



MEMORANDUM

Date: February 13, 2018

To: Carmine DeBonis, Jr.
Deputy County Administrator
for Public Works

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Bike Ranch**

Attached is a Superior Court Ruling related to Bike Ranch for your information. Apparently, the Ruling substantiates the Bike Ranch claim to be a grandfathered use, which will allow a 100 percent expansion.

I recently met with Supervisor Steve Christy and the Bike Ranch principles Kelley Matthews and Peter Lasher. Given the conclusion of at least increased grandfathered use allowed on the property, the principles would like to meet and discuss how to proceed with a rezoning for either a Minor or a Major Resort. Their vision for the Bike Ranch has been somewhat modified but essentially remains the same.

I indicated our primary concern relates to how their land use plan and/or site plan buffered adjacent existing landowners. From past information related to this subject, the Bike Ranch posed no infrastructure stress or issues related to preservation of the property since I believe it was in general conformity to the Conversation Land System of the Sonoran Desert Conservation Plan. Hence, even though there was previous substantial opposition to the Bike Ranch, most of the opposition arguments were not based on identifiable, substantial adverse impacts of the use.

Please contact Kelley Matthews at 520.404.7454 to discuss how best to proceed. It would be appropriate to have Planning staff attend any meetings. Although we cannot predetermine an outcome that would be present to the Commission and the Board of Supervisors, we should provide the best professional advice to the landowner.

CHH/anc

Attachment

c: The Honorable Steve Christy, District 4 Member, Pima County Board of Supervisors
Andrew Flagg, Chief Civil Deputy County Attorney

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RICHARD E GORDON

CASE NO. C20161545

DATE: February 06, 2018

EL CORTIJO, LLC
Plaintiff

VS.

PIMA COUNTY BOARD OF ADJUSTMENT,
DIST. 4 and PIMA COUNTY
Defendants

R U L I N G

IN CHAMBERS UNDER ADVISEMENT RULING

Plaintiff El Cortijo, LLC (“El Cortijo”) brings this lawsuit to appeal the zoning decisions of Defendants Pima County Board of Adjustment, District 4 (“Pima County Board of Adjustment”) and Pima County concerning property it owns in Tucson. Pending before the Court are Pima County’s December 20, 2016, Motion for Summary Judgment, and El Cortijo’s January 30, 2017, Cross-Motion for Summary Judgment. The Court conducted two hearings and, on December 13, 2017, took the matter under advisement. After careful consideration and for the following reasons, the Court will deny Pima County’s Motion for Summary Judgment and will grant El Cortijo’s Cross-Motion for Summary Judgment.

I. Background

El Cortijo owns property at 3700 South Old Spanish Trail (“Old Spanish Trail Property”). It is the site of a project that began in the 1950s as a café/restaurant (with living quarters), a gas station, and eight rental units that are still present today. The project, at least initially, was referred to as a “motor court” or a “motel with six dwelling units.” Its early incarnations were approved under an exemption to Pima County’s then newly

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enacted zoning code known as a “non-conforming use” permit. *See* Pima County Ordinance No. 1952-III (“Pima County Zoning Code (1952)”) § 2406.

A. The prior lawsuit

On March 25, 2015, El Cortijo requested from Pima County Acting Chief Zoning Inspector Tom Drzazgowski a zoning interpretation “confirming the non-conforming status” of its Old Spanish Trail Property. Following the enactment of a zoning ordinance that prohibits an existing use on land, the newly unauthorized preexisting use may continue as a legal non-conforming use notwithstanding the recent ordinance. Thus, if confirmed, El Cortijo would have been allowed to continue any non-conforming uses on its Old Spanish Trail Property. On April 21, 2015, Mr. Drzazgowski concluded that “any non-conforming uses have been either discontinued, severed, or brought into compliance.” On July 14, 2015, the Pima County Board of Adjustment upheld Mr. Drzazgowski’s interpretation.

On August 12, 2015, El Cortijo filed a statutory appeal seeking de novo review of the Pima County Board of Adjustment’s interpretation. El Cortijo claimed that the Old Spanish Trail Property was entitled to be considered a legal non-conforming “guest ranch.” *El Cortijo, LLC v. Pima County Board of Adjustment District 4, et al.*, C20153647; *see In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) (“[i]t is proper for a court to take judicial notice of its own records or those of another action tried in the same court”). On December 7, 2015, the Superior Court dismissed the case without prejudice based on the failure to exhaust administrative remedies.

On December 24, 2015, El Cortijo renewed its request for a zoning interpretation. This time El Cortijo focused on its contention that the Old Spanish Trail Property was entitled to be considered a legal non-conforming guest ranch. On January 13, 2016, Mr. Drzazgowski concluded that the Old Spanish Trail Property “does not have a non-conforming use for a [g]uest [r]anch.” On March 8, 2016, the Pima County Board of Adjustment again upheld Mr. Drzazgowski’s interpretation.

Mary Dimond

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B. The current lawsuit

On April 1, 2016, El Cortijo filed the present statutory appeal. El Cortijo seeks de novo review of the Pima County Board of Adjustment's earlier decisions. El Cortijo claims that that the Old Spanish Trail Property met the definition of a guest ranch and was allowed until the zoning code disallowed it in 1985 (at which point the project became legally non-conforming) or, alternatively, the rentals were a "non-expressed residential use"

On December 16, 2016, Pima County filed a Motion for Partial Judgment on the Pleadings. Pima County argued, among other things, that El Cortijo's non-expressed residential use claim was unexhausted. On December 20, 2016, Pima County filed a Motion for Summary Judgment, and on January 30, 2017, El Cortijo filed a Cross-Motion for Summary Judgment.

On April 26, 2017, the Court held a hearing and denied Pima County's Motion for Judgment on the Pleadings. The Court then stayed the case, including the motions for summary judgment, and allowed El Cortijo to exhaust the non-expressed residential use claim. The Court also granted El Cortijo the right to file an amended complaint.

On May 9, 2017, El Cortijo requested a zoning interpretation that the Old Spanish Trail Property should be considered a non-conforming business use as "either a non-expressed residential use or, alternatively, as a tourist court." On June 8, 2017, Tom Drzazgowski concluded that the Old Spanish Trail Property "does not have a non-conforming business use for a non-expressed residential use or, tourist court, or guest ranch." On September 12, 2017, the Pima County Board of Adjustment upheld Mr. Drzazgowski's interpretation. The vote was 2 to 2.

On September 22, 2017, El Cortijo filed a First Amended Complaint, which Pima County answered on September 29, 2017. On October 9, 2017, the parties filed a Joint Statement noting that the only outstanding matters were their motions for summary judgment. More specifically, the parties asked the Court to determine:

Mary Dimond

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“(1) whether the use on El Cortijo’s property is a legal non[-]conforming guest ranch and (2) whether the use on El Cortijo’s property is a non[-]conforming non[-]expressed residential use.”

On December 13, 2017, the Court held a hearing on the cross-motions for summary judgment. The parties agree that no trial is necessary and the issues should be resolved on the record before the Court. The Court, therefore, is treating the pending motions as a bench trial based on the record and will issue appropriate findings of fact and conclusions of law. Ariz. R. Civ. P. 52.

II. Findings of Fact

The facts are undisputed. Pima County enacted its original zoning code in 1952. New building construction and alterations had to comply with the 1952 Zoning Code, and restrictiveness generally was governed by the “zone” in which the property was located. *See* Pima County Zoning Code (1952) §§ 302, 2401. To ameliorate unfairness, the 1952 Zoning Code had a hardship provision connected to plans for a “non-conforming use.” The provision grandfathered in existing projects allowing them to continue or even expand if they qualified as a “business use.” Pima County Zoning Code (1952) §§ 304, 2406.

The original owner and developer of the Old Spanish Trail Property was Bert Calvert. On April 14, 1955, Mr. Calvert appeared before the Board of Adjustment seeking to build a “gas station, café, and motor court.” Under the 1952 Zoning Code, the Old Spanish Trail Property was zoned Suburban Ranch (“SR”), which would not have allowed the project. The Board of Adjustment approved Bert Calvert’s project pursuant to the non-conforming use exception, § 2406. The June 13, 1955 written permit (no. 6984) shows approval for “1 gas station, 1 café, 1 motel with 6 dwelling units.”

The project site originally occupied approximately 600’ by 600’ of real property (approximately 8.26 acres). Eventually eight rental units were built in addition to the café/restaurant (with living quarters) and the gas station. Five of the units were constructed within the original boundaries, but the last three probably were not.

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O R D E R

On June 13, 1957, Bert Calvert appeared before the Board of Adjustment to challenge a revocation of his original § 2406 building permit (no. 6984). He also addressed the potential of rearranging the rental units slated to be built at the site. The Board of Adjustment voted, “[t]hat Mr. Calvert be allowed to continue construction, with the provision that a plan for five units be submitted to the Zoning Inspector for his approval.” On June 15, 1957, following the hearing, Bert Calvert secured the needed permit (no. 15223) to “[a]dd 5 units.” These units were designated A through E.

Three more units were built, together with a pool. On February 13, 1958, Bert Calvert was issued a permit (no. 18594) to build an 860-squarefoot “residence.” On April 2, 1958, Bert Calvert was issued a permit (no. 19563) to build a swimming pool. On December 9, 1958, and on February 2, 1959, Bert Calvert was issued permits (nos. 24764 and 26356) for two more “residence[s].” One of the permits indicated a “Total 8 units + corner.” These last three units were designated F, G, and H.

Improvements and additions to the rental units followed. Bert Calvert secured the required permits (no. 38271, 40675, 41502, 56288, 62327) and referred to his rental units as “cottage[s]” using their designated letters. In the 1950s and 1960s Bert Calvert also advertised his rentals as cottages that were furnished. On September 12, 1960, Bert Calvert was issued a permit (no. 34828) for a sign “Houses for rent,” but photographic evidence shows a no/vacancy sign also was close by.

Bert Calvert called his project “Saguaro Corners Rentals.” Occupancies were both short and long term; Bert Calvert’s plan was to do “whatever would work.” The units were rented for as little as a day, but more typically they were rented monthly, seasonally, and yearly. And, although the units generally were rented out as a whole, a five-bedroom unit was rented by the room. More recently, the units have tenancies as short as four months and as long as thirteen years, with leases that are for the most part month-to-month.

The café/restaurant had street access and was open to the public. It eventually took over the gas station which closed. In 1989, the café/restaurant was rezoned, and it was later split off and sold.

Mary Dimond

Judicial Administrative Assistant

In 2013 El Cortijo purchased the Old Spanish Trail Property. The eight rental units still exist at the site and are still being rented.

III. Conclusions of Law

El Cortijo currently owns the Old Spanish Trail Property which consists of approximately 45 acres and the eight rental units described herein. El Cortijo argues that Mr. Drzazgowski erred in his assessment of the appropriate zoning status of its Old Spanish Trail Property, and that the Board of Adjustment erred in affirming his decisions. This Court's review of the Board of Adjustment's decisions is de novo. A.R.S. § 11-816(D). This means that the Court may do whatever "the Board of Adjustment could have done in the first instance." *Santa Cruz County v. S. Arizona Christian Assembly, Inc.*, 22 Ariz. App. 507, 510, 528 P.2d 1266, 1269 (1974). Similarly, the Court is not bound by the Board of Adjustment's interpretation of the law, although its "interpretation should be accorded some weight." *See Jones v. County of Coconino*, 201 Ariz. 368, 370, ¶ 10 & n.1, 35 P.3d 422, 424 & n.1 (App. 2001). Such deference, however, is not required "where it clearly appears that the [Board of Adjustment's] position is wrong," particularly "where there is no showing of a long-standing interpretation by the agency." *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 212, 772 P.2d 33, 35 (App. 1989). The Court will apply these legal principles to the facts and arguments.

Both parties' positions have changed over time – even from one hearing to the next. El Cortijo now argues that all eight rental units have a legally non-conforming use as a tourist court (which includes a motel), guest ranch, or non-expressed residential, it does not matter precisely how the use is characterized, and they are all a "business use" so that El Cortijo can legally expand them. A.R.S. § 11-812(B); *see also* Pima County Zoning Code (2018) § 18.01.030(D)(1)(b); Pima County Code (1952) § 304. Pima County now argues that only the first five rental units (those authorized in 1957 via permit no. 15223) have a legally non-conforming residential use based on the limited lot size, the last three units (those authorized in 1958 and 1959 via permit nos. 18594, 24764, and 26356) are all conforming SR zoned residences, any non-conforming tourist court

Mary Dimond
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related use has been abandoned, and there is no qualifying non-conforming business use that would allow any portion of the project to expand.

“A non[-]conforming land use is commonly defined as a lawful use maintained after the effective date of a zoning ordinance prohibiting such use in the applicable district.” *Rotter v. Coconino County*, 169 Ariz. 269, 271, 818 P.2d 704, 706 (1991); *see also* A.R.S. § 11-812(A)(1). “[N]on[-]conforming uses are *excepted* from the general rule that zoning ordinances should be strictly construed in favor of the property owner.” *City of Glendale v. Aldabbagh*, 189 Ariz. 140, 143, 939 P.2d 418, 421 (1997) (citation omitted) (emphasis in original). “[W]hile this is so, nonconforming uses still are constitutionally protected from the retroactive effect of zoning laws and may be removed only ‘as quickly as possible *within the limits of fairness and justice.*’” *Motel 6 Operating Ltd. P'ship v. City of Flagstaff*, 195 Ariz. 569, 572, ¶ 14, 991 P.2d 272, 275 (App. 1999) (citation omitted) (emphasis in original). But “[s]tatutes and ordinances dealing with the expansion or change of nonconforming uses must be strictly construed to further the legislature's policy goals.” *Rotter*, 169 Ariz. at 276–77, 818 P.2d at 711–12.

El Cortijo has the burden of showing that its property is subject to a legally non-conforming use and that any non-conforming use is a business use entitled to expand. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 184, ¶ 39, 181 P.3d 219, 231 (App. 2008). The Court believes that El Cortijo has met its burden.

A. The first five rental units

The Court agrees with El Cortijo that the first five rental units (permit no. 15223) are better characterized as part of the original tourist court project rather than some sort of independent residential project requiring § 2406 approval because of inadequate lot size under SR zoning. A “tourist court” (which includes a motel) was defined as “a building or a group of buildings on the same lot, whether detached or in connected rows, containing individual sleeping or dwelling units and designed for or occupied by automobile travelers or

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O R D E R

other transient tenants.” Pima County Zoning Code (1952) § 466. While the minutes of the 1957 Board of Adjustment meeting at which the permitting of these five units was approved are ambiguous, Bert Calvert’s subsequent conduct shows use consistent with the historical definition of a tourist court.

The photographs and advertisements show that the project was collectively referred to as “Saguaro Corner”; it would be strange to have clustered residences connected to a café/restaurant and a gas station (which are uniquely suited to travelers and transient tenants), especially on a 600’ by 600’ lot. Additionally, Bert Calvert labeled these first five rental units by letters A through E, he advertised them as rental “cottages,” he allowed occupancy for as little as a day, he used a no/vacancy designation with his rental sign, and he constructed a common swimming pool. Although other evidence supports a contrary conclusion, the Court does not believe that it is substantial enough to outweigh these supporting facts.

And the Court does not find that the tourist court use was abandoned or discontinued. *See* Pima County Zoning Code (2018) § 18.01.030(D)(2); *Kubby v. Hammond*, 68 Ariz. 17, 24-25, 198 P.2d 134, 139-40 (1948) (interpreting abandonment narrowly and requiring intent); *Aldabbagh*, 189 Ariz. at 143-44, 939 P.2d at 421-22 (addressing statutory cessation). It is true that the café/restaurant and gas station portion of the project ended by the late 1980s, and that at least some of the units have been occupied on a long-term basis. But these facts do not necessarily nor wholly disconnect the project from its “transient” origins – a term that was left undefined in the 1952 Zoning Code but which no doubt focuses on serving temporary visitors in addition to automobile travelers. Pima County Zoning Code (1952) § 466. The record lacks any evidence of an intent to abandon renting to temporary guests and, although the project has tenancies that fall outside of this construct, there appears to have always been (and continues to be) short term tenancies at the site.

B. The last three rental units

The last three rental units (permit nos. 18954, 24764, and 26356) are more problematic. At least one of the permits indicated that the project included a “Total eight units + corner,” and other evidence shows that the

Mary Dimond
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ORDER

units continued with the sequential lettering of F through H – which immediately follows (and are undoubtedly connected to) the first five units lettered A through E. The record looked at as a whole would not sensibly allow treating these three units as being separate and distinct from the first five and the café/restaurant and gas station.

The Court believes, therefore, that these last three units in reality were part of the ongoing tourist court. But the three units were permitted outside of the Board of Adjustment process. This means that the Court is legally precluded from finding that this portion of the project was part of the existing tourist court because that finding would have required the issuance of a non-conforming use permit under § 2406 by the Board of Adjustment. Such a legal constraint requires the Court to find a different and allowed conforming use within the SR zone under the 1952 Zoning Code for the three rental units. The parties offer two alternatives.

Pima County argues that these last three units were residences primarily because the permits say “residence.” “One-family dwellings” were allowed in the SR zone when these three units were permitted, but a “residence” was not a defined use in the 1952 Zoning Code. Pima County Zoning Code (1952) § 601(a). Unit F, the first of the three units built, fell short – both literally and colloquially – of being a one-family dwelling as initially constructed; it had no kitchen, it had five bedrooms each with its own separate exterior entrance, and was rented by the room. Pima County Zoning Code (1952) §§ 422, 423, 425. More importantly, Pima County’s interpretation overlooks the units’ direct connection to the larger ongoing tourist court of which it was physically a part, and it commits approximately 10 acres (144,000 square feet per unit) to the project with no convincing evidence of an intention to do so. Pima County Zoning Code (1952) § 603.

El Cortijo argues that these last three units were part of a guest ranch. A guest ranch was a defined use in the 1952 Zoning Code and it was allowed in the SR zone when these units were permitted. Pima County Zoning Code (1952) § 601(c). A guest ranch included a “group of buildings containing sleeping units, having a building site of not less than four commercial acres.” Pima County Zoning Code (1952) §§ 433. Because the historic definition of a guest ranch is extremely similar to the historic definition of a tourist court, and in light of

Mary Dimond
Judicial Administrative Assistant

witness testimony indicating that the entire project was considered in the past by Pima County to be a guest ranch, the Court agrees with El Cortijo.

It is true, as Pima County argues, that these three units were never permitted as a “guest ranch.” But, as noted, there was no definition for what was actually permitted either – “residence[s].” And, while the fit is not perfect given that the café/restaurant was open to the public with street access and a gas station, Pima County Zoning Code (1952) § 2001, it provides the most reasonable explanation of what was intended and permitted based on a scant record that is over 60 years in the making. Following a 1985 amendment to the Pima County Code, a guest ranch was no longer an allowed use in the SR zone, then making the entire site non-conforming. Pima County Ordinance No. 1985-153.

C. Expansion

A non-conforming business use is legally allowed to expand by one-hundred percent (100%). A.R.S. § 11-812(B); *see also* Pima County Zoning Code (2018) § 18.01.030(D)(1)(b). A “business use” under Pima County’s modern Zoning Code includes both a “motel” and “nonexpressed residential uses,” which are “[a]ll residential uses not expressly permitted in any other residential zone and which are not otherwise unlawful, injurious to the general health or welfare, or specifically excluded.” Pima County Zoning Code (2018) § 18.01.030(D)(1)(c) (looking to enumerated uses described in TR zone); § 18.31010(B)(15), (17) (motel and nonexpressed residential uses). Here, the tourist court use is a business use because it is considered a motel. Pima County Zoning Code (2018) § 18.03.020(T)(2). Similarly, the guest ranch use is a business use because its use is not expressly permitted in a residential zone, Pima County Zoning Code (2018) § 18.05.010(2), and it is not unlawful or injurious.

IV. Conclusion

Accordingly,

IT IS ORDERED DENYING Pima County’s December 20, 2016, Motion for Summary Judgment.

Mary Dimond
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O R D E R

Page 11

Date: February 06, 2018

Case No.: C20161545

IT IS FURTHER ORDERED GRANTING El Cortijo LLC's January 30, 2017, Cross-Motion for Summary Judgment.

IT IS FURTHER ORDERED REVERSING the Pima County Board of Adjustment's 2-2 decision that upheld the Pima County Acting Chief Zoning Inspector's interpretation finding no legally non-conforming uses on the Old Spanish Trail Property and **FINDING** in favor of El Cortijo LLC for the reasons stated herein.

IT IS FURTHER ORDERED that, **within 20 days**, El Cortijo LLC submit for the Court's signature a form of final judgment pursuant to Ariz. R. Civ. P. 54(c); any objection shall be filed **within 20 days** thereafter; no reply is allowed.

cc: G Lawrence Schubart, Esq.
Julia Lin Matter, Esq.
Lesley M. Lukach, Esq.
Clerk of Court - Under Advisement Clerk

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