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BOARD OF ADJUSTMENT HEARING SUBMITTAL

To: Board of Adjustment, Town of Oro Valley

Applicants/ Appellants: Paul and Susan Clifton GST Exempt Trust, under Agreement dated December 27, 2012, Paul T. Clifton and Susan Lea Clifton, Co-Trustees, and Thomas M. Parsons, Esq., Stubbs & Schubart, P.C. (collectively "Clifton" or "Appellant")

Re: May 27, 2021, Zoning Interpretation

OV Case No.: 2101544

Clifton hereby supplements its Appeal previously submitted to this Board of Adjustment ("Board"). This is submittal is intended to clarify the applicable legal principles, and certain salient facts, to place the Appellant's presentation at the September 28, 2021, hearing before the Board in the proper context.

APPLICABLE LEGAL PRINCIPLES

Consistent with the original submittal, it is important to point out that the relevant ordinance, Ordinance No. (O) 98-38 ("Ordinance 98-38"), must be interpreted based rules of construction applicable to zoning ordinances. In Arizona, the interpretation of zoning ordinances, like other statutes and regulations, "presents a question of law [which the courts] review de novo."[1] *Yavapai–Apache Nation v. Fabritz–Whitney*, 227 Ariz. 499, 503, ¶ 13, 260 P.3d

[1] While the Board makes factual determinations in variance applications, its role is more limited in interpreting ordinances.

299, 303 (App. 2011) (quoting *Libra Grp., Inc. v. State*, 167 Ariz. 176, 179, 805 P.2d 409, 412 (App. 1991)). Moreover, statutes and ordinances are to be interpreted as of the time they were enacted or adopted.[2] *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1063 (9th Cir. 2020).

Zoning ordinances, like other statutes which are in derogation of common law rights, are subject to special limitations. For example, if the language of a zoning ordinance is in doubt or subject to conflicting reasonable interpretations, it is properly resolved in favor of the landowner. *Kubby v. Hammond*, 68 Ariz. 17, 198 P.2d 134 (1948); *County of Cochise v. Faria*, 221 Ariz. 619, 623 ¶10, 221 P.3d 957, 961 (App. 2009) ("statutes granting zoning authority . . . and zoning ordinances enacted pursuant to that authority will be strictly construed in favor of property owners."). In other words, the Ordinance must clearly and unambiguously support an alleged restriction on the use of property. *Id.*

As a "corollary" to the rule of strict construction, the law also mandates that zoning ordinances "will not be extended by implication." 4 AM. LAW OF ZONING §41.5 (5th ed. 2021). In other words, in "interpreting the language of [a zoning ordinance] to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the

[2] Thus, it is inappropriate to consider facts that occurred several years later to interpret Ordinance 98.38.

intention of the legislative body in favor of the property owner and against any implied extension of the restriction."[3] 4 AM. LAW OF ZONING §41.5.

Cases from other jurisdictions illustrate the application of this principle. For example, a South Carolina court held that a tourist court could not be excluded from a district where "hotels" were a permitted use, because to do so would be to extend the effect of the ordinance by implication. *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953). In *Fidler v. Zoning Bd. of Adjustment of Upper Macungie Tp.*, 408 Pa. 260, 182 A.2d 692 (1962), a zoning ordinance which forbade trade which was noxious and offensive, but allowed agricultural uses, did not outlaw a turkey farm occupied by 40,000 to 50,000 turkeys. To hold otherwise, said the Supreme Court of Pennsylvania, would be to extend, by implication, the concept of a trade which was noxious and offensive.

Similarly, a zoning regulation which did not clearly prohibit the use of a portion of a homeowner's property as a tennis court would not be construed to prohibit such a use. *Bell v. Zoning Bd. of Appeals of Cohasset*, 14 Mass. App. Ct. 97, 437 N.E.2d 532 (1982). In another case, *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604 (Minn. 1980), it was held that in the absence of evidence that a B-1 zone excludes large retail lawn and garden center from

[3] These principles effectively preclude municipalities and neighboring property owners from engaging in creative manipulation of words and facts to obtain a result precluding landowners' rights to properly use their property.

selling items which are not necessarily related to a "lawn and garden center," the trial court properly held that respondent's law and garden center, which also involved the sale of craft items, fell within the scope of the B-1 zone. Finally, a zoning ordinance which prohibits any "animal or fowl commonly known or regarded as wild or ferocious" cannot reasonably be construed to prohibit a wholesale and retail pet bird aviary. *Novak's Tropical Aviary, Inc. v. Brown*, 62 A.D.2d 984, 403 N.Y.S.2d 538 (2d Dep't. 1978).

These cases are consistent with the requirement that regulations must be sufficiently definite to enable a property owner to determine what is required. In other words, it is necessary that adopted "rules and regulations thus define the standards that owners must meet . . . as well as the grounds upon which a planning board may disapprove a plan." *Beale v. Planning Board of Rockland*, 671 N.E.2d 1233, 1238 (Mass. 1996); *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (App. 1979). Thus, requirements must ordinarily be "comprehensive, reasonably definite, and carefully drafted so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them." *Castle Estates*, 182 N.E.2d at 545 (regulations "too vague and general to inform owners about the standards they must meet"); *see also, McCarthy v. Board of Appeals of Ashland*, 241 N.E.2d 840 (1968).

THE ORDINANCE

In its title, Ordinance 98-38 indicates, in salient part, that it is:

> Amending the Rancho Vistoso Planned Area Development for Neighborhood 11, Changing the Policies Pertaining to Building Height in the **Resort District** and Parking Requirements in the **Resort District**, as requested by OV9-98-2B (emphasis added)

Thus, consistent with the property owners' application, the request did not limit the request to a hotel use. It was, instead, a request for the Resort Site in the Resort District. Similarly, in the "Whereas" clauses of Ordinance 98-38 there is no reference to a hotel; instead, the reference refers to the "building height in the resort district and parking requirements in the resort district".

Section 1 of Ordinance 98-38 also refers only to the "building height in the resort district and parking requirements in the resort district". Also, the only relevant and meaningful condition[4] attached to Ordinance 98-38 states:

> The amendments for this resort site in the Neighborhood 11 PAD regarding the height limitation being changed to 75 feet and the reduction of parking requirements are applicable to this particular **resort site** only. (emphasis added)

[4] As pointed out in the original submittal, the only mention of "hotel" is in the reference concerning aviation hazard markings which is within the jurisdiction of the Federal Aviation Administration, not the town of Oro Valley.

It should also be noted that the decision appealed from is based on a false premise. The opinion implies that the minutes of the hearing on Ordinance 98-38 reflects the landowners request that the height limitation was for a hotel. A review of the minutes does not reveal any such request. Instead, except for limited references by others, virtually all references at the hearing were to the Resort Site. See, Town Document 32, pages 192-193.

Under these circumstances, the only permitted interpretation of Ordinance 98-38 is that it was for the Resort Site, not limited to the specific use as a hotel. As noted in the original submittal, the definition of resort is not limited to a hotel. Instead, a Resort is defined as:

> A group or groups of buildings containing more than five (5) dwelling units and/or guest rooms and providing outdoor recreational activities, which may include golf, horseback riding, swimming, shuffleboard, tennis, and other similar activities, including associated lighting. A resort may furnish services customarily furnished by a hotel including a restaurant, bar, specialty retail shops, and convention facilities.

The proposed senior care facility is consistent with and necessarily within this definition. In addition, a senior care facility does not involve any greater impact in terms of traffic and parking than a hotel. In addition, the

residents of the senior care facility pose a much less substantial risk to Honey Bee Canyon than posed by hotel guests and tourists.[5]

Also, as already noted, the interpretation of Ordinance 98-38 must be based on the language of the Ordinance as of the time of its adoption in 1998. The reliance on the Ritz Carlton submittal several years later by the Zoning Manager is, therefore, misplaced. This letter, and independent submittal, was not intended to waive any rights of the property owner or to amend Ordinance 98-38 either directly or by implication.[6]

Finally, Appellant is submitting an architectural concept plan to the Town for review. Appellant contends that it may obtain mandamus relief based on Ordinance 98-38 and applicable law. The Arizona courts have recognized that no discretion exists when the issue is the application of the law to established facts. *Maricopa County Municipal Water Conservation Dist. No. 1 v. La Prade*, 45 Ariz. 61, 68, 40 P.2d 94, 97 (1934) (if "there is only one legal way [an official] can act on an admitted state of facts, it would seem that he no longer has any discretion, that his duty, although discretionary if the facts are in dispute, becomes ministerial only, and that logically there is no reason why

[5] The applicability of the 75-foot height limitation here is consistent with the five-story senior living facility approved for property located at Naranja Drive and First Avenue, the La Posada Senior Living Facility.

[6] Also, Oro Valley Ordinance No. 00-02 (Town Document No. 33) including the Town and Vestar-Athens is dated March 14, 2000, a year and a half after Ordinance 98-38.

mandamus should not lie to compel him not only to act, but to act in the only manner which the law permits.").

Sincerely,

STUBBS & SCHUBART, P. C.

Thomas M. Parsons

TMP/jd
cc: Client