND SUBJECT TO CIVIL AND CRIMINAL PENALTIES THEREUNDER. employing one or more qualified tradespersons in the building, structure or on the premises owned or operated by the applicant for the permit.

[A] 105.1.2 Annual permit records. The person to whom an annual permit is issued shall keep a detailed record of alterations made under such annual permit. The building official shall have access to such records at all times or such records shall be filed with the building official as designated.

[A] 105.2 Work exempt from permit. Exemptions from permit requirements of this code shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of this code or any other laws or ordinances of this jurisdiction. Permits shall not be required for the following:

Building:

- 1. One-story detached accessory structures used as tool and storage sheds, playhouses and similar uses, provided that the floor area *does* not *exceed* 120 square feet (11.15 m²). It is permissible that these structures still be regulated by Section 710A, despite exemption from permit.
- 2. Fences not over 7 feet (2134 mm) high.
- 3. Oil derricks.
- 4. Retaining walls that are not over 4 feet (1219 mm) in height measured from the bottom of the footing to the top of the wall, unless supporting a surcharge or impounding Class I, II or IIIA liquids.
- 5. Water tanks supported directly on grade if the capacity is not greater than 5,000 gallons (18 925 L) and the ratio of height to diameter or width is not greater than 2:1.
- 6. Sidewalks and driveways not more than 30 inches (762 mm) above adjacent grade, and not over any basement or story below and are not part of an accessible route.
- 7. Painting, papering, tiling, carpeting, cabinets, counter tops and similar finish work.
- 8. Temporary motion picture, television and theater stage sets and scenery.
- Prefabricated swimming pools accessory to a Group R-3 occupancy that are less than 24 inches (610 mm) deep, are not greater than 5,000 gallons (18 925 L) and are installed entirely above ground.
- Shade cloth structures constructed for nursery or agricultural purposes, not including service systems.
- 11. Swings and other playground equipment accessory to detached one- and two-family dwellings.
- 12. Window awnings in Group R-3 and U occupancies, supported by an exterior wall that do not project more than 54 inches (1372 mm) from the exterior wall and do not require additional support.

13. Nonfixed and movable fixtures, cases, racks, counters and partitions not over 5 feet 9 inches (1753 mm) in height.

Electrical:

- 1. **Repairs and maintenance:** Minor repair work, including the replacement of lamps or the connection of approved portable electrical equipment to approved permanently installed receptacles.
- 2. Radio and television transmitting stations: The provisions of this code shall not apply to electrical equipment used for radio and television transmissions, but do apply to equipment and wiring for a power supply and the installations of towers and antennas.
- 3. **Temporary testing systems:** A *permit* shall not be required for the installation of any temporary system required for the testing or servicing of electrical equipment or apparatus.

Gas:

- 1. Portable heating appliance.
- 2. Replacement of any minor part that does not alter approval of equipment or make such equipment unsafe.

Mechanical:

- 1. Portable heating appliance.
- 2. Portable ventilation equipment.
- 3. Portable cooling unit.
- 4. Steam, hot or chilled water piping within any heating or cooling equipment regulated by this code.
- 5. Replacement of any part that does not alter its approval or make it unsafe.
- 6. Portable evaporative cooler.
- 7. Self-contained refrigeration system containing 10 pounds (4.54 kg) or less of refrigerant and actuated by motors of 1 horsepower (0.75 kW) or less.

Plumbing:

- 1. The stopping of leaks in drains, water, soil, waste or vent pipe, provided, however, that if any concealed trap, drain pipe, water, soil, waste or vent pipe becomes defective and it becomes necessary to remove and replace the same with new material, such work shall be considered as new work and a permit shall be obtained and inspection made as provided in this code.
- 2. The clearing of stoppages or the repairing of leaks in pipes, valves or fixtures and the removal and reinstallation of water closets, provided that such repairs do not involve or require the replacement or rearrangement of valves, pipes or fixtures.

[A] 105.2.1 Emergency repairs. Where equipment replacements and repairs must be performed in an emergency situation, the permit application shall be submitted

1-29

2022 CALIFORNIA BUILDING CODE



Copyright © 2022 ICC. ALL RIGHTS RESERVED. Accessed by Tonee Thai (thai@newportbeachea.gov), (City of Newport Beach) Order Number #101369368 on Oct 04, 2027 IT:: O AM (PDT) pursuant to License Agreement with ICC. No further reproduction, no further reproductions by any third party, or distribution authorized. Single user only, copying and networking prohibited. ANY UNAUTHORIZED REPRODUCTION OR DISTRIBUTION IS A VIOLATION OF THE FEDERAL COPYRIGHT ACT AND THE LICENSE AGREEMENT, AND SUBJECT TO CIVIL AND CRIMINAL PENALTIES THEREUNDER

Attachment E

Draft Decision



BUILDING AND FIRE BOARD OF APPEALS APPEAL OF CHIEF BUILDING OFFICIAL'S DETERMINATION RE 1113 KINGS ROAD

DECISION

The City of Newport Beach Board of Appeals ("Board") heard the appeal of Greg Reed ("Appellant") of the City's Chief Building Official's ("Building Official") determination regarding the unpermitted construction at 1113 Kings Road ("Property") at a noticed public hearing conducted in the **Newport Beach Civic Center, Corona del Mar Conference Room (100 Civic Center)** on <u>September 10, 2024, at 3:30 p.m.</u>

Appellant appealed the Building Official's determination that Appellant must first apply for a building permit before replacement of existing wrought iron guardrail with a wooden fence, pursuant to the current California Building Code.

The Board reviewed the evidence submitted by the Appellant, City of Newport Beach staff, and the public, and heard testimony. The Board finds that:

- The Property had permitted construction of a wrought iron guardrail on the west side of the Property located on top of a retaining wall;
- The Appellant replaced the permitted wrought iron guardrail on the west side of Property with a wooden fence without first applying for a City building permit; and
- The applicable California Building Code, Section 105.1, as adopted and amended by the City, is as follows:

Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall first make application to the building official and obtain the required permit.

Having fully considering the matter, the Board finds that California Building Code Section 105.1 requires application for a building permit for construction of the wooden fence on top of the existing retaining wall. Accordingly, the Board affirms the Building Official's determination requiring application for a building permit for the construction of the wooden fence on top the existing retaining wall on the west side of the Property.

Vote:

PARTICIPANTS

Board of Appeals Members Present:

Appellant: Greg Reed

City Staff: Tonee Thai, Deputy Community Development Director/Chief Building Official; Joseph Meeks, Deputy City Attorney; Jaime Murrillo, Deputy Community Development Director - Planning

Other Participants:

Khosrow Nourmohammadi, Chair

Date

Attachment F

Appellant's Submitted Materials

Appeal Application

City Clerk's Office 100 Civic Center Drive / P.O. Box 1768 Newport Beach, CA 92658-8915 949-644-3005

Clerk's Date & Time Stamp

MAY 14'24 PM3:46 REC'D CITY CLERKS OFFIG

Appeals are time sensitive and must be received by the City Clerk within the specified time period from a decision or final action by a decision-maker. It is advisable to consult with the Department managing the issue if there is question with regards to appealing an action. This is an appeal of the:

- □ (CDD222) Community Development Director Action to the Planning Commission \$2116
- □ (CDD222) Zoning Administrator Action to the Planning Commission \$2116
- CDD222) Coastal Development Application CDP Appeal from Zoning Admin to the Planning Commission (only if appeal is solely based on the CDP portion of the application) - No Fee
- □ (CDD222) Planning Commission Action to the City Council \$2116
- CDD222) Community Development Director Action to the Harbor Commission \$1250
- □ (CDD222) Harbor Commission Action to the City Council (CDD Planning) \$940
- □ (CDD222) Hearing Officer Action to the City Council- \$2116
- CDD223) Building Official/Fire Marshal Action to the Building/Fire Board of Appeals \$1768
- CDD224) Chief of Police Action on an Operator License to the City Manager \$1000
- □ (RSS073) City Manager Action on a Special Events Permit to the City Council \$1890
- □ (HBR001) Harbormaster Action to the Harbor Commission \$1250
- (HBR001) Harbor Commission Action to the City Council (Harbor Department) \$940
- □ (PBW018) Public Works Director Action to Harbor Commission \$1250
- □ (PBW018) Harbor Commission Action to City Council (Public Works Department) \$940
- □ Other Specify decision-maker, appellate body, Municipal Code authority and fee: ____

Appellant Information:

Name(s):	SEE	ATTACH	ED	
Address:				
City/State/Zip:				
Phone:				
Appealing Application Regardir	ng:			
Name of Applicant(s):		Date of	Final Decision:	
Project No.:		Activity No.:		
Application Site Address:				
Description of application:				
Reason(s) for Appeal (attach a se		-		
Signature of Appellant:		tin and the second s		
FOR OFFICE USE ONLY: Date Appeal filed and Administrative		y 14	. 20 2.4.	
City/Clefk	realer Plaff File	L HEWPOR		F:\Users\Clerk\Shared\Forms\Appe
cc: Department Director, Deputy DI	rector, Stan, File	0/2010/2019		r.ioaersiciernanareu - offits vippe

al Application lated 8/2923

AND ALCON	The second s				CIT MENTAL MICH AND	
	, WPO,	and the suprementation of the second	D FIRE BOARD OF A PLICATION FOR:	APPEALS		
10	5 1 16 8	D APPEAL	RATIFIC	ATION		
OTTO .	HON AND		y of Newport Beach Building Division			
	GLIFORHUT	100 Civic Cente	er Drive, Newport Beach, C/ (949) 644-3200	A 92660	Marcoland Contractory of Contractory of Contractory	
<u>-</u>				(PORT LATERAL		
C	Application is hereby made for an Appeal of decisions, determination or interpretation of the Chief Building Official as provided in Chapter 15.80 of the Newport Beach Municipal Code.		Accepte			
(determination o	fornia Building Code, C	hief Building Official as		Case No.: <u>8A2024-0</u> Fee: <u>\$1,768</u> Date:	
	Application is he Chief Fire Mars	ereby made for an App hall as provided in Cha	peal of decisions, determina opter 15.80 of the Newport E	ition or interp Beach Munici	retation of the pal Code.	
PLEA Schad	ASE NOTE: A c	omoleted apolication n be considered for that	nust be received no later the hearing.	an four week	s prior to a Board's	
			NINK OR TYPE ALL INF uired for reply, please attach addit		4	
Buildi	ing Owner:	Greg Reed	Phone:	\$49.2	71.6342	
Owne	er's Address:			CA State	92663 Zip	
Contr	act Person or Ap	Street	City	Siale	Ζip	
		piroant	Pho	ne:		
	cant's Address:_					
- popularia						
		Street f property, which is subj	City ect of the request:	State 1113 Kings Ro		
Desci on sa	ription of any pro aid premises. Pro	Street f property, which is subj posed buildings or strue	ect of the request:	1113 Kings Ro	ad	
Descion sa side Has a been If Yes Cite s being large	adocumentation of from the formation of from the formation of filed? Security of the formation of filed? Security of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the formation of the fore	Street f property, which is subju- posed buildings or strue ovide permit or plan che side-yard setback. PC 229 of unreasonable hards S a copy of that request a and subsection of the C- ach two sets of all sketo Aopeal is being reque	ect of the request:	1113 Kings Ro	ad pocaled or to be located g wall guardrail along west te methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea	
Descion sa side Has s been If Yes Cite s being large Mu	a documentation a documentation a filed? YE s, plsase attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section	Street f property, which is subject oposed buildings or struc- povide permit or plan che side-yard setback. PC 229 of unreasonable hards S a copy of that request a and subsection of the C. Aopeal is being request on 20.30.040 and the CBC a con you are appealing or	ect of the request:	1113 Kings Ro ng buildings lo Retaining tion or alternat which an approne full size s nd misintercreta of notice of violat	ad pocated or to be located g wall guardrail along west is methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section wition:	
Descion sa side Has a been If Yes Cite s being large Mu Plea	a documentation a documentation a filed? YE s, plsase attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section	Street f property, which is subject oposed buildings or struc- povide permit or plan che side-yard setback. PC 229 of unreasonable hards S a copy of that request a and subsection of the C. Aopeal is being request on 20.30.040 and the CBC a con you are appealing or	ect of the request:	1113 Kings Ro ng buildings lo Retaining tion or alternat which an approne full size s nd misintercreta of notice of violat	ad pocated or to be located g wall guardrail along west is methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section wition:	
Description of the second seco	adocumentation of property line in a documentation of filed? YE s, please attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section ise state the action ppeal is taken from his matter.	Street f property, which is subject oposed buildings or struc- ovide permit or plan che side-yard setback. PC 229 of unreasonable hards S a copy of that request a and subsection of the C. and subsection of the C. and subsection of the C. ach two sets of all sketo ach two sets of all sketo and subsection of the C. and subsection of the C. and subsection of the C. and subsection of the C. asons for your appeal of	ect of the request:	1113 Kings Ro	ad pocated or to be located g wall guardrail along west te methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section stion:	
Descion sa side Has a been If Yes Cite s being large Mu Plea Ar	ad premises. Pre- aid premises. Pre- e of property line in a documentation i filed? YE s, please attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section isse state the action ppeal is taken from his matter.	Street f property, which is subju- posed buildings or stru- povide permit or plan che side-yard setback. PC 229 of unreasonable hardsi S a of unreasonable hardsi S a copy of that request a and subsection of the C ach two sets of all sketo Aopeal is being reque on 20.30.040 and the CBC a on you are appealing or the May 1, 2024, letter of T assons for your appeal of ter dated April 9, 2024. App	ect of the request:	1113 Kings Ro	ad pocated or to be located g wall guardrail along west te methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section stion:	
Descion sa side Has side been If Yes Cite s being large Mu Plea Ar Justi	a documentation a documentation a filed? YE s, please attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section ase state the action ppeal is taken from his matter. ification (state re <u>See attached let</u> the appeal hea	Street f property, which is subju- posed buildings or stru- povide permit or plan che side-yard setback. PC 229 of unreasonable hardsi S a of unreasonable hardsi S a copy of that request a and subsection of the C ach two sets of all sketo Aopeal is being reque on 20.30.040 and the CBC a on you are appealing or the May 1, 2024, letter of T assons for your appeal of ter dated April 9, 2024. App	ect of the request:	1113 Kings Ro	ad pocated or to be located g wall guardrail along west te methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section tion:	
Descion sa side Has side been If Yes Cite s being large Mu Plea Ar Justi	ad premises. Pre- aid premises. Pre- e of property line in a documentation i filed? YE s, please attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section isse state the action ppeal is taken from his matter.	Street f property, which is subju- posed buildings or stru- povide permit or plan che side-yard setback. PC 229 of unreasonable hardsi S a of unreasonable hardsi S a copy of that request a and subsection of the C ach two sets of all sketo Aopeal is being reque on 20.30.040 and the CBC a on you are appealing or the May 1, 2024, letter of T assons for your appeal of ter dated April 9, 2024. App	ect of the request:	1113 Kings Ro	ad pocated or to be located gwall guardrail along west gwall guardrail along west te methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section the City's position regarding the City's position regarding sets if necessary) ins for the appeal prior to	
Desci on sa side Has a been If Yes Cite s being large Mu Plea Appl	a documentation a documentation a filed? YE s, please attach specific section a g requested. Att er than 8½ x 14]: unicipal Code section ase state the action ppeal is taken from his matter. ification (state re <u>See attached let</u> the appeal hea	Street f property, which is subject opposed buildings or struc- povide permit or plan che side-yard setback. PC 229 of unreasonable hards S	ect of the request:	1113 Kings Ro	ad pocated or to be located gwall guardrail along west gwall guardrail along west te methods & materials eal or ratification is et and 12 sets no tion of City of Newport Bea ion based on those section the City's position regarding the City's position regarding sets if necessary) ins for the appeal prior to	

t

a. A

Information on Procedure for Appeal from a Determination or Action by the Chief Building Official or Fire Code Official

1

Appeal from the determination or action of the Chief Building Official or Fire Code Official or their designated agent may be made to the Building and Fire Board of Appeals. To appeal, the applicant must provide special individual reasons that make compliance with the strict letter of the Code impractical. Appeals or ratifications pertaining to State Disabled Access Standards require complete evidence to substantiate that the proposed design is equivalent to that prescribed by that standards or that due to legal or physical constraints, compliance with the standards or providing equivalency would create an unreasonable hardship.

27

Appeals must be submitted on the Appeal Form available at Permit Counter accompanied by the proper fee. You will be notified in writing of the appeal hearing's time and date.



Newmeyer & Dillion LLP 895 Dove Street Fifth Floor Newport Beach, CA 92660 949 854 7000

Michael W. Shonafelt Michael.Shonafelt@ndlf.com

April 9, 2024

VIA EMAIL

Tonee Thai Chief Building Official City of Newport Beach 100 Civic Center Drive Newport Beach, CA 92660 tthai@newportbeachca.gov

Re: 1113 Kings Road PC 2295-2019: Notices of Violation

Dear Mr. Thai,

This office represents Gregory I. Reed ("Owner"), owner of 1113 Kings Road ("Property") in the City of Newport ("City"). This responds to one or more "Notice[s] of Administrative Citation" concerning purported violation of the City of Newport Beach Municipal Code ("NBMC") related to a guardrail fence topping a retaining wall on the west side of the Property ("Notice"). The Notice asserts that the guardrail fence "is not consistent" with building permit construction drawings ("Building Permit Plans") for the west retaining wall, presumably because it is constructed with wood as opposed to wrought iron. While not explicit in the Notice, we understand there may also be concerns that the railing fence is not "open" or does not otherwise provide spacing between slats or pickets.

Our office has reviewed the Notice to understand the basis of the purported violation. That analysis has not revealed any violation of the NBMC, the California Building Code ("CBC") or, necessarily, the Building Plans. With specific regard to the NBMC and the CBC, we found no provision that prohibits a wooden railing fence consistent with the asbuilt condition of the west retaining wall. Nor do we find any provision requiring use of wrought iron or any minimum spacing requirements for fence elements. In fact, where the NBMC expressly requires "open" grillwork, wrought iron, latticework, spaced pickets or similar materials, it is with specific regarding to railings on walls located at the front setback (NBMC, § 20.30.040.A.C.1) or with respect to specific neighborhoods located within the City (*id.*, § 20.30.040.B). It is a fundamental canon of statutory construction that the expression of one thing implies the exclusion of others. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424.) In this case, the Code's identification of specific

Tonee Thai Chief Building Official City of Newport Beach April 9, 2024 Page 2

instances where open fencing is required necessarily implies that solid fencing is allowed everywhere else. Nor did we find any more general requirement for open fencing elements or materials that could be applicable to a side-yard within this neighborhood of the City.

The only reference to wrought iron is a single note on one page in the Building Plans. (1113 Kings Road PC 2295-2019- Construction Drawings [herein defined as "Building Plans,"] p. TS3.) That note features a reference to a 42-inch high railing of "wrought iron fence with openings not to allow 4" sphere to pass through," the wording of the note does not, perforce, mandate minimum openings in the fencing material, only openings that are not so large as to allow a four-inch ball to pass through. Nor does it expressly preclude use of other materials for the fence railing. In fact, the as-built condition complies with every applicable standard that we found, as set forth in either the CBC or the NBMC, and otherwise substantially conforms to the approved Building Plans.

Notwithstanding the above and Owner's objections to any claim of violation, Owner is willing to replace the as-built wooden guardrail fence with a wrought iron fence of a design substantially closed design. We must insist on a design that maintains an appropriate level of both safety and privacy, and the proposed design is intended to achieve both of those objectives. The Owner is entitled to both privacy and safety as essential elements of his fundamental right to quiet enjoyment of the Property.

Please advise the undersigned of the City's position on this matter, as well as any appropriate channel for administrative appeal of the City's decision, in writing, no later than *close of business, April 17, 2024*. This deadline is intended for no other purpose than to ensure clarity of the City's position and the grounds therefor -- as well as to facilitate a clear channel of administrative redress. To that end, we will deem any adverse response or any failure to respond as a basis for administrative redress through NBMC chapter 15.80 and/or other relevant code provisions.

If you have any question concerning this letter, please do not hesitate to call me.

Very truly yours,

MSUU

Michael W. Shonafelt

MWS

9999.MWS / 15638568.2

20

Tonee Thai Chief Building Official City of Newport Beach April 9, 2024 Page 3

 cc: James Campbell, Deputy Director, Community Development (jcampbell@newportbeachca.gov)
 Aaron C. Harp, Esq., City Attorney (aharp@newportbeachca.gov)
 Greg Reed, (greg@goldenbearequities.com)

9999.MWS / 15638568.2

City of Newport Beach Revenue 100 Civic Center Dr. Newport Beach, CA 92660 949-644-3141 Welcome
05/14/2024 03:57PM Holly W. 017834-0006 000093956
MISCELLANEOUS BUILDING APPEALS (CDD223) 2024 Item: CDD223 1 @ \$1,768.0000 BUILDING APPEALS (CDD223) \$1,768.00 \$1,768.00
Subtotal \$1,768.00 Total \$1,768.00
CHECK \$1,768.00 Check Number 514418
Change due \$0.00
Paid by: CDD

. .

,

Thank you for your payment

CUSTOMER COPY

, 768.00 514418 11-35/1210 1 A SULARS 69 ADILY NOT TO EXCERT SALV 1 0 DATE V-Cight 0 7834 しいべし housand - Seven hundred SUPPORT SERVICES, INC. 600 W SANTA ANA BLVD STE 101 SANTA ANA, CA 92701 0 Southern California Legal BANK OF AMERICA CALIFORNA 2 N558 : このので して あいまたまい FOR 520 Ad THE TRANSPORT OF THE TRANSPORT

1 :

32