



Minutes of the Development Review Commission REGULAR MEETING April 9, 2024

Minutes of the **Regular Meeting** of the Development Review Commission, of the City of Tempe, was held in Council Chambers
31 East Fifth Street, Tempe, Arizona

Present:

Chair Andrew Johnson
Vice Chair Michelle Schwartz
Commissioner Don Cassano
Commissioner Linda Spears
Commissioner Larry Tom
Alt Commissioner Rhiannon Corbett

City Staff Present:

Jeff Tamulevich, Director, Community Development
Ryan Levesque, Deputy Director, Community Development
Michelle Dahlke, Principal Planner
Chris Jasper, Senior Planner
Lucas Jensen, Planner I
Joanna Barry, Administrative Assistant II

Absent:

Commissioner Barbara Lloyd
Commissioner Joe Forte
Alt Commissioner Charles Redman
Alt Commissioner Robert Miller

Hearing convened at 6:07 p.m. and was called to order by Chair Johnson

Consideration of Meeting Minutes:

- 1) Development Review Commission – Study Session 3/26/24
Development Review Commission – Regular Meeting 3/26/24

Motion: Motion made by Commissioner Cassano to approve Study Session minutes and Regular Meeting minutes for March 26, 2024 and seconded by Commissioner Tom.

Ayes: Chair Johnson, Vice Chair Schwartz, Commissioners Cassano, Spears, and Tom.

Nays: None

Abstain: Commissioner Corbett

Absent: Commissioners Lloyd and Forte

Vote: Motion passes 5-0

The following items were considered for **Consent Agenda**:

- 3) Request a Use Permit to allow temporary outdoor vending for **FOOD TRUCK PROJECT**, located at 1101 South Rural Road. The applicant is Neah Designs LLC. **(PL240048)**

Motion: Motion made by Commissioner Cassano to approve Consent Agenda and seconded by Commissioner Tom.

Ayes: Chair Johnson, Vice Chair Schwartz, Commissioners Cassano, Spears, Tom, and Corbett.

Nays: None

Abstain: None

Absent: Commissioners Lloyd and Forte

Vote: Motion passes 6-0

The following items were considered for **Public Hearing**:

- 2) Request a Use Permit to allow Entertainment (live music) for **RUSTY TACO**, located at 707 South Forest Avenue, Suite No. 112. The applicant is Brandon Risk of Rusty Taco. **(PL240042)**

PRESENTATION BY APPLICANT:

Brandon Risk, applicant, gave an overview of their request. He stated they would like Conditions of Approval #9 and #11, that state that the patio music should be switched to ambient at midnight, and that the doors should be closed for live music at midnight, to be changed to extend the time to 1:55 a.m. Mr. Risk stated that the concern was brought up mainly for the residents of the Atmosphere building, which they are an occupant of, that noise would be an issue. Mr. Risk stated they have communicated with their landlord at the Atmosphere building about this and they added a condition in their lease specifically referring to the noise, should they get this Use Permit, to ensure it is not an issue. He indicated they have been open for two years and have not had any problems relating to the noise. Mr. Risk stated that all they want is someone controlling the music and that they are not planning to change anything volume-wise, add additional speakers, or have bands play.

Chair Johnson asked the applicant if their specific request is to modify Condition of Approval #9 to end no later than 1:55 a.m. daily. Mr. Risk stated that was correct and that they would like the same modification to be made to Condition of approval #11. He stated they are fine with all the other conditions.

Commissioner Tom referenced the applicant's comment about adding a condition to their lease and asked him to explain what that would be. Mr. Risk stated that when they started the application process it had to get signed off on by their landlord at the Atmosphere building. The landlord had concerns for their residents about the noise, so they met to go over noise regulation. He stated they had decibel readers to make sure that the sound is not too loud on the exterior and as it travels upwards. Mr. Risk stated additional language was added to the current lease so that if there was a problem with the noise the landlord could come to them to regulate it.

Commissioner Cassano noted that the lease is with the landlord and not the City of Tempe, so the City would not have any enforcement of it. He asked that staff look at how the City could enforce it. Commissioner Cassano also asked staff to address if the Conditions of Approval would transfer to a new owner if the current one decided to sell the business.

Vice Chair Schwartz noted that in the staff report it indicates they were issued a code violation in May of 2023 for having live entertainment without a Use Permit and asked the applicant what they have done in the meantime regarding live entertainment. Mr. Risk stated that at that time they did not know they needed a permit to have a DJ. He advised that after receiving the violation letter from the City they proceeded to go through the Use Permit request process.

Chair Johnson noted that the applicant stated they are not going to be changing anything from what they are currently doing, yet they are requesting a Use Permit. He asked for clarification if they are applying for the Use Permit so they would be in compliance if they brought in another DJ in the future. Mr. Risk clarified that when he referenced not changing anything, he was referring to how the volume is operated. He noted that the DJ would be there to control what songs play, not the volume.

PRESENTATION BY STAFF:

Chris Jasper, Senior Planner, gave a brief overview of the request. He stated staff is requiring the applicant to coordinate with the Tempe Police Department to manage potentially disruptive behavior at the business, and that a security plan be submitted to them for review. Mr. Jasper stated that staff routes Use Permit requests, especially those related to live entertainment, to the Police Department for review. He noted that they identified some concerns related to broadcasts from the outdoor speakers on the patio and potential noise impacts to not only the residents of the Atmosphere, but also those across the street at Union Tempe. Mr. Jasper stated that based on that feedback, staff put together the unique conditions to control volume emissions after midnight. He clarified that these conditions are only applicable to live entertainment activities and would not be applicable during general operating hours.

Commissioner Cassano asked how the City defines live entertainment. Mr. Jasper stated that in the City's code it refers to any presentation or participation in dancing, musical instrumentation, or similar activities that are controlled or created by an individual. Commission Cassano asked if a DJ playing recorded music was considered live entertainment and Mr. Jasper advised that it was.

Commissioner Spears referenced Condition of Approval #4 that states "live entertainment to cease at 1:55 a.m. daily" and noted it appears to be in conflict with Condition of Approval #9. Mr. Jasper clarified that live entertainment is allowed to take place inside the suite until 1:55 a.m. on a daily basis, and that Condition of Approval #9 limits it being broadcast to the outside patio spaces after midnight. Commissioner Spears asked why it is different to have the same speakers playing recorded music versus live music or a DJ since they are using the same sound system. Mr. Jasper stated that there is a possibility live music/DJ could be louder, so they want to try and preempt that. He stated it is also to bring people inside so that the live entertainment activity is taking place and contained inside the suite. Commissioner Spears asked if that was consistent with other entertainment venues in the downtown area. Mr. Jasper stated that staff has implemented these conditions at other locations, with the most recent one being Bang Bang at the corner of Mill & 5th where they halted outdoor transmission of music/DJ at midnight, and at Dartstar / Trumbull's.

Commissioner Tom asked if they could play recorded/house music outside until 1:55 a.m. and was advised that was that they could.

Michelle Dahlke, Principal Planner, addressed Commissioner Cassano's prior question about change/transfer of ownership. She advised that transfers were acceptable in City code, however it would need to go through an administrative process. Ms. Dahlke noted that the conditions of approval would not change, just the ownership.

Chair Johnson referenced the comment and question about the conditions of the lease being incorporated into the staff conditions of approval and if that was possible. Ms. Dahlke advised that it was not since the lease is a civil matter and cannot be enforced by the City.

Commissioner Tom asked if it would be possible to add a new condition requiring an administrative review of the use in six-nine months. Mr. Jasper advised that could be an added stipulation.

Commissioner Cassano asked if the portion of Condition of Approval #9 that references City noise code allows them to broadcast after midnight. Mr. Jasper stated that they can broadcast ambient noise from those speakers after midnight, but not anything produced by live entertainment.

Vice Chair Schwartz stated that if they extended the time to 1:55 a.m. for Condition of Approval #11 it would end up being null and void unless they extended their business hours. Mr. Jasper stated that was correct.

Chair Johnson stated that it seems like if they were to play the radio outside at the same volume as the live music was to be played outside, as required by the code they could have the same amount of noise emanating from their premises from midnight to 1:55 a.m. whether it is live music of some other type of radio. Mr. Jasper stated that the level of noise would need to meet the City's noise ordinance requirements regardless of whether it is live entertainment or ambient noise. He stated that the intent of the added conditions is to ensure that the live entertainment use be contained in the suite after midnight. Chair Johnson asked if they could record what the DJ was planning to play that night and just broadcast it outside. Jeff Tamulevich, Community Development Director, stated that the City has had issues with live entertainment and that it does not really boil down to the level of the music. He stated that they are concerned that when loud music plays it seems to emanate outside. Mr. Tamulevich stated they have not had issues with the music the applicant has been playing at their business, but they have not had live entertainment, except for the one time they had a DJ without a live entertainment Use Permit, which led to the violation. Mr. Tamulevich stated that loud music seems to emanate more when there is live entertainment.

Commissioner Tom asked if the code violation was the result of a citizen complaint or an observation by Code Compliance. Mr. Tamulevich advised that he believed the complaint came from the Police Department to Code Compliance.

PUBLIC COMMENT: NONE

APPLICANT RESPONSE:

Daniel Fanelli, also an owner of the business, stated they are not a live music venue. He noted they were not aware that a DJ was considered live entertainment, and that once they were made aware they ceased that altogether. He stated they have never had any noise complaints. Mr. Fanelli stated that any DJ in the venue would not have any control over the noise level of the music. He stated that the condition requiring the garage doors to be closed would cut off half of their business from being able to order drinks at the bar.

Chair Johnson asked the applicant if they are agreeable to having a condition added for a future administrative review for compliance. Mr. Fanelli stated that would be completely fine.

STAFF RESPONSE:

Mr. Jasper pointed out that the Use Permit is associated with entertainment/live music, but very broadly. He stated that the Conditions of Approval are also intended to preempt any live performances by bands or other live performance beyond a DJ.

Chair Johnson stated that his concern is that it is setting a precedent where other businesses who have to comply with the conditions they were allowed to have for live music could cite this example as problematic. Mr. Jasper stated they have had similar conditions on other Use Permits and that these conditions would be more in keeping with those. Chair Johnson asked if modifying the conditions and allowing this applicant to have live music until 1:55 a.m. would be setting a precedent. Mr. Jasper stated that modifying Condition of Approval #9 would change some of the previous conditions that they have put before the Commission. He stated that Condition of Approval #11 is somewhat unique in that it affects overhead doors. He stated that when they have had similar live entertainment Use Permits come before the Commission staff has identified closing doors to patio spaces.

Commissioner Cassano asked if there was a way to limit this request to "DJs only". Mr. Tamulevich stated that is an available option.

Commissioner Tom asked if a DJ just plays recorded music and was advised that is correct.

COMMENTS AND DISCUSSION FROM THE COMMISSION:

Commissioner Cassano stated they need to clarify if Condition of Approval #11 stays if they are going to allow a "DJ only".

Commissioner Spears suggested eliminating Conditions of Approval #9 & #11 and modify Condition of Approval #4 to define live entertainment as a DJ in this case.

Chair Johnson noted that Condition of Approval #10 could also be stricken since it states "during all other times of business operation", but there are no other times if they allow the live entertainment to end at 1:55 a.m.

Motion: Motion made by Commissioner Spears to approve PL240042 with modification to Condition of Approval #4, removal of Conditions of Approval #9, #10, & #11, and addition of stipulation for compliance review in six (6) months with staff. Seconded by Commissioner Cassano.

Ayes: Chair Johnson, Vice Chair Schwartz, Commissioners Cassano, Spears, Tom, and Corbett.

Nays: None

Abstain: None

Absent: Commissioners Lloyd and Forte

Vote: Motion passes 6-0

Staff Announcements: NONE

There being no further business the meeting adjourned at 6:53 p.m.

Prepared by: Joanna Barry, Administrative Assistant II
Reviewed by: Michelle Dahlke, Principal Planner