

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROOSEVELT ACTION ASSOCIATION, an)
Arizona non-profit corporation,)
) No. 1 CA-CV 03-0013
Plaintiff/Appellant,)
)
v.)
)
CITY OF PHOENIX BOARD OF) Maricopa County
ADJUSTMENT; MICHAEL LIEB; SHERYL) Superior Court
JOHNSON; MICHELLE ALLEN; MICHAEL) No. CV2002-000287
SCHROEDER; RAUL GARZA; SCOTT)
DAVIS; CLYDE ROUSSEAU AND JANE)
DOE ROUSSEAU, husband and wife, d/b/a/)
ROUSSEAU DESIGN; CP ROUSSEAU)
60 LLC, an Arizona limited liability company,)
)
Defendants/Appellees.)
_____)

ANSWERING BRIEF FOR APPELLEE
CITY OF PHOENIX

OFFICE OF THE CITY ATTORNEY
PETER VAN HAREN, City Attorney
State Bar #003600
Donald L. Jones, #004220
Assistant City Attorney
200 W. Washington, Suite 1300
Phoenix, Arizona 85003-1611
Attorneys for Defendants/Appellees
City of Phoenix

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STATEMENT OF FACTS

Appellee Clyde Rousseau (“Rousseau”) owns two adjacent vacant lots at 29 and 33 West Lynwood Street (the “Property”) (IR27, Ex.B, ¶1). The Property is located between the Spaghetti Factory, nee Spaghetti Company (a restaurant), and the Roosevelt Historic District (IR27, Ex.A, Fig.2, Ex.B, ¶2C). The Property is zoned R-4, Multiple Family Residence District (IR23, Ex.1, p.4; Zoning Ordinance, Sec. 617).

In 2001, Rousseau desired to build four residential structures on the Property to sell in a price range of \$350,000 (IR23, Ex.1, pp.2,8). In planning the project, Rousseau applied for four zoning variances from the City of Phoenix (the “City”). These variances included reduction of the rear yard setback to zero feet, reduction of a front yard setback to twelve feet for one of the lots, reduction of the side yard setbacks on the lot line between his two properties to five feet (leaving ten feet between the structures), and to permit an eight-foot wall (fence) instead of a six-foot wall (IR23, Ex.2). The City’s Zoning Administrator granted the variances for the side yard setbacks and the eight-foot wall (IR23, p.4). Rousseau appealed the decision to the Board of Adjustment which conducted a hearing. At the hearing, several of Appellants testified in opposition. The two main themes of that opposition included (1) that Rousseau’s plan featured front facing garages (IR23, Ex.1, p.5), and (2) that the planned structure failed to maintain the standard thirty-

foot setback consistent with the single-family houses in the neighborhood (IR23, Ex.1, pp.6,10).

In its deliberations, some of the Board's considerations included the proximity to the Spaghetti Factory parking lot (IR23, Ex.1, p.9); the fact that height and density proposed were considerably less than that would be permitted under ordinance (IR23, Ex.1, pp.8,9); and precedent for zero rear setback (IR23, Ex.1, p.10). The Board voted to uphold the Zoning Administrator's decision to grant the two variances he granted, and to overturn his decision with respect to the two variances he had denied (IR23, Ex.1, p.10).

Appellant filed a special action to challenge the Board's decision (IR1), and the City filed a Motion to Dismiss for lack of standing (IR9) in which Rousseau joined (IR10). Thereafter, Appellant filed a response to the Motion to Dismiss combined with a Motion for Leave to Amend Complaint (IR20). Simultaneously, Appellant filed a Motion for Summary Judgment (IR22), together with a Statement of Facts (IR21). Among all of these filings, the only place Appellant articulated any kind of specific explanation as to how it believed any of the variances caused any harm is in its Motion for Summary Judgment (IR22, p.9, ll.15-22). Moreover, the only variance Appellant addressed in its argument is the front yard setback (IR22, pp.9-10).

Both the City (IR23) and Rousseau (IR27) replied to Appellant's Response

and Motion to Amend arguing that the new material presented by Appellant was insufficient for standing, that the leave to amend should be denied, and the Complaint dismissed. The City (IR25) and Rousseau (IR26) also filed Motions to Strike the Motion for Summary Judgment, or in the alternative Stay the Time for a Response Until After a Decision on Defendants' Motion to Dismiss.

On September 12, 2002, nearly six months after Rousseau's Reply Memorandum, and four days before the hearing on the Motion to Dismiss, Appellant filed the Affidavit of Larry Freedlund (document not located by Superior Court).

At the September 16, 2002 hearing, Appellant obliquely intertwined a new argument that it had standing as a taxpayer with its discussion of aggrievement. Understandably, the trial court did not address the issue of taxpayer standing when it issued its minute entry granting the Motion to Dismiss, denying Leave to Amend, and striking the Motion for Summary Judgment (IR43).

INCORPORATED BY REFERENCE

Appellee City of Phoenix Board of Adjustment, as required by Rule 13(f) of the *Rules of Civil Appellate Procedure*, hereby incorporates by reference portions of the brief filed by Clyde Rousseau and related parties:

1. Statement of the Case;
2. That portion of the argument that addresses the propriety of the trial court's granting the Motion to Strike Appellant's Motion for Summary Judgment.

ISSUES PRESENTED FOR REVIEW

1. Whether Appellant was required to allege and prove special damages to obtain standing;
2. Whether Plaintiff was successful in alleging and proving special damages;
3. Whether dismissal of the Complaint without leave to amend or an evidentiary hearing was proper;
4. Whether denial of Appellant's Motion for Summary Judgment was proper.

ARGUMENT

I. APPELLANT MUST DEMONSTRATE SPECIAL DAMAGES

A. Arizona courts have consistently required plaintiffs to demonstrate special damages in order to have standing to contest land use decisions.

For nearly half a century, Arizona courts have required those persons seeking judicial relief from land use decisions to allege and prove “special damages.” Verner v. Redman, 77 Ariz. 310, 271 P.2d 468 (Ariz. 1954); Perper v. Pima County, 123 Ariz. 439, 600 P.2d 52 (App. 1979); Buckelew v. Town of Parker, 188 Ariz. 446, 937 P.2d 368 (App. 1997).

That a private individual must both allege and prove special damages peculiar to himself in order to entitle him to maintain a cause of action of this character is too well settled to admit of argument to the contrary, unless, as argued by counsel for appellees, judicial notice may be taken by the court.

Verner, at 77 Ariz. 312-313, 937 P.2d 469.

An adjacent property owner who suffers no special damage from the granting of a variance cannot seek judicial review of an administrative decision to grant a variance. To be aggrieved, the plaintiff must have sustained damage peculiar to himself.

Perper, at 123 Ariz. 441, 600 P.2d 54.

Courts traditionally limit standing in zoning cases to those who have sustained special damage to their interest in real property.

Buckelew, at 188 Ariz. 450, 937 P.2d 372.

B. ARS § 9-462.06(K) is consistent with Arizona case law requiring plaintiffs to demonstrate special damages.

1. Person aggrieved is equivalent to someone who is damaged.

On pp. 14 and 15 of its Brief, Appellant includes a section that seems to question whether the “person aggrieved” standard imposed by ARS § 9-462.06(K) is equivalent to someone who is “specially damaged.” However, as the court stated in PF West, Inc. v. Superior Court, 139 Ariz. 31, 34, 676 P.2d 665, 668 (App. 1984), the term “person aggrieved” is consistent with the common usage of that term limiting the availability of judicial review to those who are specially damaged by the decision of the Board of Adjustment. See also, Perper at 123 Ariz. 441, 600 P.2d 54; and Buckelew at 188 Ariz. 452, 600 P.2d 374, equating aggrieved with special damages.

2. “Taxpayer affected” is equivalent to “person aggrieved” in requiring that special damages be alleged and proved.

Appellant’s argument that it has standing through its members as taxpayers does not permit Appellant to avoid the requirement that it allege and prove special damages. In making their argument for standing as taxpayers, Appellant asserts that in construing ARS § 9-462.06(K), “[one could debate whether the word ‘affected’ modifies only its immediate antecedent ‘- municipality -’ or also

taxpayer and thus whether any ‘taxpayer’ can appeal or only a ‘taxpayer’ [who is] affected by the decision.]”

To the extent such a debate is necessary, the outcome is clear that “affected” modifies “taxpayer,” “officer,” and “department.”

ARS § 9-462.06(J) and (K) are read as follows:

J. In a municipality with a population of more than one hundred thousand persons according to the latest United States decennial census, the legislative body, by ordinance, may provide that a person aggrieved by a decision of the board or a taxpayer, officer or department of the municipality affected by a decision of the board may file, at any time within fifteen days after the board has rendered its decision, an appeal with the clerk of the legislative body. The legislative body shall hear the appeal in accordance with procedures adopted by the legislative body and may affirm or reverse, in whole or in part, or modify the board’s decision.

K. A person aggrieved by a decision of the legislative body or board or a taxpayer, officer or department of the municipality affected by a decision of the legislative body or board may, at any time within thirty days after the board, or the legislative body, if the board decision was appealed pursuant to subsection J of this section, has rendered its decision, file a complaint for special action in the superior court to review the legislative body or board decision. Filing the complaint does not stay proceedings on the decision sought to be reviewed, but the court may, on application, grant a stay and on final hearing may affirm or reverse, in whole or in part, or modify the decision reviewed.

ARS § 9-462.06(J) and (K). (emphasis supplied)

Though not at issue in this case, subsection J’s similar language demonstrates that “municipality” is not modified by “affected” in either subsection J or K. That is to say, having identified the “municipality” in the first clause of the first sentence of subsection J, and having given no subsequent indication that another “municipality” is somehow involved in these decisions, there is absolutely no purpose served by an adjective modifying and further identifying the second use of “municipality.” Although used only once in subsection K, the use of the same phrase would likewise indicate that no adjective modifying “municipality” is necessary or appropriate.

Further evidence that “affected” modifies “taxpayer” is contained in ARS § 28-8475(A), which deals with appeals from airport boards of adjustment:

§ 28-8475. Appeals; superior court.

A. A person who is aggrieved or a taxpayer who is affected by a decision of a board of adjustment, or a governing body of a political subdivision or a joint airport zoning board that is of the opinion that a decision of a board of adjustment is invalid, may file a verified petition in the superior court setting forth that the decision is invalid, wholly or partially, and specifying the grounds. The petition shall be filed within thirty days after the decision is filed in the office of the board.

* * * * *

This later legislative enactment dealing with very similar subject matter is syntactically more clear, but nevertheless, has the same meaning with regard to the words “taxpayer” and “affected” as ARS § 9-462.06(K).

A possible explanation of the reason for the two categories, “person aggrieved” and “taxpayer affected” can be observed in ARS § 48-1709(A) dealing with the creation of electrical districts:

§ 48-1709. Appeal from order of board.

A. Any person aggrieved by the decision of the board of supervisors may appeal from the decision or any part thereof to the superior court in the county in which the hearing was held. All persons interested in or in any way affected by the decision of the board of supervisors whether or not the party has appeared before the board at the hearing may appeal from the board decision.

* * * * *

ARS § 48-1709(A).

It would appear that the above subsection evidences the desire of the legislature to permit affected persons to appeal despite the fact that they are not “persons aggrieved” who historically had the connotation of persons who actually appeared and participated before a decision making body.

Having established that “affected” modifies taxpayer in Section 9-462.06(K), the question becomes whether the distinction between “affected” and “aggrieved” has any significance other than participation in the proceeding or non-

participation. In this regard, it is significant that Arizona courts have, on occasion, used the two words or their roots interchangeably:

Based on the foregoing, we believe that personal rights of the minor are being affected, that they are “aggrieved” within the meaning of the statute and have standing to appeal.

In the Matter of the Appeal in Pima County, Juvenile Action No. B-9385, 138 Ariz. 291, 294, 674 P.2d 845, 848 (1983). (emphasis supplied)

However, a party who is aggrieved by only one part of a judgment or decree cannot by appeal question another part which has no bearing or effect on his rights or interests; he can complain only such parts of the judgment or decree that affect him.

Chambers v. United Farm Workers, 25 Ariz. App. 104, 106, 541 P.2d 567, 569 (1975) quoting 4 C.J.S. Appeal & Error, § 183. (emphasis supplied)

In Scott v. Board of Adjustment 405 S.W.2d 55 (Tex. 1966), a case cited by appellant, the Texas Supreme Court equated the impact of the words “affected” and “aggrieved” on standing:

Where the statute requires that the person be interested, affected, or aggrieved, or (in the absence of a statute) where the common law rule requiring the showing of particular injury or damage is controlling, the plaintiff must allege and show how he has been injured or damaged other than as a member of the general public in order to enjoin the actions of a governmental body.

Id. at 405 S.W.2d 56.

That same court later articulated that the terms “aggrieved” and “affected” are synonymous. Hooks v. Texas Department of Water Resources, 611 S.W.2d 417, 419 (1981).

Similarly, the statutory terms “person aggrieved” and “taxpayer affected” should be construed as virtual equivalents. And just as the Buckelew court equated “person aggrieved” with the requirement to allege and prove special damage, this court should equate “taxpayer affected” with that same requirement. See Buckelew, supra, at 188 Ariz. 452, 937 P.2d 374.

II. APPELLANT HAS FAILED TO ALLEGE OR PROVE SPECIAL DAMAGES.

A. Arizona courts have found special damages sufficient for standing in land use cases only when a plaintiff has been able to articulate a palpable burden or harm.

An empirically observable thread that runs through Arizona land use cases involving standing is that courts have found the special damage requirement to be factually satisfied only when a plaintiff has been able to articulate palpable burden or harm to his property.

This circumstance is predictable in that Arizona courts have held that to qualify as an “aggrieved party” for purposes of appeal, “. . . the judgment must operate to deny the party some personal or property right or to impose a substantial burden on the party.” In the Matter of Appeal in Pima County Juvenile Action No. B-9385, 138 Ariz. 291, 293, 674 P.2d 845, 848. Similarly, in Sears v. Hull, 192 Ariz. 65, 961 P.2d 1013 (1998), our Supreme Court made the following observation applicable to standing in general:

To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury. An allegation of generalized harm that is shared and shared alike by all or a large class of citizens generally is not sufficient to confer standing.

Id. at 192 Ariz. 69, 961 P.2d 1017. (emphasis supplied)

Thus, in Verner, supra, our Supreme Court refused to take judicial notice of

special damages to a residential property from the construction of a service station three and a half blocks away.

In Perper, supra, the court found as insufficient to establish special damages allegations that a rezoning (which was effected in conjunction with a variance) would cause the plaintiff's property to be “. . . affected . . . in that the rezoning would decrease property values in the whole area, there would be increased traffic and noise, and that the residential atmosphere and scenery would be substantially destroyed.” Id. at 123 Ariz. 441, 600 P.2d 53. The court characterized these allegations as “. . . only general economic and aesthetic losses. Id. at 123 Ariz. 440, 600 P.2d 54.

On the other hand, in Armory Park Neighborhood Association v. Episcopal Community Services, 148 Ariz. 1, 712 P.2d 914 (1985), the court found standing on behalf of residents to complain about a nuisance created by the transient patrons of a soup kitchen who littered, drank, trespassed, urinated and defecated on nearby properties; sometimes broke into a storage building and unoccupied homes, and who asked residents for handouts. The court reasoned:

We hold, therefore, that because the acts allegedly committed by the patrons of the neighborhood center affected the residents use and enjoyment of their real property, a damage special in nature and different in kind from that experienced by the residents of the city in general, the residents of the neighborhood could bring an

action to recover damages for or enjoin the maintenance of a public nuisance.

Id. at 148 Ariz. 12, 712 P.2d 918. (emphasis supplied)

Buckelew, supra, like the case at bar, involved a special action from a decision of municipal board of adjustment. The court initially examined and rejected Buckelew's claim that he should be granted standing solely for the reason that his property was adjacent to the mobile home park at issue. Id. at 188 Ariz. 451, 937 P.2d 373. In acknowledgment of the nuisance roots of zoning regulation, the court then analyzed the case in the light of Armory Park.

Thus, to have standing, Buckelew must plead damage from an injury peculiar to him or at least more substantial than that suffered by the general public. Buckelew may suffer damage "peculiar to himself" even if his "immediate" neighbors suffer the same damage as he from the alleged zoning violation. An interference with Buckelew's use and enjoyment of his land similar to that suffered by the landowners in Armory Park will suffice.¹

Buckelew's amended special action complaint meets this standard. He alleges that his property shares a common boundary with the RV park and that a number of conditions and activities at the RV park interfere with the use and enjoyment of his property. Specifically, he complains of damage from noise emanating from the park; littering and threats of violence by tenants; fire and health hazards, including raw sewage; increased criminal activity in the RV park; and destruction of his personal property by children living at the RV park. These are

¹ While this reference to Armory Park does not necessarily mandate that a plaintiff prove an actual nuisance in order to establish special damages, it is an implicit acknowledgement that there must be a threshold level of palpable injury or threat of palpable injury to sustain standing.

damages similar to those alleged by the plaintiffs in Armory Park.

Buckelew, at 188 Ariz. 452, 937 P.2d 374. (emphasis supplied)

Similarly, in Blanchard v. Show Low, 196 Ariz. 114, 993 P.2d 1078 (App. 1999) the court found standing for one couple, the Thompsons, to challenge zoning to accommodate a Wal Mart where they had articulated specific harms or infringements on their free use and enjoyment of their property:

Because the Thompsons' property was 750 feet from the proposed project, and given the nature of the project itself, the harm to her property was "different [from] and greater than" that to other property located further away. Its proximity makes it sufficiently likely that traffic, litter, drainage, and noise from the project will significantly affect it.

Id. at 96 Ariz. 118, 993 P.2d 1082. (emphasis supplied)

However, with regard to another plaintiff, Challis, the court found the general allegations of harm contained in the complaint together with expert testimony about general harm in the area in the form of increased traffic and noise to be insufficient for standing. The court agreed with the appellees' position that the "harms claimed . . . are no more than 'vague and general allegations of injury' and are insufficient to constitute the particularized damages that confer standing."

Although the complaint did not allege nuisance, our Supreme Court conducted an Armory Park analysis in Sears. The court found no harm distinct from that of the general public, and thus no special damages where plaintiffs had

alleged that gaming permits on an Indian reservation 3.2 miles from their children's school would expose their children to values contrary to their own, result in urban crowding, traffic and stresses which will detract from the quality of their immediate community, as well as economic loss in the immediate community as a result of compulsive gamblers' attendant criminal activity and inability to remain employed. Sears, at 192 Ariz. 70, 961 P.2d 1018.

A synthesis of all of these cases yields several propositions with regard to the necessary showing to establish standing: (1) a plaintiff must allege and prove a palpable burden or harm to his property, (2) the burden or harm must be something greater than that suffered by the community as a whole, (3) vague and general allegations of harm are insufficient, (4) also insufficient are allegations of general economic and aesthetic losses, and (5) while propinquity may be a factor, even an adjacent property owner must prove special damages.

B. The complaint alleges no damages.

A fair reading of the Complaint yields no allegation leading to the conclusion that Appellant, or any of its members, are damaged in any way by the decision of the Board of Adjustment. (IR1) In its attempt to address standing, the Complaint alleges only that Plaintiff's "... officers, directors, members and supporters live in and around the Roosevelt Historic District and are thus directly and personally interested in the outcome of these proceedings." (IR1, ¶1) The

Complaint also contains a perfunctory paragraph with the usual predicate for injunctive relief:

30. Unless Rousseau is immediately enjoined from proceeding with the project, with the variances approved by the defendant Board of Adjustment, Plaintiff will suffer irreparable harm or injury. (IRI, ¶30)

Mere personal interest, no matter how intense, does not equate to harm, injury or damages. See State v. Lamberton, 183 Ariz. 47, 899 P.2d 939 (1995), holding that the victim of a child molester was not an aggrieved party such as to permit her to appeal the trial court's grant of defendant's petition for post conviction relief.) Without an allegation sufficient to sustain special damages, the Complaint was deficient and subject to dismissal. Blanchard, supra.

C. The variances cause no harm to other properties.

The reason that Plaintiff has had such difficulty even alleging special damages is simply that the setback and height variances approved by the Board do not cause any harm to any other properties.

Variance #1 reduces the rear yard setback adjacent to an alley to zero feet from fifteen feet to accommodate garages. (IR23, Ex.2) A zero setback in the rear of properties is a common feature in the neighborhood, including the two properties immediately adjacent to the Project. (IR27, Ex.B, ¶D) Appellant would be hard pressed to demonstrate harm as a result of this variance.

Variance #2 is a reduction of the side yard setbacks between the two Rousseau parcels from ten feet to five feet. (IR23, Ex.2) The purpose of side yard setbacks is to provide a spacing buffer between two properties. Inasmuch as this setback reduction impacts only Rousseau and his successors in interest, there is no harm or damages to Appellant or its members.

Variance #3 is a reduction of the front yard setback to twelve feet from twenty feet. (IR23, Ex.2) Appellant's position is that this reduced setback would be inconsistent with the thirty foot "uniform setback" pattern that is necessary to maintain the appearance of the historic neighborhood." (IR23, Ex.1, pp.6,10)

Assuming arguendo that Appellant here states something more than "general economic and aesthetic harm," its position ignores several pertinent facts. First, the required front setback for a multifamily residence on Rousseau's R-4 lot is only twenty feet. Zoning Ordinance, Sec. 617.B.Table B. Second, as a matter of right under the Zoning Ordinance, Rousseau is permitted without need for a variance to construct his buildings with projections, consisting of no more than one half of the maximum width of the structure, five feet into the front yard from the required twenty-foot setback, thus resulting in a fifteen foot setback for portions of each yard. Zoning Ordinance, Sec. 701.A.3.a(2)(c). The variance which reduced the setback to twelve feet is only for the width of a chimney on Rousseau's western parcel. (IR23, Ex.1, p.3) In view of the fact that the street's historic thirty-foot

uniform setback is already substantially compromised by the required twenty-foot setback and by the permitted five-foot projections, any additional harm caused by the variance to the aesthetic interest Appellant desires to protect would be *de minimus*. It is difficult to conceive that an additional reduction of three feet for the width of a chimney would cause any palpable harm to any property in the neighborhood. This is especially true where the additional three-foot projection would serve to obstruct further the neighborhood's view of the adjacent restaurant parking lot. (IR23, Ex.1, p.4, Ex.4; IR27, Ex.B, TabA)

Variance #4 permits an eight-foot (an increase from six foot) wall along portions of the side yards. (IR23, Ex.1, p.3, Ex.2) On the east side of the property, the wall abuts the Spaghetti Factory parking lot. On the west side is a residential property, the owner of which has executed a cross-easement agreement with Rousseau for construction of the eight-foot wall. (IR27, Ex.B, ¶2D) Appellant cannot seriously allege harm as a result of this variance.

D. Appellant has presented no evidence of special damages.

In view of the discussion immediately above, it is not surprising that Appellant has never attempted to explain the specific manner in which Variances 1, 2, or 4 caused harm to the historic character of the neighborhood, much less to any other property.

With its Response to the Motion to Dismiss, Appellant attached the

Affidavits of Ian Cartwright, James Trocki, Andrew George, Cindi Housenga, and Alex Tanner. (IR20, Tabs G,C,D,E, and F)

The most specific portion of Cartwright's affidavit is contained in paragraphs 6 and 7:

6. . . . Those variances include significantly decreased setbacks from the streets and garages built onto the front of the fourplex. Garages facing the street in this historic neighborhood are prohibited.

7. In my opinion the design that Rousseau has proposed will significantly decrease the value of my property. It is completely out of character with other homes in the historic district - including recently built developments. (IR20, TabG)

Trocki's affidavit states in part:

14. . . .The project, with the variances as approved by the City of Phoenix Board of Adjustments, will damage me as a homeowner because the structure impinges upon the neighborhood's historic character, which we have worked so hard to maintain.

* * * * *

17. Additionally because this development is substantially different than the other homes in the area, in my opinion it will negatively affect the market value of my home. (IR20, TabC, ¶¶14,17)

The most pertinent portion of George's affidavit is in paragraph 12:

12. . . . Additionally, the zoning variances are inconsistent with the historical and architectural integrity that the Roosevelt Action Association and its residents

and members have worked to preserve. (IR20, TabD, ¶12)

Housenga states:

5. I understand that the Rousseau project includes zoning variances that are entirely out of sync with the character of the neighborhood, including decreased setbacks and garages that face the street. In my opinion, these variances will decrease the value of properties surrounding them and will decrease the overall historic integrity of the neighborhood. (IR20, TabE, ¶5)

Tanner's affidavit is even more general:

10. . . . The project as approved by the City of Phoenix Board of Adjustments, will damage me as a homeowner in the Roosevelt Historic District because it is inconsistent with the historic architectural and zoning requirements that are required of other homeowners with historic properties in the Roosevelt Historic District. (IR20, TabF, ¶10)

Neither the above quotations, nor the affidavits from which they are excerpted, provide any detail as to how the reductions to any of the setbacks and permitting portions of two side yard walls to be raised two feet cause any particularized infringements on the affiants' use and enjoyment of their land. With regard to the issue of damages, these affidavits contain mere opinions and conclusions lacking in any meaningful foundation. Despite Appellant's transparent attempt to characterize these nonexistent special damages as specific to individual property owners, these affidavits are similar to the "vague and general allegations of injury" rejected with regard to the Challis' claim in Blanchard at 196

Ariz. 118, 993 P.2d 1081; and do not even approach the specificity of the allegations the Perper court described as “. . . only general economic and aesthetic loses.” Perper, at 123 Ariz. 441, 600 P.2d 54. Moreover, the affidavits better support the proposition (though not sufficiently to support special damages) that Appellant’s members will suffer harm as a result of the architectural style (for which no variance was requested or required) of Rousseau’s project than from the variances here at issue.

Perhaps in recognition of this deficiency, Appellant, on the Thursday before a Monday oral argument, filed the affidavit of Larry Freedlund, who owns the home directly across the street from the Rousseau project. (Document not located by Superior Court) In paragraph 4 thereof, Freedlund puts forth his case for special damages:

4. The new project at 29 and 33 West Lynwood is inconsistent and incompatible with the historic character of the surrounding neighborhood. The new project negatively impacts my own use and enjoyment of my own home, by impairing my view and clashing with my own aesthetic appreciation of the neighborhood. Because the new project is inconsistent with the historical character of the neighborhood, I also believe it will negatively affect the market value of my home. In recent years the homes in the Roosevelt neighborhood have seen significant appreciation, which I believe is partially due to the special historic qualities of the neighborhood.

(Document not located by Superior Court)

Remarkably, Freedlund’s entire affidavit references only the “new project” and never the “variances.” Moreover, when Freedlund states that the new project impairs his view, and aesthetic appreciation of the neighborhood, it must be taken in the context (1) that his former view consisted of two vacant lots, an alleyscape, a block wall, and the unlandscaped Spaghetti Factory parking lot (IR23, Ex. 5); and (2) that Rousseau would have been free to build his buildings in the same architectural style even without the variances. Simply stated, Freedlund’s conclusory affidavit, like those of the other affiants, does not create a link between the variances and any harm specific to him or his property such as to substantiate special damages.

III. DISMISSAL WAS PROPER WITHOUT LEAVE TO AMEND OR AN EVIDENTIARY HEARING.

A. The Superior Court acted appropriately in denying leave to amend.

Rule 15(a)(1), *Arizona Rules of Civil Procedure*, provides “leave to amend shall be freely given when justice requires. Nevertheless, a trial court does not abuse its discretion by denying a motion to amend if it finds that the amendment would be futile. Walls v. Department of Public Safety, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991). One of the situations in which a court acts within its discretion in finding that amendment of the complaint would be futile is when the

amended pleading could be defeated by a motion for summary judgment. Id. In this case, the Superior Court minute entry illustrates just such a situation:

The proposed amended complaint would simply re-allege the same type of aesthetic and general property value damages that this court has determined as being insufficient to confer standing. (IR43, p.3)

B. No evidentiary hearing was necessary.

Where a trial court, in considering a motion to dismiss, considers evidence extrinsic to the complaint, the reviewing court treats the motion to dismiss as a motion for summary judgment. All facts are viewed in the light most favorable to the party against whom the judgment was entered. Blanchard, supra, at 196 Ariz. 117, 993 P.2d 1081.

In the instant case, however, there was no evidence before the court that demonstrated any causative link between the Variances 1, 2, and 4, and any harm to any individual property owner who could conceivably be deemed to suffer special damages. Where a plaintiff fails to provide any evidence to support an allegation essential to his case, summary judgment is appropriate. See Badia v. City of Casa Grande, 195 Ariz. 349, 998 P.2d 134 (App. 1999); and Walls, supra.

As to Variance #3 (the reduction of the three-foot front yard setback) the evidence was undisputed that Rousseau was under no obligation to honor the existing thirty-foot setback that existed in the Roosevelt portion of Lynnwood.

(See Appellant's Brief, p.3) The Zoning Ordinance permitted Rousseau a twenty-foot setback with a five-foot projection. Zoning Ordinance, Sec. 617.B.Table B; 701.A.3.a.(2)(c). Thus, as a matter of right, Rousseau could halve to fifteen feet the line of sight setback Appellant asserts to be aesthetically and historically significant.

No reasonable trier of fact would find on the basis of the evidence presented that the further incursion of three feet for the width of a fireplace would have an additional detrimental impact so as to support special damages to any of the affiants in this case. Indeed, this would be the case even if Arizona law permitted standing on a mere showing of general aesthetic and economic loss. In the absence of an issue of material fact, summary judgment would have been appropriate.

Walls, supra. Further, Appellant had ample opportunity between the April 3, 2002 filing of the City's Reply Memorandum (IR23) and the September 16 hearing in which to submit additional evidence. And in fact, Appellant did file the affidavit of Larry Freedlund on September 12, 2002 (not found by Superior Court).

Unfortunately for Appellant, none of the evidence it presented contains any facts from which the Court could infer special damages. Where a plaintiff has an opportunity to procure proof necessary to support his claim and fails to do so, summary judgment is properly granted. Morrell v. St. Luke's Medical Center, 27 Ariz. App. 486, 489, 556 P.2d 334, 337 (1976). It follows that if the trial court

could have granted summary judgment under these facts, no evidentiary hearing was required.

Denial of the Motion to Amend and dismissal of the Complaint without an evidentiary hearing was, therefore, the appropriate resolution of the case.

IV. APPELLANT’S PARADE OF STRAW MEN SHOULD NOT BE PERMITTED TO OBFUSCATE THE FACT THAT IT HAS FAILED TO DEMONSTRATE ANY HARM RESULTING FROM THE FOUR VARIANCES.

A. Pecuniary and aesthetic damages remain viable bases for standing where there is an actual injury or a threat of actual injury.

In Section I.C of its Brief, Appellant begins a parade of “strawmen” with the assertion that “[t]he trial court erred in holding that aesthetic and pecuniary damage are irrelevant under ARS 9-462.06.” This gross mischaracterization of the trial court’s ruling ignores the fact that the court preceded its rejection of what it found to be allegations of general economic or aesthetic injury with several predatory comments including the requirement “. . . that plaintiff demonstrate some type of ‘actual injury or threat of actual injury’.” (IR43, p.2) This requirement of actual injury (or palpable harm or burden on property) is well illustrated in Community Planning Bd. v. Bd. of Standards and Appeals, 350 NYS.2d 138 (A.D. 1973), a case appellant cites for the proposition that “[p]ecuniary damage is the ‘gold standard’ of aggrievement.”

Presented with a factual situation very similar to that of Armory Park, the court found that nearby property owners and tenants would suffer pecuniary damage as a result of variances granted to a restaurant that catered to intoxicated and drug drenched patrons who were disorderly and boisterous in conduct and language, who blocked entrances to buildings while committing various indecencies and nuisances, and insulted and harassed tenants in the area if any attempt were made to interfere with their conduct. Community Bd., at 350 NYS.2d 139-140.

Two other cases cited by Appellant for the proposition that purely aesthetic interest supply standing also illustrate situations in which the plaintiffs were able to demonstrate “actual injury or threat of actual injury.” Both Sahl v. Town of York, 760 A.2d 266 (Me. 2000) and Pacifica Homeowners Association v. Wesley Palms Retirement Community, 178 Cal.App.3d 1147, 224 Cal.Rptr. 380 (App. 1986) involved situations where the courts granted standing to challenge conditions that blocked or threatened to block the ocean views of residential properties. It would be a rare trier of fact that would not find that blocking an ocean view would be a cognizable interference with a homeowner’s “use and enjoyment” of his property. The kinds of palpable injuries in these two cases, as well as those in Community Bd., stand in stark contrast to Appellant’s subjective and conclusory allegations about Rousseau’s project, a project that blocks not an ocean view, but the view of a

parking lot, a vacant lot, a block wall, and an alleyscape. (IR23, Ex.1, p.4)

Further, in this case, the new view would have been essentially the same with or without the variances here at issue. (IR27, Ex.B, TabA)

B. Appellant cites cases for a proposition that was not raised by the parties or discussed by the courts.

In Section I.D of its Brief, Appellant sends out its second straw man, arguing in essence that because standing was not challenged by various city attorneys in three earlier cases, “. . . everyone has recognized that homeowners have standing to challenge the issuance of variances in their immediate neighborhoods.” It is more than a little ironic that having chastised Appellees for relying on what Appellant perceives to be dicta (Appellant’s Brief, p.18, n.58), Appellant cites Ivanovich v. City of Tucson, 22 Ariz. App. 530, 529 P.2d 242 (1974); Arkules v. Bd. of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986); and Haynes v. City of Tucson, 162 Ariz. 509, 784 P.2d 715 (App. 1989) to support a proposition that was not raised by any of the parties or discussed by any of the courts. To even respond to such an argument is perilous because facts that would have been placed before the court to fully address the standing issue are most certainly missing. Nevertheless, there are hints in each of these cases why lack of standing was not raised.

Ivanovich involved a municipal board of adjustment hearing that occurred in 1973. This was six years prior to the decision in Perper, which despite its brevity, began to bring focus to the issue of land use standing in Arizona. More significantly, this occurred during the time that ARS § 9-462.06(K) replaced former ARS § 9-465(E). That provision, repealed effective January 1, 1974, while containing “person aggrieved” did not require a “taxpayer” to be “affected” in order to petition for review:

A person aggrieved by a decision of the board, or a taxpayer, or municipal officer may, at any time within thirty days after the filing of the decision in the office of the board, petition a writ of certiorari for review of the board’s decision. Allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and for good cause shown, grant a restraining order, and on final hearing may reverse or affirm, wholly or partly, or may modify the decision reviewed.

Former ARS § 9-465(E).

While it is not clear from reading the case which provision was applicable, it is certainly possible, even if the suit was brought pursuant to ARS § 9-462.06(K), that the attorneys handling the case would have missed this nuance.

Arkules involved a challenge by an immediately adjacent neighbor of a variance granted to a building regulation that required a house to blend with the mountain background and to be made from materials or colors which would not unduly reflect light. The applicant for the variance had stated that he wanted to

build a white Mediterranean home with columns. Depending on the facts, the attorney defending the case on behalf of the City, may well have conceded

standing on the basis of palpable damage to Arkules in the form of a large white house that substantially interfered with a mountain view. Unlike the present case, the variance would have been a demonstrable causative link to Arkules' special damage. Also unlike the present case, Arkules had a view with cognizable value, while Appellant, in the present case, wants to protect a view of a parking lot, two vacant lots, a block wall, and an alleyscape, a view that has no value and in fact may be cognizably negative in value.

Haynes involved a special action brought by nearby residents to challenge a variance to the minimum parking requirements for a proposed restaurant at the corner of Euclid and University Avenues in Tucson. Under the circumstances, it is not unlikely that a city attorney would have significant experience with problems where commercial entities near residential properties lack sufficient parking. At a bare minimum, these problems will include increased traffic congestion, blocked access to driveways, and danger to pedestrians (especially children) as they venture out into the street between parked cars. More potential harm is likely when you add to this equation the fact that the business is a restaurant, perhaps with a bar, near a major university. The situation would be ripe for additional noise, litter, unpleasant confrontations, vehicular liaisons, and other byproducts of youthful exuberance, with a resulting loss of use and enjoyment of property similar to that confronted by the neighborhood in Armory Park.

In summary, there is nothing in any of these three cases to support Appellant's tenuous logic.

C. The Superior Court's minute entry does not exclude actions to vindicate explicit goals of the Zoning Ordinance where a plaintiff can demonstrate actual or potential injury.

Appellant's third "straw man" is its assertion in Section I.E of its Brief that the trial court's ruling leads to the result that intended beneficiaries of the Zoning Ordinance have no standing to vindicate the explicit goals of the Zoning Ordinance. Appellant excerpts an example from the trial court's non-exhaustive series of potential injuries that may give rise to standing, and concludes that because the trial court mentions "fire hazards" as a potential injury sufficient for standing, this means that only a person who has an interest incidental to purposes of the Zoning Ordinance can assert standing.

Again the key to the court's minute entry is the phrase "actual injury or threat of actual injury." In the present case, Appellant has been unable to articulate any kind of actual injury either within the heart of what it perceives as the explicit goals of the Zoning Ordinance or from what it describes as a secondary interest. This is not to say, however, that a challenge to a setback variance cannot be successful in any case where the basis for standing is a palpable injury particular to the plaintiff. If, for example, an adjacent neighbor could prove that a reduced setback was likely to increase significantly the noise level within his home or

permit his neighbors to invade the intimacy of his family circle, a court might well find that he suffered a cognizable interference with the use and enjoyment of his property such as to cause special damages and afford him standing. Such a harm would be well within the protected zone of interests Appellant describes as within the explicit goals of the Zoning Ordinance.

D. It is the Appellant’s analysis, not the trial court, that would repeal ARS § 9-462.06(K).

Appellant’s fourth “straw man” contained in Section I.F of its Brief, is the statement that “[t]he trial court’s analysis would practically destroy the right of appeal guaranteed by Section 9-462.06(K).” A more realistic view is that it is Appellant’s analysis, and not that of the trial court, that in effect, would repeal ARS § 9-462.06(K) by eliminating any significance for the words “aggrieved” and “affected.”

Appellant presents a hypothetical devoid of any meaningful detail (e.g., does the increased size of the sign block the view of a sign belonging to another entity, does the increased size cause glare or undue illumination onto or into the premises of another, etc.) about the circumstances of a hypothetical neighborhood in which a hypothetical oversized sign is located, due to the decision of a hypothetically corrupt board of adjustment, and concludes, *ipso facto*, that the right to contest a variance on the basis of aesthetic or economic damage is repealed. This analysis

ignores the difference between vague and general allegations of injury and evidence of particularized damages necessary for standing. See, Blanchard, at 196 Ariz. 118, 993 P.2d 1081. Once again, nothing in the trial court’s decision eliminates the potential for standing to assert aesthetic and economic damages where a plaintiff can allege and prove he has or will sustain “actual injury.” Such proof, however, is not present in the vague opinions and conclusory allegations of the affidavits Appellant submitted to the trial court.

V. THE STATUTORY LIMITATION ON STANDING IS JURISDICTIONAL AND NOT SUBJECT TO JUDICIAL DISCRETION.

Because the Arizona Constitution does not contain a “case or controversy” provision analogous to that of the U.S. Constitution, our state courts are not constitutionally required to decline jurisdiction based on lack of standing. Sears, supra. However, where the status of being an “aggrieved party” is a requirement of a statute in order to prosecute an appeal, our courts have considered the requirement to be jurisdictional. Abril v. Harris, 157 Ariz. 78, 754 P.2d 1353 (App. 1987); Christian v. Cotten, 1 Ariz. App. 421, 403 P.2d 825 (1965). With regard to challenges to decisions of municipal boards of adjustment, the legislature has limited the class of persons who may file a special action to “person aggrieved” and “taxpayer(s), officer(s), or department(s) . . . affected.” ARS § 9-462.06(K). If an individual does not meet these criteria, the court simply lacks

jurisdiction to hear the case.

Nevertheless, Appellant urges this Court to consider the rationale underlying standing articulated in Armory Park, as a way of implicitly imploring this Court to grant it standing to sue where none exists either at common law or pursuant to statute. Although made in the context of explaining nuisance theory, the following passage, also from Armory Park, provides an equally valid reason to limit standing to those actually aggrieved or affected:

[t]he law does not concern itself with trifles or seek to remedy all of the petty annoyances and disturbances of everyday life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result.

Armory Park, at 148 Ariz. 7, 712 P.2d 19.

In enacting ARS § 9-462.06(K), the legislature did not intend to make the courts available to remedy all wrongs no matter how insignificant.

Moreover, even if the ability to file a special action to challenge the Board's decision were not jurisdictional, this case does not fit into that small category of exceptional cases, generally involving issues of great public importance likely to recur, where Arizona courts waive standing as a matter of discretion. Sears, at 192 Ariz. 71, 916, P.2d 1019.

CONCLUSION

Appellant utterly failed to present any evidence to the trial court of a causative link between the variances granted to Rousseau and any harm to the use and enjoyment of the property of any of its members. At the very most, the evidence presented in support of standing alleged, but did not prove, the kind of general economic and aesthetic losses that Arizona courts have found insufficient to confer standing. In any event, Appellant has not established special damages. For these reasons, the decision of the trial court should be affirmed.

Respectfully submitted, this _____ day of March, 2003.

PETER VAN HAREN, City Attorney

By _____
DONALD L. JONES
Assistant City Attorney
200 W. Washington, Suite 1300
Phoenix, Arizona 85003-1611
Attorneys for Defendants/Appellees
City of Phoenix

DLJ/rp/144330