

**Date** February 13, 2012

Request from Ryan Howell, President of the Sherman Hill Neighborhood Association, to speak regarding the Board of Adjustment's decision regarding sale of liquor at the QuikTrip, 1421 Ingersoll.

Moved by \_\_\_\_\_ to

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				

**CERTIFICATE**

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

MOTION CARRIED APPROVED

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

**CITY ATTORNEY**

Jeffrey D. Lester

**DEPUTY CITY ATTORNEYS**Mark Godwin  
Lawrence R. McDowell  
Kathleen Vanderpool**ASSISTANT CITY ATTORNEYS**Angela T. Althoff  
Roger K. Brown  
Ann M. DiDonato  
David A. Ferree  
Glenna K. Frank  
Gary D. Goudelock, Jr.Michael F. Kelley  
Vicky L. Long Hill  
Steven C. Lussier  
Katharine J. Massier  
Carol J. Moser  
Douglas P. Philip

February 9, 2012

HONORABLE MAYOR AND MEMBERS  
OF THE DES MOINES CITY COUNCIL

Re: Item 48 on the City Council Agenda for February 13, 2012; Conditional Use Permit issued by the Zoning Board of Adjustment to allow the sale of alcoholic liquor by the Quick Trip at 1421 Ingersoll Avenue.

SUMMARY

Carlton Landing, LLC, applied for a conditional use permit to allow the sale of alcoholic liquor at the QuikTrip at 1421 Ingersoll Avenue. The application was considered by the Zoning Board of Adjustment at its meeting on December 21, 2011. The Board voted 4 to 3 in support of a motion to deny the application. At that time, it appeared the motion had passed and the Board took no further action on the application. However, it was subsequently determined that the vote cast by Jason Clayton in favor of the motion was void because he was automatically removed from office prior to the meeting when he relocated his residence to West Des Moines. Under those circumstances, the motion to deny the application actually failed upon a vote of 3 to 3 by the remaining members of the Board. In the absence of further action by the Board, there was no valid final decision to either deny or approve the application.

By the time the above circumstances became known to the City Legal Department, it was also clear that these circumstances were known by the applicant's attorney and would be used by the applicant to challenge the Board's decision. The Legal Department recommended that the Board reconsider the application at its next meeting to allow a valid final decision to be made. The Board reconsidered the application at a hearing held at its next meeting on January 25, 2012. At the conclusion of that hearing, the six remaining members of the Board voted 4 to 2 in support of a motion to approve the application.

The decision of the Board to approve the application for a conditional use permit was memorialized in a written decision filed January 31, 2012. Any party aggrieved by that decision, including the City, has until March 1, 2012, to file a petition in the District Court challenging the lawfulness of that decision.

DISCUSSION

A change to Iowa Code §123.30(3)(e)(1), which became effective July 1, 2012, repealed the longstanding prohibition against the issuance of a Class E Liquor Control License to any

premises at which gasoline is sold. This change in the law allowed Iowa gas stations and convenience stores which sell gasoline to seek a Class E Liquor Control License to sell liquor for off-premises consumption. In response to this change in the Iowa law, the City of Des Moines amended its Zoning Ordinance to further restrict the allowed location of businesses engaged in the sale of alcoholic liquor.

At this time, gas stations/convenience stores in the City of Des Moines are eligible to seek a Class E Liquor Control License in the "C-2", NPC and less restrictive districts, subject to compliance with the following conditions set forth in Section 134-954 of the Zoning Ordinance:

Allowed subject to receipt of a conditional use permit from the board of adjustment as provided in [Section 134-954(b)]; subject to a 150 foot separation from any church, school, public park or licensed child care center as defined by I.C. ch. 237A; and, subject to no more than 40% of gross receipts being from the sale of liquor, wine, beer or tobacco products. However, the separation requirement is not applicable in the C-3, C-3A, C-3B, C3-R and D-R downtown riverfront district.

Carlton Landing, LLC, applied for a conditional use permit to allow the sale of alcoholic liquor at the QuikTrip at 1421 Ingersoll Avenue. The store was already authorized to sell beer and wine for off-premises consumption, and the applicant agreed that no more than 40% of its gross receipts would be derived from the sale of liquor, wine, beer or tobacco products. The Community Development Department determined that the property at 1421 Ingersoll Avenue is zoned "C-2" and is located more than 150 feet from any church, school, public park or licensed child care center. Under these circumstances, Zoning Board of Adjustment is required to approve the conditional use permit if it first determines that the use of the property at 1421 Ingersoll Avenue would conform with the criteria set forth in Section 134-954(b) of the Zoning Ordinance.

The application for a conditional use permit was initially considered by the Zoning Board of Adjustment at its regular monthly meeting on December 21, 2011. The minutes of that meeting show that at the conclusion of the public hearing on the application, a motion was made and seconded to deny the conditional use permit. The vote was 4-3 in support of the motion, with Jeffrey Clayton voting with the majority. When the vote was taken, it was believed that the motion had passed and the Board proceeded to consider the next item on its agenda. It was later learned that Jeffrey Clayton was not eligible to vote as a member of the Board of Adjustment on December 21st, and his vote in support of the motion to deny the application should not have been counted. As a result, the motion to deny the application actually failed on a vote of 3 to 3, and no final action was taken by the Board on December 21, 2011, to either approve or deny the application.

Jeffrey Clayton was not eligible to vote as a member of the Board of Adjustment on December 21, 2011, because he ceased to be a resident of the City of Des Moines prior to that meeting. The following language in Section 2-1049 of the Des Moines City Code generally requires that all members of City boards, committees, commissions and agencies maintain their residency in the City of Des Moines. None of the exceptions to this requirement were applicable to Mr. Clayton.

**Sec. 2-1049. Residency requirements.**

(a) For the purposes of this section, the term "residence" shall mean the actual domicile of a person where he or she normally eats and sleeps and maintains the normal personal and household effects necessary for day-to-day living. The term "residence" shall not include a place secured solely for the purpose of meeting the requirements of this section which is maintained in addition to the person's actual place of residence outside the city.

(b) Except as otherwise specifically provided in this Code or by statute, **each appointed member of each city administrative or advisory board, committee, commission or agency shall maintain his or her residence in the city during the member's entire term of office.**

(c) **If any such member moves out of the city during the member's term of office, he or she shall automatically cease to be a member** of the administrative or advisory board, committee, commission or agency, and his or her successor shall be appointed for the unexpired portion of the term. Any member of an administrative or advisory board, committee, commission or agency shall inform the city clerk as soon as he or she ceases to be a city resident.

...

Mr. Clayton signed an Application for Homestead Tax Credit on October 18, 2011, wherein he stated under oath that he was then a resident of the City of West Des Moines. Pursuant to Section 2-1049(c) of the Des Moines City Code highlighted above, Mr. Clayton "automatically" ceased to be a member of the City Zoning Board of Adjustment the moment he became a resident of West Des Moines. Since Mr. Clayton was no longer a member of the Board of Adjustment when he sat with the Board at its December meeting his vote in support of the motion to deny the conditional use permit cannot be counted in determining whether that motion passed or failed. As a result, the motion failed on a vote of 3 to 3 by the remaining members of the Board. One might argue that the application failed by operation of law, because it takes four affirmative votes for the Board of Adjustment to approve the application. I.C. 414.14. However, the Board never reach that conclusion on December 21st, because it thought it had passed an affirmative motion to deny the application.

At this time we can only speculate on what might have occurred if Jeffry Clayton had not participated in the Board's consideration of the application for a conditional use permit to allow the sale of alcoholic beverages at 1421 Ingersoll Avenue on December 21, 2011. What is certain is that the motion made on December 21st to deny the application failed on a vote of 3 to 3 by the actual members of the Board of Adjustment, and no further action was taken.

By the time the above circumstances became known to the City Legal Department, it was also clear that these circumstances were known by the applicant's attorney and would be used by the applicant to challenge the Board's decision. It is also unlikely in light of well established Iowa precedent that any Iowa court would uphold a Board of Adjustment decision that was tainted by the participation of a disqualified member whose vote was determinative of the outcome. If the applicant was allowed to proceed with a legal challenge under those circumstances, the best outcome the City could reasonably expect to obtain was for judgment remanding the matter back to the Board for further consideration and to make a final decision. It was certainly a possibility that a reviewing court could enter judgment reversing the Board's decision and ordering the issuance of the Conditional Use Permit. For these reasons, the City Legal Department

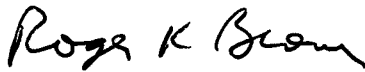
recommended that the Board reconsider the application and make a final decision untainted by the participation of a disqualified member.

The Zoning Board of Adjustment reconsidered the application at its next regular meeting on January 25, 2012. The hearing was conducted with proper notice and all interested parties were allowed the opportunity to present additional evidence and comments. At the conclusion of that hearing, the six remaining members of the Board voted 4 to 2 in support of a motion to approve the application. One of the three remaining members of the Board who originally voted in support of the motion to deny the application, voted in support of the motion to approve the application after hearing the additional evidence and comments presented at the second meeting.

Any party, including the City of Des Moines and affected neighbors, who believe they are "aggrieved by any decision of a board of adjustment" may challenge that decision by a petition for writ of certiorari timely filed with the Polk County District Court. "Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board." I.C. 414.15. In this case the Board's decision was filed on January 31, 2012, and the thirty day period to file the petition will expire on March 1, 2012.

The merits and likelihood of success on any legal challenge to the decision of the Board of Adjustment to grant the conditional use permit is outside the scope of this non-confidential communication. In light of the threatened litigation by individuals opposed to the Board's decision, the Legal Department requests that the City Council and staff refrain from participating in any public discussion of the specific factual circumstances of this matter. If members of the City Council desire to consider the merits and likelihood of success of an appeal of the Board's decision, that would be an appropriate topic for a closed session. Section 21.5(1)(c) of the Iowa Open Public Meeting Act specifically allows a closed session, "To discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would likely prejudice or disadvantage the position of the governmental body in that litigation."

Respectfully submitted,



Roger K. Brown  
Assistant City Attorney  
515-283-4541

cc: *Jeffrey Lester, City Attorney*  
*Mike Ludwig, Zoning Administrator*  
*Diane Rauh, City Clerk*  
*Richard A. Clark, City Manager*