

DRAFT MINUTES BOARD OF ADJUSTMENT APRIL 27, 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

Richard Dalton

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

Michael Niederbaumer, City of Tempe Attorney

Absent:

David Lyon

There were 4 interested citizens present at the study session.

- The Giguere Residence (PL140422) was discussed. The Hearing Officer denied the request for two (2) variances for the applicant, Mr. Robert Giguere. Mr. Giguere subsequently appealed that decision to the Board of Adjustment who overturned the Hearing Officer's decision and approved the two (2) variances at the April 22, 2015 public hearing. Two (2) of the neighborhood residents (Clark Park Neighborhood Association) asked for a reconsideration of this decision, however that request did not meet the ZDC requirements for a reconsideration hearing. They subsequently appealed the Board's decision to Superior Court and the decision of that entity upheld the Board of Adjustment's decision.
- Attorney Niederbaumer gave a brief overview of the Superior Court ruling to deny the appeal and uphold the BOA decision on the Giguere Residence. He discussed how the case had progressed through the various stages until the Superior Court ruling. He explained that after the Hearing Officer had denied the request, the Board of Adjustment had overturned that decision and approved. The Board's decision was then appealed to Superior Court. It was noted by Attorney Niederbaumer that there was no evidence on the record to support the appeal, and based on that fact, the Superior Court's decision was to support and uphold the decision of the Board of Adjustment.
- There was general discussion amongst the Board members regarding the building permit and inspection process when it comes to residential vs commercial projects.
- Staff and the Board members discussed overview to the scheduled case for this hearing. Ryan Levesque explained that today's hearing was for the Board to determine whether the request for reconsideration was viable. The Board's motion is to determine whether Board's decision is to allow the case to be reconsidered. If approved, another Board of Adjustment public hearing will be scheduled to hear the reconsideration.
- Jack Confer questioned that since this case for Healing Healthcare has already been filed with the Superior Court and why the case was being re-addressed to the Board of Adjustment.

- Ryan Levesque noted that the applicant is not to present his reconsideration case or any new material at today's hearing, but only the reasoning for his request for reconsideration (i.e. whether David Lyon should have recused himself from the February 24, 2016 Board of Adjustment hearing due to what the applicant feels was a conflict of interest).

REGULAR SESSION 6:00 PM

Present:

Jan Sell, Chair
Kevin Cullens
Richard Dalton
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

Absent:

David Lyon

There were 11 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 Board Member Richard Dalton, seconded by Board Member Albert Dare, the Board by a vote of 6-0 approved the Board of Adjustment Minutes for February 24, 2016. (Board Members Richard Dalton and Jan Sell abstained from this vote as they were not present at the regular session of the February 24, 2016 hearing.)

Chairman Sell recused himself from tonight's appeal case, citing a conflict of interest. Vice Chair Board Member, Richard Dalton, was appointed Acting Chairman for tonight's public hearing.

THE BOARD DISCUSSED THE FOLLOWING CASE(S):

- Request reconsideration of the Board of Adjustment's decision on February 24, 2016 to deny the appeal and uphold 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 Gallagher and Kennedy.

Ryan Levesque instructed the applicant and Board members that no new material was to be presented, that the decision before the Board tonight was whether or not to approve the request for reconsideration based on the applicant's premise that David Lyons should have recused himself from the last BOA public hearing of February 24, 2016. If that motion is approved, then another Board of Adjustment public hearing will be scheduled to hear the reconsideration.

Attorney Mark Fuller was present to represent this case. He 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 he wanted to make a couple of points for clarification to aid the Board in their decision as to whether they should approve his request for reconsideration:

- The Board acts as a quasi-judicial body and, as such, should support fundamental free and fair public hearings. Should there be a conflict of interest, Board members should recuse themselves.
- As his firm did not have the luxury of waiting until tonight's decision by the Board as to whether they would hear the request for reconsideration, a filing had been made to Superior Court.
- He asked that the Board bear in mind that it was a close decision at the February 24, 2016 hearing when the vote was 4 – 3 to deny the appeal and uphold the Zoning Administrator's decision to deny the location.
- Attorney Fuller stated that the Superior Court has a broader challenge to determine Ordinances with respect to the validity that the law demands to the public.
- Attorney Fuller explained that the issue generating the request for reconsideration is that a conflict of interest exists if a Board member has an interest that is not shared with the public at large. It essentially amounts to a conflict of interest when the Board vote was 4 to 3 and, based on comments by Mr. Lyons, as well as questions he raised during the hearing, the Board was unduly influenced.
- Attorney Fuller indicated that the ASU property that Mr. Lyon helped to develop is located across the street from the proposed location of the dispensary. Mr. Lyon made statements on the record likening the dispensary to an adult entertainment business. It suggests biases against the use here, it suggests a lack of objectiveness and impartiality. He called it a public nuisance, and said on the record "there are a number of things where people might be in a residential type situation" within the APS easement.
- Attorney Fuller stated that there is no residential development and there is an appearance of impropriety here. He indicated that it is the most fundamental right of the applicant(s) to be entitled to make their presentation for reconsideration. The vote was very close at the last hearing and who knows what a revote will determine.

Board Member John Puzauskas asked what the delay in processing for another hearing by the Board would affect, and why the applicant submitted the lawsuit to Superior Court in advance of the Board's decision on whether to proceed with a reconsideration.

Attorney Fuller responded that it is a matter of law and conflict of interest. His firm filed the Superior Court case as they could not afford to sit back and wait for the results of this process (Board of Adjustment decision on whether or not to reconsider) to occur. They went ahead and filed the lawsuit.

Attorney Fuller stated that the challenge is based on the initial decision made by the Board, and feels that it is a matter of law that the application for reconsideration be granted. The process of reconsideration should be a fair process, and rather than delay the lawsuit and involve more time consumed and more delay as well as a great amount of expense, the firm went ahead with the filing to Superior Court.

Board Member Albert Dare referred to the Master Plan for the University and noted that it can change from time to time. 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.

Attorney Fuller acknowledged the validity of this fact that change(s) could occur to what was originally planned.

Board Member Dare stated that those are the things that need to be compared, not some mythical pie-in-the-sky, and to say that the indicated area(s) located at the northwest corner of McClintock Drive and Rio Salado Parkway will never be residential is not correct.

Attorney Fuller responded that the easement is a permanent easement that prohibits any structures. One could envision a hypothetical situation where the power plant would go away. To respond to the question the law requires due process and to restrict the marijuana dispensary against the residential zoned property is to keep dispensaries from forming in those locations. Those structures (high voltage electrical transmission lines) are permanent with the established easement for the power lines that prohibits any other structure(s) from being built. It is a one off or unique situation to decide this request for the dispensary on a very narrow basis and speculate what may or may not change in the future as the power lines are not going to go away.

Board Member Richard Dalton stated the purpose of the meeting tonight is to determine if there was a mistake, a hardship or delay that merits reconsideration.

Board Member Albert Dare addressed the question of fairness of the Board's decision. He stated his decision was formed considering information contained in the lease. That information was given to the Board by the City Attorney's office.

Board Member Jack Confer asked if the Board was to offer (i.e. approve) the motion for reconsideration, would the case then be going before the Hearing Officer or the Board of Adjustment.

Ryan Levesque responded that the reconsideration case would be heard by the Board of Adjustment.

Board Member Kevin Cullens wanted to verify if the only information they have is that there may have been a conflict of interest of Mr. Lyon being employed by the same company that did the planning.

Ryan Levesque stated he does not have verification, but that evidence has been presented at this time. He noted Catellus was the master developer for ASU and they hired Architekton as well as Sasaki, a planning group for development of the area.

Board member Richard Dalton asked the Board members if there were any other questions. Board members indicated that there were not.

MOTION: Board Member Richard Dalton made a motion to approve the request for reconsideration of the February 24, 2016 Board of Adjustment decision. Board Member Richard Kausal seconded the motion.

VOTE: The motion was approved by a vote of 4 -3. (Albert Dare, Jack Confer and David Naugle dissenting).

DECISION: The Board approved the motion for reconsideration and shall schedule a reconsideration hearing.

Ryan Levesque noted that the case for reconsideration hearing would be scheduled at the May 25, 2016 Board of Adjustment public hearing.

The next Board of Adjustment hearing is scheduled for May 25, 2016.

There being no further business the hearing adjourned at 6:40 p.m.

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

Steve Abrahamson, Principal Planner

SA:dm