

MINUTES OF THE BOARD OF ADJUSTMENTS MEETING HELD OCTOBER 17, 2001, AT 6:30 P.M. IN ROOM 300 AT DRAPER CITY HALL.

MEMBERS PRESENT: Chair Dave Blaylock, Brad Jones, LaMont Smith, Steve Tripp

EXCUSED: Bret Cummock

STAFF PRESENT: Todd Godfrey, Grant Crowell

ALSO PRESENT: Samuel Coster, Tom Bennett, Mr. & Mrs. Barry Skinner, Barbara Kitchens, Marvin Orr, Mr. & Mrs. Charles Ahue, Michael Vicer, Darlene Coster

1.0 **Approval of March 21, 2001 Board of Adjustment minutes**

1.1 Steve Tripp moved to accept the minutes as written. The motion was seconded by LaMont Smith and passed unanimously on a roll call vote.

2.0 **Request by Samuel Coster for a lot area variance from 40,000 to 5,663 square feet located at 13040 South 1300 East on 0.13 acres**

2.1 Tom Bennett, Ballard Spahr Andrews & Ingersol, representing the applicant, said the house being discussed was built in 1972. In 1990, Florence Day purchased the house from the Cutlers. At that time, Mr. Cutler prepared a metes and bounds description to property surrounding the house, 0.13 acres, and that is the property that was deeded to Mrs. Day. She had no knowledge that there was anything improper or illegal about the creation of the small lot. The house had existed for 18 years and there was nothing to suggest that there was a problem or that further inquiry was needed. Mr. Bennett said a title search was done on the property and a title policy issued, but there was nothing recorded against the property at the time the parcel as it was presented to her. Approximately one year later in 1991, there was a notice recorded in the County Recorder's office against the property, giving notice to third parties that there was an impropriety with the lot. He said that nothing happened with the property for approximately ten years. Six months ago Mrs. Day deeded half interest in the property to her grandson, Mr. Coster. Mrs. Day no longer lives in the home, she lives in a nursing home and is in ill health. Mr. Coster wanted to do some financing on the property so that he could improve the home and have extra funds to provide assistance to his grandmother's support. When he applied for the loan and a title search was done on the property, the notice of the improper lot was discovered. The lenders indicated that they were not willing to lend on the property as a result of that notice. Mr. Coster examined a number of alternatives trying to solve the problem and eventually sought legal assistance. He stated that they are requesting a variance that the lot be designated as a legal lot so that the notice of impropriety can be deleted from the County records and Mr. Coster can proceed to finance or sell his property. Mr. Bennett stated that he received a copy of the

Staff Report which reviews the criteria that must be satisfied in order to find that the granting of a variance is appropriate. Mr. Bennett reviewed each of the criteria as follows:

(1) Literal enforcement of the Zoning Ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance; Mr. Bennett said the Staff Report states that there is a concern that if a variance were granted it would “set an enormous precedent in interpreting the zoning ordinance.” He said that the decisions of a Board of Adjustment in granting a variance does not create a precedent for others coming in to request zoning or zone changes in the future. It is limited to the specific facts and circumstances before the Board. He said to literally enforce this zoning ordinance would, in fact, create an unreasonable hardship on a person who bought this property after it had existed as a home for 18 years. The hardship is that the owner cannot do anything with the property. She cannot refinance it, she cannot sell it, all she can do is to continue to own it. He said the language in the Staff Report states “The purpose of the RA1 and RA2 zones is to generally preserve the character of the City’s semi-rural areas; to promote and preserve conditions favorable to large-lot family life . . .” and nothing with this variance will do anything to change the character of the neighborhood. The house has been there for 28 years, the character of the neighborhood will remain exactly the same, and granting the variance does not adversely effect that.

(2) There are special circumstances attached to the property that do not generally apply to other properties in the same district; Mr. Bennett said the Staff Report seems to indicate that the special circumstances being claimed have to do with the owner’s age and health. He stated that is not the case and had nothing to do with the variance request. The special circumstances that are present are the fact that the home was constructed so long ago, that the property was purchased with no knowledge of any sort of a zoning ordinance violation, and that is what makes this unique.

(3) Granting the variance is essential to the enjoyment of a substantial property right possessed by other people in the same district; Mr. Bennett said the Staff Report states that “no other owners would be allowed to develop lots less than 40,000 square feet without first getting the zoning designation changed.” He said no one is asking for the right to develop a lot of less than 40,000 square feet. The right the applicant is requesting, is the right to be able to exercise their primary property rights with respect to this property.

(4) The variance will not substantially affect the General Plan and will not be contrary to the public interest; Mr. Bennett said that the property has already been developed and granting this variance is not going to have any impact on the General Plan, it is not going

to change the neighborhood, and in fact it would be contrary to the public interest to deny the variance. He said the Board needs to consider what will eventually happen to this property if the variance is denied. He said unless someone comes in and pays cash for the property and wants to improve it, the home is going to deteriorate because the owners will not be able to improve it, and eventually it may be abandoned and become a blighted piece of property.

(5) The spirit of the Zoning Ordinance is observed and substantial justice done. Mr. Bennett stated that they are not here to make narrow legal arguments about how to interpret a zoning ordinance. He said they are here because to fail to grant this variance puts a burden on the property owners which is a substantial injustice. It leaves them with a piece of property that is almost valueless unless sold to another neighbor. He said that to render justice in this case would be to grant the variance and give the property owners the rights that every other property owner has in that neighborhood.

Mr. Bennett said the important facts are (1) the property owner had no roll in the improper subdivision of the lot. She had no roll and had no knowledge of the violation when she purchased, and there would be nothing to suggest to her that there was a violation. (2) The house exists and failing to grant the variance is not going to make it go away. (3) Failing to grant the variance creates a significant burden on Mrs. Day and Mr. Coster by depriving them of their basic rights to refinance and sale this property. (4) The property owners have no other remedy. They could try and find Mr. Cutler and bring a lawsuit against him eleven years after the fact. He stated it would take a lot of time, money and uncertainty and it is not a reasonable alternative. He said that his understanding is that there has been some effort with respect to adjacent property owners which have been rebuffed. In fact, there may be some property owners who have a desire for an unsuccessful result so that they can have some advantage and may be able to acquire this property at a better price. (5) He said that the most likely result of not granting a variance is that the home will end up being abandoned at some point and create a blight on the City. (6) Mr. Bennett said that this is not creating a dangerous precedent because these are narrow and unique facts: a building that had been there for a long time and a person who purchased the property with no knowledge or reason to do further investigation to find out if there was a problem. He said that he talked to Mr. Crowell today and asked him whether this happens from time to time. Mr. Crowell responded that he was not aware of another situation in the time he has worked for the City that is like this. Mr. Bennett said that it is in the public interest to grant the variance because there is no harm to the public, no adverse impact on the General Plan, and no adverse impact on the City's ability to make zoning decisions in the future. He said the failure to grant the variance has a significant, specific and burdensome impact on the property owners and as a result requested the Boards consideration and granting of the variance.

- 2.2 Mr. Blaylock said the vicinity map does not show the other homes and asked if each lot has a home on it.

Mr. Coster answered in the affirmative.

- 2.3 Mr. Tripp asked how close the adjacent homes are to this home.

Mr. Coster said they are about 30 feet apart.

- 2.4 Mr. Smith excused himself from the discussion and vote on this item due to his relationship with this family.

- 2.5 Brad Jones asked when Mrs. Day received notice of the illegal deed.

Mr. Bennett said that the first time Mr. Coster received notice there was a problem was when he went for financing on the property.

Mr. Coster said that Florence Day did not receive any notice and was not aware of the problem.

- 2.6 Mr. Tripp said that he was under the impression that when Mrs. Day purchased the property and had the deed recorded, she was notified that it was an illegal lot.

Mr. Bennett said that is not correct. The notice was not recorded until a year later.

- 2.7 Grant Crowell stated that in 1972 when the house was constructed, the property would have been in unincorporated Salt Lake County. Draper City incorporated in 1978 and the Zoning and Subdivision laws were in place in 1981. Mr. Crowell stated that when a deed is taken to Salt Lake County, they will record it if the proper people have signed it. They do not do a zoning check or check with the City. The matter before the Board is a variance request for lot area. The zoning is RA1 which is a 40,000 square foot minimum lot size. The subject lot size is 5,663 square feet, .13 acres. The property as currently configured was created in 1990, and at that point the City's zoning ordinance and subdivision ordinance were in effect. For whatever reason, it did not come to the City's attention until sometime before they recorded a notice of illegal subdivision in March of 1991. He explained that when this came to the City's attention this year, Mr. Coster was trying to do some improvements on the house and the notice was found.

Mr. Crowell reviewed the criteria set forth in state code for granting a variance as follows:

(1) Literal enforcement of the Zoning Ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance; Mr. Crowell said that while the granting of zone changes is a function of the City Council, staff is worried about the precedent that such a variance request could send the wrong message to the public saying that if somebody does something illegal and time elapses you could get that corrected through a Board of Adjustment action. He said the purpose and intent of the low density zone is to have larger lots and this request does not meet that intent.

(2) There are special circumstances attached to the property that do not generally apply to other properties in the same district; Mr. Crowell said special circumstances are typically interpreted as something physical, something unique to the property, a physical condition that is not shared by other properties in the same neighborhood or vicinity. All of the properties seem to share the same general physical constraints. There are no drop-offs, creeks, etc. that would prevent other property from being included with this parcel to create legal lots in the future.

(3) Granting the variance is essential to the enjoyment of a substantial property right possessed by other people in the same district; Mr. Crowell said that the granting of this variance would grant an additional right and privilege that is not granted to other people in the same area of the City, that if anyone else were to come to the City to request a development, they would have to meet the minimum lot sizes in the zoning ordinance.

(4) The variance will not substantially affect the General Plan and will not be contrary to the public interest; Mr. Crowell said that when the General Plan calls out an area for low density residential and agricultural, the City Council typically interprets it as one to two units per acre. Staff feels that this would be a special right granted to them that would not be enjoyed by others.

(5) The spirit of the Zoning Ordinance is observed and substantial justice done. A hardship cannot be found if the hardship is self imposed or economic in nature. Regardless of who filed the deed, the creation of the illegal lot, in Staff's opinion, was a self-created hardship. At the time it was created there were probably other mechanisms available to work with the City to create legal building lots through rezoning or proper subdivision platting that were not done. Whoever created the original deed imposed this situation.

2.8 Mr. Blaylock said that as he read the notice, nothing could be done to the property including any kind of improvement.

Mr. Crowell said that probably what would have to happen would be to have this property

included with one or two other adjoining properties, rezoned to half acre lots and platted as subdivision lots. He said it is possible, but is not sure how feasible it would be to get all of the parties together to make this work.

- 2.9 Brad Jones said that Mr. Crowell stated that the special circumstances must be related to the property itself and asked if that was in the City Code.

Mr. Crowell said that is included in the State and City codes. He said it does not warrant special circumstances to the individuals.

- 2.10 Mr. Blaylock said the notice states "subject to prosecution."

City Attorney Todd Godfrey said that at this point the City would not record a notice of illegal subdivision alone, a notice would be recorded and the City would additionally bring a court action to set aside the deed that created the illegal subdivision. Sometimes criminal action can be taken to set aside an improper action and violation of the subdivision ordinance.

- 2.11 Mr. Tripp asked what recourse there would be.

Mr. Godfrey said that time has probably passed and it is too late. The City obviously had notice that the deed was illegal in 1991. He said there is no action the City could take in terms of civil enforcement to set aside that deed. Whether or not the private property owner has a right to go back against whoever conveyed the property to them, he could not answer.

- 2.12 Mr. Jones asked whether the property remains in its illegal nature if the variance is not granted.

Mr. Godfrey said that it would until it is combined with another lot or some other kind of action is taken to alleviate the problem. He said that it is not likely there is anything the City can do to change that status.

- 2.13 Mr. Bennett said he believes Staff is mixing up granting a variance and precedent that is brought into consideration on a zone change. Secondly, this hardship was not self-imposed, the problem was imposed by the person who sold this property to Mrs. Day, not caused by her. He said the problem is how to solve this matter in a reasonable and equitable way so that people can get on with their lives. The option suggested by Mr. Crowell was to try and put lots together, get a zone change, resubdivide, and break it into half acre lots. He said that suggestion will have much more impact on the property and

much more significant of an effect on the General Plan than to grant a variance for the property and leave everything else the way it is. Lastly, if the City had brought an action in 1991, Mrs. Day could have gone to Mr. Cutler and asked for her money back. He said that realistically he does not believe that is available.

- 2.14 Mr. Blaylock asked if Mrs. Day purchased the property.

Mr. Bennett said Mrs. Day's son handled the property purchase.

Mr. Blaylock asked if the notice could have gone to the son.

Mr. Bennett said he does not believe so because he never took title to the property.

- 2.15 Mr. Blaylock asked if the County is required to send a notice to the property owner.

Mr. Godfrey said they are not.

- 2.16 Mr. Jones asked if there is such a thing as setting a precedence in granting a variance.

Mr. Godfrey explained that there is no broad legal precedent that comes from any one grant of a variance. They are fact specific, and generally relate to only one piece of property. However, Mr. Godfrey said he agreed with Mr. Crowell's assessment that when you start granting variances that stretch the requirements you create problems and issues in terms of future enforcement. He said discriminatory enforcement problems for the City are created in terms of enforcing zoning regulations on other properties in the area. He stated that he is not judging the facts in this case, but that is what he understands Mr. Crowell's argument to be.

- 2.17 Barry Skinner, 13038 South 1300 East, said in 1972 he bought the house where he currently lives. At that time Barry and Dorene Thompson owned the subject property and asked for a variance so that they could build a smaller house in order to care for Mr. Thompson's mother. The criteria was that the small house had to be sold with the big house, or it had to be torn down and moved. Mr. Thompson built the house in 1972 and his mother lived in the small house until the late 1980s. They sold the property to Curtis Wayne Cutler and he decided he was going to rent it. Mr. Skinner said that he found out he was going to rent it to Florence Day, an older person, that needed a place to live, and he did not want to be hard and calloused about the situation. Several years later Mr. Cutler decided he wanted to sale the small home, and Mr. Skinner said he told him he could not sale the small house separately because of the stipulations. Mr. Skinner said he came to a City Council meeting and told them he was opposed to what was going on because the small house was never supposed to be decided from the big house. Mr.

Skinner said he doesn't understand why it was never caught in the title search. He said that Mr. Cutler lives in Midvale and he should be responsible for what has happened, or the owners should talk to the neighbors and see if they can sell it to them. He stated that he is opposed to the variance.

- 2.18 Barbara Kitchens, neighbor to the west, said she is an acre away and will not sell anything. She said the small house deteriorates the neighborhood and she is opposed to the variance.
- 2.19 Marvin Orr, west of Barbara Kitchens, said he moved in after all of this transpired, but he pulled some titles and was advised that the subject property does not have an ingress or egress right-of-way to it so Mr. Coster is trespassing to get in and out.
- 2.20 Charles Ahue, 13050 South 1300 East, lives to the east of this property. When he purchased his property and tried to get financing he found out that it was not a legal acre and Mr. Cutler had to make the sale of the property legal. He said there was no right-of-way granted to the property at the time of the sale so trespassing has been happening. He said he has had words with the neighbor about lights being on, because the houses are so close the lights shine into his bedroom. He said he is opposed to the variance.
- 2.21 Mr. Blaylock asked Mr. Ahue if he bought the property after the small house was built.
- Mr. Ahue said he bought his home in 1991 and the small house was existing.
- Mrs. Ahue said that the property owner tried to sell them property zoned as an acre, which was not an acre, and he had to come up with the rest of the property.
- 2.22 Mr. Blaylock said that there have been several comments made regarding right-of-way and said it is his understanding that since the applicant has used the right-of-way he would have the right of egress and ingress whether or not there is a deeded right-of-way.
- Mr. Godfrey said there is an argument that could be made to that effect. He said it is a legally ambiguous kind of standard as to whether or not someone has ingress and egress by use.
- 2.23 Mr. Bennett stated that the deed from the Cutlers' to Mrs. Day shows two rights-of-way with the description of the property. One is a 25-foot right-of-way together with and subject to a right-of-way 12-foot on both sides of the center line. He said that a survey would have to be looked at to see exactly where they sit. He said that he does not believe access is an issue.
- 2.24 Mr. Blaylock asked if that would assume that Mr. Cutler had the right to grant the

easement?

Mr. Bennett said it is a warranty deed from Mr. Cutler and he is warranting he did have that property to grant.

Mr. Godfrey noted that access is not an issue for the variance.

2.25 Mrs. Kitchens said there is a private lane Mr. Coster always parked on until she told him he could not park on her property.

2.26 Mr. Tripp asked what the property owner is obtaining financing for.

Mr. Coster said he was trying to obtain financing to pay for painting the inside of the house, new flooring, and central air conditioning. He said it was after the improvements were complete that he tried to get financing and found out about the clause on the deed. Mr. Coster said he is not building onto the house in any way.

2.27 Mr. Coster stated that regarding selling the house, he asked Barbara Kitchens what she would be willing to pay for the house if he was willing to sell and she offered \$50,000. He said that when he was trying to refinance he had the house appraised at approximately \$108,000.

2.28 Mike Vicer, Mr. Coster's mortgage broker, said he assisted Mr. Coster in trying to get financing and then trying to figure out what to do. He said that he disagrees that Mr. Coster's home devaluates other property in any way. He said that just because a smaller home is set next to a larger home does not adversely effect the value of the larger home. He said that the smaller home does appraise for \$108,000 standing by itself.

2.29 Marvin Orr, said that the small home is manufactured and was set on a foundation. He said that if Mr. Coster could recoup the amount of property value from his neighbors, he could pick the home up and put it on another lot.

2.30 Mr. Godfrey explained to the Board that they can entertain a motion and make a decision tonight or continue this matter. He said there have been factual allegations that there is no support for, and verification of some of those facts may assist in a decision. He said it might also be fair to allow the applicant the chance to address any of the issues that were raised. Mr. Godfrey said that if there was a formal variance granted by the County prior to incorporation of the City, that may factor into the Board's decision in some way.

2.31 Mr. Tripp said that he agrees the Board needs more information before a decision can be made. He said he believes that Wayne Cutler created the entire problem and that they

City also has some responsibility due to the fact they did not deal with this issue when they were aware of it. He said he feels sorry for the parties involved and believes that the Board needs further information before a decision can be made.

2.32 Mr. Blaylock asked if there is any legal recourse with Mr. Cutler.

Mr. Bennett said it would require some research, but his gut feeling is that it is probably too late. He said that Mr. Cutler could argue that when the notice was recorded against the property, it was constructive notice, and if there was a problem it should have been raised it at that time.

MOTION

2.33 Mr. Tripp moved to continue this matter in order to obtain further information.

Second: The motion was seconded by Mr. Jones.

Vote: The motion passed unanimously on a roll call vote. Mr. Smith did not vote due to a conflict of interest.

Mr. Godfrey recommended that Staff find out whether or not there was a variance granted by the County in 1972. He said that there may also be records in the City's files that have not yet been researched regarding whether or not notice of the illegal subdivision was sent to Mrs. Day or another party.

Mr. Blaylock asked that a map be made available showing how close together the houses are in relation to one another. Mr. Bennett will provide a schematic drawing of the subject home and the homes on either side of it.

Mr. Tripp also asked that he show the distance of the road in front of the subject property with the setback of the existing house in relationship to the road.

Mr. Godfrey noted that any information should be submitted through City Staff. He also stated that it would be preferable from the applicant's perspective to set a date certain.

MOTION TO SET DATE CERTAIN

Mr. Tripp moved to reconvene on November 7, 2001, at 6:30 p.m. for the study meeting and 7:00 p.m. for the business meeting. The motion was seconded by Mr. Jones and passed unanimously.

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The meeting adjourned at 8:00 p.m.

Submitted by:
Linda Dunlavy
Minutes Secretary