ARIZONA COURT OF APPEALS

DIVISION ONE

ARCADIA OSBORN NEIGHBORHOOD ASSOCIATION, et al.,

Plaintiffs/Appellants,

v.

CLEAR CHANNEL OUTDOOR, LLC, et al.,

Defendants/Appellees.

Court of Appeals
Division One
No. 1 CA-CV 22-0464

Maricopa County
Superior Court
No. LC2020-000294-001

DEFENDANTS/APPELLEES' ANSWERING BRIEF

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INTRODUCTION

This is a case about who has standing under A.R.S. § 9-462.06(K) to file a special action petition challenging a board of adjustment decision affecting real property. For private parties, this statute limits standing to (1) persons who are aggrieved by the decision, or (2) taxpayers who own or lease adjacent property or a property within 300 feet of the adjacent property. The plaintiffs do not seriously contend that they own or lease property within the statutory radius, so this case concerns only the "person aggrieved" basis for standing.

Under Arizona law, possessing an interest shared by the general public does not make someone a "person aggrieved" for purposes of A.R.S. § 9-462.06(K). Because the plaintiffs in this case failed to plead facts showing that the board caused them special damage to a protected interest, different in kind or quality from the damage suffered by the community generally, the superior court properly dismissed their case for lack of standing. This Court should affirm.

STATEMENT OF FACTS AND CASE

I. The proposed development.

This case arises out of a decision by the City of Phoenix Board of Adjustment regarding a property located at the northwest corner of Thomas Road and Central Avenue in "Midtown" Phoenix. [IR-I (Complaint) at Ex. A, p. 1 (APP098) (2910 N. Central Ave., 85012).][1]

Defendant/Appellee J & R Holdings VI, LLC ("J&R") owns the lot, which is mostly vacant except for three billboards owned by Defendant/Appellee Clear Channel Outdoor, LLC. [*Id.* at Ex. A, p. 5 (APP102).] Clear Channel's billboards are located within "a perpetual, exclusive easement (the 'Sign Easement') for the construction, maintenance, repair, dismantling, replacement, alteration, improvement, operation, illumination and use of outdoor advertising sign structures, appurtenances and related property and equipment (the 'Billboards'), over, under, upon

[1] The plaintiffs attached a complete copy of the Zoning Adjustment Hearing Officer ("ZAHO") decision as Exhibit A to their original complaint. [IR-1 at 9, ¶ 19 & Ex. A (APP091, APP096-106).] Although the amended complaint [IR-32] purports to do the same, it includes an incomplete copy. Accordingly, when referring to the ZAHO decision, this brief cites to the complete copy at IR-1.

and across" the property. [IR-26 at Ex. 1 (easement), p. 2; *see also* IR-32 at 11, ¶ 20 (APP131).]

When created, the Sign Easement did not prevent the property's development; the owner could build to the north and west of the Easement. [*See* IR-1 at Ex. A, pp. 5-6, 9 (APP102-03, APP106).] In 2003, however, the City of Phoenix adopted and applied a Transit Oriented Development Overlay ("TOD-1") to the area. [*Id.* at Ex. A, p. 9 (APP106).] The Transit Oriented Development Overlay, as its name suggests, is designed to encourage urban density and "a pedestrian-oriented environment" in areas around light rail stations. *See* Phoenix Zoning Code ("Code") § 662. To that end, and unlike the zoning law in place when the parties executed the Sign Easement, the new TOD-1 standards set a *maximum* building setback of six to twelve feet and require designs to maximize street frontage. *See* Code § 662(A), (I).

The preexisting perpetual Sign Easement on J&R's property runs along both sides of the lot's street frontage, however. To comply with the significantly reduced setbacks of TOD-1, any new structure would have to encroach on the Sign Easement. As a practical matter, the new zoning ordinance made it impossible to develop the lot while still complying with

the preexisting Sign Easement. [*See* IR-1 at Ex. A (ZAHO findings), pp. 5-6, 9 (APP102-03, APP106) ("development will always be conditional on a work-around with the billboards").] Consequently, the site has remained mostly vacant despite its location at a major Midtown intersection, directly next to "both a busy light rail station and one of the busiest bus stops in the city." [*Id.* at Ex. A, pp. 2, 5 (APP099, APP102).]

In 2019, J&R and Clear Channel agreed on a creative solution that would allow development of the lot in accordance with the City's new urban standards, while also preserving Clear Channel's property rights. The proposed solution would relocate Clear Channel's existing signs and easement onto the facade of a new mixed-use tower, thereby freeing up the underlying land for development as desired by the City. [*See id.* at Ex. A, p. 2 (APP099).]

II. The zoning proceedings.

Although the entire project hinges on obtaining approval to relocate the billboards onto the building, different city processes apply to the approvals for the building and the billboard relocation. [*See* IR-32 at 12, ¶ 21 (APP132).] Accordingly, J&R applied for rezoning approval for the mixed-used development and Clear Channel separately applied for approval to

relocate the billboards and easement. [*See* IR-1 at Ex. A, pp. 2-3 (APP099-100).]

Clear Channel applied for five use permits and a variance, which together would allow it to relocate its three static signs from their current location to the facade of J&R's new tower and convert two of the three signs to digital. [*Id.* at Ex. A, p. 2 (APP099).] The City's Zoning Adjustment Hearing Officer held a public hearing on Clear Channel's application. [IR-32 at 12, ¶ 21 (APP132).] Among the participants were plaintiffs Wallace Graham, Neal Haddad, Harvey Shulman, and the Urban Phoenix Project Network ("Urban Phoenix"). [IR-1 at Ex. A, p. 1 (APP098).] The neighborhood association nearest the project, the Willo Neighborhood Association, also participated and supported approval. [*See id.* (APP104).] The record does not reflect that plaintiffs Arcadia Osborn Neighborhood Association ("Arcadia-Osborn") or Tabitha Myers attended or participated in the hearing. [*See id.* at Ex. A, p. 1 (APP098).]

After the hearing, the ZAHO granted Clear Channel's application in part. [*Id.* at Ex. A, pp. 1-2 (APP098-99).] The ZAHO approved the sign relocation subject to certain stipulations but denied the request to convert two of the three signs to digital. [*Id.*]

Clear Channel appealed the ZAHO's denial of the digital conversion to the Board of Adjustment. [IR-32 at 13, ¶ 26 (APP133).] Despite not having participated in the earlier proceedings, Arcadia-Osborn (joined by Urban Phoenix) filed a separate appeal asking the Board to reverse the approval of the sign relocation. [*Id.* (APP133).] After a hearing, the Board granted Clear Channel's appeal and denied the opposition's appeal. [*Id.* at 13-14, ¶ 27 (APP133-34).]

III. The superior court special action.

The plaintiffs then filed a special action in superior court under A.R.S. § 9-462.06(K), seeking to overturn the Board's decision. [*See* IR-1.] The six plaintiffs included four individuals (Harvey Shulman, Wallace Graham, Neal Haddad, and Tabitha Myers) and two non-profit organizations (Arcadia-Osborn and Urban Phoenix). [*Id.* at 2.]

According to the complaint, Graham and Haddad reside 4331 E. Weldon Ave., 85018 and 3402 N. 32nd St., 85018, respectively—about four and six miles away from J&R's property, on the other side of SR-51. [IR-1 at 30;

see also IR-32 at 34 (APP154).][2] Shulman is a part-time Phoenix resident who spends approximately 6 months each year at a condo located more than a half-mile south of the property, at 16 W. Encanto Blvd., #512, 85003. [IR-1 at 5, ¶ 3 (APP087); *see also* IR-32 at 6, ¶ 6 (APP126) & Ex. E, ¶ 2 (APP173).] Myers likewise resides more than a half-mile away, in the Willo Historic Neighborhood, at 502 W. Cambridge Ave., 85003. [*See* IR-1 at 5, ¶ 4 (APP087); IR-32 at 8, ¶ 8 (APP128) & Ex. D, ¶ 24 (APP167).]

None of the individual plaintiffs allege that they can see Clear Channel's signs from property they own or lease. The plaintiffs nevertheless alleged in their original complaint that they were persons aggrieved by the Board's decision because they regularly use the adjacent intersection and will face increased traffic risks if the development proceeds. [*See, e.g.*, IR-1 at 12, ¶ 29 (APP094).] Specifically, they alleged that, "[a]s the result of the Board Decision approving the relocation of Defendant CCO's

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[2] Based on Google Maps, the motion to dismiss calculated the distance between each plaintiffs' home address and J&R's property at 2910 North Central Avenue as 5.9 miles (Graham), 4.1 miles (Haddad), 0.6 miles (Shulman), and 0.6 miles (Myers). [*See* IR-26 at 11 n.5 (APP117).] The plaintiffs did not dispute these calculations below, nor do they dispute them on appeal.

nonconforming billboards" and "conversion of two of those billboards to digital, all of the individual Plaintiffs will be subjected to a real increased risk of personal injury, property damage to their vehicles and other property, and economic/financial harm resulting therefrom." [*Id.*]

The defendants moved to dismiss the complaint for lack of standing under A.R.S. § 9-462.06(K). [IR-26.] The plaintiffs filed responses to the motion to dismiss, along with an amended complaint. [IR-29 (association response); IR-31 (pro se response); IR-32 (First Amended Complaint); *see also* IR-33 (Myers joinder in association response).] The parties stipulated [IR-37] that the pending motion to dismiss would apply to the amended complaint, which added additional detail regarding the plaintiffs' alleged standing, but left the overall substance and nature of those allegations unchanged. [*Compare* IR-1, *with* IR-32.] The plaintiffs continued to claim aggrievement based on "a real increased risk of personal injury, property damage to their vehicles and other property, and economic/financial harm resulting therefrom." [IR-32 at 15-16, ¶ 33 (APP135-36).]

After briefing and oral argument, the superior court granted the motion to dismiss. [IR-49 (ruling) (APP215).]

The superior court first correctly recognized that the "person aggrieved" standard requires showing that the Board's decision caused the plaintiffs "special damage, that is, damage that is different in 'kind or quality' from any damage suffered by the public generally." [*Id.* at 2 (APP216) (citing *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 359, ¶20 (App. 2007)); *see also* IR-49 at 7 (APP221) ("To have standing as 'persons aggrieved' . . . the individual plaintiffs must show that the Board's decision caused special damage to their personal, pecuniary, or property rights that is different in kind or quality form the harm suffered by the impacted community generally.").]

Turning to the specific allegations in the amended complaint, the superior court found that the individual plaintiffs failed to allege that the Board's decision caused them special damages to a tangible personal, pecuniary, or property right, different from the harm suffered by the overall community, because the "crux of each Plaintiffs' alleged harm is safety" and "the safety of a large, busy intersection is a general communal interest, and Plaintiffs fail to show a harm to him or her that is peculiar or greater than the harm to any other citizen using the intersection." [IR-49 at 3, 5 (APP217, APP219).] Buttressing this conclusion, the superior court found that (1) "[a]

potential traffic risk is not an 'injury in fact,'" (2) "a person's interest in traffic safety is not a tangible personal interest, such as a property right or a specific use or enjoyment of property," (3) "nowhere in the Amended Complaint do Plaintiffs allege facts to show that their use of the intersection is unique, and therefore specially harmed, as compared to the hundreds of other people who drive, walk, or ride by or near the intersection of Central and Thomas daily," and (4) "Plaintiffs live between one-half to six miles from the intersection, distances courts find reduce the impact of an alleged offensive condition and, therefore, standing to challenge that condition." [*Id.* at 4 (APP218).]

The superior court also found that the organizational plaintiffs lacked representational standing "because their members are not aggrieved, they allege harm to purely advocacy interest, and like the individual plaintiffs, they allege harm to general communal interests" only. [*Id.* at 7 (APP221).] Finally, it rejected the plaintiffs' alternative claims for standing based on the Constitution and Declaratory Judgments Act. [*Id.* at 6 (APP220).] Accordingly, the superior court granted the motion to dismiss and entered final judgment. [*Id.* at 7 (APP221).]

Plaintiffs/Appellants Shulman, Haddad, Myers, and Arcadia-Osborn filed timely notices of appeal. [IR-51; IR-52.] Plaintiffs Urban Phoenix and Wallace Graham did not appeal.

STATEMENT OF THE ISSUES

1. Should the Court limit its review to the evidence and issues before the superior court at the time it ruled on the motion to dismiss?

2. Did the superior court correctly determine that a general communal interest in traffic safety did not make the individual plaintiffs "persons aggrieved" by the Board decision for purposes of A.R.S. § 9-462.06(K)?

3. Did the superior court correctly determine that Arcadia-Osborn lacked standing?

4. Did the superior court correctly reject the plaintiffs' alternative standing arguments under the Constitution and Declaratory Judgments Act?

5. Did Myers waive any claim for taxpayer standing by failing to plead or argue it before the trial court?

STANDARD OF REVIEW

"[W]hether a party has standing to sue is a question of law, which we review de novo." *Ctr. Bay*, 214 Ariz. at 356, ¶ 15.

ARGUMENT

I. The Court should limit its review to the record before the superior court.

At the outset, this Court should summarily disregard several items and arguments in this appeal.

First, the Court should assume that the record fully supports the superior court's decision because the plaintiffs failed to provide the transcripts necessary to review the ruling. As the appellants, the plaintiffs had the "burden to ensure that the record on appeal contains all transcripts or other documents necessary for [this Court] to consider the issues raised." *Blair v. Burgener*, 226 Ariz. 213, 217, ¶ 9 (App. 2010) (citation and quotation marks omitted). Under ARCAP 11(c)(1)(A), the appellant has the burden of ordering and filing the transcripts from the superior court. The consequences for failing to provide transcripts are serious. "In the absence of a transcript, we presume that the record supports the trial court's decision." *Old Republic Nat'l Title Ins. Co. v. New Falls Corp.*, 224 Ariz. 526, 531 n.4 (App. 2010); *accord*, *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions.").

Here, the plaintiffs did not order any transcripts and did not file the notice required by ARCAP 11(c)(3)(A). Without the hearing transcript before it, this Court must presume that the record—including any concessions offered by the plaintiffs—supports the superior court's ruling here. For example, the plaintiffs cannot obtain relief by claiming the superior court failed to consider or misconstrued their evidence and arguments below. *See, e.g.*, Haddad/Shulman Op. Br. at 41.

Second, the appendix of Plaintiffs/Appellants Haddad and Shulman contains material that is not part of the superior court record. The Court should disregard materials that were "not part of the record on appeal." *Avitia v. Crisis Preparation & Recovery Inc.*, __ Ariz. __, 1 CA-CV 21-0083, 2022 WL 16753332, at *2 n.1 (Ariz. App. Nov. 8, 2022). Haddad and Shulman concede (at 11-12, n.16) that APPENDIX-0251 to -0273 are not part of the superior court record. Although they contend that they should have been part of the administrative record, they took no steps to address this issue in the superior court or before filing their opening brief. Because they were not before the superior court at the time that court made its decision, this Court should disregard them. *See Avitia*, 2022 WL 16753332, at *2 n.1.

Similarly, the Court should limit its review to the record before the superior court when it decided the motion to dismiss. The appellate courts "will not consider new factual theories raised in an attempt to secure reversal of the trial court's determinations of law." *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 90 (1990); *see also id.* at 88 ("As a general rule, we will not review an issue on appeal that was not argued or factually established in the trial court.").

On appeal, however, the plaintiffs cite to and include at APPENDIX-164—214 and APPENDIX-245—88 portions of the administrative record they never relied on below. For example, the plaintiffs now assert (at, e.g., 5 n.7, 7-8 & n.12) facts about the neighborhood support for Clear Channel's application. But they never made these claims before the superior court, despite Clear Channel repeatedly raising the topic. [*See* IR-26 at 3-4 (APP109-10), 13-14 (APP119-20); IR-39 at 14.]

The plaintiffs had the burden of flagging any relevant evidence in the administrative record for the superior court. They cannot rely on new or additional evidence for reversal after the fact. *See Schoenfelder*, 165 Ariz. at 90. Accordingly, the Court should disregard the plaintiffs' assertions predicated on APPENDIX-164—214 and APPENDIX-245—88.

Third, appellate briefs must contain "appropriate references to the record" and "citations of legal authorities" for all assertions. ARCAP 13(a)(5), (a)(7). The Court should disregard all allegations in the plaintiffs' briefs that lack supporting record and legal citations. *See, e.g.*, *Carey v. Soucy*, 245 Ariz. 547, 550 n.3 (App. 2018) (disregarding party's recitation of facts where it "substantially fail[ed] to provide citations to the record in support of its factual assertions"); *In re U.S. Currency in the Amount of $26,980.00*, 199 Ariz. 291, 299, ¶ 28 (App. 2000) (refusing to consider "bald assertion[s] . . . offered without elaboration or citation to any constitutional provisions or legal authority.").

For example, the plaintiffs suggest that the support of the Willo Neighborhood Association (the association in closest proximity to the project), should be disregarded in favor of other, more distant neighborhood groups because Willo is "distinct from the Midtown 'neighborhood.'" Haddad/Shulman Op. Br. at 5 n.7; *id.* at 7-8 n.12 (alleging that Regency-on-Central and Phoenix Towers Cooperative "represent their hundreds of

residents, all within the Midtown 'neighborhood'"). The plaintiffs cite nothing to support these allegations, however. *See id.*[3]

Meanwhile, many other citations do not support the claims made. The plaintiffs suggest, for example, that Regency-on-Central wholly opposed Clear Channel's application. Haddad/Shulman Op. Br. at 5 n.7, 7-8 & n.12. But the plaintiffs' own administrative record citations reveal that Regency-on-Central opposed one narrow aspect of the application—the digital conversion—and not the billboards' relocation generally. *See* Haddad/Shulman Op. Br. at 5 n.7 (citing "AR:342," which states only that Regency HOA members "oppose the digital conversion"). In contrast, the plaintiffs oppose Clear Channel's entire application. The Court should disregard all such unsupported claims when deciding this appeal.

In sum, when deciding this appeal, the Court should disregard the materials at APPENDIX-0251—73 because they are not part of the superior court record. It should also disregard the administrative record excerpts at

[3] Moreover, the plaintiffs waived this argument because they never made it before the superior court. *See Stock v. Stock*, 250 Ariz. 352, 354 n.1 (App. 2020) (superior court "could not address an argument not properly before it, meaning the argument was waived").

APPENDIX-164—214 and APPENDIX-245—88 and arguments predicated thereon because the plaintiffs did not rely on them in superior court. Finally, the Court should generally disregard all assertions lacking supporting citations.

II. The superior court correctly determined that the individual plaintiffs are not "persons aggrieved" under A.R.S. § 9-462.06(K).

A. A.R.S. § 9-462.06 confers limited private party standing.

Ordinarily, Arizona courts are "'not constitutionally constrained to decline jurisdiction based on lack of standing' because the Arizona Constitution, unlike the Federal Constitution, contains no 'case or controversy' requirement." *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209, ¶ 8 (2019) (citation omitted). But "[t]he legislative branch may . . . expressly modify[] or abrogate[e] prudential standing rules." *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603, ¶ 17 (App. 2016) (citations omitted); *see also Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523, ¶ 12 (2021) ("Standing may be conferred by a statute."). When a statute defines who may bring an action, proof of standing is required to state a claim as a matter of law. *See Ariz. Dept. of Water Res. v. McClennen*, 238 Ariz. 371, 376, ¶ 29 (2015) (statutory authorization to participate in administrative

proceeding differs from prudential standing). Here, a statute (A.R.S. § 9-462.06(K)) confers the right to file a special action challenge to a board of adjustment decision, so the plaintiffs must satisfy the statute's requirements.

For private parties, the legislature limited standing to (1) persons who are aggrieved by the decision, or (2) taxpayers who own or lease property within a tight radius from the affected property (either adjacent to or within 300 feet of adjacent property):

> *A person aggrieved* by a decision of the . . . board or a taxpayer who *owns or leases the adjacent property or a property within three hundred feet* from the boundary of the immediately adjacent property, [or] an officer or a department of the municipality affected by a decision of the . . . board, . . . may file a complaint for special action in the superior court to review the . . . board decision.

A.R.S. § 9-462.06(K) (emphases added.) This statute does not allow anyone merely interested in the issue to directly participate in the proceeding or interfere with the use of someone else's private property because doing so would obliterate the American principle that one private party cannot tell another private party how to use his or her land.

B. To qualify as a "person aggrieved" under § 9-462.06(K), a third party must suffer special damage to a tangible personal interest.

This appeal concerns only "person aggrieved" standing. No plaintiff alleged standing as a taxpayer who owns or leases property within the statutory bounds (immediately adjacent or within 300 feet). [*See* IR-32 at 10, ¶ 18 (APP130) (alleging standing as persons aggrieved only).] (*See also* Argument § V.C, below.)

The statute does not define "person aggrieved." But Arizona law is well settled that to be "aggrieved," a person must have suffered "special damages or particularized harm" to a tangible personal interest, such as the use and enjoyment of his or her property. *Ctr. Bay*, 214 Ariz. at 359, ¶ 20. This reading of "person aggrieved" is "consistent with the common use of that term in other zoning statutes" in Arizona and elsewhere. *See P.F. West, Inc. v. Super. Ct.*, 139 Ariz. 31, 34 (App. 1984) ("person aggrieved" is the same as one who is "specially damaged" under county zoning statutes); *Super. Outdoor Signs, Inc. v. Eller Media Co.*, 822 A.2d 478, 488-91 (Md. Ct. Spec. App. 2003) (standing under zoning statute required showing that grant of billboard variance caused plaintiff special damages).

"Special damage" means damage that differs in kind or quality from the damages suffered by the larger community. *See, e.g.*, *Ctr. Bay*, 214 Ariz. 353, 358-59, ¶ 20 (App. 2007) ("The damage alleged must be peculiar to the plaintiff or at least more substantial than that suffered by the community at large." *Id.*; *Perper v. Pima Cnty.*, 123 Ariz. 439, 441 (App. 1979) ("To be aggrieved, the plaintiff must have sustained damage peculiar to himself."); *see also Sears v. Hull*, 192 Ariz. 65, 69-70, ¶ 17 (1998) (showing "distinct and palpable injury" requires more than "generalized harm that is shared alike by all or a large class of citizens generally"). In the zoning context, that generally means showing that one's own real property will suffer damage different than the damage suffered by the impacted community. As this Court has repeatedly observed, it is a "well-established principle that when challenging a governing board's zoning decision, a plaintiff must allege particularized injury to his or her *own property*." *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419, 425, ¶ 15 (App. 2011). Accordingly, "Courts traditionally limit standing in zoning cases to those individuals who have sustained special damage to their interest in real property." *E.g.*, *Buckelew v. Town of Parker*, 188 Ariz. 446, 450 (App. 1996).

The requirement that a person must suffer special damages to a tangible personal interest to have standing to challenge a zoning decision derives from public nuisance law. "Because the zoning law is rooted in the law of nuisance, a zoning ordinance violation came to be treated as a public nuisance for the purpose of determining the standing of an injured party." *Id.* Thus, courts in Arizona and elsewhere look to public nuisance law when evaluating standing in the zoning context.

Under the law of public nuisance, a private party cannot sue for a public nuisance unless its "property or pecuniary interests" have been damaged in a way that is "different in kind or quality from that suffered by the public in common." *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, 400-01, ¶¶ 10, 15 (2018) (citation omitted). "The rationale behind this limitation [is] twofold": (1) it helps to avoid "the multiple actions that might follow if every member of the public were allowed to sue for a common wrong," and (2) comports with the idea "that a harm which affect[s] all members of the public equally should be handled by public officials." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 5 (1985).

The same rationale applies with equal force to zoning challenges. Zoning, like public nuisance law, protects the general welfare and not private property rights. *See Verner v. Redman*, 77 Ariz. 310, 315 (1954) (zoning laws "have been universally upheld as a proper exercise of the police power for the protection of the public health and promotion of the general welfare"). Allowing anyone to seek judicial review of a board decision affecting someone else's property, based solely on a perceived injury to an intangible personal interest, would invite multiple lawsuits and would not further the purpose of the zoning laws.

It would also breach the default American rule of property ownership. In America, one private party ordinarily has no right to control what happens on someone else's property, with only limited exceptions such as public nuisance. The police power gives the *government* a limited right to tell citizens how they may use their own private land, but other private parties have no such power.

The same principles apply to zoning matters and other proceedings between the government and a landowner about how the landowner may use its property. By default, such proceedings involve only the government and those with a property interest in the affected land. Other private parties

may have the right to petition their government by offering comments or urging the government to take one action or another. But in a dispute between the government and one private party, other private parties ordinarily do not have a right to directly interfere.

Consequently, to qualify as a "person aggrieved," a third-party challenger must show that a board decision caused special damage, different in kind (and not just degree) from the damage suffered by the community generally, to a tangible property interest. Special damage to a commonly held or abstract personal interest does not suffice.

C. The superior court correctly determined that the plaintiffs' interest in traffic safety does not make them "persons aggrieved" by the Board decision.

The superior court correctly found that the plaintiffs' allegations of harm in the form of "increased risk of personal injury, property damage to their vehicles and other property, and economic/financial harm resulting therefrom" do "not implicate a property or pecuniary interest particular to the individual plaintiffs," nor are these harms "peculiar or greater than the harm to any other citizen" who uses this major metropolitan intersection. [IR-49 at 4 (APP218).] This Court should affirm because an interest in traffic safety, divorced from any impact on one's own real property, does not

permit a third party to challenge a board decision affecting another person's use of his or her land under § 9-462.06(K).

1. The individual plaintiffs assert an interest in traffic safety, unrelated to their use and enjoyment of their own real property.

Taking the plaintiffs' allegations as true, the superior court correctly found that "[t]he crux of each Plaintiffs alleged harm is safety—that the digital billboard conversion will harm them by making the intersection less safe for drivers and pedestrians." [IR-49 at 5 (APP219).]

Specifically, the individual plaintiffs—Haddad, Myers, and Shulman—allege that the Board's decision causes them damage because they regularly use the intersection at Central and Thomas and the decision will make the intersection less safe for drivers and pedestrians. [*E.g.*, IR-32 at 6-9, ¶¶ 6-10 (APP126-29).] For example, Haddad alleges that he personally "regularly uses the commuter route that passes through the C[entral] & T[homas] Intersection" to do things like "attend meetings in midtown Phoenix or across town; to travel to west side neighborhoods and neighbors; or to visit two restaurants that serve as meeting places." He alleges that the intersection is "already very dangerous," and "the changes proposed by CCO, especially the digital billboard conversions, will make it

much more dangerous to me due to the increased visibility, glare and distraction from a digital billboard." [IR-32 at Ex. C, ¶ 12 (APP161).]

Similarly, Shulman alleges that, "While occupying my Tapestry condo property I have been a frequent and regular user of the C[entral] & T[homas] Intersection as a pedestrian (e.g., walker and runner) and car driver . . . to engage in many activities such as eating at or buying food to take out from [nearby] restaurants and stores . . .; banking at Wells Far[g]o Bank or Bank of America, and visiting St. Joseph's Hospital Complex for services." [IR-32 at Ex. E (Shulman Decl.), ¶ 5 (APP174).] He asserts that the Board's decision to allow the billboard relocation and conversion "is going to make the current dangerous situation far more treacherous for me and (I believe) others" because it will be "much more distracting for drivers (and to me, as a pedestrian) compared to the current situation." [*Id.* ¶ 10 (APP178).]

Myers likewise alleges that the Board's decision will increase existing "pedestrian safety issues" and "be more harmful to [Myers] as a pedestrian, bicyclist, and driver . . . ." [IR-32 at Ex. D (Myers Decl.), ¶¶ 28, 33 (APP168, 169).] She goes one step further, however, and alleges that the Board's decision will also harm her as a tenant of a co-working space across the street because the relocated signs will impact her use and enjoyment of the

building's "common areas" and "coffee shop." [*Id.* ¶¶ 13-14 (APP166).] She does not allege, however, that the relocated signs will impact her use and enjoyment of the "dedicated office space" she uses for her business, the Midtown Law Office. [*See id.* at ¶¶ 9-22 (APP166-67).]

2. Traffic safety at a busy commercial intersection is a shared public interest.

The superior court correctly concluded that the complaint's allegations do "not implicate a property or pecuniary interest particular to the individual plaintiffs," nor is the plaintiffs' alleged harm "peculiar or greater than the harm to any other citizen" who uses this major commercial in one of the nation's largest cities. [*See* IR-49 at 4-5 (APP218-19).]

An interest in traffic safety, divorced from any particular interest in the use and enjoyment of real property, does not justify a third-party challenge to a board decision affecting another person's use of his or her property. *See, e.g., Ctr. Bay*, 214 Ariz. at 359, ¶ 25 ("we [have] found standing when the plaintiffs alleged specific claims of damage to their use and enjoyment *of their property*" due to "traffic, litter, drainage, and noise" (emphasis added)); *see also Laughman v. Zoning Hearing Bd. of Newberry Twp.*, 964 A.2d 19, 23 (Pa. Commw. Ct. 2009) ("Any concern that the increase in traffic might lead to

accidents is merely a concern of 'remote consequences' and is not direct because all citizens share concerns regarding traffic and safety."), *cited approvingly by Burks v. City of Maricopa*, 2 CA-CV 2017-0177, 2018 WL 3455691, at *4, ¶ 19 (Ariz. App. July 16, 2018). Courts regularly decline to find standing based on similar community-based objections to a development absent some showing of particularized, specific harm to the challenger's use and enjoyment of his or her real property.

In *Burks v. City of Maricopa*, for example, this Court held that the plaintiff lacked standing to challenge the city's decision to grant a conditional use permit to a proposed motorsports facility. 2018 WL 3455691, at *5, ¶ 21. Plaintiff Burks alleged that she lived near the proposed facility, which would "significantly increase[] noise, odors, dust, gas, and smoke emanating from the Property, all of which uniquely and negatively affect [her] use and enjoyment of her Property," as well as "result in significantly increased traffic resulting in longer drive times, increased fuel consumption, and ... an increased safety risk to her." *Id.* at *4, ¶ 16 (internal quotation marks omitted). The Court nonetheless held that she lacked standing. *Id.* at *5, ¶ 21. Noting that Burks's address was five miles from the proposed development, it concluded that her allegations were "in the nature of

'general economic or aesthetic losses in [the] area,'" rather than injury particular to her as compared to the community at large. *Id.* at *4, ¶ 19 (quoting *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 118, ¶ 20 (App. 1999)).

The superior court properly relied on *Burks* to deny the plaintiffs standing. [IR-49 at 4.] Just like in *Burks*, the individual plaintiffs here allege that relocating Clear Channel's signs will result in general harm to the neighborhood in the form of decreased traffic safety. Also like *Burks*, the individual plaintiffs' personal properties are far removed from the challenged land use. Haddad and Graham live approximately four and six miles away from Clear Channel's signs, on the other side of SR-51. Meanwhile, Myers and part-time resident Shulman are more than half a mile away. *Cf. Burks*, 2018 WL 3455691, at *4, ¶ 19 (citing with approval New Hampshire and Pennsylvania cases finding that property owners between one-half and six miles away from subject property lacked standing). Thus, even if concern over traffic safety could justify standing, the superior court rightly found that the plaintiffs did not allege any facts showing that their "use of the intersection is unique, and therefore specially harmed, as

compared to the hundreds of other people who drive, walk, or ride by or near the intersection of Central and Thomas daily." [IR-49 at 4 (APP218).]

Nor do the plaintiffs' allegations of diminished use and enjoyment of the general area and its public accommodations transform an otherwise general communal interest into a particularized special injury. Notably, none of the individual plaintiffs—not even Myers—alleges that the Board's decision impacts the use or enjoyment of his or her own property. In fact, none of them claim that Clear Channel's signs would even be visible from their homes or offices. Working nearby—even on a daily basis—is not in and of itself a particularized property justifying standing.

In *Superior Outdoor Signs,* for example, the Maryland court of appeals interpreted a statute similar to § 9-462.06(K) to find that a plaintiff lacked standing as a "person aggrieved" to challenge a zoning decision concerning a property adjacent to his workplace. 822 A.2d at 488-91. The plaintiff (Gregory) sued to challenge a board decision granting a billboard variance to the adjacent property. *Id.* at 488. Gregory alleged that he co-owned and worked for the company that owned the adjacent property, visited it daily for work, and drove by the subject property on a daily basis to get to and from work. *Id.* at 488-91. He claimed he was aggrieved by the decision

permitting the billboard variances based on his interest "in maintaining a daily visual exposure to less, rather than more, billboards when he is on [his company's] grounds and the billboards on the Subject Property are in view and when he is driving by the Subject Property." *Id.* at 489.

The court found that Gregory lacked standing. *Id.* at 490-91. It explained that neither his "claimed interest in limiting the number of billboards visible" from his workplace nor "his status as a person who drives by the Subject Property daily" implicated a personal and legally protectible interest sufficient to confer standing to challenge the billboard variance. *Id.* at 491. The court further noted that even if these interests were sufficient, Gregory had not shown that his interests were "specially affected beyond any such interest of members of the general public." *Id.*

This principle makes sense in light of § 9-462.06(K)'s structure. The statute creates standing for private parties within a narrow radius only if they have a specified property interest—ownership or leasehold. Perhaps the legislature could have extended standing to anyone who lives, works, or plays within that radius. By limiting the statute to property interests, however, the legislature respected the fact that zoning is inherently about real property.

Consider a person who has a 10-mile commute to work. That person will pass through dozens of major intersections and thousands of parcels of land. The law does not give that person standing to file a special action over zoning decisions on each of those thousands of parcels.

Likewise, people who regularly use a local bank or patronize a particular chain restaurant do not have standing to challenge zoning decisions impacting their access to and enjoyment of those amenities. [*Cf.* IR-32 at Ex. E (Shulman Decl.), ¶ 5 (APP174) (alleging he frequently uses the intersection to bank at Wells Fargo and patronize restaurants like Panera and Starbucks); *id.* at Ex. D (Myers Decl.), ¶¶ 17-19 (APP166-67) (alleging she regularly crosses intersection to visit National Bank of Arizona, Panera, and Smoothie King).] This is precisely the type of "common wrong" action that the special damage requirement is designed to prevent. *See Buckelew*, 188 Ariz. at 450; *Hopi Tribe*, 245 Ariz. at 400-01, ¶¶ 10-15.

Simply put, working at, traveling to, or driving by nearby areas does not confer standing under § 9-462.06(K). Thousands of drivers and pedestrians use the intersection at Thomas Road and Central Avenue daily. The superior court properly concluded that the individual plaintiffs' assertions regarding their regular use of the intersection does not distinguish

them from the thousands of other people who travel these same routes. This Court should affirm.

III. The plaintiffs' contrary arguments misread the law and advocate for an untenable construction of § 9-462.06(K).

A. *Scenic Arizona* does not support standing for the plaintiffs.

The plaintiffs do not meaningfully dispute that to qualify as persons aggrieved under § 9-462.06(K), they must show that the Board's decision caused special damage to a tangible personal interest that is different in quality or kind that the damages suffered by others in the impacted neighborhood. *See* Haddad/Shulman Op. Br. at 42-43 ("the consensus from Court of Appeals decisions . . . is that the 'person aggrieved' standard under A.R.S. § 9-462.06(K) can be met by showing 'special damages'"). Instead, they argue that they meet this standard based on *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419 (App. 2011).

But even assuming that *Scenic Arizona* was correctly decided, the legislature's subsequent changes to § 9-462.06(K) directly undercut its reasoning. Furthermore, unlike here, *Scenic Arizona* dealt with a specific federal statute that protected the general public interest in regulation of highway billboards.

1. Subsequent amendments to § 9-462.06(K) undercut *Scenic Arizona*'s reasoning.

In *Scenic Arizona*, a statewide advocacy organization filed a special action challenge to a board's approval of a digital highway billboard, arguing that Arizona's Highway Beautification Act ("AHBA") prohibited the billboard. *Id.* at 420-21, ¶ 1. The organization alleged that the digital billboard would harm its members by negatively impacting their aesthetic interests, increasing highway safety risks, and requiring longer drive times to avoid it. *Id.* at 422, ¶ 6. Reasoning "that the legislature intended to permit much broader standing in this context than in other proceedings," *id.* at 423, ¶ 9, and observing that the AHBA "was adopted to promote . . . 'the safety and recreational value of public travel and [preserve] natural beauty,'" *id.* at 424, ¶ 11, this Court concluded that the organization had standing.

When the Court decided *Scenic Arizona*, § 9-462.06(K) provided for not only the usual "person aggrieved" standing, but also broad taxpayer standing, unlimited by proximity or impact. A.R.S. § 9-462.06(K) (1995); *see also Pawn 1st, L.L.C. v. City of Phx.*, 231 Ariz. 309, 312, ¶ 20 (App. 2013) (interpreting taxpayer standing expansively under old version of § 9-462.06(K)). In addition, the old version of § 9-462.06 strangely made it easier

to file a special action appeal to challenge a board decision than to file an administrative appeal to the board in the first instance under subsection (D). Under that version, only persons aggrieved could file an administrative appeal to a board of adjustment, but any taxpayer could file a special action challenge to the subsequent board decision. *Compare* A.R.S. § 9-462.06(D) (1995) ("Appeals to the board of adjustment may be taken by persons aggrieved"), *with id.* § 9-462.06(K) (either "[a] person aggrieved . . . or a taxpayer [may] . . . file a complaint for special action in the superior court").

Scenic Arizona relied on both of these aspects of the statute to conclude "that the legislature intended to permit much broader standing in this context than in other proceedings." *See* 228 Ariz. at 423, ¶¶ 9-10 (emphasis added). Contrasting the text of the old § 9-462.06(D) and (K), the Court reasoned that "[t]he legislature plainly intended that standing to challenge a board decision in superior court would be easier to establish than an appeal to the board of adjustment; otherwise, the legislature would not have included the 'taxpayer' category." *Id.* at 423, ¶ 10 (discussing the 1995 version of § 9-462.06).

But the legislature has since amended § 9-462.06 to specifically narrow the statutory text upon which *Scenic Arizona* relied. The statute now limits

taxpayer standing by physical proximity, allowing only taxpayers owning or leasing adjacent property or within 300 feet of adjacent property to file a special action challenge to a board decision. This amendment changes the default rule that proximity does not create a presumption of special damage, even for adjacent property. *See Perper*, 123 Ariz. at 441 ("An adjacent property owner who suffers no special damage from the granting of a variance cannot seek judicial review of an administrative decision to grant a variance."). Under the amended statute, taxpayers with property adjacent or nearly adjacent to the disputed area are presumed to be specially damaged, while persons outside the statutory radius must show special damages. But either way, standing is tied to property interests. Accordingly, the amended statute no longer authorizes expansive standing for special action appeals of board decisions compared to administrative appeals to the board. *See* A.R.S. § 9-462.06(D), (K) (2015); *see also* APP242 (comparison of 1995 and 2015 versions).

In other words, the amended § 9-462.06(K) changes exactly those aspects of the statute that *Scenic Arizona* relied upon to construe "person aggrieved" standing more broadly than normal. For this reason, the plaintiffs' argument that the statutory amendments are irrelevant because

they concern only taxpayer standing misses the point. *See* Haddad/ Shulman Op. Br. at 23-28; Arcadia-Osborn Op. Br. at 13, 15-19. *Scenic Arizona* did not construe the phrase "person aggrieved" in a vacuum; it relied on its interpretation of § 9-462.06 as a whole, including the taxpayer standing provision, and the legislature has now undermined the very bases the court relied on as evidence of legislative intent.

Nor does the fact that courts continue to cite *Scenic Arizona* for general statements of law show that it is a valid interpretation of the amended version of § 9-462.06. Tellingly, the plaintiffs do not cite to a single case, from Arizona or elsewhere, that follows *Scenic Arizona*'s expansive application of the "person aggrieved" requirement to find standing without any special damage to a particularized property interest. To the contrary, cases cited by the plaintiffs regarding standing in the zoning context discusses the damage suffered by the plaintiff in connection with the plaintiffs' own real property. *See* Haddad/Shulman Op. Br. at 43-44 (citing *Burks*, *Buckelew*, *Blanchard*, and *Ctr. Bay*).

As already discussed, *Burks* focused specifically on the lack of harm to the plaintiff's real property to deny her standing as a person aggrieved.

Similarly, *Buckelew* reinforces that "Arizona requires that landowners suffer special damage before they have standing to complain about a zoning decision on adjacent property." 188 Ariz. at 450. Because the plaintiff "allege[d] that his property shares a common boundary with the RV park and that a number of conditions and activities at the RV park interfere with the use and enjoyment *of his property*," the Court rejected the town's argument that the plaintiff lacked standing as a person aggrieved. *Id.* at 452 (emphasis added).

Meanwhile, *Blanchard* held that neighbors who owned a tire shop and residence 750 feet from the property that had been rezoned to allow a Wal-Mart Supercenter had standing based on the alleged adverse effects the rezoning would have on their own real property (e.g., greatly increased traffic, noise, and pollution, and illumination from parking lot lighting). 196 Ariz. at 118, ¶ 24. But another opponent who lived 1,857 feet (0.35 miles) away lacked standing because she alleged only "general harm to the area around the parcel in the form of increased traffic and noise, etc.," but did not identify "any particular harm to [*her*] *property*." *Id.* at 118, ¶ 21 (emphasis added).

Finally, *Ctr. Bay* held that the plaintiff, which owned an existing apartment complex across the street from a proposed development, had alleged special damages sufficient for standing "because it owned property adjacent to the proposed project," and it asserted (among other things) that "the value of its property and the quiet use and enjoyment of the property would be compromised if the project were constructed," and given the proximity of its apartments to the project, the "units would be less desirable because of the lack of setbacks and landscaping." 214 Ariz. at 356, ¶ 11.

As these cases show, *Scenic Arizona* is an outlier. The decision has always been in tension with the "well-established principle that when challenging a governing board's zoning decision, a plaintiff must allege particularized injury to his or her own property." 228 Ariz. at 425, ¶ 15. Because *Scenic Arizona* divorces standing under § 9-462.06(K) from the property interests justifying third party participation in the regulation of another party's land use, it was incorrectly decided. Moreover, subsequent legislative changes have further limited its utility. This Court should decline to follow it.

2. Even if *Scenic Arizona* was correctly decided, it should not be extended beyond its facts.

Even if *Scenic Arizona* were still valid, it does not support standing here. As *Scenic Arizona* emphasized, standing is a fact-specific inquiry, and a key fact there was the nature of the billboards in question. Specifically, *Scenic Arizona* involved highway billboards, which by law can be located only in commercial and industrial areas. The court relied on this fact to justify departing from the "well-established principle[s]" of standing applied in other zoning cases, stating, "It is clear to us that proximity to one's own property is much less relevant to the question of standing in the context of a challenge to a billboard along a highway, which by law may be located only in commercial or industrial areas." *Id.* at 426, ¶ 15.

The signs here, by contrast, are not highway billboards that would be insulated from judicial review unless parties with a general interest in traffic safety and aesthetics could sue. *Cf. id.*, ¶ 16. Clear Channel's signs are in a dense urban area, surrounded by a mix of commercial, residential, and retail properties. Many impacted parties, including adjacent property owners and nearby tenants, could have standing to challenge a sign permit in these circumstances.

The superior court correctly recognized that cases involving in-town billboards apply more directly. For example, the superior court cited *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 822 A.2d 478 (Md. Ct. Spec. App. 2003). [IR-49 at 5 (APP219).] There, the court interpreted a statute similar to § 9-462.06(K) to find that the plaintiff lacked standing to challenge a billboard variance granted to a property adjacent to his workplace. *Eller*, 822 A.2d at 488-91. Similar to the plaintiffs' allegations here, in *Eller* the plaintiff argued standing based on his "interest in limiting the number of billboards visible" from his workplace and "his status as a person who drives by the Subject Property daily." *Id.* at 491. The court disagreed, concluding that even if these were legally protectible interests, the plaintiff had not shown that his interests were "specially affected beyond any such interest of members of the general public." *Id.*

Even though the superior court relied on *Eller* in dismissing their claims, the plaintiffs do not address *Eller* in their appeal briefs. Instead, they double down on *Scenic Arizona*, arguing that the Phoenix Zoning Code's provisions—specifically, the use permit standards in Code § 307(A) and the off-premises sign ordinance in Code § 705.2—give the plaintiffs a "legally protected public interest[] at the street corner in Midtown Phoenix rather in

the same way the AHBA did for a highway" in *Scenic Arizona*. Arcadia-Osborn Op. Br. at 16; *see also* Haddad/Shulman Op. Br. at 32. Not so.

The AHBA "was adopted to promote . . . 'the safety and recreational value *of public travel*'" along Arizona's highways. *Scenic Ariz.*, 228 Ariz. at 424, ¶11 (emphasis added). In contrast, the provisions for granting a use permit under Code § 307(A)(7) reference traffic as only one relevant consideration. *See* Code § 307(A)(7)(a)-(d). Moreover, unlike the AHBA, Code § 307(A)(7)(a) does not consider the safety or recreational value of public travel; it focuses on whether the use will cause "a significant *increase* in vehicular or pedestrian traffic *in adjacent residential areas*." (Emphases added). Even the plaintiffs' complaint acknowledges that the focus is on "nearby residential areas." [IR-32 at 16, ¶ 35 (APP136).]

Nor does Code § 705.2—the off-premises sign ordinance—indicate that it was adopted to protect the safety and recreational value of public travel. The only statement of purpose found in that ordinance (under § 705.2(G)(4)) is the general statement that "[a] reduction in the number of nonconforming boards will promote a better visual environment in the City." Thus, unlike the AHBA, neither of these Code provisions were

adopted specifically to protect public travel and recreation, as the plaintiffs claim.

Furthermore, the plaintiffs ignore that § 705.2 specifically authorizes illuminated and digital off-premises signs and builds in appropriate safeguards for surrounding neighborhoods. Section 705.2(E)(4), for example, provides that when an illuminated sign is located on a "lot contiguous to a residential zoning district and residential use . . . or separated only by a street or alley," no illuminated sign can be placed where it is visible to those residential areas. Notably, none of the plaintiffs here allege that the signs are visible from their residences, so they cannot claim a "legally protected public interest" on this basis. *Cf.* Arcadia-Osborn Op. Br. at 16.

Ultimately, the plaintiffs do not cite a single case where a court has found third-party standing under similar circumstances. This Court should affirm the superior court's determination that the plaintiffs lack standing as persons aggrieved by the Board's decision.

B. The plaintiffs' reading of § 9-462.06(K) conflicts with the purpose of the zoning statutes and leads to absurd results.

Finally, the Court should reject the plaintiffs' interpretation of "person aggrieved" because it contradicts § 9-462.06(K)'s text and purpose, and would eviscerate the special damages requirement.

1. A.R.S. § 9-462.06(K) does not define "person aggrieved" differently for purposes of challenging billboards versus other land uses.

The plaintiffs repeatedly suggest that the "person aggrieved" standard in § 9-462.06(K) must be construed more broadly when the challenged board decision involves billboards rather than other land use. The statutory text does not support this view, however. Nothing in § 9-462.06(K) suggests that the standard differs depending upon the particular zoning ordinances considered by the board of adjustment. To the extent *Scenic Arizona* suggests otherwise, it is wrong.

Whether a zoning application deals with signage or another use, the salient point is that the zoning laws address *land use*. Accordingly, to be a person aggrieved, the special damages alleged must connect in some way to the challenger's use and enjoyment of his or her own land. (*See* Argument § II.B.)

2. A.R.S. § 9-462.06(K) should not be interpreted to allow distant landowners to override the desires of direct neighbors.

The Court should also reject the plaintiffs' construction of § 9-462.06(K) because it would eviscerate the "special damages" requirement and thus the whole purpose of the "person aggrieved" standard.

The plaintiffs attempt to sidestep the general, communal nature of their claimed harm by asserting that they will suffer a higher *degree* of harm than others in the neighborhood given their frequent use of public property. But as the Supreme Court recently reiterated, special damage requires a plaintiff to show harm that is "different in kind, *and not merely in degree*, from that suffered by the public generally." *Hopi Tribe*, 245 Ariz. at 401, ¶ 13 (citation omitted; emphasis added). The Supreme Court "[has] never held that a common injury may become 'special' merely because the party's use of public property is frequent or the degree of harm alleged is substantial." *Id.* at 405, ¶ 29. Arizona courts continue to rely on nuisance caselaw to interpret standing in the zoning context, including under § 9-462.06(K). *See, e.g.*, *Ctr. Bay*, 214 Ariz. at 359, ¶ 25.

Moreover, as the superior court correctly recognized, whether a person qualifies as someone "aggrieved" by a zoning decision necessarily

presents a fact-specific inquiry. [IR-49 at 5 (APP219).] Some zoning cases will impact larger segments of the community than others. For example, zoning decisions involving a busy commercial location or large-scale development implicating the broader community, such as a sports stadium, will have a greater impact on the general community than a zoning decision concerning the renovation of a single-family home. And when a zoning case impacts a large segment of the community in the same way, an individual community member necessarily must do more to show that he or she faces a different or more serious kind of injury than the community at large. *See Burks*, 2018 WL 3455691 at * 2, ¶ 6.

Consider the stadium example. Building a sports stadium increases traffic not just for the immediate neighbors but also for surrounding communities. But not every person who will face increased traffic if a stadium is built has standing to file a special action challenging the stadium's zoning approval, however.

Similarly, suppose a landowner proposes to develop a high-rise apartment complex next to Scottsdale Fashion Square. Under § 9-462.06(K), the adjacent property owner (Fashion Square's owner, Macerich) and leaseholders (e.g., Nordstrom) would have standing to pursue a special

action. But the thousands of employees who work there lack a property interest sufficient to give them standing, even though they may travel to and from the affected property regularly, and the development may increase traffic risks and reduce their views.

Yet that is precisely what the plaintiffs advocate for here. Accepting the plaintiffs' view of § 9-462.06(K) as sufficient would effectively eviscerate the "person aggrieved" requirement for any prominent or large-scale zoning case because every person who chooses to pass by the project, even relatively infrequently, can claim particularized harm. That cannot be right, as a matter of law or common sense.

In fact, this case highlights the danger of adopting such an approach. J&R's property is in Midtown and is part of the Encanto Village Core, adjacent to the Willo Historic Neighborhood. [IR-39 at Ex. 2 (Board hearing minutes), p. 17 (APP198).] The three neighborhood groups closest to the Property—the Midtown, Encanto Village, and Willo Historic Neighborhood Associations—each support the project, and did so before the Board. [*Id.* at pp. 17-18 (APP198-99).] In other words, none of the three closest neighborhood associations claims that the Board's decision will cause it special damage. Yet the plaintiffs—each of whom is further away and less

impacted by the project—claim that they have a unique interest that allows them to sue to stop a development that the surrounding neighbors want. Interpreting § 9-462.06(K) to allow groups from outside the impacted area to override the desires of more immediate neighbors by filing a special action challenge to a board decision makes no sense and is contrary to the orderly regulation of land use—the whole point of zoning law.

In sum, the superior court correctly ruled that the plaintiffs, who do not own or lease real property anywhere close to Clear Channel's signs, lack standing to challenge the Board's decision approving relocation and conversion of those signs under § 9-462.06(K) based on their general interest in traffic safety at the nearby intersection. This Court should affirm.

IV. The superior court correctly determined that Arcadia-Osborn lacks standing under A.R.S. § 9-462.06(K).

A. The superior court correctly determined that Arcadia-Osborn lacks associational standing.

1. Associational standing under § 9-462.06(K) requires Arcadia-Osborn to show that its members are persons aggrieved and that it can adequately and fairly represent them.

Arcadia-Osborn separately asserts that it has associational standing. Associational standing permits an organization "to assert the claims of its members in a representational capacity." *Armory Park*, 148 Ariz. at 5.

Associational standing therefore depends upon the injuries or interests of the organization's members. So, to have associational standing under § 9-462.06(K), Arcadia-Osborn must show both that (1) its members have standing as persons aggrieved, and that (2) Arcadia-Osborn will "adequately and fairly represent the interests of those" members such that its representational appearance serves judicial efficiency. *Armory Park*, 148 Ariz. at 5-6. Arcadia-Osborn's associational standing claim fails on both elements.

2. None of Arcadia-Osborn's members qualifies as a "person aggrieved," nor has it shown that associational representation is necessary or proper.

Although Arcadia-Osborn argues that the superior court erred by finding that it lacked associational standing, it agrees that its associational standing depends upon whether its members qualify as "persons aggrieved" in their own right. *See* Arcadia-Osborn Op. Br. at 20-22. But Arcadia-Osborn's suggestion (at 20) that its members do not have to show special damages to qualify as persons aggrieved is flat wrong, *see, e.g.*, *Ctr. Bay*, 214 Ariz. 359, ¶ 20, and contrary to the position of its co-appellants, *see* Haddad/Shulman Op. Br. at 42-43.

Here, Arcadia-Osborn relies on the interests of its members, plaintiffs Graham, Shulman, and Haddad, for representational standing. But as discussed above (in Argument § II.C), none of the individual plaintiffs qualifies as a person aggrieved. Accordingly, Arcadia-Osborn's associational standing claim fails at step one.

Moreover, even if its members could establish standing as persons aggrieved, Arcadia-Osborn also fails to satisfy the second element for associational standing. Arcadia-Osborn made no attempt to demonstrate why it is better positioned than those members to represent their interests, or how permitting it representational standing would serve judicial economy and administration here. *See Armory Park*, 148 Ariz. at 5-6 (Arizona courts consider "whether judicial economy and administration will be promoted by allowing representational appearance"). Indeed, the fact that Arcadia-Osborn's asserted representational standing relies on the interests of members who are already participating as individual plaintiffs suggests that it is not better positioned than they are, and allowing its representational appearance would be superfluous.

For these reasons, this Court should affirm the superior court's determination that Arcadia-Osborn lacks associational standing.

B. The superior court correctly determined that Arcadia-Osborn lacks direct standing.

1. Arcadia-Osborn cannot rely on alleged interference with its advocacy to create standing under § 9-462.06(K).

The amended complaint also alleges that Arcadia-Osborn has direct standing based on alleged harm to its organizational interests. Specifically, Arcadia-Osborn claims that it "will suffer direct, concrete harm" from the Board's decision because its "mission[] will be frustrated and undermined, and [it] will have to divert scar[c]e funds and resources from other important activities to address the new dangers presented by" the decision. [IR-32 at 15, ¶ 31 (APP135). Relying on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), Arcadia-Osborn argued to the superior court that these "concrete harms to its mission and to its finances and other resources" gave it direct standing as a "person aggrieved." [IR-29 at 16.]

Arcadia-Osborn lacks direct standing for two reasons. First, Arcadia-Osborn conflates the "frustration of mission/diversion of resources" test from the federal standing doctrine with the special damages required under § 9-462.06(K)'s "person aggrieved" standard. As *Havens Realty* itself recognizes, standing must be evaluated in the context of the claims asserted. 455 U.S. at 373 ("congressional intention cannot be overlooked in

determining whether [plaintiffs] have standing to sue"). For that reason, Arcadia-Osborn's cases analyzing Article III standing under federal statutes do not apply. None of those cases involves the "person aggrieved" standard, so they have no bearing on standing here. Section 9-462.06(K), not federal standing doctrine, governs who may seek judicial review of a board decision.

Second, even if the frustration of mission/diversion of resources test from federal standing doctrine applied here, the superior court correctly found that Arcadia-Osborn could not satisfy it based on the recent Arizona Supreme Court decision in *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219 (2022). [*See* IR-49 at 6 (APP220).]

In that case, the Arizona School Boards Association filed a challenge to a bill prohibiting private entities from adopting Covid-19 mitigation measures. *See* 252 Ariz. at 224, ¶ 17. The superior court found that the Association had standing "because they alleged facts establishing that the bill 'directly affected their rights and resources.'" *Id.* On appeal, the Supreme Court explicitly disavowed "the proposition that an organization has standing to challenge the constitutionality of a statute if it demonstrates

merely that the contested statute drained its resources and frustrated its mission." *Id.* at 224, ¶ 18.

Instead, the Court held that "an organization cannot establish standing if the 'only injury arises from the effect of [a challenged action] on the organizations' lobbying activities, or when the service impaired is pure issue-advocacy." *Id.* (quoting *Equal Means Equal v. Ferriero*, 3 F.4th 24, 30 (1st Cir. 2021)) (cleaned up). It explained that allowing an interest organization to sue based on allegations of drained resources and a frustrated mission would eviscerate the standing doctrine by eliminating any need to show "actual injury." *Id.*

Arcadia-Osborn's allegations in this case are a textbook example of "injury to advocacy" interests rejected by the Supreme Court in *Arizona School Boards*. Arcadia-Osborn asserts that it serves "as the 'go-to' source for individuals and neighborhoods throughout the City who have questions about, and seek guidance on, how to minimize or reduce the rebuilding of billboards and conversion of static billboards to digital billboards in their neighborhoods." [IR-29 (pro se response) at 15.] It allegedly accomplishes this mission through "outreach to, and educational campaigns directed at, sister neighborhoods, one-on-one consultations with representatives from

other neighborhoods and billboard industry representatives, monitoring billboard construction, and taking part in ZAHO cases / board of adjustment cases/ and court litigation involving billboards all over Phoenix . . . ." [*Id.*] Arcadia-Osborn claims that the Board's decision "is undermining the work AONA has done with other neighborhoods and within its own neighborhood" because "it has created practical and legal precedent that makes it more difficult to protect neighborhoods from digital billboard intrusions." [*Id.*]

In other words, Arcadia-Osborn alleges that its primary mission is *opposing billboards* and the Board's decision interferes with that mission because it makes it *harder to oppose billboards*. This is interference with pure issue advocacy only. Furthermore, this argument is circular. If Arcadia-Osborn's mission is opposing billboards, then it cannot claim it is harmed by having to use its resources to oppose billboards. *Arizona School Boards* forecloses standing on this basis, as the superior court concluded. [IR-49 at 6 (APP220).]

Arcadia-Osborn does not analyze *Arizona School Boards*. Instead, it argues (at 22-27) that various "federal cases rooted in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) hold that the diversion of resources can be

used to show that the interest to be protected is germane to the organization's purpose and constitutes a concrete injury, thereby meeting prong B of the *Hunt* test [for Article III standing]." Arcadia-Osborn Op. Br. at 23. But none of those federal cases—*Havens Realty* included—undermines the Arizona Supreme Court's recent analysis in *Arizona School Boards*. *See, e.g.*, *Havens Realty*, 455 U.S. at 378 (reiterating that "simply a setback to the organization's abstract social interests does not confer standing"); *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 748 (9th Cir. 1991) (standing issue was moot; citing *Havens* in dicta only). Not even Arcadia-Osborn suggests otherwise.

To the contrary, cases like *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942-43 (9th Cir. 2021) (cited by Arcadia-Osborn at 24-25), confirm that the superior court correctly rejected Arcadia-Osborn's frustration of mission/diversion of resources claims. In *Sanderson Farms*, the Ninth Circuit affirmed the district court's dismissal of the complaint on standing grounds. *Id.* at 942. It explained, "Diversion of resources has been found when organizations 'expended additional resources that they would not otherwise have expended, and *in ways that they would not have expended them*.'" *Id.* (citation omitted, emphasis added). Because the plaintiff

organizations had engaged in the same activities before the defendants' alleged misconduct occurred, the court concluded that allocating additional resources to those activities was not a "diversion" of resources but "a continuation of existing advocacy." *Id.* at 943.

The same is true here—Arcadia-Osborn alleges that it has engaged in anti-billboard activities for the "past 3 or 4 years," well before the Board decision in this case. [*See* IR-32 at Ex. C (Haddad Decl.), ¶ 8 (APP158).] As *Sanderson Farms* confirms, allocating more resources to activities the organization was already engaged in does not constitute a "diversion" of resources for standing purposes. Accordingly, even if frustration of mission/diversion of resources were relevant under § 9-462.06(K), Arcadia-Osborn would still lack standing.

2. Arcadia-Osborn does not qualify as a "person aggrieved" under § 9-462.06(K).

Nor does Arcadia-Osborn have standing under the applicable "person aggrieved" standard.

Under § 9-462.06(K), any party claiming to be a "person aggrieved"—whether an individual or an organization—must demonstrate that it has suffered special damages different in kind or quality from others in the

impacted community. When an individual's alleged interest in a board decision is shared by the larger community, the individual is not "aggrieved" for purposes of § 9-462.06(K). (*See* Argument §§ II.B, II.C.1.) So, too, with an organization. If the organization's mission is to protect general community interests, alleged harm to that shared interest does not support standing under § 9-462.06(K). *Cf. Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972) (special interest and expertise in environmental issues did not give organization standing; "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'").

For example, in *Spahn v. Zoning Bd. of Adjustment*, 977 A.2d. 1132, 1152 (Pa. 2009), the Pennsylvania Supreme Court held that the plaintiff civic associations were not "persons aggrieved" under a statute analogous to § 9-462.06(K) because they had "not demonstrated an interest greater than any other citizen of Philadelphia." Instead, "the associations essentially admit[ted] that their purpose in bringing the action is to enforce zoning provisions of the Philadelphia Zoning Code, oppose the erection of illegal billboards, and foster community development," a purpose which is "no

different from the abstract interest that all citizens have in the outcome of the proceedings." *Id.*; *see also Hist. Alexandria Found. v. City of Alexandria*, 8 S.E.2d 199, 201, 203 (Va. 2021) (foundation established "to advocate for the preservation of Alexandria's historic buildings, districts, and neighborhoods" did not have standing to challenge proposed renovation of historic property because the "resulting harm would be shared by" the neighborhood generally).

Like in *Spahn*, Arcadia-Osborn essentially admits that its purpose in suing "is to enforce the provisions of the . . . Zoning Code, [and] oppose the erection of illegal billboards." 977 A.2d. at 1152. Arcadia-Osborn argued that the "BoA's decision and misconstruction of the municipal zoning code is a 'game changer'" that undermines Arcadia-Osborn's attempts to limit billboards [IR-29 at 14], and that "[a]pproval of the CCO billboards as proposed would threaten AONA's mission (and successes) in limiting digital billboard conversion" [IR-32 at Ex. C, ¶ 10 (APP160)]. An interest in enforcing the Phoenix Zoning Code regarding signage does not qualify Arcadia-Osborn as "a person aggrieved" because this is an interest generally shared by the public. Although Arcadia-Osborn may be more engaged on this issue than others, having strong feelings about a topic of general

community interest is not enough to claim "aggrievement" from a Board decision counter to those views.

Arcadia-Osborn's distant proximity from Clear Channel's signs further undermines any claim that it is particularly impacted by the Board decision relative to others. Arcadia-Osborn represents the neighborhood between 40th Street and 56th Street (west-east) and Indian School and Thomas Road (north-south)—almost five miles from J&R's property at its closest boundary.[4] As observed in *Burks*, a five-mile radius means Arcadia-Osborn's "alleged harms would likely apply to some degree to all those located within the corresponding seventy-eight-and-one-half-square-mile area from the proposed" development. *Burks*, 2018 WL 3455691, at *4, ¶ 18. Topping it off, none of the three associations nearest to Clear Channel's signs—and thus most directly impacted by the Board's decision—claim that it will cause their neighborhoods special damage. [IR-39 at Ex. 2, pp. 17-18 (APP198-99).] The Court should not read § 9-462.06(K) to allow a distant

[4] *See* City of Phoenix, Neighborhood Organization Details, https://nsdonline.phoenix.gov/NeighborhoodOrgs/Details/1837.

association to stop development on a property miles away, contrary to the wishes of the neighborhoods next door.

For all these reasons, the superior court correctly ruled that Arcadia-Osborn lacks direct standing to challenge the Board's decision under § 9-462.06(K). This Court should affirm.

V. The superior court correctly rejected the plaintiffs' alternative standing arguments.

A. The superior court correctly determined that the individual plaintiffs have no standing to sue for violations of others' constitutional rights.

None of the plaintiffs identify their standing to assert constitutional violations as an issue for appeal. *See* Haddad/Shulman Op. Br. at 22; Arcadia-Osborn Op. Br. at 11. Haddad's and Shulman's Opening Brief, however, includes some conclusory arguments on this topic (albeit only in the background sections, at 16-17). The Court should not consider these cursory arguments, which the plaintiffs neither properly identified nor developed. *See World Egg Bank, Inc. v. Nesco Investments, LLC*, 251 Ariz. 377, 379 n.2 (App. 2021) (deeming "waived any objection to the superior court's . . . determination" of an issue that appellant "asserts in passing" but "neither identifies nor develops . . . as an issue on appeal"). If it considers them, it should reject them.

The superior court reasoned that none of the individual plaintiffs had standing to assert claims for Due Process or First Amendment violations because those claims alleged violations of the rights of other people. [IR-49 at 6 (APP220) ("Because they do not allege violations of their own constitutional rights, they have no constitutional claims to stand on.").]

On the First Amendment claim, Haddad and Shulman do not dispute that this claim involves other people's rights, but generally assert (at 17) that they "do have standing to raise the constitutional rights of others [under the First Amendment] if a violation of those rights will directly harm them." In support, they cite two U.S. Supreme Court cases addressing *jus tertii* (third-party) standing. *Id.* Neither Haddad nor Shulman asserted *jus tertii* standing below; however, they claimed first-party standing only. [*See* IR-31 (pro se response) at 13-14 (addressing alternative standing arguments).] "The general law in Arizona is that legal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits." *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011). Accordingly, this Court "will not consider new theories" not raised in the trial court. *Fendler v. Phx. Newspapers*, 130 Ariz. 475, 478 n.2 (App. 1981).

Furthermore, neither Shulman nor Haddad has argued that they meet the requirements for *jus tertii* standing. "When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III . . . ; and second, do prudential considerations . . . point to permitting the litigant to advance the claim?" *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). The complaint alleges that "the Board's decision violates the First Amendment because it gives Clear Channel's off-premises advertising preferential treatment over on-premises advertising," [IR-49 at 6 (APP220)], but neither Haddad nor Shulman suggest that prudential considerations support their advancement of this claim on behalf of on-premises advertisers.

Similarly, on the Due Process claim, Haddad and Shulman assert (at 16) that Arcadia-Osborn has standing to assert a Due Process violation based on alleged irregularities in the administrative proceedings because it was an appellant before the Board. But Haddad and Shulman cannot raise arguments for Arcadia-Osborn that Arcadia-Osborn itself does not make. And in any event, Arcadia-Osborn waived any argument that it has standing

to assert a Due Process claim by failing to raise it below. [*See* IR-29 (association response) at 17.]

Accordingly, if the Court reaches the issue of standing to assert constitutional violations, it should affirm the dismissal.

B. The superior court correctly determined that Arcadia-Osborn could not rely on the Declaratory Judgments Act to establish standing under A.R.S. § 9-462.06.

The superior court correctly concluded that Arcadia-Osborn's claim for "standing under the Arizona Declaratory Judgments Act, A.R.S. § 12-1831 *et seq.* ('Act'), fails because there is no claim for declaratory relief under the Act." [IR-49 at 6 (APP220).]

1. Arcadia-Osborn does not allege any independent claims for declaratory judgment.

The two association plaintiffs—Arcadia-Osborn and Urban Phoenix—argued below that even if they lacked standing as "person[s] aggrieved," they would have standing under the Arizona Declaratory Judgments Act (the "Act"), A.R.S. §§ 12-1831 *et seq.* Arcadia-Osborn now argues (at 27-28) that the superior court erred by finding that it lacked standing under the Act. It urges that under Arizona's notice pleading standard, the complaint could be construed to state a claim under the Act and thus give Arcadia-Osborn standing.

Not so. As the superior court correctly observed, the complaint does not allege any independent declaratory judgment claim, separate and apart from the reversal of the Board decision.

The Act provides that "[a]ny person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832. The complaint cites the Act in passing. [IR-32 at 10, ¶ 16 (APP130).] But none of its twelve counts actually alleges that the plaintiffs are persons "whose rights, status or other legal relations are affected by" the Phoenix Zoning Code or otherwise seeks "a declaration of [their] rights, status or other legal relations thereunder."

Instead, every count includes a general request for relief in the form of a "declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion . . . ." [IR-32 at 17-32 (APP137-52).]

These allegations do not state an independent claim for declaratory relief. First of all, "the prayer is not part of the complaint" for purposes of

stating a claim under the Act. *Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192 (1973).

More importantly, the relief Arcadia-Osborn requests is simply the special action relief authorized by § 9-462.06—namely, a judicial determination that the Board acted arbitrarily, capriciously, and abused its discretion. As the superior court correctly observed, "Plaintiffs brought this case for special action relief pursuant to A.R.S. § 9-462.06(K) and seeking a determination that the Board acted arbitrarily and capriciously and abused its discretion." [IR-49 at 6 (APP220).] Nothing in their complaint "seek[s] an independent determination of Plaintiffs' legal rights under the Phoenix Zoning Code apart from the Board's decision." [*Id.* (APP220).]

2. A party cannot use the Declaratory Judgments Act to circumvent the requirements of § 9-462.06(K).

The superior court correctly recognized that requesting relief in the form of a "declaratory judgment" does not transform a zoning appeal under § 9-462.06 into a declaratory judgment action under § 12-1832. A contrary holding would allow parties to circumvent § 9-462.06's carefully prescribed administrative review process and deferential standard of review merely by asserting a declaratory judgment claim.

A person aggrieved by a zoning decision cannot seek judicial review without first seeking review by the board of adjustment or city council under A.R.S. § 9-462.06. *See Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, 442, ¶ 14 (App. 2001) ("If a party fails to utilize the available administrative remedies, the courts decline to exercise jurisdiction."). And that judicial review is highly deferential. As the plaintiffs recognize, a board of adjustment decision will not be overturned unless it is "arbitrary, capricious, or an abuse of discretion." [IR-32 at 3 (APP123).] But if a party could simply re-cast it claims for relief under § 9-462.06 as claims for declaratory relief under § 12-1832, it could circumvent both the exhaustion requirement and the deferential standard of review.

For the same reason, Arcadia-Osborn cannot use the Act to circumvent the standing requirements of § 9-462.06(K). A.R.S. § 9-462.06(K) expressly defines who has standing for purposes of challenging a board of adjustment decision. A plaintiff cannot replace "person aggrieved" in § 9-462.06(K) with "[a]ny person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance" by styling a claim as one for declaratory judgment under § 12-1832. When the substantive relief sought is the reversal or modification of a board of adjustment decision, § 9-462.06 governs.

The superior court correctly rejected Arcadia-Osborn's alternative argument for standing under the Declaratory Judgments Act. [IR-49 at 6 (APP220).] This Court should affirm.

3. The individual plaintiffs waived any claim for standing under A.R.S. § 12-1832.

The individual plaintiffs also make cursory arguments that the superior court erred by denying them standing under the Declaratory Judgments Act. *See* Haddad/Shulman Op. Br. at 20-21, 52 n.32; Arcadia-Osborn Op. Br. at 27-28. But none of the individual plaintiffs claimed standing on this basis before the superior court; only the associational plaintiffs did. [*See* IR-29 at 17 (association response) (claiming DJA standing); *cf.* IR-31 at 2-14 (pro se response) (making no such claim).]

This Court "will not consider new theories" not raised in the trial court. *Fendler*, 130 Ariz. at 478 n.2. Accordingly, the individual plaintiffs cannot challenge the superior court's ruling on this ground on appeal.

C. Myers waived any taxpayer standing claim.

Finally, Arcadia-Osborn's opening brief suggests (at 11 & 17) that Tabitha Myers may have taxpayer standing even if she does not have standing as a "person aggrieved." Specifically, it queries whether the

superior court erred "by dismissing Myers for failing to meet the definition of a taxpayer in a BoA billboard decision." *Id.* at 11 (formatting omitted). But the superior court never made any such ruling, because Myers never claimed taxpayer standing below. [*See generally* IR-49 (APP215).]

Again, this Court "will not consider new theories" not raised in the trial court. *Fendler*, 130 Ariz. at 478 n.2. And like the other plaintiffs, Myers claimed standing only as a "person aggrieved" by the Board's decision in trial court. [*See* IR-29 (association response); IR-33 (Myers joinder).] Neither the complaint nor the plaintiffs' responses to the motion to dismiss raise taxpayer standing as an alternative. [*See generally* IR-32 (amended complaint); IR-29 (association response); IR-31 (pro se response).] Accordingly, all plaintiffs—including Myers—waived any claim for taxpayer standing.

Moreover, Myers does not offer any arguments or citations to support a taxpayer standing theory. *See* Arcadia-Osborn Op. Br. at 17-19 (disputing superior court's analysis of *Scenic Arizona* but never discussing Myers's taxpayer qualifications). Undeveloped and unsupported arguments are "insufficient to preserve an issue on appeal." *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 241 Ariz. 230, 238, ¶ 27 (App. 2016).

In sum, the plaintiffs waived any claim for standing as taxpayers under A.R.S. § 9-462.06(K). This Court should decline to reverse the superior court based on claims and theories never presented to it.

CONCLUSION

The superior court correctly found that these plaintiffs lack standing. This Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of January, 2023.

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APPENDIX
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APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 07/26/2022

CAPTION: URBAN PHOENIX PROJECT ET AL VS CLEAR CHANNEL ET AL

EXHIBIT(S): NONE

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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

URBAN PHOENIX PROJECT NETWORK, an Arizona non-profit association; ARCADIA OSBORN NEIGHBORHOOD ASSOCIATION, an Arizona non-profit association;	LC 2020-000294-001 Case No.

HARVEY SHULMAN, an individual; TABITHA MYERS, an individual; WALLACE GRAHAM, an individual; and NEAL HADDAD, an individual; Plaintiffs, v. CLEAR CHANNEL OUTDOOR, LLC, a Delaware limited liability company, as real party in interest; J & R HOLDINGS VI, LLC, an Arizona limited liability company, as real party in interest; CITY OF PHOENIX, an Arizona municipal corporation; and CITY OF PHOENIX BOARD OF ADJUSTMENT, an official body of the City of Phoenix; Defendants.	**VERIFIED COMPLAINT FOR STATUTORY SPECIAL ACTION AND DECLARATORY RELIEF**

Plaintiffs Urban Phoenix Project ("UPP"), Arcadia Osborn Neighborhood Association ("AONA"), Harvey Shulman ("Shulman"), Tabitha Myers ("Myers"), Neal Haddad ("Haddad"), and Wallace Graham ("Graham") (collectively "Plaintiffs"), for their complaint (the "Complaint") against the defendants named herein, allege as follows:

INTRODUCTION

In this important case, a City of Phoenix Zoning Adjustment hearing officer ("ZAHO") issued a decision ("ZAHO Decision") in which, for several reasons, the ZAHO refused to grant a use permit to allow certain presently existing, nonconforming static billboards (i.e., non-digital billboards) to be converted by Defendant Clear Channel Outdoor, LLC ("CCO") into digital billboards with brighter electronic images changing every 8 seconds. However, in another part of that same ZAHO Decision, the ZAHO did

grant a use permit ("Use Permit")[1] and a variance ("Variance")[2] to allow those presently existing nonconforming static billboards to be rebuilt and to be relocated by Defendant CCO as static billboards (i.e., non-digital billboards).

On appeal, by a vote of 4 to 3, Defendant City of Phoenix Board of Adjustment ("Board") issued a decision ("Board Decision") that reversed the ZAHO Decision insofar as the ZAHO refused to grant any of the static billboards to be rebuilt as digital; i.e., Defendant Board granted the Use Permit and Variance to allow the requested conversions to digital billboards. In that same appeal, Defendant Board also rejected a challenge to that part of the ZAHO Decision that allowed the static billboards to be rebuilt and relocated, even as static billboards.

Because Defendant Board acted without or in excess of its legal authority under applicable rules, ordinances (including particularly the City of Phoenix Zoning Ordinance) ("Ordinance"), statutes and constitutional requirements, and because its actions were arbitrary, capricious, or an abuse of discretion, Plaintiffs have filed this Complaint. The importance of the legal issues that were wrongly decided (and will affect many other future billboard applications in Phoenix) is confirmed by the unprecedented nature of the Board Decision, described by Defendant CCO itself: "This is the first effort in Phoenix to locate

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[1] Technically, several use permits were requested for several specific requested uses, but this Complaint will use the capitalized singular term "Use Permit" to refer to those permits issued for the specific requested uses. The capitalized term "Use Permit" does not include uses that do not come within the specific requested uses.

[2] Any use of the capitalized term "Variance" in this Complaint refers only to the single Variance that was requested and granted by Defendant Board – i.e., a Variance to reduce the required setback of 25 feet from the public right-of-way to zero ("0") feet. No other variance was requested and no other variance was granted.

internally illuminated advertising signs on a high-rise building outside of Downtown".[3] This case is also important because of the particular location of the billboards here -- with zero setback from the public right-of-way at the intersection of two major arterial intersections that is a commuter hub, Central Avenue and Thomas Road ("the Billboard Arterial Intersection").

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff UPP is a non-profit organization that raises awareness and inspires action for quality urban spaces that can be easily enjoyed by all. It is significantly involved in visioning for and creating a Central Phoenix in which walking, biking, and public transit are just as or more comfortable, safe and convenient than driving, particularly along Light Rail stations and other major transit routes. Its mission includes, but is not limited to, working for "8-to-80 design" (streets where 8-to-80-year-olds can function safely), "eyes on the street" (buildings with frequent doors, and with windows on every floor), and GOLD" bus rapid transit and effective light rail transit (where safety and short headways are critical). UPP's contributors, members, volunteers and other supporters include users of the Billboard Arterial Intersection.

2. Plaintiff AONA is an Arizona non-profit neighborhood association operating in Maricopa County, Arizona, particularly within the City of Phoenix. AONA's goals include developing strategies for protection of its residents and their neighborhood, and specifically involvement in transportation issues like safety and traffic that impact its

[3] As to Defendant CCO's billboards, the words "billboard", "sign", "board" are used interchangeably in this Complaint because they were so used throughout the proceedings below and because they are within the definition of "Signs" in Ordinance Section 202.

residents. A substantial number of AONA residents regularly use -- and will continue to use -- Thomas Road as their main commuter route to go from their homes west and/or into downtown Phoenix (and go east back to their homes), and the Billboard Arterial Intersection through which they pass is less than a 10 minute drive away from their homes.

3. Plaintiff Shulman is a part-time resident in Maricopa County, Arizona, within the City of Phoenix and for more than two years has been a member of the AONA Planning & Zoning Committee. Plaintiff Shulman resides only six short (north-south) blocks from the Digital Billboard Intersection and, as a pedestrian and/or driver, crosses the Billboard Arterial Intersection numerous times each week, almost daily, and will continue to do so. In the past five or six years, while crossing the Billboard Arterial Intersection as a pedestrian using the crosswalks and crossing carefully and only with the "Walk Signal", on at least two occasions he was almost hit by cars (which missed him by about one foot), and he has personally viewed several other similar "near misses" involving other pedestrians.

4. Plaintiff Myers is a full-time resident domiciled in Maricopa County, Arizona, particularly within the City of Phoenix, and more particularly in the Willo Historic Neighborhood and just a few blocks from the Billboard Arterial Intersection. Myers also works on a regular basis in an office building located right at the Billboard Arterial Intersection and 105 feet from one of the proposed digital billboards (2828 N. Central Avenue), and she is -- and will remain -- a regular user of the Billboard Arterial Intersection. She is also part of UPP.

5. Plaintiff Graham is a full-time resident domiciled in Maricopa County, Arizona, particularly within the City of Phoenix, and more particularly in the AONA

neighborhood. He is a member, director, and past officer of AONA, and he is -- and will remain -- a regular user of the Billboard Arterial Intersection to go west and to into downtown Phoenix (and go east back to his home). His personal experience is that this is currently a dangerous intersection even without digital billboards.

6. Plaintiff Haddad is a full-time resident domiciled in Maricopa County, Arizona, particularly within the City of Phoenix, and more particularly in the AONA neighborhood. He is a member, officer and director of AONA, and he is --and will remain -- a regular user of the Digital Billboard Intersection to go west and to into downtown Phoenix (and to go east back to his home). His personal experience is that this is currently a dangerous intersection even without digital billboards.

7. Defendant Clear Channel Outdoor, LLC, ("CCO") is a Delaware limited liability company, possessing certain real property rights and doing business in Maricopa County, Arizona. It is named because it is a real party in interest. Defendant CCO caused the actions giving rise to this Complaint to occur within Maricopa County, because it is listed by Defendant City as the "Applicant" for the Use Permit and Variance application filed on December 26, 2019 as "Application of Zoning Adjustment - Application No. ZA-541-19", on the March 19, 2020 "Appeal to the Board of Adjustment", and on the published agendas for the ZAHO public hearing and for Defendant Board's appeal meeting.

8. Defendant J & R HOLDINGS VI, LLC, ("JRH") is an Arizona limited liability company that owns the land upon which CCO's billboards are located and does business in Maricopa County, Arizona. It is named because it is a real party in interest. Defendant JRH caused the actions giving rise to this Complaint to occur within Maricopa

County, because it is listed by Defendant City as the "Owner" on the Use Permit and Variance application filed on December 26, 2019, as "Application of Zoning Adjustment - Application No. ZA-541-19", on the March 19, 2020, "Appeal to the Board of Adjustment", and on the published agendas for the ZAHO public hearing and Defendant Board's appeal meeting.

9. Defendant City of Phoenix ("City") is an Arizona municipal corporation located in Maricopa County, Arizona.

10. Defendant City of Phoenix Board of Adjustment ("Board") is an official body designated by Defendant City of Phoenix to, among other things, hear and decide appeals from the decisions of the City of Phoenix Zoning Administrator ("Zoning Administrator") pursuant to the Ordinance and the Arizona Revised Statutes ("A.R.S").

11. This Court has jurisdiction to hear and determine the claims in this Complaint by virtue of Article VI, Section 14, of the Arizona State Constitution, Rule 4(b) of the Rules for Procedure for Special Actions, and A.R.S. § 9-462.06(K).

12. This action is brought pursuant to A.R.S. § 9-462.06(K), A.R.S. § 12-1831 *et seq*. and the Rules of Procedure for Special Actions.

13. Venue in this Court is proper under A.R.S. § 12-401 and Rule 4(b), Rules of Procedure for Special Actions.

14. As explained in this Complaint, Plaintiffs are aggrieved by the Board Decision, and other actions and omissions identified herein that led to the Board Decision, and therefore Plaintiffs have standing to bring this action.

GENERAL ALLEGATIONS COMMON TO ALL CLAIMS

A. The Application and ZAHO Hearing

15. On or about October 24, 2019, Defendant CCO filed an application with Defendant City for a Use Permit and Variance to relocate its three static billboards on the property owned by Defendant JRH and to convert two of those static billboards to digital allegedly under various provisions of Ordinance Section 705.2 of the City of Phoenix Zoning Ordinance. The application, designated ZA-541-19, was set for a public hearing to occur on November 26, 2019, before a ZAHO. Because of an error in that application in regard to the Variance request (intended to reduce to zero -- from the required 25 feet -- the billboards' setback from the public right-of-way), the application was amended in a number of respects, re-filed on December 26, 2019, and re-set for a public hearing to occur on February 6, 2020.

16. By recorded easement, Defendant CCO currently maintains three nonconforming static billboard faces on a large lot extending to the Billboard Arterial Intersection, which lot has been mostly vacant for decades except for a small commercial building and the billboards. Defendant JRH has wanted to build a mixed-use high-rise office building there which would require changes to Defendant CCO's easement, and when Defendant JRH informed Defendant CCO of this project ("the Project"), Defendant CCO refused to modify its easement absent Defendant JRH's agreement to allow the billboards to be increased in height, to be relocated closer to the Billboard Arterial Intersection, to have their setback reduce to zero feet, to be embedded into the structure of the building itself and, at least for two of the billboards, to be converted to digital billboards.

17. In its application and throughout the case before the ZAHO and Defendant

Board, Defendant CCO has repeatedly stated: "[T]his dramatic new high-rise … [Project] cannot move forward to actual development unless the future relocation of the existing billboards is also approved. Although subject to two different processes at the City, this is a package deal." In a letter sent to or circulated among hundreds of residents living near the Project, Defendant CCO wrote: " Without approval of these unique [use permit and variance] requests, this visionary [Project] development will not be able to move forward."

18. Several persons and organizations, including most of the Plaintiffs and others, opposed Defendant CCO's application at or in writing before the February 6, 2020, public hearing and the ZAHO took the case under advisement.

19. On March 11, 2020, the ZAHO issued the ZAHO Decision (***attached hereto as Exhibit A***). The ZAHO repeatedly emphasized that the Use Permit and Variance proceeding was about the billboards, not about the development Project. In his ZAHO Decision he stated "it is possible that the 'Project' itself is acting as an inadvertent form of coercion, thereby causing self-supporting approval of the digital billboards."

20. The ZAHO Decision granted Defendant CCO a Use Permit and Variance which allowed it, among other things: to relocate all its static billboards to locations much closer to the Billboard Arterial Intersection; to increase the billboards' heights above ground; and to reduce the billboards' setback from the public right-of-way from the required distance of 25 feet to zero feet. In granting those relocations, the ZAHO did not address multiple objections raised by the opponents of those relocations.

21. However -- and not allowing the ZAHO Decision to be influenced by the "inadvertent form of coercion" associated with the Project – the ZAHO rejected conversion

of any static billboards to digital for several reasons including, among other things: vehicular and pedestrian safety; changing electronic images every 8 seconds; and increased glare. For example, the ZAHO explained that a 2017 Road Safety Assessment from the Maricopa County Association of Governments ranked the Billboard Arterial Intersection as the fifth highest high crash intersection in the County. He also stated that "this intersection is a significant transportation hub with both a busy light rail station and one of the busiest bus stops in the City."

B. The Proceedings Before Defendant Board

22. On March 19, 2020, Defendant CCO appealed to Defendant Board to reverse the ZAHO Decision insofar as it denied the conversion to digital billboards. On March 26, 2020, Plaintiff UPP and Plaintiff AONA filed their "Appeal to the Board of Adjustment" asking Defendant Board to reverse the ZAHO Decision insofar as it granted the Use Permit and Variance to, among other things, relocate the static billboards to locations much closer to the Billboard Arterial Intersection, to increase the billboards' heights above ground, to reduce the billboards' setback from the public right-of-way from the required distance of 25 feet to zero feet.

23. Defendant Board heard both appeals, through "virtual" presentations, on August 6, 2020. By a vote of 4 to 3, Defendant Board reversed the ZAHO Decision to the extent that the ZAHO refused to allow any of the static billboards to be rebuilt as digital, i.e., Defendant Board granted a Use Permit and Variance to allow the requested conversion of two static billboards to digital. At the same time, Defendant Board rejected the appeal by Plaintiff UPP and Plaintiff AONA that challenged the ZAHO Decision insofar as it

allowed the requested billboard relocations (even if the billboards were to remain static).

24. The rationale provided by Board Member Cole for his successful motion -- in fact, the only rationale provided by any of the four Members of Defendant Board who voted for that motion -- was stated by Board Member Cole as follows:

> I think that this project should go forward. I think there's been a lot of work done. I think there's a number of people in support of it and a number of people against it. I also, my personal belief, is that this corner is underutilized and will continue to be unless some kind of a compromise can be worked out. And if it means adding digital signs to the building as an accommodation to the sign company, I'm in favor of that.

25. The rationale of the three dissenters was provided by Board Chair Eigo when, in stating he would vote against the motion, he pointed out glare that exceeds ambient conditions, the variance is not necessary for the preservation and enjoyment and substantial property rights, and the billboards will be materially detrimental to some working or living in the area. Beyond that, Chair Eigo stated that Defendant Board was required to focus on the billboard issues, and not on the bigger development Project:

> [N]ot to cast aspersions on anyone's vote on this, but our charge is frustratingly narrow. Our charge is to look at the permit and variance rubric and decide and if the applicant has met those. It is not to like or dislike a project. I guess I would go back to the original ZAHO result where they feel leverage and I think we feel leverage as well. Our charge is not to ensure that there's not an empty site for another generation to come -- which none of us wants to see. But I believe looking narrowly at our charge, that's where I come down.

26. On August 31, 2020, Plaintiff UPP and Plaintiff AONA and others filed with Defendant Board a timely Request For Reconsideration (***attached hereto as Exhibit B***) that identified several manifest errors in the Board Decision. Defendant Board denied the Request for Reconsideration at its meeting on September 3, 2020 (Defendant Board's denial is included within any references in this Complaint to the "Board Decision").

27. By timely filing of this Complaint, Plaintiffs seek the review and vacation of

the Board Decision and denial of the Use Permit and Variance.

COUNT I
(Relocation of Billboards Not Permitted)
Statutory Special Action (Violation of Sections 705.2.G.4, 705.2.G.5, 705.2.G.1 & 307.A.7.b of the Ordinance)

28. Plaintiffs allege, adopt, and incorporate by reference the allegations of the paragraphs preceding this point in the Complaint as though fully set forth herein (collectively, "Preceding Allegations", which hereafter cover all allegations up to each such point in the Complaint where the reference to "Preceding Allegations" is later made).

29. As the result of the Board Decision approving the relocation of Defendant CCO's nonconforming billboards at the Billboard Arterial Intersection, and in addition because the Board Decision permitted conversion of two of those billboards to digital, all of the individual Plaintiffs will be subjected to a real increased risk of personal injury, property damage to their vehicles, and economic harm resulting therefrom.

30. Ordinance Section 307.A.7, in subparts 7.a and 7.b, establishes standards for granting Use Permits. Ordinance Section 307.A.7.a generally requires that a proposed use: not create certain traffic problems in nearby residential areas; not emit glare at a level exceeding that of ambient conditions; not contribute in a measurable way to neighborhood deterioration; and not contribute to downgrading of property values. Ordinance Section 307.A.7.b requires that a proposed use will be in compliance with all provisions of the Zoning Ordinance and other Phoenix laws. Further, Ordinance Section 705.2.G.1 states that no billboard may be constructed in violation of any provision in Ordinance Section 705.2, except as stated in Ordinance Section 705.2.G, and Ordinance Section 705.2.G.4 and

C. That Plaintiffs recover their Costs and Fees.

Dated and filed on the 5th day of October, 2020.

/s/ Richard Mario Storkan
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EXHIBIT A

ZA-541-19-4 (SIGN) – #1 & #2 - DENIED AS FILED; #3, #4, #5, & #6 - APPROVED / STIPULATIONS

DECISION: The request for use permits and a variance was taken under advisement. It was taken out from under advisement on March 11, 2020 and decided as follows:

#1 and #2 - Denied as filed, approved for non-digital signs only.

#3, #4, #5 and #6 - Approved with the following stipulations:

1) 60 months to apply for and pay for the new building permits.

2) The location of the billboards on the building shall be consistent with the elevations date stamped February 6, 2020. The south and east facing billboards shall be no more than 85 feet from the corner of the building.
3) The height of the south and east facing billboards shall not exceed 36 feet.

4) The height of the north facing billboard shall not exceed 48 feet.

Application #:	**ZA-541-19-4 (SIGN) – #1 & #2 - DENIED AS FILED; #3, #4, #5, & #6 - APPROVED / STIPULATIONS**
Existing Zoning:	C-2, P-1, R-4 TOD-1
Location:	Northwest corner of Central Avenue and Thomas Road
Quarter Section:	15-27(G8)
Proposal:	**1)** Use permit to relocate and rebuild an existing non-conforming off-premise sign (single face) to digital, 48 feet tall. Use permit required. **2)** Use permit to relocate and rebuild an existing non-conforming off-premise sign (double face) to a single digital and a single conventional face, both 36 feet tall. Use permit required. **3)** Use permit to allow an off-premise structure to be within 320 feet of a historic preservation district. A distance of 500 feet is required. **4)** Use permit to allow an off-premise structure to be within 230 feet of a neighborhood conservation district. A distance of 250 feet is required. **5)** Use permit to allow an off-premise sign to be located within 320 feet from a residential district and residential use. A distance of 500 feet is required. **6)** Variance to reduce the off-premise setback to 0 feet. A maximum of 25 foot setback is required from the right-of-way.
Ordinance Sections:	705.2.G.5 705.2.G.4 705.2.A.4.a 705.2.A.4.b 705.2.A.5 705.2.B.1
Applicant:	Diane Veres, Clear Channel Outdoor
Representative:	Stephen C. Earl, Earl, Curley, & Lagarde
Owner:	Jim Pederson, J and R Holdings VI, LLC

ZONING ADJUSTMENT HEARING OFFICER: CRAIG STEBLAY
PLANNERS: TERESA HILLNER, PLANNER III AND ERIC MORALES, PLANNER II

Speaking in favor was Stephen Earl, Andrew Yancey, Carolyn Oberholtzer, Lidia Dickinson, Margaret Dietrich, Robert Cannon, Pam Pawlowski, Tom Doescher, Diane Veres and Lou Musica.

Present in support was Ann Bommersbach.

Present in interest was Betty Brackenridge.

Speaking in opposition was Dan Shilling, Harvey Shulman, Susan Edwards and Wally Graham.

Present in opposition was Elizabeth Proffilt, Dorothy Broal, Robin Stinnett, Neal Haddad, Paul Barnes and Victoria Dean.

DECISION: The request for use permits and a variance was taken under advisement. It was taken out from under advisement on March 11, 2020 and decided as follows:

#1 and #2 - Denied as filed, approved for non-digital signs only.

#3, #4, #5 and #6 - Approved with the following stipulations:

1) 60 months to apply for and pay for the new building permits.

2) The location of the billboards on the building shall be consistent with the elevations date stamped February 6, 2020. The south and east facing billboards shall be no more than 85 feet from the corner of the building.

3) The height of the south and east facing billboards shall not exceed 36 feet.

4) The height of the north facing billboard shall not exceed 48 feet.

FINDINGS OF FACT: A significant amount of the testimony and documentation regarding this case is related to a new mixed-use development, Midtown Tower, the "Project". Over the past 9 months there have been numerous presentations and neighborhood discussions regarding the subject property and the "Project". Four pages of the applicant's 8-page narrative is discussion about the "Project". Page 5 of the narrative states, "Although subject to two different processes at the City, this is a package deal." In other words, if the subject Zoning Adjustment is not approved, the "Project" cannot be built. The proposed "Project" has been through all the required rezoning hearings and it now has City Council approval to proceed under Chapter 13 (WU Code).

In his opening statement, Mr. Andrew Yancy, representing the developer, Pederson Group, said "community reaction was overwhelmingly positive to our proposal", "Through our re-zoning process we received unanimous support from the Encanto Village, the City Planning Commission, and from City Council".

However implied, support for the "Project" does not mean support for large digital billboards. Several people who spoke in support for this case were enthusiastic about the "Project" but qualified their support with caveats for the billboards such as; "may cause some annoyance, but not much", or "we understand that there will be a slight increase in glare".

As evidenced from testimony and documentation, this ZA case is convoluted to encompass several digressions. Arguably, it is possible that the "Project" itself is acting as an inadvertent form of coercion, thereby causing self-supporting approval of the digital billboards.

Use Permit Requests #1 & #2:
Absent the digital component, approval of these use permits to relocate three nonconforming off-premise signs will not cause a significant increase in vehicular or pedestrian traffic in adjacent residential areas; or emit odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions. Additionally, there should be no potential for detriment to pedestrian safety.

The relocation of these billboards, as stipulated, should not cause any adverse impact on adjacent or other properties in the area. To the contrary, combined with the proposed mixed-use development in accordance with the WU Code, this project will enhance the pedestrian environment and encourage further development and vitality of the mid-town area.

The proposed digital billboards are at the intersection of two urban arterial streets. Testimony from both the applicant and the opposition is that this location is a significant transportation hub with both a busy light rail station and one of the busiest bus stops in the city. In fact, the Maricopa County Association of Governments issued a Road Safety Assessment prepared for the City of Phoenix in 2017, which ranked the Central Avenue and Thomas Road intersection as the 5th highest High Crash Intersection. There are no definitive conclusions in the submitted documentation or studies that a large digital billboard image changing every 8-seconds does not distract drivers.

Both the applicant and the opposition presented documentation as to the differences between non-digital and digital billboards, and their distraction effect on drivers. In reviewing these studies, it is apparent that the most significant difference is in direct relation to the distance between the digital sign and the windshield (the drivers' eyes). For example, the farther the digital sign is from the windshield, such as freeways or suburban arterials, the less distracting it can be for the driver. Conversely, signs closer to the driver's eyes, like on narrower urban arterial streets, can be more distracting to the driver. Thereby causing concern for pedestrian safety, notably when making a right-turn where pedestrians have shared right-of-way.

Naturally, pedestrians are not a factor for placement of freeway digital signs. In this case however, sign placement is a very significant factor because of the detriment toward pedestrian safety resulting from distracted drivers. (Reference: Ordinance Section 705.2.C.1, and 705.B.c.4. "No sign shall be erected, operated, used or maintained which creates in any other way an unsafe distraction for motor vehicle operations.")

There is recent documentation that substantiates the forgoing. "Digital Billboards and Traffic Safety", funded by the US Department of Transportation (USDOT) in 2017, prepared by Dr. Virginia Sisiopiku, professor of transportation engineering at the University of Alabama. Study excerpts include:

- Digital billboards have "unique features", compared to non-digital billboards, including their brightness and contrast with surroundings, their messages that change suddenly, their realistic imagery, the lack of driver acclimation with their messages, and the potential for interactivity with drivers.
- A survey of road users found that they perceived digital billboards are more dangerous, younger drivers stared at digital billboards longer without adjusting their speeds, and digital billboards - especially those transitioning at 500 feet - drew significantly more attention than static (non-digital billboards.
- While industry representatives claim that there has not been any "proof" that digital billboards cause more accidents (that is, no cause-and-effect), the facts are clear that the study found that the crash rate is 25% - 29% higher at digital billboard influence zones (such as intersections) compared to non-digital. In other words, there is a correlation between crash rates and digital billboards.

Excluding the aspect of the re-development project, this ZA case situation is almost identical to several recent cases involving digital conversion of large billboards. While precedent should not be a factor in zoning adjustment considerations, the facts leading to denial of these recent digital conversions are very applicable to this request. For example:

- The preponderance of research conducted on effects of digital billboards on motorists shows significant distraction and increase crash risk.
- Studies funded by the National Highway Traffic Safety Administration and USDOT - Office of the Assistant Secretary for Research and Technology and prepared by the National Center for Transportation Systems Productivity and Management at Georgia Institute of Technology found:

  > "that drivers had a significantly longer dwell time, a greater number of fixations, and longer maximum fixation duration when driving past an electronic billboard compared to other signs on the same road stretches"

"that the presence of digital billboards is correlated with an increase in crash rates in areas of billboard influence (compared to control areas downstream of the digital billboard location). Moreover, certain types of crashes such as sideswipe and rear-end crashes were found to be over-represented at digital advertising billboard influence zones "

- The applicant stated that research has shown no difference in distraction caused by digital billboards compared with non-digital ones. The two studies showing no difference were commissioned by the Outdoor Advertising Association of America's Foundation for Outdoor Advertising Research and Education. The methodology and results of these studies have been questioned with regard to accuracy and objectivity.

- The 48-foot high billboard and its changing digital displays will be far more visible to residents of the surrounding neighborhoods. The objective of the application is to increase the sign's conspicuity, but this can result in negative impacts for residents.

Additional aggravating circumstances with the subject case include:

- The subject location has a significantly greater pedestrian presence due to the adjacent light rail station and bus stop.
- While the referenced prior cases met the standard 25-foot sign setback requirements, this digital request is for a 0-foot setback.

Accordingly, denial of these large digital billboard conversions is well founded.

Use Permit Requests #3, #4 & #5:
Pursuant to 307.A.7.a., approval of these use permits allowing for decreased separation from a historic preservation district, a neighborhood conservation district, and a residential zoning district with a residential use; will not cause a significant increase in vehicular or pedestrian traffic in adjacent residential areas; or emit odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions; or contribute in a measurable way to the deterioration of the neighborhood or area, or contribute to the downgrading of property values.

The existing billboards have been on this site for over 40 years (since 1976). Although the current placement predates much of current code, the relocation would be farther away. Therefore, approval of the relocation helps mitigate any effects on the neighborhood, most of which developed or expanded despite the sign presence. The area has proven to be viable and continues to be developed with much more intensive uses without any adverse impact from the signs. Consequently, there should not be adverse effects toward the neighborhoods.

Variance Request #6:
The proposed project is planned to be developed in accordance with the WU Code (Walkable Urban Code, Chapter 13). The spirit and intent of the WU Code is to promote a pedestrian enhanced environment along the City's transportation corridor. To help accomplish this urban vision, WU code specifically requires new structures to be primarily on or very near the property lines that are street adjacent.

There is no provision within Sections 705 (Signs) or 705.2 (Off-premise Signs) of City Ordinance that specifically allow billboards to be incorporated into the street façade of a building. Absent such provision, a variance is necessary because Section 705.2.B.1 requires a minimum setback of 25-feet from all property lines adjacent to public right(s)-of-way. Accordingly, for these relocated off-premises signs to work within the new development, they need to be parallel to the property line and incorporated into the building façade which has no setback.

Special Circumstances: Excepting for the billboard signs and a small commercial structure, this site has been primarily vacant for nearly 50 years. Although there have been attempts for additional development on the site, plans could never materialize because the billboards and their associated view corridors are in the way. Hence, development will always be conditional on a work-around with the billboards.

Hardship: While a variance for a new development plan would usually mean a self-imposed hardship, the underlying conditions with this site are exceptional. Essentially, there are two separate owners, both of which have legal rights to the same property. The real estate is owned by Pederson Group (J and R Holdings VI, LLC). However, portions of the property are permanently encumbered with perpetual easements in favor of Clear Channel Outdoor, who owns the billboards. Neither of these entities are the original owners and neither where involved with creating of this special condition. Thus, the hardship is not self-imposed.

Substantial Use of the Property: Due to the special condition and those circumstances, only one of the entitled parties is and has been enjoying their substantial property rights. In his opening statement, Clear Channel Representative, Mr. Stephan Earl, said: "I want to make it crystal clear that Clear Channel did not initiate this process. We are content to continue the existing condition we had, which is the three conventional billboards."

While Clear Channel is, and has been, enjoying substantial property rights, the owner of the property, Pederson Group, is severely restricted in their rights for development. Unless, the property owner, the billboard owner, and the surrounding community, can compromise a plan that allows full and substantial property rights while at the same time preserving and enhancing the neighborhood.

Therefore, absent this variance approval, the owner will be denied similar rights that are enjoyed by other property owners along Central Avenue.

Detriment to the Neighborhood or Public Welfare in General: As stipulated, this sign variance combined with the proposed development will further enhance the urban vitality of this neighborhood.

SUMMARY: Mr. Yancey was present representing The Peterson Group which was the property owner. He stated that Mr. Earl was present representing Clear Channel. He discussed the condition of the site and the fact that it was underutilized. He stated that the billboards on the property where located within perpetual easements and had been located on this property for many years. He stated that the current locations of the easements made it difficult to develop the property to its potential. He noted that the property had been rezoned recently to the Walkable-Urban Code district and they had held many public meetings as a part of that process in which they proposed the new billboard locations. He felt they had a lot of neighborhood support for the project and the billboard locations.

Mr. Yancey stated that the new building on the property would be a positive addition in the neighborhood and would activate walkability. He stressed that the project would only be possible with the relocation of the billboards to the new locations.

Mr. Earl clarified that Clear Channel did not initiate this request. He stated that Clear Channel was ok with leaving the billboards in their current condition and current locations, but the new rezoning and proposed project created the need to move the boards to develop the land. He said that the building proposal would occupy all the open space along the street fronts so the only possible location to relocate the boards would be to integrate them into the building, above the first floor. He stated that Clear Channel and the property owner were willing to work together to relocate the boards to the new proposed locations to make the project on the property possible. He clarified that the billboards new locations would be at 36 feet tall and not 48 feet. He noted that the request to locate them on the property line was due to the buildings proposed location being on the property line. Locating the billboards 25 feet from the property lines would place the boards inside of the building which would not work.

Mr. Earl stated that the building proposal created the need for the relocation of these boards which changed the distance from historic neighborhoods and residential uses. He stated that the ordinance, under the new zoning district, required the building to be located close to the street. He said that the digital boards were always shown throughout the rezoning process and it was not something they tried to hide. He understood that some citizens disliked billboards and even more when they were digital, but he felt that the proposal would be a benefit to the neighborhood and City. He argued that the eight-second copy change was appropriate and had been in the Ordinance for many years. He did not agree that a longer duration between copy changes would be safer or more beneficial to the area. He discussed the technology of the board such as automatic dimmers to adjust the illumination throughout the day.

Mr. Earl discussed the comparison that some people where making between the proposed signs and the BMO sign located on top of a building nearby. He argued that the BMO sign was completely different and not relatable to this proposal. He clarified that the signs would only be on until 11:00 PM and would be adjusted automatically based on the ambient conditions throughout the day.
He noted that the height of the signs would not impact any surrounding properties since they would only be visible from the commercial buildings in the surrounding area. He stated that this area was intended to be urban with mixed-use buildings. He did not see any negative impacts being imposed on the surrounding area because of the proposals. He discussed the lighting regulations in the Ordinance and that they would be in compliance with all restrictions and requirements that were in place. He felt that the development of this property would be a major improvement in the area and would add to the value of the neighborhood. He pointed out that the closest neighborhood to this proposal was Willow and they were in support of the proposal.

Mr. Earl wanted to cooperate with the opposition regarding the lighting, but he did not agree with limiting the colors they could use or the illumination that they had available through the Ordinance. He clarified that the static board on the north of the building would be 48 feet tall but not the other boards.

Mr. Steblay noted that the building proposal was not in question here since the request was only for the billboards. Mr. Earl stated that the building was only possible with the proposed sign locations due to the perpetual easements that the sign company had in place.

Mr. Steblay asked what the height was to the bottom of the boards. Mr. Earl stated that the bottom of the boards would be 22 feet from the ground. He also noted that a billboard on 7th Avenue was 21 feet from the bottom of the board to the ground. Mr. Steblay asked why the boards needed to be turned to digital if Mr. Earl stated that the boards were currently very effective as static boards. Mr. Earl felt the change would be beneficial and more effective.

Ms. Oberholtzer stated that there was previous entitlement history on the property that noted its odd shape and the hardships that the billboards created. She stated that the easements for the billboards created hardships that required variances to relocate them to develop the property. Mr. Steblay asked why they could not develop the property without the rezoning that they went through. Ms. Oberholzer stated that the C-2 zoning also required variances to relocate the boards to develop the property. She argued that the Ordinance restriction of a maximum building setback created the hardship on the property when it came to relocating these boards with the development of the property. Mr. Steblay asked how long the current owner had owned the property. Ms. Oberholtzer stated that he had owned it since 2001. Mr. Steblay noted that the current owner purchased the property under its current condition. Ms. Oberholtzer stated that the billboards current heights were more harmful to the area due to them being so low. She argued that the proposed height would be an improvement.

Ms. Dickinson stated that she was the owner of the Wagon Wheel building on 7th Avenue which was adjacent to a digital billboard that also had similar opposition previously. She discussed her original concerns with the request to turn that sign digital and wanted to voice her change in opinion now that the sign there had been digital for over a year. She stated that a digital board was not as disruptive as people thought it would be. She stated that Clear Channel had been very helpful in changing the property into a more positive sight.

Ms. Dietrich stated that she lived half a mile north of this proposed site. She stated that she was present for all of the public meeting for this site. She felt that the proposal would not be detrimental to the area. She understood that the digital signs may be a little more distracting as opposed to a static sign, but she felt that its each individuals' responsibility to be cautious and safe when driving by a digital sign.

She clarified that there had been many meetings for this site and the developer had never hid the fact that the signs would be digital, and that the building proposal would only be possible with the relocation of the billboards. She supported the proposal.

Mr. Cannon was present representing the Willow Neighborhood Association. He shared that the discussions for these billboards began in June of 2019. He stated that they worked with the sign company and developer to arrive at a delicate balance that preserved the neighborhood and allowed the property to be developed. He stated that the closest and largest neighborhood the Willow District was in full support of these proposals.

Ms. Pawlowski lived in the Melrose District and was a part of many discussion regarding the billboard on 7th Avenue and Montecito Street. She stated that the neighborhood's original apprehension to that sign was found to be incorrect. Since its development the sign has been a positive addition and the increase in height provided a better site in the community. She said that the home values in the area had continued to increase with no impact due to the sign being changed to digital.

Mr. Doescher lived 3-blocks south of this property and was a member of the Willow Neighborhood Association. He stated that Clear Channel had listened to their concerns and worked to provide a proposal that would not be detrimental to the neighborhood. He asked that a one-year review be stipulated to evaluate its impact, but he was in full support.

Mr. Shilling was the president of the Phoenix Towers. He stated that the official standing regarding this proposal was not in support. Their opposition was due to the precedent that this would set in the area. He felt that the digital boards would be detrimental, and he was in support of dark skies not illuminated signs.

Mr. Shulman stated that he lived about 7 blocks from this site. He said this intersection was very busy, and cars constantly run the traffic light causing accidents. He felt the digital signs would increase the probability of pedestrian and vehicle accidents. He stated that the signs were built in 1972 and the perpetual easement was recorded in 2000. He was confused about what happened between those years and what the change was. He discussed that vagrants camped out under the billboards and it was the responsibility of the board company to maintain the area clean. He stated that he sat with the applicant to try and find a balance between his requests and their proposals, but the applicant was unwilling to accommodate their requests. He said that he asked the sign company to reduce the sign to under 200 nits, but they rejected his request.

Mr. Shulman felt that an 8-second copy change would be distracting. He argued that the Ordinance stated that it could be 8-seconds but that could be increased as a stipulation. He proposed that they move the sign proposals further from the intersection. He pointed out other nearby billboards that were non-digital. He argued that the signs on this site did not have to be digital. He stated that there were no major billboards on Central Avenue between Roosevelt Street and Camelback Road. He said that there was one exception on Turney Avenue where the hearing officer for that case stipulated that the sign had to be smaller and would have no advertising facing south. He felt that there had to be a balance and that the sign company was not entitled to the same sign area and the opportunity to turn them digital.

Ms. Edwards lived in the area. She wondered what communication had occurred with businesses across the street from these proposed signs since they would be impacted by the light and sign changes. She echoed Mr. Shulmans concerns with traffic safety and the level of illumination.

Mr. Graham was on the Board of the Arcadia Neighborhood Association. He stated that their interest on this intersection was that many of their residents use Thomas Road to commute home and they had safety concerns with the proposal. He felt digital boards distract drivers. He referred to a 2017 study that was included in a document entered into the case file. He discussed the impact a digital board had on driver distraction. He said that areas with digital boards had a 25-29% higher rate in accidents which he felt indicated a negative correlation. He asked that Mr. Steblay look through his submittal for facts regarding a correlation between accidents and digital signs.

Mr. Shulman argued that glare from a digital billboard would be increased above ambient conditions when compared to the current glare with the static boards. He stated that the signs would be too bright at night and would be disruptive. He argued that the distance between the signs would become less with the new proposal which he felt was not appropriate. He said that a luxury apartment building was proposed less than 500 feet from this site.

He argued that the permit history from the 1970's indicated a board of 621 square feet not the current size. Due to that he felt that the boards should not be allowed to move or be altered since they were not legal.

Mr. Earl understood that there was opposition to the boards, but he asked that it be noted that the Willow Neighborhood spent time working with this project and they ultimately were in support of the proposal. He also noted that they were the neighborhood that would be most impacted since they were the closest. He argued that the TOD-1 overlay previously on the property also required that any development be near the property line and therefore the rezoning did not change that condition. He felt that the C-2 zoning prior to TOD-1 being implemented may have allowed for the signs to remain in their place but the change in requirements created the hardship that the site faced at this current time.

Mr. Earl argued that the lighting standards in the Ordinance would be met. He argued that the implementation of these proposals would not be detrimental to the neighborhood. He felt that the redevelopment of this site would be exciting for the area.

Mr. Musica was a lighting expert for Clear Channel and wanted to note that they conducted lighting research on this site and found the change to be minimal. He argued that the ambient lighting from a static board and a digital board would be the same and, in some cases, would be less with a digital board. He stated that glare was a matter of opinion, but a digital board would be non-impactful on a site that already had a static board. He said that there were studies on both sides of the spectrum to argue that they were impactful and that they were not impactful. He noted that the National Highway Traffic Department conducted studies that showed digital billboards were not obstructive or distracting. He pointed out that these signs would be dimmer than what was required for right-of-way signs.

Mr. Steblay asked why they could not do smaller boards with longer periods between copy changes. Mr. Earl stated that the board company had a set sign size and a copy change standard had already been adopted by the City which was 8 seconds. He felt that a longer time between copy changes would be less effective and not efficient for companies that buy displays on these signs. Mr. Steblay felt that they wanted to move the boards and upgrade them. Mr. Earl stated that they wanted to ensure that the revenue would not be impacted by the change in location. Mr. Steblay asked if they had options to move the signs to different locations. Mr. Earl stated that they did but moving them further away from the intersection would be more impactful to the Willow Neighborhood.

Ms. Veres was present for Clear Channel. She stated that the digital boards were safer to operate and manage. They do not require individuals to access them like they do for static boards. She felt the boards proposed locations would be disruptive if they were all static due to the amount of space needed to conduct a change in the display with the boards being at the property line. Traffic would need to be stopped or redirected.

Mr. Steblay took this item under advisement before rendering a decision.

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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

URBAN PHOENIX PROJECT NETWORK, an Arizona non-profit association; ARCADIA OSBORN NEIGHBORHOOD ASSOCIATION, an Arizona non-profit association; HARVEY SHULMAN, an individual; TABITHA MYERS, an individual; WALLACE GRAHAM, an individual; and NEAL HADDAD, an individual,

Plaintiffs,

vs.

CLEAR CHANNEL OUTDOOR, LLC, a Delaware limited liability company, as real party in interest; J & R HOLDINGS VI, LLC, an Arizona limited liability company, as real party in interest; CITY OF PHOENIX, an Arizona municipal corporation; and CITY OF PHOENIX BOARD OF ADJUSTMENT, an official body of the City of Phoenix,

Defendants.

No. LC2020-000294 -001

DEFENDANTS' MOTION TO DISMISS

(Oral argument requested)

(Assigned to the Honorable Katherine Cooper)

Defendants Clear Channel Outdoor, LLC ("Clear Channel"), J & R Holdings VI, LLC ("J&R"), and the City of Phoenix and City of Phoenix Board of Adjustment (collectively, "the City"), hereby move to dismiss the plaintiffs' special action complaint under Ariz. R. Civ. P. 12(b)(1) and 12(b)(6). The Court should dismiss this

case for lack of standing because converting a vacant lot with billboards into a developed lot with billboards neither peculiarly impacts nor causes actual injury to general users of the nearby intersection like the plaintiffs.

BACKGROUND

I. The proposed development.

The property at issue is located at 2910 North Central Avenue, 85012, at the northwest corner of Thomas Road and Central Avenue in Midtown Phoenix. *See* Compl. at 4 (crossroads); *id.* at Ex. A, p. 2 (APN).[1] J&R owns the lot, which is mostly vacant except for three billboards owned by Clear Channel. Compl. at 6-8, ¶¶ 8, 16. Clear Channel's billboards are located within "a perpetual, exclusive easement (the 'Sign Easement') for the construction, maintenance, repair, dismantling, replacement, alteration, improvement, operation, illumination and use of outdoor advertising sign structures, appurtenances and related property and equipment (the 'Billboards'), over, under, upon and across" the property. Grant of Perpetual Easement (attached as Exhibit 1) at 2; *see also* Compl. at 8, ¶ 16 (referencing recorded easement).[2]

When created, the Sign Easement did not prevent development of the property; the owner could build to the north and west of the Easement. *See* Compl. at Ex. A, pp. 5-6, 9. In 2003, however, the City adopted and applied a Transit Oriented Development Overlay ("TOD-1") to the area. *See id.* at 9; Phoenix Zoning Code ("Code") § 662. To encourage urban density and "a pedestrian-oriented environment" in areas around light rail stations, the new TOD-1 standards set a *maximum* building setback of six to twelve feet and require designs to maximize street frontage. Code § 662(A), (I)(2). But the preexisting perpetual Sign Easement on the property runs along both sides of the

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[1] Exhibit A to the complaint is not numbered sequentially. Accordingly, pincites to Exhibit A in this motion refer to the PDF numbering (e.g., "Ex. A, p. 1" refers to the first page following the slipsheet).

[2] "A complaint's exhibits, or public records regarding matters referenced in a complaint, are not 'outside the pleading,' and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012).

property's street frontage, thus making it impossible to develop the lot in compliance with the TOD-1 requirements. *See* Compl. at Ex. A, pp. 5-6, 9. As a result, the lot has sat largely vacant for many years, despite its location at a key Midtown Phoenix intersection directly next to "both a busy light rail station and one of the busiest bus stops in the city." Compl. at Ex. A, p. 3.

In 2019, J&R and Clear Channel agreed on a creative solution that would allow development of the lot in accordance with the City's new urban standards while also preserving Clear Channel's property rights. The proposed solution would relocate Clear Channel's existing signs and easement onto the facade of a new mixed-use tower, thereby freeing up the underlying land for development as desired by the City. *See* Compl. at Ex. A, p. 2.

II. Zoning approvals and appeals.

Although the entire development is contingent upon obtaining approval to relocate the billboards onto the building, *see* Compl. at 8, ¶ 17, the approvals for the building itself and the billboard relocation are subject to different city processes, Compl. at Ex. A, pp. 2-3. Accordingly, J&R applied for rezoning approval for the mixed-used development[3] and Clear Channel separately applied for approval to relocate the billboards and easement. *See id.*

Clear Channel applied for five use permits and a variance, which together would allow it to relocate its three static signs from their current location to the facade of J&R's new tower and convert two of the three signs to digital. Compl. at Ex. A, p. 2. The City's Zoning Adjustment Hearing Officer ("Hearing Office") held a public hearing on Clear Channel's application on February 6, 2020. Compl. at 9, ¶ 18. Among the attendees and participants were plaintiffs Harvey Shulman, Neal Haddad, and Wally Graham. The neighborhood association nearest the project, the Willo Neighborhood Association, also participated and supported approval of the application. *See* Compl.

[3] The development itself has been through all required rezoning hearings and received City Council approval to proceed. Compl. at Ex. A, p. 3.

at Ex. A, pp. 7-9; *see also id.* at 5, ¶ 4 (describing the Willo neighborhood as being "just a few blocks" from the project). The complaint does not allege that plaintiffs the Urban Phoenix Project Network ("Urban Phoenix"), the Arcadia Osborn Neighborhood Association ("AONA"), or Tabitha Myers either attended or participated, however. *See* Compl. at Ex. A, p. 2; *cf. id.* at 9, ¶ 18 (claiming "most of the Plaintiffs" participated in the hearing).

After the hearing, the Hearing Officer granted Clear Channel's application in part. Compl. at Ex. A, pp. 1-2; *see also id.*at 9-10, ¶¶ 20-21. Subject to certain stipulations, the Hearing Officer approved the sign relocation, but denied the request to convert two of the three signs to digital. *Id.*

Clear Channel appealed the Hearing Officer's denial of the digital conversion to the Board of Adjustment. Compl. at 10, ¶ 22. Despite not having participated in the proceedings, Urban Phoenix and AONA subsequently filed a separate appeal, asking the Board to reverse the Hearing Officer's approvals. *Id.* After a hearing, the Board granted Clear Channel's appeal and denied the opposition's appeal. *Id.* at ¶ 23.

Two months after the Board issued its decision, six plaintiffs filed this special action challenge under A.R.S. § 9-462.06(K), seeking to overturn the Board's decision. Compl. at 7, ¶ 12.

ARGUMENT

The Court should dismiss the complaint because none of the plaintiffs are aggrieved persons with standing to challenge the Board's decision under A.R.S. § 9-462.06(K).

I. By statute, the only private parties who may appeal a board's zoning decision are persons specially damaged by the decision and adjacent landowners or lessees.

The right to file a special action challenge to a board of adjustment decision is purely statutory. *See Welch v. Cochise Cty. Bd. of Supervisors*, 251 Ariz. 519, ¶ 12

(2021) ("Standing may be conferred by statute."). The relevant statute is § 9-462.06(K), which narrowly defines the permissible plaintiffs:

> A person aggrieved by a decision of the legislative body or board or a taxpayer who owns or leases the adjacent property or a property within three hundred feet from the boundary of the immediately adjacent property, an officer or a department of the municipality affected by a decision of the legislative body or board . . . may file a complaint for special action in the superior court to review the legislative body or board decision.

A.R.S. § 9-462.06(K) (2015). Thus, the only private parties who may file a special action challenge to a zoning decision are (1) a person who is aggrieved by a zoning decision, or (2) an affected taxpayer who owns or leases the adjacent property or a property within 300 feet of the adjacent property.

The plaintiffs in this case claim standing only as "person[s] aggrieved." *See* Compl. at 7, ¶ 14 ("Plaintiffs are aggrieved by the Board Decision, and . . . therefore Plaintiffs have standing to bring this action."). They do not allege standing as taxpayers who own or lease nearby property.

A. To be "aggrieved," a person must have suffered special damage, different from the damage suffered by the community generally, to a tangible personal interest.

Although not defined in § 9-462.06(K), Arizona law is well-settled that to qualify as a "person aggrieved" by a zoning decision, the decision must have caused the person special damage which is different in kind or quality from the damage suffered by the impacted community generally. *See, e.g.*, *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 359, ¶ 20 (App. 2007) (to be aggrieved for purposes of § 9-462.06(K), a person must "demonstrate special damages or particularized harm"); *Buckelew v. Town of Parker*, 188 Ariz. 446, 452 (App. 1996) ("We have concluded that Buckelew has alleged special damage, and as a result, he is a 'person aggrieved.'"); *Perper v. Pima Cty.*, 123 Ariz. 439, 441 (App. 1979) ("To be aggrieved, the plaintiff must have sustained damage peculiar to himself.").

Construing "person aggrieved" in this way "is consistent with the common use of that term in other zoning statutes," both in Arizona and elsewhere. *P.F. West, Inc. v. Super. Ct.*, 139 Ariz. 31, 34 (App. 1984) ("person aggrieved" is the same as one who is "specially damaged" under county zoning statutes); *Super. Outdoor Signs, Inc. v. Eller Media Co.*, 1822 A.2d 478, 488-91 (Md. App. 2003) (to have standing under statute, plaintiff required to show that grant of billboard variance caused him special damages).

To meet this standard, a person (1) "must have suffered an injury in fact, economic or otherwise" as a result of the zoning decision; (2) must "plead 'particularized harm' resulting from the decision"; and (3) must allege damage that is "peculiar to the plaintiff or at least more substantial than that suffered by the community at large." *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 358, ¶ 20 (App. 2007) (cleaned up) (quoting, among others, *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 118, ¶¶ 20, 24 (App. 1999)). It is not enough to allege "general economic or aesthetic losses in an area"; the complaint must allege "instances of injury *particular to the plaintiff*." *Blanchard*, 196 Ariz. at 118, ¶ 20 (emphasis added).

In other words, being a concerned neighbor does not suffice. *Ctr. Bay Gardens*, 214 Ariz. at 357-58, ¶ 19 ("[a]n adjacent property owner who suffers no special damage from the granting of a variance cannot seek judicial review of an administrative decision to grant a variance." (citation omitted)). To be "aggrieved," a zoning decision must have harmed a tangible personal interest, such as a pecuniary or property right. *See id.* at 359, ¶ 25 (standing found on "specific claims of damage to [plaintiffs'] use and enjoyment of *their* property" (emphasis added)); *see also* Black's Law Dictionary (11th ed. 2019) (defining "aggrieved" as "having *legal rights* that are adversely affected" and "person aggrieved" as "a party whose *personal, pecuniary, or property rights* have been adversely affected by another person's actions or by a court's decree or judgment" (emphases added)).

The rule that "aggrievement" requires special damages to a concrete personal interest derives from zoning's roots in public nuisance law. *Buckelew v. Town of Parker*, 188 Ariz. 446, 450 (App. 1996) ("Because the zoning law is rooted in the law of nuisance, a zoning ordinance violation came to be treated as a public nuisance for the purpose of determining the standing of an injured party."). To avoid "the multiple actions that might follow if every member of the public were allowed to sue for a common wrong," *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Services*, 148 Ariz. 1, 5 (1985), a person cannot bring a public nuisance suit unless his or her "property or pecuniary interests" have been damaged in a way that is "different in kind or quality from that suffered by the public in common," *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, 400-01, ¶¶ 10, 15 (2018) (latter quote from *Armory Park*, 148 Ariz. at 5).

The same rationale applies to Board of Adjustment appeals under § 9-462.06(K). Allowing anyone from the community—whether personally impacted or not—to challenge a Board decision affecting someone else's property based on a perceived common wrong risks multiple lawsuits and does not further the purpose of our zoning laws.

B. To have standing under § 9-462.06(K), an organization must show that its members are persons aggrieved and that it can adequately and fairly represent them.

Associational standing permits an organization "to assert the claims of its members in a representational capacity." *Armory Park*, 148 Ariz. at 5. Consequently, "Arizona cases that discuss associational standing do so based on their members' injuries or interests." *Encanterra Residents Against Annexation v. Town of Queen Creek*, 2 CA-CV 2020-0002, 2020 WL 1157024, at *5 (Ariz. App. Mar. 9, 2020) (mem.); *see also Armory Park*, 148 Ariz. at 5-6 (in Arizona, associational standing requires organization to show that it "has a legitimate interest in an actual controversy involving its members" and will "adequately and fairly represent the interests of those of its members who would have had standing in their individual capacities"). To

establish associational standing under § 9-462.06(K), therefore, Urban Phoenix and AONA must show that they represent members who have suffered special damages as a result of the Board's decision.

II. The plaintiffs have not suffered any special damages, different than the damage suffered by the community at large, to a tangible personal interest.

This case is brought by six plaintiffs: non-profit organizations Urban Phoenix Project Network (Urban Phoenix) and Arcadia Osborn Neighborhood Association (AONA), and pro se plaintiffs Harvey Shulman, Tabitha Myers, Neal Haddad, and Wally Graham. The plaintiffs claim standing solely as "persons aggrieved" under § 9-462.06(K). Compl. at 7, ¶ 14. But their complaint fails to identify *any* particularized harm or special damages suffered by the plaintiffs which differentiates them from other community members and organizations.

A. The individual plaintiffs lack standing.

The individual plaintiffs make only one allegation regarding their alleged harm: "As the result of the Board Decision approving the relocation of Defendant CCO's nonconforming billboards" and "conversion of two of those billboards to digital, all of the individual Plaintiffs will be subjected to a real increased risk of personal injury, property damage to their vehicles, and economic harm resulting therefrom." Compl. at 12, ¶ 29. That's it. The complaint says *nothing* else about any harm resulting from the Board's decision.

By any standard, speculative future harm in the form of increased traffic risks is not an "injury in fact." *Ctr. Bay Gardens*, 214 Ariz. at 358, ¶ 20. Nor is an interest in traffic safety the sort of tangible personal interest that justifies allowing a third party to challenge a Board decision affecting another person's use of his or her property. *See, e.g., id.* at 359, ¶ 25; *see also Laughman v. Zoning Hearing Bd. of Newberry Twp.*, 964 A.2d 19, 23 (Pa. Commw. Ct. 2009) ("Any concern that the increase in traffic might lead to accidents is merely a concern of 'remote consequences' and is not direct because all citizens share concerns regarding traffic and safety."), *cited approvingly by Burks v.*

City of Maricopa, 2 CA-CV 2017-0177, 2018 WL 3455691, at *4, ¶ 19 (Ariz. App. July 16, 2018). This makes sense, because a general interest in traffic safety at a major intersection in one of the largest cities in the United States does not implicate a property or pecuniary interests *particular to the plaintiffs*.

Thousands of drivers and pedestrians use the intersection at Thomas Road and Central Avenue on a daily basis. But the individual plaintiffs make no effort to explain why their use of the intersection is different from, or specially harmed relative to, the interests of the thousands of other people who travel these same routes. Instead, they assert merely that each of them uses the intersection on a regular basis. Compl. at 5, ¶ 3 (Shulman "crosses the Billboard Arterial Intersection numerous times each week"); *id.* ¶ 4 (Myers is "a regular user of the Billboard Arterial Intersection"); *id.* at 5-6, ¶¶ 5-6 (Graham and Haddad are both "regular user[s] of the Billboard Arterial Intersection to go west and to into downtown Phoenix (and go east back to [their] home[s]"). This is precisely the type of "common wrong" action that the standing requirement in the nuisance and zoning contexts is designed to prevent. *See Buckelew*, 188 Ariz. at 450; *Hopi Tribe*, 245 Ariz. at 400-01, ¶¶ 10-15.

The reasoning of *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419 (App. 2011), further confirms that general traffic safety concerns do not give the plaintiffs standing here. In *Scenic Arizona*, a statewide advocacy organization filed a special action challenge to a board's approval of a digital highway billboard, arguing that Arizona's Highway Beautification Act ("AHBA") prohibited the billboard. *Id.* at 420-21, ¶ 1. The organization alleged that the digital billboard would harm its members by negatively impacting their aesthetic interests, increasing highway safety risks, and requiring longer drive times to avoid it. *Id.* at 422, ¶ 6.

Reasoning "that the legislature intended to permit much broader standing in this context [under § 9-462.06(K)] than in other proceedings," *id.* at 423, ¶ 9, and observing that the AHBA "was adopted to promote . . . 'the safety and recreational value of public travel and [preserve] natural beauty,'" *id.* at 424, ¶ 11, the court concluded that the

organization had standing. Since then, however, the legislature amended § 9-462.06 to specifically narrow the statutory text upon which *Scenic Arizona* relied. *Compare, e.g.*, *id.* at 423, ¶ 10 (contrasting text of § 9-462.06(D) & (K) (1995) to conclude that "[t]he legislature plainly intended that standing to challenge a board decision in superior court would be easier to establish than an appeal to the board of adjustment"), *with* A.R.S. § 9-462.06 (2015) (making it more difficult to establish standing to challenge board decision in superior court than an appeal to the board in the first instance). Furthermore, the plaintiffs in this case do not have any legally protected traffic safety interest like the organization in *Scenic Arizona* did under the AHBA. Accordingly, *Scenic Arizona* underscores that a general interest in traffic safety, without more, is not enough for standing under the amended § 9-462.06(K).

Courts regularly decline to find standing based on similar community-based objections to a development absent some showing of particularized, specific harm to a concrete interest. For example, in *Burks v. City of Maricopa*, the court held that the plaintiff lacked standing to challenge the city's decision to grant a conditional use permit to a proposed motorsports facility.[4] 2018 WL 3455691, at *5, ¶ 21. Plaintiff Burks alleged that she lived near the proposed facility, which would "significantly increase[] noise, odors, dust, gas, and smoke emanating from the Property, all of which uniquely and negatively affect [her] use and enjoyment of her Property," as well as "result in significantly increased traffic resulting in longer drive times, increased fuel consumption, and ... an increased safety risk to her." *Id.* at *4, ¶ 16 (internal quotation marks omitted). The court nonetheless held that she lacked standing. *Id.* at *5, ¶ 21. Noting that Burks's address was five miles from the proposed development, it concluded that her allegations were "in the nature of 'general economic or aesthetic

[4] Although not arising under A.R.S. § 9-462.06(K), *Burks* applied the same special damages test imposed by the "person aggrieved" standard, as articulated in *Buckelew* and *Blanchard*. *See Burks*, 2018 WL 3455691, at *3, ¶ 15 (plaintiff must "plead damage from an injury peculiar to her or at least more substantial than that suffered by the general public").

losses in [the] area,'" rather than injury peculiar to her as compared to the community at large. *Id.* at *4 (quoting *Blanchard*, 196 Ariz. 114, ¶ 20).

Just like in *Burks*, the plaintiffs in this case allege only that relocating Clear Channel's signs will result in general harm to the neighborhood in the form of decreased traffic safety. Furthermore, similar to Burks, several of the plaintiffs—Mr. Graham and Mr. Haddad—live four to six miles away from J&R's property.[5] The closest resident, Mr. Shulman, is still over a half a mile away.[6] *Cf. Burks*, 2018 WL 3455691, at *4, ¶ 19 (citing with approval cases from New Hampshire and Pennsylvania finding that property owners between one-half and six miles away from subject property lacked standing to challenge zoning decision). Thus, even if concern over traffic safety were the sort of interest that could justify standing, Mr. Shulman, Mr. Graham, and Mr, Haddad have not shown that the Board's decision causes them substantially more harm to their safety interests than it does to the safety interests of others in the community.

The last individual plaintiff, Ms. Myers, alleges generally that she lives "in the Willo Historic Neighborhood" but does not provide an address. Instead, the complaint lists the address of an office building at 2828 N. Central Avenue, Phoenix, 85004, where Ms. Myers claims to work "on a regular basis." Compl. at 5, ¶ 4.[7] Again, however, working nearby—even on a daily basis—is not in and of itself a sufficiently tangible interest to justify standing.

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[5] Mr. Graham lists his address as 4331 East Weldon Avenue, Phoenix, AZ 85018—a single family home almost six miles from the property, on the other side of Highway 51. Compl. at 30. Similarly, Mr. Haddad lists his address as 3402 North 32nd Street, Phoenix, AZ 85018—a residential complex almost four miles from the property, on the other side of Highway 51. Compl. at 30.

[6] Mr. Shulman lists his part-time residence as 16 West Encanto Boulevard, Unit 512, Phoenix, AZ 85003. Compl. at 4, ¶ 2. (He does not elaborate on what "part-time" means.) This multi-family complex is more than a half mile from the property and thus well outside the impact area of the proposed development.

[7] Public records show that the professional LLC operating at that address is registered to 502 West Cambridge Avenue, Phoenix, AZ 85003—a single family residence more than a half a mile from J&R's property.

In *Superior Outdoor Signs, Inc. v. Eller Media Co.*, for example, the Maryland court of appeals interpreted a statute similar to A.R.S. § 9-462.06(K) to find that a plaintiff lacked standing as a "person aggrieved" to challenge a zoning decision concerning a property adjacent to his workplace. 822 A.2d at 488-91. The plaintiff (Gregory) sued to challenge a board decision granting a billboard variance to the adjacent property, claiming that the was aggrieved by the decision based on injury to his personal and property interests. *Id.* at 488. Gregory alleged that he co-owned and worked for the company that owned the adjacent property, visited it daily for work, and drove by the subject property on a daily basis to get to and from work. *Id.* at 488-91. As relevant here, he asserted a personal interest "in maintaining a daily visual exposure to less, rather than more, billboards when he is on [his company's] grounds and the billboards on the Subject Property are in view and when he is driving by the Subject Property." *Id.* at 488.

The court found that Gregory lacked standing. *Id.* at 490-91. It explained that neither his "claimed interest in limiting the number of billboards visible" from his workplace nor "his status as a person who drives by the Subject Property daily" implicated a personal and legally protectible interest sufficient to confer standing to challenge the billboard variance. *Id.* at 491. The court further noted that even if these interests were sufficient, Gregory had now shown that his interests were "specially affected beyond any such interest of members of the general public." *Id.*

The same is true for the interests alleged by Ms. Myers and the rest of the individual plaintiffs here. The fact that they regularly use a major intersection in Phoenix to travel to and from work or home and thus would pass Clear Channel's signs, even on a daily basis, is not a sufficient interest to qualify them as "persons aggrieved" with standing to file a special action challenge to the Board's decision under A.R.S. § 9-462.06(K).

B. The organizational plaintiffs likewise lack standing.

Because the two organizational plaintiffs rely on the same type of generic interest as the individual plaintiffs—namely, their members' regular use of the intersection at Thomas Road and Central Avenue—they likewise lack standing.

Plaintiff Urban Phoenix describes itself as a group which "raises awareness and inspires action for quality urban space that can easily be enjoyed by all." Compl. at 4, ¶ 1. It alleges an interest in the Board's decision because "UPP's contributors, members, volunteers and other supporters include users of the Billboard Arterial Intersection." Compl. at 4, ¶ 1. Meanwhile, plaintiff AONA alleges that its "goals include developing strategies for protection of its residents and their neighborhood, and specifically involvement in transportation issues like safety and traffic that impacts its residents." Compl. at 4-5, ¶ 2. It similarly asserts that "[a] substantial number of AONA residents regularly use — and will continue to use — Thomas Road as their main commuter route to go from their homes west and/or into Downtown Phoenix (and go east back to their homes), and the Billboard Arterial Intersection through which they pass is less than a 10-minute drive away from their homes." *Id.* at 5, ¶ 2.

Mere use of a major urban intersection is not a particularized interest, nor is regular use of the intersection a special damage unique to these organizations' members. (*See* § II.A, above.) Because associational standing allows an organization "to assert the claims of its members in a representational capacity," the failure to plead standing on behalf of their members dooms both Urban Phoenix's and AONA's claims. *Armory Park*, 148 Ariz. at 5. Even if Urban Phoenix or AONA could identify members with standing, however, neither one makes any attempt to explain why the organization is better positioned than the individual members to represent their interests. *See Armory Park*, 148 Ariz. at 5-6 (Arizona courts consider "whether judicial economy and administration will be promoted by allowing representational appearance").

Moreover, the complaint itself refutes any suggestion that these organizations and their members have a legitimate interest in the controversy here, because it reveals

that the neighborhood organization most directly impacted by the sign relocation—the Willo Neighborhood Association—*supports* the Board's decision. *See* Compl. at Ex. A, pp.7-9. If the neighborhood association right next to the project wants it to proceed, groups from outside the impacted area should not be allowed to override that neighborhood support by filing a special action under A.R.S. § 9-462.06(K).

CONCLUSION

Because the plaintiffs lack standing to bring suit under A.R.S. § 9-462.06(K), the Court should dismiss the plaintiffs' complaint with prejudice.

DATED this 30th day of November, 2021.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

URBAN PHOENIX PROJECT NETWORK, an Arizona non-profit association; ARCADIA OSBORN NEIGHBORHOOD ASSOCIATION, an Arizona non-profit association; HARVEY SHULMAN, an individual; TABITHA MYERS, an individual; WALLACE GRAHAM, an individual; and NEAL HADDAD, an individual;

Plaintiffs,

Case No. LC2020-000294-001

FIRST AMENDED COMPLAINT FOR STATUTORY SPECIAL ACTION AND DECLARATORY RELIEF

[Assigned to the Honorable Katherine Cooper]

v.

CLEAR CHANNEL OUTDOOR, LLC, a Delaware limited liability company, as real party in interest; J & R HOLDINGS VI, LLC, an Arizona limited liability company, as real party in interest; CITY OF PHOENIX, an Arizona municipal corporation; and CITY OF PHOENIX BOARD OF ADJUSTMENT, an official body of the City of Phoenix;

Defendants.

Plaintiffs Urban Phoenix Project ("UPP"), Arcadia Osborn Neighborhood Association ("AONA"), Harvey Shulman ("Shulman"), Tabitha Myers ("Myers"), Neal Haddad ("Haddad"), and Wallace Graham ("Graham") (collectively "Plaintiffs"), for their complaint (the "Complaint") against the defendants named herein, allege as follows:

INTRODUCTION

In this important case, a City of Phoenix Zoning Adjustment hearing officer ("ZAHO") issued a decision ("ZAHO Decision") in which, for several reasons, the ZAHO refused to grant a use permit to allow certain presently existing, nonconforming static billboards (i.e., non-digital billboards) to be converted by Defendant Clear Channel Outdoor, LLC ("CCO") into digital billboards with brighter electronic images changing every 8 seconds. However, in another part of that same ZAHO Decision, the ZAHO did grant a use permit ("Use Permit")[1] and a variance ("Variance")[2] to allow those presently

[1] Technically, several use permits were requested for several specific requested uses, but this Complaint will use the capitalized singular term "Use Permit" to refer to those permits issued for the specific requested uses. The capitalized term "Use Permit" does not include uses that do not come within the specific requested uses.

[2] Any use of the capitalized term "Variance" in this Complaint refers only to the single Variance that was requested and granted by Defendant Board – i.e., a Variance to

existing nonconforming static billboards to be rebuilt and to be relocated by Defendant CCO as static billboards (i.e., non-digital billboards).

On appeal, by a vote of 4 to 3, Defendant City of Phoenix Board of Adjustment ("Board") issued a decision ("Board Decision") that reversed the ZAHO Decision insofar as the ZAHO refused to grant any of the static billboards to be rebuilt as digital; i.e., Defendant Board granted the Use Permit and Variance to allow the requested conversions to digital billboards. In that same appeal, Defendant Board also rejected a challenge to that part of the ZAHO Decision that allowed the static billboards to be rebuilt and relocated, even as static billboards.

Because Defendant Board acted without or in excess of its legal authority under applicable rules, ordinances (including particularly the City of Phoenix Zoning Ordinance) ("Ordinance"), statutes and constitutional requirements, and because its actions were arbitrary, capricious, or an abuse of discretion, Plaintiffs have filed this Complaint. The importance of the legal issues that were wrongly decided (and will affect many other future billboard applications in Phoenix) is confirmed by the unprecedented nature of the Board Decision, described by Defendant CCO itself: "This is the first effort in Phoenix to locate internally illuminated advertising signs on a high-rise building outside of Downtown".[3] This case is also important because of the particular location of the billboards here -- with zero setback from the public right-of-way at the intersection of two major arterial

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reduce the required setback of 25 feet from the public right-of-way to zero ("0") feet. No other variance was requested and no other variance was granted.

[3] As to Defendant CCO's billboards, the words "billboard", "sign", "board" are used interchangeably in this Complaint because they were so used throughout the proceedings below and because they are within the definition of "Signs" in Ordinance Section 202.

intersections that is a commuter hub, Central Avenue and Thomas Road ("the Billboard Arterial Intersection").

PARTIES, JURISDICTION, AND VENUE

1. As detailed in Exhibit 1, Plaintiff UPP is a non-profit organization whose mission is raising awareness and inspiring action for quality urban space in Phoenix emphasizing comfortable, convenient, and safe walking, biking and public transit through applications of its principles: (i) "The 8-to-80 City" (design that allows persons for 8 to 80 years old to safely and independently move around and shop); (ii) Shade and Heat Mitigation and Design; (iii) "Eyes on the Street" (buildings with frequent doors and windows, and windows on every floor, especially the first few floors); (iv) Prioritization of easy and safe pedestrian access; (v) slow street design; (vi) Protected bike lanes everywhere; (vii) Sale and attractive transit (frequent and dependable); (viii) Minimized / Convertible off-street parking designs; (ix) Keep public space "public"; (x) Best urban design practices.

2. UPP accomplishes the mission through donation and grants used to fund UPP activities, through volunteers, and through an extensive social media presence. UPP conducts: (i) Monitoring: monitoring proposed developments and approved developments under construction in TODs and WU Code district, including zoning proceedings; (ii) Research: retrieving new information, from experts and publications and by networking, regarding best practices for maximizing urban livability; (iii) Education: disseminating information to UPP supporters, volunteers, and advocates, the public, neighborhood associations, city planners, about urban development in TODs and WU Code districts, and for practical use; (iv) Consultation: imparting information and participating in government

agency/department policy decisions regarding urban development and design decisions for specific projects; (v) Hearing/Litigation: extensive participation, in specific administrative and civil matters involving individual applications for use permits, variances, etc. for specific developments in TODs or WU Code districts; (vi) Direct Action/Advocacy: engaging direct action and advocacy on legislative proposals involving urban planning and road safety issues, especially for the TODs and WU Code districts. UPP's contributors, members, volunteers and other supporters include users of the Billboard Arterial Intersection.

3. As stated in the attached declaration from Neal Haddad, Vice-President of AONA, Plaintiff AONA is an Arizona non-profit neighborhood association operating in Maricopa County, Arizona, particularly within the City of Phoenix. AONA's goals include developing strategies for protection of its residents and their neighborhood, and specifically involvement in transportation issues like safety and traffic that impact its residents. A substantial number of AONA residents regularly use -- and will continue to use -- Thomas Road as their main commuter route to go from their homes west and/or into downtown Phoenix (and go east back to their homes), and the Billboard Arterial Intersection through which they pass is less than a 10 minute drive away from their homes.

4. As Mr. Haddad also lays out in more detailed in his attached declaration, AONA focuses its activities on its purposes and mission of AONA, which include: (i) preserving, renewing, and enhancing the residential character of AONA;)(ii) Researching, studying, developing relationships with other neighborhood associations and remaining current on city and neighborhood issues thereby serving as a source of information-

gathering and dissemination; (iii) Maintaining liaisons with appropriate persons, resources groups and governmental bodies; (iv) Addressing potential impacts of transportation decisions to insure compatibility with neighborhood goals and objectives, including dealing with billboards, both legacy and new, either on the arterial boundaries of the neighborhood or at other locations within several miles which can, and have, served as precedent for billboard proposals within or adjacent to AONA.

5. In addition, during the past 3 or 4 years, billboard companies have filed numerous applications to rebuild static billboards or convert static billboards to digital billboards. In response AONA has developed the expertise to either effect amicable settlements of issues contrary to the neighborhood well-being or, when that is not an option, opposing such proposals at Zoning Adjustment (ZA) hearing and before the BOA. AONA, invests limited funds and other resources on billboard issues to both prevent intrusion and to educate our members on how to safely navigate streets and sidewalks as pedestrians, bicyclists and drivers when they pass by billboards. However, because of the unique aspects of Defendant BoA's approval of Defendant CCO's billboards, unless it is overturned it will frustrate AONA's mission and cause AONA to divert far more resources to the "billboard problem" and thereby cause AONA to reduce its other activities that are also important to carry out its mission.

6. As explained in his attached declaration, Plaintiff Shulman is a part-time resident (at least 5 ½ months, sometimes more including time in the summer) in Maricopa County, Arizona, within the City of Phoenix and for more than 3 years has been a member of the AONA Planning & Zoning Committee. Plaintiff Shulman resides only six short

(north-south) blocks from the Digital Billboard Arterial Intersection and, as a pedestrian (walker and runner) and/or driver, crosses the Billboard Arterial Intersection numerous times each week, almost daily, and will continue to do so.

7. More specifically, Plaintiff Shulman demonstrates that his condominium is 0.48 miles from the Billboard Arterial Intersection; that "conservatively", as a driver, walker or runner, he crosses the that intersection at least 75 times per month; that he crosses the intersection even in hot weather months when he won't see another person on the street (except those entering/exiting the Light Rail or bus); that his crossing of that intersection occurs far more frequently than such use by members of the general public and by the community at large; that his regular running route in Phoenix is highly unusual and even unique among major US cities because it allows runners to run 3, 4 or 5 miles along the main street in the city (Central Avenue) with cross only one major intersection (the Billboard Arterial Intersection); that the Billboard Arterial Intersection is already very dangerous (having been rated in 2017 as the 5th most crash-prone intersection in all of Maricopa County), and the billboards proposed by Defendant CCO (especially digital, but also static) will make his driving, walking and running far more dangerous; that in the past six or seven years, while crossing the Billboard Arterial Intersection as a walker or runner using the crosswalks and crossing carefully and only with the "Walk Signal", on at least three occasions he was almost hit by cars (which missed him by about one foot), and he has personally viewed several other similar "near misses" involving others; that avoiding that Intersection will cause him to spend more time and more money to travel by car, and will decrease the duration/lengths of his runs and his enjoyment on his runs; that the harms he

will face are specific to him, especially as a runner because only about 50 different runners per year run this route; and that reversing Defendant BOA's approve of the billboards will remedy this problem. Pro Se Plaintiff Shulman's attached declaration provides far more details, and a description of far more particularized harm.

8. As explained in her attached affidavit, Plaintiff Myers is a full-time resident domiciled in Maricopa County, Arizona, particularly within the City of Phoenix, and more particularly in the Willo Historic Neighborhood and just a few blocks from the Billboard Arterial Intersection. Myers also works on an almost daily basis in an office building located right at the Billboard Arterial Intersection and 105 feet from one of the proposed digital billboards (2828 N Central Avenue), and she is -- and will remain -- a regular user of the Billboard Arterial Intersection. She is also part of UPP. Her declaration attached to this Complaint describes in detail how few, if any, people are more exposed to the dangers of the Billboard Arterial Intersection based on her closeness of 105 feet, the amount of time she is within 105 feet, and the fact that she crosses the intersection at least 70 times per month. She details the exact harms she will face if digital billboards are installed.

9. As explained in his attached declaration, Plaintiff Graham is a full-time resident domiciled in Maricopa County, Arizona, particularly within the City of Phoenix, and more particularly in the AONA neighborhood. He is a member, director, and past officer of AONA, and he is -- and will remain -- a regular user of the Billboard Arterial Intersection to go west and to into downtown Phoenix (and go east back to his home). His personal experience is that this is currently a dangerous intersection even without digital billboards. He will also be required to spend more money and more time in fulling his

"billboard" activities for AONA unless Defendant BoA's decision is reversed. Mr. Graham's attached declaration provides further details.

10. As explained in his attached declaration, Plaintiff Haddad is a full-time resident domiciled in Maricopa County, Arizona, particularly within the City of Phoenix, and more particularly in the AONA neighborhood. He is a member, officer and director of AONA, and he is --and will remain -- a regular user of the Digital Billboard Intersection to go west and to into downtown Phoenix (and to go east back to his home). His personal experience is that this is currently a dangerous intersection even without digital billboards. Like Mr Graham, Mr. Haddad will also be required to spend more money and more time in fulling his "billboard" activities for AONA unless Defendant BoA's decision is reversed. Haddad's attached declaration provides further details

11. Defendant Clear Channel Outdoor, LLC, ("CCO") is a Delaware limited liability company, possessing certain real property rights and doing business in Maricopa County, Arizona. It is named because it is a real party in interest. Defendant CCO caused the actions giving rise to this Complaint to occur within Maricopa County, because it is listed by Defendant City as the "Applicant" for the Use Permit and Variance application filed on December 26, 2019 as "Application of Zoning Adjustment - Application No. ZA-541-19", on the March 19, 2020 "Appeal to the Board of Adjustment", and on the published agendas for the ZAHO public hearing and for Defendant Board's appeal meeting.

12. Defendant J & R HOLDINGS VI, LLC, ("JRH") is an Arizona limited liability company that owns the land upon which CCO's billboards are located and does business in Maricopa County, Arizona. It is named because it is a real party in interest.

Defendant JRH caused the actions giving rise to this Complaint to occur within Maricopa County, because it is listed by Defendant City as the "Owner" on the Use Permit and Variance application filed on December 26, 2019, as "Application of Zoning Adjustment - Application No. ZA-541-19", on the March 19, 2020, "Appeal to the Board of Adjustment", and on the published agendas for the ZAHO public hearing and Defendant Board's appeal meeting.

13. Defendant City of Phoenix ("City") is an Arizona municipal corporation located in Maricopa County, Arizona.

14. Defendant City of Phoenix Board of Adjustment ("Board") is an official body designated by Defendant City of Phoenix to, among other things, hear and decide appeals from the decisions of the City of Phoenix Zoning Administrator ("Zoning Administrator") pursuant to the Ordinance and the Arizona Revised Statutes ("A.R.S").

15. This Court has jurisdiction to hear and determine the claims in this Complaint by virtue of Article VI, Section 14, of the Arizona State Constitution, Rule 4(b) of the Rules for Procedure for Special Actions, and A.R.S. § 9-462.06(K).

16. This action is brought pursuant to A.R.S. § 9-462.06(K), A.R.S. § 12-1831 *et seq.* and the Rules of Procedure for Special Actions.

17. Venue in this Court is proper under A.R.S. § 12-401 and Rule 4(b), Rules of Procedure for Special Actions.

18. As explained in this Complaint, Plaintiffs are aggrieved by the Board Decision, and other actions and omissions identified herein that led to the Board Decision, and therefore Plaintiffs have standing to bring this action.

GENERAL ALLEGATIONS COMMON TO ALL CLAIMS

A. The Application and ZAHO Hearing

19. On or about October 24, 2019, Defendant CCO filed an application with Defendant City for a Use Permit and Variance to relocate its three static billboards on the property owned by Defendant JRH and to convert two of those static billboards to digital allegedly under various provisions of Ordinance Section 705.2 of the City of Phoenix Zoning Ordinance. The application, designated ZA-541-19, was set for a public hearing to occur on November 26, 2019, before a ZAHO. Because of an error in that application in regard to the Variance request (intended to reduce to zero -- from the required 25 feet -- the billboards' setback from the public right-of-way), the application was amended in a number of respects, re-filed on December 26, 2019, and re-set for a public hearing to occur on February 6, 2020.

20. By recorded easement, Defendant CCO currently maintains three nonconforming static billboard faces on a large lot extending to the Billboard Arterial Intersection, which lot has been mostly vacant for decades except for a small commercial building and the billboards. Defendant JRH has wanted to build a mixed-use high-rise office building there which would require changes to Defendant CCO's easement, and when Defendant JRH informed Defendant CCO of this project ("the Project"), Defendant CCO refused to modify its easement absent Defendant JRH's agreement to allow the billboards to be increased in height, to be relocated closer to the Billboard Arterial Intersection, to have their setback reduce to zero feet, to be embedded into the structure of the building itself and, at least for two of the billboards, to be converted to digital billboards.

21. In its application and throughout the case before the ZAHO and Defendant Board, Defendant CCO has repeatedly stated: "[T]his dramatic new high-rise … [Project] cannot move forward to actual development unless the future relocation of the existing billboards is also approved. Although subject to two different processes at the City, this is a package deal." In a letter sent to or circulated among hundreds of residents living near the Project, Defendant CCO wrote: " Without approval of these unique [use permit and variance] requests, this visionary [Project] development will not be able to move forward."

22. Several persons and organizations, including most of the Plaintiffs and others, opposed Defendant CCO's application at or in writing before the February 6, 2020, public hearing and the ZAHO took the case under advisement.

23. On March 11, 2020, the ZAHO issued the ZAHO Decision (***attached hereto as Exhibit A***). The ZAHO repeatedly emphasized that the Use Permit and Variance proceeding was about the billboards, not about the development Project. In his ZAHO Decision he stated "it is possible that the 'Project' itself is acting as an inadvertent form of coercion, thereby causing self-supporting approval of the digital billboards."

24. The ZAHO Decision granted Defendant CCO a Use Permit and Variance which allowed it, among other things: to relocate all its static billboards to locations much closer to the Billboard Arterial Intersection; to increase the billboards' heights above ground; and to reduce the billboards' setback from the public right-of-way from the required distance of 25 feet to zero feet. In granting those relocations, the ZAHO did not address multiple objections raised by the opponents of those relocations.

25. However -- and not allowing the ZAHO Decision to be influenced by the

"inadvertent form of coercion" associated with the Project – the ZAHO rejected conversion of any static billboards to digital for several reasons including, among other things: vehicular and pedestrian safety; changing electronic images every 8 seconds; and increased glare. For example, the ZAHO explained that a 2017 Road Safety Assessment from the Maricopa County Association of Governments ranked the Billboard Arterial Intersection as the fifth highest high crash intersection in the County. He also stated that "this intersection is a significant transportation hub with both a busy light rail station and one of the busiest bus stops in the City."

B. <u>The Proceedings Before Defendant Board</u>

26. On March 19, 2020, Defendant CCO appealed to Defendant Board to reverse the ZAHO Decision insofar as it denied the conversion to digital billboards. On March 26, 2020, Plaintiff UPP and Plaintiff AONA filed their "Appeal to the Board of Adjustment" asking Defendant Board to reverse the ZAHO Decision insofar as it granted the Use Permit and Variance to, among other things, relocate the static billboards to locations much closer to the Billboard Arterial Intersection, to increase the billboards' heights above ground, to reduce the billboards' setback from the public right-of-way from the required distance of 25 feet to zero feet.

27. Defendant Board heard both appeals, through "virtual" presentations, on August 6, 2020. By a vote of 4 to 3, Defendant Board reversed the ZAHO Decision to the extent that the ZAHO refused to allow any of the static billboards to be rebuilt as digital, i.e., Defendant Board granted a Use Permit and Variance to allow the requested conversion of two static billboards to digital. At the same time, Defendant Board rejected the appeal

by Plaintiff UPP and Plaintiff AONA that challenged the ZAHO Decision insofar as it allowed the requested billboard relocations (even if the billboards were to remain static).

28. The rationale provided by Board Member Cole for his successful motion -- in fact, the only rationale provided by any of the four Members of Defendant Board who voted for that motion -- was stated by Board Member Cole as follows:

> I think that this project should go forward. I think there's been a lot of work done. I think there's a number of people in support of it and a number of people against it. I also, my personal belief, is that this corner is underutilized and will continue to be unless some kind of a compromise can be worked out. And if it means adding digital signs to the building as an accommodation to the sign company, I'm in favor of that.

29. The rationale of the three dissenters was provided by Board Chair Eigo when, in stating he would vote against the motion, he pointed out glare that exceeds ambient conditions, the variance is not necessary for the preservation and enjoyment and substantial property rights, and the billboards will be materially detrimental to some working or living in the area. Beyond that, Chair Eigo stated that Defendant Board was required to focus on the billboard issues, and not on the bigger development Project:

> [N]ot to cast aspersions on anyone's vote on this, but our charge is frustratingly narrow. Our charge is to look at the permit and variance rubric and decide and if the applicant has met those. It is not to like or dislike a project. I guess I would go back to the original ZAHO result where they feel leverage and I think we feel leverage as well. Our charge is not to ensure that there's not an empty site for another generation to come -- which none of us wants to see. But I believe looking narrowly at our charge, that's where I come down.

30. On August 31, 2020, Plaintiff UPP and Plaintiff AONA and others filed with Defendant Board a timely Request For Reconsideration (***attached hereto as Exhibit B***) that identified several manifest errors in the Board Decision. Defendant Board denied the Request for Reconsideration at its meeting on September 3, 2020 (Defendant Board's denial is included within any references in this Complaint to the "Board Decision").

31. By timely filing of this Complaint, Plaintiffs seek the review and vacation of the Board Decision and denial of the Use Permit and Variance to eliminate or materially reduce the substantial risks and actual harms, different to each Plaintiff as set forth in the attached declaration, that will affect each Plaintiff should Defendant BoA's decision stand. For example, with more details in those declarations, Plaintiffs Myers faces intrusions in her use and enjoyment of her office space, and safety risks in her use of the intersection, with the alternative of having to spend money to move here office location in order to escape the harms; Plaintiffs Shulman, Haddad and Wallace face special harm, different for each one, in terms of pedestrian and driver safety, annoying glare and added financial costs if this the Defendant BoA's decision stands. Not only will their constituencies and members face harms, but as organizations Plaintiffs UPP and AONA will suffer direct, concrete harm in that their respective missions will be frustrated and undermined, and they will have to divert scare funds and resources from other important activities to address the new dangers presented by Defendant Board's decision. *See Haddad and Boyd Declarations* attached.

COUNT I
(Relocation of Billboards Not Permitted)
Statutory Special Action (Violation of Sections 705.2.G.4, 705.2.G.5, 705.2.G.1 & 307.A.7.b of the Ordinance)

32. Plaintiffs allege, adopt, and incorporate by reference the allegations of the paragraphs preceding this point in the Complaint as though fully set forth herein (collectively, "Preceding Allegations", which hereafter cover all allegations up to each such point in the Complaint where the reference to "Preceding Allegations" is later made).

33. As the result of the Board Decision approving the relocation of Defendant CCO's nonconforming billboards at the Billboard Arterial Intersection, and in addition

because the Board Decision permitted conversion of two of those billboards to digital, all of the individual Plaintiffs (i.e., each and every Plaintiff on his/her/its individualized basis) will be subjected to a real increased risk of personal injury, property damage to their vehicles and other property, and economic / financial harm resulting therefrom.

34. For the reasons in this Complaint, and particularly the detailed reasons in the attached declarations, each Plaintiff is a "person aggrieved" who/which is entitled to bring this Complaint under ARS 9-462.06(K).

35. Ordinance Section 307.A.7, in subparts 7.a and 7.b, establishes standards for granting Use Permits. Ordinance Section 307.A.7.a generally requires that a proposed use: not create certain traffic problems in nearby residential areas; not emit glare at a level exceeding that of ambient conditions; not contribute in a measurable way to neighborhood deterioration; and not contribute to downgrading of property values. Ordinance Section 307.A.7.b requires that a proposed use will be in compliance with all provisions of the Zoning Ordinance and other Phoenix laws. Further, Ordinance Section 705.2.G.1 states that no billboard may be constructed in violation of any provision in Ordinance Section 705.2, except as stated in Ordinance Section 705.2.G, and Ordinance Section 705.2.G.4 and 705.2.G.5 are provisions that specifically require compliance with the standards for use permits in Ordinance Section 307.7 (stated another way, a violation of Ordinance Section 705.2.G.4 or 705.2.G.5 is also a violation of Ordinance Sections 705.2.G.1 and 307.A.7.b).

36. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, Ordinance Sections 705.2.G.4 and 705.2.G.5 allow certain nonconforming billboards to be "rebuilt" -- but they do not state that these billboards can

be "relocated". In contrast, Ordinance Section 705.2.G.3 -- inapplicable to Defendant CCO's situation -- specifically allows nonconforming signs to be "relocated". Other parts of the Zoning Ordinance -- none applicable or helpful to Defendant CCO -- also allow structures to be "relocated" or "moved" in addition to being "rebuilt" or "re-erected"; but not so in Ordinance Sections 705.2.G.4 and 705.2.G.5.

37. In granting Defendant CCO's requested Use Permit and Variance, Defendant Board allowed Defendant CCO to relocate and move its nonconforming billboards to locations at significant distances from their current locations even though Ordinance Sections 705.2.G.1, 705.2.G.4 and 705.2.G.5 do not authorize any "relocation".

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it granted the Use Permit and Variance for all three nonconforming static billboards to be relocated without authorization and in violation of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their costs of suit incurred here, including reasonable attorneys' fees and costs pursuant to A.R.S. § 12-348 (collectively "Costs and Fees").

COUNT II
(Moving a General Nonconformity Not Permitted)
Statutory Special Action (Violation of Sections 907, 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b of the Ordinance)

38. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

39. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, Ordinance Section 907, entitled "Moving of use or structure that does not conform to existing development standards", applies to Defendant CCO's relocation of its nonconforming billboards. Because of Ordinance Sections 102 and 103, Ordinance Section 907 is not preempted or otherwise inapplicable by anything in Ordinance Sections 705.2.G.1, 705.2.G.4 and 705.2.G.5, whether a billboard will be static or digital.

40. Defendant CCO never sought -- nor would it be entitled to -- a variance or any other authority to relocate its billboards in violation of Ordinance Section 907.

41. When Defendant Board approved relocating Defendant the nonconforming billboards without assuring their compliance with all requirements of the zone where the relocated billboards will be located, including specifically the Walkable Urban Code District, Ordinance Section 1301 et seq. (especially Section 1308) (and/or the formerly applicable Interim Transit-Oriented Zoning Overlay District One, Ordinance Section 662 (especially Section 662.K), Defendant Board acted in violation of Ordinance Section 907 – also a violation of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it granted the Use Permit and Variance for the three nonconforming static billboards to be relocated in violation of Ordinance Sections 907, 705.2.G.1, 702.5.G.4, 702.2.G.5 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT III
(Factors Required for Digital Conversion Not Satisfied)
Statutory Special Action (Violation of Sections 705.2.G.4, 705.2.G.1 & 307.A.7.b of the Ordinance)

42. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

43. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, Ordinance Section 705.2.G.4 states that 2 of 3 factors must be met before an existing, nonconforming billboard can be converted to digital:

> a. Removal of 1,200 square feet of existing nonconforming off-premise signs within the City limits for each digital face requested;
> b. If the Parcel has no landscaping along the street frontage, a minimum five-foot landscape strip … shall be provided … [or] If landscape is impractical then this requirement may be satisfied by installing a decorative pole cover;
> c. Reductions in size or height or changes in configuration, angle or construction which will bring the structure into greater compatibility with the size and scale of nearby buildings, or other changes approved by the Zoning Administrator which promote a better visual environment in the area.

44. Defendant Board approved Defendant CCO's proposed digital conversion of two billboards although Defendant CCO does not meet two of the three "a-b-c" factors.

45. Because Defendant Board approved the conversion of two existing, nonconforming static billboard faces to become two digital billboard faces, in order to meet factor "a" under Ordinance Section 705.2.G.4, Defendant CCO must remove 2,400 square feet of existing nonconforming off-premises signs (1,200 for each digital face X 2 digital faces = 2,400 square feet). However, Defendant CCO proposed, and Defendant Board required, removal of only 1,344 square feet of existing nonconforming signs, located at 9330 N. 19th Ave., Phoenix -- or 1,056 square feet less than required to meet factor "a".

46. Defendant CCO's application also conceded its plan did not include any landscaping and "There will be no poles for any of these signs and the building backdrop will be far more attractive than any pole cover." But factor "b" requires either landscaping or "a decorative pole cover" -- and a "building backdrop" (instead of a "decorative pole cover") is not a choice under factor "b". Thus, Defendant CCO did not meet factor "b".

47. As such, Defendant CCO did not meet two of the three "a-b-c" factors in Section 705.2.G.4 required to convert two nonconforming billboard faces to digital.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it granted the Use Permit and Variance for two nonconforming static billboards to be rebuilt to digital in violation of Ordinance Section 705.2.G.4, and thus also of Sections 705.2.G.1 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT IV
(One Billboard Not Rebuildable Because Not "Legally" Nonconforming)
Statutory Special Action (Violation of Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b of the Ordinance)

48. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

49. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, both Ordinance Sections 705.2.G.4 and 705.2.G.5 allow only "nonconforming" billboard signs to be rebuilt, as defined by the Zoning Ordinance.

50. Ordinance Section 202 defines a "Sign, Nonconforming" as "Any sign and/or its structure lawfully erected and maintained which no longer conforms to the provisions of this section for reasons beyond the control of the sign owner, sign user or for reasons beyond the control of the property owner." (emphases added).

51. One of Defendant CCO's billboards (the easternmost billboard of the current three billboards) does not fit the description of a "nonconforming" sign because it was not "lawfully erected". The City permit that was issued for that billboard authorized a sign size of 13 1/2 feet X 46 feet, a total of 621 square feet. Instead, the current billboard was erected to be and is 14 feet X 48 feet, a total of 672 square feet, and is almost 10% larger than allowed by the City permit that authorized its construction.

52. Because the as-built size of Defendant CCO's easternmost billboard exceeded the size authorized in the City permit for that billboard, it was not "lawfully erected"; as a result, it does not meet the definition of a "nonconforming" billboard under Ordinance Section; and therefore it may not be "rebuilt to digital" under Section 705.2.G.4 (or even rebuilt as non-digital under Section 705.2.G.5).

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it allowed a nonconforming billboard to be rebuilt in violation of Ordinance Sections 705.2.G.4 and 705.2.G.5, and thus also of Sections 705.2.G.1 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT V
(Billboards Do Not Meet Billboard-to-Billboard Spacing Requirement)
Statutory Special Action (Violation of Sections 705.2.B.2, 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b of the Ordinance)

53. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

54. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, Ordinance Section 705.2.B.2 is applicable and states "Spacing standards for off-premises structures shall be 1,000 feet from one structure to another." Further, Ordinance Section 705.2.G.1 states that "It shall be unlawful to hereafter erect, construct, alter, maintain, or use any sign in violation of any provisions contained herein, except as provided in this section [705.2.G.]."

55. All of Defendant CCO's three existing billboards are now located within 1,000 feet of each other, and accordingly are "legacy" (i.e., "grandfathered") billboards in regard to the existing spacing. The farthest distance between two of its existing legacy billboards is now 196 feet, in substantial nonconformity with the 1,000 feet spacing requirement; but this farthest distance will be reduced to only 130 feet (33% reduction in the existing, already nonconforming distance, and only 13% of 1,000 feet distance required by Ordinance Section 705.2.G.2). Further, the total cumulative spacing between all of Defendant CCO's three existing legacy billboards is now 364 feet, and this will be further reduced to only 290 feet (20% reduction in existing cumulative spacing). Also, the average spacing between all of Defendant CCO's three existing legacy billboards is now only 121 feet, and this will be further reduced to only 97 feet (20% reduction in existing average).

56. Nothing in Ordinance Sections 705.2.G.4 or 705.2.G.5 removes the above general requirement in Ordinance Section 705.2.G.1 for compliance with the other provisions in Ordinance Section 705.2, including the spacing requirement in Ordinance Section 705.2.B.2. In violation of Ordinance Sections 705.2.G.1 and 705.2.B.2, Defendant CCO did not seek a use permit or a variance -- -- nor did Defendant Board approve through a use permit or a variance -- to further reduce (and increase the nonconformity) of the already nonconforming distance between the existing legacy billboards. To the extent the Board Decision allows this spacing reduction, it is illegal.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it allowed the relocation of three legacy nonconforming billboards in violation of Ordinance Section 705.2.B.2 (1,000 foot spacing requirement), and thus also of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT VI
(Billboards Not Permitted Within 500 Feet of Residential Use)
Statutory Special Action (Violation of Sections 705.2.A.5, 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b of the Ordinance)

57. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

58. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, and in addition to Ordinance Section 705.2.G.1 discussed above, Ordinance Section 705.2.A.5 is applicable and states:

> [N]o part of any off-premise structure may be located closer than 500 feet from a residential district and residential use .... This setback may be reduced subject to obtaining a use permit pursuant to Section 307 and a demonstration that there are visual or physical barriers that mitigate the impacts of the proposed off-premise advertising structure to the residential use.

59. Nothing in Ordinance Sections 705.2.G.4 or 705.2.G.5 removes the above general requirement in Ordinance Section 705.2.G.1 for compliance with other provisions in Ordinance Section 705.2, including the requirement for a use permit if a billboard does not meet the 500 feet residential distance requirement in Ordinance Section 705.2.A.5.

60. Pursuant to Ordinance Section 705.2.A.5, Defendant CCO sought, and Defendant Board approved, a Use Permit to relocate the billboards to new locations where they would be within 320 feet of residences in the Willo neighborhood (which distance Defendant CCO claims is farther away from that neighborhood than the existing billboards).

61. However, moving farther from residences in the Willo neighborhood also involved moving closer to residences elsewhere. Defendant CCO did not apply for, or receive, approval for allowing the three existing billboards to be located within 500 feet of a new residential development under construction near the southeast corner of the Billboard Arterial Intersection (which residential development is currently beyond 500 feet of the existing billboard locations, but will be closer than 500 feet to the relocated billboards).

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it allowed the relocation of three legacy nonconforming

billboards in violation of Ordinance Section 705.2.A.5 (500 foot distance to residential use), and thus also of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT VII
(Billboards Prohibited As Safety Hazard at New Locations)
Statutory Special Action (Violation of Sections 705.B.3.c, 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b of the Ordinance)

62. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

63. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, and pursuant to Ordinance Section 705.2.C.1 which incorporates Ordinance Section 705.B except as stated, Ordinance Section 705.B.3. (particularly subsections 705.B.3.c(3) and 705.B.3.c(4)) is applicable and identifies "Signs not permitted in Phoenix":

> The following signs are not permitted in the City of Phoenix, except as provided elsewhere in this section [i.e., Section 705]….
> c. Signs which pose a safety hazard. No sign shall be erected, operated, used or maintained which …
> (3) Uses in a manner which may confuse motor vehicle operators, the words 'stop', 'warning', 'danger', 'turn', or similar words implying the existence of danger or the need for stopping or maneuvering.
> (4) Creates in any other way an unsafe distraction for motor vehicle operations.

64. Nothing in Ordinance Sections 705.2.G.4 or 705.2.G.5 removes the above prohibition on "Signs not permitted in Phoenix"-- and it defies common sense to even argue that "signs which pose a safety hazard" are acceptable if they are billboards. In fact, as stated above, the major relocation of Defendant CCO's billboards much closer to the

dangerous Billboard Arterial Intersection that is a transit hub, with no setback to the public right-of-way, and the conversion of two of these static billboards to brighter digital billboards with electronic images that will change every 8 seconds, creates an unprecedented serious safety hazard from the distractions it will cause and the messages it will carry. These billboard messages include words in large capital letters like "WRECK", "ACCIDENT", "CRASH", "CRIMINAL" and "TRAFFIC REPORT" -- none of which has any relation to actual road conditions at the Billboard Arterial Intersection.

65. Defendant Board approved Defendant CCO's proposed Use Permit and Variance, including for the digital conversion of two static billboards, in violation of Ordinance Sections 705.B.3.c, and thus also of Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it allowed when the relocation of three legacy nonconforming billboards in violation of Ordinance Sections 705.2.G1, 705.2.A.5 (500 foot distance to residential use), and thus also 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT VIII
(Digital Billboards Will Emit Glare Above Ambient Conditions)
Statutory Special Action (Violation of Sections 307.A.7.a, 507 Tab A, 705.2.G.1, 705.2.G.4, 705.2.G.5 of the Ordinance)

66. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

67. Using a calibrated Konica Minolta LS-100 Luminance Meter, Plaintiffs measured the glare emitted by Defendant CCO's three existing static billboards to determine that the current average glare emitted for each was 27 nits, 32 nits and 31 nits, whereas Defendant CCO took no light measurements at all (other similar, nearby static billboards randomly chosen for measurement by Plaintiffs had an average of 27 nits); the average glare to be emitted by each such billboard to be converted to digital as proposed by Defendant CCO is 300 nits, or about 9.7 to 11 times higher than each existing static billboard, or the equivalent of 8 to 9 full moons of increased glare at the Billboard Arterial Intersection.

68. In 2019, the Illuminating Engineering Society ("IES", formerly "IESNA"), through the American National Standards Institute ("ANSI"), issued Report 39-19 ("RP-19-19") that established 40 nits as the maximum light emission by billboards and other signs in geographic locations like the Billboard Arterial Intersection. A consultant's report presented to Defendant City in late 2019 / early 2020, but withheld from public release until June 17, 2020, stated "RP-39-19 Is a definitive document of its time". Ordinance Section 507, Tab A, subsection II.A.8.8 states that "recommended lighting levels" that are "established by [IES], … should be incorporated into lighting design for on-site non-residential development", "as may be modified the City of Phoenix." Defendant City has not acted to modify the standards in RP-39-19 since its 2019 release.

69. Defendant Board issued a Use Permit for the digital conversions in violation of Ordinance Section 307.A.7.a which states a use permit may be issued only if the applicant proves the proposed use "[w]ill not… emit… glare at a level exceeding ambient conditions."

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it allowed when issued a Use Permit in violation of Ordinance Sections 307.A.7.a and 507 Tab A, and thus also of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT IX
(Billboards Prohibited in Walkable Urban Code District)
Statutory Special Action (Violation of Sections 1308, 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b of the Ordinance)

70. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

71. As part of other provisions of the Zoning Ordinance incorporated by Ordinance Section 307.A.7.b, Ordinance Section 1308 states, in relevant part, that in the above-mentioned Walkable Urban Code District, "Prohibited Signs" include "Signs advertising goods or services not provided on the premises …." (Section 1308.B.1.f); the area (square footage), height (above ground), size of lettering and location of any Wall Sign on a building must comply with specific limits (Table 1308.1); "internal sign illumination [of any Wall Sign] is limited" to "wall signs at store frontages". (Section 1308.C.5.b(1)); and wall signs must be "shielded to prevent glare" (Table 1308.2). Defendant CCO's billboards, as relocated – and whether static or digital – will not meet the requirements in Section 1308,

72. Nothing in Ordinance Sections 705.2.G.4 or 705.2.G.5 removes the general use permit requirement in Ordinance Section 307.A.7.b that a use must comply with all provisions of the Zoning Ordinance, including requirements in Ordinance Section 1308.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it allowed when it granted a Use Permit to Defendant CCO in violation of Ordinance Section 1308, and thus also of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT X
(Use – Not Area - Variance Standard Required & Lack of Defendant Board Authority)
Statutory Special Action (Violation of Sections 307.A.10, 705.2.G.1, 705.2.G.4, 705.2.G.5 & 307.A.7.b of the Ordinance and also A.R.S. §9-462.06)

73. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

74. Defendant CCO applied for, and Defendant Board granted, an area variance to reduce the setback of its relocated billboards from the 25 foot setback requirement in Ordinance Section 705.2.B.1 to "zero" setback (100% reduction). However, the billboards are not just nonconforming structures, they are also nonconforming uses (even assuming, despite Count IV above, that all are "Nonconforming").

75. Defendant Board applied the more lenient standard for area variances when it granted the variance, rather than the stricter standard for use variances, as Plaintiffs asserted

in their oral presentation and their Request for Reconsideration, citing Pawn 1st, LLC v City of Phoenix, 242 Ariz. 547 (2017) ("Pawn 1st"). Defendant CCO did not even attempt to show that it met the stricter standard for a use variance, nor could it meet that standard.

76. Even if Defendant could have met the stricter use variance standard, Defendant Board, as stated in Pawn 1st cited by Plaintiffs, is without legal authority to grant use variances as stated in ARS §9-462.06.H.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it granted a variance to Defendant CCO in violation of Ordinance Section 307.A.10, and thus also of Ordinance Sections 705.2.G.1, 705.2.G.4, 705.2.G.5 and 307.A.7.b, as well as in violation of ARS §9-462.06.H and Pawn 1st.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT XI
(Unconstitutional Grant of Use Permit and Variance)
Statutory Special Action (Violation of AZ Constitution, Article II, §§6 and 13, and US Constitution, Amendments One and Fourteen)

77. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

78. Several provisions of the Zoning Code, including those referenced earlier in this Complaint, such as but not limited to Ordinance Sections 705, 705.2, and 1308 establish standards for signage, including billboards, as to size (area), location, height, letter size, brightness and more.

79. In granting the Use Permit and Variance, Defendant Board granted special rights to Defendant CCO to embed in a building three digital billboards which are "Wall Signs" under the Zoning Code and which will display off-premises advertising that is forbidden to be displayed, under similar conditions, to tenants of that building who want to display on-premises signage (i.e., promoting goods or services offered on the premises, or the entities offering such goods or services).

80. The restrictions imposed on on-premises wall signage are valid restrictions intended to protect nearby residents, workers, pedestrians, vehicle drivers, bicyclists and others from certain harms ("On-Premises Sign Restrictions"). However, Defendant Board has eliminated these On-Premises Sign Restrictions from Defendant CCO's billboards – and it has done so tied to the content of the messages of those billboards (i.e., "off-premises messages" vs. "on-premises messages"), thereby also providing Defendant CCO with preferential unequal treatment.

81. By its unequal treatment of wall signage tied to message content, Defendant Board has subjected Plaintiffs to far greater and unreasonable dangers and harm to their persons and property than they would otherwise face if Defendant CCO's billboards had to meet the valid restrictions imposed on on-premises wall signs, e.g., harm from added glare, increased distractions and safety hazards for drivers and bicyclists and pedestrians, close-by in-your face intrusive messages (e.g., zero setback to public right-of-way), and more.

82. By giving special rights to Defendant CCO not enjoyed by others, particularly owners of and potential advertisers on building walls signs, Defendant Board has acted in

violation of the Arizona Constitution, Article II, §§6 and 13, and the US Constitution, 1st Amendment and 14th Amendment.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it granted a Use Permit and Variance to Defendant CCO in violation of the Arizona Constitution, Article II, §§6 and 13, and the US Constitution, 1st Amendment and 14th Amendment.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

COUNT XII
(Due Process and Separation of Functions Violations Regarding Hearing Process) Statutory Special Action (Violation of AZ Constitution, Article II, §4 and US Constitution, Amendments Five & Fourteen)

83. Plaintiffs allege, adopt, and incorporate the Preceding Allegations.

84. Upon information and belief, the Zoning Administrator and/or her staff assisted Defendant CCO to come up with the Use Permit and Variance application submitted by Defendant CCO. In addition, months after the ZAHO Decision and after Plaintiffs' appeal was filed with Defendant Board, and through a Public Records Request, Plaintiffs learned the Zoning Administrator had communicated multiple times ex parte with the ZAHO while he was writing the ZAHO Decision and she asked him to change parts of it – which he did before he finally issued it.

85. While Plaintiffs' appeal was pending with Defendant Board, and although Defendant Board's rules required its Secretary to grant Plaintiffs an automatic continuation of the date of the appeal hearing, the Secretary denied that continuance at the direction of the Zoning Administrator. Further, upon information and belief, the one or more members of Defendant Board communicated ex parte with the Zoning Administrator in regard to the scheduling and process that would be applied to the appeal to Defendant Board. The extent of the Zoning Administrator's involvement was not evident until the end of Defendant Board's hearing in this appeal.

86. In accepting the Zoning Administrator's actions as stated above and allowing them to affect its decision, and otherwise proceeding as stated above, Defendant Board engaged in arbitrary, unreasonable and unlawful conduct violating Plaintiffs' due process rights under the Arizona Constitution, Art. II, §4, and US Constitution, 5th Amendment and 14th Amendment, including a combination of functions.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion, when it granted a Use Permit and Variance to Defendant CCO in violation of the Arizona Constitution, Article II, §4, and the US Constitution, 5th Amendment and 14th Amendment.

B. For judgment reversing the Board Decision.

C. That Plaintiffs recover their Costs and Fees.

Originally dated and filed on the 5th day of October, 2020; and filed as amended (First Amended Complaint) on this 31st day of January 2022.

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EXHIBIT C

DECLARATION OF NEAL HADDAD

Declaration of Neal Haddad

State of Arizona)
) ss.
County of Maricopa)

I, Neal Haddad, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18, and competent to give this Declaration. I have personal knowledge of the matters stated in this Declaration, except as stated otherwise or as is obvious from the content of my statement.

2. Since May 1997 and continuing now, I've owned and resided at 3402 North 42nd Street, Phoenix, Arizona, which is within the borders of the Arcadia Osborn Neighborhood Association ("AONA"), one of the plaintiffs in the case of Urban Phoenix Project Network v. Clear Channel Outdoor, LLC (Case No. LC2020-000294 – Maricopa County Superior Court). I'm also a pro se plaintiff in that case. I'm making this Declaration in my role as Vice-President, director and member of AONA and as an individual plaintiff. I am making this declaration in support of AONA's claim that it has direct organizational standing and representational standing in the above case, and that I have personal standing as a pro se plaintiff in that case.

3. I also note that two of the other pro se plaintiffs in that case are members of AONA: Wallace Graham (who has also been an officer and director of AONA) and Harvey Shulman (who has been a member of AONA's Zoning Committee since at least February 2018).

4. I've been a member of AONA since 1997 and have held several offices with AONA and/or have been an officer of AONA almost continuously since 2012. From February 2019 until currently, I have been Vice President of AONA.

5. I'm also involved with several other non-profit organizations in Phoenix, primarily to help AONA carry out its mission. For example, I'm currently President and a board

member of the Neighborhood Coalition of Greater Phoenix ("NCGP"), with which I've been actively involved as an officer or board member since 2012. In my experience, neighborhood organizations learn from each other by informing, educating and brainstorming ideas information with each other.

6. Some of these organizations with which I liaison, even though geographically based, have developed expertise in some areas that are valuable to other organizations. For example, the Encanto Citizens Association has a high percentage of historic homes; when AONA has an issue involving historic preservation in AONA, I have been in touch with its officers for consulting advice and information that's helpful to AONA. Similarly, to a much higher degree than other neighborhoods, AONA has experienced an increase in efforts to rebuild billboards and/or convert static billboards to digital billboards on City streets adjacent or very close to residential areas. As a result, AONA has developed an expertise on issues of billboard glare, vehicular and pedestrian safety risks created by billboards, and billboard effect on property values and neighborhood deterioration. In fact, AONA has been involved in several adjudicatory challenges to billboard proposals in or immediately adjacent to AONA. To many other neighborhood associations throughout Phoenix – from Laveen and Estrella to North Central Phoenix – AONA is known to many as the "go-to" source of information, education and brainstorming ideas about billboards. Similarly, we are constantly educating our own members about preserving our neighborhood against billboards and about being careful as pedestrians, bicyclists and drivers when they pass by billboards. In short, over the past several years AONA has spent literally thousands of dollars to engage in outreach to, and educational campaigns directed at, our members and our sister neighborhoods; one-on-one consultations with representatives from other neighborhoods and billboard industry representatives; monitoring

billboard construction; and taking part in ZAHO cases / Board of Adjustment cases/ and court litigation involving billboards, most cases involving billboards within or within a few hundred feet of the AONA boundaries.

7. The geographic boundaries of AONA are Indian School Road on the north, Thomas Road on the south, 40th Street on the west and 56th Street on the east. The purposes, or missions, of AONA are stated in our By-Laws as follows, and AONA's activities have been focused on accomplishing these missions:

- To organize the neighbors of our area into an association for the purpose of preserving, renewing and enhancing the residential character of our neighborhood.
- Research, study and remain current on city and neighborhood issues, serving as a source of information-gathering and dissemination, for the benefit of the neighborhood (on this point, I'll note that in order to gather such information and disseminate it to our members, we must have relationships with other neighborhood associations as explained above).
- Maintain liaisons with appropriate persons, resources groups and governmental bodies for **the benefit** of the neighborhood.
- Develop and implement long-range and short-range strategies for the improvement and protection of our neighborhood.
- Become involved in transportation issues which could impact our neighborhood to insure their compatibility with neighborhood goals and objectives.

8. The last-stated purpose above – involvement in transportation issues which could impact our neighborhood – has special relevance to billboards. Because there are a very large number of "legacy" billboards within or at AONA's boundaries – especially on Thomas Road

and Indian School Road. More so in the past 3 or 4 years, billboard companies have filed numerous applications to rebuild static billboards or convert static billboards to digital billboards. To address these situations, we have developed the expertise mentioned in paragraph 5 above. In some cases, AONA has reached an amicable settlement with a billboard company that has been willing to make changes in its proposals; in other cases we have actively opposed these proposals at Zoning Adjustment (ZA) hearings and before the Board of Adjustment (Board). Although billboards have never been the major focus of AONA, we have been required to put funds and other resources towards billboard issues. We have spent these funds not only to prevent the construction of unreasonable billboards in our neighborhood, but also (as stated in ¶6 above) to educate our members on how to safely navigate streets and sidewalks as pedestrians, bicyclists and drivers when they pass by billboards.

9. The proposal for redeveloping a vacant lot at the intersection of Central Ave. and Thomas Road (C&T Intersection) first came to our attention at least 3 or 4 years ago, but little was said or known about what would happen to the three static billboards at that intersection owned by Clear Channel Outdoor, LLC ("CCO"). In about October 2019 (almost 2 ½ years ago), CCO filed an application to relocate those three billboards which, as we saw it, would result in at least the following seven problems ("the Seven Problems"): it would make these billboards considerably closer to the C&T Intersection; increase billboard heights above ground to increase visibility; reduce billboard setback from the public right-of-way to **zero** feet (from the required 25 feet); "embed" these billboards in the side of the proposed office building by effectively making them "wall signs;" move the three billboards closer to each other (despite a billboard separation requirement of 1,000 feet which these billboards do not currently meet); reduce the distance between at least one of these billboards and a nearby residential development

to less than the required distance of 500 feet (none of these billboards is currently closer than 500 feet to that residential development); and convert two of the billboards from static to digital, which would increase the glare from those billboards by 11 times and would result in constantly changing (every 8 seconds) message content, color, hues, and brightness levels. At that point, alarm bells went off for AONA and for a number of other neighborhood organizations.

10. The CCO proposal had the potential to negatively affect AONA in two different ways: (1) Approval of the CCO billboards as proposed would threaten AONA's mission (and successes) in limiting digital billboard conversion because it would serve as both practical and legal precedent for allowing within AONA billboards similar to the CCO billboards that have one or more of the above-identified Seven Problems. Billboard companies had tried, and mostly failed, to construct within AONA billboards with several of these problems; but if CCO's application succeeded, we saw the possibility that many of our past successes might be undone. We would also have to update our research, our studies, and our analyses that allowed us in the past to stop these types of billboards – not only to protect ourselves, but to respond to other neighborhoods that would likewise be threatened by such billboards (and billboard successes in other neighborhoods would be even more precedent for use against AONA in our own neighborhood). And we saw the likelihood that AONA would have to devote far more resources to the billboard problem – not only as the "go-to" organization that other associations come to for assistance, but also to expand and update the educational and information efforts directed to our own members. With very limited resources, AONA could devote more resources to billboards if funds and other resources were diverted from other, already-underfunded projects.

11. One other concern about CCO's proposal has been that the C&T Intersection is probably, in my experience, located on one of the non-highway commuter routes most used by

our members. Thomas Road is the southern-most boundary of AONA, and so a high percentage of our residents who want to drive across town or to the downtown area will use Thomas Road and drive west (and then south if going downtown). There are AONA residents who work close to the C&T intersection, including at least one AONA resident who bikes to that intersection because her office is located nearby. Our mission is not only to protect our residents while in our neighborhood, but also to act when a significant number of our residents regularly use a commuter route where development will cause greater safety risks. In that regard, with Thomas Road being the southern-most boundary of AONA, our interest in the Seven Problems is not theoretical and it is very different from most other neighborhoods; and the harms to our members is also real and not shared by the general public. This is why – when compared to every other opponent of CCO's proposal – AONA submitted to the ZA Hearing Officer and to the Board the most information, the most research, and the most detailed analysis of the Seven Problems and their negative effect on AONA residents (and others) who regularly cross the C&T Intersection. While we understand that others besides AONA residents are at risk, AONA residents who use this commuter route are a special subset of all users of the C&T Intersection for the reasons stated above.

12. I, personally, am one of the AONA residents who regularly uses the commuter route that passes through the C&T Intersection. Whether to attend meetings in midtown Phoenix or across town; to travel to west side neighborhoods and neighbors; or to visit two restaurants that serve as meeting places (pre-COVID). I cross through that intersection at least seven times per month (7 x 2/mo. x 12/mo. per year = 168 crossings per year). The intersection is already very dangerous because of all the reasons stated in the decision of the ZA Hearing Officer in this case; the changes proposed by CCO, especially the digital billboard conversions, will make it

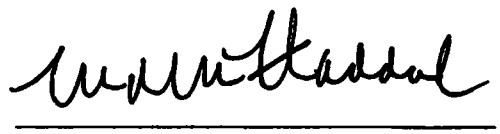
much more dangerous to me due to the increased visibility, glare and distraction from a digital billboard.

13. UPP has called the Board's approval of the CCO digital billboards a "game-changer". Certainly, we at AONA agree it has opened up a Pandora's Box of problems. To AONA and to me, the Board's decision is like the convergence of a hurricane and a tornado (and probably a snowstorm and earthquake) happening at the same location at the same time. When CCO acknowledged that its proposal was a "first" for any billboards outside of the downtown area, we agree that it is a "first" in terms of the glare, distraction and other safety risks that it poses.

14. Due to the Board's decision, in the past 18 months AONA has already diverted more resources to the issue of digital billboards than ever before. We now receive at least double the number of requests by other neighborhoods and their leadership for assistance on billboard issues. We have spent funds to rent a "nit gun" that measures billboard brightness at many billboard locations so that we have a basis of "field readings" for judging the potential effect of other proposed billboard conversions; we have spent more money than before to gather, copy and distribute (to other organization **and** to our members) scientific and other (e.g., transportation) research about the effects of digital billboards, and how to deal with safety issues created by digital billboards. In my estimate, our funds and time spent on the billboard issue have at least doubled since the Board approved the CCO application (personally, I've had to spend so much time on this issue that it has led to a not-insignificant reduction in my income generated by my professional services). This is **not** time and money spent by AONA on lobbying or direct public advocacy, but instead money spent on things like more educational campaigns directed at our members and sister neighborhoods; more one-on-one consultations

with representatives from other neighborhoods and billboard industry representatives; more, and more detailed, monitoring billboard construction; and taking part in more ZAHO cases and board of adjustment cases to reduce the negative impacts from billboards. One result, of course, has been the diversion of very limited AONA funds and resources to billboard issues, which undermines our ability to carry out some of our other activities. But the issue of billboards is a safety, health, property value, and quality of life issues to all of our members and we can't abandon the issue.

Pursuant to Rule 80(i), Arizona Rules of Civil Procedure, I declare under penalty of perjury that the foregoing is true and correct.



1.30.22

Neal Haddad, AONA Vice President Date

EXHIBIT D

AFFIDAVIT OF TABITHA MYERS

Affidavit of Tabitha R. Myers

State of Arizona)
) ss.
County of Maricopa)

I, Tabitha R. Myers, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 and am competent to give this Affidavit. I have personal knowledge of the matters set forth herein, except to those matters stated on information and belief, and as to those matters, I believe them to be true. If called to testify, I could and would testify competently, under oath, as to all matters set forth herein.

2. I am a licensed attorney at law in the State of Arizona in good standing and make this Affidavit pursuant to my ethical obligations under Rule 3.3, Ariz. R. Prof. Cond., "Candor Toward the Tribunal."

3. However, in the matter of *Urban Phoenix Project Network, et al. v. Clear Channel Outdoor, LLC, et al.*, ("UPP" v. "CCO"), No. LC2020-000294, Maricopa County Superior Court, my role is as Plaintiff Pro Per, and not as an attorney, as described in the complaint filed in that case ("Complaint"). I am also a former member of the board of directors of UPP, having first joined UPP in May of 2018. I consider myself a current member of UPP.

4. I am the Owner/Managing Attorney of Tabitha Myers Law, PLLC, doing business as Midtown Law, a law firm specializing in general business law.

5. Commencing in February 2020, Midtown Law began leasing commercial office space on the 10th floor of the building ("2828 building") located at 2828 N. Central Avenue in Phoenix, Arizona (the "Midtown Law Office").

6. The 2828 building is located directly on the southwest corner of the Central Avenue and Thomas Road intersection ("C&T Intersection"), directly across the street and only 105 feet from the lot on the northwest corner of that intersection ("the Lot") on which there are now three static billboards operated by Clear Channel Outdoor, Inc. ("CCO").

7. Also, at the C&T intersection is the Thomas Road Light Rail stop and 5 bus stops. Attachment 1 to this Affidavit is a Google Earth photo of the Lot which shows the 2828 building.

It also shows the location of three current CCO static billboards on the Lot, labeled as 1, 2 and 3 with yellow dashed lines, and the location of the three proposed CCO billboards approved by the Board to be built on the Lot, labeled as 4, 5 and 6, with red solid lines. Proposed billboards 4 and 6 would be digital. This information is in the Board of Adjustment record.

8. Proposed billboard 4 (digital facing south) and proposed billboard 5 (static facing east) will be much closer to the C&T Intersection than any of the current static billboards.

9. I generally work at the Midtown Law Office five days a week, each week, Monday through Friday, except for holidays. The 2828 building is the place where I spend my most time, second only to my home.

10. Even during COVID restrictions, I regularly worked at the Midtown Law Office.

11. I regularly conduct depositions, client meetings, and settlement conferences at the Midtown Law Office at least several times per month.

12. As a night owl, I work late into the evening at least once a week.

13. The Midtown Law Office is a dedicated office space, located in a co-working space with common areas. On the 10th floor common area, there is a balcony that overlooks the lot that the proposed building and three billboards will occupy. I enjoy the views from the balcony, and it is a good place to take a relaxation break.

14. Additionally, there is a lounge area with a coffee shop on the first and second floors of the Midtown Law Office building where I work and attend special events. The lounge area directly looks over the lot that the proposed building and billboards will occupy, and it is only about 105 feet from proposed billboard 4.

15. Regularly, at least *three to four* times a week (at least 15 times per month), I walk, bike or drive across the C&T Intersection to or from the 2828 building.

16. I often visit the stores and eat meals at the Park Central Mall, at least five times per month, which I access from the 2828 building by walking north across Thomas Road on Central Avenue. The re-development of that mall makes it a good place to shop and eat.

17. I also often buy meals and goods from the businesses located in the shopping plaza on the southeast corner of the C&T Intersection (such as Panera, Smoothie King, King's Beer and

Wine, and Wok 'N Roll), at least eight times per month, which I access from the 2828 building by walking east across Central Avenue on Thomas Road.

18. Midtown Law's business bank (National Bank of Arizona) is located on the northeast corner of Central Avenue and Thomas Road.

19. When I make in-person deposits to Midtown Law's business bank accounts, which is once a month *at a minimum*, I walk from the 2828 building to National Bank of Arizona, by first walking north across Thomas Road and then east across Central Avenue, or vice versa.

20. If I need to travel from the 2828 building to downtown or to the State Capital for work-related tasks (such as court filings and appearances, Department of Liquor filings, and Arizona Corporation Commission filings), which occurs on average about a few times per month, I will sometimes take the light rail train downtown, using the light rail stop at Central Avenue and Thomas Road to access the light rail. This requires me to walk north across Thomas Road, and then east across Central Avenue.

21. Other times when I travel downtown, for the reasons stated above, I drive south down Central Avenue, by first exiting the 2828 building parking garage on First Avenue, turning right on Thomas Road, and then turning south on Central Avenue towards downtown Phoenix.

22. My observation is that there are often many cars traveling in both directions on Thomas Road and so driving from First Avenue and turning onto Thomas Road, whether turning right or left on Thomas Road, is often difficult and not always safe.

23. I have lived in the City of Phoenix since at least 2013, at various addresses.

24. In April of 2016, I moved to my current residence, a single-family home located at 502 West Cambridge Avenue, in Phoenix, Arizona. My home is roughly 2,000 feet from the corner of Central Avenue and Thomas Road, as the crow flies.

25. Upon information and belief, the C&T Intersection is the intersection I travel the most compared to any other intersection in the Valley.

26. I estimate that I travel across the C&T Intersection *at least* 70 times a month.

27. In 2017, the Maricopa County Association of Governments ("MAG") issued a report (provided to the Board in this case) stating that the C&T Intersection was the 5th most

dangerous intersection in all of Maricopa County (not just Phoenix). This is based on the current situation at the C&T Intersection.

28. My personal experience is consistent with the pedestrian safety issues identified in the MAG report. When I walk across the C&T Intersection, I am very cautious to pay attention to vehicular traffic, as I have almost been hit by a car walking across the intersection on three separate occasions even when I was crossing in the crosswalk with the walk signal in my favor (I have also personally viewed several other "near hits"). I've observed that many drivers are distracted and do not see pedestrians like me who are crossing Thomas Road on the east side of Central Avenue or who are crossing Central Avenue on the south side of Thomas Road.

29. Also from my observation, when drivers go east on Thomas Road and then stop for a red light at Central Avenue, many look left (north) up Central Avenue to see if there are cars traveling down (south) on Central Avenue that might impede a right turn on red. I see that such drivers focus on traffic coming from the north, rather than focus on pedestrians walking from south to north in the crosswalk on Thomas Road, or rather than focus on pedestrian walking from west-to-east right in the crosswalk across Central Avenue.

30. These distractions now occur even though there no billboard right at the C&T Intersection. I have personally experienced how this danger exists even before CCO's proposed billboard 4 and 5 (described in paragraph 16 and 17 above).

31. The record before the Board states, and I agree, the proposed billboard 4 will have greater impact than the currently situation because: **(1)** there will be two proposed billboards - proposed billboards 4 and 5 - at the C&T intersection (at present, only current billboard 3 is even remotely close to that intersection); **(2)** it will be about 100 feet closer to the 2828 building (with zero setback to the public right-of-way on Thomas Road); **(3)** it will emit 11 times as much light towards the 2828 building (300 nits vs. 27 nits); **(4)** it will face directly towards the 2828 building (current billboard 3 is angled about 45 degrees away from Thomas Road); **(5)** it will be digital and change messages and colors every 8 seconds).

32. As the record before the Board also states, and I agree, proposed billboard 5 will have greater impact than the current situation because: **(1)** there will be two proposed billboards - proposed billboards 4 and 5 - at the C&T intersection (at present, only current billboard 3 is

even remotely close to that intersection); **(2)** it will be about 50 feet closer to the 2828 building (with zero setback to the public right-of-way on Central Avenue); **(3)** it will face directly towards traffic driving east to west on Thomas Road across Central Avenue (current billboard 3 is angled about 45 degrees away from Central Avenue); **(5)** its increased height above any current billboards (and well as new position facing east) will make it more visible and visible sooner to drivers driving from east to west on Thomas Road).

33. Upon information and belief, the greater impact mentioned above will be more harmful to me as a pedestrian, bicyclist, and driver, and as a tenant who works in the 2828 building.

34. This harm to me will be specific to me and beyond that of the general public or more substantial to me than that suffered by the community at large, especially regarding safety, in light of the above facts about my work location being only about 105 feet from the Lot (and proposed billboards); my frequent use of the C&T intersection for purposes of traveling to downtown (by Light Rail or auto), or such other daily pedestrian activities like getting lunch, shopping, and going to the bank; and my daily commute (by auto, bike or walking) from my home only a mile away.

35. This harm will also be specific to me and beyond that of the general public regarding the visibility of especially proposed billboard 4, which will have distracting, brighter message changes every 8 seconds that will interrupt my work within and/or enjoyment of the lounge area which I use in the 2828 building for purposes of work, or for having a drink or snack with clients and others; and will affect my relaxing environment on the 10th floor balcony.

36. Upon information and belief, the above specific harms to me are unique, or at least apply only to a relatively small number of people. The 2828 building is adjacent to the Lot (only across the street), and while others also work there during the typical workday, there are very few people in that building when I'm there on evenings, nights or weekends (my observation is typically no more than 5 people at any such times). Also, I don't see many bicycles being used by those who work in the 2828 building (I've observed typically no more than about 1 bike on any day). Further I've observed that the lounge where I sometime work or take a work break does not have many users (I can't recall seeing more than about 3 people there at any time, regardless of when I use the lounge). The outdoor balcony with views from the 10th floor will

also be subjected to the changing messages from proposed digital billboard 4, but I see hardly anyone else using that balcony during the day.

37. In sum, even if others may face the safety risks and visual distractions that will cause specific harm to me and given that the 2828 building is like a second home to me, upon information and belief there are less than 10 other people subjected to the same type of harm for the same amount of time as it will harm me.

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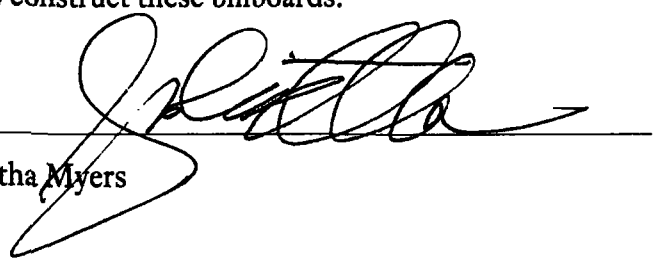
38. As a practical matter, I don't have any good choices if I remain at the 2828 building. I must commute from my home to there, which means I can't avoid the proposed billboards. I can't give up going out to file documents downtown, to get food, to go to the bank, or even shop. Moving to another office building will add expenses. Upon information and belief, the only remaining way to eliminate the harm to me from the proposed billboards appears to be denying CCO the permits it needs to construct these billboards.



Tabitha Myers

1·24·22

Date

EXHIBIT E

Harvey Shulman, Pro Se (Bar #033493)
16 W. Encanto Blvd, unit 512
Phoenix, AZ 84003
(301) 466-1517
HarveyJShulman@gmail.com
Pro Se Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

URBAN PHOENIX PROJECT NETWORK, an Arizona non-profit association, et al; Plaintiffs, v. CLEAR CHANNEL OUTDOOR, LLC, a Delaware limited liability company, et al. Defendants.	Case No. CV2020-001933 **DECLARATION OF HARVEY SHULMAN** [Assigned to the Honorable Katherine Cooper]

I, HARVEY SHULMAN declare as follows:

1. I am over the age of 18, and competent to give this Declaration. I am a Pro Se Plaintiff in this Case with personal knowledge of the matters stated in this Declaration, except those matters that I state on information and belief which I believe them to be true. If called to testify, I could and would testify competently, under oath, in this Case.

2. Since about February 2009 and continuing now, I've owned condo property at 16 W Encanto Boulevard, Phoenix, AZ 85003 in the Tapestry-on-Central condo development ("Tapestry"). I have been a part-time resident at that address, typically for at least 6 months per year during the winter-spring season (between about October 31 and

May 1), with an absence of an occasional week here and there during that time period, but with some additional days at that property in the summer months.

3. For the past 2 years, COVID has somewhat disrupted that schedule (actually spending more time in Phoenix), as it has somewhat disrupted other activities in which I normally engage while I'm residing in Phoenix (for example, dining out in restaurants as opposed to take-out food from restaurants). My normal activities may also be disrupted by other things like illness.

4. Clear Channel Outdoor, LLC ("CCO"), a defendant in this Case, has proposed to relocate and re-construct 3 static billboards ("Static Billboard") and convert two of them into digital billboards ("Digital Billboard") on a lot ("Lot") owned by defendant J&R Holdings VI, LLC ("J&R") at the northwest corner of the intersection of N. Central Avenue and Thomas Road ("C&T Intersection"). My Tapestry building is only about six short north-south blocks – approximately 0.48 miles (2,550 feet) from the C&T Intersection, as measured on Google Maps. The C&T Intersection is about a 5-6 minute walk (3-4 minute run) from my Tapestry building.

5. Attached to this Declaration as ***Appendix I*** is a Google Map of the general area around the C&T Intersection, and reference to it will assist in understanding how CCO's proposed digital billboard conversion granted by defendant Board of Adjustment (BoA) will harm me. While occupying my Tapestry condo property I have been a frequent and regular user of the C&T Intersection as a pedestrian (e.g., walker and runner) and car driver, crossing it in each direction **at least** fifteen times per week (and 20 or more times per week on many weeks), to engage in many activities such as eating

at or buying food to take out from restaurants and stores in the Park Central Mall to the north of the C&T Intersection (where First Watch, Fired Pie, Jamba Juice, Starbucks and other food establishments are or have been located), in the small shopping area on the southeast corner of the C&T Intersection (where Panera Bread, Wok N'Roll, Smoothie King and food establishments are or have been located), or on West Thomas Road (e.g., Pino's Restaurant); banking at Wells Faro Bank or Bank of America; and visiting St. Joseph's Hospital Complex for services. In addition to using the C&T Intersection to engage in activities within a few blocks of that intersection, I've almost always used the C&T Intersection every I drove to any location in Phoenix that is north of my Tapestry building; for dining, grocery stores, US Post Office and many other services (or to visit friends) either I will turn east or west on Thomas Road (to go to east or west Phoenix) or I will continue north to go the north Phoenix. I estimate that, conservatively, I've crossed the C&T Intersection at least 75 times per month during the winter-spring season, at least 50% of those times as a pedestrian; during COVID, having also spent parts of May, June, July, August and September in Phoenix, I similarly used the C&T Intersection at least 60 times per month in those months (less than in other months due to very hot weather), but slightly more as a driver than as a pedestrian. Even in summer-type weather I often walk to nearby locations like these, and frequently I won't see another person on the street (unless s/he is exiting/entering a bus or the Light Rail station in the middle of the C&T Intersection). I've had people say to me things like "I guess you're not a Phoenix native if you're walking in this temperature." My crossing of the C&T Intersection for my pedestrian treks to and from these locations, upon information and belief, occurs far more

frequently than such use by members of the general public and by the community at large, and from my experience less than 10% of Tapestry residents cross this intersection as pedestrians more than 5 or 6 time per month (more often they drive across it).

6. Especially when I've used the C&T Intersection as a pedestrian (walker or runner), I've been extra-cautious about my safety. For example, coming from my Tapestry building (south of the C&T Intersection) and trying to cross Thomas Road in the crosswalk with the "Walk Sign" in my favor, I've been almost hit (missed by a foot or less) by cars at least two times between about 2016 and October 2020 (almost 1 ½ years ago); since then it has happened a third time. These are "near misses", which don't include several other instances that involved several feet. From looking into the windows of cars (and at the heads of their drivers) that mostly create this safety hazard when they drive east on Thomas Road and then stop at a red light that faces in front of them on Central Ave (as I'm about to enter the crosswalk at the C&T Intersection), I can see that many drivers are not looking at me even when I am immediately in front of them or immediately to their right side. Instead, the drivers are "looking north" towards their left side, looking up Central Ave, to see if cars are driving south along Central Ave that would prevent these drivers from turning "right on red" from Thomas Road onto Central Ave at the C&T Intersection. Again, I have seen these drivers "looking north" dozens and dozens of times. This is a current problem even though the nearest billboard to that C&T Intersection is a static billboard that is angled and faces southeast (only partially angled towards that driver), and even though its closest edge is about 170 feet away from such driver's lane (per Google maps); from what I see, it doesn't appear to me that the

drivers are looking at this current static billboard at that distance and angle, but instead the drivers appear distracted entirely or almost entirely by "looking north" for Central Ave. drivers, and not by looking at the current static billboard.

7. Also, as a driver who regularly uses this intersection, I have also observed that a high percentage of such drivers are driving at speeds that significantly exceed the posted speed limit. I almost always drive at the posted speed limit and don't enter the C&T intersection when the traffic signal is red, but at least 1/3 or ½ of the cars are exceeding the speed limit and my experience is that at least 10% of cars speed up when the traffic signal turns yellow and they enter the intersection when the traffic signal has already turned red.

8. The Maricopa Association of Governments published a Road Safety Assessment (RSA) study – given to defendant BoA in this Case – which found the C&T Intersection to be the 5th highest "crash intersection" in all of the County. In 2020, I spoke with an engineer on that RSA team who told me that they had no knowledge if any significant improvements were made after 2017 and they had no knowledge of the proposal to relocate CCO's current billboards closer to the C&T Intersection or that two of the CCO billboards would be converted from static to digital.

9. At the ZA hearing on CCO's proposal, even one witness who supported CCO said, in underplaying the additional distraction from the digital billboards:

> As to the additional distraction from the building being built and the subsequent signs, yes there will be an additional distraction to drivers at that corner. However, any pedestrian trying to cross Thomas at that intersection currently takes their life

in their hands. The heads there do a 360 swivel because all those cars are out to get you now, and this is only going to add a little bit to the trouble.

10. One of the specific dangers to me from CCO's plans is that even though the C&T Intersection is already dangerous from drivers "looking north" to turn right-on-red and from speeding, CCO wants to put a digital billboard that will face fully south towards that driver, flashing a new digital message every 8 seconds with changing colors and content – a digital billboard that will have "zero" setbacks to the public right-of-way and will be only about 90 feet from that driver (decreasing the current distance by almost 50% from 170 feet to 90 feet). And there was uncontested evidence before defendant BoA that showed this propose digital billboard will be about 11 times brighter than the current static billboard (proposed 300 nits vs. current 27 nits), so even if there were no safety risks to me at present, the added billboard glare at this intersection will be unreasonably distracting to me, as a pedestrian and as a driver. I can see how the construction and operation of this new digital billboard is going to make the current dangerous situation far more treacherous for me and (I believe) others, because this new ultra-bright digital billboard with changing advertisements will be add much more distracting for drivers (and to me, as a pedestrian) compared to the current situation.

11. Defendant CCO has **alleged** from the time it filed its digital conversion application, and reiterated this point to defendant BoA (see published Board minutes of August 6, 2020 at p. 17) that digital billboards don't create more safety risks for drivers or pedestrians than static billboards because digital billboards distract drivers for only 1.34 seconds and static billboards for only 1.28 seconds, both durations below an asserted

"2-second standard" in a purported 2013 "government study"; in other words, CCO has claimed that driver distractions of less than 2 seconds don't create unreasonable safety risks. But even if these assertions are accurate they don't give me any comfort as a current frequent user of the C&T Intersection, based on my repeated experiences at this very intersection, as stated above and as further explained below.

12. In terms of how much distraction will be caused by CCO's proposal to place a digital billboard (or any billboard) on the C&T Intersection, as mentioned above my experience has been that even without a current billboard distraction at the proposed location there is a distraction because of the many drivers traveling east on Thomas Road who try to turn "right-on-red" on Central Ave at the C&T Intersection. In terms of the duration of the current distraction, from my experience I can confidently say these drivers already spend at least 2 seconds "looking north" up Central Ave (again, even without any billboard directly facing them at this intersection). I know they are already "looking north" for at least 2 seconds because, as a regular runner across this intersection (more later on this point in this declaration), I've timed the duration of driver distraction on my "running watch" and I don't recall ever seeing a distracted driver who turned his/her head to "look north" for less than 2 seconds.

13. Even if CCO is correct that a distraction up to 2 seconds that is **caused by a billboard** isn't dangerous, in this specific situation CCO is overlooking the fact that its proposed billboard will have cumulative effect: it plans to add a new digital billboard -- with "zero" setback – in the face of drivers right at the C&T Intersection. This new distraction, even if it is for "only" 1.34 seconds as CCO asserts, will be an additional

distraction that (using CCO's own calculations) would make the total distraction for drivers "looking north" at least 3.34 seconds (at least 2 seconds to "look north" for cars traveling south on Central Ave **plus** at least 1.34 seconds to glance at the digital billboard). This additional distraction will create more safety risk for me at 3.34 seconds, an amount of distraction that is beyond the 2 second duration after which, according to CCO, there are unreasonable safety risks.

14. However, upon information and belief, CCO is substantially understating the safety risk for its digital billboard by alleging that it is reasonable for a distraction time of only 1.34 seconds – my "information" is not speculative and, in fact, is based on CCO's own technical marketing literature directed to its potential customers who want to create their own digital billboard message designs. CCO's literature says:

> **View for 5 Seconds: View your creative for 5 seconds. This simulates driving past the billboard. Can you read the entire message in 5 seconds, if not your drivers will miss your message too."** (https://clearchanneloutdoor/com/get-creative/).

15. To put it another way, when I read CCO's own statements on its own website, they confirm my fears that placing a digital billboard with "zero" setback at the C&T Intersection will triple driver distraction time at least for drivers turning "right-on-red" at the precise location where I've almost been hit.

16. My own experience and my concerns based on the current situation and CCO's proposal is consistent with what the ZA hearing officer determined in this case when he rejected the digital billboards (digital billboards that defendant BoA has approved). The ZA hearing officer stated:

> Naturally, pedestrians are not a factor for placement of freeway digital signs. In this case, however, sign placement is a very significant factor because of the detriment toward pedestrian safety resulted from distracted drivers. (Reference: Ordinance Section 705.2.C.1 and 705.B.c.4 "No sign shall be erected, operated, used or maintained which creates in any way an unsafe distraction for motor vehidle operations.
>
> *** *** *** ***
>
> Digital billboards have 'unique features', compared to non-digital billboards, including their brightness and contrast with surrounding, their messates that change suddently, their realistic imagery, the lack of driver acclimation with their message, and the potential for interactivity with drivers. A survey of road users found that they perceived digital billboars are more dangerous, younger drivers stared at digital billboards longer without adjusting their speeds, and digital billboards … drew significantly more attention than static (non-digital) billboards. While industry representatives claim that there has not been any "proof" that digital billboards cause more accidents (that is, no cause-and-effect), the facts are clear that the study found that the crash rate is 25%-29% higher at digital billboard influence zones (such s intersections) compared to non-digital. In other words, there is a correlation between crash rates and digital billboards.

17. The ZA hearing officer in this case compared CCO's proposal to other proposals for other digital billboards in other ZA hearings where the digital conversion was rejected, and he concluded that "this ZA case situation is almost identical", except that this case has more "aggravating circumstances", including the "subject location has a significantly greater pedestrian presence due to the adjacent light rail station and bus stop" and "the referenced prior cases met the standard 25-foot setback requirements [but] this digital request is for a 0-foot setback. Accordingly, denial of these large digital billboard conversions is well founded." I agree that the "zero" setback of the proposed digital billboards (and the building in which they will be embedded) also will increase the danger to me, as will the much brighter and changing light (digital billboard will be ten times brighter than the current static billboard and change messages every 8 seconds).

18. My own experience about current and future conditioner is as the ZA hearing officer explained, and I still do not understand why and how defendant BoA granted the conversion because nothing they said or did would mitigate my safety and glare concerns.

19. What I've said above about my experience as a pedestrian and driver who regularly has used the C&T Intersection also applies to me even more so as a runner who crosses the C&T Intersection at least 20 times per month (I consider a runner also to be a pedestrian, but I want to address the special harm to me as a runner).

20. Running across the C&T Intersection has been a regular part of my running route in Phoenix for at least a decade. I've run on the sidewalks in almost every major U.S. city, and Phoenix is unique in my experience. For Central Ave. from McDowell Road to Osborn Road, a north-south distance of 1.5 miles, almost no side street (east-west street) that runs into Central Ave. on the west side of Central Ave. is a "through-street" – and this is also a "billboard-free zone" except for the eastern-most static CCO billboard that is on Central Ave. but over 100 feet north of the C&T Intersection. See attached **Appendix I**. The lack of "through-streets" in this area is because almost every side street either has a vehicle barrier (that prevents vehicles from driving west of 1st Ave) (see photo in attached **Appendix I**) or there is a large development (like Park Central Shopping / Creighton Medical Campus) starting at Central Ave. or at 1st Ave. This means a runner can run between McDowell Road and Osborn Road on Central Ave. – Phoenix's "main street" – for 1.5 miles in one direction or for 3.0 miles on a "round trip"/"return" loop without crossing any significant intersection except the C&T

Intersection. By adding to this Central Ave. route the sidewalk area(s) either along McDowell Road and/or Osborn Road and 7th Ave., a runner can run for about 4.25 miles. If the runner extends his/her run further north to run Weldon Ave (south of Indian School Road), the round trip/ return loop run will be close to 5 miles without crossing any major intersection except the C&T Intersection.

21. What's unique about Phoenix from my running experience is that there is no other major city where a running route offers a 3-mile or 4-mile or 5-mile run on the city's "main street" (here, Central Ave.), with the urban feel of tall buildings on both sides (and not a park or body of water on one side) (I refer to this as "the Central Ave Urban Running Route"), and where this route can be run with crossing only one significant intersection. Phoenix is special because not only do you get this urban feel, but when running north along Central Ave. you can see the mountains in the distance (see photo in attached **Appendix I**, and when running south along Central Ave. you can see the skyline of downtown with the mountains behind it. To me, it's a magnificent running route, and that's why I have regularly been running on this Central Ave Urban Running Route – and from a road safety perspective, day or night, it's a very safe route in terms of danger from drivers, **except** at the C&T Intersection.

22. Another benefit of the Central Ave Urban Running Route, particularly in the summer, is that there are several large garages along Central Ave where it's possible to take a break from the strong sun and also add "elevation gain" to the run by running for a few minutes indoors and between the floors of those garages.

23. From a safety standpoint, as explained above, the most dangerous part of my run is the C&T Intersection. It always requires special caution from me because it is dangerous even without digital billboards and without the static billboards being clustered close to the C&T Intersection. So I am very concerned that **any** billboards (static or digital) relocated closer to this intersection and with "zero" setback would increase safety risks for me, but allowing **digital** billboards in that situation is much worse for me because their much brighter lights and changing messages every 8 seconds add even more to the risk that I will be hit by a vehicle at that intersection. An alternative running route is not acceptable to me because it would substantially reduce the enjoyment, emotional high, and duration of my running workout if I don't cross the C&T Intersection on such alternative route. Either of those choices is harmful to me – the much higher safety risks from continuing to run the Central Ave Urban Running Route after CCO's proposed billboards are constructed VS. abandoning that running route and decreasing the enjoyment, emotional high and duration of my running workout. This situation can be remedied by reversing defendant BoA's decision and denying any permits to for the digital conversion or even for relocation of the current static billboards.

24. The harms that I've identified above – safety and glare – are specific harms to me, upon information and belief, or at least harms more substantial than the harms to the general public or even by the nearby community as a whole. When I run on my Central Ave Urban Running Route, for example, whether it is early morning, mid-day, later in the afternoon or in the evening, I rarely pass more than another 2 or 3 people during my 45-50 minute run. From my experience, I believe this running route across

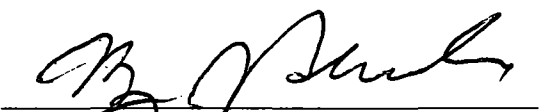
this part of the C&T Intersection is used by no more than about 30 different people per day, or no more than 50 different people per week (in my experience, many runners have favorite routes, so my estimate also means 50 different runners on this route throughout the year)[1]. But even if that number is 100 different runners, we are a discrete group that is different from the public or community at large, and as a runner I feel how the harmful effects on me are also different than the harmful effects if I was only a walking pedestrian.

25. I also want to address CCO's point that I don't live close enough to its proposed digital billboards to suffer any special harm. The reality is that unlike other situations in which people might be harmed at the location where they live, billboards are specifically directed at persons who pass by the billboard location, regardless of where they live. The fact that my Tapestry property is less than half a mile from the C&T Intersection makes it much more likely, however, that the C&T Intersection will be (as it is) on my frequent walking or running route than it would be on the walking or running route of the general public. Currently, because I'm completing the renovation of a rental property that I've owned about 1.25 miles from the Lot on which the CCO digital billboards will be located, I'm now occupying the property under renovation – but I still run on my Central Ave Urban Running Route starting at Osborn Road directly north of

[1] After drafting this Declaration, on Saturday, January 29, at about 10:30 AM I ran for 40 minutes and at about 2PM I drove (very slowly for 25 minutes) along the above Central Ave Urban Running Route. On Sunday, January 30, at about 12 noon I drove for 20 minutes back and forth on Central Ave along the above Central Ave Urban Running Route (north to Weldon Ave). On both days the weather was about 70 degrees (or less) and sunny, with a slight breeze. I expected to see several runners. However, in that total time of almost 90 minutes, I noticed only 3 runners along Central Ave. This is consistent with my estimate of only 30 different people per days who run across this part of the C&T Intersection.

the C&T Intersection. When my renovation is completed, certainly by Fall 2022, I plan to return to re-occupy a condo that I still own at Tapestry. But regardless, I am still specially harmed as a runner who regularly crosses, and will continue to regularly cross, the C&T Intersection. I continue to view myself as "aggrieved" by CCO's digital billboard plans.

Pursuant to Rule 80(i), Arizona Rules of Civil Procedure, I declare under penalty of perjury that the foregoing is true and correct.



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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

URBAN PHOENIX PROJECT NETWORK, an Arizona non-profit association; ARCADIA OSBORN NEIGHBORHOOD ASSOCIATION, an Arizona non-profit association; HARVEY SHULMAN, an individual; TABITHA MYERS, an individual; WALLACE GRAHAM, an individual; and NEAL HADDAD, an individual,

Plaintiffs,

vs.

CLEAR CHANNEL OUTDOOR, LLC, a Delaware limited liability company, as real party in interest; J & R HOLDINGS VI, LLC, an Arizona limited liability company, as real party in interest; CITY OF PHOENIX, an Arizona municipal corporation; and CITY OF PHOENIX BOARD OF ADJUSTMENT, an official body of the City of Phoenix,

Defendants.

No. LC2020-000294

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

(Oral argument requested)

(Assigned to the Honorable Katherine Cooper)

Defendants Clear Channel Outdoor, LLC ("Clear Channel"), J & R Holdings VI, LLC ("J&R"), and the City of Phoenix and City of Phoenix Board of Adjustment (collectively, "the City") offer the following reply in support of the motion to dismiss the plaintiffs' First Amended Complaint with prejudice. The plaintiffs' additional allegations in their amended pleading confirm that they lack standing because they point only to speculative future harm to general communal interests shared by all members of the impacted neighborhood. Because the plaintiffs cannot show that the Board's decision causes any actual injury or special damage to a concrete, personal interest, their challenge to it should be dismissed.

BACKGROUND

Defendants filed a Motion to Dismiss the complaint for lack of standing on November 30, 2021 (hereafter "the Motion"). On January 31, 2022, the plaintiffs filed (1) a First Amended Complaint; (2) a response to the Motion to Dismiss by UPPN and AONA ("Association Response"); (3) a joinder in the Association Response by pro se plaintiff Tabitha Myers; and (4) a separate response to the Motion to Dismiss by pro se plaintiffs Harvey Shulman, Wally Graham, and Neal Haddad ("Pro Se Response").

The Amended Complaint adds additional detail regarding the plaintiffs' alleged standing, but the overall substance and nature of those allegations remains the same. Attached as **Exhibit 1** is a copy of the First Amended Complaint (excluding exhibits) with annotations showing the differences between it and the original complaint.

Defendants disagree that the plaintiffs could amend as a matter of right under Ariz. R. Civ. P. 15. Nevertheless, because the Amended Complaint continues to allege the same type of interest and harm related to the Board decision as the original complaint, Defendants consented to the filing. In addition, the parties have stipulated that the briefing on the Motion to Dismiss shall apply to the Amended Complaint.

ARGUMENT

The Court should dismiss the Amended Complaint because none of the plaintiffs are aggrieved persons with standing to challenge the Board's decision.

have in the outcome of the proceedings." *See also Hist. Alexandria Found. v. City of Alexandria*, 858 S.E.2d 199, 201, 203 (Va. 2021) (foundation established "to advocate for the preservation of Alexandria's historic buildings, districts, and neighborhoods" did not have standing to challenge proposed renovation of historic property because the "resulting harm would be shared by" the neighborhood generally).

For all of these reasons, neither UPPN nor AONA can establish associational or direct standing under § 9-462.06(K). The Court should grant the Motion to Dismiss.

IV. The plaintiffs' alternative bases for standing also fail.

A. The plaintiffs cannot rely on A.R.S. § 12-1831 to establish standing for a zoning appeal under A.R.S. § 9-462.06(K).

Finally, UPPN and AONA claim standing under the Declaratory Judgments Act, A.R.S. § 12-1831 *et seq.* ("the Act"). Ass'n Response at 17. But the Amended Complaint does not actually state any claims for declaratory relief under the Act, so the plaintiffs cannot rely on it to show standing.

Although the Amended Complaint cites the Act in passing (at 10, ¶ 16), none of its twelve counts alleges a separate claim for declaratory relief. Instead, every count includes a general request for relief in the form of a "declaratory judgment that Defendant Board acted in excess of legal authority and erred as a matter of law, and otherwise acted arbitrarily, capriciously, and with an abuse of discretion . . . ." Am. Compl. at 17, ¶ A (Count 1); *id.* at 18, ¶ A (Count 2); *id.*at 20, ¶ A (Count 3); *id.* at 21, ¶ A (Count 4); *id.* at 23, ¶ A (Count 5); *id.* at 24-25, ¶ A (Count 6); *id.* at 26, ¶ A (Count 7); *id.* at 28, ¶ A (Count 8); *id.*at 29, ¶ A (Count 9); *id.* at 30, ¶ A (Count 10); *id.* at 32, ¶ A (Count 11); *id.* at 33, ¶ A (Count 12).

As an initial matter, "the prayer is not part of the complaint" for purposes of stating a claim under the Declaratory Judgments Act. *Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192 (1973). Even if it were, however, the relief the plaintiffs request is simply the special action relief authorized by A.R.S. § 9-462.06—namely, a judicial determination that the Board acted arbitrarily and capriciously and

abused its discretion. The plaintiffs do not seek any independent judicial determination of their legal rights under the Phoenix Zoning Code separate and apart from the Board of Adjustment decision. *Cf.* A.R.S. § 12-1832 ("Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."). Requesting that this relief be granted via a "declaratory judgment" does not transform a zoning appeal under § 9-462.06 into a declaratory judgment action under § 12-1831 *et seq*. And just like the plaintiffs cannot use the Act to circumvent the deferential standard of review applicable to zoning appeals under § 9-462.06, they cannot rely on the Act to circumvent the standing requirements of § 9-462.06(K).

In short, because the organizational plaintiffs do not actually allege any claims under the Declaratory Judgments Act, the Act does not give them standing here.

B. The individual plaintiffs have no standing to sue for violations of others' constitutional rights.

The Court should likewise reject the individual plaintiffs' argument that the constitutional claims (Counts 11 and 12) give them standing to bring this lawsuit. *See* Pro Se Response at 13.

First, claims for violations of the First Amendment and Due Process cannot give the individual plaintiffs standing to sue private parties like Clear Channel or J&R as a matter of law. To the extent these claims purport to assert independent constitutional violations, separate and apart from the zoning appeal, they involve only the City defendants.

Moreover, the individual plaintiffs lack standing to bring Count 11 at all, whether as an independent claim or as part of the zoning appeal. Count 11 asserts that the Board's decision violates the First Amendment because it gives Clear Channel's off-premises advertising content preferential treatment relative to on-premises advertising content. But

the individual plaintiffs do not assert that *their* First Amendment rights have been violated. Rather, they allege that the Board's decision gives "special rights to Defendant CCO not enjoyed by others, particularly owners of and potential advertisers on building wall signs." Am. Compl. at 31, ¶ 82. None of the plaintiffs claim to be owners of and potential advertisers on building wall signs, however. Thus, the plaintiffs lack standing to sue over this alleged First Amendment violation at all. *Cf. Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶ 18 (2005) (individual lacked standing to assert a First Amendment challenge to ordinance absent allegation that the ordinance's application violated her individual rights); *see also Foss v. Ariz. Bd. of Regents*, 1 CA-CV 18-0781, 2019 WL 5801690, at *3 (Ariz. App. Nov. 7, 2019) ("The 'complaint must assert a legal relationship, status or *right in which the party* has a definite interest and an assertion of the denial of it by the other party.'" (emphasis added, citation omitted)).

The same problem exists with Count 12's Due Process claim. Count 12 asserts that the Board violated the plaintiffs' procedural due process rights by denying the plaintiffs a continuance of the Board hearing and by communicating ex parte with the Zoning Administrator regarding scheduling and processes for the Board hearing. Am. Compl. at 33, ¶ 85; *see also* Pro Se Response at 13. But the individual plaintiffs did not appeal the zoning administrator's decision to the Board; only UPPN, AONA, and Clear Channel did. Because they were not parties to the Board appeal, the individual plaintiffs had no right to seek a continuance or weigh in on the schedule or processes to be used. And, therefore, they cannot assert that their rights were violated based on these alleged errors. *Cf. Bennett*, 211 Ariz. at 196, ¶ 18 (denial of application filed by non-profit sponsor could not have damaged individual plaintiff's constitutional rights).

CONCLUSION

The Court should dismiss with prejudice for lack of standing.

. . .

. . .

. . .

DATED this 11th day of March, 2022.

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EXHIBIT 2

BOARD OF ADJUSTMENT HEARING
AUGUST 6, 2020

The Board of Adjustment was held virtually.

PRESENT: Mr. Tim Eigo, Chairman
Mr. Jonathon Ammon
Mr. Abraham James
Mr. Steve Beuerlein
Mr. Rick Cole
Ms. Gail Knight
Mr. Jose de Jesus Rivera

ALSO PRESENT: Mr. Paul Li, representing the Law Department
Mr. Joshua Bednarek, representing the Planning and Development Department
Ms. Tricia Gomes, representing the Planning and Development Department
Ms. Julie Garcia, Board Secretary

ABSENT: None

Chairman Eigo called the meeting to order at 12:07 p.m. and the Board members introduced themselves. City staff introduced themselves and Mr. Eigo swore in Ms. Gomes.

***

Mr. Ammon read the Board of Adjustment opening statement for the benefit of those present.

***

A. Approval of Minutes

Before asking for a motion to approve the July 2, 2020 minutes, Mr. Eigo indicated he had asked Ms. Gomes for clarification of the minutes.

Ms. Gomes noted Item No. 2 which stated, "Ms. Gomes stated the parties were not present and indicated the item could be pushed to the end of the agenda, and the Board could make a decision on the item at that time." Ms. Gomes stated that Chairman Eigo

asked for clarification to clear the record with added language, "The Board moved Item 2 to the end of the agenda as a courtesy and allow the applicant to join late." She said there was emphasis that Item No. 2 was heard after Item No. 5 so the record showed the order in which the cases were heard.

Mr. Eigo asked the Board for a motion for the approval of the July 2, 2020 minutes as modified.

Mr. James ***MOTIONED*** to approve the July 2, 2020 meeting minutes as modified. Ms. Knight ***SECONDED***. The motion ***CARRIED*** by a vote of 7-0.

Roll Call:	AYE	NAY
Mr. Beuerlein	X	
Ms. Knight	X	
Mr. Ammon	X	
Mr. James	X	
Mr. Eigo	X	
Mr. Cole	X	
Mr. Rivera	X	

***

B. Approval of Agenda

Mr. Beuerlein ***MOTIONED*** to approve the August 6, 2020 agenda. Mr. James ***SECONDED***. The motion ***CARRIED*** by a vote of 7-0.

***

4.	Application #:	**ZA-541-19-4 (SIGN)** **(Continued from June 4, 2020)**
	Existing Zoning:	C-2, P-1, R-4 TOD-1
	Location:	Northwest corner of Central Avenue and Thomas Road
	Quarter Section:	15-27(G8)
	Proposal:	**1)** Use permit to relocate and rebuild an existing non-conforming off-premise sign (single face) to digital, 48 feet tall. Use permit required. **2)** Use permit to relocate and rebuild an existing non-conforming off-premise sign (double face) to a single digital and a single conventional face, both 36 feet tall. Use permit required. **3)** Use permit to allow an off-premise structure to be within 320 feet of a historic preservation district. A distance of 500 feet is required. **4)** Use permit to allow an off-premise structure to be within 230 feet of a neighborhood conservation district. A distance of 250 feet is required. **5)** Use permit to allow an off-premise sign to be located within 320 feet from a residential district and residential use. A distance of 500 feet is required. **6)** Variance to reduce the off-premise setback to 0 feet. A maximum of 25 foot setback is required from the right-of-way.
	Ordinance Sections:	705.2.G.5, 705.2.G.4, 705.2.A.4.a, 705.2.A.4.b 705.2.A.5, 705.2.B.1
	Applicant:	Diane Veres, Clear Channel Outdoor
	Representative:	Stephen C. Earl, Earl, Curley, & Lagarde
	Owner:	Jim Pederson, J and R Holdings VI, LLC
	Appellant:	Stephen C. Earl, Earl, Curley, & Lagarde
	Appellant:	Wallace Graham, Et Al, Arcadia-Osborn Neighborhood Association

Ms. Gomes stated Item 4 was ZA-541-19-4, located at the northwest corner of Central Avenue and Thomas Road. The case included the following requests: **1)** a use permit to relocate and rebuild an existing non-conforming off-premise sign (single face) to digital, 48 feet tall; **2)** a use permit to relocate and rebuild an existing non-conforming off-premise sign (double face) to a single digital and a single conventional face, both 36 feet tall; **3)** a use permit to allow an off-premise structure to be within 320 feet of a

historic preservation district when 500 feet is required; **4)** a use permit to allow an off-premise structure to be within 230 feet of a neighborhood conservation district when 250 feet is required; **5)** a use permit to allow an off-premise sign to be located within 320 feet from a residential district and residential use when 500 feet is required; and **6)** a variance to reduce the off-premise setback to 0 feet when 25 feet is required.

This case was appealed by two separate appellants.

Appellant #1, represented by Taylor Earl, with Earl & Curley, requested that the Zoning Adjustment Hearing Officer's decision to deny as filed Items 1 and 2 be overturned and approved and Items 3, 4, 5 and 6 be upheld subject to the stipulations.

Appellant #2, represented by Harvey Shulman on behalf of the Arcadia Osborn Neighborhood Association and Urban Phoenix Project, requested that the Zoning Adjustment Hearing Officer's decision to deny as filed Items 1 and 2 and approved with stipulations for Items 3, 4, 5 and 6 be overturned and denied.

Ms. Gomes stated Item No. 4 would have a varied speaking time. Appellant #1 would speak for 10 minutes, Appellant #2 would speak for 20 minutes, with a 15 minute rebuttal by Appellant #1, following a 5 minute rebuttal by Appellant #2.

Ms. Gomes stated Mr. Earl would be speaking on behalf of Appellant #1 as the main speaker, and several individuals would speak if necessary.

Mr. Eigo swore in Appellant #1 and Appellant #2 speakers.

Mr. Earl stated he was speaking on behalf of Clear Channel Outdoor and the Pederson Group.

Mr. Earl stated the proposed project was located at Central Avenue and Thomas Road. He presented the current locations of the existing billboards and the proposed digital and printed billboards which would be placed on the façade of the proposed building. He stated the existing billboards sat on perpetual easements which were granted in the 1970's. He said the current owner purchased the property in 2002 and in 2003 the city added the TOD-1 overlay which imposed a maximum building setback from the street, which forced any proposed buildings to be built against the street. He stated building on top of easements cannot be done, which was why there was no development on the property.

Mr. Earl noted the project went through a zoning update through the Walkable Urban Code. He stated they presented the proposed building and digital billboards to the decision makers and community and received overwhelming support, in addition to receiving unanimous approval before the Phoenix City Council. In the end, he said the Hearing Officer approved the relocation of the signs but not the digital conversion. Mr. Earl noted that since the hearing, they proposed to reduce the size of the digital billboard by approximately 44 percent, from 14-feet x 48-feet to 10.5-feet x 36-feet.

Mr. Earl stated there would be no odor, dust, gas or noise. He said there would also be no glare. He noted there was not much difference in appearance between a traditional and digital billboard during the day. He presented a traditional and digital billboard at night and said there was no glare from the digital. He noted the city had strict rules about illumination levels being capped, where lighting was turned off from 11:00 p.m. to sunrise. He indicated the digital signs had a crisp image, dimming software and ambient light sensors that assist with the regulation.

Mr. Earl presented a billboard in the Melrose District and believed it fits into the environment. He stated there was no glare and contained appropriate lighting levels in compliance with city requirements.

Mr. Earl stated the current proposal would give a neater appearance and urban aesthetic, which was what the city wanted. He said the proposed development would clean up the property.

Mr. Earl said there was a concern about seeing the digital signs by residents of two housing towers. He noted Regency House was located .42 miles from the subject. He indicated the residents may be able to see the billboards, but seeing was not a harm to their property.

Mr. Earl stated the subject property was located at a unique intersection, and the Midtown Plan calls for urban development and energy at this location. He noted the property was next to a light rail station which was where the city wanted to see urban aesthetics and "round the clock activity". Mr. Earl said this area was also part of the Encanto Village Core, which was where the city wanted a concentration of activity and intensity. He stated activity in the area was increasing with new private development. He clarified the area was to be an urban intersection, not a suburban intersection.

Mr. Earl stated the opposition had speculated about certain impacts on drivers, but said drivers were not part of the use permit test. He mentioned a federal government study published in 2013 that would disprove the opposition's speculation. The study included eye-tracking technology of drivers as they passed digital and printed billboards. He stated the longest glance duration was 1.34 seconds for digital and 1.28 seconds for printed, both of which were within the two second safety standard. He said the study was the subject matter gold standard for technical analysis and methodology and was relied upon by federal and state governments.

Mr. Earl stated Phoenix had digital signage for 12 years and Clear Channel Outdoor was unaware of any instance of its digital billboards being associated with a traffic accident. He believed fears about traffic safety were refuted by science and experience in Phoenix.

Mr. Earl presented neighborhood support videos from the three nearest community groups, Willo Historic Neighborhood, Midtown Neighborhood Association and Encanto

Village. He made note of where the communities were located in relation to the proposed development site.

Mr. Eigo mentioned to Ms. Gomes his assumption that the clock had stopped while the videos were being shown. Mr. Eigo was not aware of this type of presentation and thought the videos were akin to a support letter that could have been included in the Board packet. Since he had been on the Board, he had not seen a video testimonial. He thought this was similar to testimony in person, but could not question the individual.

Ms. Gomes said there were discussions and it was part of the applicant's presentation and testimony on the item.

With completion of the video, time was completed for Appellant #1.

Mr. Shulman noted that Ms. Jessica Bueno and Mr. Paul Barnes would be speaking first.

Ms. Bueno identified herself as the President of the Urban Phoenix Project (UPP) and said her organization opposed moving and digitizing any of the subject billboards. She said UPP had worked hard to develop and support the Transient Oriented District (TOD) and Walkable Urban (WU) Code District. She stated billboards were prohibited in the districts. She said it was one thing to allow pre-existing boards to remain, but moving them closer to the light rail stop in Midtown with zero setbacks and allowing digital messages every eight seconds ignored the WU code, good urban planning and road safety.

Mr. Barnes indicated in his 40 years of working on neighborhood issues, he had never seen a signage situation where the proposal was so dangerous. He was in opposition to moving the multiple billboards closer to the intersection, putting the billboards closer together, having zero setbacks to the public right-of-way, and making the billboards higher. He also felt digital signage with changing messages was dangerous. He said the proposal was inconsistent with the idea of phasing out non-conforming uses and moved in the opposite direction of increasing the impact and dangers from non-conforming uses.

Mr. Shulman said the case was about the law that regulated billboards, and said it was not a package deal to approve the project. He said he was asking the Board to enforce the zoning code as written. Mr. Shulman stated he intended to show the law does not permit the proposed project and the applicant had not met burden of proof.

He indicated the Scenic Arizona case which outlawed all digital billboards in Arizona and the Tellico Dam and Alaska Pipeline cases. He said the Arizona Legislature changed the law, not because the court cases were wrong, but because they were right.

Mr. Shulman stated that if the billboards were approved, there would be reduced distance to four crosswalks, zero setback, reduced separation between the billboards,

reduced distance to the new Toll Brothers residential use, and increased height leading to more visibility of the signs. He said it was contrary to the Walkable Urban Code and violated the first amendment, and said if the boards became digital, there would be 2,000 messages per night with glare.

Mr. Shulman presented a map of Central Avenue, from Interstate 10 to Camelback Road. He noted there were no digital signs on Central Avenue, except for a small sign at Central and Turney Avenues, which was a mid-block location. It had a 15-foot setback with no other boards nearby. He mentioned within 5,000 feet on either side of Thomas Road there were no boards of any kind except the subject billboards and one small board about a block away which was set back 25 feet. He believed the neighborhood would drastically change if the proposed development was approved.

Mr. Shulman presented the distance between the current billboards and the proposed billboards. He stated there would be reduced space between the billboards. He said moving the billboards would locate them within 500 feet of the new Toll Brothers apartments.

Mr. Shulman mentioned there had been discussions with Clear Channel and the Pederson Group about brightness, moving further from the intersection, setbacks and message duration. He indicated Clear Channel's response was they were helping the community and stated they had Willo support. Mr. Shulman felt the Regency and Phoenix Towers were important as well. Mr. Shulman said he asked for more discussion within the last few weeks and there was no response. He believed there was leverage by the applicant to convert the billboards to digital by using the building.

Mr. Shulman stated a digital board at night emits 300 nits with a conventional board emitting between 30 and 49 nits, which was measured in Phoenix by Dr. Luginbuhl and Dr. Scowen. They found that 93 percent of the billboards in Phoenix were less than 100 nits and 7 percent were over 100 nits. Mr. Shulman's group conducted a study measuring these billboards and billboards from Clear Channel which averaged 30 nits. Mr. Shulman stated four other random billboards owned by different companies and located within a few miles were studied. He said the proposed billboards that were currently 40 nits or under will be replaced with 300 nits.

Mr. Shulman presented data which showed the average conventional billboard at Central and Thomas was 27 nits; the average conventional billboard was 40 nits. He presented a photo which showed the lighting difference between digital and conventional billboards and felt the digital lighting was stronger than the conventional lighting.

Mr. Shulman said the applicant ignored the evidence by Dr. Lewin who said billboards created glare and there were three types of glare: annoyance, discomfort and disability. From numerous sources, he stated there was consensus that the maximum in the subject area should be 40 nits. At 200 feet from a sign, he stated 300 nits was

equivalent to 15 full moons, and at 100 feet it would be equivalent to 60 full moons. He stated on a Bullhead City highway, the limit was 200 nits and there were no pedestrians.

Mr. Shulman mentioned driver distraction and safety and noted none of the opposition's studies were from an intersection similar to the subject intersection. Mr. Shulman stated the intersection used to be the fifth most dangerous intersection in Maricopa County, and although it had gone down somewhat recently, it was still a dangerous intersection. He presented testimony from people who stated the intersection's danger. He said a billboard industry magazine said digital billboards caused greater distraction.

Mr. Shulman believed the proposed digital signage produced glare above ambient levels. He said the applicant mentioned a billboard noise study, but did not mention a light study, even though they had the burden to show no glare increase.

Mr. Shulman presented Exhibit C and said the subject intersection had 13 of 15 factors that make billboards dangerous in locations.

Mr. Shulman said there was a requirement that billboards be 1,000 feet apart. He indicated the applicant was reducing the digital billboard size, but felt the non-conformance made it worse. He noted the proposed Toll Brothers housing and said the signage would be moved within 500 feet of the development, which he believed made the non-conformity worse.

Mr. Shulman felt the core of the case was Section 705.2.G, rebuilding or relocating. He said one of the billboards was not legally erected and said it was clear the permit was for a 13.5-foot x 26-foot sign to be built 14-feet x 48-feet. He stated it was 51 square feet too big, it was not according to permit, and would not qualify as a legally non-confirming sign under Section 705.2.G.

Mr. Shulman said the applicant was going to take down two billboards that total 1,344 square feet. He noted Factor A in 705.2.G.4 stated 1,200 feet per digital face needed to be removed, which would require 2,400 feet to be taken down, not 1,300+ feet. He said any interpretation of the law that says the opposite was incorrect.

Mr. Shulman said the applicant twice noted there was no pole associated with the sign, but in the recent filing they say there was a pole. He said there was a pole in the building but that does not meet the requirement. Mr. Shulman summarized they have not met factors A and B for any conversion.

Mr. Shulman stated there was a difference between relocating a sign and rebuilding a sign. He said there was documentation that Section 705.2.G.4 and 5 did not authorize relocation, but the word was not used. He said the applicant wanted to relocate, not just rebuild or reconstruct and believed it was up to the City Council to allow relocation as part of rebuilding. He felt that due to moving the nonconforming use, it would violate Section 907 of the code and said Section 705.2.G does not replace Section 907.

Mr. Shulman said the applicant requested a use variance and not an area variance and felt they had not quoted the use standards let alone met them. He believed it was the wrong variance and should not be granted.

Mr. Shulman said the applicant's request was in violation of the First Amendment and was unconstitutional. He said allowing billboards on the building in the WU District could not be done with on-premise signs.

Mr. Earl stated the opposition's claims about digital defects on lighting and traffic were an attack on digital science and whether digital signs should be allowed. He said the City Council accepted it in the form of signage and the city had issued dozens of approvals for such billboards based on its established tests. He said the opposition was citing many different studies and they could refute them. He mentioned that Phoenix had digital billboards for over a decade with appropriate lighting levels and no traffic problems or accidents. He believed science and experience was proof, not speculation.

Mr. Earl stated that since the 1970's the city had planned the Central Corridor for high-rise development. He said the city determined long ago this area was not suburban, but instead would be a pocket similar to downtown. He noted the city was split into villages which was the village core system. The village core was where the concentration of activity and intensity would occur within a village. The city designated the subject property as part of the Encanto Village Core, with Central Avenue as the focus of the core with intense commercial use envisioned from the 1985 Encanto Village Draft Plan. The city had been calling for urban development at this location for a long time.

Mr. Earl stated the Reinvent PHX Plan brought intensity of development and urbanization next to the light rail. The Central and Thomas location was given the "high intensity" location.

Mr. Earl stated the city also placed the TOD overlay at the subject location which "encourages uses that allow round the clock activity around transit stations." He felt because the site was adjacent to the light rail station, this type of encouragement for round the clock activity applied here.

Mr. Earl said the Midtown TOD Policy Plan encouraged a bustling corridor of commerce and energy, and felt the Central and Thomas location was a great place for an urban aesthetic which the digital billboards would provide.

Mr. Earl said private industry was also fulfilling the City's vision of urban design, high activity, nightlife and intense development. He noted a nine-story multi-family development, Creighton University medical school being developed, and Park Central which went through a revitalization with restaurants, retail and entertainment.

Mr. Earl showed photos which emphasized the appropriateness of lighting levels with Phoenix's strict regulations and the lighting patrol of the digital billboards. He said the ambient light levels surrounding the digital sign would not vary significantly from that of

a traditional printed billboard, and in many cases it would be less. The brightness of the digital display was carefully limited and controlled so it was never too bright for conditions. He noted with city regulations, the signs would not have glare. Mr. Earl presented a before and after of the site and stated the site would be cleaned up with a better aesthetic.

Mr. Earl cited the Federal Highway Administration report which stated, "when billboards were present, the drivers in this study sometimes looked at them, but not such that overall attention to the forward roadway decreased." He said the FHA report was also relied upon by the U.S. Department of Transportation, the National Highway Traffic Safety Administration, and state and local governments.

Mr. Earl cited the MAG study and said the crash rate at this intersection was lower than the city average. He stated certain safety upgrades recommended by MAG for this intersection would be achieved through the redevelopment of the project. He said the report concluded there were no environmental conditions observed that would indicate design or maintenance as a factor to pedestrian collisions.

Mr. Earl mentioned the city intersections where digital billboards were placed against the right-of-way. He indicated these billboards were in place during the MAG study. Mr. Earl believed the federal government study backed their position, in addition to Phoenix's experience.

Mr. Earl stated that although the Hearing Officer disagreed with the digital conversions, the digital sign dimensions were being reduced.

Mr. Earl reiterated the support of the three nearest neighborhood groups. He said the opposition, Arcadia-Osborn Neighborhood Association, was 4.5 mile away. Mr. Earl asserted an argument for lack of standing by both of the oppositions. He felt neither AONA nor UPP had standing under ARS Section 9-460.06 because they had not shown they were sufficiently within the 300-foot language for "aggrieved". He said UPP did not have standing in a previous case on Central Avenue and he felt similar reasoning applied here for both groups. He believed without standing, the appeal would not be before the Board today and only the appeal of the digital conversion would be before the Board.

Mr. Earl read a portion of Willo's support letter for the proposed project and noted the letter said the billboard relocations would improve the site for the neighborhood. He presented a second letter from Willo which came as a response to statements of the opposition. Even though the letter was received after the submission deadline, Mr. Earl asked the Board to receive the second Willo letter into the record because it was written in response to the opposition's accusations. He said they also had a support letter from Congressman Greg Stanton that was filed after the deadline and believed it would be helpful in the Board's decision and asked for it to be submitted into the record as well.

Mr. Earl said digital was a necessary part of the application and felt there would be great challenges changing out sign copy on a building with pedestrian walkways next to it. He said the digital conversion allowed changes without interrupting the pedestrian experience and without having to work with property management of the building. He said the signs would be unavailable for two years during the construction phase.

Mr. Earl presented a video of the property owner, Mr. Jim Pederson.

Mr. Eigo reminded the parties that late arriving materials would only be admitted by a vote of the Board. Mr. Eigo deferred the discussion and vote to stay on track with the hearing and after Mr. Shulman's rebuttal.

Mr. Shulman objected to Mr. Taylor's new information.

Mr. Shulman showed the different types of development that could be built on the site without the variances and violations. He said he had no problem with an urban area and felt that some think that urban means digital. He stated Mr. Earl's pictures were misleading because they were taken from drones with undermounted lights and felt there was going to be greater glare for people on the street and in cars.

Mr. Shulman said nobody had raised these digital issues and noted decisions evolve as new circumstances come to light. Mr. Shulman said they were presenting issues that do not accommodate digital signs. He felt the true test was the Urban Core because the TOD and the WU District prohibited off-premise on buildings, and specifically prohibited billboards from being on buildings. He said on-premise signs could not link to digital signs. He noted the importance of the Urban Core, the law and the code, and noted 12 sections of the code were violated, and very few were answered by the opposition.

Mr. Shulman said standing had never been raised. He said UPP had a member/officer who worked full-time within 100 feet of the sign and there was no basis to deny standing.

Mr. Shulman stated that Willo's stance was a direct violation of its policy on signs. He stated that Willo sent a letter to Alan Stephenson in April 2018 which said they opposed these types of signs with brightness. He stated Willo's current letter gave no specifics other than they liked the project. Mr. Shulman noted Willo would be getting free advertising and the group opposed other signs along Central Avenue.

Mr. Shulman noted the transportation study. He said the study was performed in Redding, Pennsylvania and Richmond, Virginia, not any place like Phoenix and not at the subject intersection.

Mr. Shulman suggested the Board not decide the case but take time to read through their submissions. He felt the signs would be embedded for a long time and it would set a precedent. Mr. Shulman asked the Board to deny the digital and the relocation because it was not permitted under 705.2.G and violated other sections of the code.

Mr. Eigo mentioned the two late arriving letters and entertained a motion from the Board to accept the materials. Hearing no motion, the Board did not accept the late arriving items.

Mr. Eigo stated he was open to a conversation among the Board about standing. He stated that Mr. Earl was correct that the Board had recently had a split decision that ruled a community organization did not have standing in a case. Mr. Eigo stated the standing issue did not need to be reached at the hearing because the case was before the Board and there were two appellants. He summarized Appellant #1 was represented by Mr. Earl, the case was appealed, and even though a portion of the case was appealed, it put the entire case before the Board properly. Mr. Eigo asked the Board for their thoughts.

Mr. Rivera thought standing was not an issue.

Mr. Eigo said a Board member could make a motion in regard to standing, and if there was no motion, the Board would proceed to questions.

Mr. Cole indicated he disagreed with the Mr. Eigo's position and had strong questions if AONA had standing. In his opinion, he did not feel AONA was impacted. He felt standing could be considered in the case, but not today. Mr. Cole stated if one of UPP's members worked within 100 feet of the development, that person might have standing.

Mr. Eigo said that was wise counsel for any parties in the future.

In his opinion, Mr. James stated all citizens of the City of Phoenix may have standing.

Mr. Eigo mentioned there were rules about standing. His position was the applicant brought this before the Board previously, and as long as the applicant was here with a proper appeal, the entire case would be heard.

Mr. Rivera stated that when he thought of standing, if an issue could affect an entire community, it was not necessarily determined by geographic location.

Mr. Eigo asked Mr. Earl if the Board would be wrong to apply the standards of wall signs to what he was trying to do with the proposed development.

Mr. Earl replied yes it would be wrong to do so because those would be on-premise signs, not off-premise signs, and were governed by different regulations. He said the key was what was being advertised. On-premise signage would be advertising something on a particular site and off-premise signage would be advertising that did not occur on the site and they have separate regulations.

Mr. Eigo asked Mr. Shulman if he agreed with the characterization.

Mr. Shulman said he disagreed with the characterization. He felt the problem was the distinction of off-premise and on-premise signage which was prohibited in the WU District and TOD. He said the applicant wanted to install signage into the structure of the building which would not be allowed by anyone else in the building and violated the First Amendment.

Mr. James asked Mr. Earl about digital signage in an urban area of Phoenix.

Mr. Earl was not sure if he understood Mr. James' question and said he would answer the best he could. He spoke of the Melrose District billboard photograph and said it was not on the light rail and did not have the same level of urbanization as the subject intersection. He stated the city wanted urban style development along the light rail and said the proposed development was an appropriate aesthetic.

Mr. James clarified his question and asked Mr. Earl about digital signage in Downtown Phoenix.

Mr. Earl said the Central and Thomas location was one level below Downtown Phoenix as a regional center and said the subject location called for high intensity with Downtown Phoenix calling for high*est* intensity. He said the area would have many of the same characteristics, pedestrian oriented activity and high-rises as downtown. He reiterated Central and Thomas was specifically named one of the high intensity areas along the light rail system.

Mr. James asked Mr. Shulman and Mr. Earl about those living in high-rise residential buildings along Central Avenue and whether there had been discussion about the proposed development.

Mr. Shulman said almost everyone he knew supported the project, which meant getting the building built. He stated there were hundreds of residents in Phoenix Towers, Regency and Tapestry, and said Phoenix Towers and Regency had opposed the billboards. He said the residents did not want to be in suburbia nor downtown. He said the digital billboards located downtown were in the entertainment district which had its own zoning standards, including for signage. He felt it was ironic this was the argument from the applicant, although the City Council created the TOD and the WU District which stated no billboards or off-premise signs. He stated the Phoenix Towers and Regency residents chose to live in Midtown, and do not want to live in downtown or in the entertainment zone. He said if the billboards were allowed, the City Council should amend the TOD and the WU Code.

Mr. Earl responded by saying Mr. Shulman was talking about the residential area of Central and Encanto, which was two stops down on the Reinvent PHX Plan, in the medium urban center. He stated the area had different character and felt there might be hard feelings from the past about the BMO sign. He reiterated the distance of the residential buildings and said seeing the sign would not harm the individual property. He

stated there was a video available to the Board that showed the distance of the buildings to the subject intersection.

Mr. Ammon mentioned the downtown intersections not in the MAG study, Jefferson and 1st Avenue and Washington and 1st Avenue. He asked Mr. Earl about the sign sizes at these locations and their relation to the street.

Mr. Earl said the digital signs shown were 14-feet x 48-feet, but they might differ by a foot or so. He said the subject signs were reduced to 10.5-feet x 36-feet, which was a reduction of approximately 43.75 percent.

Mr. Ammon asked Mr. Shulman about the TOD and the WU Code in relation to being in different locations, with one area having digital and the other area without digital.

Mr. Shulman said the signs were in the TOD or WU Code, but the signs were also in the entertainment district. He said he measured the length of the sign to the street. He felt Washington and Jefferson Streets were types of street. They were both one-way and the pictures exhibited were in a one-way direction. He said Central Avenue and Thomas Road had activity from every direction. He said the sidewalks in downtown were very wide which would not be the case at Central and Thomas. He believed the Melrose sign was irrelevant because it was not at a main intersection. He noted Regency House led the fight with support from Phoenix Towers with the Stewart apartment building downtown and the FAA. He said red lights on top of the Stewart blinked as often as billboards and people did not like it. He felt it did not matter if you were 4/10-mile away or whether you were at an intersection.

Mr. Ammon asked Mr. Shulman if he was against the signs in the area of the downtown region.

Mr. Shulman said he was not against the signs, but said it was about location, the size, the brightness and messaging.

Mr. Ammon asked Mr. Earl for clarification about the character areas along Central Avenue.

Mr. Earl responded that the Reinvent PHX Plan had grading of different levels of intensity and said the Downtown Core was at the top. He stated the rail was a function of intensity. He identified Central and Thomas and Central and Osborn go together since they were adjacent light rail stations. He said Metrowest had two stations. He said there were two locations that received the regional center designation which called for high intensity development. He noted there were many high rises which brought activity such as the Park Central revitalization, the medical school and private development. The proposed development would provide first level retail and restaurants, which Mr. Earl believed was the type of activity the city was looking for in this location. He stated the current billboards were legally non-conforming and the zoning ordinance allowed for the digital conversion under certain conditions which he believed were met

Mr. Ammon said his first interpretation was it was going against the WU Code of no digital. Mr. Ammon believed the Board was tasked to make a pretty important decision that he felt was a little gray with the WU code not allowing digital, but the zoning ordinance allowing digital conversions. Mr. Ammon wanted clarity.

Mr. Earl said the application was appropriate. He said the cases coming before the Board for digital conversion were typically going to be billboards that would not allow for digital under the zoning district. He stated the original boards were considered legal, and when the city changed the zoning ordinance, the boards were then legal non-conforming. Mr. Earl believed there was full compliance with the zoning ordinance.

Mr. Eigo asked Mr. Earl about the perpetual easements on the billboards.

Mr. Earl wanted to give a history of the property and said the perpetual easements were granted in the 1970's. He stated the easements were in harmony with the setbacks and when his client bought the property there were no problems.

Mr. Rivera interrupted Mr. Earl and said the Board had spent much time on the case and wanted the parties to answer the questions directly. Mr. Rivera felt it prolonged the hearing and confused the issues.

Directing his comment to everybody, Mr. Eigo said he would appreciate a response with a yes or no and then an explanation.

Mr. Earl answered that the arrangement was to release property rights in order to replace the easements onto the façade of the building which he believed was a balancing of property interests. He said it was the city who added the TOD with the setback requirements so a building could no longer be placed on a site and not interfere with perpetual easements. Mr. Earl felt this created the conflict, a requirement to push buildings up to the property line where you had already been granted property rights.

He stated it was city leadership who approached the Pederson Group and Clear Channel to develop the property and this was the unique solution. He stated they would honor the easements, but would relocate them to the façade of the building which would allow the building to go forth with what the city wanted by pushing it toward the street and allowed the billboard rights to be protected.

Mr. Eigo said it was not the job of the Board or opposition to solve development problems. He asked Mr. Earl if there was consideration of the opposition's other building designs that would have met the TOD and WU Code.

Mr. Earl said those recommendations came very late and said the WU Code allowed for a very strict design face. He felt Mr. Shulman was discussing the setbacks/variance and believed he was proposing to push the billboards back on the building by 25 feet. Mr. Earl believed the boards would not be visible at 25 feet. He said his group did not entertain Mr. Shulman's pictures and thought the current design was attractive.

Mr. Eigo said his next question to Mr. Shulman was a trap and gave him the option of answering. He stated it was not Mr. Shulman's job to solve development problems and said issues were brought up that he believed did not meet the code. He asked Mr. Shulman if the applicant had sought a different variance from TOD and the WU Code, left the billboards as is and therefore could push the building back, and installed a surface parking lot, would this scenario benefit the community.

Mr. Shulman said he begged Clear Channel and the Pederson Group to work with their group and the high-rise groups. He stated he would like something that allowed the billboards to be moved but was not sure of legality because he believed 705.2.G allowed relocation. Mr. Shulman stated nobody talking about moving back 25 feet, but did not like zero feet on the street. Mr. Shulman mentioned a diagram which showed two traditional billboards at Central Avenue and Indian School Road. He said the billboards were owned by Clear Channel and had recently been taken down. He said the land was bought by Toll Brothers to build a residential community. He believed there was an arrangement where the billboards were gone and construction was starting. Mr. Shulman said he wanted to see the restrictions and asked Clear Channel for the agreement with the Pederson Group but was denied. Mr. Shulman believed there was room for accommodation.

Mr. Eigo asked for questions from the Board.

Mr. Cole believed it was time to have a motion. He said Mr. Eigo had given both parties ample opportunity to talk about the case. After looking at the opposition's materials, he did not see how they were accommodating for redevelopment of the site with an office building. He said he saw illustrations of how it could look, but saw nothing that incorporated signs and materials, in reviewing the 644 pages. He believed it was a challenge to redevelop the property, particularly when a sign company had easements and they wanted something in consideration for moving their signs. Mr. Cole said he would like to move the case forward and wind down the discussion.

Ms. Knight asked Mr. Cole if he made a motion.

Mr. Cole said he was making a statement, but would be happy to make a motion.

Mr. Cole moved to uphold the Zoning Adjustment Hearing Officer's decision and reverse as it related to the digitization of the signs, subject to the modification of the size of the signs as presented by the applicant.

Mr. Eigo wanted clarification of Mr. Cole's motion and asked if he was reversing the Zoning Adjustment Hearing Officer's denial of use permits 1 and 2 and affirmed the use permit and variances 3, 4, 5 and 6 with stipulations.

Mr. Cole believed the project should go forward and recognized the number of people for and against. He said his personal belief was that the corner was underutilized and

would continue to be unless there was a compromise, even if it meant adding digital signs to the building as an accommodation to the sign company.

Mr. Cole MOTIONED in ZA-541-19-4 to OVERTURN the Zoning Adjustment Hearing Officer's decision and approve Items 1 and 2, and UPHOLD Items 3, 4, 5 and 6 with stipulations.

Ms. Knight SECONDED the motion.

Mr. Cole asked Ms. Gomes for assistance in clarifying the motion.

Ms. Gomes said Mr. Eigo reiterated the motion correctly and stated Mr. Cole's motion was to overturn the ZAHO's decision on Items 1 and 2 and approve the digital billboards, and to uphold Items 3, 4, 5 and 6 with four stipulations which were part of the approval:

Stipulations:

1) 60 months to apply for and pay for the new building permits.

2) The location of the billboards on the building shall be consistent with the elevations date stamped February 6, 2020. The south and east facing billboards shall be no more than 85 feet from the corner of the building.

3) The height of the south and east facing billboards shall not exceed 36 feet.

4) The height of the north facing billboard shall not exceed 48 feet.

Ms. Gomes asked Mr. Cole to confirm the original four stipulations.

Mr. Cole said he confirmed but also wanted to add the stipulation about reducing the overall sizes of the digital signs.

Ms. Gomes said correct, that was the clarity she wanted. She said the applicant's presentation was proposing to reduce the north and south facing digital boards to 10.5-feet by 36-feet. Her suggestion for the stipulation would state:

5) The sign face dimensions for the north and south facing billboards shall not exceed 10.5-feet by 36-feet.

Ms. Gomes mentioned the removal of a billboard in the applicant's submittal and suggested a stipulation for removal of a board.

Mr. Cole responded yes to the removal of the board which he felt was in good faith of the sign company removing a board as part of the process.

Ms. Gomes said the board that was a part of the applicant's packet was located at 9330 North 19th Avenue and said she could read the stipulation into the record for clarity.

Mr. Eigo agreed.

Ms. Gomes read the stipulation:

6) The applicant shall remove an existing off-premise advertising structure in compliance with Section 705.2.G.4.a. The billboard that will be removed is at the following location: 9330 North 19th Avenue (SGNP 164470 and 164337). An off-premise sign demolition permit shall be issued for each off-premise sign to be removed prior to final sign inspection on the subject board at northwest corner of Central Avenue and Thomas Road and the signs shall be removed within 20 days of issuance of those demolition permits unless the existing legal nonconforming sign(s) have already been removed. If any such off-premise sign is re-erected within the stipulated period of 205 days from the issuance of the demolition permit, the applicant shall remove an alternate legal nonconforming off-premise sign to achieve the required square footage necessary to be removed.

Mr. Eigo asked Ms. Knight if she continued to offer a second motion.

Ms. Knight responded yes.

Mr. Eigo said he would not be supporting the motion. He believed there was evidence in the use permit of glare that exceeded ambient conditions and the variance was not necessary for the preservation and enjoyment of substantial property rights, and that it would be materially detrimental to some working or living in the area. Mr. Eigo did not want to influence anyone's vote, but said the Board's charge was frustratingly narrow and stated their responsibility was to look at the permit and variance rubric and decide if the applicant had met the criteria; it was not to like or dislike a project. He referred to the original Hearing Officer result feeling leverage and he believed the Board felt leverage as well. He said their charge was not to insure there was not an empty site for another generation which nobody wanted to see.

Mr. Eigo asked for questions from the Board.

Mr. Rivera complimented Mr. Cole for putting together the motion after looking at all the material and discussions. He stated he would not be supporting the motion for the reasons Mr. Eigo indicated. Mr. Rivera said since his time on the Board, he had been firm about short, concise and to the point presentations and had never seen a case with 600+ pages presented to the Board to read, and then reiterated again. He said the Board was dedicated to reading what was submitted. He referred to Item No. 2 with their conciseness and how they came to an agreement beforehand. Mr. Rivera said both parties did not answer questions, they were not to the point, and the comments confused him. He would like a direct answer with a direct question. He said the amount of time spent on this case was extremely frustrating and served no purpose.

Mr. Eigo said he would not blame the litigants. Due to working in a virtual setting, and not being able to see the parties involved, he said he tended to want to clarify with the other side for fairness. He understood Mr. Rivera's point.

Motion CARRIED by a vote of 4-3 (Beuerlein, Eigo, Rivera).

Roll Call:	AYE	NAY
Mr. Beuerlein		X
Ms. Knight	X	
Mr. Ammon	X	
Mr. James	X	
Mr. Eigo		X
Mr. Cole	X	
Mr. Rivera		X

***

E. Other Business

5. Update on September 3, 2020 Board of Adjustment agenda.

Ms. Gomes stated there were 6 cases scheduled for the September agenda.

6. Update on pending appeals of the Board of Adjustment.

Mr. Li stated the Urban Phoenix Project filed a lawsuit challenging the Board's approval of the variances for the project on Central Avenue and Camelback Road. He stated the Board denied the grounds that UPP did not have standing. He thought resolution would be soon and could be resolved by filing briefs. Mr. Li stated he would keep the Board informed.

Mr. Eigo asked Mr. Li about the City's position on the case. He assumed the Board's decision would be defended but thought the city might have a different decision based on its relationship with community groups.

Mr. Li said he would defend the decision of the Board and also recognized the Board did not want the city to abandon the decision. He stated the city might take a less active role, especially if there was a party interest who had the ability to file a lawsuit that did not have a citywide implication. Mr. Li believed the case had a citywide implication and said he would keep the Board informed.

Ms. Gomes stated she had no additional items for the Board.

Mr. Cole asked staff if a visual presentation could be set up for presenters. He felt it was a difficult to understand the dynamics of a case when there was no ability to see who was talking and thought it fair to the presenters and public. He suggested the possibility of using Zoom which had 20 windows. Mr. Cole mentioned having a clock on screen so presenters could keep track of time. He found it a little problematic with staff announcing the time during a presentation.

Mr. Eigo thought the virtual hearings had gone much better than he would have guessed, and was open to making things better.

Ms. Gomes stated staff would look into the Board comments and would provide feedback. She thanked the Board for their input and wanted to make it a better process for all.

Ms. Knight agreed with the comments of Mr. Rivera about reading the submissions and preparing for the hearings. She felt the Board should also monitor themselves to make sure they were not re-litigating what had

already been reviewed. She stated the Board wanted individuals to be on topic and not deviate from an issue, and hoped the Board would also do the same and not go into long discussions. She thought the Board was putting themselves in the position of the ZAHO who had already gone through the case and gave an opinion, and to be mindful of that.

Mr. Ammon stated that he asked many questions today. He said he was at the hearing in December and three hours were spent discussing the case. He felt there were certain questions that needed to be asked and felt those responding needed to be held accountable. He admired Mr. Rivera's tenacity for jumping in with his response to answer questions directly. Mr. Ammon said he would do a better job and appreciated everyone's patience.

Mr. Eigo said he also tended to ask long questions and would be mindful in the future. He believed it was only when you poke the litigants with questions that you feel comfortable with the answer.

7. Q & A: Procedure and Process - Board of Adjustment case law.

8. The Board may vote to go into Executive Session pursuant to A.R.S Section 38-431.03.A.3. for the purpose of receiving legal advice regarding any of the above Items A-E.

F. Adjournment

Mr. Beuerlein MOTIONED to adjourn.

Ms. Knight SECONDED.

Motion CARRIED by a vote of 7-0.

There being no further business, the meeting was adjourned at 4:03 p.m.

Respectfully submitted,

_____

Julie Garcia, Secretary to the Board, Council Reporter

*** Filed ***
05/27/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2020-000294-001 DT 05/12/2022

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

URBAN PHOENIX PROJECT NETWORK
ARCADIA OSBORN NEIGHBORHOOD ASSOCIATION
HARVEY SHULMAN
TABITHA MYERS
WALLACE GRAHAM
NEAL HADDAD

RICHARD MARIO STORKAN
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2828 N CENTRAL AVE STE 1017
PHOENIX AZ 85004
WALLACE GRAHAM
4331 E WELDON AVE
PHOENIX AZ 85018
NEAL HADDAD
3402 N 32ND ST
PHOENIX AZ 85018

v.

CLEAR CHANNEL OUTDOOR L L C (001)
J & R HOLDINGS V I, L L C (001)
CITY OF PHOENIX (001)
CITY OF PHOENIX BOARD OF ADJUSTMENT

ERIC M FRASER
ANDREW ABRAHAM
PAUL LI

KIMBERLY W MACEACHERN
HAYLEIGH S CRAWFORD
JUDGE COOPER
REMAND DESK-LCA-CCC

RULING RE: MOTION TO DISMISS

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2020-000294-001 DT 05/12/2022

Pending before the Court is the Motion to Dismiss filed by Defendants Clear Channel Outdoor, LLC ('Clear Channel"), J&R Holdings VI, LLC ("J&R"), and the City of Phoenix ("Phoenix") and City of Phoenix Board of Adjustment ("the Board"). The Court has read the briefs and the initial and First Amended Complaint and considered counsels' oral argument of April 13, 2022.

Defendants seek to dismiss Plaintiffs' special action complaint pursuant to Rules 12(b)(1) and 12(b)(6). They assert that Plaintiffs lack of standing to bring this action "because converting a vacant lot with billboards into a developed lot with billboards" does not peculiarly impact or actually injure Plaintiffs. (Motion, p. 2) In addition, they contend that alleged harm to organizational interests is not sufficient to create standing for the non-profit plaintiffs, Urban Phoenix Project Network ("Urban Phoenix") and Arcadia Osborn Neighborhood Association ("AONA").

The lot and billboards are located on the northwest corner of Thomas Road and Central Avenue in Phoenix. Through various City-related proceedings, Clear Channel obtained approval from the Board to relocate and digitize its billboards onto the façade of a new mixed-use tower.

Plaintiffs filed this special action challenge under A.R.S. § 9-462.06(K), seeking to overturn the Board's decision. They claim that the billboards' location, design, and/or glare will cause them personal injury, property damage, and unspecified financial harm. Amended Complaint ¶33.

Person Aggrieved Standard

Plaintiffs claim standing to challenge the Board's decision as "persons aggrieved" under A.R.S. § 9-462.06(K): "A person aggrieved by a decision of the legislative body or board…may file a complaint for special action in the superior court to review the legislative body or board decision."

To be "aggrieved," Plaintiffs must show that the Board's decision caused them special damage, that is, damage that is different in "kind or quality" from any damage suffered by the public generally. *Center Bay Gardens, LLC v. City of Tempe City Council*, 214 Ariz. 353, 359 ¶20 (App. 2007) (to be aggrieved for purposes of § 9-462.06(K), a person must "demonstrate special damages or particularized harm"); *Buckelew v. Town of Parker*, 188 Ariz. 446, 452 (App. 1996) ("We have concluded that *Buckelew* has alleged special damage, and as a result, he is a 'person aggrieved.")

The "person aggrieved" standard requires that Plaintiffs 1) suffer and plead an actual, particularized harm and 2) allege damage that is "peculiar to the plaintiff or at least more

substantial than that suffered by the general public." *Center Bay Gardens*, 214 Ariz. at 358. Claiming "general economic or aesthetic losses" is not sufficient. *Id.* at 357-58. The Complaint must allege injury to a tangible interest "particular to the plaintiff," such as a plaintiff's use and enjoyment of their property. *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 118 (App. 1999).

In applying the "person aggrieved" standard, Arizona courts found standing:

- To challenge an RV park next to the plaintiff's residence where the complaint alleged a common boundary with the RV park and that noise, sewage and criminal activity at the park interfered with the plaintiff's use and enjoyment of their property. *Buckelew,* supra.

- For plaintiff apartment complexes to address a mix-used housing development based on alleged losses in the value, quiet use, and enjoyment of property due to the density, size, setbacks, and landscaping of the new project. *Center Bay Gardens*, *supra.*

By contrast, the appellate courts did not find standing:

- To challenge a rezoning measure to accommodate a Wal-Mart Supercenter where the plaintiff lived several hundred feet from the rezoned parcel and asserted general allegations of harm to the area. *Blanchard, supra.*

- To preclude a motorsports facility located five miles from the home of the plaintiff who alleged that the facility would 1) increase noise odors dust, gas, and smoke which would negatively impact her use and enjoyment of her property and 2) increase traffic causing an "increased safety risk to her." The court described her allegations as "general economic or aesthetic losses" with no particular harm to her. *Burks v. City of Maricopa*, 2018 WL 3455691 ¶ 17 (App. 2018).

- To challenge the sale and use of reclaimed water for artificial snowmaking on public land despite alleged injury to land with religious and cultural significance. *Hope Tribe v. Arizona Snowbowl Resort Limited Partnership*, 245 Ariz. 397 (2018) (finding it insufficient that the Hopi Tribe suffered the same kind of harm or interference to a greater extent or degree).

No Particular Harm Alleged

Turning to the First Amended Complaint in this case, the Court finds that it fails to allege the requisite particularized harm to the individual plaintiffs, Shulman, Myers, Graham, and Haddad.

The Complaint alleges: "As the result of the Board Decision approving the relocation of Defendant CCO's nonconforming billboards" and "conversion of two of those billboards to digital, all of the individual Plaintiffs will be subjected to a real increased risk of personal injury, property damage to their vehicles and other property, and economic/financial harm resulting therefrom." Amended Complaint, §33.

Construing the allegations favorably for Plaintiffs as the Court must, the Court finds no particularized harm alleged in that statement. First, it states that Plaintiffs "will be subjected to a real increased risk." A potential traffic risk is not an "injury in fact." *Ctr. Bay Gardens*, 214 Ariz. at 358, ¶ 20. Second, a person's interest in traffic safety is not a tangible personal interest, such as a property right or a specific use or enjoyment of property. *Id.* In *Burks*, the Court of Appeals rejected *Burks*' concern about traffic safety as a basis for standing. Third, nowhere in the Amended Complaint do Plaintiffs allege facts to show that their use of the intersection is unique, and therefore specially harmed, as compared to the hundreds of other people who drive, walk, or ride by or near the intersection of Central and Thomas daily. Finally, proximity is relevant here, as Plaintiffs live between one-half to six miles from the intersection, distances courts find reduce the impact of an alleged offensive condition and, therefore, standing to challenge that condition. *See Burks, supra.* (no standing in part due to the five-mile distance between plaintiff's residence and the proposed development); *Blanchard, supra.* (plaintiff lacked standing in part because she lived 1,875 feet from the rezoned parcel). *But see Buckelew, supra.* (court found standing where the plaintiff shared a common boundary with the RV park at issue).

In short, a general concern for traffic safety at an intersection distanced from Plaintiffs' work or residence does not implicate a property or pecuniary interest particular to the individual plaintiffs.

Scenic Arizona

Relying on *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419 (App. 2011), Plaintiffs contend that they meet the "person aggrieved" standard. *Scenic Arizona* involved a challenge to a board's decision approving a digital billboard based on A.R.S. § 9-462.06(K) and Arizona's Highway Beautification Act ("AHBA"). The plaintiff organization alleged the same kind of general harms pled in this case – impact on members' aesthetic interests, traffic safety risks, and longer drive times. The Court of Appeals found that the organization had standing.

Scenic Arizona does not support Plaintiffs' argument because a) the Legislature has since amended § 9-462.06 (K) to eliminate the standing-friendly language that the *Scenic Arizona* court relied on, b) this is not an AHBA case, and 3) for the reasons stated above, Plaintiffs' concern for communal safety does not satisfy the "person aggrieved" standard.

Construing the "person aggrieved" standard more broadly than any other decision referenced in the briefs, the *Scenic Arizona* court relied on text in § 9-462.06(K) that expanded taxpayer and special action challenges to board decisions. 228 Ariz. at 423 ("When the legislature has intended to impose more stringent standing requirements, it has used different language than what it included in the statute here.") After the decision in *Scenic Arizona*, the Legislature modified that language, limiting taxpayer and special action challenges, thereby removing the text that supported standing in *Scenic Arizona.* The statutory basis for standing that existed in *Scenic Arizona* does not exist in today's § 9-462.06(K), and therefore, *Scenic Arizona* does not support Plaintiffs' argument.

The *Scenic Arizona* court also found the aesthetic and safety interests of the aggrieved plaintiffs reflected in the AHBA, also not applicable in this case. The Court of Appeals found that plaintiff alleged sufficient harm because "[t]he essence of these allegations is the claimed interference with the proper use and enjoyment of one of the highways of this state, which are interests within the scope of the AHBA." *Id.* at 424. The present case does not involve specific statutorily-protected interests. It involves a street corner in Central Phoenix.

Finally, standing is a fact-specific inquiry, and Plaintiffs must satisfy the judicially-established requirements discussed above. They must show an actual injury in fact, a particularized harm resulting from the Board's decision, and damage that is peculiar to the plaintiff or at least more substantial than that suffered by the rest of the community. *Center Bay Gardens*, 214 Ariz. at 358. The crux of each Plaintiff's alleged harm is safety – that the digital billboard conversion will harm them by making the intersection less safe for drivers and pedestrians. Amended Complaint, ¶¶6-9; Declarations, Exhs. C, D, E, F. In fact, the safety of a large, busy intersection is a general communal interest, and Plaintiffs fail to show a harm to him or her that is peculiar or greater than the harm to any other citizen using the intersection. *See Superior Outdoor Signs, Inc. v. Eller Media Co.*, 822 A.3d 478 (Md. App.2003) (no standing to challenge a billboard variance because plaintiff failed to show that his interest in were "specially affected beyond any such interest of members of the general public.")

For these reasons, the decision in *Scenic Arizona* cannot confer standing in this case.

Constitutional Claims

Additionally, the individual plaintiffs claim that their claims for violations of the First Amendment and Due Process (Counts 11 and 12) give them standing. Because they do not allege violations of their own constitutional rights, they have no constitutional claims to stand on.

First, they allege that the Board's decision violates the First Amendment because it gives Clear Channel's off-premises advertising preferential treatment over on-premises advertising. They do not assert that *their* First Amendment rights have been violated. They have no standing to bring a claim on behalf of some unidentified on-premises advertiser.

Similarly, they claim that the Board violated their procedural due process rights in scheduling and processes for the Board hearing. But they did not file the appeal that led to the Board hearing and, therefore, had no right to seek a continuance or process for the hearing. Thus, they cannot assert that their rights were violated nor claim standing based on that theory.

Urban Phoenix and AONA Lack Standing

Urban Phoenix and AONA claim standing representationally, directly, and as parties seeking a declaratory order. None of these arguments establish standing.

To have standing representationally, Urban Phoenix and AONA must show that they represent members who have suffered special damages as a result of the Board's decision. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Services*, 148 Ariz. 1, 5 (1985) (an organization has standing "to assert the claims of its members in a representational capacity.") Because their members cannot plead standing for the reasons stated, Urban Phoenix and AONA's representational standing fails. *Id.*

Nor is direct standing available to Urban Phoenix and AONA. In *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 501 P.3d 731, 736 ¶18 (Ariz. 2022), the Arizona Supreme Court held that "an organization cannot establish standing if the 'only injury arises from the effect of [a challenged action] on the organizations' lobbying activities, or when the service impaired is pure issue-advocacy." 501 P.3d 731, 736.

Last, standing under the Arizona Declaratory Judgments Act, A.R.S. § 12-1831 et seq. ("Act"), fails because there is no claim for declaratory relief under the Act. Plaintiffs brought this case for special action relief pursuant to A.R.S. § 9-462.06(K) and seeking a determination that the Board acted arbitrarily and capriciously and abused its discretion. Their Amended Complaint does not seek an independent determination of Plaintiffs' legal rights under the Phoenix Zoning Code apart from the Board's decision and does not state a separate claim for declaratory relief under the Act. Therefore, standing is not available under the Act.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2020-000294-001 DT 05/12/2022

Conclusion

To have standing as "persons aggrieved," under A.R.S. § 9-462.06(K), the individual plaintiffs must show that the Board's decision caused special damage to their personal, pecuniary, or property rights that is different in kind or quality from the harm suffered by the impacted community generally. They have not alleged facts to show that kind of particularized harm. Urban Phoenix and AONA lack representational standing because their members are not aggrieved, they allege harm to purely advocacy interests, and like the individual plaintiffs, they allege harm to general communal interests.

For these reasons, **IT IS ORDERED** granting Defendants' Motion to Dismiss.

IT IS FURTHER ORDERED that this is a final order/judgment under Rule 54(c), Ariz. R. Civ. Proc. as there are no claims or issues remaining. Because no further matters remain pending, the Court signs this minute entry as a final judgment entered.

/ s / KATHERINE COOPER

JUDGE OF THE SUPERIOR COURT

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

Section 307. Zoning Administrator.

A. **Authority and duties of the Zoning Administrator.** There is hereby created in the City Planning and Development Department a Zoning Administrator. The Zoning Administrator shall be appointed by the Planning and Development Director and shall be under his direction. The Zoning Administrator may appoint Deputy Zoning Administrators to perform the functions of the Zoning Administrator and to act under his direction. The Zoning Administrator shall:

1. Enforce the provisions of this Zoning Ordinance.

2. Accomplish all administrative actions required by the ordinance, including the giving of notice, holding of hearings, preparation of reports, receiving and processing appeals, and the acceptance and accounting for fees.

3. Subject to the supervision of the Planning and Development Director, and to general and specific policy laid down by the Planning Commission and City Council, interpret the Zoning Ordinance to members of the public, to City departments, and to other branches of government.

4. Undertake preliminary negotiation with, and provide advice to, all applicants for zoning adjustment action.

5. Appoint a secretary for the Board of Adjustment.

6. Report regularly to the Planning and Development Director on the conduct of his office, including number of cases handled and their disposal and recommendations for changes and improvements in ordinance regulations and procedures.

7. Hear applications for and grant those special exceptions designated as use permits where required by this ordinance upon a finding that the use covered by the permit, or the manner of conducting the same:

a. Will not cause a significant increase in vehicular or pedestrian traffic in adjacent residential areas; or emit odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions; or contribute in a measurable way to the deterioration of the neighborhood or area, or contribute to the downgrading of property values.

b. Will be in compliance with all provisions of this ordinance and the laws of the City of Phoenix.

c. No structure, building, or land shall be used where a use permit is specifically required by the terms of this ordinance until a use permit for such use shall have been granted by the Zoning Administrator or Board of Adjustment;

d. Any structural alteration to the interior or exterior of a structure or building containing any of the uses referred to in paragraphs a and b above, other than maintenance, shall require the securing of a use permit;

e. Any use permitted subject to a use permit shall continue to be subject to said permit in any less restrictive district unless such use shall specifically appear as a permitted use;

f. Structures or buildings devoted to any use which is permitted under the terms of this ordinance, subject to the securing of a use permit, may be altered, added to, enlarged, expanded, or moved from one location to another on the lot only after securing a new use permit, unless the Zoning Administrator or Board of Adjustment has previously issued a use permit for such alteration, addition, enlargement, or expansion; and any use of the land which is permitted under the terms of this ordinance, subject to the securing of a use permit, may be extended over the lot on which such use is located only after securing a new use permit, unless the Zoning Administrator or Board of Adjustment has previously issued a use permit for such extension;

g. A use permit may only be revoked by the Zoning Administrator upon a finding that there has been material noncompliance with a condition prescribed in conjunction with the issuance of the use permit or that the use covered by the permit or the manner of conducting the same violates the standards listed in this section that govern the granting of the permit;

h. Revocation of a use permit shall become final only after:

(1) The fifteen-day period expired within which an appeal may be filed; or

(2) A decision of the Board of Adjustment upholding the revocation.

8. When a lot is divided by a district boundary, but only when at least fifty percent of the lot area is within the less restricted district, to grant a use permit for the extension of a use which is permitted in a less restricted district into the more restricted district to a maximum of twenty-five feet, and subject to all regulations of the less restricted district.

9. Authorize upon application and hearing such variance from the terms of this ordinance as will not be contrary to the public interest, when owing to special conditions, a literal enforcement of any provisions of the ordinance would result in unnecessary property hardship.

A variance shall not be authorized unless the Zoning Administrator shall find upon sufficient evidence:

a. That there are special circumstances or conditions applying to the land, building, or use referred to in the application and which do not apply to other properties in the district; and

b. That such special circumstances were not created by the owner or applicant; and

c. That the authorizing of the variance is necessary for the preservation and enjoyment of substantial property rights; and

d. That the authorizing of the application 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.

10. The Zoning Administrator may not:

a. Make any changes in the uses permitted in any zoning classification or zoning district, or make any changes in the terms of the Zoning Ordinance; provided that the restriction in this paragraph shall not affect the authority to grant variances.

b. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

11. Refer any of the matters on which he is authorized to rule or issue a permit to the Board of Adjustment for action.

12. Prescribe in connection with any use permit or any variance such conditions as he may deem necessary in order to fully carry out the provisions and intent of this ordinance. Such conditions applying to a use permit may include, among other things, a limitation of the time for which such permit shall be valid. Violations of any such condition shall be a violation of this ordinance and such violation shall render the use permit or variance null and void.

13. Such use permits and/or variances as are granted by the Zoning Administrator shall be void if the use is not commenced or if a building permit has not been obtained within sixty days of such granting or within the time stipulated.

14. Determine the location of any district boundary shown on the zoning map adopted as a part of this ordinance when such location is in doubt.

15. The Zoning Administrator may hear application concerning property upon which a previous application has been heard only when:

a. The application does not involve the same request for use permit, determination of location of district boundary line, or alleging the same misinterpretation, point of noncoverage, or hardships as the previous application, or when:

b. The application does not contain the original request for specific variance; or

c. Substantial change in the use of adjacent property has occurred since the previous application was heard; or

d. A period of not less than one year has passed since the previous application was heard; or

e. The previous application was closed without hearing when neither the property owner nor his representative were present at the time such application was scheduled for hearing.

16. Temporary helistops. Use permits for temporary helistops may be approved for a period of not more than one year for sites located in any zoning district subject to:

a. Demonstration of minimum adverse environmental impact to any neighborhood in the area of the site.

b. Evidence shown that the site complies with provisions of the Phoenix Fire Code, and FAA "Notice of Landing Area Proposal," and a letter of no objection has been received from the FAA.

Extension of the original use permit for temporary helistops may be obtained by applying for said extension prior to the one year expiration date.

17. Entertainment district alcohol sales and service.

a. Authorize, upon application and hearing, a use permit for alcohol sales and service within an entertainment district requiring an exemption pursuant to Section 4-207(C)(4), Arizona Revised Statutes.

b. The City Council may only approve an exemption authorized by Section 4-207(C)(4), Arizona Revised Statutes, to a property that has an approved use permit for alcohol sales and service.

B. **Time Limit.** The Zoning Administrator shall act upon or refer to the Board any matter brought before him within sixty days of the date of filing or within such longer period of time as may be agreed to by the Zoning Administrator and the applicant. If no decision has been made at the expiration of such time limit, the application shall be deemed to have been denied for purposes of the applicant's right to further administrative review. (Ord. No. G-3514, 1992; Ord. No. G-3603, 1992; Ord. No. G-4681, 2005; Ord. No. G-5584, 2011; Ord. No. G-5590, 2011; Ord. No. G-5599, 2011; Ord. No. G-6116, 2016)

Section 662. Interim Transit-Oriented Zoning Overlay District One (TOD-1).

Editor's note—Ord. No. G-5244 (TA-4-07), § 2, adopted September 3, 2008, effective October 3, 2008, amended Section 662 in its entirety to read as herein set out. Former Section pertained to similar subject matter. See the History following this Section and the Text Amendment Table for a complete derivation.

A. **Purpose.** The primary purpose of the Transit-Oriented District One (TOD-1) is to encourage an appropriate mixture and density of activity around transit stations to increase ridership along the Central Phoenix/East Valley (CP/EV) Light Rail Corridor and promote alternative modes of transportation to the automobile. The secondary purpose of the TOD-1 is to decrease auto-dependency, and mitigate the effects of congestion and pollution. These regulations seek to achieve this type of development by providing a pedestrian, bicycle, and transit supportive environment development integrating auto uses with a complementary mix of land uses, where streets have a high level of connectivity and the blocks are small, all within a comfortable walking and bicycling distance from light rail stations.

Transit-oriented development often occurs as infill and reuse within areas of existing development. The regulations within this ordinance vary in some cases from other ordinances, such as the Urban Residential (UR) District, related to infill development in the City, because of the additional need to support transit ridership. The Transit-Oriented District prohibits uses that do not support transit ridership.

The specific objectives of this district are to:

- Encourage people to walk, ride a bicycle, or use transit;
- Encourage outdoor pedestrian activities within public rights-of-way;
- Allow for a mix of uses designed to attract pedestrians;
- Achieve a compact pattern of development more conducive to walking and bicycling;
- Provide a high level of amenities that create a comfortable environment for pedestrians, bicyclists, and other users;
- Maintain an adequate level of parking and access for automobiles and integrate this use safely with pedestrians, bicyclists, and other users;
- Encourage uses that allow round-the-clock activity around transit stations;
- Provide sufficient density of employees, residents, and recreational users to support transit; and
- Generate a relatively high percentage of trips serviceable by transit.

B. **Applicability.** The City of Phoenix' Transit-Oriented Development Overlay District (TOD-1) shall apply to lands delineated on the City's Official Supplementary Zoning Map 1086 as adopted on November 19, 2003. All land uses and development including, but not limited to buildings, drives, parking areas, landscaping, streets, alleys,

greenways, and pedestrian/bicycle ways designated to be within this district, shall be located and developed in accordance with the following provisions:

1. For all existing large scale retail/mixed use centers of 40 acres or more within primary village cores the TOD-1 shall not apply where development is proposed which does not result in a net increase of the total area of the existing building footprint in the center. Repaving or restriping of parking lots is not intended to be covered by the TOD. When development of such property results in a net increase of the total area of the existing building footprint the following shall apply:

    a. Where redevelopment is proposed that results in a net increase of less than 30 percent of the area of the existing building footprint on the total site as of the effective date of the ordinance, TOD-1 Sections F, H, J, and K shall be applied as considerations rather than as regulatory provisions.

    b. Where development is proposed that results in a 30 percent net increase or more in the area of the existing building footprint on the total site as of the effective date of the ordinance, the site plan for that phase of the proposed development will be subject to review by the Planning and Development Department and the TOD-1 Sections F, H, J, and K shall be applied as presumptions. The applicant shall have the right to appeal the stipulations of the Planning and Development Department to the Planning Commission and City Council.

    c. Where redevelopment is proposed for 100 percent of the area of the existing buildings footprint on the total site, all standards and regulations of the TOD-1 shall be applied as requirements.

C. **Inconsistencies of Underlying Districts.** In the event that the underlying zoning district standards, or other ordinance or regulations are inconsistent with these overlay Zoning Ordinance standards or any other provisions herein, the standards of the TOD-1 shall apply.

D. **Prohibited Uses.** For property within the TOD-1 the following uses are prohibited:

1. Automobile service stations, including oil and lubrication services, tire and muffler installation, and service, or other motor vehicle services, but excluding retail or wholesale outlets selling motor vehicle parts and accessories without provision for on-site installation.

2. Boat dealers, resellers, repair, and leasing.

3. Bulk retail and wholesale uses including building materials, food and beverage sales, restaurant suppliers, etc.

4. Car washes.

5. Cemeteries.

6. Cold storage plants.

7. Commercial equipment and construction equipment, sales, service and rental of.

8. Drive-in businesses.

9. Exterior storage.
10. Funeral homes and mortuaries.
11. Gas station and gas station accessory uses such as mini-marts, convenience food, and sundries sales.
12. Golf courses including miniature golf courses.
13. Junk yards and motor vehicle wrecking yards.
14. Kennels, excluding those accessory to veterinary clinics.
15. Manufactured home sales.
16. Nurseries or greenhouses.
17. RV parks or mobile home parks and campgrounds.
18. Telecom hotels.
19. Towing services.
20. Truck stops and uses related to trucking excluding loading and unloading for permitted commercial uses.

For sites with existing structures or facilities, these uses shall not be prohibited until January 1, 2014. After January 1, 2014, property owners within the TOD-1 may request that the Planning Commission initiate an application for a special permit to permit uses otherwise prohibited by this Paragraph D, but which are allowed by the underlying zoning. (See Section 647.A.2.ii.)

E. **Permitted Uses.** Unless prohibited by Section 662.D or restricted by Section 662.F.

1. All uses in the underlying zoning district.
2. Automobile leasing or rental, subject to the following limitations:
    a. On underlying commercially zoned property only.
    b. Use permit required subject to the provision of this Ordinance.
    c. Parking and return of vehicles shall occur on private property.
    d. Maximum of 10 automobiles may be stored on site.
3. Outdoor dining or seating as an accessory to a restaurant, subject to the following limitations:
    a. No consumption of alcoholic beverages unless a use permit is obtained.
    b. On underlying commercial zoned property only.

F. **Restricted Uses Requiring A Use Permit.**

1. For property within the TOD-1 Overlay District One (TOD-1) the following uses are considered uses that are conditional and that require use permits and must be allowed in the underlying zoning district:

a. Grocery stores with building footprints over 50,000 square feet.

b. Light industrial facilities.

c. Liquor, retail sales, and package retail sales.

d. Outdoor dining or seating as an accessory to a restaurant or bar with alcoholic beverage consumption.

e. Outdoor recreational uses.

f. Parking, accessory to a permitted use, that exceeds automobile parking maximum regulations as outlined within Section K.1 automobile parking requirements per floor area or unit size and land use type.

g. Parking facilities (commercial) as a primary use.

h. Post offices (private).

i. Sports facilities with over 10,000 seat.

2. Use permits are subject to Section 307.A.7.b.—h., 8, 11—13 and the following criteria with review and approval of the Zoning Administrator. The Zoning Administrator shall grant those special exceptions designated as use permits where required upon a finding that the use covered by the permit:

a. Will provide a minimum density of one employee or user for every 500 square feet of gross building area exclusive of any parking facilities.

b. Will provide architectural materials or landscape elements that "break up" the scale of buildings and spaces to achieve a pedestrian scale.

c. Will be built in a compact form or manner to decrease the amount of land needed to develop the given amount of land use.

d. Will provide building(s) that emphasizes pedestrian access, comfort, and visual interest with safe and comfortable separation from vehicle access to the building and site.

e. Will not contribute in a measurable way to the deterioration of the neighborhood or area, or contribute to the downgrading of property values.

G. **Non-Conforming Uses.** Uses prohibited in the TOD-1 that existed legally prior to the effective date of the overlay district and became non-conforming due to the overlay district may expand on the same or adjacent parcel under the following conditions:

1. Either owned or leased prior to January 1, 2014,

2. Be developed under the conditions and development standards of this district, and

3. The underlying zoning permits the use.

H. **Measurements.**

1. The distance from a light rail station or light rail line shall be measured from the closest points from the station platform to the lot line.

I. **Development Standards For Permitted Uses.**

1. **Setbacks and build-to lines.**

a. *Setbacks and build-to lines.* The standards in Table 1 shall apply to new development within the TOD-1.

(1) Where ground level retail uses are present, setback may be increased up to 12 feet for outdoor seating, patio dining, or retail sales by securing a use permit in accordance with provisions of Paragraph F above.

(2) Features such as, arcades, awnings, trellises, covered walkways, covered (non-enclosed) bicycle parking, and similar architectural features placed on the front (street-facing) side of the building are allowed within the setback.

(3) Where there are existing or proposed easements that restrict construction that are greater than the build-to-lines, the measurements shall be from the easement line.

(4) Non-street side setbacks, adjacent to parcels within the TOD-1 shall comply with the setback standards in Table 1.

(5) Non-street side setbacks adjacent to parcels not within the TOD-1 shall comply with underlying zoning setback standards.

(6) Development setbacks adjacent to a fully dedicated alley as determined by the Subdivision Ordinance may be measured from the centerline of alley.

Table 1:
Standards TOD-1 Setbacks
Street Setbacks

Distance From Station	Max. Building Setback
0—1,000 feet	6 feet
1,000—2,000 feet	12 feet

Section 705.2. Off-Premise Signs.

A. **Location Restrictions.**

1. Off-premise structures shall be located only in A-1 or A-2 districts and shall be located only on arterial streets as designated on the Street Classification Map or located within 300 feet of the right-of-way and oriented to the following permitted freeways:

a. Interstate 17;

b. Interstate 10;

c. SR (LOOP) 202, "Red Mountain Freeway";

d. SR (LOOP) 202, "Ed Pastor Freeway," western section, Interstate 10 to the 2,000-foot distance from the boundary of the South Mountain Preserve;

e. SR 143;

f. The Western SR (LOOP) 101 to Camelback Road;

g. Off-premise signs are a prohibited use on all other existing and future freeways within the City limits and shall not be reoriented to obtain freeway visibility.

2. Off-premise advertising structures may also be located in a planned unit development (PUD) when oriented and within 300 feet of a freeway as identified in Section 705.2(A)(1). Off-premise advertising structures located in a PUD must comply with all standards in this section and the gross area of the PUD must have a minimum of 20 acres. An off-premise advertising structure may be located within a PUD with a gross area of less than 20 acres if all the following conditions are met:

a. The off-premise advertising structure is located on publicly owned land that is used for a school for K-12 education; and

b. Located within a PUD that has a minimum gross area of 15 acres; and

c. All other requirements for off-premise advertising structures in the PUD are met.

3. No off-premise structure shall be erected within the following locations:

a. In or within 2,000 feet of the boundaries of the Phoenix or South Mountain preserves.

b. In any historic preservation district.

c. Within any scenic corridor zoning overlay or drive adopted by the City of Phoenix.

d. Any arterial street where the sign face is oriented to a freeway not specified in Section 705.2.A.1.

4. Any off-premise structure erected within the following locations shall require a use permit:

a. Within 500 feet of the boundary of any historic preservation district.

b. In or within 250 feet of a special planning district or neighborhood conservation district.

c. In addition to the provisions of Section 307, findings of approval shall include:

(1) Compatibility with existing, special planning district plans, neighborhood conservation district plans or historic preservation district plans;

(2) Relation to public open areas and parks;

(3) Relation to significant public views or vistas;

(4) Impact to adjacent residential uses.

5. Except as follows below, no part of any off-premise advertising structure may be located closer than 500 feet from a residential district and residential use. A vacant residentially zoned lot shall be treated as a residential use.

a. For residential uses within a planned unit development (PUD) boundary, no setback from an off-premise advertising structure is required within the PUD boundary.

b. For an off-premise advertising structure that is located on publicly owned land that is used for a school for K-12 education within the boundary of a PUD, no part of any off-premise advertising structure may be located closer than 250 feet from a residential district and residential use outside of the PUD boundary.

c. This setback may be reduced subject to obtaining a use permit pursuant to Section 307 and a demonstration that there are visual or physical barriers that mitigate the impacts of the proposed off-premise advertising structure to the residential use.

B. **Setbacks/Spacing/Height/Area.**

1. With the exception of freeway signs which require no setback, all off-premise structures shall maintain a setback of a minimum of 25 feet from all property lines adjacent to public right(s)-of-way.

2. Spacing standards for off-premise structures shall be 1,000 feet from one structure to another. Measurement shall be from the vertical edge of the sign face closest to the sign face of the structure to which is being measured.

3. The maximum square footage of permitted off-premise signs is as shown in the table below:

	Sign Face (Square Feet)	**Embellishments**	**Total Maximum Area (Square Feet)**
Poster	378 sq. ft.	20%	450 sq. ft.
Bulletin	672 sq. ft.	20%	785 sq. ft.

with Section 705.D. Landscaped area shall be provided with a permanent watering system and all plant materials shall be maintained in a living condition.

E. **Illumination/Digital Standards.**

1. Off-premise signs may be internally illuminated, indirectly illuminated, or directly illuminated.

2. Intermittent or flashing illumination or animation may be permitted subject to a use permit. Automatic panel changes (trivision) are permitted.

3. Electronic message displays are permitted subject to obtaining a use permit in accordance with the provisions of Section 307 and satisfying the following conditions:

a. The sign copy image shall be static with no animation and with no flashing, blinking, or moving lights;

b. In the transition between copy changes, there shall be no sense of movement from one image to the next;

c. Network time shall be made available on the digital sign faces to the City of Phoenix for emergency messaging—messages to override all copy for one hour, then display for eight seconds in every minute as long as needed;

d. In the event of an electronic malfunction the sign shall be shut off until repairs have been made to restore the electronic messaging system;

e. The sign copy changes shall not occur more frequently than every eight seconds, unless otherwise specified by the Zoning Administrator;

f. Dimmer on sign shall be set in the evening hours (from sunset to 11:00 p.m.) not to exceed 300 nits for signs that are 14 feet by 48 feet and 342 nits for signs that are ten feet by 30 feet to ensure compliance with current ordinance standard for illumination, unless otherwise specified by the Zoning Administrator;

g. From 11:00 p.m. until sunrise all sign illumination shall be extinguished and sign shall be equipped with an automatic device to assure compliance. The only exception to this stipulation will be for amber alerts and other governmental emergencies, unless otherwise specified by the Zoning Administrator.

4. On any lot contiguous to a residential zoning district and residential use (RE-43 through R-2 and P.A.D.-1 through P.A.D.-12) or separated only by a street or alley, no such illuminated sign structure may be placed in such manner that any portion of the face of the sign is visible. A vacant lot shall be treated as a residential use.

5. Lighting for off-premise structures shall be shielded in accordance with Section 23-100 of the Municipal Code unless the structure: 1) exceeds 301 square feet per sign face; 2) consists of panels which are designed to be removed from the top of the sign board; and 3) is equipped with an automatic device which shuts off the fixture between 11:00 p.m. and sunrise. For such signs, the lighting may consist of no more than four bottom-mounted individual fixtures (or lamps) which produce a maximum of 40,000 lumens per fixture, and where no more than 1,117 lumens per fixture spill or are cast beyond the sign face.

f. No more than one advertisement, logo or message is permitted per sign.

8. Prior to issuance of the sign permit, the Zoning Administrator or his or her designee shall review the permit to ensure compliance with the requirements of Section 705.2.C.1 through 7[1].

9. In addition to appropriate sign permits, all necessary structural plan approvals and permits must be obtained prior to the installation of the sign or any associated structures.

G. **Nonconforming Off-Premise Signs.**

1. It shall be unlawful to hereafter erect, construct, alter, maintain, or use any sign in violation of any provisions contained herein, except as provided in this section.

2. No nonconforming off-premise sign shall be moved, altered, re-erected, relocated or replaced unless brought into compliance with screening and projecting ladder requirements of Section 705.2.A.3 and 4[2], except as provided in this section. The area of the sign may not be increased.

3. Notwithstanding any other provision of this chapter and ordinance, a legal nonconforming sign that is located on a parcel of property which is severed from a larger parcel of property and acquired by a public entity for public use by condemnation, purchase, or dedication may be relocated on the property that was not acquired without extinguishing the legal nonconforming status of that sign; provided, that the nonconforming sign:

a. Is not increased in area or height;

b. Remains structurally unchanged except for reasonable repairs or alterations;

c. Is placed in the most similar position possible on the remaining property that it occupied prior to the relocation;

d. Is relocated in a manner so as to comply with all applicable safety requirements. After relocation pursuant to this subsection, the legal nonconforming sign shall be subject to all provisions of this section in its new location.

4. A reduction in the number of nonconforming boards will promote a better visual environment in the City. A nonconforming board located on a City street or on a permitted freeway can be rebuilt to a digital subject to the use permit standards in Section 307, in addition to meeting two of the following:

a. Removal of 1,200 square feet of existing nonconforming off-premise signs within the City limits for each digital face requested;

b. If the parcel has no landscaping along the street frontage, a minimum five-foot landscape strip consisting of one two-inch caliper tree for every 30 feet on center along with five shrubs and ground cover for every tree shall be provided along the street frontage, including a permanent water supply. If landscape is impractical then this requirement may be satisfied by installing a decorative pole cover;

c. Reductions in size or height or changes in configuration, angle or construction which will bring the structure into greater compatibility with the size and scale of nearby buildings, or other changes approved by the Zoning Administrator which promote a better visual environment in the area.

5. A nonconforming off-premise sign not requesting a digital may be rebuilt subject to the use permit standards in Section 307, in addition to the following:

a. Reduction in size or height or change in configuration, angle or construction which brings the structure into greater compatibility with the size of adjacent buildings within the context area;

b. Improvement in placement, addition of landscaping, or improvements to lighting. (Ord. No. G-5669, 2011; Ord. No. G-6178, 2016; Ord. No. G-6747, § 1, 2020; Ord. No. G-6703, §§ 1, 2, 2020)

1 Please note there was a scrivener's error in the adoption of Ordinance G-5669. The above reference should be to "Section 705.2.F.1 through 7" not "Section 705.2.C.1 through 7". This will be corrected in a future update.

2 Please note there was a scrivener's error in the adoption of Ordinance G-5669. The above reference should be to "Section 705.2.C.3 and 4" not "Section 705.2.A.3 and 4". This will be corrected in a future update.

The Phoenix Zoning Ordinance is current through Ordinance G-7013, passed September 7, 2022.

Disclaimer: The City Clerk's Office has the official version of the Phoenix Zoning Ordinance. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

City Website: www.phoenix.gov
Code Publishing Company

A.R.S. § 9-462.06

§ 9-462.06. Board of adjustment

Effective: [1995] to July 2, 2015

A. The legislative body shall, by ordinance, establish a board of adjustment, which shall consist of not less than five nor more than seven members appointed by the legislative body in accordance with provisions of the ordinance, except that the ordinance may establish the legislative body as the board of adjustment. The legislative body may, by ordinance, delegate to a hearing officer the authority to hear and decide on matters within the jurisdiction of the board of adjustment as provided by this section, except that the right of appeal from the decision of a hearing officer to the board of adjustment shall be preserved.

B. The ordinance shall provide for public meetings of the board, for a chairperson with the power to administer oaths and take evidence, and that minutes of its proceedings showing the vote of each member and records of its examinations and other official actions be filed in the office of the board as a public record.

C. A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator, shall exercise such other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

D. Appeals to the board of adjustment may be taken by persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds thereof. The zoning administrator shall immediately transmit all records pertaining to the action appealed from to the board.

E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in the zoning administrator's opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property. Upon such certification proceedings shall not be stayed, except by restraining order granted by the board or by a court of record on application and notice to the zoning administrator. Proceedings shall not be stayed if the appeal requests relief which has previously been denied by the board except pursuant to a special action in superior court as provided in subsection K of this section.

F. The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with § 9-462.04 and posting the notice in conspicuous places close to the property affected.

G. A board of adjustment shall:

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

2. Hear and decide appeals for variances from the terms of the zoning ordinance only if, because of special circumstances applicable to the property, including its size, shape, topography, location, or surroundings, the strict application of the zoning ordinance will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district. Any variance granted is subject to such conditions as will assure that the adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is located.

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

H. A board of adjustment may not:

1. Make any changes in the uses permitted in any zoning classification or zoning district, or make any changes in the terms of the zoning ordinance provided the restriction in this paragraph shall not affect the authority to grant variances pursuant to this article.

2. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

I. If the legislative body is established as the board of adjustment, it shall exercise all of the functions and duties of the board of adjustment in the same manner and to the same effect as provided in this section.

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

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

A.R.S. § 9-462.06

§ 9-462.06. Board of adjustment

Effective: July 3, 2015

A. The legislative body, by ordinance, shall establish a board of adjustment, which shall consist of at least five but no more than seven members appointed by the legislative body in accordance with provisions of the ordinance, except that the ordinance may establish the legislative body as the board of adjustment. The legislative body may, by ordinance, delegate to a hearing officer the authority to hear and decide on matters within the jurisdiction of the board of adjustment as provided by this section, except that the right of appeal from the decision of a hearing officer to the board of adjustment shall be preserved.

B. The ordinance shall provide for public meetings of the board, for a chairperson with the power to administer oaths and take evidence, and that minutes of its proceedings showing the vote of each member and records of its examinations and other official actions be filed in the office of the board as a public record.

C. A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator, shall exercise other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

D. Appeals to the board of adjustment may be taken by persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds of the appeal. The zoning administrator shall immediately transmit all records pertaining to the action appealed from to the board.

E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in the zoning administrator's opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property. On the certification proceedings shall not be stayed, except by restraining order granted by the board or by a court of record on application and notice to the zoning administrator. Proceedings shall not be stayed if the appeal requests relief that has previously been denied by the board except pursuant to a special action in superior court as provided in subsection K of this section.

F. The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with § 9-462.04 and posting the notice in conspicuous places close to the property affected.

G. A board of adjustment shall:

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

2. Hear and decide appeals for variances from the terms of the zoning ordinance only if, because of special circumstances applicable to the property, including its size, shape, topography, location, or surroundings, the strict application of the zoning ordinance will deprive the property of privileges enjoyed by other property of the same classification in the same zoning district. Any variance granted is subject to conditions as will assure that the adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which the property is located.

3. Reverse or affirm, in whole or in part, or modify the order, requirement or decision of the zoning administrator appealed from, and make the order, requirement, decision or determination as necessary.

H. A board of adjustment may not:

1. Make any changes in the uses permitted in any zoning classification or zoning district, or make any changes in the terms of the zoning ordinance provided the restriction in this paragraph shall not affect the authority to grant variances pursuant to this article.

2. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

I. If the legislative body is established as the board of adjustment, it shall exercise all of the functions and duties of the board of adjustment in the same manner and to the same effect as provided in this section.

J. In a municipality with a population of more than one hundred thousand persons, the legislative body, by ordinance, may provide that a person aggrieved by a decision of the board or a taxpayer who owns or leases the adjacent property or a property within three hundred feet from the boundary of the immediately adjacent property, an officer or a department of the municipality affected by a decision of the board, at any time within fifteen days after the board has rendered its decision, may file an appeal with the clerk of the legislative body. The legislative body shall hear the appeal in accordance with

procedures adopted by the legislative body and may affirm or reverse, in whole or in part, or modify the board's decision.

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

Showing differences between versions effective [1995] to July 2, 2015 and July 3, 2015 [current] **Key:** deleted text
added text
16 deletions · **19** additions

A.R.S. § 9-462.06

§ 9-462.06. Board of adjustment

A. The legislative body ~~shall~~ , by ordinance, **shall** establish a board of adjustment, which shall consist of ~~not less than~~ **at least** five ~~nor~~ **but no** more than seven members appointed by the legislative body in accordance with provisions of the ordinance, except that the ordinance may establish the legislative body as the board of adjustment. The legislative body may, by ordinance, delegate to a hearing officer the authority to hear and decide on matters within the jurisdiction of the board of adjustment as provided by this section, except that the right of appeal from the decision of a hearing officer to the board of adjustment shall be preserved.

B. The ordinance shall provide for public meetings of the board, for a chairperson with the power to administer oaths and take evidence, and that minutes of its proceedings showing the vote of each member and records of its examinations and other official actions be filed in the office of the board as a public record.

C. A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator, shall exercise ~~such~~ other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

D. Appeals to the board of adjustment may be taken by persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds ~~thereof~~ **of the appeal** . The zoning administrator shall immediately transmit all records pertaining to the action appealed from to the board.

E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in the zoning administrator's opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property. ~~Upon such~~ **On the** certification proceedings shall not be stayed, except by restraining order granted by the board or by a court of record on application and notice to the zoning administrator. Proceedings shall not be stayed if the appeal requests relief ~~which~~ **that** has previously been denied by the board except pursuant to a special action in superior court as provided in subsection K of this section.

F. The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with § 9-462.04 and posting the notice in conspicuous places close to the property affected.

G. A board of adjustment shall:

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

2. Hear and decide appeals for variances from the terms of the zoning ordinance only if, because of special circumstances applicable to the property, including its size, shape, topography, location, or surroundings, the strict application of the zoning ordinance will deprive ~~such~~ **the** property of privileges enjoyed by other property of the same classification in the same zoning district. Any variance granted is subject to ~~such~~ conditions as will assure that the adjustment authorized shall not constitute a

grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which ~~such~~ **the** property is located.

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

H. A board of adjustment may not:

1. Make any changes in the uses permitted in any zoning classification or zoning district, or make any changes in the terms of the zoning ordinance provided the restriction in this paragraph shall not affect the authority to grant variances pursuant to this article.

2. Grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

I. If the legislative body is established as the board of adjustment, it shall exercise all of the functions and duties of the board of adjustment in the same manner and to the same effect as provided in this section.

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

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

Credits

Added by Laws 1973, Ch. 178, § 2, eff. Jan. 1, 1974. Amended by Laws 1978, Ch. 94, § 5; Laws 1982, Ch. 219, § 1; Laws 1988, Ch. 269, § 1, eff. Sept. 30, 1988, retroactively effective to April 1, 1988;~~Laws 1995, Ch. 169, § 1.~~ **Laws 1995, Ch. 169, § 1; Laws 2015, Ch. 125, § 1.**

A. R. S. § 9-462.06, AZ ST § 9-462.06

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