

ARIZONA COURT OF APPEALS

DIVISION ONE

TMS VENTURES, LLC,

Plaintiff/ Appellee/
Cross-Appellant,

v.

TERESA C. ZACHARIAH, et al.,

Defendants/ Appellants/
Cross-Appellees.

Court of Appeals

Division One

No. 1 CA-CV 18-0712

1 CA-CV 19-0388

(Consolidated)

Maricopa County

Superior Court

No. CV2016-005381

**DEFENDANTS/APPELLANTS/CROSS-APPELLEES'
OPENING BRIEF AND APPENDIX**

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INTRODUCTION

This is a case about the scope of a common law doctrine called public dedication. A landowner may choose to voluntarily donate land to the general public and, *if the general public accepts the dedication*, then the land is forever dedicated to the public. But if the general public does not accept it, then the dedication is invalid and the land remains in private hands.

Here, the purchaser of a landlocked piece of land high up on Camelback Mountain needed access to its property. The purchaser sued its new neighbors to try to gain access via a private driveway on the neighbors' private property. The owner prevailed on a claim for an implied way of necessity (a ruling not challenged on appeal). But the owner also prevailed on a claim for public dedication.

In particular, the superior court found that a private, locked, gated driveway had been irrevocably dedicated to the general public, and that the public had accepted the dedication. It based the ruling on two flawed legal principles: (1) that the neighbors' notice of an easement across their lots constituted acceptance by the general public, and (2) that the use of the driveway by the owners and their invited guests was use by the general public sufficient to validate the public dedication. These holdings violate

the fundamental principles of public dedication and, if upheld, would cause the doctrine to become unmoored from longstanding law. That aspect of the judgment should be reversed.

At bottom, the law already provides a legal doctrine for one property owner to gain access to land by traversing someone else's private property: an implied way of necessity. Here, the unappealed ruling on implied way of necessity will give the purchaser access to its property. The Court should not distort a different legal doctrine (public dedication) to fit a situation to which it was never intended to apply.

STATEMENT OF FACTS AND CASE*

I. Factual background.

A. Overview of the parties and property.

Defendants/Appellants/Cross-Appellees Teresa and Joseph Zachariah, Roseanne Appel, and Ingrid and Alfred Harrison ("the neighbors") own houses located high on the north side of Camelback Mountain. [Tr. Ex. 145 ([APP160](#)); Tr. Ex. 151 ([APP169](#)); Tr. Ex. 9 ([APP147](#));

* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., ([APP144](#)), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

IR-228 at 1, ¶ 2 ([APP083](#)).] Their lots are part of a subdivision called Stone Canyon East. [(Tr. Ex. 239 at 1 ([APP180](#)); IR-228 at 1, ¶ 2 ([APP083](#))).] The Zachariahs own Lot 22, the Appels own Lot 23, and the Harrisons own Lot 24. [IR-148 at 2, ¶¶ 6-8 ([APP126](#))).]

Plaintiff/Appellee TMS Ventures, LLC (“TMS”) purchased a 3.44-acre parcel of undeveloped land situated directly above those lots (the “TMS Parcel”). [Tr. Ex. 228 ([APP177](#)); IR-228 at 1, ¶ 1 ([APP083](#))).] The TMS Parcel, which is not part of Stone Canyon East, is bordered on three sides by the Phoenix Mountain Preserve. [*Id.* at 2, ¶ 9 ([APP084](#)); IR-148 at 2, ¶ 5 ([APP126](#))).] It has no direct access to any public roadway.

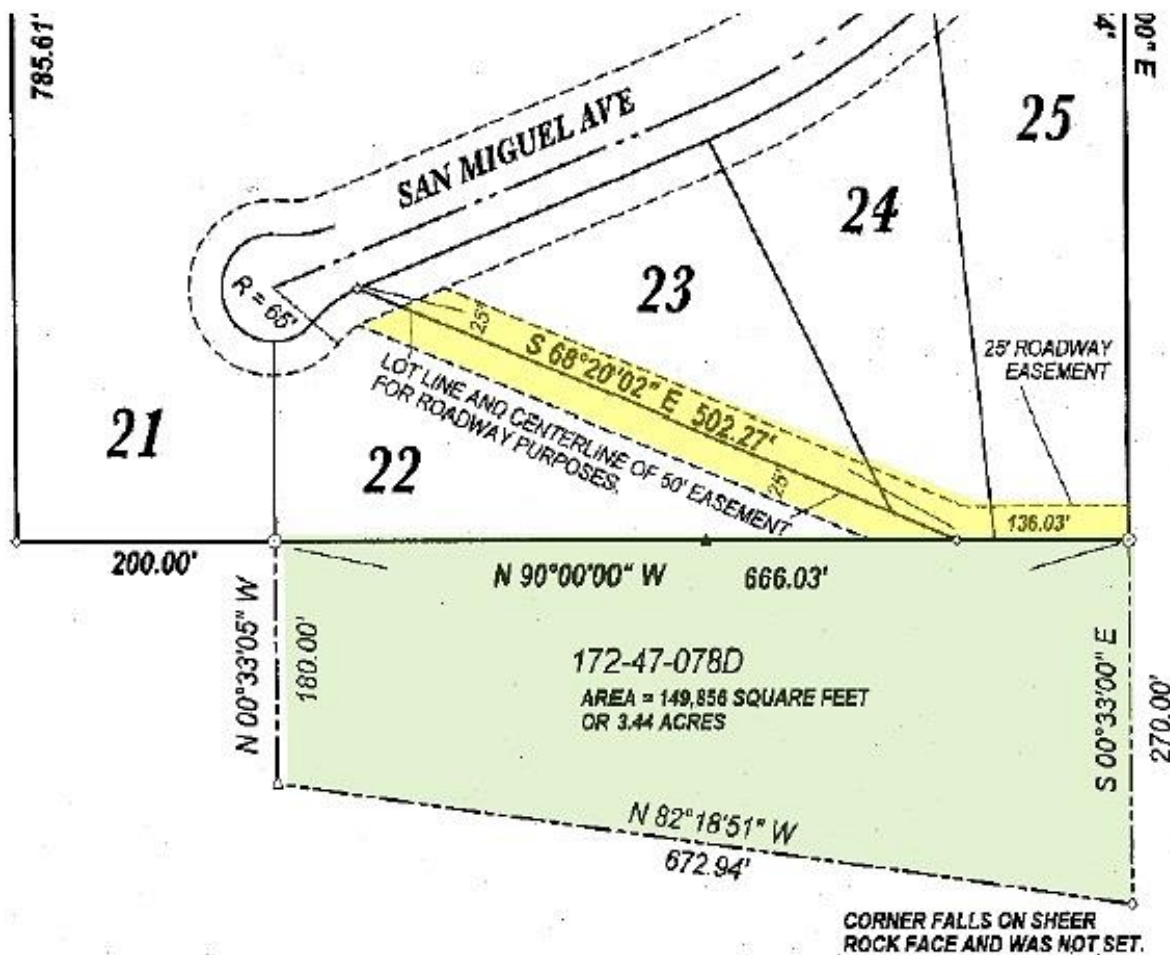
A video showing the neighborhood is part of the record at Trial Exhibit 210 and provides a helpful overview of the neighborhood, the terrain, and the lots in dispute.

B. Phoenix Title developed the neighborhood and purported to grant an easement to Maricopa County.

In 1958, Phoenix Title and Trust Company (“Phoenix Title”) owned all of the property at issue in this dispute—both the land now part of Stone Canyon East and the TMS Parcel—as trustee for several beneficiaries. [IR-228 at 2, ¶ 10 ([APP084](#))).] Phoenix Title recorded the subdivision plat for

Stone Canyon East on February 27, 1959. [Tr. Ex. 239 at 1 ([APP180](#)); IR-228 at 2, ¶ 11 ([APP084](#)).] That plat dedicated San Miguel Avenue as a public road to provide access to Lots 22 through 25. [Tr. Ex. 239 at 1 ([APP180](#)); IR-228 at 2, ¶ 12 ([APP084](#)).] Phoenix Title also recorded the subdivision plat for the neighboring Stone Canyon, which had streets that interconnected with those in Stone Canyon East. [Tr. Ex. 205 at 1 ([APP176](#)).] The plats, however, did not include the TMS Parcel or specify any means for accessing the unplatted TMS Parcel. [Tr. Ex. 239 at 1 ([APP180](#)).]

A year after recording the Stone Canyon East subdivision plat, Phoenix Title recorded a separate document purporting to grant to Maricopa County a public roadway easement. [Tr. Ex. 1 ([APP144-45](#)); IR-228 at 2-3, ¶¶ 14-15 ([APP084-85](#)).] The easement (highlighted in yellow in the diagram below), purported to provide access to the TMS Parcel (highlighted in green below) via a 50-foot-wide roadway crossing over lots 22, 23, 24, and 25 (“the Easement”). [Tr. Ex. 1 at TMS00002 ([APP145](#)).] The recorded document also purported to grant to the County a separately described roadway easement to expand the previously dedicated San Miguel Avenue. [*Id.* at TMS00001 ([APP144](#)).]



[IR-150 at 4 ([APP135](#)) (TMS’s statement of the case in joint pretrial statement) (shading in original superior court record).]

The Easement was a “wildcat” easement, “[m]eaning that it was not accepted by the engineer or the county. It was simply recorded. That’s it.” [8/2/2018 Transcript at 218:17-21 ([APP250](#)).] “[I]t was not accepted on to the county [street] system,” or “on to the local city [street] system in Paradise Valley.” [*Id.* at 218:12-15 ([APP250](#)); see also *id.* at 219:1-11 ([APP251](#)).]

C. Phoenix Title sold the lots, but many of the deeds did not reference the purported Easement.

Phoenix Title did nothing to get the Easement into the chain of title of some of the lots it sold, even though Phoenix Title owned all of the lots plus the TMS Parcel at the time it recorded the Easement. [IR-228 at 5, ¶ 21 ([APP087](#)).]

Beginning in 1961, Phoenix Title began conveying lots within Stone Canyon East. [*Id.* at 5-6, ¶ 23 ([APP087](#)).] Late that year, Phoenix Title conveyed land that included the TMS Parcel to a beneficiary of the trust. The deed did not note the existence of the Easement. [Tr. Ex. 3 ([APP146](#)).] Through a June 5, 1964 deed that also omitted any express reference to the Easement, Phoenix Title conveyed Lot 22. [Tr. Ex. 164 ([APP172](#)).] On March 10, 1966, it likewise conveyed Lot 23 by a deed that did not reference the Easement. [Tr. Ex. 165 ([APP174](#)).] In 1970, the entity that owned the land above Stone Canyon East on Camelback Mountain conveyed all of its property except the TMS Parcel to the City of Phoenix for “public recreational purposes.” [Tr. Ex. 150 ([APP166](#)).] That land became part of the Phoenix Mountain Preserve.

Teresa and Joseph Zachariah purchased Lot 22 in 2010. [Tr. Ex. 145 (APP160); IR-148 at 2, ¶ 6 (APP126).] From that lot's initial sale, none of the deeds within the property's chain of title has ever referred to the Easement. [IR-49, Ex. 4.] Roseanne Appel purchased Lot 23 in 2009. [Tr. Ex. 151 (APP169); IR-148 at 2, ¶ 7 (APP126).] As with Lot 22, none of the deeds within Lot 23's chain of title referred to the Easement. [IR-50, Ex. 5.]

D. The neighbors have a private, locked, gated driveway on the Easement.

Lots 22 through 25 now contain single-family homes. [IR-228 at 1, ¶ 2 (APP083).] To preserve the undeveloped land above their lots, the Zachariahs and Appels jointly sought to purchase the TMS Parcel for \$600,000; the "main reason for trying to purchase the property [was] we were going to donate it to the Phoenix Mountain Preserve." [7/30/2018 Transcript at 209:6-210:10 (APP202-03).]

No public roadway has ever been constructed on the portion of the Easement across Lots 22 and 23. Instead, the Zachariahs and Appels have built a private, gated driveway on that strip, as shown in the photograph below.



[Tr. Ex. 149 at 11 ([APP165](#)).]

The Zachariahs and Appels exclusively use the driveway to access their homes. They keep the driveway gated and locked. [7/31/2018 Transcript at 36:9-10 ([APP212](#)), 45:22-46:1 ([APP221-22](#)).] The Appels traverse part of the driveway on the Zachariahs' property to reach their house, while the Zachariahs use the turnout on the Appels' property to access their own. [7/30/2018 Transcript at 213:1-5, 213:12-15 ([APP206](#)).] Ms. Zachariah never viewed the driveway as a public road and always "saw this as a private drive to serve my residence." [7/31/2018 Transcript at 18:25-19:5 ([APP210-11](#)).]

E. TMS purchased the TMS Parcel with knowledge of the issues surrounding access.

The TMS Parcel has always remained unimproved, vacant land. Yet in 2012, 53 years after Stone Canyon East was created, TMS purchased the land with a speculative hope of building an 18,000-square-foot single-family home above the subdivision. [Tr. Ex. 228 ([APP177](#)); 8/2/2018 Transcript at 76:25-77:3 ([APP248-49](#)).]

When TMS bought the TMS Parcel, it was surrounded on three sides by the Phoenix Mountain Preserve with no direct access. [IR-228 at 2, ¶ 9 ([APP084](#)); *id.* at 6, ¶ 24 ([APP088](#)).] The seller warned TMS that the property might not have physical access to a road. [7/30/2019 Transcript at 139:5-18 ([APP198](#)); *see also* Tr. Ex. 119 at TMS5127, lines 52-53 ([APP155](#)) (“Current road may not physically touch property which may prevent physical access.”).] TMS apparently bought the property intending to gain access through the private, locked, gated driveway over other people’s property.

In fact, although TMS would need to cut across Lots 22, 23, 24, and 25 to access the TMS Parcel, TMS spoke only with Lot 22’s owner (and possibly the children of Lot 23’s owner) before purchasing. [7/30/2019 Transcript at

177:22-178:22 ([APP199-200](#)); *id.* at 71:16-72:19 ([APP188-89](#)) (“I believe it was the children of the owners.”).]

Moreover, TMS knew before purchasing that the Easement had to be accepted by Maricopa County in order to be a valid public dedication. [*Id.* at 77:4-18 ([APP194](#)); *see also* Tr. Ex. 122 at ORT000144, ¶ 3 ([APP159](#)).] TMS contacted Maricopa County, which led to a dead end because the County had never accepted the alleged dedication, but TMS did not inquire further; instead, it punted the issue to others. [7/30/2019 Transcript at 110:3-8 ([APP195](#)); *id.* at 121:25-122:11 ([APP196-97](#)).] After closing on the property, TMS tried to get the Town of Paradise Valley to accept the alleged dedication, and threatened to sue “all parties including the town.” [Tr. Ex. 281 at 2 ([APP182](#)).] The Town did not accept the dedication.

F. The neighbors had major concerns about development.

Developing the TMS Parcel presents multiple concerns to the homeowners in Stone Canyon East. Not only is there no accessible roadway to the TMS Parcel, but the construction would create enormous risks to the existing homes below the property. The TMS parcel has a slope angle of 53%. [8/1/2018 Transcript at 56:1-13 ([APP236](#)).] The proposed driveway to the TMS Parcel requires grades of up to 30%. [Tr. Ex. 73 at sheet 4 ([APP149](#))

(showing grade of 30%).] (Compare that to I-17's climb through the mountains to Flagstaff, which has a 6% grade. [8/1/2019 Transcript at 76:2-24 ([APP237](#)).]) The photos below show the severe grade.



[Tr. Ex. 149 at 6 ([APP164](#)).]



[Tr. Ex. 209 at 22.]

Given the nature of the terrain and the slope of Camelback Mountain, enormous shifting and rolling boulders have threatened the neighbors' houses in the past. [7/31/2018 Transcript at 41:11-51:17 ([APP217-27](#)).] The photos below show boulders that have rolled down, threatening life and property.



[Tr. Ex. 208 at DEFS000517.]



[Tr. Ex. 208 at DEFS000518.]

Construction on the TMS Parcel could exacerbate the risks and undermine the stability of the land and its features. Expert testimony described the possible dangers that heavy-equipment construction could cause:

Well, it could have a huge [e]ffect because those rocks that are there, the outcrops that we looked at earlier and boulders that are laying there, they are currently stable. However, they've never experienced vibrations from construction. They've only experienced the environment.

And so a little bit of vibration could adversely affect the stability because there could be some soil that's holding a rock in place that gets vibrated, the soil gets vibrated loose and, all of a sudden, that lock doesn't have that support anymore. And it could fall down the hill very easily, so it could be affected negatively.

[8/1/2018 Transcript at 39:23-40:13 ([APP232-33](#)).]

TMS's own architect acknowledged the shared concerns about the falling of the boulders: "I think it was—there was, you know, concern obviously for the neighbors. The town wanted to make sure we addressed all these issues, so we all shared a mutual concern about the boulders."

[8/2/2018 Transcript at 30:23-31:6 ([APP242-43](#)).] When designing TMS's proposed house, the architect told the Town of Paradise Valley, "In my 35 years of designing hillside homes here in Paradise Valley, I have never encountered a situation and a site with these natural conditions. The lot has a 52% slope and only one available means of ingress, an off-site easement that also has a 52% slope." [Tr. Ex. 81 ([APP150](#)).]

Expert testimony suggested that constructing the contemplated house for TMS would require measures such as permanently bolting down boulders and erecting protective fencing, at a cost of millions of dollars.

[8/2/2018 Transcript at 58:24-61:21 ([APP244-47](#)).] According to TMS's own architect and engineer, they would have to secure 115 boulders to the mountain (at a cost of about \$25,000 each), 2,000 boulders would need to be removed, and another 2,000 would need to be removed from the neighbors' property to construct a driveway over the Easement. [*Id.* ([APP244-47](#)); *see*

also Tr. Ex. 83 at 2 ([APP153](#)).] That work alone (*not including constructing the house*) was estimated to cost about \$5 million; this was the “worst site [TMS’s engineer] ha[d] ever seen.” [8/2/2018 Transcript at 61:13-17 ([APP247](#)); accord Tr. Ex. 83 at 2 ([APP153](#)).] The time needed for the preparations and construction of a new driveway and TMS’s proposed residence could be seven and a half to ten years. [8/6/2018 Transcript at 15:2-15 ([APP256](#)).]

For all of these reasons, the neighbors opposed TMS’s proposed construction, and particularly opposed TMS’s claim that a public roadway existed over a private, locked, gated driveway.

II. TMS sued the neighbors to gain access over their private property.

A. TMS sued on a variety of easement theories.

When the Zachariahs (owners of Lot 22), the Appels (owners of Lot 23), and other residents in Stone Canyon East objected to TMS’s plans to develop the TMS Parcel and cut across their private property, TMS sued the owners of Lots 22 through 25.¹ [IR-1; IR-22.] TMS asserted several causes of action to establish access to its land through the Easement. Specifically, it sought declaratory and injunctive relief based on theories of express

¹ Jerry Smith, the owner of Lot 25, never appeared in the superior court or challenged the suit and is not a party to this appeal.

easement, implied easement, common law public dedication, private way of necessity, and implied way of necessity. [IR-22.] The Stone Canyon East owners counterclaimed, challenging TMS's right to access through several causes of action and also asserting a claim for anticipatory nuisance. [IR-11.]

Following a summary-judgment motion, the superior court rejected TMS's claim for a private easement. [IR-61 at 3 ([APP081](#)).] It also denied as moot TMS's claims for an express and implied easement, which TMS had abandoned. [IR-207 at 3.]

B. The superior court ruled that TMS could enforce the Easement under the doctrine of common law public dedication.

Following a six-day bench trial on the parties' remaining claims regarding access, the superior court issued findings of fact and conclusions of law. [IR-228 ([APP083-97](#)).] As for common law public dedication, the superior court held that TMS "is entitled to enforce the Easement for Roadway as a common law dedication." [*Id.* at 14, ¶ 1 ([APP096](#)).] Recognizing TMS's need to establish both an offer to dedicate land and acceptance by the general public, the court found that the express language and subsequent recording of the Easement demonstrated Phoenix Title's intent to dedicate the Easement. [*Id.* at 7, ¶¶ 30-32 ([APP089](#)).]

Without distinguishing the two discrete parts of the Easement, the court further concluded that the general public had accepted a dedication of the entire Easement based on three findings:

- First, although the conveyance documents within the chains of title for Lots 22 and 23 did not reference the Easement, the court found acceptance by the public of the driveway based on the deeds for *Lots 24 and 25* that referenced the Easement. [*Id.* at 7-8, ¶¶ 33-36 ([APP089-90](#)).]
- Second, the court held that actual knowledge of the Easement by the Zachariahs and Appels at the time of their purchases constituted acceptance by the general public. [*Id.* at 8-10, ¶¶ 36-46 ([APP090-92](#)).]
- Third, the court found that the use of portions of the gated driveway by the Zachariahs and Appels, along with the public's use of the part of San Miguel Avenue that the Easement had widened, amounted to sufficient use of the entire Easement by the general public to create a valid acceptance of the dedication. [*Id.* at 10, ¶¶ 47-49 ([APP092](#)).]

Alternatively, the superior court held that an easement exists as an implied way of necessity. [*Id.* at 12-14, ¶¶ 54-66 ([APP094-96](#)).] The neighbors do not challenge the ruling on implied way of necessity. (Consequently, TMS's ability to access the TMS Property is not in dispute on appeal.)

The superior court sua sponte certified its findings of fact and conclusions of law under Rule 54(b). [*Id.* at 15, ¶ 5 ([APP097](#)).] The neighbors filed a timely notice of appeal from the Rule 54(b) judgment. [IR-236.] They

also filed a motion to amend the findings of fact [IR-231], which the superior court granted in part and denied in part. [IR-242 ([APP098](#)).] The neighbors then filed an amended notice of appeal. [IR-245.] Less than a week later, the superior court granted without prejudice TMS's motion for summary judgment on the neighbors' counterclaim for anticipatory nuisance. [IR-246 at 4 ([APP104](#)).] The court awarded TMS \$369,410.25 in attorneys' fees and \$13,413.85 in costs and entered judgment under Rule 54(c). [IR-275 ([APP106](#)).] The neighbors timely appealed from the Rule 54(c) judgment [IR-278], and TMS filed a timely cross-appeal [IR-284]. This Court later consolidated the appeal from the Rule 54(b) judgment and the Rule 54(c) judgment.

This Court has jurisdiction under [A.R.S. § 12-2101\(A\)\(1\)](#).

STATEMENT OF THE ISSUES

1. Common law public dedication requires the public to have accepted the dedication. Here, the government never accepted the dedication, the Easement is not in the chain of title/conveyance deeds for Lots 22 and 23, and the private, locked, gated driveway is not accessible to the public. Did the superior court err by finding that TMS can enforce the

portion of the Easement across Lots 22 and 23 as a common law public dedication?

2. Did the superior court err in awarding attorneys' fees and costs not authorized by statute?

STANDARD OF REVIEW

This appeal challenges only the superior court's legal rulings, not the superior court's findings of fact. The Court of Appeals reviews the superior court's legal conclusions de novo. *See Harte v. Stuttgart Autohaus, Inc.*, 146 Ariz. 382, 383 (App. 1985) ("We are not bound by the trial court's legal conclusions.").

This Court also "review[s] the interpretation and application of [an] attorneys' fee statute de novo." *Midtown Med. Grp., Inc. v. Farmers Ins. Grp.*, 235 Ariz. 593, 596, ¶ 16 (App. 2014). "[W]hether certain expenditures are taxable costs is a matter of law that we review de novo." *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 422, ¶ 36 (App. 2010) (citation omitted; alteration in original).

ARGUMENT SUMMARY

The doctrine of public dedication allows a private party to irrevocably donate land to the general public for public roadways, public parks, and

public plazas. The common law form of public dedication requires both an offer to donate by the landowner and acceptance by the general public. This case concerns only the acceptance element of the doctrine. ([Argument § 1.A.1.](#))

For a valid acceptance, the government can accept the dedication on behalf of the public, the conveyance deeds can reference the dedication, or the general public can accept the dedication through use. ([Argument § I.A.2.](#)) But the doctrine, particularly acceptance by use, applies only to properties open to and used by the general public. Land used by only a limited class of people, such as the owners of adjacent lots, does not qualify for public dedication. ([Argument § I.A.2.](#)) And because public dedication requires a landowner to forever forfeit a fundamental property right (the right to exclude others), the proponent of a dedication bears the burden of establishing the public dedication. ([Argument § I.A.4.](#))

Here, as a matter of law, the Easement is not a valid public dedication because the public never accepted the dedication. No one disputes that the government never accepted it. No one disputes that the conveyance deeds for Lots 22 and 23 never referenced it. And no one disputes that only the owners of the adjacent lots and their invited guests used it. In fact, the

driveway is private, locked, and gated – the opposite of being open to the general public. ([Argument § I.C.](#)) By ruling that the general public nevertheless accepted the dedication, the superior court departed from long-settled principles. ([Argument § I.C.](#)) Upholding the superior court’s ruling to find a public dedication of a private, locked, gated driveway would cause the doctrine to become unmoored from the underlying fundamental legal principles. This Court should not do so in a case where the owner of the TMS Parcel already has access under the more applicable doctrine (implied way of necessity). ([Argument § I.D.](#))

In addition, the superior court improperly awarded attorneys’ fees to TMS under [A.R.S. § 12-1103\(B\)](#), which applies only to quiet title actions. It similarly erred by awarding costs to TMS that are not properly recoverable under [A.R.S. § 12-332](#). ([Argument § II.](#))

Because the superior court erred in finding a valid common law public dedication and in awarding fees and costs beyond those authorized by the applicable statutes, this Court should reverse.

ARGUMENT

I. Because TMS could not establish a valid acceptance by the general public, the Easement cannot be enforced as a public dedication.

A. Public dedication law.

1. Public dedication allows a private landowner to donate land to establish public roads, public parks, and public plazas.

When the public wants or needs land owned by private citizens, the government typically acquires the land in a market transaction or through eminent domain. A third option also exists to get privately owned land into the hands of the general public: the private owner may voluntarily dedicate (i.e., *donate*) the land to public use. “Dedication is the intentional appropriation of land by the owner to some proper public use.” *City of Chandler v. Ariz. Dept. of Transp.*, 224 Ariz. 400, 403, ¶ 9 (App. 2010) (citation omitted).

Public dedication comes in two forms: “pursuant to statute (a statutory dedication) or by action of the common law (a common law dedication).” *Id.* By statute, for example, a developer may dedicate platted roads to the public. See A.R.S. § 9-254. Here, for instance, Phoenix Title’s 1959 plats presumably satisfied the statutory requirements to create San Miguel Avenue. [Tr. Ex. 239 at 1 (APP180); Tr. Ex. 205 (APP176).] But

Phoenix Title's creation of the Easement in 1960 did not satisfy the statutory requirements. This case therefore involves common law dedication (and therefore the phrase "public dedication" in this brief generally refers to the common-law form).

2. Public dedication is not valid unless the public has accepted the dedication.

"An effective dedication of private land to a public use has two general components: [1] an offer by the owner of land to dedicate and [2] acceptance by the public." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 423-24, ¶ 21 (2004) (citations omitted). This case involves the second element (acceptance by the public). Without public acceptance, a public dedication is invalid regardless of whether the owner of the land intended to dedicate it to the public.

A public dedication may be accepted in several ways. The first and most obvious way is acceptance by the government, which can be shown by formal governmental acts or by government maintenance and control. For example, a municipality may accept a public dedication for a public plaza by passing a resolution or by taking steps to preserve and maintain the plaza. *See Evans v. Blankenship*, 4 Ariz. 307, 316 (1895) (finding acceptance when the

city council “instructed the street and alley committee to ‘clear up the plaza’”).

Courts also recognize public acceptance from a publicly recorded deed.* But this form of acceptance is narrow; it requires “a sale of property that referred to the plat dedicating property to the public.” *Lowe v. Pima County*, 217 Ariz. 642, 647, ¶ 19 (App. 2008). That is, the dedicating party should “expressly refer[] to the deed of dedication in the deeds to the parcels” when selling the land so the dedication becomes part of the chain of title. *Id.* at ¶ 21. Merely recording the dedication in an adjacent property is insufficient. *See id.*

In certain limited circumstances, courts have also recognized public acceptance when the general public has used the dedication. For acceptance by use, the proponent of the dedication must show that the general public used the particular property in dispute. *See, e.g., Smith v. Borough of New*

* Acceptance by including a dedication in a deed is not consistent with acceptance by the general public. This Court need not reach the question of whether this is a valid form of public acceptance because, as explained below, the chains of title for Lots 22 and 23 did not include the Easement. But the neighbors reserve the right to seek review from the Supreme Court on whether Arizona should continue to recognize acceptance by deed.

Hope, 879 A.2d 1281, 1289 (Pa. Commw. Ct. 2005) (“The opening of a portion of a street does not affect the status of the remaining unopened portion.”); *Ford v. Dickerson*, 662 S.E.2d 503, 507 (W. Va. 2008) (“Where the owner of a tract of land lays the same off into lots, streets, and alleys, and makes a plat thereof, and offers to dedicate the streets and alleys shown upon such plat to the public, the public authorities may accept such dedication in whole or in part.”); *Chalkley v. Tuscaloosa Cty. Comm’n*, 34 So. 3d 667, 674 (Ala. 2009) (“[T]he law on the subject generally is that [a]n offer of dedication need not be accepted in its entirety; the property offered for dedication may be accepted in part and the remainder rejected.”) (citations and internal quotation marks omitted).

3. Public dedication and acceptance by use apply only to properties open to and used by the general public, not just a few private property owners.

Public dedication applies only to “land donated to a proper public purpose,” such as “a park, a road, a public plaza, or some other public space.” *Pleak*, 207 Ariz. at 421, 425, ¶¶ 8, 26 (2004); see also *Mayor, Aldermen & Inhabitants of City of New Orleans v. United States*, 35 U.S. 662, 712-13 (1836) (describing using public accommodation for “highways, the streets of our cities and towns, and the grounds appropriated as places of amusement or

of public business, which are found in all our towns, and especially in our populous cities”); *City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 150 (1968) (“The Court has found a dedication only in cases involving either a park or a street.”).

For a public dedication to be valid, the dedicated land generally must be open to “all segments of the general public.” *Id.* at 150. Property open only to a limited number of private users does not suffice for public dedication. The principle that for “a common law dedication, the use contemplated by the land must be a use by the general public, and not for a limited class thereof,” dates back at least half a century in Arizona. *Id.* at 151; see also *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283, 290 (1947) (“The use by the purchasers of lots *and the general public* constitutes a sufficient acceptance.”) (emphasis added).

Said another way (in a principle that has survived close to 200 years), private use of land is inconsistent with the creation and existence of a public dedication, which must be “used for the public purposes intended by the appropriation.” *City of Cincinnati v. White’s Lessee*, 31 U.S. 431, 440 (1832). “The essence of a dedication is that it is for the use of the public at large. There may be a dedication for special uses, but it must be for the benefit of

the public. Generally, there can be no dedication to private uses” 23 [Am. Jur. 2d Dedication § 5](#).

Courts in Arizona and elsewhere have emphasized this requirement for public dedications. This Court, for example, has held that “a parking lot for the private use of the customers of [the] businesses adjoining the property” does not establish a public dedication. *Mocho*, [8 Ariz. App. at 150](#); see also *Vick v. S.C. Dep’t of Transp.*, [556 S.E.2d 693, 698](#) (S.C. Ct. App. 2001) (“Aside from the buyers of the five lots, there was no evidence of general use by the public or of acceptance or maintenance by city or county authorities.”).

4. Because public dedication involves an irrevocable forfeiture of fundamental property rights, courts place the burden on the party seeking to establish a dedication.

The right to exclude the public from your property is one of the most central and fundamental rights of private property. *State v. Adams*, [197 Ariz. 569, 573, ¶ 22](#) (App. 2000) (“[H]e had the right to exclude anyone he wished from his property. One of the main rights attached to property is the right to exclude others.” (footnote omitted)). Public dedication opens the property to the general public, and “a dedication, once perfected, is irrevocable.” *City of Chandler*, [224 Ariz. App. at 403, ¶ 9](#). A public dedication,

therefore, requires a landowner to *forever* forfeit a fundamental property right.

Recognizing how serious it is to forever forfeit a fundamental property right, “[t]he courts have placed a *heavy burden* upon one asserting or claiming a dedication.” *Mochó*, 8 Ariz. App. at 149 (emphasis added). This Court previously cited several other jurisdictions’ compelling rationales for placing the burden on the party asserting a dedication: “It is not a trivial thing to take another’s land, and for this reason the courts will not lightly declare a dedication to public use.” *Id.* at 150 (citation omitted). “Dedications being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing, and the acts proved must not be consistent with any construction other than that of a dedication.” *Id.* (citation omitted). For these reasons, “[t]he burden of proof to establish a dedication is on the party asserting it.” *Kadlec v. Dorsey*, 224 Ariz. 551, 552, ¶ 8 (2010) (citations omitted).

An easement on the property does not create a presumption of public dedication. Indeed, the Arizona Supreme Court expressly *rejected* the position that “a private road becomes public whenever the property through

which the road runs is subject to an easement.” *Id.* at 553, ¶ 10 (“But no Arizona case has so held.”).

B. As a matter of law, the Easement does not qualify as a public dedication.

Here, TMS failed to meet its heavy burden of proving a public dedication because, as a matter of law, the general public never accepted the Easement on Lots 22 and 23 of Stone Canyon East.

First, neither Maricopa County nor any city or town took any steps to accept the purported dedication on behalf of the public, and TMS disclaimed that method of acceptance. [7/30/2019 Transcript at 179:4-8 ([APP201](#)) (“Q. . . . You’re not claiming that the County or the Town accepted the easement that’s Exhibit 1, are you? / A. Not at this point. I have no reason to believe.”); 7/30/2019 Transcript at 7:17-22 ([APP187](#)) (“There may be questions about whether that roadway easement that was recorded that’s now in front of you, your Honor, whether that was ever intended, whether that was ever accepted by the county. We’re not going to present any evidence on that issue.”).]

Second, no recorded document within the chains of title for Lots 22 or 23 refers to the Easement. When Phoenix Title first sold Lots 22 and 23 in

the 1960s, the conveyance deeds did not reference the Easement at all. [Tr. Ex. 164 ([APP172](#)); Tr. Ex. 165 ([APP174](#)).] The subsequent chains of title likewise did not reference the Easement. [IR-49, Ex. 4; IR-50, Ex. 5.] The superior court specifically found that the Easement was “not expressly included in the conveyance document” for Lots 22 and 23. [IR-228 at 8, ¶ 36 ([APP090](#)).]

Third, the general public did not accept the Easement by use. The property in question (the Easement that runs across Lots 22 and 23, and over Lots 24 and 25) has, for all relevant periods, been a private driveway with a locked gate. [7/31/2018 Transcript at 36:9-10 ([APP212](#)), 45:22-46:1 ([APP221-22](#)).] In other words, it was designed to *exclude* the public. It cannot be used by the general public at all, and remains distinct from the nearby public roadway. It is used only by the owners of the lots and their invited guests. The image below shows the driveway:



[Tr. Ex. 149 at 11 ([APP165](#)).]

As a matter of law, using one's own driveway cannot qualify as "public" use, especially where the driveway is intentionally and explicitly inaccessible to the general public. "[T]here can be no dedication to private uses, or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public" *Mocho*, [8 Ariz. App. at 150](#); see also *Vick*, [556 S.E.2d at 698](#) (no acceptance by use because the only use was "from the buyers of the five lots" adjacent to the street); *City of Santa Clara v. Ivancovich*, [118 P.2d 303, 307](#) (Cal. Ct. App. 1941) ("The question of actual use by the city of the particular strip in dispute may be disposed of immediately. It was never actually improved as a street. It has been enclosed by a fence, and no

objection in that regard has been made by the city during a period of forty years.”).

Thus, as a matter of law, the general public has not accepted the dedication.

C. The superior court erred in finding a public dedication.

In concluding that the general public had accepted the dedication of the Easement as to Lots 22 and 23, the superior court made several errors of law that, if accepted, would dramatically and unreasonably expand the doctrine of public dedication to cover purely private uses of property.

1. The superior court’s holding on acceptance by notice violates the law of the case and has no basis in law.

The superior court recognized that none of the conveyance documents for Lots 22 and 23 expressly referenced the Easement, which should have ended the inquiry. [IR-228 at 8, ¶ 36 ([APP090](#)).] Instead, the court held that the owners’ notice of the Easement could satisfy the requirement that the general public had accepted the Easement. [*Id.* ([APP090](#)).] In particular, the court noted that the Zachariahs had acknowledged the Easement’s existence in an addendum to their purchase contract and that the Appels had obtained a title insurance policy that excluded the Easement from coverage. [*Id.* at 8,

¶¶ 37-38 ([APP090](#)).] It also found that the owners' conduct, both before and after their purchases, corroborated the conclusion that they knew about the Easement. [*Id.* at 9, ¶ 44 ([APP091](#)).]

This ruling has two problems: (1) it ignored the court's own prior, binding determination from another judge that notice was irrelevant to acceptance, and (2) the ruling has no basis in law.

(a) The superior court ignored binding law of the case in finding that notice of an easement can constitute acceptance of a public dedication.

The court's ruling that actual notice constituted acceptance for Lots 22 and 23 violated the doctrine of law of the case. That doctrine ensures that a court will not revisit a prior decision that it made in the same case and thereby permit a "horizontal appeal" of an issue. "A party seeks a 'horizontal appeal' when it requests a second trial judge to reconsider the decision of the first trial judge in the same matter, even though no new circumstances have arisen in the interim and no other reason justifies reconsideration." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, [176 Ariz. 275, 278-79](#) (App. 1993). Horizontal appeals are disfavored "because they waste judicial resources by asking two judges to consider identical

motions and because they encourage ‘judge shopping.’” *Id.* at 279 (quoting *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 214 (App. 1990)).²

Here, Judge Warner specifically ruled that actual notice was insufficient to constitute acceptance: “Although the owners of [Lots 22 and 23] may have had actual notice of the claimed easement, a common law easement requires acceptance, not just notice.” [IR-61 at 2 (APP080).] Consequently, the trial on public dedication should have focused exclusively on whether the evidence supported acceptance through usage by the general public. After a judicial rotation, however, Judge Gates was assigned to the case and ruled that notice sufficed for acceptance. [IR-228 at 8-10, ¶¶ 36-46 (APP090-92) (“[A]t the time the Zachariahs and Ms. Appel purchased Lots 22 and 23, each Defendant had actual knowledge of the recordation of the Easement for Roadway.”).] This ruling violated the law of the case and should be reversed for that reason.³

² In certain limited circumstances, a court may reconsider a prior ruling, such as “when an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law.” *Powell-Cerkoney*, 176 Ariz. at 279. No such circumstances exist here.

³ The superior court referenced law of the case as it pertained to another one of Judge Warner’s rulings. [IR-228 at 6 n.1 (APP088).]

(b) As a matter of law, mere notice of an easement cannot constitute public acceptance of a public dedication.

Even if law of the case did not bar the superior court's reconsideration of the effect of notice on acceptance, its holding has no basis in the law. The court not only decided that the owners of Lots 22 and 23 "through purchase accepted the offer" to dedicate, but further held that their acceptance meant that the Easement "was accepted by the general public." [*Id.* at 10, ¶¶ 45-46 ([APP092](#)).] In other words, the court conflated the requirement of an explicit reference in a deed with actual notice by a single buyer in the chain of title. But Arizona law requires an express reference to a public dedication *in the conveying instrument itself*, not merely actual notice from another source. *See Lowe*, [217 Ariz. at 647](#), ¶ 19 ("*Pleak*, as well as the cases on which it relied, required a sale of property that *referred to the plat dedicating property to the public.*") (emphasis added). As a matter of law, a reference contained in a purchase agreement addendum or title insurance policy cannot establish acceptance by the public.

Moreover, the superior court based this ruling on the irrelevant point that "[c]onstructive and actual notice have the same effect." [IR-228 at 8, ¶ 36 ([APP090](#)) (quoting *Neal v. Hunt*, [112 Ariz. 307, 311](#) (1975)).] But this dispute

does not involve the difference between constructive and actual notice. Neither constructive notice nor actual notice qualifies as acceptance by the public for purposes of public dedication, and for good reason. Accepting a public dedication impacts the public at large, including all subsequent purchasers.

“[A] dedication, once perfected, is irrevocable.” *City of Chandler*, [224 Ariz. at 403](#), ¶ 9. That means that establishing a public dedication would bind future purchasers of Lots 22 and 23, regardless of whether they have notice, and even though the chains of title on those lots say nothing about the Easement. In this context, treating actual knowledge of the current owner as acceptance of a public dedication makes no sense. It directly conflicts with the stated policy behind allowing acceptance of a public dedication by deed. *See Lowe*, [217 Ariz. at 647](#) (requiring express reference to public dedication in chain of title “ensures that when a subsequent purchaser buys part or all of the property, he or she will have notice of the public dedication impacting the land”).

2. As a matter of law, the private use the superior court identified does not qualify as acceptance by the general public.

The superior court also found that “the Easement for Roadway was accepted by use.” [IR-228 at 10, ¶ 49 ([APP092](#)).] But the court principally relied on the Zachariahs’ and the Appels’ use of *their own driveway*. [*Id.* at 10, ¶¶ 47-48 ([APP092](#)).] As explained above ([Argument § I.B](#)), use of a private, gated, locked driveway is not use by the general public—the gate and lock are designed to *exclude* the general public, and the character of use from the landowners and their invited guests is not the same thing as use by the general public.

In support of its holding, the superior court cited two cases: *Evans*, [4 Ariz. at 316](#), and *Allied Am. Inv. Co. v. Pettit*, [65 Ariz. 283, 290](#). [IR-228 at 10, ¶ 48 ([APP092](#)).] The court cited *Evans* for the principle that “[a]cceptance may be presumed if the gift is beneficial,” but that presumption is no longer good law under *Kadlec*, [224 Ariz. at 552, ¶ 8](#) (“Dedication is not presumed. . . .”). And in any event, *Evans* further found actual acceptance because the Phoenix City Council “instructed the street and alley committee to ‘clear up the [public] plaza.’” *Evans*, [4 Ariz. at 316](#). On top of that, the purported dedication in *Evans* created a “public square”—something open

to the public, unlike the private driveway at issue here. *Id.* at 313. *Evans* thus does not support the holding that private use of a gated, locked driveway qualifies as public use.

Allied fares no better. It involved a park open to the general public, and the quotation the superior court selected (“[t]he use by the purchasers of lots *and the general public*”) confirms that the park was open to and used by *the general public*; it was not limited just to the lot-owners. [IR-228 at 10, ¶ 48 (APP092) (quoting *Allied*, 65 Ariz. at 290).] Contrast that, for example, with a private park inside a condominium complex, which park is accessible only with a keyfob issued to unit owners.

Thus, neither case involved purely private use of an alleged dedication; the superior court cited no such case.

The superior court also made a fleeting reference to a paved portion of San Miguel Avenue on a different part of the Easement. [*Id.* at 10, ¶ 47 (APP092).] But that part of the public roadway is not part of this dispute. TMS seeks to establish a public dedication on the neighbors’ driveway, not on San Miguel Avenue. The expansion of San Miguel Avenue is separately described and separately delineated from the driveway in dispute, and the public roadway obviously has much different usage than the private, locked,

gated driveway. [Tr. Ex. 1 ([APP144-45](#)).] As explained above ([Argument § I.A.2](#)), TMS needed to prove use by the public on the particular property in dispute. See *Sweeten v. Kauzlarich*, [684 P.2d 789, 792](#) (Wash. App. 1984) (“Although the facts indicate the lane has been used by a variety of people, primarily family, friends and business invitees of the lot owners, public use has never extended to the full width of the dedication. The court was correct in limiting acceptance to that part actually accepted through public use.”).

The superior court erred in holding that any prior usage constituted acceptance of the private portion of the Easement.

D. Reversing on common law public dedication will not leave TMS without access, but affirming the ruling would unjustifiably expand the public dedication doctrine.

The neighbors do not challenge the superior court’s ruling on implied way of necessity. That means that regardless of how this Court rules, TMS will have access to the TMS Parcel.

The neighbors challenge the common law public dedication ruling because they do not want a *50-foot-wide public road* through their property. In addition, validating a public dedication of such a wide road would likely cause their homes to become nonconforming because the structures would be too close to the road and would encroach into mandatory building

setbacks. Although their homes would be grandfathered in as legal nonconforming structures, the nonconforming nature would affect the neighbors' ability to remodel or expand their homes, and would likely decrease the value of their homes at resale.

Upholding the superior court's ruling would substantially expand the doctrine, and unnecessarily so. Presumably TMS does not actually want to open the neighbors' driveway to the general public. Instead, TMS seeks to use the driveway to access just the TMS Parcel. But common law public dedication is a poor fit for this scenario. The law already has a mechanism to protect a property owner's right to access landlocked property – implied way of necessity. That doctrine fits; common law public dedication does not. As a California court explained when addressing an analogous concept, “a private easement over a roadway is an entirely different matter than a dedication of that roadway to use by the public in general. Where, as here, the use of property is consistent with a private easement, there is no basis for finding an implied acceptance of an offer of dedication by public use.” *Biagini v. Beckham*, [78 Cal. Rptr. 3d 171, 181](#) (Ct. App. 2008). Expanding public dedication to cover a private driveway would completely unmoor the

doctrine from its natural scope of property open to the general public (public roads, public parks, and public plazas).

II. The superior court erred as a matter of law in its award of attorneys' fees and costs.

The superior court also erred by improperly awarding TMS \$369,410.25 in attorneys' fees and \$13,413.85 in costs. [IR-275 at 2 ([APP106](#)).]

If this Court reverses as to the first issue, then it should vacate the award of attorneys' fees and costs and remand to the superior court to decide on fees and costs in light of the reversal. If this Court affirms on the first issue, then it should vacate and reverse for the reasons below.

The superior court awarded attorneys' fees to TMS for its public dedication and implied way of necessity claims under [A.R.S. § 12-1103](#). [IR-228 at 15, ¶ 4 ([APP097](#)) ("Plaintiff is entitled to recover its attorneys' fees and costs pursuant to A.R.S. § 12-1103."); IR-246 at 4 ([APP104](#)) ("As part of its form of judgment, Plaintiff may leave blank spaces for an award attorney's fees and taxable costs previously awarded pursuant to A.R.S. § 12-1103.").] That statute authorizes a court to award attorneys fees to a party that unsuccessfully sought the execution of a quitclaim deed before prevailing in an action to quiet title to property:

If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court.

[A.R.S. § 12-1103\(B\)](#).

The statute applies only to the party that actually prevails in a quiet title action. *See, e.g., Pac. W. Bank v. Castleton*, [246 Ariz. 108, 112, ¶ 22](#) (App. 2018) (party not eligible for fee award when “it has not yet formally prevailed on its quiet title action”). “[A.R.S.] § 12-1103(B) refers to an ‘action to quiet title to real property,’ indicating it is limited to that specific kind of proceeding. *See Action to Quiet Title*, Black’s Law Dictionary (10th ed. 2014) ([A] proceeding to establish a plaintiff’s title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it.’).” *Cook v. Grebe*, [245 Ariz. 367, 369](#) (App. 2018). A claim concerning some interest in property that is “not an interest in the title” does not entitle a litigant to fees under [§ 12-1103](#). *Dickens v. First Am. Title Ins. Co. of Arizona*, [162 Ariz. 511, 517](#) (App. 1989).

Neither a public dedication claim nor an implied way of necessity claim qualifies for attorneys' fees under [A.R.S. § 12-1103](#). In *Pleak*, the Supreme Court rejected applying § 12-1103 to public dedication claims, explaining that "a common law dedication of a roadway easement to public use leaves fee title to the roadway in the landowner, and [the landowner] therefore properly refused in this case to issue a quit claim deed to the [party seeking dedication]." *Pleak*, [207 Ariz. at 425 n.6](#). Implied ways of necessity likewise do not transfer title and are not eligible under § 12-1103(B). *Cf. Dabrowski v. Bartlett*, [246 Ariz. 504, 517-18, ¶¶ 40-46](#) (App. 2019) (landowner that prevailed in quiet title action to show that no implied easement existed could recover under [§ 12-1103\(B\)](#)).

Here, TMS asserted quiet title claims (Count I and Count II), which were limited to easement theories. [IR-22 at 7-10 ([APP115-18](#)).] By contrast, TMS's public dedication claim (Count III, dubbed "common law dedication") and implied way of necessity claim (Count VI) were not claims to quiet title. [*Id.* at 10-11, 14 ([APP118-19](#), [APP122](#)).] In the joint pretrial statement, the parties likewise characterized only some of the claims as ones seeking quiet title. [IR-150 at 2 ([APP133](#)).] TMS thus recognized that its public dedication and implied way of necessity claims were not quiet title

actions. When the parties briefed this issue below, TMS practically gave up on its claim to fees under § 12-1103 by the time of its reply, instead shifting to [A.R.S. § 12-341.01](#) (a theory the superior court never adopted). [IR-249 (fee application); IR-267 (response); IR-273 (reply).]

On top of that, *Pleak*'s binding holding that § 12-1103(B) does not apply to public dedication makes sense here. In prevailing on its public dedication claim, TMS has in effect confirmed a right for the general public, but TMS itself does not get any specific interest in the property that triggers the statute. In the implied way of necessity claim, TMS has the right to access the property but does not get any title, and that right of access could go away (e.g., if a new route opens up or the ownership merges). Thus, just like the landowner in *Pleak*, the neighbors properly declined to execute TMS's quitclaim deed, and TMS is not entitled to its attorneys' fees. See [207 Ariz. at 425 n.6](#). Because the superior court based its fee award on an incorrect principle of law, this Court should reverse.

In addition, the superior court improperly awarded TMS thousands of dollars in costs. By statute, "[t]he successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law." [A.R.S. § 12-341](#). "But the statutes do not grant

the prevailing party a right to recover every manner of litigation expense. Under [A.R.S. § 12-332](#) (2016), the prevailing party in a civil action in superior court is allowed only its taxable costs” *RS Indus. v. Candrian*, [240 Ariz. 132, 137, ¶ 15](#) (App. 2016).

[A.R.S. § 12-332](#), in turn, lists properly recoverable taxable costs, including:

- Fees of officers and witnesses;
- Cost of taking depositions;
- Compensation of referees;
- Cost of certified copies of papers or records;
- Sums paid a surety company; and
- Other disbursements that are made or incurred pursuant to an order or agreement of the parties.

[A.R.S. § 12-332\(A\)](#).

Unless the taxable costs are permitted by [A.R.S. § 12-332](#), they are not recoverable. The statute does not authorize expenses “incurred for photocopying, facsimiles, shipping and travel expenses,” nor can a party recover “the fees it pays its own expert witness.” *RS Indus.*, [240 Ariz. at 137, ¶ 16](#). Legal research charges, postage, and miscellaneous expenses such as meals and parking during trial are not allowed, either. See *Newman v. Select*

Specialty Hosp.-Ariz., Inc., [239 Ariz. 559, 567, ¶ 42](#) (App. 2016) (finding such items not recoverable as taxable costs).

The superior court nevertheless awarded TMS the full \$8,947.42 in requested costs incurred by Beus Gilbert. Although the documents supporting the request for fees did not explain how the total was calculated, they included items such as \$5,186.75 for “Photocopy Expense”; \$2,925.00 for “Expert Witness Fee”; \$1,407.00 for “Color Copies”; \$83.33 for “United Parcel Service”; \$39.33 for “Outside Messenger Service”; \$200.25 for “Scanned Documents”; \$200 for “Delivery Service”; and \$80.33 in “Meal Expense,” “Parking,” and “Travel Expense.” [IR-251 at 74 ([APP143](#)).] None of these costs is allowed under [A.R.S. § 12-332](#), and the award necessarily included some of them. Because the superior court awarded costs not listed under [A.R.S. § 12-332](#), this Court should vacate the costs award.

CONCLUSION

The Court should vacate, reverse, and remand the superior court’s ruling that TMS can enforce the Easement as a common law dedication. It also should vacate the award of attorneys’ fees and costs entered in favor of TMS.

RESPECTFULLY SUBMITTED this 18th day of November, 2019.

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**APPENDIX
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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

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168.	SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE TERRENCE MANNING AS AN EXPERT IN LEGAL ACCESS TRIAL	Jul. 17, 2018
169.	MOTION IN LIMINE TO EXCLUDE EXPERTS STEVEN NOWACZYK AND/OR DAVID DEATHERAGE IN LEGAL ACCESS TRIAL	Jul. 17, 2018
170.	MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 18, 2018
171.	RESPONSE TO MOTION FOR COURT TO INSPECT THE PREMISES	Jul. 18, 2018
172.	(PART 1 OF 2) RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 19, 2018
173.	(PART 2 OF 2) RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 19, 2018
174.	SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 20, 2018
175.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE NEWSPAPER ARTICLES	Jul. 20, 2018
176.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE EXPERTS STEVEN D. NOWACZYK AND/OR DAVID DEATHERAGE IN LEGAL ACCESS TRIAL	Jul. 20, 2018
177.	RESPONSE IN OPPOSITION TO SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE TERRENCE MANNING AS AN EXPERT IN LEGAL ACCESS TRIAL	Jul. 20, 2018
178.	ME: MATTER UNDER ADVISEMENT [07/19/2018]	Jul. 25, 2018
179.	ME: HEARING [07/23/2018]	Jul. 25, 2018

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No.	Document Name	Filed Date
180.	DEFENDANTS' DEPOSITION DESIGNATION REGARDING JEFFRY D. VANN	Jul. 25, 2018
181.	PLAINTIFF'S DEPOSITION DESIGNATIONS TO BE USED AT TRIAL	Jul. 27, 2018
182.	(PART 1 OF 2) NOTICE OF FILING AMENDED TRIAL EXHIBIT LIST AND WITNESS LIST	Jul. 27, 2018
183.	(PART 2 OF 2) NOTICE OF FILING AMENDED TRIAL EXHIBIT LIST AND WITNESS LIST	Jul. 27, 2018
184.	PLAINTIFF'S BENCH MEMORANDUM RE: LEGAL ACCESS	Jul. 30, 2018
185.	ORIGINAL DEPOSITION OF JEFFRY D. VANN TAKEN ON 04/05/2018	Jul. 30, 2018
186.	ORIGINAL DEPOSITION OF JEFFRY D. VANN TAKEN ON 04/05/2018	Jul. 30, 2018
187.	ORIGINAL DEPOSITION OF J. DAVID DEATHERAGE, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
188.	ORIGINAL DEPOSITION OF J. DAVID DEATHERAGE, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
189.	ORIGINAL DEPOSITION OF FRED EVERETT FLEET, P.E., F. ASCE TAKEN ON 04/20/2018	Jul. 30, 2018
190.	ORIGINAL DEPOSITION OF FRED EVERETT FLEET, P.E., F. ASCE TAKEN ON 04/20/2018	Jul. 30, 2018
191.	ORIGINAL DEPOSITION OF TERRENCE MICHAEL SCALI TAKEN ON 03/09/2018	Jul. 30, 2018
192.	ORIGINAL DEPOSITION OF TERRENCE MICHAEL SCALI TAKEN ON 03/09/2018	Jul. 30, 2018
193.	ORIGINAL DEPOSITION OF PETER JOSEPH MARTORI TAKEN ON 03/07/2018	Jul. 30, 2018
194.	ORIGINAL DEPOSITION OF PETER JOSEPH MARTORI TAKEN ON 03/07/2018	Jul. 30, 2018
195.	ORIGINAL DEPOSITION OF STEVEN D. NOWACZYK TAKEN ON 04/17/2018	Jul. 30, 2018
196.	ORIGINAL DEPOSITION OF JOHN T. LOTARDO, J.D. TAKEN ON 03/06/2018	Jul. 30, 2018

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No.	Document Name	Filed Date
197.	ORIGINAL DEPOSITION OF TERENCE A. MANNING, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
198.	ORIGINAL DEPOSITION OF TERENCE A. MANNING, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
199.	ORIGINAL DEPOSITION OF ANDREW JASON PLATT TAKEN ON 04/03/2018	Jul. 30, 2018
200.	ORIGINAL DEPOSITION OF PAUL GERALD JOHNSON, MAI, CRE TAKEN ON 03/15/2018	Jul. 30, 2018
201.	ORIGINAL DEPOSITION OF GERRY LEE JONES TAKEN ON 04/09/2018	Jul. 30, 2018
202.	ORIGINAL DEPOSITION OF JOHN KENNEDY GRAHAM TAKEN ON 03/13/2018	Jul. 30, 2018
203.	ORIGINAL DEPOSITION OF DAVID BRUCE APPEL TAKEN ON 02/20/2018	Jul. 30, 2018
204.	ORIGINAL DEPOSITION OF MARK B. CANDELARIA, AIA TAKEN ON 04/13/2018	Jul. 30, 2018
205.	(PART 1 OF 2) ORIGINAL DEPOSITION OF MARK B. CANDELARIA, AIA TAKEN ON 04/13/2018	Jul. 30, 2018
206.	(PART 2 OF 2) ORIGINAL DEPOSITION OF MARK B. CANDELARIA, AIA TAKEN ON 04/13/2018	Jul. 30, 2018
207.	ME: UNDER ADVISEMENT RULING [07/30/2018]	Jul. 31, 2018
208.	ORIGINAL DEPOSITION OF ALFRED HARRISON TAKEN ON 02/20/2018	Jul. 31, 2018
209.	ORIGINAL DEPOSITION OF TERESA CAROL ZACHARIAH, M.D. TAKEN ON 07/17/2017	Jul. 31, 2018
210.	ME: TRIAL [07/30/2018]	Aug. 1, 2018
211.	(PART 1 OF 2) DEFENDANTS'/ COUNTERCLAIMANTS' BENCH MEMORANDUM REGARDING LEGAL ACCESS	Aug. 5, 2018
212.	(PART 2 OF 2) DEFENDANTS'/ COUNTERCLAIMANTS' BENCH MEMORANDUM REGARDING LEGAL ACCESS	Aug. 5, 2018

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No.	Document Name	Filed Date
213.	(PART 1 OF 2) PLAINTIFF'S BENCH MEMORANDUM RE: SEVERANCE OF TITLE AS IT RELATES TO LEGAL ACCESS BASED ON IMPLIED WAY OF NECESSITY	Aug. 6, 2018
214.	(PART 2 OF 2) PLAINTIFF'S BENCH MEMORANDUM RE: SEVERANCE OF TITLE AS IT RELATES TO LEGAL ACCESS BASED ON IMPLIED WAY OF NECESSITY	Aug. 6, 2018
215.	TRIAL/ HEARING WORKSHEET	Aug. 6, 2018
216.	ME: TRIAL [07/31/2018]	Aug. 7, 2018
217.	ME: TRIAL [08/01/2018]	Aug. 7, 2018
218.	ME: TRIAL [08/02/2018]	Aug. 7, 2018
219.	ME: TRIAL [08/03/2018]	Aug. 7, 2018
220.	DEFENDANTS' / COUNTERCLAIMANTS' SUPPLEMENTAL BENCH MEMORANDUM	Aug. 9, 2018
221.	ME: ORAL ARGUMENT SET [08/06/2018]	Aug. 13, 2018
222.	ME: MATTER UNDER ADVISEMENT [08/06/2018]	Aug. 13, 2018
223.	PLAINTIFF'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	Aug. 13, 2018
224.	DEFENDANTS'/ COUNTERCLAIMANTS' PROPOSED FINDINGS OF FACT	Aug. 13, 2018
225.	DEFENDANTS'/ COUNTERCLAIMANTS' PROPOSED CONCLUSIONS OF LAW	Aug. 13, 2018
226.	ME: RULING [08/20/2018]	Aug. 22, 2018
227.	ME: ORAL ARGUMENT RESET [09/25/2018]	Sep. 27, 2018
228.	ME: JUDGMENT/DECREE [09/24/2018]	Sep. 28, 2018
229.	EXHIBIT WORKSHEET H.D. 07/30/2018	Oct. 1, 2018
230.	MOTION FOR ONE-DAY EXTENSION TO FILE MOTION TO AMEND FINDINGS OF FACT UNDER RULE 52(B)	Oct. 16, 2018
231.	DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO AMEND FINDINGS OF FACT	Oct. 16, 2018

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No.	Document Name	Filed Date
232.	RESPONSE TO DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO AMEND FINDINGS OF FACT	Oct. 20, 2018
233.	PROPOSED ORDER	Oct. 22, 2018
234.	ME: MATTER UNDER ADVISEMENT [10/19/2018]	Oct. 23, 2018
235.	SUPPLEMENTAL CITATION TO LEGAL AUTHORITY	Oct. 29, 2018
236.	NOTICE OF APPEAL	Oct. 29, 2018
237.	DEFENDANTS'/ COUNTERCLAIMANTS' REPLY IN SUPPORT OF THEIR MOTION TO AMEND FINDINGS OF FACT	Oct. 31, 2018
238.	MOTION TO STRIKE DEFENDANTS' SUPPLEMENTAL CITATION TO LEGAL AUTHORITY	Nov. 2, 2018
239.	DEFENDANTS'/ APPELLANTS' NOTICE OF TRANSCRIPT ORDER	Nov. 13, 2018
240.	COURT OF APPEALS RECEIPT	Dec. 4, 2018
241.	ELECTRONIC INDEX OF RECORD	Dec. 4, 2018
242.	ME: RULING [12/03/2018]	Dec. 5, 2018
243.	COURT OF APPEALS APPELLATE CLERK NOTICE DATED 12/05/2018	Dec. 5, 2018
244.	COURT OF APPEALS RECEIPT	Dec. 10, 2018
245.	AMENDED NOTICE OF APPEAL	Dec. 14, 2018
246.	ME: UNDER ADVISEMENT RULING [12/17/2018]	Dec. 20, 2018
247.	COURT OF APPEALS RECEIPT	Dec. 26, 2018
248.	AMENDED ELECTRONIC INDEX OF RECORD	Dec. 26, 2018
249.	(PART 1 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
250.	(PART 2 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
251.	(PART 3 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019

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No.	Document Name	Filed Date
252.	(PART 4 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
253.	(PART 5 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
254.	(PART 1 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
255.	(PART 2 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
256.	(PART 3 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
257.	(PART 4 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
258.	(PART 5 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
259.	(PART 1 OF 2) STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Jan. 9, 2019
260.	(PART 2 OF 2) STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Jan. 9, 2019
261.	(PART 1 OF 2) NOTICE OF ERRATA IN SUPPORT OF STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Jan. 16, 2019
262.	(PART 2 OF 2) NOTICE OF ERRATA IN SUPPORT OF STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Jan. 16, 2019
263.	NOTICE OF LODGING PROPOSED FORM OF JUDGMENT	Jan. 22, 2019
264.	NOTICE OF FIRST EXTENSION OF TIME FOR DEFENDANTS TO RESPOND TO PLAINTIFF'S APPLICATION FOR ATTORNEY'S FEES; STATEMENT OF COSTS; AND PROPOSED FORM OF ORDER	Feb. 4, 2019
265.	MOTION TO EXCEED PAGE LIMIT FOR DEFENDANTS' RESPONSE TO PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Feb. 7, 2019
266.	DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF TAXABLE COSTS	Feb. 8, 2019
267.	(PART 1 OF 3) DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND TAXABLE COSTS	Feb. 8, 2019

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No.	Document Name	Filed Date
268.	(PART 2 OF 3) DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND TAXABLE COSTS	Feb. 8, 2019
269.	(PART 3 OF 3) DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND TAXABLE COSTS	Feb. 8, 2019
270.	DEFENDANTS' OBJECTION TO PLAINTIFF'S PROPOSED FORM OF JUDGMENT	Feb. 8, 2019
271.	ORDER	Feb. 12, 2019
272.	ME: ORDER SIGNED [02/12/2019]	Feb. 15, 2019
273.	(PART 1 OF 2) REPLY IN SUPPORT OF PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Feb. 20, 2019
274.	(PART 2 OF 2) REPLY IN SUPPORT OF PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Feb. 20, 2019
275.	AMENDED JUDGMENT	Apr. 15, 2019
276.	NOTICE OF APPEARANCE	Apr. 30, 2019
277.	STIPULATION TO SET SUPERSEDEAS BOND	Apr. 30, 2019
278.	NOTICE OF APPEAL	May. 3, 2019
279.	ORDER SETTING SUPERSEDEAS BOND	May. 6, 2019
280.	NOTICE OF DEPOSIT WITH THE COURT	May. 17, 2019
281.	(PART 1 OF 2) NOTICE OF POSTING CASH SUPERSEDEAS BOND	May. 17, 2019
282.	(PART 2 OF 2) NOTICE OF POSTING CASH SUPERSEDEAS BOND	May. 17, 2019
283.	NOTICE OF TRANSCRIPT ORDER AND STATEMENT OF ISSUES ON APPEAL	May. 20, 2019
284.	NOTICE OF CROSS APPEAL	May. 22, 2019



TMS VENTURES LLC VS ZACHARIAH, ET AL

**Electronic Index of Record
MAR Case # CV2016-005381**

APPEAL COUNT: 2

RE: CASE: UNKNOWN

DUE DATE: 05/03/2019

CAPTION: TMS VENTURES LLC VS ZACHARIAH, ET AL

EXHIBIT(S): ALREADY AT COURT OF APPEALS

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): ORIGINAL DEPOSITION INCLUDED IN THE INDEX OF RECORD

TRANSCRIPT(S): NONE

COMPILED BY: rivASF on May 24, 2019; [2.5-17026.63]
\\ntfsnas\C2C\C2C-2\CV2016-005381\Group_02

CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005381

03/29/2017

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

UNDER ADVISEMENT RULING

Plaintiff's November 16, 2016 Motion for Partial Summary Judgment re: Access and Utilities is under advisement following argument. At issue is whether an easement exists over Defendants' properties to provide access to Plaintiff's property.

1. Background.

The properties at issue are on the north side of Camelback Mountain, and Phoenix Title and Trust Company ("Phoenix Title") owned them in 1959. That year, it created the Stone Canyon East subdivision by recording a subdivision plat ("the Plat") creating several lots, including those at issue here: Lots 22, 23, 24 and 25. It included a dedicated easement for San Miguel Avenue, which provides access to Lots 22, 23, 24 and 25.

At the time, Phoenix Title also owned a parcel to the south of those lots ("the Property"). San Miguel Avenue is the closest road to the Property, but does not abut it. Rather, to reach the Property from San Miguel Avenue, it is necessary to cross Lots 22, 23, 24 and/or 25.

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The Property is not part of the Stone Canyon East subdivision, and the Plat did not dedicate an easement that would allow access to the Property. Thus, when the Plat was recorded, the Property became land-locked.

Whether Phoenix Title intended this or not, it attempted a fix in 1960 by recording an “Easement for Roadway.” The Easement for Roadway states that it dedicates a 50-foot easement from San Miguel Avenue to the Property. Portions of the easement are on Lots 22, 23, 24 and 25.

Phoenix Title sold Lots 22, 23, 24 and 25 along with others in the subdivision. The original deed for Lot 24 expressly referenced the Easement for Roadway. The original deed for Lot 25 does not, although a subsequent conveyance did refer to the Easement for Roadway. No deed conveying Lots 22 or 23 referenced the Easement for Roadway, but the owners of those lots had actual notice of it.

Portions of Lot 22’s and Lot 23’s driveways are in the claimed easement, but the evidence is conflicting regarding how the claimed easement has been used over the years.

Plaintiff owns the Property, and argues three theories for why it has a valid easement over Defendants’ properties. Defendants own Lots 22, 23 and 24. The owner of Lot 25 does not contest Plaintiff’s claim.

2. Common Law Dedication.

Plaintiff argues, first, that Phoenix Title effected a common law dedication of easement for a roadway. A common law dedication requires (1) an offer by the owner of land to dedicate the easement and (2) acceptance by the general public. *Pleak v. Entrada Prop. Owners’ Ass’n*, 207 Ariz. 418, 423-24, 87 P.3d 831, 836-37 (2004). “No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice.” *Id.* at 424, 87 P.3d at 837.

Phoenix Title’s 1960 recording evinces a clear intent to dedicate a roadway easement through Lots 22, 23, 24 and 25. So the question is whether it was ever accepted. An offer to dedicate is accepted if subsequent deeds explicitly reference the deed of dedication. *Lowe v. Pima Cty.*, 217 Ariz. 642, 646, 177 P.3d 1214, 1218 (App. 2008).

Here, deeds conveying two of the servient parcels reference the Easement for Roadway: the initial deed conveying Lot 24 and a subsequent deed conveying Lot 25. But no deed to Lots 22 or 23 reference the Easement for Roadway. Although the owners of those lots may have had notice of the claimed easement, a common law easement requires acceptance, not just notice.

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A common law easement can also be accepted by usage. But the evidence regarding usage is insufficient to warrant summary judgment for Plaintiff on this issue.

3. Private Easement.

Next, Plaintiff argues that it has a private easement under Section 2.1(1)(b) of the Restatement, which says:

A servitude is created . . . if the owner of the property to be burdened . . . conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community....

Restatement (Third) of Property (Servitudes) § 2.1(1)(b) (2000). The Easement for Roadway was not a declaration of servitudes for the Stone Canyon East subdivision; rather it attempted to establish a public road easement through that subdivision to the Property, which was not part of the subdivision. So Plaintiff argues that the Easement for Roadway itself established a different general-plan development, one that included the Property along with Lots 22, 23, 24 and 25.

“General-plan development” is defined as “a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude imposed to effectuate a plan of land-use controls for the benefit of the property owners in the development or neighborhood.” Restatement (Third) of Property (Servitudes) § 1.7(1) (2000). Applying this definition, there was no general-plan development that included both the Property and its neighbors. The Easement for Roadway did not create a real estate development or neighborhood; it purported only to create a roadway easement. **So it did not create a private easement** under Restatement § 2.1(1)(b).

4. Implied Way of Necessity.

Third, Plaintiff argues that it has an implied way of necessity. “Under the common law, where land is sold that has no outlet, the vendor by implication of the law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property.” *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991). To establish an implied easement, Plaintiff must show (1) common ownership of the parcels, (2) severance of the claimed dominant parcel from the claimed servient parcel, (3) at the time of severance, the dominant parcel had no outlet, and (4) reasonable necessity for access existed at the time of severance. *College Book Centers, Inc. v. Carefree Foothills Homeowners’ Ass’n*, 225 Ariz. 533, 541, 241 P.3d 897, 905 (App. 2010). The Restatement standard is similar, though it adds what

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amounts to an affirmative defense: “unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.” Restatement (Third) of Property (Servitudes) § 2.15 (2000).

The evidence establishes the first three elements. The land that became the Property and Lots 22, 23, 24 and 25 was under common ownership and, when the Property was severed from the rest, it became land-locked. There is no evidence of any outlet to the Property other than through Defendants’ properties.

It is not clear from the record, however, that access to the Property was reasonably necessary at the time of severance. Rather, there is a fact dispute over whether the Property can be (or could have been at the time of severance) reasonably developed given its topography. This fact issue precludes summary judgment on the issue of implied easement.

5. Adverse Possession.

Assuming there is an easement, Defendants claim it has been lost by adverse possession. Plaintiff argues that Defendants cannot prove this defense. To prove adverse possession of an easement, Defendants must show acts adverse to the easement for ten years. *Sabino Town & Country Estates Ass’n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). The evidence on this issue is conflicting so as to preclude summary judgment.

6. Order.

Based on the foregoing,

IT IS ORDERED denying the Motion.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

9.28.2018 8:00am

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09/24/2018

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

CORY LEON BROADBENT
DOCKET-CIVIL-CCC

JUDGMENT
(UNDER ADVISEMENT RULING)

Following the trial held on July 30, 31, August 1, 2, 3, and 6, 2018, the court makes the following findings of facts and conclusions of law.

1. Plaintiff TMS Ventures, LLC is the owner of undeveloped property consisting of approximately 3.44 acres, located on the north side of Camelback Mountain in the Town of Paradise Valley, Arizona. *See* Stipulated Facts for Trial ¶1. The property is referred to herein as “the TMS Property.”
2. Defendants own residential properties, known as Lots 22 through 25 of the Stone Canyon East subdivision, which are either adjacent to or in close proximity to the TMS Property. *Id.* ¶¶3-4.
3. Plaintiff purchased the TMS Property on November 16, 2012. *Id.* ¶2.
4. Defendants Teresa C. and Joe Zachariah (“Zachariahs”) purchased Lot 22 of the Stone Canyon East subdivision on June 25, 2010. *Id.* at ¶6.

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5. Defendant Roseanne T. Appel (“Appel”) purchased Lot 23 of the Stone Canyon East subdivision on August 31, 2009. *Id.* at ¶7.
6. Defendants Ingrid Lenz and Alfred Harrison, as Trustees of the Ingrid Lenz Harrison Revocable Trust Under Agreement Dated November 19, 1999, as amended (“Harrisons”), purchased Lot 24 of the Stone Canyon East subdivision on June 12, 2009. *Id.* at ¶8.
7. Defendant Jerry D. Smith, Trustee of the JDS Trust dated August 22, 2005 (“Smith”) purchased Lot 25 of the Stone Canyon East subdivision on June 19, 2006. *Id.* at ¶9.
8. Plaintiff plans to build a home on the TMS Property.
9. The TMS Property is bounded on the West, South and partially on the East by land owned by the City of Phoenix. *Id.* at ¶5.
10. Turning back in time, in December 1958, Phoenix Title and Trust Company (“Phoenix Title”) acquired title to land that contains the TMS Property (the “Remainder Parcel”) and all of the land that later became the Stone Canyon East subdivision. *Id.* at ¶10.
11. On February 27, 1959, Phoenix Title caused the Stone Canyon East subdivision plat (the “Plat”) to be recorded. *Id.* at ¶11. The Plat included Lots 1 through 25. *See* Exhibit 2.
12. The Plat dedicated San Miguel Avenue and the other streets shown in the Plat to the public. *See* Stipulated Facts for Trial at ¶12. The Plat indicated that San Miguel Avenue has a total dedication width of 50 feet (25 feet on each side of the centerline). *See id.* at ¶13.
13. San Miguel Avenue is a public roadway, maintained by the Town of Paradise Valley. *Id.* at ¶14.
14. On March 1, 1960, Phoenix Title recorded a document entitled “Easement for Roadway” in Docket 3178, Page 402, Maricopa County Recorder’s Office (hereinafter referred to as “the Easement” or “Easement for Roadway”). *Id.* at ¶15.

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15. The Easement for Roadway stated that Phoenix Title “does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes” and that it is “a public way for vehicular and foot traffic thereon.” *See* Exhibit 1.
16. The Easement for Roadway included two stated purposes: “to increase the width of San Miguel Avenue as shown on said plat and to provide for another roadway not shown on said plat.” *Id.*
17. The Easement for Roadway set forth the dedicator’s intent to expand the dedicated area of San Miguel Avenue by an additional 25 feet on both sides of the road “so that the roadway is increased a total width of 50 [feet] over the width shown in the plat of said Stone Canyon East.” *Id.*
18. The Easement for Roadway also stated that it grants a 50-foot easement for roadway purposes leading from San Miguel Avenue to the TMS Property, legally described as:

A strip of land 25’ wide along the N. side and a strip of land 25’ wide along the S. line of the lot line separating Lots 22 and 23, and 25’ wide N. of the S. border of said subdivision in Lots 24 and 25.

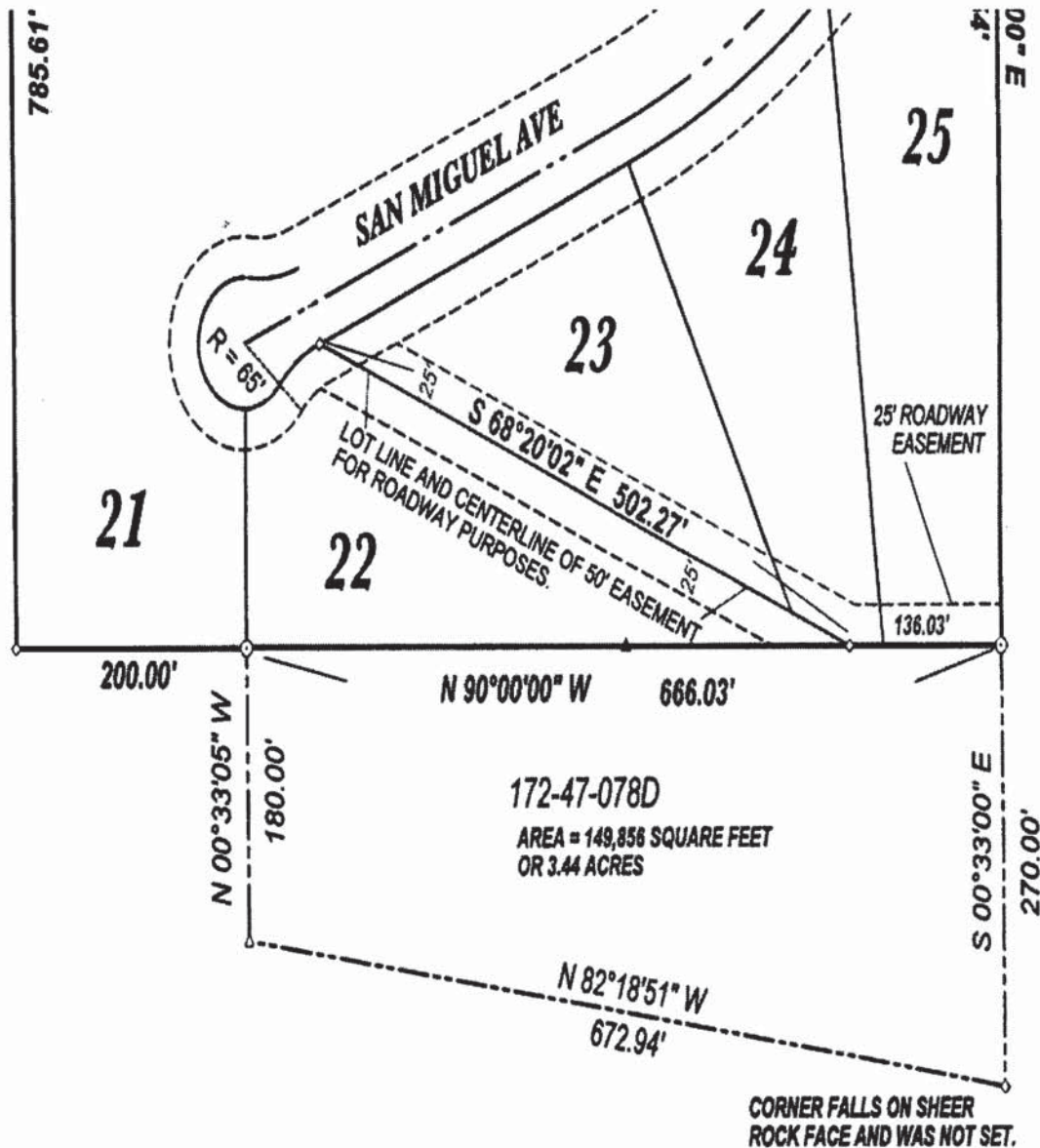
Id.

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19. The Easement for Roadway area of the new roadway extended from San Miguel Avenue to the TMS Property.



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20. The Easement for Roadway intended to burden Lots 16, 19, 20, 21, 22, 23, 24, and 25. *Id.*
21. At the time of recordation of the Easement for Roadway, Phoenix Title owned Lots 16, 19, 20, 21, 22, 23, 24, 25, and the Remainder Parcel, including the TMS Property. *See* Stipulated Facts for Trial ¶16; *see also* Exhibits 3, 4, 164, 165, 176, 186, and 188. After recordation of the Plat but prior to recordation of the Easement for Roadway, Phoenix Title sold seven Stone Canyon East Lots; however, none of the Lots sold prior to the March 1, 1960 were burdened by the Easement for Roadway. *See* Exhibits 157 through 163.
22. The Remainder Parcel was not landlocked by the recordation of the Plat because Phoenix Title continued to own the platted lots in the subdivision that could be used to access the Remainder Parcel, which included the TMS Property.
23. After the Easement for Roadway had been recorded, Phoenix Title conveyed title to Lots 22 through 25 and the Remainder Parcel as follows:
 - a. Special Warranty Deed from Phoenix Title for Lot 25 recorded on March 30, 1961 at Document Number 1961-0118063, Maricopa County Recorder's Office. *See* Exhibit 176.
 - b. Special Warranty Deed from Phoenix Title conveyed the TMS Property and other property South of the Stone Canyon East subdivision to Frank and Catherine D. Riley (1/3 interest), Theodore A. and Marianna Rehm (1/3 interest) and C. Tim and Mildred Jane Rodgers (1/3 interest) on October 25, 1961. *See* Exhibit 3. This conveyance severed Phoenix Title's common ownership of the Remainder Property from Lots 22, 23, and 24.
 - c. Special Warranty Deed from Phoenix Title to Ralph Luikart and Georgiana Jane Luikart for Lot 24 recorded on March 15, 1962 at Document No. 1962-0075189, Maricopa County Recorder's Office. *See* Exhibit 187.
 - d. Special Warranty Deed from Phoenix Title for Lot 22 recorded on June 5, 1964 at Document Number 1964-0213434, Maricopa County Recorder's Office. *See* Exhibit 164.

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Owners' Ass'n, 207 Ariz. 418, 423-24, 87 P.3d 831, 836-37 (2004).

A. An offer by the owner of the land to dedicate the easement

29. "No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice." *Id.* at 424, 87 P.3d at 837 (citation omitted).
30. Based on the credible evidence and testimony presented at trial, the court finds that the unambiguous language of the Easement for Roadway and the act of recording the Phoenix Title's 1960 Easement for Roadway demonstrates a clear intent of the donor to dedicate a 50-foot easement for roadway purposes leading from San Miguel Avenue to the TMS Property, legally described as:

A strip of land 25' wide along the N. side and a strip of land 25' wide along the S. line of the lot line separating Lots 22 and 23, and 25' wide N. of the S. border of said subdivision in Lots 24 and 25.

31. The Easement for Roadway did not include use restrictions. Moreover, the Easement for Roadway did not attempt to restrict usage to the public by failing to extend the easement to the boundary of the relevant properties. Instead, the express language of the Easement for Roadway stated the donor's intent to grant "an easement for roadway purposes" that is "a public way for vehicular and foot traffic thereon." *See* Exhibit 1.
32. The court finds that the first element of common law dedication, i.e., an offer by the owner of the land to dedicate the easement, is satisfied.

B. Acceptance by the general public

33. Next the court turns to acceptance by the general public. The element of "acceptance by the general public" is met if a conveyance document refers to the dedicatory instrument. *Pleak*, 207 Ariz. at 418 ¶ 23, 87 P.3d at 837; *see also Lowe v. Pima County*, 217 Ariz. 642, 647, ¶19, 177 P.3d 1214, 1219 (App. 2008)("[W]hen a conveying instrument expressly refers to a prior dedication,

adhere to the statement that "Phoenix Title's 1960 recording evinces a clear intent to dedicate a roadway easement through Lots 22, 23, 24, and 25." Instead, the findings and decisions herein are based on the credible evidence and testimony at trial.

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‘knowledge of the dedication can be imputed to the title holder.’”).

34. In this case, Phoenix Title conveyed Lot 24 on March 15, 1962 by a Special Warranty Deed. The Special Warranty Deed included an express reference to the Easement for Roadway. *See* Exhibit 4.
35. On July 26, 1963, Ben and Marian Dale Cheney conveyed Lot 25 by Warranty Deed that made specific reference to the Easement for Roadway. *See* Exhibit 5.²
36. Although **not expressly included in the conveyance document**, unlike the plaintiffs in *Lowe v. Pima County*, at the time the Zachariahs and Ms. Appel purchased Lots 22 and 23, each Defendant had **actual knowledge** of the recordation of the Easement for Roadway. 217 Ariz. at 647, ¶20, 177 P.3d at 1219; .*cf* *Neal v. Hunt*, 112 Ariz. 307, 311, 541 P.2d 559, 563 (1975)(“Constructive and actual knowledge have the same effect.”)(citation omitted).
37. Prior to purchasing Lot 23 on August 31, 2009, Ms. Appel obtained a title insurance policy in July 2009 that expressly identified the Easement for Roadway as an exception to coverage. *See* Exhibit 14.³
38. Like Ms. Appel, prior to purchasing their property, the Zachariahs were aware of the recorded Easement for Roadway, which expressly dedicated an easement across Lot 22 for the benefit of the TMS Property. In fact, in a proposed, signed addendum to their purchase contract, the Zachariahs expressly acknowledged the existence of the Easement for Roadway, stating:

An easement was discovered on the south side of the subject property which would enable a buyer ingress/egress to the 3.4 acre parcel located on the north side of the subject.

See Exhibit 22. In this proposed addendum, the Zachariahs cited the easement as a basis for a lower purchase price.

39. Despite their attempt to negotiate a price reduction over the easement, Dr. Teresa

² Phoenix Title also conveyed Lot 16 on March 8, 1963 by a deed that made specific reference to the Easement for Roadway, and on April 11, 1968, Billie and Freda Nutt Hanks conveyed Lots 16 and 20 by Warranty Deed that made specific reference to the Easement for Roadway.

³ The Zachariahs also obtained a title insurance policy for Lot 22 that expressly identified the Easement for Roadway as an exception to coverage. *See* Exhibit 17.

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Zachariah testified that they bought Lot 22 because she believed the easement was invalid and unenforceable. Dr. Teresa Zachariah based her alleged belief on a conversation with Bill Mead, a Paradise Valley Town Engineer and her real estate agent, Jay Kronmiller. Mr. Mead informed Dr. Teresa Zachariah that Paradise Valley did not have any interest in or intent to build a road leading from San Miguel Avenue to the TMS Property. However, the lack of interest in using or maintaining the easement by the Town of Paradise Valley does not invalidate the easement. *See Hunt v. Richardson*, 216 Ariz. 114, 19, ¶14, 163 P.3d 1064, 1069 (App. 2007).

40. The court finds that the Zachariahs knew about the existence of the Easement for Roadway prior to purchasing Lot 22, and they understood that a purchaser of the TMS Property could attempt to use the easement to access the TMS Property from San Miguel Avenue even though the Town of Paradise Valley did not intend to build and maintain a public roadway on the Easement. In purchasing Lot 22 with actual knowledge of the Easement for Roadway, the Zachariahs accepted the dedication.
41. Communications between Plaintiff and Defendant Teresa Zachariah further corroborate her awareness of the easement. When Plaintiff mentioned the easement as the basis for his request to use the Zachariah property to access the TMS Property, the response was not, "What are you talking about; what easement?" Instead, the dialogue was a respectful, cordial neighborly discussion about facilitating access to protect the privacy of the Zachariahs and allow access to the TMS Property.
42. After purchase, Dr. Teresa Zachariah even discussed the process for allowing continuous access to the TMS Property across the easement area, stating "as you get to the point access is needed on continuance basis, [I] can leave the gate to . . . remain open set hours and set to close at night – [I] would think this would be best all around." *See Exhibit 212; see also Exhibits 30-31.*
43. Hoping that the easement did not really exist is insufficient to outweigh the credible evidence and testimony regarding actual knowledge of the easement.
44. The post-purchase conduct of the Zachariahs and Appels further supports that the Zachariahs and Ms. Appel bought their property knowing of the existence of the dedicated easement across their respective property. In 2012, Drs. Teresa and Joseph Zachariah along with other Defendant neighbors attempted to purchase the TMS Property for \$600,000.00 to donate the land to the Phoenix Mountain

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Preserve. The court finds that the act of attempting to purchase and donate the property was intended to eliminate the possibility that a person could build a home on the TMS Property and utilize the easement. The court finds that the owners of Lot 22 knew about the easement and hoped it would not be used in the future, but expressed a desire to join forces with other neighbors to pay in excess of half a million dollars to ensure no one would develop the property and use the easement.

45. Phoenix Title expressed its intent to dedicate the easement for public use and prior to purchase **each Defendant had actual or constructive notice** of the offer to dedicate and through purchase accepted the offer.
46. The court finds that Plaintiff proved the Easement for Roadway was **accepted by the general public**.
47. The court also addresses use as a means of proving acceptance by the public. *See Lowe*, 217 Ariz. at 647, 117 P.3d at 1219. The owners of Lots 20, 23, and 25 built driveways on the easement and freely use the easement to cross their neighbor's property without payment or permission. The owner of Lot 23 accesses her property by using the **shared driveway** on the portion of the easement located on Lot 22. Moreover, the prior owner of Lot 22 built a paved turn-around area benefitting Lot 22 that extends onto Lot 23. Also of note, the owner of Lot 20 built a driveway located within the Easement area across Lot 16, and the public uses a paved portion of San Miguel Avenue that was constructed outside the dedicated portion of the Plat but within the Easement area. *See Exhibit 48*.
48. Dr. Teresa Zachariah admitted that she has the legal right to use the portion of her driveway on Lot 23 and the Appels have the legal right to use the driveway in the easement across her property. Further, she acknowledged that she would violate the Appels' property rights if she chained off the portion of the Appels' driveway crossing Lot 22 through the easement area. *See also Evans v. Blankenship*, 4 Ariz. 307, 316, 39 P. 812, 813 (Ariz. Terr. 1895) ("Acceptance may be presumed if the gift is beneficial, and use [] is evidence that it is beneficial.") *quoting Abbott v. Cottage City*, 10 NE 325, 329 (Mass. 1887); *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283, 290, 179 P.2d 437, 441 (1947) ("The use by the purchasers of lots **and the general public** constitutes a sufficient acceptance.").
49. The court finds that Plaintiff proved the Easement for Roadway was **accepted by use**.
50. Based on the credible evidence and testimony presented at trial, the court finds

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that Plaintiff has satisfied all elements to demonstrate that an easement was created by common law dedication.

C. Recordation of the Plat

51. Defendants contend that the recordation of the Stone Canyon East subdivision Plat on February 27, 1959, precluded any subsequent easement that would increase the size of San Miguel Avenue or create a roadway leading to the TMS Property because the easement would change the size of the dedicated subdivision lots. The recordation of the Easement for Roadway did not affect the size of the burdened lots. “The effect of a common law dedication is that the public acquires an easement to use the property for the purposes specified, while the fee remains with the dedicator.” *Pleak*, 207 Ariz. at 421, ¶ 8, 87 P.3d at 834; *see also Smith v. Beesley*, 226 Ariz. 313, 319, 247 P.3d 548, 554 (App. 2011) (finding that a “plat does not function as a restrictive covenant.”); *Woodling v. Polk*, 473 S.W.3d 233, 238 (Mo. Ct. App. 2015)(“[I]f a developer does not include easements in the subdivision plat, he or she can create easements on an individual basis with each lot owner at the time of sale in the conveyance deeds, or even by contract after sale.”); *Jones v. Nichols*, 765 N.E.2d 153 (Ind. Ct. App. 2002) (creating an easement which burdens platted property does not require replatting of the property).

D. A.R.S. §9-474 et seq.

52. Defendants also argue that the subdivision statutes (A.R.S. §§ 9-474 through 9-479) are the only means to establish a public right-of-way, and that common law dedication cannot be applied to a subdivision plat. Although A.R.S. §9-474 et seq. establishes a process for qualified landowners to transfer fee to dedicated areas within a platted subdivision for public use, the statutory means of dedication does not preclude a landowner from granting an easement for public use across the landowner’s own property. *See Smith*, 226 Ariz. at 319, 247 P.3d at 554 (“[The] plat does not function as a restrictive covenant.”); *accord Territory v. Richardson*, 8 Ariz. 336, 76 P.456 (1904); *Champie v. Castle Hot Springs Co.*, 27 Ariz. 463, 233 P. 1107 (1925); *Pleak*, 207 Ariz. at 422 ¶15, 87 P.3d at 835(recognizing that some roads are without legal status as either public highways or private ways). A.R.S. §9-474 et seq. did not abrogate or eliminate Phoenix Title’s ability to grant to the public an easement to pass over its privately owned property.

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E. Declaration of Restrictions

53. Defendants claim that the Declaration of Restrictions against Lots 22 through 25 prevented Phoenix Title from granting the Easement for Roadway because the easement from San Miguel Avenue to the TMS Property benefitted non-Stone Canyon East Properties. *See* Defendants'/Counterclaimants' Bench Memorandum Regarding Legal Access filed 8/9/18 at 6-9. The court does not find that any specific provision of the Declaration of Restrictions prevented Phoenix Title on March 1, 1960 from granting the easement across Lots 22, 23, 24, and 25.⁴

IMPLIED WAY OF NECESSITY

54. Plaintiff alternatively seeks a declaration in Count 4 of its Second Amended Complaint that if the Easement for Roadway is not enforceable as a common law dedication it may be enforced as an implied way of necessity. Although unnecessary, to ensure completeness of the record, the court enters the following findings and conclusions of law related to implied way of necessity.
55. To establish that an easement exists as an implied way of necessity Plaintiff must prove the following elements: (1) the dominant property and servient property were under common ownership; (2) severance of common ownership; (3) no outlet for the dominant property at the time of severance; and (4) access across the servient property was reasonably necessary when severance occurred. *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 541, 241 P.3d 897, 905 (Ct. App. 2010); *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d

⁴ For example, Paragraph 11 of the Declaration of Restrictions states: "The native growth on said property, including cacti, shall not be destroyed or removed from any of the lots in said subdivision except such native growth as it may be necessary to remove for the construction and maintenance of roads, driveways, dwelling houses, garages or gardens *relating to said residence* and walled-in service yards and patios . . ." (Emphasis added). Defendants argue that "relating to said residence" modifies "road" and thus prohibits the creation of any road that does not relate to or benefit a Stone Canyon East lot. The court disagrees with Defendants' interpretation of the Declaration of Restrictions. *See* Exhibit 156. Applying the last antecedent rule to Paragraph 11 demonstrates that "relating to said residence" modifies "garages or gardens" not "roads." Moreover, as noted in *Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Ass'n*, 178 S.W.3d 384, 391 (Ct. App. Tex. 2005), cited by Defendants, doubts about the meaning of restrictive covenants "should be resolved in favor of the free and unrestricted use of the premises, and any ambiguity must be strictly construed against the party seeking to enforce the restrictive covenant."

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957, 960 (App. 1991)(“Establishment of an implied way of necessity is dependent on a unity of ownership of the dominant and servient estates, followed by severance thereof.”).

56. Plaintiff asserts that severance of common ownership of Lots 22, 23, 24, and the TMS Property occurred on October 25, 1961 when Phoenix Title conveyed the TMS Property to Frank and Catherine D. Riley (1/3 interest), Theodore A. and Marianna Rehm (1/3 interest), and C. Tim and Mildred Jane Rodgers (1/3 interest).
57. The court agrees.⁵ See *Siemsen v. Davis*, 196 Ariz. 411, 414-15, ¶14, 998 P.2d 1084, 1087-88 (App. 2000) (“factual predicates . . . are original unity of title and subsequent severance”); *Tobias v. Dailey*, 196 Ariz. 418, 421, ¶13, 998 P.2d 1091, 1094 (Ct. App. 2000) (“[f]ormer unity of title and subsequent separation are factual predicates”); Restatement (Third) of Property (Servitudes) § 2.15, comment c (an implied way of necessity “arises only when the conveyance severs interests held in a single ownership”).
58. At the time of severance on October 25, 1961, no outlet for the TMS Property existed.
59. Citing *Gulotta v. Triano*, 125 Ariz. 144, 145, 608 P.2d 81, 82 (App. 1980), Defendants contend that Phoenix Title intentionally landlocked the TMS Property when it recorded the Plat for the Stone Canyon East subdivision.
60. However, the court finds that the credible evidence and testimony revealed that Phoenix Title did not intentionally landlock the TMS Property; instead, Phoenix Title attempted to provide access by recording the Easement for Roadway.

⁵ Defendants claim that this court previous found as a matter of law that the TMS Property was “landlocked” when the Plat was recorded. See Defendants’/Counterclaimants’ Supplemental Bench Memorandum filed 8/9/18 at 2. The court clarified that it did not intend to foreclose adjudication of any fact by using the term “landlocked.” As stated in footnote 1 above, when the court does not actually decide a particular issue, the prior decision is ambiguous, or the decision did not address the merits, law of the case does not apply. See *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993). Therefore, the court finds that the limitations of law of the case do require this judicial officer to adhere to an implication that recordation of the Plat landlocked the TMS Property. Instead, the findings and decisions herein are based on the credible evidence and testimony at trial.

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61. Defendants also argue that the October 25, 1961 transfer of the TMS Property from Trustee to Cestui que Trust did not sever common ownership for purposes of an implied way of necessity. The court disagrees.
62. The court finds that the first three elements of implied way of necessity have been satisfied.
63. Next the court turns to whether Plaintiff proved that access across the servient property was reasonably necessary when severance occurred. The court finds based on the credible evidence and testimony that access across the servient property was reasonably necessary in or around October 25, 1960. In support of this conclusion, the court finds that the TMS Property was reasonably developable in 1960. Developing the property would have been expensive and complex; however, the court finds based on the credible testimony of multiple experts that the TMS Property was reasonably developable in 1960.
64. The court finds that neither the language nor the circumstances of the conveyance established an intent to deprive the TMS Property of rights to access.
65. The court further finds that the best location for the implied way of necessity is within the area over Lots 22, 23, and 24 described in the 1960 Easement for Roadway.
66. The court concludes that even if a common law dedication was not proven (which it was), Plaintiff also proved, in the alternative, the existence of an implied way of necessity over Lots 22, 23, and 24.
67. Given the findings set forth above, the court does not address statutory private way of necessity.

CONCLUSION

Having considered the testimony and evidence, the court enters the following orders:

1. Plaintiff is entitled to enforce the Easement for Roadway as a common law dedication.
2. Plaintiff also proved in the absence of a common law dedication that it is entitled to enforce the easement identified on the Easement for Roadway across Lots 22,

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23, and 24 as an implied way of necessity.

3. Defendants' counterclaims are dismissed with prejudice, excepting Count 8, which will be tried separately.
4. Plaintiff is entitled to recover its attorneys' fees and costs pursuant to A.R.S. § 12-1103.⁶
5. The court expressly determines that, with respect to its ruling regarding common law dedication, implied way of necessity, the right to receive attorneys' fees and costs pursuant to A.R.S. § 12-1103, and all counterclaims with the exception of Count 8 of the Counterclaim, there is no just reason for delay. Therefore, the court directs the entry of judgment, making this is a final, appealable order. Ariz. R. Civ. P. 54(b).


JUDGE OF THE SUPERIOR COURT

⁶ The court finds submission of an application for attorneys' fees and costs prior to resolution of Count 8 is premature.

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Chris DeRose, Clerk of Court
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12/05/2018 8:00 AM

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12/03/2018

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

CORY LEON BROADBENT

RULING

The court received and considered Defendants'/Counterclaimants' Motion to Amend Findings of Fact filed October 16, 2018, Plaintiff's Response filed October 20, 2018, and Defendants'/Counterclaimants' Reply filed October 31, 2018.

A court is required to make findings of "ultimate facts." The court has reviewed Defendants'/Counterclaimants' requested amendments to the court's September 24, 2018 decision and concludes no "ultimate facts" are missing from the findings. *See Ellingson v. Fuller*, 20 Ariz.App. 456, 460, 513 P.2d 1343, 1343 (App. 1973) ("The purpose behind requiring the trial court, upon request, to mak[e] findings of fact, is to enable an appellate court to examine the basis upon which the trial court relied in reaching its ultimate judgment."). The court concludes the basis for the trial court's decision is set forth in the September 24, 2018 ruling. However, upon review of the pleadings and the ruling,

IT IS ORDERED granting, in part, Defendants'/Counterclaimants' Motion to Amend Findings of Fact and correcting the following findings in the September 24, 2018 ruling:

53. Defendants claim that the Declaration of Restrictions against Lots 22 through 25 prevented Phoenix Title from granting the Easement for Roadway because the

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easement from San Miguel Avenue to the TMS Property benefitted non-Stone Canyon East Properties and constituted a “structure” under Arizona law. *See* Defendants’/Counterclaimants’ Bench Memorandum Regarding Legal Access filed 8/9/18 at 6-9. The court does not find that any specific provision of the Declaration of Restrictions prevented Phoenix Title on March 1, 1960 from granting the easement across Lots 22, 23, 24, and 25.¹

56. Plaintiff asserts that severance of common ownership of Lots 22, 23, 24, and the Remainder Parcel occurred on October 25, 1961 when Phoenix Title conveyed the Remainder Parcel to Frank and Catherine D. Riley (1/3 interest), Theodore A. and Marianna Rehm (1/3 interest) and C. Tim and Mildred Jane Rodgers (1/3 interest).
58. At the time of severance on October 25, 1961, no outlet for the Remainder Parcel existed.
59. Citing *Gulotta v. Triano*, 125 Ariz. 144, 145, 608 P.2d 81, 82 (App. 1980), Defendants contend that Phoenix Title intentionally landlocked the Remainder Parcel when it recorded the Plat for the Stone Canyon East subdivision.
60. However, the court finds that the credible evidence and testimony revealed that Phoenix Title did not intentionally landlock the Remainder Parcel; instead, Phoenix Title attempted to provide access by recording the Easement for Roadway.
61. Defendants also argue that the October 25, 1961 transfer of the Remainder Parcel from Trustee to Cestui que Trust did not sever common ownership for purposes of

¹ For example, Paragraph 11 of the Declaration of Restrictions states: “The native growth on said property, including cacti, shall not be destroyed or removed from any of the lots in said subdivision except such native growth as it may be necessary to remove for the construction and maintenance of roads, driveways, dwelling houses, garages or gardens *relating to said residence* and walled-in service yards and patios . . .” (Emphasis added). Defendants argue that “relating to said residence” modifies “road” and thus prohibits the creation of any road that does not relate to or benefit a Stone Canyon East lot. The court disagrees with Defendants’ interpretation of the Declaration of Restrictions. *See* Exhibit 156. Applying the last antecedent rule to Paragraph 11 demonstrates that “relating to said residence” modifies “garages or gardens” not “roads.” Moreover, as noted in *Raman Chandler Properties, L.C. v. Caldwell’s Creek Homeowners Ass’n*, 178 S.W.3d 384, 391 (Ct. App. Tex. 2005), cited by Defendants, doubts about the meaning of restrictive covenants “should be resolved in favor of the free and unrestricted use of the premises, and any ambiguity must be strictly construed against the party seeking to enforce the restrict covenant.”

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an implied way of necessity. The court disagrees.

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Chris DeRose, Clerk of Court
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12/20/2018 8:00 AM

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12/17/2018

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

CORY LEON BROADBENT

UNDER ADVISEMENT RULING

The court considered Plaintiff/Counterdefendant TMS Ventures, LLC's (hereinafter referred to as "Plaintiff") Motion for Summary Judgment Re: Nuisance Counterclaim, Defendants/Counterclaimants' (hereinafter referred to as "Defendants") Response, and Plaintiff's Reply. The court also received Defendants' Supplemental Citation to Legal Authority and Plaintiff's Motion to Strike Defendants' Supplemental Citation to Legal Authority.

IT IS ORDERED denying Plaintiff's Motion to Strike Defendants' Supplemental Citation to Legal Authority. Based on the ruling, the court also considered Defendants' Supplemental Citation to Legal Authority.

By way of background, Plaintiff filed its Complaint against Defendants on April 25, 2016, asserting several claims related to legal access to Plaintiff's property. Defendants counterclaimed regarding legal access and alleged a claim for anticipatory nuisance regarding Plaintiff's proposed construction of a roadway and associated hillside residence. The court bifurcated the legal access and nuisance claims, ordering a bench trial on the legal access claims with a separate jury trial on the anticipatory nuisance claim.

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Following the bench trial, the trial court ruled that Plaintiff is entitled to enforce the Easement for Roadway as a common law dedication, and in the absence of a common law dedication, Plaintiff is entitled to enforce the easement identified on the Easement for Roadway across Lots 22, 23, and 24 as an implied way of necessity. Now, the case has entered the second phase in which Defendants allege a claim for anticipatory nuisance and request declaratory judgment and a permanent injunction. *See* Answer and Counterclaim, Eighth Claim for Relief, requesting declaratory relief that Plaintiff's future actions in fracturing, excavating, and constructing a private road on the disputed easement area over and across Lots 22, 23, and 24 will substantially and unreasonably interfere with Defendants' use and enjoyment of their residence and outdoor living space including through the exposure of Defendants to the foreseeable risk and danger that boulders and rocks will become dislodged from the disputed easement area and/or the Property and physically trespass upon Lots 22, 23, and/or 24 causing death, personal injury, and/or property damage and forever enjoining Plaintiff its successors and assigns from fracturing, excavating, and constructing a roadway over and across Lots 22, 23, and 24 and any parts thereof, and forever enjoining Plaintiff from fracturing, excavating, and filling the Property for the purpose of constructing a residence thereon.

Plaintiff filed a Motion for Summary Judgment, arguing that Defendants have failed to meet the factual burden necessary to avoid summary judgment on claims for anticipatory nuisance and permanent injunction.

"The law is well settled that in order to enjoin an anticipated nuisance, the nuisance must be highly probable." *See McQuade v. Tucson Tiller Apts., Ltd*, 25 Ariz. App. 312, 315 (App. 1975); *see also Kubby v. Hammond*, 68 Ariz. 17, 26 (1948)("The erection of a building to be used for a certain business will not be restrained on the ground of anticipating nuisance therefrom where it is not necessarily a nuisance but may become one under some circumstances. The anticipated injury being contingent and possible only, the court will refrain from interfering.")(quoting *Murphy v. Cupp*, 31 S.W.2d 396, 401 (Ark. 1930)); *Grossman v. Hatley*, 21 Ariz. App. 581, 585 (App. 1974).

Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, ¶15 (2006); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482 ¶14 (2002); *Orme School v. Reeves*, 166 Ariz. 301, 309, (1990); Ariz. R. Civ. P. 56(a). Summary judgment is "not intended to resolve factual disputes and is inappropriate if the court must determine the credibility of witnesses, weigh the quality of evidence, or choose among competing inferences." *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, 393, (App. 2010); *State Comp. Fund v. Yellow Cab Co.*, 197 Ariz. 120, 123, ¶11 (App. 1999). It is the "party moving for summary judgment who bears the 'burden of persuasion.' . . . This burden of persuasion never shifts to the non-moving party. . . . The moving party's burden is

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a ‘heavy’ one: all reasonable inferences from the evidence are made in the non-moving party’s favor.” *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 17 (App. 2012).

Plaintiff argues that judgment as a matter of law is proper because Defendants have failed to establish that it is highly probable a nuisance will arise. *See* Plaintiff’s Motion for Summary Judgment at 6-11. Defendants, on the other hand, claim that: 1) the Plaintiff’s proposed construction of a roadway and associated residence will unreasonably interfere with Defendants’ use and enjoyment of their property and cause damages; and 2) that Defendants’ injury is highly probable. *See generally* Defendants’ Response. More specifically, Defendants assert that Plaintiff’s proposed construction of the roadway and residence will: 1) decrease their property values; 2) place Defendants at a greater risk of boulder dislodgement and structural damage to their property; and 3) deprive them of the enjoyment of their properties due to traffic, noise, vibration and other construction activities. *Id.* at 4.

The Town of Paradise Valley has not approved construction of the roadway leading to Plaintiff’s property or for any residence on Plaintiff’s property. Defendants’ injury is merely possible, not highly probable. Future construction of the roadway and residence is, at best, possible, and to the extent construction occurs, the extent of the construction, the plan for stabilizing boulders and minimizing risk to Defendants’ property, and the duration of construction is unspecified and uncertain. And Defendants’ proffered testimony by Paul G. Johnson that use of Defendants’ driveway to access Plaintiff’s property will reduce the value of each of Zachariah’s and Appel’s property by half a million dollars is insufficient to create a genuine issue of fact adequate to withstand Plaintiff’s Motion for Summary Judgment of Defendants’ claim for declaratory and permanent injunctive relief.¹ *Id.* at 4 & 9-10, quoting Defendants’ Statement of Facts ¶54, *citing* Paul G. Johnson’s deposition testimony; *see Kubby*, 68 Ariz. at 26 (“The proper remedy for minor inconveniences arising from an alleged nuisance lies in action for damages, rather than injunction.”).

¹ The court acknowledges in certain cases injunctive relief may be necessary to prevent the potential for serious injury or death. However, here, the potential risk of serious injury or death created by Plaintiff’s proposed construction of a roadway and residence is undefined, theoretical, and not highly probable. The mere claim that Defendants’ property value may decrease as a result of Plaintiff’s potential development of a roadway and residence does not serve as a basis for injunctive or declaratory relief. *Compare City of Tucson v. Apache Motors*, 74 Ariz. 98, 101 (1952)(finding the measure of damages in a permanent nuisance case is the difference between the market value of the premises immediately before and its market value immediately after completion of the structure creating the nuisance) *with Brenteson Wholesale, Inc. v. Arizona Public Serv., Co.* 166 Ariz. 519, 522-23 (App. 1990) (permitting injunction based on the potential harm of serious bodily injury or death from an airplane drifting into power lines).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005381

12/17/2018

Because the court is granting Plaintiff's Motion for Summary Judgment without prejudice, the court is not ruling on Plaintiff's claim that Defendants are not entitled to declaratory judgment on the tort claim of anticipatory nuisance.

IT IS ORDERED granting Plaintiff's Motion for Summary Judgment without prejudice.

The court previously entered decision on all remaining counts and ordered that Plaintiff was entitled to recover attorneys' fees and costs pursuant to A.R.S. § 12-1103, finding that submission of an application for attorneys' fees and costs prior to resolution of Defendants' Eight Claim for Relief was premature. The court has now ruled on Defendants' Eight Claim for Relief.

IT IS ORDERED that no later than **20 calendar days** after the filing date of this order, Plaintiff must submit a proposed form of judgment, which includes Rule 54(c) language. As part of its form of judgment, Plaintiff may leave blank spaces for an award attorney's fees and taxable costs previously awarded pursuant to A.R.S. § 12-1103.

IT IS FURTHER ORDERED that Plaintiff may, no later than **20 calendar days** after the filing date of this order, submit an application for an award of attorneys' fees and a statement of costs pursuant to A.R.S. § 12-1103. If Defendants wish to oppose the application for attorneys' fees and costs, a response must be filed no later than 20 calendar days after service of the application or statement.

Grant with New Order

See eSignature page

BURCH & CRACCHIOLO, P.A.

702 EAST OSBORN ROAD

PHOENIX, ARIZONA 85014

TELEPHONE (602) 274-7611

Andrew Abraham, SBA # 007322, aabraham@bcattorneys.com

Bryan F. Murphy, SBA # 006414, bmurphy@bcattorneys.com

Casey S. Blais, SBA # 026202, cblais@bcattorneys.com

Attorneys for Plaintiff/Counterdefendant

Clerk of the Superior Court

*** Electronically Filed ***

K. Ballard, Deputy

4/15/2019 8:00:00 AM

Filing ID 10349404

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited
liability company,

Plaintiff,

v.

TERESA C. ZACHARIAH and JOE
ZACHARIAH, wife and husband;
ROSANNE T. APPEL, a married woman
as her sole and separate property;
INGRED LENZ HARRISON and ALFRED
HARRISON, or their successors, as Trustees
of The Ingrid Lenz Harrison Revocable Trust
Under Agreement Dated November 19, 1999,
as amended; JERRY D. SMITH, Trustee of
the JDS Trust Dated August 22, 2005; JOHN
DOES I-Z, JANE DOES 1-X; ABC
CORPORATIONS I-X; BLACK AND
WHITE PARTNERSHIPS I-X and XYZ
LIMITED LIABILITY COMPANIES 1-X,

Defendants.

TERESA C. ZACHARIAH AND JOE
ZACHARIAH, et al.

Counterclaimants,

v.

TMS VENTURES, LLC, an Arizona limited
liability company,

Counterdefendant.

Case No. CV2016-005381

AMENDED JUDGMENT

The Court, having granted Judgment in favor of Plaintiff TMS Ventures, LLC,
and against the Defendants on all claims and counterclaims,

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED amending the
2 Judgment entered on September 28, 2018 in favor of TMS Ventures and against
3 Defendants Teresa C. Zachariah and Joe Zachariah husband and wife, Roseann T.
4 Appel, Ingrid Lenz Harrison and Alfred Harrison, as Trustees of The Ingrid Lenz
5 Harrison Revocable Trust Under Agreement Dated November 19, 1999, and hereby
6 incorporating by reference the following rulings:

7 (a) Judgment (Under Advisement Ruling) entered on September 28, 2018
8 regarding the Easement;

9 (b) Ruling entered on December 5, 2018 thereby amending ¶¶ 53, 56, 58-61
10 of the Judgment;

11 (c) Under Advisement Ruling entered on December 20, 2018 dismissing the
12 anticipatory nuisance counterclaim without prejudice;

13 IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting in favor
14 of Plaintiff TMS Ventures, LLC and jointly and severally against Defendants Teresa C.
15 Zachariah and Joe Zachariah husband and wife, Roseann T. Appel, Ingrid Lenz
16 Harrison and Alfred Harrison, as Trustees of The Ingrid Lenz Harrison Revocable
17 Trust Under Agreement Dated November 19, 1999, an award of attorneys' fees in the
18 amount of \$369,410.25 and costs in the amount of \$4,466.43 for work performed by
19 Burch & Cracchiolo, P.A. and costs in the amount of \$8,947.42 for work performed by
20 Beus Gilbert PLLC.

21 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that interest shall
22 accrue on the above sums at the statutory rate of 6.25% per annum until paid in full.

23 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no further
24 matters remain pending and this judgment is entered pursuant to Rule 54(c).

25 DONE IN OPEN COURT this 12th day of April, 2019.

26
27 _____
28 HONORABLE PAMELA GATES
Judge of the Superior Court

eSignature Page 1 of 1

Filing ID: 10349404 Case Number: CV2016-005381
Original Filing ID: 10046115

Grant with New Order



/S/ Pamela Gates Date: 4/12/2019
Judicial Officer of Superior Court

APP107

ENDORSEMENT PAGE

CASE NUMBER: CV2016-005381

SIGNATURE DATE: 4/12/2019

E-FILING ID #: 10349404

FILED DATE: 4/15/2019 8:00:00 AM

CASEY SCOTT BLAIS

CORY LEON BROADBENT

FRANCIS J SLAVIN

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Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
K. Laird, Deputy
8/19/2016 10:22:00 AM
Filing ID 7658657

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Casey S. Blais, SBA # 026202, cblais@bcattorneys.com
Attorneys for Plaintiffs

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

TMS VENTURES, LLC, an Arizona
limited liability company,

Plaintiff / Counterdefendant,

vs.

TERESA C. ZACHARIAH and JOE
ZACHARIAH, wife and husband;
ROSANNE T. APPEL, a married woman
as her sole and separate property; INGRID
LENZ HARRISON and ALFRED
HARRISON, or their successors, as
Trustees of The Ingrid Lenz Harrison
Revocable Trust Under Agreement Dated
November 19, 1999, as amended; JERRY
D. SMITH, Trustee of the JDS Trust Dated
August 22, 2005; JOHN DOES I-Z, JANE
DOES I-X; ABC CORPORATIONS I-X;
BLACK AND WHITE PARTNERSHIPS
I-X; and XYZ LIMITED LIABILITY
COMPANIES I-X;

Defendants / Counterclaimant.

No.: CV2016-005381

**VERIFIED SECOND AMENDED
COMPLAINT**

(Quiet Title / Declaratory Judgment /
Injunction)

(Assigned to the Honorable Randall
Warner)

Plaintiff TMS Ventures, LLC (“Plaintiff” or “TMS”), through counsel
undersigned, files this Second Amended Complaint and alleges as follows:

1 **PARTIES & JURISDICTION**

2 1. Plaintiff TMS Ventures, LLC is an Arizona limited liability company with
3 its principal place of business in Maricopa County, Arizona.

4 2. Upon information and belief, Defendants Teresa C. Zachariah and Joe
5 Zachariah, wife and husband, are residents of Maricopa County, Arizona.

6 3. Upon information and belief, Defendant Rosanne T. Appel, is a resident of
7 Arapahoe County, Colorado.

8 4. Upon information and belief, Defendants Ingrid Lenz Harrison and Alfred
9 Harrison, as Trustees of the Ingrid Lenz Harrison Revocable Trust Under Agreement
10 Dated November 19, 1999, as amended, are residents of Hennipen County, Minnesota.

11 5. Upon information and belief, Defendant Jerry D. Smith, Trustee of the
12 JDS Trust dated August 22, 2005, is a resident of Maricopa County, Arizona.

13 6. Defendants John Doe I-X and Jane Doe I-X, ABC Corporations I-X, Black
14 and White Partnerships I-X, and XYZ Limited Liability Companies I-X, all represent
15 unknown parties who own or claim entitlement to the real property or easement
16 described in this Complaint and/or have caused events to occur as described herein. The
17 true names of these defendants are unknown. Plaintiff will request leave to amend its
18 Complaint when the true names are ascertained.

19 7. All of the Defendants shall collectively be referred to as the "Defendants."

20 8. Venue is proper in this court pursuant to A.R.S. § 12-401(12).

21 9. The court has subject matter jurisdiction over this matter because it
22 concerns real property located in Maricopa County, Arizona, and there is *in personam*
23 jurisdiction over the Defendants above named with respect to the claims alleged in this
24 Complaint.

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• • • •

1 18. Defendant Rosanne T. Appel is the owner of Lot 23 of the Stone Canyon
2 East subdivision, commonly known as 5507 E. San Miguel Avenue, Paradise Valley,
3 Arizona 85253. Defendant acquired title to her property by virtue of a Warranty Deed
4 recorded on August 31, 2009 at Document No. 2009-0808938, M.C.R.. A true and
5 correct copy of said deed is attached as Exhibit D and incorporated by this reference.

6 19. Defendants Ingrid Lenz Harrison and Alfred Harrison, as Trustees of the
7 Ingrid Lenz Harrison Revocable Trust Under Agreement Dated November 19, 1999, as
8 amended, are the owners of Lot 24 of the Stone Canyon East subdivision, commonly
9 known as 5519 E. San Miguel Avenue, Paradise Valley, Arizona 85253. Defendant
10 acquired title to her property by virtue of a Special Warranty Deed recorded on June 12,
11 2009 at Document No. 2009-0537533, M.C.R.. A true and correct copy of said deed is
12 attached as Exhibit E and incorporated by this reference.

13 20. Defendant Jerry D. Smith, Trustee of the JDS Trust dated August 22,
14 2005, is the owner of Lot 25 of the Stone Canyon East subdivision, commonly known as
15 5525 E. San Miguel Avenue, Paradise Valley, Arizona 85253. Defendant acquired title
16 to her property by virtue of a Warranty Deed recorded on June 19, 2006 at Document
17 No. 2006-0819362, M.C.R.. A true and correct copy of said deed is attached as Exhibit
18 F and incorporated by this reference.

19 21. Plaintiff purchased the Property on or about November 16, 2012 pursuant
20 to the Warranty Deed recorded that same date in Maricopa County Recorder's Office
21 Document No. 2012-1046521, a true copy of which is attached as Exhibit G and
22 incorporated by this reference.

23 22. Prior to purchasing the Property, the Plaintiff knew about and relied upon
24 the Easement, which provided for ingress and egress leading to the Property.
25
26

1 23. Upon information and belief, Phoenix Title and Trust Company (“Phoenix
2 Title”) was a subdivision trust company used to create the Stone Canyon East
3 subdivision.

4 24. At all times relevant to the Easement, Phoenix Title held common
5 ownership of the real property that included the Plaintiff’s Property, and Defendants’
6 property (Lots 22, 23, 24, and 25).

7 25. The Easement’s stated purpose is to “increase the width of San Miguel
8 Avenue as shown on said plat and **to provide for another roadway not shown in said**
9 **plat.**” See Exhibit A (emphasis added).

10 26. The Easement created a roadway easement across the Defendants’
11 properties:

12 **NOW, THEREFORE ... Phoenix Title and Trust Company**
13 **... does hereby grant to the County of Maricopa, State of**
14 **Arizona, an easement for roadway purposes ... as contained**
15 **herein and as set forth below, said easement to be over the**
 following described premises:

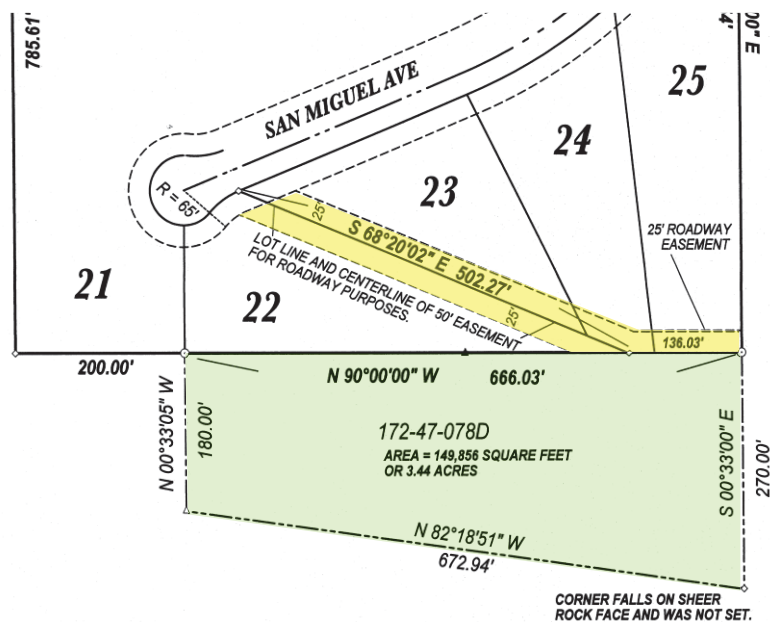
16 **[...] A strip of land 25’ wide along the N. side**
17 **and a strip of land 25’ wide along the S. line**
18 **of the lot line separating Lots 22 and 23, and**
 25’ wide N. of the S. border of said
 subdivision in Lots 24 and 25.

19 27. As stated therein, the recorded Easement consists of twenty-five feet (25’)
20 along each side of the common boundary line between Lot 22 and Lot 23, and twenty-
21 five feet (25’) along the southern boundary line of Lot 24 and Lot 25.

22 28. As depicted below, the Easement (highlighted in yellow) provides for a
23 roadway leading from San Miguel Avenue to the Plaintiff’s Property (highlighted in
24 green):

25

26



29. The Easement constitutes the only express legal access to the Plaintiff's Property.

30. Plaintiff seeks a declaration from the court that it is entitled to use the Easement for ingress and egress to and from the Property.

31. The Easement has been partially constructed and a portion of the Easement serves as a roadway leading to Lot 22 and Lot 23.

32. Phoenix Title recorded the Easement for Roadway in 1960 while it owned the Property and the lots encumbered by the easement (Lots 22, 23, 24, and 25).

33. Following the recording of the Easement, Phoenix Title sold Lots 22, 23, 24, and 25 and the Property to third-parties with express language in the various deeds that title was taken "subject to ... easements" of record.

34. On or about March 15, 1962, Phoenix Title recorded the conveyance of Lot 24 to Ralph and Georgiana Jane Luikart by Special Warranty Deed "subject to...Easement for roadway as granted to County of Maricopa by instrument rec. in Docket 3178, page 402; Easement for roadway as granted to County of Maricopa by

1 instrument rec. in Docket 3178, page 402.” A true and correct copy of said deed is
2 attached as Exhibit H and incorporated by this reference.

3 35. On or about July 26, 1963, Ben B. and Marian Dale Cheney (who obtained
4 title to Lot 25 by Phoenix Title on March 30, 1961) recorded the conveyance of Lot 25
5 to Carl E. and Mildred I. Mellen by Warranty Deed “subject to the following:...4.
6 Easement and rights incident thereto for roadway over said premises, as set forth in
7 instrument recorded March 1, 1960, in Docket 3178, page 402.” A true and correct copy
8 of said deed is attached as Exhibit I and incorporated by this reference.

9 36. Upon information and belief, Defendants purchased their lots (Lots 22, 23,
10 24, and 25) with actual and/or constructive knowledge of the Easement.

11 37. Defendants are bound by the terms and restrictions imposed by the
12 Easement.

13 38. On or about March 31, 2016, and more than 20 days before filing this
14 lawsuit, Plaintiff, through its attorney, tendered to Defendants a written demand to
15 acknowledge the Easement, together with a Quit Claim Deed and \$5.00 cash pursuant to
16 A.R.S. § 12-1103(B). A copy of the letters are attached as Exhibit J and incorporated by
17 this reference.

18 39. Despite demand, Defendants have not signed the Quit Claim Deed or
19 responded to the letters sent by Plaintiff.

20 40. Plaintiff is entitled to its reasonable attorneys’ fees and costs pursuant to
21 A.R.S. §§ 12-1103.

22 COUNT I

23 **(Quiet Title / Declaratory Judgment – Express Easement)**

24 41. Plaintiff incorporates all of the allegations contained in the preceding
25 paragraphs as if fully stated here.
26

1 42. An express public easement for ingress and egress exists from San Miguel
2 Avenue to the Plaintiff's Property.

3 43. The Easement was acknowledged and accepted by at least the following
4 actions: (i) the deeds for Lots 24 and 25 contain an express acknowledgement of the
5 recorded Easement, (ii) the owners of Lots 22 and 23 have utilized the Easement for
6 ingress and egress to their respective properties for many years.

7 44. Prior to purchasing Lot 22, Defendants Zachariah were aware that the
8 Easement existed and acknowledged that it allowed access to the Property. The
9 purchase price paid by the Zachariahs was negotiated down to reflect the value of Lot 22
10 with the Easement.

11 45. Upon information and belief, Defendants claim there is no such easement,
12 which is adverse to Plaintiff's title and usage of the Property.

13 46. Defendants' claims are without any right, and Defendants have no right,
14 title, estate, lien or interest superseding Plaintiff's use and entitlement to the Easement.

15 47. Plaintiff seeks a determination that the Easement is valid and enforceable
16 and that Plaintiff is entitled to use the Easement for ingress and egress for the benefit of
17 its Property.

18 48. A real and present controversy exists between the parties because
19 Defendants refuse to recognize and honor the right of Plaintiff to use the Easement for
20 ingress and egress to the Property.

21 49. Defendants have refused and continue to refuse to recognize Plaintiff's
22 right to go on and use the Easement for access, ingress and egress to Plaintiff's Property.

23 **WHEREFORE,** Plaintiff requests the following relief against all Defendants:

24 A. For a declaratory judgment regarding Plaintiff's right to the use and enjoy
25 of the Easement for roadway purposes over and across those portions of Lots 22, 23, 24,
26

1 and 25, as expressly stated in the recorded Easement for Roadway and quieting title to
2 the same in favor of and benefitting Plaintiff;

3 B. For an order permanently and perpetually enjoining Defendants from
4 interfering in any manner with Plaintiff's use of the Easement;

5 C. For an award of attorneys' fees and costs pursuant to A.R.S. § 12-1103;

6 D. For such other relief as this court deems just and proper.

7 **COUNT II**

8 **(Quiet Title/Declaratory Judgment as to Implied Easement)**

9 50. Plaintiff incorporates all of the allegations contained in the preceding
10 paragraphs as if fully stated here.

11 51. If no express easement exists in favor of Plaintiff, then Plaintiff is entitled
12 to an easement by implication for ingress and egress across portions of the real property
13 owned by Defendants.

14 52. The land comprised of the Property and Defendants' real property was
15 owned by a common grantor (Phoenix Title) beginning in 1958.

16 53. Upon information and belief, the common grantor created the Stone
17 Canyon East subdivision, and the Property was not included in that subdivision.

18 54. On or about March 1, 1960, the common grantor (Phoenix Title) executed
19 and caused an "Easement for Roadway" to be recorded, a true and correct copy of which
20 is attached as Exhibit A hereto.

21 55. The common grantor stated in the "Easement for Roadway" that the
22 purpose of this document was "to increase the width of San Miguel Avenue as shown on
23 said plat and **to provide for another roadway not shown in said plat.**" *Id.*

24 56. As evidenced by the recorded Easement, the common grantor intended to
25 provide for ingress and egress to the Property from San Miguel Avenue.
26

A. For an order establishing a private way of necessity across as much of Defendants' property as necessary to provide ingress and egress to the Property;

B. For such other relief as the court deems appropriate.

COUNT V
(Injunction---TRO, Preliminary and Permanent)

71. Plaintiff incorporates all of the allegations contained in the preceding paragraphs as if fully stated here.

72. The Easement is an express easement that was recorded before Defendants acquired any interest in their property. Alternatively, Plaintiff's Property is benefitted by an implied easement in the same location as the Easement.

73. The Easement (express or implied) is fifty-feet (50') in width and extends from San Miguel Avenue to the Property.

74. The defendant owners of Lots 22 and 23 have maintained a secured gate at the entrance to the Easement which those Defendants can lock or unlock at their convenience.

75. Said gate has made it impossible for Plaintiff to use the Easement for ingress and egress to Plaintiff's Property.

76. Additionally Plaintiff believes Defendants will restrict access to the Easement (express or implied) while Plaintiff constructs the remaining portions of the Easement, so it can provide physical access to the Property within the boundaries of the Easement.

77. Plaintiff has no adequate remedy at law and has (and will) suffer irreparable harm.

78. Plaintiff's right to free and unrestricted ingress and egress to the Property is unique and difficult if not impossible to measure in monetary damages.

1 79. In addition or in the alternative, the actions by Defendants constitute a
2 breach of their covenant to Plaintiff's quiet and peaceful enjoyment of the Easement
3 (express or implied). Plaintiff seeks recovery of the actual and consequential damages
4 from the Defendants together with its reasonable attorneys' fees and costs.

5 80. For the reasons stated, Plaintiff requests that the court enjoin the
6 Defendants from restricting or impeding Plaintiff's use, access to, or construction of the
7 Easement, including but not limited to enjoining Defendants from maintaining a secured
8 gate across the Easement.

9 81. It is essential that the court temporarily restrain and/or enter a preliminary
10 injunction against Defendants prohibiting them from continuing the conduct described
11 above because those actions adversely affect the Plaintiff's right to use the Easement.

12 82. Upon application, the Defendants should be required to appear and show
13 cause why they should not be enjoined during the pendency of this lawsuit.

14 **WHEREFORE**, Plaintiff requests the following relief against all Defendants:

15 A. For a temporary restraining order and/or preliminary injunction restraining
16 Defendants, their agents, servants, guests or invitees from impeding or restricting
17 Plaintiff's use and enjoyment of the Easement (express or implied);

18 B. For a temporary and permanent injunction that restrains Defendants from
19 impeding or restricting Plaintiff's use and enjoyment of the Easement (express or
20 implied);

21 C. For a declaratory judgment regarding the terms, conditions, and location of
22 the Easement (express or implied);

23 D. For all actual and consequential damages to be proven at trial;

24 E. For an award of attorneys' fees and costs pursuant to A.R.S. § 12-1103;

25 F. For such other relief as this court deems just and proper.

26

1 **COUNT VI**

2 **(Implied Way of Necessity-All Lots and the Property)**

3 82. Plaintiff incorporates all of the allegations contained in the preceding
4 paragraphs as if fully stated here.

5 83. Beginning in 1958, Phoenix Title held title to the Property and the real
6 property that became Lots 22-25.

7 84. During the 1960s Phoenix Title severed that unity of ownership by
8 conveying the Property and Lots 22-25 to various third parties.

9 85. There was no outlet for ingress and egress to the Property.

10 86. A reasonable necessity for access to the Property existed at the time the
11 unity of ownership held by Phoenix Title was severed and said necessity exists today.

12 **WHEREFORE**, Plaintiff requests the following relief against all Defendants:

13 A. For an order establishing an implied way of necessity across as much of
14 Defendants' property as necessary to provide ingress and egress to the Property;

15 B. For an order regarding the terms, conditions, and location of the implied
16 way of necessity;

17 C. For all actual and consequential damages to be proven at trial;

18 D. For an award of attorneys' fees and costs pursuant to A.R.S. § 12-1103;

19 E. For such other relief as the court deems appropriate.

20 F. For all actual and consequential damages to be proven at trial;
21 For an award of attorneys' fees and costs pursuant to A.R.S. § 12-1103;

22 **DATED** this 19th day of August, 2016.

23 **BURCH & CRACCHIOLO, P.A.**

24 By: /s/ Andrew Abraham
25 Andrew Abraham
26 Bryan F. Murphy
Casey S. Blais

702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
Attorneys for Plaintiff

ORIGINAL of the foregoing filed
this 19th day of August, 2016 with:
Clerk of the Superior Court

COPY of the foregoing served by mail
and email this same date on:

Francis J. Slavin
Heather N. Dukes
FRANCIS J. SLAVIN, P.C.
2198 East Camelback Road, Suite 285
Phoenix, Arizona 85016
b.slavin@fjslegal.com
h.dukes@fjslegal.com
Attorneys for Defendants/Counterclaimants

/s/ Troy Redondo

VERIFICATION

I, Terrence M. Scali, as the managing member of TMS Ventures, LLC, hereby declare under the penalty of perjury:

1. That I am a resident of Arizona;
2. That I am competent and authorized to make this Verification;
3. That I have read the foregoing "Verified Second Amended Complaint" and know the contents thereof; and
4. That the allegations contained therein are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to those matters I believe them to be true.

DATED this 18th day of August, 2016.



Terrence M. Scali, as Managing Member of
TMS Ventures, LLC

BURCH & CRACCHIOLO, P.A.
702 EAST OSBORN ROAD
PHOENIX, ARIZONA 85014
TELEPHONE (602) 274-7611

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Bryan F. Murphy, SBA # 006414, bmurphy@bcattorneys.com
Casey S. Blais, SBA # 026202, cblais@bcattorneys.com
Attorneys for Plaintiff/Counterdefendant

Chris DeRose, Clerk of Court
*** Electronically Filed ***
M. De La Cruz, Deputy
6/25/2018 5:25:00 PM
Filing ID 9462172

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited
liability company,

Plaintiff,

v.

TERESA C. ZACHARIAH and JOE
ZACHARIAH, wife and husband;
ROSANNE T. APPEL, a married woman
as her sole and separate property;
INGRED LENZ HARRISON and ALFRED
HARRISON, or their successors, as Trustees
of The Ingrid Lenz Harrison Revocable Trust
Under Agreement Dated November 19, 1999,
as amended; JERRY D. SMITH, Trustee of
the JDS Trust Dated August 22, 2005; JOHN
DOES I-Z, JANE DOES 1-X; ABC
CORPORATIONS I-X; BLACK AND
WHITE PARTNERSHIPS I-X and XYZ
LIMITED LIABILITY COMPANIES 1-X,

Defendants.

TERESA C. ZACHARIAH AND JOE
ZACHARIAH, et al.

Counterclaimants,

v.

TMS VENTURES, LLC, an Arizona limited
liability company,

Counterdefendant.

Case No. CV2016-005381

**STIPULATED FACTS FOR
TRIAL**

(Complex Civil Case)

(Assigned to the Hon. Pamela Gates)

The parties, through their respective counsel undersigned, hereby submit their
Stipulated Facts and Law for Trial pursuant to Rule 16(g)(2)(A), Ariz. R. Civ. P., and
the Court's minute entries of January 26, 2018 and February 7, 2018.

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1 acquired title to land that contains the Property (the “Remainder Parcel”) and all of the
2 land to later become the Stone Canyon East subdivision.

3 11. On February 27, 1959, Phoenix Title caused the Stone Canyon East
4 subdivision plat (the “Plat”) to be recorded.

5 12. The Plat expressly states that it dedicates San Miguel Avenue and the
6 other streets shown in the Plat to the public.

7 13. The Plat states that San Miguel Avenue has a total dedicated width of 50
8 feet (25 feet on each side of the centerline).

9 14. San Miguel Avenue is a public roadway and is maintained by the Town
10 of Paradise Valley.

11 15. On March 1, 1960, Phoenix Title recorded a document entitled
12 “Easement for Roadway” in Docket 3178, Page 402, Maricopa County Recorder’s
13 Office (hereafter the “Easement”).

14 16. At the time the Easement was recorded, Phoenix Title owned the
15 Remainder Parcel and Lots 16 and 19-25 in Stone Canyon East subdivision.

16 17. The Easement was recorded to increase the width of San Miguel Avenue
17 as shown on the Stone Canyon East subdivision plat and “to provide for another
18 roadway not shown in said plat” described as:

19 “A strip of land 25’ wide along the N. side and strip of land 25’ wide
20 along the S. line of the lot line separating Lots 22 and 23, and 25’ wide
21 N. of the S. border of said subdivision in Lots 24 and 25.”

22 18. The Easement also states that the County may itself or grant to others the
23 right to place under the surface of the easement property any type of public utility
24 facilities so long as said facilities do not show above the surface in any manner
25 whatsoever.

26 19. After the Easement for Roadway had been recorded, Phoenix Title
27 conveyed title to Lots 22-25 and the Remainder Parcel, as follows:

28 a. Special Warranty Deed from Phoenix Title for Lot 25 recorded on March

- 1 30, 1961 at Document No. 1961-0118063, Maricopa County Recorder's
2 Office.
- 3 b. Special Warranty Deed from Phoenix Title for the Remainder Parcel
4 recorded on October 25, 1961 at Docket 3895, Page 476, Maricopa
5 County Recorder's Office.
- 6 c. Special Warranty Deed from Phoenix Title for Lot 24 recorded on March
7 15, 1962 at Document No. 1962-0075189, Maricopa County Recorder's
8 Office.
- 9 d. Special Warranty Deed from Phoenix Title for Lot 22 recorded on June
10 5, 1964 at Document No. 1964-0213434, Maricopa County Recorder's
11 Office.
- 12 e. Special Warranty Deed from Phoenix Title for Lot 23 recorded on March
13 10, 1966 at Document No. 1966-0035783. Maricopa County Recorder's
14 Office.
- 15 20. On June 5, 1964, John D. Ratliff obtained title to the Remainder Parcel,
16 including the Property, by virtue of the Warranty Deed recorded on June 5, 1964 at
17 Docket 5080, Page 19, Maricopa County Recorder's Office.
- 18 21. On June 30, 1964, Camelback Mountain Properties obtained title to the
19 Remainder Parcel, including the Property, by virtue of the Warranty Deed recorded on
20 June 30, 1964 at Docket 5110, Page 314, Maricopa County Recorder's Office.
- 21 22. On April 6, 1970, the City of Phoenix obtained title to the Remainder
22 Parcel, except for the Property, by virtue of the Warranty Deed recorded at Docket
23 8083, Page 449, Maricopa County Recorder's Office.
- 24 23. Taylor R. Coleman purchased Lot 22 by Warranty Deed recorded on
25 June 10, 1994 at Document No. 1994-0463126, MCR.
- 26 24. Taylor R. Coleman purchased the TMS Property by Special Warranty
27 Deed recorded on May 21, 1996 at Document No. 1996-0353874, MCR.
28

1 25. On November 13, 2002, ANMP 74th Street, LLC purchased Lot 22 and
2 the TMS Property by Warranty Deed on November 13, 2002 at Document No. 2002-
3 1198038, MCR, and by Warranty Deed on November 13, 2002 at Document No. 2002-
4 1198044, MCR, respectively.

5 26. On May 18, 2007, Taylor R. Coleman purchased the TMS Property and
6 Lot 22 by Special Warranty Deed on May 18, 2007 at Document No. 2007-0580188,
7 MCR, and by Special Warranty Deed on May 18, 2007 at Document No. 2007-
8 0580189, MCR, respectively.

9 27. On January 30, 2009, Pacific Art Publishing, LLC purchased the TMS
10 Property and Lot 22 based upon the Quit Claim Deed recorded at Document No. 2009-
11 0082020, MCR, and the Quit Claim Deed recorded at Document No. 2009-0082021,
12 MCR, respectively.

13 28. LaFamilia Management, LLLP acquired Lot 22 by Warranty Deed on
14 December 20, 2010 recorded at Document No. 2010-1139129, MCR.

15 29. LaFamilia Management, LLLP acquired the TMS Property by Warranty
16 Deed on November 16, 2012 recorded at Document No. 2012-1046521, MCR.

17 30. The Town of Paradise Valley (“Town”) incorporated on May 24, 1961.
18 The incorporation area included the Stone Canyon East Subdivision and the Remainder
19 Parcel.

20 31. The Town has adopted a Hillside Code for construction of homes in
21 defined hillside areas.

22 32. The Town has created a Hillside Building Committee to review
23 construction applications for adherence to the Town’s Hillside Code.

24 33. Plaintiff has filed an application with the Town’s Hillside Building
25 Committee for approval to allow the construction of a residence on the Property and
26 extending an existing paved area in a southeast direction over undeveloped hillside
27 along the common property line of Lots 22 and 23 and over the south 25 feet of Lots
28

1 24 and 25.

2 34. The Town's Hillside Building Committee has deferred taking any action
3 on Plaintiff's application pending the outcome of Plaintiff's lawsuit for access across
4 Lots 22-25.

5 35. There is an approximate 12-foot wide paved area leading from the East
6 San Miguel cul-de-sac up the hill to a landing area at the top of the paved area serving
7 Defendant Zachariah's residence located on Lot 22, Stone Canyon East.

8 36. Part of the paved area is located on Lot 23 owned by Defendant Appel
9 and is used by Lot 22.

10 37. Defendant Appel also gains access to her residence using the 12-foot
11 wide paved area on Lot 22 for a short distance from the East San Miguel cul-de-sac.

12 38. Near the top of the 12-foot wide paved area there is an electronically
13 controlled wrought iron security gate.

14 39. The gate was erected in 1987.

15 40. Access through the gate is controlled by Defendants Zachariah.

16 41. After Plaintiff purchased the Property, from time to time, upon the
17 request of Plaintiff, the Zachariahs have allowed Plaintiff and its contractors and
18 consultants access through the gate.

19 DATED this 25th day of June, 2018.

20 **BURCH & CRACCHIOLO, P.A.**

21
22 By: /s/ Andrew Abraham
23 Andrew Abraham
24 Bryan F. Murphy
25 Casey S. Blais
26 702 East Osborn Road, Suite 200
27 Phoenix, Arizona 85014
28 *Attorneys for Plaintiff/ Counterdefendant*

FRANCIS J. SLAVIN, P.C.

By: /s/ Francis J. Slavin
Francis J. Slavin

1 Daniel J. Slavin
2 2198 E. Camelback Road, Suite 285
3 Phoenix, Arizona 85012
4 *Attorneys for Defendants/ Counterclaimants*

5 ORIGINAL e-filed this 25th day of
6 June, 2018, and COPY delivered
7 through the AZ TurboCourt system to:

8 Honorable Pamela Gates
9 MARICOPA COUNTY SUPERIOR COURT

10 **BEUS GILBERT PLLC**

11 Cassandra H. Ayres
12 Cory L. Broadbent
13 701 North 44th Street
14 Phoenix, AZ 85008

15 By: /s/Melanie Wright

BURCH & CRACCHIOLO, P.A.
702 EAST OSBORN ROAD
PHOENIX, ARIZONA 85014
TELEPHONE (602) 274-7611

Andrew Abraham, SBA # 007322, aabraham@bcattorneys.com
Bryan F. Murphy, SBA # 006414, bmurphy@bcattorneys.com
Casey S. Blais, SBA # 026202, cblais@bcattorneys.com
Attorneys for Plaintiff/Counterdefendant

Chris DeRose, Clerk of Court
*** Electronically Filed ***
M. De La Cruz, Deputy
6/25/2018 6:03:00 PM
Filing ID 9462235

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited
liability company,

Plaintiff,

v.

TERESA C. ZACHARIAH and JOE
ZACHARIAH, wife and husband;
ROSANNE T. APPEL, a married woman
as her sole and separate property;
INGRED LENZ HARRISON and ALFRED
HARRISON, or their successors, as Trustees
of The Ingrid Lenz Harrison Revocable Trust
Under Agreement Dated November 19, 1999,
as amended; JERRY D. SMITH, Trustee of
the JDS Trust Dated August 22, 2005; JOHN
DOES I-Z, JANE DOES 1-X; ABC
CORPORATIONS I-X; BLACK AND
WHITE PARTNERSHIPS I-X and XYZ
LIMITED LIABILITY COMPANIES 1-X,

Defendants.

TERESA C. ZACHARIAH AND JOE
ZACHARIAH, et al.

Counterclaimants,

v.

TMS VENTURES, LLC, an Arizona limited
liability company,

Counterdefendant.

Case No. CV2016-005381

JOINT PRETRIAL STATEMENT

(Complex Civil Case)

(Assigned to the Hon. Pamela Gates)

Plaintiff TMS VENTURES, LLC, (“Plaintiff” or “TMS”) and
Defendants/Counterclaimants, TERESA C. ZACHARIAH and JOE ZACHARIAH;
and Defendants ROSANNE T. APPEL; INGRED LENZ HARRISON and ALFRED

HARRISON, as Trustees of The Ingrid Lenz Harrison Revocable Trust (collectively “Defendants” or individually (“Defendant Zachariah”, “Defendant Appel”, “Defendant Harrison”), through their respective counsel undersigned, hereby submit their Joint Pretrial Statement in this matter pursuant to Rule 16(g), Ariz. R. Civ. P., and the Court’s minute entries of January 26, 2018 and February 7, 2018.

1. List of Claims

At the Court’s request, the parties hereby list their claims as follows:

Cause of Action	Party(s) Asserting the Claim	Claim is Against
Quiet Title/Declaratory Judgment for Express Easement (Count I)	Plaintiff TMS Ventures, LLC	All Defendants
Quiet Title/Declaratory Judgment for Implied Easement (Count II)	Plaintiff TMS Ventures, LLC	All Defendants
Declaratory Judgment for Common Law Dedication (Count III)	Plaintiff TMS Ventures, LLC	All Defendants
Private Way of Necessity – A.R.S. § 12-1201 (Count IV)	Plaintiff TMS Ventures, LLC	All Defendants
Injunction – TRO, Preliminary and Permanent (Count V)	Plaintiff TMS Ventures, LLC	All Defendants
Implied Way of Necessity – All Lots and the Property (Count VI)	Plaintiff TMS Ventures, LLC	All Defendants
Quiet Title/Declaratory Judgment - Peaceable Ownership and Adverse Possession (Counterclaim: Count I)	Defendants Zachariah, Appel and Harrison	Plaintiff
Quiet Title/Declaratory Judgment - Merger and Extinguishment (Counterclaim: Count II)	Defendants Zachariah, Appel and Harrison	Plaintiff
Quiet Title/Declaratory Judgment - No Public	Defendants Zachariah, Appel and Harrison	Plaintiff

Easement (Counterclaim: Count III)		
Quiet Title/Declaratory Judgment - No Private Easement (Counterclaim: Count IV)	Defendants Zachariah, Appel and Harrison	Plaintiff
Quiet Title/Declaratory Judgment - No Implied Way of Necessity (Counterclaim: Count V)	Defendants Zachariah, Appel and Harrison	Plaintiff
Declaratory Judgment - Unlawful Attempt to Amend Stone Canyon East Subdivision Plat (Counterclaim: Count VI)	Defendants Zachariah, Appel and Harrison	Plaintiff
Declaratory Judgment - Easement Violates Declaration of Restrictions (Counterclaim: Count VII)	Defendants Zachariah, Appel and Harrison	Plaintiff

2. List of Trial Witnesses

See Witness List attached hereto as Exhibit A.

3. The Parties' Trial Exhibits

Plaintiff's Exhibits: *See* Exhibit List attached hereto as Exhibit B.

Defendants' Exhibits: *See* Exhibit List attached hereto as Exhibit C.

4. Deposition Designations

Plaintiffs intend to offer at trial the following proposed designations of deposition testimony:

David Bruce Appel, February 20, 2018, 43:15 thru 44:4; and 97:17 thru 98:7

John Kennedy Graham, March 13, 2018; 55:2-17

Gerry Lee Jones, April 9, 2018, 97:3-12 and 98:3-16

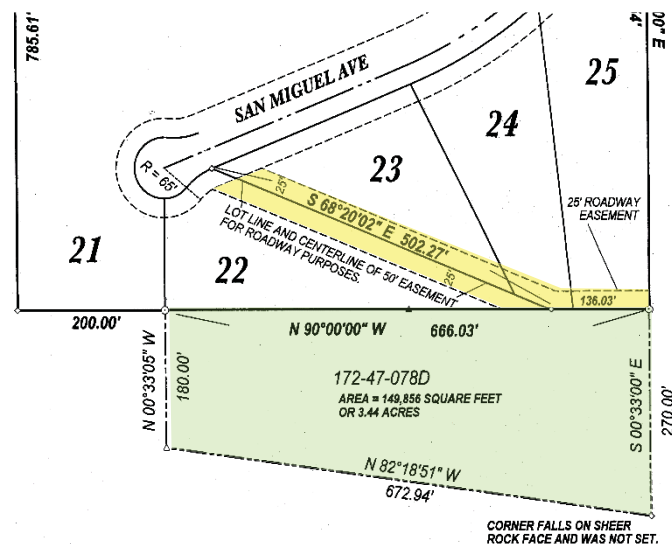
Defendants object to Plaintiff's use of the deposition designations for any purpose other than impeachment. Defendants do not intend to offer any proposed deposition summaries or designations of deposition testimony at trial, other than for impeachment

purposes.

5. Brief Statement of the Case

Plaintiff's Statement: The purpose of this lawsuit is to confirm that Plaintiff TMS Ventures, LLC has legal access and access for utilities to its property. Plaintiff's property is a vacant residential parcel, consisting of 3.44 acres and located on the north side of Camelback Mountain. It has an address of 5507 E. San Miguel Avenue. Plaintiff purchased the property in 2012, and the Defendants are the neighboring property owners.

Access to Plaintiff's property was created in 1960 when the common owner and subdivider (Phoenix Title) intentionally recorded an "Easement for Roadway" (to be marked as Exhibit 1). The recorded Easement is by far the single most important document in this lawsuit, as it reflects the express intent of the subdivider of Stone Canyon East to create legal access from San Miguel Avenue to Plaintiff's property. The Easement area of the new roadway (highlighted in yellow) leads from San Miguel Avenue to the Property (highlighted in green):



The Easement for Roadway establishes Plaintiff's legal access and access for utilities to the property (and across Defendants' properties at Lots 22-25). The evidence at trial

1 will prove that the Easement has been used by the public for decades and accepted by
2 the Town of Paradise Valley, and as such the easement constitutes a common law
3 dedication. Alternatively, Plaintiff will prove the same route of access by way of an
4 implied easement or a statutory private way of necessity (which is similar to a private
5 condemnation action).

6 Once Plaintiff has a ruling on its rights for legal access and utilities, Plaintiff
7 intends to submit plans to the Town of Paradise Valley to build a residence on the
8 property.

9 **Defendants'/Counterclaimants' Statement:** The TMS Property, consisting of
10 3.4 acres, was part of a larger parcel comprising approximately 23 acres which was
11 intentionally excluded from the Stone Canyon East Subdivision Plat. The 23 acres
12 consisted of a mountain slope of 53% commencing from its north property line and
13 extending to the steeper elevations lying to the south up Camelback Mountain to the
14 ridge line. This property is traversed by 3 storm drainage channels which carry storm
15 flows originating on the higher slopes of the mountain. There is an extensive boulder
16 field on the 23 acres which is interspersed with the storm water channels.

17 The 23 acres were part of a larger parcel of land conveyed to Phoenix Title &
18 Trust as trustee for the benefit of C. Tim Rodgers, Frank Riley, Theodore Rehm and
19 their spouses. The remainder of the larger parcel comprises Stone Canyon East
20 Subdivision Plat which was recorded in February 1959.

21 The Stone Canyon East Subdivision Plat consisted of 25 custom residential lots
22 with public streets. Lots 21-25 are the lots with the highest elevations in the
23 subdivision. East San Miguel Avenue terminated in a cul-de-sac abutting lots 19-23.
24 There were no streets set forth on the plat providing access from the cul-de-sac across
25 lots 22-25 to the 23 acres of steep mountain property.

26 The elevation of the East San Miguel cul-de-sac is approximately 1620 feet.
27 The lowest elevation of the 23 acres is approximately 1720 feet. In 1958 and 1959,
28

1 Maricopa County had a policy of not approving lots on Camelback Mountain above
2 1600 feet in elevation. C. Tim Rodgers had obtained plat approval on another
3 subdivision prior to the County's approval of the Stone Canyon East plat which
4 reportedly was required to conform to the 1600-foot elevation limit.

5 The trust beneficiaries, Messrs. Rodgers, Riley and Rehm and their spouses,
6 intentionally excluded the 23 acres of steep mountain property from the land
7 comprising the Stone Canyon East Subdivision Plat, which blocked legal and physical
8 access for the 23 acres to McDonald Drive to the north.

9 Phoenix Title & Trust and the trust beneficiaries intentionally and knowingly
10 severed the steep hillside 23-acre parcel from the land comprising the Stone Canyon
11 East plat and, therefore, are not entitled to claim a right of access across Defendants'
12 lots under the common law doctrine of implied way of necessity or the statutory private
13 way of necessity under A.R.S. § 12-1201 *et seq.* In addition, Plaintiff is not entitled to
14 gain access under the theory of common law dedication or by reason of a March 1960
15 Easement for Roadway recorded by Phoenix Title & Trust which was invalid because
16 there was no approval or acceptance by the then Town of Scottsdale, City of Phoenix
17 and Maricopa County.

18 The TMS Property is surrounded on its eastern, western and southern borders by
19 undeveloped land which functions as a nature preserve and belongs to the public. The
20 TMS Property has never been developed, and lacks legal access to ever be developed
21 in the future.

22 **6. Requested Technical Equipment**

23 The parties do not anticipate requiring technical equipment other than what is
24 already available in the courtroom.

25 **7. Requested Interpreters**

26 The parties are not aware of any witnesses or parties in need of an interpreter.

27 **8. Invocation of Rule 615**

1 The parties have invoked Rule of Evidence 615 to preclude the attendance of
2 non-party witnesses at trial.

3 **9. Settlement Efforts**

4 The parties engaged in a private mediation held on May 9, 2017 with Larry H.
5 Fleischman, which was not successful.

6 DATED this 25th day of June, 2018.

7 **BURCH & CRACCHIOLO, P.A.**

8
9 By: /s/ Andrew Abraham
10 Andrew Abraham
11 Bryan F. Murphy
12 Casey S. Blais
13 702 East Osborn Road, Suite 200
14 Phoenix, Arizona 85014
15 *Attorneys for Plaintiff/ Counterdefendant*

16 **FRANCIS J. SLAVIN, P.C.**

17 By: /s/ Francis J. Slavin
18 Francis J. Slavin
19 Daniel J. Slavin
20 2198 E. Camelback Road, Suite 285
21 Phoenix, Arizona 85012
22 *Attorneys for Defendants/ Counterclaimants*

23 ORIGINAL e-filed this 25th day of
24 June, 2018, and COPY delivered
25 through the AZ TurboCourt system to:

26 Honorable Randall Warner
27 MARICOPA COUNTY SUPERIOR COURT

28 **BEUS GILBERT PLLC**

Cassandra H. Ayres
Cory L. Broadbent
701 North 44th Street
Phoenix, AZ 85008

By: /s/ Casey S. Blais

Exhibit B

BURCH & CRACCHIOLO, P.A.

702 EAST OSBORN ROAD
PHOENIX, ARIZONA 85014
TELEPHONE (602) 274-7611

Andrew Abraham, SBA #007322, aabraham@bcattorneys.com
Bryan F. Murphy, SBA #006414, bmurphy@bcattorneys.com
Casey S. Blais, SBA #026202, cblais@bcattorneys.com

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TELEPHONE (480) 429-3000

Cory L. Broadbent/024049, cbroadbent@beusgilbert.com
Cassandra H. Ayres/025937, cayres@beusgilbert.com

Attorneys for Plaintiff/Counterdefendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited
liability company,

Plaintiff,

vs.

TERESA C. ZACHARIAH and JOE
ZACHARIAH, wife and husband; et al.,

Defendants.

TERESA C. ZACHARIAH and JOE
ZACHARIAH, wife and husband; et al.,

Counterclaimants,

vs.

TMS VENTURES, LLC, an Arizona limited
liability company,

Counterdefendant.

Case No.: CV2016-005381

**AFFIDAVIT OF CORY L. BROADBENT
IN SUPPORT OF DEFENDANTS'
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND COSTS**

(Complex Civil Case)

(Assigned to the Honorable Pamela Gates)

1 STATE OF ARIZONA)
2 County of Maricopa) ss.

3 Cory L. Broadbent, being first duly sworn upon his oath, deposes and states:

4 1. I am an attorney with the firm of Beus Gilbert PLLC (the "Firm"), which has
5 served as counsel for Plaintiff/Counterdefendant TMS Ventures, LLC ("TMS") in the above-
6 captioned action.

7 2. I am admitted to the practice of law in the State of Arizona.

8 3. I am one of the attorneys of record for TMS and submit this Affidavit in support
9 of Plaintiff's Application for Award of Attorneys' Fees.

10 4. I am familiar with the matters contained herein and make this Affidavit of my own
11 personal knowledge and belief.

12 5. Attached to this Affidavit, as Exhibit 1, is a summary which contains a description
13 of time and costs recorded by the Firm on behalf of the Defendants in connection with this
14 litigation.

15 6. This detailed description of the time commences on April 27, 2017 and continues
16 through and including December 31, 2018.

17 7. I am generally familiar with rates charged by other lawyers in this community with
18 similar experience, education and training and the rates charged by the Firm for the time
19 expended on this matter by the above-referenced attorneys are consistent with those rates.

20 8. As reflected in Exhibits 1 and 2 attached to this Affidavit, the total amount of
21 attorneys' fees billed to TMS is \$234,488.50.¹

22
23
24
25 ¹ The total amount of attorneys' fees includes Westlaw legal research fees, which are included
on Exhibit 2.

1 9. After reviewing the time records and evaluating the effort necessary to conduct
2 this litigation, I believe this amount is reasonable and appropriate.

3 10. Therefore, I request on behalf of the TMS that \$234,488.50 be awarded for TMS's
4 attorneys' fees incurred in responding to Defendants' counterclaims.


5 11. As reflected in the attached Exhibit 2, the total amount of taxable costs incurred
6 by TMS is \$8,947.42.

7 12. I also request that the TMS be awarded their costs in the amount of \$8,947.42.

8 FURTHER AFFIANT SAYETH NAUGHT.

9 DATED this 9th day of January, 2019.

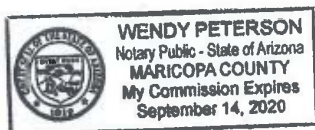
10 **BEUS GILBERT, PLLC**

11 
12 By _____
13 Cory L. Broadbent
14 701 N. 44th Street
15 Phoenix, AZ 85008
16 *Attorneys for Plaintiffs*

17 SUBSCRIBED AND SWORN to before me this 9th day of January, 2019, by Cory L.
18 Broadbent.

19 
20 _____
21 Notary Public

22 My commission expires:



Units Tally

Code	Description	Units	Our Cost	Client Cost
CACONF	Conference Call	0	\$12.39	\$12.39
CACRF	Court Reporter Fee	0	\$5,416.05	\$5,416.05
CAEWF	Expert Witness Fee	0	\$2,925.00	\$2,925.00
CAFF	Filing Fee	0	\$360.82	\$360.82
CAME	Meal Expense	0	\$39.33	\$39.33
CAMES	Outside Messenger Service	0	\$13.90	\$13.90
CAPAR	Parking	0	\$37.00	\$37.00
CASP	Subpoena	0	\$114.00	\$114.00
CATE	Travel Expense	0	\$4.00	\$4.00
CAUPS	United Parcel Service	0	\$83.33	\$83.33
EXBWC	Photocopy Expense	20747	\$5,186.75	\$5,186.75
EXCOL	Color Copies	938	\$1,407.00	\$1,407.00
EXDEL	Delivery Service	0	\$200.00	\$200.00
EXPSE	Postage Expense	12	\$17.65	\$17.65
EXSD	Scanned Documents	801	\$200.25	\$200.25
EXSOT	Secretarial Overtime	0	\$148.02	\$148.02
EXWEST	Westlaw Legal Research	0	\$1,748.00	\$1,748.00

WHEN RECORDED:
Mail to Phx T & T Co. Main Office
Trust Dept
Phoenix, Arizona

19600301_DKT_3178_402_2

Trust Nos. 2643 & 2644

DKT 3178 PAGE 402

EASEMENT FOR ROADWAY

WHEREAS, the undersigned Phoenix Title and Trust Company, an Arizona Corporation, as Trustee, has subdivided under the name of Stone Canyon East, part of Tract 4, O'Brien's Camelback Lands, a subdivision recorded in Book 18 of Maps at page 36 thereof, in the office of the County Recorder of Maricopa County, Arizona, and

WHEREAS, in connection therewith said Phoenix Title and Trust Company has recorded a plat as and for the plat of said Stone Canyon East, and

WHEREAS, it is now desired to increase the width of San Miguel Avenue as shown on said plat and to provide for another roadway not shown in said plat,

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, the said Phoenix Title and Trust Company, as Trustee, being fully instructed by the proper parties in interest so to do, does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes and for no other purpose, subject to all of the restrictions upon the use thereof, as contained herein and as set forth below, said easement to be over the following described premises:

A strip of land 25' wide on the S. side of the southerly line of San Miguel Avenue as shown in the plat, and a strip of land 25' wide on the N. side of said San Miguel Avenue as shown in the plat, said strips 25' wide to extend around the end of San Miguel Avenue so that the roadway is increased a total width of 50' over the width shown in the plat of said Stone Canyon East.

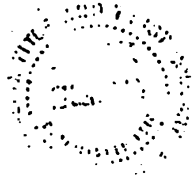
The easement granted above affects Lots 16, 20, 19, 21, 22, 23, 24 and 25.

Also the following:

A strip of land 25' wide along the N. side and a strip of land 25' wide along the S. line of the lot line separating Lots 22 and 23, and 25' wide N. of the S. border of said subdivision in Lots 24 and 25.

The easement hereby granted is for roadway purposes only and it is specifically intended that by granting the easement herein the County of Maricopa shall not have any right, either itself or to grant to others any right to maintain or place upon the premises covered hereby, any utilities, structures or maintain and erect any facilities upon said property, and that the only right granted hereby shall be to maintain a public way for vehicular or foot traffic thereon. However, it is specifically agreed that the said County may itself, or grant to others the right to place under the surface of the property described above, any type of public utility facilities so long as said facilities do not show above the surface in any manner whatsoever.

Dated at Phoenix, Arizona this 24th day of February, 1960.



PHOENIX TITLE AND TRUST COMPANY,
an Arizona corporation,
TRUSTEE

By [Signature]
Assistant Vice President

ATTEST: [Signature]
Notary Assistant Secretary

STATE OF ARIZONA
COUNTY OF MARICOPA

On this the 29th day of February 19 60 before me the undersigned officer personally appeared
R. Brehmer and B. A. Vitek

Assistant Secretary respectively of the PHOENIX TITLE AND TRUST COMPANY a corporation and that they as such officers respectively being authorized as to do executed the foregoing instrument for the purposes therein contained by signing the name of the corporation as Trustee by themselves as such officers respectively.

In witness whereof I have hereunto set my hand and official seal

My Commission Expires

4/2/60

DKT 3178 PAGE 403

[Signature]
Notary Public

STATE OF ARIZONA, County of Maricopa; ss.

I do hereby certify that the within instrument was filed and recorded at request of Phoenix Title & Trust Co.

on MAR 1 60 8:00 AM at DEED M. Docket 8178

Page 403 Records of Maricopa County, Arizona.

WITNESS my hand and official seal the day and year first above written.
N. KELLY, Maricopa County Recorder,
By [Signature] Deputy.

STATE OF ARIZONA

DKT 3895 PAGE 476

COUNTY OF MARICOPA

OCT 25 '61 - 8 00 AM

ss. I hereby certify that the within instrument was filed and recorded

In DOCKET

DKT 3895 PAGE 476

and indexed in DEEDS

at the request of **Phoenix Title & Trust Co.**

Witness my hand and official seal.

When recorded, mail to:

Theodore A. Rehm

P.O. Box 367

Scottsdale, Ariz.

N.C. "KELLY" MOORE, County Recorder,

Deputy Recorder

Fee No.

01-DEED

184333

Compared
Photostated
Fee:

1 15

Special Warranty Deed

For the consideration of Ten Dollars, and other valuable considerations, the undersigned PHOENIX TITLE AND TRUST COMPANY, an Arizona corporation, as Trustee, the Grantor herein, does hereby convey to **FRANK RILEY and CATHERINE D. RILEY, his wife, an undivided one-third interest; THEODORE A. REHM and MARIANNA REHM, his wife, an undivided one-third interest; and C. TIM RODGERS and MILDRED JANE RODGERS, his wife, an undivided one-third interest.** the Grantee, the following real property situated in Maricopa County, Arizona:

PARCEL NO. 1: That part of the East 1200 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18 of Maps, page 36, lying South of the South Line of STONE CANYON EAST, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona in Book 81 of Maps, page 34.

EXCEPT therefrom the East 334 feet thereof.

PARCEL NO. 2: The South 50 feet of the West 234 feet of the East 334 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18 of Maps, page 36.

PARCEL NO. 3: The South 100 feet of the East 100 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18 of Maps, page 36.

SUBJECT TO RESERVATIONS IN PATENTS AND ALL EASEMENTS, RIGHTS OF WAY, ENCUMBRANCES, COVENANTS, CONDITIONS AND RESTRICTIONS AS MAY APPEAR OF RECORD.

And the Grantor hereby binds itself and its successors to warrant and defend the title, as against all acts of the Grantor herein and no other, subject to the matters above set forth.

IN WITNESS WHEREOF, the PHOENIX TITLE AND TRUST COMPANY, as Trustee, has caused its corporate name to be signed and its corporate seal to be affixed by the undersigned officer thereunto duly authorized this 20th day of

October A. D., 1961.

Deed from Trustee to Cestui que Trust

No Internal Revenue Stamps Required

PHOENIX TITLE AND TRUST COMPANY, as Trustee

By

Virginia Quackenbush
Trust Officer

STATE OF ARIZONA

County of Maricopa

Before me this 20th day of October, 1961, personally appeared Virginia Quackenbush who acknowledged himself to be a Trust Officer of the PHOENIX TITLE AND TRUST COMPANY and that he as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation as Trustee, by himself as such officer.

My commission will expire: 6-15-63

Georgia M. Peet
Notary Public

TMS0764

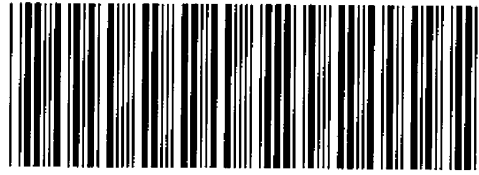
APP146

Recording Requested By:
FIRST AMERICAN TITLE

When Recorded Mail To:

A Mrs. Ingrid Lenz Harrison
1410 Shoreline Drive
Wayzata, MN 55391

1/2



OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL

95-0067809 02/06/95 03:51

LAWRENCE 1 OF 75

WARRANTY DEED

Escrow No. 229-185-0658600

For the consideration of TEN AND NO/100 DOLLARS, and other valuable considerations, I or we,

BERNARD D. CHAPMAN, a single man

the GRANTOR

do hereby convey to

~~ALFRED HARRISON AND~~ INGRID LENZ HARRISON, wife of ALFRED HARRISON, as her sole and separate property.

the GRANTEE

the following described real property situate in Maricopa County, Arizona:

Lot 24, of STONE CANYON EAST, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, recorded in Book 81 of Maps, Page 34.

EXCEPT all coal and other minerals in the said land as reserved unto the United States of America in the recorded patent to said land.

SUBJECT TO: Existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record.

And the GRANTOR does warrant the title against all persons whomsoever, subject to the matters above set forth.

DATED: December 1, 1994


Bernard D. Chapman
BERNARD D. CHAPMAN

STATE OF ARIZONA)
) ss.
County of Maricopa)

This instrument was acknowledged and executed before me this 6th day of February 19 95 by BERNARD D. CHAPMAN

My Commission Expires:

Gerry Ring Wally
Notary Public

FAT-AZ 6051 (Rev. 1/91)



19950067809
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
ADRIAN FONTES

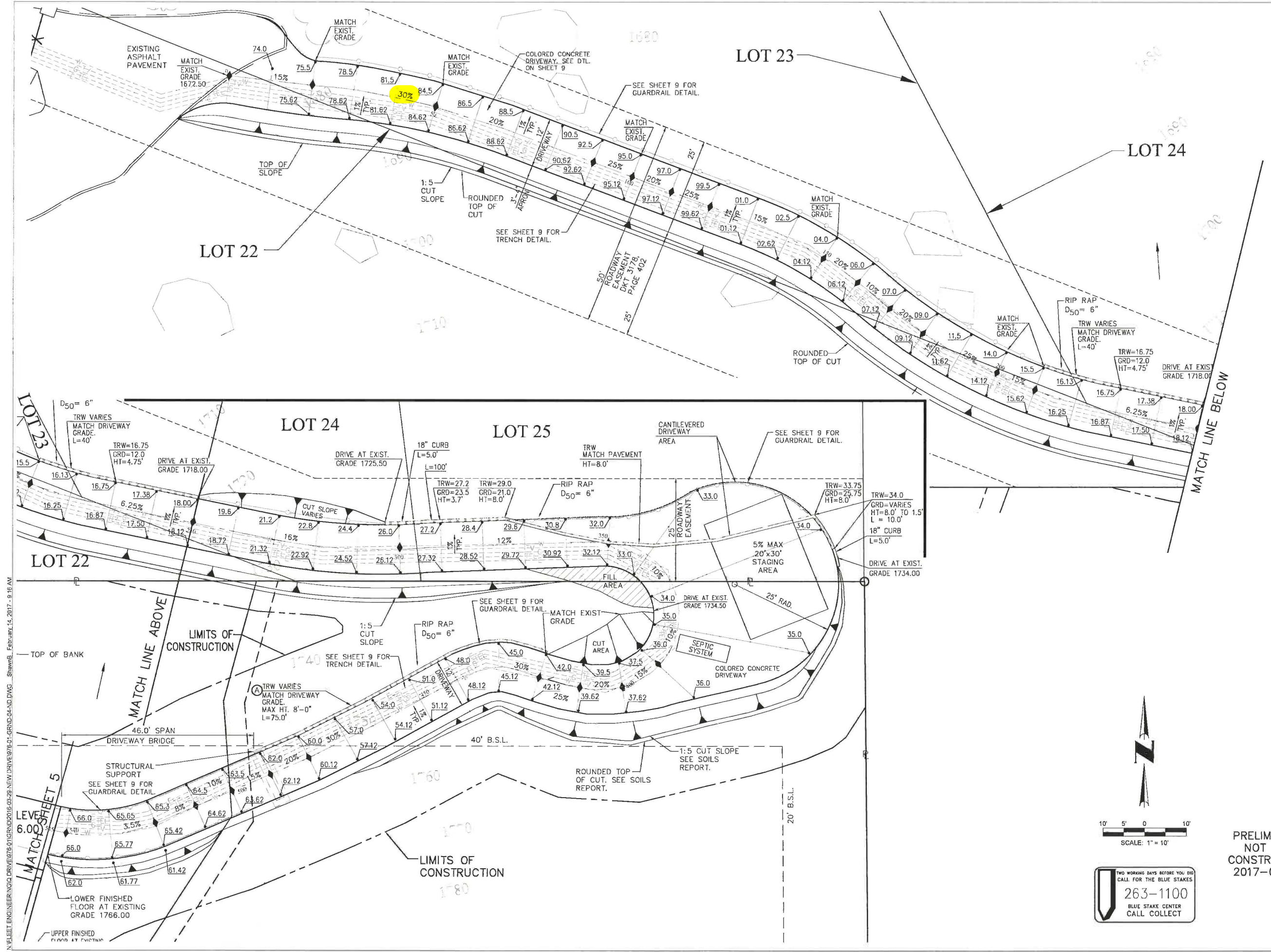


The foregoing instrument is an
electronically prepared
full, true and correct copy
of the original record in this
office.

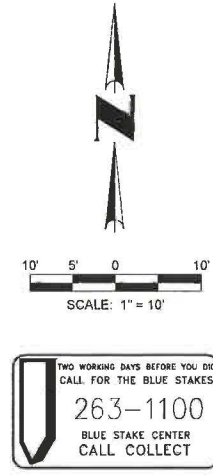
Attest: 01/10/2017 02:28:08 PM

By Adrian P. Fontes Recorder

To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=173431>



N:\FLEET ENGINEERING\NOIC DRIVEWAY\01-GRND\01-GRND-04-ND.DWG - ShawnB - February 14, 2017 - 9:16 AM



ARCHITECTURE



INTERIORS

Candelaria Design

February 18, 2016

Board of Adjustment
Town of Paradise Valley
6401 East Lincoln Drive
Paradise Valley, Arizona 85253

Re: Scali Residence – 5507 East San Miguel Avenue

Dear Board Members:

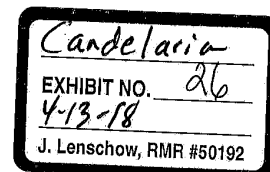
Thank you for your consideration of our variance request for 5507 East San Miguel Avenue. We were retained to design a home on this lot in 2012 and have spent the last four years intricately designing this home to meet all criteria required by the Town of Paradise Valley zoning ordinance and hillside regulations. We have collaborated and worked closely with the Town Engineers and Staff over the course of these four years.

The initial design required over eight variances. Through cooperation between our team and the Town over the course of these four years, we have arrived at a design that requires just one variance. The variance requested has nothing to do with the design or size of the home. The home itself will meet all zoning and hillside requirements, in addition to addressing hydrology and water flow concerns in ways that have been ingeniously integrated into this design.

The one variance requested has to do with the construction of a driveway from the only available point of access over challenging topography to the first available, buildable spot on the lot. **In my 35 years of designing hillside homes here in Paradise Valley, I have never encountered a situation and a site with these natural conditions. The lot has a 52% slope and only one available means of ingress, an off-site easement that also has a 52% slope.** As you are aware, the Town requires that driveways not exceed a 30% slope. By just doing the simple math, it is apparent that a 30% slope driveway cannot be constructed from a 52% slope without changing the topography. Even with the driveway set at an angle to this slope, we are limited by the location of the easement and the existing natural grade at the point where the easement meets the lot. Hence, after starting this design with eight variances, we are requesting only one variance for the length of cut of this driveway. There is no other means of ingress and egress available and given the Town's 30% maximum slope requirement, this is the optimal way to locate a driveway on the lot that can access a home, while minimizing the disturbance to the lot.

6900 East Camelback Road #400 Scottsdale, Arizona 85251 ~ 602.604.2001 ~ fax: 602.604.2002
· candelariadesign.com

{00032901 4}



CDA003838

APP150

ARCHITECTURE



INTERIORS

Candelaria Design

I have reviewed the letter from our engineer, Mr. Fred Fleet, dated February 18, 2016, and agree with his analysis of other options for locating a home on the lot. Given the challenges of the lot's topography and point of access, the best place on the lot that a home can be built, regardless of the size or design of the home, is in the proposed location.

It is my professional opinion, after consultation with our engineers and the Town of Paradise Valley Staff, that this variance provides the means of accessing this lot with just a single variance and thus allowing our client the use of his property, while at the same time minimizing the disturbance and resultant visual impact to the lot and surrounding hillside. This variance is in no way due to convenience. It is simple math.

Thank you again in advance for your consideration of our request.

Sincerely,

Mark B. Candelaria, AIA
Candelaria Design Associates, LLC

6900 East Camelback Road #400 Scottsdale, Arizona 85251 ~ 602.604.2001 ~ fax: 602.604.2002
· candelariadesign.com

{00032901 4}

CDA003839

APP151

From: Mark Candelaria <mark@candelariadesign.com>
Date: Wednesday, October 25, 2017 5:46 AM
To: Vivian Ayala
Cc: Stacey Payne
Subject: Re: Scali - Mtg Notes 10/24/17
Attachments: ScaliVannMtgNotes102417.pdf; Untitled attachment 00070.html

Dear Vivian:

Here are my notes from our meeting yesterday with Jeff Vann.





CANDELARIA

Mr. M. Vann Engineering - 10.24.17

115 BUILDINGS - IN REMEDIATION - TO BE PINNED

• NEWBY HERNDON.

• CHRIS & MARK DRYWORTH

GET COST ON

- 25% per building to remediate

Some need to be removed 2000 buildings

Another 2000 buildings need to be dealt with off-site

1100 temporary fire catch fencing
etc.

* 5 million - estimated for this work. - but really doesn't have any idea
how much he has ever seen.

• NEED A CONTRACTOR ON BOARD ASAP. TO ADDRESS THE
LOGISTICS & SEQUENCING.

• NEED MTC. BY KITCHELL - TO REVIEW INITIAL REPORT SO THAT
VANN CAN COMPLETE REPORT ADDRESSING SOME SEQUENCING
& LOGISTICS.

• Summary Motion 2 months - ago - no word.

Kerry will check w Attorney if its ok to get by Kitchell

RUSS LYON SOTHEBY'S INT'L REALTY - Waterfront
VACANT LAND/LOT SELLER'S PROPERTY
DISCLOSURE STATEMENT (SPDS)
(TO BE COMPLETED BY SELLER)

The printed portion of this FORM has been approved by the Arizona Association of Realtors®. This is NOT intended to be a binding contract.

PAGE 1



MESSAGE TO THE SELLER:

Sellers are obligated by law to disclose all known material (important) facts about the Property to the Buyer. The SPDS is designed to assist you in making these disclosures. If you know something important about the Property that is not addressed on the SPDS, add that information to the form. Prospective Buyers may rely on the information you provide.

INSTRUCTIONS: (1) Complete this form yourself. (2) Answer all questions truthfully and as fully as possible. (3) Attach all available supporting documentation. (4) Use explanation lines as necessary. (5) If you do not have the personal knowledge to answer a question, use the blank lines to explain. By signing below you acknowledge that the failure to disclose known material information about the Property may result in liability.

MESSAGE TO THE BUYER:

Although Sellers are obligated to disclose all known material (important) facts about the Property, there are likely facts about the Property that the Sellers do not know. Therefore, it is important that you take an active role in obtaining information about the Property.

INSTRUCTIONS: (1) Review this form and any attachments carefully. (2) Verify all important information. (3) Ask about any incomplete or inadequate responses. (4) Inquire about any concerns not addressed on the SPDS. (5) Review all other applicable documents, such as CC&R's, association bylaws, rules, and the title report or commitment. (6) Obtain professional inspections of the Property. (7) Investigate the surrounding area.

THE FOLLOWING ARE REPRESENTATIONS OF THE SELLER(S) AND ARE NOT VERIFIED BY THE BROKER(S) OR AGENT(S).

OWNERSHIP AND PROPERTY

1. THIS DISCLOSURE CONCERNS THE FOLLOWING REAL PROPERTY: 5507 E San Miguel Ave, Paradise
2. Valley, az 85253
3. COUNTY: Maricopa TAX PARCEL NUMBER: 172-47-078D
4. ZONING: Not known LEGAL OWNER OF PROPERTY: La Familia Management, LLC
5. DATE PURCHASED OR ACQUIRED: 12/31/2010
6. How did you acquire the Property? ☐ Purchase ☐ Inheritance ☒ Foreclosure ☐ Gift ☐ Other: _____
7. Is the Property located in an unincorporated area of the county? ☐ Yes ☐ No Not to my knowledge
8. If yes, and five or fewer parcels of land other than subdivided land are being transferred, the Seller must furnish the Buyer with a written Affidavit of Disclosure in the form required by law.
9. To your knowledge, is the Property within a subdivision approved by the Arizona Department of Real Estate? ☐ Yes ☐ No Unknown
10. If yes, attach a copy of the Subdivision Public Report.
11. Is the legal owner(s) of the Property a foreign person or a non-resident alien pursuant to the Foreign Investment in Real Property Tax Act (FIRPTA)? ☐ Yes ☒ No If yes, consult a tax advisor; mandatory withholding may apply.
12. Does the Property include any leased land? ☐ Yes ☒ No
13. If yes, is the land: ☐ State ☐ Federal ☐ Privately owned ☐ Other: _____
14. How many acres are leased? _____
15. Expiration date of current lease? _____ (Attach a copy of the lease.)
16. Is the Property currently leased to a tenant? ☐ Yes ☐ No
17. If yes, expiration date of current lease: _____ (Attach a copy of the lease.)
18. If any refundable deposits or prepaid rents are being held, by whom and how much? Explain: _____
19. _____
20. _____
21. _____
22. YES ☐ NO ☒ Have you entered into any agreement to transfer your interest in the Property in any way, including lease renewals or options to purchase? Explain: _____
23. YES ☐ NO ☐ To your knowledge, is the Property subject to Covenants, Conditions and Restrictions or deed restrictions? Explain: Seller has no knowledge of CC&R's
24. _____
25. _____

ARIZONA ASSOCIATION OF REALTORS® Form VLSPDS 02/08 C

Initials: _____ BUYER BUYER

PAGE 1 of 5

Produced with zipForm® by zipLogix, 18070 Fifteen Mile Road, Fraser, Michigan 48068 www.zipLogix.com

San Miguel Lot



Scoti EXHIBIT 2
DATE 3-9-18
Colette E. Ross
CR No. 50658

TMS5126

APP154

- YES NO
26. ☐ ☒ Are you aware of any association(s) governing this Property?
 27. If yes, provide contact(s) information: Name: _____ Phone #: _____
 28. If yes, are there any fees? How much? \$ _____ How often? _____
 29. ☐ ☒ Are you aware of any assessments affecting this Property? (Check all that apply): See letter from Town of PV
 30. ☐ Association assessment ☐ Road maintenance ☐ Sewer ☐ Water ☐ Electric ☐ Other _____
 31. If yes, the approximate balance: \$ _____
 32. ☒ ☐ Are you aware of any proposed assessment(s)?
 33. If yes, explain: See letter from Town of PV
 34. ☐ ☒ Are you aware of any pending or anticipated disputes or litigation regarding the Property or the association(s)?
 35. Explain: _____
 36. ☐ ☒ Are you aware of any of the following recorded against the Property? (Check all that apply):
 37. ☐ Judgement liens ☐ Tax liens ☐ Other non-consensual liens
 38. Explain: _____
 39. ☐ ☒ Are you aware of any title issues affecting this Property? (Check all that apply):
 40. ☐ Recorded easements ☐ Use restrictions ☐ Lot line disputes ☐ Encroachments
 41. ☐ Unrecorded easements ☐ Use permits ☐ Conservation easement ☐ Other _____
 42. Explain: There is a recorded easement but it's not an issue
 43. ☐ ☒ Are you aware of any pending or anticipated eminent domain or condemnation proceedings regarding the Property?
 44. Explain: _____
 45. ☐ ☒ Are you aware of any development, impact, or similar fees regarding the Property?
 46. Explain: _____

ACCESS

- YES NO
47. ☒ ☐ To your knowledge, is there legal access to the Property?
 48. ☒ ☐ To your knowledge, is there physical access to the Property?
 49. ☒ ☐ To your knowledge, is the physical and legal access the same?
 50. To your knowledge, is the road/street access to the Property maintained by: ☐ County ☐ City ☐ Homeowners' association
 51. ☒ Privately ☐ Not maintained Explain: This is my belief but I have not confirmed
 52. ☒ ☐ Are you aware of any problems with legal or physical access to the Property?
 53. Explain: Current road may not physically touch property which may prevent physical access
 54. ☐ ☒ Are you aware of any public or private use paths or roadways on or across the Property?
 55. Explain: _____

USE

56. What is the current use of the Property? Vacant lot / residential
 57. What prior uses of the Property are you aware of? None
- YES NO
58. ☒ ☐ To your knowledge, does the current use conform with current zoning?
 59. ☐ ☒ Are you aware of any improvements on the Property?
 60. Explain: _____
 61. ☐ ☒ Are you aware of any crops being grown on the Property?
 62. If yes, are the crops ☐ Owner operated ☐ Tenant operated
 63. If yes, who has the right to harvest the crops and for what period of time? Explain: _____
 64. _____
 65. ☐ ☒ Are you aware of any livestock on the Property?
 66. If yes, are the livestock ☐ Owner operated ☐ Tenant operated ☐ Open range



UTILITIES

67. **Are the following services available to the Property?**

YES	NO	PROVIDER
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Electricity
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Fuel <input type="checkbox"/> Natural gas <input type="checkbox"/> Propane <input type="checkbox"/> Oil
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Cable
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Telephone
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Garbage collection
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Fire
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Are there any alternate power systems installed on the Property? If yes, indicate type (Check all that apply):
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> Solar <input type="checkbox"/> Wind <input type="checkbox"/> Generator <input type="checkbox"/> Other
<input type="checkbox"/>	<input checked="" type="checkbox"/>	If yes, are you aware of any past or present problems with the alternate power system(s)? Explain:

WATER

78. **Is there a domestic water source to the Property?**

79. ☐ YES ☒ NO

If yes, water source is: ☐ Public ☐ Private water company ☐ Private well ☐ Shared well ☐ Hauled water

80. If water source is a private or shared well, or water can be used from springs, streams, lakes, ponds, reservoirs, canyons, or ravines, complete and attach the **DOMESTIC WATER WELL/WATER USE ADDENDUM**.

81. If water source is public, a private water company, or hauled water, Provider is:

82. ☐ YES ☒ NO

83. Are you aware of any past or present drinking water problems? Explain: N/A

84. ☐ YES ☒ NO

85. To your knowledge, is the Property in one of the following districts or areas? (Check all that apply):

86. ☐ Central Arizona Project (CAP) District ☐ Irrigation Non-Expansion Area ☐ Active Management Area

87. ☐ Central Arizona Groundwater Replenishment District ☐ Other:

88. ☐ YES ☒ NO

89. Are you aware of any grandfathered water rights associated with the Property?

90. If yes, ☐ Type I ☐ Type II ☐ Irrigation

91. Grandfathered Water Rights Certificate #

92. What is the allotment? acre feet

93. Number of irrigated acres

94. ☐ YES ☒ NO

95. To your knowledge, does the Property have surface water rights? If yes, Certificate #

SEWER/WASTEWATER TREATMENT

94. **NOTICE TO BUYER: CONTACT THE APPROPRIATE GOVERNMENTAL OR PRIVATE PROVIDER REGARDING THE AVAILABILITY AND COST OF SEWER CONNECTION.**

95. Type of sewer: ☐ Public ☐ Private ☒ Planned and approved sewer system, but not connected ☐ None

96. Name of Provider: Unknown

97. ☐ YES ☒ NO

98. Is the Property served by an On-Site Wastewater Treatment Facility? (If no, skip to line 110.)

99. If yes, the Facility is: ☐ Conventional septic system ☐ Alternative system; type:

100. ☐ YES ☒ NO

101. If the Facility is an alternative system, is it currently being serviced under a maintenance contract?

102. If yes, name of contractor: Phone #:

103. Approximate year Facility installed: (Attach copy of permit)

104. ☐ YES ☒ NO

105. Are you aware of any repairs or alterations made to this Facility since original installation?

106. Explain:

107. Approximate date of last Facility inspection and/or pumping of septic tank:

108.



109. ☐ YES ☐ NO Are you aware of any past or present problems with the Facility? Explain: _____
110. ☐ YES ☒ NO Are you aware of any site/soil evaluation (percolation or other tests) having been performed on the Property?
111. If yes, when and by whom? _____
112. **NOTICE TO SELLER AND BUYER: THE ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY REQUIRES A**
113. **PRE-TRANSFER INSPECTION OF ON-SITE WASTEWATER TREATMENT FACILITIES ON RE-SALE PROPERTIES.**

ENVIRONMENTAL INFORMATION

114. ☐ YES ☒ NO Are you aware of the presence of any of the following on the Property, past or present? (Check all that apply):
115. ☐ Asbestos ☐ Radon gas ☐ Mining operations ☐ Pesticides
116. ☐ Underground storage tanks ☐ Fuel/oil/chemical disposal or storage
117. Explain: _____
118. ☐ YES ☒ NO Are you aware of the presence of any of the following in close proximity to Property, past or present? (Check all that apply):
119. ☐ Asbestos ☐ Radon gas ☐ Pesticides ☐ Underground storage tanks
120. ☐ Fuel/oil/chemical disposal or storage ☐ Other: _____
121. Explain: _____
122. ☐ YES ☒ NO Are you aware if the Property is located within any of the following? (Check all that apply):
123. ☐ Superfund ☐ Water Quality Assurance Revolving Fund ("WQARF")
124. ☐ Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")
125. ☐ YES ☒ NO Are you aware of any environmental assessments or studies having been performed on the Property?
126. If yes, was the study a (Check all that apply): ☐ Phase I ☐ Phase II ☐ Phase III ☐ Other _____
127. (Attach copies of the environmental assessment or study.)
128. ☒ YES ☐ NO Are you aware of any past or present issues or problems with any of the following on the Property? (Check all that apply):
129. ☐ Soil settlement/expansion ☐ Drainage/grade ☐ Erosion ☐ Fissures ☒ Other
130. Explain: Lot is obviously steep and rocky
131. **NOTICE TO BUYER: THE ARIZONA DEPARTMENT OF REAL ESTATE PROVIDES EARTH FISSURE MAPS TO**
132. **ANY MEMBER OF THE PUBLIC IN PRINTED OR ELECTRONIC FORMAT UPON REQUEST AND ON ITS WEB SITE**
133. **AT www.azre.gov.**
134. ☐ YES ☒ NO Are you aware of any past or present issues or problems in close proximity to the Property related to any of
135. the following? (Check all that apply):
136. ☐ Soil settlement/expansion ☐ Drainage/grade ☐ Erosion ☐ Other
137. Explain: _____
138. ☐ YES ☒ NO Are you aware if the Property is subject to any present or proposed effects of any of the following? (Check all that apply):
139. ☐ Airport noise ☐ Traffic noise ☐ Rail line noise ☐ Neighborhood noise ☐ Toxic waste disposal
140. ☐ Odors ☐ Nuisances ☐ Sand/gravel operations ☐ Other _____
141. Explain: _____
142. ☐ YES ☒ NO Are you aware of any portion of the Property being situated on or in close proximity to a closed landfill?
143. Explain: _____
144. ☒ YES ☐ NO Are you aware of any conditions that make the Property subject to any of the following ordinances or regulations?
145. (Check all that apply):
146. ☒ Hillside ☐ Erosion control ☐ Native plant/animal species preservation ☐ Natural area open space requirements
147. ☐ Wetlands area ☐ Critical habitat
148. ☐ YES ☒ NO Are you aware if the Property is located in the vicinity of an airport (military, public, or private)?
149. Explain: _____
150. **NOTICE TO SELLER AND BUYER: PURSUANT TO ARIZONA LAW A SELLER SHALL PROVIDE A WRITTEN**
151. **DISCLOSURE TO THE BUYER IF THE PROPERTY IS LOCATED IN TERRITORY IN THE VICINITY OF A MILITARY**
152. **AIRPORT OR ANCILLARY MILITARY FACILITY AS DELINEATED ON A MAP PREPARED BY THE STATE LAND**
153. **DEPARTMENT. THE DEPARTMENT OF REAL ESTATE ALSO IS OBLIGATED TO RECORD A DOCUMENT AT THE**
154. **COUNTY RECORDER'S OFFICE DISCLOSING IF THE PROPERTY IS UNDER RESTRICTED AIR SPACE AND TO**
155. **MAINTAIN THE STATE LAND DEPARTMENT MILITARY AIRPORT MAP ON ITS WEBSITE AT www.azre.gov.**
156. ☐ YES ☒ NO Are you aware if any portion of the Property is in a flood way or flood plain?
157. Explain: _____
158. ☐ YES ☒ NO Are you aware of any portion of the Property ever having been flooded?
159. Explain: _____



MISCELLANEOUS

- YES NO
160. ☐ ☒ Are you aware of any survey of the Property by a licensed surveyor having been performed? If yes, when and by whom? _____ (Attach surveyor's plat map)
161. ☐ ☐ If yes, is the survey recorded?
162. ☐ ☒ Are you aware of any archeological features or artifacts on the Property?
163. ☐ ☒ Explain: _____
164. ☐ ☒ Are you aware of any archeological study having been performed on the Property?
165. ☐ ☒ If yes, when and by whom? _____
166. ☐ ☒ Are you aware of any endangered species on the Property? Explain: _____
167. ☐ ☒ Are you aware of any endangered species studies having been performed on the Property? If yes, when and by whom? _____
168. ☐ ☒ Are you aware of any mineral rights that transfer with the title? If yes, explain: _____
169. ☐ ☒ Are you aware of any open mine shafts/tunnels or abandoned wells on the Property?
170. ☐ ☒ If yes, describe location: _____
171. ☐ ☒ (Illustrate location on plat map, if attached.)
172. _____
173. _____
174. _____
175. _____

ADDITIONAL EXPLANATIONS

- YES NO
176. ☒ ☐ Is there any other information concerning the Property that might affect the decision of a buyer to buy, or affect the value of the Property, or affect the Property's use by a buyer? Explain: Lot is obviously very steep
177. and rocky and development of lot will be more challenged than a typical flat
178. lot.
179. _____
180. _____
181. _____
182. _____
183. _____
184. _____
185. _____
186. _____
187. _____
188. _____

189. **SELLER CERTIFICATION:** Seller certifies that the information contained herein is true and complete to the best of Seller's knowledge as of the date signed. Seller agrees that any changes in the information contained herein will be disclosed in writing by Seller to Buyer prior to Close of Escrow, including any information that may be revealed by subsequent inspections.

192. Jeff M. And 10/31/12
 SELLER LaFamilia Management, LLC MO/DA/YR SELLER MO/DA/YR

193. Reviewed and updated: Initials: /
 SELLER SELLER MO/DA/YR

194. **BUYER'S ACKNOWLEDGEMENT:** Buyer acknowledges that the information contained herein is based only on the Seller's actual knowledge and is not a warranty of any kind. Buyer acknowledges Buyer's obligation to investigate any material (important) facts in regard to the Property. Buyer is encouraged to obtain Property inspections by professional independent third parties.

197. **NOTICE:** Buyer acknowledges that by law, Seller, Lessors and Brokers are not obligated to disclose that the Property is or has been:
 198. (1) the site of a natural death, suicide, homicide, or any other crime classified as a felony; (2) owned or occupied by a person exposed
 199. to HIV, diagnosed as having AIDS or any other disease not known to be transmitted through common occupancy of real estate; or
 200. (3) located in the vicinity of a sex offender.

201. By signing below, Buyer acknowledges receipt only of this SPDS. If Buyer reasonably disapproves of any items provided herein, Buyer shall deliver to Seller written notice of the items disapproved as provided in the Contract.

203. Ramiro Salas 11/2/12
 BUYER TMS Ventures MO/DA/YR BUYER MO/DA/YR

Initials: MS

BUYER BUYER



SCHEDULE B

Customer Reference: Terrence & Marcella Scali

I. REQUIREMENTS:

1. Payment of first installment of taxes and assessments, general and special, for the year 2012.

Note: APN: 172-47-078D

Full Amount for the year 2012: \$6,587.72 1st half: 3293.86 2nd half: 3293.86

2. FURNISH the following documentation with respect to LaFamilia Management, L.L.L.P., an Arizona limited liability company, an Arizona Limited Partnership: *Requested Here*

1. A copy of the Certificate of Limited Partnership of said Limited Partnership that has been endorsed "filed" by and in the office of the Arizona Secretary of State.
2. A copy of the Limited Partnership Agreement of said Limited Partnership.

NOTE: The right is reserved to make additional requirements or exceptions upon examination of the documents submitted to satisfy this requirement.

Per Ramon

3. Proper showing of the Easement for Roadway recorded in Docket 3178, page 402 being accepted by the County of Maricopa, State of Arizona. *11/8 Need ltr. from County saying they accept this easement.*

This requirement is being made to provide access to said land.

4 Noted "The Company reserves the right to make additional exceptions and/or requirements upon examination of all matters submitted to fulfill the above requirements."

5. RECORD DEED FROM LaFamilia Management, L.L.L.P., an Arizona limited liability company TO TMS Ventures, LLC, an Arizona limited liability company.

6. The applicable rate(s) for the policy(s) being offered by this report or commitment appears to be section(s) 2.1.1. *Noted*

Scali EXHIBIT *5*
DATE *3-9-18*
Colette E. Ross
CR No. 50658

1014735-3-3-1--
sarabiam

CHICAGO TITLE INSURANCE COMPANY
Recorded at the request of:
Chicago Title

When recorded, mail to:

Joe Zachariah
5505 E San Miguel Ave
Paradise Valley AZ 85253

Escrow No.: CT1014735-CT2909

Space above this line for Recorder's Use

1/2 RESALE

SPECIAL WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

U.S. Bank, N.A., as Trustee for Salomon Brothers Mortgage Securities VII, Inc., Asset-Backed Floating Rate
Certificates Series 1998-NC4

does hereby convey to

Joe K. Zachariah and Teresa C. Zachariah AND JOE ZACHARIAH, WIFE AND
HUSBAND
the following real property situated in Maricopa County, Arizona:

Lot 22, of Stone Canyon East, according to the Plat of Record in the Office of the County Recorder of Maricopa
County, Arizona, recorded in Book 81 of Maps, Page 34

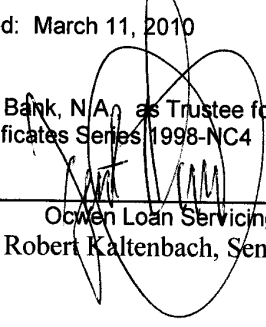
EXCEPT all coal and other minerals as reserved in the Patent from the United States of America, Records of
Maricopa County, Arizona.

SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way,
covenants, conditions and restrictions as may appear of record

And the Grantor hereby binds itself and its successors to warrant and defend the title, against all acts of the
Grantor herein, and no other, subject to the matters set forth.

Dated: March 11, 2010

U.S. Bank, N.A., as Trustee for Salomon Brothers Mortgage Securities VII, Inc., Asset-Backed Floating Rate
Certificates Series 1998-NC4


BY: 
Owen Loan Servicing, LLC
Robert Kaltenbach, Senior Manager

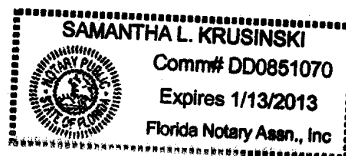


NOTARY ACKNOWLEDGMENT(S) TO SPECIAL WARRANTY DEED

State of FLCounty of ORANGEThe foregoing document was acknowledged before me this 12 day of MARCH, 2010by Robert Kaltenbach, Senior Manager

(Seal)


Notary Public Samantha L. Krusinski



Escrow No.: CT1014735-CT2909

ACCEPTANCE OF COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP

Teresa C Zachariah and Joe Zachariah each state that:

They have offered to purchase the real property situated in Maricopa County described as follows:

Lot 22, of Stone Canyon East, according to the Plat of Record in the Office of the County Recorder of Maricopa County, Arizona, recorded in Book 81 of Maps, Page 34.

EXCEPT all coal and other minerals as reserved in the Patent from the United States of America, Records of Maricopa County, Arizona.

Each of them, individually and jointly as Grantees, declare that it is their intention to accept the conveyance and acquire all interest in the real property as community property with right of survivorship, and not as a community property estate and not as tenants in common.

By the execution and delivery of this "Acceptance of Community Property With Right of Survivorship" they direct and authorize Escrow Agent to attach this "Acceptance of Community Property With Right of Survivorship" to the deed upon its execution and delivery and to record this "Acceptance of Community Property With Right of Survivorship" together with the deed.

Dated: June 24, 2010

Teresa C. Zachariah
Teresa C Zachariah

Joe Zachariah
Joe Zachariah

NOTARY ACKNOWLEDGMENT(S) TO ACCEPTANCE OF COMMUNITY PROPERTY

State of Arizona

County of Maricopa

The foregoing document was acknowledged before me this 25th day of June, 2010.

by TERESA C. ZACHARIAH and JOE ZACHARIAH.

(Seal)



KARLA VERDICONO
Notary Public - Arizona
Maricopa County
Expires 08/31/2012

Karla Verdicono
Notary Public

20100542481
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL



The foregoing instrument is an
electronically prepared
full, true and correct copy
of the original record in this
office.

Attest: 12/29/2016 09:46:46 AM

By  Recorder

To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=172894>



SCE000077



SCE000082

DKT 8083 PAGE 449

269754

WARRANTY DEED
64398 01-DEED

For the consideration of Ten Dollars (\$10.00), and other valuable consideration, CAMELBACK MOUNTAIN PROPERTIES, a limited partnership, does hereby convey to the CITY OF PHOENIX, a municipal corporation, all of its right, title and interest, past, present and future, in the following described real property situated in Maricopa County, Arizona:

PARCEL "M-2"PART NO. 1:

That part of the East 1200 feet of Tract 4, O'Brien's Camelback Lands, according to the plat of record in Book 18 of Maps, at Page 36 in the records of Maricopa County, Arizona, lying South of the South line of Stone Canyon East, according to the plat of record in Book 81 of Maps at Page 34 in the records of said County, and lying West of the West line of the East 334 feet of said Tract 4;

EXCEPT that part thereof described as follows:
BEGINNING at the Southeast corner of said Stone Canyon East; thence Southerly, parallel with and 334 feet West of the East line of said Tract 4; a distance of 270 feet; thence Northwesterly to a point in the West line of the East 1000 feet of said Tract 4 which is 180 feet Southerly of the Southwest corner of Lot 22 in Stone Canyon East; thence Northwesterly, along said West line, to said Southwest corner; thence East, along the South line of Stone Canyon East, to the point of beginning.

PART NO. 2:

The South 50 feet of the West 234 feet of the East 334 feet of Tract 4, O'Brien's Camelback Lands, according to the plat of record in Book 18 of Maps at Page 36 in the records of Maricopa County, Arizona.

PART NO. 3:

The South 100 feet of the East 100 feet of Tract 4, O'Brien's Camelback Lands, according to the plat of record in Book 18 of Maps, at Page 36 in the records of Maricopa County, Arizona.

SUBJECT TO:

1. 1970 taxes, a lien, not yet payable.
2. All matters of record.
3. Use of the property herein conveyed is restricted to public recreational purposes.

8083 PAGE 450

Grantor hereby warrants the title against all persons
whomsoever, including all of the Grantor's past, present or
future interest, subject to the matters above set forth.

DATED this 6 day of April, 1970.

CAMELBACK MOUNTAIN PROPERTIES, a
limited partnership, by SUN
VENTURES, INC., an Arizona corpora-
tion, as General Partner

By John D. Ratliff
John D. Ratliff, President

STATE OF ARIZONA }
County of Maricopa } ss.

The foregoing instrument was acknowledged before me this
6 day of April, 1970, by JOHN D. RATLIFF as President
of SUN VENTURES, INC., an Arizona corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official
seal.

Richard F. Grauer
Notary Public

My Commission Expires:

My Commission Expires Feb. 23, 1974

STATE OF ARIZONA }
County of Maricopa } ss.

I hereby certify that the within
instrument was filed and re-
corded at request of

ARIZONA TITLE

APR 10 1970-2 40

In Docket 8083

on page 449-450

Witness my hand and official
seal the day and year aforesaid.

Paul H. Houston

By John D. Ratliff
County Recorder
Deputy Recorder

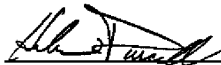
100

19700063288
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL



The foregoing instrument is an
electronically prepared
full, true and correct copy
of the original record in this
office.

Attest: 06/28/2016 05:10:30 PM

By  Recorder

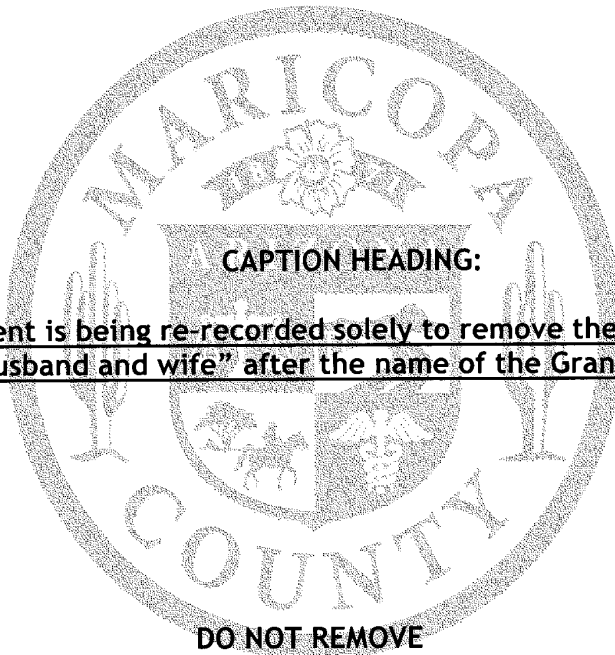
To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=163903>

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
20090814786 09/01/2009 01:52
ELECTRONIC RECORDING

2276003-2-1-1--A
fraustoj

WHEN RECORDED MAIL TO:

Rosanne T. Appel
5 Lynn Road
Cherry Hills Village, CO 80113



CAPTION HEADING:

This document is being re-recorded solely to remove the words/reference to
"husband and wife" after the name of the Grantee herein.

DO NOT REMOVE

THIS IS PART OF THE OFFICIAL DOCUMENT

<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=172893> [20090814786] 3 Pages

RECORDING REQUESTED BY
Greystone Title Agency
AND WHEN RECORDED MAIL TO:

ROSANNE T. APPEL
5 LYNN ROAD

CHERRY HILLS VILLAGE, CO 80113

ESCROW NO.: 00002276 - 003 - AMA

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
20090808938 08/31/2009 01:54
2276003-1-3-1--
ELECTRONIC RECORDING

SPACE ABOVE THIS LINE FOR RECORDER'S USE

1/2

Warranty Deed

For the consideration of Ten Dollars, and other valuable considerations, I or we, **Gary R. Hawkins and R. Gail Hawkins, husband and wife**

do/does hereby convey to **Rosanne T. Appel, a married woman as her sole and separate property,**
~~husband and wife~~

the following real property situated in Maricopa County, ARIZONA:

Lot 23, of Stone Canyon East, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, recorded Book 81 of Maps, Page 34.

SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations, and liabilities as may appear of record. And I or we do warrant the title against all persons whomsoever, subject to the matters set forth above.

Dated: August 20, 2009

Grantors:



Gary R. Hawkins

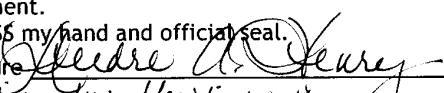


R. Gail Hawkins

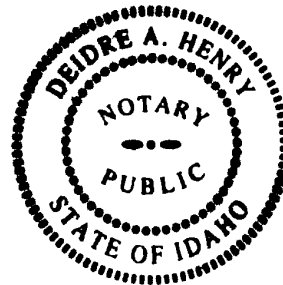
State of Idaho } ss:
County of Ada

On August 20th, 2009, before me, the undersigned, a Notary Public in and for said County and State, personally appeared **Gary R. Hawkins and R. Gail Hawkins** personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature 
Residing In: Meridian, ID
Commission Expires: Nov 14, 2012

FOR NOTARY SEAL OR STAMP



RESCLPKG

SCE000014
MCR 2 of 3

APP170

20090814786
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL



The foregoing instrument is an
electronically prepared
full, true and correct copy
of the original record in this
office.

Attest: 12/29/2016 09:46:46 AM

By *Helen Purcell* Recorder

To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=172893>

STATE OF ARIZONA

COUNTY OF MARICOPA

ss. I hereby certify that the within instrument was filed and recorded

JUN 5 '64-3 00 In DOCKET DAT 5080 PAGE 25 and indexed in DEEDS
at the request of Phoenix Title & Trust Co.

Fee No.

110514

01-DEED

Compared
Photostated
Fee: 1.50

When recorded, mail to:

STONE CANYON EAST PROPERTIES, INC.
7401 East Chaparral Rd.
Scottsdale, Arizona 85251

Witness my hand and official seal.

~~N. C. KELLY MOORE~~, County Recorder,
Clifford H. Ward
By *Indention* Deputy Recorder

Esc. No. 05000082-6
Trust No. 2643-15

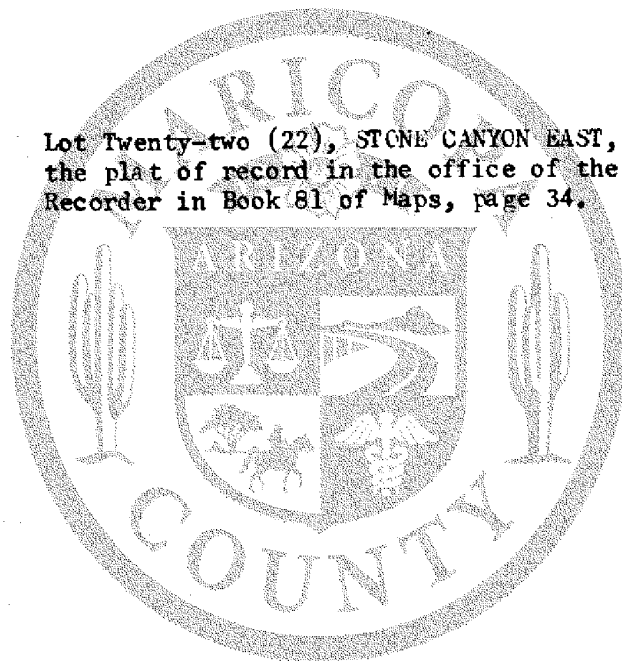
Special Warranty Deed

For the consideration of Ten Dollars, and other valuable considerations, the undersigned PHOENIX TITLE AND TRUST COMPANY, an Arizona corporation, as Trustee, the Grantor herein, does hereby convey to

STONE CANYON EAST PROPERTIES, an Arizona corporation

the Grantee, the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

Lot Twenty-two (22), STONE CANYON EAST, according to the plat of record in the office of the Maricopa County Recorder in Book 81 of Maps, page 34.



Subject to all taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record.

And the Grantor hereby binds itself and its successors to warrant and defend the title, as against all acts of the Grantor herein and no other, subject to the matters above set forth.

Dated this 19th day of May, 1964.

Deed from Trustee to Beneficiary:

PHOENIX TITLE AND TRUST COMPANY, as Trustee

No Internal Revenue Stamps Required.

By *Alfred Canler*
Trust Officer

STATE OF ARIZONA

County of Maricopa

ss.

Before me this 20th day of May, 1964, personally appeared ALFRED CANLER

who acknowledged himself to be a Trust Officer of the PHOENIX TITLE AND TRUST COMPANY and that he as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation as Trustee, by himself as such officer.

My commission will expire: 7/9/65

Form 100-8 REV 2/62
pd

DAT 5080 PAGE 25

Notary Public

MCR 1 of 2

SCE000128

19640213434
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
ADRIAN FONTES



The foregoing instrument is an
electronically prepared
full, true and correct copy
of the original record in this
office.

Attest: 01/16/2017 05:05:27 PM

By *Adrian P. Fontes* Recorder

To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=173737>

STATE OF ARIZONA

COUNTY OF MARICOPA

DKT 5953 PAGE 202

ss. I hereby certify that the within instrument was filed and recorded

Fee No.

MAR 10 1966-8 09AM DOCKET DKT 5953 PAGE 202 and indexed in DEEDS

at the request of Phoenix Title & Trust Co.

When recorded, mail to:

WARREN G. WOLF
7333 N. 16th Ave.,
Phoenix, Arizona

Witness my hand and official seal

CUSTORD H. YARD

By

John Choate
County Recorder
Deputy Recorder

escrow no. 16000894-1

Special Warranty Deed
(JOINT TENANCY)

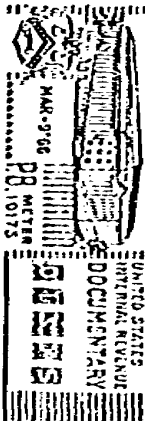
For the consideration of Ten Dollars, and other valuable considerations, the undersigned PHOENIX TITLE AND TRUST COMPANY, an Arizona corporation, as Trustee, the Grantor herein does hereby convey to

WARREN G. WOLF and DOLORES WOLF, his wife

not as tenants in common and not as a community property estate but as joint tenants with right of survivorship, the Grantor, the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:Lot 23, STONE CANYON EAST, according to Book 81
of Maps, page 34, records of Maricopa County,
Arizona.

013687

013687



Subject to all taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record.

And the Grantor hereby binds itself and its successors to warrant and defend the title, as against all acts of the Grantor herein and no other, subject to the matters above set forth.

The grantees by signing the acceptance below evidence their intention to acquire said premises as joint tenants with the right of survivorship, and not as community property nor as tenants in common.

Dated this 17 day of Feb., 19 65.

ACCEPTED AND APPROVED:

PHOENIX TITLE AND TRUST COMPANY, as Trustee

Warren G. Wolf
Warren G. Wolf*Virginia Quackenbush*
Trust Officer*Dolores Wolf*
Dolores Wolf

STATE OF ARIZONA

County of MaricopaBefore me this 21st day of February, 1965, personally appeared VIRGINIA QUACKENBUSH who acknowledged himself to be a Trust Officer of the PHOENIX TITLE AND TRUST COMPANY and that he as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation as Trustee, by himself as such officer.My commission will expire: 3/22/68*Richard Renda*
Notary PublicSTATE OF MaricopaCounty of MaricopaThis instrument was acknowledged before me this 19 day ofFeb, 1965, by
Warren G. Wolf and Dolores Wolf*Robert Martin*
Notary PublicMy commission will expire: My Commission Expires May 15, 1968

FORM 100-10 REV 10/63

SCE000134

MCR 1 of 2

APP174

19660035783
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
ADRIAN FONTES

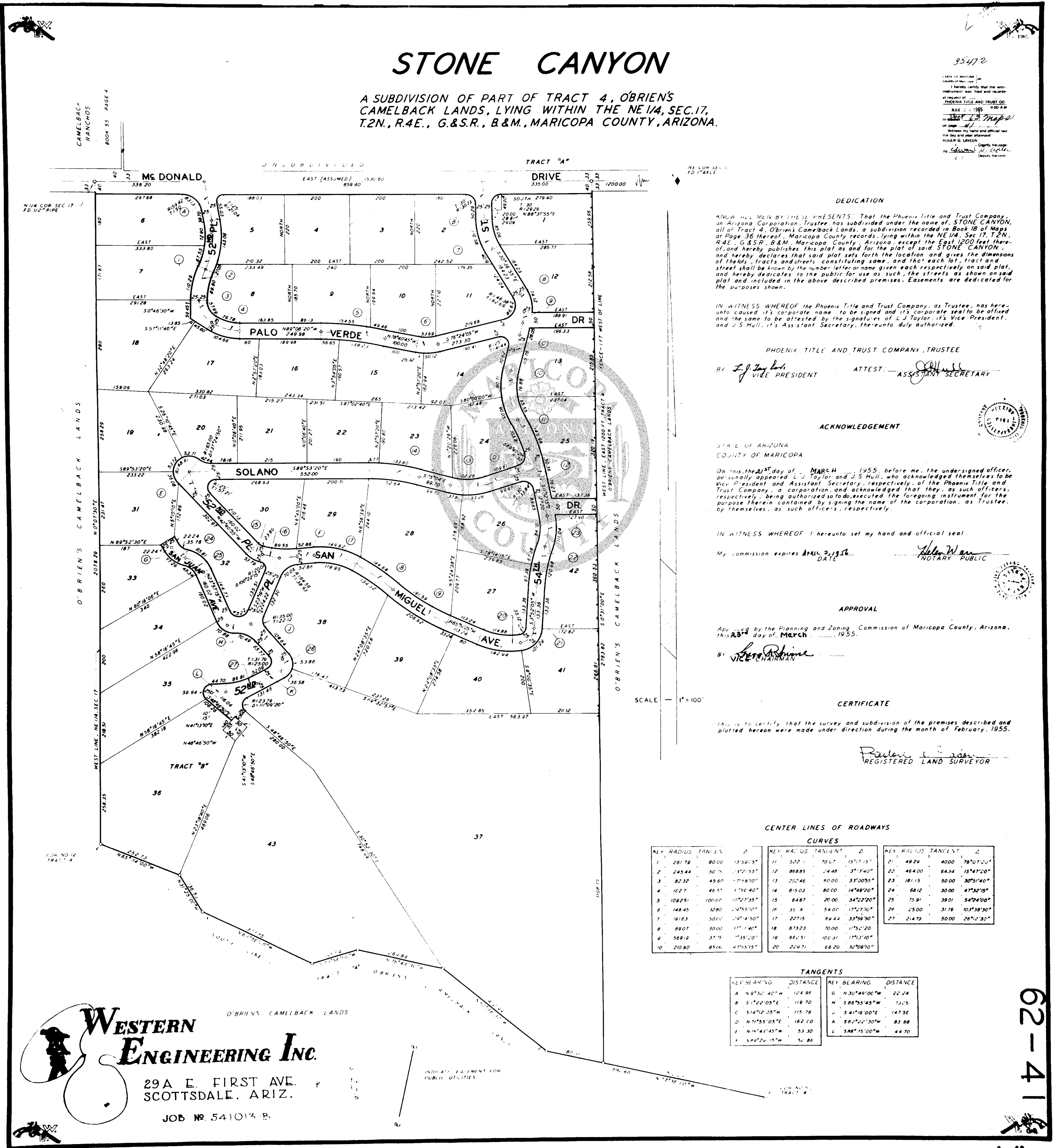


The foregoing instrument is an
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full, true and correct copy
of the original record in this
office.

Attest: 01/16/2017 10:21:08 AM

By Adrian P. Fontes Recorder

To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=173703>



OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
20121046521 11/16/2012 03:56
ELECTRONIC RECORDING

RECORDING REQUESTED BY
OLD REPUBLIC TITLE AGENCY

ORDER #: 4724011411

WHEN RECORDED MAIL TO

TMS Ventures, LLC
8201 N. Hayden Rd
Scottsdale, AZ 85258

24011411-2-2-1--
mcdevitttr

10f1

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**WARRANTY DEED
CORPORATION**

For valuable consideration, receipt of which is hereby acknowledged LaFamilia Management, L.L.P., an Arizona limited liability company

Do hereby convey to TMS Ventures, LLC, an Arizona limited liability company
the following real property situated in Maricopa County, Arizona:

See "Exhibit A" attached hereto and made a part hereof.

SUBJECT TO existing taxes, assessments, covenants, conditions, restrictions, rights of way, easements and all other matters of record.

The undersigned hereby warrants the title against all persons whomsoever, subject to the matters above set forth.

Dated: November 9, 2012

LaFamilia Management, L.L.P., an Arizona limited liability partnership
By: Famcor Management, Inc., an Arizona corporation, its General Partner

By: *Jeffrey M. Andersen*
Jeffrey M. Andersen, Vice President

State of *Arizona*
County of *Maricopa*

The foregoing instrument was acknowledged before me this *16th* day of *Nov*, *2012*
by Jeffrey M. Andersen, Vice President of Famcor Management, Inc., a/an Arizona corporation, on behalf of the corporation, its General Partner of LaFamilia Management, L.L.P., an Arizona limited liability partnership.

Christy Keledjian
Notary Public



http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=197947 [20121046521] 3 Pages

ORDER NO. : 4724011411-SF

EXHIBIT A

That part of the East 1200 feet of Tract 4, OBRIENS CAMELBACK LANDS, according to Book 18 of Maps, page 36, records of Maricopa County, Arizona, described as follows:

Beginning at the Southeast corner of STONE CANYON EAST, according to Book 81 of Maps, page 34, records of Maricopa County, Arizona;

Thence Southerly, parallel with and 334 feet West of the East line of said Tract 4, a distance of 270 feet;

Thence Northwesterly to a point on the West line of the East 1000 feet of said Tract 4 which is 180 feet Southerly of the Southwest corner of Lot 22 of said Stone Canyon East;

Thence Northerly along said West line, to said Southwest corner;

Thence East along the South line of Stone Canyon East to the Point of Beginning;

EXCEPT all coal and other minerals, as reserved in the Patent.

<http://recorder.maricopa.gov/recdocdata/verify/cert.aspx?id=197947> [20121046521] 3 Pages

20121046521
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
ADRIAN FONTES

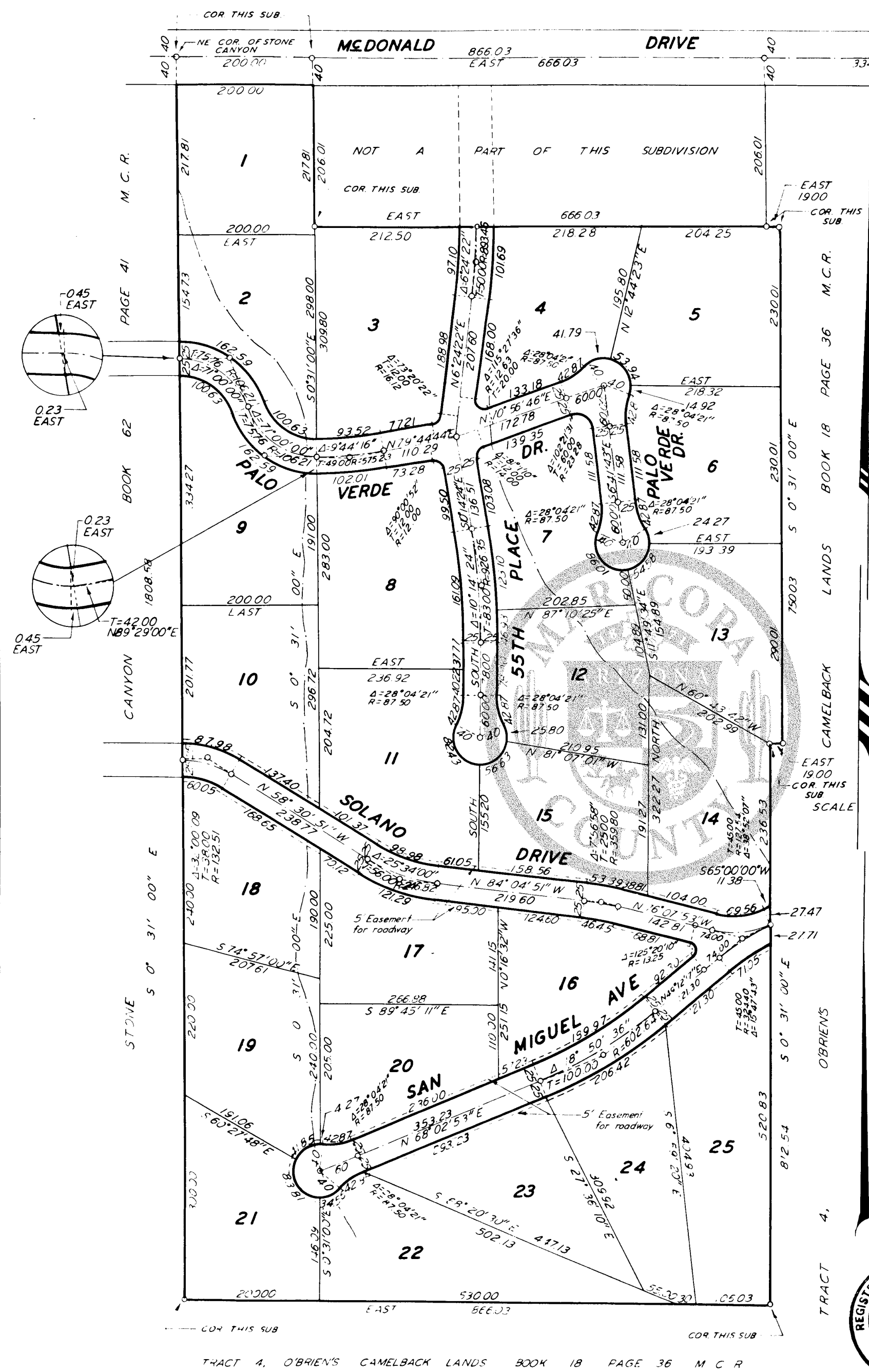


The foregoing instrument is an
electronically prepared
full, true and correct copy
of the original record in this
office.

Attest: 04/25/2018 10:35:22 AM

By *Adrian Fontes* Recorder

To Verify this purchase visit
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=197947>



STONE CANYON EAST

A SUBDIVISION OF A PORTION OF TRACT 4, O'BRIEN'S CAMELBACK LANDS, BK. 18, PG. 36, M. C. R.

DEDICATION

KNOW ALL MEN BY THESE PRESENTS: That the Phoenix Title and Trust Company, an Arizona Corporation, Trustee, has subdivided under the name of STONE CANYON EAST, part of Tract 4, O'Brien's Camelback Lands, a subdivision recorded in Book 18 of maps on Page 36 thereof, office of the Maricopa County Recorder, as shown plotted hereon, and hereby publishes this plat as and for the plat of said STONE CANYON EAST, and hereby declares that said plat sets forth the location and gives the dimensions of the lots and streets constituting same and that each lot and street shall be known by the number or name given each respectively, on said plat, and hereby dedicates to the public for use as such, the streets as shown on said plat and included in the above described premises. Easements are dedicated to the use shown.

IN WITNESS WHEREOF, the Phoenix Title and Trust Company, as Trustee, has hereunto caused its corporate name to be signed and their corporate seal to be affixed and the same to be attested by the signatures of their officers thereunto duly authorized.

PHOENIX TITLE AND TRUST COMPANY—TRUSTEE

BY [Signature] ASST. VICE PRESIDENT ATTEST [Signature] ASSISTANT SECRETARY

ACKNOWLEDGEMENT

STATE OF ARIZONA
COUNTY OF MARICOPA

On this the 28 day of Jan, 1959, before me the undersigned officer, personally appeared J. S. HALL and Bernard A. Wicks, who acknowledged that they as such officers, respectively, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation, as Trustee, by themselves, as such officers, respectively.

IN WITNESS WHEREOF, I hereunto set my hand and official seal. [Signature]
My commission expires Jan 2, 1969 NOTARY PUBLIC

APPROVAL

Approved by the Board of Supervisors of Maricopa County, Arizona this 24 day of February, 1959.

BY [Signature] CHAIRMAN ATTEST [Signature] CLERK

Approved [Signature] SECRETARY CITY OF PHOENIX PLANNING COMM. DATE 1/28/59

Approved [Signature] MAYOR OF SCOTTSDALE DATE 1/28/59

Approved _____ COUNTY ENGINEER M.C.H.D. DATE _____

Approved _____ MARICOPA COUNTY HEALTH DEPT. DATE _____

CERTIFICATE

This is to certify that the survey and subdivision of the premises described and plotted hereon was made under my direction during the month of January, 1959. [Signature]
REGISTERED LAND SURVEYOR



Collar, Williams & White Engineering, Inc.

115 NORTH BROWN AVE.
SCOTTSDALE, ARIZONA
JOB NO. 581020

From: Paul Dembow <pv_dembow@yahoo.com>
Sent: Monday, June 17, 2013 6:59 AM
To: Doug Jorden
Subject: Fw: Roadway Easement issue
Attachments: 3178-402.pdf; 12126TOPO.pdf

S. coli EXHIBIT *33*
DATE *3-9-18*
Colette E. Ross
CR No. 50658

Doug,

I hope you had a great Father's Day!

I've been an acquaintance of Terry's for several years. Give me a call later today at my office 602-569-6900 ex. 207 to give me some details. I told Terry to take a chill pill and not utter 'Law Suit.' I'm sure cooler heads and property rights will prevail.

Speak to you soon.

Regards,

Paul Dembow
Town Council
Town of Paradise Valley
6401 East Lincoln Drive
Paradise Valley, Arizona 85253
480-348-3690

Disclaimer: All messages contained in this system are the property of the Town of Paradise Valley and are considered a public record subject to disclosure under the Arizona Public Records Law (A.R.S. 39-121). Town employees, public officials, and those who generate e-mail to and from this e-mail domain should have no expectation of privacy related to the use of this technology.

----- Forwarded Message -----

From: "tmscal@aol.com" <tmscal@aol.com>
To: pdembow@paradisvalleyaz.gov; tmscal@aol.com
Sent: Saturday, June 15, 2013 1:19 PM
Subject: Roadway Easement issue

Paul,

attached is the Roadway Easement that was recorded with the county in 1960, a copy of the Topographic for the area and a short email string between myself and the title company. My family owns parcel #172-47-78D and we wish to continue the existing Private Road that supplies access to lots #172-47-22 and #172-47-23 and follow that recorded easement across the south end of lots #24 and #25. Whether or not the town of PV wishes to accept and recognize the recorded easement, AZ law provides an "Implied Way of Necessity" and all that is required by law is reasonable necessity. The recorded Roadway Easement already specifies the only practical way to access our property and thus is "reasonable necessity".

Additionally, my family and wife in particular are suffering from the unnecessary emotional and financial stress caused by the town's initial position which questions our right to obtain permit to build this private roadway to our parcel and ultimately to serve as the way to supply utilities and access to our property. We have spent hundreds of thousands of dollars acquiring our property and toward our architect, Mark Candelaria, our Engineers, Fred Fleet, our attorney Doug Jorden, land surveyors, designers, etc. And, now that we have approached the town to seek permit for the grading & excavation planning to build this Private Road, we have been effectively stonewalled and put off with a notion that the easement although recorded may or may not have been accepted by the county?

The town has unnecessarily required me to pay for and conduct a land disturbance study for the surrounding parcels mentioned above due to some potential land disturbance additions from our proposed Private Roadway. However, if the town employees actually applied section III.G. of the town Zoning as to land disturbance: "Grading within streets rights-of-way or tracts of land for private roads is exempt from the disturbance calculations", then this study, the time, the costs and delays were unnecessary. I feel abused and targeted and wish to receive fair and impartial support for the continued development of the Roadway Easement and our family's new home under the existing building and zoning codes as they are fairly applied to all town residents.

As I see it now, I am left with the options of your council's helping me through this issue or my suing all parties including the town. I don't wish to waste millions of dollars pursuing my rights, but I can and I will. I am a man of principle first and foremost. So, I ask for your support as my representative and as a town resident for the past 18 years. What else can I provide you to help us with our cause?

Sincerely,

Terry Scali
.602-403-2778

-----Original Message-----

From: Hodges, Douglas <Douglas.Hodges@ctt.com>
To: Scali, Terry <TScali@nfp.com>; 'Mark Vanderlinde' <MarkV@VRealtyAdvisors.com>; 'tmscal@aol.com' <tmscal@aol.com>
Cc: Enget, Maria <maria.enget@ctt.com>; 'Allison Babij' <alley.babij@russlyon.com>
Sent: Fri, Jun 7, 2013 12:03 pm
Subject: RE: Property History

The document is attached. I did not receive an invoice from the title department so I guess there will be no charge.

Doug Hodges
Property Research
6710 N. Scottsdale Rd., Suite 100
Scottsdale, AZ 85253
doug.hodges@ctt.com
Direct: 602.667.1171



CHICAGO TITLE AGENCY

Where Experience Equals Excellence

From: Scali, Terry [mailto:TScali@nfp.com]
Sent: Friday, June 07, 2013 9:45 AM
To: Hodges, Douglas; 'Mark Vanderlinde'; 'tmscal@aol.com'
Cc: Enget, Maria; 'Allison Babij'
Subject: RE: Property History

Thx

-----Original Message-----

From: Hodges, Douglas [Douglas.Hodges@ctt.com]
Sent: Friday, June 07, 2013 12:41 PM Eastern Standard Time
To: Scali, Terry; 'Mark Vanderlinde'; 'tmscal@aol.com'
Cc: Enget, Maria; 'Allison Babij'
Subject: RE: Property History

Okay I have requested this from our Title Dept. I will forward this when received with any invoice generated.

Doug Hodges
Property Research
6710 N. Scottsdale Rd., Suite 100
Scottsdale, AZ 85253
doug.hodges@ctt.com
Direct: 602.667.1171



CHICAGO TITLE AGENCY

Where Experience Equals Excellence

From: Scali, Terry [<mailto:TScali@nfp.com>]
Sent: Friday, June 07, 2013 9:30 AM
To: Hodges, Douglas; 'Mark Vanderlinde'; tmscali@aol.com
Cc: Enget, Maria; 'Allison Babij'
Subject: RE: Property History

I need a copy and verification of the recorded version please. Thx, Terry.

-----Original Message-----

From: Hodges, Douglas [Douglas.Hodges@ctt.com]
Sent: Friday, June 07, 2013 11:46 AM Eastern Standard Time
To: Scali, Terry; Mark Vanderlinde; tmscali@aol.com
Cc: Enget, Maria; Allison Babij
Subject: RE: Property History

Hello Terry – I apologize for the delayed turnaround on this. I've had an unusually heavy workload in the last week or so & I had to set aside time to work on this. I believe I've found the deed you're looking for, at least I hope so. I could not pull a recorded copy from our title plant because it is too old & not available through the plant, & there would be a charge to request a copy from the title department. I was able to find a scanned unofficial copy on the Recorder's website & I'm hoping this will satisfy your needs.

Please let me know if not.

Doug Hodges
Property Research
6710 N. Scottsdale Rd., Suite 100
Scottsdale, AZ 85253
doug.hodges@ctt.com
Direct: 602.667.1171



CHICAGO TITLE AGENCY

Where Experience Equals Excellence

From: Scali, Terry [<mailto:TScali@nfp.com>]
Sent: Wednesday, June 05, 2013 6:34 PM
To: Mark Vanderlinde; Hodges, Douglas; tmscali@aol.com
Cc: Enget, Maria; Allison Babij
Subject: RE: Property History

Doug,

I also left you a voicemail on this issue. I need your help identifying and validating the roadway easement that was filed in February 1960 by Phoenix Title and trust Co to create the easement that provides access to our property on parcel 172-47-078D. In the worst case scenario there was originally an owner of the combined property that formed the 4 other lots and my lot. At some point in history those lots were split. AZ law requires subdivisions to provide access to all lots. Since the "Easement for Roadway" document we have references

the four other lots as early as 1960, I suspect that the subdividing of these properties happened sometime earlier than 1960. Can you help me obtain this information? Thanks,

Terry

Terrence M. Scali

CEO NFP Property & Casualty Insurance Services, Inc.

8201 N Hayden Rd, Scottsdale AZ 85258

P: 480-947-3556 | F: 480-947-6699 | tscali@nfp.com | www.laprescali.com



Property and
Casualty Services, Inc.

Lapre Scali & Company is now NFP Property and Casualty, Inc. Learn more at www.laprescali.com and www.nfppc.com

From: Mark Vanderlinde [<mailto:MarkV@VRealtyAdvisors.com>]

Sent: Monday, June 03, 2013 5:11 PM

To: doug.hodges@ctt.com

Cc: Scali, Terry; Maria Enget; Allison Babij

Subject: Fwd: Property History

Hi Doug,

Thank you for coordinating the history on that Camelback lot. The buyer has asked for a bit more assistance in trying to determine the specific documentation for an easement (from the batch you forwarded to Maria) that created the lot he purchased. Please take a look at the information, and if you would, coordinate any help you can offer directly with Terry Scali at the attached email.

Again, thank you for assisting in helping this client untangle this lineage.

Regards,

Mark Vanderlinde

Private Client Advisor

Luxury Residential Sales and Development

The V'ella Group &

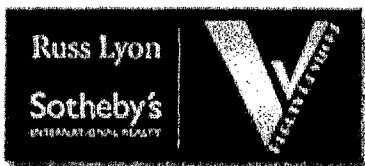
Sotheby's International Realty

Mobile: 602-619-6195

MarkV@TheVellaGroup.com

www.TheVellaGroup.com

Artfully Uniting Extraordinary Homes With Extraordinary Lives



Begin forwarded message:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC.,

Plaintiff,

vs.

TERESA C. ZACHARIAH, et.al.,

Defendants.

CV 2016-005381

Phoenix, Arizona
July 30, 2018

BEFORE THE HONORABLE PAMELA GATES

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Trial)

PREPARED FOR:
COPY

MICHELE KALEY, CSR, RPR
Certified Court Reporter #50512
(480) 558-6620
kaleym@superiorcourt.maricopa.gov

A P P E A R A N C E S

FOR THE PLAINTIFF/COUNTER-DEFENDANT:

BY: Andrew Abraham
Brian F. Murphy
BURCH & CRACCHIOLO, P.A.
702 East Osborn
Phoenix, Arizona 85014

FOR THE DEFENDANTS/COUNTER-CLAIMANTS:

BY: Francis J. Slavin
Daniel J. Slavin
Jessica Dorvinen
LAW OFFICE OF FRANCIS J. SLAVIN
2198 East Camelback Road
Phoenix, Arizona 85012

ALSO PRESENT:

Ladonna Gaut
Assistant to Messrs. Murphy and Abraham

Rami Burbar
Technical Assistant to Mr. Slavin

1 case about the reverse of that, the intent not to land
2 lock. And it starts, your Honor, by taking a look at
3 Exhibit No. 2, which is the plat that we've recorded.

4 Your Honor, on the plat that was recorded in
5 1959, I believe, the TMS property is up here. And
6 there is no evidence on the plat to suggest that a TMS
7 property was intended to be land locked. In fact, in
8 fact, what the evidence shows is that it was planned,
9 actually, to have legal access.

10 And the reason why it was planned is, you'll
11 see, your Honor, there's a zigzagging of the streets
12 which is sort of a traditional way to get up the
13 hillside. Zigzagging in the streets. And the lots,
14 the defendants' lots were actually platted in a way to
15 accommodate the final zigzag, which is right here.

16 And, your Honor, that same zigzag is exactly
17 what Exhibit 1, the roadway easement, reflects. There
18 may be questions about whether that roadway easement
19 that was recorded that's now in front of you, your
20 Honor, whether that was ever intended, whether that
21 was ever accepted by the county. We're not going to
22 present any evidence on that issue.

23 But one thing that's surely clear about this
24 roadway easement is it reflects the intent of Phoenix
25 Title and Trust to provide ingress, egress, and

1 A. Yes, and providing a gate code for future use.

2 Q. All right. Was Dr. Zachariah always amenable
3 preclosing to unfettered access to the property you
4 were looking at?

5 A. Teresa Zachariah, yes.

6 Q. And did either of the Zachariahs ever put any
7 limitations on your use of the driveway as part of
8 your due diligence before you closed?

9 A. Not that I'm aware of.

10 MR. ABRAHAM: Move admission, your Honor, of
11 Exhibit 31.

12 MR. F. SLAVIN: No objection.

13 THE COURT: 31 is admitted.

14 (Whereupon, Exhibit No. 31 was admitted into
15 evidence.)

16 Q. BY MR. ABRAHAM: Did you meet preclosing with
17 any families, members of the Appel family, owners of
18 Lot 23?

19 A. I believe so.

20 Q. Can you tell us about that?

21 A. After we had contracted for the property, my
22 son would have been six years younger then, so 23. He
23 wanted to see this lot that we were going to build our
24 dream home on. And so I drove over with him, and we
25 drove up the driveway and ended up walking the

1 property. And as we were leaving, I saw that the
2 neighbors on Lot 23, I think the Appel lot, seemed to
3 be out and about. So we stopped at their driveway and
4 walked up their driveway to introduce ourselves to
5 them and did so.

6 Q. And did you have some pleasantries and
7 conversations with them?

8 A. Yeah. It was a very short introduction. They
9 were probably surprised to see somebody walking up
10 their driveway. But I was trying to explain, hey, I
11 just bought that property and I want to introduce
12 myself and my child and, you know, just start a normal
13 neighborhood relationship.

14 Q. Do you recall what members of the Appel family
15 you actually met?

16 A. Well, as I came to learn later, I believe it
17 was the children of the owners, Roseanne Appel. So
18 not the owner of her property herself, but her
19 children.

20 Q. Did you hear from any member of the Appel
21 family prior to your closing on the lot that there
22 were limitations on your use of the easement to gain
23 access to the property you were buying?

24 A. No.

25 Q. All right. Let's look at Exhibit 119. Can

1 you tell us what Exhibit 119 is?

2 A. It's referred to as a, looks like a seller's
3 property disclosure statement.

4 Q. Is this a document that the seller completed
5 and provided to you during due diligence?

6 A. Yes.

7 Q. All right. Let's go to, well, let's look at a
8 couple of things. Down at the bottom of page one,
9 there's a question and there's an answer where the
10 seller's representing to you they have no knowledge of
11 any CC&Rs.

12 Do you see that?

13 A. Yes.

14 Q. And now let's go to page two. And is there a
15 whole section at lines 47 through 55 regarding access.

16 A. Yes.

17 Q. And now these are representations that your
18 seller is making to you as a buyer and is part of due
19 diligence, right?

20 A. That's correct.

21 MR. ABRAHAM: And let me move for admission,
22 your Honor, of Exhibit 119.

23 MR. F. SLAVIN: No objection.

24 THE COURT: I thought that was 13. That's
25 119?

1 MR. ABRAHAM: 119, your Honor.

2 MR. F. SLAVIN: 119.

3 THE COURT: 119 is admitted.

4 (Whereupon, Exhibit No. 119 was admitted into
5 evidence.)

6 Q. BY MR. ABRAHAM: All right. The seller is
7 representing to you at page 47 that there's legal
8 access to the property?

9 A. Yes.

10 Q. And then representing to you at line 48 that
11 there's physical access to the property?

12 A. Yes.

13 Q. But there is, if you go down to the section
14 52, there is some disclosure: Current road may not
15 physically touch property, which may prevent physical
16 access.

17 So you knew that the current improvements on
18 the ground may not actually get to the property line
19 of what you were looking at?

20 A. Yes, as for a vehicle.

21 Q. And I assume that's part of the reason you had
22 Don Miller do a survey and took professionals up there
23 to make sure you could actually fully get to the
24 property, correct?

25 A. Correct.

1 Q. Let's go to the next page, Ladonna, and then
2 one more. Keep going to the last page where they
3 sign. And here, just so we have the record, at line
4 192, starting at line 189 through 192, the seller
5 makes, certifies regarding the information is true and
6 correct to the best of their knowledge and is signed
7 by Jeff Anderson?

8 A. Yes.

9 Q. Do you see that?

10 A. Yes.

11 Q. And then you acknowledge receipt of it down at
12 the bottom on line 203 on November 2nd, 2012?

13 A. Correct.

14 MR. ABRAHAM: Okay. Now let's look at Exhibit
15 20. Keep going. Keep going. Let's get to the title
16 commitment. It's at the end of that. Is that the
17 exhibit?

18 MS. GAUT: That was 120.

19 MR. ABRAHAM: 120?

20 MS. GAUT: Commitment for title insurance.

21 MR. ABRAHAM: Yes.

22 Q. In front of you is what was marked in your
23 deposition as exhibit three, and it's 120 at trial.

24 Is this a copy of the title commitment you
25 received?

1 A. Yes.

2 Q. All right. Now let's go and -- on the first
3 page, it's showing the proposed insured is your
4 entity, correct?

5 A. That's correct.

6 Q. All right. Let's go to the second page and
7 keep going. And it shows that the property is owned
8 by La Familia, which is your seller, correct?

9 A. Correct.

10 Q. All right. Let's go to the next page,
11 Ladonna. Keep going. All right.

12 And then it shows as one of the exceptions,
13 Exhibit 1, which is the easement, correct?

14 A. That's correct.

15 Q. Okay. So the title company confirms to you
16 that the easement, Exhibit 1, was a record, as well,
17 correct?

18 A. That's correct.

19 MR. ABRAHAM: I'd move the admission of 120,
20 your Honor.

21 MR. F. SLAVIN: No objection.

22 THE COURT: 120 is admitted.

23 (Whereupon, Exhibit No. 120 was admitted into
24 evidence.)

25 Q. BY MR. ABRAHAM: Now at some point during the

1 escrow before your closing, did you learn something
2 about acceptance of the easement by the county, at
3 least there was a question on that issue?

4 A. Yes, there was some question from the title
5 company about finding or having some written document
6 about acceptance of the easement.

7 Q. Let's look at Exhibit 122. Part of a title
8 commitment includes requirements from the title
9 company?

10 A. Yes.

11 Q. All right. And one of the requirements was
12 requirement number three, proper showing of the
13 easement being accepted by the County.

14 Do you see that?

15 A. I do.

16 Q. All right. And that's what you were just
17 referring to?

18 A. That's correct.

19 Q. And there's some handwritten -- you don't know
20 whose handwriting that is, I take it? Or do you?

21 A. I don't.

22 MR. ABRAHAM: Move admission of 122, your
23 Honor.

24 MR. F. SLAVIN: No objection.

25 THE COURT: 122 is admitted.

1 A. I think we revealed an e-mail earlier that
2 kind of gave the timeframe, but I don't.

3 Q. Okay. But, basically, did Maricopa County
4 provide you with any showing that it had approved or
5 accepted the 1960 Easement?

6 A. I believe they responded that they turned all
7 of this over to Paradise Valley, so I don't think they
8 provided me anything.

9 Q. Okay. So you would understand that, when you
10 went over there, they didn't tell you they accepted it
11 and that, basically, since this area was incorporated,
12 that that would be left up to the Town of Paradise
13 Valley, correct?

14 A. I believe so.

15 Q. Okay. All right. Now it talks about here --
16 let's look at number three. It says: Investigate
17 applicable building, zoning, fire, health and safety
18 codes, including applicable swimming pools, various
19 regulations to determine any potential hazards,
20 violations, or defects in the property.

21 Do you see that, sir?

22 A. Yes.

23 Q. Okay. Now I believe you stated that you had
24 walked up to the property with Mr. Vanderlinde,
25 correct?

1 A. I believe that's correct.

2 Q. Okay. Because later on, Mr. Jorden wrote a
3 letter to that effect to the title company.

4 Do you remember that?

5 A. I do.

6 Q. Okay. So this is a very important document
7 that you went to the MLS and you talked to their
8 sellers; and you were told there was legal access by
9 virtue of this 1960 roadway easement, correct?

10 A. That's a compound question. I feel like
11 you're asking me to determine that that's the only
12 thing that happened. What I did is I spoke to the
13 owners representative on the property, and they
14 confirmed that this easement existed and was valid.

15 Q. So basically then, if I can understand you
16 correctly, you relied upon the seller's rep assuring
17 you that this 1960 Easement was valid, correct?

18 A. That was one of the reliances.

19 Q. Okay. And the other reliance you had is that
20 the title company, if they closed that transaction,
21 then they must have received something that they
22 believed it was sufficient to satisfy that
23 requirement, correct?

24 A. That's correct.

25 Q. Okay. But you yourself never did, in fact, go

1 and confirm yourself, did not confirm that the, either
2 the Town of Paradise Valley or Maricopa County had
3 actually accepted this easement for public roadway,
4 correct?

5 A. I may have attempted to reach out to parties
6 to try to confirm that, but I never was able to
7 confirm that.

8 Q. Okay. So, basically, what you then did is you
9 closed the transaction relying upon others to confirm
10 the validity of the 1960 Easement, correct?

11 A. Essentially, yes.

12 Q. Let's try 6 again. I'm sorry. Did I get that
13 wrong? I'm sorry. I want 30. I beg your pardon,
14 Rami. It's 30.

15 Okay. Now Mr. Abraham already showed you
16 this e-mail, this Exhibit 30. And at the bottom of
17 this e-mail, the e-mail you sent was, you sent it to
18 Theresa and Joe Zachariah. And this is on November 5,
19 correct?

20 A. Yes.

21 Q. Okay. And this was at a time before you had
22 closed the purchase of the property, correct?

23 A. That's correct.

24 Q. And you closed the purchase of the property on
25 November 16th, 2012, correct?

1 Q. BY MR. F. SLAVIN: Getting back to Exhibit
2 119, which Mr. Abraham questioned you about, sir.
3 Rami, I'd like you to go to line or box 52 on this
4 one, right where it says, "use." Do you see that?

5 Okay. Now this is Seller's Property
6 Disclosure Statement, which are regularly used in
7 closing real estate transactions, correct?

8 A. Yes.

9 Q. And you're not a stranger to sellers property
10 disclosure statements, are you?

11 A. No.

12 Q. Here, this states: Are you aware of any
13 problem of legal or physical access to the property?

14 And then the statement says here: Current
15 road may not physically touch property which may
16 prevent physical access.

17 You saw that part, right?

18 A. Yes.

19 Q. And so you knew and understood that, even by
20 going out and looking at the property, that the
21 current road -- and here, my sense is this current
22 road means the private or, excuse me, the driveway
23 that's on the Zachariah property, correct?

24 A. I presume it could mean either that or the
25 road, San Miguel, either or both.

1 think that was -- the way I took that was they were
2 wanting to better understand how I might disturb the
3 land or what I might build up there, which led to me
4 inviting them to come to my house and see exactly what
5 the plans are.

6 Q. But you never had a meeting with them, did
7 you?

8 A. I met with one of the neighbors, but not the
9 Zachariahs.

10 THE COURT: Is now a good time for the break?

11 MR. F. SLAVIN: Sure. I've got about ten more
12 minutes and I'm done.

13 THE COURT: Okay. I'm sorry. You're welcome
14 to sit. I'm not going to leave right now.

15 (Recess taken.)

16 THE COURT: We are back on the record in
17 CR 2016-005381. All appearances previously in effect
18 are still in effect.

19 Mr. Scali is still on the stand, still under
20 oath. Your continued cross examination.

21 MR. F. SLAVIN: Thank you.

22 Q. Mr. Scali, isn't it true that you never spoke
23 to Mr. or Mrs. Harrison regarding the claimed easement
24 area across their property?

25 A. That's true.

1 Q. Okay. And also, is it true that you never
2 spoke to the Appels with regard, to either Terry Appel
3 or Roseanne Appel regarding the easement area you're
4 claiming over her property?

5 A. I did speak with the Appels or whoever was in
6 their driveway that day. Maybe I assumed wrong, but I
7 thought it was family members.

8 Q. And you have not produced any e-mails so far
9 as far as, between you and the Appels that I could
10 find?

11 A. I don't believe I have any e-mails between us.

12 Q. Okay. And of course, Mr. Smith, same thing.
13 You had no discussions with him prior to your purchase
14 with regard to the roadway easement, correct?

15 A. Are you talking about Jerry Smith?

16 Q. Jerry Smith, yes, owner of Lot 25?

17 A. I don't think I spoke with him until after the
18 purchase.

19 Q. Okay. So out of those 22, 23, 24 and 25, you
20 had just spoken to the owners of Lot 22?

21 A. And as I stated before, the folks who were in
22 the driveway at Lot 23.

23 MR. F. SLAVIN: Okay. That concludes my cross
24 examination.

25 THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. ABRAHAM:

Q. Terry, just a few follow-up questions. You're not claiming that the County or the Town accepted the easement that's Exhibit 1, are you?

A. Not at this point. I have no reason to believe.

Q. And did the title company issue to you an owners policy of title insurance following closing?

A. Yes.

Q. Did you provide the title company with everything they asked for during escrow regarding any matter?

A. Everything that I could, I provided them, yes.

Q. Ladonna, can you put up 69? And if you would, can you zoom into the common property line between TMS and Lot 22. A little bit closer.

MR. F. SLAVIN: Your Honor, I may have an objection. This might be going beyond my cross examination.

THE COURT: Overruled.

Q. BY MR. ABRAHAM: You were asked on cross examination about boulders and washes on your property.

1 evidence, your Honor.

2 MR. F. SLAVIN: No objection.

3 THE COURT: 27 is admitted.

4 (Whereupon, Exhibit No. 27 was admitted into
5 evidence.)

6 Q. BY MR. MURPHY: Ma'am, I already quoted in, if
7 you recall, the initial offer you made was \$530
8 thousand. In your e-mail of April 18, 2012, you
9 increased your offer to \$550 thousand; is that
10 correct?

11 A. Yes.

12 Q. And though I don't have it in this e-mail, you
13 later increased your offer to \$600 thousand; is that
14 correct?

15 A. That's correct.

16 Q. But that offer was, in fact, to be funded 50
17 percent by you, the owner of Lot 22, and 50 percent by
18 the Appels, the owner of Lot 23; is that correct?

19 A. That's correct.

20 Q. So both you and the Appels made an offer of up
21 to \$600 thousand to acquire the TMS property?

22 A. It wasn't the TMS property at the time. But,
23 yes, that raw land up there, we did offer 600k.

24 Q. The 3.44 acre parcel that sits directly south
25 of your property and the Appels' property?

1 A. That's correct.

2 Q. In fact, you thought the property might be
3 developed, and that's why you were trying to acquire
4 it. Isn't that true?

5 A. That would be one of our concerns. Our main
6 reason for trying to purchase the property is we were
7 going to donate it to the Phoenix Mountain Preserve.

8 Q. But the reason you were going to donate it was
9 to ensure it was never developed; is that right?

10 A. That's correct.

11 Q. And as it happened, Mr. Scali outbid you for
12 the property. Is that your understanding?

13 A. He obviously bought the property. I don't
14 know that there was, to my recollection, David Appel
15 was talking to Jeff, and as Terry Scali himself said,
16 he was going to get back to David if there was an
17 offer. My understanding is he never did, so it was
18 never an issue of bidding going on.

19 Q. But you and the Appels agreed to combine your
20 resources to pay \$600 thousand to eliminate the risk
21 presented by an easement that you had believed was
22 invalid and unenforceable?

23 A. Yes.

24 Q. If you could post Exhibit 48, which has been
25 admitted into evidence and go to page three, please.

1 And if you could zoom in on the boundaries between Lot
2 22 and Lot 23, please.

3 Ma'am, let's focus on your use of the
4 easement. Let me start off by stating you understand
5 that this was an e-mail, pardon me, a survey that was
6 prepared by a gentleman named Ryan Fidler of a company
7 called RLF who you had retained to do surveying work;
8 is that correct?

9 A. I don't see that written on here. I'm taking
10 your work for that.

11 MR. MURPHY: Let's see if we can shrink down
12 again, and I'll go down to the signature and stamps on
13 this document. Could you enlarge the corner? That's
14 not quite showing here.

15 MS. GAUT: Is that what you want?

16 MR. MURPHY: No. We need the signature RLF at
17 the top.

18 THE WITNESS: I see the RLF on the page. I
19 don't see a date.

20 Q. BY MR. MURPHY: Maybe the enlargement would
21 make that clear.

22 A. Okay.

23 Q. Ladonna, you need to scroll down to get the
24 text that I need here. If you could go to the top of
25 the page, sorry. There we are.

1 RLF Consulting is the group that's related to
2 Mr. Fidler. Is that your understanding?

3 A. Only from what you're telling me. I presume
4 that RLF and Fidler, we probably paid, but it was
5 probably set up by our legal team.

6 Q. Very good. Let me -- this is already admitted
7 in evidence, so why don't we go back again, if you
8 would, to that portion that shows the distinction
9 between Lots 22 and 23 and start right there, if you
10 would.

11 A. Will you zoom out and then zoom back in?

12 Q. Sure.

13 A. Just so I know what we're looking at.

14 Q. Sure.

15 A. I think I get it. I think this is my house
16 and I think -- but just to be sure, okay. Now you can
17 zoom in. Thank you.

18 Q. Great. And if you could zoom in on this
19 aspect of the driveway just a little bit lower,
20 please.

21 And to set the stage, ma'am, your house is at
22 the bottom of the screen. That's Lot 22. And then
23 just above that is Lot 23 owned by the Appels; is that
24 correct?

25 A. That's correct.

1 Q. And this shows that, in order to get access to
2 San Miguel Avenue, the Appels' driveway crosses a
3 portion of your driveway, Lot 22, correct?

4 A. Their driveway crosses part of mine, yes,
5 that's correct.

6 Q. And if you could go down the, oh, course of
7 the easement -- very good -- stop right there. This
8 also shows the dotted line at the center is the
9 boundary between Lot 22 and Lot 23.

10 Is that your understanding?

11 A. Yes, that's my understanding.

12 Q. And your driveway has an extension that goes
13 on to Lot 23, the Appels' property as a turnaround
14 area for your driveway, correct?

15 A. That's correct.

16 Q. And that is in the easement area?

17 A. Yes.

18 Q. Is that right?

19 A. So you're asking me if that easement area.

20 MR. F. SLAVIN: Your Honor, he's asking for a
21 legal conclusion about easement area and that sort of
22 thing.

23 THE COURT: To the extent that counsel's
24 referring to easement area, it's not a conclusion of
25 law. We're just using it to define the area depicted

C E R T I F I C A T E

I, MICHELE KALEY, do hereby certify that the proceedings had upon the hearing of the foregoing matter are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED this 9th day of September,
2018.

/S/
MICHELE KALEY, RPR
CERTIFIED REPORTER
CERTIFICATE NO. 50512

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC.,

Plaintiff,

vs.

TERESA C. ZACHARIAH, et.al.,

Defendants.

CV 2016-005381

Phoenix, Arizona
July 31, 2018

BEFORE THE HONORABLE PAMELA GATES

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Trial)

PREPARED FOR:
COPY

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Assistant to Messrs. Murphy and Abraham

Rami Burbar
Technical Assistant to Mr. Slavin

1 is the Appels' here. This is the Harrisons' here.
2 And the one partially in view is the Smiths'. The one
3 at the very end is Kathy Brown.

4 Q. And also this indicates the 50-foot
5 right-of-way area that's the subject of this lawsuit.

6 Do you see that?

7 A. Yes, I do.

8 Q. Okay. In the red, correct?

9 A. Correct.

10 Q. And you previously testified that that red
11 line, the distance from that red line to the front of
12 your property is approximately --

13 A. 24 feet.

14 Q. -- 24 feet?

15 A. Yeah.

16 Q. Did, and you understand that the plaintiff is
17 seeking to use your driveway up to the turnaround
18 area.

19 Do you see that?

20 A. Yes.

21 Q. And you understand that's something that the
22 plaintiff is seeking the Court to grant it judgment to
23 be able to do on your property, correct?

24 A. Yes.

25 Q. Okay. Did you ever understand, when you

1 bought the home or after that, that this was anything,
2 other than just a private drive to serve your
3 residence?

4 A. Yes. I saw this as a private drive to serve
5 my residence.

6 Q. Okay. Let's move on. There was some
7 discussion yesterday when Mr. Murphy examined you with
8 regard to some addenda or addendums -- whatever you
9 want to say -- to a purchase contract that you and
10 your husband had signed for the purchase of this home,
11 correct?

12 A. Correct.

13 Q. Okay. Let's go to, let's go to Exhibit 23 for
14 a minute. So this is the addendum to the purchase
15 contract, and it shows your name and your husband's
16 name. Do you see that?

17 A. Yes, I do.

18 Q. Okay. And it's for the premises located at
19 5505 East San Miguel Avenue, Paradise Valley.

20 Okay. Let's go down below this, Rami, for a
21 moment.

22 Again, it sets forth here the sale price to be
23 a million three ten. And that was the original sale
24 price that was set forth in the purchase contract that
25 you had originally signed for this home, correct?

1 fairly well-known entity in Arizona. And it's very
2 high in this area. It's very steep. There's lots of
3 boulders. I've discussed this with Bill Mead. My
4 opinion, at this point, is no one's ever developed it
5 before. It's not going to be. I see the boulders. I
6 see the steepness of this. I see the gate.

7 Q. The gate, meaning the --

8 A. There's a gate at the end -- I'm sorry.

9 There's a gate at the end of my driveway that's been
10 there that, basically, would block this area. And the
11 only -- you know, I'm relying on experts that are
12 title examiners. And they have looked and they don't
13 find this. It doesn't seem to show up, except with
14 the bank who is now looking at a property that they're
15 going to have to foreclose on. So there's a lot of
16 issues that to me said, hey, why are they -- this
17 easement doesn't even exist.

18 Q. Can you tell me why you looked in this area in
19 the first place to buy a home?

20 A. Yes. It was because of the mountains and
21 because of the peace and nature surrounding it. I'll
22 give you a little background without going too far. I
23 grew up in the country. I like open space. I like
24 nature. And my husband and I settled in Carefree,
25 which is the north part of the Phoenix area. And we

1 lived close to Black Mountain, and we loved that. It
2 was nice. It's peaceful. It's like being in nature,
3 but still close to the city.

4 Both being physicians, if you're going to be a
5 pulmonary critical care physician, you're not going to
6 do that in a town of two to 3000 people, so you need
7 to live in a larger city. But it was great to live in
8 Carefree, except -- I said I was a pulmonary critical
9 care physician. After eight years of emergencies
10 happening at 2:00 a.m. and driving 45 minutes to an
11 hour one way to get to hospitals, it got a little
12 tiring.

13 So we were looking for a property like we had
14 there without the drive. And so this property was
15 perfect for that. I can also say that one of the
16 great things -- and still today -- I like about the
17 property is, it is very quiet. Even the roads around
18 there because of the Camelback's positioned. I get
19 home, and it's a sanctuary. I don't hear anything.

20 So summing up what I said was, it was because
21 of wanting the same type of home that I had in
22 Carefree without that drive for my job.

23 Q. Okay. You were here yesterday to hear the
24 testimony of Mr. Scali. And you were also asked
25 questions by Mr. Murphy with regard to certain

1 communications that are alleged to have occurred
2 between you and Mr. Scali.

3 Do you recall that?

4 A. Yes, I do.

5 Q. Do you recall when you first -- what was your
6 first contact with Mr. Scali? Was it with him
7 directly or someone representing him? Do you recall
8 someone representing him?

9 A. No. I remember the episode at, where I was
10 out doing yardwork at the top of my driveway.

11 Q. Do you know when that occurred? What time it
12 was?

13 A. It was some time before purchase. I would
14 say, no, I do not know the exact date.

15 Q. Okay.

16 A. I know it was one, a few-week period before I
17 actually talked to him on the phone.

18 Q. Okay. Okay. So you had this first meeting.
19 And can you -- so what were you doing at the time?
20 Were you outside your residence? Were you inside?

21 A. I want to clarify. It was not a meeting that
22 was set up. Now it may have been set up with the real
23 estate agent and Terry, but I was just surprised by
24 them showing up. I was out doing yardwork. I just
25 happened to be there. It wasn't something I was

1 planning to be there for.

2 Q. Okay. So it was Mr. Scali, and I think he
3 testified it was a couple of real estate agents?

4 A. I know that at least one of them was a real
5 estate agent because he introduced himself. And Terry
6 introduce the himself, as well.

7 Q. Okay.

8 A. There was one other person. And in hindsight,
9 I suspect that was the other real estate agent, but I
10 didn't know that at the time.

11 Q. And can you recall the discussions or the
12 nature of the, the content of the discussions that had
13 occurred on the driveway meeting?

14 A. Again, seven years ago, do I remember exact
15 wordings? No. But this has been important to me over
16 the past seven years, so I do have some memory of all
17 of this. And, obviously, they were looking at the
18 purchase of that land above. I knew it was for sale.
19 We had tried to purchase it ourselves, so I was
20 surprised by them.

21 So first off, they were introducing themselves
22 to me. And I knew in that conversation, they were
23 looking at the land above. I know we talked about
24 cooking, for some reason. And I know we talked about
25 how I liked living there. But it was a very short

1 conversation. It was a chitchat. And they left and I
2 finished my yardwork.

3 Q. So when you say they left, had they walked up
4 the driveway?

5 A. Yes. That's how I met them.

6 Q. And you recall they then walked back down the
7 driveway?

8 A. Yeah. Yes, I do. Now I know from their
9 testimony, they've talked about going up further on
10 the property. Can I say they did or did not? No. I
11 went ahead and finished my yardwork and I went back in
12 the house. So what happened after that, I don't know.

13 Q. But as long as you were outside, they walked
14 away back down the hill?

15 A. Yes.

16 Q. Correct?

17 A. Yes.

18 Q. Okay. And was there any discussion at all
19 with regard to the enforceability or the application
20 of the 1960 Roadway Easement?

21 A. We didn't discuss that.

22 Q. Never discussed it?

23 A. (Witness shakes head left to right).

24 Q. Okay. So that was your very first contact
25 with Mr. Scali, correct?

1 A. Correct.

2 Q. Who you referred to now as "Terry"?

3 A. I will be more than happy to call him
4 Mr. Scali or call him Terry.

5 Q. Okay. And so when, do you recall what was
6 your next contact with Mr. Scali?

7 A. When he called me on the phone and told me who
8 he was and that he had purchased the property. By
9 looking at the e-mails, I know that was somewhere,
10 November 4th, 5th. It's the day before the e-mail.

11 Q. Can we get Exhibit 30 up on the screen?

12 A. Actually, I stated that wrong. I don't look
13 at my e-mail often. And so there's an e-mail in here
14 that's dated November 5th. I believe I talked to him
15 on November 6th because, on November 7th, there's one
16 that says, "good to talk to you yesterday."

17 Q. So --

18 A. So I read this e-mail after I talked to him.

19 Q. Okay. So, basically, Mr. Scali, is he the one
20 who initiated the phone call?

21 A. Yes.

22 Q. Okay. And, again, do you recall essentially
23 or generally what was discussed during that phone
24 call?

25 A. I remember that he tells me he's purchased the

1 property. It was a very cordial conversation. And it
2 was important to me that he -- because I was, again,
3 as we talked in the past, we were trying to purchase
4 the property. And how David Appel had left it with
5 Jeff Anderson was he would let us know, so I was a
6 little surprised. But I did tell him we were trying
7 to purchase it. We didn't want it developed. We were
8 going to donate it. But I also congratulated him on
9 the purchase, but that's all I remember of the
10 conversation.

11 Q. And then he follows up with, the e-mail on
12 November 7th, says: Thanks, Teresa. We should have
13 more info to share in a few weeks. Our best until
14 then, Terry.

15 Right?

16 A. Yes.

17 Q. Okay. And did Mr. Scali ever share with you
18 and your husband the actual, or his plans for
19 development of the property?

20 A. No.

21 Q. Did, after you had this conversation and
22 these, this e-mail exchange, did you end up contacting
23 a lawyer?

24 A. The first lawyer I contacted was back when we
25 were trying to purchase and donate, which was a

1 gentleman named Christopher Wooten who I happened to
2 know who was in real estate. I knew him from a
3 medical, from taking care of him. And I reached out
4 to him, but I didn't go much further at that point. I
5 was trying to work out how to purchase and donate.
6 And at this point, I have not contacted a lawyer
7 otherwise.

8 Q. Okay. Now I believe there was a request,
9 there were e-mails yesterday with regard to his
10 request for the gate code and for access?

11 A. That's correct.

12 Q. Let's go to Exhibit 212 for a minute. I
13 believe we looked at this yesterday, or you were asked
14 about this yesterday. And here he is contacting you
15 in January asking, what's the best way for him to use
16 the driveway and to get access to the lot.

17 Do you see that?

18 A. Yes, I do.

19 Q. And then you send an e-mail back, basically,
20 providing him with the gate code and how to use the
21 gate code to access his property, correct?

22 A. That's correct.

23 Q. All right. And by this, were you doing
24 anything more than being a good neighbor?

25 A. I guess I didn't even really consider it a

1 neighbor at the time. I was being open and respectful
2 to be able to go up and look at the property. In my
3 mind, no one had -- he tells me he has purchased the
4 property. And in my mind, he may go -- it's hard to
5 see on paper. It's hard to see from the street level
6 even.

7 So in my mind, I think he's going to go up,
8 have it surveyed; and he's logically going to come to
9 the same conclusion that everyone else has, that this
10 is nearly impossible to develop. I had no reason not
11 to let him survey the property.

12 Q. Did you, at any time, have any discussions
13 with Mr. Scali regarding the 1960 Roadway Easement?

14 A. No.

15 Q. At some point in time, I believe you sent an
16 e-mail to the Town of Paradise Valley to, was it then
17 Mayor Scott LeMarr?

18 A. If you're referring to the e-mail I sent with
19 the attachment of the geotech survey?

20 Q. Yeah, you talked about that yesterday.

21 A. Is that what we're discussing?

22 Q. Yeah, right.

23 A. I met Mr. Mead at the Town, but I really had
24 not had a lot of interaction in this way. Actually,
25 ended up sending the e-mail to 30 different people

1 because I didn't know who to send it to there.

2 Q. And that e-mail also went to a planner at the
3 Town by the name of George Burton?

4 A. Yes.

5 Q. Okay. And in that e-mail, you were expressing
6 your concern about safety?

7 A. Yes.

8 Q. Okay. And that was, basically, your concern
9 at that point in time?

10 A. Yes.

11 Q. Okay. Mr. Scali talked about some agreement
12 to relocate the security gate on your property. Was
13 there ever an agreement to do that?

14 A. No, there was never an agreement. Terry and I
15 did discuss the gate. Again, even today, my gate is
16 still a little bit of an issue.

17 Q. Kind of a pain in the what, whatever?

18 A. If you will.

19 Q. Okay.

20 A. But it's two-ways ward, I guess.

21 Q. Yes.

22 A. But if you come to my property, the gate
23 code -- how this was designed is the gate code is at
24 the bottom of the hill. My driveway, I'm sure there's
25 an exact number somewhere. But let's say it's a

1 hundred feet up a steep incline, and it's narrow. So
2 you put in the gate code and you drive up; and then
3 all of a sudden, the gate didn't open all the way.
4 And so it's not opened, and I've done this a few
5 times. You work on your dexterity of driving back
6 down the driveway. And so I was trying to -- the gate
7 was a hassle for me, and I didn't want it to be a
8 hassle for him; so I was trying to be helpful with the
9 gate.

10 Q. And were you --

11 A. But let me finish that.

12 Q. Yeah.

13 A. So to me -- and even today -- it still makes
14 sense for the gate to be further down the hill, closer
15 to the key pad.

16 Q. And that's something that you've considered
17 doing yourself?

18 A. Yes.

19 Q. Okay. But you haven't gotten there yet to
20 actually move the gate down?

21 A. Well, we got a little sidetracked.

22 Q. Okay. All right. So, again, did you ever
23 believe that you had any agreement or understanding
24 with Mr. Scali with regard to whether or not he could
25 use your driveway permanently to gain access to his

1 lot?

2 A. We never discussed that.

3 Q. And Mr. Scali never sent you any kind of an
4 e-mail to that effect confirming conversations?

5 A. I think we've seen the e-mails. There was
6 quite a few of e-mails in the 1st of November and then
7 there's one in January and one in June.

8 (Discussion off the record.)

9 Q. BY MR. F. SLAVIN: Okay. I'd like to show
10 you, if you will, Exhibit 208, please.

11 Can you identify what's depicted in this
12 photograph?

13 A. Yes. You're standing at the bottom of my
14 driveway where those two gentlemen are standing on a
15 bunch of dirt. And up on my driveway is a large
16 boulder that a gentleman is standing by.

17 Q. What period of time are we talking about here?

18 A. Everybody knows about 9/11, but I think this
19 was 9/14. There was a large storm that came through
20 Paradise Valley. And I hear people talk about going
21 through a flood, going through a fire, but until
22 you've been through it, you don't really understand
23 it.

24 Q. Okay.

25 A. And the night of that storm, I keep hearing

1 rumbles of something. At the time, I didn't know what
2 it was; but now I realize it was a lot of small
3 boulders falling down. But then there was a loud
4 crash and there was a large amount of water that came
5 flooding down the hill. Water started coming in with
6 mud into our house.

7 And so this was the morning after. And we
8 were having trouble with water. We were having
9 trouble with our pool. It was demolished. And then,
10 like all good men, my husband was going to go to work
11 and let me clean it up.

12 Q. Oh, no.

13 A. And that boulder was blocking his ability to
14 get out of the driveway, but he managed. And so I'm
15 trying to figure out what to do here. And I have
16 friends who happen to be retired policemen. And I
17 called him and he told me call the town mayor; that
18 they will come when it's a safety issue. And that
19 boulder was precariously placed right in the middle of
20 my driveway.

21 That's my electric behind it. That's my water
22 behind it. And right behind these people standing at
23 the end of the street is the Brown's house. It wasn't
24 the Browns at the time. It was the Drums. But if
25 that boulder continued to roll, it was going to run

1 into their home. So I called the mayor and they came
2 and helped.

3 Q. And did the Town of Paradise Valley clean up
4 the area where all of this dirt was located?

5 A. Yes, they did.

6 Q. And did they end up removing the boulder?

7 A. They removed it from the driveway with two
8 boulders -- one in front, one behind -- and walked it
9 down. But you'll see, if I point right here, that's
10 at the end of my driveway. Just coming over this
11 area, that boulder still sits there today.

12 Q. Okay. So it was just moved down the hill and
13 it was repositioned, if you will, to the right --
14 right -- here of the curb?

15 A. Right.

16 Q. To your driveway; is that correct?

17 A. For memories.

18 Q. Okay. Did you send a copy of this information
19 to Mr. Scali?

20 A. Yes, I did.

21 MR. F. SLAVIN: Do you have Exhibit 144,
22 please?

23 THE COURT: What's 277?

24 MR. F. SLAVIN: I think it's 144.

25 THE COURT: Sorry. Thank you.

1 Q. BY MR. F. SLAVIN: Is this a copy of an e-mail
2 that you sent to Mr. Scali dated December 15th, 2014?

3 A. Yes. But full disclosure, I sent it, but my
4 husband wrote it.

5 Q. Okay. And what was your reason for sending
6 this e-mail to Mr. Scali?

7 A. We ourselves had been concerned about our own
8 safety even back when we had the geotech survey done.
9 This storm kind of bolted, jolted is the word, sorry,
10 us literally. And we were concerned ourselves. Our
11 neighbors were concerned.

12 This was, I don't want to say a life-changing
13 experience, but it was definitely a neighborhood
14 experience. That storm was scary and he was looking
15 at this property above. I hadn't heard from him in
16 quite some time. I wanted him to know how we felt
17 about it.

18 Q. It says here about half way down, it says: We
19 have attached pictures for your review from just one
20 homeowner. That means yourself, correct?

21 A. Yes.

22 Q. And it is clear that no fencing or
23 construction skirts would stop boulders this size from
24 rolling down.

25 Do you see that?

1 A. Yes.

2 Q. Okay. Then you go on to say all of the
3 homeowners below your lot incurred similar problems
4 and have pictures to validate this safety concern.
5 And then it goes on to say: In fact, there are
6 boulders that are ten times the size of this one that
7 will be disturbed during any construction process.

8 A. That's correct.

9 Q. So, again, you wanted to share your concern
10 with Mr. Scali that potentially something like this
11 could happen if he proceeded to construct his home?

12 A. I think we -- in my mind, we had two
13 objectives. One, to let him know we were very
14 concerned; but, also, he should concerned and he
15 should know what's going on.

16 Q. Did you receive any response to this e-mail?

17 A. No.

18 MR. F. SLAVIN: Okay. So at this point, we
19 would move for admission of the following exhibits:
20 19, 21, 23, 140, 143, 145, 146, 206, 212, 239, which
21 we understand is maybe a duplicate of one of the
22 plaintiff's exhibits, but it has a certification
23 associated with it, Exhibit 288, and then we've got
24 two apparently that are still objectionable from the
25 plaintiff's standpoint. That's 208 and 144.

1 All right. Counsel, we're going to recess for
2 the evening. We're at 4:30. I know we got started a
3 little bit late this morning. My calculation is that
4 Plaintiff's today used 125 minutes. Defense used 176
5 minutes which puts us at 14 minutes behind schedule.
6 I'm going to worry about how to make this up.

7 All right, folks. I'll see you tomorrow.
8 (Matter concluded.)

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C E R T I F I C A T E

I, MICHELE KALEY, do hereby certify that the proceedings had upon the hearing of the foregoing matter are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED this 2nd day of November,
2018.

/S/
MICHELE KALEY, RPR
CERTIFIED REPORTER
CERTIFICATE NO. 50512

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC.,

Plaintiff,

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TERESA C. ZACHARIAH, et.al.,

Defendants.

CV 2016-005381

Phoenix, Arizona
August 1, 2018

BEFORE THE HONORABLE PAMELA GATES

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Trial)

PREPARED FOR:
COPY

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1 Q. And the subsequent reports, was that -- or the
2 subsequent materials from Mr. Vann you examined, was
3 that still contained in his materials?

4 A. No, I did not see that recommendation in his
5 subsequent report.

6 Q. Well, what is a rockfall impact zone?

7 A. It's a horizontal area that is dedicated to,
8 essentially, collect rockfall that may fall from up
9 above. Basically, it allows for kind of a safe place,
10 a safe place for rocks to fall.

11 Q. It's a horizontal plane on the property?

12 A. Yes.

13 Q. Okay. And is the length of the plane of the
14 rockfall zone, is that related to the height of the,
15 let's say of a cut in the hillside?

16 A. It is. There's no hard and fast rule on how
17 wide that horizontal zone should be. It has a lot to
18 do with the height of the cut that you mentioned. It
19 also has a lot to do with the quality of the rock that
20 you're cutting into. If it's a very high quality and
21 sound, you need little space. But if it's weak and
22 fractured, you need more space.

23 Q. Okay. So what impact can vibration from heavy
24 equipment have on the overall slope stability on a
25 thicker piece of property?

1 A. Well, it could have a huge affect because
2 those rocks that are there, the outcrops that we
3 looked at earlier and boulders that are laying there,
4 they are currently stable. However, they've never
5 experienced vibrations from construction. They've
6 only experienced the environment.

7 And so a little bit of vibration could
8 adversely affect the stability because there could be
9 some soil that's holding a rock in place that gets
10 vibrated, the soil gets vibrated loose and, all of a
11 sudden, that lock doesn't have that support anymore.
12 And it could fall down the hill very easily, so it
13 could be affected negatively.

14 Q. Is there a safety factor of 1.0 that's used in
15 evaluating a stability of cuts and fills?

16 A. Well, there's a safety factor, yes, but 1.0
17 isn't it. It's usually 1.5 that's used commonly for
18 an acceptable factor of safety. When you identify a
19 factor of safety that's less than 1.0, that means it
20 could fall at any moment. That's essentially the,
21 kind of the -- you can kind of think of 1.0 as the
22 break-even angle.

23 And so from an engineering perspective, we
24 don't feel comfortable living with just a 1.0 factor
25 of safety. So what we say is we want it designed to

1 permission?

2 A. Yes, sir.

3 Q. Now, sir, I want to make sure that we testify,
4 that we identify what you aren't going to talk about.

5 Would you agree that you did not retain or you
6 did not identify any conflicts or inconsistencies as
7 it relates to legal access to the property? That
8 wasn't part of your scope of work?

9 A. That's correct.

10 Q. And you don't intend to offer any opinions
11 regarding the legal access issue; is that correct?

12 A. That's correct.

13 Q. And we've noted you did a report of March 9,
14 2017. I think you also did a supplement in July of
15 2017; is that correct?

16 A. That's correct.

17 Q. And those both included a section entitled
18 geologic and geotechnical observations and comments.

19 Do you recall that, generally?

20 A. I do.

21 Q. And in that, you expressed opinions
22 criticizing the investigation that had been done of
23 the property by Vann Engineering and proposed
24 development schemes that had been given to you; is
25 that correct?

1 A. That's correct.

2 Q. And those opinions all related to a proposed
3 future development of the TMS property. Is that your
4 understanding?

5 A. Yes.

6 Q. They did not relate to the developability of
7 the property in 1960?

8 A. That's correct.

9 Q. Now you were asked by Mr. Slavin about the
10 risk of boulder fall from storm water and rockfall.
11 Those risks can be accounted for geotechnically with
12 good plans. Would you agree with that?

13 A. I think there's a certain level of protection
14 that can be implemented during construction and after.

15 Q. And you mentioned a safety level of 1.0 or
16 more are the accepted thresholds in that regard in
17 your industry?

18 A. That's correct.

19 Q. And you said to develop safely, number one,
20 you need to do, you need a good topographic study. Is
21 that correct so far as a starting point?

22 A. Yes.

23 Q. You need to do geology work, including rock
24 coring; that is correct?

25 A. Yes.

1 Q. Okay. And so, and the slope of -- if I
2 understand correctly, the slope category is you take
3 the distance horizontal and then you take the distance
4 vertical and that comes up with a slope or a
5 percentage.

6 Is that fair?

7 A. It is, yes.

8 Q. Yeah.

9 A. The 53 percent is the reference to the slope
10 angle from the south edge -- or, I'm sorry, from the
11 north -- yeah, the south edge of the property in
12 question to the north edge of the property in question
13 in general.

14 Q. In general. So that, so this demonstrates,
15 now is this the right angle or do you lay it down
16 the --

17 A. No. This is the right angle. The handle's in
18 the back here. So you had asked us if we could
19 prepare an exhibit so that it could be visually
20 absorbed, you know, what that angle looks like. And
21 so that's what we did. So this face that is shown
22 here is 53 degrees from this horizontal here. So this
23 angle is 53 degrees. So, in general, that is the
24 slope angle of the site in question from the south to
25 the north.

1 A. I do, sir.

2 Q. Thank you. So with that explanation, what has
3 been your experience with regard to driving or
4 attempting to drive firefighting, fire trucks up a
5 grade as steep as 25 to 30 percent as reflected on
6 this plat?

7 A. When I first got on the fire department in
8 1974, most of our vehicles were 10, 12, 15 years old.
9 At that time, those vehicles were gasoline engines
10 with standard transmissions. Since then, things have
11 changed considerably and they are now large
12 horse-powered diesel engines with automatic
13 transmissions.

14 There's no way that a, even a powerful diesel
15 engine can climb a grade of about 15 to 17 percent.
16 And even then, it would be a giant struggle to climb a
17 grade that way. Perhaps as an example, many of us
18 have gone up I-17 to Flagstaff. And when you go up
19 through the mountains and you see those trucks
20 lumbering on the right side of the road and just
21 slowing grinding their way up, that's a six percent
22 grade.

23 The signage on that highway is six percent
24 grade. And those trucks are barely making it up. A
25 15, 20, or 30 percent grade would be physically

1 tomorrow.

2 (Matter concluded.)

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C E R T I F I C A T E

I, MICHELE KALEY, do hereby certify that the proceedings had upon the hearing of the foregoing matter are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED this 2nd day of November,
2018.

/S/
MICHELE KALEY, RPR
CERTIFIED REPORTER
CERTIFICATE NO. 50512

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC.,

Plaintiff,

vs.

TERESA C. ZACHARIAH, et.al.,

Defendants.

CV 2016-005381

Phoenix, Arizona
August 2, 2018

BEFORE THE HONORABLE PAMELA GATES

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Trial)

PREPARED FOR:
COPY

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Assistant to Messrs. Murphy and Abraham

Rami Burbar
Technical Assistant to Mr. Slavin

1 a conceptual design of the house, correct?

2 A. Correct.

3 Q. Okay. Now -- and he goes on to say that in
4 his January 2, 2017, report that his findings or
5 recommendations were used to provide what were called
6 temporary and permanent cut slope recommendations at
7 that time.

8 Are you with me?

9 A. Yes, sir.

10 Q. Okay.

11 MR. F. SLAVIN: Can we -- Rami, take it up.

12 Q. Okay. So here he's saying he gave again
13 preliminary recommendations for boulder stability were
14 provided.

15 Do you see that, sir?

16 A. Yes, sir.

17 Q. And then he said, "An extensive scope of work
18 was proposed to verify and finalize printed
19 recommendations for boulder stability mitigation
20 measures for the upslope granite boulders."

21 Do you see that?

22 A. Yes, sir.

23 Q. So you recall at some point in time Vann was
24 requested to prepare a boulder stabilization study?

25 A. Yes.

1 Q. And that request came as a suggestion or
2 recommendation from your architectural firm, correct?

3 A. I think it was -- there was, you know, concern
4 obviously for the neighbors. The town wanted to make
5 sure we addressed all these issues, so we all shared a
6 mutual concern about the boulders.

7 Q. Okay. And so -- and -- but Mr. Vann -- the
8 decision to hire Mr. Vann to do that, that came upon a
9 recommendation from you to Mr. Scali; isn't that
10 correct?

11 A. Yes.

12 Q. Okay. And so, if you will, go ahead to the
13 paragraph -- two paragraphs down at the end where it
14 says, "both Copper State Engineering and
15 Vann Engineering understand."

16 Do you see that, Rami? There we go.

17 Let me just outline that for you, sir, so you
18 can get a better handle on it.

19 So here again, Mr. Vann -- okay. So, again,
20 Mr. Vann states up above that he received a report
21 from Copper State Engineering. And the evidence so
22 far introduced in this case is that Copper State did
23 provide a report to the Zachariahs.

24 Do you recall that?

25 A. Yes, sir.

1 least Vivian attended a meeting with Jeff Vann.

2 Is that fair?

3 A. I believe so, yeah.

4 Q. Okay. Because it says "our meeting
5 yesterday"?

6 A. Yeah.

7 Q. Fair enough?

8 A. Yes.

9 Q. Okay. So you're the one that apparently took
10 notes during the meeting as opposed to Vivian?

11 A. No, generally we both take notes.

12 Q. Okay.

13 A. But since she was preparing the meeting notes,
14 I always give her a copy of my notes so she can
15 consolidate them into one set of meeting notes.

16 Q. Okay. Can you go to the next page, please.

17 Now, it looks like your handwriting isn't any
18 better than mine, but can you just sort of decipher
19 what this is here? It looks like -- at the top it
20 says, "Meeting with Vann Engineering," and it says
21 "10/24/2017."

22 Do you see that?

23 A. Yes.

24 Q. Okay. Now, if you will, can you just sort of
25 read this to the Court and to me so we can get a firm

1 handle on what you're saying here?

2 A. Yeah. So the next line down says, "115
3 boulders in remediation to be pinned."

4 Ashley Herndon, she was with a company that does that
5 type of work, so we were discussing who would do some
6 of this. Chris at -- I can't remember what that one
7 says. I can't make that one out.

8 Q. Okay. But with this you're indicating here
9 someone with another company that would be contacted,
10 and it would say "get costs on" what? What does that
11 say?

12 A. Get costs on probably the remediation is what
13 we were talking about. What Jeff Vann guessed was
14 25,000 per boulder to remediate, but he said that was
15 just a wild guess. He had no idea because obviously
16 he doesn't do that work.

17 "Some need to be removed."

18 "2000 boulders total," I think he was
19 referring to how many there were, how many just
20 boulders there were.

21 Q. Well, this says -- it says here though "some
22 have to be removed"?

23 A. Right.

24 Q. And I think that they were the smaller
25 boulders that would just be removed as opposed to

1 being pinned in place?

2 Do you understand that?

3 A. No. I think some would have to be removed
4 because they were in the construction area, so they
5 wouldn't need to be counted. They wouldn't have to be
6 remediated.

7 Q. Okay.

8 A. Because they were going to be removed anyway
9 for the construction of the house.

10 Q. Okay. Down below that it says "another"? Is
11 that what it says?

12 A. "Another 2000 boulders need to be dealt with
13 offsite."

14 Q. Do you know what that means?

15 A. I would guess those were boulders in the road
16 easement, because those are not on Terry's site.

17 Q. So that would be the boulders in the road
18 easement coming up the hill from the --

19 A. Yes.

20 Q. From the cul de sac on San Miguel?

21 A. That's what I remember on this.

22 Q. Okay. Then there's something here? What is
23 this?

24 A. "1100 linear feet of temporary for catch
25 fencing." So the goal was to put catch fencing

1 both -- I can't remember if it was both above,
2 definitely below the work area so that during the work
3 there would be something to restrain any boulders that
4 broke loose.

5 Q. Okay.

6 A. And then, like I said earlier, once
7 construction was completed, those fences would have to
8 be removed.

9 Q. All right. Let's take the next section here
10 right below that.

11 A. Okay.

12 Q. So please continue.

13 A. Okay. "\$5 million estimate for the work, but
14 I really don't have any idea."

15 "Worst" -- okay, but then Jeff Vann said,
16 "worst site he has ever seen." That was Jeff's
17 comments in the meeting.

18 Q. And previously you indicated Jeff took sort of
19 an educated guess of what it would cost approximately
20 \$25,000 per boulder?

21 A. Right.

22 Q. Okay.

23 A. I think our intent then was to give all of
24 these studies to Kitchell, and let someone who is
25 actually going to do -- well, that's what I'm saying

1 your design process and meetings? Did he -- did
2 GM Hunt ever provide some sort of a cost estimate or
3 cost range for the construction of the driveway and/or
4 the construction of the residence?

5 A. My recollection was he did a real informal
6 estimate of the house. I don't know if he addressed
7 the driveway at all.

8 Q. Do you recall what that estimate was?

9 A. I don't remember off the top of my head.

10 Q. Okay.

11 A. Sorry.

12 Q. Mr. Scali testified that he had some estimates
13 for the construction of the house that ranged from
14 \$200 to \$500 a square foot.

15 Have you ever heard those numbers?

16 A. No.

17 Q. Okay. Do you recall what the Moonlight Way
18 house cost per square foot?

19 A. I believe it is approximately \$700 a square
20 foot.

21 Q. And is that house -- what is the size of the
22 Moonlight house under roof?

23 A. Under roof, I believe it's about 10,000 with
24 the garage and everything.

25 Q. And again, Mr. Scali's house under roof is

1 approximately 18,000?

2 A. I believe under roof it's pretty close to
3 that.

4 Q. Were there any boulder fields involved with
5 the Moonlight Way house that you designed?

6 A. No.

7 Q. Okay. Were there any hillside issues that you
8 dealt with there?

9 A. Just the normal process. We did have to do
10 the rock bolting and all of that --

11 Q. Right.

12 A. -- as you mentioned.

13 Q. Okay. Mr. Candelaria, that concludes my
14 questioning of you. Thank you, very much.

15 A. Thank you.

16 THE COURT: Cross. You want to take our break
17 now?

18 MR. ABRAHAM: Sure.

19 THE COURT: I'm going to break in three
20 minutes.

21 MR. F. SLAVIN: You're only going to take five
22 minutes, aren't you?

23 MR. ABRAHAM: Probably.

24 THE COURT: Why don't we break now. We'll
25 break two-and-a-half minutes early. All right.

1 A. It's a little difficult to see but --

2 Q. We can put it up on the screen.

3 A. Super. Thank you.

4 Q. Okay. All right. So is this a copy of the
5 Stone Canyon East subdivision plat that you reviewed?

6 A. Yes.

7 Q. All right. There is something called Easement
8 for Roadway. Can you put up Exhibit No. 1 for me.

9 Sir, what is on the screen is Exhibit No. 1.
10 Can you tell us, is this a document that you reviewed
11 for purposes of providing your opinion?

12 A. Yes. It is one I reviewed, and it was not
13 accepted on to the county system. I think later it
14 was shown to not have been put on to the local city
15 system in Paradise Valley.

16 Q. And --

17 A. This is a wildcat. Excuse me.

18 Q. Wildcat, meaning what?

19 A. Meaning that it was not accepted by the
20 engineer or the county. It was simply recorded.
21 That's it.

22 Q. And this was, and this was -- it purports to
23 grant an easement for roadway, for a public roadway to
24 Maricopa County. Do you see that?

25 A. Correct.

1 Q. And, but your testimony is that was never
2 accepted by the County?

3 A. That's right. It was never accepted by the
4 County. And I went to a Jennifer Toth, who is the
5 current county engineer and asked her to go through
6 the records. And to the best of their ability, they
7 could not find acceptance of this particular piece of
8 roadway on to either the county system or any other
9 system.

10 Q. What other system? Sorry.

11 A. Any other system.

12 Q. Any other system. And if this document, this
13 1980, excuse me, 1960 roadway easement had been
14 accepted by the County, would it had have appeared on
15 a County Roadway Grid System of some type?

16 A. Roadway record, yes, it would.

17 Q. Roadway record.

18 A. Yes.

19 Q. And that contains, if you will, then all of
20 the rights of way that have been dedicated and/or
21 easements granted for right of way involving lands and
22 unincorporated areas?

23 A. Yes. There's three levels. Level one is
24 liens. That's been accepted on to the county system,
25 and it represents a roadway in which will be

1 ready, sir.

2 THE WITNESS: Thank you.

3 THE COURT: You're welcome to stay, but you're
4 welcome to leave. The plaintiffs used 79 minutes.
5 Defendants used 235. My very quick preliminary math
6 suggests that the defense has used an aggregate eight
7 hundred ten minutes and the plaintiff has used a total
8 of 417. Those numbers have not been confirmed. At
9 the beginning of today, defense has used nine hours
10 45, and the plaintiff has used five hours and 38
11 minutes. So that's where you were at the beginning of
12 today. You know now where you are at the end of
13 today. And we'll resume tomorrow afternoon at 1:30.
14 Thank you.

15 MR. F. SLAVIN: Thank you.

16 THE COURT: You're welcome to stand. I'm
17 going to stay here. If you're standing to gather your
18 belongings, you may do so. I'm going to check my
19 math.

20 (Matter concluded.)

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C E R T I F I C A T E

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DATED this 4th day of November,
2018.

/S/
MICHELE KALEY, RPR
CERTIFIED REPORTER
CERTIFICATE NO. 50512

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Technical Assistant to Mr. Slavin

1 A. Yes, right. Very preliminary now.

2 Q. Very preliminary. But based upon those
3 preliminary plans, sir, and your experience in the
4 architectural design and construction of residences,
5 do you have any estimate of how long the construction
6 would take to build a roadway, excavate the pad, and
7 to construct the residence?

8 A. A great deal of the answer of that is
9 predicated upon who the building contractor is and
10 what his experience is. This is a complex piece of
11 work. And I would judge that, if you had a highly
12 qualified building contractor, construction
13 superintendent and architect working cohesively, it
14 would taken seven and a half to ten years to construct
15 the project.

16 Q. Does that estimate include a two-way roadway
17 or a one-way roadway?

18 A. Well, if I was building it, I would certainly
19 insist upon a two-way road. And I think most building
20 contractors that want to do the most efficient job
21 would insist on it, as well, in addition to the
22 requirement of it for the fire business and also for
23 the benefit of the owners in the future.

24 Q. Okay. And so your seven-and-a-half to ten
25 years assumes that's a two-way street, right?

1 MS. DORVINEN: We haven't had a chance to
2 review the one today. But it doesn't address issues
3 that weren't addressed in the first one, I don't
4 believe.

5 MR. F. SLAVIN: We don't know.

6 THE COURT: Okay. Well, take a look at it.
7 And if you intend to submit anything else, it needs to
8 be submitted, any further bench memorandum will need
9 to be submitted on or before August 9th.

10 So we're off the record.

11 (Matter concluded.)

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