

# Staff Summary Report

City Council Meeting Date: November 6, 2008

Agenda Item Number: 21

**SUBJECT:** This is a public hearing for 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 (PL060676)** located at 53 East Broadway Road for one (1) use permit and if reconsideration is approved, then re-hearing of the request for the use permit.

**DOCUMENT NAME:** 20081106dslc01

**PLANNED DEVELOPMENT (0406)**

**SUPPORTING DOCS:** Yes

**COMMENTS:** Hold a public hearing for a request for 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 as follows:

- a. Reconsideration of the City Council decision of September 11, 2008 to approve the appeal by the Date Palm Neighborhood Association and deny the request for use permit (ZUP08068).
- b. If reconsideration is approved then rehear:

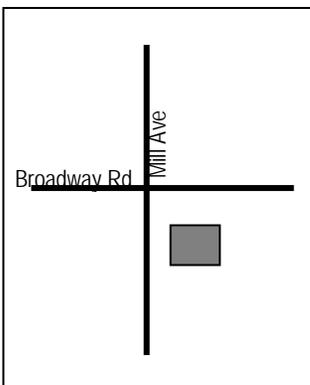
**ZUP08068** Use permit to allow a hookah lounge/tobacco retailer.

**PREPARED BY:** Lisa Collins, Development Services Planning Director (480-350-8989)   
Chris Anaradian, Development Services Department Manager (480-858-2204)

**LEGAL REVIEW BY:** David Park, Assistant City Attorney

**FISCAL NOTE:** N/A

**ADDITIONAL INFO:** The applicant, Anis Ben Harzallah of H B Tobacco, is requesting a reconsideration of the City Council decision of September 11, 2008 to approve the appeal of Steve Stewart with the Date Palm Manor Neighborhood Association.



On May 20, 2008, the Hearing Officer approved an amendment to an existing tobacco retailer use permit to allow smoking, which was previously prohibited, to occur at the establishment located at 53 East Broadway Road. This approval was appealed to the Development Review Commission on July 8, 2008. The appeal was denied and the amended use permit was upheld. The approval of the Development Review Commission was appealed to the City Council.

On September 11, 2008 the City Council voted 7-0 to approve the appeal which overturned, thus denying, the May 20, 2008 Hearing Officer decision to amend the tobacco retailer use permit to allow smoking to occur at the establishment.

**PAGES:**

1. List of Attachments

**ATTACHMENTS:**

1. City Council Staff Summary Report for 9/11/08 w/attachments  
*(Attachment pages 1- 37)*
2. Letter of Resolution – City Council Denial of Use Permit (September 16, 2008)  
*(Attachment page 38)*
3. City Council Minutes of September 11, 2008  
*(Attachment pages 39-47)*
4. Motion for Reconsideration by H. B. Tobacco  
*(Attachment pages 48-54)*

# Staff Summary Report



City Council Meeting Date: September 11, 2008

Agenda Item Number: 32

**SUBJECT:** This is a public hearing for an 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 (PL060676)** located at 53 East Broadway Road for one (1) use permit.

**DOCUMENT NAME:** 20080911dssd01

**PLANNED DEVELOPMENT (0406)**

**SUPPORTING DOCS:** Yes

**COMMENTS:** Hold a public hearing for 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)** (Steve Stewart, Date Palm Manor, applicant; Anis Ben Harzallah, business owner; Mark Stoneman/Stoneman Properties, property owner) 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.

**PREPARED BY:** Shawn Daffara, Planner II (480-858-2284)

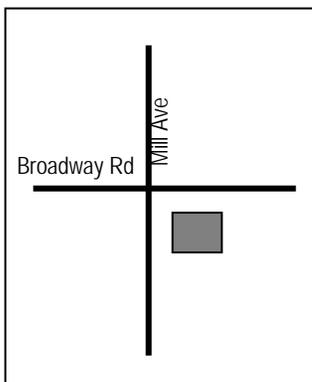
**REVIEWED BY:** Lisa Collins, Development Services Planning Director (480-350-8989)   
Chris Anaradian, Development Services Department Manager (480-858-2204)

**LEGAL REVIEW BY:** N/A

**FISCAL NOTE:** N/A

**RECOMMENDATION:** Staff – Denial of the appeal

**ADDITIONAL INFO:** The applicant, Steve Stewart with the Date Palm Manor Neighborhood Association is requesting an appeal of the July 8, 2008 Development Review Commission decision to deny the appeal for the request for a use permit to allow a hookah lounge/tobacco retailer at 53 West Broadway Road in the CSS, Commercial Shopping and Services District. An appeal letter from Date Palm Manor Neighborhood Association with a signed petition has been received. Staff support's the Hearing Officer and Development Review Commission decision in approving the use permit. The original request for a use permit meets the criteria for a use permit in the Zoning and Development Code.



**PAGES:**

1. List of Attachments
2. Comments;
3. Comments; Reasons for Approval;
4. Conditions of Approval; History & Facts;
5. Description; Zoning & Development Code Reference

**ATTACHMENTS:**

1. Location Map(s)
2. Aerial Photo(s)
- 3-4. ZUP06088 Approval Letter (December 27, 2006)
5. Zoning Administrator Opinion (April 10, 2008)
6. Letter of Intent from May 20, 2008 Hearing Officer Report.
7. Site plan
8. Floor Plan
- 9-10. ZUP08068 Approval Letter (May 28, 2008)
- 11-12. Hearing Officer Minutes from May 20, 2008
- 13-17. 1<sup>st</sup> Appeal Letter from Date Palm Manor with Petition (May 29, 2008)
- 18-21. Letters of Oppositions for 1<sup>st</sup> Appeal.
22. Development Review Commission Denial of Appeal Letter (July 9, 2008)
- 23-24. Development Review Commission Minutes from July 8, 2008
- 25-26. 2<sup>nd</sup> Appeal Letter from Date Palm Manor (July 10, 2008)
27. List of other Hookah Lounges in the City of Tempe
28. Section 3-423: Use Separation Requirements
- 29-30. Definition of Tobacco Retailer and Hookah Lounge
31. Staff Photograph(s)

## **HEARING OFFICER, MAY 20, 2008, SUMMARY:**

The existing Tobacco retail store, which received a use permit in December 2006, is located within the Walgreen's Shopping Center at 53 East Broadway Road, in the CSS, Commercial Shopping & Services District. The applicant, HB Place requested a use permit to amend the previous approval to allow a hookah lounge/tobacco retailer in May of 2008. An ordinance that established separation requirements took effect in June of 2007.

As part of the December 2006 use permit, the Hearing Officer included the following condition -"Smoking will not be permitted within the establishment." The scope of the business is to include the sale of coffee, hot and cold beverages, cigars, cigarettes, chewing tobacco, cigarette tobacco, pipe tobacco, pipes, hookahs, water pipes for tobacco use only, lighters and other tobacco-related products.

The applicant indicated he felt that condition of approval (# 8) didn't include restrictions on Hookah; therefore Hookah existed at this business. The City of Tempe Code Enforcement noticed and found it to be in violation of the conditions of approval. The business owner requested to go back before the Hearing Officer to have the earlier condition amended to clarify that Hookah and no other forms of smoking were allowed at the business.

The City of Tempe Zoning and Development Code tobacco retailer separation requirements, which took effect in June of 2007, prohibits a tobacco retailer (hookah lounge) from locating within 1,320 feet of a school. The applicant provided a copy of their "Tobacco Distributors License" dated 2004, from the State of Arizona, as evidence that they had been operating as a hookah lounge prior to the separation requirement. It was determined that HB Place had been operating as a hookah lounge prior to the separation requirement taking effect; therefore allowing them to submit a use permit request to operate a hookah lounge/tobacco retail establishment, thus amending the previous condition relating to smoking with in the establishment.

Mr. Harzallah submitted this application to request a use permit to include a hookah lounge. The primary use is a hookah lounge, with hours of operation from 3pm to 2am, seven (7) days a week with 2-3 full time employees. Peak hours for hookah tend to be after dinner into the late evening.

Staff supported the request for a use permit to allow a hookah lounge.

The Hearing Officer Minutes are attached – see Attachment Nos. 11 & 12.

## **DEVELOPMENT REVIEW COMMISSION, JULY 8, 2008, SUMMARY:**

The applicant, Steve Stewart, President of the Date Palm Manor Neighborhood Association requested an appeal of the May 20, 2008 Hearing Officer's decision to approve the request for a use permit to allow a hookah lounge/tobacco retailer at 53 West Broadway Road in the CSS, Commercial Shopping and Services District. Mr. Stewart opposed the HB Place use permit in December of 2006 for a Tobacco Retailer and the use permit request for a hookah lounge on May 20, 2008.

Staff recommended approval of the use permit when it went before the Hearing Officer on May 20 and is recommending denial of the appeal, thus upholding the Hearing Officer's approval of the use permit.

The Development Review Commission Minutes are attached – see Attachment Nos. 23 & 24.

## **COMMENTS FOR CITY COUNCIL, SEPTEMBER 11, 2008:**

The applicant, Steve Stewart, President of the Date Palm Manor Neighborhood Association is requesting an appeal of the July 8, 2008 Development Review Commission decision to deny the appeal, thus upholding the Hearing Officer approval, for a use permit to allow a hookah lounge/tobacco retailer at 53 West Broadway Road in the CSS, Commercial Shopping and Services District. Mr. Stewart opposed the HB Place use permit in December of 2006 for a Tobacco Retailer and again opposed the use permit request for a hookah lounge on May 20, 2008.

Staff recommended approval of the use permit when it went before the Hearing Officer on May 20, recommended denial of the appeal

before the Development Review Commission, and are still recommending denial of the appeal, thus upholding the Hearing Officer's approval of the use permit.

## Use Permit

The Zoning and Development Code requires a use permit for a hookah lounge in the CSS, Commercial Shopping and Services District. Evaluating the use permit, the proposal appears to pass the use permit test listed below:

- a) Any significant increase in vehicular or pedestrian traffic in adjacent areas;
  - There will be no significant increase in vehicular or pedestrian traffic in adjacent areas.
- b) Nuisance arising from the emission of odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions;
  - This is a hookah lounge and will generate smoke; however all hookah smoking shall be contained within the establishment moreover, the hookah lounge as its own independent ventilation system. Therefore this use should not adversely impact neighboring businesses with the emission of odor, dust, gas, noise, vibration, smoke, heat, or glare.
- c) 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;
  - The proposed development would not contribute to neighborhood deterioration or downgrade property values. This use permit request is consistent with the General Plan 2030's Land Use Element. The requested use permit will not be detrimental to the surrounding area, but will further the General Plan Land Use Element Goals and Strategies.
- d) Compatibility with existing surrounding structures and uses;
  - The proposed use appears to be compatible with surrounding uses

## Conclusion

Staff recommends denial of the appeal.

## REASON(S) FOR APPROVAL:

1. The business is a general commercial use, and is compatible with the other businesses on the property and within the area.
2. No apparent nuisance resulting from noise, smoke, odor, dust, vibration, or glare.
3. No apparent hazards to persons or property from possible explosion, contamination, fire or flood.

**THE FOLLOWING CONDITIONS OF APPROVAL WERE ASSIGNED BY THE HEARING OFFICER AND MODIFIED BY THE DEVELOPMENT REVIEW COMMISSION AS INDICATED.**

**CONDITION(S)  
OF APPROVAL:**

1. The use permit is valid for HB Place and may be transferrable with approval from the Hearing Officer staff. Should the business be sold, the new owners must contact the Hearing Officer staff for review of the business operation.
2. This use shall not violate the City of Tempe Smoking Ordinance or Smoke Free Arizona Act A.R.S. §36-601.01.
3. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
4. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
5. Any intensification or expansion of the use shall require the applicant to return to the Hearing Officer for further review
6. The gross sale of beverages and snack items may not exceed that of tobacco and hookah products.
7. All rear exit doors require a lexan vision panel. Details to be approved through Building Safety Plan Review prior to issuance of building permit.
8. All doors shall have illumination to meet five (5) foot candles at the door and two (2) foot candles within a 15' radius. Details to be approved through Building Safety Plan Review.
9. All business signs shall receive a Sign Permit. Please contact Planning staff at (480) 350-8331.
10. The applicant shall contact City of Tempe Crime Prevention Unit for a Security Plan. Please contact Sergeant Ken Harmon (480) 858-6330.
11. The hours of operation for on premises smoking are limited to **8:00 PM to 3:00 AM. ADDED BY THE DEVELOPMENT REVIEW COMMISSION**

**HISTORY & FACTS:**

- December 19, 2006                    ZUP06088: Hearing Officer approved a use permit to allow a Tobacco Retailer for HB PLACE.
- March 11, 2008                    CM080349: Complaint opened on HB PLACE for violation of conditions of approval. "Smoking will not be permitted inside this establishment."
- April 10, 2008                    DSM08019: Zoning Administrators Decision to allow HB PLACE hookah lounge to apply for a use permit given they did not meet the 1,320 foot separation from a school.
- May 20, 2008                    ZUP08068: Hearing Officer approved a Use Permit for HB PLACE to allow a Tobacco Retailer/Hookah Lounge.
- May 30, 2008                    UPA08003: Date Palm Manor Neighborhood Association filed and appeal of ZUP08068.
- July 8, 2008                    UPA08003: The Development Review Commission denied the appeal for HB PLACE, thus upholding the Hearing Officer's approval.
- July 10, 2008                    UPA08005: Date Palm Manor Neighborhood Association filed an appeal of UPA08003/ZUP08068.

**DESCRIPTION:**

Owner – Stoneman Properties  
Applicant – Anis Benn Harzallah  
Existing Zoning – CSS, Commercial Shopping and Services District  
Parcel Size – 114,301 s.f. / 2.62 acres  
Total Building Area – 40,202 s.f.  
Tenant Area – 2,117 s.f.  
Parking Required – 8 spaces  
Parking Provided – 152 spaces

**ZONING AND  
DEVELOPMENT**

**CODE REFERENCE:**

Part 3, Chapter 2, Section 3-202, Table 3-202A – Permitted Land Uses in CSS, Commercial and Shopping and Services District.

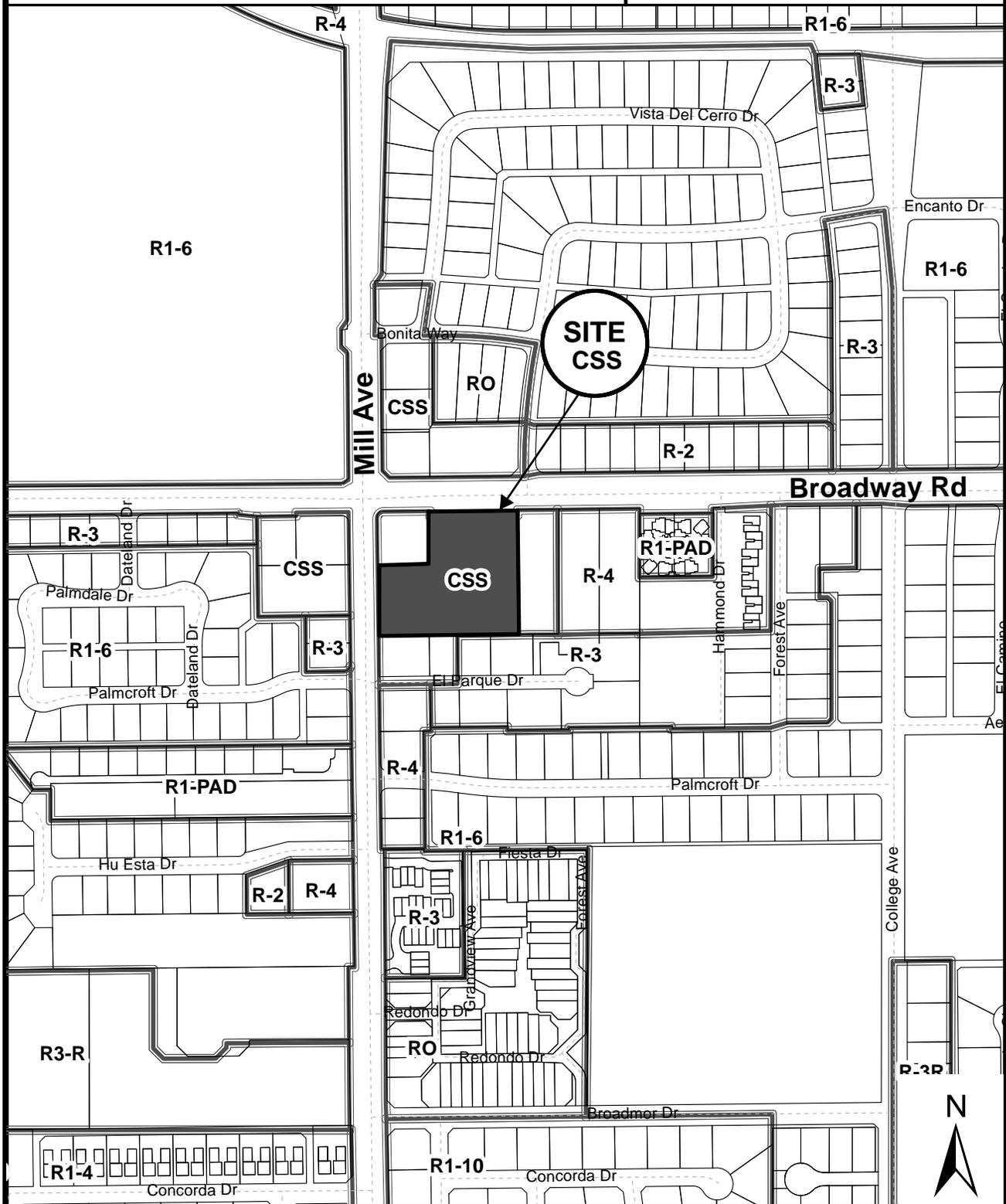
Part 3, Chapter 4, Section 3-423 – Use Separation Requirements

Part 6, Chapter 3, Section 6-308 – Use Permit

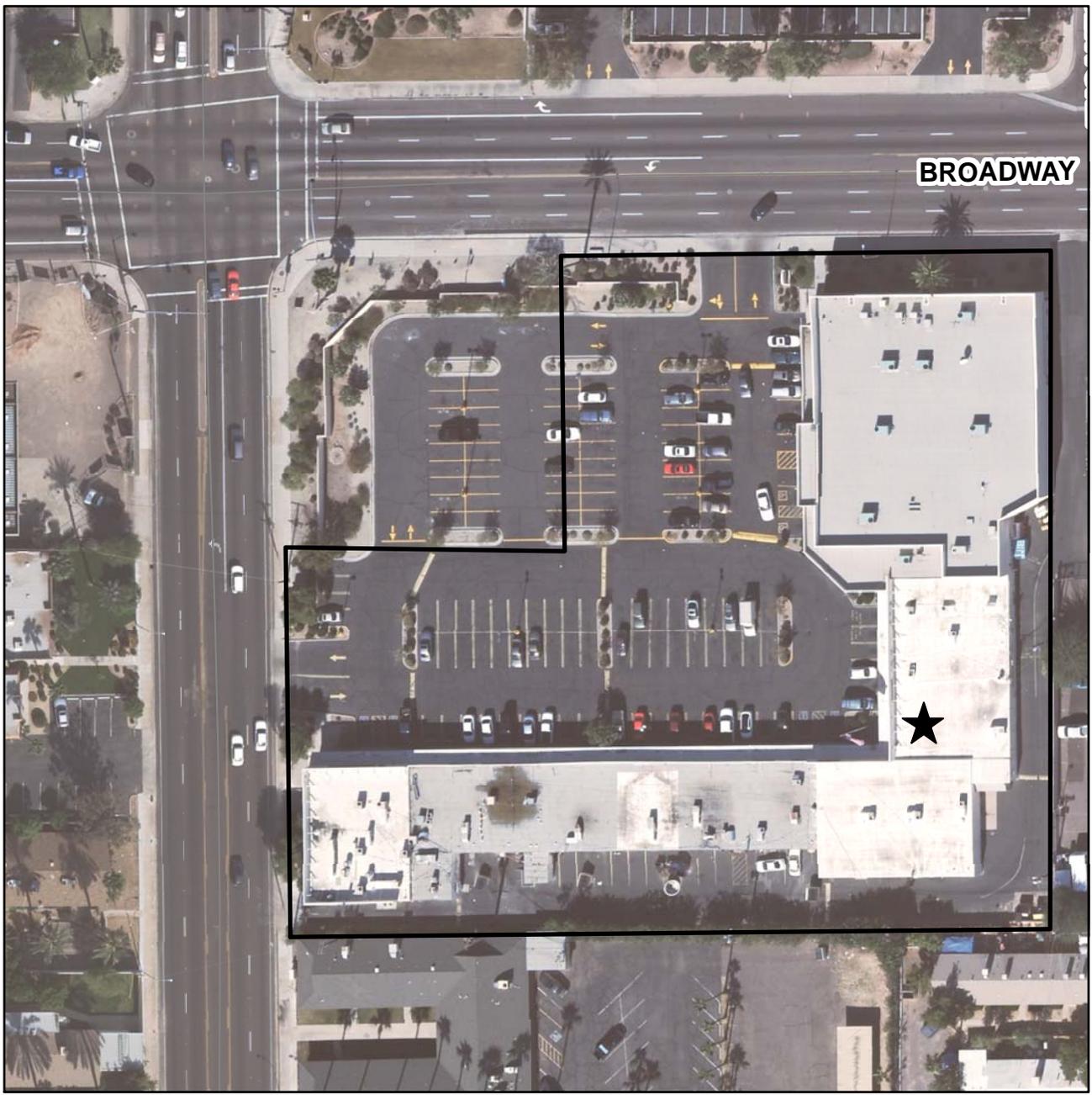
Part 6, Chapter 3, Section 6-313 – Security Plan

**WALGREENS PLAZA-  
HB TOBACCO**

**PL060676**



**Location Map**



**WALGREEN'S PLAZA - HB TOBACCO (PL060676)**

(480) 350-8331 (Phone)

December 27, 2006

Mr. Anis Ben Harzallah  
851 West University Drive  
Tempe, Arizona 85281

**RE: HB PLACE TOBACCO  
PL060676 / ZUP06088**

Dear Mr. Harzallah:

You are hereby advised that at the hearing held December 19, 2006, the Hearing Officer of the City of Tempe, acting in accordance with Section 1-305, Paragraphs C and D, of the Zoning and Development Code:

Approved the request by **WALGREENS PLAZA – HB PLACE TOBACCO (PL060676)** (Anis Ben Harzallah, applicant; Commercial Properties LLC, property owner) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for:

**ZUP06088** Use permit to allow a tobacco retailer.

Subject to the following conditions of approval:

1. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
2. The use permit is transferable. Should the business be sold, the new owners must reprocess for administrative review.
3. The use permit is valid for the plans and business operation as submitted to and approved by the Hearing Officer/Board of Adjustment.
4. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
5. The applicant shall devise a security plan in conjunction with the Police Department officials (contact Officer William Vanek (480) 858-6342) prior to the use permit becoming effective.
6. All business signs shall be Development Review staff approved and permits obtained.
7. The applicant shall contact and work with Development Services Development Review staff to upgrade non-compliant lighting at the proposed suite. Further, a 6" x 6" lexan or laminated glass vision panel shall be centered and installed at 63" above finished grade in the east elevation man door. These upgrades shall provide for the safety, security and code compliancy of the proposed business.
8. **Smoking will not be permitted within this establishment. ADDED BY HEARING OFFICER**

Approvals are specifically conditioned upon the applicant proceeding with the proposed use(s) and/or variance(s) within twelve (12) months of the date of the approval by the Hearing Officer and required by the Zoning and Development Code.

In addition to proceeding with the approvals granted, it is understood that any and all conditions as stipulated by the Hearing Officer as indicated above, shall be fully complied with.

If the action of the Hearing Officer was required for the purposes of rectifying any violations of the Zoning and Development Code, the violations shall be the responsibility of the applicant/owner to fully correct and achieve conformance.

In sign-related violations, corrections shall be made within five (5) days of Hearing Officer action; in all other matters, corrections shall be made within fifteen (15) days of Hearing Officer action, unless specifically conditioned otherwise by the Hearing Officer.

You are further advised that the above does not waive the requirements for obtaining building permits and other clearances as may be necessary.

Sincerely,

A handwritten signature in black ink that reads "Steve A. Abrahamson". The signature is written in a cursive, slightly slanted style.

Steve Abrahamson  
Senior Planner

SA:dm

cc: Mr. Craig Lessler/Lessler Commercial Properties LLC  
Mr. Stanford Stoneman/Stoneman Properties  
File

Development Services  
Department

480-350-8331

April 10, 2008

Mr. Ben Harzallah  
HB Place Tobacco  
53 East Broadway Road  
Tempe, Arizona 85282

**FILE COPY**

RE: **HB PLACE TOBACCO – HOOKAH LOUNGE**  
53 East Broadway Road  
PL060676 / DS0061478 / DSM08019

Dear Mr. Harzallah:

I have reviewed your request for a Zoning Administrator's opinion as whether an application for a use permit to allow a hookah lounge at the HB Place Tobacco located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District can be accepted. Given the supporting evidence that shows the hookah use existed prior to the separation requirement becoming effective, you are able to apply for a use permit to allow a Hookah Lounge/Tobacco Retailer at this location.

The City of Tempe Zoning and Development Code, Part 3, Land Use, Section 3-423 states:

'Tobacco Retailers shall not be located on a lot within 1,320 feet, measured by a straight line in any direction, from the lot line of a charter school, private school, or public school, which provides elementary or secondary education. Instructional or vocational schools are excluded from the separation agreement.'

Please submit the use permit fee of \$1065.00 along with the remaining project submittal items when applying for your use permit (i.e. 300 ft. radius map, typed mail labels, site plan, floor plan, letter of intent and signed letter of approval from the property owner).

If you need additional information or assistance, please contact Shawn Daffara, staff planner, at 480-858-2284.

Sincerely,



Lisa Collins  
Planning Director

LC/dm

cc: Kay Savard/COT Tax & Licensing  
Dean Miller/COT Commercial Code Department  
File

**APRIL17,2008**

**City of tempe**

**Development**

**Services**

**31 east fifth st.**

**Tempeaz85280**

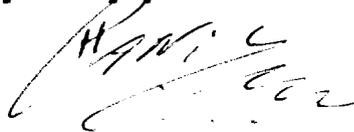
**RE;use permit request**

**Gentlemen,I anis harzallah dba of hb tobacco ihave a space of 2117 s.f. located at 53 east broadway,I did open this business in december ,2006.my business is involve to sale hot and cold beverages,tobacco,seling hookahs ans serving them to smoke**

**I'am operating this premises as a hookah lounge,I have two employees,and I operate from 7:00pm to 2:00am.**

**I have a 10 to 20 average customer a night;however,my businesswill not cause any significant change to the vehicular or pedestrian traffic in and around the wallgreens plaza and surrounding streets.and my business never cause any nuisance and will never do,exceeding the ambient conditions.**

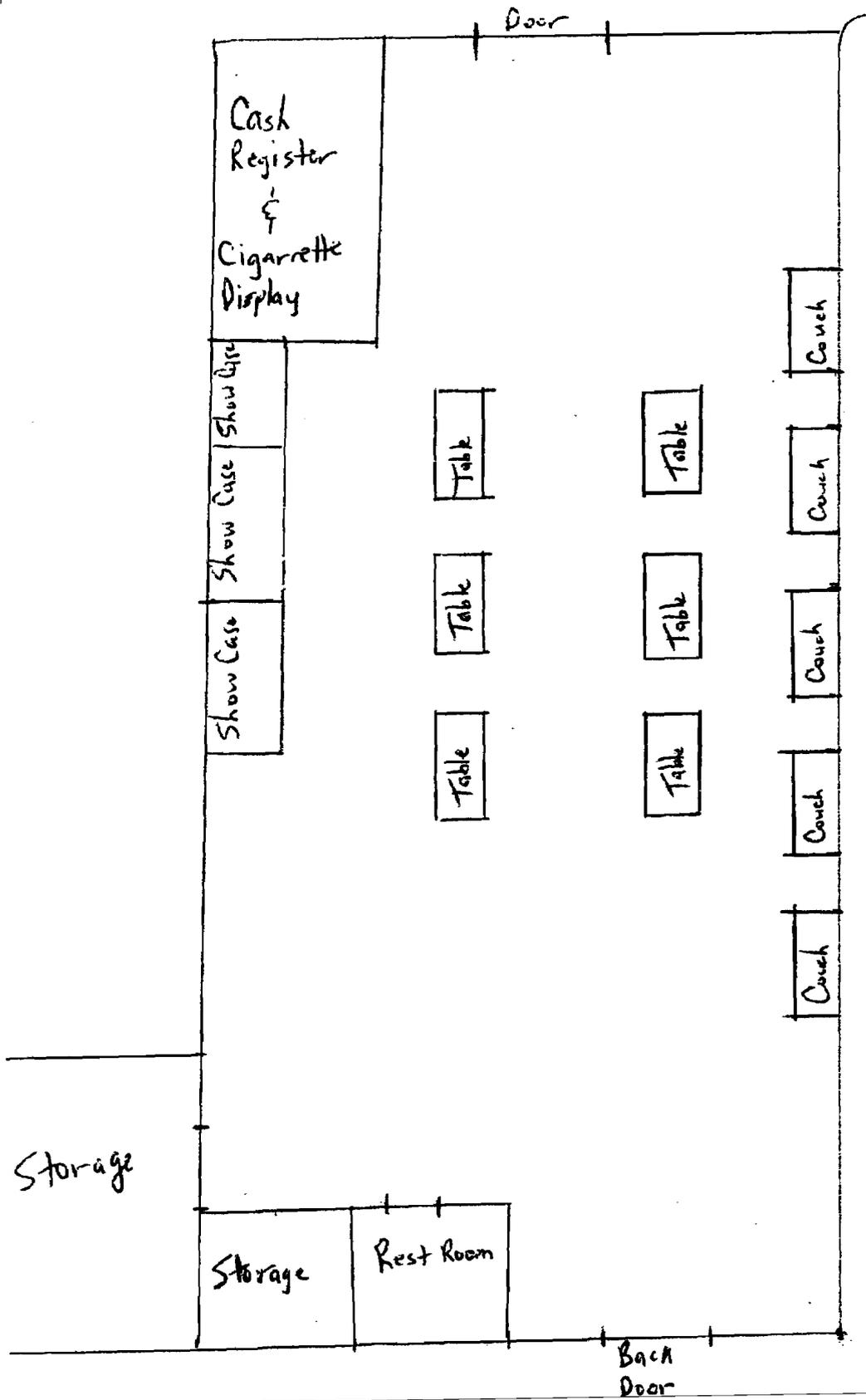
**Very truly yours**



**Anis ben harzallah**



H.B. Place Tobacco  
53 E. Broadway



Development Services  
Department

(480) 350-8331 (Phone)

May 28, 2008

**FILE COPY**

Mr. Anis Ben Harzallah  
HB Place Tobacco  
53 East Broadway Road  
Tempe, Arizona 85282

**RE: H B TOBACCO  
PL060676 / ZUP08068**

Dear Mr. Harzallah:

You are hereby advised that at the hearing held May 20, 2008, the Hearing Officer of the City of Tempe, acting in accordance with Section 1-305, Paragraphs C and D, of the Zoning and Development Code:

Approved the request by **WALGREENS PLAZA - H B TOBACCO (PL060676)** (Anis Ben Harzallah, applicant; Mark Stoneman/Stoneman Properties, property owner) 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.

Approved subject to the following conditions:

1. The use permit is valid for HB Place and may be transferable with approval from the Hearing Officer staff. Should the business be sold, the new owners must contact the Hearing Officer staff for review of the business operation.
2. This use shall not violate the City of Tempe Smoking Ordinance or Smoke Free Arizona Act A.R.S. § 36-601.01.
3. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
4. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
5. Any intensification or expansion of the use shall require the applicant to return to the Hearing Officer for further review.
6. The gross sale of beverages and snack items may not exceed that of tobacco and hookah products.
7. All rear exit doors require a lexan vision panel. Details to be approved through Building Safety Plan Review prior to issuance of building permit.
8. All doors to have illumination to meet five (5) foot candles at the door and two (2) foot candles within a 15' radius. Details to be approved through Building Safety Plan Review.
9. All business signs shall receive a sign permit. Please contact Planning staff at (480) 350-8331.
10. The applicant shall contact City of Tempe Crime Prevention Unit for a Security Plan. Please contact Sergeant Ken Harmon (480-858-6330).
11. **The hours of operation for on premises smoking are limited to 7:00 PM to 2:00 AM. ADDED BY HEARING OFFICER**

Approvals are specifically conditioned upon the applicant proceeding with the proposed use(s) and/or variance(s) within twelve (12) months of the date of the approval by the Hearing Officer and required by the Zoning and Development Code.

In addition to proceeding with the approvals granted, it is understood that any and all conditions as stipulated by the Hearing Officer as indicated above, shall be fully complied with.

If the action of the Hearing Officer was required for the purposes of rectifying any violations of the Zoning and Development Code, the violations shall be the responsibility of the applicant/owner to fully correct and achieve conformance.

In sign-related violations, corrections shall be made within five (5) days of Hearing Officer action; in all other matters, corrections shall be made within fifteen (15) days of Hearing Officer action, unless specifically conditioned otherwise by the Hearing Officer. You are further advised that the above does not waive the requirements for obtaining building permits and other clearances as may be necessary.

Sincerely,

A handwritten signature in black ink, appearing to read 'Shawn Daffara', with a long horizontal flourish extending to the right.

Shawn Daffara  
Planner II

SD:dm

cc: Mark Stoneman/Stoneman Properties  
File

- Hold a public hearing for a request by **PHOENIX 1 PLAZA – NEXTLINK WIRELESS INC. (PL080147)** (Sonya Okamoto/PlanCom Inc., applicant; Fountainhead Corporation LLC, property owner) located at 2625 South Plaza Drive in the GID, General Industrial District for:

**ZUP08076** Use permit to allow roof top wireless antennas.  
**CONTINUED AT THE REQUEST OF THE APPLICANT**

- 
3. Hold a public hearing for a request by the **NANNAPANENI RESIDENCE (PL060629)** (Ravi Nannapaneni, applicant/property owner) located at 1026 East Knox Road in the AG, Agricultural District for:

**VAR08009** Variance to increase wall height in the front yard setback from four (4) feet to six (6) feet.

Mr. Ravi Nannapaneni was present to represent this case.

Shawn Daffara, staff planner, gave an overview of this case, and stated that no additional public input or information had been received since the staff report had been issued. He noted the neighbor to the west is no longer in opposition and that his concerns have been resolved.

Mr. Williams noted that the purpose of a variance is to provide relief when the Zoning and Development Code is not applied fairly to a property owner. Mr. Nannapaneni's residence is across the street from the parking lot of a high school where there is a lot of activity and the wall will allow privacy.

**DECISION:**

Mr. Williams approved PL060629/VAR08009 subject to the following conditions:

1. The variance is granted based on the plans submitted and approved by the Hearing Officer.
2. Obtain all necessary clearances from the Building Safety Division.
3. The wall shall be designed to match the existing residence in color, form and material.

FILE COPY

- 
4. Hold a public hearing for a request by **WALGREENS PLAZA - H B TOBACCO (PL060676)** (Anis Ben Harzallah, applicant; Mark Stoneman/Stoneman Properties, property owner) 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.

Mr. Anis Ben Harzallah was present to represent this case.

Shawn Daffara, staff planner, gave an overview of this case, and stated that no additional public input or information had been received since the staff report had been issued. This request is based on the Zoning Administrator's opinion that they were allowed to apply for this use permit.

Mr. Williams questioned Mr. Abrahamson as to whether there had been any applicants that were restricted as to hours designated for smoking vs the business hours they are allowed to sell tobacco products. Mr. Williams noted that there was a Walgreens located next door to this business who also sold tobacco products. Mr. Abrahamson explained that the sale of tobacco products was not the primary source of income for Walgreens and they were not required to have a use permit, whereas Mr. Harzallah would derive over fifty percent (50%) of his income from the sale of tobacco. Mr. Williams cited his concern over high school students in the nearby area and asked if perhaps it would be more beneficial to limit the hours when smoking is allowed to a later time period such as 5 PM. He asked if limiting the hours is an option in this case.

Mr. Harzallah spoke and explained that the normal hours of his business were from 7 PM to 2 AM. Staff confirmed that this applicant's letter of explanation specified these hours of business.

Mr. Steve Stewart, Chairman of Date Palm Manor Homeowners Association, presented Mr. Williams with a specific petition of opposition to this request by his association. He pointed out the location of Tempe High School (northwest corner) and that the association strongly protests this use permit based on health concerns.

Mr. Angel Mendez, of Penasco Place, spoke in support of this request and stated that as a business owner and neighbor, Mr. Harzallah keeps the premises and parking area clean and causes no problems.

Ms. Margaret Christiansen, resident of Tempe, spoke in opposition and stated that as adults in our community we need to protect our youth during a period when they are very vulnerable and experimental against things, such as tobacco, that are harmful at all costs.

Mr. Williams noted that the sale of tobacco products is not what is under advisement today as that use permit had been approved over a year ago. The use permit to allowing smoking on the premises is what is being considered today, and because of the concern over high school students having a place to go and smoke, a use permit was denied a year and a half ago. He went on to state that we are back today to look at that very same question. Further, he indicated that he shared a very strong concern with the community over the close proximity of high school students, and the relation of this business to the location of the high school. Due to the Zoning Administrator's opinion that stated that this use was 'grandfathered', and the fact that the hours of operation were beyond the high school hours, since high school kids are not concentrated at 7 PM at this location, Mr. Williams noted that he was approving this request with an added condition limiting the hours of operation.

**DECISION:**

Mr. Williams approved PL060676/ZUP08068 subject to the following conditions:

1. The use permit is valid for HB Place and may be transferable with approval from the Hearing Officer staff. Should the business be sold, the new owners must contact the Hearing Officer staff for review of the business operation.
2. This use shall not violate the City of Tempe Smoking Ordinance or Smoke Free Arizona Act A.R.S. § 36-601.01.
3. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
4. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
5. Any intensification or expansion of the use shall require the applicant to return to the Hearing Officer for further review.
6. The gross sale of beverages and snack items may not exceed that of tobacco and hookah products.
7. All rear exit doors require a lexan vision panel. Details to be approved through Building Safety Plan Review prior to issuance of building permit.
8. All doors to have illumination to meet five (5) foot candles at the door and two (2) foot candles within a 15' radius. Details to be approved through Building Safety Plan Review.
9. All business signs shall receive a sign permit. Please contact Planning staff at (480) 350-8331.
10. The applicant shall contact City of Tempe Crime Prevention Unit for a Security Plan. Please contact Sergeant Ken Harmon (480-858-6330).
11. **The hours of operation for on premises smoking are limited to 7:00 PM to 2:00 AM. ADDED BY HEARING OFFICER**

**DATE PALM MANOR – NEIGHBORHOOD ASSOC.**

**C/O Steve Stewart, Chairman – 10 W. Palmcroft Dr. – Tempe, AZ 85282  
480 – 966-5865**

**CITY OF TEMPE**

**May 29, 2008**

**c/o Development Services Department  
P.O.Box 5002  
Tempe, AZ 85280-5002**

**DEVELOPMENT SERVICES DEPARTMENT:**

**Date Palm Manor Neighborhood Association hereby requests appeal consideration on application PL060676 decision issued May 20, 2008. This appeal is based on the following, that we believe the Hearing Officer may have overlooked.**

- 1. Our initial complaint is on the reverse side of this request and definitely deserves additional consideration.**
- 2. The modification of hours of operation to start at 7:00 pm, does not in any way detour the juvenile traffic because of the tobacco legal age of (18) eighteen. Two years ago, here in Date Palm Manor, we had about ten of our Police Officer's break-up a group of 4-500, drinking and gun-firing teenager's celebrating someone's 18<sup>th</sup> birthday. This "hookah lounge" is like a giant teenage magnate to allow our youth to openly travel in a negative direction. This is the opposite direction of the YMCA.**
- 3. We have worked very hard to make Tempe a beautiful city. With less than 19% of the American public smoking, and kids comprising a large percentage of that 19% , the problem is compound; littering and contributing.**
- 4. Why add to our already overloaded Police Department? Tempe Leadership tries to develop responsible and active citizen's. Without a doubt, if the "hookah lounge" is allowed to operate, the entire surrounding neighborhoods will be watching and calling the police as required.**

**Respectfully,**



**Steve Stewart, Chairman - Date Palm Manor Neighborhood Assoc.**

## WALGREENS PLAZA-HB TOBACCO

We, the residents of DATE PALM MANOR; located in the southwest quadrant of Mill Avenue and Broadway Road in Tempe, Arizona; do hereby STRONGLY PROTEST the application (PL060676) (Anis Ben Harzallah, applicant; Mark Stoneman/Stoneman Properties, property owner) 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.

First point of consideration is TEMPE HIGH SCHOOL located directly across the street on the northwest corner of Broadway Road and Mill Avenue. Secondly, both the City of Tempe and the State of Arizona are attempting to better protect our children and citizens from the abusive effects of tobacco; this application is definitely counterproductive and as such, should not be granted.

The below signed residents pray for the denial of this application:

<u>NAME</u>	<u>ADDRESS</u>	<u>SIGNATURE</u>	<u>DATE</u>
1. Steve Stewart	10 W. Palmcroft Dr.	_____	5-18-08
2. Joy Stewart	10 W. Palmcroft Dr.	_____	5-18-08
3. Margaret Christiansen	18 W. Palmcroft Dr.	_____	5-18-08
4. Carolyn Jenkins	116 W. Palmcroft Dr.	_____	5-18-08
5. Adrienne Decker	103 W. Palmdale Dr.	_____	
6. Pat Lauderdale	111 W. Palmdale Dr.	_____	
7. Patti Morrell	115 W. Palmcroft Dr.	_____	
8. Bidy Hayden	121 W. Palmcroft Dr.	_____	

NOTE: 5-29-08: When this petition was originally given to the Development Services Department, May 20, 2008 @ the public hearing, there were (23) twenty-three valid resident signatures on three separate sheets. This sheet is being attached to our request for appeal to the Hearing Officer's decision on this case at that hearing.

# WALGREENS PLAZA-HB TOBACCO<sup>(1 of 3)</sup>

We, the residents of DATE PALM MANOR; located in the southwest quadrant of Mill Avenue and Broadway Road in Tempe, Arizona; do hereby STRONGLY PROTEST the application (PL060676) (Anis Ben Harzallah, applicant; Mark Stoneman/Stoneman Properties, property owner) 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.

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4.	4. Carolyn Jenkins	116 W. Palmcroft Dr.	<i>Carolyn V. Jenkins</i>	5-18-08
5.	5. Adrienne Decker (VACATION)	103 W. Palmdale Dr.		
6.	6. Pat Lauderdale	111 W. Palmdale Dr.	<i>Pat Lauderdale</i>	5-18-08
7.	7. Patti Morrell	115 W. Palmcroft Dr.	<i>Patti Morrell</i>	5-18-08
8.	8. Biddy Hayden	121 W. Palmcroft Dr.	<i>Biddy Hayden</i>	5-18-08
9.	9. HAL L. JENKINS	116 W. PALMCROFT	<i>Hal L. Jenkins</i>	5-18-08
10.	10. KRS ROBERTS	25 W. Palmcroft	<i>KRS Roberts</i>	5-18-08
11.	11. MARTON MUNIK	19 W. PALMCROFT	<i>Marton Munik</i>	5-18-08
12.	12. Robert Eagar	26 W. Palmcroft	<i>Robert Eagar</i>	5-18-08
13.	13. Kari Eagar	26 W. Palmcroft	<i>Kari Eagar</i>	5-18-08
14.	14. Beverly Alisky	44 W. Palmdale	<i>Beverly Alisky</i>	5-18-08
15.	15. Sandra Alisky	44 W. Palmdale	<i>Sandra Alisky</i>	5-18-08
16.	16. Annamaria Oliviero	111 W. Palmdale Dr.	<i>Annamaria Oliviero</i>	5-18-08

# WALGREENS PLAZA-HB TOBACCO

(2 of 3)

We, the residents of DATE PALM MANOR; located in the southwest quadrant of Mill Avenue and Broadway Road in Tempe, Arizona; do hereby STRONGLY PROTEST the application (PL060676) (Anis Ben Harzallah, applicant; Mark Stoneman/Stoneman Properties, property owner) 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.

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8. Biddy Hayden	121 W. Palmcroft Dr.		
16. 9. Roseanna Spier	2018 S. Dromedary Dr	Roseanna Spier	5-18-08
17. 10. Dale Spier	2018 S. Dromedary Dr	Dale Spier	5-18-08
11.			
12.			
18. 13. Elsie M. Miller	15 W. Palmcroft Dr.	Elsie M. Miller	5-20-08
19. 14. Debbie Bonets	25 W. Palmcroft Dr.	Debbie Bonets	5-20-08
20. 15. CATHY ORTIZ	2025 S. Dataland	Cathy J. Ortiz	5/20/08
21. 16. Peggy Maddox	102 W. Palmcroft	Peggy Maddox	5/20/08

**WALGREENS PLAZA-HB TOBACCO**

(3 of 3)

We, the residents of DATE PALM MANOR; located in the southwest quadrant of Mill Avenue and Broadway Road in Tempe, Arizona; do hereby STRONGLY PROTEST the application (PL060676) (Anis Ben Harzallah, applicant; Mark Stoneman/Stoneman Properties, property owner) 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.

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8. Bidy Hayden	121 W. Palmcroft Dr.		
9. Rosanna Spier	2018 S. Pomeary Dr	Rosanna Spier	5-19-08
10. Dale Spier	2018 S. Pomeary Dr	Dale Spier	5-19-08
22. 11. Mark Petiford	14 W. Palmcroft Dr.	Mark P Petiford	5/19/08.
23. 12. Chenli Petiford	14 W. Palmcroft Dr.	Chenli Petiford	5/19/08.
13. ELSIE M. MILLER	15 W. Palmcroft Dr.	Elsie M. Miller	5-20-08
14. Deldae BOWEN	25 W. Palmcroft Dr	Deldae Bowen	5-20-08
15. Cathy Ortiz	2025 S. Pataland	CATHY J. ORTIZ	5/20/08
16. Peggy Maddox	102 W Palmcroft Dr	Peggy Maddox	5/20/08

**Anaradian, Christopher**

**From:** Ellis, Shana  
**Sent:** Thursday, May 22, 2008 3:14 PM  
**To:** Anaradian, Christopher  
**Subject:** FW: Hearing for a permit for a Hookah Lounge across from Tempe High School

Here is the other one I told you about.....

Shana

**From:** Scott Turley [mailto:scott.turley@gmail.com]  
**Sent:** Sunday, May 18, 2008 5:19 PM  
**To:** Hallman, Hugh; Hutson, Hut; Arredondo, Ben; Carter, Barbara; Ellis, Shana; Mitchell, Mark; Shekerjian, Onnie  
**Cc:** huthutson@cox.net; julie@julieforcouncil.com; navarrorforcitycouncil@hotmail.com; corey@coreywoods2008.com  
**Subject:** Hearing for a permit for a Hookah Lounge across from Tempe High School

Dear esteemed Mayor, Tempe City Council, and those running for City Council:

I am a concerned resident in the city of Tempe in the neighborhood between Mill Avenue and the railroad tracks south of Alameda Dr. Our family has two young children, ages three and five and attend church with families who also live in the surrounding neighborhoods some of whom have children attending Tempe High.

It has come to my attention that the business HB is applying for a permit to operate a Hookah Lounge in the Walgreen's shopping center across the street from Tempe High school. The business also intends to extend operations from 3pm to 2am, opening its business just as the Tempe High School will be releasing its students from classes.

I am concerned because I frequent this shopping center often. The corner restaurant, El Penasco, is a local favorite for our family, and we sometimes walk their to frequent it and other businesses in the plaza.

About four years ago, we were looking to buy a house in the area. We did not want to follow the trend of many of my friends who were buying brand new houses on the outskirts of town. We chose Tempe because we love Tempe. We bought an old house in an old neighborhood because we liked the amenities of the city. However, one of the distinct disadvantages of being in this part of the city for us is the number of tobacco type shops close by. There are three, including this one that we could literally walk to from our house.

Much more important, having such a shop right across the street from a high school is a direct violation of city law. And for them to operate such a shop at 3pm so close to the hours of operation of a high school just violates common sense. I do understand the shop was operating before the city law to ban such establishments was in place, but the law was passed for a reason, and common sense needs to dictate in this case.

I strongly urge all on this list who have the power to limit operations of such establishments to locations not near our schools, and they especially should not be allowed to open as students are walking nearby.

05/22/2008

ATTACHMENT 24

One final note, I am a concerned and informed Tempe resident. I have researched those running for city council this Tuesday and I am planning to vote. I am generally excited at the direction Tempe is currently going, but I definitely want to see neighborhoods like mine looked after to ensure a safe, family friendly environment for all who reside here.

I appreciate your time on this matter.

Scott Turley  
16 W. Del Rio Dr.  
Tempe, 85282  
480-517-1438

**Anaradian, Christopher**

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**To:** Abrahamson, Steve

**Subject:** FW: Hearing for a permit for a Hookah Lounge across from Tempe High School

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**From:** Ellis, Shana

**Sent:** Thursday, May 22, 2008 3:01 PM

**To:** Hearn, Shelley; Anaradian, Christopher

**Subject:** FW: Hearing for a permit for a Hookah Lounge across from Tempe High School

Do either of you have any information on this? Thanks!

Shana

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**From:** TESmith [mailto:etsmith2@cox.net]

**Sent:** Monday, May 19, 2008 10:33 PM

**To:** Hallman, Hugh; Hutson, Hut; Arredondo, Ben; Carter, Barbara; Ellis, Shana; Mitchell, Mark; Shekerjian, Onnie

**Subject:** Hearing for a permit for a Hookah Lounge across from Tempe High School

Dear Mayor and Tempe City Council,

It has come to my attention that the business HB is applying for a permit to continue to operate and expand a Hookah Lounge in the Walgreen's shopping center across the street from Tempe High school.

While I visit this strip mall frequently, I never realized the type of business that HB was conducting behind it's highly silvered windows, being tucked back in the corner, opening only after dark and with almost no signs to speak of. This was not an operation to take pride in, it was being run with stealth, keeping under the radar screen.

With this proposal, they will become the premier store in this shopping facility. The application by the owner states that he plans to extend his operation hours from 3pm to 2am, opening its business just as Tempe High School is releasing its students for the day.

I understand that there is some need to allow the grandfathering of existing business locations even when they operate in violation of the new laws regarding their proximity to schools. If the business plan were to continue as it has since 2006, I would not object. But, in my opinion, this new business plan is a blatant attempt to ensnare our city's youth in an activity that has come under condemnation by so many in the community.

I feel that it was irresponsible for the city staff to recommend approval of this application to the hearing officer. I also feel that it would be a betrayal of the public trust for this application to be approved by city officials as it stands now.

My wife and I have raised our five children with pride here in Tempe over the past 30 years. I have felt that the city has tried to make itself a safe place for youth and children and in the whole, it has done a good job.

We have one son who is a junior at Tempe High School and a daughter who will most likely attend there in two years. We take their public safety very personally. We object to letting this loophole throw open the gate to actions so inconsistent with our current laws.

Although the time is short, I trust that you and your staffs will be able to communicate our displeasure and concerns to the hearing officer responsible. Be assured that we do not stand alone in our feelings. There are many others who would want to stand and be counted were the time to respond not so short.

We appeal to you, our elected officials, to examine this matter more closely.

Sincerely,

Tim and Evelyn Smith  
21 W Geneva Dr.  
Tempe, AZ 85282

480 968-5603

Development Services  
Department

(480) 350-8331

July 9, 2008



Steve Stewart  
Date Palm Manor Neighborhood Association  
10 West Palmcroft Drive  
Tempe, AZ 85282

RE: **PL060676 – WALGREENS PLAZA-HB PLACE TOBACCO APPEAL OF USE PERMIT  
DS061478 UPA08003**

Dear Mr. Stewart:

At its hearing of July 8, 2008, the Development Review Commission denied the appeal request and upheld the Hearing Officer's decision for approval of the Use Permit for **WALGREEN'S PLAZA-HB PLACE TOBACCO** at 53 East Broadway Road in the CSS, Commercial Shopping and Services District. The request includes the following:

**UPA08003** – (ZUP08068) Appeal of the approval to allow a hookah lounge/tobacco retailer.

This denial may be appealed to the City Council within fourteen (14) days. Please submit your request in writing to the City of Tempe's Development Services Department.

If you have any questions, please contact me at (480) 858-2284.

Sincerely,



Shawn Daffara  
Planner II  
Development Services Department

cc: File  
Ben Harzallah

SD/II

**REGULAR AGENDA**

2. Request for **TEMPE (HAYDEN) BUTTE (PL080136)** (City of Tempe, property owner; Joe Nucci, Historic Preservation Officer, applicant) for designation to the *Tempe Historic Property Register*, located at 222 East 5<sup>th</sup> Street in the GID, General Industrial District, the MU-4, Mixed-Use High Density District and in the Rio Salado & Transportation Overlay Districts. The request includes the following:

**HPO08002 – (Ordinance No. 2008.31)** Historic Designation located on approximately 35 acres.

STAFF REPORT: [DRCr\\_TempeButte\\_070808.pdf](#)

This case was presented by Ryan Levesque and represented by Bob Gasser of the Historic Preservation Commission.

Commissioner Nicpon: Will this designation preclude any commercial or recreational activities and has ASU been brought into this process so that the entire butte can be historically designated, not just part of it?

Levesque: This designation will not preclude any type of development but it's the City's intent to keep the butte as it is. Yes, ASU has been informed of the process and they are aware of what the City is doing. Although at this time, ASU is not included in this submittal. ASU may also choose to include their portion of the property at a later date or partake in any future national designation.

Bob Gasser, Chairman of the Historic Preservation Commission, makes a brief presentation on the designation process of the butte and what their part has been in this process.

Commissioner DiDomenico: What does this designation mean at a local level?

Gasser: It brings awareness to the historic significance of the butte.

Nicpon: Do we own the entire mountain?

Gasser: No. ASU owns east of College Avenue.

On a motion by Commissioner Nicpon and seconded by Commissioner Attridge, the Commission with a vote of 7-0 recommend approval of this Historic Designation with all conditions as outlined in the staff report.

**FILE COPY**

- 
3. Appeal of the May 20, 2008 Hearing Officer's decision to approve the request by **WALGREENS PLAZA - H B TOBACCO (PL060676)** (Steve Stewart/ Date Palm Manor Home Owners Association, applicant) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District. The request includes the following:

**UPA08003 – (ZUP08068)** Appeal of the approval to allow a hookah lounge/tobacco retailer.

STAFF REPORT: [DRCr\\_HBPlaceAppeal\\_070808.pdf](#)

This case was presented by Steve Abrahamson and represented by the applicant, Steve Stewart.

Commissioner Webb to Mr. Stewart: Do you know of any problems that the Hookah lounge has had?

Mr. Stewart: No.

Webb: Are you familiar with Tempe High's zero tolerance policy?

Stewart: Yes.

Mr. Harzallah, HB Place Tobacco business owner, makes a brief presentation.

Nicpon: You sell tobacco in this establishment; will tobacco be allowed to be smoked inside?

Harzallah: No, only hookah. We also require identification from each customer, no one under 18 is allowed.

Nicpon: What is your ventilation system for smoke?

Harzallah: We have a filtration system.

Oteri: Even though your 2006 use permit indicates no smoking, you took liberties and allowed smoking of hookah, can you explain?

Harzallah: I checked with all hookah lounges and was under impression that the hookah was excluded, and not included in the smoking ordinance. I don't allow tobacco such as cigarettes and cigars to be smoked.

DiDomenico: Can any of the items used to smoke hookah be purchased by anyone under 18?

Harzallah: No.

Chair MacDonald opens the hearing to public input:

Six people from the public voiced support for denial of the use permit, stating concerns that the lounge is located across from a high school and its hours of operation.

Three people spoke in opposition to the appeal stating that there have been no direct complaints against the hookah lounge and indicating that clientele are required to show identification and be 18 or over to enter the establishment; also indicating that Walgreens, which is located in the same plaza, also sells tobacco products.

The hearing was closed for public comment and both the applicant and shop owner finished their closing comments.

A motion was made to approve the appeal (denying the use permit) by Commissioner Nicpon and seconded by Commissioner Attridge (supported by Commissioner Swanson) (motion then failed with a vote of 3-4, (Commissioners MacDonald, DiDomenico, Oteri, Webb opposed).

On a motion by Commissioner DiDomenico and seconded by Commissioner Webb, the Commission with a vote of 4-3 (Nicpon, Swanson and Attridge opposed) denied the appeal (upholding the Hearing Officer's approval of the use permit).

The following condition was modified on the Use Permit:

11. THE HOURS OF OPERATION FOR ON PREMISES SMOKING ARE LIMITED TO ~~7:00 PM TO 2:00 AM~~  
**8:00 PM TO 3:00 AM**

# **DATE PALM MANOR N.A.**

C/O Steve Stewart – 10 W. Palmcroft Drive – Tempe, AZ 85282

July 10, 2008

## **CITY OF TEMPE**

c/o Mayor and City Council

P.O.Box 5002

Tempe, AZ 85280

### **MAYOR AND CITY COUNCIL:**

**Date Palm Manor Neighborhood Association hereby request appeal consideration on application PL060676 decision issued July 8, 2008, by the Development Review Commission based upon the following:**

- 1. Arizona is a NO SMOKING state and Tempe is a NO SMOKING city**
- 2. Multiple violations of Tempe City Code; Article II, Sec.22-40/54**
- 3. All Tempe "hookah lounges" (six others) are located in school areas**
- 4. Supposedly, only a flavored "light tobacco" is used in the hookah**
- 5. The lounge owner, Mr. Anis Ben Harzallah, openly stated in the July 8, 2008 DRC Meeting, that the hookah's were used while homework was being done. This lounge is directly across the street from Tempe High School and will act as a gigantic adolescent magnet at any time of the day, especially evening hours.**
- 6. This lounge is also in violation of the distance restriction from a school. (Broadway Road & Mill Avenue)**
- 7. The applicant of PL060676 is attempting to infer a grandfather status**
- 8. If we change a speed limit down from 35mph to 25mph, that means immediately. It obviously indicates an assumed safety hazzard. Because you have traveled this area in the past at 35mph does not grandfather you to continue to do so. We know the health effect's of tobacco use and here we are encouraging its use with the eighteen year olds and their friends. Think about that for a minute!**
- 9. Here in Tempe, we are very community active; as indicated by such**

**organizations as: YMCA, TCAA, Boys & Girls Club, Tempe**

**- Page Two -**

**Leadership, and the various service clubs, such as Kiwanis (Serving the Children of the World). All of these community organizations devote countless hours and millions of dollars NON-PROFIT. By allowing a business to profit by promoting a known health hazzard; we may as well increase all of our school speed zones to at least 40mph. Our actions outspk our words, everytime, when it comes to our children.**

- 10. Date Palm Manor does not stand alone in this request. The meeting of July 8, 2008 was addressed by many other Tempeans with identical and extended concerns. Sometimes governments with good intentions make bad decisions. The mistake is to not correct the error. Apparently, when the decision was made to allow "houkah lounge's" in Tempe, no one was aware of the original use of the hookah was for opium; which is a cool and attractive origin to an adolescent.**

**In conclusion, we in the neighborhood of Date Palm Manor (Broadway & Mill Ave.) would request the Mayor and City Council consider enforcement of the laws and codes in place, resulting in the denial of application PL060676.**

**Respectfully,**



**Steve Stewart, Chairman  
Date Palm Manor N.A.**

**Cc: The Honorable Janet Napolitano  
Governor of Arizona  
1700 W. Washington  
Phoenix, AZ 85007**

**HOOKAH LOUNGES**

**Updated: July 2008**

<u>Business</u>	<u>Address</u>	<u>Operation</u>	<u>Use Permit</u>
Red Sea	827 S. Rural Rd	2002	Yes, Aug 2002
Café Istanbul	1310 E. Apache Blvd	2004	Yes, June 2008
Urban Café	1212 E. Apache Blvd	2006	Yes, May, 2008
King Tut	1125 E. Apache Blvd	2004	Yes, May 2008
Memo's Café	1845 E. Broadway Rd	2008	Yes, April 2008
HB Place	53 E. Broadway Rd	2006	Yes, May 2008
Layelena	1290 N. Scottsdale Rd	2006	Hookah is Outdoors, no use permit necessary.

**Hookah Lounges that could not meet Smoke Free Arizona or Separation Requirement, Ceased Activity**

Oasis Café	1731 E. Broadway Rd	2005	Withdrew Application
La Pita	505 S. Mill Ave	2005	Ceased Hookah Activity.
Eddie's Pizza	1250 E. Apache Blvd	2007	Ceased Hookah Activity.
Mill's End	310 S. Mill Ave	2007	Ceased Hookah Activity

### Section 3-422 Amateur Radio Antennas

Amateur radio antennas for non-commercial use.

- A. Antennas Permitted.** Amateur radio antennas are permitted in all zoning districts subject to the following standards:
1. Antenna *structures* are allowed up to thirty-five (35) feet in height;
  2. Antenna *structures* shall comply with *setback* standards for the zoning district in which it is located and in all residential zoning districts, shall be located in the rear half of the *lot*;
  3. Antennas, including support *structures*, shall not extend beyond the *property line*; and
  4. When a Federally Licensed Radio Amateur no longer occupies the subject property, the antenna *structure* shall be removed.
- B. Antennas with a Use Permit.** All amateur radio antennas that exceed thirty-five (35) feet in height shall require approval of a *use permit*. Such antennas shall be of telescoping design and lowered to a height of no more than thirty-five (35) feet when not in use. In no event shall an amateur radio antenna exceed the height of seventy-five (75) feet.

### Section 3-423 Use Separation Requirements.

- A. Non-Chartered Financial Institutions.**
1. *Non-chartered financial institutions* shall not be located on a *lot* within 1,320 feet, measured by a straight line in any direction, from the lot line of another *non-chartered financial institution*.
  2. *Non-chartered financial institutions* shall not be located on a lot within five hundred (500) feet, measured by a straight line in any direction, from the lot line of a residential district.
  3. The requirements pursuant to Section 3-423(A) shall also apply to *Non-chartered financial institutions* which are ancillary to another existing or permitted use.
- B. Auto Title Loan.** *Auto Title Loan* businesses shall not be located on a *lot* within 1,320 feet, measured by a straight line in any direction, from the lot line of another *auto title loan*. The requirements in this section shall also apply to *auto title loan* businesses which are ancillary to another existing or permitted use.
- C. Tobacco Retailer.** *Tobacco Retailers* shall not be located on a lot within 1,320 feet, measured by a straight line in any direction, from the lot line of a *charter school, private school, or public school*, which provides elementary or secondary education. *Instructional or vocational schools* are excluded from the separation requirement.

## Section 7-121 "T" Definitions.

*Tattoo, body piercing establishment* means any establishment offering indelible designs, letters, scrolls, figures, symbols or other marks that are placed on or under the skin with ink or colors by the aid of needles or other instruments and that cannot be removed without a surgical procedure; any establishment offering designs, letters, scrolls, figures or symbols or other marks done by scarring/branding on or under the skin; any establishment where decorations or other devices are inserted into the skin; any establishment using techniques such as penetrating, perforating, boring or creating a hole in the skin or another human body part; or any establishment whose primary function is permanent body alteration for non-surgical purposes. The following establishments shall be exempt from this definition: those where offering permanent facial make-up/cosmetics ancillary to the primary business; those where procedures are performed by a person authorized by the laws of this state to practice medicine, osteopathy, chiropractic, podiatry, naturopathy or acupuncture and the procedures are performed in conformity with the standards of that profession; those where procedures are performed by registered nurses, licensed practical nurses or technicians, when acting under the supervision of a licensed physician or osteopath; those where the only type of piercing offered is ear piercing.

*Telecommunications Hotel* means a windowless controlled environment buildings which allow for businesses to lease computer server space for connection to local exchange carriers, interexchange carriers, Internet service providers, competitive access providers and telephone services. In addition to voice and data connectivity, the amenities include controlled temperature and humidity, 24-hour security, fire detection/suppression systems and generator power backup. These facilities have no pedestrian activity associated with the use.

→ **Tobacco retailer** means any person or business who primarily sells or offers for sale, tobacco, tobacco products, or tobacco paraphernalia, or who distributes samples of tobacco products or paraphernalia. These businesses include but are not limited to, smoke shops, tobacco shops, cigars and pipe retailer, cigarette retailer, and hookah lounges.

*TOD* means a Transportation Overlay District, which creates an overlay to existing zoning to encourage development supportive of light rail, bus, bicycle and pedestrian uses.

*(TOD) Corridor* means the portion of the Overlay District not located within a *Station Area*.

*(TOD) Station Area* means the portion of the Overlay District located Only areas within 400 linear feet of a light rail transit station are referred to as *Station Areas*, measured from the center point of the platform, extending 400 feet in a linear direction along the center of any public right of way, including only properties adjacent to the public right-of-way, with required uses, development and design standards that encourage intensified development around the light rail stations.

*Transit shelter* means a structure provided at a bus or train stop to provide shelter from weather and/or sun to transit patrons waiting at the stop.

*Tourist court* see "hotel".

*Townhouse* means an estate in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in a subdivided lot.

**Section 7-109      “H” Definitions.**

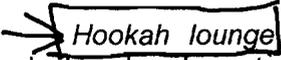
*Hardscape* means brick, concrete, wood, tile, paver, or other decorative hard surfaces used outside in lieu of or in conjunction with landscape materials such as trees, shrubs, turf, ground cover wood chips, or gravel.

*Home occupation* means a business activity that is carried out on the same site as a dwelling unit, and which is accessory to the household living use on the site.

*Hospital* means a building where the sick or injured are given in-patient medical or surgical care, including ancillary uses common to medical needs, such as pharmacies and medical labs. (Not a clinic.)

*Horizontal regime* means the three dimensional area in a condominium plat that is under a single ownership.

*Hotel* means a building that contains more than five (5) boarding rooms.

 *Hookah lounge* means any business which primarily serves tobacco and related products, whereby patrons share the tobacco from a communal hookah or water pipe which is placed at each table. The business may sell beverages and snacks, but the gross sales of these items shall not exceed that of tobacco and related products.

**Section 7-110      “I” Definitions.**

*Intensity* means dwelling unit density, employment density and/or floor area ratio, whichever is applicable.



**WALGREENS PLAZA- HB TOBACCO**

**53 EAST BROADWAY ROAD**

**PL060676**

**FRONT OF BUSINESS**

Development Services  
Department

(480) 350-8331 (Phone)

September 16, 2008

Mr. Anis Ben Harzallah  
HB Place Tobacco  
53 East Broadway Road  
Tempe, Arizona 85282

**RE: H B TOBACCO  
APPEAL BY DATE PALM MANOR NEIGHBORHOOD ASSOCIATION  
PL060676 / ZUP08068 / UPA08005**

Dear Mr. Harzallah:

At their regular meeting of September 11, 2008, the City Council approved the appeal by the Date Palm Manor 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)** (Steve Stewart, Date Palm Manor, applicant; Anis Ben Harzallah, business owner; Mark Stoneman/Stoneman Properties, property owner) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for a use permit to allow a hookah lounge/tobacco retailer.

This decision denies the use permit previously approved by the Hearing Officer.

Any appeal of the City Council's decision regarding must be made to Superior Court within thirty (30) days of the hearing. You have until **October 11, 2008** to file a formal appeal if you so desire.

If you have any questions, please contact me at (480) 858-2284.

Sincerely,



Shawn Daffara  
Planner II

SD:dm

cc: Mr. Steve Stewart/Date Palm Manor Neighborhood Association.  
Mr. Mark Stoneman/Stoneman Properties  
Jeff Tamulevich/COT – Commercial Code Compliance  
E-Mailed to: Anis\_HA90004@hotmail.com  
E-Mailed to: Ferran@doitnow.com  
File

approximately 277,536 s.f., on 16.33 net acres, located at 4502 S. Hardy Drive in the R-3 Multi-Family Residential Limited District. The request includes the following:

**SBD08017** – Amended Subdivision Plat to combine remnant parcels into two main properties and modify water easements for new development.

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 September 11, 2009. Failure to record the plan within one year of City Council approval shall make the plan null and void.

**DOCUMENT NAME:** 20080911dsdk03.pdf **PLANNED DEVELOPMENT (0406)**

\*32.

~~THIS ITEM WAS REMOVED FOR SEPARATE CONSIDERATION~~

Held a public hearing and **granted an 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, **denying the amendment to allow smoking inside the establishment.**

**COMMENTS:** 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) (Steve Stewart, Date Palm Manor, applicant; Anis Ben Harzallah, business owner; Mark Stoneman/Stoneman Properties, property owner) 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.

City Attorney Andrew Ching summarized that this is an appeal to consider whether or not the use permit should be granted.

Mayor Hallman clarified that the appeal was essentially to deny the use permit. He asked if Council had granted the item, would that not have denied the use permit?

Mr. Ching agreed.

APPLICANT PRESENTATION:

**Steve Stewart**, Date Palm Neighborhood Association, stated that there are three questions for Mr. Harzallah. Why does he want the hookah lounge permit, has he spent more than \$15K as reported in this morning's *East Valley Tribune* attempting to obtain this permit, and how has he been harassed and prejudiced against. He would also ask the Council how many are specifically familiar with the 37 pages of history up to this point. His main question is why the Development Review Commission (DRC) favors granting this hookah lounge permit. In 2007, the State of Arizona became a non-smoking state. The question is either revenue or health. Is revenue more important than moral intent? At this point, it appears to be. Basically, Date Palm Manor Neighborhood Association hereby requests appeal consideration on the decision issued July 8, 2008, by the

DRC based on the following: (1) Arizona is a no smoking state and Tempe is a no smoking city. (2) There have been multiple violations of Tempe City Code Article II, Sec. 22-40/5. (3) All Tempe hookah lounges (six others) are located in school areas. (4) Supposedly, only a flavored light tobacco is used in the hookah. (5) The lounge owner openly stated at the July 8, 2008, DRC meeting that the hookahs were used while homework was being done. This lounge is directly across the street from Tempe High School and will act as a gigantic adolescent magnet at any time of the day, especially in the evening hours. (6) This lounge is also in violation of the distance restriction from a school. (7) The applicant is attempting to infer a grandfather status. (8) The Association knows the health effect of tobacco use and its use is being encouraged with the eighteen-year-olds and their friends. (9) Tempe is a very active community with organizations devoting many hours and millions of nonprofit dollars. By allowing a business to profit by promoting a known health hazard, we may as well increase the school speed zones to 40 mph. Actions outspoke words. (10) Date Palm Manor does not stand alone in this request. The July 8, 2008, meeting was addressed by many other Tempeans with identical concerns. Sometimes governments with good intentions make bad decisions. The mistake is in not correcting the error. They are not asking to put Mr. Harzallah out of business. They are asking not to allow him to extend his business. The logic is there to deny the permit. It's not the complaint of the lounge, it's the complaint of the product being promoted.

Mayor Hallman stated that Mr. Stewart implied that the Council was doing this for revenue. He could think of lots of reasons why someone would approve this that had nothing to do with revenue, such as private property rights, etc.

Mr. Stewart stated that he was attempting to raise a red flag. It was not meant as a personal objection, but rather a social objection.

Mayor Hallman asked for clarification that if Council were to approve this, it is clearly putting peoples' health at stake purely for revenue.

Mr. Stewart clarified that that is what it looked like up to this point. This is not a personal attack, but rather an attempt to think as a government for the betterment of the people. The revenue is the layman's concept of why government doesn't do something.

Mayor Hallman added that, for example, the fact that the City is now being sued for denying a use permit for a tattoo parlor which is costing a significant amount of dollars over and above the revenue that a tattoo parlor brings to the City, in fact, you are telling us that we probably should have voted the other way because we would then have saved the City money.

Mr. Stewart added that he said that for a specific reason to get the government to work together to consider this objectively.

RESPONDENT'S PRESENTATION:

**George Ferrin**, Counsel for Anis Ben Harzallah, business owner, stated that Mr. Stewart stated that the 2006 use permit approval had a caveat not to be a hookah lounge. That is not the case. As Council may know, there was a lot of confusion apparently about whether hookah was smoking for a variety of reasons.

Mayor Hallman asked for clarification on who had the misunderstanding about what constitutes smoking.

Mr. Ferrin responded that Mr. Harzallah did, as well as some members of the City staff because there were other hookah lounges in business without any objections. This pre-dates the June 28, 2007, amendment which finally defined hookah lounges and it pre-dates the prohibition on separation of 1320 feet from a school. That's why he believes staff has recommended that the use permit be affirmed because this use began as a hookah lounge back in 2006 and no one thought they were violating the law then because at the same time Mr. Harzallah would be very careful about making sure that only people 18 or older could get in. The tobacco itself has been maligned here as a known health hazard, however, he presented a package of the hookah mix and on the label it says that "tar is 0" and the nicotine is ".05%." Regular cigarettes are 14% tar. This hookah mix is 1/280<sup>th</sup> of the concentration of a regular cigarette. At one of the hearings, someone mentioned a Mayo Clinic report on the dangers of hookah smoke. That report stated that hookah might be a problem because it is colder smoke which is more tolerable so someone might smoke more, but it was all speculation. It concluded that more study was required. Mr. Stewart confuses 18-year-olds with children. The State legislature has determined that 18-year-olds can smoke if they want to and they are no longer considered children. If HB Tobacco does not have its use permit for the hookah lounge, it could very well go out of business. If it does, what will replace it? Another bar or check-cashing place? Concerning today's newspaper report, the internet version of the report includes comments offered by people at random. There is not one comment that supports removal of the use permit. Every comment supports keeping the use permit in the hands of HB Tobacco. He felt Mr. Stewart's position was basically that hookah smoking will cause a deterioration of children's moral precepts and a fall-off in real estate values. There has been no substantive evidence in any of the hearings that there was any drop-off of real estate values. If we are going to follow Mr. Stewart's vision in this case, then we are going to have to deny the use permits for just about every grocery store and convenience store because they all sell tobacco and alcohol. The criteria for determining whether the use permit should be sustained is summarized in the staff report. It asks whether the use increases vehicle or pedestrian traffic, whether the use emit odors, dust, gas, noise, vibration, smoke, heat or glare? Currently there is no problem with those. Another is whether the use will contribute to neighborhood deterioration or property value reduction. There is no evidence to that regard. The other criteria is whether the use is compatible with the existing nearby structures and uses. In this particular case, HB Tobacco does not reach out with an evil hand. It has gotten along well with the other tenants in the center. He distributed a memorandum to the City Attorney.

Councilmember Mitchell stated that on December 19, 2006, the original request by the owner to have a permit to be a retailer contained eight conditions upon approval. The eighth one states "smoking will not be permitted within this establishment." His understanding is that smoking did occur. A complaint was filed on March 11, 2008, for violation of the conditions of approval.

Mr. Ferrin responded that when the business was first started in 2006, it started as a hookah lounge.

Anis Ben Harzallah responded that when he opened the business, there were six hookah lounges and four restaurants that sold hookah. He was told that hookah was not considered smoking.

Mayor Hallman asked if it was the City of Tempe that told him hookah was not smoking.

Mr. Harzallah responded that one of the City planning staff told him that there was nothing that specified hookah in the Code. That person told him it was now a permit for a hookah lounge. There is a permit for a tobacco store, but hookah can be treated like everything else.

Councilmember Mitchell asked why that condition would be added.

Mr. Harzallah responded that he thought that was a condition only for cigarettes. He had another tobacco store previously at University and Hardy and smoking is allowed inside. At that time there was nothing in the Code about hookah. He followed staff and the Code, and he tried to upgrade.

Mayor Hallman clarified that Mr. Harzallah's view was that hookah is not smoking. When he was at the hearing at which the hearing officer added the condition that smoking would not be permitted, did he have a conversation that he was intending to operate as a hookah lounge, even though the hearing officer raised the issue and sought to exclude smoking of any type? If he tried to exclude smoking of any kind, why wouldn't Mr. Harzallah have made sure it was understood that he intended to open a hookah lounge.

Mr. Harzallah responded that he went to each owner of the restaurants and hookah lounges and talked to them.

Mayor Hallman asked why he didn't say that he intended to open a hookah lounge when he spoke with the hearing officer.

Mr. Harzallah stated that he didn't speak English well at that time and he had brought a lawyer with him. Now he understands well. At that time, his lawyer told him not to worry, that he would function like the other businesses.

Mayor Hallman added that in the City's view, burning tobacco products creates smoke.

Mr. Harzallah stated because the City did not obligate anyone not to smoke hookah in the restaurants, his research got him into trouble. After that, the City corrected it. He would not put all of his money into something that would cause a problem with the City.

Mayor Hallman asked if he has hookah at his tobacco store.

Mr. Harzallah responded that he sells hookah and if the customer wants to try it, they can.

Mayor Hallman asked if he was operating his other store as a hookah lounge.

Mr. Harzallah responded that he is not. It is a tobacco store, but if someone wants to try it, he allows them to try it.

Mayor Hallman asked if that shop has a use permit that doesn't preclude smoking.

Mr. Harzallah responded that it does not preclude smoking. Before he had the problem with Mr. Stewart, he had the problem with the City.

Mayor Hallman added that he sensed that when the hearing officer raised the issue and he answered the question and agreed to a stipulation that there would be no smoking, that maybe the reason he didn't come forward and say that he intended to operate it as a hookah lounge was because he knew at that time there might be a problem.

Mr. Harzallah added that he made his research after that and was told that hookah was not listed in the Code. There is a tobacco retailer license and hookah is not considered smoking. There were six other hookah lounges and there were restaurants that allowed it. They told him he didn't need a use permit to have a hookah lounge. After that, City staff made the correction. He followed whatever rules he was given.

Councilmember Navarro asked what the City did in 2006 when he said he wasn't going to allow smoking. Did the City give warnings?

Mr. Ferrin responded that there was a complaint filed and in response to that, Mr. Harzallah approached the commission, got a zoning opinion and was informed at that time that all he had to do was to apply for the variance. The problem wasn't so much that he had violated the prohibition on smoking in the lounge. The Smoke-Free Arizona Act is confusing. It includes a frequently-asked question section and one question is whether people can smoke in a hookah café or cigar cantina. The answer is yes, so long as it is established that it meets the requirements of a retail tobacco store. That sounds like someone could start a hookah store as a tobacco retail store with smoking.

Mayor Hallman clarified that is where the problem exists. The specific exclusion in the use permit was added by the hearing officer to preclude smoking. Essentially, the law would say someone can smoke there, as long as it is run as a retail tobacco store, so Mr. Ferrin just admitted that the exception in the law was an exception that allows smoking because it is a retail tobacco store.

Mr. Ferrin added that is what Mr. Harzallah was operating—a retail tobacco shop and a hookah lounge.

Mayor Hallman stated that the use permit specifies no smoking.

Mr. Ferrin added that if it says no smoking, the natural reaction would be whether hookah constitutes smoking. Mr. Harzallah answered that in his mind, but he was wrong. That's when the request was made for the new use permit so that he could then run the hookah lounge and retail tobacco store at the same place.

Councilmember Woods stated that this use permit was granted in 2006. The Smoke-Free Arizona Act did not go into effect until May 1, 2007. It seems that wouldn't have anything to do with this use permit which was granted earlier. That is different than Tempe's smoke-free ordinance that was enacted in 2002. His concern is that Mr. Harzallah admits that hookah does contain tobacco, so he doesn't understand how that could not

be considered smoking.

Mr. Ferrin responded that it is smoking and it was a violation of the prohibition that the hearing officer set out, but he didn't know that the hearing officer needed to lay that restriction down. He thought that City staff was working on fixing the problem by considering the expansion from being a tobacco retailer to being a tobacco retailer and a hookah lounge.

Mr. Harzallah added that in July of 2007 they made the separation. That was the first time he heard the word hookah in the City. He tried to operate under the rules.

Mayor Hallman appreciated the admissions and honesty and he appreciated Mr. Harzallah's hard work. The difficulty is essentially that Mr. Harzallah made the decision in his mind, but he was wrong. It is smoking and is in violation of the use permit. A number of the facilities mentioned no longer offer hookah and can't offer it. The City found out that hookah was being offered in ways that they did not understand. The fault that City staff might have is that they are not on the coolest side of the universe of human beings and didn't recognize what it was and did not understand what was happening in the culture within Tempe. He appreciates the position Mr. Harzallah is put in. He would entertain a motion to approve the appeal and revoke the use permit.

Mr. Ferrin stated that one of their witnesses that wanted to make a comment had to leave but he filled out a card on which he wrote his comments. The card was presented to the City Clerk.

#### PUBLIC HEARING

**Margaret Christiansen**, Tempe, provided a copy of her letter to Council. She expressed gratitude to the Council for the many long hours its members devote to the important work of governing the City. She and her husband came to Tempe nearly thirty years ago and have considered this to be a good place in which to live and educate their children. The government consists of "We, The People" and the councilmembers are the elected officials to do the citizens' bidding. Some years ago, the children were told to "say no to drugs," and now those children are in high school. Tobacco is a drug, and are we now telling our children that we were wrong when we taught them to "say no to drugs"? She urged Council to not comply to this request to allow a use permit for a hookah lounge/tobacco retailer.

**Bill Butler**, Tempe, stated that he is a small-time landlord and investor. He has five apartment buildings. He has five leases on August 22, and to date, two of those tenants have decided they could not live with the terms of their leases both involving the number of people living in the apartments and the numbers of transients that come and stay overnight. Two of his incomes have been kicked out because they couldn't live up to the terms of their contract. That is what this case is about. The owner had a contract with the City two years ago and now he decides he can't live with that contract. Maybe he will have to find another place to have his business. He urged Council to approve the appeal and deny the use permit.

**Steve Weiner**, Tempe. He is a regular customer at H B Tobacco. He owns three smoke shops in Scottsdale, Tempe and Awahtukee. This is a very nice facility, well-ventilated, the music is not too loud, and the crowd is good. He feels Mr. Harzallah is a good businessman and he urged Council to support him.

**James Cicero**, Tempe, owner of a dry cleaning establishment in the same plaza as H B Tobacco. The business has not caused any interference with his business or any problems for the plaza. If anything, it might help provide exposure for his business. H B Tobacco presents a very relaxing atmosphere and is a nice gathering place.

**Vinnie Malone**, Tempe, neighbor of H B Tobacco. He has never seen a man work so hard for his business. He has not been aware of any problems with the business. The business is well-run and he is a good man.

**Lee Fairbanks, M.D.**, Tempe. He respects and appreciates the citizens of Tempe. The National Restaurant Association Hospitality Group has stated that Tempe has changed the social norm in America. On the national scene, Tempe was considered the first city with a large college community with the great atmosphere of the celebrations. If Tempe could do it, it would prove nationally that it could be done. Tempe did better than what anyone else is doing, and it can do better on the hookahs than anyone else has done. He has been spreading the Arizona story around the world. Hookah bars are one of the big problems of people trying to get around the law. The problems left are with private clubs where someone can pay a dollar to join so they can allow smoking, or the hookah bars, the electronic gadget cigarettes, and the casinos. The bars are now smoke-free, the restaurants are smoke-free, the stores are smoke-free, the offices are smoke-free, the hospitals have gone beyond smoke-free to smoke-free campuses. Tempe should do better than anyone else and say that there is no hookah smoking.

**Nancy Randall**, Tempe, stated she is concerned because of the high school's proximity. She understands that the hookah lounge plans to expand which will be a magnet for the young people. She referred to an article in the newspaper and cited the Mayo Clinic report which stated that "it is a myth that hookah smoking is safer than smoking cigarettes. This tobacco is no less toxic. Hookah smokers actually inhale more toxic tobacco smoke than do cigarette smokers because of the massive volume of smoke they intake." The article also stated that hookah lounges are coming into the United States fueled by the soaring popularity of hookah smoking among teens and young adults. Mr. Harzallah is a good man, but she is more concerned with our youth.

**Alton Brasher**, Apache Junction, congratulated the Mayor and Council on the Smoke-Free Arizona. Tempe set the standards. Mr. Harzallah's character is not in question here, but rather it is the possibility of getting around the law. In parallel to that, when the Smoke-Free Arizona law passed in May of 2007, there was an exception made for the service clubs. The service clubs were allowed to smoke, as well as the fraternal clubs. He is afraid the same thing will happen with this. If hookah lounges are allowed to come in with a little smoke, then the next time someone will come around the law for something with more smoke. He encouraged the Council to grant this appeal and set an example for the cities around the state.

**Gerald Handertmark**, Mesa. All leaders should be thinking in terms of tightening, rather than loosening, the tobacco laws. There are other non-smoking states now where there is no smoking anywhere. It is time for Arizona to go the same way and close the loopholes in the fraternal organizations and not extend more liberal tobacco-smoking.

**Beverly Alisky**, Tempe. She has lived in Date Palm Manor since 1968. She can look over her back fence at Tempe High. They have approximately two feet between the alley and their back fence and there was marijuana growing there. She started smoking cigarettes when she was 15 years old. A physician described tobacco as a substitute for overeating and didn't give her the diet pills she wanted. She smoked for 35 years. She grew up in Chicago where there were hookah lounges using water pipes. Flavored tobacco was nice, but they also put 'funny tobacco' in the pipes. She was young and didn't know. We don't want this for our children. They are our most precious possessions.

**Motion by Councilmember Arredondo to approve the appeal and revoke the use permit as requested. Second by Councilmember Mitchell.**

Mayor Hallman asked the applicant for any closing remarks. There were none.

Mayor Hallman stated that it was asserted by the appellee that the City didn't know whether or not smoking of hookah on a premise was considered smoking. He asked if staff was confused on that issue.

Lisa Collins responded that the staff knew when H.B.Tobacco went before the hearing officer that hookah was smoking. Staff had processed a use permit before that for a hookah lounge. It was clear that when there was a condition that said no smoking in the establishment that it meant no smoking.

Mayor Hallman asked if the action taken by staff when they investigated was to issue a notice of non-compliance.

Ms. Collins agreed.

Mayor Hallman clarified that the non-compliance was understood that it was violation of the condition stating that smoking would not be permitted.

Ms. Collins agreed and the applicant asked to come forward and have that condition amended. In their comments about expanding the use, they meant to be asking to remove that condition of no smoking in the establishment.

Mayor Hallman added that staff is recommending both at the commission and the hearing officer, based on staff's determination, that the use could be expanded. It appears, however, that it would, given the timing, require that Council would be creating a variance to the rule of separation for a smoking establishment.

Ms. Collins responded that the case was processed prior to the initial request for the tobacco retailer.

Mayor Hallman clarified that the initial use permit was processed prior.

Ms. Collins agreed. The initial use permit was processed prior to the separation requirement.

Mayor Hallman clarified that it included the obligation not to allow smoking.

Ms. Collins agreed.

Mayor Hallman stated that he was puzzled why anyone thought that removing that preclusion for smoking would not be viewed as allowing smoking at a time that Council had already put into place an ordinance requiring smoking of hookah be separated from schools.

Ms. Collins agreed. Had it been a new application, staff would not have been able to process it, however, this was viewed as an amendment to an original application which was processed prior to the separation requirement. That's why it was allowed to go forward to the hearing officer.

Mayor Hallman clarified that it was purely on the basis that this could be viewed as an amendment and, therefore, grandfathered, but it would still have to be the view of this Council that smoking hookah in this establishment was appropriate.

Ms. Collins agreed.

**Motion passed on a roll call vote, 7-0.**

Mayor Hallman added that he is grateful that there are commissioners that sit through these kinds of hearings. It was ultimately a 4-3 vote to go ahead and grant the application and deny the appeal from the hearing officer. At least one of our commissioners have been here this evening, participating by observing this, and he is grateful for that effort.

**DOCUMENT NAME:** 20080911dssd01.pdf **PLANNED DEVELOPMENT (0406)**

- \*33. Held a public hearing and recommended the approval of a Series 10 Beer and Wine Store Liquor License for 7-Eleven #32265F, 485 West Warner Road.

**COMMENTS:** Vaneet Sapra, Agent

**DOCUMENT NAME:** 20080911LIQ02.pdf **LIQ LIC (0210-02)**

- \*34. Held a public hearing and recommended the approval of a Series 6 bar liquor license for CP Aroma LLC dba Aroma Market/Café, 116 West Sixth Street.

**COMMENTS:** Kenneth Losch, Agent

**DOCUMENT NAME:** 20080911LIQ01.pdf **LIQ LIC (0210-02)**

B. Award of Bids/Contracts

35. Awarded **Contract #2008-171**, a landscape design services contract with EPG, Inc., for Daley Park improvements.

**COMMENTS:** Total cost for this contract shall not exceed \$463,819.25.

**DOCUMENT NAME:** 20080911PWDR02.pdf **DALEY PARK (0706-10)**

1 G. Peter Spiess, Esq. (006721)  
2 **SPIESS & ASSOCIATES, PC**  
3 420 West Roosevelt Street  
4 Phoenix, Arizona 85003  
5 (602) 254-8100  
6 Attorneys for Ben Harzallah

5 SEA  
H. Albany

7 Larry S. Lazarus (003271)  
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(602) 254-8100  
Co-Counsel for Ben Harzallah

**IN THE CITY COUNCIL FOR THE CITY OF TEMPE, STATE OF ARIZONA**

10 HB TOBACCO )  
11 53 EAST BROADWAY ROAD )  
12 TEMPE, AZ 85282, )  
13 ) Permittee, )  
14 v. )  
15 STEVE STEWART )  
16 10 WEST PALMCROFT DRIVE )  
TEMPE, AZ 85282 )  
Complainant. )

Case No. PL060676 / ZUP08068 / UPA08005  
**MOTION FOR RECONSIDERATION OF  
CITY COUNCIL DECISION OF  
SEPTEMBER 11, 2008**

17 Permittee HB Place Tobacco, by and through its undersigned counsel, hereby respectfully  
18 requests that the City Council of the City of Tempe, Arizona (the "Council") reconsider its  
19 September 11, 2008 decision to uphold the appeal and revoke HB's use permit to operate as a  
20 tobacco retailer and hookah lounge. This motion is supported by the Memorandum of Points and  
21 Authorities appended hereto.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL BACKGROUND.**

22 In late 2006, Mr. Anis Ben Harzallah dba HB Place Tobacco ("HB Tobacco") Executed  
23 lease for the premises located at 53 East Broadway Road, Tempe, Arizona 85282 for use as a retail  
24 tobacco store as then defined in the Tempe City Code (the "Premises"). At the time the lease wa

1 entered into the Walgreens Shopping Center in which the premises are located was (and still is)  
2 zoned CSS. This zoning designation permits establishments which meet the definition of tobacco  
3 retailers. *See* Section 3-202 of the City of Tempe Zoning and Development Code (the "Code"),  
4 Table 3-202A. While the definition of tobacco retailers did not discuss hookah lounges in  
5 December, 2006, the City of Tempe (the "City") generally took the position that hookah lounges  
6 came within the definition of tobacco retailers. *See* Statements of Steve Abrahamson, Hearing Held  
7 December 19, 2006 in ZUP0688. Thus, in December, 2006, the permitted uses for tobacco retailers  
8 included use as a smoke shop or hookah lounge.

9         Prior to the December 19, 2006 hearing City staff issued its Staff Summary Report,  
10 Document 20061219dssa03, finding that the requested use permit met the four (4) applicable tests  
11 and recommending approval of the use permit subject to seven (7) conditions. None of these  
12 conditions addressed smoking within the Premises. At the hearing held December 19, 2006 the  
13 hearing officer approved the use permit but improperly attached an additional Condition No. 8 which  
14 provided "8. Smoking will not be permitted within this establishment." *See* Hearing Officer  
15 Minutes dated December 19, 2006. Thus the hearing officer approved the use permit allowing Mr.  
16 Harzallah to operate a tobacco retail store, **but denied a property right inherent in that**  
17 **designation and specifically allowed under the Code.** Mr. Harzallah understood Condition 8 to  
18 mean no processed tobacco in the form of cigarettes, cigars, and pipes; but not prohibiting the use  
19 of hookahs.

20         On March 20, 2008 a hearing was scheduled with the City's Development Services  
21 Department regarding non-compliance with Condition 8 of the use permit. On May 20, 2008 the  
22 hearing officer approved a use permit to allow a Hookah Lounge/Tobacco Retailer for HB Tobacco  
23 issued his conditions of approval containing twelve (12) conditions. Condition No 12 stated:  
24 "Cigarette Smoking shall not be permitted with the establishment." This condition was added at the  
25 request of Development Services Staff **and is consistent with Mr. Harzallah's prior**  
26 **understanding that "smoking" meant cigarettes and cigars, not hookah pipes.**

1 On May 30, 2008, Mr. Stephen Stewart appealed the decision to the Development Review  
2 Commission. On July 8, 2008, the Development Review Commission denied the appeal. Two days  
3 later on July 10, 2008, Stephen Stewart appealed to the Tempe City Council which held a hearing  
4 on the appeal on September 11, 2008 (the "September 11<sup>th</sup> Hearing"). Prior to the September 11<sup>th</sup>  
5 Hearing the City staff issue dits Staff Summary Report finding that the requested use permit, as  
6 amended, met all the elements of the use permit test and recommending that it be approved subject  
7 to eleven (11) conditions, none of which prohibited the requested use as a hookah lounge.

8 At the September 11<sup>th</sup> Hearing the Council failed to discuss (and therefore to consider) any  
9 of the four (4) required applicable factors for the issuance of a use permit. *See* Hearing Transcript  
10 from September 11, 2008 Hearing of City Council for the City of Tempe in Case No. UPA08005.  
11 The Council then listened to public comment relating to the "Smoke-Free Arizona Program" and  
12 issued its decision approving the appeal and denying the amendment to allow smoking inside the  
13 establishment.<sup>1</sup> *Id.*

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15 **II. LEGAL DISCUSSION.**

16 **A. Right to File Motion for Reconsideration.**

17 Pursuant to City of Tempe Zoning and Development Code ("City of Tempe Code"),  
18 Chapter 7, Section 6-701, *et seq.*, HB Tobacco is permitted to file this Motion to Reconsider the  
19 September 11, 2008 City Council Decision regarding HB Tobacco's application for a use permit  
20 as an extraordinary remedy because it meets the requirements of Section 6-702, which states that

21 Reconsideration of a decision is available only as an extraordinary  
22 remedy upon a determination by the decision-making body that the  
23 criteria in subsections A and B are met:

24  
25 <sup>1</sup> The public comment relating to the "Smoke-Free Arizona Program" and its policies was  
26 irrelevant and should not have been considered by the Council. Retail tobacco stores are specifically  
exempted from the smoking prohibitions of the Act. See Substantive Policy Statement #SP-087-PHS-EDC  
Arizona Department of Health Services, Division of Public Health Services, Smoke-Free Arizona Program  
(the "Policy Statement").

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- A. Mistake. The party requesting reconsideration has sufficiently alleged 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; and.
- B. Hardship or Delay. Reconsideration is appropriate to avoid delay or hardship that may be caused by an appeal [to the Arizona Superior Court].

In addition to satisfying the aforementioned criteria, this Motion to Reconsider is timely as it has been filed within the fourteen (14) calendar days of the original City of Tempe Council decision on September 11, 2008. City of Tempe Code, § 6-703. Furthermore, as filing a Motion for Reconsideration is not a precondition to appealing the decision, HB Tobacco preserves its right to appeal the City of Tempe City Council's decision to the Arizona Superior Court if this Motion for Reconsideration is denied or if the decision is not ultimately reversed by a subsequent Council action.

**B. The City of Tempe Council Failed to Adhere to the Applicable Standard of Review Because the Council Did Not Consider the Factors Required to Determine Whether a Use Permit Is Granted.**

In determining whether to grant an appeal that would deny a use permit previously granted by a Hearing Officer, the City of Tempe Council shall analyze whether the applicant satisfies the approval criteria set forth in City of Tempe Code, Section 6-308(E), which provides:

- E. Approval Criteria
  - 1. A *use permit* shall be granted only upon a finding by the decision-making body, that the use covered by the permit, the manner of its conduct, and any *building* which is involved, will not be detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood, or to the public welfare in general, and that the use will be in full conformity to any conditions, requirements, or standards prescribed therefore by this Code.
  - 2. In arriving at the above determination, the following factors shall be considered, but not limited to:
    - a. Any significant increase in vehicular or pedestrian traffic;

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- b. Nuisance arising from the emission of odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions;
- c. 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 the rehabilitation, redevelopment or conservation as set forth in the city's adopted plans or General Plan;
- d. Compatibility with existing surrounding *structures* and uses; and
- e. Adequate control of disruptive behavior both inside and outside the premises, which may create a nuisance to the surrounding area or general public.

An examination of the record from the September 11<sup>th</sup> hearing irrefutably demonstrates that although staff considered these factors in making its recommendation for approval of the use permit, the Council's discussion failed to consider these factors in any meaningful manner, despite the mandate of the City Code. In failing to consider the factors set forth in City of Tempe Code, Section 6-308(E), the City of Tempe Council conducted a mistake of law by omission. In other words, the Council failed to take all required factors into consideration and instead based its decision on inapplicable criteria. Moreover, the record indicates that little to no City Council member provided any rationale for the final decision that mirrored any of the factors provided in Section 6-308(E). While the staff report supporting the approval of the use permit stated that HB Tobacco satisfied each of the Section 6-308(E) criteria, neither the Mayor nor any Council Member discussed or factored these criteria into the final decision. Instead, the Council listened to policy arguments that fly in the face of Policy Statement, as issued by the Arizona Department of Health Services. Indeed, the presentation of the Complainant essentially argued that it is more preferable to have smoking take place during school hours on an outside patio in full view of the students, than to have the smoking limited to after-school hours inside a premises not visible to or accessible by the students. Thus the Council's decision of the appeal failed to meet the standard of review and was arbitrary and capricious.

1           **C.     Reconsideration Is Appropriate to Avoid Delay and Hardship to**  
2           **Hb Tobacco and its Owner, Mr. Anis Ben Harzallah, Caused by**  
3           **an Appeal to the Arizona Superior Court as the Denial of the Use**  
4           **Permit Strips the Applicant of His Ability to Run His Business**  
5           **and Maintain an Income.**

6           As the record repeatedly states, Mr. Harzallah, who immigrated to this country twelve years  
7 ago and has since become a U.S. citizen, invested his lifes savings into this and his other store. His  
8 customers, who are all adults, patronize his business at the Premises primarily for the social  
9 atmosphere of the hookah lounge, the very subject of the use permit. A denial of the ability to  
10 maintain his hookah lounge at the Premises is not only contrary to law, but will destroy his business  
11 and effectively his livelihood in a period of weeks as his customers leave to patronize the several  
12 other hookah lounges in Tempe. Clearly the required hardship occasioned by an appeal to the  
13 Maricopa County Superior Court is manifest.

14           **D.     The Imposition of Conditions Denying Hb Tobacco a Use**  
15           **Permitted under the Code in Order to Obtain a Permit for That**  
16           **Same Use Is an Improper Exercise of Authority and Denial of a**  
17           **Property Right.**

18           The Walgreens Shopping Center in which the Premises are located is zoned CSS. This  
19 zoning designation permits establishments which meet the definition of tobacco retailers. *See*  
20 Section 3-202 of the Code, Table 3-202A. While the definition of tobacco retailers did not discuss  
21 hookah lounges in December, 2006, the City generally took the position that hookah lounges came  
22 within the definition of tobacco retailers. *See* Statements of Steve Abrahamson, Hearing Held  
23 December 19, 2006 in ZUP0688. Thus, in December, 2006, the permitted uses for tobacco retailers  
24 included use as a smoke shop or hookah lounge. Since then the Code has been amended to  
25 specifically allow hookah lounges in the definition of hookah lounges. Thus, under the zoning  
26 designation and use permit obtained by HB Tobacco, they should be allowed to maintain a hookah  
lounge. Thus, under the Code, HB Tobacco has an entitlement to use a hookah lounge which should  
not, and could not, be altered by the imposition of a condition that it not be a hookah lounge. *See,*  
*e.g., Verner v. Redman, 77 Ariz. 310, 271 P.2d 468, (1954); Pingitore v. Town of Cave Creek, 194*

1 Ariz. 261, 981 P.2d 129, 273 Ariz. Adv. Rep. 18 (1999).

2 **III. CONCLUSION.**

3 For the reasons set forth above the decision of the City Council for the City of Tempe should  
4 be reversed or at least a new hearing conducted to properly consider the applicable factors.

5 Dated this 25<sup>th</sup> day of September, 2008.

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**SPIESS & ASSOCIATES, PC**

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By: 

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14 Filed this 25<sup>th</sup> day of September,  
2008 with the City of Tempe.

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