



BOARD OF ADJUSTMENT

March 11, 2021

City Annex Building, Conference Room
680 Park Avenue

Member Present: Alden Allen, Wendy Nobles, Nathan Kennedy, Ron Johnson, James Wyatt

Staff Present: Naysha Foster, Current Planner, Brad Cramer, Director, Mike Kirkham, Assistant City Attorney, Randy Fife, City Attorney

Call to Order: James, called the meeting to order at 12:25 p.m.

Conditional Use Permit

CUP21-001: James informed the Board that this meeting is a continuation of the meeting that was held on February 25, 2021. He stated that this is a public meeting and testimony is closed. The Board will deliberate and render a decision. There are two items up for consideration:

1. A structure within seventy-five (75) feet of a waterway or flood way.
2. A public service facility in a park zone.

Ron said he finished reading the email testimony. It appears to him that the City has done their due diligence in choosing a location a year ago when public meetings were held. As he has studied the issue, he thinks the City has done its job and to request this variance would be appropriate and he has no reasons not to do it. James said as he goes through the requirements in the Zoning Ordinance and the bullet points you must look at; one sticks out as a hurdle. The proposed uses consistent with the purpose of the base zone in which the use is proposed to be located. He struggles with rectifying the fact that this water tower is consistent with the park zone adjacent to a natural water way. The discussion about being non-compliant with the Federal Conservatorship and the idea of purchasing additional land somewhere else to offset the land that we're short. The issue with that is, there is no way to get riverfront park. Once the land is gone it's not coming back. It's not an equitable trade. If the water tower does go there, there needs to be additional improvements to make it incorporate into the park. Wendy said this is the same thing she struggles with. There is so little space for people to go. Once it's gone, we'll never get it back. How do you mitigate this water tower with trees or anything else? Mike Kirkham asked Board member Allen to verbalize his comments as a transcribable record is needed and chat comments won't be sufficient. Alden said the discussion is breaking up and it is very difficult to hear the conversation between staff and Board. James said they would speak up. Alden questions is this allowed use consistent with the park zone. He is drawn to the Sugar Substation on Hitt Road where a park is hidden behind a public utility. Because of this the park is not used often. He's afraid the same thing will happen at Capital Park if the water tower goes in. He said the idea of a park space is to be inviting. He doesn't know if there are conditions that can be made on the installation of this facility that can integrate well enough to be able to mitigate that impact. Discussion about moving the water tower to the parking lot was had amongst the Board. James also pointed out to the Board that there is language all over the zoning ordinance that talks about radio towers and communication towers. Some of that language is that towers must be situated such that if they collapse, they don't cause harm to neighbors' property. He understands that water towers are not a very common structure so that probably explains the absence of them in the Zoning Ordinance, but he thinks it would have to be a similar concern. This cannot happen with the water tower in this location. James said there is two items that need to be considered and the first one is does the water tower being bult here cause water hazards, is it going to create a flood or change the water flow? He thinks the answer to this is no. The second piece is what he has difficulty with. He doesn't know if there is any amount of mitigation that can be done to make this a little more attractive or appealing. Ron said one of the issues he has is with the renditions of what the water tower looks like. He believes, if he is correct, that the picture the Board was shown is not what the tower was going to be. The decision of what it's going to look like has not been

made yet. If we did move forward, he would like the tower to beautify the area not take away from it. The Board had a discussion of the foot print the tower would have on the park.

James stated that there are some tools the Board can utilize for Conditional Use Permits. One of those would be to ask for resubmittals of documents to show what things are going to look like. The question is, do we feel like there is enough that could be done to even ask the City to move forward with mitigation and what would those mitigation items be? He said if we don't feel like there's a path forward, we just need to establish that right now and ask to see the changes. James thinks you could do things at ground level to make it more park like around the structure, but it never makes the structure go away. Nathan asked if there is an item they could use to allow us to vote against this. James responded "absolutely." Mike informed the Board that they could deny or approve with conditions, however, they had to point to the relevant standards and criteria that are present in the Zoning Code that justifies the denial or the conditions. So, if the Board denies the CUP, Mike would encourage them to point to specific sections in the zoning code that point to the denial. Nathan asked if there was anything they could point to? James said the only thing he could see is the section that says the proposed use is consistent with the base zone. Mike said they might want to look at that section in the order in which it is written. Section 11-2-2 reads that there are tables of allowed land uses that are set forth in this chapter, allowed land uses are listed as permitted (P), conditional ©, or prohibited (blank) uses for each zone. Subsection one says, "If a proposed use of property is not listed in the tables, the use shall be prohibited, unless the Zoning Administrator specifically determines that the use is equivalent to a permitted or conditional use." Subsection C is one of the four criteria that the Zoning Administrator could use to determine whether a proposed use is equivalent to a permitted or conditional use that's listed in the code. If the Board is going to rely on this section of code you would first need to make a finding that the Public Service Facility, that the water tower is defined as, does not appear in the conditional or permitted uses in the park zone. Mike thinks it is. James stated it's permitted but it's not consistent with the park. Mike informed him it is because it's listed as a Conditional Use in the code. The Board then discussed the decision-making criteria from 11-6-5 subsection (B) Conditional Use Permit. Mike informed the board that they could look at the criteria listed in the Zoning Code on whether there are ways that Conditional Use might be conditioned. A conditioned use in Idaho is one that is not outright allowed but is allowed if certain conditions that are specified in the Zoning Code are met. The Zoning Code section 11-6-5 (3) says that, "In addition to the conditions specified by the Zoning Code for conditional uses in each particular Zone, the City Council, Board of Adjustment, or planning Commission may impose additional conditions, including, but limited to:

- (a) Minimizing adverse impact on other developments or adjacent properties.
- (b) Controlling the sequence and timing of development.
- (c) Controlling the duration of development.
- (d) Assuring the development is maintained properly.
- (e) Designating the exact location and nature of development.
- (f) Requiring landscaping of on-site or off-site public facilities or services.
- (g) Restricting the hours of operation of any business or other commercial activity conducted on the premises.
- (h) Such other conditions as may be necessary to preserve the character and harmony of the zone and avoid conflict with the general characteristics of the area designated in the Comprehensive Plan."

If the Board was going to deny this Conditional Use Permit, Mike thinks they would need to point to one of those eight criteria as the basis for denying the permit. The Board discussed denying the permit based on letter (h) criteria shown above.

Randy Fife, City Attorney, said the idea of a conditional use is that it is allowed in the zone. The default is, if an applicant comes with something that fits within the criteria of the zone, it is allowed unless there is absolutely no way that it can be accommodated. Occasionally, there are adjustments that can't be made to accommodate but the default is to accommodate the use within the zone not to prohibit it. One mistake that is made fairly frequently is that people don't understand that concept or they try to find different things that increase the likelihood that it won't fit within the zone and that's not what the law requires. It requires that any adjustments that are reasonable to be made in order to allow the use. The Board then discussed the height restriction in the zone and if towers are structures and if they fit in the zone. Alden provided section 11-3-10 of the City Code where it says that maximum building height is thirty-five (35) feet. The Board continued to discuss if they can deny the Conditional Use Permit based on 11-5-5 (3)(h). Alden said he has a legal concern regarding the Conditional Use Permit based on section 11-3-10: "Standards For Special Purpose Zones (A) Dimensional Standards. Table 11-3-8 Dimensional Standards for Special Zones shall be used for determining the minimum site area, minimum setbacks, maximum building height, and maximum lot and building coverage in each special purpose Zone. (5) In the Park and Open Space Zone the minimum lot area is one (1) acre; except for public parks, playgrounds, or historical sites and monuments there is no

minimum.” Alden says this is below that minimum and doesn’t fit in the zone. Mike stated that this is not a subdivision, the size of the overall park won’t change. The Board discussed this and decided that the park is over an acre. Alden stated he does not think it fits within this zone and pointed to code 11-3-9: Purpose of Special Purpose Zones (B) which states: “Parks and Open Space. This zone provides a park zone and protects open space within the City for preservation and recreational use. Another purpose of this zone is to identify the appropriate location and efficient layout of public parks and playgrounds. This zone will harmonize the various features and facilities of parks and playgrounds with the surrounding area. This zone also interconnects park and open space systems linked by trails, greenways, or other public corridors.” The Board discussed conditions for the permit such as fencing material, hard scape, water features, redoing the sidewalks, and land scaping.

Brad Cramer, Community Development Services Director, clarified there is a height limit of thirty-five feet (35’) in a park zone for a structure. The exemption that would apply to this is other similar structure not intended for human occupancy. Alden asked the City staff if the Conditional Use Application has a completed Flood Elevation Certificate? Naysha replied it is not required because the tower would not be in the flood way. Mike informed the Board that the conditions they impose cannot be conditions that would redesign the project. They need to point to the standards listed in the zone. The Board can condition landscaping and location but cannot impose aesthetic conditions not in the code. What the Board has to avoid doing today is amending the Zoning Code and coming up with a new Zoning Code that applies just to this property. The Board needs to apply the Zoning Code as written to the property.

Ron made a motion to approve the Cities request for a Conditional Use Permit with the condition that great care be taken in approving the landscaping and that the City does all that it can to make this look beautiful. Mike informed the Board that that condition is probably not specific enough. Brad said it’s best to make the conditions measurable. The Board discussed specific conditions such as caliper of trees, fencing material, and removal of hard scape.

Ron made a motion to get a better look than when they started. The landscaping be improved. The Board continued discussion of what improvements could be made. Ron made the motion to approve the Conditional Use Permit as presented. James said he thinks they need to condition the tree size and they need to be chosen from the Cities tree guide. The fence needs to be made of a decorative metal, the asphalt needs to be limited, and the conditions need to be met in a specific timeframe. The Board discussed these conditions. Alden asked for clarification from staff regarding purpose of the zone vs. standards of the zone. Can conditions be set regarding purpose of the zone? Mike informed the Board that purpose statements are generally not something that is measurable. The purpose statement cannot swallow up the specific standards and uses that are allowed and permitted in the zone. The Zoning Ordinances that are in play are 11-3-2: Provisions That Apply In All Zones, 11-3-1: General Provisions, 11-6-5: Decision Making Criteria, and 11-2-6 (X): Standards For Allowed Land Uses. The Board continued their discussion regarding conditions.

Alden made a motion to approve the Conditional Use Permit as presented. James said we already have a motion to approve without conditions. No second, motion fails. Discussion about conditions continues.

James made a motion to approve the Conditional Use Permit with the following conditions:

1. A minimum of five (5) trees, selected from the City’s approved tree list, with a six-to-eight-inch caliper shall be planted in the same vicinity as the planned water tower as presented, pursuant to section 11-6-5(B)(3)(f) of the Comprehensive Zoning Ordinance.
2. Landscaping improvements shall be completed within one (1) year after the construction of the water tower or the applicant shall come back before the Board of Adjustment, pursuant to section 11-6-5(B)(3)(c) of the Comprehensive Zoning Ordinance.
3. If a fence is installed, chain-link shall not be permitted as a material, pursuant to section 11-6-5(B)(3)(h) of the Comprehensive Zoning Ordinance.

4. The applicant shall reduce the amount of asphalt by eliminating the access directly connection to Capital Avenue to preserve green space and maintain harmony of the area as required in the Park Zone, section 11-6-5(B)(3)(h) of the Comprehensive Zoning Ordinance.

Nathan seconded the motion. James called for a roll call vote: Ron, yes; Nathan, yes; Wendy, yes; Alden, nay. The motion passed.

Adjourn: James adjourned the meeting at 3:14 p.m.

Respectfully Submitted,

Ann Peterson, Recording Secretary