

**CITY OF MASCOUTAH
ZONING BOARD OF APPEALS
#3 WEST MAIN STREET
MASCOUTAH, IL 62258-2030**

APRIL 22, 2015

The minutes of the regular meeting of the Zoning Board of Appeals of the City of Mascoutah.

CALL TO ORDER

Meeting was called to order at 7:00 p.m.

PRESENT

Chairman Don Taylor and Board members Bob Scott, Bob Twenhafel, Gene Haege, Bob Skeen, Charles Jefferson, and Jim Kuehn.

ABSENT

None.

ALSO PRESENT

City Manager Cody Hawkins, City Attorney Al Paulson, Building Commissioner Danny Schrempp, Assistant City Manager Lisa Koerkenmeier, Mayor Gerald Daugherty, Councilman Paul Schorr, Ken Zacharski and applicant Barry Hayden.

ESTABLISHMENT OF A QUORUM

A quorum of Zoning Board of Appeals members was present.

Chairman Taylor introduced and welcomed new member Charles Jefferson.

AMEND AGENDA

None.

MINUTES

Twenhafel moved, seconded by Scott, to approve the minutes of the February 25, 2015 Zoning Board of Appeals meeting as presented. ***Motion passed.*** Passed by unanimous yes voice vote.

BOARD BUSINESS

Public Hearing – ZBA 15-02 – Appeal of an Administrative Decision, Mr. Barry Hayden, Plaza 23 LLC

Chairman Taylor opened the public hearing at 7:02 p.m.

Chairman Taylor stated that the Zoning Board of Appeals will be hearing case #15-02 this evening. The petitioner is Mr. Barry Hayden, representing Plaza 23 LLC. The purpose of this hearing is to consider appeal of an Administrative Decision of the interpretation of Chapter 34, Unified Land Development Code, Article V. District Regulations, Division 11. GC – General

Commercial District, Section 34-5-101. Permitted uses, and Section 34-5-102. Accessory uses and structures.

Chairman Taylor reviewed the Zoning Board of Appeals rules and procedures.

Members of the audience and staff who will be speaking or providing testimony were sworn in by Mayor Gerald Daugherty.

Assistant City Manager provided the background of the basic facts of, and relief requested in, the petition and staff comments.

The applicant Barry Hayden desires to construct apartment buildings on property he owns in MidAmerica Plaza located in the northwest corner of Interstate 64 and IL Route 4. The City Administrative Office determined that apartments are not permitted by right as a principal use in the General Commercial (GC) Zoning District. Residential uses are permitted in the GC District under Section 34-5-102. Accessory uses and structures. (a) Residential uses are allowed provided that they are located on the second floor of the building or at the rear of the building. Section 34-2-3. Definition of terms, includes the following definition of accessory use or structure: Accessory use or structure. A use or structure which is clearly incidental to, customarily found in association with, and serves a principal use; is subordinate in purpose, area, and extent to the principal use served; and is located on the same lot as the principal use, or on an adjoining lot in the same ownership as that of the principal use.

Mr. Hayden submitted two concept plans; one in December 2014 and one in February 2015, which depict the construction of several apartment buildings on this property. City Administrative staff made a similar zoning/land use determination for both concept plans in that the residential use (the apartment buildings) as depicted in both concept plans was the principal use and therefore was not in conformance with the GC, General Commercial Zoning District.

A comparable concept plan was shared by Mr. Hayden with staff in April 2014, which depicted 216 apartment units and no commercial land use. Following staff's determination that the concept plan was not in conformance with the GC Zoning District based on the interpretation of the Code detailed above, Mr. Hayden filed an application to rezone the property from GC, to RM, Multiple-Family Residential, which allows apartment buildings. The rezoning of the property to RM was denied by the City Council on July 21, 2014.

Concept Plan A: 34.48 acres – Apartment buildings attached to office modules

Concept Plan A submitted on December 3, 2014 includes 12 buildings of various sizes on 34.48 acres. The smallest building includes approximately 27,300 square feet of residential space comprising 31 apartment units, and the largest building includes approximately 57,900 square feet of residential space comprising 64 apartment units. Concept Plan A includes a total of 669, two-story apartment units. Each apartment building includes an attached 348 square foot office building. The concept plan as presented includes a total of approximately 602,400 square feet of residential space and approximately 4,176 square feet of commercial office space.

Based upon a similar concept plan submitted by the applicant in October 2014, the City Attorney concurred with the City Administrative Office that 602,400 +/- square feet of residential space is not accessory to 4,176 +/- square feet of commercial office space. In a letter dated October 9, 2014 from the City, which included the City Attorney's legal opinion, Mr. Hayden was informed that a concept plan of this nature was not in conformance with General Commercial zoning since the residential use is not incidental to the primary use and is not subordinate in purpose and area. Additionally, the City Attorney concluded that the area of the principal use has to be larger than the area of the accessory use at a minimum.

The applicant is appealing the City Administrative Office's decision that Concept Plan A is allowed under the present code, since the GC Zoning District allows residential uses provided that they are located on the second floor of the building or at the rear of the building.

Concept Plan B: 8.6 acres – Apartment buildings, no office modules

Mr. Hayden submitted Concept Plan B on February 6, 2015 which depicts 18, two-story apartment buildings comprising 114 units. This concept plan includes only residential use, no commercial office component. The City Attorney again concurred with the City Administrative Office's decision that the residential use as depicted in Concept Plan B would not be considered an accessory use and therefore is not permitted on the applicant's property presently zoned General Commercial.

The applicant is appealing the City Administrative Office's decision that Concept Plan B is allowed under the present code. Additionally, the applicant cites Section 34-5-81, Permitted Uses in the Neighborhood Commercial (NC) Zoning District, and Section 34-5-91, Permitted Uses in the Downtown Commercial (DC) Zoning District, which states that "Residential uses are considered appropriate in commercial zones."

Kuehn asked about the background on the property since there are already apartments there. Assistant City Manager stated that in 2010, the City Zoning Code read differently stating "*all uses*" permitted in the Neighborhood Commercial (NC) and Downtown Commercial (DC) Districts are permitted by right within the General Commercial (GC) District. City staff interpreted this code section to mean that "*all uses*" did not imply residential uses or apartments. Mr. Hayden filed a lawsuit against the City of Mascoutah, and the court ruled in his favor allowing the apartments to be built on property he owned zoned General Commercial (GC). Assistant City Manager stated that in 2011, the City Code was revised and the word "*commercial*" was added to state that "*all commercial uses*" permitted in the NC and DC Districts are permitted by right within the GC District, which removed any question that residential uses were allowed as a principal use in the GC District. Kuehn asked if any notification was provided to Mr. Hayden with regards to the code change. Assistant City Manager stated that the code change would have been published by state statute but no individual notices would have been sent to Mr. Hayden or other individuals because there are many individuals this change could possibly affect.

Mr. Hayden addressed the board members regarding the narratives he provided supporting approval of the concept plans. The narratives include a reference to Section 34-5 et seq. of Division 11 of the City's code which states that "all commercial uses permitted in the NC and the DC zones are permitted within the GC zone. The narrative also states that Division 10 of the Code specifically sets forth the DC provisions and unequivocally states that "residential uses are considered appropriate uses in commercial zones," and that a similar reference is found in Division 9 which sets forth the NC provisions. The narrative further states that the City Code's very definition of "Permitted use" is "a use allowed by a right in the zoning district." In summary, the narratives state that "residential uses are permitted uses in all zoning categories (GC, DC and NC)."

Assistant City Manager explained that Section 34-5-81(e)(2) and Section 34-5-91(f)(2) which state "residential uses are considered appropriate use in commercial zones" are sections included in the NC and DC Zoning Districts and must be read and interpreted in context to the NC and DC Zoning Districts; this reference is not cited, nor intended to be applied to the GC Zoning District. Assistant City Manager stated that the petitioner is trying to use the same justification and rationale from a few years ago when he was allowed to build the apartment buildings, but the Code revision to add the word and specify "commercial" has eliminated the possibility of interpreting the Code to also include residential uses.

City Attorney stated that the bottom line is that there are two different interpretations of the Code and different opinions, but it is staff's opinion, and his opinion, that the way to read this code would be that in order to have residential in GC would be under specific exception as an accessory use and in Mr. Hayden's concepts plan residential use is not shown as an accessory use. City Attorney stated that this is City staff's interpretation of the zoning code and Mr. Hayden respectfully disagrees. City Attorney further stated that by law it is up to the Zoning Board to either make a decision saying that Mr. Hayden should be allowed to build the apartment buildings because it is allowed under the zoning code or make a decision to deny the appeal because the board believes it is not an allowed use under the zoning code.

Mr. Hayden stated that he understands that Concept Plan A does not depict the residential use as an accessory use. Concept Plan B should be allowed since the Code specifically states that "residential uses are considered appropriate uses in commercial zones."

Board members reiterated that specific reference is made in the NC and DC sections and not in the GC section.

Board members reviewed the information provided and presented and discussed the information and appeal.

Public hearing was closed at 8:01 p.m.

Scott moved, seconded by Skeen, to deny Mr. Hayden's appeal based on the finding that residential use is not a principal use in the General Commercial (GC) Zoning District.

Motion passed. AYE's – 7 – Twenhafel, Skeen, Haege, Jefferson, Scott, Kuehn, Taylor. NAY's – none. Abstentions – none.

MISCELLANEOUS

None.

ADJOURNMENT

Kuehn moved, seconded by Scott, to adjourn meeting at 8:04 p.m. ***Motion passed.*** Passed by unanimous yes voice vote.