

DRAFT MINUTES BOARD OF ADJUSTMENT WORK STUDY SESSION RETREAT JANUARY 22, 2020

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.

Special Study Session 6:00 PM

Present:

Staff:

Chair David Lyon	Chad Weaver, Community Development Director
Vice Chair James Frazey	Ryan Levesque, Deputy Director - Planning
Board Member Richard Watson	Jeff Tamulevich, Code Enforcement Mgr
Board Member Whitney Baker	Steve Abrahamson, Principal Planner
Board Member Kevin Cullens	Dalton Guerra, Planner I
Board Member Raun Keagy	Brittainy Nelson, Administrative Assistant

- **Introductions**

The new member of the Board Raun Keagy informed the board that he is a resident of Tempe for about 15 years. He works in the City of Scottsdale and Code compliance falls under his area. He is aware of the code compliance and variance. He has a background in Planning, and he sees this to give back the community that he lives in and bring some technical skills from his background to the table.

- **Board of Adjustment Organization**

Mr. Abrahamson stated that the Board of Adjustment is a Quasi-Judicial Body. Consist of seven regular members and two alternates which can serve a term for three years. Elect Chair and Vice Chair from Regular Members. A quorum consists of four members. Would like for board members to attend as regularly as possible because the attendance is monitored through several ways. One being a report that is done at the end of the year that way the City Council gets a feel for who is there and sometimes they make their reappointment decisions based upon the attendance.

- **Board of Adjustment – Roles and Responsibilities**

Mr. Abrahamson stated that there are variance applications, appeals from decisions made by the Hearing Officer pertaining to abatement appeals, and appeals from any decision made by the Zoning Administrator. Mr. Abrahamson invited Jeff Tamulevich up to talk about the abatement process.

Mr. Tamulevich stated that he wanted to inform the Board that the cases that they hear are a very small percent of properties that code compliance sees. Code has over 10,000 cases in 2019 which consist of violations both commercial and residential. A very small percent of them will make there way to the Board of Adjustment table. Citations that are presented are at least 2 percent of all the violations less than 1 percent go to court. If the process is not resolved in court that is when code will start going to the abatement process. It then goes to the Hearing Officer. Board of Adjustment would then be hearing cases that are at

least 180 days or older. At the point that the Board of Adjustment hears the cases that code compliance has been handling that case for many months. The residents in the neighborhoods have dealt with the violations for many months. An Example of a Case would be one that the Board Heard back in October. It was a property that the Code compliance area has been dealing with for nine months prior to coming to the Board. The October case went from a nine-month process then was added the four months that the Board gave and which the property has gotten worse. He wants to make sure that the Board has a good view on how the process works and that this is a long process. Going forward the Code Compliance area will be more descriptive when generating the reports.

Board Member Cullens stated that he is not comfortable with discussing a specific case because it was not agenzized.

Chair Lyon stated that he would like to see staff be a little less fair and be more blunt about the process. He is aware that they cannot, but it would be nice to see.

Mr. Weaver stated that what Mr. Tamulevich is trying to explain with the process is that the decision that the Board makes through the appeals would need to be made in a slightly different light then other decisions that are made. The abatements that come to the Board have been through a much longer process before it comes to the Board. Where Mr. Tamulevich code inspectors are going through the process and once, they decided to abate the property it is because it is the only way that they can see to have it cleaned up.

Vice Chair Frazey stated that since the time he has been on the Board this is the most detail that he has heard on the process and it has been very helpful.

Board Member Miller stated that Staff should give a recommendation however the Board does not have to follow the recommendation if they don't want to.

Mr. Tamulevich stated that Staff will give there recommendation however it is difficult to do without sounding bias. Going forward they look forward to presenting all the history and facts that are needed give a better understanding of the position that they are taking.

Mr. Abrahamson stated that it is all evidence based as well. That Mr. Tamulevich would give all the up to date state of the property.

Board Member Watson stated that the documentation that is provided is very good.

Mr. Tamulevich stated that another way for the Board to inform themselves on the upcoming case would be to watch the Videos.

Board Member Cullens stated that they were never provided that information.

Mr. Abrahamson stated that all the videos are up on the City Website and that it is open to the public.

Board Member Cullens stated that he does not like to go outside of the materials that are provided because he does not want to have more information then any one else on the Board to make the decision. Now if Staff feels that the Board should be viewing the videos then they should be providing it.

Ms. Nelson stated that she can provide the links to the Board when they receive all the other materials.

Board Member Keagy stated that he would like the video links he believes that they would be beneficial. He also would like to know if the abatements are from a general fund or they do they have a budget for abatements.

Mr. Tamulevich stated that they do have a budget for abatements.

Mr. Tamulevich walked the Board through the abatement process from the point of first contact to when it comes to the appeal process. Keeping in mind that the length of time will depend on the type of violation as well. However, on average there is 14 days to clean up the property after the first violation. Then after the second violation there is another 14 days. If people are making progress on the property, then they can be given extensions. If after the second violation no progress has been made, then they will receive a citation. They are given 10 days from the citation to schedule a court date or just pay the fine. If they do schedule a court date, then they have up to 28 days to be heard before a judge. If they are found responsible, they or not the case can still go on. They may end up in court a second time. After the citation stage is when the City goes the abatement route. The City will file for abatement and post to the property. They are given a 30 day notice to clean up the property before it is taken to the Hearing Officer. Once it goes to the Hearing Officer and if the Hearing Officer approves the abatement then there is an additional 14 days to clean up the property before the City steps in. Within the 14 days is the ability to appeal if they appeal in the 14 days then it will come to the Board. In some cases, the appeal will not be heard for 30 to 45 days.

Board Member Keagy asked if all the abatements go through the Hearing Officer first would it ever come straight to the Board of Adjustment.

Mr. Tamulevich stated that the Board would only be hearing appeals from the Hearing Officer. There are emergency abatements that can take place such as green pools or dangerous situations.

Mr. Abrahamson stated that when an appeal does come up then it is in the best interest to Approve or Deny the appeal because it has already been through a long process and a continuance would only draw out the process longer.

- **Official vs Individual Capacity**

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Mr. Abrahamson informed the Board that there is an Official vs Individual Capacity that personal Opinions should be kept to oneself. The things that the Board should remember when acting in Individual Capacity is that it is best not to identify as a Board member; no speaking on behalf of the Board; Vital to note when Board member position conflicts with the Board decision.

- **Procedural Considerations**

Mr. Abrahamson informed the Board that all motions are governed by Robert's Rules of Order/Parliamentary Procedures. Meeting Minutes do become public record.

- **Voting**

Mr. Abrahamson informed the Board that the Chairman will ask for a motion and a second to the motion. Often a Board Member can get the Chair's attention and make a motion they do not have to wait for the chair to ask for a motion. The voting occurs with the raising of hands in favor of the motion.

Mr. Levesque stated that this is something that needs to be a vote of the majority of the whole Board. An example was when there were two absent council members and some of the questions from the public was the decision was made is it that there only needs to be a 3-2 vote to decide because there is only five. The answer was no it would need to be a vote of the whole Council so there would still need to be a vote of 4. There are situations that are unique scenarios where someone has an identified conflict of interest and there are not enough votes to replace that person.

Board Member Cullens asked since the quorum of the Board is four if there was only a minimum of four then the Board could not have a 3-1 vote and it pass.

Mr. Levesque stated that is correct. During those times the public is aware that there is a short Board and if they want to proceed with the hearing they are offered the ability of having a continuance.

Chair Lyon stated that he has never seen where the Board has ever been hung, they are usually one side or the other but if it were to happen then there would be a continuance.

Board Member Cullens asked where this process would come from is it in the statute or City ordinance.

Mr. Levesque stated this is something that was passed down from the attorney's office and there have been some recent case laws on the matter as well.

Vice Chair Frazey asked for clarification on an earlier point that when certain places ask for a Bio, the Board members should not put Tempe Board of Adjustments.

Mr. Abrahamson stated that they may that is not an issue.

Mr. Levesque stated that what that meant was that one should not say it as they have official city business position.

Board Member Miller asked if there was an option to vote present.

Mr. Levesque stated that it is normally a vote for approving, denying, or abstain. The City is trying to provide the opportunity to vote by a push of a button in the future.

Board Member Cullens asked if there could be a way that the Board Members can avoid showing up and, in the end, canceling the meeting. There have been at least a few times when he has come to the meeting and there was a short Board. And staff asked the applicant or appellant if they want to continue with the meeting that night and asked to postpone it.

Mr. Levesque stated that sometimes the applicant will approach him and say that they do not like the tone of the study session and would like to continue.

Board Member Cullens stated that time is precious and everyone that shows for the meeting and then they want to continue because of what they heard. It makes a person not want to come back next time because they showed up to have it continued.

Mr. Levesque stated that is part of the reason that the City ask for communication on rather or not one will be able to attend at least two weeks in advance. There are going to be conflicts that arise on a short notice base. However, since it is already legally advertised it solely rest on the applicant's desires.

Board Member Watson asked for clarification that even if there is a full Board can they have an option to continue.

Mr. Levesque stated that there is always the option to continue. There may be residents that ask the Board to continue the item because they need more information. Even the Board has the right to continue the meeting because they don't have enough information.

Board Member Watson asked is still a right even if the reason that they are continuing is because they do not like the vibe that they are getting from the study session.

Mr. Levesque stated that really there should not be any talk about how they are going to vote during the study session. The study session is to ask the procedural questions, clarification that is needed on the staff report.

Mr. Weaver stated that City staff wouldn't bring the Board to the meeting if there is nothing to weigh in on. The hard part for the City staff is establishing what needs to know that the case is not going to be heard and then letting everyone that City has notified know. There may be residents that know there is a meeting and

City staff has no way of knowing if they are going to show up until they arrive. Certainly, city staff would like to determine ahead of time, but it can be a little difficult once it is agenzized.

Board Member Cullens asked if there can be a written policy or if city staff can decide before hand that there is only a quorum of four to make it a no go.

Chair Lyon clarified that when the Board takes a motion for continuance it is something that the Board does not have to grant. The continuance it is up to the Board to grant or deny.

Mr. Weaver stated that it is correct. If the applicant is asking because the board is not full then that may be something to take into consideration. With the Board a lot of the cases that are heard are variance cases and if they are asking for a continuance then it is just hurting the applicant unless they have something in mind. It can become a lawsuit if the Board does press on and there is not a full Board.

Chair Lyon stated that he would like to have the Boards opinion on what is the threshold of what a continuance would be when they do not have a full Board. In his opinion if there are 6 then the Board should still hear.

Board Member Watson said that he disagrees because if the full Board is 7 then the person can be short changed. He feels that it is unfair to the applicant.

Board Member Cullen's states that his understanding is that the quorum is four and there is a meeting then business should continue rather is a full Board or not.

Chair Lyon asked for clarification on his math he understands the 4 out of 7 to pass a motion in any direction, if there is only four Board members that show up and the vote is a 3-1 it would fail.

Board Miller stated that to his understanding it would be a motion to continue at that juncture. If the merits for the case are there, then it will be successful no matter how many people are at the Board that night.

Board Member Watson stated that if you look at the previous votes the Board does not always vote in favor of the motion being presented.

Chair Lyon stated that he feels when there are less people then there is more of a chance for a hung result. Since this a topic that could use more debate then this will need to look at in a more individual way and case by case basis.

- **State Law Open meeting law**

Mr. Abrahamson informed the Board that the open meeting law in the state of Arizona is there so that if there is public business to be conducted it is advertised. Advertising consist of posting signs on the property; it is put in the legal section of the Arizona Republic; there are also post cards that are sent out to the homes of the residences that are within 1320 feet of the project and Neighborhood Association. There cannot be four members of the Board meeting up that would mean that the Board members are in violation of the law.

Mr. Levesque stated that the same will go to email communication. City staff to keep a tight lid on the communication to avoid. The Administrative Assistants can communicate directly with the Board and there is a notice on the bottom of the emails about replying all or they send it out via Blind carbon copy.

- **Conflict of Interest**

Mr. Abrahamson informed the Board that a member has a competing professional or personal obligation or financial interest that would make it difficult to fulfill their duties fairly. Situation where personal interest might

influence public duty. Can exist whether money is involved. Can exist whether the conflict is actual or only perceived. To determine if a conflict exists then one should look at State conflict of interest law to ARS 38-501-511. A substantial interest not defined as remote. Responsibility of members to determine if a situation might affect them or a relative.

Mr. Abrahamson asked for the Chair to give an example of when he had a conflict on Development Review Board once.

Chair Lyon explained that there was a case on the agenda from a former employer and he asked to pass on the case. Then there was a time when he was accused of conflict of interest on a case where someone that he worked with at the time had done work on. He was unaware of this and had to do some research on the matter because he was not sure of who or what work had been done.

Mr. Abrahamson stated that if you review the agendas in advance and notice a conflict of interest please let the staff liaison know. And if in doubt declare conflict.

Mr. Levesque stated in letting the staff know ahead of time instead of at the meeting then one of the alternates will be asked to step in.

Mr. Abrahamson informed the Board to announce the conflict before discussion and then leave the building while the case is being heard.

Mr. Levesque stated that this will make sure that there is no misinterpretation of rather or no one can suggest that your body language or eye contact influenced the Board in anyway.

Mr. Abrahamson informed the Board that each situation is unique consult with staff before declaring a conflict if possible. A few examples of the conflict of interest are work for a firm that has done business with City and anticipate future work. Own property near property subject to zoning (action could affect your property value). Or a close relative has applications going before the Board. Penalties that one could be facing are a Class 6 Felony for intentional or knowing violation. Class 1 misdemeanor for reckless or negligent violation. Forfeiture of public office for either and actions taken voidable.

- **Approval Criteria of a Variance**

Mr. Abrahamson informed the Board that a variance needs to meet the following criteria. That special circumstances are applicable to the property, including its size, shape, topography, location, or surroundings. The strict application of this Code will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district. The adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is located. A variance may not be granted if the special circumstances applicable to the property are self-imposed by the property owner.

- **Appeals**

Mr. Abrahamson informed the board that they could be hearing Abatement appeals as well as Zoning Administrators decisions.

Mr. Levesque stated that Zoning Administrators appeals are administrative actions it is normally the applicant that is appealing. The public does not usually ask for appeals because this is a procedural right or that codes are met by the applicant. In some situations, either the applicant disagrees with the outcome or there is a situation where they feel like the interpretation or intent of the code was not met. The most recent cases are the Medical Marijuana.

Board Member Keagy asked if non confirming uses would fall in the Zoning Administrators decision area.

Mr. Levesque stated it would if the code does not clearly state.

- **Thank you and Questions**

Mr. Abrahamson informed that the traits for a successful planning commissioner is that a person should be a visionary. Has a feel for the assets and problems and potentials of that city or municipal. They should remain particle and objective and sustain from conflict of interest. Place the community interest first. Come to the meeting prepared. Appreciate the dialogue and enjoy collaborations. They are practical and yet creative.

Mr. Levesque stated that there was once a dinner for all the Boards and Commissions, and they would like to reinstate that process. Just as a thank you for serving once a year.

Mr. Abrahamson informed the Board that the Council Chambers will be open on Thursday February 13, 2020. And then the Board will meet in there after that date.

Chair Lyon thanked staff for making sure that everyone was on the same page.

Hearing adjourned at 7:30pm

Prepared by: Brittainy Nelson, Administrative Assistant
Reviewed by:

Steve Abrahamson, Principal Planner

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