

BOARD OF ADJUSTMENT MINUTES
September 9, 2003
7:00 p.m.

Present: Chairman Bud Neslen, Al Hess, Planning Commission Representative Larry Rigby, Assistant City Attorney J.C. Ynchausti, Planning Director Blaine Gehring, Recording Secretary Connie Feil.

Absent: Vice Chairman Dean Holbrook and Leon Thurgood.

Bud Neslen welcomed all those present and had the Board Members introduce themselves.

Al Hess made a motion to approve the minutes for August 12, 2003 as written. Larry Rigby seconded the motion and voting was unanimous.

1. Consider granting a variance to allow a 6 foot fence in the front yard setback at 4067 S. Mountain Oaks Drive, Michael and Lisa Serio, applicants.

Michael and Lisa Serio, applicants were present. Richard Davis, Attorney representing the applicants, was also present.

Richard Davis explained that the Serios bought their property because they want to live in Bountiful and they now have a beautiful home with a beautiful view. There is a canyon above the home which has a natural water drainage on the east side of the property. The water drainage will stop at the road, Mountain Oaks Drive, and will drain to the northwest corner of the property. Because of the elevations, a 12-foot retaining wall on the downhill side of the driveway has been built. The six foot fence was built to protect pedestrians and the Serios from falling off of the retaining wall. The drop off is five to ten feet from the sidewalk.

Because of the unique elevations and orientation of the lot, the house was placed on the lot with the front of the house facing into the mountain and the back facing Mountain Oaks Drive and the side yard facing Highland Oaks Drive. The orientation of the house is on the original site plan that was submitted to the Planning Commission. When the contractor pulled the permit he and the Serios thought that the front yard was considered where the front of the house was facing. The wrought iron fence that was installed is actually located around the perimeter of the back yard.

Michael Serio asked the City if he could have a 6-foot fence on his property. He was told a 6-foot fence is only allowed around the back and side yard. The Serios became aware that the fence was an issue when they received a letter from the City stating that there was a violation having a 6-foot fence constructed on the corner. They feel that the fence is not in their front yard but the ordinance says that it is in the front yard. How this situation is legally constituted is beyond the Serios understanding.

Mr. Davis mentioned that having the fence on the east side is important because the water run off from the canyon will form a pool in the northwest corner of the property rather than running onto the road. The problem with this piece of property, which is unique and not the same as other properties, is the water coming down the canyon. If the fence is moved, a new fence will be dropped about 15 feet and then come back up again. The purpose for the fence is to keep the pedestrians safe from the elevation drop and to keep the Serios dogs inside.

Mr. Davis feels that the five specific findings that have to be met by State Law have been satisfied. Mr. Davis read the five steps and feels that all five have been met. There seems to be an issue with establishing a precedent. A variance is not a precedent for any other thing unless it is made without a finding. The Serios are not looking for a special favor. Given the nature and character of the property and the ability to use the property with the very small deminimus nature of the variance asked, there will not be a precedence to any other piece of property. This is such a unique piece of property compared to anything else in Bountiful. Mr. Davis stated that laws are never made just for laws sake, which is not an excuse to disobey the law, but granting this variance the Spirit of the Zoning Ordinance is obtained and justice is done.

Bud Neslen asked J.C. Ynchausti to explain the procedure and ordinance to this situation.

Mr. Ynchausti explained that Mr. Gehring sent a violation notice to the Serios in April notifying them that the fence around the corner of the property did not meet the fencing ordinance. The fence violates the City's zoning ordinance which requires such a fence not to extend beyond the front setback of the house. The fence may extend to the sidewalk next to the rear and street side yard, but not into the front setback area.

On June 3, 2003, the Board of Adjustment held a public hearing to consider the variance. At that time, the applicants asked that this item be tabled in order for a request to be heard by the Planning Commission and City Council to consider changing the ordinance to allow them to keep their fence. Also at that time, nobody was present either for or against the variance and the public hearing was closed.

The Planning Commission heard the amendment request on June 17, 2003, at which time they voted unanimously not to have the ordinance changed. The item was then referred to the City Council which decided not to set a public hearing to consider the amendment further.

The variance is now back on the table before the Board of Adjustment for your decision. No further public hearing is scheduled. This is the first time that a city board is being presented with the entire issue, all of the argument, all of the facts and being asked what to do in this situation.

There was a lengthy discussion about the placement of the fence. There were suggestions on where the changes could be and questions about the dogs. The Board members understood the situation with the dogs and the drop off. It was decided that the fence does not meet the ordinance and it has become a dog and aesthetic issue which is not enough to grant a variance.

Blaine Gehring explained that a variance should be granted if there is no other way to meet the ordinance. There is a way to meet the ordinance by cutting the fence down to 4 feet and place the 6 foot fence back to keep the dogs in. There are drop offs all over the City on properties that are steep. As far as no traffic with this property being located on a corner with only two houses, there will be development on the hillside. There are changes being made on the hillside ordinance and development will occur. Staff feels that this property should and can meet the ordinance. It does not need a variance to meet the ordinance. The purpose for a variance is that it cannot be met any other way, this property can be.

Richard Davis stated that he does not see that requirement written in the statute. Sometimes there will be variances for setback requirements or side yard requirements but that does not mean that is the only way to do it or you cannot get a variance. No where in the statute does it say "This is the only way you can do it". It has to say that "This is a unique issue on this piece of property and granting a variance it will not upset the public policy".

Blaine Gehring mentioned that Mr. Davis did not address the fact that there are specific things stated by State Law that the Board must find in order to find a unique hardship. Two of those things are; the problem cannot be self imposed and cannot be economic. Both of those cases apply. This is a self imposed problem. It is not a problem imposed by the property. The fence has been put up in violation of the ordinance and the Serios want to keep the fence. There is no unique hardship here.

Mr. Davis stated that any problem with any property can be resolved by economic changes. If necessary, property can be bought, you can make a fill from another place and this is not statutory as Mr. Gehring says. Both issues that Mr. Gehring has mentioned are not in the statute. It does say if the issue is unique to the property and is not otherwise negatively affecting the purpose of the ordinance it can be granted. All five of the findings are quoted by Mr. Gehring in his recommendation, but then he adds the other two elements that are not statutory.

Mr. Gehring asked J. C. Ynchausti to look up the statute to clarify the requirements. Mr. Davis looked in his Utah Code and admitted the two requirements were present in the statute.

J. C. Ynchausti asked to respond to Mr. Davis's comments. One of the things that this Board does, which is heard regularly, is establish precedent. The Board looks at a piece of property then look at the equation and see if a variance applies. The Board can't look at someone saying you did it for the Serios and now you have to do it for me. If the statute applies or does not apply the decision is easy. Precedent is something that the Board should not be looking at. You look at each individual piece of land and the uniqueness of the property.

Mr. Ynchausti feels that Mr. Davis has submitted the petition with the most honest and good intentions. The public clamor is something that this Board does not get to consider. What the

public does or says about this situation or future development the Board should not speculate about. The Board should look at what the ordinances and statute are and then decide.

Al Hess mentioned that in any case that comes before the Board the applicant has to meet all five conditions. Mr. Hess has a problem with the first three conditions. He feels that they are not being met and the last two are really questionable.

Bud Neslen asked for a motion either for or against the variance. Al Hess made a motion to grant the variance as written and Bud Neslen seconded the motion. Voting was denied by majority vote with Bud Neslen voting "aye" and Al Hess and Larry Rigby voting "nay".

Al Hess made a motion to deny the request for a variance and Larry Rigby seconded the motion. Voting passed by majority vote with Larry Rigby and Al Hess voting "aye" and Bud Neslen voting "nay".

Meeting adjourned at 8:00 p.m.