

**Board of Adjustment**  
 Variance Consideration  
 Appeal of Administrative Interpretation



**City Of Sedona**  
**Community Development Department**  
 102 Roadrunner Drive Sedona, AZ 86336  
 (928) 282-1154 • Fax: (928) 204-7124

**Request for:**

- Variance Consideration  
 Appeal of Administrative Interpretation

Date Rec'd:	
Case #:	
Fee Paid:	

**Property/Business Owner Information:**

Primary Contact

Name:	Son Silver West Gallery, Inc. (see attachment)	Phone:	
Address:	1476 State Route 179, Sedona, Arizona 86336	Cell Phone:	
E-mail:	<a href="mailto:rio@sonsilverwest.com">rio@sonsilverwest.com</a>		

**Authorized Agent (if applicable) Information:**

Primary Contact

*\*\*Please attach a letter of authorization from property/business owner (see attached Authorization Letters)*

Name:	Francis J. Slavin, Esq. of Francis J. Slavin, P.C.	Phone:	602-381-8700
Address:	2198 East Camelback Road, Suite 285, Phoenix, Arizona 85016	Cell Phone:	Fax: 602-381-1920
E-mail:	<a href="mailto:b.slavin@fjslegal.com">b.slavin@fjslegal.com</a> ; <a href="mailto:h.dukes@fjslegal.com">h.dukes@fjslegal.com</a>		

**Pursuant to the City of Sedona Land Development Code, this is a formal request for a variance consideration or appeal of an administrative interpretation regarding the following:**

*Note: Requestor should be as specific as possible regarding the reasons for the variance consideration or appeal and refer to the specific sections of the Sedona Land Development Code being contested. (Attach additional pages if more space is required)*

Interpretations and Enforcement Decisions Made by Community Development Director Audree Juhlin in the 2 notices of violation and a memorandum issued to Son Silver West Gallery, Inc. and the Robsons dated November 10, 2015.

Specific issues on appeal to the Sedona Board of Adjustment are set forth in the attached narrative submitted by Francis J. Slavin, P.C. dated November 25, 2015.

Signature:		Date:	11.25.15
Print Name/Title:	FRANCIS J. SLAVIN, Counsel and Authorized Agent		

**Property and Business Owners Appealing Decision of Community Development Director  
November 25, 2015**

**Son Silver West Gallery, Inc.**

1476 State Route 179  
Sedona, Arizona 86336

**Linda Rose Robson and William B. Robson**

**Trustees of the Linda Rose Robson Living Trust dated July 12, 1999**

1476 State Route 179

Sedona, Arizona 86336

Tracts 42 and 41 of Broken Arrow Subdivision, Book 2 of Maps, Page 71, CCR.

APN: 401-31-012A

**Linda Rose Robson and William B. Robson**

**Trustees of the Linda Rose Robson Living Trust dated July 12, 1999, and**

**Linda Rose Robson and William B. Robson**

**Trustees of the William B. Robson Living Trust dated July 12, 1999**

1535 State Route 179

Sedona, Arizona 86336

Tract 40 of Broken Arrow Subdivision, Book 2 of Maps, Page 71, CCR.

APN: 401-31-011

**Rio Cody Robson**

61 Arrow Drive

Sedona, Arizona 86336

Tract 45 of Broken Arrow Subdivision, Book 2 of Maps, Page 71, CCR.

APN: 401-31-016

**Linda Rose Robson and William B. Robson**

**Trustees of the William B. Robson Living Trust dated July 12, 1999, and**

**William B. Robson and Linda Robson**

365 Bowstring Drive

Sedona, Arizona 86336

Tract 49 of Broken Arrow Subdivision, Book 2 of Maps, Page 71, CCR.

APN: 401-31-020

November 25, 2015

**VIA HAND-DELIVERY**

Mr. Joel Gilgoff, Chairman  
CITY OF SEDONA  
Board of Adjustment  
102 Roadrunner Drive  
Sedona, Arizona 86336

**RE: Son Silver West Authorization Letter for Appeal of Director's Interpretation  
and Decision to Board of Adjustment**

Dear Chairman Gilgoff:

On behalf of Son Silver West Gallery, Inc., the William B. Robson Living Trust, dated July 12, 1999, and the Linda Rose Robson Living Trust, dated July 12, 1999, we hereby authorize the Law Offices of Francis J. Slavin, P.C. to submit an appeal of the Community Development Director's decisions and interpretations issued as part of the two Notices of Violation and the Memorandum dated November 10, 2015, as applicable to Tracts 40, 41, 42, and 49 of the Broken Arrow Subdivision, recorded at Book 2 of Maps, Page 71, Official Records of the Coconino County Recorder's Office.

Yours very truly,



Linda Rose Robson  
Trustee of the Linda Rose Robson Living Trust dated July 12, 1999  
Trustee of the William B. Robson Living Trust dated July 12, 1999  
President/CEO of Son Silver West Gallery, Inc.



William B. Robson  
Trustee of the Linda Rose Robson Living Trust dated July 12, 1999  
Trustee of the William B. Robson Living Trust dated July 12, 1999

November 25, 2015

**VIA HAND-DELIVERY**

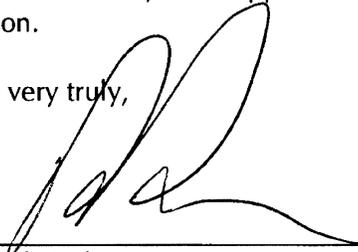
Mr. Joel Gilgoff, Chairman  
CITY OF SEDONA  
Board of Adjustment  
102 Roadrunner Drive  
Sedona, Arizona 86336

**RE: Son Silver West Authorization Letter for Appeal of Director's Interpretation  
and Decision to Board of Adjustment**

Dear Chairman Gilgoff:

On behalf of Son Silver West Gallery, Inc., Robson Design, and as the individual property owner of Tract 45 of the Broken Arrow Subdivision, recorded at Book 2 of Maps, Page 71, Official Records of the Coconino County Recorder's Office, I hereby authorize the Law Offices of Francis J. Slavin, P.C. to submit an appeal of the Community Development Director's decisions and interpretations issued as part of the two Notices of Violation and the Memorandum dated November 10, 2015 applicable to Tracts 40, 41, 42, 45 and 49 of the Broken Arrow Subdivision.

Yours very truly,



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Rio Cody Robson  
Owner of Tract 45 of Broken Arrow Subdivision  
Vice-President of Son Silver West, Inc.  
Representative of Robson Design

**SON SILVER WEST APPEAL TO SEDONA BOARD OF ADJUSTMENT**  
**November 25, 2015**

**I. INTRODUCTION**

Visitors traveling north along State Route 179 are welcomed to Sedona by a familiar oval sign hung between large wooden posts with the outline of a Native American chief mounted atop a horse, his feathered headdress prominent against a fading red sunset. To many of Sedona’s visitors and residents, the Son Silver West sign is a landmark as familiar as the majestic, multi-hued red rocks which tower above the landscape, embodying the traditional western art and unique beauty for which Sedona is renowned. For 34 years, the Robson family has molded and refined its Son Silver West business to become one of the most successful and widely recognized art galleries in this community, the State and the Southwest. Their passion for art coupled with dedication, hard work and creativity has drawn repeat visitors and residents of Sedona alike to its location at 1476 SR 179. As one of the longest operating family-owned small businesses in Sedona, Son Silver West continues to contribute to the distinctive Sedona experience as well as the long-term financial viability of the community.



In 1960, buildings were constructed on Tract 42 of the Broken Arrow Subdivision, which is the current location of the main buildings on the Son Silver West Property. It was at that time the former “La Galleria” began operating as a commercial art gallery with outdoor retail space on Tract 42 by Mary Ernestine Nestler Todd and her late husband.<sup>1</sup> The La Galleria was in operation prior to Coconino County adopting its first zoning ordinance in 1964.<sup>2</sup> Thus, the gallery and its primary structures on Tract 42 have operated as a legal non-conforming use since 1964.<sup>3</sup>

In 1981, Bill and Rose Robson purchased what was then known as La Galleria and moved to Sedona from northern California. During the first few years of Son Silver West’s

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<sup>1</sup> See “Background” section of Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached to SSW Memorandum as **Exhibit “3”**.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

existence, the Robsons struggled to make ends meet while operating the art gallery. The Robsons searched for ways to revitalize their new business to attract main-stream customers living in and traveling to Sedona. Bill Robson, a ceramicist by education and training, began making and selling pottery and periodically loaded up his pick-up truck hauling strings of chilies purchased in New Mexico to sell the ever-popular chilies at Son Silver West. The Robson's ingenuity saved Son Silver West in those early years and allowed them to adjust their business model to meet ever-changing retail demands over the next 3 decades.

The Robson's eventually came to learn that their boundless ingenuity that helped jump-start Son Silver West was to be tempered by zoning restrictions. Shortly after Sedona incorporated in 1988, the City of Sedona rezoned the commercial art gallery, workshop, and retail use for single family residential use! By state law, the Robsons were allowed to continue doing business as a legal non-conforming use. In 1992, a conditional use permit was approved by the City Planning and Zoning Commission allowing the expansion of the Son Silver West legal non-conforming use onto an adjoining parcel of land to the south, Tract 41. Since 1992, the Robsons have obtained various approvals and permits from the City of Sedona to erect additional buildings, shade structures and fences. From time to time, the Robsons received interpretations and also notices of violation from former Community Development Director John O'Brien arising from the Son Silver West legal non-conforming use status. In these prior occasions, the Robsons either undertook corrective action required by Director O'Brien or submitted evidence demonstrating compliance with their legal non-conforming use status to the satisfaction of the Director.

Director O'Brien performed an inspection of the Son Silver West property in connection with a pending enforcement action and issued a formal decision on December 21, 2011 finding the Son Silver West property to be in compliance with no outstanding violations (the "**December 21, 2011 Decision**"). Since the issuance of the December 21, 2011 Decision, the uses, buildings, and structures on the Son Silver West property have remained the same. The Robsons rightfully relied upon the December 21, 2011 Decision from Director O'Brien, thereafter expending substantial sums of money investing in their business with an assurance that their Son Silver West property was in compliance with City codes and their existing zoning and building permit approvals.

Director O'Brien retired in July of 2012. He was replaced by Kevin Snyder from the City of Auburn, Washington. Fast-forwarding almost 3 years after Director O'Brien's December 21, 2011 Decision, the Robsons received a Notice of Violation from the newly appointed Community Development Director, Audree Juhlin, dated October 8, 2014 (the "**2014 NOV**"). The 2014 NOV was limited to alleged violations for the following parcels owned by the Robsons, which are located adjacent to Son Silver West Tracts 42 and 41: (1) a residence located on Tract 45 with an address of 61 Arrow Drive, (2) a residence located on Tract 49 with an address of 365 Bowstring, and (3) a vacant Tract 40 with frontage along SR 179 and adjacent to the Son Silver West parking lot on the south. The 2014 NOV did not address any violations on the Son Silver West Property (Tracts 42 and

41), having the legal effect of ratifying the prior December 21, 2011 Decision as a formal, binding decision of an authorized City official.

After evaluating their options and with the encouragement of Director Juhlin, the Robsons decided to pursue a Community Plan amendment and rezoning approval for Planned Development zoning on Tracts 40, 41, 42 and 45. Enforcement of the 2014 NOV was placed on hold by Director Juhlin while the Robsons processed these applications. The Robsons held an initial neighborhood meeting to explain their plan and received positive feedback. Unforeseeably, the Robsons were met with opposition at their second neighborhood meeting. Despite the Robson's attempts to amend their pending applications to rezone only the existing Son Silver West Property and the vacant Tract 40 to Planned Development zoning district, the mounting opposition and resulting negative staff report forced the Robsons to withdraw their Community Plan amendment and rezoning applications in August of 2015.

On September 9, 2015, the Robsons and their legal counsel met with Director Juhlin, City Attorney Robert Pickels and City Manager Justin Clifton. The purpose of the meeting was to discuss the City's plan to commence enforcement proceedings under the 2014 NOV as well as additional alleged violations for the Son Silver West Property. The additional violations alleged by Director Juhlin directly contradicted the December 21, 2011 Decision by former Director O'Brien. With the agreement of the City, the Robson's counsel submitted a legal memorandum dated September 22, 2015 providing the history of the Son Silver West business operations and its legal non-conforming use rights, the history of related City approvals, enforcement actions and decisions, the binding effect of Director O'Brien's December 21, 2011 Decision and the Robson's reliance thereon, and the Robson's vested rights on the Son Silver West Property. A copy of the SSW Memorandum dated September 22, 2015 and the attached exhibits provided to Director Juhlin are submitted herewith as **Exhibit "A."**

The evidence submitted in the SSW Memorandum was altogether rejected by the City. Director Juhlin proceeded to serve the Robsons and Son Silver West with 2 additional Notices of Violation dated November 10, 2015 (the "**2015 NOV**") as well as a memorandum providing Director Juhlin's interpretation and decision regarding the authority of former Director O'Brien to render his December 21, 2011 decision (the "**Director's 2015 Memorandum**").<sup>4</sup>

As a result, on behalf of clients Son Silver West Gallery, Inc. and the Robsons, Francis J. Slavin, P.C. hereby submits this appeal to the Sedona Board of Adjustment arising from the interpretations issued by the Community Development Director as set forth in the 2015 NOVs and the Director's 2015 Memorandum dated November 10, 2015 with regard to the following properties:

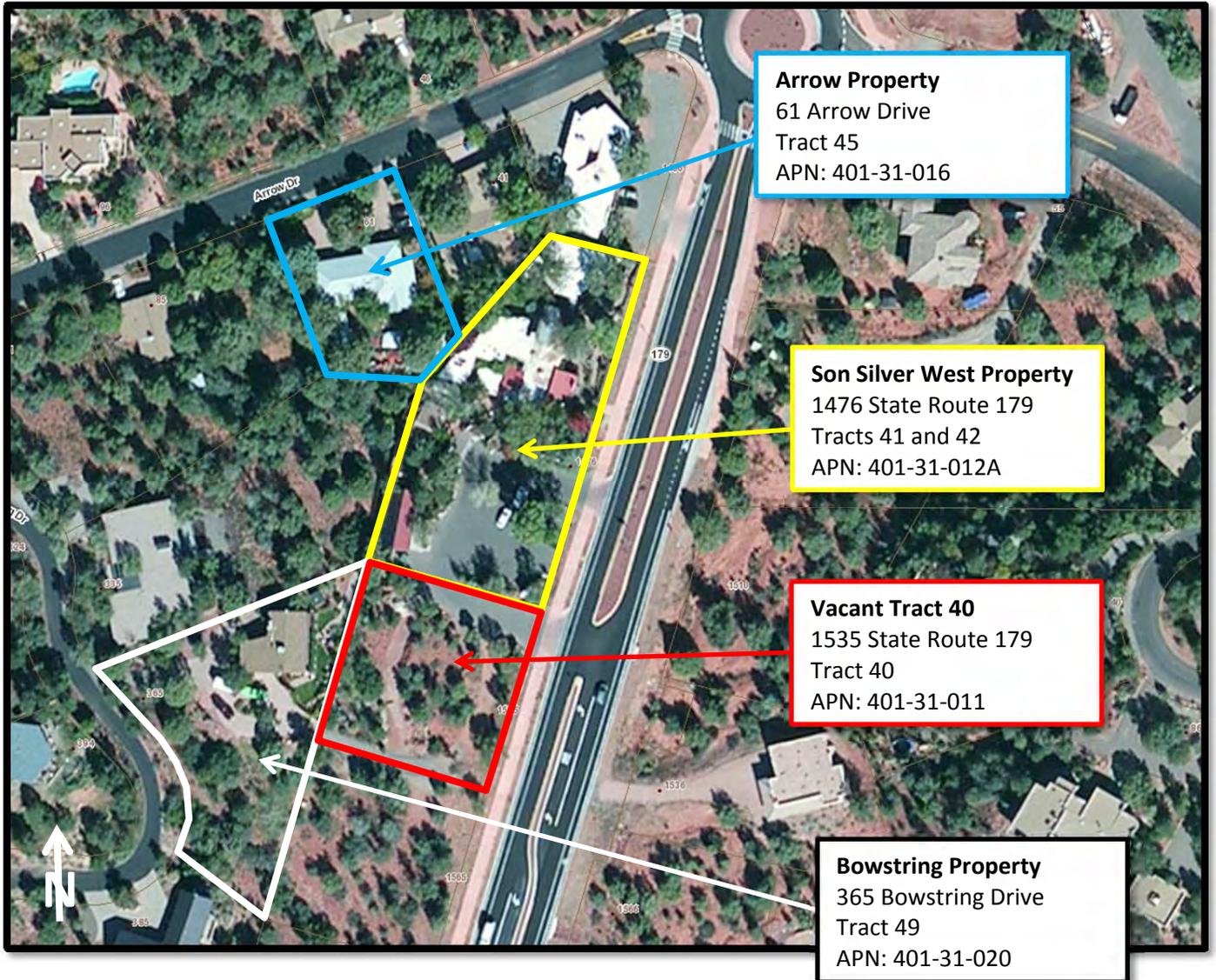
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<sup>4</sup> City Attorney Robert Pickels later authored a letter to Attorney Francis (Buzz) Slavin dated November 24, 2015 which set forth his reasoning questioning the scope of former Director John O'Brien's authority.

**PROPERTIES OWNED BY ROBSONS WITHIN BROKEN ARROW SUBDIVISION  
LYING ALONG WEST SIDE OF SR 179 & SOUTH OF ARROW DRIVE-MORGAN ROAD ROUNDABOUT**

Address	Assessor's Parcel No.	Broken Arrow Tract No.	Parcel Size	Property Owner	Referenced Terms in this Memorandum
1476 State Route 179	401-31-012A	Tract 42 & 41	0.83 ac	Linda Rose Robson and William B. Robson, Trustees of the Linda Rose Robson Living Trust u/t/a dated July 12, 1999	Referred to collectively as " <b>Son Silver West Property</b> " or individual tracts as " <b>Tract 42</b> " & " <b>Tract 41</b> "
1535 State Route 179	401-31-011	Tract 40	0.48 ac	Linda Rose Robson and William B. Robson, Trustees of the Linda Rose Robson Living Trust u/t/a dated July 12, 1999	Referred to as " <b>Vacant Tract 40</b> "
61 Arrow Drive	401-31-016	Tract 45	0.38 ac	Rio Cody Robson	Referred to as " <b>Arrow Parcel</b> "
365 Bowstring Drive	401-31-020	Tract 49	0.65 ac	Linda Rose Robson and William B. Robson, Trustees of the Linda Rose Robson Living Trust u/t/a dated July 12, 1999	Referred to as " <b>Bowstring Parcel</b> "

COCONINO COUNTY ASSESSOR'S PARCEL MAP OF SON SILVER WEST AND ROBSON PROPERTIES



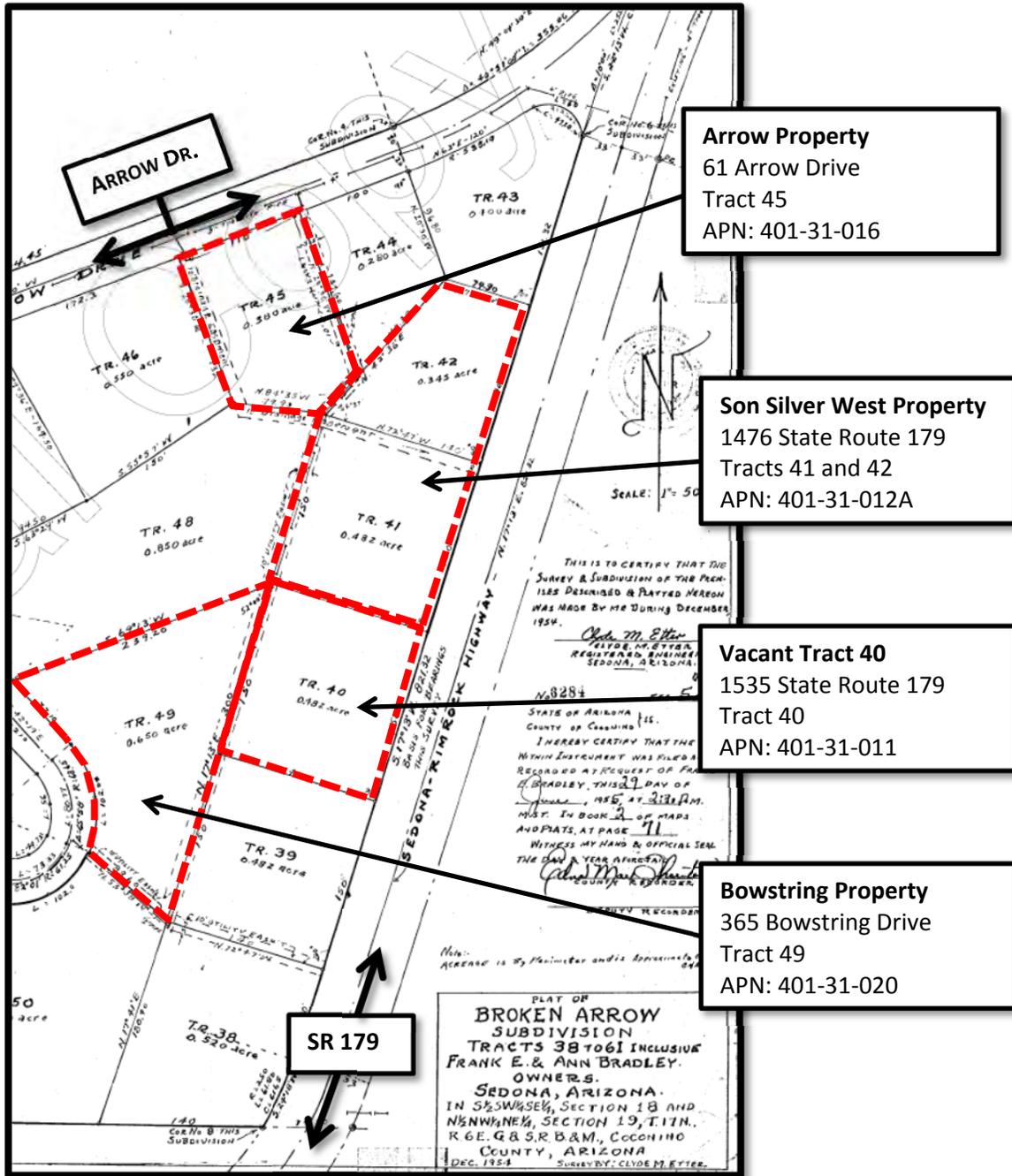
**II. HISTORY**

Our firm provides the following abbreviated statement of facts with regard to Son Silver West based upon records that were made available on the City of Sedona website and records provided by the Robsons.

- A. The Broken Arrow subdivision plat was recorded on June 29, 1955** at Book 2 of Maps Page 71, Official Records of Coconino County Recorder (“CCR”) (hereinafter the “**Broken Arrow Plat**”).<sup>5</sup> The following lots designated on the Broken Arrow Plat are currently owned by the Robsons:

<sup>5</sup> Broken Arrow Plat is attached to SSW Memorandum as **Exhibit “1”**.

**BROKEN ARROW PLAT, BOOK 2 OF MAPS, PAGE 71, CCR**



**Arrow Property**  
 61 Arrow Drive  
 Tract 45  
 APN: 401-31-016

**Son Silver West Property**  
 1476 State Route 179  
 Tracts 41 and 42  
 APN: 401-31-012A

**Vacant Tract 40**  
 1535 State Route 179  
 Tract 40  
 APN: 401-31-011

**Bowstring Property**  
 365 Bowstring Drive  
 Tract 49  
 APN: 401-31-020

**SR 179**

**B. Deed Restrictions for the Broken Arrow subdivision were recorded on July 21, 1955 in Book 77, Page 509, CCR.<sup>6</sup> The Deed Restrictions state in part as follows:**

<sup>6</sup> See Deed Restrictions attached to SSW Memorandum as **Exhibit "2"**.

9. The forgoing restrictions and covenants run with the land and shall be binding on all owners of said Tracts and all persons claiming under then [sic] until January 1, 1966, at which time said covenants shall be automatically extended for successive periods of ten (10) years each, unless by a majority of the then owners of the Tracts, it is agreed to change the said covenants in whole or in part.

...

13. The business district shall be confined to those Tracts numbered 38 to 44 inclusive, fronting on Sedona Rimrock Highway.

As set forth in Paragraph 13 of the Deed Restrictions, the developer of the Broken Arrow subdivision contemplated business uses on tracts lying along the west side of State Route 179, including the Son Silver West Property and Vacant Tract 40.

- C. In 1960, buildings were constructed and the former “La Galleria” began operating as a commercial art gallery with outdoor retail space on Tract 42** by Mary Ernestine Nestler Todd and her late husband.<sup>7</sup> The La Galleria was in operation when Coconino County adopted its first zoning ordinance and initiated residential zoning for Tract 42 in 1964.<sup>8</sup> Thus, the gallery and its primary structures on Tract 42 were allowed to continue to operate as a legal non-conforming use since 1964.<sup>9</sup>

According to a letter from Ms. Todd to former Sedona Community Development Director Tom Schafer dated February 2, 1990<sup>10</sup>, during the Todd’s ownership of La Galleria from 1960 to 1981, the Todds “conducted the outdoor display of pottery, chimes, chilies, and southwestern art-and-craft items.” Ms. Todd also states in her letter that the “outdoor display area and gallery presently maintained by the Robsons is compatible with that which was done at that location in my previous business.”

- D. In 1964, Coconino County adopted its first zoning ordinance and initiated C-RS-18,000 (Single Family Residential) zoning for all property located within the Broken Arrow subdivision, including the La Galleria on Tract 42.**<sup>11</sup> The initial

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<sup>7</sup> See “Background” section of Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached to SSW Memorandum as **Exhibit “3”**.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Letter from Ms. Todd to Director Tom Schafer attached to SSW Memorandum as **Exhibit “4A”**.

<sup>11</sup> See “Background” section of Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached to SSW Memorandum as **Exhibit “3”**.

zoning of Tract 42 to a single family residential zoning district rendered the La Galleria commercial art gallery and associated outdoor retail display areas a legal non-conforming use under Ariz. R. Stat. § 9-462.02(A).

- E. On January 20, 1981, Tract 42 and the La Galleria were purchased by William B. and Linda Rose Robson** by Joint Tenancy Deed recorded in Book 820, Page 872, CCR.<sup>12</sup> At the time of the Robson’s purchase, the commercial gallery and associated retail uses on Tract 42 remained a legal non-conforming use within the unincorporated territory of Coconino County. The City of Sedona was not incorporated until 1988. From 1981 to the present, the Robsons have continuously operated the commercial art gallery and associated retail uses as a legal non-conforming use, renaming the “La Galleria” as “Son Silver West.”
- F. On March 4, 1987, William B. and Linda Rose Robson purchased Tract 41** by deed recorded in Book 1144, Page 786, CCR.<sup>13</sup> At the time of the Robsons purchase, Tract 41 was located within the unincorporated territory of Coconino County.
- G. The City of Sedona was incorporated in January 1988.** Upon incorporation, the City of Sedona adopted an interim zoning code and placed residential zoning on the Son Silver West Property comparable to the existing Coconino County C-RS-18,000 zoning district.
- H. On August 16, 1991, the City of Sedona approved Son Silver West’s plans to repair the roof and structure of an existing chili cage on Tract 42 located on the east side of the existing gallery building along Highway 179.**<sup>14</sup> According to the Son Silver West records recently posted to the City of Sedona FTP site on November 24, 2015, final inspections of the chili cage repairs were performed by the City on October 17, 1991.<sup>15</sup> Pictures attached to the City’s 1991 chili cage permit records show strings of chilies being dried and sold on the Son Silver West Property.<sup>16</sup>

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<sup>12</sup> Joint Tenancy Deed conveying Tract 42 from Mary Ernestine Nestler Todd to William Robson and Linda Rose Robson attached to SSW Memorandum as **Exhibit “4B”**.

<sup>13</sup> Joint Tenancy Deed conveying Tract 41 from John T. Brooks and Sally M. Brooks to William Robson and Linda Rose West Robson attached hereto as **Exhibit “B”**.

<sup>14</sup> See approved Chili Cage Plan, attached to SSW Memorandum as **Exhibit “5”**.

<sup>15</sup> See Permit No. B1517 issued for Chili Cage repair, attached hereto as **Exhibit “D”**.

<sup>16</sup> *Id.*

## Coconino County Assessor Parcel Map – Location of Permitted Chili Cage



- I. On November 26, 1991, the Sedona City Council adopted the first Sedona Community Plan which designated the Son Silver West Property as Commercial on the Land Use Map.<sup>17</sup>
- J. On September 5, 1992, the Sedona Planning and Zoning Commission approved Case No. CUP 92-3, granting a conditional use permit for the Son Silver West Property which allowed expansion of the Son Silver West legal non-conforming use onto Tract 41 (hereinafter the "1992 CUP").<sup>18</sup> At the time of

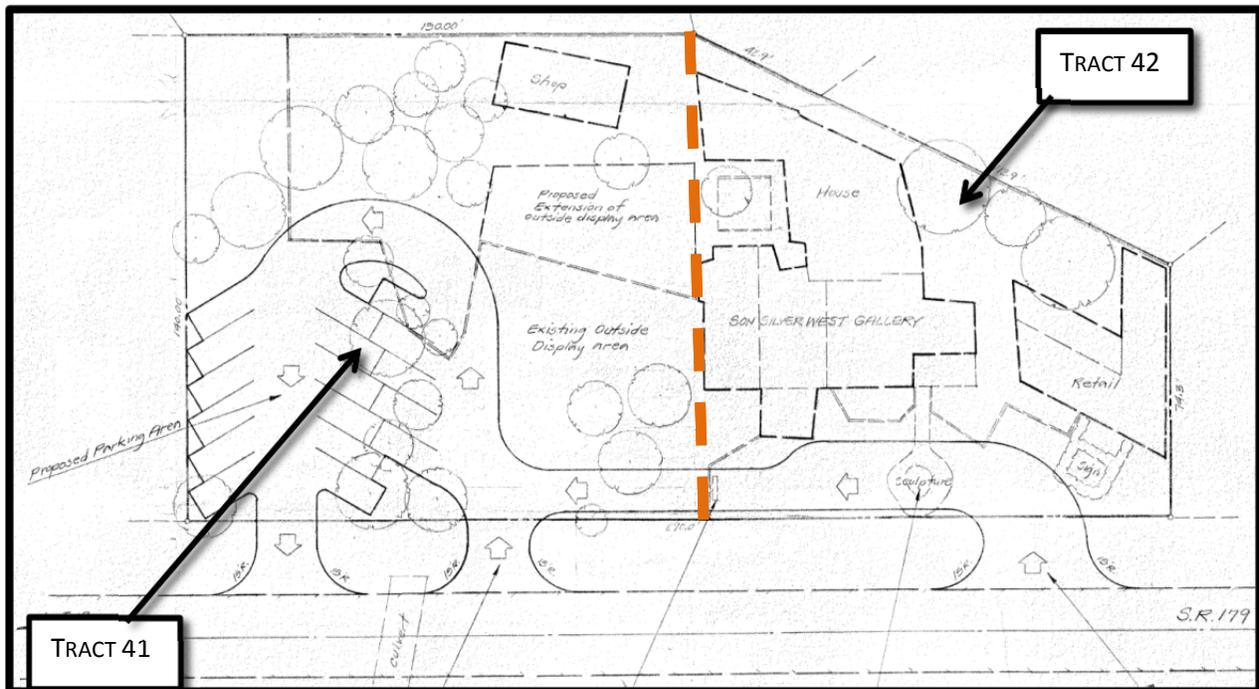
<sup>17</sup> See "Analysis" section of Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992, page 6, attached to SSW Memorandum as **Exhibit "6"**.

<sup>18</sup> See Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached to SSW Memorandum as **Exhibit "3"**; See also Minutes from the September 15, 1992 Planning and Zoning Commission hearing attached to SSW Memorandum as **Exhibit "8"**; See also Letter from Sedona Associate Planner John O'Brien to Robsons dated September 21, 1992 attaching final conditions of approval for Case No. CUP 92-3, attached to SSW Memorandum as **Exhibit "9"**; See also Site Plan prepared by Shephard-Wesnitzer, Inc. dated April 4, 1992, Job No. 91038, submitted by Robsons to City of Sedona and approved as part of CUP 92-3 as "Alternative Site Plan #2", attached to SSW Memorandum as **Exhibit "10"**.

approval of the 1992 CUP, Section 204.01 of the Sedona Interim Zoning Ordinance provided for the expansion of non-conforming uses through the administrative approval of a conditional use permit by the Planning & Zoning Commission. The option for obtaining a conditional use permit to expand a legal non-conforming use has since been deleted from the Sedona Land Development Code.

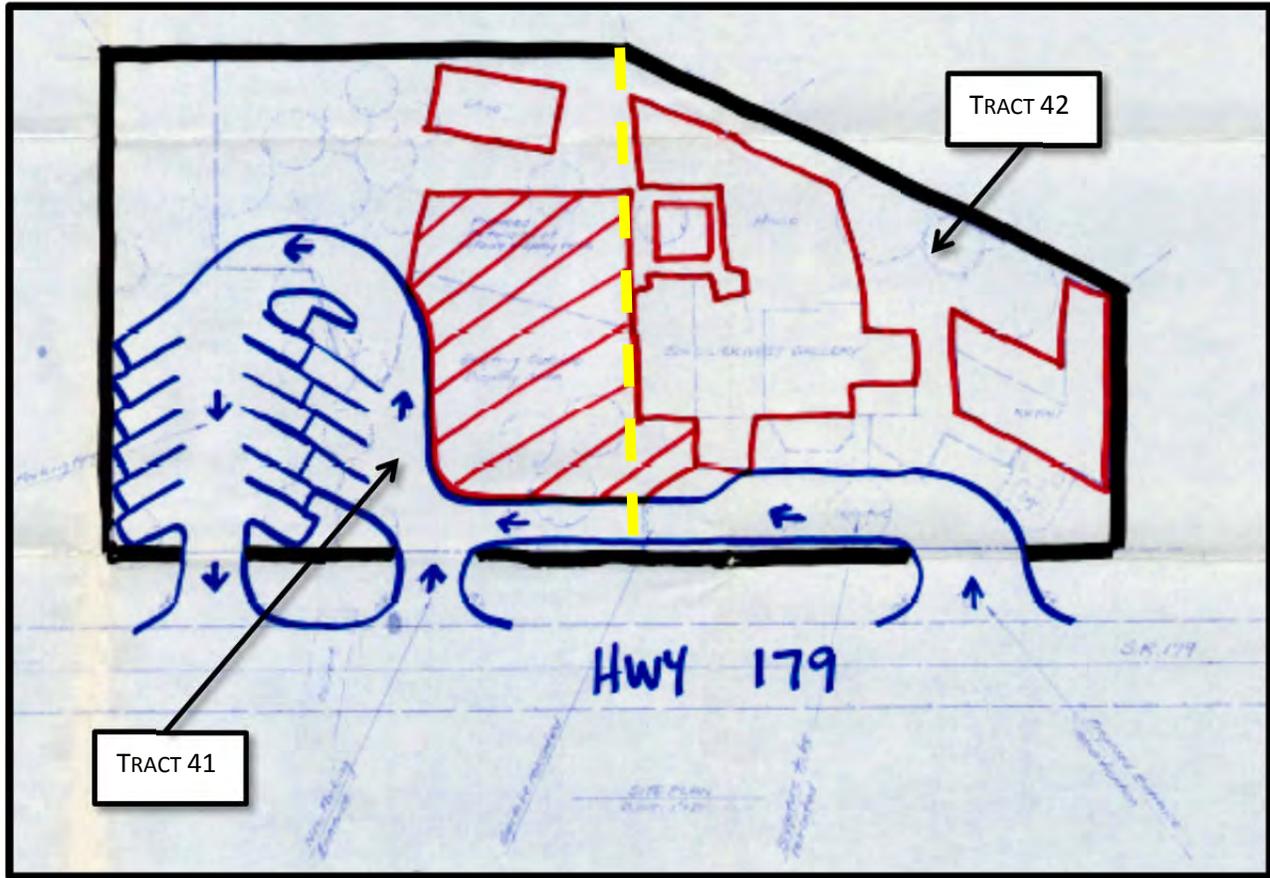
As part of the Robson’s 1992 CUP application, a schematic site plan drawn to scale was prepared by Shephard–Wesnitzer, Inc. dated April 4, 1992, Job No. 91038 (the “**1992 Plan**”) which showed the following improvements and uses as of April of 1992: (1) the art gallery, enclosed retail, art workshop and residential uses on the Son Silver West Property , (2) the proposed relocation and expansion of the parking area from Tract 42 to Tract 41 and reconfiguration of the on-site traffic circulation, and (3) the outside retail display area to be expanded in the northern area of Tract 41. This 1992 Plan was submitted by the Robsons to the City of Sedona and was approved with a hand-drawn overlay sketch as “**Alternative Site Plan #2**” (shown with red and blue overlay on following page).<sup>19</sup>

**1992 PLAN LATER ADOPTED AS “ALTERNATIVE SITE PLAN #2” BY PLANNING AND ZONING COMMISSION**  
**\*With FJS, PC Annotations Designating Tracts 41 and 42**



<sup>19</sup> See larger size of Site Plan prepared by Shephard–Wesnitzer, Inc. dated April 4, 1992, Job No. 91038, submitted by Robsons to City of Sedona and approved as part of CUP 92-3 as “Alternative Site Plan #2”, attached to SSW Memorandum as **Exhibit “10”**.

ALTERNATIVE SITE PLAN #2 APPROVED WITH CUP 92-3 ON SEPTEMBER 15, 1992  
\*With FJS, PC Annotations Designating Tracts 41 and 42



The location of the additional 5,000 s.f. of outdoor retail display area to be expanded onto Tract 41 is shown on Alternative Site Plan #2 with diagonal red lines. This expanded outdoor retail display area measures approximately 60 feet by 90 feet. The 1992 Plan and the Alternative Site Plan #2 do not identify the locations of the outdoor retail display areas which were then existing on Tract 42. The Robsons steadfastly maintain that virtually all of the outdoor area on Lot 42 was used for retail display, except for the parking area lying between the gallery and SR 179.

The 1992 CUP was approved by the Planning and Zoning Commission subject to certain conditions of approval<sup>20</sup>, which are at issue in this appeal:

1. Uses and physical improvements on the subject property shall not exceed those as characterized in the staff report dated

<sup>20</sup> See Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached to SSW Memorandum as **Exhibit "3"**; See also Letter from Sedona Associate Planner John O'Brien to Robsons dated September 21, 1992 attaching final conditions of approval for Case No. CUP 92-3, attached to SSW Memorandum as **Exhibit "9"**; See also larger size of this "Alternative Site Plan #2", attached to SSW Memorandum as **Exhibit "10"**.

September 15, 1992, and as approved by the Planning and Zoning Commission (alternate site plan #2).

- ...
6. The outside sales/display area shall be screened by a six-foot high fence/ocotillo cactus to the satisfaction of the Director of Community Development.
- ...
9. All other exterior outside lighting shall be shielded to the specifications of the Director of Community Development.

Condition No. 1 to the 1992 CUP limits the uses and physical improvements on the Son Silver West Property to those characterized in both the staff report dated September 15, 1992 (the "1992 Staff Report") and the Alternate Site Plan #2. Unfortunately, the square footages of the buildings and uses measured on the scaled version of Alternate Site Plan #2 do not match the uses and square footages identified in the 1992 Staff Report. A comparison of the uses and square footages identified in the 1992 Staff Report versus the uses and square footages provided in Alternate Site Plan #2 is set forth below:

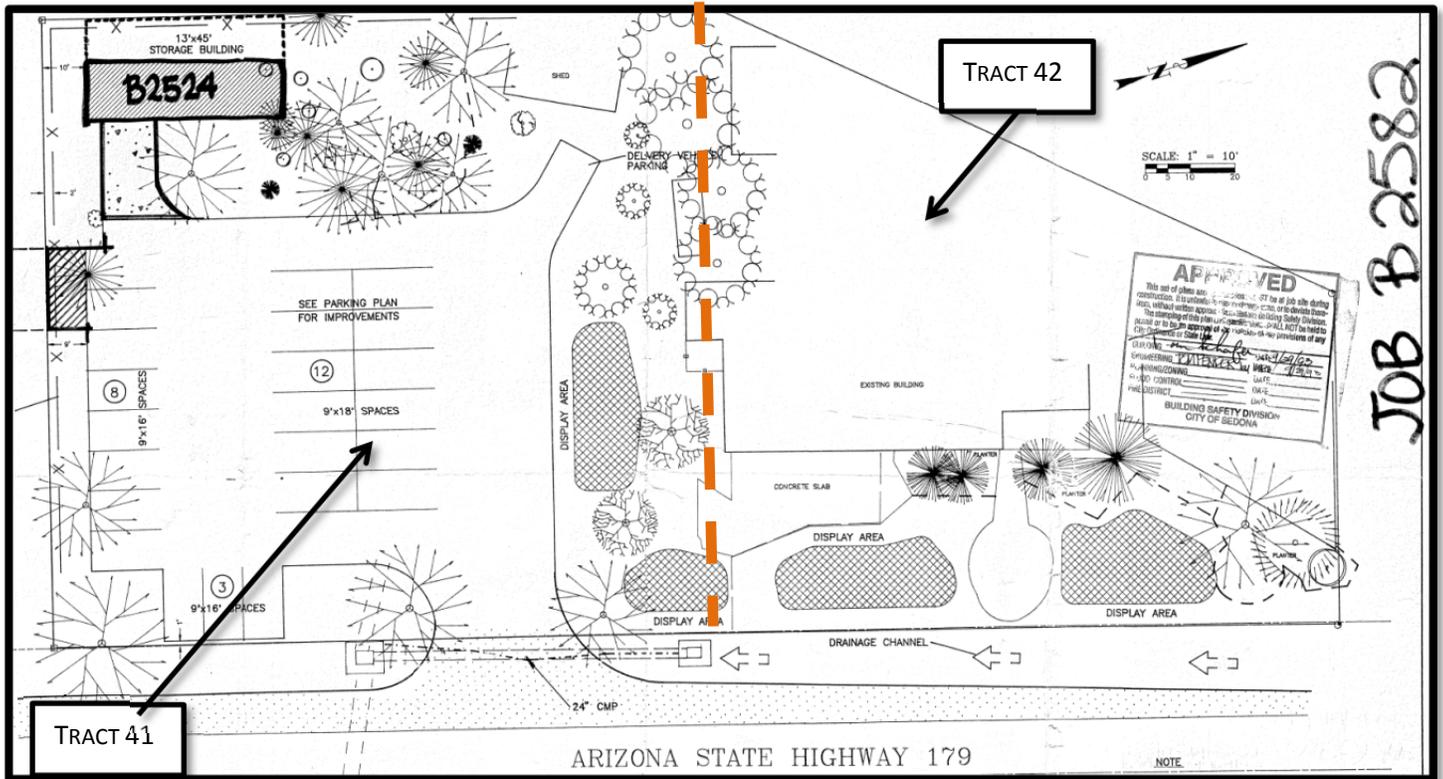
1992 STAFF REPORT <sup>21</sup>		ALTERNATE SITE PLAN # 2 <sup>22</sup>	
USE	SQUARE FOOTAGE	USE	SQUARE FOOTAGE
Retail space in enclosed buildings	2,250 s.f.	Retail Son Silver West Gallery	4,328 s.f.
Additional outside retail display area on Tract 41	5,000 s.f.	Outdoor retail display area on Tract 41	5,400 s.f.
Single-family dwelling	1,950 s.f.	House	1,950 s.f. (483 s.f. at southwest corner of House used as Art Studio)
Pottery shop with kiln	1,300 s.f.	--	--
Storage space	590 s.f.	--	--
Workshop	750 s.f.	Shop	740 s.f.
Parking located between gallery and Highway 179	N/A	Parking proposed at south end of Property on Tract 41	N/A

<sup>21</sup> See Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached to SSW Memorandum as **Exhibit "3"**

<sup>22</sup> See "Alternative Site Plan #2", attached to SSW Memorandum as **Exhibit "10"**.

K. On September 29, 1993, the former Community Development Director Tom Schafer approved a Site Plan, Highway 179 Paving & Striping Plan, and Parking Plan prepared for the Son Silver West Property by Shephard-Wesnitzer, Inc. dated September 1993, Job No. 91038 (the "1993 Plan").<sup>23</sup> The 1993 Plan contains a City of Sedona Building Safety Division "Approved" stamp as well as large handwriting referencing "JOB B2582" and "B2524". The "B2524" number is placed on top of a 13' x 45' building located at the southwest corner of Tract 41, evidencing the City's issuance of a building permit for that structure.

**1993 PLAN APPROVED BY FORMER COMMUNITY DEVELOPMENT DIRECTOR SCHAFER**  
**\*With FJS, PC Annotations Designating Tracts 41 and 42**



The 1993 Plan approved by Director Schafer shows an approximate 30-foot wide outdoor retail display area lying along the north side of Tract 41 and south of the gallery building that was existing at the time of the CUP approval in 1992. Based upon the approximate 60-foot width of the outdoor display area shown on the prior 1992 Plan and Alternative Site Plan #2, it is obvious that the display area existing along the north side of Tract 41 at the time of the CUP approval was reduced by almost half in order to accommodate the new parking area on Tract 41. Not by coincidence, the 1993 Plan also shows outdoor retail "display

<sup>23</sup> See 1993 Plan attached to SSW Memorandum as **Exhibit "11"**.

areas” within the entire north-south area lying between the existing Tract 42 gallery and retail buildings on the west and the drainage channel abutting Highway 179 on the east. This additional outdoor display area shown on Tract 42 along Highway 179 on the 1993 Plan, formerly occupied by the original parking area of the gallery, was relocated from the 5,000 s.f. outdoor display area approved along the north side of Tract 41 by the CUP. Thus, in 1993, Director Schafer approved these outdoor retail display areas as they currently exist today.

### Coconino County Assessor Parcel Map – 1993 Plan Approvals



The buildings and the outdoor retail display areas located interior to Tract 42 are not depicted on the 1993 Plan due to the nature of the plans. The 1993 Plans were submitted for issuance of building permits related to the new parking area on Tract 41, improvements to Highway 179, and the construction of a new building at the southwest corner of Tract 41. Providing a detailed plan of the existing improvements and uses within the interior of Tract 42 was not necessary for the issuance of those permits.

**L. As of June 7, 1994, the new parking lot had been constructed on Tract 41.<sup>24</sup>**

**M. On June 7, 1994, former Community Development Director Tom Schafer and the Robsons entered into an agreement with regard to the Robson's future compliance with CUP Condition Nos. 4, 6, 8, 9, and 10 as summarized below:**

- Condition No. 4 – The Robsons agreed that all required improvements to Hwy. 179 would be commenced no later than April 1, 1995 and completed no later than July 1, 1995.
- Condition No. 6 – The Robsons agreed that earthen berms and screen landscaping would be provided along the east side of the newly established display area in front of the gallery adjacent to Hwy. 179 to the satisfaction of the Director of Community Development no later than August 1, 1994 and October 1, 1994, respectively. A combination of earthen berming, landscaping and rustic fencing was also required in order to satisfy any additional visual screening requirements of all outside display areas as approved by the Director no later than October 1, 1994. (Emphasis added).
- Condition No. 8 – The Robsons agreed that all mercury vapor lighting would be eliminated no later than August 1, 1994.
- Condition No. 9 – The Robsons agreed to install parking lot lighting no later than August 1, 1994. It was agreed that all lighting would be shielded to the satisfaction of the Community Development Department Director no later than August 15, 1994. (Emphasis added).
- Condition No. 10 – The Robsons agreed that the south and east sides of the new parking lot area on Tract 41 would be screened with earthen berms and landscaped to the satisfaction of the Director no later than July 1, 1994. (Emphasis added).

The June 7, 1994 agreement also acknowledged public use of the Son Silver West “newly established parking lot area on the south side of the property [Tract 41] prior to completion of the Hwy. 179 improvements.”<sup>25</sup>

**N. On February 22, 1995, John O'Brien, who at the time was an Associate Planner with the City of Sedona, sent a letter to Bill Robson which provided confirmation that all**

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<sup>24</sup> See Agreement dated June 7, 1994, attached to SSW Memorandum as **Exhibit “12”**.

<sup>25</sup> *Id.* at SSW Memorandum **Exhibit “12”**.

**required improvements required under the 1992 CUP for the Son Silver West Property had been completed, with the exception of:** (1) elimination of the existing mercury vapor lighting [Condition 8], (2) installation of additional parking lot lighting [Condition 9], and (3) construction of the SR 179 improvements [Conditions 4]. Mr. O'Brien requested that the Robsons complete the lighting items as soon as possible and provided notice that the SR 179 improvements would need to be started by April 1, 1995.<sup>26</sup>

- O. On May 16, 1995, Associate Planner John O'Brien sent a follow-up letter to Bill Robson providing notice that construction of the required SR 179 improvements was required to have been started no later than April 1, 1995 and was to be completed no later than July 1, 1995.** As of May 16, 1995, it did not appear that the Robsons had commenced construction of the SR 179 improvements. Mr. O'Brien stated that the SR 179 improvements were required to be completed by July 1, 1995 or the Robsons would be in violation of the conditions of the June 7, 1994 agreement and the conditions associated with the CUP.<sup>27</sup>

According to email correspondence between City Planning staff on March 15, 2007, it was noted that the SR 179 improvements required under the CUP included grading and paving to improve drainage and safety. Planner Beth Escobar noted that it appeared that the former SR 179 "requirements were just absorbed into the current ADOT improvement project" which included installation of a median and expansion of SR 179.<sup>28</sup> Thus, it appears based upon the correspondence from John O'Brien to the Robsons in 1995 and this March 15, 2007 email that all 12 conditions approved pursuant to the CUP were satisfied.

- P. In or about 1995, the City of Sedona adopted a formal Land Development Code ("LDC")** which no longer allowed the expansion of non-conforming uses by obtaining the Planning and Zoning Commission's approval of a conditional use permit.
- Q. In 1998, Sedona voters ratified the City Council's action adopting an updated Community Plan, removing the Commercial land use designation on the Son Silver West Property and replacing it with a T-14 Transitional land use designation.**

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<sup>26</sup> See February 22, 1995 letter from Associate Planner John O'Brien to Robsons, attached to SSW Memorandum as **Exhibit "13"**.

<sup>27</sup> See May 16, 1995 letter from Associate Planner John O'Brien to Robsons, attached to SSW Memorandum as **Exhibit "14"**.

<sup>28</sup> See March 15, 2007 email from Beth Escobar attached to SSW Memorandum as **Exhibit "15"**.

- R. **In 2002, Sedona voters ratified the City Council’s action adopting an updated Community Plan which removed the Transitional land use designation from the Land Use Plan. The Son Silver West Property was re-designated as Single Family Residential.**
- S. **On August 23, 2004 and September 4, 2004, Steve O’Brien of ADOT, the Robsons and Sedona Community Development Director John O’Brien reached an agreement whereby a new driveway connecting the Son Silver West parking lot to Highway 179 would be located and paved on Vacant Tract 40 to accommodate a full median break to serve Son Silver West.<sup>29</sup> The new driveway and median break would allow circulation of large delivery trucks to the site and would eliminate any backing up of large trucks onto SR 179.**
- T. **Between 2006 and 2012, Community Development Director John O’Brien exercised his authority to interpret and enforce the LDC and the conditional use permit approved for Son Silver West on a periodic and consistent basis. The exercise of this enforcement authority was apparent in the following correspondence and notices of violation issued by Mr. O’Brien to the Robsons between the years of 2006 through 2012.**
1. On January 11, 2006, Director John O’Brien issued a Notice of Violation letter to the Robsons suspending the 1992 CUP due to unlawful addition to a storage building, operation of an information booth for an off-site resort, non-compliant screening, and encroachment of commercial activities and parking on the Arrow Property and Vacant Tract 40.<sup>30</sup>
  2. On February 24, 2006, Director John O’Brien issued an Amendment to the January 11, 2006 Notice of Violation to the Robsons regarding non-compliant screening along the south property line of Tract 41, demolition work to be performed under demolition permit, the driveway on Vacant Tract 40 being removed and returned to its natural state (despite being agreed upon by ADOT and John in 2004), discontinuing unlawful commercial uses and parking on Vacant Tract 40 and use of the 1,950 s.f. residence.<sup>31</sup>

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<sup>29</sup> See ADOT Meeting Notes dated August 23, 2004 and Record of Conversation dated September 8, 2004, attached to SSW Memorandum as **Exhibit “16”**.

<sup>30</sup> See January 11, 2006 letter from Director O’Brien attached to SSW Memorandum as **Exhibit “17”**.

<sup>31</sup> See February 24, 2006 letter from Director O’Brien attached to SSW Memorandum as **Exhibit “18”**.

3. On February 28, 2006, a demolition permit was issued by the City to the Robsons to remove an unlawful addition to the southernmost storage building located on Tract 41.<sup>32</sup>
4. By March of 2006, the Son Silver West Properties were brought into compliance and the CUP was reinstated.<sup>33</sup>
5. On May 2, 2008, Director John O'Brien sent a letter to Rio Robson responding to the Robson's proposal to use Vacant Tract 40 as a temporary staging area for the SR 179 construction project and future plans to develop Vacant Tract 40 as a permanent parking lot for Son Silver West customers. Director O'Brien permitted the use of Vacant Tract 40 as a temporary staging area but prohibited the proposed parking expansion. Director O'Brien provided information on the City's Community Plan update process for purposes of the Robsons applying for a Major Community Plan Amendment and rezoning for Vacant Tract 40.<sup>34</sup>
6. On May 19, 2011, Director John O'Brien issued a Notice of Violation to Rio Robson regarding the illegal use of Vacant Tract 40 as a parking lot and for outside sales, display and storage of merchandise and equipment associated with the adjacent Son Silver West retail business. The Notice encloses the May 2, 2008 letter in which Mr. O'Brien previously outlined steps that would be necessary to develop the Vacant Tract 40 as permanent parking for Son Silver West (Community Plan Amendment and rezoning). The Notice gave the Robsons until June 24, 2011 to remove all parking on Vacant Tract 40, including all concrete parking stops, and to remove all display items. The Notice states that, should the Robsons fail to remove these items by June 24, 2011, formal code enforcement action would result.<sup>35</sup>
7. On May 24, 2011, Director John O'Brien issued a follow-up letter to his May 19<sup>th</sup> Notice of Violation to Rio Robson regarding the requirement to remove illegal paved parking spaces on Vacant Tract 40. Director O'Brien also recommended that the Robsons become involved in the Community Plan Update process for purposes of redesignating the Son

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<sup>32</sup> See Demolition Permit records, Permit No. B9254-D attached hereto as **Exhibit "H"**.

<sup>33</sup> See Email from Planner Beth Escobar dated March 15, 2007 attached to SSW Memorandum as **Exhibit "15"**.

<sup>34</sup> See May 2, 2008 letter from Director O'Brien, attached to SSW Memorandum as **Exhibit "19"**.

<sup>35</sup> See May 19, 2011 letter from Director O'Brien, attached to SSW Memorandum as **Exhibit "20"**.

Silver West Property and Vacant Tract 40 for commercial or parking use.<sup>36</sup>

8. On August 31, 2011, Director John O'Brien issued a Notice of Violation and suspension of the CUP to the Robsons listing violations relating to the following unlawful improvements and/or uses: (1) a coffee shop, a shade structure behind the coffee shop, a roof system attached to a rear yard storage building, a fence along the rear property line, a fence along the front property line, and an open-air roof structure that enclosed a vending machine on the Son Silver West Property, (2) commercial parking and storage on the Vacant Lot 40, and (3) commercial parking and storage on the Arrow Property.<sup>37</sup>
9. On September 8, 2011, the City of Sedona issued a permit to the Robsons for the existing wrought-iron fence erected within the front yard of the Son Silver West Property abutting Highway 179. The permit/job number assigned to this front fence was B11594. The permit approval form shows a "Zoning Approval Date" of 9/1/2011.<sup>38</sup> An email sent by Director O'Brien to staff dated September 8, 2011 confirmed that he approved the issuance of a permit for the wrought-iron fence constructed by the Robsons along SR 179.<sup>39</sup>
10. On September 12, 2011, Director John O'Brien issued a zoning interpretation to the Robsons finding that Robson would not be allowed to modify CUP 92-3 to introduce new uses, such as a coffee shop, or construct new accessory structures because to do so would be a change of a legal nonconforming use inconsistent with the LDC Article 1204.<sup>40</sup> The Director advises the Robsons that a Community Plan Amendment and a rezoning to a commercial zoning district would be required in order to operate a coffee shop and construct new accessory structures on the Son Silver West Property.

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<sup>36</sup> See May 24, 2011 letter from Director O'Brien attached to SSW Memorandum as **Exhibit "21"**.

<sup>37</sup> See August 31, 2011 letter from Director O'Brien attached to SSW Memorandum as **Exhibit "22"**.

<sup>38</sup> See Permit Approval and Approved Plans for Son Silver West front wrought-iron fence, attached to SSW Memorandum as **Exhibit "23"**.

<sup>39</sup> See September 8, 2011 email from Director O'Brien to Brian Pearson attached hereto as **Exhibit "F"**.

<sup>40</sup> See September 12, 2011 letter from Director O'Brien to the Robsons attached to SSW Memorandum as **Exhibit "24"**.

11. On September 26, 2011, the Robsons appealed the Director's September 12, 2011 interpretation to the Board of Adjustment.<sup>41</sup> Within their appeal, the Robsons challenged the determination by Director O'Brien that the construction of the shade roof and gutter behind the coffee shop was an unlawful structure. The Robsons asserted this structure had been in place for 15 years and was permitted along with the building of a work-repair shop. With regard to the rain gutter system and all-weather clear roofing installed on the west side of the permitted existing building at the southwest corner of Tract 41, the Robsons explained that these improvements were necessary to direct rain water into a gutter system as a precautionary public health and safety measure. The Robsons did not appeal the use of the coffee shop on the Son Silver West Property.
12. On October 4, 2011, Director O'Brien sent an email to Rio Robson notifying Mr. Robson that the Board of Adjustment meeting to hear the Robson's appeal of his decision "to not allow expansion of the Son Silver West Gallery as noted in [the] September 12, 2011 letter" would be held on Friday, December 2, 2011 at 1:00 pm in the Vultee Conference Room at City Hall.<sup>42</sup> Director O'Brien informed Mr. Robson that he would provide a staff memorandum and an agenda for the Board of Adjustment meeting about 7 to 10 days prior to the hearing. This email supports a finding by the Board of Adjustment that Director O'Brien's subsequent December 21, 2011 decision issued in this Board of Adjustment matter was a decision finding compliance with the existing 1992 CUP and Alternative Site Plan #2.
13. On October 6, 2011, Director John O'Brien sent an email to Rio Robson explaining that an expansion of parking on Vacant Tract 40 and the use of the Arrow Property for office space and employee parking would require a Community Plan amendment and rezoning application.<sup>43</sup>
14. On November 3, 2011, Rio Robson sent an email to Director O'Brien requesting to "defer" the December 2<sup>nd</sup> appeal hearing before the Board of Adjustment.<sup>44</sup>

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<sup>41</sup> See Robson's appeal narrative to the Board of Adjustment dated September 22, 2011 and City of Sedona Receipt No. 5.015822 dated September 26, 2011 in the amount of \$200 for the Board of Adjustment appeal submitted by the Robsons, attached to SSW Memorandum as **Exhibit "25"**.

<sup>42</sup> See October 4, 2011 email from Director O'Brien to Rio Robson attached hereto as **Exhibit "G"**.

<sup>43</sup> See October 6, 2011 email from Director O'Brien attached to SSW Memorandum as **Exhibit "26"**.

<sup>44</sup> See November 3, 2011 email from Rio Robson to Director O'Brien attached to SSW Memorandum as **Exhibit "27"**.

15. On November 4, 2011, Director John O'Brien responded to Rio Robsons November 3<sup>rd</sup> request stating that he would "hold off on the appeal hearing" and that based upon his site inspection on November 2, 2011, it was apparent that the Robsons had discontinued the coffee shop use. He also stated that he had reviewed all permits that the City had on file and could not find a permit for the roof system and shade structure [described in August 31, 2011 notice of violation]. Director O'Brien stated that he would talk with the Chief Building Inspector and would let the Robsons "know if it will be necessary to reschedule . . . [the] appeal hearing with the Board of Adjustment."<sup>45</sup>
16. **On December 21, 2011, Community Development Director John O'Brien emailed Rio Robson providing the following enforcement decision with regard to alleged outstanding violations on the Son Silver West Property and the pending appeal before the Board of Adjustment:**<sup>46</sup>

I have been giving your building permit situation at Son Silver West some thought lately and how we might proceed. Rather than get into some long drawn out enforcement action based on what you might have or might not have constructed at Son Silver West over the years, here is how I would like to proceed:

1. You have already shut down the coffee shop and this was my primary concern. I appreciate you taking care of this issue.
2. The other two issues are the construction of the shade structure behind the former coffee shop and the roof system attached to the storage building. You claim these were replacements of other similar structures that were in disrepair and were constructed many years ago. I cannot locate building permits on any of these older structures, but they may have been constructed before Sedona incorporated. I cannot make this determination with the information that I have. I am OK with you leaving them as they are currently constructed.
3. By March 1, 2012, I am requesting that you provide to me a site plan of your property showing all of the existing buildings, their use and parking. The site plan needs to be dated.

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<sup>45</sup> See November 4, 2011 email from Director O'Brien attached to SSW Memorandum as **Exhibit "27"**.

<sup>46</sup> See December 21, 2011 decision by Director O'Brien attached to SSW Memorandum as **Exhibit "28"**.

4. By March 1, 2012, I am requesting that you provide photographs of the exteriors of all of the buildings. The photographs need to be dated and their use labeled and keyed to the site plan.

This documentation will establish what you are allowed to have at Son Silver West at this time and will give us a historical record of the allowable uses on your property. Then, from this point forward, there won't be a question with what is allowed and what is not allowed.

I feel this is a fair compromise to resolve this situation. Please let me know your thoughts.

Thanks.

John O' Brien, Director  
Community Development Department

17. **On December 23, 2011, Rio Robson responded by email to Director O'Brien's December 21, 2011 Decision<sup>47</sup>** stating the following:

Dear John,

Sounds like a great plan, I will come by and talk about the site plan after Christmas. Thank you again.

Happy holidays to you and the family.

Rio

- U. **On or about May 9, 2012, Director John O'Brien sent by email to several staff members and provided to future Director Audree Juhlin a memorandum titled "Project Status Information May 2012."<sup>48</sup>** Within the memorandum, Director O'Brien provided updates and information on a number of projects throughout the City of Sedona, including Son Silver West. Notably, Director O'Brien provided no information to staff or Ms. Juhlin regarding any current violations on the Son Silver West Property or current violations relating to the 1992 CUP.

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<sup>47</sup> See December 23, 2011 email from Rio Robson to Director O'Brien attached hereto as **Exhibit "1"**.

<sup>48</sup> See May 9, 2012 email from Director O'Brien and redacted memorandum titled "Project Status Information May 2012" attached to SSW Memorandum as **Exhibit "29"**.

Instead, Director O'Brien memorialized his prior December 21, 2011 decision by stating:

Rio Robson is supposed to get us a notebook of photographs of the property showing all of the existing improvements. He needs to date these photos and provide them to staff so we know exactly what they have now in place and what is legal non-conforming ... so the next time they building [sic] without permits, we will know what is legal and what is illegal. I have asked for this for several months and Rio has said "he will get to it soon" for at least four months.

- V. **In early summer 2012, Rio Robson submitted to John O'Brien a conceptual site plan and labeled photographs** of the existing uses, structures and parking area on the Son Silver West Property, including the Father Kino Chapel on the Arrow Property.<sup>49</sup> The photographs submitted by Mr. Robson are labeled and dated March 1, 2012.
  
- W. **On July 3, 2012, Director John O'Brien retired** after being employed by the City of Sedona for 24 years.
  
- X. **As a result of and in reliance upon the December 21, 2011 decision by Director John O'Brien finding no use or structural violations of the LDC and 1992 CUP existing on the Son Silver West Property, the Robsons undertook the following actions and substantial investments in their Son Silver West business:**
  - A. The Robsons increased their off-site warehousing and art inventory space from approximately 2,000 s.f. to 8,500 s.f. in order to maintain a constant supply of art objects and goods to the Son Silver West Property for sale. The Robsons are currently in the process of expanding their total warehousing space to approximately 14,000 s.f.
  
  - B. The Robsons expanded their sources and increased their wholesale purchases of art objects and related inventory items for the Son Silver West Property. The assurance supplied by Director O'Brien's decision that the Son Silver West Property was operating with no violations of the LDC or 1992 CUP caused the Robsons to purchase larger volumes of retail inventory to be stored in the expanded warehouse space and transferred to the Son Silver West Property for sale. For instance, the Robsons purchased approximately \$300,000

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<sup>49</sup> See conceptual site plan and photographs dated March 1, 2012, attached to SSW Memorandum as **Exhibit "30"**.

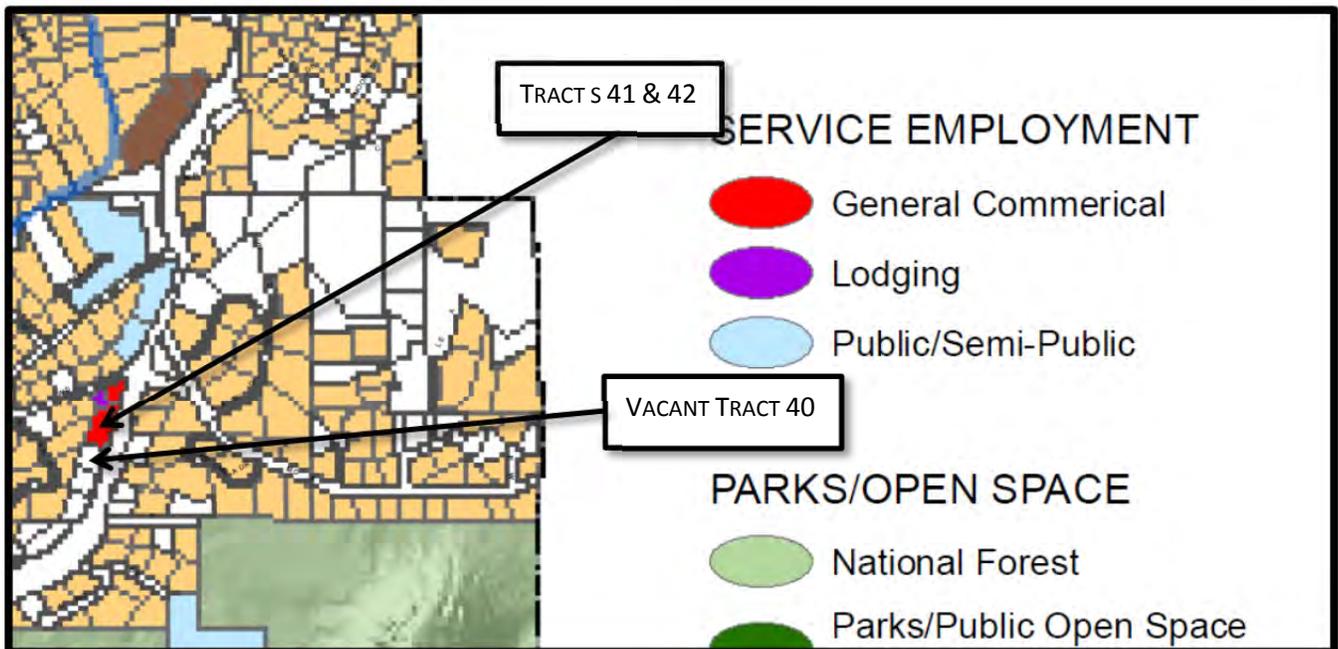
worth of art inventory from Mexico in 2013 and an additional \$500,000 of inventory in 2014.

- C. The Robsons purchased new art manufacturing equipment totaling approximately \$45,000 and spent approximately \$100,000 on computer software and telecommunication equipment for the Son Silver West Property.
- D. As a result of these actions taken by the Robsons in reliance on the December 21, 2011 decision by Director O'Brien, the Robsons realized noticeable increases in annual net revenue starting in 2012 through this year to date.

**Y. On March 11, 2014, an updated Sedona Community Plan adopted by the City Council was ratified by voters.** As suggested by John O'Brien, Rio Robson played an active role in the Community Plan Update process in 2013 and 2014, including the formation of a Community Focus Area (CFA) for the area along SR 179 surrounding the Son Silver West Property.

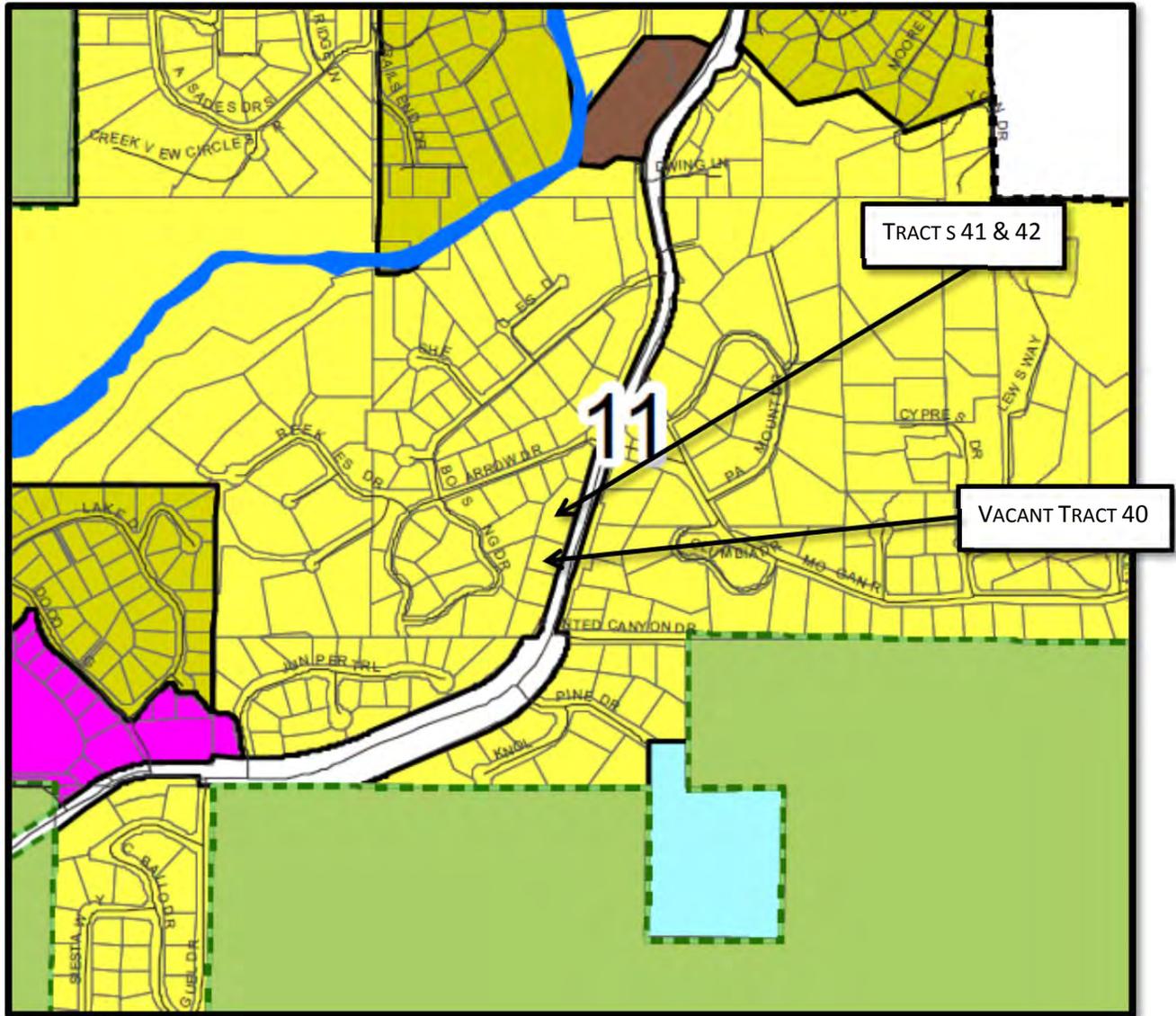
The current 2014 Community Plan designates the Son Silver West Property (Tracts 42 and 41) as General Commercial (red color) on the Existing Land Use Map. Vacant Tract 40 is designated as Vacant Land (white color).

**EXISTING LAND USE MAP RATIFIED BY VOTERS ON MARCH 11, 2014**



Incredibly, the commercial retail uses existing on Tract 42 since 1960 and expanded on Tract 41 under the 1992 CUP were not identified on the Future Land Use Map with a Commercial land use designation. Instead, the Son Silver West Property and Vacant Tract 40 are designated as Single Family Low Density (0.5 to 2 DU/AC) (yellow color). The number “11” designates the area along SR 179, including the Son Silver West Property and Vacant Tract 40, as being within Morgan Road Community Focus Area 11.

**FUTURE LAND USE MAP RATIFIED BY VOTERS ON MARCH 11, 2014**



The Land Use Element of the 2014 Community Plan describes the Morgan Road CFA as possessing attributes including commercial non-conforming uses along SR 179, such as Son Silver West, and identifies community expectations for non-residential uses along SR 179. According to

page 34 of the Land Use Element, the Morgan Road CFA is a location where the City will develop a Specific Plan, including any necessary rezoning, for adoption by the City Council. The Specific Plans will be developed with participation from property owners, neighbors, and stakeholders and will strive to achieve the “Community Expectations” for each CFA. According to the Land Use Action Plan on page 55 of the Land Use Element, creation and implementation of a Specific Plan for the Morgan Road CFA will occur approximately 6 to 10 years from now.

**Community Focus Area 11: Morgan Road**



1:6,000  
Note: Image is for illustration purposes only  
- actual boundaries and affected parcels will be determined through the future CFA planning process.

<p><b>Attributes</b></p> <ul style="list-style-type: none"> <li>• Existing non-conforming commercial uses and church parking area along SR 179 in otherwise residential area.</li> <li>• One existing parcel with “Office Professional” zoning.</li> <li>• Residential lots and access affected by the SR 179 widening and roundabout construction.</li> </ul>	<p><b>Community Expectations</b></p> <ul style="list-style-type: none"> <li>• Explore opportunities for non-residential uses along SR 179 if key public or neighborhood amenities are provided (e.g., good pedestrian access to neighborhoods, open space retention, or enhancement next to the highway).</li> <li>• Consider new non-residential development only if compatible with the character of the neighborhood.</li> </ul>
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Z. On October 8, 2014, Director Audree Juhlin issued a Notice of Violation letter to the Robsons for an unlawful expansion of a legal non-conforming use onto three nearby single-family residential properties zoned RS-18b: (1) the Vacant Tract 40, (2) the Arrow Property, and (3) the Bowstring Property. The Notice required the immediate cessation of all commercial activities at these 3

residentially zoned properties and provided an option for the Robsons to apply for approval of a Major Community Plan amendment and rezoning for general commercial uses. The October 8, 2014 Notice did not allege any violations on the Son Silver West Property.<sup>50</sup> At the time, 33 months had expired since Director O'Brien's December 21, 2011 enforcement ruling.

- AA. On May 28, 2015, Attorney Brian Furuya of Aspey, Watkins & Diesel, PLLC, on behalf of the Robsons, submitted a Major Community Plan Amendment application to the City of Sedona** requesting that the Future Land Use Plan be amended to show a Planned Area designation for the Son Silver West Property, Vacant Tract 40 and the Arrow Property.
- BB. On June 26, 2015, Attorney Brian Furuya of Aspey, Watkins & Diesel, PLLC, on behalf of the Robsons, submitted a rezoning application to the City of Sedona requesting that the Son Silver West Property, Vacant Tract 40 and the Arrow Property be rezoned from the RS-18b district to the Planned Development district** for purposes of: (1) converting a legal non-conforming use on the Son Silver West Property to a legal conforming use, (2) developing additional parking on the Vacant Tract 40 along SR 179, (3) allowing use of the Arrow Property as offices relating to Son Silver West's business, and (4) allowing a coffee and smoothie bar on the Son Silver West Property.
- CC. On July 24, 2015, Attorney Brian Furuya of Aspey, Watkins & Diesel, PLLC, on behalf of the Robsons, submitted a revised Major Community Plan Amendment and rezoning application pertaining to the Son Silver West Property and Vacant Tract 40 only.** The revised Major Community Plan Amendment application requested a change in the land use designation for Tracts 40, 41 and 42 from Single Family Low Density to Planned Area. The revised rezoning application requested that the 2 parcels be rezoned from the RS-18b district to the Planned Area district and requested approval to develop a new parking lot on the Vacant Tract 40.
- DD. On August 12, 2015, Attorney Brian Furuya, on behalf of the Robsons, submitted a request to withdraw the Major Community Plan Amendment and rezoning applications pending under Case No. PZ15-00004.**
- EE. On September 8, 2015, Attorneys Francis J. Slavin and Heather Dukes and the Robsons (Rio Robson in person and Bill and Linda Rose Robson by telephone from Wyoming) met with City of Sedona Community Development Director Audree Juhlin, City Manager Justin Clifton and City Attorney Robert Pickels to discuss an "expanded list" of alleged violations of the 1992 CUP and Sedona Land Development Code applicable to the Son Silver West Property, Vacant**

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<sup>50</sup> See October 8, 2014 letter from Director Audree Juhlin attached to SSW Memorandum as **Exhibit "31"**.

**Tract 40, the Arrow Property and the Bowstring Property.** Many of the alleged violations discussed during this meeting were items that either were in existence in 1988 or were previously approved by: (1) the Planning Commission pursuant to Case No. CUP 92-3, (2) former Community Development Director Tom Schafer with regard to the 1993 Plan approval and building permits issued thereunder, and (3) former Community Development Director John O'Brien's written interpretation and final enforcement decision dated December 21, 2011. During this meeting, Mr. Slavin offered to provide a legal memorandum to the City of Sedona representatives in attendance at that meeting.

- FF. On September 22, 2015, Attorneys Francis J. Slavin and Heather Dukes submitted the SSW Memorandum to City Attorney Robert Pickels.<sup>51</sup>**
- GG. On November 10, 2015, during a meeting at City Hall attended by the Robsons and their counsel, Community Development Director Juhlin served the Robsons with two notices of violation dated November 10, 2015 (the "2015 NOVs")<sup>52</sup> and a memorandum interpretation of former Director O'Brien's December 21, 2011 Decision (the "Director's 2015 Memorandum").**

### **III. ISSUES PRESENTED**

Son Silver West submits the following issues on appeal to the Board of Adjustment, arising from the interpretations and enforcement decisions of Community Development Department Director Audree Juhlin in the 2015 NOVs and the Director's 2015 Memorandum dated November 10, 2015.

- A. THE DECEMBER 21, 2011 DECISION BY COMMUNITY DEVELOPMENT DIRECTOR O'BRIEN**
  - 1. Whether Former Community Development Director O'Brien had the Legal Authority to Interpret, Enforce, and Determine Compliance with the 1992 CUP, Alternative Site Plan #2, and subsequent site plan and permit approvals issued by the City to Son Silver West?**
  - 2. Whether the December 21, 2011 Decision was an approval issued by the Community Development Director in his official capacity at the City?**

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<sup>51</sup> See SSW Memorandum dated September 22, 2015, attached hereto as **Exhibit "A"**.

<sup>52</sup> See 2015 NOVs and Director's 2015 Memorandum issued by Director Juhlin to Son Silver West and Robsons on November 10, 2015, attached hereto as **Exhibit "C"**.

3. Whether the current buildings, structures and uses on Son Silver West Tracts 41 and 42 are identical to those inspected and approved by Director O'Brien in his December 21, 2011 Decision?
4. Whether the Conceptual Site Plan and Photographs dated March 1, 2012 were submitted by Son Silver West to the Community Development Director in accordance with Director O'Brien's December 21, 2011 Decision?
5. Whether the City of Sedona is estopped from issuing a Notice of Violation to Son Silver West for conditions on Tracts 42 and 41 determined to be in compliance by Director O'Brien in his December 21, 2011 Decision and subsequently recognized as compliant by Community Development Department staff and Directors for almost 4 years thereafter?

**B. APPEAL OF CODE VIOLATIONS LISTED IN NOVEMBER 10, 2015 NOTICE**

1. **CORRECTIVE ACTION A.5:** Whether a permitted shed located at 61 Arrow Drive may be used as a private religious and contemplative space accessory to a single-family residence?
2. **CORRECTION ACTION C.1:** Whether the Community Development Director erred in issuing a notice of violation to the owner of 1535 SR 179 for unlawful overflow parking by customers and third parties after owner took necessary steps to post the vacant lot with "No Parking" signs?
3. **CORRECTIVE ACTION C.2:** Whether the Community Development Director erred in issuing a Notice of Violation to the owner of 1535 SR 179 requiring that the owner cease and desist all use of the vacant lot for commercial purposes when the City of Sedona Community Development Department previously approved the relocation and construction of a commercial driveway on 1535 SR 179 to allow ingress and egress traffic to travel to and from Son Silver West Tracts 42 and 41 and the SR 179?
4. **CORRECTIVE ACTION D.1:** Whether the existing outdoor retail display areas on Son Silver West Tracts 42 and 41 are permitted as a result of: (1) the legal non-conforming outdoor retail display areas historically located on Tract 42, (2) the 1992 CUP and Alternative Site Plan # 2 approving the expansion of an additional 5,000 square feet of outdoor retail display area on Tract 41, and (3) the 1993 Site Plan Approval which allowed the transfer of some of the 5,000 s.f.

of outdoor retail display approved under the 1992 CUP from Tract 41 to the former parking area along the frontage of Tract 42?

5. **CORRECTIVE ACTION D.2:** Whether the Son Silver West retail space in enclosed buildings is permitted up to approximately 4,328 s.f. as depicted in the survey map prepared by Shephard Wesnitzer, Inc. and approved by the Planning and Zoning Commission as part of the 1992 CUP Condition No. 1 as “Alternative Site Plan #2”?
6. **CORRECTIVE ACTION D.2:** Whether the southernmost building on Tract 41, referred to as “Building A” by Director Juhlin in the 2015 NOV, was approved as a storage shed to be used in connection with the existing Son Silver West commercial operations?
7. **CORRECTIVE ACTION D.2:** Whether the northernmost building on Tract 41, referred to as “Building B” by Director Juhlin in the 2015 NOV, was approved as an art workshop to be used in connection with the existing Son Silver West commercial operations?
8. **CORRECTIVE ACTION D.3:** Whether the single-family residence depicted on Alternative Site Plan #2 as “House” was approved as an administrative office and employee lounge by Director O’Brien’s December 21, 2011 Decision?
9. **CORRECTIVE ACTION D.4:** Whether the existing wrought-iron fence lying along the frontage of Tract 42 was approved by Director O’Brien and issued a fence permit in accordance with Condition 6 to the 1992 CUP?
10. **CORRECTIVE ACTION D.5:** Whether the existing light fixtures on Tracts 42 and 41 were approved by Director O’Brien in accordance with Condition 9 to the 1992 CUP?
11. **CORRECTIVE ACTION D.6:** Whether the existing shade structures on Tracts 42 and 41 were approved by the December 21, 2011 Decision by Director O’Brien?
12. **CORRECTIVE ACTION D.6:** Whether the 1992 CUP approval, Conditions of Approval, or Alternative Site Plan #2 limit the square footage of shade structures erected in outdoor retail display areas on the Son Silver West Property?

13. **CORRECTIVE ACTION D.7: Whether the existing 6-foot tall solid wood fence and the 6-foot tall masonry wall lying along the west lot line of Son Silver West Tract 41 and 42 require the issuance of a wall permit under the City of Sedona Building Code?**

**C. CHILIES**

1. **Whether the preparation, roasting, display and vending of chilies on the Son Silver West Property are permitted as a legal non-conforming use?**

**D. BUSINESS LICENSE**

1. **Whether revocation of Son Silver West's Business License under Section 5.05.040(A) of the Sedona City Code is a lawful method for enforcing the Sedona Land Development Code?**

**E. UNLAWFUL REVOCATION OF 1992 CUP FOR VIOLATIONS ON PROPERTIES SEPARATE AND APART FROM SON SILVER WEST PROPERTY GOVERNED BY 1992 CUP**

1. **Whether a conditional use permit approval issued for Son Silver West Tracts 42 and 41 may be revoked as a result of alleged violations of the Sedona Land Development Code on Tracts 40, 45 and 49, when Tracts 40, 45 and 49 were not a part of the conditional use permit approval?**

**F. VESTED RIGHTS OF SON SILVER WEST**

1. **Whether Director Juhlin erred by making the determination in the 2015 NOV and Director's 2015 Memorandum that documentation submitted by Son Silver West to Director Juhlin in the September 22, 2015 Memorandum and records on file at the City of Sedona do not provide sufficient evidence of prior City approvals which would allow certain existing conditions on the Son Silver West Property?**
2. **Whether the existing uses and structures on the Son Silver West Property, which are being challenged by Director Juhlin as unlawful, are vested as a matter of law?**

**IV. JURISDICTION OF BOARD OF ADJUSTMENT**

The Sedona Board of Adjustment has jurisdiction to hear this appeal of the Community Development Director Juhlin's erroneous interpretation and enforcement of the City of Sedona Land Development Code, Building Code and the 1992 CUP. The

jurisdiction of the Board of Adjustment to hear appeals of this nature has been established by statute pursuant to the following sections of Ariz. R. Stat. § 9-462.06.

C. **A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator**, shall exercise other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

...

D. **Appeals to the board of adjustment may be taken by persons aggrieved** or by any officer, department, board or bureau of the municipality affected **by a decision of the zoning administrator**, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds of the appeal.

...

G. **A board of adjustment shall:**

1. **Hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance** adopted pursuant to this article.

The Sedona Community Development Director performs the duties of the Zoning Administrator pursuant to Ariz. R. Stat. § 9-462.05. See Section 306.B of the Sedona LDC. As the Zoning Administrator, decisions by the Community Development Director regarding an interpretation of the Sedona Land Development Code may be appealed to the Board of Adjustment. See Section 304.01.B of the Sedona LDC. Thus, the interpretations and enforcement decisions made by Director Juhlin, as Zoning Administrator, in the 2015 NOV and the Director's 2015 Memorandum, may be appealed to the Board of Adjustment by Son Silver West and the Robsons as aggrieved persons.

## V. **STAY OF ALL PROCEEDINGS IN THE MATTER APPEALED FROM**

As required by Ariz. R. Stat. § 9-462.06(E), the 30-day time period to comply with the 2015 NOV's as well as the City's related inspections and enforcement proceedings are stayed by Son Silver West's and the Robson's appeal to the Board of Adjustment. Ariz. R. Stat. § 9-462.06(E) states as follows:

E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in the zoning administrator's opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property. . . .

In this case, none of the alleged violations would cause imminent peril to life or property. The 2015 NOV's arise from the alleged expansion of commercial uses to residential parcels which were not included within Son Silver West's legal non-conforming use designation and the amount of square footage allowed for certain uses on the Son Silver West property. The City's 2015 NOV citing to the failure of Son Silver West to obtain approvals from the Coconino County Health Department to sell roasted chilies purports to raise a public health, welfare and safety concern in the event it is determined that Health Department approval is necessary. Yet, at the same time, it cannot be proven that this public health, welfare and safety concern rises to the level of imminent peril to life or property inasmuch as the Robsons have been selling roasted chilies for several decades. Thus, all inspections and enforcement proceedings relating to the 2015 NOV's or the Director's 2015 Memorandum are stayed until the Board of Adjustment hears and issues a final decision on this appeal.

## **VI. ARGUMENT**

Son Silver West and the Robsons submit this appeal to the Board of Adjustment, requesting a decision to reverse the erroneous interpretations and decisions of the Community Development Director in the 2015 NOV's and the Director's 2015 Memorandum, for the reasons presented below.

### **A. THE DECEMBER 21, 2011 DECISION BY COMMUNITY DEVELOPMENT DIRECTOR O'BRIEN**

On December 21, 2011, former Director John O'Brien issued a formal decision in his official capacity as Director of the Community Development Department and Zoning Administrator finding the Son Silver West Property (Tracts 42 and 41) to be in compliance with the 1992 CUP. The December 21, 2011 Decision was issued in direct response to a pending, formal appeal before the Sedona Board of Adjustment relating to shade structures on the property. The December 21, 2011 Decision read as follows:

Hi Rose and Rio,

I have been giving your building permit situation at Son Silver West some thought lately and how we might proceed. Rather than get into some long drawn out enforcement action based on what you might have or might not have constructed at Son Silver West over the years, here is how I would like to proceed:

1. You have already shut down the coffee shop and this was my primary concern. I appreciate you taking care of this issue.
2. The other two issues are the construction of the shade structure behind the former coffee shop and the roof system attached to the storage building.

You claim these were replacements of other similar structures that were in disrepair and were constructed many years ago. I cannot locate building permits on any of these older structures, but they may have been constructed before Sedona incorporated. I cannot make this determination with the information that I have. I am OK with you leaving them as they are currently constructed.

3. By March 1, 2012, I am requesting that you provide to me a site plan of your property showing all of the existing buildings, their use and parking. The site plan needs to be dated.

4. By March 1, 2012, I am requesting that you provide photographs of the exteriors of all of the buildings. The photographs need to be dated and their use labeled and keyed to the site plan.

This documentation will establish what you are allowed to have at Son Silver West at this time and will give us a historical record of the allowable uses on your property. Then, from this point forward, there won't be a question with what is allowed and what is not allowed.

I feel this is a fair compromise to resolve this situation. Please let me know your thoughts.

Thanks.

John O' Brien, Director  
Community Development Department

As a result of this Decision, the appeal was never rescheduled to be heard by the Board of Adjustment. The City never

- 1. Community Development Director O'Brien had the Legal Authority as Zoning Administrator to Interpret, Enforce, and Determine Compliance with the 1992 CUP, Alternative Site Plan #2, and subsequent site plan and permit approvals issued by the City to Son Silver West.**

In the her 2015 Memorandum, Director Juhlin issued an interpretation of the Community Development Director's powers and authority and made the following decision regarding the authority of former Director O'Brien to issue his December 21, 2011 Decision.

Land use on this site is governed by a regulatory conditional use permit (CUP). Former Director O'Brien had no authority to conditionally approve

changes that directly affect the approved 1992 CUP, through unilateral administrative action. The Land Development Code (LDC), Subsection 402.12 (Conditional Use Permit – Validity and Revisions) states, “Any proposed revisions or changes to an approved conditional use permit application shall be submitted in the same manner and subject to the same approval process as the original review.” **Because Son Silver West has made changes deviating from the 1992 CUP, these changes are subject to review and consideration as prescribed in Section 402 (Conditional Uses). This section of the LDC does not provide for administrative consideration or approvals at a staff level. Therefore, former Director O’Brien did not have the authority to substitute an administrative action for the regulatory requirements prescribed in the LDC relating to modification of a CUP and unilaterally approve changes to the CUP.**

Emphasis added. Director Juhlin again affirmed her interpretation that former Director O’Brien lacked any authority to issue the December 21, 2011 decision by stating that, “based on the regulatory process outlined in the Land Development Code, former Director O’Brien did not have the legal authority to approve any modifications to this CUP.”

While there is no disagreement regarding the required process to modify a CUP under Section 402 of the LDC, Director Juhlin glosses over a key step in the interpretation and enforcement process: Whether Son Silver West is in compliance with the existing CUP? If a Director exercises his enforcement powers as the Zoning Administrator and makes the determination that a property is in compliance with its existing CUP, there is no need to seek the Planning Commission’s approval to modify the CUP.

In this case, Director O’Brien exercised his enforcement authority prescribed by state statute and the Sedona Land Development Code. A Zoning Administrator “is charged with the responsibility for enforcement of the zoning ordinance.” See Ariz. R. Stat. § 9-462.05(C). The Sedona Land Development Code assigns the Zoning Administrator’s duties to the Community Development Department Director. See § 306.B of the Sedona LDC. As part of his enforcement authority, the Director is responsible for notifying a property owner of their failure to comply with certain conditions of approval for a CUP, the reasons for the suspension and the time period by which the property owner must comply with the conditions. See § 402.10.E(1) of the Sedona LDC. For a more detailed analysis of the powers and authority delegated to the Sedona Community Development Director by state statute and prescribed by the Sedona LDC, please see Section III of the September 22, 2015 legal memorandum attached hereto as **Exhibit “A”**.

As part of the pending 2011 enforcement action against Son Silver West arising under the 1992 CUP, former Director O’Brien relied upon his long-time institutional knowledge of the Son Silver West Property and 1992 CUP, conducted a site inspection of the Son Silver West Property with Rio Robson,<sup>53</sup> researched the City of Sedona’s site plan

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and permit approval records on file for the Property, and spoke with City staff who would have had knowledge relevant to his determination. Based upon this intimate knowledge of the property and its history, as well as his inspection and research, Director O'Brien determined that the Son Silver West Property was in compliance with the 1992 CUP. Director O'Brien makes no statement regarding a modification or change to the 1992 CUP requirements in his December 21, 2011 decision. Thus, there would have been no requirement for Son Silver West to modify its CUP through the typical Planning Commission amendment process set forth in Section 402 of the LDC.

By making the recent interpretation that Son Silver West is not in compliance with the 1992 CUP, Director Juhlin has merely made a decision that differs from the decision of Former Director O'Brien. A different interpretation by Director Juhlin does not have the legal effect of overruling former Director O'Brien's December 21, 2011 Decision .

In a nutshell, the City has taken the position that former Director O'Brien committed an ultra vires act simply because the new Community Development Director does not agree with Mr. O'Brien's December 21, 2011 Decision. An ultra vires act is one that is "unauthorized" or "beyond the scope of power allowed or granted by a corporate charter or by law." Black's Law Dictionary (10<sup>th</sup> ed. 2014). With regard to a municipality, the exercise of zoning power must be founded on the state legislature's delegation to local governmental units, and "in the absence of such a grant, such exercise is ultra vires and void." *Bella Vista Ranches, Inc. v. City of Sierra Vista*, 126 Ariz. 142, 144, 613 P.2d 302, 304 (App.1980). "The doctrine of ultra vires, when invoked, should not be allowed where it would not advance justice, but, on the contrary, would accomplish a legal wrong." *Higgins v. Arizona Sav and Loan Ass'n*, 85 Ariz. 6, 10, 330 P.2d 504, 507 (1958) (citing *Leon v. Citizen's Building & Loan Ass'n*, 14 Ariz. 294, 127 P. 721, 722 (1912)). Furthermore, public officials are "presumed to have done their duty" and their acts "are presumed to be correct and legal in absence of clear and convincing evidence to the contrary." Emphasis added. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 193, 181 P.3d 219, 240 (App.2008) (citing *Verdugo v. Indus. Comm'n*, 108 Ariz. 44, 48, 492 P.2d 705, 709 (1972)).

In *Bella Vista Ranches, Inc. v. City of Sierra Vista*, 126 Ariz. at 143, 613 P.2d at 303, the Arizona Court of Appeals determined that Sierra Vista had no authority to regulate subdivisions prior to the passage of Ariz. R. Stat. §§ 9-463 and 9-463.04. An owner of real property in Sierra Vista challenged the City's enforcement of its subdivision regulations which were adopted in 1966 – prior to the state legislature's passage of the first subdivision enabling statutes, Ariz. R. Stat. 9-463 and 9-463.04, in 1974. *Id.* The Court of Appeals found that, because the legislature had delegated no comprehensive regulatory authority to cities and towns over subdividing at the time Sierra Vista adopted its subdivision regulations, Sierra Vista's exercise of the zoning power to require approval of subdivision plats was ultra vires and void. *Id.* at 143-144, 613 P.2d at 303-304.

Contrary to Sierra Vista's attempt to regulate subdivisions within its territorial limits without being delegated this statutory authority in *Bella Vista Ranches, Inc. v. City of Sierra Vista*, Director O'Brien's December 21, 2011 enforcement ruling was an authorized enforcement act under Ariz. R. Stat. § 9-462.05 and Section 306 of the Sedona LDC. Ariz. R. Stat. § 9-462.05 charges the zoning administrator with the responsibility of enforcing the zoning ordinance - a responsibility that is delegated to the Community Development Director under the Sedona LDC. The City of Sedona may not limit or qualify such authorization in an attempt to vacate an enforcement decision by the Director. As shown below in Section IV.A.2 of this narrative, the December 21, 2011 decision was the culmination of the Director's prior interpretation and enforcement decisions issued to the Robsons starting in 2006 through 2011, and was a final decision obviating the need to reschedule a Board of Adjustment hearing for purposes of deciding the Robson's pending appeal of the Director's September 12, 2011 interpretation. In addition, the fact that O'Brien intended that his decision serve as a baseline for future review of potential expanded uses and structures on the Son Silver West Property also supports a finding that the decision was authorized, final and enforceable.

Director John O'Brien's December 21, 2011 decision was not appealed by an aggrieved person to the Board of Adjustment within 15 days, as required by Sedona LDC § 404.10(A). Therefore, in the event an aggrieved person were to attempt to challenge Director O'Brien's decision in Superior Court in the future, the Superior Court would lack jurisdiction to hear and decide the appeal due to the person's failure to exhaust administrative remedies.

Furthermore, the City's failure to take any action to challenge Director O'Brien's decision for almost 4 years from December 21, 2011 until September 2015 is persuasive that the City both recognized and ratified Director O'Brien's decision as being an authorized and final decision. When current Director Juhlin issued a notice of violation to the Robsons on October 8, 2014, the notice alleged no violations pertaining to the use or existing structures on the Son Silver West Property which is consistent with Director O'Brien's December 21, 2011 decision.<sup>54</sup> Instead, the October 8, 2014 notice alleged violations on Vacant Tract 40, the Arrow Property and the Bowstring Property. It was not until after the Robsons withdrew their Major Community Plan and rezoning applications that the City began revisiting violations that had been resolved by Director O'Brien's prior enforcement decision. Thus, it appears that, in the 45 months preceding our September 8, 2015 meeting, the City was continuing to uphold and enforce the December 21, 2011 decision by Director O'Brien as an authorized act of the Sedona Community Development Director. To disregard that enforcement decision upon which the Robsons have relied for 45 months as ultra vires, or unauthorized, "would not advance justice, but, on the contrary, would accomplish a legal wrong." See *Higgins*, supra. Moreover, the City of Sedona cannot provide clear and convincing evidence that would overcome the presumption that John O'Brien performed his enforcement duties as the Director of Community

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<sup>54</sup> See Notice of Violation dated October 8, 2014 attached hereto as **Exhibit "31"**.

Development when issuing his December 21, 2011 decision and that such decision was correct and legal.

Therefore, we petition the Board of Adjustment to reverse Director Juhlin's interpretation and decision and find that Director O'Brien had authority to issue the December 21, 2011 Decision determining the Son Silver West Property to be in compliance with the 1992 CUP.

**2. The December 21, 2011 Decision was issued by the Community Development Director acting in his official capacity as Zoning Administrator.**

In the her 2015 Memorandum, Director Juhlin provides the following decision finding that the December 21, 2011 Decision by former Director John O'Brien was not a "formal approval."

The City's position is that Director O'Brien never gave any formal approval; and regardless, would not have had the authority to do so.

This decision is again restated by Director Juhlin in the 2015 NOV:

While we are aware of certain limited communications discussing the site conditions, staff's records reflect that no formal approval in conformance with the Sedona Land Development Code or Sedona City Code has been granted. Staff believes that while the documentation submitted by your legal counsel provides a detailed overview of the history of the property, the information presented does not offer satisfactory proof that any formal approvals exist allowing the expansion of the site beyond what was approved in the 1992 CUP.

Son Silver West appeals this decision of Director Juhlin. There is no requirement or standard set forth in the Sedona Land Development Code or the 1992 CUP which requires a decision of the Zoning Administrator to be in a certain form or substance in order to be effective. The December 21, 2011 Decision was a written approval issued to the Robsons with John O'Brien's electronic signature and his official capacity as Director of the Community Development Department added after his name.

We would also point to the history of communications between John O'Brien and the Robsons as evidence which would support a finding that Director O'Brien's December 21, 2011 Decision was an official approval determining Son Silver West to be in compliance with the 1992 CUP. Beginning in approximately 1995 through his retirement in July 2012, John O'Brien, first as an Associate Planner and later as the Community Development Director, consistently and periodically exercised his power to enforce the provisions of the Sedona LDC and the 1992 CUP issued to the Son Silver West Property.

As described in greater detail in the Statement of Facts set forth in the September 22, 2015 memorandum attached hereto as **Exhibit "A"**, Mr. O'Brien took several actions with regard to Son Silver West leading up to his December 21, 2011 decision.

As an Associate Planner at the City, in 1995, Mr. O'Brien sent letters to the Robsons enforcing both the conditions of approval for CUP 92-3 and the requisite time periods for completion of those conditions.<sup>55</sup>

Then, on January 11, 2006 and February 24, 2006, Mr. O'Brien, as the Director of the Community Development Department, issued to the Robsons a notice of violation and an amended notice of violation, respectively.<sup>56</sup> Within these notices, Director O'Brien provided notice to the Robsons that their CUP was suspended until the listed violations were either corrected or discontinued. By March of 2006, the Son Silver West Properties were brought into compliance and the CUP was reinstated.<sup>57</sup>

On May 2, 2008, Director O'Brien sent a letter to Rio Robson interpreting the Sedona LDC to allow the temporary use of Vacant Tract 40 as a staging area for the SR 179 construction project. In response to the Robson's inquiry regarding development of Vacant Tract 40 as a permanent parking lot for Son Silver West customers, Director O'Brien enforced the LDC prohibiting such use unless the Robsons applied for and obtained City Council approval of a Community Plan amendment and rezoning for Vacant Tract 40.<sup>58</sup>

Approximately 3 years later, on May 19 and May 24, 2011, Director O'Brien exercised his enforcement authority by issuing a notice of violation and follow-up letter to Rio Robson requiring removal of all parking and outdoor display and storage uses being conducted on Vacant Lot 40 in violation of the LDC.<sup>59</sup> These May 2011 letters were followed by a subsequent notice of violation and suspension of the CUP dated August 31, 2011. The August 31, 2011 notice was issued by Director O'Brien for an unlawful coffee shop use and the alleged unlawful erection of: (1) a shade structure behind the coffee shop, (2) a roof system attached to a rear yard storage building, (3) an open-air roof system enclosing a vending machine, and (4) a fence along the front property line of the Son

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<sup>55</sup> See Letter from John O'Brien to Robsons dated February 22, 1995 attached hereto as **Exhibit "13"** ; See also Letter from John O'Brien to Robsons dated May 16, 1995 attached hereto as **Exhibit "14"**.

<sup>56</sup> See Letters from John O'Brien to Robsons dated January 11, 2006 and February 24, 2006 attached hereto as **Exhibits 17" and "18"**, respectively.

<sup>57</sup> See Email from Planner Beth Escobar to City staff dated March 15, 2007 attached hereto as **Exhibit "15"**.

<sup>58</sup> See Letter from John O'Brien to Rio Robson dated May 2, 2008 attached hereto as **Exhibit "19"**.

<sup>59</sup> See Letters from Director O'Brien dated May 19, 2011 and May 24, 2011 attached hereto as **Exhibit "20" and "21"** respectively.

Silver West Property. The August 31, 2011 notice also cited parking and storage violations on Vacant Tract 40 and the Arrow Property.<sup>60</sup>

On September 12, 2011, Director O'Brien issued to the Robsons an official interpretation of the LDC finding that the Robson's would not be allowed to modify their CUP to introduce new uses, such as a coffee shop, or to construct new accessory structures on the Son Silver West Property because to do so would constitute a change to a legal non-conforming use inconsistent with LDC Article 1204. Director O'Brien advised the Robsons to apply for City Council approval of a Community Plan amendment and rezoning in order to operate a coffee shop or erect new structures on the Son Silver West Property.<sup>61</sup> On September 26, 2011, this interpretation was appealed by the Robsons to the Board of Adjustment challenging the Director's decision that new structures had been erected.<sup>62</sup>

On October 6, 2011, Director O'Brien sent a separate interpretation letter to the Robsons finding that an expansion of parking on Vacant Tract 40 and the use of the Arrow Property for office space and employee parking would require a Community Plan amendment and rezoning application.<sup>63</sup>

On November 3, 2011, Rio Robson emailed a request to John O'Brien to defer the Board of Adjustment hearing.<sup>64</sup> After receiving the Robson's November 3, 2011 email request, Director O'Brien sent an email response on November 4, 2011 stating that he would "hold off on the appeal hearing" and would notify the Robsons, after meeting with Sedona's Chief Building Inspector, whether it would be necessary to reschedule the appeal hearing before the Board. Director O'Brien also confirmed that he made a site inspection of the Son Silver West Property on November 2, 2011 and verified that the coffee shop use had been discontinued.<sup>65</sup>

On December 21, 2011, Director O'Brien sent an email to Rio Robson providing his final decision regarding the enforcement proceedings that had commenced on August 31, 2011 as well as the September 12, 2011 formal interpretation that was appealed by the Robsons to the Board of Adjustment.<sup>66</sup> In his decision, Director O'Brien acknowledged the discontinuance of the coffee shop use. He also expressed his inability

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<sup>60</sup> See Letter from Director O'Brien dated August 31, 2011 attached hereto as **Exhibit "22"**.

<sup>61</sup> See Letter from Director O'Brien dated September 12, 2011 attached hereto as **Exhibit "24"**.

<sup>62</sup> See September 26, 2011 appeal from Robsons to Board of Adjustment attached hereto as **Exhibit "25"**.

<sup>63</sup> See email from Director O'Brien dated October 6, 2011 attached hereto as **Exhibit "26"**.

<sup>64</sup> See email from Rio Robson to Director O'Brien dated November 3, 2011 attached hereto as **Exhibit "27"**.

<sup>65</sup> See email from Director O'Brien dated November 4, 2011 attached hereto as **Exhibit "27"**.

<sup>66</sup> See Director O'Brien's December 21, 2011 decision attached hereto as **Exhibit "28"**.

to locate City or County building permits or approvals for the shade structure and roof system which the Robsons claimed were replacements of similar structures. Due to the lack of documentation and the possibility that these structures could have been constructed before Sedona's incorporation in 1988, Director O'Brien made the decision to allow the structures to remain as constructed. In requiring the Robsons to submit a site plan and photographs of the Son Silver West Property showing existing buildings, their use and parking, Director O'Brien made the following enforcement decision:

This documentation will establish what you are allowed to have at Son Silver West at this time and will give us a historical record of the allowable uses on your property. Then, from this point forward, there won't be a question with what is allowed and what is not allowed.

When analyzing the language used by Director O'Brien in his December 21, 2011 enforcement ruling in the context of the preceding history of enforcement decisions as well as the Robson's appeal pending before the Board of Adjustment, it is clear that Director O'Brien's decision was an authorized act of enforcement by Sedona's Zoning Administrator under Ariz. R. Stat. § 9-462.05 and Section 306 of the Sedona LDC and that he intended his decision to be a formal and final decision by which the City and the Robsons could rely upon in the future.

Prior to retiring, in May of 2012, Director O'Brien sent an email to several staff members and provided to future Director Audree Juhlin a memorandum titled "Project Status Information May 2012."<sup>67</sup> Within the memorandum, Director O'Brien provided an update and information regarding Son Silver West. Notably, Director O'Brien provided no information to staff or Ms. Juhlin regarding any current violations on the Son Silver West Property or current violations relating to the 1992 CUP. Instead, Director O'Brien memorialized his prior December 21, 2011 decision by stating:

Rio Robson is supposed to get us a notebook of photographs of the property showing all of the existing improvements. He needs to date these photos and provide them to staff so we know exactly what they have now in place and what is legal non-conforming ... so the next time they building [sic] without permits, we will know what is legal and what is illegal. I have asked for this for several months and Rio has said "he will get to it soon" for at least four months.

It is important to note that, after the Robsons submitted a conceptual site plan and photographs of the Son Silver West Property to Director O'Brien, no Board of Adjustment hearing was scheduled by the City of Sedona. Since there was no evidence available to

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<sup>67</sup> See May 9, 2012 email from Director O'Brien and redacted memorandum titled "Project Status Information May 2012" attached hereto as **Exhibit "29"**.

Director O'Brien to present to the Board of Adjustment with regard to the alleged new structures, Mr. O'Brien never rescheduled the Board of Adjustment hearing.

The history of communications between Director O'Brien and the Robsons, the fact that his December 21, 2011 Decision was an authorized act of the Community Development Director under state statute and the Sedona LDC, and the written format of his decision which included his signature and title as Community Development Director, all support a decision by the Board of Adjustment to reverse the determination of Director Juhlin requiring some type of "formal approval" in order for the December 21, 2011 Decision to become effective.

**3. The current buildings, structures and uses on Son Silver West Tracts 41 and 42 are identical to those inspected and approved by Director O'Brien in his December 21, 2011 Decision.**

In her 2015 Memorandum, Director Juhlin determined that the materials submitted by Son Silver West's legal counsel as part of the SSW Memorandum "fail to substantiate that conditions outlined in the attached Notice of Violation were in fact present prior to 2011 and not created afterward."<sup>68</sup> In response to this decision, Son Silver West will be submitting the following supplemental documentation to the Community Development Director and the City of Sedona Board of Adjustment for their consideration: (1) historical aerial photographs of the Son Silver West Property obtained from the City of Sedona GIS Department<sup>69</sup>, (2) an accurate site plan of the existing structures and uses on the Son Silver West property, and (3) sworn statements from Rio Robson and Linda Rose Robson confirming that the buildings, structures and uses on the Son Silver West Property which existed at the time of issuance of the 2015 NOVs were the same buildings, structures and uses that were approved by Director O'Brien in his December 21, 2011 Decision. These supplemental materials will be submitted at least 10 calendar days prior to the Board of Adjustment hearing scheduled for this matter. In the meantime, we submit the following aerial photograph comparisons of: (1) a current Google Earth aerial photograph dated April 2, 2015 and (2) a Google Earth aerial photo dated June 20, 2011. We would request a determination by the Board of Adjustment finding that the current conditions existing on the Son Silver West Property are the same or substantially similar conditions approved by Director O'Brien as being in compliance with the Sedona LDC and 1992 CUP in the December 21, 2011 Decision.

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<sup>68</sup> See Director's 2015 Memorandum attached hereto as **Exhibit "C"**.

<sup>69</sup> Sedona GIS Analyst, Lisa Leurs, is out of the office until December 2, 2015. At that time, a request for historical aerial photographs will be made with the Sedona GIS Department.

**4. The Conceptual Site Plan and Photographs dated March 1, 2012 were submitted by Son Silver West to the Community Development Director in accordance with Director O'Brien's December 21, 2011 Decision.**

Within her 2015 Memorandum<sup>70</sup>, Director Juhlin provides the following interpretation of the conceptual site plan and photographs that were submitted by Rio Robson to the City in response to Director O'Brien's December 21, 2011 Decision:

When reviewing the email exchange, it is clear that a March 1, 2012 deadline was established for the Robsons to supply the requested information. It is also clear based on a May 8, 2012 email from former Director O'Brien to staff that he had not received the requested documentation from the Robsons. As of today's date, staff has been unsuccessful in locating any such documentation that John O'Brien, or any other staff may have received in response to the 2011 email request.

...

After thorough review, staff has determined that the documentation supplied by the Robsons in the summer of 2015, is insufficient, does not satisfy the 2011 email request and fails to substantiate that conditions subject to the attached Notice of Violation were present in 2011. The map submitted is not considered an adequate site plan, but rather a more informal marketing map used for customers to navigate the site. The map does not accurately portray what is on site and the photos are not adequately keyed to the map. The buildings are not correctly represented in size, shape, orientation and location, and it does not sufficiently depict property lines. For instance, the Chapel is shown on the 1476 SR 179 property, when in fact it is located on the 61 Arrow Drive property. Additionally, the map does not depict shade structures or outdoor display areas. Since the original impetus for former Director O'Brien's request was a question regarding the legality of the shade structures, the logical result would have been a site plan that showed the shade structures.

...

Further, staff was unable to satisfactorily evaluate the pictures submitted as they are black and white and the exterior photos are of poor quality; many are washed out by sunlight or include significant shadows and do not provide staff with a clear understanding of the size, scope, location and nature of the conditions at that time the photos were taken. None of the buildings have photos of all of the exteriors and large portions of the site seem to have been excluded, based on the best guess of photo locations by staff as shown on the map.

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<sup>70</sup> *Id.*

In the 2015 Memorandum, Director Juhlin also raises an objection to the site plan and photographs submitted by the Robsons because “they were never confirmed as . . . [complete] by Director O’ Brien.”

Son Silver West’s and the Robson’s appeal on this matter are three-fold: (1) Director O’Brien’s December 21, 2011 Decision provided a minimalistic description of the site plan and photographs that were being requested of the Robsons, (2) Director O’Brien made no mention of a requirement that he review and approve the site plan and photographs submitted by the Robsons in order for his December 21, 2011 Decision to be valid, and (3) the conceptual site plan and photographs were submitted by Rio Robson to Director O’Brien at the City of Sedona in early summer 2012, which is contrary to Director Juhlin’s statement that the documentation was not supplied by the Robsons until the summer of 2015.

Director O’Brien stated the following in his December 21, 2012 Decision with regard to the site plan and photographs to be submitted by the Robsons:

3. By March 1, 2012, I am requesting that you provide to me a site plan of your property showing all of the existing buildings, their use and parking. The site plan needs to be dated.
4. By March 1, 2012, I am requesting that your provide photographs of the exteriors of all of the buildings. The photographs need to be dated and their use labeled and keyed to the site plan.

The Robsons submitted a site plan and photographs that they believed, at the time, would satisfy Director O’Brien’s request. In all fairness, there is no statement by Director O’Brien conditioning his December 21, 2011 Decision on his approval of the site plan and photographs submitted. Instead, it appears from his prior email correspondence, that Director O’Brien based his Decision on a prior inspection of the Son Silver West Property performed on November 2, 2011,<sup>71</sup> his research of the City’s records, and his communications with staff.

The request for the site plan and photographs was a follow-up item that would have been used as baseline documentation by both the City and the Robsons moving forward. In response to the inadequacies of the site plan and photographs first raised at the September 9, 2015 meeting with City Attorney Pickels, City Manager Clifton and Director Juhlin, the Robsons offered to submit an engineered site plan and photographs to the City in the SSW Memorandum:<sup>72</sup>

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<sup>71</sup> See Email from Director O’Brien to Rio Robson dated November 4, 2011 attached to SSW Memorandum as **Exhibit “27.”**

<sup>72</sup> See SSW Memorandum, page 38, attached hereto as **Exhibit “A”**.

[W]e are willing to submit an engineered site plan with dimensions and professional photographs keyed to the site plan for the Son Silver West Property. The uses and structures existing on the Son Silver West Property today were in existence at the time of Director O'Brien's December 21, 2011 decision. There have been no modifications to the Son Silver West Property in that 4-year period. The engineered site plan and photographs will supply the City with confidence when responding to any future allegations or inquiries regarding the uses being conducted on the Son Silver West Property.

This offer to provide an engineered site plan and photographs keyed to the site plan is still extended by the Robsons to the Community Development Director. All-in-all, Director O'Brien's request for a site plan and photographs was well-founded given: (1) the lengthy history of this property as a legal non-conforming use since 1964, (2) the conflicting uses and square footages between those set forth in the 1992 Staff Report and those depicted on the Alternative Site Plan #2, (3) the piecemeal site plan and permit approvals issued by the City after the 1992 CUP approval, and (4) the previous inability of City staff to locate City permit approvals and plans for the Son Silver West Property that the Robsons were able to later produce from their personal records. This site plan and photographs would greatly mitigate future ambiguities and disagreements which might arise regarding the legal non-conforming use rights enjoyed by Son Silver West. We would request that the Board of Adjustment issue a determination finding that, based upon the historical records, sworn statements and the aerial photographs submitted as part of this appeal, the submittal of an engineered site plan of the existing conditions on the Son Silver West Property and professional photographs keyed to the site plan would satisfy the request by former Director O'Brien in his December 21, 2011 Decision for documentation which would establish the legal non-conforming uses, buildings and structures that were permitted on the Son Silver West Property at the time of his Decision.

5. **The City of Sedona is estopped from issuing a Notice of Violation to Son Silver West for conditions on Tracts 42 and 41 determined to be in compliance by Director O'Brien in his December 21, 2011 Decision and subsequently recognized as compliant by Community Development Department staff and Directors for nearly 4 years thereafter.**

In Arizona, the elements of equitable estoppel are: "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *Valencia Energy Co. v. Arizona Dep't of Revenue*, 191 Ariz. 565, ¶ 35, 959 P.2d 1256, ¶ 35 (1998). In *Freightways, Inc. v. Arizona Corp. Comm'n*, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981), the Arizona Supreme Court disapproved of the rule prohibiting the application of principles of equitable estoppel against a sovereign, stating that estoppel will be applied against a sovereign, even a sovereign exercising its governmental functions, when justice

dictates (quoting *Silver City Consol. Sch. Dist. No. 1 v. Bd. of Regents*, 75 N.M. 106, 401 P.2d 95, 99 (1965)) (“We recognize that estoppel in its usual sense is not generally applicable against a sovereign in the exercise of governmental functions, but where right and justice demand it, the doctrine will be applied.”). The government may be estopped only when its “wrongful conduct threatens to work a serious injustice and ... the public interest would not be unduly damaged.” *Valencia Energy Co.* at ¶ 33, 959 P.2d at ¶ 33, quoting *Freightways*, 129 Ariz. at 248, 630 P.2d at 544. In order to find that the public interest would be unduly damaged, the Arizona Supreme Court in *Freightways* stated “that where the application of estoppel will not affect the exercise by the state of its governmental powers and sovereignty, or bind it by unauthorized acts of its officers and employees, estoppel will, when justice dictates, be applied to the state.” *Freightways*, 129 Ariz. at 248, 630 P.2d at 544.

**a. The City’s recent alleged violations pertaining to the Son Silver West Property are inconsistent with Director O’Brien’s December 21, 2011 Decision and the actions of the City.**

Director O’Brien’s December 21, 2011 decision arose out of his interpretation and enforcement of the Sedona LDC and 1992 CUP with regard to allowable uses and structures on the Son Silver West Property. As the City’s Zoning Administrator and Community Development Department head, Director O’Brien was charged with the statutory authority and responsibility to enforce the City of Sedona LDC and the 1992 CUP. As part of this decision, Director O’Brien identified no outstanding violations of the Sedona LDC and 1992 CUP and requested that Rio Robson submit a site plan and photographs of the existing uses and structures on the Son Silver West Property. Director O’Brien explained the following purpose for the requirement that Rio Robson submit the site plan and photographs to the City:

This documentation will establish what you are allowed to have at Son Silver West at this time and will give us a historical record of the allowable uses on your property. Then, from this point forward, there won’t be question with what is allowed and what is not allowed.

Following the December 21, 2011 decision, Director O’Brien sent an email and memorandum on May 9, 2012 to fellow staff and future Director Audree Juhlin notifying them of his decision to use the photos submitted by Rio Robson to establish the permitted legal non-conforming uses and structures as a baseline for the future. The City of Sedona later accepted the conceptual site plan and March 1, 2012 photographs submitted by Rio Robson and never rescheduled the pending Board of Adjustment hearing. When Director Audree Juhlin issued a notice of violation to the Robsons on October 8, 2014, she did not assert any violations pertaining to the uses or structures on the Son Silver West Property. Instead, her October 8, 2014 notice addressed violations on the Vacant Tract 40, the Arrow Property and the Bowstring Property only. It was not until our September 8, 2015 meeting, almost 4 years after Director O’Brien’s December 21, 2011 decision, that the City of

Sedona for the first time elected to raise alleged violations on the Son Silver West Property which were previously addressed and resolved by Director O'Brien's enforcement decision finding no violations. The 2015 NOVs and the Director's 2015 Memorandum issued by Director Juhlin contain decisions and interpretations regarding the Son Silver West legal non-conforming uses and structures and the 1992 CUP approval which are contrary to Director O'Brien's December 21, 2011 decision.

**b. The Robsons relied on Director O'Brien's December 21, 2011 Decision.**

In reliance on the December 21, 2011 decision by Director John O'Brien finding no use or structural violations of the LDC and 1992 CUP, the Robsons undertook significant actions and substantial investments with regard to their Son Silver West business.

The Robsons increased their off-site warehousing and art inventory space from approximately 2,000 s.f. to 8,500 s.f. in order to maintain a constant supply of art objects and goods to the Son Silver West Property for sale. The Robsons are currently in the process of expanding their total warehousing space to approximately 14,000 s.f.

The Robsons expanded their sources and increased their wholesale purchases of art objects and related inventory items for the Son Silver West Property. The assurance supplied by Director O'Brien's decision that the Son Silver West Property was operating with no violations of the LDC or 1992 CUP caused the Robsons to purchase larger volumes of retail inventory to be stored in the expanded warehouse space and transferred to the Son Silver West Property for sale. For instance, the Robsons purchased approximately \$300,000 worth of art inventory from Mexico in 2013 and an additional \$500,000 of inventory in 2014.

The Robsons purchased new art manufacturing equipment totaling approximately \$45,000 and spent approximately \$100,000 updating computer software and telecommunication equipment for the Son Silver West Property.

As a result of these actions taken by the Robsons in reliance on the December 21, 2011 decision by Director O'Brien, the Robsons realized noticeable increases in annual net revenue starting in 2012 through this year to date.

**c. The Robsons would be substantially damaged as a result of the City's repudiation of Director O'Brien's December 21, 2011 Decision.**

By upholding the 2015 NOVs, the Robsons would suffer substantial injuries as a result of the City's repudiation of Director O'Brien's December 21, 2011 decision. Some of the violations which would cause damage to the Robsons and their business include: (1)

limiting the total outdoor retail display area on Tracts 41 and 42 to 5,000 s.f., (2) requiring 1,950 s.f. within the original home/gallery structure to be used as a single family residence, and (3) removing any enclosed commercial retail areas which exceed 2,250 s.f. Requiring compliance with these alleged violations would severely injure the Robson's Son Silver West business and financial commitments they have made in reasonable reliance on Director O'Brien's decision.

**d. The City's wrongful conduct threatens to work a serious injustice to the Robsons and the public interest would not be unduly damaged by the application of estoppel against the City.**

Balancing the equities, the interest of the public would not be damaged by upholding the validity of Director O'Brien's December 21, 2011 decision, and there is no threat to the sovereignty of the City in upholding the validity of that decision as issued inasmuch as it has been honored by the City for nearly 4 years. Due to the unique legal non-conforming use at issue in this case, preventing the City from bringing a CUP revocation or suspension action would not affect the exercise by the City of its general governmental powers to apply its LDC city-wide. The Sedona LDC no longer allows the expansion of a legal non-conforming use through the administrative approval of a CUP. Thus, the 1992 CUP that was being enforced by Director O'Brien is truly unique. On the other hand, the damage that would be done to the Robsons, who relied upon the Director's decision in the operation of its Son Silver West business since 2011, would be of great magnitude. The Robsons and Son Silver West request a determination by the Board of Adjustment that the City of Sedona and Director Juhlin are equitably estopped from issuing the following violations which are inconsistent with the December 21, 2011 Decision: (1) limiting the total outdoor retail display area on Tracts 41 and 42 to 5,000 s.f., (2) requiring 1,950 s.f. within the original home/gallery structure to be used as a single family residence, (3) removing any enclosed commercial retail areas which exceed 2,250 s.f.

**B. APPEAL OF CODE VIOLATIONS LISTED IN NOVEMBER 10, 2015 NOTICE**

**1. APPEAL OF CORRECTIVE ACTION A.5: The permitted shed located at 61 Arrow Drive may be used as a private religious and contemplative space accessory to a single-family residence.**

As the property owner of 61 Arrow Drive, Rio Robson appeals to the Board of Adjustment Director Juhlin's decision in the 2015 NOV requiring the religious accessory structure referred to as the "Chapel" to be reverted to a shed. While Mr. Robson understands that the property at 61 Arrow Drive is zoned RS-18b Single-Family Residential and that commercial retail uses associated with Son Silver West cannot be conducted in the Chapel building, Mr. Robson appeals the decision of Director Juhlin requiring the private religious accessory structure to be converted back to a shed.

There are no provisions in the Sedona LDC which would prevent a residential property owner from using an accessory building as a private contemplative religious space. Section 902.01(A) of the Sedona Land Development Code allows the following with regard to accessory uses:

A. Accessory uses, including facilities and equipment are permitted in conjunction with any principal use, provided the accessory use is compatible with the principle use and does not alter the character of the premises. Any reference to a permitted use shall include the accessory use.

The use of the enclosed shed as a private contemplative religious space, with no retail items for sale or commercial operations being conducted within, would be compatible with the principle residential use and would not alter the character of the premises. Thus, Mr. Robson requests a determination from the Board of Adjustment finding that Director Juhlin erred in requiring Mr. Robson to convert the private accessory religious space within the permitted building back to a shed.

**2. APPEAL OF CORRECTION ACTION C.1: The Community Development Director erred in issuing a notice of violation to the owner of 1535 SR 179 for unlawful overflow parking by customers and third parties after owner took necessary steps to post the vacant lot with “No Parking” signs.**

According to the 2015 NOV issued by Director Juhlin, the Robsons and Son Silver West are in violation of Article 6 (District Regulations RS-18b) and Article 12 (Non-Conforming Situations) of the SLD by allowing over-flow parking and receiving and storage of merchandise on Vacant Tract 40. The Robsons and Son Silver West appeal this alleged violation inasmuch as they have ceased to allow over-flow parking and receiving and storage of merchandise on the vacant lot. The Robsons have posted “No-Parking” signs on Vacant Tract 40. They are unable to erect a wall or fence further restricting vehicular access to and from Vacant Tract 40 and the Son Silver West commercial driveway because there is an existing easement of record which grants the owner of Tract 39 vehicular access across the Robson’s Vacant Tract 40 for purposes of ensuring Tract 39’s access to SR 179.<sup>73</sup> When the SR 179 improvements were constructed, no driveway cut was allowed for Tract 39. Therefore, the only access to and from Tract 39 to SR 179 is located along its shared property line with Vacant Tract 40, which said access road then turns north through the Robson’s Vacant Tract 40 to connect to the Son Silver West paved commercial driveway which intersects with SR 179. Thus, the Robsons and Son Silver West request a determination from the Board of Adjustment finding the Robsons to be in compliance with

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<sup>73</sup> See Easement recorded against Vacant Tract 40 at Docket 250, Page 114, Official Records of Coconino County Recorder attached hereto as **Exhibit “E”**.

Article 6 and Article 12 and that the “No-Parking” signs currently erected on Vacant Tract 40 are an adequate measure to discourage parking on this vacant lot.

3. **APPEAL OF CORRECTIVE ACTION C.2: The Community Development Director erred in issuing a Notice of Violation to the owner of 1535 SR 179 requiring that the owner cease and desist all use of the vacant lot for commercial purposes when the City of Sedona Community Development Department previously approved the relocation and construction of a commercial driveway on 1535 SR 179 to allow ingress and egress traffic to travel to and from Son Silver West Tracts 42 and 41 and SR 179.**

Under Corrective Action C.2 of the 2015 NOV, Director Juhlin requires that the Robsons and Son Silver West immediately “cease and desist all use of this property [Vacant Tract 40] for commercial purposes including but not limited to shipping/receiving activities and storage of merchandise.” The Robsons and Son Silver West do not dispute the prohibition of the specified commercial uses on Vacant Tract 40 (i.e. shipping/receiving activities and storage of merchandise). On the other hand, they must appeal the requirement that they cease and desist all use of Vacant Tract 40 for commercial purposes because the driveway located upon and along the north boundary of Vacant Tract 40 is used as the main commercial driveway allowing vehicular access to and from the Son Silver West Property and SR 179. The location of this commercial driveway on Vacant Tract 40 was previously approved by Director O’Brien and ADOT for traffic safety purposes. On August 23, 2004 and September 4, 2004, Steve O’Brien of ADOT, the Robsons and Sedona Community Development Director John O’Brien reached an agreement whereby a new driveway connecting the Son Silver West parking lot to Highway 179 would be located and paved partly on Vacant Tract 40 to accommodate a full and safe median break to serve Son Silver West.<sup>74</sup> The new driveway and median break would allow circulation of large delivery trucks to the site and would eliminate any backing of large trucks onto SR 179. Given this prior approval, the Robsons and Son Silver West request a determination of the Board of Adjustment allowing the continued use of the commercial driveway on Vacant Tract 40.

4. **APPEAL OF CORRECTIVE ACTION D.1: The existing outdoor retail display areas on the Son Silver West Property are permitted as a result of: (1) the legal non-conforming outdoor retail display areas historically located on Tract 42, (2) the Planning and Zoning Commission’s approval of the 1992 CUP and Alternative Site Plan # 2 allowing the expansion of an additional 5,000 square feet of outdoor retail display area on Tract 41, and (3) the 1993 Site Plan Approval which allowed the relocation of part of the outdoor retail**

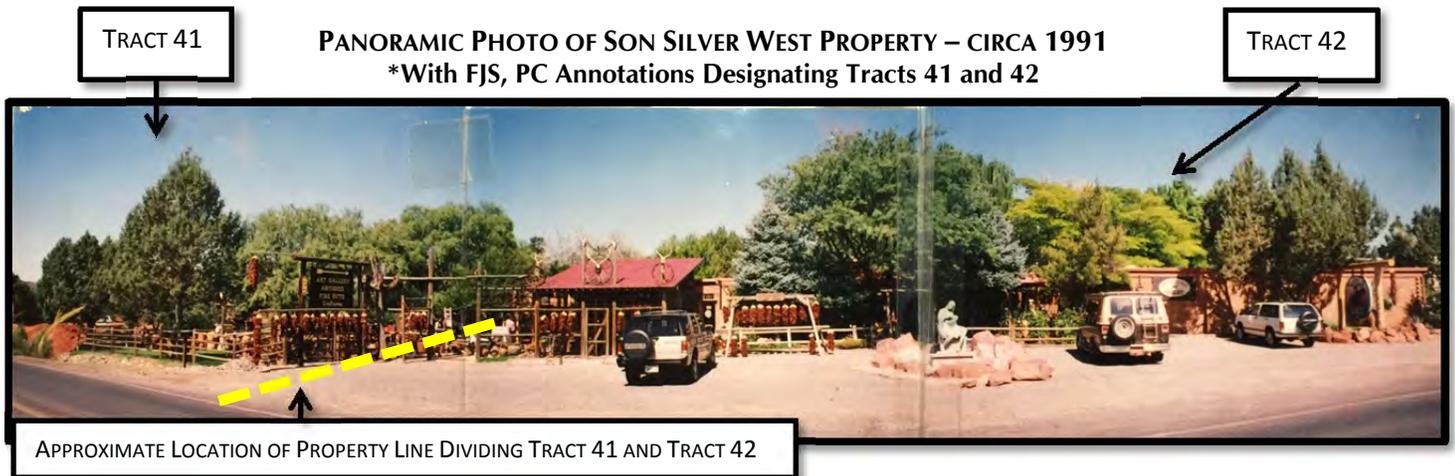
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<sup>74</sup> See ADOT Meeting Notes dated August 23, 2004 and Record of Conversation dated September 8, 2004, attached to SSW Memorandum as **Exhibit “16”**.

**display area from Tract 41 to the former parking area along the frontage of Tract 42.**

The Robsons and Son Silver West appeal Director Juhlin’s interpretation of the 1992 CUP and the Director’s decision set forth in the 2015 NOV requiring the removal of all outdoor retail display area in excess of the approved 5,000 square feet for the Son Silver West Property. The approved site plans, historical photographs and the 1992 Staff Report on file with the City of Sedona support a Board of Adjustment determination that the CUP issued to Son Silver West permitted the 5,000 s.f. expansion of the outdoor retail display area on Tract 41 and did not address the existing outdoor retail display areas which had been maintained as a legal non-conforming use on Tract 42 since 1960. Thus, the CUP did not limit the entire Son Silver West Property to 5,000 s.f. of outdoor retail display area. It limited the expansion of the existing outdoor display area on Tract 41 by 5,000 s.f. Our conclusion is supported by the following:

- Before the CUP approval in 1992, the Son Silver West outdoor retail display area was located on both Tract 41 and Tract 42, as shown by a historical panoramic photograph of the Son Silver West Property taken prior to the permitted relocation and reconfiguration of the parking area from Tract 42 to Tract 41 (circa 1991). As shown on the left side of the photograph, some of the outdoor retail display area was located along SR 179 on a grassy area of Tract 41. Outdoor retail display areas are also shown between the gallery building and former parking area on Tract 42.

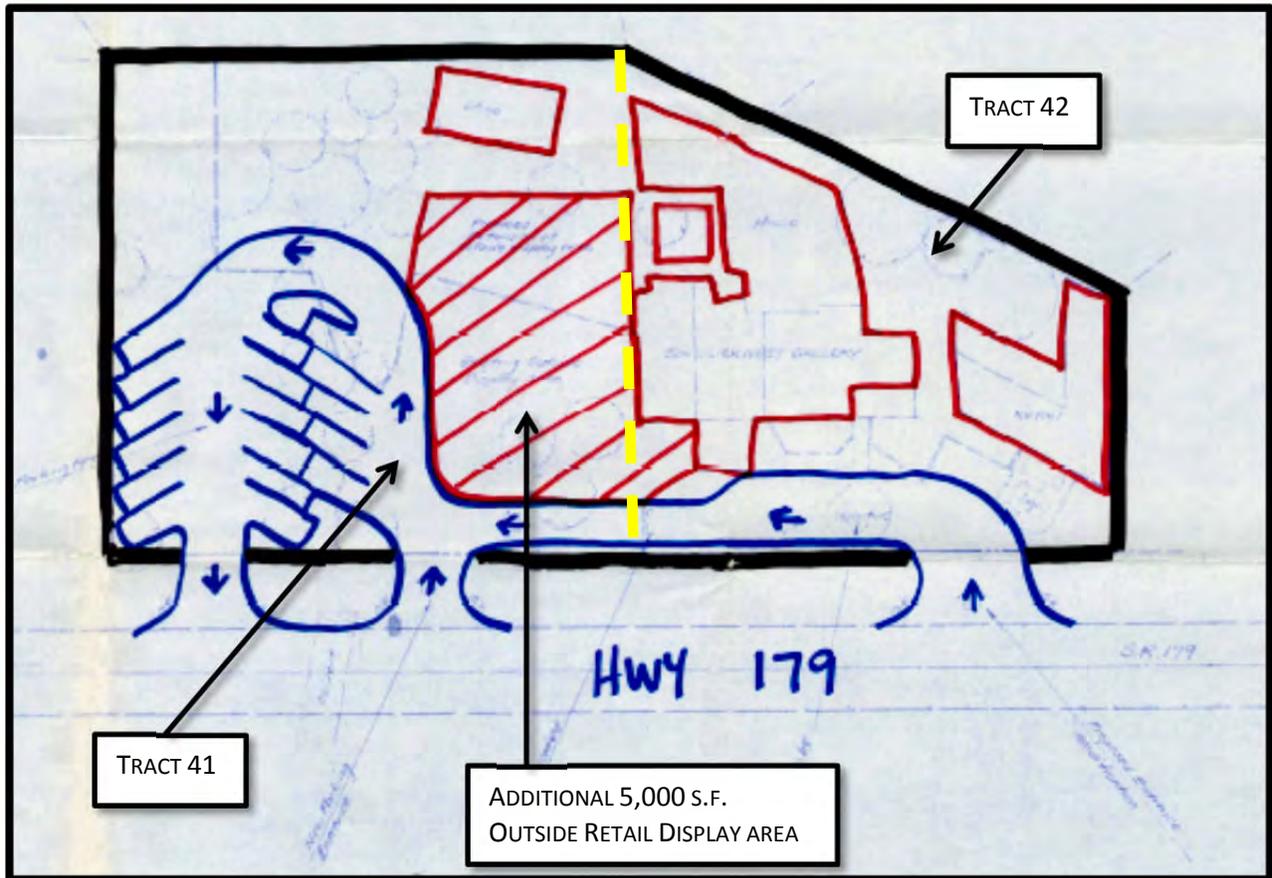


- The 1992 Plan and Alternative Site Plan #2 showed the extent of the existing and future proposed outdoor display area measuring approximately 60 feet by 90 feet located in the north-half of Tract 41 and lying south of the gallery, which would be left untouched after the new parking improvements were constructed. Neither the 1992 Plan nor the Alternative Site Plan #2 show the outdoor display areas that would be removed from the Tract 41 frontage as a result of the reconfiguration of the parking area and accessway. These plans also did not identify the existing outdoor display areas on Tract 42. Notably, the outdoor display area shown in the

panoramic photograph located between the east side of the gallery building and former parking area on Tract 42 is not depicted. This is expected inasmuch as the site plan is titled "Parking Lot Expansion Plan and Access Modifications." The plan was limited in terms of identifying only those areas of the Son Silver West Property impacted by the proposed parking and access modifications.

**ALTERNATIVE SITE PLAN #2 APPROVED WITH CUP 92-3 ON SEPTEMBER 15, 1992**

**\*With FJS, PC Annotations Designating Tracts 41 and 42 & Additional 5,000 S.F. of Outdoor Retail Display**



The location of the additional 5,000 s.f. of outdoor retail display area to be expanded onto Tract 41 is shown on Alternative Site Plan #2 with diagonal red lines. This expanded outdoor retail display area measures approximately 60 feet by 90 feet in width, according to the scaled drawing. The 1992 Plan and the Alternative Site Plan #2 do not identify the locations of the outdoor retail display areas which were then existing on Tract 42.

- The staff report dated September 15, 1992 emphasizes that the CUP addresses the outdoor display areas on the "southern one-half" of the Son Silver West Property.<sup>75</sup> The Summary Sheet for CUP 92-3 provides a parcel map with both Tracts 41 and 42

<sup>75</sup> See Sedona Community Development Staff Report to Planning and Zoning Commission regarding Case No. CUP 92-3 dated September 15, 1992 attached hereto as **Exhibit "3"**.

delineated and identifies the former APNs for both Tracts 41 and 42 as being the location of the property. Thus, the “southern one-half” of the property which was the subject matter of the legal non-conforming use expansion and CUP application could only have been Tract 41. Specifically, the staff report states the following in support of our conclusion that the 5,000 s.f. outdoor retail display area was a limitation on the legal non-conforming use expansion onto Tract 41 only:

The City of Sedona and the current property owners disagree about the legal establishment of the large outside display area associated with the business as well as other associated uses on the southern one-half portion of the subject property.

...

Alternative site plan #1 shows . . . .Alternative site plan #2 shows a 30-foot wide one-way drive, with no parking in front of the building. This drive would access the new 17 space lot on the southern one-fourth of the property. The new parking lot would also be accessed the same as site plan #1. Both plans discuss expansion and shifting of the existing outside display area.

...

#### Development Proposal

- Conditional use permit requested to allow for expansion of nonconforming use
- If approved, would allow for continued use of 5,000 square foot outside sales/display area with minor modifications, and construction of 17-space parking lot on southern one-fourth of property.

...

#### Recommendation

The current use of the southern one-half of the subject property, specifically the 5,000 square foot outside sales/display area has been the subject of City zoning enforcement actions for approximately three years.

...

The applicant is pursuing an avenue of administrative relief (CUP request) which, if approved, would allow for the continued use of the disputed display area and the construction of a new parking area.

Emphasis added.

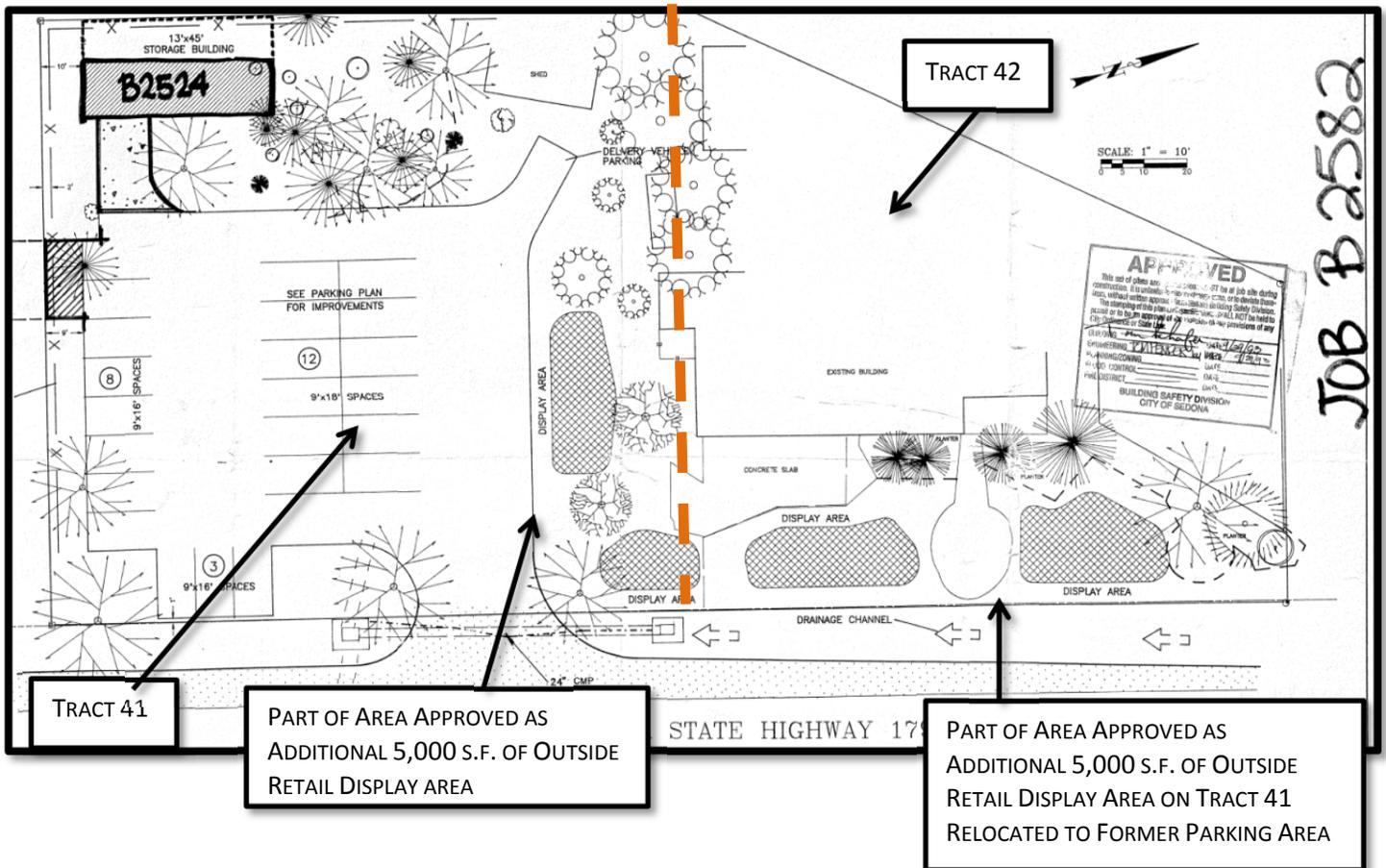
- On September 29, 1993, former Community Development Director, Tom Schafer, approved the 1993 Plan.<sup>76</sup> The 1993 Plan shows an approximate 30-foot by 90-foot outdoor retail display area lying along the north side of Tract 41 and south of the gallery building that was existing at the time of the CUP

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<sup>76</sup> See 1993 Plan attached to SSW Memorandum as **Exhibit “11”**.

approval in 1992. Based upon the approximate 60-foot width of the outdoor display area shown on the prior 1992 Plan and Alternative Site Plan #2, it is obvious that the display area existing along the north side of Tract 41 at the time of the CUP approval was reduced by almost half in order to accommodate the new parking area on Tract 41. Not by coincidence, the 1993 Plan also shows outdoor retail “display areas” within the entire north-south area lying between the existing Tract 42 gallery and retail buildings on the west and the drainage channel abutting Highway 179 on the east. This additional outdoor display area shown on Tract 42 along Highway 179 on the 1993 Plan was relocated from the 5,000 s.f. outdoor display area approved along the north side of Tract 41 by the CUP. Thus, in 1993, Director Schafer approved these outdoor retail display areas as they currently exist today. Again, it is clear that the 5,000 s.f. of outdoor retail display was approved for expansion of the legal non-conforming use onto Lot 41. There is no evidence to support Director Juhlin’s interpretation that the 5,000 s.f. of outdoor retail space applied to any area except Tract 41.

**1993 PLAN APPROVED BY FORMER COMMUNITY DEVELOPMENT DIRECTOR SCHAFER**  
**\*With FJS, PC Annotations Designating Tracts 41 and 42 and Outside Retail Display Areas**



In summary, based upon the history of the outside retail display areas that were located throughout Tract 42 when the Property was originally operating as the La Galleria in Coconino County and later as Son Silver West at the time of Sedona's incorporation in 1988, the outside display areas on Tract 42 were already permitted as a legal non-conforming use. It was not until the Robsons purchased Tract 41 in 1987 that the City of Sedona began issuing notices of violation for an alleged expansion of the outside retail display areas onto Tract 41. With this background, the 1992 Staff Report's references to the 5,000 s.f. expansion of the outdoor retail display areas onto the south half of the property is placed in context. The Robsons and Son Silver West were limited to 5,000 square feet of additional outdoor display area on Tract 41 only. The remaining outdoor display areas on Tract 42 are grandfathered. Therefore, we request a ruling by the Board of Adjustment reversing the erroneous decision of Director Juhlin requiring the total outdoor retail display area to be limited to 5,000 square feet on the Son Silver West Property.

5. **APPEAL OF CORRECTIVE ACTION D.2: The Son Silver West retail space in enclosed buildings is permitted up to approximately 4,328 s.f. as depicted on the survey map prepared by Shephard Wesnitzer, Inc. and approved by the Planning and Zoning Commission as part of the 1992 CUP Condition No. 1 as "Alternative Site Plan #2".**

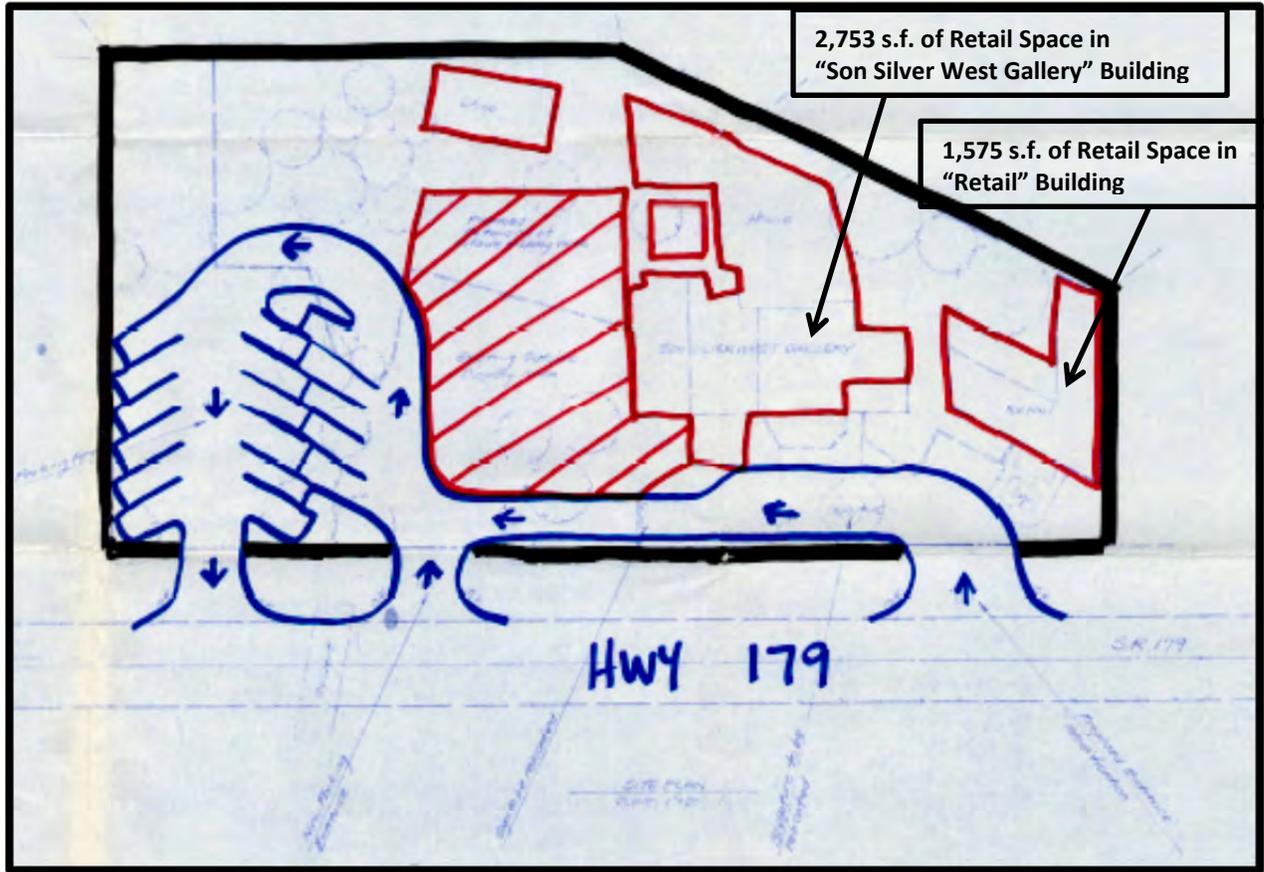
The City Planning and Zoning Commission's approval and adoption of the uses and physical structures depicted on Alternate Site Plan #2, as set forth in Condition No. 1 to the 1992 CUP, constitutes an official City approval which allows enclosed retail display areas totaling 4,328 square feet on the Son Silver West Property. Condition No. 1 to the 1992 CUP states, "**Uses and physical improvements on the subject property shall not exceed those** as characterized in the staff report dated September 15, 1992, and **as approved by the Planning and Zoning Commission (alternate site plan #2).**"<sup>77</sup> Emphasis added. Alternate Site Plan #2 was approved by the Planning and Zoning Commission using the full-sized, drawn-to-scale (1 inch=20 feet) Shephard-Wesnitzer plan titled "Parking Lot Expansion Plan and Access Modifications" dated April 4, 1992, Job No. 91038.<sup>78</sup> By using an engineer's 20-scale to calculate the building areas labeled as "Son Silver West Gallery" and "Retail" on the Alternate Site Plan #2, the Robson's architect has confirmed a total allowable building area of 4,328 square feet dedicated to retail space. For demonstrative purposes, we have provided the retail square footages scaled take-off of Alternative Site Plan #2 below:

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<sup>77</sup> See 1992 Staff Report attached to SSW Memorandum as **Exhibit "3"**.

<sup>78</sup> See 1992 Plan and Alternate Site Plan #2 attached to SSW Memorandum as **Exhibit "10"**.

ALTERNATIVE SITE PLAN #2 APPROVED WITH CUP 92-3 ON SEPTEMBER 15, 1992  
\*With FJS, PC Annotations Designating Scaled, Retail Building Square Footages



Based upon this survey of the existing buildings, which was later adopted by the Planning and Zoning Commission as Alternative Site Plan #2, there is a significant discrepancy between the retail space adopted by the Planning and Zoning Commission on the Plan and the square footages referenced in the 1992 Staff Report. Clearly, Alternative Site Plan #2 provides the most accurate depiction of the legal non-conforming retail space in enclosed buildings at the time of the 1992 CUP approval. Therefore, we would request determinations by the Board of Adjustment finding: (1) the Planning and Zoning Commission's approval of Alternative Site Plan #2 as part of the 1992 CUP allowed an existing 4,328 s.f. of enclosed retail space on Tract 42 and (2) Director Juhlin's decision in the 2015 NOV limiting the enclosed retail space to 2,250 s.f. to be in error and reversed.

6. **APPEAL OF CORRECTIVE ACTION D.2: The southernmost building on Tract 41, referred to as "Building A" by Director Juhlin in the 2015 NOV, was approved by the City for storage in connection with the existing Son Silver West commercial operations.**

The Robsons and Son Silver West appeal Director Juhlin's decision in the 2015 NOV relating to the use of the southernmost building on Tract 41, referred to as "Building

A" by Director Juhlin. The purpose of this appeal is to seek clarification that this building may be used for commercial storage purposes. Neither the 1993 Plan nor the permit records for this building limit its use to residential storage. Therefore, we would request a Board of Adjustment determination that Son Silver West may use the southernmost building on Tract 41 as a storage building in connection with its commercial business.

**7. APPEAL OF CORRECTIVE ACTION D.2: The northernmost building on Tract 41, referred to as "Building B" by Director Juhlin in the 2015 NOV, was approved as an art workshop to be used in connection with the existing Son Silver West commercial operations.**

The Robsons and Son Silver West appeal Director Juhlin's decision in the 2015 NOV requiring the northernmost building on Tract 41 to be returned to a storage shed. The Alternative Site Plan #2 approved by the Planning and Zoning Commission as part of the 1992 CUP designates the use of this building as "shop."<sup>79</sup> The City's permit records for this structure approved its use as a "new commercial structure" and "shop."<sup>80</sup> Therefore, we would request a determination by the Board finding the approved use of that northernmost building on Tract 41 is for a commercial art workshop and not a storage shed as set forth in the 2015 NOV.

**8. APPEAL OF CORRECTIVE ACTION D.3: The single-family residence depicted on Alternative Site Plan #2 as "House" was approved as an administrative office and employee lounge by Director O'Brien's December 21, 2011 Decision.**

The Robsons and Son Silver West appeal the decision of Director Juhlin in the 2015 NOV which requires the Robsons to restore 1,950 square feet of the primary dwelling unit to single-family residential use. Former Director O'Brien performed an inspection of the former residence on November 2, 2012.<sup>81</sup> At that time, the former residence was being used as administrative office space and an employee lounge complete with a full kitchen, bathroom, and meeting area. The administrative office and employee lounge space remains locked at all times and is not open to the public. Inasmuch as the retail space under roof was not being expanded by the conversion of the residence to office and employee lounge space, Director O'Brien approved the existing use during his inspection with Rio Robson and in his December 21, 2011 Decision. Director O'Brien was authorized as the Zoning Administrator to interpret compliance with the 1992 CUP given that the existing administrative office and employee lounges uses complied with the intent of the 1992 CUP to limit further non-conforming uses which would generate additional traffic and intensity to the Son Silver West Property.

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<sup>79</sup> See Alternative Site Plan # 2 attached to SSW Memorandum as **Exhibit "10."**

<sup>80</sup> See Permit Records for art workshop building attached hereto as **Exhibit "J."**

<sup>81</sup> See November 4, 2011 Email from Director O'Brien to Rio Robson attached to SSW Memorandum as **Exhibit "27"**.

**9. APPEAL OF CORRECTIVE ACTION D.4: The existing wrought-iron fence lying along the frontage of Tract 42 was approved by Director O'Brien and issued a fence permit in accordance with Condition 6 to the 1992 CUP.**

The Robsons and Son Silver West appeal the decision of Director Juhlin in the 2015 NOV requiring additional screening to be incorporated along the Son Silver West Property frontage along SR 179. As cited by Director Juhlin, Condition No. 6 to the 1992 CUP states that the “outside sales/display area shall be screened by a six-foot high fence/ocotillo cactus to the satisfaction of the Director of Community Development.”<sup>82</sup> Emphasis added. Following the 1992 CUP approval, on June 7, 1994, former Community Development Director Tom Schafer and the Robsons entered into an agreement with regard to the Robson’s future compliance with CUP Condition No. 6 as follows:

Condition No. 6 – The Robsons agreed that earthen berms and screen landscaping would be provided along the east side of the newly established display area in front of the gallery adjacent to Hwy. 179 to the satisfaction of the Director of Community Development no later than August 1, 1994 and October 1, 1994, respectively. A combination of earthen berming, landscaping and rustic fencing was also required in order to satisfy any additional visual screening requirements of all outside display areas as approved by the Director no later than October 1, 1994.

On February 22, 1995, John O'Brien, who at the time was an Associate Planner with the City of Sedona, sent a letter to Bill Robson which provided confirmation that all required improvements required under the 1992 CUP for the Son Silver West Property had been completed, including the screening requirement of Condition No. 6, with the exception of: (1) elimination of the existing mercury vapor lighting [Condition 8], (2) installation of additional parking lot lighting [Condition 9], and (3) construction of the SR 179 improvements [Conditions 4]. Therefore, as of February 22, 1995, the Robsons had complied with screening requirements along the Son Silver West Frontage.

The existing wrought-iron decorative fence erected along the Son Silver West Property frontage also met the satisfaction of Director O'Brien. This is evidenced by the City’s permit approval for the wrought-iron fence issued on September 8, 2011.<sup>83</sup> Director Juhlin has no authority to now decide that the existing, permitted fence does not meet her satisfaction. The Robsons and Son Silver West request a Board of Adjustment determination reversing the Decision of Director Juhlin and finding the wrought-iron fence permit to be sufficient evidence of Compliance with Condition No. 6 of the 1992 CUP.

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<sup>82</sup> See 2015 NOV attached hereto as **Exhibit “C”**.

<sup>83</sup> See Wrought-Iron Fence Permit Approval attached to SSW Memorandum as **Exhibit “23.”**

**10. APPEAL OF CORRECTIVE ACTION D.5: The existing light fixtures on Tracts 42 and 41 were approved by Director O'Brien in accordance with Condition 9 to the 1992 CUP.**

The Robsons and Son Silver West also appeal the decision of Director Juhlin in the 2015 NOV requiring the existing light fixtures to be shielded in compliance with Condition No. 9 of the 1992 CUP and the Sedona LDC. Condition No. 9 required that “[a]ll other exterior outside lighting shall be shielded to the specifications of the Director of Community Development.” Emphasis added. After entering into the Agreement with former Director Schafer on June 7, 1994, the Robsons agreed to install parking lot lighting no later than August 1, 1994. It was agreed that all lighting would be shielded to the satisfaction of the Community Development Department Director no later than August 15, 1994. The lighting installed in the parking lot area on the Son Silver West Property met the satisfaction of former Director O'Brien and was not listed as an outstanding violation in the December 21, 2011 Decision. Therefore, we request a determination by the Board of Adjustment reversing Director Juhlin's decision requiring the existing light fixtures to be shielded.

**11. APPEAL OF CORRECTIVE ACTION D.6: The existing shade structures on Tracts 42 and 41 were approved by the December 21, 2011 Decision by Director O'Brien.**

The Robsons and Son Silver West appeal the decision of Director Juhlin in the 2015 NOV requiring the submittal of building permit applications for the shade structures erected or expanded on the Son Silver West Property without prior approvals. All of the existing shade structures on the Son Silver West Property have either been in existence prior to the incorporation of the City of Sedona and therefore enjoy legal non-conforming status, have been approved by the City of Sedona through the issuance of a building permit, or were approved as part of the December 21, 2011 Decision. The December 21, 2011 Decision culminated as a result of Director O'Brien's August 31, 2011 notice of violation which questioned 2 shade structures on the Son Silver West Property. After researching the City's records and performing an inspection of the property on November 2, 2011, Director O'Brien made his December 21, 2011 Decision determining that the 2 shade structures were permitted as follows:

2. The other two issues are the construction of the shade structure behind the former coffee shop and the roof system attached to the storage building. You claim these were replacements of other similar structures that were in disrepair and were constructed many years ago. I cannot locate building permits on any of these older structures, but they may have been constructed before Sedona incorporated. I cannot make this determination with the information that I have. I am OK with you leaving them as they are currently constructed.<sup>84</sup>

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<sup>84</sup> See December 21, 2011 Decision by Director O'Brien attached to SSW Memorandum as **Exhibit “28”**.

Director O'Brien mentioned no other shade structure violations in his December 21, 2011 Decision. The Robsons have erected no additional shade structures since the December 21, 2011 Decision. Therefore, we would request a determination by the Board of Adjustment reversing Director Juhlin's decision requiring building permit applications for existing shade structures on the Son Silver West Property.

**12. APPEAL OF CORRECTIVE ACTION D.6: The 1992 CUP approval, Conditions of Approval, and Alternative Site Plan #2 do not limit the square footage of shade structures erected in outdoor retail display areas on the Son Silver West Property.**

Inasmuch as the 1992 CUP Conditions, the 1992 Staff Report, and the Alternative Site Plan #2 approved by the Planning and Zoning Commission failed to address or provide requirements for the existing shade structures on the Son Silver West Property, the Robsons and Son Silver West appeal the decision of Director Juhlin in the 2015 NOV requiring the Robsons to submit building permit applications for the shade structures.

**13. APPEAL OF CORRECTIVE ACTION D.7: The existing 6-foot tall solid wood fence and the 6-foot tall masonry wall lying along the backside or west property line of Son Silver West Tract 41 and 42 do not require the issuance of a permit under the City of Sedona Building Code.**

Son Silver West and the Robsons appeal the decision of Director Juhlin in the 2015 NOV requiring building permits to be obtained for the existing masonry wall and wooden fence lying along the west property line of the Son Silver West Property. As to the wall which was relocated by the Robsons onto the Arrow Property to the north of the Chapel, the Robsons will be applying for a building permit to replace that wall with a new fence along the shared property line between the Arrow Property and the Son Silver West Property. As to all other existing masonry walls and wood fences located along the west property line of the Son Silver West Property, these walls remain a legal non-conforming use and were inspected by former John O'Brien during his November 2, 2011 inspection. No rear wall or fence violation was issued by Director O'Brien in his December 21, 2011 Decision or in his communications leading up to the Decision. Thus, we request that the Board of Adjustment issue a ruling finding Director Juhlin's requirement that the Robsons obtain a building permit for the wall/fence along the backside of the property to be erroneous.

## C. CHILIES

### 1. **The preparation, roasting, display and vending of chilies on the Son Silver West Property are permitted as a legal non-conforming use.**

The Robsons and Son Silver West appeal the decision of Director Juhlin in the 2015 NOV requiring them to cease the preparation, roasting, display and vending of produce, including but not limited to chilies.<sup>85</sup> The sale of chilies has been conducted on the property since the days of the La Galleria, prior to the Robson's purchase of Tract 42 in 1981 and prior to the City's incorporation. A letter from the prior owner of Tract 42, Ms. Ernestine Todd, dated February 2, 1990, was submitted to prior Sedona Community Development Director, Tom Schafer, stating that, during her ownership of the La Galleria, she conducted "the outdoor display of pottery, chimes, chilies and southwestern art-and-craft items."<sup>86</sup>

The City's approval of the 1991 chili cage plans for repair of the existing roof and structure also demonstrate that the Robsons have conducted the display and vending of chilies on the Son Silver West Property since at least 1991.<sup>87</sup> The City's chili cage permit records include pictures of the strings of chilies being displayed in the outdoor retail display area for sale to the public.<sup>88</sup> This prior decision of approval by the City directly contradicts the 2015 NOV requiring Son Silver West and the Robsons to immediately cease all preparation, roasting, display and vending of chilies on the Son Silver West Property. As mentioned above, the Robsons have been selling chilies at their gallery for more than 30 years. We would request that the Board of Adjustment find the chili cage plan and permit approval records to be satisfactory evidence and that the Robsons have the vested right in reliance upon such permit to continue the legal non-conforming use of preparing, roasting, displaying and vending chilies on the Son Silver West Property.

## D. BUSINESS LICENSE

### 1. **The revocation of Son Silver West's Business License in accordance with Section 5.05.040(A) in the Sedona City Code is unlawful when imposed as a result of an interpretation of non-compliance with the Sedona Land Development Code.**

The Robsons and Son Silver West hereby appeal to the Board of Adjustment the interpretation and application by Director Juhlin, within the 2015 NOV, of the license

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<sup>85</sup> See 2015 NOV attached hereto as **Exhibit "C"**.

<sup>86</sup> See Letter from E. Todd attached to SSW Memorandum as **Exhibit "4"**.

<sup>87</sup> See Chili Cage approved plan attached to SSW Memorandum as **Exhibit "5"**; See also Chili Cage permit records recently supplied by the City of Sedona on November 24, 2015 and attached hereto as **Exhibit "D"**.

<sup>88</sup> See **Exhibit "D"** attached hereto.

revocation procedures pursuant to Sedona City Code Section 5.05.040(A) to potentially revoke the business license of Son Silver West as a result of the alleged pending zoning and building code violations. Section 5.05.040(A) of the City Code allows the City or its designee to suspend, revoke or deem to be invalid a business license for the alleged violation of the Sedona City Code, the Sedona Land Development Code or the Arizona Revised Statutes. Yet, due process considerations would prevent the revocation of a business license when a property owner has filed an administrative appeal of the alleged violations with the City.

**E. UNLAWFUL REVOCATION OF 1992 CUP FOR VIOLATIONS ON PROPERTIES SEPARATE AND APART FROM SON SILVER WEST PROPERTY GOVERNED BY 1992 CUP**

- 1. A conditional use permit approval issued for Son Silver West Tracts 42 and 41 may not be revoked as a result of alleged violations of the Sedona Land Development Code on Tracts 40, 45 and 49, when Tracts 40, 45 and 49 were not a part of the conditional use permit approval.**

The Robsons appeal the interpretation and decision of Director Juhlin in the 2015 NOV that the Planning Commission may, pursuant to Section 402.10 of the Sedona LDC, revoke the 1992 CUP for the Son Silver West Property as a result of outstanding violations for adjoining residential properties owned by the Robsons but not included within or subject to the 1992 CUP approval. The revocation provisions applicable to the Son Silver West Property state:

E. If a use permit is granted subject to conditions, upon failure to comply with conditions, a conditional use permit shall be suspended automatically, may invoke enforcement per Article [14](#) SLDC, or may be revoked . . .

The Arrow Property, Bowstring Property and the Vacant Tract 40 are not subject to the 1992 CUP approval of the conditions granted thereunder. Therefore, the Robsons non-compliance with any violations asserted by Director Juhlin within the 2015 NOV which apply to those 3 properties cannot result in the revocation of the 1992 CUP approved solely for the Son Silver West Property. As such, the Robsons request a determination by the Board of Adjustment finding that alleged violations on the Arrow Property, Bowstring Property and the Vacant Tract 40 cannot form the basis for revocation of the 1992 CUP under Section 402.10 of the Sedona LDC.

**F. VESTED RIGHTS OF SON SILVER WEST**

- 1. Director Juhlin erred by making the determination in the 2015 NOV and Director's 2015 Memorandum that documentation submitted by Son Silver West to Director Juhlin in the September 22, 2015 Memorandum and records on file at the City of Sedona do not provide sufficient evidence of prior City approvals which would allow certain existing conditions on the Son Silver West Property to continue.**

The Robsons and Son Silver West respectfully submit this appeal of the interpretation and decision by Director Juhlin in the 2015 NOV that, after reviewing the documentation submitted with the SSW Memorandum, "staff found no evidence that provided any formal approval allowing for the existing conditions and expansion above that which was approved as part of the 1992 CUP."<sup>89</sup> As set forth under each issue on appeal above, we request a Board of Adjustment determination finding that the Robsons and Son Silver West submitted evidence of City approvals allowing the existing conditions set forth in this appeal.

- 2. Certain existing uses and structures on the Son Silver West Property, which are being challenged by Director Juhlin as unlawful, are vested as a matter of law.**

The owners of Son Silver West enjoy vested rights with regard to: (1) the legal nonconforming use of the Son Silver West Property, (2) all legal non-conforming structures and outside retail display areas in existence on Tract 42 at the time of the CUP approval in 1992, (3) the construction of the southernmost building on Tract 41, (4) the current parking configuration on Tract 41, and (5) the existing outdoor retail space along the frontage of Tract 42 as well as the approximate 30-foot area along the north property line of Tract 41. The Robsons enjoy vested rights with regard to Item Nos. 1 and 2 as legal nonconforming use rights resulting from Sedona's incorporation in 1988 and the City Planning Commission's approval of the 1992 CUP. The uses and structures identified in Item Nos. 3, 4 and 5 are vested as a result of: (1) the September 29, 1993 Decision by Director Tom Schafer approving the Son Silver West site plan and parking plan (the "**1993 Plan**") as being in general conformance with the 1992 CUP, (2) the City's issuance of building permits related thereto, and (iii) the Robson's good faith reliance thereon as demonstrated by their substantial work and incurrence of substantial expenditures to complete the construction of those improvements.

The Arizona common law provides for delayed vesting of development rights. As a general rule, this involves the issuance by the municipality of a building permit or project-specific development approval and the good faith reliance thereon by the developer in the

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<sup>89</sup> See 2015 NOV attached hereto as **Exhibit "C"**.

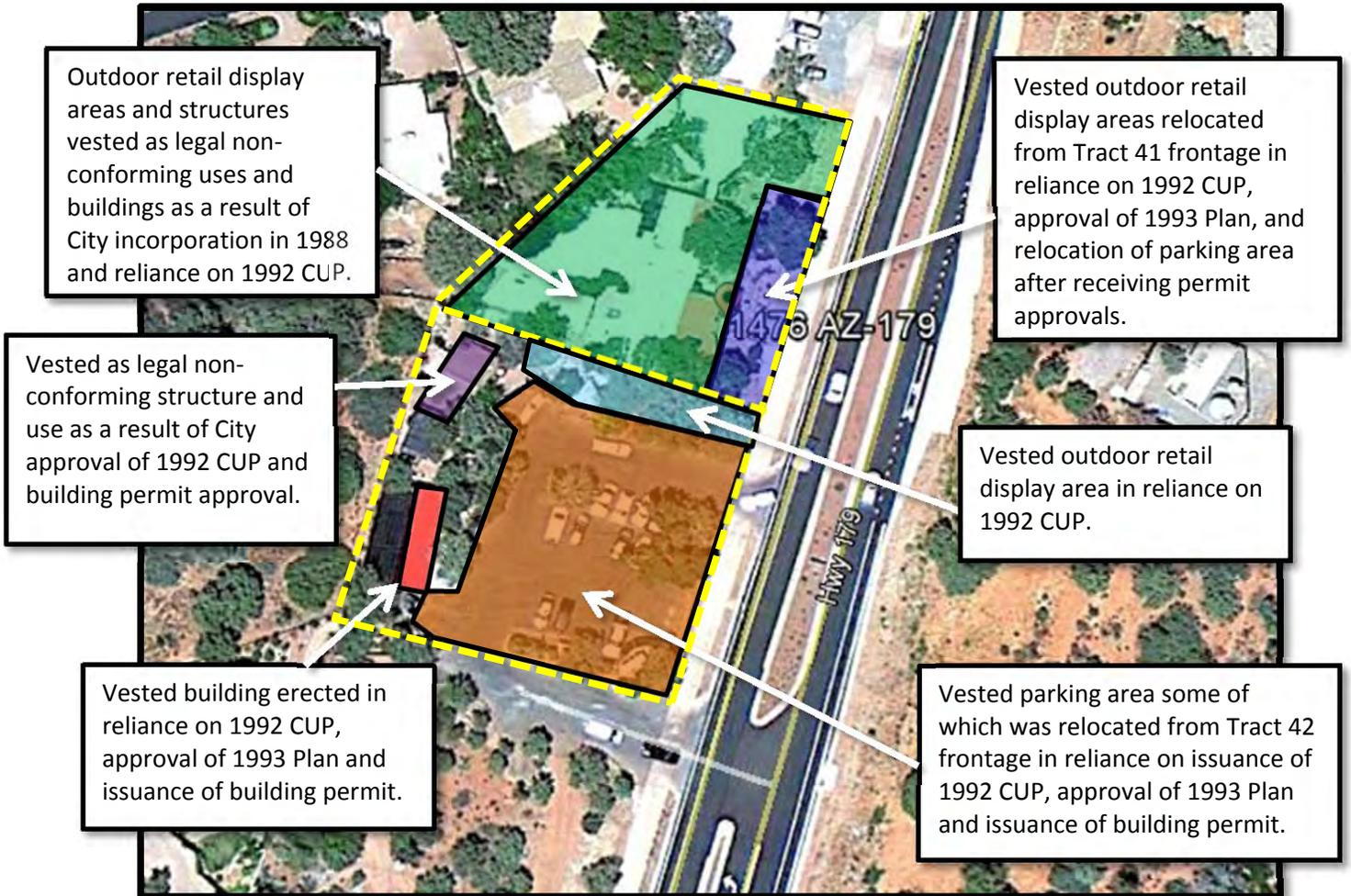
form of substantial work, incurrence of substantial expenditures and/or incurrence of substantial liability. Once a building permit is issued as duly authorized by law and the permittee has materially acted in reliance thereon, the right to continue under those rules is vested and municipality may not arbitrarily revoke or change the rules under which the permit was issued. *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz.App. 600, 607, 557 P.2d 532 (App.1976). This common law rule is based upon the theory of equitable estoppel.

In the legal nonconforming use context, "a nonconforming land use is a vested property right and is 'defined as a lawful use maintained after the effective date of a zoning ordinance prohibiting such use.'" *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 182, 181 P.3d 219, 229 (App.2008). In this case, the Robsons, as owners of the Son Silver West Property and its legal non-conforming use, enjoy a vested right to preserve and maintain the development that existed on the Son Silver West Property prior to the incorporation of the City of Sedona in 1988 and as a result of the 1992 CUP approval, the 1993 Plan approval and building permits issued by the City in accordance with development regulations applicable to the property in existence on the effective date that vesting occurred. At the time of the 1992 CUP approval and the 1993 Plan and building permit approvals, the original Sedona Community Plan identified the Son Silver West Property with a General Commercial land use designation. Inasmuch as the 1992 CUP and permit approvals allowed the expansion of a commercial retail use in conformance with City's Community Plan at that time, the Robsons were justified in placing good faith reliance on these approvals.

As generally depicted on the aerial photograph below and the 1993 Plan attached hereto as **Exhibit 11**, the Robsons relocated and built a new expanded parking lot area on Tract 41, constructed the southernmost building on Tract 41 and relocated part of the 5,000 s.f. of outdoor retail display area granted under the 1992 CUP to the former parking lot area on Tract 42, all while justifiably relying on the: 1) the 1993 Plan approved by former Community Development Director Tom Schafer and 2) building permits issued for the southernmost building and the new parking area on Tract 41. Inasmuch as these substantial expenditures and improvements were made by the Robsons in good faith reliance on the City's approvals and permits issued, the Robsons possess vested property rights in the location and square footage of the buildings, parking area and outdoor retail display areas existing at the time of the City's incorporation in 1988 and as shown on the 1993 Plan.

**VESTED RIGHTS OF SON SILVER WEST**  
**JUNE 2011 GOOGLE PHOTOGRAPH OF SON SILVER WEST PROPERTY DEMONSTRATING**  
**IMPROVEMENTS AND AREAS CONSTRUCTED IN RELIANCE ON 1993 PLAN AND PERMITS**

\*With annotations supplied by Francis J. Slavin, P.C.



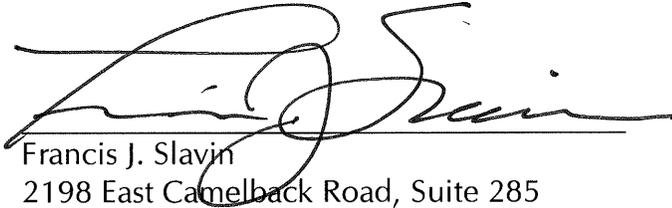
**VII. CONCLUSION**

Son Silver West Gallery respectfully requests a favorable determination by the Board of Adjustment upholding the authorized and official December 21, 2011 Decision of former Sedona Community Development Director John O' Brien, acting as the Zoning Administrator, which found the current uses, buildings, and structures on the Son Silver West Property to be in compliance with the 1992 CUP, Alternative Site Plan #2, plan and permit approvals issued by the City of Sedona to the Robsons, and the Sedona Land Development Code. Since the December 21, 2011 Decision, the Son Silver West Property has remained unchanged, and the Robsons have relied upon that Decision to substantially invest in their business and future at this location. To allow a different decision 4 years later by current Director Juhlin purportedly overturning a prior Director's determination of compliance and attempting to circumvent the Robson's vested rights in certain uses,

buildings and structures on the Son Silver West Property would be contrary to law and result in a serious injustice to the Robsons.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of November, 2015.

FRANCIS J. SLAVIN, P.C.

A handwritten signature in black ink, appearing to read "Francis J. Slavin", written over a horizontal line.

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Robson Design,  
Rio Cody Robson,  
William B. Robson and Linda Rose Robson, and  
William B. Robson and Linda Rose Robson,  
as Trustees of the William B. Robson Living Trust dated  
July 12, 1999 and  
as Trustees of the William B. Robson Living Trust dated  
July 12, 1999*