

DRAFT MINUTES BOARD OF ADJUSTMENT July 28, 2021

Minutes of the regular hearing of the Board of Adjustment, of the City of Tempe, which was held virtually.

Study Session 5:30 PM

Present:

Staff:

Chair David Lyon	Steve Abrahamson, Principal Planner
Vice Chair James Frazey	Lee Jimenez, Senior Planner
Board Member Whitney Baker	Brittainy Nelson, Administrative Assistant
Board Member Kevin Cullens	
Board Member Raun Keagy	
Board Member John 'Jack' Confer	
Board Member Rachel Phillips (Alternate)	
Board Member Robert Miller (Alternate)	

- **VICTORUM TATTO**

Mr. Jimenez informed the Commissioners that he did update the packet with any new comments that came in. Mr. Abrahamson stated that there is one comment that he will be reading into the record and that there are several citizens that would like to speak.

- **HOUSE KEEPING**

Mr. Abrahamson informed the Commissioners that there is a possibility that virtual meetings may continue in a hybrid fashion. There is a new alternate to the group, Rachel Phillips.

Due to there being 8 members present, Vice Chair Frazey offered to leave the meeting so that Rachel Phillips could get a chance to participate in the meeting.

Regular Meeting 6:03 PM

Present:

Staff:

Chair David Lyon	Ryan Levesque, Deputy Dir Com Dev - Planning
Vice Chair James Frazey	Steve Abrahamson, Principal Planner
Board Member Whitney Baker	Lee Jimenez, Senior Planner
Board Member Kevin Cullens	Brittainy Nelson, Administrative Assistant
Board Member Raun Keagy	
Board Member John 'Jack' Confer	
Board Member Rachel Phillips (Alternate)	

1) Voting of the Meeting Minutes

Motion by Board Member Keagy to approve the Meeting Minutes of June 23, 2021; seconded by Board Member Baker. Motion passed on **4-0** vote.

Ayes: David Lyon, Whitney Baker, Raun Keagy, John Confer

Nays: None

Abstain: Kevin Cullens, Rachel Phillips, Robert Miller

Absent: James Frazey, Richard Watson

- 2) Request a Variance to reduce the separation requirement between tattoo shops from 1,320 feet to 490 feet for **VICTORUM TATTOO**, located at 516 South Mill Avenue. The applicant is Earl & Curley. (PL210091)

Presentation from Applicant representative: Rod Jarvis

Mr. Jarvis informed the Board Members that he is seeking a variance due to spacing requirements. The spacing requirement is 1,320 feet between tattoo establishments. The 1,320 feet is satisfied because the only legitimate business that they are distancing from, if one is to go door to door, is more than 1,320 feet away. When looking for placement of the establishment there was minimal signage and Colossus tattoo was tucked away in the corner of the building. However, he is aware that is not how distancing is done it is done on a more technical and legal matter.

Victorum is a state-of-the-art tattoo facility in Scottsdale that has been there for over three years now and is owned and operated by Mr. Cole Pierce. Mr. Jarvis showed photos of the existing tattoo facility in Scottsdale. He also showed the commissioners aerials of the property distance. The property line to property line is 1,225 feet. Suite to Suite is 1,360 feet. The reason for the distancing requirement goes back to another time in history. The surrounding cities of Tempe no longer require distancing. It was not uncommon at one time to require distancing because it was believed that tattoo facilities attracted a certain negative element to a community. Where now tattoos are more mainstream with people that are working in the office one cubical over have one, people on wall street have tattoos.

Mr. Jarvis informed the commissioner of the time of events and how the request came about.

- Victorium leases space on Mill Avenue January of 2021
- Mr. Pierce begins small TI work and learns that he needs a Use permit for operating the facility however the facility was never opened or operated.
- During February of 2021 variance for spacing discovered and discussion with City began.
- March 10, 2021 competition submits use permits for a tattoo facility.
- March 17, 2021 Victorium submitted plans for Variance.
- April 2021 Victorium application revised to now show competition new location.

- Two months after Ink & Eagle use permit approval there has been no sign of internet presence, no trade name, no construction on site.

Management representative stated that TI's will start after students come back. When asked if there was a lease management representative stated that he has options. Ink & Eagle purposed location is not visible from Mill Avenue, it is tucked back in multi-tenant building at far upper corner. It is by appointment only and is an Art Gallery. The facility is not the same clientele or business operations. There were statements that the area was over saturated. If the market is over saturated, then why is Mr. Conti opening a 2nd shop if there are too many tattoo establishments. Victorium second largest customer base comes from Tempe because college students are the largest customer population. ASU is largest university in United States of America with new clientele every 4 years. The situation reminds him of an event from years ago when there was a Cine Capri theater and the lease had run out and the owners wanted to develop the area into what it is currently. Mr. Harkins was trying to use the zoning process to stop that from happening so that he can continue to lease the property. It was pointed out in the planning process that it was not a legitimate use of the planning process. Presented the commissioners with photos of the two facilities to show the difference in set up and use of the area. The variance test states there are special circumstances or condition applying to the property, including the size, shape, topography location or surroundings. The property is built over 100 years ago. Due to historic nature, there is limited water and restroom capacity limiting the uses that can occupy the space. Water is provided and will be used to follow all rules and regulations required for blood borne pathogens. The other facility that is 500 feet away is smoke and mirrors which is a special circumstance. Then the strict application of the Zoning and Development code will deprive such property of privileges enjoyed by other properties of the same classification in the same zoning district. Strict application of the zoning code is measuring from property line to property line. If measurement can be taken from suite to suite, then the variance process could be skipped and obtained a use permit months ago. The use separation was over 1320 feet. Since measurement had to be from property line to property line with a large property with a variance for 95 feet was required. This allowed the competitor to jump in line and obtain a use permit. 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. The authorization of this variance will not put limitations on other properties in the vicinity. A variance may not be granted if the special circumstances applicable to the property are self-imposed by the property owner. The applicant did not create the circumstances that they are in. The applicant did not draft the spacing requirements those things are legacy. 46% of Americans have at least one tattoo. 36% of Americans between 18 and 29 have at least one tattoo. 40 % of Americans between the age of 26 and 40 have at least one tattoo. The industry growth means more need for tattoo establishment. A tattoo facility is more like a barber shop of hair salon. It is a personal statement using a person's body to create a look that gives whatever image or look the individual is trying to get across. Where bars are a disruptive use there is no separation requirement on them. There was a neighborhood meeting held and only one person showed up. Only one phone call received. Seven letters of opposition received. There are five of them from Mr. Conti and two from other competitors.

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

Chair Lyon acknowledged Board Member Phillips.

Board Member Phillips stated that she is an ASU graduate and that for the past 6 years being a working mom she never saw any students with a tattoo. The athletes did have them when she worked the games held at ASU. The presentation was amazing however, she doesn't see where the variance is meet.

Chair Lyon acknowledged Board Member Baker

Board Member Baker stated that the Board is not meeting to determine if tattoo is allowable or not. The Board is also not meeting to change the code. They are in attendance to look at a variance. She has looked, listened, and read the materials multiple times. She was looking for someone else enjoying the variance and that has been presented yet. She is also looking for evidence of this being self-imposed. Is there someone that is already enjoying the variance at this point and how is this not self-imposed?

Mr. Jarvis informed the Board that he is not aware of anyone else with a variance of the distancing requirement for tattoo parlors. The applicant did not need to choose this site they could have chosen another site. However, it could be said to any situation that whatever you are seeking a variance for to just choose another site then choosing a wrong place is not self-imposing.

Chair Lyon acknowledged Board Member Miller.

Board Member Miller asked if the operation that 490 feet from the applicant is their evidence that the individual has not exercised his option for a lease which would mean that this is not an operating business.

Mr. Jarvis stated that they visited with the property manager and ask is there a lease. The property manager avoided the question by saying he has options; no lease was produced. Nothing has happened on the site, and nothing has happened on the web to show the business is coming.

Board Member Miller stated that when the department went to verify when putting the information together for the Board in respect to the distancing between the two businesses, was it ever verified that the Ink and Eagle be an operating space.

Chair Lyon stated that they would like to hold off on that question till staff does their presentation.

Mr. Jarvis stated that the distancing between the facilities are 1000 feet apart.

Presentation by Staff, Lee Jimenez, Senior Planner

Mr. Jimenez informed the commissioners that Victorium is purposing to have their tattoo shop in a suite that is on the west side of South Mill between 5th street and 6th street. Which is in the CC Center district and the TOD overlay district. They are seeking relief from the separation requirements of a tattoo shop and body piercing establishment. Pursuant to City of Tempe Development and Zoning code that a tattoo shop or body piercing establishment should be on a lot within a quarter mile or 1320 feet which is measured by a straight line any direction from another tattoo or body piercing establishment. The purposed tattoo shop is located at approximately 490 feet of the nearest tattoo shop. Which was approved the Development Review Commission on April 27, 2021. The other two establishments that consist of tattoo shop and a body piercing establishment are located approximately 1225 feet from the purposed tattoo facility. In addition to the variance a use permit will also be required should the variance be approved, and the Development Review Commission is the decision-making body if the use permit was requested. The Neighborhood meeting took place April 29, 2021 at 6 pm. Staff has received letters of support and seven letters of opposition. Those that oppose are all general concerns about over saturation of tattoo and body piercing facilities. In regards to the question about the tattoo and body piercing those establishments were existing prior to code amendment which established a separation requirement and are grandfathered in. Staff does not support the request for a variance the request does not meet the variance criteria. Staff believes that there is no special circumstance that is related to the property size, shape, topography location or surroundings. Everything lined out has been personal circumstances. Other properties in the same classification and zoning are also subjected to the same separation requirements. Authorized of the variance will constitute a granting of special privileges limitations on other properties within the area. Lack of water is not considered a special circumstance. There are buildings that have been retrofitted to provide water to the more historic buildings.

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

Chair Lyon acknowledged Board Member Miller.

Board Member Miller asked is the issue about the Ink and Eagle establishment that is referenced in the report is that is 490 feet away from the purposed Victorium property. It appears that Ink and Eagle does not really exist other than in name.

Mr. Jimenez stated the site has been entitled for a use permit to operate a tattoo facility. Which is valued up to a year after the approval unless the use does not commence. City does not require a lease agreement as part of the application process for a use permit or variance or entitlement. But it does require property owner authorization. The owner of the property did authorize for the applicant to file the use permit application.

Board Member Miller stated that there is an entitled operation that is not operating and does not appear to be going to operate.

Mr. Jimenez stated that a best example that he can give in this case is an oddly shaped lot with a pan handle. Where the pan handle is encroaching on the separation requirements. That is tied to the physical attributes of the property. That is not a self-imposed circumstance. Another example would be a separation requirement that is across a major feature like a freeway with lots of distance. Those are the type of conditions that would apply in this variance request.

Board Member Miller stated in terms of the operational aspects of going from one facility to another one can does not fly in a straight line.

Chair Lyon acknowledged Board Member Cullens.

Board Member Cullens asked when the City code was modified changing the distance requirements.

Mr. Jimenez stated that the Ordinance was adopted by City Council on December 13, 2007.

Public Comment:

Danielle Chestnut – Tempe Resident

I have been a local resident for 35 years and am against anymore tattoo shops moving in the area. I have spoken with many of my neighbors and Tempe coworkers that all agree. Within the last 10 years alone I've seen a surge in tattoo shops. I support the existing requirements.

Sean Dowdell – Tempe Business

We oppose this variance for several reasons. This business knowingly tried to open a tattoo shop within the radius restrictions, set forth by the City. They tried to skirt the law and thought no one would care of call them on it. They also tried to skirt building permits for construction again, they thought they couldn't get caught. Now they are applying for a variance based on hardship which was entirely self-imposed. Tempe City states that self-imposed hardships are not a valid reason to grant a variance for any permit. CDC & OSHA state the #1 preventative way to stop communicable diseases is through handwashing. In Victorium's representatives' own statement on their application they state that the space does not and will not have any running water. So not only can they now wash their hands before and after each client in the space, but they also cannot even mop their floors and disinfect their space properly at all. This is a super sub-standard for a tattoo shop in this modern day, not mention the entire COVID era we just came out of. This should be common sense as a necessity for tattoo shops and if they understand bloodborne pathogens, they would know this already. Anyone claiming to be able to raise a competitive standard in the tattoo industry should certainly know that it would be impossible if they can't even reach a common standard of something as simple as handwashing and mopping with hot water. If this variance is passed it is going to open up the floodgates of other low end tattoos shops to open anywhere in Tempe, and we will see the exact result like Glendale saw when they opened it up without restriction. The landlord claiming hardship to rent should be consideration for this board. Again, it is self-imposed and could easily be converted to a retail space or any other office space that would not absolutely require hot water and drainage to operate. Please deny the variance as the city has done to other illegal uses.

Mark Walters – Tempe Resident

He owns and operate and tattoo at Studio Canvas since 1993. Living Canvas is the first legal studio in Tempe and the rules and regulations that are in place today because the business has worked with the City of Tempe to create a legal framework that would set the group work for future studios to safely integrate and over saturate City of Tempe. Has never opposed any legal application for a studio in Tempe. However there have been many that have illegally opened and rightfully shut down. There have been a few that applied for variances but have been denied. If a variance is granted in this case, it will be creating a dangerous precedence moving forward. There are a list of shops following behind it using the exact variance as a guideline. The guidelines are here so that Tempe does not turn into Glendale which is completely over saturated with shops on every corner. The problem is that they are all undercutting each other for business and have resorted to violence between shops. This is not what is wanted in the City of Tempe. The biggest concern about this applicant is the lack of water on the premises. They calm that this is a good use the business however it is the opposite. In Tempe a tattoo shop requires a use permit, and a use permit requires bloodborne pathogens certification training. Regardless of if the artist is trained or not it is impossible to use the training since the number one is handwashing. In the bloodborne pathogens manual it states handwashing is the most effective controlled technique. Handwashing before touching clients, putting on gloves, starting any procedure then disinfecting hands after touching clients applying wound dressing or handling biological waste material and removing gloves. None of this can be done properly since there is no water source to the building let alone for handwashing. In 34 years of tattooing there has not been a tattoo shop with less than two handwashing stations. Most states that require licensing for tattoo require handwashing sinks at every station where people are getting tattoos. Due to Covid everyone has learned a thing or two about handwashing. Would request that the Board deny the applicant.

Joseph Conti – Tempe Resident

Has been a Tempe resident and business owner for 25 years. The statement that was made about this being smoke and mirrors is a lie. Resent the assumption that he is using the preexisting zoning Tempe separation as stated to remove healthy competition. The truth is there was business model in the work for years including separation from JGJ enterprises that currently owns tattoo plant that he works for to branch out on his own to open a shop on Mill avenue. He executed the plan, and the use permit was approved by the Council and overwhelming support from the Tattoo industry. It seems that Victorium tattoo did not do their due diligence and tried to open without even looking into the preexisting laws in Tempe. The location that they are requesting the variance for is prime real estate and for any retail shop. If the variance is approved, then the board will be setting an example of the way that others do business in the City. Furthermore, there are many locations that will accommodate the permits that they are seeking all around Tempe. Due to a lack of business experience, they have chosen a location that does not adhere to current regulations. If they are wanting to strengthen healthy competition within the industry, they should do it within the boundary that others have adhered to. Respectfully asking that this request be denied.

Merrill Darcey – Tempe Resident

The City doesn't seem to be capable of spurring small business development beyond the vape pen economy of cannabis dispensaries, fast food joints and tattoo parlors. They lost interest long ago assuming they had it in the first place in creating a sensible city development plan that incorporates the needs of the many while positing Tempe for jobs, neighborhood preservation and infrastructure demands. In other cities, these interests aren't competing, they're complementary. Mill Avenue does not have a per se entertainment district of an adult entertainment district where some businesses are permitted or not permitted. This should be right of choice I believe that most Tempeans want to see their city change with the times, without losing its personality. I also believe that most residents want to strive for access, inclusion, and fairness. Any successful business should not be prohibited from this choosing.

Public Comments Closed

Chair Lyon advised that Mr. Jarvis may respond to the public comment and thing that he has heard so far.

Mr. Jarvis stated in the real world the business is a lot more than 1320 feet from the existing business. The statement that there is no water is a miss statement. The business does have water and they will have water at the site. No one has tried to skirt building requirements. This will be a very high-end shop. JGJ list Mr. Conti as a CEO not just an employee. Living Canvas is a competitor and the statement that the site would be better used for retail where

retail is having a hard time across the nation at this time. Retail is done online more and more. The applicant does believe that this is a non-self-imposed hardship. And that the distancing requirement is met in every way. The facts indicate that Ink and Eagle is a sham.

Commission Discussion

Chair Lyon stated that he is in agreement with Board member Baker's comment made earlier. The criteria on which the variance is considered are very limited. The Board will not be considering the appropriateness of water at this time. Those decisions are up to the other permitting bodies. Is there a special circumstance, is the property deprived of a privilege that other properties have, cannot grant a special privilege by approving the variance and is the special circumstance imposed? The purpose of the Board is to grant relief where strict application of the zoning ordinance causes undue hardship. There have been cases where there was a residential property that was an odd shape and couldn't accommodate a home properly. Where if the variance was denied then there wouldn't be a home in the area. That is why there is a variance process to say it makes sense that there should be a home in the area even though the rules say no. This is not a 100% black and white; you can't do it. There are certain rules that should be understood before the Board considers leniency. One is the distance requirement. Knowing how far it is from one door to another could become a big argument. The simplest way to measure is to draw a straight line between two things and then find out what the distance should be and let that determine the standard. In this case it is 1320 feet between properties. There is also the four criteria which are there are special circumstances or conditions applying to the property, including the size, shape, topography, location or surroundings; the strict application of the Zoning and Development code will deprive such property of privileges enjoyed by other properties 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.

Board Member Cullens stated if this was simply the case of being 70 feet short of the required 1320 feet there would be more grievance in his opinion. That is not the case; rather, anyone likes it or not, a permit was issued to another tattoo business within 500 feet where they have a year to develop their business. It is no other person's place to judge; rather, it is a true business or not. He is not against tattoos; it is what the Board has the authority to make decisions on. Also, to have the decision on hearsay that has nothing to do with the Code.

Board Member Baker stated that she agrees with Board Member Cullens and that she could see the Board considering this in other circumstances. Rather, or not, the business is open at 490 feet is not for the Board to judge; he does have a year and he is going to be given that year. However, at this time 490 feet is not something that she would consider based on the information that the Board has heard and the type of decision that they need to make with the authority they were given. The Board should take into consideration the work that Mr. Jimenez has put in and he has given the Board his recommendation. She intends to support it based on the information that has been heard.

Board Member Miller stated he would like to come back to what the Board is authorized to do. He agrees with the Board Members that, rather, or not, the business that is 490 feet away is operational or not is not of concern. It is there in theory, and it is there in permit, and it has been judged based upon that. He could not support granting a variance for 490 feet.

Chair Lyon stated that Mr. Jarvis had a great presentation and that from what he saw he likes the look of the Victorium tattoo. It comes down to a straight consideration that someone else has a permit less than 500 feet away and they have a year to use it. If it was just the 90 feet, there could be more of a consideration for the place. The term that the other permit is a smoke and mirrors operation is not something that he can buy. It is a valid permit, and the board needs to honor that. He will not be able to support the application for a variance.

Chair Lyon called for a motion:

Motion by Board Member Miller to deny the variance to reduce the separation requirement between tattoo shops from 1,320 feet to 490 feet for **VICTORUM TATTOO**, located at 516 South Mill Avenue: second by Board Member Phillips. Motion passed on **7-0** vote.

Ayes: David Lyon, Whitney Baker, Raun Keagy, John Confer, Kevin Cullens, Rachel Phillips, Robert Miller

Nays: None

Abstain: None

Absent: James Frazey, Richard Watson

Staff Mr. Abrahamson did not have any announcements.

Hearing adjourned at 7:30pm

Prepared by: Brittainy Nelson, Administrative Assistant
Reviewed by:

Steve Abrahamson, Principal Planner

SA:bn