



**Springville**

**Board of Adjustment  
December 19, 2012 - 7:00 PM  
Council Chambers**

Board Members in Attendance: Ron Fakler, Michael Jex, Jose Inclan, Michael Barker, and Alternates Matt Stewart (Alternate Karen Ellingson was in audience)

Board Members Excused: Don Olsen

Council Representative: Dean Olsen

Staff in Attendance: Director Fred Aegerter, Planner Brandon Snyder, Legal Counsel John Penrod and Secretary Darlene Gray

Others in Attendance: Jody Burnett, Independent Legal Counsel for the Board of Adjustment; James Driessen, Legal Counsel for the applicant; David Fuller and Ruth Fuller, the applicants; Travis Anderson, Surveyor

**Call to Order**

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

**2013 Meeting Schedule**

BM Inclan moved to approve the 2013 Meeting Schedule as published. BM Jex seconded the motion. The vote to approve the 2013 Meeting Schedule was unanimous.

**Approval of Minutes – March 21, 2012 and June 20, 2012 Training Session**

BM Fakler asked if the Board Members had an opportunity to review the minutes for the regular session and the training session.

BM Jex indicated that there was one typographical correction to the March 21, 2012, meeting minutes. He identified page four, line 142; *he* should be *the*. Secretary Gray indicated that she would make the correction.

BM Jex moved to approve the March 21, 2012, meeting minutes with the correction made. BM Barker seconded the motion. The vote to approve the March 21, 2012, meeting minutes with the correction was unanimous.

BM Barker moved to approve the June 20, 2012, Training Session minutes as written. BM Stewart seconded the motion. The vote to approve the meeting minutes was unanimous.

## **Approval of Agenda**

Director Aegerter indicated that the agenda had not been approved. BM Fakler read the agenda and called for a motion to approve the agenda.

BM Jex moved to approve the agenda as presented to the Board. BM Stewart seconded the motion. The vote to approve the agenda was unanimous.

*(Verbatim minutes of the meeting from this point)*

## **David and Ruth M. Fuller seeking an appeal of the Community Development Director's second denial of a Certificate of Non-Conformity concerning property located at 2025 Canyon Road.**

BM Fakler: Okay on this issue, as I understand it, I'd like to kind-of set the procedure we're going to follow, the person making the appeal; this has been to the District Court, I don't know if you are all aware of that. After we looked, made the decision, it was appealed to the District Court, the District Court had a hearing and has remanded one of the two issues we grappled with, back to us and if I could read, have you all read the Court's; well I'd like to read it into the record anyway. The District Court, Judge Claudia Laycock, was held February 16, 2011, concerning the nonconforming application by the Fullers. Okay, she stated in her opinion, "In the additional proceedings, the City will not attempt to prove Plaintiff's have abandoned the nonconforming use they claim, nor require Plaintiff to provide any lack of abandonment, but rather (and this is our issue for tonight) but rather the parties will focus on whether and to what extent Plaintiff's can prove the nonconforming use of their property as a two-family dwelling was ever lawfully and legally established in the first instance. The person, as I understand this, making the appeal has the burden of proving that the error has been made. New evidence by the appellant can be given and additional evidence may be given. The Board's decision must be rendered by the information given in the Community Director's decision and any new or additional information given by the appellant. This is not a Public Hearing. Public may attend, but no public comment will be allowed. So again, I wish to re-state the issue we will be grappling with tonight as Judge Laycock has said it to us. Whether and to what extent, appellant's can prove the nonconforming use of their property as a two-family dwelling was ever lawfully and legally established in the first instance. The procedure will be as follows; presentation first will be by the appellant. Response by the Community Development Director or his spokesman, which I understand will be Attorney Penrod. At that time, questions by the Board Members may, and I sure will, be asked of either side. Finally, concluding statements will be given by the appellant since they are appealing this. And finally after all of this, the Board is going to make a decision. So, I would like to get this meeting started. The appellant's ready.

Mr. Driessen: Yes

BM Fakler: Thank you.

Mr. Driessen: Last time I was here I tried to call you all Your Honor since I'm used to dealing with judges. If for some reason that happens again, please excuse me.

BM Fakler: Well, we're certainly flattered. We're really not that distinguished.

Mr. Driessen: First, I'm gonna let you know that what I'm mostly going to be doing here tonight is explaining, talking about exactly what was just read into the record. What we're here for and what we're here to decide. There's, there's quite a bit of documents and evidence in here and I don't think anybody really disputes what, what, what it is. What we're gonna be talking about is what it means. I brought with me some legal opinions, now they weren't in the record but what you're gonna hear tonight is a lot of legal arguments because we're on remand, we're not here arguing the first instance again. And so I just wanted you each to have a copy of that as I'm talking about it; at least you'll know what I'm talking about. And (Mr. Driessen left the podium to distribute the document) and

Planner Snyder: Do you need additional copies made.

Mr. Driessen: Mr. Burnett should be pretty familiar with this decision, read from 2012. Will the microphone pick me up if I do this?

Planner Snyder: no. Do you need additional copies? We need one for the record.

Mr. Driessen: Why don't I, why don't I hand these to you and if you can hand them I think I have just enough here; 1, 2, 3, 4, 5. Okay, we'll need one more copy. While you're at it there's gonna be one more case I that I'm gonna be talking about also and actually, I should keep one of those or I'm not going to know what I'm talking about. Yes, same thing so. The second one is John Harris v. Springville City a case of 1984, which again I think very pertinent here.

BM Fakler: Why don't we wait, if you will, we're missing one for Board Member Stewart. Could you wait Counselor until he can gets his copy?

Mr. Driessen: Sure.

Mr. Burnett: I'll tell you what, to save time, I can get my copies later and I can give my copy to Mr. Stewart. That way Mr. Driessen can go ahead.

Mr. Driessen: Thank you. And I'll be fairly quick. I've got, (Mr. Driessen held up a sheet of paper displaying notes on the front and back) these are my notes that I'm gonna talk to you about tonight. First, we're here on remand so it is a little bit different why we're here. The last time, in during the Board of Adjustment hearing, we brought in a witness, Mr. Whiting who spoke about growing up across the street from this house. He saw when the house was brought in and put on, on, on the foundation. You remembered he was in kindergarten and had no friends and that there was people who lived upstairs and there were another family living downstairs. And then in the process of that hearing when we got to talking about it, it was posed to the Board that, well, it really doesn't matter what evidence we bring into the Board today, because all we're really deciding is what, whether Mr. Aegerter made a mistake or not and we don't have to really listen or consider this new evidence that Mr. Whiting had brought before them. When we got to the District Court, certainly I argued that that was manifest there; that why do you hold hearing and why do you take evidence if the Board can't consider it. And as we were going in District

Court, we had quite a few other issues up at the District Court that was the, the, the legality of the annexation, the, the, the redrawing of the zoning map, the constitutionality of the ordinance, all those issues still up at the District Court right now that were remanded here with Judge Laycock in the hopes that we're gonna resolve the zoning issue and with that, rise or fall all these other constitutional issues and things that are before the court up there. So I just wanted to give you a little background; you can take my word for it; I'm certainly, certainly I'm sure that Mr. Penrod, he can tell you the way he sees it, but I think it's important that we know why we're here. And tonight what's the record, I think there was a little bit of back and forth and dispute about what's in your record here tonight. We feel because we are on remand and I'll read the remand again, I think you jumped right to paragraph number two which is the question we're here to decide, but number one, the City's February 16, 2011 decision denying Plaintiff's nonconforming use application is remanded for further proceedings and consideration of evidence by the Community Development Director of Springville City. Now when this order was being written up, it came as a result of a stipulation and of course, exactly how that's gonna be written, that's what attorneys do, and we went back and forth trying to describe what we're exactly gonna hear. We felt that certainly the evidence that's gonna be heard is that will be added was that testimony by Mr. Whiting that we never got. We're gonna argue here tonight that Mr. Aegerter took it upon himself to go a step further and did all, quite a bit more research which is right in there, so we would just say on the record, this is a remand this isn't a redo, this isn't go back and, and, and, and, and recalculate everything and so, so, so my argues are gonna have two, two, two different directions tonight. And if you're used to hearing kind of any kind of a legal approach to things this often happens, okay. Number one, we don't think Mr. Aegerter was supposed to go back and, and go research as many more records that he could find to try prove legality of the, of the property which he, which he did, try to do that, he was really only supposed to look at record that we already, plus add in the, the testimony of Mr. Whiting.

Now, second, if we lose on that and the Board says, oh well we think that we should look at all the new evidence that Mr. Aegerter got on the second time around, then we're gonna argue that it's still not adequate that the appellants have met their burden of showing prior, legal use. So, so that's my argument two fold tonight and, and, and the big question that we have before us here is what is the burden, what is the burden to show legal, prior use? And that I think is explained very well in this decision here that you each have a copy of it's, it's *Daines v Logan City* was argued by Jody K. Burnett and Robert C. Keller. They're, they're I guess they're kinda super stars here cause they got a nice decision for them and absolutely they go this case stands for the fact that it can't just be prior use, it has to be legal, prior use in order to meet the requirements for nonconforming use and when Mr. Aegerter went and did his extra research, he went to do some title searching to find out, okay let's look and see what really happened on this this property and the Fullers and Springville, it was quite a bit larger piece of property at one time and it had been divided several times and when you look to the record, Mr. Aegerter's report will say that he's going to assume that this one-acre lot that was transferred must have been talking about this property. There's actually nothing in there that really shows the, the half-acre which the property is today. The argument is by Mr. Aegerter that there was an ordinance in the County before it was annexed into the City that required one and a half-acres in order to be a legal, two-family dwelling. And then the results should be then according to Mr. Aegerter, that there's no way that this property could ever have been legal. And even if it was, then I guess the second argument Mr. Aegerter would make, although I don't think he really made it quite well in

his report, was that even it was that the appellants hadn't met their burden of showing prior, legal nonconforming use so that this was a two-family dwelling. I don't think anyone contested this has been now a two-family dwelling for quite some time since about 1975 according to the testimony of Mr. Whiting who was in here and I think was very credible, persuasive, especially when you're looking at credibility of the witness of the ability to recall the facts of being, you know, childhood, not having any friends and remembering the friends that moved in across the street upstairs and downstairs. But Mr. Aegerter argues that that use was illegal because of the County Code. If you look at this Logan City case, that is not the standard. The standard is whether or not there was legal use and this case goes on to say that this kind to prove illegality of the use is actually opposite to the standards. That the, the illegality of the use is, is, is what the other side was trying to prove that that Logan City hadn't met it's burden to show that it was illegal. So you got this kinda of dichotomy going on okay, was it legal or was it an illegal prior use? And what, what we will, we, when I say me I'm talking about me and my clients here, we would argue that what you're, what was presented to the Board is prima-fascia at first level evidence that certainly there was two-family dwelling use. Since the title records that Mr. Aegerter produced really can't hone in on this property, at the time there was also a Church building being built when this property was subdivided somehow and there was some accordance satisfaction going on with, with the, there were over six-acres and a lot of that property was growing, there was several different dwellings that were being built on this same six-acres over the years. And what we don't have doesn't seem to be there ever will be the actual building permits, any variances, anything that the County ever engaged in over this property. And so it's our position that because there are no records of the variances, there are no records of the actual building permits, that we've established that there was this, what would be nonconforming to the Springville City Ordinance back as early as 1975 before the Ordinance came into effect, before the annexation, there was a two-family dwelling there. The County certainly had never made it illegal. They had an ordinance out there about having to have a one-point-five-acres, but during this time that this property was divided the County certainly didn't object to the two-family dwelling and it was legal. If you take that burden now, you're gonna put that burden on the appellants here to say that they're gonna have to go and produce these non-existing records to to show the variances, to show the, the, the building permits that were issued to, to allow this property be a two-family dwelling; you have shifted the burden improperly even, now, now certainly it's, it's amazing how many of these cases end up at the Court of Appeals and how many of them arguing. It's not that one person can read this and say exactly what it says and another's gonna come and argue what it doesn't say, but we are certainly arguing here that because of this this whole idea that in this case they are arguing the standard is not proving the illegal use, it's whether the appellants met their burden of showing that they were there legally. They were there with that two-family dwelling for many years before this Ordinance came in before the, it was even annexed and we're gonna say that that makes the difference because in this case, they're talking about the City Ordinances that changed and whether or not the use was still legal. We have a different situation here. This was not the City of Springville, this was the County before this ever happened and, and, to, to, to come back for Mr. Aegerter to try to say well it had to be illegal because we found this County Ordinance from way back when that had this one-and-a-half acre requirement. That's not the question. He doesn't have to meet the burden to proving that it's illegal. We have on the appellant's side, a prima-fascia requirement to show that two-family dwelling was there; it was legal and, and that is the issue, the only issue before the court today. Okay and Mr. Aegerter focused on illegal.

The, the, the, now will the, will the appellants actually have to produce building permits and variances to convince this Board? And that is the question that's before you. Is that really part of the appellant's burden?

BM Stewart: Would you please repeat that? Your last sentence.

Mr. Driessen: Will this Board have to require the appellants to produce valid building permits from the County or variances in order to meet their burden that the prior use was legal? As Mr. Aegerter says that they have to. We don't believe that there's any case precedent out there that says that that is the burden and so that's part one the, the argument. Now, so where are we today, cause there, there are still issues back at the District Court. What ever's decided here, there is still the constitutional issue the, the zoning map, the, the appellants here have a different case up at the District Court than what's here before you today. They're actually challenging how the zoning map came into being as well as this this case although they have also kind of said that all those constitutional issues that they're kinda willing to let go if, if we can resolve the nonconforming use and that's really where we are today and Judge Laycock has been adamant about sending this back here totally in the hopes that we come to some kind of a resolution of this here today. And, and which brings up the question which is the second case which is Springville City, John Harris v Springville City the 1984 case and this clearly says that, that the Board here just really feels sorry for the plaintiff, they've been through a lot, they really just should have the nonconforming use, it's, it's, it's not a big deal that you're really doing to steer yourself wrong. That's what was decided here in Springville.

BM Fakler: Pardon me, did we get a copy of the case you're talking about now? I'm still reading the Daines case here. (Mr. Driessen distributed the Harris case document.) Thank you.

Mr. Driessen: as a matter of fact, this is, before this all started before this went to the Board it went to the appeal, it's actually a previous issue over animal rights on this very same property. And that went to the Courts and what happened at the District Court is the parties got together and decided to settle it and they came to the arrangement that the, the, there was a nonconforming use for animal rights on this property. It's kinda odd I think, when you have a decision like Daines, not like Daines, like Harris v Springville City where it's clearly saying, look Board of Adjustment you can't judge, grant someone a nonconforming use because you've got citizens and you're worried about their rights. It's not all, it's about, you know, it's derogation of the appellants right, it's derogation of the City's rights, you can't, you really do have to follow your zoning ordinances and make that decision, but yet, why did Springville City grant them this nonconforming use on the animal rights and just agree, under stipulation. Well that's because there was a court case an on-going court case and you can do it. It's almost like granting a variance. As a matter of fact, we asked several times with Mr. Penrod going before we even started going up to the Federal Court and coming back to the State Court coming back here. We applied for a variance, but the minute we applied for a variance then for some reason we can't do both, we can't, once we claim that we're gonna ask for a variance, somehow, we're giving up our rights for the nonconforming use, we give up our rights for nonconforming use you denied the variance and they are dead in the water so. Years of legal battles over nonconforming use. All my clients want is their basement apartment. Seems pretty crazy that you can give a nonconforming use when there's a court case and a settlement, but you can't do it otherwise and

so frankly, I, I do follow Judge Laycock's logic here. And, and I really think that the, the Board has to dig a little deeper beyond here and, and take a look the; you're on remand and makes the case a little bit different. I would say, if you're here for the first time, well then, by golly, John Harris v Springville City is good law, you can't just grant nonconforming use as a variance if that was not what was applied for. As a matter of fact, we applied for a variance, if honored colleague here would even stipulate that as long as it's not without prejudice to the nonconforming use but if there is procedural reasons we can't do that, I think that because we have on-going court case here, the, the Board is within its right to put the question before is, is for the Board, can we grant the Fuller's the right to have their basement apartment? And because it is a case in controversy in the District Court that is also a third option. And, and certainly if that resolves it, then, you know I'm on the record here that my clients are certainly willing to forego this further. They do feel strongly and have very strong constitutional arguments up at the District Court so you have a couple different ways to decide this. Either find Mr. Aegerter was wrong in holding them up to this standard of the illegal, that he proved that the use was illegal or, or was it legal in the County before it even came to the City. Or I'm also telling you there's another way out of here to, if, if, if, you really want to just grant their ability to have the, the, two-family dwelling, we can just go there because there is a case in controversy in the District Court today. It is not over, it's existing, it's remanded here for us to, to decide exactly what I read to you. Further proceeding and consideration of evidence by the Community Development Director, we differ on what that evidence is and we think the evidence is only what we presented previously. We certainly can take that same argument back to the District Court and I think we will, we will, it'll be well taken. But we could also resolve this here today, I believe and I do, you know, ask the City here, are you the type of city that helps residents comply? If they can't comply, then they lose, or are you the type of city that is here to be sure that residents don't comply? And I would say that if you're really looking at what your jobs are as city administrators, it's the first one. You're here to help residents comply when they can't comply, they can't comply, but you're not here to be obstructionists and, and I think there, we have opened enough doors here that there is some way out of this and we can find compliance. And with that I'll end my statement. I'll reserve, of course, on the, on the agenda here that I can come back after we've heard from the other side.

BM Fakler: Thank you.

Attorney Penrod: Thank you, Chairman, Chairman Fakler and the other Board Members. We're happy to be here tonight and just a couple things to get started off, I'm going to actually have Administrator Aegerter come up here and do most of my presentation. But I want respond to a couple of things that were brought up by the plaintiff's counsel. First off, this Board has no responsibility, no purpose, really no authority to negotiate any sort of ability to give variances outside of what the law allows. When you look at what the law allows on a nonconforming use and what's before you here tonight, it's one issue and one issue only. It's not what is at the District Court, what are the constitutional arguments at the District Court; what other arguments might be at the District Court. It's one issue, one issue only, and that was given to you from a Judge at the District Court, Judge Laycock. And again, I just wanted to reiterate what that is and that is, in the additional proceedings, the City will not attempt to prove Plaintiffs have abandoned the nonconforming use they claim, nor require Plaintiff to prove any lack of abandonment, so that's the first thing, you're not supposed to really think about or even consider abandonment.

One of the reasons that was put before the judge, the parties, they agreed, we're not going to look at that issues, that's an issue we're not going to look that. And so the second part of this is what the Board is supposed to consider tonight, and that is rather the parties will focus on whether and to what extent plaintiffs can prove the nonconforming use of their property as a two-family dwelling was ever lawfully and legally established in the first instance. So you have a judge from the District Court that basically says that the plaintiffs have got to prove, they've got to bring evidence before this Board to show that it was a lawful use in the first instance. There has been some case law that has been thrown at you, I've read through that prior to tonight, I've read through it again tonight and I don't think it stands, I don't see anything in there that stands for what the plaintiff's counsel has said that it stands for and that is that they don't have to prove that it was ever a legal use. In fact, as I read this, it shows that they do have to prove, in fact there are a couple sentences in here I want to point to one, it underneath paragraph eleven.

BM Faker: which case are you on?

Attorney Penrod: This is the Daines case and it's talking about Daines who's the plaintiff and the appellant and he's actually talking about whether it's arbitrary and capricious that the decision that was made from the City level and there was an appeal up at the district level. And I just want to read a little bit of this paragraph. It says a final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal. And that's the standard that is found in State Code. Daines's application was denied on the ground that, while he amply demonstrated multi-family use over a period of decades, he was unable to show that this use was legally established as required by City ordinances. And basically that's why we're here tonight, is for them to show that the use was legally established under the law. And as you look at that, there was some comments and I'll let Mr. Aegerter's get into that a little bit more, that this was constructed while it was underneath the the County's Code and it didn't meet the County's Code and it didn't meet the City's Code and never was legally constructed, there never was a legal established use to have an accessory apartment and this location. And I'd like to turn, if it's okay with you Chairman Fakler, I'd like to turn my time over to Aegerter, Director Aegerter to go the history of it to show what, what has really happened with this property and to show there was never a time where the use of an accessory apartment was legally established for this property that is in question, if that's okay with you Chairman, Thank you.

Director Aegerter: Thank you, Chair Fakler, members of the Board. What I'm going to do today is go through a chronologically in association with this property. Just so you have some understanding. As we received the information from the last Board of Adjustment meeting and reviewed those minutes, there were some things that we learned after the District Court, this information was given to us by the Fuller's in terms of a Quit Claim Deed. There was discussion about a parcel of property over six acres was included three dwelling units on it. And again as we started to look at this information, we were trying to understand it because of the fact that we were, we were unclear as to where these homes were, what the situation was associated with them. But in 1958 there was a Quit Claim Deed associated with the property outlined in red. The Thorpe home was located where the LDS Church is, which is the red-roofed building at the top of the illustration and then the properties that we're talking about are located below that on Canyon Road and Canyon Road in case you're wondering where that is is located right here.

(Director Aegerter identified Canyon Road on the map that was displayed on the overhead projector). It's not a very bright one. Up here, right here is Canyon Road. I'll just try to go through this chronology. Talking about the issues associated with the property and with the zoning laws, the zoning ordinances which were in place. Utah County Zoning Ordinance in 1956, they adopted a zoning ordinance it was in place at the time of the annexation into Springville City in 1975, it was a RA zoning designation. The requirement of that were one-acre for a single family home, one-and-a-half for a two family dwelling and the smallest lot mentioned was to be 100 feet. Most of you have the requirements for the lot dimensions along the street. The way the County had written their ordinance in '56 was that just one of the sides of that lot has to be 100 feet, doesn't have to necessarily be alongside of the road, it can be on the side or on the back of the property. So that was the '56 ordinance. In 1960, there was a Board of Adjustment case before the Utah County Board of Adjustment. It took two times because for some reason on April 19 they didn't have an adequate quorum. If you've ever experienced that as a Board, we probably have. So the meeting ended up being carried over into the next week. The Whitings were the petitioners. The Whitings again had ended up ultimately acquiring this property from Mrs. Whiting's in-laws and those in-laws, they are the ones referred to here as the Thorpes. They were the parents of Mrs. Whiting just so you understand this complex genealogy. So the Whitings petitioned to allow the three lots of 2.82 acres of .94 acres each. So what they wanted to do was take the three lots that are pictured here and they wanted to divide them evenly. Well, the ordinance established in '56 said you needed one acre in order to have a single family home. So they went to the Board of Adjustments for a variance in terms of saying, you know, we want to be able to have it on .94 acres. The Board of Adjustments, in that case, it indicated that two houses existed on the property, one was on the easterly side and one was on the westerly side and the Whitings wanted to construct a home on the center lot. The Board approved the creation of the three lots, but the stipulation was that two of those lots needed to contain one-acre each and then one could contain the .82 and the .82-acre lot was to be the westerly lot where the Whitings lived and so again you go to this illustration that you're seeing here and that's lot one which is outlined in red. In the Board of Adjustment case they also indicated that there was a house located on lot one and on lot three. So again the thing that we discovered in looking at this in that that is on this parcel just under two-acres there were two homes located on that parcel at the time. In 1968, as a result of a divorce decree, Melvin and Ruth T. Whiting deeded the center lot, that's outlined in yellow, to Gloria Ruth T. Whiting from, from, again the divorce decree. Again Melvin and Ruth owned the property, now they were divorced and so Gloria Ruth is actually Ruth. And so the property was, was deeded to her through that, that, divorce decree. Up until that time they had held both properties. Springville City was involved in an annexation in 1975. It was known as the Springville Utah Kolob Stake Addition recorded March 21, 1975. This property at that time it was annexed into Springville City. As we looked at the records, certainly the annexation specifically said the property was zoned RA-1 at time of annexation and the RA-1 standards had been adopted by the City in '68 and they're outlined below. You had an 80-foot minimum frontage on the road, in this case Canyon Road, two-family or multi-family dwellings were not included and listed uses. The minimum lot size was to be 10,000 square feet with animal keeping on 20,000 square feet because most of the properties in this area included animal keeping and so again the half acre lot would allow animal keeping. But you could have a single family home with the 10,000 square feet lot. And again, the record that was provided for us, Mr. Melvin Whiting, who was the son of Melvin and Bessie Whiting, who lived in lot number one next to the church, indicated that at

your meeting of February 16, 2011, that he remembers the house being brought on a trailer and placed on a foundation prior to starting kindergarten in 1975.

BM Stewart: Mr. Aegerter, I'm sorry I need to interrupt you, but I have yet to understand the house in this statement. I've read several references to it in the document and I'm wondering what house you're referring to.

Director Aegerter: The house, according to the February 16, 2011 meeting in those minutes that was the basis of the understanding that was presented was that this house was located on a foundation and that there were people living above and below it. Other than that, that's the house that the Fuller's

BM Stewart: The house in questions was originally was built, he remembers them bringing that in.

Director Aegerter: exactly.

BM Stewart: I just wanted to make sure that was the same house for sure.

Director Aegerter: Okay, and so in May 1981, you still had the one-acre lots. You have Gloria T., Ruth T Whiting, who by then has wised up and moved to Arizona because she understands how miserable winters are in Utah and she deeds the property to Rudger G. Smith and to Grace W. Smith and his and his wife, who is his wife, Mr. Smith's wife and then Grant E. Naegle and Norma C. Naegle, who is Mr. Naegle's wife, so again these four people own the property in question. A month later those four people turn around and sell the property to another four people. And in this situation, the legal description of the property, generally because there have been some lot-line adjustment through the years of the property on which the Fuller house is located. So this is 1981.

In 1985, the property was deeded from those four individuals to David Fuller and Ruth M. Fuller, husband and wife, that's how it appeared in the deed. So again at the time of annexation as we mentioned, records indicate that in 1975 it was zoned RA-1 which they indicated allowed for a single family home on a 10,000 square foot lot and on the 20,000 square foot lot there was animal keeping involved. In R1-8, excuse me, in 1981 the R1-20 zone also allowed single family home on a 20,000 square foot lot and again animal keeping was allowed in connection with that and then from 1997 to the present, this property has been zoned R1-10. And so again as we've looked through the record, we tried to find, you know, indications of where it could be a duplex or a single family home with an accessory apartment and as we have looked, we have not found anything that would indicate that in terms of zoning and in terms of the lot sizes that were associated with this property. We actually requested that the Planning Commission or the City Council, you know, consider an ordinance that would allow accessory apartments and the City Council indicated that they didn't feel that that was appropriate city-wide within Springville. So again in terms of our approach, we've have tried to look at this issue and to deal with it in terms of looking at, you know, was there a time it was zoned appropriately? Was there a time that there was a lot size that would have allowed it? And as we've looked at the record,

we found nothing that would indicate that there was ever a time that this was appropriate zoned to allow a two-family dwelling unit. Any questions from the Board at this time?

BM Fakler: okay is the City's presentation through then?

Attorney Penrod: Yes

BM Fakler: okay, then its question time, Board Members?

Director Aegerter: do you want to ask questions of me or would you like Mr. Driessen.

BM Jex: since you're at the microphone, if I may Mr. Chair. Mr. Aegerter I realize that at least we have testimony on the record that when the home was placed on that property in 1975, that it would have been under the County jurisdiction and not the City's. You mentioned that that piece of property was annexed in March of 1975. So I am so vague on the timing but let's assume for the record here, that the home was placed while it was under the County jurisdiction.

Director Aegerter: sure

BM Jex: in your professional opinion, or based on your understanding what would have been the requirements of the County at that time as far a building permit or building inspection in having a home placed on a foundation versus a new home construction?

Director Aegerter: Well, there certainly is a permit requirement that would be established even if it was a house being moved to a new location it would require a building permit as a part of that.

BM Jex: Thank you.

BM Stewart: just as a follow up to that question, I wonder if you and looking to the records, there are lots permits that we have copies right now, but do you have any, have you seen access for having in your possession a building permit for this time period when this house was first set on the foundation.

Director Aegerter: We don't, we don't have that and we've, you know, tried to find that the first time this went to the Board and we have not found any permit associated with this construction.

BM Fakler: would you need a building permit to place a house on a foundation?

Director Aegerter: you would, yes.

BM Fakler: now?

Director Aegerter: you would, absolutely.

BM Fakler: maybe not back then, maybe there's reasons to buy no permits

Director Aegerter: well, I can tell you 30 years ago you would have as well.

BM Fakler: would you?

Director Aegerter: (nodded in the affirmative). This was longer ago than that, but that's when I first started in planning

BM Fakler: I have two questions. Counsel for the appellant seemed to make a big deal about the remand from the District Court back to this body, that you did a lot more research and that you shouldn't have done more research. How do you answer that?

Director Aegerter: Well, the way I answer that is, you know, when we had presented before us that there was a six plus-acre lot that included three houses on it and I'm given something that's a Quit Claim Deed from 1958, I'm unclear as to what that even, how that is proving there were three houses on that parcel of land of six acres or plus. So again the thing that I need to look at is to understand where that information has come from, and so I'm researching, that's what I'm trying to understanding is what would be the basis of the understanding of why someone thought that there were three house located on six or more acres on this, in this general area over that time.

BM Fakler: Well I was speaking, and now I'll ask counsel about a prohibition of you doing more research that the City had to stand of your original research and documentation that you did more, I don't know why a judge would prevent that, but I'll ask that to counsel for the appellant.

Director Aegerter: sure

BM Fakler: one more question. Other testimony by Whiting that more than one person lived in that house.

Director Aegerter: sure

BM Fakler: in your mind does that make a zoning illegality legal just because the zone was violated?

Director Aegerter: no, absolutely not.

BM Fakler: There is no way that can make it legal, in your mind?

Director Aegerter: no

BM Fakler: Okay, thank you.

BM Jex: Mr. Aegerter, one more question if I may. With your professional opinion that when the home was transported and place there in early 1975, that that was, that action alone would have established a new use of that property and that any prior, nonconforming use or any other use that had been established with other structures on that property would have been vacated?

Director Aegerter: Well, I don't know exactly what was on the property in 1960. It indicated that it was a vacant parcel,

BM Jex: okay

Director Aegerter: but I'm unclear as to what was there at that time. I mean, there, today on that, what was parcel number two, there are two houses located there and you know clearly under the County's zoning ordinance, two houses would have been illegal, if the house that's there was there before this house was added to the site. So, I don't know if that answers your question, but that's what I'm saying is that based in terms of what was there if it was a vacant lot, even establishing the house there, I mean, there's, ideally you should have some record as to the fact that the house was established there. I mean, that's, that's sort of what I'm looking for in terms of

BM Jex: yes, it was unclear. It seems like that property was subdivided. There had been one acre and was reduced down to .55 acres. I read the property valuation of the Fullers correctly. So assuming that there was a structure on that property, and I don't know the history either, had that been removed and a new home placed, my question is, I guess, this, that would have vacated any prior established use of that property and established a new use of the property?

Director Aegerter: legal? Is that you're asking?

BM Jex: In your professional opinion.

Director Aegerter: no, legally, I mean I can, I can do a lot of things. I can build a structure and if nobody catches it for 20 years, it still doesn't make it legal if it wasn't allowed by the zoning. So I wouldn't say that, you know, this became a legal use at the point that there was a house put there if there was another house already on the lot.

BM Jex: Alright

BM Inclin: Springville is growing a lot and we get building and construction going, especially in the last few years. Now I want to go back to the letter from August 10, 2000 where the Fullers are notified that they, they're renting a residence in a single family residential zone. What would trigger something like that? I know that the City has very finite resourcing and you cannot go after everybody, but what would trigger, what trigger? Do we know what trigger it is?

Director Aegerter: I don't know what triggered that. Typically the thing that triggers today and this was the case here, is a building permit or a complaint. If we receive, you know, in the building permit process, if there's an indication of the use that we look at and say, that's a use that use isn't allowed in that zone, then that causes us to go to the individual and say you know we're sorry but you can't have that use in this area or if there's a complaint from an adjacent property owner. In some cases it's, you know, a lot of times if a person there's a complainant against somebody, they'll drive around the City to find everybody else that appears to be in violation. And in that case, it's typically what we're doing. So again building permit or complaint are typically the things that drive this type of review.

BM Inlan: Thank you.

BM Stewart: I have one more question for you.

Director Aegerter: Sure.

BM Stewart: In your opinion, what would constitute proof, what would, what would satisfy the burden of proof from the applicant in showing that their nonconforming use was legal and has been legal for as long as they stipulate?

Director Aegerter: And again, I would, I probably would look at a, a zoning map in connection with the property to see if there was ever a time when that property was zoned and situated it would have allowed it, would have allowed a two-family dwelling. That's typically what I, you know what I've always looked at in these cases.

BM Stewart: Okay, if I understand correctly, you would look for a zoning map dated at the time that the property has said to have been legal in this nonconforming use.

Director Aegerter: Yeah, I would be looking on, based on the information that you received at the last Board of Adjustment meeting, that, you know, the house was put there in 1975, I would be looking at something from 1975 on that would indicate that this was zoned R2, you know, it's the typical designation for a two-family dwelling. That's the type of thing I would look for.

BM Stewart: Okay, and in this particular case that we're discussing, have you that evidence at your disposal, have you seen evidence of the zoning map from 1975 that shows this house could be zoned or could have an accessory apartment legally within the R2 or such zone?

Director Aegerter: no, I have not.

BM Stewart: Okay

BM Fakler: Okay, Mr. Aegerter, I guess we're through with you

Director Aegerter: Okay

BM Fakler: thank you. Did you have something more before I call Counsel.

Attorney Penrod: In response to the question that was brought up about the remand issue and you can refer to your own counsel if you want on that issue. But the one thing I think is the very key to this is when this was remanded to this body, the burden was placed on the plaintiffs to prove and again I'll read it, if they can prove the nonconforming use, the property with a two-family dwelling was ever lawfully or legally established in the first instance. And all they've been able to provide was 1958 Quit Claim Deed which when you saw it up on the map which was present to you, doesn't even have anything to do with this property, it was outside this property. So if you look at what the burden is on this remand is for them to prove that it was legal in the first instance. And so I just wanted to point that out because it seems that we're

focusing a lot on what Mr. Aegerter did with research, but when he's presented with the deed that shows hardly anything, he's got to do something to figure out what's going on with this property. And so he, in my opinion, did the field work for the plaintiffs because he never received anything from the plaintiffs but a deed that really had nothing to do with it. I just wanted to point that out. I think that it was very appropriate what he did and it's very, and it's allowed on this type of remand, so. Thank you.

BM Fakler: Thank you. Okay, Counsel could we have you come up. Are there any questions of counsel before he makes his final presentation? Well, I have one. The same I asked of the City, just because Mr. Whiting saw double occupancy in that house, does that make a wrong in the zoning, right? So there was double occupancy, let's grant that. Does that make the zoning right, that you can have double occupancy in that house?

Mr. Driessen: what makes it right would be variances or building permits that were granted by the County that do not exist anymore that, that the, if I may, if I may, the, unless there's an objection, I would really like to see that original picture of the six-acre lot. Do you have any objections?

BM Fakler: that's fine.

Mr. Driessen: so what do I do?

Director Aegerter: hit the back button.

Mr. Driessen: so, which is the house? Up here. (inaudible – Mr. Driessen left the podium to point out the house on the map) You're not even in that original, you're not even in the red to start with. There's a lot of things that have gone on here that the, the Title search cannot possibly answer all these questions. And so that gets us back to Mr. Penrod and he was absolutely right and I don't think he was about whose burden it is to prove in one of these cases. We don't even have to go back to this case law 1984, we can go back to the 1800's if you want. Whose burden is it to show the prior use? Now this idea about prior legal use, that's a little bit

BM Fakler: whose burden is it?

Mr. Driessen: It is the appellant's burden. That has always been clear, but I really appreciated BM Stewart's comment when he said what constitutes proof. Not just whose burden, but what is that burden. How tall is that hurdle that you need to jump over? That is what is argued over and over again in the case law and nobody really seems to hit it right on the dot.

BM Stewart: Mr. Driessen, I just have to interrupt you. I believe that's right, it is Mr. Driessen I assume. (Mr. Driessen corrected BM Stewart on the pronunciation of his name). Right now I believe it is time for us to ask you questions about your opening statements and then you'll an opportunity afterwards to summarize. Is that correct? I think, I think that's what we'd like to do right now is to have you answer our questions and then afterwards we'd like to hear your summary, of course which includes some of these details you're bringing up right now.

Mr. Driessen: I'm sorry, I did get a little off track a little bit.

BM Stewart: that's okay. I'd appreciate an answer to his question. It is, it is really important, you know, and so maybe ask it again. I'd like to hear the answer.

BM Fakler: You know I'm having a tough time tying your argument together, Mr. Driessen. There sits the house outside the orange as you pointed out. I don't know if that's for or against you. The lot is pretty small. It's certainly not an acre and a half. So the County, do you dispute that the County had an acre and a half zone for two-family parcel? Do you dispute that? Back in the County, clear back in about 1966 in the fall of things started getting documented, the County required, as I understand it, one and one half acres for a two family parcel. Do you agree with that?

Mr. Driessen: that ordinance did exist.

BM Fakler: Okay. Now we come forward and we end up with a lot of lot splitting. And we all agree that in, what year did we move that?

BM Jex: 1975

BM Fakler: house onto the foundation?, 1975.

Mr. Driessen: 1975

BM Fakler: If the County was an acre and a half for two parcel dwelling, the City adopted, or took over in 1975 also; it becomes Springville City. Right?

Mr. Driessen: just after.

BM Fakler: They annexed it.

Mr. Driessen: they annexed it just after.

BM Fakler: okay. Now if that isn't an acre and a half, how do you tie the right to have a two-family dwelling on less than an acre and a half when the County had an acre and half for two-family dwelling on this

Mr. Driessen: but there were always two families on the property.

BM Fakler: which property?

Mr. Driessen: again,

BM Fakler: the eight acres?

Mr. Driessen: the, the, the original six acres. We've got the

BM Fakler: Okay

Mr. Driessen: the two houses there was the Whiting house below, the more white-colored roof and then what is now the Fuller's house up there, not within the red. If you don't mind, my client is gonna point. (Mr. Fuller approached the map)

Mr. Fuller: this was actually the Thorpe house, this was the one that had the deed for this property here. So he had to have another deed for this piece of property here. But our house and his house isn't that (inaudible).

Mr. Driessen: and so, you know, it's our argument that the deed that were produced really don't ever, until the later deeds and the later conveyances to the Fuller's which is well after the annexation, well after everything, that's when this property finally first gets mentioned. And so we don't even know how many acres were there when the house was, was, was, moved on there because there's, there's this problem with the records. I'm trying to see, you even see right here that this house wasn't even on this property that was the original property that we started with and so that's why in 1975, it is still not clear and what Mr. Aegerter produced still is not clear.

BM Fakler: right, but you have the burden to prove clearness. Is that not correct?

Mr. Driessen: yes, and that goes back to my original question is what meets that burden. Do we have to produce those variances and building permits to show that, why that was legal? Where on the other hand, do they have to produce something to show that it was illegal. That's not the standard. The standard is what was reasonably produced at the first Board meeting here and that's what we're gonna stand our argument on, this, this idea that, that the Fuller's presented a Quit Claim Deed to the record here. It's in the record. The Fuller's did not submit that to the record. It, it's really funny how this developed that, that, that, you know, do we get snookered by other attorneys, or what goes on when they do these stipulations. The whole idea of this coming back here was, this whole idea of the mistake that was made that, that the Board would not consider Mr. Whiting's testimony. And that was it, that's what, that's what was the record, that's what was gonna be presented, so

BM Fakler: if we considered Mr. Whiting's

Mr. Driessen: right

BM Fakler: testimony, why does that make it right, that there're two people lived in that house, well big deal, there's two people living here illegally on many parcels of ground, two families in the City, I mean, I don't understand why, why you think that

Mr. Driessen: because it's back to the burden of proof and again do, the burden of proof is not was it illegal, it was in the County, it existed in the County it was there for many years, but yet

BM Fakler: on how big a plot of ground was it

Mr. Driessen: we don't know, we know when the Fuller's purchased it, it was a half an acre.

BM Stewart: If I may, I would like to address the burden of proof because I think that both parties, both the plaintiff and the City all have in the same, in the same regard, the burden of proof is the reason we're here again. The judge of the appeals court said the same thing, the applicants have a burden of proof to show that at some point in the history of this property, it has been legal for an accessory apartment as a nonconforming use. I believe that is pretty clear and everyone agrees to it. I've read through lots and lots of detail here all the way back from when, I believe in 2000 when this started as an application for a nonconforming use and so on and so forth, there's a lot of data here but what I'd really like to do here is

Mr. Diressen: with the animal rights

BM Stewart: Were those in 2000?

Mr. Driessen: 2000, yes

BM Stewart: okay, there's been a lot to do about this property, but right now what we need to know as a Board, our decision is going to be based simply on whether or not you as the applicant provide a burden of proof that unmistakably shows us that this property is legal in its nonconforming use because at some period of time in the past, it had been so. Now what I'd like you to do is summarize for us as a Board, that burden of proof. I would like you to summarize the proof that this property, not because of lack of records, is legal as a nonconforming use and accessory apartment, but because of some record, a record, records that show that proof exists because I cannot find it. I'm looking for the proof and I asked, I asked Mr. Aegerter what he would consider proof. Now, you may have a different answer, and I would like to know that first of all. What you would consider as proof that this is a legal, nonconforming use property. He gave his opinion and I would like to know yours. And then what is that proof.

Mr. Driessen: My opinion is that this is a different case because it was annexed in from the County. It was existing in the County not being contested. It's not that level of proof that we need to show that it was legal in the County because we're talking about was it legal in the City at the time it was annexed.

BM Stewart: okay, let's talk both then, if you'd like to, I'd like to know what is the proof that the County said this was legally a nonconforming two-family dwelling.

Mr. Driessen: that level is nearly, like Mr. Fakler, it did exist, there were two families there, the County did not deny it, therefore the presumption is that there were building permits, there were variances or it would have been challenged and that wouldn't work if it had been in the City the whole time and the City changed the rule because it was annexed into the City at the time. This is this idea is you take your plaintiff or you take your, your, your, plaintiff the way it comes to you, okay? This was annexed from the County at the time. If the City at that time had a problem with, with it coming in, then it's too late, you, already got it, there's two-family use and yes, I am saying what Mr. Whiting's testimony met that burden of proof because there were two families living there at the time it was annexed. The County ordinance does not apply any more.

BM Stewart: you're saying because the County allowed it to happen during the time it was part of the County and because the City did not object to the use that they may have known about at the time it was annexed, it is a legal, nonconforming use?

Mr. Driessen: very, very close. I'm telling you if you were, if we go back in time and do some magic time manipulation, we're here before the County Board of Adjustment, I lose. If I can't prove that the County had the legal use, but that annexation is a point in time, it's a snapshot when this property is coming into the City it's either legal or illegal. There's an ordinance out there that you're going to try, Mr. Aegerter is going to try through research that we don't even think was supposed to be done this time, but to try to show that there's an ordinance out there that would have prevented it from being legal in the County. But our argument is, is going to be and will remain throughout this, that doesn't not matter, because of this annexation that took place there was a legal use at the time of the annexation. You wanna go back and argue that the County law didn't allow it, well, first, our first argument is we weren't even supposed to go there. Was, did we meet the burden the first time around? And I say we did.

BM Stewart: okay

BM Fakler: well now, your whole story about legal use at the time the City annexed this house from the County is that it had multi-dwelling then, is that correct?

Mr. Driessen: it had, yes, and, and, and I'm saying that's enough to meet the burden because the County

BM Fakler: well,

Mr. Driessen: law ceased to exist at that moment of annexation.

BM Fakler: the City said either it's gotta go to a building permit or a complaint triggers the City or County investigation. Where there's no complaint, does that make multi-dwelling allowable on a piece of ground if no citizen complained about it?

Mr. Driessen: if it was always the County or if it was always the City, fine, I'm with you there. But it wasn't; it used to be the County, now it's the City and that is the triggering point, that's the date that it was legal.

BM Fakler: so, your argument has to be that if the City annexed a multiple use house that was in violation of the parcel acre, that the City has accepted it as legal? Is that your argument? It's gotta be.

Mr. Driessen: sure.

BM Fakler: okay

Mr. Driessen: Sure, I wouldn't put it quite that way. I would say that the County

BM Fakler: (Inaudible)

Mr. Driessen: no, I'm saying again, with burden of what you have to prove, and what the burden is to meet this legal use burden, it's not the illegal use burden and that's what this was turned into.

BM Fakler: let's assume you prove multiple dwelling, nobody seems to be arguing about that, so that house

Mr. Driessen: yep

BM Fakler: was used by multiple families

Mr. Driessen: and that's what we

BM Fakler: does that make it legal?

Mr. Driessen: that makes it legal because of the annexation, that's gonna be our

BM Barker: so you are arguing exactly what Mr. Sherman (Stewart) said that any, any property no matter what it's use as soon as the City annexes that property, then any prior illegality is completely wiped away?

Mr. Driessen: right, and, and we're gonna say that the, the, the certainly, the case law out there does not

BM Barker: well, and now that's gonna be my question, is there case law that would support that position because I'm not aware of anything like that.

Mr. Driessen: no, it's a novel position, and it's a novel position and I think there, there, there certainly is case law out there arguing for the fact that in the, in the, I only brought my two cases with me, but there are several Provo cases again a city that has had lots and lots of these things and the questions is what, this, this, this whole was it legal was it illegal; it's what the Board can see as, as reasonable meeting of the burden. Nobody will come forward in these cases and say, Okay, you need A, B, C D, E to establish legal prior use. If, if the Board was in its discretion to find legal prior use and it's my position here that the annexation, we wouldn't have this case before the appellant court. And, and in, when you're going back all these years and should my clients be prejudiced because the County just doesn't keep good enough records and there's no way to find those variances and ordinances; are you gonna put that burden upon a citizen to make the impossibility and I will tell you if you want to go out and research impossibility as a part of the law, you will be able to find it. When impossibility becomes an issue then it merely becomes a good faith argument.

BM Fakler: I think we understand

Mr. Driessen: in good faith, were there two families there at the time the annexation; were it, are my clients in good faith bringing that before you and that is the key and that's what I am saying is the burden to get

BM Inclan: I have a question

Mr. Driessen: was it in good faith presentation of the best that you can get and then further, Mr. Aegerter brings a lot of evidence and it still has holes in it, it still holes in it because we're not even in the red here.

BM Inclan: even if your client did all this in good faith and it came from the County to the City, here in 2010 your clients requested an advisory opinion from the office of the Property Rights Ombudsman, and here the, inside it says that the City has the discretion to determine how and when to enforce its ordinances.

Mr. Driessen: yes

BM Inclan: It's says ordinarily, a municipality is not precluded from enforcing its zoning regulations when its officers have remained inactive in the face of such violations. It goes on basically to say that yes, in light, you might go from, from, the County to the City but that doesn't mean that it's allowed and the City has the right to enforce the, the ordinance. So without having any nonconforming use, a certificate or, or, or any other document, and even when your clients, if I remember correctly, there are a couple of documents here where they were asked to, to cross what kind of property they owned and both times single family was crossed out where there was an option for a duplex or multi-family dwelling. I just don't, I'm still failing to see where, where the nonconforming use has even been, where you're coming from with that.

Mr. Driessen: There's two questions, we can get there. Mr. Aegerter first described very well and he was absolutely correct about when they enforced. It's, it's really about damages, what happened now is if they're found that they are nonconforming and the City assess a fine against the Fullers because they're gonna keep renting it, then the Fullers can come back and say well what about all of my neighbors who are also nonconforming, that's the whole problem why the City was looking at maybe changing their rules cause, you know you've got this rampant problem that they can't enforce them already. And that's all that part of it was about and then

BM Fakler: Counsel, I've gotta interrupt. That isn't our issue tonight.

Mr. Driessen: right,

BM Fakler: that's isn't our

Mr. Driessen: it's not, but that part he was reading on the opinion down there

BM Fakler: okay

Mr. Driessen: but, but the

BM Inclan: I think my point is, there were several opportunities that were given to client where they could have for example marked that it was a duplex or a multi-family dwelling wherein the City would have precedent and there you have a more solid, nonconforming exception.

Mr. Driessen: I would ask you to go back and read the minutes from the original Board hearing here and strong evidence was presented because the Fullers brought in a signed copy of that same document where nothing was marked, it was clear that the City administrator marked single family. The Fullers did not know how to mark it, they told them, they came in to apply for their building permit. They knew they were a multi-family there was no place on that form to mark the type of dwelling it was and so they left it blank and there's, there is a copy in there of the blank one which they signed and then there's another copy where it is checked and it was presented here that that box was checked after they filed it because there was, there is no multi-family residential dwelling.

BM Stewart: but the interesting thing about that argument is, and which concerns me greatly in the sense that the Fullers since 1975 have had a burden on their shoulders to assure that their property is in conformance in all cases. I think any property owner has the burden to ensure that their property is in conformance with all law, ordinance whatever it is, they are the responsible parties to that and in not just one case, but multiple cases that I've seen in here there has been a building permit or a permit process or the type of building on the property has been marked single family. It has never once been marked as multi-family. This is one case you're talking about, I wasn't in the original Board meeting and yes, there was some discussion and argument about whether or not this was marked after the case by the City, so let's just throw that one out, we're not going to go with that one, but other cases there are at least two that I've read about, one for a barn, I believe, and one for the re-build of the property once it was destroyed by fire, suddenly destroyed by fire. In both of those cases, I can find no evidence that the Fullers marked the property as multi-family. And the burden of proof that I'm looking for, that we were trying to get from you, is whether or not there has ever been a multi-family, nonconforming use legally on this property. And there is, from what I can see, no evidence and I'm not talking about hearsay, I'm not talking about the grandfathering clause once the City annexes a portion of the County into, there is no actual document, there is no actual testimony by someone in authority that shows that this property has a legal, nonconforming use assigned to it and I would love to see that because that's why we're here. We've been ordered by a judge to find the applicant's burden of proof that this has a nonconforming use assigned to it, but there is no evidence.

Mr. Driessen: and I disagree with

BM Stewart: I know, I know, I know you disagree, but your evidence, I can't hold, I can't read, I can only suppose. And what I'd like to do is hold, read, listen to testimony and there's just not that. Even Melvin Whiting does not, his testimony while it may be relevant to this case in general, it is not relevant to the burden of proof of nonconforming use because if this, if this property were to have been a dog kennel without the City's knowledge, without the County's knowledge, and it had been operating for 20 years before it was annexed into the City, even if the City did annex it into there, unless there was proof that someone from the City, an officer of the City did not know about it or did know about it, that alone does not give proof that the nonconforming use is legal to have a dog kennel on a residential lot, just as I cannot see the, the,

the proof that a multi-family dwelling has ever been granted in nonconforming or conforming use to this property.

Mr. Drissen: and all I can say is just like the last time I was here and one of the Board members stated a legal basis that said we don't even have to listen to Mr. Melvin's Whiting's testimony because all we have to look at is what is presented by Mr. Aegerter and I said I disagree. I'm gonna tell you that I, I do disagree. At the time of the annex that burden of proof is met because it was a multi-family dwelling at the time it was annexed and there is no proof of illegality. So the question is again, legality and where that burden is met. How high is that hurdle? That

BM Stewart: I just told you, I think that the Boards wanting, we want proof.

Mr. Driessen: and higher

BM Stewart: well a little bit higher than just supposition

Mr. Driessen: certainly

BM Jex: this is based on the preponderance of the evidence. The evidence hasn't been presented and I think

BM Fakler: we're getting, we're getting way off the issue

Mr. Driessen: no, and I don't, I don't mean to be disrespectful at all

BM Fakler: well then, well then

Mr. Driessen: I mean we agree to disagree

BM Fakler: well then, what I'm going to do is you're gonna get your final summation here in just a minute, but I want to bring Mr. Penrod up. I know he's been raising his hand and I have something I want to ask him. We do not decide the law on this Board as you're well aware and we depend on you smart ones to tell us. The connection, the only connection I can see that Mr. Driessen is making about the compliance of the property his client is on is that at the time the City annexed the piece of County property into itself, there were I guess we've accepted two-families in this dwelling. And by accepting through annexation the two families living in this dwelling which Mr. Driessen says are legal use probably because there was no protest or complaint by a neighbor, do you know of any law that makes the two families in this dwelling legal?

Attorney Penrod: I do not.

BM Fakler: that the City has to honor?

Attorney Penrod: No, and if I understand the question, it's just because it was annexed, at that point we have to accept it as legal because the property was annexed into Springville. Is that, am I understanding the question?

BM Fakler: that's the only connection I can see between the eight-acres that we started with down to half acre that we've got now, the only thing that happened, Mr. Driessen says, is the City annexed that property; that made it all good.

Attorney Penrod: even if you annex a property into a City, you still have to show that at some point when that property was in County, it was a lawful use in order for it to continue as a lawful, nonconforming use under a new City ordinance that no longer allows that use. Does that make sense?

BM Fakler: who has the burden to do that, the City or the person who owns the house?

Attorney Penrod: the person who owns the house has that burden and in this case it's even made, I mean it's made very clear by Judge Laycock's order that says the plaintiff has to come in and prove, is there any evidence they can prove and this was a legal use at the time it was created.

BM Fakler: okay, I'm gonna end the questioning by the Board Members at this point.

Attorney Penrod: can I just clarify again. You mentioned I raised my hand.

BM Fakler: well you did raise your hand

Attorney Penrod: I just want to clarify one thing. What you see up here is (referring to the map displayed) what was presented to the City by the Fullers and that's a Quit Claim Deed from 1958. And as you look at the top this entry number for the Quit Claim Deed in 1958 and so 8.21 acres and the house isn't even in the property so that's why it was put up there by Director Aegerter to show that the only information we got to prove anything from when Judge Laycock gave her order until now is this deed and the house isn't even in the deed. So just quickly the eight, or the six-acres best seen right here and here's the six-acres

BM Fakler: and it was still in the County

Attorney Penrod: it was still in the County, these are the six-acres,

Director Aegerter: that's, that's just under three-acres, that's what I needed to clarify.

Attorney Penrod: yeah, this is, this is how the lots ended up because if you look at the 1960 Board of Adjustment meeting minutes, there was two-point-eight acres and they were divided up into one-acre, one-acre, .82-acres and so here's what we have. So we do have evidence to show the property and everything else. I just wanted to make clear that that first that first property here shows that the first Quit Claim Deed here shows that there, it didn't come from us, it came from them and their property is outside the Quit Claim Deed. I just wanted to make clear.

BM Stewart: you're saying that's irrelevant really this

Attorney Penrod: this is irrelevant, this much irrelevant it's just to show you what was presented to the City.

BM Fakler: okay, thank you. Mr. Driessen, you get your final say, finally.

Mr. Driessen: There's not much to sum up. Wasn't provided by the Fullers', this is the Quit Claim Deed that that we were hounded and hounded that they said it existed. I, I, I finally admitted, yeah, the Quit Claim Deed existed and then suddenly it's in the record, so I.

BM Stewart: but it's irrelevant anyway, so it really doesn't matter

Mr. Driessen: it's irrelevant anyway. What is relevant is, is on the other picture you saw the one lot with the Fullers house is on, there were two houses on there, so it's one lot with two houses, not a single multi-family dwelling but certainly multi-family and again

BM Stewart: how, sorry, how is that relevant?

Mr. Driessen: because there's always been two-family

BM Stewart: no, no, no how is it relevant that you have two houses which is two single family dwellings and we're talking multi-family. You, you, you used the word that put those two together.

Mr. Driessen: because it was already, already, than if you're, if that the burden is the illegality, which seems the way we want to go here that that that somebody needs to come forth and prove that the zoning was illegal. It was always illegal, they had two houses on one lot there, that was

BM Stewart: illegality does not make legality.

Mr. Driessen: exactly.

BM Stewart: Okay, I'm glad we agree on that.

Mr. Driessen: and so, so proving illegality seems to be the direction that we've gone. My argument is that at the time it was annexed you accepted this City accepted the lot and that annexation that is the time that it was legal that would be the argument, it is novel argument but again, no case law out there telling you that, that you can't do that way, you want to as a Board, yeah, you're gonna have to weigh these issues, these are serious issues, there's a lot of things riding on this, I guess, you know, because they're, they're, they're important legal issues to decide. And in summary, what is that burden of proof; what do you have to meet to prove legal use? I'm hearing the hurdle, at least opinions have been tossed back and forth tonight, that that burden is pretty high. And I'm arguing that no, that burden is not that high and that we're supposed to be looking at what happened here in the first instance. And if, if we studied this

property even Mr. Aegerter will admit, we'll never have all the answers as to the legality. He's trying to show illegality and that's not, that's not the way this, this question goes.

BM Fakler: okay. There any important questions you Board Members wish to ask or is it time to get down to the decision?

BM Jex: Want to open it for discussion?

BM Fakler: would you like to discuss it?

BM Barker: can I ask Mr. Burnett a question? He's here to make sure because there's several attorneys in the room and quite frankly, your opinion is the only one that I care about tonight in terms of what the law is.

BM Fakler: he's our attorney

BM Barker: exactly, and that's why I care what his opinion is. Is there the presumption of legality in terms of a structure that's built; is there any kind of presumption that that is constructed legally according to ordinance in place?

Mr. Burnett: As I understand the question, generally, no. Its further complicated here by it's not the structure per say but the allowable use of the structure. That's my only hesitation, but yeah. I don't think this is any different than the Daines case; the annexations only relevant to the extent that it means that it's the Utah County ordinances that are the issue rather than Springville City ordinances. Otherwise, I'd use the same kind of analysis.

BM Barker: the second question I have for you is in this particular remand is it your opinion that it's remanded to make a decision based on the evidence that was already in the record or are we entitled to receive new evidence?

Mr. Burnett: I think you're entitled to receive new evidence. Yeah, I mean, obviously the order could have been written much differently if it was saying you, you, you may only look at X, Y and Z and it wasn't. Other than, I mean, the judge did say don't look at the abandonment issue though it's with respect to whether the use was lawfully established, I think it's fair game for new evidence as it was for the appellants.

BM Barker: Thank you

BM Fakler: I, I didn't get a chance in all the verbiage coming from there to read the Daines case. What was result of the Daines case and why?

Mr. Burnett: yeah, in the Daines case the court appeals upheld the decision of the city and in paragraph eleven, I'll go down a little bit further, it's on the third page you have from what Mr. Penrod read that it's Daines application was denied on the ground that, while he amply demonstrated multi-family use over a period of decades, he was unable to show that this use was legally established, as required by City ordinance. That's why I say, it really isn't the kind of

analysis in terms of, there's no question, there was no question in that case that the use it claimed was being made but was it ever lawfully established to begin with.

BM Fakler: okay, is there any other questions, discussion? The decision is to be made after the party presentations. The Board should consider and deliberate about the evidence and arguments presented. The Board may reverse or affirm in whole or in part or modify the decision of the Community Development Director in this matter. After deliberation, the Board should render a decision, which describes the grounds or reasons. Gentlemen, these are really important, the grounds or reasons for the decision and any motion adopted to support it. Okay? Any discussion?

BM Stewart: Just do this out loud? I really have a problem with going to a judge who has asked us to deliberate the evidence that has been presented before, new evidence that we've received tonight, and tell her or him that we have decided that a particular use of a property was deemed legal when I cannot give her a reason why. Other than there appears to be a lack of evidence that it was illegal or that a City-County transaction took place and there are no records to show what may have happened in the past, and so with that I wonder if any of you have same concern because it just seems against why I'm on this Board to do something like that. I can't do something illegal, or recommend an illegal action, but when a judge has asked me as part of the Board to find whether or not there is whether or not a burden of proof has been established by the applicant about a legality of this nonconforming use and I have no reason why I could say yes it has. I don't how I can stand before a judge and tell her or him that.

BM Jex: I don't disagree, the, the order from the District Court is pretty clear that this Board is to hear the evidence and establish whether there was ever legally or lawfully established use in the first instance of this property as a multi-family dwelling. And you know, the appellant's Counsel has asked the question what's the burden that needs to be proved. In my mind, in my understanding it's the preponderance of the evidence that's been presented here in testimony and in the records. As I've looked and looked into the testimony, the argument is that it was a multi-family dwelling at the time that it was annexed from the County into the City and therefore it must have established legality. That, that does not seem to be a reasonable argument and the Counsel has even admitted that it is a novel idea that there isn't case law supporting that. The role of this Board is not to establish new law or new precedence. And I'm really; I have a very difficult time believing that this board can go in the direction of overturning the decision by the Community Development Director. Based on the evidence that we've had presented, I'm looking at the Warranty Deed dated, I believe, May it may be November of 1968 transferring the property from the Whittings to Gloria Whiting and in that it establishes in 1968, it's the last record that we have for the home that was placed on the property in 1975 that it was a one-acre lot, so I, I, I have to believe that we have evidence here that would establish that it was something of one-acre or less that the home was established on in 1975 and the burden in my mind proved by the Community Development Director that it did not meet the requirements of the County to be a multi-family dwelling that being one and a half acres. So, you know, I'm not making a motion, it's up for discussion if anyone has a different opinion, but I believe that the findings of this Board must be that we uphold the decision by the Community Development Director.

BM Fakler: discussion from gentlemen to my left? Otherwise I will call for a motion.

BM Barker: I'm not sure I have anything to add to the discussion other than, at some point logically to, to, to be characterized as a legal, nonconforming use we've got, we've got two aspects to that, well, three, without addressing the use aspect of it. At some point it had to be legal meaning there was something on the books, an ordinance or some sort that says in this zone these are the uses you can do and so a person comes in and whether animal right or, or, having a beauty salon, whatever it is, there has to be an ordinance that says in that zone you can offer or use that use. And so the person comes in and they, they come in under the ordinance and they, they have a business or whatever it is, that is legal under the ordinance. Then for whatever reason then the City decides to change the ordinance, for whatever reason. So now that that use that was legally established under the original ordinance is now not allowed in that zone, that that's when it becomes the nonconforming aspect of it. See, you can have a, a illegal, nonconforming use than that would a use that was never permitted under an ordinance it was established and just continued until somebody finds out about it and then takes some kind of action. So for this to be established as a legal nonconforming use in my opinion, there's gotta be some kind of evidence that there was an ordinance under either the county or Springville City that allowed a multi-family use to be used on that particular piece of property. And without any evidence before me that that there was that ordinance in place and that when this use arose that it complied with that ordinance, I don't see how the burden has been met. That's my analysis.

BM Fakler: thank you

BM Inclan: and mine is along the same lines. I'm still failing to see how this legal non-conforming use can be claimed. I, I just, I take under consideration the Whiting testimony and I don't think that's sufficient. It's it really lacks, I don't understand how again jumping from the County to the City to annexation, how that automatically legalize it without any other requirement. So I think I'm, that's how I'm viewing it.

BM Fakler: Thank you. Gentlemen, I'm going to call for a motion. I'd like one of you to make a motion and I'd like it to be seconded and then I'll call for a vote.

BM Barker: This should be wrapped all up into a motion.

BM Stewart: I make a motion to uphold the letter of August 1, 2012 by Mr. Fred Aegerter denying the application for Certificate of Nonconformity to the Fuller property in question.

Mr. Burnett: I think we need to state the grounds in support of that in terms of what you relayed previously, to include that.

BM Stewart: okay. On the grounds that the burden of proof that is required by the appeals Court judge given to us have not been met by the applicant. That meaning that there has been no evidence, no document, no testimony given that shows that prior to the discussion on this property the property had been given a legal, nonconforming use while in the County or in the City, I should say, neither place.

BM Fakler: motion's been made. Do I get a second to this motion? Do I get any amendment to this motion?

BM Barker: may I ask counsel a question? Can we add grounds if we second or, or

Mr. Burnett: sure, yeah, you could, you could, while even before seconding, you could make a substitute motion or move to amend the motion.

BM Barker: can I go ahead and move to amend the motion?

BM Fakler: certainly.

BM Barker: indicating that there's been a lack of evidence presented to this Board that when the use was originally established that it conformed with the applicable zoning ordinance either under the Utah County zoning ordinance or Springville City zoning ordinance and that, for that reason there's been a lack of evidence showing that it was legal in the first instance.

BM Fakler: Mr. Stewart, will you accept that amendment to your motion?

BM Stewart: I accept the amendment to the motion.

BM Fakler: Motion's been made and the amendment has been made and it's been accepted to the motion. Do I get a second to the motion?

BM Jex: I'll second the motion.

BM Fakler: second's been made by Mr. Jex. I now call for a vote on the motion. All in favor say yes.

All Board Members responded – Yes.

BM Fakler: all opposed say no. The yeses have it. Now, is there anything else we've got to discuss, Darlene?

Mr. Burnett: before we leave that, I, let me just note for the record, for the benefit of both the Board and everybody else that pursuant to State law, the decision won't be final for purposes of any potential, additional judicial action until those minutes are approved by the Board. And when's your January meeting?

BM Jex: the third Wednesday.

Mr. Burnett: third Wednesday?

Director Aegerter: yeah, the January meeting is the 16<sup>th</sup> and there was the template I used to have the date for the last meeting so

Mr. Burnett: so that, it would either occur on the 16<sup>th</sup> or Mr. Driessen you may, your clients may want to consider whether you're okay with electronic approval to facilitate or expedite that, it's up to you. Otherwise it will get approved as part of their agenda on the 16<sup>th</sup> of January but if you're interested in expediting that process we could probably try do it electronically or something like that. Just think about that and let me know what you'd like to do in that regard. We don't need to make that decision tonight, you can let us know.

BM Fakler: okay

Mr. Driessen: As long as we get noticed... (inaudible – he spoke from his chair in the audience)

Mr. Burnett: right, but yeah, it will be January 16 unless you want to have us expedite that process by trying to do it electronically that's why I said it's up to you, if you don't that's fine.

Mr. Driessen: January 16 is fine.

Mr. Burnett: Okay, very good. Thank you.

*(End of verbatim minutes)*

### **Nomination of Chairperson**

BM Fakler indicated that it was time to nominate and elect a new Chairperson of the Board. He opened the nominations.

BM Stewart asked if BM Fakler could be re-nominated. BM Barker indicated that BM Fakler could be re-nominated as the Chairperson.

BM Jex nominated BM Fakler to be the chairperson for 2013 Calendar year. BM Inclan seconded the nomination of BM Fakler. The vote to elect BM Fakler as the Chairperson was unanimous.

### **Nomination of Co-Chairperson**

BM Jex asked for an explanation of the duties of the co-chairperson. BM Fakler explained that the Co-Chairperson filled in when the chair was not in attendance. BM Jex indicated that he would be happy to be the Co-Chairperson if no one else was interested.

BM Barker moved to accept BM Jex as the Co-Chairperson. BM Stewart seconded the nomination. The vote to elect BM Jex as the Co-Chairperson was unanimous.

With nothing further to discuss, BM Jex moved to adjourn the meeting. BM Inclan seconded the motion. The vote to adjourn was unanimous.

BM Fakler adjourned the meeting at 8:53 PM.