Decision Date: November 14, 2023
Appeal Period End Date: November 29, 2023

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Case No. DIR-2023-6417-RAO
Reasonable Accommodation
Wilshire Community Plan
Zone: R1-1-HPOZ
D.M.- 132B189
C.D.-5
CEQA- ENV-2023-6418-CE
Legal Description- Lot 215, Tract 2000

The designee of the Director of Planning has denied Applicant's request for a reasonable accommodation (hereinafter "City Planning Decision") based on the Findings 1, 2, and 4 cannot be made in the affirmative. Applicant appeals to Findings 1, 2, and 4 below. In support of this application for appeal, a supplemental Medical Note dated November 28, 2023 from Applicant's medical provider is attached heretofore (hereinafter "Supp. Medical Note").

I. Finding No. 1 is Inaccurate as the Applicant Requesting a Reasonable Accommodation Will Be Used By an Individual With a Disability as Defined By FEHA, the Fair Housing Act, the ADA, and Binding Caselaw

The Fair Housing Act and FEHA mandate that persons with disabilities be afforded equal opportunity for housing, requiring local governments to refrain from discrimination against housing for persons with disabilities. (42 U.S.C. § 3604(f)(3)(B); Cal. Gov. Code § 12927(c)(1).) Similarly, the Americans with Disability Act and Section 504 of the Rehabilitation Act of 1973 also require localities to provide equal opportunities to persons with disabilities. (42 U.S.C. §§ 12101 *et seq*.; 29 U.S.C. § 701.)

As acknowledged by the Planning Department, "The California Fair Employment and Housing Act considers a disability to be a physical or mental impairment that limits a major life activity. 'Limits' means making the achievement of a major life activity difficult. 'Major Life Activity' including caring for oneself, performing manual tasks, seeing, hearing, *eating*, *sleeping*, walking, standing, lifting, bending speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, and major bodily functions." (City Planning Decision, p. 4 [emphasis added].)

[redacted] causing [redacted] is deemed to be a disability. [redacted] can be considered "disabling" under the ADA. [redacted] can be considered "disabling" under ADA; [redacted]

The Applicant has a medical condition that rises to the level of a disability as defined by applicable law. "Ms. Leung has expressed to me that she has suffered from severe [redacted] caused by

the numerous break ins and crime that have occurred at her residence in the past 20 months. As a result of this [redacted] Ms. Leung has suffered from [redacted]." (Supp. Medical Note.)

As documented in the Applicant's Supp. Medical Note, she, undeniably, has a disability as defined by the FEHA, the FHA, the ADA, and binding California caselaw. Further, the Medical Note specifically provides that the Applicant's condition directly impacts and limits Applicant from achieving major life activities including, but not limited to, [redacted]. (*See* Supp. Medical Note.)

As such, Finding No. 1 should be made in the affirmative.

II. Finding No. 2 is Inaccurate as the Requested Accommodation is Necessary to Alleviate the Applicant's Medical Condition

Applicant's medical provider specifically states the over-in-height fence, hedge, and gate is required to alleviate the patient's condition. "As a result of this [redacted], Ms. Leung has suffered from [redacted]. She has expressed to me that after installing her approximately 6 foot high gate [sic] on or around February 2023 the break ins have stopped and [redacted] has improved. However, Ms. Leung has expressed that if her gate and hedges are either removed or lower, she will not feel safe in her own home and her [redacted] will be exacerbated." (Supp. Medical Note.)

Applicant does not disagree with the statement in the City Planning Decision that there is no guarantee that a gate, fence, or hedge will provide a safer, more secure housing or that there is uncertainty of what factors may exacerbate or deter criminal activity on site. Having said that, what is important to note is that ever since February 2023 (the date the over-height fence was put up), there has ***not been a single*** break in at the property – in contrast, prior to that date, there had been at least ***twenty-four (24)*** such break-ins in the preceding 15 months.

In any event, speculation as to the causes or deterrence of criminal activity is irrelevant to this request for a reasonable accommodation. The only pertinent issues before the City Council is that 1) the Applicant has a medical disability, 2) the need for a reasonable accommodation (having an over-height-fence and hedges) has been verified by her medical provider, 3) without such an accommodation (i.e. having a shorter, or no fence/hedges), Applicant's disability, as attested to by Applicant's medical provider, will in fact worsen and Applicant will not be afforded the equal opportunity to use and enjoy her dwelling; and (4) as acknowledged by the City Planning Decision, the accommodation does not impose an undue burden on the City. (*See* 42 U.S.C. § 3604(f)(3)(B); Cal. Gov. Code § 12927(c)(1).)

As such, Finding No. 2 should be made in the affirmative.

III. Finding No. 4 is Inaccurate as the Over-the-Height Fence, Hedge, or Gate Would Not Be a Fundamental Alteration to the City's Land Use and Zoning Regulations, the City Has Made Numerous and Similar Variances for Other Residences on 3rd Avenue, and Is Consistent With the Aesthetics of the Street

A. The Planning Department Has a Legal Obligation to Provide Applicant With a Reasonable Accommodation

In addition to prohibiting discrimination against housing for persons with disabilities, FEHA, the FHA, the ADA and Section 504 also require local governments to take affirmative steps to accommodate the needs of people with disabilities. These laws obligate communities "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [persons with disabilities] equal opportunity to use and enjoy a dwelling." (42 U.S.C. § 3604(f)(3)(B); see also Cal. Gov. Code § 12927(c)(1) and § 1:9.)

This legal requirement to provide Applicant's requested reasonable accommodation (which the Planning Department has admitted imposes no undue financial or administrative burden as noted in Finding No. 3) surpasses the Planning Department's desire to "complement the *aesthetics* of the streets" or "maintain, enhance, and preserve the historic integrity, sense of place and aesthetic appearance of the HPOZ." (City Planning Decision, pp. 5-6 [emphasis added].)

The Planning Department cannot prioritize the aesthetics of a community over Applicant's need for a reasonable accommodation. Any local zoning ordinance, including the Wilshire Park HPOZ Preservation Plan, that expressly treats housing for people with disabilities differently than other housing would violate state and federal law.

B. The Wilshire Park HPOZ Preservation Plan Allows for the Planning Department to Provide Variances to Residences within the HPOZ

Even assuming the Wilshire Park HPOZ Preservation Plan is binding, which it is not especially for requests for reasonable accommodations (and more so given that the subject property is designated a non-conforming property), it allows for the Planning Department to make variance decisions.

"Fencing and walls, where appropriate, should be comprised of simple materials that are consistent with the Period of Significance. *In most cases*, front yard fencing is inappropriate, but low garden walls that *do not obstruct views of the home* or the streetscape may be appropriate in some locations. In some cases, low picket fencing may be appropriate, provided it is minimal in style. *However, in matters of public safety, a simple semi-transparent wrought iron fence painted in dark green, dark brown or black may be appropriate . . .* (Note: *Fences and hedges over 42'' in the front yard require a variance from the Planning Department*). (Wilshire Park HPOZ Preservation Plan, October 20, 2010, p. 64.)

The Wilshire Park HPOZ Preservation Plan is specifically written to provide exceptions which the Planning Department can, and has, provided. Further, the Wilshire Park HPOZ Preservation Plan uses terms that are not absolute, including "in most cases" and "may be appropriate" providing the homeowners with some flexibility, especially for "matters of public safety." Even though this request is outside of the jurisdiction of the Wilshire Park HPOZ Preservation Plan, the Plan explicitly allows for variances.

C. The Planning Department Has Consistently Made Exceptions to the Zoning Code Provisions for Neighboring Residences on 3rd Avenue

The City Planning Decision states that "[t]he restrictions for over-in-height fences, walls, and landscaped architectural features in the front yard were designed to maintain open, unobstructed frontages, to complement the aesthetics of the streets" and "[g]ranting the Reasonable Accommodation would afford a special privilege to the applicant without addressing the needs of an

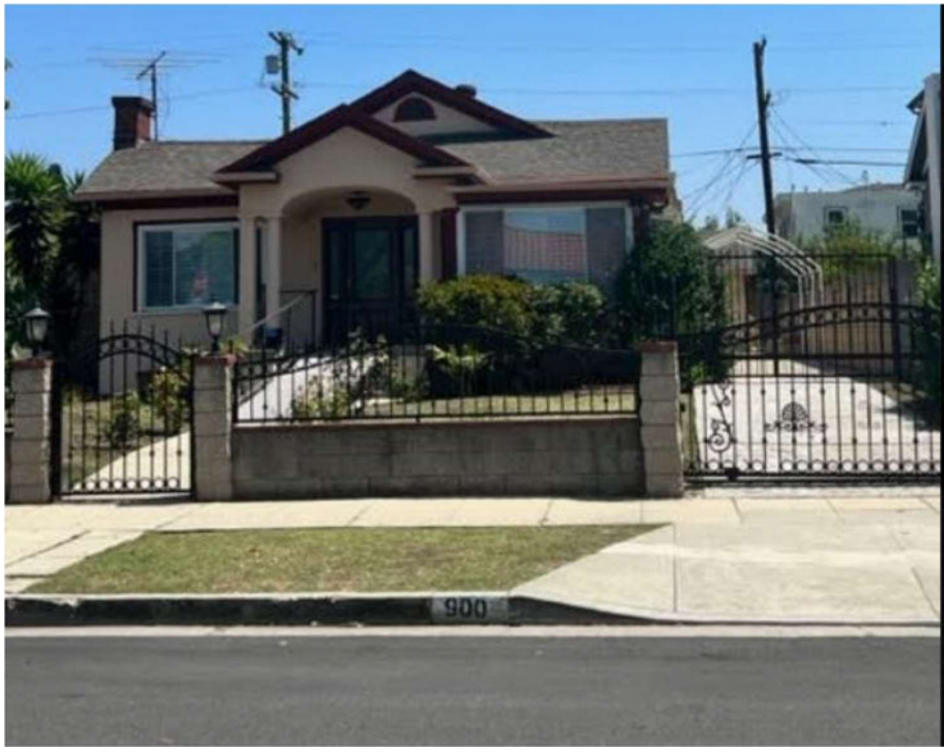
individual with a disability, and thereby compromise the purpose of the Zoning Code Provisions relating to reasonable accommodation, front yard projections, and historic preservation." (City Planning Decision, p. 7.) As stated above and as documented by the supplemental materials provided as part of this Appeal, the requested Reasonable Accommodation directly addresses the needs of Applicant's disability.

With respect to the remaining statement that the Reasonable Accommodation is a "special privilege" that would compromise the aesthetics of the streets or cause obstructed frontages, such a finding is simply without merit. First, even with the over-in-heigh fence and hedges, due to the sloping of the house, the subject property's frontage is clearly visible from the street.

Moreover, no "special privilege" exists as *numerous* other residential properties on 3rd Avenue, including the residents directly next to and across from the Applicant's property, have gates and fences *significantly* over 3.5 feet. For example, the following residents on 3rd Avenue have gates, fences, and hedges that not only exceed the 3.5 foot limitation, but in some cases, *exceed* the height of Applicant's requested Reasonable Accommodation that is the subject of this Appeal:

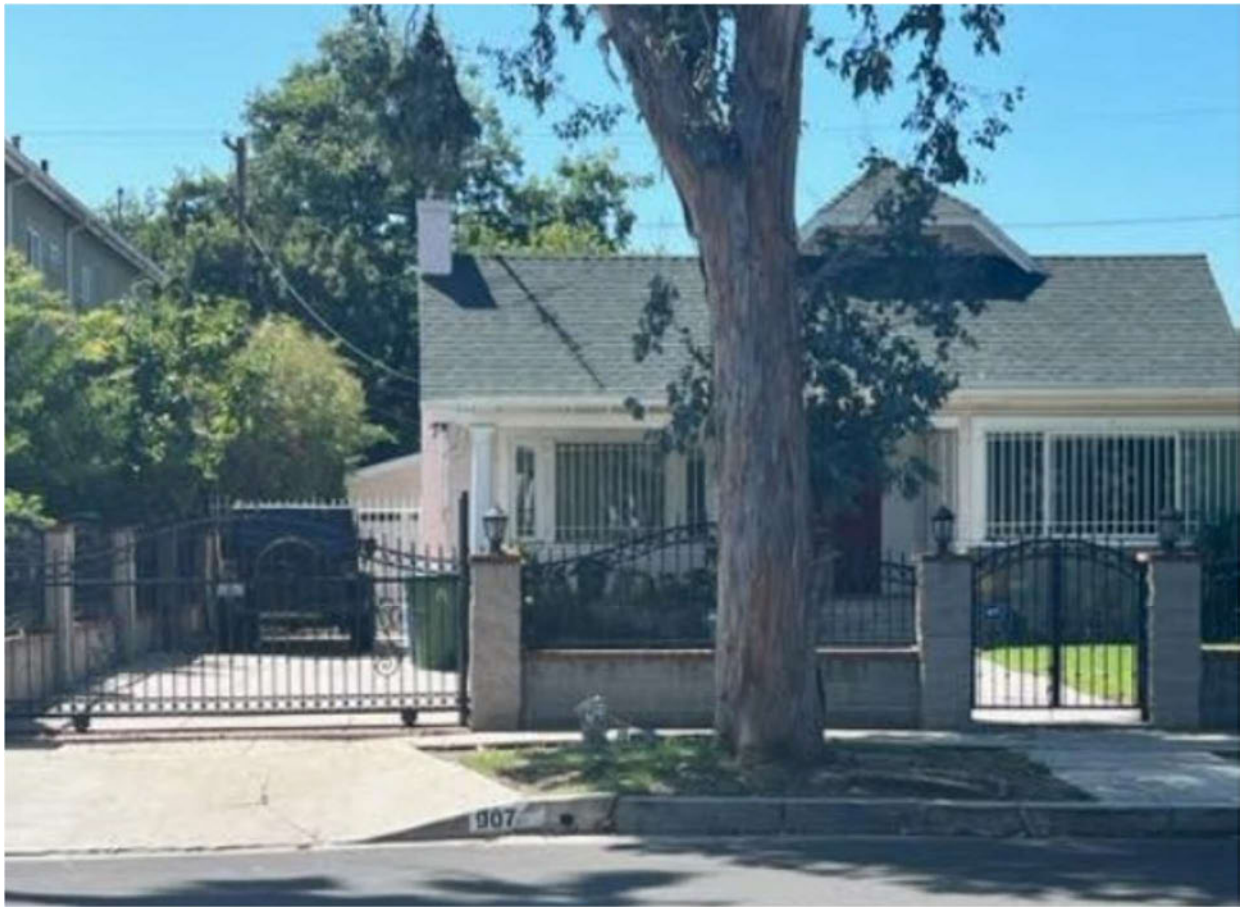
- 910 3rd Avenue- (**neighboring property directly to the right of subject property) (*seven* (7) ft.)**

- 900 3rd Avenue (**neighbor directly to the left of subject property**) (**6 ft., 1.5 in.**)



- 901 3rd Avenue- **(neighbor diagonally across the street) (5 ft., 4 in.)**

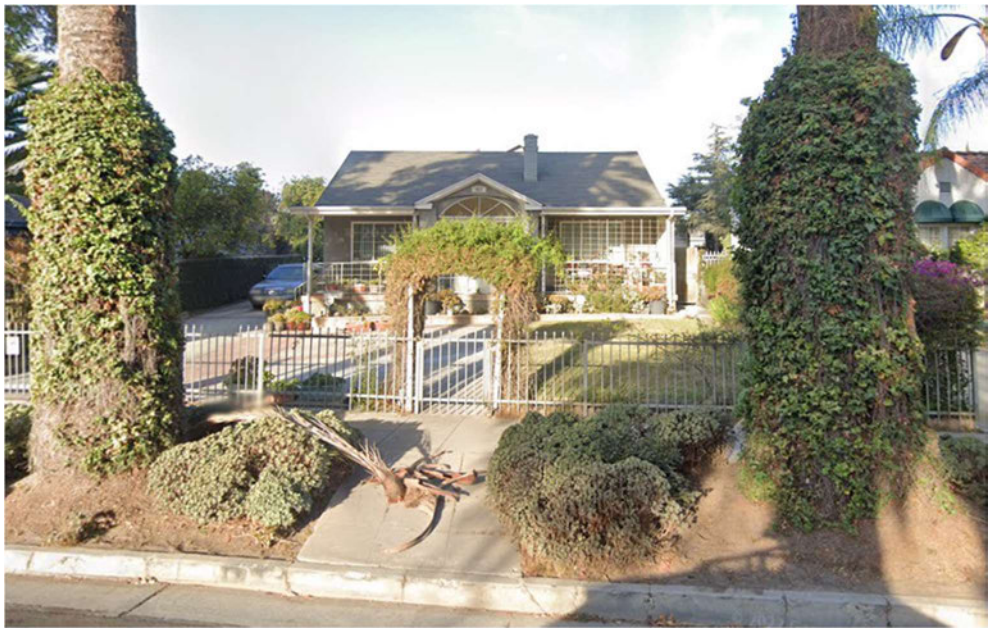
- 907 3rd Avenue- **(neighbor directly across the street) (6 ft., 4 in.)**



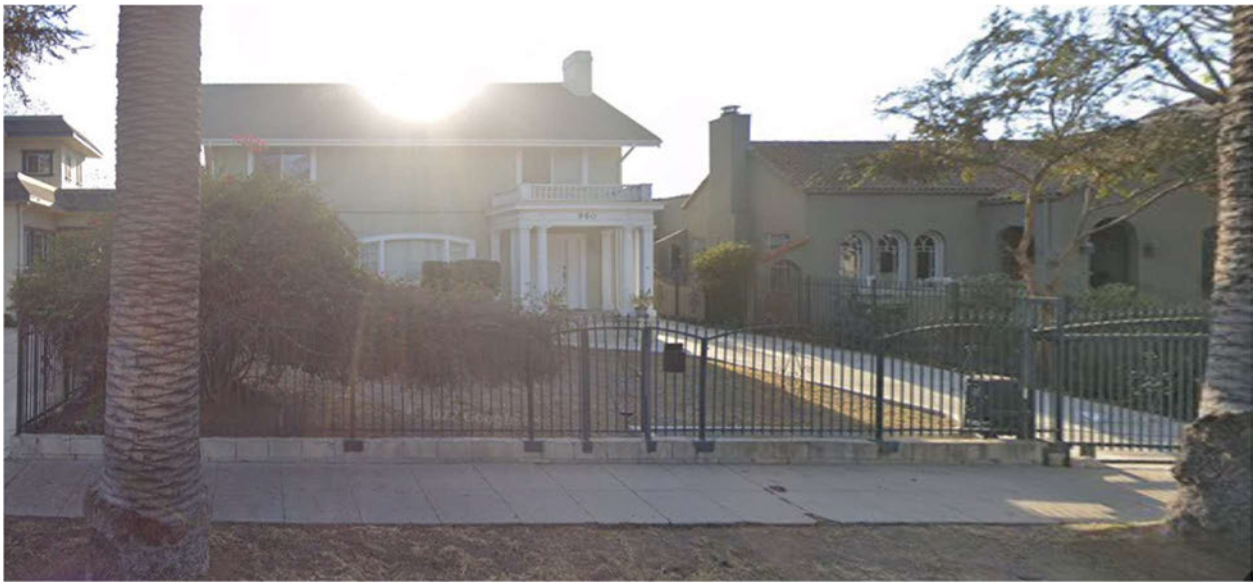
- 930 3rd Avenue- **(neighbor down the street) (gate 5 ft.; hedges 6 ft., 2 in.) (google image)**

- 939 3rd Avenue- (**neighbor down the street**) (**5ft., 6 in.**)

- 957 3rd Avenue- **(neighbor down the street)** (**3ft., 11 in.; hedges +6 ft.**)



- 960 3rd Avenue- **(neighbor down the street) (<u>6 ft.; hedges/flowers >*twenty* (20) ft.</u>)** (google image)



As demonstrated by the sampling of properties identified above, Applicant's gate/hedges are objectively consistent with "the aesthetics of the street" given how many of Applicant's neighbors on the same street, including neighbors directly to the right, left, and across the street from the Applicant's property (and all within the same HPOZ), also have over-in-height fences and hedges.

Moreover, allowing these neighboring residents to have gates, fences, and hedges well above the 3.5-foot limit but refusing Applicant's reasonable accommodation request on the basis of disability for a gate and hedge of similar, and in fact shorter, height, is unquestionably discriminatory. The Planning Department cannot cherry-pick which homes should and should not follow the Zoning Code Provisions and applicable law. Applicant's requested reasonable accommodation is consistent with the nature and aesthetic of Applicant's neighborhood and most importantly, is necessary to accommodate Applicant's disability.

D. The Request for Accommodation is Not a Permanent Change to the Residence

The Applicant's request for a reasonable accommodation is not a permanent change or enhancement to the structure of the home. No change or variation is made to the residential home, and the residence is in full compliance with Zoning Code provisions and the Wilshire Park HPOZ Preservation Plan. If the Applicant's medical condition improves such that the Reasonable Accommodation is no longer necessary, the Applicant can shorten the gate and hedges to 3.5 feet or remove them altogether. However, at this time, the 6-foot gate is required and necessary to address the Applicant's disability as expressly noted by her medical provider.

In sum, Finding No. 4 should be made in the affirmative.

Conclusion

As set forth in this Appeal and in Applicant's original application, Applicant suffers from a disability, as that term is defined under applicable law, has requested a reasonable accommodation that is directly necessary for Applicant to enjoy equal access and use of her long-time home, the failure to provide the reasonable accommodation will exacerbate Applicant's disability, and the requested reasonable accommodation is consistent with the nature and intent of the City's and HPOZ's regulations and equally importantly, are consistent with the actual homes in Applicant's neighborhood. While Applicant is confident that the included additional information is sufficient for the City Council to grant Applicant's Appeal and request for a reasonable accommodation, Applicant is prepared to, and explicitly reserves all rights, to pursue additional legal action, including filing a civil complaint asserting failure to accommodate and disability discrimination under FEHA, the FHA, and the ADA. Should the City Council require any additional information, please do not hesitate to contact me.

Sincerely,

Sue Leung, Esq.