

# Minutes HEARING OFFICER OCTOBER 16, 2012

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 Diana Kaminski, Senior Planner

### Number of Interested Citizens Present: 9

Meeting convened at 1:30 PM and was called to order by Ms. MacDonald. She noted that anyone wishing to appeal a decision made by the Hearing Officer would need to file a written appeal to that decision within fourteen (14) days, by October 30, 2012 at 3:00 PM, to the Community Development Department.

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- 1. Ms. MacDonald noted that the Hearing Officer Minutes for October 2, 2012 had been reviewed and approved.
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- 3. Request approval for a Use Permit to allow a massage establishment for WELLSPRING HOLISTIC HEALTH, located at 430 West Warner Road, Suite 104. The applicant is Ben Zorensky.

Ben Zorensky, BEZ LLC. was present to represent this case.

Steve Abrahamson introduced the case. Wellspring Holistic Health is requesting a Use Permit to allow a massage establishment located at 430 West Warner Road, Suite 104 in the Warner Professional Plaza. The center is a group of four massage therapists and wellness professionals. Staff has not received any public input. Staff is requesting approval of the Use Permit.

Mr. Zorensky agreed to the conditions of approval.

There was no public input.

Ms. MacDonald noted that this request meets the criteria for a Use Permit:

- 1. Traffic generated by this use should not be excessive.
- 2. It won't create a nuisance resulting from odor, dust, gas, noise, vibration, smoke, heat or glare.
- 3. It won't contribute to the deterioration of the neighborhood.
- 4. It is compatible with existing surrounding structures and uses.
- 5. Will allow you to adequately control disruptive behavior both inside and outside the property.

#### **DECISION:**

Ms. MacDonald approved the Use Permit for PL120308/ZUP12086 subject to the following conditions:

- 1. The Use Permit is valid for Wellspring Holistic Health and may be transferable with approval from the Hearing Officer staff. Should the business be sold, the new owners must contact the Hearing Officer staff for review of the business operation.
- 2. All business signs shall be Development Plan Review approved and permits obtained.
- 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. Obtain all necessary clearances and permits for the occupancy from the Building Safety Division.
- 5. All required State, County and Municipal permits shall be obtained or the Use Permit is void.
- 6. All required permits and clearances shall be obtained from the Audit and Licensing Division of the City of Tempe prior to the Use Permit becoming effective.

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2. Review of compliance with conditions of approval for a Use Permit to allow a retail smoke shop and live indoor entertainment for MIDNIGHT HOOKAH, located at 1630 East Apache Boulevard, Suite 103-104. The applicant is Nader Yousif.

# REVIEW OF COMPLIANCE WITH CONDITIONS OF APPROVAL BY THE HEARING OFFICER AT THE MARCH 20, 2012 HEARING.

# **CONTINUED FROM SEPTEMBER 18, 2012**

Ms. MacDonald stated this is a review from the March 20, 2012 hearing. Conditions of approval were imposed on Midnight Hookah. One of the conditions was to return to the Hearing Officer to see how they have complied with the conditions of approval.

Lynne Lagarde, Attorney from Earl, Curley & Lagarde, representing Nader Yousif, owner of Midnight Hookah was present to represent this case.

Diana Kaminski introduced the case. Midnight Hookah is located on the north side of Apache Boulevard just west of McClintock Drive. It is an existing commercial center that would allow a variety of retail uses. All of the suites are currently empty with the exception of Midnight Hookah. This is a review of the conditions of approval. The staff report includes information provided by the Police Department as well as comments received from the public.

Ms. MacDonald stated the applicant received their Use Permit in September 2011. On March 20, 2012 the applicant came back to the Hearing Officer for review of compliance with the conditions of approval of the Use Permit. At that time several of the conditions had not been met. An additional six months was granted to establish a credible pattern of business operations. Ms. MacDonald asked staff for a review of the second six month review period of operation from March 2012.

Ms. Kaminski stated between March 25<sup>th</sup> and September 4<sup>th</sup>, 2012 the Police Department indicated there were calls for service for loud music complaints between 2:00 – 2:23 a.m. on Sundays and Fridays after hours. There was a trespass call for a threat with a gun. There were officer initiated calls regarding loitering, altered state of consciousness, drinking in the parking lot, smoking outside and warrants for arrest. Since March, police have made 10 arrests at Midnight Hookah.

On August 16, 2012 the Police Department observed the following activities during a check on the property: The security guard at the door checking IDs did not have readily identifiable attire as security per Security Plan requirement. The security guard did not leave the door to inspect the parking lot. There was a lot of behavior in the parking lot that indicated possible drug or alcohol related activity outside of the business. There was loitering in the parking lot and no signage posted to prevent loitering. Music was heard greater than 100 feet away from the business. The security guard was smoking with customers within five to seven feet from the entrance which is a violation of the smoking law.

On August 25, 2012 the Police Department noticed 15 individuals hanging out in the parking lot. People were smoking on the sidewalk, outside adjacent to the building. The security guard was not clearly identifiable. The Police Department has met with the owner to review the Security Plan. The business owner is working on bringing these items up to compliance within the requirements of the Security Plan.

On September 8, 2012 Commander Hale noticed that the entire parking lot was filled. The parking lot consists of 67 parking spaces. The business is required to have occupancy of no greater than 49 patrons. There were approximately 15 cars parked along the front curb blocking the fire lane. There was only one security guard located at the front of the business. The security guard was standing with about 12 patrons outside. The commander went inside and counted approximately 80 people which is in excess of the occupancy allowance. There was also a welfare check for someone that was dizzy and bleeding from the mouth on September 16, 2012.

Staff has received a few calls and several emails and provided them in the staff report primarily regarding the loud music after hours in violation of the hours of operation. Someone also indicated there have been parking problems in the adjacent business to the extent that cars have been towed. An email received today indicated there were noise complaints over the weekend as late as 2:25 a.m. The music is supposed to be off at 1:55 a.m.

Ms. MacDonald stated some of the conditions of approval have been met by the applicant.

Ms. Kaminski reviewed the conditions of approval that Staff believes Midnight Hookah is not in compliance with.

- 4. 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. There have been thirteen citizen-initiated complaints since the last hearing. This hearing fulfills the requirement of the condition, verifying complaints and re-evaluating the appropriateness of the uses.
- 6. The applicant shall contact the City of Tempe Crime Prevention Unit for a security plan within 30 days of this approval. This condition has been met; implementation has not been met.
- 8. The business hours of operation shall be Sunday through Thursday 5pm to 1am, with music off at midnight, and Friday through Saturday, 7pm to 3am, with live entertainment to stop at 1:55am. The applicant agreed to these hours of operation as a part of the use permit, yet has a sign in the window stating they are open until 4am. The sign has been removed since a meeting held on October 2, 2012. There have been five calls regarding loud music after 2am on Sundays and Fridays. An email indicated loud music playing until 4 and 5 am as recently as 10/7/12.
- 13. Any intensification or expansion of use shall require a new Use Permit. The building safety occupancy of this building is II-B, allowing 49 occupants for the total space. A website flier for Midnight Hookah advertises "up to 250 occupancy"; this would be an intensification of use to a banquet hall or nightclub, requiring a different occupancy type (assembly) for building safety. The Certificate of Occupancy is supposed to be prominently placed at the entrance and security staff is to adhere to the occupancy limits posted. The parking lot for 1630 has 67 spaces, which should adequately accommodate the 49 person occupancy of this space. There are no other businesses within the center at this time.
- 15. This use shall not violate the City of Tempe Smoking Ordinance or Smoke Free Arizona Act A.R.S. §36-601.01. A police report indicated patrons smoking hookah outside, next to the main entrance of the establishment, this is a violation of smoking laws. Any night that the occupancy of the building has exceeded 49 people would also be a violation of the state statute. This condition has not been met.
- 16. The owner/management shall adhere to the City Adopted International Mechanical Code. This condition has not been met; the air handling system is not large enough for the number of patrons advertised to occupy the space.
- 19. An occupancy inspection and clearance from the Tempe Fire Department shall be obtained prior to the Use

Permit becoming effective. This condition was met at the time of opening, but has been violated since last year.

20. Use Permit approval is for a Retail Tobacco Store (Hookah Lounge) with live entertainment, not a nightclub. Reduce the volume level of the background music within the Hookah Lounge, and provide sound insulation to the interior of the structure to mitigate excessive noise. The sound insulation was added, per condition. Loud noise complaints continue to be called in on different nights of the week. This condition has not been maintained.

Ms. MacDonald noted the occupancy and the Mechanical Code requirements are related. The occupancy of 49 people is relevant to the air handling system for proper ventilation of the Hookah Lounge.

Ms. Lagarde introduced Nader Yousif, the owner of Midnight Hookah and Joseph Johnson, the contractor for Midnight Hookah. Ms. Lagarde explained there was a misunderstanding related to the main compliance issue which is occupancy. The issue was not clear until the meeting on October 2, 2012 with Ms. Kaminski, the Building Safety Department, Fire Department, and Police representatives. Mr. Yousif and Mr. Johnson were under the false impression that the occupancy was 49 patrons per suite. The City plans clearly show that the total occupancy is 49 for the entire space. The business has been operating under the misunderstanding of the occupancy. It was indicated the architect did not communicate what had been approved.

After meeting with Mr. Williams in Building Safety, Ms. Lagarde indicated they were given two options: They could use the entire space for 49 people or reconstruct the firewall and conduct two separate businesses. The firewall could be reconstructed without a great deal of difficulty. Plans could be submitted to the City by the end of the week. In order to have a hookah lounge in the second suite another Use Permit would be necessary. Mr. Yousif would like to move forward with a second suite and a restaurant in the building.

Ms. Lagarde further explained that the conditions regarding the hours of operation are well understood now. The security guards have been given shirts so they can be identified. The security guards have also been given additional instructions for patrolling the parking lot. The enforcement of patrons in the parking lot is going to be difficult to enforce. People may step outside to take a phone call or smoke a cigarette. There is an understanding that the behavior outside needs to be controlled. Three no loitering signs have been posted. The occupancy sign is in the main hookah lounge area. The type of entertainment that occurred on Thursday nights has been eliminated. Mr. Yousif recognizes what the rules are now to run a business that is compliant. Maintenance personnel have been hired to take care of the litter problem. The noise problem has been difficult to address. Mr. Yousif indicated the music is turned down and the disc jockey stops at the appropriate time. There have still been reports of loud music. Mr. Yousif recognizes he has a limited period of time to prove to the City that he can operate in compliance.

Ms. MacDonald stated Mr. Yousif has had a year to bring his business into compliance. The issues should have been resolved by now. In this case the issues have increased.

Ms. Kaminski stated the Use Permit was granted in March 2011, due to construction delays the certificate of occupancy was issued in September. The first six month review did not start until September 2011.

Ms. Lagarde indicated most of the issues are due to the occupancy misunderstanding. Mr. Yousif is clear on what needs to be done now. Staff has recommended a continuance until December followed by a revocation process. Mr. Yousif would like to get the business into compliance quickly. He plans to submit plans to get the wall installed and submit for a second Use Permit. He also wants to control the noise and the behavior in the parking lot.

Chuck Buss, Tempe resident lives in the neighborhood behind Midnight Hookah. He is also the Chair for the University Heights Neighborhood Association. He stated there are after hours noise complaints regarding the loud music, several people hanging out in the parking lot, and parking issues. He does not feel the establishment is ran the way it should be. The business looks and sounds like a hip-hop nightclub.

Carl Leggett, Tempe resident lives in the neighborhood behind Midnight Hookah. He stated the loud music is still playing at the establishment after 3:00 a.m. and the parking lot is still full. This is a routine occurrence for Midnight Hookah.

Ms. Lagarde stated the type of entertainment being offered on Thursday night has been discontinued. There has been noncompliance. Mr. Yousif is asking for the opportunity to comply now that he understands the rules. The live music is required to stop Sunday – Thursday at 1:00 a.m., Friday – Saturday at 1:55 a.m. Music can still play after those times at a lower level. The music will need to be played lower so it does not impact the neighborhood. The business closes at 3:00 a.m. but sometimes it takes people a while to clear out of the parking lot.

Ms. MacDonald asked for an explanation regarding a sign in the window at Midnight Hookah advertising the business hours of operation open until 4:00 a.m. This disregards the conditions of approval.

Ms. Lagarde stated they originally wanted the business to be open until 4:00 a.m. The sign should have been taken down.

Ms. Kaminski noted condition #8 The business hours of operation shall be Sunday through Thursday 5 p.m. to 1 a.m., with music off at midnight, and Friday through Saturday, 7 p.m. to 3 a.m., with live entertainment to stop at 1:55 a.m. All of the bars in Tempe are required to stop live entertainment at 1:55 a.m. The last hour of operation would be a winding down period, not an after-hours club.

Ms. MacDonald stated she carefully reviewed all of the information provided by the City of Tempe and the history of the business. This applicant has failed to make a good faith effort to follow the rules. The misunderstandings apply to critical parts of the business. The conditions of approval for the occupancy and hours of operation have been completely disregarded. The Security Plan was not implemented. The control of behavior in the parking lot was nonexistent. There was a conflict with the Mechanical Code and the occupancy level. One of the most notable violations was the overcrowded parking lot with the fire lane blocked, and overflow parking. That is a threat to the public health, safety and welfare. The hot coals and combustible materials used in the business are flammable products. Based on the track record, it would not be prudent for the City to allow this business to continue.

Ms. MacDonald reviewed the criteria for a Use Permit:

The manner of conduct and the building for the proposed use will not be detrimental to persons residing or working in the vicinity to the adjacent property, to the neighborhood, or to the public welfare in general.

This business has affected the wellbeing of the neighbors and the public welfare in general. Safety measures are not being followed.

- 1. Does this business create a significant increase in vehicular or pedestrian traffic?

  The parking on site and the occupancy has increased the traffic for this center.
- 2. Does this business create a nuisance arising from the emission of odor, dust, gas, noise, vibration, smoke, heat or glare?

Based on testimony from the Police Department and the neighbors it does create a nuisance. The noise, vibration and outdoor smoking have not been controlled.

- 3. Does it contribute to the deterioration of the neighborhood or downgrade of property values?

  This business does contribute to the deterioration of the neighborhood and downgrade of property values.
- 4. Is it compatible with existing surrounding structures and uses? It is not compatible with surrounding structures and uses.
- 5. Is there adequate control of disruptive behavior both inside and outside the premises which may create a nuisance to the surrounding area?

There has not been control of behavior inside or outside the premises.

# **DECISION:**

Ms. MacDonald authorized the Zoning Administrator to initiate the revocation process. The applicant has not met the conditions of the Use Permit approval as outlined. Due to the threat to the public health, safety and general welfare the revocation hearing will be held on November 7, 2012.

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4. Request approval for a Use Permit to allow a hookah lounge for ALMAZA HOOKAH LOUNGE, located at 107 East Baseline Road, Suite A-3. The applicants are Jack and Mary Narsa.

Jack and Mary Narsa, Almaza Hookah Lounge, LLC were present to represent this case.

Steve Abrahamson introduced the case. The applicant is requesting a Use Permit for a hookah lounge at 107 East Baseline Road, Suite A-3. This is located at the south east corner of Mill Avenue and Baseline Road in the Mill Towne Center. The request is for a hookah lounge with an occupancy of 49 patrons. The applicant has not requested a Use Permit for live entertainment. The letter of intent mentions live entertainment in the form of pool tables. The floor plan indicates there are up to or above 70 seats in the establishment with an occupancy of 49. This is a concern that needs to be discussed with the applicant. Staff is not making a recommendation for approval or denial.

Ms. Narsa stated at the time of submitting the Use Permit Application they were trying to include everything that could potentially be included in the business. It has been brought to their attention that two Use Permits will be necessary for the business, one for the hookah lounge and one for entertainment. At this time the applicants would like to open the lounge and provide hookah service. Entertainment will be evaluated at a future time and they will apply for a second Use Permit at that time. Regarding the occupancy, there is no air handling system at the location. An architect and a mechanical engineer have been retained to install the equipment. Based on the plans the occupancy will allow up to 70 people. Plans have been submitted to the Building Safety Department that include the calculations for occupancy. The applicant is willing to modify the application if needed to correlate with the plans.

Ms. MacDonald noted the discrepancy between the occupancy of 49 and seating of about 75 people for the establishment. Renting the space would require an additional permit for events. Pool tables could require an additional permit creating a billiards space depending on the number of pool tables. All of the elements need to be addressed at the appropriate time. The hours of operation also need to be addressed. Ms. MacDonald would like the applicant to return in a few weeks after the recently submitted building plans have been reviewed by staff.

Ms. Narsa agreed to return at a later date. She also agreed to follow all of the codes and regulations required.

THIS CASE WILL BE CONTINUED TO NOVEMBER 7, 2012 BY THE REQUEST OF THE HEARING OFFICER.

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5. Request approval for a Use Permit to allow a dust collector for COMTECH BUILDING 3, located at 2126 West 7<sup>th</sup> Street. The applicant is Mike Hall, Michael Hall Architect.

THIS CASE WILL BE CONTINUED TO NOVEMBER 7, 2012 BY THE REQUEST OF COMMUNITY DEVELOPMENT STAFF.

The next Hearing Officer public hearing will be held on November 7, 2012.

There being no further business the public hearing adjourned at 2:55 PM.

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Prepared by: Julie Stennerson, Executive Assistant

Reviewed by:

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

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