

**Minutes
Formal City Council Meeting
November 6, 2008**

Minutes of the Formal Council Meeting of Thursday, November 6, 2008, held at 7:30 p.m. in the Harry E. Mitchell Government Center, Municipal Building, City Council Chambers, 31 E. Fifth Street, Tempe, Arizona.

COUNCIL PRESENT:

Mayor Hugh Hallman
Vice Mayor Shana Ellis
Councilmember P Ben Arredondo
Councilmember Mark W. Mitchell
Councilmember Joel Navarro
Councilmember Onnie Shekerjian
Councilmember Corey D. Woods

Mayor Hallman called the meeting to order at 7:31 p.m.

1. Councilmember Mitchell gave the invocation.
2. Boy Scouts Cameron Cross and Matthew Chaney, Troop 565, led the audience in the **Pledge of Allegiance**.
3. **MINUTES**
 - A. Approval of Council Meeting Minutes
Motion by Councilmember Shekerjian to approve the following **COUNCIL MEETING MINUTES**. Second by Vice Mayor Ellis. Motion passed unanimously on a voice vote.
 1. Council's Executive Session – October 16, 2008
 2. Council's Issue Review Session – October 16, 2008 [20081106clrkck02.pdf](#)
 3. Council's Formal Meeting – October 16, 2008 [20081106clrkck01.pdf](#)
 - B. Acceptance of Board & Commission Meeting Minutes
Motion by Councilmember Shekerjian to accept the following **COMMITTEE & BOARD MEETING MINUTES**. Second by Councilmember Woods. Motion passed unanimously on a voice vote.
 4. Apache Boulevard Project Area Committee – September 8, 2008 [20081106apac01.pdf](#)
 5. Committee for Youth, Families & Community – September 15, 2008 [20081106cyfc01.pdf](#)
 6. Community Special Events Task Force – October 10 & 21, 2008 [20081106setf01.pdf](#)
[20081106setf02.pdf](#)

7. Development Review Commission – September 9 & 23, 2008 [20081106drc01.pdf](#)
[20081106drc02.pdf](#)
8. Hearing Officer – September 16 & October 7, 2008 [20081106ho01.pdf](#) [20081106ho02.pdf](#)
9. Historic Preservation Commission – September 11, 2008 [20081106hpc01.pdf](#)
10. Library Advisory Board – September 8, 2008 [20081106lab01.pdf](#)
11. Mayor's Youth Advisory Commission – September 16 & October 7, 2008
[20081106myac01.pdf](#) [20081106myac02.pdf](#)
12. Municipal Arts Commission – September 10, 2008 [20081106mac01.pdf](#)
13. Neighborhood Advisory Commission – Neighborhood Affordable Housing Subcommittee
Joint Meeting with Council Housing Committee – October 9, 2008 [20081106nac01.pdf](#)
- 13a. Tardeada Advisory Board – September 8, 2008 [20081106tab03.pdf](#)
14. Tempe Police Public Safety Personnel Retirement Board – Executive Session
September 11, 2008
15. Tempe Police Public Safety Personnel Retirement Board – September 11, 2008

4. REPORTS AND ANNOUNCEMENTS

A. Mayor's Announcements

- a. Mayor Hallman announced the opportunity to celebrate the success by some women who have demonstrated courage, dedication, ability, skill and athleticism above and beyond that of their competitors. He congratulated and welcomed the **NCAA Collegiate Women's Softball Champions from Arizona State University** and introduced **Clarisa Andorfer-Lopez, Rhiannon Baca, Katie Burkhart, Caylyn Carlson, Katie Cochran, Mindy Cowles, Katie Crabb, Krista Donnenwirth, Megan Elliott, Dani-Rae Lougheed, Jessica Mapes, Brittney Matta, Kristen Miller, Ashley Muenz, Amanda Nesbitt, Brooke Neuman, Michelle Nulliner, Sarah Rice, Colleen Robbins, Lesley Rogers, Mandy Urfer, Jackie Vasquez, Renee Welty, and Clint Myers, Head Coach.**
- b. Mayor Hallman commended the community for their support of those who are the most vulnerable residents. Many times this is done through very quiet work by many of the local non-profit agencies. The week of November 17 through 21, 2008, is **National Hunger and Homelessness Awareness Week** and residents may donate food items at Central Storage on Priest and Baseline, or any Arizona Food Bank. Those interested in donating can find information through the Tempe Action Agency at www.tempeaction.org. He introduced **Stephen Sparks** who accepted a proclamation on behalf of the City to bring greater awareness of the problems our community members face.
- c. Mayor Hallman announced that **Tempe in Motion (TIM)** received a **Crescordia Award** in the Livable Communities/Multimodal Transportation and Connectivity category for innovative projects that provide alternative modes of transportation to improve air quality and decrease congestion. Enormous strides have been taken in providing environmentally sensible and culturally sustainable community amenities. To the credit of many people who have worked very hard over the past decade, five free neighborhood circulator routes and an alternative fueled bus fleet have been implemented, the light rail program has been constructed, miles of bikeways have been built, two green buildings have been constructed so far, neighborhood pedestrian facilities have been constructed, as well as many other great transportation amenities. He introduced **Jayson Matthews**, Chair of the Transportation Commission, who accepted the award on behalf of the City. In addition, the TIM also received the **American Public Transportation Association Award** for the 2008 AdWheel First Place for the ASU U-Pass Print Campaign.

The **East Valley Bus Operations and Maintenance Facility** also received the **USGBC LEED Gold** award. The facility is co-owned and co-operated with Scottsdale and Valley Metro, is part of the Regional Transportation Program, and is the first City-owned facility to receive this prestigious designation. He introduced City employees **Tom Wilhite** and **Robert Yabes** and **Nora Calato** from the Green Building Council.

- d. Mayor Hallman announced that the **Tempe Center for the Arts (TCA)** has received the **Crescordia Award** in the Buildings and Structures/Public Assembly category from Valley Forward. This award honors the unlikely and innovative transformation of a former landfill on the south bank of Tempe Town Lake into an architectural work that houses local arts organizations and adds to the quality of life in Tempe. In addition, the TCA has received the **Award of Merit** in the Site Development and Landscape/Parks category from Valley Forward. He introduced **Don Fassinger** who accepted the awards.

B. Manager's Announcements – None.

5. **AGENDA**

All items in these minutes identified with an asterisk (*) are **public hearing items**. All items listed on the agenda are approved with one council action. Items scheduled for Introduction/First Public Hearing will be heard but not adopted at this meeting. Items scheduled for Second Public Hearing/Final Adoption will be voted upon at this meeting.

Mayor Hallman announced consideration of the **AGENDA**.

Motion by Councilmember Shekerjian to approve the Agenda as amended (Item #21 was removed for separate consideration). Second by Councilmember Woods. Motion passed on a roll call vote 7-0.

A. Miscellaneous Items

16. Approved the appointment of Thomas J. Robinson as City Court Judge and approved **Contract #2008-228**, an employment agreement under the terms described therein.
DOCUMENT NAME: [20081106mclca01.pdf](#) **COURT ADMINISTRATION (0501-02)**
17. Approved the renewal of **Contract #2006-284A**, Intergovernmental Agreement for Security Services in the Police Courts Building.
COMMENTS: Total expenditures for this agreement shall not exceed \$205,000.
DOCUMENT NAME: [20081106mclr01.pdf](#) **COURT ADMINISTRATION (0501-02)**
18. Authorized the engagement of the law firm Renaud, Cook, Drury, Mesaros for legal representation in Barker v. City of Tempe.
DOCUMENT NAME: [20081106casv01.pdf](#) **LEGAL AND LEGISLATIVE SERVICES (0500)**
19. Approved **Contract #2004-112D**, a Second agreement between North America Sports, Inc., the Tempe Convention and Visitors Bureau, and the City of Tempe for the City to host the Ironman Arizona Triathlon, extending the Agreement for an additional five (5) years, beginning with the November 2009 race.

COMMENTS: The fiscal impact to the City is approximately \$135,000 annually in combined cash and City services for the first two years of the agreement.

DOCUMENT NAME: [20081106prtd01.pdf](#) **SPORTS ADMINISTRATION/POLICIES (0105-01-07)**

20. Approved **Contract #2007-37B**, the first amendment to extend the term of the Development and Disposition Agreement (C2007-37) between the City of Tempe and GDG Partners LLC, to one year after the execution of the lease authorized in the modification agreement.

DOCUMENT NAME: [20081106cdnr02.pdf](#) **RIO SALADO MASTER PLAN (0112-07-03)**

- *21. **THIS ITEM WAS REMOVED FOR SEPARATE CONSIDERATION.**

Held a public hearing and **denied** a **request for reconsideration** of the City Council decision of September 11, 2008, to approve the appeal by the Date Palm Neighborhood Association of the July 8, 2008, Development Review Commission decision to uphold the Hearing Officer's approval of the request by H B TOBACCO located at 53 East Broadway Road for one (1) use permit, and re-hearing of the request for the use permit.

COMMENTS: Reconsideration of the City Council decision of September 11, 2008, to approve the appeal by the Date Palm Neighborhood Association (UPA08005) of the July 8, 2008, Development Review Commission decision to uphold the May 20, 2008 Hearing Officer's approval of the request by WALGREENS PLAZA - H B TOBACCO (PL060676) (Anis Ben Harzallah, business owner/applicant; Mark Stoneman/Stoneman Properties, property owner; Steve Stewart, Date Palm Manor) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for:

ZUP08068 Use permit to allow a hookah lounge/tobacco retailer.

APPLICANT'S PRESENTATION

Peter Spiess, with the law firm of Spiess and Associates, and **Benjamin Graff**, with the law firm of Lazaris and Associates, appearing for the applicant.

Mr. Graff asked for clarification that Council is entertaining whether or not to approve the motion for reconsideration.

Mayor Hallman clarified that a request for rehearing is before Council. There is not yet a motion.

Mr. Graff summarized that a motion for reconsideration was filed in compliance with Tempe City Code. Basically, there are two requirements for a motion to reconsider. First, there must be a mistake. The party requesting reconsideration must sufficiently allege in writing that a mistake of law or fact occurred and the alleged mistake, if found to have occurred, was a substantial factor in the decision. There are two areas of mistake of fact and of law. During the September 11, 2008, City Council hearing, there was not consideration of the required factors for use permits. He referred Council to Attachment #4 of the staff packet concerning the required factors for a use permit as follows:

- Any significant increase in vehicular or pedestrian traffic in adjacent areas.
- Nuisance arising from the emission of odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions.
- Contribution to the deterioration of the neighborhood or to the downgrading of property values which is in conflict with the goals, objectives or policies for rehabilitation, redevelopment or conservation as set forth in the City's adopted plans, or General Plan.

- Compatibility with existing surrounding structures and uses.

Mayor Hallman asked if those are exclusive or whether they are among other items that can be considered.

Mr. Graff responded that his interpretation is that those are the factors that must be considered. Other factors can also be considered, but the Council must or should by ordinance consider those four factors in addition to others.

Mayor Hallman added that if the Council considered these and then denied the use permit, then what mistake of law has taken place.

Mr. Graff stated that his contention is that the Council did not consider them.

Mayor Hallman asked for the basis of that contention.

Mr. Graff responded that his contention is on the basis of review of the DVD of the City Council meeting and subsequent transcripts made from the DVD hearings. Although it was in the staff report, there didn't seem to be direct discussion or consideration of the factors.

Mayor Hallman asked for clarification that it was because the Council didn't read their material. If they read the materials, then they would have considered that.

Mr. Graff responded that he defined "consideration" as a public discussion of those factors.

Mayor Hallman stated that if he read them prior to preparing for the Council meeting, concluded that he understood them, and made his own determination that there was failure to meet these standards, was Mr. Graff saying that he actually had to articulate that in public?

Mr. Graff responded that he would argue that there needs to be public discussion and participation in the discussion of those factors.

Mayor Hallman asked if it was enough that he could now tell Mr. Graff that he took judicial notice of everything that was in the staff report and understood all of that and concluded that there were a number of factors, in addition to those four items, that caused him to vote the way he did. Would that be sufficient?

Mr. Graff responded that given the fact that staff throughout all of the hearing processes recommended support and recommended that all of these factors were met, there was no clear evidence or discussion of why the Council decided otherwise.

Mayor Hallman asked whether Mr. Graff felt the testimony that Council took during that hearing demonstrated to Council that one or more of these issues was of concern.

Mr. Graff stated that he did not believe the testimony taken provided any evidence that those factors were not met.

Mayor Hallman asked that if he told Mr. Graff now that when he heard that testimony and that is what he concluded, would that help?

Mr. Graff stated that it wasn't a question of whether he believed him, but in terms of verbally addressing them, explaining them to the public and to the applicant, and even explaining to the opponent why there was evidence sufficient to meet the standard of saying that these factors or one of these factors was not met. The discussion was void of that.

Mayor Hallman asked if there was a citation in Arizona law that specifies that he had to articulate specifically his reasons for voting the way he did.

Mr. Graff responded that there was not. He could only cite the City's requirements.

Mayor Hallman clarified that Mr. Graff said he had the basis to conclude that it was necessary to articulate rather than have come to that conclusion and if there was evidence in the record that would support his conclusion.

Mr. Graff confirmed that would be his argument.

Mayor Hallman asked where in City Code or State law that is stated.

Mr. Graff responded that he would define "considered" to be in a public setting in a public discussion or a reading beforehand.

Mayor Hallman asked for clarification that if it had been read in public it would be acceptable.

Mr. Graff responded that if those factors had been discussed publicly, read out loud, then that would have satisfied the requirements, especially if there had been discussion as to why those four factors were met or not met.

Mayor Hallman clarified that it is not enough that evidence was presented to him that caused him to conclude that one or more of these factors or other items were sufficient to cause him to vote the way he did.

Mr. Graff responded that the record is void of discussion either way.

Mayor Hallman asked if it was void of evidence that would have led him to conclude that one or more of these factors or other factors caused him to vote the way he did.

Mr. Graff responded that not perhaps other factors, but these four factors.

Mayor Hallman stated that Mr. Graff had already told him that he doesn't have to reach a conclusion on one of these factors. Those are just some of the factors he could consider. He considered these and other factors and made his decision based on that. Was Mr. Graff telling him there was evidence to support a decision based on other factors but not these four particular factors?

Mr. Graff responded that there was certainly a discussion and a conclusion made based on other factors, much of which was on public policy discussions as to whether or not smoking was appropriate at this location. There were other factors, but these four factors were not discussed.

Mr. Spiess stated that because it was a public hearing, if the applicant is to have his use permit denied, he is entitled to know the basis on why it is being denied, and because it is a public deliberative process, the applicant, as a matter of due process, is entitled to know the basis of the decision. When it comes to these four criteria, simply reading a staff report

without enunciating why that leads a councilmember to believe that a criteria wasn't met, particularly in light of staff's recommendation, is not sufficient.

Mayor Hallman stated that Mr. Graff just explained that these are factors that must be considered, but they are not determinative, and he, therefore, could conclude his decision based on some other factors as well. Do you agree?

Mr. Spiess agreed with that, but the problem is that the record itself is devoid of any enunciated consideration of these four criteria, so there is no way from the record to determine whether any of the criteria was discussed.

Mayor Hallman clarified that there was no evidence presented that would have supported a conclusion based on the four criteria.

Mr. Spiess responded that he did not believe there was evidence presented that would have supported the conclusion based on the four criteria.

Councilmember Arredondo stated that he understood those are four easy ones and there could be others. That's the bottom line.

Mr. Graff agreed that there could be others. He also believed that, in terms of another mistake of law, the City Council should not deny a use inherently prohibited as a property right under one use permit that does meet all of the criteria, while also allowing that same use permit to be approved in the same CSS zoning district. He believed that is inconsistent with Arizona law. In other words, there is a tobacco retailer in a CSS zoning district. That tobacco retailer under City ordinance is allowed to have smoke shops or is allowed to have a hookah lounge, in this case. The City then granted that use permit in the same CSS zoning district.

Mayor Hallman asked if he would reach that same conclusion, for example, with respect to strip clubs. The City has a separation requirement for strip clubs and there are certain zoning areas in which strip clubs are allowed, but they are not allowed under our City Code in that same zoning category if they are within 1,320 feet of a church, school, park, and several other things. Did Mr. Graff think that is not allowed under Arizona law as well?

Mr. Graff responded that that analogy doesn't apply here.

Mayor Hallman clarified that is a First Amendment right.

Mr. Graff responded that because from the record and from Planning Director Collins, it was in the record at the September 11, 2008, hearing, as well as previous hearings, that the separation requirement did not apply to their client. There was a clear grandfathering multiple conclusion that it didn't apply.

Mayor Hallman asked if Council could reach its own conclusion even if the hearing officer concluded differently. Are they bound by that hearing officer's determination?

Mr. Graff responded that substantial evidence, conclusions and prior opinions all led to there being a grandfathering.

Mayor Hallman clarified that the Supreme Court couldn't overrule a Court of Appeals if there were a grandfathered right.

Mr. Graff clarified that he wasn't saying that. His conclusion was not taking away any powers that the City Council has.

His conclusion was that HB Tobacco is actually grandfathered and the separation requirement does not apply.

Mayor Hallman clarified that his client applied for a new use permit to begin with.

Mr. Graff responded that the City went through a period of time in the spring of 2008 where they went through all of the local hookah lounges and amended those permits. That was done more because of the 2007 amendment to City Code that actually clarified the definition of hookah lounges. The majority of the amendments were based on that and not based on separation. There is a lot in the record that shows that there has been substantial confusion on the part of their applicant, as well as the City, as to what defines a hookah lounge. There was a period of time where State and City ordinances were new and a period was created where everyone was evaluating the true definition. Their client was probably brought into the middle of that and that resulted in some of the confusion. The second factor of law is that there is a strong argument supported by Arizona law that treating HB Tobacco differently than at least five other hookah lounges have been treated with tobacco retailer permits in CSS zoning should not be permitted.

Mayor Hallman asked if that argument isn't dependent upon Mr. Graff's conclusion that the separation requirement doesn't apply to his client. Mr. Graff conceded that the separation requirement can be applied, for example, to strip clubs, and that separation requirements even in the First Amendment context are enforceable. The question then is if that is true, then why isn't a separation requirement applicable to a smoking establishment separating it from a school applicable? Mr. Graff's point is that HB Tobacco was grandfathered. He clarified that none of the others were within the separation requirement distance of any of the protected uses.

Mr. Graff stated that he would relate back to the record.

Mayor Hallman clarified that none of the other uses Mr. Graff cited are actually like his client's use because they are not within the distance of the protected uses.

Mr. Graff stated that in the approval of Urban Café located at 1212 E. Apache Boulevard, Ms. Collins noted that they were grandfathered in before the separation requirements because they were actually near the New School for the Arts. They received their hookah lounge permit. They have been operating since 2004, and they received their permit in 2008. He would cite that as another example where not only staff precluded that there was a grandfathering, but that permit was approved through the normal process.

Mayor Hallman added that the neighborhood didn't appeal that to this Council so it could be overruled.

Mr. Graff stated that he would say that in that case it was clear that there was a grandfathering, just as there is in this case. He continued that there must be a hardship. The hardship here is that his client does not know whether or not he will be in business in the future. The City has already started proceedings to revoke his use permit based on City Council's previous action. His client has placed his life savings in this business and the hookah use is essential to that business and to his life savings. There is a great hardship. The hardship is also in having to go through the appeal process in Superior Court, which has been initiated, but his client is not in a position to afford legal fees of going through the trial process. He strongly believed they meet the requirements for filing a motion for reconsideration and for City Council to approve a re-hearing.

Mr. Spiess stated that he concurred that this matter should be re-heard by City Council and would ask Council to give that due consideration.

Mayor Hallman asked if it would help to clarify the records. He was glad to articulate the basis for his vote. Mr. Graff has argued that the record did not have sufficient indication as to why he voted the way he did. He would be glad to articulate that now if that would help.

Mr. Spiess clarified that the first issue before Council is whether or not this will be re-heard. If the Council wishes to provide a basis for its prior decision from September 11, 2008, in order to assist in moving forward with a special action, even though those proceedings have terminated, would be up to the Council.

Mayor Hallman clarified that his client can't afford to move ahead with a special action.

Mr. Spiess clarified that he couldn't make that decision for his client at this point.

Mayor Hallman clarified that would be the basis for the hardship. If that doesn't count, then could he take that off the list?

Mr. Spiess responded that it is a basis for hardship because it will cost a lot of money to go through the process, but he couldn't sit here and make a decision for his client as to whether or not in the future he will be able to take out a loan or do whatever it takes to try to save what he has worked on for the last twelve years. Legally, he believes the hardship standard is the appeal process itself.

PUBLIC HEARING

City Attorney Andrew Ching clarified under City Zoning Code Sec. 6-705 Process for Reconsideration, there are limits and to the extent new evidence is taken, it has to be limited to those issues raised in the motion for reconsideration as articulated by Council and not additional evidence outside those parameters. They can speak to the issue to whether or not there was a mistake of fact or law or hardship.

Steve Stewart, Tempe, Date Palm Manor Neighborhood Association, stated that he was present to back Council's previous decision. Council articulated extremely well last time. Under the circumstances, the Neighborhood Association felt it was a good final decision.

Mayor Hallman clarified that Mr. Ching's statement was, given the motion for reconsideration, that the only items that Council can now consider as part of the issue of reconsideration is whether or not there was a mistake of law or fact, and whether there is a hardship.

Mr. Ching clarified that, from the Tempe Zoning and Development Code, Section 6-705, "the decision making body shall limit their discussion to the issues raised in the motion for reconsideration and the merits of those issues when deciding whether or not to reconsider."

Mayor Hallman summarized that it has been said there were mistakes of fact or law, but ultimately the only thing that was presented in the argument were the four criteria that they believed Council did not apply, and that Council, therefore, should not have denied the use permit. Secondly, as a matter of law, Council should not have denied the use permit when others were approved in the same zoning category.

Mr. Graff agreed that those are the two mistakes of law. He added that in terms of mistake of fact, there certainly were some items taken into consideration from a neighbor.

Mayor Hallman asked how he knew they were considered.

Mr. Graff responded that he stated Council did not base its consideration on the four factors.

Mayor Hallman asked what Council took into consideration.

Mr. Graff responded some of the neighbors testified, for example, that HB Tobacco was a magnet for teenagers.

Mayor Hallman asked which one of them took that into consideration.

Mr. Graff believed it was taken into consideration while Council was discussing toward the end whether the separation requirement applied because it was related to schools and teenagers and whether teenagers were attracted to the business.

Mayor Hallman clarified that there was evidence put into the record, but how did he know any of Council considered any of that. He thought the whole point was that Mr. Graff couldn't discern the basis for Council's consideration.

Mr. Graff stated that he was merely stating what was brought to Council's attention from the neighbors, and he believed it was considered because it is part of public record.

Mayor Hallman clarified that Mr. Graff feels that if things that are in public record they were considered. He added that the packet Council is presented with is part of the public record and those things in the public record have been considered.

Mr. Graff agreed that the packet is part of the public record.

Mayor Hallman stated that he actually reads his packets and considers them completely, including all of the facts and information supplied in those packets. That is generally the basis on which he makes his decisions. He further noted that it had come to his attention that their client has also sought a use permit at another location.

Mr. Spiess stated that he is aware that he has sought a use permit at another location. He did not know whether it was granted.

Mayor Hallman clarified that it was brought to the hearing officer on October 21 for a location at 1400 South McClintock Drive, Suite #3.

Mr. Graff added that, apparently, there was an approval of a use permit conditioned upon certain air handling requirements being met in the space. It was suggested from City staff that there might need to be a change to the building code and a mechanical engineer would need to be hired. He has hired a mechanical engineer and has paid him \$4,000 and is waiting to hear from the building department.

Deputy Development Services Manager Lisa Collins responded that all smoking establishments, which includes hookah lounges, are required to meet building code for specific air handling requirements. The existing location or any other hookah lounges in the City would have to meet that requirement, as well as the one Mr. Harzallah just got approval for. She understood that he has requested some type of waiver. She didn't think it involves a code amendment, but he is looking at ways to address the code, as are all of the other smoking establishments.

Mayor Hallman had a sense that the purpose behind this second location was to give his client the opportunity of a back-up plan for the business he has currently at Broadway and Mill.

Mr. Graff responded that his understanding was that should these proceedings and the Superior Court proceedings not go as anticipated, he would need some kind of a back-up plan, but now the issue is whether he can afford that back-up plan because of the mechanical changes that will have to be made.

Councilmember Shekerjian asked Ms. Collins for clarification that when Council previously met, this gentleman was in violation of his use permit.

Ms. Collins agreed. They were here the last time because they were asking to amend their use permit. The initial use permit was specific that no smoking was allowed inside the establishment. They went back to our hearing officer to amend that. The hearing officer approved that, it was appealed to the Development Review Commission, and they narrowly approved that amendment as well. It came to the City Council and that amendment was denied, 7-0. It was an amendment to an original use permit.

Councilmember Shekerjian clarified that the argument as to why he was allowing smoking when he specifically was told he couldn't allow smoking was that there was confusion in his mind about whether or not using a hookah was actually smoking. Her understanding was that since that time, he has continued to allow smoking in his establishment.

Ms. Collins agreed. They do have a revocation proceeding in place because they are currently violating their use permit.

Councilmember Shekerjian clarified that once the confusion about whether or not smoking a hookah was smoking was cleared up, there was a continuance of the violation.

Ms. Collins agreed. The last time Code Enforcement was out, there was smoking in the establishment.

Councilmember Shekerjian asked Mr. Ching for clarification that Council has the ability to consider other kinds of factors, such as violating the law or ordinance.

Mr. Ching responded that the Zoning Ordinance under Use Permits Approval Criteria, Subsection (E) of 6-308 of the Zoning and Development Code does say Council shall consider the following factors "but not be limited to." He would have to conclude that what she said would fall under this "not be limited to" notion of other things, so long as they relate back to the overall use permit standard, which under (E)1 is to determine whether or not the use and its manner of conduct is or is not detrimental to persons residing or working in the vicinity to adjacent property, to the neighborhood, or to the public welfare in general.

Councilmember Shekerjian stated for the record, that she considered all of those things, plus the factor that the ordinance was violated and that his use permit was violated. She was disappointed that after Council clarified that it was smoking, that smoking continued in that establishment.

Mr. Ching added that in addition to their special action of appeal, they did file for an injunctive relief from the application of Council's decision, so to the extent that whatever is going on there, there has not yet been a hearing on the merits of the injunctive request by the applicant.

Councilmember Shekerjian added that there is a matter of good faith.

Mayor Hallman stated that he was not taking into consideration the continuation or violation pending court decision whether or not relief should be granted. He was puzzled why it has taken this long if there is an effort for injunctive relief.

Mr. Ching responded that there was a temporary restraining order request hearing, but the hearing was used by the court to instead schedule and merge the temporary restraining order request for permanent injunction. The temporary restraining order was never ruled on. The judge said that rather than granting it, there would be a scheduling conference, which was held last Friday to set out a schedule to then ultimately determine whether injunctive relief will follow.

Mr. Spiess added that the hearing on the preliminary injunction is set for next Thursday. Part of the delay was due to the necessity to prepare transcripts of the prior proceedings.

Mayor Hallman clarified that the reason he raised the issue of the other location is that it strikes him that it touches on whether there is hardship. The client understands the position that he currently is in, and it seemed to be a sensible move to find another location where he could move the business, especially if it is in a location that not only qualifies for avoiding the separation requirement, but also is near the light rail station. He doesn't like this case because he likes the client and he respects that he has invested significant amounts of money and hard work to try to achieve success and he has done that in a number of locations.

Motion by Councilmember Woods not to re-hear Item #21. Second by Councilmember Arredondo. Motion passed on a roll call vote, 7-0.

DOCUMENT NAME: [20081106dslc01.pdf](#) **PLANNED DEVELOPMENT (0406)**

22. Approved **with condition** a Final Subdivision Plat for the RURAL AND TYLER TRANSIT SITE located at 838 South Rural Road.

COMMENTS: (PL080306) (City of Tempe, Jyme Sue McLaren, property owner, Arizona Engineering Company, John Scott, applicant), located at 838 South Rural Road in the GID, General Industrial District and R-3, Multi-Family Residential Limited District. The request includes the following:

SBD08029 - A final subdivision plat, combining seven (7) parcels to create one (1) lot and one (1) tract on a net of 2.58 acres.

The following condition was also approved:

1. The Subdivision Plat shall be put into proper engineered format with appropriate signature blanks and recorded with the Maricopa County Recorder's Office through the City of Tempe's Development Services Department on or before one year from date of City Council approval (November 06, 2009). Failure to record the plan within one (1) year of City Council approval shall make approval of the Subdivision Plat null and void.

DOCUMENT NAME: [20081106dsjc01.pdf](#) **PLANNED DEVELOPMENT (0406)**

23. Approved **with condition** a Final Subdivision Plat for TAHILIANI RESIDENCE located at 1101 East Warner Road Estate 151.

COMMENTS: (PL080121) (Harry T. Tahiliani, owner; Matt Price; Southwest Commercial Services, applicant) for a Final Subdivision Plat on +/- 2.11 net acres located at 1101 East Warner Road Estate 151 in the R1-15, Single Family Residential District and AG, Agricultural

District, including the following:

SBD08012 – Final Subdivision Plat to combine two properties into one lot.

The following condition was also approved:

1. Place the Subdivision Plat into proper engineered format with appropriate signature blanks. Record the Subdivision Plat with the Maricopa County Recorder's Office through the Tempe Development Services Department on or before one year from date of City Council approval (November 06, 2009). Failure to record the plan by one year from City Council approval shall make the approval of the Subdivision Plat null and void.

DOCUMENT NAME: [20081106dssd01.pdf](#) **PLANNED DEVELOPMENT (0406)**

- *24. Held a public hearing and recommended the approval of a Series 12 restaurant liquor license for Ziegler's NYPD LLC dba NYPD Pizza, 9845 South Priest Drive.

COMMENTS: Richard Stark, Agent

DOCUMENT NAME: [20081106LIQ01.pdf](#) **LIQ LIC (0210-02)**

B. Award of Bids/Contracts

25. Awarded **Contract #2008-229**, one-year contracts with four, one-year renewal options to Caltrol, Inc., and Hennesy Equipment Sales Company for the purchase, repair, and maintenance of actuators used by the Water Utilities Department for water production and wastewater treatment services.

COMMENTS: (RFP #08-170) Total cost for these contracts shall not exceed \$75,000 during the initial contract period.

DOCUMENT NAME: [20081106fst03.pdf](#) **PURCHASES (1004-01)**

26. Awarded **Contract #2008-230**, a professional services design contract with Damon S. Williams Associates, LLC, for an upstream diversion of the Southern Regional Outflow (SRO) interceptor at the intersection of Priest Drive and 17th Street.

COMMENTS: Total cost for this contract is \$98,667.

DOCUMENT NAME: [20081106PWDR01.pdf](#) **WATERMAIN UPGRADES (0810-04)**
PROJECT NO. 3204031

27. Approved **Contract #2008-138B**, Job Order No. 2 with ForeSite Design and Construction, Inc., for the construction of a restroom building at Tempe Beach Park, project contingency and authorization to spend funds from Rio Salado Capital Improvement Fund No. 6501731.

COMMENTS: Total amount for Job Order No. 2 is \$535,175 and the project contingency is \$50,000.

DOCUMENT NAME: [20081106PWDR02.pdf](#) **TEMPE BEACH PARK (0706-38)**
PROJECT NO. 6501755

28. Awarded **Contract #2008-231**, a construction contract for renovation of local streets to Southwest Slurry Seal, Inc., and approved an initial project contingency.

COMMENTS: Total contract amount is \$2,054,367.47 and initial contingency is \$205,000.

DOCUMENT NAME: [20081106PWDR03.pdf](#) **STREET UPGRADING-MAINT-CONSTRUCTION (0809-05)**
PROJECT NO. 5400743

29. Awarded **Contract #2008-232**, a construction contract with Kroll Contractors, Inc. and approval of a project contingency for a City of Tempe employee parking lot facility at Price Road and Apache Boulevard.
COMMENTS: Total amount for the contract is \$1,158,644.96 and the project contingency is \$120,000.
DOCUMENT NAME: [20081106PWDR08.pdf](#) **PARKING (0503-19) PROJECT NO. 6003021**
30. Approved **Contract #2007-220AA**, addendum to a contract with CPC Construction, Inc., for minor concrete improvements, on-call maintenance and emergency repairs or grading, for extension of the term for an additional twelve months.
COMMENTS: Total cost for this addendum is \$1,226,009.68, which will increase the original contract amount of \$1,151,660 to \$2,377,669.68.
DOCUMENT NAME: [20081106PWDR04.pdf](#) **STREET UPGRADING-MAINT-CONSTRUCTION (0809-05) PROJECT NO. 5401413**
31. Approved a one-year renewal of a contract with Dave Bang Associates, Inc., for the purchase and installation of park furniture.
COMMENTS: (T08-065-01) Total amount not to exceed \$300,000.
DOCUMENT NAME: [20081106fslg01.pdf](#) **PURCHASES (1004-01)**
32. Approved a one-year renewal of a contract with Arizona Refuse Sales, LLC, for truck mounted roll-off container hoists.
COMMENTS: (T07-078-01) Total amount not to exceed \$36,000.
DOCUMENT NAME: [20081106fsta02.pdf](#) **PURCHASES (1004-01)**
- C. Ordinances and Items for Introduction/First Hearing - These items will have two public hearings before final Council action.
- *33. **Introduced and held the first public hearing** to adopt an ordinance abandoning an existing Waterline Easement located at 1666 N. McClintock Drive. **The second public hearing is scheduled for November 20, 2008.**
DOCUMENT NAME: [20081106PWCH09.pdf](#) **ABANDONMENT (0901) ORDINANCE NO. 2008.64**
- *34. **Introduced and held the first public hearing** to amend Chapter 2, Article V, Boards, Commissions, Etc., of the Tempe City Code, by amending Section 2-181 relating to Powers and Duties; amending Div. 12, relating to Tempe Citizens' Panel for Review of Police Complaints and Use of Force by amending Sections 2-285 and 2-288; and repealing Section 2-287. **The second public hearing is scheduled for November 20, 2008.**
DOCUMENT NAME: [20081106pdsam03.pdf](#) **TCC CH 2 – CITY CODE ADMINISTRATION (0503-02) ORDINANCE NO. 2008.68**
- *35. **Introduced and held the first public hearing** to adopt an ordinance authorizing the Mayor to execute a Land and Improvements Lease between the City and Melrose 223, LLC and Cardiff Capital LLC or their successor in interest, and a Memorandum of Lease. **The second public**

hearing is scheduled for November 20, 2008.

DOCUMENT NAME: [20081106cdnr01.pdf](#) RIO SALADO MASTER PLAN (0112-07-03) ORDINANCE NO. 2008.70

D. Ordinances and Items for Second Hearing/Final Adoption

- *36. Held the **second** public hearing and approved ORDINANCE NO. 2008.54 authorizing the Mayor to sign **Contract #2008-233**, a Covenant and Agreement to Hold Property as One Parcel. The property is located adjacent to 4th Street and Maple Avenue.

DOCUMENT NAME: [20081106cdcm01.pdf](#) DEVELOPMENT PROJECT (0406)

- *37. Held the **second** public hearing and **approved with conditions** a Zoning Map Amendment, Planned Area Development Overlay for ELEMENT HOTEL located at 919 East Apache Boulevard.

COMMENTS: (PL080167) (Bill Swank, 915 Apache LLC, property owner; Manjula Vaz, Gammage & Burnham PLC, applicant) consisting of a new 152-room hotel with ground floor commercial located on Apache Blvd. within approximately 113,800 square feet of building area, six stories in height on 2.1 acres, located at 919 East Apache Boulevard in the CSS, Commercial Shopping and Service District and R-4, Multi-Family Residential General District. The request includes the following:

ZON08007 - (Ordinance No. 2008.48) Zoning Map Amendment to be added into the (TOD) Transportation Overlay District, with existing CSS and R-4 Zoning Districts.

PAD08013 – Planned Area Development Overlay to modify the development standards to allow a maximum building height increase from 35 feet to 85 feet and reduce the minimum required parking from 188 to 142 spaces.

The following conditions were also approved.

1. A building permit shall be obtained on or before November 6, 2010, or the zoning of the property may revert to that in place at the time of application, subject to a public hearing.
2. The property owner(s) shall sign a waiver of rights and remedies pursuant to A.R.S. §12-1134 that may now or in the future exist, releasing the City from any potential claims under Arizona's Private Property Rights Protection Act, which shall be submitted to the Development Services Department no later than December 7, 2008, or the zoning and PAD approval shall be null and void.
3. The Planned Area Development shall be put into proper engineered format with appropriate signature blanks and kept on file with the City of Tempe's Development Services Department prior to issuance of building permits.
4. An Amended Subdivision Plat is required for this development and shall be recorded prior to issuance of building permits.

DOCUMENT NAME: [20081106dsrl01.pdf](#) PLANNED DEVELOPMENT (0406)

- *38. Held the **second public hearing** and adopted ORDINANCE NO. 2008.55 abandoning existing Public Utility Easements located at 2235 E. Apache Boulevard.

DOCUMENT NAME: [20081106PWCH06.pdf](#) ABANDONMENT (0901)

- *39. Held the **second public hearing** and adopted ORDINANCE NO. 2008.56 amending Article II of Chapter 29 of the Tempe City Code relating to Streets and Sidewalks.

DOCUMENT NAME: [20081106PWWWS07.pdf](#) STREETS AND SIDEWALKS (0503-29)

- *40 Held the **second public hearing** and adopted ORDINANCE NO. 2008.63 amending Chapter 26A of the Tempe City Code relating to Procurement.
DOCUMENT NAME: [20081106fsmg04.pdf](#) TCC CH 26A – PROCUREMENT & MATERIALS MGT (0503-41)
- *41. Held the **second public hearing** and adopted ORDINANCE NO. 2008.62 amending Chapter 22, Article IV of the Tempe City Code, relating to Alarm Regulations by amending Section 22-77.1 relating to service fees for excessive false alarms.
DOCUMENT NAME: [20081106pdsam01.pdf](#) TCC 22 – OFFENSES-MISCELLANEOUS

E. Resolutions

42. Approved RESOLUTION NO. 2008.87 amending Appendix A of the Tempe City Code relating to sewer and water development fees. A public hearing was held October 2, 2008.
COMMENTS: These proposed changes establish the sewer and water development fee rate structure with the effective date of the increases occurring February 1, 2009.
DOCUMENT NAME: [20081106mkwud01.pdf](#) MISCELLANEOUS FEES (0210-05)
43. Approved RESOLUTION NO. 2008.100 to enter into **Contract #2008-234**, a Memorandum of Understanding with Maricopa County to accept funding from the Justice Assistance Grant (JAG) program for the purchase of Smartboards, symposiums and computers.
COMMENTS: Funding in the amount of \$23,268.30.
DOCUMENT NAME: [20081106pdsj01.pdf](#) POLICE DEPARTMENT ADMINISTRATION (0606-02)
44. Approved RESOLUTION NO. 2008.98 authorizing the Mayor to execute **Contract #2008-188**, a Development Agreement with Clear Channel regarding the disposition of three existing billboards within the City of Tempe.
DOCUMENT NAME: [20081106cdcm02.pdf](#) COMM DEV/REDEVELOPMENT ADM (0403-01)
45. Approved RESOLUTION NO. 2008.89 amending City Code Appendix A – Schedule of Fees and Charges, Chapter 29, Streets and Sidewalks, relating to Engineering Fees.
DOCUMENT NAME: [20081106PWWWS05.pdf](#) MISCELLANEOUS FEES (0210-05)
46. Approved RESOLUTION NO. 2008.97 amending City Code Appendix A – Schedule of Fees and Charges, Miscellaneous Offenses, relating to the fees for Permits for Alarms.
COMMENTS: Change the initial fee for alarm permits from \$10 to \$15 for businesses only; set an annual alarm renewal fee for businesses at \$15 and no renewal fee for residents; and change the fee structure for businesses to receive one free false alarm.
DOCUMENT NAME: [20081106pdsam02.pdf](#) MISCELLANEOUS FEES (0210-05)

6. PUBLIC APPEARANCES

UNSCHEDULED PUBLIC APPEARANCE

Gail Fisher, Tempe, President of Friends of the Tempe Center for the Arts. She wanted to follow up on a letter she sent to Mayor and Council last June on behalf of the Friends of the Tempe Center for the Arts and the board members. They requested that the east promenade at the TCA be named in honor and memory of the late E.J. and Virginia Tinsley. This remarkable couple devoted a lot of their time and good will to the City of Tempe. Virginia was especially passionate about arts and education, she was a founding member of the board of the TCA and was instrumental in Prop 400 in 2000. She was interested in the status of this request and she provided a copy of the letter to the City Clerk.

7. CURRENT EVENTS/COUNCIL ANNOUNCEMENTS/FUTURE AGENDA ITEMS

- Vice Mayor Ellis announced that on October 28th the Tempe in Motion program received the MAG Liveable Communities Award. These awards recognize the best clean air and alternative transportation in Maricopa County. She congratulated Transit staff.
- Councilmember Navarro congratulated the citizens of Tempe for passing the four Tempe bonds this week. This says a lot about our community in investing in our community. Also, the school bonds passed and that also says a lot about our community.
- Councilmember Mitchell also congratulated the citizens of Tempe for the successful passage of the four City bonds, as well as the school bonds.
- Councilmember Woods added his congratulations as well. He congratulated the citizens for placing their trust in all of Council, as well as the school governing board members.
- Councilmember Arredondo stated that he has had an opportunity to monitor Esquer Park and from day one, there have been some arrests for illegal activity. That says we are listening to our neighborhoods and the community and making some critical changes. Also, he attended a public meeting at Escalante and heard concerns about their park, and since that time, there have been at least nine arrests and the mounted police have been there. We hear, we act, and we try to make this community better. Concerning the bond election, Joe Spracale, Charles Huellmantel, Rich Woerth spearheaded something that a lot of people would have said “no” to, but they stepped forward and said “yes” and that was very important. Also, Barb Carter, John McDonald, Linda Spears. A lot of people were concerned about the date that we chose, but it reinforces the fact that in our community, our City and schools are important, and we are not afraid to vote whether it is a low turnout or a large turnout. The message is the same. He congratulated the citizens for doing what is right. It is important now that Council follows what the citizens have mandated it to do.
- Councilmember Shekerjian added that she also thinks the passage of the bonds speaks to the great spirit of Tempe. The Mayor and Council unanimously supported those bonds and the school bonds. Those bonds are very important to our community. Second, she had the opportunity to do a ride-along with the police. She had an opportunity to see how some of the reorganization of the Police Department helps to stop crime in the community. It was extraordinarily impressive. She thanked Chief Ryff for allowing her to do that. She also thanked Chief Jones for allowing her to visit Fire Station #3. It was a phenomenal experience. She is always impressed with how much City employees want to take this organization from a good organization to being great. That means they are never fully satisfied, but they are pushing the limits to do a little better. She also congratulated the Mayor for receiving the National JAG Above And Beyond Service Award. He will accept that

award in December in Washington, D.C. JAG is the Jobs for America's Graduates and it takes the most at-risk kids in schools and helps them be successful. The award was given to him for assisting JAG to receive local dollars so we can receive matching grant money as well as setting up an ongoing fund-raising opportunity by getting the students to participate in the P.F. Chang's Half Marathon.

- Mayor Hallman congratulated the community on the success of the seven most important things on the ballot. The four bond questions for Tempe and three questions for the school district made the difference between true success and failure. Those three school district items were essential for the continuing success of the Tempe Union High School District. Those had failed last year and the district was at risk of facing continuing cuts. A huge group of people came together under the banner "Yes, Yes, Yes", a PAC committee that supported that effort and they did amazing work, raised money and got out the vote. That group was chaired by Mel Hanna and Dick Foreman, but there were hosts of other folks involved. Even in the midst of the largest turnout in the City's history, approximately 70% of those who voted approved the four bond questions. We owe a great debt of gratitude to our continuing servant, Joe Spracale, who put his name on that effort. It is with great pride that we thank the members of the community who stepped up to run that campaign.

Meeting adjourned at 8:55 p.m.

I, Jan Hort, the duly-appointed City Clerk of the City of Tempe, Maricopa County, Arizona, do hereby certify the above to be the minutes of the Formal City Council meeting of November 6, 2008, by the Tempe City Council, Tempe, Arizona.

Hugh Hallman, Mayor

ATTEST:

Jan Hort, City Clerk

Dated this day of , 2008.