



Z O N I N G  
A D J U S T M E N T S  
B O A R D  
S T A F F R E P O R T

FOR BOARD ACTION  
MARCH 9, 2023

## 870 Santa Barbara Road

**Appeal of Zoning Officer's Decision to construct a 6-foot fence on top of a 3-foot retaining wall (9 feet total height).**

### I. Background

#### A. Land Use Designations:

- General Plan: LDR – Low Density Residential
- Zoning: R-1H– Single Family Residential District, Hillside Overlay Zone

#### B. Zoning Permits Required:

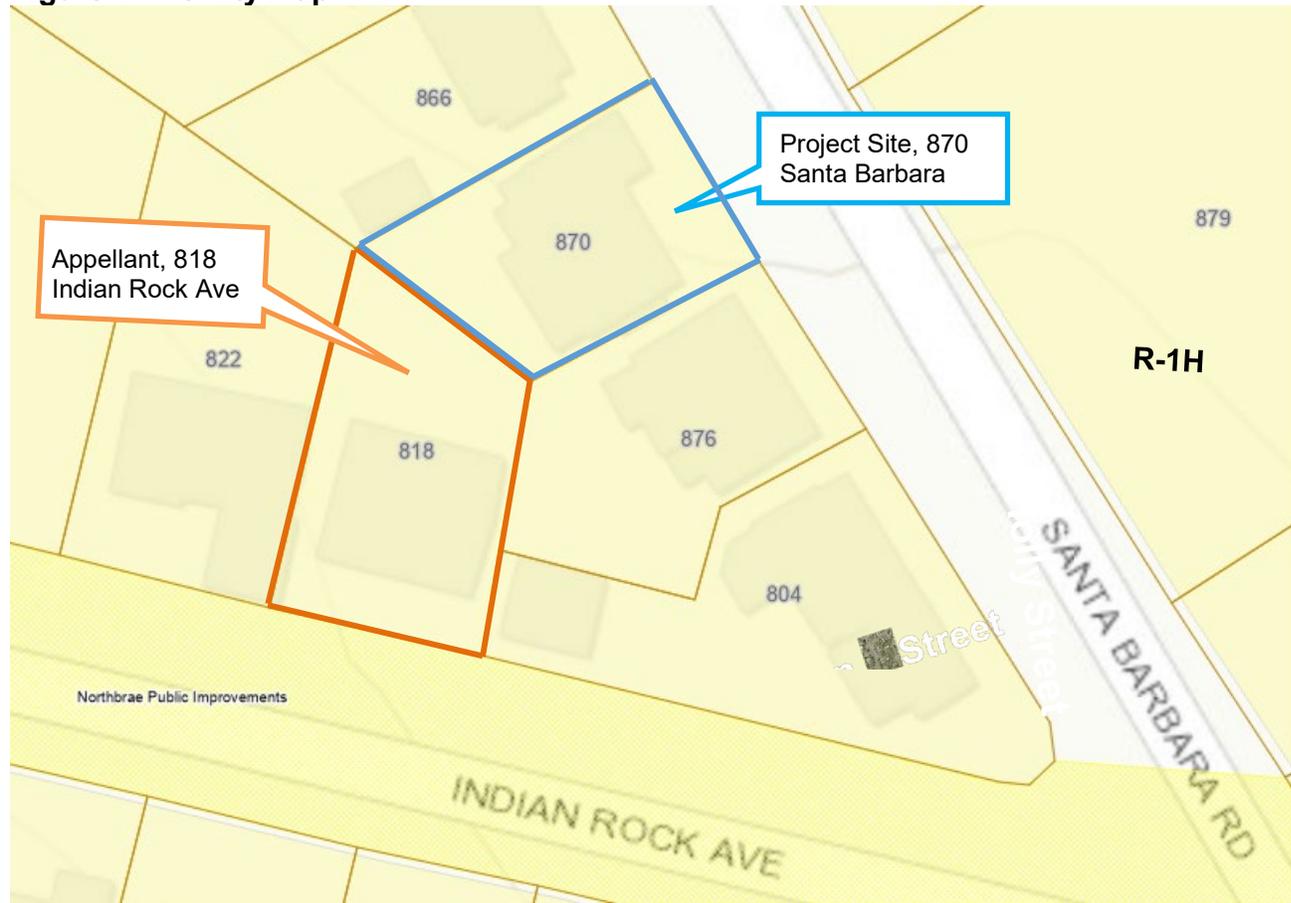
- Administrative Use Permit pursuant to Berkeley Municipal Code (BMC) Section 23.304.080 to construct a fence more than 6 feet in height on a lot line.

**C. CEQA Recommendation:** It is staff's recommendation that the project is categorically exempt pursuant to Section 15301 of the CEQA Guidelines ("Existing Facilities"). The determination is made by ZAB.

#### D. Parties Involved:

- Applicant/ Owner: Sanju Thomman, 870 Santa Barbara Road, Berkeley
- Appellants: Barbara Schick, 818 Indian Rock Ave, Berkeley

**Figure 1: Vicinity Map**



R-1H = Single-Family Residential District (Hillside)

Figure 2-3 : Site Plan

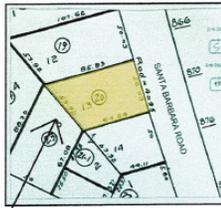
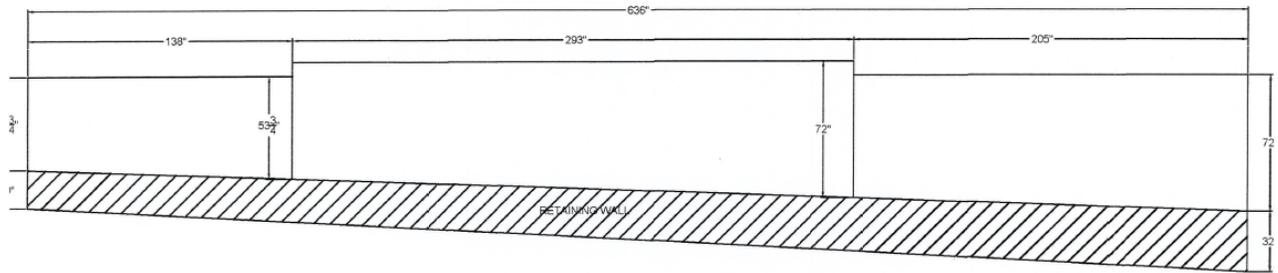


SITE PLAN

SITE PLAN 870 SANTA BARBARA ROAD: FENCE PROJECT : AUP APPLICATION



**Figure 4: Fence Details**



FENCE VIEW AS INDICATED BY ARROW  
 AS SEEN BY NEIGHBOR

**Table 1: Land Use Information**

Location		Existing Use	Zoning District	General Plan Designation
Subject Property		Single-family Dwelling	R-1H	LDR (Low Density Residential)
Surrounding Properties	North	Single-family dwelling		
	South	Single-family dwelling		
	East	Park		
	West	Single-family dwelling		

**Table 2: Special Characteristics**

Characteristic	Applies to Project?	Explanation
Housing Accountability Act (Govt. Code 65589.5(j))	No	The project is not a "housing development project," as no additional units would be created. The project is to expand an existing unit on the site. Therefore, the HAA findings do not apply to this project.
Coast Live Oaks	No	There are no existing oak trees on the site.
Creeks (Per BMC Section 17.08.045)	No	No creek or culvert, as defined by BMC Chapter 17.08, exists on or within 30' of the site.
Historic Resources	No	The project does not propose the demolition or substantial alteration of a building over 40 years old. Staff approved a waiver from the Historical Resource Evaluation requirement and it was determined that the building is not likely to be a resource.
Housing Accountability Act (Govt. Code 65589.5(j))	No	The project is not a "housing development project," as no additional units would be created. The project is to construct a 6-foot-tall fence on top of a 3-foot retaining

		wall, therefore, the HAA findings do not apply to this project.
Rent Controlled Units (Per BMC Chapter 13.76)	No	The existing residential building is a single-family dwelling, and thus not subject to the Rent Control Ordinance.
Residential Preferred Parking (RPP) (Per BMC Chapter 14.72)	No	The project site is not located in a zone of the Residential Preferred Parking program.
Seismic Hazards Mapping Act (Per State Hazards Mapping Act)	No	The project site is located in the Earthquake Fault Rupture (Alquist-Priolo) Zone and susceptible to liquefaction, fault rupture, or landslide, as defined by the State Seismic Hazards Mapping Act (SHMA). Fences are exempt from additional review.
Soil/Groundwater Contamination	No	The project site is not located in the City's Hazards Management Area and the site is not on any list maintained pursuant to the Cortese List.
Transit and Bicycle Access	Yes	The project site is within 0.12 miles of AC transit routes 67 on Spruce Street and Marion Ave. The Spruce Street Bike Way is also located within 0.12 miles.

**Table 3: Project Chronology**

Date	Action
October 05, 2021	Application submitted
February 2, 2022	Application deemed incomplete
July 26, 2022	Revised application materials submitted
September 2, 2022	Application deemed Complete
October 6, 2022	Notice of Administrative Decision issued
October 26, 2022	Appeal received
February 23, 2023	Public hearing notices mailed/posted
March 9, 2023	ZAB hearing

## II. Project Setting

**A. Neighborhood/Area Description:** The subject site is located on the south side of Santa Barbara Road across the street from Grotto Rock Park near Marin Avenue, where Indian Rock Road intersects with Santa Barbara Road in a residential neighborhood that consists of single-family dwellings that range from one to two stories in height. See Figure 1: Vicinity Map.

**B. Site Conditions:** The project site is rectangular, with a 50-foot wide lot line along Santa Barbara Street and an average lot depth of 70 feet. The parcel is currently developed with a one-story single-family dwelling and shares a rear lot line of 818 Indian Rock Avenue. There is an existing 3-foot tall retaining wall along the perimeter of the property in the rear. The parcel is conforming to current zoning standards in terms of minimum lot size, lot coverage, and building setbacks from the front (west) and right (right) side property lines.

## III. Project Description

The project approved by the Zoning Officer would legalize a 6-foot tall by 53-foot-long wooden fence on top of an existing 3-foot retaining wall that runs along the rear lot line of the subject property. The fence would replace a pre-existing 3-foot-tall wire fencing. The fence was constructed without permit in April 2021. Although the fence is 6-feet in height, which is permitted by-right, it is adjacent to a variable-height retaining wall. For land use purposes, fence height is measured from the lowest existing grade point within a 3-foot radius of the structure to the highest point of the structure (BMC 23.304.080(B)), which makes the overall height approximately 9 feet at its highest point.

#### IV. Community Discussion

**A. Neighbor/Community Concerns:** The fence was constructed without the benefit of a zoning permit, and in July 2021 the appellant filed a request for service with the Building and Safety Division about the illegal construction. Fences under 7 feet in height do not require a building permit, however, a zoning permit would be required, based on the measurement noted above, because the fence height per land use exceeds 6 feet in a required setback.

The owner submitted the Administrative Use Permit application to legalize the fence on October 5, 2021. A pre-application poster was installed in front of the subject property at time of submittal. The applicant sent plans to the neighbors on abutting and confronting properties via certified mail in on September 28, 2021.

**B. Zoning Officer's Decision to Approve:** The Zoning Officer determined that the proposed project would not be detrimental to those living and working in the neighborhood because it would replace a 3 – 4-foot tall existing fence, no changes were proposed to the existing building or other site improvements, and the fence would be approximately 20 feet away from the neighboring residence. Further, the proposed fence would not create detrimental air, views, light, or privacy impacts due to the existing building-to-building separations and location along a lot line. A solid fence would increase privacy between the neighboring lots. On October 6, 2022, Staff posted the Notice of Administrative Decision at the site and sent notices to abutting and confronting property owners and occupants and to interested neighborhood groups.

**C. Appeal:** The appeal of the administrative decision was filed on October 26, 2022 by Barbara Schick, the owner of 818 Indian Rock Avenue. The appeal points are summarized below in Section V.

**D. Public Notice:** On February 23, 2023, the City mailed public hearing notices to all adjacent property owners and occupants within 300 feet of the subject property, and to interested parties. Staff also posted the Notice of Public Hearing at three locations within the immediate vicinity of the subject site.

#### V. Appeal Issues and Analysis

The issues raised in the appellant's letter and staff responses are as follows. For the sake of brevity, the appeal issues are not re-stated in their entirety. Additional items were raised in the letter that are outside of the purview of the Zoning Ordinance and the ZAB, and are not addressed here. Please refer to the appeal letter (Attachment 3) for the full text.

**A. Appeal Issue 1 – Adverse Impact**

The appellant states that the new fence affects the value of and enjoyment of her property because the unfinished side of the fence faces her lot.

Staff Analysis:

The proposed fence replaces the existing 3-4-foot high wire fence. While the fence is increasing in height and material, the 6-foot-tall wooden fence meets the standards for fences in Residential Districts and does not contain prohibited materials such as barbed wire or jagged glass. The Zoning Ordinance does not regulate the direction of the finished side of a fence. As a result, adverse impact cannot be found.

**B. Appeal Issue 2 – Blocks sunlight and air**

The appellant states that the new solid fence blocks at least 8 feet of sunlight and air circulation to the fruit trees from the direction of 870 Santa Barbara.

Staff Analysis

The proposed fence would be 6-feet tall and constructed adjacent to an existing variable-height retaining wall, totaling 9 feet at its highest point. It is located more than 20 feet from the neighboring building. Based on the photos provided, the fence appears to be about 12 – 18 inches from the face of the retaining wall. Fences that are setback from the face retaining wall by more than 36 inches (3 feet) are not measured from the bottom of the retaining wall. It is not clear whether an additional 18 – 24-inch setback would reduce potential shading on the perimeter trees.

**C. Appeal Issue 3 – Maintenance of Retaining Wall:**

The appellant raised concerns about drainage impacts and maintenance of the retaining wall.

Staff Analysis

No changes were made to grade as part of this projects that would affect drainage. Although the retaining wall is not part of the subject permit, if maintenance is required it would be possible to remove portions of the fence to complete the work.

**D. Appeal Issue 4 – Privacy:**

The appellant states that a green privacy fence comprised of the existing trees on her property and additional trees planted on the subject lot could have provided privacy. She had requested Sanju Thomman plant citrus trees on his side to create a green fence all year round. She notes that Thomman did plant 3 citrus trees, but not positions to create the green privacy fence all year round.

Staff Analysis:

The fence would be located on the rear property line between the two properties. The decision to use trees, vegetation, or fencing is not within the purview of the land use code. The fence provides privacy between the neighboring dwellings, and therefore does not impact privacy.

## VI. Recommendation

Because of the project's consistency with the Zoning Ordinance and General Plan, and minimal impact on surrounding properties, staff recommends that the Zoning Adjustments Board: **APPROVE Administrative Use Permit #ZP2021-0183** pursuant to Section 23.406.040 and subject to the attached Findings and Conditions (see Attachment 1) and **DISMISS the Appeal.**

**Attachments:**

1. Findings and Conditions, #ZP2021-0183, October 6, 2022
2. Project Plans, received July 26, 2022
3. Letter of Appeal, received October 26, 2022
4. Notice of Public Hearing
5. Correspondence Received

**Staff Planner:** Brian Garvey, bgarvey@cityofberkeley.info, (510) 981-7424

# ATTACHMENT 1

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## FINDINGS AND CONDITIONS

MARCH 9, 2023

### 870 Santa Barbara Road

#### Administrative Use Permit #ZP2021-0183

**To construct a 6-foot fence on top of a 3-foot retaining wall (9 feet total height).**

#### PERMITS REQUIRED

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- Administrative Use Permit pursuant to Berkeley Municipal Code (BMC) Section 23.304.080 to construct a fence more than 6 feet in height on a lot line.

#### CEQA FINDINGS

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1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to CEQA Guidelines Section 15301 “Existing Facilities.”
2. Furthermore, none of the exceptions in CEQA Guidelines Section 15300.2 apply, as follows: (a) the site is not located in an environmentally sensitive area, (b) there are no cumulative impacts, (c) there are no significant effects, (d) the project is not located near a scenic highway, (e) the project site is not located on a hazardous waste site pursuant to Government Code Section 65962.5, and (f) the project would not affect any historical resource.

#### FINDINGS FOR APPROVAL

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3. As required by BMC Section 23.406.030(F), the project, under the circumstances of this particular case existing at the time at which the application is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City because:
  - A. The proposed project will construct a 6-foot-high, 53-foot-long wooden fence to be constructing on an existing 3-foot-high retaining wall. The fence will replace preexisting wire fencing. No changes are proposed to the existing building or other site improvements.
  - B. The new 6-foot high fence would be approximately 20 feet from the nearest neighbor at 818 Indian Rock Ave.

- C. Pursuant to BMC 23.304.080(C), the replacement fence would not contain strands of barbed or razor wire, sharp or jagged glass, sharp or jagged metal components (e.g., razor-spikes), or similar materials.
  
  - D. The removal and replacement of the existing fence above the retaining wall is not determinantal.
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## **STANDARD CONDITIONS**

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The following conditions, as well as all other applicable provisions of the Berkeley Municipal Code, apply to this Permit:

### **1. Conditions Shall be Printed on Plans**

The conditions of this Permit shall be printed on the *second* sheet of each plan set submitted for a building permit pursuant to this Administrative Use Permit, under the title 'Use Permit Conditions'. *Additional sheets* may also be used if the *second* sheet is not of sufficient size to list all of the conditions. The sheet(s) containing the conditions shall be of the same size as those sheets containing the construction drawings; 8-1/2" by 11" sheets are not acceptable.

### **2. Compliance Required (BMC Section 23.102.050)**

All land uses and structures in Berkeley must comply with the Zoning Ordinance and all applicable City ordinances and regulations. Compliance with the Zoning Ordinance does not relieve an applicant from requirements to comply with other federal, state, and City regulations that also apply to the property.

### **3. Approval Limited to Proposed Project and Replacement of Existing Uses (BMC Section 23.404.060.B.1)**

- A. This Permit authorizes only the proposed project described in the application. In no way does an approval authorize other uses, structures or activities not included in the project description.

### **4. Conformance to Approved Plans (BMC Section 23.404.060.B.4)**

All work performed under an approved permit shall be in compliance with the approved plans and any conditions of approval.

### **5. Exercise and Expiration of Permits (BMC Section 23.404.060.C)**

- A. A permit authorizing a land use is exercised when both a valid City business license is issued (if required) and the land use is established on the property.
- B. A permit authorizing construction is exercised when both a valid City building permit (if required) is issued and construction has lawfully begun.
- B. The Zoning Officer may declare a permit lapsed if it is not exercised within one year of its issuance, except if the applicant has applied for a building permit or has made a substantial good faith effort to obtain a building permit and begin construction. The Zoning Officer may declare a permit lapsed only after 14 days written notice to the applicant. A determination that a permit has lapsed may be appealed to the ZAB in accordance with Chapter 23.410 (Appeals and Certification).
- C. A permit declared lapsed shall be void and of no further force and effect. To establish the use or structure authorized by the lapsed permit, an applicant must apply for and receive City approval of a new permit.

### **6. Permit Remains Effective for Vacant Property (BMC Section 23.404.060.D)**

Once a Permit for a use is exercised and the use is established, the permit authorizing the use remains effective even if the property becomes vacant. The same use as allowed by

the original permit may be re-established without obtaining a new permit, except as set forth in Standard Condition #5 above.

**7. Permit Modifications (BMC Section 23.404.070)**

No change in the use or structure for which this Permit is issued is permitted unless the Permit is modified by the Board. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project.

**8. Permit Revocation (BMC Section 23.404.080)**

The City may revoke or modify a discretionary permit for completed projects due to: 1) violations of permit requirements; 2) Changes to the approved project; and/or 3) Vacancy for one year or more. However, no lawful residential use can lapse, regardless of the length of time of the vacancy. Proceedings to revoke or modify a permit may be initiated by the Zoning Officer, Zoning Adjustments Board (ZAB), or City Council referral.

**9. Indemnification Agreement**

The applicant shall hold harmless, defend, and indemnify the City of Berkeley and its officers, agents, and employees against any and all liability, damages, claims, demands, judgments or other losses (including without limitation, attorney's fees, expert witness and consultant fees and other litigation expenses), referendum or initiative relating to, resulting from or caused by, or alleged to have resulted from, or caused by, any action or approval associated with the project. The indemnity includes without limitation, any legal or administrative challenge, referendum or initiative filed or prosecuted to overturn, set aside, stay or otherwise rescind any or all approvals granted in connection with the Project, any environmental determination made for the project and granting any permit issued in accordance with the project. This indemnity includes, without limitation, payment of all direct and indirect costs associated with any action specified herein. Direct and indirect costs shall include, without limitation, any attorney's fees, expert witness and consultant fees, court costs, and other litigation fees. City shall have the right to select counsel to represent the City at Applicant's expense in the defense of any action specified in this condition of approval. City shall take reasonable steps to promptly notify the Applicant of any claim, demand, or legal actions that may create a claim for indemnification under these conditions of approval.

**ADDITIONAL CONDITIONS IMPOSED BY THE ZONING OFFICER**

Pursuant to BMC Section 23.404.050.H, the Zoning Officer attaches the following additional conditions to this Permit:

**Prior to Submittal of Any Building Permit:**

**10. Project Liaison.** The applicant shall include in all building permit plans and post onsite the name and telephone number of an individual empowered to manage construction-related complaints generated from the project. The individual’s name, telephone number, and responsibility for the project shall be posted at the project site for the duration of the project in a location easily visible to the public. The individual shall record all complaints received and actions taken in response, and submit written reports of such complaints and actions to the project planner on a weekly basis. Please designate the name of this individual below:

**Project Liaison**

\_\_\_\_\_ Name

\_\_\_\_\_ Phone #

**Standard Construction-related Conditions Applicable to all Projects:**

**11. Transportation Construction Plan.** The applicant and all persons associated with the project are hereby notified that a Transportation Construction Plan (TCP) is required for all phases of construction, particularly for the following activities:

- Alterations, closures, or blockages to sidewalks, pedestrian paths or vehicle travel lanes (including bicycle lanes);
- Storage of building materials, dumpsters, debris anywhere in the public ROW;
- Provision of exclusive contractor parking on-street; or
- Significant truck activity.

The applicant shall secure the City Traffic Engineer’s approval of a TCP. Please contact the Office of Transportation at 981-7010, or 1947 Center Street, and ask to speak to a traffic engineer. In addition to other requirements of the Traffic Engineer, this plan shall include the locations of material and equipment storage, trailers, worker parking, a schedule of site operations that may block traffic, and provisions for traffic control. The TCP shall be consistent with any other requirements of the construction phase.

Contact the Permit Service Center (PSC) at 1947 Center Street or 981-7500 for details on obtaining Construction/No Parking Permits (and associated signs and accompanying dashboard permits). Please note that the Zoning Officer and/or Traffic Engineer may limit off-site parking of construction-related vehicles if necessary to protect the health, safety or convenience of the surrounding neighborhood. A current copy of this Plan shall be available at all times at the construction site for review by City Staff.

**12.** Construction activity shall be limited to between the hours of 8:00 a.m. and 6:00 p.m. on Monday through Friday, and between 9:00 a.m. and noon on Saturday. No construction-related activity shall occur on Sunday or on any Federal Holiday.

**13.** If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.

14. Subject to approval of the Public Works Department, the applicant shall repair any damage to public streets and/or sidewalks by construction vehicles traveling to or from the project site.
15. All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter in thickness and secured to the ground.
16. All active construction areas shall be watered at least twice daily, and all piles of debris, soil, sand or other loose materials shall be watered or covered.
17. Trucks hauling debris, soil, sand, or other loose materials shall be covered or required to maintain at least two feet of board.
18. Public streets shall be swept (preferably with water sweepers) of all visible soil material carried from the site.
19. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way.
20. The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.
21. Any construction during the wet season shall require submittal of a soils report with appropriate measures to minimize erosion and landslides, and the developer shall be responsible for following these and any other measures required by the Building and Safety Division and the Public Works Department.

**Prior to Issuance of Occupancy Permit or Final Inspection:**

22. All construction at the subject property shall substantially conform to the approved Use Permit drawings or to modifications approved by the Zoning Officer.
23. All landscape, site and architectural improvements shall be completed per the attached approved drawings dated July 26, 2022.

**At All Times (Operation):**

24. All exterior lighting shall be energy efficient where feasible; and shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.
25. Drainage Patterns. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.



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Prepared by: Brian Garvey  
For Samantha Updegrave, Zoning Officer



8/31/2021

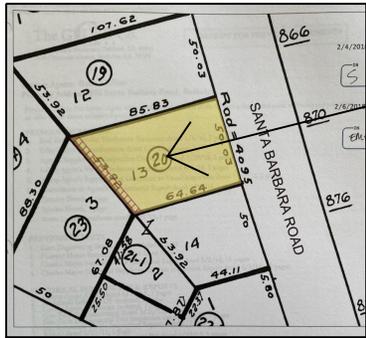
Google Earth



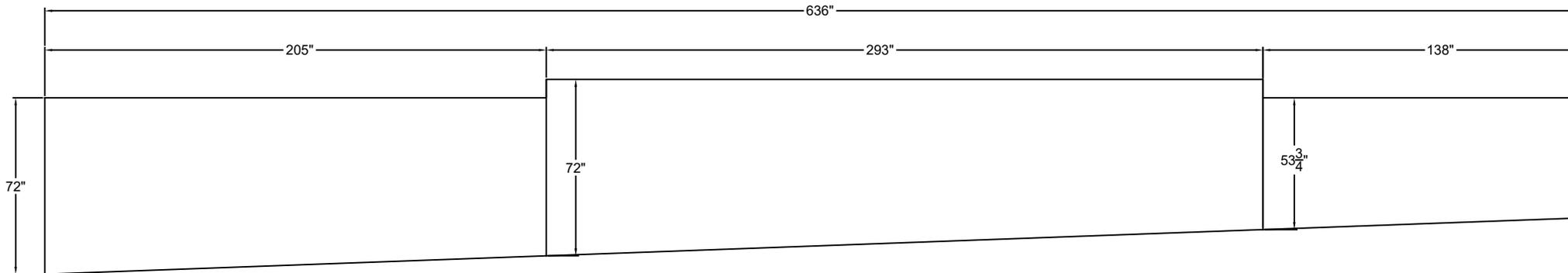
# SITE PLAN

SITE PLAN 870 SANTA BARBARA ROAD: FENCE PROJECT : AUP APPLICATION





FENCE VIEW AS  
INDICATED BY ARROW  
  
AS SEEN BY  
PROPERTY OWNER





Received

OCT 26 2022

Land Use Planning

Land Use Planner: Cecilia  
Mariscal

Zoning Officer  
Permit Service Center  
1947 Center Street, 3rd Floor  
Berkeley, CA 94704  
Tel: 510.981.7410

October 25, 2022

Re: Appeal of the Approval of the Administrative Use Permit #ZP2021-0183

Dear Sir/Madam,

I (Barbara Schick) am appealing the Approval of the Administrative Use Permit #ZP2021-0183 for 870 Santa Barbara Road to construct a 6-foot fence on top of a 3 foot retaining wall because it adversely affects my property. According to BMC 23.304.080, an AUP is required for fences "More than 6 ft in height and on lot line or within required lot line setbacks for main building." The granted approval permits the height of the proposed fence to be 9 feet, since "The height of a fence is measured as the vertical distance from the lowest existing grade point within a 3-foot radius of any point of the structure to the highest point of the structure."

#### REASON FOR APPEAL

I am the sole owner of and reside at 818 Indian Rock Ave, Berkeley, CA 94707, the backyard of which shares the property line with the backyard of 870 Santa Barbara where the prior fence has already been removed and the proposed fence has already been constructed. My backyard garden is a pesticide-free "urban farm" with fruit trees and vegetables, the produce of which I share with neighbors and friends. The new almost solid fence next to the existing 2-3 foot retaining wall (figs. 1 & 2) **blocks at least 8 ft of sunlight and air circulation to my fruit trees from the direction of 870 Santa Barbara. This affects the yield of my fruit trees and their growth.** Previously, only 2-3 feet of sunlight was blocked from the direction of 870 Santa Barbara by the 2-3 foot retaining wall with the original 3 foot wire fence on top of it (figs. 3 & 4). The current height of the fence plus retaining wall and since the ugly side of the fence faces my property, **it also affects the value of my property and my enjoyment**

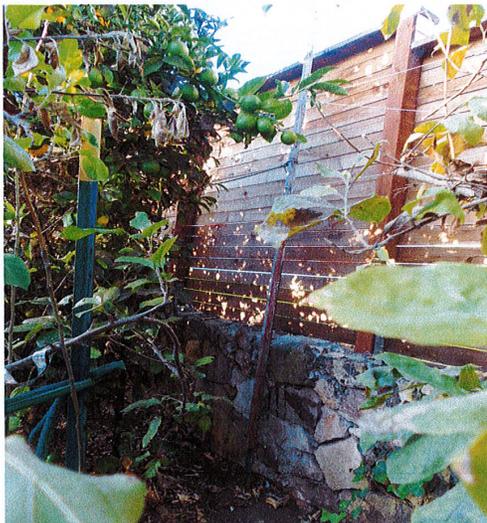


Fig. 1

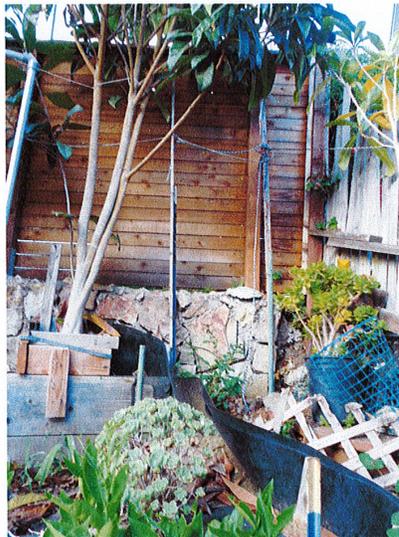


Fig. 2 (note 6ft neighbor's fence to the right)

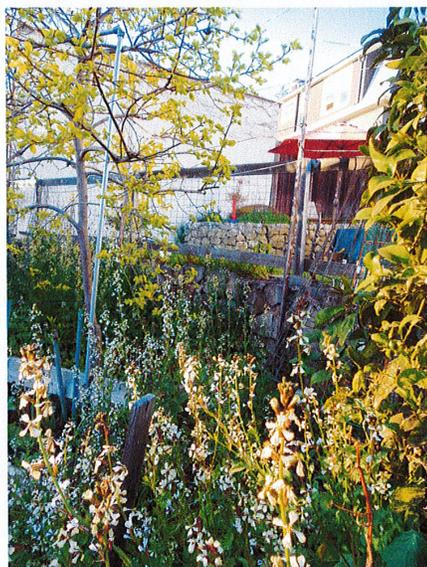


Fig. 3



Fig. 4

previous fence

### FACTS

One of the owners of 870 Santa Barbara Road (Sanju Thomman) is requesting retroactive permission for construction of a 6-foot fence on top of a 3 foot retaining wall. The retaining wall, which was built prior to 1950 (possibly as early as 1928 when the house was probably constructed), is constructed of stones and is approximately 9 inches wide. **Although the request is for a 6 foot fence on top of a three foot retaining wall, the fence was not built on top of, but rather adjacent to, the retaining wall, which is actually 2-3 feet tall.** The fence consists of 4x4 pressure-treated wood posts (set in concrete) adjacent to the retaining wall. Horizontal 3.5 inch wide boards (good side facing 870 Santa Barbara and unfinished, i.e., ugly side, facing

my property) are on the 870 Santa Barbara side of the posts. These boards create an almost solid fence that blocks light and air circulation. I was told that proper etiquette is for an ugly side of a fence to face the property of the owner of the fence, not that of the neighbor or the public view. Often it is possible to make both sides of the fence identical, which was not done.

The fence's horizontal boards are approximately 15 inches from the property line between our backyards. Now approximately 15 inches by 53 feet of 870 Santa Barbara's backyard (dirt and retaining wall) are essentially inaccessible from 870 Santa Barbara (fig. 5). Who is going to maintain the retaining wall and the strip of ground between the fence and the property line (see PREVENTION OF WATER, DIRT, AND WEEDS FROM NEIGHBOR'S PROPERTY section below)? On the Annotated Tract Map of Berkeley Heights, Filed April 7, 1909 (see attachment B), which shows property lines, the property line of 870 Santa Barbara in relation to those of the properties on either side of 870 Santa Barbara is a straight line, not 15 inches from the edge of the retaining wall. This should prevent arguments as to where the actual property line is and on which property the retaining wall is.



Fig. 5 Setback of fence from property line

According to Thomman's Zoning Project Application ZP2021-0183 the height of the retaining wall starts at 20" and increases gradually in a straight line to 32". However, the height of the retaining wall from my side does not increase gradually in a straight line, and the few measurements I made do not agree with his. For example, I measured 23-26" close to where Thomman maintains the retaining wall is 20". According to BMC 23.304.080 "The height of a fence is measured as the vertical distance from the lowest existing grade point within a 3-foot radius of any point of the structure to the highest point of the structure." As far as I know, neither Thomman nor his workers measured the elevation from the top of the horizontal boards of the new fence to within 3 ft of the grade of my backyard.

According to the letter (see attachment A) Sanju Thomman and Erin Egad (the owners of 870 Santa Barbara Rd) sent me in September 2021, "the main reason for construction of the fence is for a combination of privacy and safety." "We have a 3 and

½ year old son who could easily climb over or fall into and down the existing fence into neighbor's property which is at a lower level."

#### SAFETY

I know of no instances since 1950 where any people or children fell from the backyard of 870 Santa Barbara Road into my backyard, even with the "flimsy," according to Thomman, fence. The previous wire fence was not the type conducive to climbing on. Interestingly, if the fence needed to be 6 ft (72") for safety and privacy, why is about 21% (138" of 636" of the fence according to his application) only 56" (4.7 ft) tall? As their child, who would now be at least 4½, grows older, if he really wanted to climb over the fence, he would find a way to do so, irrespective of the height. In which case, theoretically he could tumble down not up to 6 ft as with the previous fence, but up to 8-9 ft. with the current and proposed fence.

When the old fence was removed, some rocks, stones, and concrete from the retaining wall were left on the top of the retaining wall and in the area that can no longer be accessed from 870 Santa Barbara. If someone, such as a child, on my property trips and bumps into the retaining wall these loose items might hurt them. I have not removed them, since they are on Thomman and Egad's property.

Thomman and Egad's workers that were installing the fence cut 3 wire strings we had strung between poles to prevent deer from jumping between our properties, which deer had done previous to our installation of this deer deterrent. When I became aware of this, I quickly secured the cut wires to prevent them from coming off the other poles. Since the wires are high up (6-8 ft), I had to stand on a small terrace and almost fell. As a child, I was hit by a deer, and recently, I have come close to bucks with large antlers. So having anti-deer string deterrents is a safety precaution for both properties, especially for small children, in case deer get past gates and fences.

The sump in 870 Santa Barbara's backyard used to (and may still) have a plastic cover covered by a stone slab, not by a grate over a Christy box. The later of which might be safer for preventing people, children, and animals from accidentally falling into a sump with water if the slab is ever moved. (I saw the covering of the sump when I weeded the backyard for previous owners.)

#### PRIVACY

At the back of my property, which faces the backyard of 870 Santa Barbara, I have several mature fruit trees (orange, lemon, apple, and persimmons), the leaves of which create a living "green privacy fence" (fig. 6). Since the persimmons and apple trees, as well as magnolia and loquat trees there, are deciduous, they lose their leaves for several months a year. Years ago, I suggested to Thommson to plant citrus trees on his side of the property line across from my **deciduous** trees so that there would be a "green fence" all year round. Such a fence provides privacy, is good for the environment, and is visually pleasing. They did plant 3 citrus trees, but not in positions that would fill in the gaps due to the deciduous trees. So privacy could have been, but was not, achieved year round with a "green fence." In his application, Thomman makes a point of mentioning "Trees which span the entire course of the fence. Trees are 2-3 feet above the top of the fence at 870 Santa Barbara Road." He does not mention that four of these trees (the apple, Hiatchi persimmons, Fuyu persimmons, and magnolia)

are deciduous and lose their leaves for part of the year, plus the leaves of one loquat do not block my view of the fence. Nor does he address the blockage of sunlight and air circulation. As far as I know, there is no height limit for trees in Berkeley, so the height of my trees is irrelevant. Many of my fruit trees are dwarf varieties.



Fig. 6 Trees creating a green living fence

Since my property, including my two-story house is lower, than 870 Santa Barbara, Thomman and Egad can easily see, from both their backyard and house, almost everything that happens in my backyard and into my back windows if their coverings (curtains or blinds) are open. The height difference from their backyard to my ground floor is about 12 ft. Prior to the fence being built, because of my green living fence I could only easily see into their backyard if I was gardening behind the trees of my garden's upper terrace. My windows that face 870 Santa Barbara all have venetian blinds or curtains that are usually closed. In contrast, the top floor windows of 870 Santa Barbara that face my property do not appear to have window coverings (curtains, shades, or blinds). The three windows on the top floor of my house that face 870 Santa Barbara, are in a closet, a bathroom, and at the turn in a staircase, and their curtains or blinds are usually closed. When people climb to the top of the rock formation in Grotto Park, which is across from 870 Santa Barbara, do they have a good view of the house and yards of 870 Santa Barbara?

#### PREVENTION OF WATER, DIRT, AND WEEDS FROM NEIGHBOR'S PROPERTY

When the Perez-Mendes' owned 870 Santa Barbara (three owners ago), established trees (at least one cedar, one maple, and I believe a camellia) in the backyard unexpectedly died and the professional gardener could not figure out why. Since I have fruit trees and grow vegetables that we eat and share with others, I had to prevent water and dirt from that 870 Santa Barbara Rd. from entering my yard. The retaining wall between our properties was previously not high enough to prevent this. When Christinia Wendling (2015) owned the property, I explained the problem to her and we both worked at lowering the ground next to the wall at least 2-3 inches and placing boards where this was not possible. This solved the problem, until 870 Santa Barbara was placed on the market in 2018 and the broker had sod laid down on the barren backyard. I told the people installing the sod to make sure it was at least 2-3 inches lower than the retaining wall. However, after the sod was installed, in many places the retaining wall was no longer higher than the backyard of 870 Santa Barbara, especially due to the slope of its backyard (fig. 7). I asked the new owner Thomman

(2018) to clear away at least a few inches of the grass lawn or have a flower bed next to the retaining wall and original wire fence, which would ensure that water and dirt from their property would not enter mine. This would also prevent weeds (grass, dandelion, and oxalis) from becoming entwined in the wire fence, where they could seed and their seeds be blown into my garden. When Wendling (2015) and when Balanced Holdings LLC (2016) owned 870 Santa Barbara, they let me weed their barren backyard, so that seeds from their weeds would not contaminate my garden. **Despite my request and suggestions, Thomman did not agree to do anything to prevent their water, dirt, or weeds from affecting my property. According to item #19 of Attachment 1 of the notice of Administrative Decision “The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way.”** Furthermore, If their sump pump stops working (i.e., due to an electricity shut off or mechanical failure), water in the sump could flow over the retaining wall into my garden, unless there is a backup battery or generator.



Picture 7. Example of where dirt & water will not be blocked by the retaining wall

#### SEWER EASEMENT

The City of Berkeley has an easement on properties where the city sewer is located. According to the Annotated Tract Map of Berkeley Heights and maps of the sewer replacement in 1997 (see Attachments B and C), a City of Berkeley sewer is located on 870 Santa Barbara Rd's property near the property line. The newly constructed fence may be built directly over the sewer. While considering the appeal, this may have to be taken into consideration, due to constraints sewer easements place on what permanent structures one can construct in such easements.

#### HISTORY

When Thomman mentioned they were going to build a 6 ft fence. I told him it was not allowed, since I knew that the combined height of retaining walls plus fences cannot exceed 6 feet total from grade without special permission. Thomman and Egad did not contact me further about their plans, did not consult with me as to the type of fence, or ask me to contribute financially. I filed a Request for Service –Inspection for Illegal Construction on July 19, 2021 (see Attachment D). I wrote “870 Santa Barbara Road, Berkeley 94707. New (April 2021) backyard fence is too high (fence plus retaining wall more than 6ft). Ugly side faces neighbor. Also problems with retaining wall (will not

prevent dirt and water from entering neighbor). Need to assess from neighbor's backyard." Several months later David Montes (Building Inspector II) inspected the fence and said it was too high to have been built without an AUP.

Since 870 Santa Barbara is uphill from my property in the Berkeley Hills, its backyard is higher than mine. The retaining wall is on land belonging to 870 Santa Barbara and allows its backyard to slope only slightly. My property does not benefit from the retaining wall. Like many old retaining walls it leans a little and is missing filler in some places (fig. 8). It may not have an appropriate footing, because in some places I can stick my hand under part of the wall. Although I have mentioned to four different owners of 870 Santa Barbara (and the sale agents), that there are problems with the retaining wall, they did not come to look at the retaining wall from my side and have not done anything about it. Prior to Thomman's mentioning that they were going to build a fence, he said they were going to replace the retaining wall, which they did not do. Although dealing with a retaining wall with problems prior to erecting a fence on or near it is desirable, this was not done.



Fig. 8- Rocks and filler missing from the retaining wall (note ivy invasion)

Since 2004 when I moved into 818 Indian Rock Ave, I have known that there are problems with the retaining wall of 870 Santa Barbara, therefore I have been careful not to water next to it, since expansion and contraction of earth due to water could affect foundations and retaining walls. For years, when Thomman and Egan watered their backyard lawn, their sprinkling system would also water 2-9 ft into my backyard. Besides interfering with my ability to control the amount of water my fruit trees received, it soaked the ground right next to their retaining wall. In June and July one year the ground on my property next to their retaining wall never dried, even though I did not water near the wall, while hand watering my garden 2-3 times a week. I lost a fruiting mandarin tree (fig. 9), which I attribute to Thomman and Egan's also watering parts of my yard, despite my repeated requests for them not to. I also am careful not to disturb dirt near their retaining wall.

All the fences bordering my property were installed by the neighbors. The 822 Indian Rock neighbor installed a beautiful fence that is identical on both sides, i.e. good sides face both neighbors. They did not contact us before installing and did not ask us to contribute financially. The ~ 6 foot fence on the 804 Indian Rock side of my property, , which is probably at least 70 years old, is not solid, so it does not completely block light or air circulation.



Fig. 9 Fruit-bearing mandarin tree as it started to die in 2018

Thank you in advance for considering my appeal of the approval of AUP (ZP#2021-0183). Please send me a Notice of Decision.

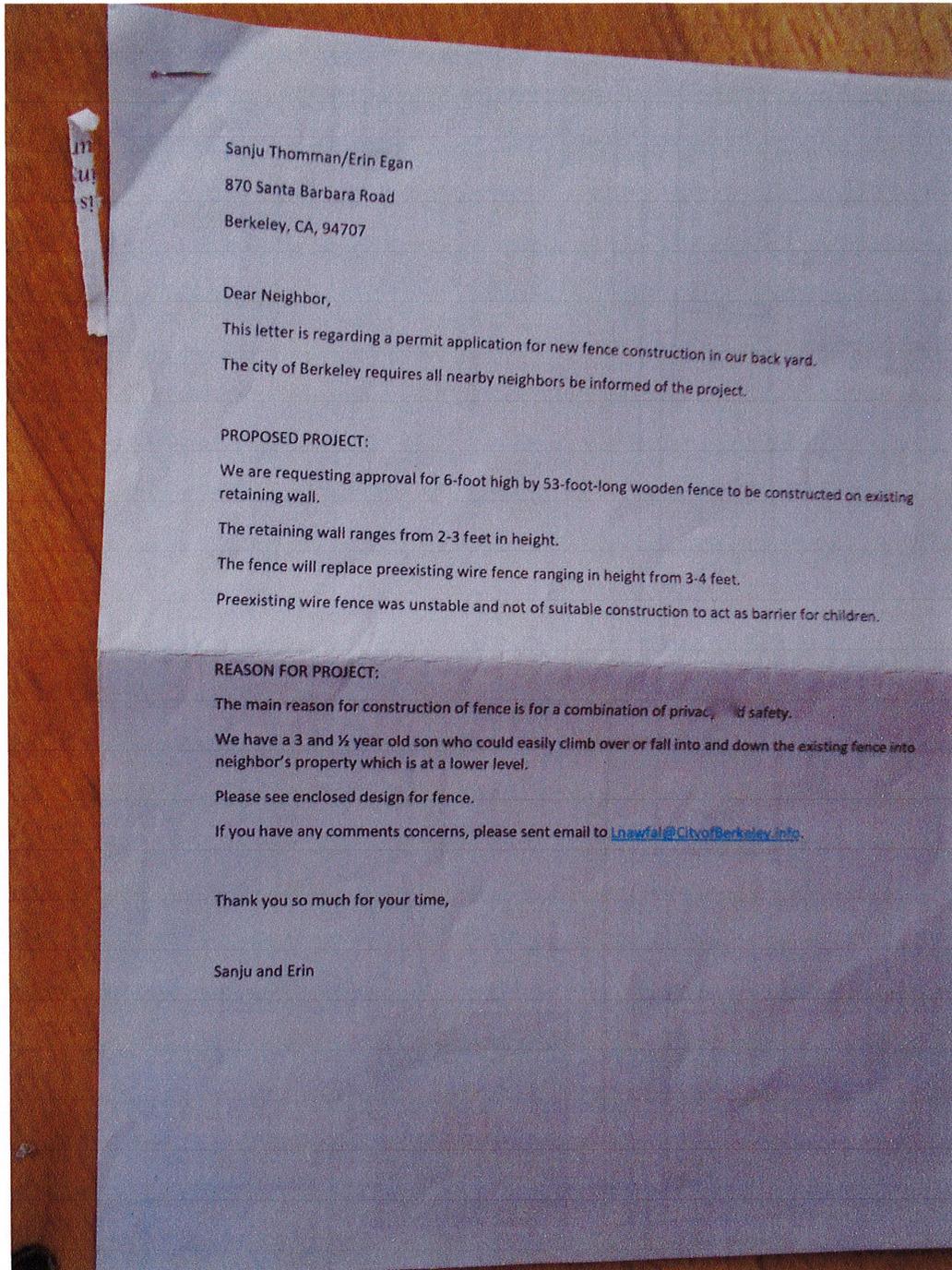
Sincerely yours,

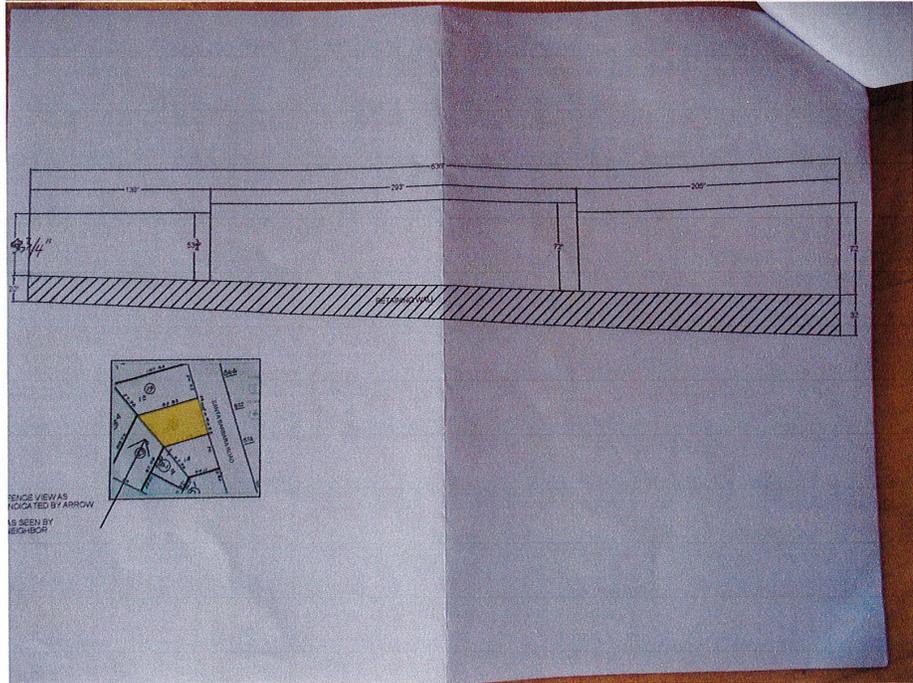
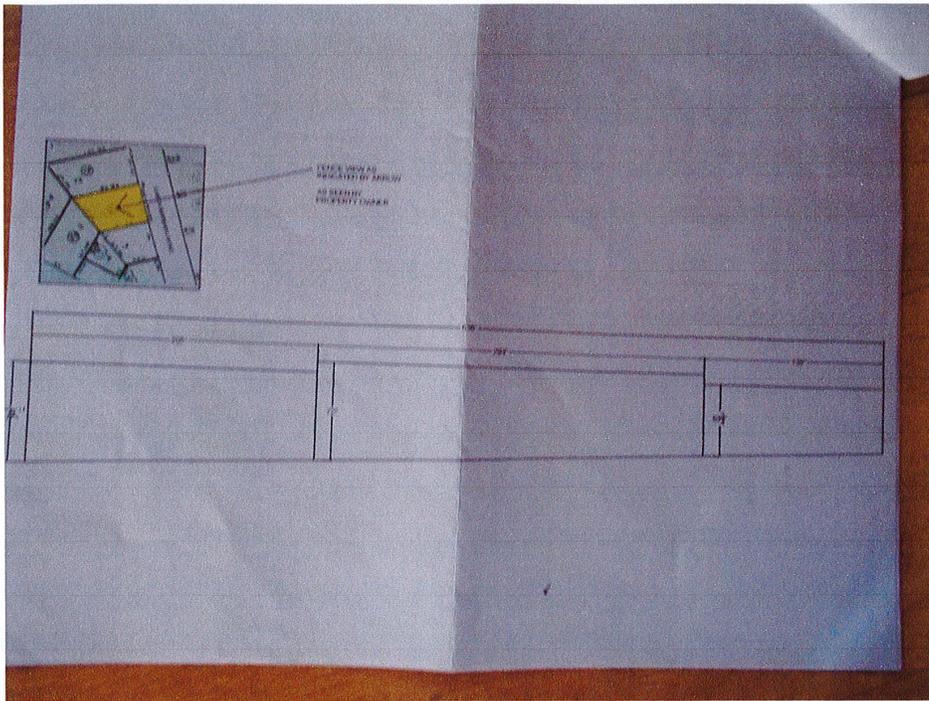
*Barbara Schick*  
Barbara Schick, PhD  
818 Indian Rock Ave  
Berkeley, CA 94707

510-332-4269 (cell)  
[bschick2@earthlink.net](mailto:bschick2@earthlink.net)

P.S. Please double check that no documents related to this AUP (ZP#2021-0183) ended up in the file for ZP#2022-0071.

## ATTACHMENT A

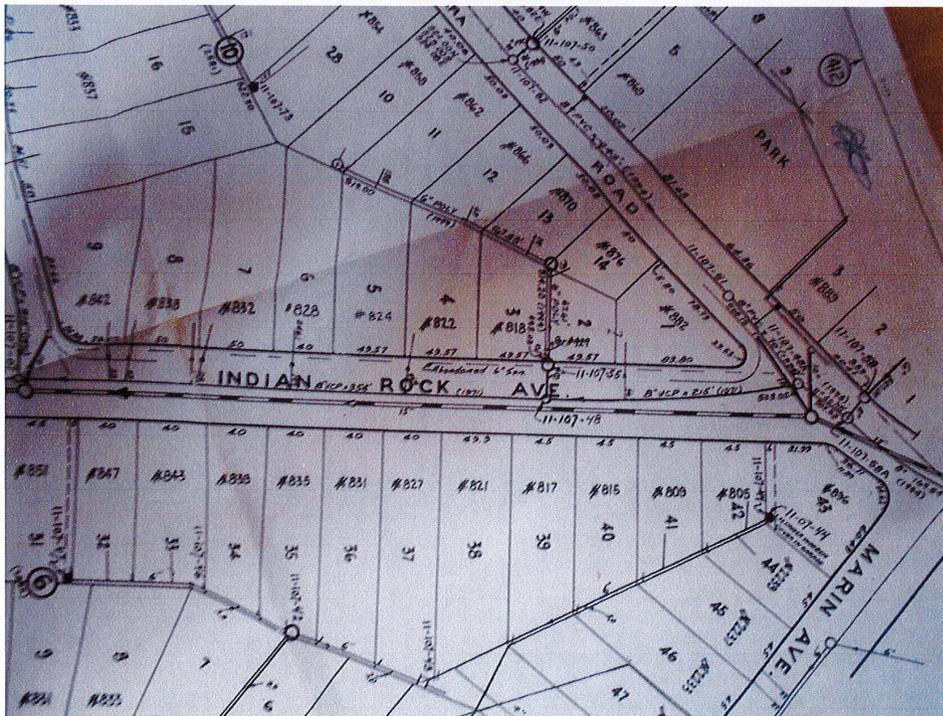




ATTACHMENT B



ATTACHMENT C



ATTACHMENT D



Building and Safety  
 Permit Service Center

**Please Note:**  
 The City of Berkeley will not automatically publicize the origin of this request, however if anyone seeks information about this request, it is considered public information. This form is for illegal construction/code concerns only. Any noise concerns should be directed to the Environmental Health Division.

For unsafe work practices, complete a Complaint to Investigate Unsafe Work Practices form.

Fo

**REQUEST FOR SERVICE**  
**Inspection for Illegal Construction**

**Request Details**

**Address:** 870 Santa Barbara Road, Berkeley 94707  
 New (April 2021) backyard fence is too high (8'6" plus retaining wall more than 6'4"). Ugly side of fence faces neighbor. Also problems with retaining wall will not prevent dirt and water from entering neighbor's back yard. Need to assess from neighbor's back

**Owner Information**

**Name:** Sanju Thonney/Erin Egan **Phone:** 617-642-556  
**Address:** 870 Santa Barbara Rd **City/ST/Zip:** Berkeley, CA 94707  
**Email:** Unknown

**Complainant Information**

**Name:** Barbara Schick **Phone:** 510-332-4444  
**Address:** 318 Endieu Rock Ave **City/ST/Zip:** Berkeley, CA 94707  
**Email:** bschick2@earthlink.net

**Relationship to the Address of Concern:**  Neighbor  Tenant  
 Fire Department  Health Department  Other

*Barbara Schick*  
 Complainant Signature July 16, 2021  
Date

PERMIT SERVICE CENTER  
 JUL 19 2021  
 RECEIVED BY: IC

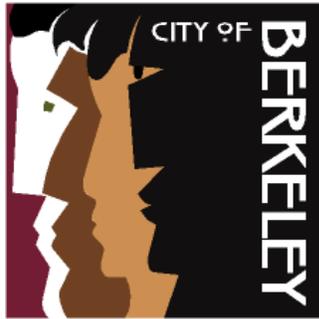
**Office Use Only**

**Inspector:** \_\_\_\_\_ **Priority:** \_\_\_\_\_ **Due:** \_\_\_\_\_  
**Action:**  Posted NOV  Posted 2<sup>nd</sup> NOV  NFA  Other: \_\_\_\_\_

**Notes:**

Building and Safety  
 1947 Center St. 3<sup>rd</sup> floor  
 Berkeley, CA 94704  
 510-981-7440 TTY 6803  
 buildingand@berkeley.gov

Building Inspector Signature (12) Date



# Z O N I N G A D J U S T M E N T S B O A R D

## NOTICE OF PUBLIC HEARING

### 870 Santa Barbara Road

Administrative Use Permit #ZP2021-0183

**PLN2022-0100 to Appeal of Zoning Officer's Decision to construct a 6-foot fence on top of a 3-foot retaining wall (9 feet total height).**

The Zoning Adjustments Board of the City of Berkeley will hold a public hearing on the above matter, pursuant to Zoning Ordinance Section 23.404.

**When:** Thursday, March 9, 2023, 7:00 pm

**Where:** Berkeley Unified School District meeting room, 1231 Addison Street, (wheelchair accessible) with remote/hybrid option (via Zoom).

**Please see the Agenda for details:** [https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-03-09\\_ZAB\\_Agenda.pdf](https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-03-09_ZAB_Agenda.pdf)

***PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED IN A HYBRID MODEL WITH BOTH IN-PERSON ATTENDANCE AND VIRTUAL PARTICIPATION AVAILABLE FOR MEMBERS OF THE PUBLIC.***

*For in-person attendees, face coverings or masks that cover both the nose and mouth are encouraged. If you're feeling sick, please do not attend the meeting in-person as a public health precaution.*

*Currently, there are no physical distancing requirements in place by the State of California or the Local Health Officer for an indoor event similar to a Commission meeting. However, all attendees are requested to be respectful of the personal space of other attendees. An area of the public seating area will be designated as "distanced seating" to accommodate persons that need to distance for personal health reasons.*

**A. Land Use Designations:**

- General Plan: LDR – Low Density Residential
- Zoning: R-1H– Single Family Residential District, Hillside Overlay Zone

**B. Zoning Permits Required:**

- Administrative Use Permit pursuant to Berkeley Municipal Code (BMC) Section 23.304.080 to construct a fence more than 6 feet in height on a lot line.

**C. CEQA Recommendation:** Categorically exempt pursuant to Section 15301 of the CEQA Guidelines ("Existing Facilities")

**D. Parties Involved:**

- Applicant/ Owner: Sanju Thomman, 870 Santa Barbara Road, Berkeley
- Appellants: Barbara Schick, 818 Indian Rock Ave, Berkeley

**Further Information:**

All application materials are available online at:  
<https://aca.cityofberkeley.info/CitizenAccess/Welcome.aspx>.

The Zoning Adjustments Board final agenda and staff reports will be available online 6 days prior to this meeting at: <https://berkeleyca.gov/your-government/boards-commissions/zoning-adjustments-board>.

Questions about the project should be directed to the project planner, Brian Garvey, at (510) 981-7424 or [bgarvey@cityofberkeley.info](mailto:bgarvey@cityofberkeley.info).

Written comments or a request for a Notice of Decision should be directed to the Zoning Adjustments Board Secretary at [zab@cityofberkeley.info](mailto:zab@cityofberkeley.info).

**Communication Disclaimer:**

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the secretary to the relevant board, commission or committee for further information.

**Written Comments, Communications, and Reports:**

Written comments must be directed to the ZAB Secretary at the Land Use Planning Division (Attn: ZAB Secretary), or via e-mail to: [zab@cityofberkeley.info](mailto:zab@cityofberkeley.info). All materials will be made available via the Zoning Adjustments Board Agenda page online at this address: <https://berkeleyca.gov/your-government/boards-commissions/zoning-adjustments-board>

All persons are welcome to attend the hearing and will be given an opportunity to address the Board. Comments may be made verbally at the public hearing and/or in writing before the hearing. The Board may limit the time granted to each speaker.

**Correspondence received by 5:00 PM, eight days before this public hearing, will be provided with the agenda materials provided to the Board.** Note that if you submit a hard copy document of more than 10 pages, or in color, or with photos, you must provide 15 copies. Correspondence received after this deadline will be conveyed to the Board in the following manner:

- **Correspondence received by 5:00 PM two days before** this public hearing, will be conveyed to the Board in a Supplemental Communications and Reports, which is released around noon one day before the public hearing; or
- **Correspondence received after 5:00 PM two days before** this public hearing will be saved in the project administrative record.

**Accessibility Information / ADA Disclaimer:**

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6342 (V) or 981-6345 (TDD) at least three business days before the meeting date.

**SB 343 Disclaimer:**

Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available to the public. Please contact the Land Use Planning Division ([zab@cityofberkeley.info](mailto:zab@cityofberkeley.info)) to request hard-copies or electronic copies.

**Notice Concerning Your Legal Rights:**

If you object to a decision by the Zoning Adjustments Board regarding a land use permit project, the following requirements and restrictions apply:

1. If you challenge the decision of the City in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice.
2. You must appeal to the City Council within fourteen (14) days after the Notice of Decision of the action of the Zoning Adjustments Board is mailed. It is your obligation to notify the Land Use Planning Division in writing of your desire to receive a Notice of Decision when it is completed.
3. Pursuant to Code of Civil Procedure Section 1094.6(b) and Government Code Section 65009(c)(1), no lawsuit challenging a City Council decision, as defined by Code of Civil Procedure Section 1094.6(e), regarding a use permit, variance or other permit may be filed more than ninety (90) days after the date the decision becomes final, as defined in Code of Civil Procedure Section 1094.6(b). Any lawsuit not filed within that ninety (90) day period will be barred.
4. Pursuant to Government Code Section 66020(d)(1), notice is hereby given to the applicant that the 90-day protest period for any fees, dedications, reservations, or other exactions included in any permit approval begins upon final action by the City, and that any challenge must be filed within this 90-day period.
5. If you believe that this decision or any condition attached to it denies you any reasonable economic use of the subject property, was not sufficiently related to a legitimate public purpose, was not sufficiently proportional to any impact of the project, or for any other reason constitutes a "taking" of property for public use without just compensation under the California or United States Constitutions, the following requirements apply:
  - A. That this belief is a basis of your appeal.
  - B. Why you believe that the decision or condition constitutes a "taking" of property as set forth above.
  - C. All evidence and argument in support of your belief that the decision or condition constitutes a "taking" as set forth above. If you do not do so, you will waive any legal right to claim that your property has been taken, both before the City Council and in court.