

DRAFT MINUTES BOARD OF ADJUSTMENT SEPTEMBER 27, 2017

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:

David Lyon, Vice Chair
James Frazey
Kevin Cullens
Richard Kausal
David Naugle
John Puzauskas
Albert Dare, Sr. (Alternate)
John 'Jack' Confer (Alternate)

Steve Abrahamson, Principal Planner
Karen Stovall, Senior Planner
Ryan Levesque, Deputy Director - Planning
Diane McGuire, Administrative Assistant II

Absent:

Jan Sell, Chair

There were 4 interested citizens present at the study session.

- Steve Abrahamson, Principal Planner, welcomed new Board member, James Frazey, and gave a brief overview of the procedures followed by the Board of Adjustment.
- Diane McGuire, Administrative Assistant, reminded Board members that if they were not present during the last BOA public hearing, held on August 24, 2016, they could not vote on the approval of those Minutes. She also reminded the Board members to turn on the microphone when speaking.
- Steve Abrahamson explained that the Board was currently without a Vice Chair, and questioned whether the Board members wanted to vote on that position this evening, or delay it until the next BOA. Members indicated that they wished to vote on that position this evening.
- Albert Dare nominated David Lyon for the position of Vice Chair. All were in favor of this nomination, and Mr. Lyon accepted the position.
- Mr. Abrahamson noted that there would be a Board of Adjustment public hearing held on October 25th, 2017.
- Board members reviewed the case on the scheduled agenda.
- Richard Kausal expressed his understanding that tonight's schedule case was based on the position of the appellant in line the day the application was submitted.
- John Puzauskas stated that he was confused as to what the Board was being asked to do, as it was his understanding that the appeal was based on the position the appellant held in the entrance line.
- Jack Confer agreed that the issue was very obscure.
- Richard Kausal questioned what happens if the Board approves the appeal. Would there then be two (2) medical marijuana dispensaries in the same proximity?
- Karen Stovall, Senior Planner, responded that, should the Board decide to approve the appeal, then there would be two (2) approved sites within a mile of each other.

- Albert Dare expressed his understanding that the established criteria to have one franchise per square mile was to keep the riff raff out of the way.
- David Lyon noted that, regardless of the conflict being reviewed this evening, the buildings at the 410 South Madison were already in existence.
- Steve Abrahamson explained, in response to a question from the Board, that this evening's case has nothing to do with a variance, that variance submittals are a completely different issue and were unrelated to this appeal case.
- John Puzauskas questioned whether someone had legally jumped their position in line and if that is what affected the ZAO's decision to deny tonight's appellant.
- Kevin Cullens stated that he would like an interpretation of that issue also.
- Steve Abrahamson responded that the first person in line was approved for a medical marijuana facility in the area proposed by tonight's appellant, and that was the issue.

REGULAR SESSION 6:00 PM

Present:

David Lyon, Vice Chair
James Frazey
Kevin Cullens
Richard Kausal
David Naugle
John Puzauskas
Albert Dare, Sr. (Alternate)

Steve Abrahamson, Principal Planner
Karen Stovall, Senior Planner
Ryan Levesque, Deputy Director - Planning
Diane McGuire, Administrative Assistant II

Absent:

Jan Sell, Chair

Present but not needed due to full Board:

John 'Jack' Confer (Alternate)

There were 10 interested citizens present at the regular session.

Hearing convened at 6:00 p.m. and was called to order by Vice Chair David Lyon.

Vice Chair Lyon introduced himself. Remaining Board members introduced themselves individually.

On a motion by Board member Richard Kausal, seconded by Board Member Albert Dare, the Board by a vote of 7-0 approved the Board of Adjustment Minutes for August 24, 2016.

THE BOARD DISCUSSED THE FOLLOWING CASE(S):

1. Appeal of the Zoning Administrator's decision to deny the proposed Medical Marijuana Dispensary location at 410 South Madison Drive for **410 SOUTH MADISON SUITE #2 (HANA MEDS) (PL170205)**. The appellant is Zoned Properties Inc.

Karen Stovall, Senior Planner, gave an overview of the case:

- Using a location map, Ms. Stovall, indicated the position of the appellant's proposed site.
- She noted that tonight's case was an appeal of the zoning Administrator's decision, made on July 17, 2017, to deny a proposed Medical Marijuana Dispensary location at 410 South Madison Drive, Suite #2.
- After review of the application, staff determined that the subject property did not comply with the separation requirement from any Medical Marijuana Dispensary because the City had accepted a potential dispensary location within a 1 mile radius of the subject site.
- Ms. Stovall asked if the Board had any questions. The Board indicated that they did not have any questions for Ms. Stovall at this time.

Bryan McLaren, of Zoned Properties LLC, was present to represent this case. He stated that his position was CEO for Zoned Properties LLC.

Mr. McLaren presented the following points of reference:

- His clients are primarily tenants seeking to activate their business interests in various locations.
- He indicated that he had worked diligently with the Community Development – Planning staff in order to prepare his submittal in accordance with the established guidelines for a medical marijuana facility.
- He thanked the Board members for their time, and expressed his appreciation for their consideration of his appeal.
- He asked the Board if they had any questions.

Vice Chair Lyon asked Mr. McLaren for an explanation of his submittal process.

Mr. McLaren responded that the process of his submittal was based on the criteria of the City's updated Code Text Amendment for medical marijuana facilities. This amendment consisted of changes within the Code that regulate the location, operation requirements and number of dispensaries in Tempe.

Mr. McLaren presented the following sequence of events:

- Although the Code Text Amendment (Ordinance 2017.25) was approved by City Council on May 25, 2017, the City did not begin accepting applications until 30 days following this City Council approval (June 26, 2017).
- It was Mr. McLaren's understanding that new applications would be processed on a first come, first served basis as of June 26, 2017 (i.e. based on arrival time).
- His client, Hana Meds, had already invested considerable funds to locate their business operations in Tempe and to develop a Medical Marijuana Business Park.
- Mr. McLaren explained that he had arrived 12 hours prior to the City's opening time of 8 AM in order to be first in line. The City had posted a notice on the entry door that any customers filing an application for medical marijuana use acceptance (i.e. administrative review of applications by the City) and that customers would be required to enter the office single file and sign in. Applicants would be called in the order of the sign in sheet for application submission to a permit tech.
- Upon arrival 12 hours earlier, Mr. McLaren chatted with a security guard who was present while waiting for the door to open. He did not realize until later that said security guard was, in essence, representing another medical marijuana client's place in line (i.e. first in line). The applicant, Michael Colburn, exchanged places with the security guard who he had hired to hold his place in line.
- Mr. McLaren explained that it due to this security guard 'holding the first in line place', he was given the number 2 instead of number 1 and, as his site in close proximity to client #1, his application was denied.
- Mr. McLaren feels that having someone other than the actual client hold a place in line is improper and inappropriate.

Board member Richard Kausal asked Mr. McLaren if he had any idea that the other applicant (#1) was going to apply for a medical marijuana dispensary site. Mr. McLaren acknowledged that he did know that, that he had learned that fact earlier on.

Board member Frazey asked if Mr. McLaren had been in line for 12 hours, how long was the other applicant there before he was present. Mr. McLaren responded that although the other applicant (#1) had been there previously, that person had switched out his position with a hired security guard to hold his place in line.

Board member John Puzauskas as if applicant #1 receive a post it noted that indicated his was #1, and that Mr. McLaren received a post note with #2. Mr. McLaren acknowledged that this was correct.

Board member Frazey referred to the aerial depiction of Mr. McLaren's proposed location, and noted that it appeared to consist of an established business complex (i.e. Business Park).

Mr. McLaren stated that, as a developer, he wanted to make sure that the City criteria was met. That basically the submittal process requires that a site be approved before proceeding with the use permit process for approval. He noted that this particular location is a site with ample parking and it is well illuminated. He felt that both of these factors would hopefully result in certification as a medical marijuana location.

Mr. McLaren explained that currently Hana Meds cultivates medical marijuana and operates a related kitchen at that location. This was intended to establish a flagship property as a Medical Marijuana Business Park, and was critical to the decision of Hana Meds to locate their business operation in Tempe. A sizeable investment of millions of dollars had been made based on this location, which would allow multiple parallel activities (i.e. both cultivation and dispensary). With the proposed submittal for a dispensary on June 26, 2017, Mr. McLaren explained that he felt he had reached that threshold of acceptance.

Mr. McLaren stated that statistics had shown what when group operations are done together, there is actually less crime and that, based on that fact, it is actually preferred that medical marijuana facilities operate in group environment.

Board member Dare asked how the numerical order of applicants was established on June 26, 2017.

Ryan Levesque, Deputy Director – Planning, explained that interested applicants had been waiting outside the entrance doors on the date (June 26, 2017) new applications were being received for review. The group was questioned if anyone within the group was there to apply for a medical marijuana application. Three people were identified with that intent. The group was asked who was first and the others indicated that the representative for Mr. Colburn was first in line. Applicants were given a numbered post it note to designate their position in line and as the door opened at 8 AM they signed in and were called in the numerical order based on their individual numbered designations.

Mr. McLaren stated that he had no argument with that process, that his whole argument for the appeal was based on the fact that the vendor (Michael Colburn) left and that a hired representative took his place in line. Mr. McLaren stated that this was done as opposed to Mr. Colburn waiting in line himself, and, from his perspective, this was improper and should invalidate Mr. Colburn's #1 numerical designation.

Board member Dare stated that if Mr. McLaren had arrived 12 hours in advance, was there anyone, such as a City official or police officer present to monitor the waiting applicants.

Mr. McLaren stated there was not.

Board member Albert Dare asked that when the appellant entered the City offices, did he answer that he as #2. Mr. McLaren stated that was correct. Mr. Dare asked if Mr. McLaren's application was accepted at the Madison location, would he oppose the use at the University location. Mr. McLaren responded that he would not oppose that resolution.

Board member Puzaukas asked if the appellant recognizes no contest about who was first in the door ahead of Mr. McLaren, what is the appellant asking the Board to do? Mr. McLaren that while he is not contesting who was first in line, his appeal is based on who should have been assigned #1. He indicated his opinion that the number 1 person should be invalid, as they used a 'proxy' line person for a period of time.

Vice Chair Lyon questioned whether when the group outside the door was asked who was first in line, did he agree that the other applicant was first? Mr. McLaren confirmed that he had done so.

Vice Chair Lyon thanked Mr. McLaren for his time.

Vice Chair Lyon asked if there was any member of the audience who wished to speak on this case. There was no one.

Vice Chair Lyon asked if any of the Board members had comments they wished to express.

Board member Kausal stated that while he does not personally agree with the process on limitations, he has to recognize the established legal criteria as this is really an issue with the law.

Board member Dare stated that this was a situation of 'who's on first – who's on second'. In his opinion, the City did not adequately provide a way to determine the numerical order of the waiting applicants.

Vice Chair Lyon stated that the appellant is reasonable and candid about what transpired, however the matter really comes down to whose application was submitted first. Mr. McLaren missed the opportunity to establish his case, when staff asked who was first in line.

Board member Dare expressed his opinion that the appellant could have felt intimidated at the time of application.

Board member Naugle made a motion to deny the appeal and uphold the Zoning Administrator's opinion to deny the dispensary location at 410 South Madison Suite #2.

Board member Kausal seconded the motion.

DECISION: Appeal was denied and the Zoning Administrator's opinion, dated July 17, 2017, to deny the use acceptance request for a medical marijuana dispensary for 410 South Madison Suite #2 (PL170205) located at 410 South Madison Drive was upheld.

VOTE: Appeal was denied by a vote of 6 to 1.
(Albert Dare dissenting.)

It was noted by Steve Abrahamson that the appellant does have the option to appeal the Board's decision to Superior Court within thirty (30) days, should they so desire.

Steve Abrahamson made the following announcements:

- October is Planning Month.
- The next Board of Adjustment hearing is scheduled for October 25, 2017.

There being no further business the hearing adjourned at 6:45 p.m.

Prepared by: Diane McGuire, Administrative Assistant II

Reviewed by:



Steve Abrahamson, Principal Planner

SA:dm