

**September 23, 2019**

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**To:** City Commission  
**From:** Kelly Reid, AICP, Planner and Carrier Richter, Deputy City Attorney  
**Re:** Proposed Chapter 17.40 Code Amendment

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At the August 21, 2019 meeting, the City Commission heard testimony that amending OCMC 17.40.060(K), the Historic Overlay District regulations, to eliminate the inconsistent procedures for fences and non-contributing properties in historic districts would impact the City's ability to regulate an existing fence in the Ganong Street right-of-way or other existing development within the Canemah Historic District.

Staff wishes to clarify how the proposed code amendments affect existing structures within the City. OCMC 17.58.040 provides that: "A structure or site that was lawfully established but no longer conforms to all development standards of this land use code (such as setbacks) shall be considered lawfully nonconforming." In other words, if a structure complied with the regulations at the time it was constructed, it is deemed legal notwithstanding any changes to the law. Therefore, the question in non-conforming cases is whether the structure was "lawfully established." The City has a procedure for making these determinations. Whether the fence in the Ganong Street right-of-way was "lawfully established" may include consideration of compliance with the OCMC 17.40.060(K) procedures, assuming that they were in effect at the time that the fence was constructed. This inquiry will not change if these previously applicable procedures are subsequently deleted through this Code amendment. Therefore, this code amendment will have no effect on the City's ability to regulate or review non-conforming fences within historic districts.

It may be that the testimony was directed at concerns that these amendments would hamstring the City's ability to provide procedural safeguards in its review of new construction. An alternative to seeking approval as a non-conforming structure, the Ganong right-of-way fence could be reviewed for compliance with the current standards that would include elimination of the OCMC 17.40.060(K) procedures, assuming that the City Commission takes such action. The result will be that this existing fence will either comply with existing clear and object fence policies and can be approved through Type I review, or if discretion is necessary to deviate from the policies in this case, a Type III review, including notice and a hearing before the HRB will be required.

Eliminating these procedures will not alter or interfere with the City's authority to revisit the HRB policies or regulations providing more specific guidance on what activities qualify as "routine maintenance" or what activities may be allowed within the right-of-way.

The proposed amendment eliminates a review procedure that is no longer necessary, now that the City Commission has adopted clear and objective policies for fences in Historic Districts. In the past, when this procedure was originally codified, the City did not have guidelines or policies for fences on historic properties. Under these circumstances, the procedure for public notice and a public hearing was necessary and appropriate.