

**BOARD OF ZONING ADJUSTMENT
STAFF REPORT**

Date: February 3, 2014

CASE NUMBER

5877 / 5790 / 4193

APPLICANT NAME

Joe Walvis (M. Don Williams, Agent)

LOCATION

4114 Moffett Road
(Northeast corner of Moffett Road and Wolf Ridge Road)

VARIANCE REQUEST

SURFACE: Surfacing Variance to allow a storage yard to have gravel surfacing in a B-3, Community Business District

TREE PLANTINGS: Tree Planting Variance to allow frontage trees placed beyond the 25' front building setback in a B-3, Community Business District

**ZONING ORDINANCE
REQUIREMENT**

SURFACE: The Zoning Ordinance requires storage yards to have concrete or asphalt surfacing in a B-3, Community Business District

TREE PLANTINGS: The Zoning Ordinance requires all frontage trees to be placed in the 25' front building setback in B-3, Community Business District

ZONING

B-3, Community Business

AREA OF PROPERTY

1.8 ± Acres

**CITY COUNCIL
DISTRICT**

District 1

**ENGINEERING
COMMENTS**

If the aggregate surfacing is approved for use as requested the applicant will need to submit and receive a Land Disturbance Permit for the proposed site development.

**TRAFFIC ENGINEERING
COMMENTS**

Traffic Engineering has no objection to the surface variance, as the area in the rear of the building is not included in the required parking calculations. The perimeter fence will prohibit vehicles from parking beyond the proposed

gravel surface in most of the area. Additional vertical obstructions (i.e. bumper stops, posts, etc.) may be necessary around the proposed grassed detention area to prohibit encroachment.

URBAN FORESTRY
COMMENTS

No comments.

FIRE DEPARTMENT
COMMENTS

All projects within the City of Mobile Fire Jurisdiction must comply with the requirements of the 2009 International Fire Code, as adopted by the City of Mobile.

ANALYSIS

The applicant is requesting Surfacing and Tree Planting Variances to allow a storage yard to have gravel surfacing with frontage trees placed beyond the 25’ front building setback in a B-3, Community Business District; the Zoning Ordinance requires storage yards to have concrete or asphalt surfacing and all frontage trees to be placed in the 25’ front building setback in B-3, Community Business Districts.

The site was most recently before the Board at its November 5, 2012 meeting. At that time, the applicant requested a variance to allow the storage of vehicles and boats on an existing grass surface for an existing pawn shop. The Board denied the request, and the applicant filed an appeal with the Circuit Court within the 15-day appeal period.

The application at hand is a result of court-ordered mediation held in December 2013 for the appeal case. The appeal case has been placed on the administrative docket for the court, until the application at hand has been acted upon by the Board.

The Zoning Ordinance states that no variance shall be granted where economics are the basis for the application; and, unless the Board is presented with sufficient evidence to find that the variance will not be contrary to the public interest, and that special conditions exist such that a literal enforcement of the Ordinance will result in an unnecessary hardship. The Ordinance also states that a variance should not be approved unless the spirit and intent of the Ordinance is observed and substantial justice done to the applicant and the surrounding neighborhood.

Variances are not intended to be granted frequently. The applicant must clearly show the Board that the request is due to very unusual characteristics of the property and that it satisfies the variance standards. What constitutes unnecessary hardship and substantial justice is a matter to be determined from the facts and circumstances of each application.

The applicant’s narrative for the variance requests is lengthy, and as such, each of the three addendums follow, as submitted with the application:

First Addendum to Joe Walvis variance application
4114 Moffett Road, Mobile, AL
January 6, 2014
Don Williams, agent

9. Description of the use and character of improvements

The City of Mobile has noted the following:

- a. Vehicles, boats and trailers stored on grass surfacing within rear fenced yard, with a locked gate;
- b. Site is no longer in compliance with the approved 1995 tree plan for building addition;
- c. a 25'x 40' metal building addition has been previously placed without plans and permits .

This BZA application addresses all three issues. We will comply with the trees and building permit issues. This application requests that applicant be allowed to store vehicles, boats and trailers on a gravel alternative parking surface (not asphalt or concrete).

Second Addendum to Joe Walvis variance application
4114 Moffett Road, Mobile, AL
January 6, 2014
Don Williams, agent

10. For Bulk or Site Variance applications

The dispute between the City of Mobile and Joe Walvis began when a City inspector received an anonymous complaint that Pronto Pawn was operating a used car lot on this property without a business license. Said complaint was determined to be unfounded, but that inspector elected to inspect the entire property and, among other violations, cited the Appellant, Joe Walvis, for violating the off-street parking provisions of its zoning ordinance, to-wit, that such storage area was a grass surface and not a paved surface.

Said fenced storage area is located to the rear of the pawn shop and is enclosed by a chain-link fence and secured by a locked gate. All pawn shops are required by law to store pawned items on site and this fenced area is used exclusively to store pawned items which can be stored outdoors, such as vehicles, boats, trailers and various other equipment. It is not accessible for off-street parking by employees or the public and has been in continuous use for that purpose for 20 years. In the chart of permitted uses described in §64-12.6 of said ordinance, such storage of vehicles and boats by pawn shops is expressly authorized in B-3 districts.

Walvis filed a variance application with of the City of Mobile Board of Zoning Adjustment seeking a variance which would allow that enclosed storage area to continue to be used for the storage of pawned vehicles, boats, trailers and other equipment on a grassed surface in a B-3 community business district in connection with Appellant's operation on said site of a pawn shop known as Pronto of Alabama, Inc. The Board of

Zoning Adjustment denied that application in a final decision dated November 5, 2012. On November 20, 2012, Joe Walvis filed a notice of appeal from a final decision dated November 5, 2012 of the City of Mobile Board of Zoning Adjustment [Circuit Court Case No. CV-2012-902581].

Pursuant to the order of Circuit Judge Stewart Hicks Stewart, the parties to such appeal attended a Court-ordered mediation before mediator, Stephen E. Clements, on December 17, 2013. At such mediation, the City advised that it did not have statutory authority to change, by settlement, any prior ruling of the Board of Zoning Adjustment; however, Jeff Hoffman, of the City's Urban Development staff, and the City's legal counsel, John Lawler, proposed a settlement option by having the Appellant, Joe Walvis, submit a new application for a variance with of the Board of Zoning Adjustment which requested that he be allowed to pave the aforesaid fenced storage area with a gravel surface. Walvis and the City agreed to such settlement proposal.

This application for such variance is submitted to the Board of Zoning Adjustment pursuant to the terms of the mediated settlement agreement between the Appellant, Joe Walvis, and the City of Mobile Urban Development Department and their respective legal counsel.

Third Addendum to Joe Walvis variance application
4114 Moffett Road, Mobile, AL
January 6, 2014
Don Williams, agent

10. **For Administrative Appeal applications**

Joe Walvis contends that there is no City zoning ordinance which is applicable to a pawn shop's fenced area for the storage of pawned vehicles, boats, trailers and various other equipment, as is shown by the following:

§64-1 of the City's zoning ordinance provides that its purpose is to:

provide for the harmonious development of the City of Mobile, in accordance with the master plan heretofore made and adopted by the Mobile city planning commission, to lessen congestion in the public streets, secure safety from fire, provide adequate light and air, avoid undue concentration of population, promote health and the general welfare and conserve the value of buildings by encouraging the most appropriate use of the land by districting according to the peculiar suitability of the land for particular purposes, all to create conditions favorable to health, safety, convenience or prosperity. [Emphasis added]

§64-2 of the City's zoning ordinance provides definitions for certain words and phrases which are used in such zoning ordinance. Appellant suggests that the following

definitions are relevant to its argument that the City's Off-Street Parking provisions do not require the paving of this fenced area:

- > The word "shall" is mandatory; the word "may" is permissive.
- > ***Accessory use:*** A use customarily incidental to the principal use of a building site or to a structure and located upon the same building site with the principal use.
- > ***Alternative parking surface:*** Pervious or semi-pervious parking surface, having a design acceptable to the city engineer and the director of the urban development department, or her or his designee, capable of accommodating vehicles up to five thousand (5,000) pounds gross vehicle weight and maintained free of weeds, dust, trash and debris; an example of such a material being interlocking grass paving blocks, porous asphalt or grasscrete. Crushed limestone, gravel, shell or sod shall not be considered an acceptable alternative paving surface. Alternative paving surface design shall be appropriate to the intended use. Alternative parking surfaces may only be required as a condition of application approval for spaces requested in excess of the minimum ratio requirements of this chapter. [Emphasis added]
- > ***Building site:*** The land occupied or to be occupied by a structure and its accessory structures and including such open spaces, yards, minimum area, off-street parking facilities and off-street truck loading facilities as are required by this chapter; every building site shall abut upon a dedicated street for at least twenty-five (25) feet. [Emphasis added]
- > ***Permitted use:*** A use meeting all the requirements established by this chapter for the district in which the use is located
- > ***Structure:*** Anything constructed or erected which requires location on the ground or is attached to something having a location on the ground; except (a) public utility poles, wires, guy wires, and cables; and, (b) fences and walls other than building walls. [Emphasis added]
- > ***Vehicular use area:*** All areas used by any and all types of *vehicles, boats, trailers, or other equipment, whether such vehicles, boats, trailers, or equipment are self-propelled or not for the purpose of, including but not limited to, driving, parking, loading, unloading, storage, or display, such as, but not limited to, new and used car lots, and activities of a drive-in nature in connection with banks, restaurants, gas stations, grocery and dairy stores, and the like.* [Emphasis added]

§64-2 of the City's zoning ordinance does not provide a definition for the words "storage", "parking" or "off-street parking"; therefore, the plain meaning of such words must be deemed to be the intended meaning of such words in such ordinance. The plain meaning of the words "off-street parking" is a facility on privately or publicly owned property which provides a place for property owners, employees and/or the public to park vehicles in a location other than on a public.

§64-6.A of such ordinance provides as follows:

The off-street facilities herein required shall be provided in, at least, the amount and maintained in the manner herein set forth....

The various sub-paragraphs of said Paragraph A expressly provide for the size and location of each parking space, access thereto and maneuvering room, drainage and surfacing thereof, wheel stops, the delineation of each such parking space and lighting requirements, unless such parking spaces are to be used exclusively for employee parking or service by parking attendants. Further, depending on the size and nature of any building located on any property, a specific number of parking spaces are required. Entrances and exits to each such parking facility must be provided and located so as to minimize traffic congestion and to prevent vehicles from backing into a roadway. Specific-sized safety aisles must be provided between abutting rows of parking spaces for pedestrian safety and must have wheel stops, be paved and be free of standing water. Each such parking facility must also be screened and landscaped and the sale, repair, dismantling, or servicing of any vehicles, equipment, materials, or supplies thereon are prohibited.

The aforesaid requirements and restrictions make it abundantly clear that the provisions for such off-street parking facilities were exclusively intended to apply only to off street parking by property owners, employees, and/or the general public. In addition to provisions for off-street parking, §64-6 also provided for off-street truck loading facilities. That truck loading section was clearly intended for safety purposes and has no applicability to Appellant's use of this property. There is also no provision in the City's zoning ordinance provision which addresses or specifically applies to a "vehicular use area", as defined therein.

The only logical inference which can be drawn from any of the aforesaid provisions of §64-6.A is that such requirements are applicable only to off-street parking facilities which are used for parking by property owners, employees and/or the public. Clearly, the aforesaid off-street parking provisions have no applicability to Appellant's grassed, fenced area used exclusively for the storage of pawned vehicles, boats, trailers and various other equipment suitable for outside storage.

In fact, there is no provision in the City's ordinance which specifically regulates the manner in which a property owner is to use its property for the temporary storage of pawned vehicles and equipment at a pawn shop location, although the chart of permitted uses in §64-12.6 specifically provided that vehicles and boats may be stored by pawn

shops in B-3 districts. The statutes governing the operation of pawn shops expressly require pawn shop to take possession of and temporarily store any pawned items on site, and the City was presumably aware of that statutory obligation 21 years ago when it first licensed and allowed a pawn shop to operate at this location. No other business operation has a similar obligation, which makes Appellant's use of and this property unique and probably explains the provision in §64-12.6. Despite allowing such pawn shop business to operate at this location for more than 21 years, the City's ordinance contains no specific provision for Appellant's use of this fenced area. The City has, however, clearly allowed and acquiesced to Appellant's use thereof for the last 21 years, without objection or incident.

When a specific use is not specifically listed in said zoning ordinance, §63-12, paragraph 3, provides that "the director of inspection services or his agent shall make a determination of the district or districts in which the use may be permitted as a use by right or by planning approval", but that determination has not been made and/or disclosed to Appellant in this case. The initial inspector – and the City – simply assumed that the aforesaid off-street parking provisions applied to Appellant's use and issued citations therefor.

In addition to the above, § 64-10 of said zoning ordinance provides that, in interpreting and applying its provisions, such interpretations shall be held to be the minimum requirements for the promotion of the public health, safety and general welfare. Grass has been growing within this fenced area for the last 21 years and, environmentally, that's a plus for the City, because, as previously pointed out to the City, paving this fenced area would clearly increase the volume of surface water runoff from this area into the City's storm sewer system. No one, including the City, has complained about this enclosed area's *not* being paved in the last 21 years. The initial inspector and the City simply assumed that it was a zoning violation and acted accordingly. Appellant's point is that no public health, safety or general welfare issue presently exists because of this unpaved, grassed fence-enclosed area and such an issue is not likely to exist in the future.

A pawn shop is legally required by §5-19A-5(c), *Code of Alabama 1975*, as amended, to retain possession of all pawned items on site. That requirement is unique to the operation of a pawn shop business, which makes the storage of such vehicles, boats and trailers unlike the operation of any other business. Other than the chart of permitted uses described in §64-12.6, there is no other ordinance provision which regulates such storage of vehicles or boats by pawn shops, The owners of this pawn shop have relied on this section and the absence of any other zoning requirement by the use for the 21 continuous years of such greased surface for such storage area. Even if any applicable ordinance required that such storage area be paved, to now require otherwise does constitute an unnecessary hardship, but there is no applicable City ordinance which now requires such paving with gravel or any alternative parking surface and there is no *health, safety, convenience or prosperity* basis for such an ordinance. The Administrator simply has no zoning ordinance which requires such paving.

End of applicant's narrative.

It should be noted that an Administrative Appeal narrative, addendum # 3, cannot be considered by the Board since an application for Administrative Appeal was not submitted for the Board's consideration.

Staff's suggestion during the mediation process was that the applicant consider the submission of a variance request that shows at least some attempt to comply with Zoning Ordinance requirements, as the applicant had no desire to pave any of the storage area with asphalt or concrete. Staff did suggest that the applicant could request aggregate surfacing as part of their variance request, instead of the original request for unimproved surfacing; this suggestion by staff, however, was not intended to imply that aggregate surfacing would be a compliant surface, nor that it would be recommended for approval.

The applicant argues that the Zoning Ordinance does not specify that a paved surface of any sort is required for storage, however, on December 31, 2013, the Mobile City Council approved an amendment to the Zoning Ordinance that specifically allowed aggregate storage yards "by right" in I-1, Light Industrial districts: such yards had only previously been allowed "by-right" in I-2, Heavy Industrial districts. The original amendment submitted for the Planning Commission and subsequently the City Council's consideration included a proposal to allow aggregate storage yards in B-3, Community Business districts, with Planning Approval, however that proposal was not approved by either body.

This site came to the attention of staff when it was determined that vehicles sales were occurring on-site, without appropriate Zoning approval. Upon further investigation, it was additionally found that existing trees, depicted on an approved 1995 tree plan, had been removed without permits, that vehicles and boats were being stored on unimproved surfaces, and that a building addition had been constructed, between 2006 and 2010, without the appropriate permits.

Approval of the applicant's request for an aggregate surfaced storage yard in a B-3 district would be contrary to the public interest, as such storage yards are only specifically allowed in I-1, Light Industrial and I-2, Heavy Industrial districts. Furthermore, there are no special conditions which exist on the property that would make the literal enforcement of the Zoning Ordinance requirements a hardship, nor prevent the applicant from paving the storage area in asphalt or concrete, as all intervening trees have been removed from the area. Finally, the spirit of the Ordinance would not be observed, and substantial justice would not be provided to the surrounding area if the applicant were allowed to continue to store boats and vehicles on unimproved surfaces, especially given the fact that the existing buildings have been enlarged both with and without permits, and that trees have been removed and rendered the site out of compliance with previously approved tree and landscape plans.

The applicant's request to place required frontage trees outside of the frontage area is somewhat merit-based. The property is not a legal lot created through the Subdivision Regulations, and if at some point the property is submitted for subdivision review, a request will be made to dedicate right-of-way along its western boundary for the future major street, the Inner Ring Road, which

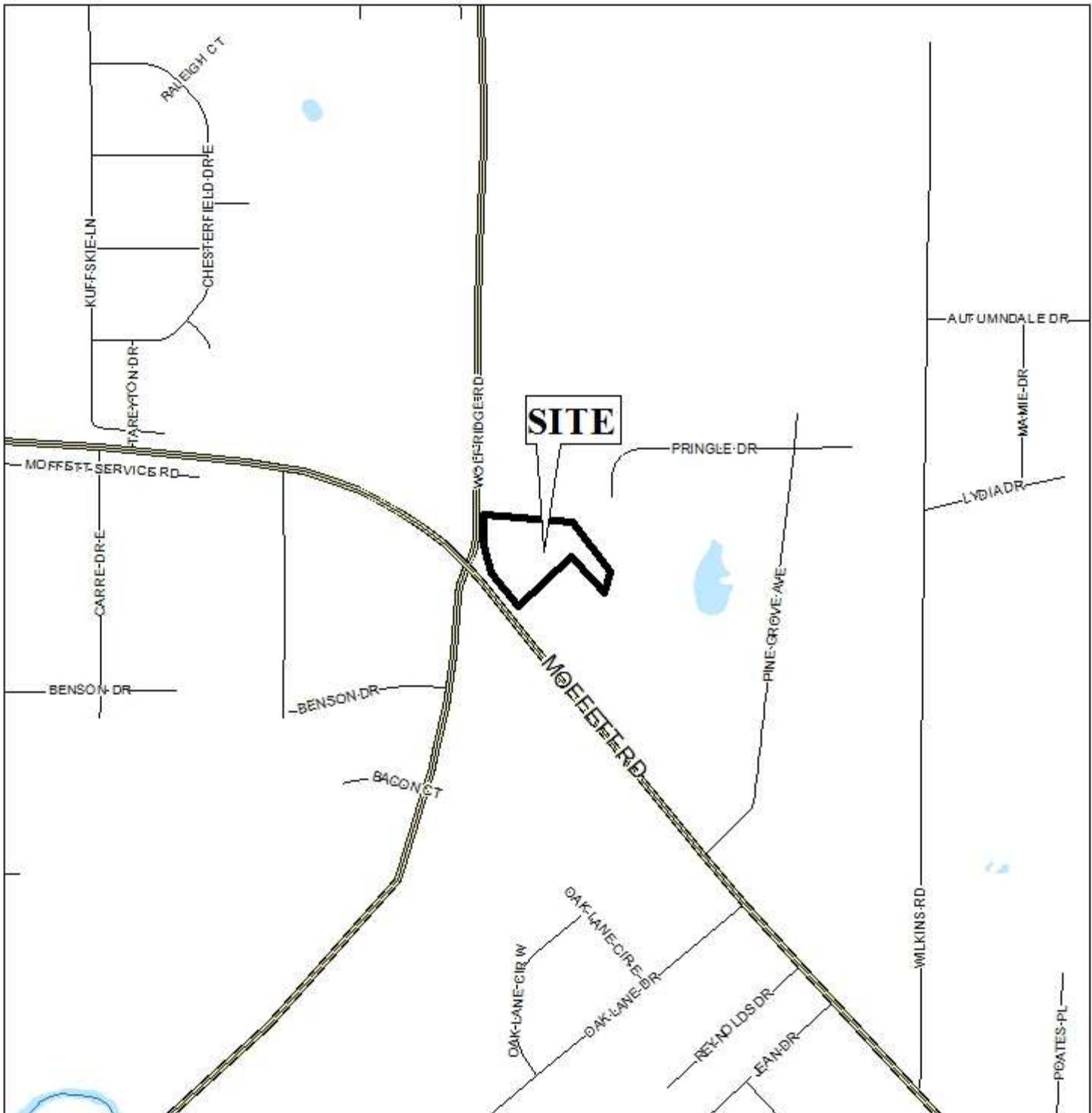
will require the provision of 50-feet of right-of-way as measured from the centerline of Wolf Ridge Road. The potential for such future dedication removes existing landscape areas from consideration for tree plantings, as such trees would face removal if the road were improved to major street standards. The applicant proposes to instead plant only two trees within the front setback area, and plant the remaining seven of the required nine frontage trees within approximately 85 feet of the street rights-of-way. The planting proposal would not be contrary to the public interest, does reflect conditions with the site that would create an unnecessary hardship due to literal enforcement of the Ordinance, and would observe the spirit of the Ordinance and give substantial justice to the applicant and the surrounding neighborhood.

RECOMMENDATION:

Surface Variance: Based upon the preceding, the surface variance request is recommended for denial.

Tree Planting Variance: Based upon the preceding, the tree planting variance, with regards to the location of seven of the nine required frontage trees, is recommended for approval as proposed by the applicant and depicted on the submitted site plan.

LOCATOR MAP



APPLICATION NUMBER 5877 DATE February 3, 2014

APPLICANT Joe Walvis (M. Don Williams, Agent)

REQUEST Surfacing Variance



BOARD OF ADJUSTMENT VICINITY MAP - EXISTING ZONING



Residences lie to the north of the site. An office lies to the south.

APPLICATION NUMBER 5877 DATE February 3, 2014

APPLICANT Joe Walvis (M. Don Williams, Agent)

REQUEST Surfacing Variance

LEGEND															
	R-1	R-2	R-3	R-A	R-B	H-B	T-B	B-1	LB-2	B-2	B-3	B-4	B-5	I-1	I-2



**BOARD OF ADJUSTMENT
VICINITY MAP - EXISTING ZONING**



Residences lie to the north of the site. An office lies to the south.

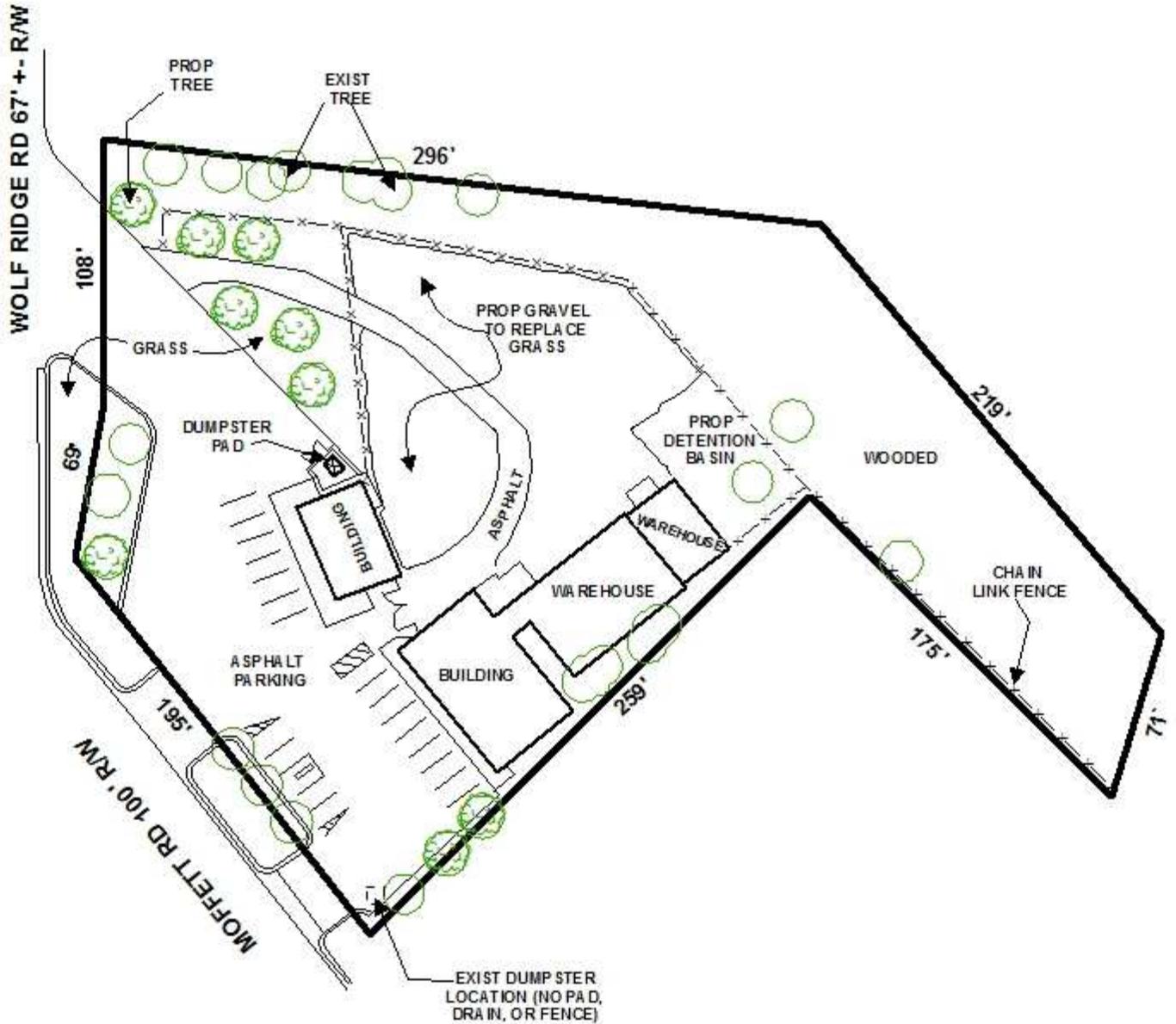
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APPLICANT Joe Walvis (M. Don Williams, Agent)

REQUEST Surfacing Variance



SITE PLAN



APPLICATION NUMBER 5877 DATE February 3, 2014

APPLICANT Joe Walvis (M. Don Williams, Agent)

REQUEST Surfacing Variance

