

MINUTES BOARD OF ADJUSTMENT May 23, 2018

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:

Staff:

Chair David Lyon	Steve Abrahamson, Principal Planner
Vice Chair James Frazey	Lee Jimenez, Senior Planner
Board Member Richard Watson	Sarah Adame, Executive Assistant
Board Member Whitney Baker	
Board Member Kevin Cullens	
Board Member David Naugle	
Board Member John Puzauskas	
Board Member John 'Jack' Confer (Alternate)	
Board Member Albert Dare (Alternate)	

- **BLUE DRAGON VAPOR**

The Board Members recapped the Blue Dragon Vapor case file. The Board Members went over the outline of events to that brought the case to the Board. The Board Members got clarification on the dates of events. The Board Members went over the stipulations that they would like to see if the request is granted. Steve Abrahamson gave clarification on what the Hearing Office denied and what they are ruling on in this hearing.

Regular Meeting 6:03 PM

Moment of Silence for Diane McGuire who recently passed away.

1) **Voting of the Meeting Minutes**

Study Session March 28, 2018
Regular Meeting March 28, 2018

Motion: Board Member Baker

Second: Board Member Naugle

Final Vote: 5-0 Approved with Board Member Puzauskas and Board Member Cullens abstaining.

- 2) Request an appeal of the February 6, 2018 Hearing Officer's decision to deny a variance to reduce the use separation requirement from a tobacco retailer to an elementary or secondary school for **BLUE DRAGON VAPOR (PL170384)** located at 6473 South Rural Road. The appellants are Tracey Moore & David Barno.
CONTINUED FROM MARCH 28, 2018 BOARD OF ADJUSTMENT

Presentation by Staff, Lee Jimenez, Senior Planner

Mr. Jimenez gave a location description of the Blue Dragon Vape Shop and described the discrepancy of the zoning code for tobacco retail. This shop is currently located in the southeast corner of East Guadalupe Road and South Rural Road within the PCC-1, Planned Commercial Center neighborhood district and it should not be located on the lot measured by a straight line in any direction from the lot line of a charter school, private school or public school which provides elementary or secondary education. It is currently located approximately two hundred ten (210) feet from Gethsemane Lutheran School and one thousand four (1,004) feet from Marcos De Niza High School. On February 6, 2018, the Hearing Officer heard and denied a variance to reduce the use separation requirement from a tobacco retailer to an elementary or secondary school. No action was taken on the use permit request to allow a tobacco retailer (vape shop) since the variance was denied. On February 13, 2018, an appeal to the Hearing Officer's decision was submitted by appellants, Tracey Moore and David Barno of the Blue Dragon Vape Shop. On March 28, 2018, the Board of Adjustment voted 6-0 to continue the item at the applicant's request. Mr. Jimenez went on to explain that the Hearing Officer staff received two phone calls and one email in opposition and at the hearing on February 6, 2018, four more people spoke in opposition. No other public input has been received since. Mr. Jimenez discussed the purpose of tonight's meeting and how the voting on this appeal will impact the Hearing Officer's decision.

Presentation from Appellant's representative: Mr. Clair Lane, Attorney

Mr. Lane advised the Board of his history of working with projects that impact the City and he is knowledgeable on the City's processes. Mr. Lane began to tell the Board that he knows the history of this situation and advised that he would be able to help clarify the entire matter.

Mr. Lane described the order of events from when Blue Dragon Vape Shop opened to where they are today.

- The owners of the Blue Dragon Vape Shop approached Mr. Belding about leasing space in the Waffle House shopping center.
- Mr. Belding (the landlord) asked Mr. Lane to contact the City to see if the Vape store was a lawful use in the shopping center.
- Mr. Lane said that he contacted the City and read the code and decided yes, it was.
- Then the owners of the Blue Dragon Vape Shop and Mr. Belding entered a lease agreement.
 - Soon after that, the owners of the Blue Dragon Vape Shop received a notice from the City advising them that they needed a use permit for the tobacco store.
 - Mr. Lane advised the Board that Dave Nakagawara came out on site and found the Blue Dragon Vape Shop had less than 20% of the liquids that are sold and don't have any nicotine at all in them. The standard rule is if your tobacco sales are less than "x" then, you're not a tobacco store. Mr. Nakagawara went through the store's inventory, sales, nicotine supplies, and said that he was going to go back and check with the City's legal department staff. The Blue Dragon Vape Shop received a phone call back and said that clearly, the Blue Dragon Vape Shop is not a tobacco store and does not need a use permit. He said that he would cancel the pending hearing for the use permit. The Blue Dragon Vape Shop has never heard from him again.
 - Now 3 years later, the Blue Dragon Vape Shop received a letter in the mail advising them that they are a tobacco store and that they need a use permit and a variance.
- Mr. Lane advised the Board that the owners of the Blue Dragon Vape Shop don't object to being subject for a variance and use permit. The Blue Dragon Vape Shop wants to stay open. They have a staff and a reputation for being the number 1 quit-smoking clinic in Tempe.

- The cause of this hardship is caused by a City staff member. Mr. Lane expressed that the owners of The Blue Dragon Vape Shop be granted whatever relief they need to stay open because they are lawful and are open to every City code. He would hate to see them go through expensive hurdles just to get a use permit.

Chair Lyon asked the Board if they had any questions for Mr. Lane.

Board Member Kevin Cullens wanted to clarify Mr. Lane's timeline and relationship with the appellant, Blue Dragon Vape Shop. Mr. Lane advised yes, and explained that Mr. Belding always has him check out his tenants.

Board Member Frazey reviewed that the ordinance that was dated July 21, 2014. He stated that prior to that date, the language from the code specifically, describes smoking as using an electronic smoking device designed for the purpose of inhaling and exhaling aerosol or vapor and has nothing to do with nicotine. That was dated July 31, 2014.

Mr. Lane expressed that he did talk about that and says that it was a mistake from the City and he wants the City to answer to it. Also, he stated that the City should have requested for a variance or have the tenants move across the street. Mr. Lane said at that time, the City told them that they only needed a sale tax license. When Mr. Nakagawara came out to the site of the store, he was distinguishing the difference between real cigarettes that inhale nicotine to electronic cigarettes.

Board Member John Puzauskas asked Mr. Lane if there was any documentation and Mr. Lane advised that they only filed for a tax license. Mr. Lane expressed that he is old school and at that time, a man's word is his word and that looks good to him. As far as he knows, for the past two years, the Blue Dragon Vape Shop has not been doing anything wrong, and then someone else looks at the shop and comes up with a different conclusion. Mr. Lane continued to say that this hardship was not created by the owners of the Blue Dragon Vape Shop, but by the City. The hardship would be devastating loss to their business and employees.

Board Member Whitney Baker asked Mr. Lane if this case is closed and Mr. Lane advised that this is what he was told. Board Member Baker reviewed with Mr. Lane that the Blue Dragon Vape Shop received a notice in writing. Mr. Lane advised that there was "a guy" that came out to the shop that told them they were in violation and didn't receive anything. Board Member Baker then asked how they knew that there was a hearing, if they didn't receive anything in writing. Mr. Lane advised the Board that Mr. Nakagarawa told them that he canceled the hearing and was told that they did not have to go to the hearing. Board Member Baker asked Mr. Lane if he was aware of what the current record shows. Mr. Lane advised no. Board Member Baker advised Mr. Lane that the record does not show that Mr. Nakagarawa went out to the Blue Dragon Vape Shop, but he also assured Mr. Lane that no one is saying that it didn't happen. The record shows that it was pulled from the agenda because it does not meet the criteria due to it being located 1,320 feet near a school. Board Member Baker clarified with Mr. Lane that no documentation was received notifying them that this had been pulled off the agenda and Mr. Lane confirmed.

Ms. Tracy Moore is an owner of the Blue Dragon Vape Shop and she gave her description of this situation. She stated that after five months of being open that they did obtain their sale tax license, they then received the letter of violation. This is when the City told her that she needed to apply for a. They asked the Director, Dave Nakagarawa to come to the store and he did. He told them that they did not need to apply for the use permit because the 50% rule of sales indicated that they have to be primarily in tobacco sales. He expressed that the hearing will be cancelled. Ms. Moore said that she did not know if he signed off on it or on something else, but she never received anything in the mail. In September of 2017, she received a letter advising her that the shop was still in violation, but the violation was for not having a use permit. Ms. Moore advised that Mr. Nakagarawa said the he was going to give them the use permit because they had already paid for it and went through the process. They just didn't attend the hearing because he cancelled it. Ms. Moore advised that Mr. Nakagarawa did not state that they needed a

variance. The variance was added afterwards. Ms. Moore advised the Board that she sent two emails to Diane to remove the request of the variance because they did not need it. Ms. Moore expressed that Mr. Nakagawara called her and asked her why the City has her money and why she does not have the use permit yet. Ms. Moore said that she told him that she did not know and that it was a very good question. Ms. Moore advised that this issue has been reopened, since Chad Weaver became the new director. When Mr. Weaver visited the Blue Dragon Vape Shop, Ms. Moore asked Mr. Weaver what he would like them to do. Mr. Weaver explained to her that because the Blue Dragon Vape Shop is in a quarter mile from the schools in the area, they would need to obtain a variance. Ms. Moore was then sent the paperwork, asked to pay the fee to file, and then attend the hearing. Ms. Moore has expressed that she had done everything the City has asked her to do. She continued to explain that the shop is not a tobacco shop and that she has collected \$3000.00 per month in sales tax and has about 200 customers per day. Closing the shop would be a devastation. Ms. Moore presented a letter to the Board, stating that the Gethsemane Lutheran School is closing and a variance won't be needed, but it is possible another school, Valley Christian School, may move in. She also described how they are actively trying to do things the right by not selling to minors and also taking in copies of driver licenses from online orders.

Mr. David Burno, the 2nd owner of the Blue Dragon Vape Shop, came before the Board to assist Ms. Moore in her presentation to the Board and to answer questions from the Board.

Chair Lyon asked the owners of the Blue Dragon Vape Shop what their top three sold items are. Ms. Moore responded by listing batteries, clothes, and electronics as their top three items sold in the shop. Mr. Burno described the batteries as modulars and said that also coils are highly sold. Mr. Burno explained to the Board that Ms. Moore did all the work to open this business from the start and she tried to do it correctly by approaching the City, asking questions, completing all of the applications, and paying all of the fees.

Public Comment:

Mr. Abrahamson advised the Board that Mr. Warko does not want his comment card read into the minutes. Mr. Warko has left the hearing.

Terry St. Michaels – Tempe Resident

Ms. Michaels advised the Board that she appreciates all of the hassles of variances and application processes for building permits. She is here to express her thoughts defined by the City's ordinance about paraphernalia, smoking, and vape products that are considered tobacco products. She stated that right or wrong, this is what the ordinance says. Ms. Michael's expresses that she has been a teacher since 1982 and has been a high school teacher and also a college professor. She states that her concern is for the Marco De Niza students and that there are many places that surround the school near the vape shop, where students meet up. She expresses that the Blue Dragon Vape Shop does not contribute to the City plan and that the vision of the area is to attract unique local retail and dining which services both adults and family. Ms. Michaels said that she appreciates the consciousness of the Blue Dragon Vape Shop and that once the variance is given, they can do whatever they want. She is unsure of the Blue Dragon Vape Shop's future decisions or if they will continue to own the shop thereafter.

There were no questions from the Board for Ms. Michaels.

Jim Filo – Tempe Business Man

Mr. Filo advised the Board that he has been in the area for over thirty-two years and he has built businesses here in Tempe. He stated that he is here to find out how the City of Tempe treats business people and that he knows these folks that own the Blue Dragon Vape Shop and their story. Mr. Filo expressed that he thinks that there is a misunderstanding and appreciates the mission of undoing these hardships. He said that he knows that the Blue Dragon Vape Shop owners have been in hearings three times because he has attended all three hearings with no results. Mr. Filo expressed his thoughts that if students wanted to obtain tobacco, they could easily go to the Circle

K across the street, rather than walking a little further to try to get into the vape shop, which they are also not old enough to allowed access within. Mr. Filo ended his statement by stating that he is curious what the Board is going to do. He says that he knows that the Blue Dragon Vape Shop has done everything they are supposed to do and he thinks that the City should step up and say “yes, we messed up and maybe we can work something out”, as a way to compromise.

There were no questions from the Board for Mr. Filo.

Public Comments Closed

Chair Lyon advised the appellants that she could come up and respond to the public comment.

Ms. Moore advised that they were advised that they were responsible to hold a neighborhood public meeting. They sent out 500 letters to all the neighbors. The meeting was held at their shop and no one attended the meeting. Only the City official and herself attended it.

Chair Lyon asked if there were any more questions for Ms. Moore and there weren't any.

Mr. Lane asked the Board if he could come up to speak. Chair Lyon allowed him to speak.

Mr. Lane expressed his opinion that the owners of the Blue Dragon Vape Shop would like to be granted the variance and want to comply with the ordinance. Once the variance is granted, the owners of the Blue Dragon Vape Shop know that they must go through with the use permit, which will put more control on the business. He expressed that they don't want to pull the wool over anyone eyes. They do want to comply with the law. Mr. Lane asked the Board to grant the appeal and the variance. Therefore, they could then get a free use permit and everyone is happy. Mr. Lane also stated by granting the variance, it solves the problem, protects the City, and protects the business.

Commission Discussion

Board Member John Puzauskas asked if the variance would be with a sale, if the variance is granted and the business is sold several years from now. Mr. Lee Jimenez advised that the variance will run with the land but the use permit could be transferable to the new owner, depending on the conditions of the use permit.

Board Member Richard Watson asked staff if the variance could be conditional. He asked if, for example, the variance would be still valid if the business changes ownership. Staff Mr. Abrahamson advised yes, they can put a condition on the variance. It would have to be something that they are aware of and agree to prior to the sale.

Board Member Puzauskas asked how the Board would determine that and under what conditions it would be determined.

Board Member Watson shared his concern about the variance's distance. He asked the Board what happens if ownership changes and the variance stays in the ownership of Ms. Moore and Mr. Barno.

Staff Mr. Abrahamson advised that should you approve the appeal thus overturning the Hearing Officer's decision this evening, and allow them to have the variance for the separation requirement, they will have to move on to the Hearing Officer once again for a use permit. It is not out of the ordinary to place a condition on the use permit, such that it would not be transferable. Mr. Abrahamson continued to advise that it would more feasible to put the nontransferable condition on the use permit. If the owners of the Blue Dragon Vape Shop were to sell the business, then the new owner would have to get a new use permit.

Chair Lyon clarified that the Board may have a desire to place a condition on the variance but feels that there is not much else to say to the Hearing Officer, concerning that the Board would like there to be a condition on the use permit.

Staff Mr. Abrahamson advised Chair Lyon and the Board that in this meeting tonight, that should this go to the Hearing Officer for a use permit, it is the Board's recommendation that a condition be placed on it. It is not guaranteed that the Hearing Officer would do it, but at least it would be in the minutes.

Vice Chair James Frazey confirmed if the Blue Dragon Vape Shop were to sell to another business, because of who they are, the new owner should not be allowed the variance because they are not the Blue Dragon Vape Shop. The distances are still there.

Board Member Richard Watson advised that he thinks that is a good question from Vice Chair Frazey and considers that the Blue Dragon Vape Shop has been operating since 2015, regardless of what happened with the previous Director, because there is no documentation to support it. He is looking for a creative solution to help a Tempe business continue and to help the City continue to enjoy the revenue. Board Member Watson advised that he lives in this neighborhood and realizes that the traffic pattern is ugly. He likes that the appellant is putting measures in place to try to put appropriate controls to keep this from getting into the hands of minors. He sees that they have made an investment in their business, but he is concerned about the message that the City of Tempe represents by not finding a way for them to continue their business.

Board Member Kevin Cullen asked staff if the Board is bound to that and the other three variance approval criteria?

Staff Mr. Abrahamson advised that the decision that is made is based on the evidence you heard here tonight and if you feel to include that particular point, there can't be a vote of approval of the appeal, and that is your decision as an individual Board Member.

Chair Lyon stated that any Board Member is free to disagree with him, but the extreme reading of code where the Board can't ever grant a variance where someone else has the same variance would mean there would be certain variances where this could never happen. He would discourage that reading and back it off just a little. Part of the idea of a variance is to grant relief where there is reasonable hardship and would advise to temper how it is read.

Board Member Baker stated that she read in the minutes where the Blue Dragon Vape Shop was pulled off the agenda because distance. She realizes that part of the code that she has heard a couple times now from the appellant is that they are only 13 % nicotine. Board Member Baker asked staff where in the code does it say a percentage?

Staff Mr. Abrahamson stated that the code does not say a percentage. He went on to clarify that code defines a tobacco retailer as a business that sells an excess of 50% of their revenue in tobacco or tobacco related products. Our code indicates that a vape shop sells tobacco related products. Everything in the shop can be considered tobacco paraphernalia.

Chair Lyon stated that when asked what were the top three items sold in the store, he was trying to figure out if they were tobacco related items. The code state primarily tobacco products. His says, he has read that the owners of the Blue Dragon Vape Shop should not have a variance because they don't fit the criteria for a business that is a tobacco retailer, but at the same time he is inclined to grant some relief here. Chair Lyon stated that he thinks the owners have had to jump through hoops, and that things get missed and there is no proper documentation. He does like the motion of conditioning the variance with a use permit that is nontransferable or to recommend that the condition be put on the use permit.

Board Member Baker stated that the Board is here to serve the community, as a whole. She went on to agree; stating that if something happened, yes, they don't fit, and yes, we agree not by their own fault. They are asking for a variance because they are valid members of the community. They have put in a lot of money and ensure safety even though they are within the 1,320 feet of the schools that they are on good terms with. The vape shop is not having any issues and they are not getting any citations and this should be considered.

Board Member David Naugle stated that he was intrigued by the condition but would be inclined to consider that for the term of the lease that they have entered. The Blue Dragon Vape Shop has entered a lease for three years in good faith and he feels it would be reasonable to base the condition to the end of the lease.

Board Member Puzauskas asked what will happen when the lease expires and they negotiate a new lease.

Board Member David Naugle stated that he thinks that the appellant is aware of what the ordinance requires now and they would be able to relocate to a place where they would fall into the terms of the ordinance in terms of distance.

Board Member Baker stated her opinion against the condition of adding the term of the lease, in regard to the option of having the Blue Dragon Vape Shop relocate.

Chair Lyon advised that it would not be feasible to add that condition because they don't have control over the lease document.

Staff Mr. Abrahamson stated that Mr. Jimenez has expressed a possible motion with condition, that the variance would not be valid without a nontransferable use permit.

The Board agreed that this was a good option.

Chair Lyon called for a motion:

Motion: Board Member Watson motioned to grant a variance to Tracey More and/or David Barno, as the owners of Blue Dragon Vapor and that variance is conditional upon them getting a use permit that is nontransferable.

Board Member Baker seconded the motion.

Board Discussion

Board Member Cullens asked Chair Lyon to read what was motioned. Chair Lyon reviewed that the vote was to overturn the Hearing Officer's decision and grant a variance to Blue Dragon Vapor on the condition that they obtain a nontransferable use permit. Staff Mr. Abrahamson advised that the Board is approving the appeal that overturns the Hearing Officer's decision. Chair Lyon stated that the motion was to approve the appeal that overturned the Hearing Officer's decision that denies the variance on the condition that Blue Dragon Vape Shop obtains a nontransferable use permit.

VOTE: 6-1 with Board Member Frazey in opposed.

Staff Mr. Abrahamson did not have any announcements.

Hearing adjourned at 7:16 p.m.

Prepared by: Sarah Adame, Executive Assistant
Reviewed by:



Steve Abrahamson

Steve Abrahamson, Principal Planner

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