City of
CHARLOTTE

MEMORANDUM

TO: Mayor Lewis and City Council Members

FROM: Gregg Guetschow, City Manager

SUBJECT: Dairy Queen Appeal

DATE: February 20, 2018

Summary:

- Restaurants, including drive-through restaurants, are conditional uses in the B-1 Local Business District.
- The Planning Commission is permitted to establish conditions in addition to those provided in the zoning ordinance when, in its opinion, such conditions are necessary to protect the neighborhood.
- An appeal has been brought challenging the decision or determination of the Planning Commission that, as a condition associated with the expansion of the Dairy Queen to include drive-through service, no order speaker will be permitted.
- Such an appeal should be considered pursuant to the provisions of the zoning ordinance permitting administrative reviews.
- The standard for granting the relief sought is a showing that the Planning Commission erred in imposing the prohibition on the use of an order speaker.

City Council, acting as Zoning Board of Appeals, will hold a public hearing and decide an appeal brought by Brett Roberts, owner of Dairy Queen. The appeal concerns a condition established by the Planning Commission prohibiting the use of a speaker system to take orders in the drive-through lane.

Council members might recall that several distinct actions were required in order for the expansion of Dairy Queen to take place. These were the rezoning of the property from R-1 Single Family Residential District to B-1 Local Business District, the granting of a conditional use permit, and the approval of a site plan. Denying the use of an order speaker was an additional condition established at the time the conditional use permit was issued.

There are two general categories of uses permitted in zoning districts: uses permitted by right and conditional uses (also called uses subject to special conditions). Over time, the City's zoning ordinance has tended to blur the distinction between the two so it is difficult to give examples of each that apply 100% of the time. In general, however, uses permitted by right are those uses of

land within a district that require no discretion on the part of administrators. In the B-1 district, these include offices, retail establishments such as grocery stores, meat markets and hardware stores, and personal service establishments such as beauty parlors and barber shops. Conditional uses are those that have characteristics, often related to the creation of noise, odor, and traffic, that might have adverse impacts on neighbors' quiet enjoyment of their properties. In the B-1 district, conditional uses include automobile service stations and restaurants, including drive-through restaurants.

As the name implies, the ordinance establishes conditions that must be met in order for a conditional use to be established in a district. In addition, in the B-1 district, section 82-229 provides that conditional uses are "subject further to such other conditions which in the opinion of the Planning Commission are necessary to provide adequate protection to the neighborhood and to abutting properties." In the case of Dairy Queen, the minutes of the meeting reflect concerns from neighbors and Commissioners about the impact of a drive-through operation on the neighborhood. The Planning Commission concluded, among other conditions that it established, that the order speaker should be prohibited.

It is this decision that Mr. Roberts is appealing.

The nature of this appeal, while permitted by law and ordinance, is not of the type that typically comes to the Zoning Board of Appeals and is unlike any that has come to the Zoning Board of Appeals since the Council has been acting in that capacity. The purpose of this memorandum, then, is to provide Council background information that is important to an understanding of its role in deciding this matter.

The zoning ordinance provides at section 82-59 that the Zoning Board of Appeals "has the power to act on those matters where this chapter provides for an administrative review, interpretation, exception or special approval permit and to authorize a variance as defined in this section and laws of the state." The ordinance provides further that "[t]hese powers include the following:

> (1) *Administrative review*. To hear and decide appeals where it is alleged by the applicant that there is an error in any order, requirement, permit, decision or refusal made by the Building Official or any other administrative official in carrying out or enforcing any provisions of this chapter.
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> (2) *Variance.* To authorize, upon an appeal, a nonuse variance from the strict application of the provisions of this chapter where by reason of exceptional narrowness, shallowness, shape or area of a specific piece of property … the strict application of the regulations enacted would result in peculiar or exceptional undue hardship upon the owner of such property…

> (3) *Exceptions and special approvals.* To hear and decide … requests for exceptions, for interpretations of the zoning map, and for decisions on special approval situations on which this chapter specifically authorizes the Board to pass…"

The form the City uses for accepting applications for appeal does not require the applicant to indicate the basis for his/her appeal. We can infer that the appeal is an administrative review, however, by eliminating the other two based on what is known about the application.

A request for a variance would not be appropriate; there has been no action prohibiting the development based on any of the listed characteristics in the schedule of regulations found in article XX of the zoning ordinance applicable to a parcel of land. It might be suggested that the action of the Planning Commission created a hardship on the owner but that is not an accurate understanding of the test. The hardship must be 1) peculiar (i.e., unique to this parcel) or exceptional. In addition, that hardship must arise from the application of regulations such as setbacks, lot coverage and the like related to exceptional narrowness, shallowness, shape or area of the parcel. Additional clarity regarding variances is also found in Michigan's Zoning Enabling Act which provides in Section 604 (7) "If there are *practical difficulties* for nonuse variances … in the way of *carrying out the strict letter of the zoning ordinance*, the zoning board of appeals may grant a variance in accordance with this section…" (emphasis added). There are no regulations related to order speakers for drive-through restaurants found in the strict letter of the zoning ordinance. Finally, it is worth noting that the standard of practice in considering requests for variances is to deny them in situations in which the hardship is self-created. The decision to establish a drive-through service where none existed previously was that of the owner and would fit the definition of a self-created hardship.

A request for an exception or special approval is not applicable either. The latter applies only in situations in which the Zoning Board of Appeals is specifically authorized to grant special approvals under specific listed circumstances. A request for an exception likewise applies to situations in which reasonable development of a parcel cannot be accomplished while also complying with all of the listed regulations in the code. The authority and basis for such exceptions are found in article XXII of the zoning ordinance. The Zoning Board of Appeals has not been granted the authority by the zoning ordinance to overturn or modify an action of the Planning Commission in establishing a condition for a conditional use by granting an exception.

The only remaining basis for consideration by the Zoning Board of Appeals in this instance is administrative review. The zoning ordinance appears to limit such appeals to decisions or orders made by the building official or other administrative official. The Zoning Enabling Act provides a different standard, stating that the Zoning Board of Appeals "shall hear and decide appeals from and

review any administrative order, requirement, decision, or determination made by an administrative official or body charged with enforcement of a zoning ordinance adopted under this act." The Planning Commission is a body charged with enforcement of a zoning ordinance and its action relative to prohibiting the use of an order speaker is a decision or determination made by it.

The ordinance seems to imply that administrative review is appropriate only in instances where the ordinance makes specific provision for such review. I can find no instance in the language of the zoning ordinance in which an administrative review is contemplated. I think it is best to conclude that the Zoning Enabling Act and the ordinance contemplate a broader right to include any decision or order, even in the absence of listed instances, where such a right might be claimed.

The action of the Zoning Board of Appeals in cases of administrative review, as provided in section 603(2) of the Zoning Enabling Act, is to "reverse an order, requirement, decision, or determination of the administrative official or body…" Apart from requiring the Zoning Board of Appeals to "state the grounds of any determination made by the board," the Zoning Enabling Act does not provide any standards to be applied when considering such an action. The act does grant the Council the authority to provide by ordinance for the manner in which regulations are established and enforced. The zoning ordinance is clear in indicating that administrative reviews may be considered when it is alleged that an error has been made.

In order for the Zoning Board of Appeals to reverse the Planning Commission's decision or determination in this case, then, it will be necessary to find that the Planning Commission erred in prohibiting the use of an order speaker. As previously noted, the conditions established in the zoning ordinance make no reference to order speakers. The Zoning Board of Appeals must then consider whether an error occurred in establishing this prohibition as the Planning Commission exercised its prerogative to establish "other conditions which in the opinion of the Planning Commission are necessary to provide adequate protection to the neighborhood and to abutting properties." The burden of demonstrating that the Planning Commission erred rests with the applicant.

The City's zoning ordinance does not elaborate on what constitutes an error. In its guidelines for the zoning board of appeals, the City of Wixom, Michigan identifies four types of errors in cases of administrative review: errors in fact, judgment, procedure or interpretation. I believe these categories are a useful way of thinking about the types of errors that could arise in such a situation.

An extensive record, in the form of minutes and video of the Planning Commission meeting of October 3, 2017, is available to Council in its role as Zoning Board of Appeals in evaluating the question of an error. Considerable public testimony and Planning Commission comments focused on the question of

protection of the neighborhood and abutting properties. This documentation will be supplemented by input from the applicant, residents and others during the public hearing that will precede your action.

Following the public hearing, Council has three courses of action available to it. The first is to affirm the decision or determination of the Planning Commission. The second is to find that an error was made and reverse the decision or determination of the Planning Commission, permitting the order speaker to be installed. The third is to find that an error was made and return the matter to the Planning Commission for further consideration. In all three courses of action, it is necessary to state the grounds on which Council's action is based. You will find a proposed resolution in the agenda packet to be used in rendering your decision in this matter.
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