

PLANNING COMMISSION MINUTES
October 16, 2012
7:00 p.m.

Present: Chairman Tom Smith, Vice Chairman Dave Badham, Von Hill, Sean Monson, Michael Allen, Sharon Spratley, City Council Representative Beth Holbrook, City Prosecutor J. C. Ynchausti, City Engineer Paul Rowland, Planning Director Aric Jensen and Recording Secretary Connie Feil.

Absent: City Manger/City Attorney Russell Mahan.

Tom Smith welcomed all those present.

Michael Allen made a motion to approve the minutes for October 2, 2012 as written. Sean Monson seconded the motion and voting was unanimous in favor.

1. Introduction and swear in of newly appointed Planning Commission Member.

The City recorder was not present so Dave Badham made a motion to move this item to the end of the agenda. Beth Holbrook seconded the motion and voting was unanimous in favor.

2. Consider final subdivision plat for Villas at Stone Creek located at 600 N. 400 E., Gary Wright, applicant.

Von Hill recused himself from this item (Hill & Argyle are the engineers and surveying firm on this project).

Gary Wright, applicant, was present. Paul Rowland explained that the Planning Commission and City Council reviewed this proposal last month and granted preliminary subdivision approval. The only changes since that approval are the redline corrections and the provision of additional engineering information.

The subdivision runs primarily east-west along an extension of 550 North, with lots on both sides of the road. There is one adjustment that needs to be made where 550 North crosses the creek, the curves on the road need to be made larger. This will allow for a safer turn radius.

At the time of preliminary review, two substantial issues of concern were identified: First, the extension of 550 North through the corner of the LDS Church property must be accomplished in order for this subdivision to meet maximum cul-de-sac and circulation requirements. The City had hired an appraiser as the first step of the acquisition process.

Second, FEMA is in the process of updating the flood zone designation for these properties, and one of the conditions of approval must be that this approval is subject to FEMA's final flood mapping. It is anticipated that all of the floodplain will be contained within the existing creek

channels, with the exception of a portion of Dry Creek which the developer is required to pipe as part of this approval. After installing the pipe, the developer can request a letter of map revision from FEMA if necessary.

Staff recommends final approval of the proposed subdivision with the following conditions:

1. The extension of 550 North through the corner of the LDS Church property is completed fully at the expense of the developer, as set forth in Ordinance 2012-06 and the existing development agreement between the City and the Developer.
2. Any approval is conditioned upon the final floodplain map designation set forth by FEMA.
3. Any and all redline corrections are made.
4. Any and all fees and bonds are paid.
5. The final plat mylar is prepared and recorded within the required time frame.
6. Davis County grants final approval for the proposed creek crossings.

There is an additional condition as follows:

7. The developer is required to enter into a storm water facility maintenance agreement for the detention pond with the Bountiful City.

Gary Wright agreed with changing the radius of the curves for safety reasons and will comply with entering into the agreement for the detention pond.

Dave Badham made a motion to recommend to the City Council final subdivision plat approval for Villas at Stone Creek located at 600 N. 400 E. based on the facts and findings of Staff including the additional condition #7, with the owner of Lot 5 or other pertinent entity to enter into the agreement. Beth Holbrook seconded the motion and voting was unanimous in favor.

Von Hill returned to the table for the remainder of the meeting.

3. Consider a variance to allow building on slopes greater than 30% and retaining walls greater than 10 ft. located at 3109 S. Bountiful Blvd., Kirk Christenson, applicant.

Jeremy Reutzel, attorney, and Kirk Christenson, applicant, were present. Kirk Christenson is requesting a variance from the provisions of the Bountiful City Land Use Ordinance such that his client could keep improvements that have already been made to his property without city approval. A letter and materials provided by Mr. Reutzel, attorney, dated September 24, 2012 were previously given to each Planning Commission Member.

Mr. Jensen gave a visual presentation as he explained that Mr. Christenson's property is located at 3109 South Bountiful Blvd, and is wholly contained within a Residential-Foothill (R-F) zoning designation. A single family dwelling was constructed on the property in approximately 1979. Mr. Christenson acquired the property in February 2011.

Mr. Jensen stated that at some point subsequent to February 2011 and prior to July 2012, Mr. Christenson caused that a series of retaining walls that at points exceed 10 feet in height be constructed without a permit on a portion of his property where the existing slope of the ground exceeded 30%. Such action is contrary to the provisions of the Bountiful City Land Use Ordinance 14-1-105; copies of the ordinance were previously given to the Planning Commission members.

Mr. Christenson may also be in violation of other provisions; however, these represent the substantive issues.

It should also be noted that Mr. Christenson is a regional manager for BRAHMA, Inc., which is a “full spectrum contractor” (<http://www.brahmagroupinc.com/pages/experience.html>) and a subsidiary of Terra Millennium Corp., “One of the oldest and largest industrial engineering and contracting companies in North America”, (<http://www.brahmagroupinc.com/pages/home.html>). In addition, some or all of the work was performed by individuals who are also employees of BRAHMA, Inc.

Mr. Christenson’s primary argument is that the work performed was necessary to prevent rocks and other debris from rolling down the hillside and into his home. The argument of protecting the dwelling from uphill debris is legitimate, but this report will show that there is little or no nexus between the work actually performed and this objective, and that this argument is only a pretext for the applicant’s actual intent, which is to construct a sport court or similar feature, and a patio or raised viewing area, in areas not permitted by City ordinance.

Another substantive claim is that Mr. Christenson was unaware of the City’s ordinances. As Mr. Christenson is a professional contractor, this is a highly dubious argument, and is further weakened by the fact Mr. Christenson did not obtain a building permit or an excavation permit, a requirement that he would be fully aware of as a construction professional. Regardless, ignorance of the law is not a valid defense.

Mr. Jensen continued stating that this is a request for a variance and the State Statute regarding variances must be followed. The Planning Commission is required to base their decision on the criteria outlined by State Law, and the following is a copy of Utah Code 10-9a-702, which outlines the duties of the appeal authority in relation to variances and sets forth the requirements that must be met in order for a variance to be granted.

Mr. Jensen reviewed the Utah Code with all those present.

10-9a-702. Variances.

(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to

the applicable appeal authority for a variance from the terms of the ordinance.

- (2)(a) The appeal authority may grant a variance only if:*
 - (i) 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;*
 - (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;*
 - (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;*
 - (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and*
 - (v) the spirit of the land use ordinance is observed and substantial justice done.*
- (2)(b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:*
 - (A) is located on or associated with the property for which the variance is sought; and*
 - (B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.*
- (ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.*
- (2)(c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:*
 - (i) relate to the hardship complained of; and*
 - (ii) deprive the property of privileges granted to other properties in the same zone.*

(3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.

(4) Variances run with the land.

(5) The appeal authority may not grant a use variance.

(6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

(a) mitigate any harmful affects of the variance; or

(b) serve the purpose of the standard or requirement that is waived or modified.

Mr. Jensen explained that Staff has reviewed the letter and material submitted by the applicant and his attorney. It states that the primary purpose of this variance is for the safety of the home. In his opinion, the information submitted doesn't accomplish or meet the intention stated, and the improvements on the ground don't reflect the hardship being complained about.

Mr. Jensen presented visual pictures of the property showing each level of ground that was built on slopes greater than 30%, and the retaining walls greater than 10 feet in height. The improvements do not address the issue of retaining or catching things falling down the hillside. It appears that the improvements were constructed for recreational purposes and not for the issue being complained of (retaining or catching debris from the hillside).

Mr. Jensen continued with aerial photos showing the landscaping and retaining done by the surrounding properties. The applicant's property is the only one in this area that has built this far up the hillside. All surrounding homes have stopped their building at 30%. If the applicant had applied for a building permit this situation would not exist because the application would have been denied.

In regards to Section 10-9a-707 (2)(a)(i - v), Staff's opinion is that the petitioner has not provided sufficient evidence such that the Commission can grant the variance as requested.

First, literal enforcement of the ordinance in regards to retaining wall height, the maximum height of cuts and fills, and the requirements regarding building and excavation permits would not create an unnecessary hardship because a home and landscaped yard have existed on the property since 1979. It cannot be argued that the applicant is being denied a fundamental property right because the property has been developed and lived on for past 33 years.

Second, there are no special circumstances associated with this property – most of the properties along the east side of Bountiful Blvd have steep rear yards with slopes in excess of 30%.

Third, granting this variance would actually give the applicant rights and privileges above and beyond those belonging to adjoining property owners. No other property in this area has been disturbed and developed to the same extent as the applicant's.

In regards to Section 10-9a-707 (2)(b - c), the applicant must show that the hardship that the variance mitigates is not self-imposed or economic. The applicant's claim is that the purpose of the retaining walls and excavation is to prevent rocks and other materials from rolling down the mountainside and damaging his property. However, a review of the actual work performed and of other properties with similar situations does not support this claim.

First, the information provided by Intermountain Geo Environmental Services, Inc., and from Recon Wall Systems, in no place discusses the use or design of these walls as deterring or otherwise preventing rocks and debris from colliding with the dwelling. If the purpose of the walls was truly to stop uphill debris, then: 1. The wall designer would have included an uphill lip, swale, or similar component for catching debris, 2. The structural engineer would have included calculations as to the sufficiency of the uphill lip, swale, or other feature for detaining such debris.

Second, a review of the site plan from Balling Engineering clearly shows that the purpose of the walls is to create large, flat areas that can be used for the enjoyment of the property owner. This is evidenced by the large concrete surface on the middle plateau, the stone pavement on the top plateau, the landscape feature on the top plateau, and the interconnecting stairs and walkways. None of these improvements are typical to an erosion or soil stabilization effort, but they are exactly the type of improvements necessary for a sport court and a patio.

Based on this analysis, the Planning Commission cannot grant a variance for the improvements as constructed; there are not special circumstances that apply just to this property and not other properties in the area, the property owner is not being deprived of a right enjoyed by other property owners, and the fact that the work was performed without a permit makes the situation a self-imposed or self-created hardship. If the applicant had applied in advance of construction for a permit to disturb some of the 30% slope area to create a legitimate, low impact soil stabilization feature, this most likely would have met the requirements such that the Commission could grant a variance. However, since this is not the case, the Commission should deny the variance for the reasons stated.

Staff recommends denying the variance and adopting findings of fact based on the arguments presented in the staff report.

Jeremy Reutzel explained that the variance is not for the walls over 10ft but for building on slopes over 30%, and that the walls over 10 feet will be reduced to meet the ordinance. Mr. Reutzel explained that the retaining walls were designed in three sections and built to stop falling rocks and debris from falling into the home. Mr. Christensen did landscape the flat areas, which were no longer at 30%, after the walls were built.

Mr. Reutzel explained that the previous owner had constructed a fence to stop falling rocks from the hillside. The fence was torn down because of falling rocks. Mr. Reutzel stated that this property is unique from the rest of the neighborhood. His reasoning was that this property was the only one without retaining walls. It is also unique because the area above the home was used as a recreational area leaving no natural vegetation. With the wind storm last year the trees had to be removed leaving no retaining or trees to stop any debris from falling into his house.

Mr. Reutzel stated that Mr. Christenson didn't recognize that this portion of the property was unusable. The zoning map doesn't show that this is unusable land and all of his neighbors have retaining walls. There are neighbors that support Mr. Christenson in protecting his home. Mr. Christenson's intent to build walls and improve his property has nothing to do with any requirements for approval of a variance. The request is for fixing the falling rocks, which the walls have done that. Mr. Christenson has found rocks behind the wall, so the wall is doing what it was designed to do.

Mr. Reutzel explained the criteria for allowing a variance.

1. Unreasonable hardship and self imposed: There is a hardship with the rocks falling into his house. This is not self imposed because Mr. Christenson did not cause the rocks to come down on his house.
2. Special circumstances to this property: There is a fundamental right to live in your home safely. All of his neighbors have retaining walls to protect their homes and he is entitled to the same.
3. Public interest: The public interest is served by safety. Mr. Christenson built the best retaining walls that he could buy. He spent thousands of dollars on this project to make sure that it was done right. His neighbors approve of his improvements.
4. Spirit of the Land Use Ordinance: The key purpose of the Land Use Ordinance is safety. Mr. Christenson is trying to protect his home. He should be able to use the walls for the safety issue.

Mr. Reutzel stated that all of the standards have been met. Mr. Christenson did not obtain a building permit and he recognizes that. He also knows that penalties will be associated with that and he is willing to pay. Obtaining a building permit is not a condition for granting a variance. There is nowhere in the statute that says you have to have a building permit to obtain a variance. For all of the above reasons the variance should be granted.

Kirk Christenson explained that his intent for building the walls is for the safety of the property. There was no retention on the property and the excavation for the home was to the foundation only. Everything coming down the hillside was straight to the home. The intent was for safety issues but subsequently the enjoyment of the project is the reason for spending a large amount of money for it. Mr. Christenson pointed that the three levels of walls are similar to his neighbors. He also explained that in his profession his clients obtain their own permits and he didn't realize that he would be required to get one for his home.

The public hearing was opened for all those with comments and concerns.

William Meyers, residing at 3125 S. Bountiful Blvd, explained that he watched the walls and landscaping being installed. The project has been maintained and done very well. He feels that this property is unique because of the deer trails and ravens that run across it. Mr. Meyers has a drainage canal that runs along his property to stop the debris. Mr. Christenson does not have this canal or the trees to help his situation. Mr. Meyers can understand the need for why Mr. Christenson built the walls.

Jed Iverson, previous owner of this property, mentioned that he lived in the home for 5 years before Mr. Christenson. He sold the home because there wasn't a back yard because of the hill. Mr. Iverson mentioned that there was a fence and trees to stop the rocks from falling into the yard. Over time that didn't work. There is a pile of rocks on the back property that Mr. Iverson had collected from falling down the hill.

Dave Phillips, residing at 3101 S. Bountiful Blvd., has lived in his home for 30 years. About 20 years ago he landscaped the backyard and terraced the yard with large boulders. Over the years tires, rocks, and all kinds of debris have fallen into the backyards along this area. The walls and landscaping on Mr. Christenson property has increased the value of all the properties.

Lanny Hansen, residing at 3083 S. Bountiful Blvd., explained that before some of the homes were built the hill was used by motorcyclists. There are no trees on this property which makes the soil very loose. There is nothing to stop anything falling down the hill. In the winter, people are snowboarding and tubing down the hills. Mr. Hansen supports the approval of this variance.

The public hearing was closed without further comments or concerns.

J.C. Ynchausti explained that when a variance is considered the judgment must be based on the facts presented. The doctrine of public clamor allows for additional information, but comments by neighbors and friends are not considered facts. Mr. Ynchausti's opinion was that not everything that had been said was something that could be considered in making this decision.

Lloyd Cheney, Assistant City Engineer, drew a diagram showing the slope of the hillside, which ranges from 30% to 50%, and the contours of the cuts into the hill. He stated that when building a home adjacent to an ascending slope, the building code requires that the structure be set back 15ft from the toe of the slope or the wall.

Mr. Rowland also drew a diagram showing the contours of the natural ground before and after the construction of the walls and cement pads. The City ordinance states that you cannot build, excavate, or disturb ground of 30% or greater. Ground greater than 30% is considered undevelopable but can be landscaped with trees, vegetation and walking paths. Also, the grade of ground over 30% cannot be changed by more than ten vertical feet.

Mr. Ynchausti explained that when considering a variance it is only the subject property that can be considered. What has occurred or been granted in other situations is not relevant. A decision should be based on the application of elements from the statute to this property. Each property is unique and should be judged on those elements.

Mr. Christensen agreed with Mr. Ynchausti that each property is unique in its own way. He doesn't agree with a government entity telling him what he can and cannot do with his property. All he wants to do is improve his private property.

There was a discussion regarding the grades of the hill, cuts into the hill, height of the walls, and the fact the work was done without any permits. The Commission Members discussed whether the applicant was asking for a variance in order to justify, after the fact, disturbing slopes exceeding 30%. The argument was presented that the applicant did not get a permit, and that if he had applied it would have been denied because of the slope exceeding the 30%.

Michael Allen made a motion to deny the variance based on the fact that all the elements of the statute have not been satisfied. Von Hill seconded the motion and voting was unanimous 5-0 in favor.

Mr. Jensen explained the process of appealing this decision.

4. PUBLIC HEARING – Consider update to 2012 biennial Moderate Income Housing Report.

Aric Jensen reviewed the second draft of the Moderate Income Housing Report. There were some changes made to the calculations by adding the costs of basic utilities. As a result, the average and range increased in some situations. The older units are more affordable versus the newer units, and as more units are built the older ones will reduce in rent. At this time the City has its share of moderate income housing units.

After a brief discussion the public hearing was opened for all those with comments and concerns.

The public hearing was closed without any comments or concerns.

Von Hill made a motion to recommend to the City Council approval of the biennial Moderate Income Housing Report as amended. Michael Allen seconded the motion and voting was unanimous in favor.

5. Planning Director's report and miscellaneous business.

Mr. Jensen mentioned that because of Election Day on November 6th, and Thanksgiving the week of November 20th the next Planning Commission meeting will be held on November 13, 2012 at 6:00 p.m.

Meeting adjourned at 8:50 p.m.