

Minutes of the Board of Adjustments meeting of October 24, 2019, held in the Weber County Commission Chambers, 2380 Washington Blvd. Floor 1, Ogden UT at 4:30 p.m.

Members Present: Bryce Froerer-Chair
Laura Warburton- Vice Chair
Phil Hancock
Rex Mumford
Nathan Buttars

Staff Present: Rick Grover, Planning Director; Tammy Aydelotte, Planner; Chris Crockett, Legal Counsel; Marta Borchert, Secretary

- Pledge of Allegiance
- Roll Call

Chair Froerer states that legal staff has some issues to address. Mr. Crockett states that he would like to provide some guidelines on how the procedure works for a land-use appeal to the Board of Adjustments. The Board of Adjustments are reviewing is a review of the record. Since there is an actual record with minutes from the administrative decision; the Board is confined to reviewing what is in the record. Once that is reviewed the standard of review, the burden is cast upon the appellant to show how it is not in compliance, and how the authority erred. In order to uphold the land use authorities' decision, there has to be substantial evidence to support that decision. Mr. Crockett reads the definition of substantial evidence." Substantial evidence is defined as quantum and quality of relevant evidence that is adequate enough to convince a reasonable mind to support a conclusion. A determination of whether there is substantial evidence considers all evidence on the record. Favorable and unfavorable." He adds that after the conclusion of the presentation of evidence if the Board wishes to close the meeting so that they may deliberate in private they can announce the decision in the closed meeting. If the Board wants to go back and deliberate and discuss the case they are welcome to do so, they would just need a motion to close the meeting. He asks if there are any questions about the procedure.

1. Minutes: Approval of July 11, 2019 meeting minutes.

MOTION: Phil Hancock moves to approve minutes as presented. Rex Mumford. Seconds. Motion carries (5-0) Minutes were approved as presented.

2. BOA 2019-03- Consideration and action on an appeal of an administrative decision, made by the Weber County Planning Division, to grant an approval of an Access Exception (AAE#2019-04) for access to a rear lot in a future two-lot subdivision. Applicant: Kristen Zaugg, Represented by Zane Froerer; Staff Presenter, Tammy Aydelotte

Chair Bryce Froerer recused himself as he is a law partner of the applicant's representative. Vice-Chair Laura Warburton was appointed Chair for the remainder of the meeting.

Mr. Crockett notes that the previous version of the packet indicated that Mr. Crockett was the attorney that advised Director Grover. This was not the case, the attorney that advised Director Grover was Matthew Wilson. Ms. Aydelotte states that an amended packet was sent out and posted on the State website and County site.

Tammy Aydelotte explains that the item before the Board is an appeal on an administrative decision made on September 4th, 2019 by the Weber County Planning Director acting on the Land Use Authority on an application for alternative access or an access exception. She notes that she included the section in the Land Use code that explains how and why access exception is approved.

Mr. Mumford asks if Ms. Aydelotte has the dimensions of the subject property. Ms. Aydelotte states that the lot width is 163 ft. the length of the access is 269 ft.

Mr. Buttars asks is if the 3975 West street the private road, and the 4000 roads the public road.

Ms. Aydelotte states that this is correct.

Mr. Hancock asks if it is a 1-acre parcel. Ms. Aydelotte states that it is 2 and a half-acre parcel.

Mr. Buttars asks if it is common for a County to make these kinds of decisions before a subdivision has been approved. Ms. Aydelotte states that in order for a subdivision to be approved there has to be recognized legal access or frontage to each lot. The reason that the access was approved before the subdivision was that the legal access is approved through an administrative decision. They can be run concurrently; there is nothing in the land-use code that states order of operations other than there needs to be legal access for each lot in the subdivision.

Mr. Mumford asks if the frontage for lot 1 and 2 become temporary access. Ms. Aydelotte states the frontage for lot 1 is along the private road. She adds that the requirement is for lot width, not frontage. In the land-use code in the A-1 zone, there are standards of development. One of them is lot size, which is in the A-1 Zone. The minimum lot size is 40,000 sq. ft. The lot width is 150 ft you can measure that from the front yard setback. Both of the lots have the required width. When there is no frontage available but they do have access by a private right of way access easement they may use a private right of way or access easement as the primary access. She adds that the burden of proof is on the applicant to explain why it is not feasible to put in a road there.

Mr. Buttars asks where the northern waterway is. Ms. Aydelotte states that it is along the eastern boundary. Mr. Buttars asks what kind of a waterway it is. Ms. Aydelotte states that it is an open irrigation canal.

Mr. Mumford asks if both lots share the access. He states that on Exhibit B the hammerhead drawing shows that the access is flared to where it accesses both lots. Ms. Aydelotte states that this something that is required by the fire district, it is fire access for both lots.

Mr. Buttars asks if the access goes all the way to the canal. Ms. Aydelotte states that this is how they have demonstrated it, but it does not have to go all the way back to the canal. The easement hasn't been recorded.

Mr. Froerer states that he is representing Kelly and Kristen Zaugg. There is no subdivision and no lot in place, therefore the County should not proceed with granting alternate access in this application. He adds that what is being asked is to be granted access to a lot that does not exist and may never exist and for which an application has not been filed. Under the law, while there may not be a specific ordinance that states that you cannot apply under the law the rights in the prospective subdivision do not vest. They are not created until an application is filed. The County is correct you can file an access request along with a subdivision application but you can't have the alternate access request by itself. In the land-use code there a section that lists all the standards, nothing in the County's staff report addresses any of the standards. The County cannot grant rights unless it complies with all the regulations. It is under a land-use permit unless it complies with all the regulations under that permit. The County can't say we are going to grant this application believing that another application that does cover the standards will be filed. If both applications had been filed at once it could be dealt with in a different manner. The County has

given final approval to alternative access for a lot that doesn't exist in a lot that hasn't been applied for. There are two ways that a lot that doesn't have frontage can gain access. The Planning staff didn't go through any of the standards. One of them is the flag lot, which the County did address. You have to have three acres, there has to be an access strip which is part of the lot. In this situation we're dealing with an access easement as part of that. According to the land-use code 108-7-32, "It shall be demonstrated that appropriate and legal access exists due to historic use, court decree, or the execution of an easement, right-of-way, or other instrument capable of conveying or granting such right." In this case there is nothing that demonstrated this. There has to be a subdivision first, then the access easement and then decide if it is going to be adequate access to make sure that the lot won't have to be accessed over the frontage or the front lot line. The statute states that the lot has to be accessed over the front lot line unless it complies with 108-7-32. At this point there is no lot to evaluate whether that should apply. It was stated that the easement goes all the way back. At this point the easement can't go back. There is no subdivision, there is unity of ownership it is one lot. There can be no easement that exists accessing half of one lot to the back of one lot. If you have an easement between two lots and you combine 2 parcels the easement disappears. The reverse is true, you cannot create an easement to a lot that doesn't exist. Nothing has been recorded there are no specifications or parameters. It is very speculative at this point. Another thing that needs to be required is an actual easement. What was presented was a proposed easement. In all three statutes and all three ordinances 29 section 30, section 31, and 32 the applicant is required to demonstrate special or unique boundary, topographical or other physical conditions which would cause an undesirable or dangerous condition to be created for a property access across the frontline, or based on substantial evidence it shall be shown to be unfeasible or impractical to extend the street. The staff report which was prepared for the administrative review meeting states the correct and the need to have substantial evidence. There was no soil testing, no surveying, no analysis of where things are located. There is no subdivision so it's really difficult to assess if the lot can be accessed when there is no lot. The statute refers to access to a lot using a private right of way or access easement. (Lots/parcels that do not have frontage on the street) the current lot does have frontage. This application should be presented in conjunction with a subdivision application but not by itself. They are applying for the whole lot which does have frontage, which makes it disqualified for alternative access. The County should not vest rights in a prospective lot for an application that has not been filed. According to the notice of decision the conditions or findings, "the recommendation is based on the following findings, the proposed subdivision conforms to the Western Weber General Plan." He asks how the County can decide that when there is no subdivision. He adds that under CLUDMA the rights don't even vest in the subdivision until there is an application. In their decision, the County is saying that a subdivision that has not been applied for qualifies as a legitimate subdivision. The proposed subdivision complies with the applicable County ordinances. The staff report states that the recommendation is based on the following findings. Even if it was conditioned, and they get carried through, under the law you cannot have conditional final approval. It's either final or it's conditional. If the County wants to give them a conditional approval it can't say they have final approval. He adds that he feels that the County got ahead of itself. They should have required a subdivision application, to be filed contemporary with the application. They then should have gone through all the requirements, all the standard and criteria, before granting the alternate access. At this point, the County cannot grant alternate access. He states that once the subdivision application has been submitted they can figure out if the alternate access meets the standards.

Mr. Buttars states that regarding 18 of 19 exhibit A, Director Grover listed 11 conditions. Do the conditions listed assuage what Mr. Zane Froerer's client is trying to do. Mr. Froerer states at this point he does not have enough information to answer that question fairly. He adds that the analysis that needs to go into alternate access is independent of the subdivision access. It can together but findings and substantial evidence have to support both land-use decisions.

Mr. Hancock asks if the access is approved and the subdivision doesn't materialize, who is harmed. Mr. Froerer states that the question isn't who is harmed. The question is did they follow the land use regulations when they approve the access, they did not, they ignored section 29. Nobody would really be harmed, but it is hard to speak

to that when the review of land-use is meant to ensure due process for all interested parties. Mr. Hancock asks if his client's only concern is due process. Mr. Froerer states that his client does not want the lots subdivided. He asks if that is a fair thing to ask of her at this point if the application has not been filed for a subdivision. He adds that she doesn't even get a chance to address those issues, because that application has not been filed. Mr. Hancock asks if there might be an opportunity at a later point in time for her to address her concerns. Mr. Froerer states that she might but the final decision states that the subdivision is all good. Mr. Hancock states that he disagrees, the application filed does not address subdivision approval. Mr. Froerer states that he agrees that it doesn't address final approval but the final decision says that the approval based upon those findings and that the subdivision is proper within the County's greater western plan. He states that when the application is filed his client will have the opportunity to review and determine whether it is consistent with the County ordinances. However, that does not affect this decision. This is the final decision. The alternate access is granted, it was not granted consistent with the ordinances for the lot and it should be reversed. Whether or not they can do the subdivision in the future is different. He adds that they are not looking at this as a mechanism to prevent the subdivision. There is a mechanism by which the subdivision and the application for an alternative access can be dealt with in an appropriate way. Had the County gone through and addressed all the standards the County would be on better footing. They would still have to explain how they are granting access to a lot that doesn't exist.

Mr. Hancock states that not very long ago there was a similar case before the Board of Adjustments. Mr. Crockett states that there was a similar discussion, but way he reads the law, this is an individual land use application and in order to uphold the land use application according to *108.7.31 (1) (C) Based on substantial evidence, it shall be shown that it is unfeasible or impractical to extend a street to serve such lot/parcel. Financial adversity shall not be considered; however, circumstances that may support approval of a private right-of-way/access easement as access to a lot/parcel may include but not be limited to unusual soil, topographic, or property boundary conditions.* Mr. Crockett states that in the review of the record there has to be enough information that there is substantial evidence to uphold that finding. Mr. Hancock notes that they don't accept that it is the same owner from both lots and they have the legal right to request that subdivision. Mr. Froerer states that he feels they have the right to request the subdivision. It would be a good thing and they should apply for a subdivision. The County can then evaluate whether the subdivision is appropriate. At this point, his client wants to make sure that there is an orderly process on how subdivision and access to lots in her community are granted by the County and that there is a safe and orderly manner in doing those subdivisions.

Chair Warburton asks if there are any more questions for Mr. Froerer.

Mr. Buttars asks that Mr. Froerer address the concern regarding the private road where there is frontage. Mr. Froerer states that the County does not define the street. It refers to the street in this application, record, and ordinance. The County doesn't define it as a private or public street. It should be read broadly and be given its regular use. When an ordinance refers to frontage to a street it should be interpreted as a frontage to a private street or a public street. Under the statute a public street is defined. Under the ordinances in 101-1-6 the term street is not specifically defined by the Weber County Ordinances it must be given the broadest definition possible. The public street is specifically defined under Utah Code under CLUDMA that governs it. The ordinance does not specifically refer to frontage on a public street it shouldn't be read to limit frontage to being only on a public street. There may an issue that was not addressed. What is being done is they are tacking on a private access easement to a private street that goes to a public road and there may be some issues that the fire marshall has with the distance between the public street and the lot. They are piggybacking off of a private street. This was not addressed in the application.

Chair Warburton asks if there are any more questions. There are none.

Chair Warburton asks if Ms. Aydelotte would like to address the issues brought up by Mr. Froerer. Ms. Aydelotte states that the reason that some of the recommendations were not addressed at the time of the application is that they are typically addressed at subdivision approval. This is why it is more expensive to file a subdivision application because it pays for everyone's review. At an access exception staff looks at the standards listed and the Planning Director ensures that everything meets code. There were several additional conditions added, that he wanted to make sure were specifically addressed when the subdivision application is filed. Chair Warburton states that if staff is looking at conditions or looking at applying conditions, it does not mean that approval has been granted it means that those conditions need to be addressed before the application can be approved. Ms. Aydelotte states that it is considered final approval as long as the conditions have been met. Chair Warburton points out that it is a possible subdivision; at this point, it is only a right to access. Mr. Crockett states that in his legal opinion he does not see how it can be final when those conditions have not been addressed. It makes more sense to do them in conjunction. At this point they seem too distanced. Chair Warburton states that when she saw Ms. Zauggs compliant there wasn't anything that was connected to what Mr. Froerer brought up. Chair Warburton states that she feels there are two different things going on. She adds that she does not want to take away someone's property rights and cost them more time and money, based on a technicality. Mr. Crockett states that the Board of Adjustment's decision doesn't have the authority to adjudicate someone's property rights. This is something that is addressed through a judicial body. Chair Warburton asks if the Board is quasi-judicial. Mr. Crockett states that as far as whether there is legal access to go in there the Board does not have the ability to say yes or no, or take away their legal access.

Chair Warburton asks if there are any more questions for staff.

Mr. Buttars states that regarding Director Grover's decision on page 14, it states "*I recommend approval based on the findings outlined in the staff report. That is based on substantial evidence; it has been found that it is unfeasible or impractical to extend the street to serve such lot or parcel. Based on the topography of the property boundary conditions, which limits typical access requirements in a unique way. This has to do with the waterway in this situation. This stands approved based on specific conditions.*" Mr. Buttars states that he is trying to understand how the waterway meets the unfeasible and impractical requirement if it is the back of the lot. He asks if Director Grover wants to speak to this. Director Grover states that in this situation the waterway makes it difficult for the street to extend back through that area. Bodies of water it is more difficult for developers to cross those areas. In this situation, he felt that it was because of the canal and there are homes on the other side where it is difficult to develop and make a street connection through that area. Mr. Buttars states that the access may not even go to the canal. Director Grover states that typically when they look at streets they look at connectivity. They don't typically have a sub street, they like to have through streets going to another possible development in the future. In this situation it is impractical. Mr. Buttars asks if this is the case even when there is special access. Director Grover states that is why that provision is there is to look at the special access options. He adds that in his opinion this section of code should be amended in the future, but it is in the code at this point in time. For this reason the waterway was a hindrance to future development.

Chair Warburton asks if there are any more questions. There is none.

Chair Warburton asks if she can open the meeting for public comment. Mr. Crockett states that he recommends that it is not opened, because the meeting is for a review of the record. He adds that the only thing that the Board is allowed to consider is what is in the record.

Chair Warburton states that if the public has any comments they are welcome to send them or speak to Tammy Aydelotte at the office.

MOTION: Nathan Buttars moves to close the meeting to deliberate the case. Rex Mumford seconds.

Phil Hancock-Aye; Rex Mumford-Aye; Nathan Buttars-Aye; Chair Laura Warburton-Aye.
Motion carries (4-0)

MOTION: Rex Mumford moves to reopen the meeting. Nathan Buttars seconds. Motion carries (4-0)

MOTION: Nathan Buttars moves to reverse Access Exception AAE# 2019-04 for access to rear lot in a future two – lot subdivision , because it doesn't meet LUC §108-7-31(1)(C) in that the record does not reflect substantial evidence to support the unfeasibility or impracticability to extend to a street to serve such lot/ parcel. The Board of Adjustments does not find that the County did anything illegal in their actions, only that the Board of Adjustments didn't find the quantum & quality of relevant evidence that is adequate enough to convince a reasonable mind to support the conclusion. Rex Mumford Seconds. Motion carries (4-0)

3. Review and Approval of the Board of Adjustment's Rules of Order.

Mr. Crockett states the change added to the Rules of Order was based on a suggestion from the Board of Adjustments at the July 11, 2019 meeting. The change was regarding the number of times the Board has to meet. On page 2 there is a section referencing that the Board is meant to meet once per quarter to review minutes. He notes that he removed that part so that the Board of Adjustments only has to meet in an as-needed basis. There was another change on the bottom of page 3 going to the top of page 4, which would authorize the approval of minutes via email which would be coordinated through the chair. Chair Warburton asks if there is any more discussion. There is none.

MOTION: Rex Mumford moves to approve changes to the Rules of Order. Nathan Buttars seconds. Motion Carries (4-0) Rules of Order changes are approved as presented.

Adjournment- Nathan Buttars moves to adjourn the meeting, Rex Mumford Seconds. Meeting adjourned at 6:15 pm.