COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

This is an appeal from a final decision of the Phoenix Board of Adjustment, which granted several zoning variances to appellee Clyde Rousseau. A.R.S. § 9-462.06(K) prescribes that the appeal should take the form of a statutory special action.

The plaintiff is the Roosevelt Action Association ("RAA"), an official neighborhood organization that represents the historic preservation and other interests of its members. The defendants include the Board of Adjustment and its members plus Clyde Rousseau and related entities.

The defendants moved to dismiss on the basis that RAA members lacked standing to pursue this appeal. The RAA responded and also filed a motion for summary judgment on the merits. The RAA also requested leave to amend its complaint to detail the personal stake of its members. The defendants refused to respond to the motion for summary judgment, and instead moved to strike it.

After briefing and argument, the trial court concluded that the RAA members lacked standing to pursue the appeal. In light of its disposition on the motion to dismiss, the trial court granted the motion to strike the summary judgment motion.

The RAA filed a timely notice of appeal, and this court has jurisdiction under A.R.S. § 12-2101(B).

STATEMENT OF FACTS

The Roosevelt Neighborhood

The Roosevelt neighborhood in central Phoenix is one of the City's oldest and most historic. The neighborhood was developed from 1893 to 1919 with the addition of five subdivisions to the original Phoenix townsite.[1] The historic character of the neighborhood flows from the architectural style and placement of the homes on the street – the "streetscape." Existing homes along Lynwood have front yard setbacks that average close to 30 feet.[2]

The Roosevelt Action Association is an official neighborhood organization that was created in 1982.[3] The RAA's central mission is historic preservation. The City of Phoenix's own maps specify that the RAA's "jurisdiction" extends from Central Avenue to 7th Avenue and from Fillmore to McDowell.[4] The RAA worked towards creation of the Roosevelt Area Special Planning District, which the City Council adopted in 1989.[5] Phoenix thus recognizes the Roosevelt neighborhood as a Historic District. The City Council gave the RAA an explicit voice in neighborhood development by providing that "any development proposals … should be reviewed by the Roosevelt Action Association."[6] The RAA has its own page on the City's website.[7]

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1 Index of Record ("I.R.") 20, Tab C, Ex. A, p. 4.
2 I.R. 21, Tab E, p. 6.
3 I.R. 20, Tab A.
4 I.R. 20, Tab B.
5 I.R. 20, Tab C, Ex. A.
6 *Id.*, p. 20.
7 *Id.*, Tab A.

Appellee Clyde Rousseau owns two adjacent lots in the Roosevelt neighborhood at 29 and 33 West Lynwood Street.[8] The lots are within the RAA's area as recognized on City maps. The lots themselves are not in the Historic District because they were vacant when the City imposed the historic preservation zoning overlay. However, the lots are in a Special Planning District that is attendant to the historic area.[9] The Roosevelt Neighborhood District Plan requires that any new construction on the lots must be "compatible with the historic context of the neighborhood" in addition to meeting the usual zoning regulations.[10]

Rousseau's Request for Zoning Variances

Rousseau wants to build modernistic duplexes on each of his two lots. The standard zoning regulations that apply to Rousseau's lots require that all buildings be set back at least 20 feet from the property line in the front yard.[11] Setbacks must be at least 15 feet in the rear and at least 10 feet on one side.[12] The Zoning Ordinance also provides that side walls may not exceed 6 feet in height.[13] The Zoning Ordinance imposes these requirements "to reduce noise, maintain privacy and minimize psychological feelings to a change in development character and avoid any adverse affect in property values."[14]

A zoning "variance" is a special exemption from zoning regulations. A property that has a variance is not subject to the same rules as

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[8] I.R. 21, ¶ 1.
[9] *Id*. ¶ 12.
[10] I.R. 20, Tab C, Ex. A, p. 20.
[11] Phoenix Zoning Ordinance § 617; I.R. 21, Tab I.
[12] *Id*.
[13] Phoenix Zoning Ordinance § 703.
[14] Phoenix Zoning Ordinance § 617(A); I.R. 21, Tab. H.

all other properties in the area. Obviously, variances are supposed to be the exception and not the rule.

Rousseau is seeking four variances from the zoning ordinance: (1) to allow a front yard setback of just 12 feet instead of the minimum 20 feet required by the zoning ordinance; (2) to completely eliminate rear setback (to zero) instead of 15 feet; (3) to reduce the side setback from 10 feet to 5 feet; and (4) to allow construction of an eight-foot wall instead of the six feet permitted by the ordinance.[15]

The Phoenix Zoning Ordinance requires the applicant to prove these four elements to obtain any variance:

- The variance will not be materially detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood, or to the public welfare in general;
- The variance is "necessary" for the preservation and enjoyment of the applicant's property rights;
- The property has "special circumstances" that do not apply to other properties in the area;
- The special circumstances were not created by the owner.[16]

A request for a variance is first heard and decided by the Phoenix Zoning Administrator. The Zoning Administrator concluded that the reduced front yard setback requested by Rousseau was "not necessary and would be visually intrusive and thereby detrimental to the other homes

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[15] I.R. 21, ¶ 6.

[16] Phoenix Zoning Ordinance § 307(A)(9); I.R. 21, ¶ 7.

in the historic district to the north and west."[17] He denied Rousseau's variance requests for reduced front and rear yard setbacks.

Rousseau appealed to the Phoenix Board of Adjustment. The transcript of his sworn testimony is in the record.[18] Rousseau essentially conceded that the variances were not "necessary" to preserve his property rights.[19] In order to prove "special circumstances," Rousseau cited the width of his lots, although his lots are the same size as every other lot in the neighborhood.[20] Rousseau offered no evidence to prove a lack of detriment to the surrounding area, except for some drawings of the proposed project. Representatives from the RAA appeared at the hearing and testified in opposition to the variance request. The Board of Adjustment granted Rousseau all the variances he sought.

The RAA's Appeal and the Personal Interest of its Members.

Arizona law provides that any "person aggrieved" by a board of adjustment decision can file an appeal to Superior Court.[21] The RAA pursued this appeal because its members are concerned about the aesthetic integrity of their historic neighborhood, and the effect that loss of that integrity has on their property values. The basis for their appeal on the merits is that Rousseau failed to prove at least two of the four prerequisites for a variance. The complaint alleged that RAA members are "directly and personally interested" in this matter because they "live in and around the Roosevelt Historic District."[22]

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[17] I.R. 21, Tab C.
[18] *Id.*, Tab E.
[19] *Id.* ¶ 10.
[20] *Id.*, ¶¶ 2, 11.
[21] A.R.S. § 9-462.06(K).
[22] I.R. 1.

Once the City raised the issue of standing, the RAA detailed the interest of its members through the affidavits of six members who live in the immediate area. Those six members allege damage to their economic and their aesthetic interests in the historic character of their neighborhood. The following only summarizes the plaintiffs' detailed accounts of their longstanding involvement in neighborhood preservation and development.

Larry Freedlund is a "resident and taxpayer of the City of Phoenix" who lives at 30 West Lynwood, directly across from the proposed duplex at 29 West Lynwood.[23] Because Mr. Freedlund's home is "directly across Lynwood Street from the new project," he explains that "from my front door, I look directly into the new development."[24] Mr. Freedlund alleges that the project "negatively impacts my own use and enjoyment of my own home, by impairing my view and clashing with my own aesthetic appreciation of the neighborhood."[25] He also believes that "it will negatively affect the market value of my home," because the project is "inconsistent with the historical character of the neighborhood" which he believes is responsible for recent appreciation in property values.[26]

Ian Cartwright lives at 38 West Lynwood, across from the proposed duplex at 33 West Lynwood.[27] Mr. Cartwright "chose to purchase [his] home in an historic district because of the significance in value attributed to living in an historic home and in an historic neighborhood."[28] Mr. Cartwright observed that the variances "include

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23 (Filed but not yet located or indexed by Superior Court Clerk).
24 *Id*. ¶ 2.
25 *Id*. ¶ 4.
26 *Id*.
27 I.R. 20, Tab G, ¶ 1.
28 *Id*. ¶ 5.

significantly decreased setbacks from the streets."[29] Mr. Cartwright is "directly impacted" by this because "[his] home is across the street from the development."[30] He adds that "because I live directly across the street from this project, it will damage me far more substantially than City residents in general."[31] Because the design of the project is "completely out of character with other homes in the historic district," Mr. Cartwright alleges that "the design that Rousseau has proposed will significantly decrease the value of my property."[32]

James Trocki also lives on West Lynwood in the Historic District. He is a member, and past president, of the Central City Village Planning Committee.[33] Mr. Trocki alleges that, given the variances approved by the City, the project "will damage me as a homeowner because the structure impinges upon the neighborhood's historic character, which we have worked so hard to maintain."[34] He explains that because he lives in the neighborhood "this project will damage me far more substantially than City residents in general."[35] He also alleges that the project will negatively affect the market value of his home because it is so different from all other homes in the area.[36]

Andrew George also lives on West Lynwood "within one block" of the development.[37] He is a past president of RAA and serves on

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29 *Id.* ¶ 6.
30 *Id.* ¶ 8.
31 *Id.* ¶ 10.
32 *Id.* ¶ 11, 7.
33 I.R. 20, Tab. C, ¶ 5.
34 *Id.* ¶ 14.
35 *Id.* ¶ 16.
36 *Id.* ¶ 17.
37 I.R. 20, Tab D, ¶ 12.

the Phoenix Historic Preservation Commission. He states that the variances "are entirely inconsistent with the historical and architectural integrity that the Roosevelt Action Association and its residents and members have worked to preserve."[38]

Cindi Housenga also lives on West Lynwood.[39] For 14 years she has been a realtor selling predominantly historic homes. Based on this experience, and because the variances are "entirely out of sync with the character of the neighborhood," Mrs. Housenga explains that they "will decrease the value of the properties surrounding them and will decrease the overall historic integrity of the neighborhood."[40] She also believes that these variances will "pave the way for the potential for additional requests for zoning variances along the same lines, which will further degrade the historic integrity of the neighborhood and, ultimately, negatively impact property values."[41]

Alec Tanner lives in the Historic District nearby on Portland Street.[42] Mr. Tanner similarly recounts that the variances are inconsistent with the historic character of the neighborhood.

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38 *Id*. ¶ 12.
39 I.R. 20, Tab. E.
40 *Id*. ¶ 5.
41 *Id*. ¶ 6.
42 I.R. 20, Tab F.

ISSUES PRESENTED

1. A.R.S. § 9-462.06(K) allows any "person aggrieved" to appeal a decision of the Phoenix Board of Adjustment, and the case law says that a person is "aggrieved" if his stake is more substantial that the general public. The plaintiffs are immediate neighbors who alleged that the Board's decision negatively impacts their neighborhood's historic integrity and thus their own property values. Did the trial court correctly conclude that the plaintiffs have no standing to appeal?

2. The statute also allows "any taxpayer" to appeal a decision of the Board of Adjustment. Plaintiffs are taxpayers. Did the trial court err in concluding that the plaintiffs had no standing to appeal?

3. The trial court must permit an amendment to the complaint to cure any defect in pleading. The materials submitted by the plaintiffs establish that they have standing. Did the trial court err in denying leave to amend the complaint?

4. The RAA filed a motion for summary judgment after the defendants' answers were "due" under Rule 12. The defendants failed to respond to the motion for summary judgment. Did the trial err in denying the motion for summary judgment?

SUMMARY OF ARGUMENT AND STATEMENT OF REVIEW

Phoenix is a huge city of more than 1.3 million residents. Out of the City's 470 square miles, only a small handful have a housing stock that approaches 100 years old. The Roosevelt neighborhood is one of those historic districts, and the RAA is the officially-recognized voice of that neighborhood.

The vast majority of Phoenix residents have zero interest in the variances on Lynwood Street. But some do, and they are the plaintiffs. Neighbors who live only 60 feet from the proposed development alleged that the variances will affect their interests in historic presentation, aesthetics and property values. For purposes of this appeal, the court must assume that the Board of Adjustment erred in granting these variances. The question is thus whether *anyone* in Phoenix has standing to ask the Superior Court to review that error.

By giving any "aggrieved person" standing to appeal, the legislature sought to protect the public from arbitrary and erroneous decisions of the Board of Adjustment. Many RAA members purchased their homes for the purpose of living in a historic neighborhood and have invested years of their lives working to protect and preserve the historic integrity of their neighborhood. The case law establishes that plaintiffs have standing as long as their interest is "more substantial" than that of the general public. The trial court's conclusion rests on the untenable assumption that the interest of these people is indistinguishable from the other 1.3 million residents of Phoenix.

The trial court was plainly wrong in concluding that aesthetic and economic injury are insufficient to create standing. The trial court's conclusion that a plaintiff has standing only if she suffers damage to an additional non-zoning risk – such as a fire hazard – is a novel and aberrant

idea that finds no home in the laws of this or any other jurisdiction. Moreover, the trial court's decision points down a path that makes most variances literally nonappealable by anyone in the City. It must be rejected as a dangerous and unwise misreading of the legislature's intent.

This court reviews de novo the trial court's dismissal for lack of standing. *KZPZ Broadcasting v. Black Canyon City Concerned Citizens*, 199 Ariz. 30, 13 P. 3d 772 (App. 2000).

ARGUMENT

I. RAA MEMBERS ARE "AGGRIEVED" BY THE BOARD'S DECISION BECAUSE THEIR STAKE IN THE DEVELOPMENT OF THEIR NEIGHBORHOOD IS FAR GREATER THAN THAT OF PHOENIX RESIDENTS IN GENERAL.

A. More Than Just "Persons Aggrieved": Four Cases that Discuss Standing

In theory, a single statute governs the analysis of standing. A.R.S. § 9-462.06(K) allows any "person aggrieved" to appeal a decision of the Board of Adjustment. The ultimate question is narrow: whether an immediate neighbor who alleges damage to his aesthetic and historic preservation interests, plus a negative effect on property value, is "aggrieved" within the meaning of A.R.S. § 9-462.06(K).

However, Arizona law has developed in a way that broadens the question. One person can file litigation concerning the use of another person's property in a variety of situations, including an action for nuisance or to enforce a restrictive covenant. A.R.S. § 9-462.06 mandates that all municipalities have a board of adjustment with quasi-judicial powers, and that all persons aggrieved by its decisions have a right to appeal. Finally, citizens can challenge the procedures used by a city council to rezone property.

Because of the different origins and natures of these various claims, one might expect different tests to specify who has standing to bring them. There is no intrinsic reason why the test for standing should be the same in every case. However, Arizona courts have largely "unified" the standing question.

In this case the trial court's decision cited four cases. Only one of the four was an appeal from a board of adjustment decision, but the trial

court regarded all of them as "requiring" dismissal. Before discussing the errors in the trial court's analysis, it is necessary to review each of these four cases and the different contexts in which they arose. They are discussed in chronological order.

Perper: No Standing to Seek Rule 60(c) Relief.

The oldest case cited by the trial court is the unusual case of *Perper v. Pima County*,[43] which grew out of previous litigation between landowners and the county. All parties settled the original litigation and stipulated to the entry of a final judgment that rezoned the property. The original judgment was not appealed. Several months later, nearby property owners filed a special action that sought to set aside the previous final judgment. The court held that the special action must be treated as a motion pursuant to Rule 60(c) to set aside the prior judgment. It would have sufficed for Division Two to note that the new plaintiffs had no "standing" because Rule 60(c) only authorizes the trial court to grant relief to "a party or a party's legal representative."

The new plaintiffs argued that *if* the board of adjustment had created the property rights in question, rather than a settlement agreement, then they could have appealed that hypothetical board of adjustment decision. The court responded that the new plaintiffs would have lacked standing to appeal because they had not sustained special damage. *Perper* has often been cited as holding that a neighbor must suffer "special damage" in order to appeal the grant of a variance by a board of adjustment. This is pure dictum. The fact is that *Perper* did not involve any variance, or any board of adjustment decision, or any appeal from any land use decision.

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[43] 123 Ariz. 439, 600 P.2d 52 (App. 1979).

Armory Park: Standing to Sue for Common Law Nuisance.

The Supreme Court discussed standing to sue for a common law nuisance in *Armory Park Neighborhood Ass'n v. Episcopal Community Services.*[44] Neighbors complained that a community center for indigents was a public nuisance because the center's clients damaged the surrounding neighborhood. The parties stipulated that there was "no issue" concerning zoning.[45] Citing its own prior cases from other contexts, the Supreme Court stated that "an injury to plaintiff's interest in land is sufficient to distinguish plaintiff's injuries from those experienced by the general public and to give the plaintiff-landowner standing to bring the action."[46]

The Supreme Court concluded that the neighborhood association had standing to sue for nuisance, because the actions complained of – littering and the like – affected neighborhood residents more than the general public in Tucson. Neighbors have standing whenever they suffer damage that is "special in nature and different in kind from that experienced by the residents of the city in general."[47]

Buckelew: Standing to Appeal from a Board of Adjustment.

This court considered standing to appeal a board of adjustment decision in *Buckelew v. Town of Parker.*[48] For whatever reason, this court did not analyze the issue of standing under the "aggrieved person" standard imposed by § 9-462.06(K). The court only mentioned § 9-462.06 in discussing the right to appeal the zoning administrator's decision *to* the

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44 148 Ariz. 1, 712 P.2d 914 (1985).
45 148 Ariz. at 2, 712 P.2d at 915.
46 148 Ariz. at 5, 712 P.2d at 918.
47 *Id*.
48 188 Ariz. 446, 937 P.2d 368 (App. 1997).

Board of Adjustment.[49] In that context, the court cited a previous case which stated in dictum that a "person aggrieved" is equivalent to someone who is "specially damaged."

Buckelew involved an attempt to compel the town to abate a zoning violation. The court stated that landowners must "suffer special damage before they have standing to complain about a zoning decision on adjacent property."[50] The court held that to have standing a plaintiff "must plead damage from an injury peculiar to him or at least more substantial than that suffered by the general public."[51] The court held that Mr. Buckelew had standing because his allegation of "interference with [his] use and enjoyment of his land" was sufficient to distinguish him from the general public.

Blanchard: Standing to Challenge the Procedural Regularity of Re-Zoning.

The court considered standing to challenge to the procedural adequacy of a rezoning in *Blanchard v. Show Low Planning and Zoning Comm'n.*[52] This court stated that a plaintiff must suffer "an injury peculiar to him or at least more substantial than that suffered by the community at large."[53] 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."[54] This court held that at least two plaintiffs (the Thompsons) had standing to challenge the rezoning because they owned a house that was "only" 750 feet from the property. Because of this 750-foot proximity, the court affirmed the trial court's conclusion that the Thompsons

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[49] 188 Ariz. at 452, 937 P. 2d at 374.
[50] 188 Ariz. at 450, 937 P. 2d at 372.
[51] 188 Ariz. at 452, 937 P. 2d at 374.

faced "special damages that will be more substantial than those suffered by the community at large."[55]

B. RAA Members Alleged Damage That Was Both "Peculiar to" Themselves and "More Substantial" than Phoenix Residents in General.

The rules established by these cases are clear. RAA members are "persons aggrieved" within the meaning of A.R.S. § 9-462.06 if they allege special damage. "Special damage" means damage that is distinct from the general public. A plaintiff distinguishes herself from the general public by alleging harm that is "peculiar to" herself, or damage that is "more substantial" than the damage suffered by the general public.

In their affidavits, RAA members alleged an interest that was both "peculiar to" themselves and "more substantial" than the general public in Phoenix. They explained that their personal interest in the historic preservation of their own neighborhood was at issue, that the value of their own respective homes was at stake, and that they would be far more impacted than City residents in general due to their close proximity to the project. These allegations must be assumed to be true for purposes of a motion to dismiss.

These plaintiffs did not make allegations of "general economic or aesthetic losses in an area, *without* instances of injury peculiar to the plaintiff."[56] That would be the case if, for example, a resident of Ahwatukee merely alleged that these variances would damage the "whole Roosevelt neighborhood." Rather, these RAA members alleged damages to

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52 196 Ariz. 114, 993 P. 2d 1078 (App. 1999).
53 196 Ariz. at 118, 993 P. 2d at 1082.
54 196 Ariz. At 118, 993 P.2d at 1078 ¶ 20.
55 *Id.*
56 *Blanchard,* 196 Ariz. at 118, 993 P.2d at 1078 (emphasis added).

the area together *with* allegations of damage to their own aesthetic and economic interests. Ian Cartwright and Larry Freedlund both live only 60 feet away from the project, and no one can seriously claim that their interest is the same as the other two million residents of Phoenix.

C. The Trial Court Erred In Holding That Aesthetic And Pecuniary Damage Are Irrelevant Under A.R.S. § 9-462.06.

The trial court acknowledged that the plaintiffs had successfully distinguished themselves from the general public by alleging damage to their interest in historic preservation, as well as potential depreciation in their property values. But the trial court concluded that a plaintiff must do *more* than allege harm that is "peculiar to himself" or "more substantial" than the damage suffered by the general public. The trial court ordered dismissal because the plaintiffs had not alleged that they also faced specific *types* of harm – such as an increased fire hazard – beyond their aesthetic and economic harm. The trial court concluded that economic and aesthetic harm are *per se* insufficient unless they are accompanied by phenomena such as "destruction of personal property, increases in fire and health hazards, break-ins, etc."[57]

Arizona law does not exclude economic and aesthetic harm from the concept of aggrievement.

The trial court claimed to be bound by all four cases discussed above, but it misapprehended what the cases actually *held*. Only one case (*Buckelew*) addressed standing to appeal a board of adjustment decision. *Armory Park* was a public nuisance case, in which the opinion never mentions § 9-462.06, so it is incorrect to characterize it as "holding" anything regarding the right to appeal a variance decision. *Perper's*

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[57] I.R. 43.

comment about special damage was obvious dictum. *Blanchard* was a zoning case in which § 9-462.06 played no role.

More importantly, the trial court distorted the ***holdings*** of these cases by mixing them up with their ***facts***. *Buckelew* and *Blanchard* both stated the rule of law clearly: a plaintiff has standing if he alleges damage that is peculiar to himself or more substantial than that of the general public. Those are the words this court wrote twice, and there is nothing ambiguous about them.

No case has held that aesthetic and pecuniary harm cannot supply standing unless the harm is also accompanied by a tangible "nuisance." *Armory Park* involved allegations of particular bothersome activities because it was a nuisance case. *Buckelew* was an action to compel abatement of a zoning violation that was nuisance-like. But in neither case did the court say that "nuisance-like" damages would be required in all future cases. And even if the court had said that, it would have been dictum.[58]

The trial court was wrong to exclude economic and aesthetic harm from the concept of "aggrievement." The whole promise of zoning is "preserving the character of established residential areas and maintaining, and even inflating, property values therein…."[59] Appearance and property values are what zoning is all *about*. History proves the depth of the trial court's error.

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[58] It is "always inappropriate" to read an opinion as authority for matters that were not specifically presented and discussed. *Calnimptewa v. Flagstaff Police Dep't.,* 200 Ariz. 867, 30 P.3d 634 (App. 2001).

[59] *Rathkopf, The Law of Zoning and Planning, § 1:3 (2001).*

Courts have always recognized economic harm as a form of aggrievement.

The Arizona legislature did not create the "persons aggrieved" standard contained in A.R.S. § 9-462.06(K). That phrase was promulgated back in 1921 in section 7 of the Standard State Zoning Enabling Act.[60] Because the persons aggrieved standard is part of a uniform act, it has been enacted in almost all jurisdictions. It has been on the books in Arizona since 1925.[61]

It is hard to imagine now, but the constitutionality of zoning was doubtful until 1926 when the Supreme Court decided in *Euclid v. Ambler Realty*.[62] In its early days zoning was a controversial invasion of private property rights. Municipalities struggled to find a basis to justify zoning regulations, and often characterized zoning as a tool in the fight against communicable disease.

Even in those earliest days, courts held that economic damage sufficed as aggrievement. "Most cases, particularly the early ones, speak of aggrievement in terms of a specific adverse effect upon the value of the plaintiff's property."[63] Pecuniary damage is the "gold standard" for aggrievement.[64] The idea that aggrievement includes pecuniary harm should not be surprising. This court's rules allow an appeal to be taken by

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60 The original act is reprinted in Rathkopf, *The Law of Zoning and Planning,* appendix A-4.

61 *Nicolai v. Tucson Bd. of Adjustment*, 55 Ariz. 283, 101 P.2d 199 (1940) (quoting "persons aggrieved" language as enacted in Arizona in 1925 and noting that Arizona "copied" it from the Standard State Zoning Enabling Act).

62 272 U.S. 365, 47 S.Ct. 114 (1926).

63 Rathkopf, *The Law of Zoning and Planning,* § 63:21 (2001).

64 *E.g., Community Planning Bd. v. Bd. of Standards and Appeals,* 350 N.Y.S.2d 138 (A.D. 1973) (pecuniary damage "is the usual measure of the status of 'aggrieved person' to appeal a zoning decision").

any "party aggrieved" by a judgment. ARCAP 1. It almost goes without saying that a party whose pecuniary interest is directly affected by a judgment is aggrieved.[65]

It is so widely accepted that pecuniary interests count for purposes of aggrievement that it is hard to find cases that discuss the issue. The literature confirms that a negative effect on property values "normally" forms the claim of special damage.[66] The standard treatise explains that in order to have standing "the interest claimed to be adversely affected *need not* take the form of depreciation in the value of the plaintiff's property or any special pecuniary damage."[67] Stating that damage "need not" be pecuniary in order to confer standing necessarily confirms that economic damage is sufficient to confer standing.

Injury to aesthetic and historic preservation interests is sufficient to confer standing.

The trial court also erred in ruling that harm to historical preservation interests is insufficient to aggrieve someone. In the early days, courts generally held that pursuit of aesthetic goals was beyond the scope of the police power, and tended to justify zoning regulations based on non-aesthetic purposes. Starting in the 1930s, judicial attitudes changed and courts accepted aesthetics as one legitimate purpose, if not the sole basis, for zoning regulations.[68] In this period the courts tended to justify zoning restrictions on the non-aesthetic purpose of preserving property values.

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65 *E.g., Abril v. Harris,* 157 Ariz. 78, 754 P.2d 1353 (App. 1987).

66 Comment, *Zoning and Procedural Due Process,* 91 Harv.L.Rev. 1502, 1544 (1978).

67 Rathkopf, *The Law of Zoning and Planning,* § 63.18 (2001).

68 Rathkopf, *The Law of Zoning and Planning,* § 16:2 (2001).

By the 1960s, the courts moved toward full recognition of aesthetics as a public purpose which, by itself, justified regulation of land use. In 1961 the Arizona Supreme Court recognized the expanding goals of land use regulation:

> The concept of the public welfare is broad and inclusive. …The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[69]

This court sanctioned the use of municipal zoning to achieve aesthetic purposes in 1977, when it recognized the "general weight of recent precedent upholding the overall authority of communities to regulate matters of aesthetics and design through the zoning power."[70]

One particular aesthetic interest is the goal of preserving historic buildings and neighborhoods. In recent decades courts have recognized that injury to historic preservation interests is sufficient to confer standing. The next sentence speaks directly to this case: "An allegation that the development of property threatens the aesthetic or cultural value of a historic district is sufficient to confer standing if the plaintiff (or at least one member of a plaintiff-citizen group) resides or owns property in the district."[71] Several courts — including federal courts — have therefore

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69 *City of Phoenix v. Fehlner*, 90 Ariz. 13, 363 P.2d 607, 609 (1961) (quoting *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102 (1954)).

70 115 Ariz. at 234, 564 P.2d at 923.

71 Rathkopf, *The Law of Zoning and Planning,* § 63:22 (2001).

recognized that an interest in historic preservation is enough to confer standing.[72]

Unlike Arizona courts, federal courts are governed by the stringent standing requirements of Article III of the Constitution. Yet for more than three decades, the U.S. Supreme Court has recognized that an injury to aesthetic interests is, by itself, sufficient to create standing in the federal courts.[73] No one has suggested that the "persons aggrieved" standard in the Standard State Zoning Enabling Act is more restrictive than the "injury in fact" standard that governs the federal courts.

The trial court's conclusion that *neither* aesthetic damage *nor* pecuniary damage is sufficient to aggrieve someone was truly unprecedented. In holding that aesthetic damage did not count, the court defied the past several decades in which courts have adopted the view that aesthetic damage is worthy of protection. Moreover, the trial court's views do not even qualify as "old-fashioned" because, even in the earliest days of zoning law, economic damage was sufficient to make a party aggrieved.

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72 *Hall County Historical Soc'y v. Georgia Dep't of Transp.,* 447 F. Supp. 741 (N.D. Ga. 1978) (standing granted to challenge the construction of a highway near a historic district on aesthetic and environmental grounds); *Neighborhood Development Corporation v. Advisory Council on Historic Preservation,* 632 F.2d 21 (6th Cir. 1980); *Citizens for Washington Square v. City of Davenport,* 277 N.W.2d 882 (Iowa 1979) (citizens' group had standing when it was organized to promote the historic preservation of a park).

73 *E.g, Friends of the Earth, Inc., v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000) (plaintiffs suffer the requisite injury in fact when their "aesthetic and recreational values" will be lessened by challenged activity.)

D. The Trial Court's Decision is Contrary To Established Standing Doctrine In Arizona And Other States.

The trial court's decision is contrary to traditional assumptions regarding a neighbor's right to appeal a zoning variance. In all of Arizona case law, there are three reported decisions in which neighbors appealed the grant of a variance by the local board of adjustment. In all three cases, this court held on the merits that the variances were improperly granted.[74]

The types of variances at issue in these cases say something about the neighbors' potential standing to complain. In *Arkules* a neighbor appealed a variance that allowed someone else to paint his Paradise Valley home off-white instead of mountain-colored. In *Ivancovich,* neighbors objected to a variance that allowed the addition of a story onto a department store that was at least several hundred feet from their homes. In *Haynes,* neighbors appealed a variance that reduced the number of parking spaces required in a parking lot. It is hard to imagine that the objecting neighbors' interests in these cases were neither aesthetic nor economic. If Ian Cartwright and Larry Freedlund do not have standing in this case, then there is no way that the neighbors had standing in *Arkules, Ivancovich,* or *Haynes*.

None of these three opinions mentions the issue of the neighbors' standing, so one can safely assume that nobody ever raised the issue. It is telling to ask: why didn't they? There has been no change in the law. In all of these cases, the lawyers for the variance-seekers could have tried to protect their clients' interests by arguing "lack of standing," and the respective City attorneys could have defended their clients' decisions on the

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74 *Ivancovich v. City of Tucson Bd. of Adjustment*, 22 Ariz. App. 530, 529 P.2d 242 (1974); *Arkules v. Bd. of Adjustment of Town of Paradise Valley*, 151 Ariz. 438, 728 P.2d 657 (App. 1986); *Haynes v. City of Tucson*,162 Ariz. 509, 784 P.2d 715 (App. 1989).

same basis. The blunt fact is that no attorney raised the issue of standing even though they had every reason to. The two possible explanations are a mass failure of competent advocacy, or, much more likely, that everyone has recognized that homeowners have standing to challenge the issuance of variances in their immediate neighborhoods.

The RAA is not trying to remove, or even to broaden, the traditional limits on standing. Ian Cartwright and Larry Freedlund live right across the street, and the courthouse door need not be opened very wide in order to let them in. The entire Roosevelt neighborhood is less than one-half-square-mile – about one-tenth of one percent of the 470 square miles that comprise the City of Phoenix. By limiting standing in this case to residents of the Roosevelt neighborhood, the court would be denying standing to 99.9% of Phoenix residents. Limiting standing to those who live on the 00 block of West Lynwood would deny standing to almost 99.999% of city residents. The question for appeal is whether the trial court was correct to deny standing to the remaining .0001% of Phoenix residents.

Arizona has hardly been alone in allowing neighbors to appeal variances that affect their own immediate neighborhoods. "An adjoining or nearby property owner, on the face of it, has a sufficient interest to enable him to appeal a determination of a board regarding the zoning usage of adjacent property without proof of special injury or damage."[75] Maryland courts make this explicit presumption:

> An adjoining, confronting or nearby property owner is deemed *prima facie* to be specially damaged and, therefore, a person aggrieved. A person challenging the fact of aggrievement has the burden of denying such damage in his answer to the petition for appeal and

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75 Rathkopf, *The Law of Zoning and Planning,* § 63:18 (2001).

> coming forward with evidence to establish that the petitioner is not, in fact, aggrieved.[76]

Missouri courts have held that "it is now well established that an adjoining, confronting or nearby property owner has standing, without further proof of special damage, to assert the invalidity of an ordinance or the right to review an administrative decision affecting the property in question."[77] "Landowners whose property is located in the immediate vicinity of the subject property are entitled to a presumption that they will be adversely affected in a way different from the community at large."[78]

Even without an explicit presumption, courts have routinely recognized that immediate neighbors have standing to appeal variances and similar decisions, because they have a pecuniary stake or an aesthetic stake, or both. An abutting landowner has standing to appeal a setback variance when he alleges that the proposed project would decrease his property value.[79] An owner of property across from a proposed development has a direct pecuniary interest in a zoning change.[80]

The purely aesthetic interests of nearby neighbors also supply standing. Oregon courts have adopted an essentially-aesthetic test to determine standing, under which neighbors who live within "sight or sound" of a proposed use of land have standing to appeal.[81] A homeowners' association had standing to challenge the violation of a use permit that

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76 *Bryniarski v. Montgomery County Bd. of Appeals,* 230 A.2d 289, 294 (Md. 1967).

77 *Allen v. Coffel,* 448 SW.2d 671, 675 (Mo. App. 1979).

78 *Piela v. Van Voris,* 655 N.Y.S. 2d 105, 106 (App. Div. 1997).

79 *Brooks v. Cumberland Farms, Inc.,* 703 A.2d 844 (Me. 1997).

80 *Towle v. City of Nashua,* 212 A.2d 204 (N.H. 1965).

81 *Duddles v. City Council of West Linn,* 535 P.2d 583 (Or. App. 1975)

obstructed the view, because the homeowners suffered injury greater than suffered by the general public.[82] Owners of property across the street from a proposed motel expansion had standing to challenge a zoning board decision because the "motel expansion would obstruct their view of the ocean, and [because] additional traffic would adversely affect them."[83]

E. It Makes No Sense to Hold That Neighbors Can Only Enforce Zoning Laws in Order To Protect Nonzoning Purposes.

The trial court's decision leads to the illogical result that the intended beneficiaries of the zoning ordinance have no standing to vindicate the *explicit* goals of the zoning ordinance; standing only exists for the rare person who alleges damage to an interest that is *incidentally* related to the zoning ordinance.

Setback requirements have an obvious intended beneficiary: the neighborhood. The Phoenix Zoning Ordinance lists the four reasons why it imposes setback requirements: to "avoid any adverse effect in property values," as well as to "reduce noise," "maintain privacy," and "minimize psychological feelings to a change in development."[84] These are economic and aesthetic goals. The ordinance confirms the stake of nearby property owners by providing that no variance can be granted if it would be detrimental to property values in the neighborhood. If a variance is granted, of course, any neighbor who is "aggrieved" can supposedly appeal.

The trial court held that in order to be aggrieved, a neighbor must face injury to something besides economic and aesthetic interests,

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82 *Pacifica Homeowners' Association v. Wesley Palms Retirement Community*, 224 Cal. Rptr. 2d 380 (App. 1986).

83 *Sahl v. Town of York,* 760 A.2d 266, 269 (Me. 2000).

84 Phoenix Zoning Ordinance § 617(A).

such as increased risk of fire. But Phoenix does not require building setbacks in order to prevent fires. That is the job of the fire code. Even if the prevention of fires were a "silent" goal of the setback requirements, it would not follow that citizens should only have standing in order to protect subsidiary, unenumerated goals. The rule is just the opposite.

A plaintiff has standing to enforce a statute if his interest is within the "zone of interests" protected by that statute. According to this court, the "acid test" for standing is "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 or constitutional guarantee in question."[85] Some jurisdictions have expressly adopted the "zone of interest" test to regulate the question of standing to appeal land use decisions.[86]

The trial court stood this "zone of interests" analysis on its head. Under its analysis, a neighbor does not have standing if he alleges harm that falls within the zone of interests that are explicitly protected by the zoning ordinance. Rather, a plaintiff only has standing if he alleges harm to a secondary interest – such as a fire hazard – that is *not* explicitly related to the zoning ordinance. In order to obtain judicial review of the city's application of its zoning ordinance, he must show that the city is thwarting the goals of some non-zoning body of law. This makes no more sense than saying that showing a "mere" increase in fire danger provides no standing to contest a variance from the fire code.

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85 *Town of Paradise Valley v. Gulf Leisure Corporation*, 27 Ariz. App. 600, 606, 557 P.2d 532, 538 (1976) (quoting *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153, 90 S. Ct. 827, 830 (1970)).

86 *E.g., Sopchak v. Guernsey,* 574 N.Y.S. 2d 110 (App. Div. 1991).

F. The Court Must Reject Any Analysis That Practically Repeals § 9-462.06(K).

The trial court's analysis would practically destroy the right of appeal guaranteed by § 9-462.06(K). Unlike many jurisdictions, Arizona does not allow local boards of adjustment to issue "use" variances, which allow the use of property in a way that is prohibited in its zone (*i.e.*, a commercial use in a residential zone). In Arizona the vast majority of variances thus concern design issues such as the height of fences and the size of signs.

One must imagine extremely unusual circumstances in order for an oversized sign to threaten neighbors in a way that goes beyond aesthetic or economic interests. If aesthetic and economic damage don't count to make a neighbor "aggrieved," then no one has standing to contest any sign variance, barring very rare circumstances. The right of appeal would similarly vanish for variances relating to setbacks, wall height and similar restrictions. This is unacceptable because protecting economic and aesthetic interests is the purpose of these zoning restrictions, and the substantive test for issuance of a variance requires consideration of the impact on the neighborhood.

The idea that most variances are totally unappealable is especially troubling because a plaintiff's stake has no necessary relation to the merit of the appeal. One can imagine variance decisions that *should* be appealed, due to procedural irregularities, obvious error, or pure cronyism. But the City's approach to standing would foreclose any right of appeal even in cases of egregious error.

Suppose that a zoning ordinance prescribes a maximum sign size of six square feet. A well-connected local businessman wants a bigger, flashier sign. By hook or by crook, he persuades the local board of

adjustment to grant a variance that allows a 60 square foot sign. The six-square-foot limit is designed to protect neighborhood aesthetics, and (in theory) the businessman must prove lack of detriment to the surrounding area in order to obtain the variance. But suppose that the board of adjustment just gets it wrong. Or that the Board grants the variance due to personal favoritism. The City's argument means that there is no right of appeal so long as the neighborhood only suffers damage to aesthetics and property values. On the trial court's logic, a local board of adjustment could freely hand out sign variances — with no regard for the legal requirements of the zoning ordinance and no possibility of judicial review — as long as the oversized signs did not create a fire hazard.

G. The Severe Restriction Proposed By The Trial Court Does Not Further The Purposes Of The Standing Requirement.

The final question is: why? The requirement of standing serves particular purposes, and it should be enforced only insofar as it serves those purposes. In *Armory Park* the Supreme Court explained that the standing requirement exists "to ensure that our courts do not issue mere advisory opinions, that the case is not moot, and that the issues will be fully developed by true adversaries."[87] The idea is to expend judicial resources only in cases in which courts can truly help people who may deserve it.

The right of neighbors to seek judicial review of variance decisions is not a bad thing to be stamped out. If it were a bad thing, the legislature would not have authorized it. It is a good thing. That is why the legislature in this state (and every other) has guaranteed aggrieved persons the right of judicial review. By the same token, before a court dismisses a

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87 *Armory Park*, 141 Ariz. at 6, 712 P.2d at 919.

lawsuit due to lack of standing, someone should demonstrate why allowing judicial review would be inconsistent with the purposes of the standing doctrine.

In this case, there may be good reason to deny standing to 99.99% of Phoenix residents. But neither the City nor the trial court has offered any convincing reason why the right of judicial review must be denied to Ian Cartwright and Larry Freedlund. This court is not being asked to issue an advisory opinion, the case is not moot, and these men are "true adversaries" because they are litigating a development that is just 60 feet from their own homes.

The City's current litigation position contradicts its own legislative policies and public pronouncements. The paramount land use policy document is the Phoenix General Plan.[88] That document – adopted by public vote in 2002 – describes neighborhood organizations as "the most powerful and effective tool to preserve and revitalize neighborhoods" and directs the City to allow those organizations "to handle neighborhood issues as they develop."[89] As noted, the City has recognized the RAA's jurisdiction on City maps, given the RAA a page on the City's website and the City Council has legislatively mandated that all development proposals in the area should be reviewed by the RAA.[90] In light of all this, many RAA members believe that the City's current position – that the RAA has no voice when it counts – can be fairly described as hypocrisy.

Standing is a means of efficiently allocating judicial resources, not an end in itself. Dismissing this case would not serve the purposes of

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88 *See* A.R.S. § 9-461.05 (requiring cities to adopt a general plan).

89 I.R. 20, Tab H, p. 279.

90 I.R. 20, Tab C, Ex. A, p. 20.

standing. It would only thwart the goal of the legislature in guaranteeing judicial review.

H. At a Minimum, There Are Fact Issues Regarding Standing.

The RAA believes that the record demonstrates standing beyond any reasonable doubt. But, at a minimum, the trial court was obliged to resolve any fact issues before dismissing the case.

Fact issues concerning standing must be resolved like any other fact issue. If facts are disputed a court cannot decide the issue without an evidentiary hearing.[91] "The court must resolve any genuine disputed factual issue concerning standing, either through a pretrial evidentiary proceeding or a trial itself."[92] The court held that "where the district court was faced with warring affidavits on issues essential to standing, the court erred in making findings of disputed facts," on which it then based its standing conclusion, without holding an evidentiary hearing.[93]

II. RAA MEMBERS ALSO HAVE STANDING AS TAXPAYERS.

There is another basis for standing that was argued to the trial court, but ignored in its decision. A.R.S. § 9-462.06(K) does not limit standing to persons aggrieved. The statute also gives standing to other persons by using the word "or." The statute provides:

> 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 [file an appeal].

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91 *Bischoff v. Osceola County*, 222 F.3d 874 (11th Cir. 2000).

92 222 F.3d at 881 (quoting *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983)).

93 222 F.3d at 885.

By using the word "or," the statute lists people who can file an appeal in addition to persons aggrieved. The usual disjunctive meaning of the word "or" is "to express an alternative or to give a choice of one among two or more things."[94] There is no denying that the statute lists "a taxpayer" as a person who can file an appeal *in addition to* a person aggrieved.

One could debate whether the word "affected" modifies only its immediate antecedent – "municipality" – or also taxpayer, and thus whether any "taxpayer" can appeal or only a "taxpayer [who is] affected" by the decision. But even under the more-restrictive construction, Larry Freedlund is a taxpayer affected by the Board of Adjustment's decision in this case. He thus has standing to appeal wholly apart from his status as an aggrieved person. This precise construction has been adopted by numerous courts.[95]

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94 *In re Ryan* A.,_____ Ariz. _____, 39 P.3d 543 (App. 2002) (quoting *Rutledge v. Board of Regents,* 147 Ariz. 534, 556, 711 P.2d 1207, 1229 (App. 1985)).

95 *E.g.*, *City of Pompano Beach v. Zoning Bd. of Appeals,* 206 So. 2d 52 (Fla. App. 1968) (identical Florida statute "provides that three classes of persons may appeal from a decision of a Board of Adjustment: aggrieved persons, taxpayers, or any officer, department, board or bureau of the governing body of the municipality."); *Scott v. Board of Adjustment,* 405 S.W.2d 55 (Tex. 1966) ("the statute provides for three separate classes of people who may appeal: (1) any persons aggrieved; or (2) any taxpayer; or (3) any officer, department, board or bureau of the municipality. The three groups are set out disjunctively."); *Boulden v. Marin Commissioners,* 535 A.2d 477 (Md. 1988) (reviewing same statute and concluding that "no conclusion is possible other than that the legislature intended to give a taxpayer standing to appeal notwithstanding lack of aggrievement.").

III. THE TRIAL COURT ERRED IN DENYING THE RAA'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT.

After the City filed its motion to dismiss, the RAA requested leave to amend the complaint in order to incorporate the specific allegations in the affidavits of its members. If a deficiency in the complaint can be cured by pleading alone, the motion to dismiss should be denied; if granted, the plaintiff should be given leave to amend.[96] The trial court acknowledged that it must ordinarily grant leave to amend the complaint. However, the trial court concluded that the amendments would be "futile" because it would still have to dismiss even if amendment were allowed. The court considered the affidavits of the RAA members in making this determination.

This court must evaluate the standing issue in light of the RAA members' affidavits, just as the trial court did, whether the procedural lens is the propriety of dismissal under Rule 12 or the propriety of amendment under Rule 15. Thus, to a certain practical extent, the motion to amend is beside the point. For the sake of logical completeness, however, plaintiffs hereby argue that their proposed amendments were not futile because the affidavits do show enough to confer standing. The trial court's denial of the motion to amend was therefore error.

IV. THE TRIAL COURT ERRED IN DENYING THE RAA'S MOTION FOR SUMMARY JUDGMENT

The trial court erred in failing to grant the RAA's motion for summary judgment, to which the defendants never filed a response.

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96 *Republic Nat'l Bank of New York v. Pima County*, 200 Ariz. 199, 25 P.3d 1 (App. 2001); *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 637 P.2d 1088 (App. 1981).

The City was served on January 22, 2002. The City filed a motion to dismiss on February 14, 2002. The RAA filed a response to the motion to dismiss on March 22, 2002. On the same day, the RAA filed a motion for summary judgment on the merits.

The RAA's motion showed that the record was devoid of evidence to support two of the four required elements for a variance. Rousseau testified under oath that he had already redesigned his project to comply with existing zoning and had actually filed for a building permit.[97] Rousseau had thus admitted that the variances were not "necessary" for the preservation of his property rights.

Moreover, the record contains no evidence that "special circumstances" apply to Rousseau's property. The purported special circumstances were the dimensions of the lots, but the record establishes that Rousseau's lots are the same dimensions at every other lot in the neighborhood.[98] This court has held that these requirements – necessity and special circumstances – are "jurisdictional prerequisites" to the granting of a variance.[99]

The defendants argued that the summary judgment motion was premature under Ariz.R.Civ.P. 56(a). That rule provides that a claimant may file a motion for summary judgment "no sooner than the date on which the answer is due." The defendants argued that no answer was "due" until after the court ruled on their motion to dismiss. The defendants argued that they could thus refuse to respond to the motion for summary judgment. Instead they filed a motion to strike.

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[97] I.R. 21, ¶ 10.

[98] I.R. 21, ¶¶ 2, 11.

[99] *Ivancovich v. City of Tucson*, 22 Ariz. App. 530, 529 P.2d 242 (1974).

The City was served on January 22, 2002. An answer was "due" 20 days later on February 12, 2002 (or possibly a few days later in accordance with a short informal extension that was granted to the City). An answer is "due" when it is scheduled or expected in the prescribed course of events. Rule 12 gives the defendant the *option* of raising certain defenses by way of a motion instead on an answer. But this option does not change the date on which an answer is "due" for purposes of Rule 56. Otherwise any defendant could keep a plaintiff at bay for several months by casting any plausible argument as a motion to dismiss for failure to state a claim under Rule 12(b)(6). This would invite delay and permit unfairness in any case (such as a collection case) in which the plaintiff wanted to seek speedy relief on the merits under Rule 56.

Due to the defendants' failure to respond, the trial court was obliged to grant the motion for summary judgment pursuant to Ariz.R.Civ.P. 7.1(a).

CONCLUSION

The task is striking the balance between too much judicial review and too little, and the trial court erred by striking the balance at zero. No one can seriously contend that the only stake of Ian Cartwright and Larry Freedlund in this case is the same undifferentiated stake as the other 1.3 million residents of Phoenix. They and the others have alleged an injury that is "peculiar to" themselves and quite clearly "more substantial" than the general public. Denying standing to those in the immediate neighborhood would create an unprecedented and dangerous system in which most variance decisions are immune from judicial review. For these reasons, the trial court's decision must be reversed and the case remanded for further proceedings.

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By_____
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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, the undersigned hereby certifies that this brief was prepared in a proportionately spaced typeface (Times New Roman, in 14 point type) and contains a total of 10,368 words.

_____
CAMERON C. ARTIGUE

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, CAMERON C. ARTIGUE, as counsel for appellants do certify that on the ____ day of February, 2003, I caused delivery of this Opening Brief as follows:

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