

**Expert Witness Report by David E. Richert, CEO of Richert & Associates**  
Son Silver West Gallery  
Appeal of Notices of Violations to Sedona Board of Adjustment  
Case No. AP2015-02  
May 26, 2016

**Qualifications to provide this report are as follows:**

1. Received Bachelors Degree in Landscape Architecture from the University of Wisconsin-Madison with emphasis in civil engineering, land use planning and economics in 1972.
2. Received Masters Degree in Public Administration from Arizona State University – Tempe with emphasis on land use planning and local government structures and development procedures in 1978.
3. Completed summer course for Senior State and Local Government Officials at the John F. Kennedy School of Government at Harvard University – Cambridge in 2004.
4. Hired by the City of Phoenix in 1972 as a Land Use Planner and, by 1978, I was promoted to supervisor in charge of administration of conditions of approval (stipulations), exactions and/or ordinance requirements for all of the City's site plans, subdivisions, abandonments, lot splits and hillside development.
5. In 1982, I was promoted to a Principal Planner and was responsible for the rezoning (entitlement procedures) for the City of Phoenix and the previous supervisory duties.
6. In 1984, I was named the City's Zoning Administrator and reviewed all requirements for development and building permits, legal non-conforming uses and conditional use permits. As the City of Phoenix Zoning Administrator, I exercised the same duties of interpreting and enforcing the zoning ordinance as exercised by former Sedona Community Development Director John O'Brien and current Director Audree Juhlin.
7. From 1992 through 2005, I served as the City of Phoenix Planning Director responsible for all development activities and oversight of development approvals and all conditions of approval. The Phoenix Zoning Administrator worked under my supervision.

As part of this research, analysis and work, I am being compensated at a rate of \$350.00 per hour.

As part of these proceedings, I am independent of the City of Sedona and the Appellants, the Robson family and Son Silver West Gallery. My compensation is in no way dependent upon the substance of my opinions and conclusions, or on the outcome of any Board of Adjustment proceedings or lawsuits regarding this matter.

## The Scope of Work

I was requested to prepare a report analyzing the legal non-conforming use and permit history of the Son Silver West property, communications between former Sedona Community Development Director John O'Brien and the Robsons regarding Son Silver West Gallery including the period of August 2011 through December 2011, and the recent November 10, 2015 notices of violations issued by current Director Audree Juhlin to the Robsons.

## Documents and Information Reviewed

1. Broken Arrow subdivision plats and deed restrictions.
2. November 10, 2015 Notices of Violations and Memorandum from Sedona Community Development Director Audree Juhlin regarding Son Silver West.
3. Robson's November 24, 2015 appeal of the Notices of Violations to the Sedona Board of Adjustment and all exhibit attachments, including communications between former Director O'Brien and the Robsons between August 2011 and December 2011.
4. Staff Report prepared by Director Audree Juhlin and City Attorney Robert Pickels to the Board of Adjustment Members for the June 3, 2016 hearing.
5. Site plan and building permit approvals for the Son Silver West property.
6. City of Sedona 1991 Community Plan Land Use Element and Recommended Land Use Plan Map dated November 26, 1991.
7. City of Sedona 1998 Community Plan Land Use Element and Future Land Use Map dated June 8, 1998.

## Timeline of Key Events

Upon reviewing the documents and information listed above, I believe the following events are central to the issues presented in the Robsons appeal narrative to the Board of Adjustment which rely upon the prior decision of former Director John O'Brien:

1. In 1952, the Broken Arrow subdivision plat was recorded by Frank and Ann Bradley, subdividing property lying east of Highway 179. (Book 2, Pg 37, Official Records of the Coconino County Recorder's Office "CCR") ("Broken Arrow East").
2. In July 1952, the Broken Arrow East CCRs were recorded, designating Lots 1 through 7 fronting on the Sedona Rimrock Highway as the "business district." (Book 34, Page 576, CCR). See **Exhibit "1"**.
3. In 1955, a second Broken Arrow subdivision plat was recorded by Frank and Ann Bradley, subdividing property lying west of Highway 179. The Son Silver West Gallery is located on Tracts 41 and 42. (Book 2, Pg 71, CCR) ("Broken Arrow West").
4. Also, on July 21, 1955, Frank and Ann Bradley recorded deed restrictions against the tracts located within Broken Arrow West. The restrictions established that the "business district shall be confined to those Tracts numbered 38 to 44 inclusive,

fronting on Sedona Rimrock Highway.” The Son Silver West Gallery is located on business district Tracts 41 and 42. (Book 77, Pg 509, CCR). See **Exhibit “2”**.

5. In 1960, Ernestine Nestler Todd established the La Galleria commercial art gallery on Tract 42 and, according to her letter dated February 2, 1990, conducted outdoor display of pottery, chimes, chilies, and southwestern art-and-craft items on Tract 42 as part of the La Galleria operations.
6. In November 1961, the Broken Arrow East CCRs were amended with regard to the business district Lots 1 through 7. The Lots 1 through 7 were to continue to be regarded as business lots allowing for one room within a single-family dwelling, measuring no more than 600 s.f. of floor area, to be used for commercial business, manufacturing or professional services. To this day, Lots 1 through 7 continue to be designated as business lots under the Broken Arrow East CCRs. (Docket 182, Page 447, CCR). See **Exhibit “1”**.
7. In 1964, Coconino County adopted its first zoning ordinance and established single-family residential zoning for all tracts in the Broken Arrow West subdivision, including the La Galleria Tract 42. The commercial art gallery use became a legal non-conforming use from 1964 until 1988, when the City of Sedona was incorporated.
8. In 1981, the Robsons purchased La Galleria and changed the commercial art gallery’s name to Son Silver West Gallery. The Robsons have continued the commercial art gallery legal nonconforming use from 1981 to the present.
9. In 1987, the Robsons purchased Tract 41 of Broken Arrow West.
10. In 1988, Sedona was incorporated.
11. After incorporation, in 1991, the City of Sedona adopted a Community Plan designating Broken Arrow West Tract 43 and the Son Silver West Gallery on Tracts 42 and 41 with a General Commercial/Lodging land use designation. See **Exhibit “3”** attached hereto.
12. The City of Sedona adopted single-family residential zoning for all tracts in the Broken Arrow West subdivision, similar to the zoning previously approved by Coconino County. The Son Silver West Gallery continued operating as a legal non-conforming use on Tract 42.
13. On February 5, 1989, a Plan Map of the Incorporated Subdivision of Broken Arrow was compiled for the City of Sedona by P. A. Lindberg, which was later revised in May 1991. The Plan Map was found in the City of Sedona’s official conditional use permit records for Son Silver West. It appears that the Plan Map was created around the time of Sedona’s incorporation and was later revised and considered as part of the Robson’s conditional use permit application. The Plan Map depicts Tracts 38 through 44 of Broken Arrow West, which would include the Robson’s Tracts 40 through 42, as “Business Lots.” Only Tract 44 is depicted as both a “Business Lot” and a “Developed Residential Lot” on the Plan Map. Also, Tracts 1 through 7 in Broken Arrow East are shown as “Residential Lots; ‘One-Room’ Business Allowable.” The Plan Map depicts a scheme of development where

businesses are allowed on Broken Arrow tracts fronting along Highway 179. See **Exhibit "4"** attached hereto.

14. In September 1992, Robsons obtained a conditional use permit approval from the Sedona Planning Commission allowing the Robsons to expand their legal non-conforming commercial gallery use, outdoor display operations, and parking onto Tract 41. The outdoor display area on Tract 42 was not limited or otherwise affected by the 1992 CUP. The Robsons were stipulated to conformance with Alternative Site Plan #2 and the staff report prepared by John O'Brien. The building square footages and uses provided in the staff report are inconsistent with those depicted in the Alternative Site Plan #2.
15. At the time the Robson's conditional use permit was approved in 1992, the Sedona Community Plan reflected the historical and existing use of the Son Silver West property by designating the property for commercial use.
16. In September 1993, former Director Tom Shafer approved a site plan for the Son Silver West property which reconfigured the parking area and 5,000 s.f. of outside retail display area originally approved for Tract 41 and depicted on Alternative Site Plan #2. Some of the outdoor display area approved for Tract 41 was shifted to the frontage area on Tract 42 in place of the original parking. The 1993 site plan depicts the present-day development and operations on the Son Silver West property.
17. In 1995, the Sedona Land Development Code was amended, removing the Planning Commission's authority to allow the expansion of a legal non-conforming use by approving a conditional use permit.
18. In June 1998, the Sedona Community Plan land use map was amended, resulting in the land use designation for Broken Arrow West Tract 43 and the Son Silver West Tracts 42 and 41 being changed from a General Commercial/Lodging designation to a T-SR 179 Transition land use designation. The T-SR 179 Transition designation recognized that existing single-family uses along the Highway 179 corridor "are not always compatible with the high traffic volumes and associated noise impacts and safety issues related to direct highway access from multiple curb cuts from individual lots." This land use designation would allow transitional uses which are residential in scale and buffered from both the highway corridor and adjacent residential uses on a "case-by-case basis." Uses could include artist work studios, some office uses and small-scale bed and breakfasts. See **Exhibit "5"**.
19. In 2000, the Robsons purchased vacant Tract 40, located directly south of the Son Silver West property.
20. In or about 2002, the Sedona Community Plan land use map was amended again, changing the Son Silver West land use designation from a T-SR 179 Transition designation to a Single-Family Residential designation.
21. After the City's incorporation in 1988, the Robsons continued to operate their business. From time to time, the Robsons received interpretations and decisions as well as site plan and permit approvals for the Son Silver West Tracts 41 and 42 from

former Community Development Directors Tom Shafer and John O'Brien, including the following:

- A. April 25, 1989 - Permit No. B0370 issued for a fence around a dumpster on Tract 41.
- B. April 25, 1989 - Permit No. B0371 issued for the pottery kiln roof repair on Tract 42.
- C. March 7, 1991 - Permit No. B1223 issued for drainage culvert on Tract 42 (expired).
- D. August 16, 1991 - Permit No. B1517 issued for chili cage on Tract 42.
- E. August 6, 1992 - Permit No. B1995 issued for electrical work on Tract 42.
- F. September 15, 1992 - Sedona Planning Commission approval of conditional use permit allowing legal non-conforming use expansion onto Tract 41.
- G. November 3, 1992 - Permit No. B2039 issued for construction of 489 s.f. "new commercial structure" on Tract 41.
- H. November 3, 1992 - Permit No. B2040 issued for remodel of retail area on Tract 42 located east of pottery kiln on Tract 42.
- I. August 2, 1993 - Permit No. B2524 issued for construction of 585 s.f. storage shed on Tract 41.
- J. September 29, 1993 - Permit No. 2582 issued for grading of parking lot on Tract 41. The 1993 site plan was approved by Director Tom Shafer as part of this permit approval reconfiguring the 5,000 s.f. of outside display area approved for Tract 41 and the surface parking area.
- K. April 19, 1994 - Permit No. B2877 for parking lot lighting on Tract 42 (expired).
- L. June 1, 1994 - Permit No. B2943 for construction of 1,025 s.f. of new arbor and covered patio structures on Tracts 41 and 42.
- M. August 20, 2004 - Meeting Notes from ADOT and City of Sedona meeting during which it was decided to allow to be installed on Tract 40 a commercial driveway connecting to Highway 179 with 4 way turning movements.
- N. February 28, 2006 - Permit No. B9254 for demolition of part of a storage building on Tract 41.
- O. September 8, 2011 - Permit No. B11594 for erection of wrought iron view fence along frontage of Highway 179.
- P. December 21, 2011 - Decision issued by Director O'Brien after November 2, 2011 inspection finding that existing uses and structures on Tracts 41 and 42 were permitted.

See **Exhibit "6"**.

The Robsons also received periodic correspondence and notices of violation regarding their legal non-conforming use and conditional use permit stipulations, which were resolved between the Robsons and the former Directors. The conditional use permit for Son Silver West has never been revoked.

22. On August 23, 2011, Building Code Enforcement Officer, Jim Windham, and Director O'Brien performed an inspection of the Robson's properties and found certain violations to exist on Tracts 42, 41, 40 and the residence at 61 Arrow.
23. After the inspection of the Robson's properties, on August 31, 2011, former Director John O'Brien issued a notice of violation and a suspension of the 1992 conditional use permit to the Robsons relating to Tracts 42 and 41 for unpermitted coffee shop operations being conducted on-site, certain shade structures, the wrought-iron fence along the front property line, and a fence along the rear property line. Director O'Brien also noticed the Robsons for violations relating to commercial parking and storage on Vacant Lot 40 and employee parking and storage of construction materials on the 61 Arrow Property. The 2011 notice of violation and CUP suspension demonstrates that Windham and O'Brien conducted a comprehensive inspection and review of these properties and determined these to be the only outstanding issues of non-compliance with the 1992 conditional use permit and the Sedona Land Development Code. There were no other outstanding and unresolved notices of violation at that time.
24. The Robson requested a zoning interpretation from Director O'Brien regarding the coffee shop use and new accessory structures.
25. On September 12, 2011, Director O'Brien issued his zoning interpretation to the Robsons, which provided that the Sedona Land Development Code would not allow the Robsons to introduce new uses, such as a coffee shop, or construct new accessory structures due to the property's legal non-conforming use status.
26. On September 26, 2011, the Robsons appealed the Director's zoning interpretation to the Board of Adjustment with regard to the shade structures and roof system on the Son Silver West property.
27. The Board of Adjustment hearing was scheduled for December 2, 2011.
28. On November 2, 2011, Director O'Brien conducted a follow-up on-site inspection of the Robson properties together with Rio Robson and observed that the Robsons had discontinued the coffee shop use.
29. On November 3, 2011, Rio Robson requested a continuance of the December 2, 2011 Board of Adjustment hearing.
30. On November 4, 2011, Director O'Brien granted the continuance, noting the voluntary discontinuance of the coffee shop use, and discussing his pending research of the permit records for the Son Silver West shade and roof structures in question.
31. On December 21, 2011, Director O'Brien issued a follow-up enforcement decision with regard to the outstanding shade and roof structure items from his August 31,

2011 notice of violation and the pending appeal of his September 12, 2011 interpretation to the Board of Adjustment. Director O'Brien issued a decision to the Robsons acknowledging that the Robsons had already shut down the coffee shop use, which was Director O'Brien's primary concern. Director O'Brien also decided that, because the Robsons had submitted information claiming that the roof and shade structures were replacements of other similar structures that were in disrepair, and because Director O'Brien could not locate building permits on any of the older structures and could not support a violation determination with the information that he had, the Robsons were allowed to leave the structures as they were currently constructed. Having resolved this last outstanding item from the August 2011 notice of violation and having conducted 2 recent inspections of the Robson's properties, Director O'Brien's December 21, 2011 decision had the effect of confirming that the August 2011 violations on the Son Silver West property had been resolved and that the property was again in compliance with the 1992 conditional use permit. To prevent this situation from occurring again, Director O'Brien requested that the Robsons submit a site plan and photographs to the City for purposes of confirming the extent of the allowable uses and structures on the Son Silver West property in the future.

32. On December 23, 2011, Rio Robson acknowledged Director O'Brien's decision finding that the Son Silver West property to be in compliance with the 1992 CUP as a result of the August 2011 notice of violation having been resolved. Rio Robson agreed to Director O'Brien's request for a site plan and photographs as a means of documenting the extent of the permitted Son Silver West uses and structures for future reference.
33. The Board of Adjustment hearing regarding the shade structure and roof structure violations was never rescheduled as a result of the December 21, 2011 decision.
34. There was no timely appeal of the Director's December 21, 2011 decision to the Board of Adjustment.
35. In mid-summer 2012, Rio Robson submitted a conceptual, hand-drawn site plan and photographs to the City of Sedona Community Development Department. Community Development Department staff received the submittal, advising Mr. Robson that the site plan and photographs would be placed in Director O'Brien's inbox.
36. Nearly 4 years later, on November 10, 2015, current Director Audree Juhlin issued 2 notices of violations and an interpretation memorandum to the Robsons. The November 2015 notices of violations issued by Director Juhlin failed to recognize the history of site plan approvals, permit approvals, and decisions issued by the former Directors to the Robsons over a 20-year span of time. The 2015 notices of violations also failed to recognize the prior resolution of the August 2011 notice of violation, which culminated in the December 21, 2011 decision rendered by Direction John O'Brien finding the Son Silver West property to be, once again, in compliance with its 1992 conditional use permit.

37. On November 25, 2015, the Robsons appealed Director Juhlin's notices of violations and the interpretation memorandum to the Board of Adjustment.

### **Executive Summary**

1. Prior to the incorporation of the City of Sedona, the former La Galleria and Son Silver West Gallery operated on the Broken Arrow West Tracts 42 and 41 as permitted by the private recorded deed restrictions. The Broken Arrow plan of development created by the private recorded restrictions, specifically designating business lots along Highway 179, was later recognized and adopted by the City of Sedona as evidenced by the 1991 Community Plan and the City's approval of the Robson's 1992 conditional use permit.
2. Arizona's zoning enabling statutes and the Sedona Land Development Code grant broad authority to the City's Community Development Director, as the City's Zoning Administrator, to interpret and administer the Code and to interpret, enforce and determine compliance with a conditional use permit. The August 2011 notice of violation issued by former Director O'Brien and the steps he took to investigate and obtain the Robson's compliance with the 1992 conditional use permit culminated in the December 21, 2011 decision. The December 2011 Decision, finding that the August 2011 notice of violation to be resolved and finding the Son Silver West property to be, once again, in compliance with the 1992 conditional use permit, was an authorized decision by the City's Zoning Administrator.
3. Based upon my experience as both the Zoning Administrator and Planning Director for the City of Phoenix, the December 21, 2011 email was an authorized act and a binding decision made by Director O'Brien that cannot be mischaracterized and ignored 4 years later as a mere invitation for dialogue.
4. The December 21, 2011 decision by Director O'Brien was never appealed to the Sedona Board of Adjustment within the requisite time period and, as a result, the City and any persons aggrieved would have no further remedy to overturn the December 21, 2011 decision.
5. The City's current attempts in 2015 to ignore valid site plan, building permit and enforcement decisions by the former Community Development Directors and to enforce strict compliance with a 1992 conditional use permit that predates many of those subsequent approvals and decisions would constitute an unlawful taking of the Robson's property rights.



## **Discussion and Analysis:**

**Issue Number 1:** Private restrictions recorded against property may restrict or enlarge uses separate and apart from a municipality's zoning controls. In the context of recorded private restrictions which allow uses which pre-date the incorporation of a municipality, those private restrictions create an initial plan of development that often is subsequently adopted or recognized by the municipality upon incorporation.

**Conclusion:** The Broken Arrow West deed restrictions were recorded in 1955, approximately 9 years before Coconino County adopted its first zoning ordinance and 33 years prior to the City of Sedona's incorporation. These deed restrictions provided for business uses to be conducted on Tracts 38 through 44 along the west side of Highway 179, creating a plan of development where single-family residential tracts would be shielded from the more intense traffic along Highway 179 by the buffer of business uses. The Broken Arrow Plan Map dated February 5, 1989 and revised in May 1991 depicts the plan of development created by the deed restrictions and demonstrates that it was always the intent of the original Broken Arrow property owner and the understanding of the future lot owners in Broken Arrow to encourage and allow business uses along Highway 179. This Plan Map from the City's files was created around the time of Sedona's incorporation in 1988 and was later revised and considered as part of the Robson's conditional use permit applications in 1991 and 1992. The deed restrictions and Plan Map also support the City's decision in 1991 to adopt an initial Community Plan Recommended Land Use Map depicting a General Commercial/Lodging land use designation for the Son Silver West property. Thus, it appears to have been the City of Sedona's initial policy to recognize that the former La Galleria and the current Son Silver West Gallery, which have been established and continuously operating since 1960 in accordance with the Broken Arrow plan of development, to be allowable commercial uses along Highway 179.

**Issue Number 2:** A majority of the Robson's appeal to the Board of Adjustment involves a prior decision and agreement made by former Community Development Director John O'Brien. The legislative body of each municipality is required to establish the office of zoning administrator, which is defined as the official responsible for enforcement of the zoning ordinance." A.R.S. Sections 9-462(A)(4) and 9-462.05C. The broad discretion and authority of a zoning administrator is prescribed by state statute and may be more specifically defined by a municipality's zoning ordinance or code. In the City of Sedona, the Community Development Director acts as the zoning administrator. Sedona LDC Section 306.B. The Sedona Land Development Code grants broad authority to the City Zoning Administrator to interpret and administer the Code.

When acting as the zoning administrator, the Community Development Director has a duty to review building plans, compare plans with ordinances, codes, specifications and regulations, and to direct and enforce compliance. Sedona LDC Section 306.B.1. The Director is also charged with reviewing subdivisions and master plans, zoning, rezoning and variance applications, comparing those applications with the Sedona Community Plan, the Sedona Land Development Code, and other codes and regulations, and directing and enforcing compliance therewith. Sedona LDC Section 306.B.2. The Director is responsible

for preparing agendas and presentations to the Planning Commission and attends all Commission and necessary Council meetings as an expert advisor. Sedona LDC Section 306.B.3. In addition, the Director has the authority to direct office analyses of building permit applications and field inspections, to issue building and grading permits and to manage the building safety function. Sedona LDC Section 306.B.4. As the head of the Community Development Department, the Director has the authority to establish and direct department policies, procedures and operations and to inform the City Manager of all departmental activities through written and oral reports. Sedona LDC Section 306.B.5. In addition, the Director is responsible for producing, administering and maintaining the City of Sedona Community Plan, suggesting to the Planning Commission and Council modifications to ordinances, codes and regulations essential for community development, and performing any related planning, zoning and building duties as directed by the City Manager and the Council. Sedona LDC Sections 306.B.8, 9 and 12.

With regard to conditional use permits, the Sedona Land Development Code provides for the initial conditional use permit to be approved administratively by the Planning Commission and interpreted and enforced administratively by the Director. The Community Development Director is responsible for notifying property owners of their failure to comply with conditional use permit conditions of approval, the reasons for a suspension of a conditional use permit, and the time period by which the property owner must comply with the conditions. Sedona LDC Section 402.10.E(1). It is the Director's role to determine compliance with a conditional use permit.

Based upon our State statutes and the Sedona Land Development Code, the Sedona Community Development Director, acting as the City's zoning administrator and Department head, has broad authority and discretion to interpret, implement and enforce the Sedona Land Development Code, building codes, conditional use permits, and decisions made by the Sedona Planning Commission and City Council.

**Conclusion:** The 2011 decision by former Director O'Brien regarding the Son Silver West Gallery was based upon his interpretation and application of the 1992 conditional use permit, the 1993 site plan, various building permits issued to Son Silver West, approximately 20 years of experience in interpreting and enforcing the 1992 conditional use permit, and his inspections of the property. The decision by Director John O'Brien arose after O'Brien's inspection and issuance of a notice of violation in August of 2011. The August 2011 notice of violation suspended the Robson's conditional use permit for specific, enumerated reasons provided in the notice of violation. Between August 2011 and December 2011, the Robsons took measures to cease the unpermitted coffee shop use, submitted permit applications, and filed an appeal to the Board of Adjustment as to the violations relating to certain shade and roof structures. In November, Director O'Brien also conducted another detailed site inspection with Rio Robson. By the time Director O'Brien issued his December 2011 decision, the shade and roof structures were the only unresolved items from the August 2011 notice of violation. As to those issues, Director O'Brien decided that, because the Robsons had submitted information claiming that the roof and shade structures were replacements of other similar structures that were in disrepair, and because Director O'Brien could not locate building permits on any of the

older structures and could not support a violation determination with the information that he had, the Robsons were allowed to leave the structures as they were currently constructed. Director O'Brien's December 21, 2011 decision had the effect of confirming that the August 2011 violations on the Son Silver West property had been resolved and that the property was again in compliance with the 1992 conditional use permit. His decision arising from the August 2011 notice of violation was a valid and enforceable decision under applicable state enabling statutes and the City's Land Development Code.

**Issue No. 3:** The nature of a zoning administrator's role, especially when coupled with the role of a municipality department director, is that of a decision maker. There are no specifics in Arizona's zoning enabling statutes or the Sedona Land Development Code as to how a zoning administrator's decision must be made, in what medium the decision must be issued, and whether specific words must be used in the decision in order for it to constitute a decision with formal and binding effect. A decision by a zoning administrator takes into account many case-by-case details that are unique to and impact each decision and how it is made, such as the complexity of the use or zoning history of the property, the zoning administrator's familiarity, history or level of involvement with the property, and the availability of records to rely upon. The manner in which a decision is issued and the content of the decision is also guided by the municipality's policies and the zoning administrator's judgment and preferences.

**Conclusion:** When one considers the acts of the City before and after the December 21, 2011 email from former Director O'Brien to Rio Robson, it is clear that the current Community Development Director has committed error by characterizing the written decision made by former Director O'Brien as a "limited communication" and "an invitation to dialogue." Director O'Brien had a 20-year history with the Son Silver West property, starting in 1992 with his staff report to the Planning Commission regarding the Robson's conditional use permit application and ending with his retirement in July of 2012. Based upon correspondence in the City's records, it appears it was the common policy of Director O'Brien to evaluate and make decisions regarding the uses and structures on the Son Silver West Property by conducting oral discussions and meetings with the Robsons, on-site inspections, and written correspondence in the form of letters, agreements and emails. Also, the December 21, 2011 decision was issued by Director O'Brien to resolve the August 2011 notice of violation, the Robson's pending interpretation request and the Board of Adjustment appeal filed by the Robsons. In this instance, the December 2011 email decision sent by Director O'Brien had the effect of:

1. Resolving the outstanding shade and roof structure issue raised in the August 2011 notice of violation,
2. Finding that the Son Silver West property had returned to compliance with the 1992 conditional use permit after having resolved the violations noticed in August 2011,

3. Forming an agreement with the Robsons regarding the submittal of a site plan and photographs to assist the City and the Robsons in the future in the event alleged violations were to arise again, and
4. Resolving the Robson's pending appeal before the Board of Adjustment regarding the shade and roof structures so that the Board of Adjustment hearing was never re-scheduled.

Based upon my experience as both the Zoning Administrator and Planning Director for the City of Phoenix, the December 21, 2011 email was an authorized act and a binding decision made by Director O'Brien that cannot be mischaracterized and downplayed 4 years later as a mere invitation for dialogue.

**Issue No. 4:** Once a zoning administrator issues a decision or interpretation, any person aggrieved by that decision must file an appeal to the municipality's board of adjustment or appointed hearing officer within the time period specified by the municipality's code or ordinance. If no appeal is filed within that time period, the decision of the zoning administrator is final and binding as a result of the aggrieved person's failure to exhaust administrative remedies. Under ARS 9-462.06.D, the requirement to exhaust administrative remedies not only applies to persons aggrieved but also to "any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator."


**Conclusion:** The December 21, 2011 decision by Director O'Brien was never appealed to the Sedona Board of Adjustment within the requisite time period. If the City did not agree with or was affected by the Decision, an appeal should have been filed with the Board of Adjustment. No appeal was filed and the Decision remained in full force and effect for approximately 4 years. As a result, the City and any persons aggrieved would have no further remedy to overturn the December 21, 2011 decision.

**Issue No. 5:** Decisions made by a prior Community Development Director to issue plan approvals and permit approvals to a property owner become final, binding decisions that the City must uphold once the property owner relies upon the approval by expending money to make the permitted improvements and receives inspection approval. Any action by a municipality to later revoke or take action which nullifies or ignores a prior decision by a Director upon which the property owner has justifiably relied upon would constitute a taking of the owner's property rights. A municipality would be estopped from revoking or taking action inconsistent with those prior approvals and decisions.

**Conclusion:** Son Silver West obtained valid site plan approvals, building permit approvals and decisions from the former Directors of the Sedona Community Development Department both before and after the Planning Commission's issuance of the 1992 conditional use permit. The Robson's property rights to operate Son Silver West as it exists today are evidenced by those valid approvals. The City's current attempts in 2015 to ignore those valid site plan, building permit and enforcement decisions by the former

Directors and to enforce strict compliance with a 1992 conditional use permit that predates many of those subsequent approvals and decisions would constitute an unlawful taking of the Robson's property rights.

RICHERT & ASSOCIATES

  
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David E. Richert, CEO

5/26/2016  
Date

**Exhibit Attachments:**

- Exhibit 1: Broken Arrow East deed restrictions recorded with Coconino County Recorder's Office.
- Exhibit 2: Broken Arrow West deed restrictions recorded with Coconino County Recorder's Office.
- Exhibit 3: City of Sedona Community Plan Recommended Land Use Plan Map dated November 26, 1991 and General Commercial/Lodging designation description from 1991 Community Plan Land Use Element.
- Exhibit 4: Plan Map of the Incorporated Subdivision of Broken Arrow prepared for the City of Sedona by P. A. Lindberg dated February 5, 1989 and revised in May 1991.
- Exhibit 5: City of Sedona Community Plan Future Land Use Map dated June 8, 1998 and T-SR 179 Transition designation description from 1998 Community Plan Land Use Element.
- Exhibit 6: Building permit records for Son Silver West obtained from City of Sedona official records.