
**CITY COUNCIL CHAMBERS
11465 W CIVIC CENTER DRIVE
AVONDALE, AZ 85323**

**Tuesday, January 26, 2016
6:00 P.M.**

I. CALL TO ORDER

The meeting was called to order at approximately 6:00 pm by Chairman Sours.

CHAIRMAN SOURS: I'd like to call this meeting to order. The January 26th meeting of the City of Avondale Board of Adjustment.

II. ROLL CALL

The following members and representatives were present:

BOARD MEMBERS PRESENT

David Sours, Chair
Mandy Neat, Board Member
Sean Scibienski, Board Member
William Bock, Legal Counsel for Board

BOARD MEMBERS ABSENT

Melissa Valenzuela, Vice Chair, Excused
Thomas Forwith, Board Member, Excused

CITY STAFF PRESENT

Tracy Stevens, Development & Engineering Director
Robert Gubser, AICP, Planning Manager
Gary Verburg, Legal Counsel
Linda Herring, Development Services Representative
Stephanie Long, Administrative Assistant

CHAIRMAN SOURS: Let's do a roll call.

So let's start over here, Board Member Neat, present.

BOARD MEMBER NEAT: Mandy Neat, present.

CHAIRMAN SOURS: And Board Member Scibienski.

BOARD MEMBER SCIBIENSKI: That's correct, I'm present.

CHAIRMAN SOURS: And Board Member Sours, chair, is present. We have a quorum here.

And I need to read an opening statement. Can you all hear me? I had a cold last week and my voice is a little weak. So I still have some remnants of that with a little bit of a cough, but I've got a pocket full of cough drops, so I'm prepared.

This Board of Adjustment is composed of Avondale citizens who have been appointed by the City Council to serve on the Commission as a civic responsibility without compensation. In the interest of maintaining a fair and efficient hearing, the Board adheres to the following steps: The chairman calls a case; staff gives a brief report and recommendation; applicant gives a presentation; opposition and support give testimony, no more than three minutes per speaker; appellant may give a rebuttal -- or applicant may give a rebuttal; Board discussion and decision. Anyone wishing to speak before the Board must fill out a speaker form and hand it to the Board's secretary. And thank you in advance for your participation.

III. APPROVAL OF MINUTES:

Chair Sours called for a motion to approve January 12, 2016 Regular Meeting minutes.

CHAIRMAN SOURS: Board Members, did you have an opportunity to look over the minutes from the last meeting?

BOARD MEMBER SCIBIENSKI: Chairman, I'd like to make a motion to approve the minutes.

CHAIRMAN SOURS: Do we have a second?

BOARD MEMBER NEAT: I'll second that motion.

CHAIRMAN SOURS: Okay. All in favor of approving the minutes?

BOARD MEMBER SCIBIENSKI: Aye.

CHAIRMAN SOURS: Aye.

The minutes are approved from the previous meeting.

IV. BUSINESS FROM THE FLOOR:

There were no scheduled public appearances.

V. WITHDRAWALS AND CONTINUANCES:

There were no withdrawals or continuances.

VI. PUBLIC HEARING ITEMS:

CHAIRMAN SOURS: So the format for this evenings meeting will be as follows: The appellant, Paul Gilbert, on behalf of AutoMatch, will be allowed 30 minutes to present and then the Board will ask questions. Then the City will be allowed 30 minutes to speak, and that includes all the speakers, and then the Board may ask questions. And then the appellant, Paul Gilbert, will then be allowed a 15-minute rebuttal, followed by any questions from the Board.

BOARD MEMBER SCIBIENSKI: Chair, point of order.

CHAIRMAN SOURS: Sure.

BOARD MEMBER SCIBIENSKI: I think 30 minutes plus 15-minute rebuttals is too much. I would recommend or suggest that we decrease the amount. I'd say 20 minutes with ten-minute rebuttals.

CHAIRMAN SOURS: We started with ten minutes and then it went to 45 minutes and then we're back down to 30 minutes and both sides seem happy with that, so that's I think where we should keep it right now, if that's --

BOARD MEMBER SCIBIENSKI: Okay. I just think you can only beat a dead horse so often.

CHAIRMAN SOURS: And then to ensure everyone is allowed their full time to present, we're going to reserve all questions until the end of each presentation so we don't interrupt their presentation or their time. So let's go ahead and get started with the appellant, Mr. Gilbert.

1. PL-15-0246 – Avondale AutoMall Zoning Interpretation Appeal

Public hearing before the Board of Adjustment to review and solicit public input on application PL-15-0246, a request from Paul Gilbert, Beus Gilbert, PLLC to appeal the Zoning Administrator's interpretation that used car sales are not permitted unless ancillary to a new car sales use. Staff recommends that the Board **AFFIRM** the decision of the Zoning Administrator. Staff Contact: Robert Gubser, AICP, Planning Manager

PAUL GILBERT: Thank you. For the record, my name is Paul Gilbert, 701 North 44th Street in Phoenix. I'm here on behalf of an AutoMatch. Sorry for wanting the extra time, Board Member, but we lawyers are paid by the word, so.

I exult in the presence of Mr. Bock and Mr. Verburg and Mr. Gubser and I'm looking forward to hearing from them as well. I have with me tonight my two associates, Cassandra Ayres to my right and Andy Jochums, who will be operating the PowerPoint presentation.

The posture that we are in tonight is that we are appealing an interpretation of the City Zoning Administrator that my clients, AutoMatch, may not put a full service used car dealership on the property that is known as the Avondale Auto Mall. I've known your Counsel, Bill Bock, for many, many years and have the greatest respect for him and I'm sure you have been ably instructed as to your responsibilities.

At the risk of appearing a little demanding, I just want to make a point about your role as members of the Board of Adjustment. You've been appointed by the City, but you don't work for the City. The Board of Adjustments is an independent body. Your job is to make informed decisions. You're a quasi-judicial body that hears the evidence and then makes an impartial decision. There is no presumption that the City is correct or right. In the briefing documents, Mr. Verburg made the point that you're in deference to the Zoning Administrator. I submit that is only partially correct. I would like to comment on that at the outset.

Obviously, cities are not infallible. They can make wrong and bad decisions. That's why we have a Board of Adjustment. But in addition, under Arizona law there is a very current famous case called Hart v. Bayless. I have a quote from that case for you. "The zoning ordinances" -- according to this case -- "being in derogation of common law property rights will be strictly construed and any ambiguity or uncertainty is construed against the City." That's the basic predicate that we'll be hearing from this case. Basically, this case says that if there is some ambiguity, then based on that, you rule in favor of the appellant and against the City.

It's also said basically, in our words, tie goes to the runner. If you feel that the parties are in equal juxtaposition with each other, then you should rule in favor of the property owners. That's the holding and mandate of this Hart v. Bayless case.

TRACY STEVENS: Paul. Excuse me, Paul, can you speak a little bit closer to the mic, because the recording is not picking you up very well. Thank you. Sorry about that.

PAUL GILBERT: I assume the Board is hearing me all right?

CHAIRMAN SOURS: Yes, sir.

PAUL GILBERT: All right. I'd like to give you a brief overview of the arguments that we will be presenting this evening. There are five main points that we wish to make. I will briefly summarize them for you:

One, our position is that the PAD Zoning allows used car sales as a stand-alone business; two, the City is incorrectly defining and using the word "and." Sorry that so much of this will turn on the use of this one word, but here it's very important. And they're using the word "and" as a limitation rather than as a conjunctive expansion. We'll elaborate on that shortly. Third point, AutoMatch, contrary to what the City would have you believe, is a classic full-service dealership. Fourth, there is no indication from the documents that the Council ever intended to limit or restrict used car dealerships from the Auto Mall; and five and final, the development agreements, which are quoted rather profusely by the City Attorney, do not trump the PAD.

Now, for a brief historical background, I think is instructive here. This is the visual area and map of the property. Andy, can you indicate where our proposed site is? Good.

The Auto Mall was developed in 1999 to accommodate the development of, quote, "several full-service automobile dealerships using the planned area development or PAD as the lead through to accomplish that." Incidentally, I was the attorney that handled that Auto Mall case, so I would submit that I think I know something about what the case was designed to do. I represented the developer, I represented the applicant.

The PAD basically expanded the zoning uses that were allowed under the C-2 zoning that then was on this property and created -- and you will hear this word often this evening -- additional uses that would be allowed pursuant to your conditional use permit. I'm going to go into greater detail on that issue later, but we need to focus on what the PAD says.

The PAD says that the intent of the Auto Mall was for a broad inclusion of automotive uses. Some of those uses would include new and used car sales, outdoor and indoor repair including mechanical and collision repair, et cetera, and storage and sales of automotive parts. The PAD has been amended since 1999, but importantly, and I don't think the City Attorney will disagree with me, that none of these amendments involve the underlying burden of the document. The 1999 original PAD is the controlling and (indiscernible) document.

In June of 2014, AutoMatch entered into a lease with the property owner in order to open and operate a full-service used car dealership. This was AutoMatch's first facility in Arizona. It provided for certified pre-owned cars, maintenance and repair facilities and on-site financing. After AutoMatch submitted the pre-application, they were informed by the City that they could not sell used cars on the property as a -- that they could only -- excuse me -- sell used cars on the property as a secondary or ancillary use to new car sales. In other words, they could not sell only used cars. The City basically took the position that a stand-alone used car dealership would not be permitted.

We want to stay at this location. We're not a flash in the pan business; we're here to stay. We have locations throughout the country. Their parent company is a company called Camping World and we are in the Auto Mall currently. We are a nationwide corporation with locations all over the United States.

We and AutoMatch vigorously disagree with the City's interpretation and have spent the last year-and-a-half challenging this interpretation. We're sticking this out and we've gone to this great length, because we have been and remain sincerely convinced that we are correct on this matter.

Now, let me go at the argument. The first argument, the PAD allows used car sales as a stand-alone business. Very importantly as we reason together we ask you to focus on this point: The allowed uses in the Auto Mall PAD include, quote, "in addition to the land uses permitted" -- that's in addition to what's already permitted, not less, but in addition to the uses already permitted under the Community Commercial C-2 Zoning -- this applicant application includes a request for a conditional use permit for the following uses.

So the C-2 uses that were on the property at the time the PAD was approved are very instructive, because the PAD says if they're there, you get to keep them. Very important factor as we focus on this. So then the PAD went on to expand the zoning uses that were allowed under the C-2 Zoning. And it included additional uses, not less, but additional and did not anywhere in the document say and oh, by the way, these C-2 uses that were allowed before no longer can be allowed. Well, that then brings up the very important and I submit dispositive issue, well, what was allowed? All uses within the C-2 Zoning District are allowed within the PAD.

So what did the Zoning Ordinance allow in 1999, which was the year the Zoning Ordinance was applied? Let's look at that. The 1999 Zoning Ordinance allowed auto, recreational vehicle, motorcycle, travel trailer, and boat sales. Do you see any distinction there between new and used? It isn't there. So new and used were both allowed at the time that the PAD was placed on the property. The PAD says everything that was allowed under C-2 is now allowed. There was no restriction on used automobiles and no distinction was made between new and used, both were allowed.

I'm running out of time already, so I've got to speed this up.

But the Zoning Ordinance also included a definition and that said that automobile, boat, truck, and trailer sales were allowed. And then it defines on a sales lot as including, guess what, new or used automobiles, boats, et cetera. Bottom line, if it was allowed before, it was allowed after the adoption of the PAD. Stand-alone and used cars were allowed to be sold on that property before the PAD was adopted.

Now, the City makes a big use of the word "and," and it says "and" is a limitation. Let's look at that. The first item listed in the additional uses allowed with a conditional use permit is outdoor auto sales, new and used. What does "and" mean? The City uses "and"

as a limitation, arguing that the phrase above has to mean that new and used car sales can only be done together, not to stand alone. The City's argument is without merit. First of all, the City uses the word "and" as though it's a noun. It goes to the English Webster, Merriam Webster Dictionary. But the -- its more common use, as the dictionary, the same dictionary they're referring to, points out, it is used as a connecting function or an additional item. So what the City did is they cherry-picked the definition that they quoted in their brief review and didn't take a look at what follows. And what follows says this is how "and" is defined. The word "and" -- I'm quoting now -- "functions to indicate a connection or additional items within the same class or type." So it's a conjunction to use similar uses together, not as the way the City is proposing.

Now, but even more importantly, let's look at your own ordinance, how it uses the word "and." The 1999 version of the ordinance uses the word "and" in a lot of ways. It doesn't find -- I'm going to go through these very quickly, what is allowed: Auto, recreational vehicle, motorcycle, travel trailer and boat sales; commercial parking lot and garages; mini storage and vehicle storage areas; printing and copying shops; farm implements and machinery sales; barber shops and beauty salons; medical and dental laboratories; et cetera.

Following the City's logic, their definition of "and," each of the involving samples must occur together or not at all. The City's interpretation leads to a certain result. Are travel trailer sales not allowed without boat sales? Are barber shops not allowed without beauty salons? Must a parking lot include a garage? Well, you get the point. I could go on and go through each one of them, but it's clear "and" is not used in that restrictive sense. It's a conjunctive. It means add to, join similar uses. So when they use new and used automobile sales, it was clearly not a limitation or a restriction.

Now, also remember that the PAD expands the uses that are already allowed. The additional phrase "new and used" modifies outdoor automobile sales and provides that new and used outdoor auto sales at the Auto Mall are an allowed use of the conditional use permit. The City's interpretation begs the question of why the only type of sale excluded is used cars. We could sell used boats, used campers, used motorcycles, used trailers, but we can't sell used cars. That is an absurd and unintended result that was manufactured after the fact.

I'm going to make a real quick point and the next point that is worthy of more time, but AutoMatch is a full-service dealership. In Exhibit 3, our 3, we have allowed eight to ten pages that describes what we do. We have everything that a dealership does, a full-service dealership, we do. We repair on site, we finance on site, we -- you can come back. You get a warranty with our car. Even though it's used, we certify it before we sell it. So everything that a full-service dealership does we do; and it's all spelled out. Our people, for example, have to have one -- two years -- a two-year degree in automotive services or one year on the job and two years of training. So we have everything that a full-service dealership has.

Now, next is there is no evidence of the Council intent to restrict used car dealerships. The City's interpretation stretches common sense. If it was so important to exclude this one single use as a stand-alone use, it should have been discussed in the plethora of hearings that took place when this PAD was adopted. I was there for most of them.

So the Planning and Zoning Commission hearing on November the 18th, nothing. City Council hearing, nothing. Planning Commission Hearing in 2003, we reviewed the minutes of all of these cases and in 2003, again, at the City Council level. So there was never any discussion that used cars would not be allowed as a stand-alone use.

Next argument -- and you're going to hear a lot about this from the City Attorney. They are now claiming that the development agreement somehow supersedes the PAD or that the development agreement is evidence of an intent to not allow used cars. There again, the City's reliance is misplaced. Importantly, what was the adoption of the development agreement juxtaposed against the adoption of the PAD? The PAD came after the development agreement and therefore controls.

The development agreement is intended to provide sales tax rebates for new car sales. We're not asking for sales tax rebates and they typically aren't given under the circumstances of used car sales.

So all this focus on the development agreement was designed to do something very different, and that was give a sales tax rebate to only new car dealers. Well, of course the development agreement will only talk about new car dealers, because they're the only ones that get the retail. But that doesn't mean used car dealers can't locate on the site. And of infinite importance is the fact that the development agreement was never intended to put restrictions on uses. That would almost constitute very narrowistic contract zoning. That wasn't the purpose of the development agreement.

And so this plethora of quotes from the development agreement dealing sales tax rebates and only referencing new car sales aren't relevant, because it isn't there as a restriction, it is there as an entitlement for new car dealerships to get sales tax rebates. Now, we'll just with the few minutes I have remaining talk about some of the recitals that are quoted. I find it interesting that the City's brief only quotes the recitals. There's nothing of substance in their document. They say oh, these recitals only talk about new cars, so therefore, it must mean that we can only have new cars under the PAD. Again, putting aside the fact that the PAD was adopted later and controls.

So the City is trying to -- oh, and one other interesting thing. If it's so important that that was going to constitute a permanent use, the development agreement expires this year, so even if the City's right and the development agreement, that the intent was to prohibit used cars, it's over with this year. So if that was so important they should have put it in there. They should have put it in there as a use and they should have put it in the PAD, none of which happened.

How am I doing on time?

CHAIRMAN SOURS: You have about seven-and-a-half minutes left.

PAUL GILBERT: Wow, I've got time to go get a hamburger.

Let me just go through the five reasons that the City quotes in these recitals in the development agreement with the PAD. They -- and I'm going to start with the first development agreement, all right?

The City quotes recital B-1 and it says, quote, "The City clearly sets forth the developer's intent to construct an Auto Mall complex consistent with the RV restrictions."

BOARD MEMBER SCIBIENSKI: Is there a slide that goes along with what you're reading? I'm sorry.

PAUL GILBERT: It's Exhibit 1.

BOARD MEMBER SCIBIENSKI: Thank you.

PAUL GILBERT: So this argument is based on a selective portion. The City -- where is that? Recital B-1 also clearly provides for, quote, "other automobile uses." Used cars are clearly other automotive uses. Other automotive uses also include boats, trailers, parts and repair. All of these were included in the PAD, which was drafted after the development agreement. Other automotive uses includes the sale of recreational vehicles, which are also already included on the Auto Mall. They're not new cars and they are allowable. One of the very first users to go on the Auto Mall was the Tex Earnhardt's rec vehicle facility. That was not a new car dealership. And so generally the City did not intend to restrict this to only new car dealerships. The City has not and cannot argue. For example, Camping World, which is also our client, that sells rec vehicles, is not allowed, because they are not a, quote, "new car dealership." So there's nothing in that recital that derogates from our position.

The City says that, in C-1, recital that there will be significant benefits to the City if you receive the transaction privilege sales tax. We don't disagree with that. New cars bring significant benefits. Is there a corollary that says that you can't have these other uses? This just has an open and vivid truism that new car dealerships do bring in sales tax, but that doesn't mean there can't be other automotive uses. And we know that they are already there and on the site.

Recital D establishes the developer's obligation to use best efforts to attract additional dealerships. Nothing wrong with that. We think that's a wonderful goal, but it doesn't say that they can't have used car sales. It isn't in there and, therefore, that is not a valid argument that you can't have used cars.

Let me just wrap this up.

The City says recital D in the first amendment is also clearly stating that you have to have new car dealerships. Again, this document -- and I'm getting a little redundant here in support of the PAD, but there's no restriction on uses in this development agreement or in any of the development agreements. It's clear that the transaction rebates were offered to attract new car dealerships; and that's what's commonly done.

CHAIRMAN SOURS: Sir.

PAUL GILBERT: Yes?

CHAIRMAN SOURS: I hate to interrupt you. I'm just letting you know you have three minutes left.

PAUL GILBERT: Okay. Thank you. I'm watching that.

So it's clear that that transaction privilege rebate is just a motivation, was satisfied. We don't have any trouble with that. But (indiscernible) the requirements were satisfied and the amendment does not supersede the PAD zoning.

Finally, in recital D of the second amendment to the development agreement, I'm now looking at the second amendment, was also quoted and they say the new language added in section 2.2 also states that new car dealerships are required. Well, this argument falls through. Without being redundant, we already made that argument to you before. But now here's an interesting corollary to this quote. Recital D of that same second amendment says "The intent of the second amendment is to increase the potential rebates for infrastructure increases to accommodate additional auto dealerships." Additional auto dealerships can clearly include both used and new car dealerships.

Lastly, in 2.2 the City is also quoting that section for saying you can't have used car sales. That is not the actual quote. The actual quote says -- the language and this is verbatim: "shall," quote, "permit retail automotive dealership uses within the project." Retail automotive dealerships don't have to be new, they don't have to be used, they can be either one. If the City intended to say that only applies to new and not the old, they could have used some very different wording, but they didn't. So the actual language in it talks about retail automotive dealerships.

So I'm finishing on time. I would just say in conclusion, that was some really compelling reasons as to why used cars should be allowed at this dealership. The PAD absolutely doesn't prohibit it. There's language in the PAD that actually indicates they are allowed. The development agreement is dependent upon a completely different focus and are being used by the City as a bootstrap to prohibit used car dealerships don't apply here. So for these reasons we hope you would concur.

Thank you.

CHAIRMAN SOURS: Thank you. We have questions?

BOARD MEMBER SCIBIENSKI: Mr. Chairman, I have a few.

Can you go back to the slide that showed the original C-2 Zoning language?

PAUL GILBERT: Okay.

BOARD MEMBER SCIBIENSKI: Okay. Let's -- Okay. Well, I'll try to go one at a time here and see what you might have to say about it.

I understand the argument about development agreements not trumping the PAD. I guess my response to that is when the Supreme Court is trying to decide a constitutional issue, they read the federalist papers and the anti-federalist papers to try to get an idea of the mindset of the founding fathers when they were negotiating the Constitution. In my opinion -- and correct my opinion, if you would -- the development agreement is our peek at the mindset of the City prior to the PAD. It's our federalist, anti-federalist papers.

PAUL GILBERT: With all due respect, you're elevating the development agreement to quite a lofty ideal of a federalist and anti-federalist thing, the papers. But let me take that head-on. If it's a so-called peek into the mind of the City Council, why didn't they say we are only going to allow new car dealerships? The peek into the mind of the City Council, and that's all they were expecting to do with that, was to provide sales tax rebates. That's all they talked about.

So the peek into the mind of the City Council was clearly we want to encourage people to locate here and we'll give them sales tax rebates if they do. So --

BOARD MEMBER SCIBIENSKI: I think your argument's circular, because you're arguing that because they didn't specify the need of new car only, they didn't care about new car on one end. That's what you're arguing to me just now. But you're arguing on the other hand that this has nothing to do with what they intended with the use of the property. It can't be both. It's either it has nothing to do with what they intended for the use of the property, it had only to deal with tax breaks, or if they wanted new only, they would have said new only. I guess it's circular in my opinion. It's one or the other. It can't be both.

PAUL GILBERT: Pardon my candor, but I think that's circular. In fact, what was their primary intent? That's what to use your analogy with the Supreme Court is to look for the intent. That intent was focused solely on sales tax rebates. But it doesn't stop there. There are other references to other automobile uses. It's clearly spelled out in there. If they didn't want other automobile uses, they should have said so.

And they also have allowed dealerships to locate there that don't meet the definition, the City has, of a new car dealership. We've given you two examples. They weren't new car dealerships and the City allowed them, so the City must have had the interpretation at least at one time very analogous to what we're proposing.

BOARD MEMBER SCIBIENSKI: Okay. Can you go back to the slide that shows the original PAD, please?

Okay. So in this particular --

PAUL GILBERT: Is this the slide you wanted?

BOARD MEMBER SCIBIENSKI: Yes.

So to your particular point with regards to allowed uses, I agree wholeheartedly and I think the City does as well that existing C-2, we're adding on top of, we're not -- whether the City agrees or not, I read this as you do. It's C-2 plus.

My question -- I guess my question that I want you to address, argue, however you want to talk about it, when I read the previous, it didn't specify how --

Let me finish.

It didn't specify how --

PAUL GILBERT: Sorry.

BOARD MEMBER SCIBIENSKI: When I read the previous slide that we were on, which was the original C-2, it talks about all of the automobile related, RV, all of that, uses. It does not specifically mention outdoor at all. So how I see this is this is the PAD really allowing yards, outdoor sales. So it's taking C-2 to the next level by allowing outdoor. That's kind of what I'm thinking. Otherwise, it's included, why mention it. So if you're going to mention it at all, there's got to be a reason.

And before you rebut, I'm just going to walk you through my logic here.

PAUL GILBERT: Okay.

BOARD MEMBER SCIBIENSKI: But if you're going to -- if you're going to mention it at all, there's got to be a reason, because it's already allowed. And in my opinion that reason's got to be the addition of the word "outdoor." Okay?

On top of that, if "and" is not to be interpreted as a noun -- and I understand your point about there's two definitions and two ways to -- what's the -- what's -- you know, what is the meaning of "and" in this particular case. But if "and" is not supposed to be interpreted as a noun, why even have new and used? Why not just have automobile -- outdoor automobile sales, period? Why the addition of new and used?

PAUL GILBERT: Okay. That was a good question. And I believe that the intent was to clarify and make sure. As you remember, it was in addition to. That's what the PAD

says. They wanted to make sure that both new and used could be there. Because in the original definition it --

BOARD MEMBER SCIBIENSKI: Can you go back to the slide when he reads this, please. Thank you.

PAUL GILBERT: In the original definition, it just says auto, recreational vehicles, and so on. Okay?

BOARD MEMBER SCIBIENSKI: Uh-huh.

PAUL GILBERT: It doesn't say new and used, it just says auto.

BOARD MEMBER SCIBIENSKI: Uh-huh.

PAUL GILBERT: That means you can have both.

BOARD MEMBER SCIBIENSKI: Correct.

PAUL GILBERT: But then later on in the Ordinance, it talks about the definition of a trailer sales lot, automotive, boat, truck, and trailer sales lot. That's defined as an open area used for the display, sales, and/or rental of new or used automobiles.

BOARD MEMBER SCIBIENSKI: Okay. So then outdoor was allowed. I see that. I missed that.

So then I go back to if it's already allowed, why are we -- unless we're defining -- unless we're using "and" as a noun here, why even mention it?

PAUL GILBERT: Well, it's mentioned. Why even mention auto service? Why even mention new car dealers?

BOARD MEMBER SCIBIENSKI: That's my --

PAUL GILBERT: Why mention all those others?

BOARD MEMBER SCIBIENSKI: That's my point. Why do we need an extra allowed use for something that's already allowed unless we're clarifying the allowed use?

PAUL GILBERT: That's my point right back at you. They're again, the elaborating the uses that will be allowed. And you can't tell me in the Ordinance that they use "and." I gave you 14 examples.

BOARD MEMBER SCIBIENSKI: That's my next point. And I can't tell you that. However, the City didn't write the PAD. The PAD was presented by the developer and adopted by the City. You wrote it as the attorney or your staff wrote it, where City staff

wrote the zoning. So we've got two different people who might hold two different definitions of "and." So that's my direct argument to that point. I see your point. They are going different paths, but my point to you is you've got two different authors, who we have to as a board decide what those ultimate authors' intents were.

So I'm going to, again, wrap it up. I don't want to take up too much time.

Okay. I think actually that is -- that's all I had.

Chairman, that's all I have for the applicant.

CHAIRMAN SOURS: Okay. Thank you.

Go ahead.

BOARD MEMBER NEAT: If it's okay, I have just one question. I wasn't around in Avondale in 1999 and I have read all the documentation and one thing I have noticed about Avondale is that we're a lot about economic development. And I'm thinking in 1999 we were still about growth and wanting to grow and have more businesses. But my question is you were there and if they were making this PAD at that time and the zoning and they just didn't go further to define it, did we have new car sales already lined up for this area that they were already buying into, so why not incentivize that? I mean, I'm just trying to -- like incentivize the new car sales with the sales tax privileges and they kind of stopped and thought hey, it's full. And now we're in 2016 and we're kind of vacant. So I was just kind of trying to think of more of the mindset of they just didn't have to go a step further, is maybe that why we didn't write more into it? Or I guess this is coming out -- did we already have new car sales -- new car companies lined up for the development at that time in 1999 when this all came about?

PAUL GILBERT: Well, there were some dealerships, but not -- it wasn't complete.

BOARD MEMBER NEAT: It wasn't full yet?

PAUL GILBERT: Oh, no, not anywhere near. In fact, they talked about in I think it was the second development agreement about the need to -- they mentioned you've got to promise that you're going to bring to -- specifically mentioned.

BOARD MEMBER NEAT: Okay. Sorry, that was a lot of reading.

PAUL GILBERT: Yeah. That's all right.

BOARD MEMBER NEAT: Okay. Yeah, because I know, you know, in Surprise for instance, we have a mall being built and they want to have developments promised before they break ground. So I was just trying to figure out, you know, if that was what was coming to us at that time to stop the limit.

PAUL GILBERT: I can guarantee you I don't think there's any dispute about this.

BOARD MEMBER NEAT: Okay.

PAUL GILBERT: The Auto Mall is not full.

BOARD MEMBER NEAT: Okay.

PAUL GILBERT: In fact, the best indication of that is that there were two parts of the Auto Mall. The Auto Mall had two Auto Mall parts and then they have their retail part next to it. And then later the retail was changed to expand the Auto Mall.

BOARD MEMBER NEAT: I appreciate it. Thanks.

CHAIRMAN SOURS: Is that it? Okay. I don't have any questions myself, so thank you.

PAUL GILBERT: Thank you.

CHAIRMAN SOURS: So we're ready for the City's presentation. You're allowed 30 minutes total.

GARY VERBURG: Hi. Can you hear me?

BOARD MEMBER NEAT: Barely.

GARY VERBURG: Can you hear me?

CHAIRMAN SOURS: Barely.

GARY VERBURG: Can you hear me?

CHAIRMAN SOURS: Is the mic actually on?

GARY VERBURG: The light is on.

CHAIRMAN SOURS: Do you have an RTS button like we do?

GARY VERBURG: I can talk louder.

BOARD MEMBER SCIBIENSKI: The mic's not actually on, so I don't know if you're going to show up. We can hear you, but will the recording pick it up? Or are we going to get incomplete minutes like we did in this case?

UNIDENTIFIED SPEAKER: Is it because your RTS is out?

CHAIRMAN SOURS: Try again and see.

GARY VERBURG: How's this? Oh, wow.

CHAIRMAN SOURS: That works.

GARY VERBURG: Okay. Now, I'm going to blow you out of here, I guess.

My name is Gary Verburg. I work with Gust Rosenfeld, I work with Andrew McGuire, the City Attorney for the City of Avondale. And I've been asked here -- asked by the City Attorney to help present the City's side in this particular appeal.

Our approach today will be twofold if you don't mind. We're going to have a presentation by Mr. Robert Gubser, who was the Zoning Administrator, to provide the factual background for the record that we need for you to make an informed decision. He will also explain why he rendered the decision he did in the analysis. After which I will provide an as brief as I can legal argument as to why his interpretation is correct. So it will be a twofold presentation. Without any further ado I'll turn it over to Robert.

Thank you.

ROBERT GUBSER: Thank you, Gary. Good evening, Board Members. I appreciate the opportunity to be able to present staff's overview of the interpretation request as well as the appeal.

Like Gary said, this is going to be kind of a twofold presentation. First, I'm going to provide you with a brief history of the Avondale Auto Mall, hopefully addressing some of the questions that Board Member Neat was just asking. Also, I'll discuss some of the overviews of the powers and duties that are assigned to me as the Zoning Administrator as well as talk about the analysis of the interpretation that I made. Third is just talk real quickly about the appeal process and then fourth, I'm going to hand it back to Gary to discuss some of the legal support for the interpretation.

First, starting off regarding the history of the Avondale Auto Mall. Back in December of 1999, the site was rezoned to the Avondale Auto Mall PAD. It was under case Z99-402-A. It rezoned the site from agricultural to that PAD. Essentially, it was 150 acres between 99th Avenue and 107th Avenue, just south of the I-10 corridor. The western 50 acres was rezoned to support a retail power center, and then on the eastern 100 acres it was identified to rezone that site for eight full-service automobile dealerships and other related uses.

As mentioned in the previous presentation, we talked about C-2 uses, but there was also a modified list of permitted uses with a conditional use permit. And I'm going to jump into that in just a few minutes. That was approved under Ordinance 723-99, which is included in your staff report.

This is the approved development plan back from 90 -- from the -- rezoned back in '99. As you can see in the highlighted gray areas, that is the eight full-service dealerships in the 100 acres and then you can see the retail power center highlighted on the western 50 acres.

There was a PAD amendment that occurred back in April of 2003 and it was under A03-402-AM1. Essentially, what happened at that time is it eliminated the western 50 acres of retail power center. The developer was looking at incorporating that 50 acres into additional automobile dealerships and related uses in addition to the originally approved C-2 uses. That was approved under Ordinance 927-03. Again, it's in your staff report.

And just to kind of give you just a little brief understanding of what was occurring at that point in time, I was able to get an aerial photograph from December of 2002, so it's as close as I can get to April 2003. There was three existing dealerships in the Auto Mall at that point in time, there were three more that were going to be under construction, and then there was one more that was going through site plan approval and I think it was going to City Council for approval pretty close to the time that this PAD amendment was going forward.

This is the approved development plan that accompanied that PAD. As you can see highlighted in the red, that was the change from the retail power center to the additional areas for automobile dealerships.

In addition to the PADs, obviously, I'm going to discuss the development agreements that the City and the developer entered into. Essentially, what it does is it's a contractual agreement. We were establishing retail sales tax incentives, also further specifying project details. There was an initial one back in 1999. It had a small corrective agreement that occurred in 2000. There was also a first amendment in 2002, followed by a second amendment in 2003. This, basically, accompanied that PAD amendment that was in 2003.

Not only did we have an overall development agreement with the entire developer for the site, there was also individual dealership development agreements that the City entered into in terms of retail sales tax incentives.

This is what it looks like present day. We've already seen this aerial. There's 13 new car vehicle dealerships on the site right now. There's one vacant dealership, which is part of the request before you this evening for the AutoMatch site. There's one pad that's not developed, as you can see in the brown area just a little bit farther on the east side. There's a list of the 13 dealerships that are in the Avondale Auto Mall right now.

In terms of the pre-application meeting, all of this is stemming from the August 5th, 2014 pre-application meeting that was held with the City. It was under case PL-14-0134. It was for the AutoMatch USA site located at 10501 West Papago Freeway.

The request that we received was to locate a pre-owned vehicle sales facility in the Avondale Auto Mall. At that point, based off the interpretation of staff at the time, we ruled that the used car sales were allowed subject to new car sales as the primary use. That's contained within the pre-application meeting comments, which is also in your staff report.

Based off of staff's interpretation at this point in time, the applicant did not move forward with the requested use with the City.

So that's the history and the background. I'm going to talk about the powers and duties that are assigned to the Zoning Administrator so you can understand how I came up with the interpretation that I did and then also run through the interpretation analysis.

The powers and duties are given to the Zoning Administrator based off of the language that's contained within the Zoning Ordinance, Section 106. And I'm just going to read these so you understand exactly what those powers and duties are.

The first is to interpret the Zoning Ordinance including, but not limited to, clarification of intention, determination and clarification of unspecified land uses, determination of zoning district boundaries, and similar matters.

The second is to accomplish administrative actions including preparation of reports, processing appeals, which is why we're here this evening, providing assistance to variance applicants and similar matters, and also to serve as secretary to the Board of Adjustment and Planning Commission.

And fourth, is to undertake similar duties as may arise from time to time to enforce in the enforcement and the interpretations of the Zoning Ordinance.

So, as you can see, all the requirements and the powers and duties are contained within the Zoning Ordinance regarding the interpretation of specific uses.

So in regards to the zoning interpretation, there was a zoning interpretation filed on September 1st, 2015. Again, this is in response to the AutoMatch preapp that came in in September of 2014. I issued a formal response based off of that request on October 15th, 2015.

Regarding my analysis, I had to look at what the intent was. And my ruling and my determination was the intent was not to allow for a stand-alone used car dealership as permitted within the Avondale Auto Mall. I've looked at -- in terms of for my evaluation I looked at the original 1999 PAD, the subsequent amendment to the PAD that was in 2003, as well as the language contained in the economic development agreements and any of the supporting staff reports, both with the zoning cases and the development agreements.

That's what I needed to make my determination is to understand what occurred previously. So it was made clear from the beginning and it was also consistently followed through a series of related agreements and supporting documents that the used car dealerships were not allowed as a stand-alone use within the Avondale Auto Mall.

So getting a little bit further in the actual analysis portion of this, contained in your staff report on page three, these are some of the recitals that Mr. Gilbert was talking about, and I'm going to go a little bit more in depth on those.

Regarding the 1999 PAD, on page 2 of that PAD, the purpose of the zoning was to accommodate the development of several full-service automobile dealerships. So essentially when you read that with the remaining language in the paragraph, it is clear that the mention of used car sales is intended to allow for used car sales at full-service dealerships, not to allow for stand-alone used car lots.

The second is regarding the proposed uses in the conditional use permit list, refer to outdoor automobile sales, new and used, indicating the two types of sales are to be from dealerships offering both new and used vehicles. Had it been intended otherwise -- which I'm going to touch on here in a few minutes -- the text could have just used the term "or" instead.

There were as part of phase one construction, it was to include eight full-service dealerships. The Auto Mall was clearly planned as a new car sales area, so the use of eight full-service dealerships is a plain reference to new car dealerships.

Among other descriptions -- descriptive terms describing services provided at new car dealerships, the rear yard provisions specifically refer to the service section of the dealership. On-site manufacturer service facilities are hallmarks of new car dealerships. If you buy a new car at the dealership, they want you to go service it at that dealership.

There are multiple occurrences where the text describes the signs throughout within the Avondale Auto Mall. They're specifically referring to the corresponding manufacturer's logo. These are clearly references to new car dealerships.

And regarding the 2003 PAD amendment, the intent of the amendment,-- and this isn't included within the narrative report itself that was written by the developer and sent to City Council -- was to obtain the proper zoning to allow for additional new vehicle dealers. That's what the staff was responding to. That's what was contained within the narrative report.

Also, within the development agreements there was quite a few recitals that were made. Reviewing those, looking at the intent of what was contained within those development agreements, it was basically to construct an auto mall consisting of new car dealerships. That was the intent of those development agreements. Obviously, there's significant benefits to the City when you bring in new car dealers in terms of the sales tax. The developers were obligated to use the best efforts -- and this is contained within some of

the development agreements -- to attract additional dealerships, and new car dealers are used as an example. And then also contained within the first and second amendments, there was recitals that are clearly stating new car dealerships. That's contained within the language. And then also in the report to City Council regarding that second amendment, it basically was saying we'll allow for the expansions of sites suited for new car dealerships. So within all those development agreements that I had to look at to understand the intent of what was moving forward to that is the requirement for new car dealerships.

Now, just take a quick step back in terms of what a PAD is. Well, the PAD allows for a modified list or a tailoring of zoning standards. It could be setbacks, it could be height requirements, it could be landscaping, parking, anything along those lines. You have to use a base zoning category to build or to modify your standards from. So what they used to base their standards off was the C-2 zoning district. Permitted uses as we already discussed in this meeting, regarding what was the permitted C-2 use, auto, recreational, vehicle, motorcycle, travel trailer, and boat sales and rentals. That was all included under the C-2 allowed uses at the time. But what they did is they modified that use listing. So they've taken that -- yes, it was allowed, but they modified it. They allowed it to -- they modified it to include the listing for automobile sales new and used. If they needed to add that -- or if it was already included in the existing listing, they didn't need to amend it already at point in time or add it to the modified list, it was already allowed. So we feel that the intent of that was the fact that they wanted to very specifically call out that it had to be new and used automobile dealerships subject to those conditional use permits.

We also have to look at understanding the intent, understanding the comprehension of the intent. We have to presume what the Council meant, to use precise words for a reason to give words their common meaning. So we have to understand by reviewing all these documents what exactly this was entailing.

So I know we've talked about the word "and." That's what we've focused on a lot. The way the PAD was written, it allows for outdoor auto sales new and used. We're going to continue to say that both need to be present at that time based off of the evaluation of that and the definition of the word "and." We're saying that it operates as a conjunction, so basically it's saying that two or more have to happen at the same time or in the same place. So what we are saying is that new and used have to be there at the same time.

In terms of the appeal process, which is before you this evening, the requirements are specifically called out within section 112 of the Zoning Ordinance. The applicant submitted the appeal based off of my interpretation that I made. Your decision and your scope of review this evening is twofold. One, it's limited in determining whether the decision -- whether the interpretation by the zoning administrator was in accordance with the intent and requirements of the zoning ordinance and you have to either affirm or reverse the decision of the Zoning Administrator. So that's your scope of the review this evening.

Just some housekeeping items real quick. In terms of noticing requirements, we met all the noticing requirements of the appeal. Based off of what's required in the Zoning Ordinance, we notified all property owners within 500 feet, it's included in a newspaper ad, and the site has been posted. We did receive one phone call and letter from the same individual regarding this appeal. They are in support of the used car sales. So just some minor housekeeping items.

If necessary, somebody could appeal this decision this evening to the Supreme Court. It's outlined within the Arizona Revised Statute and there needs to be an appeal filed within 30 days of the Board decision.

So in conclusion, in terms of the findings, the first one is the intent was not to allow a stand-alone used car dealership to be permitted within the Auto Mall. It's clearly spelled out within the documents that I had to review and it's also clearly specified within the staff report that's before you this evening. And the second point is it's been made clear from the beginning and consistently followed through, through a series of related agreements and supporting documents: Again, the original intent of the 1999 PAD; the subsequent PAD amendment that occurred in 2003; the numerous economic development agreements not only with the overall developer, but with the individual dealers as well; and then understanding the comprehension of the intent of the entire process.

So staff is recommending that the Board affirm the Zoning Administrator's determination.

So with that I'm going to hand it over back to Gary and he's going to talk about more of the legal interpretation of this.

So thank you.

GARY VERBURG: Can you give me the balance of time?

CHAIRMAN SOURS: Gary, you have about 13 minutes left, 13-and-a-half minutes.

GARY VERBURG: Okay. Very good. Thank you.

Yes, I'm going to go over my brief that I sent to you, the hearing memorandum on appeal, just quickly, because I trust that you've had it in your possession and had a chance to read it. And then I want to address some of the issues that Mr. Gilbert raised as well if I may in response to them.

I think in order to resolve this case or use hearing officers, you really need to have sort of a basic understanding of what does PAD zoning do; what's it for? And I know you were on the Planning and Zoning Commission, so you probably have a pretty good understanding, but if you'll just bear with me a little bit I think it will help put the arguments into a context that you can understand.

You use PAD zoning, or a landowner will use PAD zoning if they want to -- or a city as well, if they want to make changes or variances or precision in the underlying zoning classifications which are in existence. That's the reason why you use a PAD zoning, so you can have very unique requirements for specific parcels of land. That's the purpose behind it. So I think it helps you understand some of the arguments that are going to be made here today if you keep that in mind.

The first point I want to address is relating to what do you do if there's an ambiguity, we win if there's an ambiguity, that's not the law. I think I know the case they're citing and that particular case dealt with a circumstance where there really wasn't any what I would call parole or parole evidence. Let me put it a different way, because that's a legal term. Where there was no other evidence that would demonstrate what the intent was to clear up the ambiguity. The charge that you have here today is to actually discern the legislative intent of the City Council in 1999 when they adopt -- or was in 2000 when they adopted this particular PAD zoning. That's the critical issue.

And so when we talk about we call them canons of instruction of how do you interpret various ordinances in order to glean the event, that's what I cited to you in my brief is the courts will defer to the experts in the field oftentimes, because they assume that they know what they are talking about. I'm not saying that's the end-all to the question, I'm saying that his decision or his opinion on intent should be accorded some weight in your deliberations when you are discerning what was the intent of the City Council when they adopted this PAD zoning.

With respect to that, there's a couple of legal things you need to keep in mind on PAD zoning. And this is kind of an important concept. Under the zoning code that was in existence at the time and at the time of the amendment, the provisions of the ordinances state that the planned development plan shall become part and parcel of the zoning. It becomes part of the regulatory framework under which the land use can operate. So it's very important to read what is in that development plan or narrative submitted by, in this case it would have been the property owner, because those plans themselves become part of the regulations. And that's why this is a very important concept to understand. If it's in the plan, they've got to do it, otherwise they're violating the zoning code.

So you'll see in my memorandum I highlight some of the factual issues that have been described by both sides here, but the development plan we believe clearly indicates that new car dealerships were the contemplated primary use for this particular property.

We've heard a lot of discussions about well, the development agreement isn't really controlling or it's not controlling, it decided -- it was agreed to prior. I submit to you, yes, it was. I think it was one month prior to the PAD zoning. These documents were going up in tandem with one another. It defies logic to assume that the PAD zoning wasn't in some way connected to the development agreement. And point of fact, the development agreement is contingent upon adoption of the PAD zoning. So to pretend like they're not related to me is not a very strong argument and I don't think you need to put much weight on it.

Let's see. Also, noted by Mr. Gubser, if you take a look at the documents as a whole, you'll see references to signage, which can only relate to new automobile dealerships. You can also see the language used by the applicant in the narrative and in some of the other corroborating documents that went through the process. In almost each instance when we talk about what type of dealership, the reference is to new car dealership. While he states that -- excuse me. While Opposing Counsel has stated that there's no limitation on used car dealerships, there's absolutely nothing in the record that says only used car dealerships are permissible. It doesn't exist.

Their primary argument is to rely upon the underlying C-2 classification of zoning. And I was going to make this argument, but I think you made it for me in the questions, that that provision in the development plan that talks about outdoor automobile sales new and used would be redundant under his interpretation. There is no need for it. There would be no need to even have PAD zoning, you would just go forward with C-2 zoning. So I think the only inference you can take from that is certainly it had to mean something.

And you know how I talked to you about earlier in my presentation, PAD zoning modifies the underlying zoning. And to the extent that that modification is in there, it is binding upon the landowner. And that modification would not have to be in there at all if it weren't intended to make a change in the underlying zoning. It's redundant otherwise. So it has to mean something.

In many respects, this case evolves down to what is the meaning of the word "and." And I know that is sort of a difficult thing to perhaps wrestle with if I were in your shoes, but it's precisely when we have issues like this in the law -- and believe me they happen quite frequently -- the courts, and that's the role you're acting in, they need to determine the intent. And that's why you look at all those collateral documents. I'm not saying those documents are necessarily controlling of the zoning, that is not my position, nor is it the City's position. What those collateral documents prove, though, is what the intent of the City Council was at the time they adopted that zoning. There's no doubt in my mind that those incentives, up to \$14 million, would have been provided for used car dealerships if that was the intent of the City Council. It defies logic, it defies credulity and I just don't believe that is a conclusion that a person can rationally come up with. That's why you need to take a look at the other documents, the collateral documents that the Zoning Administrator referred to, because they inform the analysis of what was the City Council's intent. Not because any document standing alone is controlling, unless it's in the development plan document, in which case it is controlling, because it is part of the zoning regulation itself.

Let me talk briefly about the development agreement. That's a separate argument we have put in our memorandum to you and that really is based upon contractual rights. The development agreement, I think, quite clearly contemplates the development of new car dealerships. We can talk about whether or not they're in the recitals or in the body as a whole, but for anybody that's trained in the law, the purpose for recitals -- this is the exact purpose for recitals -- is to articulate the intent of the parties. So I think it's particularly

informative as to what the intent of the Council was at the time and particularly informative of what the landowner's intent was at the time; the obligation to put in new car dealerships.

So I'm not saying that the development agreement itself is a regulatory document, but there is a contractual obligation, and that contractual obligation runs with the land. That's in the development agreement itself. That's in the development agreement statutes. And that's also consistent with case law. So the fact that it runs with the land means the obligation continues beyond the 15 years. The development agreement obligation remains today and will remain during the future.

I think with that I probably ought to wrap it up and see if you have any questions.

Oh, I did want to add one other thing. There's been a lot of talk about the fact that his client is a used car dealership that is a full-service dealership. Well, full-service is not a use as recognized in the code, dealerships are. So when we talk about full-service dealerships, we're talking about the type of dealership that is contemplated at the time of the adoption of the PAD. And while his client maybe has a full-service dealership, what you should do is apply the common understanding that all people would. Nearly all used car dealerships are not full-service car dealerships, particularly in the year 2000 and I think you should afford that phrase its common meaning that most people would interpret that to mean you mean new car dealerships if you're talking about full-service dealerships.

I guess with that, I'll open it up to any questions.

CHAIRMAN SOURS: You have about a little over three minutes left, but if you're finished, we'll go into the questions.

GARY VERBURG: I'll go ahead and answer the questions. I think I've gotten my points out that I needed to get out.

BOARD MEMBER SCIBIENSKI: Chairman.

CHAIRMAN SOURS: Go ahead.

BOARD MEMBER SCIBIENSKI: I have a -- actually, I'm going to start with a question of Rob, of staff, if I may.

ROBERT GUBSER: Yes.

BOARD MEMBER SCIBIENSKI: In my dealings, I am aware of two instances and so I'm going to ask you and Tracy might actually be able to help with this, being that she was around before.

How many formal and informal interpretations of this manner have you given to other applicants? I know of -- it's my understanding that CarMax was given an informal interpretation before choosing to move to Tolleson and then I know the Mitsubishi dealership was trying to open a used car only lot and was given an informal similar interpretation. Can you tell me -- quantify how many others there are besides those two, this making the third?

ROBERT GUBSER: Board Members, the only one that I know of in my short time here for the almost two years that I've been here, is just this one that we were dealing with with AutoMatch. I have heard of about the CarMax one. I don't know when that was specifically done. But I have -- outside of that, I do not know of any other ones.

BOARD MEMBER SCIBIENSKI: Tracy?

TRACY STEVENS: Mr. Chair, I had also, but we weren't able to locate one for CarMax. So there may have been some discussions early on, but I don't recall ever making --

BOARD MEMBER SCIBIENSKI: That's why I clarified informal, because I know the Mitsubishi one did not get to a formal --

TRACY STEVENS: -- interpretation.

BOARD MEMBER SCIBIENSKI: -- interpretation. It was a casual discussion, so that's why I was trying to get some clarification on that.

So outside of those two that I've mentioned, no recollection, absolutely no formal, no idea of anybody else that's attempted and/or discussions?

TRACY STEVENS: Mr. Chair, Board Member, not that I'm aware of.

BOARD MEMBER SCIBIENSKI: Okay. Rob, can you bring your slides back up, please. Slowly go through and I'll tell you where to stop. I don't even know what to call it. It's going to be in your interpretation, so we can go through to that part. Keep going. Okay, stop. Let's start with this one.

You talked about the 2003 PAD amendments, you discussed this particular excerpt. I know that the applicant or whatever we happen to call him -- I'm sorry -- mentioned that it was -- the body of the complete paragraph, I don't have it directly in front of me. Do you mind reciting that paragraph where that sentence is included for me?

ROBERT GUBSER: If I can, Mr. Chair, Board Member Scibienski. I have that as Exhibit D within the report. It's the project narrative for Avondale Auto Mall and the retail shopping center. It's the PAD zoning amendment dated February 2003. If you'd like I can read the entire paragraph or would you just like the last sentence that this references?

BOARD MEMBER SCIBIENSKI: Read the paragraph, please.

ROBERT GUBSER: "AZVT, LLC acquired approximately 150 acres of unimproved land south of Interstate-10 between 99th Avenue and 107th Avenues. Subsequently, the project was rezoned to P.A.D.D. C-2 with a conditional use permit to allow for new and used vehicle sales and other various automotive related uses on the easternmost 100 acres. The westernmost 50 acres was rezoned to P.A.D.D. C-2 with a conditional use permit to allow for commercial and retail uses. Because of the Avondale Auto Mall's success, insofar as new vehicle dealers desire to purchase land within the 50-acre portion of the overall 150 acre property owned by AZVT, LLC., but not within property rezoned as the Avondale Auto Mall, AZVT wishes to obtain the proper zoning to allow for additional new vehicle dealers."

BOARD MEMBER SCIBIENSKI: Okay. Thank you very much for that.

ROBERT GUBSER: You're welcome.

BOARD MEMBER SCIBIENSKI: And I think my other question was actually addressed by Counsel and that was the -- and I guess, Rob, I'll let you address it too just to be certain.

Your definition of full-service, your belief that the intent of full-service is new and used, not just the offering of repair, sales, maintenance, are there any specific areas that lead you directly to that definition or are you kind of relying on what counsel did, what did somebody in the year 1999 think of when they thought of used car sales?

ROBERT GUBSER: Chairman Sours, Board Member Scibienski, that is my interpretation. I'm basing it off of the intent and what the -- the documents that I reviewed based off of the '99 rezoning as well as the 2003 rezoning, understanding what was written in the staff reports and included in the minutes.

BOARD MEMBER SCIBIENSKI: Okay. Thank you very much.

ROBERT GUBSER: Okay.

BOARD MEMBER SCIBIENSKI: Mr. Chairman, that's all I had.

CHAIRMAN SOURS: Okay. Thanks.

Mandy?

BOARD MEMBER NEAT: I have no questions.

CHAIRMAN SOURS: I just have one, I think. Having worked in commercial real estate for quite a while and in retail and knowing that we had -- now they're all online,

but at that point there were just binders and binders of zoning ordinances from all over that we used all the time. How would you expect a business to interpret your zoning ordinance? We've got this kind of meandering route to go through to figure out the actual zoning. How would someone interpret your zoning here?

ROBERT GUBSER: Chairman Sours, that is the question of the evening. It's the -- you know, obviously, if we had every single use that was out there, and like you said we would have binders and binders, we'd have a library full of uses. That is -- what my role is, is to understand what the intended use is, understanding the language that was contained within ordinances and staff reports, just understanding the overall intent, making that interpretation based off of that information that was provided to me and provided to us that is available and then basing off of that and going from there.

CHAIRMAN SOURS: It seems so much simpler, rather than Webster's definitions of "and" just to if your intent was to exclude these car dealerships you could have said -- you know, the wording could have been "except for stand-alone used car dealerships" or "stand-alone used car dealerships are not permitted." That seems like it would have been so much easier if that was clearly the intent.

ROBERT GUBSER: Yes, Mr. Chair.

The language that's contained within those PADs could have been written in a different way. I do know that the way we write PADs at this point in time, we're very specific in terms of the language that's contained within those documents.

CHAIRMAN SOURS: Okay. Thank you. Go ahead.

BOARD MEMBER NEAT: I was wondering -- this was 17 years ago. Wow, 1999, right? So if someone wanted a change to planning and zoning, if we wanted -- I mean, if someone came and said hey, this should be changed, is this how they would be changing it is by going to the Board of Adjustment or would they be able to go to Planning and Zoning and say this needs to be changed for 17 years later?

I'm just kind of confused personally on what my job is. And I know I've asked a million times and I've gotten the same answers and you guys were all great, very attorney spoken. But is it to uphold the intent of 1999 or is it to make a change in Planning and Zoning for 2016? I'm sorry, I'm just a little lost on that part.

ROBERT GUBSER: Chairman Sours, Board Member Neat, if they wanted to at this point in time, it would be a PAD amendment similar to what they did in 2003 to add that additional 50 acres and change the zoning. The PAD amendment would go before the Planning and Zoning Commission. They would make their recommendation to the City Council. The City Council as the legislative body would go ahead and approve or deny that request at that point in time.

Your charge this evening, again, is to -- specifically to make -- you know, to affirm or deny the decision based off the Zoning Administrator.

BOARD MEMBER NEAT: Thank you.

ROBERT GUBSER: You're welcome.

CHAIRMAN SOURS: Any more questions? No? Okay.

Mr. Gilbert, you have 15 minutes for rebuttal.

PAUL GILBERT: All right. In the attitude of fairness, since Gary quit 15 or three minutes early, I'll only use part of my rebuttal.

CHAIRMAN SOURS: Okay.

PAUL GILBERT: A couple of points I want to make; and there's a lot to cover here.

Mr. Verberg gave you a definition of a PAD. A PAD can restrict uses, that's done, but your charge this evening is to interpret this PAD. What did this PAD say? Look at the very first line.

How do I use this? Is that right in your eye?

ANDY JOCHUMS: Thanks.

PAUL GILBERT: All right. The very first words "In addition to the land uses permitted under the community C-2 zoning district." In addition. So this PAD -- that's what you're interpreting -- doesn't have any restriction language on it. The only guidance you had is it says we're doing it in addition. If they wanted to restrict it, they can do that in a PAD and they sure well should. Every PAD that I'm familiar with -- and this isn't my first rodeo -- when it restricts, it spells it out. That didn't happen here. It says clearly in addition. So that means it expanded it. Now, so this PAD doesn't ever discuss a restriction.

Furthermore, I agree with Mr. Verburg's general description to you of a PAD, but when you want to talk about intent, so to take this famous peak that you were talking about, look at my -- well, you can't look at it, but I will avow to you my presentation on this case presented the PAD built exclusively with development standards. We never talked about uses. It was just assumed we could have all these uses. That's the biggest reason developers use a PAD is you're varying development standards, which we did here. And my whole presentation focused on that. That's what the PAD did. It didn't bury the standards or the uses.

Now, we've talked a lot about intention. Intention is determined from the document itself. That's the PAD. There's nothing in the PAD that restricts uses. There's nothing in

the PAD that indicates in any way an intent to restrict used car uses. The only guidance is that language that we talked about before that talks about "in addition." So the purpose of this PAD was clearly to expand, not to restrict.

Mention was made about the sign. There were restrictions on who can go on the pylon sign, but that doesn't have anything to do with the restrictions as uses in the PAD. So there were restrictions on who could go on the pylon sign, but no restrictions whatsoever were mentioned with regard to used car dealers. So who can go on the pylon sign or not go on the pylon sign is irrelevant. That doesn't give you any guidance as to the restrictions and particularly in this case the uses that can go on the PAD.

I've got to vigorously disagree with Mr. Verburg's attempt to distinguish that Hart v. Bayless case. That's one of the most famous cases in zoning entitlement work. And I gave you the quote and it says "since zoning ordinances derogate from common law property rights, they are strictly construed against the municipality." So if there's an ambiguity here, you've got to strictly, strictly construe that against the municipality.

Another quote and I'm sorry I don't have this on the PowerPoint, Scenic versus -- excuse me. Scenic Arizona v. Phoenix Board of Adjustment. Quote " An agency's interpretation is not infallible and the courts must remain the final authority on critical questions of statutory construction." That's you are serving as a court. You're a quasi-judicial body. I'm sure Mr. Bock explained that to you. So you've got that right. It's you. You're in charge and you don't have to give deference to anything except the guidance of Hart v. Bayless and that is you've got to strictly construe it against the City. And there is no language in that PAD that restricts the use of used cars.

Now, I'm -- I'm really not happy that some of you seem to be putting some faith in other interpretations. Well, first of all, that's not relevant. That has nothing to do with this case before you. Because the City may have turned down another case, that doesn't interpret the PAD. That's your responsibility.

BOARD MEMBER SCIBIENSKI: Can I interrupt?

PAUL GILBERT: Do I have a choice?

BOARD MEMBER SCIBIENSKI: We'll add time.

CHAIRMAN SOURS: I'd rather you wait until the end so we don't impact his 15 minutes.

PAUL GILBERT: I don't mind.

But nobody has taken this, to my knowledge, to a formal interpretation. We're the only ones. So there's no precedence here that should guide you in any way in this regard.

I want to talk about the recitals. Again, I agree as Mr. Verburg stated, that the recitals in the development agreement are there and they can help interpret the development agreement. But in this case those recitals don't change the body of the development agreement. And the body of that development agreement specifically allows other automotive uses.

Secondly, that wording in the development agreement isn't even consistent with what the City has allowed on the property, because that development agreement says "new car dealerships." We've cited two instances of dealerships that have gone on there that are not new car dealerships. So you take the practical use of what's gone on there and it's clear that the City isn't interpreting this as limited to new car dealerships.

A couple of other quick points and then I'll wrap it up. It's interesting, because apparently under the interpretation -- remember, new and used only modifies the outdoor automotive sales, new and used, so I suppose then under this interpretation we could have all the used car sales we wanted on the property as long as we put them indoors, because that's the way the City's interpreting this. So we can have used cars, we just have to put them indoors, because this says "outdoor automobile sales, new and used." It's only -- this new and used is only used in conjunction with the outdoor automobile sales, so it has nothing to do with the use itself.

The major point I'm going to conclude with -- and I feel a bit redundant, but I'm still going to finish consistent with Gary's time. New and used, it keys down because there's only one phrase in the PAD that's up before you, new and used. What does the "and" mean? I have not heard tonight from any speaker from the City to give an explanation that indicates "and" is used here in a restrictive sense as a noun and not as a conjunctive. You haven't heard anybody refute that.

Furthermore, we have indicated, I forget, 16 instances where the City is using in its own ordinance the interpretation of "and" in the conjunctive as an expansion, an added to.

So in conclusion, the only, only wording in the PAD that talks about new and used modifies outdoor automobile sales, and the "and" is used, according to the City, in a very different interpretation than the City's been using the rest of the interpretation of the ordinance. Lastly, there's nothing in the development agreement that restricts uses. That wasn't their purpose, that wasn't their intent.

So for these reasons, we believe that the position of --

Oh, and I'll make this one real fast. I really take umbrage with them trying to classify us as not being full-service. I didn't spend a lot of time on it, but in that -- in Exhibit 3, we list every service we provide. I defy you to find in a new full-service dealership any activity that we don't perform in that list that we've handed to you.

So for these reasons, we believe that the decision of the interpretation should be overturned.

Happy to answer your question now.

CHAIRMAN SOURS: Go ahead.

BOARD MEMBER SCIBIENSKI: It's not a question, it's a comment. But historical decisions precedence have been used for eons in trying to discover intent. So I beg to differ with your argument against my use of what the City has interpreted for the last 16 years.

Now, unfortunately, there were very few cases, so whether or not we want to call it a precedent, that's for me to decide. But it is a very fair argument for me to find out how has the City been interpreting, what was the precedent set, and what has happened through the years? Does that mean it won't be overturned? No. But I think it's very valuable in trying to come up to a decision.

Also, do you sell new cars?

PAUL GILBERT: Do --

BOARD MEMBER SCIBIENSKI: Will they sell new cars?

PAUL GILBERT: On our side?

BOARD MEMBER SCIBIENSKI: Correct. Brand-new cars.

PAUL GILBERT: No.

BOARD MEMBER SCIBIENSKI: Okay. There is one use that you won't do that the others do.

PAUL GILBERT: Yeah, but that isn't how you define -- I'm sorry. May I respond?

CHAIRMAN SOURS: Sure. Go ahead.

PAUL GILBERT: That isn't how you decide -- how you define a full-service dealership.

BOARD MEMBER SCIBIENSKI: You didn't ask me to define one. You defied me to give you one use --

PAUL GILBERT: Okay.

BOARD MEMBER SCIBIENSKI: -- that you don't do. I just gave you it.

PAUL GILBERT: But those other car dealerships, every one of them sell used cars. And, furthermore, coming back to the interpretation, my point is there's only been one

request for a formal interpretation that I know of, so why these other cases were turned down and the details are not known and I don't think that sets a viable precedent whatsoever. For example, CarMax, we all know what happened to them. They were able to go right across the street, so they got all the benefits, except Avondale didn't get the sales tax. But they went right across the street. They didn't go in the mall. There was an opportunity for them to go there, so they didn't challenge it. I don't presume to know all the reasons, but, again, there's only been one request for interpretation, that's us.

BOARD MEMBER SCIBIENSKI: As was the City's statement to that point.

The City when I asked the question, responded that there was no formal applications.

PAUL GILBERT: That's correct.

BOARD MEMBER SCIBIENSKI: So you're arguing the exact point that they responded to me with.

CHAIRMAN SOURS: Sean, do you have any other questions?

BOARD MEMBER SCIBIENSKI: I'm done with questions. I'm ready to make a comment and a motion.

CHAIRMAN SOURS: Okay. Do you have a --

BOARD MEMBER NEAT: No, I don't have any.

CHAIRMAN SOURS: Okay. I guess that's it for the presentations.

What I'd like to do is we have one of two decisions to make here and I just want to make sure that we're very clear on what we're doing here. We can affirm or reverse the decision of the Zoning Administrator. Affirming the Zoning Administrator means that you agree with the interpretation that there cannot be stand-alone -- there cannot be a stand-alone used car dealer; that the used car sales must be connected with new car sales as a primary use.

On the other hand, reversing the Zoning Administrator means that you do not support the opinion of the Zoning Administrator, but you do support the position of the appellant Paul Gilbert and AutoMatch, which is that you could have stand-alone used car dealerships.

BOARD MEMBER SCIBIENSKI: Mr. Chairman, may I make a motion?

CHAIRMAN SOURS: Yes, sir.

BOARD MEMBER SCIBIENSKI: Okay. First I'm going to briefly explain my motion. But first let me make the motion and then I'll give a brief explanation to why I'm making the motion.

I move to affirm the decision of the Zoning Administrator. Not because I don't -- believe that used car sales would be a poor use in that particular facility. In fact, I would wholeheartedly support this particular project, but I do not believe it was the intent of the initial zoning. I do not believe that this was the appropriate channel in which to do that. In fact, I think they should go in front of the Planning and Zoning Board and ask for an amendment of the PAD to clarify and allow so that the City can then focus on what they want in the way of used car, versus opening the door to any type of used car lot.

So, therefore, my belief is the original intent was to not allow used car sales. Again, like the project. Don't think under current statute it fits. That's my motion.

CHAIRMAN SOURS: So your motion is to --

BOARD MEMBER SCIBIENSKI: Is to affirm the Zoning Administrator.

CHAIRMAN SOURS: -- the decision of the Zoning Administrator?

BOARD MEMBER SCIBIENSKI: That is correct.

CHAIRMAN SOURS: And I'm going to ask for a second on that and then we're going to open that for our discussion. Do we have a second on that motion? Okay.

BOARD MEMBER NEAT: I was just thinking. I'm sorry. I would like to discuss it.

CHAIRMAN SOURS: We can discuss this.

BOARD MEMBER NEAT: I would like to discuss it.

CHAIRMAN SOURS: Okay. Go ahead.

BOARD MEMBER NEAT: So it's kind of embarrassing, like, we can't ever talk, you know, behind closed doors.

I think in 1999, you're absolutely right, Sean, that the intent was new and used. And if that's what we're upholding, I will second it. However, I do think, as well, that this project needs to have the amended PAD due to the fact that as our attorney -- as the attorney -- not ours, the attorney for the City stated that in 1999 a used car sales lot was not a full-service dealership. It was a corner lot, you know, with some signs out front and it was a completely different appearance. So I see where the City was coming from in 1999 to say new and used based on the full-service, which this project does have.

And I do second you now that I'm speaking out loud just on the fact that we need the PAD amended instead of -- and the Zon -- based on it, the Zoning Administrator is right on the interpretations, but in 2016 I do think we need the PAD changed.

CHAIRMAN SOURS: Okay. For record purposes, we have a second on that motion and we're going to discuss this a little bit.

My opinion is that -- I worked on the retail side of the world for a long time and knowing what work goes -- how many reviews zoning ordinances go through and how many reviews PAD documents go through is months sometimes, public hearings. Everyone has a chance to look at this backwards and forwards.

If the intent was to not allow used car dealerships, stand-alone used car dealerships, I would have thought that there would be some language in there that made that specific rather than relying on definitions of "and." I'm just saying that it's not a good way to do business and you're asking a lot of commercial establishments to try to interpret these zoning ordinances if they don't mean what they seem to say on the surface.

I agree with the appellant here that the words "in addition" here are really important. The land use permitted under community commercial zoning. And I don't see anything in the C-2 zoning that excludes used car sales unless you really take a meandering road -- a meandering approach to it.

I really don't know what the City's intent was other than the Zoning Ordinance and the PAD document and I really don't care. I only care what the Zoning Ordinance and the PAD document actually read and there's nothing in either of them that excludes full-service stand-alone used car dealer.

So that's my comment right now.

BOARD MEMBER SCIBIENSKI: Two things, first and foremost, our job is to find intent. Whether we care about it or not, our job is to do our best to interpret what the intent was at the time and it's not an easy job. But that's just my rebuttal to that.

But outside of that, we have a first and a second and I -- you know, I think we should call a vote.

CHAIRMAN SOURS: The intent for me is in the actual ordinance.

BOARD MEMBER SCIBIENSKI: Understood.

CHAIRMAN SOURS: Okay. Because of the months of review those documents go through.

BOARD MEMBER SCIBIENSKI: I served on P and Z for six years, four -- three as the chairman. I know what goes into it and I know not everything ends up in the documents and in the minutes.

CHAIRMAN SOURS: Any other comments? Any other discussion?

BOARD MEMBER NEAT: I see both sides of the argument here completely, but if our job is intent in 1999, then the definition is correct. If our job is -- in my opinion, if the job is to do common sense for 2016 for what it's defined as, then I see it differently. But our job is intent, correct? I mean, is that correct? I've read this thing and --

CHAIRMAN SOURS: Yeah.

BOARD MEMBER NEAT: Okay.

CHAIRMAN SOURS: Okay. We've had some discussion, we've had presentations, I guess we're -- we have a motion on the floor. And the motion on the floor is to affirm the decision of the zoning administrator.

All those in favor say Aye.

BOARD MEMBER SCIBIENSKI: Aye.

CHAIRMAN SOURS: Those opposed. Oh, go ahead.

BOARD MEMBER NEAT: Aye.

CHAIRMAN SOURS: Those opposed say No. I say No. And here we are.

BOARD MEMBER SCIBIENSKI: And, Chairman, can I reiterate a comment again, please?

CHAIRMAN SOURS: Sure.

BOARD MEMBER SCIBIENSKI: To the applicant, I really do think it's a good project and I think it is needed today. And I would recommend highly, if we could, that you do go through the steps to get a PAD amendment to have it. I just don't think it was the intent of the City from the get-go, or moving forward, hence my decision tonight.

CHAIRMAN SOURS: So then the motion passes with the majority.

So I guess there's no other business and we're ready to adjourn the meeting here. Do we have a motion to adjourn the meeting?

VII. OTHER BUSINESS:

There was no other business.

VIII. PLANNING STAFF REPORT:

BOARD MEMBER SCIBIENSKI: Is there a planning staff report?

CHAIRMAN SOURS: Do you have any reports, Rob?

ROBERT GUBSER: Not this evening, sir. Thank you.

BOARD MEMBER SCIBIENSKI: Okay. Thanks.

IX. BOARD COMMENTS AND SUGGESTIONS:

X. ADJOURNMENT:

BOARD MEMBER SCIBIENSKI: I'll move that we adjourn.

CHAIRMAN SOURS: Do we have a second to adjourn the meeting?

BOARD MEMBER NEAT: I second.

CHAIRMAN SOURS: All in favor of adjourning the meeting?

BOARD MEMBER NEAT: Aye.

BOARD MEMBER SCIBIENSKI: Aye.

CHAIRMAN SOURS: We're done here.

With no further business, the meeting concluded at approximately 7:45 p.m.

FOR SPECIAL ACCOMMODATIONS

Individuals with special accessibility needs, including sight or hearing impaired, large print, or interpreter, should contact the City Clerk at 623-333-1200 or TDD 623-333-0010 at least two business days prior to the meeting.

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Staff Signature

Date