

Board of Adjustment Minutes



**City Council Chambers, Lower Level
May 8, 2007**

Board members Present:

Dina Higgins, Chair
Garrett McCray
Dianne von Borstel
Roxanne Pierson

Board members Absent:

Craig Boswell - Excused
Mike Clement, Vice Chair- Excused

Staff Present:

Gordon Sheffield
Jeff McVay
Jim Hash
John Wesley

Larry Mades
Jason Sanks
Christopher Sykora
John Nedin
David Healey

Others Present:

Steve Buckles
Michael Ginsburg
Natalie Hassler
Laurel Ginsburg
Maria Gardeta-Healey
Daryl Burton
Laurie Buckles
Maria Sykora
Robert Emmelkemp

The study session began at 4:30 p.m. The Public Hearing meeting began at 5:30 p.m. Before adjournment at 7:15 p.m., the following items were considered and recorded on Board of Adjustment CD #2.

Study Session 4:30 p.m.

- A. The study session began at 4:30 p.m. The items scheduled for the Board's Public Hearing were discussed.
- B. Corrections to the Minutes from that 04 April Board of Adjustments Hearing Gordon Sheffield, Zoning Administrator, stated a correction to the minutes is needed regarding BA07-016 Condition Number 10. This condition changed to read: "A solid wall will be added to the north, east, and south sides of the covered arena to shield the light from the adjoining neighbor. In regards to the open arena the applicant shall not use any lighting that is not approved by the property owner of parcel number 136-08-003-Z as described by the Maricopa County Assessors Office". The board agreed to accept the change.

Public Hearing 5:30 p.m.

- A. Consider Minutes from the April 10, 2007 Meeting A motion to approve the minutes with the changes noted by Gordon Sheffield was made by Boardmember von Borstel and seconded by Boardmember McCray. Vote: Passed 4-0
- B. Consent Agenda A motion to approve the consent agenda as read was made by Boardmember McCray and seconded by Boardmember von Borstel. Vote: Passed 4-0

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Case No.: BA07-012

Location: 2751 E University Road

Subject: Requesting 1) a Development Incentive Permit (DIP); 2) a Special Use Permit for an automobile service station; and 3) a Special Use Permit for a carwash, to allow the redevelopment of an auto service station and carwash in the C-2 zoning district.

Decision: Approved with conditions

Summary: This case was on the consent agenda and not discussed on an individual basis.

Motion: It was moved by Boardmember McCray, seconded by Boardmember von Borstel to approve this case with the following conditions:

1. *Compliance with the site and landscape plans submitted, except as modified by the conditions below.*
2. *The drive aisle adjacent to the south property line shall have a minimum width of twenty feet (20').*
3. *A minimum five-foot (5') landscape setback shall be provided from the seventy-five foot (75') future right-of-way for University Drive*
4. *A minimum five-foot (5') landscape setback shall be provided from the sixty-five foot (65') future right-of-way for Lindsay Road south of the identified driveway entrance.*
5. *A Sign Agreement shall be required for any monument signs located within the public utilities and facilities easements adjacent to University Drive and Lindsay Road.*
6. *No Improvements or signs shall be allowed within the right-of-way to be dedicated with this development.*
7. *Future cross access shall be provided to future developments to the south of site.*
8. *Compliance with all requirements of the Design Review Board.*
9. *Compliance with all requirements of the Building Safety Division in the issuance of building permits.*

Vote: Passed 4-0

Finding of Fact:

- 1.1 The applicant has proposed to raze and rebuild the current AM/PM convenience store and fueling station, as well as intensifying the use with the addition of six fueling dispensers and a self-service automated carwash facility.
- 1.2 The applicant requested and was approved for an alternative dedication of 10 feet and a 10-foot public utilities and facilities easement (PUFE) along University Drive and a 10-foot PUFE along Lindsay Road.
- 1.3 No site improvements will be allowed within the required dedications or PUFE's and a Sign Agreement will be required for any monument signs within the PUFE's.

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- 1.4** Primary concerns relate to the elimination of landscape setbacks adjacent to University Drive and Lindsay Road. The dedication requirements for University Drive and Lindsay Road significantly affect the size of the parcel and the degree to which the plan can comply with current Code development standards.
- 1.5** Conditions of approval require that five-foot setback reduction be transferred to provide a five-foot setback from the future right-of-way for University Drive. Including the 10-foot PUF, this would result in an effective setback of 15-feet.
- 1.6** Conditions of approval require that a five-foot reduction in the drive aisle adjacent to Lindsay Road and the parking stalls adjacent to the east building elevation be transferred to provide a five-foot setback from the future right-of-way for Lindsay Road south of the identified driveway entrance. Including the 10-foot PUF, this would result in an effective setback of 15-feet.
- 1.7** Additionally, conditions of approval require the drive aisle adjacent to the south property line to have a minimum width of 20 feet to accommodate vehicle stacking for the carwash and solid waste vehicles servicing the trash enclosure.
- 1.8** The project meets the minimum eligibility requirements for consideration of a DIP, including: 1) compliance with the definition of a by-passed parcel; 2) the proposed development is consistent with the General Plan and proposes an allowed use within the C-2 zoning district; 3) the deviations requested are commensurate with surrounding development; 4) the deviations requested are necessary to allow development on the site; and 5) the development has received initial review and will require approval by the Design Review Board for compliance with the intent of the Design Guidelines.
- 1.9** The adopted conditions of approval allow the redevelopment of a non-conforming site with a permitted use that improves conformance with current development standards.
- 1.10** Existing automobile service station has a SUP and the proposal would continue the same activity.
- 1.11** Related to the carwash, staff notes that the site is in an area of non-residential development and the carwash would be located approximately 300 feet from the nearest residential development.

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Case No.: BA07-017

Location: 1441 East Broadway

Subject: Requesting an interpretation of the Mesa Zoning Ordinance regarding the use of portable storage containers in conjunction with an office building in the O-S district.

Decision: Continued to the July 10,2007 hearing.

Summary: This case was on the consent agenda and not discussed on an individual basis.

Motion: It was moved by Boardmember McCray, seconded by Boardmember von Borstel to approve this case with the following conditions:

Vote: Passed 4-0

Finding of Fact: N/A

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Case No.: BA07-018

Location: 62 North May Road

Subject: Requesting a variance to allow a carport to encroach into the required side yard in the R-4 zoning district.

Decision: Approved with conditions

Summary: Mr. Venzor, applicant, presented the variance request and explained the events that led to the requested variance.

In response to a questions from Boardmember McCray, Mr. Venzor explained that he made the carport longer but not wider then it's original size and that narrowing the carport by five feet it will make the space unusable.

Mr. Sheffield explained that the minimum width for a parking space is nine feet same as the width of this proposed carport if reduced and that the proposed carport will have plenty of room for door swing if the wall where open as intended with the construction of a carport.

In response to a question from Chair Higgins, Mr. Venzor agreed to the carport with a minimum setback of five feet .

Motion: It was moved by Boardmember Pierson, seconded by Boardmember von Borstel to approve this case with the following conditions:

- 1. Compliance with the site plan as submitted, except as modified by the conditions below.*
- 2. Reduction of the southern side of the carport to a maximum width of nine-foot four-inches with a overhang that will be a maximum width of two feet past the outside of the exterior wall.*
- 3. Compliance with all requirements of the Building Safety Division regarding the issuance of building permits.*

Vote: Passed 4-0

Finding of Fact:

- 1.1 During the period of time prior to the raze and rebuild of the new carport, the previous structure was considered to be legal but non-conforming and was allowed to remain in its present configuration as long as no improvements or intensification ocured.
- 1.2 The demolition and reconstruction of the carport was completed without the benefit of building permits.
- 1.3 Current Code requires developments in multiple residence districts consisting of one or two dwelling units to provide side yard setbacks of ten feet.
- 1.4 Due to the proximity to the property line, current Building Code would require fire-rated construction including a 30-inch parapet.
- 1.5 A five-foot setback will still permit a nine-foot wide parking space and carport cover.
- 1.6 Staff recommends that in order to meet minimum fire construction standards of the City of

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Mesa Building Code, the structure will have to be reduced to within five-feet of the property line. If the carport remained at three feet from the property line.

- 1.7 Special circumstances exist because of the location of the building and fixed width of the land parcel.
- 1.8 Approval of this variance will allow this property to be used in a manner consistent with other lots with similar zoning.

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Case No.: BA07-019

Location: 1040 E. Main Street

Subject: Requesting a Substantial Conformance Improvement Permit to allow the redevelopment of a restaurant in the C-3 zoning district.

Decision: Continued to June 12, 2007

Summary: Oscar Tinajero, applicant, presented the Substantial Conformance Improvement Permit (SCIP) request and explained that the site is very small, and the existing building is only approximately 800 square feet. He further explained that he has leased the site and is currently unable to open the restaurant. The business will include catering services and will have eight employees.

Jeff McVay, a member of the Planning Division Staff, explained that this case is a good example of SCIP and that Staff is prepared to work with the applicant to resolve the concerns related to the drive thru and request the case be continued to work on resolving the issues.

Mr. Tinajero handed out an alternative site plan for the Board and Staff to review. He stated that this site plan showed a revised drive through with the window being on the north side of the building and proving thirty feet on the north wall and thirty-two feet on the east wall for stacking before reaching the sidewalk at Main Street.

Staff advised the members of the Board that 140 feet of stacking distance is currently required for a drive thru per City of Mesa Code.

In response to a question from Boardmember McCray, Mr. Tinajero stated that the drive thru is necessary to make the restaurant work, as there will only be two tables available for dining.

Chair Higgins commented that the current project description talks about the ability to phone in orders. Mr. Tinajero explained that you would be able to do both, call in orders and drive up.

Chair Higgins stated that she is leaning towards a 30-day continuance in order to work out the issues.

Boardmember McCray added that the applicant should remain open to the idea of not having a drive thru window at this site due to the size and restrictions of the property. Mr. Tinajero said that he would remain open to the option and had discussed with Staff the idea of drive up intercoms comparable to a "Sonic", which staff had recommended.

Motion: It was moved by Boardmember von Borstel, seconded by Boardmember Pierson to continue this case until the June 12, 2007 so that the applicant and staff can work on the site issues related to the SCIP.

Vote: Passed 4-0

Finding of Fact: N/A

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Case No.: BA07-020

Location: 2302 E. Harmony Ave

Subject: Requesting a variance to allow a patio enclosure to encroach into the required rear yard in the R1-7 zoning district.

Decision: **Applicant has withdrawn request.**

Summary: This case was on the consent agenda and not discussed on an individual basis.

Motion: It was moved by Boardmember McCray, seconded by Boardmember von Borstel to approve this case with the following conditions:

Vote: Passed 4-0

Finding of Fact: N/A

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Case No.: BA07-021

Location: 627 W 8th Street

Subject: Requesting a Substantial Conformance Improvement Permit (SCIP) to allow the redevelopment of a public assembly hall in the R-2 zoning district.

Decision: Approved with conditions.

Summary: This case was on the consent agenda and not discussed on an individual basis.

Motion: It was moved by Boardmember McCray, seconded by Boardmember von Borstel to approve this case with the following conditions:

1. *Compliance with the site and landscape plans submitted, except as modified by the conditions below.*
2. *The sidewalk connecting Eighth Street to the facility that parallels the entrance drive shall continue down the western side of the parking lot connecting the rear storage building with the main facility.*
3. *Applicant shall meet minimum standards for the drive aisle width.*
4. *Sidewalk shall be constructed of a durable surface such as pavers or stamped concrete and held to grade to provide useable drive surface as well as pedestrian access.*
5. *Corner shall be widened to provide a radius that is not so severe.*
6. *Landscaping along the northern and eastern borders of the property shall be provided to Code.*
7. *Compliance with all requirements of the Building Safety Division in the issuance of building permits.*

Vote: Passed 4-0

Finding of Fact:

- 1.1 The applicant has noted that compliance with current Code requirements would preclude the use of the property as intended by the owner.
- 1.2 The applicant has applied for the SCIP to gain relief from the current setback and parking lot landscape requirements.
- 1.3 The sidewalk along the drive aisle be constructed at-grade and of a durable surface such as pavers or stamped concrete that will withstand vehicular traffic and differentiate the pedestrian route.
- 1.4 The drive aisle corner entering the parking area should be widened to provide a radius with a more sweeping design.
- 1.5 Concrete filled bollards should be installed adjacent to the 905 square foot building in the southwest corner of the site and a minimum drive width of 24 feet adjacent to parking and 20 feet elsewhere should be provided.

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Case No.: BA07-022

Location: 2200 and 2300 Blocks of South Country Club Drive, West side, South of Baseline Road

Subject: Requesting an interpretation of Mesa Zoning Ordinance Section 11-18-8(M) with regards to the application of supermajority voting requirements for City Council approval of a Council Use Permit in the M-1 zoning district.

Decision: ***Uphold and confirm*** the interpretation of the Zoning Administrator, and thereby deny case BA07-022.

Summary: This request involves an appeal of a Zoning Administrator interpretation regarding §11-18-8(M) of the Zoning Ordinance. This section of the Zoning Ordinance governs the processing and related procedures for all applications reviewed and recommended, or reviewed and decided by the Planning and Zoning Board. Paragraph (M) of this section specifically deals with circumstances involving protests filed against these applications. The application of this paragraph to requests for Council Use Permits is the primary subject of this appeal.

Last February, the applicant requested that the Zoning Administrator make three interpretations with regard to a pending application for a Council Use Permit. The three questions are as follows:

- 1) Is the City's listing of Council Use Permits as being eligible for the three-quarter (3/4) supermajority vote requirement permissible under Arizona Revised Statutes (ARS), or does this listing exceed the authority given to the City by way of the State's enabling statute, in particular, ARS §9-461 through 9-463?
- 2) Does the three-quarter (3/4) supermajority vote requirement for City Council approval apply to Council Use Permit applications?
- 3) If the supermajority vote requirement does apply to a Council Use Permit application, does the measurement of the 150 foot radius protest area begin with the side or rear property line of the case site that is coterminous with the street right-of-way line, or does the measurement of this protest area begin with the right-of-way line on the opposite side of the street from a side or rear property line, directly across from the proposed site?

Zoning Administrator Gordon Sheffield explained that this appeal is strictly an interpretation of the Zoning Ordinance provisions related to the requested Council Use Permit.

Mr. W. Ralph Pew stated his name and address and indicated that he would be the legal counsel speaking on behalf of the property owner, "Lowe's Home Improvement Inc."

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Mr. Pew requested that the Board of Adjustments take under consideration that there are three separate questions and he would like to request that there would be separate votes taken on each question that was interpreted.

Mr. Pew stated that with the number of Board members that were present tonight, it was putting the applicant into a very difficult place. This is because of the requirement to have four concurring votes to overturn the Zoning Administrator's decision.

In light of this, Mr. Pew requested that if any Boardmember disagree with the Zoning Administrator interpretation, the Board of Adjustment consider continuing this case to a special meeting when additional Board members could be present, and offered the dates of Monday, May 14th or Wednesday, May 16th, both of which are prior to the May 21st City Council meeting. The date is critical, he said, because of the understanding between Mr. Pew and the Council regarding the zoning case continuance. In agreeing to continue this case to May 21, the Council indicated that they would decide the related Council Use Permit and Site Plan Modification case at that meeting, and that they would not be open to further continuances.

Mr. Pew explained that the questions before the Board relate to super majority voting requirements, which are permitted under state statute for rezoning cases. He questioned the City's ability to carry over these provisions to administrative matters such as Council Use Permits. A super majority vote requires six out of seven City Council members to vote in favor of a particular request in order for the project to be approved.

Mr. Pew indicated that his first question (is the use of protest related supermajority vote requirements for Council Use Permits permitted under Arizona Revised Statutes?) involved a detailed legal analysis. However, Mr. Sheffield had stated that the question is outside of this Board's jurisdiction, and is therefore not eligible for appeal. He explained his belief that Mesa has gone beyond the authority given to it by the State Legislature to require three-quarter, supermajority vote of City Council in the event of certain protest requirements being met by neighbors opposing a case. Continuing, he noted for the record that he discussed his belief that the Board of Adjustment does have the jurisdiction to consider this issue, as well as have the authority to determine if §11-18-8(M) of the City Code exceeds the authority granted to the City by the State Legislature. He also stated that the reason for his belief that the City had overstepped. His reasoning included the fact that a Council Use Permit is an administrative act and not a Legislative act, and his belief that the super majority vote is meant to be reserved for Legislative policy functions, therefore, administrative acts are not eligible for that kind of extra voting requirement.

Mr. Pew next relayed his reasoning regarding the other two questions that related to the Mesa Zoning Code, which is "Does the three-quarter (3/4) supermajority vote requirement for City Council approval apply to Council Use Permit applications?" He explained that the super majority vote originally related strictly to zoning amendments. Mr. Pew states that as the original language read it did not include the wording: "Council Use Permits, Site Plan

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Review and Site Plan Modification” as the ordinance language does now. He explained that their position on the matter of language being added to the ordinance at a later date is very simple. As he read the language of that paragraph, he concluded that it related to four types of actions that can be subject to a super majority vote, is limited to the single group of protestors described as “Those within the lots included in the proposed zoning Council Use Permit etc (not owners of property located outside of the request site). Therefore, he argued that protests related to those four types of actions can only apply when the owner(s) of the site in question file the protest.

Mr. Pew then posited that if City Council did intend, historically, to assure that the later additions of these other processes to §11-18-8M, then they could have simply added a sentence at the end of the paragraph that stated: “If the super majority vote stated above applies to these specific types of actions.” But the Council did not choose to add that language. Therefore, he argued, it was not the Council’s intent to make these additional zoning process eligible to be affected y the supermajority voting requirements. Based on this, he asked the Board to determine that a Council Use Permit is not subject to three-quarter supermajority vote requirement when specific protest related opposition from neighboring property owners is present.

Mr. Pew, concluding his statement regarding the second question, indicated that there is a well-established principal of law that states “when there is an ambiguity or uncertainty about the Zoning Ordinance, the uncertainty is to be construed in favor of the property owner.”

Mr. Pew next argued the third question involved in this appeal, which asked: “Where does the protest radius of 150 feet begin for sites that abut a street or a street corner? He pointed out the use of the word “either”, and described a dictionary definition of the term, which included: “a clear choice between two possibilities”. If the language was meant to say more then two choices, then the sentence should of read “Among” but it didn’t. He then explained that the measurement should begin on the opposite side of the street only in situation where the protest came in front of the lot, not the side or rear of the parcel. Concluding, he asked the Board to accept the interpretation of Sec 11-18-8(M) as he had described it.

No else appeared to speak in support of the case. Fourteen people were present to speak in opposition.

Of the people that spoke in opposition of the request, their points included:

1. Taking away property rights.
2. The radius should “collapse” the width of the street and who owns the right-of-way
3. Mr. Pew’s use of an “Eleventh hour” challenge to the zoning case
4. Attempt to use the Board of Adjustment as a court of law
5. Allowing it to go to Council for a vote
6. Belief in the system
7. Their land use rights are being placed in jeopardy
8. Possible claims arising because of Proposition 207 and the potential

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detrimental impacts of the Lowe's project on their properties.

In rebuttal, Mr. Pew's explained that the law requires all avenues to be exhausted, and that the only option of his client is to go through these processes.

Jim Smith, Assistant City Attorney, then described the true definitions of the words "Either", "Or" and "Either-Or". He also indicated that the actual ordinance language isn't to collapse the street but describes a "Jump" of the street right-of-way when measuring the 150 foot radius, and that the language clearly favors the interpretation of the Zoning Administrator.

Boardmember McCray voiced his concerns that semantics are being used to limit reasonable protests from affecting the vote of a zoning related decision. He was hesitant to make any decision that would limit how legitimate protests affect a Council vote, or to otherwise limit protest related actions of a citizen of Mesa.

Boardmember Pierson stated the board had an obligation to uphold the protest related requirements in place to help protect citizens. Boardmember von Bostel agreed as did Boardmember Higgins.

Motion: It was moved by Boardmember McCray, and seconded by Boardmember Pierson, to affirm the interpretation of the Zoning Administrator regarding the application of Sec 11-18-8(M) of the Zoning Ordinance to Council Use Permits and the measurement of a protest related radius, which would have the effect of denying this case.

Vote: Passed 4-0

Finding of Fact:

- 1.1 The language of the Sec 11-18-8(M) is clearly intended to include Council Use Permits as among those zoning processes that are eligible to invoke protest related supermajority vote requirements for approval of zoning related applications.
- 1.2 The legislative history of when Council Use Permits were added to the list of zoning processes eligible for protest related supermajority vote requirements makes clear City Council's intent to include Council Use Permits among those applications that could invoke supermajority vote requirements if specific protest conditions exist.
- 1.3 The language of how to determine the total protest area of one side of a case site clearly intends to use a 150' radius away from a case site. On any side or rear property line of a case site that does not touch a street, the 150' begins at the property line. On property lines that abut a street, the 150' radius begins "opposite" or across the street from the case site, where the property line of the lot "across from the case site" coincides with the street right-of-way. This applies to any property line of a case site that abuts a street.

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Respectfully submitted,

Jeffrey McVay, AICP
Senior Planner
Secretary, Board of Adjustment

Minutes written by Jim Hash, Planner I

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