

## MEMORANDUM

Date: October 27, 2023

To: Carol Mitten, City Administrator  
Kimberly Smith, Community Development Services Director  
Kevin Garcia, Principal Planner/Zoning Administrator  
Nick Olsen, Planner I

From: David B. Wesner, City Attorney

Re: ZBA-2023-C-5, Conditional Use Permit - 205 N. High Cross Road

I received a phone call from the attorney for the applicant in the above-referenced ZBA case. I also received a letter from the attorney explaining the position of the applicant with regard to the hearing and decision of the ZBA. I have also met with you to discuss the hearing and decision. I have had a chance to review the material regarding the case, the letter from the attorney and the City's Zoning Code. This memo is to outline my opinion concerning the case and the decision made by the ZBA.

The letter from the attorney indicated that it was a request for appeal of the decision. The letter cited Article XI-3.D as the basis for an appeal as of right. The pertinent language of that Article provides: "The following shall govern for all appeals from any order, requirement, decision or determination made by the Zoning Administrator under this ordinance." Article XI-7 provides that the Zoning Administrator is designated by the Community Development Services Director. Based upon the language of Article XI-3.D, appeals are from actions taken by the Zoning Administrator and not the Zoning Board of Appeals. Therefore, I disagree that Article XI-3.D provides an appeal as of right from the decisions of the Zoning Board of Appeals. Section XI-3.B.9 provides: "Except for the Board's recommendation on a major variance, no decision of the Board shall be subject to review, modification, or reversal by the City Council or any City Official, but shall be subject to judicial review pursuant to the provisions of the Illinois Administrative Review Act." Based upon Section XI-3.B.9, I do not find any right to administratively appeal the decision of the ZBA concerning the application for conditional use. Section XI-3.B.9 clearly indicates that the sole remedy for a party aggrieved by a decision of the ZBA concerning a conditional use permit is to seek judicial review.

Although I do not find a right to administratively appeal the decision made by the ZBA on the applicant's request for a conditional use permit, I do find that the decision is not legally sufficient under the City's Zoning Code. Section VIII-2 provides the procedures for requests for conditional uses. Section VIII-2.D

provides: “The Zoning Board of Appeals shall determine whether the reasons set forth in the application, and the evidence adduced during the public hearing, justify the granting of the conditional use based upon the criteria specified in Section VII-2.A.” Section VII-2.G provides: “The Secretary to the Zoning Board of Appeals shall prepare a decision sheet that states the Board’s findings of fact and decision concerning the requested conditional use for the Board Chair’s signature.” At the conclusion of the hearing, the ZBA did not make findings of fact pursuant to Section VIII-2.D and Section VIII-2.G. Due to the ZBA not establishing any findings of fact, the Secretary of the Board is not able to prepare a decision sheet with the required information. Therefore, I find the original discussion and vote of the ZBA on this application legally insufficient. As such, the ZBA will need to re-address its original discussion and resulting vote in order to more fully discuss the requirements of the Zoning Code, make findings of fact and conduct a vote based upon those findings of fact in order to comply with the requirements of the Zoning Code. I believe this can be accomplished through a motion to reconsider. The motion to reconsider will need to be made by a member whose original vote was on the prevailing side. Approval of the motion to reconsider will allow the discussion and vote to be re-opened such that relevant findings of fact based upon the criteria and requirements of the Zoning Code can be articulated in order to comply with the Zoning Code requirements for a legally sufficient decision. Please note that the motion to reconsider will NOT result in a re-hearing of the application. No new evidence would be submitted, no new testimony would be given, and no new questions to staff or the applicant concerning the application would be allowed. The ZBA would only be continuing their discussion on the case, establishing findings of fact, and conducting a vote based upon the record already created from the hearing in order to have a legally sufficient decision based upon the requirements of the Zoning Code. If the members of the ZBA who were absent during the meeting at which the hearing was conducted are present for the continuing discussion of this case, those members would be able to participate in the discussion and vote if they have reviewed the record, including the video of the hearing. Those members should state on the record that they have conducted that review as a basis for their participation in the discussion and vote.

The need to have a legally sufficient decision stands on its own based upon the Zoning Code requirements, but it is especially important in light of the only appeal recourse being judicial review.

If you have any questions or need assistance from me in delineating what would constitute legally sufficient findings of fact that the ZBA would need to make, please let me know and I can address those in a separate memo.

*David B. Wesner*