

Tooele City Board of Adjustments

April 21, 2003

Minutes

Board Attendees: James Ferguson, Roy Niskala, Cheri Zander, Kevin Shields, Barry Lewis

Absent: Jerry Houghton

Staff Attendees: Cary Campbell, Community Development Director/Building Official
Roger Baker, City Attorney
Andrea Cahoon, Contract Secretary

Minutes prepared by Andrea Cahoon.

Jim Ferguson called the meeting to order at 5:02 p.m.

1. Approval of Minutes from April 7, 2003

Mr. Shields moved to approve the minutes of April 7, 2003 as presented. Mr. Niskala seconded the motion. All members present voted, "Aye."

Mr. Lewis arrived at 5:04 p.m.

2. An Appeal to the Ruling by the Tooele City Planning Commission on February 26, 2003, Item Two, Allowing a Conditional Use to Operate a Home Occupation Day Care in an Existing Residence Located at 306 Upland Drive by Eugene S. and Audrey J. Barrett

Chairman Ferguson explained that this meeting was convened to hear an appeal on a decision made by the Planning and Zoning Commission to approve a Conditional Use Permit to allow a Home Occupation Day Care in an existing residence located at 306 Upland Drive.

Angie Emerson, the owner of the day care, was asked by Mr. Ferguson if she was a renter? She answered, "Yes." Mr. Ferguson asked her if she was told of the restrictive covenants when she rented the house? She answered, "No."

Frank Mohlman stated that he was the legal counsel representing the Barretts. Mr. Ferguson asked who was the president of the Board for the Homeowners Association? Mr. Mohlman stated there was none, just the restrictive covenants that were recorded when the property was recorded. Mr. Ferguson questioned that, because he lives in an area with restrictive covenants and they were required to have a homeowner's association. Mr. Baker explained that it depends on what the covenants say. Mr. Ferguson asked who decides what is a violation and what is not? Mr. Baker said that is determined by the people who own property there.

Mr. Mohlman made the disclosure that Barry Lewis is a member of the Board of Adjustments and he has done legal work for Mr. Lewis in the past and wanted to state that for the record. Mr. Lewis stated that he would abstain from voting. Mr. Ferguson stated that another member of the Board of Adjustments was also a member of the Planning Commission and so he was not in attendance at the

meeting.

Mr. Ferguson asked if there were any other businesses operated out of homes in the area? Angie Emerson answered that there are nine licensed businesses in the neighborhood. There happens to be a licensed business about five houses away that has been operating for 30 years. It is an upholstery business. There is a sign on the door, and a large shop behind the home where the work is done. When she spoke to the home owner, she had no idea that the covenants said that these homes would be for residential purposes only. The business owner stated that you could have businesses in these homes and they have had a business for thirty years. She indicated that she had a business license, and that she gets it renewed each year, and pays her taxes. Most of the homeowners don't have any clue about the CC&Rs.

Ms. Emerson explained that she went door to door to the homeowners in the area, and there are 103 homes in the area that is under these covenants. It only takes a majority to rewrite the covenants so that it is worded the way they want it. The covenants were written in 1962, and most of the original home owners are gone. The current home owners didn't know that the covenants exist or what they say. She collected 40 signatures from homeowners stating that they didn't care if she had the day care, and that they were interested in rewriting the covenants. They said they would look at a revised set of covenants that has been reworded to say, "A zoned residential business is allowed." The revision would have to be signed by 53 home owners and it would then have to be notarized. Mr. Ferguson stated that would not have any affect on this particular case. Dan Thurmer, representing Angie Emerson, explained that the case that is being brought up by the Barretts, claims there are restrictive covenants in place saying that homes (the lots specifically) in that area are to be used for residential purposes only. If that is amended and changed, then there is no case. Mr. Ferguson responded that those can be amended and changed, but what they are dealing with tonight occurred before the covenants were changed. They have not been changed yet, so that is in the future.

Mr. Shields asked the Barretts what their grounds for appeal were? Mr. Mohlman answered the grounds for the appeal were based on the following: The Conditional Use Permit was presented to the Planning Commission and the appropriate notices were given. His clients appeared at the Planning and Zoning meeting, and he has reviewed those minutes (February 26, 2003 meeting). He assumed that this Board had copies of those minutes as well. His understanding was that after the testimony was taken, there was a question by the Planning Commission in relation to what the legal status was of the restrictive covenants. Mr. Mohlman then referred to the minutes from the Planning Commission meeting and quoted the following from the bottom of page 4:

Chairman Searle asked if there were any businesses located in the area covered by the CC&Rs? He also wondered if there was a legal precedence as to the definition of the term "residential" and if the intent was to prevent a 7-11 type business, or to insure that homes were used strictly as residences and not as businesses? Mr. Baker answered that he received the CC&Rs today and did not have time to research the terms and find out if they had any special meaning. The Commission could take up to 30 days to examine the issue further if they wished. He felt that the two most obvious meanings would be 1) The intent is to make sure that commercial structures are not built in the neighborhood, or 2) To prohibit any business activity of any kind in the residential area. He felt that the first interpretation would be found more reasonable by a court of law.

There was a discussion amongst the commissioners and a motion was made to table the item for 30 days to give Mr. Baker adequate time to research the issue. That particular motion failed 4-3. Then the Planning Commission voted on the Conditional Use Permit and it was granted on a vote of 4-3. It was a divided board. Mr. Houghton, a member of the Board of Adjustments and the Planning Commission,

voted in favor of tabling the item for 30 days.

Mr. Mohlman explained that the issue as he sees it is there are restrictive covenants on the property that have been in existence since 1962. As part of the restrictive covenants there is language that says the covenants run for a period of 30 years from the date they are recorded. They were recorded in 1962. They are then automatically extended for 10 years unless an instrument is signed by a majority of the owners, agreeing to change the said covenants. Yes, they can be changed, but there has to be a signed document by more than 50 percent of the lot owners. This has not been done, and hadn't been done when the Conditional Use was granted. That can be done in the future. Both parties can go talk to all of the neighbors and find out what their positions are. If they are done away with, then the Conditional Use still needs to be obtained, but the restrictive covenants would not prevent it.

Mr. Baker said that the Conditional Use would still need to be obtained. As to the applicability of the restrictive covenants and the conditional use process, he felt that the Planning Commission can't enforce restrictive covenants. They need to be enforced by the property owners.

Mr. Mohlman said that after his clients came to him, he researched it, and found a case (Crimmins v. Simonds) from 1981 that was decided by the District Court in Tooele County and appealed to the Utah Supreme Court. It was for a subdivision right next door to this one. It was very similar to this one and was a case involving (709 Upland, Plat C of the Upland Terrace Subdivision) a woman who wanted to operate a beauty salon in her home. There was a private action brought against that. The restrictive covenants were presented, and there was just a little bit of variance in the language of the restrictive covenants that they had, and the ones in question. Those stated "no trade or business permitted." These state "No lots shall be used except for residential purposes." There is identical language later on in the Crimmins case that says, "nor shall anything be done which may be or become an annoyance or nuisance to the neighborhood." In the restrictive covenants that applied in the Crimmins case there was a requirement for a unanimous vote to change them. The defendants, argued there was a change in circumstances in the surrounding neighborhoods that rendered the covenant no longer enforceable. There is case law to suggest that if the nature of the neighborhood has significantly changed over the years, the covenants are not available. The Court said that in order to render restrictive covenants unenforceable the change must be so great that it clearly neutralizes the benefits of the restrictions to the point of defeating its purpose or such nature that it renders the covenant valueless.

In this case, the restrictive covenants were enacted in 1962 as well. It was brought before the court within the 30-year period, and also contained the 10-year extension clause. The court further stated that the fact that others are doing business and hobby activities in their homes does not change the predominant character of the neighborhood from residential to commercial. The fact that she (Ms. Emerson) is saying that others in the neighborhood have businesses is irrelevant. Mr. Mohlman referred to page 480 of the opinion on the left side, halfway down the first paragraph. The 2nd argument presented by the defendants in that case was that there should be an equitable balance of injury test. They had expended \$7,000.00 into their home business. The court ruled on that issue on page 480, right side of that page, paragraph 6. The final argument in the Crimmins case was the issue of changing the covenants, and that it had to be unanimous.

Mr. Mohlman felt it was ironic that the other case was also in Tooele, the restrictive covenants were adopted at the same time as these, and that particular opinion was enacted. He has also updated his research on this to see if the courts have followed this opinion through the years. The latest case is called Swenson vs. Erickson, and upholds the Crimmin opinion. Mr. Mohlman contended that it was a violation of the restrictive covenants for the Planning Commission to approve the Conditional Use Permit. Mr. Mohlman explained that he understood that Mr. Baker felt that the Planning Commission does not have to follow the restrictive covenants and it is a private action. He felt that wasn't logical.

Why are the restrictive covenants there if the Planning Commission can set them aside and not honor them?

Mr. Ferguson asked the Barrett's what their main complaint was? Mr. Mohlman said that these people live right next door, on the same side of the street. He presented a photo of how close the properties are to each other. His clients are retired, and are home all day long. They object to having a business operated right next door to them. The children play in the backyard right next to them.

Mr. Baker said that the Planning Commission had placed a requirement on the Conditional Use Permit that the Emersons construct a new fence outside the Barrett's fence. He asked if the picture showed that the new fence had been constructed? Ms. Emerson answered that they understood it to only be the backyard fence next to the Barrett's property that needed to be built, and that they had 60 days to complete it. They have not completed it yet because the weather hasn't cooperated, but they have purchased the materials to construct it. Mr. Baker stated that they are still within the time limit to install the fence.

Mr. Mohlman said his clients aren't against children, but parents have more control and patience of their own children than someone else's. This is a business that they are operating and it is their opinion that this is a violation of the restrictive covenants that are still in place. If they want to go to the efforts to get the restrictive covenants changed, there is a way to do that. That has not been done at this point. He wished that the Planning Commission would have given Mr. Baker a chance to research it more thoroughly, but it wasn't allowed. Mr. Ferguson confirmed that the Barrett's objection was to having a business next door.

Mr. Ferguson explained that the Board of Adjustments handbook says "given the type of primary use, in a given location would be noxious or offensive, within the meaning of a clause forbidden any trade, industry, or use that is noxious or offensive, by reason of emission of smoke, dust, odors, glare, vibration, or noise." Mr. Barrett stated that they had been through kids, grand kids and great grand kids, and he is 81 years old and he thinks that they are entitled to a little privacy and in the summertime this is going to be hell. Mr. Mohlman stated there is noise.

Someone mentioned that 15 kids in the backyard would make a lot of noise. Someone else stated that her permit only allowed eight children at a time. Ms. Emerson replied that she could live there and have 15 of her own children and they couldn't tell her one thing they could do in her yard.

Mr. Shields asked if with the approval of the Conditional Use Permit everything fell within the zoning ordinances and conditions for approval? Mr. Baker answered in his opinion, yes. Mr. Shields explained that as the Board of Adjustments, when they hear an appeal such as this, the person or entity making the appeal has the burden of proving that an error has been made. Only zoning decisions applying the zoning ordinance may be appealed to the Board of Adjustments. This seems to be an appeal of the CC&Rs, and they have no jurisdiction over the CC&Rs. That will have to be taken to a civil court. If the parties can resolve it with a new vote prior to going to court, it will save a lot of time and money. Mr. Shields opinion was that the Board needs to determine whether or not any zoning decisions, applying the zoning ordinance have been in error.

Mr. Mohlman referred to the City Code Section 2-4-4, under Appeals to the Board of Adjustments. He felt that what should be decided is whether the restrictive covenants are part of the zoning ordinance or not. Their opinion is that they are a part of the zoning ordinance, and have to be because they are a public record and are still in force. He indicated that apparently Mr. Baker feels differently. Mr. Thurmer said there are literally hundreds of cases throughout the country that have dealt with these issues. The City Planning Commission did not develop that opinion. The Crimmin case went to the District Court and then to the State Supreme Court and that is the proper venue for this. Mr. Shields

concurrent.

Mr. Ferguson said that with a beauty shop you have traffic coming and going all day long. With a day care center the parents drop the children off in the morning, and pick them up in the evening. The land owners can enforce the covenants. The City can't because they are not a property owner in that subdivision. The City has a right to issue a Conditional Use Permit, which they have done. Mr. Mohlman stated that you are saying that a Conditional Use Permit can be issued in violation of the restrictive covenants. Mr. Thurmer stated that happens all of the time.

Mr. Shields said they can enforce the zoning ordinances. If there is an appeal such as this one, it shouldn't be taken to the Board of Adjustments because it has to do with the CC&Rs, and it should be taken to a court of law, or handled within a homeowner's association. Mr. Ferguson said that he had only gone to court one time with an issue from the Board of Adjustments. Somebody had violated the variance that was granted to them. The judge stated at that time that the covenants and ordinances must be enforced equally throughout. In this case there are all these other businesses in the area, and they are complaining about one of them, the CC&Rs are not being applied equally.

Mr. Mohlman said that in the Crimmins case it didn't make any difference. Why did the Planning Commission ask about the CC&Rs if they can't enforce them?

Mr. Baker said he must look at what is the function of the Planning Commission? Their function was to receive the application for a Conditional Use, make sure it complied with all of the City's conditional use regulations, and if they determined it does, then they vote on what conditions they felt should reasonably be placed on the use. All of that happens irrespective of whether or not there are covenants, conditions, and restrictions (hereinafter "CC&Rs") because those are not incorporated in the City's conditional use ordinance that the Planning Commission is enforcing. On the other hand, looking at the CC&Rs, it was his understanding that the Supreme Court has ruled a number of times that covenants filed against the land, become in essence a binding contract among all of the properties subject to those CC&Rs. A violation of those CC&Rs needs to be brought by one of the parties to that contract as a breach of contract. Whether the Planning Commission wished to or not, they could not decide on that question. The Planning Commission wanted to know more about the covenants and how they worked, and how they might work in this situation, so they asked for time. Four commissioners did not feel a need to explore the issue any further. He didn't see a violation of the CC&Rs by what the Planning Commission has done. Maybe one of the homeowners has or has not violated the CC&Rs, but the Planning Commission can't enforce them.

Mr. Mohlman said it would have helped him if Mr. Baker had advised the Planning Commission like that, but he didn't do that. Mr. Baker replied that he answers the questions he is asked. Mr. Mohlman said that Mr. Baker was asked if there were any businesses currently located there and he answered that he didn't know and needed time to research it. Mr. Baker replied that he was not asked to explain how the law of CC&Rs works. Mr. Baker stated that he faxed something to Mr. Mohlman on Friday, and that it appeared from the conversation that Mr. Mohlman may not have received it. Mr. Baker showed a document to Mr. Mohlman and asked him if he received it? Mr. Mohlman replied that he hadn't received it and asked where he faxed it to? Mr. Baker answered that he faxed it to the number listed in the Lawyer's 2003 book. Mr. Mohlman asked if he faxed it to the Bountiful office? Mr. Baker stated that was the number that he had apparently provided to the bar. Mr. Mohlman stated the number on the fax was the Bountiful office number, and he works in his Tooele office almost full-time now. Mr. Baker indicated he was not aware of that fact, that the last he knew Mr. Mohlman was splitting his time about half-and-half between offices. Mr. Baker then provided a copy of his document to Mr. Mohlman.

Ms. Emerson said the wording of the CC&Rs say that it is for "residential purposes only." What do

people do in their homes? They eat, sleep, watch t.v., relax, play, and build memories. That is what the children in the day care do as well. They live in the home. That is a residential purpose. Mr. Shields asked if she had any employees? She stated no, and she can only have eight children at one time.

Mr. Baker clarified that the Home Occupation Day Care Ordinance does not allow them to have any employees, only themselves.

Mr. Mohlman stated that he wasn't sure that the fact that Mr. Emerson's father was living in the house as well was brought up. Ms. Emerson stated that it was in the Planning Commission minutes.

Mr. Shields moved to uphold the Planning Commission's decision based upon the fact that the appeal does not apply to zoning decisions, but to the CC&Rs. Therefore, the Board of Adjustments has no jurisdiction over the covenants, conditions, and restrictions. Mr. Ferguson seconded the motion. All members present voted, "Aye." Mr. Lewis abstained.

Mr. Barrett said that what you are saying is the Planning Commission can do anything they want to any time? Mr. Ferguson responded that he was saying that if you've got a covenant, it should be applied to everyone equally, not just at someone's convenience. It should apply every day to every home.

3. Variance Request on Setbacks for a Detached Single Car Garage with a Personal Adjoining Hobby Shop that Will have One Sink and One Lavatory by Merrill Ray and Angie McDonald

This item was withdrawn by the applicants.

4. Adjournment

Ms. Zander moved to adjourn the meeting. Mr. Lewis seconded the motion. All members present voted, "Aye." The meeting adjourned at 5:45 p.m.

Approved by: _____

Date: _____