Amended Administrative Order
Board of Adjustment
City of Scottsdale

for

Case Numbers 3-BA-2024 and 4-BA-2024

The initial documents submitted by Banner Health and HonorHealth regarding the appeal have been forwarded to the undersigned by City staff.

The Board of Adjustment (the Board) has jurisdiction to "hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance." A.R.S. § 9-462.06.G.1. *See also* Sec. 1.805.A.(1), Scottsdale Zoning Ordinance. Jurisdiction over an application is presumed unless challenged by an opponent of the application. Rule 401, Board of Adjustment Rules of Procedure. Banner Health has challenged the jurisdiction of the Board, in essence, asserting that the Zoning Administrator's letters dated January 30, 2024, are not "an order, requirement or decision." Rule 401 provides that when its jurisdiction is challenged, "the Board shall hear arguments and vote the question." Banner Health also asserts that the Zoning Administrator's letters are based on a hypothetical situation and, therefore, not ripe for appeal. Lastly, the Board must decide whether an appellant has standing to maintain an appeal before reaching the merits of an appeal.

Accordingly, pursuant to the authority granted the Chair of the Board by Rule 102, Board of Adjustment Rules of Procedure, to set the meeting procedure,

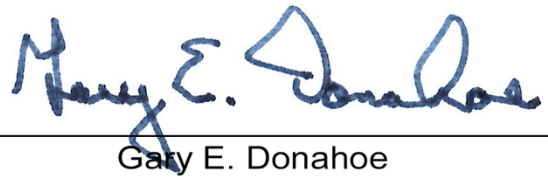
IT IS HEREBY ORDERED consolidating case numbers 3-BA-2024 and 4-BA-2024 for hearing on May 1, 2024.

IT IS FURTHER ORDERED that the hearing on May 1, 2024, shall be limited to the legal issues of (1) whether either of the Zoning Administrator's letters dated January 30, 2024, is "an order, requirement or decision" subject to appeal to the Board pursuant to A.R.S. § 9-462.06G.1., thus giving the Board jurisdiction over the appeal; (2) whether any issue addressed in those letters is ripe for review by the Board; and (3) whether the appellant has standing to maintain an appeal. Should the Board decide all those preliminary legal issues in the affirmative, the merits of the appeal will be heard at the Board's meeting on June 5, 2024.

IT IS FURTHER ORDERED that any supplemental memorandum from either HonorHealth or Banner Health shall be submitted no later than the close of business on **April 17, 2024**. That memorandum shall be limited to the three issues delineated in the above paragraph. Any memorandum shall not exceed twelve (12) pages in length exclusive of any attachments. If court opinions or legal treatises are cited in a

memorandum, a copy of each opinion and the section from the legal treatise containing the referenced comment shall be attached to the memorandum.

Dated this 10th day of April, 2024.



Gary E. Donahoe
Chairman, Scottsdale Board of Adjustment

Approved as to form by:

s/Eric C. Anderson
_____
Eric Anderson
Counsel to the Board of Adjustment

Copy of this Administrative Order is emailed
to the following this 10th day of April:

Ms. Erin Perreault
Zoning Administrator
City of Scottsdale
eperreault@scottsdaleaz.gov

Mr. Brett W. Johnson
Snell & Wilmer
Counsel for HonorHealth
bwjohnson@swlaw.com

Ms. Susan E. Demmitt
Gammage & Burnham, PLC
Counsel for Banner Health
sdemmitt@gblaw.com

BOARD OF ADJUSTMENT
REPORT

Meeting Date: 5/1/2024

ACTION

3-BA-2024: HonorHealth - Definition Appeal

Request to consider the following:

1. Request for an appeal of the Zoning Administrator's written response dated January 30, 2024 regarding a requested interpretation involving the Zoning Ordinance definitions of "Office" and "Hospital".

4-BA-2024: HonorHealth Appeal - Application to Construct Hospital by Banner Health

Request to consider the following:

1. Request for an appeal of the Zoning Administrator's written response dated January 30, 2024 regarding a requested interpretation involving the utilization of the Zoning Ordinance definition of Office to circumvent the Zoning Ordinance definition of Hospital.

APPLICANT/APPELLANT CONTACT

Brett W. Johnson
Snell & Wilmer
602-382-6312

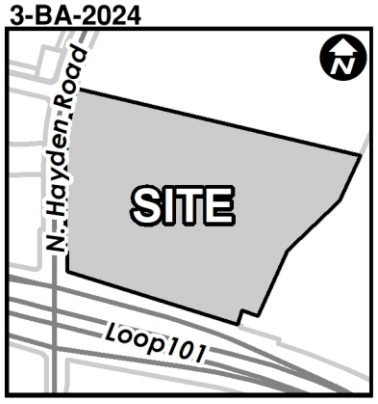
OWNER

HonorHealth (3-BA-2024 Subject Site)
Banner Health (4-BA-2024 Subject Site)

LOCATION

3-BA-2024: Northeast corner of N. Hayden Road and the Loop 101 Freeway, and City-wide.
4-BA-2024: Southwest corner of N. Hayden Road and the Loop 101 Freeway.

3-BA-2024



4-BA-2024

BACKGROUND

3-BA-2024 Context

The appellant represents HonorHealth. HonorHealth owns property at the northeast corner of N. Hayden Road and the Loop 101 Freeway. The appellant requested an interpretation of definitions in the Zoning Ordinance applicable to assist HonorHealth in their long-range planning of their property and as applicable to other properties city-wide.

The HonorHealth site is part of the Crossroads East Master Development Plan area with Planned Community Development (P-C) zoning established with Case 19-ZN-2002. As parcels have come through the development process, portions of that Master Development Plan have been amended through the City Council public hearing process.

History/Timeline

- December 22, 2023: A request for interpretation was submitted to the Zoning Administrator from Snell & Wilmer on behalf of HonorHealth, seeking an interpretation of the Zoning Ordinance definitions of "Office" and "Hospital". That request was stamped received on December 26, 2023.
- January 30, 2024: The Zoning Administrator provided a response to the request.
- February 23, 2024: An appeal of the Zoning Administrator's response was received through the City Clerk's Office.

4-BA-2024 Context

The appellant represents HonorHealth. HonorHealth owns property at the northeast corner of N. Hayden Road and the Loop 101 Freeway. The appellant requested an interpretation concerning Zoning Ordinance definitions applicable to the proposed development by Banner Health on their recently acquired property generally located at the southwest corner of N. Hayden Road and the Loop 101 Freeway.

The Banner Health proposed development site is part of the Crossroads East Master Development Plan area with Planned Community Development (P-C) zoning established in zoning Case 19-ZN-2002. As parcels have come through the development process, portions of the Master Development Plan have been amended through the City Council public hearing process.

In June of 2023, Gammage & Burnham representing Banner Health, filed zoning Case 5-ZN-2023 proposing a zoning district map amendment from Planned Community Development with P-C comparable Central Business District (P-C C-2) and comparable Industrial Park District (P-C I-1) to Special Campus (S-C) District, including a development plan, for a new medical campus with a proposed full-service hospital with helipad, on a +/- 48-acre site located at 18400 N. Hayden Road. This was the active zoning case submitted by Banner Health at the time the interpretation request was filed by Snell & Wilmer.

History/Timeline

- June 21, 2023: Gammage & Burnham, representing Banner Health, filed zoning Case 5-ZN-2023 proposing to rezone to the S-C district.
- December 22, 2023: A request for interpretation was submitted to the Zoning Administrator from Snell & Wilmer on behalf of HonorHealth, seeking an interpretation involving the utilization of the Zoning Ordinance definition of Office to circumvent the Zoning Ordinance definition of the term Hospital. That request was stamped received on December 26, 2023.
- January 30, 2024: The Zoning Administrator provided a response to the request.
- February 23, 2024: An appeal of the Zoning Administrator's response was received through the City Clerk's Office.

3-BA-2024 Adjacent Uses and Zoning

- North Undeveloped Arizona State Land; zoned Planned Community District (P-C) [Crossroads East Master Development Plan].
- South Undeveloped Axon site; zoned Planned Community District with comparable Industrial Park District (P-C I-1) [Crossroads East Master Development Plan, as amended].
- East City of Scottsdale Water Campus; zoned Planned Community District (P-C), Open Space Planned Community District (OS P-C), and Industrial Park (I-1).
- West Cavasson mixed-use development; zoned Planned Airpark Core, Planned Community District (PCP P-C) [Crossroads East Master Development Plan, as amended].

4-BA-2024 Adjacent Uses and Zoning

- North Cavasson mixed-use development; zoned Planned Airpark Core, Planned Community District (PCP P-C) [Crossroads East Master Development Plan, as amended]
- South San Artes, multi-family residential development; zoned Planned Community District with comparable Multi-family Residential District (P-C R-5) [Crossroads East Master Development Plan, as amended].
- East Undeveloped Axon site; zoned Planned Community District with comparable Industrial Park District (P-C I-1) [Crossroads East Master Development Plan, as amended].
- West Undeveloped sites; zoned Planned Community District with comparable Industrial Park District (P-C I-1) [Crossroads East Master Development Plan, as amended].

Community Input

Staff also received correspondence from Gammage & Burnham, representing Banner Health, pertaining to the Zoning Administrator responses and Snell & Wilmer appeals. That document is included with the report attachments for the Board's reference.

Zoning Ordinance Requirements

Jurisdiction:

The "jurisdiction" or authority of the Board of Adjustment is addressed in section 9-462.06 of the Arizona Revised Statutes:

C. A board of adjustment shall hear and decide appeals from the decisions of the Zoning Administrator…

G. A board of adjustment shall:

1. Hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance adopted pursuant to this article…

3. Reverse or affirm, wholly or partly, or modify the order, requirement or decision of the zoning administrator appealed from, and make such order, requirement, decision or determination as necessary…

The "jurisdiction" of the Board of Adjustment is also addressed in Section 1.805 of the Scottsdale Zoning Ordinance:

> The Board shall hear appeals from the Zoning Administrator's interpretation of the Zoning Ordinance or other decisions. The Board of Adjustment shall determine those matters over which it has jurisdiction.

The jurisdiction of the Board of Adjustment is granted by state statute and municipal ordinance. If the Board acts in a matter over which it has no jurisdiction, the action taken has no effect.

The Zoning Code of the City of Scottsdale and the Rules of Procedure for the Board of Adjustment give the Board the authority to make the determination whether the Board has jurisdiction.

Under state law, the Zoning Ordinance, and the Board by-laws, the Board's jurisdiction is limited to variances from the terms of the Zoning Ordinance, appeals of Zoning Administrator decisions and interpretations of the Zoning Ordinance, and the General Manager interpretations and decisions made under the Land Divisions Ordinance.

Standing:

In order to have standing, the Applicant must be an aggrieved party. Section 1.202.B of the Scottsdale Zoning Ordinance states the following about aggrieved parties:

> "The appeal of ordinance interpretations or other decisions by the Zoning Administrator may be initiated by any aggrieved person or by any officer, department, board or commission of the City affected by the interpretation or decision of the Zoning Administrator. For purposes of this subsection, an aggrieved person is one who receives a particular and direct adverse impact from the interpretation or decision which is distinguishable from the effects or impacts upon the general public."

Action:

Upon finding that an application for appeal has both Jurisdiction and Standing, the Board of Adjustment can then discuss the merits of the case to determine whether or not the Zoning Administrator Decision was arbitrary, capricious or an abuse of discretion as specified in Section 1.805.D.(1) of the Zoning Ordinance.

Procedural Note:

Per the Administrative Order issued by the Chairman of the Board of Adjustment dated April 10, 2024, the hearing on May 1, 2024 shall be limited to the legal items of jurisdiction and standing. Therefore, the discussion of this report has been limited to those topics. Should the Board decide the preliminary jurisdiction and standing in the affirmative, the merits of the appeals will be heard at the Board of Adjustment meeting on June 5, 2024, and staff will issue another report discussing such merits.

Findings: Jurisdiction and Standing

Jurisdiction:

Staff questions whether the Board has jurisdiction in this appeal. Each of the Zoning Administrator-issued responses indicate that an interpretation could not be provided based on the lack available information submitted in the interpretation requests. Due to the fact that interpretations were not issued, it is unclear what jurisdiction exists for the Board of Adjustment to hear an appeal.

Standing:

Staff questions whether the Applicant (Appellant) has standing in these appeals. Each of the Zoning Administrator-issued responses did not provide an interpretation, due to lack of sufficient details relating to the proposed HonorHealth property and due to a hypothetical scenario suggested by the Applicant that could not be supported by the Banner Health application contents on file with the city for Case 5-ZN-2023 at the time of the interpretation request. Thus, it is unclear if anyone would be considered aggrieved or adversely impacted by the Zoning Administrator response outcomes, in which case standing to appeal would not exist.

3-BA-2024 Applicant/Appellant's Request for Interpretation

On December 22, 2023 (stamped received on December 26, 2023) a request for interpretation was submitted to the Zoning Administrator from Snell & Wilmer, on behalf of HonorHealth, seeking interpretations of the Zoning Ordinance definitions of "Office" and "Hospital". That request expressed a desire to benefit HonorHealth in the long-range planning of their property.

The interpretation request identified Zoning Ordinance Section 3.100 (Article III - Definitions), and sought confirmation that a "hospital" could only be built in the Commercial Office (C-O) or Special Campus (SC) zoning districts, and that an "office" could be built in other zoning districts, to the effect that an office might only be utilized for medical office or clinical medical care but not inpatient care that reaches the level associated with a hospital.

The interpretation request further identified that in November of 2022, HonorHealth purchased property at the northeast corner of N. Hayden Road and the Loop 101 Freeway. That site is approximately forty-eight (48) acres zoned Planned Community District (P-C) with comparable Commercial Office district (C-O), and the ability to designate approximately ten (10) acres with comparable Central Business district (C-2). The Zoning Ordinance limits the building of a hospital to C-O (requiring a use permit with public hearings) or to SC zoning districts, but an office can be built in a number of zoning districts, including C-2 and I-1. However, because an "office" can include medical services and limited inpatient care normally allowed accessory to a clinic or rehabilitation facility, the distinction between the two development types is somewhat unclear, according to HonorHealth, compelling them to seek an interpretation for its development master planning efforts.

3-BA-2024 Zoning Administrator's Response

The Zoning Administrator, in response to the Request for Interpretation received on December 26, 2023, reviewed the available information and provided a response on January 30, 2024.

The response letter notes that the request for interpretation focuses primarily on "Hospital" and "Office" land uses but there are a variety of other healthcare-related land uses specified in the Zoning Ordinance, including, but not limited to "Residential Healthcare Facility," "Minimal Residential Health Care Facility," and "Specialized Residential Health Care Facility." The Zoning Administrator stated in the response that the Zoning Ordinance provides the potential for hybrid and analogous uses that are not specifically named in the request, and that although the traditional perception of a hospital commonly included multiple healthcare uses combined into one facility, those individual components may be broken into more specific or analogous land uses that may not fit squarely within the definition of a "Hospital". Also noted in the response is that the healthcare industry is continuously evolving, and the assessment of individual development proposals is typically based on the specific information available at that time, such as North American Industry Classification System (NAICS) designations, state licensing categorizations, operations information, types of care provided, emergency vehicle and transport vehicle types and trips, as examples.

The Zoning Administrator response identifies that certain land uses are defined in Section 3.100 of the Zoning Ordinance, which includes terms that give general guidance, but not absolute specifics, as it is not practical for a Zoning Ordinance to account for all possible land uses and scenarios. Additionally noted, is that Section 1.202.D of the Zoning Ordinance states that the use regulations in each district cannot be all inclusive and may include general use descriptions that encompass several specific uses, and requires the Zoning Administrator to be able to interpret the uses specified in each district liberally to include other uses which have similar impacts to the listed uses.

The response letter concludes that because of these factors, and absent a development proposal and sufficient details relating to the proposed use of the HonorHealth property, that an interpretation could not be provided that would contain the specific distinctions requested by Snell & Wilmer on behalf of HonorHealth.

3-BA-2024 Applicant/Appellant's Request for Appeal

On February 23, 2024 an appeal of the Zoning Administrator response was filed which argues that the response leaves ambiguity in the definitions of "Office" and "Hospital" and that the Zoning Administrator's decision was arbitrary, capricious, or an abuse of discretion.

The appellant states that allowing this ambiguity to go unaddressed renders the implementation and enforcement of the Code wasteful, time-consuming, and ineffective. Further stating that clarifying the distinction between these two land uses is in the interest of HonorHealth, the City, and every resident and business that will be impacted by having a full-scale hospital built in a non-conforming zoning district. The response received leaves in place an ambiguity regarding the ability to build a hospital in different zoning districts. According to HonorHealth, healthcare providers such as HonorHealth are unable to gauge their own compliance with the Code as a result and are forced to spend hundreds of thousands of dollars in pre-development planning without knowing what constitutes a "hospital." They claim this also impacts the residents and businesses, as the ambiguity would seemingly allow a hospital to be built throughout various zoning districts, many of which are adjacent to residential neighborhoods and business.

3-BA-2024 Discussion

With the Zoning Administrator assessment and response stating that "Because of these factors, and absent a development proposal providing, among other things, sufficient details relating to the proposed use of a property, we cannot provide an interpretation that would contain the specific distinctions you have requested", staff questions the jurisdiction for the Board of Adjustment to hear an appeal when no interpretation has been rendered or decision made.

The Board of Adjustment is tasked with hearing appeals of interpretations of the Zoning Ordinance text made by the Zoning Administrator, and the Board shall determine those matters over which it has jurisdiction. In staff's assessment, if an interpretation was not able to be

issued, and no decision has been made, it would be reasonable to conclude that no corresponding appeal could be made, and thus the Board of Adjustment should find that no jurisdiction exists to hear such an appeal.

Per Sec. 1.202.B of the Zoning Ordinance, in order to have standing, an applicant must be an aggrieved person, where an "aggrieved person is one who receives a particular and direct adverse impact from the interpretation or decision which is distinguishable from the effects or impacts upon the general public." In staff's assessment, based on the criteria, and the Zoning Administrator-issued response that did not include an interpretation, it would be reasonable to conclude that no one would be considered aggrieved or adversely impacted by that outcome, in which case the necessary standing to make an appeal would not exist.

4-BA-2024 Applicant/Appellant's Appeal

On December 22, 2023 (stamped received on December 26, 2023) a request for interpretation was submitted to the Zoning Administrator from Snell & Wilmer on behalf of HonorHealth, seeking an interpretation involving the conceptual utilization by Banner Health of the Zoning Ordinance definition for Office to circumvent the Zoning Ordinance definition of Hospital. The interpretation request sought to address the potential for the improper building of a hospital on property with a zoning designation of Central Business (C-2) or Industrial Park (I-1). Specifically, to clarify that building and/or operating a "hospital" under the guise of an "office" within the definitions of the Code is a violation of the Code.

The request acknowledged that in June 2023, Banner Health submitted an application requesting a rezoning of the property generally located at the southwest corner of N. Hayden Road and the Loop 101 Freeway. In that application, Case 5-ZN-2023, Banner Health proposed a plan to build a forty-eight (48) acre medical campus including various uses and a full-service hospital with in-patient beds to provide hospital level medical care. That application proposed to rezone the property from C-2 and I-1 zoning to Special Campus (SC), specifically to allow for a "hospital" under the "Medical Facilities" use category. In order to provide certainty to Scottsdale's citizens and stakeholders, HonorHealth requested the interpretation as to whether Banner Health can avoid the public rezoning hearing process by characterizing its proposed "hospital" as an "office". According to HonorHealth, of the 47 zoning categories in the Code, a hospital is only allowed to be built in C-O (requiring a use permit with public hearings) or SC zoning districts. The Banner Health property is currently designated as C-2 and I-1, and does not allow a hospital without a rezoning.

The interpretation request sought an interpretation from the Zoning Administrator to confirm that a "hospital" is strictly limited to the C-O zoning district (requiring a use permit with public hearings) or within an approved SC zoned development. Stating that, a decision permitting this non-compliant use would adversely impact the uniformity and intent of Scottsdale's zoning ordinances, essentially rendering any zoning restriction moot.

4-BA-2024 Zoning Administrator's Response

The Zoning Administrator, in response to the Request for Interpretation received on December 26, 2023, reviewed the available information and provided a response on January 30, 2024.

The response letter notes that the request for interpretation focuses on addressing the hypothetical scenario for the improper building of a hospital on property with a zoning designation of Central Business (C-2) or Industrial Park (I-1). The Zoning Administrator noted in the response that the request for interpretation specifically referenced an active application submitted by Banner Health regarding their property generally located at the southwest corner of N. Hayden Road and the Loop 101 Freeway (Case 5-ZN-2023). In that application, Banner Health requested a zoning district map amendment from Planned Community Development (P-C) with comparable Central Business District (P-C C-2) and comparable Industrial Park District (P-C I-1) to Special Campus (S-C) District. The zoning application narrative stated that the intent to rezone to the SC district is to accommodate a hospital facility, as well as various other uses, including diagnostic and treatment facilities, a cancer center, medical offices, and ancillary medical uses.

The response also notes that the request for interpretation included the following statement: "In order to provide certainty to Scottsdale's citizens and stakeholders, we request this interpretation as to whether Banner can avoid the public rezoning hearing process by characterizing its proposed "Hospital" as an "Office"." However, the Zoning Administrator noted the inability to identify any language in the rezoning request that would indicate Banner Health was attempting to circumvent the rezoning process as suggested, and additionally noting that the request for interpretation concerns a hypothetical scenario that cannot reasonably be responded to as it is not within the scope of the referenced application.

The Zoning Administrator points out in the response letter that each development application submitted to the City is reviewed in the context of, among other things, the details of that proposal, available operational parameters, and available North American Industry Classification System (NAICS) and licensing information to assess whether the applicant's proposed use fits into the existing or proposed zoning designations and permitted land uses. Absent sufficient details to evaluate those factors, an interpretation could not be provided regarding whether a hypothetical proposal would be permitted under the Zoning Ordinance. To the extent that the associated request was for the Zoning Administrator to interpret the Zoning Ordinance to confirm the districts where a "Hospital" is permitted, both the definition of "Hospital" and the zoning districts where that is a specified permitted land use are already identified in the Zoning Ordinance.

4-BA-2024 Applicant/Appellant's Appeal

On February 23, 2024 an appeal of the Zoning Administrator's Decision was filed which argues that the response leaves ambiguity in the definitions of "Office" and "Hospital" and that the Zoning Administrator's decision was arbitrary, capricious, or an abuse of discretion.

The appellant states that allowing this ambiguity to go unaddressed renders the implementation and enforcement of the code wasteful, time-consuming, and ineffective. Further stating that clarifying the distinction between these two land uses is in the interest of HonorHealth, the City, and every resident and business that will be impacted by having a full-scale hospital built in a non-conforming zoning district. According to HonorHealth, while the code is based on intentional and sound public policy that restricts a hospital to designated zoning districts, the interpretation leaves open the possibility that hospitals can be built in zoning districts that allow "offices," not "hospitals."

4-BA-2024 Discussion

With the Zoning Administrator assessment and response that "Absent sufficient details to evaluate those factors, as is the case with your hypothetical, we cannot provide an interpretation regarding whether a proposal would be permitted under the Zoning Ordinance", staff questions the presence of the necessary jurisdiction for the Board of Adjustment to hear an appeal when no interpretation has been rendered or decision made.

The Board of Adjustment is tasked with hearing appeals of interpretations of the Zoning Ordinance text made by the Zoning Administrator, and the Board shall determine those matters over which it has jurisdiction. In staff's assessment, if an interpretation was not able to be issued and no decision made, it would be reasonable to conclude that there could not be a corresponding appeal, and the Board of Adjustment should find that no jurisdiction exists to hear such an appeal.

Per Sec. 1.202.B of the Zoning Ordinance, in order to have standing, an applicant must be an aggrieved person, where an "aggrieved person is one who receives a particular and direct adverse impact from the interpretation or decision which is distinguishable from the effects or impacts upon the general public." In staff's assessment, based on the criteria, and the Zoning Administrator-issued response that did not include an interpretation, it would be reasonable to conclude that no one would be considered aggrieved or adversely impacted by the response outcome, in which case the necessary standing to make an appeal would not exist.

Conclusion

Based on the Zoning Administrator's provided responses to the applicant's requests, and the identified limitations on being able to render an interpretation due to lack of specifics provided in the available information, along with definitions already provided by the Zoning Ordinance, an interpretation was not rendered, or decision made, and as such, there are not interpretations to be appealed to the Board of Adjustment. Without interpretations there would be no standing to file an appeal, nor would there be an aggrieved party or adverse impact resulting.

Should the Board of Adjustment find that there is both Jurisdiction and Standing in this matter, this will be brought back to the Board for a future hearing specific to the merits of the case and the determination of whether or not the Zoning Administrator's response was arbitrary, capricious or an abuse of discretion.

Findings

In a typical request to the Board of Adjustment, the Board must review and determine if the required four (4) findings have been justified to allow a Zoning Variance. In the case of an appeal of the Zoning Administrator decision, such as this one, these findings are not required, and the Board of Adjustment will need to:

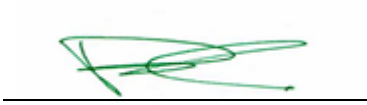
- Determine whether or not it has jurisdiction over this matter;
- Determine whether the Applicant (appellant) has standing; and, if the Board first finds that it has jurisdiction over the matter and that the applicant has standing, then the Board shall;
- Discuss the merits of the case to determine whether or not the Zoning Administrator's Decision was arbitrary, capricious or an abuse of discretion.

APPROVED BY

4/11/2024

Jeff Barnes, Report Author
480-312-2376, jbarnes@scottsdaleaz.gov

Date



4/12/2024

Bryan Cluff, Board of Adjustment Liaison
480-312-2258, bcluff@scottsdaleaz.gov

Date

4/15/2024

Tim Curtis, AICP, Current Planning Director
480-312-4210, tcurtis@scottsdaleaz.gov

Date

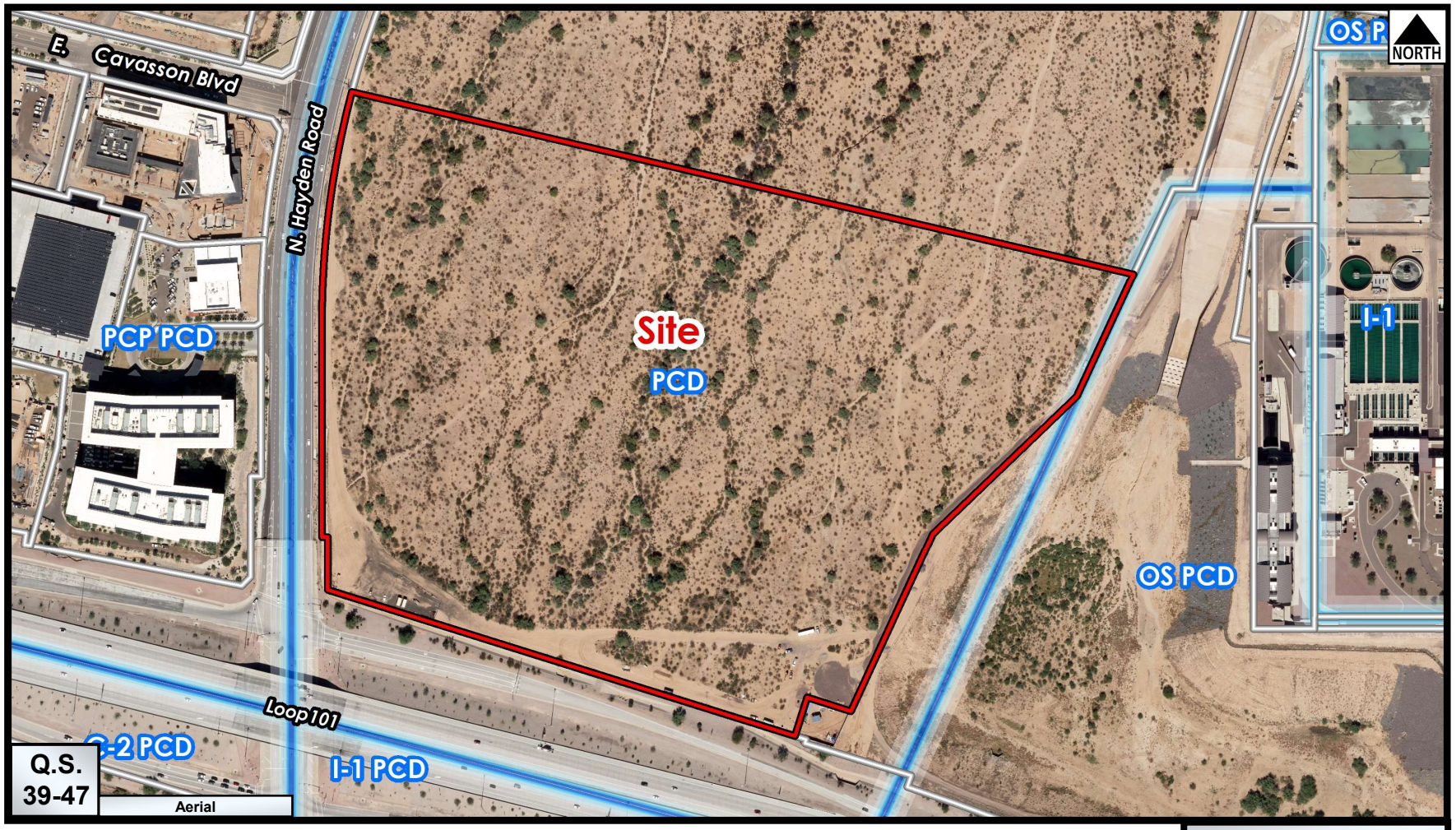
ATTACHMENTS

1. Context Aerial (3-BA-2024)
2. Zoning Map (3-BA-2024)
3. Context Aerial (4-BA-2024)
4. Zoning Map (4-BA-2024)
5. February 23, 2024, Appeal of the Zoning Administrator's Response (3-BA-2024)
   - Exhibit A: January 30, 2024, Zoning Administrator's Response (3-BA-2024)
   - Exhibit B: December 22, 2023, Request for Zoning Administrator's Interpretation (3-BA-2024)
6. February 23, 2024, Appeal of the Zoning Administrator's Response (4-BA-2024)
   - Exhibit A: January 30, 2024, Zoning Administrator's Response (4-BA-2024)
   - Exhibit B: December 22, 2023, Request for Zoning Administrator's Interpretation (4-BA-2024)
   - Exhibit 1: December 22, 2023, Request for Zoning Administrator's Interpretation (3-BA-2024)
   - Exhibit C: Case 5-ZN-2023 Project Narrative
7. March 11, 2024, Gammage & Burnham's correspondence
8. Appellant's supplemental materials received
9. Gammage & Burnham's supplemental materials received

Context Aerial

ATTACHMENT #1

3-BA-2024



Zoning Aerial

ATTACHMENT #2

3-BA-2024

Context Aerial

ATTACHMENT #3

4-BA-2024

Zoning Aerial

ATTACHMENT #4

4-BA-2024

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Brett W. Johnson PC
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February 23, 2024

Ben Lane
City of Scottsdale – City Clerk
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

RE: Zoning Interpretation Appeal

Dear Mr. Lane:

This firm represents HonorHealth, a long-time healthcare non-profit operating hospitals, primary and specialty care clinics, and ancillary offices in the City of Scottsdale (the "City"). HonorHealth is appealing the Zoning Administrator's Interpretation dated January 30, 2024, pertaining to the definitions of a "hospital" and an "office" (the "Interpretation"). A true and accurate copy of the Interpretation is attached as Exhibit A.

HonorHealth is appealing the Interpretation as it is arbitrary, capricious, and/or an abuse of discretion, and is not supported by the City's Zoning Ordinances (the "Code"). As it stands, the Interpretation leaves in place an ambiguity between the definition of a "hospital" and an "office" for medical purposes. As discussed in HonorHealth's original request to the Zoning Administrator, attached as Exhibit B, allowing this ambiguity to go unaddressed renders the implementation and enforcement of the Code wasteful, time-consuming, and ineffective. Indeed, clarifying the distinction between these two land uses is in the interest of HonorHealth, the City, and every resident and business that will be impacted by having a full-scale hospital built in a non-conforming zone.

As it stands, the Interpretations leaves in place an ambiguity regarding the ability to build a hospital on different zoning districts. Healthcare providers such as HonorHealth are unable to gauge their own compliance with the Code as a result and are forced to spend hundreds of thousands of dollars in pre-development planning without knowing what constitutes a "hospital." This also impacts the City's residents and business, as the ambiguity would seemingly allow a hospital to be built throughout various zoning districts, many of which are adjacent to residential neighborhoods and business.

As an aggrieved party to the Interpretation, HonorHealth timely submits this appeal pursuant to the provisions of A.R.S. § 9-462.06 and the Scottsdale Code of Ordinances, Section

1.805. Once the request for the appeal has been processed, HonorHealth will submit additional expansive arguments in accordance with Board of Adjustment Rules of Procedure Section 403.

As required by Scottsdale Code of Ordinances, Section 1.202(B), HonorHealth is submitting this appeal within thirty (30) days of the issuance of the Interpretation.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th

Enclosure

EXHIBIT A

CITY OF SCOTTSDALE

PLANNING, ECONOMIC DEVELOPMENT & TOURISM

7447 E. Indian School Rd., Suite 105
Scottsdale, AZ 85251

January 30, 2024

Brett W. Johnson PC
Snell & Wilmer
One East Washington Street, Suite 2700
Phoenix, AZ 85004

Mr. Johnson,

This letter is in response to the request for Zoning Ordinance interpretation contained in your letter under the subject line "Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office,"" which was received on December 26, 2023. Your letter states that you are representing HonorHealth regarding a property they recently acquired at the northeast corner of State Route 101 Freeway and Hayden Road. Specifically, you indicate that you are seeking to clarify the application of the City of Scottsdale's Zoning Ordinance to HonorHealth's newly acquired property.

Your request for interpretation focuses primarily on "Hospital" and "Office" land uses. However, there are a variety of other healthcare-related land uses specified in the Zoning Ordinance, including, but not limited to "Residential Healthcare Facility," "Minimal Residential Health Care Facility," and "Specialized Residential Health Care Facility." The Zoning Ordinance also provides the potential for hybrid and analogous uses that are not specifically named in your request. Although the traditional perception of a hospital commonly included multiple healthcare uses combined into one facility, those individual components may be broken into more specific or analogous land uses that may not fit squarely within the definition of a "Hospital" under the Zoning Ordinance. The healthcare industry is continuously evolving, and our assessment of individual development proposals is based on the information available to us at that time, such as North American Industry Classification System (NAICS) designations, state licensing categorizations, operations information, types of care provided, emergency vehicle and transport vehicle types and trips, as some examples.

Certain land uses are defined in Section 3.100 of the Zoning Ordinance, which includes terms that give general guidance, but not absolute specifics, as it is not practical for a Zoning Ordinance to account for all possible land uses and scenarios. Additionally, Section 1.202.D of the Zoning Ordinance states that the use regulations in each district cannot be all inclusive and may include general use descriptions that encompass several specific uses. That section also requires the Zoning Administrator to interpret the uses specified in each district liberally to include other uses which have similar impacts to the listed uses.

Because of these factors, and absent a development proposal providing, among other things, sufficient details relating to the proposed use of a property, we cannot provide an interpretation that would contain the specific distinctions you have requested.

Respectfully,

Erin Perreault, AICP
Zoning Administrator
City of Scottsdale

EXHIBIT B

Snell & Wilmer
ONE EAST WASHINGTON STREET
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602.382.6000 P
602.382.6070 F

Brett W. Johnson PC
(602) 382-6312
bwjohnson@swlaw.com

December 22, 2023

SENT VIA EMAIL AND COURIER

Erin Perreault, Zoning Administrator
City of Scottsdale
7447 E. Indian School Road, Suite 105
Scottsdale, AZ 85251
eperreault@scottsdaleaz.gov

RE: Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office"

Dear Ms. Perreault:

We represent HonorHealth, a long-time healthcare nonprofit operating hospitals, primary and specialty care clinics, and ancillary offices in and around Scottsdale. Recently, HonorHealth acquired property at the northeast corner of State Route 101 Freeway and Hayden Road (the "Property") as part of its commitment to expanding alongside Scottsdale's growing population. Given this substantial investment into the Property, and to support HonorHealth's long-term facility planning efforts, HonorHealth seeks to clarify the application of the City of Scottsdale's Zoning Ordinances to this newly acquired property so it may ensure compliance with any use restrictions or regulations.

Specifically, pursuant to the Scottsdale's Zoning Ordinance (the "Code") Section 3.100, HonorHealth requests confirmation that (1) a "hospital", for which inpatient medical care will be provided, may only be built on land use zoned Commercial Office ("C-O") or Special Campus ("SC"), and (2) that an "office" use that may be built on other land use zones, such as Central Business ("C-2") and Industrial Park ("I-1"), may only be utilized for medical office or clinical medical care and not inpatient care that exceeds accessory support for limited medical practitioners (i.e. not to a "hospital" level of service with primary focus on inpatient care).

On or about November 16, 2022, HonorHealth purchased the Property subject to approximately forty-eight (48) acres of land use zone C-O, with the ability to designate up to approximately ten (10) acres of land use zone C-2. HonorHealth's strategy is to responsibly plan for future growth in Scottsdale and use data to drive decisions on building new healthcare services whether it be a hospital, medical office, or urgent care. HonorHealth looks at each individual

community and their specific needs to tailor medical options for the future. As a result of the diverse range of possible facilities in a future development on a property with mixed-use zoning including C-O and C-2, HonorHealth requests this interpretation to ensure that future facilities are built on the correct land use zone.

The Code limits the building of a hospital to C-O (requiring a use permit with public hearings) or to SC. An "office" can be built on a number of land use zones, including zone C-2 and I-1. However, because an "office" can include medical services and limited inpatient care normally allowed as an accessory to a clinic or rehabilitation facility, the distinction between the two development types is somewhat unclear, compelling this request to establish clarity with an interpretation of the Code that HonorHealth can rely upon for its development master planning efforts (as well as for planning future land use entitlements if/as needed).

Despite this friction, the Code is unambiguous in defining a hospital for zoning purposes. The Code, in Section 3.100 defines a hospital as "a facility for the **general and emergency** treatment of human ailments, **with bed care** and shall include a sanitarium and clinic but shall not include convalescent or nursing home." *Scottsdale, AZ – Zoning Ordinances*, App. B, Art. III (emphasis added).

Additionally, a hospital is required to obtain a license through the Arizona Department of Health Services. As such, Arizona's licensing requirements support the City's zoning-based definition of a hospital.[1] For purposes of licensure, Arizona law defines a "hospital" as: "a class of health care institution that provides, through an organized medical staff, **inpatient beds**, medical services, continuous nursing services, and diagnosis or treatment to a patient." Ariz. Admin. Code § 9-10-101(110) (emphasis added). Arizona's licensing requirements definition includes "inpatient **beds**" for hospitals.

Conversely, the City's Code defines an "Office" as "an establishment or activity primarily engaged in professional, clerical or medical services, **including inpatient services**." A "hospital" is defined "**with bed care**." While "bed care" is not defined by the Code, there is an implied distinction between "inpatient" stays and "bed care" being of a more intense nature (by being longer in duration, requiring more monitoring, staff, and support services, etc.). The Code definition of "office" describes medical services with a limited scope when compared to the broader definition, and scale, of a "hospital"; evidenced by allowing medical offices across the City by-right, while limiting the location of hospitals to specific areas and, in the case of the C-O zone, requiring a Conditional Use Permit (which requires public hearings and a discretionary

[1] Although Arizona's definition supports the City's definition of a "hospital," any distinction between the definitions should be read in deference to the State's Statutory definition. *See*, City of Scottsdale, Zoning Interpretation 2002-2 (Aug. 1, 2002) (applying an updated Statutory definition of "Adult Care Homes" to Scottsdale's Ordinances for "Adult Foster Care" and "Assisted Living").

approval by the City). Medical offices, on the other hand, are typically a limited practice and a specific service, such as a general practitioners office or a specialist office (such as a cardiac practice) that generally has business hours that are similar to office uses (hence, why they are allowed in zones with other non-medical office uses). Given their intensity, 24-hour operation, larger staffing needs as well as food and other support for both patients and staff, the definition of a hospital includes "general and emergency treatment" – contemplating an expansive network of treatment and practice types. Both through the terms in the Code and by allowing one use broadly and the other use narrowly, the definitions are therefore unambiguous and clearly distinguished.

When conflicting interpretations of law exist after examining the text, including the text of zoning ordinances, Arizona courts refer to the law's subject matter, historical background, and purposes. *Maricopa County v. Rana*, 248 Ariz. 419, 422 (2020) (citing *State v. Burbey*, 243 Ariz. 145, 147 (2017)). Should there be any perceived conflict about how a "hospital" falls into the City's zoning laws, the purpose of the land use zone designations resolves those issues. The City does not allow a hospital in either the C-2 or I-1 land use zone as such use is clearly more intensive than other allowed uses, creating a need to prohibit the intensity of a hospital from this zone. Indeed, the City designates these use zones with a specific purpose in mind:

> C-2: This district is intended to permit uses for recurring shopping and service needs for multiple neighborhoods. This district includes uses usually associated with office and retail shopping developments, typically located near residential neighborhoods.
>
> I-1: The I-1 District is intended to provide for light manufacturing, aeronautical, light industrial, office and supportive uses to sustain and enhance major employment opportunities. The development standards are intended to provide development flexibility consistent with the sensitive design principles, and appropriate transition in areas adjacent to residential districts.

With C-2 zoning located throughout the City and often adjacent to less intensive zones and residences, the zone is intended to allow compatible uses while excluding those that feature more intensive operations. A hospital that has its 24/7 operation, large staff, large number of visitors (both patients and their visitors), deliveries and emergency vehicle operations, clearly does not conform to this intent.

The text and purpose of the City's Code makes clear that a "hospital" is limited to two (2) specific zones – C-O (requiring a use permit with public hearings) and SC. The City's decision to limit hospitals to land use zones C-O and SC – and only these two (2) zones out of forty-seven (47) zoning categories – implements the public policy of recognizing the intense impact of a hospital (with its twenty-four hour operation and helicopter traffic) on neighborhoods, traffic, and infrastructure, compared to the less intense impacts of an office.

With this notice of formal interpretation, HonorHealth respectfully requests that you interpret the Zoning Ordinance to confirm that a facility for the general and emergency treatment of human ailments with bed care, including related clinic care, is not permitted in any zoning district except the C-O (requiring a use permit with public hearings) and SC districts. Moreover, "office" uses that include the treatment of human ailments with accessory bed care of any duration shall not be defined as a "hospital" pursuant to the Code.

This confirming interpretation will provide much needed clarity on the distinction between "Hospital" uses and medical office uses that will assist the HonorHealth team with their long-range planning efforts.

If you have any questions, please do contact me at bwjohnson@swlaw.com or (602) 382-6312. Thank you for your attention to this matter.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th
cc: Jim Thompson, City Manager
Sherry Scott, City Attorney

Snell & Wilmer
ONE EAST WASHINGTON STREET
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Brett W. Johnson PC
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bwjohnson@swlaw.com

February 23, 2024

Ben Lane
City of Scottsdale – City Clerk
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

RE: Zoning Interpretation Appeal

Dear Mr. Lane:

This firm represents HonorHealth, a long-time healthcare non-profit operating hospitals, primary and specialty care clinics, and ancillary offices in the City of Scottsdale (the "City"). HonorHealth is appealing the Zoning Administrator's Interpretation dated January 30, 2024, pertaining to Banner Health Arizona's ("Banner") application and attempt to construct a hospital as an "office" on its property (the "Interpretation"). A true and accurate copy of the Interpretation is attached as Exhibit A.

HonorHealth is appealing the Interpretation as it is arbitrary, capricious, an abuse of discretion, and is not supported by the City's Zoning Ordinances (the "Code"). As it stands, the Interpretation leaves in place an ambiguity between the definition of a "hospital" and an "office" for medical purposes. As discussed in HonorHealth's original request to the Zoning Administrator, attached as Exhibit B, allowing this ambiguity to go unaddressed renders the implementation and enforcement of the Code wasteful, time-consuming, and ineffective, and violates long-standing City Council approved and implemented, legislative based, public policy that protects the City's citizens, taxpayers, and businesses.

Indeed, clarifying the distinction between these two land uses is in the interest of HonorHealth, the City, and every resident and business that will be impacted by having a full-scale hospital built in a zoning district that does not allow a hospital. While the Code is based on intentional and sound public policy that restricts a hospital to designated zoning districts, the Interpretation leaves open the possibility that hospitals can be built in zoning districts that allow "offices," not "hospitals." Not only does this derogate the intent of the City Council in establishing the Code, but it presents a direct harm to the numerous residential neighborhoods and businesses adjacent to zoning districts that permit "offices" but not "hospitals."

ATTACHMENT #6

As an aggrieved party to the Interpretation, HonorHealth timely submits this appeal pursuant to the provisions of A.R.S. § 9-462.06 and the Scottsdale Code of Ordinances, Section 1.805. Once the request for the appeal has been processed, HonorHealth will submit additional expansive arguments in accordance with Board of Adjustment Rules of Procedure Section 403.

As required by Scottsdale Code of Ordinances, Section 1.202(B), HonorHealth is submitting this appeal within thirty (30) days of the issuance of the Interpretation. In accordance with Scottsdale Code of Ordinances Section 1.805(B), HonorHealth also requests a formal stay of all developments on the Property discussed in Banner's application, attached as Exhibit C.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th

Enclosure

EXHIBIT A

CITY OF SCOTTSDALE

PLANNING, ECONOMIC DEVELOPMENT & TOURISM

7447 E. Indian School Rd., Suite 105
Scottsdale, AZ 85251

January 30, 2024

Brett W. Johnson PC
Snell & Wilmer
One East Washington Street, Suite 2700
Phoenix, AZ 85004

Mr. Johnson,

This letter is in response to the request for Zoning Ordinance interpretation contained in your letter under the subject line "Request for Scottsdale Zoning Ordinance Interpretation Concerning the Utilization of the Definition of "Office" pursuant to C-2 and I-1 to Circumvent Definition of "Hospital" pursuant to C-O," which was received on December 26, 2023. Your letter states that you are representing HonorHealth in their efforts to "address the potential for the improper building of a hospital on property with a zoning designation of Central Business ("C-2") or Industrial Park ("I-1")."

Your request for interpretation primarily concerns an application submitted by Banner Health Arizona regarding their property generally located at the southwest corner of State Route 101 Freeway and Hayden Road (Case No. 5-ZN-2023). In that application, Banner Health Arizona has requested a zoning district map amendment from Planned Community Development (PCD) with comparable Central Business District (PCD C-2) and comparable Industrial Park District (PCD I-1) to Special Campus (S-C) District. The applicant's narrative states that their intent is to rezone to the SC district to accommodate a hospital facility, as well as various other uses, including diagnostic and treatment facilities, a cancer center, medical offices, and ancillary medical uses.

Your request for interpretation includes the following statement: "In order to provide certainty to Scottsdale's citizens and stakeholders, we request this interpretation as to whether Banner can avoid the public rezoning hearing process by characterizing its proposed "Hospital" as an "Office"." However, we have been unable to identify any language in your request that would indicate the applicant is attempting to do as you have suggested. Rather, it appears your request for interpretation concerns a hypothetical scenario that we cannot reasonably respond to as it is not within the scope of the referenced application. Each development application submitted to the City is reviewed in the context of, among other things, the details of that proposal, available operational parameters, and available North American Industry Classification System (NAICS) and licensing information to assess whether the applicant's proposed use fits into the existing or proposed zoning designations and permitted land uses. Absent sufficient details to evaluate those factors, as is the case with your hypothetical, we cannot

provide an interpretation regarding whether a proposal would be permitted under the Zoning Ordinance.

To the extent that you have requested the Zoning Administrator interpret the Zoning Ordinance to confirm the districts where a "Hospital" is permitted, both the definition of "Hospital" and the zoning districts where that is a specified permitted land use are already identified in the Zoning Ordinance.

Respectfully,

Erin Perreault, AICP
Zoning Administrator
City of Scottsdale

EXHIBIT B

Snell & Wilmer
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PHOENIX, AZ 85004-2556
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Brett W. Johnson PC
(602) 382-6312
bwjohnson@swlaw.com

December 22, 2023

SENT VIA EMAIL AND COURIER

Erin Perreault, Zoning Administrator
City of Scottsdale
7447 E. Indian School Road, Suite 105
Scottsdale, AZ 85251
eperreault@scottsdaleaz.gov

RE: Request for Scottsdale Zoning Ordinance Interpretation Concerning the Utilization of the Definition of "Office" pursuant to C-2 and I-1 to Circumvent Definition of "Hospital" pursuant to C-O

Dear Ms. Perreault:

We represent HonorHealth.[1] HonorHealth operates a network of hospitals and medical centers in the City of Scottsdale, and as such, seeks to address the potential for the improper building of a hospital on property with a zoning designation of Central Business ("C-2") or Industrial Park ("I-1"). Specifically, pursuant to Scottsdale's Zoning Ordinance (the "Code"), HonorHealth seeks to clarify that building and/or operating a "hospital" under the guise of an "office" within the definitions of the Code is a violation of the Code.[2]

[1] A ruling permitting the respective action would cause HonorHealth to face an adverse impact. A nearby HonorHealth medical campus will be economically impacted by allowing hospitals on non-conforming zones. Additionally, the ruling would adversely affect HonorHealth's unique role as Scottsdale's largest hospital network by allowing hospitals to be built on C-2 and/or I-1 use zones without the opportunity of public comment and City Council review, therefore, decreasing the value of HonorHealth's properly conforming use zones. *See*, *City of Scottsdale Bd. of Adjustments*, 1-BA-2023, at 4 (citing *Cherry v. Wiesner*, 781 S.E.2d 871 (N.C. Ct. App. 2016) (holding that a nearby landowner has standing if new construction would cause "special damages" distinct from other landowners)).

[2] *See* HonorHealth's Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office" dated December 22, 2023, discussing the distinction between a "hospital" and an "office," attached as Exhibit 1.

On June 15, 2023, Banner Health Arizona ("Banner") submitted an application to the City of Scottsdale to request a rezoning of the property generally located at the southwest corner of State Route 101 Freeway and Hayden Road (the "Property").

This application, Case 5-ZN-2023, clearly illustrates Banner's plan to build an extensive 48-acre medical campus featuring, among other uses, a full-service hospital and in-patient beds to provide hospital level medical care. In doing so, Banner proposed rezoning the property to Special Campus ("SC") from C-2 and I-1 zoning to specifically allow for a "hospital" under the "Medical Facilities" use category, which provides for an extensive list of medical related uses, including a "hospital" use. Note that Banner's zoning application recognizes that the Property would need to be rezoned to allow its desired hospital use:

> "In order to facilitate development of the Project, Banner is proposing to rezone the Property to Special Campus (SC) zoning, which will help implement the vision for this area and maintain the citywide balance of land uses. Importantly, the proposed SC zoning and the Banner Scottsdale Medical center are in line with the types of uses already allowed on the Property pursuant to the existing zoning. So, **while the SC zoning change is necessary to accommodate the hospital facility,** the proposed medical uses are comparable to and compatible with the land uses already allowed by right on the Property." (emphasis added).

In order to provide certainty to Scottsdale's citizens and stakeholders, we request this interpretation as to whether Banner can avoid the public rezoning hearing process by characterizing its proposed "hospital" as an "office". Of the 47 zoning categories in the Code, a hospital is only allowed to be built in C-O (requiring a use permit with public hearings) or SC zoning districts. The Property is currently designated as C-2 and I-1, and does not allow a hospital without a rezoning. By example, the HonorHealth Thompson Peak Hospital was required in 2005, in Case 46-ZN-1990#16 and 21-UP-1995#3, to rezone its C-2 property to C-O and obtain a use permit. The City Council Report dated December 13, 2005, includes the following quote, "The PCD C-2 District does not allow hospitals."

Permitting a "hospital" in an "office" zoning category eviscerates the distinct purposes of each zone, their respective uses, and the concomitant legislatively approved public policy for each zoning district. The building, constructing, and/or operating of a "hospital" masquerading as an "office" in a C-2/I-1 district sets an adverse precedent allowing the development of non-permitted uses.

With this notice of formal interpretation, HonorHealth respectfully requests that you interpret the Zoning Ordinance to confirm that a "hospital" is strictly limited to the C-O (requiring a use permit with public hearings) land use zone, or within an approved SC zone and that those are the only lawful zoning districts that permit a "hospital" use. A decision permitting this non-

compliant use would adversely impact the uniformity and intent of Scottsdale's zoning ordinances, essentially rendering any zoning restriction moot.

If you have any questions, please do contact me at bwjohnson@swlaw.com or (602) 382-6312. Thank you for your attention to this matter.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th
Enclosure
cc: Jim Thompson, City Manager
Sherry Scott, City Attorney

EXHIBIT 1

Snell & Wilmer
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Brett W. Johnson PC
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bwjohnson@swlaw.com

December 22, 2023

SENT VIA EMAIL AND COURIER

Erin Perreault, Zoning Administrator
City of Scottsdale
7447 E. Indian School Road, Suite 105
Scottsdale, AZ 85251
eperreault@scottsdaleaz.gov

RE: Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office"

Dear Ms. Perreault:

We represent HonorHealth, a long-time healthcare nonprofit operating hospitals, primary and specialty care clinics, and ancillary offices in and around Scottsdale. Recently, HonorHealth acquired property at the northeast corner of State Route 101 Freeway and Hayden Road (the "Property") as part of its commitment to expanding alongside Scottsdale's growing population. Given this substantial investment into the Property, and to support HonorHealth's long-term facility planning efforts, HonorHealth seeks to clarify the application of the City of Scottsdale's Zoning Ordinances to this newly acquired property so it may ensure compliance with any use restrictions or regulations.

Specifically, pursuant to the Scottsdale's Zoning Ordinance (the "Code") Section 3.100, HonorHealth requests confirmation that (1) a "hospital", for which inpatient medical care will be provided, may only be built on land use zoned Commercial Office ("C-O") or Special Campus ("SC"), and (2) that an "office" use that may be built on other land use zones, such as Central Business ("C-2") and Industrial Park ("I-1"), may only be utilized for medical office or clinical medical care and not inpatient care that exceeds accessory support for limited medical practitioners (i.e. not to a "hospital" level of service with primary focus on inpatient care).

On or about November 16, 2022, HonorHealth purchased the Property subject to approximately forty-eight (48) acres of land use zone C-O, with the ability to designate up to approximately ten (10) acres of land use zone C-2. HonorHealth's strategy is to responsibly plan for future growth in Scottsdale and use data to drive decisions on building new healthcare services whether it be a hospital, medical office, or urgent care. HonorHealth looks at each individual

community and their specific needs to tailor medical options for the future. As a result of the diverse range of possible facilities in a future development on a property with mixed-use zoning including C-O and C-2, HonorHealth requests this interpretation to ensure that future facilities are built on the correct land use zone.

The Code limits the building of a hospital to C-O (requiring a use permit with public hearings) or to SC. An "office" can be built on a number of land use zones, including zone C-2 and I-1. However, because an "office" can include medical services and limited inpatient care normally allowed as an accessory to a clinic or rehabilitation facility, the distinction between the two development types is somewhat unclear, compelling this request to establish clarity with an interpretation of the Code that HonorHealth can rely upon for its development master planning efforts (as well as for planning future land use entitlements if/as needed).

Despite this friction, the Code is unambiguous in defining a hospital for zoning purposes. The Code, in Section 3.100 defines a hospital as "a facility for the **general and emergency** treatment of human ailments, **with bed care** and shall include a sanitarium and clinic but shall not include convalescent or nursing home." *Scottsdale, AZ – Zoning Ordinances*, App. B, Art. III (emphasis added).

Additionally, a hospital is required to obtain a license through the Arizona Department of Health Services. As such, Arizona's licensing requirements support the City's zoning-based definition of a hospital.[1] For purposes of licensure, Arizona law defines a "hospital" as: "a class of health care institution that provides, through an organized medical staff, **inpatient beds**, medical services, continuous nursing services, and diagnosis or treatment to a patient." Ariz. Admin. Code § 9-10-101(110) (emphasis added). Arizona's licensing requirements definition includes "inpatient **beds**" for hospitals.

Conversely, the City's Code defines an "Office" as "an establishment or activity primarily engaged in professional, clerical or medical services, **including inpatient services**." A "hospital" is defined "**with bed care**." While "bed care" is not defined by the Code, there is an implied distinction between "inpatient" stays and "bed care" being of a more intense nature (by being longer in duration, requiring more monitoring, staff, and support services, etc.). The Code definition of "office" describes medical services with a limited scope when compared to the broader definition, and scale, of a "hospital"; evidenced by allowing medical offices across the City by-right, while limiting the location of hospitals to specific areas and, in the case of the C-O zone, requiring a Conditional Use Permit (which requires public hearings and a discretionary

[1] Although Arizona's definition supports the City's definition of a "hospital," any distinction between the definitions should be read in deference to the State's Statutory definition. *See*, City of Scottsdale, Zoning Interpretation 2002-2 (Aug. 1, 2002) (applying an updated Statutory definition of "Adult Care Homes" to Scottsdale's Ordinances for "Adult Foster Care" and "Assisted Living").

approval by the City). Medical offices, on the other hand, are typically a limited practice and a specific service, such as a general practitioners office or a specialist office (such as a cardiac practice) that generally has business hours that are similar to office uses (hence, why they are allowed in zones with other non-medical office uses). Given their intensity, 24-hour operation, larger staffing needs as well as food and other support for both patients and staff, the definition of a hospital includes "general and emergency treatment" – contemplating an expansive network of treatment and practice types. Both through the terms in the Code and by allowing one use broadly and the other use narrowly, the definitions are therefore unambiguous and clearly distinguished.

When conflicting interpretations of law exist after examining the text, including the text of zoning ordinances, Arizona courts refer to the law's subject matter, historical background, and purposes. *Maricopa County v. Rana*, 248 Ariz. 419, 422 (2020) (citing *State v. Burbey*, 243 Ariz. 145, 147 (2017)). Should there be any perceived conflict about how a "hospital" falls into the City's zoning laws, the purpose of the land use zone designations resolves those issues. The City does not allow a hospital in either the C-2 or I-1 land use zone as such use is clearly more intensive than other allowed uses, creating a need to prohibit the intensity of a hospital from this zone. Indeed, the City designates these use zones with a specific purpose in mind:

> C-2: This district is intended to permit uses for recurring shopping and service needs for multiple neighborhoods. This district includes uses usually associated with office and retail shopping developments, typically located near residential neighborhoods.
>
> I-1: The I-1 District is intended to provide for light manufacturing, aeronautical, light industrial, office and supportive uses to sustain and enhance major employment opportunities. The development standards are intended to provide development flexibility consistent with the sensitive design principles, and appropriate transition in areas adjacent to residential districts.

With C-2 zoning located throughout the City and often adjacent to less intensive zones and residences, the zone is intended to allow compatible uses while excluding those that feature more intensive operations. A hospital that has its 24/7 operation, large staff, large number of visitors (both patients and their visitors), deliveries and emergency vehicle operations, clearly does not conform to this intent.

The text and purpose of the City's Code makes clear that a "hospital" is limited to two (2) specific zones – C-O (requiring a use permit with public hearings) and SC. The City's decision to limit hospitals to land use zones C-O and SC – and only these two (2) zones out of forty-seven (47) zoning categories – implements the public policy of recognizing the intense impact of a hospital (with its twenty-four hour operation and helicopter traffic) on neighborhoods, traffic, and infrastructure, compared to the less intense impacts of an office.

With this notice of formal interpretation, HonorHealth respectfully requests that you interpret the Zoning Ordinance to confirm that a facility for the general and emergency treatment of human ailments with bed care, including related clinic care, is not permitted in any zoning district except the C-O (requiring a use permit with public hearings) and SC districts. Moreover, "office" uses that include the treatment of human ailments with accessory bed care of any duration shall not be defined as a "hospital" pursuant to the Code.

This confirming interpretation will provide much needed clarity on the distinction between "Hospital" uses and medical office uses that will assist the HonorHealth team with their long-range planning efforts.

If you have any questions, please do contact me at bwjohnson@swlaw.com or (602) 382-6312. Thank you for your attention to this matter.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th
cc: Jim Thompson, City Manager
Sherry Scott, City Attorney

EXHIBIT C

Banner Scottsdale Medical Center

Application Narrative for Special Campus Zoning

Submitted by:

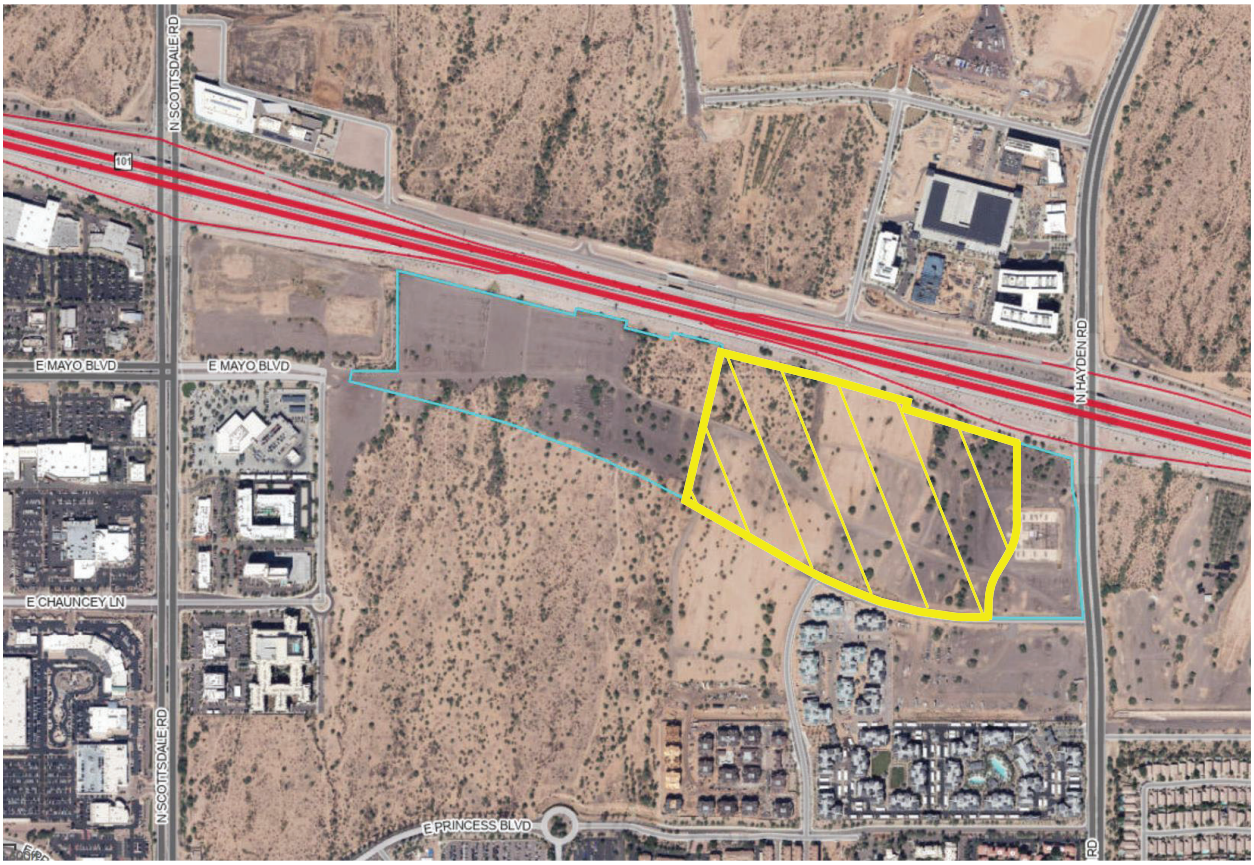
Banner Health®

June 15, 2023

Table of Contents

1. Introduction

Banner Health ("Banner") submits this application to the City of Scottsdale ("City") in support of Banner's proposal to develop the Banner Scottsdale Medical Center, which is planned as an approximately 48-acre medical campus (collectively, the "Project" or "Banner Scottsdale Medical Center") on property generally located at the southwest corner of State Route 101 Freeway and Hayden Road in the City ("Property"). The Property is comprised of a portion of Maricopa County Assessor Parcel number 215-07-209D as shown below. In order to facilitate development of the Project, Banner is proposing to rezone the Property from I-1 and C-2 PCD to Special Campus ("SC") zoning.



The SC zoning district is designed to accommodate unique land uses in a campus setting and includes specific provisions for medical facilities. With regard to medical facilities, the SC district is intended to accommodate multiple medical uses in an integrated campus setting.

The proposed Banner Scottsdale Medical Center campus will include a state-of-the-art, full-service hospital, diagnostic and treatment facilities, a cancer center in partnership with MD Anderson, medical offices, ancillary medical uses, and other related uses. The facility is intended to serve as a broad-based community healthcare resource to serve the existing and growing population in North Scottsdale and North Phoenix. Banner has carefully chosen the programming for this facility to provide an optimum level of service for the target demographic. In addition to providing health care choice for the growing population in the northeast region (which is projected to grow by 100,000 residents by 2030), the Banner Scottsdale Medical Center will provide services to more than 50,000 residents who already live in Scottsdale or nearby and rely on Banner Health for their insurance and health care needs. These residents are currently leaving the region to receive health care services. The Banner Scottsdale Medical Center fulfills Banner's mission making health care easier so life can be better.

2. Site and Zoning History

The Property historically has been included within Planning Unit VI of the Crossroads East PCD. The Crossroads East PCD encompasses approximately 1,000 acres generally located between Legacy Boulevard and Princess Boulevard (north-south) and Hayden Road and Scottsdale Road (east-west), bounding both sides of SR 101. At the time of the original Crossroads East PCD approval in 2002, the Crossroads East PCD encompassed land wholly managed under trust by the Arizona State Land Department. In the time since, numerous properties within the Crossroads East PCD have been sold at public auction and are developed or under development. The Property was part of a larger parcel sold at public auction by ASLD in 2022 to an entity controlled by the Van Tuyl Companies and De Rito Partners ("VT / DRP") On May 16, 2023, the Scottsdale City Council adopted Ordinance No. 4594 (19-ZN-2022#11) affirming the zoning classification in case no. 19-ZN-2002#6 and finalizing the zoning district boundary as Planned Community District (PCD), with PCD comparable zoning districts Central Business (P-C C-2) on the approximate east four-fifths of the Property and Industrial Park (P-C I-1) on the west one-fifth of the Property. Banner is seeking to rezone the Property from Crossroads East P-C C-2 and P-C I-1 to Special Campus.

3. Existing Conditions

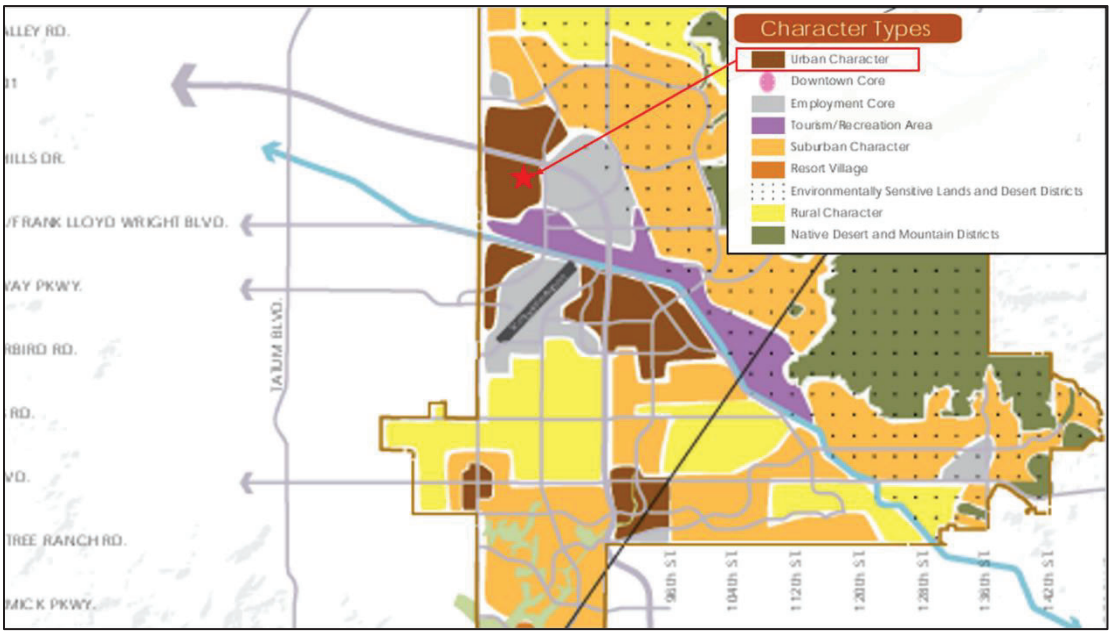
The Property is currently vacant, undeveloped desert land, and is immediately bounded on the east by property owned by VT / DRP and zoned P-C C-2 in 19-ZN-2022#11 and Hayden Road; to the west by the Miller Road alignment with additional vacant property owned by VT / DRP to the west of Miller Road; to the north by the State Route 101 Freeway ("SR 101"); and to the south and southwest by apartments and undeveloped desert land, respectively. Moving further outward, notable uses include Nationwide/Cavasson, vacant property owned by Axon, the Fairmont Scottsdale Princess, and the TPC golf course.

4. General Plan 2035 Analysis

The Property is currently designated within the City's General Plan Character Types as Urban Character with a Future Land Use Designation of Mixed-Use Neighborhoods. See Section 7 below for a detailed discussion as to how the Banner Scottsdale Medical Center complies with the General Plan Land Use designations for this property.

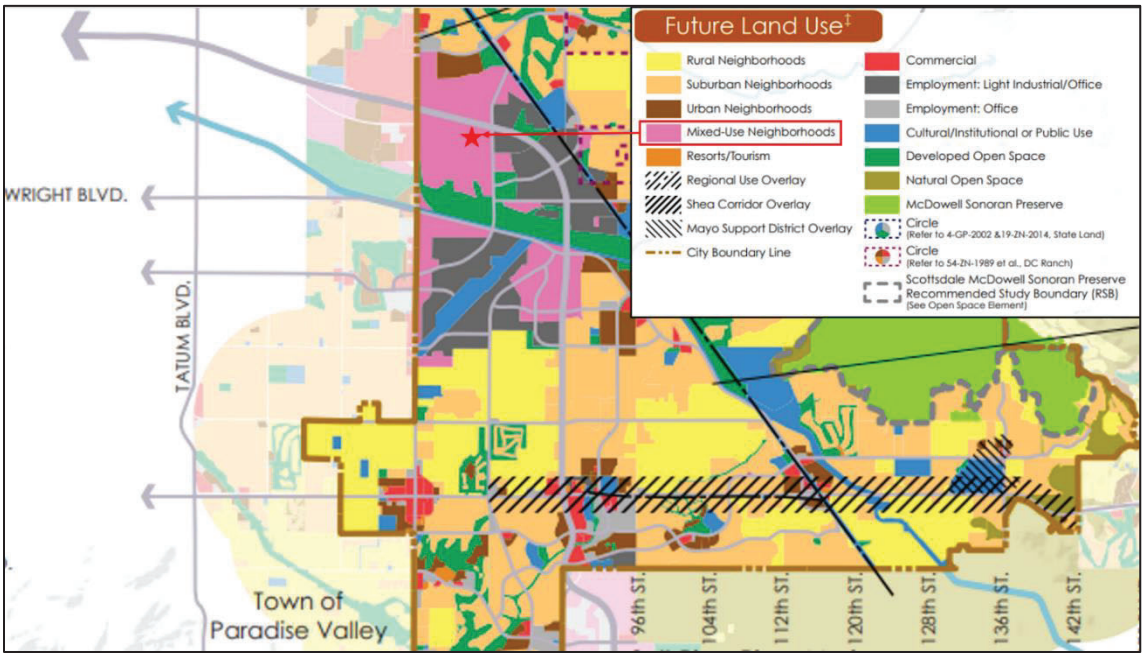
The City's General Plan 2035 ("General Plan") provides a statement of vision and community-wide land use and development goals. The General Plan is to be used as a decision-making guide for development and is intended to be used as a framework for more specific planning. It is an expression of the City's goals and policies and is intended to shape the physical form of the city.

Per the General Plan, the Property lies within the Urban Character Type designation.



The Urban Character Type is intended to accommodate higher-density residential, non-residential, and mixed-use neighborhoods, including apartments, high-density townhouses, business and employment centers, and resorts. Properties within the Urban Character Type and in Growth Areas, including mixed-use portions of the Greater Airpark, are appropriate for taller buildings. The proposed Banner Scottsdale Medical Center is appropriate for and consistent with the Urban Character Type designation.

Additionally, the Property has a further refined Future Land Use Designation of Mixed-Use Neighborhood.



Properties designated Mixed-Use Neighborhood are predominantly within the Greater Airpark Character Area and located in areas with strong access to multiple nodes of transportation and regional services. These areas can accommodate higher-density of housing with complementary office or retail services; however, within the Greater Airpark, the Regional Plan contemplates those properties designated Mixed-Use Neighborhood may consistent of non-residential uses. The proposed Banner Scottsdale Medical Center is consistent with the attributes of the Mixed-Use Neighborhood designation.

Shown below are elements and goals from each chapter of the General Plan that are advanced with the proposed Banner Scottsdale Medical Center.

Character and Culture Chapter

Character & Design Element

Goal CD 1: *Determine the appropriateness of all development in terms of community goals, surrounding area character, and context*.

Policy CD 1.3- Ensure that all development is a part of and contributes to established Character Types.

RESPONSE: The proposed development lies within the Urban Character Type designation and within the Greater Airpark Character Area. The Banner Scottsdale Medical Center promotes the goals and policies of these character types. A complete discussion of how this project complies with the goals and policies of the character area is provided in Section 7 below.

Goal CD 3: *Foster quality design that enhances Scottsdale as a unique southwestern desert and tourism community through the development review processes*.

Policy CD 3.1- Strengthen Scottsdale's economic and environmental attributes, distinctive character and attractiveness through collaborative site planning and design.

RESPONSE: The Banner Scottsdale Medical Center will be developed in collaboration with the City to ensure a quality design that provides a high-quality employment opportunity within the Greater Airpark Character Area, while taking into consideration the environmental attributes of the Property and addressing any potential impacts on the surrounding area.

Goal CD 4: *Enhance the design of streets and public spaces to improve Scottsdale's visual quality, experience, Sonoran Desert context, and social life*.

Policy CD 4.3- Establish new, and maintain existing, guidelines and policies for the design and maintenance of Visually Significant Roadways and major city streets, including Scenic Corridors, Buffered Roadways, Desert Scenic Roadways (in ESLO districts), and streets with themed streetscape designs.

RESPONSE: The Banner Scottsdale Medical Center will help to directly implement the guidelines of the Buffered Roadway along Mayo Boulevard and Miller Road. The proposed design within the landscape boundaries along Mayo Boulevard and Miller Road are planned to include regional desert plantings (both salvaged and new), bioswales, a retention basin, and a meandering pedestrian path. This treatment will enhance the unique image of the streetscape.

It is anticipated that development of the VT / DRP "out parcels" with frontage along Hayden Road will comply with the Buffered Roadway guidelines.

Goal CD 6: *Minimize light and noise pollution.*

Policy CD 6.1- Support Scottsdale's dark sky areas and designation as an Outdoor Light Control City by reducing light pollution, glare, and trespass where possible, while still attending to public safety need.

RESPONSE: Lighting will be chosen for the Project to provide the maximum amount of light necessary for safety and security, while minimizing light trespass and glare. Full cut-off fixtures will be shielded and will be pointed away from property lines to ensure that the lighting program maintains dark skies to the greatest extent possible. Lighting will conform to the City of Scottsdale's requirements.

Policy CD 6.2- Encourage creative, energy efficient, and high-quality designs for outdoor lighting that reflect the character of the local context.

RESPONSE: As shown on the cut-sheets provided with the application materials, the lighting fixtures chosen for this campus include stylish, energy-saving, LED fixtures. The styling of the fixtures is unobtrusive and intended to allow the light

poles to blend into their surroundings. The LED technology allows the light fixtures to have greater pole spacing to minimize visual clutter without sacrificing photometric performance.

Land Use Element

Goal LU 2: *Sensitively transition and integrate land uses with the surrounding natural and built environments.*

Policy LU 2.3- Locate employment and major non-residential uses along major transportation networks to limit impacts on residential areas and provide citywide and regional access.

RESPONSE: The Banner Scottsdale Medical Center is located with convenient access to a freeway (SR 101) and two arterial roadways (Hayden Road and Mayo Blvd), providing access to major regional transportation corridors. The surrounding area is a developing area that provides visibility to Banner and allows Banner to establish high value employment uses within the Greater Airpark. The development has been strategically planned with sensitivity to nearby residential uses, with the taller buildings placed closest to SR 101 to provide the maximum possible distance between the hospital towers and nearby residences, while preserving view sheds. Importantly, the City's planning policies and prior approvals for high value employment uses in the area (Nationwide/Cavasson and Axon most recently) provide support for additional, comparable uses like the Banner Scottsdale Medical Center along SR 101.

Goal LU 3: *Maintain a balance of land uses to provide a high quality of life.*

Policy LU3.3- Maintain a citywide balance of land uses and consider modifications to the land use mix to accommodate changes in community vision, demographic need, and economic sustainability.

RESPONSE: In order to facilitate development of the Project, Banner is proposing to rezone the Property to Special Campus (SC) zoning, which will help implement the vision for this area and maintain the citywide balance of land uses. Importantly, the proposed SC zoning and the Banner Scottsdale Medical Center are in line with

the types of uses already allowed on the Property pursuant to the existing zoning. So, while the SC zoning change is necessary to accommodate the hospital facility, the proposed medical uses are comparable to and compatible with the land uses already allowed by right on the Property.

Policy LU 3.5- Engage the community in all land use discussions.

RESPONSE: As detailed in the Citizen Review Plan for the Project, Banner hosted a neighborhood meeting as required by the City of Scottsdale. The notification list included all property owners within 750-feet of the development site, as well as those individuals on the Citywide "Interested Parties" list. A summary of the neighborhood meeting and any additional outreach to interested stakeholders will be provided to the City in the form of a Citizen Review Report prior to the first public hearing for these applications.

Additionally, as the zoning application moves forward, Banner will fully comply with the revised city policy and expectations regarding public outreach for General Plan, Rezoning, and Zoning Ordinance Text Amendment cases that become effective July 1, 2023. Banner will proactively engage with the community as the application moves forward and will create a project specific website to easily disseminate information to residents, stakeholders and interested parties.

Goal LU 6: *Attract and retain diverse employment, business, and retail land uses to improve the economic well-being of Scottsdale's residents.*

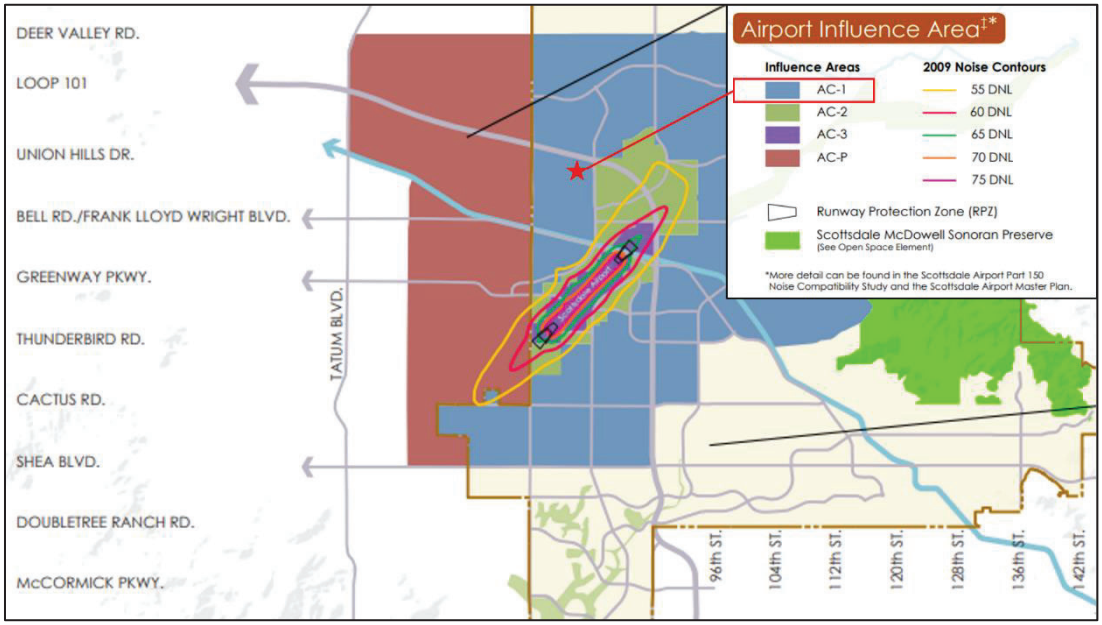
Policy LU 6.2- Support well-planned, clustered employment center of related or similar uses such as Healthcare and Research and Development land uses.

RESPONSE: The proposed Banner Scottsdale Medical Center, along with the Nationwide/Cavasson office development to the north across SR 101 and the planned Axon headquarters and manufacturing facility to the east across Hayden Road across provide support for this area as a well-planned employment center for healthcare, insurance, and public safety companies.

Goal LU 7: *Protect the viability of the Scottsdale Airport by encouraging compatible land uses and development types in the surrounding area.*

Policy LU 7.1- Maintain and follow the Airport Part 150 Noise Compatibility Program. Noise contours and other related information must be disclosed to all potential residents and businesses according to the Airport Influence Area and Noise Contour maps.

RESPONSE: As shown below, the Property lies outside the 55 DNL Noise Contour area for the Scottsdale Airport yet remains within Airport Influence Area AC-1. Hospitals are permitted within the AC-1 Influence Area with certain limitations. Banner has already begun work with the City and the Scottsdale Airport to ensure compliance with all requirements, including a height analysis, noise mitigation measures, required disclosures and avigation easements, if required.



Collaboration and Engagement Chapter

Community Involvement Element

Goal CI 1: *Seek early and ongoing community involvement through broad public input in project and policy-making decisions.*

Policy CI 1.1- Maximize opportunities for early notification of proposed projects using a variety of methods.

Policy CI 1.2- Use public involvement plans to identify an engage interested parties and provide opportunities for information exchange.

Policy CI 1.3- Require project sponsors to conduct community involvement programs, and encourage them to show responsiveness to community comments, and demonstrate how comments are ultimately addressed.

RESPONSE to Policies 1.1 through 1.3: As previously noted, the applicant has provided a Citizen Review Plan to City Planning Staff. As detailed in the plan, Banner held a neighborhood meeting as required by the City's Zoning Ordinance. The notification list included all property owners within 750-feet of the development site, as well as those individuals on the Citywide "Interested Parties" list. Additionally, a sign was posted on the Property providing notice of the neighborhood meeting. A summary of the neighborhood meeting, all of the notification materials used to coordinate the meeting and a summary of any additional outreach to interested stakeholders will be provided to the City in the form of a Citizen Review Report prior to the first public hearing for these applications.

As the zoning application moves forward, Banner will fully comply with the revised city policy and expectations regarding public outreach for General Plan, Rezoning, and Zoning Ordinance Text Amendment cases that become effective July 1, 2023. Banner will proactively engage with the community as the application moves forward and will create a project specific website to easily disseminate information to residents, stakeholders and interested parties.

Community Well-Being Chapter

Healthy Community Element

Goal HC 1: *Promote access to health and human services for citizens of Scottsdale.*

Policy HC 1.1- Support the development, preservation, and enhancement of critical healthcare facilities, particularly in underserved areas. Work with healthcare administrators to plan and develop facilities of the most suitable size, location, quality and type.

RESPONSE: The proposed Banner Scottsdale Medical Center campus will include a full-service acute care hospital, a cancer center, diagnostics and treatment facilities, medical office uses and other ancillary uses. The facility is intended to serve as a broad-based community healthcare resource to serve the existing and growing population in North Scottsdale and North Phoenix. Banner has carefully chosen the programming for this facility to provide an optimum level of service for the target demographic. In addition to providing health care choice for the growing population in the northeast region (which is projected to grow by 100,000 residents by 2030), the Banner Scottsdale Medical Center will provide services to more than 50,000 residents who already live in Scottsdale or nearby and rely on Banner Health for their insurance and health care needs. These residents are currently leaving the region to receive health care services. The Banner Scottsdale Medical Center fulfills Banner's mission making health care easier so life can be better.

Innovation & Prosperity Chapter

Economic Vitality Element

Goal EV 2: *Provide diverse economic activities, employment opportunities, and educational pursuits to enhance the socioeconomic prosperity of all community members.*

Policy EV 2.1: Target specific economic sectors for expansion or relocation in Scottsdale that will enhance the quality of life of the community, provide the greatest positive impact, and deliver the fewest negative impacts.

RESPONSE: The Banner Scottsdale Medical Center is intended to serve as a broad-based community healthcare resource to serve the existing and growing population in North Scottsdale and North Phoenix and will directly and positively impact quality of life for the community. Health care choice benefits all Scottsdale residents. The Banner Scottsdale Medical Center fulfills Banner's mission making health care easier so life can be better.

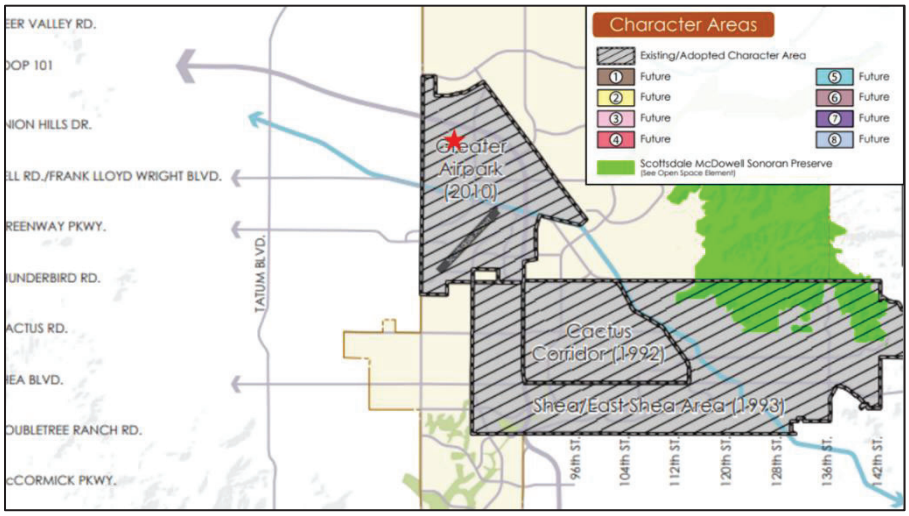
Policy EV 2.4- Attract and retain a mix of businesses and industries that can provide jobs for residents of all skill and education levels.

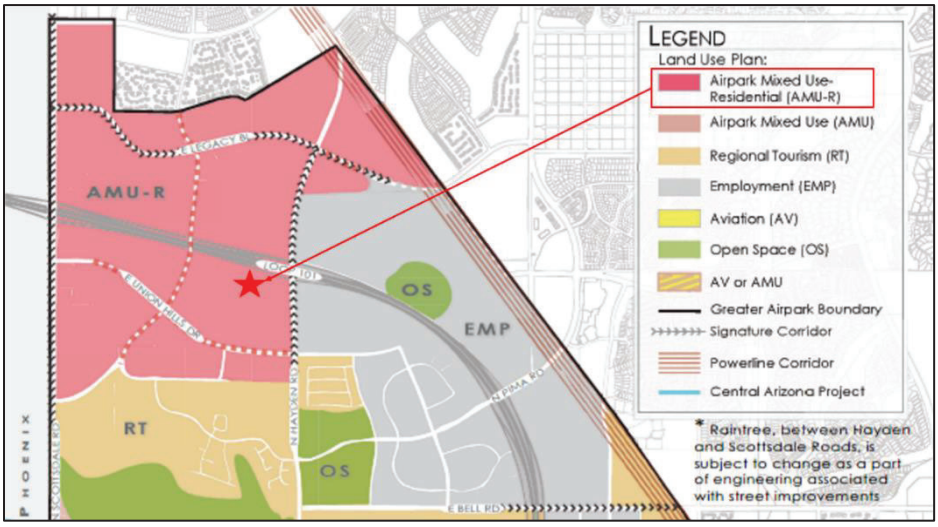
RESPONSE: The Banner Scottsdale Medical Center will be an employment center for individuals of all skill and education levels—from administrative and operational employees to nurses, doctors and other practitioners, the hospital and ancillary uses will provide job opportunities for residents of Scottsdale and beyond.

5. Compliance with Greater Airpark Character Area Plan

Greater Airpark Character Area Plan

The Property is located within the Greater Airpark Character Area Plan and is designated for Airpark Mixed-Use Residential (AMU-R). Section 8 below provides detailed discussion as to how the Banner Scottsdale Medical Center advances the goals and polices of the Greater Airpark Character Area Plan.





The Property is located within the Greater Airpark Character Area Plan ("GACAP"). The GACAP is a growth area within Scottsdale, and it is encouraged that development in this area will support a planned concentration of uses in order to discourage sprawl. The development site is designated as Airpark Mixed-Use Residential ("AMU-R") on the

GACAP Land Use Map. Similar to the Employment Core designation in the General Plan, the AMU-R designation in the GACAP includes medium- to higher-scale development and uses, such as office, commercial warehousing and light industrial land uses that provide opportunities for local as well as regional jobs. These areas within the GACAP should have access to multi-modal transportation systems. The proposed Banner Scottsdale Medical Center is ideally situated at SR 101 & Hayden Road and will bring a range of jobs to the area. The jobs at the health campus will include administrative, nursing, physician and support staff positions.

The proposed Banner Scottsdale Medical Center advances the following goals and policies of the plan elements:

Land Use Element

Goal LU 1: *Maintain and expand the Greater Airpark's role as a national and international economic destination through appropriate land uses, development and revitalization*.

Policy LU 1.1- Maintain and expand the diversity of land uses in the Greater Airpark.

RESPONSE: The addition of a medical campus at will contribute to the diversity of land uses in the area by providing an acute-care hospital that will serve the residential areas to the north and the future residential uses to the west.

Policy LU 1.2- Support a mix of uses within the Greater Airpark that promote a sense of community and economic efficiency, such as clustering similar/supportive uses and incorporating residential intended for the area's workforce where appropriate.

RESPONSE: The proposed Banner Scottsdale Medical Center near the Cavasson/Nationwide employment campus and near the planned Axon campus that is under development. The Project advances the goal of clustering similar employment uses and will contribute to a vibrant gateway at the SR 101 & Hayden Road interchange.

Policy LU 1.3- Promote development intensities supportive of existing and future market needs.

RESPONSE: The proposed Banner Scottsdale Medical Center is planned at an intensity that will serve the immediate healthcare needs for the area, with planned expansions to support the needs of future residents as well. As noted, The facility is intended to serve as a broad-based community healthcare resource to serve the existing and growing population in North Scottsdale and North Phoenix. Banner has carefully chosen the programming for this facility to provide an optimum level of service for the target demographic. In addition to providing health care choice for the growing population in the northeast region (which is projected to grow by 100,000 residents by 2030), the Banner Scottsdale Medical Center will provide services to more than 50,000 residents who already live in Scottsdale or nearby and rely on Banner Health for their insurance and health care needs. These residents are currently leaving the region to receive health care services. The Banner Scottsdale Medical Center fulfills Banner's mission making health care easier so life can be better.

Policy LU 1.4- Encourage the redevelopment of underutilized land to more productive uses.

RESPONSE: As previously noted, the Property is undeveloped, but has been planned for high quality employment uses for many years. The Banner Scottsdale Medical Center will make productive use of the Property by providing hundreds of employment opportunities within this important employment area of the City.

Policy LU 1.8- Prevent erosion of Greater Airpark Employment land uses through land use regulations, such as limiting retail and restaurants in areas designated for employment.

RESPONSE: As a state-of-the-art healthcare campus, the proposed Project will be comprised of high-quality employment land uses and opportunities.

Goal LU 3: *Sensitively transition land use, scale, and intensity at the Greater Airpark boundary in areas adjacent to lower-scale residential neighborhoods.*

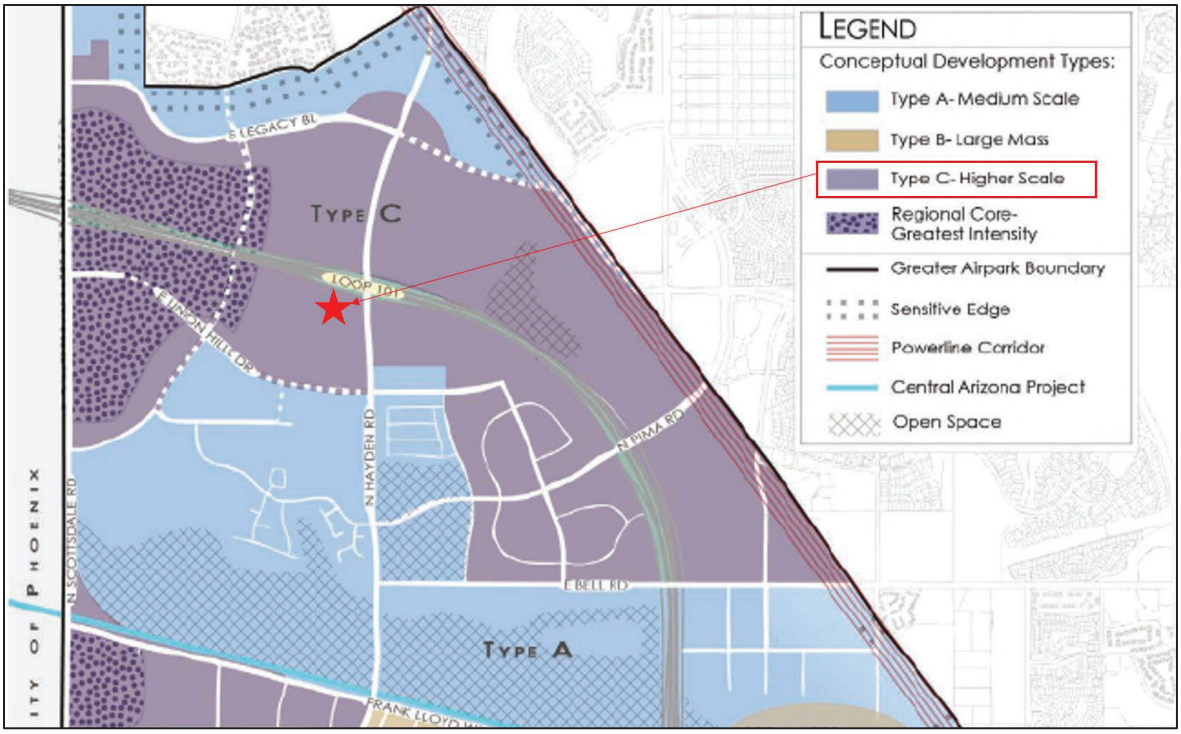
Policy LU 3.1- The scale of existing residential development should be acknowledged and respected through a sensitive edge buffer, which may include transitional development standards, landscape buffers, and sensitive architectural design solutions.

RESPONSE: The GACAP contemplates medium- to higher-scale development on the Property, along with other properties along SR 101. Banner has strategically designed the site plan and building height and orientation adjacent to the SR 101 in order for the scale to complement the area's character, including the Cavasson/Nationwide office campus and Axon campus. The placement of the taller buildings along the SR 101 frontage places the greatest distance possible between the proposed development and the nearest residential development.

Goal LU 4: *Utilize development types to guide the physical and built form of the Greater Airpark.*

Policy LU 4.3- Encourage higher-scale Type C development in areas with access to major transportation corridors and where lower-scale residential areas will be buffered from higher-scale development.

RESPONSE: As shown below, the Banner Scottsdale Medical Center is located in a part of the Airpark that calls for Type—C Higher Scale development. This development type is encouraged in areas with access to multiple modes of transportation and where scale will complement the area's character. The location of the proposed medical campus at the intersection of SR 101 and a major arterial, and away from residential development, perfectly implements this policy.



Goal LU 6: *Promote the Greater Airpark as a mixed-use economic and aviation-based employment center that is complementary to Downtown Scottsdale, the city's premier cultural, civic and residential mixed-use core.*

Policy LU 6.1- Prioritize employment uses over residential uses in the Greater Airpark.

RESPONSE: Rezoning the Property to Special Campus for the proposed Banner Scottsdale Medical Center will implement the stated policy of the Scottsdale Airpark Character Area Plan that emphasizes employment uses over residential uses. Banner anticipates that this proposed development will bring over 1,000 healthcare related jobs to over the next 5 years. These include physicians, nurses, clinical, and other professionals.

Economic Vitality Element

Goal EV 1: *Sustain the long-term economic prosperity of the Greater Airpark.*

Policy EV 1.5- Develop existing and attract new high-value businesses to the Greater Airpark.

RESPONSE: The addition of a healthcare campus to the Greater Airpark Area will introduce a new-high value employer and community asset to the Greater Airpark Area, including diverse, high-quality jobs that will attract employees that may support surrounding residential and commercial areas.

Policy EV 1.7- Attract new businesses to the Greater Airpark and encourage retention programs to keep them in the community over time.

RESPONSE: A healthcare campus is a sustainable, high value, community-oriented business that will remain and grow with the community over time. Banner is proud of their track record in Arizona and has twelve hospitals in the greater Phoenix area. With over 50,000 employees, Banner is the largest private employer in Arizona. Moreover, Banner will be making a significant capital investment at this location of nearly $450 million over the next five years. This includes $300 million in the initial hospital investment and $150 million in physician and ambulatory investments. At buildout, the full healthcare campus will represent a direct investment of over $750 million dollars in the City.

Policy EV 1.8- Attract a diversified business base to help insulate the city during economic downturns.

RESPONSE: Individual medical needs don't change during economic downturns. People require medical care and surgical services in times of prosperity and also when there is a downturn in economic activity. A healthcare campus will provide consistent availability of medical care to Scottsdale residents no matter what the economic condition of the City may be. As noted, the Banner Scottsdale Medical Center will provide services to more than 50,000 residents who already live in Scottsdale or nearby and rely on Banner Health for their insurance and health care

needs. These residents are currently leaving the region to receive health care services.

Goal EV 2: *Maintain and strengthen established economic engines in the Greater Airpark.*

Policy EV 2.4- Support the growth and development of the Greater Airpark's office industries and corporate headquarters.

RESPONSE: With the development of the Banner Scottsdale Medical Center, the Greater Airpark Area will become home to Banner's only full-service healthcare campus in the City. The hospital and related office uses will create a synergy within the airpark that may bring other medical related uses to the airpark area.

Goal EV 4: *Support the continued development of new economic opportunities that capitalize on market trends and the Greater Airpark's competitive strength.*

Policy EV 4.5- Recognizing that there are limited, large scale, economic producing opportunities remaining in Scottsdale, work with the State Land Department to attract revenue generating projects to the Greater Airpark land holdings so as to benefit both the State and local community.

RESPONSE: Banner has worked closely with the City for the development of the hospital, while leaving a sizable amount of Property, including valuable frontage along Hayden Road and west of the Miller Road alignment, which can be utilized for other employment uses that will create a synergy of uses at this important location in the City.

Environmental Planning Element

GOAL EP 1 - *Reduce energy consumption through environmentally sensitive land use practices and design policies.*

Policy EP1.3 - Promote landscape design and irrigation methods that contribute to water and energy conservation.

RESPONSE: Low water native plant species will be selected for a natural desert landscape palette as well as a significant amount of species salvage from the site pre-construction.

Policy EP1.4 - Promote solar and alternative energy development standards in building and site design.

RESPONSE: Electric vehicle charging stations will be provided, and infrastructure for solar-ready parking canopies will be planned for the hospital and in the future parking structure. Additionally, energy efficiency will be promoted with mechanical system selections.

Policy EP 1.7 – Encourage design concepts that maximize building efficiency such as building orientation, air circulation, and shading.

RESPONSE: The buildings are oriented to maximize views from the patient tower to the surrounding Sonoran Desert views, as well as to optimize energy efficiency with its east/west axis orientation. Natural and built shading is provided throughout the site to support the use of the pedestrian network of trails and sidewalk.

GOAL EP 3 **-** *Reduce the Urban Heat Island effect in the Greater Airpark*

Policy EP3.2 – Increase the use of effective natural and man-made shading for parking lots, streets, and pedestrian areas.

RESPONSE: The majority of the parking fields run along the East/West axis with ample shading being provided by buildings and on collector paths from the southern exposure. Additionally, the planned parking structure will provide additional parking spaces without requiring additional fields of pavement.

Policy EP3.3 – Incorporate opportunities for "cool" technologies that will help reduce the heat island effects, such as alternative pavement material, high solar reflectance building surface treatments, passive cooling elements, open spaces, and "green" roofs.

RESPONSE: The roofing will have a high solar reflectance, and the project maximizes the amount of open space to support wellness and use of the pedestrian pathways.

Policy EP3.4 – Increase tree planting as a ground-level ozone reduction measure.

RESPONSE: Tree size and quantities will adhere to the municipal code requirements throughout the site and will be aided by landscape salvage efforts for mature species integration into the campus. The densities of vegetation will increase next to areas of heavy pedestrian use and major building elements.

GOAL EP 4 - *Foster a sustainable balance between environmental stewardship and the development and redevelopment of the Greater Airpark*

Policy EP4.2 – Encourage all developments to respect and respond to the Sonoran Desert climate.

RESPONSE: The building is oriented to respect the Sonoran climate and pedestrian pathways are planned to have natural shading to protect pedestrian thermal comfort. The site organization allows for the direction of wind flow from the south to naturally cool outdoor gathering spaces.

Policy EP4.8 – Building design should respect and enhance the Sonoran Desert context of the Greater Airpark using building orientation, landscape buffers, color, textures, materials, and lighting.

RESPONSE: The Banner design standards were developed to be rooted in the themes of the Sonoran Desert context. The material configuration and type mimic natural landforms and textures and promote visual connectivity to the desert surroundings. The landscape design supports pedestrian movement and is aligned with the historic natural water flows through the site.

GOAL EP 5 **-** *Improve water conservation efforts and encourage the reuse of graywater.*

Policy EP5.1 – Review future development impacts on water use and encourage development design that fosters water conservation.

RESPONSE: Water is a critical component to the promotion of patient wellness within the healthcare facilities. Banner is committed to solutions that reduce water use without compromising patient care. Such solutions may include landscape design and its emphasis on low water-use plant species, water-smart medical equipment, and low-flow plumbing fixtures.

Policy EP5.3 – Promote rainwater harvesting techniques in site planning, landscape design, and landscape improvements for all development types.

RESPONSE: Open space and pedestrian pathways are planned to either have natural bioswales to promote water movement or depressions to increase water infiltration. Basins are designed to be integrated into the natural landscape design character.

Policy EP5.4 – Encourage landscape improvements that limit the amount of turf area and make optimal use of indigenous and adapted desert plants.

RESPONSE: The landscape palette is planned to largely consist of indigenous and adapted desert plant species.

GOAL EP 6 **-** *Effectively manage and protect local and regional stormwater drainage ways.*

Policy EP6.1 – Establish flood control design criteria that recognizes, considers, and respects: sensitive aesthetic treatment; multiple uses that harmonize the character; and impact on wildlife habitats.

RESPONSE: The Project's basins will be designed to convey a natural aesthetic and, like the existing washes, will promote natural habitat and native plant population. Amenities like walking trails will be integrated around the water conveyance systems.

Policy EP6.2 – Continue to monitor stormwater runoff to identify and reduce stormwater pollution.

RESPONSE: Stormwater will be treated before it leaves the site for enhanced water quality. A stormwater pollution prevention plan will be implemented to protect stormwater from pollutants prior to, during and post construction. Finally, the first flush will be retained onsite, which typically contains the highest amount of sediment and oils.

Policy EP6.5 – Integrate alternative stormwater detention practices, such as rainwater harvesting and water infiltration methods.

RESPONSE: Areas of open space will provide shallow areas and depressions to promote good infiltration and will create bioswales along public pathways to promote wildlife habitat and natural landscape zones.

Character and Design Element

Policy CD 1.3- Encourage a variety of building shapes and heights that are appropriate in each Future Land Use Area in order to promote visual interest in the Greater Airpark Area and to promote the overall character of the specific Future Land Use Area within which they are located.

RESPONSE: Banner is proposing a building height for its main building that will be compatible with the surrounding buildings in the area and that will extend the visual interest created by the Cavasson and Axon developments in the surrounding area.

Public Services and Facilities Element

Goal PSF 3: *Maintain and enhance public services including public safety, human services, and customer services in the Greater Airpark.*

Policy PSF 3.1- Encourage the development of additional public safety facilities, including law enforcement, emergency, and medical services, in conjunction with area growth in order to provide and maintain adequate response time.

RESPONSE: The addition of a Banner Scottsdale Medical Center in the Greater Airpark Area will provide health care choices and support growing demand for additional medical facilities in this high growth area. Banner will be able to serve North Scottsdale and North Phoenix residents and provide opportunities to reduce the travel time of first responders from an emergent situation to a point of treatment and care.

6. Scottsdale Sensitive Design Program

The Scottsdale Sensitive Design Program is a comprehensive compilation of policies and guidelines related to the City's built environment. The basic framework for these policies and guidelines is the *Sensitive Design Principles*. These principles are derived from existing city policies and from concepts developed by citizen groups, such as Great Sonoran, and articulate Scottsdale's design vision and outline design expectations and values. Shown below are each of the principles and the way in which the Banner Health Campus will implement it.

1. The design character of any area should be enhanced and strengthened by new development.

   RESPONSE: The design of the Project is consistent with the surrounding development along the freeway corridor and will add value through the use placement in proximity to other uses. The natural desert context will be supported through the landscape design and open space planning.

2. Development, through appropriate siting and orientation of buildings, should recognize and preserve established major vistas, as well as protect natural features.

   RESPONSE: The buildings are oriented to maximize views for the patient towers to the surrounding Sonoran Desert views, as well as to optimize energy efficiency with its east and west axis orientation. Natural and built shading is provided throughout the site to support the use of the pedestrian network of trails and sidewalk.

3. Development should be sensitive to existing topography and landscaping.

   RESPONSE: The buildings follow the natural descent of the site to allow for the pedestrian network of trails to engage the natural topography. A natural desert palette will be developed for the landscaping and will be aided by an appropriate salvage of existing species on site.

4. Development should protect the character of the Sonoran Desert by preserving and restoring natural habitats and ecological processes.

   RESPONSE: The open space network seeks to restore and redevelop the natural desert conditions on the site. Generally, the existing water conveyance through the site is maintained through the planning with the existing topography. Basins and bio-swales will be paired with walking trails and a pedestrian network of paths to allow for connectivity with the natural systems.

5. The design of the public realm, including streetscapes, parks, plazas, and civic amenities, is an opportunity to provide identity to the community and to convey its design expectations.

   RESPONSE: This project seeks to promote a healing environment through its programmatic mission, as well as with its site design and building architecture. Community pathways are preserved, and connections are enhanced with this development.

6. Developments should integrate alternative modes of transportation, including bicycle and bus access, within the pedestrian network that encourages social contact and interaction within the community.

   RESPONSE: EV charging stations will be provided at full build-out, along with bicycle parking throughout the campus.

7. Development should show consideration for the pedestrian by providing landscaping and shading elements as well as inviting access connections to adjacent developments.

   RESPONSE: Most of the pedestrian routes to entrances on the campus run in an east/west direction and are shaded from the southern exposure by proposed landscaping. A continuous walking trail is provided around the perimeter of the site to allow for visitors to connect with the natural desert and enjoy the views outward from the site.

8. Buildings should be designed with a logical hierarchy of masses.

   RESPONSE: Each of the building entries use are marked by a material designation and varied height to identify the entry to the facility. In a healing environment, intuitive wayfinding is critical, and the Banner Health design standards promote this strategy. As an example, the open space and road alignment visually leads even the most anxious visitor to the campus, an Emergency Department patient, directly to the Emergency entry without having to search for signage.

9. The design of the built environment should respond to the desert environment.

   RESPONSE: The massing of the buildings on the site are aligned with the solar orientation as well as in response to the naturally ventilating winds that will flow through the campus. Additionally, planned open spaces are located adjacent to the structures. Views to the surrounding desert context are promoted from this site by the strategic placement of the buildings.

10. Developments should strive to incorporate sustainable and healthy building practices and products.

    RESPONSE: Banner is committed to energy efficient strategies and the use of health building practices. Prefabrication is utilized during construction to limit the amount of waste onsite, and healthy products are utilized on the interior to promote a healing environment.

11. Landscape design should respond to the desert environment by utilizing a variety of mature landscape materials indigenous to the arid region.

    RESPONSE: The landscape palette will build off the salvaged inventory of indigenous landscape materials on the site to create a new experience that will celebrate the existing desert context.

12. Site design should incorporate techniques for efficient water use by providing desert adapted landscaping and preserving native plants.

    RESPONSE: As previously noted, water is a critical component to the promotion of patient wellness within the healthcare facilities. Banner Health is committed to solutions that reduce water use without compromising patient care. One such solution is through the landscape design and its emphasis on low water-use plant species. Additionally, open space and pedestrian pathways are planned to either have natural bioswales to promote water movement or depressions to increase water infiltration. Basins are designed to be integrated into the natural landscape design character. And finally, large turf areas are not planned for this development. Instead, the landscape palette will consist of indigenous and adapted desert plant species.

13. The extent and quality of lighting should be integrally designed as part of the built environment.

    RESPONSE: Exterior lighting will be selected to promote safe nighttime access to the healthcare facilities and support wayfinding to and within the campus, while being cognizant of the dark sky principles in this part of Scottsdale.

14. Signage should consider the distinctive qualities and character of the surrounding context in terms of size, color, location and illumination.

    RESPONSE: Banner's sign program will use materials from the building composition that are rooted in themes from the Sonoran Desert. The placement, size, and illumination support appropriate, timely and safe wayfinding practices for both vehicles and pedestrian access.

7. Development Project Overview

The Banner Scottsdale Medical Center campus is planned to include a multi-story, full-service, acute care hospital planned to accommodate up to 300 patient beds, a partnership with MD Anderson for the cancer center, diagnostics and treatment facilities, ancillary medical uses, medical office buildings, structured parking, and helipads. Additionally, Banner may develop up to 70-units of workforce housing for medical facility employees. These workforce housing units are shown on the alternate overall site plan to be located on the south side of the parking structure. The parking structure and possible workforce housing units would be built following the initial phase of the Project. The objective of these housing units is to provide a wage appropriate housing option for employees of the Banner Scottsdale Medical Center campus. The Project is intended to expand the Banner Health network and serve as a new community healthcare resource for the existing and growing population in North Scottsdale and North Phoenix. The campus will be designed with primary access off Hayden Road to the east, and secondary access points off Mayo Boulevard and Miller Road. Parking for the ultimate buildout of the Property will be accommodated via a combination of surface and structured parking located conveniently to the functions that they serve. The Project will include outdoor patios and gardens as well as a walking trail throughout the campus. The Banner Scottsdale Medical Center has been master-planned to be developed in four phases.

Phasing

The Banner Scottsdale Medical Center is designed to be built, over time, in four phases. Phase 1 will accommodate approximately 348,500 square feet for the hospital facility, which will include a 4-story patient tower with approximately 106-beds and an adjoining 2-story diagnostic & treatment building that will house emergency, surgery, laboratory, pharmacy, and associated support services. Phase 1 will be supported by an on-grade, screened loading dock and central utility plant, as well as a ground-mounted helipad. Phase 1 will also include a 3 to 4-story approximately 112,500 SF medical office building.

Phase 2 is anticipated to include a 1 to 3-story 83,000 square-foot cancer treatment building, a 2-story expansion to the diagnostic & treatment building, and an expansion to the 2 to 4-story approximately 55,000 SF medical office building.

Phases 3 and 4 are planned to accommodate additional staff and patient volumes with the final expansion of the hospital, new patient towers at the east and west ends of the

main Phase 1 hospital tower, an expansion of the diagnostic & treatment building, and construction of the parking structure. A secondary roof-mounted helipad is planned for the Phase 3 patient tower. At build out, the hospital is planned for approximately 300 licensed patient beds.

Site Organization

The Banner Scottsdale Medical Center is designed to establish a strong community presence for the hospital and to maintain flexibility for future development on the Property. Beyond the main entry off Hayden Road, staggered building heights provide a visual cue to promote intuitive wayfinding to the various treatment areas. Intuitive wayfinding is a critical design element that helps alleviate stress for patients and visitors to the campus.

The hospital's four and five-story patient towers are strategically placed on the north side of the Property to provide maximum visibility from SR 101, while also providing separation from surrounding uses. The main hospital building, which will be constructed with Phase 1, will contain a 4-story patient tower, a 2-story diagnostic & treatment building, emergency department, and central utility plant. These buildings are designed to accommodate an expansion on the east side with the addition of an administration building, neo-natal intensive care unit, and additional patient beds, and on the west side with an additional patient tower with a roof-mounted helipad.

A 3-story cancer center will be developed in Phase 2 and will likely be located directly south of the main hospital building. The two buildings may be connected by an elevated walkway on the second story of each building. Parking for the cancer center is anticipated for the parking fields to the east, south, and west. The area surrounding the cancer center has been planned to provide flexibility for the development, expansion, and ultimate layout of the building. Retention and open space areas are located to the south of the cancer center along Mayo Boulevard.

A medical office building ("MOB"), which may ultimately include a surgery center and outpatient imaging center, is located in the northwest corner of the Property. Primary access to the MOB is from Mayo Boulevard, with secondary access eventually from Miller Road. Retention and open space areas are located to the south of the MOB along Mayo Boulevard and to the west along Miller Road. The MOB may be expanded upon in future phases of development.

The loading dock and central utility plant are connected to the diagnostic & treatment portion of the hospital (constructed as part of Phase 1). The location for this main service area was purposely chosen to be obscured from view from adjoining city streets and building entries and is easily accessed from a service drive extending from Mayo Boulevard.

Wellness and Connectivity

One of the main priorities in designing the Project for wellness and connectivity is ensuring intuitive wayfinding and safe, efficient pedestrian paths. An additional priority is to lift the human spirit and support wellness through both the internal site design, and the orientation to the greater community. To achieve these goals, two "green" spines have been established on the campus, one in a north/south direction, and the other in an east/west direction, to provide connectivity between the buildings and the parking infrastructure, open spaces, and perimeter sidewalks. Both spines connect into an overall wellness path that encircles the 48-acre property for a total length of over 1 mile. The walking path may be used for visitors and staff alike and will provide an excellent way of relieving stress. Appropriately spaced nodes may be established along these paths to pace the journey, as well as to provide ample respite space outside of the hospital. Local landmarks may be celebrated along this path with signage.

Parking

Parking accommodations on the campus were developed to meet the City's parking ordinance requirements and to conform to Banner's system-wide parking standards and operational needs. Banner has developed parking standards that blend 6 different methodology scenarios based on the following criteria: 1) licensed patient bed totals, 2) staff totals (broken down per shift), 3) facility square footage based on use, and 4) anticipated patient visits. The resulting Banner network-wide parking standard that has been established per building use are as follows:

- Hospital Tower: 4 parking spaces per licensed bed,
- Medical Office Building: 4.5 parking spaces per 1,000 square feet
- Cancer Center: 4.5 parking spaces per 1,000 square feet

The parking totals generated by the Banner Health requirements exceed the requirements of the City by approximately 800 parking spaces. The additional parking is being provided

based on Banner's defined operational needs and extensive experience operating similar facilities in the greater Phoenix-metro area and throughout Arizona. Banner seeks to provide 4 stalls per licensed bed while the City only requires 1.5 stalls per bed. As the Project develops, Banner will continue to evaluate its parking demand against master plan values to provide the appropriate amount of parking for the provided use.

The Project has been designed to maximize opportunities for placing parking fields close to building entries for a better sense of arrival for staff, visitors, and patients. Landscaped paths will be incorporated to allow for safe movement into the facility. ADA parking is included directly adjacent to the patient drop-off for the main and emergency department entries and will be provided proportionately in covered parking areas. Covered parking for employees is provided north of the facility, while patient and visitor parking is located directly east of the main hospital buildings. A dedicated parking lot for emergency visitors is provided. In Phase 1, staff parking will also be west of the hospital with a secondary staff entry provided. In future phases of the hospital, some or all of the staff parking will be relocated to the future parking structure. Infrastructure is being planned for electric vehicle charging stations and solar ready parking canopies north of the hospital, as well as in the future phased parking structure on the north side of the campus.

Loading Dock and Central Plant

The loading dock and central plant area are centrally located on the Property. The loading dock layout includes three loading spaces, two compactors, a raised delivery truck area and a ramp down to the bottom of the dock. The central operating plant and MEP yard will be physically sized in Phase 1 for the ultimate build out of the Project and will be equipped when each subsequent phase comes online. The loading dock and central operating plant will support all phases of the hospital as well as the cancer center. The medical office building will be self-supported within the northwest portion of the Property and will be designed to function as a stand-alone development parcel.

8. Architectural Character

Architectural Design and Theme

The Banner Scottsdale Medical Center is planned to be timeless in design, of unmatched quality and will mirror the quality of care and commitment to the community that Banner Health strives to provide in all its facilities. The Banner Scottsdale Medical Center will be designed using Banner Health template designs that are adapted to the specific site and that have been developed to maximize functional and operational efficiencies, while providing state-of-the-art treatment spaces focused on exceptional patient care for the growing North Scottsdale and North Phoenix communities.

The Banner Scottsdale Medical Center will be designed using quality materials and massing strategies that are sensitive to the local surroundings in terms of scale and massing along the freeway corridor. This proposed development builds off the design themes established at Banner's other medical center projects, specifically Banner Ironwood in Queen Creek, Banner Gateway in Gilbert, and Banner Ocotillo in Chandler. The architecture and building massing are integrated with property and building programming strategies that aim to relieve stress for patients, enhance wayfinding for staff and visitors, communicate a premium care delivery environment, and integrate seamlessly into the natural desert environment.

COMMUNITY HOSPITAL

A focus on health and wellness will elevate the experience of those visiting the site. To emphasize placemaking and connectivity with the community, the natural desert site will be celebrated with nature trails and open spaces, as well as through the architecture by framing the direct views to the McDowell Mountain preserve north and east of the site, and long -range views south to the greater valley.

Building Materials

A blend of quality building materials will include masonry block, metals, and synthetic finishes combined with a composition of windows and shading elements. This combination will help break down the perceived size of the building and create an appropriate scale along SR 101.

Masonry elements will be concentrated at the main entry points of the building and along the freeway frontage; the two most visible sides of the building. The masonry work will consist of four different colors and multiple masonry textures that are inter-woven in a pattern reminiscent of the natural Arizona landscape. This signature pattern will also be used in site walls and to screen the building support areas on the east elevation. The placement of the masonry serves two primary functions; 1) to communicate design excellence that is representative of the care received and 2) to be a focal element that stands out from the rest of the building perimeter to call one's attention to a specific element.

Synthetic stucco (EIFS) of a similar color with horizontal and vertical score lines will be the predominant material on the east and north sides of the building. Punched window openings, areas of metal panel, canopies and other subtle accents will provide a rich textural composition intended to create visual interest and avoid creating monolithic elevations. EIFS is also used in areas that are planned for future expansion to limit the demolition of high-cost materials. Metal panel accents will be used throughout the exterior of the building to lighten the appearance and provide a visual break from the predominant masonry or stucco exterior materials. These panels will be used in a way that breaks the building's cornice line with the intent of reducing the building's mass.

The color palette will be comprised of a range of natural earth tones, with the intention of staying away from large amounts of warm or dark colors. Light sand and tan colors will be complimented by the cooler glass and small areas of metal panels. This approach gives the building a lighter feel, relying on the rich texture of the various materials to promote a sense of elegance and quality commensurate with the consistent visual identity of Banner Health facilities.

Sustainability

Banner has a long-standing history of celebrating health and wellness with their facility design and providing solutions that limit environmental impact with a balance on fiscal responsibility and a hyper focus on positive outcomes for patient care. As long-term building owners and facility operators, each of the structures on the campus will include systems that promote high returns on investment and low maintenance or replacement costs. Specific strategies for each building type will be developed through the design of each phase that promote energy efficiency, water/waste reduction without compromising patient care, and a respect for the natural surroundings.

Banner is a proponent of sustainable strategies and will incorporate many LEED system goals as well as those promoted within the International Green Construction Code. strategy to ensure the Banner's commitment to health, wellness and well-being onsite, the design team is using the AIA's Framework for Design Excellence to solicit and evaluate effective solutions for the project and is committed to highlighting solutions in each of the ten categories developed by the American Institute of Architects (Integration, Equitable Communities, Ecosystems, Water, Economy, Energy, Well-being, Resources, Change, and Discovery). Banner will invest resources in the sustainable strategies that have the most impact and return on investment overall for the campus.

One of these sustainable strategies includes a landscape design that consists of native and regionally adapted species of trees, shrubs and cacti that are low water use by nature. No turf or lawn areas are proposed for the project landscape design. Additionally:

- All planting areas throughout project will be top-dressed with a 2" depth granite mulch to retain moisture at tree and shrub locations.
- All trees and plants will be fed by an automatic underground irrigation system that delivers water directly to each tree and shrub in timed intervals through drip emitters.
- Trees, shrubs and cacti will be valved separately to accurately control the amount and duration of watering to match individual species needs without over-watering.

- The irrigation system will utilize a master valve that will automatically shut down system in the event of a detected leak within the overall system and rain sensors to monitor local weather conditions and adjust water schedule accordingly.

The paving and hardscape areas on the site will direct stormwater runoff into landscape planting areas to collect and convey stormwater runoff to larger retention areas. These micro basins will deliver water to plants prior to entry into stormwater structures thereby reducing net irrigation demand and lowering stormwater volume entering the drainage system.

A second sustainable strategy pertains to the design and implementation of clever plumbing solutions that are consistent with City code requirements. These strategies include:

- Careful monitoring and adjustment of hot water usage;
- Cooling tower makeup water will be closely monitored and adjusted as appropriate to minimize evaporation and reduce discharge;
- The project will use high-efficiency plumbing fixtures to conserve water and incorporate minimum requirements needed to ensure a safe and healthy building while applying safeguards so that the environmental impact is minimized.

9. Development Program

List of Land Uses, Density, Floor Area Etc.

Permitted Uses within the Banner Scottsdale Medical Center are as follows:

Medical facilities.

Medical care facilities. Multiple function and integrated group practice clinics and similar service organizations that provide in and outpatient diagnostic services and extensive medical treatment such as, but not limited to, surgical, chemical, dental, mental health, optometry, therapeutic and/or other personal health care services and activities along with a full-service hospital or support hospital with any of the following support facilities: continuous nursing care; specialty care practice, including but not limited to trauma care; nursing, medical and/or commercial

schools and associated dormitories; medical appliance sales; medical laboratories; pharmacy and pharmaceutical sales, and other complementary uses.

Medical research facilities. Facilities for carrying on the research, investigation, testing or experimentation in the natural or physical sciences, or engineering and development as an extension of investigation with the objective or creating end products in the bio-medical field of industry including pilot plant operation and/or protype product development.

Ancillary uses.

Major campuses (SCMj). Those specialty retail, gift shop, restaurant, cafeteria, service, business and professional office, warehousing and wholesale, transportation, parking structures, light manufacturing, travel accommodation uses which are essential to and/or complementary of the primary uses. Also residential uses necessary for clients, employees, guests or students directly associated with the primary use, which may include dormitories, condominium, and multi-family residential. A maximum of 70 residential units are allowed. Those commercial uses set forth in Section 5.1403 that are ancillary to and supportive of the primary use and/or uses, or municipal uses.

Development Standards

Development Standards applicable to all development within the Banner Scottsdale Medical Center are as follows provided that Development Standards not outlined below are governed by the provisions of the City of Scottsdale Zoning Ordinance.

1) ***Floor area ratio***. Maximum: 0.60.

2) ***Required open space.***

a) Total open space. Minimum: 0.24 multiplied by the net lot area.

b) Total open space is distributed as follows:

i) Frontage open space minimum: 30 square feet per 1 lineal foot of public street.

ii) The remainder of the total open space, less the frontage open space, shall be common open space.

iii) Parking areas and parking lot landscaping are not included in the required open space.

iv) NAOS may be included in the required open space.

3) *Building height maximum (excluding rooftop appurtenances).*

a) Maximum: Five stories or Eighty-five (85) feet

4) *Yards.*

a) Side and rear yards.

i) Minimum fifty (50) feet, including any alley width, from a single-family residential district shown on Table 4.100.A., or the single-family residential portion of a Planned Community P-C or any portion of a Planned Residential Development PRD with an underlying zoning district comparable to the single-family residential districts shown on Table 4.100.A.

ii) Minimum twenty-five (25) feet, including any alley width, from any residential district other than a single-family residential district shown on Table 4.100.A., or portion of a Planned Community P-C with an underlying zoning district comparable to any residential district other than a single-family residential district shown on Table 4.100.A.

5) *Screening.*

a) Walls.

i) On the property line or within the required yards: Maximum eight (8) feet in height.

ii) Within frontage open space: Maximum three (3) feet in height.

b) All outdoor operations, mechanical equipment and appurtenances, storage and refuse areas shall be within an enclosed building or screened by a solid wall at least six (6) feet in height or as otherwise approved by the Development Review Board.

10. On-Site Circulation and Traffic

As previously noted, the main entry to the site will be off Hayden Road, with multiple entries along Mayo Boulevard and an additional entry off Miller Road. Signage will be provided at the main entry directing visitors to the main hospital building, cancer center, and medical office building. Ample surface parking will be provided, and as the Project develops, a centrally located parking structure will be provided to serve the parking needs of increased patient and staff populations.

To separate service traffic from visitor traffic, all building services and emergency traffic will be directed to the Mayo Boulevard entry. Ambulance traffic will also use this entry point as it will have a dedicated emergency access to the emergency department. The ground helipad is also located in this service zone and serves as a helicopter "parking' spot."

A Traffic Impact Analysis (TIA) has been provided that evaluates the traffic impact from the Project from the projected opening day in 2025, through 2040, when the Project is expected to reach full buildout. There are several recommendations proposed within the TIA, including:

- Provide dedicated right-in/right-out turn lanes.
- Enlarged driveways to provide separate left and right turn egress lanes to reduce vehicle queues within the parking lot;

The construction of the above mitigation strategies, in addition to right turn lanes at the planned share drive closest to Hayden Road, the primary hospital entrance and the western-most drive to the medical office building along Mayo Boulevard, and the service/ambulance entrance, are anticipated to be constructed in the initial phase of development. Banner will work closely with the City of Scottsdale traffic and engineering departments to ensure that the traffic anticipated in this area is dispersed in the safest and most efficient manner possible.

11. Water/Sewer

There is an existing 16-inch ductile-iron-pipe (DIP) water main that runs east-west through a portion of Mayo Boulevard, between Hayden Road and 78th Street, and an existing 16-inch DIP water main that runs east-west along SR 101. A portion of the 16-inch water main along SR 101 travels through the new footprint of the future medical office building and will be relocated. Also, a future water main is proposed by others to run east-west through Mayo Boulevard, from 78th Street to Miller Road, and extend north-south in Miller Road to the existing 16-inch water main along SR 101. On-site public water mains will be provided to loop through the Property and provide domestic and fire service to the proposed buildings. Fire hydrants will be spaced throughout the site to meet fire code requirements. All water mains will be sized for domestic and fire flow demands. Please refer to the water exhibit provided for additional notes and information.

An existing 12-inch polyvinyl chloride (PVC) public gravity sewer main is located east of the site which conveys wastewater flows south in Hayden Road. This gravity sewer conveys wastewater south along Hayden Road to the existing North Pumpback Station at the intersection of Frank Lloyd Wright Boulevard and Pima Road. From the lift station, wastewater is conveyed north through a 30-inch sewer force main to the existing City wastewater reclamation facility, northeast of the project site. The Banner Scottsdale Medical Center will be served by a new private 12-inch gravity sewer service on-site and will connect into a new public 12-inch gravity sewer main in Mayo Boulevard (being constructed by separate development). The new public 12-inch gravity sewer main will convey wastewater flows to the east in Mayo Boulevard and then travel south in Hayden Road to the existing North Pumpback Station. All new private sewer services on-site will be PVC SDR35. Please refer the sewer exhibit provided for additional notes and information.

12. Development Team

Property Owner / Applicant / Developer:	**BANNER HEALTH** Troy Freeman *Vice-President, Real Estate Management* Mark Barkenbush *Vice-President, Facility Services* 2901 North Central Avenue, Suite 160 Phoenix, Arizona 85012 818 / 422-9122 Troy.Freeman@bannerhealth.com Mark.Barkenbush@bannerhealth.com
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March 11, 2024

blane@scottsdaleaz.gov
Mr. Ben Lane
City Clerk
City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

RE: Zoning Interpretation Appeal – Snell & Wilmer on behalf of HonorHealth

Dear Mr. Lane:

Gammage & Burnham, PLC represents Banner Health ("Banner"). Banner operates multiple medical services facilities within the City of Scottsdale ("City") and has proposed a new medical center campus including a hospital on property owned by Banner at the southwest corner of Hayden Road and the Loop 101 Freeway. We are in receipt of two letters from Snell & Wilmer, submitted to the City on behalf of HonorHealth, dated February 23, 2024 that purport to appeal letters issued by Zoning Administrator Erin Perreault on January 30, 2024, in which the Zoning Administrator declined to issue any interpretation of the Scottsdale Zoning Ordinance ("SZO") because the initial requests for interpretation were "hypothetical" and were not related to a specific development proposal. Because Banner and its proposed development are the true and express target of the Snell & Wilmer interpretation requests, we are compelled to share our thoughts regarding the aforementioned appeals. For the following reasons, we submit that the Zoning Administrator's January 30 letters are not subject to appeal and should not be scheduled for review by the Board of Adjustment.

By way of background, the Zoning Administrator's authority under Arizona law is limited to responsibility for "enforcement" of a zoning ordinance (A.R.S. § 9-462.05(C)). Absent a connection to enforcement, the Zoning Administrator has no authority to issue "interpretations" or "other decisions" that are merely views on hypothetical scenarios. Likewise, the SZO recognizes that the Zoning Administrator's authority is limited to enforcement of the zoning ordinance (SZO 1.201).

The Zoning Administrator's January 30 letters adhered to (and expressed) these principles. The first letter (concerning the definition of "Hospital" and "Office") noted that the Zoning Administrator "cannot provide an interpretation" in the absence of "a development proposal" containing "details relating to the proposed use of property." Similarly, the second letter (concerning the Utilization of "Office" to Circumvent Definition of "Hospital") concluded that the Zoning Administrator "cannot provide an interpretation" because the request "concerns a hypothetical scenario."

ATTACHMENT #7

Importantly, the Board of Adjustment's authority (both under Arizona law and emanating from the SZO) is rooted in enforcement of a zoning ordinance and is limited to hearing and deciding appeals from interpretations or decisions of the Zoning Administrator.

Simply put, the January 30 letters are not "interpretations" or "other decisions" that can be appealed under the SZO. The SZO 1.202(A) requires the Zoning Administrator to "respond in writing" to all requests for interpretations and declares that all "responses" are available for public review. In this case, as required, the Zoning Administrator provided a "response" in writing but makes clear in her response that she is not providing an interpretation. Such a response should not be conflated with an actual "interpretation" or "other decision." What reasonably follows is that not all "responses" can be appealed under SZO 1.202(B)—only responses that are "interpretations" and "other decisions" regarding the SZO are subject to appeal. Any other outcome would result in such an expansive definition of "interpretation" or "other decision" that almost any statement or response from a city official could be appealed. Further, as noted, the Board of Adjustment's authority is limited to hearing and deciding appeals of actual interpretations or other decisions in pursuit of property enforcing the requirements of the SZO. In this case, the purported appeal does not seek a different interpretation, but instead is aimed at forcing the Zoning Administrator to act. It is not within the scope of authority of the Board of Adjustment to tell the Zoning Administrator what to do. As stated previously, the Zoning Administrator's response in this case is neither an "interpretation" or an "other decision" and is not subject to appeal.

In support of this opinion, case law from other jurisdictions confirms that when a zoning administrator addresses preliminary or hypothetical cases, they do not constitute appealable "decisions." Holt v. Stonington Bd of Zoning Appeals, 968 A.2d 946 (Conn. App. 2009); 3 Rathkopf's The Law of Zoning and Planning § 57:44 (a preliminary or advisory opinion from a zoning administrator is "not a decision subject to appeal.") A fortiori, an express declination to issue an interpretation does not constitute an "interpretation" or "other decision" that is subject to appeal.

We respectfully request that you consider these views as this matter proceeds.

Sincerely,

GAMMAGE & BURNHAM

By 
Susan E. Demmitt

Cc: Ms. Erin Perreault, AICP, Zoning Administrator - City of Scottsdale

/sed

Appellant's Supplemental Materials

ATTACHMENT #8

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April 15, 2024

VIA EMAIL

Scottsdale Board of Adjustment
c/o Planning and Development Staff
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

Re: Appeal of Zoning Interpretations: 3-BA-2024 and 4-BA-2024

To Whom it May Concern:

This firm represents HonorHealth, a long-time healthcare nonprofit operating hospitals, primary and specialty care clinics, and ancillary offices in the City of Scottsdale (the "City). The following memorializes HonorHealth's position on the issues identified by the Board Chairman in his Amended Administrative Order dated April 10, 2024, to be heard at the May 1, 2024, Board of Adjustment Hearing (the "Hearing"). The Hearing concerns consolidated appeals 3-BA-2024 and 4-BA-2024 (collectively, the "Appeal") and will address three legal issues: (1) are either of the Zoning Administrator's letters dated January 30, 2024,[1] an "order, requirement or decision," (2) whether any issue set forth in those letters is ripe for review, and (3) whether HonorHealth has standing to appeal.

I. SUMMARY OF THE CLAIMS

As noted above, this Appeal results from the consolidation of two separate appeals, one concerning a property owned by HonorHealth at the northeast corner of State Route 101 Freeway and Hayden Road (the "HonorHealth Property") and the other concerning a property owned by Banner Health ("Banner") at the southwest corner of State Route 101 Freeway and Hayden Road (the "Banner Property"). The individual appeals follow two requests for interpretations from the Scottsdale Zoning Administrator.[2] In the Responses, the Zoning Administrator decided not to

[1] *See* Responses dated January 30, 2024, attached as Exhibit A. Hereinafter referred to as the "Definitional Response" and the "Development Response," respectively, and collectively, the "Responses."

[2] *See* Letter RE: Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office," attached as Exhibit B; *see also* Letter RE: Request for Scottsdale Zoning Ordinance Interpretation Concerning the Utilization of the Definition of "Office" pursuant to C-2 and I-1 to

provide an opinion to the purely Code interpretative issues raised in the Requests. As such, HonorHealth appealed the Definitional Request and the Development Request to the Board of Adjustment (the "Board").

As an overview, HonorHealth submitted the Definitional Request—in relation to its own property—to obtain a decision to clarify a vital distinction between two land use definitions found in Section 3.100 of the Scottsdale Code of Ordinances Appendix B – Basic Zoning Ordinance (the "Code"): that a "hospital" is a unique, large scale, facility that is notably different and distinguishable from an "office" with medical uses. As such, HonorHealth submitted a reasonable and straight forward decisional request: **What is a hospital and how is it different from the definition of an office?**

Without clear and unambiguous land use definitions in the Code allowing for clear and unambiguous enforcement of land uses, Banner and other healthcare providers will be able to disregard the Code and the concomitant underlying public policy limiting the location of hospitals. While areas for office uses in the City are widely permitted due to the limited impact on surrounding neighborhoods, hospitals are strictly regulated. To address this definitional ambiguity in land uses and provide clarity to landowners and citizens, HonorHealth simultaneously submitted the Development Request to ensure compliance with the Code on the Banner Property.

Clarifying this definitional land use ambiguity furthers the interests of HonorHealth, other similarly situated healthcare providers in the City, and residents and businesses who do not expect "hospitals" on property that is designated by the Code for "offices." Through clarifying the land use definitions at issue, HonorHealth seeks to ensure that if Banner proceeds to build a "hospital," it can only do so in the appropriate zoning category.

In the Zoning Administrator's Responses, she made a decision to refuse to interpret the Code as she is required to do by law. Such action by the Zoning Administrator constitutes a "decision" pursuant to the Code and, therefore, granting the Board jurisdiction to hear the appeals. Additionally, ambiguities in the Code and Banner's continued development of a "hospital" ensure that the issues are ripe for review by the Board, and HonorHealth, as both owner of the HonorHealth Property and a neighbor of the Banner Property, has standing to bring the appeal as an "aggrieved party." As such, there must be some recourse, either by the Zoning Administrator or this Board, in interpreting the Code as to what is a "hospital".

Circumvent Definition of "Hospital" pursuant to C-O, attached as Exhibit C. These requests are hereinafter referred to as the "Definitional Request" and the "Development Request," respectively, and collectively, the "Requests."

II. THE BOARD HAS JURISDICTION TO HEAR THE APPEAL.

Arizona law is clear. In the pursuit of a thorough and enforceable zoning code, the Zoning Administrator has a duty to interpret and apply the zoning code. When the Zoning Administrator makes any "decision" relating to her duties, the Board "shall hear and decide appeals" that follow. A.R.S. §§ 9-462.06(C),(G)(1). As such, the Zoning Administrator's decision in her Responses to not issue an opinion in resolving a deleterious land use ambiguity in the code is clearly a "decision" granting the Board jurisdiction to hear the Appeal. Otherwise, a Zoning Administrator could simply ignore his or her required duties by simply refusing to issue an opinion and the Board would never have an opportunity to ensure the citizens, property owners, and businesses of the City receive ambiguity resolving Code interpretations before spending significant resources on designs and plans that may be contrary to the Code.

The powers and duties of the Zoning Administrator result from the statutory authority of the City's legislative body to regulate the use of buildings, structures, and land ***"by ordinance."*** A.R.S. § 9-462.01(A). Arizona law permits the City to regulate land uses and create zoning designations. *Id*. As part of the City's powers, it has the authority to enforce ordinances through its Zoning Administrator; again, the City has the power to do so "***by ordinance."*** A.R.S. § 9-462.05(D).

It is, however, misleading to attribute the Zoning Administrator's duties to what is commonly viewed as an "enforcement" role overseeing graffiti removal, illegal signage, or a failure to maintain a property. Indeed, the City's Code of Ordinances, Chapter 18, applies to those common "enforcement" actions for which the Zoning Administrator and the Board play no role.[3]

a. The Zoning Administrator Shall Interpret Land Uses.

As set forth in A.R.S. § 9-462.01(A), the City Council adopted Ordinance 455, which established "land use classifications," imposed regulations, and governed the use of land for both residential and non-residential purposes. Scottsdale, AZ – *Code of Ordinances*, No. 455. This ordinance imposes land use restrictions throughout the City along with the definitions of "hospital" and "office" that are the focus of the Requests.

Interpretation of the Code, including Section 3.100's land use definitions, is a duty of the Zoning Administrator. As such, the Code instructs that the Zoning Administrator "shall enforce" the Code, which includes definitions of land uses. *Id*. at Sec. 1.201. However, the obligation to do so is extensive as the Code notes that the "provisions of this Zoning Ordinance ***shall be interpreted and applied by the Zoning Administrator***." *Id*. at Sec. 1.202(A). The duty to enforce the Code is, in fact, a requirement: "The word "shall" shall be construed as being ***mandatory***." *Id*. at Sec. 1-5.

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[3] *See* City of Scottsdale, CODE ENFORCEMENT, available at: https://www.scottsdaleaz.gov/codes/code-enforcement.

Additionally, in amending Section 1.200 of the Code in 1995, the City staff authored the City Council Action Report noting that the Zoning Administrator's responsibilities are related to enforcement "***and***" interpretation of the Code. There is no *option* for the Zoning Administrator to interpret the Code, but a *mandate* to do so. The Code is also unequivocal that the "Zoning Administrator "***shall interpret uses within each district.***" *Id*. at Sec. 1.202(D). This section further elaborates that while the Code may be interpreted liberally, the Code "***shall not be interpreted***" to allow for an unspecified use that is permissible in another district. *Id*. For example, an unspecified use such as a "hospital" in an "office" zoning district—the gravamen of HonorHealth's Requests.

Contrary to the Responses, the City has a long history of adopting interpretations for pre-development proposals and clarifications and/or resolution of ambiguities in the Code and its definitions, evidencing a pattern and practice of fulfilling the Code's mandate to "interpret uses within each district." There is nothing "hypothetical" about the Requests.

One such decision specifically dealt with an ambiguous land use definition of "Adult Care Homes" in response to "several requests for clarification."[4] The interpretation analyzed the ambiguous definition in comparison to three defined land use terms in the Code, "adult foster care," "assisted living facility," and "assisted living home." The interpretation there did not concern a *specific* parcel, property, or development. Instead, the interpretation only acted to *clarify* a vague definition—as required by the Code.

Another interpretation dealt with conflict between the land use definitions of "municipal use" and a "Wireless Communication Facility."[5] There, a public safety radio communications site fell within *both definitions.* Interpreting the definitions in comparison to the purposes of the Code, the interpretation clarified that a public safety communication site is not regulated as a Wireless Communication Facility. Once again, the interpretation did not refer to a specific development plan or property; the interpretation only concerned a definitional ambiguity. The decision necessarily clarified such land use ambiguity in the Code—as is the obligation of the Zoning Administrator.

An interpretation is not limited to analyzing defined land use terms, however. A past interpretation analyzed how the words "substantial and significant" were applied to an "adult novelty store" land use.[6] While neither substantial nor significant were defined in the Code at the time, the interpretation relied on the intent of the Code itself. The interpretation noted that "in determining the intent of the ordinance, one must consider as a whole and give harmonious effect to all its sections." Considering the intent, the interpretation provided clarity in how the definitions

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[4] *City of Scottsdale Zoning Interpretation*, The Definition of Adult Care Homes, No. 2002-02 (1 Aug., 2002).
[5] *City of Scottsdale Zoning Interpretation*, Public Safety Radio Communication Sites (17 Oct., 2008).
[6] *City of Scottsdale Zoning Interpretation*, Request for quantification of the terms "substantial" and "significant" in relation to an "adult novelty store" use (8 June, 2009).

applied to the land use.

Additionally, this is far from an outdated practice recently abandoned by the current Zoning Administrator. In fact, the same Zoning Administrator that issued the Responses provided an interpretation to clarify an "ambiguous" zoning stipulation in 2022.[7] Less than two years ago, the Zoning Administrator acknowledged that an ambiguous stipulation subject to multiple interpretations needed to be clarified. In such interpretation, pursuant to the authority of the Code and Arizona Revised Statutes, the Zoning Administrator issued an interpretation for pre-development permits by examining the intents and public policies of the City.

Thus, when there is an error in a requirement or decision by the Zoning Administrator ***in the enforcement*** of the Code, including ambiguity and/or vagueness of land use definitions found in Section 3.100 of the Code, the Board has jurisdiction to hear an appeal. A.R.S. § 9-462.06(G)(1). As discussed above, the City has ***obligated*** the Zoning Administrator to interpret land uses and the Code generally, including Section 3.100.

This is not through traditional "code enforcement" measures found in an unrelated and inapplicable portion of the City Code, but rather is done through interpretations that clarify and give power to the Code. A failure to perform this mandated obligation, ***that the "Zoning Administrator shall interpret uses within each district,"*** is in itself a "decision" made in error by the Zoning Administrator.

b. In Issuing Her Decision, The Zoning Administrator Failed to Exercise Her Duties in Interpreting an Ambiguous Land Use.

As the Zoning Administrator is ***obligated*** to interpret the Code, this includes the Code's definitions in Section 3.100, and therein, the definition of a "hospital" land use. As explained in the Definitional Request, the Appeal stems from a lack of clarity relating to the definition of a "hospital" in contrast to an "office" used for medical services.

This distinction between land uses is critical as the Code limits the building of a hospital to Commercial Office ("C-O") or Special Campus ("S-C") zoning districts. Even when in the C-O zoning district, a hospital is subject to procedural safeguards including statutorily required use permits and public hearings to ensure compliance with the Code. Contrary to a hospital, an "office" can be built on a number of land use zoning categories, including Central Business ("C-2") or Industrial Park ("I-1") zones (the zoning categories found on the Banner Property). However, because an "office" may include "medical services, including inpatient services," the distinction between the two development types is unclear. Thus, the Definitional Request to establish clarity ***in regard to how the Code is enforced***. Similarly, the Development Request sought clarity to ***whether the Code would be enforced*** on the Banner Property.

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[7] *City of Scottsdale Zoning Interpretation*, Clarification of Zoning Stipulation No. 15 associated with Case 20-ZN-2002#3, One Scottsdale (24 Aug., 2022).

In issuing the Responses, the Zoning Administrator decided to ignore the Code's definitional ambiguity related to land uses—and its possible exploitation on the Banner Property—and refused to address the concern at issue, thereby deciding to leave a loophole ***in the enforcement of the Code***. The Zoning Administrator's decision runs counter to the actual policy goals of the City—having a clear and enforceable zoning ordinance. The purpose of the Code and the land use definitions therein is to allow for compliance prior to making investments in developments; the Zoning Administrator's decision runs counter to this purpose.

In fact, the Zoning Administrator's Definitional Response cited to Section 1.202(D) of the Code, stating: the "presumption established in this Zoning Ordinance is that all general uses of land are permissible within at least one (1) zoning district in the city's planning jurisdiction…Uses specified in each district shall be interpreted liberally to include other uses which have similar impacts to the listed uses." The Zoning Administrator seemingly disregarded the remaining very important and relevant portion of Section 1.202(D) stating: "***However***, the use regulations ***shall not be interpreted***…to allow an unspecified use in one (1) zoning district which more closely relates to a use that is permissible in another zoning district. ***The Zoning Administrator shall interpret uses within each district.***" (emphasis added).

The Zoning Administrator's reference to a provision in the Code, without acknowledging her respective obligation therein, is emblematic of the issue—by deciding not to clarify the ambiguity in error, the responses render the Code ***unenforceable***. Indeed, a response is not only appealable when a positive action is taken by the Zoning Administrator. Arizona law instructs that if "her conclusion as to the [zoning issue] was erroneous, she would be authorizing a use in violation of the zoning ordinance…which requires that she refrain ***from authorizing use of property in violation of the ordinance***." *Mitchell v. Town of Jerome*, 2009 WL 792338, *3 ¶ 14 (Ariz. App. 2009) (evaluating an interpretation that changed the land use of a property).

The "decision" being evaluated can result from a "conclusion" that would lead to an authorization of land uses in violation of the code. This is precisely the case here. The Zoning Administrator—in error—decided that there is no ambiguity needing correction. Despite her language attempting to steer away from this conclusion, it is in fact a "conclusion." Leaving in place ambiguous definitions leads to an unenforceable zoning code, and therefore, the ***Board has jurisdiction to review the Zoning Administrator's Responses and decisions therein.***

III. BOTH APPEALS PRESENT ISSUES RIPE FOR REVIEW.

At the outset, the Definitional Request was made in relation to the HonorHealth property, and only the HonorHealth property. The Definitional Request is ripe as it concerns a clear land use ambiguity in the Code, and the Zoning Administrator's decision to neglect the distinction has left HonorHealth without guidance on how it may develop a medical center and/or hospital on its property. As such, this section will focus on the Banner Property, and the Zoning Administrator's arguments that this is only a "hypothetical" scenario.

a. Banner's Original Application to Build a Hospital.

As set forth in the Development Request, the Appeal stems from Banner's plan to build a 48-acre medical campus including offices but anchored by a hospital with in-patient beds to provide medical care. Banner's original rezoning application recognized that the Banner Property would need to be rezoned to allow its desired hospital use:

> "In order to facilitate development of the Project, Banner is proposing to rezone the Property to Special Campus (SC) zoning, which will help implement the vision for this area and maintain the citywide balance of land uses. Importantly, the proposed SC zoning and the Banner Scottsdale Medical center are in line with the types of uses already allowed on the Property pursuant to the existing zoning. So, **while the SC zoning change is necessary to accommodate the hospital facility,** the proposed medical uses are comparable to and compatible with the land uses already allowed by right on the Property." (emphasis added).

The Banner Property is zoned only for C-2 or I-1 land uses and does not allow a hospital without a rezoning. For a hospital to be built on the Banner Property in accordance with the Code, Banner would need to undergo an extensive legislative re-zoning process that includes community outreach and public hearings before the Airport Advisory Commission, Planning Commission, and City Council.

During Banner's attempt to rezone, the community outreach and public hearing process sparked a response from local residents that included nearly 150 messages to the Scottsdale Mayor and City Council opposing Banner's proposal.[8] In addition, a petition organized by the Citizens Advocating for Residential Excellence had 102 residents sign in opposition to Banner's development of a Hospital on the Property.[9] This opposition also garnered the support of the Scottsdale Fire Fighters Association[10] and a local community member and retired healthcare worker;[11] both of whom authored articles expressing opposition to Banner's development of a hospital due to the impact it would have on residents, first responders, and the community at large. **Importantly and tellingly, Banner has not withdrawn its original application.**

In order to provide clarity, certainty, and uniformity in the application of these zoning designations, HonorHealth filed the Development Request to ensure that Banner, and others, could not avoid the statutorily provided public rezoning process by characterizing a proposed "hospital"

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[8] *See* Exhibit D.
[9] *See* Exhibit E.
[10] Sasha Weller, *North Scottsdale needs more doctors and nurses, not another hospital*, DAILY INDEPENDENT (Jul. 19, 2023), available as Exhibit F.
[11] Shirley Wagner, *Banner hospital unwanted, unneeded in Scottsdale*, DAILY INDEPENDENT (Aug. 25, 2023), available as Exhibit G.

as an "office" due to ambiguity regarding land uses in the definitions in Section 3.100 of the Code. Now, HonorHealth is continuing the Appeal to ensure that Banner, and others, may not use such definitional ambiguity regarding land uses to the detriment of the enforceability of the Code.

b. Banner's Second Application.

After HonorHealth's Development Request, Banner submitted a Notice of Development Review Board Application on February 26, 2024, and a corresponding Development Review Board Application on March 8, 2024 (collectively the "Second Application"). While Banner has limited the scope of the construction to a part of the property in the Second Application, its true intentions are still obvious—the Second Application is part and parcel of a hospital. This thinly veiled attempt to disguise its new hospital as such has been apparent since Banner's original application to rezone the Property, in which it stated: "the SC zoning change is necessary to accommodate the hospital facility."

Banner describes the Second Application's new proposal as an "outpatient medical office and services facility" to obfuscate the nature of the finished facility. However, Banner still publicly displays its true intention, noting in its press release that ***the Property will be used for "an acute care hospital, adjacent medical office building and a cancer center."***[12] By constructing an oncology program, ambulatory surgery services, outpatient imaging, primary and specialty care clinics, and a fully developed cancer center, Banner is clearly and unambiguously laying the foundation for a full-scale hospital.

Banner's press release is not a left-over from its original application, however. Even *after* Banner submitted its Second Application, various publications began detailing Banner's plans to build a medical office "as part of a major hospital campus" with a projected completion date in 2026.[13] Again, this article was not a one-off by a mistaken reporter. In fact, Banner's own legal team touted the building of "the first piece of a major hospital campus."[14] Banner's legal team has admitted this directly to the Board as well, stating that: Banner "has proposed a new medical center campus ***including a hospital*** on" the Banner Property.[15]

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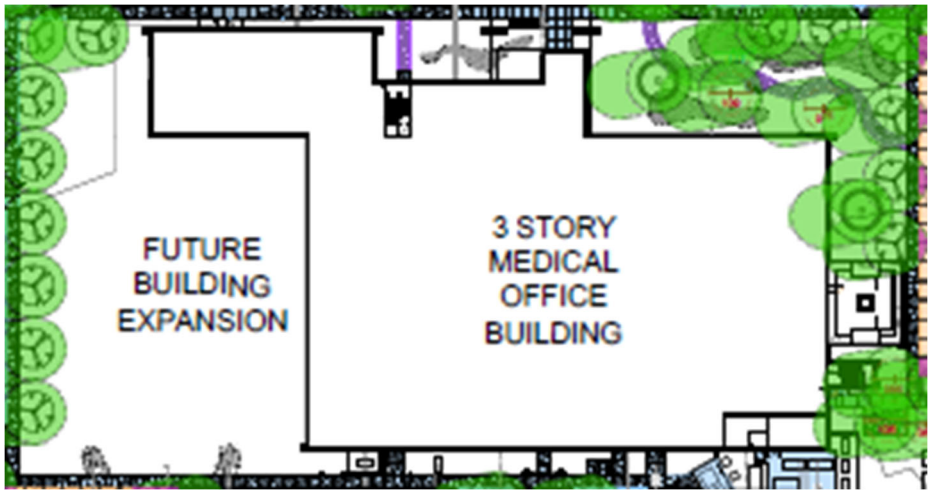
[12] *See* Exhibit H, also available at: https://www.bannerhealth.com/newsroom/press-releases/banner-health-to-build-medical-campus-in-scottsdale (last accessed: Apr. 8, 2024).
[13] Ron Davis, *Banner Health Eyes Medical Offices in Scottsdale as Part of Large Hospital campus*, PHOENIX BUSINESS JOURNAL (Mar. 26, 2024), attached as Exhibit I; Rebekah Morris, *BEX Vol. 15, Iss. 13*, AZ BUILDER'S EXCHANGE (Mar. 29, 2024), attached as Exhibit J.
[14] *See* Exhibit K.
[15] *See* Exhibit L.

The Second Application includes graphics that put Banner's intention into action, as the purported medical "office," identified as "Banner Health Center Plus Site," is shown on 14.8 acres of the Property, with ***33 acres left for future developments***:

Additionally, the development map included in the Second Application leaves an undisclosed building connected to the current facility for a future expansion:



When viewed in combination with Banner's original application and its ongoing public statements to build a hospital, this planned expansion demonstrates that Banner is planning to construct a "hospital."

Because Banner has continued its development proposals—based on ambiguous land use definitions of "hospital" and "office" in Section 3.100 of the Code—this issue is ripe for review. Statements that a "hospital" campus would be completed by 2026 evidence the rapid pace at which Banner is attempting to construct its development.

There is no dispute. Banner is attempting to build a hospital on the Banner Property despite the City's planners clearly acknowledging that "***the site does not have zoning for a hospital at this time***."[16] The Zoning Administrator's failure to address this issue in her decision heightens the pressing nature of the issue. Appeals of both the Definitional Response and Development Response are ripe for review by the Board. The decision to refuse to clarify the land use definitional ambiguities in Section 3.100 of the Code is contrary to Section 1.202(A) of the Code and the pattern and practice of the Zoning Administrator.

IV. HONORHEALTH HAS STANDING AS AN AGGRIEVED PARTY.

For a party to appeal to the Board, it must be an "aggrieved party." The City defines an aggrieved party as "one who receives a particular and direct adverse impact from the interpretation or decision which is distinguishable from the effects or impacts upon the general public." *Scottsdale, AZ – Zoning Ordinances*, App. B, Art. I, Sec. 1.202(B). In other words, for a party to have standing, it must show a direct, negative impact from a Zoning Administrator's interpretation separate from the City's general population. Arizona law further discerns when a party is "aggrieved" under A.R.S. § 9-462.06 (Board of Adjustment), and specifically notes that "the legislature intended to permit much broader standing in this context than in other proceedings." *Scenic Arizona v. City of Phoenix Bd. of Adjustment*, 228 Ariz. 419, 423 (App. 2011). Indeed, this broad application of standing was meant to seek input from the public and permit, rather than limit, challenges in front of the Board. *Id*. at 425.

Specific to cases involving the proximity of a neighbor, Arizona courts have held that "[w]hile proximity is a factor to be considered in determining standing, a neighborhood or other discrete area may be affected by zoning changes and ***not all landowners need to be directly adjacent to the subject property to be harmed*** by the proposed rezoning." *Blanchard v. Show Low Plan. & Zoning Comm'n*, 196 Ariz. 114, 117–18 (App. 1999).[17]

As with the issues of ripeness above, the Definitional Response concerns the HonorHealth

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[16] *See* Exhibit M.

[17] Previous decisions by the City's staff have relied on more restrictive measures from other states. *See, City of Scottsdale Bd. of Adjustments*, 1-BA-2023, at 4 (citing *Cherry v. Wiesner*, 781 S.E.2d 871 (N.C. Ct. App. 2016) (holding that an impact can be only be on a nearby landowner if a new non-conforming construction would cause "special damages" distinct from other landowners)). While cited Arizona authority should take priority, HonorHealth also meets the out-of-state standard previously cited by City authority as the unique impact to a major healthcare provider constitutes "special damages."

Property, and only the HonorHealth Property. There is no room for doubt that an interpretation concerning a property owned by HonorHealth gives it standing to appeal the decision. A failure to clarify what HonorHealth may, or may not, build on its property before it spends hundreds of thousands of dollars on development plans clearly gives HonorHealth standing to appeal.

As a longstanding hometown healthcare provider in Scottsdale, HonorHealth has a unique and distinct interest in clarifying that a "hospital" may only be built on clearly allowed zoning districts, and that a hospital may not be built under the guise of an "office." A ruling to the contrary would obviate the statutorily protected legislative process applicable to re-zoning, including the opportunity for public hearings, and public involvement.

This Appeal is specifically unique to HonorHealth as a longstanding healthcare provider in Scottsdale, with 85 facilities and 7,347 employees. HonorHealth is the largest employer in the City and the ability to expand, modify, or update facilities has an impact unique to HonorHealth, its patients, and its employees. As such, any interpretation impacting the definition of a hospital would have a unique and substantial impact on HonorHealth.

As to the Development Response, the HonorHealth Property is located at the northeast corner of State Route 101 Freeway and Hayden Road, ***directly across the State Route 101 Freeway from the Banner Property at issue here***. Pursuant to Arizona law and previous decisions by the Board, HonorHealth has standing as an aggrieved party due to its proximity to the Banner Property. As a neighbor that will face "special damages," including but not limited to challenges with master planning its property as well as a diminution in HonorHealth's property value, HonorHealth is an aggrieved party with standing to bring this appeal.

Because HonorHealth has standing to appeal, and would be negatively impacted by a dismissal, a finding by the Board that fails to properly consider the evidence and provide a full and fair hearing may constitute an actionable Due Process violation. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003). The U.S. Court of Appeals in *Ramirez-Alejandre* discussed an administrative decision, and to what extent the decision by a reviewing board must examine the claim. The court noted: "despite the fact that '***[t]here is no administrative rule requiring the Board to review all relevant evidence submitted on appeal[,][i]t is beyond argument, ... that the Due Process Clause requirement of a 'full and fair hearing' mandates that the Board do so in its capacity as a reviewing tribunal***.'" *Id*. at 380 (emphasis added) (quoting *Larita–Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir.2000)).

In short, a reviewing board is under a constitutional obligation to fully and fairly review the evidence submitted on appeal. Here, HonorHealth has submitted a reasonable and simple request to clarify the Code definitions of where hospitals can be located. As such the Board owes HonorHealth a constitutional obligation to fully consider the proposed question, and the appeal generally, thus acknowledging the lack of clarity surrounding enforcement implementation of the Code.

V. CONCLUSION

The Board has presented three legal issues for the Hearing. HonorHealth has shown that the Board has jurisdiction, that the issues are ripe, and that HonorHealth has standing to bring the appeal.

The Board's jurisdiction results from the Zoning Administrator's written decisions refusing, contrary to the requirements of Section 1.202(A) and (D) of the Code, and the Zoning Administrator's pattern and practice, to provide clarity between land use definitions set forth in the Code. This is a decision and an error by the Zoning Administrator. The Zoning Administrator has to interpret and enforce the Code.

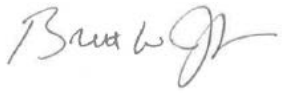
The issues are ripe for review on two fronts. First, the land use definitional ambiguities set forth in the Code concern HonorHealth's property and as such, leave it without guidance on how to develop future medical facilities and hospitals on the HonorHealth Property. Second, Banner, via its legal team, has admitted that it still plans to build a "hospital" on the Banner Property—despite lacking the proper zoning designation. The recent proposals in the Second Application, and a 2026 completion date, evidence that this issue is ripe for review by the Board.

Third, HonorHealth is an aggrieved party both as an owner of its own property and a neighbor to the Banner Property. Arizona law is clear in its intent to afford a broad application to what constitutes an "aggrieved party." A finding opposite to this intention would deprive HonorHealth of its right to be heard by the Board on matters that have a special impact on its property rights and interests.

In short, there is an ambiguity in the land use definitions in the Code that needs clarification, and the Zoning Administrator has failed to do so as required by the Code. In neglecting the ambiguity, she issued a decision contrary to her duty. The Board now has the jurisdictional obligation to modify the Definitional Response and the Development response to clarify the land use definition of a "hospital." HonorHealth respectfully requests that Board proceeds to address this ambiguity in the Code on the merits.

Very truly yours,

Snell & Wilmer



Brett W. Johnson

EXHIBIT A

CITY OF SCOTTSDALE

PLANNING, ECONOMIC DEVELOPMENT & TOURISM

7447 E. Indian School Rd., Suite 105
Scottsdale, AZ 85251

January 30, 2024

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Snell & Wilmer
One East Washington Street, Suite 2700
Phoenix, AZ 85004

Mr. Johnson,

This letter is in response to the request for Zoning Ordinance interpretation contained in your letter under the subject line "Request for Scottsdale Zoning Ordinance Interpretation Concerning the Utilization of the Definition of "Office" pursuant to C-2 and I-1 to Circumvent Definition of "Hospital" pursuant to C-O," which was received on December 26, 2023. Your letter states that you are representing HonorHealth in their efforts to "address the potential for the improper building of a hospital on property with a zoning designation of Central Business ("C-2") or Industrial Park ("I-1")."

Your request for interpretation primarily concerns an application submitted by Banner Health Arizona regarding their property generally located at the southwest corner of State Route 101 Freeway and Hayden Road (Case No. 5-ZN-2023). In that application, Banner Health Arizona has requested a zoning district map amendment from Planned Community Development (PCD) with comparable Central Business District (PCD C-2) and comparable Industrial Park District (PCD I-1) to Special Campus (S-C) District. The applicant's narrative states that their intent is to rezone to the SC district to accommodate a hospital facility, as well as various other uses, including diagnostic and treatment facilities, a cancer center, medical offices, and ancillary medical uses.

Your request for interpretation includes the following statement: "In order to provide certainty to Scottsdale's citizens and stakeholders, we request this interpretation as to whether Banner can avoid the public rezoning hearing process by characterizing its proposed "Hospital" as an "Office"." However, we have been unable to identify any language in your request that would indicate the applicant is attempting to do as you have suggested. Rather, it appears your request for interpretation concerns a hypothetical scenario that we cannot reasonably respond to as it is not within the scope of the referenced application. Each development application submitted to the City is reviewed in the context of, among other things, the details of that proposal, available operational parameters, and available North American Industry Classification System (NAICS) and licensing information to assess whether the applicant's proposed use fits into the existing or proposed zoning designations and permitted land uses. Absent sufficient details to evaluate those factors, as is the case with your hypothetical, we cannot

provide an interpretation regarding whether a proposal would be permitted under the Zoning Ordinance.

To the extent that you have requested the Zoning Administrator interpret the Zoning Ordinance to confirm the districts where a "Hospital" is permitted, both the definition of "Hospital" and the zoning districts where that is a specified permitted land use are already identified in the Zoning Ordinance.

Respectfully,

Erin Perreault, AICP
Zoning Administrator
City of Scottsdale

CITY OF SCOTTSDALE

PLANNING, ECONOMIC DEVELOPMENT & TOURISM

7447 E. Indian School Rd., Suite 105
Scottsdale, AZ 85251

January 30, 2024

Brett W. Johnson PC
Snell & Wilmer
One East Washington Street, Suite 2700
Phoenix, AZ 85004

Mr. Johnson,

This letter is in response to the request for Zoning Ordinance interpretation contained in your letter under the subject line "Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office,"" which was received on December 26, 2023. Your letter states that you are representing HonorHealth regarding a property they recently acquired at the northeast corner of State Route 101 Freeway and Hayden Road. Specifically, you indicate that you are seeking to clarify the application of the City of Scottsdale's Zoning Ordinance to HonorHealth's newly acquired property.

Your request for interpretation focuses primarily on "Hospital" and "Office" land uses. However, there are a variety of other healthcare-related land uses specified in the Zoning Ordinance, including, but not limited to "Residential Healthcare Facility," "Minimal Residential Health Care Facility," and "Specialized Residential Health Care Facility." The Zoning Ordinance also provides the potential for hybrid and analogous uses that are not specifically named in your request. Although the traditional perception of a hospital commonly included multiple healthcare uses combined into one facility, those individual components may be broken into more specific or analogous land uses that may not fit squarely within the definition of a "Hospital" under the Zoning Ordinance. The healthcare industry is continuously evolving, and our assessment of individual development proposals is based on the information available to us at that time, such as North American Industry Classification System (NAICS) designations, state licensing categorizations, operations information, types of care provided, emergency vehicle and transport vehicle types and trips, as some examples.

Certain land uses are defined in Section 3.100 of the Zoning Ordinance, which includes terms that give general guidance, but not absolute specifics, as it is not practical for a Zoning Ordinance to account for all possible land uses and scenarios. Additionally, Section 1.202.D of the Zoning Ordinance states that the use regulations in each district cannot be all inclusive and may include general use descriptions that encompass several specific uses. That section also requires the Zoning Administrator to interpret the uses specified in each district liberally to include other uses which have similar impacts to the listed uses.

Because of these factors, and absent a development proposal providing, among other things, sufficient details relating to the proposed use of a property, we cannot provide an interpretation that would contain the specific distinctions you have requested.

Respectfully,

Erin Perreault, AICP
Zoning Administrator
City of Scottsdale

EXHIBIT B

Snell & Wilmer
ONE EAST WASHINGTON STREET
SUITE 2700
PHOENIX, AZ 85004-2556
602.382.6000 P
602.382.6070 F

Brett W. Johnson PC
(602) 382-6312
bwjohnson@swlaw.com

December 22, 2023

SENT VIA EMAIL AND COURIER

Erin Perreault, Zoning Administrator
City of Scottsdale
7447 E. Indian School Road, Suite 105
Scottsdale, AZ 85251
eperreault@scottsdaleaz.gov

RE: Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office"

Dear Ms. Perreault:

We represent HonorHealth, a long-time healthcare nonprofit operating hospitals, primary and specialty care clinics, and ancillary offices in and around Scottsdale. Recently, HonorHealth acquired property at the northeast corner of State Route 101 Freeway and Hayden Road (the "Property") as part of its commitment to expanding alongside Scottsdale's growing population. Given this substantial investment into the Property, and to support HonorHealth's long-term facility planning efforts, HonorHealth seeks to clarify the application of the City of Scottsdale's Zoning Ordinances to this newly acquired property so it may ensure compliance with any use restrictions or regulations.

Specifically, pursuant to the Scottsdale's Zoning Ordinance (the "Code") Section 3.100, HonorHealth requests confirmation that (1) a "hospital", for which inpatient medical care will be provided, may only be built on land use zoned Commercial Office ("C-O") or Special Campus ("SC"), and (2) that an "office" use that may be built on other land use zones, such as Central Business ("C-2") and Industrial Park ("I-1"), may only be utilized for medical office or clinical medical care and not inpatient care that exceeds accessory support for limited medical practitioners (i.e. not to a "hospital" level of service with primary focus on inpatient care).

On or about November 16, 2022, HonorHealth purchased the Property subject to approximately forty-eight (48) acres of land use zone C-O, with the ability to designate up to approximately ten (10) acres of land use zone C-2. HonorHealth's strategy is to responsibly plan for future growth in Scottsdale and use data to drive decisions on building new healthcare services whether it be a hospital, medical office, or urgent care. HonorHealth looks at each individual

community and their specific needs to tailor medical options for the future. As a result of the diverse range of possible facilities in a future development on a property with mixed-use zoning including C-O and C-2, HonorHealth requests this interpretation to ensure that future facilities are built on the correct land use zone.

The Code limits the building of a hospital to C-O (requiring a use permit with public hearings) or to SC. An "office" can be built on a number of land use zones, including zone C-2 and I-1. However, because an "office" can include medical services and limited inpatient care normally allowed as an accessory to a clinic or rehabilitation facility, the distinction between the two development types is somewhat unclear, compelling this request to establish clarity with an interpretation of the Code that HonorHealth can rely upon for its development master planning efforts (as well as for planning future land use entitlements if/as needed).

Despite this friction, the Code is unambiguous in defining a hospital for zoning purposes. The Code, in Section 3.100 defines a hospital as "a facility for the **general and emergency** treatment of human ailments, **with bed care** and shall include a sanitarium and clinic but shall not include convalescent or nursing home." *Scottsdale, AZ – Zoning Ordinances*, App. B, Art. III (emphasis added).

Additionally, a hospital is required to obtain a license through the Arizona Department of Health Services. As such, Arizona's licensing requirements support the City's zoning-based definition of a hospital.[1] For purposes of licensure, Arizona law defines a "hospital" as: "a class of health care institution that provides, through an organized medical staff, **inpatient beds**, medical services, continuous nursing services, and diagnosis or treatment to a patient." Ariz. Admin. Code § 9-10-101(110) (emphasis added). Arizona's licensing requirements definition includes "inpatient **beds**" for hospitals.

Conversely, the City's Code defines an "Office" as "an establishment or activity primarily engaged in professional, clerical or medical services, **including inpatient services**." A "hospital" is defined "**with bed care**." While "bed care" is not defined by the Code, there is an implied distinction between "inpatient" stays and "bed care" being of a more intense nature (by being longer in duration, requiring more monitoring, staff, and support services, etc.). The Code definition of "office" describes medical services with a limited scope when compared to the broader definition, and scale, of a "hospital"; evidenced by allowing medical offices across the City by-right, while limiting the location of hospitals to specific areas and, in the case of the C-O zone, requiring a Conditional Use Permit (which requires public hearings and a discretionary

[1] Although Arizona's definition supports the City's definition of a "hospital," any distinction between the definitions should be read in deference to the State's Statutory definition. *See*, City of Scottsdale, Zoning Interpretation 2002-2 (Aug. 1, 2002) (applying an updated Statutory definition of "Adult Care Homes" to Scottsdale's Ordinances for "Adult Foster Care" and "Assisted Living").

approval by the City). Medical offices, on the other hand, are typically a limited practice and a specific service, such as a general practitioners office or a specialist office (such as a cardiac practice) that generally has business hours that are similar to office uses (hence, why they are allowed in zones with other non-medical office uses). Given their intensity, 24-hour operation, larger staffing needs as well as food and other support for both patients and staff, the definition of a hospital includes "general and emergency treatment" – contemplating an expansive network of treatment and practice types. Both through the terms in the Code and by allowing one use broadly and the other use narrowly, the definitions are therefore unambiguous and clearly distinguished.

When conflicting interpretations of law exist after examining the text, including the text of zoning ordinances, Arizona courts refer to the law's subject matter, historical background, and purposes. *Maricopa County v. Rana*, 248 Ariz. 419, 422 (2020) (citing *State v. Burbey*, 243 Ariz. 145, 147 (2017)). Should there be any perceived conflict about how a "hospital" falls into the City's zoning laws, the purpose of the land use zone designations resolves those issues. The City does not allow a hospital in either the C-2 or I-1 land use zone as such use is clearly more intensive than other allowed uses, creating a need to prohibit the intensity of a hospital from this zone. Indeed, the City designates these use zones with a specific purpose in mind:

> C-2: This district is intended to permit uses for recurring shopping and service needs for multiple neighborhoods. This district includes uses usually associated with office and retail shopping developments, typically located near residential neighborhoods.
>
> I-1: The I-1 District is intended to provide for light manufacturing, aeronautical, light industrial, office and supportive uses to sustain and enhance major employment opportunities. The development standards are intended to provide development flexibility consistent with the sensitive design principles, and appropriate transition in areas adjacent to residential districts.

With C-2 zoning located throughout the City and often adjacent to less intensive zones and residences, the zone is intended to allow compatible uses while excluding those that feature more intensive operations. A hospital that has its 24/7 operation, large staff, large number of visitors (both patients and their visitors), deliveries and emergency vehicle operations, clearly does not conform to this intent.

The text and purpose of the City's Code makes clear that a "hospital" is limited to two (2) specific zones – C-O (requiring a use permit with public hearings) and SC. The City's decision to limit hospitals to land use zones C-O and SC – and only these two (2) zones out of forty-seven (47) zoning categories – implements the public policy of recognizing the intense impact of a hospital (with its twenty-four hour operation and helicopter traffic) on neighborhoods, traffic, and infrastructure, compared to the less intense impacts of an office.

With this notice of formal interpretation, HonorHealth respectfully requests that you interpret the Zoning Ordinance to confirm that a facility for the general and emergency treatment of human ailments with bed care, including related clinic care, is not permitted in any zoning district except the C-O (requiring a use permit with public hearings) and SC districts. Moreover, "office" uses that include the treatment of human ailments with accessory bed care of any duration shall not be defined as a "hospital" pursuant to the Code.

This confirming interpretation will provide much needed clarity on the distinction between "Hospital" uses and medical office uses that will assist the HonorHealth team with their long-range planning efforts.

If you have any questions, please do contact me at bwjohnson@swlaw.com or (602) 382-6312. Thank you for your attention to this matter.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th
cc: Jim Thompson, City Manager
Sherry Scott, City Attorney

EXHIBIT C

Snell & Wilmer
ONE EAST WASHINGTON STREET
SUITE 2700
PHOENIX, AZ 85004-2556
602.382.6000 P
602.382.6070 F

Brett W. Johnson PC
(602) 382-6312
bwjohnson@swlaw.com

December 22, 2023

SENT VIA EMAIL AND COURIER

Erin Perreault, Zoning Administrator
City of Scottsdale
7447 E. Indian School Road, Suite 105
Scottsdale, AZ 85251
eperreault@scottsdaleaz.gov

RE: Request for Scottsdale Zoning Ordinance Interpretation Concerning the Utilization of the Definition of "Office" pursuant to C-2 and I-1 to Circumvent Definition of "Hospital" pursuant to C-O

Dear Ms. Perreault:

We represent HonorHealth.[1] HonorHealth operates a network of hospitals and medical centers in the City of Scottsdale, and as such, seeks to address the potential for the improper building of a hospital on property with a zoning designation of Central Business ("C-2") or Industrial Park ("I-1"). Specifically, pursuant to Scottsdale's Zoning Ordinance (the "Code"), HonorHealth seeks to clarify that building and/or operating a "hospital" under the guise of an "office" within the definitions of the Code is a violation of the Code.[2]

[1] A ruling permitting the respective action would cause HonorHealth to face an adverse impact. A nearby HonorHealth medical campus will be economically impacted by allowing hospitals on non-conforming zones. Additionally, the ruling would adversely affect HonorHealth's unique role as Scottsdale's largest hospital network by allowing hospitals to be built on C-2 and/or I-1 use zones without the opportunity of public comment and City Council review, therefore, decreasing the value of HonorHealth's properly conforming use zones. *See*, *City of Scottsdale Bd. of Adjustments*, 1-BA-2023, at 4 (citing *Cherry v. Wiesner*, 781 S.E.2d 871 (N.C. Ct. App. 2016) (holding that a nearby landowner has standing if new construction would cause "special damages" distinct from other landowners)).

[2] *See* HonorHealth's Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office" dated December 22, 2023, discussing the distinction between a "hospital" and an "office," attached as Exhibit 1.

On June 15, 2023, Banner Health Arizona ("Banner") submitted an application to the City of Scottsdale to request a rezoning of the property generally located at the southwest corner of State Route 101 Freeway and Hayden Road (the "Property").

This application, Case 5-ZN-2023, clearly illustrates Banner's plan to build an extensive 48-acre medical campus featuring, among other uses, a full-service hospital and in-patient beds to provide hospital level medical care. In doing so, Banner proposed rezoning the property to Special Campus ("SC") from C-2 and I-1 zoning to specifically allow for a "hospital" under the "Medical Facilities" use category, which provides for an extensive list of medical related uses, including a "hospital" use. Note that Banner's zoning application recognizes that the Property would need to be rezoned to allow its desired hospital use:

> "In order to facilitate development of the Project, Banner is proposing to rezone the Property to Special Campus (SC) zoning, which will help implement the vision for this area and maintain the citywide balance of land uses. Importantly, the proposed SC zoning and the Banner Scottsdale Medical center are in line with the types of uses already allowed on the Property pursuant to the existing zoning. So, **while the SC zoning change is necessary to accommodate the hospital facility,** the proposed medical uses are comparable to and compatible with the land uses already allowed by right on the Property." (emphasis added).

In order to provide certainty to Scottsdale's citizens and stakeholders, we request this interpretation as to whether Banner can avoid the public rezoning hearing process by characterizing its proposed "hospital" as an "office". Of the 47 zoning categories in the Code, a hospital is only allowed to be built in C-O (requiring a use permit with public hearings) or SC zoning districts. The Property is currently designated as C-2 and I-1, and does not allow a hospital without a rezoning. By example, the HonorHealth Thompson Peak Hospital was required in 2005, in Case 46-ZN-1990#16 and 21-UP-1995#3, to rezone its C-2 property to C-O and obtain a use permit. The City Council Report dated December 13, 2005, includes the following quote, "The PCD C-2 District does not allow hospitals."

Permitting a "hospital" in an "office" zoning category eviscerates the distinct purposes of each zone, their respective uses, and the concomitant legislatively approved public policy for each zoning district. The building, constructing, and/or operating of a "hospital" masquerading as an "office" in a C-2/I-1 district sets an adverse precedent allowing the development of non-permitted uses.

With this notice of formal interpretation, HonorHealth respectfully requests that you interpret the Zoning Ordinance to confirm that a "hospital" is strictly limited to the C-O (requiring a use permit with public hearings) land use zone, or within an approved SC zone and that those are the only lawful zoning districts that permit a "hospital" use. A decision permitting this non-

compliant use would adversely impact the uniformity and intent of Scottsdale's zoning ordinances, essentially rendering any zoning restriction moot.

If you have any questions, please do contact me at bwjohnson@swlaw.com or (602) 382-6312. Thank you for your attention to this matter.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th
Enclosure
cc: Jim Thompson, City Manager
Sherry Scott, City Attorney

EXHIBIT 1

Snell & Wilmer
ONE EAST WASHINGTON STREET
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602.382.6070 F

Brett W. Johnson PC
(602) 382-6312
bwjohnson@swlaw.com

December 22, 2023

SENT VIA EMAIL AND COURIER

Erin Perreault, Zoning Administrator
City of Scottsdale
7447 E. Indian School Road, Suite 105
Scottsdale, AZ 85251
eperreault@scottsdaleaz.gov

RE: Request for Scottsdale Zoning Ordinance Interpretation of "Hospital" and "Office"

Dear Ms. Perreault:

We represent HonorHealth, a long-time healthcare nonprofit operating hospitals, primary and specialty care clinics, and ancillary offices in and around Scottsdale. Recently, HonorHealth acquired property at the northeast corner of State Route 101 Freeway and Hayden Road (the "Property") as part of its commitment to expanding alongside Scottsdale's growing population. Given this substantial investment into the Property, and to support HonorHealth's long-term facility planning efforts, HonorHealth seeks to clarify the application of the City of Scottsdale's Zoning Ordinances to this newly acquired property so it may ensure compliance with any use restrictions or regulations.

Specifically, pursuant to the Scottsdale's Zoning Ordinance (the "Code") Section 3.100, HonorHealth requests confirmation that (1) a "hospital", for which inpatient medical care will be provided, may only be built on land use zoned Commercial Office ("C-O") or Special Campus ("SC"), and (2) that an "office" use that may be built on other land use zones, such as Central Business ("C-2") and Industrial Park ("I-1"), may only be utilized for medical office or clinical medical care and not inpatient care that exceeds accessory support for limited medical practitioners (i.e. not to a "hospital" level of service with primary focus on inpatient care).

On or about November 16, 2022, HonorHealth purchased the Property subject to approximately forty-eight (48) acres of land use zone C-O, with the ability to designate up to approximately ten (10) acres of land use zone C-2. HonorHealth's strategy is to responsibly plan for future growth in Scottsdale and use data to drive decisions on building new healthcare services whether it be a hospital, medical office, or urgent care. HonorHealth looks at each individual

community and their specific needs to tailor medical options for the future. As a result of the diverse range of possible facilities in a future development on a property with mixed-use zoning including C-O and C-2, HonorHealth requests this interpretation to ensure that future facilities are built on the correct land use zone.

The Code limits the building of a hospital to C-O (requiring a use permit with public hearings) or to SC. An "office" can be built on a number of land use zones, including zone C-2 and I-1. However, because an "office" can include medical services and limited inpatient care normally allowed as an accessory to a clinic or rehabilitation facility, the distinction between the two development types is somewhat unclear, compelling this request to establish clarity with an interpretation of the Code that HonorHealth can rely upon for its development master planning efforts (as well as for planning future land use entitlements if/as needed).

Despite this friction, the Code is unambiguous in defining a hospital for zoning purposes. The Code, in Section 3.100 defines a hospital as "a facility for the **general and emergency** treatment of human ailments, **with bed care** and shall include a sanitarium and clinic but shall not include convalescent or nursing home." *Scottsdale, AZ – Zoning Ordinances*, App. B, Art. III (emphasis added).

Additionally, a hospital is required to obtain a license through the Arizona Department of Health Services. As such, Arizona's licensing requirements support the City's zoning-based definition of a hospital.[1] For purposes of licensure, Arizona law defines a "hospital" as: "a class of health care institution that provides, through an organized medical staff, **inpatient beds**, medical services, continuous nursing services, and diagnosis or treatment to a patient." Ariz. Admin. Code § 9-10-101(110) (emphasis added). Arizona's licensing requirements definition includes "inpatient **beds**" for hospitals.

Conversely, the City's Code defines an "Office" as "an establishment or activity primarily engaged in professional, clerical or medical services, **including inpatient services**." A "hospital" is defined "**with bed care**." While "bed care" is not defined by the Code, there is an implied distinction between "inpatient" stays and "bed care" being of a more intense nature (by being longer in duration, requiring more monitoring, staff, and support services, etc.). The Code definition of "office" describes medical services with a limited scope when compared to the broader definition, and scale, of a "hospital"; evidenced by allowing medical offices across the City by-right, while limiting the location of hospitals to specific areas and, in the case of the C-O zone, requiring a Conditional Use Permit (which requires public hearings and a discretionary

[1] Although Arizona's definition supports the City's definition of a "hospital," any distinction between the definitions should be read in deference to the State's Statutory definition. *See*, City of Scottsdale, Zoning Interpretation 2002-2 (Aug. 1, 2002) (applying an updated Statutory definition of "Adult Care Homes" to Scottsdale's Ordinances for "Adult Foster Care" and "Assisted Living").

approval by the City). Medical offices, on the other hand, are typically a limited practice and a specific service, such as a general practitioners office or a specialist office (such as a cardiac practice) that generally has business hours that are similar to office uses (hence, why they are allowed in zones with other non-medical office uses). Given their intensity, 24-hour operation, larger staffing needs as well as food and other support for both patients and staff, the definition of a hospital includes "general and emergency treatment" – contemplating an expansive network of treatment and practice types. Both through the terms in the Code and by allowing one use broadly and the other use narrowly, the definitions are therefore unambiguous and clearly distinguished.

When conflicting interpretations of law exist after examining the text, including the text of zoning ordinances, Arizona courts refer to the law's subject matter, historical background, and purposes. *Maricopa County v. Rana*, 248 Ariz. 419, 422 (2020) (citing *State v. Burbey*, 243 Ariz. 145, 147 (2017)). Should there be any perceived conflict about how a "hospital" falls into the City's zoning laws, the purpose of the land use zone designations resolves those issues. The City does not allow a hospital in either the C-2 or I-1 land use zone as such use is clearly more intensive than other allowed uses, creating a need to prohibit the intensity of a hospital from this zone. Indeed, the City designates these use zones with a specific purpose in mind:

> C-2: This district is intended to permit uses for recurring shopping and service needs for multiple neighborhoods. This district includes uses usually associated with office and retail shopping developments, typically located near residential neighborhoods.
>
> I-1: The I-1 District is intended to provide for light manufacturing, aeronautical, light industrial, office and supportive uses to sustain and enhance major employment opportunities. The development standards are intended to provide development flexibility consistent with the sensitive design principles, and appropriate transition in areas adjacent to residential districts.

With C-2 zoning located throughout the City and often adjacent to less intensive zones and residences, the zone is intended to allow compatible uses while excluding those that feature more intensive operations. A hospital that has its 24/7 operation, large staff, large number of visitors (both patients and their visitors), deliveries and emergency vehicle operations, clearly does not conform to this intent.

The text and purpose of the City's Code makes clear that a "hospital" is limited to two (2) specific zones – C-O (requiring a use permit with public hearings) and SC. The City's decision to limit hospitals to land use zones C-O and SC – and only these two (2) zones out of forty-seven (47) zoning categories – implements the public policy of recognizing the intense impact of a hospital (with its twenty-four hour operation and helicopter traffic) on neighborhoods, traffic, and infrastructure, compared to the less intense impacts of an office.

With this notice of formal interpretation, HonorHealth respectfully requests that you interpret the Zoning Ordinance to confirm that a facility for the general and emergency treatment of human ailments with bed care, including related clinic care, is not permitted in any zoning district except the C-O (requiring a use permit with public hearings) and SC districts. Moreover, "office" uses that include the treatment of human ailments with accessory bed care of any duration shall not be defined as a "hospital" pursuant to the Code.

This confirming interpretation will provide much needed clarity on the distinction between "Hospital" uses and medical office uses that will assist the HonorHealth team with their long-range planning efforts.

If you have any questions, please do contact me at bwjohnson@swlaw.com or (602) 382-6312. Thank you for your attention to this matter.

Very truly yours,

Snell & Wilmer

Brett W. Johnson PC

BWJ:th
cc: Jim Thompson, City Manager
Sherry Scott, City Attorney

EXHIBIT D

Thank you again for contacting Mayor Ortega and the City Council.

Respectfully,

Rebecca Kurth
Management Assistant to the Mayor and City Council Office of Mayor David D. Ortega
3939 N. Drinkwater Blvd
Scottsdale, AZ 85251
Phone: 480.312.7977
Email: RKurth@ScottsdaleAZ.gov

From: Shirley Wagner <slw63khs@gmail.com>
Sent: Wednesday, April 6, 2022 10:47 AM
To: Mayor David D. Ortega <DOrtega@Scottsdaleaz.gov>; City Council <CityCouncil@scottsdaleaz.gov>
Subject: OPEN HOUSE APRIL 6 and PROPOSED CONTRUCTION

Open House meeting tonight April 6 at Grayhawk school regarding Banner Health proposal to build a hospital and medical office buildings on a 45 acre plot on the northeast section on Hayden Road and the 101 Loop. I was made aware of this meeting by a fellow Grayhawk resident. To my knowledge this meeting has not been highly publicized Just another example of the City of Scottsdale sneaking this proposal through the process without significant public input. There is a sign posted on Hayden Road that might contain information about tonight's meeting but it is extremely dangerous to stop along this section of Hayden Road to read the sign.

I personally do not believe there is a need for another hospital in this area of Scottsdale as we have excellent healthcare available to the community at the HonorHealth Thompson Peak and Shea campuses.

The increase in traffic in this area will be significant. Has a traffic low analysis been done? The Nationwide project has been built along with a huge hotel under construction across the street from the proposed Banner project . More traffic!!

Hospital's consume a lot of water. Has a water usage analysis been done? Where will the water come from? Will the wells that service the Grayhawk communities dry up? Please consider water usage in all of the proposed Scottsdale developments.

I am opposed to the construction of the Banner Health hospital.

Shirley Wagner
slw63khs@gmail.com

Bcc: [redacted]
To: Nancy Tomback[nancy.tomback@russlyon.com]
From: Graham, Barry
Sent: Thur 6/8/2023 5:05:08 PM
Subject: Re: Opposed to Banner Health Building off of Hayden and 101
Received: Thur 6/8/2023 5:05:09 PM

Nancy, thank you for emailing us.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Nancy Tomback <nancy.tomback@russlyon.com>
Sent: Thursday, June 8, 2023 9:23 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Opposed to Banner Health Building off of Hayden and 101

I am a 30 year REALTOR and a Grayhawk resident for 25 years. You are hurting the north Scottsdale area and not helping the real estate market at all, by overbuilding in an area that can't handle the current traffic it already has. First it was Nationwide, then the Hotel, Cavasson and all they are going to build surrounding it. It will be gridlock on Hayden to get north to our homes, and this is not helping the neighborhood of North Scottsdale. We don't have alternate routes. Scottsdale Road is already bumper to bumper.

I am appalled at the irresponsible development in north Scottsdale everywhere; Scottsdale Road and Thompson Peak, the condo's going in at the 101 and Scottsdale, and now this.

How do you expect people to drive on these streets? Do you want another LA traffic jam to be the reputation of our community? And what about the beauty of our mountains? Does everyone just care about development with no care for integrity and beauty of our neighborhood.

I am against this development and I will be happy to speak to the Mayor's office regarding this development.

Nancy Tomback

To: Jason Miller[j@sonmiller.com]
From: Littlefield, Kathy
Sent: Sun 6/4/2023 10:33:24 PM
Subject: Re: Please say NO to the Banner hospital off Hayden and the 101
Received: Sun 6/4/2023 10:33:25 PM

The Banner Health hospital is being built on a portion of the State land which was bought at the state land auction for this purpose. I do not believe we can tell them they can't build.
Councilwoman Kathy Littlefield

From: Jason Miller <j@sonmiller.com>
Sent: Friday, June 2, 2023 8:30 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Please say NO to the Banner hospital off Hayden and the 101

We are already dealing with water issues in North Scottsdale, and we don't need an empty hospital.
Best regards,
Jason Miller

To: margaret infantino[infantinom@cox.net]
From: Graham, Barry
Sent: Thur 6/8/2023 9:11:26 PM
Subject: Re: Proposed Banner Health Hospital at Hayden and the 101
Received: Thur 6/8/2023 9:11:27 PM

Thank you for your email, Margaret

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: margaret infantino <infantinom@cox.net>
Sent: Thursday, June 8, 2023 11:55 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Health Hospital at Hayden and the 101

⚠ External Email: Please use caution if opening links or attachments!

We do not need another hospital in this area please DO NOT approve this!! It will only bring more congestion to our community.

To: james t. fritsch[jamesfritsch@earthlink.net]
From: Littlefield, Kathy
Sent: Sun 6/4/2023 10:49:02 PM
Subject: Re: Proposed Banner Health hospital near Hayden and Hwy. 101
Received: Sun 6/4/2023 10:49:02 PM

The Banner Health hospital is being built on a portion of the State land which was bought at the state land auction for this purpose. I do not believe we can tell them they can't build.

Councilwoman Kathy Littlefield

From: james t. fritsch <jamesfritsch@earthlink.net>
Sent: Thursday, June 1, 2023 11:56 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Health hospital near Hayden and Hwy. 101

As a homeowner and resident of the Stonebrook II community I strongly oppose the consideration of a Banner Health hospital in the southwest quadrant of Hayden and Hwy.101---directly near the northern boundary of our neighborhood.
It seems self-evident that there is absolutely no need for an additional hospital. Thompson Peak hospital, Shea hospital, and Deer Valley hospital are all within a ten-minute drive our home.
In this day and age of professional medical staffing shortages, an additional hospital will aggravate that problem at our existing hospitals.
We have a looming problem with water supplies. Arizona's draw from the Colorado River has already been mandated that will reduce our use by 20%. It has estimated that the hospital under consideration will use 160,000 gallons per day.
The placement of the hospital under consideration adjacent the new fire station will promote a danger to traffic and pedestrians. The likelihood of lengthened emergency response time in so already congested area must be taken into consideration.
I request that you do not support or endorse the planning or building of this hospital project.

Sincerely,
James Fritsch
8171 East Maria Drive
Scottsdale 85255

To: Betcher, H. Scott[sbetcher@ppg.com]
From: Littlefield, Kathy
Sent: Sun 6/4/2023 10:57:28 PM
Subject: Re: Proposed Banner Health Hospital
Received: Sun 6/4/2023 10:57:29 PM

The Banner Health hospital is being built on a portion of the State land which was bought at the state land auction for this purpose. I do not believe we can tell them they can't build.

Councilwoman Kathy Littlefield

From: Betcher, H. Scott <sbetcher@ppg.com>
Sent: Thursday, June 1, 2023 9:43 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Health Hospital

All,

I am a concerned resident with the irresponsible development of North Scottsdale. First Optima seems to have carte blanch to build unnecessary high rise residential housing. The beauty of North Scottsdale is being destroyed. We do not need another hospital in the area. Particularly with current level of staffing shortages. We need to preserve the quality of healthcare that already exists.

Therefore, I encourage you to vote NO for the proposed Banner Health hospital at Hayden and 101.

Thank you

Scott Betcher
Sr Region Manager
Automotive Refinish
PPG

19699 Progress Drive
Strongsville, OH 44149
M: 724-719-8498
E: sbetcher@ppg.com
Web: www.ppgrefinish.com

To: Randall[rogrand25608@cox.net]
Cc: City Council[CityCouncil@scottsdaleaz.gov]
From: Kurth, Rebecca
Sent: Thur 6/15/2023 9:08:20 PM
Subject: RE: Water "Be at peace with your landscape, water no more then. Twice a week" Mailer, 'Swimflation', "Frank Lloyd Wright fiasco, "the 15 minute life", that would have us all, live work and play, where they want us……call it Bike Lanes, Banner Health and Ho
Received: Thur 6/15/2023 9:08:22 PM

Good afternoon Mr. Rogers,

Please see the below information from the Scottsdale Water Department

Scottsdale evaluates water and growth holistically for the city. As Scottsdale strategically considers water resources and the city's water future, we must also consider reasonable and responsible growth. While exponential growth could hinder and stress resources, zero growth could hinder the economy. Reasonable and responsible growth is possible when we maximize conservation efforts, invest in our infrastructure, and have the innovation and plans in place to accommodate ever-changing water issues.

Scottsdale has put water at the forefront of its priority. And with every decision made, the impact to our water supply and water future are considered with the utmost of importance.

The Banner Health project has not formally been submitted to the City, and is still in the pre-application process.

Respectfully,

Rebecca Kurth

Rebecca Kurth | Management Assistant to Mayor & City Council
City of Scottsdale | Office of Mayor David D. Ortega
480.312.7977 |623.715.6879 | rkurth@scottsdaleaz.gov

-----Original Message-----
From: Randall <rogrand25608@cox.net>
Sent: Tuesday, June 13, 2023 4:37 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Water "Be at peace with your landscape, water no more then. Twice a week" Mailer, 'Swimflation', "Frank Lloyd Wright fiasco, "the 15 minute life", that would have us all, live work and play, where they want us……call it Bike Lanes, Banner Health and Hon...

⚠ External Email: Please use caution if opening links or attachments!

Mayor and CC,

Where to start, maybe with the City Taxpayer, we received the Mailing on Water usage, which greatly increases between May and October, Parks and Facilities funded by Taxpayers, now see us being chastised on paid Advertorial material, while reading of the increases for usage at Parks and Pools, this while Apartments continue to be presented from Shea to Pinnacle Peak, comically the Grand Peaks even has the levity of address in the long departed Henkel Corporation that had to have Euro-Industrial Design, with Architectural concessions by Mayor and CC, now on the north side of the 101, the south side will have another 2,500 Units, Rooftop Pools, a few hundred yards east again on the north side of the 101 another 1,250 Units and Cars.

Then, why would a Parcel on the south side, being adjacent to the former Luke property, now proposed 2,500 Units have a Banner Health in what is a residential core, has not Scottsdale Healthcare, now Honor Health been a good match for Scottsdale, great Dr.'s, Facilities, from Downtown, Shea, Grayhawk both Hospital and Urgent Care, yet residents will be subjected to Lighting issues, Sounds of Sirens and Ambulances, this where the City has already treacherous Roads and Bike Lanes, Hayden between Thompson Peak and The 101 is 45-40, with 65-70 being the normal speed be it Saturday @08:30 or 3:30PM! Not for nothing but the new Hilton looks like they're still expecting their first guest, PITCH has to wondering how long they can hold out, Nationwide just took on a tenant having been empty for 3 years. Why Banner Health on the 101, 5 minutes from Honor Health Grayhawk, 9 minutes from Shea and 92nd St?

Again, Scottsdale needs a 10 year moratorium on multi-family housing, look no further than Scottsdale to Kierland to Bell to Mayo and into the Desert Ridge melange of confusion. People can commute from west of Scottsdale Road, they don't have to live in Scottsdale to be employed, why is the elected CC and Mayor supporting Developers instead of Resident Taxpayers, who as Property Owners see their Taces rise, paying for Services that are not directed to them?

Scottsdale, once a great City, now with urbanization by Developers and their facilitators in government, we have Crime that is increasing both on our periphery and as with the 'Q' and Old Town's South Beach in the Desert.

Randall C. Rogers
Scottsdale, Az. 85255 ('91)

To: Debi Poe[arizonageode@msn.com]
From: Littlefield, Kathy
Sent: Sun 6/4/2023 10:46:05 PM
Subject: Re:
Received: Sun 6/4/2023 10:46:06 PM

Debi,

The Banner Health hospital is being built on a portion of the State land which was bought at the state land auction for this purpose. I do not believe we can tell them they can't build.

Councilwoman Kathy Littlefield

From: Debi Poe <arizonageode@msn.com>
Sent: Thursday, June 1, 2023 2:28 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject:

Please DO NOT approve the building of a new Banner Hospital near Hayden Road and the 101. We do not need another hospital in this area as we already have two excellent ones available. More importantly, Hayden Road can barely keep up with the traffic now and there are multiple apartments going up that will increase the congestion.
Thank you,
Deborah Poe
Registered voter and resident for 30 years!

Sent from Mail for Windows

To: Kenneth Ross[kjrossjkross@yahoo.com]
From: Kurth, Rebecca
Sent: Fri 6/9/2023 8:45:12 PM
Subject: RE: Banner hospital
Received: Fri 6/9/2023 8:45:14 PM

Good afternoon Mr. Smith,

Thank you for contacting the City Council with your thoughts on this topic, your correspondence has been received.

Respectfully,

Rebecca Kurth

Rebecca Kurth | Management Assistant to Mayor & City Council
City of Scottsdale | Office of Mayor David D. Ortega
480.312.7977 | rkurth@scottsdaleaz.gov

-----Original Message-----
From: Kenneth Ross <kjrossjkross@yahoo.com>
Sent: Thursday, June 8, 2023 11:14 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Cc: CareScottsdale@gmail.com
Subject: Banner hospital

⚠ External Email: Please use caution if opening links or attachments!

My name is Ken Ross. I live in Grayhawk and urge you to NOT let Banner Health build an unnecessary hospital at 101 and Hayden. As you know there's a hospital very close by and we already have traffic, noise and water issues. I appreciate your consideration.

Sent from my iPhone

To: O Delgado[odlgd04@gmail.com]
From: Graham, Barry
Sent: Sat 6/17/2023 8:03:57 PM
Subject: Re: City Council - Vote
Received: Sat 6/17/2023 8:03:57 PM

Orlando, thank you for taking time to email us.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: O Delgado <odlgd04@gmail.com>
Sent: Thursday, June 15, 2023 11:05 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: City Council - Vote

⚠External Email: Please use caution if opening links or attachments!

Dear City Council,

I am writing as a constituent and full time resident to oppose the approval of a new hospital being proposed by Banner health near Hayden Road and the 101 freeway.

I live and work in this area and we are well supplied with medical facilities with a hospital on Thompson Peak Parkway, Mayo clinic nearby, and Honor Health on Shea Boulevard.

The noise, traffic, and construction that this would create in our neighborhood would be unprecedented and not necessary.

Beyond the absence of need for increased access to healthcare in this community, there is also increased construction, traffic, noise, and disruption to our community. There is also the demand for water use.

We are already facing future crisis for water, and this demand would increase the shortage rapidly as well as place a heavy draw from our community.

Please say NO to any Banner health development in our area, for the reasons mentioned above. As a constituent, I feel passionately about this and if approved, I will vote accordingly in the next elections to remove individuals who are remaining in power that are not listening to the needs and concerns of the communities and the residents therein Scottdale.

The proposal to build in our area is nothing short of damaging without providing any true benefit to the community and will only be a benefit to Banner System. I would encourage Banner to look outside of North Scottsdale to service more underserved communities and truly follow the needs of communities.

Thank you,

Orlando Delgado
7755 East Nestling Way,
Scottsdale, AZ
85255

Councilwoman Kathy Littlefield

From: Ciaran Mullins <ciaran1972@gmail.com>
Sent: Friday, June 2, 2023 8:17 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: No Hospital

Dear Mr. Mayor

I oppose the proposed Banner Hospital on the southwest corner of Hayden & the 101.

The TPC is hard enough live through, don't make it any harder. There is enough hospital's. We don't want another in my neighborhood

Sincerely,
Ciarán B. Mullins
480-246-5411
ciaran1972@gmail.com

To: City Council[CityCouncil@scottsdaleaz.gov]
From: T. Graves, Ph.D.
Sent: Thur 6/1/2023 2:52:53 AM
Subject: BANNER HEALTH NEW HOSPITAL HAYDEN RD AND 101
Received: Thur 6/1/2023 2:53:10 AM

Attention City Councilmen/Women:

I am in opposition to the proposed Banner Health Hospital at Hayden Road and the 101. I find this to be unnecessary to place a 3rd area hospital within a 3 mile radius.We have ample levels of care and response teams available to provide emergency/acute care and additional medical services to those who need it. This is again an unfortunate misuse and allocation of commercial space when there is no documented or data to support the need for more healthcare beds.

Secondly, there is an increasing water shortage and this additional health care hospital is anticipated to utilize 165,000 gallons of water per day. Being a healthcare provider, there is no justification for this to even be considered given this current time when water, traffic and noise are the largest issues facing our community.

As a resident of Scottsdale, our landscape is being encroached upon by poor city planners, big business and misallocation of unneeded services within MY community.

Respectively,
Tracey Graves
Scottsdale, AZ

To: City Council[CityCouncil@scottsdaleaz.gov]
From: John Popp
Sent: Tue 6/6/2023 3:11:14 PM
Subject: Banner Health Proposed Hospital
Received: Tue 6/6/2023 3:17:13 PM

I oppose the building of a hospital at Hayden and 101. We don't need this facility

--
John G. Popp
847-828-8987
Resident of Princess Views

To: City Council[CityCouncil@scottsdaleaz.gov]
From: songBirdie
Sent: Sun 6/4/2023 7:09:19 AM
Subject: Banner Health
Received: Sun 6/4/2023 7:09:44 AM

To whom it may concern,

Why in the hell would you allow another hospital to be built in North Scottsdale. We have PLENTY of hospital (beds) already. This building will eat up precious resources that we don't have extra of, most importantly water. Why in the world aren't you guys using common sense? They must be paying you some side cash to get this done, on one with an ounce of common sense would allow this to happen!

Respectfully,

dan milligan
songBirdie™
7689 east paradise lane · suite 4
scottsdale · arizona · 85260
dan@songBirdie.com · email
www.songBirdie.com · web

To: City Council[CityCouncil@scottsdaleaz.gov]
From: O Delgado
Sent: Thur 6/15/2023 6:05:11 PM
Subject: City Council - Vote
Received: Thur 6/15/2023 6:05:35 PM

⚠ External Email: Please use caution if opening links or attachments!

Dear City Council,

I am writing as a constituent and full time resident to oppose the approval of a new hospital being proposed by Banner health near Hayden Road and the 101 freeway.

I live and work in this area and we are well supplied with medical facilities with a hospital on Thompson Peak Parkway, Mayo clinic nearby, and Honor Health on Shea Boulevard.

The noise, traffic, and construction that this would create in our neighborhood would be unprecedented and not necessary.

Beyond the absence of need for increased access to healthcare in this community, there is also increased construction, traffic, noise, and disruption to our community. There is also the demand for water use.

We are already facing future crisis for water, and this demand would increase the shortage rapidly as well as place a heavy draw from our community.

Please say NO to any Banner health development in our area, for the reasons mentioned above. As a constituent, I feel passionately about this and if approved, I will vote accordingly in the next elections to remove individuals who are remaining in power that are not listening to the needs and concerns of the communities and the residents therein Scottdale.

The proposal to build in our area is nothing short of damaging without providing any true benefit to the community and will only be a benefit to Banner System. I would encourage Banner to look outside of North Scottsdale to service more underserved communities and truly follow the needs of communities.

Thank you,

Orlando Delgado
7755 East Nestling Way,
Scottsdale, AZ
85255

To: Mayor David D. Ortega[DOrtega@Scottsdaleaz.gov]; City Council[CityCouncil@scottsdaleaz.gov]
From: Shirley Wagner
Sent: Wed 4/6/2022 5:46:36 PM
Subject: OPEN HOUSE APRIL 6 and PROPOSED CONTRUCTION
Received: Wed 4/6/2022 5:47:21 PM

Open House meeting tonight April 6 at Grayhawk school regarding Banner Health proposal to build a hospital and medical office buildings on a 45 acre plot on the northeast section on Hayden Road and the 101 Loop. I was made aware of this meeting by a fellow Grayhawk resident. To my knowledge this meeting has not been highly publicized Just another example of the City of Scottsdale sneaking this proposal through the process without significant public input. There is a sign posted on Hayden Road that might contain information about tonight's meeting but it is extremely dangerous to stop along this section of Hayden Road to read the sign.

I personally do not believe there is a need for another hospital in this area of Scottsdale as we have excellent healthcare available to the community at the HonorHealth Thompson Peak and Shea campuses.

The increase in traffic in this area will be significant. Has a traffic low analysis been done? The Nationwide project has been built along with a huge hotel under construction across the street from the proposed Banner project . More traffic!!

Hospital's consume a lot of water. Has a water usage analysis been done? Where will the water come from? Will the wells that service the Grayhawk communities dry up? Please consider water usage in all of the proposed Scottsdale developments.

I am opposed to the construction of the Banner Health hospital.

Shirley Wagner
slw63khs@gmail.com

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Nancy Tomback
Sent: Thur 6/8/2023 4:23:48 PM
Subject: Opposed to Banner Health Building off of Hayden and 101
Received: Thur 6/8/2023 4:24:14 PM

I am a 30 year REALTOR and a Grayhawk resident for 25 years. You are hurting the north Scottsdale area and not helping the real estate market at all, by overbuilding in an area that can't handle the current traffic it already has.

First it was Nationwide, then the Hotel, Cavasson and all they are going to build surrounding it. It will be gridlock on Hayden to get north to our homes, and this is not helping the neighborhood of North Scottsdale. We don't have alternate routes. Scottsdale Road is already bumper to bumper.

I am appalled at the irresponsible development in north Scottsdale everywhere; Scottsdale Road and Thompson Peak, the condo's going in at the 101 and Scottsdale, and now this.

How do you expect people to drive on these streets? Do you want another LA traffic jam to be the reputation of our community? And what about the beauty of our mountains? Does everyone just care about development with no care for integrity and beauty of our neighborhood.

I am against this development and I will be happy to speak to the Mayor's office regarding this development.

Nancy Tomback

To: Mayor David D. Ortega[DOrtega@Scottsdaleaz.gov]
From: dondii04@gmail.com
Sent: Thur 6/15/2023 4:50:56 PM
Subject: Opposition to hospital development
Received: Thur 6/15/2023 4:51:16 PM

Dear Mayor Ortega,

I am writing as a constituent and full time resident to oppose the approval of a new hospital being proposed by Banner health near Hayden Road and the 101 freeway.

I live and work in this area and we are well supplied with medical facilities with a hospital on Thompson Peak Parkway, Mayo clinic nearby, and Honor Health on Shea Boulevard.

The noise, traffic, and construction that this would create in our neighborhood would be unprecedented and unnecessary.

We reside in a well serviced community, and there are many communities throughout Phoenix and Arizona that would benefit from increased healthcare access, however, north Scottsdale is not one of these communities.

Beyond the absence of need for increased access to healthcare in this community, there is also increased construction, traffic, noise, and disruption to our community. There is also the demand for water use.

We are already facing future crisis for water, and this demand would increase the shortage rapidly as well as place a heavy draw from our community.

Please say NO to any Banner health development in our area, for the reasons mentioned above. As a constituent, I feel passionately about this and if approved, I will vote accordingly in the next elections to remove individuals who are remaining in power that are not listening to the needs and concerns of the communities and the residents therein.

The proposal to build in our area is nothing short of damaging without providing any true benefit to the community and will only be a benefit to Banner System. I would encourage Banner to look outside of North Scottsdale to service more underserved communities and truly follow the needs of communities.

Respectfully,
Dondii Delgado.
7755 East Nestling Way,
Scottsdale, AZ
85255

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Jim Stockwell
Sent: Fri 6/9/2023 10:57:20 PM
Subject: New Banner Health hospital at Hayden and the 101
Received: Fri 6/9/2023 10:57:46 PM

Subject: Urgent Opposition to Proposed Hospital Construction at Hayden and 101

Dear Mayor Ortega and City Council Members,

I am a long-time resident of our city and I am writing to express my strong opposition to the proposed hospital construction project at the corner of Hayden and the 101 freeway. While I fully understand the importance of healthcare facilities, I believe this particular project could disrupt the character of our community more than it might serve it.

The location for the proposed hospital construction will drastically alter the aesthetic of our town, pushing it towards an urban look rather than maintaining the quiet, suburban charm that many residents, including myself, love and cherish. This building stands to intrude on our visual landscape, rather than enhance it, potentially altering the character of our community and affecting our overall quality of life.

Moreover, our area is already adequately served by existing healthcare facilities, reducing the need for additional hospital capacity. I believe it's essential that our city resources are directed towards enhancing and supporting what we already have rather than duplicating services.

Further, the construction and operation of the proposed hospital will undoubtedly increase both traffic and noise levels in our residential area. The peace and tranquility we currently enjoy may be replaced by the constant hum of activity associated with a large, round-the-clock facility like a hospital.

In conclusion, I respectfully request that you weigh these concerns against the purported benefits of the proposed hospital. As our elected representatives, it is your duty to consider the potential long-term impacts on our town's character, infrastructure, and quality of life. Therefore, I implore you to reject the proposed hospital project at Hayden and the 101 freeway.

Thank you for your time and consideration. I trust that our voices will be heard and seriously considered in your deliberations.

Sincerely,

Jim Stockwell
7559 E Tailspin Ln
Scottsdale, AZ 85255
jimstockwellatwork@yahoo.com
602-570-9926

To: City Council[CityCouncil@scottsdaleaz.gov]
From: margaret infantino
Sent: Thur 6/8/2023 6:55:49 PM
Subject: Proposed Banner Health Hospital at Hayden and the 101
Received: Thur 6/8/2023 6:56:13 PM

⚠ External Email: Please use caution if opening links or attachments!

We do not need another hospital in this area please DO NOT approve this!! It will only bring more congestion to our community.

To: City Council[CityCouncil@scottsdaleaz.gov]
From: james t. fritsch
Sent: Thur 6/1/2023 6:56:03 PM
Subject: Proposed Banner Health hospital near Hayden and Hwy. 101
Received: Thur 6/1/2023 6:56:17 PM

As a homeowner and resident of the Stonebrook II community I strongly oppose the consideration of a Banner Health hospital in the southwest quadrant of Hayden and Hwy.101---directly near the northern boundary of our neighborhood.

It seems self-evident that there is absolutely no need for an additional hospital. Thompson Peak hospital, Shea hospital, and Deer Valley hospital are all within a ten-minute drive our home.

In this day and age of professional medical staffing shortages, an additional hospital will aggravate that problem at our existing hospitals.

We have a looming problem with water supplies. Arizona's draw from the Colorado River has already been mandated that will reduce our use by 20%. It has estimated that the hospital under consideration will use 160,000 gallons per day.

The placement of the hospital under consideration adjacent the new fire station will promote a danger to traffic and pedestrians. The likelihood of lengthened emergency response time in so already congested area must be taken into consideration.

I request that you do not support or endorse the planning or building of this hospital project.

Sincerely,
James Fritsch
8171 East Maria Drive
Scottsdale 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Betcher, H. Scott
Sent: Thur 6/1/2023 4:43:33 PM
Subject: Proposed Banner Health Hospital
Received: Thur 6/1/2023 4:43:48 PM

All,

I am a concerned resident with the irresponsible development of North Scottsdale. First Optima seems to have carte blanch to build unnecessary high rise residential housing. The beauty of North Scottsdale is being destroyed. We do not need another hospital in the area. Particularly with current level of staffing shortages. We need to preserve the quality of healthcare that already exists.

Therefore, I encourage you to vote NO for the proposed Banner Health hospital at Hayden and 101.

Thank you

Scott Betcher
Sr Region Manager
Automotive Refinish
PPG

19699 Progress Drive
Strongsville, OH 44149
M: 724-719-8498
E: sbetcher@ppg.com
Web: www.ppgrefinish.com

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Rob Dorsey
Sent: Tue 7/18/2023 8:43:03 PM
Subject: Banner Health Hospital
Received: Tue 7/18/2023 8:43:27 PM

Mayor and City Council,
I don't think North Scottsdale needs another hospital at Hayden and the 101. I live off Thompson Peak and we have two great hospitals available to us. I know the City has the preserve but destroying more desert seems like the wrong thing to do. There is nothing like it in the rest of the world and we should be its caretakers. Thank you.
Robert Dorsey
Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Mike Baker
Sent: Tue 7/18/2023 10:28:58 PM
Subject: Banner Health Hospital at Hayden and the 101
Received: Tue 7/18/2023 10:29:09 PM

Member of the City Council:

From my research, there is no need for another hospital at the intersection of Hayden and the 101. It is simply unnecessary. It will create excess traffic in an area that is quickly becoming over built. The potential of putting quality healthcare at risk is real, as is the creation of traffic that is not needed at all! Please do not approve this Banner Health proposal.

Thank you,

Michael Baker

To: City Council[CityCouncil@scottsdaleaz.gov]
Cc: Info@CareScottsdale.com[Info@CareScottsdale.com]
From: M CALAWAY
Sent: Tue 7/25/2023 6:59:32 PM
Subject: Banner Health Hospital Plans
Received: Tue 7/25/2023 6:59:44 PM

I am hoping everyone will please take a moment to reflect on the wonderful city Scottsdale is now, in spite of all the large apartment complexes being built around town and other huge buildings going on..

The new Banner Health Hospital proposed at Hayden and the 101 will 'saturate' the health care market that already exists in Scottsdale. With 3 wonderful Honor Health Hospitals and the Mayo Hospital maintaining Scottsdale's stellar care, there is not need other than Banners' greed.

It will also dilute the medical work force already stretched thin everywhere is this city/state/country.

Just say NO!!

Thanks and Regards,

Mary Calaway
480-946-1484

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Rocky Saunders
Sent: Tue 7/25/2023 12:43:56 AM
Subject: Banner Health hospital Proposal
Received: Tue 7/25/2023 12:44:36 AM

To Scottsdale City Council:

As residents of Scottsdale, My wife and I oppose the proposed Banner Hospital proposal.

This new facility would be be a burden on key resources in Scottsdale.

We oppose this new hospital.

Rocky Saunders
Virginia Saunders
9423 East Cavalry Drive
Scottsdale, AZ. 85262

To: City Council[CityCouncil@scottsdaleaz.gov]
From: connie roslerfamily.com
Sent: Sun 7/16/2023 10:49:36 PM
Subject: Banner Health Hospital
Received: Sun 7/16/2023 10:49:52 PM

Hello, I just wanted to let you know that I am opposed to the building of another hospital here in Scottsdale. I believe we have sufficient health care hospitals here in our town. We have used both Thompson Peak and Scottsdale on Shea as well as Osborne. We do not need another hospital. We live just south of Pinnacle Peak and near Hayden. We do not want more traffic coming our way. We do use Hayden to get to the 101. I can't imagine the traffic that adding the Banner Hospital to that location would add! Anything you can do to prevent the building of the Banner Hospital in that proposed location would be greatly appreciated!!!!
Connie Rosler

Cc: Kristen Bagley[kbagley@honorhealth.com]
To: City Council[CityCouncil@scottsdaleaz.gov]
From: Bonnie Cornille
Sent: Tue 7/25/2023 11:51:18 AM
Subject: Banner Health Proposal for hospital at 101 and Hayden
Received: Tue 7/25/2023 11:51:43 AM

I totally oppose the construction of a Banner Hospital in Scottsdale at 101 and Hayden. Being part of Honor Health Volunteer services for several years and being one of the founding 200 person staff at Mayo Clinic Arizona since 1987 and current Emeriti of Mayo, I have worked with and in Healthcare for 40 years in AZ.

The current health and hospital facilities in Scottsdale have adequately provided healthcare for our residents for 40 years and both are master planned to do so for the next 30 years and beyond even with population increases that are projected. In addition, the ongoing expansion of both of our current facilities has provided us with a Birds Eye view of how extremely difficult it is to obtain qualified staff to safely run our medical system at this time. Adding another hospital system to Scottsdale could have a totally devastating effect on safe quality care for all of the existing facilities.

I understand the desire to grow and build a better Scottsdale and to desire an increase in our population, but adding another hospital system to the mix will in the long run have a totally negative effect on the quality of the medical care that we will provide. Seek and study and explore the medical experts' knowledge and the negative medical logistics that this will create.

Bonnie Cornille
Emeritus Associate Administrator
Mayo Arizona
Sent from my iPad

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Tim
Sent: Sun 7/16/2023 4:41:12 PM
Subject: Banner Health Proposed Hospital 101 and Hayden Rd
Received: Sun 7/16/2023 4:41:26 PM

This proposal for another hospital a significant negative to the homeowners and hime values in this immediate area. 3 major hospitals already in this immediate area. Mayo,Honorhealth anf Shea Med Center more than meet the need. This proposal exacerbates the traffic congestion in this are with all the recent commercial const and condo/apartment const. Current traffic exceeds the capacity of our current toads between Scottsdale Rd and Hayden north and south of the 101.
Please re-evaluate and vote NO!
Timothy Anderson
7735 E Monica Dr
Scottsdale Az 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Roger Cobb
Sent: Thur 7/13/2023 11:06:09 PM
Subject: Banner Hospital Proposal
Received: Thur 7/13/2023 11:06:31 PM

Please DO NOT approve the Banner Hospital proposal to build a hospital on the southwest corner of Hayden and the 101.

My wife and I live on Princess Drive near Hayden and we do NOT need another hospital in this area since we have HonorHealth Thompson Peak Medical center, Shea Medical center and Mayo Clinic in our community.

This Banner proposal would cause more unwanted traffic to Hayden road. more unwanted traffic for the Waste Management Open and possible problems with Scottsdale Airport landings.

I walk every morning down to Princess drive to Hayden RD and the traffic is terrible and dangerous.

Roger and Linda Cobb
7700 East Princess Drive, unit 2
Scottsdale 85255

To: Bloemberg, Greg[GBLO@Scottsdaleaz.gov]
Cc: itycouncil@ScottsdaleAz.gov[itycouncil@ScottsdaleAz.gov]
From: Angie Banks
Sent: Fri 7/28/2023 9:02:31 PM
Subject: Banner Hospital
Received: Fri 7/28/2023 9:02:42 PM

Hello,

I'm a physicians assistant living and working in Scottsdale (Via Linda & Mtn. View). I fully support a new hospital coming to the city. I've been here for 12 years and seen first hand the growing demand for healthcare services. In my opinion the perception that there is a doctor, nurse, or worker shortage is mostly due not being able to keep up with growing demand. We desperately need more healthcare assets, like a new hospital, to keep up with our growing and aging population. I hope that you will support the project. I speak for a lot of friends and coworkers in the industry who feel the same way.

Thank you,
Angie Banks

10255 E Via Linda, #216
Scottsdale, AZ 85258

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Deborah Mayer
Sent: Tue 7/25/2023 3:30:06 AM
Subject: Banner in Scottsdale
Received: Tue 7/25/2023 3:30:51 AM

Dear Scottsdale City Council Members,

Please reject Banner Health's delivery of a hospital in Scottsdale. HonorHealth has this covered. Studies have shown there is no need for Banner's presence at this time.

Thank you!

Sincerely,
Deborah G. Mayer
5129 N. 83rd St
Scottsdale, AZ 85250

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Sio, Terence T., M.D., M.S.
Sent: Tue 7/18/2023 11:23:54 PM
Subject: Banner Scottsdale - I oppose strongly
Received: Tue 7/18/2023 11:24:08 PM

Dear City Council,

I'm a resident in Grayhawk, just slightly north of the proposed hospital site.

I thought about this for a while, and I'm still opposing this. Besides the obvious issue that we will be so crowded with medical facilities in the area (including Mayo Phoenix, where I work), it's just simply not a good use of that land in rezoning. The immediate environment (from Hilton, all the new developments, down to Waste Management/Phoenix Open/Princess Scottsdale areas), will be so heavily affected. I drive thru the 101 fwy and Hayden Rd. to work every day, and I'm already very dreaded about the inconvenience, noise, pollution, and traffic that it may accompany, should this become a reality.

I can't imagine this proposal will garner too much traction! Let's make sure to kill this proposal, if there's a major, overwhelming majority which I suspect will be the case

Sincerely,
Terence Sio

Terence Tai-Weng Sio, MD, MS (he/him)
Department of Radiation Oncology
Mayo Clinic Arizona
E-mail: Sio.Terence@mayo.edu
Clinical Appointments: 480-342-3971
Office (Olivia M. Spradlin): 480-342-1262
Fax: 480-342-3972 After Hours: 480-301-8000

Mayo Clinic
www.mayoclinic.org

From: Rule, William G., M.D. <Rule.William@mayo.edu>
Sent: Tuesday, July 18, 2023 3:37 PM
To: DL ARZ RadOnc Physicians <DLARZRADONCPHYSICIANS@exchange.mayo.edu>
Subject: Banner Update

I'm sure that most of you are aware of this...less than 4 miles from us down the 101. "According to a Banner press release, the $400 million project will include an acute care hospital, adjacent medical office building and a cancer center."

https://www.scottsdale.org/city_news/banner-requests-rezoning-for-new-medical-campus/article_12577214-1cea-11ee-95b0-ffb33bd8d5db.html

William G. Rule, M.D.
Assistant Professor of Radiation Oncology
Mayo Clinic
480-342-4707
rule.william@mayo.edu
Pronouns: He/Him/His

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Cassandra Cook
Sent: Mon 7/24/2023 8:44:43 PM
Subject: Do not support the Banner proposal.
Received: Mon 7/24/2023 8:46:14 PM

I live near Hayden & the 101.

*Scottsdale has already asked Residents to cut water and I read that a large Banner Hospital water use would be 165,000 gallons A DAY.

*Not counting the added Traffic and a large Tall building near our Quiet neighborhoods.

* plus, we already have two of the highest quality hospitals within 2 miles of this site.

*also the Scottsdale Firefighters Association said it would for a variety of reasons put our quality Healthcare at risk. I think they would know a thing or two.

*** Please, put the Scottsdale local residents as your main consideration. We voted for you and you are here to serve in our best interest to keep Scottsdale special, not to serve special corporate interests

Thank you.
Cassandra Cook
480-329-5211

To: City Council[CityCouncil@scottsdaleaz.gov]
From: KAREN DOERING
Sent: Mon 7/24/2023 4:32:21 PM
Subject: Hayden and 101 Proposed Banner Health Hospital
Received: Mon 7/24/2023 4:32:30 PM

As a fulltime resident of 85255 I am against the proposed Banner Health Hospital to be located at Hayden Road and 101. Please respect the wishes of the community you represent.

Karen Doering

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Lois Zapernick
Sent: Sat 7/15/2023 10:19:08 PM
Subject: Hospital Building Option VOTE NO
Received: Sat 7/15/2023 10:19:32 PM

Our area has a wonderful hospital at Thompson Peak and Scottsdale Road area.

I AM VOTING AGAINST BUILDING A BANNER HEALTH HOSPITAL AT Hayden and 101. That area is so congested already with the Hayden and 101 buildings.

Lois Zapernick PO Box 25998 Scottsdale AZ 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Charlotte Stone
Sent: Wed 7/19/2023 7:12:33 PM
Subject: Hospital Hayden & 101
Received: Wed 7/19/2023 7:12:51 PM

⚠ External Email: Please use caution if opening links or attachments!

I have received information re another Hospital being built on Hayden & 101 by Banner Health.

Please vote "NO". We have sufficient hospitals in the area. This would only deplete our resources of water, doctors and health care professionals in an unnecessary way.

I am opposed to this proposal and a resident in the area. Cavasson development is already impacting this critical location.

Again, please vote "NO".

Charlotte Stone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Janice Wooten
Sent: Fri 7/14/2023 4:54:45 PM
Subject: Mayor and City Council
Received: Fri 7/14/2023 4:55:51 PM

Please vote NO to another hospital in Scottsdale! We already have 2 wonderful hospitals!!!!! We don't need another!!

Jan Wooten/ Grayhawk
7956 E Feathersong Ln
Scottsdale AZ 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: ernest varela
Sent: Wed 7/19/2023 9:48:01 PM
Subject: New Hospital.
Received: Wed 7/19/2023 9:48:13 PM

We live in North Scottsdale and greatly oppose having Banner Health build a hospital at Hayden and the 101 Freeway. There are two very excellent hospitals already located near our area. We are registered voters asking for your help in keeping an unnecessary hospital from being built in our quiet neighborhood. This hospital will bring unwanted congestion in this beautiful area. Please help in keeping an unwanted hospital out of our neighborhood.

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Cheryl
Sent: Sat 7/29/2023 7:37:14 PM
Subject: New Banner Health Hospital
Received: Sat 7/29/2023 7:37:28 PM

Dear Mayor and City Council,

It has come to my attention that Banner Health wants to build a new hospital at Hayden Road and the 101 Freeway. We have two quality Honor Health Hospitals in the area at Shea and 92nd Street,
as well as Scottsdale and Thompson Peak within two miles of the proposed site. There is also Mayo Hospital at 56th Street and Mayo Blvd about 4 miles away. This gives plenty of options for hospital health
care to the North Scottsdale area. Also with the current workforce shortage of medical professionals I don't know where the medical staff would come from. This is overkill and adds to traffic congestion, unnecessary water requirements and other issues in this already busy area.

Please say no to this unnecessary hospital in our area.

Thank you for your consideration,
Cheryl Boone-Passarelli
10123 E. Whispering Wind Drive
Scottsdale, AZ 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: MICHAEL HUSAR
Sent: Fri 7/14/2023 4:21:54 AM
Subject: New Hospital
Received: Fri 7/14/2023 4:22:06 AM

Mayor and Council,

I wish to let you know that I am opposed to having a new hospital built on Hayden and the 101. I am opposed for the following reasons:

(1) This hospital is absolutely unnecessary. We already have two hospitals within 2 miles of this location.
(2) It will not improve the healthcare in the area. In fact, with the shortage of doctors and nurses we have both in Scottsdale and statewide, we could see an increase in wait times and costs for Scottsdale residents.
(3) Both the HonorHealth and Shea Medical Center have existing bed capacity and expansion plans to provide more should the need arise.
(4) It will create additional traffic in that area that the community doesn't want.
(5) A hospital the size Banner is proposing uses about 165,000 gallons of water per day, a commodity that is in short supply.

I therefore ask that you not support the Banner Health proposal.

Sincerely,

Michael Husar
12151 E. Sand Hills Rd
810-348-2712 (cell)

To: City Council[CityCouncil@scottsdaleaz.gov]
From: janekgriffin@gmail.com
Sent: Fri 7/14/2023 9:22:08 PM
Subject: New hospital
Received: Fri 7/14/2023 9:22:30 PM

My husband and I are opposed to the new proposed hospital at 101 and Hayden. You are turning North Scottsdale into N.Y. City with all the proposed high rises. This proposed hospital will
Only stretch limited resources further.

Jane and Tom Griffin
7348 E. Conquistadores Dr.
Scottsdale,Az 85255

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Deanne Johnson
Sent: Fri 7/14/2023 1:40:30 PM
Subject: NO Banner Hospital!
Received: Fri 7/14/2023 1:40:41 PM

Dear Mayor,

Our family is adamantly opposed to the Banner Hospital proposed in North Scottsdale. We don't need or want it. Just big money trying to take over our beautiful area! Stop this now!

The Johnson Family

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Gary Beaty
Sent: Tue 7/25/2023 4:20:13 PM
Subject: No contributing to the nursing and Doctor shortage
Received: Tue 7/25/2023 4:20:29 PM

I'm concerned with the effort regarding the hospital at Hayden and the 101. With the Mayo Hospital, Thompson Peak, and Shea / 90th St. This area and State has a shortage of qualified Healthcare to fill the presently available locations to presently receive Healthcare.

I am retired and volunteer at Valley Healthcare campuses. We have Nursing students and interns that also integrate with us in taking care of our community and finding innovative ways to do so.

I've lived here in the Valley for 52 years and still enjoy it, so I hope we can make the best efforts, not hamper the efforts of the very people who are already involved in these services.

Gary Beaty

5640 E Bell Rd
Unit 1066
Scottsdale, AZ 85254

To: City Council[CityCouncil@scottsdaleaz.gov]
From: William Powell
Sent: Thur 7/20/2023 6:23:15 PM
Subject: No More Hospitals!
Received: Thur 7/20/2023 6:23:41 PM

No more hospitals in N. Scottsdale. We have plenty to choose from already....Mayo, Honor Health Shea, Honor Health Thompson Peak and several Urgent Care clinics. Enough!

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Maryann McGee
Sent: Mon 7/17/2023 8:06:37 PM
Subject: NO on Banner Health Hospital at Hayden and 101
Received: Mon 7/17/2023 8:07:29 PM

Hello,

I am writing to ask that the proposed Banner Health Hospital at Hayden and 101 does NOT go through. As a resident of E Princess Dr., I do not want this hospital built there. E. Princess Dr. traffic has increased drastically in the past few years. Much of the traffic in this used-to-be peaceful neighborhood is large trucks, dumptrucks, trucks with long trailers hauling heavy tractors and machinery. E. Princess Dr. makes a great short cut for these loud vehicles so that the drivers can avoid the busy intersections at Hayden @ Frank Lloyd Wright and at Scottsdale Rd. and Frank Lloyd Wright. The vehicles serve the developments currently being built just north of 101. Car traffic has also increased and will continue to if the Banner hospital is built.

I am heartbroken at the new developments north of 101 recently. Beautiful desert land is gone. Animals that called that desert their home have been eliminated. Not to mention the effects of more development and traffic on our global warming crisis.

Please ensure that the Banner project does not happen!

Thank you,
Maryann McGee

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Ramona Krutzik
Sent: Wed 8/9/2023 1:18:27 AM
Subject: NO on new hospital
Received: Wed 8/9/2023 1:18:55 AM

Dear Mayor and city council,

We do. It need another hospital in Scottsdale.

At a time when water, traffic and noise are the biggest issues facing our community, we need responsible development.
The North Scottsdale area already has the highest quality hospitals with plenty of proven bed capacity and expertise to meet our healthcare needs now and decades into the future.
An additional hospital in the area would exacerbate workforce staffing shortages. An unnecessary new hospital will not create more physicians and nurses but rather further strain the workforce

I ask you to vote NO on adding another hospital at the corner of Hayden and the 101.
Sincerely,
Ramona Krutzik, MD

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Howard Sckolnik
Sent: Fri 7/14/2023 10:19:41 PM
Received: Fri 7/14/2023 10:20:03 PM

Dear Council members,

As a resident of Scottsdale living at Grayhawk I recently became aware of the proposed construction of a new Banner facility in our backyard.

This is a ridiculous unnecessary facility that will only contribute to an increased strain on our resources. There is ample hospital capacity spread between the Thompson Peak and Shea Honor Health facilities and is a waste of everyone's money.

Please oppose this unneeded expansion by Banner.

Howard Sckolnik CPA
8203 E. Sierra Pinta Drive,
Scottsdale, AZ 85255
(602)-524-0974
Hsckolnik@gmail.com

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Sharon Hanley
Sent: Thur 7/20/2023 12:11:42 AM
Subject: No to Banner Health at Hayden & 101
Received: Thur 7/20/2023 12:11:56 AM

No to Banner Health at Hayden & 101. Will bring too much traffic
I live in Greyhawk
Sharon Hanley
8238 E Hoverland Rd
Scottsdale, AZ 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Billymalcom
Sent: Sat 7/15/2023 9:57:54 PM
Subject: NO to Banner Health building a new hospital near Hayden and the 101
Received: Sat 7/15/2023 9:58:18 PM

My family opposes Banner Health building another hospital on the southwest corner of Hayden and the 101. It's unnecessary for this area. We currently live in Grayhawk!

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: MARYAN HOLBROOK
Sent: Thur 7/20/2023 12:08:42 AM
Subject: No to Banner Health Hayden & 101
Received: Thur 7/20/2023 12:09:00 AM

No to Banner Health at Hayden & 101
Too much traffic

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Michelle Bell
Sent: Thur 7/20/2023 8:45:59 PM
Subject: NO to Banner Hospital on Hayden
Received: Thur 7/20/2023 8:46:11 PM

⚠ External Email: Please use caution if opening links or attachments!

As a resident of North Scottsdale, I am strongly against building a new Banner Hospital at 101 and Hayden. I have used both Honor Health Hospitals on Thompson Peak and Shea and Mayo within the last three months and have found all facilities meet the needs of our community. The ThompsonPeak location is rarely at capacity and this hospital just doesn't seem necessary.
I am an employee of Phoenix Children's and my husband just recently left Valleywise Health. We both know the workforce issues facing our hospitals and that would only add to it.
We have concerns with the overdevelopment of that corridor and the impact it has on water and traffic. We are respectively asking for the council and mayor to vote no about building another hospital in the area.

Kind Regards,
Michelle

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Carmen Rayis
Sent: Thur 7/20/2023 9:24:04 PM
Subject: No to Banner Hospital
Received: Thur 7/20/2023 9:24:26 PM

Hi Scottsdale Mayor Office,
Please do allow Banner Health to move in at Hayden and 101. This will create unliveable conditions to our area.
It is extremely congested and we already have a hospital a mile away.

I hope you consider our voices as Scottsdale residents and oppose this.

Thank you

Carmen Rayis

To: City Council[CityCouncil@scottsdaleaz.gov]
From: James Rice
Sent: Sat 7/15/2023 3:39:40 AM
Subject: NO!! Banner Health Hospital 101 and Hayden
Received: Sat 7/15/2023 3:40:27 AM

Hello Mr. Mayor and City Council of Scottsdale: I'm urging to you all to vote NO regarding the Banner Health Hospital proposal near the 101 and Hayden, it is not needed and will not only dilute the quality of our healthcare but also increase unwanted traffic up here as well as impact and deplete our valuable water supply to a tune of 165,000 gallons/day.
I'll be paying close attention to your votes.

Sincerely,
Dr. James Rice

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Mary Ortolano
Sent: Fri 7/14/2023 2:01:26 PM
Subject: NOT ANOTHER HOSPITAL
Received: Fri 7/14/2023 2:01:58 PM

Dear Council Members:
Please don't allow a hospital to be built near the 101 and Hayden. We don't need the traffic, and unnecessary use of water. We already have a hospital off of Scottsdale and Thompson Peak.

Sincerely,
Dr. and Mrs. Frank Ortolano
7676 E Manana Drive
Scottsdale, AZ 85255

Sent from Mail for Windows

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Debbie Lasker
Sent: Mon 7/24/2023 10:47:38 PM
Subject: Oppose
Received: Mon 7/24/2023 10:47:48 PM

⚠ External Email: Please use caution if opening links or attachments!

Good afternoon,

I am emailing to oppose and reject Banner's rezoning application.
Due to workforce shortages across the board and the impact that an over saturation of inpatient hospital beds can have on an area. I feel strongly about opposing this application.

I live in Scottsdale off Dynamic
20719 142N Place

We oppose!!

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Carol Bennett
Sent: Fri 7/14/2023 5:43:24 PM
Subject: Opposition of proposed new banner health hospital near Hayden rd
Received: Fri 7/14/2023 5:43:58 PM

I oppose this new hospital! It is unnecessary- Mayo Clinic is right firm the road and Shea & HonorHealth are nearby too!

Just vote NO!!!!

Thank you?
Carol Bennett
13271 E Juan Tabo Rd
Scottsdale, AZ 85255

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Stacey
Sent: Tue 7/18/2023 11:15:02 PM
Subject: Please STOP Building in Scottsdale!! □□□□□□□□□□□□□□□□□□□□*
Received: Tue 7/18/2023 11:15:30 PM

⚠ External Email: Please use caution if opening links or attachments!

Dear Mayor,

This has been a horrible year for Scottsdale. The building just never quits! I have lived in Scottsdale for 50 years. I currently reside in Grayhawk and I have been in this atea for 31 years. This was our beautiful part of Scottsdale. It's getting absolutely unbearable up here now - the traffic is horrific. The air pollution is bad. The whole situation is bad. The beauty is gone! We simply cannot how house more people up here without issues. We Absolutely do not need another hospital!!!!! Please do not build Banner Hospital in our beautiful city!!! we have HonorHealth we do not need Banner. Again, the traffic is horrific up here. The honking that people get just to get out of the supermarket is uncalled for. People are getting madder and madder. This is not why we came to Scottsdale. We came to Scottsdale to experience its beauty and to have a little piece of serenity. All of the apartments and growth have completely destroyed it. Again, please stop the proposal for banner health to build at Thompson in Peak and the 101 freeway.
STOP THE DESTRUCTION
Thank you!
Stacey Ambrose
Resident of Scottsdale 50 years

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: mountainluv
Sent: Tue 7/25/2023 11:10:08 PM
Subject: Proposal regarding plan for building Banner 300 bed hospital.
Received: Tue 7/25/2023 11:10:28 PM

I think the idea of another hospital being built in Scottsdale is outrages. What is needed is a lot of work on our streets, including more monitoring on the race cars driving down major streets.

Annette Ruotolo
16420 N Thompson Peak Pkwy
Scottsdale, AZ 85260

To: City Council[CityCouncil@scottsdaleaz.gov]
From: joseph infantino
Sent: Tue 7/25/2023 2:57:41 PM
Subject: Proposed Banner Health Hospital
Received: Tue 7/25/2023 2:58:03 PM

We DON'T need another hospital. We already have 2 Honor Health and Mayo Hospital in the immediate area why would we need a fourth. It would only cause traffic congestion and very unnecessary.

To: City Council[CityCouncil@scottsdaleaz.gov]
From: JANE HEIST
Sent: Wed 7/19/2023 9:17:54 PM
Subject: Proposed Banner Hospital at Hayden and the 101
Received: Wed 7/19/2023 9:18:08 PM

Dear Mayor and City Council:

Please do **not** allow Banner to put a new hospital at Hayden and the 101. With HonorHealth Thompson Peak and Mayo nearby, there is no need for another facility in the area.

Thank you for your consideration,

L. Jane Heist
Scottsdale Taxpayer and Resident

Nicholas and Charlotte Skaff
20157 N 85th place
Scottsdale AZ 85255

July 27 2023

VIA EMAIL (citycouncil@scottsdaleaz.gov)

Mayor and City Council
Scottsdale Arizona

RE: Proposed Banner Hospital (Hayden/101)

Dear Mayor and City Council

We are writing in response to a notification that we have received regarding the proposed **unnecessary** hospital to be located on the southwest corner of Hayden Rd and the 101. Our community already has a hospital just minutes away at Thompson Peak and Scottsdale road. In addition, there is Mayo Hospital two exits up the freeway.

We have been residents of North Scottsdale (more precisely Grayhawk community) for over 16 years. We are full - time residents and moved to the community to avoid the congested Kierland area. Growth is a natural expectation, however, with the addition to the Scottsdale airport, the NUMEROUS high rise apartments, and Cavasson Resort Project (101/Hayden), etc. it seems growth is not being carefully planned.

The proposed hospital seems to counter several current concerns already pressing our community resources.

- **Traffic congestion/**Clean air – council appears to support climate initiatives as well as monitoring congestion and somehow doing both is keeping Scottsdale as one of "Best Cities to Live " . Clearly, none of the Council lives in our area.
  If you live near Hayden Road/101, you would know it is TOTALLY unusable for two weeks of the year during the Waste Mgmt OPEN. The Hayden off ramp of the freeway is literally a parking lot. Massive parking lots and buses appear everywhere. Hayden Road is blocked off and special passes are issued to thru traffic at the TPC. In addition, this area is congested for Barrett Jackson and West World Events.
  As residents, we have tried to work around this congestion, however, it is doubtful patients in need of a hospital will arrive at this corner in a timely manner.

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Nick Skaff
Sent: Fri 7/28/2023 3:42:37 AM
Subject: Proposed Banner Hospital Hayden/101
Received: Fri 7/28/2023 3:44:30 AM
City Council.pages

Honorable Mayor / City Counsel Member

Please find our appeal in the attached letter for your review and consideration

Nick and Charlotte Skaff

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Jody Kent
Sent: Thur 7/13/2023 8:07:16 PM
Subject: Proposed Hospital 101 & Hayden
Received: Thur 7/13/2023 8:07:44 PM

⚠ External Email: Please use caution if opening links or attachments!

Hello,
I live in the Princess Enclave community near the 101 and Hayden Road. Our traffic (and car break ins, etc.) have increased dramatically since the large apartment complexes have been built across the street. Please do NOT allow a new huge hospital with traffic and loud ambulances to be built near our homes. Thank you.

Jody Kent
17677 N 77th Way
Scottsdale 85255
602-460-1770

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
Cc: Info@CareScottsdale.com[Info@CareScottsdale.com]
From: Toni
Sent: Tue 7/18/2023 6:58:40 PM
Subject: Proposed construction of Banner Health near Hayden & Rt. 101
Received: Tue 7/18/2023 6:58:52 PM

As one of the residents near the proposed construction of a new Banner Health Hospital, I wish to expressed my dismay that *another* hospital is being considered in North Scottsdale. The traffic at that intersection is becoming horrendous!!!

PLEASE do not bring another hospital to our quiet community. I join with the Scottsdale Firefighters Association in opposing this effort.

Respectfully,

Toni Minarich
8951 E. Rusty Spur Place
Scottsdale, AZ

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Paul Lynch
Sent: Thur 8/3/2023 5:44:01 PM
Subject: Proposed Hospital N Hayden in Scottsdale
Received: Thur 8/3/2023 5:44:23 PM

Hello

We live in (and own) property in the Princess Enclave community near the 101 and N Hayden Rd. Our traffic has significantly increased as well as car break ins etc. over the past couple of years due to the dramatic increase in apartment buildings in our area. We DO NOT support the construction of a new hospital complex near us as this will make the current congestion and noise levels even worse. I trust you will not let this project move forward.

Thanks

Paul Lynch
17725 N 77th way
Scottsdale 85255
480 532 8385

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Toby Taylor
Sent: Thur 7/20/2023 1:32:53 AM
Subject: Fwd: Banner Health Hospital
Received: Thur 7/20/2023 1:33:22 AM

from: tobyarizona101@gmail.com

Subject: Banner Health Hospital

Dear Mayor and City Council Members,
We do NOT need another hospital. I am referring to the proposed one for the SW corner of Hayden and the 101.
1) We have several Honor Health hospitals in the area which amply supply the care needed.

2) The traffic and congestion this additional hospital would create is something our community does not want.

3)Think of the water usage! A hospital that size uses about 165,00 gallons EVERY DAY!!

4) Medical personnel and resources will be spread way too thin and with that quality healthcare is in jeopardy.

PLEASE, I beg you, do not support this unnecessary project and preserve the quality healthcare we currently have.

Thank you,

Toby T Taylor
18650 N Thompson Peak Pkwy #1008, Scottsdale, AZ 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Rayann
Sent: Fri 7/14/2023 10:26:15 PM
Subject: Fwd: Banner Health Hospital
Received: Fri 7/14/2023 10:26:40 PM

I live in North Scottsdale. I'm writing to ask you to say no to the unnecessary hospital that Banner Health is proposing in North Scottsdale.
While I know that Banner Health Medical and their hospitals operate way above average to serve the public, I believe that building another hospital in the vicinity of the 101 and Hayden will only create more traffic in a residential neighborhood and will bring unnecessary medical care and beds into an area that is near to two Honor Health Hospitals that are already established. It will put a strain on the workforce and increase waiting time.

Please review this location and say no.
I Thank you in advance for your consideration.

Sincerely,
RayAnn Zerilli

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Bern & Pat Jones
Sent: Sun 7/23/2023 8:18:45 PM
Subject: Fwd: Ill advised New Construction
Received: Sun 7/23/2023 8:18:58 PM

Begin forwarded message:

From: Bern & Pat Jones <bern.pat.jones@gmail.com>
Subject: Ill advised New Construction
Date: July 22, 2023 at 10:03:53 AM MST
To: "CityCounsel@scottsdaleaz.gov" <CityCounsel@ScottsdaleAz.gov>

Dear Council persons,

Recent reports reveal that Scottsdale Council has approved the construction of a new hospital Near Hayden and the 101.

There is already a hospital within 700 yards of the intended site for the new structure(s) and Mayo Clinic has a huge facility rivaling the worlds best only 2 miles to the west .

Where are the brains in the Council? Maybe this would have merit in Cave Creek but to put it where proposed is an insult to residents and contrary to everything we have been told about future Scottsdale development. Gradually our height and density standards are being selectively modified to the disadvantage of Scottsdale homeowners when the prevailing infrastructure is clearly inadequate.

Mr. Ortega, you are showing your true colors- you are weak in leadership and have become the snake in the grass that many feared pre-election. Also you personally lied to me in phone call that we had at election time regarding your stand for the protection of North Scottsdale.

Absent the guts to do proper research ,use your heads and see the proposed construction for the Planning and logistical disaster that it will become. Cancel it now and do not build anything new in excess of 3 stories as we were promised.

Do your jobs.
Bernard A Jones

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Carl Raine
Sent: Wed 7/19/2023 9:12:41 PM
Subject: Proposed New Hospital at Hayden and 101
Received: Wed 7/19/2023 9:13:17 PM

⚠ External Email: Please use caution if opening links or attachments!

RE: Proposed new hospital by Banner Health at Hayden & 101

Council Members:

Here is another example of an issue before the council that deserves broad and open exposure to the affected community, including the possibility of placing the issue on the ballot.

We already have two of the best AZ hospitals providing fully adequate hospital facilities and current capacity in the area affected. There are indicated expansion plans already on the books at these institutions to maintain their capacity and ability to serve in the future, which we would urge the council to review and take into full consideration.

There is an issue of water usage by a new hospital that could tax our already strained AZ water availability. We would urge the Council to give this due and serious consideration, as well as the inevitable traffic issues at the indicated site proximate to the 101 freeway.

The ultimate question is whether another hospital squeezed into the same area will actually put quality health care at risk, vs make a meaningful improvement on an already good situation. What does the medical community – the doctors and nurses necessary for any hospital to serve the community – say about the need and/or possible negative impact of another facility in this area?

Based upon our own view of the questions posed above, we urge the Council to reject approval, and ignore the overtures (or worse) from lobbying interests who will inevitably appear, bankrolled sources more interested in construction and related profits than the actual welfare of the residents.

It is time for the Council to reject the moneyed interests and act with visible clarity on the real needs of our unique residential community.

Yours truly,
Carl Raine
15252 N 100th St, Unit 1166
Scottsdale, AZ 85260

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Shirley Wagner
Sent: Mon 7/24/2023 9:37:17 PM
Subject: PROPOSED SCOTTSDALE BANNER HOSPITAL
Received: Mon 7/24/2023 9:38:00 PM

I am opposed to the construction of a Banner Hospital at the southwest corner of Hayden Road and the 101 freeway. HonorHealth already provides excellent patient care at the Thompson Peak facility. Mayo Hospital is in the area also. The water usage of the proposed hospital would add additional burden to Scottsdale's already taxed water supply. The traffic on Hayden Road is already very heavy, the addition of hundreds of vehicles/day would be chaotic.

I realize that there is huge pressure placed on you to approve this project but I urge you to vote no to the proposal. Please do not cave in to the developer and state politicians' requests.

Thank you for your consideration of my appeal.

Shirley Wagner
slw63khs@gmail.com
480-861-5345

To: Raquelle[raquellepantano@cox.net]
From: Littlefield, Kathy
Sent: Sat 7/29/2023 8:59:45 PM
Subject: Re: An unnecessary hospital Scottsdale does - not - need
Received: Sat 7/29/2023 8:59:46 PM

Thank you for your email.

Councilwoman Kathy Littlefield

From: Raquelle <raquellepantano@cox.net>
Sent: Sunday, July 23, 2023 6:11 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: An unnecessary hospital Scottsdale does - not - need

⚠External Email: Please use caution if opening links or attachments!

Hello,

I am writing to oppose the unnecessary hospital that Scottsdale doesn't need will create traffic the community doesn't want.
A typical hospital the size Banner is proposing uses about 165,000 gallons of water a day. Mayor Ortega is "always" preaching water conservation. This should be easy for the Mayor and the City Council to reject.
The Scottsdale Firefighter Association opposes this unnecessary hospital. They understand that when you spread medical personnel and resources too thin, it can put quality healthcare in jeapordy.
HonorHealth is Scottsdale's hometown healthcare provider and has been here for Scottsdale for decades ensuring residents get the quality healthcare they need and deserve.
Banner Health is owned by an out of State Conglomerate!
Protect our neighborhoods and preserve quality healthcare.

Regards,
Raquelle Pantano

Bcc: [redacted]
To: Sandy Bingenheimer[sandybing@icloud.com]
From: Graham, Barry
Sent: Mon 7/24/2023 3:26:55 PM
Subject: Re: Banner expansion
Received: Mon 7/24/2023 3:26:56 PM

Sandy, thank you for your email

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—scottsdaleaz.gov

From: Sandy Bingenheimer <sandybing@icloud.com>
Sent: Monday, July 24, 2023 7:40 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner expansion

⚠ External Email: Please use caution if opening links or attachments!

I'm a senior living at Maravilla and I could almost walk to Mayo Hospital and Thompson Peak - why would we need/want another hospital in this area - when I see all the apartments going up I am so concerned about water and I'm sure another hospital would be a huge drain on our water resources - please vote against this unnecessary project!
Thank You, Sandra BINGENHEIMER

Sent from my iPad

Bcc: [redacted]
To: Charles Johnston[cactuschuck439@gmail.com]
From: Graham, Barry
Sent: Sun 7/16/2023 4:06:27 PM
Subject: Re: Banner
Received: Sun 7/16/2023 4:06:28 PM

Charles and Sue, thank you for taking time to email us.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Charles Johnston <cactuschuck439@gmail.com>
Sent: Saturday, July 15, 2023 6:34 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner

⚠ External Email: Please use caution if opening links or attachments!

Dear Mayor And Council,
Hi We are totally opposed to the Banner request to build a hospital at Hayden and AZ 101. It is not needed because there is more than adequate hospital capacity in North Scottsdale. In fact, excess capacity probably exists as more procedures are done as outpatient procedures at Honor facilities and other surgery and specialty centers in the area.
In addition, we believe that Banner is seeking to control the local healthcare market. As evidence, Banner has established joint ventures that have acquired physical therapy practices, rehab facilities and medical practices.
Additionally, there currently is a shortage of healthcare practitioners in the area. The addition of an unneeded Banner hospital will increase the competition for accredited healthcare professionals. This will increase staffing costs. Also, adding one more location for first responders to have to service will put a significant burden on them.
This is a very bad idea. Please vote no on Banner's request!!
Thank you for your consideration.
Charles E Johnston
Sue H Johnston
10040 E Happy Valley Rd unit 365
Scottsdale, AZ 85255

Sent from my iPhone

To: Rayann[rayzaglow@cox.net]
From: Janik, Betty
Sent: Sat 7/15/2023 2:43:07 PM
Subject: Re: Banner Health Hospital
Received: Sat 7/15/2023 2:43:08 PM

Thanks for sharing your thoughts on this.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Rayann <rayzaglow@cox.net>
Sent: Friday, July 14, 2023 3:26 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Fwd: Banner Health Hospital

I live in North Scottsdale. I'm writing to ask you to say no to the unnecessary hospital that Banner Health is proposing in North Scottsdale.
While I know that Banner Health Medical and their hospitals operate way above average to serve the public, I believe that building another hospital in the vicinity of the 101 and Hayden will only create more traffic in a residential neighborhood and will bring unnecessary medical care and beds into an area that is near to two Honor Health Hospitals that are already established. It will put a strain on the workforce and increase waiting time.

Please review this location and say no.
I Thank you in advance for your consideration.

Sincerely,
RayAnn Zerilli

Bcc: [redacted]
To: mark56306@aol.com[mark56306@aol.com]
From: Graham, Barry
Sent: Sun 7/16/2023 4:04:11 PM
Subject: Re: Banner Health Hospital at Hayden & 101
Received: Sun 7/16/2023 4:04:11 PM

Mark, thank you for taking the time to email council

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: mark56306@aol.com <mark56306@aol.com>
Sent: Saturday, July 15, 2023 4:56 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health Hospital at Hayden & 101

As a resident of Grayhawk area of Scottsdale for 25 years I am very concerned that an additional hospital in this area is unnecessary and would just create more traffic and noise and expense.
I believe we are more than adequately served in northern Scottsdale with the 2 hospitals we already have.
Feel free to contact me with information or questions.
Sincerely,
Mark Reilly

Bcc: [redacted]
To: M CALAWAY[mtcala@msn.com]
From: Graham, Barry
Sent: Tue 7/25/2023 7:09:50 PM
Subject: Re: Banner Health Hospital Plans
Received: Tue 7/25/2023 7:09:51 PM

Mary, thank you for emailing us your concerns.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: M CALAWAY <mtcala@msn.com>
Sent: Tuesday, July 25, 2023 11:59 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Cc: Info@CareScottsdale.com <Info@CareScottsdale.com>
Subject: Banner Health Hospital Plans

I am hoping everyone will please take a moment to reflect on the wonderful city Scottsdale is now, in spite of all the large apartment complexes being built around town and other huge buildings going on..

The new Banner Health Hospital proposed at Hayden and the 101 will 'saturate' the health care market that already exists in Scottsdale. With 3 wonderful Honor Health Hospitals and the Mayo Hospital maintaining Scottsdale's stellar care, there is not need other than Banners' greed.

It will also dilute the medical work force already stretched thin everywhere is this city/state/country.

Just say NO!!

Thanks and Regards,

Mary Calaway
480-946-1484

To: Linda Morales[lindajm2_1998@yahoo.com]
From: Whitehead, Solange
Sent: Wed 8/2/2023 3:18:09 AM
Subject: Re: Banner Health Hospital Proposal Hayden and the 101
Received: Wed 8/2/2023 3:18:10 AM

Dear Linda,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.
I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Linda Morales <lindajm2_1998@yahoo.com>
Sent: Monday, July 24, 2023 6:49 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health Hospital Proposal Hayden and the 101

Hello,
As a resident living near the intersection of Thompson Peak and Hayden, I do not feel we should add any business which will worsen traffic than it is already. We already have several new businesses on Hayden near the 101.

During the Phoenix Open, traffic in the area is horrendous. Normally it takes me about 3 minutes to get to the 101 from my complex. During the Phoenix Open, the same route has at times has taken me 27 minutes. Adding more businesses will cause gridlock for those of us who live and work here year-round.

I don't think we need another hospital we have so many already. The Mayo Hospital complex is less than two miles from Honor Health Thompson Peak Hospital. Please consider the residents here when deciding this proposal.

Thank,
Linda Morales
19700 N 76th Street
Scottsdale, AZ 85255

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Marlowe Sorensen
Sent: Sat 7/22/2023 7:32:40 PM
Subject: RE: Banner Health Hospital
Received: Sat 7/22/2023 7:33:33 PM

⚠ External Email: Please use caution if opening links or attachments!

Attention to City Council Members:

Please DO NOT approve another hospital in the Scottsdale area!!

We have 2 of the BEST hospitals already....Mayo Hospital and Honor Health Hospital.

Consider the water usage....the traffic issue....Banner Hospital is NOT needed!

I am a 23 year resident of Scottsdale and I am watching this once, lovely, suburban area over run with new apartments, office buildings, stores, restaurant, traffic, etc....Please don't burden us with another hospital....

Thank you.

Marlowe Sorensen

To: Rocky Saunders[rsaunders25@cox.net]
From: Whitehead, Solange
Sent: Wed 8/2/2023 3:18:53 AM
Subject: Re: Banner Health hospital Proposal
Received: Wed 8/2/2023 3:18:53 AM

Dear Rocky,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.
I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Rocky Saunders <rsaunders25@cox.net>
Sent: Monday, July 24, 2023 5:43 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health hospital Proposal

⚠ External Email: Please use caution if opening links or attachments!

To Scottsdale City Council:

As residents of Scottsdale, My wife and I oppose the proposed Banner Hospital proposal.

This new facility would be be a burden on key resources in Scottsdale.

We oppose this new hospital.

Rocky Saunders
Virginia Saunders
9423 East Cavalry Drive
Scottsdale, AZ. 85262

To: Toby Taylor[tobyarizona101@gmail.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 1:33:50 AM
Subject: Re: Banner Health Hospital
Received: Thur 8/3/2023 1:33:51 AM

Dear Toby,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Toby Taylor <tobyarizona101@gmail.com>
Sent: Wednesday, July 19, 2023 6:32 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Fwd: Banner Health Hospital

from: tobyarizona101@gmail.com

Subject: Banner Health Hospital

Dear Mayor and City Council Members,
We do NOT need another hospital. I am referring to the proposed one for the SW corner of Hayden and the 101.
1) We have several Honor Health hospitals in the area which amply supply the care needed.

2) The traffic and congestion this additional hospital would create is something our community does not want.

3)Think of the water usage! A hospital that size uses about 165,00 gallons EVERY DAY!!

4) Medical personnel and resources will be spread way too thin and with that quality healthcare is in jeopardy.

PLEASE, I beg you, do not support this unnecessary project and preserve the quality healthcare we currently have.

Thank you,

Toby T Taylor
18650 N Thompson Peak Pkwy #1008, Scottsdale, AZ 85255

To: Anna Woods[dustyrdmt@yahoo.com]
From: Janik, Betty
Sent: Sat 7/15/2023 10:11:25 PM
Subject: Re: Banner Health New Hospital at Hayden and the 101
Received: Sat 7/15/2023 10:11:26 PM

Anna

Thanks for sharing your thoughts.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Anna Woods <dustyrdmt@yahoo.com>
Sent: Saturday, July 15, 2023 11:47 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health New Hospital at Hayden and the 101

This is a bad location for a hospital. Hayden Road is closed each year during the TPC golf tournament and very congested during the Barrett Jackson auction.

Scottsdale already has Honor Health and Mayo Clinic hospitals. Is this new hospital necessary? I would urge you not to support this Banner Health proposal.

James B. Woods
Vi at Silverstone
23005 N. 74th Street, Unit 3013
Scottsdale, AZ 85255

To: Bonnie Cornille[bonniecornille@icloud.com]
From: Whitehead, Solange
Sent: Wed 8/2/2023 3:13:35 AM
Subject: Re: Banner Health Proposal for hospital at 101 and Hayden
Received: Wed 8/2/2023 3:13:36 AM

Hi Bonnie -

Thank you for writing and providing detailed information on your position.

A zoning case must be a high bar to earn my support . I will be looking at the data, speaking with our first responders, reviewing traffic, and getting additional public input.

Appreciate your note, Solange

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Bonnie Cornille <bonniecornille@icloud.com>
Sent: Tuesday, July 25, 2023 4:51 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Cc: Kristen Bagley <kbagley@honorhealth.com>
Subject: Banner Health Proposal for hospital at 101 and Hayden

⚠External Email: Please use caution if opening links or attachments!

I totally oppose the construction of a Banner Hospital in Scottsdale at 101 and Hayden. Being part of Honor Health Volunteer services for several years and being one of the founding 200 person staff at Mayo Clinic Arizona since 1987 and current Emeriti of Mayo, I have worked with and in Healthcare for 40 years in AZ.

The current health and hospital facilities in Scottsdale have adequately provided healthcare for our residents for 40 years and both are master planned to do so for the next 30 years and beyond even with population increases that are projected. In addition, the ongoing expansion of both of our current facilities has provided us with a Birds Eye view of how extremely difficult it is to obtain qualified staff to safely run our medical system at this time. Adding another hospital system to Scottsdale could have a totally devastating effect on safe quality care for all of the existing facilities.

I understand the desire to grow and build a better Scottsdale and to desire an increase in our population, but adding another hospital system to the mix will in the long run have a totally negative effect on the quality of the medical care that we will provide. Seek and study and explore the medical experts' knowledge and the negative medical logistics that this will create.

Bonnie Cornille
Emeritus Associate Administrator
Mayo Arizona
Sent from my iPad

Bcc: [redacted]
To: Jim[jdmtelecom@cox.net]
From: Graham, Barry
Sent: Fri 7/21/2023 9:58:36 PM
Subject: Re: Banner Health Proposal for hospital located at SW corner of Hayden Rd. & 101 in Scottsdale
Received: Fri 7/21/2023 9:58:37 PM

Jim, thank you for reaching out to the council.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Jim <jdmtelecom@cox.net>
Sent: Friday, July 21, 2023 1:13 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health Proposal for hospital located at SW corner of Hayden Rd. & 101 in Scottsdale

⚠ External Email: Please use caution if opening links or attachments!

To my mayor and city council members of Scottsdale,

I would like to take this opportunity as a local resident near the proposed site, to express my position regarding the building of a new proposed hospital in this area. I firmly believe that this is an unnecessary venture to our area as we already have two top notch hospitals within a five mile radius that is more than capable of handling the needs of me and all my neighbors. In addition, when you consider all of the additional traffic this will bring to an already expanding community, the additional need that will be put on resources such as water and power, and the shortage of health care professionals will all lead to a very unwarranted and unnecessary project. As a longtime resident of this area, I urge the mayor's office and the city council to rebuke this proposal and stop this over saturation of such unnecessary proposals. This will do nothing to enhance this beautiful area and will only add to diminishing the existing healthcare for all living in this immediate area.

I urge you to please vote NO regarding all considerations regarding this matter!

Regards,

Jim Marlow
JDMTelecom@cox.net

To: i.k. williams[ikw1018@yahoo.com]
From: Graham, Barry
Sent: Tue 7/25/2023 4:12:04 PM
Subject: Re: Banner Health Proposal to build a Hospital
Received: Tue 7/25/2023 4:12:04 PM

Irene, thanks for taking the time to share your concerns.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—scottsdaleaz.gov

From: i.k. williams <ikw1018@yahoo.com>
Sent: Tuesday, July 25, 2023 5:52 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health Proposal to build a Hospital

I am writing to ask Mayor David Ortega and the Scottsdale City Council to **REJECT** Banner's proposal to build a hospital at 101 & Hayden. We already have two high quality hospitals within two miles of the proposed site. HonorHealth Shea Medical Center & HonorHealth Thompson Peak Medical Center have been providing services to the community for over 60 years. And the Mayo Clinic is not far away either.

The Scottsdale Fire Fighters Association also opposes this unnecessary hospital. They understand that when you spread medical personnel and resources too thin, it can put access to healthcare and patient lives, in jeopardy. When it comes to emergency services, it makes no sense to cluster all your fire stations in just one part of the city. The same is true for hospitals. Simply put, Banner's proposal should be **rejected** by the Scottsdale City Council, not because of who is proposing it, but because of what is being proposed.

A new hospital doesn't mean more doctors and nurses. There is a critical shortage of medical professionals serving Scottsdale and the entire state. An additional hospital in the area would dilute those resources, increasing wait times and costs for **ALL** of Scottsdale.

At a time when **water**, traffic, and noise are the biggest issues facing our community, we need responsible development. The North Scottsdale area already has the highest quality hospitals with plenty of proven bed capacity and expertise to meet our healthcare needs now and decades into the future. An additional hospital in the area would increase staffing shortages. An unnecessary new hospital will not create more physicians and nurses but rather further strain the workforce.
Again, I ask the Mayor and the Scottsdale City Council to **reject** Banner's proposal to build a hospital at 101 & Hayden.

Thank you,

Irene Williams

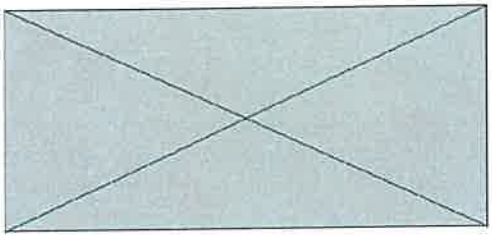
Bcc: [redacted]
To: Tim[timgolf72@gmail.com]
From: Graham, Barry
Sent: Mon 7/17/2023 4:11:25 PM
Subject: Re: Banner Health Proposed Hospital 101 and Hayden Rd
Received: Mon 7/17/2023 4:11:25 PM

Tim, thank you for emailing us

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Tim <timgolf72@gmail.com>
Sent: Sunday, July 16, 2023 9:41 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health Proposed Hospital 101 and Hayden Rd

This proposal for another hospital a significant negative to the homeowners and hime values in this immediate area. 3 major hospitals already in this immediate area. Mayo,Honorhealth anf Shea Med Center more than meet the need. This proposal exacerbates the traffic congestion in this are with all the recent commercial const and condo/apartment const. Current traffic exceeds the capacity of our current toads between Scottsdale Rd and Hayden north and south of the 101.
Please re-evaluate and vote NO!
Timothy Anderson
7735 E Monica Dr
Scottsdale Az 85255



From: Deb Rusk <dernzen@gmail.com>
Sent: Friday, July 7, 2023 12:49 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health proposed new hospital at 101 and Hayden

I have been a resident of Scottsdale since 1989. I've lived in this house at 8121 E Rita Dr, Scottsdale AZ 85255 for the past 25 years.
Until recently living here was nice. However with the plans for a hospital, fire station and Axon's behemoth building plans of 6 huge building right next to our neighborhood, it's becoming too overgrown. 2500 new apartments just are going up across the street which would abut the hospital. We have Thompson Peak Hospital only 7 minutes away and 92nd Shea hospital only about 6 minutes away. Why on earth would you put another hospital in the middle of these two facilities? Let Banner put a hospital further up north by Cave Creek and Carefree.Thats the area that needs one.

With all this going on our noise level has increased several decibels I;m sure, as the noise from the airport, freeways and other facilities we have around us continue to grow. We need a noise wall on the freeway to reduce some of the freeway noise.

We do not have the infrastructure of roads for all this traffic. We do not want extra traffic on 82nd St which will definitely happen when Axon puts up its monstrous 6 buildings (which they want to be 5 stories high) and include another 2350 apartments. While they say they will tell the folks not to use 82nd St, we all know that cannot and will not be monitored nor do they care once they get what they want. There is absolutely no way they can make people use or not use a street. They are all public streets. We can't even get more stop signs at 82nd and Princess as there have not been enough deaths occurring at the intersection yet we take our lives in hand each time we have to make a left turn out from 82nd St onto Princess.

This does nothing for the values of our homes except reduce the value. You should be ashamed of yourselves if you let this happen to our neighborhood.

Would you want all this going on in your neighborhood?

Debra Rusk,
8121 E Rita Dr
Scottsdale AZ 85255

480-227-3911

To: Tony Nguyen[tonynguyenmd@gmail.com]
From: Janik, Betty
Sent: Sat 7/15/2023 3:01:18 PM
Subject: Re: Banner Health
Received: Sat 7/15/2023 3:01:18 PM

Thanks for contacting me. I wish we had a CON in AZ to objectively evaluate the need for another hospital.

CW Betty Janik

From: Tony Nguyen <tonynguyenmd@gmail.com>
Sent: Friday, July 14, 2023 4:51 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health

Esteemed Council members and Mayor,

The proposed Banner Hospital at Hayden and the 101 are particularly concerning. The area already has 2 hospitals and a 3rd hospital less than 10 miles away. The amount of traffic and pollution are not necessary in this area. The new Nationwide building is enough to pollute the previously beautiful skyline. Please do not obstruct the rest of Camelback mountain.

The new proposed hospital is a cash grab for the lucrative Scottsdale population. Why not protect the hospitals we already have in the area and prevent them from harm after so faithfully serving us. Most other states have a certificate of need for hospitals. There is no need in this location.

Please politely decline Banners offer to build a hospital in our backyard.

Sincerely,
Tony Nguyen

To: Ray@aceautophx.com[ray@aceautophx.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 12:33:44 AM
Subject: Re: Banner Health
Received: Thur 8/3/2023 12:33:45 AM

Dear Ray,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Ray@aceautophx.com <ray@aceautophx.com>
Sent: Monday, July 24, 2023 2:05 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner Health

Please say NO,NO,NO on allowing Banner Health to put a Hospital on the south west corner of Hayden & 101. There is enough traffic in that area already. And when Barret Jackson and the Phoenix Open are going it would very congested with a hospital there. We already have Mayo Hospital and Honor Health and the Shea Medical Center within 2 miles of that area. WHY DO WE NEED MORE!!!!!

Thanks Ray Mobilia

602-531-1147

To: Raymond[ray.sillari@gmail.com]
From: Littlefield, Kathy
Sent: Sat 7/29/2023 10:06:58 PM
Subject: Re: Banner Hospital expansion on Hayden Rd and the 101
Received: Sat 7/29/2023 10:06:59 PM

Thank you for your email.

Vice Mayor Kathy Littlefield

From: Raymond <ray.sillari@gmail.com>
Sent: Saturday, July 22, 2023 10:40 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Cc: ray sillari <ray.sillari@gmail.com>
Subject: Banner Hospital expansion on Hayden Rd and the 101

⚠ External Email: Please use caution if opening links or attachments!

There are many reasons why this hospital is not needed and will be a burden to those of us living in the area who use Hayden Rd. We have two great hospitals at Thompson Peak and Shea that are not filled to capacity and service the area well.
Expansion is not alway necessary of good when not needed and for profit only. Please consider the facts and reason for this development.

Thanks Ray Sillari

To: Deborah Mayer[deborahgmayer@gmail.com]
From: Durham, Thomas
Sent: Mon 7/31/2023 12:22:24 AM
Subject: Re: Banner in Scottsdale
Received: Mon 7/31/2023 12:22:25 AM

Can you send me copies of the studies or direct me to them?

Get Outlook for iOS

From: Deborah Mayer <deborahgmayer@gmail.com>
Sent: Monday, July 24, 2023 10:30:06 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Banner in Scottsdale

Dear Scottsdale City Council Members,
Please reject Banner Health's delivery of a hospital in Scottsdale. HonorHealth has this covered. Studies have shown there is no need for Banner's presence at this time.

Thank you!

Sincerely,
Deborah G. Mayer
5129 N. 83rd St
Scottsdale, AZ 85250

To: Cassandra Cook[cassandra.trends@gmail.com]
Cc: City Council[CityCouncil@scottsdaleaz.gov]
From: Kurth, Rebecca
Sent: Mon 7/24/2023 11:49:32 PM
Subject: RE: Do not support the Banner proposal.
Received: Mon 7/24/2023 11:49:38 PM

Good afternoon Ms. Cook,

Thank you for contacting Mayor Ortega and the City Council with your thoughts on this project. I have forwarded your comments to the appropriate staff. This project has not been scheduled for public hearing yet, you can find more information at https://eservices.scottsdaleaz.gov/bldgresources/Cases/Details/54729.

Respectfully,

Rebecca Kurth

Rebecca Kurth | Management Assistant to Mayor & City Council
City of Scottsdale | Office of Mayor David D. Ortega
480.312.7977 |623.715.6879 | rkurth@scottsdaleaz.gov

From: Cassandra Cook <cassandra.trends@gmail.com>
Sent: Monday, July 24, 2023 1:45 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Do not support the Banner proposal.

I live near Hayden & the 101.
*Scottsdale has already asked Residents to cut water and I read that a large Banner Hospital water use would be 165,000 gallons A DAY.

*Not counting the added Traffic and a large Tall building near our Quiet neighborhoods.

* plus, we already have two of the highest quality hospitals within 2 miles of this site.

*also the Scottsdale Firefighters Association said it would for a variety of reasons put our quality Healthcare at risk. I think they would know a thing or two.

*** Please, put the Scottsdale local residents as your main consideration. We voted for you and you are here to serve in our best interest to keep Scottsdale special, not to serve special corporate interests

Thank you.
Cassandra Cook
480-329-5211

To: KAREN DOERING[karen.doering@cox.net]
From: Littlefield, Kathy
Sent: Sat 7/29/2023 8:34:56 PM
Subject: Re: Hayden and 101 Proposed Banner Health Hospital
Received: Sat 7/29/2023 8:34:57 PM

Thank you for your email.

Vice Mayor Kathy Littlefield

From: KAREN DOERING <karen.doering@cox.net>
Sent: Monday, July 24, 2023 9:32 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Hayden and 101 Proposed Banner Health Hospital

As a fulltime resident of 85255 I am against the proposed Banner Health Hospital to be located at Hayden Road and 101. Please respect the wishes of the community you represent.

Karen Doering

Bcc: [redacted]
To: Lois Zapernick[lois.zapernick@russlyon.com]
From: Graham, Barry
Sent: Sun 7/16/2023 4:03:24 PM
Subject: Re: Hospital Building Option VOTE NO
Received: Sun 7/16/2023 4:03:25 PM

Lois, thank you for sharing your concerns with council

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—scottsdaleaz.gov

From: Lois Zapernick <lois.zapernick@russlyon.com>
Sent: Saturday, July 15, 2023 3:19 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Hospital Building Option VOTE NO

Our area has a wonderful hospital at Thompson Peak and Scottsdale Road area.
I AM VOTING AGAINST BUILDING A BANNER HEALTH HOSPITAL AT Hayden and 101. That area is so congested already with the Hayden and 101 buildings.
Lois Zapernick PO Box 25998 Scottsdale AZ 85255

To: Bern & Pat Jones[bern.pat.jones@gmail.com]
Cc: City Council[CityCouncil@scottsdaleaz.gov]
From: Kurth, Rebecca
Sent: Mon 7/24/2023 11:54:41 PM
Subject: RE: Ill advised New Construction
Received: Mon 7/24/2023 11:54:43 PM

Good afternoon Mr. Jones,

Thank you for contacting Mayor Ortega and the City Council with your thoughts on this project. I have forwarded your comments to the appropriate staff. This project has not been scheduled for public hearing yet, you can find more information at https://eservices.scottsdaleaz.gov/bldgresources/Cases/Details/54729 and for updates on the scheduling of hearings.

Respectfully,

Rebecca Kurth

Rebecca Kurth | Management Assistant to Mayor & City Council
City of Scottsdale | Office of Mayor David D. Ortega
480.312.7977 |623.715.6879 | rkurth@scottsdaleaz.gov

From: Bern & Pat Jones <bern.pat.jones@gmail.com>
Sent: Sunday, July 23, 2023 1:19 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Fwd: Ill advised New Construction

Begin forwarded message:

From: Bern & Pat Jones <bern.pat.jones@gmail.com>
Subject: Ill advised New Construction
Date: July 22, 2023 at 10:03:53 AM MST
To: "CityCounsel@scottsdaleaz.gov" <CityCounsel@ScottsdaleAz.gov>

Dear Council persons,

Recent reports reveal that Scottsdale Council has approved the construction of a new hospital Near Hayden and the 101.

There is already a hospital within 700 yards of the intended site for the new structure(s) and Mayo Clinic has a huge facility rivaling the worlds best only 2 miles to the west .

Where are the brains in the Council? Maybe this would have merit in Cave Creek but to put it where proposed is an insult to residents and contrary to everything we have been told about future Scottsdale development. Gradually our height and density standards are being selectively modified to the disadvantage of Scottsdale homeowners when the prevailing infrastructure is clearly inadequate.

Mr. Ortega, you are showing your true colors- you are weak in leadership and have become the snake in the grass that many feared pre-election. Also you personally lied to me in phone call that we had at election time regarding your stand for the protection of North Scottsdale.

Absent the guts to do proper research ,use your heads and see the proposed construction for the Planning and logistical disaster that it will become. Cancel it now and do not build anything new in excess of 3 stories as we were promised.

Do your jobs.
Bernard A Jones

Bcc: [redacted]
To: CARREEN RAINE[carreenraine@icloud.com]
From: Graham, Barry
Sent: Wed 7/19/2023 6:48:06 PM
Subject: Re: Hospital
Received: Wed 7/19/2023 6:48:07 PM

Thank you for emailing us, Career

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—scottsdaleaz.gov

From: CARREEN RAINE <carreenraine@icloud.com>
Sent: Wednesday, July 19, 2023 11:17 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Hospital

⚠ External Email: Please use caution if opening links or attachments!

To whom It May Concern:

We are supporting a NO vote regarding a new hospital. This is unnecessary as we are surrounded by good hospitals that have empty beds!

You represent us and we will be carefully watching your voting record.

Thank You,

Carreen Raine
15252 N. 100th Street, #1166
Scottsdale, AZ 85260

To: Janice Wooten[janicewooten21@gmail.com]
From: Janik, Betty
Sent: Sat 7/15/2023 2:25:08 PM
Subject: Re: Mayor and City Council
Received: Sat 7/15/2023 2:25:09 PM

Janice
Thanks for contacting me and sharing your thoughts.

Councilwoman Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Janice Wooten <janicewooten21@gmail.com>
Sent: Friday, July 14, 2023 9:54 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Mayor and City Council

⚠ External Email: Please use caution if opening links or attachments!

Please vote NO to another hospital in Scottsdale! We already have 2 wonderful hospitals!!!!! We don't need another!!

Jan Wooten/ Grayhawk
7956 E Feathersong Ln
Scottsdale AZ 85255

To: ernest varela[evarela3352@gmail.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 1:36:34 AM
Subject: Re: New Hospital.
Received: Thur 8/3/2023 1:36:35 AM

Dear Ernest,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: ernest varela <evarela3352@gmail.com>
Sent: Wednesday, July 19, 2023 2:48 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: New Hospital.

We live in North Scottsdale and greatly oppose having Banner Health build a hospital at Hayden and the 101 Freeway. There are two very excellent hospitals already located near our area. We are registered voters asking for your help in keeping an unnecessary hospital from being built in our quiet neighborhood. This hospital will bring unwanted congestion in this beautiful area. Please help in keeping an unwanted hospital out of our neighborhood.

Sent from Mail for Windows

To: janekgriffin@gmail.com[janekgriffin@gmail.com]
From: Janik, Betty
Sent: Sat 7/15/2023 2:34:25 PM
Subject: Re: New hospital
Received: Sat 7/15/2023 2:34:25 PM

Jane
Thanks for sharing your thoughts on this controversial issue.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: janekgriffin@gmail.com <janekgriffin@gmail.com>
Sent: Friday, July 14, 2023 2:22 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: New hospital

⚠ External Email: Please use caution if opening links or attachments!

My husband and I are opposed to the new proposed hospital at 101 and Hayden. You are turning North Scottsdale into N.Y. City with all the proposed high rises. This proposed hospital will
Only stretch limited resources further.

Jane and Tom Griffin
7348 E. Conquistadores Dr.
Scottsdale,Az 85255

Sent from my iPhone

To: MICHAEL HUSAR[mahusar@aol.com]
From: Janik, Betty
Sent: Fri 7/14/2023 2:47:51 PM
Subject: Re: New Hospital
Received: Fri 7/14/2023 2:47:52 PM

Michael

Thanks for sharing your thoughts.

Councilwoman Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: MICHAEL HUSAR <mahusar@aol.com>
Sent: Thursday, July 13, 2023 9:21 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: New Hospital

Mayor and Council,
I wish to let you know that I am opposed to having a new hospital built on Hayden and the 101. I am opposed for the following reasons:
(1) This hospital is absolutely unnecessary. We already have two hospitals within 2 miles of this location.
(2) It will not improve the healthcare in the area. In fact, with the shortage of doctors and nurses we have both in Scottsdale and statewide, we could see an increase in wait times and costs for Scottsdale residents.
(3) Both the HonorHealth and Shea Medical Center have existing bed capacity and expansion plans to provide more should the need arise.
(4) It will create additional traffic in that area that the community doesn't want.
(5) A hospital the size Banner is proposing uses about 165,000 gallons of water per day, a commodity that is in short supply.
I therefore ask that you not support the Banner Health proposal.
Sincerely,
Michael Husar
12151 E. Sand Hills Rd
810-348-2712 (cell)

To: Whitehead, Solange[SWhitehead@Scottsdaleaz.gov]
From: cherylbp@cox.net
Sent: Wed 8/2/2023 2:48:25 AM
Subject: Re: New Banner Health Hospital
Received: Wed 8/2/2023 2:48:45 AM

Thanks for your reply.

Sent from my iPhone

On Aug 1, 2023, at 7:25 PM, Whitehead, Solange <SWhitehead@scottsdaleaz.gov> wrote:

Hi Cheryl,

I appreciate your writing and your reasoning. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.
I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

<Outlook-521znfjj.jpg>

From: Cheryl <cherylbp@cox.net>
Sent: Saturday, July 29, 2023 12:37 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: New Banner Health Hospital

Dear Mayor and City Council,

It has come to my attention that Banner Health wants to build a new hospital at Hayden Road and the 101 Freeway. We have two quality Honor Health Hospitals in the area at Shea and 92nd Street, as well as Scottsdale and Thompson Peak within two miles of the proposed site. There is also Mayo Hospital at 56th Street and Mayo Blvd about 4 miles away. This gives plenty of options for hospital health care to the North Scottsdale area. Also with the current workforce shortage of medical professionals I don't know where the medical staff would come from. This is overkill and adds to traffic congestion, unnecessary water requirements and other issues in this already busy area.

Please say no to this unnecessary hospital in our area.

Thank you for your consideration,
Cheryl Boone-Passarelli
10123 E. Whispering Wind Drive
Scottsdale, AZ 85255

Bcc: [redacted]
To: Sharon Hanley[smh1299@cox.net]
From: Graham, Barry
Sent: Thur 7/20/2023 4:11:05 PM
Subject: Re: No to Banner Health at Hayden & 101
Received: Thur 7/20/2023 4:11:07 PM

Sharon, Thank you for emailing the council

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Sharon Hanley <smh1299@cox.net>
Sent: Wednesday, July 19, 2023 5:11 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: No to Banner Health at Hayden & 101

No to Banner Health at Hayden & 101. Will bring too much traffic
I live in Greyhawk
Sharon Hanley
8238 E Hoverland Rd
Scottsdale, AZ 85255

To: Maryann McGee[mcgeemar104@gmail.com]
From: Littlefield, Kathy
Sent: Mon 7/17/2023 8:47:53 PM
Subject: RE: NO on Banner Health Hospital at Hayden and 101
Received: Mon 7/17/2023 8:47:00 PM

Thank you for your email.

Councilwoman Kathy Littlefield

From: Maryann McGee <mcgeemar104@gmail.com>
Sent: Monday, July 17, 2023 1:07 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: NO on Banner Health Hospital at Hayden and 101

Hello,
I am writing to ask that the proposed Banner Health Hospital at Hayden and 101 does NOT go through. As a resident of E Princess Dr., I do not want this hospital built there. E. Princess Dr. traffic has increased drastically in the past few years. Much of the traffic in this used-to-be peaceful neighborhood is large trucks, dumptrucks, trucks with long trailers hauling heavy tractors and machinery. E. Princess Dr. makes a great short cut for these loud vehicles so that the drivers can avoid the busy intersections at Hayden @ Frank Lloyd Wright and at Scottsdale Rd. and Frank Lloyd Wright. The vehicles serve the developments currently being built just north of 101. Car traffic has also increased and will continue to if the Banner hospital is built.

I am heartbroken at the new developments north of 101 recently. Beautiful desert land is gone. Animals that called that desert their home have been eliminated. Not to mention the effects of more development and traffic on our global warming crisis.

Please ensure that the Banner project does not happen!

Thank you,
Maryann McGee

To: William Powell[wrpowell58@gmail.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 1:33:07 AM
Subject: Re: No More Hospitals!
Received: Thur 8/3/2023 1:33:07 AM

Dear William,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: William Powell <wrpowell58@gmail.com>
Sent: Thursday, July 20, 2023 11:23 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: No More Hospitals!

No more hospitals in N. Scottsdale. We have plenty to choose from already….Mayo, Honor Health Shea, Honor Health Thompson Peak and several Urgent Care clinics. Enough!

Sent from my iPhone

To: Gary Beaty[gman_2050@yahoo.com]
From: Whitehead, Solange
Sent: Wed 8/2/2023 3:06:53 AM
Subject: Re: No contributing to the nursing and Doctor shortage
Received: Wed 8/2/2023 3:06:53 AM

Thanks, Gary. Appreciate your thoughtful input. All my best, Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Gary Beaty <gman_2050@yahoo.com>
Sent: Tuesday, July 25, 2023 9:20 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: No contributing to the nursing and Doctor shortage

I'm concerned with the effort regarding the hospital at Hayden and the 101. With the Mayo Hospital, Thompson Peak, and Shea / 90th St. This area and State has a shortage of qualified Healthcare to fill the presently available locations to presently receive Healthcare.

I am retired and volunteer at Valley Healthcare campuses. We have Nursing students and interns that also integrate with us in taking care of our community and finding innovative ways to do so.

I've lived here in the Valley for 52 years and still enjoy it, so I hope we can make the best efforts, not hamper the efforts of the very people who are already involved in these services.

Gary Beaty

5640 E Bell Rd
Unit 1066
Scottsdale, AZ 85254

To: Billymalcom[billymalcom@gmail.com]
From: Janik, Betty
Sent: Sat 7/15/2023 10:09:56 PM
Subject: Re: NO to Banner Health building a new hospital near Hayden and the 101
Received: Sat 7/15/2023 10:09:57 PM

Billy

Thanks for sharing your thoughts.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Billymalcom <billymalcom@gmail.com>
Sent: Saturday, July 15, 2023 2:57 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: NO to Banner Health building a new hospital near Hayden and the 101

My family opposes Banner Health building another hospital on the southwest corner of Hayden and the 101. It's unnecessary for this area. We currently live in Grayhawk!

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: MARYAN HOLBROOK
Sent: Thur 7/20/2023 12:14:22 AM
Subject: Re: No to Banner Health Hayden & 101
Received: Thur 7/20/2023 12:14:36 AM

No to Banner Health at Hayden & 101.
This will bring too much traffic to the area
I live in Greyhawk
Maryan Holbrook
8238 E Hoverland Rd
Scottsdale, AZ 85255
480-948-7055

> On 07/19/2023 8:08 PM EDT MARYAN HOLBROOK <mholbrook3@cox.net> wrote:
>
> No to Banner Health at Hayden & 101
> Too much traffic

To: Carmen Rayis[rayisqt@gmail.com]
From: Janik, Betty
Sent: Fri 7/21/2023 4:22:44 AM
Subject: Re: No to Banner Hospital
Received: Fri 7/21/2023 4:22:45 AM

Carmen

Thanks for contacting me and sharing your thoughts.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Carmen Rayis <rayisqt@gmail.com>
Sent: Thursday, July 20, 2023 2:24 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: No to Banner Hospital

Hi Scottsdale Mayor Office,
Please do allow Banner Health to move in at Hayden and 101. This will create unliveable conditions to our area.
It is extremely congested and we already have a hospital a mile away.

I hope you consider our voices as Scottsdale residents and oppose this.

Thank you

Carmen Rayis

To: Michelle Bell[fogelbell@hotmail.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 1:32:18 AM
Subject: Re: NO to Banner Hospital on Hayden
Received: Thur 8/3/2023 1:32:18 AM

Dear Michelle,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Michelle Bell <fogelbell@hotmail.com>
Sent: Thursday, July 20, 2023 1:45 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: NO to Banner Hospital on Hayden

As a resident of North Scottsdale, I am strongly against building a new Banner Hospital at 101 and Hayden. I have used both Honor Health Hospitals on Thompson Peak and Shea and Mayo within the last three months and have found all facilities meet the needs of our community. The ThompsonPeak location is rarely at capacity and this hospital just doesn't seem necessary.
I am an employee of Phoenix Children's and my husband just recently left Valleywise Health. We both know the workforce issues facing our hospitals and that would only add to it.
We have concerns with the overdevelopment of that corridor and the impact it has on water and traffic. We are respectively asking for the council and mayor to vote no about building another hospital in the area.

Kind Regards,
Michelle

To: James Rice[jimrice@asu.edu]
From: Janik, Betty
Sent: Sat 7/15/2023 3:08:33 PM
Subject: Re: NO!! Banner Health Hospital 101 and Hayden
Received: Sat 7/15/2023 3:08:34 PM

Dr Rice

Thanks for sharing your concerns.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: James Rice <jimrice@asu.edu>
Sent: Friday, July 14, 2023 8:39 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: NO!! Banner Health Hospital 101 and Hayden

Hello Mr. Mayor and City Council of Scottsdale: I'm urging to you all to vote NO regarding the Banner Health Hospital proposal near the 101 and Hayden, it is not needed and will not only dilute the quality of our healthcare but also increase unwanted traffic up here as well as impact and deplete our valuable water supply to a tune of 165,000 gallons/day.
I'll be paying close attention to your votes.

Sincerely,
Dr. James Rice

To: Carol Bennett[carolbennett100@yahoo.com]
From: Janik, Betty
Sent: Sat 7/15/2023 2:30:30 PM
Subject: Re: Opposition of proposed new banner health hospital near Hayden rd
Received: Sat 7/15/2023 2:30:30 PM

Thanks for sharing your thoughts with me.

CW Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Carol Bennett <carolbennett100@yahoo.com>
Sent: Friday, July 14, 2023 10:43 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Opposition of proposed new banner health hospital near Hayden rd

⚠External Email: Please use caution if opening links or attachments!

I oppose this new hospital! It is unnecessary- Mayo Clinic is right firm the road and Shea & HonorHealth are nearby too!

Just vote NO!!!!

Thank you?
Carol Bennett
13271 E Juan Tabo Rd
Scottsdale, AZ 85255

Sent from my iPhone

To: Debbie Lasker[hdgecho@hotmail.com]
From: Whitehead, Solange
Sent: Wed 8/2/2023 3:23:01 AM
Subject: Re: Oppose
Received: Wed 8/2/2023 3:23:01 AM

Dear Debbie,

I appreciate your writing and zoning case must meet a high bar to earn my support. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.
I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Debbie Lasker <hdgecho@hotmail.com>
Sent: Monday, July 24, 2023 3:47 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Oppose

⚠ External Email: Please use caution if opening links or attachments!

Good afternoon,

I am emailing to oppose and reject Banner's rezoning application.
Due to workforce shortages across the board and the impact that an over saturation of inpatient hospital beds can have on an area. I feel strongly about opposing this application.

I live in Scottsdale off Dynamic
20719 142N Place

We oppose!!

Sent from my iPhone

Bcc: [redacted]
To: mountainluv[mountainluv@cox.net]
From: Graham, Barry
Sent: Tue 7/25/2023 11:45:31 PM
Subject: Re: Proposal regarding plan for building Banner 300 bed hospital.
Received: Tue 7/25/2023 11:45:32 PM

Annette, thank you for taking the time to share your feedback with us.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—scottsdaleaz.gov

From: mountainluv <mountainluv@cox.net>
Sent: Tuesday, July 25, 2023 4:10 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposal regarding plan for building Banner 300 bed hospital.

I think the idea of another hospital being built in Scottsdale is outrages. What is needed is a lot of work on our streets, including more monitoring on the race cars driving down major streets.

Annette Ruotolo
16420 N Thompson Peak Pkwy
Scottsdale, AZ 85260

To: mountainluv[mountainluv@cox.net]
From: Littlefield, Kathy
Sent: Sat 7/29/2023 7:07:11 PM
Subject: Re: Proposal regarding plan for building Banner 300 bed hospital.
Received: Sat 7/29/2023 7:07:12 PM

Thank you for your comments.

Councilwoman Kathy Littlefield

From: mountainluv <mountainluv@cox.net>
Sent: Tuesday, July 25, 2023 4:10 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposal regarding plan for building Banner 300 bed hospital.

I think the idea of another hospital being built in Scottsdale is outrages. What is needed is a lot of work on our streets, including more monitoring on the race cars driving down major streets.

Annette Ruotolo
16420 N Thompson Peak Pkwy
Scottsdale, AZ 85260

To: joseph infantino[infantinoj@cox.net]
From: Graham, Barry
Sent: Tue 7/25/2023 4:10:19 PM
Subject: Re: Proposed Banner Health Hospital
Received: Tue 7/25/2023 4:10:20 PM

Joseph, thank you for emailing us.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: joseph infantino <infantinoj@cox.net>
Sent: Tuesday, July 25, 2023 7:57 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Health Hospital

We DON'T need another hospital. We already have 2 Honor Health and Mayo Hospital in the immediate area why would we need a fourth. It would only cause traffic congestion and very unnecessary.

To: JANE HEIST[ljh0cpa@hotmail.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 1:37:13 AM
Subject: Re: Proposed Banner Hospital at Hayden and the 101
Received: Thur 8/3/2023 1:37:14 AM

Dear Jane,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: JANE HEIST <ljh0cpa@hotmail.com>
Sent: Wednesday, July 19, 2023 2:17 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Hospital at Hayden and the 101

Dear Mayor and City Council:

Please do **not** allow Banner to put a new hospital at Hayden and the 101. With HonorHealth Thompson Peak and Mayo nearby, there is no need for another facility in the area.

Thank you for your consideration,

L. Jane Heist
Scottsdale Taxpayer and Resident

Scottsdale, AZ 85251

From: Lori Sepeda <michikitty@cox.net>
Sent: Wednesday, July 12, 2023 8:10 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Hospital in North Scottsdale

To Our Mayor and City Council:

We would like to write to you regarding the proposed Banner Hospital at Hayden Road and the Loop 101. We have lived here for almost 23 years. We moved here when there was no freeway or congestion in the area. We moved here specifically for that reason. We understand each city must have their growth and development, but the past few years have been ridiculous in our area. We attended meetings to oppose the HUGE Nationwide building/site plans, to no avail. It seemed like you were just at the meetings, not to listen to us, but to "buffer" the fact that you were going to approve it either way. It really made us feel useless for even going to the meeting.

This Banner hospital would be an UNNECESSARY business in our neighborhood. We have Honor Health, literally down the street and Mayo Clinic just a couple of off-ramps down the freeway. Honor Health Shea down the freeway in the other direction. We do not need another hospital in our area! We do not need the extra traffic, congestion or noise in our already overly busy neighborhood! Our local roads aren't even maintained, as it is. We have so many DEEP potholes that have not been repaired for MONTHS!! If you add a big hospital, more traffic, people, pollution, noise...that will just add to the decline of our neighborhood. Which we are not okay with. We DO NOT need another hospital in our area!! Please THINK before you approve businesses that will affect the surrounding neighborhoods. Although money is obviously important to you, sometimes, maybe the MONEY part of it will hurt the people that really care about their neighborhood. Is that really worth it to YOUR CITY? Is the money more important to you than the people that pay to live here?

PLEASE consider the MAJOR down-fall this hospital will bring to us living here in the area. To our quality of life that we moved here for. We can't believe that this idea of another hospital in the neighborhood would even be a possibility. PLEASE think about us that live here and that drive these roads every day! We know we aren't the only neighbors that feel this way, and this email probably won't make any difference. But we felt we needed to TRY and make a difference for our community.

Sincerely,
Jim & Lori Sepeda

To: Paul Lynch[paul12903@me.com]
From: Littlefield, Kathy
Sent: Sun 8/6/2023 3:43:51 PM
Subject: Re: Proposed Hospital N Hayden in Scottsdale
Received: Sun 8/6/2023 3:43:52 PM

Thank you for your email.

Vice Mayor Kathy Littlefield

From: Paul Lynch <paul12903@me.com>
Sent: Thursday, August 3, 2023 10:44 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Hospital N Hayden in Scottsdale

⚠External Email: Please use caution if opening links or attachments!

Hello

We live in (and own) property in the Princess Enclave community near the 101 and N Hayden Rd. Our traffic has significantly increased as well as car break ins etc. over the past couple of years due to the dramatic increase in apartment buildings in our area. We DO NOT support the construction of a new hospital complex near us as this will make the current congestion and noise levels even worse. I trust you will not let this project move forward.

Thanks

Paul Lynch
17725 N 77th way
Scottsdale 85255
480 532 8385

To: Toni[tminni@aol.com]
From: Graham, Barry
Sent: Tue 7/18/2023 7:07:50 PM
Subject: Re: Proposed construction of Banner Health near Hayden & Rt. 101
Received: Tue 7/18/2023 7:07:51 PM

Thank you for your email, Toni

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Toni <tminni@aol.com>
Sent: Tuesday, July 18, 2023 11:58 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Cc: Info@CareScottsdale.com <Info@CareScottsdale.com>
Subject: Proposed construction of Banner Health near Hayden & Rt. 101

As one of the residents near the proposed construction of a new Banner Health Hospital, I wish to expressed my dismay that *another* hospital is being considered in North Scottsdale. The traffic at that intersection is becoming horrendous!!!

PLEASE do not bring another hospital to our quiet community. I join with the Scottsdale Firefighters Association in opposing this effort.

Respectfully,

Toni Minarich
8951 E. Rusty Spur Place
Scottsdale, AZ

To: Lori Sepeda[michikitty@cox.net]
From: Littlefield, Kathy
Sent: Fri 7/14/2023 3:02:45 PM
Subject: Re: Proposed Banner Hospital in North Scottsdale
Received: Fri 7/14/2023 3:02:45 PM

Thank you for your thoughts and concerns.

Vice Mayor Kathy Littlefield

From: Lori Sepeda <michikitty@cox.net>
Sent: Wednesday, July 12, 2023 8:10 AM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed Banner Hospital in North Scottsdale

To Our Mayor and City Council:

We would like to write to you regarding the proposed Banner Hospital at Hayden Road and the Loop 101. We have lived here for almost 23 years. We moved here when there was no freeway or congestion in the area. We moved here specifically for that reason. We understand each city must have their growth and development, but the past few years have been ridiculous in our area. We attended meetings to oppose the HUGE Nationwide building/site plans, to no avail. It seemed like you were just at the meetings, not to listen to us, but to "buffer" the fact that you were going to approve it either way. It really made us feel useless for even going to the meeting.

This Banner hospital would be an UNNECESSARY business in our neighborhood. We have Honor Health, literally down the street and Mayo Clinic just a couple of off-ramps down the freeway. Honor Health Shea down the freeway in the other direction. We do not need another hospital in our area! We do not need the extra traffic, congestion or noise in our already overly busy neighborhood! Our local roads aren't even maintained, as it is. We have so many DEEP potholes that have not been repaired for MONTHS!! If you add a big hospital, more traffic, people, pollution, noise...that will just add to the decline of our neighborhood. Which we are not okay with. We DO NOT need another hospital in our area!! Please THINK before you approve businesses that will affect the surrounding neighborhoods. Although money is obviously important to you, sometimes, maybe the MONEY part of it will hurt the people that really care about their neighborhood. Is that really worth it to YOUR CITY? Is the money more important to you than the people that pay to live here?

PLEASE consider the MAJOR down-fall this hospital will bring to us living here in the area. To our quality of life that we moved here for. We can't believe that this idea of another hospital in the neighborhood would even be a possibility. PLEASE think about us that live here and that drive these roads every day! We know we aren't the only neighbors that feel this way, and this email probably won't make any difference. But we felt we needed to TRY and make a difference for our community.

Sincerely,
Jim & Lori Sepeda

To: Isaac D[dizon.isaac@gmail.com]
From: Janik, Betty
Sent: Sat 7/15/2023 2:36:34 PM
Subject: Re: Support: Banner Health Hospital Hayden/Loop 101
Received: Sat 7/15/2023 2:36:35 PM

Issac
Thanks for sharing you thoughts on this issue.
Councilwoman Betty Janik

Councilwoman Betty Janik, City of Scottsdale
bjanik@scottsdaleaz.gov
office: 480-312-2374
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Isaac D <dizon.isaac@gmail.com>
Sent: Friday, July 14, 2023 2:45 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Support: Banner Health Hospital Hayden/Loop 101

Dear Scottsdale City Council,

I am writing to express my **support of the new Banner Health proposed hospital at Hayden Road/Loop 101**. I am a resident in the neighborhood and believe that we can use more choice in healthcare in Scottsdale (7900 E Princess Dr. #2226, Scottsdale).

Having this option will make Scottsdale competitive for bioscience companies, medical practices and in attracting more medical professionals from around the country and the world. It is better that we have this community asset rather than Phoenix who has a history of building largely out of proportion buildings right up against our border. It's a win win for us to have Banner Health as a supplement to our great health services here in Scottsdale.

Thank you,
Isaac Dizon
Scottsdale Resident and Voter

To: Bryan Haslett[haslettb07@yahoo.com]
From: Whitehead, Solange
Sent: Thur 8/3/2023 1:29:04 AM
Subject: Re: Stop the hospital!
Received: Thur 8/3/2023 1:29:05 AM

Dear Bryan,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Bryan Haslett <haslettb07@yahoo.com>
Sent: Friday, July 21, 2023 2:17 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Stop the hospital!

⚠ External Email: Please use caution if opening links or attachments!

Good day,

Surely there's a better place to put a new hospital than the Hayden road & 101!

It's so close to other quality hospitals that are not saturated.

If we already have to few healthcare workers…a new hospital won't magically produce more healthcare workers.

Please move to stop the building of another hospital which will be underutilized & likely understaffed. The only thing for sure will be additional traffic in an area that is increasingly busy.

We can still preserve what's left of Scottsdale's small city charm if we try.

Thank you for this opportunity to voice my concerns.

Year round resident.

Bryan

Bryan Haslett
11766 E De La O Rd.
Scottsdale, AZ 85255

Sent from my iPhone

To: Whitehead, Solange[SWhitehead@Scottsdaleaz.gov]
From: Chris Butler
Sent: Wed 8/2/2023 4:13:22 AM
Subject: Re: Rezoning.
Received: Wed 8/2/2023 4:13:41 AM

Thank you.

Sent from my iPhone

On Aug 1, 2023, at 7:40 PM, Whitehead, Solange <SWhitehead@scottsdaleaz.gov> wrote:

Dear Christine,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.
I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

<Outlook-exuc0msn.jpg>

From: Chris Butler <butler.chrism@gmail.com>
Sent: Thursday, July 27, 2023 9:16 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Rezoning.

Please reject Banner rezoningcapplication.
Christine Butler
Sent from my iPhone

To: Chris Butler[butler.chrism@gmail.com]
From: Whitehead, Solange
Sent: Wed 8/2/2023 2:40:21 AM
Subject: Re: Rezoning.
Received: Wed 8/2/2023 2:40:21 AM

Dear Christine,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Chris Butler <butler.chrism@gmail.com>
Sent: Thursday, July 27, 2023 9:16 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Rezoning.

Please reject Banner rezoningcapplication.
Christine Butler
Sent from my iPhone

To: Whitehead, Solange[SWhitehead@Scottsdaleaz.gov]
From: Diane Bykowski
Sent: Thur 8/3/2023 1:17:08 AM
Subject: Re: Rezoning of property for Banner at the 101 and Hayden
Received: Thur 8/3/2023 1:17:31 AM
Outlook-nnynlwt3.jpg

⚠External Email: Please use caution if opening links or attachments!

Thank you for your response. I appreciate it..
Diane Bykowski

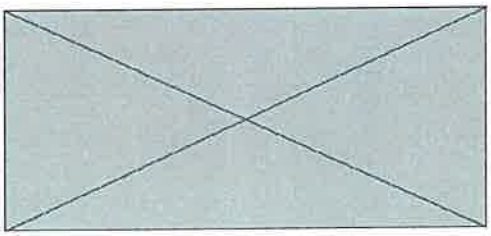
On Wed, Aug 2, 2023, 5:30 PM Whitehead, Solange <SWhitehead@scottsdaleaz.gov> wrote:

Hi Diane,

I appreciate your writing and zoning case must meet a high bar to earn my support. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead



From: Diane Bykowski <justmontage@gmail.com>
Sent: Monday, July 24, 2023 7:02 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Rezoning of property for Banner at the 101 and Hayden

⚠External Email: Please use caution if opening links or attachments!

Dear Mayor and City Council.
As a a resident of Scottsdale, I urge you to vote no and reject Banner's rezoning petition.

There is no need for an additional hospital or medical facility in that cojested area. There are 2 excellent medical facilities within 3 miles of this site.

Please vote NO!

Diane Bykowski
5935 E Kings Ave, Scottsdale, AZ 85254

To: Shirley Wagner[slw63khs@gmail.com]
From: Whitehead, Solange
Sent: Wed 8/2/2023 3:24:59 AM
Subject: Re: PROPOSED SCOTTSDALE BANNER HOSPITAL
Received: Wed 8/2/2023 3:25:00 AM

Dear Shirley,

I appreciate your writing. I will be carefully reviewing traffic impacts, speaking with our first responders, and looking at current hospital capacity prior to making any decisions. Protecting our neighborhoods and quality of life is definitely my top priority.

I truly appreciate your writing and please feel free to follow up any time.

Solange Whitehead

Solange Whitehead
Councilwoman
swhitehead@ScottsdaleAZ.gov
Office: 480.312.2550

City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

From: Shirley Wagner <slw63khs@gmail.com>
Sent: Monday, July 24, 2023 2:37 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: PROPOSED SCOTTSDALE BANNER HOSPITAL

I am opposed to the construction of a Banner Hospital at the southwest corner of Hayden Road and the 101 freeway. HonorHealth already provides excellent patient care at the Thompson Peak facility. Mayo Hospital is in the area also. The water usage of the proposed hospital would add additional burden to Scottsdale's already taxed water supply. The traffic on Hayden Road is already very heavy, the addition of hundreds of vehicles/day would be chaotic.

I realize that there is huge pressure placed on you to approve this project but I urge you to vote no to the proposal. Please do not cave in to the developer and state politicians' requests.

Thank you for your consideration of my appeal.

Shirley Wagner
slw63khs@gmail.com
480-861-5345

Bcc: [redacted]
To: Carl Raine[carlraine@me.com]
From: Graham, Barry
Sent: Wed 7/19/2023 9:14:00 PM
Subject: Re: Proposed New Hospital at Hayden and 101
Received: Wed 7/19/2023 9:14:00 PM

Carl, thanks for taking a minute to share your thoughts with us

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—scottsdaleaz.gov

From: Carl Raine <carlraine@me.com>
Sent: Wednesday, July 19, 2023 2:12 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Proposed New Hospital at Hayden and 101

⚠ External Email: Please use caution if opening links or attachments!

RE: Proposed new hospital by Banner Health at Hayden & 101

Council Members:

Here is another example of an issue before the council that deserves broad and open exposure to the affected community, including the possibility of placing the issue on the ballot.

We already have two of the best AZ hospitals providing fully adequate hospital facilities and current capacity in the area affected. There are indicated expansion plans already on the books at these institutions to maintain their capacity and ability to serve in the future, which we would urge the council to review and take into full consideration.

There is an issue of water usage by a new hospital that could tax our already strained AZ water availability. We would urge the Council to give this due and serious consideration, as well as the inevitable traffic issues at the indicated site proximate to the 101 freeway.

The ultimate question is whether another hospital squeezed into the same area will actually put quality health care at risk, vs make a meaningful improvement on an already good situation. What does the medical community – the doctors and nurses necessary for any hospital to serve the community – say about the need and/or possible negative impact of another facility in this area?

Based upon our own view of the questions posed above, we urge the Council to reject approval, and ignore the overtures (or worse) from lobbying interests who will inevitably appear, bankrolled sources more interested in construction and related profits than the actual welfare of the residents.

It is time for the Council to reject the moneyed interests and act with visible clarity on the real needs of our unique residential community.

Yours truly,
Carl Raine
15252 N 100th St, Unit 1166
Scottsdale, AZ 85260

Bcc: [redacted]
To: Phil Stone[pbstoneaz@gmail.com]
From: Graham, Barry
Sent: Fri 7/21/2023 5:45:15 PM
Subject: Re: Unnecessary Banner Health hospital
Received: Fri 7/21/2023 5:45:16 PM

Phil, thank you for emailing council your thoughts.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Phil Stone <pbstoneaz@gmail.com>
Sent: Thursday, July 20, 2023 6:22 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Unnecessary Banner Health hospital

As a Scottsdale resident residing in the vicinity of the proposed Banner Health hospital, I am adamantly opposed to this proposal. I am saddened by the explosion of apartments, office buildings, and now hospitals that are taking over our once quiet and slower paced existence. We have three major health facilities in this immediate area and certainly don't need or want another. Please preserve some semblance of the Scottsdale we are living here for.
Thank you.
--
Phil Stone
480-292-0453

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Phil Stone
Sent: Fri 7/21/2023 1:22:13 AM
Subject: Unnecessary Banner Health hospital
Received: Fri 7/21/2023 1:22:36 AM

As a Scottsdale resident residing in the vicinity of the proposed Banner Health hospital, I am adamantly opposed to this proposal. I am saddened by the explosion of apartments, office buildings, and now hospitals that are taking over our once quiet and slower paced existence. We have three major health facilities in this immediate area and certainly don't need or want another. Please preserve some semblance of the Scottsdale we are living here for.

Thank you.

--

Phil Stone
480-292-0453

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Bryan Haslett
Sent: Fri 7/21/2023 9:17:00 PM
Subject: Stop the hospital!
Received: Fri 7/21/2023 9:17:27 PM

⚠ External Email: Please use caution if opening links or attachments!

Good day,

Surely there's a better place to put a new hospital than the Hayden road & 101!

It's so close to other quality hospitals that are not saturated.

If we already have to few healthcare workers...a new hospital won't magically produce more healthcare workers.

Please move to stop the building of another hospital which will be underutilized & likely understaffed. The only thing for sure will be additional traffic in an area that is increasingly busy.

We can still preserve what's left of Scottsdale's small city charm if we try.

Thank you for this opportunity to voice my concerns.

Year round resident.

Bryan

Bryan Haslett
11766 E De La O Rd.
Scottsdale, AZ 85255

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Diane Bykowski
Sent: Tue 7/25/2023 2:02:56 AM
Subject: Rezoning of property for Banner at the 101 and Hayden
Received: Tue 7/25/2023 2:03:17 AM

Dear Mayor and City Council.
As a a resident of Scottsdale, I urge you to vote no and reject Banner's rezoning petition.

There is no need for an additional hospital or medical facility in that cojested area. There are 2 excellent medical facilities within 3 miles of this site.

Please vote NO!

Diane Bykowski
5935 E Kings Ave, Scottsdale, AZ 85254

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Raquelle
Sent: Mon 7/24/2023 1:11:31 AM
Subject: An unnecessary hospital Scottsdale does - not - need
Received: Mon 7/24/2023 1:12:55 AM

Hello,

I am writing to oppose the unnecessary hospital that Scottsdale doesn't need will create traffic the community doesn't want.
A typical hospital the size Banner is proposing uses about 165,000 gallons of water a day. Mayor Ortega is "always" preaching water conservation. This should be easy for the Mayor and the City Council to reject.
The Scottsdale Firefighter Association opposes this unnecessary hospital. They understand that when you spread medical personnel and resources too thin, it can put quality healthcare in jeapordy.
HonorHealth is Scottsdale's hometown healthcare provider and has been here for Scottsdale for decades ensuring residents get the quality healthcare they need and deserve.
Banner Health is owned by an out of State Conglomerate!
Protect our neighborhoods and preserve quality healthcare.

Regards,
Raquelle Pantano

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Renee Canute
Sent: Tue 7/18/2023 10:29:37 PM
Subject: Another hospital?!?
Received: Tue 7/18/2023 10:29:58 PM

Who do they think is going to staff this hospital proposed for Hayden and 101? Can we vote on this? Mayo is across the street and Thompson Peak is very close by. What is the point??
Please respond.
Thanks for your time,

Renee Canute RN CCM
Medical Case Manager
Ph 602-625-1722
Fx 480-419-1443

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Sandy Bingenheimer
Sent: Mon 7/24/2023 2:40:38 PM
Subject: Banner expansion
Received: Mon 7/24/2023 2:41:02 PM

I'm a senior living at Maravilla and I could almost walk to Mayo Hospital and Thompson Peak - why would we need/want another hospital in this area - when I see all the apartments going up I am so concerned about water and I'm sure another hospital would be a huge drain on our water resources - please vote against this unnecessary project!
Thank You, Sandra BINGENHEIMER

Sent from my iPad

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Charles Johnston
Sent: Sun 7/16/2023 1:34:35 AM
Subject: Banner
Received: Sun 7/16/2023 1:34:56 AM

Dear Mayor And Council,
Hi We are totally opposed to the Banner request to build a hospital at Hayden and AZ 101. It is not needed because there is more than adequate hospital capacity in North Scottsdale. In fact, excess capacity probably exists as more procedures are done as outpatient procedures at Honor facilities and other surgery and specialty centers in the area.
In addition, we believe that Banner is seeking to control the local healthcare market. As evidence, Banner has established joint ventures that have acquired physical therapy practices, rehab facilities and medical practices.
Additionally, there currently is a shortage of healthcare practitioners in the area. The addition of an unneeded Banner hospital will increase the competition for accredited healthcare professionals. This will increase staffing costs. Also, adding one more location for first responders to have to service will put a significant burden on them.
This is a very bad idea. Please vote no on Banner's request!!
Thank you for your consideration.
Charles E Johnston
Sue H Johnston
10040 E Happy Valley Rd unit 365
Scottsdale, AZ 85255

Sent from my iPhone

Bcc: [redacted]
To: Susie Brousseau[ksbrous@cox.net]
From: Graham, Barry
Sent: Fri 10/6/2023 3:29:35 AM
Subject: Re: Against banner's new Scottsdale campus
Received: Fri 10/6/2023 3:29:35 AM

Susie, thank you for taking time to email us your thoughts on this matter.

Barry Graham | Councilmember
City of Scottsdale
3939 N. Drinkwater Blvd. | Scottsdale, AZ 85251
BGraham@scottsdaleaz.gov—**scottsdaleaz.gov**

From: Susie Brousseau <ksbrous@cox.net>
Sent: Thursday, October 5, 2023 2:20 PM
To: City Council <CityCouncil@scottsdaleaz.gov>
Subject: Against banner's new Scottsdale campus

⚠External Email: Please use caution if opening links or attachments!

We do not need another hospital in n scottsdale. PLEASE vote against Banner building a hospital!!! Our traffic is atrocious already and we do not want the extra sound or the extra lighting it will do to out "night skies". Please save Scottsdae from unneeded growth!!!!!!!

Sent from my iPhone
Susie Brousseau CLU ChFC CFP
Ksbrous@cox.net
602-509-5432 cell
Blackhawk Capital Partners
21090 N. Pima Rd.
Scottsdale, AZ. 85255
Susie@blackhawk-capital.com

To: City Council[CityCouncil@scottsdaleaz.gov]
Cc: paule.jackson[paule.jackson@icloud.com]
From: Jane Jackson
Sent: Wed 10/18/2023 11:10:14 PM
Subject: Please don't let Banner Health build a hospital in North Scottsdale
Received: Wed 10/18/2023 11:10:34 PM

Dear Scottsdale city council members:

Please don't let Banner Health build a hospital in North Scottsdale. It doesn't seem to make sense to have another hospital so close to Honor Health -- especially since Scottsdale is built out.

Also, it would be too confusing to the public. If we need to go to the emergency room, we know where to go: Honor Health, at any of their 3 locations in Scottsdale. Don't confuse us with a different hospital chain; it'll cause problems with logistics, finances, etc (e.g. if we're on a HMO). Too much hassle, confusion, time & money wasted!

Honor Health has a better reputation. Along with the Mayo hospital close by, and the Mayo Clinic, Scottsdale is doing very well.

cheers,

Jane Jackson, 13883 E. Paradise Lane, Scottsdale 85259

To: City Council[CityCouncil@scottsdaleaz.gov]
Cc: Mayor David D. Ortega[DOrtega@Scottsdaleaz.gov]
From: James Stievater
Sent: Wed 10/4/2023 4:39:23 PM
Subject: Opposed to North Scottsdale Hospital on Hayden & 101
Received: Wed 10/4/2023 4:39:38 PM

Hello all,

It has come to my attention that there are plans to build a new hospital on Hayden & the 101. As a Full-Time Resident in the area for the past 10 years I would like to express my STRONG DISAGREEMENT and dislike with this plan.

I reside in one of the neighborhoods on the N Hayden Rd that runs North of E Pinnacle Peak Rd. During my time here I have seen multiple new neighborhoods be developed that not only destroy the local scenery but have made the roads heading North from the 101 significantly more congested. During rush hour traffic the travel time has near doubled if not tripled when trying to get home from the 101 exits. The exits off the 101 to N Pima and N Hayden have also seen significant backups and delays because of increased traffic.

I believe placing a hospital in this area is totally unnecessary and inconsiderate of the residents here who are already dealing with issues of increased traffic congestion. Not to mention the Mayo Clinic is fully capable and, in my experience, has done great at handling the needs of the community at large. Mayo Clinic hospital is less than 10 minutes away from this new planned hospital so I hardly see the purpose this is fulfilling. In addition we are already dealing with extreme water scarcity and do not need more development to promote more water usage.

N Hayden Road has been CRITICAL in helping lessen the traffic congestion by allowing residents an alternate route instead of the N Scottsdale and N Pima roads north. Which often become heavily congested.

So I would like to reiterate please do not approve of this new hospital location, we do not need it, we do not want it.

Thank you for your time and consideration,

James Stievater on behalf of Michael & Nada Stievater

To: Mayor David D. Ortega[DOrtega@Scottsdaleaz.gov]
Cc: City Council[CityCouncil@scottsdaleaz.gov]
From: Bruce Stephens
Sent: Tue 10/10/2023 8:05:11 PM
Received: Tue 10/10/2023 8:05:37 PM

THERE IS NO APPARENT REASON FOR ANOTHER HOSPITAL IN NORTH SCOTTSDALE, OTHER THAN YOU ALL CAN'T GIVE BACK THE "DONATIONS" TO YOUR CAMPAIGN FUNDS.

THE "NORTH END" HAS HAS A RECENT EXPLOSION OF DEVELOPMENT WITH EXTREMELY HIGH DENSITY. THE TEST DRILLING (FOR WATER) AND ESTABLISHING PUMPING STATIONS, IS ONLY ROBBING WATER FROM THE SOURCE THAT'S ALREADY BEING SUCKED DRY. THERE IS NO NEW WATER DEPOSITS.

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Jennifer Early
Sent: Sat 10/14/2023 7:55:52 PM
Subject: Concern regarding potential new Banner hospital
Received: Sat 10/14/2023 7:56:08 PM

Hello,
I am writing as a concerned citizen of north Scottsdale regarding the opening of a hospital by Banner in my area. I was very surprised to hear that Banner may be building a hospital in north Scottsdale. This area of town is already well serviced by Mayo Clinic and HonorHealth. Adding another hospital to the mix would oversaturate our area with healthcare services, cause increased traffic and make the shortage of healthcare workers worse.
Please do not allow this to happen in our city.

Thank you,
Jennifer Early

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Nancy Davidson
Sent: Thur 10/5/2023 3:17:57 PM
Subject: Banner Hospital at Hayden and the 101
Received: Thur 10/5/2023 4:19:56 PM

When I moved here in 2012 I loved the openness of Scottsdale. The recent surge of development is making me rethink staying here. The traffic, noise and congestion are very concerning. Also, the beautiful mountain views have been replaced with high rise buildings. It's all very troubling. I'm starting to not recognize my city. Please veto the new Banner development. It's not necessary and will be problematic in so many ways.

Nancy Davidson
Pinnacle Peak
Scottsdale, 85255

Sent from my iPad

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Christa gimmelli
Sent: Wed 10/4/2023 6:54:33 PM
Subject: WE DO NOT NEED ANOTHER HOSPITAL AT HAYDEN & 101
Received: Wed 10/4/2023 6:54:58 PM

As a resident of the Grayhawk community I am writing this email to tell you we 100% DO NOT need another hospital at Hayden and the 101!!! We are well equipped with hospitals in the area. Adding another hospital so close will only congest the area further, increase the noise pollution, and increase the already high number of homeless people living in the area!!! In addition - we cannot support the water use with all of the additional high density housing going up in this area.

Tell Banner to go closer to Desert Ridge or go further north off of the Carefree Highway.

Sincerely,
Matthew and Christa Gimmelli

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Linda
Sent: Thur 10/5/2023 5:05:17 PM
Subject: We do not need another hospital
Received: Thur 10/5/2023 5:05:48 PM

I am a health care worker living in north Scottsdale. The hospitals presently serving us now offer excellent care and availability.

[redacted] I could have used Banner as I have been working at a Banner facility for more than twenty one years.
Having competition is needed to keep the hospitals looking to improve care and allow advances in overall improvement for patients and healthcare employees.
We do not need another hospital! The area where I live is some of the most beautiful I have seen. Don't spoil it by building an unnecessary hospital.

Sent from my iPhone

To: City Council[CityCouncil@scottsdaleaz.gov]
From: Maziyar Kalani
Sent: Sun 10/8/2023 5:27:55 PM
Subject: Reference 5-ZN-2023
Received: Sun 10/8/2023 5:28:22 PM

This is regarding the proposed Banner hospital at 101 and Hayden road.

I am opposed to this. The corridor has enough hospitals and the quality of Banner care is abysmal to begin with. The traffic it will generate will also be unnecessary. Make it a park or some kind of open space.

MK

Sent from my iPhone

EXHIBIT E

C.A.R.E (Citizen Advocating for Residential Excellence)

Petition summary	I oppose a new, unnecessary hospital on the southwest corner of Hayden and the 101 that, if approved for rezoning, will exacerbate a shortage of medical professionals for Scottsdale and increase area traffic. Scottsdale already has quality hospitals, including HonorHealth, to meet our city's needs well into the future.
Petition Action	We, the undersigned, urge the Scottsdale Mayor and City Council to say NO to Banner Health's unnecessary request to rezone.

Printed Name	Signature	Address	Email	Date
Amy Thomas	Amy Thomas	14388 N. 91st Street Scottsdale		12/16/23
ANN NELSON	Ann Nelson	9074 E Gelding 85260		12-16-2023
Rosie Holelien	Rosie Holelien	14825 N. 97th Pl Scottsdale Az		12/16/23
Susan Bonnell	SB	9809 E Blanche Scottsdale 85260		12/16/23
Danna Spencer	Danna Spencer	9091 E Evans Dr Scottsdale Az 85260		12-16-23
DAVID R. HOFERICH	David Hoferich	14825 N 97TH PL SCOTTSDALE		12/16/2023

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Printed Name	Signature	Address	Email	Date
	MARK GIEBELHAUS	3026 E ROCKLEDGE RD PHX AZ 85048		11/11/23
Holly Pendleton	Holly Pendleton	643 W MUIRWOOD Dr Phoenix, AZ 85045		11-11-2023
Mona Mellagard		1601 Evia de Corta Scottsdale 85258		11/11/2023
Sonja Clark	Sonja Clark	2595 E Wood Pl Chandler 85249		11/11/23
margart Creldon		2940 N 83rd St Scottsdale AZ 85251		11/11/23
BARBARA MCMULLEN	Barbara K McMullen	9822 N. 77th St SCOTTSDALE AZ 85255		11/11/23
Allison Gillbreth		6721 E. Phelps Rd Scottsdale AZ 85254		11/11/23

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Printed Name	Signature	Address	Email	Date
Irene Gabner		7140 w Villa Linda Dr 85383	Tcarmina@hotmail.com	11/4/23
John Flowers		7440 65th Dr 85283	John Flowers	11/4/23
Lizz Woody			steppchistyle2@gmail.com	11/4/23
Laurie Shield		19119 N 94th St Scottsdale AZ		11/4/23
Gary Sathay		2446 W Coyote Crook Dr. Anthem 85086		11/17/23
Marcia Portwood	Marcia Portwood	35413 N 34TH AVE Phoenix AZ 85086		11/17/23
Linda Bardon	Jordan Bardon	14416 N. Silverado Drive AZ 85260		11/17/23

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Printed Name	Signature	Address	Email	Date
James Bassett		11359 N 114th Ave Youngtown Az	jamesbassett9@Gmail	11-4-23
Amy Diaz	Amy S Diaz	10950 E Salvador Scottsdale	amy.diaz@ymail.com	11/4/2023
Ursula Amison	Ursula Amison	8951 N. 70th Str Scottsdale 85251	uamison132@gmail.com	11/4/23
Kipiny Hw	Kipiny Hw	2001 N scottsdale Rd, Scottsdale 85257	whomadmao@gmail.com	11/4/23 11/4/23
Jay White	Jay White	Tempe AZ	wisdom.of.evolution@gmail.com	
Kimberly Baber	Kimberly Baber	5129 N. 75th St #332 PMB 85014	Kimberlydbabermeade@gmail.com	
George Turner	George Turner	10050 E Mountain View Lake Dr. Scottsdale, AZ 85257		11/4/23
Liz Turner	Liz Turner	11 11		11/4/2023

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Printed Name	Signature	Address	Email	Date
Tracy Arctil	Tracy Arctil	9718 E Celtric Dr Scottsdale		11/12/2023
Dora Luja	Dora Luja	14237 N Westminster Place Fountain Hills		11-12-2023
Patricia A. Williams	Pat Williams	11829E Gold Dust Ave Scottsdale 85259		11/12/23
Denise Lockwood	Denise J. Lockwood	10835 E La Junta Rd Scottsdale AZ 85255		11/12/23
	Jeremy Foster	3814 W Florian Ct. Anthem AZ		11/13/23
JOHN FOX		1564 W [illegible] Anthem 85086		~~11/13/23~~ 11/13/23
Barbara Hallett	Barbara Hallett	39510 N MESSNER WAY ANTHEM, AZ 85686		11-13-23

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Printed Name	Signature	Address	Email	Date
ELROY THOMAS		8921 E Fairway Blvd Sun Lakes 85248		12/9/2023
Patricia Thomas	Patricia A Thomas	IN III		12-9-23
Evelyn BURRIER	Evelyn B.	15623 W. Ballad 85375		12/9/23
Marjorie Barton	Marjorie Barton	13230 W Prospect Dr		12/9/2023
DORIS HAMEL	Doris Hamel	21603 N. Yellowstone Ct.		12-9-23
Randy Hellwege	Randy Hellwege	4242 West Sentinel		12-9-23
Alan Nicol	ALAN NICOLL			12/9/23

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Printed Name	Signature	Address	Email	Date
Jeffrey Apoduck		8741 E. Solano Dr. Scottsdale AZ 85250		11/12/23
Sarah Dorn		8432 E. Gary Rd. Scottsdale 85260		11-12-2023
Tamara Kaye		25555 N. Windy Walk Dr.		11/12/2023
Fred Schneider		11430 E Pinon Dr Scottsdale AZ 85253		11/12/2023
CONAY Huizar		11030 N 120th Drive Scottsdale AZ 85259		11-12-23
Jennifer Kelly		31225 N. Black Cross Rd Scottdale 85266		11/12/23
Sherry Gavin	Sherry Gavin	7675 E Proxiletal Scottsdale AZ 85266		11/18/23
	Aaron Katz	9772 E Sands DR Scottsdale AZ 85255		11/18/2023
CAROL ANN NASO		15529 E Palisades Blvd	Fountain Hills	11/18/23
B Salt	Bryan Spitholt	9718 E Celtic Dr Scottsdale		11-18-23
April Riggins		8777 E Camino del Norte Scottsdale		11-18-23
Deborah Moore		15529 E. Palisades Blvd Fountain Hills		11/18/23

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Printed Name	Signature	Address	Email	Date
Briana Johnson	[signature]	13020 N. 96th Pl Scottsdale 85260	brianaleighj@gmail.com	11/4/23
Cam Benally	[signature]	1939 N. Sandal Mesa, 85205	cjbenal3@asu.edu	11/4/23
Austin Meissner	[signature]	3305 Silver dr [illegible]	austin meissner [illegible] .com	11/4/23
Shanelle Cruz	[signature]	1979 E Rio Salado Pkwy Apt 3017 Tempe 85288	runwaydreams@gmail	11/4/23
[illegible]	[signature]	1133 E [illegible] Dr Phoenix AZ 85042		11/4/23
Greg Pishko	[signature]	5731 E. Windstone Trl Cave Creek AZ 85331		11/4/23
Melanie Foster	[signature]	433 E Terrace Ave Gilbert AZ 85234	melefoster@gmail.com	11/4/23
Jovunni [illegible]	[signature]	1050 SW 215th Beaverton [illegible]	Jovunni.[illegible]@ymail	11/4/23
Hayley Kinard	[signature]	112 W 3rd Pl, Mesa AZ 85201		11/4/23
Jenn Bassett	[signature]	11359 N 114th Ave Youngtown, AZ		11/4/23
[illegible]	[signature]	14[illegible] S [illegible] Rd Tempe AZ	[illegible]	11/4/23
Sharese Madden	[signature]	7677 W Paradise Ln	Sharesemadden[illegible]@yahoo.com	11/4

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Printed Name	Signature	Address	Email	Date
George Khalaf		13020 N. 96th Place Scottsdale		11/4/23
Max Fuss		945 E Playa Del Norte Dr		11/4/23
Keaveny		4713 S Aileen Ln		11/4/23
Briel Gatkin		17701 W Bell rd		11/4/23
Ashanti Crudder		4425. E. McDowell Rd		11/4/23
Tunisia Isaac		8650 S Kyrene Rd Unit 1241 Tempe AZ		11/4/23
[illegible]		20100 7E 7th place		11/4/23
Jeff Raff		15050 N. Thompson		11/4/23
Danielle Wood		818 W. Rancho Tanis St.		11/4/23
Jaclyn R		[illegible]		11/4/23
Vanessa		4213 N miller rd		11/4
Sara Ruiz		112 W. 3rd Pl		11/4

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Printed Name	Signature	Address	Email	Date
Cindy Heller	Cindy L. Heller	9426 E Palm Tree Scottsdale AZ 85255		12/13/23
PAUL SMITH	Paul Smith	9356 E. PALM TREE Dr. SCOTTSDALE AZ 85255		12/13/23
Debra Smith	debra smith	11 14		12/13/23
STEPHEN S.		19204 N. 93 RD Scottsdale 85255		12/15/23
Kristey Cohen	Kristey Cohen	18624 N 95th St Scottsdale AZ 85255		2-19-2
Hadara Carol	Hadara Carol	9468 E. Palm Tree Scottsdale AZ 85255		12-19-23
Sam Brandt	Sam Brandt	11434 E Cottontail Rd Cave Creek 85331		12-19-23
William Hewell	Ww	18254 N 95th Way Scottsdale Az 85255		12/19/23
Robert Schuman	Robert Schuman	19102 N 94th St 85255		12/19/23
ANN SHILSTRA	ann s.	9381 E Rockwood Dr		12/19/23
Laura P	Laura Picard	18857 N 95th St. Scottsdale AZ		12/19/23
Diana Bagley	Diana Bagley	18853 N 95th Way Scottsdale. AZ 85255		12/19/23

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Printed Name	Signature	Address	Email	Date
Nancy M Pipher	Nancy M Pipher	4909 East Poinsettia Dr.		12/2/23
GERALD JONES	Gerald Jones	11615 N 50TH ST		12-2-23
Daniel Fuentes		1116 N. Longmore Street Chandler AZ		12-2-23
Christine Halstead	Christine Halstead	26632 N 206th AVE 85361		12/2/23
Steve Spracken	Steve Spracken	11602 N. 50th Pl Scdl, AZ		12/2/2023
Vikki Thomson	Vikki Thomson	Phoneix AZ 85254		12/2/23
TOM MAXSON	TOM MAXSON	20365 N 109TH AVE 85373		12/3/2023
Orion Head		19419 N 14th Pl Phx, Az		12/3/2023
Eric McComis		19420 N 8th St Phx AZ		12-3-23
Don Eastman		19426 N 8th Place Phx AZ		12/3/2023
	Kirk Yount	9863 E Blanche 85260		12/3/23

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EXHIBIT F

DAILY INDEPENDENT

(/)

OPINION

Weller: North Scottsdale needs more doctors and nurses, not another hospital

Posted Wednesday, July 19, 2023 2:53 pm

By Sasha Weller, president, Scottsdale Fire Fighters Association | Guest Commentary

Why is the Scottsdale Fire Fighters Association opposing Banner Health's proposed new hospital and helipad near Hayden and the Loop 101? The short answer is quality healthcare is dependent on healthy hospitals.

North Scottsdale already has great medical care. An unneeded hospital puts that quality care in jeopardy.

As president of the Scottsdale Fire Fighters Association, I understand the problems that come with a shortage of medical professionals and support staff. Arizona is in the bottom 10 in the United States when it comes to the number of nurses per capita, according to Becker's Hospital Review. The U.S. Department of Health and Human Services says Arizona is short more than 650 primary care physicians. Banner's proposed hospital near Hayden and the 101 would exacerbate the problem.

More hospitals do not mean more doctors and nurses.

Led by Mayo and HonorHealth, north Scottsdale is already served by multiple outstanding medical facilities and hospitals that are meeting the challenges associated with a tight labor market. According to recent polling among Scottsdale voters, healthcare remains last of all community concerns. This is a testament to our existing system and its choices.

However, an over-saturation of hospitals puts quality care at risk. This is not more "competition." This is just unwise. An unnecessary hospital could lead to increased wait times at all hospitals, and increased costs because of a shortage of medical professionals, support staff, and resources.

North Scottsdale is not lacking excellent healthcare. To reiterate: in recent public opinion surveys, availability of healthcare services ranked last among the concerns of Scottsdale voters, but traffic was ranked first. HonorHealth and Mayo have been serving the area for decades with the capacity to add services to meet any future needs for the area.

Staff shortages at medical facilities can also greatly slow down first responders. If a hospital doesn't have enough staff, our fire fighters must stay at the hospital until a patient is handed off to hospital staff.

The Level 1 trauma center at HonorHealth Scottsdale Osborn Medical Center serves all trauma patients in Scottsdale with the highest level of resources. To retain top level physicians, specially trained staff, and the latest technology, hospitals must treat a certain number of trauma patients annually to be certified as a Level 1 trauma center. Without those patient volumes, the trauma center would lose certification and that service could close.

HonorHealth Scottsdale Osborn Medical Center and HonorHealth Scottsdale Shea Medical Center are certified stroke centers. Osborn is also a Primary Stroke Center Plus, the only Arizona hospital to achieve this designation. To maintain these designations, the volume of patients needs to support the additional resources the hospital invests to achieve these patient critical designations.

For years we have worked with HonorHealth on quality improvement initiatives such as heart monitors that transmit directly from the ambulance to the hospital and physician, allowing us to treat heart attack patients when seconds count.

Our fire fighters trust HonorHealth and Mayo. We have partnered with them for decades to meet the healthcare needs of the community. It's one reason why Scottsdale is the envy of the Valley in terms of healthcare.

There are also quality of life issues for many neighborhoods and tens of thousands of residents near Hayden and the 101. Hospitals do generate a lot of traffic. Just look at 92nd Street and Shea Boulevard. A new and unneeded hospital would create unwanted traffic. Scottsdale is a great city, but traffic can be a challenge. Why make it worse, unnecessarily?

The Scottsdale Fire Fighters Association is engaged in this issue because we realize the quality healthcare infrastructure we have built over the last several decades is at risk if there are too many hospitals in an area and not enough need.

When it comes to emergency services, it makes no sense to cluster all your fire stations in just one part of the city. The same is true for hospitals. Simply put, Banner's proposal should be rejected by the Scottsdale City Council, not because of who is proposing it, but because of what is being proposed.

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MACHINING A WINNER
East Valley robotics team looking to claim victory in Robotics World Championship
By Connor Van Ligten
INDEPENDENT NEWSMEDIA
Desert Ridge High School in Mesa has one of the best robotics teams in all of Arizona. They now have a chance to prove they are one of the best in the world as they prepare for the VEX Robotics World Championship in Dallas, which takes place in late April.
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VEX, a robotics company owned by Innovation First Inc., organizes the worldwide competition that features teams from around the U.S. as well as international teams from China and Japan. Last year, the 99067B Nano Jagwires team from Desert Ridge made it to the top 16 of the World Championships.
See Robotics on page 10
DESERT RIDGE HIGH SCHOOL
2024
The Desert Ridge robotics roster that competed in the 2024 AIA State Championship. (Wendi Harden)

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EXHIBIT G

DAILY INDEPENDENT

(/)

OPINION

Wagner: Banner hospital unwanted, unneeded in Scottsdale

Posted Friday, August 25, 2023 11:42 am

By Shirley Wagner | Scottsdale

My relationship with HonorHealth goes back to 1977, when I started working at Scottsdale Memorial Hospital as a nuclear medicine technologist.

The system has had name changes over the years, but quality patient care has always been the top priority. Physicians that practice at the hospital are innovative and forward looking.

Upon retiring, I have continued my relationship with HonorHealth by volunteering at the Thompson Peak campus. Thompson Peak Medical Center was recently awarded a 5-star rating by the Centers for Medicare and Medicaid Services. Two of the five hospitals in the state awarded this rating serve the north Scottsdale community. The other hospital awarded this 5-star rating is the nearby Mayo Clinic Hospital/Phoenix.

As a longtime and involved resident of Scottsdale, I am opposed to the construction of a Banner hospital at the southwest corner of Hayden Road and the 101 freeway — it is simply not needed. The north Scottsdale area already has the highest quality hospitals with plenty of proven bed capacity and expertise to meet our healthcare needs now and decades into the future.

HonorHealth accepts all major insurances, so Scottsdale residents do not need to travel out of the area to access high quality healthcare. The water usage of the proposed hospital would add additional burden to Scottsdale's already taxed water supply.

The traffic on Hayden Road is already very heavy, the addition of hundreds of vehicles/day would be chaotic. An additional hospital in the area would exacerbate workforce staffing shortages. An unnecessary new hospital will not create more physicians and nurses but rather further strain the workforce.

I hope Mayor Ortega and the Scottsdale City Council will put Scottsdale residents first and say no to an unwanted and unneeded hospital near Hayden and the 101.

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Vol. 2 No. 283

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EXHIBIT H

Mar 20, 2023 09:00 AM MST

Banner Health to build medical campus in Scottsdale

Acute care hospital and cancer center will support growing Northeast Valley

SCOTTSDALE, Ariz. (March 20, 2023) – Banner Health is finalizing the purchase of +/- 48 acres of land on the southwest corner of Hayden Rd. and the Loop 101 freeway to build a new, comprehensive medical center and support services in the Northeast Valley of metro Phoenix.

With an investment of more than $400 million, the project will include an acute care hospital, adjacent medical office building and a cancer center. Banner Scottsdale Medical Center will be a full-service, destination hospital with a focus on key areas of distinction for Banner, including cardiovascular, orthopedics, cancer and neuroscience programs. This new, digitally enabled medical center will provide seamless integration with Banner's ambulatory and virtual sites of care, furthering Banner's mission of

making health care easier so life can be better. The project complements Banner's comprehensive, market-wide network and brings Banner services and options to those who work and live in the Northeast Valley.

The Northeast Valley population is projected to grow by more than 17% in the coming decade. As part of this growth, it is expected that Banner's insurance products will expand in the region as well, with more covered lives residing in the area. Banner is committed to expanding services ahead of this growth to ensure easy access to care for Scottsdale residents and Banner plan members. Banner's health insurance division currently has approximately 50,000 members who reside in the Northeast Valley. Many of these members participate in value-based health plans that require convenient and affordable care.

"Our strategic growth plan is focused on convenience and access, with facilities close to home for our patients, members and their families," said Scott Nordlund, chief strategy and growth officer for Banner Health. "Scottsdale is a natural growth area for Banner, and we are committed to ensuring our patients and health plan members have care close to where they work or live when they want and need it."

The four-story, 384,000-sq. ft. Banner Scottsdale Medical Center is expected to open in 2026 with 106 licensed patient beds and 20 observation beds, along with shelled space for expansion as the community grows. The medical office building will house physician offices, specialty care and other clinical services. Banner has partnered with SmithGroup for the project design and Okland Construction as the contractor.

This medical campus project will create high-quality jobs and employment opportunities in Scottsdale, with 1,000 health care related jobs over the next five years and 2,500+ jobs at full development. Construction and ancillary jobs will also be associated with the facility development.

Banner's existing presence in the market includes primary care clinics, specialty clinics, urgent care locations, outpatient imaging, physical therapy centers and the Banner Behavioral Health Hospital in Scottsdale, which has provided inpatient and outpatient behavioral health services to the community for more than 40 years.

Banner Health is the leading health care provider across metro Phoenix, recognized for expanding existing and building new hospitals and ambulatory care sites to meet health care needs as communities grow. Recent projects include:

- Opened Banner Ocotillo Medical Center in Chandler in November 2020, which was Banner's 13th hospital in the metro Phoenix market.
- Opened the new women's tower on the Banner Desert Medical Center campus to serve women from childbirth to senior care.
- Opened a new patient tower on the Banner Gateway Medical Center campus to expand cancer care services and women's health care.
- Opened Banner Health Center *plus* in the Arcadia neighborhood at 44th St. and Camelback.
- Soon to open Banner Sports Medicine Scottsdale, a comprehensive sports medicine and high-performance center for athletes of all ages and skill levels, from youth to professional.
- Announced plans for a new hospital in Buckeye, Ariz.

Banner Health is one of the largest, secular nonprofit health care systems in the country. In addition to 30 acute-care hospitals, Banner also operates an academic medicine division, Banner – University Medicine, and Banner MD Anderson Cancer Center, a partnership with one of the world's leading cancer programs, MD Anderson Cancer Center. Banner's array of services includes a health-insurance division, employed physician groups, outpatient surgery centers, urgent care locations, home care and hospice services, retail pharmacies, stand-alone imaging centers, physical therapy and rehabilitation, behavioral health services, a research division and a nursing registry. To make health care easier, 100% of Banner-employed doctors are available for virtual visits, and Banner operates a free 24/7 nurse line for health questions or concerns. Patients may also reserve spots at Banner Urgent Care locations and can book appointments online with many Banner-employed doctors. Headquartered in Arizona, Banner Health also has locations in California, Colorado, Nebraska, Nevada and Wyoming. For more information, visit bannerhealth.com.

Banner Buckeye Medical Center | Banner Health | Banner Ocotillo Medical Center | Banner Scottsdale Medical Center | Banner Behavioral Health Hospital | Banner Desert Medical Center

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For further information contact us at: media@bannerhealth.com

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EXHIBIT I

Commercial Real Estate

Banner Health eyes medical offices in Scottsdale as part of large hospital campus

A conceptual rendering of Banner Health's proposed medical office building in north Scottsdale.

BANNER HEALTH VIA CITY OF SCOTTSDALE

By Ron Davis – Reporter , Phoenix Business Journal
Mar 26, 2024

Listen to this article 4 min

The first piece of a major hospital campus in north Scottsdale is up for review by the city.

Phoenix-based Banner Health filed an application to approve design plans for a new three-story 119,500-square-foot "Banner Health Center Plus" medical office building on just under 15 acres near Loop 101 and Hayden Road. This is part of a $400 million hospital campus Banner is planning on 48 total acres at the site.

Banner Health Center Plus would serve as an outpatient medical office that would be home to a comprehensive M.D Anderson oncology program, clinic space for Banner University Medical Group, urgent care, family pharmacy, an ambulatory surgery center and more. It is anticipated that the Banner University Medical Group clinics will occupy the entire second floor of the building, according to Banner's application.

A date for the application to be heard by Scottsdale's development review board is to be determined, though the city will likely give feedback to Banner before the project is heard by the board, said David Leibowitz, a spokesman for Banner on this project. With the zoning in place for the site, approval from the DRB would allow Banner to proceed with building the medical office.

As of March 25, Leibowitz said the tentative goal is to have the medical office built by the end of 2025. Banner Health Center Plus will employ about 220 people upon opening.

Banner is working with Phoenix-based SmithGroup for the project design and Dibble Engineering for the civil engineering on the project. Susan Demmitt of Gammage & Burnham PLC is the land-use counsel working with Banner for its application.

Banner has other Valley projects in the works

The entire medical campus is expected to employ some 2,500 workers at full development. In addition to the Banner Health Center Plus, plans also include a four-story hospital and cancer center, according to previous reporting. The hospital is projected to open in 2026.

Banner has two other "Plus" centers in the Valley in Glendale at 7701 W. Aspera Blvd. and at The Grove in Phoenix's Arcadia neighborhood. Developer Red Development sold the

Plus center to Austin, Texas-based Virtus Real Estate Capital in early 2023 for $48.5 million.

Hayden Loop 101 Investors LLC, an entity traced to Scottsdale-based De Rito Partners Development, was the winning bidder of an 85.6-acre site at the southwest corner of Hayden and Loop 101 at a state land auction in April 2022. Banner bought its land for the hospital campus in 2023 from De Rito for $57.6 million, according to an affidavit of property value.

The site for Banner's hospital campus is surrounded by other big-ticket projects such as the Cavasson mixed-use campus, One Scottsdale, ASM America, Optima McDowell Mountain Village and more. Axon Enterprise Inc. is looking to develop a 74-acre site into an office headquarters campus with retail, a hotel and multifamily just to the east of Banner's land. That project has been tabled indefinitely after Scottsdale Planning Commission granted a continuance at a February meeting.

The site is a few miles east of Mayo Clinic's north Phoenix hospital campus, where it's wrapping up a $748 million expansion of its campus and is in the process of developing a 120-acre medical and research campus.

EXHIBIT J

PLANNING & DEVELOPMENT

Banner Planning First Project on N. Scottsdale Campus

Banner Health has filed an application with the **Scottsdale Development Review Board** for its 119.5KSF **Banner Health Center Plus** medical office building on the 48-acre healthcare campus site it owns near Hayden Road and Loop 101.

The initial project is planned for 15 acres of the overall site and will include space for an **M.D. Anderson** oncology program, **Banner University Medical Group**, an urgent care, a family pharmacy and an outpatient surgery center.

The Scottsdale **DRB** has not yet set a meeting date to review the proposal.

Project representatives said the MOB is planned for delivery by the end of next year.

SmithGroup is the project design firm, and **Dibble Engineering** is the civil engineer. The project is represented by law firm **Gammage & Burnham PLC**.

ON THE JOB

BANNER HEALTH CENTER PLUS, SCOTTSDALE

VOLUME: **119.5KSF**

OWNER: **BANNER HEALTH**

DESIGN FIRM: **SMITHGROUP**

GC: **OKLAND CONSTRUCTION**

DATABEX PROJECT ID: #6339

Other plans for the site include a four-story hospital and cancer center that are targeted for a 2026 opening. (Source)

Credit: SmithGroup/City of Scottsdale

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EXHIBIT K

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Gammage & Burnham is extremely proud of our partners **Susan Demmitt** and **Ashley Zimmerman Marsh** who are playing substantial roles in the first piece of a major hospital campus in north Scottsdale which is up for review by the city. Read more about it here!
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March 11, 2024

blane@scottsdaleaz.gov
Mr. Ben Lane
City Clerk
City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

RE: Zoning Interpretation Appeal – Snell & Wilmer on behalf of HonorHealth

Dear Mr. Lane:

Gammage & Burnham, PLC represents Banner Health ("Banner"). Banner operates multiple medical services facilities within the City of Scottsdale ("City") and has proposed a new medical center campus including a hospital on property owned by Banner at the southwest corner of Hayden Road and the Loop 101 Freeway. We are in receipt of two letters from Snell & Wilmer, submitted to the City on behalf of HonorHealth, dated February 23, 2024 that purport to appeal letters issued by Zoning Administrator Erin Perreault on January 30, 2024, in which the Zoning Administrator declined to issue any interpretation of the Scottsdale Zoning Ordinance ("SZO") because the initial requests for interpretation were "hypothetical" and were not related to a specific development proposal. Because Banner and its proposed development are the true and express target of the Snell & Wilmer interpretation requests, we are compelled to share our thoughts regarding the aforementioned appeals. For the following reasons, we submit that the Zoning Administrator's January 30 letters are not subject to appeal and should not be scheduled for review by the Board of Adjustment.

By way of background, the Zoning Administrator's authority under Arizona law is limited to responsibility for "enforcement" of a zoning ordinance (A.R.S. § 9-462.05(C)). Absent a connection to enforcement, the Zoning Administrator has no authority to issue "interpretations" or "other decisions" that are merely views on hypothetical scenarios. Likewise, the SZO recognizes that the Zoning Administrator's authority is limited to enforcement of the zoning ordinance (SZO 1.201).

The Zoning Administrator's January 30 letters adhered to (and expressed) these principles. The first letter (concerning the definition of "Hospital" and "Office") noted that the Zoning Administrator "cannot provide an interpretation" in the absence of "a development proposal" containing "details relating to the proposed use of property." Similarly, the second letter (concerning the Utilization of "Office" to Circumvent Definition of "Hospital") concluded that the Zoning Administrator "cannot provide an interpretation" because the request "concerns a hypothetical scenario."

Importantly, the Board of Adjustment's authority (both under Arizona law and emanating from the SZO) is rooted in enforcement of a zoning ordinance and is limited to hearing and deciding appeals from interpretations or decisions of the Zoning Administrator.

Simply put, the January 30 letters are not "interpretations" or "other decisions" that can be appealed under the SZO. The SZO 1.202(A) requires the Zoning Administrator to "respond in writing" to all requests for interpretations and declares that all "responses" are available for public review. In this case, as required, the Zoning Administrator provided a "response" in writing but makes clear in her response that she is not providing an interpretation. Such a response should not be conflated with an actual "interpretation" or "other decision." What reasonably follows is that not all "responses" can be appealed under SZO 1.202(B)—only responses that are "interpretations" and "other decisions" regarding the SZO are subject to appeal. Any other outcome would result in such an expansive definition of "interpretation" or "other decision" that almost any statement or response from a city official could be appealed. Further, as noted, the Board of Adjustment's authority is limited to hearing and deciding appeals of actual interpretations or other decisions in pursuit of property enforcing the requirements of the SZO. In this case, the purported appeal does not seek a different interpretation, but instead is aimed at forcing the Zoning Administrator to act. It is not within the scope of authority of the Board of Adjustment to tell the Zoning Administrator what to do. As stated previously, the Zoning Administrator's response in this case is neither an "interpretation" or an "other decision" and is not subject to appeal.

In support of this opinion, case law from other jurisdictions confirms that when a zoning administrator addresses preliminary or hypothetical cases, they do not constitute appealable "decisions." Holt v. Stonington Bd of Zoning Appeals, 968 A.2d 946 (Conn. App. 2009); 3 Rathkopf's The Law of Zoning and Planning § 57:44 (a preliminary or advisory opinion from a zoning administrator is "not a decision subject to appeal.") A fortiori, an express declination to issue an interpretation does not constitute an "interpretation" or "other decision" that is subject to appeal.

We respectfully request that you consider these views as this matter proceeds.

Sincerely,

GAMMAGE & BURNHAM

By 
Susan E. Demmitt

Cc: Ms. Erin Perreault, AICP, Zoning Administrator - City of Scottsdale

/sed

EXHIBIT M

To: Bloemberg, Greg[GBLO@Scottsdaleaz.gov]
From: President Stonebrook II
Sent: Tue 3/26/2024 8:29:21 PM
Subject: Re: Banner
Received: Tue 3/26/2024 8:29:40 PM

Hi,

That's exactly the information I needed! Thank you so much.

On Tue, Mar 26, 2024 at 1:28 PM Bloemberg, Greg <GBLO@scottsdaleaz.gov> wrote:

Hello Susan,

My understanding is Banner is still exploring their options for the zoning case. Staff sent them 1st review comments and we are now awaiting a resubmittal.

In the meantime, they have submitted a DRB application for a medical office building on the site (6-DR-2024). The site already has C-2 zoning, which allows medical offices by right subject to DRB approval, so no zoning action is required. The zoning case is more for the hospital than anything else. The site does not have zoning for a hospital at this time.

Let me know if you have any additional questions.

Regards,

Greg Bloemberg

Principal Planner

Current Planning

City of Scottsdale

e-mail: gbloemberg@scottsdaleaz.gov

phone: 480-312-4306

From: President Stonebrook II <stonebrookiipres@gmail.com>
Sent: Tuesday, March 26, 2024 11:41 AM
To: Bloemberg, Greg <GBLO@scottsdaleaz.gov>
Subject: Banner

Hi Greg,

Can you please help me understand where Banner is in the review and approval process for 5-ZN-2023? They presented again to our community at a recent board meeting and I believe they said they are at DRB review? I could be wrong about that though. Also, at what point during project reviews does an applicant go before the DRB (after the planning commission or?)

Thanks in advance, hope alli is well.

--

Susan McGarry | President | Scottsdale Stonebrook II HOA

C: 760-994-6368

INDEX OF AUTHORITIES

ZONING INTERPRETATION **CITY OF SCOTTSDALE**

NUMBER: 2002-2
DATE: August 1, 2002
SUBJECT: The definition of Adult Care Homes.
Sect. 3.100, pg. 4949. Definitions. General. Adult care homes.
Sec. 5.012(A)(2). District Regulations. R1-190 single-family residential district. Use regulations. Permitted uses. Adult care homes.
Sec. 5.102(A)(2). District Regulations. R1-43 single-family residential district. Use regulations. Permitted uses. Adult care homes.

PURPOSE: There have been several requests for clarification regarding whether adult foster care and assisted living homes are covered by the criteria for adult care homes found in the Zoning Ordinance of the City of Scottsdale. This is because the State of Arizona has changed the statutory names and definitions of Adult Care Homes. This interpretation is meant to clarify that the criteria for these homes be applied to facilities with the new statutory names and definitions.

DETERMINATION: Adult Care Homes shall mean an adult foster care or assisted living home that is an assisted living facility defined by A.R.S. § 36-401. These definitions are included here for clarification and are not meant to replace the definition of adult care home found in the Zoning Ordinance of the City of Scottsdale.

6. "Adult foster care" means a residential setting which provides room and board and adult foster care services for at least one and no more than four adults who are participants in the Arizona long-term care system pursuant to chapter 29, article 2 of this title and in which the sponsor or the manager resides with the residents and integrates the residents who are receiving adult foster care into that person's family.

10. "Assisted living facility" means a residential care institution, including adult foster care, that provides or contracts to provide supervisory care services, personal care services or directed care services on a continuing basis.

11. "Assisted living home" means an assisted living facility that provides resident rooms to ten or fewer residents.

The criteria for adult care homes established in Sec. 5.012(A)(2) and Sec. 5.102(A)(2) of the Zoning Ordinance of the City of Scottsdale shall apply to adult foster care and assisted living homes.

Written by:

LISA COLLINS
CUSTOMER SERVICE & COMMUNICATIONS DIRECTOR
Dated 8/1/02

Approved by:

JERRY STABLEY
ZONING ADMINISTRATOR
Dated 8/7/02

ZONING INTERPRETATION RECORD

Subject of Interpretation:

Public safety radio communications sites, including monopoles, antennas, equipment shelters, cable, cable trays, generators, back-up power supplies and other required appurtenances for the operation of radio communications for fire, police, first responders, government contractors, and municipal employees.

Zoning Ordinance Section Number:

S.R.C. Appendix B, Article III, Section 3.100

Title of Section:

Article III. Definitions. Sec. 3.100. General

Cause for Interpretation:

Clarify that public safety radio communications sites used solely to provide radio communications to local, state and federal government agencies for the safety and good of the general public fall within the Zoning Ordinance's definition and regulations of a "municipal use" rather than the Zoning Ordinance's definition and regulation of a Wireless Communication Facility.

Interpretation:

Pursuant to Section 3.100: A *Wireless communications facility (WCF) means a facility for the transmission and/or reception of radio frequency signals, including over-the-air broadcasting signals, usually consisting of antennas, equipment cabinet, a support structure, and/or other transmission and reception devices. Exemption: ham radio, amateur radio facilities, commercial radio and television broadcasting towers, and point-to-point end-user facilities less than one (1) meter in diameter;* and a

Municipal use means any use provided to the general public which is operated by or contracted for by the city. Municipal use shall not include any vehicle, bicycle, equestrian, or pedestrian right-of-way dedications or easements or scenic dedications or easements, single purpose flood control corridors, or utilities which are located underground.

Public safety radio communication sites are a "Municipal use" as defined in this section rather than a "WCF." Public safety radio communications sites provide radio communications to individuals in local, state and federal government agencies that have responsibility for protecting life and property along with the execution of other municipal services that are required to maintain a safe environment for residents, businesses and visitors. The City of Scottsdale either operates or contractually participates in the use of public safety radio communication sites for the good of the general public, including using them to facilitate emergency personnel response to calls for service. As such, public safety radio communications sites fall within the Zoning Ordinance's definition of a "municipal use" and shall be regulated as a "municipal use" rather than as a "WCF."

Interpretation By	Date	Approved By
Keith Niederer Senior Planner	10/17/2008	Connie Padian Zoning Administrator

ZONING INTERPRETATION RECORD

Subject of Interpretation:

Request for quantification of the terms "substantial" and "significant" in relation to an "adult novelty store" use.

Zoning Ordinance Section Number:

Article III, Section 3.100

Title of Section:

Definitions; General

Cause for Interpretation:

On March 25, 2009, a request was made by Sender & Associates Law Offices for an interpretation of the terms "substantial" and "significant" as they are used in the definition of "adult novelty store" under Article III, Section 3.100 of the Scottsdale Zoning Ordinance.

In pertinent part, the Scottsdale Zoning Ordinance defines "adult novelty store" as "...any commercial establishment having as a substantial or significant portion of its stock and trade instruments, devices, or paraphernalia which are designed for use in connection with specified sexual activities, excluding condoms and other birth control and disease prevention products." The ordinance does not include a separate definition of the terms "substantial" or "significant" because these are commonly understood words used in everyday language.

The request for interpretation asserts that use of the term(s) "substantial or significant" should be interpreted to mean "a commercial establishment would become an adult novelty store only if at least fifty percent (50%) or more of its stock and trade includes instruments, devices or paraphernalia for use in connection with specified sexual activities". 50% or more would commonly be referred to as at least half or a majority of its stock in trade.

Interpretation:

Generally, the City ordinances are interpreted to give full effect to their intent. In determining the intent of the ordinance, one must consider the ordinance as a whole and give harmonious effect to all its sections; however, where the language is susceptible to more than one interpretation, a reasonable interpretation must result. By reading the word in the context of this ordinance, rather than trying to analyze each word in its isolated form, a reasonable interpretation serving the purpose of the ordinance can easily be accomplished.
In the area of the regulation of adult businesses, the City's intent is to regulate the location of adult uses, such as adult novelty stores, to prevent the spread of adverse, if unintended effects associated with adult businesses, which include crime, nuisance, the deterioration of residential and commercial neighborhoods, as well as the corruption of community morals. *(Scottsdale Revised Code, Section 1.403)*

The intent of this ordinance is, in part, to create a buffer zone between stores that are selling significant amounts of sexually explicit adult items, and children of impressionable ages and

family communities. Qualifying "substantial and significant" as half or more not only conflicts with the common meaning and understanding of the words "substantial" and "significant", but it also conflicts with the intent of the Zoning Ordinance. If the Zoning Ordinance were interpreted to mean a City only regulated stores that had at least half or more of its stock in trade designed for use in connection with specified sexual activities, the intent and purpose of the location and distance criteria of the adult use zoning regulations would be defeated.

For instance, the interpretation the requestor proposes (that a business must have at least half or more of its stock and trade be designed for use in connection with specified sexual activities in order to be considered an adult novelty store) would allow a store to have up to forty-nine percent (49%) of its stock and trade be designed for use in connection with specified sexual activities and still locate adjacent to a school without having to comply with the adult use regulations of the Scottsdale Zoning Ordinance and its location and distance criteria. This would defeat the intent and purpose of the ordinance in question. "Substantial" and "significant" are general terms and are interpreted to mean considerable, meaningful, or noteworthy.

The requestor also argues in favor of a dictionary interpretation of the terms "substantial and significant"; however, the common dictionary definitions do not offer the mathematical quantification the requestor desires, nor do they imply a 50% minimum. Rather, these words and their common definitions would include amounts *as great* as half, but they would also include considerable or noteworthy amounts that are *less* than half, but more than an insignificant or insubstantial portion.

With the original, regulatory intent in mind, and considering the context of these words along with their commonly understood meaning, the term "substantial and significant portion of its stock and trade" is reasonably interpreted to mean "carrying instruments, devices, or paraphernalia for use in connection with specified sexual activities, which constitutes at least twenty-five percent (25%) or more of the floor area of the establishment". Defining "substantial and significant" in this manner is reasonable, it serves the intent and purpose of the ordinance, and it provides the requestor with the mathematical quantification desired.

Interpretation By	Date	Approved By
Greg Bloemberg Planner Lusia Galav, AICP Zoning Administrator	June 8, 2009	Lusia Galav, AICP Zoning Administrator

Subject of Interpretation:

Clarification of Zoning Stipulation No. 15 associated with Case 20-ZN-2002#3, One Scottsdale.

Title of Stipulation:

Timing of Scottsdale Road Street Improvements

Original Stipulation Language:

STREETS

15. TIMING OF SCOTTSDALE ROAD STREET IMPROVEMENTS. No certificate of occupancy shall be granted for any new site building once 937 residential units in Planning Unit II have been permitted, or once 1,793,358 square feet of commercial/retail/office space have been permitted, unless N. Scottsdale Road has been completed to a full six-lane cross section or equivalent capacity is achieved by interim improvements, to the satisfaction of the City's Transportation Director.

Cause for Interpretation:

The Zoning Administrator (ZA) has determined that the language of Stipulation No. 15 in Scottsdale Zoning Case 20-ZN-2002#3 is ambiguous and subject to multiple interpretations. Therefore, in accordance with the authority set forth in A.R.S. § 9-462.05 and Scottsdale Revised Code, App. B, § 1.1.202, the ZA is issuing this interpretation to clarify implementation of Stipulation No. 15 associated with One Scottsdale, Planning Unit II and the issuance of building permits, certificates of occupancy and the timing of improvements to North Scottsdale Road

Interpretation:

TIMING OF SCOTTSDALE ROAD STREET IMPROVEMENTS. The Zoning Administrator has reviewed the record history of Zoning Case No. Case 20-ZN-2002#3 including, but not limited to, the record files of the Planning & Development Department and City Council public hearings in relation thereto. Based on the review thereof, the ZA has determined that the intent of the City Council in adopting Stipulation No. 15 was to limit occupancy of new residences or buildings until such time as the stated improvements to Scottsdale Road are completed as defined therein. The City Council's intent was not to have Stipulation No. 15 applied in such a manner as to have building permits issued by the City which could be left in fluctuation and unable to obtain a certificate of occupancy. Accordingly, Stipulation No.15 is interpreted by the ZA as to limit issuance of both building permits and associated certificates of occupancy within One Scottsdale Planning Unit II. No new building permits will be issued by the City in excess of the 937 residential units, or upon 1,793,358 square feet of commercial/retail/office space having been permitted (threshold), unless the North Scottsdale Road improvements have been completed to a full six-lane cross section or equivalent capacity is achieved by interim improvements, to the satisfaction of the City's Transportation Director. Any building permit issued by the City prior to reaching the stated threshold will be eligible for a certificate of occupancy so long as such building otherwise meets the requirements of the building code and any other applicable development regulations or stipulations.

_____ August 24, 2022

Interpretation By Date

Erin Perreault, AICP
Zoning Administrator

2009 WL 792338
Only the Westlaw citation is currently available.
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24
Court of Appeals of Arizona,
Division 1, Department A.

Marvin MITCHELL, a single man, Plaintiff/Appellant,
v.
TOWN OF JEROME, an Arizona municipal corporation; Jack Guth and Denise Guth, a married couple and real parties in interest, Defendants/Appellees.

No. 1 CA-CV 08-0086.
|
March 26, 2009.

West KeySummary

1 **Zoning and Planning** Commercial districts and uses in general

Zoning and Planning Agricultural uses, woodlands and rural zoning

Credible evidence supported a Board of Adjustment's determination that property was zoned for agricultural (AR) use rather than for commercial use. The property owner alleged that the map the board relief upon was ambiguous. However, the Board's decision was also supported by a document tracking the zoning history of the properties. The document stated that the properties were zoned AR when originally purchased from a mining company, and that they had twice been sold as AR-zoned properties before the current property owner made his purchase. Additionally, slightly less than four years ago the realty company involved had represented the property as being zoned AR. Moreover, the fire department expressed concern that the lots would be nearly impossible to access with fire rescue vehicles and that the fire department would be unable to guarantee suitable fire protection as the road was currently constructed.

Appeal from the Superior Court in Yavapai County; Cause No. CV82006-0071; The Honorable Ralph Matthew Hess, Judge Pro Tem. AFFIRMED.

Attorneys and Law Firms

Davis Miles, PLLC By Gregory L. Miles, Monica K. Lindstrom, Robert N. Sewell, Mesa, Attorneys for Plaintiff/Appellant.

Moyes Sellers & Sims, LTD By C. Brad Woodford, Jeffrey T. Murray, Rebecca Lumley, Phoenix, Attorneys for Defendant/Appellee Town of Jerome.

Jack Guth, Jerome, In Propia Persona.

Denise Guth, Jerome, In Propia Persona.

MEMORANDUM DECISION

GEMMILL, Judge.

***1** ¶ 1 Plaintiff-Appellant Marvin Mitchell appeals the superior court's order affirming a decision by the Jerome Board of Adjustment (“the Board”) declaring that his property in Jerome is zoned AR, for agricultural use, rather than C-1, for commercial use. The superior court found that credible evidence supported the Board's determination. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 Mitchell owns two parcels of property on Block 14 in Jerome, Arizona, referred to as lots 401-06-130a and 401-06-132. [1] When Mitchell purchased the property it had been zoned C-1 based on a decision by Renee Tavares, the Zoning Administrator.

¶ 3 In January 2006, Jerome Town Attorney David Gordon sent a memorandum to Tavares noting that the Zoning Commission was to consider the zoning of a particular parcel of property. Gordon explained that Jerome's zoning ordinance authorized the zoning administrator to interpret the zoning

ordinance and to advise the public and Zoning Commission on issues of zoning regulations and zoning designations, including the zoning of a particular parcel of property if its zoning was ambiguous. Tavares then classified the property as C-1, after determining that all of Block 14, where the property was located, was zoned C-1. Defendants-Appellees, Jack and Denise Guth, who owned property behind Mitchell's parcels, filed an appeal with the Board.

¶ 4 The Board conducted a hearing on February 27, 2006, at which Tavares gave her reasoning for designating the property C-1. She explained that the map was ambiguous, showing no parcels, no historic lots, and no pinpoint metric points. She further explained that she obtained the square footage on the lots of Block 14 and compared it to the use regulations for property zoned C-1 and AR. Property zoned C-1 had no minimum square footage, no minimum width, no minimum lot dwelling, and no maximum lot coverage. Property zoned AR had a minimum square footage of 10,000 square feet, a minimum lot width of 100 square feet, a minimum lot dwelling of 850 square feet, and a maximum lot coverage of forty percent of the square footage of the property. Only one property on Block 14, which was not owned by Mitchell, met the minimum square footage and none met the minimum lot width for AR zoning. Tavares therefore concluded that all lots on Block 14, including Mitchell's, were C-1.

¶ 5 The Board considered several maps, one identified as the official zoning map for Jerome which was a topographical map, a second obtained from a prior town clerk, and a third taken from the internet web site of the Yavapai County Recorder's Office. Jack Guth reported that the town council had determined that the official town zoning map was ambiguous. He disputed that determination. Guth argued that, although their specific property could not be seen on the map, various landmarks were visible so that the zoning line was identifiable. He contended that the zoning line ran along the back of his property such that property on his block but behind his property, like Mitchell's, was historically zoned AR. He further argued that the Zoning Administrator's decision that Mitchell's property was C-1 was an improper zoning change. Guth acknowledged that the county map showed that the disputed property was zoned C-1, but argued that the county's map included a disclaimer that it was not to be used as a legal document. He also explained that when he bought his property, he inquired about purchasing the disputed property and was told that it was all zoned AR. The Board was presented with a document, apparently created by Guth, outlining the history of Mitchell's lots, which indicated that they were historically zoned AR.

***2** ¶ 6 Town Attorney Gordon identified the principal issue before the Board as being whether the map was ambiguous, asserting that it was ambiguous because it had no property lines and no indication of building locations. Gordon asserted that, by statute, Tavares was the person responsible for interpreting the zoning provisions in light of the ambiguous map. Gordon rejected the notion that designating the property C-1 was a change, saying that it was an interpretation "because lo and behold this C-1 line runs so close to these boundaries that we just can't tell where it starts and where it stops. And that's because when we look at this map, we can't tell where one property line starts and one property line stops."

¶ 7 Tavares added that the map had no latitude or longitude numbers and so had no starting or ending points for measurements; that the original size of the map was unknown and that expanding or contracting a map altered the scale; and that under the interpretation advocated by the Guths, the zoning line would pass through the middle of one of the parcels on Block 14.

¶ 8 By a vote of three to one, the Board found that the map was not ambiguous and that the C-1 zoning line ran through the middle of Block 14 behind the Guths' property, leaving the Guths' property zoned C-1 and Mitchell's property zoned AR.

¶ 9 Mitchell filed a complaint for special action and declaratory judgment. The superior court ruled that the Board's conclusion that the zoning map was clear and unambiguous was not supported by competent evidence and that the Board's determination to the contrary was arbitrary, capricious, and an abuse of discretion. The court further found that the Board's decision that Mitchell's property was zoned AR was supported by competent evidence, specifically the town map and enlargements of the map, historic representations of the zoning classifications of the property, the topography of the area, and the relationship of the zoning district boundary lines to landmarks and streets. The court also concluded that classifying Mitchell's property as AR was not illegal zoning. Mitchell timely appeals and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ANALYSIS

¶ 10 In a special action to review a decision by a municipal board of adjustment, a superior court determines whether the board's decision was arbitrary or capricious or an abuse of discretion. *Murphy v. Town of Chino Valley,* 163 Ariz. 571, 574, 789 P.2d 1072, 1075 (App.1989); *Blake v. City of Phoenix,* 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App.1988). This court, when reviewing an appeal from the superior court's decision, applies the same standard of review. *Murphy,* 163 Ariz. at 574, 789 P.2d at 1075. We may not substitute our judgment for that of the board, but must affirm if credible evidence exists to support the board's decision. *Pingitore v. Town of Cave Creek,* 194 Ariz. 261, 264, ¶ 18, 981 P.2d 129, 132 (App.1998); *see also City of Phoenix v. Superior Court of Maricopa County,* 110 Ariz. 155, 158, 515 P.2d 1175, 1178 (1973) (stating that a reviewing court "is limited to finding error and may not substitute its opinion of the facts for the Board's and if the evidence supports the Board's decision, it should be affirmed"). Where the decision involves the interpretation of statutes or ordinances, we review the matter de novo. *City of Tempe v. Outdoor Sys., Inc.,* 201 Ariz. 106, 109, ¶ 7, 32 P.3d 31, 34 (App.2001); *Pingitore,* 194 Ariz. at 264, ¶ 18, 981 P.2d at 132.

***3** ¶ 11 Mitchell first argues that the Board had no authority under statute or the Jerome Zoning Ordinance to consider an appeal of Tavares's ruling that his property was zoned C-1 and, by declaring that the property was zoned AR, the Board unlawfully re-zoned the property.

¶ 12 Under both the Jerome Zoning Ordinance and Arizona statutes, the Board has the authority to consider an appeal from the zoning administrator's decisions. Subsections 107(B)(1) and (4) of the Jerome Zoning Ordinance authorizes the zoning administrator to:

> 1. Enforce the Zoning Ordinance.
>
> ....
>
> 4. Subject to general and specific policy laid down by the Planning and Zoning Commission and Town Council, interpret the Zoning Ordinance to members of the public, Town departments, and other branches of government.

Section 105(B)(1)(a) authorizes the Board to:

> a. Hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of the zoning ordinance, and to reverse or affirm, wholly or partly, or modify the order requirement or decision of the zoning administrator appealed from, and make such order, requirement, decision or determination as necessary.

Section 305(A)(1), governing appeals, also provides:

> 1. Appeals to the Board of Adjustment concerning interpretation or administration of this Ordinance may be taken by any person aggrieved or by any officer or department of the Town affected by any decision of the Zoning Administrator.

Arizona statutes also address a board of adjustment's authority over appeals from a zoning administrator's decision:

> C. A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator, shall exercise such other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

A.R.S. § 9-462.06(C) (2008).

¶ 13 Mitchell argues that the zoning administrator's actions in this case constituted an interpretation of the zoning ordinance, not enforcement. He contends that under Jerome Zoning Ordinance § 107(B), the zoning administrator has the authority to interpret the zoning ordinance. He further

argues that, while the Board has the authority under Jerome Zoning Ordinance § 105(B)(1)(a) to consider an appeal of a zoning administrator's decision involving enforcement of the ordinance, it does not have the authority to hear an appeal of the zoning administrator's interpretation of the ordinance. According to Mitchell, because Tavares was interpreting the ordinance and not enforcing it, the Board exceeded its authority and its decision is void.

¶ 14 Tavares's actions involved determining the zoning status of a particular piece of property. She reached her decision in part by considering the use restrictions of the zoning categories and the characteristics of the parcels at issue. Her decision that the property was classified C-1 authorized use of the property that differed from the use permitted if the property were properly classified AR. If her conclusion as to the classification was erroneous, she would be authorizing a use in violation of the zoning ordinance and in violation of her obligations under § 108 of the zoning ordinance governing enforcement, which requires that she refrain from authorizing use of property in violation of the ordinance.[2] Tavares's actions therefore did not merely interpret the ordinance, but related to its enforcement.

***4** ¶ 15 Even if we accepted Mitchell's distinction between interpretation and enforcement and his contention that Tavares's actions constituted an interpretation and not enforcement of the ordinance, Jerome Zoning Ordinance § 305(A)(1) clearly authorizes any person aggrieved by a decision of the zoning administrator concerning the interpretation of the ordinance to appeal to the Board. Further, Jerome Zoning Ordinance § 108 recognizes the Board's authority to interpret the ordinance. Moreover, determining the location of zoning boundaries is within the purview of the Board. Jerome Zoning Ordinance § 402 provides rules governing the determination of zoning boundary lines. Boundaries are to be determined based on "The Zoning Map of the Town of Jerome." Where the boundary location is uncertain, the map is to be interpreted according to specific rules. Section 402(2)(e) provides that when the rules for interpreting the zoning map do not establish the location of a zoning boundary, "the [Board] shall determine the location."

¶ 16 In this case, Tavares offered an opinion as to the zoning classification of Mitchell's property as C-1. The Guths challenged that determination, asserting that the property had always been AR. The Board, after considering the map and the offered evidence, determined that the property was classified AR. The Board is empowered to make such a determination by §§ 105(B)(1)(a), 305(A)(1), and 402(2)(e) of the Jerome Zoning Ordinance.

¶ 17 Mitchell also asserts that the Board's decision was an unlawful rezoning of the property. The record does not reflect that the zoning changed. Rather, the Board determination was an act of clarification concerning the property's existing zoning classification.

¶ 18 Mitchell further argues that the Board's decision is not supported by credible evidence. He asserts that, because of the map's ambiguity, it provides no support for the Board's decision; and the decisions of the Board were the product of guesses, speculations, and presumptions. The map was not the only information presented to the Board on which it could base its decision, however. Also included in the record is a document, apparently prepared by Jack Guth, tracking the zoning history of the properties. This document states that the properties were AR when they were originally purchased from the mining company that owned it, that they had been twice sold as AR-zoned properties before Mitchell made his purchase, and that as late as July 27, 2005, the realty company involved in selling the properties represented them as being zoned AR. Denise Guth reiterated this history before the Board and noted that an earlier potential purchaser of the property had stated in a letter to his real estate agent that the prior zoning administrator had told him that the property was zoned AR. A copy of this letter was included in the record. Jack Guth told the Board that he and Denise had previously inquired about purchasing the parcels and had been told that they were zoned AR. He further stated that when they bought their property in 1990 they understood that their property was zoned commercial, but that the property behind them was not. Denise similarly stated that when they bought their property, they were told that their property was the last on that street of the C-1 zoning and that everything behind them was not C-1. Denise Guth explained that her understanding of the reason for having different zones in close proximity was to have lower density as one went down the hill and for fire protection safety. A letter from the Chief of the Jerome Volunteer Fire Department to Tavares, included in the record, appeared in part to corroborate Denise's statements. The letter expressed concern that Mitchell's lots would be nearly impossible to access with fire rescue vehicles and that the fire department would be unable to guarantee suitable fire protection as the road was currently constructed.

***5** ¶ 19 In addition, despite the ambiguity of the map, the members of the Board could nevertheless consider the

map as a factor in making a determination.[3] Guth presented the Board with an enlarged section of the Zoning Map. He argued to the Board members that certain roads and certain landmarks were identifiable on the map in relation to the zoning line. The Board members could draw on their own knowledge of the physical layout of the town in conjunction with the other information presented to reach their conclusions.

¶ 20 This court determines only if credible evidence exists to support the decision of the Board and must affirm if such facts exist. *Pingitore,* 194 Ariz. at 264, ¶ 18, 981 P.2d at 132. We do not substitute our opinion of the facts for that of the Board, even if we would have reached a different conclusion. *Id.; Blake,* 157 Ariz. at 96, 754 P.2d at 1371 ("We will not substitute our judgment for that of the board, even where the question is faulty or debatable and one in which we would have reached a different conclusion had we been the original arbiter of the issues raised by the application."). Based upon our review of the record, we conclude-as did the superior court-that the Board had credible evidence before it supporting its conclusion that Mitchell's property was zoned AR.

¶ 21 Mitchell additionally contends that the Board's decision results in unlawful spot zoning. Spot zoning occurs when a zoning ordinance is not in accord with the general or comprehensive zoning plan. *Haines v. City of Phoenix,* 151 Ariz. 286, 291, 727 P.2d 339, 344 (App.1986); *Klensin v. City of Tucson,* 10 Ariz.App. 399, 403, 459 P.2d 316, 320 (1969). Whether spot zoning is invalid depends on the circumstances of the particular situation. *Haines,* at 291, 727 P.2d at 344.

¶ 22 Mitchell argues that having one block zoned partially C-1 and partially AR is nonsensical and that the size of the lots supported a C-1 zoning for the entire block. Even if we accepted Mitchell's assertions as true, illegal spot zoning does not follow. The issue before the Board was to determine the existing zoning classification of Mitchell's property. The information presented to the Board was that the property was historically zoned AR. The reason for the original AR classification, according to the information before the Board, was to have lower density at lower elevations and to address fire safety concerns. The fact that the property was historically zoned AR suggests that the AR classification is in keeping with the original zoning plan for the town. In the absence of evidence that a zoning classification of AR for the property contravenes the general zoning plan for Jerome, we perceive no illegal spot zoning.

CONCLUSION

¶ 23 We find that the Board had authority to consider the Guths' appeal of the zoning administrator's decision that Mitchell's property was zoned C-1. We further find that credible evidence was presented to the Board to support its decision reversing the zoning administrator's finding and concluding that the property was properly zoned AR. Accordingly, the superior court's ruling is affirmed.

CONCURRING: SHELDON H. WEISBERG, Presiding Judge and DANIEL A. BARKER, Judge.

All Citations

Not Reported in P.3d, 2009 WL 792338

Footnotes

1 The record does not indicate when Mitchell purchased the property. However, the record does show that the property was still for sale as of July 27, 2005. In addition, Jack Guth told the Board that he and his wife protested the C-1 designation before the property was sold.

2 Section 108 of the Jerome Zoning ordinance is titled "*ENFORCEMENT* " and states:

> This ordinance shall be enforced by the Zoning Administrator who shall in no case grant permission for the issuance of any permit for the construction, reconstruction, alteration, demolition, movement or

> use of any building, structure, lot or parcel if the building or structure as proposed to be constructed, reconstructed, altered, used or moved or the lot or parcel as proposed to be used would be in violation of any of the provisions of this ordinance, unless directed to issue such permit by the Board of Adjustment after interpretation of the ordinance or the granting of a variance or by the Town Council after lawful amendment of this ordinance.

3 Mitchell argues that because the map is ambiguous, it is "statutorily insufficient and cannot be relied upon." In support of his assertion, Mitchell cites A.R.S. § 9-251 (2008). Section 9-251, however, does not contemplate setting forth a standard of sufficiency for city maps. This section does not address what maps can and cannot be relied upon by town boards. Rather, § 9-251 simply requires "an accurate plat or map" setting forth the various streets, parks, lots, etc. In any event, the map is not the sole basis upon which the Board relied in making its determination that the property was zoned AR.

End of Document

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Callowhill Neighborhood Ass'n v. City of Philadelphia Zoning Bd. of Adjustment, Pa.Cmwlth., June 17, 2015

228 Ariz. 419
Court of Appeals of Arizona, Division 1, Department B.

SCENIC ARIZONA, an Arizona corporation; Neighborhood Coalition of Greater Phoenix, an Arizona corporation, Plaintiffs/Appellants/Cross–Appellees,
v.
CITY OF PHOENIX BOARD OF ADJUSTMENT, a municipal agency, Defendant/Appellee,
American Outdoor Advertising, Inc., an Arizona corporation, Defendant/Appellee/Cross–Appellant.

No. 1 CA–CV 09–0489
|
Nov. 17, 2011.
|
As Amended Feb. 9, 2012.

Synopsis

Background: Advocacy organization petitioned for special action seeking review of decision of City of Phoenix Board of Adjustment approving application of advertising company for a use permit to operate an electronic billboard adjacent to interstate highway. Advertising company moved to dismiss for lack of standing. The Superior Court, Maricopa County, No. LC2008–000497–001 DT, Joseph C. Kreamer, J., denied motion to dismiss, and denied relief sought by advocacy organization. Parties cross-appealed.

Holdings: The Court of Appeals, Brown, J., held that

[1] advocacy organization had standing to challenge decision of Board of Adjustment granting permit for electronic billboard, and

[2] electronic billboard was prohibited by Arizona Highway Beautification Act (AHBA).

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (8)

[1] **Appeal and Error** Failure to State Claim, and Dismissal Therefor

Appeal and Error Failure to state claim, and dismissal therefor

In reviewing a trial court's denial of a motion to dismiss, the Court of Appeals considers the facts alleged in the complaint to be true and determines whether the complaint, construed in a light most favorable to the plaintiff, sufficiently sets forth a valid claim.

1 Case that cites this headnote

[2] **Administrative Law and Procedure** Standing in general

If a statute authorizes judicial review of an administrative decision, deciding whether a plaintiff has standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

2 Cases that cite this headnote

[3] **Zoning and Planning** Right of Review; Standing

The plain language of statute providing for judicial review of Board of Adjustment decisions does not limit standing to adjacent property owners, nor does it restrict potential challengers to those who are parties to a zoning or adjustment proceeding. A.R.S. § 9–462.06(K).

[4] **Highways** Billboards and highway beautification in general

Zoning and Planning Permits, certificates, and approvals

Allegations by advocacy organization that electronic billboard would affect the aesthetic enjoyment of its members, create an increased safety risk, and cause longer drive times and increased fuel consumption, was sufficient to establish that advocacy organization was a

"person aggrieved" under Arizona Highway Beautification Act (AHBA) and, therefore, advocacy organization had standing to petition for special action seeking review of decision of City of Phoenix Board of Adjustment approving application of advertising company for a use permit to operate the electronic billboard adjacent to interstate highway. A.R.S. § 9–462.06(K).

[5] **Zoning and Planning** Right of Review; Standing

In land use challenges that do not involve a specific statutory appeal procedure, a plaintiff generally must satisfy judicially-established requirements to show (1) particularized harm resulting from the decision, (2) an injury in fact, economic or otherwise, and (3) the damage alleged is peculiar to the plaintiff or at least more substantial than that suffered by the community at large.

1 Case that cites this headnote

[6] **Zoning and Planning** Right of Review; Standing

When challenging a governing board's zoning decision, a plaintiff must allege particularized injury to his or her own property; but proximity to one's own property is much less relevant to the question of standing in the context of a challenge to a billboard along a highway, which by law may be located only in commercial or industrial areas.

[7] **Highways** Billboards and highway beautification in general

Electronic billboard's operation was a display of "intermittent" lighting within meaning of Arizona Highway Beautification Act (AHBA), and, therefore, was prohibited by AHBA; combination of LED's used to display each brightly lit image on the billboard adjacent to interstate highway changed every eight seconds, and billboard used multiple arrangements of lighting to display images that stopped and started at regular intervals. A.R.S. § 28–7903(A).

2 Cases that cite this headnote

[8] **Administrative Law and Procedure** Deference to Agency in General

Administrative Law and Procedure Consistent or longstanding construction

The general rule that judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and that ordinarily an agency's interpretation of a statute or regulation it implements is given great weight, does not necessarily apply when the agency's interpretation of a particular provision is not longstanding.

1 Case that cites this headnote

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OPINION

BROWN, Judge.

***420** ¶ 1 The City of Phoenix Board of Adjustment ("Board") granted a use permit to American Outdoor Advertising, Inc. ("American Outdoor") to operate an electronic billboard adjacent to Interstate 17.[1] The Neighborhood Coalition of Greater Phoenix, along with Scenic Arizona,[2] petitioned for special action in the superior court, asserting ***421** ****372** the billboard would violate Arizona Revised Statutes ("A.R.S.") section 28–7903 (1998),[3] a provision of the Arizona Highway Beautification Act ("AHBA"). The court determined that Scenic had standing to challenge the Board's decision, but denied the petition on its merits, finding the Board did not act in excess of its authority. For the following reasons, we affirm the court's decision as to standing, but reverse on the merits because the billboard's intermittent lighting is not allowed under the AHBA.

BACKGROUND

¶ 2 In early 2008, American Outdoor submitted an "application for zoning adjustment" to the City requesting a use permit to allow an "electronic message board" on an existing billboard.[4] A zoning adjustment hearing officer initially considered the application and approved the billboard subject to several conditions, including a maximum brightness level, a minimum display time of eight seconds for each image, extinguishment of all illumination from 11:00 p.m. until sunrise, and a prohibition against any animation or any "flashing, blinking, or moving lights."

¶ 3 Scenic appealed the hearing officer's decision to the Board, asserting in part that the billboard would use "intermittent light" in violation of the AHBA. At the hearing before the Board, Scenic's representatives presented testimony outlining their opposition to the use permit for the reasons previously addressed in their appeal letter and accompanying exhibits. American Outdoor's representative responded that the billboard's changing light display was nothing more than a "change of copy" and that a letter from the Arizona Department of Transportation ("ADOT") to the City's zoning administrator indicated ADOT's approval of the proposed use. American Outdoor also referenced a favorable ruling by an administrative law judge ("ALJ") in an ADOT enforcement action and a Federal Highway Administration ("FHWA") guidance memorandum that purportedly approved electronic billboards.

¶ 4 Following the hearing, the Board upheld the hearing officer's decision to grant the permit, finding that the billboard would "be in compliance with all provisions of the [city] ordinance and other laws." Scenic then petitioned for special action relief in the superior court pursuant to A.R.S. § 9–462.06(K) (2008), naming the Board and American Outdoor (collectively "American Outdoor") as defendants. Scenic alleged that the Board's decision violated the AHBA and therefore the Board acted in excess of its authority. American Outdoor moved to dismiss for lack of standing. Scenic's subsequent motion to amend the complaint was unopposed. After Scenic filed its amended complaint, American Outdoor again moved to dismiss for lack of standing. The court denied the motion, but subsequently denied the relief Scenic requested. Scenic appealed and American Outdoor cross-appealed the court's ruling on standing.

DISCUSSION[5]

I. Scenic Qualifies as a "Person Aggrieved" Under the Municipal Board of Adjustment Statute.

[1] ¶ 5 American Outdoor asserts that Scenic's members are not "aggrieved" by the Board's decision, and that if individual members do not have standing, Scenic cannot sue on their behalf.[6] In reviewing a trial court's ***422** ****373** denial of a motion to dismiss, "we consider the facts alleged in the complaint to be true ... and determine whether the complaint, construed in a light most favorable to the plaintiff, sufficiently sets forth a valid claim." *Douglas v. Governing Bd. of the Window Rock Consol. Sch. Dist. No. 8,* 206 Ariz. 344, 346, ¶ 4, 78 P.3d 1065, 1067 (App.2003) (internal quotations and citations omitted); *see also Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

¶ 6 In its amended complaint, Scenic alleged as follows: (1) its members use, and intend to continue using, the streets and highways within view of the billboard and the billboard affects their aesthetic enjoyment; (2) the billboard creates an increased safety risk to its members by distracting them and other drivers on the road and thereby increases the risk of traffic accidents; and (3) its members face longer drive times and increased fuel consumption if they choose to alter their routes to avoid the billboard.[7] American Outdoor contends that these allegations are conclusory and thus "not entitled to be accepted as true." Although broadly stated, Scenic's amended complaint does include material factual allegations relating to the harm its members have suffered; therefore, we presume the allegations are true. *Cf.* *Aldabbagh v. Ariz. Dept. of Liquor Licenses and Control,* 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App.1989) (When reviewing a motion to dismiss, "the well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not.").

[2] ¶ 7 If a statute authorizes judicial review of an administrative decision, deciding whether a plaintiff has standing "must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club v. Morton,* 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The pertinent statute here is A.R.S. § 9–462.06(K), which provides that a "person aggrieved" by a decision of the Board may file a special action in superior court seeking review of the decision. The statute provides further that a "taxpayer, officer or department of the municipality affected by a decision" of the Board also may seek judicial review. Thus, Scenic must demonstrate that under those provisions at least one of its members is "aggrieved" by the decision of the Board, which is an issue we review de novo. *See* *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.,* 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (noting that representational standing may be based on members of the organization having "standing to sue in their own right"); *Center Bay Gardens v. City of Tempe,* 214 Ariz. 353, 356, ¶ 15, 153 P.3d 374, 377 (App.2007) ("Unless there are fact issues that require resolution, whether a party has standing to sue is a question of law, which we review de novo."). Additionally, this type of statute is "remedial and must be construed liberally to promote the ends of justice." *See* *City of Scottsdale v. McDowell Mountain Irr. & Drainage Dist.,* 107 Ariz. 117, 121, 483 P.2d 532, 536 (1971) (considering whether appellants qualified as "any person affected" under A.R.S. § 45–1522, which provides a judicial remedy for challenging the organization of an irrigation district).

¶ 8 No prior reported case has squarely addressed the meaning of "person aggrieved" within the context of § 9–462.06(K), particularly under the circumstances presented here, where the plaintiff seeks judicial review of the Board's approval of a hearing officer's grant of a use permit for operation of an electronic billboard. Our legislature has given the Board the duty to hear and decide appeals from decisions made by the zoning administrator, such as the grant or denial of variances, the issuance of use permits, or the interpretation of a zoning ordinance. ***423** ****374** *Austin Shea (Arizona) 7th St. & Van Buren, L.L.C. v. City of Phoenix,* 213 Ariz. 385, 390, ¶ 21, 142 P.3d 693, 698 (App.2006) (citing A.R.S. § 9–462.06(C)). In resolving matters before it, the Board may receive evidence and take testimony from witnesses who are placed under oath. *Id.* Thus, the Board acts in a "quasi-judicial" capacity. *Id.* (citing *Lane v. City of Phoenix,* 169 Ariz. 37, 41, 816 P.2d 934, 938 (App.1991)). Additionally, "[t]he Board must act in accordance with the law or it is without jurisdiction." *Arkules v. Bd. of Adjustment,* 151 Ariz. 438, 440, 728 P.2d 657, 659 (App. 1986).

¶ 9 The statute does not define "person aggrieved," but we are able to discern from its use in § 9–462.06(K) that the legislature intended to permit much broader standing in this context than in other proceedings.[8] When the legislature has intended to impose more stringent standing requirements, it has used different language than what it included in the statute here. *See P.F. West, Inc. v. Superior Court,* 139 Ariz. 31, 33–34, 676 P.2d 665, 667–68 (App.1984) (construing A.R.S. § 11–808(D), which permits a judicial challenge to a county board of adjustment decision only by an "adjacent or neighboring property owner who is specially damaged," and finding no such restrictive language in statute allowing appeal to a county board of adjustment); *see also Mendelsohn,* 76 Ariz. at 169, 261 P.2d at 988 ("Instead of these more specific terms, the legislature chose the phrase 'the person aggrieved', which has a broader signification.... Had the legislature meant to limit the right to [appeal to] one of the two parties it could have used, and doubtless would have used, a more limited term.").

[3] ¶ 10 In contrast, the plain language of § 9–462.06(K) does not limit standing to adjacent property owners, nor does

it restrict potential challengers to those who are parties to a zoning or adjustment proceeding. *See* *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n,* 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995) (recognizing that courts look first to language of the statute to determine legislative intent). Even within the context of the municipal board of adjustment statutes, the legislature chose to differentiate between the standing requirements. Under § 9–462.06(D), an appeal *to the board* may be taken by "persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator...." A challenge *in superior court,* however, may be filed by a "person aggrieved" or by a "taxpayer." A.R.S § 9–462.06(K). The legislature plainly intended that standing to challenge a board decision in superior court would be easier to establish than an appeal to the board of adjustment; otherwise, the legislature would not have included the "taxpayer" category. *See P.F. West,* 139 Ariz. at 34, 676 P.2d at 668 ("Since these statutes were enacted together, we must assume that the legislature intended different consequences to flow from the use of different language in these three subsections.").

¶ 11 We are also guided by the principle that deciding whether a person is aggrieved necessarily involves examining the legal basis of the claimed injury. *See* *McDowell Mountain,* 107 Ariz. at 121, 483 P.2d at 536 (quoting *Camp,* 397 U.S. at 153, 90 S.Ct. 827) (applying the United States Supreme Court's definition of standing as "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute"); ***424** **375** *Town of Paradise Valley v. Gulf Leisure Corp.,* 27 Ariz.App. 600, 606–07, 557 P.2d 532, 538–39 (1976) (same). The AHBA was adopted to promote "the reasonable, orderly, and effective display of outdoor advertising," while also promoting "the safety and recreational value of public travel and [preserving] natural beauty." *See* Arizona–Federal Agreement, November 18, 1971; 23 U.S.C. § 131(a) (2010); *infra* ¶ 29.

¶ 12 Additionally, whether a particular plaintiff can establish standing to challenge a use permit for a billboard involves unique considerations that may not be present in other land use contexts. *See* *City of Ladue v. Gilleo,* 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) ("[S]igns take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507–08, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (noting safety and aesthetic concerns related to billboard advertising); *Ballen v. City of Redmond,* 466 F.3d 736, 744 (9th Cir.2006) ("The externalities of billboards include perdurable [9] visual pollution that pervades a substantial volume of our eyesight and grows into an unignorable part of our cultural landscape."). Unlike an apartment building, trailer park, or retail supercenter, a billboard exists for the purpose of capturing the attention of highway drivers. The intended use of a billboard such as that at issue here has little or nothing to do with the land on which it sits. Thus, the potential impact of a particular billboard on a person who operates a vehicle on the highway is highly relevant in determining whether that individual has been adversely affected within the context of the AHBA.

[4] ¶ 13 Based on the foregoing, Scenic was required to allege sufficient facts to establish that the interests of its members would be adversely affected by the decision of the Board. Scenic was therefore obligated to allege specific harm that legitimately falls within the zone of interests the AHBA was intended to protect. Scenic alleged that the billboard would affect the aesthetic enjoyment of its members, create an increased safety risk, and cause longer drive times and increased fuel consumption. The essence of these allegations is the claimed interference with the proper use and enjoyment of one of the highways of this state, which are interests within the scope of the AHBA. *See* A.R.S. §§ 28–7901 to –7915 (1998, Supp.2010); *see also* *Camp,* 397 U.S. at 153–54, 90 S.Ct. 827 (recognizing that the interest of an aggrieved person within the meaning of a relevant statute "may reflect aesthetic, conservational, and recreational as well as economic values") (internal quotations and citation omitted). [10]

[5] ¶ 14 Our conclusion does not conflict with well-established principles of standing involving other land use challenges that typically do not involve a specific statutory appeal procedure. In those cases, a plaintiff generally must satisfy judicially-established requirements to show (1) "particularized harm resulting from the decision[,]" (2) "an injury in fact, economic or otherwise[,]" and (3) the "damage alleged [is] peculiar to the plaintiff or at least more substantial than that suffered by the community at large." *Center Bay Gardens,* 214 Ariz. at 358, ¶ 20, 153 P.3d at 379 (internal quotations and citations omitted). Our opinions in these

other cases have generally focused on proximity to the proposed use and the impact the use will have on the plaintiff and the immediately surrounding neighborhood. *See, e.g.,* *Blanchard v. Show Low Planning and Zoning Comm'n,* 196 Ariz. 114, 118, ¶¶ 21, 24, 993 P.2d 1078, 1082 (App.1999) (finding that proximity made it sufficiently likely that traffic, litter, drainage, and noise from the proposed project would significantly affect plaintiff's property); ***425 **376** *Buckelew v. Town of Parker,* 188 Ariz. 446, 449, 452, 937 P.2d 368, 371, 374 (App.1996) (finding standing based on allegations of property damage to plaintiff's property, noise, littering, threats of violence, increased criminal activity, and the destruction of personal property by tenants on adjacent property); *Center Bay Gardens,* 214 Ariz. at 360, ¶ 26, 153 P.3d at 381 (concluding that a proposed development project would harm plaintiffs' property because it would be across the street and would nearly triple the living density in the area and fail to abide by previously required landscape set-offs). [11]

[6] ¶ 15 Such cases stand on the well-established principle that when challenging a governing board's zoning decision, a plaintiff must allege particularized injury to his or her *own property. See, e.g.,* *Blanchard,* 196 Ariz. at 118, ¶ 24, 993 P.2d at 1082. It is clear to us that proximity to one's own property is much less relevant to the question of standing in the context of a challenge to a billboard along a highway, which by law may be located only in commercial or industrial areas. *See* A.R.S. § 28–7902(A) (Supp.2010); FHWA, A History and Overview, http://www.fhwa.dot. gov/realestate/ oacprog.html# TERMS (last visited Oct. 20, 2011) ("The objective of the [Federal] Highway Beautification Program legislation was to limit billboards to areas of similar land use.... In so doing, the areas not having commercial and industrial areas would be protected from the intrusion of off-premise[s] outdoor advertising signs."). We reject American Outdoor's effort to characterize the issue of standing here as one based on proximity and proof of damage to property. Nothing in the language of § 9–462.06(K) suggests that the legislature intended that the "person aggrieved" would be required to prove damages to real property he or she owned in close proximity to the offending land use.

¶ 16 In sum, the plain language of the board of adjustment statute is expansive, which means the legislature intended to allow substantial public input and challenge. *Cf. Mendelsohn,* 76 Ariz. at 170, 261 P.2d at 989 ("Unquestionably, our liquor legislation envisages participation by the general public in the administration of the liquor laws.... The persons upon whose doorsteps the liquor business will operate, and whose businesses, homes, and families will be affected thereby, are given the same rights as those who seek to engage in the liquor traffic."); *Center Bay Gardens,* 214 Ariz. at 360, ¶ 29, n. 9, 153 P.3d at 381, n. 9 (stating that "parties are not prevented from asserting 'selfish' interests in opposition to zoning decisions, nor are boards of adjustment precluded from considering such interests"). Additionally, the injuries alleged here fall within the zone of interests the AHBA was intended to protect—the safety and aesthetics of Arizona's highways. Finally, restricting standing to only those neighboring property owners who experience injuries to their own properties would make highway billboards, which are restricted to commercial and industrial areas, virtually immune from judicial review. Although the absence of any appropriate plaintiff is not a valid reason for granting standing, [12] it is a relevant consideration when, as here, the injuries alleged by plaintiffs fall within the broad parameters of § 9–462.06(K) and the established purposes of the Federal Highway Beautification Act ("FHBA") and the AHBA. Because Scenic has satisfied the "person aggrieved ***426 **377** requirement under § 9–462.06(K), we agree with the superior court's determination that Scenic has standing to challenge the use permit.

II. The Use Permit Violates the Arizona Highway Beautification Act.

¶ 17 The AHBA, under the section titled "Outdoor Advertising Prohibited," provides in pertinent part as follows:

> Outdoor advertising shall not be placed or maintained adjacent to the interstate, secondary or primary systems at the following locations or positions, under any of the following conditions or if the outdoor advertising is of the following nature:
>
> ...
>
> 4. *If it is visible from the main traveled way and displays a red, flashing, blinking, intermittent or moving light or lights likely to be mistaken for a warning or danger signal,* except that part necessary to give public service information such as time, date, weather, temperature or similar information. [13]

...

5. If an illumination on the outdoor advertising is of such brilliance and in such a position as to blind or dazzle the vision of travelers on the main traveled way.

A.R.S. § 28–7903(A) (1998) (emphasis added).

¶ 18 The issues we must resolve are whether the billboard displays intermittent lighting, and if it does, whether such lighting violates the AHBA. Because resolution of these issues is based on statutory interpretation, our review of the Board's legal determination is de novo. *See* *Pingitore v. Town of Cave Creek,* 194 Ariz. 261, 264, ¶ 18, 981 P.2d 129, 132 (App.1998).

¶ 19 We note at the outset the complexity of this task. The technology that allows digital images to be displayed on billboards using internal lighting directed from a remote location was not in existence until long after the AHBA was adopted. Neither the statute nor the related administrative regulations define "intermittent," and ADOT's informal positions and interpretations on the topic have recently changed. Similarly, efforts by the FHWA to provide guidance to the states as to whether federal law allows digital billboards are largely unhelpful to our analysis. Furthermore, two legislative attempts within the last decade to change the AHBA to specifically allow digital billboards have failed. With those factors in mind, we analyze whether the billboard proposed by American Outdoor complies with Arizona law.

¶ 20 When construing a statute, our goal is to find and give effect to legislative intent. *Mail Boxes, Etc.,* 181 Ariz. at 121, 888 P.2d at 779. We look first to the plain language of the statute as the best indication of the legislature's intent. *Id.* "Each word, phrase, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial." *City of Phoenix v. Yates,* 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949). Although a statute's language must be consulted first, uncertainty about the meaning of the statute's terms requires us to apply "methods of statutory interpretation that go beyond the statute's literal language." *Estancia Dev. Assocs., L.L.C. v. City of Scottsdale,* 196 Ariz. 87, 90, ¶ 11, 993 P.2d 1051, 1054 (App.1999). These methods must include "consideration of the statute's context, language, subject matter, historical background, effects and consequences, and spirit and purpose," *id.,* as well as "the evil sought to be remedied." *McElhaney Cattle Co. v. Smith,* 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982).

A. The Billboard Uses Intermittent Lighting.

[7] ¶ 21 American Outdoor suggests that its billboard does not display "intermittent" lighting within the meaning of the AHBA because its LED lighting is "constant" and the display merely changes "copy" every eight seconds. We disagree. The lighting is ***427** ****378** not "constant," as counsel for American Outdoor essentially conceded at oral argument. Counsel agreed that because black light does not exist, any time the color black is part of an LED image, some of the LED lights have been turned off. Furthermore, asserting that the continuous transitions of brightly lit images on the billboard are changes of "copy" ignores reality. What American Outdoor calls a change of " copy" is actually a transition from one lighted image to the next lighted image. In this context, "copy" means a lighted image; therefore, a change of "copy" means a change of lighted image. One cannot be separated from the other.

¶ 22 Consistent with the ordinary meaning of intermittent, defined as "[s]tarting and stopping at intervals ... occasional, periodic, sporadic," Webster's II New College Dictionary 593 (3d ed. 2005), any "intermittent" light is constant until the point that it changes, which of course creates the intermittency. *See* *Airport Props. v. Maricopa County,* 195 Ariz. 89, 99, ¶ 36, 985 P.2d 574, 584 (App.1999) (stating we may turn to "recognized, authoritative dictionaries ... [for] the ordinary meanings of words contained in statutory provisions"). Because the combination of LEDs used to display each brightly lit image on the billboard changes every eight seconds, the billboard's lighting necessarily is intermittent under the plain meaning of the statute. Thus, we are not persuaded by American Outdoor's attempt to exempt its billboard from the bar on intermittent lighting. The billboard uses multiple arrangements of lighting to display images that stop and start at regular intervals, which means it uses intermittent lighting.

¶ 23 Our conclusion is supported by the City's position that the proposed billboard would utilize intermittent lighting; indeed, that was the reason the billboard required a permit. *See* Phoenix City Ordinance ("Phx. Ord.") § 705.2(A)(19) ("Intermittent or flashing illumination or animation may be permitted subject to a use permit."). The City wrote a letter in October 2007, apparently in response to an inquiry about digital billboards, in which the City's planning director described intermittent lighting as "stopping and starting at regular intervals" and observed that an electronic message

board that changed "every so many seconds" would meet the definition of intermittent. At the board of adjustment hearing, the zoning administrator attempted to clarify the prior letter, stating that the City only required American Outdoor to apply for a use permit because the billboard would involve a change of "copy." Her explanation fails, however, because nothing in the City Code requires a use permit for a change in "copy." Indeed, it would be absurd if a sign company were required to seek a use permit each time it desired to change the copy on a traditional billboard by painting a new advertisement or installing a new canvas, a point recognized in the City Code. *See* Phx. Ord. § 705(B)(2)(n) (stating there is no permit required for "[c]hanging copy on a legal sign"); Phx. Ord. § 705.2(A)(19). Additionally, in response to a Board member's question requesting legal advice, the deputy city attorney present at the Board hearing acknowledged the billboard's lighting could be considered intermittent for purposes of state law. [14] Thus, while it is possible that under the City Code "intermittent" means something different from the AHBA, the record does not reveal any legislative action taken by the City to define or clarify "intermittent." Furthermore, the City is not permitted to adopt standards that are less strict than the AHBA. *See* A.R.S. § 28–7912(B) (1998) ("Cities, towns or counties shall not assume control of advertising under this section if the ordinance is less restrictive than this article."). [15]

**379 *428 ¶ 24 In sum, we reject American Outdoor's position that its billboard does not display intermittent lighting. Because the combination of lights used to display various images on the billboard changes at periodic intervals, they are intermittent under the plain meaning of the statute.

B. Intermittent Lighting of Billboards in Arizona Has Not Been Approved by the FHWA, the Arizona Legislature, or ADOT.

¶ 25 Alternatively, American Outdoor asserts that even if the lighting on its billboard may be intermittent, the billboard does not violate state law because the images it displays change only every eight seconds. American Outdoor's argument assumes that notwithstanding the plain language of the statute, it must allow for *some* intermittent lighting. American Outdoor asserts that federal administrators and other state and city governments have agreed that billboards whose digital images change no more frequently than every eight seconds are permitted, and argues that its billboard's lighting does not violate the AHBA because those regulators have said so. Resolving this argument requires us to review the pertinent history and purpose of the AHBA. *See* *Carrow Co. v. Lusby,* 167 Ariz. 18, 20, 804 P.2d 747, 749 (1990) ("Legislative intent often can be discovered by examining the development of a particular statute.").

1. Federal Highway Beautification Act

¶ 26 The federal government, concerned about the unregulated placement of billboards along interstate highways, adopted the Federal–Aid Highway Act of 1958 ("Bonus Act"). Pub. L. No. 85–381, 72 Stat. 89 (expired June 30, 1965); *see also* FHWA, A History and Overview, Federal–Aid Highway Act of 1958, http:// www.fhwa.dot.gov/realestate/oacprog.htm# ACT1958 (last visited Oct. 20, 2011). If states agreed to prohibit billboards within 660 feet of highways in areas not zoned either industrial or commercial, the original legislation authorized bonus payments from the federal government of one-half of one percent of the highway construction costs. 23 C.F.R. 750.101; *see* *Covenant Media of Ill., L.L.C. v. City of Des Plaines, Ill.,* 496 F.Supp.2d 960, 962, n. 2 (N.D.Ill.2007) (explaining the Bonus Act).

¶ 27 In 1965, Congress enacted the FHBA to regulate outdoor advertising signs adjacent to highways. *Libra,* 167 Ariz. at 178, 805 P.2d at 411 (citing Pub. L. No. 89–285, 79 Stat. 1028 (1965) (codified at 23 U.S.C. § 131)). The purpose of the FHBA is to "protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a) (2002). The FHBA mandates that a state that fails to provide "effective control" of specified advertising signs along interstate and primary highway systems faces a penalty of a ten-percent reduction of its share of federal highway funds. *Libra,* 167 Ariz. at 178, 805 P.2d at 411 (citing 23 U.S.C. § 131(b)). In accordance with the FHBA, most states, including Arizona, adopted statutes to provide "effective control" of advertising signs along federally-funded highways. The FHBA includes "certain standards for 'effective control,' and provides that each state and the Secretary of Transportation may enter into an agreement for the erection and maintenance of certain signs adjacent to a highway within industrial or commercial areas." *Id.* (citing 23 U.S.C. § 131(d)).

¶ 28 A 1968 amendment to the Act added a provision requiring the Secretary of Transportation to accept state and local determinations of "customary use" with regard to size,

lighting, and spacing of signs in commercial and industrial areas. Highway Appropriation Act, Pub. L. No. 90–495, § 6(a), 82 Stat. 815 (1968). A 1978 amendment applicable to Bonus states allowed signs advertising activities conducted on the same property, or on-premises ***429 **380** signs, to change messages at reasonable intervals by electronic process or remote control. Surface Transportation Assistance Act of 1978, Pub. L. No. 95–599, § 122, 92 Stat. 2689 (1978). The clear congressional intent, however, was that this change did not apply to off-premises billboards. *See* 124 Cong. Rec. 26,917–18 (1978), 1978 U.S.C.C.A.N. 6575. [16]

2. AHBA/Arizona–Federal Agreement

¶ 29 In 1970, the Arizona Legislature adopted the AHBA, which contains provisions regulating outdoor advertising within 660 feet of the edge of the right-of-way along highways. *Libra,* 167 Ariz. at 178, 805 P.2d at 411 (citing 1970 Ariz. Sess. Laws, ch. 214, § 1 (2nd Reg. Sess.) (codified at A.R.S. §§ 18–711 to –720, repealed by 1973 Ariz. Sess. Laws, ch. 146, § 85 (1st Reg. Sess.))). "It is undisputed that the [AHBA] was adopted to comply with the terms of the [FHBA], in order that Arizona would receive its full share of federal highway funds." *Id.* at 180, 805 P.2d at 413. The AHBA also directed the State Highway Commission to enter into an agreement with the United States Secretary of Transportation. 1970 Ariz. Sess. Laws, ch. 214, § 1 (2nd Reg. Sess.) (formerly codified at A.R.S. § 18–716 (1970), currently codified at A.R.S. § 28–7907 (1998)). The legislative history contains no relevant information relating to the issues presented here, as it simply references the authority of the Commission "to acquire strips of land adjacent to highways for 'beautification purposes.' " Minutes of Ariz. H. Comm. Natural Res. on H.B. 195, 29th Leg., 2nd Reg. Sess. (Mar. 31, 1970).

¶ 30 The Arizona–Federal Agreement ("Agreement") was signed on November 18, 1971, and is almost identical to the current language of the AHBA. A.R.S. § 18–713(A)(5) (1970). The Agreement recites that its purpose is to "promote the reasonable, orderly, and effective display of outdoor advertising while remaining consistent with the national policy to protect the public investment[»,] ... to promote the safety and recreational value of public travel and to preserve natural beauty." Arizona–Federal Agreement, November 18, 1971.

3. FHWA Guidance Memorandum

¶ 31 In support of its argument that we should construe the Arizona statute to allow digital images that change no more frequently than every eight seconds because regulators elsewhere have allowed such billboards, American Outdoor relies on a 2007 guidance memorandum issued by an FHWA Associate Administrator for Planning, Environment, and Realty. *See* Guidance Memorandum from FHWA to Div. Adm'rs (Sept. 25, 2007). The memorandum was written to "Division Administrators" and explained at the outset that pursuant to 23 C.F.R. 750.705, a state department of transportation must obtain FHWA approval of "any changes to its laws, regulations, and procedures to implement the requirements of its outdoor advertising control program." The memorandum then stated that "[p]roposed laws, regulations, and procedures" that would allow digital billboards subject to "acceptable criteria ... do not violate a prohibition against 'intermittent,' or 'flashing' or 'moving' lights as those terms are used in the various [federal-state agreements]" ("FSAs"). [17] That statement was followed by the comment that "all of the requirements in the [FHBA] and its implementing regulations, and the specific provisions of the FSAs, continue to apply." Recognizing that many technological advances had occurred since the FSAs were entered into with the states, the memorandum then explained that digital billboards are acceptable "if found to be consistent with the FSA and with acceptable and approved State regulations, policies and procedures." Division administrators were instructed to consider all relevant information submitted ***430 **381** by a state for proposed regulation of digital billboards, including duration of message, transition time, brightness, spacing, and location. The division administrators were also (1) told to "confirm that the State provided for appropriate public input, consistent with applicable State law and requirements" and (2) "strongly encouraged to work with their State in its review of their existing FSAs."

¶ 32 Although the FHWA memorandum may indicate the federal agency's willingness to allow a state to permit some intermittent billboard lighting, the only standards, rules, or regulations Arizona has adopted to address electronic billboards are the provisions of the AHBA. Nothing in our record indicates there has been any attempt by ADOT to obtain FHWA approval for any proposed law, regulation, or procedure that would exempt digital billboards from the current state prohibition against intermittent lighting. Similarly, we are unaware of any authority suggesting that a guidance memorandum from the FHWA has binding legal effect on the states, and the memorandum itself includes

a disclaimer that it is "not intended to amend applicable legal requirements." In a nutshell, the only purpose of the memorandum was to open the door to individual states to work with the FHWA to find acceptable solutions for allowing digital billboards, in the discretion of each state. The memorandum did not eliminate the AHBA's prohibition of intermittent lighting.

4. Interpretations by ADOT

[8] ¶ 33 American Outdoor also asserts that we must defer to ADOT's recent interpretation of the AHBA, because it is entitled to great weight. It is true that "[j]udicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight." *U.S. Parking Sys. v. City of Phoenix,* 160 Ariz. 210, 211, 772 P.2d 33, 34 (App.1989) (citation omitted). But that general rule does not necessarily apply when the agency's interpretation of a particular provision is not longstanding. *See id.* at 212, 772 P.2d at 35; *cf. Kubby v. Hammond,* 68 Ariz. 17, 21, 198 P.2d 134, 137 (1948) (deferring to the agency definition when the word "industrial" had been construed the same way by the agency for seventeen years). Moreover, an "agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction." *U.S. Parking Sys.,* 160 Ariz. at 211, 772 P.2d at 34.

¶ 34 The only arguably longstanding interpretation by ADOT is its (recently abandoned) position that electronic billboards are prohibited because they display intermittent lighting. In 2004, ADOT commenced an enforcement action to prohibit operation of two digital billboards placed on Interstate 10 and Interstate 17. After a hearing, the ALJ found in favor of the advertising company. Clear Channel Outdoor Advert. Co., 03SGN–094 (Jan. 8, 2004). In a post-hearing brief, ADOT vigorously contested the ALJ's decision, arguing that the billboards used intermittent lighting in violation of the AHBA. The ALJ denied reconsideration and rehearing, and ADOT did not judicially appeal the decision. Additionally, in 2003 and 2005, ADOT's representatives made comments in legislative committee hearings supporting the agency's position that the AHBA as currently drafted does not permit electronic billboards. *See infra* ¶ 48, n.24.

¶ 35 But in a January 2008 letter to the City's zoning administrator regarding proposals by other applicants for use permits for digital billboards, ADOT stated it did "not have any objection to the issuance" of the permits. Without citation to regulation or published policy, the agency declared that "[t]he State's outdoor advertising regulations do not prohibit signs that are capable of changing static copy through electronic means at a reasonable frequency." [18]

****382** ***431** ¶ 36 In light of these conflicts, prior to oral argument we issued an order requesting ADOT to submit an *amicus curiae* brief addressing (1) its interpretation of A.R.S. § 28–7903(A)(4); (2) the "legal effect" of its January 2008 letter to the City's zoning administrator; and (3) whether ADOT's interpretation of § 28–7903(A)(4) is "consistent with its obligations underA.R.S. §§ 28–7907 and 28–7908." In response, ADOT filed a one-page brief stating that its policy for electronic billboards, as reflected in an attached guidance policy memorandum dated August 4, 2008, is consistent with ADOT's obligations under the AHBA. The ADOT "policy" memorandum provides a brief history of electronic billboards and quotes portions of the 2007 FHWA guidance memorandum, but omits any guidance as to whether electronic billboards violate the AHBA's prohibition against intermittent lighting. The amicus brief explained further that the letter to the City's zoning administrator "has no legal effect" beyond the fact that it correctly stated ADOT's position relating to specific use permits that the City was considering and ADOT's policy regarding electronic billboards.

¶ 37 Contrary to Scenic's assertion, the positions taken by ADOT relating to pending legislation, *see infra* n.24, and the 2004 enforcement proceeding do not constitute the type of longstanding precedent that merits judicial deference to the administrative agency. Similarly, ADOT's January 2008 letter to the City and its August 2008 "policy" memorandum provide no support for American Outdoor's argument that ADOT has adopted a policy allowing electronic billboards. Even if we could construe these informal actions as policies, they have not been adopted by rule as contemplated by the AHBA or the Administrative Procedures Act ("APA"). [19] Thus, the lack of formality and the inconsistency with which ADOT has approached the issue persuade us that ADOT's interpretations of the statute are not entitled to judicial deference. Therefore, we are left with the plain meaning of the statute, which, as discussed *supra* ¶ 22, does not permit digital billboards.

C. Intermittent Lighting is Not Restricted by the Phrase "Likely to be Mistaken for a Warning or Danger Signal."

¶ 38 American Outdoor next contends the billboard does not violate the AHBA because the statutory provision prohibits only intermittent lights that are likely to be mistaken for a warning or danger signal. *See* A.R.S. § 28–7903(A)(4) (prohibiting off-premises sign "[i]f it is visible from the main traveled way and displays a red, flashing, blinking, intermittent or moving light or lights likely to be mistaken for a warning or danger signal, except that part necessary to give public service information such as time, date, weather, temperature or similar information"). [20] Thus, according to American Outdoor, ***432 **383** unless an outdoor advertising display has an intermittent light *and* such light is likely to be mistaken for a warning or danger signal, the advertising display is allowed under the statute. Scenic counters that § 28–7903(A)(4) lists different types of prohibited lights, one of which is a light that is likely to be mistaken for a warning or danger signal.

¶ 39 Viewing the plain language of the statute, both parties' interpretations are plausible; however, neither construction gives effect and meaning to each word and phrase. Thus, because the statute is ambiguous, we turn to other recognized methods of statutory construction to attempt to ascertain the intent of the legislature. [21] *See* *Centric–Jones Co. v. Town of Marana,* 188 Ariz. 464, 468, 937 P.2d 654, 658 (App.1996).

¶ 40 Keeping in mind the historical background of the AHBA, we analyze whether the legislature intended that intermittent lights be prohibited only if they are "likely to be mistaken for a warning or danger signal." *See* *Calvert v. Farmers Ins. Co. of Ariz.,* 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985) (ascertaining legislative intent based on "words, context, subject matter, and effects and consequences of the statute"). American Outdoor's interpretation of § 28–7903(A)(4) would render superfluous the exception for lighting "necessary to give public service information such as time, date, weather, temperature or similar information." Under American Outdoor's view, the prohibition only applies to lighting that falls within a single category—lighting that is likely to be mistaken for a warning or danger signal. If that were true, however, no need would exist for a specific exception governing lighting for public service information. Instead, any lights that are flashing, blinking, intermittent, or moving, except those likely to be mistaken for a warning or danger signal, would be permitted. But we must strive not to construe statutory schemes in a way that renders any portion of them superfluous, and therefore we cannot agree with American Outdoor's restrictive interpretation. *See* *Grand v. Nacchio,* 225 Ariz. 171, 175–76, ¶ 22, 236 P.3d 398, 402–03 (2010) ("We ordinarily do not construe statutes so as to render portions of them superfluous.").

¶ 41 Furthermore, if we were to adopt the statutory construction urged by American Outdoor—that "likely to be mistaken" modifies every other kind of light in that subsection—the result would severely diminish Arizona's "effective control" over billboard lighting. Granted, under American Outdoor's interpretation, the AHBA would still prohibit lights "likely to be mistaken for a warning or danger signal," and lights "of such brilliance and in such a position as to blind or dazzle the vision of travelers on the main traveled way." *See* A.R.S. § 28–7903(A)(4)–(5). But beyond those narrow prohibitions, the lighting options would be unrestricted. For example, the statute would not bar animations or other videos, given that they could hardly be mistaken for a warning or danger signal or rise to the level of blinding brilliance. Similarly, a colorful array of holiday lights could be allowed, even if the lights flash or blink. Flashing floodlights used to light a traditional billboard that could intermittently rotate between light and darkness every few seconds to capture the attention of nighttime drivers might also not be prohibited. Even a light display involving "chasing snakes" would appear to be permissible. *See* *Ellison Furniture & Carpet Co. v. Langever,* 52 Tex.Civ.App. 50, 113 S.W. 178, 178 (1908) (describing proposed electric sign with the word "Ellison" surrounded by a border consisting of rows of electric lights "so arranged that by a system of intermittent lights the border produced the effect of two snakes chasing each other around the word 'Ellison' ").

¶ 42 These lighting scenarios are entirely inconsistent with the safety and beautification purposes of the AHBA, the FHBA, and ***433 **384** the Agreement, a principle apparently recognized at least in part by ADOT. In its January 2008 letter to the City, ADOT wrote: "The State's outdoor advertising regulations do not prohibit signs that are capable of changing static copy through electronic means at a reasonable frequency. *They do however prohibit electronic signs that display or emulate animation.*" (Emphasis added.) The bifurcated interpretation suggested by American Outdoor and reflected in the ADOT letter demonstrates why it would be plainly contrary to the legislature's intent to adopt American Outdoor's contention that the prohibition in § 28–

7903(A)(4) applies only to lighting that is "likely to be mistaken for a warning or danger signal."

¶ 43 To the extent American Outdoor argues that the AHBA's main purpose is safety rather than beautification, that argument also fails. The AHBA must be interpreted in a manner consistent with the Agreement and the FHBA. There is no question that safety considerations are an essential component of the AHBA; however, those provisions do not override the beautification aspect of the legislation. Because the purpose of the statutory scheme was to limit the proliferation of billboards, we are not persuaded by American Outdoor's narrow reading of the lighting provisions of the AHBA. *See South Dakota v. Volpe,* 353 F.Supp. 335, 340 (1973) ("Congress never intended to subvert the [FHBA's] stated purpose to arbitrary actions taken by the individual state legislatures.").

¶ 44 Based on the history and purpose of the statute, we conclude that the most reasonable reading is to follow the statute exactly as it is punctuated. Accordingly we read the statute as barring "a red, flashing, blinking, intermittent or moving light," as well as "lights likely to be mistaken for a warning or danger signal." Thus, a billboard that displays an intermittent light is prohibited without regard to whether the display is likely to be mistaken for a warning or danger signal. Recognizing that the statute is not drafted artfully, this reading adheres most closely to the legislative history and intent. *See* *Calvert,* 144 Ariz. at 294, 697 P.2d at 687 (noting "[t]he cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute"); *State v. Cornish,* 192 Ariz. 533, 537, ¶ 16, 968 P.2d 606, 610 (App.1998) ("Courts will apply constructions that make practical sense rather than hypertechnical constructions that frustrate legislative intent."). [22]

¶ 45 Our conclusion is consistent with the Arizona Legislature's unsuccessful efforts to amend the law twice within the last eight years. In 2003, House Bill 2364 proposed an amendment that would have specifically permitted electronic billboards as long as they displayed a static, non-animated message that changed no more frequently than every six seconds. H.B. 2364, 46th Leg., 1st Reg. Sess. (Ariz. 2003). The proposed legislation passed the House but failed by a roll call vote in a Senate committee. Minutes of Ariz. S. Comm. on Commerce on H.B. 2364, 46th Leg., 1st Reg. Sess. (Apr. 2, 2003).

¶ 46 In 2005, House Bill 2461 proposed adding the following language to the AHBA: " 'Intermittent' means a pattern of changing light intensity, other than that achieved with immediate, fade or dissolve transitions between messages, where any message remains static for less than six seconds." H.B. 2461, 47th Leg., 1st Reg. Sess. (Ariz. 2005). The bill also proposed definitions for "fade" and "dissolve" and would have required a separate permit for digital billboards, along with a mandate that ADOT separately establish and collect fees for those permits. *Id.* Both the House and Senate passed the bill, but the governor vetoed it, pointing to opposition from neighborhood associations and Arizona's major observatories. *See* Letter from Governor Janet Napolitano to Speaker Jim Weiers (May 9, 2005).

¶ 47 Normally, "[r]ejection by the house or senate, or both, of a proposed bill is an unsure and unreliable guide to statutory construction." ***434 **385** *City of Flagstaff v. Mangum,* 164 Ariz. 395, 401, 793 P.2d 548, 554 (1990). However, there are limited occasions when such inaction by the legislature can be relevant in determining the intended scope of a statute. *See* *Long v. Dick,* 87 Ariz. 25, 29, 347 P.2d 581, 583–84 (1959) (explaining that "the members of the legislature were repeatedly made aware of the operation of the statute and must have known its administrative interpretation and application. Yet, no change of any material or substantial nature occurred...."); *Ni v. Slocum,* 196 Cal.App.4th 1636, 127 Cal.Rptr.3d 620, 631 (2011) (construing the legislature's passage of a bill, which the governor later vetoed, directing further study on creation of a digital electoral system as evidence that the legislature did not believe such a system was addressed by existing statutes); *Denver Publ'g Co. v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe,* 121 P.3d 190, 197 (Colo.2005) (comparing the broad definition of " public record" in failed legislation with the narrower definition included in successful legislation).

¶ 48 Here, the legislative history includes statements made by the advertising industry, opposition groups, and ADOT representatives during the committee hearings. [23] Those statements, together with the legislature's decision to attempt to adopt legislation, tend to support the legislature's understanding that electronic billboards are barred by existing laws. At a minimum, the legislative history demonstrates that the legislature was aware of ADOT's informal positions in 2003 and 2005 that the AHBA did not allow electronic billboards. [24]

D. Arizona Has Not Changed the Statutory Prohibition of Intermittent Lighting.

¶ 49 We recognize that digital billboards are now permitted in many states. But those states have acted legislatively or administratively to formally enact standards, and Arizona has not. Of the states that allow digital billboards, the vast majority do so only by specific statute or regulation that addresses the "intermittent" issue.

¶ 50 For example, in Delaware, the legislature adopted a statute expressly permitting digital billboards and stating they are "not considered to be in violation of flashing, intermittent, or moving lights criteria" if they comply with certain conditions, including a minimum display time of ten seconds, brightness ***435 **386** controls, limitations on proximity to other digital billboards, and default settings in case of a malfunction. 17 Del. C. § 1110(b)(3)(e) (2010). The Iowa Administrative Code provides that "[n]o off-premises sign shall include any flashing, intermittent or moving light or lights," but specifically exempts digital billboards so long as they comply with certain restrictions, such as a fixed message time and transition time. Iowa Admin. Code r.761–117.3(1)(e)(1–3) (2010). Similarly, the Texas Department of Transportation adopted a formal rule stating "the use of an electronic image on a digital display device is not the use of a flashing, intermittent, or moving light." 43 Tex. Admin. Code § 21.252 (2011). The rule also requires a minimum display time of eight seconds, a maximum transition time of two seconds, a default setting in case of malfunction, and brightness controls. *Id.* § 21.257. [25]

¶ 51 A failed effort by South Dakota is also relevant here. *See Volpe,* 353 F.Supp. at 341. In *Volpe,* South Dakota sued the United States Secretary of Transportation seeking to compel the Secretary to pay $3 million that was withheld from federal highway funds, representing a ten-percent reduction of the funds based on South Dakota's failure to comply with the FHBA. *Id.* at 337. The Secretary had determined that South Dakota had failed to adopt an acceptable statute that effectively controlled outdoor advertising. *Id.*

¶ 52 One of South Dakota's contentions was that the Secretary had acted arbitrarily and unreasonably in not accepting the state's determination of "customary use" with regard to size, lighting, and spacing requirements. *Id.* at 341. The court rejected the argument, explaining that the Secretary was "[c]harged with administering the Act and preserving the stated purpose from the caprice of the individual states, [and that] the Secretary established these generally accepted criteria as a floor to acceptable alternatives." *Id.* The court found that South Dakota's provisions were unacceptable and agreed with the Secretary that they did not meet the minimum national standards. *Id.*

¶ 53 There is no contention here that Arizona has failed to adopt an acceptable statute effectively controlling outdoor advertising. Arizona has done so, and its beautification act, including the prohibition of intermittent lighting, has been in place since 1970. Intermittent lighting has not become exempt from the statutory prohibition merely because of technology that now allows a myriad of lighting options that were unavailable in 1970. American Outdoor's principal argument relies on the notion that changing the light display no more than every eight seconds is a reasonable determination of what should be defined as intermittent and what should not. That may well be the case; however, neither the AHBA nor the Agreement includes an exception for "limited" intermittence, and it is not our function to re-write the statute to allow one. Stated differently, it is neither our responsibility nor our prerogative to determine that a light display changing every seven seconds uses intermittent lighting while one changing every eight seconds does not. Instead, those functions lie squarely with the legislature, and to the extent permitted by the AHBA, by delegation with the director of ADOT. *See* A.R.S. § 28–7908(A) ("The director shall adopt and enforce rules governing the placing, maintenance and removal of outdoor advertising.") [26] Furthermore, allowing for public input through legislative amendment and/or formal rulemaking procedures is sound public policy. *See Winsor v. Glasswerks PHX, L.L.C.,* 204 Ariz. 303, 310, ¶ 24, 63 P.3d 1040, 1047 (App.2003) (some policy issues are "best handled by legislatures with their comprehensive machinery ***436 **387** for public input and debate"). [27]

¶ 54 In sum, the conclusion we reach here is consistent with the AHBA, the Agreement, and the FHBA. We emphasize that we are interpreting the law as it has existed for over forty years. Our decision confirms that neither the legislature nor ADOT has formally addressed the effects of substantial technological changes relating to the operation and use of off-premises outdoor advertising displays. Because we hold that a digital billboard uses intermittent lighting and is therefore prohibited by the AHBA, the use permit was granted in violation of state law and is therefore invalid. [28]

Highway Beautification Act. We therefore remand for entry of judgment in favor of Scenic.

CONCLUSION

¶ 55 We hold that Scenic has standing to challenge the Board's decision granting American Outdoor's application for a use permit to operate an electronic billboard. We also hold that the Board acted in excess of its authority in granting the permit because the billboard's lighting violates the Arizona

CONCURRING: DIANE M. JOHNSEN, Presiding Judge, and MARGARET H. DOWNIE, Judge.

All Citations

228 Ariz. 419, 268 P.3d 370, 621 Ariz. Adv. Rep. 4

Footnotes

1 The billboard at issue is the substantial equivalent of a large digital picture frame. It displays a static color image that changes every eight seconds. The image is produced using matrices of thousands of tiny light emitting diodes ("LEDs"). An LED is "[a] semiconductor diode that converts applied voltage to light." Webster's II New College Dictionary 641 (3d ed. 2005). The images displayed on the screen are programmed remotely through a computer terminal. Using this technology, billboards can "provide dynamic and realistic views much like color television." Federal Highway Administration ("FHWA"), Research Review of Potential Safety Effects of Electronic Billboards on Driver Attention and Distraction (Literature Review), http:// www.fhwa.dot. gov/ realestate/elecbbrd/chap2.html (last visited Oct. 20, 2011).

2 Neighborhood Coalition is a citizen organization whose announced purpose "is to protect, and give a voice" to members "who want to protect and preserve aesthetic, economic, and safety concerns within their neighborhoods." Scenic Arizona is a statewide organization "dedicated to scenic preservation and outdoor advertising control" that endeavors to "give a voice to citizens and members who are concerned by traffic safety and its interplay with aesthetic regulation." Except as otherwise noted, we refer to both organizations collectively as "Scenic."

3 We cite the current statutes when there have been no relevant changes.

4 This type of outdoor advertising is also referred to as an "off-premises changeable electronic variable message sign" or a "digital changing video display." For convenience, we refer to the message board at issue here as "the billboard," and to these types of outdoor advertising devices generally as digital billboards or electronic billboards.

5 On appeal, the Board filed a separate answering brief addressing the merits of the special action. Because the Board's arguments closely parallel American Outdoor's arguments, we need not separately address the Board's position.

6 For convenience, and consistent with the terminology used by the parties, we frame this issue generally as whether Scenic has "standing" to challenge the Board's decision in superior court. The more accurate question, however, is whether Scenic qualifies as a "person aggrieved" under A.R.S. § 9–462.06(K) within the context of the AHBA. *See* *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (quoting 5 U.S.C. § 702 (1964 ed., Supp. IV)) ("[T]he Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.' ").

7 Scenic did not allege that any of its members are "taxpayers" within the meaning of § 9–462.06(K). *See* discussion *infra* ¶¶ 7, 10.

8 "Aggrieved" means "having legal rights that are adversely affected." Blacks Law Dictionary 73 (8th ed. 2004). As our supreme court has observed, the term "person aggrieved" must be considered in the context in which it is used. *Mendelsohn v. Superior Court,* 76 Ariz. 163, 166, 261 P.2d 983, 986 (1953) ("We find that whether the legislature has given [petitioners] the right to appeal cannot be determined by looking only to the phrase 'the person aggrieved'. Our exhaustive examination of the law and cases in Words and Phrases 'Aggrieved' and 'Person Aggrieved', Corpus Juris Secundum 'Aggrieved', and Black's Law Dictionary, 3rd ed., 'Aggrieved Party', served to remind us of what Humpty Dumpty told Alice—'When *I* use a word, it means just what I choose it to mean—neither more nor less.' Chapter Six, Through the Looking Glass, Charles Dodgson.... Accordingly, the question of whether these [petitioners] have the right to appeal must be bottomed on something more substantial than a pedantic construction of two adjectives and one noun.").

9 Perdurable means "extremely durable" or "permanent." Webster's II New College Dictionary 836 (3d ed. 2005).

10 American Outdoor relies on *Spahn v. Zoning Bd. of Adjustment,* 602 Pa. 83, 977 A.2d 1132, 1152 (2009), asserting that civic organizations do not have standing to challenge a zoning board of adjustment decision. *Spahn,* however, is not persuasive here. It merely stands for the proposition that the legislature may limit who has the right to challenge a zoning decision. *See id.* (finding state law imposed more strict requirements than the city's ordinance).

11 Of the various reported land use decisions in Arizona, only *Buckelew* involved the statutory right to judicially challenge a board of adjustment decision under § 9–462.06(K). But we did not address the "person aggrieved" standard in *Buckelew;* instead, we found the plaintiff had standing based on the specific damages to his residence, which was located adjacent to the offending use. 188 Ariz. at 452, 937 P.2d at 374. In *Center Bay Gardens,* we referenced § 9–462.06(K) in a footnote, stating that "[w]e do not consider the 'aggrieved person' standard to create a substantially different test than that set forth in *Buckelew, Blanchard,* and the related cases." 214 Ariz. at 358, ¶ 20, n. 7, 153 P.3d at 379, n. 7. However, *Center Bay Gardens* involved a challenge to a decision of the Tempe City Council to grant several variances from its zoning ordinance. *Id.* at 354–55, ¶¶ 3–5, 153 P.3d at 375–76. It did not involve a challenge to the decision of the board of adjustment under § 9–462.06(K), and thus the statement in the footnote is dictum.

12 *See Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 227, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.")

13 These prohibitions apply only to "off-premises advertising." *See* A.R.S. § 28–7902(A)(2) (Supp.2010) (providing an exception for "[s]igns, displays and devices that are located *on the premises* of the activity that they advertise") (emphasis added). It is undisputed that the billboard at issue here constitutes off-premises advertising and is therefore subject to the AHBA lighting restrictions.

14 The attorney added, however, that he believed the state prohibition on intermittent lighting applied only to lights that were "likely to be mistaken for a warning or danger signal." *See* discussion *infra* II.C.

15 Local zoning authorities are not preempted from enforcing outdoor advertising ordinances as long as the local law is at least as restrictive as the AHBA. *Libra Group, Inc. v. State of Arizona,* 167 Ariz. 176, 181, 805 P.2d

409, 414 (1991) ("We find that the reference to 'lawfully placed' includes local law, if any exists, as the act also recognizes county and municipal authority to issue permits for outdoor advertising signs in its permitting provision."). Phoenix zoning ordinances authorize the issuance of a use permit if the proposed use "[w]ill be in compliance with all provisions of this ordinance and the laws of the City of Phoenix, Maricopa County (if applicable), State of Arizona, or the United States." Phx. Ord. § 307(A)(7)(b) (amended on Jan. 19, 2011, by Ord. No. G–5584, to read "Will be in compliance with all provisions of this ordinance and the laws of the City of Phoenix."). Therefore, the use permit issued to American Outdoor cannot be upheld if it was issued in contravention of a City ordinance, or a state or federal law. *Cf.* A.A.C. R17–3–701(A)(1)(d) (" 'Illegal sign' means one which was erected and/or maintained in violation of the state law.").

16 More background on federal outdoor advertising requirements is available from the Federal Highway Administration website. FHWA, A History and Overview, The Outdoor Advertising Control Program, http://www.fhwa.dot. gov/realestate/oacprog.html# OACP (last visited Oct. 20, 2011).

17 The FHWA identified an acceptable display duration time as being "between 4 and 10 seconds," and stated that "8 seconds is recommended."

18 Two days before the letter was sent, ADOT's employees, including the author of the letter, exchanged emails indicating that ADOT had taken a "hands-off approach" to digital billboards since the 2004 enforcement matter and that the industry had attempted a legislative change. The email exchange further noted that "[b]efore we bring FHWA in on this, we probably need to determine what ADOT's/The State's position is" and suggested the option of obtaining an opinion from the attorney general "once we get a sense of what is happening."

19 The AHBA provides in part as follows:

> The director shall adopt and enforce rules governing the placing, maintenance and removal of outdoor advertising. The rules shall be consistent with:
>
> 1. The public policy of this state to protect the safety and welfare of the traveling public.
>
> 2. This article.
>
> 3. The terms of the agreement with the United States secretary of transportation pursuant to § 28–7907.
>
> 4. The national standards, criteria and regulations promulgated by the United States secretary of transportation pursuant to 23 United States Code § 131.

A.R.S. § 28–7908(A). The APA explains the meaning of a rule:

> "Rule" means an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. Rule includes prescribing fees or the amendment or repeal of a prior rule *but does not include intraagency memoranda* that are not delegation agreements.

A.R.S. § 41–1001(18) (Supp.2010) (emphasis added).

20 In the original version of the statute, there was a comma after "intermittent" and before "moving light." A.R.S. § 18–713 (1970). The comma was removed by legislative act in 1972. Act of Mar. 15, 1972, 1972 Ariz. Sess. Laws 52. Nothing indicates that the legislature intended to change the meaning by removing the comma, and we will not infer that intent absent some indication. *State v. Govorko,* 23 Ariz.App. 380, 384, 533 P.2d 688, 692 (1975) ("Certainly if the legislature intended such a significant change in the breadth of the statute,

one would expect a more substantial showing of such intent than the use of a grammatical sleight of hand with commas.").

21 The statute's uncertainty is presumably a natural consequence of the poor wording of the federal legislation on which it is based. As one author observed, "[i]t must be conceded ... that title I of the Highway Beautification Act is one of the worst-drafted pieces of legislation ever to emerge from the Congress." Roger A. Cunningham, Billboard Control Under the Highway Beautification Act of 1965, 71 Mich. L. Rev. 1295, 1371 (1972–73).

22 Our interpretation does not purport to resolve all potential issues relating to other types of lighting prohibited by the AHBA. For example, reading the statute as we do here would mean that a billboard using just one "red" light for illumination would be prohibited, a potentially absurd result. However, the type of "red" lights that the statute prohibits is not a question before us.

23 Scenic points to testimony in 2003 from various entities, including the Arizona Outdoor Advertising Association and ADOT showing that ADOT's interpretation of current statutes meant that an amendment would be necessary to allow digital billboards. Wendy Briggs, representing the Association, testified that ADOT's "interpretation of the existing law is that these boards are not permitted," but it was her contention "that they are already permitted in some instances." Minutes of Ariz. H. Comm. on Commerce and Military Affairs on H.B. 2364, 46th Leg., 1st Reg. Sess. (Feb. 24, 2003). Kevin Biesty, on behalf of ADOT, stated that ADOT believed that Arizona would be out of compliance with federal law, could jeopardize the Agreement, and would stand to lose approximately $65 million in federal funding if the amendment were adopted. He proposed a stakeholder meeting to review "the issue with a view to drafting rules and guidelines in regard to the new technology." *Id.* Blake Custer, for Clear Channel Outdoor, explained he had discussed electronic billboards with the City of Phoenix and "was informed there needed to be a change in the law" before such billboards would be allowed. *Id.* We generally give no weight to comments of non-legislators at committee hearings to ascertain the intent of the legislature. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 270, 872 P.2d 668, 674 (1994). However, these statements indicate the uncertain status of whether digital billboards were permissible when this legislation was proposed.

In 2005, a representative of Young Electric Sign Company spoke in support of the proposed amendment, stating it would be a clarification of the original language. Minutes of Ariz. H. Comm. on Transp. on H.B. 2461, 47th Leg., 1st Reg. Sess. (Feb. 10, 2005). ADOT representatives explained that "since the statutes have been enacted, it has been ADOT's position that all offsite electronic variable message signs were prohibited." *Id.* ADOT supported the bill because it would "provide[ ] a tool for ADOT to establish a baseline at six-second intervals, and to actually regulate these signs and recover permit fees." *Id.*

24 We also note that the legislature did amend different provisions of the AHBA in 2005, adding an expanded definition of on-premises signage that would include a "comprehensive commercial development." 2005 Ariz. Sess. Laws, ch. 157, § 2 (1st Reg. Sess.) (codified at A.R.S. § 28–7902(A)(2)). But the amendment also provided that the expanded use would be applicable only insofar as it "does not cause a reduction of federal aid highway monies pursuant to 23 United States Code section 131." *Id.*

25 For additional examples, *see, e.g.,* Fla. Admin. Code Ann. r.14–10.004(3)(2010) (allowing changeable message signs subject to restrictions, including minimum display time and maximum transition time); Idaho Admin. Code r.39.03.60.300.05 (2011) (same); Ala. Admin. Code r.450–10–1–.13 (2011) (same); Kan. Stat. Ann. § 68–2234(e) (2010) (same); Ohio Admin. Code 5501:2–2–02(B) (2010) (same); Mich. Comp. Laws Ann. § 252.318(f) (2011) (same); N.J. Admin.Code 16:41C–8.8(a) (2011) (same).

26 ADOT has adopted various rules relating to outdoor advertising control, including definitions of some "specialized terms," but has not defined "intermittent." *See* Ariz. Admin. Code R17–3–701(A).

27 As a further indication that technological advances in the billboard industry relating to electronic billboards, as well as the economic implications of such changes, have not been fully addressed by ADOT or the legislature, we note that the fee currently charged by ADOT for a billboard permit is a one-time payment of twenty dollars. *See* Permit Application, http://www.azdot.gov/highways/MaintPermits/PDF/Application. pdf (last visited Oct. 20, 2011). By contrast, the City of Tolleson currently charges a $3,000 per month permit fee for a digital billboard. Tolleson City Zoning Ordinance § 12–4–132(H)(6). ("If a use permit for digital billboard is approved, such approval is subject to a monthly 'Off–Premise [s] Sign Advertising Permit Fee' in the amount of $3,000 per month, payable to the City of Tolleson.").

28 Based on this resolution, we need not address Scenic's contention that the Board failed to make required findings of fact. *See Yuma County v. Tongeland,* 15 Ariz.App. 237, 238, 488 P.2d 51, 52 (1971) (not addressing parties' arguments concerning findings of fact when the decision was based on other reversible error).

KeyCite Yellow Flag - Negative Treatment
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196 Ariz. 114
Court of Appeals of Arizona,
Division 1, Department E.

William BLANCHARD; Leveta Challis; Veta Cook; Caron Letcher; Carole and Vaughn Thompson, Plaintiffs–Appellants, Cross Appellees,
v.
SHOW LOW PLANNING AND ZONING COMMISSION; City Of Show Low; Ed Muder, as Planning and Zoning Administrator, Defendants–Appellees, Cross Appellants,
John Menhennet, Trustee of the John Menhennet Living Trust; Wal–Mart Stores, Inc., Real Parties in Interest, Defendants–Appellees.

No. 1 CA–CV 98–0325.
|
May 25, 1999.
|
Review Denied Nov. 30, 1999. *

Synopsis
Nearby property owners brought special action attacking procedures used to rezone newly annexed parcel to construct large chain discount store. The Superior Court, Navajo County, No. CV 98-000081, Tom L. Wing, J., granted city's motion to dismiss on ground that rezoning was valid despite initiation of rezoning prior to completion of parcel's annexation. Owners appealed, and city cross appealed. The Court of Appeals, Weisberg, J., held that: (1) citizens did not have taxpayer standing to challenge rezoning; (2) only owners of residence and business located approximately 750 feet from parcel showed particularized harm necessary to have standing to challenge rezoning; and (3) city was not precluded from initiating rezoning of parcel prior to completion of annexation process; and (4) under circumstances, city was not required to give county direct notice of rezoning.

Affirmed.

Noyes, J., filed dissenting opinion.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (12)

[1] **Appeal and Error** Failure to State Claim, and Dismissal Therefor

On review, motion to dismiss would be treated as motion for summary judgment where trial court considered evidence extrinsic to complaint.

14 Cases that cite this headnote

[2] **Zoning and Planning** Modification or amendment

Mere taxpayer status is insufficient to confer standing on the parties to challenge rezoning.

2 Cases that cite this headnote

[3] **Zoning and Planning** Modification or amendment

Taxpayer status was insufficient to confer standing on citizens to challenge rezoning of parcel for commercial development that did not involve expenditure of public monies.

2 Cases that cite this headnote

[4] **Zoning and Planning** Modification or amendment

In order to be sufficiently affected to have standing to challenge rezoning of parcel, property owners did not have to own parcels adjacent to or within 300 feet of rezoned parcel.

A.R.S. § 9–462.04, subd. A, par. 3.

2 Cases that cite this headnote

[5] **Action** Persons entitled to sue

Question of standing in Arizona is not of constitutional dimension, but involves questions of prudential or judicial restraint to insure that case is not moot and issues will be fully developed by true adversaries.

2 Cases that cite this headnote

[6] **Zoning and Planning** Modification or amendment

Owner who alleged no particularized harm to property located approximately 1,875 feet away from rezoned parcel did not have standing to challenge rezoning on basis of generalized harm to area in form of increased traffic and noise.

3 Cases that cite this headnote

[7] **Zoning and Planning** Modification or amendment

Owners of residence and tire business demonstrated particularized harm necessary to have standing to challenge commercial rezoning of parcel located approximately 750 feet from their property for development of chain discount store by showing harm different and greater than that to other property located farther away in form of greatly increased traffic load, noise, air and light pollution, and litter.

2 Cases that cite this headnote

[8] **Appeal and Error** Statutory or legislative law

Statutory interpretation is a matter of law that is reviewed de novo.

1 Case that cites this headnote

[9] **Zoning and Planning** Proceedings to Modify or Amend

Statute requiring that, upon annexation, parcel retain zoning classifications that permit uses no greater than what had been permitted prior to annexation and that "subsequent changes" be carried out in compliance with the appropriate rezoning provisions did not bar city from initiating rezoning proceedings before annexation of parcel was final. A.R.S. § 9–471, subd. L.

[10] **Zoning and Planning** Notice and Hearing

City was not prohibited from initiating rezoning process while annexation of parcel was pending where citizens were given appropriate notice and applicable hearing procedures were followed. A.R.S. § 9–471, subd. L.

[11] **Zoning and Planning** Applicability to Persons or Places

Statute setting forth procedures by which a city in a county not having county zoning ordinance applicable to unincorporated territory may exercise its zoning powers both to territory within its corporate limits and to that which extends distance of three contiguous miles in all directions had no application to parcel that had county zoning prior to its annexation. A.R.S. § 9–462.07, subd. A.

[12] **Zoning and Planning** Notice and Hearing

Direct notice to county was not required to rezone parcel that city was in process of annexing where, if annexation did not proceed, property would not have been rezoned and county could have had no possible interest and where, if annexation was completed, there would have been no county land adjacent to rezoned property at time that rezoning became effective. A.R.S. § 9–462.04, subd. A, par. 2.

Attorneys and Law Firms

****1079** ***115** Morrill & Aronson, P.L.C. by Martin A. Aronson, William D. Cleavel, John T. Moshier, Phoenix, Attorneys for Plaintiffs–Appellants, Cross Appellees.

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Ryley, Carlock & Applewhite, P.A. by Samuel P. Applewhite, III, N. Warner Lee, Phoenix, Attorneys for Real Party in Interest, Defendant–Appellee, John Menhennet.

OPINION

WEISBERG, Judge.

¶ 1 This case involves the appeal of the City of Show Low's (City) rezoning of a parcel of land to accommodate a Wal–Mart Supercenter Store. The crux of appellant's argument is that the City did not follow proper procedures for rezoning the parcel because it held rezoning hearings and approved a rezoning ordinance *before* the parcel was annexed, thereby rendering the rezoning void. For the reasons set forth below, we affirm the trial court's finding that the rezoning was valid and reverse only as to the standing of appellant Challis.

FACTS AND PROCEDURAL HISTORY

¶ 2 On November 4, 1997, the City Council adopted Ordinance 427 approving the annexation of land located in an unincorporated area of Navajo County. Per statute, the annexation did not become effective until thirty days later on December 3, 1997. See ****1080 *116** Arizona Revised Statutes Annotated (A.R.S.) § 9–471(D) (1996).

¶ 3 In October and November, prior to the effective date of annexation, the City initiated proceedings to rezone a portion of the annexed land from AR–43 agricultural/residential to C–2 general commercial. On October 24, 1997, the City posted and published notice that it would hold a hearing on the issue of rezoning. According to the City, notice was provided "through a display ad in the newspaper, by posting the subject property, and by sending notice to property owners within 300 feet of the subject property."

¶ 4 On November 12, 1997, the City's Planning and Zoning Commission held a public hearing. The hearing was televised on the local cable station. One of the appellants, Carole Thompson, attended the meeting and protested the rezoning plans.

¶ 5 At the November 12 meeting, the Planning and Zoning Commission announced that another hearing would take place before the City Council. That meeting occurred on November 18, 1997. According to the City, notice of this hearing was also "provided through a display ad in the newspaper, posting the subject property, and notice to owners within 300 feet," none of which was statutorily required. See A.R.S. § 9–462.04. This hearing, too, was televised on the local cable channel. According to the City, no one from the public provided any comment at that public hearing.

¶ 6 On December 1, 1997, the City Council voted to adopt Ordinance 428 rezoning to C–2 a portion of the annexed land. Pursuant to statute, the rezoning did not become effective until December 31, 1997, which was after the effective date of annexation. See A.R.S. § 9–462.04(H) (1996). Wal–Mart submitted plans to the City for the proposed construction of a "Super Wal–Mart" store on a portion of the annexed and rezoned property, as well as on a nine-acre parcel that was already zoned C–2.

¶ 7 On March 2, 1998, appellants, Carole and Vaughn Thompson, William Blanchard, LeVeta Challis, Veta Cook, and Caron Letcher, as owners of property located near the annexed parcel or as residents of Show Low, filed a complaint for special action relief in superior court, alleging that the City had "exceeded its jurisdiction by rezoning property before that property had been annexed to the City." Appellants asserted that A.R.S. section 9–471(L) prohibited the initiation of any rezoning procedures prior to the annexation of the subject property.

¶ 8 Because the Planning and Zoning Commission's hearings and vote to rezone and the City Council's vote to adopt the rezoning ordinance all took place prior to the December 3 effective date of the annexation, appellants argued that the rezoning was ineffective. They also argued that the rezoning was invalid because the City failed to give adequate notice to the county pursuant to A.R.S. section 9–462.04(A)(2) and failed to comply with A.R.S. section 9–462.07 (1996). The City and Wal–Mart countered with motions to dismiss, arguing that appellants (1) lacked standing to contest the rezoning and (2) misinterpreted the requirements of the applicable statutes.

¶ 9 The trial court held hearings on April 7 and April 14, 1998, at which, upon stipulation of the parties, the court heard evidence on both the merits of the complaint and the motions to dismiss. The trial court found that the three plaintiffs who owned property closest to the annexed parcel—Carole and Vaughn Thompson (henceforth referred to collectively as "the

Thompsons") and LeVeta Challis—had standing to challenge the rezoning, while the other plaintiffs did not. The court also found that the only flaw in the procedures followed by the City was that certain rezoning procedures predated the date of the adoption of the ordinance to annex the parcel. Notwithstanding, because the court further found that the City had substantially complied with the statutory requirements, it concluded that the rezoning was valid.

¶ 10 Appellants have timely appealed. They ask us to reverse the trial court's finding that Blanchard, Cook, and Letcher do not have standing. They also ask us to reverse the court's finding that the rezoning of the parcel was carried out in substantial compliance with the relevant statutes and to order that the parcel remain zoned as AR–43 agricultural ****1081** / ***117** residential. The City, John Menhennet, Trustee of the John Menhennet Living Trust, and Wal–Mart cross-appeal, arguing that the trial court erred in finding that the Thompsons and Challis have standing to challenge the rezoning. We have jurisdiction pursuant to A.R.S. section 12–2101(B).

STANDARD OF REVIEW

[1] ¶ 11 Because the trial court in considering the motion to dismiss heard evidence extrinsic to the complaint, we treat this motion to dismiss as a motion for summary judgment. *See* *Frey v. Stoneman,* 150 Ariz. 106, 109, 722 P.2d 274, 277 (1986). We review a grant of summary judgment to determine whether a genuine issue of material fact exists and to determine whether the trial court correctly applied the law. *See* *Matter of Estate of Johnson,* 168 Ariz. 108, 109, 811 P.2d 360, 361 (App.1991). In so doing, we view all facts and the reasonable inferences therefrom in the light most favorable to the party against whom the judgment was entered. *Prince v. City of Apache Junction,* 185 Ariz. 43, 45, 912 P.2d 47, 49 (App.1996). We review the denial of a motion for summary judgment for an abuse of discretion. *See* *Salt River Valley Water Users' Ass'n v. Superior Court,* 178 Ariz. 70, 74, 870 P.2d 1166, 1170 (App.1993). We review questions of statutory interpretation *de novo.* *Young v. City of Scottsdale,* 193 Ariz. 110, 112, 970 P.2d 942, 944 (App.1998).

STANDING

¶ 12 The Thompsons own property located diagonally across the Show Low Lake Road/South White Mountain Road intersection approximately 750 feet from the rezoned parcel. Challis owns property approximately 1,875 feet south of the rezoned parcel; Veta Cook resides on Challis's property. William Blanchard and Caron Letcher are City residents, and Letcher also owns and operates a flower shop located approximately three-quarters of a mile north of the rezoned parcel. All of the parties claimed standing because they were either taxpayers or because they owned property either in Show Low or near the rezoned parcel that they alleged would be harmed by the rezoning.

¶ 13 Appellees argued below that all appellants lacked standing to challenge the rezoning. They maintained that taxpayer status alone was not sufficient to confer standing. They further maintained that even the Thompsons and Challis, whose properties were located closest to the rezoned parcel, did not have standing because neither property was adjacent to the parcel and because there was no showing of any particularized harm to either.

¶ 14 The trial court found that the Thompsons and Challis had standing because "the properties of Thompson and Challis are located in such close proximity to the subject property ... that the rezoned use of [the] property will result in specific damages to their properties different [from] and greater than the effects upon the general public." However, the court did not find that any of the other parties had standing.

[2] **[3]** ¶ 15 Appellees argue, and we agree, that mere taxpayer status is insufficient to confer standing on the parties. The cases relied upon by appellants to support this standing argument, *Smith v. Graham County Community College Dist.,* 123 Ariz. 431, 600 P.2d 44 (App.1979), and *Ethington v. Wright,* 66 Ariz. 382, 189 P.2d 209 (1948), are cases in which taxpayers were found to have sufficient standing to question expenditures of public monies. Because no public funds are at issue in the rezoning of this parcel of land, taxpayer status alone does not confer standing in this case.

[4] ¶ 16 Appellees further argue that the trial court erred in finding that the Thompsons and Challis had standing because neither owns property directly adjacent to the rezoned parcel. Appellees do not cite any authority for this proposition, but rely on *Buckelew v. Town of Parker,* 188 Ariz. 446, 937 P.2d 368 (App.1996), in which the parties did own property

adjacent to the rezoned parcel, to support their argument. We, however, do not read *Buckelew* so narrowly.

¶ 17 While proximity is a factor to be considered in determining standing, a neighborhood or other discrete area may be affected by zoning changes and not all landowners ****1082** ***118** need to be directly adjacent to the subject property to be harmed by the proposed rezoning. *See* *Armory Park v. Episcopal Community Servs.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (action on behalf of neighborhood affected by meal center for indigents). Thus, the mere fact that the Thompson and Challis properties are not adjacent to the rezoned parcel does not alone preclude standing. [1]

¶ 18 Next, appellees argue that the harms claimed to the Thompson and Challis properties are no more than "vague and general allegations of injury" and are insufficient to constitute the particularized damages that are required to confer standing. They therefore maintain that the evidence does not support the trial court's finding of particularized harm to their properties. We agree as to Challis but disagree as to the Thompsons.

[5] ¶ 19 Our supreme court has determined that "the question of standing in Arizona is not a constitutional mandate since we have no counterpart to the 'case or controversy' requirement of the federal constitution." *Armory Park,* 148 Ariz. at 6, 712 P.2d at 919 (*quoting* *State v. B Bar Enter.,* 133 Ariz. 99, 649 P.2d 978 (1982)). Nonetheless, in addressing questions of standing, we are confronted with "questions of prudential or judicial restraint," *id.,* and will impose that restraint to insure that "the case is not moot and that the issues will be fully developed by true adversaries." *Id.*

¶ 20 To have standing, a plaintiff "must plead damage from an injury peculiar to him or at least more substantial than that suffered" by the community at large. *Buckelew,* 188 Ariz. at 452, 937 P.2d at 374. Allegations of general economic or aesthetic losses in an area, without instances of injury particular to the plaintiff, are generally not sufficient to create standing. *Id.* at 451, 937 P.2d at 373.

[6] ¶ 21 Challis owns property approximately 1,875 feet away from the subject property. Her property is neither near the Thompsons' property nor in the Thompsons' neighborhood. Challis did not appear at the hearings. Significantly, no evidence was presented about any particular harm to Challis's property, other than the general allegations of harm contained in the complaint and the testimony of appellants' expert about general harm to the area around the parcel in the form of increased traffic and noise, etc. We hold that this evidence was insufficient for the trial court to find that Challis had standing.

[7] ¶ 22 Unlike Challis, the Thompsons have a residence and a tire business that are located only approximately 750 feet from the subject property, across State Route 260. Part of their property is also zoned commercial and borders on an RV park and sales facility. Also, Carole Thompson was the only appellant who presented evidence about harm to her property.

¶ 23 She testified that the rezoning of the property would "adversely affect" her use and enjoyment of her property because of "[t]he greatly increased traffic load, the noise and pollution from the cars, possible increase in crime ... in addition to ... light pollution from the parking lot lights at the proposed Wal–Mart Center." Significantly, her testimony was supported by appellants' expert witness, who was an "urban and land planner."

¶ 24 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. The evidence thereby supports the trial court's conclusion that the Thompsons will suffer special damages that will be more substantial than those suffered by the community at large. *See* *Buckelew,* 188 Ariz. at 452, 937 P.2d at 374. We therefore conclude that the trial court did not abuse its discretion in finding particularized harm to the Thompsons and holding that they had standing to contest the rezoning.

****1083** ***119** REZONING ISSUES

(A) *May rezoning be initiated before land has been annexed?*

¶ 25 As previously set forth, on November 4, 1997, the City Council adopted Ordinance 427, approving the annexation of the subject parcel, which was then located in an unincorporated portion of Navajo County. The annexation, however, did not become effective until thirty days later on December 3, 1997. See A.R.S § 9–471(D). Prior to the

effective date of annexation, the City posted notices and held public hearings on proposed Ordinance 428, which would rezone a portion of the parcel to C–2, general commercial status.

¶ 26 On December 1, 1997, the City Council voted to adopt Ordinance 428. Pursuant to statute, the rezoning did not become effective until December 31, 1997. Appellants filed their complaint for special action relief on March 2, 1998.

¶ 27 Appellants maintain that the City violated A.R.S. section 9–471(L) because it held hearings and voted to change the zoning *before* the land was officially annexed on December 3, 1997. A.R.S. section 9–471(L) states:

> A city or town annexing an area shall adopt zoning classifications which permit densities and uses no greater than those permitted by the county immediately before annexation. *Subsequent* changes in zoning of the annexed territory shall be made according to existing procedures established by the city or town for rezoning of land.

(Emphasis added.) Appellants read the word "subsequent" to mean that hearings or votes regarding prospective rezoning are barred prior to the actual annexation of a parcel of land. We disagree.

[8] ¶ 28 Statutory interpretation is a matter of law that we review *de novo*. *State Compensation Fund v. Superior Court,* 190 Ariz. 371, 374, 948 P.2d 499, 502 (App.1997). "The language of a statute is the most reliable evidence of its intent." *Walker v. City of Scottsdale,* 163 Ariz. 206, 209, 786 P.2d 1057, 1060 (App.1989).

[9] ¶ 29 Nothing in the plain language of the statute prohibits the City from commencing rezoning proceedings before a parcel has been annexed. The statute merely requires that, upon annexation, a parcel retain zoning classifications that permit uses no greater than had been permitted prior to annexation. Ordinance 427, approving the annexation of the property, translated the county zoning categories into equivalent City zoning categories, thereby satisfying that requirement.

¶ 30 As noted, the statute also requires that any "subsequent changes" in the zoning be carried out "according to existing procedures." Appellants do not question that the appropriate procedures were followed and have even stipulated that adequate notice of the rezoning was given to them.[2] Nevertheless, they fault the City for having started the rezoning process before the annexation was final. But nothing in the statute prohibits a city from beginning the rezoning process prior to the effective date of annexation. If the legislature had wanted such a delay, it could have written the statute accordingly. As written, however, the statute does not require that the rezoning process be initiated only "subsequent to the annexation;" it simply provides that any "subsequent changes" be carried out in compliance with the appropriate rezoning provisions.

¶ 31 In support of our interpretation, we find persuasive the reasoning of *Schanz v. City of Billings,* 182 Mont. 328, 597 P.2d 67, 69 (1979). In *Schanz,* the City of Billings Zoning Commission transmitted its recommendation for the rezoning of a parcel of land to the City Council five hours before the Council acted on a resolution annexing the parcel. *Id.* at 69. Plaintiffs in that case similarly complained that the rezoning was invalid because it took place before the annexation had been approved.[3] The Montana Supreme Court held that the ordinance did not specifically prohibit the Zoning Commission ****1084 *120** from sending its recommendation to the Council before the final annexing resolution was passed and refused to impose such a requirement. *Id.* at 69–70. The court therefore concluded that the property had been properly rezoned. *Id.* at 70.

¶ 32 The plaintiffs in *Schanz* also complained that their state constitutional rights had been violated by the procedures followed. *Id.* The court, however, disagreed because appropriate notice had been given and all required hearings held, and because the plaintiffs had been given a reasonable opportunity to participate but failed to do so. *Id.*

[10] ¶ 33 Appellants similarly argue that Arizona statutes establish a "measured process for annexation and rezoning so as to permit effective public input into these decisions." They maintain that residents "cannot have meaningful input into such decisions if they do not have time to hear about a proposed decision" and that the City's actions to "rush" the

rezoning therefore "impinged on the public's rights [sic] to participate." But appellants concede that they had appropriate notice and that applicable hearing procedures were followed. Nothing in this case even suggests that appellants' opportunity to protest the proposed rezoning was diminished by the initiation of the rezoning process prior to the effective date of annexation. Therefore, because A.R.S. section 9–471(L) does not prohibit a city from initiating or approving a subsequent change in zoning while annexation is pending, we conclude that the rezoning here was valid.

(B) *Does A.R.S. section 9–462.07 apply?*

[11] ¶ 34 Appellants next argue that the rezoning was invalid because the City failed to comply with A.R.S. section 9–462.07. Section 9–462.07(A) sets forth the procedures by which a city in a "county not having a county zoning ordinance applicable to the unincorporated territory" may exercise its zoning powers "both to territory within its corporate limits and to that which extends a distance of three contiguous miles in all directions of its corporate limits and is not located in a municipality." Appellants argue that this statute controls here, but we disagree.

¶ 35 When construing statutes, this court will "adopt a construction ... that reconciles it with other statutes, giving force to all statutes involved." *Lewis v. Arizona Dep't of Econ. Sec.*, 186 Ariz. 610, 614, 925 P.2d 751, 755 (App.1996). Section 9–462.07(A) applies only when the municipal body is exercising its zoning power in a county "not having a county zoning ordinance applicable to the unincorporated territory." Here the subject property did have county zoning applicable to it while it was still in the county. Thus, A.R.S. section 9–462.07(A) does not apply.

(C) *Did appellants stipulate that appropriate notice was given the county?*

¶ 36 Appellants further argue that the rezoning was invalid because the City failed to comply with the requirements of A.R.S. section 9–462.04(A)(2), which provides:

> In proceedings involving rezoning of land which abuts other municipalities or unincorporated areas of the county or a combination thereof, copies of the notice of public hearing shall be transmitted to the planning agency of such governmental unit abutting such land. In addition to notice by publication, a municipality may give notice of the hearing in such other manner as it may deem necessary or desirable.

Appellees respond that this issue has been waived because appellants stipulated as to notice to the county in the trial court.

¶ 37 At the hearings, appellants' counsel stated: "Legally sufficient notice was given in publication, and on the property, if the property had been part of the municipal limits. That I will stipulate to, your honor." In his subsequent argument to the court, appellants' counsel nonetheless argued that appellees had failed to comply with the requirements of section 9–462.04(A)(2) by failing to give proper notice to the county.

¶ 38 In response, appellees' counsel noted that he was "confused" because he "thought [appellants' counsel] stood here and said he would stipulate that all notice requirements were given and everything was done right." The trial court ultimately found that appellants' stipulation "precluded" a finding that ****1085 *121** the City had not complied with section 9–462.04(A)(2), impliedly agreeing that notice to the county was included in appellants' stipulation on notice.

¶ 39 On appeal, appellants argue that they never stipulated that proper notice had been given to the county. They maintain that the trial court was wrong in finding that they had and reurge their argument that the rezoning was invalid because the county was not given proper notice.

¶ 40 The record indicates that there was some confusion as to the extent of appellants' stipulation. However, based on our review of the record, and of the context in which the stipulation was made, we conclude that appellants' attorney was referring only to the notice given to appellants and not to the county. We will therefore consider this argument on appeal.

(D) *Was direct notice to the county required?*

[12] ¶ 41 Appellants argue that the rezoning is invalid because the City failed to give direct notice to the county

planning commission as required by A.R.S. section 9–462.04(A)(2) whenever the rezoned land abuts the county. [4] However, notice to the county is required only when the land being rezoned "abuts other municipalities or unincorporated areas."

¶ 42 The purpose of A.R.S. section 9–462.04(A)(2) is to provide notice to the county when it will have land abutting property that may be rezoned by the City. But under the facts here, there could not have been county land adjacent to the rezoned property at the time of rezoning. If the annexation did not take place, then the property would not have been rezoned by the City, and the county would have had no interest in the proposed rezoning. If, as happened here, the annexation would take place, then there would not have been any adjacent county land **at the time of the rezoning,** because there was other land located between the subject parcel and the City boundary. Consequently, the interest of the county, which otherwise required notice under the statute, was not present in this case. We therefore conclude that direct notice to the county was not required here. [5]

ATTORNEYS' FEES

¶ 43 Appellants have requested attorneys' fees pursuant to A.R.S. section 12–2030, which provides for the award of fees in a mandamus action "against the state or any political subdivision thereof." Because appellants are not the prevailing parties, and without considering whether the statute is applicable, we decline their request.

CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court's dismissal of the complaint in this case.

CONCURRING: NOEL FIDEL, Presiding Judge.

NOYES, Judge, Dissenting.

¶ 45 In Arizona, the State has, by statute, preempted the field of zoning legislation. *See Levitz v. State,* 126 Ariz. 203, 205, 613 P.2d 1259, 1261 (1980). These procedural requirements are jurisdictional in nature. *See Hart v. Bayless Inv. & Trading Co.,* 86 Ariz. 379, 388, 346 P.2d 1101, 1108 (1959) (reviewing statutory notice for zoning action). "Such a rule is no mere 'legal technicality'; rather it is a fundamental safeguard assuring each citizen that he will be afforded due process of law." *Id.* Municipalities must follow the procedures set out in the State statutes. *See id.* The statutory procedures ****1086 *122** must be strictly followed, and an ordinance that does not comply with the statutory procedures is void. *See Levitz,* 126 Ariz. at 205, 613 P.2d at 1261; *Committee for Neighborhood Preservation v. Graham,* 14 Ariz.App. 457, 458, 484 P.2d 226, 227 (1971); *Manning v. Reilly,* 2 Ariz.App. 310, 313, 408 P.2d 414, 417 (1965).

¶ 46 In this case, the City Council adopted an ordinance annexing the property on November 4, 1997. Under State law, this annexation was not effective for thirty days, until after December 4, 1997. *See* A.R.S. § 9–471(D). Even though the property was not yet within the city limits of Show Low, during the months of October and November 1997, the City undertook actions purporting to rezone the subject property from agricultural to general commercial. These actions included the October 24th posting and publication of notice that the Show Low Planning and Zoning Commission would hold a hearing on the issue. This was forty-one days prior to the annexation of the property. On November 12, 1997, twenty-two days prior to the annexation of the property, the City Planning and Zoning Commission held a hearing and voted to recommend the rezoning of the property. On November 18, 1997, sixteen days prior to the annexation of the property, the Show Low City Council held a hearing on the zoning change. Then, on December 1, 1997, three days prior to the City obtaining jurisdiction over the property, the City Council voted to rezone the property from agricultural to general commercial.

¶ 47 Arizona's zoning and planning laws set up a measured, two-tiered process for annexation and rezoning so as to permit effective public input into these decisions. *See* A.R.S. § 9–462.04 (setting forth public notice and hearing provisions for rezoning). Local residents cannot have meaningful input into such decisions if they do not have time to hear about a proposed decision, gather the facts about it, and then mobilize others to appeal to elected officials or the courts. *See* A.R.S. § 9–462.04(H) (rezoning cannot be made effective until at least thirty days after approval). The City's actions here to rush a rezoning application through the process unlawfully impinged on the public's right to participate.

¶ 48 A statute such as A.R.S. section 9–471(L), which requires a city to apply equal or more restrictive zoning to a newly annexed parcel, is written to protect neighboring property owners, not the owners of the property being annexed, and certainly not for the procedural convenience of the municipal government. This statute allows time for the public to become educated on the issues and to formulate opinions and allow those opinions to be heard regarding any subsequent rezoning of the property. It prevents a city government from entangling the issues of relaxation of the allowed land use with the issues of annexation, thereby masking the former from public attention. It prevents a city government from hastily relaxing the land use regulations on a parcel of property that, at all times prior, and in this case even at the time of the city's actions, had been outside its jurisdiction. The Legislature has mandated that any such relaxation in zoning restrictions not be done as part of the transition of jurisdiction from one governmental subdivision to another, but instead that it be, as that statute plainly states, *subsequent* to the jurisdictional change and in accordance with existing procedures. *See* A.R.S. § 9–471(L). In this case the City ignored this requirement; it relaxed the zoning requirement *prior* to obtaining jurisdiction over the property.

¶ 49 The only way that the City of Show Low could have had jurisdiction to pass an ordinance relaxing the zoning on the Wal–Mart parcel at the time it did—prior to the effective date of the annexation—would have been if it had complied with A.R.S. section 9–462.07 regarding extraterritorial jurisdiction. Under the general municipal zoning enabling statute, A.R.S. section 9–462.01(B), a city may only zone territory within its boundaries. The extraterritorial jurisdiction statute, A.R.S. section 9–462.07, provides the exclusive procedural vehicle by which a municipality may reach beyond its borders and extend its zoning authority into unincorporated areas of the county. The City did not comply with that statute.

**1087 *123 ¶ 50 I respectfully dissent from the decision to affirm this jurisdictionally defective rezoning decision.

All Citations

196 Ariz. 114, 993 P.2d 1078, 296 Ariz. Adv. Rep. 17

Footnotes

* Feldman, J., recused himself and did not participate in the determination of this matter.

1 Appellees also argue, without support, that the distance of 300 feet is significant because A.R.S. section 9–462.04(A)(3), relevant to notice of public hearings, uses that distance for deciding which property owners are entitled to first class mail notification of proposed rezoning.

2 Appellants maintain, however, that notice was defective as to the county because the City did not send written notice of the rezoning hearings to it. This issue is discussed further below.

3 The City was required to affirm or change the zoning classification within 90 days of passage of a final resolution for annexation.

4 At the hearings, Adrian Williamson, the Show Low city planner testified about the notice procedures. The sole question appellant's counsel asked him on cross-examination was “Sir, was there a written transmittal of any type to the Navajo County planning agency of this proposed rezoning by the City of the Wal–Mart Supercenter site?” Williamson responded: “Not that I'm aware of.”

5 Appellants have made one further argument: that the development agreement between the City and Wal–Mart is invalid because the zoning changes are invalid. Because of our disposition of the zoning issue, we need not reach this matter.

993 P.2d 1078, 296 Ariz. Adv. Rep. 17

End of Document

In addition, the "jurisdiction" of the Board of Adjustment is also addressed in Section 1.805 of the Zoning Ordinance:

> The Board shall hear appeals of interpretations of the zoning ordinance text made by the Zoning Administrator. The Board of Adjustment shall determine those matters over which it has jurisdiction:

The jurisdiction of the Board of Adjustment is granted by state statue and municipal ordinance. If the Board acts in a matter in which it has no jurisdiction, the action taken has no effect.

Issue 2 - Standing:

To have standing, the applicant must be an aggrieved party. Section 1.202(B) of the Scottsdale Zoning Ordinance establishes the requirements for appealing Zoning Ordinance interpretations and provides in relevant part:

"The appeal of ordinance interpretations or other decisions by the Zoning Administrator may be initiated by any aggrieved person or by any officer, department, board or commission of the City affected by the interpretation or decision by the zoning administrator. For purposes of this subsection, an aggrieved person is one who receives a particular and direct adverse impact from the interpretation or decision which is distinguishable from the effects or impacts upon the general public."

Thus, in order for the Board of Adjustment to hear this appeal, appellant(s) must have standing by showing a direct, negative impact from the interpretation that is separate from the impact the interpretation has on Scottsdale residents generally.

In the appeal application dated February 20, 2023, Appellant states:

"We believe every Scottsdale citizen, who lives in a home in Scottsdale, is a valid aggrieved person as this interpretation impacts every single-family zoning district in the City."

And in the materials dated January 20, 2023 Appellant further states:

"Allowing this interpretation to stand would impact every single-family zoning district in the City as they all reference this section of the zoning ordinance. Therefore, it negatively impacts all districts and in a way that affects citizens most, building height."

Even if the appellant is correct in the assertion that "this interpretation impacts every single-family zoning district in the City," this does not mean that all citizens residing in these single-family zoning districts qualify as "aggrieved persons" and have standing under the Code. This is because an aggrieved party under the Code is one who suffers a direct, adverse impact which is separate from the impact felt by others in the general community. Further, the interpretation does not only apply to single-family zoning districts as Type-4 WCF applies to commercial and most other zoning districts in the City. Thus, being a Scottsdale resident or Scottsdale homeowner does not create the standing needed to challenge a Zoning Administrators interpretation. To have standing, the appellant would, at a minimum, need to allege that they are uniquely impacted by the interpretation because the appellants property is immediately

proximate to a property that may benefit from the interpretation, and the appellant has suffered a unique special harm.

In *Cherry v. Wiesner*, the court held:

> A nearby landowner has standing to challenge a land use decision like this one only if the new construction will cause him to suffer some type of "special damages" distinct from other landowners in the area. Usually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property of the landowner challenging the proposed land use, such as smoke, light, noise, or vandalism created by the new property use, which are different from the effects on the rest of the neighborhood. *Cherry v. Wiesner*, 781 S.E.2d 871 (N.C. Ct. App. 2016).

Thus, an objection on the grounds that every Scottsdale citizen would be aggrieved seemingly does not constitute a direct, adverse harm that is separate from that of the community and likely fails to meet the definition of an "aggrieved party."

The appellant also provides an Aggrieved Party list of individuals that are purportedly impacted by this interpretation. However, the individuals identified are not listed as appellants on the application. "Generally, a person who is not a party to an action is not aggrieved." *Wieman v. Roysden*, 802 P.2d 432 (Ariz. Ct. App. 1990). However, for the sake of argument, even if these individuals were appellants, it appears that they have not identified a particular and direct adverse impact from the interpretation which is distinguishable from the effects or impacts upon the general public, and thus have no basis to support a claim of standing based on suffering a negative impact that is distinct from that experienced by the general public.

Action:

If the Board finds that the application for appeal has both Jurisdiction and Standing, the Board may then discuss the merits of the case to determine whether or not the Zoning Administrator's decision was made in an arbitrary and capricious manner and/or an abuse of discretion as specified in Section 1.805D.1 of the Zoning Ordinance.

Findings: Jurisdiction and Standing:

Jurisdiction**:** *Staff finds that the Board of Adjustment satisfies the test of jurisdiction.*

Standing: *Staff finds that the appellant's claim may not satisfy the test of standing.*

Issue 3 – Substantive Review:

KeyCite Yellow Flag - Negative Treatment
Distinguished by Little River, LLC v. Lee County, N.C.App., December 19, 2017

245 N.C.App. 339
Court of Appeals of North Carolina.

Louis CHERRY and Marsha Gordon, Petitioners
v.
Gail WIESNER, City of Raleigh, and
Raleigh Board of Adjustment, Respondents.
City of Raleigh, a municipal corporation, Petitioner
v.
Raleigh Board of Adjustment, Louis W. Cherry, III,
Marsha G. Gordon, and Gail P. Wiesner, Respondents.

No. COA15–155
|
Feb. 16, 2016.

Synopsis
Background: Owners of lot in designated historic district appealed city Board of Adjustment ruling which rejected modernist design for home, which had been approved by city Historic Development Commission. The Superior Court, Wake County, Elaine M. O'Neal Bushfan, J., reversed the Board's decision, and neighbor appealed.

Holdings: The Court of Appeals, Stroud, J., held that:

[1] neighbor failed to allege special damages and thus was not an "aggrieved party" with standing to challenge the decision;

[2] neighbor had numerous opportunities to allege standing before Board of Adjustment; and

[3] neighbor was not entitled to supplement the record before the trial court to include two affidavits addressing the issue of standing.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (17)

[1] **Action** Persons entitled to sue
Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.
5 Cases that cite this headnote

[2] **Appeal and Error** Standing
Standing is a question of law reviewed de novo.

[3] **Action** Persons entitled to sue
The party invoking jurisdiction has the burden of proving the elements of standing.
2 Cases that cite this headnote

[4] **Action** Persons entitled to sue
As a jurisdictional requirement, "standing" relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute.
5 Cases that cite this headnote

[5] **Action** Persons entitled to sue
Since standing is a jurisdictional requirement, the party seeking to bring her claim before the court must include allegations which demonstrate why she has standing in the particular case.
6 Cases that cite this headnote

[6] **Action** Persons entitled to sue
Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

4 Cases that cite this headnote

[7] **Action** Persons entitled to sue

It is not necessary that a party demonstrate that injury has already occurred, but a showing of immediate or threatened injury will suffice for purposes of standing.

1 Case that cites this headnote

[8] **Zoning and Planning** Right of Review; Standing

To be considered an "aggrieved person," and thus have standing to seek review of a Board of Adjustment's land use decision, a party must claim special damages, distinct from the rest of the community. West's N.C.G.S.A. § 160A–400.9(e) (2013).

2 Cases that cite this headnote

[9] **Zoning and Planning** Right of Review; Standing

A reduction in value of property may be part of the basis for standing to challenge a Board of Adjustment's land use decision, but diminution in value alone is not sufficient. West's N.C.G.S.A. § 160A–400.9(e) (2013).

[10] **Zoning and Planning** Right of Review; Standing

A property owner does not have standing to challenge another's lawful use of her land merely on the basis that such use will reduce the value of her property; however, where the challenged land use is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain an action to prevent the use. West's N.C.G.S.A. § 160A–400.9(e) (2013).

2 Cases that cite this headnote

[11] **Zoning and Planning** Right of Review; Standing

Status as an adjacent landowner alone is insufficient to confer standing to challenge a Board of Adjustment's land use decision. West's N.C.G.S.A. § 160A–400.9(e) (2013).

[12] **Zoning and Planning** Right of Review; Standing

Vague, general allegations that a property use will impair property values in the general area will not confer standing to challenge a Board of Adjustment's land use decision. West's N.C.G.S.A. § 160A–400.9(e) (2013).

2 Cases that cite this headnote

[13] **Zoning and Planning** Right of Review; Standing

Even if a proposed use of property will actually adversely affect property values in the general vicinity, because this type of effect is not distinct to the particular landowner who is challenging a land use, this factor alone does not confer standing to challenge the land use decision. West's N.C.G.S.A. § 160A–400.9(e) (2013).

1 Case that cites this headnote

[14] **Environmental Law** Other particular parties

Neighbor failed to allege special damages from city Historic Development Commission's approval of modernist home design in city historic district, and thus was not an "aggrieved party" with standing to challenge the decision; neighbor's arguments that home was "directly across the street from her home" and that its architectural incongruity would "harm the character of the neighborhood and contribute to erosion of the neighborhood's value" did not involve damages distinct to neighbor as opposed to the overall neighborhood. West's N.C.G.S.A. § 160A–400.9(e) (2013).

[15] **Environmental Law** Other particular parties

Neighbor had numerous opportunities to allege standing before Board of Adjustment to challenge land use decision such that court could conclude that she lacked standing despite the Board's failure to directly address the issue or rule on city Historic Development Commission's motion to dismiss appeal for lack of standing; neighbor submitted two separate Applications for Review of Commission's approval of lot owners' plans for modernist house in historic district, application instruction required neighbor to "EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY" in boldface and capitalized letters and quoted the applicable standing statute, and Board invited written responses after Commission moved to dismiss the appeal. West's N.C.G.S.A. § 160A–400.9(e) (2013).

[16] **Action** Persons entitled to sue

Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing.

4 Cases that cite this headnote

[17] **Environmental Law** Other particular parties

Neighbor who sought to challenge land use decision granting lot owners' request to build modernist house in historic district was not entitled to supplement the record before the trial court to include two affidavits addressing the issue of standing, where initial appeal form directed neighbor to state why she was an "aggrieved party," but she failed to allege any special damages, motion to supplement was not until about nine months after her initial application for review and only 18 days before court hearing, and affidavits provided very little new substantive information and did not provide any basis for standing. West's N.C.G.S.A. §§ 160A–393(j), 160A–400.9(e).

****873** Appeal by respondent Gail Wiesner from order entered on 15 September 2014 by Judge Elaine M. O'Neal Bushfan in Superior Court, Wake County. Heard in the Court of Appeals on 26 August 2015. Wake County, Nos. 14 CVS 4003, 14 CVS 4307.

Attorneys and Law Firms

Kilpatrick Townsend & Stockton LLP, Raleigh, by Joseph S. Dowdy and Phillip A. Harris, Jr., for petitioner-appellees Louis Cherry and Marsha Gordon.

City of Raleigh Attorney, Thomas A. McCormick, by Deputy City Attorney, Dorothy K. Leapley and Associate City Attorney, Nicolette Fulton, for petitioner-appellee City of Raleigh.

Petesch Law, Raleigh, by Andrew J. Petesch, for respondent-appellant Gail Wiesner.

STROUD, Judge.

***340 Synopsis of Opinion**

Gail Wiesner ("respondent") lives across the street from the single-family "modernist" design home of Louis Cherry and Marsha Gordon ("petitioners") in Raleigh's Oakwood neighborhood. Oakwood is a designated historic district, where the design of new construction must be approved by the Raleigh Historic Development Commission ("the ***341** Commission"). As required by the rules of the historic district, before building on their vacant lot, petitioners applied for a certificate of appropriateness to build their new home ("the Cherry–Gordon house"). When the Commission held hearings to consider the application, respondent and others objected to petitioners' proposed modernist design because they considered it incongruous with the other houses in the historic district. After a series of hearings, the Commission approved the design, but then the Raleigh Board of Adjustment ("the Board") rejected the design. Petitioners then appealed the Board's ruling to the Superior Court, which reviews decisions of the Board and the Commission to make sure that their rulings comply with the law. The Superior

Court reversed the Board's decision, which meant that the Commission's decision to approve ****874** the design was affirmed. [1] This opinion addresses respondent's appeal from the Superior Court's ruling.

The Superior Court did not rule on the question of the Cherry–Gordon house's modernist design and the claim of "incongruity" with the historic district but decided that respondent did not have legal standing to challenge the approval of the design. A person who brings a legal action challenging a land use decision like this one must have "standing" to bring the action. The applicable statute gives "standing" only to an "aggrieved party," as the law defines that term. Although respondent lives across the street from the Cherry–Gordon house, the location of her home does not automatically give her standing to challenge the issuance of the certificate. A nearby landowner has standing to challenge a land use decision like this one only if the new construction will cause him to suffer some type of "special damages" distinct from other landowners in the area. Usually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property of the landowner challenging the proposed land use, such as smoke, light, noise, or vandalism created by the new property use, which are different from the effects on the rest of the neighborhood. Respondent's claims of damages from the Cherry–Gordon house are all essentially aesthetic, since she believes the house does not fit in with the historic neighborhood and is unpleasant for her to see from her home across the street. Even if she is correct in her assessment of the Cherry–Gordon house's design, respondent has failed to show that she is an "aggrieved party" as the law defines that term, so the Superior Court's order reversing the Board's decision was correct and we affirm it.

***342** I. Background

On or about 23 August 2013, petitioners filed an Application for Certificate of Appropriateness with the Commission seeking a determination that their plan for the construction of the Cherry–Gordon house on a vacant lot in the Oakwood Historic District of Raleigh was not incongruous with the guidelines of the City of Raleigh. On 9 September 2013, the Certificate of Appropriateness Committee of the Commission ("the Committee") held a hearing on petitioners' application and voted to approve in part their application ("design approval") subject to certain conditions and to defer consideration of the Cherry–Gordon house's windows until a subsequent hearing. On 7 October 2013, the Committee held a second hearing and voted to approve petitioners' application regarding the proposed windows ("window approval"). On 17 September 2013, respondent gave notice of an intention to appeal the Committee's design approval decision to the Board, and on 24 October 2013, respondent gave notice of an intention to appeal the Committee's window approval decision to the Board. On 24 October 2013, petitioners purchased a building permit from the City of Raleigh and began construction of the Cherry–Gordon house pursuant to the certificate of appropriateness.

On or about 7 November 2013, respondent, through counsel, submitted her Application for Review of the Committee's design approval decision with the Board. The Application for Review form includes the following question: "**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY[.]**" (Emphasis in original.) Respondent answered: "As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135–13–CA, for 516 Euclid Street." Respondent also stated:

> The structure as proposed is incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

****875** Respondent also alleged that the Committee made various procedural errors.

On or about 6 December 2013, respondent, again through counsel, submitted a substantively identical Application for Review of the Committee's window approval decision to the Board. Under the ***343** "**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY**" question, respondent answered:

> As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135–13–CA, for 516 Euclid Street at both the Sept. 9, 2013 and Oct. 7, 2013 public hearings before the Certificate of Appropriateness Committee.

Respondent also stated:

> The windows proposed for the dwelling structure are incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent again alleged that the Committee made various procedural errors.

The Commission answered respondent's pleadings and moved to dismiss her appeal to the Board for lack of standing. [2] On 13 January 2014, the Board held a hearing on respondent's appeal and the Commission's motion to dismiss for lack of standing but postponed rendering its decision until a 10 February 2014 hearing. The Board invited the parties to submit written responses by 31 January 2014. On or about 31 January 2014, respondent filed a brief in which she argued:

> [T]he Record is sufficient to demonstrate that she will suffer special damages distinct from the rest of the community if an incongruous structure is constructed directly across the street from her home. However, should the Board need additional evidence as to special damages, [respondent] requests that she be permitted to present such evidence to the Board.

At a 10 February 2014 hearing, the Board announced its ruling to reverse the Commission's decision but did not directly address the issue of standing.

***344** On or about 20 February 2014, petitioners moved to alter or amend the judgment. On or about 10 March 2014, the City of Raleigh filed procedural objections to the Board's proposed findings and conclusions, including an argument that the Board had not addressed the issue of standing. At a 10 March 2014 hearing, the Board announced its ruling denying petitioners' motion and voted to approve the minutes of the 10 February 2014 hearing. The Board's counsel noted:

> With regard to this standing issue, I don't know that the Board is equipped to determine whether or not [respondent] sustained special damages, but I do—do believe that, by continuing with the hearing, that that was tantamount to making a determination that standing did exist. And, certainly, that is something that's preserved on the record for the City [of Raleigh] to appeal.

On 28 March 2014, petitioners filed a petition for writ of certiorari and a motion to stay in the Superior Court in Wake County, arguing that respondent lacked standing, among other arguments. On 31 March 2014, the Clerk of Superior Court for Wake County granted petitioners' petition and issued a writ of certiorari. On 31 March 2014, petitioners moved for a temporary restraining order and a preliminary injunction. On 2 April 2014, the trial court granted petitioners' motion for a temporary restraining order. The trial court ordered that respondent "shall cease, desist and refrain from enforcing" the Board's decision and "any subsequent threat of a Stop Work Order" and that petitioners "shall cease work" on the Cherry–Gordon house, provided that they "are allowed to preserve the property from ruin by wind, water, mildew, vandalism,

as well as potential harm to trespassers[.]" On 2 April 2014, the City of Raleigh also filed a petition for writ of certiorari also arguing that respondent lacked standing, among other arguments. ****876** On 2 April 2014, the Clerk of Superior Court for Wake County granted the City of Raleigh's petition and issued a writ of certiorari. On 11 April 2014, the trial court granted petitioners' motion for a preliminary injunction.

On 7 August 2014, in both certiorari proceedings, respondent moved to supplement the record to include two affidavits addressing the issue of standing. On 14 August 2014, respondent answered both petitioners' and the City of Raleigh's petitions and moved to strike certain allegations and exhibits included in petitioners' petition. On 15 August 2014, the City of Raleigh moved to supplement the record to include certain documents that were before the Committee but were missing from the Board's record. On 22 August 2014, petitioners responded to respondent's motion to strike and moved to supplement the record. On 22 August ***345** 2014, petitioners also responded to respondent's motion to supplement, noting that respondent could have introduced the two affidavits about nine months earlier when she first appealed to the Board. The trial court held a hearing on 25 and 26 August 2014. On 25 August 2014, the City of Raleigh orally moved to consolidate the two certiorari proceedings. On 8 September 2014, the trial court granted the City of Raleigh's motion to supplement the record and motion to consolidate.

On 15 September 2014, the trial court entered an order in which it (1) concluded that respondent lacked standing and thus reversed the Board's decision; (2) affirmed the Commission's decisions; (3) denied respondent's motion to supplement the record; and (4) denied respondent's motion to strike and petitioners' motion to supplement the record as moot. On 3 October 2014, respondent gave timely notice of appeal.

II. Discussion

Respondent argues that the trial court erred in (1) concluding that she lacked standing to appeal the Commission's decisions to the Board; (2) finding that respondent had the opportunity to allege standing before the Board; (3) denying respondent's motion to supplement the record; (4) failing to determine what competent, material, and substantial evidence was before the Committee; (5) concluding that competent, material, and substantial evidence in the whole record supported the Committee's findings of fact and that the Committee's decisions were not arbitrary; and (6) concluding that the Committee did not act outside the scope of its authority or apply improper standards or interpretations of standards. Because we hold that respondent lacked standing to appeal the Committee's decisions to the Board, we do not address issues (4), (5), and (6).

A. Standing

i. Standard of Review

[1] **[2]** "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cty. Bd. of Adjust.*, 186 N.C.App. 651, 653, 652 S.E.2d 355, 357 (2007) (citations, quotation marks, and brackets omitted).

ii. Analysis

[3] **[4]** The party invoking jurisdiction has the burden of proving the elements of standing. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C.App. 110, 113, 574 S.E.2d 48, 51 (2002), *disc. review denied,* ***346** 356 N.C. 675, 577 S.E.2d 628 (2003). As a jurisdictional requirement, standing relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute. North Carolina courts began to use

> the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. Standing most often turns on whether the party has alleged "injury in fact" in light of the applicable statutes or caselaw. Here, we must also examine the forms of relief sought. *See [Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.],* 528 U.S. 167, 185 [120 S.Ct. 693, 706] 145 L.Ed.2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought").

Id. at 114, 574 S.E.2d at 52 (citations omitted).

****877** **[5]** **[6]** **[7]** Since standing is a jurisdictional requirement, the party seeking to bring her claim before the court must include allegations which demonstrate why she has standing in the particular case:

> Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Id. at 113, 574 S.E.2d at 51 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992)) (brackets omitted). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of immediate or threatened injury will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjust.,* 362 N.C. 640, 642–43, 669 S.E.2d 279, 282 (2008) (quotation marks omitted).

In the context of an appeal regarding a land use decision such as this case, N.C. Gen.Stat. § 160A–400.9(e) sets forth both the proper court to consider the appeal and the requirements of standing for parties seeking review:

> An appeal may be taken to the Board of Adjustment from the commission's action in granting or denying any certificate, which appeals (i) may be taken by *any aggrieved party,* (ii) shall be taken within times prescribed by the preservation commission by general rule, ***347** and (iii) shall be in the nature of certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the superior court of the county in which the municipality is located.

N.C. Gen.Stat. § 160A–400.9(e) (2013) (emphasis added).

[8] Thus, "any aggrieved party" may appeal a decision of a board of adjustment[3] to the superior court in the county where the municipality is located. *See* N.C. Gen.Stat. § 160A–400.9(e). Our case law has further defined the term "aggrieved party," particularly in the context of land use disputes:

> Aggrieved parties include owners of property upon which restrictions are imposed and those who have sustained pecuniary damage to real property in which they have an interest. Not only is it the petitioner's burden to prove that he will sustain a pecuniary loss, but he must also allege the facts on which the claim of aggrievement is based. The petition must therefore allege the manner in which the value or enjoyment of petitioner's land has been or will be adversely affected. Examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level. Once the petitioner's aggrieved status is properly put in issue, the trial court must, based on the evidence presented, determine whether an injury has resulted or will result from the zoning action.

Kentallen, Inc. v. Town of Hillsborough, 110 N.C.App. 767, 769–70, 431 S.E.2d 231, 232 (1993) (citations, quotation marks, and brackets omitted). "[T]o be considered an 'aggrieved person' and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community." *Casper v. Chatham Cty.,* 186 N.C.App. 456, 458, 651 S.E.2d 299, 301 (2007).

[9] **[10]** A reduction in value of property may be part of the basis for standing, but diminution in value alone is not sufficient:

> ***348** A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property.

However, where the challenged land use is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain an action to prevent the use.

****878** Additionally, in [*Mangum*], our Supreme Court held that the petitioners in that case had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects that would result from the challenged use. 362 N.C. at 643–44, 669 S.E.2d at 282–83. Recently, this Court applied the standard set forth in [*Mangum*] and concluded that a petitioner challenging her neighbor's application for a use permit on the basis that the proposed use would reduce the value of the petitioner's property was sufficient to establish the petitioner had standing. [*Sanchez v. Town of Beaufort,* 211 N.C.App. 574, 579, 710 S.E.2d 350, 353–54, *disc. review denied,* 365 N.C. 349, 717 S.E.2d 745 (2011).]

We discern no meaningful distinction between [*Mangum*], *Sanchez,* and the present case. Here, petitioners testified to their concerns that the alleged unlawful approval of the Training Facility would increase noise levels, had the potential to result in groundwater and soil contamination, and threatened the safety of anyone on their property due to stray bullets. These problems, petitioners contend, would result in a decrease in their property values. We conclude this evidence was sufficient to establish standing to challenge [the intervenor-respondent's] proposed land use.

Fort v. Cnty. of Cumberland, 218 N.C.App. 401, 404–05, 721 S.E.2d 350, 353–54 (citations and quotation marks omitted), *disc. review denied,* 366 N.C. 401, 735 S.E.2d 180 (2012).

[11] ***349** The fact that respondent owns property "immediately adjacent to or in close proximity to the subject property" also bears some weight on the issue of whether the party will suffer special damages, but status as an adjacent landowner alone is insufficient to confer standing. *Mangum,* 362 N.C. at 644, 669 S.E.2d at 283.

In *Kentallen,* the petitioner was an adjoining landowner who challenged the issuance of a special exception permit to the respondents allowing construction of a "thirty-foot by thirty-five-foot addition to a metal storage building" which was "located less than the required twenty feet from the rear boundary" of the respondents' lot; the building was a nonconforming use under the applicable ordinance. *Kentallen,* 110 N.C.App. at 768, 431 S.E.2d at 231–32. The petitioner alleged that the view of the building "would not be visually attractive." *Id.,* 431 S.E.2d at 231–32. This Court held that the petitioner was not an aggrieved party:

> In this case, [the petitioner's] allegation that it is the "owner of adjoining property" does not satisfy the pleading requirement, in that there is no allegation relating to whether and in what respect [the petitioner's] land would be adversely affected by the [Board of Adjustment for the Town of Hillsborough's] issuance of the special exception permit. Furthermore, the evidence presented before the Board, that the requested construction would increase "the negative impact" on the petitioner's property and "would not be visually attractive," is much too general to support a finding that [the petitioner] will or has suffered any pecuniary loss to its property due to the issuance of the permit.

Id. at 770, 431 S.E.2d at 233 (brackets omitted).

[12] **[13]** Vague, general allegations that a property use will impair property values in the general area also will not confer standing. In *Lloyd v. Town of Chapel Hill,* this Court held that the parties' allegation that they "owned property in the immediate vicinity of that upon which variances [from a town ordinance] had been sought and that grant of the variances would materially adversely affect the value of [their] property" did not demonstrate "special damages distinct from the rest of the community." *Lloyd v. Town of Chapel Hill,* 127 N.C.App. 347, 351, 489 S.E.2d 898, 900 (1997) (citation, quotation marks, and brackets omitted). Similarly, in *Davis v. City of Archdale,* this Court held

that the parties' allegation that ***350** rezoning ordinances would diminish the value of their property because they would increase "traffic on roads which already carry traffic volumes ****879** in excess of capacity and [would] increase[ ] demands upon already overburdened public utilities" did not demonstrate "special damages distinct from those of the rest of the community." *Davis v. City of Archdale,* 81 N.C.App. 505, 508, 344 S.E.2d 369, 371 (1986). In these cases, although the challengers to the land use alleged impairment of property values, the allegation was general for the entire neighborhood or area and not specific to a certain parcel of property. *See id.,* 344 S.E.2d at 371; *Lloyd,* 127 N.C.App. at 351, 489 S.E.2d at 900. And we note that even assuming that respondent's allegations are true and the proposed use will actually adversely affect property values in the general vicinity, because this type of effect is not distinct to the particular landowner who is challenging a land use, this factor alone does not confer standing. *See Davis,* 81 N.C.App. at 508, 344 S.E.2d at 371; *Lloyd,* 127 N.C.App. at 351, 489 S.E.2d at 900.

Several cases have provided examples of the types of special damages which will give a landowner standing to challenge a land use decision. In *Mangum,* our Supreme Court held that several adjacent and nearby landowners' allegations that the issuance of a special use permit for the construction of an adult establishment would cause "vandalism, safety concerns, littering, trespass, and parking overflow from the proposed business to [the parties'] adjacent or nearby lots" demonstrated special damages. *Mangum,* 362 N.C. at 645–46, 669 S.E.2d at 283–84. Similarly, in *Sanchez,* the petitioner's home was in a waterfront historic district across the street from the "Carpenter Cottage"; the respondent purchased the Carpenter Cottage and applied for a permit to demolish the cottage and build a one-and-one-half story structure which would block the petitioner's view of the water. *Sanchez,* 211 N.C.App. at 575–76, 710 S.E.2d at 351–52. The petitioner objected to the height of the respondent's proposed structure. *Id.* at 576, 710 S.E.2d at 352. The historic commission denied the application due to the proposed structure's height; the respondent appealed to the board of adjustment, which found that the commission's height limitation was "arbitrary and capricious" and remanded to the commission for issuance of a permit. *Id.* at 577, 710 S.E.2d at 352. The superior court affirmed the decision of the board of adjustment, and this Court affirmed. *Id.* at 577, 583, 710 S.E.2d at 352, 356. On the issue of standing, this Court noted the petitioner's allegations that the proposed structure "would interfere with her use of her property by causing her to lose her private waterfront view" and that "the loss of this view would reduce the value of [her] property by at least ***351** $100,000" as sufficient to show that she suffered special damages. *Id.* at 579, 710 S.E.2d at 353–54. [4]

[14] In this case, respondent alleged that she would suffer special damages because the Cherry–Gordon house is "directly across the street from her home" and that its architectural incongruity would "harm the character of the neighborhood and contribute to erosion of the neighborhood's value[.]" On appeal, her arguments are purely aesthetic or are not distinct to her property. She notes that her

> home sits directly across from the Cherry–Gordon property on a narrow street with no sidewalks. The front setbacks are especially shallow, with the two-story Cherry–Gordon dwelling only less than fifteen feet from the curb. [Respondent's] home features a wide front porch and many front windows.
>
> At the September 2013 [Commission] meeting, [respondent] opposed the 516–COA application for including multiple incongruous elements. Taking that allegation of incongruity as true, the Cherry–Gordons' proposed design would have dominated the view and vista from [respondent's] front windows, porch and yard with an incongruous structure. [Respondent] also addressed several adverse effects that would result [from] such incongruity, including ****880** reduced property values and impaired enjoyment of the neighborhood.

(Citations omitted.)

But these allegations do not demonstrate special damages *distinct to respondent,* other than the view from her front porch; rather, respondent alleges a generalized damage to the overall neighborhood—"reduced property values and impaired enjoyment of the neighborhood." The mere fact that respondent's home is "directly across the street" from the Cherry–Gordon house does not constitute special damages. *See Mangum,* 362 N.C. at 644, 669 S.E.2d at 283; *Kentallen,* 110 N.C.App. at 770, 431 S.E.2d at 233. Respondent's allegation is akin to the allegations in *Kentallen, Lloyd*, and *Davis,* where this Court held that the party had ***352** failed to allege special damages. *See Kentallen,* 110

N.C.App. at 770, 431 S.E.2d at 233; *Lloyd,* 127 N.C.App. at 351, 489 S.E.2d at 900; *Davis,* 81 N.C.App. at 508, 344 S.E.2d at 371; *Sarda v. City/Cty. of Durham Bd. of Adjust.,* 156 N.C.App. 213, 215, 575 S.E.2d 829, 831 (2003) ("Petitioners' mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages distinct from the rest of the community in their Petition, is insufficient to confer standing upon them.") (citation and quotation marks omitted). Respondent makes no allegation of damages particular to her property like the allegation of potential "vandalism, safety concerns, littering, trespass, and parking overflow" in*Mangum* or the allegation of the loss of a waterfront view and the resulting reduction of market value of the property in *Sanchez*. *See* *Mangum,* 362 N.C. at 645–46, 669 S.E.2d at 283–84; *Sanchez,* 211 N.C.App. at 579, 710 S.E.2d at 353–54. Because respondent has failed to even *allege* special damages, she is not an aggrieved party and thus lacks standing to contest the Committee's decisions. *See Casper,* 186 N.C.App. at 458, 651 S.E.2d at 301; N.C. Gen.Stat. § 160A–400.9(e).

iii. Respondent's Opportunity to Allege Standing

[15] **[16]** Respondent responds that she did not have an opportunity to allege standing before the Board. But respondent's argument is not so much that she did not have the opportunity but that she did not realize that she needed to make a showing of her special damages. She actually had multiple opportunities to allege standing before the Board. After retaining counsel, respondent submitted two separate Applications for Review of the Committee's decisions to the Board. The Applications for Review were on forms provided for this purpose. The form has some instructions and questions with blanks for answers. The second page of the form includes the following section of instructions:

> General Statute 160A–400.9(e) provides that "An appeal may be taken to the Board of Adjustment from the Commission's action in granting or denying any certificate, which appeals (i) may be taken by any aggrieved party, (ii) shall be taken within times prescribed by the preservation commission by general rule, and (iii) shall be in the nature of Certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the Superior Court of the County in which the municipality is located." Appeals in the nature of Certiorari means that the Board of Adjustment may review your case, but any review must ***353** be on the record of the case presented to the Commission and no new evidence can be introduced at this hearing.
>
> To clearly present your case, attach to this application the adopted minutes of the Commission meeting(s) (**attached hereto as Exhibit A**),[5] copies of your COA application, any exhibits presented to the Commission during the hearing(s), copies of pertinent excerpts from the rules of procedure of the Commission, and any other relevant documents that were presented at the hearing. These copies must be obtained from the Commission to ensure ****881** that they are from the official record of the case. The Commission will forward any physical evidence in the record (photos, material samples, audiotape, etc.) to the [Board] for review during the hearing on your appeal.
>
> **EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY:**

The Application for Review form quotes the applicable statute, N.C. Gen.Stat. § 160A–400.9(e), as we discussed above, and explains the appeal process. In boldface and capitalized letters, the Application for Review form then asks the applicant to explain why she has standing, since only an "aggrieved party" may have standing to challenge the Commission's decision. Respondent argues: "Allowing the City [of Raleigh] to successfully challenge standing on the basis of an application that uses the word 'aggrieved,' but without any language as to special damages, would be contrary to the concept and principles of notice pleading." Essentially, respondent argues that her application was sufficient to give "notice" of the basis for her claim, and that she should not be required to set forth specific allegations of her special damages, particularly since the Application for Review form did not set forth a definition of the term "aggrieved party." But the Application for Review form goes above and beyond the call of duty in setting forth the applicable statute and general appeal procedure. Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of

alleging in its pleadings that it has standing. *See* *Smith,* 186 N.C.App. at 653, 652 S.E.2d at 357; *Kentallen,* 110 N.C.App. at 769, 431 S.E.2d at 232; *Neuse River Found.,* 155 N.C.App. at 113, 574 S.E.2d at 51; ***354** N.C. Gen.Stat. § 160A–400.9(e). In addition, even after the Commission moved to dismiss her appeal for lack of standing and the Board invited the parties to submit written responses, respondent failed to allege special damages.

Respondent also notes that the Board did not properly consider the issue of standing and if it had, she would have sought to supplement her evidence earlier in the process. Essentially, this argument is that the Board failed to directly address her standing and if it had, she would have submitted additional evidence. We agree that the Board should have explicitly ruled upon the Commission's motion to dismiss for lack of standing, but as the Board's counsel noted at the 10 March 2014 hearing, the Board obviously found that respondent had standing since otherwise it would not have considered respondent's appeal and ruled in her favor. But standing is a jurisdictional issue, which this Court would have to consider on appeal *de novo,* even if the Commission had not filed a motion to dismiss raising this defense, and even if the Commission, Board, and Superior Court had all failed to address it. *See Fort,* 218 N.C.App. at 404, 721 S.E.2d at 353 ("Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal.") (citation and quotation marks omitted).

Even though the Board failed to directly rule upon the motion to dismiss, this does not relieve respondent of her burden to allege standing in her pleadings since standing is a jurisdictional prerequisite. *See* *Smith,* 186 N.C.App. at 653, 652 S.E.2d at 357; *Kentallen,* 110 N.C.App. at 769, 431 S.E.2d at 232; *Neuse River Found.,* 155 N.C.App. at 113, 574 S.E.2d at 51; N.C. Gen.Stat. § 160A–400.9(e). In any event, the Commission raised the issue of respondent's standing in its first responsive pleading, thus highlighting the need for support for her status as an aggrieved party. In sum, we hold that respondent had multiple opportunities to allege standing before the Board. We therefore hold that the trial court did not err in concluding that respondent lacked standing despite the Board's failure to directly address the issue.

B. Respondent's Motion to Supplement the Record

Respondent next contends that the trial court erred in denying her motion to supplement the record to include two affidavits addressing the issue of standing. One was her own affidavit and the other an affidavit ****882** from Michael R. Ogburn, a real estate appraiser.

***355** i. Standard of Review

N.C. Gen.Stat. § 160A–393(j) provides that the trial court "may, *in its discretion,* allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination of the following issues: (1) Whether a petitioner or intervenor has standing." N.C. Gen.Stat. § 160A–393(j) (2013) (emphasis added). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.,* 184 N.C.App. 1, 17, 645 S.E.2d 810, 820 (2007) (citation omitted), *aff'd per curiam,* 362 N.C. 669, 669 S.E.2d 321 (2008).

ii. Analysis

[17] Respondent moved to supplement the record to include two affidavits addressing the issue of standing. Respondent's brief fails to state any reason why the trial court's decision not to allow supplementation of the record was "manifestly unsupported by reason[.]" *See* *id.,* 645 S.E.2d at 820 (citation omitted). The legal authority cited for her claim of abuse of discretion is a general reference to our Supreme Court's statement in *Mangum* that

> the North Carolina Constitution confers standing on those who suffer harm: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18.

See *Mangum,* 362 N.C. at 642, 669 S.E.2d at 281–82 (brackets and ellipsis omitted). This statement is true, but it does not explain how the trial court may have abused its discretion in denying respondent's request to supplement the record. As discussed above, the initial appeal form directed respondent to state why she was an "aggrieved party," but she failed to allege any special damages. The Commission

raised the issue of respondent's standing before the Board, and respondent again had multiple opportunities before the Board to present evidence to support her standing but failed to do so. In fact, respondent's motion to supplement was not filed until 7 August 2014, about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the 25 August 2014 hearing before the Superior Court. This delay ***356** alone could justify the trial court's discretionary denial of her motion. In addition, respondent had already submitted a tremendous amount of information as part of her opposition to the Commission's approval; the record in this case is over 1,200 pages.

We also note that the affidavits which she proffered as supplements add very little new substantive information to the already voluminous record and would not have provided a basis for standing. Respondent's own affidavit details the location of her home, her education and experience as a real estate broker, her opinion that the Cherry–Gordon house is "significantly incongruous" with the Oakwood Historic District, and details regarding the neighborhood. The only item of alleged impact upon respondent's property which could arguably be considered as distinct from the entire neighborhood noted in the affidavit is her complaint of increased traffic from people "gawk[ing]" at the "modernist house[.]" As "an example" of the Cherry–Gordon house's impact on her property, she avers:

> [N]ews reporters and other media agents staked out in front of and around my property waiting to ambush me with the intention of obtaining unscheduled interviews. Upon information and belief, it is [petitioners] and their agents who have fomented a significant amount of media coverage in this matter. This unwanted attention creates ingress and egress problems as well as a significant amount of anxiety for my husband and [me]. As a result of stories published in, among others, the News & Observer, Vanity Fair, Boston Globe, Seattle Times, and New York Times as well as a feature on the Today Show, I have ****883** received dozens of unsolicited emails and phone calls expressing rude, harassing, and graphic commentary on my involvement in this matter, even though I am only exercising my statutory right to seek review of a COA approval.

Even if the Cherry–Gordon house has generated increased "gawk[er]" traffic and unwanted media attention, respondent's affidavit indicates that the traffic increased due to the publicity surrounding the challenge to the construction of the Cherry–Gordon house. This is simply not the sort of increased traffic our prior cases have addressed as part of the basis for standing of an adjacent property owner to challenge a permit, since traffic is not generated by the usual or intended use of the Cherry–Gordon house or property itself but is generated only by the media coverage of the controversy surrounding its construction. The ***357** Cherry–Gordon house is a 2,580–square–foot single-family residence, and the record shows that it would generate exactly the same type of "traffic" in its normal use as respondent's home or any other single-family residence of similar size.

The second affidavit provides some additional information regarding respondent's allegations regarding impairment of property values. The affidavit of Michael R. Ogburn details Mr. Ogburn's qualifications as a real estate appraiser and his opinion that respondent's property "will be adversely affected in terms of property value and marketability by the existence of the [Cherry–Gordon house] and that those effects, from a residential housing market standpoint, would be significant." This affidavit could arguably demonstrate a claim of special damages due to a decrease in respondent's property value (and not to the property values in the neighborhood generally), but as noted above, allegations of a decrease in value alone are not sufficient. *See Fort,* 218 N.C.App. at 404, 721 S.E.2d at 353 ("A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property."). Although the parties dispute whether the Cherry–Gordon house is architecturally congruous with the Oakwood Historic District, petitioners' use of the property for a single-family residence is clearly lawful, and Mr. Ogburn's affidavit does not address any sort of secondary impacts upon respondent's property, such as traffic, noise, light, odors, runoff, or any other sort of potential damage generated by the use of petitioners' property. Overall, the trial court's decision to deny the motion to supplement was entirely reasonable, and we hold that the

trial court did not abuse its discretion in denying respondent's motion to supplement the record.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

All Citations

245 N.C.App. 339, 781 S.E.2d 871

Footnotes

1 We refer to the Cherry–Gordon house as an existing home instead of a proposed home, since petitioners elected to proceed with construction of the home despite the pendency of this appeal, understanding the risk that they could be required to demolish it.

2 The record does not provide a date for the Commission's answer and motion to dismiss.

3 "The board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development[.]" N.C. Gen.Stat. § 160A–388(b1) (2013).

4 But as to the substantive issue—the approval of the proposed structure—the petitioner lost, since this Court agreed with the board of adjustment that the commission's height limitation was arbitrary. *Id.* at 582–83, 710 S.E.2d at 356. In other words, the damage to the petitioner's property value and view gave her standing but did not determine her claim on the merits. *See id.*, 710 S.E.2d at 356.

5 Respondent inserted this portion in bold in her first Application for Review and attached the minutes of the Committee's 9 September 2013 hearing as Exhibit A. The remainder of the text quoted is from the form itself.

319 F.3d 365
United States Court of Appeals,
Ninth Circuit.

Ramon RAMIREZ–ALEJANDRE, Petitioner,
v.
John ASHCROFT, Attorney General, Respondent.

No. 00–70724.
|
Submitted Nov. 7, 2001.
|
Filed Jan. 9, 2002.
|
Argued and Submitted June 20, 2002.
|
Filed Feb. 13, 2003.

Synopsis

Alien petitioned for review of final order of deportation issued by the Board of Immigration Appeals (BIA). The Court of Appeals, Rymer, Circuit Judge, 276 F.3d 517, entered order dismissing petition. On rehearing en banc, the Court of Appeals, Thomas, J., held that Board of Immigration Appeals (BIA) violated alien's right to due process, in connection with Attorney General's appeal of decision of immigration judge granting alien's application for suspension of deportation, by stating that it was entirely precluded from considering new evidence bearing on whether deportation would result in extreme hardship to alien and his dependents, including evidence that, in the eight years intervening between immigration judge's decision and proceedings before BIA, alien's daughter had been diagnosed as suffering from serious medical condition for which treatment was readily available in the United States, but for which such treatment was likely unavailable if alien was deported.

Petition granted; case remanded.

Trott, Circuit Judge, dissented and filed opinion with which O'Scannlain, Gould, Tallman, and Rawlinson concurred.

West Headnotes (12)

[1] Aliens, Immigration, and Citizenship Jurisdiction and venue

Under transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Court of Appeals lacks jurisdiction to review discretionary determinations of the Board of Immigration Appeals (BIA) of whether an alien seeking suspension of deportation has met statutory eligibility requirement by demonstrating "extreme hardship," and also lacks jurisdiction to review BIA's discretionary decision of whether to grant suspension once eligibility is determined. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C.(1994 Ed.) § 1254(a)(1); Omnibus Consolidated Appropriations Act, 1997, § 309(c)(4)(E), 110 Stat. 3009.

5 Cases that cite this headnote

[2] Aliens, Immigration, and Citizenship Jurisdiction and venue

While, under transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Court of Appeals lacks jurisdiction to review discretionary determinations of Board of Immigration Appeals (BIA) of whether an alien seeking suspension of deportation has met statutory eligibility requirement by demonstrating "extreme hardship," and also lacks jurisdiction to review BIA's discretionary decision of whether to grant suspension once eligibility is determined, it retains power to review constitutional due process challenges to immigration decisions. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. (1994 Ed.) § 1254(a)(1); Omnibus Consolidated Appropriations Act, 1997, § 309(c)(4)(E), 110 Stat. 3009.

11 Cases that cite this headnote

[3] Aliens, Immigration, and Citizenship Constitutional questions

On constitutional due process challenges to immigration decision, Court of Appeals' review is de novo, and when deciding whether agency procedures comport with due process, Court does

not defer to the agency. U.S.C.A. Const.Amend. 5.

12 Cases that cite this headnote

[4] **Constitutional Law** Non-citizens; aliens

Due Process Clause applies to all persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. U.S.C.A. Const.Amend. 5.

[5] **Constitutional Law** Proceedings in general

Decision of the Board of Immigration Appeals (BIA) violates due process if proceeding was so fundamentally unfair that alien was prevented from reasonably presenting his case. U.S.C.A. Const.Amend. 5.

8 Cases that cite this headnote

[6] **Constitutional Law** Proceedings in general

Although there is no administrative rule requiring the Board of Immigration Appeals (BIA) to review all relevant evidence submitted on appeal, the Due Process Clause requirement of full and fair hearing mandates that the Board do so in its capacity as a reviewing tribunal. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[7] **Constitutional Law** Admission and exclusion; deportation

Board of Immigration Appeals (BIA) violated alien's right to due process, in connection with Attorney General's appeal of decision of immigration judge granting alien's application for suspension of deportation, by stating that it was entirely precluded from considering new evidence bearing on whether deportation would result in extreme hardship to alien and his dependents, including evidence that, in the eight years intervening between immigration judge's decision and proceedings before BIA, alien's daughter had been diagnosed as suffering from serious medical condition for which treatment was readily available in the United States, but for which such treatment was likely unavailable if alien was deported; BIA did not exclude evidence based on its relevance or admissibility, but upon theory that it, as appellate court, was categorically barred from considering evidence, and alien, as prevailing party below, had no alternate means of introducing evidence. U.S.C.A. Const.Amend. 5.

1 Case that cites this headnote

[8] **Aliens, Immigration, and Citizenship** Admissibility

On appeal from decision of immigration judge on application for suspension of deportation, Board of Immigration Appeals (BIA) is not obligated to accept all evidentiary materials tendered after immigration hearing, but may place appropriate restrictions on type of evidence it will consider and set standards for relevancy and admissibility; however, inasmuch as the BIA is charged with determination of facts as they exist at the time case is finally decided, BIA may not categorically refuse to consider any tendered supplemental evidence at all.

3 Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship** Remand

Following determination that the Board of Immigration Appeals (BIA) had erred in categorically excluding any supplemental evidence offered by alien upon question of whether he satisfied "undue hardship" standard for obtaining suspension of deportation, without regard to the evidence's relevance or admissibility, Court of Appeals could not address questions concerning alien's eligibility for relief, but had to remand to the BIA; as regards question of extreme hardship, evaluation of relevant evidence had to be reserved for the BIA.

12 Cases that cite this headnote

[10] Aliens, Immigration, and Citizenship Effect of irregularities; harmless or prejudicial error

As predicate to obtaining relief for violation of his procedural due process rights in immigration proceedings, alien must show that this violation prejudiced him. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[11] Aliens, Immigration, and Citizenship Effect of irregularities; harmless or prejudicial error

Alien is "prejudiced" by a violation of his procedural due process rights in immigration proceedings, as required for him to obtain relief based on this violation, where alien's rights are violated in such a way as to potentially affect outcome of deportation proceedings. U.S.C.A. Const.Amend. 5.

7 Cases that cite this headnote

[12] Aliens, Immigration, and Citizenship Effect of irregularities; harmless or prejudicial error

Board of Immigration Appeals' (BIA's) violation of alien's due process rights, in connection with Attorney General's appeal of decision of immigration judge granting alien's application for suspension of deportation, in indicating that it was barred from considering any new evidence bearing upon whether deportation would result in extreme hardship to alien and his dependents, had potential for likely altering BIA's decision to reverse immigration judge's finding that alien had demonstrated requisite extreme hardship, and thus was prejudicial; evidence in question, including evidence that, in eight years intervening between immigration judge's decision and proceedings before BIA, alien's daughter had been diagnosed as suffering from serious medical condition for which treatment was readily available in the United States but for which such treatment was likely unavailable if alien was deported, was type of evidence that BIA had considered in past as bearing on hardship inquiry, and alien's case was extremely close one, and had resulted in split decision by BIA to reverse immigration judge's decision. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

Attorneys and Law Firms

***368** Jonathan M. Kaufman, Kaufman Law Office, San Francisco, CA, for the petitioner.

Michael T. Dougherty (briefed) and David Kline (argued), United States Department of Justice, Civil Division, Office of Immigration Litigation, Washington, D.C., for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. INS No. AXX–XXX–725.

Before SCHROEDER, Chief Judge, O'SCANNLAIN, TROTT, TASHIMA, THOMAS, W. FLETCHER, GOULD, PAEZ, BERZON, TALLMAN and RAWLINSON, Circuit Judges.

Opinion by Judge Thomas; Dissent by Judge Trott.

OPINION

THOMAS, Circuit Judge.

In the book *Bang the Drum Slowly,* members of the fictional New York Mammoths amused themselves by drawing in dupes with a card scam known as "Tegwar," which was an acronym for "The Exciting Game Without Any Rules." Mark Harris, BANG THE DRUM SLOWLY 8 (Alfred A. Knopf, Inc.1956). The mark, lured into the game by the players' enthusiasm, would be given a handful of cards and encouraged to make wild bids using a weird vocabulary of calls that changed from round to round. *Id.* at 48, 60–64. The poor cluck would always lose but would be reassured of the game's legitimacy by the veneer of rationality that appeared to overlie the seemingly sophisticated game.

For years, the Board of Immigration Appeals ("BIA") played a variant of Tegwar in its procedural treatment of appeals from suspension of deportation decisions issued by immigration judges ("IJs"). Until recently, aliens who could demonstrate

extreme hardship were eligible for suspension of deportation. Under the unique directives applicable to this remedy, the BIA was required to decide eligibility for suspension based, not on the facts that existed as of the time of the hearing before the IJ, but on the facts as they existed when the BIA issued its decision.

The BIA's factual determination was impeded by the extraordinary length of time between the IJ and BIA decisions, a period that sometimes lasted as long as a decade. In this case, it took the BIA eight years to decide the appeal. Naturally, life goes on while the wheels of justice turn, and inevitably developments occur that are relevant to the determination of whether an alien would suffer extreme hardship. Despite being charged with finding the facts as they existed at the time of its decision, the BIA did not establish any formal or consistent procedures during the period relevant to this case for the submission of evidence that became available after the IJ hearing.

***369** The informal custom and practice of the BIA varied wildly, with the BIA in some cases declaring itself the ultimate fact-finder and accepting tendered evidence in various forms, and in other cases, such as this one, categorically rejecting evidence on the ground that it was a purely appellate body. The net result was a process without rules, with an administrative body that morphed without any consistency from fact-finding to pure appellate review of a fixed record.

The remedy of suspension of deportation now has been replaced by statute, and the function of the BIA has now been changed by regulation. This case presents the question of whether the now-repealed procedures to which petitioner was subjected violated his right to due process of law. Under the circumstances presented by this case, we conclude that they did and grant the petition for review.

I

Because we are concerned in this case about how things were, not how they are, some historical context is important. Until 1940, immigration law did not provide any exceptions to a deportation order. "[T]he deportation statute unyieldingly demanded that an alien illegally in the United States be deported; no deviations were mentioned in the law." GORDON, MAILMAN & YALE–LOEHR, IMMIGRATION LAW and PROCEDURE § 74.01[1], 74–4.1 (Rev. ed.2002) (hereinafter referenced as "Gordon, Mailman" unless the citation is to other editions of the treatise). The sole mechanism at that time for a deportable alien to remain in the United States was a private bill passed by Congress pursuant to Art. I, § 7, of the Constitution. *INS v. Chadha,* 462 U.S. 919, 933, 103 S.Ct. 2764 (1983). Confronted with a large number of compassionate cases presented by aliens who had "established deep roots in our soil," Congress passed the Alien Registration Act of 1940, which granted the Attorney General the authority to suspend deportation in certain cases, subject to a Congressional override. Gordon, Mailman § 74.07[2][a], 74–68. The statute was amended in 1948 "to broaden the categories of aliens eligible for suspension of deportation." *Chadha,* 462 U.S. at 933, 103 S.Ct. 2764. The 1948 amendments also repealed the Congressional override provisions and restricted the Attorney General from canceling a deportation unless both houses of Congress voted to approve the action. *Chadha,* 462 U.S. at 933, 103 S.Ct. 2764.

The Immigration and Naturalization Act of 1952 permitted one house of Congress to veto the Attorney General's suspension of deportation. *Id.* at 934, 103 S.Ct. 2764. This procedure was stricken as an unconstitutional violation of the separation of powers, first by our Court, *Chadha v. INS,* 634 F.2d 408 (9th Cir.1980), and then by the Supreme Court, *Chadha,* 462 U.S. at 959, 103 S.Ct. 2764. Thereafter, the power to suspend deportation was vested solely in the Attorney General, and suspension of deportation became an exclusively administrative process. Gordon, Mailman § 74.07[2][e], 74–71. The Attorney General delegated the authority to suspend deportation to both the BIA and to IJs. Under the procedure applicable during the relevant period, "the final approval of a suspension application by an immigration judge or the Board of Immigration Appeals[would] result in the prompt grant of lawful permanent residence." *Id.* at § 74.07[7](c), 74–129.

To receive a suspension of deportation, an alien was required to make a formal application. The administrative determination for suspension of deportation involved two steps: (1) a determination of whether the statutory conditions had been satisfied, which generally involved a question ***370** of law, and (2) a determination of whether ultimate relief would be granted to those eligible, which involved the exercise of discretion. *Id.*

As to the former, Congress always has provided specific statutory prerequisites for eligibility for suspension of deportation. During the time period applicable to this case, an alien would be eligible for suspension if (1) the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application for suspension of deportation; (2) the applicant was a person of good moral character; and (3) deportation would result in extreme hardship to the alien or to an immediate family member who was a United States citizen or a lawful permanent resident. 8 U.S.C. § 1254(a)(1) (repealed).

An application for suspension of deportation first would be considered by an IJ, who would decide whether to grant relief. The rules of evidence are not applicable to immigration hearings. *Saidane v. INS,* 129 F.3d 1063, 1065 (9th Cir.1997) (citing *Baliza v. INS,* 709 F.2d 1231, 1233 (9th Cir.1983)). Thus, for example, hearsay testimony may be considered. *Olabanji v. INS,* 973 F.2d 1232, 1234 (5th Cir.1992). However, the proceeding must be conducted "in accord with due process standards of fundamental fairness." *Id.*

Under procedures applicable during the relevant period, if the IJ found statutory eligibility and elected to grant relief, the case would then be referred to the INS district office, who would decide whether to appeal the IJ's decision to the BIA. If the IJ denied the application, the alien had the right to appeal the denial to the BIA. Gordon, Mailman § 74.07[7][c], 74–130.

Under procedures applicable at the time, the BIA was required to reach its decision as to whether to grant the application for suspension of deportation based on the facts existing *at the time it decided the appeal* from the order issued by the IJ. *Chookhae v. INS,* 756 F.2d 1350, 1352 (9th Cir.1985). This factual examination was required because, as we have noted, both the BIA and the IJ had been delegated the authority to grant suspension of deportation. Thus, as we noted in *Santana–Figueroa v. INS,* 644 F.2d 1354, 1357 (9th Cir.1981), the BIA's "discretion can be properly exercised only if the circumstances are actually considered." We consistently have adhered to this view. *See, e.g., Gonzales–Batoon v. INS,* 767 F.2d 1302, 1303 (9th Cir.1985) (reversing and remanding BIA denial of suspension for its failure to evaluate applicant's medical condition after the Ninth Circuit expressly had instructed BIA to consider such factor when making its decision); *Figueroa–Rincon v. INS,* 758 F.2d 1345, 1345, *superseded by* 770 F.2d 766, 767–68 (9th Cir.1985) (reversing and remanding for BIA's failure to follow the court's instructions to consider the "emotional and psychological hardship complicated by age" because the BIA failed to consider the present circumstances in the applicant's life).

Our Circuit is not alone. For over twenty years, federal courts have directed the BIA to consider newly emerged facts before adjudicating a suspension application. For example, in *Opoka v. INS,* 94 F.3d 392 (7th Cir.1996), the Seventh Circuit vacated a BIA denial of suspension and remanded it with instructions for the BIA to consider the newly conferred legal status on the applicant's wife and children when evaluating the applicant's suspension claim. The wife's status was legalized after the original suspension application and the Seventh Circuit reasoned that if the husband's application were considered "without recognizing the status of his wife [the decision] would be futile and wasteful of scarce judicial ***371** resources." *Id.* at 395. The Seventh Circuit continued by stating that "[r]ather than improvidently attempting to review a record that has been significantly impacted by an agency decision," the decision should be remanded for the BIA to consider all factors in the case. *Id.* *See also* *Rodriguez–Gutierrez v. INS,* 59 F.3d 504, 509–10 (5th Cir.1995) (reversing BIA denial of suspension because it had failed to consider applicant's exemplary behavior in the years subsequent to his criminal conviction); *Cortes–Castillo v. INS,* 997 F.2d 1199, 1203 (7th Cir.1993) (where BIA is given information unavailable to the IJ, it should reexamine the equities and reevaluate the case) (internal citation omitted); *Luna v. INS,* 709 F.2d 126, 128–29 (1st Cir.1983) (Breyer, J.) (reversing and remanding BIA decision in order to provide applicant a hearing to present evidence to the BIA with respect to what happened in the applicant's life in the four years since the IJ issued its decision); *Ravancho v. INS,* 658 F.2d 169, 176 (3rd Cir.1981) (remanding matter for consideration of evidence not considered by BIA, specifically noting that its review of the BIA "extends at least to a determination as to whether the *procedure* followed by the Board in a particular case constitutes an improper exercise of [the Attorney General's] discretion") (emphasis added).

Our decision in *Chookhae* is illustrative. We previously had remanded the petition for review because the BIA had failed to consider the relevant factors in determining economic hardship. The BIA reviewed the record and issued a new decision without allowing the submission of any further evidence. We reversed and remanded with instructions that the BIA "consider the *current* hardship to the citizen children of the petitioner that would result from her deportation." 756 F.2d at 1352 (emphasis supplied). In *Chookhae,* we emphasized that "the appropriate exercise of the Attorney General's discretion to suspend deportation is predicated on a properly focused inquiry into the hardships claimed by the petitioner." *Id.* We instructed the BIA to conduct an examination based on "a scope that is of more than historical interest to Mrs. Chookhae, her children, the INS and this court regarding the current, respective hardship that the imminent deportation of Mrs. Chookhae would cause." *Id.* We recently reaffirmed this principle in *Guadalupe–Cruz v. INS,* 240 F.3d 1209, 1212 (9th Cir.2001) (citing *Chookhae* and remanding suspension application to BIA with instructions to consider the current facts and petitioners' current circumstances).

Indeed, not only did appellate courts require the BIA to consider new evidence, appellate courts at the time invoked their discretionary authority to admit new evidence into the record pursuant to 28 U.S.C. § 2347(c) and 8 U.S.C. § 1105a(a)(4) (repealed 1996) and then remand the entire record for consideration by the BIA. *See, e.g., Saiyid v. INS,* 132 F.3d 1380, 1384–85 (11th Cir.1998) (considering whether remand for the consideration of new evidence with respect to suspension application admitted for the first time on appeal was warranted under § 2347) (superceded by statute on other grounds); *Makonnen v. INS,* 44 F.3d 1378, 1384–86 (8th Cir.1995) (asylum); *Bernal–Garcia v. INS,* 852 F.2d 144, 147 (5th Cir.1988) (asylum); *Becerra–Jimenez v. INS,* 829 F.2d 996, 1000–02 (10th Cir.1987) (voluntary departure); *Dolores v. INS,* 772 F.2d 223, 226–27 (6th Cir.1985) (per curiam) (motion to reopen with respect to asylum); *Coriolan v. INS,* 559 F.2d 993, 1002–04 (5th Cir.1977) (reversing denial and remanding matter under § 2347(c) for further consideration of the alien's asylum claim after taking judicial notice of a human rights report that was ***372** outside of the record, which contended current persecution existed in the country at issue).

The direction to consider current evidence was not an invention of appellate courts. Rather, it was fully consistent with the BIA's own practice of determining admissibility "on the basis of the law and the facts existing at the time the application is finally considered." *Matter of Kazemi,* 19 I. & N. Dec. 49, 51 (BIA 1984); *see also Matter of Alarcon,* 20 I. & N. Dec. 557, 562 (BIA 1992) (citing *Kazemi*); *Matter of Correa,* 19 I. & N. Dec. 130, 133–35 (BIA 1984); *Matter of Morgan,* 13 I. & N. Dec. 283, 284 (BIA 1969) ("[T]he facts as they now exist are determinative...."); *Matter of K-,* 9 I. & N. Dec. 143 (1961), *aff'd sub nom.; Klapholz v. Esperdy,* 201 F.Supp. 294, 298–99 (S.D.N.Y.1961), *aff'd,* 302 F.2d 928, 929 (2d Cir.1962) (per curiam); *see also Ali v. Reno,* 22 F.3d 442, 448 n. 3 (2d Cir.1994) (citing *Kazemi*).

The BIA's consideration of current evidence in making its decisions in suspension of deportation cases was completely consistent with its delegated responsibility. Unlike a normal adjudicated case proceeding under the Administrative Procedure Act, 5 U.S.C. § 554, *et seq.,* the BIA never was acting as a traditional appellate administrative body. It was vested with the authority to exercise the discretion granted by the Attorney General consistent with the statutory requirements. Thus, in making the determination whether an applicant was presently of good moral character and would suffer extreme hardship, the BIA necessarily had to consider the facts as they existed at the time of the BIA decision. If, for example, the applicant had gone on a murderous killing spree between the time of the IJ and BIA decisions, that fact certainly would be relevant to determining present "good moral character." Similarly, new facts relevant to the determination of extreme hardship that developed after the IJ decision were necessarily material to the BIA's independent determination as to an alien's statutory eligibility for suspension and whether the Attorney General's discretion should be exercised.

The practice of considering current evidence on appeal also was consistent with the BIA's general powers during the relevant period. At that time, the BIA retained enormous discretionary power. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 266, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Kashefi–Zihagh v. INS,* 791 F.2d 708, 711 (9th Cir.1986) (noting the BIA's power to re-find the facts and to accept new evidence on appeal). As the BIA itself has described it, "the Board has had broad authority to engage in a de novo review of the record underlying an Immigration Judge's decision and make its own independent findings of

fact, irrespective of those made by the Immigration Judge." *In re S–H–,* 23 I. & N. Dec. 462, 463–64 (BIA 2002). The BIA itself exercises its broad discretion to make its own independent findings of fact in suspension cases. *See, e.g., Charlesworth v. INS,* 966 F.2d 1323, 1325 (9th Cir.1992) ("The Board is not required to defer to the immigration judge's findings and conclusions. [Applicant's] argument that the Board failed to do so miscomprehends the Board's role in immigration proceedings: the [Board] has the power to conduct a de novo review of the record, to make its own findings, and independently to determine the legal sufficiency of the evidence.") (internal citations and quotation marks omitted); *Cordoba–Chaves v. INS,* 946 F.2d 1244, 1249 (7th Cir.1991) (observing that "[t]he BIA reviewed the entire administrative record de novo" and affirming its authority to do so); *Castillo–Rodriguez v. INS;* 929 F.2d 181, 185 (5th Cir.1991) (observing that "the Board explicitly disclaimed any reliance on ***373** the immigration judge's credibility findings"); *Damaize–Job v. INS,* 787 F.2d 1332, 1338 (9th Cir.1986) ("The Board has the power to review the record de novo and make its own findings of fact, including credibility determinations."); *Noverola–Bolaina v. INS,* 395 F.2d 131, 135 (9th Cir.1968) (finding that "[i]t is the common practice of the Board to make its own independent findings of fact"); *Matter of Edwards,* 20 I. & N. Dec. 191, 196 (BIA 1990) (stating that "we have reviewed the record on a de novo basis" and then explaining which parts of the record it weighed and which parts it ignored in making its decision. Its offered explanation for ignoring some evidence in the record was "for purposes of expediency."); *Matter of B-,* 7 I. & N. Dec. 1, 36 (1956) (decision by Attorney General finding that the BIA had power to make independent findings of fact that are contrary to those of an inquiry officer); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 1.10(e), 1–58 (Rev. ed.1967) (excerpting statement by the BIA Chair describing its function as "[u]nlike appellate courts" and noting that the BIA conducted *de novo* review, not review of the findings for substantial supporting evidence).

Although charged with the responsibility of considering newly developed evidence in making determinations on suspension of deportation, the BIA failed to adopt procedures necessary to implement that responsibility during the relevant period. Surprising as it may seem, there were no applicable regulations at the time that permitted an applicant to move to supplement the record while the appeal was pending. Instead, the BIA elected to proceed with an ad hoc, case-by-case approach.

This problem is not one of recent discovery. Almost ten years ago, we described the BIA's procedures as "schizophrenic." *Yepes–Prado v. INS,* 10 F.3d 1363, 1372 (9th Cir.1993). Indeed, during the relevant period, the BIA failed even to define consistently the standard of review under which it was considering the IJ's decision on suspension applications. Judge Posner termed the practice "irresponsible" and the government's argument supporting the procedure as "incoherent[ ]" and "astonishing[ ]." *Ortiz–Salas v. INS,* 992 F.2d 105, 107 (7th Cir.1993). *See also, Hazzard v. INS,* 951 F.2d 435, 440 n. 4 (1st Cir.1991) (observing that although "[t]he BIA has the discretionary power to conduct *de novo* review of an immigration judge's decision," it "does not invariably do so"). In response to the criticism set forth in *Yepes–Prado* and *Ortiz–Salas* with respect to its lack of consistent review standards, the BIA clarified that "when the Board engages in a review of a discretionary determination by an immigration judge, we rely upon our own independent judgment in deciding the ultimate disposition of the case." *Matter of Burbano,* 20 I. & N. Dec. 872, 873 (BIA 1994). The issue presented on this case does not address the adequacy of the BIA's standard of review. Rather, the inquiry focuses on whether, within its exercise of such "independent judgment," the BIA considered new evidence offered on appeal.

On occasion, the BIA itself has accepted new evidence presented on appeal. *See, e.g., Charlesworth,* 966 F.2d at 1325 (observing that BIA affirmed IJ decision after considering a letter that the INS submitted with its appellate brief); *Hazzard,* 951 F.2d at 437 (observing that BIA affirmed IJ decision after considering evidence that the applicant had requested be submitted with its appellate brief); *Matter of Godfrey,* 13 I. & N. Dec. 790, 791 (BIA 1971) ("[W]e ordinarily confine our review to a consideration of the record alone, although in exceptional cases we do receive and consider additional affidavits or other documents not previously available."); *Matter* ***374** *of Ss. Captain Demosthenes,* 13 I. & N. Dec. 345, 346 n. 1 (BIA 1969) (accepting evidence submitted after the IJ decision).

The BIA also, on occasion, remanded the proceeding or reopened the matter for consideration of new evidence by an IJ. *See, e.g., Matter of Li,* 21 I. & N. Dec. 13, 18–19

(BIA 1995) (remanding proceedings after evaluating new evidence that was submitted on appeal. "Ordinarily, we would not consider evidence first offered on appeal. However, in this instance the issue to which this evidence pertains was understandably not focused on below...."); *Matter of Pena–Diaz,* 20 I. & N. Dec. 841, 845–46 (BIA 1994) (granting motion to reopen and remanding for consideration of extreme hardship in light of the equities accrued by respondent during the years INS "has affirmatively permitted the alien to remain" by failing to enforce final deportation order); *Matter of Flores–Gonzalez,* 11 I. & N. Dec. 485, 488 (BIA 1966) (remanding for consideration of whether respondent established good moral character from "the date of the filing of his application for suspension of deportation up to and including the final adjudication of the said application").

Some of the BIA's remands to IJs were *sua sponte;* some were pursuant to motions. As the BIA itself acknowledged, the regulations did not provide a mechanism for a party to request a remand. The remands were granted informally "as a matter of motions practice." *See* *Matter of Coelho,* 20 I. & N. Dec. 464, 470 (BIA 1992) ("Motions to remand are not expressly addressed by the Act or the regulations. However, such motions are commonly addressed to the Board.").

On other occasions, as in the instant case, the BIA has refused to admit further evidence relevant to suspension relief into the record, stating that it is categorically precluded from doing so. *See, e.g.,* *Matter of S–A–,* Int. Dec. # 3433 at 2 (BIA 2000) (accepting late brief but not supplemental evidence by citing to *Fedorenko's* proposition that the BIA is an appellate body); *Matter of Fedorenko,* 19 I. & N. Dec. 57, 74 (BIA 1984) (rejecting counsel's request made at the time of oral argument to submit a letter in the record describing itself as "an appellate body whose function is to review, and not to create, a record").

In short, despite its responsibility to consider current relevant evidence in suspension cases, the BIA decided if and when it would accept evidence on a haphazard, irregular basis, without any written regulation or procedure, and with the rules changing from case to case. To be blunt, counsel for applicants were the marks in a game of Tegwar.

For many years, the lack of rules and procedures did not have adverse consequences. The BIA was, for the most part, current in its work. It heard appeals promptly and dealt with records that were still warm. However, as delays between the IJ and BIA hearings began to lengthen, the problem became more acute. In *Chookhae,* there had been a gap of five years between the IJ and BIA decisions, which we deemed too lengthy for the BIA to rest on the record that existed at the IJ hearing. 756 F.2d at 1352. By the time of our decision in *Chookhae,* such delay was not atypical. Last year, the Attorney General gave a press conference at which he called the BIA's delays "shocking" and "unacceptable," noting that the BIA has "a massive backlog of more than 56,000 pending cases" of which over 10,000 "are over three years old" and "[e]ven worse, there are some ... that are more than seven years old." Attorney General John Ashcroft, Speech Announcing Administrative Change to Board of Immigration Appeals (Feb. 6, 2002) (transcript *available at* ***375** http://www.usdoj.gov/ag/speeches/ 2002/020602transcriptadministrativechangetobi) (hereinafter "Attorney General Speech"); *see also* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed.Reg. 7309, 7310 (Feb. 19, 2002) (hereinafter "Procedural Reforms") ("Numerous cases have languished before the Board for more than two years, some for more than five years...."). In the instant matter, the IJ issued a decision in March 1992, and the BIA did not rule on the appeal until June 2000, just over eight years later.

Over a period of eight years, much can change in an immigrant family's life, particularly in the factors relevant to a determination of extreme hardship, such as health, employment, and community ties. There may also have been changes in the facts relevant to the determination of good moral character—positive and negative. However, during the relevant period, the BIA had no formal procedure for the government or an applicant to tender new relevant evidence while an appeal was pending.

Although the BIA failed to establish any mechanism for the applicant and the government to tender post-hearing relevant evidence, it did have one procedure at the time for the consideration of new evidence: a post-BIA decision on a motion to reopen. During the period relevant to this case, there were two operative regulations, 8 C.F.R. §§ 3.2 and 3.8 (1992). Section 3.2 granted the BIA the power "on its own motion[to] reopen or reconsider any case in which it has rendered a decision" but limited such authority by providing that no motion "shall be granted" unless the alien establishes particular evidentiary and procedural conditions. Section 3.8 enumerated the filing procedures and other administrative matters relating to motions to reopen or reconsider.

Motions under § 3.2 to reopen a BIA decision were subject to highly restrictive rules. First, the applicant was required to have established prima facie eligibility for suspension of deportation *before* a motion to reopen would be granted. *INS v. Wang,* 450 U.S. 139, 141, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1980); *In re Gutierrez–Lopez,* 21 I. & N. Dec. 479, 482 (BIA 1996). In other words, a motion to reopen could not be used to tender evidence to establish prima facie eligibility.

Second, § 3.2 provided for reopening a case in which the BIA "ha[d] rendered a decision." A motion to reopen is proper after a decision has been made, not before. By its own terms, the regulation failed to provide a procedure for an alien to supplement the administrative record before the BIA rendered its final decision, even though facts might have existed at the time of decision that were legally sufficient to establish the alien's eligibility for relief.

Third, neither § 3.2 nor § 3.8 provided for a procedure by which a party or the government could petition for remand. As particularly relevant to the instant case, the regulations failed to contemplate any circumstances in which a party who had prevailed before the IJ could seek a motion granting further consideration of its case.

Fourth, at the relevant time, regulations governing relief granted through a motion to reopen had become exceptionally restrictive. For relief to be granted, a motion had to be filed within a limited time period, and only one motion could be filed throughout the duration of the case regardless of what the circumstances demanded.

Finally, as a general matter, the BIA disfavored motions for reopening of immigration ***376** proceedings. The BIA considered a motion to reopen post-hearing not a matter of right, but rather, an "extraordinary remedy" that is used "sparingly" and "reserved for truly exceptional situations." *See, e.g., In re G–D–,* 22 I. & N. Dec. 1132 (BIA 1999); *In re J–J–,* 21 I. & N. Dec. 976, 984 (BIA 1997) (reserving motions to reopen for "exceptional situations"); *In re Arie Shaar,* 21 I. & N. Dec. 541, 546 (BIA 1996) (finding no "compelling circumstance" warranting a motion to reopen); *Matter of Pena–Diaz,* 20 I. & N. Dec. 841, 844 (BIA 1994) (observing that alien requesting such action bears a "heavy burden"). Obviously, when long delays on appeal had become common, the need to provide additional character or hardship evidence was routine, rather than "exceptional."

These significant restrictions placed on motions to reopen were well within the authority of the BIA to create. *See Wang,* 450 U.S. at 142–43, 101 S.Ct. 1027. The nature of these restrictions makes it clear that the motion to reopen was not designed to deal with petitioners who simply sought to supplement the record with evidence of facts that had developed during the pendency of the appeal. The restrictions on a motion to reopen were intended to establish a high barrier to relief, and, in fact, did so. However, they were intended to establish a high barrier to someone other than a petitioner seeking to provide additional evidence during the pendency of an appeal.

In sum, because of the unique discretionary authority to grant suspensions of deportation conferred to the BIA by the Attorney General, the BIA was required to determine statutory eligibility for the exercise of such discretion based on current evidence. Because of this unique delegation, the BIA's process in considering appeals from IJs necessarily deviated from the normal contested case administrative procedure. The BIA had, and exercised, the power to re-find facts. However, the BIA was inconsistent with respect to its treatment of relevant supplemental evidence tendered on appeal. It did not have formal procedures for consideration of such evidence. In some cases, it accepted the evidence; in other cases it remanded for further findings; and in some, like the present case, it declared itself precluded from entertaining the evidence. The BIA could, under highly restricted circumstances, consider evidence after a motion to reopen was filed and granted. However, the BIA would not grant a motion to reopen unless the applicant previously had established a prima facie case of statutory eligibility for relief.

Since the events in this case occurred, much has changed in both substantive and procedural immigration law. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104–208, 110 Stat. 3009–546 (Sept. 30, 1996). IIRIRA repealed the statutory remedy of suspension of deportation that is at issue in this case and replaced it with a remedy entitled cancellation of removal. INA § 240A, 8 U.S.C. § 1229b (1996). After April 1, 1997, any alien placed in removal proceedings faces generally higher standards to qualify for cancellation of removal that include a longer physical presence requirement, a more stringent standard of hardship, and omission of

consideration of hardship to the aliens themselves. INA § 240A(b), 8 U.S.C. § 1229b(b). Section 240A(d) also provides special rules with respect to the termination and interruption of continuous physical presence. *See* IIRIRA § 309(c)(5); *see also* *Ram v. INS,* 243 F.3d 510, 518 (9th Cir.2001).

In addition, the Attorney General recently completely reorganized the procedures ***377** used by the BIA. The Attorney General was concerned with the process at issue in the case under which the BIA would make factual findings on appeal. In that regard, he observed:

> It's a well-settled principle of our judicial system that courts of appeals do not lightly reopen the factual findings-factual findings of trial courts below .... Consequently, appellate courts normally disrupt the factual findings of trial courts only when the findings rise to the level of being clearly erroneous. *However, the Board of Immigration Appeals routinely ignores this fundamental principle of appellate review.* In effect, the board gives immigrants two bites at the apple, two opportunities to present their facts.

Attorney General Speech (emphasis added).

Because of this concern, and the Attorney General's recognition of the enormous delay by the BIA in processing immigration appeals, the Attorney General promulgated new regulations effective September 25, 2002, which are designed to streamline administrative appellate review, including a provision that, with certain exceptions, generally prohibits the introduction and consideration of new evidence in proceedings before the BIA. *See* Procedural Reforms, 67 Fed.Reg. at 7311–12, 7315. The BIA also substantially has revised its procedures regarding motions to reopen. The current regulations are quite different from, and much more elaborate than, those in place at the time of the appeal to the BIA in this case. *See* 8 C.F.R. § 3.2 (2002).

However, neither the substantive nor procedural changes are applicable to this case. Deportation proceedings were initiated against Ramirez–Alejandre on May 4, 1990. The BIA issued its decision on June 6, 2000. Therefore, this case is governed by the transitional rules of IIRIRA. *Kalaw v. INS,* 133 F.3d 1147, 1150 (9th Cir.1997). Accordingly, Ramirez–Alejandre remains eligible for suspension of deportation under pre-IIRIRA law and the new remedy of cancellation of removal is not applicable. Because the new procedural regulations were promulgated after the BIA issued the instant decision in this case, they also are not relevant to the issues presented in this case.

[1] IIRIRA altered our review of the BIA decisions in suspension of deportation cases. "Under the transitional rules, we lack jurisdiction to review the discretionary determination whether an alien seeking suspension of deportation ... has met the statutory eligibility requirement of 'extreme hardship.' " *Sanchez–Cruz v. INS,* 255 F.3d 775, 778–79 (9th Cir.2001) (citing *Kalaw,* 133 F.3d at 1152); *see also* IIRIRA § 309(c)(4)(E). We also lack jurisdiction to review the Attorney General's discretionary decision whether to grant suspension once eligibility is determined. *Sanchez–Cruz,* 255 F.3d at 779; *Kalaw,* 133 F.3d at 1152. IIRIRA also precluded appellate courts from remanding cases to the BIA for the taking of additional evidence under 28 U.S.C. § 2347(c). *Altawil v. INS,* 179 F.3d 791, 793 (9th Cir.1999).

[2] **[3]** Notwithstanding these statutory limitations on judicial review, we retain the power to review constitutional due process challenges to immigration decisions. *Sanchez–Cruz,* 255 F.3d at 779. This review is *de novo. Id.* In deciding whether agency procedures comport with due process, we do not defer to the agency. *See* *Vt. Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 543, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (noting that administrative agencies have great latitude in crafting rules of procedure only "[a]bsent constitutional constraints").

***378** Now that we have set the historical context, we turn to the specifics of this case.

II

Ramon Ramirez–Alejandre is forty-four years old and was born in El Rincón, Michoacan, Mexico. Approximately twenty-three years ago, Ramirez–Alejandre entered the United States without inspection and found gainful employment as a gardener and landscaper. By age thirty-four, Ramirez–Alejandre had advanced in his career and was working as a project foreman, responsible for supervising the maintenance crew of a 400–unit condominium project. During the 1980s, Ramirez–Alejandre started a family with his common-law wife who also was undocumented. Their first child, Elizabeth, entered the country without inspection and their second, Edith, became a United States citizen by birth. Five of Ramirez–Alejandre's six brothers live in the United States and have acquired permanent legal status. Ramirez–Alejandre's mother, sister, and remaining brother live in Mexico. Ramirez–Alejandre's father was murdered in Mexico in 1985. There is no record of Ramirez–Alejandre being arrested, abusing substances, or receiving public assistance.

On May 4, 1990, the INS issued an Order to Show Cause, charging Ramirez–Alejandre with entering the United States without inspection in violation of INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1990). On March 9, 1992, Ramirez–Alejandre appeared before an IJ, conceded deportability, and applied for suspension of deportation. The IJ carefully considered the record and determined that Ramirez–Alejandre established physical presence in the United States "since 1983 or even before" despite insignificant departures from the country; that he established good moral character despite using false documents to secure employment, failing to file income tax forms, and failing to disclose information to the INS at his arrest; and that he demonstrated that his deportation would result in extreme hardship to both himself in light of the "grinding poverty" in Mexico and to his United States citizen daughter in light of Mexico's decreased educational opportunities and unavailability of quality health care. The IJ described Ramirez–Alejandre as "a role model" who "would be relegated to the grinding poverty of ... Mexico without ... any hope for anything in the future" if he were deported and thus granted Ramirez–Alejandre relief in accordance with its exercise of discretion. The INS appealed the IJ decision on March 17, 1992, alleging that Ramirez–Alejandre had failed to establish any of the statutory elements required to demonstrate eligibility for relief and that, even if he had, the BIA should not exercise its discretion to grant relief. Ramirez–Alejandre argued that the INS was raising new issues on appeal, that statutory eligibility had been met, and that the BIA should defer to the IJ's findings.

On January 7, 1993, after briefing on the appeal was completed and before the BIA issued its decision, Ramirez–Alejandre requested that evidence with respect to his daughter Edith's medical condition that had arisen subsequent to the IJ hearing be included in the record and considered in support of his suspension application. Ramirez–Alejandre submitted with his request a November 10, 1992 letter from his daughter's primary care physician attesting that Edith had suffered reoccurring bouts of otitis media over the past year. Although she had been able to receive adequate treatment in the United States, the physician cautioned that if such condition were untreated, the reoccurring ear infections could result in "severe hearing ***379** loss and developmental delay and learning impairment." The physician stated his belief that if Edith were returned to Mexico, her access to medical treatment at best would be inadequate and that it was likely she would be unable to receive any treatment for the condition.

On November 3, 1994, Ramirez–Alejandre filed a supplemental brief and twenty-four additional documents. Ramirez–Alejandre contended that the IJ made no error in granting relief. He nonetheless requested that if the BIA determined that the IJ made its decision in error, the BIA consider the evidence before issuing a decision.

Ramirez–Alejandre's supplemental evidence included records that Ramirez–Alejandre had no history of criminal arrests or convictions, that he had been residing continuously in the United States since 1979, that he paid back taxes, that he was an active member and regular volunteer in his church, that his landlord attested to his reliability as a tenant, and that many friends and relatives wrote of his involvement in their lives. The record also presented an ambiguity with respect to the status of Ramirez–Alejandre's health. It was undisputed that Ramirez–Alejandre suffered a severe back injury on January 3, 1994 causing him to be disabled. Two letters from Ramirez–Alejandre's chiropractor and employer, however, make it unclear whether Ramirez–Alejandre fully recovered, was able to work with continued rehabilitation, or remained disabled. On November 18, 1994, the INS filed a response requesting that the BIA not consider this evidence.

On March 9, 1998, the BIA requested supplemental briefing with respect to whether Ramirez–Alejandre remained eligible for suspension of deportation. The INS responded by arguing that Ramirez–Alejandre had established only two years of physical presence pursuant to the provisions contained within

IIRIRA. Ramirez–Alejandre contended that IIRIRA was not applicable to the present circumstances and again offered to provide relevant evidence of hardship facing Ramirez–Alejandre and his citizen daughter that had developed in the years since the date of the original hearing.

The BIA rendered its decision on June 6, 2000, affirming the IJ's conclusions with respect to physical presence and good moral character. The BIA agreed that Ramirez–Alejandre had demonstrated physical presence but established the date of commencement to be "May 5, 1979" rather than the IJ's finding that Ramirez–Alejandre had resided in the country "since 1983 or even before."

The BIA, however, reversed the grant of relief after determining that Ramirez–Alejandre had not demonstrated extreme hardship. In reaching its conclusion, the BIA noted that, while Ramirez–Alejandre had "submitted additional evidence on appeal that he claims supports a finding of 'extreme hardship,' this Board as an appellate body does not consider evidence submitted for the first time on appeal." The BIA did not state in its opinion that it had refused to consider the evidence because of the form in which it was submitted. Rather, it said that it simply does not consider evidence submitted for the first time on appeal. As our historical examination clearly indicates, the BIA's statement was untrue.

Ramirez–Alejandre timely petitioned for review of the BIA's decision. A three-judge panel of this Court denied his petition in a split decision. *See* *Ramirez–Alejandre v. Ashcroft,* 276 F.3d 517 (9th Cir.2002). Thereupon, a majority of the non-recused active judges of this Court voted to rehear the case *en banc*. *Ramirez–Alejandre* ***380** *v. Ashcroft,* 285 F.3d 1173 (9th Cir.2002).

III

The question in this case is whether, under the law and procedure applicable at the time, the BIA's categorical refusal to provide a procedure by which Ramirez–Alejandre might tender new evidence relevant to the establishment of prima facie eligibility for suspension of deportation violated his right to due process of law.

[4] **[5]** **[6]** The Supreme Court recently affirmed that "the Due Process clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis,* 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (citations omitted). "A BIA decision violates due process if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Sanchez–Cruz,* 255 F.3d at 779 (citation and internal quotation marks omitted); *see also* *Zahedi v. INS,* 222 F.3d 1157, 1164 n. 6 (9th Cir.2000) (stating that "immigration proceedings as a whole" are governed "by the Fifth Amendment's Due Process Clause"). An alien asserting a due process challenge must show prejudice. *Sanchez–Cruz,* 255 F.3d at 779; *Campos–Sanchez v. INS,* 164 F.3d 448, 450 (9th Cir.1998). As we have noted, despite the fact that "[t]here is no administrative rule requiring the Board to review all relevant evidence submitted on appeal[,][i]t is beyond argument, ... that the Due Process Clause requirement of a 'full and fair hearing' mandates that the Board do so in its capacity as a reviewing tribunal." *Larita–Martinez v. INS,* 220 F.3d 1092, 1095 (9th Cir.2000) (internal citation omitted).

[7] In the instant case, the BIA violated Ramirez–Alejandre's right to due process of law by stating that it was entirely precluded from considering new evidence on appeal. As we have noted, the BIA was charged at the time with considering current evidence as to extreme hardship. *Chookhae,* 756 F.2d at 1352. However, on the occasions that Ramirez–Alejandre submitted supplemental evidence to the BIA, there was no established procedure available whereby Ramirez–Alejandre could seek to introduce into the record legally significant evidence relating to changed or additional circumstances. The BIA had, as we have discussed, accepted supplemental evidence in other cases. However, in this case, it refused to do so, falsely claiming that "this Board as an appellate body does not consider evidence submitted for the first time on appeal." Thus, Ramirez–Alejandre was precluded, in ways that other applicants were not, from presenting new evidence relevant to the establishment of prima facie eligibility for suspension of deportation. This left him unable to "reasonably present[ ] his case." *Sanchez–Cruz,* 255 F.3d at 779 (internal quotation marks omitted). Thus, he was denied due process of law.

[8] In *Larita–Martinez,* in considering a due process challenge similar to the one at bar, we recognized the presumption that the BIA reviewed all the evidence on appeal, including supplemental evidence. *See* 220 F.3d at 1095–

96. By contrast, in the instant case, the BIA affirmatively and categorically rejected consideration of supplemental evidence. As we noted in *Larita–Martinez,* 220 F.3d at 1095:

> There is no administrative rule requiring the Board to review all relevant evidence submitted on appeal. It is beyond argument, however, that the Due Process Clause requirement of 'a full and fair hearing' mandates that the Board do ***381** so in its capacity as a reviewing tribunal. (citation omitted).

Of course, the BIA is not obligated to accept all materials tendered by a party after an immigration hearing. Agencies are afforded wide latitude in the formulation of administrative procedure. *Vermont Yankee Nuclear Power,* 435 U.S. at 524–25, 98 S.Ct. 1197. The BIA may place appropriate restrictions on the type of evidence it will consider and set standards for relevancy and admissibility. However, when it is charged with the determination of facts as they exist at the time the case is finally decided, it may not categorically refuse to consider any tendered supplemental evidence at all.

In the instant case, the evidence tendered by Ramirez–Alejandre was not rejected because of any concerns about form, relevancy, admissibility, or his failure to demonstrate exceptional circumstances existed. It was rejected because the BIA stated that it was precluded as a matter of law from considering it, despite prior decisions requiring it to consider such evidence and despite the fact that it was receiving such evidence in other cases. Thus, we must assume, as we have in the past under similar circumstances, that any purported failure to comply with procedural requirements was not the stated reason for the BIA's failure to consider the new evidence. *See, e.g., Ubau–Marenco v. INS,* 67 F.3d 750, 757–58 n. 9 (9th Cir.1995), *overruled on other grounds by Fisher v. INS,* 79 F.3d 955, 963 (9th Cir.1996) (en banc). Perhaps more important, on many other occasions, the BIA has accepted evidence on appeal that was presented in the same format used by petitioner. In *Charlesworth,* for example, the BIA relied on a letter that the INS just sent in on appeal. 966 F.2d at 1325. In *Hazzard,* the BIA considered documents on appeal that were just sent in with an appellate brief. 951 F.2d at 437. In the case of *In re Min Song,* Int. Dec. # 3455, 2001 WL 1030900 (BIA 2001), the BIA relied on unverified documents that were just sent in with the petitioner's brief. In *Matter of Lin Lee,* 19 I. & N. Dec. 435, 436 (BIA 1998), the BIA relied on new documents submitted on appeal in granting relief.

The INS contended for the first time at oral argument that the availability of a post-hearing § 3.2 motion to reopen provided Ramirez–Alejandre with an adequate means of presenting his evidence. However, it did not. First, as we have noted, a motion to reopen was not available unless the applicant has first established a prima facie case. Here, the BIA held that Ramirez–Alejandre had not established a prima facie case; thus, a motion to reopen was not available to him as a matter of law under the operative BIA regulations. Second, as we have also noted, a § 3.2 motion to reopen was available only after the BIA had issued its decision; it was not a vehicle for tendering new relevant evidence for the BIA's consideration prior to reaching a decision. Finally, as we noted earlier, the need to present new evidence in a long-delayed appeal can hardly be characterized as "exceptional" or "extraordinary."

The INS also argued that Ramirez–Alejandre could have moved to reopen the IJ's decision to present additional evidence while the case was pending on appeal. First, under § 3.2 as it existed at the relevant time, the purpose of a motion to reopen was to obtain further relief. Ramirez–Alejandre already had obtained favorable relief from the IJ, so there was no further relief to be sought. Indeed, the INS has been unable to cite any case in which a motion to reopen was allowed to be filed by a prevailing party for the purposes of placing additional favorable evidence in the record. Second, the filing of such a motion would have required Ramirez–Alejandre ***382** to forfeit the relief he had won. The BIA has held that "where an alien moves to reopen her deportation proceedings, she is effectively asking that the previous decision ordering her deported be set aside so that she may present new evidence to support an application for relief from deportation." *In Re M–S–,* Int. Dec. # 3369, 1998 WL 769392 (BIA 1998). Third, by the time Ramirez–Alejandre made his third attempt to supplement the record, his application for § 3.2 relief before the IJ was precluded. The BIA changed the operative regulations in 1996, four years before it issued its decision, providing that an applicant was limited to one motion to reopen and such motion was to be made only "90 days after the date on which the final administrative decision was

rendered in the proceeding." 8 C.F.R. § 3.2(c)(2) (1996). Further regulatory amendments also stated that no applicant may file a motion to reopen or reconsider the IJ decision once the BIA assumes jurisdiction of the case. 8 C.F.R. § 3.23(b) (Apr. 29, 1996). Thus, as of 1996, Ramirez–Alejandre had lost his right to file a motion to reopen or reconsider the immigration hearing. There was no well-worn path available to him; all paths had been closed.

The INS also contends that Ramirez–Alejandre had another remedy on appeal in the form of a motion to remand the case to the IJ pursuant to *Matter of Coelho,* which for the first time described the BIA's informal and haphazard motion practice. 20 I. & N. Dec. 464. However, as the BIA stated in *Coelho,* a remand was not allowed unless the "evidence presented would likely change the result in the case." *Id.* at 473. In short, the remedy of remand was not intended as a vehicle for the prevailing party to supplement the record. Rather, it was designed as a method by which the losing party could present new evidence so that the IJ might reconsider the original decision. Thus, it plainly did not apply to petitioners such as Ramirez–Alejandre, who had won favorable relief before the IJ, and simply wanted to bolster the record on appeal with new, previously unavailable evidence.

Moreover, the BIA construed a motion to remand as the functional equivalent of a motion to reopen. *Id.* at 471. Under BIA procedure, a motion to remand must meet all the requirements of a motion to reopen and the two are treated the same. *Rodriguez v. INS,* 841 F.2d 865, 867 (9th Cir.1987). Thus, all of the restrictions pertaining to a § 3.2 motion to reopen applied with equal force to a remand motion. In particular, the BIA has held that the procedures applicable under § 3.2 applied to motions to remand, including the requirement that motions be filed within 90 days of the decision. *In re OPARAH,* 2000 WL 1899793, File A71 798 305 (BIA 2000) (publication page references are not available for this document.); *see also* 8 C.F.R. § 3.2(c)(4) (1998). Thus, at the time Ramirez–Alejandre wanted to supplement the record, any motion to remand would have been time-barred.

In short, the operative regulations failed to provide Ramirez–Alejandre with any procedural avenue by which he could request that the BIA consider relevant supplemental evidence prior to the time it made its decision. His acknowledgment of the existence of the procedures at oral argument does not alter the fact that they were not legally available to him at the operative time.

What is not before us is the question of whether Ramirez–Alejandre submitted the evidence in the proper form or using the proper procedure. The BIA did not reject Ramirez–Alejandre's proffered evidence on those grounds, and the INS conceded at argument that the material Ramirez–Alejandre ***383** sought to add to the record would have been admissible at an immigration hearing. In fact, similar material tendered in the same form was, in fact, admitted at Ramirez–Alejandre's immigration hearing.

We also are not confronted with the question of whether the BIA should have considered the evidence because the case presented "exceptional circumstances." The BIA did not reject the evidence at issue as failing to meet that standard; it simply announced it never considered evidence on appeal under any circumstances.

[9] Further, the case before us does not contain any issues for us to decide concerning Ramirez–Alejandre's eligibility for relief. The BIA and IJ both affirmed findings that Ramirez–Alejandre possessed the qualifying good moral character, rendering any second-guessing of his character on appeal moot. With respect to findings of extreme hardship, the evaluation of relevant evidence must be reserved for the BIA on remand. *INS v. Ventura,* 537U.S. 12, 123 S.Ct. 353, 355–56, 154 L.Ed.2d 272 (2002). In addition, the BIA has discretion to determine when a proceeding should be remanded to the IJ, *see* *INS v. Doherty,* 502 U.S. 314, 323, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992), and nothing in this analysis should be construed as limiting that discretion. However, the BIA rejected the evidence at issue on the sole ground that it was precluded as a matter of law from considering it; and it is on that exclusive basis that we must consider whether Ramirez–Alejandre's due process rights were violated. We do not hold that an applicant for discretionary suspension of deportation has a constitutional due process right to require the BIA to consider any supplemental information the alien wishes to submit after the IJ hearing. However, it is one thing to reject tendered evidence because of form or irrelevance; it is quite another to prevent one party from presenting it at all based on a purported categorical rule, while accepting supplemental evidence from others with alacrity.

Thus, as applied to this petitioner, BIA procedures that existed at the time violated his right to due process of law. Although the BIA determined eligibility on the basis of the facts as they existed at the time of the BIA decision, the BIA denied Ramirez–Alejandre the opportunity to tender relevant supplemental evidence that had developed in the eight years after his hearing before the IJ. The BIA did so on the basis of a purported rule, not found in the regulations, that it categorically would not accept supplemental evidence on appeal, despite the fact that it was required to determine the application based on current facts, that it retained the power not only to accept new evidence on appeal, but to "re-find" the facts as determined by the IJ, and that it had accepted supplemental evidence in other cases. By precluding Ramirez–Alejandre from any means of tendering evidence to it under these circumstances, the BIA deprived him of due process of law.

IV

[10] **[11]** **[12]** As a predicate to obtaining relief for a violation of procedural due process rights in immigration proceedings, an alien must show that the violation prejudiced him. *Sanchez–Cruz,* 255 F.3d at 779; *Campos–Sanchez,* 164 F.3d at 450. This standard is met under circumstances in which an alien's rights are violated "in such a way as to affect potentially the outcome of their deportation proceedings." *United States v. Cerda–Pena,* 799 F.2d 1374, 1379 (9th Cir.1986) (citation and emphasis omitted). In assessing prejudice in this context, we need not determine with certainty whether the outcome would have ***384** been different, but rather whether the violation potentially affected the outcome of the proceedings. In this case, the question is whether the tendered evidence had the potential to affect the BIA's determination of extreme hardship.

As the Supreme Court has noted, the words "extreme hardship," as used in the statute, "are not self-explanatory, and reasonable men could easily differ as to their construction." *Wang,* 450 U.S. at 144, 101 S.Ct. 1027. Thus, the Attorney General has been vested with the authority to construe the phrase. *Id.* at 145, 101 S.Ct. 1027. As the BIA observed in the instant case:

> "Extreme hardship" is not an easily definable term of precise or inflexible content. Instead, the elements required to establish "extreme hardship" are dependent upon an evaluation of the facts and circumstances peculiar to each case. *Matter of Chumpitazi,* 16 I. & N. Dec. 629 (BIA 1978); *Matter of Kim,* 15 I. & N. Dec. 88 (BIA 1974). *See also* *Jara–Navarrete v. INS,* 813 F.2d 1340 (9th Cir.1986).

In re Ramirez–Alejandre, 276 F.3d 517 (Jun. 6, 2000).

However, in evaluating hardship in suspension cases, the BIA has identified a number of relevant factors. As the BIA has stated:

> We consider the age of the respondents, both at entry and at the time of their application for relief; their family ties in the United States and abroad; their length of residence in the United States over the minimum requirement; their own health, as well as that of their United States citizen children; political and economic conditions in [their native country]; the financial impact of departure from the United States; the possibility of other means of adjusting their status in the United States; their involvement and position in their local community; and their immigration history.

In re Kao, 23 I. & N. Dec. 45 (BIA 2001) (citing *Matter of Anderson,* 16 I. & N. Dec. 596 (BIA 1978)).

We consistently have held that because the determination of extreme hardship is made on a fact-specific basis, it is incumbent upon the BIA to consider all factors bearing on that determination. *Ordonez v. INS,* 137 F.3d 1120, 1123

(9th Cir.1998) (noting that the BIA abuses its discretion if it fails to consider all relevant factors bearing on extreme hardship); *Santana–Figueroa v. INS,* 644 F.2d 1354, 1356 (9th Cir.1981) (finding that "discretion can be properly exercised only if the circumstances are actually considered. When important aspects of the individual claim are distorted or disregarded, denial of relief is arbitrary.") (internal citation omitted).

The supplemental evidence that Ramirez–Alejandre attempted to tender was relevant to establishing these factors. It involved the additional eight years of residence in the United States, it updated information concerning the financial impact of departure from the United States, and it presented facts concerning his community involvement. *See Kao,* 23 I. & N. Dec. 45 (enumerating such factors in extreme hardship determinations). In addition, the BIA grants significant weight to whether the health and well-being of a child would be affected adversely by deportation, especially if such child is a United States citizen. *See, e.g., Kao,* 23 I. & N. Dec. 45 (stating that the alien couple "can establish their eligibility for suspension of deportation if they demonstrate that their deportation would result in extreme hardship on their United States citizen children"); *In re L–O–G–,* 21 I. & N. Dec. 413, 421–22 (BIA 1996) (finding likelihood of success in demonstrating extreme ***385** hardship based on four factors. The first three dealt exclusively with the hardship a six year old child likely will encounter if deported.).

Ramirez–Alejandre also tendered evidence demonstrating that he had been active in his church community and in the lives of friends and relatives for nearly twenty years. We have held in other circumstances that the BIA had abused its discretion by not considering similar evidence of community ties. *Santana–Figueroa,* 644 F.2d at 1357; *see also Urbina–Osejo v. INS,* 124 F.3d 1314, 1319 (9th Cir.1997); *Gutierrez–Centeno v. INS,* 99 F.3d 1529, 1534 (9th Cir.1996). We also have determined that the BIA errs if it fails to consider the health of the petitioner and the petitioner's family, including evidence such as Ramirez–Alejandre's dependence on the medical treatment he received for his back problems. *See Batoon v. INS,* 707 F.2d 399, 402 (9th Cir.1983). We have further held that the BIA erroneously disregards any evidence concerning the hardship of the separation of the alien from family members living in the United States, which would include evidence that Ramirez–Alejandre has been living in the United States for over twenty years and that five of Ramirez–Alejandre's seven siblings have permanent legal status in this country. *Salcido–Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir.1998) (per curiam).

We also have directed the BIA to give particular attention to whether a deportation will disrupt the lives of children, especially those who have remained in the country during their early formative years due to the delay caused by the INS or BIA. Edith was born in this country and, at the time that the BIA opinion issued, was nine years old. Elizabeth was six at the time of the original hearing and was fourteen years old at the time of the BIA's decision. Evidence with respect to the daughters' language skills, educational attainment, medical conditions, ties to the community, ability to adapt to a foreign country, and impact on life opportunities are factors that the BIA is compelled to consider. *See, e.g., Casem v. INS,* 8 F.3d 700, 703 (9th Cir.1993) (reversing and remanding for BIA to consider impact deportation would have on child who aged five years while suspension application was on appeal); *Gutierrez–Centeno,* 99 F.3d at 1534 (finding BIA erred in part for failing to consider how children who spent seven of their formative years in the United States would be impacted by deportation); *Prapavat v. INS,* 662 F.2d 561, 563 (9th Cir.1981) (establishing that factors that adversely impact a citizen child such as "deportation to an underdeveloped country that offers minimal opportunities for suitable employment, the child's lack of knowledge of that country's language, her health problems, and the economic loss from the forced liquidation of the [aliens'] assets must all be assessed in combination").

Thus, any fair consideration of the evidence tendered, in light of the applicable law and the BIA's own standards, shows that it was relevant and significant to a determination of extreme hardship. Indeed, similar factors to those found in the instant case were sufficient to establish that an alien met the more heightened extreme hardship standard operative in the new cancellation remedy. *See, e.g., In re Recinas,* 23 I. & N. Dec. 467 (BIA 2002). Such similarities are notable in light of the fact that it is undisputed that the tendered evidence would have been admissible before an IJ or the BIA.

Perhaps more important, this was an extremely close case. Even without the evidence submitted by Ramirez–Alejandre on appeal, the IJ determined that he had established the

element of extreme hardship. ***386** When the BIA reversed on the same record, the panel split 2–1.

It is indisputable that all of the supplemental evidence, and in particular the evidence pertaining to the health and well-being of Ramirez–Alejandre's daughters, would have bolstered greatly Ramirez–Alejandre's claim that he would face extreme hardship if deported. Whether or not the supplemental evidence absolutely would entitle Ramirez–Alejandre to suspension of deportation is not for us to say. However, it unquestionably had the potential for likely altering the out-come under the BIA's own precedent and our case law applicable to this type of relief. Thus, Ramirez–Alejandre has provided sufficient evidence to show prejudice and to warrant a remand. *Cerda–Pena,* 799 F.2d at 1378–79.

V

This case comes to us in a narrow context, involving now-repealed procedures applicable to a now-repealed remedy involving a petitioner who was in the unusual position of prevailing before the IJ, but wished to supplement the record with current information during the lengthy appeal for the BIA's discretionary consideration. Under the circumstances presented by this case, and the procedures and law applicable at the time, the petitioner was denied the right to present reasonably his case in a full and fair hearing. Under applicable law, the BIA was required to determine extreme hardship as of the time it decided the case. Eight years had elapsed since the hearing before the IJ; however, Ramirez–Alejandre arbitrarily was denied the opportunity to request the submission of legally relevant, supplemental evidence based on a rule that was applied arbitrarily and capriciously.

We grant the petition for review and remand to the BIA for reconsideration of the tendered evidence without application of the categorical exclusion rule upon which it relied in this case, namely that "this Board as an appellate body does not consider evidence submitted for the first time on appeal." We neither express an opinion as to whether the BIA should accept or reject the tendered evidence on any other basis, nor do we preclude the BIA from taking any other appropriate administrative action with respect to the evidence. We express no opinion on the ultimate merits of the petition.

PETITION GRANTED AND REMANDED.

TROTT, Circuit Judge, Dissenting, with whom judges O'SCANNLAIN, GOULD, TALLMAN, and RAWLINSON concur.

> "A motion to reopen is one of two ways, a motion to reopen, or just send it in. It violates due process to ignore what we sent in."
> Counsel for petitioner (explaining during oral argument the nature of his claim).

I

Ramirez–Alejandre claims that the BIA's decision not to consider new factual information "just sent in" for the first time on appeal regarding the merits of his request for suspension of deportation constituted a denial of due process of law. There are four main reasons why his claim fails.

First, the method he chose to attempt to bring this information to the BIA was simply informational and by choice did not comply with the applicable procedure and published rules. *See* *Matter of Coelho,* 20 I. & N. Dec. 464, 471–72 (B.I.A.1992); 8 C.F.R. §§ 3.2, 3.8 (1991, 1996). Second, he had an opportunity prior to the BIA's final decision properly to augment the record with this information, in the form at least ***387** of a motion in the alternative, but, although he was aware of this opportunity, he admits he chose not to take advantage of it. Thus, the information never became part of the record as *evidence* and thus was no more than hearsay. Third, he had another opportunity to move to reopen after the BIA ruled against him, but he deliberately did not do so. Fourth, his situation did not in any manner approximate "exceptional circumstances" such that the Constitution mandated reopening of the evidentiary record.

Given that *he,* not the BIA, is responsible for the missed opportunities that form the predicate for his claim of constitutional foul, we should reject out of hand his due process claim as demonstrably lacking in merit. To quote the test relied on by the majority, Ramirez–Alejandre must show that "the proceeding was so fundamentally unfair that [he] was *prevented from reasonably presenting his case.*" *Sanchez–Cruz v. INS,* 255 F.3d 775, 779 (9th Cir.2001) (quotation and citations omitted) (emphasis added). In a nutshell, no one and nothing prevented him from reasonably presenting his case.

Nevertheless, and with all respect, our friends in the majority have adopted an opinion that stands for the astonishing proposition that an illegal alien who is an applicant for discretionary suspension of deportation has a constitutional due process right to have the BIA, *sitting as an appellate court,* "consider" on the merits unverified *factual* information "just sent in" for the first time by the applicant on appeal, information that has not been tested, cross-examined, subjected to any of the usual forms of authentication ordinarily required in an adjudicatory setting, or made a part of the evidentiary record. Just shovel something over the BIA's transom *after* the hearing conducted by the IJ, and the Constitution requires the BIA to take whatever-it-is into consideration in making its decision, even in circumstances where the party delivering the information fails to make a motion to make the information a formal part of the record. This unprecedented holding cannot be correct, as I shall attempt to demonstrate; and, because it masquerades as a constitutional imperative, it threatens *all* rules enacted by the BIA, old or new, governing the *receipt* and the consideration on appeal of potential new evidence, as well as what the record consists of in these cases.

The majority's conclusion from this record is that "Ramirez–Alejandre was *denied the opportunity to request the submission of legally relevant supplemental evidence* based on a rule that was applied arbitrarily and capriciously." (Emphasis added). Not only has Ramirez–Alejandre not made the claim to us in either his petition for review or any of his briefs that he was "*denied the opportunity* to request the submission of evidence," but the majority's conclusion is plainly wrong.

To illustrate that the problem of which Ramirez–Alejandre complains is entirely of his own making and falls a legal country mile short of supporting either (1) his constitutional due process argument, or (2) the argument the majority has plucked from thin air on his behalf, a few facts are in order.

To begin with, we have the manifestly informal manner in which Ramirez–Alejandre attempted to bring his new information to the BIA's attention after the IJ had rendered his decision and the matter was on appeal. After briefing to the BIA was completed, Ramirez–Alejandre forwarded on January 7, 1993, a letter dated November 10, 1992, to the Board from his daughter's primary care physician (indicating that she had suffered several bouts of ear infections throughout the year) with the bald request that the "letter be included in ***388** the record of proceeding and considered in support of[his] application for suspension of deportation." The doctor's letter itself was unauthenticated and not offered in affidavit or declaration form. The doctor's signature was not notarized. It did not comply with the Rules. It was not "evidence."

On November 3, 1994, Ramirez–Alejandre filed a supplementary brief in general support of his application for suspension of deportation, attaching 24 additional documents. He now admits that much of the information attached to his brief was not new and could have been presented to the IJ. Among the documents was a September 12, 1994, unverified letter from a doctor of chiropractic associated with "The Back Doctors" indicating that Ramirez–Alejandre had suffered—after his hearing before the IJ—an injury to his back on January 3, 1994, which triggered workers compensation. The letter represented that Ramirez–Alejandre was currently on full disability. The letter said also, "I anticipate permanent disability." As in the case of the earlier doctor's letter, this one, too, lacked any indicia of admissibility as evidence—no affidavit, no declaration, no notary, no anything.

I note here that Ramirez–Alejandre demonstrated in his November 3, 1994, submission that he was fully aware of his opportunity formally to augment the factual record by making a proper motion and thereby to convert his assertions into evidence, but, as he candidly admitted during oral argument, he chose not to follow this well-worn path. Instead, he merely indicated in his papers filed with the BIA that *if* the *INS* made a motion to remand, he would not object, and I quote:

> However, if the INS believes it appropriate, *respondent will not oppose* a motion to remand the proceedings for a further evidentiary hearing so that the additional evidence can be considered.

(Emphasis added).

The INS then put Ramirez–Alejandre on actual notice that the INS opposed his casual attempts to add to the record on appeal information which was not before the IJ. On November 15, 1994, the Service filed a supplemental brief objecting to Ramirez–Alejandre's gambit, arguing that the Board's "review on appeal is limited to the record before

the Immigration Judge." Under the headnote "Respondent's Additional Evidence Submitted on Appeal Should Not be Considered Part of the Record," the Service cited three cases in support of its position: *Matter of Soriano,* 19 I. & N. Dec. 764, 767 (B.I.A.1988) (remanding for consideration of new information); *Matter of C,* 20 I. & N. Dec. 529, 530 n. 2 (B.I.A.1992) (declining to consider new evidence submitted on appeal and noting that no motion to reopen based on new evidence had been made); and *Matter of Haim,* 19 I. & N. Dec. 641, 642 (B.I.A.1988) ("A party seeking to reopen [the] proceedings must state the new facts which he intends to establish, supported by affidavits or other evidentiary material."). Thus, not only was he given a warning that his information would not be considered in its present condition and was not part of the record, but he was advised what to do and how to do it: make a motion in some form to reopen.

Matter of Coelho made it clear in 1992 to all applicants and counsel what steps were necessary to substantively and procedurally augment factual records with respect to the merits of a claim. Here is the BIA's description of the process:

> Motions to remand are an accepted part of appellate civil procedure and serve a useful function. Where a motion to remand simply articulates the remedy requested by an appeal, we treat it as part ***389** of the appeal and do not require it to conform to the standards for consideration of motions. However, where a motion to remand is really in the nature of a motion to reopen or a motion to reconsider, it must comply with the substantive requirements for such motions. The requirements for these motions are set forth at 8 C.F.R. §§ 3.2 and 3.8 (1991). In this instance, the motion to remand is in the nature of a motion to reopen since the respondent requests additional proceedings to present evidence regarding his rehabilitation which was not available during the initial proceedings.

20 I. & N. Dec. at 471 (internal citations omitted).

The majority attempts unconvincingly to dilute *Coelho* by dismissing it as merely a reference to "motions practice." Although we use case law in this fashion on a routine basis to advise litigants of the rules of the road, the majority reasons that the same practice offends the Constitution when used by the BIA. [1] Why? I believe it is a mistake not to regard *Coelho* as authoritative precedent which controls the disposition of this case.

Nevertheless, on May 6, 1998, almost four years later, Ramirez–Alejandre submitted yet another supplemental brief in which he stated that "[i]f the Board will permit respondent another evidentiary hearing, *additional evidence* of the hardship he and his United States citizen child will suffer can be offered." (Emphasis added). Notwithstanding Rules 3.2 and 3.8 requirements of a showing of materiality, unavailability, and indiscoverability at the IJ's hearing, Ramirez–Alejandre made no attempt by affidavit or otherwise to indicate what such "additional evidence" might be or how it might affect the BIA's decision.

The BIA handed down its decision on June 6, 2000. The Board held that Ramirez–Alejandre had not shown extreme hardship. Its decision noted also that while Ramirez–Alejandre had "submitted additional evidence on appeal that his claims support a finding of 'extreme hardship,' this Board as an appellate body does not consider evidence submitted for the first time on appeal. *Matter of Fedorenko,* 19 I & N Dec. 57, 74 (BIA 1984)."

To illustrate the folly of accepting "for consideration" Ramirez–Alejandre's "evidence" at face value, one need look no deeper than his November 3, 1994, supplementary brief and the attached unverified letter from "The Back Doctors" claiming, without proof, that "Mr. Ramirez is suffering from an acute upper thoracic and cervical spine condition.... The patient at the present time is on full disability and is expected to remain so for the next two months. I anticipate permanent disability and the patient to be eligible for re-habilitation." This letter is dated September 12, 1994, and gives the date of Ramirez–Alejandre's injury as "January 3, 1994." Yet, a mere fifteen pages later in the same submission we find a letter dated September 28, 1994,—16 days after the date of The Back Doctors' letter—which reads,

> Ramon Ramirez works for Heather Farms Landscape, Inc.[ ] He has been an excellent worker and has been a project foreman for approximately 3 years. He has been responsible for the over all maintenance [sic] of a 400 unit condominium complex. To include the supervision of three other workers and/or maintenance crew. We look forward to ***390** seeing Ramon continue employment with Heather Farms Landscape. Ramon has been employed with Heather Farms Landscape for four years.

Given the date of Ramirez–Alejandre's injury specified in The Back Doctors' letter, January 3, 1994, and that letter's claims of "acute" condition, "full disability," and "anticipate[d] permanent disability," someone has some explaining to do. Counsel's supplementary brief accompanying these mutually impeaching letters calls Ramirez–Alejandre "permanently disabled" and claims it is "unlikely that he will be able to do manual labor again." Yet, in "support" of his dire description and prediction, the same counsel included in this same package yet another suspicious unverified letter, this one from Jose Juan Bernal, the "Pastoral Administrator" of Ramirez–Alejandre's church. Pastor Bernal tells us in this letter of August 30, 1994, that Ramirez–Alejandre "is in charge of getting the group going and singing, every Monday that they have their meetings. He is also the one in charge of putting things in order and cleaning the halls. He does this with joy and enthusiasm."

When it helps his case to be hurt and permanently disabled, he is hurt and disabled. When it helps his case to be a good worker and permanently employed, he is just that. But both at once? I repeat, not one of these letters was verified, notarized, or tendered in affidavit form. Can this be information which the BIA has a constitutional duty to consider unless and until it is part of the record?

The Service opposed Ramirez–Alejandre's request for suspension of deportation in large measure based on *record* evidence of lies, deception, and dishonesty on his part. The INS asserted that he had failed to establish good moral character as required by the Immigration and Nationality Act in that during his illegal tenure in the United States he had used at least four false names, four false Social Security cards, had purchased and used a fake alien registration card, and had lied about several material issues to immigration officers when he was arrested, including whether he or his family had ever received public assistance benefits. Suffice it to say here that none of this uncontested evidence of Ramirez–Alejandre's life outside the law helps his dubious assertion of inability to work and permanent disability. The point of this discussion is not to cast aspersions at Ramirez–Alejandre, but to call attention to the fact that the *only* place these issues can be adequately sorted out and made a part of the record is in a proper hearing, not helter-skelter on appeal. In a hearing setting, information does not become part of the evidentiary record until it is properly offered and received.

Ramirez–Alejandre might as well have dropped off this untested, unverified, unauthenticated, and untrustworthy material in a plain brown wrapper. With all respect to counsel, this informal method of attempting to inform the Board on appeal of new facts is hardly the stuff of which how-to-do-it continuing education of the Bar courses, or, for that matter, constitutional claims are made.

But, now, as we probe for persuasive evidence that Ramirez–Alejandre was "*prevented* from reasonably presenting his case," *Sanchez–Cruz,* 255 F.3d at 779 (citation and quotation omitted) (emphasis added), or "denied" this opportunity, we get to the heart of the problem with his claim and with the majority's constitutional holding. When counsel for Ramirez–Alejandre was asked during oral argument why prior to the Board's decision he had not tried to augment the evidentiary record by filing a motion to reopen or to remand, his answer was quite revealing:

> ***391** (Mr. Kaufman) If he [Ramirez–Alejandre] was required to submit a motion to reopen, or in this case it would be treated as a motion to remand, he would have to give up the win. He'd have to throw in the towel and ask for.... Well, if he's asking to reopen the case, then he's saying that I no longer want to have this win.

When pressed on this point, he struck with this unpersuasive excuse, stating,

> (Mr. Kaufman) There is no clear rule that says that a motion to reopen is the *only vehicle* that an applicant can use to supplement the record when a case is before the BIA.
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> * * *
>
> (Mr. Kaufman) Rule 3.2(c) says that an alien who wishes to introduce new facts *may* file a motion to reopen.
>
> * * *
>
> (Mr. Kaufman) A motion to reopen is one of two ways, a motion to reopen, or just send it in. *We just sent it in. It violates due process to ignore what we sent in.*
>
> * * *
>
> (Mr. Kaufman) Whether the evidence comes to the BIA in a motion to reopen under 3.2, *or if the evidence comes to the BIA appended to an appellate brief, its job is the same. It has to assess the evidence.*

(Emphasis added).

Chief Judge Schroeder asked counsel why he persisted in claiming he had to "throw in the towel" and "give up his win" when he could easily have made his motion in the alternative, i.e., "rule for me on the INS's appeal, or, in the alternative, if you are inclined to rule for the Service, consider my new evidence as a motion to remand so that I can introduce new evidence that will bring a stale factual record up-to-date." Ramirez–Alejandre's answer to our Chief's sensible question was to stick doggedly with his I-can-just-send-it-in-and-they have-to-consider-it refrain. His briefs and his answers to our questions show without a doubt that he knew how properly to reopen the factual record to preserve his point, but he chose not to do so.

It gets worse. Judge Thomas, the author of the majority's opinion, asked him at oral argument whether his remedy was not "to reopen *after* the BIA rendered its decision?" Ramirez–Alejandre's counsel's answer to this question drives a stake through both the heart of his claim and the majority's conclusion that he was "denied" this opportunity:

> (Mr. Kaufman) Petitioner *had the option of asking the Board to reopen* but it was clear to me that the BIA's decision dictated what they would do with that.

I then asked counsel if I understood him correctly to have made the choice not to exercise his known option to file a motion to reopen, and his answer, delivered with a shrug of his shoulders, was, "I decided to file the petition for review."

What all of this boils down to is a textbook example of a number of knowing and deliberate decisions Ramirez–Alejandre's counsel made *not* to exhaust the adequate remedies that *he confesses* were available to him to augment the record. The record as properly considered thoroughly impeaches the majority's conclusion that Ramirez–Alejandre was "denied the opportunity to request the submission" of legally relevant evidence that had developed in the eight years after his hearing before the immigration judge. Ramirez–Alejandre says he knew he had this very opportunity by following the procedure established by *Coelho* as controlling case law and the Rules, but he decided to forego it, and he did so more than once. Not once did he ***392** assert in his briefs that the Rules and practice gave him no avenue to augment the record.

We have been here before, with different results. In *Roque–Carranza v. INS,* 778 F.2d 1373 (9th Cir.1985), we said the following:

> INS regulations set out a mechanism for the reopening or reconsideration of deportation hearings. The petitioner must submit a motion to reopen to the BIA and state the new facts to be proved at the reopened hearing. 8 C.F.R. § 3.8(a) (1985). The BIA is vested with the discretion to determine when a hearing should be reopened ... based upon its evaluation of whether the evidence sought to be introduced is material and was previously

> unavailable. 8 C.F.R. § 3.2 (1985). We have held that in circumstances such as at bar we will not supersede this ordinary reopening procedure by compelling the BIA to reopen the hearing. Thus, the petitioner must follow the INS regulations and file a motion to reopen or for reconsideration with the BIA.

Id. at 1373–74 (internal citations omitted).

Given Ramirez–Alejandre's position as *he* explains it to us, in contrast to how the majority's opinion remodels it, it is clear that the majority has decided a hypothetical case. The majority goes out of its way to try to assert that somehow he could not have made these motions had he tried, but Ramirez–Alejandre's rationale for his choices *not* to make such motions makes the majority's effort utterly irrelevant. The path to full consideration of his evidence was clear, but Ramirez–Alejandre chose not to take it.

Moreover, as mentioned earlier, Ramirez–Alejandre never made the claim to the BIA that their Rules, practices, and procedures were so arbitrary and capricious that they denied him due process by refusing to accept his information. He did not do so before the BIA ruled, and he did not do so in a motion to reopen. Furthermore, he did not make this claim to us, not in his petition for review, and not in any of his briefs. In fact, his position was that he could have made a motion to remand or reopen, but was not required to do so. I quote from his opening brief:

> 8 C.F.R. Section 3.2(e) (1999) permits petitioner to present evidence to the BIA on appeal.... At least some of the evidence petitioner offered the BIA on appeal satisfied the requirements [for reopening the record] of Section 3.2(c) because it was both material and new.

I quote next from his petition requesting rehearing en banc:

> While 8 C.F.R. § 3.2 certainly permits the BIA to consider evidence offered on appeal, the panel erred in finding that petitioner was *required* to invoke it's [sic] provisions in a formal motion in order to compel the BIA to consider all of his evidence, or to vest this Court with jurisdiction to review the BIA's decision when it refused.
>
> First, petitioner did not have to "reopen" his proceeding under 8 C.F.R. § 3.2 to compel the BIA to consider his evidence. When the evidence was offered petitioner was the prevailing party in the proceeding. The IJ had *approved* his application for suspension of deportation. The appeal to the BIA was made by the INS, not petitioner. For petitioner then, the proceedings were already "open".

Ramirez–Alejandre has conceded that he had a right to move to reopen the record. Why the majority feels empowered when Ramirez–Alejandre concedes he had the right to reopen to tell him he did ***393** not is peculiar indeed. The Rules were in place when Ramirez–Alejandre made his choices, *Coelho* had been published, and controlling case law was clear, Ramirez–Alejandre knew what he could do, he was on notice that the INS had objected, but he did not want to "throw in the towel and give up his win." If he now regards his situation as a predicament, it was entirely self-inflicted. Parenthetically, Ramirez–Alejandre does not dispute that the 1999 Amendment to 8 C.F.R. § 3.2 simply codified the standard practice of which he was fully aware.

Ramirez–Alejandre's counsel's only justification for his conduct is his incorrect interpretation of an inapposite case decided after his final submission to the BIA, *Larita–Martinez v. INS,* 220 F.3d 1092 (9th Cir.2000). He argues that *Larita–Martinez* "holds that the due process requirement of a 'full and fair hearing' '*mandates'* that the BIA consider '*all* ' relevant evidence submitted on appeal." This "just send it in and the *BIA* must consider it" position is both a skewed view of *Larita–Martinez's* holding and a novel concept of what is evidence. In that case, unlike this one, the BIA made no mention on its decision of information submitted on appeal by the petitioner. Thus, the three-judge panel invoked the presumption that all evidence is considered unless the tribunal says otherwise, and the panel simply did not reach that petitioner's due process issue. The panel's opinion cannot be read for the position argued by Ramirez–Alejandre, and it did nothing to sweep away the BIA's regulations governing the reopening of the factual record. To the extent that *Larita–Martinez* can be misread to support Ramirez–Alejandre's argument, we should take this opportunity to set the record straight. We are left with a situation where the record is

whatever counsel happens to include in letters to the Board. One can only wonder if we have destroyed the concept of an evidentiary administrative record in BIA cases.

The majority seems also to be mistaken as to what the BIA means when it refers to "reviewing facts *de novo*." This 2058 description does not mean that the BIA routinely creates a new factual record and entertains new and untested factual information in connection with its decision. All de novo means in that context is that the BIA re-weighs and re-evaluates historical facts already in the record in order to arrive at its own factual findings, giving no deference to the IJ's interpretation of them. Evaluation de novo is and was not an open invitation willy-nilly to submit *new* untested facts not in the record made by the IJ.

We come next to the majority's assertion that "*on occasion* " the BIA has accepted and considered new evidence on appeal. This "on occasion" assertion is true, but it tells only part of the story of this exceptional practice, and in so doing, it distorts by omission what the BIA "on occasion" has done, and why. Here, using the meager handful of cases cited by the majority, is the whole story.

In *Matter of Ss. Captain Demosthenes,* 13 I. & N. Dec. 345 (B.I.A.1969), the official immigration status of an alien crewman of a ship, whose inappropriate behavior had resulted in monetary fines against his vessel, had changed between the time the district director made his decision to fine his vessel and the BIA's consideration of the ship's appeal. To quote the BIA regarding this change,

> At the time the district director considered the case, [the crewman Koumoutsos] was still at large in this country. However, information has now been received by this Board that he was eventually apprehended by immigration authorities in Boston, Massachusetts, and ***394** deported to Greece at the expense of the vessel's owners.

Id. at 346.

Attached to this recitation regarding Koumoutsos's fate at the hands of the INS, we find this qualifying footnote:

> Ordinarily, we would remand the case to have this information introduced into evidence and considered by the District Director, but we will not do so here because of the unavoidable administrative delay involved; because the authenticity of the information does not appear to be subject to question; and because the present posture of the case calls for final resolution of all aspects of the problems presented, at one and the same time.

Id. at 346 n. 1.

Next, we come to *Matter of Godfrey,* 13 I. & N. Dec. 790 (B.I.A.1971), a case involving a deportation order against an alien who entered into a sham marriage. In this case, new counsel asked the BIA on appeal to allow oral testimony explaining his client's earlier written inculpatory statement received at the hearing from which the appeal was being taken. The BIA rejected this unusual request with this explanation:

> We did not permit her to testify at oral argument for two reasons. First, this Board is not equipped to receive oral testimony. Second, we ordinarily confine our review to a consideration of the record alone, *although in exceptional cases* we do receive and consider additional affidavits or other documents not previously available.

Id. at 791 (emphasis added). This statement, too, is the subject of a footnote in the BIA's opinion, a footnote that cites authority for the "exceptional circumstances" exception. That authority is *Matter of Ss. Captain Demosthenes.*

As for *Hazzard v. INS,* 951 F.2d 435, 440 (1st Cir.1991), that court's authority in that case for the proposition that the

BIA "may consider" new evidence not presented to the IJ is *Matter of Ss. Captain Demosthenes* and *Matter of Godfrey.*

All *Hazzard* does is confirm what I have already exposed as the holdings and reasoning of those "exceptional circumstances" cases. The other circuit court case the majority cites is *Charlesworth v. INS,* 966 F.2d 1323 (9th Cir.1992). *Charlesworth* involves our approval of a BIA decision *to reopen* a case pursuant to 8 C.F.R. § 3.2. If anything, *Charlesworth* hurts Ramirez–Alejandre's argument.

We find the same exceptional circumstances principles at work in *Matter of Flores–Gonzalez,* 11 I. & N. Dec. 485 (B.I.A.1966). Here, the BIA concluded that an error of law adverse to *Flores–Gonzalez* had been made during a deportation hearing in connection with his application for suspension of deportation. Given this conclusion, the BIA remanded the case "to the special inquiry officer for a reappraisal and reevaluation of the evidence concerned with the respondent's application for suspension of deportation and a decision as to whether suspension of deportation is warranted as a matter of discretion." *Id.* at 488. One cannot miss the remedy: remand for consideration of the evidence in the light of the proper law.

In re Min Song, 23 I. & N. Dec. 173 (B.I.A.2001), is consistent with the BIA's view that it has discretion in extraordinary cases to consider new evidence. The issue involved a removal order based on the alien's conviction of an aggravated felony. In the interim, by an act of the state court in which Min Song had been convicted, the felony had lost its aggravated nature. The BIA's decision speaks for itself.

> In his brief on appeal, he presents new evidence relating to the reduction of his ***395** criminal sentence and requests termination of these proceedings, asserting that the theft offense of which he was convicted no longer falls within the definition of an aggravated felony. In support of his request to terminate, he has submitted a copy of an order dated April 4, 1999, issued by the Circuit Court for Montgomery County, court's February 2, 1992, sentence in the criminal case and ordered the sentence revised nunc pro tunc to 360 days, which was suspended. The Immigration and Naturalization Service has not indicated any objection to this evidence of the revision of the respondent's sentence.

Id.

In re Xiu Hong Li, 21 I. & N. Dec. 13 (B.I.A.1995), is yet another illustration of the BIA's consistent exercise of discretion in exceptional cases. After clarifying a relevant principle controlling its ultimate decision, the BIA referenced new evidence in connection with its decision *to remand* for further consideration of the petitioner's application for a visa. The BIA said,

> Ordinarily, we would not consider evidence first offered on appeal. See Matter of Soriano, 19 I & N Dec. 764 (BIA 1988); Matter of Obaigbena, 19 I & N Dec. 533 (BIA 1988). However, in this instance the issue to which this evidence pertains was understandably not focused on below, inasmuch as no standard had yet been articulated regarding the treatment of terminations of adoption for immigration purposes. In light of our decision, accordingly, we find it appropriate to remand this matter to the RSC director to allow the petitioner a full and fair opportunity to meet his burden of establishing that the natural parental relationship has been reestablished under Chinese law such that it can be recognized for immigration purposes.
>
> Accordingly, this matter will be remanded to the RSC director for further consideration of the visa petition.

Id. at 18–19.

In summary, what we see is a rare practice engaged in "on occasion" by the BIA under clearly extraordinary circumstances involving uncontested and incontestable information. What the majority has done with the BIA's rational practice is to turn it into a practice that must be available to every appellant such as Ramirez–Alejandre, whether exceptional circumstances are present or not. The majority has converted the BIA's discretionary use of that rare practice into a constitutional right. This is not only unprecedented, but it is wrong.

Moreover, I fail to see how we can construe Ramirez–Alejandre's statement on November 3, 1994, that he would "not oppose" a motion by the Service to remand as a motion by him to remand. It wasn't. But then to conclude that the BIA's failure to so construe *the government's* remand motion set the stage for a due process claim violation is to build the top floor of a house of cards on a missing layer.

When all is said and done, however, and speaking of TEGWAR, where have we left the BIA? In the body of the majority's opinion, the holding is that the BIA had a constitutional duty to "consider" Ramirez–Alejandre's "tendered evidence information." What does "consider" mean? What does this do to the record? Will it be consistent with the majority's opinion for the BIA to say, "We have construed Ramirez–Alejandre's numerous references to new evidence as a motion to reopen the record, and we have denied that motion because even accepting his information as true, it is not sufficient to establish 'extreme hardship.' "? Or would this consideration ***396** fall short of what the majority demands?

The irony in our resolution of this case, of course, is that had the BIA construed Ramirez–Alejandre's submissions as a motion to remand or to reopen and then denied it, we would be without jurisdiction to entertain this issue. Why? Because our standard of review with respect to motions to reopen is for 2063 abuse of discretion, *see* *Israel v. INS,* 785 F.2d 738, 740 (9th Cir.1986), and in transitional Rules cases, "abuse of discretion claims recast as due process violations do not constitute colorable due process claims over which we may exercise jurisdiction in deportation suspension cases...." *Sanchez–Cruz,* 255 F.3d at 779 (citation omitted). *See also* *INS v. Doherty,* 502 U.S. 314, 323, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992) (alteration in original) (quoting *INS v. Abudu,* 485 U.S. 94, 99 n. 3, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)) ("We also noted in *Abudu* that the abuse-of-discretion standard applies to motions to reopen 'regardless of the underlying basis of the alien's request [for relief].' ").

II

The latest example from the Supreme Court of our excessive zeal on behalf of petitioners is *Ventura v. INS,* 264 F.3d 1150 (9th Cir.2001). The Court summarily reversed us in a unanimous per curiam opinion, concluding that we "exceeded [our] authority" when we made a decision that properly belonged to the BIA. *INS v. Ventura,* 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002). *See also* *Chen v. INS,* 266 F.3d 1094 (9th Cir.2001), *judgment vacated by* *INS v. Chen,* 537 U.S. 1016, 123 S.Ct. 549, 154 L.Ed.2d 423 (2002). I fear we have made a similar mistake here. To resurrect the words of Judge Kozinski in *Abovian v. INS,* 257 F.3d 971 (9th Cir.2001) (Kozinski, J., dissenting from denial of rehearing en banc, representing the views of eight concurring judges), the Ninth Circuit "overthrows ... perfectly reasonable BIA decision[s]" in asylum and withholding of removal cases "by invoking novel rules divorced from administrative law, Supreme Court precedent and common sense[,]" and thus has "whittled away the authority and discretion of immigration judges and the BIA." Judge Graber made a similar observation in *Cardenas v. INS,* 294 F.3d 1062, 1069 (9th Cir.2002) (Graber, J., dissenting): "[T]he majority resolves every ambiguity in favor of [the asylum applicant], whereas [the correct] standard of review requires us to resolve every ambiguity in favor of the decision-maker below."

It is common knowledge that when Congress placed new limitations in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") on our authority to review certain BIA decisions, Congress did so in response to documented, unwarranted sorties by the judiciary onto the BIA's administrative turf. The impact of IIRIRA on our role in this process was draconian. To quote *Kalaw v. INS,*

> IIRIRA dramatically altered this court's jurisdiction to review final deportation and exclusion orders. It introduced sweeping changes into our immigration laws, including the specific repeal of the judicial review procedures previously provided under INA § 106. IIRIRA's replacement section for judicial review, new INA § 242, purports to vest the BIA with final appellate jurisdiction for most INS deportation proceedings. *See* IIRIRA § 306 (now codified at 8 U.S.C. § 1252).

133 F.3d 1147, 1149 (9th Cir.1997).

Ramirez–Alejandre's petition for review demonstrates the impact of these new restrictions imposed by Congress on our authority. ***397** As the majority demonstrates, we no longer have jurisdiction to review the "discretionary determination whether an alien seeking suspension of deportation ... has met the statutory eligibility requirement of 'extreme hardship.' " *Sanchez–Cruz,* 255 F.3d at 778 (citing *Kalaw,* 133 F.3d at 1152); *see also* IIRIRA § 309(c)(4)(E) (1996). In addition, we have no longer any power to review the Attorney General's discretionary decision to grant suspension once eligibility is determined. So what have we done here? With all respect to the majority, we have indulged in an end-run around IIRIRA and improperly inserted ourselves once again into the administrative prerogative of the BIA, where we do not belong. In so doing, we have decimated the concept of a record of evidence reviewable and controlling on appeal and ordered the BIA to consider whatever counsel sends in.

III

Congress has authorized the Executive Branch in the person of the Attorney General to establish "requirements and procedures" governing asylum applications. 8 U.S.C. § 1158(b)(1); *see also* 8 U.S.C. §§ 1158(b)(2)(C), (d)(1), (d)(5)(B). Moreover, Congress has charged the Attorney General, not us, with the primary responsibility for administering the immigration laws. *See* 8 U.S.C. § 1103(a), as amended by Public Law 107–296 § 1102 (2002). Our assigned limited role is to *review* the workings of the BIA, not to run the INS. When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review." *Rios–Pineda,* 471 U.S. 444, 452, 105 S.Ct. 2098, 85 L.Ed.2d 452 (1985). This excursion beyond our warrant is particularly troubling here because of the connection between immigration law, foreign affairs, and national defense. Nevertheless, once again we aspire to be all things to all people. Over the years, we have established a body of law in this Circuit that is at odds with what Congress has asked us to do.

As one final example of our repeated errors, we have the Supreme Court's opinion in *INS v. Wang,* 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981), summarily reversing our en banc opinion. In that case, we had overruled the BIA's decision not to reopen a request for suspension of deportation based on extreme hardship. In reversing our holding, the Court said,

> By requiring a hearing on such a motion, the Court of Appeals circumvented [the regulation], which was obviously designed to permit the Board to select for hearing only those motions *reliably indicating* the specific recent events that would render deportation a matter of extreme hardship for the alien or his children.

Id. at 143, 101 S.Ct. 1027 (emphasis added). The Court then castigated us for extending our " 'writ beyond its proper scope.' " *Id.* at 145, 101 S.Ct. 1027 (quoting Sneed, J., dissenting from our en banc opinion).

I regret the majority's inappropriate and unnecessary decision to liken the BIA to a fictional comedy. Our warrant to entertain petitions for review does not contemplate this kind of critical judgment. Moreover, the majority does so on the basis of a handful of unusual cases out of tens of thousands of cases decided by that agency. It is time to accept the limits of our role. The due process violation shoe does not fit Ramirez Alejandre's foot, but nonetheless, we allow him to use it to kick ***398** open the door that he chose not to open with the handle he knew was there and which the INS explicitly brought to his attention. When all is said and done, he has prevailed. If counsel just sends it in to the BIA, the Constitution requires that appellate body to consider it on the merits.

I respectfully dissent.

All Citations

319 F.3d 365, 03 Cal. Daily Op. Serv. 1340, 2003 Daily Journal D.A.R. 1703, 2003 Daily Journal D.A.R. 1800

Footnotes

1 For example, ordinarily we do not entertain an issue raised for the first time on appeal, even if that issue has merit. However, we claim the discretion to do so as we see fit. *A–1 Ambulance Serv., Inc. v. County of Monterey,* 90 F.3d 333, 338–39 (9th Cir.1996).

Gammage & Burnham's Supplemental Materials

ATTACHMENT #9

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April 15, 2024

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Ms. Erin Perreault, Zoning Administrator
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Scottsdale, AZ 85251

RE: Board of Adjustment Case Numbers: 3-BA-2024 and 4-BA-2024

Dear Ms. Perreault:

Gammage & Burnham, PLC represents Banner Health ("Banner") and submits the following supplemental memorandum in connection with the above-referenced cases, which were consolidated pursuant to the Amended Administrative Order of the Board of Adjustment ("Board") of the City of Scottsdale ("City") dated April 10, 2024 ("Amended Order").

In accordance with the Amended Order, this memorandum focuses on three legal issues: (1) whether either of the Zoning Administrator's letters dated January 30, 2024, are "an order, requirement or decision" subject to appeal pursuant to A.R.S. § 9-462.06(G)(1), thus giving the Board jurisdiction over the appeal; (2) whether any issue addressed in those letters is ripe for review by the Board; and (3) whether the appellant has standing to maintain an appeal.

I. Brief Factual History

The record contains no evidence that HonorHealth's original letters, or these appeals, have any connection to specific development plans by HonorHealth. According to the City's public website, HonorHealth has no pending applications with the City. What prompted the present appeals was Banner's announcement that it planned to develop a new medical campus at the southwest corner of Hayden Road and the Loop 101 Freeway.

On December 22, 2023, HonorHealth submitted two letters to Zoning Administrator Erin Perreault. The first letter asked the Zoning Administrator to issue an interpretation of the words "Hospital" and "Office" as they are used in the Scottsdale Zoning Ordinance ("SZO"). The second letter asked the Zoning Administrator to issue an interpretation declaring that the hypothetical construction of a hospital by Banner in the Central Business district ("C-2") would be in violation of the SZO. HonorHealth's letters stated in passing that they were motivated by HonorHealth's "long term planning," as opposed to its opposition to Banner's specific development plans. Whether or not HonorHealth's description of its motivations is sincere, it confirmed that HonorHealth's requests were not tied to any specific development plan – theirs or ours.

Indeed, at the time HonorHealth submitted its requests to the Zoning Administrator on December 22, 2023, the only application Banner had pending with the City was an application to rezone its property to the Special Campus zoning district to accommodate a future hospital (an application that is still pending). Yet, Banner's rezoning application was not cited in the December 22 letters as the basis for interpretation. Further, at that time, Banner had not submitted specific development plans for any specific project to be developed on its property utilizing the existing and approved zoning. Simply put, HonorHealth's requests were not and are not rooted in or guided by ***any*** specific development proposal by Banner utilizing the existing, approved zoning on Banner's property.

On January 30, 2024, the Zoning Administrator issued the two letters that are the subject of this appeal. In the first letter (concerning the definition of "Hospital" and "Office"), the Zoning Administrator explained that she "cannot provide an interpretation" in the absence of "a development proposal" containing "details relating to the proposed use of property." Similarly, in the second letter (concerning the Utilization of "Office" to Circumvent Definition of "Hospital") the Zoning Administrator explained that she "cannot provide an interpretation" because HonorHealth's request "concerns a hypothetical scenario."

On February 23, 2024, HonorHealth purported to appeal the Zoning Administrator's not-an-interpretation letters. As of that date, Banner had not submitted to the City any applications for a specific development proposal on its property utilizing the existing, approved zoning, meaning that HonorHealth's appeal has no connection to any pending development proposal.

Not until March 8, 2024 did Banner submit an application—which is not part of this appeal—for approval by the City's Development Review Board ("DRB") under Sec. 1.904 of the SZO for a medical office building on a portion of its property. That application is currently under preliminary staff review (with no formal review comments even issued at this time) and is pending before the DRB as Case Number 6-DR-2024 ("Banner's DRB Application"). Banner's DRB Application is not yet scheduled for hearing but will likely be heard by the DRB sometime in late summer of 2024.

II. Analysis of Legal Issues

For the following reasons, Banner respectfully urges the Board to dismiss this appeal for lack of jurisdiction and standing based upon all of the grounds specified in the Amended Order.

I. The Zoning Administrator's January 30 Letters are not "Interpretations" that Qualify for Appeal

The very first sentence of HonorHealth's February 23 appeal letters should prompt skepticism, because it characterizes the Zoning Administrator's January 30 letters as something they are not. A refusal to issue an interpretation is not an interpretation any more than a rained-out baseball game is a baseball game. Moreover, the logic behind the Zoning Administrator's letters persuasively demonstrates why there is no basis for the Board to exercise jurisdiction over the purported appeals.

Only one provision in Arizona's Zoning Enabling Act delegates authority to the Zoning Administrator. A.R.S. § 9-462.05(C) gives her authority to "enforce" the SZO. Likewise, the SZO recognizes that the Zoning Administrator's authority is limited to enforcement of the zoning ordinance (SZO 1.201).

"Enforcement" cannot exist in a vacuum; it requires a specific factual context. A factual context can arise—and thus supply a jurisdictional basis for the Zoning Administrator to make interpretations—in two

ways. First is the City's exercise of the traditional powers of zoning enforcement. That is, the Zoning Administrator (or her delegee) may determine that a specific existing or proposed use or structure is inconsistent with the zoning ordinance. In that event, a property owner (or applicant) may seek a formal interpretation.

Second, and conversely, a private party who owns or intends to develop property may seek an interpretation related to a specific development proposal as a precautionary step. Doing so may clarify the path for development and, ultimately, prevent coercive enforcement down the road. This is akin to the pursuit of a declaratory judgment in superior court, which is also a vehicle to seek legal clarity before a breach or serious violation occurs.

But in any case, a matter must be *ripe*—meaning that the facts are concrete and not speculative. The Zoning Administrator has no authority to issue "interpretations" in hypothetical scenarios. The authorities explain that a board of adjustment is "without authority to render an advisory opinion concerning the meaning of a zoning regulation or its application to a particular set of circumstances." 4 *American Law of Zoning* §40:5 (5th Ed. 2023).

And even if a zoning administrator does supply an advisory opinion (which has not happened in this case), this does not constitute a "decision" that can be appealed to a board of adjustment. *Holt v. Stonington Bd of Zoning Appeals*, 968 A.2d 946 (Conn. App. 2009); 3 Rathkopf's The Law of Zoning and Planning § 57:44 (a preliminary or advisory opinion from a zoning administrator is "not a decision subject to appeal.").

Finally, the January 30 letters were not made appealable just because they were reduced to writing. SZO 1.202(A) requires the Zoning Administrator to "respond in writing" to all requests for interpretations. In this case the Zoning Administrator provided a written "response," which made clear that she is not providing an interpretation. Put differently, not all "responses" can be appealed under SZO 1.202(B)—only responses that make "interpretations" and "other decisions" regarding the SZO are subject to appeal. Any other outcome would result in such an expansive definition of "interpretation" or "other decision" that almost any statement or response from a city official could be appealed.

II. Because the Matter is not Ripe, the Board Has No Jurisdiction

A. The "Enforcement" Element Required by A.R.S. § 9-462.06(G)(1) is Missing

Any exercise of the Board's jurisdiction must ultimately be grounded in Arizona statutes, because the Board "has no powers except those granted by the statutes creating it; its power is restricted to that granted by the zoning ordinance in accordance with the statute." *Arkules v. Paradise Valley Board of Adjustment*, 151 Ariz. 438, 442 (App. 1986) (abrogated in part on different issue *Legacy Foundation v. Citizens Clean Elect. Comm'n*, 243 Ariz. 404 (2018)).

Arizona statutes give the Board jurisdiction over two types of appeals. The first is variances (A.R.S. §9-462.06(G)(2)). The second, as noted in the Board's Amended Order, is appeals involving an error "in the enforcement of a zoning ordinance." A.R.S. § 9-462.06(G)(1)).

The Zoning Administrator correctly concluded that the matter put forth by HonorHealth is hypothetical—it presents no plausible enforcement scenario related to factual context. Banner does not desire any clarification on any specific aspect of a development proposal. The City is not enforcing or threatening to enforce any provision of the SZO. Even if one speculates that City staff might spot some issue

in the future, that can be addressed through consultation with City staff, or when the Development Review Board performs its role. But there is no ripe dispute at present, there is no enforcement action at present, and the Board lacks jurisdiction over hypothetical matters.

Section 1.805 of the SZO does not replicate the statutory "enforcement" requirement; it merely states that the Board may hear appeals from the Zoning Administrator's interpretations. But the SZO cannot expand the Board's jurisdiction beyond the scope provided by Arizona statutes. *Arkules v. Paradise Valley Board of Adjustment, supra.* And, as explained above and through the Zoning Administrator's own words, the Zoning Administrator's January 30 letters are not "interpretations." The Board thus lacks jurisdiction under both Arizona statues and the SZO.

B. Deciding Unripe Disputes Would Constitute the Attempted Exercise of Legislative Authority

The Board "has no legislative authority and acts solely in a quasi-judicial capacity in exercising its zoning enforcement duties." *Lane v. City of Phoenix*, 169 Ariz. 37, 42 (App. 1991). As a quasi-judicial body, the Board's jurisdiction extends only to adjudicating ripe cases. When there is no justiciable controversy, any decision by the Board would consist of adding new rules to the SZO. That is not a judicial (or quasi-judicial) function—it is a legislative function.

C. The Board's Jurisdiction Does Not Extend to Pre-Judging Matters Committed to Other Bodies of the City of Scottsdale

The reason for the statutory limits on the Board's jurisdiction is confirmed by the practical consequences of the scenario envisioned by HonorHealth. If the Board became an all-purpose overseer of ongoing development proposals, it would complicate and undercut the role of the City's planning staff and the City's Development Review Board. Confining the Board's jurisdiction to ripe cases promotes an orderly an efficient development review process that benefits the City, its staff and various public bodies, and the general public.

III. HonorHealth Lacks Standing as a "Person Aggrieved"

The third and final jurisdictional defect is HonorHealth's lack of standing. HonorHealth's appeal letters confess that HonorHealth lacks the particularized injury needed for standing.

Arizona law only gives the Board jurisdiction of appeals by "persons aggrieved" by the decision of the Zoning Administrator. A.R.S. § 9-462.06(D). The statutory phrase "person aggrieved" has been repeatedly explained. In order to qualify as a person aggrieved, the complainant must demonstrate "a particularized palpable injury." *Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88 ¶11 (App. 2023). On the other hand, standing is absent if the complainant merely points to "generalized harm that is shared alike by all or a large class of citizens." *Id.* (quoting *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998)).

HonorHealth's letters show the absence of any particularized injury, both because of what those letters say and what they do not say. Both of HonorHealth's letters point to generalized harm to Scottsdale citizens: The first appeal letter ("Office vs. Hospital") alleges "direct harm to the numerous residential neighborhoods and businesses adjacent to zoning districts that permit 'offices' but not 'hospitals.'" The second appeal letter (seeking a declaration that a hospital is not permitted in C-2) claims that the Zoning Administrator decision "impacts the City's residents and business [sic] . . .throughout various zoning districts,

many of which are adjacent to residential neighborhoods and business." These assertions epitomize "generalized harm" because they encompass wide swaths of the City and its residents.

At the same time, HonorHealth's letters fail to demonstrate any direct, palpable, particularized injury to HonorHealth. The first appeal letter says literally nothing. The second appeal letter makes the fantastic assertion that the entire world of healthcare providers "will be forced to spend hundreds of thousands of dollars in pre-development planning without knowing what constitutes a 'hospital.'" As an aside, HonorHealth, to date, has built and operates three hospitals in the City of Scottsdale and clearly has successfully navigated the SZO definition of what constitutes a "hospital." But even if this implausible assertion is credited at face value, it is presented on behalf of the entire class of all "healthcare providers." HonorHealth thus confesses that there is no injury unique to itself.

"Standing is not dispensed in gross." *Town of Chester v. Laroe Estates, Inc*., 581 U.S. 433, 439 (2017). To the contrary, standing requires a claimant "to demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* HonorHealth has not even tried to explain how it faces particularized harm—especially when the Zoning Administrator's January 30 letters declined to make any pronouncements, in a context where HonorHealth has no specific development proposal of its own.

For these reasons, we submit that the Board lacks jurisdiction and HonorHealth has no standing in these matters.

Sincerely,

GAMMAGE & BURNHAM

By
Cameron Artigue

CA/jaa

cc: Mr. Bryan Cluff, Planning & Development Area Manager (BCluff@Scottsdaleaz.gov)

4 Am. Law. Zoning § 40:5 (5th ed.)

American Law of Zoning | November 2023 Update
Patricia E. Salkin

Chapter 40. Procedure Before the Zoning Board of Appeals

II. Jurisdiction and Powers

§ 40:5. Appellate jurisdiction—Review of administrative decisions

References

A board of appeals commonly has jurisdiction to "hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement" of a zoning ordinance or statute.[1] Such an appeal involves a de novo hearing.[2] A board of appeals has jurisdiction to hear an appeal from a planning board.[3] The jurisdiction vested in the board by this kind of provision is appellate, not original.[4] A board of appeals, for example, is without authority to render an advisory opinion concerning the meaning of a zoning regulation or its application to a particular set of circumstances.[5] But it has jurisdiction to interpret the zoning regulations[6] upon an appeal from a construction of such regulations by an enforcement official.[7]

The jurisdiction of a board of appeals to construe the ordinance includes the power to determine the application of the ordinance to specific property. It is within the power of a board of appeals to determine whether an applicant for a building permit is entitled to a nonconforming use.[8] This power to rule on the application of an ordinance to specific land may be exercised by the board although it is without power to enforce its decision.[9] An occasional decision has suggested that a board of appeals lacks jurisdiction to review the granting of a permit where the applicant had a right to the permit and the board's approval was not required.[10] It appears, however, that the real meaning of these decisions is that the board erred on the merits rather than in accepting the matter for review.

The jurisdiction of the board of appeals to review administrative decisions usually is exclusive.[11] Absent an ordinance provision to the contrary, this exclusive jurisdiction cannot be exercised by another administrative officer,[12] or by the legislative authority of the municipality.[13] In fact, in a zoning matter, the courts are reluctant to review a decision by an administrative officer prior to an appeal to the board of appeals.[14]

Where the right of appeal from an administrative officer to the board of appeals clearly expressed in the ordinance, the board's jurisdiction to hear such an appeal is not affected by a provision making such officer's decision subject to the approval of the mayor. Jurisdiction to entertain an appeal from the named officer survives, although the mayor has approved the decision in issue.[15]

A board of appeals lacks jurisdiction to review an administrative decision if the subject matter has been placed within the exclusive power of another administrative body. Where, for example, the authority to regulate the subdivision of land outside the municipality was vested exclusively in a planning and zoning commission, the board of appeals lacked jurisdiction to hear an appeal relating to the subdivision of such land.[16] A board of appeals lacks authority to review an administrative decision

relating to a matter other than zoning.[17] A board of appeals does not have jurisdiction to hear appeals from decisions of the legislative body.[18] Furthermore, administrative proceedings of local government are subject to judicial review.[19]

Footnotes

1 Standard State Zoning Enabling Act § 7 (1926). A determination of the zoning administrator is not final if any appeal is taken therefrom to the board of appeals. City and County of San Francisco v. Padilla, 23 Cal. App. 3d 388, 100 Cal. Rptr. 223 (1st Dist. 1972). The board of appeals is empowered to hear and determine appeals from any order, requirement, decision, or determination made by a board charged with the enforcement of any ordinance or regulation duly adopted. It is not endowed with the power to overturn or veto, in its entirety, an amendment to a zoning ordinance. Bryant v. Lake County Trust Co., 152 Ind. App. 628, 284 N.E.2d 537 (1972). The board of adjustment has jurisdiction of appeals by "any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." Grandview Baptist Church v. Zoning Bd. of Adjustment of City of Davenport, 301 N.W.2d 704 (Iowa 1981). A board of zoning appeals has appellate jurisdiction to review decisions of decisions of administrative officials charged with enforcement of zoning regulations. Absent such a decision, the board is without jurisdiction. Barron v. Getnick, 107 A.D.2d 1017, 486 N.Y.S.2d 528 (4th Dep't 1985).

Where planning director's decision not to revoke conditional use permit was action taken in "interpretation, administration or enforcement" of land use ordinance, decision was appealable by intervenor whose revocation request was denied. Winchester Water Control Dist. v. Hissong, 75 Or. App. 194, 706 P.2d 193 (1985).

Under the Pennsylvania Municipalities Planning Code, the courts and the Zoning Hearing Board have jurisdiction of a case in which a zoning officer's misinterpretation or misapplication of a provision of the zoning ordinance will cause a landowner to suffer harm. Collis v. Zoning Hearing Bd. of East Allen Tp., 51 Pa. Commw. 368, 415 A.2d 102 (1980).

But cf. Waltco Truck Equipment Co. v. City of Tallmadge Bd. of Zoning Appeals, 40 Ohio St. 3d 41, 531 N.E.2d 685 (1988) (statute which vests jurisdiction in board of appeals to hear appeals from denial of permits does not give board jurisdiction to hear appeal from granting of permits).

See also Anderson and Roswig, Planning, Zoning, Subdivision: A Summary of Statutory Law in the 50 States, Chart No. 6 p 202 (1966).

2 See, e.g.,

Connecticut: Caserta v. Zoning Bd. of Appeals of City of Milford, 226 Conn. 80, 626 A.2d 744 (1993) ("It would be inconsistent with these broad grants of power to the board, and with the concomitant procedural limitations thereon, to envision the board's function as anything less than a de novo determination of the issue before it, unfettered by deference to the decision of the zoning officer. It follows from the de novo nature of the board's consideration of the issues decided by the zoning enforcement officer that the trial court … must focus on the decision of the board and the record before it, because it is that decision and record that are the subject of the appeal under § 8-8.").

Maine: LaMarre v. Town of China, 2021 ME 45, 259 A.3d 764 (Me. 2021) ("In the vast majority of local permitting processes, an applicant seeks a permit, the CEO grants or denies it based on the application, and that is the end of the matter, with no appeal. A two-fold problem arises, however, when someone objects to a permit and the scope of the Board's review is appellate. First, often by the time interested persons, such as abutters, learn of the issuance of a permit to which they object, the decision has already been made by the CEO based on whatever information the applicant submitted. If objectors cannot submit their opposing evidence to the Board—a material distinction between de novo and appellate review—then they are deprived

of a critical component of administrative due process. Second, courts, planning boards, and some boards of appeals adjudicate; that is their function. In contrast, adjudication is not a usual CEO task. Unsurprisingly, when an objection by an interested person comes to the attention of a CEO during the permitting process, the CEO is unfamiliar with the minimum requirements of due process and the prerequisites for preparing a record and a decision sufficient for meaningful appellate review. For these reasons, in order to avoid the frequent necessity of time-consuming and costly remands, we strongly urge municipalities to provide for de novo review of CEO decisions by boards of appeals.").

Maryland: Boehm v. Anne Arundel County, 54 Md. App. 497, 459 A.2d 590 (1983) ("Thus, the Board of Appeals may consider the decision of the Zoning Office in any light it desires but is not bound by the earlier decision in its de novo review. The de novo hearing, which is in actuality the first formal hearing on the issue, purges any potential errors from the earlier decision of the Zoning Office.").

Wisconsin: Osterhues v. Board of Adjustment for Washburn County, 2005 WI 92, 282 Wis. 2d 228, 698 N.W.2d 701 (2005) ("When reviewing the decision to grant or deny a conditional use permit, a county board of adjustment has the authority to conduct a de novo review of the record and substitute its judgment for the county zoning committee's judgment. Moreover, under the applicable state statute, a board has authority to take new evidence.").

3 *Connecticut:* The Supreme Court of Connecticut held that the planning and zoning commission's denial of an application for a special exception was an enforcement decision and must be appealed directly to the town board of zoning appeals. Jewett City Savings Bank v. Town of Franklin, 280 Conn. 274, 907 A.2d 67 (2006).

A statute authorizing a zoning board of appeals to hear appeals from the decisions of an "official" does not preclude a municipality from authorizing such a board to hear appeals from an administrative decision of the zoning commission, a body with legislative and administrative powers. Conto v. Zoning Commission of Town of Washington, 186 Conn. 106, 439 A.2d 441 (1982).

Maryland: Where an ordinance provided that the board of appeals has jurisdiction to review determinations "made by an administrative official," an appeal will lie to the board from the county planning board. Howard Research and Development Corp. v. Concerned Citizens for Columbia Concept, 297 Md. 357, 466 A.2d 31 (1983). Since there are no special exception uses in a new town district, the Board of Appeals does not have original but appellate jurisdiction as to whether a site plan development should be approved. The Planning Board will initially determine whether to approve the plan, and an appeal will lie to the Howard County Board of Appeals. Howard Research and Development Corp. v. Howard County, 46 Md. App. 498, 418 A.2d 1253 (1980); Viles v. Board of Municipal and Zoning Appeals, 230 Md. App. 506, 148 A.3d 358 (2016) (the board had authority to review decisions of the planning commission pursuant to state law, but the city could not grant such authority pursuant to its charter).

Michigan: but see Matem, LLC v. City of Howell, 2021 WL 6064355 (Mich. Ct. App. 2021) (holding that there was nothing in the ordinance that conveyed authority to the zoning board to hear appeals from the planning commission's decisions on special land use applications).

Nebraska: Under Nebraska statutes, when a county board of supervisors or board of commissioners makes a zoning decision, a party adversely affected by the decision may appeal to the county board of adjustment. This procedure forecloses the ability to appeal the zoning decision by petition in error. Therefore, in a case involving a challenge to a conditional use permit, landowners should have appealed the board of commissioners' decision to the board of adjustment rather than filing a petition in error, and the district court lacked jurisdiction over the error proceedings. Gabel v. Polk County, 269 Neb. 714, 695 N.W.2d 433 (2005).

West Virginia: Board of Zoning Appeals of the Town of Shepherdstown v Tkacz, 2014 WL 5032592 (W. VA. 9/30/2014) (holding that the request for a building permit to construct a fence was a zoning matter and thus was appealable to the board of zoning appeals, and it was not, as the lower court had found, a subdivision matter appealable to the circuit court).

4 A board of adjustment with jurisdiction to hear appeals from officials authorized to enforce the zoning regulations is without authority to hear an original complaint of violation and to issue a cease and desist order. Board of Zoning Appeals of City of Plymouth v. Heyde, 160 Ind. App. 165, 310 N.E.2d 908 (1974).

But cf.

Maine: Stewart v. Town of Sedgwick, 2000 ME 157, 757 A.2d 773, 778 (Me. 2000) (The decision of a ZBA regarding the grant of a permit to construct a deck was vacated because the ZBA had confused its roles as tribunal of original jurisdiction and appellate tribunal. Under a Maine statute, a board must conduct a hearing de novo (i.e., take evidence, make factual findings, and apply the appropriate law), unless there is a municipal ordinance in place that creates a purely appellate role or hybrid role for the board. In this case, the board held a hearing de novo, but reached conclusions as if it were an appellate body (i.e., it reviewed the planning board's decision to see if it was supported by evidence in the record). The Court found that the town zoning ordinance did not explicitly provide for purely appellate hearings by the ZBA. "Because this amalgamated process met neither the statutory nor ordinance requirements, and had the effect of depriving the applicant and interested parties of the opportunity to have the Board undertake its own analysis of the evidence, the decision of the Board cannot stand.").

5 See, e.g.,

Maine: Herrle v. Town of Waterboro, 2001 ME 1, 763 A.2d 1159 (Me. 2001) (explaining that, to the extent the enforcement provisions of an ordinance authorized an appeal to the zoning board from a violation determination by the code enforcement officer or board of selectmen, the zoning board's role in such an appeal was purely advisory in nature and was not subject to judicial review).

New York: Webster Citizens for Appropriate Land Use, Inc. v. Town of Webster, 200 A.D.3d 1617, 159 N.Y.S.3d 598 (4th Dep't 2021) ("the DPW issued a written memorandum in which it required numerous revisions to the project. The memorandum, however, is silent with respect to whether any variances are needed for the project. Indeed, there is no evidence in the record that the statement in the Planning Board's November 19, 2019 meeting agenda, i.e., that the project constituted a permitted use, was made as a result of any determination by the DPW. Thus, we conclude on this record that there was no determination from the DPW affording jurisdiction to the ZBA to hear petitioner's appeal.").

Rhode Island: Franco v. Wheelock, 750 A.2d 957, 960 (R.I. 2000) (finding that an "advisory opinion" issued by a zoning board at a town's request was nonbinding, unauthorized and unenforceable; thus, the town could not use the advisory opinion as a predicate step for enforcing restrictions against a waterfront restaurant owner who had already obtained a restraining order against the town).

6 McGlasson Builders, Inc. v. Tompkins, 203 N.Y.S.2d 633 (Sup 1960).

See also High v. Cascade Hills Country Club, 173 Mich. App. 622, 434 N.W.2d 199 (1988) (zoning board of appeals has authority to interpret zoning ordinance which it administers); Zoning Resolution City of New York § 72-11 (1961, as amended).

7 See, e.g.,

Maine: Cushing v. Smith, 457 A.2d 816 (Me. 1983) ("The Zoning Board of Appeals has power to grant an administrative appeal "to hear and decide where it is alleged there is an error in any … determination made by the Code Enforcement Officer …." ").

Massachusetts: Fisher v. Zoning Board of Appeals of Stow, 2020 WL 508720 (Mass. Land Ct. 2020) ("The letter at issue in this case is more than a mere punting of the issue to the Board …. The plain language of this letter from the building commissioner was an explicit denial of Fisher's zoning enforcement request. The building commissioner told Ms. Fisher in no uncertain terms that he did not intend to take the action she requested to stop the uses at the Subject Property. The building commissioner's May 26 response was

a decision on the April 7 and May 22 zoning enforcement request letters, as contemplated by G. L. c. 40A, §§ 7, 8, 15.").

New York: Anayati v. Board of Zoning Appeals of Town of North Hempstead, 65 A.D.3d 681, 885 N.Y.S.2d 300 (2d Dep't 2009) (finding that the zoning board had jurisdiction to review the building inspector's determination that the house was in violation of the town code, as articulated through an appearance ticket, and the zoning board also had authority to grant area variances resulting from an appeal of the building inspector's determination without the need for a separate application).

Ohio: Bierlein v. Grandview Heights Board of Zoning Appeals, 2020-Ohio-1395, 153 N.E.3d 817 (Ohio Ct. App. 10th Dist. Franklin County 2020) ("the BZA's jurisdiction is not limited to reviewing the Director's decisions approving or rejecting permit applications. Rather, G.H.O. 1139.04(a) broadly permits the BZA to review any decision or determination made by the Director in the enforcement of the zoning ordinance in the city's residential districts …. The Director's decision to place appellants' permit application on hold was based on the Director's determination that appellants' proposed improvements did not comply with the zoning code requirements applicable to accessory structures. As such, G.H.O. 1139.04(a) authorized the BZA to review the Director's decision.").

Horvath v. Barberton Board of Building and Zoning Appeals, 2022-Ohio-1302, 2022 WL 1164714 (Ohio Ct. App. 9th Dist. Summit County 2022), appeal not allowed, 167 Ohio St. 3d 1482, 2022-Ohio-2765, 192 N.E.3d 511 (2022) (interpreting the city charter and the property maintenance code to provide that the zoning board had jurisdiction over appeals related to zoning and building, which included the violation notice issued by the building department that required the property owner to abate certain building maintenance violations).

Pennsylvania: Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board, 227 A.3d 37 (Pa. Commw. Ct. 2020), appeal denied, 240 A.3d 874 (Pa. 2020) ("On December 22, 2014, the Zoning Officer issued a preliminary opinion that Keystone's proposed landfill expansion complied with the Zoning Ordinance…. Section 909.1(a)(3) does not confer jurisdiction on a zoning hearing board to consider the merits of a preliminary opinion issued under Section 916.2 of the MPC. Simply, a preliminary opinion is not a "determination" for purposes of Section 909.1(a)(3)…. For the reasons set forth above, we conclude that the Zoning Board lacked jurisdiction to review the merits of the Zoning Officer's preliminary opinion.").

Washington: Messer v. Snohomish County Bd. of Adjustment, 19 Wash. App. 780, 578 P.2d 50 (Div. 1 1978) ("On the appeal from the zoning adjustor's decision, the board of adjustment could have granted the opponents a de novo hearing but the board did not err by not doing so.").

Wisconsin: Application of Brandt, 15 Wis. 2d 6, 112 N.W.2d 157 (1961) ("Brandt attempted to appeal to this board the Town Board's decision denying renewal of his permit, but the board refused to take jurisdiction. In so doing, the Town Board was acting in its administrative capacity. It makes no difference that the decision is one by an administrative body or an administrative single officer. The administrative decision is the subject of the grievance and the subject of the appeal. We think the board of appeals had jurisdiction under the ordinance and should have exercised it.").

8 Levine v. Buxenbaum, 19 Misc. 2d 504, 185 N.Y.S.2d 980 (Sup 1959). A determination of a board of adjustment concerning the existence of a nonconforming use will not be reversed unless it is without support in the record. Hassall v. Murdock, 246 A.D. 845, 285 N.Y.S. 54 (2d Dep't 1936). The delegation of authority from a home-rule city to its board of adjustment to initially hear and determine questions relating to nonconforming use of property was a valid exercise of the city's police power. White v. City of Dallas, 517 S.W.2d 344 (Tex. Civ. App. Dallas 1974).

9 Crotty v. Poersch, 129 N.Y.S.2d 793 (Sup 1954). Although a Board of Appeals and Review may have appellate jurisdiction over revocation it does not necessarily follow that enforcement is included. Auger v. D.C. Bd. of Appeals and Review, 477 A.2d 196 (D.C. 1984).

See also Frost v. Borough of Centerville, 111 Pa. Commw. 371, 533 A.2d 1130 (1987) (power to enforce zoning ordinance is vested in board of supervisors, not zoning hearing board).

10 Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co., 131 Colo. 230, 280 P.2d 1107 (1955) (overruled on other grounds by, Hartley v. City of Colorado Springs, 764 P.2d 1216 (Colo. 1988)); Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 122 N.J.L. 308, 4 A.2d 768 (N.J. Sup. Ct. 1939).

See Waltco Truck Equipment Co. v. City of Tallmadge Bd. of Zoning Appeals, 40 Ohio St. 3d 41, 531 N.E.2d 685 (1988) (statute which vests jurisdiction in board to hear appeals from denial of permits does not give board jurisdiction to hear appeal from granting of permits).

11 City of Philadelphia v. Budney, 396 Pa. 87, 151 A.2d 780 (1959); In re Kalen, 248 A.D. 777, 289 N.Y.S. 58 (2d Dep't 1936).

12 Ober v. Metropolitan Life Ins. Co., 157 Misc. 869, 284 N.Y.S. 966 (City Ct. 1935), (note: decisions combined in n.y.s.) and on reargument, 157 Misc. 872, 1935 WL 29548 (N.Y. Sup 1935), (note: decisions combined in n.y.s.) (tenement house department), motion den 157 Misc 872, 284 NYS 966; In re Allerad Realty Corp., 138 Misc. 232, 244 N.Y.S. 531 (Sup 1930) (fire commissioner).

13 The board of trustees of a village is without authority to review the acts of a building inspector in granting permits. Such authority is vested exclusively in the board of zoning appeals. 113 Hillside Ave. Corp. v. Village of Westbury, 27 A.D.2d 858, 278 N.Y.S.2d 558 (2d Dep't 1967). The Board of Supervisors of a township does not have jurisdiction to entertain an appeal from a denial of a permit by a zoning officer, jurisdiction over such appeals being lodged in the zoning hearing board by Section 909 of the Pennsylvania Municipalities Planning Code. Lang v. North Fayette Tp., 63 Pa. Commw. 268, 437 A.2d 1282 (1981). Cf. Concerned Coupeville Citizens v. Town of Coupeville, 62 Wash. App. 408, 814 P.2d 243 (Div. 1 1991) (town council, acting in its capacity as board of adjustment, had power to review denial of conditional use permit).

14 See, e.g.,

Michigan: Wolff v. Steiner, 350 Mich. 615, 87 N.W.2d 85 (1957); Levine v. Buxenbaum, 19 Misc. 2d 504, 185 N.Y.S.2d 980 (Sup 1959); Brachfeld v. Sforza, 118 N.Y.S.2d 631 (Sup 1952).

Nebraska: Under Nebraska statutes, when a county board of supervisors or board of commissioners makes a zoning decision, a party adversely affected by the decision may appeal to the county board of adjustment. This procedure forecloses the ability to appeal the zoning decision by petition in error. Therefore, in a case involving a challenge to a conditional use permit, landowners should have appealed the board of commissioners' decision to the board of adjustment rather than filing a petition in error, and the district court lacked jurisdiction over the error proceedings. Gabel v. Polk County, 269 Neb. 714, 695 N.W.2d 433 (2005).

North Carolina: Clement v. Cumberland County, 836 S.E.2d 789 (N.C. Ct. App. 2020) (“Because Lloyd's response to Petitioners' April 16, 2018 zoning inquiry constituted an appealable, official decision, Petitioners were required by Section 1604 of the Ordinance to file their appeal with the Board of Adjustment within thirty days of receiving written notice of that decision. By failing to file an appeal with the Board of Adjustment, Petitioners did not exhaust their administrative remedies. Accordingly, Petitioners cannot subsequently create jurisdiction with the Superior Court “by couching [their] claim in the guise of a mandamus proceeding.” To hold otherwise would undermine the quasi-judicial scheme intended by the General Assembly in Section 160A-388 and could lead to market uncertainty and costly economic waste by forcing Cumberland County to revisit a prior, official determination regarding a project which has presumably moved toward completion.”).

15 Cook v. Howard, 155 Md. 7, 141 A. 340 (1928).

16 *Kentucky:* Seligman v. Belknap, 288 Ky. 133, 155 S.W.2d 735 (1941).

New York: Marx v. Zoning Bd. of Appeals of Village of Mill Neck, 137 A.D.2d 333, 529 N.Y.S.2d 330 (2d Dep't 1988).

But cf.

Rhode Island: Carlson v. Town of Smithfield, 723 A.2d 1129 (R.I. 1999). The Supreme Court of Rhode Island upheld a town zoning ordinance that required cluster developments to be approved by both the planning and zoning boards. Developers argued that the ordinance was ultra vires because, under the state enabling law, the planning board had exclusive jurisdiction to review cluster developments. The state supreme court rejected this argument. "The Rhode Island Zoning Enabling Act … 'empowers each city and town with the capability to establish and enforce standards and procedures … and criteria in regulating the type, intensity, and arrangement of land uses' … and grants municipalities considerable discretion in choosing how best to fulfill the purposes of the Act …. Although [the enabling act] provides that the planning board must approve any land developments, we agree with the trial justice that if the town, as here, opts to provide cluster developments, it can exercise its discretion to require zoning board approval in addition to planning board approval." *723 A.2d at 1131–1132* (statutory citation omitted).

17 Zoning involves a division of the city into zones for the purpose of applying different proscriptions and reasonable application of different regulations in different zones. A city-wide regulation of the removal of gravel is not "zoning". Appeals from the planning board's decisions on excavation permits are not subject to review by the board of appeals. Benjamin v. Houle, 431 A.2d 48 (Me. 1981).

18 Where the County Planning Commission had no power to issue or withhold building permits, and as this power to enforce zoning regulations rests with the governing authority, the Commission's approval was not an enforcement decision within the meaning of the statute which held that the Zoning Board of Appeals had power to hear and decide appeals from decisions of an administrative official in the enforcement of zoning ordinances. Therefore, such approval was not appealable to the Zoning Board of Appeals. Royal Atlanta Development Corp. v. Staffieri, 236 Ga. 143, 223 S.E.2d 128 (1976). Under the statute involved, the board of adjustment does not have jurisdiction to hear and adjudicate an appeal from the action of the board of supervisors changing a zoning classification. Boomhower v. Cerro Gordo County Bd. of Adjustment, 163 N.W.2d 75 (Iowa 1968).

In Massachusetts, a legislative decision granting a permit is not appealable to the board of appeals, even though the issuance of the permit is quasi-administrative in character. Lane v. Selectmen of Great Barrington, 352 Mass. 523, 226 N.E.2d 238 (1967). Zoning board of adjustment did not have jurisdiction to review an order of the board of selectmen that landowner cease operation of campground as it was a violation of town zoning ordinance. Town of Derry v. Simonsen, 117 N.H. 1010, 380 A.2d 1101 (1977). Absent a specific provision in the municipal zoning ordinance, a board of zoning appeals is without authority to review a decision of the legislative body of the municipality. Katz v. Board of Appeals of Village of Kings Point, 21 A.D.2d 693, 250 N.Y.S.2d 469 (2d Dep't 1964). The Court held that the failure of the city to provide for a board of review to make special exceptions to the rules and regulations of the city did not entitle the petitioner to certiorari in view of the fact that a statute declared that the city council may act as a planning commission and that appeal from their decision can be directly to superior court. Veader v. City Council of City of East Providence, 106 R.I. 120, 256 A.2d 212 (1969).

See also Porter v. Town of East Hampton, 18 Conn. App. 312, 557 A.2d 932 (1989) (board cannot hear appeal from planning and zoning commissions when the latter are acting within their legislative capacity).

19 Daily v. City of Sioux Falls, 2011 SD 48, 802 N.W.2d 905 (S.D. 2011).

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765 F.3d 127
United States Court of Appeals, Second Circuit.

Carol HOLT, Plaintiff–Appellee,
v.
TOWN OF STONINGTON,
Defendant–Appellant,
Zoning Board of Appeals, Town of Stonington, Planning & Zoning Commission, Town of Stonington, Joseph Larkin, Zoning Enforcement Officer of Town of Stonington, Defendants.

No. 12–4878–cv
|
Argued: Nov. 5, 2013.
|
Decided: Aug. 29, 2014.

Synopsis

Background: Property owner brought diversity action against town, seeking equitable relief to prevent town from denying her the ability to build on a lot she owned in town. The United States District Court for the District of Connecticut, Peter W. Hall, Chief Judge, following a bench trial, granted an injunction in favor of property owner based on a claim of municipal estoppel. Town appealed.

Holdings: The Court of Appeals held that:

[1] property owner failed to exhaust her available administrative remedies, and

[2] property owner's failure to exhaust administrative remedies was not excused on ground that exhaustion would have been inadequate or futile.

Vacated and remanded.

West Headnotes (13)

[1] **Federal Courts** Necessity of Objection; Power and Duty of Court

Federal Courts Waiver, estoppel, and consent

A federal court's lack of subject matter jurisdiction is not waivable by the parties, and federal courts must address jurisdictional questions before reaching the merits.

8 Cases that cite this headnote

[2] **Administrative Law and Procedure** Exhaustion of Administrative Remedies

Under Connecticut law, a failure to exhaust administrative remedies is a defect that deprives the court of subject matter jurisdiction to act in the case.

11 Cases that cite this headnote

[3] **Administrative Law and Procedure** Nature and purpose

Under Connecticut law, the doctrine of exhaustion is grounded in a policy of fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions; it also relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review, which may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise discretion or apply its expertise.

[4] **Administrative Law and Procedure** Exceptions

Under Connecticut law, courts recognize exceptions to the exhaustion requirement only

infrequently and only for narrowly defined purposes.

[5] **Administrative Law and Procedure** Opportunity for adequate relief

Administrative Law and Procedure Futility

For purpose of exception to exhaustion requirement under Connecticut law for when recourse to the administrative remedy would be demonstrably futile or inadequate, an administrative remedy is adequate when it could provide the plaintiff with the relief that it seeks and provide a mechanism for judicial review of the administrative decision.

3 Cases that cite this headnote

[6] **Administrative Law and Procedure** Futility

For purpose of exception to exhaustion requirement under Connecticut law for when recourse to the administrative remedy would be demonstrably futile or inadequate, it is futile to seek a remedy only when such action could not result in a favorable decision and invariably would result in further judicial proceedings.

[7] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

Property owner failed to exhaust her available administrative remedies, as required under Connecticut law prior to bringing action seeking equitable relief to prevent town from denying her the ability to build on a lot she owned in town, where she withdrew her application for a zoning permit before town zoning officials had acted on the application, letter issued and later revoked by town zoning officer did not constitute a decision by administrative officials, and she filed suit in federal court shortly after her attempt to overturn decision of zoning board of appeals was rejected by state court.

[8] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

Property owner's failure to exhaust her available administrative remedies, as required under Connecticut law, prior to bringing action seeking equitable relief to prevent town from denying her the ability to build on a lot she owned in town was not excused on ground that exhaustion would have been inadequate or futile, where administrative process governing issuance and denial of zoning permits and appeals from such permitting decisions existed in town, property owner had not alleged that town zoning authorities were without power to grant equitable relief she sought, that is, estoppel of town's ability to change its position on whether her lot could permissibly be built upon, and property owner had not shown that her pursuit of process through municipal zoning system could not result in a favorable decision and invariably would result in further judicial proceedings.

[9] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

Under Connecticut law that a plaintiff must exhaust available administrative remedies before she can file a claim for judicial relief in a zoning dispute; the requirement of exhaustion may arise from an administrative scheme providing for agency relief.

3 Cases that cite this headnote

[10] **Administrative Law and Procedure** Futility

For purpose of exception to exhaustion requirement under Connecticut law for when recourse to the administrative remedy would be demonstrably futile or inadequate, futility is more than a mere allegation that the administrative agency might not grant the relief requested.

[11] **Administrative Law and Procedure** Presumptions and burden of proof

For purpose of exception to exhaustion requirement under Connecticut law for when recourse to the administrative remedy would be demonstrably futile or inadequate, the presumption that administrative board members acting in an adjudicative capacity are not biased must be overcome by showing actual bias, rather than mere potential bias.

1 Case that cites this headnote

[12] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

Even the fact that a zoning officer may have previously indicated how he would decide a plaintiff's challenge to a state administrative process does not excuse compliance, on ground of futility, with the exhaustion requirement under Connecticut law.

[13] **Administrative Law and Procedure** Determination of Exhaustion

Federal Civil Procedure Effect

Because a failure to exhaust can be remedied through the pursuit of administrative process, a dismissal for failure to exhaust available administrative remedies should be without prejudice.

5 Cases that cite this headnote

Attorneys and Law Firms

***129** Kevin M. Tighe, Coventry, CT, for Defendant–Appellant.

William E. Murray, Gordon & Rees LLP, Glastonbury, CT, for Plaintiff–Appellee.

Before: NEWMAN, HALL, and LIVINGSTON, Circuit Judges.

Opinion

PER CURIAM:

Plaintiff-appellee Carol Holt ("Holt") filed this diversity suit seeking equitable relief to prevent defendant-appellant Town of Stonington, Connecticut (the "Town" or "Stonington"), from denying her the ability to build on a lot of land that she owns in the Town. The district court (Hall, *C.J.*) granted Holt an injunction to this effect following a bench trial. Under Connecticut law, however, a plaintiff must first exhaust available and adequate administrative remedies before she may receive judicial relief in a zoning dispute. On appeal to this Court, the Town argued in its reply brief that Holt did not avail herself of state law proceedings to seek relief concerning her property's zoning status before she filed her municipal estoppel claim in federal court. After considering supplemental briefing from the parties on this issue, we conclude that Holt failed to exhaust her administrative remedies as required by Connecticut law. As a result, the district court lacked jurisdiction over this case. We vacate the judgment and remand with instructions to dismiss the complaint.

I.

Holt is the owner of an unimproved lot in Stonington, Connecticut, which she purchased in 2005. Under the Town's zoning regulations, a lot must conform with certain minimum area requirements in order to be used as residential property. However, under certain conditions, the regulations permit the building of a single-family residence on undersized lots of land whose development predated the adoption of the zoning regime.

Early in 2005, prior to Holt's purchase of the lot, a Stonington zoning enforcement officer informed the prior owner in an opinion letter (the "2005 opinion letter") that the property could be suitable for building a single-family residence. On the basis of the 2005 opinion letter, Holt purchased the property in May 2005 with the understanding that she could build a house on the lot. Soon afterward, she submitted to Stonington zoning authorities an application for a zoning permit.

As reflected in the Town's public records, Holt's lot had been altered by a sale of a ten-foot strip of land to the owner of a neighboring property in 1981, an alteration the existence

(or significance) of which was apparently overlooked by the Stonington zoning enforcement officer who prepared the 2005 opinion letter. A neighbor who objected to Holt's development of the lot attempted to appeal the 2005 opinion letter to the Town's zoning board of appeals. After resulting delays in the permitting process, Holt withdrew her permit application in January 2006, before the Town had acted on it.

***130** Later, the zoning board of appeals overturned the zoning officer's 2005 opinion letter, deciding on the basis of the 1981 alteration to the property that Holt was precluded from building on the lot because it did not conform with the zoning regulations. Holt then filed an action to appeal the zoning board's decision in Connecticut state court. On appeal from the dismissal of her action by the trial court, the state appellate court determined that the 2005 opinion letter was a "preliminary, advisory opinion and not a decision subject to appeal." *Holt v. Zoning Bd. of Appeals,* 114 Conn.App. 13, 968 A.2d 946, 955 (2009). The court thus concluded that the zoning board of appeals lacked jurisdiction to review the 2005 opinion letter, as it was not an appealable decision. *Id.*[1]

In December 2009, Holt filed the instant suit in federal court seeking, *inter alia,* an order to estop the Town from preventing Holt from building on the lot. After ruling on two motions to dismiss and motions for summary judgment, the district court conducted a bench trial and ultimately entered an injunction estopping the Town "from determining that the [property in question] is unbuildable under the Town's zoning regulations." J.A. 885.

II.

[1] **[2]** **[3]** "A federal court's lack of subject matter jurisdiction is not waivable by the parties, and we must address jurisdictional questions before reaching the merits." *Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc.,* 87 F.3d 44, 47 (2d Cir.1996). Under Connecticut law, a failure to exhaust administrative remedies is a defect that deprives the court of subject matter jurisdiction to act in the case. *Hous. Auth. v. Papandrea,* 222 Conn. 414, 610 A.2d 637, 640 (Conn.1992). "The doctrine of exhaustion is grounded in a policy of fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions." *Concerned Citizens of Sterling v. Town of Sterling,* 204 Conn. 551, 529 A.2d 666, 670 (1987). "It also relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review." *Simko v. Ervin,* 234 Conn. 498, 661 A.2d 1018, 1021 (1995) (internal quotation marks omitted). Moreover, "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise discretion or apply its expertise." *Johnson v. Statewide Grievance Comm.,* 248 Conn. 87, 726 A.2d 1154,1159 (1999) (internal quotation marks omitted). "In the absence of exhaustion of [an administrative] remedy, the action must be dismissed." *Garcia v. City of Hartford,* 292 Conn. 334, 972 A.2d 706, 710 (2009) (internal quotation marks omitted).

[4] **[5]** **[6]** Connecticut courts recognize exceptions to the exhaustion requirement "only infrequently and only for narrowly defined purposes." *Stepney, LLC v. Town of Fairfield,* 263 Conn. 558, 821 A.2d 725, 730 (2003) (internal quotation marks omitted). Included among the exceptions "grudgingly carved" by the Connecticut courts are instances where "recourse to the administrative remedy would be demonstrably futile or inadequate." ***131** *Hunt v. Prior,* 236 Conn. 421, 673 A.2d 514, 521 (1996) (internal quotation marks omitted). "[A]n administrative remedy is adequate when it could provide the plaintiff with the relief that it seeks and provide a mechanism for judicial review of the administrative decision." *O & G Indus., Inc. v. Planning & Zoning Comm'n,* 232 Conn. 419, 655 A.2d 1121, 1125–26 (1995). "It is futile to seek a remedy only when such action could not result in a favorable decision and invariably would result in further judicial proceedings." *Simko,* 661 A.2d at 1023 (internal quotation marks omitted).

III.

[7] Holt failed to exhaust available administrative remedies before filing this case. She withdrew her application for a zoning permit before Stonington zoning officials had acted on the application. Further, the letter issued (and later revoked) by the Stonington zoning officer did not constitute a decision by administrative officials; the state court held that this letter responded to a "hypothetical situation" and was "not a decision from which a landowner can appeal." *Piquet v. Town of Chester,* 306 Conn. 173, 49 A.3d 977, 984–85 (2012) (discussing with approval the Connecticut Appellate Court's decision in *Holt,* 968 A.2d 946). Rather, the "final determination that a single-family residence could be constructed on the plaintiff's lot is made by the issuance of

appropriate permits, such as a building permit or a certificate of zoning compliance." *Holt,* 968 A.2d at 951. But instead of "appeal[ing] from a future denial" of such administrative action, *Piquet,* 49 A.3d at 985, Holt instituted the present lawsuit in federal court shortly after her attempt to overturn the decision of the zoning board of appeals was rejected by the state court.

[8] **[9]** Holt argues that she was not required to exhaust administrative remedies, or that exhaustion would have been inadequate or futile. We disagree. First, it is clear under Connecticut law that a plaintiff must exhaust available administrative remedies before she can file a claim for judicial relief in a zoning dispute. "[T]he requirement of exhaustion may arise ... from an administrative scheme providing for agency relief." *City of Hartford v. Hartford Mun. Emps. Ass'n,* 259 Conn. 251, 788 A.2d 60, 79 (2002) (internal quotation marks omitted). There is no dispute that an administrative process governing the issuance and denial of zoning permits and appeals from such permitting decisions exists in Stonington. *See Levine v. Town of Sterling,* 300 Conn. 521, 16 A.3d 664, 669–70 (2011) (ruling that further administrative exhaustion was not required where "at the time the plaintiff would have appealed from" a zoning official's decision, "the town did not have a zoning board of appeals in place" and the plaintiff otherwise "lacked any administrative remedies with which to appeal"); *see also, e.g., Simko,* 661 A.2d at 1021–22; *O & G Indus.,* 655 A.2d at 1124–25.

Second, Holt says the administrative process could not have granted her the equitable relief she sought—the estoppel of the Town's ability to change its position on whether her lot could permissibly be built upon. But Holt's ultimate objective is to obtain approval to build a house on the lot, and she has not alleged that the Stonington zoning authorities were without the power to grant her that relief.[2] Thus, ***132** there is no evidence that the administrative remedies available through the normal zoning process could not both "provide the plaintiff with the relief that [she] seeks" and permit "judicial review of the administrative decision." *O & G Indus.,* 655 A.2d at 1125–26. We reject Holt's contention that administrative remedies are inadequate because a type of remedy she seeks, rather than the relief itself, would be unavailable in an administrative proceeding. "It is not the plaintiff's preference for a particular remedy that determines whether the remedy is adequate." *Hunt,* 673 A.2d at 522 (internal quotation marks and ellipsis omitted); *see also Papandrea,* 610 A.2d at 641("[A] claim for injunctive relief does not negate the requirement that the complaining party exhaust administrative remedies.").

[10] **[11]** **[12]** Third, Holt has not shown that it would be futile to apply to the administrative authorities for authorization to build on the lot in question. "[F]utility is more than a mere allegation that the administrative agency might not grant the relief requested." *Johnson,* 726 A.2d at 1163 (internal quotation marks omitted); *see also Concerned Citizens of Sterling,* 529 A.2d at 671 ("[W]e have never held that the mere possibility that an administrative agency may deny a party the specific relief requested is a ground for an exception to the exhaustion requirement."). The Connecticut courts have held that a party's suspicion of "bias on the part of a zoning commission," based on members' allegedly hostile comments, "does not render pursuit of administrative remedies futile." *Simko,* 661 A.2d at 1023 (citing *O & G Indus.,* 655 A.2d at 1127). Although Holt alleged that Town officials displayed an "appearance of partiality and impropriety" at a public zoning hearing, she has not overcome the "presumption ... that administrative board members acting in an adjudicative capacity are not biased" by showing "actual bias, rather than mere potential bias." *O & G Indus.,* 655 A.2d at 1127 (internal quotation marks omitted). Moreover, even the fact that a zoning officer may have "previously indicated how he would decide [a] plaintiff's challenge" to a state administrative process "[does] not excuse compliance, on ground of futility, with [the] exhaustion requirement." *Stepney, LLC,* 821 A.2d at 730 (citing *Papandrea,* 610 A.2d at 646). Holt has failed to establish that her pursuit of process through the municipal zoning system "could not result in a favorable decision and invariably would result in further judicial proceedings." *Simko,* 661 A.2d at 1023 (internal quotation marks omitted).

Even if Holt were to assert that she exhausted administrative remedies after the filing of her suit,[3] this would be immaterial to our conclusion. The Connecticut Supreme Court has "recognized on multiple occasions that an aggrieved party must exhaust its administrative remedies *before* it may seek judicial relief." *Fairchild Heights Residents Ass'n v. Fairchild Heights, Inc.,* 310 Conn. 797, 82 A.3d 602, 613 (2014) (emphasis in original); *accord Republican Party of Conn. v. Merrill,* 307 Conn. 470, 55 A.3d 251, 258 (2012) (concluding that "*prior to bringing* an action," a plaintiff is "required to exhaust its administrative remedies" (emphasis added)); ***133** *Simko,* 661 A.2d at 1021 ("[I]f an adequate administrative remedy exists, it must be exhausted *before* [a

court] will *obtain jurisdiction to act* in the matter." (emphasis added)).

IV.

[13] Because a failure to exhaust can be remedied through the pursuit of administrative process, "a dismissal for failure to exhaust available administrative remedies should be 'without prejudice.' " *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.,* 560 F.3d 118, 124 (2d Cir.2009). For the foregoing reasons, the judgment of the district court is Vacated and the case Remanded with instructions to dismiss the complaint without prejudice.

All Citations

765 F.3d 127

Footnotes

1 In 2008, the same zoning enforcement officer sent a letter to Holt purporting officially to revoke the 2005 letter. Holt filed an appeal with the zoning board challenging the zoning officer's determination in this new letter. The zoning board, however, rejected that appeal on the ground that the 2008 letter was not related to any permit application, and was therefore not an appealable decision.

2 Indeed, in 2011 Holt sought a variance from the zoning requirements that would permit her to build on the property, but her application was denied. The record does not indicate the basis for the denial. Holt does not argue to this Court that the denial of the variance application exhausted her administrative remedies. Even were she to do so, we also note in this regard that the application for a variance was filed a year and a half after this action was commenced in the district court in late 2009.

3 For instance, Holt might have asserted that she exhausted available administrative remedies by seeking a variance in 2011. However, the record regarding any administrative process following the filing of the complaint was not developed here, and we make no determination as to whether any such action sufficed to exhaust Holt's administrative remedies under Connecticut law.

3 Rathkopf's The Law of Zoning and Planning § 57:44 (4th ed.)

Rathkopf's The Law of Zoning and Planning | December 2023 Update
Arden H. Rathkopf, and Daren A. Rathkopf, Edward H. Ziegler, Jr.

Chapter 57. The Board of Appeals: Its Purposes, Powers, and Procedures
Sara C. Bronin & Dwight H. Merriam*

IV. Procedure on Appeals to Boards of Appeals

§ 57:44. What constitutes an appealable decision

Local administrative officers do not always make decisions with that degree of formality which could be desired. The question, therefore, arises as to what constitutes sufficient action on the part of the administrative official to vest jurisdiction in the board of appeals to review the decision made by him or to grant a variance. One Texas court explained:

> "The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury. It is not the same as an exhaustion of remedy requirement that generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."[1]

A mere request by the building inspector that work be stopped, without the revocation of the permit which had been issued therefore, is insufficient, there being nothing from which the permit holder may legally appeal.[2] Also, a zoning enforcement officer's opinion letter may be found to be a "preliminary, advisory opinion and not a decision subject to appeal."[3] It has been held that a zoning officer's decision that there is no violation is appealable to the zoning board of appeals, unless the local regulations provide otherwise.[3.50]

However, in one case, where the building inspector orally denied an application for a permit on the ground that the proposed construction would violate the ordinance, the court held that the oral denial of the application, coupled with the statement by the building inspector that a variance was needed before a building permit could be issued, constituted such a decision was contemplated by the statute and by the ordinance, and that, therefore, an appeal might be taken to the board of appeals in the form of an application for a variance.[4]

Where the department of public works refused to issue a permit for a quarry in a residential district, the administrative official in charge advised the applicant that he would have to go to the board of zoning adjustment for one, and the owner requested the issuance of such a permit by the board, it was held that there had been a sufficient appeal to the zoning board of adjustment to confer jurisdiction on it.[5]

Footnotes

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forthcoming Fourth Restatement of Property Law, examines property, land use, historic preservation, and sustainable development law. Also an architect, she consults on real estate development and public policy.

Dwight H. Merriam is a land use planner and lawyer in Simsbury, Connecticut, practicing land use, real estate and environmental law. He is a Fellow and Past President of the American Institute of Certified Planners, former chair of the American Bar Association's Section of State and Local Government Law, a member of the American College of Real Estate Lawyers, a Counselor of Real Estate, a member of Owners' Counsel of America, and a member of the Association of Real Property and Infrastructure.

1 City of El Paso v. Madero Development, 803 S.W.2d 396, 399 (Tex. App. El Paso 1991), writ denied, (June 19, 1991) (application for variance required before denial can be final).

2 Wyler v. Eckert, 73 N.Y.S.2d 789 (Sup 1947). And see Atherton v. Selectmen of Bourne, 337 Mass. 250, 149 N.E.2d 232 (1958) (holding that oral withdrawal of a stop work order formerly issued was not a statutory "order or decision" of the building inspector from which adjoining landowners could appeal to the board). And see Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653 (1994) (town Board of Commissioners' decision approving site plan held not appealable to board of adjustment); Platte Woods United Methodist Church v. City of Platte Woods, 935 S.W.2d 735 (Mo. Ct. App. W.D. 1996) (board of aldermen's denial of conditional use permit held not applicable to board of zoning adjustment). But see State, ex rel. Burger King Corp., v. Oakwood, 72 Ohio App. 3d 157, 594 N.E.2d 116 (8th Dist. Cuyahoga County 1991) (village council's decision to grant development permit held to be appealable administrative decision within the jurisdiction of board of zoning appeals); Reardon v. Zoning Bd. of Appeals of Town of Darien, 311 Conn. 356, 87 A.3d 1070 (2014) (ZEO's failure to respond to a letter is not an appealable decision), the court stated in a footnote:

> One commentator suggests that, should an official have a mandatory duty to enforce the regulations in light of uncontroverted facts, a mandamus action, rather than appeal, would be the proper procedure. See Robert A. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice § 39:1 (4th Ed. 2017) (''[i]f a public official or public agency had a duty to perform a particular act and fails in the discharge of that duty, a writ of mandamus is the proper remedy for compelling performance of the act").

3 Holt v. Zoning Bd. of Appeals of Town of Stonington, 114 Conn. App. 13, 968 A.2d 946 (2009).

See also Holt v. Town of Stonington, 765 F.3d 127 (2d Cir. 2014) (not ripe).

3.50 Raposa v. Town of York, 2019 ME 29, 204 A.3d 129 (Me. 2019).

4 Hunter v. Board of Appeals of Village of Saddle Rock, 4 A.D.2d 961, 168 N.Y.S.2d 148 (2d Dep't 1957), citing Leone v. Yates., 280 A.D. 823, 113 N.Y.S.2d 915 (2d Dep't 1952); see State ex rel. Beacon Court, Inc. v. Wind, 309 S.W.2d 663 (Mo. Ct. App. 1958) and Hunter v. Board of Appeals of Village of Saddle Rock, 4 A.D.2d 961, 168 N.Y.S.2d 148 (2d Dep't 1957), both holding that a verbal decision is an appealable order which starts the appeal period.

But see Goto v. District of Columbia Bd. of Zoning Adjustment, 423 A.2d 917 (D.C. 1980), deferring to the zoning board's determination that oral notice of an administrator's decision did not commence the appeal period.

5 State ex rel. Beacon Court, Inc. v. Wind, 309 S.W.2d 663 (Mo. Ct. App. 1958).

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KeyCite Red Flag - Severe Negative Treatment
Abrogated by Legacy Foundation Action Fund v. Citizens Clean Elections Commission, Ariz., January 25, 2018

151 Ariz. 438
Court of Appeals of Arizona,
Division 2, Department B.

Bernard ARKULES and Barbara Arkules, Plaintiffs/Appellants,
v.
BOARD OF ADJUSTMENT OF the TOWN OF PARADISE VALLEY and Sam DeMuro, Defendants/Appellees.

No. 2 CA–CIV 5679.
|
April 30, 1986.
|
Review Denied Oct. 22, 1986.

Synopsis
Property owners brought special action seeking reversal of town board of adjustment's decision granting property owner a variance from building regulation which would have required his house to blend with mountain background and to be made from materials or colors which would not unduly reflect light. The Superior Court, Maricopa County, Cause No. C–511979, Roger G. Strand, J., granted summary judgment in favor of property owner who sought variance, board, and town. The property owners appealed. The Court of Appeals, Lacagnina, J., held that: (1) property owners' special action was timely; (2) board's notice of hearing was adequate; and (3) board had no authority to grant variance to allow property owner's personal preference for color which would enhance design he chose for his house.

Affirmed in part, reversed in part and remanded.

West Headnotes (8)

[1] **Judgment** Invalid or unauthorized judgments
Zoning and Planning Time for Proceedings
Effect of void decision by town board of adjustment is same as that of any void decision by a court; mere lapse of time does not bar attack on void judgment.
4 Cases that cite this headnote

[2] **Judgment** Invalid or unauthorized judgments
Statutes of limitation or rules of court are not applicable to void judgments.
2 Cases that cite this headnote

[3] **Zoning and Planning** Time for Proceedings
Property owners were not bound by requirement that special action be filed within 30 days after municipal department has rendered decision where property owners sought reversal of zoning decision of town board of adjustment on the basis that it exceeded board's jurisdiction and bringing of special action within reasonable time of learning of board's decision was thus timely. A.R.S. § 9–462.06, subd. J.
4 Cases that cite this headnote

[4] **Zoning and Planning** Notice
Town board of adjustment's notice of hearing on variance was adequate, although address of property affected was listed as "6396 North Mummy Mountain Road" and correct address was 6936; anyone interested by exercise of reasonable diligence could have ascertained whether his property would be affected and in what manner, since notice named applicant, correct street and specific nature of request.

[5] **Zoning and Planning** Notice
Town board of adjustment's departure in variance case from its custom of mailing notices of hearing to all property owners did not render notice invalid in the absence of statute or rule requiring mailing of notice to adjoining property owners. A.R.S. § 9–462.06, subd. F.

[6] **Zoning and Planning** Wisdom, judgment, or opinion

The Court of Appeals is not prohibited from reviewing evidence presented by record filed in superior court in action seeking review of town board of adjustment decision, and Court of Appeals may substitute its opinion for that of superior court since it is reviewing same record.

5 Cases that cite this headnote

[7] **Zoning and Planning** Profit or disadvantage; financial considerations

Town board of adjustment's granting of permission to property owner to change color of his home in violation of mountain building regulations was not necessary to relieve property owner from demonstrable hardship but rather to serve his personal convenience, and board had no authority to grant variance to allow property owner's personal preference for color which would enhance design he chose for his house in violation of building regulations and statute providing that board of adjustment may not grant variance if special circumstances applicable to property are self-imposed by property owner. A.R.S. § 9–462.06.

6 Cases that cite this headnote

[8] **Zoning and Planning** Profit or disadvantage; financial considerations

Personal hardship does not justify a variance.

2 Cases that cite this headnote

Attorneys and Law Firms

****658** ***439** Bernard Arkules, Paradise Valley, pro se and for plaintiffs/appellants.

Charles G. Ollinger, Paradise Valley, for defendant/appellee Bd. of Adjustment of the Town of Paradise Valley.

Beus, Gilbert, Wake & Morrill by Neil Vincent Wake and Pamela L. Vining, Phoenix, for defendant/appellee DeMuro.

OPINION

LACAGNINA, Judge.

Sam DeMuro petitioned the Board of Adjustment of the Town of Paradise Valley for a variance from a building regulation which would require his house to blend with the mountain background and to be made from materials or colors which would not unduly reflect light. The Board granted the variance, and Bernard and Barbara Arkules filed a special action in the superior court seeking reversal of the Board's decision for the following reasons: 1) the notice of the Board's hearing on the variance was defective; 2) the Board was prohibited by its own rules and regulations and by statute from granting a variance not pertaining to the real property and its use and in doing so exceeded its jurisdiction; and 3) the reasons given for permitting the color change were neither a "special circumstance" nor "demonstrable hardship" relating to the real property as those terms were defined by statute and by the Board's rules and regulations.

All parties requested summary judgment alleging the dispositive facts upon which the court could render judgment were not in dispute. The superior court granted summary judgment in favor of DeMuro, the Board and the Town of Paradise Valley, determining that the Board substantially complied with lawful notice requirements for a variance hearing and that the Board's consideration of the request for variance and its decision were neither arbitrary, capricious nor an abuse of discretion. The court also denied DeMuro's motion to dismiss for lack of jurisdiction.

We affirm the judgment of the superior court finding substantial compliance with the notice requirements and that it had jurisdiction to hear the special action. We reverse that portion of the judgment holding the decision to grant the variance was not arbitrary or capricious and was lawfully granted.

ARKULES' SPECIAL ACTION WAS TIMELY

The Board of Adjustment derives its powers from A.R.S. § 9–462.06, the statute under which it is created. The provisions of § 9–462.06 grant the Board certain specific powers, most

of which are mandatory. In addition, there are certain actions the Board may not take:

****659 *440** H. A board of adjustment may not:

—

2. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

Courts have uniformly held that a board of adjustment has no powers except those granted by the statutes creating it, *Applestein v. Osborne,* 156 Md. 40, 143 A. 666 (1928); its power is restricted to that granted by the zoning ordinance in accordance with the statute. *Carini v. Zoning Board of Appeals of the Town of West Hartford,* 164 Conn. 169, 319 A.2d 390 (1972), *cert. denied,* 414 U.S. 831, 94 S.Ct. 64, 38 L.Ed.2d 66 (1973); *Bora v. Zoning Board of Appeals of the Town of Norwalk,* 161 Conn. 297, 288 A.2d 89 (1972). The Board must act in accordance with the law or it is without jurisdiction. *See Denning v. County of Maui,* 52 Hawaii 653, 485 P.2d 1048 (1971).

Courts have termed any decision made by a board of adjustment beyond these restrictive powers as "ultra vires and void," *Applestein v. Osborne,* 143 A. at 669, a nullity and of no force and effect, *Kaufman v. City of Glen Cove,* 45 N.Y.S.2d 53, 180 Misc. 349 (1943); *Noonan v. Zoning Board of Review of Town of Barrington,* 90 R.I. 466, 159 A.2d 606 (1960); *DiPalma v. Zoning Board of Review of Town of Bristol,* 72 R.I. 286, 50 A.2d 779 (1947), and "legally meaningless," *Westbury Hebrew Congregation, Inc. v. Downer,* 302 N.Y.S.2d 923, 926, 59 Misc.2d 387 (1969).

It is well settled in Arizona that the powers and duties of an administrative agency are measured and limited by the statute creating it. *Ayala v. Hill,* 136 Ariz. 88, 664 P.2d 238 (App.1983). Under the provisions of A.R.S. § 12–902(B), an appeal from an administrative agency may be heard even though untimely to question the agency's personal or subject matter jurisdiction in a particular case. The Board of Adjustment, though structured much like an administrative agency, acts in a quasi-judicial capacity. *See Hill Homeowners' Association v. Zoning Board of Adjustment,* 129 N.J.Super. 170, 322 A.2d 501 (App.1974). Indeed, Arkules appeared in superior court by special action, formerly a writ of certiorari brought in order to "control acts beyond the jurisdiction of another body ... [and] to review ... the judicial functions of a lower tribunal." *Book Cellar, Inc. v. City of Phoenix,* 139 Ariz. 332, 335, 678 P.2d 517, 520 (App.1983).

[1] [2] [3] Therefore, the effect of the void decision by the Board of Adjustment is the same as that of any void decision by a court: "the mere lapse of time does not bar an attack on a void judgment." *Wells v. Valley National Bank of Arizona,* 109 Ariz. 345, 347, 509 P.2d 615, 617 (1973). We have held that a void judgment does not acquire validity because of laches. *International Glass & Mirror, Inc. v. Banco Gan. Y Agr. S.A.,* 25 Ariz.App. 604, 545 P.2d 452 (1976). Statutes of limitation or rules of court are not applicable to void judgments. *Preston v. Denkins,* 94 Ariz. 214, 382 P.2d 686 (1963). Therefore, Arkules was not bound by the 30–day limit of A.R.S. § 9–462.06(J). This special action brought within a reasonable time of learning of the variance was timely, and the court properly denied DeMuro's motion to dismiss for lack of jurisdiction.

SUBSTANTIAL COMPLIANCE SATISFIES NOTICE REQUIREMENTS

[4] The Board published its notice of hearing which appeared in the *Scottsdale Daily Progress* and listed the address of the property affected as "6396 North Mummy Mountain Road." The correct address was 6936. Anyone interested, by the exercise of reasonable diligence, could have ascertained whether his property would be affected and in what manner, since the notice named the applicant, the correct street and the specific nature of the request (a color variance). North Mummy Mountain Road is only three blocks long with only five houses. Arkules live immediately adjacent to the property for which the color variance was granted and, at the ****660 *441** time the notice was published and posted, they lived across the street from the applicant DeMuro. The notice was adequate. *Chess v. Pima County,* 126 Ariz. 233, 613 P.2d 1289 (App.1980); *East Camelback Home Owners' Association v. Arizona F N & P,* 18 Ariz.App. 121, 500 P.2d 906 (1972).

[5] In addition to the published notice, notices were posted on and near the subject property in compliance with A.R.S. § 9–462.06(F). The notices were posted both on the building site and at the nearest public intersection, North Mummy Mountain Road and Arroyo Road. The Board's departure in this case from its custom of mailing notices to all property owners does not render the notice invalid. There is no statute or rule which requires mailing of the notice to adjoining property owners. We agree with the trial court that the Board substantially complied with notice requirements and affirm.

RULES AND REGULATIONS OF THE BOARD PROHIBIT A COLOR VARIANCE

[6] This court must allow the Board's decision to stand if there is some credible evidence to support it. *Ivancovich v. City of Tucson Board of Adjustment,* 22 Ariz.App. 530, 529 P.2d 242 (1974); *Sevilla v. Sweat,* 9 Ariz.App. 183, 450 P.2d 424 (1969). We are not prohibited from reviewing the evidence presented by the record filed in the superior court, and we may substitute our opinion for that of the superior court since we are reviewing the same record. *Sevilla v. Sweat, supra.* The minutes of the hearing quoted below are insufficient to grant the Board authority to permit the variance.

> The statements which MR. DeMURO had given as the basis for his request were reviewed in detail. MR. DeMURO gave an account of his personal experience and aspirations in beginning the project two years ago. He said that all of his life he had hoped to build a Mediterranean home and now he felt he was about to see it built. He said he specifically wanted a house with columns, and a white house. He hastened to say, he did not mean "hospital white" he meant an off-white. He said the architecture and the entire house was designed around his dream of a white house with columns. * * *

And further, the minutes reflect "MR. DeMURO stated that he did not think white blends with the mountain, but he felt it brought out the beauty of the mountain."

[7] The Board had no authority to grant a variance to allow Mr. DeMuro's personal preference for a color which would enhance the design he chose for his house. The provisions of A.R.S. § 9–462.06 which give the Board authority read as follows:

> G. A board of adjustment shall:
>
> —
>
> 2. Hear and decide appeals for variances from the terms of the zoning ordinance only if, because of special circumstances applicable to the property, including its size, shape, topography, location, or surroundings, the strict application of the zoning ordinance will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district. Any variance granted is subject to such conditions as will assure that 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.
>
> —
>
> H. A board of adjustment may not:
>
> —
>
> 2. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

[8] The color of a house is not a factor pertaining to the real property or which would deprive the property of uses or privileges enjoyed by other property of the same zoning classification. Permission to use an unapproved color not compatible with the requirements of the mountain ****661 *442** building regulations also violated the following rules and regulations of the Board which prohibit a color variation.

> Sec. V. *Pre-requisites for Granting of a Variance*
>
> All of the following requirements must be met before the Board of Adjustment may lawfully grant a variance:
>
> A. There must be "special circumstances" or factors pertaining to the real property which do or will deprive such property of certain benefits, uses, or privileges enjoyed by other property of the same zoning classification in the Town. The "special circumstances" or factors may be size, shape, topography, location, or the nature of surrounding property.
>
> B. A variance cannot be granted if the "special circumstances" or factors causing the applicant's need for a variance were created by the property owner or occupier or a previous property owner.
>
> C. A variance cannot be granted if it would constitute a grant of special privileges inconsistent with the legal limitations upon other properties in the vicinity and zone in which such property is located.
>
> —
>
> F. "demonstrable hardship" must relate to the land as opposed to the particular owner or occupant.

The Board's stated reasons for permitting the variance clearly demonstrate that the color variation had nothing to do with

the size, shape, topography or location of the property and could not be a special circumstance pertaining to the real property. The permission to change the color in violation of the mountain building regulations was not necessary to relieve DeMuro from a demonstrable hardship but rather to serve as a personal convenience. Statutory provisions and the rules and regulations of the Board specifically state that any hardship must relate to the use of the land as opposed to the owner. A personal hardship does not justify a variance. Hagman, Urban Planning and Land Development Control Law at 204 (1971). A variance is "not a personal exemption from the enforcement of zoning regulations." *Garibaldi v. Zoning Board of Appeals,* 163 Conn. 235, 237, 303 A.2d 743, 745 (1972).

There was no evidence before the Board to support any lawful reason for the exercise of its power to grant a color variance. We find the Board proceeded without legal authority and therefore reverse the judgment of the superior court. Rule 3(b), Rules for Special Actions, 17A A.R.S.

Affirmed in part, reversed in part and remanded for entry of judgment declaring the variance invalid.

BIRDSALL and FERNANDEZ, JJ., concur.

All Citations

151 Ariz. 438, 728 P.2d 657

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169 Ariz. 37
Court of Appeals of Arizona,
Division 1, Department A.

Wade H. LANE and Barbara Lee Lane, Petitioners–Appellants,
v.
The CITY OF PHOENIX, Mayor Terry Goddard, William S. Parks, M.D., Duane Pell, Paul Johnson, John B. Nelson, Howard Adams, Linda Nadolski, Mary Rose Wilcox, and Calvin C. Goode, Respondents–Appellees.

No. 1 CA–CV 90–067.
|
Aug. 22, 1991.

Synopsis
Property owners appealed from judgment of the Superior Court, Maricopa County, Cause No. CV 89–22621, Michael D. Ryan, J., dismissing their special action and affirming city council's decision holding that use of their property as commercial dog kennel was not valid nonconforming use under city's zoning ordinances. The Court of Appeals, Haire, J., held that in reviewing decision of city board of adjustment that commercial dog kennel was not valid nonconforming use under city's zoning ordinances, city council was limited to record before board, and could not conduct de novo review.

Reversed and remanded.

West Headnotes (2)

[1] Zoning and Planning Particular uses or structures as nonconforming

In reviewing decision of city board of adjustment that commercial dog kennel was not valid nonconforming use under city's zoning ordinances, city council was limited to record before board, and could not conduct de novo review. A.R.S. § 9–462.06, subd. J.

6 Cases that cite this headnote

[2] Zoning and Planning Administrative review

In hearing appeal from board of adjustment pursuant to statute authorizing such appeals, city council is bound by record presented to board, and may not consider new evidence or reweigh evidence previously presented to board. A.R.S. § 9–462.06, subd. J.

6 Cases that cite this headnote

Attorneys and Law Firms

****935 *38** Charles A. Ditsch, Phoenix, for petitioners-appellants.

Roderick G. McDougall, City Atty. by Michael D. House, Asst. Chief Counsel, Edward P. Reeder, Asst. City Atty., Phoenix, for respondents-appellees.

OPINION

HAIRE, Judge.

Appellants Wade H. and Barbara Lee Lane (property owners) have appealed from a judgment entered by the Maricopa County Superior Court dismissing their special action and affirming the Phoenix City Council's decision holding that the use of their property as a commercial dog kennel was not a valid nonconforming use under the City's zoning ordinances.

The issue that is dispositive of this appeal is whether the Phoenix City Council applied the correct standard of review when it heard an appeal of a decision rendered by the Phoenix Board of Adjustment (Board).

BACKGROUND

In January of 1989, the City of Phoenix served the property owners with a notice that their operation of a commercial dog kennel on the subject property was a violation of the City of Phoenix zoning code. The property owners contended that their use of the property as a commercial dog kennel constituted a valid nonconforming use and filed an application for a determination that the use was not unlawful.

They claimed that when the property was annexed by the City in March, 1960, it was being lawfully used as a commercial dog kennel, and that this use had never been abandoned.

The property owners' application was first considered by a hearing officer, but the hearing officer referred the matter to the Board of Adjustment when he determined that he had prepared one of the zoning maps that would be used as evidence in the proceeding. After conducting a hearing at which evidence was presented by the City and the property owners, the Board ruled that use of the property as a commercial dog kennel was a valid nonconforming use. Neighbors of the property owners appealed the Board's decision to the Council, which, after considering petitions stating additional facts protesting the continued use of the property as a dog kennel, reversed the Board and held that the property owners had not proven that the use of the subject property as a commercial dog kennel was a valid nonconforming use. The property owners then filed a special action in superior court seeking a review of the Council's decision.

SCOPE OF CITY COUNCIL'S REVIEW OF BOARD OF ADJUSTMENT DECISION UNDER A.R.S. § 9–462.06(J)

[1] The first question presented is whether in an appeal to a city council from a board of adjustment decision pursuant to A.R.S. § 9–462.06(J), the city council may consider new evidence and reweigh evidence previously submitted to the board of adjustment. A.R.S. § 9–462.06(J) was enacted in 1988 and provides as follows:

> In a municipality with a population of more than one hundred thousand persons according to the latest United States decennial census, 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 and may affirm or reverse, in whole or in part, or modify the board's decision. The authority to file a complaint, as provided in subsection K of this section, may be used in lieu of or in addition to the appeal provided in this subsection.

Before the enactment of this provision, a city council had no authority to review a decision made by a board of adjustment in zoning enforcement and variance matters. Review of a board of adjustment decision ****936 *39** could be obtained only by filing a complaint for special action in the superior court. *See* A.R.S. § 9–462.06(K).[1] After the enactment of A.R.S. § 9–462.06(J) in 1988, in a municipality having a population of more than one hundred thousand persons, a party aggrieved by the Board's decision was given another avenue of appeal. Not only could review be obtained by complaint for special action in the superior court, but, in addition, review could be obtained by filing an "appeal" to the council of the city involved.

The statute provides little guidance as to the intended standard of review to be exercised ****937 *40** by a city council in this newly created appeal. In disposing of the appeal, a city council is given the authority to "affirm or reverse, in whole or in part, or modify the board's decision." Practically identical language is used to describe the superior court's authority when review of a board of adjustment decision is sought by special action, and case law has clearly established that under such circumstances, the superior court is bound by the evidence presented to the Board, and cannot receive additional evidence or reweigh the evidence previously considered by the Board in order to arrive at a different factual determination. *See, Murphy v. Town of Chino Valley,* 163 Ariz. 571, 789 P.2d 1072 (App.1989); *Blake v. City of Phoenix,* 157 Ariz. 93, 754 P.2d 1368 (App.1988).

The City urges that notwithstanding the use of substantially identical language in describing both the superior court's and a city council's review authority in an appeal from a board of adjustment, when the legislature enacted subsection (J), it intended to allow a city council to conduct a *de novo* review, that is, to both reweigh the evidence presented to the Board and also to receive any new evidence that the parties might wish to present.

The legislative history of subsection (J) furnishes no hint as to legislative intent on this issue. Although subsection (J) was enacted as Senate Bill 1163, its language was not in the original bill of that number considered by the Arizona Senate, but rather was inserted by floor amendment in the House of Representatives. As a result, there was no reported committee consideration in either house. *See,* Senate Journal, 38th Legislature, p. 990; House Journal, 38th Legislature, p. 1154; Laws 1988, Ch. 269.

Because there is no legislative history which might aid us in determining legislative intent on the issue presented, we will consider newly enacted subsection (J) within the context of

the remainder of the statutory scheme set forth in A.R.S. § 9–462.06 in an effort to resolve the question. *See, Trickel v. Rainbo Baking Company of Phoenix,* 100 Ariz. 222, 228, 412 P.2d 852, 855 (1966); *Libra Group, Inc. v. State,* 167 Ariz. 176, 805 P.2d 409 (App.1991).

Before proceeding further, we note that the City's position before this court is that in hearing an appeal from the Board, it may effectively substitute itself for a board of adjustment, and exercise all of the evidentiary and decisional functions normally exercised by a board of adjustment under Arizona law. Although A.R.S. § 9–462.06 contemplates that zoning ordinances enacted by a city council will create a board of adjustment which is separate and apart from the council, the statute also authorizes the council to forego the creation of a separate board of adjustment. Under such circumstances, the council itself will then function as the board of adjustment. *See,* A.R.S. § 9–462.06(A). If the ordinance establishes the council itself as the board of adjustment, then, under subsection (I), the council is empowered to "exercise all of the functions and duties of the Board of Adjustment, in the same manner and to the same effect" as otherwise would be exercised by the board.

In the case presently before this court, the council has not taken advantage of the statutory provision which would enable it to exercise "in the same manner and to the same effect" the functions and duties of a board of adjustment. Yet, the council would effectively accomplish, on a selective basis, the same result if its authority on appeal under newly enacted subsection (J) is interpreted as urged by the City.

Although we find no clear answer in A.R.S. § 9–462.06 concerning the intended scope of review by a council of a board of adjustment decision, we have concluded that the review is limited in scope as urged by the property owners, and that the council does not have the authority to take additional evidence or to reweigh evidence previously considered by the Board so as to substitute its factual conclusions for those of the Board.

In arriving at our decision, we have relied upon the fact that there is no provision in newly enacted subsection (J) or in the remainder of A.R.S. § 9–462.06 that indicates an intention to grant *de novo* review ****938 *41** authority to the council. In this connection, we note that when *de novo* review is intended, the legislature has not found it difficult to so provide. *See, e.g.,* A.R.S. § 12–910(B) and former A.R.S. § 20–166 (concerning appeals from the director of insurance).

If there were other provisions in A.R.S. § 9–462.06 indicating an intent that in hearing the appeal the council was to function in an evidentiary capacity, we would not find the absence of an express provision for *de novo* review overly persuasive. However, no such provisions are present. Subsection (J) merely provides that the council "shall hear the appeal." There is nothing in the statute to indicate that in "hearing" the appeal the council is to exercise the powers and extend to the parties the protections normally afforded when an evidentiary proceeding is anticipated. Thus, while A.R.S. § 9–462.06(B) expressly provides that the chairman of the board of adjustment will have the power "to administer oaths and take evidence," there is no similar provision in § 9–462.06 giving such authority to the council when hearing a subsection (J) appeal from the Board. Likewise, in describing the Board's power in hearing an appeal from the Board's hearing officer, A.R.S. § 9–462.06(F) requires that the Board "give notice of hearing by both publication in a newspaper of general circulation ... and posting the notice in conspicuous places close to the property affected." No similar requirements are imposed by § 9–462.06 on an appeal to the council under subsection (J).

In *Murphy v. Town of Chino Valley,* 163 Ariz. 571, 789 P.2d 1072 (App.1989), the question presented was whether, under A.R.S. § 9–462.06, a board of adjustment had *de novo* review authority on an appeal from a decision of its hearing officer. The court of appeals considered the provisions of § 9–462.06 relating to the powers and duties of a board of adjustment, and from those provisions inferred a statutory intent to give the board *de novo* review authority. Conversely, in our opinion, the absence of any similar provisions in § 9–462.06 governing the council in hearing a subsection (J) appeal from the board must be taken as an indication of a legislative intent that the council was not to proceed on a *de novo* basis.

In conclusion, we note that there is no indication in A.R.S. § 9–462.06 concerning underlying policy considerations that might have led to the enactment of subsection (J). As previously indicated, A.R.S. § 9–462.06 now gives a party separate and alternative avenues to gain review of a Board of Adjustment decision, one bypassing the council and going directly to the superior court, and the other going first to the council and then to the superior court. In considering the appropriate function of a city council under this review scheme, it must be kept in mind that under Arizona's zoning laws, a city council, as such, has never been given the final voice for the city in the matter

of the *enforcement* of the city's zoning laws. Conversely, a city council has always been the final voice for the city when it functions as a legislative body in the enactment or amendment of zoning ordinances. Therefore, it is entirely appropriate that in reviewing a decision of a hearing officer or planning commission *regarding zoning changes,* the hearing officer's or planning commission's decision is in the form of a recommendation only, and the council, in exercising its *legislative* function, is not bound by the matters presented to the hearing officer or the planning commission. *See,* A.R.S. § 9–462.04(B); *Bartolomeo v. Town of Paradise Valley,* 129 Ariz. 409, 631 P.2d 564 (App.1981); *Wait v. City of Scottsdale,* 127 Ariz. 107, 618 P.2d 601 (1980).

Arizona's zoning statutes, however, do not grant legislative authority to a city council or a board of adjustment in the exercise of their authority relating to the *enforcement* of zoning ordinances previously enacted or the granting of variances. To the contrary, case law establishes that a board of adjustment has no legislative authority and acts solely in a quasi-judicial capacity in exercising its zoning enforcement duties. *See, Arkules v. Board of Adjustment,* 151 Ariz. 438, 728 P.2d 657 (App.1986). It logically follows that when a city council is considering an appeal from ****939 *42** a board of adjustment pursuant to A.R.S. § 9–462.06(J), the council likewise functions in a quasi-judicial capacity, and its powers would be much more limited than when it functions as a legislative body considering decisions (recommendations) made by a planning commission or zoning administrator.

[2] For the reasons set forth in this opinion, we hold that in hearing an appeal from a board of adjustment pursuant to A.R.S. § 9–462.06(J), a city council is bound by the record presented to the board, and may not consider new evidence or reweigh the evidence previously presented to the board. The decision of the Phoenix City Council is reversed, and the matter is remanded for further proceedings consistent with this opinion.

CONTRERAS, P.J., and JACOBSON, J., concur.

Note: Retired Judge LEVI RAY HAIRE was authorized to participate in this appeal by order of the Chief Justice of the Arizona Supreme Court pursuant to Ariz. Const. art. 6, and A.R.S. § 38–813.

All Citations

169 Ariz. 37, 816 P.2d 934

Footnotes

1 After the 1988 amendment, A.R.S. § 9–462.06 reads as follows:

> A. The legislative body shall, by ordinance, establish a board of adjustment, which shall consist of not less than five nor more than seven members appointed by the legislative body in accordance with provisions of the ordinance, except that the ordinance may establish the legislative body as the board of adjustment. The legislative body may, by ordinance, delegate to hearing officer the authority to hear and decide on matters within the jurisdiction of the board of adjustment as provided by this section, except that the right of appeal from the decision of a hearing officer to the board of adjustment shall be preserved.
>
> B. The ordinance shall provide for public meetings of the board, for a chairman with the power to administer oaths and take evidence, and that minutes of its proceedings showing the vote of each member and records of its examinations and other official actions be filed in the office of the board as a public record.
>
> C. A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator, shall exercise such other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.
>
> D. Appeals to the board of adjustment may be taken by persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds thereof. The zoning administrator shall immediately transmit all records pertaining to the action appealed from to the board.
>
> E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in his opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property.

Upon such certification proceedings shall not be stayed, except by restraining order granted by the board or by a court of record on application and notice to the zoning administrator. Proceedings shall not be stayed if the appeal requests relief which has previously been denied by the board except pursuant to a special action in superior court as provided in subsection J of this section.

F. The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with § 9–462.04 and posting the notice in conspicuous places close to the property affected.

G. A board of adjustment shall:

1. Hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance adopted pursuant to this article.

2. Hear and decide appeals for variances from the terms of the zoning ordinance only if, because of special circumstances applicable to the property, including its size, shape, topography, location, or surroundings, the strict application of the zoning ordinance will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district. Any variance granted is subject to such conditions as will assure that 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.

3. Reverse or affirm, wholly or partly, or modify the order, requirement or decision of the zoning administrator appealed from, and make such order, requirement, decision or determination as necessary.

H. A board of adjustment may not:

1. Make any changes in the uses permitted in any zoning classification or zoning district, or make any changes in the terms of the zoning ordinance provided the restriction in this paragraph shall not affect the authority to grant variances pursuant to this article.

2. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

I. If the legislative body is established as the board of adjustment, it shall exercise all of the functions and duties of the board of adjustment in the same manner and to the same effect as provided in this section.

J. (quoted in full in the text of this opinion)

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 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.

256 Ariz. 88
Court of Appeals of Arizona, Division 1.

ARCADIA OSBORN NEIGHBORHOOD, et al., Plaintiffs/Appellants,

v.

CLEAR CHANNEL OUTDOOR, LLC, Defendants/Appellees.

No. 1 CA-CV 22-0464
|
Filed August 15, 2023

Synopsis

Background: Neighborhood association and individual plaintiffs filed petition for special action, alleging city board of adjustment, which granted company five use permits and variance to relocate billboards onto facade of newly-planned building and to convert two billboards from static to digital, acted in excess of its statutory authority and that relocation and conversion of billboards would violate city zoning ordinance. The Superior Court, Maricopa County, No. LC2020-000294-001, Katherine Cooper, J., dismissed petition. Association and individual plaintiffs appealed.

Holdings: The Court of Appeals, Morse, J., held that:

[1] individual plaintiffs failed to sufficiently allege particularized harm resulting from board's decision;

[2] individual plaintiffs lacked standing to bring constitutional claims of third parties;

[3] trial court was permitted to rely on factual assertion in complaint in dismissing due process claims;

[4] any due process claims of individual plaintiffs arising from board's denial of motion for automatic continuance were moot;

[5] association was not permitted to assert representational standing;

[6] association lacked direct standing; and

[7] association and individual plaintiffs lacked standing under Arizona Declaratory Judgment Act (ADJA).

Affirmed.

West Headnotes (24)

[1] Appeal and Error Standing

Whether party has standing is question of law Court of Appeals reviews de novo.

[2] Appeal and Error Parties, process, and appearance

When ruling on motion to dismiss for lack of standing, Court of Appeals considers facts alleged in complaint to be true and determines whether complaint, construed in light most favorable to plaintiff, sufficiently sets forth valid claim.

[3] Administrative Law and Procedure Standing in general

If statute authorizes judicial review of administrative decision, deciding whether plaintiff has standing must begin with determination of whether statute in question authorizes review at behest of plaintiff.

[4] Zoning and Planning Right of Review; Standing

Court of Appeals broadly interprets term "person aggrieved," as used in statute authorizing person aggrieved by decision of legislative body or board to file special action in superior court for judicial review of decision of zoning board of adjustment, with eye toward promoting ends of justice. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[5] Zoning and Planning Right of Review; Standing

To have standing to bring action under statute authorizing person aggrieved by decision of legislative body or board to file special action in superior court for judicial review of decision of zoning board of adjustment, plaintiff must allege particularized harm resulting from decision. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[6] **Zoning and Planning** Right of Review; Standing

Allegation of generalized harm that is shared alike by all or large class of citizens generally is not sufficient to confer standing pursuant to statute authorizing person aggrieved by decision of legislative body or zoning board of adjustment to file special action in superior court for judicial review of decision. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[7] **Zoning and Planning** Right of Review; Standing

General economic losses or general concerns regarding aesthetics in area without particularized palpable injury to plaintiff are typically not sufficient to confer standing pursuant to statute authorizing person aggrieved by decision of legislative body or board to file special action in superior court for judicial review of decision of zoning board of adjustment. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[8] **Zoning and Planning** Right of Review; Standing

In order to confer standing pursuant to statute authorizing person aggrieved by decision of legislative body or board to file special action in superior court for judicial review of decision of zoning board of adjustment, it is not enough that plaintiff has suffered same kind of harm or interference as general public but to greater extent or degree. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[9] **Zoning and Planning** Permits, certificates, and approvals

Zoning and Planning Variances or exceptions

Individual plaintiffs failed to sufficiently allege particularized harm resulting from city board of adjustment's decision to grant company permits and variance to relocate billboards and convert two from static to digital, as necessary for plaintiffs to have standing, as "persons aggrieved," to challenge decision pursuant to statute that authorized person aggrieved by decision of legislative board to file special action for judicial review; although plaintiffs asserted harms related to traffic safety and loss of aesthetic value, it was not enough to allege same kind of harm as public but to greater degree, and plaintiff's allegation that she worked within view of property and that she may be distracted by billboards did not show harm not shared by others who traveled through area. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[10] **Zoning and Planning** Assignment of errors and briefs

Plaintiff waived for appellate review claim that she was entitled to standing, pursuant to statute that authorized person aggrieved by decision of legislative body or board to file special action in superior court for judicial review of decision, as taxpayer who owned or leased property within 300 feet of property where billboards were located, to challenge city board of adjustment's decision to grant company use permits and variance to relocate billboards and change two from static to digital; plaintiff did not assert taxpayer standing before Superior Court. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[11] **Zoning and Planning** Right of Review; Standing

To establish standing in cases involving land use challenges, plaintiff must generally show (1) particularized harm resulting from decision, (2) injury, economic or otherwise, and (3) damages

peculiar to plaintiff or at least more substantial than that suffered by community at large.

[12] **Zoning and Planning** Permits, certificates, and approvals

Zoning and Planning Variances or exceptions

Individual plaintiffs lacked standing to bring constitutional claims of third parties, in action challenging city board of adjustment's decision to grant company use permit and variances to relocate billboards and convert two from static to digital, even though plaintiffs argued they had standing to raise third parties' rights if violation of rights would directly harm plaintiffs; plaintiffs failed to allege substantial relationship to parties whose rights they sought to raise.

[13] **Zoning and Planning** Petition, complaint or application

Trial court was permitted to rely on factual assertion in plaintiffs' complaint that appeal was filed by two organizations, not individual plaintiffs, in dismissing individual plaintiffs' due process claims in action challenging decision of city board of adjustment to grant company use permit and variances to relocate billboards and convert two from static to digital, even though individual plaintiffs argued court erred in relying on incorrect statement that individual plaintiffs did not file appeal that led to city board of adjustment hearing; amended complaint, which court was required to accept as true, clearly stated appeal was filed only by organizations. U.S. Const. Amend. 14.

[14] **Zoning and Planning** Assignment of errors and briefs

Neighborhood association waived for appellate review issue of whether individual plaintiffs filed appeal, in action challenging city board of adjustment's decision to grant company use permits and variance to relocate billboards and convert two from static to digital; association did not raise issue in its opening brief.

[15] **Constitutional Law** Hearings and adjudications

Non-appellant parties to administrative hearing are entitled to procedural due process. U.S. Const. Amend. 14.

[16] **Constitutional Law** Mootness

Any due process claims of individual plaintiffs, arising from denial by city board of adjustment of their request for automatic continuance, were moot in action challenging board's decision to grant company use permits and variance to relocate billboards and convert two from static to digital; even if plaintiffs were wrongfully denied automatic continuance, they acknowledged board granted continuance after hearing arguments on issue. U.S. Const. Amend. 14.

[17] **Associations** Suits on Behalf of Members; Associational or Representational Standing

Test for representational standing is whether, given all circumstances in case, organization has legitimate interest in actual controversy involving its members and whether judicial economy and administration will be promoted by allowing representational appearance.

[18] **Associations** Standing of members in general

Primary consideration in test for determining whether to grant representational standing is whether association's members would have standing to sue in their own right.

[19] **Associations** Property and housing; zoning and land use

Neighborhood association failed to establish individual standing on behalf of any of its members, and thus it was not permitted to assert representational standing in action challenging

decision of city board of adjustment to grant company use permits and variance to relocate billboards and convert two from static to digital; although association alleged members were "persons aggrieved," for purposes of statute that authorized person aggrieved by decision of legislative board to file special action for judicial review, because they had worked in and commuted through area, it did not identify particularized harm, injury in fact, or damage peculiar to any specific member, and instead association relied on insufficient standing arguments raised by individual plaintiffs. Ariz. Rev. Stat. Ann. § 9-462.06(K).

[20] **Associations** Property and housing; zoning and land use

Neighborhood association lacked direct standing to bring action challenging decision of city board of adjustment to grant company permits and variance to relocate billboards and convert two to digital; although association alleged decision would threaten its mission and successes in limiting conversion and that intersection adjacent to billboards was probably located on one of non-highway commuter routes most used by its members, Arizona Supreme Court rejected federal case law to which association pointed to assert that diversion of resources was sufficient to show concrete injury justifying standing, efforts to limit conversion were issue advocacy, and reliance on members' frequency of use and use on intersection for commuter travel was shared by all commuters that traveled through area.

[21] **Associations** Injury or interest in general

Organizations cannot establish standing if only injury arises from effect of challenged action on organizations' lobbying activities, or when service impaired is pure issue-advocacy.

[22] **Associations** Property and housing; zoning and land use

Declaratory Judgment Subjects of relief in general

Neighborhood association and individual plaintiffs lacked standing under Arizona Declaratory Judgments Act (ADJA) to bring special action challenging decision of city board of adjustment to grant company permits and variance to relocate billboards and convert two to digital; although complaint mentioned ADJA, it did not allege plaintiffs' rights, status, or other legal relations were affected by any municipal ordinance, while, on nine of twelve counts raised in complaint, plaintiffs sought declaratory judgment that board acted in excess of legal authority, prayer was not part of complaint, and even if it were, using declaratory language did not transform action to one seeking declaratory judgment, and plaintiffs' request for reversal of board's decision was outside scope of ADJA. Ariz. Rev. Stat. Ann. § 12-1832.

[23] **Pleading** Prayer for relief

In considering motion to dismiss for failure to state claim, prayer is not part of complaint. Ariz. R. Civ. P. 12(b)(6).

[24] **Declaratory Judgment** Complaint, Petition or Bill

Using declaratory language does not transform special-action challenge to action seeking declaratory judgment.

***935** Appeal from the Superior Court in Maricopa County, No. LC2020-000294-001, The Honorable Katherine Cooper, Judge. **AFFIRMED**

Attorneys and Law Firms

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Judge James B. Morse Jr. delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge Daniel J. Kiley joined.

OPINION

MORSE, Judge:

***936** ¶1 The City of Phoenix Board of Adjustment ("Board") granted five use permits and a variance to allow Clear Channel Outdoor, LLC ("Clear Channel") to relocate three billboards onto the facade of a newly planned building and to convert two of the billboards from static to digital. Harvey Shulman, Neal Haddad, Tabitha Myers, (collectively "Individual Plaintiffs") and Arcadia Osborn Neighborhood Association ("AONA") filed this petition for special action in superior court claiming that the Board acted in excess of its statutory authority and that the relocation and conversion of the billboards would violate the City of Phoenix Zoning Ordinance. The superior court dismissed the petition after finding that the Individual Plaintiffs and AONA both lacked standing to challenge the Board's decision. We affirm because we agree with the superior court that the Individual Plaintiffs do not have a sufficient particularized palpable injury to confer standing and AONA has neither representational nor organizational standing.

FACTS AND PROCEDURAL BACKGROUND

¶2 Appellee Clear Channel owns and operates three static billboards located on property owned by J & R Holdings VI, LLC ("J & R") at the northwest corner of Thomas Road and Central Avenue in Phoenix ("Property"). Clear Channel's billboards are located on a tower within a "perpetual, exclusive easement" that encumbers the Property.

¶3 Although Clear Channel's easement does not expressly forbid development of the Property, both Clear Channel and J & R determined that Phoenix zoning law made it practically impossible to do so without encroaching on the easement. In 2019, Clear Channel and J & R devised a solution which would allow J & R to construct a new mixed-use tower on the Property by relocating Clear Channel's billboards and easement to the facade of the tower.

¶4 In October of that year, Clear Channel applied for five use permits and a variance, which would allow it to relocate the three billboards and to convert two of the signs from static to digital. The City's Zoning Adjustment Hearing Officer ("ZAHO") held a public hearing on Clear Channel's application. Following the hearing, the ZAHO approved the relocation of the billboards but denied the request to convert two of the three signs to digital.

¶5 Clear Channel appealed the ZAHO's denial of the digital conversion to the Board. And AONA, along with the Urban Phoenix Project Network ("UPP"), appealed the ZAHO's approval of the relocation. After a hearing on the merits, the Board upheld the ZAHO's relocation decision but reversed the denial of Clear Channel's request for digital conversion.

¶6 In response, Appellants and others filed this special action in superior court challenging the Board's decision. Appellees moved to dismiss the complaint, arguing that all plaintiffs lacked standing under A.R.S. § 9-462.06(K).

¶7 After briefing and oral argument, the superior court determined that the plaintiffs failed to plead the special damages necessary to qualify as "persons aggrieved" under the statute and dismissed the complaint. AONA and the Individual Plaintiffs appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

[1] **[2]** ¶8 "Whether a party has standing is a question of law we review de novo." *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309, 311, ¶ 11, 294 P.3d 147, 149 (App. 2013). When ruling on a motion to dismiss for lack of standing, "we consider the facts alleged in the complaint to be true ... and determine whether the complaint, construed in a light most favorable to the plaintiff, sufficiently sets forth a valid claim." *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419, 421-22, ¶ 5, 268 P.3d 370, 372–73 (App. 2011) (quoting ***937** *Douglas v. Governing Bd. of the Window Rock Consol. Sch. Dist. No. 8*, 206 Ariz. 344, 346, ¶ 4, 78 P.3d 1065, 1067 (App. 2003)).

I. The Individual Plaintiffs.

¶9 The Individual Plaintiffs claim that they are entitled to statutory standing as "person[s] aggrieved" under A.R.S. § 9-462.06(K) and that they are entitled to "procedural" and "First Amendment" standing due to the constitutional claims raised in their First Amended Complaint.

A. Persons Aggrieved

[3] ¶10 "If a statute authorizes judicial review of an administrative decision, deciding whether a plaintiff has standing 'must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.' " *Scenic Ariz.*, 228 Ariz. at 422, ¶ 7, 268 P.3d at 373 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Here, A.R.S. § 9-462.06(K) authorizes a "person aggrieved by a decision of the legislative body or board" to file a special action in superior court for judicial review of that decision.

[4] **[5]** **[6]** **[7]** ¶11 We interpret the term "person aggrieved" broadly, with an eye towards "promot[ing] the ends of justice." *Id.* at 422, ¶ 7, 268 P.3d at 373. But to have standing to bring an action under the statute, "a plaintiff must allege 'particularized harm' resulting from the [Board's] decision." *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 358, ¶ 20, 153 P.3d 374, 379 (App. 2007). "An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16, 961 P.2d 1013, 1017 (1998). In other words, "[g]eneral economic losses or general concerns regarding aesthetics in the area without a particularized palpable injury to the plaintiff are typically not sufficient to confer standing." *Ctr. Bay Gardens*, 214 Ariz. at 358-59, ¶ 20, 153 P.3d at 379–80.

[8] **[9]** ¶12 The Individual Plaintiffs assert harms related to traffic safety and loss of aesthetic value in the area. Their allegations of individualized harm focus on the frequency with which they use the intersection adjacent to the Property. But it is not enough that a plaintiff has suffered the same kind of harm or interference as the general public but to a greater extent or degree. *Hopi Tribe v. Ariz. Snowbowl Resort Limited Partnership*, 245 Ariz. 397, 401, ¶ 13, 430 P.3d 362, 366 (2018). Accordingly, because the Individual Plaintiffs have not alleged particularized harm causing palpable injuries, their allegations are insufficient to confer standing.

¶13 Myers alleges that she works in a building within view of the Property, but she does not claim that she can see the proposed billboards from her office. Instead, she claims that she may be distracted by them if she chooses to work in other public areas of the building or in a nearby café. These claims also fail to show a particularized harm that is not shared by others who regularly travel through and frequent businesses located at a busy intersection in midtown Phoenix. *See Sears*, 192 Ariz. at 69-70, ¶¶ 17-19, 961 P.2d at 1017–18 (finding plaintiffs' allegations of increased traffic, crowding, and stress did not establish standing "under nuisance or zoning law").

[10] ¶14 In addition, Myers now claims she is entitled to standing as "a taxpayer who owns or leases ... a property within three hundred feet" of the Property. A.R.S. § 9-462.06(K). But Myers did not assert taxpayer standing before the superior court and, thus, waived this claim on appeal. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12, 258 P.3d 200, 204 (App. 2011) ("If the argument is not raised below so as to allow the trial court ... an opportunity [to address it], it is waived on appeal.").

B. Scenic Arizona

¶15 Appellants claim that our decision in *Scenic Arizona* created a new, broader category of standing whenever the case involves a challenge to a billboard. This is not so.

¶16 In *Scenic Arizona*, we recognized that "deciding whether a person is aggrieved necessarily involves examining the legal basis of the claimed injury." 228 Ariz. at 423, ¶ 11, 268 P.3d at 374. In that case, Scenic Arizona ***938** claimed that a proposed electronic billboard adjacent to Interstate 17 would

violate the Arizona Highway Beautification Act, A.R.S. § 28-7901, *et seq.* ("AHBA"). *Id*. at 420, ¶ 1, 268 P.3d at 371. And we focused our inquiry on "whether Scenic qualifie[d] as a 'person aggrieved' under A.R.S. § 9-4602.06(K) *within the context of the AHBA*." *Id.* at 421, ¶ 5 n.6, 268 P.3d at 372 (emphasis added). We found that Scenic Arizona's allegations of "claimed interference with the proper use and enjoyment of one of the highways of this state, which are interests within the scope of the AHBA," were sufficient to confer standing. *Id.* at 424, ¶ 13, 268 P.3d at 375. We also noted that the loss of "aesthetic enjoyment," "increased safety risk," and other "specific harm[s]" that Scenic Arizona alleged fell "within the zone of interests the AHBA was intended to protect—the safety and aesthetics of Arizona's highways." *Id*. at 424, 425, ¶¶ 13, 16, 268 P.3d at 375, 376. Finally, we found that restricting standing to assert claims under the AHBA to only "neighboring property owners who experience injuries to their own properties would make highway billboards ... virtually immune from judicial review." *Id.* at 425, ¶ 16, 268 P.3d at 376.

[11] ¶17 Notably, *Scenic Arizona* reaffirms the "well-established principles" applied in cases "involving other land use challenges" that, to establish standing, a plaintiff must generally show (1) particularized harm resulting from the decision, (2) injury, "economic or otherwise," and (3) damages "peculiar to the plaintiff or at least more substantial than that suffered by the community at large." *Id*. at 424, ¶ 14, 268 P.3d at 375 (quoting *Ctr. Bay Gardens*, 214 Ariz. at 358, ¶ 20, 153 P.3d at 379).

¶18 Thus, the plaintiffs in *Scenic Arizona* had standing because the billboard at issue in that case was subject to the AHBA. *Id.* at 425, ¶ 16, 268 P.3d at 376. Ordinary zoning ordinances do not create the same special interest. *See* Phoenix Zoning Ordinance § 102 (2011) (stating that the purpose of the Zoning Ordinance is to "establish standards and regulations to govern the use of land and structures in the City and for review and approval of all proposed development of property in the City"). Because the billboards at issue in this case are not subject to the AHBA, *Scenic Arizona* does not provide standing for the Individual Plaintiffs to challenge an ordinary zoning decision absent allegations of a particularized harm, injury, or damages distinct from that suffered by the public. 228 Ariz. at 425, ¶ 16, 268 P.3d at 376. As noted above, *supra* ¶¶ 12-13, the Individual Plaintiffs failed to meet this standard, and the superior court correctly dismissed their complaint.

C. Constitutional Standing

¶19 The Individual Plaintiffs also claim the superior court erred in finding that they lacked standing to bring their constitutional claims because "they d[id] not allege violations of their own constitutional rights." We disagree.

[12] ¶20 First, the Individual Plaintiffs assert that they "have standing to raise the constitutional rights of others if a violation of those rights will directly harm them." But we have previously identified three requirements for litigants seeking to assert standing based on the constitutional rights of a third party: (1) the litigant must have a substantial relationship to the third party, (2) the third party must be unable to assert the constitutional rights on its own behalf, and (3) failure to grant the litigant standing must dilute the rights of the third party. *Kerr v. Killian*, 197 Ariz. 213, 217, ¶ 16, 3 P.3d 1133, 1137 (App. 2000). Because litigants failed to allege a substantial relationship to the parties whose rights they sought to raise, the superior court correctly determined they lacked standing to bring their constitutional claims.

[13] **[14]** ¶21 Finally, the Individual Plaintiffs claim the superior court erred in dismissing their due process claims. Specifically, they claim the court erred in relying on the "incorrect factual statement" that Individual Plaintiffs "did not file the appeal that led to the Board hearing." But the First Amended Complaint, which the superior court was required to accept as true, clearly states that the appeal was filed only by "Plaintiff UPP and Plaintiff AONA," not the Individual ***939** Plaintiffs.[1] The superior court did not err in relying on a factual assertion contained in the First Amended Complaint. *See Scenic Ariz.*, 228 Ariz. at 421-22, ¶ 5, 268 P.3d at 372–73 (stating that courts must consider the facts alleged in the complaint to be true).

[15] **[16]** ¶22 The Individual Plaintiffs' due process claims focus on the Board's denial of their request for an "automatic continuance." Non-appellant parties to an administrative hearing are entitled to procedural due process. *See Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 371, 752 P.2d 22, 24 (App. 1987) ("We start from the premise that there are certain 'fundamental' procedural requisites which a person is entitled to receive at an administrative hearing which is quasi-judicial in nature."). But even if the Individual Plaintiffs were wrongfully denied an "automatic continuance," they acknowledge that the Board granted their continuance after hearing arguments on the issue. Therefore, any due process claims are moot. *See Simms v. Ariz. Racing*

Comm., 253 Ariz. 214, 220, ¶ 30, 511 P.3d 209, 215 (App. 2022) (finding a due process claim moot where the plaintiff received the proper remedy through other means).

II. The Arcadia Osborn Neighborhood Association.

¶23 AONA raises claims of both representational standing on behalf of its members and direct organizational standing.

A. Representational Standing

[17] **[18]** ¶24 The test for representational standing in Arizona is "whether, given all the circumstances in the case, the [organization] has a legitimate interest in an actual controversy involving its members and whether judicial economy and administration will be promoted by allowing representational appearance." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svcs.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). A primary consideration in this test is whether the association's members would have standing to sue in their own right. *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶ 10, 199 P.3d 629, 632 (App. 2008).

[19] ¶25 AONA alleges that its members are persons aggrieved because they work in and commute through the area. But AONA does not identify particularized harm, injury in fact, or damage peculiar to any specific member. *See Scenic Ariz.*, 228 Ariz. at 424, ¶ 14, 268 P.3d at 375. Instead, AONA relies on the standing arguments raised by the Individual Plaintiffs. These arguments are insufficient. *See supra* ¶¶ 10-22. Because AONA has failed to establish individual standing on behalf of any of its members, it cannot assert representational standing. *Cf. Armory Park*, 148 Ariz. at 6, 712 P.2d at 919 (finding standing where an organization would "adequately and fairly represent the interests of those of its members who would have had standing in their individual capacities").

B. Direct Standing

[20] ¶26 Finally, AONA claims the superior court erred in finding that it lacks direct standing to challenge the Board's decision. The superior court did not err.

¶27 The First Amended Complaint lists two ways the Board's decision could harm AONA. First, the decision "would threaten AONA's mission (and successes) in limiting digital billboard conversion" and second, the intersection adjacent to the billboards is "probably ... located on one of the non-highway commuter routes most used by [its] members."

[21] ¶28 Turning to the first allegation of harm, AONA points to federal case law to assert that diversion of resources is sufficient to show a concrete injury justifying standing. But our supreme court has recently rejected that line of cases. *See Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224, ¶ 18, 501 P.3d 731, 736 (2022) (disavowing the trial court's reliance on *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013)). Instead, ***940** in Arizona, organizations "cannot establish standing if the only injury arises from the effect of a challenged action on the organizations' lobbying activities, or when the service impaired is pure issue-advocacy." *Id.* (quoting *Equal Means Equal v. Ferriero*, 3 F.4th 24, 30 (1st Cir. 2021)) (cleaned up). AONA's efforts to limit digital-billboard conversion—such as organizing neighbors for the purpose of preserving the character of the neighborhood, serving as a source of information gathering and dissemination, and promoting neighborhood goals and objectives as they relate to transportation issues—are pure issue advocacy, and granting standing on that basis would "eviscerat[e] the standing requirement ...." *Id.*

¶29 The second allegation of harm fails for the same reason as the Individual Plaintiffs' allegation of individualized harm. *See Supra* ¶ 12. AONA does not claim its members are damaged by a special use of the subject intersection. Instead, it relies on their frequency of use and reliance on the intersection for commuter travel—an interest shared by all commuters that travel through the area. As stated above, it is not enough to show that its members suffered the same kind of harm or interference as the general public but to a greater extent or degree. *Sears*, 192 Ariz. at 70, ¶ 19, 961 P.2d at 1018; *see also Hopi Tribe*, 245 Ariz. at 401, ¶ 13, 430 P.3d at 366.

III. Standing to Seek Declaratory Relief.

[22] ¶30 Appellants further claim the superior court erred in denying them standing under the Arizona Declaratory Judgments Act ("ADJA"). The ADJA allows "[a]ny person ... whose rights, status or other legal relations are affected by a ... municipal ordinance" to "obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832.

[23] **[24]** ¶31 The First Amended Complaint mentions the ADJA, but does not include an allegation that plaintiffs' "rights, status or other legal relations are affected by" the Phoenix Zoning Ordinance or any other municipal ordinance. *See id.* Instead, on nine of the twelve counts raised in the Complaint, plaintiffs seek "declaratory judgment that Defendant Board acted in excess of legal authority." But in

considering a motion to dismiss under Arizona Rules of Civil Procedure 12(b)(6), "the prayer is not part of the complaint." *Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192, 507 P.2d 113, 117 (1973). And even if it were, using declaratory language does not transform a special-action challenge to an action seeking declaratory judgment. *See Lecky v. Staley*, 6 Ariz. App. 556, 558-59, 435 P.2d 63, 65–66 (1967) (holding that labeling a complaint "Complaint For Declaratory Judgment (Contract)" did not transform an action for damages to an action for declaratory judgment).

¶32 Whether labeled a special action or a request for a declaratory judgment, Appellants ask the superior court to reverse the Board's decision. Such a request is outside the scope of the ADJA. *See* A.R.S. § 12-1832 (stating that relief is limited to "obtain[ing] a declaration of rights, status or other legal relations"), *Black v. Siler*, 96 Ariz. 102, 105, 392 P.2d 572 (1964) (noting that a declaratory judgment "simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done"). Short of reversing the Board's decision, a declaration that the Board acted in excess of its legal authority would be advisory only. *See Ariz. St. Bd. of Dirs. for Junior Colls. v. Phx. Union High Sch. Dist. of Maricopa Cnty.*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967) ("No proceeding will lie under the declaratory judgment acts to obtain a judgment which is advisory only or which merely answers a moot or abstract question; a mere difference of opinion will not suffice."). The superior court did not err.

CONCLUSION

¶33 For the reasons stated above, we affirm the ruling of the superior court that plaintiffs lack standing to challenge the Board's decision.

All Citations

256 Ariz. 88, 103 Arizona Cases Digest 20, 535 P.3d 932

Footnotes

1 Because AONA does not raise the issue in its own opening brief, we determine they have waived the issue on appeal. *See Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 17, 91 P.3d 1019, 1023 (App. 2004) ("Generally, we will consider an issue not raised in an appellant's opening brief as abandoned or conceded.").

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137 S.Ct. 1645
Supreme Court of the United States

TOWN OF CHESTER, NEW YORK, Petitioner
v.
LAROE ESTATES, INC.

No. 16–605
|
Argued April 17, 2017.
|
Decided June 5, 2017.

Synopsis

Background: Land developer brought state court action against town, alleging, among other claims, a regulatory taking in violation of Fifth and Fourteenth Amendments. Town removed action to federal court. Real estate developer subsequently moved to intervene of right. The United States District Court for the Southern District of New York entered an order denying motion for lack of standing, and real estate developer appealed. The United States Court of Appeals for the Second Circuit, Lohier, Circuit Judge, 828 F.3d 60, vacated and remanded. Certiorari was granted.

[Holding:] The Supreme Court, Justice Alito, held that an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.

Vacated and remanded.

West Headnotes (11)

[1] **Constitutional Law** Nature and scope in general
Federal Courts Case or Controversy Requirement

Article III's cases-and-controversies requirement preserves the tripartite structure of the Federal Government, prevents the Federal Judiciary from intruding upon the powers given to the other branches, and confines the federal courts to a properly judicial role. U.S.C.A. Const. Art. 3, § 2, cl. 1.

6 Cases that cite this headnote

[2] **Federal Courts** Case or Controversy Requirement

If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so. U.S.C.A. Const. Art. 3, § 2, cl. 1.

17 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest
Federal Courts Case or Controversy Requirement

Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. U.S.C.A. Const. Art. 3, § 2, cl. 1.

17 Cases that cite this headnote

[4] **Constitutional Law** Nature and scope in general
Federal Civil Procedure In general; injury or interest

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. U.S.C.A. Const. Art. 3, § 2, cl. 1.

37 Cases that cite this headnote

[5] **Constitutional Law** Nature and scope in general
Federal Civil Procedure In general; injury or interest

The standing doctrine of Article III accomplishes the task of preventing the judicial process from

being used to usurp the powers of the political branches by requiring plaintiffs to allege such a personal stake in the outcome of the controversy as to justify the exercise of the court's remedial powers on their behalf. U.S.C.A. Const. Art. 3, § 2, cl. 1.

49 Cases that cite this headnote

[6] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, a plaintiff seeking compensatory relief must have: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

280 Cases that cite this headnote

[7] **Federal Civil Procedure** In general; injury or interest

Absent a showing of the prerequisites for standing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation. U.S.C.A. Const. Art. 3, § 2, cl. 1.

10 Cases that cite this headnote

[8] **Federal Civil Procedure** In general; injury or interest

Standing is not dispensed in gross; rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought. U.S.C.A. Const. Art. 3, § 2, cl. 1.

433 Cases that cite this headnote

[9] **Federal Civil Procedure** In general; injury or interest

Where there are multiple plaintiffs, at least one plaintiff must have standing to seek each form of relief requested in the complaint. U.S.C.A. Const. Art. 3, § 2, cl. 1.

388 Cases that cite this headnote

[10] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Intervention

For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor of right. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

33 Cases that cite this headnote

[11] **Federal Civil Procedure** Intervention

An intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing, including cases in which both the plaintiff and the intervenor seek separate money judgments in their own names. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

175 Cases that cite this headnote

****1647** *Syllabus*[*]

***433** Land developer Steven Sherman paid $2.7 million to purchase land in the town of Chester (Town) for a housing subdivision. He also sought the Town's approval of his development plan. About a decade later, he filed this suit in New York state court, claiming that the Town had obstructed his plans for the subdivision, forcing him to spend around $5.5 million to comply with its demands and driving him to the brink of personal bankruptcy. Sherman asserted, among other claims, a regulatory takings claim under the Fifth and Fourteenth Amendments. The Town removed the case to a Federal District Court, which dismissed the takings claim as unripe. The Second Circuit reversed that determination and remanded for the case to go forward. On remand, real estate development company Laroe Estates, Inc. (respondent here), filed a motion to intervene of right under Federal Rule of Civil Procedure 24(a)(2), which requires a court

to permit intervention by a litigant that "claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Laroe alleged that it had paid Sherman more than $2.5 million in relation to the development project and the subject property, that its resulting equitable interest in the property would be impaired if it could not intervene, and that Sherman would not adequately represent its interest. Laroe filed, *inter alia,* an intervenor's complaint asserting a regulatory takings claim that was substantively identical to Sherman's and seeking a judgment awarding Laroe compensation for the taking of Laroe's interest in the property at issue. The District Court denied Laroe's motion to intervene, concluding that its equitable interest did not confer standing. The Second Circuit reversed, holding that an intervenor of right is not required to meet Article III's standing requirements.

Held:

1. A litigant seeking to intervene as of right under Rule 24(a)(2) must meet the requirements of Article III standing if the intervenor wishes to pursue relief not requested by a plaintiff. To establish Article III standing, a plaintiff seeking compensatory relief must have "(1) suffered ***434** an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635. The " plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Federal Election Comm'n,* 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (internal quotation marks omitted). The same principle applies when there are multiple plaintiffs: At least one plaintiff must have standing to seek each form of relief requested in the complaint. That principle also applies to intervenors of right: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that requested by the plaintiff. That includes cases in which both the plaintiff and the intervenor seek separate money judgments ****1648** in their own names. Pp. 1649 – 1651.

2. The Court of Appeals is to address on remand the question whether Laroe seeks different relief than Sherman. If Laroe wants only a money judgment of its own running directly against the Town, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene. The record is unclear on that point, and the Court of Appeals did not resolve that ambiguity. Pp. 1651 – 1652.

828 F.3d 60, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

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Opinion

Justice ALITO delivered the opinion of the Court.

***435** Must a litigant possess Article III standing in order to intervene of right under Federal Rule of Civil Procedure 24(a)(2)? The parties do not dispute—and we hold—that such an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a plaintiff. In the present case, it is unclear whether the intervenor seeks different relief, and the Court of Appeals did not resolve this threshold issue. Accordingly, we vacate the judgment and remand for that court to determine whether the intervenor seeks such additional relief.

I

In 2001, land developer Steven Sherman paid $2.7 million to purchase nearly 400 acres of land in the town of Chester, New York (Town). Sherman planned to build a housing subdivision called MareBrook, complete with 385 housing units, a golf

course, an onsite restaurant, and other amenities. Sherman applied for approval of his plan and thus began a "journey through the Town's ever-changing labyrinth of red tape." *Sherman v. Chester,* 752 F.3d 554, 557 (C.A.2 2014).

In 2012, Sherman filed this suit against the Town in New York state court. The suit concerned "the decade's worth of red tape put in place" by the Town and its regulatory bodies. *Id.,* at 558. According to Sherman, the Town obstructed his plans for the subdivision and forced him to spend around $5.5 million to comply with the Town's demands. *Id.,* at 558, 560. All of this, Sherman claimed, left him financially exhausted and on the brink of personal bankruptcy. ***436** *Id.,* at 560. Sherman brought nine federal- and state-law claims against the Town, including a regulatory takings claim under the Fifth and Fourteenth Amendments. See App. 98–122. The Town removed the case to a Federal District Court, which dismissed Sherman's takings claim as unripe. Opinion and Order in No. 1:12–cv–00647 (SDNY), Dkt. 14, ****1649** p. 25. The Court of Appeals for the Second Circuit reversed the ripeness determination and remanded for the case to go forward. *Chester, supra,* at 557.[1]

On remand, real estate development company Laroe Estates, Inc. (the respondent here), filed a motion to intervene of right under Federal Rule of Civil Procedure 24(a)(2). This Rule requires a court to permit intervention by a litigant that "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Laroe alleged that in 2003 it had entered into an agreement with Sherman regarding the MareBrook property. Under this agreement, Laroe was to make $6 million in payments to Sherman, secured by a mortgage on all of the development, and Sherman was to sell Laroe parcels of land within the proposed subdivision when the MareBrook plan was approved. However, Laroe reserved the right to terminate the entire agreement if Sherman was unable to obtain Town approval for a sufficient number of lots. While this agreement was in place and Sherman continued his futile quest for regulatory approval, Laroe paid Sherman more than $2.5 million.

In 2013, TD Bank commenced a foreclosure proceeding on Sherman's property. In an effort to save the deal, Laroe and Sherman entered into a new agreement. That agreement provided that the purchase price of the property would be the $2.5 million that Laroe had already advanced Sherman ***437** plus any amount Sherman had to pay to settle with TD Bank. Once the Town approved the plan, Laroe was required to transfer a certain number of lots back to Sherman. In addition to imposing this transfer obligation, the agreement deemed Laroe to have paid for the land in full. Laroe was also given the authority to settle the debt Sherman owed TD Bank and to terminate the agreement if the settlement failed. The settlement did fail, and TD Bank took over the property. But Laroe never terminated its agreement with Sherman.

In support of its motion to intervene, Laroe argued that, under New York law, it is "the equitable owner of the Real Property" at issue in Sherman's suit. App. 131, 135–139. Laroe asserted that its status as equitable owner gave it an interest in the MareBrook property; that its interest would be impaired if it could not intervene; and that Sherman "ha[d] his own agenda" and consequently could not adequately represent Laroe's interest. *Id.,* at 143–145. Along with its other intervention-related pleadings, Laroe filed an intervenor's complaint asserting a regulatory takings claim that was substantively identical to Sherman's. Laroe's complaint sought, among other things, a "judgment against [the Town] awarding [Laroe] damages," namely, "compensation for the taking of Laroe's interest in the subject real property." *Id*., at 162.

The District Court denied Laroe's motion to intervene on the ground that Laroe lacked standing to bring a takings claim "based on its status as contract vendee to the property." App. to Pet. for Cert. 57a. The District Court interpreted Second Circuit precedent—specifically, *United States Olympic Comm. v. Intelicense Corp., S. A.,* 737 F.2d 263, 268 (1984)—to mean that Laroe's equitable interest did not confer ****1650** standing. App. to Pet. for Cert. 55a–56a.[2]

***438** The Court of Appeals reversed. 828 F.3d 60, 62 (C.A.2 2016). Acknowledging a division among the Courts of Appeals on whether an intervenor of right must meet the requirements of Article III, the Second Circuit sided with the courts that have held that Article III standing is not required. *Id.,* at 64–65.

We granted certiorari. 580 U.S. 1089, 137 S.Ct. 810, 196 L.Ed.2d 596 (2017).

II

[1] **[2]** Article III of the Constitution limits the exercise of the judicial power to "Cases" and "Controversies." § 2,

cl. 1. This fundamental limitation preserves the "tripartite structure" of our Federal Government, prevents the Federal Judiciary from "intrud[ing] upon the powers given to the other branches," and "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 337–338, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006).

[3] [4] [5] [6] [7] "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, supra,* at 338, 136 S.Ct., at 1547. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Our standing doctrine accomplishes this by requiring plaintiffs to "alleg[e] such a personal stake in the outcome of the controversy as to ... justify [the] exercise of the court's remedial powers on [their] behalf." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (internal quotation marks omitted). To establish Article III standing, the plaintiff seeking compensatory relief must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." ***439** *Spokeo, supra,* at 338, 136 S.Ct., at 1547. "Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon, supra,* at 38, 96 S.Ct. 1917.

[8] [9] Our standing decisions make clear that " 'standing is not dispensed in gross.' " *Davis v. Federal Election Comm'n,* 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (quoting *Lewis v. Casey,* 518 U.S. 343, 358, n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); alteration omitted). To the contrary, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis, supra,* at 734, 128 S.Ct. 2759 (internal quotation marks omitted); see, *e.g., DaimlerChrysler, supra,* at 352, 126 S.Ct. 1854 ("[A] plaintiff must demonstrate standing separately for each form of relief sought"); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (same); *Los Angeles v. Lyons,* 461 U.S. 95, 105–106, and n. 7, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (a plaintiff who has standing to seek damages must also demonstrate standing to pursue injunctive relief). ****1651** The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the complaint. Both of the parties accept this simple rule.[3]

[10] The same principle applies to intervenors of right. Although the context is different, the rule is the same: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests. This result follows ineluctably from our Article III case law, so it is not surprising that both parties accept it (as does the United States as *amicus curiae*). See Brief for Petitioner ***440** 13 (arguing that an intervenor must always demonstrate standing); Brief for Respondent 28 ("[A]n intervenor who ... seeks relief beyond that requested by a party with standing must satisfy Article III"); Brief for United States as *Amicus Curiae* 16 (An intervenor must demonstrate its own standing if it "seek[s] damages" or "injunctive relief that is broader than or different from the relief sought by the original plaintiff(s)").

[11] In sum, an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names. Cf. *General Building Contractors Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 402–403, n. 22, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) (declining to address the State's standing "until [it] obtains relief different from that sought by plaintiffs whose standing has not been questioned").

That principle dictates the disposition of this case. It is unclear whether Laroe seeks the same relief as Sherman or instead seeks different relief, such as a money judgment against the Town in Laroe's own name. Laroe's complaint—the best evidence of the relief Laroe seeks—requests a judgment awarding damages *to Laroe*. App. 162. Unsurprisingly, Sherman requests something different: specifically, compensation for the taking of *his* interest in the property. *Id.,* at 122. In other words, as Laroe's counsel conceded at oral argument, the complaint plainly seeks separate monetary relief for Laroe directly against the Town. Tr. of Oral Arg. 43–44. And, as Laroe's counsel conceded further, if Laroe *is* "seeking additional damages in [its]

own name," "at that point, an Article III inquiry would be required." *Id.,* at 47.

To be sure, at some points during argument in the Court of Appeals, Laroe made statements that arguably indicated that Laroe is not seeking damages different from those sought by Sherman. In particular, Laroe's counsel stated ***441** that he was "not saying that Sherman and [Laroe's] damages are not the same damages," and insisted that there is "exactly one fund, and the town doesn't have to do anything except turn over the fund." Tr. 16, 33; see also Reply Brief in No. 15–1086(CA2), p. 12 (similar). At other points, however, the same counsel made statements pointing in the opposite direction. When asked directly whether "there would be separate awards to you and to the Sherman estate" ****1652** if Sherman's suit was successful, Laroe's counsel admitted that he "ha[d] never contemplated how [damages] ge[t] allocated at the end of the day" and suggested bifurcated proceedings so that once liability was settled, Laroe and Sherman could "duke it out" over damages if necessary. Tr. 32–35. And in its Court of Appeals briefing, Laroe argued that it—not Sherman—would be entitled to most of the damages from the takings claim, flagging the allocation issue as one that the District Court would have to resolve. Brief for Appellant in No. 15–1086(CA2), p. 32 ("[T]he trier of fact will have to determine the relative allocation of rights over the fund.... Specifically, what is the value of Sherman's bare legal title as compared to Laroe's equitable title in the subject property"); Reply Brief in No. 15–1086, at 15 ("[M]ost, if not all of the benefits" of this litigation "will accrue [to] Laroe"); see also 828 F.3d, at 70 (noting that Sherman and Laroe "may disagree about ... the issue of damages were they to prevail"). Taken together, these representations at best leave it ambiguous whether Laroe is seeking damages for itself or is simply seeking the same damages sought by Sherman.[4]

***442** Unfortunately, the Court of Appeals did not resolve this ambiguity. In fact, the section of its opinion concerning standing did not discuss whether Laroe sought different relief than Sherman. *Id*., at 64–66. Elsewhere, in a different context, the court did acknowledge Laroe's statement that it sought "essentially the same" damages as Sherman. *Id.,* at 66. But the court also found that "it is unclear from the record whether Laroe believes the Town is directly liable to Sherman or Laroe for the taking." *Ibid*.

This confusion needs to be dispelled. If Laroe wants only a money judgment of its own running directly against the Town, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene. We leave it to the Court of Appeals to address this question on remand.

* * *

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Sherman died in 2013, and his estate replaced him as the plaintiff.

App. to Pet. for Cert. 21a, n. 2.

2 We assume for the sake of argument only that Laroe does not have Article III standing. If resolution of this question becomes necessary on remand, the Court of Appeals will be required to determine whether the District Court's decision was correct.

3 See Brief for Petitioner 23 ("If different parties raising a single issue seek different relief, then standing must be shown for each one"); Brief for Respondent 15 ("[A] case or controversy as to one claim does not extend the judicial power to *different* claims or forms of relief").

4 Before this Court, Laroe's counsel represented that Laroe is not seeking damages of its own and is seeking only to maximize Sherman's recovery. Tr. of Oral Arg. 43–44. But in light of the ambiguous record and the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance. *Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("[W]e are a court of review, not of first view").

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