

Minutes of the Board of Adjustment STUDY SESSION September 25, 2024

Minutes of the Study Session of the Board of Adjustment, of the City of Tempe, which was held in Council Chambers
31 East Fifth Street, Tempe, Arizona

Present:

Staff:

Vice Chair Kevin Morrow	Jeff Tamulevich, Community Development Director
Board Member Raun Keagy	Ryan Levesque, Comm Dev, Deputy Director
Board Member Kaelee Palmer	Diana Kaminski, Comm Dev, Principal Planner
Board Member Sean McCarley	Chris Jasper, Comm Dev, Senior Planner
Board Member Rickey Lynn Gans	Lucas Jensen, Comm Dev, Planner II
Board Member Robert Miller (Alt)	Drew Yocom, Comm Enhancement Deputy Director
Board Member Brett Siegal (Alt)	Clarence Matherson, City Attorney's Office
	Matt Mansfield, City Attorney's Office
	Jack Schofield, Comm Enhancement, Deputy Director
	Josh Bies, Tax and License Manger
	Mike Baxley, Community Development Director
	David Fabok, Fire Marshall
	Kim Hale, Police Commander
	Jason Wolf, Media
	Jennifer Daniels, Administrative Assistant II

Meeting convened at 5:36 p.m. and was called to order by Vice Chair Morrow.

Vice Chair Morrow reviewed the agenda for the BOA Regular Meeting. Vice Chair Morrow asked the board if there were any questions on tonight's agenda? The board had no questions.

Ms. Diana Kaminski, Principal Planner let the board members know they received additional public comments that came in before the meeting. One case tonight, Exhale Society Inc. is requesting a continuance. In the interest of public safety/health and welfare staff is recommending that we hear the case tonight and not continue the item.

Vice Chair Morrow asked for a motion to adjourn the Study Session.

Motion by Board Member Gans to close the Study Session; second by Board Member Palmer. Motion passed on **6-0** vote.

Ayes: Vice Chair Morrow, Board Members Keagy, Palmer, McCarley, Gans, and Siegal

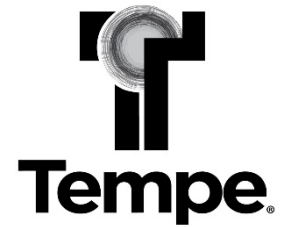
Nays: None

Abstain: None

Absent: Board Members Foy, McCaffrey and Miller

Hearing adjourned at 5:39 p.m.

Prepared by: Jennifer Daniels, Administrative Assistant II
Reviewed by: Diana Kaminski, Principal Planner



Minutes of the Board of Adjustment REGULAR MEETING September 25, 2024

Minutes of the Regular Meeting of the Board of Adjustment, of the City of Tempe, which was held in Council Chambers
31 East Fifth Street, Tempe, Arizona

Present:

Staff:

Vice Chair Kevin Morrow	Jeff Tamulevich, Community Development Director
Board Member Raun Keagy	Ryan Levesque, Comm Dev, Deputy Director
Board Member Kaelee Palmer	Diana Kaminski, Comm Dev, Principal Planner
Board Member Sean McCarley	Chris Jasper, Comm Dev, Senior Planner
Board Member Rickey Lynn Gans	Lucas Jensen, Comm Dev, Planner II
Board Member Robert Miller (Alt)	Drew Yocom, Comm Enhancement Deputy Director
Board Member Brett Siegal (Alt)	Clarence Matherson, City Attorney's Office
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	Jack Schofield, Comm Enhancement, Deputy Director
	Josh Bies, Tax and License Manger
	Mike Baxley, Community Development Deputy Director
	David Fabok, Fire Marshall
	Kim Hale, Police Commander
	Jason Wolf, Media
	Jennifer Daniels, Administrative Assistant II

Meeting convened at 6:00 p.m. and was called to order by Vice Chair Morrow.

1) Election of Officers

Vice Chair Morrow asked the board if there is any discussion or nominations for Chair.

Motion by Board Member Keagy to nominate Vice Chair Morrow for Chair; second by Board Member Gans.
Motion passed on **5-0** vote.

Ayes: Board Members Keagy, Palmer, McCarley, Gans, and Siegal

Nays: None

Abstain: Vice Chair Morrow

Absent: Board Members Foy, McCaffrey and Miller

Motion by Board Member Keagy to nominate Board Member Palmer for Vice Chair; second by Vice Chair Morrow. Motion passed on **5-0** vote.

Ayes: Vice Chair Morrow, Board Members Keagy, McCarley, Gans, and Siegal

Nays: None

Abstain: Board Member Palmer

Absent: Board Members Foy, McCaffrey and Miller

2) Voting of the Meeting Minutes:

Study Session & Formal Meeting Minutes from May 22, 2024.

Motion by Vice Chair Palmer to approve Meeting Minutes from Study Session and Regular Meeting May 22, 2024; second by Board Member Keagy. Motion passed on **5-0** vote.

Ayes: Chair Morrow, Vice Chair Palmer, Board Members McCarley, Keagy and Gans

Nays: None

Abstain: Board Member Siegal

Absent: Board Members Foy, McCaffrey and Miller

- 3) Request a Variance to reduce the separation requirement between a tobacco retailer and a charter school from 1,320 feet to 900 feet for **RED STAR VAPOR**, located at 904 North Scottsdale Road, Suite 106. The applicant is Red Star Vapor. **(PL240156)**

Item was moved to agenda Item #4

Applicant Presentation:

Mr. Michael Williams, of Red Star Vapor gave a presentation for a variance request at 904 North Scottsdale Road Suite 106. This is due to a discovery of a charter school, Ombudsman Charter School in the Hayden Plaza, north of Curry Road at 1290 North Scottsdale Road. If it was to be measured from suite to suite it would be 1,380 feet. Due to the plaza be larger the plot line is within the 1,320 feet. When measured plot line to plot line it is 715 feet. Mr. Williams discussed the benefits of vaping over tobacco use for adults. The staff at Red Star Vapor has taken and will continue to take the Arizona Retailer Tobacco Training, that is provided through the state. That is a new regulation with the City of Tempe. In order to receive your tobacco license you must attend the training and receive a certificate showing participation. Mr. Williams stated that he was told by the City of Tempe it was ok to open and they were within the separation requirements, but it was later found that the research was done for public schools and not charter schools. Unfortunately, the lease was already signed by Red Star Vapor.

Chair Morrow asked where the closest vape and/or other tobacco shop is to this location? Mr. Williams stated that there is a hookah lounge in the same plaza as Goodwill and the charter school. Red Star Vapor has another location about 4 miles away on Rural. We tend to have a location about every 5 miles. We have 62 total locations currently.

Board Member Gans asked, you said there is a hookah lounge? Mr. Williams stated yes, it is in the same plaza as the charter school.

Chair Morrow asked, is there a smoke shop in the next shopping center up between the gun store and coffee shop? Mr. Williams stated he did not see one. Chair Morrow stated there is the Adult Boutique, Video and Smoke Shop on the West side of Scottsdale Road. Mr. Williams stated he is not aware of that one.

Board Member Miller asked staff, we are talking about different ways of measuring from location to location. Is it my understanding the way in which we are normally measuring plot line to plot line. Is that the standard throughout the city? Ms. Kaminski stated yes, that is what is defined in the Zoning Code. Board Member Miller asked if the applicant is requesting to change the methodology that is being utilized is in fact creating a special circumstance. Other applicants could come in and site this same decision.

Board Member Siegal asked, when the city originally pulled the permits there were no schools found? Do you have proof of that? Mr. Williams stated that is correct. I went into the city prior to signing the lease because I wanted to make sure that we did meet separation requirements. I was initially told that it did meet separation requirements but that is because they were going off the public schools and they were not ware of that charter school until we got into

the Use Permit process. I did not have a choice but to do a variance at that point. Board Member Siegal asked if Mr. Williams received anything from the city? Mr. Williams stated yes, I worked closely with Mr. Lucas Jensen, Planner. We spoke multiple times. He was that one that told me they found a charter school. Board Member Siegal asked was this all verbal? Mr. Williams stated that they actually have it documented that I came in prior in the staff report on page 2.

Board Member Keagy asked, once you found out that you would need a variance did you reach out to your landlord? Mr. Williams stated yes, that was the first thing I did. We asked if we could sublease the suite. The landlord was not willing to let us sublease the suite. We were looking at \$150,000 to get out of the lease.

Board Member Gans asked, do you have any knowledge of the other tobacco using group next to the Goodwill? Do they have a permit or variance? Mr. Williams stated, I believe they were there before the school.

Staff Presentation:

Mr. Lucas Jensen, Planner II with Community Development Planning. Mr. Jensen gave a presentation on a request for a variance for Red Star Vapor. The variance request is required due to the location of the charter school. There are no modifications to the existing site. If the variance is approved the applicant will then need to go through the use permit process. The applicant did consult with Planning staff before and as he mentioned it was verbally noted that it met separation requirements. This was based on the current available mapping information based on public schools. Once a formal application for a use permit was submitted and reviewed, further review did reveal that there was a charter school. I notified the applicant that the only way forward was to apply for a variance. I did not verify through city records whether that was in legal operation before the school was sited there. Around 2pm this afternoon we received 1 comment card that was given to the board to read.

Chair Morrow asked, are you aware of other schools operating in commercial plazas in the city of Tempe? Or is this an unusual occurrence? Mr. Jensen stated he does not have the answer to that question. Ms. Kaminski stated the charter schools do come and go within shopping centers throughout the city. We try to keep track of them. Our map is now tied to the state education board, so we are working on a GIS map to better populate those. The private schools are a similar situation. Some locations require a use permit which gives us the ability to identify them. Chair Morrow stated that the tobacco retailer's property is not special, but the plaza is oddly shaped and large. I am not sure our plot-to-plot measurement was designed to measure the distance to schools that are in located in a strip mall. The special circumstances is where the school is, not necessarily where the tobacco retailer is. I am sympathetic to the applicant that signed a lease after being told by city staff that it would be ok.

Vice Chair Palmer asked, if a variance was to be approved, would the applicant still need to obtain a use permit through a public hearing process? Which is heard through the DRC? Mr. Jensen stated that is correct.

Board Member Gans asked, do we not take into consideration the fact that there is a hookah lounge basically right next door to the school? Mr. Jensen stated, that is not something we would consider in our review. We are reviewing this on an individual basis as a stand-alone project.

Ms. Kaminski stated that the hookah lounge has been there for a while and they did receive a use permit in 2009. The charter school is from 2016.

Applicant Response:

None

Public Comment:

Chair Morrow read a public comment from a resident by the name Kim, she opposes the variance that would allow the store to go in, saying it is not a business that would enhance this part of Scottsdale Road in our neighborhood.

Ms. Darlene Justus, Tempe resident stated that there is another business to the north, just a little more north of McDowell Road. We do measure things according to how the city does it. According to this they are in the wrong place. I feel bad they received misinformation. That does not mean we have to have this in our in neighborhood. We are talking about tobacco and vaping. We are talking about kids and people that go to ASU under 21. We have so

many young people hooked on vaping. They have proven that it effects their lungs in a negative way. How many different chemicals do they use to make the different flavors. We know tobacco is bad. This ordinance is there so young people are not inundated with these types of businesses. We have another one that wanted to go within 250 feet of a school. Where are we going to draw the line and say this ordinance is important? I have no problems with this business, but Tempe needs to stand strong.

Commission Discussion:

Board Member Miller stated he would make a motion to grant the variance based upon the fact this condition was externally imposed by misinformation provided by the city. I am not a fan of vaping, but we are not here to discuss the pros and cons of it. If you move the building the issues would still be the same. The owner had made a good faith effort.

Board Member Keagy stated he is sensitive to the idea that information was not accurate, but the ordinance is the ordinance. I feel that if we approve this variance, we would be kicking the can down the road and turning it over to the DRC for the use permit requirement. I am not going to support the motion.

Vice Chair Palmer stated that she is sympathetic to the applicant that the lease is signed, however it has always been known that a use permit, even if the distance met. A use permit is still required which is also a subjective process. I am not seeing anything that meets the 4-part test for that reason I will not be supporting.

Board Member Gans stated my vote is going to be in favor for the reason being that we are being very picky over the distances. It bothers me that there is a hookah lounge right next door to the charter school, yes they are grandfathered in but on Broadway Road we have an adult store which could normally never be there and it is grandfathered in. At some point we have to be lenient in some of our ordinances. There is a certain amount of tax coming in. You are looking at a store that will be on a major road. Kids would have to cross Curry Road, which is a very busy road. I see no reason not to approve this.

Board Member Miller stated he does not want his vote to be seen any way as endorsement of business or of a reduction of the distance separation that are required. But in this case we had a situation and we are trying to fix it. Chair Morrow stated, I agree.

Motion by Board Member Miller to grant the variance: second by Board Member Gans. Motion passed on **5-2** vote.

Ayes: Chair Morrow, Board Members McCarley, Keagy, Gans and Siegal

Nays: Vice Chair Palmer and Board Member Keagy

Abstain: None

Absent: Board Members Foy and McCaffrey

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- 4) Request a Variance to reduce the required side yard building setback from 15 feet to 7 feet and a variance to reduce the required side yard setback for an accessory building from 3 feet to 2 feet to allow for a building addition for **1701 E SECRETARIAT**, located at 1701 East Secretariat Drive. The applicant is Justin Dahl-James. **(PL240182)**

Applicant Presentation:

Mr. Justin Dahl-James, architect for 1701 E Secretariat gave a presentation. Mr. Ed Durham purchased the home in 2022. Mr. Durham was looking to do an addition to home. Mr. Dalh-James was looking at the setbacks to verify the addition would work with the setbacks. We had a survey done, and it was revealed that the property line is not where the walls are. There are previous additions that were done on the property that were dimensioned off the historic property lines. One of the previous additions had a variance granted in 1977. It was located off what was assumed to be the property line at the time. The garage addition was added in 1977 and had a variance approved. We are looking to get 2 variances to bring both of these existing built structures into compliance.

Staff Presentation:

Mr. Chris Jasper, Senior Planner, Community Development gave a presentation on this case. These variances would update 2 previous variances that were previously approved by the city in 1977 and 1991. The plans and building permits from 1977 and 1991 show that the property line is at the sharded wall. The survey shows the wall was constructed about 3-4 feet off the property line on the adjoining neighbor's property. We have some theories on why that is. There is a 3-foot utility easement that runs north/south on most properties in this neighborhood, Sunburst Farms Tempe subdivision. There are requirements that structures are not placed on the utility easement. I think the walls were offset a little too far.

Board Member Gans stated there is a legal term called "Open and Notorious", you may be familiar with. As I look at this someone is giving away property to someone else. Mr. Jasper stated that is a private issue and private process to determine whether there was a proper adverse position claim. Board Member Gans stated, in doing this is the city not aiding and abetting that process? If the city approves this and goes to the new survey property line rather than the historic property line, there is quite a difference there. Is the city in one way or another aiding one or the other property owner in that situation? Mr. Jasper stated he would hesitate to say the city is adding and abetting. This variance approval would not allow for the structures in question to encroach beyond the property line. We would be allowing them to be located closer to the property line. If there are questions on where the shared wall is to be located that can be coordinated between the 2 property owners. I am not aware of any civil action between or among the owners. If there is a request or desire to move the shared wall onto the actual property line, if it is over 7 feet we will process a building permit. Other than the city would not be involved beyond this variance approval.

Board Member Keagy stated this is a classic textbook example of why a variance should be requested, for all the reasons listed. I will support the variance request.

Applicant Response:

Public Comment:

None

Commission Discussion:

Motion by Board Member Keagy to approve to reduce the required side yard building setback from 15 feet to 7 feet and a variance to reduce the required side yard setback for an accessory building from 3 feet to 2 feet to allow for a building addition, subject to the 3 conditions listed in the staff report for 1701 E Secretariat: second by Board Member Gans. Motion passed on 7-0 vote.

Ayes: Chair Morrow, Vice Chair Palmer, Gans, Miller, Siegal, McCarley and Keagy

Nays: None

Abstain: None

Absent: Board Members Foy and McCaffrey

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- 5) Request a Variance to reduce the use separation requirement between a tobacco retailer and a public school from 1,320 feet to 250 feet to **EXHALE SOCIETY, INC.**, located at 35 East Broadway Road. The applicant is Rose Law Group. **(PL240244)**

Item was moved to agenda Item #3

Applicant Presentation:

Mr. John Galeski, attorney with Rose Law Group is present on behalf of Mr. Ryan Hurley, attorney with Rose Law Group. Mr. Hurley has been the attorney representing Exhale Society Inc. Mr. Hurley is currently sick and could not make it to the hearing. For this reason, we are asking for a continuance on the item.

Board Member McCarley asked Mr. Galeski if Exhale Society is currently operating as a consumption lounge? Mr.

Galeski stated he did not know the details of the case. They have been operating on site. There have not been neighbor complaints or police calls to the site itself. We would like to discuss the merit of case at the next hearing. We considered ourselves a private club and lounge and that is what we have been operating under. People come to the site and bring their own marijuana; it is not sold at the site. It is consumed behind sealed doors. Board Member McCarley asked if we push this to the next meeting would you still be operating over the next month? Mr. Galeski stated the operation has continued. We are open to your consideration if there are concerns about health and safety. There is an operation that is going on.

Board Member Keagy stated that his concern is the history. Code Compliance first contacted the business in February. Since then, correction and compliance notices and citations were issued several times. Now your clients have decided to come in and obtain the necessary administrative relief to operate. That is concerning that there was a long period of time that they were operation without the required variance and use permit. I am concerned pushing this off another month since this property has continued to operate in violation. If you were to tell us you would stop all operations for the following month that might be a consideration. Mr. Galeski stated he would need to speak with his client because he did not see that as being a stipulation.

Board Member Keagy asked for staff's position in this request for continuance. Would someone from staff be willing to address that?

Staff Presentation:

Mr. Drew Yocom, Community Enhancement Deputy Director provided clarification that Exhale Society in accordance with the code can not be in operation at this location at this time.

Board Member Keagy asked, the 2 citations that were issued have the fines been paid? Mr. Yocom stated that 1 citation has gone to court and the property owner failed to appear at that court hearing. There is a 2nd citation going forward with the business owner as well.

Vice Chair Palmer asked if they are currently shut down? Or are they supposed to be shut down? Mr. Mike Baxley, Community Development Building/Safety Deputy Director, stated that they do not currently have a valid Certificate of Occupancy. Nobody is allowed to occupy that suite until they receive permits and complete the work that needs to be done. Vice Chair Palmer asked if staff has confirmed that nobody is occupying the suite? Mr. Baxley stated there is a sign on the door that no one is to occupy the suite. We have been by twice and have not seen anyone there.

Applicant Response:

None

Public Comment:

None

Commission Discussion:

Chair Morrow stated that he is inclined to grant them 1 continuance since their attorney is sick. Board Member Seigal stated that he seconds that.

Motion by Chair Morrow to approve a continuance for Exhale Society Inc to the October hearing: second by Board Member Siegal. Motion passed on **5-2** vote.

Ayes: Chair Morrow, Vice Chair Palmer, Gans, Miller and Siegal

Nays: Board Members Keagy and McCarley one

Abstain: None

Absent: Board Members Foy and McCaffrey

6) **Board/Staff Announcements**

Chair Morrow does not have any announcements.

Ms. Kaminski congratulated Chair and Vice Chair on their new appointments. We will be having a meeting in October to hear a variance request for a shade canopy in the front yard setback and for the Exhale Society case that was continued.

Board Member Keagy stated that the board did not get a chance to say goodbye to Jack Confer and thank him for his job as Chair. Did the city send him a thank you? Mr. Levesque stated that he was sent a certificate for his years of service.

7) **Adjourn**

Motion by Board Member Gans to adjourn meeting; second by Chair Morrow. Motion passed on **7-0** vote.

Ayes: Chair Confer, Vice Chair Morrow, Board Members Keagy, Palmer, Foy, Gans and Siegal

Nays: None

Abstain: None

Absent: Board Members Foy and McCaffrey

Hearing adjourned at 7:05 p.m.

Prepared by: Jennifer Daniels, Administrative Assistant II
Reviewed by: Diana Kaminski, Principal Planner