

# Staff Summary Report

Hearing Officer Hearing Date: January 19, 2010

Agenda Item Number: 4

**SUBJECT:** This is a public hearing for a request by **AGAVE CENTER - CARL'S JR. RESTAURANT (PL090412)** located at 8825 South Jewel Street for two (2) variances.

**DOCUMENT NAME:** 20100119kko01 **PLANNED DEVELOPMENT (0406)**

**COMMENTS:** Request by **AGAVE CENTER - CARL'S JR. RESTAURANT (PL090412)** (Nick Wood/Snell & Wilmer, L.L.P., applicant; Property Reserve Arizona, L.L.C., property owner) located at 8825 South Jewel Street in the PCC-1, Planned Commercial Center Neighborhood District and the SWOD, Southwest Tempe Overlay District for:

**VAR09018** Variance to allow a drive-through lane on the street side of the building deviating from Zoning and Development Code Section 3-408, drive-through orientation requirements.

**VAR09019** Variance to waive trees in the landscape islands for a portion of the parking area within the El Paso Natural Gas line easement.

**PREPARED BY:** Kevin O'Melia, Senior Planner (480-350-8432)

**REVIEWED BY:** Steve Abrahamson, Planning & Zoning Coordinator (480-350-8359) *SEA*

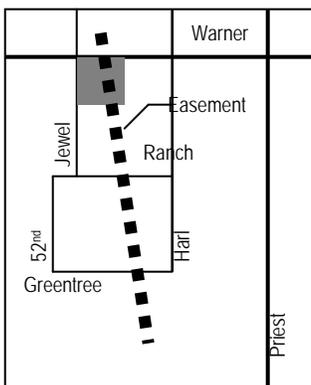
**LEGAL REVIEW BY:** N/A

**DEPARTMENT REVIEW BY:** N/A

**FISCAL NOTE:** N/A

**RECOMMENDATION:** Staff – Approval, subject to conditions

**ADDITIONAL INFO:** Net site area 0.86 acre



The applicant requests approval of two variances in order to allow development of this lot for a restaurant with a vehicular drive-through for food pick-up. The first variance requests an exemption from the requirement to conceal the drive-through from the building street frontages due to the presence of a natural gas line easement on site that limits building location. The second variance requests an exemption for the installation of trees in landscape islands where these islands are located over the gas line easement. Staff agrees with the applicant that the natural gas line easement limits the ability of site development within the requirements of the Zoning and Development Code. Staff supports both variance requests, subject to conditions of approval.

A neighborhood meeting is not required for these variance requests since the site is remote from residential development. The case has been advertised in the newspaper, neighboring property owners have been notified of the Hearing by mail and the site has been posted. At the time of preparation of the report, staff has received no public input regarding the requests.

**PAGES:**

1. List of Attachments
- 2-3. Comments / Reasons for Approval
4. Conditions of Approval / History & Facts
5. Description / Zoning & Development Code Reference

**ATTACHMENTS:**

1. Location Map
2. Aerial Photo
- 3-6. Letter of Explanation –Variance Requests, dated 12/17/2009
7. Neighborhood Meeting Requirement Applicability Letter, dated 12/10/2009
8. Proximity of Site to Residential Development Map
9. Site Plan
10. Project Data
11. Floor Plan
- 12-13. Exterior Elevations
- 14-18. El Paso Easement Information Letter, dated 01/08/2010 (1 page) and El Paso Natural Gas regulations regarding the use of the gas line easement (4 pages)
- 19-33. Site Photographic Survey

## COMMENTS:

### Site Analysis:

In the northeastern portion of the Agave Center a series of lots are currently being subdivided for development. Recently, Jewel Drive has been extended into the Agave Center from Warner Road south to Ranch Road to assist with this development. The subject site is at the northeast corner of Warner Road and Jewel Drive. A recently installed row of three Phoenix Date palms in the right of way on the western edge of this site help define the Agave Center entrance on Jewel Street. Existing native and arid adapted landscape is located in the Warner Road right of way, including along the northern edge of this site. A bus stop is also located in this frontage, near the northeast site corner. The site is vacant with the exception of a roofless El Paso Natural Gas masonry equipment enclosure. Two concrete gas line valve vaults are located to the west of the enclosure. These structures are the surface component of buried regional gas lines that diagonally bisect the site. Also, a retention basin for storm water runoff from half of the Jewel Street extension is located on the west of the site near the palms.

Three easements currently impact the site. An 8'-0" wide public utility easement is located in from the western and northern site property lines. A 30'-0" wide landscape easement is located in from the northern property line. A separate utility easement for interstate transportation of natural gas cuts diagonally north-south through the eastern half of the site. As indicated on the Amended Plat for the Sahara Agave Center, this easement is of an unspecified width and is to be dedicated by separate instrument. The site plan for the proposed development indicates the easement width is 40'-0".

### Position of drive-through:

In autumn, 2009 the applicant initiated a development process by submitting the restaurant concept for preliminary site plan review. During the interdisciplinary C.O.T. staff and development team review period which followed, it was determined by planning staff that a site design is available with a drive-through in the interior of the site, that is, oriented so it is partially shielded from the public streets by the building. The disadvantage of the staff scheme is that the bulk of the site parking is buffered from the building entrances by the drive-through. The opportunity of moving the building to the eastern part of the site and allowing the bulk of parking between the building and the street frontages in order to remedy this disadvantage is not allowed by the presence of the gas easement. This site planning limitation, where the building is forced to be located on the west of the site, is directly the result of the position of the gas line easement on the site. Staff agrees with the applicant that the most reasonable development for this site places the drive-through to the north and west of the restaurant and balances the following design determinants:

- The restaurant is positioned on the west half of the site, out of the way of the gas easement.
- For pedestrian paths that originate from the parking area, the dining room is easily accessible to patrons who drive to the site and walk to restaurant entrances without having to cross the drive-through or walk extensively around its edge.

### Trees in Easement:

As indicated above, the limitation of the position of the building mandates the parking area location to the east of the site, including over the gas line easement. Landscape islands associated with parking may not have trees within the easement due to potential interference of mature root systems with existing subterranean gas line structures. The Zoning and Development Code does allow placement of trees for parking area shade in a flexible configuration which would allow minimum 20 percent shade at the summer solstice at 3:00pm. Staff observes that the easement's size precludes attainment of a minimum 20 percent solstice shade throughout the parking area. Shade canopies may be considered to attain the 20 percent goal but similarly, the foundations of canopies are excluded from the bulk of the parking area by the easement's location.

### Variance Requests:

The Zoning and Development Code Section 3-408 requires that "New drive-through facilities shall be oriented toward side or rear yards and not placed between the street right-of-way and the primary customer entrance." The applicant requests exemption from this part of the ordinance due to a site-imposed limitation on the position of the building away from the easement. A building position on the east side of the site, which would allow the restaurant entrance to be oriented toward site parking and the street and allow the drive-through

to be tucked behind the building, is denied for this development due to the presence of the easement.

The Zoning and Development Code Section 4-704 requires that "Parking lots shall have landscape treatments that provide shade and allow for natural surveillance. Two (2) options are provided for conformance." The applicant requests exemption from this part of the ordinance due to a site-imposed limitation on the position of the building away from the easement, which also mandates the position of a portion of the parking area over the easement. The applicant requests exemption from the two options due to the inability of placing landscape islands for canopy trees or shade structures at ends of or to the sides of parking rows that are over the easement. The applicant does not seek an exemption for parking area landscape that is outside of the easement, and the applicant does not seek to abolish landscape islands over the easement but to be allowed to not install trees in these islands.

#### **Section 6-309 D Approval Criteria for Variances:**

1. A special circumstance is applicable to the property in the form of a gas line easement which restricts the position of structures and trees on the property to a greater degree than that for a typical property. The gas provider has indicated that a structure, any part of a structure, or a tree is restricted from placement within the easement right of way.
2. The strict application of the Zoning and Development Code will deprive this property of privileges enjoyed by other property of the same classification in the same zoning district in that a circuitous parking to entrance pedestrian path would be established and the size of parking (and of restaurant) would be restricted on the property to a greater degree than that for a typical property.
3. The adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitation upon other properties in the vicinity and zone in which such property is located. The adjustment is warranted due to allow the property owner to develop a project of size and quality similar to that for a typical property.
4. The special circumstance of the site (the presence of the gas line easement) is not self-imposed by the property owner, but is a pre-existing feature of the site. Refer to "Gas Line Easement of Unspecified Width per Book 498 of Maps Page 9, Maricopa County Records and Book 47 of Misc. Page 564, Maricopa County Records." (Source: Amended Subdivision Plat of Sahara Agave Center).

#### **Conclusion**

Staff recommends approval of each of the two (2) variances requested. Staff believes the applicant's site design solution successfully supports the approval criteria for the variances.

#### **REASONS FOR APPROVAL:**

1. A special circumstance applies to the land that will limit development on the eastern portion of the property, which in turn impacts development on the entire property.
2. Authorization of the variances is necessary for the preservation and enjoyment of substantial property rights for this property.
3. Authorization of the variances will not be materially detrimental to persons residing or working in the vicinity of the property, and is not materially detrimental to persons on adjacent properties, in the neighborhood or to the public welfare in general.
4. The adjustments authorized are not a grant of special privileges that are inconsistent with the limitations upon other properties in the vicinity and zone in which the property is located.

**CONDITIONS  
OF APPROVAL:**

1. Development Plan Review approval shall be obtained and construction documents for site development shall be submitted to the Development Services Building Safety Division for building permit by January 19, 2011 or the variance approvals shall be made void. Subsequently, an expiration of the building plan check period or issued building permit will result in expiration of the variances.
2. Establish the width of the natural gas easement, dedicate this easement by separate instrument and have the instrument recorded at the Maricopa County Recorder's office prior to issuance of building permit.
3. Provide a continuous minimum 3'-0" high screen on the street side of the drive-through. The screen shall consist of a combination of landscape berm and masonry or concrete site wall. The landscape berm may not be less than 50 percent of the entire screen. Provide site wall of materials and finish that architecturally compliments the materials and finish of the building. Details of screen wall and landscape berm layout shall be approved during Development Plan Review process.
4. Modify the existing retention basin on the western edge of Lot 3 to conform to the site plan. The reconfigured basin is required to handle 100 year storm water runoff for Jewel Street (east half) extending from Warner Road south to Ranch Road. Incorporate the capacity requirement for this basin with the requirement for on-site water retention for Lot 3. Details of reconfigured retention basin layout as it relates to screen wall and berm placement shall be approved during Development Plan Review process.
5. The exemption of trees applies only to parking landscape islands or other landscape areas that are over the gas line easement. For each required tree that is exempted, install one additional tree (minimum 24" box installation size) on site or in one of the adjacent street frontages that otherwise would not be required by the Zoning and Development Code. Details of tree selection and locations shall be approved during Development Plan Review process.
6. Install landscape islands over the gas line easement where planting in islands provides a 100 percent ground cover spread when plants are mature. Details of plant selection and layout shall be approved during Development Plan Review process.
7. Promptly repair damage to paving and landscape caused by periodic heavy maintenance to gas lines contained under the natural gas easement.

**HISTORY & FACTS:**

- January 14, 1999      The City Council approved the Final Plat of Agave Center (Formerly Known as Warner 10 Commerce Center).  
Note: two parallel gas lines are located on sheet 2 of 2 of this plat with the following identification:  
"GASLINE EASEMENT PER BK 47 OF MISC PG 564 & BOOK 23 OF MAPS, PAGE 45 (NO DEFINED WIDTH)".
- January 7, 2010      The City Council approved the Amended Subdivision Plat for the Sahara Agave Center located at 1780 West Ranch Road in the GID, General Industrial District, PCC-1, Planned Commercial Center Neighborhood District and SWOD, Southwest Tempe Overlay District.  
Note: Lot 3 of this plat is the site at the northeast corner of Warner and Jewel being considered by Carl's Junior for a restaurant and drive-through.

**DESCRIPTION:**

Owner – Charles B. Russell, CFO/Controller, Property Reserve Arizona LLC  
Prospective Owner -- Jason LeVecke, Managing Member, MJKL Enterprises  
Applicant – Nick Wood, Snell & Wilmer, LLP  
Designer -- Jeff Dietz (Richard D. Oehler R.A. # 12821) Dietz Design

**General Plan 2030**

Projected Land Use -- Commercial

**Zoning**

Existing zoning -- PCC1, Planned Commercial Center Neighborhood District and SWOD, Southwest Tempe Overlay District

**Site (Lot 3, Sahara Agave Center)**

Net site area -- 0.86 acres (37,447 s.f.)

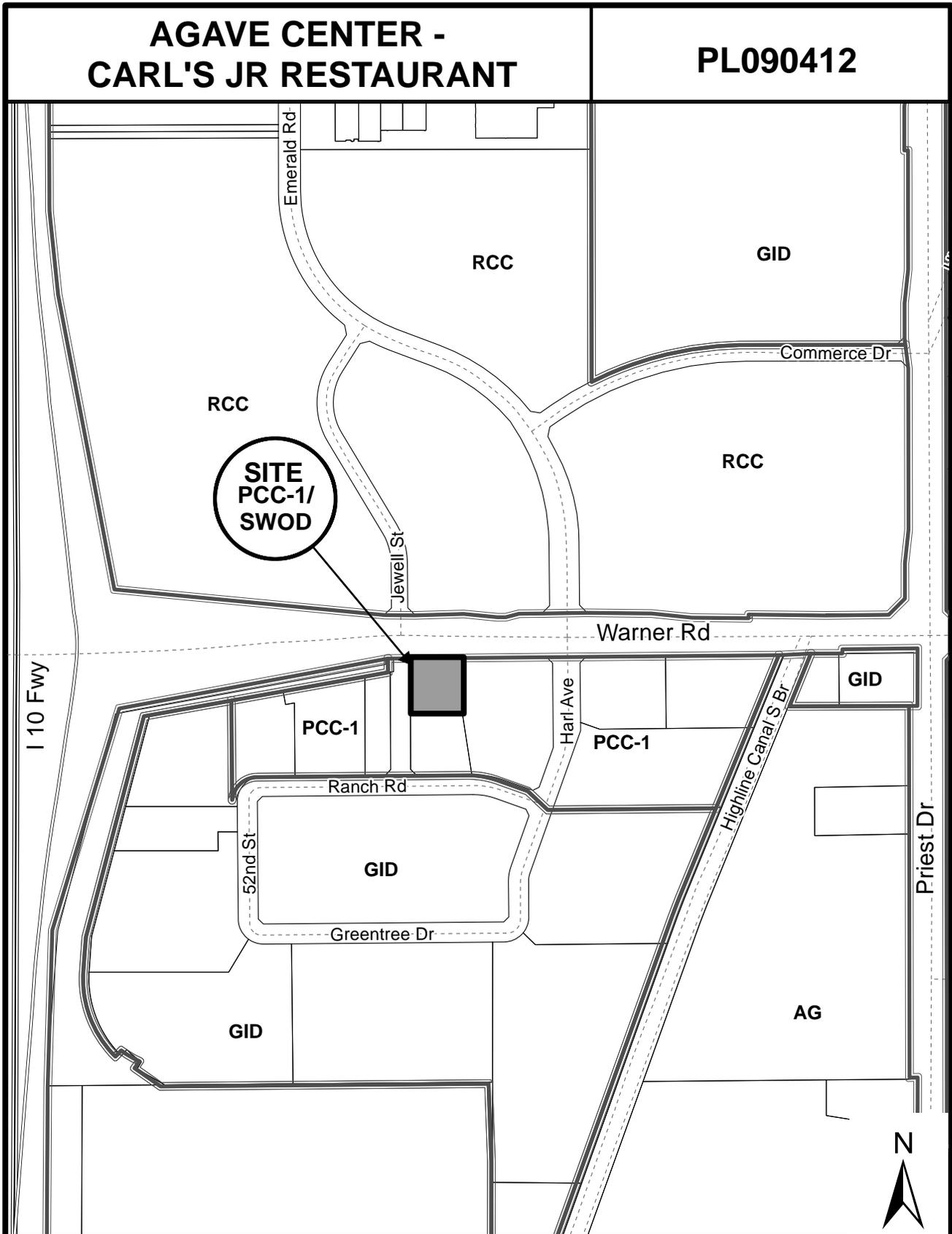
**Project Data**

Build'g area -- 2,985 s.f.  
Build'g/lot cover -- 7.97 % (50.0 % max. allowed)  
Lndscp/lot cover -- 25.30 % (15.0 % min. allowed)  
Build'g height -- 25.0 ft. (35.0 ft. max. allowed)  
Setbacks:  
    Front (W) -- 32.0 ft. (0.0 ft. min. allowed)  
    Side (S) -- 47.0 ft. (30.0 ft. min. allowed)  
    Rear (E) -- 135.0 ft. (30.0 ft. min. allowed)  
    Street side (N) -- 50.0 ft. (0.0 ft. min. allowed)  
Vehicle Parking -- 40 spaces including two disabled accessible spaces (40 required)  
Bike Parking -- 3 spaces (3 required)

**ZONING AND DEVELOPMENT**

**CODE REFERENCES:**

Part 6, Chapter 3, Section 6-309 Variances  
Part 4, Chapter 7, Section 4-704 Parking Facility Landscape Standards  
Part 3, Chapter 4, Section 3-408 Drive-Through Facilities



**Location Map**



**AGAVE CENTER - CARL'S JR RESTAURANT (PL090412)**



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602.382.6070 (Fax)  
www.swlaw.com

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DENVER  
LAS VEGAS  
ORANGE COUNTY  
PHOENIX  
SALT LAKE CITY  
TUCSON

December 17, 2009

**Hand Delivered**

Kevin O'Melia  
Senior Planner  
Development Services Department  
City of Tempe  
31 East Fifth Street  
Tempe, AZ 85281

**Re: 8825 South Jewel Street Variance Requests - "Carl's Jr"**

Dear Mr. O'Melia:

We represent MJKL Enterprises, which is acquiring the property known as 8825 South Jewel Street, from Property Reserve Arizona. MJKL Enterprises has submitted plans with the City of Tempe Development Services Department to develop a Carl's Jr brand restaurant with associated drive-thru facilities (case SPR09091) on the site. Due to specific site conditions, deviation from the strict application of the City of Tempe Zoning and Development Code (the "Ordinance") is necessary to permit the project to proceed. As authorized by the property owner, we are requesting two (2) variances from the Ordinance: (i) parking lot landscaping; and (ii) drive-through orientation for the restaurant. The purpose of this letter is to provide an overview of the requested variances and to analyze the property hardships that support approval of this request.

The property is located at the southeast corner of Warner Road and Jewel Street. It is a portion of the Agave Center (formally known as Warner 10 Commerce Center), which was last platted in 1999. The property is generally flat, with no apparent unique geographic or hydrologic features. There is an existing easement to El Paso Natural Gas for a major natural gas underground pipe along the eastern half. This easement is approximately 38 feet in width and dates back to 1933 (Maricopa County Recorder's Office Record: BK47 of Misc, PG564). The easement prohibits the construction of any structures upon it and El Paso Natural Gas does not permit the planting of trees in the easement area (to protect the pipelines and to ensure access to same).

There are two (2) sections of the Ordinance that require deviation because of the existence of the easement.

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**Request One:** Deviation from Section 3-408, which states that “[n]ew drive-through facilities shall be oriented toward side or rear yards and not placed between the street right-of-way and the primary customer entrance. Minimum width of drive-through lane is nine (9) feet”.

The purpose of this development standard is to conceal the drive-through from view of the public right-of-way. The subject site “fronts” onto Jewel Street, which would require the drive-through to be located along Warner Road or behind the structure.

Along Warner Road, there is only about 100 feet of lot frontage between the mandatory landscape setback along Jewel Street and the gas pipeline easement. Therefore, we do not have adequate space to provide an ingress or egress driveway into the site at a safe distance from the intersection. Any drive-through located in this area would conflict with traffic safety and, as such, is not a viable design alternative.

We explored an alternative design with City staff. The alternative features a drive-through oriented to the rear of the building (see Exhibit 1). Unfortunately, this design would require customers to either walk through the drive-through traffic lane or walk an extensive distance around the traffic lane to access the restaurant. Staff determined that this design is not practical (or desirable) because (i) pedestrians tend to walk in straight, direct routes (which will encourage crossing the traffic lane) and (ii) the parking spaces near the drive-through exit (numbers 21 to 32 and 11 to 20) would constantly conflict with existing vehicles (particularly when entering and exiting the parking stalls during peak business hours). Therefore, the alternative site layout is unsafe and not functional.

**Conclusion:** There is no viable alternative site design that will comply with Section 3-408 in the strictest sense. The gas pipeline easement prevents alternative site designs that are consistent with this requirement.

**Request Two:** Deviation from Section 4-704(A) which requires the provision of either standard or performance based shade provision for the parking lot area. Typically, this requirement would be met by planting shade trees in the landscaping planters adjoining the parking stalls.

However, because of the gas line easement, we are not permitted to install trees in any of the planters otherwise required within the easement area. This restriction on tree planting prohibits trees within the planting areas located in the center of the parking lot (as shown on the site plan).

Because of the required standard details for parking lot design (drive isle width, turn radii, etc), lot layout and landscaping requirements, there is no functional parking lot configuration that will permit compliance with the shade provisions. The applicant will relocate the trees that would have been required to other locations on the property.

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Conclusion: Today, parking lot design requires conformance to "best practices" of parking stall configuration, drive isle size/location as well as consideration for landscaping areas. Because of the no tree planting restriction over the gas line easement area, there is no possible way to accommodate the installation of shade trees.

Section 6-309.D contains four (4) findings that are required for the approval of a variance (also see A.R.S. § 9-462.06). The following is an assessment of those criteria in relation to these requested variances.

6-309.D.1: *"That special circumstances are applicable to the property, including its size, shape, topography, location or surroundings"*

The subject site has a unique special circumstance in that it is bifurcated by an easement that is approximately 38 feet in width and runs from the south to the north boundary of the property, impeding the development of approximately 5,600 square feet of the site (about 15% of the net property).

Conclusion: The gas line easement is a special circumstance applicable to the subject property.

6-309.D.2: *"The strict application of this Code will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district"*

Because of the special circumstance of the gas line easement, the property is unable to be developed in a reasonable manner with a permitted land use as other PCC-1 zoned properties. The easement restricts the site design in a manner that will prevent the development of a permitted land use, a privilege enjoyed by other properties of the same classification and zoning district.

Conclusion: Strict application of Section 4-704 (Landscape) and Section 3-408 (Drive-Through Orientation) would deprive the ownership of the property the ability to develop a permitted land use on the subject site, a use right enjoyed by other similarly zoned properties in the area.

6-309.D.3: *"The adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is located"*

The requested deviation from the strict application of the Ordinance is not a grant of special privileges; this request will only permit the development of the site with an already permitted land use. The trees normally required are simply going to be relocated to other landscaping areas on the site, resulting in an equivalent number of trees as would otherwise be required. The drive-through location is necessary to facilitate the development of the site with a

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restaurant with a drive-through component, a permitted land use in the PCC-1 District. By authorizing the variance to the drive-through location, no new or "special" privileges will be granted.

Conclusion: The requested deviations are minor in nature, will permit the development of the site with a permitted land use and will not grant any special privileges as this limitation, in its specific location and width, is unique to this site.

6-309.D.4: *"A variance may not be granted if the special circumstances applicable to the property are self-imposed by the property owner"*

The gas line easement dates to 1933, well before the current ownership was involved with the property. The site cannot be designed to comply with Section 3-408 and 4-704(A) of the Ordinance because of the existence of the easement.

Conclusion: The special circumstances are not self-imposed by the property owner.

In summary, the requested variances are minor development standard deviations that will allow the development of the site as a permitted land use within the PCC-1 zone. Alternative designs were reviewed with City staff. There are no practical functional alternative designs for the proposed restaurant facility that will alleviate the need for the variances requested. By approving these variances, the intent of the Ordinance will be maintained.

Respectfully submitted,

Snell & Wilmer

Nicholas J. Wood

NJW:NJG; dls  
Enclosures

**Snell & Wilmer**  
L.L.P.  
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Noel J. Griemsmann, AICP  
Sr. Urban Planner  
602.382.6824  
ngriemsmann@swlaw.com

December 10, 2009

City of Tempe  
Development Services Department  
31 East 5th Street  
Tempe, AZ 85281

Re: Neighborhood Meeting Requirement Applicability

Dear To Whom It May Concern:

The variance request for the property located at the southeast corner of Jewel Street and Warner Road is not subject to the neighborhood meeting requirement as it is more than 300 feet from an adjoining residential use. The graphic attached demonstrates the approximate distance to the closest known residential land uses, which is approximately 1,065 feet to the southeast and 1,500 feet to the west.

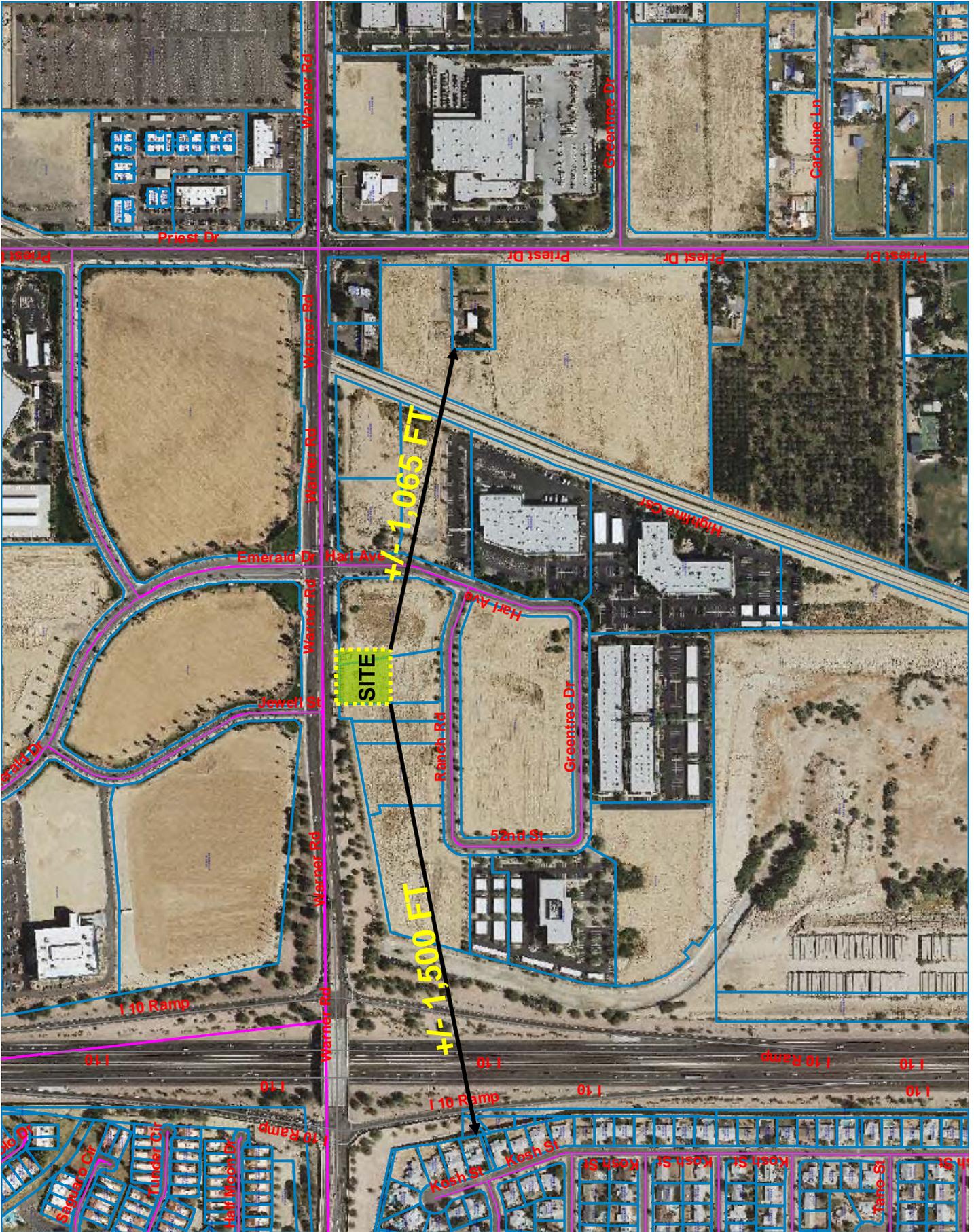
Since there are no residences within 300 feet of these variance requests, no neighborhood meeting is required under Section 6-402(B). Please consider this letter as documentation of compliance with the applicable requirements of Section 6.402 for the "Neighborhood Meeting".

Respectfully submitted,



Snell & Wilmer

Noel J. Griemsmann, AICP





# PROJECT DATA

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PARCEL OWNER/CLIENT: MJKL ENTERPRISES, LLC  
5210 S. PRIEST DRIVE  
GUADALUPE, AZ 85083

LAND DEVELOPER: SAHARA DEVELOPEMENT & INVESTMENTS  
2005 W. 14TH STREET, SUITE 130  
TEMPE, ARIZONA 85251

ARCHITECTURAL FIRM: DIETZ DESIGN LLC.  
6650 N. 47TH AVE.  
SUITE #1  
GLENDALE, ARIZONA 85301

ADDRESS: SEC. WARNER & I-10  
AGAVE CENTER  
TEMPE, ARIZONA

PROPOSED USE: CARLS JR.  
FAST FOOD RESTAURANT

PARCEL NUMBER: ..... A  
EXISTING ZONING: ..... PCC-1

NET SITE AREA (PAD B): ..... (±37,455 S.F.) ±.85 ACRE  
SITE COVERAGE: ..... 7.9%

ALLOWED MAXIMUM BUILDING HEIGHT: ..... 35'  
PROVIDED MAXIMUM BUILDING HEIGHT: ..... 25'

LANDSCAPE COVERAGE: ..... (9,469 S.F.) 25.3%

BUILDING AREA:  
CARL'S JR. .... 2,985 S.F.

REQUIRED PARKING:  
CARL'S JR.: ..... 2,985 S.F./75 = 40  
(PER 4-603E OF THE TEMPE ZONING ORDINANCE)

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TOTAL PARKING SPACES REQUIRED: ..... 40 spaces

TOTAL PARKING SPACES PROVIDED: ..... 40 spaces  
BIKE PARKING: (1/1,000 S.F.) ..... 3 spaces

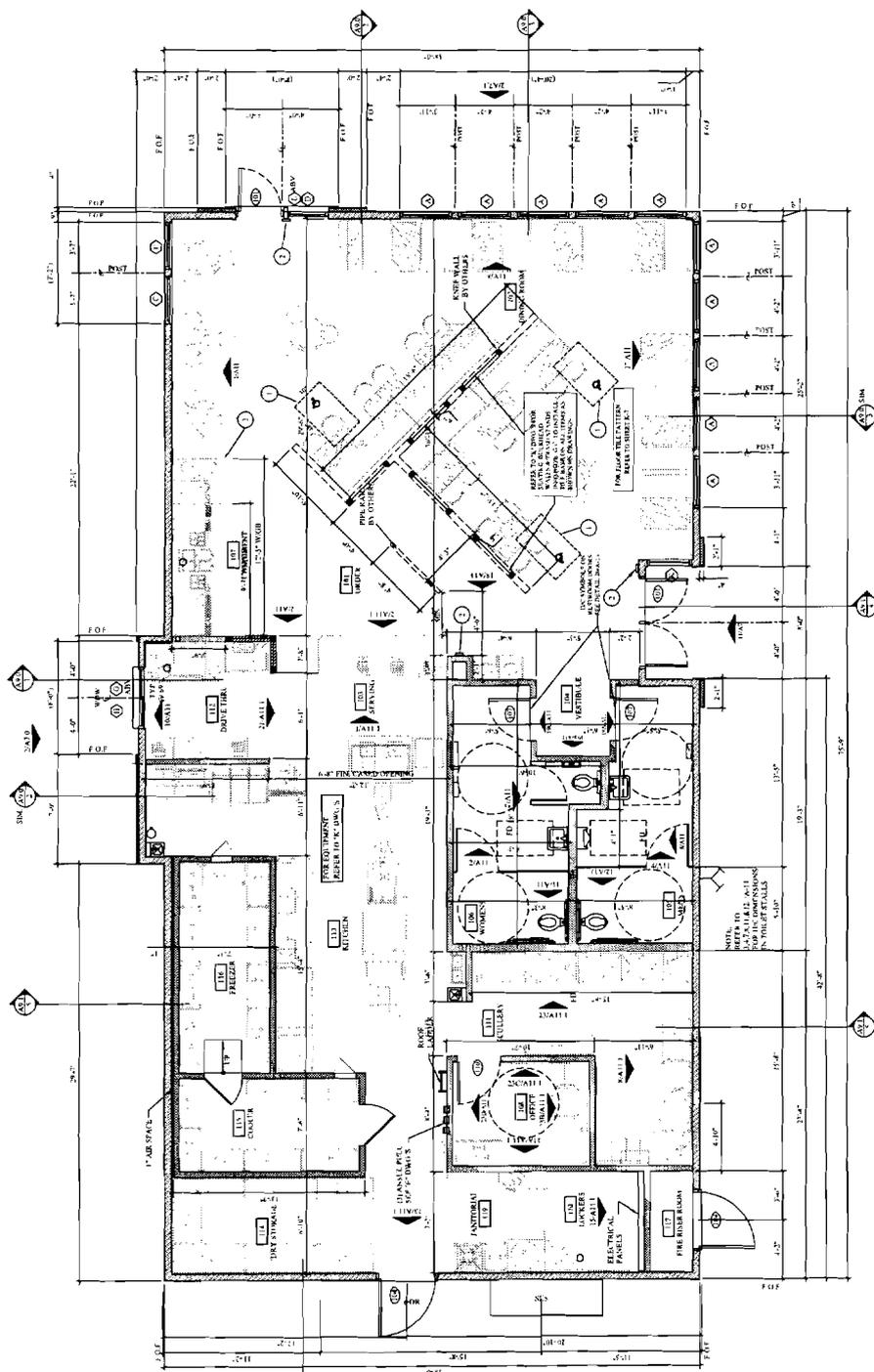
ACCESSIBLE PARKING PROVIDED: ..... 2 spaces

**GENERAL NOTES**

1. CONTRACTOR TO PROVIDE STOPS, BLOCKS AND 1/2" PLASTER BALKING WITH CONTRACTOR TO PROVIDE GRAY 1/4" FINISHES FINAL CORNER FURRING IN CONTRACTOR TO PROVIDE ACTUAL RETURNING TYPING ALL RIBBON
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50. CONTRACTOR TO PROVIDE ACTUAL RETURNING TYPING ALL RIBBON

**KEY NOTES**

1. ALL SEATING PER ROOMS AS PER ROOM SCHEDULE. ASSEMBLY OCCUPANCY SHALL HAVE THE OCCUPANCY RATING OF THE ROOM EXIT OR EXIT ACCESS BARRIERS FROM THE ROOM OR SPACE SHALL BE MAINTAINED BY THE OWNER OR CONTRACTOR. CONTRACTOR SHALL BE RESPONSIBLE FOR THE MAINTENANCE OF THE SEATING SHALL BE NO GREATER THAN 2'-0" IN HEIGHT PER ADA 4.8.3.6.



**FLOOR PLAN**  
SCALE: 1/4" = 1'-0"

**Dietz Design**  
Architectural - Planning  
8888 N. 47th Avenue, Ste. F  
Scottsdale, AZ 85254  
Tel: (480) 944-9944  
Fax: (480) 944-9944  
www.dietzdesign.com



A New Restaurant For  
**Carl's Jr.**  
L-10 & Warner, Agave Center  
Tempe, AZ

**REVISIONS**

NO.	DATE	BY	DESCRIPTION



**A3.0**  
SHEET NUMBER

**WALL LEGEND**

[Symbol]	INTERIOR FULL HEIGHT WALL
[Symbol]	INTERIOR HALF HEIGHT WALL
[Symbol]	EXTERIOR WALL SYSTEM
[Symbol]	EXTERIOR WALL FURNISH

#SPR09091





One Arizona Center  
Phoenix, AZ 85004-2202  
602.382.6000  
602.382.6070 (Fax)  
www.swlaw.com

DENVER  
LAS VEGAS  
LOS ANGELES  
LOS CABOS  
ORANGE COUNTY  
PHOENIX  
SALT LAKE CITY  
TUCSON

Nicholas J. Wood  
602.382.6269  
nwood@swlaw.com

January 8, 2010

Kevin O'Melia  
Senior Planner  
Development Services Department  
City of Tempe  
31 East Fifth Street  
Tempe, AZ 85281

**Re: 8825 South Jewel Street Variance Requests - "Carl's Jr"  
El Paso Easement Information**

Dear Mr. O'Melia:

My request for variance for the Carl's Jr store to be located at 8825 South Jewel Street is the need to deviate from (i) parking lot landscaping standards and (ii) drive-through orientation standards because of the existing El Paso Gas easement and pipeline facilities that bifurcate the site.

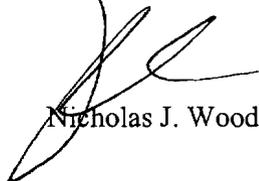
El Paso Gas will not permit the installation of trees or structures in the easement area. As noted in my narrative, this severely restricts design alternatives for the subject property. Enclosed you will find a copy of the El Paso Gas encroachment form that documents their policy regarding "surface alterations".

Please note that under "General Requirements for Surface Alterations" (Page 2), Item II.B clearly states that "no trees are allowed on the right-of-way". Additionally, the same section that the "Company's easement restricts the placement of a structure, or any part of a structure, within the right-of-way".

I respectfully request that this letter and documentation be added to the materials provided to the hearing officer for his/her review to document El Paso Gas' restrictions regarding use of the easement.

Respectfully submitted,

Snell & Wilmer



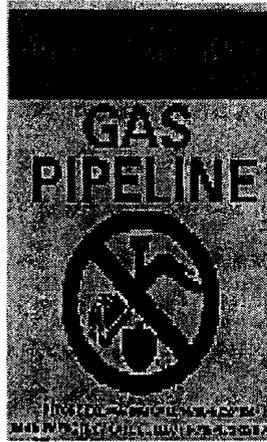
Nicholas J. Wood

NJW:NJG; dls  
Enclosure

Revision Date: 5/01/03

Western Pipelines for:

- Colorado Interstate Gas Co.
- El Paso Natural Gas Co.
- Mojave Pipeline Operating Co.
- Wyoming Interstate Company



Permit Requested by \_\_\_\_\_  
 Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 Phone ( ) \_\_\_\_\_

Your gas company representative is \_\_\_\_\_ Phone (Collect Calls Accepted)

ENCROACHMENT LOCATION					
SECTION:	TOWNSHIP:	RANGE:	COUNTY:	ST:	PM:
LATITUDE:	LONGITUDE:	LENGTH:	STATION NO:		
LINE LIST NO.:		ROW WIDTH:	ALIGNMENT SHEET NO.:		
ENCROACHMENT DESCRIPTION					

One Call number for your area is \_\_\_\_\_

\_\_\_\_\_ ("Grantor") hereby grants a permit to install, maintain and operate the above-referenced encroachment facilities ("Permitted Facility") on the above-referenced Company easement or other property ("the Property"). This permit is granted subject to the terms, requirements, and conditions shown below and strictly in accordance with the general requirements and item(s) \_\_\_\_\_ of the encroachment specifications shown on the following page(s).

**DAMAGE PREVENTION:** Permittee agrees that it shall not begin construction upon and along the Property until Permittee first provides Grantor with plans and specifications and until such plans and specifications have been approved by Grantor. Permittee further agrees to contact the following the statewide associations (One Call) within its area at least two working days prior to the commencement of construction on the property. Such construction shall be made only when a representative of Grantor is present at the time and place of construction. The instructions of such representative relating to the safety of the pipelines or other facilities of Grantor shall be followed by the Permittee, its agents and employees. Any damage done to Grantor's facilities incurred due to Permittee's failure to adhere to the state "CALL BEFORE YOU DIG" law, or incurred during construction of the Permitted Facility, shall be paid for or repaired at the expense of the Permittee.

This Permit shall be revocable in the event of noncompliance of any terms, requirements, conditions, and specifications hereof upon written notice given to Permittee and /or owner of record.

**INDEMNIFICATION:** Permittee covenants and agrees to at all times protect, indemnify, hold harmless, and defend Grantor, its officers, agents or employees, from any liability or expense, including attorneys' fees, arising from claims asserted by any person or persons for personal injuries, death or property damage including but not limited to employees of the Permittee or its contractors, subcontractors or their employees, arising from or growing out of the construction, existence, maintenance, operation or removal of the Permitted Facility.

**ENVIRONMENTAL AND SAFETY LAWS:** Permittee shall comply with all federal, state, and local laws, rules and regulations, agency policies, guidance documents or common law including, but not limited to, those related to safety or pollution or protection of the public health and the environment that govern the emission, discharge, release, manufacture, processing, distribution, use, treatment, handling, storage, disposal, or transportation of hazardous or non-hazardous substances, materials, pollutants, contaminants, chemicals, and/or waste.

COMPANY: \_\_\_\_\_

By: \_\_\_\_\_  
 GRANTOR

I acknowledge that I am authorized to execute this Encroachment Permit for the above stated entity and that I have carefully read the requirements, terms and conditions of this Permit. I also understand the provisions and prescribed penalties as provided under the laws regarding excavation.

## ENCROACHMENT REQUIREMENT

Said company is an interstate transporter of natural gas and hazardous liquids and as such, is regulated by the Department of Transportation, Office of Pipeline Safety (OPS). In some cases state and local law may exceed the federal regulations. The general requirements listed below have been designed to comply with state and federal regulations as well as insuring the safety of the public and protecting the pipeline.

The following requirements have been developed to cover a wide variety of proposed uses that may run parallel with or encroach under, over or on the right-of-way easements or other property. These minimum requirements for most proposed encroachments are incorporated into this Permit to avoid conflict with existing easement rights. Additional requirements may be required depending upon the proposed encroachments. For a review of your individual situation, please contact the nearest \_\_\_\_\_ office at \_\_\_\_\_.

## GENERAL REQUIREMENTS FOR SURFACE ALTERATIONS

- A.  Many states have laws which require 48 hours notice be given to the operators of underground facilities prior to beginning excavation. This may be accomplished by contacting a One Call system (check your state).
- B.  Company's easement restricts the placement of a structure, or any part of a structure, within the right-of-way.
- C.  An authorized Company representative must be on site during any work performed on or across the right-of-way, and will remain as long as power equipment is utilized.
- D.  The Company representative will determine the amount of cover over the pipeline that may be required.
- E.  Any change in the amount of existing material (soil) on and over the right-of-way must be approved in advance.

### I. FENCES

- A.  Fence posts shall not be installed within 5 feet of the center of the pipeline, and the first post either side of the pipe shall be set in hand dug holes.
- B.  To perform normal maintenance, access through or around fences crossing the right of-way must be provided.
- C.  Installer shall adhere to provisions A & C of GENERAL REQUIREMENTS FOR SURFACE ALTERATIONS

### II. LANDSCAPING (plantings which require excavating beyond 1 foot in depth)

- A.  Flower beds and shrubs are permitted within the right of-way but may be damaged by required annual surveys, if planted directly over the pipeline. Heavy maintenance may require total clearing of the right of way.
- B.  Lawns and vegetable gardens are acceptable uses. No trees are allowed on the right-of way.
- C.  Provisions A & C of the GENERAL REQUIREMENTS FOR SURFACE ALTERATIONS pertain to this type of planting.

### STREETS, ROADS AND DRIVEWAYS

- A.  Residential or driveways intended for light vehicle access to a single family dwelling must have a minimum of 4 feet of cover over the pipeline. If heavy vehicles; such as semi trucks or construction equipment, will use the road, refer to **Item E** under this Section for additional requirements.
- B.  Driveways shall not run lengthwise within the right-of-way and

By:

PERMITTEE



must cross on an angle, which is not less than 45 degrees.

- C.  An opportunity for Company to make a pipe inspection must be given prior to the start of any construction.
- D.  Provisions A, C, D & E of the GENERAL REQUIREMENTS FOR SURFACE ALTERATIONS pertain to driveway crossings.
- E.  Highway, residential street or road construction requires a special encroachment agreement from the Land Department, and plans for such crossings should be submitted 90 days prior to work commencement to allow time for project impact review by the local Company office.

#### IV. TEMPORARY EQUIPMENT CROSSINGS

- A.  Normal loads acceptable to the state highway department may cross the pipeline where a minimum of 5 feet of cover is provided. Equipment such as construction, logging, etc., must cross the pipeline only at approved crossing locations where the cover has been checked and determined adequate to meet bearing load requirements.
- B.  Contractor shall also be required to meet Provisions, A, C & D of the GENERAL REQUIREMENTS FOR SURFACE ALTERATIONS.

#### V. OPEN WATERWAYS

- A.  Open waterways smaller than 3 feet wide at the bottom are defined as "ditches" and must have a minimum of 3.5 feet of cover from the top of the pipe to the bottom of the ditch, or the ditch must be lined using an approved method and material. Larger open waterways are defined as "canals" and are considered on an individual basis.
- B.  Anyone altering (clearing, regrading or changing alignment) a waterway must obtain approval from Company prior to making changes and shall meet Provisions A & C of the GENERAL REQUIREMENTS FOR SURFACE ALTERATIONS.

#### VI. EXCAVATION

- A.  Plans for any excavation on the right of way must be approved prior to commencing work. Excavating closer than 2 feet to the pipeline shall be done by hand until the pipeline is exposed and shall be done only under the supervision of an authorized Company representative.
- B.  When a backhoe is used, the bucket teeth should be curled under each time it's brought back into the ditch to reduce the chance of teeth contacting the pipe.
- C.  Any plowing or ripping of soil on the right-of-way, including agricultural, at depths greater than 1 foot will require specific authorization from the Company..

#### GENERAL REQUIREMENTS FOR BURIED LINE CROSSINGS

- A.  All buried lines crossing Company's right-of-way shall be installed adhering to all applicable codes and requirements governing such installations.
- B.  All buried lines crossing the right-of-way must cross on an angle at 90 degrees or as close to it as possible. This angle must be maintained across the entire width of the easement.
- C.  All buried lines should cross under the pipeline. However, when obstructions or unfavorable soil conditions are

encountered, or when the Company's pipeline is located at a depth greater than 4 feet, approval to cross over the line may be granted by said Company..

- D.  To avoid unexpected service interruptions of buried lines, crossing over Company's pipeline, a minimum of 24 inches of cover (or local minimum required depth) must be provided over the existing crossed line.

#### GENERAL REQUIREMENTS FOR BURIED LINE CROSSINGS CONT.

- E.  All buried lines crossing the pipeline shall maintain a minimum separation of 24 inches between the two lines, and shall remain level across the entire right-of-way.
- F.  No foreign appurtenances (meters, poles, drop boxes, collection basins, etc.) shall be located on the right-of-way.
- G.  A six inch wide vinyl burial warning tape shall be placed 12 to 18 inches above the crossing line and extend across the entire right-of-way, as a protective measure.
- H.  A joint trench is the recommended method for utilities to cross, and under normal circumstances only requires that one permit be obtained by the excavating company.

#### I. COMMUNICATION LINES (TELEPHONE, TV, OTHER DATA LINES)

- A.  Shall meet all provisions for GENERAL REQUIREMENTS - BURIED LINE CROSSINGS
- B.  Shall be encased in a rigid nonmetallic conduit across the full width of the right-of-way and buried at constant depth across the right of way(s).
- C.  Fiber optic lines must be encased in PVC or equal conduit and the conduit must be encased with a minimum 5 inch red dye concrete with minimum strength of 2,500 psi across the full width of the right of-way.
- D.  There will be no intentional grounding within 200 feet of the pipeline.

#### II. BURIED POWER LINES

- A.  Shall meet all of the GENERAL REQUIREMENTS - BURIED LINE CROSSINGS, **except** for item E.
- B.  Shall have minimum clearances between lines of 24 inches for 0 to 600 volts; 30 inches for 601 to 22,000 volts; 36 inches for 22,001 to 40,000 volts; and 42 inches for 40,001 volts and above.
- C.  In the event an underground electric line crosses the pipeline, it will be necessary to install the crossing line in pvc or rigid heavy wall steel conduit with a minimum 5 inch red dye concrete with minimum strength of 2,500 psi across the full width of the right of-way.
- D.  Signs should be placed at each edge of the right-of-way to mark the underground cable angle and path of crossing. If the underground cable crosses above the pipeline, the signs shall so indicate. These signs are to be furnished by the power company or the encroaching party.

#### III. SEWER AND WATER LINES

- A.  Shall meet all of the GENERAL REQUIREMENTS - BURIED LINE CROSSINGS.
-

- B. No manholes or other appurtenances shall be installed in the right of way.
- C.  Septic tanks and drainfields are not permitted in the right of way.

**IV. SUBSURFACE DRAINAGE TILE (NON-METALLIC)**

- A. Shall meet provisions A, B, E, G & H of GENERAL REQUIREMENTS - BURIED LINE CROSSINGS.

**V. METALLIC PIPE CROSSINGS**

- A.  All 4 inch and larger metallic pipes crossing Company's pipeline or any metallic pipe transporting potential hazardous material (petroleum, natural gas, etc.) shall have two corrosion test leads installed on Company's pipeline and two on the crossing pipe at the point of intersection.
- B.  Company personnel must install the leads on company's Pipeline(s) and, if requested, will also install the leads on the crossing pipe.
- C.  Metallic pipe crossings shall have an electrical insulation coating for the full width of the right-of-way.

**ABOVE GROUND UTILITY LINE CROSSINGS**

- A.  Power lines shall maintain a minimum height of 30 feet of clearance over the right-of-way grade.
- B.  Shall have no poles or appurtenances located on the right-of-way.
- C.  Above ground crossings shall not be above or closer than 200 feet horizontally to any gas escape vent (e.g., relief valve vent, station blowdown vent).
- D.  Any pot hole (bell hole) request shall be made through a Company's representative.
- E.  Any facilities laying on or just above the surface on the right of way that would impede the access of company vehicles shall have a vehicular ramp installed over the facilities.

Special provisions not addressed in this document shall be listed below or as an attachment labeled as (EXHIBIT "A") attached to this form and initialed by the Permittee.

\_\_\_\_\_

\_\_\_\_\_

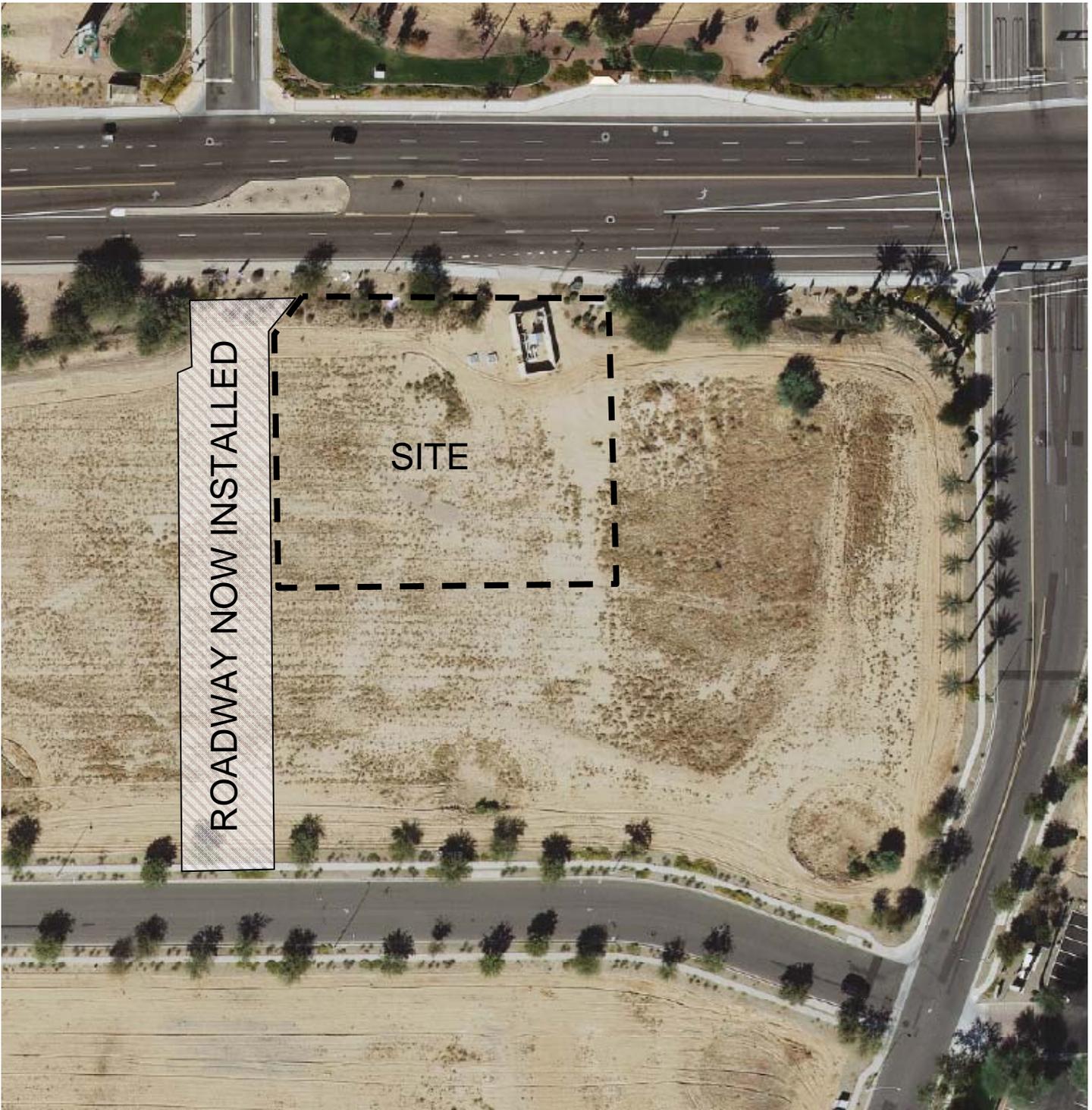
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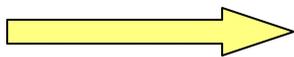
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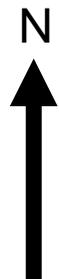
**State One Call Contacts**

- Arizona (800) 782-5348 [www.azbsinc.com](http://www.azbsinc.com)  
Maricopa County (602) 263-1100
- California (800) 227-2600 [www.digalert.org](http://www.digalert.org)
- Colorado (800) 922-1987 [www.uncc2.org](http://www.uncc2.org)
- Kansas (800) 344-7233 [www.kansasonecall.com](http://www.kansasonecall.com)
- Nevada (800) 227-2600 [www.usanorth.org](http://www.usanorth.org)

- New Mexico (800) 321-25378 (ALERT) [www.nmonecall.org](http://www.nmonecall.org)
- Oklahoma (800) 522-6543 [www.callokie.com](http://www.callokie.com)
- Texas Lone Star Notification (800) 669-8344  
Texas Excavating Safety System (800) 344-8377  
Texas One Call (800) 245-4545
- Utah (800) 662-4111
- Wyoming Wyoming One Call (800) 348-1030  
Call Before You Dig of Wyoming (800) 849-2476



 = Direction of View



## 8825 S Jewel St – Site Photographs Taken 01/11/10

