



Board of Adjustment
February 16, 2011- 7:00 PM
Council Chambers
Transcript of Fuller Appeal

Board Members in attendance: Ron Fakler, Michael Jex, Bob Freeman and Tom Wroe
Board Members excused: Don Olson and Chris Creer
Council Representative in attendance: Dean Olson
Staff in attendance: Planner Brandon Snyder and Secretary Darlene Gray

Call to Order

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

BM Fakler asked BM Jex to offer a prayer.

Approval of Agenda

BM Wroe moved to approve the agenda as written. BM Freeman seconded the motion. The vote to approve the agenda was unanimous.

Approval of Minutes: May 19, 2010 and November 18, 2010

BM Wroe moved to approve the meeting minutes of May 19, 2010 and November 18, 2010 as represented by staff. BM Freeman seconded the motion. BM Freeman noted that he was absent at the May 19, 2010 meeting and was not privy to the content. He indicated that he had reviewed the minutes and stated that the minutes seemed to be in order, but stated that he could not speak to the content. With the motion made and seconded, the vote to approve the meeting minutes was unanimous.

BM Fakler explained that he would read the request of the petitioner into the record and asked all the petitioners to speak into the microphone. He indicated that staff would give a presentation of information, if any, the Board Members would ask questions to staff, the petitioner would be asked to come forward and give his or her presentation and then the Board Members would ask questions to petitioner. If there is public comment, he would open the meeting to public comment. The meeting would then be closed to public comment and board members will make decision, motion and second and vote. If the petitioner is dissatisfied with the decision of the Board of Adjustment, he must appeal to the Fourth District Court within 30 days of his dissatisfaction. He explained that the 30-day filing time was mandatory by the State.

David and Ruth M. Fuller seeking to appeal a decision by the Community Development Director regarding the denial of a Certificate of Non-Conformity concerning property located at 2025 Canyon Road.

David Fuller; Ruth Fuller; James Driessen, Driessen Law – Lindon; and Melvin Whiting.

Planner Snyder: as you mentioned we've got one item on the agenda tonight. Looking on the first page of the staff report the request before is from David and Ruth

BM Fakler: let me read that into the record. David and Ruth M. Fuller are seeking an appeal to appeal a decision by the Community Development Director regarding the denial of a Certificate of Non-Conformity concerning property located at 2025 Canyon Road. Thank you, Brandon

Planner Snyder: Thank you. As you look over staff report the main issue tonight, summary of issues on page one, is before you is was an error was made by the Community Development Director in reaching his decision. The CD Director was unavailable tonight so he will not be joining us but I'll go ahead and make the presentation as outlined in the staff report.

Mr. Driessen: will the Community Development Director ever be made available (inaudible)

Planner Snyder: we need to follow the procedure that was outlined by the chairperson tonight. I'd be more that welcome for the petitioner's time to get up and address questions at that point If you Mr. Driessen don't mind we'll go ahead and continue. The background is the home is located on 2025 Canyon Road and the determination that was reached was that it's a single family dwelling. As mentioned in the staff report, the Board of Adjustment is the appeal authority when it comes to hearing appeals of those types of decisions. Tonight you must determine if there was an error in the Land Use Authority's decision. Otherwise the decision must be upheld. Looking at page two of the staff report, two-thirds of the way down, it says in reviewing the history of the Fuller's property the CD Director considered the following: There are no permits or documentation, documentation showing that the structure was legally converted to a two-family dwelling. Records also did not, do not reflect that the property has been consistently used as a two-family dwelling. And the applicant's attached supporting documentation does not prove a non-conforming right to a two-family dwelling. And also the applicant's documentation also did not prove the legal establishment of the structure for use as a two-family dwelling. And so with that, the determination was that this was a single family dwelling and the applicant does file the appeal that's before you tonight. On page 3 of the staff report, or excuse me, yes on page three up at the top it indicates that in all cases, the property owner shall have the burden of proving that a building lot, use or other circumstances, which does not conform to the provisions of this Title, complied with the applicable ordinance requirements in effect at the time the current circumstances were originally created. And the findings that were included with the CD Director's determination are listed there for you on page three, starting on page three and it goes onto page four. Page four and five, applicable city codes and ordinances were provided for you, basically indicating the appeals to the Board as well as other multiple definitions and other sections of the Springville City Code that would relate to this hearing. The staff analysis and conclusion which is on page seven indicates the following: the applicant who files the appeal of the administrative decision must identify how and where the land use authority made an error in applying the municipality's land use ordinances. The applicant is required to provide evidence indicating that the use was legally established and continuously maintained. The applicant failed to meet all criteria. So, given the evaluation and findings above, staff concludes that no error was made in determining that the property does not have a non-conforming right to be recognized as a two-family dwelling. Staff is requesting that the Board of Adjustment deny the Fuller's appeal to the determination that the property located at 2025 Canyon Road is a single-family dwelling. Staff is also requesting that the Board Members order that the abatement or compliance requirements listed in the denied certificate of non-conformity be followed. The decision to deny the certificate was reasonable and should be upheld. The recommend, recommendation is listed there for you to deny the requested appeal. And on the last page of the staff report, page eight lists the possible alternative actions and then as well as previously stated appeal of this Board's decision by Chairperson Fakler relating to the 30-day requirements of the judicial appeal of the Board of Adjustment's action. The staff then provided all the attachments that were submitted by the applicant in the petition as well as the information that was reviewed and provided for the certificate of non-conformity that is all here in the packet for you tonight, which was provided to you earlier before this meeting. At this point I'll be more than happy to answer any questions or concerns that you have related to this appeal.

BM Fakler: Brandon, I have a question, this is a fairly thick book we were handed. Are issue tonight, I guess is pretty limited, if you'll agree, for determining a Certificate of Non-Conformity which was denied by the City to the petitioner. The business license, the animal rights, the water, the road, these various items are they germane at all to this issue tonight that we're pondering? What I'm getting at is two-thirds of the book on issues other than non-conformity, is it not or am I wrong?

Planner Snyder: that's correct.

BM Fakler: okay, thank you.

Planner Snyder: and so to reaffirm your question, what we're looking at tonight is whether was an error by the Community Development Director in reaching his decision to deny the Certificate of Non-Conformity.

BM Fakler: for the

Planner Snyder: for the use of the structure.

BM Fakler: okay, thank you. any board of members has questions of the staff?

BM Freeman: I don't

BM Wroe: that sure melted down this down quite a bit and I appreciate your question, Mr. Chairman. I'm guessing, I wasn't to hear of the layout of all of the evidence being provided as to how it, how it impacts this or not. It seems whether it does or doesn't is why we're here. So, other than I, other than that statement, I don't have a question.

BM Fakler: okay, Petitioner, Mr. or Mrs. Fuller, whichever of you is going to, or your representative..

(from the audience: "I would like to represent...")

BM Fakler: okay, come forward and give us your name and address.

Mr. Driessen: my name is James Driessen, I'd like to represent the petitioners here tonight.

Secretary Gray: spell your last name please.

Mr. Driessen: D R I E two S's E N

Secretary Gray: and you are with?

Mr. Driessen: Driessen Law, I'm an attorney

Secretary Gray: out of?

Mr. Driessen: Lindon UT.

Secretary Gray: thank you.

Mr. Driessen: yeah, first I'd like to comment on your, your question before I go forward and I would, we would agree that you know pro-say you know prepared this themselves, and you know typically these people like to be heard; they want to know that they've they've had some some grievances and so they were heard. Not germane to tonight, but think overall their, how it could apply is there is message saying you know please consider this carefully; we've had a lot of history here and we would really appreciate a fair, thorough hearing on the rest of the issues. And so in that respect, I think you can see that there was a bit of history here. But what we would really, would like to do is simplify now and understand what's before us today. And as I looked, you know I got this booklet a few days ago too and you know tried to pour over a lot of it and frankly couldn't look through you know all these things, so if we focus on the staff report, it's, it's, it's, it's a good summary of at least the issues and then I'll try to point out areas where we think there's a dispute.

BM Fakler: okay

Mr. Driessen: the initial dispute begins when there are inadequate County and City records to really show the history of the property in question. The, the City's position seems to be that there is a burden on the petitioner. We would agree that there is a burden on the petitioner, but the question is the level of that burden and how that burden is met and whether or not there are any real concrete, specific objective criteria. We would present 'no'; you have discretion and your discretion should be reasonable, not arbitrary or not capricious in making this decision. As a matter of fact, there, there's a 2009 court case that I think is very instructive; it was the Utah Court of Appeals which is very similar. Before I get there though, I should mention on the record with him here tonight are David and Ruth Fuller, the owners of the property, and Melvin Whiting, who is the son of the one of the previous owners of the property.

BM Fakler: he had a letter in here, didn't he?

Mr. Driessen: no, Steven Whiting had the affidavit, but we could not make Steven Whiting available which we should also say on the record since making a note of availability of, of actual witnesses, we're gonna have to concede Steven Whiting is not available tonight, but we have Melvin Whiting who is actually another older brother who could corroborate what was in the Steven Whiting affidavit, but, you called the CDD which is the Director, is also not available. I'd like to put on the record that we would request his availability because it's, it's kinda hard to, to, to speak for him, but there was a good summary before us of what, of what he had, but I just want to make that a note. So now, now getting back to this why I mentioned Supreme Court, this is not a court of law, however, there's really great instruction in here. This is the case of Thompson v. Logan City, it was a 2009 Court of Appeals case, if, on the record, if someone wanted to check that out it was 221 Pacific 3rd 907, Utah Appellate 2009. And very similar here; they had a son of an original owner who came and testified the nature of the building and why it was built and this was exactly a bottom basement apartment. You've, the Board of Adjustment have probably heard these similar and you know the issues that have to be decided here. But in this case, the son had testified that his family initially lived in you know, the house was built, the originally construction included a basement apartment, that there were tenants in and out of that the basement apartment as long as he could remember. And in this particular case, then the the the City came back again with very, Logan City with very similar types of evidence like you would have here where there's this external evidence that maybe maybe there wasn't a basement apartment or or or somehow the the the the petitioner had this outrageous burden that they had to meet. And so the, in this case, the the the staff denied the petition then it went to the Board and the Board actually overturned the City and granted the petition. And then for some strange reason, as you you must realize is that your Board is a separate entity, the City actually appealed it; they they didn't agree with the board's petition they took it back and let me just read some of things that that that the the court of appeals said when you're when you're deciding this issue. First, it's a very simple issue, they said

the question is with respect to the factors whether the (a) number one whether the use legally existed before a subsequent change in land use ordinances made it non-conforming with the regulations governing the use. This is a simple question, it's not saying that it always existed, we don't have to go back to 1960. As a matter of fact, Mr. Whiting will tell you, oh and by the way, I can just say what I'm saying they're here to testify and then if, you know this call to proper and then if you want to hear from them they are available to come up and answer your questions. But Mr. Whiting would tell you that he doesn't even think that the 1960 date is right. He knows that this was actually much later. The foundation was built in the early 70's and that the house was actually moved onto property again in the early 70's. So, you know bad records, we did not know. But the question is whether the use legally existed. Mr. Fuller will testify to you that he went to the County to obtain whatever accurate records were available, and as a matter of fact in the summary here of findings, they never mention the fact that Mr. Fuller includes a copy of the County the County zoning ordinance. The County zoning ordinance that that property at the time in 1960 until it was annexed in 1975 was zoned for single or two-family. And I find it odd that they exclude that from, the City excludes that from their decision; that would be an important thing. Could you have built a home with a family basement apartment; the answer is clearly yes and I would like, you know, you as the Board to consider that it could be done.

BM Fakler: may I ask you a question counselor? Was there a certain amount of ground that was involved in a two-home house in the County records.

Mr. Driessen: yes, there was and and and we would also like to refer to the the records that were provided here in the thing are not for this property. I will have Mr. Whiting and Mr. Fuller they could testify that the records that they provide you, arguing whether or not a house could be built on that property, was a different Whiting property. This property was actually owned by a Mr. Thorpe in the 60's and and had the the records that provided you have to do with different piece of property. The the the the property that the Fuller's are on was fully large enough piece of property to build the home on. They were you know...

BM Fakler: the home that the Fuller's live in now that I think we're arguing about, what piece of property was that thing on?

(comment from the audience: Do you want me to answer that?)

BM Fakler: yeah, I'm confused as to

Mr. Driessen: I would like, I would like you to actually hear from the owner.

BM Fakler: okay

Mr. Fuller: David Fuller, I'm glad to have the opportunity. Let me tell ya my story of the house. The house was all owned by Mr. Thorpe okay and that's what Mr. Whiting will tell ya. He owned probably close to, according to the County records, he owned probably six or seven acres of land there.

BM Fakler: and yours was only house?

Mr. Fuller: no, no mine is not the only house that has two apartments in it that are rented right now. The house next door was owned by Mr. Thorpe that has a rental property in it. The houses on the, next door to them has a rental property on it and then the Clyde's home that's across the street has rental property on it. And none of them has ever come up and asked that hey, you can't have an apartment in it. The only one that's come up is I. but if you go research it out all the houses right through that area had a a dual occupancy on it. Now I did is I

went to the County and on the County records that says that my property was established in 1960, okay. And so then I went and asked them for the building permit. And only thing that they could provide me with the building permit was the Whiting's property that's closest to the Church which didn't have an apartment in it, okay. But my property was owned, talking to Mel, was owned by Mr. Thorpe, I don't know what his first name was, but he owned all the property and then there was a ball diamond behind my property that he owned that too that had a great big barn on it, apparently. Well, what happened was, is, my apartment, the apartment, well, Mr. Thorpe had his home that was next door to mine that had a basement apartment in it and they was up on the top. And then he built, to move my house on, and I guess apparently, talking to Mr. Whiting over there, my property was actually moved on in the early 70's, okay. So, I don't know where the County records was or not, but when I asked the County for the records to show that it could have a dual occupancy on it, what he did is, the girl down on the bottom took it to the main guy and then he faxed me a copy that says yes your property can have dual occupancy on it and so did the next door and so did the next door because all of them had enough property in order to own it at that particular time. Now what they did is they divided it up and some of it went to the Church, okay, and then some it went to Melvin was married to Ruth Thorpe, which is, her dad okay. And then her dad gave her the property and then in a divorce between Melvin Sr. and Ruth Thorpe, they divided that property up. But the property was always had an apartment in it even the City, if you go back in the records, the City know, knew that he had an apartment in that property. The only one that they've enforced is me.

BM Fakler: let me ask a question that's been bothering me.

Mr. Fuller: okay

BM Fakler: things, I think you implied, maybe the City did, the, whatever was the Zoning Ordinance clear back in the 60's with the County. I think the County required one and a half, one and one-half acres to have the two-unit house on it. That I read that in your thing.

Mr. Fuller: yes, but the see he had about six acres.

BM Fakler: okay now

Mr. Fuller: six or seven acres.

BM Fakler: then you gave me a Board of Adjustment hearing here, right?

Mr. Fuller: I gave you what the County had on all the property I could find.

BM Fakler: now, does this Board of Adjustment hearing have anything to do with the piece of ground your house presently sits on?

Mr. Fuller: no

BM Fakler: no?

Mr. Fuller: no, it does not.

BM Fakler: and about the Board of Adjustment.

Mr. Fuller: yes, because it, it, it, it, what, even the Board of Adjustments where the property was was, they denied a piece of property for building on it or whatever, I'm not sure what that was in there, okay. There was a little tiny shack that that Mr. Whiting's grandpa lived in and it was between my house and the house over on the other side. And and that piece of property, Melvin was trying to divide that piece of property up between the two pieces and that's what got denied because it was just a little tiny strip that that Mr., the old man, I don't (Mr. Fuller turned away from the microphone). Lyman

BM Fakler: but that has nothing to do with your house.

Mr. Fuller: no

BM Fakler: okay. How big was the piece of property that your house, you said it was moved from another location and built on a foundation on that?

Mr. Fuller: well Mr. Thorpe, when he moved that on, he in

Mr. Driessen stopped Mr. Fuller and said: take a deep breath first.

Mr. Fuller: oh,

BM Fakler: I'm just trying to get, this was very complex. (Mr. Driessen and Mr. Fuller were speaking at the same time and it was inaudible)

Mr. Fuller: he intended to have rental property on all of it. It wasn't divided up, okay.

BM Fakler: okay

Mr. Fuller: the property that was my house was originally on, that they moved on, Mr. Thorpe, old man Thorpe, but I don't know his first name, he owned all of the property, okay, about six or seven acres in there. They didn't have it divided. What happened when they divided the property up, is when, what he did is he gave it to Ruth Thorpe Whiting, okay, and then Melvin Whiting and Ruth Thorpe Whiting got a divorce and then they divided the properties up. Does that make sense? So, then

BM Fakler: the house was built before the property was divided into smaller segments.

Mr. Fuller: yes

BM Fakler: Is that what you're saying?

Mr. Fuller: yes, that's what I'm saying.

BM Fakler: how many houses were on that six acres.

Mr. Fuller: three, three houses.

BM Fakler: three houses.

Mr. Fuller: and then you had what's on the corner house which has a basement apartment in it, which was Lyle Hatch's, now it's the Barnett's, but but that property has been divided up and it's still had a property. I mean it come from the County to the to the City, okay and my concern was is if the property comes from the County to the City and we're required to have a non-conforming use, then then like my recommendation is why doesn't the City provide these people with with non-conforming, cause nobody has a non-conforming.

BM Fakler: Mr. Fuller, what this Board must find out is if your house was built in conformance with the zoning ordinance clear back then, not what Springville's....

Mr. Fuller: right

BM Fakler: ordinance says, but back then.

Mr. Fuller: well and according to the County, okay, with the records that I sent to you, that they faxed me, okay, the main guy at the County, I thinks his name was in there, but he faxed a copy that showed that my house could have a dual occupancy on it.

BM Fakler: do you have that in this folder?

Mr. Fullers: it's it's in there of where it, where the it it talks about both pieces of property, but they don't have the record and shows my particular piece of property or or I couldn't find it, I mean I spent hours over there working with them.

Mr. Driessen: I, I would say to simplify this, there are no building permits, there's no, on this particular home. The building permits that the City provided are over that property of that that that shed and whether or not Mr. Whiting could build on that strip of property and and there are not, I mean even those records are are tough to find, so probably the best thing we could do right now, which again in this case that I'm referring to, they had this exact same problem and we have Mr. Whiting here can tell you, he's he's the son of Mr. Whiting who owned the property, he grew up across the street from this

BM Fakler: one more

Mr. Driessen: he can tell you that that that the the, there was a basement apartment there and

BM Fakler: what year, Mr. Fuller's was your house constructed that you lives in now.

Mr. Fuller: well, I don't know. That's a good question. The tax records shows that 1960, okay.

BM Fakler: tax records show a house there in 1960.

Mr. Fuller: that's what they show.

BM Fakler: what you gave is the tax record thing.

Mr. Fuller: yes,

BM Fakler: or the City did, okay

Mr. Fuller: okay, so the tax records show its 1960, but talking to the the Whiting's family, which Melvin remembers Capman moving it on causes one of his best friend lived there, okay. It was in the 1970's.

BM Faker: okay the house was built on another piece of ground then in the 60', moved in the 70, early 70's where it sits.

Mr. Fuller: we're only assuming. I would say that the house was built before the 60's, but I don't know.

Mr. Driessen: no, we're not assuming, Mr. Whiting won't be assuming.

Mr. Fuller: no, but but but I only assume what the tax record is to where it is, but Melvin saw it actually move on, the house, so I'm going by what he said, so I don't know.

BM Fakler: one of the things we're struggling with is you have the burden of proof to this board that your house was built in conformance with ordinances,

Mr. Fuller: yes

BM Fakler: whatever they were at that time in the County and that's what this board...

Mr. Fuller: well, and and you got a copy of the ordinance...

Mr. Driessen: let me let me take over here for a minute, what I, what I've been getting at and sometimes, I'm sorry, I takes a while to go around a corner and get to where, but let me read the end of this case. It says, we conclude that the District Court erroneously interpreted Utah Code 10-9a-802, that's municipal code at the time that they were dealing with that, as imposing upon the board a requirement to expressly find that a building permit had been issued in order to conclude that a particular loose use had legally been established prior to a zoning change. We don't have to produce the records, that's what the, this is a 2009 decision and they're clearing it up. It is not my client's burden to produce building permit records or any of that. He just has to show beyond a preponderance of the evidence that it was legally used at the time. We have the ordinance says it can be single family or two family. We, I would like to bring him up here, but he can tell you exactly what he will say; he grew up across the street, his best friend used to live in the upstairs and he saw people living in the downstairs. The house has two driveways, it has a separate cement entrance into the basement, bathrooms in the basement, it has, it has always had separate bathroom facilities, kitchen facilities in the time in question. The, you know once we get to this, it had a two meter electrical base. Now you know, the City recognized that he doesn't have two meters on there currently, but none of these things are stacked true and required for him to establish his burden. What is his burden is that we, he produce enough evidence that this place was used as a as a two family, this case, a basement apartment at a time at least before the annexation. We don't have to go back to 1960 if there was one day before the annexation where you can say there was a basement apartment in there and it legally existed. That's what this case law says, it says that, that, that you know, grant it the Board has its discretion to look at the issues of what's before them, but in your discretion to decide the, this preponderance of his burden of proof once he has met that, that there that it was used as a two family home at a time just before the annexation, that portion of the burden has been met. Then you get to the issue of continuity, that the issue of continuity there's a burden shifting, clearly in the State law that if someone challenges a break in the continuity then the burden is on the City or the challenger to, to, that there was a break in the continuity and, and in, I don't think the City has not gone there yet, I think they're, they're really riding this case, you know, on what is the burden, what do petitioners really have to show the board and, and you know if if we can, we can go through and a lot of their documentation, you know, is is deficient in a lot of ways, is irrelevant in a lot of ways,

if you'd like to continue maybe they could go down their list of, you know, starting at page four. They state really, when you really get to the stuff on number six, you know, to, they're they're coming with these building permits that the Fullers needed when the house, they had a house fire and so they had to rebuild, yeah, and you know all about that.

BM Fakler: Well, I'm one, I would not even worry about that.

Mr. Driessen: yeah

BM Fakler: what I'm worried about is if the house was established legally. Now, give me again, I'm kind of dense, give me the, how he has proved with a preponderance of evidence that this house was established legally and was used

Mr. Driessen: exactly, and that's why I'm referring to the, to the Utah Court of Appeals and they're telling you when there are inadequate records

BM Fakler: it existed, it existed?

Mr. Driessen: yeah, the house existed

BM Fakler: it existed on an appropriate site, piece of ground as required by the County record

Mr. Driessen: by the County records at the time. You're stating it very well for me, thank you.

BM Fakler: well, I read this

Mr. Driessen: and then, and then, at a time just before the annexation

BM Fakler: the letter of testimony from a Whiting

Mr. Driessen: right

BM Fakler: not this gentleman

Mr. Driessen: right

BM Fakler: and you intend to put this gentleman's testimony into

Mr. Driessen: also, yes

BM Fakler: so we have two testimonies and the house existed and I guess it was on a big enough piece of ground, is that your case?

Mr. Driessen: yes, and as funny as that sounds, if you read the Court of Appeals case, they're telling you that, that it is, that that establishes it that, that if you can get, if you can't get adequate records, then you're merely a preponderance that there was evidence, you know, true evidence, there's a preponderance that it was used as a two family dwelling and Mr. Whiting will tell you he even remembers seeing the house, you know, in his,

spring time was kindergarten year, all been put on the property, his friend lived in the upstairs and their renters, different times, he doesn't remember all the names but there were renters.

BM Fakler: What year was that house hauled onto that property?

Mr. Driessen: Spring of 1975 is what he's, I can call him up here now it would probably be good so they can ask your questions.

BM Fakler: I think we need him to testify.

Mr. Driessen: yeah, I think so.

BM Freeman: I wonder, Chair, if it would be wise at this time to invite Mr. Whiting to the microphone.

Mr. Driessen: and we would agree.

BM Fakler: you're invited, Mr. Whiting. Can you answer some of these questions that we're fuzzy on?

Melvin Whiting: alright, okay

Secretary Gray: Mr. Whiting, may I please have your address

Mr. Whiting: at the time or right now?

Mr. Driessen: no right now.

Mr. Whiting: 376 North 700 East, Price UT. Okay, I lived next door to his property. Anyway, as a child I witnessed his house brought in on a trailer, set on the foundation prior to me going to kindergarten and I remember that.

BM Fakler: do you remember what year that was?

Mr. Whiting: it would have to be before, well, kindergarten would have been '75 so it be before that.

BM Freeman: Can I ask, when were you born?

Mr. Whiting: 1970.

BM Freeman: okay, and you wouldn't have started kindergarten until September of '75, the ordinance went in in October '75.

BM Fakler: yeah, I'm aware the ordinance went in October that's why; okay, continue please, tell us everything you can why this house was a two family house. Do you remember anybody, the names of anybody? Of course you were young, you were only five years old, weren't ya?

Mr. Whiting: I just, my buddy moved into the upstairs, there was tenants in the bottom. I said people moved in and out, but that year I was excited, I got a childhood friend, there was no, few house with kids anyway, I had a friend right there in his house that for kindergarten, but...

Mr. Fuller: tell them about Thorpe and all that, they might wanna ...

Mr. Whiting: okay. Old man Thorpe owned the whole property and anyway he give the property to his daughter, Ruth, which was married to my father at the time. They divorced. He ended up with $\frac{3}{4}$ of an acre and she got the remaining property and brought in his house.

BM Fakler: well, how big was the remaining property?

Mr. Whiting: the house I lived on had $\frac{3}{4}$ of an acre, so she had the remaining total sum.

BM Fakler: was about six acres.

Mr. Fuller: well, and, let me state what he said earlier that, that old man Thorpe his house had an apartment in it and the other house had an apartment, isn't that right?

Mr. Whiting: right

Mr. Fuller: and, and they all rented them out, they was all rentals units. They got

BM Fakler: and the basement was dug on Ruth Thorpe's property and then the house was brought in and put on the basement. Did I understand that?

Mr. Whiting: right, his trailer did put it on the foundation, that basement

BM Fakler: okay, so the basement was dug and then the house was brought in, okay. Okay is that it?

Mr. Driessen: and and , you know maybe, there there has been a lot of confusion with boards of adjustments and that's why the, the, the the Appellate Court steps in here and says, you know, this isn't have to a battle of the documents, especially when there aren't documents cause it's not fair to either side. Where there are no document, there's no building permits, you look at the ordinance, that's what it tells you, look at the ordinance that isn't, you know, you you put things together and you're weighing is preponderance and when the, the petitioner is presenting testimony, eye-witness testimony, that is better than non-existent documents trying to say that

BM Fakler: he wasn't around in 1970, was he?

Mr. Driessen: he was born in 1970.

Mr. Fuller: what year was I born?

BM Fakler: no, he's the petitioner. You (inaudible)

Mr. Driessen: no, but he presented testimony from Mr. Whiting, is what I'm saying

BM Fakler: okay, but you, you moved in the house in 1980 as I recall

Mr. Fuller: yes, somewhere in that neighborhood

BM Fakler: okay and you bought it from Mrs. Thorpe

Mr. Fuller: well

BM Fakler: Mrs. Whiting that was a Thorpe

Mr. Fuller: well, what happened was it's no, not initially, what happened was, is, is, if you look at the records of back then, Mrs. Whiting or Thorpe-Whiting, Ruth Whiting, it sold to a guy that was, and he just owned it for a very short time, but he bought the Thorpe house and my house, they, they, the back property went for the church property, okay and then they divided it up so my lots becomes smaller at that particular time. Then he sold it to two people, the Rogers and Mitchells that owned my property for a short time and then I bought it.

BM Fakler: and you bought it in 1980.

Mr. Fuller: I bought it in 1980.

BM Fakler: okay

Mr. Fuller: so, so anyway, that's kinda the history of it so it went from two people right before I bought it, really quick and the one all he was is an investor, the one, the Thorpe lady, she moved to Orem and I was back in the 80's. I looked her up and stuff and got some history from her, but she, what she did is she moved over there from Melvin. Melvin still lived right next door to me and then used them as a rental property until she sold them both to this Ruger Smith which sold the one to Bill Jones and then, sold mine to the Mitchells and Rogers and then I bought it.

BM Fakler: when you bought and moved into the house was basement apartment rented at that time?

Mr. Fuller: yes it was.

BM Fakler: okay

Mr. Fuller: the two people that owned it before I moved in, okay, the Mitchells and the Rogers both of them, one lived downstairs and one lived upstairs, is what I figured or however it worked out before. The kitchen and all that was downstairs and and it has, it, just to remind you what the kitchen has, I've updated it; I've made it up to code since we had the fire; we went down there, we didn't have to, but the City made me go down and upgraded everything to the codes, okay. We brought it all up to codes down in the basement. My basement has it has a family room, okay, the entrance comes into the family room, it has a fireplace in there, you go back, it's got a kitchen there, it's got one bedroom there. Now, what I rented it out when I was there was just a one bedroom apartment. Okay and it has one, two bathrooms down and I kept one bathroom and two bedrooms, but if I open it up, it's got three bedrooms down there, two bathrooms and a kitchen and then the family room. But if you look at the neighbor, the two neighbors on the side of me on the east side, they both have basement apartments nobody's challenged them. You look in front of me, on the Clyde's family, which has an apartment on it, the same, same as mine.

Mr. Driessen: I want to pause you for a minute, as far as offering that evidence of the other places that have basement apartments that can help you maybe look at maybe his also had a basement apartment, but other than that it has no use because, cause they, we know that the City's can enforce how they enforce. They don't, you know, you have to get a complaint, it has to come to issue, and just because there's a house next to you that

BM Fakler: we're aware of that

Mr. Driessen: yeah, but it is useful information as the fact that if all of these houses have basement apartments, it, rest assured that it makes sense that the one between also does, so.

BM Wroe: Mr. Fuller may I, my name, I'm Tom Wroe. I would like to ask because you raised it, that you did have a house fire, I'm not aware of that because it was before my time, but when, did you, when you rebuilt the home was it built on the same footprint.

Mr. Fuller: the same footprint is the basement apartment was the same, the main level was exactly the same. The only thing that we did is added the attic trusses to it, just that 2200 square foot

BM Wroe: in other words, you didn't expand out, it's just you went up.

Mr. Fuller: we just went up.

BM Wroe: that's the same footprint and I'm assuming, you might correct on that, counsel.

Mr. Driessen: We don't assume that that's being challenged.

BM Wroe: well, it's quite a civil question to me because were it changed, it would be a change of use.

Mr. Fuller: yeah, the only difference is, is we, the walls on the fire and everything else it did is it went through the attic trusses, okay, and started the attic trusses so, or the trusses itself and so we just pulled the trusses off, added the attic trusses and then added the square footage on the top. It is exactly the same footings, the walls everything as the main floor.

BM Wroe: thank you, you answered the right question.

Mr. Driessen: now, you basically said we don't care too much about page four, I wanna, if, if we really don't, then I don't need to go on, but

BM Fakler: what's on page four?

Mr. Driessen: oh, that's some of this stuff probably going to the continued, the continuous use issue and and

BM Fakler: I, I agree with your statement that in this case I feel the City has the burden of proof that the use was not continuous if they alleged that, but in the opinion of Fred, I think is that, Fred, how do you pronounce your name?

BM Wroe: Agular

BM Fakler: Agular, he based his decision, I thought solely (Mr. Driessen: yes) on whether or not the house was constructed in conformance with the zoning laws at that time. And I think he says that he couldn't find ...

(Mr. Driessen interrupted and the audio is not clear.)

BM Fakler: that's correct? Okay, we'll give you your chance because I'm confused.

Mr. Driessen: okay, yeah, I'll patiently wait.

Mr. Fuller: I can take a break, I, I

BM Wroe: would you mind if we do that, we may have to come back?

Mr. Driessen: and I'm more in agreement with your statement that they're really relying on that it was never legally used and this continued continuity really they didn't mount much of a challenge. They did list a few things that could be taken, but in the conclusion part, they kinda just said it was not continuous, I mean it was never legal.

Mr. Fuller: well, and the other thing is what they said on the denial of the the actual building permit and all the other stuff from the County, it doesn't even, if you look at the property and you deal with the grid cordinance , and everything else of what establish on mine, it doesn't even fit that criteria at all. And I taken the opportunity to go with the county and say okay, here's, here's the property owners, do you have anything and they come up with stuff that pertains to the Melvin Whiting's but not ours.

BM Fakler: well, you didn't get much from them, Mr. Fuller, that's what's making this a little tough.

Mr. Fuller: it is. It is, it's tough.

BM Fakler: okay, then

Mr. Driessen: we could hear from them as far as...

BM Fakler: Brandon, if you please.

Planner Snyder: sure, I'd like to start off by just mentioning, you know, they mention, no documents, I find it interesting that all the documents the applicant submitted for the certificate and the appeal would be considered no documents. The city basically, we look at what's submitted by the applicant and then we do our own research and review of those documents and see if we can find any additional documents to base your decision off of. Just to remind you, on page five of the staff report, when you're considering a non-conforming use, the definition of that is the use or building, use of a building, structure or land that was legally established legally before its current zoning designation and has been continuously, maintained continuously since the time the zoning regulations governing the land changed and we've kinda discussed that a number of times, when it was built, when it was brought on.

BM Fakler: yeah, because I read that and it's under a Springville statute, isn't that what you just read?

Planner Snyder: non-conforming use definition is based off of State code.

BM Fakler: their definition

Planner Snyder: yes

BM Fakler: now, I think the State code, I think counselor is right on the State Code. I think that once the non-conforming use has been established, by....

Planner Snyder: I'm not here to argue case law with you tonight, I'm not a lawyer, if, if we'd like to have legal interpretation, we can pose those questions to John Penrod, Legal Counsel here tonight. What he'd like to address though, is your questions of the continuous use and I that we can point you to the right pages where you can review the documents that were submitted and reviewed to reach the determination. The main thing that I'd like to bring up though tonight is, were, were the appeal is basically stating that Fred Aegerter, the CD director made an error in reaching his decision. The two parts of the decision was one it was legally established which the applicant has not proven and number two that it has been continuously been maintained, which the applicant has not proven. Huh, what city, what city code calls out for, if you'd look on page six...

BM Fakler: Brandon, if I could stop you, let's handle the legally maintained part

Planner Snyder: sure

BM Fakler: let's do this in two parts.

BM Wroe: and I need to stop all this for a second. The documents that you send me was, was put together with a hand grenade, I mean I can't follow the pages that were even, you saying, page six

Planner Snyder: if you look in the first part the pages that we're referring to, one through eight are the staff report, the other pages behind this there in the order that they were presented to Springville City by the petitioner and so instead of trying to number them or put them into any sort of order, they were just inserted into the packet as they were presented.

BM Wroe: so we're on page six

Planner Snyder: page six of the staff report. It should say Springville City Board of Adjustment, February 16th at the bottom of the page footnote. Would you like me to

BM Wroe: yeah, there's a, we can follow it now. I read it, I read it page for page the definition and I tried to read it back and put in order, but he wisely put it in order; Thank you.

BM Fakler: what we really need, Brandon, is what is the conclusion of Fred Aegerter, the conclusion that he denied the compliance certificate on. I don't remember seeing anything about continued use, I know the basics, yeah, the basics. What was his decision? He's got it in here somewhere. Can you go to the page

Planner Snyder: what, what I'd like to do is kinda show you is what Fred looks at and what the City Code offers to the applicant as part of their submittal.

BM Fakler: maybe I'm being more restrictive, but this is an appeal from the city administrator. He has a one sentence conclusion that this certificate was denied.

Planner Snyder: no, his, his entire findings and summary are part of the conclusion as to why it was denied.

BM Fakler: and in this

Planner Snyder: and so if you look at some of the exhibits from the county, from the city, all of them refer to it as being a single family dwelling and so if it was never a two family dwelling, where is the evidence that it was continually maintained. We have documents that the Fullers themselves filled out indicating that single family dwelling. We don't have evidence from the Fullers showing that it was continually occupied as a two unit dwelling and so that the City feels that there is no, no, no proof.

BM Fakler: Mr. Penrod, could I have you come up and give us your expertise please and, and the issue that I'm stumped on is I did read Utah Code Annotated

Planner Snyder: okay

BM Fakler: and I did read about non-conforming use and of course, I did read the proponent as a preponderance of evidence to prove non-conforming use was legally established before the zoning, whatever it was, took effect. I got past that part, then right underneath that, any party claiming that the non-conforming use has been abandoned, shall have the burden of establishing the abandonment. Now, seems to me the City is putting the burden on Mr. Fuller, when the State ordinance puts the burden on the City so that's why I'm honing so much, and I hope this Board is honing in on the established on the use, not the continued use. I don't know, am I wrong there or, you're the attorney.

Legal Counsel John Penrod: I am the attorney, you've also heard from the applicant's attorney with respect to this appeal. When you look at the burden of proof, if you look at the city code it does push, place that burden of proof on the person who is trying to establish the non-conforming use.

BM Fakler: so and the City Code put a burden of proof that the State code doesn't allow on an applicant. I guess that's my issue.

LC Penrod: yes, and there's a recent case and I don't have it with me tonight and I should have brought it with me, there's a case out of Provo. And what that case was talked about the findings that come from a board like this board, an appeal board, and in that case it dealt with an apartment and again I wish I had it right in front of me so I could quote from it. But it's a case that deals with showing if the, the, the property itself was abandoned or was it not abandoned. What we have before us today is is those two questions, again that you pointed out was it a lawful, non-conforming use at the time it was established and then has it continued since that time. We have heard some evidence here today that I don't believe the City has heard until today and that is that this home was not necessarily built in 1960 but in sometime around 1974. In the packet there is an affidavit from Mr. Whiting he says that he is familiar with the property from 1979 to the present, and so there is a lapse there showing was there really anybody living the basement apartment at the time. And so when the city looked at that and they looked at what is there, they did question that abandonment because first off was it established in 1960 which was the records that we have and then, the second has somebody lived in that home, and so continuously in the apartment to not lose the unlawful non-conforming use if it was rightfully established. And so as you look at the affidavit that have been provided 1979 to the present. Today there's some more evidence that maybe there was an apartment that was used before that time. And then you look at what Mr. Aegerter has placed in his decision to deny and what has been presented to the city over the years is that in fact every time they come in for a building permit, they said it's a single family dwelling, it's not a dwelling with two units in it, but it's a dwelling with one unit in it and so you look at all that evidence and there does look to be that there has been abandoned there in the sense that we were given an affidavit from Mr. Whiting that said 1979 to the present so there are some years there that we don't have anybody saying that there was actually an apartment in the basement and then we have building documents that show that when they came in they signed these documents that it was actually a single unit and so that's where the abandonment issue

comes to light. Now I agree with you when you look at what Mr. Aegerter has done he hits heavily on the existence of the two dwelling use and then, but in his findings and a little bit when he discusses, he does talk about abandonment use there. When you're talking about burden, this Provo case actually was a lot more intense with respect to people that actually understood and knew what was going on with the property clear back, I think it was to the 1950's and again I apologize for not having that case here, but they were able to go through and basically show what was happening in every year and the person who was challenging the decision of the city came in with all kinds of different affidavits and it was a little more detailed with the facts that the City could rely on and then it came to an appeals board like this. And so there is some questions of burden, but when you look at what's been presented to the city, it shows that there had not been use at least with respect to the building permits that were filed, the applicant themselves said it was a single family dwelling and then also too what's been provided shows that from 1979 to the present somebody knew what was going on with the property. But there nothing that actually shows that there was an abandonment there. And so it is a situation that when you look at it, the city had, all they had, the documents they did have, and they can look to, we have the applicant having building permits that do show a single family dwelling.

BM Fakler: abandonment has to be one year?

LC Penrod: that's correct. But if you look at the building document, I believe they are over time; let me just look at that again.

BM Fakler: I understand what you're saying, I noticed that they put single family on a box, three to four documents when they were requesting the City for permission to do something. I maybe should ask Mr. Fuller, I didn't know if that was fear or they really didn't have anybody in there, I have no idea why he did that, but I understand what you're saying.

LC Penrod: so and then also just one thing that I'm still not completely clear of. As I read the Utah County ordinance with respect to establishing a two, two units on a single lot or a two family dwelling. And again there is so much information.

BM Wroe: in the RA zone, residential

LC Penrod: in the RA zone there, it does state and there was something that's been brought up earlier that you need an acre and a half to do that and I guess the thing that has been brought to us tonight is this wasn't actually established in 1960, but 1974 and so I guess, again to me that raises another question did they have an acre and a half when it was put down on that lot.

BM Fakler: I kept asking them that.

LC Penrod: and if so, was it really put down in a lawful, non-conforming way at that time or a lawful way at that time which would continue with a lawful, non-conforming way. So, anyway, thank you; unless there are more questions

BM Fakler: no, thank you. You have anymore, Brandon before I turn it back to petitioner's counsel?

Planner Snyder: feel free to turn it to the petitioner's counsel and then we'd like to address any final comments.

Mr. Driessen: we did hear from Mr. Whiting that there was six acres at the time that the house was moved on. Records? I don't think they have records, but we do have eye-witness testimony. I think the big issue here was these building permits and I'd like you to hear from the petitioner.

Mr. Fuller: okay, on the building permits if you look at a couple of them, one of them was done by the city attorney, Harold Mitchell and there's a letter in there that was addressed by Mr. Mitchell said come on down and sign the building permit cause that's what he done. There's another building permit

BM Fakler: you signed it right?

Mr. Fuller: well, I'm not sure if we signed it or not, but well yeah, one of us did, Ruth did.

Mr. Driessen: I think they signed it but what was explained to them is, I'll help you here is; their position is that they explained to them there, there was no box for a basement apartment.

Mr. Fuller: no, it was an accessory apartment. See my confusion was is it accessory apartment or is it dual occupancy. When I researched this out

BM Fakler: dual occupancy?

Mr. Driessen: they call these things different things.

Mr. Fuller: okay, and everybody is called it as accessory apartment. If you look at the building permits there is no spot for accessory apartments on it okay? And so we raised the question up well, we have a accessory apartment, they says there's no spot for it so mark the single. The one time if you look at one of them that he did mark is a two on it, the last one that I signed, the one that I particularly signed, I filled it out I marked a two on it and the City actually changed it and they changed it to a one. The recent copy that got back was changed back to a two, but when they submitted it to the Ombudsman office, it was, you could actually see my two in it and a one that was crossed off on the occupancy. So the city filled out some of them, because we got the one building permit when we filed the suit because the city changed the zoning without due process.

Mr. Driessen: that's a different issue.

Mr. Fuller: and that's a different issue, but it all related back to the part that in that agreement the city said that they would work with the property owners on any zoning issue, because this is a zoning issue or this is an issue that has to do with zoning on that piece of property and now we're right back to the same thing as what I did with the animal rights on the issues that was separate one. We went through there and we ended up taking to court because, the issue is is exactly the same as the animal rights; it's and all these other issues relate back to the same thing that this is talking about is my right and he talks about continuous use and I'm gonna ask you a question; can you rent an apartment out without the city knowing, okay? If they don't have a phone and I pay all the utilities, okay, and I rent an apartment out and they don't have a phone, they're not LDS, they don't go to church, can a person live there? Can a person live there if he goes to BYU Education Week, can I rent it out every year for Education Week, which I have done. Can I rent it out for any of these other activities? I had a person come from Mexico, stayed in it for weeks at a time. I've rented it out almost every year, every year I've continued to rent that out. Now if you look at what the city gave me on this Polk thing here;

BM Fakler: almost every year?

Mr. Fuller: well, every year,

BM Fakler: Some years you didn't?

Mr. Fuller: no, every year I rented it out.

BM Wroe: was that on a continual basis, sir?

Mr. Fuller: yes.

BM Wroe: 365 day rental?

Mr. Fuller: no.

BM Wroe: okay, that's what I was after.

Mr. Fuller: no, not 365 days. The requirement is is I can rent it out one day or two days a year and that doesn't really matter. I've rented it out for family members, I've rented it out for other people coming there to have a place to stay, okay, and I've, and I've continued, there has been some years I've continued. In fact I had it up for rent when we had the fire. And then we had the fire, so during the period that the fire was to rebuilt, no I didn't have anybody in there.

Mr. Driessen: it was available for rent, there's not always tenants in it, though, but at least one day a year, it was covered.

Mr. Fuller: but they're records on the Polk file that says that

Mr. Driessen: the phone directory?

Mr. Fuller: the phone directory that says that here's who it's there, there's people on there that I have never even met that's on that.

BM Fakler: I don't think that Polk is impressive, so I don't think we have to waste time

Mr. Fuller: well, and then there's people that isn't on it that's on there, so I don't even understand that thing, so.

Mr. Driessen: the main issue is what they are saying, and I could, so we have Mr. Fuller talk with, Ruth Fuller, Mrs. Fuller also submitted one of those, you know. So, his, he tried to put a two on it, they crossed it out. Her, they told her you can't put a two on it there so we're going to put a one on it, there is no accessory apartment, there is no dual occupancy, we don't have it on our form because you're in a single family zone, and this is how you have to do it, if you want to fill it out. I mean, that's, that's you know, contract adhesion, you know, basically said you have no choice, this is the form, it's not on the form because this is a single family. If you want your building permit you gotta fill it in this way. And, you know, to me, none of these building permits then you know should be used to establish that it was a, you know, with the burden shift thing analysis that we talked about, this doesn't meet the burden.

Planner Snyder: staff would like to point out that if you review the building permit under existing use of parcel and intended use of parcel, we have a box that indicates other, so if your use is not listed on here, I think a person would use common sense and say okay I'm going to check mark other and then indicate the type use as indicated on the form. Or else there are two empty boxes where you can check mark and write in your use, and so, we would argue that there is multiple opportunity to indicate accurate use of the property.

Mr. Fuller: but I might I add that if you look at the one, you can clearly see that attorney Mitchell wrote the letter, said that hey, all you have to do is come and sign the building permit, it's all available, it's all filled out, here it is. Most of the time the city, we would ask the question and the city would actually fill out that part of there. If, if you know, it's kinda like going back to my animal rights issue.

BM Fakler: no, we don't want to get into that

Mr. Fuller: well, to keep it.

BM Fakler: we understand you and Springville City haven't gotten along all that well.

Mr. Fuller: well and I don't understand.

BM Fakler: I do have one question of either one of you; what took the city so long to start prosecution against this man for non-conformance? Meaning they had this thing for 30 years.

(Background conversation not audible).

Planner Snyder: this was brought to the City's attention twice. Once earlier there was a complaint that was made by a neighbor and it was discussed and reviewed and it was indicated that they could not have the use and then after the fire, one of our building inspectors was out there and indicated that he needed to come look at an apartment in the basement and so we then checked the records and said wait a second, the permit wasn't for an apartment in the basement.

Mr. Fuller: can, can I add to what he just

BM Fakler: so it was the fire that alerted the city?

Planner Snyder: the second time, yes.

BM Fakler: the second time. What did you do the first time?

Planner Snyder: the first time the notes indicated that it was reviewed by staff and they were directed not to have the accessory apartment and the file was closed.

BM Fakler: okay

Mr. Driessen: are you saying it was verbally directed or there was no paper work or for the first one or

Planner Snyder: we have paper work, I'd have to look through here to find it.

Mr. Fuller: the only record that I got received from the fire that was prior to this, was they, the letter in there by Byron Evans, it was the, he wasn't the director of the thing, it's unsigned, they faxed to me after the fire was there, okay.

BM Fakler: I saw the letter.

Mr. Fuller: you saw the letter, okay. And the thing is is is on the city, if the city was going to wait for 30 to come to me, okay to do that

BM Fakler: well, we just all heard from the city side, so

Mr. Fuller: and then the complaint, okay let's talk about the complaint

BM Fakler: no, no, let's not talk about it.

Mr. Fuller: if you read the complaint it wasn't even the apartment that he's talking about.

BM Fakler: I'm going to open it up for any questions from the board members. Question you have, anything you need before I call for a vote.

BM Freeman: what was the date of the fire, fires I mean?

Mr. Driessen to Mr. Fuller: stand up to the microphone

Mr. Fuller: it's in the record on the last building permit that I put two on it, okay, for the thing on it, but it was about five years ago, okay and then and then we, we, its' been two years since we got occupancy on it, so we built it is probably two and half, three years that we actually ended up building it; me and son actually done all the work and that's why took us so long.

BM Freeman: thank you

BM Fakler: thank you. Any other questions?

BM Jex: I'm a bit troubled by, Mr. Fuller, the lack of evidence on the continuing use. I assume that you've kept rental records, that you have contracts, receipts, but that wasn't produced, can you speak to that?

Mr. Fuller: well, I can I can produce people that's rented from me. There are some that's gone, okay as far as that goes, but I ask you how long do you keep records? Can I go, can you keep a record for 30 years, okay? Do you keep, you know, once that rental there and you go on you destroy that rental thing and then you go on you might keep it for four or five years at a time and then go from there and then keep it again, but do you keep records for 30 years continuous on the records? If I knew that I needed to keep all of the records for this and produce then I can, but I can produce people that that still live around here that has rented from me, okay. On it, I can, I can give you people that's rented it for you know a week at a time or two weeks at a time. I can provide that if you want me to give you that opportunity, but to give you a record of 30 years all the way back, I asked you if you can produce that on anything. And the statute is only maybe eight years and so you're talking, you're talking, you know I've had, I've had somebody in it, okay, I've got somebody else moving in it right now. And, and the only time that it wasn't was during the fire that we was rebuilding it okay, so that's probably close to eight years. Okay and then, well, five, five, six years from the fire, probably five or six years and then

there was a period of time that it wasn't rented for a couple months, but we advertised for it. It was, we had people coming to look at it a few days before the fire had and then we had the fire and that was it. Okay?

BM Jex: all right.

Mr. Fuller: So, so if that answers your question, but I can provide you with some of them I can provide you with some that's still live around here, the Borklands that live in Elk Ridge they can tell you that they lived there for two years. And, Karl and Lois Borkland and they're in Elk Ridge right now, so if you want to give them a call you can, can call them. I can give you some other names too that's rented from us.

Planner Snyder: staff would just like to comment that tonight we've heard the applicant submitted documents that are unrelated to the app, to the request. Then we've heard that the applicant has documents but he chose not to submit them that may have assisted Director Aegerter in reaching his decision. It's troubling.

Mr. Driessen: I would still refer to the State's statute that it's the City's burden to challenge the continuity and and if if they've met their burden then we would have to submit rebuttal documents and so that that we want to reserve that issue if if

BM Fakler: well, you've raised quite an issue in my estimation and I'd like to ask you the attorney and Mr. Penrod the attorney, I think I read in here somewhere where the City code puts the burden on the person that is asking for the non-conforming use of continuous use. The State code, I think puts the burden on the City in this case. This board, just a minute, if this board determines the use was properly made, legally and rightfully made, then the issue I've got is the burden. Now what Brandon said is true if Mr. Fuller has the burden of showing continuous use, he hasn't done much to do that, really. But if he doesn't have the burden by state statute, the direct issue is this, if Springville City statute says that the burden is on the proponent for continuous use and the State statute says it isn't, who wins?

Mr. Driessen: Your honor, may I

BM Fakler: I'm not an honor.

Mr. Driessen: I'm sorry, I'm so used to talking to judges.

BM Fakler: I'm just a guy who's donating his time.

Planner Snyder: one comment I'd like to make is if we're going to keep referring to State statute, it might be reasonable to get a copy of State code or we can pull it up on the screen.

BM Fakler: I happen to have a copy.

Mr. Driessen: yeah and we have a copy here as well

BM Fakler: I have a copy if you want it

Planner Snyder: no, I wasn't aware that you had one.

BM Fakler: well, I'll be glad to, you know,

Planner Snyder: for the record it would probably be reasonable to state where you're referring to in State code so we can have that in the minutes.

BM Fakler: well, let's get it, oh you don't have it

Planner Snyder: we can turn the computer on if we need to.

BM Fakler: do you have glasses, I can't see

BM Wroe: They're my wife's, so

BM Fakler: this is embarrassing. Okay, this is the section 10-9a-511 entitled Non-Conforming Uses and Non-Complying Structures. And we go down through to section 4, 4a. Unless the municipality establishes by ordinance a uniform presumption of legal existence for non-conforming uses, the property owner shall have the burden of establishing the legal existence of the non-complying structure or non-conforming use. b. Any party claiming that a non-conforming use has been abandoned shall have the burden of establishing the abandonment.

BM Jex: so the argument could be made that you first have to legally establish it as a non-conforming use which

BM Fakler: absolutely, absolutely. But then if this board establishes that, then all this bit about him not proving that he's used it without a year hiatus for all those years, it becomes the city's burden which I don't know how you'd ever prove he didn't, but. Anyway. John do you agree with that or am I out of base here?

LC Penrod: I'd like to address that

BM Fakler: I appreciate your help.

LC Penrod: part of having a non-conforming use is that the non-conforming use has continued and so I think we're talking about two different things. You have a non-conforming use and we what you have is you have to show again that it was a established legally and then it continued for the appropriate time because you look at the city's ordinance that does talk about that the use is no longer used for a period of one year, then that use is not a non-conforming use.

BM Fakler: yeah, that's what bothers me.

LC Penrod: so there is an establishment period where you gotta established that and so if, in this situation what came to the city was, was again the fact that the city made the decision on was on that this home was there in 1960, was it established legally. We have the code and I'm just going to go over this one so I'm kinda of confused too about this code issue. We're told there was six acres, but it says you can only have one two-family dwelling on a property and that the property has to be an acre and a half, but they're telling us there was six acres and multiple dwelling and so it's still one property so I'm still kinda confused.

BM Fakler: three

LC Penrod: three dwelling on one property, so it already, from what's been presented, it sounds like to me that there was, it wasn't established legally to begin with and what the code says at the County. But once you've passed that, they have to show that the non-conforming use has continued. Now, we've heard some evidence

tonight that's a little bit different than the evidence we had before us in the sense that you only have that one affidavit that said that they understood that the property from 1979 to the present, they knew it and that they had some testimony to that and then we had records at the city that showed that there were the different building permits and that's been addressed by the applicant and the City. But when you look at that the non-conforming use against the two components, was it legally established and did it continue? Now, they didn't show us that it continued because all we have is something from 1979 to the present that says that there was an apartment there and then we have documents later that says well you know, we only had one dwelling. And so what we have before us was not a complete legal lot for non-conforming use information established for the certificate. Now, if we would have wanted to challenge that we could have said well, you have all this information and there was an abatement period, however, they didn't provide us enough information to show that the non-conforming use continued to continue with that non-conforming use. I think we're talking about two things in the sense that you've got to show it was legally established and it continued which again, we had a break there, because in 1960 or I guess to would be 1974 when it was annexed, to 1979 that we had no information whether there was a basement apartment there. And then all of a sudden, tonight we have evidence that shows, yeah, the home was actually put in place in 1974 and there was an apartment. So that becomes, in my opinion, at this point it comes down to a fact determination be made by the Board whether there has been enough evidence presented by the applicant that there was a continuation there that's the determination you can make. The one thing I'm still kind of not understanding, is if you can have a two-family dwelling on one lot underneath the County code that was in place when this home was put in place on an acre and a half or greater, how do you have three on a six acre because that's more than an acre and a half you should be able to have two not three, and yet they put that there and that's what they using for their establishment of saying that it was legally and lawfully built.

BM Fakler: they put four on six acres.

LC Penrod: so that's the only thing that I'm looking at that kind of confused me on this. I think the other comes down to the fact determination that you need to make. Like I mentioned, there is some evidence that was presented tonight that we didn't have. We didn't have the continual use from 1974 to the present, it was actually presented to us; 1979 to the present and then building documents to show that it was a single family dwelling. So hopefully I haven't confused, Mr. Fakler you look like you have a question.

BM Fakler: okay, let's assume that the evidence deduced in this hearing may change Fred's mind; his decision. Is this evidence supposed to be admissible to come in tonight? Since Fred didn't have...I don't understand you guy's procedure very well here.

BM Freeman: yeah, if it pleases the Chair, then tiling on that discovery, is there a, for want of a better word, a discovery phase that leads us up to to our event this evening a disclosure by opposing counsel or in this case, against the City Counsel and the applicant counsel?

Mr. Driessen: I'd like to answer that...(Inaudible)

BM Fakler: I'd like to hear from Mr. Penrod.

LC Penrod: it would have to go back and I don't have all the code here in front of me, I'd have to back and look at it. So let me sit down and defer to the counsel let me look at it so I can respond if I have a different opinion.

BM Fakler: are you making a recommendation to continue this hearing?

LC Penrod: no, I am not making a recommendation, I'm just saying that he wants to respond so let's let him respond to it and then if I have a different opinion I'll respond. Thanks.

BM Fakler: Thank you

Mr. Driessen: to answer that, you really have to look at what happens at the district court of appeals. This record becomes the entire record before the board. It's something is brought in and in many of these cases at district court there is testimony that is heard before the board and the board hears it all. It's all before you, you know. Grant it that we've had a couple of of questions of procedure that the director is not even here, you know and that would be weighed also at the district court, but everything that happened here tonight becomes the record, that's what goes to the district court and they are going to, if it's reviewed, there are going to look at it; everything that's before you. If I could just make one final response to what he had hopefully finalled, unless we start going back and forth again. Again in this same case, they're talking about the mechanisms that the board can look at. These are just mechanisms for enforcing land use enforcement. There is no magic objection, objective standard and it says clearly that municipalities may also consider when and whether they withheld building permits. So all these build permits that they threw before you where the building inspector knew there was a basement apartment, yet this was part of their decision here that they said they could use, why did they not withhold the building permit then? They should have withheld the building permit for the basement apartment and they didn't. That was, now it's just one of the considerations, not saying, you know, you base your entire decision on that, but it even says right here that the municipality may also withhold building permits where the proposed structure use does not fully confirm, conform to all regulations and their saying that if they did withhold the building permit the City is actually the one who's kind of letting go of that argument,

Planner Snyder: do you mind if we

Mr. Driessen: it could be argued both ways.

Planner Snyder: do you mind if we keep a copy of that for our records and just in response to that if we look at the building permits, first one from 1989 the type of construction is a garage. I don't think the building inspector would necessarily be inside the home or the basement of the house for a garage. 1997, the type of construction was for a barn in the rear property. Once again I don't think the building inspector would be going into the premises for that inspection. And the 2007 permit that was the one that brought this to our attention when the building inspection was asked to look in the basement.

BM Wroe: may I also, Mr. Chairman, with respect to, mention that when a building inspector goes out, it's prima-facia, first face, what he sees. I don't know of too many homes including myself, that don't have a downstairs full kitchen and I actually have this separate living quarters, but God help any of the kids that want to move in. And no one does that, but the fact of the matter is that it is there in my single family residence. So whether there was a presumption, whether the question was asked, whether there was a box on the form, but when he did his inspection is is also in question in what your comment of that he went out there and noticed this. I don't know that he did and I'm not sure it's a fair statement. But I think, I think there's an awful lot of things that Mr. Aguilar is part of what we've heard here tonight may not know about and I think that's a consideration.

BM Fakler: very definitely.

BM Wroe: they need to check into it.

BM Jex: can I pose a question? Part of the evidence that has been produced is the Utah County revised ordinance, the Zoning Ordinance, Title 10 from 1956. Assuming that was the ordinance that was in place at the time that the house was put on the lot, which we've heard testimony tonight was 1974, that ordinance read that the use, use is permitted chapter five, 10-5-1 paragraph (a), is one family or two family dwellings of a permanent character and goes on. And then later in section two (j), the minimum building size area shall be one recorded lot or parcel of land not less than one acre for each one family dwelling or not less than one and a half acres in area for each two family dwelling. The question in my mind is whether three units on one lot that was six acres was an appropriate use even then in 1974. That's the question I guess that's been posed by our, by the City Counsel and one of the questions that I'm struggling with, and I don't know anyone has an opinion on that because a recorded lot to me would translate into those six acres. One recorded lot would be the six acres. The zoning would have allowed two units on the one recorded lot. Am I misinterpreting that?

BM Wroe: no, I don't think you are because I've weaned off this particular ordinance over the years and there's, it's not ambiguous, it's pretty liberal and allows a lot of things, but it's not one family and two or, and two family, and/or two family dwelling which is just says one or the other. And the point comes up is was there a certificate of occupancy issued and we don't have that documentation. The County apparently doesn't either, so,

BM Jex: so the question again in my mind is were three building on a six acre lot recorded lot

BM Wroe: I don't know the three buildings were considered when they built under this particular ordinance. That may have been an accessory building at the time, but we're saying with sheds or barns, chicken coop, whatever. But it does raise a point that there are three, that in the documents that we have here, that there are three residents occupancies here.

BM Jex: and given the testimony

BM Wroe: in the testimony, I'm just worrying; that was a big sticker in me, a big thorn. But I'm just wondering how much of all the rest does Fred know about.

Mr. Driessen: I think Mr. Wroe's stated that, stated that well. These are all things you you have to weight in consideration and I would add that the County certainly didn't reject or there's no record of it maybe they did.

BM Wroe: they may not have even known it and and that's, I've seen that. I'm retired from the County, I understand.

Mr. Driessen: is the existence of an illegality proof of legality or is proof legality proof of legality and we don't know that and I think ...

BM Wroe: well that's why we have this gentleman.

BM Freeman: Mr. Chair, if it pleases the Chair, I would just be interested if Ms. Fuller had anything that she would like to say. Maybe she could come down she's one of the co-applicants and at least maybe affirm what was presented earlier by your counsel relative to your experience in the permit, in regards to the permit.

Mrs. Fuller: I was the one who did most of the record keeping for the apartment. And I usually keep the contracts for a year after the people vacated because I just don't have room to store everything. And once we were dallied up as to damages or anything like that, I would just shred the contract because I have personal

information on it. And the main reason that we had Melvin here tonight was because all the kids have moved away, and like anybody else, you don't keep in touch with them. And we've actually kept in touch with two of the sons, one passed away recently. And Steven has said, well why don't you call by brother Melvin and get a hold of him as see if he can come up because Steven had to work tonight and couldn't get away and Melvin took off work so that he could come up and help us. So that's the difference in bringing him instead of the one we have the affidavit from. We didn't have current information as to where Melvin lived.

BM Freeman: sure and parenthetically, I would just compliment the Whitings for making the the, come up from Price, we understand, and be a part of this process. It's important and I think you shared some things that help, so.

BM Wroe: I have a question for you, Ma'am and as you said you are the bookkeeper. Did you, was this a taxable income for you and how, weren't you required to keep records for a certain period of time.

Mrs. Fuller: I have a CPA that keeps track of our taxes and does our taxes for us. We have a Home Occupation business, my husband's retired from the military and so with all the things I have a tax guy doing our taxes. And yes, we did declare rentals.

BM Wroe: I, I don't mean to confuse us, I guess the question would be is if you have rental records for those periods of time and how far back do you keep your records and wouldn't that, you have a certain amount of time that they would to do that may establish this.

Mr. Fuller: he has us keep them for seven years.

BM Wroe: okay, so so you kept them, your rental records were kept for seven years, then?

Mrs. Fuller: most of them. With the fire, we lost a lot.

BM Wroe: oh, oh okay, yeah, you lost them. You have the last five years then.

Mrs. Fuller: yes, I have a filing cabinet in the basement, but.

BM Wroe: yeah, I understand.

Mrs. Fuller: it got destroyed.

BM Fakler: but your income tax records were also in that filing cabinet.

Mrs. Fuller: some of them, well yeah, they were up in the attic above the garage and the garage totally went.

BM Fakler: garage totally went.

BM Wroe: thank you very much

BM Freeman: Chairman, one other interruption,

BM Fakler: go ahead

BM Freeman: in conclusion to Brandon, if I may, the question, how does City view the fire; the act of God if you will and the continuous use and is there anything there we need to be aware of. Does that interrupt, does it, is it a part of the story?

Planner Snyder: well, if you look at two scenarios, one if you have a house that's a single family dwelling that burns down and the single family dwelling is still a permitted use in the zone, the person would come in when they want to rebuild and restore that house and they could do so. Number two scenario would be if you have a house maybe was non-conforming to the use such as a two family dwelling, maybe it was non-conforming to the setback, in the sense that it didn't meet the current setback requirements, there's provisions that if it were to be destroyed, they could come in within a certain time period and restore what was originally there. And so one we'd have to look at and say okay what was there before.

BM Wroe: is there a sunset on the building permit.

Planner Snyder: I believe building code provision do have sunsets, I don't know those off the top of my head, but I believe its 180 days.

BM Wroe: I guess the question we come up, counsel let me ask you a question, is there's a sunset on the, on the building permit and the house were not repaired and completed by the time that they 180 days or whatever it may be, in any case six months, would that then abrogate the continuing non-conformance.

LC Penrod: with, with, there's been, what Mr. Snyder spoken of is more of a non-conforming structural issue.

BM Wroe: not use?

LC Penrod: not use. And so there's two different things; there's non-conforming structure, there's non-conforming use and see they have the right within a certain time to come and put a non-conforming structure back in place. With the use there's still, you gotta show that the use is continued so there's an urgency on the part of the property owner who has a use and want to continue it to make sure they meet those requirements.

BM Wroe: and of course, the apple or the chicken or the egg, was it legal at the time?

LC Penrod: yeah, and was it legal at the time, and so they can continue with it.

BM Wroe: thank you

LC Penrod: And so if that's all you had.

BM Wroe: that's all I had, sir.

LC Penrod: okay, alright, thank you. And you asked a question prior if you could have more information more evidence here. In just looking at our code, really what it says is, the notice shall allege there is an error in any order, requirements, decision, determination made by an official or officials in administration interpretation in the zoning ordinance. The person making the appeal shall have the burden of proving that an error has been made. There's nothing that really states you cannot bring something, it is talking about the decision. However, tonight the evidence has come in, we have not objected to that evidence, I think on behalf of the City, we want to, if there is use that's there and there is testimony that can show it, we're fine by following what really

happened and so we're not going to object to new evidence coming in tonight with respect to use. Again that goes back to that affidavit goes only talked about 1979 to present and some of these say 1974 to present, so.

BM Wroe: that sir, is why I like living here. Thank you.

LC Penrod: Thank you.

BM Fakler: any more questions? Okay, I guess everybody has had their say. I'm going to close the hearing. I'm gonna give the Board Members a chance to have open discussion and formulate their minds a little bit and then I'm going to call for a motion.

BM Wroe: well, I would just start that I don't think Fred made an error. I don't think he had all the information that we received tonight. I'm not sure that's our proper role is to consider, do we send it back or do we stand on face facts here, what we're, the hand we're dealt. This is what was given to us and this is what the rules were.

BM Fakler: are you saying the new evidence should be considered in the decision then, the new evidence tonight or not?

BM Wroe: no I'm not saying that because I don't think that's our place, we're not, we're only to determine whether Mr. Aguilar made the right or wrong decision. I think there's some awful lot of, this interesting facts given even in this document as well as the testimony tonight, but if I'm considering what the hand Mr. Aguilar was dealt, I don't, I don't, I can't at this point see where he made an error, and, but I'm, I'm stuck with the number of things here. I'd like to hear someone else.

BM Jex: well, if I'm, I tried to pay attention to the proceeding tonight and there's a lot of information that was shared and frankly, it's a tough position to be in, to be honest with you, Mr. and Mrs. Fuller. If, again in my mind, when the home was established, did it conform to the then existing county ordinance? That's the outstanding question in my mind. If it did, showing that you had continual renters in the property is an important question, but in my mind I'm still struggling with whether or not when the home was established did it comply with the Utah County zoning ordinance. And to the point I was making earlier, I'm struggling with whether or not three homes on one parcel of land that were all multi-family dwelling conforms to the then RA zoning requirement. And right now, as I, I sought to get an option on that, and it's an outstanding question in his mind whether or not it did conform at the time the home was placed.

BM Freeman: We're a quasi-judicial board and I'm having come my mind in reference to the last comments made, meritorious though I think they are, are there any kind of theory of quasi latches, if you will, that a city has, leaving Mr. Fuller understandably raised the question, 20, 10, 20, 30 years. One of the unusual things about this case is that Mr. and Mrs. Fuller have, have lived on the premises for three decades or thereabouts and I guess I guess I'm getting a little bit ahead of myself, in dealing, the key I guess is before even 1980, what point in time do we say well were uses then clear and open. The question of continuous' is a difficult one for me candidly, I'm probably having as much trouble with that as anything right now. And in law, generally my modest awareness about contract law and other related areas, you know, at some point you have to move on and have a reliance that that old code isn't going to bite us at or reaching back from its grave, if you will. New code, newer code didn't attend to the definitions at the time the home was established. That's the question I have and I'm clumsy a little bit, but boy, I'm raising it here, I'm don't know how to come down on that. I think you're, you've clearly had a concern about this six acres, the code definition, there were three structures. It's a problem, clearly it's a problem. At what point in time do we move beyond that, I don't know.

BM Fakler: well, I think city decision was stated in its conclusion and it's in here at the end of Mr. Aguilar's memorandum. I quote: "I can't see any time for the second unit in this house could have been legal under the zoning ordinance in place since the house was constructed." To me that is the issue that is the unencumbered issue by continued use. I don't think, I think the city has the burden of continued use by state statute, so I'm not too impressed with the continued use argument for me they were fine. The city didn't give much of a continued use argument, so I'm straight at Mr. Agu, Mr. how do you say his name;

Planner Snyder: Aegerter

BM Fakler: Aegerter. I'm looking straight at his conclusion and I quoted it so the decision I have to make was that property legally built and occupied as two families under the ordinance. I acknowledge your interpretation of the ordinance, but I don't see why you can't have six acres with 4 apartment type houses on it, under there either if you have on recording, well, you have one big recorded piece of ground, I don't know. Trouble I don't know back then, I mean there's no definitive records, and of course, then I listened to the case, Mr. Driessen presented, so. We'll think about it for a minute and I'll call for a decision. I do want to claim, I think I'm right on this, John you might correct me is I'm right or wrong, the chairman is to defer from voting if he creates a tie, is that correct? In other words if it's two against one and I vote with the one, I create a tie, we've accomplished nothing. So am I allowed to vote?

LC Penrod: you are allowed to vote

BM Fakler: even if I create a tie?

LC Penrod: even if you create a tie.

BM Fakler: I hate number four, I love number five, that's the problem.

BM Wroe: you're not getting out of this that easy.

(Inaudible comments)

BM Fakler: gentlemen are you ready? And whoever makes motion, please list the definitive reasons for the motion.

Mr. Driessen to LC Penrod: I would ask legal counsel if he knows if we could even kick this back to Mr. Aegerter, if that would be an option.

LC Penrod: after hearing the appeal of the Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as the Board determines is correct. It is my interpretation that is cannot be reversed and sent back to Director Aegerter. The determination should be made at the Board level.

BM Fakler: Can the chairman make a motion? Normally he doesn't.

(Inaudible comment from LC Penrod)

BM Fakler: I move that the decision of our city administrative Fred Aeg.. I can't say that, where he feels that the house was not legally built under the zoning ordinances on the site now sits, was in error. I think the

appellant has shown with two witnesses, his own testimony, and the court cast presented by Mr. Driessen, his attorney out of Logan, I'd like and you gave the copy of that to the City, where the land records and land uses were so confused in the County before the City brought and annexed into the City. I feel that Mr. Fuller has met his burden and I don't feel with continued use of that non-conforming use is his burden to show. I believe under State law and I read the law, requires the City to show the continued use requirement. I therefore ask that this motion to be seconded.

BM Fakler: seeing no second, I call for another motion.

BM Fakler: will one change my motion, I need another motion.

BM Freeman: as a Point of Order, Chair, if we don't have a second on your motion does that mean..

BM Fakler: it dies.

BM Freeman: well the discussion is still ongoing or we're

BM Fakler: we got nothing accomplished, so we'll open for more discussion.

BM Freeman: and I'm sorry cause it's no fun being a chair anyway and now you've got this substantial pause. It's a lot to take in.

BM Wroe: Mr. Chairman I'd like to, think we should open this back up to discuss so we might be more unequivocal.

BM Fakler: your request is granted.

BM Freeman: the question I have Chair, is if, if in the second part of your motion, I'm persuaded that the city has the burden to show the non-continuous use, just how do they do that? I mean, what records would they be privy too and what standard of expectation should we look to how they would feel to do that and consider the ramifications for a whole lot of other similar kinds of use or non use?

BM Fakler: well now, that I can't answer that.

BM Freeman: I understand you're looking at State statute to provide the rationale. I support your strategy but puts us in a pickle, doesn't it?

BM Fakler: well, it's not easy for the City I presume as well as the appellant to go back 35 years and bring the records for us to show continuous occupancy so that, that. I agree that is a very tough burden on whichever side happens to need it, but. The way I read the State statute is on the City. Now, if you feel that the use was never appropriate make, then of course, it handles that issue totally

BM Freeman: that's right

BM Wroe: I just want to interject we're not, we're quasi-judicial, we're not planning commission who makes the determination of that, we're just to look at the decision Mr. Aegerter made and whether it was in conformance or not. I think if I were, my background causes me to look at some of these things and come back and say, where was the proper records and where was the proper record keeping, but that's not where we're at.

Where we're to decide is whether Fred did right or wrong. I think it's that simple and to convolute it with a lot of information that would be a wonderful to sit down across the table with and discuss between the two attorneys because they have the minds to do that, and I think beyond what we are supposed to be doing. I think it's just a simple fact of whether Fred received with the hand he was dealt, made the right decision. I've seen here that there were some other cards that needed to be put in that deck that weren't. Now that's not Fred's fault. I think there was due diligence made by by staff in what they've provided and discussed and I can tell with a lot of passion in their work. And given that, I'm inclined to go along with the staff judgment on this. . If this whole thing was to be gutted and laid out on the table, you've been through a lot, you're family has been through a lot and I'm not sure that's all fair in dealings, but I made the comment to a guy today that said well, suppose I've pulled you over for speeding in a zone that you didn't know the speed limit, well the reality of it is you're required to know that speed when you driving, operating a vehicle. And I don't mean to trivialize what you're going through to that zone and though the discussion, but all these years, and it's been a lot the that either this wasn't handled well or record keeping was amiss. I have no idea what it is, all I can do is go on what was given and effectively did Mr. Aegerter do it right or wrong. That's where I'm at. I can't go deeper into it, that's not our position, I don't believe. Not board's position to go deeper into.

BM Fakler: okay, if we could make a motion; you just about did I think.

BM Wroe: Well, I guess I did was I don't have the finds, well let me do this; okay, I make a motion that we deny the applicants application because all of the following items I don't believe are met:

- 1) The literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance.

BM Fakler: Tom, I think you're on the wrong page.

BM Wroe: oh, I'm sorry. Let me go back to where I'm supposed to, I'm looking to two books.

BM Fakler: you want this one.

BM Wroe: find out where I am here. Let's get this put together, it's so difficult.

BM Fakler: Brandon can you help us with where the findings are. (Planner Snyder approached the Board Members to help with the findings.)

BM Wroe: I'm sorry, I apologize for the interruption.

BM Freeman: you're doing just fine.

BM Wroe: in the findings that the property locate at 2025 East Canyon Road is currently in the R1-10, Single Family Residential zone. A "2-Family Dwelling" is not a permitted use in the R1-10 zone per the Springville City Code Land Use Matrix found in Section 11-4-301. Referencing exhibit A.

- 2) City records as of December 28, 2010 indicated the property has one water meter, one electric meter and one sewer connection for billing use service. The property is billed for two garbage cans. Refer to attached exhibit B. Parenthetically, he would like to add in here notice the pictures and those was

I guess some previously pictures cause I understands that they no longer have two service connections.

- 3) The property was annexed into Springville City in 1975. Utah County records indicate the home was built in approximately 1960, but there has been some discussion regarding that as well. Refer to Utah County Board of Adjustment Appeal #170 – 1960. Permit #954-B associated with Appeal #170 was for a single-family dwelling on one acre. Refer to exhibits C and E.
- 4) The property was in the Utah County R-A zone when it was annexed into Springville City. Refer to exhibits D and E.
- 5) Director in the administration or interpretation of the City Codes and Ordinances. Utah Code 10-9a-705 Burden of proof, indicates that the appellant has the burden of proving that the land use authority erred.
- 6) Springville Municipal Code 11-2-305 Appeals to the Board, indicates the following: appeal may be made to the Board of Adjustment by the applicant, other person or entity adversely affected by a decision administering or interpreting the zoning ordinance.
 - (c) The notice of appeal shall specify the grounds for the appeal and associated circumstances. The notice shall allege that there is error in any order, requirements, decision or determination made by an official or officials in the administration or interpretation of the zoning ordinance.
 - (d) The person or entity making the appeal shall have the burden of proving that an error has been made.
 - (g) After hearing the appeal, the Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as the Board determines is correct.

BM Wroe: I think it was important that we read those in, I think that there should be clarity in what we do here. And, and a lot this we academically sit and discuss and I could find fault in favor personally with a lot of what went on, but in terms of what Mr. Aegerter determined from the evidence that he was provided the, hand he was dealt, I, I stands by Director Aegerter's decision and I move that we deny this appeal.

BM Fakler: okay, is there a second for this motion?

BM Freeman: I second the motion.

BM Fakler: the motion has been made and seconded. I will now call for the vote. All in favor of the motion seconded, say Aye.

BM Freeman: Aye

BM Wroe: Aye

BM Fakler: all opposed, say Nay

BM Fakler: Nay

BM Jex: Nay

BM Jex: Mr. Chairman, can I make another comment and then make another motion?

BM Fakler: certainly, absolutely.

BM Jex: unless counsel has another comment. Upon further review of the documents that were provided, I now sees that in 1960 the Utah County Board of Adjustment did granted a variance and allowed a third home to be built on the property which I have to assume was the six acres.

BM Fakler: that isn't, we covered that earlier, this Board of Adjustment document, I don't why it's put in because it has nothing to do with your property

BM Jex: that is a different property

BM Fakler: that is a different property

BM Jex: thank you

BM Wroe: looking at the building permits that were relative that maybe surrounding and not this property and that's why, what caused me to focus in.

BM Jex: thank you

BM Fakler: okay, I'm going to call question on the motion again. All in favor of the motion make and seconded.

BM Freeman: Aye

BM Wroe: Aye

BM Jex: Aye

BM Fakler: all opposed, say Nay

BM Fakler: Nay

BM Fakler: okay, the "Aye's" had it three to one. Any business or new business we gotta cover, Darlene. I then close this hearing. Thanks everybody for coming.

BM Fakler closed meeting at 9:10 PM.