

MINUTES BOARD OF ADJUSTMENT FEBRUARY 24, 2016

Minutes of the regular hearing of the Board of Adjustment, of the City of Tempe, which was held at the Council Chambers, 31 East Fifth Street, Tempe, Arizona.

STUDY SESSION 5:30 PM

Present:

Jan Sell, Chair

Kevin Cullens

David Lyon

Richard Kausal

David Naugle

John Puzauskas

Albert Dare, Sr. (Alternate)

John 'Jack' Confer (Alternate)

Steve Abrahamson, Principal Planner

Ryan Levesque, Deputy Community Development Director

Diane McGuire, Administrative Assistant II

Lee Jimenez, Senior Planner

Absent:

Richard Dalton

There were 3 interested citizens present at the study session.

- Staff and the Board members discussed overview and updates to the scheduled case for this hearing.
- Board members questioned the legal validity/jurisdiction of a decision for the pending appeal case, as it was not a variance issue. The appropriate section of the Zoning and Development Code was referenced indicating the appeal of the Zoning Administrator was appealable to the Board of Adjustment.

REGULAR SESSION 6:00 PM

Present:

Jan Sell, Chair

Kevin Cullens

David Lyon

Richard Kausal

David Naugle

John Puzauskas

Albert Dare, Sr. (Alternate)

John 'Jack' Confer (Alternate)

Steve Abrahamson, Principal Planner

Ryan Levesque, Deputy Community Development Director

Diane McGuire, Administrative Assistant II

Lee Jimenez, Senior Planner

Absent:

Richard Dalton

There were 8 interested citizens present at the regular session.

Hearing convened at 6:00 p.m. and was called to order by Chairman Sell.

On a motion by David Naugle, seconded by Board Member John Puzauskas, the Board by a vote of 6-0 approved the Board of Adjustment Minutes for November 25, 2015. (Members Kevin Cullens and David Lyon abstained from this vote as they were not present at the regular session of the November 25, 2015 hearing.)

Chairman Sell recused himself from tonight's appeal case, citing a conflict of interest. Board member, David Lyon, was appointed Acting Chairman for tonight's public hearing.

THE BOARD DISCUSSED THE FOLLOWING CASE(S):

- Request appeal of the Zoning Administrator's decision to deny the proposed Medical Marijuana Dispensary location at 111 South McClintock Drive for **HEALING HEALTHCARE 3 INC. (d.b.a. Swell Pharmacy) (PL150524)**. The applicant is Jeffrey Gross of Gallagher and Kennedy.

Attorney Gross was present to represent this case. Attorney Jeffrey Gross stated that his firm, Gallagher & Kennedy, represents Healing Healthcare 3 Inc. which submitted a request for approval of a medical marijuana dispensary at 111 South McClintock Drive which location was denied by the Zoning Administrator. He stated that the following reasons should reverse this decision:

- The spacing requirements for dispensaries are not authorized by law. Cities, towns and counties may enact reasonable zoning regulations that limit the use of land for registered nonprofit medical marijuana dispensaries but only to the extent that the regulations are reasonable and are authorized by AZ statute. The spacing requirements imposed by the Zoning and Development Code are not authorized by AZ statutes that give the City the power to zone, and are not reasonable. None of the powers assigned to the City (i.e. zoning powers) give the City the authority to adopt spacing requirements for medical marijuana dispensaries.
- By statute, the City is limited to adopting reasonable zoning regulations for medical marijuana dispensaries, and the spacing requirements are not reasonable.
- The City's 500 ft. spacing requirement from residential property is arbitrary as applied to this requested location.
- The moratorium on new dispensaries is illegal and is not authorized by state law. Attorney Gross stated that the City adopted a moratorium limiting the number of dispensaries to two, but that his client submitted their request for approval before the moratorium went into effect. Therefore it should not apply to this client.

Attorney Gross emphasized that the spacing requirements imposed by the Zoning and Development Code are not authorized by Arizona statutes that give the City the power to zone, and are not reasonable because the municipal zoning authority comes from the State, 'the power must be exercised within the limits and in the manner prescribed in the grant and not otherwise'. He stated that ARS 9-462.01 creates the City's zoning power and through that statute, the State legislature gave the City 12 distinct and specific powers as follows:

1. Regulate the use of buildings, structures and land as between agriculture, residence, industry, business and other purposes.
2. Regulate signs and billboards.

3. Regulate the location, height, bulk, number of stories and size of structures, the size and use of lots and other open spaces, the percentage of a lot that may be occupied by a structure, access to solar energy and the intensity of land use.
4. Establish requirements for off-street parking and loading.
5. Establish and maintain building setback lines.
6. Create civic districts.
7. Require as a condition of rezoning public dedication of rights-of-way.
8. Establish flood plain zoning districts and regulations.
9. Establish special zoning districts or regulations for certain lands characterized by adverse topography, adverse soils, subsidence of the earth, high water table, lack of water, or other hazards.
10. Establish districts of historical significance.
11. Establish age-specific community zoning districts.
12. Establish procedures, methods, and standards for transfer of development rights.

Attorney Gross stated his opinion that the Tempe Zoning Code imposes severe restrictions on medical marijuana dispensaries which are allowed only in certain commercial and industrial zoning districts. Even in these districts, dispensaries cannot be located within 1,320 ft. of another dispensary, a child care facility, school, church, synagogue, temple, public park, library or public community building or 500 ft. from a residential zoning district or residential use. Based on this zoning, Attorney Gross stated that potential dispensary areas are very limited. After eliminating sites that violate spacing requirements, few remaining sites exist. He presented a color coded map of site areas indicating potential site areas and noted that most of the potential areas are owned and not on the market, and that many commercial and industrial properties are subject to deed restrictions or other encumbrances that preclude uses that do not comply with federal law.

Furthermore, Attorney Gross stated that the only area with AG, Agricultural zoning, or residential zoning within 500 ft. of the property is at the northwest corner of McClintock Drive and Rio Salado Parkway. He stated that this land never has been, and never will be, used for residential purposes. The land is owned by the AZ Board of Regents and the Karsten Golf Course has been located there since 1989. AZ State University has committed to developing Karsten Golf Course pursuant to a master plan, which depicts most of not all of the land as a parking area. Attorney Gross explained that the land lays under four (4) rows of large, high voltage electrical transmission lines, making it unusable for residential purposes. He stated that all of the land is within a 400 ft. wide APS easement for the power lines that prohibits any structure from being built. The easement provides that the property owner shall not erect or construct or permit to be erected or constructed any building or other structure, plant any trees or drill any well within the limits of said right-of-way. He stated that due to the proximity of APS's Ocotillo Power Plant at the southwest corner of Rio Salado Parkway and McClintock Drive and APS's plans to modify the major facility, it is clear that the power lines and power line easement are not going anywhere and permanently bar development of the land for residential use.

Attorney Gross stated that it is not reasonable to apply the 500 ft. residential spacing requirement of the code to the property and that it is not a legitimate function of the city's zoning power. He noted that the purpose (which he feels is invalid) of the 500 ft. spacing requirement is to keep dispensaries away from where residents live and that potential for future use (i.e. residential) is weak as no residents will ever live within 500 ft. of the facility, and that any fear of crime, is not founded on any factual basis.

Although the City adopted a moratorium limiting the number of dispensaries to two (2), HH3 submitted its request for approval before the moratorium went into effect, therefore the moratorium should not apply to HH3.

Attorney Gross presented two (2) additional supplemental documents to support his position and stated that these additional documents would provide clarification of the earlier information that he had submitted. One (1) was the Condominium Declaration for Warner Village, and the other was a location map featuring thirteen (13) number sites which were indicated as being sites that had received previous zoning clearance.

Attorney Gross stated that his client's request is an exception to the City Council Ordinance No. 2011.01 and that it cannot be applied to the property in question. This Ordinance does not give the City authority to adopt spacing requirements. It indicates what the city is allowed to do to strengthen their environment but not spacing requirements.

Attorney Gross stated that the City's moratorium creates a hardship and unfair advantage, and that the Zoning Administrator's decision should be overturned for this reason.

Board Member Albert Dare stated the City of Tempe may have limited the number of dispensaries to two (2) due to the size of the City. He referred to the appeal applicant's Exhibit No. 5, the Grant of Right-of-Way for electric transmission lines dated June 26, 1963, and questioned Attorney Gross as to why that document indicated the grantor shall not plant any trees on the site. The photographs in Exhibit No. 3 presented by the applicant show there are trees along the perimeter of the site. Exhibit No. 2 has a preliminary land use allocation showing this area as an athletic facility and hospitality in the future. Perhaps there are other plans for this land use other than leaving the land vacant. Maybe since 1963 the plans had changed, and perhaps the lease agreement is in fluctuation. Mr. Dare asked if allowing the medical marijuana dispensary to be located at 111 South McClintock Drive would change the City of Tempe Ordinance.

Attorney Gross stated he did not believe it would change the Ordinance. The Board would be interpreting the Ordinances to avoid an unnecessary hardship and to comply with statute, which states they must be reasonable. Exhibit 2 on the ASU map notes limited parking for the athletic facilities; with respect to the trees APS will allow small trees in that location, certainly not structures or buildings. He stated that the point is that the City is interpreting Ordinances in an unreasonable manner.

Board Member John Puzauskas stated he is struggling with the definition of reasonable. Reasonable seems to be centered around the 500 foot distance. There had to be some reasonableness establishing this number. The City has the right to establish the zoning.

Attorney Gross stated his argument is not the distance, but prohibiting a dispensary from a certain distance from a residential zone is unreasonable if the property within the residential zone is never going to be used for residential use. There is no connection between the intent of the Ordinance, which is to keep dispensaries a certain distance from residences and the proposed location. The easement for APS will always be there due to the power lines. Attorney Gross is asking the Board to overrule the Zoning Administrator's decision because under this particular set of circumstances it is unreasonable, arbitrary and it acts as an unnecessary hardship on the use of the property.

Board Member Jack Confer referred to the appellant's letter dated February 12, 2016, item number 4. The moratorium on new dispensaries is illegal and is not authorized by state law. It was confirmed the applicant applied for the dispensary before the Ordinance took place. This really doesn't have anything to do with the Board of Adjustment review of the decision.

Attorney Gross stated the moratorium interacts with the spacing requirements to create a situation where there is virtually no room for any other dispensaries in the City of Tempe.

Board Member Jack Confer referred to the appellant's letter dated February 12, 2016, item number 1. The spacing requirements for dispensaries are not authorized by state law. He asked Attorney Gross if he had a specific statute he was referring to.

Attorney Gross referred to A.R.S. § 9-462.01, stating that this statute creates the City's zoning power. The statute lists 12 separate powers the City has. Spacing powers are not one of the specific powers. He also cited a case *Jachimiek v. Superior Court*, which stands for the proposition that a City only has the power to zone if it is provided by statute.

Board Member Albert Dare asked about the building standards, number of doors and if the applicant owned the building. The site was previously utilized as an auto body shop. He questioned if there would be sufficient parking for the patrons.

Attorney Gross stated it was a City standard that the building was to only have one door, and believed all the zoning requirements had been met for the building.

Ryan Levesque, Deputy Community Development Director, gave an overview of this case, stating that as a result of the voter approved Medical Marijuana proposition in 2010, the State of Arizona adopted policies and regulations for implementation for the initiative. At the same time, local municipalities were responsible for preparing regulations within their jurisdictions. Tempe's Medical Marijuana regulations (Ordinance No. 2011.01) adopted in 2011 was the basis and accepted determination for providing reasonable zoning regulations for medical marijuana separation requirements and processing procedures in Tempe. Part of the administrative review process is verifying whether the applicant has identified the necessary separation requirements in the Code. A 1,320 ft. (1/4 mile) separation is required from the property line to the parcel containing another medical marijuana dispensary or cultivation facility, child care facility, charter/private/public school providing elementary or secondary education, church or similar religious worship building, public park, library or public community building. A 500 ft. separation is required from a Residential Zoning District or the property line of a property solely devoted to a residential use in any zoning district.

Mr. Levesque explained that when evaluating the request for the location at 111 South McClintock Drive, it was determined that the subject property was substantially less than 500 ft. from a residential zoning district. This case was somewhat unusual in that the applicant's typically meet with the City first, before filing the administrative application, to check if the site meets separation requirements. The properties located at the northwest corner of Rio Salado Parkway and McClintock Drive are zoned AG, Agricultural District. The properties consist of the ASU Karsten Golf Course owned by the AZ Board of Regents and a small corner property owned by the City of Phoenix used as a utility service yard. The AG, Agricultural District is defined within the Zoning and Development Code, Part 2, chapter 1 – Zoning Districts, as within the category of 'Residential Districts', more specifically defined within Section 2-102. Therefore the subject property is not in compliance with the zoning district separation requirements from 'Residential Zoning Districts'. This is not a land use separation matter and the code does not allow for any additional exceptions to this separation requirement regardless of its current condition or use. During the initial adoption period in 2011, the City received approximately 50 applications for dispensaries. Of those, the City granted acceptance use letters to 13 different sites throughout the City, providing further evidence that there are an adequate number of locations that would authorize such use. The AZ Department of Health Services, at that time, limited jurisdictions to the number of dispensaries based on their own established boundaries. The City of Tempe was authorized for 2 dispensaries, 1 in the northern portion of Tempe, and the other in the southern portion. Two (2) legal dispensaries in Tempe are currently in operation.

Mr. Levesque noted that on October 19, 2010, the Arizona League of Cities and Towns posted an initial draft of rules that Cities could use this draft to develop their own Ordinance. This document included language for dispensaries 'note be located within 'x' feet of a residentially zoned property'.

Board Member Jack Confer wanted to confirm all the arguments noted in the February 12, 2016 letter were also brought up in the initial letter dated January 13, 2016, and that the appeal time did not expire between January 13, 2016 and February 12, 2016.

Mr. Levesque stated the January 13, 2016 letter was an abbreviated summary of the appeal request. The appellant was given the opportunity to expand upon the specific request. The February 12, 2016 letter was considered a revision of the initial application justification. The February 12, 2016 letter was submitted as a component of the packet. The original letter was received on January 13, 2016 which was within the 14 days of the appeal period allowed for the request. The appeal letter identified grounds for the appeal regarding the following:

1. The location is not within 500 feet of residential property.
2. The City's restriction of the location of the dispensary is not reasonable.
3. The City's moratorium on additional medical marijuana facilities is not reasonable.
4. The City is stopped by its prior conduct in similar facilities from enforcing spacing requirements.
5. The City is providing Healing Healthcare 3 of a valid business expectancy in the property right due to the process law by denying approval of the facility

6. The City's application for spacing requirement to the facility are arbitrary and capricious and on abusive discretion with this application.

Attorney Gross was in agreement with the description and explanation given by Mr. Levesque. He believed every argument presented in the February 12th letter was raised in the January 13th letter. He does go beyond scope of that and cut back on some of the arguments made. The appeal was timely filed, Attorney Gross stated, and the rules do allow submitting supplemental material which was done during the time frame requested by Mr. Levesque.

Board Member Albert Dare had a question regarding the 400 foot strip of property parallel on McClintock. If he owned property in the agricultural zoning area and rents it out to someone else would that change the zoning as far as the City is concerned?

Mr. Levesque stated that would not change the actual zoning allowance and use requirements allowed for that district. If the property were to transfer to a future owner the rights are vested with what is allowed in that zoning district. Residential districts are allowed single family uses, golf courses, and public schools. At this time the Arizona Board of Regents is in control of the property and they are allowed to use it at their discretion as appropriate for the purposes of the public university. In reference to the master plan effort, this is a master plan visioning document; it is not a vested or approved document. The City in conjunction with ASU is developing an athletics facility district and they are looking to improve the area. This may possibly include making land use changes and changing zoning districts in the area. The zoning will not change to match the master plan until the changes are taken to City Council.

Acting Chairman Lyons asked for clarification regarding the 13 approved locations in 2011, which were subsequently limited by the Arizona Department of Health Services to 2 locations.

Mr. Levesque stated once the Ordinance was adopted, concurrently or parallel to a separate process Arizona Department of Health Services initiated their policy and regulations for the final license. Typically you go to the City to verify that your application meets the established zoning requirements, and then the applicant can apply to the State to conduct a dispensary business.

The State adopted the rules and regulations that set forth identifying a CHAA, Critical Health Analysis Area for the entire State of Arizona. The total number of dispensaries allowed in the State of Arizona is equivalent to 24 pharmacies; there was an overall limitation established by the proposition based off the 124 CHAA areas. The reason for the CHAA areas was to make the medical marijuana dispensaries accessible to most any patient within the State of Arizona. As a result of this process, Tempe was designated two (2) dispensary locations based on the jurisdictional boundaries. The City set up a lottery process where people applied for the dispensaries and a fairness equity standpoint was established. Thirteen (13) of the fifty (50) applications were authorized. Only two (2) of the dispensaries are active today. All the other applications are null and void as a result of expiration of the time period allowed for the application locations. A map was available showing sites within the City where they could apply. A verification process was also required to see if there was any change in the land use. The applicant was required to make sure they met the separation requirements. Most cities in the valley have separation requirements. Every city and jurisdiction has their own regulations.

Board member Albert Dare questioned whether an individual can go to dispensaries at other locations in other cities for available medications.

Mr. Levesque confirmed medications could be purchased from dispensaries in other cities.

Acting Chairman Lyons indicated that there was a speaker request from Mr. Roy Grinwell and called Mr. Grinwell to the podium.

Mr. Roy Grinwell of Benchmark Commercial LLC referred to the colored site map and numbered locations presented by Attorney Gross. He noted that there are only two (2) locations/dispensaries in the City of Tempe and, that due to this limited access, it opens the door to elements which limit pricing competitiveness that would normally occur when additional pharmacies are available.

Acting Chairman Lyons asked the Board members if anyone had questions for this speaker. The Board members did not.

Attorney Gross returned to the podium and stated that he believes that all of the City requirements have been met in order to approve his client's request.

Acting Chairman Lyons recalled Ryan Levesque to the podium.

In response to a question from the Board, Mr. Levesque stated that the applicant had submitted his initial application request for a dispensary at this location on December 22, 2015. The City Council held the second and final public hearing and adopted Ordinance 2011.01 on January 27, 2011. However, while the draft language for this Ordinance was being prepared, draft language for the Ordinance was being prepared as early as October 29, 2010 when staff provided City Council with a Friday memo update outlining the city of Tempe's current involvement with the AZ league of Cities and Towns with potential provision for the proposed Proposition 203, cited as the AZ Medical Marijuana Act. The Development Review Commission recommended approval of a Code Text Amendment for the AZ Medical Marijuana Act (Ordinance No. 2011.01) on December 14, 2010 and this contained very specific language about the separation requirements. The Zoning and Development Code (Section 2-102) pertaining to Residential District(s) clearly calls out the AG, Agricultural District.

The processing procedures for Medical Marijuana outlines six (6) specific steps for an administrative review application for applicants prior to a zoning determination (clearance letter as to whether or not the site is in conformance with the local ordinance regulations).

Board Member Richard Kausel stated that he did not think that the City's position is reasonable.

Board Member John Puzauskas stated it seems that a lot of effort went into this amendment and the City's consideration of this. The City is not trying to deny these facilities. Applicants can apply for a dispensary knowing what the codes are. The rules and regulations are clear and it is his understanding the applicant did not check first to see if this location could be used for a dispensary. He is troubled by the fact that there are some clear rules and regulations that have been established for a very specific purpose. He stated he is struggling with the whole idea of that a hardship Situation really applies here.

Attorney Gross responded that it is unreasonable if a property is never going to have a residential use because of the easement and power lines. To on the criteria being used to deny this request at that location because it does not meet the Ordinance's intent for the property in question is unreasonable. Based on these circumstances, the reasons for denying the request are arbitrary and unreasonable, Attorney Gross stated.

Board Member Richard Kausel referred to the language of Ordinance No. 2011.01 and stated they were against this law from the beginning. The City's position to implement the people's wishes is continually being undermined. There is no reasonable adaptation of a residential area near this location. It has been discounted; there will not be any homes around there.

Board Member Albert Dare stated that he does not feel that the appeal applicant has proven to him that the City is not within its rights to determine the applicable location(s) for marijuana dispensaries. He stated that he does not want to overturn or undermine the intent of the Ordinance and what has already been established as criteria. It does not appear to him that Arizona Public Service or any other electrical company over a period of time can't change the electrical lines. It looks like the Arizona Board of Regents is planning some development beyond what was originally planned in 1963.

Board Member Jack Confer questioned whether the Board of Adjustment had the legal status to determine the applicability of this applicant's appeal request, or whether this decision should be determined by the City Council. He asked whether there is legal counsel available within the City. Steve Abrahamson, Principal Planner, stated that legal counsel is available from the City Attorney's office. Mr. Confer indicated that perhaps this request should be continued until legal counsel could be obtained.

Acting Chairman Lyons stated that the Board feels it is important to have that clarification.

Board Member Confer questioned what the time element (i.e. number of days) would be to continue this case. Mr. Abrahamson stated that there was no specific number of days, but that the appeal case would need to be continued until the next scheduled Board of Adjustment date if a decision was not reached by the Board this evening.

Attorney Gross stated they would not object to a continuance.

Board Member Confer asked if they should base the Board's decision on when the Ordinance was actually passed (regarding the Ordinance on the limit of total dispensaries) (i.e. approved), and if the City would advise if there are any alternatives for a special master or if mediation could take place before the Board made a final decision.

Mr. Levesque stated the decision by the City was made when the letter was issued (dispensary denial), and that they did confer with the City Attorney's Office on the decision for the request. The decision was confirmed by the City Attorney's Office based on the application decision made by the Zoning Administrator for denial of this request. There were no plans at that time for remediation.

Board Member Albert Dare confirmed that this case is appealable to the Superior Court by either party.

Board Member Kevin Cullens noted the code indicates this is a residential property. He feels this is an encumbrance, and his intention is to vote for the appeal.

Acting Chairman Lyons feels there are a lot of semantics with this case regarding the words reasonable, undue hardship, and residential. This property is residentially zoned, that does not mean it has a home on it. It refers to a broad category of uses which includes not only homes, but parks and other types of development. It seems reasonable that the original applicant could have known that this property was excluded. The arguments heard include the zoning is not legal, he believes the City has the right to create such zoning ordinances, including separation requirements. He believes this use falls into the same sort of category as adult entertainment, it is a use that you need to be careful of whom you allow because it could be a public nuisance for minors. He does not believe it creates an undue hardship. He will be voting to deny the appeal.

Acting Chairman Lyon asked the Board for a motion.

MOTION: Board Member Albert Dare made a motion to deny the appeal of the applicant and uphold the December 31, 2015 Zoning Administrator's decision to deny the request for a medical marijuana dispensary location at 111 South McClintock Drive; Board Member David Naugle seconded the motion.

VOTE: The motion was approved, and the Zoning Administrator's decision to deny the location for a medical marijuana dispensary located at 111 South McClintock Drive was upheld.
Vote 4 – 3. (Board Members Richard Kausal, Jack Confer & Kevin Cullens dissenting.)

DECISION: The Board upheld the Zoning Administrator's decision to deny the request for a medical marijuana dispensary location at 111 South McClintock Drive.

The next Board of Adjustment hearing is scheduled for March 23, 2016.

There being no further business the hearing adjourned at 7:40 p.m.

Prepared by: Diane McGuire, Administrative Assistant II
Reviewed by:

A handwritten signature in blue ink that reads "Steve Abrahamson". The signature is written in a cursive style and is contained within a light blue rectangular box.

Steve Abrahamson, Principal Planner

SA:dm