

**Summary Minutes
City of Sedona
Board of Adjustment Hearing Officer Meeting
Vultee Conference Room, Sedona City Hall, Sedona, AZ
Wednesday, April 12, 2017 – 1:00 p.m.**

1. Verification of Notice, Call to Order, Pledge of Allegiance and Roll Call.

Warren Campbell confirmed for Hearing Officer Plotkin that the meeting had been properly noticed. Hearing Officer Plotkin called the meeting to order at 1:00 p.m. and requested roll call.

Roll Call:

Hearing Officer present: John Plotkin

Staff present: Warren Campbell, Audree Juhlin, Matt Kessler, Cari Meyer, Donna Puckett and Mike Raber

Councilor(s) Present: Councilor Scott Jablow

Appellant(s) present: Mr. Al Schillinger, Mr. Jim Schillinger and Mr. John Schillinger with Sedona Grand View

2. CONSIDERATION OF THE FOLLOWING REQUEST (S) THROUGH PUBLIC HEARING PROCEDURES:

Discussion/possible action on an appeal filed by Mr. Albert Schillinger, authorized agent for Sedona Grand View LLC concerning an existing apartment complex located at 150 Sombart Lane, Sedona. The appeal is regarding an interpretation of the City of Sedona Land Development Code made by the Zoning Administrator (Community Development Director) pertaining to the expansion of a nonconforming use. The subject property is zoned C-1 (General Commercial) and has historically operated as a multifamily residential development, a legal nonconforming use for this district.

The Director's Interpretation is, in part, based on the applicability of the nonconforming use regulations to whether the existing nonconforming use may expand into existing building area. The Zoning Administrator's opinion regarding this interpretation is on file and available for public inspection at the Department of Community Development located at 102 Roadrunner Drive, Building 104, Sedona, AZ 86336. Applicant: Mr. Albert Schillinger, Authorized Agent for Sedona Grand View LLC. Case Number: APPEAL17-00001

Hearing Officer Plotkin read the request for appeal as provided above and Warren Campbell reviewed the normal procedure for appeal public hearings.

Introduction, Warren Campbell: Warren Campbell explained that this appeal is regarding the director's interpretation in which a determination was made that the increase in the size of the unit in a nonconforming apartment building was an expansion as defined and prohibited in Section 1204.01 of the Sedona Land Development Code. The Appellant's appeal states that the change from a one-bedroom to a two-bedroom apartment in a manner that does not increase the overall number of units on the site or alter the exterior of the existing structure is not an expansion of the nonconforming use. Warren then stated that in the Staff Memorandum, towards the end, staff included some suggestions on what some alternate uses might be for the laundry room area that is being proposed to be incorporated into one of the apartment units, and we would state on the record that those particular points are not germane to this discussion on what the other uses of that space might be in the future.

Hearing Officer Plotkin indicated that he took from those suggestions that if the landowner chose to convert the laundry room to those other uses, it would not be considered to be a change in

nonconforming use, and Warren Campbell agreed. The Hearing Officer then stated that it could be changed from one common area use to another and not be deemed to be a nonconforming use, and Warren Campbell indicated that would be staff's interpretation, but those alternatives are not germane to the debate today.

Presentation, Matt Kessler: Matt described the subject property at S.R. 179 and Sombart Lane and indicated that there are three buildings with 17 multi-family units that existed prior to the City's incorporation. There also is a common laundry facility of just over 300 sq. ft. that is located on the first floor of Building 3. The property was purchased in 2016 by the current property owner, so the Staff Report and the site plans provided by the applicant refer to Buildings 1, 2 and 3. The subject of the interpretation focuses on Building 3, and there is a one-bedroom unit plus the common laundry facility on the first floor.

Matt explained that in January, the property owner showed interest in doing an extensive interior and exterior remodel of the site that included all three buildings, including the laundry room. The majority of the remodel was encouraged and approved through a building permit in March of this year; however, the one portion of the remodel that was not approved and is the subject of the interpretation was the one-bedroom unit in Building 3.

Matt then showed their preliminary proposed floorplan that was discussed with the applicant in January. It shows the location of the laundry room highlighted in red and shows where they were expanding the one-bedroom into a two-bedroom unit adding 300 sq. ft., and as part of that remodel, they were adding a washer and dryer to each unit, thus rendering the laundry room kind of obsolete. The director's interpretation, in response to this remodel, essentially said that the conversion of the laundry facility, which was a common area, into an additional living area for the adjacent unit, by both adding square footage and adding a bedroom, would constitute an increase in the nonconformance in two different areas of Article 12 -- Section 1202 (Nonconforming Developments) and 1204 (Nonconforming Uses); however, the interpretation went on to say that Article 12 does encourage and promote remodeling, updating and repairing of nonconforming situations, especially for buildings that are outdated and in need of refurbishing.

Matt indicated that is the end of staff's formal presentation, but staff is available for questions, and Hearing Officer Plotkin asked if the Staff Report is formally offered into the record. Robert Pickles indicated that it will become part of the formal record whether it is introduced or not. Hearing Officer Plotkin then indicated that he will treat it as being part of the record, as well as all of the materials he received that were put forward by the Appellant, so for clarity, he considers that all to be part of the record. He read the materials and thinks he has an understanding of the interpretation, so he doesn't have any questions at this point, but he assumes that he can come back to you, so now he will turn to the Appellant.

Presentation, Al Schillinger, Appellant: Mr. Schillinger introduced his two partners, Jim and John Schillinger, his brothers. The three of them formed a partnership and purchased this apartment building. He thanked everyone for the opportunity to speak as to why they feel the 320 sq. ft. should be used as a bedroom in an apartment, as opposed to an obsolete laundry room. Mr. Schillinger displayed a flipchart titled, "Unit 109 Should Be Allowed to be Remodeled into a Two-Bedroom Unit" showing the following four points:

1. Zoning is incorrect
2. Allowing relocation is in conformance with the Community Plan
3. Not expansion – reallocation of space (to fix functional obsolescence)
4. Two Court Decisions
 - a. Arizona Supreme Court – Some amount of latitude must be allowed a nonconforming use for reasonable expansion
 - b. Arizona Court of Appeals - Supports the right of the nonconforming business to continue and adjust to new circumstances

Mr. Al Schillinger indicated that they are here about 320 sq. ft. and whether or not they can add a bedroom to an existing one-bedroom unit or keep an obsolete laundry room, and there are four main points they would like to go over. He will do the first two and his brother Jim will last two, but basically Unit 109 is what they have renamed the apartment unit, and they feel it should be remodeled into a two-bedroom unit.

Mr. Al Schillinger stated that they feel the zoning is incorrect for the parcel from when it was incorporated in 1988. Also, allowing relocation is in conformance with the Sedona Community Plan, and they feel this is not an expansion, but a reallocation of space. It is basically to fix functional obsolescence of a laundry room that is no longer needed. Then, they also have two court decisions that they would like to show you. One by the Arizona Supreme Court that says some amount of latitude must be allowed a nonconforming use for reasonable expansion. Another one by the Arizona Court of Appeals that says it supports the right of the nonconforming business to continue and adjust to new circumstances.

Hearing Officer Plotkin asked if Mr. Schillinger brought those decisions with him and Mr. Schillinger replied yes, he did and they will present those later in their presentation.

Mr. Al Schillinger then stated that this apartment building was built in 1966, and in their research on the building, they found an article in the Red Rock News on February 27, 1964, when they had an open house for the apartments, and it basically says that the Royal Crest, which was the building situated on the site of the former Sedona Lodge was acquired by Mr. and Ms. (audio unclear) a few months ago, and it enjoys one of the most scenic views in the entire community. The apartments encompass the very latest conveniences to be found in luxury apartment living.

Mr. Al Schillinger indicated that they believe the building was built in 1966, and then in 1988, the City of Sedona was incorporated. It has been an apartment building the entire time, as far as they know, and it was where the former Sedona Lodge was located. They tore it down and built this apartment building around 1966. To their knowledge, this building has been in continuous use as an apartment building and was there for 22 years before Sedona was incorporated in 1988 and for 29 years after incorporation. Their question was, "How did it get C-1 zoning, when it was an apartment building for the last 51 years? How could it come into the City as C-1 zoning when it has been an apartment building? They feel a mistake was made, and they've asked quite a few people, but no one has a good explanation. They say that when incorporation happened; it happened fairly quickly and large swatches of land were incorporated at once; so it was just incorporated as C-1, but it is 51 years old, so how can this come up again? The reason is that the previous owners who purchased it in 1992 did nothing that required them to go to the City, so 29 years later, they showed up and indicated that they wanted to upgrade the building and make it a better place for Sedona. Then, they talked about expanding into the laundry room and that is when the issue came up. Staff didn't really know why, and he thinks that almost everyone who comes into the City today would say that it would not be adopted into the City with C-1 zoning; it would probably be Multi-Family zoning, since it has been that way for 51 years. They appreciate the staff and he thinks staff would like for this to occur, but when they look at the law, their hands are tied; they don't have that authority, so they are here to show that they think staff does have that authority, especially by these two court cases.

Mr. Al Schillinger then referenced the Sedona Community Plan and how adding an extra bedroom totally incorporates into the Plan that was effective in 2014 and ratified by the voters on March 11, 2014. He then referenced the summary page of the 150-page document on the Internet, and indicated that it basically says, "The vision of Sedona is a community that nurtures connections between people, encourages healthy and active lifestyles, and supports a diverse and prosperous economy, with priority given to the protection of the environment". Then, they have six major outcomes and one of those is housing diversity. In 2020, they want to see, "Sedona has fostered the building of different housing types to provide more options for all ages and income levels by using innovative public policies and programs and nurturing partnerships with private developers." They feel that adding an extra bedroom would be of much more benefit to the City than having an

unneded laundry room, especially since the laundry room is already getting added in all of the other apartments.

Mr. Al Schillinger added that if you have a one-bedroom apartment, one person could live there, and with a two-bedroom apartment, two people could live there. Two people -- managers downtown could live there, so if this doesn't get approved, then maybe only one person could live there and the other person might live in Cottonwood and drive into town everyday causing more traffic congestion and damage to the environment, etc.

Mr. Al Schillinger then referenced page 23 of the Plan and the pie chart that talks about the housing types in Sedona, and 82% is single-family housing, 10% is condos and townhomes, 4% is mobile home parks and only 4% is apartments, so that is a very small housing stock for a City this size, so any depletion of the housing stock would affect it and its citizens. He then read from page 23, "Housing is important to both individual families and the community as a whole. The home is the foundation of any community, and a diversity of housing choices is essential for a prosperous, sustainable and healthy place to live." He then summarized that his two main points are that at the inception of the building becoming part of Sedona, the zoning was incorrect to begin with; they just got the wrong flip of the coin, and then, that the housing they are trying to do totally fits into the City of Sedona's Plan's desires for what they would like to see it become.

Presentation, Mr. Jim Schillinger, Appellant: Mr. Schillinger indicated that he wanted to tell you why Unit 109 should be allowed to be remodeled into a two-bedroom apartment. Number one, because it is not an expansion; it is just a simple reallocation of space to fix the functional obsolescence. Secondly, he wanted to show you two court positions from the Arizona Supreme Court and the Arizona Court of Appeals that have ruled very closely on this matter.

Hearing Officer Plotkin asked if he brought copies and Mr. Jim Schillinger stated yes and he will give them to Mr. Plotkin. Mr. Schillinger then repeated that they are not expanding; it is a simple reallocation of space. He showed a rendering and indicated that roughly one inch equals 10 feet, and while it is not quite an exact measurement, it is close. He then referenced Sedona Grandview before the reallocation of the laundry room. Building 1 has no laundry facilities, Building 2 has no laundry facilities, and Building 3 with laundry facilities in the corner of a dedicated community room, and that is before the reallocation of the laundry. If you were a bird or had pictures from 51 years ago when this was built, you would see that Building 1 overhead looks the same, Building 2 overhead looks the same, and Building 3 overhead looks the same. There never has been any expansion to these buildings, not from 1951 to today and not in today's plan. There is no expansion; there is no rooftop expansion or building footprint expansion. The buildings are not changing, and whether you allow this Unit 109 to be a one or two-bedroom unit, the buildings will be exactly the same -- again, not expanding, not decreasing, not increasing, and not expanding. You will see that the City has mentioned Article 12 and it talks about buildings, expansions and the parcel. They are not purchasing another parcel or expanding their operation to another parcel. They are not enlarging the building; all they are doing is taking the laundry room and spreading it out into 17 units across all buildings.

Mr. Jim Schillinger then showed a drawing of before the reallocation of the laundry and one of after the reallocation, and stated that you will see that Buildings 1, 2 and 3 haven't changed in size; the overhead (view) is exactly the same space and the footprint of the buildings is exactly the same; the parcel of land is exactly the same, and the only thing that has changed is the concentration of the laundry is now spread out throughout the buildings. Each unit in each building now has a separate laundry facility. This was built 51 years ago, and things have changed a great deal in the standard of living; cars have changed, the way people communicate has changed, the way people are entertained has changed. It just makes sense that the way people live their lives and the expectations that they have has changed as well. Everyone would prefer their own personal laundry area instead of going to a community laundry room, and they are just satisfying that need and bringing the standards up. For anyone building today, that would be a high priority, but again all they have done is taken the laundry room and reallocated it; they haven't changed the footprint,

the roof or expanded the parcel into another parcel. Everything is the same, before or after their remodel, and it is going to be the same no matter if Unit 109 is going to be a two-bedroom or a one-bedroom. In addition, this is going to be a large change; they are doing a huge remodel, but they just had the plans approved, where they are working now in the pre-drywall stage; so things are pretty torn up, but it will be a beautiful building when they are done.

Mr. Jim Schillinger indicated that this is not the first time a nonconforming use has been modernized, updated and had some changes to it for various reasons, and courts have decided on these. The first one is the Arizona Supreme Court that basically said that some amount of latitude must be allowed a nonconforming use for reasonable expansion. They are not even expanding, but they do have a different use for this area, and that is the addition of another bedroom onto this apartment. Again, the buildings have not changed and the number of units has not changed. Everything is staying the same, except the laundry room is being dispersed throughout.

Mr. Jim Schillinger then distributed copies of the case referenced, and indicated that in 1967 the Arizona Supreme Court had before it a case in which there was an old house that acted as an inn on N. Central Ave. in Phoenix, and in April of 1959, it was annexed into the City of Phoenix; however, this was a residential area and it was more of an inn, so it became grandfathered as a nonconforming use. Then in 1962, the property was drastically damaged by a fire, so they went to rebuild it, but the landowners around it would have preferred for it be residential, so they took it to court. It eventually went to the Arizona Supreme Court and the Court found, on page 2 where he highlighted it, that evidence supported finding that in applying for a use permit, no expansion of a nonconforming use was an issue in view of the fact the original size of the nonconforming facility, which was destroyed by the fire, compared to the size of the new nonconforming facility sought to be erected. . . , so they weren't expanding their facility, but they were building a brand new facility, and likewise, they are just remodeling. It went on to say, "Some amount of latitude must be allowed a nonconforming use for reasonable expansion and the maintenance of accessory uses", so it was allowed to rebuild and be better than it was before, just as they strive to be better than what it was before, and they were even allowed instead of having a beer license to have a full liquor license. The Arizona Supreme Court allowed some latitude, so if things are changing, things can be adjusted even though it is a nonconforming use.

Mr. Jim Schillinger stated that the second case is the Arizona Court of Appeals in 2013 regarding a mobile home park operator who wanted to install a new mobile home. It was denied, so he went to court and the Court found that "As our Supreme Court has noted, although a property owner has no right to expand a nonconforming use of property into an adjacent parcel, the theory of vested rights within the original parcel premised on due process concerns supports the right of a nonconforming business to continue and adjust to new circumstances." It was saying that if it is not going to an adjacent parcel, and again, they are not going to a new parcel; these buildings are on the same parcel and that laundry room was in this building on the same parcel, and you are allowed to continue and adjust to new circumstances. In this case, they wanted a new mobile home, and in their case, they want to reallocate the laundry room from one place to many places, so as he said earlier, the buildings haven't changed, the footprint hasn't changed and the rooftop hasn't changed. All they want to do is reallocate the laundry and as a result of that, they want to increase Unit 109 to two bedrooms instead of the existing one bedroom.

Mr. John Schillinger added that the one other point that hasn't been slammed home is the square footage, the actual square footages of laundry facility haven't changed. You add up all 17 of those smaller ones; it is equal to the original laundry room. Hearing Officer Plotkin stated that was actually pretty clear in the material, so he understands that and he does appreciate that.

Mr. Al Schillinger wanted to summarize where staff felt that they couldn't authorize this, and he would like to think that with these four points, especially with the two court decisions, that will allow staff to allow them to reallocate the laundry room space into a bedroom, so Unit 109 can be remodeled into a two-bedroom apartment, instead of a one-bedroom apartment. To recap the four points, the zoning coming into the City was incorrect for the parcel, the reallocation is in

conformance with the Sedona Community Plan, it is not an expansion; it is a reallocation of space, and the two court decisions that are almost point-on support their claim.

Hearing Officer Plotkin indicated that he didn't have any questions for them now, but maybe later. He understands their arguments and he hasn't seen these cases before and would like to read them, but before he does, he asked if staff or counsel had any desire to respond with respect to the laws that have been presented, and there was no response given. Hearing Officer Plotkin then asked, with respect to interpretation of the City Ordinance that has been done by staff in this case, if it is the City's view that the law of the Appeals Court and the Supreme Court can be taken into consideration by the Hearing Officer in making an interpretation of whether or not the ordinance might be read differently to conform to the case law.

Robert Pickels stated that in his opinion to the extent that case law would supersede either state statute or local ordinance, yes. Hearing Officer Plotkin then stated that it is then within his purview to make that determination and Robert Pickels stated, yes.

Hearing Officer Plotkin opened the public comment period at this time.

Richard Loveless, Sedona, AZ: Mr. Loveless indicated that he is the President of Royal Sienna Townhomes, which is a few yards down over the hill, and as President of the Association, they asked him to attend. Given what he has heard, they have no objections whatsoever to what the builders are trying to do. It makes no sense to (audio unclear) . . . Association, and personally, he thinks it is a waste of their time. They've got the building, and it is very clear what they are going to do. It won't change anything in terms of their relationship to the community, and they hope to be good neighbors, so they have no objections at all. He would say that he wishes the City would look carefully at Sombart Lane; it's a substandard road that continues to be filled with potholes eight or nine times a year, and when it's screwed up, it is going to be something that they are going to be concerned about; other than that, they love the aesthetics that's changing the building, and they wish them well with it. He also represents John Griffin who owns the apartment complex across the street and built their complex, and he asked Mr. Loveless to speak on his behalf.

Having no additional requests to speak, Hearing Officer Plotkin closed the evidentiary portion of the hearing.

Hearing Officer Plotkin indicated that he would like to be able to rule today, but he wanted to read these cases first. He didn't have them before, so if we can recess for five minutes so he can read these cases, then we can reconvene.

Hearing Officer Plotkin recessed the hearing for 5 minutes to read the cases at 1:41 p.m. and reconvened at 1:46 p.m.

Hearing Officer Plotkin asked if anyone had anything else to add with respect to the case law, and there was no response. He then stated that he thinks he has a very good understanding of where the parties are on this and he finds the case law to be particularly interesting, under the circumstances. First, the correctness of the zoning back when it was adopted is irrelevant for his purposes, whether he agrees or disagrees with that argument is irrelevant for his purposes. The City has the authority to adopt a Zoning Ordinance and to apply it, and in this case as a nonconforming use, the rights of the owners have not been impaired, so whether or not the City changes its Zoning Code to perhaps more reflect the evident residential nature of this neighborhood in the future is not before him and may be something the City may want to look at.

The Hearing Officer stated that the City's interpretation of this ordinance as applied to this situation seems reasonable on its face. It is clear that what is being suggested is that they want to take what was previously a common space and convert it into a private space, so that the change or trade of private laundries for one specific common laundry is not exactly the same thing, and if he were focusing on just that issue, he thinks the City would be correct, in reading its ordinance, but he finds

that the cases presented are particularly persuasive -- not so much the Supreme Court case, because what they found in that case was that they affirmed the local bodies' determination, so they basically didn't substitute their judgement or held that it could be upheld; their judgement was fine. The mobile home case where the Court basically said that they look at the nonconforming use as a whole, to him is pretty much square-on here. The use that this property is being put to as a whole remains the same, and the only thing that troubles him is that you are adding a bedroom to this project, but given the size of the whole project, he doesn't find that to be sufficient, particularly given the differences or lack of differences in parking and so forth, so he is going to rule in favor of the Appellant, and his ruling is that in this particular instance, the use of the laundry, which was previously accessory to and part of a legal nonconforming residential use, and essentially repackaging that as part of the same building without an expansion of the space is a reasonable modification of that space as part of the overall renovation, so his ruling would be that the interpretation as applied to this particular project is inaccurate, because of the case law that has been presented to him, and that doesn't mean it would apply in every instance. There may be other factors to be considered on a case-by-case basis, but in this case, he doesn't find any compelling reasons not to treat the nonconforming use of the property as a whole as being applicable in this instance, so that is his ruling.

Hearing Officer Plotkin then asked if any further clarity is needed or a written decision and Robert Pickels indicated yes, there will need to be a written Finding of Fact and he can work with Mr. Plotkin on the preparation of that for Mr. Plotkin's signature. Mr. Plotkin indicated that would be great.

3. Adjournment.

The Hearing Officer adjourned the meeting at 1:52 p.m.

I certify that the above is a true and correct summary of the meeting of the Board of Adjustment Hearing Officer held on April 12, 2017.

Donna A. S. Puckett, *Administrative Assistant*

Date