

# MINUTES

## BOARD OF ADJUSTMENT

### November 28, 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

<u>Present:</u>	<u>Staff:</u>
Chair David Lyon	Steve Abrahamson, Principal Planner
Vice Chair James Frazey	Karen Stovall, Senior Planner
Board Member Richard Watson	Brittainy Nelson, Administrative Assistant
Board Member Whitney Baker	Blake Schimke, Planning Tech
Board Member Kevin Cullens	
Board Member John Puzauskas	
Board Member Albert Dare (Alternate)	

- **IPad overview**  
Blake Schimke gave an over of how to use the Ipad that will be used in the hearings going forward.
- **Meeting Minutes**  
Chair David Lyon said the minutes looked good however there was a typo in the last section on Mr. James Frazey name. Other than that, everyone agreed that they did not see anything else wrong in the minutes. And it would be ok to approve the minutes if the typo got fixed.
- **Peter Hantz Company**  
Chair David Lyon asked staff if there were any updates on the case. Karen Stovall did have information to give the Board members and presented them with the information for them to review before the board started the session. Chair Lyon stated that he will allow some time before hand for everyone to review the information.
- **8611 South Priest Drive**  
Chair David Lyon informed the members that there was going to be a request for continuing the hearing per the email that they received from staff. Karen informed them that she did receive an email from the applicant regarding people who were in favor of continuing the case. John Puzauskas asked if the board voted not to continue the case would the applicant have to reapply again. Steve Abrahamson stated no that the case could still be heard without the applicant there and that it has been done before.
- **Additional Comments & Questions**  
Chair David Lyon did inform the board that when the board is making a motion on a case they need to be mindful of the variance. The board can take into consideration the public comments. Steve Abrahamson informed the board to be careful of bringing up their own personal opinions on the cases. Also, to be mindful of time and try not to repeat questions that have already been asked.

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### **Regular Meeting 6:00 PM**

Chair David Lyon	Steve Abrahamson, Principal Planner
Vice Chair James Frazey	Karen Stovall, Senior Planner
Board Member Richard Watson	Brittainy Nelson, Administrative Assistant
Board Member Whitney Baker	
Board Member Kevin Cullens	
Board Member John Puzauskas	
Board Member Albert Dare (Alternate)	

#### **1) Voting of the Meeting Minutes**

Regular Meeting May 23, 2018

**Motion:** Board Member Baker

**Second:** Vice Chair Frazey

**Final Vote:** 6-0 Approved with Board Member Albert Dare abstaining.

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- 2) Request to appeal the Hearing Officer's decision to deny a variance to reduce the required separation requirements for a Medical Marijuana Dispensary from a residential use and a child care facility for **8611 SOUTH PRIEST DRIVE**, located at 8611 South Priest Drive, Suite 102. The appellant is PARC Dispensary. **(PL180173)**

Chair David Lyon asked if Karen Stovall will give a synopsis

Karen Stovall stated that late last week representation of the appellant requested a continuance of the hearing for January 23, 2019. The board will need to decide rather or not to grant the continuance request.

Chair Lyon asked if the board if they had any questions for staff.

No Show of hands.

Chair Lyon invited the representative of the appellant up.

Mr. Lawrence Felder, representative of the appellant, stated that his office and the office of Larry Lazarus has requested in writing last week to continue the hearing. On the grounds that the principal of the applicant had to undergo emergency surgical procedure of a vital organ on November 21, 2018. He is recovering and is in communication by email. The appellant is however still not able to attend the meeting. This case is very important to the appellant and it is to believe that he will be sufficiently recovered if the case was continued to the requested date. Another reason that the appellant would like to continue the case is because Mr. Lazarus is not able to attend tonight's meeting. They were able to reach the three people who were in opposition of the case and they agree on continuing the case to a later date.

Mr. Felder reinstated that he is requesting the continuance for the later date because of the unexpectant surgery that the appellant had done. The Appellant plays an important and valuable role in the case as well as to be able to answer any questions that the Board members might have.

Chair Lyon asked the Board Members if they have any questions.

Chair Lyon acknowledged Board member Kevin Cullens.

Board Member Cullens asked what day was requested to the extension.

Mr. Felder stated that he is not aware of a meeting in December. The letters that were submitted requested January 23<sup>rd</sup>, 2019.

Chair Lyon asked if there were any other questions.

No raise of hands or interjections.

**Public Comment:**

Chair Lyon stated that since the representative is asking for a continuance does Dan Swchizker still wish to speak on the case today or he can just read the comment into record.

Chair Lyon stated that Dan Swchizker is in support of the continuance.

Chair Lyon asked Michael Calisi if he would like to speak on the case today.

Mr. Calisi declined.

Chair Lyon closed the public comments.

**Public Comments Closed**

**Commission Discussion**

Chair Lyon opened the communication up to the other members of the board to get there take on continuing the case.

Chair Lyon acknowledged Board Member Whitney Baker.

Board Member Baker stated that she thinks it is only reasonable to grant the continuance because you can't foresee an emergency.

Chair Lyon acknowledged Board Member John Puzuskas.

Board Member Puzuskas stated he agrees.

Chair Lyon acknowledged Board Member Richard Watson.

Board Member Watson also stated that he agrees.

Chair Lyon stated he feels the same and does not see a reason not to grant the continuance. He also wishes the appellant all the best and health.

Chair Lyon asked if any of the other board members have anything to add.

Board Member Baker stated that she is ready to make a motion.

**Motion:** Board Member Baker motioned to grant the continuance. Board Member Watson Second the motion to continue.

**Vote:** 7-0 Approved for continuance to January 23, 2019.

- 3) Request a Variance to reduce the separation requirements for a Medical Marijuana Cultivation Facility from a religious worship facility and from a residential zoning district for **PETER HANTZ COMPANY**, located at 1840 East University Drive. The applicant is Gerald Johnson. **(PL180158)**

Presentation by Staff, Karen Stovall, Senior Planner

**(Show zoning and aerial map)**

- This Variance request is for the property located at 1840 East University Drive.
- The property is zoned GID and the site contains a single-story industrial building approximately 31,000 square feet in size.
- The applicant proposes to operate a Medical Marijuana Cultivation Facility in the north half of the building.
- Primary access to the property is from a drive that extends from University Drive to the south. The site can also be accessed from McClintock Drive to the west and Hacienda Drive to the east.

**(Show assessor map)**

- The applicant is requesting the reduction of two Cultivation Facility separation requirements.
- The first is to reduce the separation between a Cultivation Facility and a religious worship facility from 1,320 feet to zero feet.
- This map shows the property with the existing church on it, addressed as 637 S. McClintock Drive, directly west of the subject site.
- The second is to reduce the separation between a Cultivation Facility and a residential zoning district from 500 feet to 281 feet.
- The closest residentially zoned property is also shown on this map. It is to the south, across University Drive, and is zoned R-2.

**(Show zoning and aerial map again)**

- As you can see by these maps, the R-2 zoned property is one of many residentially zoned properties south of University that are within the 500-foot separation requirement.

**(Show site plan)**

- To provide some background, on June 25, 2018, the property owner filed a use acceptance request for the proposed land use, and after review of that request, the Planning Division denied the application. It was determined that the site did not meet the separation requirements from a religious worship facility or from a residential zoning district.
- The applicant is now requesting the two Variances before you tonight to reduce the separation requirements to allow this facility
- The applicant was required to hold a neighborhood meeting and did so in October 2018.
- Approximately seven individuals attended and expressed concerns with odor, security, property values, and that granting of a variance may set the precedence for other medical marijuana related businesses in the immediate vicinity.
- Staff received one letter of inquiry and two letters of opposition to the request, and those were included in the staff report attachments.

I'd like to briefly go over the Variance Approval Criteria as they apply to this case:

The first criteria is that there are special circumstances applicable to the property, including its size, shape, topography, location, or surroundings:

- The applicant claims special circumstances related to the rear or north half of the building, which was designed with separate warehouse, office space, and parking area. The applicant also claims that he has experienced

financial challenges due to downsizing of the business and difficulty leasing the rear half of the building due to the lack of visibility from a public street.

- The site design and business financials are not special circumstances.
- While the property does not have frontage on a public street, there are other commercial and industrial properties in Tempe that do not have street frontage and that are also accessed by a private street or cross-access easement.

The second criteria is that strict application of the Code would deprive the property of privileges enjoyed by other properties of the same classification and in the same zoning district.

- Regardless of the site's visibility from a public street, all properties within 1,320 feet of the identified religious worship facility and within 500 feet of the identified residential zoning districts would be denied zoning clearance for a Medical Marijuana Cultivation Facility.
- The special circumstances claimed by the applicant do not deny the property of privileges enjoyed by other properties in the same zoning district.

The third criteria is that the requested adjustment shall not constitute granting of special privileges.

- As previously stated, other properties that do not comply with the same separation requirements would also be denied zoning clearance for the same use.
- If approved, this Variance would grant special privileges inconsistent with limitations placed upon other properties in the vicinity and same zoning district.

Lastly, the variance may not be granted if the special circumstances are self-imposed.

- There are no special circumstances applicable to this site as it relates to the necessary separation requirements for a Cultivation Facility.

#### **(Conclusion)**

Based on the information submitted by the applicant and review of the Variance criteria, staff recommends denial of the requested variances.

However, if you approve the variances, there are two stipulations listed in the staff report that we recommend be attached to an approval.

With that, I'd be happy to answer any questions.

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

Chair Lyon acknowledged Board Member John Puzauskas.

Board member Puzauskas stated that he noticed the paragraph for the reason for denial had that the applicant doesn't have a Valid License with the Arizona Department of Health services for a Medical Marijuana business. He asked for clarification on if that is a requirement and what does that mean.

Ms. Stovall stated whether a business intends to operate a dispensary or cultivation facility they need to obtain license through the State Department Health Services. Currently the applicant which is also the property owner does not have a such a license. If the variance were approved, the next step would be to obtain a license through the state and then go through the state for cultivation and also become associated with the dispensary which they are also not doing because they don't have a license to cultivate in the first place.

Chair Lyon acknowledged Board Member Frazey.

Board Member Frazey had a follow up on the previous question is a cultivation facility different from a dispensary. Is a business able to operate both in the same location as a cultivation facility and does it have to be specifically tied to a specific dispensary.

Ms. Stovall stated cultivation facility and dispensary have separate licenses. As far as operating in the same location, if the separation requirements and other zoning requirements for the those uses are both met, they can be operated on the same property. In order to operate the state needs to know where the product cultivates is going to go/where it is going to be sold.

Chair Lyon acknowledged Board Member Cullens

Board Member Cullens stated that part of the reason for denial is noted that five approved dispensaries and two cultivation facilities. Is there a code or restriction on number that can be approved.

Ms. Stovall stated there is not a restriction. Tempe's code used to have limits on the number of them but at this point, if a property, complies with the separation requirements and other limitations in the code they can open. So, there's no set number.

Chair Lyon invited the Applicant Gerald Johnson up to present his case.

Presentation from Applicant: Gerald Johnson

Mr. Johnson stated that his company Peter Hantz is new to the process and they have come a long way. The company is trying to figure out what is needed to move on with the process. They were told that they are too close to a church. Mr. Johnson was not an aware of the church when the process started. The owner of the church building gave Mr. Johnson the okay to go ahead, the owner of the church building has no objections. The other obstacle is they are near a residential area. Which is a cross the street off University. Mr. Johnsons company is only interested in cultivating. Mr. Johnson current business is a manufacturing company. They currently manufacture hair products and the hair product business has gone down. So, the company is looking to expand in other revenue sources. Mr. Johnson is aware that the building next door to his has raised some questions from neighborhood meeting that they held. The odor being one which seemed to be a big problem and security. Mr. Johnson stated that his company fully intends to be completely secure with cameras, lighting, 24-hour guard, and whatever the City of Tempe Police Department requires. As far as the odor he requested for Mr. Adam Carr to explain the process in controlling the odor.

Mr. Adam Carr Chief Operating Office from Sea of Green hydroponics stated that his company currently service 65 medical cultivations in eight different states. They do consulting for them when they build out facilities for people. Regarding the odor it is nothing more than particulates in the air. The science that his company uses to remove that odor are no different than what would be in a Casino or Airport. Which is done through carbon filters and ozone generators, by oversizing the CRM to remove the articulate so that there is no odor outside of the building. Security on the cultivation side in the last six years has never had a problem for the outside to an inside problem. Someone might do something inside the company, but no one has broken in or stolen something that he is aware of.

Chair Lyon asked if there was more to Mr. Johnson presentation.

Mr. Johnson continued with the presentation and asked the Chair Lyon if he could play a four-minute video that would explain the setup of the business.

Chair Lyon stated that he would like the applicant to spend his time addressing the criteria that the board has to look at and that at this time the video should be skipped.

Mr. Johnson informed the board that in the video it shows where the product will be contained inside containers. It is not out in the open inside the building and that is an important factor as security goes as well. Mr. Johnson stated that he is not able to change the residential area. There is a four-lane highway that blocks everything off. Mr. Johnson went around to the businesses around his business and got signatures from the owners not the workers. Mr. Johnson stated that there were about 40 tons of medical marijuana sold in Arizona in 2017 which is a 50 percent increase over 2016.

Chair Lyon asked the Board if they had any questions for the Applicant Mr. Gerald Johnson.

Chair Lyon acknowledge Board member Kevin Cullens.

Board Member Cullens stated that Mr. Adam Carr mentioned there are two cultivation facilities nearby. Which means they met the criteria to operate.

Mr. Car stated that is correct.

Chair Lyon acknowledge Board member Albert Dare Sr.

Board Member Dare Sr. stated that when Mr. Johnson uses the word cultivation it brings to his mind agriculture. Board member Dare remembers when that land was all agriculture including cows. While he may or may not approve of the substance that is growing he rather pick that than cotton. He feels it is an agricultural product that should be framed in that matter. And wanted to know if Mr. Johnson saw it that way as well.

Mr. Johnson stated that yes, he does. His dad passes away recently and had a 320-acre land where they grew cotton. And he feels that this is more profitable than that was and that was a more difficult process in his eyes.

Board Member Dare Sr. stated there will be expense perhaps through the City if the police were called to the facility, and that the applicant would be paying taxes to the City and revenue will be coming to the City of Tempe.

Chair Lyon acknowledge Board member John Puzauskas.

Board Member Puzauskas stated that he was reading in the reason for denial that the staff provided. That in the report there is a statement that within half a mile of the building there are buildings that dose meet those requirements to operate the business. If the Applicant is looking to start this new business venture why wouldn't they look at that as an option to relocate to that area.

Mr. Johnson stated that is not off the table however he owns this property. So, he would like to keep everything in house.

Chair Lyon acknowledge Vice Chair James Frazey.

Vice Chair Frazey stated that regarding the church Mr. Johnson made the comment that he did not know the church was there. But when you went and got approval from the church was if from the property owner of the church, the church is not the property owner correct.

Mr. Johnson stated he would like to invite up his son Michael Johnson to answer that question.

Mr. Michael Johnson stated that the building where the church is located at there are 200 businesses within that same strip. They operate the front one closest to McClintock. They have gone and spoken to the business owners and tenants of the building and the person that owns that church and each one of them voice no objections.

Vice Chair Frazey stated that his other question was if they reached an approval they still don't have a cultivation company. And they would need a tenant. That tenant would have to come back to do the same process knowing that the tenant would still not meet the requirements of the distances.

Mr. Michael Johnson stated they would be the ones doing the growing. They would have somebody working for them in the back of the warehouse area where they will have the business set up. They did not get a Dispensary online because they wanted to make sure that the variance was approved.

Chair Lyon acknowledge Staff member Steve Abrahamson.

Mr. Abrahamson stated that there are not 31 signatures on the map and two of the business did indicate that they did not sign.

Chair Lyon acknowledge Staff member Karen Stovall

Ms. Stovall clarified that Mr. Johnson is the applicant in this case and not the appellant they are not appealing a decision that was made this is the first request for a variance. Also, that what Mr. Abrahamson was pointing out was that the church is called Big House, Inc. to the west and is listed as found no issue but did not sign.

Chair Lyon acknowledge Board Member Whitney Baker

Ms. Baker stated that the Board have criteria that they have to look at. There are specific questions to grant any variance. And one of the ones that has come up is are you being denied something that other people have been granted. She wanted to know if the applicant could provide any examples.

Mr. Johnson stated that he could not at this time, but he was hoping that it would get approved and then someone can use him as an example.

Chair Lyon clarified that the board has four criteria that he wants to make sure that the applicant gets a chance to speak to. The first criteria are, is there a special circumstance with regard to the applicants' property. the fourth one is if there is a special circumstance did the applicant cause it. There is also one that states if the board does grant it does that mean that they are allowing something that the neighbors can't. The last one begin if the board were to read the code completely strictly does that deprive the applicant of some right that other people have do have that are in similar kind of property.

Mr. Johnson stated the special circumstances is that it is difficulty to lease it out to other places. It is a big building and it's got a big rent. Mr. Johnson is not big on leasing the building out to anybody. The downturn in his business was not caused by him but the downturn came, and he is being reduced so they are looking to expand out and protect the staff. Looking at the silhouette of the building its not visible from the street. Very few businesses can be secluded and still operate very well. It's a special circumstance and a hardship on his 12,000 square feet of empty space that he would like to make productive. He does not know if the board will be granting him a something special. If he got denied the variance then it would be preventing him from putting a business that he thinks is part of the future. He doesn't believe that any of the negative connotations is valid.

Chair Lyon acknowledge Board Member Kevin Callens

Board Member Cullens stated that he wanted to reiterate that whether the board believes there is something wrong with the business they do not decide on that. The board rules on what the City Council has for Ordinance that are in place. Regardless of the boards opinion.

**Public Comment:**

Chair Lyon open the floor to the public input.

Chair Lyon invited up Jenifer Corey to speak.

**Jenifer Corey – Tempe Business woman**

Ms. Corey stated that the City of Tempe has amended the ordinance two times and the last time was back in December of 2017. Ms. Corey provided a map for the board to see that there are areas that the business can be that is away from the church and meet the city requirements to operate his business. Ms. Corey also informed the board that the city does recognize the opportunity for medical marijuana cultivation. Ms. Corey also informed the board and the applicant that if he feels the separation requirements don't work then he should consider getting a text amendment to change the requirements. Ms. Corey informed the board that she has a contact for him if he



wants to lease out his property her real estate person is good at getting business to the point that she must turn them away.

Chair Lyon acknowledge Vice Chair James Frazey

Vice Chair Frazey asked about the main entrance of the cul-de-sac and where her business is in relation to Mr. Johnson.

Ms. Corey stated the owner will speak more about how the property lays out, but her business is the closest to the building.

Chair Lyon acknowledge Albert Dare Sr.

Board member Dare Sr. stated that Ms. Corey already answered his question about where she is in proximity to the business in question. He also asked if she was representing any of the other business in the area.

Ms. Corey stated that she has not been obtained by anyone else. But when there was expressed concerns she went around and talked to certain business, the church, and the management company for the Mulit Family from the south. There is a letter in the boards packet in opposition to the Multi Family to the south of the property.

Board Member Dare Sr. asked if the property that Ms. Corey represents if they object to the variance.

Ms. Corey stated that is correct and that the concerns were security, location, access to the property, the proximity, the precedence this could set.

Chair Lyon invited up Dominic Magnoni to speak.

#### **Dominic Magnoni – Tempe Business Man**

Mr. Magnoni stated that he is the owner of the building and that leasing not a problem in the area he currently has 18 tenants in his buildings. As for revenue they collect about \$42,000 a month in tax and there's significant sales tax, renters tax as well as property tax. His tenants believe that this would negatively impact their business. Mr. Magnoni presented the board with some pictures of the property and maps showing their proximity to the business. Mr. Magnoni addressed several security issues from his side of the building. Mr. Magnoni also informed the board that for the business in question to have security they would need to try and stationed the security in his parking lot.

Chair Lyon acknowledge Albert Dare Sr.

Board Member Dare Sr. asked if these concerns have been presented to the applicant beforehand.

Mr. Magnoni stated that when he attended the neighborhood meeting his concerns arose. Mr. Magnoni tenants would have a strong impacted by the odor if this was not controlled. Mr. Magnoni is worried about losing his tenants because of the odor.

Chair Lyon invited up Todd Smith to speak.

#### **Todd Smith – Tempe Business Man**

Mr. Smith provided the board with some handouts that showed the property in several different ways. Mr. Smith pointed out that security patrol on the property would not be good because there are several dead ends. Mr. Smith was concerned that having 24-hour lighting and armed guards on the property would make the area look like a prison. Mr. Smith informed the board that they have turned the buildings around by adding landscape and repainting so that it gives the area a more up to date look. Mr. Smith feels that adding the Marijuana Facility would be going the opposite direction.

### **Public Comments Closed**

Chair Lyon advised the applicant that he could come up and respond to the public comment.

The applicant, Mr. Johnson, came back up and stated that he did want to address the safety and security issues. Mr. Johnson stated that he would do everything according to the Tempe Police Department mandates of him to secure the building. That includes but not limited to securing the doors and the back wall.

### **Commission Discussion**

Chair Lyon informed the board to keep in mind the four conditions that they would be approving or denying as stated in the packet of the PDF that staff has provided.

Chair Lyon acknowledged Vice Chair James Frazey.

Vice Chair Frazey stated that the challenge is the location where the business is trying to do this. That granting the variance reduction of the spacing would allow a special privilege that wasn't allowed to other cultivation facilities that met the requirements. There is a church 1300 foot from the property and a residence that is 500 feet away that have always been there.

Chair Lyon acknowledged Board Member Kevin Cullens.

Board Member Cullens stated that his concern is reducing the distance from the religious worship facility to Zero. Giving that to the applicant will be giving special privileges.

Chair Lyon acknowledged Board Member Albert Dare Sr.

Board member Dare Sr. asked city staff if the church is properly zoned.

Ms. Stovall stated the property directly to the west of the subject site is zoned GID churches are permitted in that zoning district.

Chair Lyon acknowledged Board Member Richard Watson.

Board Member Watson stated that in granting the variance it would be giving a special circumstance to the applicant. If reducing the setback to the church to a zero that it would be applicable to all of Tempe and would set a precedent.

Chair Lyon stated that he feels the same. Chair Lyon stated that he has heard several different applicants come in and want a variance and they have all had to prove the right by informing them about the four conditions that determine rather or not to grant the variance. The fact that it may be difficult to run the business is not something that the board is able to consider. Chair Lyon stated that he feels the same as many of his other Board Members in granting the variance would be a special privilege. It would be the first time something like this has been granted in the city of Tempe.

Chair Lyon called for a motion:

**Motion:** Board Member Whitney Baker motioned to deny the variance to Gerald Johnson, as the owners of Peter Hantz Company. Board Member Richard Watson seconded the motion.

### **Board Discussion**

Chair Lyon clarified that voting in favor would in this case be denying the variance.

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**VOTE: 6-1; one Board Member Albert Dare Sr. Indecent**

Staff Mr. Abrahamson informed the Board Members and Applicant that to appeal. An Appeal must be made within 30 days to the Maricopa County Superior Court.

Staff Mr. Abrahamson informed the board that John Puzauskas has served the city two three-year terms and tonight is his last night.

Hearing adjourned at 7:15 PM

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Prepared by: Brittainy Nelson, Administrative Assistant  
Reviewed by:



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Steve Abrahamson, Principal Planner

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