

**TOWN OF BUCKEYE
BOARD OF ADJUSTMENT
TOWN COUNCIL CHAMBERS
100 NORTH APACHE ROAD / BUCKEYE, ARIZONA 85326
REGULAR MEETING MINUTES
February 12, 2008
7:00 P.M.**

1. CALL TO ORDER

Chairperson Napolitano called the meeting to order at 7:00 p.m.

2. ROLL CALL

Members present: Chairperson Napolitano, Vice Chairman Zwerg, Boardmember Hawley, Boardmember Kempiak, Alternate Boardmember Molina and Alternate Boardmember Carson served on the Board. Councilman Hardesty was present.

Members Absent: Boardmember Jimenez, Boardmember Stafford and Boardmember Richardson

Departments Present: Attorney Mark Langlitz, Management Assistant Claudia Herrera, Interim Fire Chief Bob Costello, Community Development Assistant Director Suparna Dasgupta and Town Engineer Woody Scoutten

3. Board of Adjustment Executive Session

No Executive Session conducted.

4. Reconvene from Board of Adjustment Executive Session

N/A

5. Transwestern Pipeline Construction Site VA07-17

Associate Planner Brian Kulina presented the item before the Board. Associate Planner Kulina explained that the applicant, Mr. Carsten von Borstel, is requesting a variance from Section 7-4-6-C-1 of the Development Code for the placement of temporary buildings in which construction work is not occurring. Prior to yielding the floor to the applicant, Associate Planner Kulina listed the four statutory conditions on which the Board was required to consider in rendering a decision. Mr. von Borstel addressed the Board and explained that having an on site yard in a 50-foot right of way that traveled for 150 miles was next to impossible, but since Buckeye is located on the western half of the project that it would allow the project's nearly 350 employees to travel to sites located on the north, west and south of the Town for a 12-month period. Mr. von Borstel said that the Town is centrally located and has the services they require and that getting temporary latrines and fuel to a site along the pipeline would be difficult to access because of the unique topography of sites to the west of Town. Mr. von Borstel then said the yard would be used to gather the 350 employees that would be bussed to various work sites in the morning and returned in the evening. He added that pipes for the actual pipeline would be taken directly to the work sites from Luke Air Force Base. Mr. von Borstel then explained that the yard would contain a fueling station reviewed with the Fire Marshall and would be handled with the utmost integrity with regards to environmental concerns. Mr. von Borstel wanted the Board to know that they not only want to put 4 buildings on the site, but also a fueling station and a warehouse. Chairperson Napolitano asked if the buildings would be manufactured. Mr. von Borstel explained that there would be three 12x60-foot Mobile Mini buildings and one 40-foot Mobile Mini building. Vice Chair Zwerg asked about the site planning. Mr. von Borstel said that they would be opening up the roadway so that they could go straight ahead where Watson Road ends at the intersection with Southern Road and that project is heavily monitored by the federal government which include environmental and safety specialists that would be on site. Vice Chair Zwerg then asked about on dust and on-site security to prevent potential theft. Mr. von Borstel explained that there would be watering of the yard daily and security officers on site. Vice Chair Zwerg asked about utility connections. Mr. von Borstel said they would hardwire telephone and power connections and no generators would be in use. Vice Chair Zwerg inquired about an exit plan. Mr. von Borstel explained that the federal inspectors constantly monitor the site and are required to adhere to strict monitoring. Boardmember Hawley asked if they had contacted Wal-Mart. Mr. von Borstel confirmed that they had sent out a certified letter to all property owners within 300 feet of the site. Boardmember Hawley asked if they were aware of the traffic conflicts that may arise from the trucks entering and exiting his site and the Wal-Mart Distribution Center. Mr. von Borstel said he has not spoken to Wal-Mart

about that specific issue. Boardmember Molina asked the applicant to verify the estimated time of use as the letter presented by the applicant stated 5 months. Mr. von Borstel explained that the yard would be used for 1 year, but the majority of the 350 employees would be there for 5 to 6 months. Chairperson Napolitano asked about ground cover for the parking lot. Mr. von Borstel said that they would put it in if asked to do so, but they would put gravel at the entry. Boardmember Kempniak asked staff if there were any other objections with the application aside from the conflict with the Development Code. Associate Planner Kulina explained that staff takes no position and the matter was to be decided between the Board and the applicant. Town Engineer Woody Scoutten said that he did not believe that the project had undergone any type of site plan approval or review process and that he was concerned about the safety along the roadways due to increased traffic from employees, work trucks and fuel tankers. Town Engineer Scoutten added that he would want to require that the applicant install extended paved turnouts for the duration of use of the yard that would need to be removed at the end of use. Associate Planner Kulina reminded the Board that if they are so inclined to approve the request that they had the authority to add a stipulation requiring the applicant to process a temporary site plan for the duration of the construction period. Vice Chair Zwerg added that he wanted a timeframe for the project. Associate Planner Kulina informed the Board that the memorandum attached to their packet included verbiage that stated that the timeframe was for either the completion of construction of the pipeline or the terms of the rental lease, whichever came first and he reiterated that the stipulations were not an endorsement for or against the variance. Vice Chair Zwerg asked if the applicant would need to go through the site plan review process even though they are a tenant of the property. Associate Planner Kulina explained that the subject property has a General Commerce designation which does allow the applicant to store construction equipment on the site and that the variance request is to allow placement of temporary building on the property. Chairperson Napolitano asked to verify that construction yards are normally allowed on the same site as the construction itself. Associate Planner Kulina verified that to be correct and that request is to place temporary buildings on a site that will not be used for construction. Town Attorney Mark Langlitz explained to the Board that the courts have held that the authority of Board of Adjustments to grant a variance should be exercised sparingly and under exceptional circumstances and reminded the Board of the criteria that they must consider in order to grant a variance. Attorney Langlitz explained the special circumstances outlined in the state statute that must be satisfied in order to grant a variance. Attorney Langlitz said the first factor was to determine if there are special circumstances applicable to the property such as its size, shape, topography, location or surroundings. He then explained that the applicant must demonstrate that the property is different or unique through one of the special circumstance from other properties in the area. Attorney Langlitz commented that the Board had not inquired if any special circumstances existed and reiterated that the Board is precluded from granting a variance if any special circumstances have not been demonstrated. He advised the Board that if the applicant establishes the existence of a special circumstance that the Board must then inquire if the strict application of the Development Code denies the applicant the same privileges enjoyed by other property owners with the same zoning. Attorney Langlitz then advised the Board that the applicant must demonstrate that granting the variance of allowing construction trailers on the site where no construction is taking place does not provide the applicant with more privileges than other property owners with the same zoning designation. Lastly, he advised the Board that the applicant had to also demonstrate that the special circumstances were not self imposed. Attorney Langlitz added that the applicant was proposing a use that is not allowed without showing that there were not any other alternatives and reminded the Board that their decision had to be based on the factors that he listed. Chairperson Napolitano stated that the shape of the land and vacant properties adjacent to the site made the property a desirable location. She added that other construction sites have appeared without a public process and that compatibility with Wal-Mart was a concern. Attorney Langlitz reminded the Board that those factors were not legal standards on which to base a decision. Chairperson Napolitano then asked Attorney Langlitz to clarify that the fourth condition listed on the staff report that states that a variance will not be materially detrimental. Attorney Langlitz clarified by saying that the materially detrimental factor was not a condition the Board should consider in the decision making process. He then repeated that the Board needed to consider whether or not the applicant demonstrated special circumstances on the property, if the strict application of the Development Code denied the applicant the same privileges as other property owners in the same zoning classification by finding that other General Commerce zoned properties are permitted to have temporary construction buildings on site where there is no construction, and if those conditions were demonstrated than a variance could be granted so long as the applicant did not get more than other property owners with the same zoning designation. He then added that the applicant had to demonstrate that those special circumstances were not created by the applicant. Mr. von Borstel said that the only thing was asking for was parking for temporary construction trailers. He added that he traveled the 130 mile length of the pipeline and did not find other adequate sites because employees are not permitted to drive on dirt and construction sites are not allowed on state lands, bureau of land management lands, and federal national parks he said his options were limited. Mr. von Borstel stated that he could not find another location of the appropriate size that would allow sewer, water and power. Boardmember Kempniak asked if he could rent a location with existing buildings. Mr. von Borstel said they inquired about a former cotton

gin that was located east of Town on county land, but they opted for a location inside the city limits because he claimed that working with Maricopa County posed more challenges. He then stated that he looked at another yard south of Town but he felt traffic was hazardous; he also examined the Shulte Homes yard and claimed that it would be a challenge to park equipment at that site. Vice Chair Zwerg explained that Mr. von Borstel would have to comply with the appropriate building process and reviews. Mr. von Borstel agreed. Boardmember Hawley said that he was hearing that the attorney was finding reasons why the Board should not approve the variance. Attorney Langlitz explained that he was not advising the Board to vote either way, he explained that in order to grant the variance that the Board had to find certain conditions. Boardmember Hawley observed that he felt the issue at hand was that the Board had to find where another property owner was granted the opportunity to keep four trailers so it could be comparative but that if they found someone who had just had two trailers on their property that it really was not comparative and said that the real issue was finding how the property owner with two trailers was allowed in the first place and that the Board had to get passed that issue before they could discuss the item before them. Attorney Langlitz explained that the Board had to address those issues by statute in order to grant the variance and reiterated that he was not taking a position for or against the variance but in order to grant the variance the Board had to find certain factors and if the factors did not exist they had the authority to still grant it and that he was providing the legal basis for granting the variance and reminded the Board that it was up to the applicant to demonstrate to them through evidence, documents or testimony that those statutory criteria were met otherwise the decision will be subject to challenge by an aggrieved party. Vice Chair Zwerg asked the attorney to clarify that the variance was requested because of the trailers and if the applicant just wanted to park cars and equipment that there would be no need for a variance hearing. Attorney Langlitz explained that he was not sure that all of the other uses that the applicant is intending for the property were permitted under the current Development Code, but that the issue of the construction trailers was the only use before the Board at the meeting and that was the only use he could address. Vice Chair Zwerg then asked if the other uses would still have to comply with the code. Attorney Langlitz affirmed that all of the uses would have to comply with both the Development Code and the Town Code. Vice Chair Zwerg asked if an approval would still require the applicant to provide documents proving that the project was code compliant, legal and met the intent of the Development Code. Attorney Langlitz said that the issue before the Board was a request for a variance from Section 7-4-6-C of the Development Code that does not allow a construction site where construction is not taking place, but the law allows the Board to grant permission to permit for the site and that this situation was different from a classic variance application. Vice Chair Zwerg added that the issue of the construction trailers was minor in his opinion and as long as the balance of the project met with the intent of the Development Code and the applicant complied with the appropriate processes. Mr. von Borstel added that he knew of an offsite construction site with an existing trailer that was used for an electric project within the last year. Boardmember Molina asked if he had documentation of the company that had an offsite construction yard. Mr. von Borstel said it was Palo Verde. Chairperson Napolitano said that that particular company owns the building. Mr. von Borstel contended that it was still an offsite. Boardmember Kempniak made a motion to approve the variance due to the special circumstance of the pipeline and their not being available land for them to have the construction trailers on them due to special privileges have not been placed before them and they cannot weigh them one way or another and due to it is not materially detrimental and no one else has been given more. Attorney Langlitz said the Board needed to just describe the special circumstances applicable to the subject property, some characteristic of the property itself and then find that if a provision of the Development Code is applied to this case that the user of the property will be deprived of privileges enjoyed by other property of the same classification in the same zoning district. Boardmember Kempniak withdrew the motion. Vice Chairman Zwerg asked if the Board could cite that due to the nature of the services attempting to be provided and unique nature of the project prohibits the applicant from providing on site services. Attorney Langlitz said that the reason was unrelated to the property and that the Board had to find a special circumstance related to the subject property with respect to size, shape, topography, location or surroundings and suggested that the Board may not agree with the legal requirements and the situation of the applicant was irrelevant to the statutory grounds for a variance and the applicant had to come forward and demonstrate the four factors then the Board would have met the statutory criteria for granting a variance. He then added that he did not know that there were not other sites available and asked why the subject property was selected. Chairperson Napolitano said that the site was selected because it was zoned commercial and that the Board had surveyed to the best of their ability as non professionals and not seen other sites. Attorney Langlitz then asked the Board if the applicant had demonstrated proof that he tried to acquire other sites. Chairperson Napolitano said he demonstrated that in his testimony when he said he tried to acquire property in the county but was restricted by their regulations. Attorney Langlitz said that he heard the applicant say the site was preferable economically. Chairperson Napolitano clarified and said that the applicant said the county made it impossible for him to go on anything outside of Buckeye. Mr. von Borstel added that in his 7-month examination that they did not find another property that met the criteria as being accessed without hazard to people, not in a populated area for safety zone. Attorney Langlitz told the Board that the fact that the county would not allow a site is irrelevant to the granting of a

variance. Chairperson Napolitano said that he cited two private properties that he tried to utilize during his testimony. Boardmember Hawley asked if they have the ability to grant a variance. Attorney Langlitz explained that they could grant the variance and added that unless they satisfy the statutory criteria their decision would not hold up in court. Boardmember Hawley then asked if the decision would not hold up in court only if it was challenged. Attorney Langlitz said it would not hold up in court if its challenged and added that the Board had to believe that they had the legal basis and acted in good faith for granting the variance but that they had to give the reasons why they are granting the variance. Boardmember Molina asked the applicant if the employer had limited him to finding a location within a certain distance of the construction. Mr. von Borstel said that his employer did not limit him to dollars or area and that he examined locations within a 60-mile radius but that his employer only asked that the site be located on this portion of the project. Boardmember Molina added that she asked the question because in his earlier testimony the applicant mentioned he had to work along a certain corridor and wondered if that restricted him to a certain location. Mr. von Borstel said that it was the corridor of the pipeline and that in order to comply he had to not be able to locate on the corridor on the property as he was discussing and when he examined that he could not fit and there was no limitation that it had to be anywhere and that within a 60-mile circle he said he looked at hundreds of properties. Vice Chair Zwerg said that just because of the nature of the services they are trying to provide that it makes it a unique scenario for that property and the applicant will still need to comply with other town codes so there should be no reason for anyone to contest the decision and he believes that other similar projects will arise and that the Development Code will eventually need to be changed to accommodate those needs. A public hearing was opened at 8:05 p.m. There being no comments from the public the hearing was closed at 8:05 p.m. Assistant Director Suparna Dasgupta informed the Board that since staff cannot make a recommendation that the Board would need to read any stipulations that they would like to attach to the variance. A public hearing was re-opened at 8:06 p.m. Robert Doster said he was in conflict with an affirmative decision because the Town Council is trying to stop this project and that they have serious safety concerns and it seems inappropriate for the Board to be hearing any item related to this project because the Town Council has not rendered any decision on whether or not this project should take place. Boardmember Kempiak shared that she also thought about that and had the same conflict but that she had to separate her roles. Chairperson Napolitano then added that she was aware of the issues but that she did not want it to be part of the Board's decision making process. There being no further comments from the public the hearing was closed at 8:08 p.m. A motion was made by Boardmember Kempiak and seconded by Vice Chairman Zwerg to approve the Transwestern Pipeline Construction Site Variance with stipulations that all appropriate building and safety permits be obtained from the Town of Buckeye prior to the operation of the construction yard and approval be given to the Community Development Director of such permits and a site plan be presented due to special circumstances that were testified to that this was the only property available in close proximity of the project, due to the fact that the project is a long narrow project and they cannot have construction vehicles alongside that property and it does not constitute a special privilege and it will not give the property owner and/or applicant special privilege over and above what is required for their property or their project. Chairperson Napolitano, Vice Chairman Zwerg, Boardmember Hawley, Boardmember Kempiak, and Boardmember Carson voted aye. Boardmember Molina voted nay on the basis that the only criteria of the special privileges and that she did not have any information or evidence that that does not exist or that a special privilege will not happen. Motion passed.

6. ADJOURNMENT

There being no further business to come before the Board a motion was made by Boardmember Kempiak and seconded Vice Chairman Zwerg to adjourn the meeting at 8:09 p.m. Motion passed unanimously.

Annette Napolitano, Chairman

ATTEST:

Claudia Herrera, Management Assistant

I hereby certify that the foregoing is a true and correct copy of the Board of Adjustment Regular Meeting held on the 12th day of February, 2008. I further certify that a quorum was present.

Claudia Herrera, Management Assistant