

ZANE S. FROERER, ESQ.
GRAEME L. ABRAHAM, ESQ.
NATHAN J. CARROLL, ESQ.
STEVEN J. RAMMELL, ESQ.
SHAUNA M. MILLER, MANAGER



2755 WASHINGTON BLVD #2
OGDEN, UT 84401
(801) 389-1533
FAX (801) 689-0329
FROERERLAW.COM

FROERER & ASSOCIATES

April 28th, 2015

To: Shawn Wilkinson
Weber County Planning Department

Re: Darold Harris hardship variance

Enclosures: Aerial Photograph, Copy of Original Building Permit with drawing, Current Satellite photograph

Shawn:

Along with this letter please find enclosed an aerial picture, a copy of the original building permit and drawing for the garage, and a more recent satellite photo. Please consider this letter as an addendum to Mr. Harris's application for a variance.

As the aerial picture makes clear, for many years the adjoining homeowners as well as others in the area have used the location of fences to define the dimensions of their lots. The propane tank located adjacent to the fence helps demonstrate this. According to the survey on record with the County, this tank would be located on the neighboring lot. However, the parties relied upon the location of the fence and treated it as the true boundary.

This becomes important when considering Mr. Harris' hardship. The space between the fence as it existed and the garage was approximately fifteen feet. The aerial picture indicates that it was wide enough to drive between the garage and the fence with ease. Mr. Harris asserts that they backed the cement truck between the foundation and the fence when the garage was being constructed.

When the County approved the garage, it did so justly relying upon the fence line as well. This was in conformity with the way the adjoining property owners treated the fence lines as the property lines. Despite the survey, it is Mr. Harris' position that the true property boundary has been recognized for years as the fence line depicted in the aerial photo. The County's reliance now upon the survey creates a hardship from which Mr. Harris should be relieved.

Mr. Harris' hardship is very similar to the one faced by Wasatch Pacific, Inc. in *Save Our Canyons vs. Salt Lake City Board of Adjustments*. Ultimately, Wasatch was granted a hardship variance to construct an access road in variance of the ordinances.

The Board of Adjustments found, and both the District Court and Court of Appeals affirmed, that the requirements of granting a variance were justified because the literal enforcement would result in no access to the property and there was no other access; there were special circumstances due to the location of the property; the variance was essential to the enjoyment of a substantial property right; the variance did not substantially affect the general plan nor was in conflict with the public interest; and substantial justice was done.

A noteworthy similarity to this case is the finding of a hardship. In that case, the Board made four findings to support its decision on that point. First, there was no other location for the access road. Here, the garage has existed for nearly 30 years with its location relying upon the use of the fence line as the property line. Obviously, it cannot be moved so there is no other location for the garage to exist. Second, the literal enforcement of the zoning ordinance would deny Wasatch access to its property. Here, the literal enforcement of the ordinance would deny Mr. Harris the use of the garage in its current and only location. Third, the literal enforcement would prohibit all development of the parcel. Here, the further development of the parcel is barred until the garage is torn down or altered at substantial costs essentially rendering alteration impossible. Further, the use and benefit of the garage is also barred under the literal enforcement of the ordinance. Fourth, the road could be constructed in a way the substantially complied with the ordinance. Here, the garage substantially complies in two ways: 1) using the prior fence line as the property line it was in compliance with room to spare; 2) even now, adjusting the property line to the actual surveyed lines the garage is approximately seven feet from the boundary.

The reliance upon the fence line that was, at that time, accepted by all as the property line has created special circumstances for this property. While there are certainly other cases where this has occurred, it is not generally applicable to all properties in the area. For instance, the building permit was issued and several inspections occurred over a period of several years. There was even a change of use permit granted. Rather than merely an oversight, this creates a situation where the County should be estopped from going back on its prior land use decisions that were based upon the fence line as the property line. There should be no reason to after all. As a matter of law, boundary by acquiescence, the fence line was the proper property line to rely upon. The fact that a survey has since been conducted does not change this fact. It does create a special circumstance unique to this property for which the Board should grant an adjustment to accommodate.

Mr. Harris didn't create this hardship either. His claim to the then existing fence line as the property line was fully supported by the law. To have boundary by acquiescence, four elements must be satisfied and in this case they were. 1) Occupation up to a visible line marked by a fence, 2) mutual acquiescence to that line 3) for a long period of time 4) by adjoining land owners. By satisfying these elements, Mr. Harris demonstrates that the fence line was the actual property line to be used by the County. By shifting from that line to the survey line, the County's enforcement of the ordinance would impose a hardship upon Mr. Harris.

The prior land use decisions have created substantial property rights vested in the use of this lot. Under County Ordinances, improvements such as a garage are not permitted without the proper land use decisions. The building permits and land use permits issued to Mr. Harris would be of no effect and the enjoyment of the rights created by these land use decisions would be lost under the literal enforcement of the Ordinance.

Mr. Harris is not asking for widespread changes to policy and requirements that would substantially affect the general plan. Accommodating his garage is a matter of feet. It is not the end of zoning compliance as known to humanity. The spirit of the zoning ordinance, particularly the setback requirements remains satisfied. There is ample space between the garage and the existing fence which now encroaches upon Mr. Harris' property. The variance to the strict enforcement of the ordinance is balanced by the needs of

substantial justice which would relieve Mr. Harris of the harsh penalties. That is why the Board exists. To balance the needs of the many against the justice required by the one.

So while variances should be perhaps sparingly delivered, protecting the general public from a parade of non-conformities destroying the zoning code that enables peaceful and harmonious living, there is room for accommodation as provided in by Statute and Ordinance. Mr. Harris' property qualifies for this remedy and a variance should be granted to permit the garage to remain where it has existed for nearly 30 years.

Froerer & Associates, PLLC



Zane S. Froerer