

**MINUTES
BOARD OF ADJUSTMENT
CITY HALL COUNCIL CHAMBERS
116 W. NEEDLES AVE.
BIXBY, OK 74008
March 05, 2012 6:00 PM**

STAFF PRESENT:

Erik Enyart, AICP, City Planner
Patrick Boulden, Esq., City Attorney

ATTENDING:

See attached Sign-in Sheet

CALL TO ORDER

Meeting called to order by Chair Jeff Wilson at 6:00 PM.

ROLL CALL

Members Present: Murray King, Jeff Wilson, Darrell Mullins, Dave Hill, and Larry Whiteley.

Members Absent: None.

MINUTES

1. Approval of Minutes for December 05, 2011

Chair Jeff Wilson introduced the item and asked to entertain a Motion. Larry Whiteley made a MOTION to APPROVE the Minutes of December 05, 2011 as presented by Staff. Chair Jeff Wilson SECONDED the Motion. Roll was called:

ROLL CALL:

AYE: Mullins, Wilson, Whiteley, Hill, & King

NAY: None.

ABSTAIN: None.

MOTION CARRIED: 5:0:0

Larry Whiteley clarified with Erik Enyart that Agenda Items numbered 2 and 3 could be taken up with one (1) Motion.

2. Approval of Minutes for January 02, 2012 (Record of No Meeting)
3. Approval of Minutes for February 06, 2012 (Record of No Meeting)

Chair Jeff Wilson introduced the items and asked to entertain a Motion. Larry Whiteley made a MOTION to APPROVE the Minutes of January 02, 2012 and February 06, 2012 (Record of No Meeting) as presented by Staff. Murray King SECONDED the Motion. Roll was called:

ROLL CALL:

AYE: Mullins, Wilson, Whiteley, Hill, & King
NAY: None.
ABSTAIN: None.
MOTION CARRIED: 5:0:0

OLD BUSINESS

Chair Jeff Wilson introduced Old Business. Erik Enyart advised there was no Old Business. No action taken.

NEW BUSINESS

4. **BBOA-554 – City of Bixby.** Discussion and possible action to approve a Special Exception per Zoning Code Section 11-7A-2 Table 1 to allow a Use Unit 5 public park for property in the AG General Agricultural District.
Property located: Part of the S/2 SW/4 SE/4; The 9100 : 9300-block of E. 151st St. S.

Chair Jeff Wilson introduced the item and called on Erik Enyart for the Staff Report and recommendation. Mr. Enyart summarized the Staff Report as follows:

To: Bixby Board of Adjustment
From: Erik Enyart, AICP, City Planner
Date: Thursday, February 23, 2012
RE: Report and Recommendations for:
BBOA-554 – City of Bixby

LOCATION: – Part of the S/2 SW/4 SE/4
– The 9100 : 9300-block of E. 151st St. S.
LOT SIZE: 15 acres, more or less
ZONING: AG Agricultural District
REQUEST: Special Exception per Zoning Code Section 11-7A-2 Table 1 to allow a Use Unit 5 public park for property in the AG General Agricultural District.

SURROUNDING ZONING AND LAND USE:

North: AG; Keas Soccer Fields section of Bentley Park.
South: AG; Single-family dwellings along Riverview Rd. and 151st St. S. and an agricultural field south of 151st St. S.
East: AG; Bixby south wastewater treatment facility, Bixby maintenance building, Bixby water department building, and easterly parts of Bentley Park, all on Government Lot 8 (SE/4 SE/4 S. of Arkansas River).
West: AG, RS-3, RS-4, RD, & RT; Single-family dwellings along Riverview Rd. and 151st St. S. and residential in the Privett Addition across Riverview Rd. RD zoning per BZ-289 not yet reflected on Zoning Map; requested of INCOG 02/23/2012.

COMPREHENSIVE PLAN: Development Sensitive/Low Intensity + Vacant, Agricultural, Rural Residences, and Open Land + Community Trails.

PREVIOUS/RELATED CASES: None found.

RELEVANT AREA CASE HISTORY: (not a complete list)

BBOA-262 – City of Bixby – Request for Special Exception to allow [Use Unit 5] “Community Services, Cultural, and Recreational Facilities... (Bixby Sports Complex)” in an AG district for approximately 59 acres in Government Lot 8 (SE/4 SE/4 S. of Arkansas River) and the N. 20 Acres of the SW/4 SE/4 of Section 13, T17N, R13E abutting subject property to the north and east – included the Keas Soccer Fields section of Bentley Park, the Bixby south wastewater treatment facility, the Bixby maintenance building, the Bixby water department building, and the easterly parts of Bentley Park – BOA Approved 04/05/1993.

BACKGROUND INFORMATION:

ANALYSIS:

Property Conditions. Previously an agricultural tract, the subject property is relatively flat and contains an elevation depression. It appears to drain to the southeast, but not very well. The property is presently being graded in preparation for expanded Bentley Park use. Upon completion, the site will be graded to drain along the east and north sides to the northwest corner of the tract, where it will enter an underground stormsewer system draining to the detention pond in Bentley Park.

General. The City of Bixby purchased the subject property using monies from a 2011 General Obligation Bond approved by the voters to expand and improve Bentley Park. A Use Unit 5 public park is allowed in the existing AG district by Special Exception, which is proposed by this application.

Comprehensive Plan. The Comprehensive Plan designates the subject property as (1) Development Sensitive/Low Intensity, (2) Vacant, Agricultural, Rural Residences, and Open Land, and (3) Community Trails.

Just to the north of the subject property, centered in the Keas Soccer Fields section of Bentley Park, the Comprehensive Plan identifies an existing “Community Park.” Just to the southeast of the subject property, a “Planned Community Park” is designated. One can infer that the subject property, connecting the two designated park areas, should also be considered part of the park system.

The existing AG zoning is in accordance with the Development Sensitive and Low Intensity designations of the Comprehensive Plan Land Use Map. As a Use Unit 5 public park is allowed by Special Exception in the AG district, the proposed public park use should be considered not inconsistent with the Comprehensive Plan.

The Matrix does not indicate whether certain zoning districts would be in accordance with the Vacant, Agricultural, Rural Residences, and Open Land Land Use designation of the Plan Map. However, this Vacant, Agricultural, Rural Residences, and Open Land designation cannot be interpreted as permanently-planned land uses, and so the specific land use designation test as indicated on Page 7, item numbered 1 and page 30, item numbered 5 of the Comprehensive Plan, would not apply here.

Although not formally adopted as a part of the Bixby Comprehensive Plan, the master plan for Bentley Park dated August 16, 2011 shows that the subject property will be used for expanded Bentley Park. The City Council used the Bentley Park master plans to take action to purchase the subject property and expend bond monies to improve it. The Bentley Park master plan thus demonstrates legislative intent that the subject property be used for Use Unit 5 public park purposes, as proposed by this application.

Surrounding Zoning and Land Use Compatibility. Surrounding zoning patterns are primarily AG, RS-3, RS-4, RD, and RT.

To the north is the Keas Soccer Fields section of Bentley Park on approximately 20 acres (the N. 20 Acres of the SW/4 SE/4 of Section 13, T17N, R13E) zoned AG.

To the south are single-family dwellings along Riverview Rd. and 151st St. S. and an agricultural field south of 151st St. S., all zoned AG.

To the east is the Bixby south wastewater treatment facility, the Bixby maintenance building, the Bixby water department building, and the easterly parts of Bentley Park, all on Government Lot 8 (SE/4 SE/4 S. of Arkansas River).

To the west are single-family dwellings along Riverview Rd. and 151st St. S. and residential in the Privett Addition across Riverview Rd., zoned a mixture of AG, RS-3, RS-4, RD, and RT. RD zoning per BZ-289 is not yet reflected on Zoning Map, and has been requested of INCOG on 02/23/2012.

Staff believes that the proposed Use Unit 5 use should be compatible with surrounding zoning and land use patterns.

Staff Recommendation. For the reasons outlined in the analysis above, Staff believes that the requested Special Exception would be in harmony with the spirit and intent of the Zoning Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

Staff recommends Approval.

There being no further discussion, Chair Jeff Wilson asked to entertain a Motion. Dave Hill made a MOTION to APPROVE BBOA-554. Larry Whiteley SECONDED the Motion. Roll was called:

ROLL CALL:

AYE: Mullins, Wilson, Whiteley, Hill, & King
NAY: None.
ABSTAIN: None.
MOTION CARRIED: 5:0:0

The Board recognized former Board member Lonnie Jeffries. Mr. Jeffries approached the Board members and greetings were shared. Mr. Jeffries explained that he was moving to Tahlequah. The Board members gave Mr. Jeffries their well wishes.

5. **BBOA-555 – James Ward for First Equity Corp.** Discussion and possible action on an appeal of a building permit denial, and the interpretation on which it was based, pursuant to Zoning Code Sections 11-4-6 and 11-4-7, which permit proposed the development of an “Ice vending machine” on property in the CS Commercial Shopping Center District with PUD 50, and to allow the project development to proceed.
Property located: Lot 1, Block 1, *Jade Crossing*; 7851 E. 151st St. S.
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Chair Jeff Wilson introduced the item and called on Erik Enyart for the Staff Report and recommendation. Mr. Enyart summarized the Staff Report as follows:

To: *Bixby Board of Adjustment*
From: *Erik Enyart, AICP, City Planner*
Date: *Thursday, February 23, 2012*
RE: *Report and Recommendations for:
BBOA-555 – James Ward for First Equity Corp.*

LOCATION: – *Lot 1, Block 1, Jade Crossing*
– *7851 E. 151st St. S.*
LOT SIZE: *1 acre, more or less*
ZONING: *CS Commercial Shopping Center District with PUD 50*
REQUEST: *Appeal of a building permit denial, and the interpretation on which it was based, pursuant to Zoning Code Sections 11-4-6 and 11-4-7, which permit proposed the development of an “Ice vending machine” on property in the CS Commercial Shopping Center District with PUD 50, and to allow the project development to proceed.*

SURROUNDING ZONING AND LAND USE:

North: *IL & IM; Heavy commercial / industrial uses in Jade Crossing and Jade Crossing II along Grant St.*
South: *(Across 151st St. S.) RS-2, AG, & IL; Residential in the Jim King Addition.*
East: *IL & CS; Commercial in Spartan Family Shopping Center in Wal-Mart Stores Addition.*
West: *CS; Vacant commercial lots in Jade Crossing.*

COMPREHENSIVE PLAN: *Special District # 3 + High Intensity + Industrial Area + Regional Trail.*

PREVIOUS/RELATED CASES: *(not a complete list)*

BZ-45 – Warren Morris – Request for IH, IL, CG, & CS zoning for all of the E/2 SE/4 of this Section (80 acres, includes all of Jade Crossing) – Approved for IM, IL, and CS zoning only by the City Council 10/1976 (Ord. # 320).

BZ-101 – Warren Morris – Request for CS, RM-2, and RMH zoning for all of Jade Crossing – City Council referred matter back to Planning Commission and Applicant withdrew application on 06/21/1981.

BZ-109 – Warren Morris – Request for CS and RM-2 zoning for southerly acreage of Jade Crossing – Approved for CS zoning only by the City Council 09/08/1981 (Ord. # 447).

Preliminary Plat of ‘151 Business Park’ aka ‘151 Center’: Preliminary Plat concerning Jade Crossing / Jade Crossing II property area approved by PC 07/16/2001 and by City Council 07/23/2001 subject to hydrology issues being worked out.

Final Plat of ‘151 Business Park’ aka ‘151 Center’: Final Plat concerning Jade Crossing / Jade Crossing II property area approved by PC 03/18/2002 and by City Council 03/25/2002.

PUD 50 – Jade Crossing – Request for PUD zoning approval for Jade Crossing / Jade Crossing II property area – Approved in May, 2006 (Ord. # 940).

Preliminary Plat of Jade Crossing: Preliminary Plat approved by PC 06/19/2006 and by City Council 06/26/2006.

Final Plat of Jade Crossing: Final Plat approved by PC 10/16/2006 and by City Council 10/23/2006.

PUD 50 Minor Amendment # 1 – Request for PUD Minor Amendment approval for subject property to change the number of permitted lots to allow for six (6) as proposed by Jade Crossing II – PC approved 01/21/2008.

Preliminary Plat of Jade Crossing II – Request for Preliminary Plat approval for Jade Crossing II – Conditionally Approved by PC 01/21/2008 and by City Council 01/28/2008.

Final Plat of Jade Crossing II – Request for Final Plat approval for Jade Crossing II – Conditionally Approved by PC 05/19/2008 and by City Council 05/27/2008 and re-approved 08/10/2009 after the initial approval expired (plat recorded 09/04/2009).

BL-378 – JR Donelson, Inc. for First Equity Corporation – Request for Lot-Split approval for Lot 1, Block 1, Jade Crossing II, addressed 15010 & 15038 S. Grant St. – PC approved 03/21/2011.

PUD 50 Minor Amendment # 2 – Request for PUD Minor Amendment approval for PUD 50 to remove the maximum number of permitted lots to allow for Lot-Split per BL-378 – PC approved 03/21/2011 subject to correcting a date reference in the text as recommended by Staff.

RELEVANT AREA CASE HISTORY: (not a complete list)

BACKGROUND INFORMATION:

ANALYSIS:

Property Conditions. The subject property is a relatively flat, vacant lot in Jade Crossing. It has street frontage on 151st St. S. (State Hwy 67) and is zoned and planned for commercial use.

General. The Applicant is James Ward, Member of The Ice Guys, LLC. The property owner is First Equity Corp. The Applicant has arrangements to lease a southwestern part of the subject property for the ice vending machine use.

The Applicant submitted a building permit application which proposed to construct a “Twice the Ice” / “Ice House America” ice vending machine on part of Lot 1, Block 1, Jade Crossing.

Upon inspecting the proposed use in relation to the Zoning Code and consulting with the City Attorney, Planning Staff determined that the proposed use was an ice vending machine. The Bixby Zoning Code does not provide that this is a permitted principal use of a lot in any Zoning District. It does not fit into any land use category within Use Units 1 through 27, inclusive.

The Zoning Code does not contemplate vending machines as standalone, principal uses, as they are generally understood to be accessory uses customarily incidental to conventional principal uses. Zoning Code Section 11-7D-3.A would provide that a vending machine could be allowed as a use accessory to an allowed commercial use in Commercial districts:

“A. Permitted Accessory Uses: Accessory uses customarily incidental to a principal use permitted in a commercial district are permitted in such district.”

The **closest thing** Staff found is a Use Unit 15 “General merchandising establishment, N[ot] E[lsewhere] C[lassified]” (Zoning Code, Section 11-9-15.B). However, this contemplates a

conventional retail sales business establishment, which Merriam-Webster's Dictionary of Law defines as "c : a place of residence or esp. business with its furnishings and staff."¹ (emphasis added).

What is being proposed is a vending machine, a mechanical unit which manufactures ice and vends it. It does not appear to have any rooms in which salespersons or customers can enter or conduct business. It does not appear to have any furnishings or staff.

Staff does not believe that the original authors of the Zoning Ordinance in the late 1960s / early 1970s would have contemplated ice vending machines, which apparently date back to 2003, or not much beyond that.²

Because the Bixby Zoning Code does not provide that this is a permitted principal use of a lot in any Zoning District, Staff denied the building permit application. By this application, the Applicant is appealing the denial, and the interpretation on which it is based, to the Bixby Board of Adjustment pursuant to Zoning Code Sections 11-4-6 and 11-4-7.

The application consists of:

- The application form
- A three (3) page letter from The Ice Guys, LLC, dated 02/02/2012
- A copy of two (2) page letter from the City denying the permit, dated 01/18/2012
- Three (3) pages of a printout of an email thread pertaining to development review
- A one (1) page letter from Kathleen Cook, P.E., of Cook & Associates Engineering, Inc., pertaining to development review, dated 01/16/2012
- A one (1) page "Landscape Plan" for the site dated 01/16/201[2]

The arguments set forth in the application speak for themselves. Staff will not comment on them beyond observing that the 02/02/2012 letter appears to concede that (1) the proposed development would be a vending machine and (2) such a vending machine is not provided for in the Zoning Code ("...we did an exhaustive review of the current Bixby codes and Ordinances the potentially govern the placement and operation of vending machines and found no such ordinance that prohibited the placement of such machine..." and "...no ordinance exists that addresses Ice vending machines...").

Staff Recommendation. For the reasons outlined in the analysis above, Staff believes that the Bixby Zoning Code does not allow a vending machine as a principal use of a lot in any Zoning District. Staff recommends the appeal be denied.

Staff recommends the Applicant seek a developed commercial lot, whereby the proposed vending machine would be allowed as an accessory use, or otherwise wait until after the subject property is developed with an approved commercial use.

If the Board is sympathetic to the Applicant's cause, the proper action would be to forward a recommendation to the City Council that the Zoning Code be amended to define vending machines, provide for them to fit into one Use Unit category, and provide development standards applicable to them.

Chair Jeff Wilson asked if the Applicant was present and wished to speak on the item. Applicant James Ward of The Ice Guys[, LLC], 1402 Country Club Dr., Okmulgee, was present and stated that [The Ice Guys, LLC] was the entity seeking to develop the ice vending machine. Mr. Ward stated that he was an optometrist in Bixby, and that he was doing this as a side business. Mr. Ward stated that [The Ice Guys, LLC] had three (3) locations in Oklahoma: Vinita, Glenpool, and Sapulpa. Mr. Ward stated, "We contend that we are a vending machine." Mr. Ward stated that what was being proposed was similar to a [Coca-Cola] [vending] machine. Mr. Ward cited the [permit denial] letter he received from the City, and stated that it quoted [Merriam-]Webster's Dictionary and used the word "contemplate." Mr. Ward indicated objection to the City's use of an "extrapolated definition of what we do." Mr. Ward stated that there was no ordinance in the City Code that defined "what we can or cannot do." Mr. Ward stated that [the ice vending

¹ establishment. Dictionary.com. Merriam-Webster's Dictionary of Law. Merriam-Webster, Inc. <http://dictionary.reference.com/browse/establishment> (accessed: January 17, 2012).

² http://jacksonville.com/tu-online/stories/090805/bus_19708659.shtml

machine] would not harm the public or the City of Bixby. Mr. Ward stated that the [ice vending machine] has been received well in Sapulpa, Glenpool, and Vinita, and by the citizens in those communities.

Chair Jeff Wilson asked Applicant James Ward if there was no city ordinance that he could point to that would allow the ice vending machine. Mr. Ward responded, “No,” and stated that the only mention of “vending” in the code pertained to tobacco use, requiring people to be at least age 18 to use. Mr. Ward stated that [he and his partner] had researched the City Code and that they had the impression that an ice vending machine would be allowed. Mr. Ward indicated confusion over the “standalone” entity issue.

Chair Jeff Wilson asked if there was no State law that addressed this situation. Mr. Ward responded, “No, but there are definitions” in State law pertaining to vending machines.

Chair Jeff Wilson asked if there were State Department of Health regulations. Mr. Ward responded “Yes,” and described some health codes that applied.

Dave Hill asked where one could find freestanding Coke machines. Applicant James Ward responded “Nowhere,” but stated that it was [also] similar to an ATM machine.

Murray King asked Erik Enyart why this was not similar to an ATM machine, and noted there were several already in Bixby.

Erik Enyart stated that they were not the subject of this application. Mr. Enyart stated that he could see a parallel, but that he had not researched the ones in Bixby or made a determination on that matter.

James Ward stated that he planned to build a business in Bixby as well. Mr. Ward clarified that he intended to build a [new building] for his optometry business.

Darrell Mullins clarified with Applicant James Ward that there was no rule that allowed or prohibited ice vending machines in Bixby. Mr. Mullins indicated that the Board was not in a position to allow [an ice vending machine] where the [Zoning Code] did not provide for it.

Dave Hill asked Erik Enyart how long it would take to change the [Zoning] Code. Mr. Enyart estimated it would take about three (3) months, and stated that, normally, someone takes the [concept] to the City Council, the Council authorizes the Staff to prepare a possible amendment and set it up for a Public Hearing, the hearing is held before the Planning Commission and a recommendation is given, and then the City Council ultimately takes action on the amendment. Mr. Enyart reiterated that the entire process would take about three (3) months in the best case scenario.

Applicant James Ward stated that his application was also represented by others in attendance, including his partner Larry Hoover and Leon Martin of Ice House Oklahoma[, LLC].

Leon Martin of 5013 Mary Ann, Oklahoma City, stated that the Ice House was in 79 towns [in Oklahoma] and that they had not received any “Noes” from any town yet.

Larry Hoover of PO Box 2554, Sapulpa, expressed concern for the City of Bixby’s rejection and indicated that the City simply did not want their vending machine. Dave Hill asked Mr. Hoover if he did not believe the reasons the City Planner gave for the permit denial. After further discussion, Mr. Hoover stated that [he and his associates] had researched the City Code and, as best they could tell, the City only objected to tobacco vending machines.

Chair Jeff Wilson asked rhetorically if, under general Zoning principles, one could put in something if it was not listed in the Zoning Code, and if this would be an accessory use or simply not addressed in the Code or any law, rule, or ordinance.

Ron Kelley of 3718 E. 78th St. S., Tulsa, stated that this was platted commercial property. Chair Jeff Wilson recognized Mr. Kelley, who then signed the sign-in sheet.

Applicant James Ward stated that an ATM machine would fall into the same category as what he was proposing, and it was the same principle. Mr. Ward stated that there was an ice vending machine at the carwash in Jenks, and that Jenks permitted it, but had in their ordinances rules that they used to make the exterior of the building match the carwash.

Larry Whiteley stated that the Board did not have the authority to permit the ice vending machine if it was not written in the Zoning Code. Mr. Whiteley admonished the Applicant to go to the City Council for them to decide one way or another how to write it into the Code.

James Ward mentioned an example in another community and stated that, in that case, there was nothing else on the lot, and the ice vending machine was not accessory to anything.

Ron Kelley stated that he could provide perspective from a different angle. Mr. Kelley stated that he was the developer of the *Jade Crossing* industrial park, and stated that [he and his associates] had developed 500 lots in Bixby since 1996. Mr. Kelley stated that [he and his associates] owned commercial development land at 151st St. S. and Sheridan Rd. and elsewhere in Bixby. Mr. Kelley stated that, from his perspective, he hoped that there would be three (3) fast-food restaurants on the commercial frontage lots in *Jade Crossing*. Mr. Kelley stated that he was looking at the situation from today’s context. Mr. Kelley stated that he hoped that [the subject property] would be a \$½ Million lot, and that there would be other buildings on [those commercial frontage lots] in the future, when you look at it “from totality.” Mr. Kelley stated that, as for the category this is to fit into, he could not speak specifically to how they [interpreted] that in Glenpool, but that he knew they permitted it. Mr. Kelley stated that he worked with economic development, and that he knew that [Bixby] needed to get something going along 151st St. S. Mr. Kelley stated that he was aware that there had recently been a meeting of city planners from the area, and that it was stated then that several communities all over the metro area had permitted these, including Broken Arrow, Glenpool, and Jenks. Mr. Kelley stated that he had seen the one at the carwash in Jenks, as he had an office within a couple miles of it, and that Jenks had them paint it to match the carwash. Mr. Kelley stated that ATMs are everywhere. Mr. Kelley stated that he was looking at this “from totality,” and from an economic standpoint. Mr. Kelley

stated that someone chose [his and his associates'] site in Bixby. Mr. Kelley stated that he did not try to sell it to this group, but that this group called him up. Mr. Kelley stated that there was one in Glenpool next to the pharmacy, and there was another near his airport parking lot, a freestanding one located on Sheridan Rd. between Pine St. and Admiral. Mr. Kelley stated that he and Erik Enyart had worked together several times in the past and that they did not have a hard time getting along. Mr. Kelley stated that this was the proper zoning on a frontage lot, and that the vending machine would only take so many square feet of the lot. Mr. Kelley questioned the City's motivations for denying the permit.

Dave Hill responded that [the City] was not against this, and was taking action consistent with its Code. Ron Kelley conceded the point.

Patrick Boulden addressed Chair Jeff Wilson and asked if he could speak on the item. Mr. Wilson recognized Mr. Boulden.

Patrick Boulden introduced himself as the City Attorney for Bixby and stated that he wanted the Board to have the facts they needed in this case. Mr. Boulden stated that, if this was appealed to District Court, he would have to represent the Board, so he deliberately did not make a decision on this matter. Mr. Boulden stated that the Building Inspector was the first decider, and the Board of Adjustment was the ultimate interpreter of the Zoning Code. Mr. Boulden stated that it was incumbent upon him to not make a decision before the Board did. Mr. Boulden stated that he had talked to Erik and that Erik had acted appropriately under his advice and made a recommendation to this Board. Mr. Boulden emphasized the need to define what Use Unit the proposed use would fall into when comparing to other communities.

Leon Martin stated that practically every community defined this as belonging in a commercial district, but some defined it in an industrial district. Mr. Martin stated that, in Tulsa and Oklahoma City, it was put in C-2 or C-3 zoning, but that some communities put it in "S" as in "storage units," since the units store ice. Mr. Martin stated that this was the first time a city said it was excluded from any of those.

Patrick Boulden addressed the audience at large and asked them, "Can any of you specify what Use Unit category you think this fits into?" Leon Marin stated "retail," and Ron Kelley stated "CS."

Applicant James Ward stated that the Health Department put it into a manufacturing group, and that [he and his associates] wanted a manufacturing exemption, but that the state deemed this unique because it was automated. Mr. Ward stated that the Tax Commission saw this as retail, and that [he and his associates] had compared it to ATMs. Mr. Ward stated that there was a direct comparison – ATMs do the same thing as a [bank] teller, and that this was "the exact same thing but instead of a clerk, it is done through a vending interface." Mr. Ward stated that [he and his associates] did not understand the logic that this has to be permitted [in a Use Unit category]. Mr. Ward stated that this was ice sales, only there was a different way of being sold.

Patrick Boulden asked if the ice vending machine in Glenpool was a standalone unit, and said that the one in Jenks did not appear to be.

Ron Kelley stated that the one in Sapulpa was separate – it was on a [parcel] cutout from the corner.

Patrick Boulden and Ron Kelley clarified that they were merely speculating whether or not some of these were in fact standalone units on separate lots.

Patrick Boulden stated that the question was what was the principal use on the property – what Use Unit category this fits into. Mr. Boulden stated that an accessory use was incidental, subordinate, and customarily related to a principal use on the lot. Mr. Boulden stated that he was familiar with the Zoning Code in Tulsa, and that the Bixby Zoning Code was pretty close to the one in Tulsa. Mr. Boulden stated that[, in the Tulsa Zoning Code,] the Use Units described cannot be all-inclusive, including every anticipated use. Mr. Boulden stated that the Code describes the use, which is then followed by a long list of what [the writers] think fit into that [Use Unit category]. Mr. Boulden stated that it was not exclusive, and that the Zoning Code does not have to list every use. Mr. Boulden stated that it is incumbent upon the Board to decide what Use Unit category this would fit into.

Dave Hill asked the Applicant if they had put this [ice vending machine] in other towns, and James Ward responded affirmatively. Mr. Hill suggested Mr. Ward put this unit [that he and his associates had already purchased] in another town and go to the City Council to get them to change [the Zoning Code]. Mr. Ward expressed objection to going to the City Council, and asked what was meant by “inclusive/exclusive/no list at all.” Mr. Ward stated that there were entities that were not on that list, such as ATMs. Mr. Ward stated that it gets down to the business model. Mr. Ward stated that he had talked to Patrick and Erik and had frank discussions. Mr. Ward stated “They said one person didn’t like the colors, or the penguin on the side. If that’s the reason that got us to this point, we would appreciate candor in this regard.”

Larry Hoover stated that there were three (3) [ice vending machines] in Tulsa, and that it said “ice vending machine” on the permit. James Ward stated that [someone] had received a building permit [from Tulsa] just two (2) or three (3) weeks ago. Mr. Ward stated that another was very close to getting a building permit in Prattville, and that it would be the only thing on the lot other than an ATM machine.

Chair Jeff Wilson stated that the City Planner and City Attorney recommended affirming the permit denial, which was the Board’s first option. Mr. Wilson stated that the second option was to reverse the decision and issue the permit. Mr. Wilson stated that a third option would be to give 30 days for the Applicant to [provide evidence to support their appeal]. Mr. Wilson stated that the Applicant had an attorney on staff that could do this research, such as determining if [other communities] had permitted them on separate lots.

Murray King stated that the City Attorney had just told the Board that, just because the use was not specifically listed does not mean it is not included.

Patrick Boulden stated that, if the Board changes the Building Inspector’s decision, it was important that they identify the Use Unit for future applications.

Chair Jeff Wilson stated that the Board did not know of one [Use Unit category], and also did not know if other [communities'] Zoning Codes allowed them, or how, and also did not know if they were on separate lots in those communities. Mr. Wilson stated that the burden was on the Applicant since it was their appeal, and that, for what he had heard, they had not yet proven their case.

Ron Kelley stated that his next statement was subjective, but "We've improved in Bixby in my time here in Bixby, but that sometimes the perception manifests into reality, and that some have had the perception that it is difficult to work with [the City of Bixby]. I'm in business to attract development to the City – I admit it's subjective – but I don't like [that] perception as it's bad for Bixby. I take no issue with Erik – his job is to tell you what is in the Zoning [Code] and I have no issue with that." Mr. Kelley stated that this [ice vending machine] was relatively benign, and was approved everywhere else. Mr. Kelley stated that he did not want "rumors at the coffee shops: 'they turned down an ice vending machine and it was allowed everywhere else.'" Mr. Kelley acknowledged that he was here to make a profit. Mr. Kelley stated that other cities, such as Tulsa [developed a reputation where people say] "That's just Tulsa," and Broken Arrow was known for a time as being the most difficult. Mr. Kelley indicated Bixby had perception problems in the past, referencing a situation with an ex-Public Works Director in Bixby. Mr. Kelley stated that there would ultimately be an ice vending machine in Bixby. Mr. Kelley acknowledged that there was "nothing to hang your hat against it, and nothing to say you allow it."

Larry Whiteley asked Ron Kelley how many times he had seen [the City] deny something.

Ron Kelley stated that he was most accustomed to things being brought to this Board because someone did something wrong. Mr. Kelley stated that he had started developing over 30 years ago, and his first hearing was in the Aaronson Auditorium in Tulsa, when he was wanting to build two (2) duplexes. Mr. Kelley stated that he was very pro-Bixby, and that he was not making enough off of this development [to allow it to become a problem].

Chair Jeff Wilson referenced the sign-in sheet and recognized Brett White. Mr. White of PO Box 550, Catoosa indicated that he did not wish to speak at this time.

Chair Jeff Wilson referenced the sign-in sheet and recognized Leon Martin. Mr. Martin stated that he had already spoken.

Chair Jeff Wilson referenced the sign-in sheet and recognized Kathleen Cook. Ms. Cook of 121 E. College, Broken Arrow stated that she was available for questions of a technical nature, or questions on the site. Ms. Cook stated that she had prepared the proposed site drawing, including the parking spaces, etc., and that everything was up to code. Ms. Cook stated that she was surprised when she turned everything in and the permit was then denied.

Chair Jeff Wilson acknowledged that the Board members had received copies of a fax memo from the Sanditen Companies, opposing the application. Mr. Wilson read the message from the memo. Mr. Wilson asked the Applicant if he had received a copy of the memo, and James Ward indicated that he had not. Mr. Ward clarified with Mr. Wilson that Jolene Sanditen-Stephens was

the owner of the shopping center, which contained a grocery store. Mr. Ward speculated that she was protesting because the grocery store also sold ice. Mr. Ward jokingly remarked that, for the record, he was opposed to any new optometrists going in Bixby.

Kathleen Cook asked if the Board would allow this as “retail with a Variance for no employees or furniture.”

Darrell Mullins indicated he was not supportive of an argument that appealed to precedents. Mr. Mullins stated that there were a lot of things in Bixby that do not meet code, but a lot of things were built before the codes were put in place. Mr. Mullins indicated he did not find the ATM comparison argument persuasive.

Patrick Boulden stated that, if the Applicant had time, they could research these questions. Mr. Boulden asked the Applicant if this was agreeable to them, or if they were looking for an ‘up or down vote’ tonight. James Ward stated that [the Continuance] would be “Plan B for us.” Mr. Ward stated that he had received an email from Erik Enyart that indicated the City would approve the permit, but in his email he wrote that his interpretation was subject to final approval by the City Attorney.

Erik Enyart addressed Chair Jeff Wilson and offered to respond to some of the statements made. Mr. Enyart stated that he had been keeping track of a few “loose ends” and would respond to them. Mr. Enyart referenced the Applicant’s statement about his email. Mr. Enyart stated that the Applicant had submitted a printout of an earlier[, December 02, 2011,] email from him, which printout was included in the agenda packet. Mr. Enyart stated that, in that earlier email, he had in fact indicated that the proposed use might fall into a Use Unit 15 category as a “General merchandising establishment, N[ot]E[lsewhere]C[lassified].” Mr. Enyart stated that, upon closer inspection, the terms used did not support what was being proposed, and he did not believe that the writers of the Zoning Ordinance in the early 1970s anticipated an ice vending machine or intended that item to include vending machines, which were then, and are now, recognized as accessory uses. Mr. Enyart stated that, per his research, it appears that ice vending machines only date back to about 2002 or 2003.

Erik Enyart stated that, despite what some had previously said, there was in fact an ordinance dealing with this use. Mr. Enyart quoted Zoning Code Section 11-7D-3.A:

“A. Permitted Accessory Uses: Accessory uses customarily incident to a principal use permitted in a commercial district are permitted in such district.”

Erik Enyart stated that the City would permit this if it was accessory to a developed lot, like a [Coca-Cola] machine at a grocery store or a Wal-Mart.

Erik Enyart referred to a statement by Ron Kelley and stated that he knew for a fact the City Council would not appreciate any suggestion that the City was not “developer-friendly.” Mr. Enyart stated that this case demonstrated the need to recognize the existence of ice vending machines in the Zoning Code, and that, if brought to their attention, the City Council would most certainly authorize the Staff to work on an amendment to permit them in some way or another.

Erik Enyart indicated favor for the suggestion of Continuing this case for a month or so to allow him to research what other communities have done as far as interpreting this use in their codes, and that, based on their input, he could see where those interpretations would correspond to similar categories in the Bixby Zoning Code.

After further discussion, Chair Jeff Wilson asked how the Board would proceed if the case was Continued one (1) month. Erik Enyart responded that there were two (2) possibilities: (1) the Applicant [and/or] Staff could bring back a large body of information to allow the Board to make a decision as to what Use Unit category an ice vending machine should fall into, and the City would permit it based on that decision, or (2) after all this information is collected and reported to the Board, the Board may say, “This is all fine and good, but the City of Bixby Staff was correct, and the denial is upheld, and the next step is to ask the City Council to write provisions into the Code specifically for this and future cases.”

Chair Jeff Wilson reminded the Applicant, “You filed the appeal, you have the burden to show us” why your appeal should be approved. Mr. Wilson stated that, so far, the Applicant “hasn’t carried the burden.” Mr. Wilson stated that, for that many communities with that much experience, there [should be something that could be brought to bear on this situation]. Mr. Wilson noted that, so far, the Applicant has been talking in generalities, and that, if they gathered more information for their case it may help support it.

Larry Whiteley advised the Applicant, “If we vote on this tonight and deny it, that’s the end of it. If you take a little longer and do this [research],” it wouldn’t necessarily end tonight.

Chair Jeff Wilson stated that it would also be helpful for them to research ATMs.

Larry Hoover indicated objection to the research suggestion and asked rhetorically, if the City Attorney cannot even answer whether ATMs [can be allowable principal uses], how the Applicant could be expected to [shoulder the burden]. Mr. Hoover stated that every city does things differently.

Leon Martin stated that some cities call them storage, some utilities, etc. Mr. Martin stated that the International Building Code classification gets outside of those “retail” or whatever descriptions.

James Ward asked, “If we did this research – look at other cities – would you consider it as a part of that appeal... within the current ordinance – consider putting this into” [a Use Unit category]? Chair Jeff Wilson indicated this was a possible outcome.

Chair Jeff Wilson suggested that this could be brought back to a Special Meeting, if the Applicant could collect the information quickly enough, and asked the Applicant about how long they expected the research to take. Leon Martin responded that he could have it in about a week. After further discussion regarding dates, Erik Enyart stated that it would be most convenient if it was Continued to the next regular meeting, as it will take time to collect the information, for Staff to receive it, analyze it, and update the Staff Report, put the agenda packets together and mail

them, and as many communities are not as responsive as Bixby when it comes to providing information on request.

There being no further discussion, Chair Jeff Wilson made a MOTION to CONTINUE BBOA-555 to the April 02, 2012 Regular Meeting. Larry Whiteley SECONDED the Motion. Roll was called:

ROLL CALL:

AYE: Mullins, Wilson, Whiteley, Hill, & King

NAY: None.

ABSTAIN: None.

MOTION CARRIED: 5:0:0

ADJOURNMENT

The meeting was Adjourned by acclamation at 7:20 PM.

APPROVED BY:

Chair

Date

City Planner/Recording Secretary