

**Minutes
HEARING OFFICER
JANUARY 18, 2011**

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:

Vanessa MacDonald, Hearing Officer
Steve Abrahamson, Planning & Zoning Coordinator
Nick Graves, Planner
Kevin O'Melia, Senior Planner

Number of Interested Citizens Present: 19

Meeting convened at 1:30 PM and was called to order by Ms. MacDonald. She 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 February 1, 2011 at 3:00 PM to the Community Development Department.

1. Ms. MacDonald noted that the Hearing Officer Minutes for January 4, 2011 had been reviewed and approved.

2. Ms. MacDonald noted that the following case(s) has been removed from today's agenda:

Request by **TEMPE MARKETPLACE - TARGET (PL100427)** (Laura Shen/MBH Architects, applicant; Target Corporation, property owner) located at 1800 East Rio Salado Parkway, Suite No. 120, in the RCC, Regional Commercial Center District for:

VAR10011 Variance to waive mechanical equipment screening.
ADMINISTRATIVELY WITHDRAWN BY STAFF

3. Request by **A. T. & T. WIRELESS – PHNXAZ073-BB (PL100229)** (Grettel Keane/Westower Communications, applicant; William & Beverly Woodmansee, property owners) located at 2530 North Scottsdale Road in the CSS, Commercial Shopping & Services District for:

ZUP10166 Use permit to allow a 71 ft. tall monopole (monopine).

Ms. Grettel Keane was present to represent this case.

Kevin O'Melia, staff planner, gave an overview of this case and stated that no further public input has been received since the staff report was issued. The property is currently vacant and fenced, and the site for this request is located near the southwest corner of the property. He stated that he had reviewed the Conditions of Approval with the applicant.

Ms. MacDonald noted the large number of conditions which addressed several landscaping issues. This indicates that the applicant is being required to raise the level of maintenance on the property in terms of landscaping. Mr. O'Melia responded that in terms of cleaning up the site, these landscape issues need to be dealt with in relation to the Development Review Commission standards. The conditions also address security lighting for the site, he noted, and these site improvements will accommodate future development of the site.

Ms. MacDonald asked the applicant if she was in agreement with the Conditions of Approval as set forth in the staff report. Ms. Keane responded that they were acceptable.

Ms. MacDonald stated that this request meets the criteria for a use permit.

DECISION:

Ms. MacDonald approved PL100229 / ZUP10166 subject to the following conditions:

1. Obtain all necessary permits and clearances from the Building Safety and Engineering Divisions prior to commencing construction.
2. Protect all existing civil features in place. No drainage clearance is required if project is developed as indicated in the submittal.
3. The Use Permit for a wireless telecommunication facility including a mono-pole is granted based on the presentation exhibits included with this request. The mono-pole shall be no greater than 71.0 ft. in height, as measured from grade to top of artificial foliage above the top of the pole, as indicated in the submittal.
4. Any intensification or expansion of use beyond that presented, including additional height and/or antennae, will require a new Use Permit.
5. Maintain the minimum 71.0 ft setback from the west property line for the wireless telecommunications tower and maintain the minimum 10.0 ft setback from the west property line to the nearest wall of the equipment enclosure, as indicated in the submittal.
6. Existing chain link fence and three strand barbed wire top may remain where occurs on property, including along west (rear) property line. Remove existing coiled razor wire around three strand wire where occurs along top of fence. Modification of the existing fence to allow the addition of a 10.0 ft. wide chain link access gate is allowed where indicated.
7. Provide minimum 8.0 ft. high concrete masonry unit (CMU) equipment enclosure wall and equipment shelter. Do not match paint of these CMU surfaces to the color of the adjacent buildings. Finish CMU shelter and enclosure walls with off-white paint of maximum 75 percent light reflectance value that matches or closely resembles the off-white color of the masonry base to the fence on the site frontage. Finish hollow core doors, vents and miscellaneous metal with a medium gray color. Colors are subject to planning division approval during plan check process.
8. Provide 8.0 ft. high steel vertical picket fence and gates with pointed picket tops and white finish to match steel fence at Scottsdale Road frontage. Design fence and gates to limit foot and hand holds. Provide fence and gates at these locations.
 - a. At gate pair to equipment enclosure yard.
 - b. At fence that extends from southwest corner of equipment enclosure to perimeter fence at south property line, as indicated on the submittal.
 - c. At fence with gate access south of equipment enclosure. Relocate this fence and gate to align with east wall of the enclosure, rather than the east wall of the shelter.

9. Provide security illumination at the following locations: Conform to the Zoning and Development Code, Part 4, Chapter 8, for provisions on light fixture design and method of demonstrating illumination level. Provide illumination from dusk to dawn using a sun-sensitive photo sensor.
 - a. Provide minimum 5.0 foot-candles at lock with minimum 2.0 foot-candles at 15.0 ft. radius all around lock at property vehicles access gate, at equipment enclosure yard gate pair and at equipment shelter door.
 - b. Provide minimum 0.5 foot-candles within walled equipment enclosure yard.
 - c. Provide minimum 0.5 foot-candles for a minimum 10.0 ft. radius all around base of telecommunications tower.
10. Under-trim existing palm trees on site to remove accumulation of dead foliage. Additionally, skin palm trunks for a manicured appearance. Remove trimmed landscape material from site.
11. Remove weeds and overgrown, naturalized grass throughout the site.
12. Protect and maintain existing pine trees at site frontage. Protect and maintain existing pines, palms and other trees on site. Ensure each specimen receives periodic irrigation from a functional automatic irrigation source. Extend automatic irrigation system to specimens that are not irrigated. Replace existing tree or palm specimens that dies, shows probability of dying or is removed for any reason from date of this approval through period of construction of the telecommunication facility. Replace pine or other tree with a minimum 36" box Pinus Eldarica (Mondel pine). Replace palm with a minimum 20 ft. brown trunk Washingtonia Robusta (Mexican fan palm). Adjustment of location of tree or palm from the location of the existing specimen is acceptable, subject to approval of relocation by the Planning Division.
13. Remove the wireless telecommunication facility within thirty (30) days of discontinuance of use.

4. Request by the **SHAKOOR RESIDENCE (PL100424)** (Lonny Braithwaite/Rowland Luxury Homes, applicant; Ahtisham Shakoor, property owner) located at 2035 East Myrna Lane in the AG, Agricultural District for:

ZUP10167 Use permit to replace a single story residence with a two story residence.

Mr. Bill Schroeder was present to represent this case.

Steve Abrahamson, Planning & Zoning Coordinator, gave an overview of this case. Staff has received one call of concern from the neighbor located directly west of this property regarding potential breach of privacy. Mr. Abrahamson noted that following the distribution of the staff summary report e-mails of concern had been received from a nearby neighbor who had been out of town. Those concerns related to possible privacy issues in the original design. The applicant had submitted a new design which addressed those issues, and the individual had acknowledged that her concerns had been resolved.

Mr. Schroeder presented that site plan depiction and the location of the setbacks, noting that basically the house is an L-shaped home. The elevations have been reconfigured to move the second story balcony and spiral staircase to the interior of the lot, away from the street frontage view. The distance of various components of the structure were discussed including doors and windows in relation to the property line(s). The existing vegetation on the west side was discussed, where a large tree exists. It was acknowledged that this tree will remain.

Ms. Sandra Swanson, stated that she is the neighbor located to the west of this property, and that her concerns have been addressed by the applicant.

Ms. MacDonald acknowledged receipt of an additional e-mail from a neighbor located across the street from this property which indicated support for this request. She expressed appreciation of the applicant's flexibility to address the concerns of the neighbors. This application meets the criteria for a use permit she stated.

DECISION:

Ms. MacDonald approved PL100424 / ZUP10167 subject to the following conditions:

1. Obtain all necessary clearances from the Building Safety Division.
2. Redesign main dwelling to relocate exterior stair case and exposed second story patio from view from both street frontages; final details to be approved by staff prior to plan check submittal.

5. Request by **TEMPE TOWNE CENTER - SAHARA NIGHTS HOOKAH LOUNGE (PL100428)** (Mathew Krainski/Architect, applicant; Tempe Towne Associates LLC, property owner) located at 933 East University Drive, Suite No. 110, in the CSS, Commercial Shopping & Services District.

ZUP10168 Use permit to allow a retail smoke shop (Hookah Lounge) offering tobacco and tobacco paraphernalia products.

Mr. Mathew Krainski, as well as Josh Moldovan & Roty Dougherty (owners), were present to represent this case.

Nick Graves, staff planner, gave an overview of this case and stated that no further public input has been received since the staff report was issued. He noted that staff had received a request from the Tempe Fire Department requesting that an additional Condition of Approval be added to require an occupancy inspection and clearance prior to the use permit becoming effective. This additional stipulation will be addressed as Condition of Approval No. 10.

Mr. Krainski acknowledged the Conditions of Approval, and stated that he understood the additional Condition of Approval No. 10 being assigned. He addressed Condition of Approval No. 6 which stipulates that all rear exit doors require a lexan vision panel. Discussion followed over the lexan requirement. Mr. Abrahamson explained that this material is specified due to the durability factor and that, in the past, other materials had been used and were not able to withstand breakage.

Ms. MacDonald addressed the enhanced ventilation requirements that were required by this type of business. Mr. Krainski acknowledged these requirements and that they have been met according to the Building Code stipulations. They are still going thru the process of building plan review.

Ms. MacDonald questioned the occupancy limitations. Mr. Krainski responded that it was for a maximum of 15 people, and that the owners were fully aware of this limitation and would comply.

Ms. MacDonald stated that although Mr. Krainski had answered all of her technical questions, she wished the project owners (present in the audience) to approach the podium and acknowledge the assigned requirements for this business. Roty Dougherty & Josh Moldovan (owners) verbally acknowledged their understanding of enhanced ventilation, occupancy requirements and the other assigned Conditions of Approval, including the added Condition of Approval No. 10. They stated that they understood that they would have to return to the Hearing Officer for a new use permit if, in the future, they wanted additional seating to increase their occupancy requirements beyond the present 15 people.

Ms. Victoria Halan spoke in opposition to this request for competitive reasons stating that this request will be detrimental to the existing businesses in the area to have two (2) hookah lounges in the center. She has been a customer of the Red Sea Hookah Lounge which is located there. It is not beneficial to have two businesses in the same location.

Ms. MacDonald explained that there is no City restriction in the Code against having two businesses of the same nature in a specific center. Ms. Halan asked if the landlord could be contacted to see if there is some restriction in the lease because she did not feel it was right to have two businesses of the same type in the center. Mr. Abrahamson responded that this would be a civil matter which is dictated by the landlord. The number and contact information should be available on the Maricopa County tax website.

Mr. Michael Zdravec spoke in opposition to this request, stating that there is an overpopulation of tobacco use permits in this center. He presented a petition with over 200 signatures. He stated that this request would be in direct competition with the Red Sea Hookah Lounge and Its All Goodz (a smoke shop).

Mr. Clyde Buckstaff, representing the property owner(s), spoke in support of this request and noted that there was no exclusivity provision whatsoever in the center. He explained the long history of this property dating back to 1987. He acknowledged that the opposition to this request was a civil matter and, should they wish to pursue their opposition further, there was a process to be followed.

Mr. Greg Angelakis, father of the owner of the Red Sea Hookah Lounge, spoke in opposition stating that he was present when the lease was signed and that they were told a non-competitive clause exists. If it is not such a big deal, he would like the landlord to revisit his son's lease and adjust it accordingly.

Ms. MacDonald stated that it would not be appropriate for her to comment on the matter because, as Mr. Abrahamson pointed out, it is a civil matter and was between the landlord and his tenants. She does not have access to the lease information, nor does she need to, she explained, as her obligation was to review this request and decide if it meets the criteria for a use permit. She is limited to reviewing this criteria she noted and this application does meet those standards, which she outlined in detail. These standards do not address competitive interests at all.

It was noted, that per prior discussion, and at the request of the Tempe Fire Department, Condition of Approval No. 10 has been added to read: An occupancy inspection and clearance from the Tempe Fire Department shall be obtained prior to the use permit becoming effective. Both the applicant and business owner(s) acknowledged this addition and their intent to comply with that stipulation.

Ms. MacDonald did note that an appeal to the approval of this use permit can be made within 14 days (by February 1, 2011) to the Development Review Commission.

DECISION:

Ms. MacDonald approved PL100428 / ZUP10168 subject to the following conditions:

1. The use permit is valid for Sahara Nights Hookah Lounge and may be transferable to successors in interest through an administrative review with the Community Development Manager, or designee.
2. The use shall not violate the City of Tempe Smoking Ordinance or Smoke Free Arizona Act A.R.S. §36-601.01.
3. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
4. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective. Since smoking will be permitted on the premises, the owner/management is responsible to adhere to the 2003 International Mechanical Code.
5. Any intensification or expansion of the use shall require the applicant to return to the Hearing Officer for further review.

6. All rear exit doors require a lexan vision panel. Details to be approved through Building Safety Plan Review.
7. All doors shall have illumination to meet five (5) foot candles at the door and two (2) foot candles within a 15' radius. Details to be approved through Building Safety Plan Review.
8. All business signs shall receive a separate Sign Permit. Please contact Planning staff at (480) 350-8372.
9. The applicant shall contact the City of Tempe Crime Prevention Unit for a Security Plan. Contact Crime Prevention at (480) 858-6330 within 30 days of this approval, by February 18, 2011.
10. **An occupancy inspection and clearance from the Tempe Fire Department shall be obtained prior to the use permit becoming effective. ADDED BY STAFF**

7. Request by **FIESTA PLAZA – JAB FITNESS (PL100433)** (Brendon Spencer, applicant; Jamm Investments LLC, property owner) located at 7305 South Kyrene Road, Suite No. 112, in the GID, General Industrial District and SWOD, Southwest Overlay District for:

ZUP10169 Use permit to allow a fitness facility (boxing gym).

Mr. Brendon Spencer was present to represent this case.

Steve Abrahamson, Planning & Zoning Coordinator, gave an overview of this case and stated that no further public input has been received since the staff report was issued. He noted that the business will typically staff two (2) employees at any given time and will offer classes in boxing, kick boxing and personal training to small groups of 4 to 8 people.

Ms. MacDonald asked the applicant if he had applied for a sign permit. Mr. Spencer responded that he had not, that he had been unaware of this requirement. Initially the person assigned to completing the paperwork for this business lacked the awareness for the sign permit. Now that he is aware, he will apply for a sign permit. Ms. MacDonald noted the temporary signs currently located on the site need to be covered by a permit. Mr. Spencer stated that he would follow up on this issue.

Ms. MacDonald stated that this request meets the criteria for a use permit and that she felt this was a good location for this use.

Ms. Christine Zahn spoke and asked that a Condition be added that no fitness activities shall take place in the parking lot. There have been activities taking place in that area (parking lot and sidewalk) and she had asked the business that no workouts occur in the west parking lot and had been informed that this practice was going to continue. She stated that she was especially concerned after speaking with the landlord and discovering that the applicant had been given permission to hold workouts/boot camp activities outside. She further explained that while she is not adverse to the outdoor workouts, she just did not want them to occur in the west parking lot area.

Mr. Spencer returned to the podium. Ms. MacDonald noted that the adjacent businesses consider the outdoor activities in the west parking area to be disruptive. Mr. Spencer acknowledged that this topic had been discussed with the landlord and that he was told that he would have full use of the parking lot. He did not know why any activities might have occurred on the sidewalk area. Outside workouts include jogging around the parking area and he questioned whether this would be an acceptable activity. Ms. Zahn stated that she would find this acceptable as long as it did not occur in the west parking area.

Ms. MacDonald asked staff if there was a way to stipulate that outdoor workouts not occur in the west parking lot. Mr. Abrahamson responded, stating that a couple of things come to mind. The issue of outdoor workouts was not addressed in the applicant's letter of intent. The presence of clients in constant motion in the required parking area presents a huge liability issue because perhaps someone might be injured by a moving vehicle. Although the applicant may have the landlord's permission to do so, from the City's perspective this cannot be allowed within the required parking area.

Mr. Spencer indicated his willingness to work out this issue, stating that the outdoor activities did not occur in the actual parking spots but rather on the perimeter of the area. He stated that his business is covered by liability insurance, which premiums cover these activities in the outside area as well as indoor activities. He asked for suggestions as to how this issue can be resolved.

Mr. Abrahamson stated that since these outdoor activities were not addressed within the applicant's letter of intent, staff had not had time to review the possible implications and apparent safety issues including fire lane restrictions. This is a common sense liability issue, Mr. Abrahamson stated.

Possible language for an additional Condition of Approval was discussed. Mr. Abrahamson noted that the parking lot(s) were for the primary use of assigned parking and not for pedestrian activities. He further noted that he did not know the duration or time extent of these classes, however there is a nice trail located just east of this building that could possibly be utilized for outdoor workout activities.

Mr. Abrahamson suggested an additional Condition of Approval to read, "Recreational/fitness activities shall not take place in required parking."

Ms. Zahn spoke in opposition to this suggestion, noting that the parking spaces/assigned parking lots are full and she did not want them to be utilized in this manner. Clients are trying to access parking and are unable to do so, including the possible liability issue(s). She did not understand how this outdoor activity can be conditioned for approval due to those circumstance(s).

Mr. Abrahamson indicated that he would have to do some reviews of the Zoning and Development Code to adequately address this issue. That is why his concern is that these outdoor activities were not included in the letter of intent, so staff could adequately review them and issue a response.

Ms. MacDonald stated that by continuing this case it would give staff time to review with the different City departments how they viewed these outdoor activities in public spaces and parking areas.

Mr. Abrahamson stated that another issue that he would like to address with the applicant is that, in view of the fact that there are outdoor activities taking place, if that would affect the need for additional parking. Mr. Spencer responded that he felt this was incorrect as the outdoor activities taking place involved the same group of people already included in the shared parking analysis, not a separate group of people in addition to those individuals.

Mr. Spencer suggested that a use permit be approved for indoor use only, and that he would not have anyone working outside until an additional use permit for outdoor use can be reviewed. That way he could start his business.

Ms. MacDonald asked Mr. Abrahamson if adjusting the wording for this use permit limiting it to indoor use, and then have the applicant return for a use permit for outdoor activities.

Mr. Abrahamson stated that his was possible, however if the applicant wants to have an additional use permit, it would require an additional hearing for a separate use permit. He noted that the applicant has been operating without a use permit and that without an approved use permit the applicant is in non-compliance of the City regulations. His suggestion was that the applicant be allowed to continue to operate, and, rather than break this use permit into two (2) parts, return to the next hearing to consider the both the indoor and outdoor use issues.

Mr. Spencer explained that he does not want to operate in a non-compliant manner, but wants to get his business open and operating with an approved use permit. Mr. Abrahamson re-iterated that by continuing this request to the next hearing, staff would allow Mr. Spencer to continue to operate as he is currently (i.e. indoor activities) without any outdoor activities occurring during this period of time until review by staff.

Ms. MacDonald explained to the applicant that by processing his request in this manner (requesting both indoor and outdoor activities), it would not cost him any more in application fees. If he applied for an additional use permit to cover the outdoor activities alone, it would involve additional use permit fee(s).

Mr. Spencer responded that if he is unable to open, his costs are greater than what an additional use permit for outdoor activities would involve due to loss of business. Ms. MacDonald noted that he would be able to operate and open his business, continuing the indoor activities, until the use permit restrictions are resolved. Mr. Abrahamson stated for the record that this meant no outdoor activities are allowed until the issue is resolved at the February 15, 2011 hearing.

Mr. Spencer questioned whether this use would be approved at the February 15, 2011 hearing. Ms. MacDonald stated that this request meets all criteria for a use permit; that this use is in a good location and that no issue(s) regarding the indoor activities exist. The only issue appears to be the issue of outdoor activities. This continuance will allow the staff time to review the outdoor usage.

DECISION:

Ms. MacDonald continued PL100433 / ZUP10169 to the February 15, 2011 Hearing Officer hearing.

There will be no Hearing Officer public hearing on Tuesday, February 1, 2011.
The next Hearing Officer public hearing will be held on **Tuesday, February 15, 2011.**

There being no further business the public hearing adjourned at 3:03 PM.

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



Steve Abrahamson, Planning & Zoning Coordinator
for Vanessa MacDonald, Hearing Officer

SA:dm