

CITY OF DELTA, UTAH
BOARD OF ADJUSTMENT MEETING
MARCH 31, 2011

PRESENT

Gayle Bunker	Mayor / Chairman
Robert Banks	Council / Board Member
Bruce Curtis	Council / Board Member
John Niles	Council / Board Member
Tom Stephenson	Council / Board Member
Betty Jo Western	Council / Board Member

ABSENT

None

ALSO PRESENT

Todd Anderson	City Attorney
Alan Riding	Public Works Director
Gregory Jay Schafer	City Recorder
Russ Webb	City Resident
Bob Morris	Area Resident
Kory & Jenny Morris	City Resident
Rayola Tolley	City Resident
Howard Western	City Resident
Adam Lake	Contractor
Betty Carter	City Resident
Ronald Draper	City Resident
Dent & Mandi Kirkland	City Residents

Mayor Bunker called the Board of Adjustment meeting to order at 8:00 p.m. He stated that notice of the meeting time, place and agenda had been posted at the City Building, on the Utah Public Notice web site, at the construction site, and had been provided to the Millard County Chronicle/Progress and to each member of the City Council at least two days prior to the meeting.

BUSINESS

MAYOR BUNKER: THE CITY COUNCIL ACTING AS THE BOARD OF ADJUSTMENT TO CONSIDER A VARIANCE REQUEST OF THE SET BACK REQUIREMENTS FOR A HOME UNDER CONSTRUCTION LOCATED AT APPROXIMATELY 43 WEST 100 NORTH

Mayor Bunker began by requesting that Kory and Jenny Morris approach the microphone and reviewed what had occurred to this point. Mayor Bunker asked Mr. And Mrs. Morris if they had house plans at the time they made application for a home loan. Mrs. Morris stated that they did not have house plans when they applied for the loan. Mayor Bunker asked when the house plans were acquired. Mr. Morris

answered that they got the house plans after they were approved for the loan. Mrs. Morris stated that they applied for the loan in August, 2010 and were approved in January, 2011. Mayor Bunker asked where the Morrises acquired their house plans. Mr. Morris answered that the house plans were for a house the contractor, Adam Lake, built in Cedar City. Mayor Bunker asked if the property was purchased prior to receiving approval of the loan. Mr. Morris said they had purchased the property after the loan was approved. Mayor Bunker asked whether the property was purchased before or after the house plans were acquired. Mr. Morris thought the property was purchased after they had the house plans. Mayor Bunker asked whether the Morrises had considered whether or not the house would fit on the property they purchased. Mr. and Mrs. Morris stated that they had not considered whether the house would fit on the parcel of property they had purchased. Mayor Bunker asked if the Morrises were aware that set backs were required for construction. Mr. Morris stated that he knew the house had to be a certain distance from the road but did not know the area to the West was a city street; he thought it was a driveway to a shop on adjacent property. Mayor Bunker asked if they were aware that the home may not fit the parcel of property with the required set backs. Mr. and Mrs. Morris stated that they were not.

Mayor Bunker asked Mr. and Mrs. Morris when they knew the building permit had not been issued. Mr. Morris stated that he did not know the building permit had not been issued until they attended the City Council meeting on March 17, 2011; up to that time they believed they had a building permit. Mayor Bunker asked Mr. Morris if he or Mrs. Morris had brought the plans into the City Building with the application for building permit. Mr. Morris said they did not. Mr. Morris stated that he did not agree with City Attorney Todd Anderson's written report to the Board of Adjustment that granting this variance would "open the flood gates" for future variances. Mr. Morris felt that inasmuch as this is an old neighborhood with three of the same things happening in that half-block he did not feel that granting this variance will hurt anything that is currently on the same street. Mayor Bunker stated that the zoning ordinance does not apply to structures which were in place prior to adoption of the ordinance but it does apply to any new construction anywhere throughout the city, whether in a new development or wherever.

Council Member Betty Jo Western asked Mr. Morris what variance he is applying for because on the application he checked "variance" but did not include any other information on the form. Mr. Morris stated he guessed it was the 13 foot set back on the alley way. Council Member Western asked if it was just the alley way that was a problem or if they were dealing with set backs on both the west and east sides of the property. Mr. Morris stated that he did not know the east side was a problem because he went and measured and found it was nine feet. Mayor Bunker stated that he, along with Public Works Director Alan Riding and Assistant Public Works Director Ken Clark, had gone to the property yesterday to measure and found the east side to be about nine feet. Mrs. Morris asked why the building inspector, who signed off on two inspections, did not catch the set back problem. Council Member Western told Mr. and Mrs. Morris that the County Building Inspector is not the zoning officer; his position as a building inspector is to inspect the construction. The Delta City zoning officer is the one who enforces the zoning requirements. Council Member Western stated that she felt badly about the situation the Morrises are in but Council Members, acting as the Board of Adjustment, have the duty to enact and enforce the laws of Delta City. Council Member Western stated that, as much as she would like to consider only the feelings of the Morrises in this situation, she is responsible to look at all aspects of the situation. Council Member Western asked Mr. Morris if he had read the five criteria required for granting a variance. Mr. Morris stated that he had read them. Council Member Western asked Mr. Morris

if he could provide evidence to show they meet the five criteria. Mr. Morris felt that he could supply evidence to support granting of the variance.

Council Member Western asked Mr. Morris to provide evidence that his request for variance met the criteria set forth in the Utah Code:

(1) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances. Mr. Morris felt that not allowing the variance would cause unreasonable hardship because it would cause great expense to remove the basement which has already been constructed.

Mr. and Mrs. Morris asked how long it typically takes to get a building permit in Delta. Mayor Bunker responded that it usually takes about a week, depending upon circumstances. Mayor Bunker indicated that it was his understanding that when the building permit for the Morrises came into the City Office, the zoning officer was out of town attending training. Contractor Adam Lake stated that it was four weeks from the time he submitted the building permit until they were ready to pour cement. Council Member Western stated that the copy of the building permit she had showed a date of 2-28-11, which would be just over a month as of today. Adam Lake stated that it was four weeks from the time the building permit was dropped off in the County Building Inspector's office.

Adam Lake provided Council Members with copies of two inspection notices from the County Building Inspector which had been approved. Mayor Bunker stated that there were other matters which needed to be discussed prior to discussing the inspection notices. Mayor Bunker asked Adam Lake what he meant when he said, in the Regular City Council Meeting held March 17, 2011, that he turned in the plans on the same day that Alan Riding and Ken Clark came to the property to locate the sewer service. Mr. Lake said that he had given the plans to County Building Inspector Darrel Owens prior to that date and there were some questions that Mr. Lake needed to answer regarding details and dimensions on the plans but Mr. Owens already had the plans in his office. Mayor Bunker clarified that Mr. Lake was not saying he had given the plans to Mr. Riding and Mr. Clark at that time. Mayor Bunker asked Mr. Lake if, when Mr. Riding and Mr. Clark were at the property locating the sewer, Mr. Lake was told that they would be out of town the following week. Mr. Lake could not remember for sure but expected that they probably did. Mayor Bunker indicated the County Building Inspector stated that when the plans were picked up, Mr. Lake said that Mr. Riding was out of town. Mr. Lake did not remember that conversation with the Building Inspector. Mayor Bunker asked Mr. Lake what his response was when he brought the plans to the City Office on Tuesday, March 1st and was told that Mr. Riding was out of town. Mr. Lake stated that he requested that Mr. Riding review the plans as soon as he could. Mayor Bunker asked Mr. Lake if he was aware that he is not to build without first obtaining a building permit. Mr. Lake said that he was aware that he is not to build without a building permit. Mayor Bunker asked Mr. Lake if he had a building permit. Mr. Lake said that the application had a building permit number on it and he had made three trips to Delta to pay for the permit. Sub-contractor Dan Harris told Mr. Lake that the footings had been dug and the Building Inspector had inspected it and assigned a number to the application for building permit. Mr. Lake felt that the Council should do whatever needs to be done to fix the problem and stated that he sees no legal problems or hardship on any surrounding property owners.

Mayor Bunker read to Mr. Lake from the Uniform Building Code which states that "a permit shall not be valid until the fees prescribed by law have been paid." Mr. Lake stated that the plans were drawn with the set backs given to him by the building inspector and two inspections had been made on the construction. Mayor Bunker advised Mr. Lake that he was in violation of the law in not having a valid building permit for the construction.

Mayor Bunker told the Morrises that he understood that, even though it was their contractor who did not follow the law, they are the ones who are being hurt by the error. Even so, the Council is being asked to make variances, which set precedence for future construction, in order to correct the problem created by the contractor not obeying the law.

Council Member Western asked Mr. Lake how many homes he had constructed in Delta and had he ever had the set backs given to him by the Building Inspector rather than the Zoning Officer. Mr. Lake stated that he has always gotten the set backs from the building inspector and drew them as the building inspector told him and has never had one rejected. Council Member Western reiterated that the Council is meeting here as the Board of Adjustment, because of a broken law, and, if the variance is granted, it would create another violation of the law. Council Member Western stated that she cannot justify violating the law a second time.

City Attorney Todd Anderson stated that all the discussion of the building inspector and what happened or what did not happen is irrelevant to the issue which is before the Board of Adjustment because it comes down to whether or not there can be showing of satisfying the criteria for granting a variance as set out by applicable law. Mr. Lake is correct that the Board of Adjustment is to grant variances in particular situations because the general law does not work on a particular lot, so the question comes back to whether those five criteria can be satisfied to grant the variance in for this lot.

Mayor Bunker indicated that the home could be constructed on the lot, but the problem is the way the home is situated on the lot does not meet set back requirements. The lot meets the requirements of a building lot but the problem is the way the house is situated on the lot.

Mr. Lake stated that he is not acting as general contractor on this home to make money; he is doing it as a favor to a friend who was having difficulty working within the budget allowed and who is doing much of the work himself. Mr. Lake stated that he accepts full responsibility for the current problem and felt he had been personally attacked by Council Members at the last Council Meeting. Mr. Lake apologized for whatever he had done to offend Council Members but stated that this is not about him, it is about these young people who are trying to fulfil the requirements of the loan they have received to build a home. Council Member Bruce Curtis stated that he was not personally attacking Mr. Lake at the previous meeting but was attempting to get Mr. Lake to take responsibility, which Mr. Lake appears to have done. Council Member Robert Banks said that no one has personally attacked Mr. Lake but all Council Members feel they are, regrettably, in a situation where we have to enforce the law and they don't really have a desire to do that because many Council Members know this young couple. However, the fact is, Council Members are in a difficult situation. Council Member John Niles asked how many homes Mr. Lake has done footings and walls for in Cedar City prior to obtaining a building permit. Mr. Lake stated that the procedures to obtain a building permit is different in every place he has constructed

homes and believes that none of the other places require approval from both the building inspector and from the city but he has done other homes in Delta so he is not saying he did not know that Mr. Riding needed to approve the plans prior to obtaining the building permit. Mr. Lake was not in town when Dan Harris called and said the footings were ready to pour and a storm was coming in. Council Member Niles said that people don't let their fourteen year old son jump in the car and drive to Salt Lake so, as a contractor, why would you allow a subcontractor to start construction before making certain you have a valid permit, paid for and in hand. Someone from the audience stated that the building permit would appear to be valid since it has a permit number on it.

Council Member Niles noted that, if the building permit application had been reviewed by Alan Riding, Delta City Zoning Officer, he would have noted the set backs being incorrect and would have required that they be corrected, which would have resulted in not having the current problem. Mr. Lake felt that, while he accepts full responsibility for the basement being poured with incorrect set backs, he feels that the City has some liability.

The question was raised as to why the street in question is not maintained and that a building is currently located on another street in the same block. City Attorney Anderson advised that the statute of limitations does not run against a government entity so, if a building is constructed in the middle of a road and no one does anything about it, at some point the City can take action to remove that house from the public through fare. So, as long as the property is titled and is on the plat maps as such, it remains a city street regardless of what is upon it. The question was raised whether the property designated as a city street could be purchased from the City. Mayor Bunker stated that would have to be approved by the City Council and they are not in favor of that. Council Member Western noted that the variance being dealt with at this time actually does not address the question of purchasing property from the City. Mayor Bunker stated that, as a property owner along Main Street, he has a conflict of interest with regard to a street closure, but stated that he is not in favor of closing any street that connects to property along Main Street.

Mr. Lake commented on the Mayor's conflict of interest, to which Council Member Western responded that the Mayor does not have a vote. He is the chairman of the Board of Adjustment but does not have a vote. City Attorney Anderson noted that Mayor Bunker does not have a conflict of interest in the matter before the Board, which is a variance of set back requirements. If the matter involved closing a city street adjacent to property owned by the Mayor, he could have a conflict of interest but the application before this Board is for a variance, which has nothing to do with vacating the street.

A person from the audience stated that he has talked to some people who say that variances are granted all the time without necessarily meeting the criteria outlined for granting a variance. The variances can be challenged if granted under circumstances which do not meet the criteria but felt that everything on the list of criteria could be argued if necessary.

Ron Draper, a neighboring property owner, asked if this was an appropriate time for him to speak and was invited to do so by Mayor Bunker. Mr. Draper stated that his impression from being invited to the meeting was that the input of neighboring property owners was important to the Board of Adjustment. Mr. Draper noted that there are several sides to this situation: the City's, side, the family's side, the

contractor's side, the neighbor's side, and people who drive up and down the alley. Mr. Draper felt that the decision we need to come to is what is the right thing. As a neighbor, Mr. Draper felt that it was unfortunate that this situation occurred and everything needs to be taken into consideration in making the right decision. From Mr. Draper's standpoint as a neighbor, he felt that we need to grant a variance but make certain that anyone who travels the alley will continue to be able to use the alley. Mr. Draper felt that the Board of Adjustment has the power to grant variances but also recognized the problem of setting a precedent for future building but felt that this is largely a situation caused by communication rather than wilful disregard for the zoning ordinance. As a neighbor, Mr. Draper would like to see the house go ahead, because it is the best option at this point.

Rayola Tolley stated that she owns a rental home next to the alley and said the only people she sees using the alley are kids. Mrs. Tolley felt that, inasmuch as this is not a highway, the Morrisises should be given a variance and be allowed to build their home without additional expense.

Council Member Tom Stephenson asked Mr. Lake if he had said he could cut the foundation and change the house plans somewhat. Mr. Lake said that he could but the issue is that the loan is a government loan which took six months to work through the paperwork and changing house plan at this point would involve several more months of paperwork to have the change approved.

Council Member Robert Banks commented that he has heard enough philosophy and logic to suggest that there is a possibility that a variance could be granted and would like to have Council Member Western, or someone else, go through the criteria for granting a variance to see if a variance could be granted based on the rules. City Attorney Anderson expressed concern that, from a legal standpoint, there has basically been no discussion of the criteria required for granting a variance and, thus, no presentation to satisfy the requirements. The law that is before the Board of Adjustment is the criteria required for granting of a variance and, for a variance to be granted, the Board needs to issue an opinion that each of the criteria has been satisfied. Mayor Bunker requested that City Attorney Anderson go through the criteria so that the Morrisises could respond to how that criteria has been met in this instance.

1) Literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinance.

It is an unreasonable hardship because it will cause them (___inaudible___). City Attorney Anderson reiterated that the circumstances cannot be created by the applicant. Contractor Lake stated that the circumstances were not created by the applicant, they were created by him. Council Member Western noted that Mr. Lake was hired by the applicant so, therefore, the circumstance was created by the applicant. Mr. Lake responded that who created the circumstance is negotiable because the City's agent; i.e., the building inspector, also created the circumstance. Mayor Bunker indicated that the problem was not created by the property; the problem is that the house does not fit on the size of the property, when proper set backs are included.

2) There are special circumstances attached to the property that do not generally apply to other properties in the same zone.

There are absolutely special circumstances attached to the property that do not generally apply to other properties in the same zone. The challenge was made to find another property in the same zone that has an alley that is exactly like this one. Council Member Western noted that the property directly across the street to the north is the same. Argument from the audience was made that the existing set backs from the corners are different for every building on the that alley. Argument was also made that it does not matter what the code says. Mayor Bunker and Council Members responded that it does matter what the code says because the code is the law. The response was that the existing buildings need to be torn down then because the set backs are all different. City Attorney Anderson stated that every corner lot in the R-4 zone has the same requirements as this lot and there is nothing special on this corner lot as compared to other corner lots in the same zone. City Attorney Anderson noted that, if there is something special on this particular lot that is different from every other corner lot in an R-4 zone, now is the time to discuss that difference. Ron Draper stated that it appears that both the agents of the property owners and agents of the City, at some point, felt that it met the set backs and what is special to this matter is that somewhere the communication broke down and both parties felt that the agents had said it was okay so they went forward. This is what has created the hardship and also the special circumstances; there is something different about this situation than others because of the way the building permit was handled by the agents. City Attorney Anderson noted that the law deals with the property rather than the circumstances. The applicants felt that the alley running adjacent to their property is a unique circumstance because no other lot in Delta has that type of alley.

3) Granting the variance is essential to the enjoyment of the substantial property right possessed by other property in the same zone.

Argument from the audience was made that neighbors who have been heard this evening have no issue with granting a variance to allow construction on this home to continue. Applicants noted that they had gathered signatures from all neighbors stating they had no issue with construction going forward as planned. City Attorney Anderson noted that the opinion of the neighbors was not essential; the key factor is whether or not granting the variance is essential to the enjoyment. Mr. Draper interjected that his enjoyment, as a neighbor, would be greatly enhanced by having a nice home constructed on that vacant lot where tumbleweeds and dust constantly blow onto his property. Mr. Draper indicated that his enjoyment as a neighbor and property owner would be dissatisfied if the home was not allowed to go forward, due to lack of a variance, because the lot would remain vacant with weeds and dirt blowing around the neighborhood. City Attorney Anderson noted that the same enjoyment discussed by Mr. Draper would also come from constructing a home on the property which meets set back requirements.

4) The variance will not substantially affect the general plan and will not be contrary to the public interest.

Argument from the audience was made that neighbors have all signed a paper that they were satisfied with the house as the basement sits at this time and that the variance will not affect the general plan because the city is not going to grow in a drastically different area because of the way this house is located on the lot. Council Member Western asked whether the applicant understands the Delta City General Plan. Response was made that the general plan is not relevant at this point. Mr. Draper interjected that if the city were to issue variances "willy-nilly" to everyone who wants one, then things

become constructed in a haphazard rather than orderly fashion. Mr. Draper felt that the City Council has the responsibility to assure that building takes place in an orderly manner and that laws are enforced and this is the issue. If the problem was miscommunication in this instance, that could be considered a "special circumstance" which would not set a precedent for future construction.

5) The spirit of the land use ordinance is observed and substantial justice is done.

Argument from the audience was made that this construction puts the land to use as it was intended to be used; i.e., as a single family residence. Council Member Western asked what the applicants' understanding of the land use ordinance was. The applicant responded that it was for single family homes. Council Member Western asked the applicant if the land use ordinance also includes set back requirements. The applicant stated that the land use ordinance has to do with the use of the land. Mayor Bunker indicated that the R-4 zone allows for single family homes, as well as duplexes, four-plexes, and light commercial use. Mr. Draper stated that he believes this is a substantial issue and the Board of Adjustment is charged with resolving the issue of justice on this variance. It comes down to whether justice is going to be met by implementing the plan and, if the variance is granted, is it a just variance and do the special circumstances warrant issuing the variance vs. the responsibility for orderly development of Delta City. Mr. Draper noted that the two sides of the scale would be whether granting the variance and allowing the Morrisises to go forward with their construction would affect the ability to police construction and enforce zoning ordinances in the future. Mr. Draper felt that the law allows the Board of Adjustment to go either way on the decision.

Mayor Bunker felt that adequate discussion and been heard and stated that the decision of the City Council, acting as the Board of Adjustment, is to grant the variance of set back requirements, table discussion for one week and make a decision at the Regular City Council Meeting scheduled on April 7th, or deny the request for variance. Mayor Bunker felt that it was important to make a decision soon so that the Morrisises are not kept waiting any longer than necessary.

Council Member Tom Stephenson expressed that he felt that the blame for this situation lies with County Building Inspector, Contractor Adam Lake and Sub-Contractor Dan Harris. Council Member Stephenson did not want to see the Morrisises punished for the errors of the inspector and contractors but would bet that Mr. Lake has never constructed a house in Cedar City without having a building permit. Mr. Lake indicated that he has started houses without building permits but has never completed a house without a building permit.

Council Member Robert Banks stated that everything he had heard this evening indicates that the issues at hand could be decided one way or the other but he could, with a clear conscience, grant a variance based on the things he has heard. Council Member Banks felt that we need to make certain that justice is done in this situation and had no problem with granting the variance.

Council Member Bruce Curtis MOVED to grant a variance of side yard set back requirements of approximately 8.5 feet on the west side of the property and approximately 1.5 feet on the east side of the property for construction of a home on property located at 43 West 100 North. The motion was SECONDED by Council Member Robert Banks. Mayor Bunker asked if there were any comments or

questions regarding the motion. Council Member John Niles commented that, if Mr. Lake plans to construct any more homes in the Delta area, he must make certain that the building permit application gets through all proper channels prior to beginning construction so that we are never in this situation again. Mayor Bunker asked if there were any other comments or questions regarding the motion. There being none, he called for a vote. The motion passed with Council Members Robert Banks, Bruce Curtis, John Niles and Tom Stephenson voting in favor. Council Member Betty Jo Western voting against granting the variance on the basis that she did not feel all five of the criteria for granting the variance had been met.

Mayor Bunker stated that all members of the City Council have felt the weight that has been put on the Morrises in this matter. It has also weighed heavily on members of the Council because they realize that the Morrises were caught in the position of victim as a result of Mr. Lake not following the rules and pursuing, to the extent that he could have, obtaining a building permit. If that had been done, this situation would not have occurred.

City Attorney Anderson noted that there would need to be a written order of the variance provided and asked how the Council wanted that to be handled. Mayor Bunker instructed City Attorney Anderson to meet with him on Monday to draft the order. The Morrises and Mr. Lake were advised that they could not continue construction until the order has been written, building permit fees paid, and the building permit issued.

Council Member John Niles MOVED to adjourn the meeting. The motion was SECONDED by Council Member Betty Jo Western. Mayor Bunker asked if there were any comments or questions regarding the motion. There being none, he called for a vote. The motion passed with Council Members Robert Banks, Bruce Curtis, John Niles, Tom Stephenson and Betty Jo Western voting in favor.

Mayor Bunker declared the meeting adjourned at 9:46 p.m.



GAYLE BUNKER, Mayor/Chairman of Board



GREGORY JAY SCHAFFER, MMC, City Recorder

MINUTES APPROVED: RCCM 05-05-11