# Meeting Minutes

**Zoning Board of Adjustment**

Tuesday, July 19, 2016
Ankeny City Hall – City Council Chambers
410 W. First Street, Ankeny, Iowa

## CALL TO ORDER

The July 19, 2016 regular meeting of the Zoning Board of Adjustment was called to order at 5:00 pm by Chair M.Ott. Members present: J.Baxter, M.Ott, K.Tomlinson, B.Walker. Absent: N.Sungren. Staff present: E.Jensen, E.Carstens, E.Bodeker, D.Gervais, T.Kuhn.

## AMENDMENTS TO THE AGENDA

There were no amendments.

## MINUTES OF THE JULY 6, 2016 MEETING

Motion by K.Tomlinson to approve the July 6, 2016 meeting minutes as submitted. Second by M.Ott. Motion carried 4 – 0.

## COMMUNICATIONS / CORRESPONDENCE

M.Ott advised the Board that the correspondence received will be addressed at the time of the public hearing.

## PUBLIC HEARINGS:

**#16-13** **Cabaret Ankeny, LLC**
**2785 N Ankeny Blvd. Suites 18 & 19**
**Lot 3 Briarwood Plat 17**
**RE: Special Use Permit – Outdoor Service Area**

Chair M.Ott opened the public hearing.

Andrew Martin, 514 NE Georgetown Blvd stated that he is requesting approval of the City's recommendation for his application. He said that there have been zero compliance issues or citations since he purchased the business 4 years ago and asked that the Board's decision be based on whether his business complies with the Code as approved. He agrees with the City's recommendation as well as the Police Department's feedback and asks that the Board entrusts them after 4 years that their recommendation should be upheld believing that they have the most neutral opinion of how his business is operated and complies with local Code. He views his business as a model of how other businesses should be viewed in the City of Ankeny. Mr.Martin said that they have made a lot of investments and worked very hard the last 4 years to invest in capital improvements and projects to help be the best neighbor possible with businesses and neighbors along 4-lane federal Highway 69. He has worked with Kimberley Development to install a large berm that didn't exist before; planted 9 bushes that will become a major hedge in the near term; will be installing a permanent 40 foot wide and 20 foot deep awning later this month and into August; and have managed business better than the business before which was Tonic, with which he understands there were a lot of issues. All in all they are investing over $50,000 to accomplish one selfish objective, which is to grow the business, but the other objective is to be a good neighbor and to achieve a lot of sound and light control and other improvements so it can operate in a way that complies with the Code in full. Mr.Martin said that he hopes that at some point they can realize the level of investment, especially for a small business operator, as being one of the standards to look forward to and part of what he considers the Ankeny way of how we should work with each other in the community. He appreciates the Board's trust and consideration of him as a business owner and he invites Board members to come out when it is all completed to enjoy what he believes will be Ankeny's best patio, restaurant and bar when they are done.

Regarding the seating, M.Ott asked Mr.Martin if there is a reason that he keeps adding to the number of seats on the patio. Mr.Martin responded that normally his requests for expanded hours and seating would have been accelerated, but knowing the inflammatory situation that existed 4 years ago at Tonic, he has purposely taken baby steps. He said the patio would likely hold way more than 50, he is incrementally adding it so that they can see how it may affect the business and progress from that year after year in a way they can be respectful considering the prior situation.

J. Baxter asked what fire code would allow for the patio. Mr. Martin responded that he did not know, the inside business, which is slightly larger is set for 87. He knows that he is nowhere close to what the capacity is for that size patio, but he doesn't know the official number. J.Baxter asked if his ultimate goal is to get to that number. Mr.Martin said not necessarily, he's comfortable with 50 right now, if he gets to a point where he is consistently filling those seats he may contact the fire department to see what the official holding is. He said he wants to be careful because there is a corridor that serves as a fire escape for the inside businesses, and he would want to allow for plenty of room for emergency services even though those businesses are closed at night.

M.Ott advised the applicant that the Board received correspondence from John and Linda Ades, 2635 NW Heritage Avenue and in addition to not being supportive of the request, they mentioned the size of the plants that were installed. M.Ott asked why larger shrubs were not planted. Mr.Martin said that in the perfect situation, he would have the awning, the berm and trees that are 10-feet wide and 10-feet tall, but obviously this is a small business and he is trying to determine how he can do this economically. He said the shrubs were selected on the advice of Springhill Nursery and Earl May because of how quickly they grow and the size and density they provide during the summertime. He said it would be difficult for a small business to invest in 9 giant bushes. Mr Martin said it will be up to 2 years before they fully mature and become what they need to be, but in his opinion, 80% of the solution is the 40 x 20 foot awning because that will help trap much of the conversational sound that exists on the patio and the bushes will provide additional insurance in a year or 2 when they grow to maturity.

K.Tomlinson asked if the awning will completely cover the patio. Mr.Martin said it will provide about 80% coverage, there is a portion of one end of the patio that is curved, so there's a piece that isn't fully covered, it's also the area that is lowest into the ground, adding that the area on the north end, closest to the parking lot, will be completely covered.

B.Walker asked when the awning will be installed. Mr.Martin responded that it should have been installed by now, he has confirmation that the steel and trussing will be delivered this week, so realistically he is hoping it will be up and built by state fair time. He said he is willing as a stipulation to wait on the additional hours until the awning is installed, explaining that it's a sizable, metal, non-combustible structure that provides both sound and temperature insulation.

M.Ott asked how many patrons there are between the hours of 12 and 2 am. Mr.Martin said it depends on the time of year, SummerFest and holidays will be higher. Outside of those peak times, he would expect 30 plus.

M.Ott said that he understands there have been no citations, but asked if there have been any calls, check-ins or periodic calls to check the decibel levels. Mr Martin said he believes that is addressed in City staff's report. He said from a business perspective, he has not been informed of any calls this past year. The landlord, Kimberley Development has told him they have had zero complaints from anyone calling up.

**Staff Report:** E.Bodeker reported that Cabaret Ankeny, LLC, requests the revised Special Use Permit for the outdoor service area at 2785 N. Ankeny Blvd. to continue to utilize the patio space adjacent to Suites 18 and 19 on the west side of the building. The applicant is requesting expanded hours of operation, a greater number of chairs and requests that the Special Use Permit renewal be automatically approved by staff, as opposed to coming to the Board of Adjustment for renewal. The proximity of the outdoor service area to a residential zoning district and the use of sound, other than sound arising from conversation of patrons are the conditions which require this establishment to obtain a Special Use Permit. The Cabaret property is zoned C-2, General Retail and Highway Oriented Commercial District. A developed R-3, Multiple-Family Residence District, is located on the west side of N. Ankeny Blvd., approximately 225 feet from the outdoor service area. The outdoor service area is enclosed on the south and west with a retaining wall that steps down as it moves to the north. A wrought iron fence encloses the outdoor service area on the north side adjacent to the parking lot. In 2014, Kimberley Development, the property owner and Cabaret installed an earth berm on the west side of the patio. In June, Cabaret planted nine Moscow Beauty lilac bushes on top of the existing berm. The applicant has also obtained a building permit for a permanent awning to be constructed over the patio. Currently the site has 148 parking spaces, many of which are expected to be available in the evening due to a majority of the tenants being daytime businesses. The zoning ordinance requires one parking space for every four outside seats. The building would be short on parking if the code were applied as written, however the Department Director is allowed flexibility in administration due to the fact that a lot of those businesses are opposite peak hour businesses. Cabaret has not had any complaints or violations from the building department or with the fire department. Staff contacted the police department and they had 1 call to this address on May 19, 2016 at 3:10 am. Officers arrived at the site shortly after the complaint and did not locate any problems. They also indicated that due to the time of the complaint they could not speak to the validity that the reported noise disturbance came from Cabaret due to it being closed.

The staff position is to approve the revised Special Use Permit for an outdoor service area as presented by the applicant subject to Chapter 44. This position is based on the premise that it does not appear that any complaints were received regarding the patio over the past year and on measures the applicant has taken to try and mitigate sound coming from the patio. Conditions for Staff's recommendation include:

1. Any sound, amplified or otherwise, from the outdoor service area shall not be at a level greater than necessary to reach the audience and shall not be of such a volume so as to interfere with normal conversation on adjacent properties and shall be in compliance with Ankeny Municipal Code Chapter 44, Noise Control.
2. Hours of operation between 9am-12am Sunday through Wednesday, 9am -2am Thursday through Saturday, 9am-2am during Summerfest, and 9am-2am on the eve of and day of all federal holidays
3. Seating for up to 50 (50 Chairs).
4. Special Use Permit may be automatically approved by staff.

K.Tomlinson asked if there are other patios that are open until 2:00 am. E.Carstens said he believes there are others such as Benchwarmers that haven't been conditioned, that could likely be open until 2:00 am. Many of the locations do not have their hours of operation restricted.

J.Baxter asked what the distance is too residential and when the berm was installed. E.Bodeker responded that it's about 250 feet to residential, the berm was installed last year.

Perry Schaeffer, 2647 NW Heritage Avenue stated that he owns a residence adjacent to the Cabaret Bar. He said this is his 8th annual appearance before the Board. He would like congratulate the Cabaret Bar for their success in expanding their Special Use Permit in just 4 short years. At the time they replaced the Tonic Bar in 2004, the patio hours were 8:30 pm during the week, 10 pm on the weekends, no outdoor sound equipment and an approved seating capacity of 25. Then suddenly the hours were expanded to 10:00 pm during the week and midnight on the weekends, speakers appeared on the patio and the seating capacity increased to 32. Currently the request is to expand the patio hours to midnight during the week and 2 am on weekends and the seating capacity, which was expanded to 45 last year is requested to increase to 50. Mr.Schaeffer asked at what point does a Special Use Permit just become a bar permit - so much for the residential zoning ordinance and protections it's supposed to provide and tough luck Ankeny citizens. A 50 seat capacity will provide a size suitable for reunions, parties, receptions that could be conducted during the week until midnight and 2 am on weekends. Ambient noise, yelling and laughter carry amazingly well in to the evening air. This disturbance may not "move the needle" on the City's ordinance, but it's there and if Cabaret's request is permitted, it could be there until midnight or 2 am making it difficult to sleep with the window open. He said that the photo submitted by staff shows line of sight over the berm and into his unit. He said that on a Saturday last year, there was noise coming from the bar and patio demonstrating how ineffective the berm currently is. He said his neighbor and he considered calling the police, but felt it would do no good, which was a mistake; as they did not know the importance of being on record. Mr Schaeffer presented photos of the lilac bushes and questioned their sound deafening qualities and size. He said the awning proposed is not yet installed and he believes the current requests of the bar are premature and would be more appropriate to be considered after the awning is tested. He proposes that until the awning is constructed and proves effective in sound control, and the lilac bushes have achieved sound deadening size and the size of the berm is increased, further considerations and concessions for the Special Use Permit are premature and should not be considered until the lilacs become a sound absorbing hedge in 2 years. He would like the Board to reject the current proposals, return the hours of operation to 8:30 pm on weeknights and 10:00 pm on weekends, remove the outdoor speakers and bring the seating capacity back to 25.

M.Ott asked Mr. Schaeffer if he has contacted police anytime this year or if there have been any issues this year. Mr Schaeffer said he has not had any of the experiences he had last year and has not contacted the police. His concern is with an increase in the patio capacity and the addition of hours. He said this business moved into their residential zoning area and has infringed on their rights to have peace and quiet.

J.Baxter asked Mr.Schaeffer if there have been issues with residential property sales in his subdivision. Mr.Schaeffer responded that his neighbors, who moved because of the noise problems, have a unit that has not sold. He said their choice is to sell at a loss or deal with noise that no other resident in Ankeny has to put up with. He said they like being in Ankeny, but struggle with this every year.

Mr.Martin said he believes the zoning on his property has been there for many years, he's not sure which came first or second and he's not sure it's really relevant one way or another in decision making. He said that people stand or go out front of the business when patio seating is not available which causes more noise. M.Ott asked if smoking is the reason why people are standing in front of the business. Mr.Martin said a piece of it is smoking, it's not allowed on the patio, but also, if the patio service is closed, that is where they are going to go. He said it's easier to comply with beverage and sound laws on the patio. He said the foliage and construction design of the awning was designed by experts for the purpose of sound, adding that he could have spent 30% less to get the same benefit,

but he spent more to achieve the sound piece. He said he is trying the best he can to be a good neighbor and a better citizen in the community by following up on any complaints. He said the speakers have been on the patio since day one, back to the Tonic days, adding that since he bought the business, he has installed a volume inhibitor on Zone 3, the patio, to help with the sound. He said that even when the patio is closed for service, he cannot completely keep people off of it, he understands that the Council has rules we all live by, it's never a perfect thing, but there is a Code in place that addresses sound and as long as a business abides by that sound, that should be good. He believes it's unfair to ask a business, who is abiding by the Code and investing in operating toward that, to have to abide by other rules. He said that if the Board entrusts him with his request he will continue to work above and beyond to make this a respectful place to businesses and residents.

Motion by K.Tomlinson to close the public hearing and receive and file documents. Second by J.Baxter. All voted aye. Motion carried 4 – 0.

M.Ott said that the struggle he has with expanding the hours is that there are still landowners across the street that haven't had an issue in the last year and though, there are improvements being made to mitigate the sound, they not yet complete.

K.Tomlinson said that is the same struggle she has, she thinks the request is premature. Her research suggests that it will be within 10 years the bushes reach full height, she finds it hard to believe they will be at full height in 2 years and regardless, it's right now that they are asking for expanded hours. She appreciates the awning, plants and berm, they are definitely going in the right direction, she just doesn't think it's there yet. She suggested that the residents may be just putting up with noise because there's not a specific event that's overly loud, but it's still loud enough to be a constant noise. K.Tomlinson said that this application is before the Board, because the property is within 500 feet of residential property, it is not a right for Cabaret to be able to be open because of the proximity to adjacent neighbors and because the improvements are not finished, she is not comfortable with automatic staff approval, she thinks the Board needs to hear from the neighbors.

M.Ott said he doesn't believe any member of the Board are tying this request to the former bar Tonic, he feels comfortable the they are considering the present situation.

J.Baxter said that his concern is with the hours of operation rather than with additional seating, he doesn't believe the difference between 45 and 50 is that measureable, but adding an extra 2 hours at the end of each night, up to two in the morning on weekends strikes him as having a much greater impact on the residential areas. He said he would also be interested in revisiting this issue rather than have automatic staff approval and would suggest any approvals being effective upon the installation of the awning, which the applicant indicated would be acceptable to them.

B.Walker said he would echo those sentiments, the seating to 50 doesn't bother him, he wants to see the awning installed and more growth on the bushes. He feels like they are heading in the right direction.

J.Baxter added that he appreciates the improvements that have been made, the residents have indicated that there only issue is that they want to live in peace and not have noise. The business has indicated this is an important issue to him and is investing money to placate the residents and reduce the noise – he has a right to use his property as well, this is a balancing act.

M.Ott suggested that the owner does not have the right to use a patio, and that is why he is before the Board. J.Baxter offered that he has a right to the patio, he just couldn't serve liquor.

K.Tomlinson said she believes the residents agree that it has come a long way in 8 years, she hopes that bushes do grow right away and she thinks the awning will be a great improvement as well.

M.Ott said he would be more inclined to support current hours of operation on the patio, he's ok with the seating capacity increase to 50, he would like it to come back before the Board next year, because although there were no citations, there are still landowners that have come out and those that have provided correspondence.

E.Carstens advised the Board that if the hours are not changed and just the seating at 50 chairs is allowed, the Board could grant automatic approval; Mr.Martin would still be required to come back if he wanted any changes in the future. J.Baxter asked if staff approval was included so that he would need to come back regardless of whether he wanted to make changes or not. E.Carstens concurred stating that most of the Outdoor Service Area permits do not come back every year; if there are complaints or they want to make changes, then they come back. K.Tomlinson added that they all used to come back every year, now just those with complaints come back. J.Baxter suggested that if the awning works to dampen sound, he would be more inclined next year to grant an extension of hours.

**Board Action on Filing #16-13 property located at 2785 N Ankeny Blvd. Suites 18 & 19**
Motion by B.Walker that the Zoning Board of Adjustment grant a Special Use Permit for an outdoor service area in accordance with Sections 130.07 and 196.02 (1) (I) to Cabaret Ankeny, LLC, at 2785 N Ankeny Boulevard, Suites 18 & 19, to run concurrently and terminate with a liquor license for said establishment subject to surrounding property owner's testimony and to the following conditions:

1. Any sound, amplified or otherwise, from the outdoor service area shall not be at a level greater than necessary to reach the audience and shall not be of such a volume so as to interfere with normal conversation on adjacent properties and shall be in compliance with Ankeny Municipal Code Chapter 44, Noise Control.
2. Hours of operation to remain as they were last year, 9:00am – 10:00pm Sunday through Thursday and 9:00am - 12:00am Friday and Saturday, Thursday of Summerfest, and on the eve of all observed federal holidays.
3. Seating for up to 50 (50 Chairs).
4. Special Use Permit may be automatically approved by staff.

K.Tomlinson said she still believes the applicant should be required to come back prior to renewal next year, she believes there are still issues with the neighbors, they just didn't' call the police. J.Baxter said he believes if there were issues they would have made a complaint. B.Walker said his motion was based on the assumption the owner would come back next year with a request for longer hours. B.Walker amended his motion to modify the last point to:

4. Special Use Permit may not be automatically approved by staff, renewal of subsequent Special Use Permits must come before the Board.

Second by M.Ott. All voted aye. Motion carried 4 – 0.

**#16-14** **For The Kids, LLC / Whiskey River**
**1350 SW Vintage Parkway**
**Lot 2, The District at Prairie Trail Plat 3**
**RE: Special Use Permit – Outdoor Service Area**

Chair M.Ott opened the public hearing.

Joe Romare, 2115 SW White Birch Drive said he is applying for a Special Use Permit for the patios for For The Kids LLC and Whiskey River.

K.Tomlinson asked if this is a 2-level patio, upper and lower. Mr. Romare concurred that it is.

M.Ott asked if he is the owner. Mr. Romare said that he is the property owner and owner of the bar.

**Staff Report:** D.Gervais reported that Whiskey River is proposing two outdoor seating areas with sound to be located at 1350 SW Vintage Parkway. She presented an aerial drawing and identified the property as east of SW State Street and north of SW Vintage Parkway at the corner of SW Merchant Street. She explained that generally the area is vacant on the south and east sides, development has happened to the west with residential and Prairie Pointe at DMACC is approximately 400 feet to the south. D.Gervais presented the site plan and elevation drawings, identifying the location of the lower and 2nd floor patios. The seating capacity for the ground floor patio is 65 to 75 and the upper roof top could seat 80 to 100. The areas will require an enclosure and meet Code requirements. The operating hours of the business and outdoor service areas are proposed to be 10:00 a.m. to 2:00 a.m. daily. The owner has also requested outdoor speakers, which will play sound for the TVs and background music. There is no live music planned at this time. Given the area, the location and the timing of this development ahead of any other, the staff position is to recommend approval with automatic renewal for the request for a Special Use Permit for Whiskey River, with the conditions that any sound shall comply with Ankeny Municipal Code Chapter 44, Noise Control and the hours of operation shall be 10:00 a.m. to 2:00 a.m. daily.

J.Baxter asked if any of the adjacent vacant property to the northeast is residential. D.Gervais explained that there will likely be residential to the east, but preliminary measurements show that it will be outside of 500 feet, however Prairie Trail PUD allows residential in the town center area, so there could be nearby residential in the future. J.Baxter commented that that would come after this construction.

J.Baxter asked if there is planned development on the other side of SW Merchant. E.Jensen responded that the area is all part of The District allowing commercial 1st floor, commercial and or residential 2nd floor, adding that eventually there will be another building between Whiskey River and Prairie Pointe Student Living.

K.Tomlinson asked if there is residential on the 2nd floor of the Whiskey River building. E.Jensen responded that he doesn't believe there's any residential on the 2nd floor anywhere yet in The District.

B.Walker asked if Prairie Pointe is dedicated DMACC student housing. E.Carstens responded that it is privately owned, mainly student occupied but not restricted to students only.

There was no one in the audience to speak for or against the proposal.

Motion by J.Baxter to close the public hearing and receive and file documents. Second by B.Walker. All voted aye. Motion carried 4 – 0.

J.Baxter said that there are differences between this request and the prior request. There is an additional 180 feet separating the patio from the residential and there is no one present voicing objection. K.Tomlinson added that it is an entertainment district. B.Walker said that what makes the difference to him is that it is an entertainment area. E.Jensen advised that Board that on any of the Special Use Permits, if staff receives 2 or 3 complaints they will be brought back to the Board for a decision on whether a public hearing is warranted.

The Board deliberated on allowing automatic renewal. M.Ott said he assumes there would be no public notification with automatic staff approval. E.Carstens concurred adding that staff contacts police and code enforcement to determine if there are any violations or issues, if there are issues, the Board is

notified and can decide if they want renewal of the Special Use Permit considered, if not, they are automatically renewed until the next year. K.Tomlinson and M.Ott said they were in favor of review by the Board after the first year, although they don't expect any problems. J.Baxter said that if there's a complaint it will come back, he sees no need for additional bureaucratic requirements for the owner, however if other Board members want to see this request come back, he will not vote against it.

**Board Action on Filing #16-14 property located at 1350 SW Vintage Parkway**

Motion by M.Ott that the Zoning Board of Adjustment grant a Special Use Permit in accordance with Sections 130.07 and 196.02(1) (I) to For the Kids II, LLC dba Whiskey River for two outdoor seating areas to run concurrently and terminate with a liquor license for said establishment provided the following conditions are met:

1. Any sound, amplified or otherwise, from the outdoor service areas shall not be at a level greater than is necessary to reach the audience and shall not be of such a volume so as to interfere with normal conversation on adjacent properties and shall be in compliance with Ankeny Municipal Code Chapter 44, Noise Control.
2. Hours of operation 10:00 a.m. to 2:00 a.m. daily.
3. The Special Use Permit shall come back before the Board and shall not be automatically approved by staff

Second by K.Tomlinson. All voted aye. Motion carried 4 – 0.

There being no further business, the meeting adjourned at 6:10 pm.

Submitted by Trish Kuhn, Recording Secretary

Trish Kuhn

Zoning Board of Adjustment