



Date April 9, 2018

**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 9TH 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 9th 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, 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 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, on January 9, 2017, by Roll Call No. 17-0066, the 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 January 9, 2017; and

WHEREAS, on May 24, 2017, the Zoning Board of Adjustment voted 6-0 to approve an application from SDW, LLC (applicant) to amend said use variance and modify Condition #3 to allow the outdoor patio or seating area to be located along the north side of the building, rather than along the west side of the building, and subject to further requirements on patio construction and use as set forth in the Board's Decision and Order; and



Roll Call Number

Agenda Item Number

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Date April 9, 2018

WHEREAS, on June 12, 2017, by Roll Call No. 17-1012, the 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 June 12, 2017; and

WHEREAS, on March 28, 2018, the Zoning Board of Adjustment voted 5-1 to approve an application from SDW, LLC (applicant) to amend said use variance and modify Condition #3 to allow outdoor speakers on the outdoor patio, subject to conditions set forth in the Board decision; 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 28, 2018.
- 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. 18-160)

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

APPROVED AS TO FORM:

Glenna K. Frank

Glenna K. Frank, Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
COLEMAN				
GATTO				
GRAY				
MANDELBAUM				
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	:	DOCKET: ZON 2018-00037
SDW, LLC	:	
ON PROPERTY LOCATED AT	:	PUBLIC HEARING: MARCH 28, 2018
2301 SOUTHWEST 9 TH STREET	:	

SUBJECT OF THE APPEAL

Proposal: The requested appeals would allow the existing 502-square foot patio along the north side of the building to have outdoor speakers for amplified sound and allow for installation of a 6.7-square foot building-mounted sign on the north façade of the building that would be in addition to an existing 25-square foot building-mounted sign. The previously granted Use Variance and subsequent amendments allows use of the 2,590-square foot building a 502-square foot patio for a restaurant use, so long as there is no amplified sound on the said patio.

Appeal(s): Amend Use Variance of the permitted uses in a "C-0" Commercial-Residential District, as originally granted by the Board on March 25, 2015 (ZON2015-00026) and amended by the Board on April 27, 2016 (ZON2016-00040), December 21, 2016 (ZON2016-00195), & May 24, 2017 (ZON2016-00078) which conditionally allows a restaurant use on the premise, to modify the conditions of approval in order allow outdoor speakers on the patio.

Variance of one (1) wall-mounted sign over the maximum one (1) wall-mounted sign allowed on the north façade of the building.

Required by City Code Sections 134-807 & 134-812(3)(a & b)

FINDING

Granting the amendment to the Use Variance would be consistent with the intended spirit and purpose of the Zoning Ordinance and in harmony with the essential character of the locality of the land in question. The Board finds that it would be appropriate to amend the Use Variance for the restaurant in order to allow outdoor speakers to use used on the existing patio located along the north side of the building so long as the patio operates in accordance with the conditions of approval. The impact of the speakers will be minimal since any sound must be background auditory in nature and in accordance with a type E sound permit. Any speakers shall not be used for live entertainment and shall not be on after 10:00 PM on any day.

Granting the Variance of one (1) wall-mounted sign over the maximum one (1) wall-mounted sign allowed on the north façade of the building would also be consistent with the intended spirit and purpose of the Zoning Ordinance and in harmony with the essential character of the locality of the land in question. The appellant faces a hardship in identifying the primary entrance of the business given the unique layout of the land. The use to be authorized by the Variance will not alter the essential character of the locality of the land in question and the plight of the owner is due to unique circumstances not of the owner's own making, where unique circumstances relate specifically to the land in question and not to general conditions in the neighborhood.

DECISION AND ORDER

WHEREFORE, IT IS ORDERED that the appeal for a Variance of one (1) wall-mounted sign over the maximum one (1) wall-mounted sign allowed on the north façade of the building is granted and the appeal to amend the conditions of approval for a Use Variance of the permitted uses in a "C-0" Commercial-Residential District is **granted**, so long as the conditions of approval are revised 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 in accordance with the following:
 - a. Any patio shall be located along the north side of the building in general conformance with the submitted sketch.
 - b. Any patio shall be constructed in accordance with all Building Codes with issuance of all necessary permits by the City's Permit & Development Center.
 - c. There shall only be outdoor speakers for amplified sound that is background auditory in nature and in accordance with a type E sound permit. Any speakers shall not be used for live entertainment and shall not be on after 10:00 PM on any day.
 - d. Any patio shall not be used after 10:00 PM.
 - e. 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.

SDW, LLC
2301 SOUTHWEST 9TH STREET
ZON 2018-00037

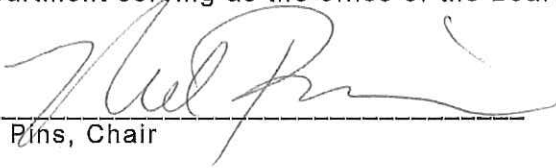
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MARCH 28, 2018

VOTE

The foregoing Decision and Order was adopted by a vote of 5-1, with Board members Carlson, Gaer, Mortice, Pins, and Smith voting in favor thereof and Board member Blake voting in opposition thereof.

Signed, entered into record, and filed with the City of Des Moines Community Development Department serving as the office of the Board, on April 4, 2018.



Mel Pins, Chair



Bert Drost, Secretary