

# MINUTES BOARD OF ADJUSTMENT OCTOBER 23, 2019

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 5:35 PM

**Present:**

**Staff:**

Chair David Lyon	Ryan Levesque, Dep Comm Dev Dir- Planning
Vice Chair James Frazey	Jeff Tamulevich, Code Enforcement Mgr
Board Member Richard Watson	Steve Abrahamson, Principal Planner
Board Member Kevin Cullens	Diana Kaminski, Senior Planner
Board Member David Naugle	Dalton Guerra, Planner I
Board Member John 'Jack' Confer	Brittainy Nelson, Administrative Assistant
Board Member Joshua Tracy (Alternate)	

- **Meeting Minutes**  
No one found any edits.
- **Generations Medical Center**  
Chair Lyon stated that he is going to move this to the end of the agenda. Mrs. Kaminski informed the board that on Friday staff received a letter of opposition from Lot 2 which is South of the site. Then on Wednesday morning they received a letter to withdraw the opposition. The Mosque also submitted a letter of opposition and provided a packet of information that was received the day of the meeting. And the third letter that was received the day of the meeting was from a member of the Mosque. The Board members stated they did not have enough time to read the large packet of information in the study session allotted time. Chair Lyon informed the board that they will have to operate with the information that they received earlier, and they will be hearing from some of the citizens during the meeting. Mr. Abrahamson informed the board that the author of the information is aware that the Board will not have time read all the information. The Board Members were wondering if the large packet of information and the lack of time to review the material would be a cause for a continuance. Chair Lyon informed the Board that the packet would just be a late submission otherwise anyone can cause a continuance by providing information this way.
- **Storm Property**  
Staff has no updates for this. Board members have no questions.
- **Gutierrez Property**  
Staff has no updates for this. Board members have no questions.

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

### **Present:**

### **Staff:**

Chair David Lyon	Ryan Levesque, Dep Comm Dev Dir- Planning
Vice Chair James Frazey	Jeff Tamulevich, Code Enforcement Mgr
Board Member Richard Watson	Steve Abrahamson, Principal Planner
Board Member Kevin Cullens	Diana Kaminski, Senior Planner
Board Member David Naugle	Dalton Guerra, Planner I
Board Member John 'Jack' Confer	Brittainy Nelson, Administrative Assistant
Board Member Joshua Tracy (Alternate)	

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

**Motion** by Board Member Vice Chair Frazey to approve the Meeting Minutes of July 24, 2019; second by Board Member Cullens. Motion passed on 6-0 vote.

**Ayes:** Chair Lyon, Vice Chair Frazey, Board Member Watson, Board Member Cullens, Board Member Naugle, Board Member Confer

**Nays:** None

**Abstain:** Board Member Tracy

**Absent:** Whitney Baker

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- 2) Request an appeal of the August 20, 2019 Hearing Officer's decision to approve the abatement of public nuisance items for the **STORM PROPERTY**, located at 1105 West Elna Rae Street. The appellant is Daryl Steele. (PL190240 / CE191569)

#### Presentation from Applicant: Daryl Steele

Mr. Steele informed the board that according to the municipal code landscaping means the combination of elements such as trees, shrubs, ground covers, vines and other organic and inorganic material for the express purpose of creating an attractive and pleasing environment. There are people out there that have an artistic landscape that have a mixture of both rock and grass. There nothing in the code besides where you park your car. That says you can't have grass or weeds inside your rock. In sec. 21-3.8 it states uncultivated plants, weeds, tall grass, uncultivated shrubs or growth, whether growing or otherwise, higher than twelve inches. The code specifies states that you can have weeds up to twelve inches. He believes that the forefathers had in mind that it will get up to about a foot so that you can pull the roots and not worry about the weeds growing back. There is also the fact that if you didn't allow any growth in grass at all that you would be out there every single day with a pair of scissors snipping off every piece of tiny grass in order to be complying and that is impossible for anyone to do. They had the fore thought that would give people something to achieve. Mr. Steele provided the Board Members with photos of his yard the day of the Hearing Officer meeting which shows that the grass is less then half an inch. The bushes are cultivated and the rest of the yard he cut down as far as he could. His neighbor's car is a problem as well because the neighbor will not move it and when he cuts that grass any lower than the rocks shoot up everywhere. Mr. Steele then referenced the City of Tempe Website and in the corner, there is a banner that reads "Its hammock weather! You'll enjoy your outdoor space more and be within Tempe City Code if you keep your lawn trimmed and the weeds shorter than 12 inches tall." Mr. steele stated that the Code Inspector should know the code since it is on the website page. Mr. Steele provided a copy of the Inspectors Report that said "1105 W Elna Rae Street is currently in violation of City of Tempe's Nuisance Code in regard to trash, litter, debris, plastic crates, buckets, boxes, furniture, water jug containers in the carport and side yard areas. Grass and weeds over gravel in the front yard." Mr. Steele then provided the photos that the Inspector took a week before and it does not show anything on the carport. There is a cabinet that Mr. Streele keeps his equipment in however he moved the cabinet out of the front area. Mr. Steele

also informed the board that he had Tempe Police Sgt Laird Badge 11586 come out and remove Mr. Lara-Reyes from the Property on November 14, 2019. Mr. Steele stated that the reason for his appeal is that the Hearing Officer did not view his house in which the Hearing Officer did inform him of this during the recording of the meeting. Also, the Inspector provided false information on the report and did not seem to know the code. Mr. Steele stated that the Hearing Officer refused to know allow him and extension to get the property within compliance. Mr. Steele has gone over the previous cases that he Hearing officer has over seen and she has never approved an extension. In the year that she has taken over the position she has sided with the City and never with the owner of the house.

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

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked if the weeds and the growth is Mr. Steele planned landscape for the property.

Mr. Steele stated that is the way that it exists.

Chair Lyon acknowledged Board Member Cullens.

Board Member Cullens asked for clarification on when the pictures where taken.

Mr. Steele went over the dates of the photos that he provided. Mr. Steele also added that he did hire someone to come out and take care of the weeds after he received the first notice. He said that there was also a fire at the house and that he had to repaint a corner of the house. Mr. Steele made sure that on the day of the Hearing all the painting was done.

Chair Lyon acknowledged Vice Chair Frazey

Vice Chair Frazey clarified that since the first complaint Mr. Steele did do some work on the property to clean up.

Mr. Steele said of course and as soon as he got the first notice, he had people come out and take care of the issue.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson asked if Mr. Steele had any current pictures of the property.

Mr. Steele stated that he did not, and his understanding was that the Meeting was to determine if she improperly applied the code and had nothing to do with the current state of the property.

Chair Lyon stated that the state of the property at the time of the hearing does make sure difference. The photos are hard to see and in the first photo that Mr. Steele showed the Board Chair Lyon stated that he does not see any grass in the photo.

Mr. Steele stated that when you are looking at the photo there is a brick circle and for about three feet in front of it there is grass about a half inch of grass which circles out and makes a figure eight between where the bird feeder is and where the lemon tree used to be.

Chair Lyon stated that the code does not say that you can have anything you want as long as it is under 12 inches. The code also does not say that you can have any combination of all those plants and materials in any arrangement. Those materials can be acceptable does not mean they always will be acceptable and weeds shorter then 12 inches are not always acceptable.

Presentation by Staff, Dalton Guerra, Planner I

Mr. Guerra informed the board that the Storm Property is located south of West University Drive and east of South Priest Drive on Lot 118 of the Western Village 3 Subdivision in the R1-6, Single-Family Residential District.

On August 20, 2019 the Hearing Officer approved the abatement for public nuisance items for the Storm Property. On September 3, 2019 the appellant, Daryl Steele, submitted an application to appeal the Hearing Officer's decision.

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

Chair Lyon acknowledged Board Member Watson.

Board Member Watson asked if any neighbors have complained.

Mr. Guerra stated that he has received any public input since the appeal was filed.

Chair Lyon invited Jeff Tamulevich to address the Board.

Mr. Tamulevich stated that the way the code reads is that anything over 12 inches is for the grass that stands in the yard. If a yard has grass and the grass is exceeding 12 inches in height, then it is a violation by code. If it is in another area that has other landscape material those areas would be considered uncontrolled growth and slum like appearance.

Presentation by Staff, Andrea Lara-Reyes, Code Inspector

Mr. Lara-Reyes informed the board that he visited the property the morning of the meeting and determined that it is still in violation of the City Code with grass and weeds in the front yard and over high weeds in the backyard. The property owner is the storm family trust. The owners have been made aware of the violations on site and have had time to make corrections. During the case Mr. Steele has talked to several City of Tempe officials and has told both that the City of Tempe Administrator that he is not the owner of the property. He is not a tenant nor his party of the Storm Family Trust. The case was generated by complaints that the Code enforcement received from the public. On March 6, 2019 a notice was mailed to the residence. On April 4, 2019 a follow up inspection was confirmed of over height grass, weeds in the backyard. And grass and weeds in the gravel in the front also junk and debris and peeling paint at that time correct notice was mailed for all violations to the property Owner. May 23, 2019 another inspection was done with no change to the property. On June 3, 2019 another inspection was done and no changes to the property this time the citation was mailed to Mr. Steele. On June 4, 2019 a copy of the citation was posted to the front door. On June 27, 2019 Mr. Lara-Reyes was giving direction to dismiss the citation due to Mr. Steele stating that he has no ownership or responsibility of the property. On June 11, 2019 notice of abatement was mailed and posted to the Storm Family Trust. August 20, 2019 inspection was conducted that morning of the Hearing Officer and was found in violation of Grass and Weeds in the gravel over the front yard at that time the Hearing Officer approved the 180-day abatement. The case has been open for 231 days and over the last five years there are over 11 cases resulting in 68 inspections at the property the city has provided well amount of time to comply as well as offer assistance programs.

Chair Lyon asked the Board if they had any questions for Mr. Laura-Reyes.

Chair Lyon acknowledged Board Member Tracey.

Board Member Tracey asked if the only violation is the over grown weeds and the paint and debris been taken care of.

Mr. Laura-Reyes stated that is correct the other items have been taken care of. The only thing left is the deteriorated landscape.

Chair Lyon asked about the condition of the backyard.

Mr. Laura-Reyes stated that at the time of the Hearing Officer submittal the backyard was in compliance. But it was part of the first correction notice that was sent out.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked for clarification on the comment that Mr. Steele made in regard to the fact that grass is allowed in gravel and that grass and weeds are allowed no matter what height in the gravel what is the specific code for this matter.

Mr. Lara-Reyes stated if you have grass landscape then the 12 inches apply.

### **No Public Comments**

### **Public Comments Closed**

Chair Lyon advised the appellant that they could come up and respond to what he has heard.

Mr. Steele stated that if the City is trying to make it so that you are not allowed to have any kind of grass over rock it should state that in the Code. The Code lumps together all landscaping regardless of type. He got the information directly from the City Code. Mr. Steele also said that the City is advertising on the City website that weeds can be up to 12 inches. Mr. Steele stated that he is not aware of what a citizen should think if they are advertising on there site that weeds can be up to 12 inches and does not say anything about being over rock. Mr. Steele stated that he made a effort and according to the code that should count and he should be dinged but should have been granted an extension when he went to the Hearing Officer. As far as the past complaints to the property he is not surprised because his grandmother had some health issues and things did not get done when his grandfather went into a home and left his grandmother by herself. Mr. Steele is not living at the property his mother runs the trust and she lives in a completely different state and asked for Mr. Steele to handle this issue for her because she is in charge of the estate. The government owns the house because of the reverse mortgage that was taken out. The paperwork has been lost so that the government can take the house back.

Chair Lyon stated that he has had some notices show up at his door because of weeds and things and he sympathizes with Mr. Steele. However, when the notices are received, they should be taken seriously.

Mr. Steele stated that when he received the first notice, he is aware that the property was not well taken care of and he did hire someone to take care of the area.

Chair Lyon stated there needs to be clarification that 12 inches is not the level at which everything is good until then there are other factors that the landscape needs to look maintained and is not a matter of inches.

### **Commission Discussion**

Chair Lyon acknowledged Board Member Cullens.

Board Member Cullens stated that based on the information provided it has been over 200 days. The Board does get these cases often and they have allowed extended time in the past. However, Board Member Cullens does feel that Mr. Steele has had enough time to complete the request. Board Member Cullens also has grass and weeds in the yard and he knows that there are ways to keep it down and does not feel that it is an issue to maintain. As mentioned before the code does not allow 12 inches of weed in grass or gravel in none grass yards.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey stated that the work has taken place and the only thing left is just the grass and the weeds in the gravel.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson stated that he is concerned about the objectivity of the process because he did not see anything obtuse about the landscape even if it is not the standard that he would uphold for himself. Also, the fact that Mr. Steele asked for an extension and that was denied the Board should be objectively looking at this.

Chair Lyon acknowledged Board Member Confer.

Board Member confer stated that he wouldn't be opposed to granting the abatement with a stay of an amount of time to complete the work that is need.

Chair Lyon stated that he feels that same way that there is the abatement process to take care of problems but if the problem can be taken care of with a 30 day stay. If there were any misunderstanding things should be clear now with Mr. Steele going through the process with the understanding that the grass will be coming out of the gravel. 30 days should be appropriate then the abatement would kick in if needed.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked for clarification that based on the comments 180 days would start 30 days from the meeting date if that was what the Board agree on.

Chair Lyon stated that if that is what was agreed on then yes.

Mr. Abrahamson stated that they can approve the appeal which will overturn the Hearing Officer or Deny the appeal which the abatement will still take place.

Vice Chair Frazey stated that he would like to Deny with stay.

Mr. Abrahamson got clarification that they can Deny the appeal with a 30 day stay.

Chair Lyon called for a motion:

Motion by Board Member Naugle to deny the appeal of the August 20, 2019 Hearing Officer's decision to approve the abatement of public nuisance items for the **STORM PROPERTY** with a 30 day stay; second by Vice Chair Frazey. Motion passed on **6-1** vote.

**Ayes:** Chair Lyon, Vice Chair Frazey, Board Member Watson, Board Member Cullens, Board Member Naugle, Board Member Confer, Board Member Tracy

**Nays:** Board Member Watson

**Abstain:** None

**Absent:** Whitney Baker

Chair Lyon clarified to Mr. Steele that he has 30 days.

Mr. Steele still had questions and needed clarification on what all needs to happen.

Chair Lyon asked Mr. Abrahamson if he would meet with Mr. Steele and talk him through the options.

Mr. Abrahamson stated that he will be more then happy to meet with Mr. Steele after the meeting or Mr. Steele can give him a call the next day and they can work out the problem.

- 3) Request an appeal of the September 3, 2019 Hearing Officer's decision to approve the abatement of public nuisance items for the **GUTIERREZ PROPERTY**, located at 2109 East Pegasus Drive. The appellant is Jesika Gutierrez. **(PL190251 / CE192930)**

Presentation from Appellant: Jesika Gutierrez

Ms. Gutierrez informed the Board that she has had a lot of issues with this property. This property was originally purchased and lived in by her father who owned multiple properties and he has gotten very ill and Ms. Gutierrez is the only person around to take of him. Ms. Gutierrez father was diagnosed with dementia. While dealing her father who also lived in Texas part time there was a fire at the home in 2017 and no one was living at the property at the time. Ms. Gutierrez was not able to take care of the property because she was in Texas taking care of her dad after he had a heart attack. Ms. Gutierrez then feel ill herself and was diagnosed with a brain tumor that she just had surgery on September 8, 2019. She has had to do a lot of work on the property based on the fire itself with insurance, neighbors complaining, with having to relocate about 5 times it has been rather difficult. Ms. Gutierrez has made progress in the front of the property. In the front yard there was dirt which now has grass and there are many other issues that Ms. Gutierrez is aware of, but she has been very sick. Ms. Gutierrez provided the Board with receipts that she is working on getting the problem resolved. Ms. Gutierrez was informed by the Trash Bin company that they had received word that they need to come and pick up the bin due to the City telling them that the bin is in violation. Ms. Gutierrez was not done with the bin it was not full yet and she still needed to put other items inside. However, the company was informed that if they do not remove it the City would impound the bin. Ms. Gutierrez was informed by her neighbors that they were friends with one of the City Code inspectors and they were calling the City all the time making complaints. Ms. Gutierrez stated that the notices where sent in her father's name but because the property had been put in a trust so that it was protected incase anything happened to her or her father then her daughter would have a say of the property. Ms. Gutierrez went through the receipts and photos that she came with to show the Board that she has been doing work on the property.

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

Chair Lyon acknowledged Board Member Confer.

Board Member Confer asked what was the result of the Civil ticket that was written on August 8, 2019.

Ms. Gutierrez stated that she was told she had to pay a fine that was reduced to 200 dollars and she made payment arrangements.

Ms. Gutierrez also stated that the judge did not want to discuss the removal of the trash can or that one of the neighbors were calling and complaining about the issue every single day.

Presentation by Staff, Dalton Guerra, Planner I

The Gutierrez Property is located north of East Guadalupe Road and west of South Price Road on Lot 170 of the Tempe Royal Palms Unit Sixteen Subdivision in the R1-7, Single-Family Residential District. On September 3, 2019 the Hearing Officer approved the abatement for public nuisance items for the Gutierrez Property. On September 16, 2019 the appellant, Jesika Gutierrez, submitted an application to appeal the Hearing Officer's decision. On September 23, 2019 the appellant was found guilty in violation of City Code Section 21-3B1 by City of Tempe Municipal Court.

Chair Lyon invited Jeff Tamulevich to address the Board.

Mr. Tamulevich stated that he would like to have Code Inspector Jack Scofield Jr. up to present the case and he will be in the audience if there are any questions.

Presentation by Staff, Jack Scofield Jr., Code Inspector

Mr. Scofield Jr. stated on April 23, 2019 there was a complaint about the property in regard to a large amount of trash debris, household items being stored on the exterior of the property such as the front yard, driveway, and the side yard, included in a trailer and scattered throughout the rear yard. The back patio was full and a trailer that was also full of items. At that time a citation was sent out to the known property owner by the County Assessor. On April 30, 2019 Mr. Scofield Jr. received a phone call from Ms. Gutierrez asking for an extension. Mr. Scofield Jr. did grant a two-week extension. Ms. Gutierrez did ask for assistance and Mr. Scofield Jr. provided her with the Heart brochure which is run through the Tempe Fire Care 7 which gives assistance to citizens in need. Mr. Scofield Jr. also gave her information on the abatement process and at that time she refused that process. She said that she will try the Care 7 for help. On May 1, 2019 there was minimal progress and a final notification was issued. On June 4, 2019 there was progress made on the property and Mr. Scofield did meet with Ms. Gutierrez and he granted another two-week extension to show more progress on the property. On June 25, 2019 visited the property again and no new progress talked to me Ms. Gutierrez and gave another two-week extension and informed her that Mr. Scofield Jr. could not get anymore extensions and that a citation would be issued. June 26, 2019 there was another complaint issued and an unregistered vehicle in the driveway. At that point went back to the office and updated and mailed out a final citation. July 10, 2019 no progress what so ever. Photos were taken and at that time the County Assessor showed Ms. Gutierrez as the owner of the property. July 24, 2019 Mr. Scofield Jr. inspected the property and found no progress again and at that time a civil citation was issued to Ms. Gutierrez. On August 15, 2019 checked the court system and found that Ms. Gutierrez did not show for the court hearing. Ms. Gutierrez did show up later in the day and a court hearing was set for September 23, 2019. On September 23, 2019 Ms. Gutierrez was found responsible for the trash and debris for the exterior area of the property the truck had been brought into compliance and was a non-issue at the time. Per the day of the Board meeting Mr. Scofield Jr. shows that Ms. Gutierrez is the owner per the county website. Mr. Scofield Jr. stated that he did go by and take photos of the property the day of the Board Meeting. The case has been open for 183 days as of today. And since 2010 there have been ten total cases as well as 61 inspections. The City has gone above and beyond to help get the property into compliance. Mr. Scofield Jr. went over the photos that he took for the Board Members.

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

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked if there was any evidence of work being done on the property since the abatement was approved in September.

Mr. Scofield Jr. stated no there seem be more items scattered throughout the back.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson asked for clarification on what period where there ten cases open.

Mr. Scofield Jr. stated that since 2010 there were ten cases and he is not aware of the length that they were open.

Chair Lyon asked for Mr. Scofield Jr. to give a brief description of what the abatement will be.

Mr. Scofield Jr. stated that the abatement consists of removing any items on the outside unless it is customary stuff in the rear yard like outdoor furniture, patio furniture, yard tools that are not in excess would not be touched.

**Public Comment:**

**Gerald Christich – Tempe Resident**

Mr. Christich informed the Board that he resides due north of the property since 1997. Mr. Christich is not aware of the exact number of years that Ms. Gutierrez has been there but over the past five years the property has been in disrepair.



### **Public Comments Closed**

Chair Lyon advised the appellant that they could come up and respond to what they have heard.

Ms. Gutierrez stated that she does have paperwork that on March 29 the property was transferred over to the trust because she was not able to physically deal with the property due to health issues. There have been multiple calls with a specific neighbor because one of the residences of the neighbors did something inappropriate to Ms. Gutierrez child and there were police involved. Ever since then there has been no communication between the two neighbors and the neighbor calls the City anytime he could. Ms. Gutierrez stated that not until 2015 was she able to step in and due everything for the property due to her father's health issues. Ms. Gutierrez stated that she is also concerned because if the abatement does take place it will affect the Trust that was put in place for her special needs daughter who does not have a job. Ms. Gutierrez would like for the Board to give her a little extra time.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked if Ms. Gutierrez is taken account of the Heart Program.

Ms. Gutierrez stated that she did reach out to the program and they were not able to provide any assistance to her at the time.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson asked when did her father purchase the house and also it was stated that she would like 30 more days but is that enough time or does she need more.

Ms. Gutierrez stated she is not positive, but she believes it was in 1986. She also stated that she was informed by Code Compliance that she could have 30 days so she will take what she can get.

Board Member Watson also stated that earlier she informed them that she was not medically cleared till December.

Ms. Gutierrez stated that right now she has some physical limitations to what she can lift and bending down.

### **Commission Discussion**

Chair Lyon acknowledged Board Member Watson.

Board Member Watson stated that based on what they have done with previous cases that he would be in favor of a 120-day extension which would be four months given that her medical clearance is between now and December to complete the work that is needed on the property.

Chair Lyon stated that he would be alright with a 30 day stay. With there being an awful lot of notice. Chair Lyon stated that with information that the board has on her medical history and the many challenges that she has on her life. He is aware that it can be difficult, but the Board needs to consider what type of message they are sending. Because the property needs to come into compliance.

Chair Lyon acknowledged Board Member Tracy.

Board Member Tracy stated that he thinks there can be a compromise between a 30 day stay and 120 day stay.

Chair Lyon acknowledged Board Member Confer.

Board Member Confer asked for clarification on the process of how the 180 days works in the abatement process.

Mr. Abrahamson stated that the way it works is that there is an abatement process that was granted by the Hearing Officer in addition to that there is a open 180 day period which should the property go south again then code can go out and clean it up with out having to go back to the Hearing Officer again. The clock starts at the time of the decision. The clean up process starts 14 days after the Hearing Officer makes her decision.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson asked Mr. Tamulevich if he personally knew the citizen that spoke because the gentleman tapped Mr. Tamulevich on the shoulder as he walked by.

Mr. Tamulevich stated that no he did not know him but that he spoke to him on the phone earlier during the day of the meeting which is the first time that he has ever talked to the citizen.

Chair Lyon called for a motion:

Motion by Board Member Watson to deny the appeal of the September 3, 2019 Hearing Officer's decision to approve the abatement of public nuisance items for the **GUTIERREZ PROPERTY** with a 120 day stay; second by Naugle. Motion passed on **5-2** vote.

**Ayes:** Vice Chair Frazey, Board Member Watson, Board Member Cullens, Board Member Naugle, Board Member Confer,

**Nays:** Board Member Tracy, Chair Lyon

**Abstain:** None

**Absent:** Whitney Baker

- 4) Request a variance to reduce the required parking from 198 to 157 for **GENERATIONS MEDICAL CENTER**, located at 6301 South McClintock Drive. The applicant is Pew & Lake. **(PL190086)**

Presentation from Applicant representative: Shawn Lakes

Mr. Lakes informed the Board that the case was filed in April and there was a neighborhood meeting in May. Mr. Josh Bender the attorney representing the Mosque attended that meeting. There has been a long-standing dispute between a couple of the adjacent property owners on how to deal with the parking issue. There was an agreement that ended up in litigation and the litigation outcome was to get a variance. Generations Medical was an office building that was built in 1984. The building is located on the Northeast corner of Guadalupe Road and McClintock. Mr. Lakes provided a slide showing the three lots and where everything is in respect of the Property in question and the parking that is allotted for each. Mr. Lakes informed the board of the Parcel History. In 1976 the Holy Spirit Catholic Church was developed. In 1981 the Home Federal Savings and Loan which is now the Mosque building was developed. 1984 was when Thomas-Davis Medical Center which is now the Generations Medical Center was developed. In 2000 the Holy Spirit Catholic Church received a parking variance where it went from 369 spaces to 274 spaces. In 2002 the property owner of Lot 1 is the Moonshadow properties/Generations Medical Center and Mosque worked out a sharing parking agreement. In 2004 the Moonshadow properties/Generations Medical Center had a revocable shared parking agreement. In February of 2006 the Moonshadow properties purchased Lot 1 and in April of 2011 Linnerson Sells lot 3 to Mosque. Lot 3 is an undeveloped PAD with around 50 parking spaces that belong to the Mosque to use for future development. Generations Medical tried to work with the representatives of the Mosque to try and acquire some spaces and that did not work it led to litigation. The court ruled that Generations Medical Center did not need the spaces and to obtain a parking variance. During the litigation Mosque property owner testified at trial that the mosque had no need for an implied easement with lot 1 because it has plenty of parking of it's own. Mr. Lakes stated that "the court finds that evidence presented at trial makes overwhelmingly clear that the parking available on Lot 1 is, and has always been, sufficient for Lot1's needs." The reason that Mr. Lakes brings that up is because on Lot 1 according to code they are supposed to have 198. However, the site has been operating with 158 spaces. Application was submitted for 158 spaces for the 29,675 s.f. medical office

building. There was a parking analysis conducted by Civitech which showed that there is enough parking on Lot 1. There were also aerial history photos to determine if there was a parking problem in the past. City Staff have also done their own analysis on the property and they have determined that it is fine and recommended approval. Mr. Lakes went over the criteria for the variance to be approved. Mr. Lake explained that when the Mosque is ready to develop the undeveloped parcel the amount of parking spaces that are requesting will not hinder the development. The request is not asking to demise any parking on any other lot. There is not a special privilege because the catholic church was granted a similar variance. The variance is not a self-imposed hardship when the Medical Center acquired the property it was with an understanding that they had a right to all the parking in the parking field. It was determined that was incorrect and they went to court and they informed them that there are no rights to the parking spaces and left the center shy and they have worked to stay in the area where they can park and has been working so far. Mr. Lakes states that there are two issues there is the functionality and what is need for the office building to function and operate. History has proven to be over the years that there is enough parking on lot 1. The neighbors in the area are ok with it and the parking study plus the staff at the Center have gone out and done their own study. Operationally there is not a problem where there is a problem is on paper and what is required by code. The Code requires a 198 space the engineering of traffic safety requires 156. There is still a gentleman's agreement with the Church and the Mosque where if they need to park on Lot 1 parking, they are welcome.

Chair Lyon acknowledged Board Member Tracy.

Board Member Tracy asked if the building is a single tenant building or a multi-tenant building. If it is a multi-tenant building what is the occupancy percent.

Mr. Lakes stated that it is multi-tenant building and it is 100 percent occupied.

Chair Lyon acknowledged Board Member Cullens.

Board Member Cullens asked for clarification where code ask for 198 spaces and there are six spaces that are ADA if there is a reduction how many spaces would be required.

Mr. Lakes stated that he is not aware of the answer to that question, but he will look it up and get back with the Board Members.

Board member Cullens stated that is a concern of his that if he agrees to reduce the parking how will that affect the ADA compliance on the site.

Chair Lyon stated that the Board will wait on that question till City Staff presents to get the answer.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson asked if Lot 3 was originally sold by Moon shadow.

Mr. Lakes stated that it was not owned by Moon Shadow.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked if the 198 that is required by code did the building ever meet that requirement.

Mr. Lakes that stated that when it was originally developed as one parcel all together those 50 spaces on Lot 3 would help offset that requirement. When moon shadow required the property, they believed that there were agreements in place so that there was not a parking problem.

Vice Chair Frazey asked if the Owner of Lot 1 was the Owner of Lot 3 as well.

Mr. Lakes stated that is correct.

Vice Chair Frazey asked what the agreement with Lot 2 for the overflow of parking is.

Mr. Lakes stated that they have a agreement with Lot 2 for up to 20 spaces and it is included in the 158.

Chair Lyon acknowledged Board Member Confer.

Board member Confer asked when did Moon shadow purchase the property and where they required to have the 198 spaces.

Mr. Lakes stated that they purchased the property in 2006 and before the property was purchased, they were required 198 spaces. MoonShadow believed that they had agreements in place to cover the parking that was required.

Presentation by Staff, Diana Kaminski, Senior Planner

Mrs. Kaminski informed the Board that the variance is to reduce the required parking on the lot from the Code required 198 to what is currently provided on the site to 158. Lot 1 used to be larger it used to be Lot 1 and 3 as one parcel which is what came in to the City through the entitlement process and building code and was developed with the building that is on Lot 1. With the vacant pad and all of the surrounding parking on the pad. Later Lot 1 was subdivided, and Lot 3 was created and the parking that was on Lot 3 was assumed to be apart of Lot 1. When the plat occurred there should have been a recorded cross accuse or shared parking agreement there was a draft that was never signed or recorded. Ms. Kaminski went over the Variance criteria stating that Lot 1 is 2.796-acre lot that is irregularly shaped. And there is other surrounding business on both McClintock Drive and Libra Drive that have mutual benefits in some cases and in other cases Lot 1 is the larger burden of granting the rights. There is a little difficulty in the strictest application of the code will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district. Where one would be looking at the same zoning and the same use. The church is not the same use and is not the same zoning however they did receive the benefit of a variance in terms of a quantity of 2% where in this case they are asking for a 20%. Lot 1 is deprived of the privileges because a lot of the agreements they have are not necessarily reciprocal. The agreement with the Catholic Church to the North is a reciprocal agreement so there are a significant number of spaces available to them however it is a revocable agreement. What it means is that either time either party disagrees it can be revoked. In the case of the Lot to the south Lot 2 that is not a reciprocal. In where Lot 2 has the right to park on Lot 1, but it is not shared to Lot 1 parking on Lot 2. The agreement with the Mosque is not recorded which is a hand shake agreement and at any time the property owner can say you cannot use my parking. 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. When looking at how the property functions the adjustment will bring Lot 1 back into compliance with the zoning code by reducing the number of parking spaces required to 20 percent a ratio that is justified by the ITE and through the various studies that were analyzed, through staff report and the applicant's information. It will provide equity between all the lots in the area not necessarily in the same zone. The variance should not be granted if the special circumstances applicable to the property are self-imposed by the property owner. In this case the parking lot originally approved by the City of Tempe and built by the first owner met the requirements of the Code. The subdivision splits that occurred prior to the current owner had the requirement for parking that became offsite on Lot 3. The ownership changed in 2006 and the current owner of Lot 1 utilized the parking on both Lot 1 and Lot 3 from 2006 to 2019 in its current condition. The owner could not have anticipated a court ruling that overturned historic use of parking spaces originally built to serve Lot 1. This recent change was not self-imposed by the current owner and creates the non-conforming condition on Lot 1. There was a neighborhood meeting on May 21, 2019 there were three residents and a representative from the Mosque in attendance. The questions that came up were what is going to be built on the vacant lot. It was cleared up that it was not apart of the request for the variance. And they stated that there were no parking issues with the Medical Center. The neighbors that lived adjacent to or near the area most of the issues arose around the holiday. There were questions about maintenance and landscaping lot of that must do the irregularly shaped lot with only a little portion of it on Libra and there is ownership adjacent to that and who is the one in control of the landscaping and maintaining that. The public input that was received was a letter of support from the architect who originally converted the bank building to a Mosque. Lot 2 has a private recorded non-reciprocal agreement that allows parking on Lot 1;

representatives of both lots have come to an agreement and there is no opposition from Lot 2. Opposition received from representatives of the Mosque to the North, who also own Lot 3 to the east. Lot 3 has an informal non-reciprocal agreement to park on Lot 1. The opposition questions the validity of the variance and the alleged self-imposed condition. Staff recommendation is that there is justification to support the variance should the board agree with the findings and approve the variance the applicant has agreed to confirm with the conditions of approval in the report from staff.

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

Chair Lyon acknowledged Vice Chair Frazey

Vice Chair Frazey clarification that the parking issue was caused when Lot 3 was sold and if the parking analyzes that staff did was at the peak hours of business.

Mrs. Kaminski stated that they did make a few visits during the morning, afternoon and late afternoon during the times where there might be peak traffic to the sites. The study that was done by the applicate provides a much more detailed analyzes where they counted cars over a longer period of time. City staff did look at historical aerials from 2004 to 2019 to get a sense of what the spaces where.

Chair Lyon acknowledged Board Member Tracy.

Board Member Tracy asked if the reciprocal recorded document that was provided to the board in the documents did the court not find that enforce able.

Mrs. Kaminski stated that was a different document and the parking had to with Lots 1 and 2 not Lot 3.

Chair Lyon acknowledged Vice Chair Frazey

Vice Chair Frazey asked if this is a common area of the maintenance agreement for Lot 1, 2 and 3 as part of a commercial pad or mater plan.

Mrs. Kaminski stated no each lot is responsible for maintenance. There is a shared access and cross drainage agreements that is in the packet.

Chair Lyon asked how many ADA spots would be required out of the 198.

Mrs. Kaminski stated that it is based on a sliding scale that at 151-200 spaces it is required to have 6. The number of spaces would not go down for the ADA requirements.

**Public Comment:** 2:16:14

**Thomas Galvin –Tempe Business Man**

Mr. Galvin informed the board that the court case that was mentioned earlier was a lawsuit. The site does not have 158 spaces it has 109 spaces. There are various revocable agreements that are applying to the property. The applicant can take care of the issues by building more parking structures or entering into a parking lease agreement with the Mosque or possibility changing the usage. There are no special circumstances applicable to the property. The property is not small or irregularly shaped. Mr. Galvin showed the Board several other properties that are about the same shape and size. City Staff stated that yes there is a church the church is not the same use as a medical office building nor is the zoning. The failure on the part of the applicant to satisfy the criteria of the variance for similar use and classification. The other properties don't have any special privileges what so ever they just have reciprocal agreements and revocable agreements that the Mosque tomorrow can revoke the parking agreement with the medical office. The Church tomorrow could revoke the agreement with the medical office which will only leave them with 109 spots. In the lawsuit the owner of the property was made aware that there was no easement

and no agreement with Lot 3. In 2015 once again that issue came up in emails and the current owner of the property and the fact that there were no agreements for Lot 3.

Chair Lyon asked why Mr. Galvin client is against the variance.

Mr. Galvin stated that they are only entitled to 109 spaces. Out of the 158 the number of these spaces are covered by parking easements to the benefits of other owners. So, this would create problems for the Mosque. If it turns out that there are only 109 spaces the Mosque is worried that any future development on Lot 3 and the Mosque property itself would be encumbered by people going over and parking in those lost. There would be no guarantee that those rights would be protected. All the applicant has to do is build a new parking structure or lease parking spaces from the Mosque. In the Lawsuit there were numerous decisions between the Mosque and the current owner of the property. The owner of the property declined to pay to lease parking spaces. There would be a equitable deal where there would be parking spaces for money and the property owner does not want to do it.

Chair Lyon stated that he does not understand that if the variance is granted that does not change the number of parking spaces or the business type or the traffic load on the site.

Mr. Galvin stated that if the medical office is a successful office then they could expand their business there is not guarantee of how many cars are coming to the medical office there is always a potential that there could be more traffic and there could be more cars and people parking there.

Chair Lyon acknowledged Board Member Tracy.

Board Member Tracy asked if the Mosque could tow people if they were parked there.

Mr. Galvin stated yes but that makes it the Mosque problem to find a towing company and monitor those things.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked for clarification that the Mosque is against the variance, but they are not opposed to the medical office paying for the parking spaces.

Mr. Galvin stated that he does not agree with the assessment and that you can have an agreement to lease a spot and still be subject to the current code requirements of 198 spaces. There is no lease agreement in place.

### **Mohammed Zubair – Tempe Business Man**

Mr. Zubair stated that no one from the Mosque testified during trial. The attorney that presented was a trial attorney and had no knowledge of the variance. There is a private easement existing between to easements that is Lot 2 to the south and a strip of a portion of Lot 1 and the Lot that the Mosque owes. Those portions are subject to the private agreement. If the board grants the variance, they need to ask the question where do they drain. The drain is on the Mosque parking.

### **Steve Lammerson – Tempe Business Man**

Mr. Lammerson informed the Board that Generations is named Generations because in the building is obstetrician, pediatricians, and internal medicines. He is a developer and a physician. He bought the land with another physician and there were 198 spots. Then in 2006 the partnership sold the front portion and they developed the back end under the guide of the city, and they were going to put a building for daycare so that the workers could be close the kids however the partnership broke up. Mr. Lammerson is also a property manager and he believes that patience and neighbors first. Mr. Lammerson will work with the owners on the lot he is retired and wants to make sure that the negative feelings go away.

### **Daryl Steele – Tempe Resident**

Mr. Steele stated that the required parking for the ADA is based off what is done in the medical facilities rather they preform out patience procedures they are required to have 20% of parking as handicapped so they would need to have roughly 40 ADA spaces. Also, when looking at the site plan that was provided it shows the covered parking for the doctors are rather close to the building which goes against what they said earlier that the staff is instructed to park away from the building.

#### **Morris Hania – Tempe Resident**

Mr. Hania stated that he feels the City should stick with the Code. Over the past 20 years that he has been a member of the community there has been problems with the medical office trying to share parking lot. Apparently from what he understood tonight the whole issue with the parking started when Lot 3 was sold. Which caused the problem. Mr. Lakes has misrepresented the problem when he wants to come and worship only a Friday does, he has to park so far away because every time he parks close to where he worships the medical office complains. The medical office is open Monday to Friday morning to night. However, when he comes to worship on Friday it's hard to park. He does agree to build a parking structure. He would like to have the variance denied and the physicians and owners to build a parking structure.

#### **Public Comments Closed**

Chair Lyon advised the appellant that they could come up and respond to the public comment.

Mr. Lakes stated that he has with him the two-public agreement between the Mosque and the Catholic Church. They have been in place since 2002 and 2004 they are revocable they work, and they function for a long time. The instance are on the special religious holidays and the medical center is ok with that they want those agreements to continue. When the church needs to the park when the medical center is not there is great. In the Boards packet is an Alta Survey that outlines the number of parking spaces on Lot 1 which show 158 spaces. For clarification the medical center is not taking away parking spaces or adding them nothing will change the day to day operations will stay the same. This is to address the paper code requirement. Last thing by approving the variance it is not impacting the Mosque to develop the vacant land.

Chair Lyon acknowledged Vice Chair Frazey.

Vice Chair Frazey asked staff in regard to the strict application of the Code the reference is always to the catholic church to the North, but it is not of the same use or zoning code is that the only zoning reference available.

Ms. Kaminski stated that Staff did not do anything beyond the immediate area. She was looking for examples in the nearby area. It does refer to the strict application however you can look at it in different ways. The fact that there was a variance granted and the percent of the variance requested. Plus, the circumstance around it there would be room for interruption of that criteria.

Chair Lyon acknowledged Board Member Confer.

Board member Confer asked if staff recommendation is to approve the variance. He is also having trouble with the reasons that they should grant the approval. For instance, the statement that starts this meets most of the requirements for the criteria. Is staff talking about the libera interruption.

Mrs. Kaminski stated is correct.

#### **Commission Discussion**

Chair Lyon acknowledged Board Member Tracy

Board Member Tracy stated that the fact that building is 100 percent occupied and there doesn't appear to be a problem during the normal operating hours and the only problems is on a religious holiday. The applicant has done several studies to show the demand of the parking.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson stated that in reviewing the test it does not meet the four test and in his opinion, it is self-imposed, and the Lot 1 owner did not do the research according to what the attorney said or the original developer in part of splitting the lot and presumed that it was ok. And presumptions are a self-imposed hardship.

Chair Lyon thanked the audience for coming and speaking and showing their support for their community. Rather the board grants the variance or denies the variance will in no way change the parking on Lots 2 or 3. It will not change the parking on Lot 1. The number of spaces will remain unchanged regardless of what the Board does. The number of cars that come to this site will remain unchanged or at least not because of what the Board does anyway. The use on the site will not change because the Board says the only thing that it will change is the number that is written in a book. And that number is how many parking spaces does the City wish the property had. According to his opinion he feels that they are ok with the parking spaces they have. In this case because it has been in operation for many years and no one is complaining about the number of parking spaces serving the building. The only people complaining is the City saying that they do not match what is in the Code. According to the four criteria there is a special circumstance because it is a very weird shaped property. It does cause a problem for an existing building that has operated for a long time that has established that it is working. It doesn't seem like a privilege to say yes you can operate with less parking then said in the Code. He does see where it is part of the owners own making, he feels that is responsible for them to believe that they were ok and that the property has been functioning they way it has for years.

Chair Lyon acknowledged Board Member Tracy

Board Member Tracy stated that he can see the need for parking decreasing because of the demand for Uber and other forms of transportation. As well as the Mosque is willing to lease the parking so is this a money problem or a parking problem.

Chair Lyon stated that there is going to be no change to the number of cars that are going to be showing up. If the applicant was to lease the parking it would be to satisfy the number in the Cities book. And as an architect one would now want a parking structure on the property. It is tinny and would take all of the space and it would be really close and the hardship of watching that thing go up would be so disrupted.

Chair Lyon acknowledged Board Member Confer.

Board Member Confer stated that he is contemplating going towards the approval that is listed in the staff report but is not understanding the conditions of items 4 and 5. He does not see how the city can insert themselves into new parking agreements.

Chair Lyon invited Mrs. Kaminski to speak.

Mrs. Kaminski stated in looking at the parking analyst that was provided with site the city recognizes that the site functions with the spaces that they have available. If they enter into private agreement that compare that property, they agree to allow another property owner the right to park on there property that takes away from those spaces beyond what the parking agreement parking analyst allows effects the study that they gave to the city. SO, by asking for the variance they are inserting the city into any future agreements. This is a stranded practice with the shared parking that have come through the city before.

Chair Lyon acknowledged Board Member Watson.

Board Member Watson stated that there are four building that may be back to get a variance. If the Mosque does develop the space and it encourages on parking, then they do not have enough space will be back.



Chair Lyon acknowledged Board Member Tracy.

Board Member Tracy stated that if they can prove that they had acquit parking then he would ok with giving the space.

Chair Lyon called for a motion:

Motion by Board Member Naugle to approve the Variance to reduce the required parking from 198 to 158 for **GENERATIONS MEDICAL CENTER**; second by Board Member Tracy. Motion passed on **5-2** vote.

**Ayes:** Chair Lyon, Vice Chair Frazey, Board Member Cullens, Board Member Naugle, Board Member Tracy

**Nays:** Board Member Watson, Board Member Confer

**Abstain:** None

**Absent:** Whitney Baker

Staff Mr. Abrahamson announced that they will have a case in December.

Hearing adjourned at 9:02pm

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Prepared by: Brittainy Nelson, Administrative Assistant  
Reviewed by:



Steve Abrahamson

Steve Abrahamson, Principal Planner

SA:bn