MARICOPA COUNTY, ARIZONA
Board of Adjustment
Minutes
July 18, 2019

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

ROLL CALL/
MEMBERS PRESENT:
Mr. Jason Morris (left 10:54 a.m.)
Mr. Greg Loper (left 10:54 a.m.)
Mr. Jeff Schwartz
Ms. Fern Ward

MEMBERS ABSENT: Mr. Craig Cardon

STAFF PRESENT:
Ms. Jen Pokorski, Planning & Development Director
Mr. Darren Gerard, Planning Services Manager
Mr. Glenn Bak, Planner
Mr. Raymond Banker, Planner
Mr. Martin Martell, Planner
Ms. Jaclyn Sarnowski, Planner
Mr. Eric Smith, Planner
Ms. Rosalie Pinney, Recording Secretary

COUNTY AGENCIES: Mr. Wayne Peck, County Attorney

ANNOUNCEMENTS: Chairman Morris made all standard announcements.

APPROVAL OF MINUTES: June 20, 2019

AGENDA ITEMS: BA2018081, BA2019023, BA2019025, BA2019027, BA2019024

Chairman Morris requested a motion to approve the June 20 minutes.

BOARD ACTION: Member Ward motioned to approve the June 20, 2019 minutes. Member Schwartz second. Approved 4-0.

REGULAR AGENDA

BA2018081 **Dalley Property (Cont. from 12/20/18)** **District 4**
Applicant & Owner: Erin Dalley
Location: 51440 N. 329th Ave. – 329th Ave. & Luray Rd. in the Wickenburg area
Zoning: Rural-43
Requests: Variance to permit:
1) Existing accessory structure (shed) side setback of 1.5' where 3' is the minimum permitted and;

2) Existing single-family residence side yard setback of 20' where 30' is the minimum permitted and;
3) Existing lot area of 43,237 sq. ft. where 43,560 sq. ft. is the minimum required and;
4) Existing lot width of 132' where 145' is the minimum required

Mr. Smith presented BA2018081 and noted there's no known opposition. The residence was built in 1975 and the parcels were in existence in 1975. These properties were recently combined. Staff does not support this request.

Vice Chairman Loper asked if the subject parcel was created in 1975, and the residence was also developed in 1975. Mr. Smith said that's correct.

Member Schwartz asked if the owner was consistent from 1972, and when were the improvements made to the site. Mr. Smith said the Dalley's are new owners, and there should be a building permit to improve the existing structures.

Member Schwartz asked if the burden of this issue is on the new property owner, or the old property owner that had this existing condition and now trying to get it into compliance? Mr. Smith said it's on the new property owner and they want to improve the property.

Mr. Gerard said this is a consolidated lot and it was previously two substandard lots that were each more substandard than a consolidated lot. It appears from the aerials this house was built prior to the permitting requirements. He doesn't know if the previous lots existed prior to 1969 which would make them grandfathered. It's not an unpermitted structure and there's no violation. It was a substandard situation and now it's less substandard.

Mr. Brandon Dalley, the applicant, said they bought the property a little over a year ago. The property was abandoned and rat infested, and they are trying to fix it up as an investment property. We are trying to get everything done right by getting permits. During the permitting process they were told to combine the lots since the lots were two half-acre lots. In doing so they had to zone it. The setbacks were different because this house was built in the early 70's not in the 60's, and the setbacks from the property lines aren't as they should be.

Member Schwartz said he believes to ask for permission and not for forgiveness, and he thanked the applicant for going about it the way it should be done. This is a unique situation and we need to look at those unique situations. This could be a lot of work, but it is the right way to do things.

Chairman Morris said this is the direction the County would like to see vacant lots and abandoned structures with reinvestment and redevelopment, but it's not the basis for granting a variance. We do look at the peculiarities of the site and in this instance there are circumstances that warrant the variance.

BOARD ACTION: Vice Chairman Loper motioned to approve BA2018081 with conditions 'a'-'c'. Member Schwartz second. Approved 4-0.

a) General compliance with the site plan stamped received June 20, 2019.

b) All required building permits for proposed and existing development shall be applied for within 120 days of the hearing date unless otherwise directed by the Board. Failure to apply for any required building permits within the specified time, or to complete necessary construction within one year from the date of approval, shall negate the Board's approval.

c) Satisfaction of all applicable Maricopa County Zoning Ordinance requirements, Drainage Regulations, and Building Safety codes.

BA2019023	**Dubei Property (Cont. from 6/20/19)**	**District 1**
Applicant & Owner:	Daniel & Kendra Dubei	
Location:	26606 S. 202nd St. – northeast of the intersection of Hawes Rd. and Empire Blvd. in the Queen Creek area	
Zoning:	Rural-43	
Request:	Variance to permit: 1) Proposed front setback of 33' where 40' is the minimum permitted	

Mr. Martell presented BA2019023 and noted the site is surrounded by similar sites that are all residential, and in the same zoning district Rural-43. The home was constructed around the year 2000, and the current property owner purchased the property in 2010. Recently the property received approval of government action for an underground drainage pipe resulting in a reduced lot size of 41,372 square feet where the minimum is 43,560 square feet. On March 8, 2017 the Flood Control District condemned the front 3,243 square feet of the property rendering the property undersized. This is for the Sonoqui Wash Channelization Project which is a drainage easement along 202nd Street from Riggs Road to a drainage basin south of Empire Boulevard. The applicant proposes to add 3,801 square feet for a total of all the structures on the property at 10,257 square feet, and with all the additions to the home the total lot coverage is going to increase from 15.6 percent to 24.8 percent. The applicant is requesting a variance to reduce the building setbacks from the required 40 feet to 33 feet. Staffs findings are based on what was submitted and the applicant has failed to demonstrate there's a peculiar condition facing the property because the rectangular lot is similar to the majority of the surrounding properties in the immediate area. The distance from the front property line to the existing home is 58 feet which is 18 feet greater than the required 40 feet. The applicant has failed to demonstrate undue physical hardship that prevents the development of the property. There are alternatives available to the property owner such as placing the proposed structure elsewhere on the property or reconfiguring the footprint of the home. The applicant has also failed to demonstrate the peculiar condition or physical hardship that was not self-created in the line of title, and the new addition can be redesigned in such a way to alleviate the need for the variance. The applicant also did not demonstrate the general intent and purpose of the zoning ordinance will be preserved with a variance by listing a financial hardship in the questionnaire, which is not a physical hardship to support a variance.

Vice Chairman Loper asked if the condemnation was on the frontage. Mr. Martell said yes on the front of the property.

Vice Chairman Loper said this resulted in the Flood Control District condemning, and asked would the variances have been required had the Flood Control District not taken that action.

Mr. Martell said if the Flood Control District did not take that action they would have even more room in front of the property.

Vice Chairman Loper asked at least another seven feet to make them legal as requested. Mr. Martell said correct, not accounting the easement that existed at the time.

Mr. Daniel Dubei said he bought this house in 2010 and had no plans of doing any additions at the time since it was just him and his wife. Their family grew and they are needing more than 1,400 square feet. The only way to do that is basically going to the side and forward a little bit. With the government action taken, they weren't aware they couldn't use that property. When they signed with the Flood Control District they said they could use their property as normal because they were just taking the under part of the land. When they made the plans they didn't take that into consideration where they couldn't use that part of the land. We invested about $7,000 to create this plan, and then we found out we couldn't use that part of the land, so that is why he is here.

Chairman Morris asked if he's had the opportunity to discuss this with any of the neighboring property owners. Mr. Dubei said yes.

Vice Chairman Loper asked isn't there a clause in the MCZO, if there is a taking of a government action it somehow grandfathers at least the existing conditions of a lot whether for right-of-way or any sort of taking. Mr. Gerard said the ordinance does indicate that in the event of government action that creates a substandard situation and it would be considered legal non-conforming.

Vice Chairman Loper asked is that just for the existing, or are they proposing stuff above and beyond that. Mr. Gerard said that is correct.

Mr. Peck said that's why there is no variance required for area. The taking by the Flood Control District is what caused the undersized lot and this is a proposal, so it's not covered.

Member Schwartz asked if there's been any consideration to talk about a government action taking against a property. It's just not causing a compliance of area, but if someone wants to make future improvements they'll be limited to that because the government took it. The owner may not know the impact at the time, but they are going to have the unintended consequences of something they didn't think about. It starts limiting what they could do or weren't aware of as we are.

Mr. Peck said had the proposed addition existed so that it couldn't fit within that 18 foot area, the government action would have converted that to a legal non-conforming situation. The lot now exists so you need to meet the requirements if you propose something new. According to staff there's 18 feet between the edge of the house and the edge of the setback line. The variance they are requesting is to go more than those 18 feet, and that's what you have to consider.

Member Schwartz asked if the County ever considered looking at not just this particular issue, but overall when there's a taking occurring. The taking of the front may have an impact on where that line could have been. Mr. Peck said when property is condemned there are two measures of the damage for which the homeowner is compensated, and in this case 3,700 feet was taken.

They would have been paid the value of that 3,700 feet, and the second element is as a result of taking that, did it devalue the remainder of the property. If the answer is yes then they are compensated for that change in value as well. When a condemnation is taken, the issue you're raising is considered at that time and it's addressed through monetary compensation.

Mr. Gerard said staff does take into consideration the comprehensive picture. You can consider a substandard lot some peculiarity for issues of setbacks. Staff's analysis is an addition could be proposed that meets the current setback requirements, and that's the recommendation for denial.

Chairman Morris said it's a fair analysis that occurs on these lots, and in this instance where the plans that were drawn may have pre-dated the taking. The property owner may have thought they would have the benefit of the lot based upon the way the Flood Control District described the taking was subsurface. These are all considerations the Board can think about.

Member Ward asked are there any other homes affected by this underground drainage pipe? Mr. Martell said this was the only property on that portion of 202nd Street.

Member Ward asked will this come back for other homes asking for the same. Mr. Martell said only undeveloped property.

BOARD ACTION: Member Schwartz motioned to approve BA2019023 with conditions 'a'-'c'. Vice Chairman Loper second. Approved 4-0.

a) General compliance with the site plan stamped received June 24, 2019.

b) Failure to complete necessary construction within one (1) year from the date of approval, shall negate the Board's approval.

c) Satisfaction of all applicable Maricopa County Zoning Ordinance requirements, Drainage Regulations, and Building Safety codes.

BA2019025	**Orangewood Plaza**	**District 2**
Applicant & Owner:	Jeff Rogers, Custom Homes & Orangewood Plaza LLC	
Location:	207 S. 98th Way – 98th Way & Balsam Ave. in the East Mesa area	
Zoning:	R-5	
Request:	Variance to permit: 1) Proposed side setback of 7.74' (north property line) where 10' is the minimum permitted	

Mr. Bak presented BA2019025 and noted the property is currently vacant and there's no known opposition. The test fails to meet the statutory test for a variance and by choosing another floor plan that would be narrower could meet the setbacks.

Chairman Morris asked if the applicant was present. Applicant not in attendance.

BOARD ACTION: Vice Chairman Loper motioned to continue BA2019025 to the August 15 hearing date. Member Schwartz second. Continued 4-0.

BA2019027 **Webb Property** **District 1**
Applicants: Dustin Becker & Jessica McGalliard
Location: 16132 E. Twin Acres Dr. in the Gilbert area
Zoning: Rural-43
Request: Variance to permit:

1) Proposed lot area of 40,377 sq. ft. where 43,560 sq. ft. is the minimum permitted

Mr. Banker presented BA2019027 and noted the subject parcel is 3,180 square feet under the minimum one acre required. The applicant is in the process of purchasing the property to build a single-family residence. As shown on the proposed site plan, access would be from the east via an ingress/egress easement and the setbacks proposed for a residence would be met. The applicant provided documentation showing support from the surrounding neighbors with seven support documents. Staff just received letters of opposition from a neighbor that came to the hearing late. Staff is unable to support this request since there is no peculiar condition facing the property and the site is as a result of lot splitting over time. There are possible alternatives to the variance by acquiring more land to meet the minimum one acre requirement. There was a previous variance on this site under BA2004006 for the same exact request. It was denied by the Board in 2004.

Mr. Dustin Becker, the applicant, said he and Ms. Jessica McGalliard are wanting to purchase this lot and build a home. In 2004 there was a request for a variance, and back then there was more land to acquire as to why they might have denied that variance. Today the lot is surrounded by homes and the land to the south is currently under construction. That neighbor is not inclined to sell any property so they could have a full acre. All the lots in the neighborhood have a house on them, except for the lot they are wanting to build a house on. If there is not a home it will remain an island, and he is not sure where they would acquire any land in the future. He didn't speak with the neighbors to the north, only the Maricopa County neighbors. The lady here in opposition approved it, so he isn't sure what she wants to say about it today.

Chairman Morris said this site originally had a variance request for a substandard lot size and that was denied back in 2004 and at that time based upon the aerial maps there was an opportunity for the property owner to expand in one direction or another, which would give them the additional 3,500 square feet they were looking for, but that opportunity doesn't exist today. Mr. Becker said no it does not.

Chairman Morris asked if they are under contract to purchase the property. Mr. Becker said yes.

Chairman Morris asked if they explored a rezoning or any other options with staff. Mr. Becker said the only other option would be to purchase the additional 3,200 square feet or file for this variance and hopefully we warrant the need for the variance.

Chairman Morris asked about the rezoning of that lot. Mr. Gerard said it would be a residential spot zone that staff wouldn't support.

Member Schwartz said they are between a rock and a hard spot, they cannot rezone because it will set a precedence, and you don't want people splitting their lots shy of the amount.

Member Ward said 20 years later there's nothing to be done about it. The people surrounding the lot get the benefit of always having an extra acre.

Ms. Laura Esparza said she lives to the west of this property. Originally this lot was 1.9 acres and the owner of the property cut it off to sell it and make a profit. The others that purchased the property have tried to get extra footage from the other homeowners and are objecting to it. She is concerned the property values would go down. If you build on a smaller lot and compare it to a regular house on one acre it lowers the value.

Ms. Esparza asked is the legal address of this lot on 162nd Street or Twin Acres Drive? Mr. Banker said the addressing department assigned 16132 E. Twin Acres Drive.

Ms. Esparza asked what the accessibility to that lot is. Mr. Banker said it depends on the easement, but from the site plan provided by the applicant the driveway is shown to access from the east.

Ms. Esparza said the access was her biggest concern. This is the last green area in Gilbert on a County Island with horses and cows and everyone has chickens. If you allow this variance then the guy on the south side will try and sell his .9 acre. The acreage just south of that is four or five acres with alfalfa, then they will start chopping that up also if you allow the variance. It's a prime location in Gilbert and she doesn't want it to get rezoned. She doesn't want anyone driving in her backyard to get to the property.

Member Schwartz asked if she would prefer a vacant lot or a rezoning or a lot to remain 2,000 feet short. Ms. Esparza said you cannot stop growth but you can manage it. As long as the access is on 162nd Street that would be okay, but some of the other neighbors are against this more then she is. She is trying to find a compromise since she is adjacent to it. The neighbors north of the lot are definitely opposed to this. Nobody knew about this until the sign was put up on July 5, and no one received a letter in the mail. She had to scramble at the last minute for letters, and she apologizes for the last minute documentation. There would have been more people here but they really didn't know about it.

Member Schwartz asked staff about the legal notice and the process. Mr. Banker said staff is not required to send out notice to the surrounding neighbors. They post the property for 10 days for variances, which is different than doing a rezone or a Special Use Permit where you are required to mail out to the neighbors within 300 feet, but not in this case.

Mr. Becker said he will have access to the east and not on her street. The surrounding neighbors that would share a property line are in approval of this. He's not sure who disapproved but they might not even be able to view the property. Chairman Morris said she was referencing the properties to the north in Gilbert, and he asked if there are properties to the north that share a property line. Mr. Becker said yes.

Chairman Morris asked what kind of outreach was done with the neighbors. Mr. Becker said he knocked on doors and introduced himself. He told them they were short square footage and asked if they would approve if he filed for a variance.

Vice Chairman Loper asked what size home is proposed on the property. Mr. Becker said just under 3,000 square feet. The setbacks are smaller than those in the regulations and he is way

within the setbacks. The Town of Gilbert also said they had no objection as long as they were within the setbacks.

Vice Chairman Loper asked if that's a comparable size to the neighbors. Mr. Becker said it is comparable to the house to the north and believes the homes to the west are smaller.

Vice Chairman Loper asked it's really not the substandard lot that is dictating the size of the house because you are well within the setbacks and this is your choice for the home, and even if it was 43,560 square feet would you still be doing this same home. Mr. Becker said correct.

Member Ward asked recognizing the concern about keeping the flavor of a County Island with the other properties and having less than an acre, would this be setting any kind of precedent? Mr. Gerard said variances should not be considered precedential, they each have to come back on their own merits.

Chairman Morris said every one of these properties that come before us are unique, and every one of the applicants need to make a case on their own. They may point to a pattern of development in a certain area but every property needs to show they have a unique circumstance on their own.

Mr. Becker said he received a letter from the Roosevelt Water District. There's a canal on the east side of the property and the people downstream could not get water since it was overgrown, and that's because it was vacant lot and nobody was taking care of it. He helped the neighbor get rid of the debris, and if you grant this variance that will not be an issue in the future because there will be somebody maintaining it.

Member Schwartz said he is in support of the variance. It is in the public's best interest to have a home there even if the property is 2,000 square feet short instead of leaving it vacant.

Vice Chairman Loper said he wished they would have done the outreach with the neighbors to the north and we don't know their opinion. Over the past 15 years there's been efforts made to try and acquire additional property to make this legal and that's been unsuccessful. Here we are and it's not serving any purpose other than a vacant piece of property. The size of the home is not indicative of a smaller lot, and it is indicative by being their wish. He is in support of the variance.

Chairman Morris said staff's response of the potential rezoning of the property given what could occur on this property. He is not an appraiser but he has enough experience in land use that sometimes a vacant lot in the neighborhood can have a much more detrimental impact on property values of surrounding houses than a well-built consistent home. Given the small amount we are talking about he would be shocked if an appraiser picked up on the fact that this lot was substandard given the type of houses in the rest of the neighborhood.

BOARD ACTION: Member Schwartz motioned to approve BA2019027 with conditions 'a'-'c'. Member Ward second. Approved 4-0.

a) General compliance with the site plan stamped received June 17, 2019.

b) All required building permits for proposed development shall be applied for within 120 days of the hearing date unless otherwise directed by the Board. Failure to apply for any required building permits within the specified time, or to complete necessary construction within one year from the date of approval, shall negate the Board's approval.

c) Satisfaction of all applicable Maricopa County Zoning Ordinance requirements, Drainage Regulations, and Building Safety codes.

BA2019024 **Interpretation** **All Districts**
Applicant: Tom Galvin, Rose Law Group
Request: MCZO, Art. 804.2.45 and 805.2.1 Third-Party Sales of medical marijuana extracts and other products in the C-2 and C-3 zoning districts

Chairman Morris and Member Loper recused themselves from this case, and Member Schwartz is acting Chairman.

Ms. Sarnowski presented BA2019024 and noted the applicant requested the Zoning Official interpret the definition of Medical Marijuana Dispensary to include sales to third parties for resale as an allowed use in the C-2 and C-3 zoning districts. This is not a site specific issue and would apply County wide. The Zoning Official interpreted the definition to allow the retail sale only to those who possess medical marijuana cards who are the actual users. A medical marijuana dispensary is a retail operation and the interpretation proposed by the applicant would include wholesale sales. Wholesale operations is permitted in IND-1 zoning district and not in commercial zoning districts. It is the view of the department that wholesale is not permitted in or compatible with retail operations and only appropriate in industrial zoning districts. It is staff's interpretation of the ordinance that cultivation, infusion, extraction, and similar activities related to a medical marijuana dispensary can be considered ancillary to and can occur on the premises of a medical marijuana dispensary for on-site sales in the C-2 and C-3 zoning districts. Such activity for product to be exported/distributed off-site to other medical marijuana dispensaries is an industrial use as it is wholesale sales, and requires industrial zoning. This interpretation is spelled out in more detail in the Director's letter to Rose Law Group, dated June 26, 2019 and is in the staff report. The Maricopa County Zoning Ordinance is a permissive regulatory document meaning that if a use is not expressly listed as a permitted use then it is a prohibited use, unless in the determination of the Zoning Inspector it is one of the uses considered to be customarily incidental to, and ancillary to, the permitted primary use of the property. Staff recommends to the Board to deny the applicant's interpretation and uphold staff's interpretation.

Mr. Gerard said for clarification, our ordinance is a permissive document and it rolls up. Anything that's permitted in C-2 and C-3 is permitted in Industrial, so you can be in an industrial zoning district have wholesale and off-site grow locations and also have the retail sales and dispensary, but it doesn't go the other direction. It's not specifically called out and we don't consider it ancillary.

Member Ward said what stood out to her in the report is the weight, and asked if they could put a weight restriction on the vehicles. Mr. Gerard said he believes that may be appropriate direction to consider for regulatory reform and it's not appropriate venue for an interpretation which would be applied across the County to every C-2 site.

Mr. Peck said Mr. Gerard is correct, it would apply throughout the County. There is nothing in the ordinance that talks about the vehicles, and that would have to be an amendment to the zoning ordinance through the Planning and Zoning Commission and the Board of Supervisors. This is not like a variance where you can put conditions. If you accept the interpretation by the applicant that would apply County-wide to medical marijuana, and could be viewed as applying in all retail operations and all retail operations could also be wholesale.

Mr. Thomas Galvin said he is with Rose Law Group on behalf of the applicant and noted they understand staff's position, but strenuously disagree with the interpretation. The seek guidance if the County can restrict a property owner from selling products produced at this location to other third-party locations in Arizona. They believe that state law does not allow a County jurisdiction to restrict where sales of a product can occur nor regulate the business of sales of the company. The zoning ordinance deals with separation requirements and reasonable zoning restrictions. It doesn't deal with the sales or how the sales are operating at the site. After reviewing the case history there's enough evidence to determine that third-party sales are not regulated by cities, towns, or counties, but regulated by the State of Arizona and the Arizona Medical Marijuana Act (AMMA) and enacted by Arizona Department of Health Services (ADHS). They are requesting the interpretation to allow third-party sales on the subject site and throughout the County. In 2010, Arizona voters legalized the medical use of marijuana. ADHS carefully created highly restrictive rules to regulate the Medical Marijuana Program in accordance with the state statute. Dispensaries can sell to other dispensaries and sell to marijuana card holders. At their sites they can do infusion, extraction and cultivation all are part of their sales operations. There are no restrictions on when a dispensary can sell to another dispensary. The State of Arizona through the state statute and ADHS created the governing rules on the operation of sales. Maricopa County Zoning Ordinance (MCZO) comes in with reasonable zoning regulations, according to A.R.S 36-2806.01 "Cities, towns, and counties may enact reasonable zoning regulations, (not sales) that limit the use of land for registered nonprofit medical marijuana dispensaries to specified areas." The MCZO does a good job of providing definitions and permitted locations for medical marijuana sites. This is the ordinance for a Medical Marijuana Dispensary – "An entity defined in A.R.S. 36-2801(11) that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies, sells, or dispenses marijuana or related supplies and educational materials." This is a blanket definition and it doesn't say what type of sales there are, it just says sales. By County's own definition dispensaries are allowed to acquire, cultivate, manufacture and sell product – no restrictions. The state statute says "a not-for-profit entity that acquires, possesses, manufactures, delivers, transfers, transports, supplies, sells or dispenses marijuana." The zoning ordinances flows from the state statute. There is another definition in the zoning ordinance and it is for offsite cultivation which is different than dispensaries, and that's the distinction that the zoning ordinance makes by the County. Offsite cultivation is an additional location where marijuana is cultivated. It does not contemplate sales transactions, so that is a separate activity that is regulated by the County. It does not mention third-party sales. By the County's own definition "offsite" is an additional location separate from the dispensary, no mention of sales. In the state statute and in the state regulations from ADHS dispensaries can sell to other dispensaries and can sell to cardholding patients. The County ordinance flows from definition in chapter 2 of the ordinance, "dispensaries are allowed to acquire, cultivate, manufacture and sell product, no restrictions." ADHS established very stringent set of regulations to oversee the entire Medical Marijuana Program. It's ADHS that regulates how marijuana is sold through the rules in accordance with the state statute. The County's zoning ordinance says that the dispensary facilities are subject to all rules adopted by ADHS. We could not allow the County to set new rules for medical marijuana dispensaries and how they could do

their sales because that would be in conflict with state law and state rules. Otherwise we would have 15 different counties contravening state rules. In the state statute, A.R.S. 36-2816(B) "A registered nonprofit medical marijuana dispensary or agent may not dispense, deliver or otherwise transfer marijuana to a person other than another registered nonprofit medical marijuana dispensary." So right here it says a dispensary can sell to another dispensary. There's other indicators of when state statute and state rules regulate sales. A dispensary shall only acquire marijuana from another dispensary and for acquiring medical marijuana from another dispensary. A dispensary that prepares, sells, or dispenses marijuana-infused edible food products shall obtain written authorization from the department to prepare, sell, or dispense marijuana-infused edible food products. These are examples of state rules and regulations that regulate the sales operation of a dispensary. State licensed dispensaries sell marijuana products to other dispensaries all the time. It happens in municipalities, towns and cities and unincorporated areas, and on county islands. These types of sales or transactions are regulated and overseen by Arizona Department of Health Services, not by a county and not by a city. Staff's analysis compares medical marijuana dispensary to a bake shop and a drug store. Bakeries and drug stores are not regulated by the State of Arizona. Medical marijuana is a heavily regulated program because it was passed by the voters. It's a heavily regulated regime which conducts the rules and regulations state-wide for sales operations. This is an unfair comparison to compare marijuana to a bakery. Staff's analysis compared an extraction component to a wholesale business, it's not a wholesale business it is direct sales. The County definition only said sales, and the state statute only says sales. AZDHS carefully crafted highly restricted inventory control system. A state regulated industry cannot be overridden by County rules that erroneously interpret AZDHS rules, state statute and even the County's own ordinance which only regulates the definition of what a dispensary is in accordance with state statute and only regulates through land use requirements and zoning requirements such as separation requirements from a church and a school. They contacted other cities in other jurisdictions if they regulate sales transactions for marijuana. The answer was no. He included letters in the packet from City of Phoenix, Scottsdale, Peoria, and Tempe with similar comments - "the state handles the regulations on licensing and who their products can be distributed to through AZDHS." This clearly shows the situation we have here, dispensaries can sale to other dispensaries and to patient cardholders, and the County is unable to regulate sales because that would be in contravention to state rules and state statutes.

Acting Chairman Schwartz asked if people are wholesaling out of their retail operations, so there's other industries that have the same situation as the applicant you are representing. Mr. Galvin said no, marijuana is a very tightly highly regulated structure. This comes from a state law by voters in 2010 and it is voter protected. You have the ADHS promulgated rules throughout the state in accordance to follow as the voters asked for. The state law says the counties can enact reasonable zoning requirements for dispensaries and marijuana type facilities. If there's ecommerce issues the county has to take a look at that separately. We are here today to discuss just the issue of medical marijuana and how it's regulated by the County. You have to ask yourself, can the County go against the state and regulate the sales of marijuana within the County. The answer is no.

Acting Chairman Schwartz asked is there are any unintended consequences by approving this today. Mr. Galvin said no there's not unintended consequences. The only unintended consequences is if you approve what staff has said because the interpretation is against state law and that could be challenged in court. The zoning interpretation that you're regulating sales

activities, which doesn't happen anywhere else in the entire State of Arizona and it doesn't even happen in any other county is going to be a problem.

Acting Chairman Schwartz asked if anyone from the public wishes to speak. Mr. Gerard said County Counsel wishes to speak to some of the issues raised. Before you is an appeal of the zoning ordinance, and the meaning of words or phrases not state statute. The zoning regulations of our jurisdiction are different than the other jurisdictions. There's not consistency of regulation of medical marijuana facilities across the jurisdictions, they are all different. What is before you is an interpretation of words and the County's zoning ordinance, and that is all what's before the Board today.

Mr. Peck said the Board does not have authority to interpret the state statute, and your jurisdiction as the Board of Adjustment is extremely limited in this situation. What the statute says, if there is a dispute about a word or a phrase that's what the Board can interpret. The argument made by Mr. Galvin would be very effective if it were made on Wednesday before the Board of Supervisors, not before the Board of Adjustment. Whether this ordinance is in violation of the state statute or it's contrary to the state statute is not relevant to your determination. What did the Board of Supervisors mean when they adopted the zoning ordinance? With the very first statement that Mr. Galvin made, "zoning ordinances do not control sales." That is not true at all. If you look at the differences between the commercial zoning districts and the industrial zoning districts you will see specific regulations that deal with sales. The ordinance in Maricopa County clearly delineates wholesale from retail and when one business sells to another business that is wholesale, and wholesale is sale. Staff's interpretation is we allow retail sales in retail zoning districts, a commercial zoning district. We allow wholesale sales in industrial districts. If the applicant were saying we can sell to other medical marijuana dispensaries from our dispensary located in and IND zoning district – staff's interpretation would be different. This is to say we can wholesale from a retail zoning district. He disagrees that this would have unintended consequences because if the retail zones are interpreted by you to allow wholesaling then that could apply to any business. He doesn't agree with Mr. Galvin's characterization of the state regulations, but before you they are irrelevant. If Mr. Galvin feels the zoning ordinance is in violation of the state statute, the place to address that is with the Board of Supervisors through the amendment process. The only thing you need to decide is what the Board of Supervisors mean when they separated wholesale from retail uses and did they intend that to apply to medical marijuana. If the Board intended something to be allowed the ordinance says so. One of the general interpretations in our zoning ordinance is if it doesn't say you can do it then you can't do it. You have to only decide what the ordinance says, not the extraneous legislative issues that were raised by Mr. Galvin.

Mr. Galvin said he is not arguing that any ordinance is contravening state law right now. If you go forward with what staff is recommending would be contravening state law. There is no contemplation in the state rules and the state statute of wholesale marijuana sales, there's no distinction. The state allows for sales of marijuana. The zoning ordinance in the definition allows for sales of marijuana, and there is no distinction between retail and wholesale. Now you're going to be creating a new definition. He doesn't understand how this zoning interpretation can pass muster in court, because you'll be defending in court this new wholesale definition that's separated out that a dispensary when they come into the County are only operating under the state statute that says sales, or the County ordinance that says sales. When we look at the zoning ordinance for C-2 and C-3 it says "a dispensary shall not be located within 1,500 feet of another dispensary, shall not be located within 1,500 feet of a church, a school, a daycare center, a

public park or playground or adult-oriented facility." It doesn't say anything about wholesale or retail marijuana, because there's no such thing as wholesale or retail marijuana. Dispensaries can sell from a dispensary to another dispensary. If you approve this zoning interpretation you're creating a new language of wholesale sales occurring at dispensaries simply because they are selling to other dispensaries. It just doesn't exist in the state regulations. He's not saying the current zoning ordinance is a problem, it is fine. He just doesn't want the Board to interpret it in a certain way that would be contravening state rules and regulations because the zoning ordinance regulates sales. Marijuana is highly regulated and it comes from the top down from the state. When they talk about offsite cultivation for third parties, it just doesn't pass muster because the product is cultivated, produced and manufactured on the site for sales. If someone is holding a card they can walk in and buy the product, or another dispensary legally through the state can walk in and buy the product. There is no distinction between wholesale or retail, it just doesn't exist.

Acting Chairman Schwartz asked if we make a motion and we have a second, that's not a vote that's just bringing a motion to be voted on. Mr. Peck said correct, the motion would be either to uphold staff's interpretation or uphold the applicant's interpretation.

Member Ward said she moves to uphold the applicant's interpretation. Mr. Peck said the applicant's interpretation that they can wholesale. Member Ward said yes.

Acting Chairman Schwartz said he is seconding the motion but he is not in favor of the motion, it's a quandary here and there's unintended consequences. He certainly understands the argument the applicant is making. He wants to help the applicant to try and come up with a solution, but he's not sure that two members of this Board should be bringing that at this time. There's others that should be weighing in on it. He believes it will have an impact on other types of industries, and it should be a conversation for the Board of Supervisors to have on corrections to be made in the zoning ordinance that would deal with not just dispensaries but other industries. He prefers to continue the case so it will give staff and the applicant time to explore other opportunities that would include either a larger forum within this group with a solution or with the Board of Supervisors. The Board of Adjustment is made up of five and two members had to recuse themselves, but three is better than two. We need more input.

Member Ward said this is an industry that is so tightly regulated and the interactions between other businesses would ultimately give you a better product with a free enterprise system. There's not a lot of allowance for that in such a new industry, but she seconds the motion to have three of them because she's afraid there are going to be secondary issues that she's not seeing.

Member Ward said she withdraws her original motion. Acting Chairman Schwartz said he'll make a new motion to continue the case to 60 days so that staff can explore with the applicant other venues or the opportunity to bring back when there's a larger forum here to discuss this matter.

Mr. Peck said he has concerns with that because participation by this Board in anything other than interpreting the words of the ordinance are outside your statutory authority. You can deny the applicant's interpretation with the suggestion to staff that it travel elsewhere to try and resolve the issue or you can grant the interpretation of the applicant which would mean they could go forward the way they want, but your statutory jurisdiction is extremely limited. To suggest that they discuss and come back with a proposed solution. That has to be handled with the Board of Supervisors.

Mr. Gerard said you can continue it, but what's discussed should be the meaning of a word or phrase from the ordinance.

Mr. Peck said you can continue it so that the other Board member who's not recused can review the record and participate. On the question of what the word means, he has no problem with that.

BOARD ACTION: Acting Chairman Schwartz motioned to continue BA2019024 to the September 19, 2019 hearing. Member Ward second. Continued 2-0-2 (Morris and Loper).

Adjournment:
Acting Chairman Schwartz adjourned the meeting of July 18, 2019 at 11:26 a.m.

Prepared by Rosalie Pinney
Recording Secretary
July 18, 2019