

**GRAND JUNCTION BOARD OF APPEALS
JUNE 11, 2003 MINUTES
12:10 P.M. to 1:40 P.M.**

The regularly scheduled Board of Appeals meeting was called to order at 12:10 P.M. by Chairman Paul Dibble. The public hearing was held in the City Hall Auditorium.

In attendance, representing the Board of Appeals, were Paul Dibble (Chairman), Travis Cox, John Paulson and Mark Williams. One position is vacant (Clay Tuffy resigned).

In attendance, representing the Community Development Department, were Bob Blanchard (Community Development Director), Ivy Williams (Code Enforcement Supervisor), Kathy Portner (Planning Manager), Nishi Aragon (Planning Technician), Ronnie Edwards (Associate Planner), and Randy Keller (Code Enforcement Officer).

John Shaver, Assistant City Attorney, was also present.

The minutes were recorded by Bobbie Paulson and transcribed by Terri Troutner.

There were 17 citizens present during the course of the meeting.

I. APPROVAL OF MINUTES

Available for consideration were the minutes of the January 8, 2003 meeting.

MOTION: (Mr. Paulson) "Mr. Chairman, I'd like to make a motion that we accept the minutes for January 8, 2003 as presented."

Mr. Cox seconded the motion. A vote was called and the motion passed unanimously by a vote of 4-0.

II. ANNOUNCEMENTS, PRESENTATIONS AND/OR VISITORS

There were no announcements, presentations and/or visitors.

III. FULL HEARING

**VAR-2003-073 APPEAL OF THE REVOCATION OF A HOME OCCUPATION PERMIT
Appeal of an administrative decision to revoke a home occupation permit issued in 1997 for 431
Rockaway Avenue.**

Petitioner: Josefina Ibarra

Location: 431 Rockaway Avenue

Mr. Shaver briefly discussed that both the applicant and staff have interpreters (Spanish/English) present to assist with forthcoming presentations. He said that because the City was not aware that an interpreter was needed until just before the hearing that it would be proper to allow both to participate so that certain linguistic nuances would be made clear. Mr. Shaver said that if the Board so opted, it could defer the hearing to allow selection of an impartial professional interpreter. Interpreters on both sides were identified, accepted by the Board and sworn in for the record--Jose Renteria (510 Rockaway Avenue, Grand Junction), for the applicant and Nishi Aragon for the City.

PETITIONER'S PRESENTATION

Josephina Ibarra, assisted by her interpreter, stated said that she'd acquired her home occupation permit in 1997 and had been told that only "six children could go because it was not in a zone of business and that the neighbors might complain if there was a lot of traffic or more children." She said that her neighbors "were not bothered by the number of children" because there were many children in the neighborhood anyway. In April 2003 she said she understood that her business had been reported for selling items to more than six children per day and that she could not "keep selling." She'd asked visiting zoning enforcement staff for permission to continue her business, and she'd later spoken with her neighbors and "the neighbors were not bothered." She said that her neighbors had told her they felt her business was "good for them, that their children didn't have to go so far to buy things." She asked for consideration to continue her business and said that she was unable to find other work due to her having a heart condition. Her cardiologist, she continued, had urged her to avoid "strong pressures."

STAFF'S PRESENTATION

Kathy Portner said that home occupations should not interfere with the residential character of neighborhoods. The permit had been originally issued to allow for a "pop and candy stand." The permit, in keeping with Code criteria, limited the number of patrons per day to six. In 1997, the Code had not prevented retail sales; however, the general policy then was not to allow retail sales in residential zones because it is too difficult to limit or monitor the number of actual customers being served. The applicant's inventory at the time of permit approval had been stored on a single shelf. During a site visit following the complaint in 2003, the applicant's inventory had significantly increased (photo presented). The home occupation permit was subsequently revoked, with staff determining the home occupation to be incompatible with the residential neighborhood and not consistent with the Growth Plan or current Zoning and Development Code criteria, which specifically prohibited retail sales as a home occupation in residential zones. The criteria on which the board must base its decision (Code Section 2.18.C) was read into the record. Staff recommended denial of the appeal.

QUESTIONS

Mr. Paulson asked for the specifics of the original complaint. Mr. Keller said that the complaint had been registered anonymously on March 6, 2003. The complaint questioned whether the home occupation was being operated legally and stated that the current Code prohibited retail sales as a home occupation in residential zones. On March 11, 2003 Mr. Keller contacted the applicant and both he and Ms. Aragon had been permitted entrance into the applicant's residence. In the rear of the residence, retail goods were displayed for sale. Mr. Keller testified that no customers had been present at that time, but it appeared that retail sales were being undertaken from the residence. He and Ms. Aragon had explained the nature of the complaint to the applicant and secured the applicant's approval to take pictures. He'd indicated that he would discuss the situation with his supervisor and a decision would be sent to the applicant.

Chairman Dibble asked Mr. Keller to relay the points made in the discussion with his supervisor. Mr. Keller said that after review of the home occupation permit and photos with Ms. Williams (Code Enforcement Supervisor), he was instructed to take the information to Ms. Portner (Planning Manager) for her review. The determination was made to revoke the permit based on the photographic evidence and statements made by the applicant. A letter of revocation was then generated by Mr. Blanchard (Community Development Director) and sent to the applicant.

Mr. Cox asked if the storage room had been measured. Mr. Keller replied negatively but estimated its size to be approximately 10' x 10', a much larger area than the 20 square feet allowed by the home occupation permit.

Ms. Portner said that the determination had been made that conditions of the home occupation permit had not been met, so a letter of revocation had been issued. Mr. Blanchard confirmed that he had issued the letter of revocation.

Mr. Cox asked for confirmation that anything exceeding 20 square feet of storage would be a violation of the home occupation permit, which was given by staff.

Chairman Dibble asked how staff anticipated monitoring the six person per day limitation. Ms. Portner replied that compliance with this criterion would be very difficult to determine, which was why the current Code specifically prohibits retail sales in residential zones.

Mr. Cox asked if the applicant could apply for a new permit if the revocation was upheld. Ms. Portner replied that any new permit would be subject to the regulations of the current Code which prohibits retail sales in residential zones. Thus, the applicant would not be able to secure a new permit.

Chairman Dibble asked if this type of business was subject to the collection of sales taxes, and if so, were there any records of sales taxes collected? Mr. Shaver responded that the business is required to collect sales taxes. Mr. Keller confirmed that he did see a sales tax license posted on the wall of the applicant's residence; however, there were no customers there at the time of his visit and he was unsure if sales taxes were being collected. Ms. Portner said that she'd checked with sales tax department staff, who confirmed that they'd received a relatively small amount of sales tax revenue from the applicant. It was difficult, she said, to determine the number of customers based on the amount of City sales tax revenue collected. She added that it had not varied significantly over the years during which the permit was in effect.

Mr. Williams asked if there were any way the applicant could make her business legal. Ms. Portner said that under the current Code it could not be made legal. The only way the original 1997 permit could continue was for the petitioner to comply with all of the original approval criteria. Mr. Williams then asked if a variance was a viable option. Ms. Portner said that the Code did not allow for "use" variances. Mr. Shaver confirmed that there was no such thing as a "use" variance. Mr. Shaver added that given the residential character of the area, approval of a rezone request would likely be unsuccessful. There would also be legal complications if a spot zone were permitted in a residential neighborhood. Mr. Blanchard added that if the question was whether the applicant could come into compliance under the terms and conditions of the original permit, he replied negatively, given that the original permit had been revoked. Mr. Shaver concurred with Mr. Blanchard's statement and said that the present hearing was solely to determine if the Director had acted in accordance with Code.

Mr. Blanchard said that if the Board opted to uphold the appeal, its finding could be that he acted in haste. This would allow the applicant an opportunity to come back into compliance.

Mr. Paulson asked if there was any evidence substantiating the number of customers served in a day, the amount of traffic generated, and whether the current inventory could be consolidated to fit within the 20 square feet allotted. Mr. Keller replied negatively.

Mr. Williams again asked whether there was any option available under the current Code "for making the business legal." Mr. Shaver replied that short of a rezone, which would likely be unsuccessful, there wasn't another option available. He emphasized that the only question before the Board is whether or not to uphold the Director's decision to revoke the original permit.

Mr. Williams asked if changes could be made to the business under the conditions of the old Code if the Director's decision was not upheld, to which Mr. Shaver replied negatively. Mr. Shaver stated that if the Board determined that the Director acted arbitrarily and the Board decided not to uphold his decision, the permit would then be referred back to staff who would then determine whether enforcement action was warranted should the business continue.

PUBLIC COMMENTS

FOR:

Herlinda Reul Renteria (510 Rockaway Avenue, Grand Junction) felt that many of the people coming to Ms. Ibarra's home were family members. Not all those visiting, and part of the complaint, are customers. She did not believe that the room was larger than 20 square feet. She hoped that the store would continue because it was a nice way for the children to buy goods. She noted the existence of another store in the neighborhood, which seemed a contradiction. She added that she had a 4-year-old daughter who frequented the store. Ms. Renteria said that she wouldn't feel that her daughter would be safe going to another store and hoped that something could be done to keep the applicant's store open.

Angelica Torres (591 W. Colorado Avenue, Grand Junction) said that she too had a daughter who bought things at Ms. Ibarra's store. Ms. Ibarra's prices were lower, and the person owning the previously mentioned store "is grouchy."

Alondra Chavira (433 Rockaway Avenue, Grand Junction) agreed that Ms. Ibarra's prices were lower, and people liked sending their kids to Ms. Ibarra's store.

Jose Renteria (510 Rockaway Avenue, Grand Junction) submitted a petition containing signatures of neighbors who supported keeping Ms. Ibarra's store open.

Nancy Renteria (510 Rockaway Avenue, Grand Junction) said that she lived next door to Ms. Ibarra and hoped the store would stay open, especially for the safety of the children. The other neighborhood store had too much traffic to be safe for children.

AGAINST:

There were no comments in opposition to the request.

PETITIONER'S REBUTTAL

Ms. Ibarra asked whether she should in the future tell those children, beyond the six she was allowed, to leave. Mr. Shaver reiterated that because the permit had been revoked, she could not continue the business under the terms and conditions of the previous permit; because the law had changed, her business would fall under the conditions of the new Code. Until the appeal question was decided by the Board, Mr. Shaver said that staff could not address the specific requirements of any new permit application.

Ms. Ibarra said that she'd told Ms. Aragon and Mr. Keller when they visited that she picked up her Mexican candies in Denver and because she travels so far to get her inventory, she has to come back with a full load to justify the trip.

QUESTIONS

Mr. Williams asked if she is an American citizen, Ms. Ibarra replied "no." Mr. Williams said that he wanted to see the business continue noting that the reason for his citizenship question was to point out the differences in culture.

DISCUSSION

Mr. Paulson said that it appeared the Director's decision to revoke the permit was based on a single complaint and on the amount of storage area occupied by the goods sold. There is no evidence of increased sales based on sales tax figures nor is there any evidence to suggest an increased customer base. He wondered why the violation hadn't been brought to the applicant's attention, whereby she could have been given the opportunity to come back into compliance with the terms and conditions of the original permit.

Chairman Dibble clarified that 20 square feet is an area 4' x 5', 10' x 2', *etc.* The photos presented support the Director's decision for revocation of the permit because a violation is clearly evidenced.

Mr. Cox said that on one hand the store posed no harm to the neighborhood and clearly provided the neighborhood with a benefit; however, the applicant's permit clearly limited the storage of goods sold to no more than 20 square feet. He agreed with the Director's determination that Ms. Ibarra had violated the terms of the permit; however, he felt that a warning could have been issued instead. Ms. Ibarra, he said, should be given a chance to bring her business into compliance with the terms of her original permit and suggested that a future inspection be scheduled to ensure compliance. Mr. Cox expressed support for the appeal.

Chairman Dibble wondered whether there had been sufficient information available to justify the revocation. He agreed that there was a lack of evidence regarding the number of children visiting the business and the amount of sales, based on reported sales tax. He noted that "it was completely possible" that some of the persons visiting the home could have been family members. Commenting on the anonymous complaint, Mr. Dibble felt that the applicant should have been given a chance to face her accuser. With regard to Code Section 2.18.C, he wondered if Ms. Ibarra would have had the means to come into compliance if she'd been given a warning notice instead.

Mr. Shaver advised that the Board could find there to be insufficient evidence to support the Director's decision. In the event of that finding, the Board could reverse the Director's decision or remand it back to the Director for additional evidentiary findings. Mr. Shaver explained further by advising the Board that it could continue to have jurisdiction pending the presentation of any new evidence. He noted that crafting a solution would be the responsibility of staff, however, and not within the purview of the Board. Mr. Shaver explained that with regard to Subsection c., the Director wasn't legally obligated to present the applicant with solutions.

At the Board's request, Mr. Shaver explained the difference between the options of rescinding the Director's decision and remanding the item to the Director for further consideration.

Chairman Dibble concluded that while the Director had not acted arbitrarily, there was no conclusive evidence to indicate whether or not the goods depicted in the photos could have fit within a 20 square foot area.

MOTION: (Mr. Williams) "I move that we remand this matter, and the rationale is to notify the petitioner and give the petitioner an opportunity to offer mitigating measures or revisions to bring the matter into compliance."

Mr. Cox seconded the motion.

Mr. Shaver asked if the applicant was to offer a resolution would that be acceptable to the Board and does the Board want to be notified of the conclusion only or did it want staff to undertake the evidentiary process and bring the item back to them for further consideration? Chairman Dibble replied that mitigation should be undertaken between staff and the applicant, with the Board making the final determination.

Mr. Shaver noted that based on the Board's intent to remand, Mr. Williams' motion inferred compliance with the applicant's 1997 permit. Mr. Shaver discussed the range of options: 1) the Director could base compliance upon the 1997 permit; 2) if the Director did not find that there was compliance, the issue would be brought back before the Board for its consideration; or 3) the Director would undertake additional administrative review, but could ultimately conclude that amortization of the permit or some equivalent remedy would be required (amortization means giving the applicant a set amount of time to comply with the regulations outlined in the current Code).

Mr. Cox suggested the issue be remanded to staff for resolution. He said that if no agreement could be reached, the issue would then come back before the Board for its continued consideration. This suggestion received support from the other Board members.

A vote was called and the motion passed unanimously by a vote of 4-0.

Ms. Portner noted that the home occupation could continue while the resolution discussions were underway.

With no further business to discuss, the meeting was adjourned at 1:40 P.M.