

MINUTES BOARD OF ADJUSTMENT DECEMBER 20, 2017

Minutes of the regular hearing of the Board of Adjustment, of the City of Tempe, which was held at the Council Chambers, 31 East Fifth Street, Tempe, Arizona.

STUDY SESSION 5:30 PM

Present:

David Lyon, Vice Chair

James Frazey

Kevin Cullens

John 'Jack' Confer (Alternate)

John Puzauskas

Steve Abrahamson, Principal Planner

Karen Stovall, Senior Planner

Diane McGuire, Administrative Assistant II

Absent:

Jan Sell, Chair

Richard Kausal

Albert Dare, Sr. (Alternate)

David Naugle

**David Naugle was absent from the study session, but attended the regular session.*

**Kevin Cullens arrived at 5:41 PM to the study session. Mr. Lyons brought him up-to-date on what had been discussed prior to his arrival.*

There were 9 interested citizens present at the study session.

- Copies of a neighborhood petition of opposition, as well as an additional e-mail of opposition, received after the BOA packet distribution, were given to all Board members.
- The brochure listing the City of Tempe 2018 public hearing dates for the Hearing Officer and the Board of Adjustment was distributed to the Board members in attendance.
- Steve Abrahamson reviewed the procedures for making a motion and how that motion may be presented.
- Discussion amongst the Board members was as follows:

Vice Chair Lyon: Does anyone want to raise any items for discussion regarding the case?

Board Member Confer: My understanding is that we are here to discuss the landscape buffer and the variance that was granted for that.

Karen: Correct.

Board Member Confer: We are not discussing the use of the property or a use permit, it is specifically for the landscape buffer variance?

Karen: Correct.

Board Member Confer: There are a lot of letters in opposition but they are not pertinent to this case, are they? This is basically eight feet of land that we are dealing with. That is the sole issue here, right? It is only about eight feet of land, it's not whether or not the site is a proper site for a car wash?

Steve Abrahamson: That is correct.

Vice Chair Lyon: We are here to decide if the Hearing Officer made the proper decision regarding the variance.

Board Member Confer: So, in short, it has nothing to do with the use itself?

Vice Chair Lyon: Any other thoughts or questions about procedure or what we are here to discuss?

Board Member Puzauskas: I have another comment. They took it down (referring to the gas station). The old gas station and the convenience store is gone. That means that something is going to happen there. It is either going to be a building or a vacant lot or something. Did you all know that the building is gone?

Karen: Yes, the City of Tempe was aware. To my knowledge they obtained a demolition permit.

Board Member Puzauskas: They did? So, they followed the rules, regulations, and procedures.

Board Member Puzauskas: What is the Ordinance number for the Board of Adjustment and our criteria to make a decision? What is the number of that?

Vice Chair Lyon: Mr. Puzauskas you mean for appeals?

Board Member Puzauskas: Yes. I just wanted to refresh my memory.

Steve Abrahamson: It all stems back to Section 6-309 of the Zoning and Development Code. Is that all you needed?

Board Member Puzauskas: Yes. So, Board of Adjustment has a list of things that we can base our decision on whether to approve or over turn prior decisions. I am looking for that list.

Steve Abrahamson: With a variance, you have four requirements or tests that you need to meet.

Board Member Confer: Aren't those tests in the letter from the attorney? Didn't they list each one of those tests?

Karen: They did and those are also listed in the Hearing Officer Staff Report.

Board Member Confer: I'm not inferring that the letter is incorrect, I just wanted to read the actual code myself and compare it to what you had in the letter.

Board Member Puzauskas: Will someone be here from the City to talk about why the variance was granted?

Steve Abrahamson: We will be here to explain any questions regarding the variance.

Karen: The Hearing Officer granted the variance.

Board Member Puzauskas: I understand but I would like to know if a member of the City will be present to answer my questions.

Steve Abrahamson: Karen was the assigned planner on the case, so if you have any questions regarding the variance, please direct them to her. Karen is going to start the proceeding tonight and introduce the case. At the end of the presentation, if you have any questions, you may direct those to her at that time.

Board Member Frazey: This case is a little bit different. Usually it is the other way around. Usually the variance is not approved. Is that right?

Steve Abrahamson: Well if you can complete the tests then a variance is approved. The question here tonight is that the appellant feels that the request does not pass the tests. So that is going to be much of the discussion tonight, I imagine.

Board Member Frazey: Is the right of way required for the bus route?

Karen: No, it would be dedicated after this case, if it were to be approved. The dedication occurs prior to issuance of permits.

Board Member Frazey: Has there ever been a variance on the property?

Karen: No. When the gas station was constructed over 25 years ago the landscape buffer was not required at that time.

Board Member Frazey: So, the landscape buffer is required by Community Development currently?

Karen: Yes.

(Mr. Kevin Cullens did not arrive until 5:41 PM and Mr. Lyons brought him up to date on what had been discussed prior to his arrival.)

REGULAR SESSION 6:00 PM

Present:

David Lyon, Vice Chair

James Frazey

Kevin Cullens

John 'Jack' Confer (Alternate)

David Naugle**

John Puzauskas

Steve Abrahamson, Principal Planner

Karen Stovall, Senior Planner

Diane McGuire, Administrative Assistant II

(David Naugle arrived at 6:03 PM after the hearing had begun and was given the additional case material.)

Absent:

Jan Sell, Chair

Richard Kausal

Albert Dare, Sr. (Alternate)

There were 15 interested citizens present at the regular session.

Hearing convened at 6:00 p.m. and was called to order by Vice Chair David Lyon.

Vice Chair David Lyon introduced the Board members present at tonight's public hearing.

On a motion by Board Member James Frazey, seconded by Board Member John Puzauskas, the Board by a vote of 6-0 approved the Board of Adjustment Minutes for November 15, 2017.

Vice Chair David Lyon introduced City staff.

THE BOARD DISCUSSED THE FOLLOWING CASE(S):

Request an appeal of the October 3, 2017 Hearing Officer's decision to approve a variance to reduce the required landscape buffer from the street sidewalk for a maneuvering lane from 20 ft. to 11 ft. -8 in. for **QUICK QUACK CAR WASH (PL170240)** located at 5201 South McClintock Drive. The appellant is Rose Law Group, PC.

Karen Stovall, Senior Planner, gave an overview of the case:

- Ms. Stovall presented a location map which indicated the zoning and location of the property in question.
- She noted that this is an appeal of the Hearing Officer's decision made on October 3, 2017 to approve a variance to reduce the required landscape buffer from the street sidewalk for a maneuvering drive lane from 20 feet to 11 feet 8 inches for Quick Quack Car Wash located at 210 south McClintock Drive.
- The applicant is proposing a 3,349 s.f. automatic car wash building at the southeast corner of McClintock and Baseline.
- The existing gas station would be demolished and replaced with the proposed care wash tunnel and self-serve vacuum canopies.
- The staff report packet includes the Hearing Officer staff report, hearing minutes, the letter of appeal, and correspondence received leading up to and following the October hearing.
- Note that Board members present at this hearing have been given copies of petitions that were received following the completion of the staff report.

Ms. Stovall asked if the Board had any questions for her at this time

Board Member Frazey: From the very beginning, there was an understanding from the City to relocate the bus bay. When was that agreement made, and what is the purpose of the relocation of the bus bay?

Karen Stovall: That comment was made by Public Works at the first preliminary review of the project. The reason was to assist bus passengers by moving the stop closer to the intersection, so if they were on a bus north or south bound on McClintock they would not need to go as far to reach a bus east bound on Baseline.

Board Member Frazey: A question regarding the preliminary site plan, is that when the owner of the property was first notified that there would be the dedication of the right-of-way for the bus bay?

Karen Stovall: The preliminary site plan review submittal was made by the applicant, not necessarily the property owner. Staff's communication was with the applicant, not the property owner. I do not know when the owner was made aware of that.

Vice Chair Lyons: Ms. Stovall could you clarify then when did you communicate the need for the bus bay to the applicant?

Karen Stovall: The preliminary site plan review comments occurred in February of 2017.

Vice Chair Lyons: So those comments were the first mention of it to the applicants?

Karen Stovall: Yes.

Board Member Puzauskas: After the site plan was developed, there was a request for a variance on the 20 foot setback. Was there any discussion about if you could still build the facility with the 20 foot setback? Is there an engineering type solution to keeping that?

Karen Stovall: That is a question that you will need to ask the applicant, or developer of the site. Staff evaluated the variance request. We are not going to see, if an applicant can redesign the site to see if something else can work.

Board Member Puzauskas: In the process of that discussion, when they came to you, was there any discussion about that?

Karen Stovall: The question did come up, if it could be reduced in length. It did end up being reduced in length. I do not have the exact dimensions.

Board Member Frazey: Another question regarding the right-of-way. There is a comment here that was made that the applicant made the dedication in return for the variance. Is that accurate?

Karen Stovall: The city has no control over if a variance is approved. The right-of-way dedication was requested from the applicant by Public Works. The applicant determined that they could not meet that dedication without applying for the variance. Again, the City does not approve or deny variances; that is done by the Hearing Officer.

The appellant, Rose Law Group, was represented by Attorney Court Rich. Rose Law Group was representing the interests of Michael Pollack as well as the surrounding neighborhood in opposition to this request.

Attorney Rich: Thank you Chairman and Commissioners. For the record, my name is Court Rich and I am with Rose Law Group on behalf of the appellant. On my way here today, I was able to connect with Mr. Abrahamson. He indicated and reiterated the City's policy about if a member is absent, a continuance can be granted. You sit as judges here today in this case, and when you are before a court, if judges cannot be present, they have either a judge sit in or they wait until all the judges can be present. The fact that there are less of you here today, doesn't change the number of votes we need to prevail in this case. In this instance, I guess I would ask, as I told staff I was going to, in keeping with the City policy that we be granted a continuance under the circumstances. I would also note that we were handed a copy of the Board of Adjustment organizational rules from the City Code, and it does indicate that when a member is unable to attend, that an alternate member shall serve at the hearing. I just wanted to make sure that there is no deficiency here. I do not believe that an alternate member is here, or has even asked to be here. I think your bylaws require that. I hope you don't hold this against me, if we go forward with this case. I'm happy to present the case, but I would like to have the full Board of judges in front of me, if I have that opportunity.

Vice Chair Lyons: Well that is certainly understandable, the math is clear. So, I have received some instruction from Steve Abrahamson, which tells us that we are capable of proceeding with four (4) as a quorum. That would require that all members of the Board voted in the affirmative, four (4) votes in the affirmative are required for a motion to pass. However, our appellant has every right to ask for a continuance, which we can consider.

Attorney Rich: Chairman I would just like to reiterate, this is something that I was not aware of until reading the Code itself. I think legally that it says that an alternate shall serve if someone is absent. So, I'm not sure that you could hear this case now, but again, I believe that we need advice from the City Attorney. I'll leave it at that.

Board Member Puzauskas: Is there a time issue relative to hearing this case?

Vice Chair Lyon: The case has already been continued due to lack of posting, the issue here is whether the actual decision by the Hearing Office was valid.

Vice Chair Lyons: Not being a lawyer myself, I will refer to City staff. Mr. Abrahamson would you be able to comment on that?

Steve Abrahamson, Principal Planner, referred to the City of Tempe's Zoning and Development Code, Section 1-300, Paragraph C, which states:

'The Board of Adjustment shall consist of 7 regular members and 2 alternate members. Whenever regular members are unable to attend or must decline due to a conflict of interest, the alternate members shall serve at the Board hearings.'

'A quorum consists of 4 members of the Board of Adjustment. The concurring vote of 4 members of the Board of Adjustment shall be necessary to act on any matter on its agenda, except that consent agenda items may be approved or continuances administratively granted as provided for in this section. In the event that Board members are not sufficiently available to make a quorum, one staff member is authorized to act as an alternate member on consent agenda items only, and only to the extent that their presence makes a quorum. Robert's Rules of Order shall govern any other motion.'

Mr. Abrahamson explained to those present that Chair Sell had excused himself from tonight's public hearing as he had a conflict of interest. Board member Kausal had made the decision not to attend due to personal reasons and his Board term ends as of tonight's public hearing. Mr. Confer is present, and he serves as an alternate member to the Board.

Mr. Abrahamson then conferred with Chad Weaver, Director for Community Development, who was present and seated in the audience. He returned to the dais to state that Mr. Weaver had clarified that it is the decision of the Board as to whether to hear a case or to continue a case.

The Board indicated that they wished to proceed and hear this case.

Attorney Rich presented a power point presentation to the Board highlighting the following points of discussion:

- The variance test is strict and requires strict compliance with 4 tests:
 1. Requires special circumstances applicable to the property.
 2. Requires that strict application of the code will deprive such property of privileges enjoyed by other properties.
 3. Shall not constitute grant of special privileges.
 4. Special circumstances may not be self-imposed by the property owner.
- Variance is purely a legal issue – case law is clear that no variance should be granted here.

Test #1 – Special circumstances:

- The 10 ft. right-of-way dedication is not 'special' rather it is simply required by code.
- Engineering Design Criteria, Pedestrian, Bicycle, Transit Design Criteria Section B (1):
- 'Development of parcels located at the far side of arterial to arterial and arterial to collector intersections shall be required to dedicate minimum easements of 9 ft. by 27 ft. for transit shelters and 11 ft. by 175 ft. for bus bays per the City's exaction policy.'
- This parcel is not a unique size, shape or configuration; nearby parcels are similar.
- Nearby parcels are similar. (Photographic aerials of nearby parcels were provided to the Board members by Attorney Rich.)
- Attorney Rich stated that this request failed to meet the requirement of Special Circumstances, and referred to a case entitled Pawn 1st versus Jachimek – Arizona Supreme Court 2017. He indicated his opinion that this was not unique or special on this block.

Test #2 – No Deprivation of Privileges:

- Other design would fit on the property (lot is larger than most other car wash lots 32,107 s.f.)
- He stated that the lot is larger than most other car wash lots) and referred to the following with aerial depiction & site plans:
 - Classic Car Wash (33,106 s.f.)
 - 3 Minute Car Wash (20,201 s.f.)
 - Clean Freak Car Wash (26,250 s.f.)
 - Quick n Clean Car Wash (29,185 s.f.)
- Attorney Rich stated that this request failed to meet this requirement as other designs would fit on the property; the site can easily be used for numerous uses; and being located on the corner is a benefit, not a burden.

Test #3 – Granting the Variance Clearly Creates Special Privilege:

- Code requires all property owners to provide the landscaping.
- Granting this variance would create a special privilege to an ordinary parcel.
- Attorney Rich stated that due to the above, this request failed to meet Test #3.

Test #4 – Need for Variance Is Clearly Self-imposed:

- The applicant knowingly submitted a site plan that simply doesn't work.
- Attorney Rich referred to the comment(s) of Hearing officer David Williams on 10/3/17:

“The dedication came at the time of application. It wasn't known and it prohibited application. It became known at that time. I believe that is reasonable enough hardship for this case. They are basically caught after the submittal or upon the time of submittal is my feeling and therefore I don't feel it is self-imposed.”
- Attorney Rich indicated that, in his opinion, that the due to the following facts, this request fails Test #4:
 - a) Preliminary Review commends on Conceptual Site Plan on February 16, 2017 told Quick Quack that the dedication was needed.
 - b) Emails about it with staff in March.
 - c) Another deficient Preliminary Site Plan submitted in May.
 - d) Staff again tells Quick Quack its preliminary design is deficient in June.
- Attorney Rich stated that despite the above, the applicant submitted another site plan on July 24, 2017, knowing that it simply doesn't work at this location. Other locations were available. Every design does not have to work on every site, the applicant can build it smaller or build it different.

Attorney Rich concluded his power point presentation stating that this variance request should be rejected as:

- No special circumstances apply.
- There is no deprivation of privileges.
- Granting this request clearly creates a special privilege.
- Clearly self-imposed.

Attorney Rich asked if any of the Board members had any questions.

Board Member Frazey: The need for the bus bay at this specific site, in your opinion does not create a special circumstance?

Attorney Rich: Yes, that is correct, that does not create a special circumstance. Your City Code indicates where your bus bays will be, and requires them, it is just part of being in that location. The thing you should consider, is if you believe that this creates special circumstance, then every single applicant with a bus bay would be back here claiming that this creates special circumstances. When every arterial and every arterial collector intersection must have these, based on City Code, I just don't see how you can find that it is a special circumstance.

Board Member Puzaukas: If this variance was denied, and the developer came back with a new design for the site, would that be okay?

Attorney Rich: One issue is that they need a use permit for this, and they don't even have that from City Council. At this point in time, that issue is not settled. Certainly, if they do not need a variance, we wouldn't be complaining that the variance is wrong. If they designed it so that it worked with the site, it would relieve them of many of their issues.

Vice Chair Lyons: I would like to address a question to Ms. Stovall. It is my understanding that you were the Hearing Officer on this case?

Karen Stovall: No, the Hearing Officer is a contracted individual, not a City employee. I was the planner for the case, and I wrote the staff report for the variance application, and presented the case at the Hearing Officer hearing.

Vice Chair Lyons: Thank you for clarifying. I would like for you to re-approach the podium to answer a few more questions (referring to Ms. Stovall).

Vice Chair Lyons: Ms. Stovall, so there are four arguments which we have heard. With regard to these four tests, our appellant has said that the bus bay does not create a special circumstance because they are common. That this does not create a special provision because car washes can be built on smaller sites. This would convey a special privilege because they would be allowed to have a smaller landscape buffer. Lastly, this is self-imposed because they knew about this condition. Would you respond to those remarks and in your estimation, how does this case weigh against those measures?

Karen Stovall: I would just like to point out that the intent of this appeal hearing is to consider whether or not the Hearing Officer made an error in his decision to approve the variance. I would like to make that statement. It sounds to me that you are requesting information about why staff made a recommendation of approval for the variance. I can go through the staff report that was written addressing each item of criteria, is that what you would like presented?

Vice Chair Lyons: If you could do that in an abbreviated fashion.

Karen Stovall:

- In the staff report we have noted that, due to the requested right-of-way dedication, that the depth of the property is being reduced by 10 feet in order to accommodate the bus pull out. The dedication for the transit improvement, that has been requested by the City, creates a special circumstance applicable to the property.
- The second one is whether the strict application of the code deprives the property of privileges enjoyed by other properties in the same classification and the same zoning district. The right-of-way dedication is being requested of this particular development. Along the north and south sides of Baseline elsewhere in the area, the half-streets right-of-way will remain at 55 feet. So, this specific property in this specific area is having this hardship imposed upon it by the City's request for right-of-way dedication.
- The third criteria, the adjustment authorized shall not create a grant with special privileges inconsistent with the limitations on other properties in the vicinity and zone in which the property is located. There are a range of parking and maneuvering setbacks along Baseline Road and granting of that variance would not create conditions that are inconsistent with other PCC-1 properties in the vicinity. We surveyed, using aerial photos, commercial properties in the area and other properties in the area which do not have a landscape buffer from the back of sidewalk of 20 feet as required by our current code.

- The last criteria is that a variance may not be granted if the special circumstances applicable to the property are self-imposed by the property owner. This right-of-way dedication is being requested by the City of Tempe. It is not something that the property owner is requesting.
- That is our evaluation.

Ms. Lindsay Shube of Gammage & Burnham, representing the applicant, Michael Clark of Identity Mutual LLC, who was present in the audience, presented the following power point presentation substantiating the request:

- An aerial map indicating the surrounding uses in locations near the proposed Quick Quack project site.
- Photographic depictions of existing site conditions looking SE from McClintock Drive and Baseline Road.
- A site/landscape plan, as well as a landscape rendering looking SE from McClintock Drive and Baseline Road.

Ms. Shube stated that this variance request does meet all the criteria necessary for approval. She made the following points:

Test #1 – That Special Circumstances are applicable to the property, including its size, shape, topography, location or surroundings.

- Ms. Shube stated that this approval criteria was satisfied, as the City is requiring a 65 ft. right-of-way dedication, whereas all other properties at this intersection only provide 55 ft.
- The required ROW dedication for transit improvements creates a special circumstance applicable to this property.

Test #2 – The strict application of the Code will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district.

- Ms. Shube stated that this approval criteria was satisfied, as the subject property is the only property at this intersection required to dedicate 65 ft. of total ROW.
- Had the City not required the dedication of ROW for a bus bay, Quick Quack could have developed without a variance – just like the other developments at this intersection.

Test #3 – The adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is located.

- Ms. Shube stated that this approval criteria was satisfied, as a range of landscaping, parking and maneuvering setbacks currently exist along Baseline Road.
- The variance does not create a condition inconsistent with other properties zoned PCC-1 in the vicinity.

Test #4 – A variance may not be granted if the special circumstances applicable to the property are self-imposed by the property owner.

- Ms. Shube stated that this approval criteria was satisfied, as it was a City imposed requirement to dedicate additional ROW for a bus bay.

In conclusion, Ms. Shube stated that:

- The variance satisfies approval criteria.
- City staff recommended approval.
- The Hearing Officer approved the variance.

Ms. Shube also noted that:

- A Development Plan Review had been submitted for site and landscape plans as well as building elevations and materials.
- The variance request had been processed to allow a car wash in the Planned Commercial Center Neighborhood District (PCC-1).
- A use permit request had been submitted to allow surface parking in excess of 125% of required parking. 14 spaces allowed; 19 spaces (includes 16 vacuum stations) proposed.
- Quick Quack was founded in 2004 and has 32 locations throughout Utah, Texas, California and Colorado.
- Quick Quack is recognized as an environmentally friendly and sustainable business, active in the community.
- 100% of the water is recaptured and filtered for recycling.
- Quick Quack builds an underground water treatment plan on every facility.

Ms. Shube presented several photographic simulations indicating the proposed street elevations & landscaping:

- Looking south from Baseline Road.
- Looking east from McClintock Drive.
- Looking southwest from Baseline Road.
- Looking southeast from McClintock Drive & Baseline Road.
- Looking northeast from McClintock Drive.
- Looking northwest from adjoining commercial center.

Ms. Shube also shared with the Board members that the use permit request, which had been presented to and approved by the Development Review Commission on December 12, 2017, had been found to satisfy all the use permit criteria for this project.

Vice Chair David Lyon noted that he had received 2 speaker request cards and called those individuals to the podium:

Ms. Sylvia Orioli, Tempe resident, spoke in opposition to this request.

What I would like to do today is to add another dimension to this whole variance approval. One of the things that I see missing, is that there is a neighborhood that is very close to this Quick Quack Car Wash that is being permitted at our corner. When I was at the Hearing Officer meeting, Mr. Williams was glad to see several of us there, and wanted to hear more from the neighbors. So, what we did is we had an opposition. We wrote letters to Council. We let our voices be heard that this is not good for our neighborhood. This is just not a good fit for that property. Yes, they got their use permit, but please think about us. Not only are there many people in our neighborhood that oppose this request, but we did a change.org online petition to try to stop the use permit. We had 82 people that were in support of not having a carwash on the southeast corner of Baseline and McClintock. So, please, when you consider your decision remember that this is a very important decision for the neighbors. We are being every affected by this and all the changes in Tempe. From three lanes to two lanes on McClintock, has caused many problems. It is a public safety issue for us. We do not want this. You need to add the other dimensions of this which is people. Lots of people showed up to the DRC meeting last week when they were approved. I counted 34 people that were in opposition with letters. Not all of them got up and spoke, but please consider us when you make your decision. The neighbors would rather have something different that would bring us together at this location, and I speak for many neighbors. I can show all of you all of the numbers that we have to help you with your decision. Thank you for your consideration.

Jamie Burt, spoke in support of this request.

I am the owner of this property in question. First of all, I just really needed to clarify for the record, I think it is item number four that Mr. Rich brought up, that we as owner had known about this bus bay issue in 2014 when another applicant wanted to lease that property. I know this was an assumption, because it was in the public record that the City communicated to the applicant that a bus stop was required. That had never been communicated to us, so we didn't know until March 6th of this year, when we received a forwarded email from the developers from the City containing the comments from the first site plan review submittal. That is when we learned of it, and we were very surprised and a little dismayed. So, I just wanted to correct that, because it continues to be said and it is not a fact. Thank you for hearing me.

Attorney Rich: I would like to reiterate that there has been talk of the other parcels not having the same right-of-way requirements, but actually they do. When and if they come in to redevelop the property, that will apply to them as well. That is the rule of the game today, that is the City law and it applies to everybody. So, the fact that the caddy-corner property right now does not have the allocation for a bus bay, when they redevelop that property they will have to dedicate that right-of-way and then what is the scenario? Now, you have already established that this is not a special circumstance, when it is just the City Code being applied. I would ask you to look at what happens when they do dedicate this ten feet. Well, they become a parcel that is 190 feet deep from the roadway. I have shown you a stack of photos of parcels that are about that size, and that are significantly smaller than the site in question throughout the City. So even the application of this rule, if you thought it was being applied specially to them, which it is not, it doesn't leave them in a unique scenario. It is not a special circumstance. Finally, I would like to address could you do this design if you had to accommodate the full setback and landscape. I was frankly surprised by the answer, which was we would look at it. Well, test number two requires that a strict application of this City Code will apply to the owner of privileges which apply to other properties. They haven't made that case. If they are not even telling you that they can't even do this, we don't even know if they are deprived of what they want to do anyway. To wrap up, these landscape requirements are not just there for good looks, they are a safety factor as well. They are between the sidewalk and driving lanes. There are going to be a lot of cars driving thorough this property, and this setback should be maintained. I haven't heard any reason why the setback should not be maintained in this case, and there is nothing special about the property that requires this variance to be issued.

Board Member Confer: Mr. Rich we had a lot of information before the meeting. It is hard to digest everything that was handed to us. One of the things that you had in your presentation was a quote from a recent case. I did not see that in your original letter to the City. What was the point of that statement? Can you reiterate that again?

Attorney Rich: This is in regard to test number one, that is when I raised that issue. In a case called Pawn First v. Jachimck which was decided this year by the Arizona Supreme Court. It stated that the properties unique characteristics create exceptional hardship or difficulties. I ask you to look at what happens when you do dedicate these 10 feet? It becomes a basic square property that is 190 feet deep from the road and about 30,000 square feet. It doesn't create an exceptional difficulty.

Board Member Naugle: I have some thoughts on this. The City has a Code, and in this particular situation, I am going to adhere to that Code for a couple of different reasons. The first is we have the immediate property owner in opposition, we have the neighborhood in opposition, and then regarding the bus pull out I have one pet-peeve with the City of Tempe. Bus transportation that does not have pull outs does not create a smooth traffic flow throughout the city.

Vice Chair Lyons: Number one I stood on the DRC as well and I heard Quick Quacks case last Tuesday. There were quite a few people that came to speak on the case and I counted 45 people. There were others who made comments who did speak. My numbers said that there were 31 that opposed and 14 that were in favor. We heard a wide variety of opinions on what effect this may have on the neighborhood. Our purpose here tonight does not allow us to consider if the car wash on the site is a good idea. We are here to decide if that variance was granted appropriately. Not what use is going on the site, or how we feel about it.

Board Member Puzauskas: What concerns me is whether or not the site can be redesigned to accommodate the setback. I just haven't gotten the right answer yet if the site can be redesigned to accommodate that.

Board Member Cullens: My main concern is whether we will set the precedence that any property that requires a bus pull out becomes a special circumstance, they do not have to apply to the Code. I think that the landscape buffer is there for safety reasons, and I would feel uncomfortable setting a precedence that it is not that large of a safety concern.

Board Member Frazey: One of the questions is, is this a special circumstance with this bus bay? This bus bay requirement is going to be there on this site, and other sites, because it is a part of the Code.

MOTION NO. 1

Board Member Confer made a motion to deny the appeal and uphold the Hearing Officer's decision to approve the variance; Board Member Naugle seconded the motion.

VOTE: 3 -3

MOTION FAILED

Vice Chair Lyons: At our DRC meeting last week, we actually heard from a number of people that this site is too small for a carwash. We heard emphatically that this site is squeezing in a carwash and is far too small. It is very interesting to hear now that the site is plenty big for a carwash. It brings me back to the point that it is not up to us to be the judge of the size of a lot that a business needs to operate. It is my belief that the owners will try to maximize their site. It is not a matter of could something be done here that is different than what is being proposed, it is a matter of does the applicant have some reasonable right to request this variance. I will refer back to the opening statement, the Board of Adjustment's function is to grant relief where a literal enforcement of the Code would result in a property hardship. It is up to us to decide what that means, and if that is the case here tonight. I believe that it is the case. I like landscape, I like trees, but in my view, it does restrict how much of the property is useable. As you heard, there are a number of properties in the area which have modified setbacks in the PCC-1. To me, it is a special circumstance.

Board Member Cullens: Based upon your statement, do you feel that any location required by Code to have a bus bay is then considered to have a special circumstance, because a greater easement must be provided?

Vice Chair Lyons: I wouldn't go as far as making it a blanket statement, but I could see how that could very frequently be the case. I believe that it is our job not to figure out the exact literal interpretation of the Code, but to understand what their purpose is, and if they are being applied correctly. Our purpose is to determine if this is an acceptable reason to uphold a variance.

MOTION NO. 2

Board Member Naugle made a motion to approve the appeal and overturn the Hearing Officer's decision to approve the variance; Board Member Cullens seconded the motion.

VOTE: 2 – 4

Board Members approved: (Board Members Cullens & Naugle)

Board Members dissented: (Vice Chair Lyon, Board Members Frazey, Confer & Puzauskas)

MOTION FAILED

MOTION NO. 3

Board Member Confer made a motion to deny the appeal and uphold the October 3, 2017 Hearing Officer's decision to approve a variance to reduce the required landscape buffer from the street sidewalk for a maneuvering lane from 20 ft. to 11 ft. -8 in. for **QUICK QUACK CAR WASH (PL170240)** located at 5201 South McClintock Drive.

Board Member Puzauskas seconded the motion.

DECISION:

Appeal was denied and the October 3, 2017 Hearing Officer's decision to approve a variance to reduce the required landscape buffer from the street sidewalk for a maneuvering lane from 20 ft. to 11 ft. 8 in. for **QUICK QUACK CAR WASH (PL170240)** located at 5201 South McClintock Drive was upheld.

VOTE: **Appeal was denied by a vote of 4 to 2.**
(Board Members Naugle and Cullens dissenting.)

Steve Abrahamson made the following announcements:

- The next Board of Adjustment hearing is scheduled for January 24, 2018.
- The terms of Chair Jan Sell and Board Member Richard Kausal are complete as of December 2017.

Board Member James Frazey made a motion to adjourn tonight's public hearing; Board Member David Naugle seconded the motion. Motion was approved by a vote of 6 – 0.

There being no further business the hearing adjourned at 7:29 p.m.

Prepared by: Diane McGuire, Administrative Assistant II
Reviewed by:



Steve Abrahamson, Principal Planner

SA:dm