



BOARD OF ADJUSTMENT
MARICOPA COUNTY, ARIZONA
 205 W. Jefferson Street, Phoenix, Arizona
 and by GoToWebinar

MINUTES
June 15, 2023

CALL TO ORDER: Chairman Loper called the meeting to order at 10:00 a.m.

MEMBERS PRESENT:

In-person
 Mr. Greg Loper, Chairman
 Ms. Suzanne Klapp (arrived @ 10:04 a.m.)

GoToWebinar
 Mr. Craig Cardon
 Ms. Fern Ward (left @ 10:50 a.m.)

MEMBERS ABSENT: Ms. Heather Personne, Vice Chair

STAFF PRESENT:

Mr. Tom Ellsworth, Planning & Development Director
 Mr. Darren Gérard, Planning Division Manager
 Mr. Matt Holm, Planning Supervisor
 Mr. Adam Cannon, Senior Planner
 Ms. Paola Jaramillo, Planner
 Mr. Martin Martell, Planner
 Mr. Joseph Mueller, Planner
 Mr. Nick Schlimm, Planner
 Ms. Rosalie Pinney, Recording Secretary

COUNTY AGENCIES:

Mr. Wayne Peck, County Attorney
 Mr. David Anderson, Business Engagement Manager, OET
 Mr. Martin Camacho, Technical Team

ANNOUNCEMENTS: Chairman Loper made all standard announcements.

AGENDA ITEMS: BA2023018, BA2023031, BA2023019, BA2023026, BA2023030, BA2022035

CONSENT AGENDA

BA2023018	Sweethome Investing LLC	District 4
Applicant:	Tammie Ott, Sweethome Investing LLC	
Location:	APN 503-34-405 @ 23016 W. Park View Rd. – 231st Ave. & Peak View Rd., in the Surprise area	
Request:	Variance to permit:	
	1) Proposed rear setback of 30’ where 40’ is the minimum permitted per MCZO Article 503.4.3.	

BA2023031	Augusta Investments Property	District 4
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Applicant: Brendon Adcox, Augusta Investments, LLC
Location: APN 503-32-520 @ 29218 N. 254th Ave. – 251st Ave. & Dixileta Dr., in the Surprise area
Request: Variance to permit:
1) Proposed north side setback of 29’ where 30’ is the minimum permitted per MCZO Article 503.4.2

Mr. Gérard presented the consent agenda.

Chairman Loper asked if anyone from the public wished to speak on the consent agenda. None.

BOARD ACTION: Member Cardon motioned to approve the consent agenda, BA2023018 with condition ‘a’, and BA2023031 with condition ‘a’. Member Ward second. Approved 3-0. Ayes: Cardon, Ward, Loper.

BA2023018 condition;

- a) Variance approval establishes a 30’ southwest setback line from the 65 LDN noise contour line within and for the eastern portion of APN 503-34-405.

BA2023031 condition;

- a) Variance approval establishes a 29’ north setback line from the delineated Military Airbase and Ancillary Military Facility Overlay Zoning District boundary line within and for the southwestern portion of APN 503-32-520.

Chairman Loper noted Member Klapp joined the hearing.

REGULAR AGENDA

BA2023019 Applicants: Location: Request:	Freeman Property (Cont. from 5/18/23) Keith & Robin Freeman APN 201-15-134 @ 24025 N 87 th Ave. – 87 th Ave. and Calle Lejos, in the Peoria area Variance to permit: 1) Lot width of 107’ where 120’ is the minimum permitted per MCZO Article 602.5.2	District 4
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Mr. Mueller presented BA2023019 and noted the subject property appears to have been created in 1986, in a minor land division that split the property from the lot south. This followed an approved zone change request that changed the zoning of the subject parcel and the parcel to the south to R1-18 from RU-43. The required 120’ foot lot width requirement would have been the same at the time the existing single-family residence (SFR) was constructed, which first appears in aerials around 1987. Staff suspects the SFR was properly permitted, although due to the age of the residence staff was not able to confirm. The applicant is now seeking the variance in order to obtain zoning clearance on a building permit for an accessory structure. The structure meets all setbacks and only needs relief from the non-conforming lot width. Staff has found that while the parcel has existed in its current configuration for almost 40 years there is no peculiar condition facing the property creating a hardship. The property is relatively flat and that the nonconforming lot width appears to be the result of an unregulated lot split. The applicant has failed to demonstrate that the peculiar condition is not self-created in the line of title because the lot existed in the current configuration, albeit with an existing residence, prior to the current owner taking possession of the property.

Mr. Keith Freeman, the applicant said they purchased the property in 1991 and he had no idea 30 years later there would be a problem to build a structure. After he went to the zoning office he ordered the steel building, because he thought they were good. He asked the Board to approve his variance request.

Chairman Loper asked if anyone from the public wished to speak on this case. None.

Chairman Loper said with these undersized lots it is better they are utilized than to remain vacant. He has no issue with this request.

BOARD ACTION: Member Cardon motioned to approve BA2023019 with condition 'a'. Member Klapp second. Approved 4-0. Ayes: Cardon, Klapp, Ward, Loper.

- a) Variance approval establishes a 107' lot width for APN 201-15-134.

BA2023026	Gardens of Sun City	District 4
Applicant:	Youssef Matta/Cunningham	
Location:	APN 230-04-917 @ 17225 N. Boswell Blvd – Palmeras Dr. & Boswell Blvd, in the Sun City area	
Request:	Variance to permit:	
	1) Proposed sign setback of 0' where 20' is the minimum permitted per MCZO Article 1402.501.1.5.	

Ms. Jaramillo presented BA2023026 and noted the variance request is for a proposed sign setback of zero feet on the west portion of the parcel where 20 feet is the minimum permitted. The applicant is proposing to remove the existing sign and placing a new sign closer to Boswell Drive. Staff notes there is an option to locate the sign within the private driveway median tract, maintaining the required 20-foot front yard setback. Staff recommends denial as the applicant has failed to demonstrate that the strict application of the Maricopa County Zoning Ordinance to the subject property has caused undue to physical hardship that prevents the reasonable further development of the property.

Mr. Youssef Matta, the applicant said the current location of the sign is causing a hardship not being seen with new staff and residents.

Member Klapp said staff's recommendation was to have the sign placed in the driveway median, and asked if that will work. Mr. Matta said it is a good idea, but there are currently palm trees there and they would have to be removed. Their proposed location would be better in order to save the trees.

Chairman Loper asked if anyone from the public wished to speak on this case. None.

Chairman Loper said good signage is important and he supports the request.

BOARD ACTION: Member Cardon motioned to approve BA2023026 with condition 'a'. Member Ward second. Approved 4-0. Ayes: Cardon, Klapp, Ward, Loper.

- a) Variance approval establishes a 0-foot sign setback along the western street line of APN 230-04-917.

BA2023030	Mercado Property	District 2
Applicants:	John Escalera, John Escalera Designs	
Location:	APN 219-43-627 @ 25826 N. Lago Ln. – Forest Rd. & Four Peaks Blvd., in the Rio Verde area	

Request:

Variance to permit:

- 1) Proposed rear setback of 17' where 25' is the minimum permitted per MCZO Article 604.4.3

Mr. Schlimm presented BA2023030 and noted the property owners are proposing to build a 400-square foot, 2-car garage on the south side of the existing residence. There is already an existing garage attached to the home. The local HOA is not allowing the owners' children to keep their two vehicles parked in the driveway for an extended period and they are proposing a second garage. This new garage would encroach eight feet into the required rear yard of the property. The owners had originally proposed to build a detached garage, this would have been allowed per MCZO Article 1106.2. However, the HOA will not allow a detached garage per community CC&Rs. The HOA is stipulating their approval on connecting the garage to the primary residence by way of a pergola, effectively rendering it an attached structure. To accommodate the new garage, a setback variance would be required, as the garage would not otherwise fit within the lot's building envelope. The driveway access to the home from Lago Lane is along the northwest side lot line. Due to the unusual orientation of the driveway and residence, the entrance to the existing garage faces toward the west corner of the lot, where the side yard and rear yard intersect. For this reason, any additional garage would need to be located toward the rear of the lot. If the entrance to the garage faced toward the north instead of the west, there would be sufficient room for an additional 20' x 20' garage without encroaching on setbacks. But given the actual conditions, finding a suitable location for the new garage entirely within the building envelope without blocking the existing garage entrance becomes difficult. Measurements made on the site plan suggest it could be done, but it would require removing a portion of the home's existing balcony. To avoid excessive alterations to the residence, and to adhere to HOA requirements, the owners want to reduce the rear setback. Staff notes that HOA regulations do not create an undue physical hardship. If not for the HOA requirements, physical development of a detached garage would be completely feasible without the pergola. The garage as proposed would be a detached structure, and thus a variance would not be necessary. The peculiar condition created by the orientation of the residence and existing garage is self-created in the line of title, as the residence was developed in this manner by then-owners in 1984. Staff notes that no public comment has been received on the request. Based upon what the applicant has submitted and the staff analysis, staff finds that the request fails to meet the statutory test for variance approval.

Chairman Loper said if it wasn't for the breezeway and the HOA request, they wouldn't need a variance. Mr. Schlimm said that is correct. Detached accessory structures are allowed in the required rear or side yard as long as they don't take up more than 30 percent of the yard. Chairman Loper asked if the pergola requires a permit if it is under 200-square feet. Mr. Gérard said it is attached so they would need a permit.

Mr. John Escalera, the applicant said this a unique lot with topographical challenges. There is a hardship in developing this lot to add two additional parking spaces, and staff's suggestions are not feasible. To move the garage door to the north face they would have to tear out the existing garage slab and create a new opening and this would cause extensive excavation of dirt. The HOA approved that it be attached by the pergola. He asked the Board to approve his request. They are 17 feet from the property line and there are no neighbors to the south only the golf course fairway.

Member Klapp asked if the property owner own the driveway. Mr. Escalera said yes, they just can't park cars on it per the HOA.

Chairman Loper asked if anyone from the public wished to speak on this case. None.

Member Klapp said the applicant is in a pickle and she is in support of this variance request.

BOARD ACTION: Member Klapp motioned to approve BA2023030 with condition 'a'. Member Cardon second. Approved 4-0. Ayes: Cardon, Klapp, Ward, Loper.

a) Variance approval establishes a 17' south setback line for APN 219-43-627.

BA2022035	Harnett Property	District 2
Applicants:	Ralph Pew, Pew and Lake PLC and Eric Spry, Spry Architecture	
Location:	APN 219-24-184 @ 8912 E. Range Rider Tr. – Range Rider Tr. and Hawes Rd., in the Mesa area	
Requests:	Variance to permit:	
	1) Proposed front setback of 20' where 40' is the minimum permitted per MCZO Article 503.4.1.a and;	
	2) Proposed rear setback of 30' where 40' is the minimum permitted per MCZO Article 503.4.3 and;	
	3) New hillside disturbance of 1,165 sq. ft. outside the lot's buildable area where hillside disturbance is prohibited outside the lot's buildable area per MCZO Article 1201.6.1.1	

Mr. Mueller presented BA2022035 and noted the parcel is of a unique flag shape as result of unregulated land divisions. Mr. Mueller said on the screen, the lot is shown with the southern lot line to the left, and the shaded areas represent an access easement on the southern portion of the property and future right-of-way (ROW) reservation area adjacent to the northern lot line (but not on subject property). There are non-vehicular access easements on the western and northern lot lines, negating setback impacts of additional street frontage. The front of the lot is considered to start at the northern terminus of the access easement, which is where the 40' front yard setback is assessed. The subject property is currently vacant, and the applicant is seeking the construction of a single-family residence and detached garage. The applicant has worked with staff extensively to mitigate many challenges facing the parcel, such as getting a reduction to ROW reservation area on the northern portion of the property, creating a non-vehicular access easements (NVAE) to ease accessory structure setback burdens, and creating an access easement along the skinny "pole" portion of the lot to negate lot width issues, the location, orientation, and size of the proposed structures still require the three variance requests. Staff has not determined there to be a peculiar condition facing the property in that while hillside is present on the parcel, it is not an unusual geographical condition in this area. While the hillside may shift development east a large portion (approximately 20,000 sq. ft.) of the lot's principle building envelope does not contain defined hillside. The applicant has failed to demonstrate that the peculiar condition is not self-created in the line of title because the unusual shape of the parcel existed prior to the current owner taking possession of the property.

Chairman Loper said they don't get credit for that distance of the pole portion of the flag lot, and asked how far it is from the roadway. Mr. Mueller said that is correct, it is about 200 feet.

Mr. Ralph Pew said he is here representing the property owner. We did reach out to the neighbor to the southeast and he had no objections. A hardship can mean a hurdle or obstacle and there is no metric to define that, it is up to the Board to determine. The purpose of the code is when you approve a variance you need to conclude it does not do damage to the zoning code, its intent and integrity. It is to protect the character and the stability of residential, business, and industrial areas of Maricopa County, and to prevent overcrowding of land and undue congestion of population. This is a beautiful residential area in northeast Mesa. There are two purposes of the zoning code that they believe their case supports and sustains. This is a highly exaggerated flag lot, the width of the pole is 113 feet, not 20 or 30 feet like you normally see. The distance from the pole to the flag is 436 feet. If the front was slightly larger we wouldn't be here today. The front lot line is now determined to be the southern portion of the flag lot, which is one of the peculiar

circumstances. This lot has an elevation change of 75 feet, at the very front it is 1,970 in elevation and at the corner is 2,045. Another highly unusual circumstance is on the northern boundary, there is a remnant of strip annexation (red lines running parallel in presentation). Back in the day, cities competed for land, and it is not allowed today to buy a strip like that. The northern boundary of the lot has 10 feet which is technically in the City of Mesa, and the county cannot count that as part of the lot. If we could use those 10 feet, we wouldn't need a rear yard setback. Also, the access easement on the pole portion of the lot is not only an access easement but precludes any construction of a building because it is 113 feet wide. If it were 20 or 30 feet we wouldn't have to deal with that. In his illustration shown is a little blue triangle on the plan which is a tiny portion of the swimming pool that extends into that front yard setback area. We are 436 feet back from Range Rider and another 20 feet where that little blue triangle starts to encroach into what should be a 40-foot setback. He urged the Board to consider as an unusual circumstance. The purpose of a front yard setback is to have a nice streetscape, have separation of buildings, and not having buildings right on the street. Here we have more than covered that. On the northern edges is a beige strip which is the strip annexation area where two things collide, one is annexation, and they can't count the northern boundary as the property line. Maricopa County Department of Transportation (MCDOT) looks at every section line as an area that needs expanded right-of-way, and after review they don't need right-of-way on this section line because it traverses a mountain, and no road will be built there. In the rear we are asking for a 30-foot setback instead of 40 and the only part that encroaches is shown in blue on the right side of the plan. It is a small portion of the structure on the northern end of the property which is not visible by the street or anyone. The last issue is with disturbing hillside shown in green on the plan, on the right is hillside and little bit of a wash. This area is one percent of the entire lot. We do need to disturb that, but it will be repaired and will not be an eyesore to anyone. These are the peculiar circumstances, and it'll be a hardship to go back and redesign. Their architect did a great job in melting this into the mountainside to the east and the wash that exists on the west, and the location of the property. A beautiful home is planned on this site, and the minor deviations they are asking for in variances and combined with peculiarities on this site. He asked the Board for approval of the variances.

Chairman Loper asked about the alternatives from staff. Mr. Mueller said we look at the orientation, size, and location on the lot. Mr. Pew said the pool area faces Range Rider, the encroachment into the front yard setback is a portion of the pool area where it is built up with a concrete wall, and that is to be counted into part of the structure of the building. They can't reorient the house since the view is south.

Member Klapp said the fact you've been able to work with staff to come up with solutions for the front and rear setback and hillside disturbance shows you've tried to come up with solutions that would work. She understands why you wouldn't want to reorient the house since the view is on the south. She believes they have met the intent of the ordinance and she is in support of this.

Member Cardon said it was good to see there was no opposition, and he appreciates the clear presentation. He believes there is a peculiar condition, and the statutory requirements are met. He is also in support of the request.

BOARD ACTION: Member Klapp motioned to approve BA2022035 with conditions 'a'-'c'. Member Cardon second. Approved 4-0. Ayes: Cardon, Klapp, Ward, Loper.

- a) Variance approval establishes a 20' south setback line for APN 219-24-184.
- b) Variance approval establishes a 30' north setback line for APN 219-24-184.
- c) Variance approval establishes permission for 1,165 square feet of hillside disturbance outside of the principal building envelope for APN 219-24-184 unrelated to driveway or utilities.

Member Ward left the hearing.

Mr. Peck said he is not here to give the Board legal advice, but he would like to discuss a case that involved this Board that was decided by the court of appeals, JD's River Bottom LLC vs. Maricopa County. Chairman Loper and Member Ward were the only two participants in that case, where only three members showed up and the third member had to recuse himself. The application involved variances for a medical marijuana facility, currently on a neighboring property is Sunday Goods. Three variances were sought. The proposal was too close to an adult business, it was located too close to a public park, and too close to another marijuana dispensary, Sunday Goods. By a vote of 2-0, the Board denied the variances. The case was appealed to the court of appeals, and the court of appeals has affirmed that denial. Until this case, there is not a case where he can find in the state of Arizona that explains what the statutory test is for a county. There is a supreme court case from seven or eight years ago that explains what the test is in a municipality and noted there is a fundamental difference between the test in a municipality and a test in the county. Staff often says the test fails to meet the statutory test and there's never been an explanation by a court to what that test is until the opinion in JD's River Bottom. The court focused on the two aspects of the test, because the third aspect of the test which is if it meets or doesn't contradict the intent or purpose of the zoning ordinance only comes into play if the Board finds the first two prongs of the test has been satisfied. The third prong is not an independent test. The court said, the condition has to be peculiar, it can't be a condition that generally exists in the area. Whether a condition exists on the property is a question of fact for the Board to determine. Whether that condition meets the test of a peculiar condition is a legal question which as a quasi-judicial board you also have to determine. The fact there is a condition on the property is not the end of your inquiry, you then have to decide if that is peculiar and not something that is common to the area. The court said, a peculiar condition is one that arises from the physical condition of the land itself, not the surrounding properties or the character of the neighborhood. Of the land itself which distinguishes from other lands in the general area. In JD's they argued there were conditions of the building and the court rejected that by saying it has to be a physical condition of the land. We finally have a case where the court has talked to us about it. The applicant failed to show unnecessary hardship when the land in question cannot yield a reasonable return absent the variance. If the property can yield a reasonable return that property must not suffer a hardship that would justify the granting of the variance. JD's kept arguing they can't put a marijuana dispensary here and the county kept arguing there is a 143 other things you can do on the property. The court said they admitted they can do other things, there is no hardship. The hardship has to be created by the regulations of the zoning ordinance. The court said where the ordinance equally affects all property in the same zoning classification, relief from the ordinance must come from an amendment to the zoning code and not a variance.

Chairman Loper asked if other properties in the area should not be used as a rationale for a peculiar condition or hardship or both? Mr. Peck said both, you have to focus exclusively on the physical condition of the property that is before you.

Chairman Loper asked if you have a hillside condition can they use that for their argument for a peculiar condition even though 10 other lots are affected by a hillside? Mr. Peck said if you look at the area and see there are 10 other properties that are also subject to that, the way to correct the problem if there is one with the variance is by amending the hillside ordinance. Chairman Loper said when talking about variances when he was in school, if you had repeated variance requests for certain items, you need to amend your ordinance.

Chairman Loper said in our deliberations for the cases today and knowing this now, he asked would it fundamentally change anything. These were all approvals or is it more important in a denial. Mr. Peck said the applicant must demonstrate both prongs of the test to your satisfaction and if the applicant has

done that, must demonstrate the granting of the variance will not negatively impact the intent and purpose of the zoning ordinance. It is equally important for grants or denials. This test is the basis of what it is by what staff tells you in their reports. Mr. Gérard said whether that be an approval or denial, when you make motions ideally you would verbalize the findings back of your motion.

Chairman Loper said on the last case we could have said, we believe the peculiar condition is the shape of the lot, and the hardship is the zoning ordinance as it does not take into account how flag lots are affected. Mr. Peck said much more important on an approval, if staff has found in its report that it does not meet the conditions, to say the ordinance does not take into account flag lots would not satisfy what the court of appeals says is a hardship. If that's what you believe you can instruct staff to look into a possible amendment to the zoning ordinance so flag lots can be taken into consideration. You are a quasi-judicial body who decides a specific case in front of you, and problems with the zoning ordinance is something that has to be decided by the Board of Supervisors.

Member Cardon said he is unsure if it would have changed anything he did today, but it adds clarity to the purpose of the statute. He appreciates Mr. Peck's clear explanation of that case.

Member Klapp said she appreciates the information as it clears up some things about marijuana cases and she found the court's opinion very interesting.

Adjournment: Chairman Loper adjourned the meeting of June 15, 2023 at 11:06 a.m.

Prepared by Rosalie Pinney
Recording Secretary

June 15, 2023