



## Action Report

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**File #:** 17-119

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**TO:** Chair and Board of Adjustment

**FROM:** Eva Cutro, Community Development Director  
Paul Michaud, Senior Planner  
George Burton, Planner

**DATE:** April 12, 2017

**CONTACT:**

George Burton, 480-348-3525

**AGENDA TITLE:**

Appeal for relief from the ruling of the Town Zoning Administrator regarding the application by TMS Ventures, LLC for Hillside Building Committee Review for the Property located at 5507 E. San Miguel Ave (Assessor's Parcel Number: 172-47-078D).

Case No. BA-16-7

**BACKGROUND**

History

TMS Ventures LLC ("TMS") is proposing to build a home on the property located at 5507 E. San Miguel Avenue ("TMS Property"). On March 2, 2016, TMS submitted an application for a variance to allow a proposed driveway cut to exceed the limitation on length. The Board of Adjustment continued the variance application to the meeting of May, 2016. However, on March 30, 2016, TMS withdrew its variance request due to some changes TMS made in its plans that TMS believes has now eliminated the need for the variance.

TMS subsequently submitted an application for Hillside Building Committee review. Hillside Building Committee review on a new home requires both a conceptual plan review and a formal plan review. TMS has stated to the Town staff that it believes it has legal access to the TMS Property pursuant to an implied way of necessity and that such access created thereby on the neighboring/southern lots provides access to the TMS Property. The legal status of access to the subject property is currently the subject of pending litigation in Maricopa County Superior Court (the "Pending Litigation"). Access is typically reviewed as part of the building permit process. The Hillside Building Committee review examines land disturbance and other such matters regulated by the Hillside Code within the boundaries of the subject site.

On September 8, 2016, the Hillside Building Committee held a conceptual plan review meeting of the proposed home in accordance with the Town's Hillside Ordinance. Subsequent to the conceptual review, attorney Francis Slavin (representing three of the property owners neighboring the TMS

Property) sent a letter to the Chair of the Hillside Building Committee (and to Town staff and the attorneys representing TMS in the Pending Litigation) stating that the Hillside Building Committee lacked legal authority to process the formal application by TMS due to the Pending Litigation and other matters (the “September 20, 2016 Slavin Letter”). On November 29, 2016, Community Development Director Eva Cutro and Town Attorney Andrew Miller issued a letter to the attorneys representing TMS stating that the TMS Hillside Building Committee application may be processed “at risk” during the Pending Litigation (the “November 29, 2016 CD Director Letter”). The “at risk” referenced in the CD Director’s Letter is a reference to the possibility that if an outcome of the Pending Litigation is different than the applicant anticipates, it could result in the Hillside Committee needing to rehear the matter. On February 16, 2017, TMS’s formal Hillside Building Committee submittal was delivered to the Town. Per Town Code and State Statute, an appeal of a Zoning Administrator’s decision to the Board of Adjustments shall suspend further decision making on the matter until the BOA has ruled on the appeal. Given this, the Town has not provided a response to the submittal.

### The Appeal

On December 29, 2016, a notice of appeal on behalf of Teresa and Joe Zachariah, Terry Appel, Alfred and Ingrid Harrison, and Save Camelback Mountain, an Arizona non-profit corporation (collectively, “Appellants”), was filed by the law offices of Francis Slavin appealing the Town Zoning Administrator’s decision to allow the TMS Ventures, LLC Hillside Building Committee application to proceed “at risk” during the Pending Litigation regarding access to the property.

Per the appellant’s submittal, “.... This appeal of the ZA Decision is being filed for the purpose of obtaining an order from the Board of Adjustment that the Zoning Administrator erred in the enforcement of the Town’s Zoning Ordinance and Subdivision Code by deciding that the Hillside Building Committee may process, consider and decide the TMS Application “at-risk” without TMS first complying with the following Town code and ordinance requirements:....”

### **RECOMMENDATION:**

Staff recommends that the Board of Adjustment (“Board”) deny the appeal and affirm the Zoning Administrator’s decision to allow TMS to continue to process its Hillside Building Committee application “at risk,” in accordance with the November 29, 2016 letter from Eva Cutro and Andrew Miller. First, an appeal to the Board is available only for the Zoning Administrator’s “enforcement of the zoning ordinance.” See, A.R.S. § 9-462.06(G)(1); Town Code, Section 2-5-3(C)(1). Therefore, the Board has no jurisdiction regarding any issues related to the Town’s subdivision or other Code requirements. Second, the Zoning Administrator did not make any order, requirement or decision regarding application of the Zoning Ordinance. Instead the Zoning Administrator simply notified TMS that if it sought to continue with its Hillside Building Committee review, it would be at its own peril. The Zoning Administrator did not make any decision as to any requirement that may or may not apply to the TMS property. Finally, Appellants’ will not suffer any prejudice by allowing the Hillside Building Committee review to proceed “at risk.” As made clear in the November 29<sup>th</sup> letter, the Town will require a final determination in the Pending Litigation before issuing any building or other permits, and any determination by the Hillside Building Committee will be subject to stipulations referencing the outcome in the Pending Litigation. Specifically, as stated in the November 29<sup>th</sup> letter, “depending on the court’s resolution of other issues that have been raised. . . additional or different development requirements may apply.” The Town’s development and processing requirements are dependent

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upon the final outcome of the Pending Litigation and issuance of a building permit will be contingent upon the resolution of the Pending Litigation.

**ATTACHMENTS**

- Vicinity Map & Aerial Photo
- Application
- November 29, 2016 CD Director Letter
- Application with Exhibits and prepared by the Law Offices of Francis Slavin (said Exhibits include the September 20, 2016 Slavin Letter and the November 29, 2016 CD Director Letter)
- March 24, 2017 letter with Exhibits and prepared by the Law Offices of Jordan Hiser & Joy, PLC
- March 29, 2017 letter with Exhibits and prepared by the Law Offices of Francis Slavin
- March 29, 2017 Superior Court of Arizona Motion for Partial Summary Judgement
- Noticing Materials
- A.R.S. § 9-462.06(G)(1)
- Town Code Section 2-5-3(C)(1)

C: Francis Slavin (Applicant)  
Case File BA-16-7