



CITY OF SANTA FE
CITY ATTORNEY

MEMORANDUM

To: Members of the Governing Body

From: Frank Ruybalid, Assistant City Attorney *FER*

Via: Erin K. McSherry, City Attorney *EM*
EM

Re: **Appeal # 2025-9812-APPL of Case # 2024-9478-HDRB.** Property owner Miriam Leth-Espensen and agent Stefanie Beninato appeal the Historic Districts Review Board’s December 10, 2024, decision denying a request for an exception to exceed the 4’6” maximum allowable height by 1’2”, for a fence in front of a contributing house in the Downtown and Eastside Historic and Business Capital Districts.

Date: April 25, 2025, for the April 30, 2025, Governing Body meeting

Property owner, Mirian Leth-Espensen, represented by agent Stefanie Beninato (“Appellant”) has filed an Appeal challenging a decision by the Historic Districts Review Board (“HDRB” or “Board”) denying her application to approve a 5-foot-8-inch-high fence at 614 Paseo de Peralta (the “Property”). A contractor for the Appellant Ms. Leth-Espensen built the fence without applying for a building permit or HDRB approval, and the City issued Notices of Violation to the property owner. The property is in the Downtown and Eastside Historic District and in the Business Capital District, East Marcy / East Palace Subdistrict. After a public hearing on December 10, 2024, the HDRB denied the Appellants’ application for retroactive approval of the non-compliant fence and the exception the Appellants sought to the Historic Districts Code. The Appellants appeal the HDRB’s denial.

Both the Business Capital District standards and the Historic Districts Code restrict the height of fences. [**Santa Fe City Code (“SFCC” or “Code”) Sections 14-7.4(A) and 14-5.2(D)(9)(c)(ii) (C)**] The Business Capital District’s height limitations are more restrictive than the Historic District’s, and the Code requires that the more restrictive limitation prevails over the less restrictive. [**SFCC Section 14-1.7(B)**] The Historic Districts Code permits exceptions to the Historic Districts standards [**SFCC Section 14-5.2(C)(5)(c)**], and the Appellant (the “Applicant” in the HDRB hearing) asked the Board to grant an exception. The six exception

criteria require the HDRB to consider elements such as the character of the streetscape, special conditions peculiar to the land, and the preservation of the City’s historic areas. **[SFCC Section 14-5.2(C)(5)(c)]** The HDRB also considered that the structure on this property has a historically “contributing” designation, and the Code prohibits the HDRB from approving an alteration that jeopardizes that designation. **[SFCC Section 14-5.2(D)(1)(a)]**

Appellant claims the location of the property in a high-traffic area poses a hazard to her, the high fence is a necessary safeguard against trespass and vandalism, and the HDRB decision was arbitrary, capricious, and not based on the facts or the law. **[Ex. A, Verified Appeal Petition (“Petition”), at 4]** She also argues that other property owners in the Historic Districts and on this streetscape have installed 6-foot fences, approved by the HDRB, and the denial of the exception for her fence is, therefore, unfair. **[Ex. A, Petition, at 3, 9]** In this “de novo” appeal, the Governing Body may uphold or reverse the HDRB’s decision to deny the application and the exception. **[SFCC Section 14-2.2(F)]** A “de novo” appeal is one in which the Governing Body conducts an independent application of the law to the evidence to decide whether the facts and the law support the structures’ historic statuses.

I. BACKGROUND

A. The Property, its History, and its Relation to the Street

The Property is on the south side of Paseo de Peralta, across the street and to the west of the entrance to Historic Fort Marcy Park. It has a mixed use as a residence and Miriam’s Well School of Weaving, which offers small weaving and textile-design classes. **[Ex. A, Petition, at 7; Ex. C, Excerpt from Minutes, at 38]** The Property is listed as historically contributing in the Downtown and Eastside Historic District, and is on the northern edge of the Business Capital District, East Marcy/East Palace Subdivision. **[Ex. C, Minutes, at 32-33]** Seven of the nine houses on Paseo de Peralta between East Marcy and Otero streets have either a contributing or significant status, and the Property is one of the seven. **[Ex. J, Building Historic Status Map, at 117]** The Anglo-American arrival influenced the development of this streetscape, and the houses in this area reflect the Anglo-American style of architecture, including low front-yard fences. **[Ex. C, Minutes, at 33]** The structure has a moderately pitched, gabled roof, deep-set windows, and a large bay of windows on the north where a porch has been enclosed. **[Ex. C, Minutes, at 32]** A photograph from the 1985 Historic Building Inventory illustrates that this house, like others in the streetscape, had low, fenestrated fencing at the property line. **[Ex. D, Staff Memo, at 53]** Although it is difficult to discern the exact fence material in the 1985 photograph, it is clear that historically the house had a direct relationship with the street, as do other historic buildings in the streetscape. **[Ex. C, Minutes, at 33]**

The south side of Paseo de Peralta has several distinguishing characteristics from the north side of the street. On the curve between East Marcy and Otero Streets, only the south side of Paseo de Peralta is within the Business Capital District (“BCD”); the north side of the street is outside the BCD. **[Ex. H, BCD Map Detail, at 115]** The south side of the street is lined with lower fences and yard walls with stepped heights, picket and wire fences, and walls combined with wrought-iron fencing creating an open fenestration of the wall. The north walls of two

structures (one residential and one commercial) abut the sidewalk. [Ex. C, Minutes, at 34; Ex. D, Staff Memo, at 45, 49, 58] There is a considerable grade difference between the south side of the street, which has a gradual slope, and the north side, where the steep, switchback trail to the Cross of the Martyrs commences. [Ex. D, Staff Memo, at 45, 88] Retaining walls characterize the streetscape on the north side, with additional walls that are substantially set back from the plane of the retaining walls. [Ex. D, Staff Memo, at 45]

B. Business Capital and Historic District Standards

Two standards limit the height of walls and fences in the neighborhoods in the northeast downtown area of Santa Fe. Height standards are found in both the Business Capital Districts Code, SFCC Section 14-7.4, Table A-1, and the Historic Districts Code, SFCC Section 14-5.2(D)(9)(c)(ii)(C). Height and other limitations in the BCD Code are more restrictive than those in the Historic Districts Code and, under this section of the SFCC, the more restrictive code section supersedes the less restrictive:

14-1.7 – CONFLICTING PROVISIONS: . . . (B) In the case of a conflict within Chapter 14, or between Chapter 14 and any other ordinance, resolution or regulation, the more restrictive limitation or requirement shall prevail, unless an exception is specifically stated, and the provision shall govern that requires: . . .

(2) the lower height of structure or lesser number of stories;

SFCC Section 14-5.1 has similar language: “When the requirements of an overlay district are in conflict with those of the underlying district or those of another overlay district, the more restrictive limitation or requirement controls as provided for in Section 14-1.7.”

The BCD has several subdivisions, and 614 Paseo de Peralta is in the East Marcy / East Palace Subdistrict (“BCD EAS”) [Ex. H, BCD Map Detail, at 115] Table A-1 under SFCC Section 14-7.4 reads, with respect to the BCD EAS subdistrict, “[w]alls, fences, and hedges permitted to maximum of 4 feet.” [Ex. I, BCD Table, at 116] The Historic Districts Code, SFCC Section 14-5.2(D)(9)(c)(ii)(C), reads, “Yard walls and fences shall be limited to a height that does not exceed the average of the height of other yard walls and fences in the streetscape.” In compliance with this formula, the Staff took the measurements of 38 other fences and yard walls along the Paseo de Peralta streetscape and calculated the average, which was 54 inches, or 4 feet, 6 inches. [Ex. D, Staff Memo, at 56] Applying the height limitation of the BCD EAS, which is 4 feet, the Appellant’s fence, at 5 feet 8 inches, exceeds it by 20 inches, or 1 foot 8 inches. Applying the height limitation of the Historic Districts Code under SFCC 14-5.2(D)(9), which is 4 feet 6 inches, the Appellant’s fence exceeds it by 14 inches.

The property at 614 Paseo de Peralta has been designated historically “contributing” under the Historic Districts Code. [Ex. J, Building Historic Status Map, at 117] SFCC Section 14-12.1, defines this status level for historic properties:

CONTRIBUTING STRUCTURE: A structure, located in a historic district, approximately 50 years old or older that helps to establish and maintain the character of that historic district. Although a contributing structure is not unique in itself, it adds to the historic associations or historic architectural design qualities that are significant for a district. The contributing structure may have had minor alterations, but its integrity remains.

The Code expressly prohibits any alteration to contributing, significant or landmark structures that will cause the structures to lose these specially protected designations. SFCC Section 14-5.2(D)(1)(a) reads:

The status of a significant, contributing, or landmark structure shall be retained and preserved. If a proposed alteration will cause a structure to lose its significant, contributing, or landmark status, the application shall be denied. The removal of historic materials or alteration of architectural features and spaces that embody the status shall be prohibited.

Proposed additions or alterations that do not comply with Code restrictions for significant or contributing buildings are not entirely prohibited; the HDRB can permit them if the property owner or project applicant requests an “exception” and meets six criteria described in the Code at SFCC Section 14-5.2(C)(5)(c). The applicant has the burden of “conclusively demonstrating” the exception criteria. [SFCC Section 14-5.2(C)(5)(c)]

II. PROCEDURAL HISTORY

A. Notices of Violation

From at least 2015 through 2023, 614 Paseo de Peralta had a low white frame and wire mesh fence on its north lot line, which permitted an unobstructed view of the house from Paseo de Peralta. [Ex. D, Staff Memo, at 45-46] In August, 2023, a constituent complained that workers were building a new fence without a permit, and on August 18, 2023, a Building Inspection officer issued Ms. Leth-Espensen a Notice of Violation and a stop-work order, commonly called a “red tag.” [Ex. F, Notices of Violation, at 108] Ms. Leth-Espensen sent an e-mail to the Staff apologizing for failing to obtain a permit, and claiming she went to the permit office where she was told she did not need a permit as long as the new fence did not exceed the height of the old fence. [Ex. D, Staff Memo, at 103]

The fence had not been removed by February, 2024, and the Building Inspection officer returned to the address and issued another Notice of Violation January 11, 2024. [Ex. F, Notices of Violation, at 109] Finding the fence still in place in April, the Historic Preservation Staff issued another Notice of Violation and filed it in Santa Fe Municipal Court, where the City opened a criminal case against Ms. Leth-Espensen, Case # CE 2024-00005. [Ex. F, Notices of Violation, at 111] On motions by Ms. Leth-Espensen’s defense counsel, Lisa Torracco, that case has been postponed pending the outcome of the Governing Body Appeal hearing. Ms. Leth-Espensen (the “Applicant”) applied for an HDRB review. [Ex. G, HD Application, at 113-114]

The Staff set an HDRB hearing on her application for December 10, 2024. The Applicant requested that the HDRB consider granting an exception to the fence height restrictions in the City Code, and she offered several reasons why she believed she fulfilled the six exception criteria. **[Ex. D, Staff Memo, at 88-89]**

B. Staff Recommendations

In its Staff Report to the HDRB, the Staff recommended that the application for the fence be denied. **[Ex. C, Minutes, at 35; Ex. D, Staff Report, at 44]** The Staff cited the height restrictions in the BCD East Marcy Subdistrict and the General Design Standards for the Historic Districts under SFCC Section 14-5.2(D) as bases for denying the application. **[Ex. C, Minutes, at 34-35; Ex. D, Staff Report, at 45-48]** In response to the request for exceptions, the Staff provided the following analysis in support of the recommendation to deny:

- Although high retaining walls and yard walls appear on the north side of Paseo de Peralta, they are required because the slope on the north side of the street is extreme while the slope on the south side of the street is more gradual;
- Low yard walls and fences, consistent with the BCD EAS ordinance, and fenestrated walls and fences, such as picket and wrought-iron fences are more characteristic of the south side of the street;
- The Applicant's need for security is no greater than that of other residents on this street, and their houses have low fences and yard walls, and the Applicant could increase her safety by measures other than a high fence that obstructs the view of the house;
- The hardships the Applicant faces without a high fence on her lot line affect all property owners on that streetscape, and the exception criteria requires the Applicant to demonstrate that the circumstances justifying an exception are unique to her property; and
- It is immaterial that the structure on the Applicant's property is a live-in workplace, as there are both residential and commercial properties on that block. **[Ex. D, Staff Report, at 48-52]**

C. Board Decision to Deny Application

On December 10, 2024, the HDRB held a public hearing about the application and request for an exception. Stefanie Beninato represented the Appellant in that hearing. **[Ex. C, Minutes, at 35]** Five members of the Board participated in the hearing. Because the chair only has a vote in the event of a tie, four members voted. **[City Resolution # 2009-20, Art. 11, § 2(B); Ex. C, Minutes, at 42]** The Staff gave a history of the property, described the project application, and recommended that the HDRB deny the project and enter findings that the exception criteria had not been met. **[Ex. C, Minutes, at 34-35]**

In the Applicant's presentation, Ms. Beninato asked Board Member Jennifer Biedscheid to disqualify herself. **[Ex. C, Minutes, at 35-36]** Ms. Beninato expressed concern that Member Biedscheid had a bias against the Applicant because the Applicant had posted a placard on her fence urging voters not to retain Judge Bryan Biedscheid, Jennifer Biedscheid's husband, in the 2024 general election. Member Biedscheid declined to disqualify herself, assuring the Applicant she had no bias, and that her service to the HDRB is not influenced by her husband's career or by cases that he presides over. **[Ex. C, Minutes, at 35-36]**

Ms. Beninato said that when the property had a low, wire fence, salt from the City's treatment of the icy street in the winter damaged the front of the house, and pedestrians coming and going from nearby parks trespassed on the property. **[Ex. C, Minutes, at 36]** Ms. Beninato gave examples of other properties in the Historic Districts with high fences, including one at the Girls, Inc., property at Paseo de Peralta and Hillside Avenue. **[Ex. C, Minutes, at 37]** Ms. Leth-Espensen also addressed the Board, testifying that strangers and homeless persons would pass through her property when she had a low fence, and the contractor told her that if the fence was not 6 feet or taller she would not need a permit. She felt that the fence was a solution to the increased traffic, tourists, and criminal elements of the city. **[Ex. C, Minutes, at 37]** Two members of the public addressed the Board, both expressing disapproval of the fence. **[Ex. C, Minutes, at 40-41]**

Member John Bienvenu moved, and the Board voted unanimously among the four voting members to deny the application, and to deny the height exception the Applicant sought. **[Ex. C, Minutes, at 42]** On February 11, 2025, the HDRB adopted written Findings of Fact and Conclusions of Law reflecting its decisions regarding the Property. **[Ex. B, Findings & Conclusions, at 25-29]**

D. Requirement for Board of Adjustment Review

Although the exception criteria under SFCC Section 14-5.2(C)(5)(c) allow the HDRB to consider many circumstances affecting a property when it reviews a project proposal, variations from the Business Capital Standards can be approved only by the Board of Adjustment. **[SFCC Sections 14-2.4 (Board of Adjustment); 14-2.5 (BCD Design Review Committee); 14-3.16 (Variances)]** For this reason, if the Governing Body grants the Appellant's appeal, the Appellant will have to submit her project to the Board of Adjustment for permission to exceed the height restrictions of the BCD EAS.

III. APPEAL TO THE GOVERNING BODY

A. Applicable Code Sections

Under SFCC Section 14-3.17(A)(2), an appeal of an HDRB decision may be filed for one or more of the following reasons:

- (a) To contest non-compliance of a final action with Chapter 14 or

Sections 3-21-1 through 3-21-14 NMSA 1978 (the New Mexico zoning enabling act);

- (b) To contest the application of SFCC Chapter 14; or
- (c) To appeal a decision lacking substantial evidence to support it.

Although the Appellant claims a violation of her constitutional right of “equal protection,” SFCC Section 14-3.17(A)(2) does not permit the Governing Body to base a decision on such a claim.

B. The Appellants’ Claims

In her Verified Appeal Petition (“Petition”), the Appellant claims the HDRB made an arbitrary and capricious ruling which was not based on the law or the facts of the case. **[Ex. A, Petition, at 4]** She claims:

1. She is in danger from trespass, vandalism and burglaries, and the Board’s decision impairs her physical safety and the peaceful enjoyment of her property. **[Ex. A, Petition, at 3, 7]**
2. Other parts of her property have coyote fencing, and the disapproval of a coyote fence on the street frontage requires two different types of fencing, creates an aesthetically incongruous and disharmonious property and devalues the property. **[Ex. A, Petition, at 3-5]**
3. Coyote fencing is commonplace on the Paseo de Peralta streetscape and elsewhere on the block, notably in the Castillo Plaza, which provides off-street parking to the Appellant’s property and other business on that block. **[Ex. A, Petition, at 4-6]**
4. The Appellant has been treated unfairly because property owners at 803 Agua Fria St. and 301 Hillside Ave. (Girls, Inc.) have been permitted to build high coyote fences, the property owners at 803 Agua Fria St. have not complied with conditions the HDRB imposed, and they have not been issued a Municipal Court citation. **[Ex. A, Petition, at 3-5, 9]**
5. The Appellant has suffered a disadvantage by the City’s failure to adopt Findings of Fact and Conclusions of Law within 35 days after the HDRB hearing, and the time for the Appellant to file her Appeal starts running on the 35th day after the hearing. **[Ex. A, Petition, at 3-4]**
6. The Board did not correctly apply the definition of “Streetscape,” set forth in SFCC Section 14-12.1, which includes both sides of the street for 300 feet in either direction of the subject property. **[Ex. A, Petition, at 4-5]**
7. Member Biedscheid’s refusal to disqualify herself resulted in an unfair hearing to the Appellant. **[Ex. A, Petition, at 10-11]**

IV. ANALYSIS

A. Evidence Supporting the Board’s Decision

The HDRB had evidence to support its decision to deny the application and to deny the exception the Appellant requested. The Board spent an hour and 15 minutes on this hearing, there are 14 pages of Minutes for this discussion and Board's decision, and it is clear that the Board gave the Appellant and her attorney (Ms. Beninato) ample opportunity to offer evidence and to answer all the Board's questions. **[Ex. C, Minutes, at 32-43]**

In response to the arguments made by the Appellant in her Verified Appeal Petition, the Governing Body may consider, with respect to each of the Appellant's arguments, the following:

1. The Appellant's exposure to safety hazards:

The Board found that there are other, unprotected points of access to the house, notably on the east and west sides, and there was no proof that the coyote fence on the street front provides greater protection than any other fence. **[Ex. B, Findings & Conclusions, at 27; Ex. C, Minutes, at 38]** There is no barrier separating the Appellant's house from the adjacent property to the west, which has only a low yard wall, and the coyote fence on the Appellant's north lot line does nothing to prevent access through the neighboring property. **[Ex. C, Minutes, at 38; Ex. D, Staff Report, at 96-97]** The HDRB also found that hazards to the Appellant can be mitigated by other designs, such a lower, picket fence which could have pointed pickets, or a wrought-iron fence which could have pointed finials. **[Ex. B, Findings & Conclusions, at 27; Ex. C, Minutes, at 39-40]**

The exception criteria require special circumstances not applicable to other lands or structures. **[SFCC Section 14-5.2(C)(5)(c)(iv)]** The HDRB found that the Appellant had not shown a need for safety greater than at any other heavily traveled location, and that all the properties on the south side of Paseo de Peralta abut the sidewalk or have a minimal setback, and are similar to the subject property. **[Ex. B, Findings and Conclusions, at 27]**

2. Aesthetic impairment from disallowance of coyote fencing:

Photos presented to the Board depicting the property when it had a lower fence show that persons passing on Paseo de Peralta cannot see the coyote fencing in the back of the property. Trees and foliage on the east and west sides of the Appellant's house obstruct the view of the back yard, and fencing in the interior Castillo Plaza is not visible even from the unfenced adjacent property to the west. **[Ex. D, Staff Report, at 46, 96-97]** The Board found the height and its lack of fenestration, greatly obstructing the view of the house, as the fence's problematic characteristics, not necessarily its composition of latillas. **[Ex. C, Minutes, at 38, 40]**

The property owner's personal sense of aesthetics is not among the criteria the Board must consider, for that would make Code-mandated design standards meaningless to the extent a property owner does not like them. **[SFCC Section 14-5.2(C)(5)(c)]** The Board must consider the property's harmony with the streetscape, the preservation of historic areas and the "qualities relating to the history of Santa Fe." **[SFCC Section 14-5.2(A)(1)]** The history of the BCD EAS does not support high, solid fences. **[Ex. D, Staff Report, at 48-49]**

3. Coyote fencing found elsewhere on the block:

In a hearing in July, 2024, the Board approved a six-foot-high coyote fence at Girls, Inc., at 301 Hillside Ave., which is down the street to the east and visible from 614 Paseo de Peralta. **[Case # 2024-8626-HDRB]** However, the section of 301 Hillside Ave. that abuts Paseo de Peralta is on the north side of the street, the north side of Paseo de Peralta is outside the BCD EAS, and the fence height restrictions of the BCD EAS do not apply there. **[Ex. H, BCD Map Detail, at 115]**

The Board approved exception criteria for the fence at the Girls, Inc., property, and structures approved by a variance or exception are excluded from the streetscape by SFCC Section 14-5.2(D)(9)(b)(ii). This section reads: “When determining streetscape, the following structure types shall be excluded: . . . existing structures approved by way of a variance or exception, and yard walls and fences whose height is inconsistent with the predominant height of yard walls and fences on an applicable streetscape.” When approving the fence at Girls, Inc., the Board considered that that property already had coyote fencing, and a six-foot-high chain-link fence.

4. High fences have been approved at 803 Agua Fria St. and 301 Hillside Ave.:

The standards for the BCD EAS, Sections 14-7.4(A), control the *south* side of Paseo de Peralta only, and 301 Hillside Ave. (Girls, Inc.) is on the north side. **[Ex. H, BCD Map Detail, at 115]** The Business Capital District’s height limitations are more restrictive than the Historic District’s, and SFCC Section 1.7(B), reads that the more restrictive limitation prevails over the less restrictive.

803 Agua Fria St. is in a different historic district: the Westside-Guadalupe Historic District, controlled by a different section of the Historic Districts Code, SFCC Section 14-5.2(I). It is also on a different streetscape. And, because it is not in the Business Capital District or any subdistrict of the BCD, average height on the streetscape is the sole height regulation that applies under the Code. SFCC Section 14-5.2(I)(1)(f) specifically permits coyote fencing for the Westside-Guadalupe Historic District, but coyote fencing is solely at the Board’s discretion for the Downtown and Eastside Historic District, SFCC Section 14-5.2(E).

Even if there were non-conforming properties in the vicinity of other structures or walls/fences that do not comply with the City Code, it is no defense to a prosecution for violating an ordinance that others have been permitted to violate it without prosecution or punishment. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 1964-NMSC-016, ¶ 24, 73 N.M. 410, 389 P.2d 13 (1964); *Kansas City v. Wilhoit*, 237 S.W.2d 919, 924 (Kan.App. 1951).

5. Delay in adopting Findings of Fact and Conclusions of Law:

The Board approved the Findings of Fact and Conclusions of Law for 614 Paseo de Peralta in its meeting on February 11, 2025, which was 63 days after the HDRB heard the

Appellant's presentation on the project. **[Ex. B, Findings and Conclusions, at 29]** An Appellant's Appeal Petition must be submitted not later than the 50th day after a Land Use Board hearing, in accordance with SFCC Section 14-3.17(C)(1)(c) and (4)(b), but the Appellant does not have to wait until the HDRB approves the Findings of Fact and Conclusions of Law for the project to get a clear understanding how the Board voted. The Appellant can review any dialogue that took place in the hearing by replaying the hearing on the YouTube site. The link to the YouTube video is printed on the Agenda for the respective HDRB hearing.

There is no disadvantage to the Appellant that the Findings and Conclusions are approved after a Land Use Appeal comes due, as they do not control the discussion at the Appeal Hearing. The Appeal procedure, controlled by City Resolution # 2011-24, reads that the parties to the Appeal Hearing may introduce evidence that was not previously part of the Record. **[City Resolution # 2011-24(VIII)(E), Other Evidence]**

6. Code definition of "streetscape" includes both sides of the street for 300 feet both directions:

The Code provision the Appellants cite, SFCC Section 14-5.2(D)(9)(a)(ii)(B), is not the only Code section setting the considerations for streetscapes and fence heights. Also bearing on the height calculation are the six Streetscape Standards, found at SFCC Section 14-5.2(D)(9)(b) (i-vi). These standards exclude the Girls, Inc., property at 301 Hillside Ave. because structures approved by variance or exception are not considered, and yard walls and fences whose height is inconsistent with the predominant height of yard walls and fences on the streetscape are not considered. It is immaterial that "streetscape" includes both sides of the street under SFCC Section 14-5.2(D)(9)(a)(ii) because the BCD EAS standards, SFCC Section 14-7.4(A), are more restrictive than the streetscape definition at SFCC Section 14-5.2(D)(9), and under the Code the more restrictive limitation prevails. **[SFCC Section 14-1.7(B)]**

Also, the definition of "streetscape" at SFCC Section 14-12.1, requires the Board to consider the visual character of a street according to its topography, the pattern of structures and open space, building and wall setbacks, street and architectural design, and heights, widths and proportions of the structures. The length of the streetscape under SFCC Section 14-5.2(D)(9)(a)(ii)(B) is only part of the equation.

7. Member Biedscheid's refusal to disqualify herself:

The sole reason the Appellant gave for her request that Board Member Jennifer Biedscheid recuse herself was that the Appellant had posted a placard on her fence urging voters not to retain Judge Bryan Biedscheid, Member Biedscheid's husband, in the 2024 general election. **[Ex. C, Minutes, at 35-36]** A person presiding over a quasi-judicial proceeding, such as a land-use hearing, is held to the same standard as a judge, with respect to matters which affect the hearing officer's family member. Rule 21-211(3) NMRA reads that a judge must disqualify herself when "[t]he judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an *economic interest* in the subject matter in controversy

or is a party to the proceeding.” (Emphasis added.) And under the City Code, a conflict of interest means a prospect of *pecuniary*, or financial, gain or loss from an official act of a public official or any member of her family. [SFCC Section 1-7.5] There was never any claim that Member Biedscheid or other relevant person, such as a member of her family or family’s business, had a financial interest in this project, or that she would gain financially from its defeat.

Member Biedscheid was one of the four voting members of the HDRB who unanimously denied the exception for the fence project. [Ex. C, Minutes, at 42] Even if Member Biedscheid recused herself, the vote would have been 3-0 to deny it, a unanimous outcome.

B. Standard of Review

On appeal, the Governing Body should independently apply the Code provisions to the facts of this case. See Appendix (relevant Code provisions).

V. CONCLUSION

In considering the Appellant’s appeal, the Governing Body must address the following question:

Has the Appellant conclusively demonstrated she fulfills the six criteria for an exception to the Historic District standards?

If the answer is “no,” then the Governing Body should deny the appeal.

If the answer is “yes,” then the Governing Body should grant the appeal and state the facts supporting each of the six criteria.

VI. MOTION OPTIONS

There are two options for motions in this case:

Motion 1: I move to deny the appeal, on the grounds that the 5-foot-8-inch, solid fence is non-conforming to Historic District height and design standards for that streetscape and the Appellants have not conclusively demonstrated the six criteria for an exception to these standards.

Motion 2: I move to grant the appeal, on the grounds that, although the 5-foot-8-inch, solid fence is non-conforming to Historic District height and design standards for that streetscape, the Appellants have conclusively demonstrated the six exception criteria. The facts supporting the exception criteria are (state (i) through (vi)):

VII. LIST OF EXHIBITS

A	Verified Appeal Petition and Appellant’s Exhibits	Jan. 28, 2025	pp. 1-24
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B	HDRB Findings of Fact and Conclusions of Law	Feb. 11, 2025	pp. 25-29
C	Excerpts from Board Meeting Minutes	Dec. 10, 2024	pp. 30-43
D	HP Staff Report	Dec. 10, 2024	pp. 44-106
	1) Senior Planner Memo	Dec. 10, 2024	pp. 44-52
	2) Senior Planner Exhibits		pp. 53-86
	3) Application Packet	Oct. 1, 2024	pp. 87-104
	4) Historic Districts Wall & Fence Guidelines		pp. 105-106
E	Board Action Letter		p. 107
F	Notices of Violation		pp. 108-112
	Code Report and Stop Work Order	Aug. 18, 2023	p. 108
	Notice of Violation	Jan. 11, 2024	pp. 109-110
	Notice of Violation and Land Use Citation	Apr. 11, 2024	pp. 111-112
G	Historic Districts Application	March 1, 2024	pp. 113-114
H	Business Capital District map detail		p. 115
I	Business-Capitol District table (East Marcy Subdistrict)		p. 116
J	Building Historic Status map detail		p. 117

**APPENDIX:
EXCERPTS FROM SANTA FE CITY CODE**

§ 14-1.7 – Conflicting Provisions

...

(B) In the case of a conflict within Chapter 14, or between Chapter 14 and any other ordinance, resolution or regulation, the more restrictive limitation or requirement shall prevail, unless an exception is specifically stated, and the provision shall govern that requires:

- (1) the greater width or size of yards, courts or other open spaces;
- (2) the lower height of structure or lesser number of stories;
- (3) the greater percentage of lot or land to be left unoccupied; or
- (4) other higher standards.

§ 14-5.2 – Historic Districts

(A) General Provisions

(1) General Purpose

In order to promote the economic, cultural, and general welfare of the people of the city and to ensure the harmonious, orderly and efficient growth and development of the city, it is deemed essential by the governing body that the qualities relating to the history of Santa Fe, and a harmonious outward appearance, which preserve property values and attract tourists and residents alike, be preserved, some of these qualities being:

- (a) The continued existence and preservation of historical areas and buildings;
- (b) The continued construction of buildings in the historic styles; and

(c) A general harmony as to style, form, color, height, proportion, texture and material between buildings of historic design and those of more modern design.

...

(C) Regulation of Significant and Contributing Structures in the Historic Districts

(1) Purpose and Intent

It is intended that:

(a) Each structure to be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as the addition of conjectural features or architectural elements from other buildings, shall not be undertaken;

(b) Changes to structures that have acquired historic significance in their own right shall be retained and preserved, recognizing that most structures change over time;

(c) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a structure be preserved; and

(d) New additions and related or adjacent new construction be undertaken in such a manner that if removed in the future, the original form and integrity of the historic property and its environment would be unimpaired.

...

(5) Exceptions

Staff shall determine if an exception to this section is required. The historic board may grant or deny an exception to the regulations set forth in this section provided that such exception does not exceed the underlying zoning.

...

(c) Height, Pitch, Scale, Massing, and Floor Stepbacks

The board is the city administrative board reviewing and granting or denying requests for exceptions from regulations set forth in Subsection 14-5.2(D)(9). . . . The board may grant exceptions and impose conditions thereon to Subsection 14-5.2(D)(9) for height of structures within the historic districts as specified in Subsection 14-5.2(D)(9)(a). In order to approve an exception, the board shall make findings of fact that the applicant conclusively demonstrated that requested exceptions comply with all the criteria listed as follows: (Ord. No. 2023-27 § 1)

(i) Do not damage the character of the streetscape;

(ii) Prevent a hardship to the applicant or an injury to the public welfare;

(iii) Strengthen the unique heterogeneous character of the city by providing a full range of design options to ensure that residents can continue to reside within the historic districts;

(iv) Are due to special conditions and circumstances which are peculiar to the land or structure involved and which are not applicable to other lands or structures in the related streetscape;

(v) Are due to special conditions and circumstances which are not a result of the actions of the applicant; and

(vi) Provide the least negative impact with respect to the purpose of this section as set forth in Subsection 14-5.2(A)(1).

(D) General Design Standards for All H Districts

In any review of proposed additions or alterations to structures that have been declared significant or contributing in any historic district or a landmark in any part of the city, the following standards shall be met:

(1) General

(a) The status of a significant, contributing, or landmark structure shall be retained and preserved. If a proposed alteration will cause a structure to lose its significant, contributing, or landmark status, the application shall be denied. The removal of historic materials or alteration of architectural features and spaces that embody the status shall be prohibited.

(b) If a proposed alteration or new construction will cause an adjacent structure to lose its significant, contributing, or landmark status, the application may be denied.

...

(9) Height, Pitch, Scale, Massing and Floor Stepbacks

The height, pitch, scale, and massing of any structure in a historic district, as defined in this section, shall be limited as provided for in this section, unless further restricted within this chapter.

(a) Applicability

The following sections identify specific areas and specific projects subject to this section. Planning and land use department staff shall determine whether or not properties are included within this section. (Ord. No. 2007-45 § 30; Ord. # 2020-22, § 16)

(i) Specific Areas

A. The authority to limit the height of any structure, as provided in this section, shall apply within the downtown and eastside, Don Gaspar, historic transition, and Westside-Guadalupe historic districts.

...

(ii) Project Types

Planning and land use department staff shall determine the applicability of this section to individual projects and the applicable streetscape as follows: (Ord. # 2007-45 § 30; Ord. # 2020-22, § 16)

A. If the project location is sited on a street which extends linearly with no interruptions or truncations, the streetscape shall include buildings, yard walls, and fences on both sides of the street on which the proposed building, yard wall, or fence is to be located, for a distance of six hundred (600) feet measured from the midpoint of the street facing façade(s) of the proposed building, yard wall, or fence in both directions parallel to the street centerline. See Illustration 14-5.2-1, "Linear Street - No Interruptions or Truncations."

B. If the streetscape is truncated by an intersecting block or a

visual intrusion (such as a curve or turn in the streetscape) before the six hundred (600) feet is measured, the streetscape shall include all buildings, yard walls, or fences up to and including those which front the intersection or intrusion. See Illustration 14-5.2-2, “Truncation by an Intersecting Block or Visual Intrusion.”

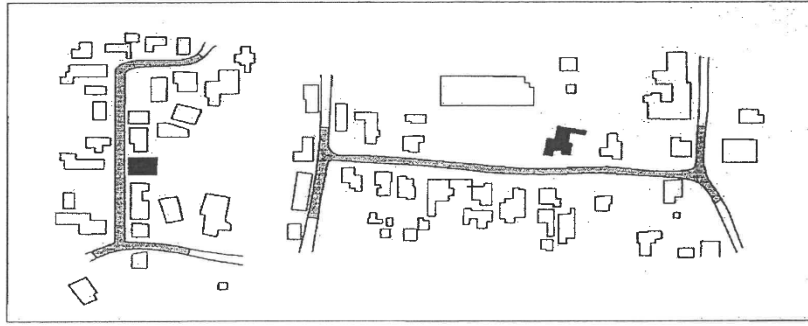


Illustration 14-5.2-2 Truncation by an Intersecting Block or Visual Intersection

(b) Streetscape Standards

...

(ii) When determining streetscape, the following structure types shall be excluded: institutional, buildings originally constructed to house a hotel, residential multiple unit, buildings with non-historic multiple stories, non-historic pitched roof, auxiliary outbuildings such as sheds, existing structures approved by way of a variance or exception, and yard walls and fences whose height is inconsistent with the predominant height of yard walls and fences on an applicable streetscape.

...

(c) Height

...

(ii) In exercising its authority under this section, the board shall limit the height of structures as set forth in this section. Heights of existing structures shall be as set forth on the official map of building heights in the historic districts.

...

C. Yard walls and fences shall be limited to a height that does not exceed the average of the height of other yard walls and fences in the streetscape.

(iii) In historic districts, height shall be the vertical distance measured between the highest part of a structure and the existing grade or finished grade, whichever is more restrictive, at the midpoint of the street facing facade, excluding rooftop appurtenances, the increased height of walls or fences over pedestrian and vehicular openings, and gates (either in opened or closed position).

...

§ 14-7.4 – Business-Capitol Districts

(A) Table of Dimensional Requirements for Townscape Subdistricts

East Marcy / East Palace:

Maximum Height of Structures (feet): 27

Maximum Lot Coverage Ratio: No requirements

Building Placement and Setback Requirements (feet):

Building setback requirements:

Street: Note 4 (10 feet)

Side: 5

Rear: 10

Minimum Open Space Requirements:

Open space of no less than 10 percent of the lot area shall be located adjacent to the front property line to serve as yard or courtyard

Landscape Treatment in Yards:

Landscape treatment required in yards and open space. Street trees and landscape treatment required if planting strip exists. Asphalt or concrete pavement prohibited in planting strip.

Height of Walls and Fences (feet):

Walls, fences, and hedges permitted to maximum of 4 feet

Placement of Off-Street Parking: Parking prohibited in required front yard

Portals: Prohibited within ROW

(B) Additional Regulations

...

(3) Design Objectives for Individual Townscape Subdistricts

The best existing qualities of the individual townscape subdistricts should be preserved, while encouraging diversity of design in the individual townscape subdistricts. New development should be harmonious with the specific physical characteristics and development and design objectives listed below:

...

(e) East Marcy / East Palace Subdistrict:

- (i) maintain the continuity of blockfaces, including street trees and yards;
- (ii) retain the residential scale of the area by limiting building heights and requiring yards;
- (iii) encourage low walls that are compatible with the characteristic open yards; and
- (iv) encourage a sense of openness.

§ 14-12.1 – Definitions

CONTRIBUTING STRUCTURE

A structure, located in a historic district, approximately fifty years old or older that helps to establish and maintain the character of that historic district. Although a contributing structure

is not unique in itself, it adds to the historic associations or historic architectural design qualities that are significant for a district. The contributing structure may have had minor alterations, but its integrity remains.

STREETSCAPE

The visual character of a street or section of a street as defined by topography; the pattern of structures and open space; building and wall setbacks; street design; architectural design; and heights, widths and proportions of structures, fixtures and graphics.

STRUCTURE

Anything that is constructed or erected with a fixed location on the ground or attached to something having a fixed location on the ground, including buildings, mobile homes, walls, fences, swimming pools, spas, tennis courts, signs, flag poles, microwave satellite receiving dishes, TV antennas and communication devices.

Appeal # 2025-5536-APPL of Case # 2024-9478-HDRB, 614 Paseo de Peralta

Appeal by Miriam Leth-Espensen of HDRB Denial

Have the Appellants conclusively demonstrated ALL SIX CRITERIA for an EXCEPTION to the Historic District standard for yard walls and fences?



Signature: 

Erin McSherry (Apr 25, 2025 16:59 EDT)

Email: ekmcsberry@santafenm.gov