Byard Cox Appeal March 15, 2016

On the Commissioners’ level on March 15, 2016 at 4:00 p.m., a meeting was held as advertised for the purpose of a Public Hearing in relation to the Appeal of Byard Cox to the Board of Adjustment Approval of a Variance for Gary E. and Shellee Faye Lewis from the minimum setback requirements for the front, side and rear yard for an existing single-family dwelling in a Grazing G-1 Zone. General Location: 6308 E. Foothill Rd., Bonneville County, Idaho

Present were Commissioner/Chairman Christensen, Commissioner Staker, Commissioner Radford, Zoning Administrator Steve Serr, and Administrative Assistant Betsy Hanks. No Public Works representative was present. Chairman Christensen conducted the hearing, made introductions, read the legal notice, and outlined the procedures and guidelines for the hearing. He stated the minutes and all documents submitted for the Zoning Hearing will be made part of this record.

Jay Kohler, 10908 S. 1 E., Attorney representing Byard Cox, clarified that the Commissioners received his memorandum from the Zoning hearing. He explained he has also created a timeline of events (Exhibit #1). He explained the Zoning Commission tried to follow the facts presented at the hearing and the law and that they were struggling to articulate what the special circumstances may be to justify approval. He and his client believe the Commission should not have considered the variance. He stated Fannie Mae had been sent a violation notice in February 2015 which gave them 30 days to file an appeal. If they did not respond, their rights would be forfeited and that the Certificate of Occupancy may be rescinded. Fannie Mae did not respond. Fannie Mae chose instead to market the property and ultimately sold the property to the Lewis’ for $105,000.00. He wonders if Fannie Mae were applying for a variance at this time that there would not be much sympathy for them. His and his clients’ first position is that the right to appeal was closed because Fannie Mae did not respond in time. They believe the right to apply for a variance is moot by transferring the property to another owner. If this is not the case, then what good did the notice of violation do? Was it a waste of Administrator Serr’ time and taxpayer money? He stated the Zoning Commission did not really discuss this point. Mr. Kohler asked for this Commission to review this point. He also stated the Zoning Commission did not focus on whether there is a hardship but instead discussed special circumstances. He and his client believe there is no undue hardship for the Lewis’s. Idaho Code #676562 which is a mandate for the Commissioners, states “a variance shall not be considered a right or a special privilege.” He stated the Lewis’s do not have a right or a special privilege to have this Commission grant a variance. “A variance may be granted to the applicant only upon showing of undue hardship because of the characteristics of the site. The Zoning Commission did not find an undue hardship. The Lewis’s may have a hardship because they bought a house with setback issues, but does it qualify as an undue hardship? He and his client believe there is a solution for this problem outside of the hearing process. The practical solution is for the Lewis’ to approach Mr. Cox and negotiate with him to bring the property into compliance. There was a superficial negotiation attempt by the Lewis’s, but no serious negotiating. The other reason they believe there is no hardship for the Lewis’s is that the property was valued at $540,000 at the time of the 2008 refinance. At the foreclosure by Fannie Mae, a 1099 sent to Mr. Cox informing the IRS of the debt cancellation, valued the property at $423,00. This is a nice home. Fannie Mae listed the house at $339,000 and Fannie Mae kept reducing the price due to the property problems. Mr. Kohler believes the Lewis’ purchased a very nice home for a steal. He believes it is significant that five days prior to the purchase of the home, the Lewis’ drafted a letter to Mr. Serr acknowledging the notice of violation and indicating their intent to file for a variance to address setback issues. The Lewis’s went into this situation knowing the problems still...
and now they claim there is a hardship. If one exists, it is knowingly self-imposed and not created by the characteristics of the property. They bought into the problem with their eyes wide open. They are asking the County Commissioners to be complicit in a plan to increase the value of their home by not paying the fair market value of the property. The Zoning Commission did not address the requirements to find an undue hardship based on the property characteristics. Any hardship here is not topographical or physical based on the characteristics of the property. Mr. Kohler stated Ordinance Section 1-511 is material to this hearing. “Before a variance can be granted, the Planning and Zoning Commission must find upon the evidence that...” five requirements. He stated the Commission did not address these five requirements and are another reason for this appeal. The County Commissioners need to look at these five requirements. He read part of Section 1-511 “Special circumstances do actually attach to the particular property covered by the application which do not apply generally to the other properties in the same zone.” He believes this is referring to topographical physical characteristics of the property that set it apart from all of the other properties in this same zone, but this property is no different than any other property in this zone. He does not believe a setback violation creates a special circumstance. Another of the five items the Commission must find to approve the variance is that the “hardship is not the result of any action taken by the property owner after the effective date of the ordinance.” Mr. Kohler stated not only current owners, but also Byard Cox and Fannie Mae should be considered. The Lewis’ state they have a hardship because they have a house they cannot live in until this problem is resolved. From their perspective, the hardship is the result of their own action of buying this property. From the prospective of previous owners, Fannie Mae created the hardship by ignoring the notice of violation. Fannie Mae created a hardship by not appealing or erred by not taking some action to fix the problem. The Lewis’ inherited the problem, like a lien on property. Anyone could file for a variance by simply putting the property in another name and he believes that would set a dangerous precedent. The previous owner was Byard Cox. The problem was admittedly created in 2007 when American Title asked Mr. Cox to sign a warranty deed to carve out the 1.27 acre parcel which created the setback violation. This was innocent on Mr. Cox’s part. Mr. Kohler stated Mr. Cox requested the survey done by Mountain River Engineering. He explained the title company wanted the 1.27 acre separated from the larger parcel which created the setback issue. At the time of the home construction and construction loan, the 1.27 acre parcel had not been separated out. The deed of trust to secure the note used the 1.27 acre property description. The 34.5 acres was one parcel in Mr. Cox’s name. He believes the title company realized the problem and asked Mr. Cox to sign the warranty deed. When Mr. Cox requested the building permit, he used the 1.27 acre legal description. The permit was issued on a 34.5 acre parcel with the matching parcel number. He assured the Commissioners there was no intent by Mr. Cox to create this problem by deeding the property from himself to himself. The Zoning Commission did not understand why Mr. Cox would create this problem and then object to the Lewis’ variance application to solve the problem. Mr. Kohler stated the construction footing inspection was performed. He commented that the property pins and boundary lines for the 1.27 acres was overlooked for this inspection.

Administrator Serr explained that the site plan was submitted with the building application. If any corrections are needed, there are notes written on both sets of the building plans and both sets of the site plan. This is so the property owner has a duplicate set of the plans kept in the office. There was no deed for the 1.27 acre legal description recorded so the building permit had to be issued on the existing parcel. There are notes on the plans for the required setbacks. There is also a note that the record of survey was not compliant. The 1.27 acre survey was not recorded until two years later.

Chairman Christensen noted Mr. Cox had the option to adjust the survey pins to make the setbacks compliant or to build on the entire parcel. He commented the
owner of the property is eventually responsible for the set of building plans received from the building department.

Chairman Christensen asked Byard Cox if he has received the 1099 form from Fannie Mae which Mr. Cox indicates he will have to claim as gain on his income taxes.

Byard Cox stated they have received a 1099A form. He believes the difference between $403,000 and $105,000 is the amount which will be on the form.

Mr. Kohler explained they are waiting for this to show up as income or some explanation.

Chairman Christensen asked if there had been other prospective buyers of this property.

Byard Cox stated there were other offers. He explained as the price of the house declined, they increased the asking price for the adjacent property due to the tax liability increasing. When the Lewis’ purchased the house, the adjacent estimated 1/3 acre was on the market for $222,000. Mr. Cox believes the County tax appraisal at the time of purchase by the Lewis’ was an estimated $300,000.

Chairman Christensen commented the Commissioners need to review the special circumstances and how the hardship was created when the building permit was issued, accepted, and later changed. He asked for clarification of the transfer of the balance of the adjacent 34 acres to another family member.

Byard Cox explained before the foreclosure, the balance of the property was sold to someone else who was not a family member. It was sold to two gentlemen from Utah in December 2013, but they purchased it back on November 10, 2015. He stated he has copies of the purchase agreements and he stated the new owners paid the taxes on 16 acres of property around the home. He stated their point is that the home has been abused because it does not meet setbacks. He believes it would be equitable if the house and the additional compliance land were to be purchased for $300,000. He believes this part of the discussion is a civil issue.

Commissioner Staker commented Mr. Kohler brought up the leveling of the price for the home and the adjacent land.

Jay Kohler explained the sale of the adjacent land to the Utah gentlemen was in the nature of a loan with a right of purchase.

Administrator Serr stated a copy of the deed for the 1.27 acres is in the file now.

Byard Cox stated it is Exhibit F on the chronological list provided by Mr. Kohler. It is the deed filed by American Title that he and his wife signed in 2007. Mr. Cox clarified that a deed of trust was filed in 2005 by Indy Mac with the same legal description as (Exhibit A on the chronological list) on the original building permit and later recorded at the Assessors’ office.

Administrator Serr explained when a deed is recorded, a separate parcel number is created. There was no deed recorded at the time the building permit was issued. He explained filing a deed of trust does not create a new parcel. Byard Cox stated the loan to build the house was secured before the house permit was issued on 10/22/2004 and the deed of trust was filed December 2005. He had secured a construction loan which automatically transferred to a long term loan when the house was completed.
Chairman Christensen stated Mr. Kohler had discussed how the definition of an undue hardship is the ability to purchase the property and negotiate a fair price. He has asked for the values and the transfers back and forth so they can better understand what created the actual hardship. He asked if Mr. Cox had an opportunity to redeem the property from Fannie Mae.

Mr. Cox stated he had the opportunity at a value of $149,900. He stated he would have still been responsible for the tax liability. He stated the 1099 would be for $299,000. He does not yet know how much this could cost him and he has not completed his 2015 taxes yet.

Commissioner Radford clarified with Mr. Kohler that they agree with the position the Zoning Administrator took with regard to Fannie Mae, but that the Lewis' did not have the right to apply for the variance.

Mr. Kohler stated they agreed action needed to be taken, but that the door for appeal was closed when Fannie Mae did not appeal in the allowed time frame. Fannie Mae would have had the right to apply for a variance had they filed the appeal in the allowed time. The right for Fannie Mae and the successors’ interests was lost.

Mr. Kohler agreed Administrator Serr was correct that a new deed was not created when the record of survey was recorded. He explained that one other reason they believe a variance should not be granted because it would constitute an unlawful limitation on Mr. Cox's property due to Section 1-711 which requires a distance of 40 feet between dwellings. This would place a limitation on where he could build a new residence on his remaining property. Mr. Kohler agreed Mr. Cox was a player in the events, but he does not believe he intentionally caused any problems.

Chairman Christensen called upon the applicant to present their application.

Gary and Shellie Lewis, 6308 E. Foothill Rd., stated this is a complicated issue. He stated they are living in the home now. They submitted a packet of information (Exhibit #2). He stated the packet includes a copy of the document (#16) showing Mr. Cox repurchased the property around the house last summer for $10.00 to each prior owner. Mr. Lewis stated he could not find a copy of the original contract for the sale of that property.

Chairman Christensen stated they would like to see a copy of the original contract when the surrounding property was transferred to new owners.

Mr. Lewis explained setbacks are only part of the problem on the property. The utilities are also part of the problem. They are all located off the property and they believe they were deliberately placed off the house property. He stated there are survey stakes remaining in the ground. This affected the electrical, well, propane, and the leach lines for the septic which are all located off the 1.27 acre parcel. These affect the price of the properties. The house and property had three committed buyers which all backed off from the purchase. They were aware of all of these problems when they decided to buy the house. Mr. Lewis stated they believed the only way they could negotiate in good faith with Mr. Cox would be with a variance. They want to negotiate with Mr. Cox and they want to buy additional property. As long as the lack of variance remains and the setback problem exists, Mr. Cox can ask any amount he wants. Mr. Lewis stated the asking price of $222,000 for 1/3 of an acre is inordinate. They are willing to pay a fair price. Mr. Cox believes the house value is $400,000 plus. The County Assessor placed a value of $285,000 for tax purposes assuming the utilities problems are solved. The real estate people believe the value after the problems are solved and the repairs are completed would be $360,000. With all the vandalism, they wonder if they paid too much. They spent $35,000 for a well along with money for

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repairs. There is also a problem with the other setbacks being only 10 feet from property lines.

Shellie Lewis stated Mr. Cox is concerned about his tax liability. She believes the house could have sold for considerably more had Mr. Cox been willing to negotiate with other earlier purchasers.

Chairman Christensen clarified that the Lewis’s were aware of the problems before purchasing the home. He commented one issue is whether the variance should have been heard. He believes the value of the property is relevant and the ability to come to a resolution. They would like to have provided the prior property tax appraisals for the record. This would be for the time when Mr. Cox owned the property along with the documentation of the cost and transfers of the property. These would help determine whether there is an undue hardship for either party.

Mr. Lewis stated they would like to submit additional letters of support (Exhibit #3).

Chairman Christensen stated the letter would be made part of the record. He suggested since there are relevant documents missing, continuing this hearing until April 18th at 2 p.m.

Commissioner Radford commented the Lewis’s had researched the value of the property in 2008 when the value was listed as $540,000. Then Fannie Mae stated the value was $423,000. He asked whether they believe the difference in value was the original price on the 34.5 acres and the $423,000 was based on the 1.27 acre parcel. He asked if they had looked at other local properties.

Mr. Lewis stated he does not believe that was the reason for the difference in price. He believes the difference was due to the decline of the housing market in 2008.

Shellie Lewis stated they were originally not looking to buy in Idaho Falls. They had looked at other short sale properties in Utah.

Chairman Christensen stated they will focus on the actual liability this creates. After the tax filing deadlines, it would help if Mr. Cox would provide the tax liability, the transfer documents, and contracts. They will consider hardships.

Commissioner Radford asked if there has been any other similar situation occurring in this County. He asked whether he remembers Fannie Mae or other companies responding to a violation letter.

Administrator Serr stated he cannot think of one which would be similar. He stated he has not sent any previous violation letters.

Gary Lewis commented in relation to the hardship, every bank they visited knew about the problems with the property. At two banks, they were told they would not be able to secure a loan on the house so they had to use cash.

Chairman Christensen stated reminder letters will be sent by registered mail about the new hearing time and date. He reminded everyone no new testimony can be considered and the requested documentation needs to be brought to the next hearing.

Chairman Christensen called for any additional testimony. There being no additional testimony, Chairman Christensen closed the public hearing and informed those present the Commissioners will review the information and the facts submitted prior to the close of this hearing and a decision will be
rendered and posted with the appropriate notice on the Commissioners' agenda. The applicants will be notified of the decision and a copy of the decision will be available through the Planning and Zoning office.