

**CITY OF TEMPE
BOARD OF ADJUSTMENT**

Meeting Date: 05/25/2016
Agenda Item: 2

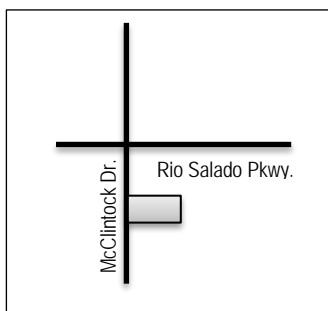
ACTION: Pursuant to ZDC Section 6-705, reconsideration of the Board of Adjustment’s decision (dated February 24, 2016), which denied the appeal of the zoning administrator’s decision regarding the application of HEALING HEALTHCARE 3 INC. (d.b.a. Swell Farmacy) (PL150524) for a medical marijuana dispensary. The Board shall limit their discussion to the issue raised in the motion for reconsideration (dated March 9, 2016), which is the asserted conflict of interest of Board member Lyons, and the merits of that issue. New evidence or testimony provided by the applicant or staff shall be limited only to grounds upon which the motion for reconsideration was granted. The applicant is Gallagher and Kennedy.

FISCAL IMPACT: There is no fiscal impact on City funds.

RECOMMENDATION: N/A

BACKGROUND INFORMATION: HEALING HEALTHCARE 3 INC. (d.b.a. Swell Farmacy) (PL150524) filed an administrative review application for a zoning clearance request for a medical marijuana dispensary (dated December 22, 2015). The Zoning Administrator determined that the subject property did not comply with the separation requirements from a residential zoning district (500 feet) (December 31, 2015) and applicant appealed. The Board of Adjustment denied the appeal (February 24, 2016) and applicant filed a motion for reconsideration based on an alleged conflict of interest by a board member. The Board of Adjustment set applicant’s motion for reconsideration for this hearing and this request includes the following:

1. Based on an alleged conflict of interest by Board Member David Lyon, reconsideration of the decision on appeal upholding the Zoning Administrator’s decision to deny a Medical Marijuana Dispensary located at 111 South McClintock Drive.



Property Owner Appellant	111 McClintock, LLC Mark Fuller, Gallagher and Kennedy
Current Zoning District Gross/Net site area	GID, General Industrial District 19,200 sf.

ATTACHMENTS: Reconsideration Filing

STAFF CONTACT(S): Ryan Levesque, Deputy Community Development Director (480) 858-2393

Department Director: Dave Nakagawara, Community Development Director
 Legal review by: N/A
 Prepared by: Ryan Levesque, Deputy Community Development Director

COMMENTS:

Applicant requests that the Board reconsider its decision to uphold the Zoning Administrator's denial of a zoning clearance for a medical marijuana dispensary because of an alleged conflict of Board member Lyon. Applicant claims that Arizona State University hired Board member Lyon's employer to conduct a strategic, 10-year growth plan for the various ASU campuses located throughout the area; ASU's Tempe campus includes Karsten Golf Course, which, in part, is located across the street from applicant's proposed site. Applicant claims that ASU's engagement of Board member Lyon's employer to produce the campus-wide growth plan created a conflict of interest under Arizona Law for Board member Lyon which he should have declared prior to the hearing of appeal. Applicant claims that Board member Lyon's failure to declare a conflict before the Board's 4-3 decision on appeal prejudiced the applicant. Board member Lyon voted to deny the appeal.

Arizona Revised Statutes 38-503. (B) Conflict of interest; exemptions; employment prohibition

Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

Under Arizona Revised Statutes 38-502(11) a substantial interest is any pecuniary or proprietary interest, either direct or indirect, other than those that are remote.

Tempe Zoning and Development Code Section 1-306 (C)(5), Board of Adjustment – Organization

The concurring vote of four (4) members of the Board of Adjustment shall be necessary to act on any matter on its agenda, [except consent agenda items or continuances].

Under Tempe Zoning and Development Code Section 1-306(E), Tempe Zoning and Development Code Section 6-705, Process for Reconsideration

The decision-making body shall limit their discussion to the testimony raised in the motion for reconsideration and the merits of those issues. New evidence or testimony provided by the applicant or staff, shall be limited to grounds upon which the motion or petition for reconsideration was granted.

ACTIONS BY THE BOARD:

The Board may approve, deny or continue the motion for reconsideration.

If the Board agrees with the allegations in the motion for reconsideration -
that Board member Lyon had a substantial interest in the decision on appeal; and
that Board member Lyon should have excused himself; and
that his decision not to excuse himself was a substantial factor in the 4-3 decision on appeal; and
that Board member Lyon's failure to excuse himself prejudiced the applicant,
the Board should grant the motion for reconsideration.

If the Board disagrees with the allegations in the motion for reconsideration, the Board should deny the motion.

A copy of the applicant's motion for reconsideration filing is included.



Jeffrey D. Gross
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March 9, 2016

VIA HAND DELIVERY and E-MAIL (ryan.levesque@tempe.gov)

City of Tempe
Board of Adjustment
c/o Ryan Levesque
31 East Fifth Street
Tempe AZ 85281

**Re: Healing Healthcare 3, Inc./Appeal of Denial of Use Acceptance Request for Medical Marijuana, 111 South McClintock Drive, Tempe AZ 85281
PL150524**

Dear Mr. Levesque:

On behalf of my client, Healing Healthcare 3, Inc. (HH3), we request reconsideration of the Board of Adjustment decision dated February 24, 2016 rejecting the appeal from the denial of the approval for a medical marijuana dispensary at 111 South McClintock Drive in Tempe. Since the February 24 Board meeting, we have learned that the acting chairman, David Lyon, is employed as an architect by SmithGroupJJR. According to its website,¹ "To assess progress and changes since its 2006 campus master plan, Arizona State University (ASU) enlisted SmithGroupJJR to help determine the university's capacity for growth and to define building priorities for the next 10 years. In addition to updating the master plans for all four ASU campuses, the strategic update includes 20 principles and actions for sustainable design."

As you know, the proposed dispensary is across the street from Karsten Golf Course, which is within the future master plan area SmithGroupJJR has been hired to update for ASU. Consequently, SmithGroupJJR has a pecuniary interest in development within and surrounding the future master plan area, including around the McClintock/Rio Salado intersection. This interest is imputed to its employee, Mr. Lyon. Therefore, Mr. Lyon had a conflict of interest, which he should have announced, and then he should have recused himself, just as Mr. Sell had done. At minimum, he should have announced his conflict.

This conflict is made all the worse because Mr. Lyon was the acting chairman and had the ability to direct the discussion and the outcome of the vote. In fact, he spoke at length about his views on the merits of the appeal. These views, which due to the conflict were presumptively colored by his employer's involvement with the neighboring master plan, included comparing

¹ www.smithgroupjjr.com/projects/arizona-state-university-master-plan-updates-for-four-campus#4. SmithGroupJJR also was involved in ASU's new College of Nursing & Health Innovation building and the U of A Downtown Phoenix College of Medicine expansion. <http://www.smithgroupjjr.com/projects/college-of-medicine-expansion#.Vs8vJvkrLRY>; www.smithgroupjjr.com/projects/arizona-state-university-college-of-nursing-health-innovation#.Vs8sKPrLRY.

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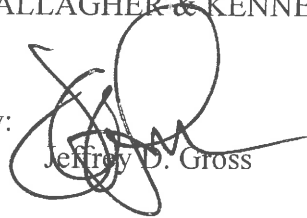
dispensaries to noxious adult uses and public nuisances. As a matter of law, the 4-3 vote that was taken after he expressed his views was tainted by his conflict and his failure to inform his fellow Board members of his position.

It was, at minimum, a mistake for Mr. Lyon not to excuse himself, the mistake was a substantial factor in the split 4-3 decision, and the mistake prejudiced HH3. For these reasons, we request that the Board reconsider its decision and that Mr. Lyon recuse himself from further participation. Since this information has only recently come to light, we reserve the right to submit additional material prior to the next Board hearing.

Sincerely,

GALLAGHER & KENNEDY, P.A.

By:



Jeffrey D. Gross

JDG/cjc

cc: Healing Healthcare 3, Inc.

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