



Legislation Details (With Text)

File #: 16-662 **Version:** 1 **Name:** SR Electric Fence Appeal
Type: Staff Report **Status:** Filed
In control: City Council
On agenda: 2/6/2017 **Final action:** 2/6/2017
Enactment date: **Enactment #:**
Title: Appeal of the City of San Leandro Board of Zoning Adjustments Determination that Electric Fences Are Not a Permitted Use Under the San Leandro Zoning Code.
Sponsors: Andrew Mogensen
Indexes:
Code sections:

Attachments: 1. BZA Resolution 16-001 Upholding ZEO Determination APL16-003, 2. Appellant's Statement for APL16-003, 3. 16-662 CC Presentation Electric Fence Appeal

Date	Ver.	Action By	Action	Result
2/6/2017	1	City Council	Received and Filed	
12/19/2016	1	City Council	Continued	

Appeal of the City of San Leandro Board of Zoning Adjustments Determination that Electric Fences Are Not a Permitted Use Under the San Leandro Zoning Code.

SUMMARY AND RECOMMENDATIONS

The Appellant, Electric Guard Dog LLC., appeals the determination of the Board of Zoning Adjustments that electric fences are not permitted under the City's Zoning Code.

The Appellant was denied a building permit to construct an electric fence on real property located at 2371 Polvorosa Avenue based on the Zoning Enforcement Official's (ZEO) determination that electric fences are not permitted under the City's Zoning Code. The Appellant filed an appeal of the ZEO's determination to the Board of Zoning Adjustments (BZA), which unanimously upheld the ZEO's determination through Resolution 2016-001 at its November 3, 2016 meeting. The Appellant filed a timely appeal of the BZA's decision to the City Council.

The City Council continued this item from its December 19, 2016 meeting, upon request from the Appellant.

Staff recommends that the City Council uphold the determination of the Board of Zoning Adjustments by adopting the attached Resolution.

BACKGROUND

On August 16, 2016, a fence contractor, Electric Guard Dog LLC., applied for a building permit to construct an 8' tall 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 approximately five acres, zoned

Industrial General (IG), and is currently the location of a distribution warehouse and trucking company operated by YRC Worldwide, Inc. / USF Reddaway.

2371 Polvorosa Drive and surrounding properties to the north, south, and west primarily consist of warehouses and a manufacturing plant for building materials, zoned Industrial General (IG). The adjacent property to the east consists of a single story office complex housing SOS/Meals on Wheels, Bancroft Pediatrics Medical Group, Alameda Pharmacy, and a number of small business offices, zoned Industrial Park (IP).

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 or enabling the use of an electric fence. The Appellant was notified of the disapproved building permit on August 25, 2016 and on September 7, 2016 filed a timely appeal of the ZEO determination to the Board of Zoning Adjustments, all in accord with San Leandro Zoning Code Section 5-2804(B).

The Board of Zoning Adjustments considered the appeal at its November 3, 2016 hearing and voted to uphold the determination of the Zoning Enforcement Official (ZEO) through approval of Resolution 2016-001 by unanimous vote (attached). The Appellant soon after filed an appeal of the Board's decision with the City Clerk on November 16, 2016 (attached).

This appeal was previously heard at the December 19, 2016 City Council meeting and continued upon request from the Appellant.

Analysis

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 land uses permitted within the City. This is the most practical approach for regulating land uses, since it is impractical and infeasible for a zoning code to identify every possible use that may not be permitted.

Uses that 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 Zoning Enforcement Official is granted the authority to interpret the Zoning Code. Article 2, Section 1-206 of the Zoning Code provides 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 provided substantive and procedural due process through specific Zoning Code provisions to file an appeal of the decision under Article 28.

In general, cities have broad latitude to interpret their own zoning codes. Courts will follow an agency's interpretation of its own laws and regulations unless such an interpretation is clearly erroneous or unauthorized. Staff holds that the City satisfied all applicable legal requirements, both substantively and procedurally, with respect to the Zoning Enforcement Official's determination, the processing of the Appellant's appeal to the Board of Zoning Adjustments and now to the City Council,

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. State law does not supersede the City's authority to prohibit or regulate electric fences.

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

It is staff's position that electric fences pose a number of challenges and concerns with regard to their placement, safety and appearance. For example, the Appellant's proposed building permit was to construct an electric fence around a warehouse and trucking terminal that is immediately adjacent to a property that has a pediatric clinic and social services facility catering to seniors. This creates a high probability that persons in the proximity to the electric fence may be inadvertently exposed to an electrical current, especially during wet or rainy conditions. In short, it is staff's assertion that installing any type of electric fence near these types of facilities where exposure to more sensitive users is inappropriate especially when safer, attractive and effective fencing and security alternatives exist.

Staff's position is that there are a number of equally effective and less dangerous alternatives to the use of electric fences that are currently allowed, such as invisible laser tripwire fences and motion sensing cameras. Other types of fencing materials with aesthetic and safety concerns are permitted, but they 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 Zoning Code further prohibits them from being located within 300 feet of a public street frontage and from being visible from a public street. Through the development review process, Planning staff actively discourages 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. Electric fences have a distinctive appearance, are highly visible, and typically include warning signs placed at regular intervals to alert passersby of their voltage and potential shock features. Such features are incompatible with the City's design policies.

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

The Appellant presents a number of points including statements that its particular product has certain

features that differentiate it from other types of electric fences. Appellant also presents alternative interpretations of the Zoning Code and State law from that of staff. The appeal before the City Council is to determine whether or not electric fences are a permitted use in the Zoning Code. As the Zoning Code operates under the principles of permissive zoning and electric fences are not identified as a permitted use, both the Zoning Enforcement Official and the Board of Zoning Adjustments have made the determination that electric fences are not permitted.

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. 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. Projects which are disapproved are statutorily exempt from CEQA under Article 18, Section 15270.

Board/Commission Review and Actions

The Board of Zoning Adjustments considered the appeal at its November 3, 2016 hearing and voted 7-0 to uphold the determination of the Zoning Enforcement Official (ZEO) through approval of Resolution 2016-001 (attached). Michael Pate, John Lee, and attorney Robert Ahn spoke at the meeting on behalf of the Appellant, Electric Guard Dog LLC. No one from the public spoke on this item and no public correspondence was received.

Summary of Public Outreach Efforts

As per the City’s noticing requirements, a legal advertisement for the City Council consideration of this appeal was published in the East Bay Times on January 27, 2017. Staff has not received any public comments regarding this appeal prior to the filing of this report. Aside from comments from the Appellant, no public comments were presented to the Board of Zoning Adjustments regarding this appeal. A representative of the Appellant requested and was granted a continuation at the prior December 19, 2016 City Council hearing, but no public comments were made.

Fiscal Impacts

The Appellant has paid a deposit and filing fee for the processing of this appeal. There are no fiscal impacts associated with this decision.

ATTACHMENT(S)

Board of Zoning Adjustments Resolution 16-001 (November 3, 2016)
Appellant’s Statement (submitted to the City Clerk on November 16, 2016)

PREPARED BY:

Andrew J. Mogensen, AICP
Planning Manager