



Legislation Text

File #: 16-518, **Version:** 1

Appeal of an Administrative Determination by the Zoning Enforcement Official (ZEO) where the ZEO determined that electric fences are not a permitted use under the San Leandro Zoning Code. The applicant had applied for and was denied a building permit to construct an electric fence on property located at 2371 Polvorosa Avenue zoned Industrial General (IG). Michael Pate, Electric Guard Dog LLC., 121 Executive Center Drive Suite 230, Columbia, SC. (Appellant) and LBA CPT Industrial Co. V LLC. (Property Owner).

BACKGROUND

On August 16, 2016, a fence contractor, Electric Guard Dog LLC., applied for a building permit to construct an 8' electric fence at 2371 Polvorosa Drive, on behalf of the property owner, LBA CPT Industrial Co. V. LLC. The property proposed for the fence is about five acres in size, zoned Industrial General (IG), and is currently the location of a distribution warehouse and trucking company operated by YRC Worldwide, Inc. / USF Reddaway.

The building permit was routed for a plan check by the Building Division. After reviewing the Appellant's proposed building permit and evaluating the applicable Zoning Code provisions, the Zoning Enforcement Official (ZEO) made the determination that the building permit could not be issued due to the fact that there are no provisions in the Zoning Code permitting the use of an electric fence. The Appellant was notified of the disapproved building permit on August 25, 2016 and soon after filed an appeal of the determination within the 15 day appeal period on September 7, 2016 in accord with San Leandro Zoning Code Section 5-2804(B).

This item was originally scheduled and noticed for public hearing before the Board of Zoning Adjustments (BZA) on Thursday, October 6, 2016. Since the October meeting was later canceled due to a lack of quorum, this item was automatically continued to the November 3, 2016 hearing date.

RELATIONSHIP TO SURROUNDING AREA

The building permit was proposed at 2371 Polvorosa Avenue, an approximately five acre property situated mid-block between Doolittle Drive and Aurora Drive, currently the location of a trucking and distribution terminal operated by YRC Worldwide, Inc./USF Reddaway. The subject property and surrounding properties to the north, west, and south are also zoned Industrial General (IG) and consist of warehouses and a manufacturing plant for building materials. The adjacent property to the east is zoned Industrial Park (IP), consisting of a single story office complex housing SOS/Meals on Wheels, a non-profit social services agency that assists senior citizens and persons in need, Bancroft Pediatrics Medical Group, a children's medical clinic, Alameda Pharmacy, and a number of small business offices.

DETERMINATION AND APPEAL

The Appellant, Electric Guard Dog LLC., is appealing a determination by the Zoning Enforcement Official (ZEO) that electric fences are not permitted under the City's Zoning Code, Article 16 Development Regulations.

Upon reviewing the building permit submitted by the Appellant on August 16, 2016 proposing to construct an 8' electric fence at 2371 Polvorosa Avenue, the Zoning Enforcement Official (ZEO) denied the building permit and determined that the San Leandro Zoning Code does not permit or enable the use of an electric fence and that electric fences are not the same as other types of fences which are permitted and regulated under the Zoning Code. While the Zoning Code contains general provisions for fences, walls and hedges, and places special restrictions on razor and barbed wire fences, the ZEO determined there are no code provisions enabling the use, location, and operation of electric fences.

AUTHORITY REGARDING INTERPRETATION OF THE ZONING CODE

San Leandro's Zoning Code operates under the principles of permissive zoning. The Zoning Code is organized as an enabling legislation that identifies and regulates those uses which are permitted. This is the most practical approach for regulating land uses, since it is impractical and infeasible for the code to identify every possible use that may not be permitted.

Those uses which are not identified in the Zoning Code are not permitted. Article 2, Section 1-202 clearly states that "No land can be used, and no structure can be constructed, occupied, enlarged, altered, demolished or moved in any zoning district, except in accord with the Zoning Code."

In situations where uncertainty exists regarding a particular Zoning Code regulation, the ZEO is enabled to interpret provisions which are uncertain or unclear. Article 2, Section 1-206 of the Zoning Code states that "Where uncertainty exists regarding the interpretation of any provision of this code or its application to a specific site, the Zoning Enforcement Official shall determine the intent of the provision." Applicants who disagree with an interpretation of the ZEO are further entitled by the Zoning Code to file an appeal of the decision, heard by either the Board of Zoning Adjustment or Planning Commission under Article 28.

In general, cities have broad latitude to interpret their own zoning codes and the courts will follow an agency's interpretation of its own laws and regulations unless clearly erroneous or unauthorized. The City has satisfied applicable legal requirements with respect to the Zoning Enforcement Official's determination and in connection with the analysis in this staff report.

Existing State law regarding electric fences (California Civil Code 835) identifies that an owner of real property shall not install and operate an electric fence where a local ordinance prohibits that installation and operation. If a local ordinance allows the installation and operation of an electric fence, the installation and operation of electric fences must meet the requirements of the local ordinance, as well as any requirements listed under State law.

ANALYSIS

The decision before the Board of Zoning Adjustments is to determine whether or not electric fences

are permitted in the City of San Leandro. Upholding the decision of the Zoning Enforcement Official would continue a prohibition on the use of electric fences. Alternately, a decision to allow electric fences would have the effect of enabling electric fences to be constructed in all zones and locations where fences are permitted consistent with state law.

There are no known existing electric fences within San Leandro and staff was unable to find any record of a building permit having previously been issued for an electric fence. The use of electric fences in urban areas is uncommon and, according to the Alameda County Fire Department, there are currently no other cities under their jurisdiction which allow their use and installation.

Electric fences pose a number of challenges and concerns with regards to their placement, safety and appearance. For example, the proposed building permit is for a warehouse and trucking terminal located in an Industrial General zoning district, but the adjacent property is the location of a pediatric clinic and senior citizen social services facility. Installing an electric fence near these types of facilities is inappropriate especially when other safer, more attractive and effective fencing and security alternatives exist. Electric fences have a distinctive appearance unlike other types of fencing and are usually accompanied by warning signs to prevent human contact. San Leandro has a number of established residential neighborhoods and residential properties located in close proximity to industrial uses. Some industrial zones, such as Industrial Transition (IT), allow residential uses. Staff has serious concerns with the placement of an electric fence near schools, parks, medical centers, or residences.

Planning staff, in consultation with the Alameda County Fire Department, is of the position that there are a number of equally effective and less intrusive alternatives to the use of electric fences which are currently allowed, such as invisible laser tripwire fences and motion sensing cameras. Staff also has concerns with safety issues for persons who may come in contact with an electrified fence, such as public safety personnel, businesses handling flammable materials, or persons using medical devices such as a defibrillator. Staff also has concerns that persons in proximity to an electric fence may inadvertently come into contact with an electrical current under wet or rainy conditions.

In their review of the appeal, the Alameda County Fire Department informed staff that there are currently no code provisions in place requiring emergency access or shut-off devices for properties secured by an electric fence and, without such regulations, the Fire Department would be required to condition each permit on a case-by-case basis. Without such regulations in place, emergency responders may have delayed access and safety issues when responding to properties with electric fences. There are currently no codified provisions at the local or state level that specifically address emergency access in relation to electric fences.

Other types of fencing materials with aesthetic and safety concerns have strict limitations under the Zoning Code. Under Article 16, Section 4-1678 of the Zoning Code, razor and barbed wire fences are only permitted in the CS, IL, and IG zoning districts and are expressly prohibited in all other zoning districts. The code further prohibits them from being located within 300 feet of a public street frontage and are not allowed to be visible from a public street. Through the development review process, Planning staff has been actively discouraging the use of razor wire, barbed wire, and cyclone/chain link fencing materials, encouraging applicants to instead use more aesthetically pleasing decorative metal fencing that compliments industrial buildings and landscaping.

The Appellant has argued in their letter dated October 25, 2016 that their electric fence should be

considered as a fence modification application. As electric fences are not stated as a permitted use or a permitted fencing material in the Zoning Code, they would not be eligible for consideration as a Fence Modification application. The Appellant has not filed for a fence modification application in this instance.

Staff is unable to make findings that electric fences are similar to other types of fences permitted under the Zoning Code. Given the number of challenges and concerns that electric fences pose, staff would not support enabling their use without having specific Zoning Code provisions in place to address those concerns.

ENVIRONMENTAL REVIEW

Consideration of an action on an Appeal does not constitute a “project” within the meaning of Public Resources Code Section 21065, 14 Cal Code Regs. Sections 15060(c)(2), 15060(c)(3), or 15378 because it has no potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment. Even if such activities did constitute a project under CEQA, staff believe the activities fall within the “common sense” CEQA exemption set forth in 14 Cal Code Regs. Section 15061(b)(3), excluding projects where “it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” Furthermore, the appeal relates to a decision involving a ministerial action defined under Section 21080(b)(1), which is deemed categorically exempt under Section 15300.1.

RECOMMENDATION

The decision of the Board of Zoning Adjustments is to make a determination that electric fences either are or are not a permitted use under the Zoning Code. Details or features regarding the Appellant’s particular product or policy recommendations are not purview to the Board’s decision.

Staff recommends the Board uphold the interpretation of the Zoning Enforcement Officer through a motion to adopt the attached Resolution 16-007 finding that electric fences are not a permitted land use in the Zoning Code.

The Board’s decision may be appealed to the City Council within 15 days in accord with the appeal process outlined under Article 28 of the Zoning Code.

PUBLIC OUTREACH

This item was automatically continued from the October 6, 2016 Board of Zoning Adjustment hearing due to the meeting cancelation. A notice of the October 6, 2016 public hearing was sent to property owners and businesses within 500 feet of the subject property and a legal advertisement was published on Friday, September 23, 2016 and again on Friday, October 21, 2016 in the East Bay Times. Staff did not receive any public comments regarding this appeal prior to the filing of this report.

ATTACHMENTS

Appellant’s Statement with Supporting Documentation
Appellant’s letter to the Board dated October 17, 2016

Board Resolution 16-007

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