

**Minutes  
HEARING OFFICER  
DECEMBER 16, 2008**

Minutes of the regular public hearing of the Hearing Officer, of the City of Tempe, which was held at the Council Chambers, 31 East Fifth Street, Tempe, Arizona.

**Present:**

David Williams, Hearing Officer  
Steve Abrahamson, Planning & Zoning Coordinator  
Sherri Lesser, Senior Planner  
Shawn Daffara, Planner II  
Derek Partridge, Planner I

**Number of Interested Citizens Present: 19**

Meeting convened at 1:30 PM and was called to order by Mr. Williams. He noted that anyone wishing to appeal a decision made today by the Hearing Officer would need to file a written appeal to that decision within fourteen (14) days by December 30, 2008 at 3:00 PM to the Development Services Department.

1. Mr. Williams approved the Hearing Officer Minutes for December 2, 2008.

2. Mr. Williams noted that the following case(s) had been removed from today's agenda:

Request by the **HEMMINGS RESIDENCE (PL080432)** (David Ullrich/Cornerstone Remodeling Corporation, applicant; Shawn Hemmings, property owner) located at 5508 South El Camino Drive in the R1-6, Single Family Residential District for:

**VAR08024** Variance to reduce the front yard setback for an open structure from fifteen (15) feet to eight (8) feet.

**CONTINUED TO JANUARY 6, 2009 HEARING OFFICER**

3. **Review of the following for possible revocation of the use permit per the City of Tempe Attorney office's direction due to non-compliance with the Condition of Approval No. 8, which reads, "Smoking will not be permitted within this establishment."**

Request by **WALGREENS PLAZA – HB PLACE TOBACCO (PL060676)** (Anis Ben Harzallah, applicant; Commercial Properties LLC, property owner) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for:

**ZUP06088** Use permit to allow a tobacco retailer.  
(Use permit was approved by the Hearing Officer at the December 19, 2006 HO hearing.)

Attorney Peter Spiess was present to represent this case. He stated that the March 8, 2008 inspection should not be considered in terms of violation since it was not until the City Council hearing of September 11, 2008 that the appeal by the opposition was approved and the smoking use permit actually denied. Attorney Spiess referred to the City of Tempe's history of hookah lounges and the no smoking ordinance which occurred after the use permit was issued in December 2006. He noted that there are at least five (5) empty stores in that shopping center and should this use permit be revoked the opportunity for crime would increase. He stated that the City Council based their decision to deny the use permit to allow smoking due to the proximity of a nearby school when, in fact, smoking use permit(s) had been allowed in other areas where schools were located nearby.

Shawn Daffara, staff planner, gave an overview of this case and stated that no additional public input information had been received since the staff report had been issued. He noted that the history of this case for a tobacco retailer at this location included numerous violations related to Condition of Approval No. 8. Mr. Harzallah was presented with two (2) options; to either stop smoking at these premises or to apply for a new use permit to allow smoking for a hookah lounge. A subsequent application for a use permit to allow smoking was approved by the Hearing Officer but overturned and denied by an appeal process instigated by the opposition. Continued smoking at these premises generated code compliance complaint(s) due to violation to COA No. 8.

Jeff Tamulevich, Commercial Code Compliance for the City of Tempe, gave a history of the code compliance notices/complaints and related inspections. Smoking has been a continuous violation at this business.

Mr. Anis Ben Harzallah spoke briefly as to how he felt the City of Tempe's actions were unfair.

Mr. Williams noted that the reason the applicant was before the Hearing Officer today was not due to neighborhood opposition but because staff had determined that this applicant was in violation of his assigned conditions of approval for this use permit. He further explained that the applicant at the time of the original request (December 2006) was asked if he understood the conditions of approval and he had confirmed that he did and that there was no smoking allowed.

Attorney Spiess stated that he had reviewed the DVD of the December 2006 Hearing Officer hearing at least a dozen times and that Mr. Harzallah's actual response to the question 'do you understand these conditions of approval?' was 'yeah I guess so sort of'.

Mr. Steve Stewart, representing Date Palm Manor Neighborhood Association, acknowledged their opposition to this applicant's request for smoking on the premises.

Mr. Williams stated that the issue before him today is consideration of this use permit revocation due to non-compliance with the assigned conditions of approval. He noted that he is not aware of three (3) other smoking hookah lounges adjacent to schools as depicted by Attorney Spiess. Mr. Williams stated that he does agree with the applicant regarding the timeliness of the Code inspections as relating to the actual denial of the smoking use permit that was originally approved by the Hearing Officer and later overturned by the City Council. Mr. Williams explained that he does not like to remove a functioning business from a shopping center that was in trouble as long as that business complied with the rules and regulations as set forth by the City of Tempe.

Mr. Williams noted that he was aware of the Superior Court's decision to deny the applicant's request for a preliminary temporary injunction. He stated that he felt that it was very clear that smoking was not approved under this original use permit.

**DECISION:**

Mr. Williams approved the revocation for PL060676/ZUP06088.

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4. Request by **TEMPE CHURCH OF CHRIST - SUNNYDALE SENIOR CENTER (PL080322)** (Darryl Starling, applicant; Tempe Church of Christ/property owner) located at 2424 South Mill Avenue in the R1-6, Single Family Residential District for:

**ZUP08175** Use permit to allow a freestanding accessory building (storage).

Mr. Darryl Starling was present to represent this case. He stated that he understood the conditions of approval. In response to a question from Mr. Williams he stated that he had investigated the issue of the flickering light which was addressed during the review of his previous request. He found no problem(s) with the light, provided by SRP, which appeared to be functioning normally, and was unsure as to what had generated this comment by the neighbor.

Derek Partridge, staff planner, gave an overview of this case and stated that no additional public input information had been received since the staff report had been issued. He noted that this request replaces a previously approved request to change the location of the storage building.

**DECISION:**

Mr. Williams approved PL080322/ZUP08175 subject to the following conditions:

1. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
  2. The detached accessory building shall not be used as a separate living unit/guest quarters (no cooking facilities).
  3. Accessory building shall be painted to match existing office building on-site.
  4. The existing two (2) accessory buildings on the property (as shown on site plan) shall be removed after completion of the proposed accessory building.
  5. Repaint the existing perimeter wall adjacent to the vacant lot to remove the inconsistencies in color within thirty (30) days (January 16, 2009).
  6. Applicant shall meet with staff for a required landscape plan, landscape shall be completed within ninety (90) days (March 16, 2009).
  7. Approval of this use permit shall void the previously approved use permit, ZUP08149.
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5. Request by **ARIZONA MILLS (PL080395)** (Todd Olson, applicant; Simon Property Group Inc., property owner) located at 5000 Arizona Mills Circle in the RCC, Regional Commercial Center District for:

**ZUP08166** Use permit to allow outdoor retailing (periodic auto sales) events.

Mr. Todd Olsen and Mr. Nat Handler were present to represent this case. Since Arizona Mills opened 11 years ago they have hosted auto sales. Each and every year the auto sales became more successful and drew traffic to the shopping center. Last year they requested and received approval for 16 auto sales and used 14 of those approvals. They understand the signage issues pertaining to these type of event(s) and that the previous vendor had practices that were unauthorized. They are currently requesting approval for 10 sales events. In these economic times the additional traffic generated by these sales are appreciated by the tenants of Arizona Mills.

Sherri Lesser, staff planner, gave an overview of this case and stated that four (4) phone calls opposing this request had been received.

Mr. Gary Hayes of the Tempe Autoplex Owners Association spoke in opposition to this request. He presented 200 letters of opposition to this request; these signatures are from employees of the dealerships and Tempe residents. He explained that the Autoplex generates tax revenue for the City of Tempe and that the configuration had been developed with the approval and input of the City Council. Several dealerships make up the autoplex. These sales at Arizona Mills are in violation of the City ordinances as well as transaction privilege licenses. He noted that there are ten (10) representatives of the autoplex in the audience in opposition to this request.

Mr. Jon Wiggins of Paradise Valley spoke in opposition to this request, stating that if they want to be in the auto sales business then they should buy a piece of land and establish themselves as auto dealers.

Mr. Dave Wallace of Scottsdale (Tempe Honda) stated his opposition to this request. He noted that lack of sales is hurting the auto sales business due to the tough economic times. The City misses out on the sales privilege tax and bringing auto dealers from other cities hurts the current dealers in Tempe. The autoplex dealers met all the requirements by the City of Tempe (i.e. use permits, etc.) and cannot compete with a parking lot sale that only requires porta-jons and a chain link fence.

Mr. Williams indicated the issue is land use compatibility and how it functions. Auto sales are not appropriate. Temporary parking, lot use, quantity of traffic, and heavy sales activity are all issues to consider. He would like to see Arizona Mills work with the Autoplex to form a cooperative agreement.

**DECISION:**

Mr. Williams denied PL080395/ZUP08166.

6. Request by **BROADWAY INDUSTRIAL PARK – STAR OF INDIA (PL080425)** (Randy Horton, applicant/property owner) located at 1038 West Southern Avenue in the GID, General Industrial District for:

**ZUP08176** Use permit to allow outdoor retail/display.

No one was present to represent this case.

Shawn Daffara, staff planner, gave an overview of this case and stated that no additional public input information had been received since the staff report had been issued. These events would take place on weekends only and there would be no conflicts with parking requirements.

**DECISION:**

Mr. Williams approved PL080425/ZUP08176 subject to the following conditions:

1. The outdoor display shall not conflict with pedestrian or vehicular traffic.
2. The use permit is valid for the plans as submitted to and approved by the Hearing Officer. Any expansion of the outdoor display would require a new use permit.
3. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the Development Services office, the use permit may be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
4. Any outdoor signage associated with the display shall be limited to three (3) square feet.
5. No sound amplification shall be used for the outdoor display.
6. No outdoor display shall be permitted within landscape areas.
7. Any display must allow for a minimum six foot (6') wide pedestrian path across the building frontage and to and from building entrances and exits.
8. The use permit is valid for weekends only when office and warehouse uses are closed.

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7. Request by the **AIRPORT BUSINESS CENTER (PL080429)** (John Guzman/Victoria Properties Management LLC, applicant; G. W. Williams Company, property owner) located at 627 South 48<sup>th</sup> Street in the GID, General Industrial District for:

**VAR08023** Variance to increase the height of the flagpole from thirty-five (35) feet to forty (40) feet.

Mr. John Guzman was present to represent this case. This request is for the American flag, not advertising, and they want to enhance that entrance area.

Sherri Lesser, staff planner, gave an overview of this case and stated that no additional public input information had been received since the staff report had been issued. This use is not out of character with the neighborhood.

Mr. Williams indicated the need for a study on the need for a potential amendment to code for a height modification.

**DECISION:**

Mr. Williams approved PL080429/VAR08023 subject to the following conditions:

1. Obtain all necessary clearances from the Building Safety Division for the increased height and lighting of the flag pole structure.
  2. The flag display on the forty (40) foot flag pole limited to a US Flag or Arizona State Flag; no corporate flag will be allowed at height to exceed thirty-five (35) feet.
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8. Request by the **DENGLER RESIDENCE (PL080434)** (Sean Dengler, applicant/property owner) located at 1658 East Del Rio Drive in the R1-6, Single Family Residential District for:

**VAR08025** Variance to reduce the east side yard setback from five (5) feet to three (3) feet.

**VAR08026** Variance to reduce the west side yard setback from five (5) feet to three (3) feet.

Mr. Sean Dengler was present to represent this case. He explained that he would like to modify the east side yard setback to reduce it from 5 feet to 0 feet.

Shawn Daffara, staff planner, gave an overview of this case and stated that no additional public input information had been received since the staff report had been issued. The applicant has worked with Planning staff and Building Safety to comply with City regulations.

Shawn Daffara noted that a continuance would be required so that revised dimensions on the east side yard setback could be modified to indicate a reduction from 5 feet to 0 feet, per the applicant's request, could be legally advertised.

**DECISION:**

Mr. Williams continued PL080434/VAR08025/VAR08026 to the January 20, 2009 Hearing Officer hearing.

9. Request by **PRANKSTERS GAR AND BRILL (PL080439)** (Perry Bolster, applicant/property owner) located at 1024 East Broadway Road in the CSS, Commercial Shopping and Services District for:

**ZUP08177** Use permit to allow a (Series 6) bar.

Mr. Perry Bolster was present to represent this case.

Derek Partridge, staff planner, gave an overview of this case and stated that no additional public input information had been received since the staff report had been issued.

**DECISION:**

Mr. Williams approved PL080439/ZUP08177 subject to the following conditions:

1. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
2. Any intensification or expansion of the use shall require a new use permit to be approved.
3. The use permit is transferable. Should the business be sold, the new owners must reprocess for administrative review.
4. A security plan is required within thirty (30) days (January 16, 2009). Contact Crime Prevention at (480) 858-6027.
5. Remove litter and miscellaneous debris from property (ongoing maintenance).
6. Repaint wrought iron fence around patio to original paint color within thirty (30) days (January 16, 2009).
7. Repaint the stucco and remove rust on monument sign within thirty (30) days (January 16, 2009).
8. Replace light at the north end of the parking lot near the refuse enclosure with full cut-off fixture within thirty (30) days (January 16, 2009).
9. Address numerals on building (Broadway frontage) shall be replaced within thirty (30) days (January 16, 2009). Numerals shall contrast with building color.

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10. Request by the City of Tempe – Neighborhood Enhancement Department to abate public nuisance items in violation of the Tempe City Code for the **EMC MORTGAGE CORPORATION PROPERTY (PL080433/ABT08041)** (EMC Mortgage Corporation, property owner) Complaint CE086318 located at 3300 South Terrace Road in the R1-6, Single Family Residential District.

No one was present to represent the property owner.

Julie Scofield, City of Tempe – Neighborhood Enhancement Inspector, stated that this is a foreclosure home and that the landscaping is the issue.

**DECISION:**

Mr. Williams authorized abatement proceedings for PL080433/ABT08041.

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The next Hearing Officer public hearing will be held on **Tuesday, January 6, 2009**.

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There being no further business the public hearing adjourned at 3:02 PM.

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Prepared by: Diane McGuire, Administrative Assistant II  
Reviewed by:



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Steve Abrahamson, Planning and Zoning Coordinator  
for David Williams, Hearing Officer

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