

TOOELE CITY PLANNING COMMISSION MINUTES
October 12, 2016

Date: Wednesday, October 12, 2016
Time: 7:00 p.m.
Place: Tooele City Hall Council Chambers
90 North Main Street, Tooele Utah

Commission Members Present:

Chris Sloan, Chairman
Melanie Hammer
Phil Montano
Shauna Bevan
Russell Spendlove
Matt Robinson

Commission Members Excused:

Tom Poyner, Vice-Chairman
Ray Smart

Commission Members Absent:

Brad Clark

City Employees Present:

Rachelle Custer, City Planner
Jim Bolser, Public Works and Community Development Director
Roger Baker, City Attorney
Paul Hansen, City Engineer

Council Members Present:

Councilwoman Winn

Council Members Excused:

Councilman Pruden

Minutes prepared by Cami Cazier

Chairman Sloan called the meeting to order at 7:00 p.m.

1. **Pledge of Allegiance**

The Pledge of Allegiance was led by Commissioner Hammer.

2. **Roll Call**

Chris Sloan, Chairman

Melanie Hammer
Shauna Bevan
Phil Montano
Matt Robinson
Russell Spendlove

3. **Public Hearing and Motion on conditional use permit for a drive thru window to be located at 2400 North 400 East by Popeyes Chicken.**

Presented by Rachele Custer

This application is a request for approval of a Conditional Use Permit for approximately .8 acres located at 2375 North 400 East. The property is currently zoned GC General Commercial. The applicant is requesting that a Conditional Use Permit be approved to allow for the development of the currently vacant site as a restaurant with an accessory drive-thru window. The restaurant is a permitted use, however the accessory drive-thru window is a conditional use.

Staff recommends approval with the specified conditions, one being that lighting be directed down onto the site. No adverse impacts have been found as the neighboring properties are also general commercial and light industrial. The other conditions are:

1. That all requirements of the Tooele City Engineering and Public Works Divisions are satisfied throughout the development of the site and the construction of all buildings on the site, including permitting.
2. That all requirements of the Tooele City Building Division are satisfied throughout the development of the site and the construction of all buildings on the site, including permitting.
3. That all requirements of the Tooele City Fire Department are satisfied throughout the development of the site and the construction of all buildings on the site.
4. That all requirements of the geotechnical report are satisfied throughout the development of the site and the construction of all buildings on the site.

Chairman Sloan opened the public hearing. No one came forward. Chairman Sloan closed the public hearing at 7:03 p.m.

Chairman Sloan expressed concern that according to the map, the property seemed quite narrow, especially the entrance. Paul Hansen stated that the entrance width is typical for commercial developments. The minimum width required by the fire department is 26 feet; the subject property meets that requirement.

Commissioner Spendlove asked about the width of the area around the drive-thru, and if there was enough space to go around and by-pass the drive-thru. Mr. Hansen responded that the city requires a space around the drive-thru for emergency vehicles to get around if needed.

Chairman Sloan asked if the lighting so close to Highway 36 would present any issues to UDOT. Mr. Hansen responded that since the lighting will be directed down, there should not be any problems.

Commissioner Robinson moved to approve the Conditional Use Permit Request by Blair Jackson, representing Nujac UT, LLC for the restaurant with an accessory drive-thru, application number 2160680, based on the findings and subject to the conditions listed in the Staff Report dated October 12, 2016. Commissioner Bevan seconded the motion. The vote was as follows: Commissioner Hammer, “Aye,” Commissioner Spendlove, “Aye,” Commissioner Robinson, “Aye,” Commissioner Bevan, “Aye,” Commissioner Montano, “Aye,” and Chairman Sloan, “Aye.”

4. **Public Hearing and Recommendation on an ordinance amending the Tooele City Code Chapter 7-5 regarding conditional uses, eliminating the board of adjustment, and referring land use appeals to the administrative hearing officer.**

Presented by Roger Baker

This effort began as an examination only of Chapter 7-5 of the City Code, regarding conditional uses. Training has been received by the staff and the Commission over the years regarding appropriate standards for conditional uses. As Ms. Custer mentioned earlier, the most important thing the Commission looks for is adverse impacts of the conditional use. A conditional use is a permitted use, something that is allowed. If adverse impacts are found that will affect neighboring properties, reasonable conditions are allowed to be imposed to mitigate those adverse effects. Those conditions must be contained in the standards in the Code and then the conditional use must be approved, subject to those conditions. The wording of the conditions imposed is also important. Many conditional use ordinances around the country and in the state have attempted to achieve lofty design standards by requiring that new uses be compatible with existing uses. The problem is that the courts are not able to define what the word compatible means. Therefore, courts have struck down ordinances that require compatibility because there is no legal definition of compatible. Other words that offend the courts as being unconstitutionally vague include harmonious, desirable, and consistent. States and municipalities have been encouraged to examine their ordinances for subjective words and replace them with more objective definable standards. The purpose of this ordinance is to clean it up so that it is more understandable to the development community and the City staff, who have to interpret and apply the Code. It creates a better system for all involved.

Looking at the conditional use chapter, the role of the board of adjustment was brought up as an appeal authority in the City Code. In 2005, the state legislature through House Bill 60 changed the Land Use Development and Management Act, called LUDMA, and introduced the concept of an appeal authority. An appeal authority is anyone authorized to hear appeals. There are different appeal authorities for different cases, depending on the Code. Having elected officials also serve as judges can create separation of power issues, which they try to avoid. Conflicts may also arise within the Planning Commission since they approve land use applications and

also hear appeals on some of those applications, like with conditional use revocations. In 2005, one of the recommendations of the legislature was that municipalities move away from boards of adjustment as an appeal authority and move in the direction of an administrative law judge, someone who is tasked to understand the development process. The appeals of those type of administrative decisions would go to the administrative law judge. To have an administrative law judge, you have to have specific procedures in the Code that describe how an appeal is to be brought, what it must contain, how the hearing will be conducted, what the burden of proof is and who bears it, what standard of evidence the judge will require before they can make a decision, and what findings of fact and conclusions of law are necessary to support that decision. These kinds of procedural guidelines were never provided for boards of adjustment. In the past, the board of adjustment has been made up of five community people with no training in handling appeals. The trend has been to migrate away from lay appeal authorities and boards toward an administrative law judge or hearing officer who has specific guidelines in the Code and specific legal training, which Tooele City has. Chapter 1-28 is the administrative hearing officer chapter. Looking at the Code, it was discovered that many different types of appeals were routed to the board of adjustment. Appeals regarding land use, zoning, amendments to the general plan, amendments to the zoning map, conditional uses, condominiums, building permits, and other issues. This is a lot to ask of a lay board with no legal training. Mr. Baker is recommending to the Planning Commission and City Council that for the public, for the development community, and for the City, a better appeal mechanism is to take appeals to the administrative hearing officer rather than to a board of adjustment. The City Administration is recommending that the board of adjustment be eliminated. It may seem like a big step, but Mr. Baker feels that it is a natural and logical step.

There is one provision in the recommendation that involves the Planning Commission. Currently in the City Code, the Planning Commission is the appeal authority in the case of a conditional use permit revocation appeal. They are also the body who approves conditional use permits. The Planning Commission is the appeal authority if the staff moves to revoke a conditional use permit. The appeal of that revocation is brought before the Planning Commission. This has potential for problems and has the cumbersome aspect of making it a public hearing appeal, which can become a public spectacle instead of a legal proceeding. Legal proceedings should not become public spectacles. Mr. Baker does not believe that this is an appropriate way to conduct an appeal. People deserve their full due process, and can receive it in a more private setting with a judge. This change removes one of the duties of the Planning Commission; however, in his 22 years as City Attorney, there has only been one instance of a public hearing appeal of a conditional use permit revocation.

The City Council has been made aware of this change, and is favorable to it. With the Planning Commission's favorable vote, the issue will be brought before the City Council next week. Mr. Baker asked for questions from the Planning Commission.

Chairman Sloan asked Councilwoman Winn if the City Council had any concerns over this ordinance. She didn't recall any concerns. Chairman Sloan agreed that a lay appeal board without training is a bit scary.

Mr. Baker emphasized that this change was no reflection on the current board of adjustment. They have served well and intelligently. One of the problems has been the infrequency of hearings, and they've had a hard time maintaining a board of people trained on the issues. An administrative hearing officer, however, has the Code, knows what appeals are coming to him, and has a day set aside every month to handle whatever types of appeals come before him.

Mr. Bolser added that he and Mr. Baker attended land use training recently, and one of the sessions dealt specifically with conditional uses. He said that they are now being counseled from a legal standpoint that they can't deny a Conditional Use Permit, but rather should impose reasonable conditions under the guidelines that Mr. Baker mentioned, approving the conditional use subject to those conditions. If the applicant cannot meet those conditions, it's on them.

Chairman Sloan pointed out that the previous issue tonight regarding the conditional use permit for a drive-thru was a good example of this process. As long as the lighting didn't bother neighboring properties or the highway, there wasn't any adverse impact.

Mr. Baker added that the legal advice received at their training said that if there were many concerns with certain conditional uses, and it was denied or had many conditions imposed, then perhaps it should be considered to prohibit those types of conditional uses altogether.

Commissioner Montano stated that after reading over these changes several times, he is greatly disturbed by them. Specifically, he struggled with the verbiage on page 2, chapter 3, where it stated "the trend among Utah" because he does not believe that changes should be made just because it is the trend. Also, he was unsure about the role of the hearing officer and how the review of district court appeals would be handled.

Mr. Baker responded that in the City Code, it tells the administrative hearing officer the following: the procedure that he has to follow for appeals, who gets to go first, what kind of evidence, the parties exchanging evidence, what kinds of briefings or papers, the burden of proof, how much evidence is required and who has to produce it. The hearing officer has to follow the law and make sure that the appeal is supported by enough evidence to convince a reasonable person that it was a correct decision. Regarding district court appeals, if an ordinance isn't written carefully to include what is going to happen at the district court, then the applicant can demand a new hearing in front of the district court judge regarding his conditional use permit. Mr. Baker does not think it is appropriate for people to be able to get approval on their land use decisions from a judge. That's what the Planning Commission and City Council does. The subject ordinance says that the judge does not have a new trial or new hearing. The judge takes the record that the Commission gives the judge, along with the minutes, exhibits, packets, and comments. The judge then looks at all the evidence and decides if there is enough to support the Commission's decision.

Commissioner Montano went on to say that he also struggles with the paragraph that says that the city administration is largely untrained and inexperienced, and is difficult to assemble. Commissioner Montano believes that to abolish that is a poor excuse, and the administration needs to do a better job at it. He also believes that while training is good, it may not always be the best way to be fair. Commissioner Montano also struggles with the term "due process." He

believes that if the adjustment committee is taken away, then due process is being taken away as well. He also believes that every day, Americans lose rights, and it needs to stop. He encouraged his colleagues to understand his reasons for not voting in favor of these changes.

Mr. Baker respected the idea that the board of adjustment is similar to a jury, and a hearing officer is more like a judge. With a jury however, they never decide the law; they only decide what happened, the facts. Only the judge decides the law, similar to a hearing officer. Therefore, a hearing officer gives better due process because they have been trained in the law. This isn't a case of right or wrong, but rather of good and better, of trying to find the best way to provide due process and hear appeals. Mr. Baker believes the scales tip in favor of the hearing officer.

Mr. Bolser added that in his career experience, there is a stark difference between the decision being made and the appeal of those decisions as far as the standard of review. With regards to training, there is an anticipation anytime going before a Planning Commission or City Council for a decision that those bodies are laymen. However, with an appeal, the legal bar has been raised and training becomes very important. He agrees with Mr. Baker that this is a very positive step for fairness and applicant's rights. This way, the appeals process is handled by people who know the law and are trained how to do it properly.

Commissioner Montano respects and understands the appeals process. However, he believes that many times they get "tunnel vision" and only do things the way they've been trained. For example, the Planning Commission allowed American Burger to extend their building closer to Main Street. They did a great job and it looks very nice. Also, they allowed the communications building on 1st East to encroach on the sidewalk to do landscaping, which looks very nice. Commissioner Montano's point is that these situations were handled on a case by case issue. He believes that the Commission should always have an open mind and be sure to give every case their due process. He added that he prefers the use of a board because all members of the board will bring their own points of view and one member may say they don't like something whereas having a single person issuing these decisions you only have one point of view.

Chairman Sloan responded to Commissioner Montano that neither of his examples were products of an appellate process. If that process had been needed, Chairman Sloan believes that it is better to have someone else with knowledge of the law to handle it.

Commissioner Robinson stated that the mention of due process being taken away is not correct. It's just transferred from a body to an individual.

Mr. Baker agreed and added that the type of due process is more clearly explained and laid out so that everyone knows what their due process is.

Commissioner Hammer asked if the administrative hearing officer was a member of the staff.

Mr. Baker responded that the officer is appointed by the City Council and has to meet certain criteria, such as live in Tooele and have a certain amount of training and education. They don't

have to be a lawyer, but local lawyers are always solicited for this position as they know the law better. They are retained by contract and not employed by Tooele City.

Mr. Bolser responded back to Commissioner Montano's issue of power being transferred from a body of people to one person. He said that the standard of legal review in an appeal process is very different from the duties of the Planning Commission and added that in the case of an appeal the issue of liking nor not liking something is outside of the scope of that review and it's a matter of whether or not the decision was reached appropriately and not whether or not they agree with the decision so a legally trained appeal authority as outlined in this proposal, even as a single person, actually provides an increased level of fairness to the applicant.

Commissioner Spendlove added that currently a Conditional Use Permit can be denied and then appealed to people who are not aware of the situation or law. This doesn't seem like a fair process. He believes that a better trained person would be more appropriate to handle the process.

Mr. Baker agreed that the Commission and City Council shouldn't make important policy decisions because everyone else is making them. He believes that instead of using the word "trend", it should have been written that the legal minds in the state legislature and in the municipal associations are recommending that an administrative hearing officer is the better way to go than boards of adjustment.

Chairman Sloan opened the public hearing. No one came forward. Chairman Sloan closed the public hearing at 7:45 p.m.

Chairman Sloan moved to forward a positive recommendation of the ordinance.

Commissioner Hammer seconded the motion. The vote was as follows: Commissioner Hammer, "Aye," Commissioner Spendlove, "Aye," Commissioner Robinson, "Aye," Commissioner Bevan, "Aye," Commissioner Montano, "No," and Chairman Sloan, "Aye."

5. **Review and Approval of Planning Commission minutes for meeting held September 28, 2016.**

Commissioner Hammer moved to approve the minutes for the meeting held September 28, 2016. Commissioner Bevan seconded the motion. The vote was as follows: Commissioner Hammer, "Aye," Commissioner Spendlove, "Aye," Commissioner Robinson, "Aye," Commissioner Bevan, "Aye," Commissioner Montano, "Aye," and Chairman Sloan, "Aye."

6. **Adjourn**

Chairman Sloan adjourned the meeting at 7:47 p.m.

The content of the minutes is not intended, nor are they submitted, as a verbatim transcription of the meeting. These minutes are a brief overview of what occurred at the meeting.

Approved this 26th day of October, 2016

Chris Sloan, Chairman Tooele City Planning Commission