

CITY1704.DSS

Chairperson Blaser called to order the December 14, 2016, regularly scheduled meeting of the Board of Adjustment at 5:30 p.m. in the City Council Chambers, West Des Moines City Hall, located at 4200 Mills Civic Parkway, in West Des Moines, Iowa.

Roll Call: Blaser, Celsi, Christiansen, Cunningham.....Present
Pfannkuch.....Absent

Item 1 – Consent Agenda

Item 1a – Minutes of November 2, 2016

Moved by Board Member Christainsen, seconded by Board Member Celsi, to approve the November 2, 2016 meeting minutes.

Vote: Blaser, Celsi, Christiansen, Cunningham.....Yes
Pfannkuch.....Absent

Motion carried.

Item 2 – Old Business

There were no Old Business items reported.

Item 3 – Public Hearings

Item 3a – Kum & Go, 330 Jordan Creek Parkway – Construct a 6,217 sq. ft. convenience store with eight fuel pumps – Kum & Go, LC – PC-003227-2016

Chairperson Blaser opened the public hearing and asked the Recording Secretary to state when the public hearing notice was published. The Recording Secretary indicated that the notice was published on December 2, 2016, in the Des Moines Register.

Chairperson Blaser then asked for a motion to accept and make a part of the record all testimony and all other documents received at this public hearing.

Moved by Board Member Celsi, seconded by Board Chair Blaser, the Board of Adjustment accepts and makes a part of the record all testimony and documents received at this public hearing.

Vote: Blaser, Celsi, Christiansen, Cunningham.....Yes
Pfannkuch.....Absent

Motion carried.

For the record, Board Members Christiansen and Cunningham have indicated conflicts of interest and would not be participating in this item. Given the fact that a majority of the voting members of the Board are either absent or have recused themselves, Chair Blaser asked for a motion to defer this item to the December 28, 2016 Board of Adjustment meeting.

Moved by Board Member Celsi, seconded by Board Member Cunningham, the Board of Adjustment defer this item to the December 28, 2016 Board of Adjustment meeting.

Vote: Blaser, Celsi, Christiansen, Cunningham Yes
Pfannkuch Absent
Motion carried.

Item 3b – Appeal Request – Christiani Appeal – Jeremy Christiani – 1100 50th Street, Unit 1102 – Appeal of decision by the Director of Development Services in interpreting the animal keeping provisions contained in the Open Space/Agricultural and Residential Use Regulations (Title 9, Chapter 5, Section 8) of City Code – VAR-003005-2016

Chair Blaser opened the public hearing and asked the Recording Secretary to state when the public hearing notice was published. The Recording Secretary indicated that the notice was published on December 7, 2016, in the Des Moines Register.

Chair Blaser then asked for a motion to accept and make a part of the record all testimony and all other documents received at this public hearing.

Moved by Board Member Cunningham, seconded by Board Member Christiansen, the Board of Adjustment accepts and makes a part of the record all testimony and documents received at this public hearing.

Vote: Blaser, Celsi, Christiansen, Cunningham Yes
Pfannkuch Absent
Motion carried.

Chair Blaser stated for the record that the applicant Jeremy Christiani had requested a deferral of this item to a later date. After testimony and staff’s presentation, the Board can either approve or deny staff’s recommendation or agree to the applicant’s request for a deferral.

Chair Blaser asked the applicant to come forward and explain the appeal recognizing the fact that this was an appeal of a specific zoning provision, and that the Board of Adjustment does not possess authority to consider the effect that the City’s police, animal control, or noise control regulations may have upon the applicant.

Jeremy Christiani, 1100 50th Street, Unit 1102, expressed that he was not prepared to present this evening as the process has been overwhelming. He has submitted information to the Board, and he was willing and ready to answer any questions posed by the Board. Mr. Christiani continued that he did not fully understand the limitations of what was being addressed tonight. He understood that the Board would have the power of the person who made the decision, and that the decision would include the interest of what would be limited to the scope of appropriateness.

Chair Blaser asked Mr. Christiani if he had an opportunity to read the staff report regarding this item. Mr. Christiani affirmed that he had read the staff report and understood that staff was recommending denial of his appeal to maintain quail on his property. Mr. Christiani added that he did bring definitions that were pertinent, in addition to what he had already submitted. He continued that in all definitions of agricultural production, it has been defined as for gain or for profit. The definition for wild is very vague and that domesticated Japanese quail are not wild as they cannot survive in the wild nor can they reproduce in the wild. The Japanese quail are domesticated forms of common quail and are considered a subspecies, and in 1983 was distinguished as its own distinct species. Mr. Christiani indicated that the Japanese quail has over 28 different calls which is the reason he keeps them as pets at his particular location which is well suited to having an aviary. He summarized by stating that these birds were important to his family, and he needed more time for organizing his comments.

Board Member Cunningham asked if it was correct that Mr. Christiani had three dozen quail and, if so, what was he actually doing with the quail. Mr. Christiani confirmed that he does have three dozen Japanese quail and that

each weighted 3.5 ounces. He elaborated that the quail have a very short life span and are kept in Guinea pig cages. Because of the constant barrage of noise from the property next to him and the highway, Mr. Christiani stated that the birds are on the other side of a 12 ft. long glass wall used as a buffer from outside sounds. He expressed that his children and their friends from school play with the quail.

Board Member Celsi inquired how many birds were born a year out of the group. Mr. Christiani responded that none as the quails would have to be incubated as they are not capable of natural reproduction.

Board Member Celsi inquired if Mr. Christiani sold any of his birds. He responded no.

Board Member Celsi inquired if Mr. Christiani brought the birds indoors when it got cold outside. Mr. Christiani replied that the most playful birds were brought indoors. The others were kept outside so that their feathers would molt and keep the birds warm for the winter. Thus, most of his birds were raised outside so as to obtain the appropriate feathering.

Board Member Celsi asked what the homeowner's covenant stated regarding what was allowed and what was not allowed for his complex. Mr. Christiani stated that he had never received an official notice of violation, but that he was told by the property manager at an annual meeting to get rid of the quail. His association has allowed pets for many years, and it was Mr. Christiani's understanding of the law that this would become a waiver and un-enforceable. He felt that this is why the City received a complaint as the homeowner's association could not take care of the situation.

Chair Blaser stated that it was a surprise to him that this issue came before the Board of Adjustment. He asked Mr. Christiani if it was correct to say that the City has determined that the quails are either wild by nature and/or primarily used in agriculture production. Mr. Christiani stated that he disagreed with the City's conclusion.

Chair Blaser asked for any other questions or comments from the audience.

Dennis Studer, 611 Valhigh High Road, stated that he read the article in the newspaper regarding this issue and found it very interesting. From this article, there were people that stated the birds were not a noise nor an odor nuisance so he did not understand why there was a problem.

Doran Doty, 1100 50th Street, stated that he originally came to listen today as he has a problem with a condo association that allowed birds as they are a noise issue for him and others. The condo association states that no pets are allowed even though he realized that a few people did have pets. He believes that the City does not allow wild birds to be kept in the City limits, especially at a condo on a patio. Mr. Doty expressed that when the weather is nice and doors are open, the birds can be heard all night. He continued that he believed that the association would like West Des Moines to deal with the situation as they are afraid of Mr. Christiani.

Chair Blaser stated that Mr. Doty's comments were appreciated, but on behalf of the Board, their function was not to do the job of the association.

Bob Gainer, Attorney for Stoneridge Condominium Association, echoed the points of the City staff report that not only does having these quail violate the West Des Moines City ordinance, but it also violates the covenants of the homeowners' association. At this point in time, Mr. Gainer was attending the meeting to support the decision of the Director that it was not appropriate to keep these animals where they were currently located.

Chair Blaser asked Mr. Gainer if he agreed that it was not the Board's function to enforce homeowner covenants. Mr. Gainer stated that he agreed that it was not the Board's jurisdiction, and that the issue was whether the Japanese quail were either wild by nature or primarily used for agricultural production.

Chair Blaser then asked for any additional questions or comments from the audience and upon hearing none, declared the public hearing closed and asked for staff comment.

Jason Wittgraf, Assistant City Attorney, stated that a complaint had been received from the City's Code Enforcement Office that Mr. Christiani was raising quail on his condo patio. The City's Community Compliance Officer determined that Mr. Christiani had three dozen quail at a residential condo in an area zoned Medium Density Residential. This was around October and all the quail on the patio were confined in little lockers.

After conducting research, Mr. Wittgraf found that Japanese quail are migratory birds, would fly away if allowed, are primarily used for their meat, become adults in a short time period, and their eggs can be used for consumption. He continued that he found that those who have quail usually have them when chickens are not allowed.

Mr. Wittgraf continued that a letter was sent to Mr. Christiani from the City indicating that he had 30 days to discontinue keeping the quail at his residence. Under 9-5-8 of City Code, it addresses permitted and permitted conditional uses, and these birds are only permitted on either open space agricultural properties or in residential estate zoning as they are considered wild by nature.

Mr. Wittgraf expressed that 36 birds was considered excessive and usually animals are limited to a maximum of four in residential designations. Mr. Christiani has not proven that he has an undue burden and, further, there are homeowner covenants that read: dogs, cats, and other pets, animals, and birds including any mammal, rodent, or snake are prohibited. Thus, Mr. Christiani has been on notice and had knowledge that birds are not allowed where he resides even before he acquired his quail. Mr. Wittgraf asked the Board to support the findings of the Director of Development Services and deny the appeal request.

Board Member Christiansen asked if Mr. Wittgraf was in favor of a continuance. Mr. Wittgraf responded that the City was not in favor of a deferral and would like to move forward with this issue. Based on City Code, proper notice was sent to all property owners of record that were located within 370 feet of the subject property. Thus, 125 residents were notified of this meeting, and he felt that this was the time and place to be heard on this matter.

Board Member Cunningham asked if there was discussion with animal control regarding the number of pets allowed. Mr. Wittgraf stated yes the number would be an animal control issue.

Board Member Cunningham asked if it was understood that Mr. Christiani was not using the quail for agricultural purposes. Mr. Wittgraf responded that this was correct that Mr. Christiani had stated he does not use quail for ag purposes.

Board Member Cunningham asked that if an animal could be used in agricultural, would that be enough to exclude the animal. Mr. Wittgraf stated that this would be the City's position.

Mr. Wittgraf continued that there is a provision in the Iowa Code under chapter 481 A, paragraph 36, 41A.1 under definitions in which wild animals are defined, and under 21D there is a definition of game which talks about wild turkeys, grouse, pheasants, partridges, and quail which alludes to wild life and wild life conservation. It was agreed that the statute does not define the word wild.

Board Member Cunningham stated that he understood that the Iowa Code defines wild animals as meaning a wild mammal, bird, fish, amphibian, reptile, or other wild life found in the state whether game or non-game, migratory or non-migratory, the ownership entitled to which it is claimed by the state.

Chair Blaser elaborated that he did not think the State definition had any applicability in this matter. Mr. Wittgraf stated that City Code does not define wild life, but that Iowa Code did comment on wild life.

Chair Blaser stated that he understood that under the condo association rules, no pets are allowed as stated in their restrictive covenants. It seems like the condo association chooses when to enforce this particular covenant as some dogs and cats have been allowed to remain which would be in violation. He agreed with Board Member Cunningham that the City can either defend the use of the word wild or that quail are primarily used in agricultural production. It was his understanding that Mr. Christiani does not use his quail for agricultural purposes. In terms of wild, it seems that there is a fine line in determining if the Japanese quail would be considered wild.

Assistant City Attorney Wittgraf interjected that Mr. Christiani could appeal the Board's decision in District Court if it was determined there was an ordinance violation.

Board Member Cunningham believed from Mr. Christiani's submissions that there are many definitions of wild one of which is living in a state of nature and not ordinarily tamed or domesticated. Materials obtained on Wikipedia state that Japanese quails are domesticated forms of the common quails. A wild animal is one that is normally not domesticated.

In his opinion, Mr. Wittgraf stated that you can see from the Wikipedia entry and Iowa Code provisions that both ways could be argued. Short of observing Mr. Christiani in his home or obtaining a search warrant, you would have to take his word that his quail are domesticated.

Chairperson Blaser asked, and it was clarified, that the condo covenants do not belong to City, and it was not the City's responsibility to enforce the condo association covenants.

Director Twedt stated that Staff feels that the term 'not ordinarily tame' in the definition of 'wild' provided by Mr. Christiani is critical as quail are wild by nature. Wild animals by nature are not allowed in Medium Density zoning districts. Ms. Twedt continued that staff was given a table of uses and has to determine where this use falls. Quail are definitely not a common household pet. She understands that Mr. Christiani does not use his quail for production, but quail can be used for production. The Code looks at what animals are compatible with a residential nature, and it was felt that quail are not compatible in the more dense areas of the City, as is the same with the City not allowing chickens.

Board Member Christiansen commented that the applicant had requested a continuance, but that if this is a code enforcement issue, he questioned if the Board of Adjustment was the right venue to address this issue. Director Twedt pointed out that Mr. Christiani received a notice of this meeting and had two weeks to prepare, just as staff had two weeks to prepare. Ms. Twedt indicated that a courtesy notice would be sent out to the 125 property owners if the Board decided to grant a continuance.

Board Member Cunningham asked Mr. Christiani why the need for a continuance. Mr. Christiani responded that he spent a lot of time and effort on issues that were not in the scope of the Board of Adjustment, and he did not understand fully what was needed to be provided to the Board. He needed time to clearly articulate his position. Board Member Cunningham stated that then it was his understanding that Mr. Christiani was requesting a continuance not for evidence, but for argument.

Board Member Christiansen asked if Japanese quail live in a natural or native environment. Mr. Christiani responded that it would be instant death for the quails if put outside as they would be a target for predators. He continued that Japanese quails cannot reproduce or feed themselves without human intervention.

Director Twedt interjected that after researching quail, it was determined that quail were meant to be outside

forging around. Quail started out in the wild and have been brought into households. For City purposes and by definition, quail are wild by nature and are an agricultural animal. SIC 0259 specifically lists the animals considered wild by nature and quail are included.

Mr. Christiani clarified that Japanese quail are a completely separate distinctly different bird of a different species.

Chairperson Blaser commented that he did not know how much more of an argument could be obtained for either side to determine whether this particular strain of quail was wild or not wild. There seems to be inconsistencies in the information provided, and there were compelling arguments for both sides regarding if the quails were wild or not. Both parties would have other opportunities for a day in court depending on the outcome.

Moved by Board Member Cunningham, seconded by Chair Blaser, to deny a request by the applicant Jeremy Christiani for a continuance.

Vote: Blaser, Christiansen, Cunningham.....Yes
Celsi.....No
Pfannkuch.....Absent
Motion carried.

Chair Blaser commented that the Board would now vote on whether or not this was a violation of allowing wild animals in this zoning category. He granted some deference to the City for its interpretation of its own ordinance.

Moved by Chair Blaser, seconded by Board Member Christiansen, the Board of Adjustment adopt a resolution for denial of an Appeal Request of the decision by the Director of Development Services in interpreting the animal keeping provisions contained in the Open Space/Agricultural and Residential Use Regulations (Title 9, Chapter 5, Section 8) of City Code.

Vote: Blaser, Celsi, Christiansen, Cunningham.....Yes
Pfannkuch.....Absent
Motion carried.

Item 4 – New Business

There were no New Business items presented.

Item 5 – Staff Reports

Item 5a – Approval of 2017 Meeting Schedule

Chair Blaser asked for any questions or comments regarding the 2017 meeting schedule; seeing none, asked for a motion to approve the 2017 meeting schedule as presented.

Moved by Board Member Celsi, seconded by Board Member Christiansen, the 2017 meeting schedule be approved as presented.

Vote: Blaser, Celsi, Christiansen, Cunningham.....Yes
Pfannkuch.....Absent
Motion carried.

Dialog Regarding a Quorum

Board Member Christiansen asked for clarification on the rules related to a quorum. He was concerned that petitioners may not get their project approved due to a lack of a quorum when three or more Board Members were absent or had to recuse themselves due to a conflict of interest. Assistant Attorney Wittgraf commented that Iowa Code, Chapter 414, talks about the Board of Adjustment but does not address procedural issues. He understands how it could be troublesome if decisions had to be postponed due to a lack of a quorum. Mr. Wittgraf continued that there could be a time when three members had a conflict of interest and would have to recuse themselves; in which case, this could be deemed a denial even though there would be no objections.

Development Coordinator Schemmel stated that State Code does not address this issue. Code only states that per State Law, three board members are required to take action on any item. Unlike the Plan and Zoning Commission, the Board of Adjustment cannot take action on an item unless the number of voting members met the quorum requirement. She felt that there needed to be more clarification on the appropriate action when it was not possible to have three voting members. Mr. Wittgraf stated that the Board Chairperson would have the ability to call an emergency or special meeting at any time or by a majority of its members for non-public hearing items or for the purposes of a study session, but Mr. Wittgraf felt that a meeting could be called outside the regularly scheduled dates with proper notice.

Item 6 – Adjournment

Chair Blaser asked for a motion to adjourn the meeting.

Moved by Board Member Christiansen, seconded by Board Member Celsi, the Board of Adjustment meeting adjourns.

Vote: Blaser, Celsi, Christiansen, Cunningham Yes
Pfannkuch Absent

Motion carried.

The meeting adjourned at 6:43 p.m.

Michael R. Blaser, Chairperson
Board of Adjustment

Kimberly Taylor, Recording Secretary