

BOARD OF ADJUSTMENT MEETING MINUTES

BOA_AF_02-15-2023

Chairperson Stevens called to order the February 15, 2023, regularly scheduled meeting of the Board of Adjustment at 5:30 p.m. in Council Chambers, West Des Moines City Hall, located at 4200 Mills Civic Parkway, in West Des Moines, Iowa, and electronically through Zoom.

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

Item 1 – Consent Agenda

Item 1a – Minutes of February 1, 2023

Chairperson Stevens asked for any corrections to the meeting minutes of February 1, 2023. Hearing none, Chair Stevens declared the minutes approved as presented.

Item 2 – Old Business

There were no Old Business items.

Item 3 – Public Hearings

Item 3a – 7502 Raccoon River Dr , US Cellular – Variance of the Eastern Side Yard Setback to accommodate a 130-foot-tall monopole tower – GSS Midwest, Inc. – VAR-005896-2023

Chairperson Stevens opened the public hearing and asked the Recording Secretary to state when the public hearing notice was published. The Recording Secretary stated that the notice was published on February 3, 2023, in the Des Moines Register.

Chair Stevens asked if there had been any written comments provided prior to the meeting. Planner Kara Tragesser informed that written comment had been provided just prior to the meeting by Eva Morales and copies had been made for the Board of Adjustment members, however Staff had not had time to review the document. A copy of the comments was also provided to Board Member Christiansen, who had joined the meeting through Zoom. Mr. Christiansen had been unable to attend the meeting in person due to illness.

Moved by Board Member Blaser, seconded by Board Member Pfannkuch, the Board of Adjustment accepted and made a part of the record all testimony and documents received at this public hearing.

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

Motion carried.

Albert Aguirre, GSS Inc., 3311 109th Street, Urbandale, presented the request for a side yard setback variance to allow a cellular monopole tower of 130 feet to be located at 7502 Raccoon River Drive. Mr. Aguirre informed that this will be a 130-foot stealth monopole tower which has met all the setback requirements at this location except for the eastern setback. Mr. Aguirre stated the fall zone is 40% according to their tower engineer, which means it would be likely to break at 52 feet, leaving an additional 6 feet if catastrophic event took place, the fallen tower would stay on their parcel. The purpose of the tower installation was to increase service to existing and future US Cellular customers. He noted that this area of West Des Moines is growing, and the installation of this tower would offload demand on smaller nearby towers.

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Chair Stevens asked Mr. Aguirre to expand on the difficulty noted in their application in locating a site. Mr. Aguirre summarized the site selection process, which involves recommendations by an engineer, research of existing zoning regulations, search for easements, floodway and floodplain areas, and gauging interest of potential landowners.

Planner Kara Tragesser provided clarification that the existing site is located within the flood plain, rather than the flood way, and as such is allowed to be built there.

Chair Stevens noted that she uses the Racoon River Kennel for her dogs and had checked with City staff prior to the meeting to determine that this did not create conflict of interest. She then asked the applicant if they had any issues with her participation. There was no opposition voiced regarding her participation in the discussion and vote.

Board Member Christiansen asked if there was an image of the proposed tower. Development Coordinator Schemmel provided several images of similar installation as recommended by the applicant. General discussion on the appearance of the installations and differences from the proposed installation occurred.

Chair Stevens asked if GSS has had any complaints from neighbors about the existing towers. Mr. Hemsted responded that he's facilitated with the building of 800 towers in 25 years and while frequently residents will appear at the initial approval zoning meetings, after construction there are not usually any complaints. This tower will be noticed by the immediate neighbors particularly while it is being constructed, however once it is in place, anyone in the neighborhood just driving by is unlikely to even notice it.

Chair Stevens noted that the applicant had mentioned this tower will be capable of hosting 3 carriers. She asked if all three carriers will be included at once. Mr. Hemsted replied that US Cellular would be the first customer, and the others joined later. She then asked Staff if those carriers would have to come back before the Board of Adjustment for approval. Planner Tragesser stated that approval would only require staff review.

Board Member Christiansen asked about a tower the Board had approved to be located at SW 50th and EP True Parkway, whether it had ever been constructed. Planner Tragesser noted that it had been approved but had never been built.

Chairperson Stevens asked if there were any questions or comments from the audience.

Eva Morales, 7490 Racoon River Drive, informed that she was present with her family and was the nearest neighbor to the proposed site. She voiced her objections to the proposed location, detailing how she believed that the applicant failed to meet all four requirements necessary to support approval of a variance. Ms. Morales provided a 23-page handout to the Board that followed along with her remarks. Ms. Morales referenced Iowa Supreme Court Case No. 19-1672, filed in February 2021, to substantiate her request for denial of the variance.

Ms. Morales noted that her family had been approached regarding the placement of tower however communication had fallen off, so they assumed their property didn't suit the project. She recommended that the tower be moved 250 feet to the east of its proposed location, which would lessen the impact to her property, including removing concern about potential fall impact.

Board Member Blaser noted that City attorney Staff and Development Staff would need to respond to some of what she had presented, and that he was not yet prepared to vote based on Ms. Morales'

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presentation alone. He concluded that he understood her position, and also understood that people need cell phone towers. Chair Stevens added that the Board had addressed differences of opinion on variance requests such as this in the past.

Ms. Morales commented that she understood the Board is quasi-judicial, and that this is application of an ordinance, with a legal standard. She reiterated that the required elements could not be satisfied, and without the burden of proof being met, the variance should not be granted.

Board Member Blaser responded that some of the legal technicalities were better addressed by an actual court of law, and Ms. Morales noted that there is an appeals process.

Zack Mancuso, 7490 Raccoon River Drive, voiced his opposition to the location of the tower at this site. He emphasized the impact to his property should a tower collapse occur, noting for the record other towers that had broken at the base rather than the predicted fault point. Mr. Mancuso shared the distance from his house to the core of the tower and pointed out that his septic system was even closer remarking that raising the elevation of the tower site would directly impact his septic system. Mr. Mancuso questioned if the future plans for expanding the kennel on site supported the applicant's claim of hardship. Mr. Mancuso then pointed out various other site options in proximity of the subject property that would result in the tower being located farther from his home. Mr. Mancuso stated that he had voiced his objections on the tower to GSS directly when the site was being determined and offered to provide cell phone texts regarding his conversations with GSS, however Chair Stevens pointed out that they should have been provided prior to the 3:00 PM deadline for written comment.

Chairperson Stevens asked for any other questions or comments from the audience and upon hearing none, declared the public hearing item closed at 6:18 PM.

After discussion by the board, Kara Tragesser, Development Services Planner, stated she had nothing to add to the Staff Report. She noted that she had received Ms. Morales' information just prior to the public hearing and had not had time to digest it. Planner Tragesser noted that the decision tonight was only for the side yard setback, and that the item would have to come forward again for a Conditional Use Permit, and also have the Site Plan reviewed by the Planning and Zoning Commission and City Council. Chair Stevens clarified that the Board was not voting on permission to build. Assistant City Attorney Jessica Grove responded that Ms. Morales had been accurate in her quotes of the Supreme Court Case, however these comments simply reinforced standards which the Board should already be considering and were practicing, it wasn't new information. It just reinforces what the Board had previously discussed about the reasonable return element meaning the impact of the zoning regulation would rid all economic use of the property, not that the property could be more economically beneficial with the improvement versus without.

Attorney Grove commented that she could understand the Board's hesitancy to make a decision; however, this was similar to many they had decided in the past. Attorney Grove reminded the Board that this was a decision simply to decide side yard setback, knowing the reason for the setback was the additional height of the element. She reminded the Board that whatever they did decide, they would need to state why they thought the criteria had been met. Since all four criteria had to be met for approval, if there was one criterion that the Board did not feel had been met, it was enough to state that one criterion.

Chair Stevens asked about the comparability of a tower approved in the past and constructed at 5400 Grand Avenue. Planner Tragesser noted that the Code had changed from that approval date to include four conditions rather than five, one of which had been unnecessary hardship, but that was the only difference in the Code from that approval. Attorney Grove added that legally, the current Board was not bound by decisions made by former Boards. She commented that the decision would

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need to be made based on the facts presented and that variances are common with all cell towers. Attorney Grove reminded the Board that their motion would need to include language regarding which conditions have been met or have not been met.

Chair Stevens asked Planner Tragesser if the City had reviewed any potential locations for the cell tower. Planner Tragesser responded that it was not the City's responsibility to choose site locations, but to review those proposed by the applicant.

Chair Stevens asked if Staff believe the unnecessary hardship requirements have been met to support the request. Planner Tragesser stated staff did, as noted in the Staff findings. Attorney Spoden cautioned that Staff presented facts but do not provide an opinion whether to support or deny variances. It would be up to the Board to choose which findings supported the decision.

Board Member Christiansen asked if the Public Hearing had been closed, as he had a question for the Applicant. Chair Stevens stated it had been.

Board Member Christiansen stated approval for the presentation, noting that the applicant could offer to defer the item to provide further discussion with the neighbor, or the applicant could ask for a vote. He asked if Legal had an opinion. Attorney Grove replied that the Board had the option to reopen the Public Hearing if they wished to ask questions of the applicant. Board Member Christiansen indicated he had a question for the applicant.

Chair Stevens reopened the Public Hearing at 6:28 PM.

Board Member Christiansen asked Mr. Aguirre and Mr. Hemsted if they would like to deliberate for a couple more weeks. Mr. Hemsted responded that they were not opposed to allowing more time for the Board to review the materials, but he was not sure that they could move the location to the west. He commented he did not have a flood plain map and one was provided to him. He concluded that he did not have enough information to comment on alternate site locations.

Chair Stevens asked if the location of the flood plain influenced the site location on this particular property. Mr. Hemsted answered that he didn't have an explanation other than this was where the property owner had indicated they would like it to be located. He added that GSS would not be able to negotiate with the neighbor on behalf of the property owner.

Board Member Christiansen commented that he hadn't had enough time to review the info presented, but that it was up to the applicant if he wished to proceed. Mr. Hemsted stated that if the Board felt they had enough information to make a decision, they should proceed. If not, they could table it.

Board Member Blaser stated that he believed it was pretty well laid out. The 51 feet being requested was not the length of a football field, and he stated he supported the proposal as written. Attorney Grove responded that the Public Hearing was still open. If the choice was made to defer the item, she recommended keeping the public hearing open until the next meeting. If a vote was to be taken tonight, the Public Hearing should be closed. She concluded that regardless of the discussion between property owners about the site location, the final site would still have to comply with Code. Ms. Morales noted that the Board had considered four or five variances since the 2021 Supreme Court ruling and had denied a variance for Dave & Buster's for not meeting the hardship requirement. This appeared to be very similar to the current request. She noted again that the placement of this tower on the kennel property was a choice and not a hardship. Ms. Morales stated that the Board needed to find substantial evidence based on fact, rather than speculation, to justify those findings.

Chair Stevens closed the public hearing at 6:36 PM.

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Board Member Christiansen asked if Board Member Blaser had made a motion. It was determined that he had not yet made a motion.

Chair Stevens commented that they had reviewed Staff Findings. She then asked for continued discussion or a motion and a second for this item.

Moved by Board Member Blaser, seconded by Board Member Pfannkuch, the Board of Adjustment adopted a resolution to approve the variance based on Staff Findings.

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

Chair Stevens was asked if she wished to comment on her "no" vote. She commented that she was uncomfortable with the unnecessary hardship and believed the neighbors had raised valid points with respect to the location selection, the fact that there's an existing business, and there's no economic hardship with respect to the property itself.

Item 4 – New Business

There were no New Business items.

Item 5 – Staff Reports


Item 6 – Adjournment

Chairperson Stevens asked for a motion to adjourn the meeting.

Moved by Board Member Pfannkuch, seconded by Board Member Blaser, the Board of Adjustment meeting adjourned at 6:39 PM.



Michele Stevens, Chairperson



Jennifer Canaday, Recording Secretary