

**BOARD OF ADJUSTMENT SUPPLEMENTAL STAFF REPORT**  
**CASE #2846-B**  
**June 18, 2007**

**Petitioner:** Smith's Food and Drug Store

**Address:** 834 East 800 South

**Request:** **Appeal:** Remand from the Third District Court to supplement the record with specific findings and conclusions of the Board's prior decision on an appeal of an Administrative decision by Smith's Food and Drug Store at 834 East 800 South not to allow a proposed fuel station without a master plan amendment to the East Central Community Small Area Master Plan.

**Remand from Third District Court**

The Petitioner, Smith's Food and Drug, appealed Case # 2846-B to the Third District Court. Upon review, the court remanded this matter back to the Board of Adjustment to supplement the record with specific findings and conclusions identifying the basis for the Board's decision.

**Background**

The City Administration refused to accept or process Smith's application to build a gas station on a portion of the existing grocery store parking lot. The administrative decision was based upon a determination that Smith's and the City had negotiated an Agreement in 1993, that no further development would occur within the grocery district, as identified in the Master Plan, without an amendment of the Master Plan.

**Board of Adjustment History**

Smith's appealed the city's administrative decision to the Board of Adjustment on June 19, 2006, the Board reviewed this matter to determine whether Staff made an error by requiring Smith's file for an amendment to the East Central Small Area Master Plan in

order for Smith's to pursue the construction of a gas station on a parcel of land located within the grocery district.

At the May 21, 2007, the Board for the purposes of providing additional clarity requested that staff restate the potential findings of fact, together with appropriate citations to the record supporting each proposed finding. The Board also provided the applicant the opportunity to respond to staff's findings and conclusions which can be found in Exhibit A.

As requested by the Board of Adjustment at their May 21, 2006 meeting, staff has prepared a response to Smith's objections to City Staff's proposed findings:

**I. Response To Smith's Objections To City Staff's Proposed Findings**

The City staff prepared ten potential findings of fact for the Board's consideration. Smith's has objected to only three of those proposed findings (findings 1, 6 and 9). The remainder of staff's proposed findings (findings 2, 3, 4, 5, 7, 8 and 10) are undisputed, and should simply be adopted by the Board.

Pursuant to the Board's request at its May 21, 2007 meeting, and for the purposes of providing additional clarity, staff will restate its potential findings of fact, together with appropriate citations to the record supporting each proposed finding. As to the three proposed findings disputed by Smith's (findings, 1, 6 and 9), staff will also provide further discussion as to the evidence in the record that supports those particular findings.

1. Smith's and the City negotiated an agreement. This finding is supported by statements in the record by Smith's own representatives. See statement by Peter Barth before the Salt Lake City Council ("a great deal of time had been spent negotiating the

language of the master plan,” record page 116) and the subsequent affidavit of Mr. Barth describing the agreement between Smith’s and the City (p. 81). In addition, the attorney for Smith’s testified at the original Board of Adjustment meeting as to the substance of the agreement between Smith’s and the City (see record p. 6 and p. 166). In addition, it is the City’s position that Smith’s and the City had negotiated an agreement (see record p. 7) and several other witnesses testified as to the existence of such an agreement (see record p. 8). Thus, there is substantial evidence in the record to support the fact that Smith’s and the City negotiated an agreement.

2. Pursuant to that agreement, the City agreed to allow Smith’s to expand its existing grocery store and to relocate its loading dock. (Undisputed. See record pp. 6, 9 and pp. 184-185.)

3. Pursuant to that agreement, Smith’s agreed that there would be no further development within the grocery district without a further amendment of the master plan. (Undisputed. See citations in support of proposed findings 1 and 9.)

4. In 1993, the City adopted the existing East Central Community Small Area Master Plan.<sup>[1]</sup> (Undisputed. See record p. 5 and p. 165.)

5. The master plan identified certain property between 800 and 900 South and between 800 and 900 East as a “grocery district.” (Undisputed. See record p. 57.)

6. The master plan provided that any further development within the grocery district would require a master plan amendment. The language of the master plan clearly supports this finding. The relevant language of the master plan, in its entirety, states as follows:

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<sup>[1]</sup> Pursuant to the comments from Board members at their May 21, 2007 meeting, the language of this proposed finding has been clarified.

Smith's Food & Drug should be allowed to relocate the dock, renovate the east street wall, and renovate and expand the entry to the north as originally proposed....

Any future plans beyond the current proposal shall require a master plan amendment.

(See record p. 51. In addition, see record at p. 86, p. 111, and p. 116.) The evidence in the record and in the language of the master plan clearly states that any development within the grocery district beyond the development which was approved in 1993 would require a master plan amendment.

7. The properties owned by Smith's which are at issue in this case are located within the grocery district. (Undisputed. See record p. 5 and p. 57.)

8. The properties owned by Smith's are both used for the operation of the grocery store business. One parcel is used as a grocery store and the other is used as a grocery store parking lot. (Undisputed. See record p. 5.)

9. The terms of the agreement between Smith's and the City are set forth in the master plan. This finding, that the terms of the agreement between Smith's and the City are set forth in the master plan, is supported by the language of the master plan itself. (See p. 51.) In addition, at the original Board of Adjustment hearing, several witnesses testified that Smith's had entered into agreement or a partnership with the City that it would not further develop the grocery store site without an additional amendment to the master plan. (See comments of Cindy Cromer, Scott Nak and Nathan Florence, at p. 8.)

Most importantly, the minutes from the City Council meeting held in January 1993, at the time that Smith's was seeking to expand its grocery store and relocate its locating dock, also confirm both the existence and the terms of Smith's agreement with

the City. Specifically Jan Striffel, who is one of the consultants who worked on the small area master plan, testified to the City Council as follows:

She [Ms. Striffel] said that the committee had also suggested that when any expansion or proposed expansion was scheduled to happen in the commercial areas in the future, it would become a master plan change and would require a master plan process.

(See record at p. 111.) Immediately following Ms. Striffel's comments, Mr. Barth, speaking on behalf of Smith's, addressed the City Council. He stated:

Smith's had approached the City to receive permission the store, add employee break rooms and to redo the inside of the store. He said because of some of the concerns which had been raised, Smith's had agreed to go through the master plan process. He said a great deal of time had been spent negotiating the language of the master plan.

(See record at p. 116.) Most significantly, Mr. Barth did not contest, dispute or attempt to clarify or to change the comments made by Ms. Striffel in any way. There is ample evidence within the record that the terms of the agreement between Smith's and the City are set forth in the master plan.

10. The City has performed as it agreed in 1993 by approving the proposed expansion of the grocery store and the relocation of the loading dock. (Undisputed. See record at pp. 51.)

**II. Response To Smith's Objections To City Staff's Proposed Conclusions.**

For the convenience of the Board, City staff's proposed conclusions are as follows:

1. The Zoning Administrator did not err in determining that any proposed construction requires a master plan amendment.

2. The proposed gas station constitutes new construction within the grocery district, therefore requiring a master plan amendment.

3. The Zoning Administrator's administrative decision refusing to accept or process Smith's application for a gas station, without first seeking an amendment to the Master Plan, was appropriate and is hereby upheld.

Smith's non-specific objections to the City's proposed conclusions are merely conclusory legal arguments. The City's proposed conclusions are consistent with the Board's prior decision. If the Board adopts the findings as proposed, the City staff's proposed conclusions are appropriate and should be adopted.

### **III. City Staff's Response To Smith's Proposed Findings.**

Staff responds to the findings proposed by Smith's in its memorandum (Exhibit A) as follows:

1. Even if this finding is true, it is irrelevant. The evidence in the record clearly demonstrates that both parcels at issue in this case are currently used for the operation of the grocery store. One parcel houses the grocery store building, and the other is used for a parking lot. Both buildings are located within the grocery store district. (See record p. 5 and p. 57.)

2. No objection.

3. No objection.

4. Even if the allegations contained in paragraph 4 are true, they are irrelevant. The so-called fuel station parcel is currently used to provide parking for the grocery store and is located within the grocery store district. (See record p. 5 and p. 57.)

5. Although Smith's claims that it "volunteered", the City asserts that Smith's and the City reached an agreement regarding the process that would be required for further development within the grocery store district. (See record pp. 6, 7, 81, 116 and 166.) The City and Smith's disagree as to the substance of that agreement.

6. No objection.

7. Although the City objects to Smith's characterization that the City "refused" to adopt an ordinance, the City does not dispute the fact that there was no change made to the zoning ordinance.

8. No objection.

9. The City disputes the allegations contained in paragraph 9. If, as the Board previously concluded, the agreement between Smith's and the City is set forth in the master plan, the master plan is a written document. (See record pp. 34-57.)

10. The City objects to the allegations contained in paragraph 10. The comments of one Board member, who was on the losing side of an issue, are not a sufficient basis for creating findings. The majority of the Board found that the agreement between Smith's and the City was set forth in the master plan. (See record pp. 11 and 192.)

#### **IV. City Staff's Response To Smith's Proposed Conclusions.**

Smith's proposed conclusions do not clarify the basis for the Board's decision as requested by the Court. Instead, Smith's would simply reverse the Board's previous decision. Those proposed conclusions are argumentative, self-serving and unsupported by the prior discussion and decision of the Board.

### **Potential Board of Adjustment Action**

Pursuant to the instruction of the court, the Board should review the minutes and other documents in the record and formulate specific findings and conclusions to more clearly identify the basis for the Board's decision in this case. Once these findings and conclusions have been finalized, that information will be forwarded to the court for further proceedings.

### **Exhibits**

Exhibit A – Smith's Memorandum

Exhibit B – Board of Adjustment Staff Report of May 21, 2007

Kevin LoPiccolo  
Zoning Administrator

**Exhibit A – Smith’s Memorandum**

**Exhibit B – Board of Adjustment Staff Report of May 21, 2007**