

Minutes of the Board of Adjustments meeting of February 11, 2021, held in the Weber County Commission Chamber, 2380 Washington Blvd. Floor 1 Ogden UT at 5:00 pm & via Zoom Video Conferencing

Members Present: Laura Warburton – Chair
Rex Mumford
Jannette Borklund
Kevyn Grimes

Members excused: Bryce Froerer
Neal Barker
Nathan Buttars

Staff Present: Steve Burton, Principle Planner; Scott Perkes, Planner III, Chris Crockett, Legal Counsel; Brandan Quinney, Legal Counsel; Marta Borchert, Secretary

1. Minutes: Approval of the October 22, 2020 meeting minutes. Minutes were approved as presented.

2. BOA2021-01: Consideration and action on a request for a 20-foot variance to the 50' natural ephemeral stream corridor setback for property located at 3488 N. Elk Ridge Trail in Eden. Staff Presenter: Scott Perkes; Applicant: Dennis Barrett

Scott Perkes states that this is an application is a request for consideration and action on a 20-foot variances to the 50 ft. natural ephemeral screen recorder setback for a lot in the Elkhorn Subdivision at approximately 3488 north Oakridge trail. The project areas here under half an acre. It is located in the R-E-15 zone. The subdivision was plated in July of 1996. This lot has sat vacant, as a developable lot until recently where the applicant is looking to build a single-family home on the lot. The sensitive lands ordinance that contains the setback requirements for ephemeral streams, was adopted in 2005. The subdivision predates that ordinance by nine years. The requirements of this ordinance came into play, nine years after this lot was designed. It has caused an encumbrance on the rear property where if the 50 ft. setback was adhered would create quite a bit of a hindrance to the development of a lot as well originally intended by the subdivision plat. The applicant is requesting a 20-foot variance to setback which means that the structure, could be as close as 30 feet to the high watermark of this stream, and in the neighborhood. In this subdivision, the majority of the lots have already been built there are only two homes that have not already been built. Many of them were built before the ordinance going into place. Most of them have the encumbrance but were not required to adhere to the ephemeral stream setbacks, whether because they go before the ordinance when they take place or because of the time the ordinance wasn't being enforced. The drainage channel runs through the backyards of some of the lots. In speaking with the Engineering department, this is a natural drainage that doesn't run with water for the majority of the year but is it's manipulated by various catch basins and control devices. There's a project from the Engineering to-do list just to the south, whereby they intend to have another detention basin, with a control device that will ensure that during high storm events that the water that has been released from the snow basin remains consistent. He notes that based on this they don't anticipate the high watermark in this natural stream varying very much at all. There are a couple of criteria points that were required for review the projects against there are five of them in the ordinance workers and staffs analysis is shown there is a hardship that the lot does have. He notes that the variance requirements have been met and the applicant is going through the appropriate channels to request a variance.

Jannette Borklund states that there was a similar item presented in the fall. She asks if this is the same property. Mr. Perkes states that it is a different property same principle. Staff is looking at some exception language to try and alleviate some of these types of requests. He notes that it keeps coming up as they enforce the ordinances there are a lot of lots of record that existed before the ordinance.

Mr. Mumford asks what the width of the easement is. Mr. Perkes states that it does not call out the width, but it is not as wide as the 50 ft. setback. The home as proposed stays out of the detention basin easement as required. Looking at the watermark it takes up quite a bit of the developable area. Mr. Mumford asks if they were to grant the 15 ft. foot variance would they be interfering

with the detention basin easement. Mr. Perkes states this is correct. He would like to clarify that the agenda had a typo stating that the variance request was for 15 ft. the request is actually for 20 ft., and the staff report was correct. He notes that the edge of the deck would be outside to the center line and it represents a 20 ft. variance. Mr. Mumford asks if the edge of the deck would be on the edge of the easement. Mr. Perkes states that it would be right on the easement. The detention basin easement does not encroach. The detention basin easement is not trespassed the structure stays outside of it. Mr. Mumford asks if Mr. Perkes has visited the site. Mr. Perkes states that he has not but he had a discussion with the engineers, and they did clarify that this is a natural drainage easement. Everyone in the area has been able to build as a normal lot. He adds that this is a hardship, enforcing the ordinance the restrictions are more restrictive for the applicant than others that have built prior.

Chair Warburton asks if there are any questions from the Board members. There are none.

Chair Warburton asks if the applicant Dennis Barrett has anything to add. Dennis Barrett states that they purchased the ground two years ago knowing that it was a building lot. He notes that they were not aware of the 50 ft. watermark. Starting from the front 30 ft requirement they can't build what they want to build without having the easement.

MOTION: Rex Mumford moves to approve BOA2021-01: Consideration and action on a request for a 20-foot variance to the 50' natural ephemeral stream corridor setback for property located at 3488 N. Elk Ridge Trail in Eden. Based on the information provided by Scott Perkes and the analysis listed in the staff report. Jannette Borklund adds that she feels that there is a special circumstance and the lot was created before the ordinance. It is consistent with the General Plan and there is a hardship on the lot. She notes that the State's law regulations are satisfied. Jannette Borklund seconds. Motion carries (4-0)

Chair Warburton states that this is a grandfathering issue. This lot was created before the new ordinance and the new ordinance put a burden on the owner. She adds that she feels that the request is reasonable.

3. Election: Election for Chair and Vice-Chair 2021

MOTION: Chair Warburton moves to nominates Jannette Borklund as Chair. Motion Carries (4-0) Jannette Borklund will be the Chair for the Board of Adjustments for 2021

MOTION: Chair Warburton moves to nominates Kevyn Grimes as Vice-Chair. Motion Carries (4-0) Kevyn Grimes will be the Vice Chair for the Board of Adjustments for 2021

4. Schedule & Information: 2021 Meetings. Chair Warburton asks much longer meetings will be held via Zoom. She adds that she misses meeting face to face. Mr. Burton states that the Commission Chamber seating is close and would make it difficult for a larger group of Board members to social distance. He notes that if the Board would like to meet in person, he is happy to have that discussion with Director Grover. He notes that Planning Staff will continue to have the meeting in person at the Commission Chamber and via Zoom because there is a requirement for the anchor location. Board member Rex Mumford is present in person. He notes that this is an option for the Board members.

5. Rules of Order: Approval of Rules of Order. Mr. Quinney states that he is happy to go over the changes in the Rules of Order. Chair Warburton states that she has a lot of questions. Mr. Quinney states that the changes are up for discussion and the Board can table them for a future agenda. Chair Warburton states that she would rather discuss the changes in person.

MOTION: Rex Mumford moves to table the Approval of the Rules of Order until they can meet in person and that it will be scheduled within a month. Chair Warburton seconds. Motion carries (4-0)

6. Review of Open Meetings Act - Brandan Quinney. Mr. Quinney reviews the Open and Public Meetings Act with the Board members.

Chair Warburton states that concerning ex parte communications if members of the Board of Adjustments or the Planning Commission meet outside of the regularly scheduled meeting to discuss and make decisions, this would be Ex parte Communication and breaking the public's trust. Mr. Quinney agrees and states that if they were planning to not just act but to discuss a matter over which the public body has jurisdiction and turn even a chance encounter into a public meeting, they have to be careful and if they

want to do business. The safe practice is to wait until it can be put on an agenda. Ms. Borklund adds that for it to be a meeting there needs to be a quorum present. Mr. Quinney agrees and adds that there is a prerequisite to being able to act in the first place. Speaking as two board members there is no quorum there is no authority to speak on behalf of the Board. Chair Warburton states that Ex Parte Communication especially on the Board of Adjustments talking to one other person or discussing it with an applicant. She notes that when people go to a public meeting they are assuming that the Board Members or the Planning Commission are 100 percent unbiased. She notes that if it is a legislative issue It is a little bit different.

Rex Mumford asks if there is an item and they have a question, if there is an issue contacting the Staff Presenter. Mr. Quinney states that there is no problem with this. There is a distinction between administrative high functions and the acting capacity of the Board and this is more administrative. He states that procedural questions are ok to discuss. Jannette Borklund states that Board members should direct the public to the Planning Staff with their questions. Mr. Quinney states that it can be a muddy issue, whether something is considered a meeting and should be open to the public with the proper meeting requirements. If there is ever any doubt best practice is to not engage. He adds that staff is available to answer questions as well.

Chair Warburton asks if Mr. Quinney can discuss the difference between a public meeting and a public hearing. Mr. Quinney states that a public hearing triggers a different act, it is not covered in the open and public meetings act. Mr. Crockett states that a public hearing is when by code they are required to take comments. This can be seen a lot during legislative, where they are passing a new ordinance by law they need to take public comment. Several land-use actions require public comment. If it is a public meeting the decision to take public comment rests within the discretion of the Board to make that determination. If it is a public hearing it will need to be noticed differently, and there are specific rules, it may need to publish the notice in the newspaper and it is going to be more than 24 hours, but the public will need an opportunity to speak on the matter being presented. Chair Warburton states that the public might feel defensive when they attend the meetings and they assume that they will be lied to. She notes that it is different with the Board of Adjustments than it was with the Planning Commission. In the Board of Adjustments even though it is not a public hearing she always allows the public to speak. She also likes explains to them they the Board is not required to follow their advice, the Board can take it in and public comment is appreciated. Mr. Quinney asks if there has been a situation where the Board of Adjustments would have to hold a public hearing. Mr. Crockett states not specifically in the ordinance, but with quasi-judicial matters, the board needs to be mindful of people's due process rights. This allows an applicant if they are appealing a land-use decision to speak to that and anyone who can demonstrate that they have a property right or an interest in the item, it would be worthwhile to allow them to speak. There are no set rules for public hearings, for a Board of Adjustments but there might be due process considerations. Mr. Quinney states that they would have to take into account certain individuals that may be affected by the decision and allow them to make the comments for due process, he adds that notice requirements change, it has to be categorized as a public hearing. If they don't foresee a situation where it would have to be a public hearing they would just follow the notice of requirements. Chair Warburton asks if those notices would be determined by code. Mr. Burton states that they do send out notices for the Board of Adjustments for example notices were sent out for the item that was on the agenda. Mr. Burton states that it is a notification that is sent out as a courtesy to let people know that something is going on. He adds that for appeals or variances they do send notices out to people at about 500 ft. on the parcel for which the request has been made. Mr. Crockett states that legally it is not required to take the comment, and in the statutes of the ordinance they would look to see if it uses the term hearing to determine whether a public comment is required. Allowing public comment allows people to express an opinion and a lot of the issues can be resolved very quickly during the meeting. It is important to keep the comments germane and the public in check because once the public comment is allowed and the item is not something that the public is not allowed to weigh in on, they cannot allow opinion to guide their decision it has to be based on substantial evidence that is in the record. There is a delicate balance. Chair Warburton states that it is important for the public to have a voice but it is also important for the Board to understand what they should base their decisions on and it is not always the public's voice and their opinions. Mr. Quinney states that the important part of the act is the notice and that the public is given notice that the meeting exists. How the public is received, their comments, and how they are allowed to address the Board are all procedural decisions. This is something that the Board can establish through the Rules of Order. Jannette Borklund states that the important thing is that even though the Board might not be able to do what they want they are not being ignored.

Mr. Quinney states that the Open and public meetings act is a minimum requirement, If the Board feels that they need to make anything more restrictive or add they have something that they want to add. As long as it doesn't conflict with the minimums they are well within their authorities.

Mr. Crockett states that concerning closed sessions it is important to keep in mind that a court could order that everything is disclosed. It is important to be mindful when they go into a closed meeting to stay on topic not just because of the criminal penalties, everything discussed could come out. In the last couple of years, there was a United States supreme court case was on this topic and they order disclosure of everything. It was not just the community; it was the entire nation. It is something that needs to be kept in mind. The closed meeting provision is the only one that carries a criminal penalty. Mr. Quinney states that the criminal penalty has a mental requirement it is called mens rea this means knowingly or intentionally violating the closed meeting provision. If it is done negligently there could be some protection from the criminal violations. Mr. Crockett states that he has never witnessed an open meetings violation with this Board. He adds for example there was some confusion with the notices and everyone was present at 4:30 and the notices said 5:00. Everyone waited until 5:00. He notes that it is that important to make sure that the public can listen in to matters that are being discussed. He adds that he appreciated everyone's patience. Chair Warburtons states that she is grateful that Mr. Burton said at the beginning of the meeting that they needed to wait until 5:00 pm because of the confusion with the notices. It is really important to back each other up.

Jannette Borklund moves to adjourn. Motion carries.

Adjournment 6:20 pm

Respectfully submitted,

Marta Borchert