

MINUTES BOARD OF ADJUSTMENT MAY 25, 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:

Richard Dalton, Vice 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

Absent:

Jan Sell

There were 4 interested citizens present at the study session.

- The Board reviewed the case to be presented at tonight's public hearing.
- Ryan Levesque noted, in response to a question from the Board, that the case before the Board is the reconsideration of the Board's decision of February 24, 2016 based on the applicant's asserted conflict of interest of Board Member Lyon.
- Board Member Jack Confer acknowledged that tonight's hearing was not to re-discuss the facts of the decision to deny the proposed location of the Healing Healthcare at 111 South McClintock Drive, as those facts had already been discussed back at the February public hearing of the Board and the decision made at that time to uphold the Zoning Administrator's denial decision.
- Board Member John Puzauskas agreed, noting that tonight's hearing is to determine if Board Member David Lyon has a conflict of interest related to this case and should have recused himself from the February 24, 2016 public hearing.

REGULAR SESSION 6:00 PM

Present:

Richard Dalton, Vice Chair

Kevin Cullens

David Lyon

Richard Kausal

David Naugle

John Puzauskas

Albert Dare, Sr. (Alternate)

Steve Abrahamson, Principal Planner

Ryan Levesque, Deputy Community Development Director

Diane McGuire, Administrative Assistant II

Present but not needed due to full Board:

John 'Jack' Confer (Alternate)

Absent:

Jan Sell

There were 13 interested citizens present at the regular session.

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

Agenda Item No. 1, Consideration of the Study Session and Formal Meeting Minutes from the April 27, 2016 Board of Adjustment was addressed by Board Member David Lyon who requested that those Minutes be reviewed and adjusted where necessary to indicate the correct spelling of his name as 'Lyon' not 'Lyons'.

On a motion by Board Member David Naugle, seconded by Board Member Albert Dare, the Board by a vote of 6-0 approved the Board of Adjustment Minutes for April 27, 2016 as corrected by David Lyon. (Board Member David Lyon abstained from this vote as he was not present at the public hearing of the April 27, 2016.)

THE BOARD DISCUSSED THE FOLLOWING CASE(S):

1. 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 Pharmacy) (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.

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.

Attorney Fuller expressed his displeasure at indication for the Board to only base their decision on tonight's hearing on whether or not Board Member Lyon had a conflict of interest pertaining to this case. Attorney Fuller opined the following:

- The issue under discussion was the appearance of impropriety; that no one was casting aspersions on the character of Mr. Lyon.
- That if the Board makes their decision based on the instruction from staff (i.e. Ryan Levesque), then there is never going to be a decision on whether or not a reconsideration of the original decision to disallow the proposed location of Healing Healthcare.
- The vote, taken at the Board hearing of April 27, 2016, was taken for the purpose of reconsideration, and, as such, in his opinion, it was a vote to reconsider the prior decision of the Board on this case.
- Attorney Fuller questioned whether the Board needs to make a threshold decision and reconsider the validity of the case, or are they going to make a decision following the advice of staff to only consider the issue of Mr. Lyon's apparent conflict of interest.
- Attorney Fuller stated that he has never seen any reason to have procedure become an adversary process of either the Board members or staff. However, it was his view that tonight's hearing being limited to the

reconsideration of Mr. Lyon's possible conflict of interest was a blatant violation as the Board should also reconsider the appropriateness of the proposed location and the original denial thereof.

Attorney Fuller explained that he was dismayed by what he viewed as a concerted effort of staff to frustrate his client's rights in the matter and undo or undermine the Board's vote. He presented a chronology of events that transpired on the merits of the application and presentation materials. Attorney Fuller stated that he felt those events indicated the possibility that the City is deliberately trying to put up roadblocks and undermine the Board's decision making authority as well as deprive it of the information that would be useful and important to the Board. He expressed his hope that the parties will not have to litigate over whether the applicant was given its legal right to a full and fair hearing before a fully informed, independent Board.

- Based on the above, Attorney Fuller, stated that there will be no further hearing and it was the applicant's request for reconsideration of the February 24, 2016 decision of the Board to have relief from that decision.
- Attorney Fuller stated that, based on the staff instruction tonight, it is guaranteed that there is going to be an appeal of the Board's February 24, 2016 decision to Superior Court.
- Attorney Fuller stated that the Board should be prepared to do what they voted on at the April 27, 2016, which, in his opinion. Was to reconsider the merits of the case.
- Attorney Fuller stated that he was not going to waste time talking about the merits of the case if the Board has been instructed not to reconsider the case.
- Attorney Fuller again stressed that it is the 'appearance' of impropriety that the Board needs to consider. That Mr. Lyon was involved in the 10 year growth plan for various ASU campuses throughout the area, including the Karsten Golf Course, which is, in part, located across the street from the applicant's proposed site. ASU's engagement of Board member Lyon's employer to produce the campus-wise growth plan creates a conflict of interest under the Arizona Law which should have been declared prior to the hearing of the appeal.
- Board Member Lyon's failure to declare a conflict before the Board's 4-3 decision on appeal prejudiced the applicant as it was a close vote and Board Member Lyon voted to deny the appeal and, as acting Chairman, he 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.
- Attorney Fuller referred to Mr. Lyon's comments which he stated included comparing the dispensaries to noxious adult uses and public nuisances. These comments, along with Mr. Lyon's employment with SmithGroupJJR (involved with the development of the future master plan area, including the intersection around McClintock and Rio Salado) unfairly influenced the Board's vote as his views were tainted by his conflict of interest and his failure to inform his fellow Board members of his position. Attorney Fuller stated that it was a mistake for Mr. Lyon not to excuse himself and that mistake was a substantial factor in the split 4 -3 decision which was detrimental to Healing Healthcare's request.

Vice Chair, Richard Dalton stated that he agrees that it is a daunting process and wanted to hear from Board Member David Lyon as to what his perspective was on the proposed conflict of interest.

Board Member David Lyon stated he did not see any conflict of interest. He asked to hear from Ryan Levesque for a technical definition of conflict of interest.

Ryan Levesque referred to the Staff Summary Report for tonight's hearing and the difference between a substantial interest and a remote interest as noted by the following:

- **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.

- **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.**

Board Member David Lyon thanked Ryan Levesque for his input on the referenced statutes of law and for providing a definition of what constitutes a substantial interest which could lead to a conflict of interest. Board Member David Lyon stated he has no property interest or financial interest in anything anywhere near this project. He is an Architect I, employed at Smith Group JJR. He started working at the company on February 8th, 16 days before the first hearing. On February 24th he had just completed the software training. He had no idea of any connection between Smith Group JJR and ASU. After further research, Mr. Lyon discovered nothing had been done by the Phoenix branch office with ASU for quite a few years. The masterplan in question had been primarily handled by the Ann Arbor Office of Smith Group JJR, published in 2011. He does not believe there was a conflict of interest and does not believe there would be any benefit to Smith Group, ASU or himself. His decision was based on the rules of the City.

Mr. Lyon stated that he doesn't believe that there is any conflict of interest on his part and that there is no financial motive or personal feelings involved with the Board's decision of February 24, 2016.

Board Member John Puzauskas wanted to confirm that Mr. Lyon started working for Smith Group JJR in February 2016 and the masterplan was published in 2011. Mr. Kausal asked if Mr. Lyon was aware of the masterplan.

Board Member Lyon stated the dates were correct and he was not aware of the masterplan. Smith Group JJR is the oldest architecture firm in the country and they have done work for many clients.

Vice Chair, Richard Dalton, wanted to confirm that Mr. Lyon was not aware of any actual or potential relationship his employer had that would have impacted this project.

Board Member Lyon stated he would not say there was not a possibility that the company he worked for had done work for ASU as an architecture firm, but Mr. Lyon was not aware of any specific work.

Board Member Richard Kausal wanted to know if Board Member Lyon was not at the meeting last month due to the issue of the subject of the meeting being the potential conflict of interest.

David Lyon responded that personal issues and family matters were the reason behind his absence from the April 27, 2016 Board of Adjustment hearing.

Board Member Albert Dare stated that, in his opinion, David Lyon did not influence him in any way and that his vote was based on the facts as presented.

Board Member Richard Kausal stated that he was confused about what was the purpose of tonight's hearing. He thought that it was to reconsider the decision of the Board from the February 24, 2016 public hearing. This was his understanding based on last month's (April 27, 2016) vote by the Board to approve a reconsideration. He stated that he thought that was the vote to be taken at tonight's public hearing.

Vice Chair, Richard Dalton asked staff to clarify the purpose of tonight's hearing for the record.

Ryan Levesque, in response to Mr. Kausal's comments, clarified that tonight's public hearing was to determine whether or not there was a conflict of interest on the part of Board Member David Lyon, as asserted by the applicant, and the merits of that issue. New evidence or testimony provided by the applicant shall be limited only to the grounds upon which the motion for reconsideration was granted.

- **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).

- **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 issue. New evidence or testimony provide by the applicant or staff, shall be limited to grounds upon which the motion or petition for reconsideration was granted.

Board Member Albert Dare stated that a public notice was put out that very clearly stated the purpose of tonight's hearing. As Board members, they are to determine exactly what was on the public notice rather than take liberties as to what should or should not be discussed/considered.

Vice Chair, Richard Dalton agreed with Mr. Dare. If there is a public notification posted it would not be in the best interest to discuss other issues.

Board Member Albert Dare responded that the public notice was posted on the public hearing board, as well as on the postcard notification mailing, the legal advertisement of the agenda and depicted within the Staff Summary Report.

Board Member Albert Dare stated the information provided in the packet (supplemental packet received from applicant on May 23, 2016) is not what was posted on the public hearing sign at 111 South McClintock Drive.

Vice Chair, Richard Dalton stated tonight's agenda is public record and was posted on the Board and Commission website for interested parties.

Vice Chair Richard Dalton asked if there were any members of the public present who wished to speak on tonight's case:

James Carmichael, business owner rents suites 205, 207& 209 South McClintock, stated that the dispensary would dominate the very inadequate parking available for businesses at that location and have a negative effect on customer parking. There are other areas that would be more suitable for this type of business.

Philip Andresek, Tempe citizen, spoke in opposition to this proposed location, noting that his business is right next to that building and that they would actually share a parking lot and available parking. He stated that he has been in business at that location for 25 years and that they have a lot of people who walk past. In his opinion, this proposed business would adversely affect the available parking and have a negative effect on the surrounding area.

Mark Kadrie, Tempe citizen, spoke in opposition to the proposed location of the Healing Healthcare. He stated that he had been a resident of Tempe for 40 years and doesn't understand why anyone would be in favor of this request at the proposed location. There are only so many parking spots and the parking situation has been dire since 1997 which the proposed dispensary location was condemned; it used to be a body shop. The dispensary would affect the parking ratio and customers of the surrounding businesses won't have any place to park. This is absolutely the wrong place to have this type of business, and that the presence of such a business at this location would be detrimental to anyone trying to pen a business there. He did not understand the purpose behind the Board reconsidering such a request as he thinks the Board is making a big mistake to consider such a business in that location. He stated that this location used to be the worst part of Tempe and now it is the best part of Tempe. This type of business would be detrimental and is not needed there.

Ryan Levesque noted to the Board that discussion should be limited to the motion for reconsideration under the Board's advisement for tonight's public hearing.

Michelle Giles, Tempe resident, spoke, questioning who actually owned Healing Healthcare and her concern(s) regarding available parking at this location which, she indicated, was a limited parking area. She questioned the postcard description of the reason for tonight's hearing.

Vice Chair Richard Dalton questioned Ryan Levesque as to the available parking at this location.

Mr. Levesque responded that parking and separation requirements are issues that are reviewed by staff. When the application was reviewed for zoning clearance determination the process was stopped due to separation requirements. As a result of the process being stopped, the parking was not evaluated.

Attorney Fuller returned to the podium and stated that he would like to clear up a couple of things as follows:

- He did not know if Mr. Lyon had a chance to view the presentation that he presented at the last meeting of April 27, 2016.
- The issue is not whether there is a conflict of interest and principles but the issue is how the public perceives the appearance of a conflict of interest. Superior Court operates under a different set of rules and views a conflict, or the appearance of conflict, under different standards. Attorney Fuller stated that the issue is not whether there is an actual conflict of interest, the integrity of the process is the issue, and, in his opinion, there is a definite appearance of conflict when you start putting together all the facts of this case.
- Attorney Fuller stated that no one was accusing Mr. Lyon of anything at all. There was only one previous decision by the Board at that time which would apply to the same standards as judges are held. Attorney Fuller stated that the Board should discuss reconsideration of the prior Board's decision of February 24, 2016 which denied the merits of this dispensary's location.

Board Member Albert Dare asked which was most important to Attorney Fuller, references that he considered to be offensive language, or the fact that the City has the right to set up zoning districts.

Attorney Fuller responded that:

- It was his view that the Board's decision was a very close vote, and that one of the Board members (i.e. a judge) actually had a professional interest in the location. That member (David Lyon) referred to the dispensary comparison to noxious adult uses and public nuisances. These words on record affect the public perception and, as a judge stating something like that on record it affected what was a very close vote.
- People have very different views about marijuana dispensaries. There are mixed topics on the record which leads directly to the integrity of the vote and indicates a probable relationship because of Mr. Lyon's being involved in the development of the surrounding area. It leads directly to the integrity of the judges (i.e. Board members) and leads to an appearance of impropriety. Judges recuse themselves every day for less than that.

Vice Chair Richard Dalton stated that based on Attorney Fuller's comments and Mr. Lyon's explanation of his position, the question that is being asked tonight is if there was any impropriety on the part of Board Member Lyon. What the Board is here to decide tonight is if there is any compelling indication of a conflict of interest on the part of Mr. Lyon.

Attorney Fuller responded that you don't hold a trial; you don't decide if there was a true conflict of interest. This idea of whether there is a true conflict of interest is not the point, the possible appearance of such a conflict is the issue.

Board Member John Puzauskas questioned Ryan Levesque if the staff or the City Attorney had any opinion on this matter when Gallagher & Kennedy felt like there was a conflict of interest regarding Mr. Lyon.

Ryan Levesque responded when they received the application they were fully prepared to address and respond to the submittal and file the motion for the reconsideration as made. The information was assessed and the hearing was scheduled. The responsibility of the Planning Division is to process the request presented in a manner that is provided in the Zoning and Development Code.

Board Member John Puzauskas stated that he did not want to hurt Mr. Lyon's feelings but if there is a procedural matter, it needs to be considered.

Board Member Albert Dare stated that based on the information provided, it was his opinion that Mr. Lyon was honest in not excusing himself. People do make mistakes, but in this particular case, that is not the situation.

Board Member Kevin Cullens stated that his decision must be based on whether there was a clear conflict of interest or whether there could have been the appearance of a conflict.

Vice Chair Richard Dalton stated that the Board is trying to determine if there was a conflict present; when does perception become a reality? He believes Mr. Lyon conducts himself with integrity. He believes Mr. Lyon would have stepped down and had an alternate take his place if there had been a conflict of interest. He stated that he really struggles with the fact that there was a conflict. When the perception was brought to the attention of Mr. Lyon, research was involved before he could identify his employers' involvement with development in the area.

Board Member David Lyon stated it took a number of phone calls and emails to find the connection. He found on Google that Catellus was the developer, he did not find any information regarding Smith Group JJR. After locating the project manager he discovered the Ann Arbor Office worked on the project and published the site plan in 2011. This information was not immediately apparent and took extensive research to discover.

Board Member John Puzauskas stated it is pretty obvious there was some digging done after the first vote to find this connection. There may be an appearance of impropriety. It is important to think through the idea of the appearance relative to the actual circumstance. Mr. Lyon probably feels violated that someone would drill down this far to find this. He stated that he thought he could see the validity of that perception and it should be considered in the deliberations.

Board Member David Lyon stated that the master plan in question has an assigned Project Manager.

Board Member Albert Date stated that he does not believe that Mr. Lyon was in any way, or had any appearance, of a conflict of interest.

Board Member John Puzauskas stated that he had already heard all of the pros and cons of the case based on last month's meeting of April 27, 2016.

Mr. Levesque noted that the Board may take the following actions on tonight's case:

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

Ryan Levesque reminded the Board that the only motion for tonight's hearing was as noted above in the 'motions by Board' and read into the record as follows:

- **If the Board agrees with the allegations in the motion for reconsideration as follows, then the Board should grant 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.
 - That Board Member Lyon's decision not to excuse himself was a substantial factor in the 4-3 decision on appeal.

- That Board Member Lyon's failure to excuse himself prejudiced the applicant.
- **If the Board disagrees with the allegations in the motion for reconsideration, the Board should deny the motion.**

Attorney Fuller stated that his understanding is that it was the reference to entertainment and public nuisance suggests a view towards the nature of the business. If he is a member of the public and sees that the firm is involved with a project that is across the street from the proposed location of the applicant, then there is the appearance of a conflict of interest. The actual reality is not the issue.

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

MOTION: Board Member Albert Dare made a motion to deny the request for reconsideration based on the asserted conflict of interest by Board Member David Lyon. Board Member David Naugle seconded the motion.

VOTE: The motion was approved by a vote of 4 -3. (Kevin Cullens, Richard Kausal and John Puzauskas dissenting).

DECISION: The Board's decision was that there was no conflict of interest on the part of Board Member David Lyon and, therefore, the February 24, 2016 Board decision to uphold the Zoning Administrator's decision to deny the location for Healing Healthcare was upheld.

The next Board of Adjustment hearing is scheduled for June 22, 2016.

There being no further business the hearing adjourned at 7:20 p.m.

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



Steve Abrahamson, Principal Planner

SA:dm