Summary Minutes
City of Sedona
Board of Adjustment Hearing Officer Meeting
Vultee Conference Room, Sedona City Hall, Sedona, AZ
Wednesday, May 17, 2023 – 11:00 a.m.

1. CALL TO ORDER AND PLEDGE OF ALLEGIANCE.

Hearing Officer Ramsey introduced himself as the Hearing Officer for the City of Sedona. There are three on a rotation, so he is here randomly unlike most of you. In the way of sort of a preliminary disclosure, he has to tell you a little of his background. We have our Camp Verde contingent present and he explained to them that he was Camp Verde's original attorney for 12 years doing a lot of the zoning work, and then he was Assistant City Attorney for Sedona, and one of his jobs was to advise, monitor and attend the Planning & Zoning Commission meetings. It has been at least six or seven years since he was officially part of the city.

He looked at the property this morning and he doesn't have any connection to that property or know any of the parties involved, but he wanted to make that disclosure in case anyone had any objection to proceeding with him being the Hearing Officer. He does have some background with both the City of Sedona and Camp Verde concerning zoning.

There were no objections.

Hearing Officer Ramsey officially called the hearing to order at 11:04 a.m. for Case Number: APPE23-00001 considering an appeal regarding 55 New Castle Lane, and led the Pledge of Allegiance with the following staff members, appellant and appellant's attorney present:

Staff Members – Kurt Christianson, Doug Drury, Elizabeth Glowacki, Steve Mertes, Cari Meyer, Chris Norlock and Donna Puckett
Appellant – V&M Real Estate LLC, Vincent VanVleet
Appellant's Attorney: Taylor Earl

Commissioner(s) Present: Sarah Wiehl

2. CONSIDERATION OF THE FOLLOWING ITEM THROUGH PUBLIC HEARING PROCEDURES:

a. Discussion/public hearing/possible action regarding an appeal of a Director's Interpretation (ZV21-00011) regarding 55 New Castle Lane, stating the nonconforming apartment building cannot be used for short term rentals.

The subject property, located at 55 New Castle Lane, is approximately 0.75 acres, is zoned RS-10 (Single Family Residential) and is further identified as Assessor's Parcel Number 401-21-068. This parcel number was assigned after a recent lot line adjustment. The property was previously identified as APN 401- 21-018J. Owner: V&M Real Estate LLC, Vincent VanVleet Appellant: Taylor Earl, Earl & Curley, PC Case Number: APPE23-00001

Hearing Officer Ramsey stated that it was a very interesting packet that was posted concerning this particular appeal. He spent some time in reviewing it. It is a little unusual, because normally when he comes to these appeals we are talking about a variance and that is entirely a different animal. Since this is a rather complex case, we have legal representation on two sides, and he would like to read a statement into the record, but prior to that, he invited both parties to state on the record who they are representing in name.

Appellant: Taylor Earl with the law firm of Earl & Curley indicated he is representing Vincent VanVleet, the property owner, and Mr. VanVleet added V&M Real Estate LLC which is the official owner of the property.

City of Sedona: Kurt Christianson, City Attorney for the City of Sedona and with him is Doug Drury, Assistant City Attorney, and representing the Community Development Department today is Steve Mertes, Community Development Director and Cari Meyer, Planning Manager.

Hearing Officer Ramsey read the following statement for the record:
"The property is a 6-unit multifamily complex in an RS-10 residential zoning district, and according to the Sedona Land Development Code, Section 1.6.B(2), it is the burden of establishing the existence of a nonconformity is on the property owner.

In early 2021, the appellant requested the city review whether the property could operate as a lodging facility. The definition for that under the code at that point was, '*Building or buildings offered for transient accommodations at a daily rate'*, based on prior nonconforming use history as a Coconino County development since the 1960s. The Community Development Director found, in a written opinion of April 13, 2021, that based on the documentation provided in the advertisements for the property as '*Newcastle Island Cottages'* for daily, weekly, or monthly rental, the property had been operated as a lodging facility prior to incorporation of the city in May of 1988, which carried over the county zoning of RS-10,000. The opinion then added: '*As nonconforming use this must operate continuously, the Director reserves the right to amend this interpretation if further information is provided showing the lodging use has ceased for more than 6 months, under the Land Development Code, Section 1.6*.' The opinion also stated that if any of the information used to make the determination was inaccurate or incomplete, the opinion would be nullified.

Later information about the property received by the city showed that the prior owners had ceased nightly and weekly rentals in 1983 in favor of monthly rental, and then sought in 1986 to return to nightly lodging through the applications to Coconino County Planning & Zoning Commission and the City Council, both which denied the change back to a nightly use.

County minutes showed that the Commission was concerned that reverting to a nightly use would have adverse impacts on traffic, sewer, noise, and setting a possible precedent for 'spot zoning'. The owner, at that point, wanted to return to the nightly to pay for the property. The property apparently was in a nonconforming status at the time that the County adopted its own zoning about 1981 or so, or possibly earlier. The gist of that particular effort by the owners was to acknowledge that they were in a nonconforming use at one point that was nightly, weekly and monthly, and then they went voluntarily to go to just monthly, and then they wanted to go back to nightly, weekly or monthly.

The language we have from their minutes of the meetings of Coconino County shows that they didn't want to allow one nonconforming use to go back to another nonconforming use, so it was denied.

On September 28, 2022, the director here for the city issued a revised interpretation, stating the nonconforming use was limited to monthly rentals. The additional records showed the property had not been used for nightly rentals for at least 5 years prior to the City of Sedona's incorporation.

Appellant has responded that the broad history of the use of the property should not be confined in terms of the 'lodging' definitions of the Land Development Code adopted by the city in 1988, and the vested right of the owners to re-establish nightly rates was not historically forfeited, and that the reliance of the owner on the initial determination by the city caused him to make substantial investments in the property and surrounding neighborhood that would not be returned without increased revenues available from nightly rentals

A separate issue related to the nonconforming use history is whether the property can nevertheless be developed as a short-term rental under A.R.S. 9-500.39. This argument is made by the appellant, and response by the city indicates the property may not qualify by statute based

on its configuration and ownership. The city also raised the question of whether this issue is properly before the Hearing Officer on this appeal. Sedona Land Development Code Section 8.9.E establishes the City Council as the Board of Adjustment and delegates to a hearing officer, '*the authority to hear and decide on matters within the jurisdiction of the Board of Adjustment',* which by statute includes (a) appeals from an alleged error in an order, requirement, or decision by the Zoning Administrator, (b) appeals for variances, or (c) reverse or affirm, in whole or part, a decision of the Zoning Administrator. The BOA may not make any changes in the uses permitted in any zoning classification or grant a variance if special circumstances applicable to the property are self-imposed. ARS 9-462. also limits a BOA to, '*hear and decide applications for variances…and appeals from the decision of the Zoning Administrator*.' Since the issue of the qualification of the property as a short-term rental, independent of its nonconforming use history, has been argued and addressed in the public comments for this hearing, including also some of the letters written in support by adjoining property owners, the Hearing Officer will allow further comment on the record, but reserves the right to determine that the issue is not within the jurisdiction of the BOA or the HO as presented. The question of short-term rental qualification was not addressed in the revised determination by the director, and, in fact, short-term rental permit applications are a separate procedure under the Sedona Land Development Code permit section.

Finally, the decision of the Hearing Officer in this case will involve legal analysis of cases, statutes, codes, and regulations much more than a typical variance issue where the factors include whether strict application of a code produces undue hardship, grants a request or constitutes a special privilege inconsistent with other properties, or the property has an exceptional topography. Public comments would therefore be more relevant concerning the history of the use of the property than how it has now been improved under the recent ownership."

The Hearing Officer stated that concluded his prepared remarks and he has copies that can be made available. He then indicated he was turning the hearing over to the appellant and asked if there were any questions on what he just covered. He was trying to make sure we stay focused on the property history and the question of nonconforming use. Some of the comments received that are in the packet are from neighbors saying they have had some improvements done and like the improvements. Unfortunately, that sort of issue is more relevant if we were talking about the impact of a variance on adjoining properties. This is getting to be pretty legal as far as issues.

There were no questions from the parties.

Presentation by Appellant's Attorney Taylor Earl: Mr. Earl indicated that he appreciated what was said. Some of the relevance regarding the way the property is being utilized is important background. They know there are some neighbors here who may speak to that; your points are well-taken on that, but speaking to the fact that it has been a benefit, it does inform the decision if not strictly relevant on some of the legal issues.

Walking through some of the history, he doesn't wish to be completely duplicative of what is in our briefing, but he wants to highlight some things. As part of the due diligence performed on this, Mr. VanVleet requested a director interpretation regarding short-term rentals on the property and the allowance for those, and then in April of 2021, Sedona issued that letter, confirmed that legal nonconforming right to short-term rentals were permitted. It was reliance upon that that Mr. VanVleet closed on the property with the understanding . . . now, he wanted to pause to say that this type of due diligence he would call typically uncommon for property purchases like this, that the property owner would pause, go to the city first, and make sure they were completely covered legally before closing on the property, understanding that investment only made sense if they could do the short-term rental. It is not only commendable, but it is relevant to understanding the reliance that was taken, notwithstanding the boilerplate language that was put in the letter, that a determination was fairly definitive in practice that it was legal and could be done.

Thereafter, Mr. VanVleet invested about approximately half a million dollars in the property and those included things like roadways, driveways, emergency evacuation bridge which they talked about on the property today, and some of the improvements that were done to the railings on

that, waterline infrastructure which is used by the property and the neighbors, interior upgrades of the unit, and then engineering costs to address water flow, flooding and landscaping. All told about a half-million that was put into the property still upon reliance, and this is separate and apart from the purchase price, but done in reliance upon the representation by the city and the conclusion by the director that it was legally done.

Ultimately, September of 2022, the city reversed the decision and they were given 30 days to stop the use, being told that it was not permitted on the property.

Mr. Earl indicated that he wanted to highlight again some of the financial harm, because he wants to set some of the backdrop. This would be about $348,000 per year if forced to have apartments if the nightly rentals were not permitted, so that is what is really at stake and why they are pursuing this. That would equate to roughly, not accounting for inflation or increases in rental rates, about $8.7 million if that were calculated out over 25 years. He does this to highlight a couple of things. One is why it is so important, and two is to highlight that Mr. VanVleet is not a fly-by-night organization that didn't do any due diligence and just went half-cocked into this. He truly was looking at it carefully and diligently and was trying to do the right thing from the beginning. He didn't go and ask the neighbors for their fair contribution; you saw that in some of the public comments that he could have asked for contributions to at least some of the items that were put in, didn't ask for that, just went in and did the improvements, and ultimately now finds himself in a situation where there would be tremendous financial harm if this were not to be allowed.

Attorney Earl stated that ultimately, they are looking for an equitable solution. They believe that the Hearing Officer does have the right under the law to craft one and to take these things into consideration. They respect the city and Kurt and him have worked well together and they appreciate Cari; this is not personal to the city. This is just something that needs to be pursued, because of the interest that was put into it. He believes that if this were a conversation being had before closing that Vincent likely would have just simply walked away, but because they are where they are, it is something that they need to pursue. He came and talked to me about it and he believes he does have the right to continue.

Mr. Earl indicated that he alluded to this, in a Supreme Court decision, it is sort of an understanding that a sort of general principle of legal nonconforming law, but then also adding an important element here that says, "Because of these negative effects, nonconforming uses should be eliminated or reduced to conformity as quickly as possible, but as a caveat, within the limits of fairness and justice". So, while they understand generally speaking the nonconforming law is that you want to convert things to conformity, that must be done within limits of fairness and justice and that is what they're hoping will be looked at and be abided by today given the circumstances and what has been on the property. Also, he noted that in another decision by the Court of Appeals that a nonconforming land use is a vested property right, and it is defined as lawful use to maintain that to the effective date of zoning ordinance prohibiting such use.

Mr. Earl stated that he wanted to talk about the history of the property that truly was a resort property. This is really going to inform this decision; the understanding of talking about the different durations. It is important to understand how the property commenced and how it has been utilized to really understand it as a resort.

As part of the record, Mr. Earl stated that there was an article written about the Hardcastle and it talked about their prior establishment, the Vue Motel, and then moving over to Hardcastle Island, calling it a Hardcastle Island Resort. The early advertisements done under the Hardcastle, again it is called Hardcastle New Island Cottages, you can see on the bank of Oak Creek separated, a private secluded, under beautiful native trees, two to six people, kitchen fully modern, everything furnished, swimming and trout fishing. This is the type of advertisement for not a long-term sort of rental; this is again a resort that was set-up as, established as and was operated as.

Again going forward, this says few days, week or month, completely furnished, modern cottages and apartments on the bank of Oak Creek in Sedona, so he also wants to stop here, again still under the Hardcastle's ownership, they are using the term "cottages" and "apartments", notwithstanding the fact that they are still looking at this as a days, weeks or months and that is

really important that it isn't somehow incongruent with the original intent and original operation to both a) have them as a monthly rental or b) identify them as apartments, so as they proceed into the later history to have somebody talk about renting them on a monthly basis, that is absolutely consistent with how this was done originally, and even if the term "apartment" was used, it would still be consistent with the intent that this was established back before any ordinance applied to this property.

In 1966, it is still before any evidence that there was any applicable county ordinance, which means it was all perfectly legal, because there was no prohibition and again, they see daily, weekly, monthly rates, cottage and apartments will be furnished, so again highlighting that term continued to be used, and yet you see the antique shop, which again helps us understand the resort nature of this.

Mr. Earl then stated that there is a shift; the former Hardcastle Apartments become the Newcastle Island when the Sianis take ownership, but you continue to see that it is being utilized in the same way. He also noted something that was on the record, he wanted to clarify something that was said that is an important distinction. There are very few statements by the actual owner of the property in that 1986 hearing. The statements and the applicant were not the owners of the property. The statements and the applicant was a potential purchaser of the property. What Mrs. Siani stated according to the minutes was, "They purchased the subject property as a resort and they would like to sell it the same way". They'll come back to the fact that she goes on to say that her husband "*is partially disabled and cannot do the required improvements or maintain the responsibility of taking care of the upkeep of the property*". So, the statements made by the potential purchaser about the way the property was utilized were not made by the owner.

Mr. Earl indicated that going to additional history on the property, continuing to see that the property is listed as a motel, and part of the 1986 hearing he wanted to talk about is a statement made by staff. Staff said, "In 1970, the property was sold to the present owner who also operated the apartments on a nightly basis until 1983. Again, identifying them as apartments, identifying the nightly basis, but excluding that they were also done on a weekly and monthly basis. This sort of representation suggests that, well it was done a certain way from '70 to '83, and then a shift occurred at '83, and that he doesn't think is intentionally misleading, but it is misleading if it is misunderstood. If read in this way, it would seem like a shift, and yet as he is about to show you and as you have seen in the record, it was operated as daily, weekly and monthly during this time period.

Mr. Earl pointed out that in 1972, you see again day, week or month. 1973, you see day, week or month. Again, furnished apartment use, yet call day, week or month. Also note that at the bottom the antique and gift shop, so you continue to see how this was established. It is a little hard to make out, but he believes it is September 5, 1974, and he confirmed that was a Thursday, it says Oak Creek apartment, day week, month. Again Thursday, July 24th, 1975, and that was a Thursday, you see the same day, week, month.

Mr. Earl then showed a list of the owners of the subject property starting with the Hardcastles who ultimately sold it to the Sianis you saw in the 1984 hearing. There has only been one owner in-between the current owner and the Siani family.

Mr. Earl stated that he would pause here, and this is the crux of what they want to say, the record in their opinion is unclear as to whether or not nightly was done during a certain period. He showed the statement from the actual owner that is on the record. It doesn't say whether or not it was exclusive to monthly; however, nightly wasn't included. You have a representation from the applicant, but that is not the owner nor is it clear whether or not that is an accurate representation of what was occurring, so the record isn't clear, but in their opinion that is irrelevant, because the property had long established for many years that this was temporary accommodations. You can use a different word, but there was no code in place when it started, so there is no word that they could say that it came in under the county code as X, and therefore, they have to look at that definition of what they were allowed to do. They were effectively writing their own use, because there was no zoning ordinance in place at the time it operated, so you cannot look through the modern lens of today's ordinance or even the county's ordinance when

it was adopted to identify what the use is, so for today, he is going to use the term *"temporary accommodations*", because that accurately reflects in the letter, they used cottages; it is the same principle that temporary accommodations is what was occurring and had been occurring for a very long time – daily, weekly, monthly. Another thing he would say is you have to understand if for a moment let's say it was for a time limited to monthly, that does not mean yearly. It does not mean the typical thing they would think you pay your month rent to run on a yearly contract, and that would be considered more of a semi-permanent accommodation. In a situation like this, the property does matter. Not only is it located on Oak Creek in a fishing area in a town that has historically been one that had high levels of tourism – that context matters, so if you go to a situation where you have monthly, it is still a temporary accommodation not only because of the context, but because by definition, monthly is not a permanent residence situation. You can look today for modern examples of long-term stay. He can go to a long-term stay and he can stay three days and he can set-up shop there for a month or two. That doesn't change that particular facility from being a hospitality or a hotel to somehow now being an apartment because they offered a longer duration. The nature of it is temporary accommodations and that has been consistent; there is no evidence on the record that suggests that it was ever anything other than a temporary accommodation from the beginning and to focus on one particular duration, again even assuming that the record affirmatively established that occurred, isn't inconsistent with the use as it was established.

Mr. Earl presented an analogy he thinks is true, which is that if you had a Farmer's Market, and if this property were to say be used for a Farmer's Market and it had three different vegetables – potatoes, tomatoes and carrots. Even if during a period there was a focus on potatoes because Idaho had a particularly good season and for a time, that wouldn't convert this into a different use. The reality would be that it would be a Farmer's Market; the nature of what was sold at the Farmer's Market wouldn't be a categorically different use, it would be a particular aspect of the use, so when they talk about temporary accommodations that encompasses different aspects of that daily, weekly, monthly. To focus on one particular aspect for a time doesn't mean that the use changes and that is why he highlighted what he did earlier, which is if it were only ever nightly for ten to thirteen years, and then shifted to only ever monthly that would be distinct fact pattern. The fact that it was established as being different types of durations opens the opportunity for those durations. There was a statement that his assertion was that any duration would somehow be fair game and that is not what they are purporting. They are saying that the durations established originally and clearly have been on the record, that any one of those could be utilized for a period of time and still be consistent with the use as it was established.

Mr. Earl also noted that there was no attorney present on behalf of the applicant at that time. The fact that they went into a proceeding to change from one nonconforming use to another does not suggest or prove that it was a necessary hearing. Had they had representation at the time, they may well have understood that they didn't need to be in that hearing process for the reasons he has just stated, but again, the city is concerned about the duration but as stated, it is all the same temporary accommodation, and there is also an important element that goes into case law and that is if not for the county, the nightly rentals would have occurred at incorporation. This is critical because clearly there was an intent for there to be nightly rentals in this '86 hearing, which pre-dated the incorporation, and it was the county's actions as a government actor that foreclosed or at least told the owner you shall not and put a bar up at that time.

Mr. Earl added that the new ordinance was applied in May of 1988 and there was in fact a gap between the incorporation and the introduction of a new ordinance. He believes the city's position is that somehow carries over, but that is not how they read the state statute. He believes the rules and regulations would carry over from the county, but the actual zoning of a property, they don't believe carried over. There was in fact a gap in time, so that clock reset and they would be looking at what occurred in-between the incorporation in January and the introduction of the ordinance in May, and during that time, but for the county's prior governmental representation that it couldn't be done, it clearly would have gone back to also including nightly, so while they don't think it is relevant whether it was nightly or monthly, to the extent the Hearing Officer thinks

it is, he is pointing out that the clock resets at the time and it was a government action that prevented that from occurring at this time.

Mr. Earl stated that in the City of Glendale case that is cited in their material, the court noted that, “On the other hand Glendale may not terminate a use just because one year passes. Some conduct that is in the control and attributed to the property owner must be a cause of the condition justifying the termination.” Again, to the extent the Hearing Officer thinks those durations change the use, which they don’t believe it does, then he would say that at the time incorporation occurred, the property owner had clear intent that they would have made the sale that would have led to there being nightly rentals, and therefore, the control attributed to the property owner, there was no intent or will here by the property owner - that was strictly because of governmental action that was preventing that from occurring.

In that same case, they cite positively to City of Minot v. Fisher and this entire section is relevant, so he will read it:

> “Some situations that have been held to be beyond the control of the property owner are: . . . financial inability of the owner to continue in business; inability to find a tenant desirous of using the premises for a purpose permissible as a nonconforming use; . . . non-use because of necessary repairs."
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> “At all times relevant in the instant case the owner of the building was attempting to find a suitable tenant or purchaser, or was repairing the building. There are no indications of a lack of diligence on the part of the owner in attempting to find a suitable tenant for the building, and we therefore believe that the apparent presumption of abandonment created by the passage of two years without the building being used should not be applied in this case and that the present nonconforming use should be permitted to continue. We so hold.”

Mr. Earl wanted to highlight a distinction here. They understand that, assuming the record is accurate, they focused on monthly rentals for a certain period. What is relevant is that prior to the real demarcation point of when the ordinance was applied in ’88, there was a moment where they would have gone back but for the government action. The other thing to highlight is if you look at the language, it talks about financial inability of the owner to continue, inability to find - this sort of inability idea is why he cited that statement in the record that said, “Her husband is partially disabled and cannot do the required improvements or maintain responsibility of taking care of the upkeep of the property.” So not only was there a government action but you also had the property owner stating there was an inability that played into that decision, not a purposeful decision, but done because of inability of the property owner at the time.

Mr. Earl indicated that he also wanted to talk about the statutory right, Mr. Hearing Officer, he heard what was said, and he does think it is right, so he would like to explain why he believes it is right for this conversation and why he thinks you do have jurisdiction to decide the case, and he would like to talk about the merits of that, because he believes it is right today. Regarding the statutory basis, they have statements from the revised letter that states as follows: “Therefore the use of this property as nightly rental lodging has not been lawfully established”. It is established by state statute; it is a permitted use on the property. Based on this revised director’s interpretation, please provide proof that units are being rented on a monthly basis within 30 days of the date of this letter. If this information is not provided, the city may move forward with issuing a notice of violation.”

You earlier stated that there is authority when there has been an error in an order requirement or decision, and he believes this falls squarely within one of either order requirement or decision to cease the use on the property. They believe that was done in error, because there is a state right. They can talk about the merits of that, but the suggestion that it has not been teed up or right is incorrect, because it is a decision that was made by the city to state that the use could not continue and must stop is something they believe was stated in error, and therefore, part of this decision, and apartments and lodging are not a permitted use in the RS-10 zone.

Mr. Earl stated that while they will agree that within the district statement, it is not listed as a permitted use, it is nevertheless a permitted use within RS-10 within the City of Sedona, because

of state preemption, so it is not an accurate statement to say that the use is not permitted for a property that was within RS-10. The city would even agree with that, what they would disagree with is whether or not it can be done with a certain number of units, but within RS-10, because of state preemption, that is being permitted. He doesn't want to speak for the City Attorney, he is sure the City Attorney will speak to that, but he believes there is agreement on that point.

Mr. Earl then indicated that the short-term rental statute states that a city or county may not prohibit vacation rentals or short-term rentals. It goes on to say in B. that there are some things that can be done like notice and registration, etc., so the definition of what is a vacation rental or short-term rental becomes important, and it goes on to define it in the same section. It says, "Vacation rentals or short-term rentals means any individual or collectively owned single-family or one-to-four-family house or dwelling unit", and then it goes on to talk about condos and other things of that nature, so the city's position is that this refers to a property and that the property boundaries must have between one and four, but that is not the way this reads. It says that any individually owned single family or one-in-four-family house or dwelling unit meaning a structure, a house that has four single-family homes, multifamily homes, so when they talk about a single-family structure versus a multifamily structure, they are talking about the structure and how many individual units are within that, so one-to-four-family house or dwelling unit refers to the building itself, not the property.

Mr. Earl continued to say that in the letter that was part of the briefing, but before he gets to that, they can appreciate that on the property it looks like maybe there is one structure, but actually there are two structures. One has three and it never goes over four. From the roof structure, it is clear that there are two roof structures with separate foundations, separate building structures, separate utility meters, simply with a connection made and a roof connection to cover the walkway, but they are in fact two separate structures. He then referenced a survey done on the property which shows those separate structures.

Mr. Earl indicated that that there was a statement in the city's letter that talked about this provision [A.R.S.9-500.39(B)] (6)(b) which says there were individual addresses and each individual address; therefore, this must be referring to property. That reading is incorrect because this is a notice provision. What it is saying is that when you demonstrate compliance with a paragraph that you go up to the last three lines of the large paragraph that says, "The owner or the owner's designee shall demonstrate compliance with this paragraph by providing the city or town with an attestation of notification compliance that consists of the following information: (b) The address of each property notified." So, this is talking about when I send out a letter, I've got to list the addresses of each property that was notified. It has nothing to do with this subject property.

Mr. Earl added that there is also a statement that there is an illusion to, sort of going back to the beginning, the second paragraph of the whole statute says, "A city or town may regulate vacation rentals or short-term rentals as follows:" Then you drop down to 2., and it references a couple of sections and the argument was that if you look at those sections, they give us a clue about what is occurring in this statute. He would say that this is referring to something totally separate, but even if they were to look at those, those talk about, in 4. under 42-12004, residential housing facilities, and 5., talks about residential care institutions or licensed nursing care institutions and in 6., it talks about real and personal property consisting of not more than eight rooms of residential property that are leased or rented to transient lodgers, together with furnishing not more than a breakfast meal. . ." This would be like a motel where you have at least eight units that are being rented out. Again, if you were to look at that it actually makes the opposite argument that they are talking about, seeing that they can go above the number that was listed. The other one also references in Section 9, it talks about real and personal property that is defined as timeshare property and then you look at the definition, it refers you to "Timeshare property means one or more accommodations . . .", meaning anything above one. It could go up to 10, 20, 30, and then what is an accommodation, means, ". . . any apartment, condominium, cabin, lodge, hotel or motel room . . .", so actually the opposite is true if you look at those provisions, they actually refer to situations where you have lodging and things that are done in multiple units.

But again, going back to the most relevant here is the straight language, which is that there is nothing here that talks about an individual property.

Mr. Earl stated that if you look at, as mentioned at the beginning, it says that the city cannot, I just going to tie these back together, so at the beginning of the code, it says, “City or county may not prohibit vacation rentals or short-term rentals”. What it doesn’t say, and again if you look at the definition of that, what it doesn’t say is that city or county may not prohibit a property from having or talk about a property owner. What it instead says is shall not prohibit the vacation rental or short-term rentals. What is a rental? A rental is something that has one to four units, which they absolutely comply with. It isn’t talking about the property; it is talking about the individual rental, so that, they meet the definition of, so there is nothing here again that talks about the property.

Mr. Earl added that they absolutely fall within the state statute protection, and it is absolutely within the purview of the Hearing Officer to decide that, because the city’s position was that they must stop, that they cannot continue, that it was not permitted within the zone and that they may face pending violations if they don’t act. The city’s position that it is not right for discussion today is respectfully not accurate; it is within the purview and they do meet it.

Mr. Earl again highlighted that Vincent did the right thing upfront. He pursued due diligence which was the right thing. He invested in reasonable reliance upon the city’s statement and a conclusion that was made, and then continued to invest more into the property which has been a benefit to the neighbors. Recognizing the city’s left-in language, he doesn’t think that undercuts a claim that they have either latches or waiver or an equitable doctrine that is applicable here, and the Hearing Officer could and should apply that, all else being set aside for a moment, the fact that he reasonably relied upon that representation and only after the investment was made and all the benefits were given to the area, the city reversed it again. He is not suggesting that was done with any ill will or underhandedness, he doesn’t feel that was the case at all. He is simply stating that because of the way that the facts played themselves out, there is an equitable doctrine at play here too.

Mr. Earl stated that, fundamentally, it goes back to this point of the record testimony on the durations and their position is that because of how it was established at daily, weekly, nightly that any one of those three durations was part of the original use for temporary accommodations, it didn’t somehow transform the use from one to another while that was focused on, which gives Vincent the opportunity today to focus on one particular of those; he is more focused on the nightly, but frankly, even under short-term rental law, you could have somebody stay for a month or two. Those situations overlap, you can have somebody who is there for a single month, clearly that is a temporary condition; they could stay a little longer. You could have somebody who is there for nightly that could stay longer. To now start to distinguish between how long they really stayed is staring to dance on the head of a legal pin in his opinion. The broader picture is that this was a temporary accommodation property; it was established that way. It has been operated that way and it continues to be operated that way. While they understand nonconforming law, he stated upfront and he will conclude with it that they have to look at this with an eye for fairness and equity, and to truly start to distinguish between those two in a hyper-technical way they think is really outside the spirit of the nonconforming law, which is to allow uses that were established, before the government came in and made a change, to be able to continue because there is a vested property right, so with that he would be happy to answer questions.

Hearing Officer Ramsey stated that he would hold off on any questions and give the City of Sedona an opportunity to make a presentation.

Presentation by City Attorney Kurt Christianson: Mr. Christianson indicated that he feels this decision was decided back in 1986. The owner came in and asked the government entity at the time, the Coconino County Planning & Zoning Commission and Board of Supervisors to convert their apartments back to nightly rentals and that decision was denied.

Before Mr. Christianson gets into that, he wanted to talk about a few brief highlights and points. The timeline is a little confused here as stated by the appellant. On March 31, 2021, V&M Real Estate LLC applied for a director's opinion under the determination of whether the nonconforming use of nightly rentals at 55 New Castle. On April 5th, 2001 [2021], they closed on the property. The deed was recorded and they owned the property, and it wasn't until April 13th, eight days later that the decision was provided by the Development Director at the time, based on information they provided allowing or stating that it was a legal nonconforming use for nightly rentals on the property.

After that point, Mr. Christianson indicated that the city learned this additional information. The Coconino County Planning & Zoning Commission's hearing and the Board of Supervisors' hearing, and in the minutes of it, it clearly states that the owner changed the use of the property from the previous nightly, monthly, weekly – whatever you want to call it, the temporary accommodations stated by Mr. Earl were changed to apartments rented on a monthly basis and that was in 1983. That use continued until 1986. There is no evidence in the record and the minutes that there was coercion from any governmental entity that anyone forced the owner to do that. There is no evidence in the record at all as to why the owner decided to do that. Perhaps, just pure speculation, because of the (audio unclear) of one of the owners hasn't changed the facts. That doesn't comply with, even that case in North Dakota that was cited by the appellant, that doesn't get into that area, because it wasn't like they had no use or no tenants of the property or that they were striving to fill them nightly and no one could come. They voluntarily changed it from nightly rentals to monthly rentals.

Mr. Christianson stated that the last legally established use of the property was the monthly rentals, apartments being rented on a monthly basis. So, a few points here, V&M claimed that they relied on the director's interpretation; they did not do that when they purchased the property. Usually if you are closing on a property on April 5th, recording a deed, you entered into the contract long before that, so probably even before asking for a director's opinion.

Mr. Christianson pointed out that the party stipulated and the record shows that by 1975, which is why all of the advertisements the appellant offered were, and maybe even before that, but the last ones were about 1975, and by 1975, the property was zoned by Coconino County as RS-10,000. The property which is equivalent to the city zoning of RS-10, and the RS-10 zoning still exists today – RS stands for single-family residential and 10,000 is the minimum lot size of 10,000 sq. ft.

Mr. Christianson stated that they argue that there was a magical time period when the city incorporated that there was no zoning between January of 1988 when the city incorporated and a few months later when city adopted its zoning ordinance. That is simply not true, A.R.S. 9-104 states when, "County territories included within the boundaries of a newly incorporated city or town, all codes, rules, regulations made, established, adopted or enacted by such county related to zoning, building, plumbing, mechanical, electrical and health and sanitation shall apply within such newly incorporated city or town." Then it goes on to say that it will continue to apply until the newly incorporated city adopts different zoning, so there is no gap or time period there, and even if there was a gap, there has been no evidence provided by the appellant that as to what the property was used for during that time period. From the 1986 hearing up until incorporation and from incorporation until the city adopted its zoning ordinance, we have been provided no evidence and no documentation to show that there was nightly use on that property. From '83 to '86, we knew it was apartments being rented on a monthly basis. Apartments rented on a monthly basis is not a temporary accommodation in anyone's definition. There is really a gap in the history; we don't know what the property was used for until Mr. VanVleet and V&M Real Estate purchased the property and the property was then converted into short-term rentals on April 5th, 2021.

Mr. Christianson explained that this hearing is not the place to decide whether short-term rentals are allowed on the property or not. The appellant's argument falls apart, because as soon as they delve into the argument, they pull up Arizona Revised Statute 9-500.39 and the definitions of that. That is not something the director interpreted. It is something the director can interpret;

it is not his role. The role that the Community Development Director who is the Zoning Administrator for the city under the Land Development Code 8.9.F is to interpret the Land Development Code, the city's zoning ordinance. He is not tasked with interpreting Arizona Revised Statutes.

Mr. Christianson added that short-term rentals are permitted by state law that preempted the city's in some circumstances, but the ability to do short-term rentals is controlled by Chapter 5.25 of the Sedona City Code, not the zoning ordinance, not the Land Development Code. The director didn't have an opinion or interpret the state's short-term rental, so even if you felt that was something the director could do, as an alternative argument, that has not happened yet, so there is nothing here for the Board of Adjustment Hearing Officer to review.

The property really should revert and must revert back to its last legally established use which was apartments rented on a monthly basis. This decision was made back in 1986. V&M Real Estate LLC asks you to ignore the Coconino County Planning & Zoning Commission's decision where they denied the application to use the property for nightly rentals 5-2, and then the unanimous decision of the Coconino County Board of Supervisors upholding that denial when they also turned down the request to convert back from what used to be nightly rentals. We stipulated that in the facts that when the property was started, its use in 1965 was used as nightly, monthly, weekly rentals, but in 1983 that changed to apartments and that needs to remain now absent any other evidence, so we ask that you uphold the director's interpretation that nightly rentals is not a legal nonconforming use of the property.

Hearing Officer Ramsey *opened the public hearing at 11:55 a.m.*

John Smith, Sedona, AZ stated that he has lived in the neighborhood for more than 20 years, and he has seen good and he has seen bad. He listened to this more like he said, she said, and he doesn't understand the legal part of it, and he doesn't profess to understand it, but he will tell you one thing, he walks his dogs through the neighborhood four or five times a day. Until the just recent ownership change did he walk his dogs down on Newcastle Island, because he was afraid to, because of the tenants occupying those apartments. What they have done, he thinks is an asset to our city. When he walks down there, he becomes an ambassador for the City of Sedona as a destination location. He meets people from all over the country and they are 100% happy. He has never heard a negative comment about the location, about the people, about the (audio unclear). He doesn't understand the law, that is beyond his scope of understanding, but they have done a marvelous job and he hopes it continues like it is, because it brings good people to our city who enjoy it, take it back home and spread the gospel of Sedona.

Patty Popp, Sedona, AZ indicated that she is a neighbor of Vincent on New Castle. She doesn't live there anymore. She moved up the road, but she did live on New Castle since 2009. She wanted to make one point. The owner before this rented those as short-term rentals, so this in taking short-term rentals is not the first time they were used as "short-term rentals". Before that, the owners, the Sianis that had the property were absentee owners and there were all kind of sketchy people, who knows how long they were there as John said, and she lived right across the island from where they were. Night time was always interesting to see what you were going to hear, what was going to manifest, what kind of car traffic there was going to be up and down the road, so however the Sianis had those properties rented, weekly, monthly, daily, it was not the best element of Sedona and when their friends showed up, it made it even worse. She will kind of reiterate what John has said, as for as Vincent and Michael, they have improved the property, improved the traffic flow and we have a much better group of people there – very kind. She even had to give a ride to one his guests who needed to get to Enterprise Rent A Car and he was going to walk there on a hot day, and she was working at her cabin and said, "Give me five minutes, I'll take you", but it was a lovely young man from Chile, which has nothing to do with the law, but this is the kind of people that we are now seeing over there. It is not as scary; you saw the improvements that Vincent and Michael did. The owner before him did some, but really not that many, so again like John, she is not a lawyer, she doesn't know the law, but in past years it has been property that has been used for daily, weekly, monthly. She can't give you names, because honestly the people that were there when the Sianis had the property, she didn't want

to know who they were, and if they were there for very long, so it was one of these situations where it was a very transient community, and with the previous owner that changed a little bit, but Vincent and Michael spend night and day, and they are our neighbors. Michael and Vincent are our neighbors. The Sianis were not, even though there were there on occasion – maybe every other month. The other owners had a family member living on Island, so they were there, but having Michael and Vincent there has made a huge difference in our community and she fully supports the short-term rental use for them. You ask her about any other short-term rental use in Sedona and she could keep you for hours on why they shouldn't be allowed, but for Michael and Vincent, absolutely, they absolutely should be allowed to continue in that capacity.

Sarah Wiehl, Sedona, AZ stated that she is going to make it very brief, because single mom, she has to pick her kid up at noon. She is here in 100% support of Vincent. She is a licensed civil engineer in the area, single mom, and she also volunteers her time on the city Planning & Zoning Commission, which is a little bit of an interesting thought in this situation. She knows now why she didn't go into law, because there is the law, the interpretations, and then there is doing the right thing and sometimes those things don't necessarily align. She is really hoping we do the right thing in this situation. She really appreciated the Farmer's Market example. Doing short-term, doing daily, doing monthly is a choice. She knows firsthand short-term and nightly can be very intense, so someone made a choice to switch to monthly, but it doesn't necessarily change the use, so she really liked the Farmer's Market example, that is very applicable. A lot of attention should be paid to that. Also, if you look back and why it was denied by the county, there were several reasons, like concerns around the road, concerns around the septic tanks and all those things have been resolved. They are on city sewer now, there have been some improvements to the road, so that needs to be considered as well. What is really sad is that back in the day, people were trying to do the right thing and they got smacked for it, and the point is if you take the 40,000 ft. view and step back, this has been operating as a short-term rental for a very significant period of time, and these are the people that we want to be supporting in our community. It is not just about Vincent and the property, it is about the cleaning support that does it, it is about the landscaping, it gives jobs to people in the area, it provides a unique opportunity of experience for people that come by being acceptable for the creek. Things can be very black and white, but there is a lot of gray area here and it is really important, which is lacking in society now a days, that we do the right thing in making this decision, and she feels very passionately about what that right thing is and we should continue to support Vincent and his property and find ways to be able to make that happen. She thinks there is some fear about a precedent being set, but when you think about that, we're thinking about fear around people taking a single-family home and converting that into this kind of situation; that is not what we are doing here. What we're trying to is make the situation correct that is already existing, so fear around precedent being set should be thrown out. We can either come from a place of empowerment and do the right thing or we can come from a place of fear, and it is about time we start stepping up and doing the right thing for people, especially people that contribute so much for our community. Statements like doing the due diligence wasn't really doing the due diligence because it was done a few days during contract, anybody who has been a in homeowner contract knows you can cancel until the last day, so he was doing his due diligence; he was doing the right thing. So that is her take on it and she hates to run, but she really hopes that we can come together and support somebody who is very valuable in our community and do the right thing.

Paul Kaiser, Sedona, AZ indicated that he would like to speak and say exactly what she just said. She nailed it right there. He lives on New Castle Lane right before you cross the wash and go over to Vincent's property. Like everybody else, the legal mumbo jumbo back and forth does not resolve the problem. At some point, you have to take the particular situation in mind and review it as an individual situation – not by broad overview regulations that have come out of the past. In this particular case, it should really be looked at and come up with a decision that is not based on this was written then and this was written now. You should be able to made decisions and change some regulations. Everyone that knows Vincent and knows the Island is 100% supportive, except one neighbor who is in a snit. So, in a democracy, hopefully the right group of people can overcome one person that is disgruntled. He realizes that doesn't make your argument, but that is what is going on. Thank you.

Hearing Officer Ramsey *closed the public hearing at 12:07 p.m. having no additional requests to speak and asked if the counselors had any additional input for the record today.*

Appellant's Attorney Earl indicated that in no particular order he wanted to address a few things, and stated that the statement made about precedent, he would also add that this is a very unique situation. He doesn't think there is likely to be a rush to use a decision in their favor today to somehow open the door to short-term rentals across the state. They're talking about their legal nonconforming interpretation is very narrow, and they prefer that to be the basis of the decision today. There is also, Kurt mentioned A.R.S. 9-104 which references codes, rules and regulations and his reading of that does not include zoning of a particular property which is a legislative act that occurs. You can have a code in place and you can have rules and regulations in place, but to suggest that that defacto means that property is zoned a certain way is different. It does not go on to say, but could have, that the zoning would be defacto carried over. When you have annexation that property is rezoned, so he believes there was in fact a gap in time, and therefore, that is relevant, because that is when the government action was introduced in the timeline. Prior to that point, there was an affirmative action of the property owner to make sure that nightly rentals were a part of that and the government action prevented that from occurring because of the statement of the Board of Supervisors.

Mr. Earl then reiterated one more time that they don't think that is relevant. They think it was relevant that it continued to be one of the three durations, but to the extent that you may believe that it is, that is a very important timeline.

Mr. Earl stated that regarding the state statute argument, he would note that Kurt mentioned the things over which the Zoning Administrator has authority, and he would also add to that, that the Zoning Administrator has authority over whether or not a property is in conformance and would then lead to enforcement actions, and the statement in the letter clearly flexes that authority to direct and make a ruling, an order that the property must stop a certain use. Whether or not the Zoning Administrator or the interpretation or the director at that point made a decision to defend that by saying the state statute didn't apply in this circumstance or provide the rationale for it isn't what controls. They made a conclusion and that conclusion is incorrect which gives him the right to appeal that decision. It isn't necessary that the decision say you don't have the authority to continue because of X, Y and Z, and then therefore he is limited to arguing it is X, Y and Z. He is allowed to argue against the conclusion, meaning that he would have to switch and he doesn't because of the state statute. Again, he believes that it is right.

Mr. Earl indicated that there was a reference made to the Board of Adjustment decision as if that had already been decided and done; he would highlight again that was not a necessary hearing for the reasons he stated. They did not need a use permit to switch from one nonconforming use to another, because they never made a switch. It was all the same temporary lodging. The word that continued to be used was that they converted it from, converted it from, that is a word that paints the picture that it went from a particular use to another use, and again that isn't what occurred. They were focusing on an aspect of a particular use and it remained the same.

Mr. Earl stated finally, the word was used that they switched it, they converted it to apartments and that is why he highlighted for you in the record that the term "apartment" was used all throughout that history of daily, weekly, monthly advertisements, the word "apartment" was used repeatedly, because that term, so yes, apartment was used, but back when it was also daily, the advertisements were showing it, so that term has been used throughout. There was also a comment today about it being transient. That is another way say temporary in terms of accommodations, and they believe that it has continued to be transient in nature; these were not long-term, annual type; there is no evidence to suggest it was ever used that way. It would have continued, in a vacation town, on the creek, to be used as temporary lodging. To start to parse out more than that, they think is beyond the spirit of what the nonconforming protections are for. Thank you.

City Attorney Christianson thanked the Hearing Officer and stated that V&M argues that an denial of nightly lodging use in 1986 means that nightly lodging use is still allowed today, and he just doesn't see it. More importantly, V&M likes to ignore the fact that the owner voluntarily

changed the nightly lodging use to apartments in 1983 and that use continued at least until 1986. The reason “apartments” was used back in the advertisements was because it had a different meaning. Apartments is our use on a long-term basis, rented at least monthly from what the minutes showed.

Mr. Christianson then explained that a nonconforming use cannot be changed or expanded once it is established. The owners likely had a nonconforming use of the property; there are two nonconforming uses here really. The building being more than a single-family unit, and then the use being nightly versus long-term rental. The building is not an issue; it is the nonconforming use of this property that is at issue here, and they gave up that use. The owners altered that nightly use in 1983 and there has been no evidence of it being reestablished legally since that time period, so we ask that you uphold the director’s interpretation.

Mr. Christianson stated that lastly, the Zoning Administrator is not part of the Code Enforcement process. Short-term rental code enforcement is done through the Senior Code Enforcement Officer. The director may be at times, but not the Zoning Administrator which is a purview of this hearing – the Land Development Code. The statute is clear that a zoning code is what establishes the zoning on the property, so the statute clearing references the zoning of the property and that is what applies here. It says, “County territories included within the boundaries of a newly incorporated city or town, all codes. . . related to zoning. . . shall apply. Thank you.

Appellant’s Attorney Earl stated that there was one thing he meant to mention that he thinks would be helpful. Regarding the timeline of the transaction, he just wanted to clarify that maybe some of our dates were a little bit off, but prior to the closing, Vincent had a conversation with the city that was a positive conversation about the way this decision would be written and while we don’t’ have that documented here today, again, it was reliance upon the representation by the city before closing. Vincent wouldn’t come that far just to close, and then hope in the next week or two he would get the letter, so the timing was off, he apologizes, he didn’t mean to be misleading on that.

Hearing Officer Ramsey thanked them and stated that those in the audience have had a short-term lesson on zoning law, and you can see the complexity that we are faced with on both sides. He congratulated the attorneys for making very good presentations of their positions. In the variance context, he knows the Hearing Officer has to do a decision within 21 days, and there are other appeals that are possible, if necessary, after that. He doesn’t see that same one here, but let him just say that he feels that he has to make a written decision and findings in this matter within the next 15 days. That being said, if either party wishes to supplement what we’ve done here today, he would give you the next 10 days to file any written documentation that you feel might be relevant. It looks like this case’s history is one where we keep finding more and more possible relevant evidence about the property use, and he does think that is the critical thing here, so if you do have any more documentation that might be relevant or useful and would like to file that with the Hearing Officer, please do so in the next 10 days.

The Hearing Officer then asked if there was any other matter on this hearing, and the parties indicated no.

3. ADJOURNMENT

Hearing Officer Ramsey adjourned the meeting at 12:11p.m.

I certify that the above is a true and correct summary of the meeting of the Board of Adjustment Hearing Officer held on May 17,2023.

_____ _____

Donna A. S. Puckett, *Administrative Assistant* Date