

Date January 9, 2017

**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, which; and

**WHEREAS**, on April 11, 2016, by Roll Call No. 16-0610, City Council received and filed the staff report and comments regarding said use variance and remanded the decision to the Zoning Board of Adjustment for further study; and

**WHEREAS**, on April 27, 2016, the Zoning Board of Adjustment voted 6-0 to revise the March 23, 2016 Decision and Order and require any outdoor patio to be completely removed immediately if the property is no longer used as a restaurant; and

**WHEREAS**, on December 21, 2016, the Zoning Board of Adjustment voted 7-0 to approve an application from Wayne Russell, LLC (applicant) to amend said use variance and modify Conditions #2 and #4 thereof to allow an additional four-month period (until March 15, 2017) to prove compliance with the auditing requirements for a restaurant due to a second change in ownership of the business tenant, and to allow an additional nineteen-month period (until December 1, 2017) to substantially improve the existing parking lot in accordance with a Site Plan as approved by the City's Permit and Development Center with further requirements as set forth in the Board's Decision and Order; 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.

Date January 9, 2017

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

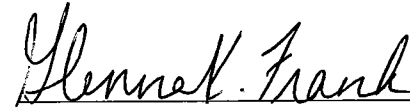
**ALTERNATIVE RESOLUTIONS**

- 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 January 26, 2017.
- 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.

(Council Communication No. 17-002)

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

\_\_\_\_\_  
 Mayor

**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.

\_\_\_\_\_  
 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	:	DOCKET: <b>ZON 2016-00195</b>
WAYNE RUSSELL, LLC	:	
ON PROPERTY LOCATED AT	:	PUBLIC HEARING: <b>DECEMBER 21, 2016</b>
2301 SOUTHWEST 9 <sup>TH</sup> STREET	:	

SUBJECT OF THE APPEAL

**Proposal:** Continued use of the 2,590-square foot building for a restaurant use, with a 371-square foot patio to the west of the building. The appellant is requesting that the Board revise the conditions of approval of the previously granted Use Variance, which is necessary to allow until March 1, 2017 for submittal of an audit to the Zoning Enforcement Officer that demonstrates the percentage of the gross receipts that were derived from the sale of prepared food and food-related services during the preceding six (6) month period and until December 1, 2018 to bring the site into compliance with the required site plan. The appeals would allow the off-street parking lot to be within 0 feet of the north (front) property line and would allow the 75-degree parking spaces to be accessed by a 19.5-foot wide drive aisle. The appeals would also allow the parking lot to not be screened along its north, east, and south perimeters.

**Appeal(s):** Amend Use Variance granted by the Board on March 25, 2015 (ZON2015-00026) and amended by the Board on April 27, 2016 (ZON2016-00040) 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.

Variance of 5 feet less than the minimum required 5-foot paving setback along the north property line.

Exception of up to 7 parking spaces less than the minimum 18 off-street parking spaces required for 2,590 square feet of restaurant use (1 space per 150 square feet).

Exception of 2.5 feet less than the minimum required 22 feet of aisle width required for 75-degree parking spaces.

Variance of the requirement that a 6-foot tall opaque screen shall be provided along the south and east property lines since they adjoin a residential use.

Variance of the requirement that a 3-foot tall opaque screen shall be provided along the north property line since it is across the street from a residential use.

*Required by City Code Sections 134-807, 134-1377(a)(23), 134-1377(f)(2)(b)(1), 134-1377(f)(4)(b)(1 & 2), & 134-1377(g)(1)*

FINDING

Since the operation of the business has been transferred to a different operator, the Board finds that 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. Revising Condition #2 of the Use Variance granted on April 27, 2016 (ZON2016-00040) 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. Thus, it is reasonable to allow additional time to prove compliance with the requirements for a restaurant. The use authorized by the Variance would not alter the essential character of the locality of the land in question.

It is also reasonable to revise Condition #4 of the Use Variance granted on April 27, 2016 (ZON2016-00040), in order to modify the May 1, 2016 deadline for bringing the site into compliance with a Site Plan approved by the Permit and Development Center. The new business operator has since had a Site Plan prepared for the property, which had determined that additional zoning appeals are necessary. Granting the Variances and Exceptions as requested would be in harmony with the essential character of the surrounding neighborhood so long as a row of shrubs is provided along both the east and south perimeters of the parking lot in order to provide screening for the adjoining residential uses. The appellant faces a hardship in that the providing the minimum required 5-foot paving setback along Davis Avenue would result in the loss of four (4) parking spaces. The impacts of reducing the provided off-street parking would be significant on the surrounding properties. Furthermore, the appellant faces a practical difficulty in complying with the requirements given the size and topography of the property. However in this instance, it is reasonable to allow the appellant only until December 1, 2017 to bring the site into compliance with the Site Plan rather than the requested date of December 1, 2018.

DECISION AND ORDER

*WHEREFORE, IT IS ORDERED* that an appeal to amend the Use Variance granted by the Board on March 25, 2015 (ZON2015-00026) and amended by the Board on April 27, 2016 (ZON2016-00040) of the permitted uses in a "C-0" Commercial-Residential District, as well as a Variance of 5 feet less than the minimum required 5-foot paving setback along the north property line, an Exception of up to 7 parking spaces less than the minimum required 18 off-street parking spaces, a Variance of the requirement that a 6-foot tall opaque screen be provided along the south and east property lines, and a Variance of the requirement that a 3-foot tall opaque screen shall be provided along the north property line, to allow continued use of the 2,590-square foot building for a restaurant use, with a 371-square foot patio to the west of the building, are **granted, so long as the previously approved conditions are modified as follows:**

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 March 15, 2017, 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 September 1, 2016 and ending February 28, 2017. 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. Any patio shall be completely removed immediately if the property is no longer used as a restaurant.
4. Prior to December 1, 2017, the existing parking lot shall be substantially improved in accordance with a Site Plan as approved by the City's Permit and Development Center. In addition to the standard Site Plan requirements, the following shall apply:
  - a. The Site Plan shall include a row of shrubs along the east and south perimeters of the parking lot in order to provide screening.
  - b. The appellant shall make a good faith effort to reconfigure the angled parking spaces as 60-degree parking spaces in order to provide additional maneuvering space within the parking lot.
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.
8. The Use Variance shall terminate immediately in the event that the restaurant usage reverts to a bar/tavern usage.

*IT IS FURTHER ORDERED* that the appeal for an Exception of 2.5 feet less than the minimum required 22 feet of drive aisle width required for 75-degree parking spaces is **granted**, subject to the above-stated conditions as well as the condition that the appellant shall use its best efforts to adhere to the Des Moines Municipal Code regarding drive aisle width in preparing the site plan and developing the subject property, including consideration of use of a 60-degree turn radius for the parking spaces.

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WAYNE RUSSELL, LLC  
2301 SOUTHWEST 9<sup>TH</sup> STREET  
ZON 2016-00195

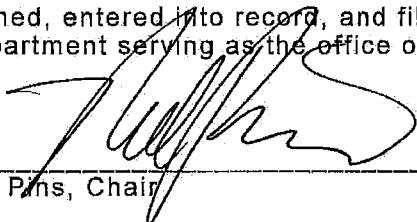
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DECEMBER 21, 2016

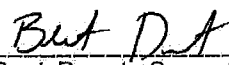
VOTE

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 December 28, 2016.



Mel Pans, Chair



Bert Drost, Secretary