



**BOARD OF ADJUSTMENT
TRAINING SESSION
June 20, 2012 – 7:00 PM
Multi-Purpose Room**

Board Members in Attendance: Michael Barker; Matt Stewart; Michael Jex; Ron Fakler; Karen Ellingson; and Jose Inclan

Board Member Excused: Don Olsen

Council Representative in Attendance: Dean Olsen

Staff in Attendance: Planner Brandon Snyder and Secretary Darlene Gray

Guests: Payson City Planner, Jill Spencer; Payson City Board of Adjustment Members, Bob Prostgaard, Donnie Bufton, and Ray Wilson

Guest Speaker: Paul Johnson, URMMA

Call to Order

BM Fakler called the meeting to order at 7:00 PM and welcomed everyone to the meeting.

Approval of Agenda

BM Jex moved to approve the agenda . BM Ellingson seconded the motion. The vote to approve the agenda was unanimous.

BM Ellingson reported that the spelling of her name was incorrect. BMs Stewart and Inclan also corrected the spelling or representation of their names. The corrections were made.

Approval of Minutes: March 21, 2012

BM Ellingson moved to approve the March 21, 2012 meeting minutes. BM Jex seconded the motion. The vote to approve the meeting minutes was unanimous.

Training Session: Paul Johnson

Planner Snyder introduced Mr. Johnson and explained that training has been held each year for review of changes in State Code. He thanked Mr. Johnson for his time and turned the meeting over to him.

BM Fakler asked Mr. Johnson if the Board of Adjustment was a quasi-judicial body and if the applicant always had the right to confront their accuser. He added that the accusers were never brought into the hearing and asked if there were any problems with that procedure. Mr. Johnson indicated that there were no problems with that procedure. He added that subpoenas could be issued and for that reason, people like to stay anonymous. Mr. Johnson explained that the witness becomes the Code Enforcement Officer

or the board who hears the appeal of the zoning official. BM Fakler stated that the zoning administrator had the responsibility of finding the evidence. Mr. Johnson stated that in the Board of Adjustment proceeding, whoever the City administrative zoning person appoints to make the decision that the applicant is appealing, they are the witness. Planner Snyder indicated that Director Fred Aegerter was the City Zoning Administrator. BM Fakler reiterated that if the applicant appeals to a court of law, then the City Zoning Administrator becomes the witness. He added that the clerk was important because she makes a record of the proceedings. Mr. Johnson stated that whatever the minutes say, happened. He indicated the reasons that the decision must be in the minutes and that the Board member making the motion should not just make the motion without stating why. If there are exhibits, they must be submitted to the clerk to be part of the record. Mr. Johnson reported that the court would look at the meeting minutes to determine if the Board used discretion. Secretary Gray explained that she had to submit verbatim minutes for a case that went court. Planner Snyder indicated that one item previously reviewed by the Board may be coming back to them.

Michael Barker introduced himself to the attendees. He reported that his prior experience was as a Planning Commissioner for six or seven years. Mr. Johnson indicated that BM Barker was the current legal counsel for the Salt Lake City Unified Police Department. Previous to that, he was with the Orem City Attorney's office and Mr. Johnson was Mr. Barker's supervisor.

Matt Stewart introduced himself. He indicated that he was new to the Board as an alternate. He currently works for Mity-Lite in Orem and stated that he is a life-long resident of Springville.

Ron Fakler introduced himself and stated that he was the owner of Fakler Tire, a business he sold about six years ago.

Mike Jex introduced himself and indicated that he works for Intermountain Health Care as the Accounts Receivable Assistant Manager.

Dean Olsen introduced himself and indicated that he is the City Council Representative to the Board of Adjustment.

Karen Ellingson introduced herself and indicated that she has a stay-at-home job.

Jose Inclan introduced himself and indicated that he owns his own business doing custom programming applications for cell phones.

Bob Prostgaard introduced himself and indicated that he served on the Payson City Council; three terms on the Planning Commission as well as three terms as a Board of Adjustment member. He stated that he loves to serve. He reported that he was the real estate director for a large firm in Salt Lake City; went to Rimrock Construction working on a 125-bed assisted living facility in Spanish Fork.

Donnie Bufton introduced herself and indicated that she is a sixth-grade teacher. Prior to that she was a draftsman for construction drafting and she also did drafting work for the Carbon County Court House.

Jill Spencer introduced herself and indicated that she has been the City Planner for Payson City for 14-years.

Ray Wilson introduced himself and indicated that he worked for the State of Utah for 33-years, but has since retired.

Mr. Johnson indicated that some cities like to stack the Board with people who know real estate, etc., but State law indicate that cities should not leave out a mixture of experiences. He stated that it would be helpful to have individuals with a knowledge of construction, setback requirements, zoning-type ordinances, but most were just looking for people with brains; those who can understand a problem and follow the law. Mr. Johnson added that problems should be solved within the confines of what State Code allows.

Mr. Johnson distributed a questionnaire for the group to complete. He explained that the Board must stay within State requirements and that they could not grant a *use variance* because every zone has uses that are allowed. Ms. Spencer asked how the Board should consider accessory apartments. Mr. Johnson indicated that would be a use variance.

BM Fakler explained that there was a case that the Springville Board of Adjustment reviewed regarding accessory apartments. He asked who would have the burden of determining whether the apartment was rented for 30+ years. He stated that he understood that somewhere in the Ordinance, the City had the burden of proof. Mr. Johnson stated that generally the applicant has the burden of proof.

Mr. Johnson continued with his presentation. He explained that the Board Members hear appeals regarding zoning decisions and grant or denies variances. From the ordinance language, the Board Members decide if the decision by staff was right or wrong. If wrong, the Board can reverse the decision and if all criteria are met, a variance can be granted.

Mr. Johnson explained that there must be substantial evidence in the record to support the Board Member's decision. He indicated that the Court will look at the approved meeting minutes and may ask for minutes that were transcribed from the meeting recording. He stated that the Chairperson must make sure that there is substantial and sufficient evidence on the record.

Mr. Johnson explained the Utah Risk Management Mutual Association. He indicated that it was a pool of 20 cities organized to protect cities. BM Fakler asked if Mr. Johnson has seen any cities sued. Mr. Johnson indicated that he had not and added that cities also have insurance. Mr. Johnson explained 'substantial evidence'.

Mr. Johnson discussed economic hardship. He explained that it would be expensive to take something to the Court of Appeals because outside counsel would have to be hired to represent the Board of Adjustment. Ms. Spencer stated that because of that possibility, should the City Council members not attend the Board of Adjustment meetings. Mr. Johnson stated that one representative should attend the meetings, but added that they could not vote. He indicated that there should be a separation of powers and the Council Representative must not sit on the stand with Board Members. Ms. Spencer asked if the Council representative could participate in the discussion. Mr. Johnson indicated that they should not. BM Fakler asked if a Planning Commission member should sit on the Board of Adjustment. Mr. Johnson reiterated that the Board of Adjustment should be an independent body and that Council Members and Planning Commissioners could not vote on items brought before the Board.

Mr. Johnson indicated that if a board member or a family member stands to gain financially from an item brought before the Board of Adjustment, that board member must recuse him/herself. That member must leave the room and they cannot return until action has been taken. He stated that Board members could not accept a gift that would tend to influence a normal, rational person, or a gift given for a decision that has already been made. Ms. Ellingson asked what if a decision had been made that was not in favor of the applicant. Mr. Johnson suggested that maybe the applicant was just thanking the Board Members for their service, but they should come back later with the gift.

Mr. Johnson explained that the Board Members could not do a De facto zone / boundary change. BM Inclan asked if the City Planner should suggest a zone change. Mr. Johnson stated that the City Planners make recommendations to the City Council. BM Ellingson asked if the Board Members agreed on a zone change, could the Planners make that suggestion to the Planning Commissioners. Mr. Johnson stated that the Board Members could approach the Planning Commissioners.

Mr. Johnson explained that the Board Members could not have any contact with parties on a case pending – ex parte contact, nor could they have any discussion with anyone. BM Ellingson asked where the Board Members could go if they had any questions. Mr. Johnson stated that the Board Members could go to the Planning staff, but not the applicant. BM Ellingson asked if the Board Members could go to look at the property in question. Mr. Johnson indicated that they could. BM Barker stated that it may also depend on the relationship the Board Member has with the individual; i.e. congregation members. Mr. Johnson stated that it was acceptable for the Board Member to sit on the Board when a member of his/her ward comes before them. He suggested avoiding the appearance of a conflict of interest and added that the law did not require the Board Member to recuse him/herself.

BM Ellingson asked if Board Members could discuss an item outside of the meeting with anyone prior to their decision. Mr. Johnson indicated that should never be done. If the Courts take a deposition, they will ask who you've spoken to, etc. BM Fakler stated that any discussion between Board Members must be done during the meeting in front of the attendees. He explained that the Utah County Board of Adjustment members had gone into a private room for discussion. Mr. Johnson stated that the Open Meeting law applies to the Board of Adjustment. He added that they must post notice of the public meeting. Mr. Johnson stated that the exceptions were when a public body met behind closed doors to discuss ongoing or eminent litigation; to discuss the competence of an individual; to purchase land or the sale of land; or for security issues. BM Fakler stated that the Utah County Board actually made their decision behind closed doors. Mr. Johnson indicated that they may have been a boundary commission and not a public body. He indicated that City Councils discuss the identified issues behind closed doors, but they must come back to the open meeting to act upon their final decision.

Ms. Spencer asked if someone applied for a use variance, could staff discourage them from applying for a meeting with the Board of Adjustment. Mr. Johnson indicated that the staff could, but staff should also explain why the Board of Adjustment would not grant the variance. Ms. Spencer asked if the City would be at risk for doing that. Mr. Johnson indicated that the City would not be at risk because it was within the law.

BM Barker stated that there was always a question of what is and what is not allowed. Mr. Johnson suggested having the City Attorney counsel the Board Members regarding not granting a use variance.

He indicated that staff could accept the application fee, the item goes before the Board, but the Board could not grant the use variance because they must comply with Code.

BM Jex asked if the Development Department could tell the applicant that they could not apply to the Board. Mr. Johnson indicated that staff could discourage the applicant.

BM Fakler asked if anyone had any other matters to discuss.

Planner Snyder reminded the Board Members that they would have to nominate a chair person at the next meeting.

With nothing further to discuss, BM Inclan moved to adjourn the meeting. BM Barker seconded the motion. The vote to adjourn was unanimous. BM Fakler adjourned the meeting at 8:38 PM.