

Minutes of the Hearings Officer meeting held on Wednesday, February 25, 2015 at 12:30 p.m. in the Murray City Municipal Council Chambers, 5025 South State Street, Murray, Utah.

Present: James Swan, Hearing Officer
Tim Tingey, Administrative and Development Service Director
Jared Hall, Manager of Community Development Division
Ray Christensen, Senior Planner
G.L. Critchfield, Deputy City Attorney
Applicants

Mr. Swan opened the meeting and welcomed those present. He reviewed the public meeting rules and procedures.

CONFLICT OF INTEREST

Mr. Swan stated that he has no conflicts of interest for this agenda.

CASE #1511 – JEFFREY RINDLISBACHER – 4752 S Rainbow Drive – Project #15-19

The applicant withdrew their request.

CASE # 1510 – APOLLO MARBLE & GRANITE – 153 West 4500 South – Project #15-10

Paul King was present to represent this request. Ray Christensen reviewed the location and request for variances relating to the Murray Land Use Code Title 17 relating to the site plan review process for the property located at 153 West 4500 South. On November 16, 2000 the Murray Planning Commission approved a site plan submitted for a warehouse building on the subject property, but the site improvements were never completed as required. After the time of the original site plan review, Apollo Marble and Granite moved a granite and marble contract construction business use onto the site without obtaining site plan approval. A site plan review and Conditional Use Permit approval by the Planning Commission is required by ordinance. The city pursued the installation of the required improvements and site plan review of the additional site. Recently, the applicant was ordered by the Murray City Justice Court to submit a variance request to the City by January 12, 2015 and to subsequently submit a site plan for review approval based on the outcome of the request for variance. This application is the response to that order. Granting the variance would be inconsistent with the land use ordinance; none of the general purposes of the ordinance can be carried out in any degree if the variance is granted and the site is not required to undergo review, or to install any improvements. The general plan encourages site improvements for safety, health, welfare and beautification of properties in the City. It is staff's opinion that granting a variances to the site plan requirements established by the ordinance generally could not be considered consistent with the general plan in any way.

The property has adequate area to provide the required site improvements and staff finds that the application of the ordinance in this case does not deprive the property owner of any privilege that others in this district enjoy. Based on review and analysis of the application material, site and surrounding area, and applicable Murray Municipal Code sections, the Community and Economic Development Staff finds that the proposal does not meet the standards for variances and recommends denial of the requested land use variances.

Paul King, indicted he is appearing on behalf of the applicant, William King, 4276 South Highland Drive. Mr. King stated that the request for the continuance was made because he was supposed to be out of town this week and they needed more time to prepare for the meeting. Mr. King stated that he had coordinated the continuation with the city before

the notices were sent out, but there was confusion and the notices went out. The city said they would consent to the continuance, but the decision would be up to Mr. Swan, the Hearing Officer. He stated the applicants would prefer having this continued to the March 25, 2015 meeting.

Mr. Swan asked if anyone from the city had any comments about the continuation. Mr. Tingey, Director of Administrative and Development Services, stated that the applicants are present and he thinks we could move forward today. Mr. Swan stated that he is inclined to move forward at this point. Notices have gone out. Mr. Swan stated that he has all the information he needs. He stated if the meeting were to be continued, that he would not be receiving any new information to review. Mr. Swan stated that before he decides for sure he asked Mr. King if he had any particular items that he wanted more preparation on. Mr. Swan stated that this case has been outstanding for a good time now; there has been a pending court case and a court order. Mr. Swan stated that he wants to have a quick resolution to this, and he would like to move this along, and that it would be in everyone's best interest. Mr. Swan asked if there was any more information that could be provided to him. Mr. King stated that in the week prior, the City told him that they would jointly request the continuance, and now they have changed their position. However, they are there and ready to move ahead.

Mr. Hall clarified that staff had said is that the decision to continue this item would be entirely up to the hearing officer's discretion. He stated the city staff is prepared to have the case reviewed and doesn't anticipate any new information coming in and this application should move forward.

Mr. Swan stated that the applicants have changed their schedules and obviously they can do it today. Mr. Swan thanked Mr. King for changing their schedules and was willing to consider a continuance if they were not present. He stated that since all of the parties are here, he wished to proceed with the hearing today.

Mr. Tingey asked to review a few things to help Mr. Swan understand the background of this issue, particularly related to the site plan and the variance processes. Mr. Tingey highlighted the background of this property. In 1993 a Conditional Use Permit was approved for a trucking company. The property was divided in 1996. In 2000 the property in question had a site plan review and approval was granted for a warehouse building to house antique trucks and trailers. There was no mention at the time of the applicants of submittal for any outdoor storage being a part of that use on the site. That is what was approved for the site plan including a number of conditions. There were multiple conditions including landscaping issues, storm water issues, parking and striping, and all of the conditions associated with that. In September of 2001 there was a final inspection of the building which was disapproved due to non-compliance with the conditions and the site itself. There was non-compliance with the site conditions and there was not an issuance of a certificate of occupancy at that time. He stated that what was in place, was the approval of that site plan review. The purpose of the site plan review is to evaluate new development of permitted uses and certain changes of use. The city code specifically states in a site plan review process, that if there is outside storage of materials, that kicks in the requirement to go through a site plan review. Section 17.54.100 also states that a site plan review, once approved, affects real property regardless of a change in ownership and all subsequent owners are subject to those conditions as long as the site is being operated. That is an important part of this process as well. Correspondence on this issue occurred for a number of years and in 2010 and

2013 there were two letters sent to the property owner. Mr. Tingey stated he has copies of the letters from March 2010 and November 2013. Those letters reiterate all of the issues related to the site and they also include what was required. Mr. Tingey stated that he would submit those as part of the record to Mr. Swan. The letters outline the requirements to be in conformance with Murray City ordinance. He summarized the requirements which are to either remove the stone product business from the site, remove those materials or adhere to the conditions from the original site plan review approval including installation of landscaping as well as installation of landscaping in accordance with the standards and/or applying and obtaining a variance to the standards which is why we are here for today. He stated that the applicants must also submit a site plan for review because the use includes outside storage and that was not included in the original approval. Mr. Tingey stated this issue went through court action on November 17, 2014 and it was ruled with the following conditions: The applicant(s) were placed on probation with the conditions that 1- They must submit the variance request by January 12, 2015 which they did; 2- After decision on the variance request is made the defendant has 45 days to submit a site plan review, and within 30 days after site plan review defendant has to meet the conditions of the site plan review approval. He reiterated that the applicant has talked a lot about the site approval process and the concern with that. However, that is not related to the variance and that is what went through the courts, and it was ruled on. Now we are moving forward with the variance application primarily related to conditions where variances are applicable, such as landscaping, if there is fencing, if there's a number of parking spaces. Those are the elements that are relevant to a variance. He reiterated that the site plan review process is not part of this variance process. And a site plan is required go through. He stated if the applicants would have had concerns about that back when the he wrote the letter in 2013, they had time to appeal that requirement but they didn't do that. He stated that the bottom line is, this is all related to the variance request on the conditions that would be required on site that are applicable to a variance, not whether or not they should go through a site plan review or approval process. That's not what this is about. Based on all of this, the requirements of granting a variance, and the standards of the variance, staff is recommending denial of this request today.

Mr. Swan stated that it is an important distinction to be made there; perhaps the most important distinction is that the site plan review process is not what is under scrutiny here and whether it needs to be complied with, but the issue is compliance with setbacks, and landscaping requirements. Mr. Swan stated to help him better understand the history of the property, he asked who owned the property in 2000. Apollo Marble became the owner of the property when this came to the city's attention. Mr. Tingey responded that he is unaware if the applicant owns the property but believes they may be leasing it, and the applicant can clarify that. Mr. Tingey stated that Mark Drazich has been an owner of these properties and was the owner at the time of approval of the original site plan review in 2001. Mr. Swan stated that perhaps the property has changed hands, and the leases and tenants may have also changed. Mr. Tingey stated that he didn't have the information regarding the change of ownership or leases. Mr. Swan stated that it sounds like the city became aware of the current use of the property for outdoor storage in 2010, and enforcement of the original approved site plan was prompted. Mr. Tingey stated that yes that is correct. Mr. Swan turned the time over to the applicant.

Mr. King stated that he thinks the issue is pretty clearly stated as far as our areas of disagreement. The background of this case is the citation that is issued and resolved at justice court. Mr. King stated the case was resolved by entering a plea of not guilty and

they agreed to apply for a variance from the requirement of that new site plan. He stated the issue for the Hearing Officer is to decide whether or not a new site plan is required to allow Apollo to store construction materials on-site, that's the issue. Mr. King provided a copy of a bill of particulars that was filed for Mr. Swan. Mr. King stated that in this case they requested that the city specify exactly how Apollo was violating the current site plan. The general requirement is stated in the first paragraph of the bill of particulars, that property could only be used in accordance with current site plans. Mr. King said he understood the general principal. Secondly how exactly is Apollo violating the current site plan? And the city said very specifically the property does not have a business license and it is not approved for the outdoor storage of construction materials. Those are the two ways specifically that Apollo is violating the current site plan. He stated that the issue of landscaping and other things that were approved in 2000, to a prior owner, is irrelevant today. Mr. King stated that Mark Drazich owned the property in 2010, when the application was made for the construction of the building. A company called 4538 South 160 West, LC, bought the property in about 2010, subject to Mr. Drazich's right to continue occupation and use of that building. He stated that 4538 South 160 West LC does not have control or use of that building. They bought it subject to his right to continue to use and is basically a life time estate that he retained on that building. Mr. King stated about 10 years ago, Apollo started renting, originally from Mr. Drazich and now from this new company that owns fee title, the unapproved portion of the property for use of storage of construction material, so that use has been going on for about 10 years.

Mr. Swan clarified that Apollo doesn't even use the sheds and the garages there on the property, just the outdoor portion of the property, is that correct? Mr. King stated yes, that is correct. Mr. King stated that Apollo doesn't have the right to use that nor does the current LC that has fee title to the building. Mr. Drazich has retained the right to occupy and use that building. It's important for us to clarify exactly what was at issue with the case and what we agreed to resolve by the variance application. That is exactly whether or not Apollo needs a new site plan review to use the open area of the property for construction material storage. He stated that in his opinion, the city misstates the application and the city's description of the application. He stated that the staff report summary entitled "The Background of The Variance Request" at the end of that paragraph the city said "a site plan review and conditional use permit is required by ordinance." There is nothing about a conditional use. We are talking about an allowed use under the zone. There is no question that storage of construction materials is allowed in this M-G-C zone.

Mr. Swan questioned if outdoor storage is specifically a permitted use. Mr. Swan read the code where it states "a permitted use is building materials, hardware, farming equipment, and supplies". He questioned if that would include storage and does it include outdoor storage of those materials. Mr. King stated that it is item number 5400. Mr. Swan stated that is correct, he looked at the definition section, could not get any clarification from the ordinance on whether or not that is indeed a permitted use on its face. Mr. Swan said he is not completely sold on that first point. Mr. King stated that that could be an issue, but we're not talking about that. The citation, from which this variance application was filed, was specifically not whether Apollo needed a conditional use permit for construction materials, but that we don't have a business license and storage of construction material doesn't show up on the site plan, so we can't do it without a new site plan. Mr. King stated that they have resolved the business license issue. Apollo has a business license; Murray City code says you don't need a separate business license just for a storage site of materials used in your business. The question is when can the city demand and receive a

new site plan. The site plan they claim exists, is that survey. That is the reason I attached it. The property survey is the document that they formally submitted to the court. In the prior action it says "this is what constitutes the current site plan". The open area that is blank on that property, is the area we are talking about, not the building. There is no indication of anything that can be done on that property so by the city's inference, you would not be able to walk across this property, or do anything on it, without a new site plan.

Mr. Swan stated that he thinks the code does set forth certain changes in use including outdoor storage as things that would require a new site plan. Mr. Swan stated that he believes that Mr. King and his client would both admit that the current use of the property is outdoor storage and has never been approved with any site plan. Regardless of the history of the property it seems that the current use has never been approved and needs to be approved by a site plan. Mr. King stated that he does not dispute that and he agrees that outdoor storage has never showed up on a prior site plan. He stated their difference in opinion, is if it needs to be required and if it needs to be approved. Mr. King gave a document where he had highlighted sections in the materials previously filed to Mr. Swan. Mr. Swan immediately stopped Mr. King and stated that in his opinion reading section 17.54.20, the remainder of that section is pretty important and Mr. Swan thinks that is something that does bear repeating. He asked Mr. King to include his response to the second sentence in section 20 and also a list of items there and how those relate. Mr. King stated that standard rules of statutory interpretation require them to be interpreted as a whole, and not out of context. The sub sections of 17.54.20 apply only if section 17.54.20 applies as a whole. He stated that that is just logical construction. We do not pull those out of context and say we can apply those regardless of the circumstances. The very first section of 17.54.20 says you need a new site plan only if you need a building permit or business license. Mr. Swan stated that that is what the first sentence says, and asked him what the second sentence says. Mr. King stated the sentence says in the context of that site plan review (Mr. King stated that he was inserting there) if one is required then you consider these items as relevant issues to be considered in a site plan. Mr. King agreed that if a site plan is required those things should be considered, but we don't get to a new site plan. The first part of 17.54.20 says very specifically you only get a new site plan if you need a building permit or business license, which only makes sense. A business making subtle minor changes in the way it does business, you cannot stack a box here or there, without getting a new site plan review, certainly that is not how the code ought to be construed and asked when the city can demand a new site plan. The code says you get a new site plan if a building permit or a new business license is required. Neither of those applies. Mr. Swan suggested that they move along, and stated that he did not want to get bogged down in this and he understands there is an issue. He stated that he is not totally convinced that there isn't an independent requirement for site plan review for the items that are listed in section 20. Mr. King stated that he thinks the code has to be read as a whole and that is certainly his position there. Mr. King stated their position and that he does not need to labor their point. However, let's make the presumption for the argument sake, that a site plan review is required. A building permit or a business license triggers the requirement of a site plan in the code. (Mr. Swan stated that he understood that Mr. King was going to the exemption) 17.54.30 says you don't need a new site plan review if we don't create any additional traffic.

Mr. Critchfield stated that Mr. King and city staff are talking completely about different things. He clarified that, procedurally, Mr. Swan does not have the authority to hear this argument today about a site plan. A site plan that was mentioned in a letter from Mr.

Tingey, Mr. Christensen and Mr. Boren, years ago that stated Apollo Marble needed a site plan, which triggered a 30 day appeal period, which had run out years ago. Had they appealed that then, they wouldn't be in front of the Hearing Officer today. The only issue that can be discussed today is the variance, and the only thing you can get a variance from are the standards. He clarified that there is no such thing as getting a variance from the site plan. He stated that the court hearing was about the site plan and there were conditions that were imposed at that time and stated that those documents should be in a packet that was given to Mr. Swan. Mr. Critchfield stated that the Judge was essentially saying either comply with the site plan or get a variance, that's it. Mr. Swan asked if the judge was saying a variance from a site plan requirement. Mr. Critchfield replied that there is no such thing as a variance from having to get a site plan. Mr. Critchfield stated that the problem is that the applicants never addressed the variance in their variance application. They have addressed the site plan issue which is not the issue. The materials that were submitted by the applicant to Mr. Swan do not say anything about how they feel about the variance. Mr. Critchfield stated that applicant is attempting to discuss in front of Mr. Swan an issue that is not to be heard before the hearing officer today.

Mr. Swan asked Mr. King for his response regarding the statement from Mr. Critchfield. Mr. King responded that the judge ruled at the court hearing on the citation. We plead no contest and the judge ruled that we file a request for a variance from the requirement of a site plan.

Mr. Swan stated that Mr. Critchfield and Mr. Tingey have explained that the appeal period has run out for the requirement for a site plan review. Mr. King responded that the citation that was filed and in the bill of particulars filed they have to have a new site plan before they can use the storage and outside storage for construction materials. Mr. Swan stated that they told Mr. King that they needed a new site plan and the appeal period from having to get a new site plan has run out. Mr. King stated that that was not true and the citation itself dealt with the issue of the requirement for a site plan. That citation was resolved by the plea of no contest and this variance application when the judge said that we had to file a variance application, and if denied, they can either go to the city or they can appeal that ruling and once that ruling is final, then we can go to the city with a new site plan if one is determined to be required.

Mr. Swan stated let's assume for just a moment that a site plan is required. He would like to hear any arguments one would have on requests for a variance from the specific landscaping and setback and fencing requirements. Mr. King stated that they do not have any arguments on those points. If a new site plan is required then that is a separate issue. Exactly how those landscaping requirements would apply or not apply is a subject of the site plan review and application they would file regarding the process. He stated that is what the judge ordered in justice court.

Mr. Swan stated that he had not seen the court order, but it seems to him that the parameters of that order would have been to apply for a variance from the setback and landscaping requirements that are already on record and applicable to the zoning. Mr. King stated that is not what that judge said.

Mr. Swan stated that he agrees with the counsel for the city that this is an inappropriate venue for a variance request on a site plan review requirements. Mr. King stated that the city has never told them that and he doesn't know how the city can claim that they have been violating the site plan. The only thing the city has told Mr. King and his clients in the

bill of particulars, which is binding on the city and its evidence of how they claim we are violating the site plan and the site plan doesn't refer to outdoor storage.

Mr. Swan stated his task as Hearing Officer is to decide whether or not Mr. King's client meets an application for a variance from the setback and landscaping requirements under the code. Mr. King stated that they have plead their request in the alternative. Mr. King asked that Mr. Swan look at the last page of their application where it says let the city grant a variance from the requirement of a new site plan and order that the existing site plan needs to be modified to allow storage of building materials on the property. Mr. Swan stated that he is not allowed to address the use and he only has authority to address the variance request from setbacks, landscaping and things like that. Mr. King stated that their application is for a variance from the requirements of a new site plan review based on the judge's order in the justice court case and they do not have any specific argument at this time regarding the details of landscaping, fencing and curb and gutter setbacks. Mr. King stated the issue is whether they need them at all.

Mr. Swan asked if anyone from the city had any additional comments or follow up.

Mr. Critchfield stated that the criminal case in justice court is completely separate. And whatever they did in justice court does not have any bearing on what the hearing officer decides. The Hearing Officer is independent of that and this is for a variance request. He stated it is important to point out that our justice court judge was the Mayor of Sandy for four years and unlike a lot of justice court judges, he has a pretty good handle on zoning issue. He stated, in his opinion, the justice court judge was not confused at all about what was going on. He reiterated that there is no such thing as variance from a site plan requirement. That would be an appeal of an administrative decision. The administrative decision was made by Mr. Tingey, Mr. Christensen, and Mr. Boren years ago when they said you have to comply with the site plan. At that point, when Apollo Marble owners received the letter, they had 30 days from that letter to appeal. Back then, the appeal would have been reviewed by the Board of Adjustment. The process for appealing an administrative decision, an application of the zoning code, is to the Hearing Officer who is the appeal authority for the city. Mr. King stated he disagrees with the interpretation that the only proper issue for the variance is from the specific landscaping and building code requirements for the site, obviously that is not the subject of our application at this point. He requested that they be allowed to modify the application and address those issues and he is not prepared to address those issues at this time. He stated that they have had this application filed since January 12, 2015, and no objection has been made to the format of the content or the general content of that prior to this point. He stated they are prepared to argue that issue and not the landscaping and building code requirements variation.

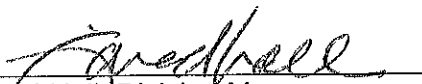
Mr. Swan stated that he would take that into consideration, but the applicants were given a variance application, and they applied for a variance the wrong way or didn't make the right arguments and now find out that perhaps they made the wrong case. He stated he is not inclined to grant that request, but he would certainly consider it.

Mr. Swan asked if anyone from the city had any additional comments. Mr. Hall reiterated that the variance application goes through test of hardship criteria as stipulated in state code which is very clear to understand. He stated it would be hard to misunderstand how those responses were inappropriate.

The meeting was opened for public comment. No comments were made and the public comment portion of the meeting was closed.

Mr. Swan stated he has enough information to make his decision regarding the variance. He stated the decision will be made available next Wednesday, March 4, 2015 at the Murray City Community and Economic Development office, 4646 South 500 West, Murray.

Meeting adjourned 1:13 p.m.



Jared Hall, Division Manager
Community and Economic Development