

Weston Burrer
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Vice Chair

PUEBLO

Zoning Board of Appeals

Ralph Scaplo
Secretary

Mike Castellucci

Rod Johnson

Zoning Board of Appeals Special Hearing

City of Pueblo, Colorado

Tuesday, May 10, 2011-7:00 p.m.

Interim City Council Chambers-301 West B Street (Former Municipal Court)

Minutes

MEETING CALLED TO ORDER

The meeting was called to order at 7:00 p.m. with Chairperson Weston Burrer presiding.

Board Members Present: Ralph Scaplo, Rudy Martinez and Mike Castellucci

Board Members Absent: Rod Johnson

Staff Members Present: Jeff Bailey, P.E., Assistant City Manager for Development Services; Carrie Muchow, Planner; Ramona Baca, Court Reporter; Karen Willson, Zoning Enforcement Officer; Kurt Stiegelmeier, Assistant City Attorney; and Paul Willumstad, Board Attorney.

APPROVAL OF AGENDA

Motion to approve the agenda for the May 10, 2011 meeting by Castellucci, second by Scaplo.

Motion passed 4-0.

PUBLIC HEARINGS AND ACTION

APPEAL

1. 006-2011 519 Beaumont (Gradisar, Trechter, Ripperger & Roth) R-2

An **Appeal** to the determination that a towing business and storage of vehicles is not allowed in an R-2 zone.

BACKGROUND

Staff Report by Carrie Muchow.

Synopsis

The subject property is located in the Eastside neighborhood. The neighborhood is composed of Mid Century single family homes (testimony by Carrie Muchow). According to Section 17-5-22 (a) of the Pueblo Municipal Code (PMC), the applicant is appealing the determination that a towing business can not be run in an R-2 zone.

In November, 2010 the owner of 519 Beaumont was sent a Notice of Violation and Order to Correct letter from a Planning Department Zoning Enforcement Officer stating that they were in violation of Section 17-4-51 of the PMC, permitted use of land and buildings in an R-2 zone and Section 11-1-405 (b) (5), nuisances; barbed wire and corrugated metal fence (testimony by Karen Willson). The property was being used as a towing company which was not an allowed use, either as a use by right or use by review, in an R-2 zone and the type of fencing around the property is also not allowed in an R-2 zone (testimony by Karen Willson). See Exhibit E for the Notice of Violation and Order to Correct letter.

The applicant is now appealing on the basis that the property has a Certificate of Non-Conforming Use.

Analysis

The applicant states that:

1. The owners were provided with a Certificate of Non-Conforming Use issued by the City in April, 2010, at the time of purchase.
2. The property has been used continuously since the issuance of the Certificate of Non-Conforming Use in 1982.
3. The storage of vehicles on the property is short-term.
4. The use of land has been pursuant to the Certificate of Non-Conforming Use.
5. The decision that the Non-Conforming use was abandoned was made by the City without notice to the owners.
6. The fence has been in existence since the issuance of the Certificate of Non-Conforming Use.
7. The use and property are in harmony with the neighborhood.
8. A Special Exception should be made to allow the use to continue since the current use is as appropriate or more appropriate than the existing Certificate of Non-Conforming Use.
9. The City has taken the use of the property by causing it to be removed from the City of Pueblo's Police Department's Tow list
10. These actions constitute an unconstitutional taking of the property by the City.

See Exhibit O for the Applicant's application documents.

Staff's Response:

1. The certificate the owners were provided at the time of purchase was not issued by the City at that time and was a copy of the original one from 1982. Had the owners talked to Staff they would have been informed that the Certificate of Non-Conforming Use had expired in June, 2009 after being vacant for six (6) months prior to purchasing the property (testimony by Karen Willson). See Exhibits F and G for documentation of cessation of use.
2. Section 17-3-3 (3) of the PMC states that "If any such nonconforming use of land ceases for any reason for a period of more than thirty (30) days, any subsequent use of such land shall conform to the regulations specified herein for the district in which such land is located". Between the months of February and June of 2009 the property was not being used for any business. The applicant's Exhibits 1, 2, and 3, aerials of the property in 2001, 2004, and current, (included in Staff's Exhibit O) are too spread out to show that the property was being used during the months Staff recorded it was vacant. See Exhibits F and G for documentation of cessation of use.

In addition to Staff's documentation, Maria Valdez, owner of 2630 and 2640 E 6th Street and neighbor to 519 Beaumont, will also testify to the property being vacant during this time period.

3. Section 17-4-28 (b) of the PMC states that “No vehicle whose manufacturer’s rated chassis or carrying capacity is greater than one (1) ton shall be parked, kept, stored, or maintained on any public or private property in any residential zone district... except during the loading or unloading of such vehicle or while currently being used for on-site construction work. Such prohibited vehicles shall include... tow trucks...”. Based on knowledge of the tow truck’s size, it may not be parked on the premises except when the tow truck is loading or unloading (testimony by Karen).
4. Section 17-3-1 (b) of the PMC states that “... A nonconforming use of a structure, nonconforming use of land or nonconforming use of structure and land in combination shall not be extended or enlarged ... by the addition of other uses of a nature which would be prohibited generally in the district involved”. According to this section of the PMC, even if the Certificate of Non-Conforming Use had not expired in June 2009, the towing operation and storage of vehicles would be considered an extension of use from the “Automobile Repair Garage” listed on the Certificate and not allowed. Section 17-2-1 (22.3) of the PMC defines a “Garage, repair” use as “a structure where automotive vehicles are repaired. It shall include body shops, painting shops, shops doing minor and major mechanical work and glass replacement. It does not include salvage operations or the exterior storage of vehicles as accessory uses.” Based on this definition, towing and storage of vehicles towed is not within the scope of a repair garage use (testimony by Jeff Bailey). See Exhibit H for the 1982 Certificate of Non-Conforming Use.
5. There is nothing in the PMC that requires the City to notify current or future owners that a Certificate of Non-Conforming Use has expired. Had the current owners inquired at the Planning Department they would have been informed of everything regarding the property and the Certificate (testimony by Jeff Bailey). In addition to this, the fact that a Certificate of Non-Conforming Use becomes void after thirty (30) days of non-use is public record in the PMC and available at the Planning Department office or online at the Pueblo City website (testimony by Jeff Bailey). The information regarding nonconforming use could have been obtained by the owners at any time, including prior to purchase, as the Certificate had lapsed in June, 2009 and the current owners did not purchase the property until April, 2010. See Exhibit I for the County Assessor’s property information showing the date of sale.
6. The fencing around the property has existed since the issuance of the Certificate of Non-Conforming Use in 1982, however, since the Certificate became void in 2009, discussed in number 2 above, the property must be brought up to current zone district regulations per Section 17-3-3 (3) of the PMC, quoted above in number 2 above. Based on this, Section 11-1-405 (b) of the PMC becomes effective and states that “... The following substances, activities or conditions are hereby expressly deemed to be detrimental to the health or safety of the inhabitants of this City and are nuisances: ... (5) The construction, installation, erection, keeping or maintenance of a barbed wire, electrically charged, sheet metal or corrugated metal fence or fences on any property located within a residential zone district”.
7. Staff does not find that this use is in harmony with the surrounding neighborhood based on the fact that the zoning for the neighborhood is R-2, single family residential and a towing business is considered an industrial use. A towing company is considered industrial partially because of the noise and fumes involved with loading and unloading cars, and partially because of the

potentially 24 hours a day operation (testimony by Carrie Muchow). A towing company is also considered inappropriate for a residential area because of its typical appearance. The building has no useable windows on the front, most of the front is a large garage door, and, in order to keep impounded cars safe, the property is heavily fenced with metal and barbed wire. All of this does not create a friendly environment or a visually appealing neighbor and may increase crime in the neighborhood from people trying to break into the storage yard and continuing to other properties in the area (testimony by Carrie Muchow). In addition to this, Staff has received many complaints regarding the property over the last few years, including two since this Appeal was filed. See Exhibit J for complaint documentation.

8. There are no legal grounds for a Special Exception in this case because a Limited Use Permit does not apply and a Use by Review is only allowed for uses specified in 17-4-51 (4). Even if there were grounds of a Special Exception, Staff does not feel that the towing use is either equally or more appropriate than the expired non-conforming use. A repair garage typically has the owner drop the car off for repair, not a tow truck, which continues the normal traffic patterns for the neighborhood. When a tow truck is always dropping the cars off the noise from the truck bed operation is significant as well as an increase in vehicle emissions from the idling truck. Also with a repair garage, the cars are being actively serviced and released where as a tow yard can potentially store a car indefinitely if the owner never comes for it. The hours between the uses are also significantly different. A towing operation has the potential to be 24 hours and is dependant on when their services are needed, even if it's at 3am. A repair garage, however, normally has day-time only hours so would not disturb residents at night. The final reason is that according to the PMC's definition of a repair garage, see #4 above, a repair garage does not allow for outside storage of vehicles, for any length of time and a towing company is only storage until an owner reclaims the vehicle. (testimony by Jeff Bailey)
9. The Zoning Board of Appeals does not have authority or jurisdiction on whether the Police Department has or will take them off the tow list, however, Auto Services, Inc has not to date been removed from the Police Department's Tow List (testimony by Karen Willson). See Exhibit K for documentation of the conversation between Karen Willson and the Pueblo Police Department regarding this property.
10. The Zoning Board of Appeals does not have the authority to determine whether a takings has occurred, that is for the courts, however Staff would argue that based on *Penn Central Transportation Co. v. City of New York*, in order for a government's action to be considered a "taking" it must either be a statute or law that completely destroys the value or intended use of the property without alternative, or takes, out right, resources or land for public functions without just compensation.

In this case, no physical item has been taken from the property owners, which leaves the matter of destroying the value of land with no reasonable alternative.

Court's have long ruled that government's have the general power to regulate in order to protect the public health, safety, morals, or general welfare; this is known as Police Power. The use of Police power in a regulatory way, such as zoning, does not constitutionally require compensation

and in *Village of Euclid v. Amber Realty Co.* the court upheld a City's right to effectively zone and regulate land.

Here, much like the Court's discussion of Appellant's choices in *City of Los Angeles v. Gage*, the issue is an incompatible use with the zoning and surrounding neighborhood. The operation of the business is not being prevented outright, it is only an issue in this location, and the owners may still use the property as allowed by the zoning ordinance, leaving a reasonable alternative for the profitability of the property. And as the Court alluded to in *City of Los Angeles v. Gage*, there would be no point in creating a residential district unless it had the benefits of being zoned solely residential.

In addition to the above items, a Pueblo towing business is required to have a Pueblo Sales Tax License, Liability Insurance issued to the Pueblo business address, and a Towing Carrier Permit registered to the Pueblo business location in order to operate in Pueblo (testimony by Karen Willson). The business in question has none of these. See Exhibits L - N for copies of these items.

As an aside, a towing business would be allowed as a use by right in an I-2 zone district (testimony by Jeff Bailey)

HEARING

Nick Gradisar, Attorney, representing Auto Services.

Kurt Stiegelmeier, Assistant City Attorney, representing the City of Pueblo.

Richard Hardy, 200 S. Main, appeared and testified that he is not responsible for the City of Pueblo Police Department tow list. Corporal Hardy did notify the Department of Planning and Community Development of the business at 519 Beaumont. Once the Planning Department discovered the business, a cease and desist order was given. Corporal Hardy's Captain asked that he call and tell Auto Services that they had been removed from the tow list. The City Attorney added Auto Services back to the tow list.

Richard Brekke, 921 Gemini, Pueblo, CO appeared and testified in favor of the application. Mr. Brekke testified that he was the manager of Russ Service (519 Beaumont) who had a towing service and a car storage business from March 1982 to August 1986.

Ron Brekke, 621 W. 6th Street, Pueblo, CO appeared and testified in favor of the application. Mr. Brekke testified that he was the owner of 519 Beaumont. He owned the property for 19 years. At the time of purchase, Russ Service was using the property for vehicle storage.

Michael M. Stine, 519 Beaumont, Pueblo, CO appeared and testified in favor of the application. Mr. Stine testified that he and his wife Tamara Stine are the owners at 519 Beaumont. Auto Services, Inc. is a mobile repair service. Mr. Stine testified that his business would rather not store cars on the lot.

At this point in the Special Hearing, Chairperson Burrer requests a five minute recess.

Carrie Muchow, 211 E. “D” Street, Pueblo, CO appeared and testified in opposition of the application. Mrs. Muchow testified that the R-2 zone designation is for single family residential and that in an R-2 zone a towing/auto repair shop is prohibited.

Maria Valdez, 2630 E. 6th, Pueblo, CO appeared and testified in opposition of the application. Ms. Valdez has lived at this address for 37 years. Ms. Valdez stated there has been dozens of tenants of this property during the time she has lived at this address. Ms. Valdez stated she could not say for sure the amount of activity that occurred on this property from January 2009-July 2009.

COMMISSION ACTION

Motion to deny the appeal and uphold the Administrative Officials decision on ZBA Case #006-2011 by Castellucci, second by Martinez.

Motion passed 4-0.

Motion to deny a special exception for ZBA Case # 006-2011 by Martinez, second by Castellucci.

Motion fails 1-3 (Martinez dissenting).

Motion to approve a special exception for ZBA Case #006-2011 by Castellucci, second by Scaplo with the following conditions:

1. The property owner must remove the metal fence on the property.
2. The property owner must remove the barbed wire from the property.
3. The property owner must have a cedar or opaque fence installed on the property.
4. The property owner must limit the hours of operation from 8AM to 6PM Monday-Sunday.
5. The property owner is allowed to store a maximum of four cars on the property and not parked on the street.
6. Lighting on the property shall not be taller than 6’, and shall have full cut off lights and bring lighting on the property up to code.
7. There shall not be more than 1 tow truck on the property at any given time and the tow trucks shall not park on the street or the front of the business.
8. The property owner must replace the front window on the property.
9. There shall not be guard dogs on the property.
10. There shall not be a “PA” or public address system on the property, and there should be no hand-held or truck radio devices turned on when in the yard.
11. The property owner shall install 6’ of proper living landscape material along Beaumont Avenue and follow the City of Pueblo Landscape code.
12. The property owner shall not have flashing lights on while entering and/or exiting the property.
13. The property owner shall not have back up alarms on while at the property.

Motion passed 3-1 (Martinez dissenting).

ADJOURN

There being no further business the meeting was adjourned at 11:35 p.m.