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**Date** ..... April 11, 2016 .....

**REVIEW OF ZONING BOARD OF ADJUSTMENT DECISION  
GRANTING AN AMENDMENT TO USE VARIANCE TO ALLOW A RESTAURANT  
SELLING ALCOHOLIC LIQUOR, WINE, AND BEER ON THE PROPERTY AT  
2301 SOUTHWEST 9<sup>TH</sup> STREET**

**WHEREAS**, on March 25, 2015, the Zoning Board of Adjustment voted 5-2 to approve an application from Wayne Russell, LLC (applicant) for a use variance to allow real property locally known as 2301 Southwest 9<sup>th</sup> Street to continue to be used as a restaurant selling alcoholic liquor, wine and beer, subject to certain conditions set forth in the Decision and Order of the Board; and

**WHEREAS**, on April 6, 2015, by Roll Call No. 15-0631, City Council received and filed the staff report and comments regarding said use variance and declined to remand the decision to the Zoning Board of Adjustment, resulting in the Board's decision to approve the use variance becoming final on April 6, 2015; and

**WHEREAS**, on March 23, 2016, the Zoning Board of Adjustment voted 7-0 to approve an application from Wayne Russell, LLC (applicant) to amend said use variance to allow an additional year (until November 15, 2016) to prove compliance with the auditing requirements for a restaurant due to the change in ownership of the business tenant, and to allow an outdoor patio along the west side of the building so long as no speakers or amplified sound occur thereon; and

**WHEREAS**, Iowa Code §414.7 and Section 134-65(d) of the Zoning Ordinance require that any use variance granted by the Board be forwarded to the City Council for its review, and the City Council may remand the use variance back to the Zoning Board of Adjustment for further study if the Council believes the variance was improperly granted.

**NOW, THEREFORE, BE IT RESOLVED**, by the City Council of the City of Des Moines, as follows:

**ALTERNATIVE RESOLUTIONS**

- A The City Council remands the Decision and Order to the Zoning Board of Adjustment for further study. The effective date of the Board's decision will be deferred for 30 days from the date of this remand.
- B The City Council takes no action to review the Decision and Order. The decision of the Board will become final on April 29, 2016.
- C The City Council declines to remand the decision to the Zoning Board of Adjustment. The decision of the Board becomes final on this date.

★ Roll Call Number

Agenda Item Number

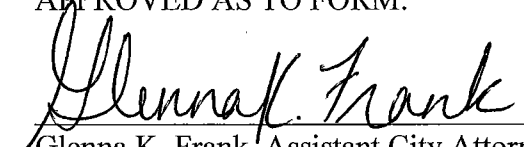
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Date April 11, 2016

(Council Communication No. 16- 173)

MOVED by \_\_\_\_\_ to receive and file the staff report and comments received, and to adopt alternative \_\_\_\_\_, above.

APPROVED AS TO FORM:

  
Glenna K. Frank, Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GATTO				
GRAY				
HENSLEY				
MOORE				
WESTERGAARD				
TOTAL				

MOTION CARRIED APPROVED

**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.

\_\_\_\_\_  
Mayor

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



**ZONING BOARD OF ADJUSTMENT  
CITY OF DES MOINES, IOWA  
DECISION AND ORDER**

This Decision and Order of the Board of Adjustment does not constitute approval of any construction. All necessary permits must be obtained before any construction is commenced upon the Property. A Certificate of Occupancy must be obtained before any structure is occupied or re-occupied after a change of use.

Any use allowed by this Decision and Order shall not be commenced or resumed until all the requirements imposed on such use by the Zoning Ordinance and this Order have been satisfied.

The use allowed by this Order must be commenced within **two years** or this Order will be void and of no further force and effect.

IN THE MATTER OF THE APPEAL FROM  
WAYNE RUSSELL, LLC  
ON PROPERTY LOCATED AT  
2301 SOUTHWEST 9<sup>TH</sup> STREET

DOCKET: ZON 2016-00040  
PUBLIC HEARING: MARCH 23, 2016

SUBJECT OF THE APPEAL

**Proposal:** Continued use of the 2,532-square foot building for a restaurant use and construction of a patio to the west of the building that generally measures 7 feet by 53 feet (371 square feet). The appellant is requesting that the Board revise the condition of approval (#2) that requires the business to submit an audit prior to November 15, 2015 to the Zoning Enforcement Officer that demonstrates the percent of the gross receipts were derived from the sale of prepared food and food-related services during the six (6) month period beginning May 1, 2015 and ending October 31, 2015. The appellant is also requesting that the Board eliminate the condition of approval (#3) that prohibits an outdoor patio.

**Appeal(s):** Amend Use Variance granted by the Board on March 25, 2015 (ZON2015-00026) of the permitted uses in a "C-0" Commercial-Residential District, which conditionally allows a restaurant use on the premise, to modify the conditions of approval.

*Required by City Code Sections 134-807, 134-1353, & 134-1377(f)(2)(b)(1)*

FINDING

The Board finds that revising Conditions #2 & #3 of the Use Variance granted on March 25, 2016 (ZON2015-00026) would be consistent with the intended spirit and purpose of the Zoning Ordinance. The appellant faces an unnecessary hardship not of the appellant's own making in utilizing the property for other purposes since the existing building is configured for a restaurant use, so it is necessary to allow an additional year to prove compliance with the requirements for a restaurant. Since the operation of the business has been transferred to a different operator, it is reasonable to revise the date by which the restaurant must prove that the business is operating as a restaurant rather than a tavern. It is also reasonable to allow additional time since the appellant has spent much time and resources improving the site over recent months. Furthermore, allowing an outdoor patio along the west side of the building would have minimal impacts on the surrounding properties so long as there are no speakers or amplified sound on the patio.

WAYNE RUSSELL, LLC  
2301 SOUTHWEST 9<sup>TH</sup> STREET  
ZON 2016-00040

MARCH 23, 2016

DECISION AND ORDER

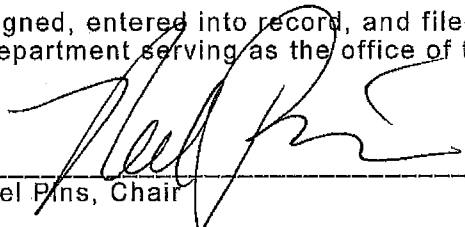
WHEREFORE, IT IS ORDERED that the appeal to amend the conditions of approval of the Use Variance granted by the Board on March 25, 2015 (ZON2015-00026) of the permitted uses in a "C-0" Commercial-Residential District that allows a restaurant use on the premise, where the appellant is requesting that the Board revise the condition of approval (#2) that requires the business to submit an audit prior to November 15, 2015 to the Zoning Enforcement Officer that demonstrates the percent of the gross receipts were derived from the sale of prepared food and food-related services during the six (6) month period beginning May 1, 2015 and ending October 31, 2015, and where the appellant is also requesting that the Board eliminate the condition of approval (#3) that prohibits an outdoor patio, is **granted** subject to the following conditions:

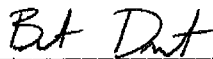
1. The sale of alcoholic liquor, wine, and beer shall only be ancillary to restaurant use, where at least 50 percent of the gross receipts must be derived from the sale of prepared food and food-related services.
2. Prior to November 15, 2016, the business shall submit a statement prepared and verified by a certified public accountant to the Zoning Enforcement Officer that demonstrates the percent of the gross receipts were derived from the sale of prepared food and food-related services during the six (6) month period beginning May 1, 2016 and ending October 31, 2016. The results of the audit shall be shared with the Zoning Board of Adjustment members.
3. Any outdoor patio or outdoor seating area for the restaurant shall be located along the west side of the building. Speakers and/or amplified sound shall be prohibited.
4. Prior to May 1, 2016, the existing parking lot shall be substantially improved in accordance with a Site Plan approved by the City's Permit and Development Center that satisfies current regulations relating to paving setbacks, landscaping, and screening.
5. Prior to May 1, 2016, the existing retaining wall around the perimeter of the parking lot shall be improved with a uniform design and placement as approved by the City's Planning Administrator.
6. Prior to May 1, 2016, the public sidewalk along Davis Avenue shall be improved with a uniform design and placement as approved by the City's Planning Administrator. As of the date of this order, no portion of the sidewalk shall be used at any time for parking.
7. If the Zoning Enforcement Officer determines at any time that the operation of the business becomes a nuisance or does not satisfy the conditions of approval, the Zoning Enforcement Officer may apply to the Board to reconsider the issuance of the Variance.

VOTE

The foregoing Decision and Order was adopted by a vote of 7-0, with all Board members voting in favor thereof.

Signed, entered into record, and filed with the City of Des Moines Community Development Department serving as the office of the Board, on March 30, 2016.

  
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 Mel Plns, Chair

  
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 Bert Drost, Secretary