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CASE NAME: **FLORENCE v. FLORENCE COPPER**

CASE NUMBER: **CV-19-0504**

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ARIZONA COURT OF APPEALS

DIVISION ONE

TOWN OF FLORENCE, Plaintiff/Appellant, v. FLORENCE COPPER, INC., Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 19-0504 Maricopa County Superior Court No. CV2015-000325

DEFENDANT/APPELLEE'S COMBINED SUBSTITUTE ANSWERING BRIEF AND APPENDIX

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INTRODUCTION

Development Agreements are special contracts, providing developers with vested rights that municipalities cannot change through unilateral actions, including zoning ordinances. These agreements are necessary to provide developers with the assurance that the investment they make now in the purchase, design, and construction of property will not be undermined by some future government action.

Here, a property owner agreed to have his parcel of property (the "Property") annexed into the Town of Florence (the "Town"), only so long as his rights to mine copper were vested in a Pre-Annexation Development Agreement ("Development Agreement" or "PADA"), which provided that those rights could be impaired only through an amendment to the Agreement regarding those rights, which was never done.

Years later, the Town enacted a zoning ordinance for the Property that did not include or describe the vested rights. After Florence Copper ("FCI") purchased the Property, a dispute arose concerning whether it could mine under the Development Agreement, or whether the later-enacted zoning ordinance prevented it from doing so. That dispute led to years of contentious litigation, resulting in a court order that the vested rights created

under the Development Agreement cannot be impaired without amending that agreement, or through definitive proof that the Property owner had waived or abandoned his vested rights. Following a trial, the court found that the prior owner had not waived, abandoned or agreed to impair these rights, leaving them intact. The trial court granted judgment in favor of Florence Copper, incorporating an award of attorneys' fees and costs.

The Town appeals that judgment, asking this Court to adopt a novel argument: that a municipality's inherent police power to zone is not subject to any kind of contractual limitation, including through a development agreement; that no matter what a town has granted a property owner as an inducement to have its property annexed, the town can later, unilaterally enact a zoning ordinance that negates every right or protection given to that owner. No statute, case law or policy supports this argument, as it undermines not only basic principles of contract interpretation, but the policy behind development agreements, including Arizona law that requires property owners to consent to any change to a development agreement. A.R.S. § 9-500.05(C) (development agreements cannot be amended absent "mutual consent" of the parties). Well-established law compels the Court to reject the Town's appeal.

STATEMENT OF THE CASE[1]

This case concerns a dispute over the relationship between a Pre-Annexation Development Agreement and a later-enacted zoning ordinance.[2] Florence Copper purchased a parcel of property[3] that in 2003 had been incorporated into the Town of Florence through a development agreement between the Town and a prior owner. In exchange for agreeing to annexation, among other things, the Town granted the prior Property owner vested rights to engage in in-situ copper mining for the thirty-five (35) year term of the agreement.[4] The parties recorded the Development Agreement and corresponding zoning ordinance.[5] Under the express terms of the Development Agreement, vested rights could not be impaired except

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[1] Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP001), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR#" followed by the record number, "TE#__" followed by the exhibit number as admitted in the superior court, or "MM/DD/YY Tr. __" followed by the page and line of the cited transcript.

[2] APP257 - (TE#1)

[3] APP486 - (TE#193) ¶ 12

[4] *See* APP261 - (TE#1) at §§ 4 ("Term and Effective Date"), 5 ("Rights Run with the Land"); APP320 - 2003 PUD, pp. 30–32, §§ III.B.12, III.B.7

[5] *See* APP258 - (TE#1) PADA at 1

through amendment of the agreement, which requires a written document, executed by both parties and recorded within ten (10) days.[6]

In 2007, the Town enacted an amended zoning ordinance for the Property (the "2007 Zoning Ordinance),[7] which did not include a reference to or description of the mining rights vested through the 2003 Development Agreement. Florence Copper purchased the Property in 2009 and, over the next several years, tried to work with the Town to open an in-situ copper recovery facility. When those efforts failed, in 2013, the Town sued, seeking a declaratory judgment that, because the 2007 zoning ordinance contained no allowance for mining, Florence Copper could not mine on the Property.[8] Florence Copper responded that the Development Agreement established vested rights to mine, and those rights could be impaired only through an amendment to that agreement as to those rights, which had not happened.[9]

Following two rounds of summary judgment motions and a six-day bench trial, the court ruled that the Development Agreement grants Florence

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[6] *See* APP272 - (TE#1) PADA, § 32

[7] APP257 - (TE#1) Town of Florence Resolution No. 872-03

[8] IR#1

[9] IR#18 at Answer ¶ 15 and Counterclaim ¶¶ 37-41; *see also* IR#367

Copper a vested right to in-situ copper recovery operations on the Property, that this right runs with the land, that it has not been lost, including by abandonment or amendment to the Development Agreement, and that if the Town breaches the Agreement, Florence Copper can pursue remedies for either specific performance or money damages.[10] The trial court further awarded Florence Copper $1.7 million in attorneys' fees and $32,365.55 in taxable costs, as the successful party of an action that lies in contract.

The Town timely appealed this judgment.[11]

STATEMENT OF FACTS

I. The Property

At issue is a 1,182-acre parcel[12] of real property previously owned by land developer W. Harrison Merrill ("Merrill"), annexed in 2003 into the Town of Florence, Arizona and sold to Florence Copper, Inc. in 2009.[13] The Property and the adjacent 160-acre parcel of State Trust land sit atop an

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[10] IR#412; IR#451

[11] IR#452

[12] The 2003 Development Agreement and the Town of Florence Resolution No. 872-03 refer to a 7,537-acre parcel; this case is only concerned with a smaller portion of the overall property. *See* APP257 - (TE#1)

[13] APP215 - IR#276 at ¶¶ 1–2

estimated 1.7 billion pounds of recoverable copper.[14] The Property has supported mining exploration and activities for over 40 years and to date over $100 million has been spent to develop it for commercial mining.[15]

In the 1990s, previous owner Magma Copper Company and its successor BHP Copper, Inc. ("BHP") spent $26 million preparing to commercially mine the Property.[16] After determining that "in-situ copper mining"[17] is the most appropriate method, BHP obtained the necessary environmental permits and designed an in-situ production wellfield.[18] In

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[14] *Id.*; *see also* APP461, APP473 - (TE#69) at 3, 18

[15] APP161, APP165 - IR#171 at ¶¶ 4, 129; *see also id.* ¶¶ 1–47; APP168 - IR#175, Ex. 13 at 3; APP209 - IR#186, Ex. 50 at 121:4-6

[16] APP216 - IR#276, Ex. 1 at ¶¶ 10–15

[17] "In-situ copper recovery" (or "in-situ mining") is a mining process that, in lieu of digging open pits or creating large tailings piles, a series of wells are used to inject a weak acidic solution (approximately the same pH as lemon juice) into the ground, dissolving underground the copper from the ore. *See* APP162 - IR #171 at ¶¶ 19–25. Recovery wells pump the solution back to the surface, where the copper is extracted, and the solution recycled. *Id.* In-situ mining is uniquely suited for water-heavy, highly fractured deposits that are difficult to mine with more traditional methods. *Id.*

[18] APP216 - IR #276, Ex. 1 at ¶¶ 10–15; APP463, APP464, APP472 - (TE#69) at 7, 18–24, 77–78; IR#177, Ex. 22; IR#177, Ex. 21

2000, BHP sold the Property to Merrill, along with the mining infrastructure and intellectual property associated with its in-situ mining project.[19]

II. Merrill Ownership

Merrill also purchased several thousand acres outside the Town of Florence, which he planned to develop into a master planned community, "Merrill Ranch."[20] Merrill also obtained the mineral lease rights in the State Trust land, which is surrounded by the Property.[21] Merrill intended to joint venture with a mining company to extract the copper before developing the Property as part of Merrill Ranch.[22] Merrill kept open and continued to monitor daily the in-situ copper recovery projects.[23]

III. 2003 Annexation and Development Agreement

In December 2003, Merrill and the Town entered into a Pre-Annexation Development Agreement under A.R.S. § 9-500.05 (authorizing municipalities to enter into development agreements with private property

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[19] APP462 - (TE#69) at 6-7, 58; APP174 - IR#177, Ex. 25 at 15:10–14; APP187, APP192 - IR#183, Ex. 27 at 15:1-19, 31:1–32:14

[20] APP185 - IR#183, Ex. 27 at 13:20–18:7

[21] *See id.;* APP187 at 15:13-16

[22] *See* APP108 - IR#239 at 11

[23] *See, e.g.*, APP193 - IR#183, Ex. 27 at 69:12-14; APP175, APP181 - IR#177, Ex. 25 at 18:15–19:10, 174:10–175:22; IR #171, Ex. 26

owners establishing rights and obligations for particular development projects),[24] providing for the annexation of Merrill's land into the Town of Florence in exchange for, among other things, vested development rights that run with the land for thirty-five (35) years.[25] The Agreement further provided that any amendment had to be in writing, executed by the Town and Owner and recorded within ten (10) days of execution.[26] Arizona law further requires that any amendment to a development agreement be done with "mutual consent of the parties." § 9-500.05(C).

The PADA expressly incorporated by reference as "Exhibit B" a Planned Unit Development Plan (the "Development Plan" or "2003 PUD"),[27] providing the land use designations, regulations, and design specifications for the development of the Property.[28] Under the 2003 PUD, the Property was to be zoned as light industrial—which does not allow for mining—with mining rights carved-out as a lawful nonconforming use in the "BHP Copper

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[24] *See* APP257 - (TE#1)

[25] *Id.* at APP261 - PADA at 4 §§ 4 ("Term and Effective Date"), 5 ("Rights Run with the Land")

[26] *See* APP272 - (TE#1) PADA, § 32

[27] *Id.* at APP286 - Development Plan (attached to PADA as "Exhibit B")

[28] *Id.* at APP258 - PADA at 1–2 ("Recitals"), 3 § 1, 4 § 6, 14 § 26, 16 § 42

Mine Overlay Area," encompassing most of the Property and adjacent State Trust land.[29] Several sections of the 2003 PUD reference mining as a use on the Property.[30] *See infra* II(A)(1)(i).

The Town approved the Development Agreement through Resolution No. 872-03.[31] On December 11, 2003, the resolution and PADA (including the 2003 PUD) were recorded with the County Recorder as Fee Number 2003-076513, as required by § 9-500.05(D).[32] On December 15, 2003, the Town passed Ordinance No. 356-03, amending its zoning map to designate Merrill's land holdings as a Planned Unit Development mixed-use zoning.[33]

As of December 15, 2003, the rights set forth in the Development Agreement became vested and cannot be changed except as provided for by the agreement's amendment process: mutual consent, executed by both parties, recorded within ten days. The Development Agreement has been

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[29] *Id.* at APP308 - Development Plan, p. 18–19; APP138 - IR#120, Ex. 9; APP202 - IR#183, Ex. 28

[30] *See* APP320 - (TE#1) Development Plan, pp. 30–32, §§ III.B.12, III.B.7

[31] APP257 - (TE#1) Town of Florence Resolution No. 872-03

[32] APP258 - (TE#1) PADA at 1

[33] APP474 - (TE#84) Town of Florence Ordinance No. 356-03; APP273 - (TE#1) PADA at 16 § 42; *see* A.R.S. § 9-500.05(A) (requiring resolution or ordinance for a development agreement and annexation to take effect)

amended twice—once in 2005 and once in 2006—both times in accordance with that procedure.[34] Neither amendment implicated mining rights.[35]

IV. 2007 Rezoning

In 2007, Merrill petitioned the Town to amend the zoning for the Property to increase the allowable residential density at Merrill Ranch and to create more flexibility to move land use designations around within the development.[36] Merrill sought rezoning because the Town had given nearby developers more density on their land and he desired the same.[37] Merrill did *not* intend this rezoning to amend the Development Agreement.[38]

The Town granted Merrill's petition and, on June 4, 2007, approved Ordinance No. 460-07 (the "2007 Rezoning Ordinance"), amending the

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[34] *See* (TE#85) 2005 PADA Amendment, (intergovernmental agreement concerning financing participation); (TE#86) 2006 PADA Amendment, (various provisions, including emergency services funds and street layouts)

[35] *Id.*; APP478 - (TE#183) at ¶ 7

[36] APP196, APP199 - IR#183 Ex. 27 at 91:1–92:10, 169:18-23

[37] *Id.* APP196 at 91:13-17

[38] APP205 - IR#183 Ex. 32 at 2 ("We feel that we shouldn't even be discussing changes to our [Development Agreement] while in the process of hearing [the 2007 rezoning] application. [] We have not made an application requesting any changes to our [Development Agreement].")

Town's zoning map to update the zoning designation for Merrill Ranch.[39] The 2007 Rezoning Ordinance[40] cited, but did not attach, a "Merrill Ranch Master Development Plan" ("2007 PUD"), from which had been removed the mining references that were in the 2003 PUD.[41] Mining was a non-conforming use under both the 2003 zoning and 2007 zoning.

The Development Agreement was not amended. The 2007 Rezoning Ordinance states that the 2007 PUD "shall supersede any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD."[42] And, unlike the 2005 and 2006 PADA amendments, neither the 2007 Rezoning Ordinance nor the 2007 PUD was recorded with the Pinal County Recorder.[43]

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[39] *See* APP445 - (TE#22); IR#184, Ex. 35 ("Per staff's suggestion, the location of the industrial area has changed")

[40] *See* APP457 - (TE#1); S*ee* APP320 - (TE#1) Development Plan, p. 30; APP138 - IR#120, Ex. 9; APP140 - IR#124, Ex. 25; APP116 - IR#412 at 16–17

[41] APP446 - (TE#22) at ¶ 6; (TE#26); APP116 - IR#412 at 16

[42] APP446 - (TE#22) at 2 ¶ 6

[43] APP117 - IR#412 at 17

It is undisputed that, during the 2007 rezoning process, no one discussed mining rights.[44] Merrill thought the 2007 zoning changes left him with the option of either mining or developing the Property, consistent with his desire for flexibility.[45]

V. FCI Purchase

In 2006, Merrill began negotiating with several mining companies for the potential purchase of the Property (and intellectual property,

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[44] APP213 - IR#275 at 8-9 ¶¶ 39–44 (citing Merrill Dep., Ex. 3, at 200:20–201:18 ("Q: Did the Town ever come to you and say we want to enter into negotiations with you to drop any of your rights to mining because we think it is inconsistent with the 2007 planned unit development agreement? A: Well, I think as I've said before, I don't think there was any discussion of that one way or the other."); *id.* at 211:23–212:5 (same); APP230 - IR#277 Ex.13 at 42:19-25 ("Q: In all the work . . . leading up to the Master Development Plan in 2007, did anyone from the Town ever talk to you about Harrison Merrill giving up his mining rights? . . . A: No."); APP222 - IR#277, Ex. 9 at 123:10-14 (Q: "[W]ere there any discussions at all between the Town and Harrison Merrill about mining at all during that 2007 process? A: To my knowledge, I'm not--I'm not aware of any."); *see also* APP235 -IR#277, Ex. 14 at 46:5-10; APP240 - IR#277, Ex. 15 at 32:17–33:10 ("Q: . . . [T]he topic of mining did not come up during the 2007 rezoning? . . . A: I didn't bring it up with Harrison, because I didn't want him to figure it out. Q: To figure what out? A: That he was probably giving up his mining deal.")

[45] APP198; APP195 - IR#183, Ex. 27 at 101:11-19 (stating that he "always thought that it could be mined"); *see also id.* at 77:13 23 ("Q: . . . You had no doubt you could mine the land. A: I felt like we could; yes, sir.")

exploratory data, mining permits)[46] and assignment of the adjacent State Trust mineral lease,[47] including Florence Copper's parent company, Hunter Dickinson Inc. ("HDI") (affiliated with Curis Resources, Ltd., or "Curis"; hereafter, the terms "Florence Copper" and "FCI" include HDI and Curis).[48] During and after the 2007 rezoning process, Merrill continued to negotiate the sale of the Property.[49] Florence Copper purchased the Property in December 2009 for over $8.5 million.[50] A few months later, Florence Copper obtained from Merrill for an additional $3 million and other consideration the mineral lease for the adjacent State Trust land.[51]

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[46] APP247 - IR#278, Ex. 24 at 2 ("Merrill Trust will irrevocably assign all licenses, permits and proprietary technologies that were assigned to Merrill Trust, or its predecessors, by BHP at the time of the completion of the sale.")

[47] *See* APP194 - IR#183, Ex. 27 at 72:11-25; APP225 - IR#277, Ex. 12 at ¶ 8

[48] APP242 - IR#278, Ex. 21 at 1 ("We at Merrill Mining (Merrill) are interested in entering negotiations with Hunter Dickinson, Inc. (HDI) at the earliest possible date.")

[49] Before the sale went through, the housing market crashed and Merrill lost the Property in foreclosure to People's Bank of Georgia; however, Merrill nonetheless continued to participate in negotiating the sale of the mine to FCI until its completion in December 2009. *See* APP164 - IR #171 at ¶ 106

[50] APP486 - (TE#193) at ¶ 12

[51] *Id.*

Although the right to mine was vested by the Development Agreement, and was a lawful nonconforming use under both the 2003 and 2007 zoning schemes, the Town insisted that the Property be rezoned before Florence Copper could mine.[52] Florence Copper disagreed that rezoning was necessary but, wanting to build a cooperative relationship, attempted to comply.[53] Despite Florence Copper's efforts, the Town became increasingly hostile and joined forces with land developers to oppose the mine.[54] Florence Copper proceeded with exercising its contractual and legal nonconforming use right to conduct mining on its Property.[55]

VI. Litigation and Trial

On October 14, 2013 the Town filed a Complaint against Florence Copper, Inc., RK Mine Finance Trust 1, and Pinal County, Arizona alleging that, under the Development Agreement and subsequent documents, FCI's use of the Property for mining and related activities was an illegal use and seeking a declaratory judgment for the same (Count I), and an eminent

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[52] APP480 - (TE#192) at ¶¶ 5–6

[53] *Id.* at APP481 - ¶¶ 7–10

[54] *Id.* at APP482 - ¶¶ 12–16

[55] *Id.* at APP480 - at 3–4

domain action (Count II).[56] In response, Florence Copper affirmatively alleged that the PADA "recognized the lawful use or legal non-conforming use of copper mining on the property, contractually preserved that use and created a contractual property right that runs with the land to conduct copper mining on the property," and further brought a series of counterclaims in which it sought, among other things, an injunction for specific performance of contract under the Development Agreement.[57] The counterclaims were subsequently stayed by the trial court until the declaratory action was resolved.[58]

Florence Copper attempted to remove the case to federal court.[59] When the request was denied and the case remanded state court,[60] venue was changed to Maricopa County,[61] where the court found that the eminent

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[56] IR#1

[57] IR#18, at Answer ¶ 15 and Counterclaim ¶¶ 37–41; *see also* IR#367

[58] *See* IR#415

[59] IR#12

[60] IR#14

[61] IR#20; IR#21; IR#74; IR#80

domain count was dependent upon the outcome of the declaratory action and therefore dismissed it without prejudice in July 2015.[62]

Following discovery, the parties cross-moved for summary judgment.[63] The Town argued that the 2007 Rezoning Ordinance and the 2007 PUD eviscerated FCI's right to mine. Florence Copper responded that its right to mine survived the 2007 rezoning because the 2003 Development Agreement created vested rights to mine that could not be impaired by a unilateral legislative action such as a rezoning ordinance. The trial court denied the Town's motion and granted, in part, FCI's motion, ruling that the Development Agreement allows Florence Copper to develop in-situ commercial mining operations, that the Town cannot unilaterally change that agreement or derogate these vested rights without breaching the agreement and that a change to the "Development Agreement requires both legislative action and contractual action."[64] The court further found that

[62] IR#83; IR#86; IR#89; IR#98

[63] IR#; IR#169–70

[64] APP109 - IR#239 at 17

"[w]hether the parties 'mutually agreed' to restrict mining rights vested by the Development Agreement is a triable issue of fact."[65]

A six-day bench trial was held in December 2019 before the honorable Judge Roger Brodman on the question of whether Florence Copper abandoned, or the parties mutually agreed to amend the Development Agreement to eliminate, the nonconforming right to mine.[66] On January 3, 2019, the court ruled in favor of Florence Copper, finding that the actions taken by the parties in 2007 "did not eliminate or abandon in-situ mining rights of the Owner established by the 2003 Development Agreement."[67]

The parties moved on February 15, 2019 for entry of a simple form of judgment, denying the Town's claims for declaratory judgment, dismissing the Town's claim for eminent domain and awarding FCI its attorneys' fees and costs.[68] That same day, the parties filed a joint Rule 16 statement and proposed discovery plan and scheduling order for Florence Copper's

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[65] *Id*.

[66] IR#412

[67] *Id.* at 21

[68] IR#416

counterclaims, in which the parties raised again the question of remedy.[69] At a February 20 status conference, the trial court expressed its preference to resolve as many issues as possible in its final judgment, and asked the parties to brief those issues, including as to fees, costs or other relief.[70]

Florence Copper then moved for a more substantive declaratory judgment, seeking, among other things, a form of affirmative judgment detailing the court's conclusions that, under the Development Agreement, it had a vested right to in-situ mining on the Property and that if the Town breached the agreement, FCI would have a right to request specific performance. [71] The trial court granted the motion in its entirety, finding that the court's interpretation of the Development Agreement should be made into the form of a judgment and that, in the event of a breach, FCI had "the available election of judicial remedies for a breach of contract, and may elect either specific performance or money damages."[72]

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[69] IR#415

[70] IR#418

[71] IR#422

[72] APP111 - IR#451 at 3; APP120 - IR#449 at 2

Florence Copper also submitted an application for $1,874,731.82 attorneys' fees and $32,365.55 in costs,[73] which the Town challenged.[74] The trial court granted Florence Copper $1,700,000 in attorneys' fees in addition to its costs, noting that "the final resolution was [not] a particularly close call."[75] The court issued a Rule 54(b) judgment incorporating its rulings on the fee application and motion for declaratory judgment.[76]

The Town now appeals the trial court's judgment.

STATEMENT OF THE ISSUES

I. Did the trial court correctly rule that, under the terms of the Development Agreement, Florence Copper had a vested right to conduct in-situ mining operations on the Property?

II. Did the trial court clearly err when it found that Florence Copper's rights had not been lost by an amendment to the Development Agreement, or by mutual consent, or by abandonment?

III. Did the trial court err in concluding that this action arose out of contract, and did the trial court abuse its discretion in awarding Florence Copper a substantial portion of its attorneys' fees?

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[73] IR#421

[74] IR#437; IR#441; IR#442

[75] IR#450

[76] IR#451

IV. Did the trial court abuse its discretion in issuing a declaratory judgment construing the Development Agreement to allow Florence Copper to pursue either the remedy of specific performance or money damages, in the event of a breach?

ARGUMENT

I. The trial court correctly ruled that, under the terms of the Development Agreement, Florence Copper had a vested right to conduct in-situ mining operations on the Property

In August 2017, the trial court concluded that, as a matter of law, the 2003 Development Agreement vested mining rights in Florence Copper. As the Town does not contest that ruling, this Court should affirm the trial court's judgment that Florence Copper has under the Development Agreement a vested right to in-situ mining operations on the Property.

The interpretation of statutes, ordinances, and contracts are matters of law which the Court reviews de novo. *See Contreras Farms Ltd. LLC v. City of Phoenix*, 247 Ariz. 485, ¶ 7 (App. 2019) (statutes and ordinances); *Terrell v. Torres*, CV-19-0106-PR, 2020 WL 370239 at *3, ¶ 13 (Ariz. Jan. 23, 2020) (contracts). When interpreting a contract, courts attempt to "ascertain and give effect to the intention of the parties," *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153 (1993), by looking at the plain meaning of the words in context, *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290–91, ¶ 15 (App. 2010). If the meaning is unambiguous, the Court will give effect to the

language as written. *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12 (App. 2006).

A. The 2003 Development Agreement is a contract that sets forth the rights, obligations, and limitations of the parties, including the vested right to in-situ copper mining on the Property

Development agreements are contracts. A.R.S. § 9-500.05(A). Under Arizona law, development agreements can be amended only by mutual consent. A.R.S. §§ 9-500.05(C). These agreements are binding on the parties and their successors, including municipalities. A.R.S. § 9-500.05 (D); *Home Builders Ass'n v. City of Maricopa*, 215 Ariz. 146, 153-54, ¶ 28 (App. 2007).

Development agreements are specialized contracts that benefit both towns and developers,[77] allowing a town to impose conditions on developers beyond what it may ordinarily do through its zoning power.[78] These dual expectations are reflected in the 2003 PADA:

> **WHEREAS**, Owner and Town acknowledge that Owner's development of the Property is a major undertaking for Owner and that the marketing, economic and investment conditions and magnitude of the development require the development to be constructed in phases over a period of years. Therefore, Owner requires certain assurances and protection of rights in order that Owner will be allowed to complete the development

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[77] APP148 - IR#170, Ex. 2 (Ex. A) at 7

[78] *Id.*

> of the Property in accordance with the Development Plan over the period of years permitted by this Agreement. Likewise, Town requires assurances from Owner that the development of the Property will comply with the Development Plan, the General Plan, and the terms and conditions of this Agreement.[79]

The only way to amend a development agreement is through the procedure set out in statute and in an agreement itself, and absent compliance with this process "the rights and benefits granted by the development agreement remain valid and enforceable."[80] Municipalities cannot enforce later-enacted zoning ordinances that impede these rights, and any effort to do so is a breach of the underlying agreement. *Id*.

As the trial court noted, "[o]ne of the purposes of development agreements is to protect developers when the winds of politics change direction,"[81] such that:

> [t]he primary purpose of a development agreement is to provide certainty to a developer or property owner that future regulatory changes (including zoning amendments and approvals) that are inconsistent with the contractual rights granted by a development agreement are not applicable to and cannot be enforced against the property or project subject to the agreement.[82]

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[79] *See* APP259 - (TE#1) PADA at 2

[80] APP143 - IR#170, Ex. 2 (Ex. A), at 3; APP111 - IR#412 at 3

[81] APP106 - IR#239 at 8–9 & n.1

[82] APP111 - IR#412 at 3 (quoting Tappendorf Report at 3)

The court correctly found that mining was allowed before annexation and that Merrill agreed to annexation only with the contractual assurance that he would be able to mine in the future.[83] The Development Agreement simultaneously promoted the Town's growth and protected the Owner's development plans on the Property, including as to copper mining.[84]

1. The Development Agreement created vested in-situ copper mining rights on the Property

The Development Agreement "clearly establishes an allowed non-conforming use of copper mining," giving "Owner a transferable, 35-year vested right to develop in-situ mining in the Mine Overlay Area" of the Property.[85] The Development Agreement has not been amended where these rights are concerned.

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[83] APP111 - IR#412 at 3-4

[84] APP259 - (TE#1) PADA at 2 (stating that the parties "acknowledge that the development of the Property . . . will be of benefit to Town and Owner"); *see also id.* APP310 - (TE#1) Development Plan, p. 20 ("Benefits and Advantages for the Town of Florence")

[85] APP110 - IR#412; APP261, APP320 - (TE#1) PADA at 4 §§ 3, 5, and at Development Plan, §§ III.B.7, III.B.12, and maps II-1, II-2, II-3, and II-4

(a) The Development Agreement, through the Development Plan, expressly provides for copper mining operations

Although the Development Agreement does not mention mining, it incorporates a development plan (2003 PUD) that expressly describes copper mining on the property. Among other things, the PUD identifies the "BHP Copper Mine Overlay Area" located on the Property[86] and notes the BHP underground mine in its "Site History".[87] The PUD further enumerates mining as a continuing non-conforming use on the Property, noting that "such use may continue as long as it remains otherwise lawful" and that:

> If any such non-conforming use of land ceases for any reason for a period of more than 180 days, any subsequent use of such land shall conform to the regulations specified by this PUD for the district in which such land is located, *with the exception of the copper mining operations*.[88]

The PUD further makes explicit exclusions that favor in-situ mining in the BHP mine area:

> Drill sites—Drilling, mining or exploration for any minerals, oil, gas or other hydrocarbon substances shall be prohibited in the

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[86] APP304 - (TE#1) Development Plan, p. 14–19, II-1, II-2, II-3, and II-4 (depicting BHP Copper Mine Overlay on Merrill Ranch maps)

[87] *Id.*, APP265 - (TE#1) PADA at 8

[88] *Id.* APP320 - (TE#1) Development Plan, p. 30 § 7 (emphasis added)

PUD area *with the exception of that area indicated as the BHP Copper Mine until said mine is closed*.[89]

Indeed, the 2003 Zoning Ordinance (No. 356-03) adopting the PADA and PUD includes an attachment describing the same "BHP Copper Mine Overlay Area".[90]

(b) The right to mine copper on the Property is a vested right under the Development Agreement

The Development Agreement describes the Owner's vested rights, including the right to develop the Property in accordance with the incorporated PUD:[91]

> **PLAN APPROVAL AND VESTED RIGHTS.** As of the execution date of this Agreement, Town, by and through its Mayor and Town Council (collectively, the "Council"), hereby grants to Owner, its successors and assigns, its approval of the Development Plan. *For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and the Development Plan*. The determinations of the Town in this Agreement and the assurances provided to the Owner in this Agreement are provided pursuant to and as contemplated by A.R.S. § 9-500.05 and other applicable law.[92]

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[89] *Id.* APP322 - (TE#1) at p. 32 § 12 (emphasis added)

[90] APP474 - (TE#84)

[91] *See e.g.*, APP261 - PADA, at 4 §§ 3–6

[92] *Id.* APP261 - at § 3 (emphasis added)

As the trial court found, "[t]his language is not ambiguous. It is not unclear. The Development Agreement gives the Owner *vested* rights for the term of the Agreement."[93] The Owner's right to mine endures for the specified term of 35 years[94] unless the Development Agreement is amended.

2. The Development Agreement can only be amended by a formal process and mutual consent of the parties

The Development Agreement, and the vested rights within, can be altered only by a formal amendment process (described in the agreement) and with the mutual consent of the parties (required by § 9-500.05(C)).[95] The formal amendment process is clear:

> **AMENDMENTS.** No amendment shall be made to this Agreement except by written document executed by Town and Owner. Within ten (10) days after the execution of any amendment by both parties, the amendment shall be recorded with the Pinal County Recorder, Pinal County, Arizona.[96]

State law further requires that "[a] development agreement may be amended, or cancelled in whole or in part, *by mutual consent of the parties* to

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[93] APP113 - IR#412 at 6

[94] APP261 - (TE#1) PADA at 4 § 4

[95] APP151 - IR#170, Ex. 2 (Ex. A) at 10–11

[96] APP272 - (TE#1) PADA at 15 § 32

the development agreement or by their successors in interest or assigns." § 9-500.05(C) (emphasis added).

The Development Agreement, by its own terms, can be altered only through mutual agreement, not unilateral action. *See Terrell*, 2020 WL 370239 at *3, ¶ 14 ("When interpreting a contract, we seek to discover and effectuate the parties' expressed intent. To do so, we construe the provisions according to their plain and ordinary meaning." (internal citation and quotations omitted). Mutual consent further insulates the Property from unilateral municipal regulations so the Owner may, with a degree of certainty, engage in long-term, large-scale development.[97]

The intent to avoid unilateral action is further evinced by mandates expressly considering the effect of legislative and administrative regulations:

> **DEVELOPMENT PLAN.** (a) the development of the Property shall be in accordance with the Development Plan and this Agreement *unless otherwise amended pursuant to this Agreement*.
>
> * * *
>
> (c) . . . Town shall not adopt or change any ordinance, regulation or other control that are not uniform and that discriminate in their application against the Owner or the Property. Owner and Town agree that after this Development Plan has been approved, *any and all subsequent zoning ordinances or requirements, zoning*

[97] APP148 - IR#170, Ex. 2 (Ex. A) at 7

restrictions, addenda, and revisions adopted by the Town will not be applied to the Property except as may be required pursuant to Paragraph 6(f) . . .

(f) The ordinances, rules, regulations, permit requirements, policies or other requirements of the Town applicable to the Property and the development of the Property shall be those that are now existing and in force for the Town as of the date of the recording of the Agreement. ***Town shall not apply to the Property any legislative or administrative land use regulation adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan*** except as follows: 1) *as specifically agreed to in writing by Owner*; 2) future generally applicable ordinances, rules, regulations, and permit requirements . . . of the Town reasonably necessary to alleviate legitimate severe threats to public health and safety . . . 3) adoption and enforcement of zoning ordinance provisions governing nonconforming property or uses; 4) future planned use ordinances, rules, regulations, permit requirements and other requirements and official policies of the Town enacted as necessary to comply with mandatory requirements imposed on the Town by county, state or federal laws and regulations . . . and 5) future updates of, and amendments to, existing building, plumbing, mechanical, electrical, and similar construction and safety related codes adopted by the Town.[98]

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[98] APP261 - (TE#1) PADA at 4–7 § 6 (emphasis added); *see also id.* APP274 at 17 § 47 ("[T]he Town shall not take any action or adopt any ordinance, resolution or other land use rule or regulation imposing a limitation on the conditioning, rate, timing or sequencing of the development of the Property or any portion thereof if such action shall have a material adverse impact on the development of the Property.")

Clearly, the Development Agreement anticipated the likelihood of unilateral municipal action and guarded against it where it would "change, alter, impair, prevent, diminish, delay or otherwise impact" the vested rights on the Property. *See Terrell*, 2020 WL 370239, at *3.

II. The trial court did not clearly err when it found that found that Florence Copper's rights had not been lost by an amendment to the Development Agreement, or by mutual consent, or by abandonment

In ruling on the parties' first motions for summary judgment, the trial court concluded that the Development Agreement established, as a vested right, copper mining on the Property as a non-conforming use. More than two years later, the parties tried before the court the question of whether Merrill had taken any action in 2007 demonstrating an objective intent to give up the vested right to mine. The trial court found that the parties did not amend the Development Agreement or mutually consent to eliminate these rights, nor did Merrill abandon them.

The Court reviews the legal conclusions of a bench trial de novo but will not set aside the trial court's findings of fact "unless clearly erroneous." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51–52, ¶ 11 (App. 2009) (internal quotations omitted). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher*

v. Dep't of Revenue of Ariz., 206 Ariz. 480, 482, ¶ 9 (App. 2003). The trial court's factual findings in support of this decision are supported by substantial evidence.

A. The Development Agreement was never amended

The Development Agreement, by its own terms, cannot be amended except through the execution of a written document by both parties that is recorded within ten days of execution.[99] State law further requires "mutual consent of the parties" to amend or alter a development agreement. § 9-500.05(C). There is no dispute, as the trial court found, that the Development Agreement was not amended "pertaining to preservation of the nonconforming use of in-situ mining . . . ."[100]

B. The trial court correctly found that the failure to amend the Development Agreement indicates the lack of agreement to eliminate mining as a non-conforming use

The amendment process is not onerous, requiring only execution and recording of a written document. The parties twice did this to amend the Development Agreement—in 2005 and again in 2006.[101] If the parties

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[99] APP272 - (TE#1) PADA at 15 § 32

[100] APP114 - IR#412 at 9

[101] *Id*. APP115 at 10

wanted to eliminate a right vested by the Development Agreement, they needed to follow this procedure. As the trial court found, their failure to do so in 2007 "demonstrates that there was no mutual agreement and is fatal to [the Town's] claim."[102]

C. The trial court correctly found that there was no mutual consent to change vested mining rights, nor did Merrill abandon his rights

Substantial evidence supports the trial court's finding that the "Town failed to demonstrate by the preponderance of the evidence that Merrill affirmatively intended to give up the vested mining rights or otherwise waived or abandoned those rights."[103] Among other things, the court found that "Merrill never manifested an objective intent to trade vested mining rights for increased density residential zoning," as was argued by the Town.[104] The court found persuasive:

- the failure to amend the Development Agreement;
- the lack of evidence "that Merrill and the Town discussed mining during the 2007 rezoning";

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[102] *Id.*

[103] APP115.01 at 11

[104] *Id.*

- Merrill's credible testimony "that he did not give up or change mining rights in the Development Agreement" in his 2007 negotiations with the Town;
- Merrill's actions during this time fame, including his efforts to sell the Property to a mining firm and his execution of long-term lease on the Property that preserved the right to enter it "for the purposes of mining exploration";
- the lack of documentary support for the Town's position, including the failure of the 2007 Zoning Ordinance to mention mining and Merrill's clear statement that he was not seeking to amend the Development Agreement;
- the lack of evidence that Merrill intended to negotiate away his right to mine 1.1 billion pounds of copper, a valuable asset; and
- that Merrill continued to spend monies "to monitor and maintain environmental permits for the mine, both before and after rezoning."[105]

The trial court further found that the Town did not communicate to Merrill its belief that the 2007 Zoning Ordinance would eliminate his mining rights under the Development Agreement. Rather, the evidence adduced at trial showed that the then-mayor of the Town did not communicate in any way to Merrill that the zoning amendment had this impact because he "didn't want [Merrill] to figure out he was giving up his mining rights."[106]

[105] APP115.01 at 11

[106] APP115.05 at 15

The trial court was unconvinced by the Town's evidence of Merrill's consent to eliminate his mining rights.[107] The Town does not challenge or argue in its Opening Brief any of these factual findings, seemingly conceding there is no basis to do so.

The trial court found there was substantial evidence "that there was never any mutual agreement to eliminate nonconforming mining rights."[108] This finding is supported by the evidence and should not be set aside. *Ballesteros-Suarez*, 222 Ariz. at 51–52, ¶ 11 (only "clearly erroneous" trial court factual determinations can be set aside).

D. The Town's arguments are legally unsupported, lack merit and are in some instances waived

1. The trial court did not violate the separation of powers doctrine when it ruled that Town's 2007 Zoning Ordinance did not eliminate Florence Copper's vested right to mine under the Development Agreement

The Town argues that because (1) it has inherent police power to enact zoning ordinances, (2) the 2007 Zoning Ordinance superseded the 2003 Zoning Ordinance and 2003 PUD, and (3) the 2007 Zoning ordinance does not include any provision for copper mining for the Property, in ruling that

[107] *Id*. APP115.05 at 15–20

[108] *Id*. APP115.05 at 15

the provisions of the 2003 PUD relating to copper mining survived the 2007 Zoning Ordinance, the "trial court violated the separation of powers." (Opening Br. at 24-27.) The Court should reject the Town's argument.

The Town does not cite to any authority, nor could it, for the proposition that a municipality's zoning authority is absolute and not subject to judicial review. The cases on which the Town relies deal with limitations on judicial oversight of zoning processes, but not the impact of a zoning scheme or, as here, when a zoning regulation impairs the vested contractual right in a development agreement or violates some other law.

Florence Copper does not question the process surrounding the 2007 Zoning Ordinance, nor does it challenge the Town's power to create, amend, and enforce zoning regulations through its police powers. That authority is not without limits, however, and is constrained by other laws, including constitutional limitations, state law, and contractual rights. *See e.g.*, *Cardon Oil Co. v. City of Phoenix*, 122 Ariz. 102, 104 (1979) ("When zoning power is used in such a way that the attempted regulation amounts to a 'taking' of property, the zoning ordinance runs into direct conflict with Ariz. Const. art. 2, § 17"); *see also City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 394, ¶ 10 (App. 1999) (cities do "not have vested rights in its zoning powers, and

the state can reduce or condition those powers"). Although the Town may amend the 2003 Zoning Ordinance with a new 2007 Rezoning Ordinance, this *amendment to its own zoning law* does not and cannot reach the rights vested in the Development Agreement. This unilateral action is a proper exercise of the Town's authority to regulate zoning only to the extent it does not interfere with vested contractual rights.

The Town further does not have the power to ignore its own contract. Ariz. Const. art. 2, § 25 (prohibiting enactment of any law "impairing the obligation of a contract"). That is particularly so for development agreements—contracts that always require "mutual consent" to be amended, and here also require recording within ten days of execution.

Development agreements are designed to provide developers confidence that they may undertake and continue a project with protection against future regulatory changes.[109] This is why they create vested rights stronger and more immediate than those available under the common law of vested rights, such as those for building permits.[110] *See e.g.*, *Fid. Nat. Title*

[109] APP148 - IR#170, Ex. 2 (Ex. A) at 7

[110] *Id.* APP149 at 8

Ins. Co. v. Pima Cty., 171 Ariz. 427, 429 (App. 1992) (rights under a building permit do not vest until the owner "physically construct[s] improvements permitted by the use or incur[s] substantial expenditures toward construction or establishment of the use"). This purpose is evinced by the statute's provision that the rights and burdens run with the land to successors. *See* § 9-500.05(D).[111] To allow a development agreement (or the vested rights enumerated in an attached PUD) to be altered by one party alone—as through a unilateral ordinance—would defeat the agreement's purpose, rendering its rights as vested in name only.

There is no legal or policy argument that support's the Town's position here. It remains free to zone, subject to certain limitations. And the courts retain the power to enforce those limitations, as the trial court has done here.

2. The trial court did not err as a matter of law in ruling that Florence Copper's vested rights to mine could not be eliminated without amending the Development Agreement

The Town argues that the trial court "determined that the 2003 PUD could not be amended without amending the PADA" (Opening Br. at 32.) That is not what the trial court ruled. Rather, the trial court ruled that the

[111] *See also* APP271 - (TE#1) PADA at 14 § 22 ("Binding Effect")

2003 PUD could be amended without amending the Development Agreement, except to the extent an amendment of the PUD involved rights vested through the Development Agreement.

The Town further argues that, because Florence Copper's right to mine emanates from the 2003 PUD, the 2007 Zoning Ordinance replaced the 2003 PUD, and that the 2007 Zoning Ordinance complied with the amendment provisions in the 2003 PUD, that amendment effectively eliminated the right to mine. (Opening Br. at 7-8, 32-35.) The Town's argument is misplaced.

The rights and obligations between the Town and Florence Copper are set forth in the Development Agreement which, by its terms, established vested rights, with the express understanding that these rights could not be impaired without Florence Copper's consent, as reflected in writing and recorded. That some of the substantive rights are incorporated into the Development Agreement through an attachment does not change the legal source and foundation of those rights as the Development Agreement.

And, although the 2003 PUD states that it "may be amended by the same procedure as it was adopted, by ordinance,"[112] (Opening Br. at 7–8) that

[112] APP310 - (TE#1) Development Plan, p. 20, III.B.3

is of no consequence as it relates to vested rights. A PUD is a development plan. It is not an agreement. It is not signed by any parties. It cannot by itself create or eliminate any rights. It only functions as a particularized articulation of a development agreement. The amendment process described in the 2003 PUD simply reflects the Town's existing zoning authority—that is, it can, by unilateral action (ordinance), make changes to a development plan, except where those changes impair or eliminate rights otherwise protected by the law. Here, that leaves the Town free to unilaterally amend or replace the 2003 PUD, up to the point where it seeks to impair rights vested in the Development Agreement.

Finally, the 2007 Zoning Ordinance provides that:

> Town and Owner agree to work together in good faith to modify any applicable portions of the Merrill Ranch Development Agreement that may be found to be in conflict with this PUD Amendment approval.[113]

The Town is thus obligated to attempt to work in good faith with Florence Copper about any perceived conflict between the 2003 PUD and 2007 PUD. The Town has not done so here, preferring to litigate to the end

[113] APP449 - (TE#22) at § 23

its effort to have the vested mining rights described in the 2003 PUD read out of existence.

3. The trial court did not create a new zoning scheme that resulted in two PUDs applying to a single property, in violation of state law

The Town argues for the first time on appeal that the trial court created two operative PUDs "in violation of state and local law." (Opening Br. at 29.) The effect of its ruling, the Town claims, is a "limited free-for-all" wherein developers may choose to develop under either the 2003 PUD or the 2007 PUD, leaving "the Town unable to plan and the public unable to participate in the development of its community in a meaningful manner." (*Id.*)

This issue is waived as it was not argued below. *See In re MH 2008-002659*, 224 Ariz. 25, 27 ¶ 9 (2010) (the Court of Appeals generally "[does] not consider arguments raised for the first time on appeal except under exceptional circumstances"); *Ruesga v. Kindred Nursing Ctrs.*, 215 Ariz. 589, 600, ¶ 39 (2007) (where the trial court "had no real opportunity" to address an argument, the issues are waived on appeal). Because it was not raised below, the Town did not (and could not) cite where the issues were raised and ruled on in the record. *See* ARCAP 13(a)(7)(A). And, because this issue

was not raised until this appeal, the trial court did not have an opportunity to address or rule on this issue. Moreover, the Town would not be prejudiced by this Court's waiver of this issue because the Town had ample time and opportunity to make this argument below.

Even if preserved, the Court should reject this argument on the merits. There are not two PUDs affecting the same rights. Rather, there is (a) the 2003 PUD incorporated into the Development Agreement, which protects vested rights on the Property. Unless and until the Development Agreement is amended as to mining rights, this Plan continues to control *the vested rights on the Property*. And, there is (b) a 2007 Zoning Ordinance that references the 2007 PUD that was not incorporated into the Development Agreement. The 2007 PUD and Ordinance are operative insofar as they do not interfere with the vested rights protected by the Development Agreement. Thus, the 2003 PUD is operative only as to the vested rights of the Development Agreement, and the 2007 PUD is operative to the extent it enhances or does not impair these vested rights. Where vested rights on the Property are concerned, there is no overlap: the 2003 PUD controls.

Even if there are two operative PUDs controlling the terms of development on the Property, the Town presents no legal authority or

citation why this would be a "violation of law." The Town makes only a bald assertion that two operative PUDs would "undercut the health, safety, and welfare component of zoning." (Opening Br. at 29.) Florence Copper is unaware of any law that would be violated by two operative PUDs.

4. The trial court did not eviscerate the public input planning process mandates by ruling that the 2003 PUD survived the 2007 rezoning process

The Town argues for the first time on appeal (Opening Br. at 30) that the trial court "eviscerated the public input mandates of the state and local planning process by ruling that the 2003 PUD survived the 2007 rezoning process." The Town is statutorily required to establish a means of public participation in zoning, which it did. The Town now argues that, due to the trial court's ruling, the public hearings it held are void because the public was "misled about the zoning" process, which "violates the separation of powers, sets bad public policy and results from an erroneous interpretation of the PADA." (*Id*. at 31–32).

The Town raises this argument for the first time on appeal, preventing the trial court from entertaining or resolving this issue such that argument is waived. *See In re MH 2008-002659*, 224 Ariz. at 27, ¶ 9; *Ruesga*, 215 Ariz. at 600, ¶ 39. Further, because it was not raised below, the Town did not (and

could not) cite where the issues were raised and ruled on in the record, ARCAP 13(a)(7)(A), instead citing only to trial exhibits that support one of its factual assertions.

The Town's argument is also substantively without merit. The Town has a statutory duty under A.R.S. §§ 9-462.03, -462.04 to establish a procedure by which the public may participate in zoning changes. The Town fulfilled its duty in creating an ordinance that complies with the statute and participating in public hearings in this case.[114] The Town's compliance with these obligations is unaffected by the trial court's ruling. Nothing in the statutory scheme, the Development Agreement, or the Town's Code states that the public input process is violated if a subsequent act, including a court order, changes the effect of an ordinance. The Town does not identify any legal requirements beyond the citizen review process. The "public input mandate" has been fulfilled.

To the extent there is a policy argument that the people of Florence were "misled about the zoning in their community" and can no longer "rely on the information they are provided by either their government or a

[114] APP445 - (TE#22) at 1 (stating that "appropriate public hearings have been held by the Planning and Zoning commission.")

developer regarding the potential land uses in their neighborhood," (Opening Br. at 31-32) such a claim would belong to the public, presumably against the Town. By its own admission, the Town is the entity in charge of involving the public in a rezoning process and it did so here through public hearings and public dissemination of the Comprehensive Master Community Plan and the 2007 PUD (*id*. at 31). The Town concedes that when it conducted these hearings, "no one discussed mining—not Town Staff, Council, Merrill or the public." (*Id.*) The Town failed to notify the public its limited authority under the Development Agreement—namely, that it may not derogate the vested rights of the Property owner without formally amending the Development Agreement and that it had not been formally amended. That error, however, does not and cannot implicate any possible claim against Florence Copper.

III. The Court should affirm the award of attorneys' fees, as Florence Copper succeeded on a contract claim and the trial court's award was reasonable

Following the trial court's January 2019 ruling, Florence Copper filed an application for attorneys' fees and costs, seeking a fee award of $1.9

million.[115] The trial court reduced the requested amount by 10% and awarded $1,700,000 in reasonable attorneys' fees and $32,365.55 in costs.[116] This Court reviews de novo the trial court's application of A.R.S. § 12-341.01 and for an abuse of discretion the trial court's award of fees and costs. *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, 369 ¶ 50 (App. 2015).

A. The trial court properly applied A.R.S. § 12-341.01, as Florence Copper prevailed on a contract dispute

Section 12-341.01 states that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." The purpose of this award is to "mitigate the burden of the expense of litigation," and can be given to a party on a finding that: (1) the party prevailed; (2) in a matter that arose out contract; and (3) the award is reasonable. *Id.*

A trial court has broad discretion to determine whether a party has met these requirements. In *Associated Indem. Corp. v. Warner*, the Arizona Supreme Court held that, when reviewing a fee award under § 12-341.01:

> The question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view

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[115] IR#421

[116] APP129 - IR#450 at 7

> of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.

143 Ariz. 567, 571 (1985) (quoting *Davis. v. Davis*, 78 Ariz. 174, 179 (1954) (Windes, J. specially concurring)). Indeed, "'if there is any reasonable basis for the exercise of [a trial court's] discretion, [its] judgment will not be disturbed.'" 143 Ariz. at 570–71 (quoting *Jones v. Queen Ins. Co.*, 76 Ariz. 212, 214 (1953)). In determining whether an award is reasonable, courts are to consider a number of factors, including: the merits of the claim/defense, whether litigation could have been avoided, whether fees would inflict hardship, whether the successful party fully prevailed, and the novelty of the legal issue. *Warner*, 143 Ariz. at 570. The trial court's award here was reasonable and justified under the law.

B. The trial court correctly applied § 12-341.01 because the Town's declaratory action arose out of a contract dispute on which Florence Copper was the successful party

The trial court correctly ruled that this case "arises out of contract," namely the Development Agreement, which set forth the parties' rights and obligations pertaining to FCI's ability to conduct mining operations on the

Property.[117] The Town's efforts to characterize its claims as ones over its right to enforce its zoning ordinances does not change the analysis, as those rights are expressly limited by the Development Agreement. As the trial court observed, "[t]his case was all about the contractual relationship established by the Development Agreement. The fact that it also involved zoning ordinances does not change the contractual nature of the claim."[118] Indeed, the parties' desire to have this dispute subject to § 12-341.01 is further reflected in the Development Agreement itself, which provides that either party may recover fees under § 12-341.01 "[i]n the event it becomes necessary for a party to this Agreement to bring an action at law . . . to enforce any of the terms or provisions of this Agreement."[119]

As this Court has held, "[t]he phrase 'arising out of a contract' in § 12-341.01 must be read broadly" and that an action "arises out of contract when the claim would not exist absent the contract." *SK Builders, Inc. v. Smith*, 246 Ariz. 196, 204-205, ¶ 28 (App. 2019). Such is the case here and the trial court's ruling should be affirmed.

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[117] APP124 - IR#450 at 2

[118] *Id.* APP125 at 3

[119] APP272 - (TE#1) PADA at 15, § 36

The trial court further found that "[t]here is no question that Florence Copper was the successful party," as the court "adopted Florence Copper's interpretation of the Development Agreement and resolved all key issues in the litigation in Florence Copper's favor."[120] "The determination of the successful party under A.R.S. § 12–341.01(A) is within the discretion of the trial court" and will not be disturbed "if any reasonable basis exists to support it." *Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 8 (App. 2016) (internal quotations omitted).

The Town argues that, although the case involved discussion of a contract, it is more appropriately governed by A.R.S. § 12-348, which addresses cases brought by towns. In relevant part, § 12-348 states that "[i]n addition to any costs that are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county that prevails by an adjudication on the merits in . . . [a] civil action brought by this state or a city, town or county against the party." Section 12-348(E)(4) also has a $10,000 cap on fee awards.

[120] APP125 - IR#450 at 3

This argument is without merit. As the trial court ruled, § 12-348 is not an exclusive remedy, nor does the cap apply to fees granted under other statutes—such as § 12-341.01.[121] *See Kadish v. Ariz. State Land Dept.*, 177 Ariz. 322, 328 (App. 1983) (holding that "nothing in A.R.S. section 12-348 bars an award of fees against the state under another statute or under equitable grounds"); *Mohave Cty. v. Ariz. Dept. of Water Res.*, 242 Ariz. 492, 493, ¶ 6 (App. 2017) (concluding that the § 12-348(E)(4) cap does not apply to fees awarded under another statute). *See Id.*[122] The trial court's ruling is correct. *Kadish* and *Mohave Cty.* control, and the Town has offered no argument as to why these cases should be ignored or overturned. Section 12-348 is not an exclusive remedy and is therefore not controlling. Neither it, nor its cap apply here.

[121] APP126 - IR#450 at 4

[122] *Id.*

C. The trial court did not abuse its discretion in awarding Florence $1.7 million in attorneys' fees

The trial court appropriately exercised its discretion in determining that the *Warner* factors "cut in favor of an award of fees to Florence Copper."[123] Among other things, the trial court found that:

- The Town's claim was not meritorious, as "Florence Copper has been successful in demonstrating that it has a vested right to mine copper [on the Property], Florence Copper's claim is worth millions of dollars."[124]
- "Florence Copper could not have avoided or settled this litigation because the Town made clear that it would accept nothing less than shutting down Florence Copper's business."[125]
- A fee award would not be an extreme hardship to the Town, which aggressively engaged in multimillion dollars litigation and lost, and "should bear the consequences of this litigation decision."[126]
- Florence Copper prevailed with respect to all of the relief sought.[127]
- Although the case presented some novel legal questions, "the final resolution was [not] a particularly close call" and "[n]othing about the nature of the

[123] *Id*. APP126 at 4–6

[124] *Id*. APP126 at 4

[125] *Id*.

[126] *Id*. APP126 at 4–5

[127] *Id*. APP127 at 5

questions presented cuts against an award of attorneys' fees."[128]

- An award of fees would not "discourage parties with tenable claims from pursuing them," and would further "serve as a deterrent to governmental overreaching" with respect to development agreements.[129]

Each of these findings is supported by the record and is uncontested by the Town in its appeal.

The trial court appropriately exercised its discretion in determining the size of the award, finding "that the fee applications are sufficiently documented and meet the *China Doll* requirements."[130] *See Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187–89 (App. 1989) ("where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories"). Reducing the fee request of $1,874,731.82 by approximately ten percent to account for certain inefficiencies, the court found that a total fee award of $1.7 million is "consistent with fees requests in other complex, large-dollar and similarly-litigated cases," and "is reasonable when compared to the Town's legal fees"

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[128] *Id.*

[129] *Id.*

[130] *Id.* APP128 at 6

of $1.5 million (not accounting for the Town's in-house attorney who worked on the matter).[131]

The Town argues on appeal that the fee award should be reduced because Florence Copper "comingled and block billed its activities on the statutory eminent domain action[], Counterclaims and the federal court removal and remand action," and there is no authority for a fee award on those actions. (Opening Br. at 35–36.)

As to comingling, the trial court found that Florence Copper excluded fees incurred for activities related to the eminent domain action and, to the extent other fees were included for that count, the *lis pendens* and the counterclaim, they were properly included because they "were inextricably interwoven with the contract claims" and the issues "revolved around the rights established by the Development Agreement."[132] *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 522, ¶¶ 22–23 (App. 2009) (the trial court did not abuse its discretion in awarding fees "incurred in litigating interwoven and overlapping contract and tort claims").

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[131] *Id.* APP128 at 6

[132] *Id.*

The trial court further found that "there is minimal block billing" in counsels' time entries.[133] Whatever block billing exists did not inhibit the Town or the court from determining the time spent on specific tasks, as is evidenced by the Town's argument to the trial court that certain fees were excessive,[134] and merely reflects that the issues in the case and the tasks performed for the case were inextricably interwoven and all linked to the question of the legal effect of the Development Agreement.

IV. The Court should affirm the trial court's ruling that specific performance is an available remedy in the event of a breach by the Town

In August 2017, the trial court held that the Development Agreement established for Florence Copper vested rights to develop in-situ commercial mining operations, that the Town cannot unilaterally change that agreement or derogate these vested rights without breaching the agreement and that a change to the "Development Agreement requires both legislative action and contractional action."[135] The court further found that "[w]hether the parties

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[133] APP128 - IR#450 at 6

[134] APP250 - IR#437 at 12–13

[135] APP109 - IR#239 at 17

'mutually agreed' to restrict mining rights vested by the Development Agreement is a triable issue of fact."[136]

In a subsequent motion for summary judgment on the question of mutual agreement, the Town took the position that it maintained the right to breach the Development Agreement through zoning, and Florence Copper's only remedy would be for damages:

> The fact that the *legislative* exercise of the Town's inalienable police power in enforcing the 2007 zoning may constitute a breach of the Development Agreement, possibly affording a *judicial* remedy, does not and cannot invalidate the Town's legislative act in rezoning the property. Constitutional separation of powers requires the court to recognize and give effect to the Town's legislative actions regardless of whether those actions may give rise to a possible breach of contract.[137]

Following a six day bench trial and Judge Brodman's order finding that the parties in 2007 "did not eliminate or abandon in-situ mining rights of the Owner established by the 2003 Development Agreement,"[138] the parties and the court discussed how to proceed with the judgment and remaining counterclaims (including those dealing with remedies), the court

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[136] *Id*.

[137] APP210 - IR#262 at 1–2

[138] APP118 - IR#412 at 21

expressing its preference to resolve as many issues as possible in its final judgment, asked the parties to brief those issues, including as to fees, costs or other relief.[139]

Florence Copper moved for a declaratory judgment, seeking a form of affirmative judgment that captured the substance and necessary implications of the January 3, 2019 minute entry order: that, under the Development Agreement, Florence Copper had a vested right to in-situ mining on the Property and that if the Town breached the agreement, it had "the available election of judicial remedies for a breach of contract, specific performance or contract damage."[140] In support of its motion, Florence Copper noted the Town's prior statements that at least implied that damages were the only available remedy, and further discussed the legal and equitable bases supporting a specific performance remedy.[141]

At oral argument, the trial court asked the Town whether it was maintaining the position taken during briefing and argument on the Second Motion for Summary Judgment that the only available remedy for any

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[139] IR#418

[140] IR#443

[141] *Id.*; *see also* IR#422

breach of the agreement was one for damages, to which the Town responded: "If there is a breach of the contract, the remedies at law under the contract are available, which include specific performance."[142]

A. The trial court correctly ruled that Florence Copper could not be legally precluded from seeking specific performance should the Town breach the agreement

The trial court granted the motion in its entirety, finding that the court's interpretation of the Development Agreement should be made into the form of a judgment and that, in the event of a breach, Florence Copper would have a right to request specific performance.[143] The trial court subsequently signed a judgment that:

> in the event of a breach of the Development Agreement by the Town of Florence, Florence Copper has the available election of judicial remedies for a breach of contract, and may elect either specific performance or money damages.[144]

This Court should affirm the trial court's order.

Given the discussion in the Opening Brief, it is necessary first to clarify the scope and limits of the trial court's decision. The trial court did not rule

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[142] APP490 - 05/29/2019 Hr'g Tr. at 21:9–11

[143] APP120 - IR#449 at 2

[144] APP132 - IR#451 at 3

that Florence Copper is presently or necessarily entitled to specific performance. Rather, it rejected the Town's argument that, because of the supremacy or non-justiciability of zoning law, the Town could never be compelled to allow Florence Copper to engage in mining activities protected under the Development Agreement. The order and judgment simply inform the parties that, should the Town in the future attempt to impair Florence Copper's vested right to mine, it could then be enjoined from doing so.

This ruling is based primarily on the Development Agreement, which expressly provides that the non-breaching party has "the right to specifically enforce any term or provision of this Agreement."[145] Although there has not yet been a breach, the trial court may, under the Arizona Declaratory Judgments Act, construe a contract "either before or after there has been a breach thereof," A.R.S. § 12-1833, which is all the court has done here.

The court further ruled that the underlying claim is appropriate for specific performance because it involves a claim over land, for which "an award of damages is usually considered an inadequate remedy,"[146] and

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[145] *See* APP273 (TE#1) PADA at 16–17 § 44

[146] APP121 - IR#449 at 3 (quoting *Woliansky v. Miller*, 135 Ariz. 444, 446 (App. 1983))

because "the mining rights may be worth hundreds of millions of dollars, and the Town (with its yearly budget of $43 million) may be unable to pay full monetary damages."[147] Given these considerations and the contract, the court appropriately exercised its discretion to declare that Florence Copper would not be precluded from pursuing specific performance should there be a breach. *See* Ariz. R. Civ. P. 57 (allowing for "speedy hearing of an action for declaratory judgment" even when there is another adequate remedy).

B. The Court should reject the Town's arguments, as they misconstrue the trial court's order and the law

At oral argument for Florence Copper's post-trial motion on contract remedy and interpretation, the court asked the Town directly whether it was arguing that a monetary award is the only available remedy for a breach, a position it had maintained to that point. The Town abandoned its argument: "If there is a breach of the contract, the remedies at law under the contract are available, which include specific performance."[148] That should end the

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[147] *Id.* (citing Restatement (Second) of Contracts § 360(c) (1981) (recognizing that court must consider collectability of damages in assessing adequacy of remedy))

[148] APP490 - 05/29/2019 Hr'g Tr. at 21:9–11

matter, as that is all the trial court's order and judgment do—confirm the availability of specific performance—and the Town has conceded the point.

The Town's arguments on appeal are equally confusing and devoid of substance.

The Town's argues that "[i]t is impossible for a court to determine whether specific performance is an available remedy as a matter of law based on an unidentifiable breach." (Opening Br. at 36-37.) This argument is not only entirely at odds with the Town's most recent position before the trial court, it ignores the court's clear legal authority under § 12-1833 to construe the Development Agreement "either before or after there has been a breach thereof." *See also* Ariz. R. Civ. P. 57.

The Town is further incorrect that "since there is no breach, there is no justiciable controversy between the parties." (Opening Br. at 37.) Section 12-1833 and Ariz. R. of Civ. P. 57 allow the trial court to construe the terms of the Development Agreement—which is all that is has done here—regardless of a breach. Moreover, the Town created the justiciable controversy by first raising this issue when it argued in June 2018 that, no matter the trial court's ruling below, Florence Copper could not mine the Property.

The Town next argues that this order is "legally improper because FCI admits in its Counterclaims and the Joint Pre-Trial Report that it is in breach of the PADA and that performance is impossible [and that] specific performance is not available to FCI when it is in breach of the agreement." (Opening Br. at 37.)[149] Again, the Town misconstrues the trial court's order and judgment as one awarding specific performance rather than denying the Town's (seemingly abandoned) argument that specific performance would be unavailable. Any question of breach or non-compliance could, of course, be raised as a defense at the time a remedy was considered.

Finally, the Court should reject the Town's argument that "the trial court's order is confusing and unnecessary considering the PADA has nearly twenty more years on its term" and that the "Town should not be bound or restrained by this ambiguous ruling for the next two decades." (Opening Br. at 37.) The Town makes no legal argument here why the ruling should be overturned.

[149] The Town cites to Florence Copper's Second Amended Answer and Counterclaim (IR#367) and the Joint Rule 16 Statement (IR#415), neither of which support its argument that Florence Copper is in breach or cannot perform under the Development Agreement.

The Town is incorrect that the order is "confusing and unnecessary." To the contrary, the judgment is clear on its face and eminently necessary given the Town's conduct below and its shifting positions regarding its ability to prevent Florence Copper from mining. If anything, the remaining 20-year term necessitates the order, as the parties need some clarity as to how the Development Agreement may be enforced.

CONCLUSION

This Court should affirm the decision and judgment of the trial court in its entirety. The Development Agreement vested rights in Florence Copper to conduct for the term of that agreement in-situ copper mining operations on the Property. Those rights remain unimpaired, as neither the 2007 Rezoning Ordinance nor any other action has affected them. Having succeeded on this dispute over a contract, the trial court properly awarded Florence Copper its reasonable attorneys' fees and costs. And the trial court correctly construed the Development Agreement to reject the Town's argument that, because of its inherent police power, it remained free to breach the Development Agreement, leaving Florence Copper only the inadequate remedy of money damages.

Florence Copper further requests that the Court award it its reasonable attorneys' fees and costs on appeal under A.R.S. §§ 12-341.01 and 341.

RESPECTFULLY SUBMITTED this 8th day of May, 2020.

OSBORN MALEDON, P.A.

By /s/ Timothy J. Eckstein
Colin F. Campbell
Timothy J. Eckstein
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Phoenix, Arizona 85012

Attorneys for Defendant/Appellee

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430.	RESPONSE TO MOTION TO STAY COUNTERCLAIMS OR IN THE ALTERNATIVE MOTION FOR RECONSIDERATION ON REQUEST TO STAY COUNTERCLAIMS	Apr. 16, 2019
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APPEAL COUNT: 3

RE: CASE: 1 CA-CV 19-0504

DUE DATE: 07/26/2019

CAPTION: TOWN OF FLORENCE VS. FLORENCE COPPER, INC., ET AL

EXHIBIT(S): H.D. 12/05/2018 LIST: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199

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LOCATION ONLY: NONE

SEALED DOCUMENT: ORIGINAL SEALED DOCUMENT INCLUDED IN THE INDEX OF RECORD

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

TRANSCRIPT(S): NONE

COMPILED BY: chestangc on August 7, 2019; [2.5-17026.63]
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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.

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 08/14/2017

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

TOWN OF FLORENCE

CHRISTOPHER W KRAMER

v.

FLORENCE COPPER INC, et al.

COLIN F CAMPBELL

RUSSELL R YURK

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The Court has considered Plaintiff Town of Florence's Motion for Summary Judgment; Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment; Plaintiff/Counterdefendant Town of Florence's Reply to Opposition to Motion for Summary Judgment and Response to Defendant/Counterclaimant's Cross-Motion for Summary Judgment; and [Revised] Defendant's Reply in Support of its Cross-Motion for Summary Judgment. The Court held oral argument on July 12, 2017.

I. BACKGROUND

At issue is whether Florence Copper, Inc. ("FCI") has a right to maintain and expand nonconforming uses or structures related to mining on the subject property (the "Property"). The Town of Florence (the "Town") filed a two count complaint. Count 1 seeks declaratory relief that the use of the Property for mining and related activities is an illegal use, the right to maintain nonconforming uses or structures on the Property related to mining activities has been abandoned, all nonconforming use structures are no longer legal, and FCI has no legal right to expand or move any legal conforming uses or structures currently present on the Property. In

Count 2, the Town seeks to obtain the Property through eminent domain. In the counterclaim, FCI contends the complaint should be dismissed. If, however, the case is not dismissed, FCI seeks specific performance as to FCI's vested contractual rights, compensatory damages for the Town's breach of contract and abuse of process, and compensatory damages for the Town's deprivation of FCI's constitutional rights.

The Town filed a motion for summary judgment arguing that the 2007 Ordinance replaced, superseded, and rescinded the 2003 Planned Unit Development Plan ("PUD" or "Development Plan") and, as a result, the right to mine the Property has been lost. In the alternative, the Town argues that W. Harrison Merrill ("Merrill") abandoned any nonconforming mining rights before FCI purchased the Property. In the cross-motion, FCI argues that the Court should enter summary judgment against the Town and declare that mining is a lawful permitted use on the Property, and the 2003 Pre-Annexation Development Agreement ("Development Agreement") preserves FCI's right to mine the entire BHP Mine Overlay Area without limitation.

To summarize the dispute: in 1996 and 2003 the Town supported mining on the Property. By 2010-11, it did not. The issue is whether the Town is bound by the 2003 Development Agreement.

II. ANALYSIS OF DEVELOPMENT AGREEMENT

A development agreement is a contract. A.R.S. § 9-500.05(C) applies to development agreements, stating: "A development agreement may be amended, or canceled in whole or in part, by mutual consent of the parties to the development agreement or by their successors in interest or assigns." Similarly, subsection D states that "the burdens of the development agreement are binding on, and the benefits of the development agreement inure to, the parties to the agreement and to all their successors in interest and assigns." Cities are bound by development agreements. *Home Builders Ass'n v. City of Maricopa*, 215 Ariz. 146, 153-54, ¶ 28 (App. 2007).

A contract's interpretation is controlled by the intent of the parties, as ascertained through its language. ***See ELM Ret. Ctr., L.P. v. Callaway***, 226 Ariz. 287, 290-91 (App. 2010). Words are given their ordinary, common sense meaning. ***Aztar Corp. v. U.S. Fire Ins. Co.***, 223 Ariz. 463, 469 (App 2010). When the language is plain and unambiguous, it will be enforced as written. *Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 267 (2008). In interpreting a contract, "acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms." ***Associated Students of Univ. of Arizona v. Arizona Bd. of Regents***, 120 Ariz. 100, 105 (App. 1978).

The starting point of the Court's analysis is to review the 2003 Development Agreement.

A. The 2003 Development Agreement Unambiguously Allowed Copper Mining on the Property

In order to place the allegations of this case in context, the Court believes it is important to first discuss whether mining operations were allowed by the Development Agreement dated December 1, 2003.

1. In-situ mining is allowed as a non-conforming use under the Development Agreement

Although the 23-page Development Agreement itself does not mention mining (except through incorporation), the Development Agreement expressly establishes and protects the Owner's right to mine within the BHP Mine Overlay area.

The Development Agreement references and incorporates the PUD dated November 7, 2003 as set forth in Exhibit B. ***See*** Page 3 ("All documents and exhibits referred to in this Agreement are hereby incorporated by reference into this Agreement"). Exhibit B is attached to the Development Agreement and is therefore incorporated into the Development Agreement. Exhibit B clearly establishes an allowed non-conforming use of copper mining. The document identifies a "BHP Copper Mine Overlay Area." ***See*** pages 19, 21, 28. The BHP underground leaching mine is referenced in the "Site History" portion. ***Id.*** at 8. The PUD provides that non-conforming uses of the land would continue. Paragraph 7 vests the Owner's right to non-conforming uses by providing:

> 7. Non-Conforming Uses of Land -- where, at the time of passage of this PUD, a lawful use of land exists which would not be permitted by the regulations imposed by this PUD, such use may continue so long as it remains otherwise lawful, provided:
>
> * No such non-conforming use shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of the adoption or amendment of this PUD.
> * No such non-conforming use shall be moved, in whole or in part, to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this PUD.
> * If any such non-conforming use of land ceases for any reason for a period of more than 180 days, any subsequent use of such land shall conform to the regulations specified by this PUD for the district in which such land is located, with the exception of the copper mining operations.

> * No additional structure not conforming to the requirements of this PUD shall be erected in connection with such non-conforming use of land.

PUD at page 30 (emphasis added). In other words, the PUD, which is incorporated by reference into the Development Agreement, unambiguously provides that copper mining operations could continue on the Property. The point was emphasized in Paragraph 12 of the PUD, which allows drilling, mining and exploration for copper within the area indicated as the "BHP Copper Mine until said mine is closed." Paragraph 12 reads:

> 12. Drill sites -- Drilling, mining or exploration for any minerals, oil, gas or other hydrocarbon substances shall be prohibited in the PUD area with the exception of that area indicated as the BHP Copper Mine until said mine is closed.

Id. at page 32 (emphasis added). If the above-referenced facts were not enough, the December 15, 2003 zoning ordinance itself (No. 356-03) which adopted the zoning in the PUD contains an attachment that references the "BHP Copper Mine Overlay Area."

> 2. The Development Agreement vests the right to mine in the Owner and future purchasers for 35 years.

The Development Agreement establishes "the permitted uses for the Property." *See* Page 1. The Development Agreement goes on to establish that its purpose is to protect the Owner's right to develop the Property over a period of years.

> Therefore, Owner requires certain assurances and protection of rights in order that Owner will be allowed to complete the development of the Property in accordance with the Development Plan over the period of years permitted by this Agreement.

Id. at page 2. The Development Agreement had a 35-year term. *Id*. at ¶ 4, page 4. The Court finds the following provision to be particularly important:

> **3. PLAN APPROVAL AND VESTED RIGHTS**. As of the execution date of this Agreement, Town, by and through its Mayor and Town Council (collectively, the "Council"), hereby grants to Owner, its successors and assigns, its approval of the Development Plan. For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and the Development Plan. The determinations of the Town in this Agreement and the assurances provided to the Owner in this Agreement are provided pursuant to and as contemplated by A.R.S. § 9-500.05 and other applicable law. (Emphasis added)

This language is not ambiguous. It is not unclear. The Development Agreement gives the Owner vested rights for the term of the Agreement. As previously noted, one of these rights is to perform mining operations in the area identified by the BHP Mine Overlay area. The words "develop and use the Property" clearly indicate that additional activity to develop the Property to support in-situ mining operations is permitted. Although the language in Paragraph 3 it is clear on its face, the language is confirmed in Paragraph 12 of the Development Plan which gives the Owner the right to drill, mine or explore for minerals. If mining was limited to its existing or historic use, there would be no reason to drill, mine or explore.

In addition, contracts "are to be given a reasonable construction" and "read in light of the parties' intentions as reflected by their language and in view of all circumstances." ***Smith v. Melson, Inc.***, 135 Ariz. 119, 121 (1983). The argument that Merrill would explicitly carve out mining rights within the BHP Mine area for a potential joint venture with a mining company while simultaneously agreeing to limit his right to commercial-scale recovery of copper is nonsensical.

Accordingly, the vested rights established by the Development Agreement run with the land. The Development Agreement provides that "Owner and its successors are entitled to exercise the rights granted pursuant to this Agreement." *Id*. at ¶ 5, page 4. There is no question that FCI is the successor to Merrill. The Court finds that the 2003 Development Agreement unambiguously provided the Owner a vested right to mine copper on the Property, provided that the copper mining did not extend beyond the limits established by the BHP Copper Mine Overlay area.

As a result of the clear and unambiguous language in the Development Plan, the Court rejects the Town's argument that the Development Agreement limited mining to its existing or historic use. The development of commercial in-situ mining is clearly and unambiguously authorized by the Development Agreement. FCI is entitled to partial summary judgment against any argument to the contrary.

B. <u>The Development Agreement Provided Specific Methods for Amendment</u>

A.R.S. § 9-500.05(C) provides that a development agreement may be amended by mutual consent of the parties. The Development Agreement contains the following provisions for amendment:

> **6. DEVELOPMENT PLAN**. (a) the development of the Property shall be in accordance with the Development Plan and this Agreement unless otherwise amended pursuant to this Agreement.
>
> * * *

> (c) . . . Town shall not adopt or change any ordinance, regulation or other control that are not uniform and that discriminate in their application against the Owner or the Property. Owner and Town agree that after this Development Plan has been approved, any and all subsequent zoning ordinances or requirements, zoning restrictions, addenda, and revisions adopted by the Town will not be applied to the Property except as may be required pursuant to Paragraph (f). . .
>
> (f) the ordinances, rules, regulations, permit requirements, policies or other requirements of the Town applicable to the Property and the development of the Property shall be those that are now existing and in force for the Town as of the date of the recording of the Agreement. Town shall not apply to the Property any legislative or administrative land use regulations adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan except as follows: 1) as specifically agreed in writing by the Owner; 2) future generally applicable ordinances, rules, regulations, and permit requirements. . . of the Town reasonably necessary to alleviate legitimate threats to public health and safety. . . 3) adoption and enforcement of zoning ordinance provisions governing nonconforming property or uses; 4) future planned use ordinances, rules, regulations, permit requirements and other requirements and official policies of the Town enacted as necessary to comply with mandatory requirements imposed on the Town by County, state or federal laws and regulations. . . and 5) future updates of, and amendments to, existing building, plumbing, mechanical, electrical, and similar construction and safety related codes adopted by the Town. (Emphasis added)
>
> The Development Agreement also describes in detail how it is to be amended:
>
> **32. AMENDMENTS**. No amendment shall be made to this Agreement except by written document executed by Town and Owner. Within ten (10) days after the execution of any amendment by both parties, the amendment shall be recorded with the Pinal County Recorder, Pinal County, Arizona.

It includes a "non-waiver" provision:

> **21. WAIVER**. No delay in exercising any right or remedy by either Town or Owner shall constitute a waiver thereof. Waiver of any of the terms of this Agreement of the Development Plan shall not be valid unless in writing and signed by all parties hereto. The failure of any part [sic] to enforce the provisions of the Agreement or the Development Plan or require performance of any of the provisions, shall not be construed

as a waiver of such provisions or the fact the right of the party to enforce all of the provisions of this Agreement and the Development Plan.

On two occasions prior to 2007, the Development Agreement was amended and the amendment was recorded. (Neither of the amendments involved mining rights.) Evidence is undisputed that no amendment to the Development Agreement revoked the Owner's right to mine on the Property.

III. THE KEY ISSUE IN THIS CASE: DID ACTIONS IN 2007 ELIMINATE THE OWNER'S RIGHT TO MINE THE PROPERTY AS A NONCONFORMING USE WITHOUT TOWN APPROVAL?

To summarize so far, the Development Agreement is a valid exercise of the Town's police power and is enforceable. The Development Agreement gave the Owner a transferable, 35-year vested right to mine copper and develop in-situ mining in the Mine Overlay Area. FCI is the successor to Merrill. The issue, then, becomes whether the actions of the Town and Merrill in 2007 eliminated this vested right.

Copper mining was not on Merrill's radar in 2007. With copper prices low and the residential real estate market booming, Merrill was concerned about residential development, not mining. Mining was not discussed. Merrill offers uncontroverted testimony that Merrill and FCI never "entered into any amendment to the 2003 PADA [Development Agreement] that eliminated any rights to mining as referred to in the 2003 PADA." Merrill Aff. at ¶ 7. In 2006-07, the Town and Merrill's representatives didn't talk about mining.

IV. THE TOWN'S MOTION FOR SUMMARY JUDGMENT: IS THE TOWN ENTITLED TO SUMMARY JUDGMENT BECAUSE UNCONTROVERTED EVIDENCE DEMONSTRATES THAT THE RIGHT TO MINE WAS SUPERSEDED OR ABANDONED?

The zoning for the Property in the Development Agreement is I-1 (light industrial). In 2007, zoning on the Property was changed from I-1 to residential. The Town argues that the events of 2007 caused the elimination of the Owner's mining rights as a matter of law. The Court disagrees. The 2007 Ordinance, a legislative action, does not fall within any of the exceptions listed in section 6(f) of the Development Agreement and therefore cannot be applied to the Property. *See Redelsperger v. City of Avondale*, 207 Ariz. 430, 436, ¶ 21 (App. 2004) ("[W]e find that the Zoning Ordinance represented legislative action because it declared a public policy and provided the ways and means for its accomplishment"); *Wait v. City of Scottsdale*, 127 Ariz. 107, 108 (1980) ("The enactment of the original zoning ordinance is a legislative function, and we fail to see why the amendment of an ordinance should be of a different character. We accept

the majority view that the enactment and amendment of zoning ordinances constitute legislative action.") The Court explains its reasoning as follows.

A. The Town Cannot Unilaterally Change the Development Agreement

As an initial matter, the Court rejects the notion that the Town can unilaterally change the Development Agreement or eliminate property rights vested by the Development Agreement. The terms of the Development Agreement clearly prevent this. So does A.R.S. § 9-500.05(C), which states: "A development agreement may be amended, or canceled in whole or in part, by mutual consent of the parties to the development agreement or by their successors in interest or assigns." (Emphasis added.) The Town cannot unilaterally act to take away a property right vested by the Development Agreement.

The Development Agreement sets forth a specific procedure to be used to amend the Development Agreement. Undisputed evidence demonstrates that this procedure was not followed. There was no written amendment to the Development Agreement, and there is no evidence that any amendment was recorded with the Pinal County Recorder. The parties knew how to amend the Development Agreement because they had done so on two prior occasions. The fact that there is no recorded document entitled "Amendment to Development Agreement" is strong evidence that the parties did not intend to amend the Development Agreement. The Town acknowledges that the rights established by the Development Agreement were vested and required mutual agreement to change. Eckhoff depo. at 77: 1-4.[1] Indeed, **at oral argument the Town admitted that it was not arguing that the Development Agreement had been amended**.

In conclusion, the Town cannot unilaterally change the Development Agreement or unilaterally derogate vested rights created by the Development Agreement. An amendment to the owner's vested rights established by the Development Agreement requires both legislative action and contractual action. In other words, if the Town adopts a zoning ordinance that conflicts with the vested contractual rights established in the Development Agreement, the Town cannot

1. In its Response, the Town argues that zoning "cannot be contracted away" and somehow the Town could amend the 2003 Ordinance by another ordinance notwithstanding the recorded Development Agreement. Response at 2. The Town cites no applicable authority for this unpersuasive argument. The Court agrees with FCI that the Town's argument displays a fundamental misunderstanding of development agreements. While a municipality is certainly free to change the zoning on property, the zoning change cannot derogate any right previously vested to property governed by a development agreement unless the parties to the development agreement mutually agree to the change. One of the purposes of development agreements is to protect developers when the winds of politics change direction.

enforce that zoning against the Property without amending the contract. FCI is entitled to partial summary judgment on any argument to the contrary.

B. Evidence Supports the Argument that Merrill's Request for a Zoning Change did not Demonstrate his Consent to the Elimination of Vested Mining Rights

Undisputed evidence shows that Merrill requested that the Town change the zoning on his development. Indeed, the Development Agreement states that "The Town shall not initiate any changes or modifications to the approved zoning except at the request of the owner of the portion of the Property for which such change is sought." Development Agreement at 6(b). The next issue is whether Merrill's request for a zoning change reflects his consent to the elimination of the mining rights vested by the Development Agreement as a matter of law.

To address this issue, the Court will again turn to the contracts entered into by the parties. The Development Agreement incorporates by reference the PUD that includes zoning classifications and designates the property as I-1 light industrial. This I-1 zoning category does not permit mining and, as a result, any mining already is a nonconforming use. The Development Agreement thus creates a contractual exception to the zoning restrictions and vested nonconforming mining rights within the zoning classification established in the 2003 PUD.

In 2007, the Town at Merrill's request approved Ordinance No. 460-07, changing the Property's zoning from light industrial to residential. The 2007 Ordinance does not include any reference to mining, nonconforming uses, or other similar activity. It does not address the owner's contractual exception to the zoning law. The Court sees no reason why a change from one zoning category (that does not allow mining) to another zoning category (which likewise does not allow mining) is, by itself, conclusive evidence that the previously vested and contractually excepted nonconforming use was eliminated. This is especially true since Merrill had substantial discretion to move zoning designations around within the totality of the development. Further, Merrill testified that the purpose of the 2007 zoning change was to maximize entitlements and get higher densities on the Property. Merrill wasn't interested in copper because he was interested in housing. Merrill depo. at 209:19-210:18; 220:6-12.

Significant evidence supports FCI's argument that the change of zoning was not an overt act indicating Merrill's waiver of the vested zoning rights. First, there is no evidence that the Town and Merrill agreed that the change in zoning eliminated the nonconforming use. The parties stipulated that the Town Manager and the Town Attorney had discussions with Merrill and his representatives regarding the proposed 2007 rezoning for Merrill's property and the issue was not discussed. The parties agree:

> In the referenced discussions between Mr. Merrill and/or his representatives and Mr. Mannato and/or Mr. Patel, the topic of in-situ copper mining on Mr. Merrill's Florence, Arizona property was never raised nor talked about. Nobody representing Mr. Merrill ever explicitly stated to Mr. Patel or Mr. Mannato that Mr. Merrill intended to give up whatever right he may have had to conduct mining on the property as part of the 2007 rezoning enactment. . . The discussions between Mr. Merrill and/or his representatives and Mr. Patel and/or Mr. Mannato preceded the adoption of Town of Florence Ordinance No. 460-07.

Statement of Stipulated Facts filed June 20, 2016. How could the parties "mutually consent" to an amendment of the Development Agreement that eliminated vested rights when undisputed evidence shows that the parties did not discuss the alleged amendment?

Second, Merrill offered uncontradicted testimony that he never consciously intended that the zoning amendment would extinguish the right to mine copper. *See*, e.g., Merrill depo. at 101:4-19; 119:13-20. Although the parties quibble over Merrill's specific language, the undisputed facts are that mining didn't come up in 2007 and was not on his mind. He testified:

> Q: And the copper mining never came up in the discussion of the 2007 PUD because it just wasn't on anybody's mind, right?
>
> A: No. Again, the mining question was never an issue, ever.

Id. at 220:6-12. Merrill's testimony is uncontroverted; the lack of amendment to the Development Agreement is confirmed by emails exchanged with Merrill's representatives. For example, the email from Merrill manager Jan Dodson on February 21, 2007 indicates that the requested zoning change is a stand-alone issue from the Development Agreement. She writes, "Why are they [the PUD zoning changes] holding us back from getting our PUD Amendment processed as a stand alone zoning document? We have not made an application requesting any changes to our DA [Development Agreement]." Nothing in the Town's response to this email suggests that the Town believed a change needed be made to the Development Agreement. Moreover, from 2007 through 2009, Merrill was in negotiations to sell the Property to a mining company. Such discussions are consistent with Merrill's belief that mining rights were not eliminated, especially since these sales discussions were bundled with Merrill's ownership of mineral lease rights on the adjacent State Trust Land.

The Town argues that the change in zoning demonstrates that Merrill intended to abandon mining. To support this claim, the Town seems to argue that increasing residential zoning density is inconsistent with the owner's desire to continue his ability to mine on the Property. It is not. Based on his testimony, Merrill's goal clearly was to maximize entitlements

(and thus the value) to the Property. Having both the right to mine and increased residential densities would give Merrill the best of both worlds and thus would increase the value of his property. Evidence shows Merrill intended to mine the property and then develop the land for residential use after copper resources were depleted. FSI SOF ¶ 51.

The Town relies on *Duffy v. Milder*, 896 A.2d 27 (R.I. 2006), to support its contention that Merrill's request to rezone the Property was an overt act manifesting his intent to abandon any mining uses on the Property. The Court believes that *Duffy* is distinguishable for several reasons. That case involves interpretation of Rhode Island law, and Arizona has asserted strong private property rights in the face of governmental regulation. *See* Proposition 207, the Private Property Rights Protection Act. Besides, as noted above, the Court was not persuaded that a change in zoning from light industrial to residential constitutes an overt act to eliminate a nonconforming use that is nonconforming under both zoning categories. Finally, the facts in *Duffy* are distinguishable. In *Duffy*, the zoning certificate stated that "the keeping of horses on this lot is currently considered a lawful nonconforming and permitted use and shall be allowed to continue until such time as an overt action for discontinuation is conducted by the property owner." *Id.* at 30. The court found that the owners' voluntary act of rezoning the property in order to build condominiums was an overt act that "manifested their intent to abandon the use of their property as a horse farm." *Id.* at 39. No language similar to the *Duffy* zoning certificate can be found in the instant case. To the contrary, waiver of Development Agreement rights requires more than an "overt act"-- it required a written agreement signed by the Owner and recorded in the County Recorder's office.

Third, the 2007 Ordinance itself suggests that it does not change rights vested in the Development Agreement. In fact, paragraph 23 reads as follows: "Town and Owner agree to work together in good faith to modify any applicable portions of the Merrill Ranch Development Agreement that may be found to be in conflict with this PUD Amendment approval." (Emphasis added.) In other words, the zoning Ordinance was an amendment to the PUD -- not the Development Agreement. If the Ordinance was in conflict with the Development Agreement, the parties needed to work through the differences. There is no evidence that the parties did so, leaving the conclusion that the zoning change did not change the vested right to mine set forth in the Development Agreement. Mr. Eckhoff, the Town's zoning administrator, admitted that "changing and amending the zoning does not amend the Development Agreement." Eckhoff depo. at 89:21-23; 93:8-9 ("The change of the zoning itself does not change the Development Agreement").

Finally, amendments to the Development Agreement must be recorded. The Court does not view this requirement as an insignificant or ministerial act that can readily be ignored. The purpose of the recording requirement is to put future purchasers of the Property -- like FCI -- on notice of what restrictions were placed on the Property. *See* Eckhoff depo. at 86:11-16; Merrill

depo. at 41:5-17 (development agreement needs to be recorded so anyone who went through chain of title would know what the rights were). *See also* A.R.S § 33-416. The undisputed fact that there was no recorded amendment to the Development Agreement is evidence that there was no change to the Development Agreement.

C. What the "Consent to Conditions" Means is Ambiguous; Evidence Supports the Argument that Merrill's Signature on the "Consent to Conditions" Was Not Written Consent to Waive Mining Rights

The Town argues that Exhibit B, the "Consent to Conditions/Waiver for Diminution of Value," reflects Merrill's written assent to the changes. Indeed, on March 21, 2007, Merrill signed Exhibit B which reads:

> The undersigned is/are the owner(s) of the subject land described in Exhibit A hereto that is subject of the PUD Rezoning Amendment Application PZ-6051-R ("Amendment PZ-6051-R"). By signing this document, the undersigned agrees and consents to all the conditions imposed by the Florence Town Council in conjunction with the approval of PUD Rezoning Amendment Application PZ-6051-R ("Conditions of Approval") and waives any right to compensation for diminution in value pursuant to Arizona Revised Statutes § 12-1134 that may now or in the future exist as a result of the approval of PUD Rezoning Amendment Application PZ-6051-R. Except as expressly set forth in Amendment PZ-6051-R and its Conditions of Approval, nothing herein shall constitute a waiver of any other of the undersigned's rights pursuant to the above- referenced statutes.

The Court does not believe that the Consent to Conditions is clear and unambiguous when viewed in the context of this case.

The Ordinance itself places a specific limitation on the Consent to Conditions. Paragraph 24 provides that the Owner "agrees to waive claims for diminution in value pursuant to Proposition 207 [A.R.S. § 12-1134] pursuant to the waiver attached hereto as Exhibit B." Thus, the waiver's purpose is limited to diminution of value caused by the zoning change under Arizona's post-*Kelo* Proposition 207, the Private Property Rights Protection Act, not a waiver of non-conforming uses. Moreover, the waiver itself speaks of "conditions imposed by the Florence Town Council" in conjunction with the change in zoning. Of course, nothing in the zoning ordinance mentions mining or expressly states that a pre-existing nonconforming use would not continue. In other words, **there are no conditions** imposed on mining in the ordinance. Finally, the waiver itself makes clear that the Owner waives items "expressly set forth in Amendment PZ-6051-R and its Conditions of Approval." Given that nothing in the zoning ordinance suggests that a pre-existing nonconforming use was eliminated, and given that the Town admits that there was no discussion with Merrill or his representatives that suggested such a result, the Consent to

Conditions cannot, as a matter of law, be read to waive Merrill's continued ability to have a nonconforming use vested by the Development Agreement.

In short, the Development Agreement expressly requires the Owner to affirmatively manifest its intent **in writing** before a right vested by the Development Agreement could be changed. State law says that a Development Agreement can only be modified by mutual consent. Here, evidence supports the argument that Merrill did not provide such consent. Merrill says he did not assent; the Town admits that the topic was never discussed. What the Consent to Conditions means is, at worst, ambiguous.

D. <u>The Non-conforming Use (*i.e.*, the mine) was not Closed or Abandoned</u>

Abandonment of mining is specifically defined in the Development Agreement. It means closure of the mine; it does not mean the cessation of copper mining operations for extended periods of time. *See* Development Plan at sections 7 and 12. Stated otherwise, "ordinary" nonconforming uses under the Development Agreement can be abandoned if they cease for more than 180 days. Mining rights, however, can only be abandoned or given up by closing the mine (or by modifying the Development Agreement).

As a matter of undisputed fact, the mine was not closed. Although undisputed evidence indicates that Merrill investigated steps to close the mine, he never instituted closure proceedings. *See* Merrill depo. at 69:12-14 (the mine was not closed). No Closure Plan has ever been submitted for the Property. The in-situ well permits have not expired and the wells have not been closed. Thus, absent a mutually agreed change to the Development Agreement, the right to mine continues to this day.

E. <u>FCI's Attempt to Obtain a Zoning Change Doesn't Mean it Waived the Right to Mine</u>

After FCI purchased the Property, FCI (or its predecessor, Curis) attempted to obtain zoning change or plan amendment. It did so in response to the Town's position that zoning needed to be changed. As noted above, the right to mine was a vested right that ran with the Property. A zoning change was irrelevant if the Owner had a right to a vested nonconforming use. By initially pursuing a rezoning amendment, FCI did not waive the vested rights established by the Development Agreement.

In short, in 2009 FCI either had a vested right to mine based on the dealings between Merrill and the Town or it did not. If FCI had a vested right, it did not lose that right by years later seeking to amend the General Plan or by seeking the Town's approval. Although the Town's approval might be expedient from a political standpoint, the Town's approval was not

necessary to allow FCI to act on a vested right. (That's what this lawsuit is for.) The request for a Plan amendment certainly was not an amendment to the Development Agreement. Statements from Curis or FCI years after the fact have no apparent relevance to actions taken by Merrill and the Town in 2007. And even if FCI held a subjective belief that rezoning was legally necessary rather than just politically advisable, such belief does not vary the terms of a contract entered into years before by third parties.[2]

F. Conclusion

The Court finds that admissible evidence supports the argument that the Development Agreement was not amended by "mutual consent." The Court finds there is admissible evidence supporting the claim that Merrill did not abandon the right to mine the Property or give up the Owner's right to mine with first obtaining the Town's approval. As a result, the Town's motion for summary judgment is denied.

V. FCI'S MOTION FOR SUMMARY JUDGMENT: IS FCI ENTITLED TO SUMMARY JUDGMENT BECAUSE NO TRIABLE ISSUE OF FACT EXISTS ON THE QUESTION OF WHETHER THE MINING RIGHTS VESTED BY THE DEVELOPMENT AGREEMENT WERE RESCINDED OR ABANDONED?

Because the Town is not entitled to summary judgment, the issue then becomes whether a triable issue of fact remains on FCI's motion for summary judgment. Could a factfinder conclude that Merrill traded the vested mining rights for increased residential densities which, at the time, increased the value of Merrill's property holdings?

Briefly summarized, FCI argues that there is no triable issue of fact on this question because: 1) the Development Agreement created a vested right to mine which could only be eliminated by mutual agreement in writing; 2) Merrill offers uncontroverted testimony that he did not enter an amendment to the Development Agreement that eliminated the right to mine; 3) the Town admits that mining was not discussed in 2007 when the zoning ordinance was amended and 4) the Town admits that the Development Agreement was never amended.

In response, the Town argues that the 2007 change of zoning was not a breach of the Development Agreement because the change was initiated at Merrill's request. The Town argues that a change in zoning to residential zoning (which was inconsistent with mining) did not require an amendment to the Development Agreement because it was an authorized change to

2. The Court questions whether FCI's belief on whether it needed to rezone is relevant to the issue of whether Merrill consented to a change in the Development Agreement in 2007. The Court reserves the issue of Rule 403 admissibility of this evidence for another day.

the PUD. The Court concludes that there is a triable issue of fact and therefore denies FCI's motion.

The starting point for this analysis is the recognition that the 2007 zoning ordinance (No. 460-07) was initiated by Merrill. (Although FCI argues that the Town requested that the Property be designated residential and the industrial zoning moved elsewhere within the development, there is no question that Merrill initiated the petition seeking to rezone his property.) The efforts to change the zoning were coordinated by Merrill and Merrill's attorneys. In support of his request, Merrill submitted a revised PUD which did not include the BHP Mine Overlay. At the time he made the request for the zoning change, Merrill sought the zoning change to increase allowable residential densities on the Property which, in turn, increased the value of his property holdings.

Although Ordinance No. 460-07 does not specifically mention mining or any elimination of mining rights, it does purport to supersede the Development Agreement by providing the following:

> 6. The Merrill Ranch Master Development Plan, dated January 26, 2007, as may be amended to reflect the final stipulations of Town Council approval, shall supersede any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD. (Emphasis added)

Evidence supports the Town's argument that the language quoted above was approved by -- if not suggested by -- Merrill's representatives. In Exhibit 13, the Town attached a February 9, 2007 letter from Merrill's attorney. The letter contains a "proposed set of modified stipulations" that Merrill would be able to support. On page 8 of the attachment to the letter, the attorney suggests amended language to paragraph 6 quoted above. There was no objection to the "shall supersede" language, and Merrill acknowledged that his attorney made the changes to the language. ***See*** Merrill depo. at 215:16-21.

In addition, the Merrill Ranch Master Development Plan dated January 26, 2007 prepared by Merrill's representatives and submitted in support of Merrill's request for a zoning change did not reference mining or a mine overlay. ***See*** Exhibit 14 at 12-14. Specific references to mining in the document would be clear evidence of Merrill's intent to preserve mining. The absence of such a reference is evidence that he did not. The 2007 PUD was enacted as part of the zoning ordinance and Merrill signed the "Consent to Conditions/Waiver for Diminution of Value." The Court has already concluded that the Consent to Conditions is not clear and unambiguous. Evidence thus supports the claim that Merrill acknowledged a change to the Development Plan and waived any claim for reduction in value by signing the "Consent to Conditions." A

reasonable factfinder could determine that this document satisfies the "written consent" requirement of section 32 of the Development Agreement.

Merrill testified that copper mining was not on his mind in 2007 when the Ordinance was enacted. However, he also testified that he believed that the Property needed to be rezoned after the 2007 PUD if the Property was to be mined. ***See*** Merrill depo. at 187:3-5, 18-21. Although Merrill did not believe that rezoning would be a problem, his post-2007 belief that the Property needed to be rezoned is evidence that he acknowledged that the Town's approval was necessary to initiate mining operations. ***See*** Exhibit 47. This is evidence that Merrill believed that an unfettered and vested right to mine the Property no longer existed. Of course, Merrill also said he would not have had discussions with mining companies for the sale of the Property from 2007 to 2009 if he "believed that any agreements with the Town of Florence existed that extinguished the right to mine copper on the private property." Merrill Aff. at ¶ 8. A finder of fact will have to figure out Merrill's intent.

The fact that Merrill filed a Site Investigation Plan for the Closure of the Florence Copper In-Situ Mine Project is a double edged sword suggesting an issue of fact. On the one hand, the evidence suggests that Merrill had no intention of mining and therefore was content to have the vested right to mine traded for increased density. On the other hand, the fact that he never followed through with a Closure Plan suggests that Merrill did not intend to abandon mining and, if fact, did not do so.

The evidence cited above supports the argument that, in exchange for increased residential densities, Merrill agreed to a plan that would not allow mining on the Property without first obtaining the Town's approval through rezoning. Thus, there is evidence to support the claim that Merrill "mutually consented" in writing to a change in the Development Agreement that resulted in the Town's ability to approve of mining activity on the Property. To be sure, no amendment to the Development Agreement was ever recorded. But the Zoning Ordinance is a matter of public record, so the purposes of recording were arguably satisfied and potentially waived. FCI cannot dispute that it had both actual and constructive notice of zoning on the Property.

In conclusion, the Court finds that admissible evidence supports the argument that Merrill consented in writing to a change in zoning that traded an unfettered right to mine the Property for increased residential zoning density which required a change in zoning if the owner wanted to mine. FCI's motion for summary judgment is denied.

VI. CONCLUSION

The Court concludes that there are triable issues of fact and neither party is entitled to a case ending summary judgment. However, the Court will resolve some issues as a matter of law.

THE COURT FINDS that, as a matter of law, the Development Agreement does not limit the Owner's mining to the existing or historic use. If effective, the Development Agreement allows the Owner to develop in-situ commercial mining operations.

THE COURT FINDS that, as a matter of law, the Town cannot unilaterally change the Development Agreement or unilaterally derogate vested rights established by the Development Agreement without breaching the contract. A change to this Development Agreement requires both legislative action and contractual action.

Whether the parties "mutually agreed" to restrict mining rights vested by the Development Agreement is a triable issue of fact.

IT IS ORDERED that the Town's motion for summary judgment is denied.

IT IS ORDERED that, except as noted above, FCI's motion for summary judgment is denied.

IT IS FURTHER ORDERED setting a Status/Trial Setting Conference on **September 15, 2017 at 8:30 a.m.**, (time allotted: 30 minutes) to address status and a trial setting, in this division, East Court Building, Fourth Floor, 101 West Jefferson, Courtroom 413, Phoenix, AZ.

IT IS FURTHER ORDERED that the parties shall submit a Rule 16 joint report and proposed scheduling order at least seven days prior to the status conference.

Chris DeRose, Clerk of Court
*** Electronically Filed ***
01/03/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 01/02/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

TOWN OF FLORENCE

CHRISTOPHER W KRAMER

v.

FLORENCE COPPER INC, et al.

COLIN F CAMPBELL

KRISTIN MACKIN
RUSSELL R YURK
JUDGE BRODMAN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial to the Court was held on December 5-13, 2019. The Court heard testimony from John DiTullio, Robert Schafer, Xenia Kritsos, Eric Mears, Mark Eckhoff, Tom Rankin, Sean McGee, Kyle Longley, Julie Tappendorf, and Grady Gammage, Jr. The Court reviewed the videotaped depositions of W. Harrison Merrill, Jan Dodson Zobel and Marchand Snyman, and the deposition transcript of Adrain Taylor. The Court reviewed the exhibits in this case.

The Court also reviewed two rounds of cross motions for summary judgment and the parties' pretrial briefs.

The purpose of the trial was not to relitigate issues previously decided in the motions for summary judgment. Nevertheless, future readers may benefit from a reconstruction of the analysis leading to the trial. As a result, the Court will borrow liberally from its August 14, 2017 ruling (the "Prior Ruling") in order to place the dispute and this trial in context.[1]

1. The Court adopts by this reference the August 14, 2017 ruling.

I. BACKGROUND

At issue is whether Florence Copper, Inc. ("FCI") has a right to maintain and expand nonconforming uses or structures related to mining on the subject property (the "Property"). The Town of Florence (the "Town") opposes mining. The Town claims that the 2007 Zoning Ordinance replaced, superseded, and rescinded the 2003 Planned Unit Development Plan ("PUD" or "Development Plan") and, as a result, the right to mine the Property has been lost. In the alternative, the Town argues that W. Harrison Merrill ("Merrill") abandoned any nonconforming mining rights before FCI purchased the Property. FCI argues that the Court should enter judgment against the Town and declare that mining is a lawful permitted use on the Property, and the 2003 Pre-Annexation Development Agreement ("Development Agreement" or "PADA") preserves FCI's right to mine the entire BHP Mine Overlay Area without limitation.

To summarize the dispute: in 1996 and 2003 the Town supported mining on the Property. By 2010-11, it did not. The issue is whether the parties are bound by the 2003 Development Agreement.

II. ANALYSIS OF DEVELOPMENT AGREEMENT AS SET FORTH IN THE PRIOR RULING

A development agreement is a contract. A.R.S. § 9-500.05(C) applies to development agreements, stating: "A development agreement may be amended, or canceled in whole or in part, by mutual consent of the parties to the development agreement or by their successors in interest or assigns." Similarly, subsection D states that "the burdens of the development agreement are binding on, and the benefits of the development agreement inure to, the parties to the agreement and to all their successors in interest and assigns." Cities are bound by development agreements. *Home Builders Ass'n v. City of Maricopa*, 215 Ariz. 146, 153-54, ¶ 28 (App. 2007).

A contract's interpretation is controlled by the intent of the parties, as ascertained through its language. ***See ELM Ret. Ctr., L.P. v. Callaway***, 226 Ariz. 287, 290-91 (App. 2010). Words are given their ordinary, common sense meaning. ***Aztar Corp. v. U.S. Fire Ins. Co.***, 223 Ariz. 463, 469 (App 2010). When the language is plain and unambiguous, it will be enforced as written. *Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 267 (2008). In interpreting a contract, "acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms." ***Associated Students of Univ. of Arizona v. Arizona Bd. of Regents***, 120 Ariz. 100, 105 (App. 1978).

The Court agrees with the following statement about development agreements made by defendant's expert, Julie Tappendorf:

> The primary purpose of a development agreement is to provide certainty to a developer or property owner that future regulatory changes (including the zoning amendments and approvals) that are inconsistent with the contractual rights granted by a development agreement are not applicable to and cannot be enforced against the property or project subject to the agreement. A municipality has no authority to apply or enforce subsequent zoning approvals or amendments that would interfere with these contractual rights, and any attempt to do so would constitute a breach of the development agreement.
>
> Moreover, a zoning ordinance simply cannot amend the development agreement. Only a proper amendment to the development agreement, entered into by mutual consent of the parties and approved in accordance with the procedures set out in state statute and in the underlying development agreement, can effectively amend the terms of the development agreement. Where there is no such amendment, the rights and benefits rights granted by the development agreement remain valid and enforceable.

Exhibit 194, page 3.

The Development Agreement must be read in conjunction with the Town's annexation. Mining was allowed prior to annexation. Merrill did not want annexation to occur unless the Town agreed to specific limitations on its future conduct. As noted by Merrill in a December 13, 2002 letter before annexation:

> I have been consistent from the beginning of my discussions with John Gieb through our meeting on Wednesday, and every meeting in between that we do not want to be annexed unless we are provided by the Town of Florence with <u>maximum</u> flexibility in the development of our 7200 acres. . .

Exhibit 127, p. 1 (emphasis in original). As a result, the Development Agreement was put in place to cement the parties' relationship and the terms of annexation.

The starting point of the Court's analysis is to review the 2003 Development Agreement as discussed in the Prior Ruling.

A. <u>The 2003 Development Agreement Unambiguously Allowed Copper Mining on the Property</u>

Mining was allowed at the time of annexation. In the Prior Ruling, the Court determined that in-situ copper mining was preserved as a nonconforming use by the 2003 Development Agreement. The Court's analysis was as follows:

1. <u>In-situ mining is allowed as a nonconforming use under the Development Agreement</u>

Although the 23-page Development Agreement itself does not mention mining (except through incorporation), the Development Agreement expressly establishes and protects the Owner's right to mine within the BHP Mine Overlay area.

The Development Agreement references and incorporates the PUD dated November 7, 2003 as set forth in Exhibit B. *See* Exhibit 1, page 3 ("All documents and exhibits referred to in this Agreement are hereby incorporated by reference into this Agreement"). Exhibit B is attached to the Development Agreement and is therefore incorporated into the Development Agreement. Exhibit B clearly establishes an allowed non-conforming use of copper mining. The document identifies a "BHP Copper Mine Overlay Area." *See* pages 19, 21, 28. The BHP underground leaching mine is referenced in the "Site History" portion. *Id*. at 8. The PUD provides that non-conforming uses of the land would continue. Paragraph 7 vests the Owner's right to non-conforming uses by providing:

> 7. Non-Conforming Uses of Land -- where, at the time of passage of this PUD, a lawful use of land exists which would not be permitted by the regulations imposed by this PUD, such use may continue so long as it remains otherwise lawful, provided:
>
> * No such non-conforming use shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of the adoption or amendment of this PUD.
>
> * No such non-conforming use shall be moved, in whole or in part, to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this PUD.
>
> * If any such non-conforming use of land ceases for any reason for a period of more than 180 days, any subsequent use of such land shall conform to the regulations specified by this PUD for the district in which such land is located, **<u>with the exception of the copper mining operations.</u>**

> * No additional structure not conforming to the requirements of this PUD shall be erected in connection with such non-conforming use of land.

PUD at page 30 (emphasis added). In other words, the PUD, which is incorporated by reference into the Development Agreement, unambiguously provides that copper mining operations could continue on the Property. The point was emphasized in Paragraph 12 of the PUD, which allows drilling, mining and exploration for copper within the area indicated as the "BHP Copper Mine until said mine is closed." Paragraph 12 reads:

> 12. Drill sites -- Drilling, mining or exploration for any minerals, oil, gas or other hydrocarbon substances shall be prohibited in the PUD area **with the exception of that area indicated as the BHP Copper Mine until said mine is closed.**

Id. at page 32 (emphasis added). If the above-referenced facts were not enough, the December 15, 2003 zoning ordinance itself (No. 356-03) which adopted the zoning in the PUD contains an attachment that references the "BHP Copper Mine Overlay Area." *See* Exhibit 84, pg. 2.

As a nonconforming use, mining was allowed "until said mine is closed." The Court finds that "closure" has specific meaning in mine-speak. It does not mean suspending operations. The Development Agreement recognized that the mine could be dormant for years before copper recovery was initiated. The Development Agreement clearly established that maintaining a dormant mine was not the equivalent of closure.

2. The Development Agreement vests the right to mine in the Owner and future purchasers for 35 years.

The Development Agreement establishes "the permitted uses for the Property." *See* Page 1. The Development Agreement goes on to establish that its purpose is to protect the Owner's right to develop the Property over a period of years.

> Therefore, Owner requires certain assurances and protection of rights in order that Owner will be allowed to complete the development of the Property in accordance with the Development Plan over the period of years permitted by this Agreement.

Id. at page 2. The Development Agreement had a 35-year term. *Id*. at paragraph 4, page 4. The Court finds the following provision to be particularly important:

> **3. PLAN APPROVAL AND VESTED RIGHTS**. As of the execution date of this Agreement, Town, by and through its Mayor and Town Council (collectively, the

> "Council"), hereby grants to Owner, its successors and assigns, its approval of the Development Plan. **For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and the Development Plan.** The determinations of the Town in this Agreement and the assurances provided to the Owner in this Agreement are provided pursuant to and as contemplated by A.R.S. § 9-500.05 and other applicable law. (Emphasis added)

This language is not ambiguous. It is not unclear. The Development Agreement gives the Owner **vested** rights for the term of the Agreement. As previously noted, one of these rights is to perform mining operations in the area identified by the BHP Mine Overlay area. The words "develop and use the Property" clearly indicate that additional activity to develop the Property to support in-situ mining operations is permitted. Although the language in Paragraph 3 it is clear on its face, the language is confirmed in Paragraph 12 of the Development Plan which gives the Owner the right to drill, mine or explore for minerals. If mining was limited to its existing or historic use, there would be no reason to drill, mine or explore.

In addition, contracts "are to be given a reasonable construction" and "read in light of the parties' intentions as reflected by their language and in view of all circumstances." ***Smith v. Melson, Inc.***, 135 Ariz. 119, 121 (1983). The argument that Merrill would explicitly carve out mining rights within the BHP Mine area for a potential joint venture with a mining company while simultaneously agreeing to limit his right to commercial-scale recovery of copper is nonsensical.

Accordingly, the vested rights established by the Development Agreement run with the land. The Development Agreement provides that "Owner and its successors are entitled to exercise the rights granted pursuant to this Agreement." ***Id***. at ¶ 5, page 4. There is no question that FCI is the successor to Merrill. The Court finds that the 2003 Development Agreement unambiguously provided the Owner a vested right to in-situ copper mining on the Property, provided that the copper mining did not extend beyond the limits established by the BHP Copper Mine Overlay area.

As a result of the clear and unambiguous language in the Development Agreement, the Prior Ruling rejected the Town's argument that the Development Agreement limited mining to its existing or historic use. The development of in-situ mining is clearly and unambiguously authorized by the Development Agreement. The Prior Ruling entered partial summary judgment in favor of FCI on this point. Although the trial did not open up this issue for reconsideration, the Court notes that even the Town's expert, Mr. Gammage, agreed that the 2003 Development Agreement preserved the Owner's right to mine.

B. <u>The Development Agreement provided specific methods for amendment</u>

A.R.S. § 9-500.05(C) provides that a development agreement may be amended by "mutual consent" of the parties. The Development Agreement contains the following mandates concerning amendment:

> **6. DEVELOPMENT PLAN**. (a) the development of the Property shall be in accordance with the Development Plan and this Agreement unless otherwise amended pursuant to this Agreement.
>
> * * *
>
> (c) . . . Town shall not adopt or change any ordinance, regulation or other control that are not uniform and that discriminate in their application against the Owner or the Property. Owner and Town agree that after this Development Plan has been approved, any and all subsequent zoning ordinances or requirements, zoning restrictions, addenda, and revisions adopted by the Town will not be applied to the Property except as may be required pursuant to Paragraph (f). . .
>
> (f) the ordinances, rules, regulations, permit requirements, policies or other requirements of the Town applicable to the Property and the development of the Property shall be those that are now existing and in force for the Town as of the date of the recording of the Agreement. **<u>Town shall not apply to the Property any legislative or administrative land use regulations adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan except as follows: 1) as specifically agreed in writing by the Owner</u>**; 2) future generally applicable ordinances, rules, regulations, and permit requirements. . . of the Town reasonably necessary to alleviate legitimate threats to public health and safety. . . 3) adoption and enforcement of zoning ordinance provisions governing nonconforming property or uses; 4) future planned use ordinances, rules, regulations, permit requirements and other requirements and official policies of the Town enacted as necessary to comply with mandatory requirements imposed on the Town by County, state or federal laws and regulations. . . and 5) future updates of, and amendments to, existing building, plumbing, mechanical, electrical, and similar construction and safety related codes adopted by the Town. (Emphasis added)

The Development Agreement also describes in detail how it is to be amended:

> **32. AMENDMENTS**. No amendment shall be made to this Agreement except by written document executed by Town and Owner. Within ten (10) days after the execution of any

> amendment by both parties, the amendment shall be recorded with the Pinal County Recorder, Pinal County, Arizona.

It includes a "non-waiver" provision:

> **21. WAIVER**. No delay in exercising any right or remedy by either Town or Owner shall constitute a waiver thereof. Waiver of any of the terms of this Agreement of the Development Plan shall not be valid unless in writing and signed by all parties hereto. The failure of any part [sic] to enforce the provisions of the Agreement or the Development Plan or require performance of any of the provisions, shall not be construed as a waiver of such provisions or the fact the right of the party to enforce all of the provisions of this Agreement and the Development Plan.

On two occasions prior to 2007, the Development Agreement was amended and the amendment was recorded. (Neither of the amendments involved mining rights.) Evidence is undisputed that no amendment to the Development Agreement revoked the Owner's right to mine on the Property. In fact, the Town does not contend that the Development Agreement was amended.

Finally, amendment of a development agreement is not the same as amending a zoning ordinance. Amending zoning, without more, cannot change rights vested in a development agreement.

III. FCI ACQUIRES THE PROPERTY

From 2006 through 2009, Merrill negotiated with Hunter Dickenson to sell the Property. The deal was never consummated. In 2009, Merrill lost the Property to the People's Bank. In August 2009, HDI was the successful bidder for 1162 acres of the Property for approximately $8000 per acre. ***See*** Exhibit 51.

To make matters even more confusing, 160 acres of the 350 acre mining site is owned by the State of Arizona. Merrill leased the mining rights on the State land, and the State was constantly pressing Merrill to engage with mining companies so the State's royalty could be realized.

In August, 2009, the State Land Department was looking for someone to take over Merrill's mineral lease. ***See*** Exhibit 54. Ultimately, FCI acquired Merrill's mineral rights on the State Lease land based on cash and stock.

The Court finds that FCI is the successor in interest to Merrill. To the extent Merrill had a right to mine, those rights were passed to FCI.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE KEY ISSUE IN THIS CASE: DID ACTIONS IN 2007 ELIMINATE THE OWNER'S RIGHT TO MINE THE PROPERTY AS A NONCONFORMING USE?

The Prior Ruling held that the Development Agreement is a valid exercise of the Town's police power and is enforceable. The Development Agreement gave the Owner a transferable, 35-year vested right to develop in-situ copper mining in the Mine Overlay Area. FCI is the successor to Merrill. The issue, then, becomes whether the actions of the Town and Merrill in 2007 eliminated this vested right.

The unfortunate fact is that the Development Agreement and associated documentation cannot be called models of clarity. As previously noted, the right to mine is not mentioned in the main body of the Development Agreement, but is incorporated by reference to Exhibit B, which is the PUD. Both parties can find isolated snippets of contract language which support their position. The documents contain some ambiguities, allowing reasonable people to differ in their interpretations. But when the Development Agreement is viewed in conjunction with the testimony and other contemporaneous documents, the Court finds that clear and persuasive evidence supports FCI's position that neither Merrill nor FCI abandoned their nonconforming use right to mine as established in the 2003 Development Agreement.

A summary of the Court's conclusion can be simply stated: If the Town wanted to amend the Development Agreement to eliminate mining rights vested by the Development Agreement, it should have amended the Development Agreement.

A. Finding #1: The Development Agreement was never amended.

A.R.S. § 9-500.05(C) provides that a development agreement may be amended by mutual consent of the parties. Here, the parties agree that the Development Agreement was never amended. The Town's representative, Mr. Eckhoff, testified that amending zoning does not amend the Development Agreement. In fact, the Town does not claim that the Development Agreement was amended.

As a matter of undisputed fact, the Court finds that the provisions in the Development Agreement pertaining to preservation of the nonconforming use of in-situ mining were never amended.

B. <u>Finding #2: The fact that the Development Agreement was not amended is strong evidence that the parties did not agree to eliminate in-situ mining as a nonconforming use</u>.

The Development Agreement contains a specific procedure for amendment. The amendment must be by a written document executed by the Town and Owner. In addition, the amendment shall be recorded. The fact that no amendment was made to the Development Agreement is strong and persuasive evidence that the nonconforming mining rights were not eliminated.

The requirement that amendments to the Development Agreement must be recorded is not an insignificant or ministerial act that can readily be ignored. The purpose of the recording requirement is to put future purchasers of the Property -- like FCI -- on notice of what restrictions were placed on the Property. Mr. Eckhoff agreed that development agreements need to be recorded so anyone who went through the chain of title would know what the rights were. By statute, development agreements must be recorded, A.R.S. § 9-500(D), so amendments must be recorded, as well.

The Town and Merrill knew how to amend the Development Agreement because they did so on two prior occasions. *See* Exhibits 85 (entitled "Amendment No. 1 to the Merrill Ranch Development Agreement") and 86 (entitled "Amendment No. 2 to the Merrill Ranch Development Agreement"). Those agreements are specific in what portion of the Development Agreement was being amended. Both were recorded. Neither mentioned mining.

When interpreting a contract, the acts of the parties before a dispute arises is the best evidence of doubtful contract terms. *Associated Students of Univ. of Arizona, supra* at 105. Here, the parties demonstrated a history of following the mandated procedures in amending the Development Agreement. If the Town wanted to eliminate a nonconforming use vested by a Development Agreement, the Town should have followed the mandated procedure for amending the Development Agreement. The parties clearly knew how to do so and had, in fact, followed procedure on two prior occasions. The Town's failure to follow this process demonstrates that there was no mutual agreement and is fatal to its claim.

C. Finding #3: The Town failed to show that Merrill affirmatively intended to give up vested mining rights. Therefore, there is no mutual agreement to modify vested mining rights and Merrill never waived or abandoned mining rights.

The Court finds that the Town failed to demonstrate by the preponderance of the evidence that Merrill affirmatively intended to give up the vested mining rights or otherwise waived or abandoned those rights.[2] Several persuasive arguments support FCI's position.

1. Merrill never manifested an objective intent to trade vested mining rights for increased density residential zoning

For several reasons, the Court finds by a preponderance of the evidence that Merrill never manifested an objective intent to trade vested mining rights for increased residential zoning, and he never manifested an objective intent to abandon mining at the Property.

First, there was no amendment to the portion of the Development Agreement that gave the owner of the Property the vested right to mine. Other amendments to the Development Agreement made clear what portions of the Development Agreement were being amended. Amendment 2 to the Development Agreement gave Merrill the right to increase density in exchange for payment of additional money. Not one word mentions mining. *See* Exhibit 86. Mr. Eckhoff acknowledged that after the Second Amendment the original Development Agreement remained in force except as amended. The Town never asked for or negotiated an amendment to the Development Agreement that would give up mining rights.

Second, there is no evidence that Merrill and the Town discussed mining during the 2007 rezoning. The Town stipulated that no Town representative ever spoke to Merrill or his representatives about mining during the 2007 rezoning. Copper mining was not on Merrill's radar in 2007. The lack of discussion persuasively demonstrates that neither party had an expressed intent to eliminate mining. In fact, credible testimony established that the Town had been historically favorable to mining development until well after 2007. There was no historical evidence from 2003 through 2007 and thereafter until 2010 that anyone at the Town was publicly opposed to the mine. Merrill had no reason to think the existing vested mining rights in the 2003 Development Agreement were at risk and needed affirmative protection. There is no evidence of a *quid pro quo* for relinquishing the mine. The increased density had been established in

2. The Town's expert offered the opinion that the burden is on the property owner to affirmatively maintain or preserve a nonconforming use. The distinction is not important. Regardless of who carries the burden, evidence clearly established that Merrill affirmatively maintained and preserved the nonconforming mining rights. In other words, FCI proved that Merrill affirmatively preserved the nonconforming use.

Amendment 2, and mining is not mentioned. Instead, in Amendment 2 Merrill agreed to pay additional money in the event the Town approved the increased density in the PUD amendment.

Third, Merrill credibly testified that he did not give up or change mining rights in the Development Agreement. *See* Exhibit 219 ("WMH Merrill nor Florence Copper ever entered into any amendment to the 2003 PADA that eliminated any rights to mining as referred to in the 2003 PADA.") Merrill credibly testified that he always felt he had the option of either mining the property or developing it residentially. He "could go in either direction." Merrill Depo. at 79:24-80:3. Mr. Eckhoff credibly testified that Merrill, like all developers, wanted "maximum flexibility." Mr. Schafer credibly testified that the development could be "sequenced," ***i.e.***, once the mine was finished the property could be developed for other purposes.

Fourth, Merrill's intent is persuasively demonstrated by his conduct. Starting in 2006 and extending through 2009 when he lost the Property, Merrill had discussions with mining companies in an attempt to sell the right to mine. Merrill never discussed zoning with the mining companies and never disclosed that the Property needed to be rezoned. The fact that Merrill negotiated to sell the Property to a mining company is strong evidence that Merrill had no contemporaneous belief that he had agreed to eliminate mining. The evidence clearly established that Merrill's business objective was to have maximum flexibility to respond to the market. Having the property zoned with a higher density while maintaining mining as a nonconforming use allowed Merrill the best of both worlds, especially when State owned land (which was not under the Town's authority) sat in the middle of the Property waiting to be mined. Moreover, shortly before the rezoning Merrill signed a 10-year agricultural lease on the Property which specifically preserved the right to enter the Property for the purposes of mining exploration drilling. Exhibit 141, p. 4. All of these actions conclusively demonstrate that Merrill intended to retain mining rights.

Fifth, when viewed in context with the other evidence, the more persuasive documents do not support the Town's position. Nothing in the Zoning Ordinance (Exhibit 22) mentions mining or the elimination of mining. Nothing in the Zoning Ordinance says that the nonconforming uses grandfathered into the Development Agreement are eliminated. In fact, paragraph 23 reads as follows: "Town and Owner agree to work together in good faith to modify any applicable portions of the Merrill Ranch Development Agreement that may be found to be in conflict with this PUD Amendment Approval." In other words, the Zoning Ordinance was an amendment to the PUD -- not the Development Agreement. If the Ordinance was in conflict with the Development Agreement, the parties needed to work through the differences. There is no evidence that the parties did so, leaving the conclusion that the zoning change did not change the vested right to mine set forth in the Development Agreement. Mr. Eckhoff, the Town's zoning administrator, admitted that changing and amending the zoning does not amend the Development Agreement.

Other documents support FCI's claim that the zoning changes did not affect the mining rights vested by the Development Agreement. The lack of amendment to the Development Agreement is confirmed by emails exchanged between the Town and Merrill's representatives. For example, the email from Merrill manager Jan Dodson on February 21, 2007 indicates that the requested zoning change is a stand-alone issue from the Development Agreement. She writes, "Why are they [the PUD zoning changes] holding us back from getting our PUD Amendment processed as a stand alone zoning document? We have not made an application requesting any changes to our DA [Development Agreement]." Exhibit 19, p. 2. Nothing in the Town's response to this email suggests that the Town believed that a change needed be made to the Development Agreement.

Merrill and the Town negotiated for over a year regarding the terms of the 2007 rezoning. But not once during this year did mining rights come up. Instead, the lengthy correspondence and documents shared between the parties reflect negotiations over numerous other conditions, including realignment of Attaway Road, the timing and amount of certain fee payments and planning approvals, and specific residential zoning standards. Mr. DiTullio's February 15, 2007 response to the Town's proposed stipulations indicates that certain proposals must be removed because they do not comply with the Development Agreement. Exhibit 18, pp. 2-3. The Town never hinted rezoning did away with rights vested by the Development Agreement, and the Town never suggested that the Development Agreement needed to be amended.

Sixth, the copper mine was a valuable asset. The Property is listed in the Merrill Trust document dated September 2003 (Exhibit 223 at 2224) as containing over 1.1 billion pounds of copper. The ***quid pro quo*** for annexation was the preservation of mining on the Property. There is no persuasive evidence that Merrill would simply give away the right to mine.

Seventh, the mine was never closed. Merrill spent hundreds of thousands of dollars to monitor and maintain environmental permits for the mine, both before and after rezoning. Mr. Mears is a geologist who worked for Brown and Caldwell, the consulting firm that prepared the Site Investigation Plan submitted to ADEQ. The Court found persuasive Mr. Mears' testimony that there was never a "big C" closure of the mine or a relinquishment of permits to mine from ADEQ or the EPA. Closure of the pilot test wells is not a closure of the entire mine. ***See*** Exhibit 8 at page 3 ("I explained that the process of permanently discontinuing hydraulic control and abandoning the test wells . . . would neither constitute nor trigger closure of the Project.") Exhibit 16 is a "precursor" to a closure plan. It is not a closure plan. The plan was simply a way to minimize monitoring costs of the pilot test facility while keeping the mine open and permits active.

> The Brown and Caldwell position was persuasively set forth in a March 18, 2009 letter:
>
> Although Merrill did not conduct any further mine development or testing activities, all environmental permits, issued by several state and federal regulatory agencies, have been maintained in the event that the mining project were to proceed. The permits require a number of on-going monitoring, compliance, and reporting activities.
>
> Unfortunately these activities cannot be legally discontinued without first obtaining "closure" of the site which would trigger several large remediation activities. These permits and attendant compliance requirements are discussed in more detail below.

Exhibit 48, p. 1. Mr. Mears credibly testified that Brown and Caldwell was hired to maintain the mining permits. Maintaining mining permits is inconsistent with abandoning the right to mine. In short, appropriate state and federal regulatory permits were maintained. This mine was never close to being closed. There was no closure and no abandonment.

2. The Town never contemporaneously expressed intent to Merrill that the 2007 change in zoning affected vested mining rights

Any amendment to the Development Agreement requires "mutual consent." In the section above, the Court found that Merrill did not consent to the elimination of mining. This should end the inquiry. Lest there be any doubt, however, the Court also finds by the preponderance of the evidence that the Town never contemporaneously expressed the intent to Merrill that the change in zoning negatively affected vesting mining rights. Undisputed evidence established that the Town never communicated to Merrill a belief that the change in zoning affected the vested mining rights. In fact, persuasive evidence showed that the Town not only failed to discuss mining, but that the Town affirmatively didn't raise the issue for fear that Merrill would "figure out he was giving up his mining rights."

Undisputed evidence demonstrates that the Town never raised the issue of mining or the waiver of mining rights with Merrill or any of his agents during discussions of the 2007 Zoning Ordinance. The fact that neither Merrill nor the Town discussed the elimination of the nonconforming mining rights strongly supports the conclusion that there was no mutual agreement that mining rights were eliminated.

The Court found persuasive the testimony from Dr. Longley that discussions about or opposition to the copper mine were not in the public discourse in Florence in 2003-2007. Thus, Merrill had no reason to believe the Town was interested in ending mining.

"The phrase 'manifestation of intent' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention." Restatement (Second) of Contracts § 2, cmt. b (1981).

The Town mayor at the time, Tom Rankin, testified that he spoke with Town representatives and communicated his desire to eliminate mining because he didn't think it was good for the Town. He admitted that his views were never communicated to Merrill, and he provided the explanation that he didn't want to raise the issue because "I didn't want Harrison [Merrill] to figure out he was giving up his mining rights." Even if one assumes that the documents are somehow ambiguous (which they aren't when viewed in context), the Court adopts FCI's argument that a party with secret intent as to a contract cannot take advantage of an ambiguity. *See* Restatement (Second) of Contracts, § 20 (first party's intent controls if first party has no reason to know of any different meaning and the second party has reason to know the meaning attached by the first party). Moreover, this testimony provides persuasive evidence that the Town knew Merrill was not interested in giving away the right to mine in 2007. If the Town "didn't want him to figure it out," the Town must have known that Merrill wouldn't agree to give the mining rights away.

When viewed in context with the other evidence, the documents are not ambiguous. Nevertheless, even if one assumes an ambiguity, the Town should not be able to take advantage of ambiguous provisions through hidden intent. If the Town wanted to eliminate mining, it should have raised the issue and executed an appropriate amendment to the Development Agreement in accordance with the mandated procedure for amendment instead of adopting a tortured interpretation of amendments to the PUDs.

3. Conclusion

In conclusion, the preponderance of the evidence firmly demonstrates that there was never any mutual agreement to eliminate nonconforming mining rights. Neither side expressed an intent to abandon mining. The preponderance of the evidence firmly demonstrates that Merrill never waived or abandoned mining rights. Since undisputed evidence indicates that FCI was the successor to Merrill, FCI continues to have a vested right to mine that cannot be altered by the Town's unilateral actions.

D. Finding #4: In light of all of the other evidence, the Town's arguments are not persuasive.

The Court finds that evidence supporting FCI's position clearly outweighs the evidence supporting the Town's position.

The Town points to several statements made by Merrill to support its claim that mining was abandoned. To be sure, in the abstract some of Merrill's actions could be interpreted as consistent with an intent to abandon mining. But Merrill's statements to mining companies must be taken with a grain of salt because he is, in the first instance, always a dealmaker trying to posture for a better deal. (Merrill knows that a seller should never act too eager or desperate to sell.) Moreover, at the time Merrill was uninterested in mining and believed the Property was more valuable in real estate development. With the price of copper low in 2005-07 and real estate skyrocketing, Merrill did not view mining as an economically feasible option. ***See*** Exhibit 8, p. 2. And the Court believes Merrill occasionally made negative comments about mining because he knew the State Land Department was pressing him to develop the mineral rights on the leased land, and he was trying to keep the State Land Department off his back. ***See*** Exhibit 25. He wanted to keep his options open, and did not want to be forced to mine if better options were available.

Merrill's statements must be viewed in conjunction with his other conduct. Merrill testified that he never gave up the right to mine. He testified that he had negotiations to sell the Property to mining companies in 2006-2009. Although he made inquiries, Merrill did not initiate formal closure procedures on the mine, never closed the mine and continued to pay for monitoring. When the Property went into foreclosure, Merrill made statements attesting to the Property's value as a mining property. His statements demonstrating that he did not abandon mining are far more persuasive than any statements suggesting that mining was abandoned.

The Town argues that the change in zoning and enactment of the 2007 PUD demonstrates that Merrill intended to abandon mining. Evidence established that the Merrill Ranch Master Development Plan dated January 26, 2007 was prepared by Merrill's representatives and submitted in support of Merrill's request for a zoning change. Evidence establishes that the new PUD did not include a reference to the BHP Mine Overlay. Any references to mining found in the 2003 PUD were removed, and such removal appears intentional. Similarly, evidence established that provisions specifically related to mining in the 2003 PUD (such as paragraph 12) were omitted from the 2007 PUD. Merrill signed the "Consent to Conditions/Waiver for Diminution of Value."

Specific references to mining in the 2007 Development Plan and/or PUD would be clear evidence of Merrill's intent to preserve mining. The absence of such a reference is evidence that he did not. However, the Court did not find the evidence supporting the Town's argument in support of abandonment as strong as the evidence opposing abandonment. The fact that Merrill initiated rezoning does not persuasively demonstrate Merrill's intent with respect to the Property's vested mining rights because the existing zoning likewise did not permit mining. Mining was preserved in the Development Agreement as a nonconforming use under any zoning plan. The Court was not persuaded that a zoning change from I-1 Light Industrial (which did not

allow mining) to Residential (which also does not allow mining) demonstrates an intent to eliminate a use that was nonconforming under either zoning classification. Unlike the 2003 PUD, which was incorporated into and recorded as part of the Development Agreement, the 2007 PUD is not part of the Development Agreement and was never recorded. Instead, it appears only in the Town's zoning book. As such, it is a zoning document and cannot create or remove any vested contractual rights.

The Town argues that the change in zoning on June 4, 2007 demonstrates that Merrill intended to abandon mining. *See* Exhibit 22. To support this claim, the Town argues that increasing residential zoning density is inconsistent with the owner's desire to continue his ability to mine on the Property. It is not. Merrill's goal clearly was to maximize entitlements (and thus the value) to the Property. Having both the right to mine and increased residential densities would give Merrill the best of both worlds and thus could increase the value of his property. Evidence shows Merrill preserved an option to mine the Property and then develop the land for residential use after copper resources were depleted.

In prior motions the Town relied on *Duffy v. Milder*, 896 A.2d 27 (R.I. 2006), to support its contention that Merrill's request to rezone the Property was an overt act manifesting his intent to abandon any mining uses on the Property. The Court believes that *Duffy* is distinguishable for several reasons. That case involves interpretation of Rhode Island law, and Arizona has asserted strong private property rights in the face of governmental regulation. *See* Proposition 207, the Private Property Rights Protection Act. Besides, as noted above, the Court was not persuaded that a change in zoning from light industrial to residential constitutes an overt act to eliminate a nonconforming use that is nonconforming under both zoning categories. Finally, the facts in *Duffy* are distinguishable. In *Duffy*, the zoning certificate stated that "the keeping of horses on this lot is currently considered a lawful nonconforming and permitted use and shall be allowed to continue until such time as an overt action for discontinuation is conducted by the property owner." *Id*. at 30. The court found that the owners' voluntary act of rezoning the property in order to build condominiums was an overt act that "manifested their intent to abandon the use of their property as a horse farm." *Id*. at 39. No language similar to the *Duffy* zoning certificate can be found in the instant case. To the contrary, waiver of Development Agreement rights requires more than an "overt act"-- it required a written agreement signed by the Owner and recorded in the County Recorder's office.

The Town argues that Section 6(f) of the 2003 PADA provides that the property owner can consent to different zoning in writing, without requiring an additional amendment to the PADA. While by itself the statement is true, the Court did not find this argument persuasive for the claim that the nonconforming rights vested by the Development Agreement were eliminated. First, other provisions of the Development Agreement more specifically control the situation concerning vested nonconforming rights, and the Town's interpretation of Section 6(f) takes the

provision out of context. Nonconforming mining rights are vested by the Development Agreement, and amendments to the Development agreement must be in writing and recorded. Second, as noted above, Merrill's request for a zoning change never manifested intent to give up vested mining rights. Third, as noted above, a change in zoning does not demonstrate an intent to eliminate a use that is nonconforming under either zoning classification.

The Town argues that Exhibit B to the 2007 Zoning Ordinance, the "Consent to Conditions/Waiver for Diminution of Value," reflects Merrill's written assent to the changes. On March 21, 2007, Merrill signed Exhibit B which reads:

> The undersigned is/are the owner(s) of the subject land described in Exhibit A hereto that is subject of the PUD Rezoning Amendment Application PZ-6051-R ("Amendment PZ-6051-R"). By signing this document, the undersigned agrees and consents to all the conditions imposed by the Florence Town Council in conjunction with the approval of PUD Rezoning Amendment Application PZ-6051-R ("Conditions of Approval") and waives any right to compensation for diminution in value pursuant to Arizona Revised Statutes § 12-1134 that may now or in the future exist as a result of the approval of PUD Rezoning Amendment Application PZ-6051-R. Except as expressly set forth in Amendment PZ-6051-R and its Conditions of Approval, nothing herein shall constitute a waiver of any other of the undersigned's rights pursuant to the above- referenced statutes.

The Court does not believe that the Consent to Conditions is clear and unambiguous when viewed in the context of this case.

The Ordinance itself places a specific limitation on the Consent to Conditions. Paragraph 24 provides that the Owner "agrees to waive claims for diminution in value pursuant to Proposition 207 [A.R.S. 12-1134] pursuant to the waiver attached hereto as Exhibit B." Thus, the waiver's purpose is limited to diminution of value caused by the zoning change under Arizona's post-***Kelo*** Proposition 207, the Private Property Rights Protection Act, not a waiver of nonconforming uses. Moreover, the waiver itself speaks of "conditions imposed by the Florence Town Council" in conjunction with the change in zoning. Of course, nothing in the Zoning Ordinance mentions mining or expressly states that a pre-existing nonconforming use would be discontinued. In other words, **there are no conditions** imposed on mining in the ordinance. Finally, the waiver itself contains a final sentence that was added by Merrill. This sentence makes clear that the Owner waives items "expressly set forth in Amendment PZ-6051-R and its Conditions of Approval," but does not waive "other" rights. ***See also*** Exhibit 160 (in discussing the added language, Merrill's attorney wrote "we have added a sentence which clarifies this concept and provides the appropriate safeguards to us that we are not waiving any rights for future unknown land-use actions the town may take outside the scope of the amendment or the conditions of approval").

The Consent to Conditions also should be read in context with other communications between the parties. Merrill's lawyer had objected to proposed stipulations that conflicted with the Development Agreement. *See* Exhibit 18. In a letter to the Mayor and Town Council on March 23, 2007, Mr. DiTullio wrote:

> The owner of the property has in place a development agreement negotiated with the Town that sets the rules and guidelines which have governed the expectations and development planning for this project. The proposed set of stipulations from Town staff contains certain attempts to modify certain aspects of the development agreement that we cannot agree to in their proposed form, as they significantly impact bargained for and previously approved development and value variables of this project.

Exhibit 20, p. 6. This letter and other contemporaneous documents demonstrate that the 2007 Zoning Ordinance was not intended to modify the Development Agreement. Given that nothing in the Zoning Ordinance suggests that a pre-existing nonconforming use was eliminated, and given that the Town admits that there was no discussion with Merrill or his representatives that suggested such a result, when viewed in conjunction with other evidence the Consent to Conditions cannot be read to waive Merrill's nonconforming use vested by the Development Agreement. At best, the waiver does not give up nonconforming rights vested by the Development Agreement. At worst, the waiver is ambiguous and the evidence taken in context favors FCI's interpretation.

The Court rejects plaintiff's expert's opinions that Merrill abandoned mining and that the Town abandonment ordinance somehow trumps the clear and unmistakable language in the Development Agreement. As noted above, persuasive evidence indicates that Merrill did not abandon the nonconforming use. Moreover, abandonment of mining is specifically defined in the Development Agreement.[3] It means closure of the mine; it does not mean the cessation of copper mining operations for extended periods of time. *See* Development Plan at sections 7 and 12. Stated otherwise, "ordinary" nonconforming uses under the Development Agreement can be abandoned if they cease for more than 180 days. Mining rights, however, can only be abandoned or given up by closing the mine (or by modifying the Development Agreement). This exception is logical and necessary, because everyone recognized that the mine could be dormant for some time, and the term of the Development Agreement was 35 years. And "closing" a mine is something much different than closing a store or restaurant.

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3. The Development Agreement was approved by the Town Council and recorded as a *quid pro quo* for annexation. It carves out nonconforming mining as an exception and allows the mine to remain dormant. The notion that a specifically detailed term is rendered moot by a Town ordinance defining general abandonment of nonconforming uses defies logic.

As a matter of undisputed fact, the mine was not closed. Although undisputed evidence indicates that Merrill investigated steps to close the mine, he never instituted closure proceedings. *See* Merrill depo. at 69:12-14 (the mine was not closed). No Closure Plan has ever been submitted for the Property. The in-situ well permits have not expired and the wells have not been closed. Appropriate federal and state mining permits have been maintained. Thus, absent a mutually agreed change to the Development Agreement, the right to mine continues to this day.

The Court also rejects the Town's argument that FCI's rezoning applications provide persuasive evidence that Merrill abandoned mining. There was no evidence that Merrill told anyone from Curis/HDI/FCI that he gave up unfettered mining rights under the Development Agreement with the understanding that he would have to later rezone in order to gain mining rights.

Mr. McGee credibly testified that he started working with the Town in 2009 and the Town initially was positive towards mining, but told HDI/Curis that it needed a General Plan Amendment. In August 2010 the Town told FCI that it needed to seek rezoning. *See* Exhibit 170 ("it has always been made clear that HDI/Curis would be subject to a public process including General Plan Amendments . . . for their project to go forward.") Mr. Eckhoff agreed, testifying that the Town always made it clear to Curis/FCI that it had to go through a General Plan Amendment and zoning change in order to mine.

The Court was persuaded that defendant made a business decision to try to work cooperatively with the Town. *See* Exhibit 174. This was a reasonable business decision borne out of necessity and was not a waiver or intentional relinquishment of the right to mine. If defendant had been able to gain the Town's cooperation through General Plan Amendment, the past several years of litigation would have been avoided. Given the Town's initial support for the mine, FCI had no reason in 2009 to believe the process would be as contentious as it has turned out to be. The fact that defendant sought rezoning does not outweigh the other strong evidence supporting defendant's position. Nor do disclosures to the Canadian securities regulators demonstrate that FCI/Curis concede that rezoning was necessary.[4]

4. The statements to the securities regulators are not inaccurate. Indeed, if FCI lost this litigation it would be forced to obtain a zoning change from the Town.

ORDERS

THE COURT FINDS that the Town failed to demonstrate its entitlement to declaratory relief that prohibits FCI from engaging in in-situ mining in accordance with the 2003 Development Agreement.

THE COURT FURTHER FINDS that Merrill's and the Town's actions in 2007 did not eliminate or abandon in-situ mining rights of the Owner established by the 2003 Development Agreement. The Town is **not** entitled to an order finding the 2007 rezoning effective and enforceable by the Town to prevent in-situ mining within the mine overlay area.

IT IS ORDERED that the Town gets no relief pursuant to Count 1 of its complaint.

The Court is unclear as to the next step in this litigation.

IT IS ORDERED that, within 10 days of the filed date of this Order, the parties are to discuss the case and a future plan of action.

IT IS FURTHER ORDERED setting a telephonic Status Conference on **January 23, 2019 at 8:30 a.m. (time allotted: 30 minutes)** in this division, to address the status and remaining issues. Counsel for plaintiff shall initiate the call by arranging the presence of all parties and contacting this division at **602-372-2943.**

IT IS FURTHER ORDERED that the parties shall submit a Rule 16 joint report and proposed scheduling order at least seven days prior to the status conference.

Clerk of the Superior Court
*** Electronically Filed ***
06/07/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 06/06/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

TOWN OF FLORENCE

CATHERINE M BOWMAN

v.

FLORENCE COPPER INC, et al.

JOSEPH N ROTH

KRISTIN MACKIN
CLIFFORD L MATTICE
RUSSELL R YURK
JUDGE BRODMAN

RULING ON JUDGMENT AND REMEDY

The Court reviewed Florence Copper's Motion for Declaratory Judgment on Contract Interpretation and Remedy, the response and reply. The Court reviewed the statements of fact accompanying the motion and response. Oral argument was held on May 29, 2019. This ruling should be read in conjunction with the simultaneously issued Ruling on Florence Copper's application for attorneys' fees and costs.

This case is over four years old, but is not ready for a final judgment. The parties had two cross-motions for summary judgment and a six day bench trial to address the meaning of the Development Agreement and the parties' rights under that agreement. After trial, Florence Copper filed the instant motion. The Court believes that ruling on Florence Copper's post-trial motion will clarify issues going forward in the trial court and in the contemporaneous appeal under Rule 54(b).

Florence Copper seeks an affirmative declaratory judgment that the Development Agreement creates a right to in-situ mining in the BHP Mine Overlay Area. The Court has already ruled that Florence Copper has a vested nonconforming right to in-situ mining in the BHP Mine Overlay Area. This ruling has been fully and fairly litigated. It is law of the case. There is no persuasive reason the Court's interpretation of the Development Agreement should not be made into the form of a judgment. For reasons stated in the motion, the Court grants Florence Copper's request for declaratory relief.

In prior proceedings, the Town has argued that it has a right to breach the Development Agreement by subsequent zoning, and Florence Copper's only remedy is to sue for damages. The issue, then, is whether Florence Copper is precluded from seeking specific performance as a matter of law.

In an effort to move a case that has already taken a long time, the Court rules that Florence Copper has the right to request specific performance as a remedy and that specific performance is not precluded as a matter of law. Specific performance is available for multiple reasons. First, specific performance is expressly authorized under the terms of the Development Agreement. *See* Development Agreement at ¶ 44 (non-breaching party has "the right to specifically enforce any term or provision of this Agreement"). The Court already has ruled that the Development Agreement is an enforceable contract. The "DEFAULT" portion of the contract should be enforced, as well.

Second, this case is a textbook illustration for application of the doctrine of specific performance. Specific performance has long been viewed as an available remedy for disputes over land, "because land is viewed as unique and an award of damages is usually considered an inadequate remedy." *Woliansky v. Miller*, 135 Ariz. 444, 446 (App. 1983). The issue in question involves development of a unique piece of property. In addition, the mining rights may be worth hundreds of millions of dollars,[1] and the Town (with its yearly budget of $43 million) may be unable to pay full monetary damages. The *Restatement (Second) of Contracts* § 360(c) (1981) recognizes that whether "damages could not be collected" is a significant factor to be considered in assessing whether a damages remedy is adequate.

Specific performance of a contract duty "will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty." *Skydive Arizona, Inc. v. Hogue*, 238 Ariz. 357, 368, ¶ 46 (App. 2015) *quoting Restatement (Second) of Contracts* § 357(1) (emphasis added). At a minimum, the Town has threatened to interfere with

1. The amount of damages is not before the Court. Nevertheless, in 2013 Florence Copper's expert calculated the then-present fair market value of the Florence Copper project to be $403.1 million.

Florence Copper's rights and has, to date, not been cooperative with Florence Copper's attempt to open the mine. *See* 1/2/2019 Ruling at p. 20 (Town refused to issue General Plan Amendment and zoning change to allowing mining).

The Town argues that a declaratory judgment addressing available remedies is unnecessary because Florence Copper has failed to establish a breach. While Florence Copper agrees that no breach has yet been established, Florence Copper argues that it is entitled to a declaratory ruling on available remedies in the event a breach is established. Having heard two cross-motions for summary judgment and six days of testimony, the Court agrees with Florence Copper. The Development Agreement vests in Florence Copper the right to mine copper in the BHP Mine Overlay Area as a nonconforming use during the term of the Development Agreement. The Development Agreement states that the Town cannot interfere: "Town shall not apply to the Property any legislative or administrative land use regulations . . . that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan." The Development Agreement grants the non-breaching party the right to seek specific performance. Nevertheless, the Town has indicated that Florence Copper's sole remedy for breach of contract is monetary damages. Based on the interpretation of the Development Agreement, the Court believes that the Town's position is incorrect as a matter of law.

A declaration that specific performance is an available remedy is not premature. The statute governing declaratory judgments, A.R.S. § 12-1833, provides that the Court may construe a contract "either before or after there has been a breach thereof." Moreover, Rule 57 which also governs declaratory judgment actions states:

> The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Unfortunately, this case has been anything but speedy. Although Florence Copper is not seeking an injunction, its recent motion places the specific performance issue squarely before the Court. The Court agrees with Florence Copper that a case or controversy exists as to whether the Town has the right to breach the Development Agreement pursuant to its police powers and leave monetary damages as Florence Copper's only remedy. A declaratory judgment is appropriate to define the rights and responsibilities under the Development Agreement.

CONCLUSION

IT IS ORDERED that Florence Copper's motion is granted. The Court grants Florence Copper's request for declaratory relief and finds that Florence Copper has the available election of judicial remedies for breach of contract, including specific performance or contract damages.

The Court will sign a Rule 54(b) declaratory judgment to execute the terms of this ruling.

Clerk of the Superior Court
*** Electronically Filed ***
06/07/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 06/06/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
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TOWN OF FLORENCE

CATHERINE M BOWMAN

v.

FLORENCE COPPER INC, et al.

JOSEPH N ROTH

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RULING ON APPLICATION FOR ATTORNEYS' FEES AND COSTS

The Court reviewed Florence Copper's application for attorneys' fees and costs, the response and reply. The Court reviewed the Town's supplemental pleading filed on June 3, 2019. Oral argument was held on May 29, 2019.

Florence Copper seeks $1,874,731.82 in attorneys' fees and $32,365.55 in costs. The Court will make some initial observations and then address the specifics of the application.

I. INTRODUCTION

The Court has extensive experience in this case. The case was assigned to the complex civil litigation calendar pursuant to former Ariz.R.Civ.P. 8(h). The Court ruled on two sets of cross-motions for summary judgment and on multiple motions involving discovery disputes and challenges to rulings made by the special master. The Court conducted a six-day bench trial. The case has been heavily litigated.

> This litigation arises out of contract. As noted in its January 2, 2019 Ruling:
>
> To summarize the dispute: in 1996 and 2003 the Town supported mining on the Property. By 2010-11, it did not. The issue is whether the parties are bound by the 2003 Development Agreement.

Findings of Fact and Conclusions of Law dated 1/2/2019 (the "Ruling") at p. 2. In the Ruling, the Court noted that "[a] development agreement is a contract" and cited contract interpretation rules. *Id.* The Court interpreted specific provisions in the Development Agreement to conclude that Florence Copper holds a vested right to mine the Property. Without the Development Agreement, Florence Copper would have no claim. This case would "not exist absent the contract." *See SK Builders, Inc. v. Smith*, 246 Ariz. 196, 204-05, ¶ 28 (App. 2019).

The case cited by the Town, *Son Silver West Gallery, Inc. v. City of Sedona*, 2018 WL 6616883 (Ariz. App. Dec. 18, 2018), is distinguishable. There, the parties' relationship was solely defined by the City's zoning ordinances. Here, the relationship between the parties is defined by a duly authorized and recorded contract called the Development Agreement. Development Agreements are, of course, contracts specifically authorized by Arizona statute. *See* A.R.S. § 9-500.05.

The Town cannot unilaterally prevent mining through zoning regulations because, when the Town annexed the Property, it entered into a written Development Agreement that vested the then-existing right to mine for 35 years. Among other issues, the Development Agreement clearly prohibited the Town from unilaterally prohibiting mining by imposing zoning restrictions on the Property. It reads:

> Town shall not apply to the Property any legislative or administrative land use regulations adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan except [ ] as specifically agreed in writing by the Owner.

Development Agreement *cited* in Ruling at p. 7. One of the most significant issues in the case was whether the Town and Owner agreed to alter or amend the nonconforming mining rights vested by the Development Agreement. The Court, of course, determined that there was no amendment to the Development Agreement and that the Owner's conduct did not eliminate its vested right to mine the Property as a nonconforming use.

This case was all about the contractual relationship established by the Development Agreement. The fact that it also involved zoning ordinances does not change the contractual nature of the claim. *See Hall v. Elected Officials' Retirement Plan*, 241 Ariz. 33, 45, ¶¶ 34-37 (2016) (even though pensions are "a creature of statute," the relationship between the class members and the plan is governed by contract so attorneys' fees should be awarded against the State under A.R.S. § 12-341.01(A)).

At oral argument, the Town asserted that the case to date only involved enforcement of zoning ordinances, not enforcement of a contract. According to the Town, the enforcement of the Development Agreement will be addressed when the Court considers Florence Copper's counterclaims. This argument is not consistent with the allegations in Count 1 of the Town's complaint or the arguments to date. In Count 1, the Town made determination and interpretation of the Development Agreement an issue by alleging the following:

> 77. The determination of the legal rights and obligations of the parties to the PADA [Pre-Annexation Development Agreement], the PUDs [Merrill Ranch Planned Unit Development], the development plans, and amendments thereto, are questions of law for the Court.
>
> 78. The interpretation of the legal effects of the PADA, the PUDs, the various development plans, and any amendments thereto, are questions of law for the Court.

Complaint at ¶¶ 77-78. The cross-motions for summary judgment involved detailed analysis of the Development Agreement and required the Court to address the Town's interpretation of the Development Agreement. *See*, *e.g.*, Ruling at p. 6 ("As a result of the clear and unambiguous language in the Development Agreement, the Prior Ruling rejected the Town's argument that the Development Agreement limited mining to its existing or historic use.") Thus, despite its recent protest, the Town understood that the Development Agreement is integral to this dispute.

There is no question that Florence Copper was the successful party. The Court adopted Florence Copper's interpretation of the Development Agreement and resolved all key issues in the litigation in Florence Copper's favor.

As a result, the instant dispute arises out of a contract and Florence Copper may recover its attorneys' fees as the successful party under A.R.S. § 12-341.01(A). To further cement Florence Copper's claim, the Development Agreement itself provides that a party who has to take legal action to enforce its right under the contract is entitled to recover attorneys' fees in accordance with § 12-341.01. Application at 2:18-20. Florence Copper is entitled to fees under the terms of the contract **and** A.R.S. § 12-341.01(A).

The Town argues that a fee award is limited to $10,000 as a matter of law under A.R.S. § 12-348(E)(4).[1] The Court disagrees. Arizona law is clear that "nothing in A.R.S. section 12-348 bars an award of fees against the state under another statute or under equitable grounds." *Kadish v. Arizona State Land Dept*., 177 Ariz. 322, 328 (App. 1983); *see also Mohave Co. v. Ariz. Dept. of Water Resources*, 242 Ariz. 492, 493, ¶ 6 (App. 2017) (§ 12-348(E)(4)'s $10,000 cap doesn't apply to fees awarded under another statute). Here, the Court's award of attorneys' fees is based on A.R.S. § 12-341.01(A) and the terms of the Development Agreement. *See also Hall, supra; Barth v. Cochise County*, 213 Ariz. 59, 64, ¶ 19 (App. 2006) (public entities that are successful parties in breach of contract actions may recover attorneys' fees under A.R.S. § 12-341.01(A)).

II. ANALYSIS OF WARNER FACTORS

Considering all relevant factors, an award of attorneys' fees is appropriate. The Court makes the following findings as to relevant factors. *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567 (1985).

1. *Whether the unsuccessful party's claim or defense was meritorious*. So far, the Town has been wholly unsuccessful in this litigation. Florence Copper has been successful in demonstrating that it has a vested right to mine copper in the BHP mine overlay area. Florence Copper's claim is worth millions of dollars.

2. *Whether the litigation could have been avoided or settled and whether the successful party's efforts were completely superfluous in achieving the results*. A.R.S. § 12-341.01(A) provides that the Court may consider a "written settlement offer" that is equal to or more favorable than the final judgment. Although the Town complains that Florence Copper had an inflated view of the amount of attorneys' fees it could recover, the Town presents no evidence that the Town ever made any reasonable written offer to settle this litigation. Florence Copper's litigation efforts were therefore necessary to achieve the result. Florence Copper could not have avoided or settled this litigation because the Town made clear that it would accept nothing less than shutting down Florence Copper's business. This factor strongly cuts in favor of an award of fees to Florence Copper.

3. *Whether a fee award would be an extreme hardship.* The Court was not persuaded that a fee award would be an "extreme" hardship to the Town. From Florence Copper's standpoint, this was a "bet the company" case involving millions of dollars. The Town has devoted a significant litigation budget and has aggressively litigated the case. But even if there was some evidence of hardship, the hardship is outweighed by other factors. The Town decided to

1. At oral argument, the Town admitted that if fees are recoverable under A.R.S. § 12-341.01(A), the $10,000 cap does not apply.

aggressively engage in multimillion dollar litigation against Florence Copper in the face of a Development Agreement which, in the Court's mind, contradicts the Town's position. The Town took a risk, lost, and should bear the consequences of this litigation decision.

4. *Whether the successful party prevailed with respect to all of the relief sought*. Florence Copper prevailed with respect to all relief sought.

5. *Whether the matter presented a novel legal question*. The matter presented some novel legal questions but, on the whole, the case was interpretation of a disputed contract. Although the Development Agreement contained a few ambiguities, the Court did not believe the final resolution was a particularly close call. Nothing about the nature of the questions presented cuts against an award of attorneys' fees.

6. *Whether the award would discourage other parties with tenable claims or defenses from litigating them*. The Court does not believe an award would discourage parties with tenable claims from pursuing them. On the other hand, any party that undertakes litigation pursuant to rights granted under a development agreement should be aware that, if it loses, it will be subject to attorneys' fees. An assessment of fees could serve as a deterrent to governmental overreaching. *See Corrigan v. City of Scottsdale*, 149 Ariz. 538, 542-43 (1986) (Arizona Supreme Court allows monetary damages against a city in a wrongful zoning case, noting that damages provide a "deterrent impact" to "obvious excesses resulting from multiple regulation").

Thus, the *Warner* factors cut in favor of an award of fees to Florence Copper. Having determined that a fee award is appropriate, the question is the amount. The Court finds that the attorneys' hourly rates are consistent with the Phoenix community, and the Court finds that Florence Copper's counsel provided sufficient explanation to satisfy *China Doll* standards.

The Town argues that Florence Copper should not be awarded attorneys' fees for efforts on issues like eminent domain, the failed removal to federal court and the counterclaim. As an initial matter, the fact that Florence Copper was unsuccessful in the federal court removal matter does not prevent an award of fees. Arizona law is clear that "partial success does not preclude a party from prevailing and receiving a discretionary award of attorneys' fees." *Berry v. 352 E.Virginia, LLC*, 228 Ariz. 9, 14, ¶ 24 (App. 2016); *see also Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189 (App. 1989) ("where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories"). Based on the "totality of the litigation" test, Florence Copper is the clear winner.

In addition, in *Modular Mining Systems, Inc. v. Jigsaw Technologies, Inc*., 221 Ariz. 515, 522, ¶ 22 (App. 2009), the court held that a trial court acted within its discretion when it awarded the prevailing party all of its fees "incurred in litigating interwoven and overlapping contract and

tort claims." The court stated "it is well established that a successful party on a contract claim may recover not only attorneys' fees expended on the contract claim, but also fees expended in litigating an interwoven tort claim." *Id.* at ¶ 23. The court noted that both the trade secret claim and the breach of employment contract claims were based on the same set of facts and involved common allegations.

Florence Copper already excluded some fees incurred in reacting to the eminent domain issue. Reply at 6:13-14. To the extent fees remain on eminent domain, the *lis pendens* and the counterclaim, the Court agrees with Florence Copper that these claims were inextricably interwoven with the contract claims. The central issues in this case all revolved around the rights established by the Development Agreement. The Court finds that all legal issues were intertwined and overlapping.

A trial court may, of course, award a party some but not all of its requested fees. *Lee v. IMG Inv. Mgt., LLC*, 240 Ariz. 158, 161, ¶ 13 (App. 2016). In addition, unsuccessful parties should not be required to pay for tasks that take an unreasonable amount of time, nor should they be required to pay for unnecessary or unproductive tasks. *Hawk v. P.C.Vill. Ass'n, Inc.,* 233 Ariz. 94, 100, ¶ 22 (App. 2013); *In re Guardianship of Sleeth*, 226 Ariz. 171, 176, ¶ 25 (App. 2010).

The Court reviewed the Town's spreadsheet containing objections to time entries. The Court finds that the fee applications are sufficiently documented and meet *China Doll* requirements. Although Osborn Maledon performed the vast majority of the work (Osborn Maledon's fees represent 84% of the total fee request), fees applications spanned four different firms. The Court finds there is minimal block billing but some duplicative billings. There are certain inefficiencies resulting from the use of so many firms. The Court finds that a 10 percent reduction is appropriate. As a result, the Court awards Florence Copper $1.7 million for reasonable attorneys' fees. (The Court rounded up to $1.7 million to account for post-trial motions.) The Court's experience is that a fee award of $1.7 million is consistent with fees requests in other complex, large-dollar and similarly-litigated cases.[2]

IV. CONCLUSION

Taking into account the *Warner* factors and the equities of the situation, the Court awards Florence Copper its attorneys' fees in the amount of $1.7 million pursuant to the terms of the contract and A.R.S. § 12-341.01(A). The Court finds this amount to be a fair and reasonable amount for attorneys' fees in this case.

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2. The fees award is reasonable when compared to the Town's legal fees. At oral argument, the Court learned that the Town has spent approximately $1.5 million in attorneys' fees. The Town also employs in-house counsel who has participated in the case.

Florence Copper is awarded its costs in the amount of $32,365.55.

IT IS ORDERED that Florence Copper is awarded $1,700,000 in reasonable attorneys' fees, with said amount accruing interest at the rate of 6.50% from the date of this Order.

IT IS FURTHER ORDERED that Florence Copper is awarded $32,365.55 in costs, with said amount accruing interest at the rate of 6.50% from the date of this Order.

Granted with Modifications
See eSignature page

Clerk of the Superior Court
*** Electronically Filed ***
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, Plaintiff, v. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Defendants.	No. CV2015-000325 **RULE 54(b) JUDGMENT** (Assigned to the Honorable Roger Brodman)
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., Counterclaimant, v. Town of Florence, Counterdefendant.	

Plaintiff Town of Florence's Complaint pleaded two claims, one for declaratory judgment (Count One), and another for eminent domain (Count Two). The Court previously dismissed Count Two without prejudice in an Order dated August 25, 2015. The parties tried the remaining declaratory judgment claim to the Court in December

2018. The Court thereafter issued findings of fact and conclusions of law on January 3, 2019, denying relief to Plaintiff on Count 1. Defendant Florence Copper, Inc. moved for summary judgment seeking relief to Plaintiff on Count One on the interpretation of the Development Agreement and the available remedies.

All claims in Plaintiff's Complaint against Defendant have now been decided. Defendant's claim as to a declaratory judgment interpretation of the Development Agreement and available remedies have been decided. The Court finds that there is no just reason for delay of entry of final judgment as to the Complaint and related Counterclaims, and that this judgment is entered under Arizona Rule of Civil Procedure 54(b). Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's claim for declaratory relief under Count One is denied, and Plaintiff shall recover nothing.

2. Plaintiff's claim for eminent domain under Count Two is dismissed without prejudice.

3. The Court grants the following declaratory judgment as to the interpretation of the Development Agreement:

(a) Under the terms of the Development Agreement, Florence Copper, Inc. has a vested right to conduct in-situ mining operations on its Florence property, including the right to maintain and expand nonconforming uses or structures related to mining on property designated as the BHP Copper Mine Overlay area in the Development Agreement and incorporated documents dated December 3, 2003.

(b) Florence Copper, Inc.'s vested right to mine runs with the land.

(c) Florence Copper, Inc.'s vested right to mine has not been lost by an amendment to the Development Agreement, or any mutual agreement to modify the vested right to mind, or by abandonment.

(d) In the event of a breach of the Development Agreement by the Town of Florence, Florence Copper has the available election of judicial remedies for a breach of contract, and may elect either specific performance or money damages.

4. Florence Copper's counterclaims for the remedy of an injunction for specific performance are dismissed without prejudice.

5. Florence Copper, Inc. is awarded attorneys' fees in the amount of $1,700,000; and taxable costs in the amount of $32,365.55. Post judgment interest is granted in the statutory amount, which on the day of this judgment is 6.50%.

DATED this ____ day of _____, 2019.

_____

The Honorable Roger Brodman
Judge, Maricopa County Superior Court

eSignature Page 1 of 1

Filing ID: 10533202 Case Number: CV2015-000325
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/S/ Roger Brodman Date: 6/6/2019
Judicial Officer of Superior Court

ENDORSEMENT PAGE

CASE NUMBER: CV2015-000325 SIGNATURE DATE: 6/6/2019

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

Town of Florence, an Arizona municipal corporation,

Plaintiff,

vs.

Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation; RK Mine Finance Trust 1, a trust organized under the laws of the New South Wales, Australia; and Pinal County, Arizona,

Defendants.

Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation,

Counterclaimant,

vs.

Town of Florence, an Arizona municipal corporation,

Counterdefendant.

No. CV 2013-02511

FIRST AMENDED ANSWER AND COUNTERCLAIM

CV 2015-000325

For its First Amended Answer and Counterclaim to Plaintiff's Complaint, Defendant Florence Copper, Inc., waives service of the Complaint and summons, appears in this case, and admits, denies and alleges as follows:

1. Admits paragraph 1.

mining activities. Affirmatively alleges that: (1) when the Town zoned the property, mining became a legal non-conforming use under common law and statutory law; (2) the structures and land uses related to copper mining exist on the property; and (3) the mining use for the property became a vested contractual property right pursuant to a development agreement with the Town in 2003.

12. Answering paragraph 12, admits that a Pre-Annexation Development Agreement ("PADA") was recorded with the County Recorder in 2003 as to the property.

13. Answering paragraph 13, admits that the PADA recorded with the County Recorder in 2003 incorporated by reference a written Planned Unit Development.

14. Answering paragraph 14, Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegation, and, therefore, denies the same.

15. Admits paragraph 15, but affirmatively alleges that the PADA also recognized the lawful use or legal non-conforming use of copper mining on the property, contractually preserved that use and created a contractual property right that runs with the land to conduct copper mining on the property.

16. Denies paragraph 16.

17. Denies paragraph 17, and affirmatively alleges that the PADA recognized the legal use or legal non-conforming use of copper mining on the property and contractually preserved that use and created a contractual property right that runs with the land.

18. Denies paragraph 18.

19. Denies paragraph 19, and affirmatively alleges that the PADA refers to copper mining in multiple places along with the mine overlay map which is incorporated by reference into the PADA.

20. Denies paragraph 20.

33. Answering paragraph 33, Defendant is without information or knowledge sufficient to form a belief as to all the circumstances that led to the 2007 zoning change and, therefore, denies the same, except admits that a zoning change took place in 2007.

34. Denies paragraph 34. Affirmatively alleges that the zoning change in 2007 did not amend or alter the 2003 PADA which was recorded with the County recorder, and that the so-called "waiver" speaks for itself.

35. Denies paragraph 35.

36. Denies paragraph 36. Affirmatively alleges that the parties never negotiated any amendments or modifications that were to be recorded to replace, amend or modify the 2003 recorded PADA.

37. Answering paragraph 37, alleges that the Merrill Ranch Master Development Plan is a written document that speaks for itself. Denies that the summary set forth in paragraph 37 adequately summarizes the entire document, and denies that it changed the right to continue to use the property for copper mining.

38. Denies paragraph 38.

39. Denies paragraph 39.

40. Denies paragraph 40.

41. Denies paragraph 41.

42. Denies paragraph 42.

43. Denies paragraph 43.

44. Denies paragraph 44.

45. Denies paragraph 45.

46. Denies paragraph 46.

47. Denies paragraph 47.

48. Denies paragraph 48, except admits that a General Plan Amendment was filed but was later withdrawn.

sonry wall, to a height of at least six (6) feet. Materials shall not be stacked, piled, or stored in such a manner as to project above the screen wall.

e. Parking areas adjacent to the required front yard shall provide a decorative screen wall or landscape berm or combination thereof to a height not to exceed three (3) feet in order to adequately screen the undercarriages of the parked vehicles.

(h) *Development standards.*

(1) The chart that follows specifies the maximum building heights and minimum yard setbacks.

Chart 2

Highway business development standards.

Land use	*Max. bldg. height (feet)*	*Minimum yard setbacks*				*Lot coverage*
		front	*side*	*street side*	*rear*	
B-2	30*	20	10	20	25	60%

* Additional building height allowances up to a maximum of 45 feet may be obtained with a conditional use permit.

(i) *Compliance with other provisions.*

(1) *Additional height and area regulations and exceptions.* The provisions and regulations in division 6 herein.

(2) *Parking regulations.* The parking regulations are as provided in division 7 herein.

(Ord. No. 4, §§ 5.801—5.804, 6-12-72; Ord. No. 261-98, 9-21-98; Ord. No. 288-00, 2-15-00)

Sec. 4-454. I-1 industrial park zone.

(a) *Purpose.* The I-1 industrial park zone is intended to provide for light industrial, storage, office and laboratory uses that are free from offensive elements (such as polluting emissions, noise, unsightly views and excessive traffic) and which are located together in a spacious, landscaped development that is planned as a single contiguous unit. The I-1 zone should be located on a highway and have access to a rail line.

(b) *Permitted uses.* The uses permitted in the I-1 zone are generally those industrial, office, storage, laboratory and manufacturing uses which do not create any danger to health and safety in surrounding areas and which do not create any offensive noise, vibration, smoke, dust, odor, heat or glare and which, by reason of high value in relation to size and weight of merchandise received and shipped, generate a minimum of truck traffic.

(1) Aircraft landing area, provided there are no existing residences or R-1, R-2, R-3, M-H or TR zoned property within one thousand (1,000) feet of the landing surface.

(2) Motion picture production.

(3) Restaurant.

(c) *Property development standards.* (See division 6 of this article for additional standards and exceptions.)

(1) *Maximum building height,* two (2) stories or thirty (30) feet.

(2) *Minimum property area,* ten (10) acres shall be required for the establishment of an industrial park. Within a park, individual parcels may be of any size.

(3) *Minimum building setback requirements.*

a. From all streets, fifty (50) feet, which shall be maintained as open space, except that access drives may penetrate the open space and parking may cover fifteen (15) percent of the required setback area. Such parking shall be screened from the street by a solid fence, wall or landscape screen of three (3) feet in height.

b. From AG, R-1, R-2, R-3, M-H and TR zone boundary lines, one hundred (100) feet.

c. From side and rear property lines, twenty-five (25) feet.

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(4) *Maximum building coverage,* fifty (50) percent of the net property area.

(5) *Landscaping and screening requirements.*

a. *Trees.* Each development shall provide one (1) tree (one and one-half-inch caliper minimum size) per each six hundred (600) square feet of required frontage and common open space.

b. *Landscaping.* Any part of the total development not required for buildings, structures, loading and vehicular access ways, streets, parking and utility areas, pedestrian walks and hard-surfaced activity areas shall be landscaped with grass, trees, shrubs and may include other materials such as water and aggregate. All landscape areas and material shall be maintained in a healthy, neat, clean, weed-free condition. Dead plant material shall be replaced with plant material of equal size and maturity.

c. *Street tree plantings.* Landscape areas and material adjacent to town rights-of-way shall be compatible and consistent with the requirements of the municipality's street tree master plan and city-scape development standards.

d. *Irrigation.* Watering requirements for all plants and planting areas shall be provided by an underground watering system.

e. *Screening.* All areas that are not maintained as open space shall be completely enclosed by a solid wall, fence or landscape screen of at least six (6) feet in height except for access points.

f. *Miscellaneous plantings.* All plant material utilized for screening of parking, refuse, service and utility areas shall be a minimum five-gallon can size and a maximum four (4) feet on center spacing. Mass plantings of shrubs and ground covers in landscape areas adjacent to town street rights-of-way shall have a minimum five-gallon can size at a maximum four (4) feet on center spacing.

g. *Screening.* Along the property lines that abut AG, R-1, R-2, R-3, M-H or TR zones, or that abut alleys that are adjacent to those zones, the following shall be provided:

1. A solid wall or fence at least six (6) feet in height except within ten (10) feet of a street where no wall or fence shall be required. The wall or fence shall not be required where there is an existing fence or wall on a common property line.

2. A landscaped strip of property at least ten (10) feet in width. The strip shall contain trees (one and one-half-inch caliper minimum size) that are planted at a maximum spacing of twenty (20) feet on center to form a buffer between the two (2) zones. The trees shall not be required in the ten (10) feet adjacent to a street.

(6) *Access.* The provisions of division 6 of this article shall apply.

a. There shall be no vehicular access allowed from alleys that serve properties zoned AG, R-1, R-2, R-3, M-H and TR.

b. Individual parcels within an industrial park shall have vehicular access from interior streets only.

Note: Regulations for distances between buildings, accessory buildings, walls, fences and required screening are contained in division 6 of this article.

(d) *Offstreet parking.* The provisions of division 7 of this article shall apply.

(Ord. No. 4, §§ 5.901—5.904, 6-12-72)

§ 150.053 SINGLE-FAMILY RESIDENTIAL (R1-6).

(A) *Purpose.* The R1-6 district is intended to allow for medium density residential development that is compatible with R1-18 zoning districts. Numerical restrictions have been kept to a minimum so as to allow as much flexibility as possible in housing design and still ensure adequate protection to adjacent R1-18 zoned property. This is a transitional zone and should be used to separate and protect the R1-18 zone from more intense land uses and zones and from heavily traveled transportation routes.

(B) *Permitted uses.* The following uses are permitted in the R1-6 zone:

(1) Dwelling, single-family;

(2) Accessory buildings (see § 150.258 for property development standards) and uses, including private swimming pools and home occupations; and

(3) Park, playground and community owned buildings.

(C) *Conditional uses.* The following uses may be permitted subject to a conditional use permit (see § 150.015):

(1) Church;

(2) Convent;

(3) Golf course (except miniature course or practice driving tee operated for commercial purpose), including clubhouse and service facilities which are intended to primarily serve golf course uses and are no closer than 300 feet to any exterior boundary of the golf course, except that the facilities shall have direct access from a collector or arterial street, or a highway, from which they shall be a distance of at least 50 feet;

(4) Group home;

(5) Manufactured home;

(6) Model home complex;

(7) Public institutional buildings;

(8) Public or private school;

(9) Public utility buildings, structures or appurtenances thereto for public service uses; and

(10) Temporary buildings used for the sale of homes and/or lots. Because no list of uses can be exhaustive, decisions on unspecified uses shall be rendered by the Planning and Zoning Commission with appeal to the Town Council.

(D) *Property development standards.* (See §§ 150.164 through 150.184 for additional standards and exceptions.)

(1) *Setbacks.*

Front	Interior Side	Street Side	Rear
20 feet	10 feet	12 feet	12 feet

(2) *Area and bulk requirements.*

Minimum Site Area	Minimum Lot Area	Minimum Lot Width	Minimum Lot Depth	Maximum Height
N/A	6,000 square feet	45 feet	100 feet	30 feet
Note: Regulations for distances between buildings, accessory				

buildings, access, walls, fences and required screening are contained in §§ 150.164 through 150.184.

(E) *Off-street parking.* The provisions of §§ 150.156 through 150.163 shall apply. (Prior Code, Ch. 4, Art. III, § 4-53) (Ord. 432-06, passed 6-19-2006; Ord. 606-13, passed 5-19-2014)

EXPERT OPINION AND REPORT

Submitted by:

Julie A. Tappendorf
Equity Partner
Ancel Glink Diamond Bush DiCianni & Krafthefer, P.C.
140 S. Dearborn St., Ste 600
Chicago, Illinois 60603

Date: July 25, 2016

In the Case of:

Town of Florence v. Florence Copper, Inc., et al.,
Case No. CV 2013-02511

I. Introduction and Qualifications

I am an attorney, licensed in Illinois since 1997. I am currently an equity partner at the law firm of Ancel Glink Diamond Bush DiCianni & Krafthefer, P.C., practicing in its Chicago office. Ancel Glink focuses on the representation of municipalities and other units of local government in a variety of legal matters, including land use and zoning, economic development, litigation, among others.

Over the past 19 years, I have represented municipalities and other units of government in all areas of local government law, with a focus on zoning, land use, and development. On behalf of my clients, I have drafted, reviewed, and negotiated numerous land use and development-related documents, including annexation and development agreements and zoning and land use approval ordinances granting special use permits, planned unit developments, variations, rezoning, and other zoning relief. I am regularly called upon by firm clients to interpret and advise them on the application or legal effect of language in an annexation or development agreement where the parties to the agreement dispute the meaning. I have advised and assisted numerous municipal clients in the proper procedure for approving an annexation or development agreement and zoning approvals, as well as the procedures for amending development agreements and zoning approvals. I have also advised clients as to the legal effect of contractual obligations, benefits, and rights contained within development agreements and how they apply to the parties, including the initial parties to the agreement as well as subsequent owners or parties. I have defended annexation and land use decisions in federal and state courts against a variety of legal challenges.

I also represent property owners and developers in land use matters, including assisting them with the entitlement process, negotiating land use agreements and approvals, and defending property owners and developers in court against land use challenges.

I have written extensively on local government and land use topics, including co-authoring two books on annexation and development agreements: *Development by Agreement: A Toolkit for Land Developers and Local Governments (ABA Press, 2012)* and *Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities (ELI, July 2003).* I also co-authored the two-volume treatise *Handling the Land Use Case*, 3d Ed. (Thompson Reuters, 2016) and the book *Land Use Law: Zoning in the 21st Century* (Law Journal Press, 2015); both include chapters on annexation and development agreements. Other books, chapters and articles I have written and published are listed in my curriculum vitae in Section VI of this Report.

My experience in the area of land use and zoning law, and particularly in drafting, reviewing, negotiating, interpreting, and advising clients on the legal effect of annexation and development agreements, as well as my review of the materials identified in Section V of this Report, informed the opinions offered in this Report.

II. Executive Summary of Opinion

The Town of Florence asserts that any right by the current owner to mine the Property was rescinded or repealed before the current owner acquired the Property. In support of its argument, the Town claims that the 2007 PUD Ordinance superseded and rescinded the 2003 PUD Ordinance as well as the 2003 PADA. The Town argues that mining activities and uses are no longer permitted on the Property because the 2007 PUD Ordinance eliminated all references to mining on the Property.

The issue in this case turns on whether a subsequent zoning ordinance can amend, or in this case supersede and rescind, contractual rights established by a development agreement. In my opinion, and as discussed in more detail in Section IV of this Report, the answer is clearly no.

The primary purpose of a development agreement is to provide certainty to a developer or property owner that future regulatory changes (including zoning amendments and approvals) that are inconsistent with the contractual rights granted by a development agreement are not applicable to and cannot be enforced against the property or project subject to the agreement. A municipality has no authority to apply or enforce subsequent zoning approvals or amendments that would interfere with these contractual rights, and any attempt to do so would constitute a breach of the development agreement.

Moreover, a zoning ordinance simply cannot amend a development agreement. Only a proper amendment to the development agreement, entered into by mutual consent of the parties and approved in accordance with the procedures set out in state statute and in the underlying development agreement, can effectively amend the terms of a development agreement. Where there is no such amendment, the rights and benefits rights granted by the development agreement remain valid and enforceable.

In sum, the rights contained in the 2003 PADA are contractual and vested, and are unaffected by the subsequent zoning changes approved by the 2007 PUD Ordinance.

III. Background of Case

The 2003 PADA

In 2003, pursuant to Resolution No. 872-03, the Town of Florence, Arizona approved a pre-annexation and development agreement ("2003 PADA") with CMR/Casa Grande, LLC, Florence Copper, Inc., El Em, LLC, and Roadrunner Resorts, LLC, the owners of 7,537 acres of land located outside the boundaries of the Town ("Property").

The 2003 PADA provided for the annexation of the Property into the Town of Florence and addressed the future use and development of the Property. The following is a summary of relevant sections of that Agreement:

- Section 1 of the 2003 PADA (Incorporation of Documents and Recitals) incorporates by reference all documents and exhibits referred to in the 2003 PADA.

- Section 3 of the 2003 PADA ("Plan Approval and Vested Rights") approved a "Development Plan" for the Merrill Ranch Planned Unit Development. The Plan is attached as Exhibit B. (2003 PADA, Ex. B). Section 3 specifically approves the Development Plan, and vests rights to use and develop the Property in accordance with the 2003 PADA and the Development Plan for the life of the 2003 PADA.

- Section 4 of the 2003 PADA ("Term and Effective Date") grants the owner and its successors and assigns the right to implement development in accordance with the Development Plan. That section also establishes a 35 year term.

- Section 5 of the 2003 PADA ("Rights Run with the Land") provides that the rights established under the 2003 PADA and the Development Plan "are attached to and run with the Property." That section also provides that the owner and its successors are "entitled to exercise the rights granted pursuant to this Agreement." Moreover, it states that the 2003 PADA "shall be interpreted and construed so as to preserve any vested and/or estoppel rights respecting the Owner and/or the Property existing under this Agreement and applicable law."

- Section 6 of the 2003 PADA ("Development Plan") requires development of the Property to be in accordance with the Development Plan, "unless otherwise amended pursuant to this Agreement." Paragraph (a) authorizes the owner to implement the uses set forth in the Development Agreement and the Development Plan. This section also discusses amendments to the Development Plan. Paragraph (b) provides that certain specified changes (relocation of street layouts, location of commercial, industrial, and residential areas and parks and trails) do not require an amendment to the 2003 PADA. Paragraph (d) allows certain adjustments to the physical boundaries of the various phases and the development schedule without an amendment to the 2003 PADA. Paragraph (f) prohibits the Town from applying any legislative or administrative land use regulation that would "change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan" except as otherwise expressly identified.

- Section 22 of the 2003 PADA ("Binding Effect") provides that the Development Plan is binding upon the Town and owner and their respective successors and assigns.

- Section 26 of the 2003 PADA ("Incorporation of Documents") incorporates the Development Plan into the 2003 PADA, among other documents.

- Section 32 of the 2003 PADA ("Amendments") prohibits any amendment to the 2003 PADA unless by written document by the Town and owner. That section also requires all amendments to be recorded with the Pinal County Recorder within 10 days after the execution of the amendment.

- Section 38 of the 2003 PADA ("Assignment") authorizes the owner to sell, transfer, or assign part or all of the Property to anyone at any time during the duration of the Agreement.

- The Development Plan (Exhibit B to the 2003 PADA) sets forth the use and development standards for a mixed-use development on the Property. The Development Plan also expressly provides that the existing nonconforming uses are allowed to continue so long as they remain otherwise lawful. (2003 PADA, Ex. B, Section III.B.7, pp. 29-30). There is a provision that terminates a nonconforming use if that use ceases for any reason for a period of more than 180 days. (*Id*., p. 30). Copper mining operations are expressly exempt from that abandonment provision. (*Id*.) The Development Plan prohibits drill sites on the Property except for "drilling, mining or exploration for any minerals, oil, gas or other hydrocarbon substances" in the area indicated as the "BHP Copper Mine" until the mine is closed. (*Id*., Section III.B.12, p. 32). Exhibits II-1, II-2, II-3, and II-4 to Exhibit B identify and depict the boundaries of the BHP Copper Mine Overlay Area. Exhibit B, like all other exhibits to the 2003 PADA, is expressly incorporated into the 2003 PADA pursuant to Section 1 of the 2003 PADA and has the same binding and legal effect as if the language of the exhibit had been set out in the agreement itself.

2003 PUD Ordinance

On December 15, 2013, the Florence Town Council approved Ordinance No. 356-03, amending the Town's zoning map to rezone the Property from the AG zone to the PUD mixed use zone.

Amendments to the 2003 PADA

The Florence Town Council approved Amendment No. 1 to the 2003 PADA, on December 19, 2005. (PADA Amendment 1). That amendment modified Exhibit C to the 2003 PADA (an Intergovernmental Agreement for financing participation) related to parcels I and II. This amendment did not modify the mining rights contained in the 2003 PADA. The amendment expressly provided that the 2003 PADA remains in full force and effect except as amended by PADA Amendment No. 1. PADA Amendment 1 was recorded on December 23, 2005.

The Florence Town Council approved Amendment No. 2 to the 2003 PADA, on January 3, 2006. (PADA Amendment 2). That amendment modified various provisions in the 2003 PADA, including the amendment fees, emergency service funds, operation and maintenance funds, road extensions, street lighting, and residential density. Like PADA Amendment 1, this amendment did not modify the mining rights contained in the 2003 PADA. This amendment also expressly provided that the 2003 PADA remains in full force and effect except as amended by PADA

Amendment No. 2. PADA Amendment 2 was recorded on January 12, 2006.

2007 PUD Ordinance

In 2007, the Town of Florence Town Council approved Ordinance No. 460-07, amending the Town's zoning map to amend the Merrill Ranch PUD. (2007 PUD Ordinance). That Ordinance amended the 2003 PUD Ordinance. Section 6 of the 2007 PUD Ordinance states that the Merrill Ranch Master Development Plan dated January 26, 2007, "shall supersede any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD."

Although the 2007 PUD Ordinance refers to the Merrill Ranch Master Development Plan, it is not clear that it was incorporated into the 2007 PUD Ordinance either as an exhibit or incorporated therein by reference. The Merrill Ranch Master Development Plan that was provided to me for review appears to be a standalone document and is dated July 6, 2007, not January 26, 2007. The legal status of the 2007 Master Development Plan is unclear. The Master Development Plan dated July 6, 2007, does not appear to address mining rights.

Lawsuit

On October 14, 2013, the Town of Florence brought a two-count complaint against Florence Copper, Inc., RK Mine Finance Trust 1, and Pinal County, Arizona. The sole remaining count in the case (Count I) asks the court to declare that the use of the Property for mining and related activities is illegal, and that the owner has no legal right to mine the Property. The Town contends that the 2007 PUD Ordinance superseded the 2003 PUD and the 2003 PADA by eliminating references to "mine overlay" or "BHP mine overlay" and modifying the Development Plan to delete all references to mining activities or uses.

On April 14, 2014, Florence Copper, Inc. filed its first amended answer and counterclaim. Florence Copper, Inc. argues that the 2003 PADA created vested rights to mine that run with the land to the current owner, and that the Town is interfering with those rights and is in breach of the 2003 PADA, among other counterclaims.

On June 3, 2014, the Town filed its answer to the counterclaim, and on November 10, 2015, filed a motion for summary judgment as to its declaratory judgment count.

IV. Opinions and Conclusions

I. History and Purpose of Annexation and Development Agreements

In the traditional zoning and land use situation, a developer or property owner submits an application for zoning or land use approvals, and the municipality will vote to approve, deny, or approve with conditions. Denzin, et al., *Land Use Law: Zoning in the 21st Century*, §2.01 (Law Journal Press, 2015). In this traditional zoning model, a developer may be concerned about the lack of certainty against future zoning or regulatory changes that could affect their right to develop the property in accordance with the zoning approval. *Id.*,§2.03. For a municipality, there could be legal restrictions on the nature and scope of any conditions a municipality may want to impose on the approval because of constitutional limitations on imposing conditions that might constitute a "taking" without payment of just compensation. *Id.*

The use of development agreements has increased substantially in the past few decades as a way to solve both of these problems. Delaney, et al., *Handling the Land Use Case*, 3d Ed., §36A:1 (Thompson Reuters, 2016). These agreements can change the nature of the relationship between the developer and municipality from adversarial to cooperative, "building upon the parties' mutual interests and respective benefits arising from the proposed development." *Id.*

For the municipality, a development agreement can provide additional authority to impose conditions beyond what it might otherwise be allowed authority to impose by relying on its contract authority rather than zoning powers. Callies, Curtin & Tappendorf, *Bargaining for Development*, p. 3 (ELI, 2003).

For the developer, the primary purpose of a development agreement is to provide the developer with the regulatory certainty it needs "by establishing the contractual equivalent to a vested right." Selmi, "Land Use Regulation by Contract," Loyola Law School Legal Studies Paper No. 2009-51, pp. 8-9; 20-21. Through the agreement, the developer can be provided with the contractual assurance that it will be allowed to proceed with its project by vesting its rights and protecting the developer against future land use or other regulatory changes. Callies, Barclay & Tappendorf, *Development by Agreement*, pp. 7-8 (ABA Press, 2012). Developers view a development agreement "as a vehicle for providing economic certainty; they constrain local governments from implementing late changes to the regulations imposed on developments." "Land Use Regulation by Contract," p. 4.

The contractual rights granted by a development agreement provide developers and property owners with certainty far earlier in the process than that provided under the traditional vested rights doctrine. That doctrine provides a point in time where a developer or property owner can continue with a development project or use despite new land development regulations that might otherwise prohibit the development or use. *Development by Agreement*, p. 7.

The problem a developer or owner encounters in relying solely on the traditional vested rights doctrine for development or use certainty is that vested rights may not be triggered until very late in the process. In some cases, the right to be "immunized from future changes in government regulation" does not vest until a building permit has been issued and substantial work has been done on the project. "Land Use Regulation by Contract," p. 4, fn. 10, 11. So, while traditional vested rights are still valuable to a developer or owner, they may come too late in the process to

provide the level of certainty a developer or owner seeks. *See e.g., Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 553 P.3d 546 (Cal. 1976) (even though developer had spent over $3 million on the project, it had no vested right to develop because a building permit was never issued). This uncertainty is particularly of concern where a project involves multiple phases of development or activities that will take place over an extended period of time.

Enter the development agreement. Instead of relying solely on the common law doctrine of vested rights to eliminate the uncertainty and risk of future regulatory changes, a developer or owner can contract for those rights at the outset of the development project. "A contract could provide a developer with the regulatory certainty it needed by establishing the contractual equivalent to a vested right." "Land Use Regulation by Contract," p. 20. The developer need not wait until some future point in time for its rights to be immunized from future zoning changes (i.e., building permit and substantial expenditure of funds). Instead, these contractual rights vest immediately, eliminating the need for a court to engage in a case-by-case analysis to find a traditional vested right (what approvals have been granted; what actions have the developer or owner taken in reliance on those approvals, etc.?). With a development agreement in place, the terms of the agreement and the rights granted by that agreement will control.

Courts have had no difficulty finding zoning and land use changes adopted after a development agreement was approved to be inapplicable to a property subject to a development agreement. *Cummings v. City of Waterloo*, 683 N.E.2d 1222 (1987). Any change to the zoning that would affect the contractual, vested rights under the development agreement is simply void. *Meegan v. Village of Tinley Park*, 52 Ill.2d 354 (1972).

A municipality's attempt to repudiate a development agreement can serve as the basis for a breach of contract lawsuit. *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes,* 191 Cal. App. 4th 435 (3d Dist. 2010) (finding town in breach of development agreement and awarding $30 million in damages to the developer because town's actions indicated they were not willing to continue with the development agreement), *see* discussion of case in *Handling the Land Use Case*, §36A:4. Similarly, a court held that a developer had a vested right to develop a subdivision pursuant to a development agreement, and invalidated the city's rezoning and disconnection ordinances, finding that the city had violated its duty of good faith and fair dealing under the annexation agreement. *Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676 (2d Dist. Ill); *see* discussion of case in *Handling the Land Use Case*, §36A:4.

The contractual rights provided by a development agreement do not just apply to the parties who entered into the development agreement but also to successor parties. *Home Builders Ass'n of Central Arizona v. City of Maricopa*, 158 P.3d 869 (Ariz. 2007). Most development agreements have express language that the agreement is binding on successors and assigns, meaning the rights and the obligations will transfer to a successor owner or party. Some development agreement statutes (including Arizona's) have express language to that effect. *See* A.R.S., §9-500.05.

The process for entering into an annexation or development agreement varies by state statute, but as a general rule, the agreement must be approved through some formal action taken by the corporate authorities of the government party to the agreement. *Land Use Law*, §2.03[2][b]. Like

any other contract, it must be executed by all parties, which typically include the developer and the government entity. Some states, like Arizona, also require the agreements to be approved by resolution or ordinance and recorded in the county in which the property is located. *Id.*

Amendments to annexation and development agreements are typically processed in the same manner as the approval of the original agreement, and in accordance with the process set out in the original agreement. An amendment generally requires all parties to mutually consent to amend or cancel a development agreement. *Land Use Law*, §2.03[2][e].

Development agreements have survived challenges that they are unlawful "contract zoning." *Giger v. City of Omaha*, 442 N.W.2d 182 (Neb. 1989), as well as challenges that they violate the reserved powers doctrine or are, in effect, a "bargaining away" of the municipality's police power, *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors*, 100 Cal. Rptr. 2d 740 (Cal. 2000).

II. Arizona Law

Many states (including Arizona) have enacted statutes that expressly authorize the use of annexation and/or development agreements. Section 9-500.05 of A.R.S. authorizes a municipality, by resolution or ordinance, to enter into development agreements relating to property in the municipality and outside of the incorporated area of the municipality. A.R.S., §9-500.05. Pursuant to that statute, "the burdens of the development agreement are binding on, and the benefits of the development agreement inure to, the parties to the agreement and to all their successors in interest and assigns." *Id.* A development agreement can be amended by "mutual consent of the parties to the development agreement or by their successors in interest or assigns." *Id.*

There is very little case law in Arizona interpreting the development agreement statute or challenging or enforcing a development agreement. That is not unusual, as judicial review of annexation and development agreements has been relatively rare across the country. Selmi, "Land Use Regulation by Contract," Loyola Law School Legal Studies Paper No. 2009-51, p. 6. Even where courts have addressed challenges to these agreements, few of these decisions involve the substance of the actual agreement. *Id.*

One Arizona case, however, makes it clear that development agreements are binding on successor parties. *Home Builders Ass'n of Central Arizona v. City of Maricopa*, 158 P.3d 869 (Ariz. 2007). That case also addresses the legality of a municipality attempting to apply a later approved ordinance to a project that is the subject of a development agreement. In 2000 and 2003, Pinal County entered into three development agreements with three different developers. Subsequently, the property subject to these agreements was incorporated into the City of Maricopa. In 2005, Maricopa adopted a development fee ordinance, requiring developers to pay various development fees. *Id.,* ¶3. A lawsuit was filed to challenge the legality of Maricopa applying this ordinance to projects and property subject to development agreements. *Id.,* ¶4. The court held that Maricopa, as a successor in interest to Pinal County, was bound by the terms of the development agreement and could not enforce its later-enacted fee ordinance against property subject to the development agreement. *Id.,* ¶29.

III. Issue Presented

The issue in this case turns on whether a subsequent zoning ordinance can amend, or in this case supersede and rescind, a previously approved development agreement and the contractual and vested rights granted by that agreement.

IV. Opinions

The short answer is that a subsequent zoning ordinance cannot amend, supersede, or rescind a development agreement. The primary purpose of a development agreement is to provide certainty to a property owner or developer that the rights granted in that agreement will not be modified or eliminated by a subsequent zoning or other regulatory change. Allowing a municipality to rescind or eliminate contractual and vested rights through zoning would render the development agreement, and the statute authorizing these agreements, a nullity.

The state of Arizona has recognized the validity of development agreements by enacting a state statute authorizing municipalities to enter into these agreements. A.R.S. §9-500.05. Under Arizona law, these agreements are binding on successor parties. A municipality is precluded from enforcing regulations or ordinances that are inconsistent with the rights granted by these agreements. *See Home Builders Ass'n of Central Arizona,* 215 Ariz. at 153 (city precluded from imposing development fees on a project subject to a development agreement).

A development agreement typically includes express language regarding the rights established by the agreement. For example, the development agreement at issue in the *Home Builders* case cited above had language very similar to that contained in the 2003 PADA - that the developer has a vested right under the development agreement that is binding upon the parties and their successors. These are common provisions in a development agreement, as they further the desires of the property owner that it obtain assurances that its project or use can continue for the life of the agreement, unencumbered by future regulatory changes.

Where a development agreement grants certain rights to the property owner to use or develop its property in a certain manner, those rights remain valid and enforceable for the life of the development agreement, unless the development agreement is properly amended by mutual consent of the parties and pursuant to the amendment process set out in state statute and the agreement itself. Most statutes and development agreements establish the proper procedure for amending a development agreement that, as a general rule, involves the following:

(1) Mutual consent of both parties to the proposed amendments to the development agreement;
(2) A written amendment to the development agreement;
(3) Approval of the written amendment by some action of the municipal corporate authorities (typically, in the form of a resolution or ordinance); and
(4) Recordation of the written amendment with the county recorder.

As an initial matter, where a development agreement provides a specific procedure to amend the agreement, that procedure must be followed. For example, if a development agreement requires

that an amendment be "by written document executed by Town and Owner" and be recorded within 10 days of the execution of the amendment, then those requirements must be followed to effect a legal and proper amendment.

Equally important is that all parties must mutually consent to amend or cancel a development agreement. *Land Use Law*, §2.03[2][e]. The purpose of the "mutual consent" requirement is to ensure that a development agreement or amendment is the result of a mutual meeting of the minds of the parties to achieve the benefit of both parties' bargaining – the essence of a contract. That is in direct contrast to the unilateral approval of a zoning ordinance by the municipal corporate authorities (such as an ordinance approving an amendment to a PUD). Thus, a municipality cannot force an owner to enter into an amendment to a development agreement.

Moreover, a zoning ordinance does not amend a contract. So, while a municipality may have the authority to adopt an ordinance amending a zoning approval (such as a PUD), and that ordinance may have been properly enacted as a zoning approval, it is not enforceable against the property owner to the extent that it would affect the owner's contractual and vested rights under the development agreement. A zoning ordinance amends a zoning ordinance. A zoning ordinance is not a proper, legal, or enforceable amendment to a development agreement. As a result, the rights and benefits set forth in a development agreement are contractual and vested rights that cannot be repealed, rescinded, superseded, eliminated, or even modified by a zoning ordinance. A municipality has no authority to try to repeal or rescind the contractual and vested rights granted by a development agreement through a zoning ordinance.

In my opinion, the process followed in this case was highly unusual and may have contributed to this dispute. In my practice, the development agreement is negotiated and approved *before* the zoning approval. The reason for that is to ensure that all of the parties' rights and benefits, as well as the parties' obligations, are negotiated and agreed upon by all parties before the municipality approves the ordinance granting the zoning. Similarly, any amendments to that agreement would be negotiated and approved prior to approving any zoning changes. That practice was followed for the initial approvals in this case, where the 2003 PADA that established each party's rights and obligations was approved first, and then only after the contractual rights and obligations were established through the PADA was the 2003 PUD Ordinance approved.

This same process was not followed in 2007, however. Before approving the 2007 PUD Ordinance amending the zoning, the parties did not mutually consent to enter into an amendment to the 2003 PADA. Instead, the Town simply approved the 2007 PUD Ordinance. Where there is no proper amendment to the development agreement, the contractual and vested rights set forth in that agreement remain valid and enforceable, and any subsequent zoning ordinance or regulation that is inconsistent with those rights (in this case, the 2007 PUD Ordinance) is simply not enforceable.

Where a municipality has followed the proper procedure to amend a development agreement in the past (in this case, by approving PADA Amendments 1 and 2), it should be clear that the municipality understands the appropriate form and procedure that must be followed to effect a proper amendment to a development agreement. Certainly, when it approved PADA

Amendments 1 and 2, the Town acknowledged the importance of having mutual consent of the parties, putting the amendment in writing, having that amendment approved by resolution of the Town Council, and recording that amendment with the county. That process was not unfamiliar to the Town, yet there is no PADA Amendment 3. As a result, the contractual rights and benefits granted by the 2003 PADA remain valid and enforceable today (except as expressly amended by PADA Amendments 1 and 2).

A municipality cannot excuse itself from its contractual obligations or rescind a property owner's contractual and vested rights through a zoning ordinance. The purpose of a development agreement is to protect the owner from a municipality taking this exact type of action by vesting the owner's rights to use and develop its property as set forth in that agreement. If municipalities were permitted to modify and even eliminate a property owner's contractual rights through a zoning ordinance, the purpose of a development agreement and the vested rights granted by that agreement would have no meaning or legal effect.

V. Conclusion

A municipality cannot amend or eliminate contractual and vested rights contained in a development agreement through a subsequently enacted zoning ordinance. While a municipality has the authority to adopt zoning ordinances and other regulations, those zoning ordinances and regulations cannot be applied or enforced in a manner that is inconsistent or that would interfere with the contractual rights in the development agreement. Any attempt to enforce a subsequent zoning ordinance against the owner of property subject to a development agreement in a manner that affects the owner's contractual and vested rights would constitute a breach of the municipality's obligations under the development agreement.

V. Materials Reviewed

Materials Provided by Attorneys for Florence Copper, Inc.

The Merrill Ranch Pre-Annexation and Development Agreement, Florence, Arizona, approved by Town of Florence Resolution No. 872-03 on December 1, 2003, and recorded on December 11, 2003. (2003 PADA).

Town of Florence Ordinance No. 356-03, amending the Town's zoning map to rezone property from the AG zone to PUD mixed use zoning, adopted by the Town Council on December 15, 2003. (2003 PUD Ordinance).

Amendment No. 1 to the 2003 PADA, approved by the Town Council on December 19, 2005. (PADA Amendment 1).

Amendment No. 2 to the 2003 PADA, approved by the Town Council on January 3, 2006. (PADA Amendment 2).

Town of Florence Ordinance No. 460-07, amending the Town's zoning map to amend the Merrill Ranch PUD, adopted by the Town Council in 2007. (2007 PUD Ordinance).

Town of Florence Complaint, Case No. CV 2013-02511 (Filed October 14, 2013)

Florence Copper, Inc. First Amended Answer and Counterclaim, Case No. CV 2013-02511 (Filed April 14, 2014)

Town of Florence Reply to Counterclaim, Case No. CV 2013-02511 (Filed June 2, 2014)

Town of Florence Motion for Summary Judgment and Separate Statement of Facts in Support of Motion for Summary Judgment, Case No. CV 2013-02511 (Filed November 10, 2015)

Transcript of 30(B)(6) Deposition of Town of Florence (Mark Eckhoff) (May 23, 2016)

Transcript of Deposition of W. Harrison Merrill (October 21, 2015)

Transcript of Deposition of Janet Lynn Zobel (May 13, 2016)

Research Materials

Callies, Barclay & Tappendorf, *Development by Agreement: A Toolkit for Land Developers and Local Governments* (ABA Press, 2012)

Callies, Curtin & Tappendorf, *Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities* (ELI, July 2003)

Delaney, Abrams, Schnidman, Salkin & Tappendorf, *Handling the Land Use Case*, 3d Ed.

(Thompson Reuters, 2016)

Denzin, Tappendorf et al., *Land Use Law: Zoning in the 21st Century* (Law Journal Press, 2015)

Selmi, "Land Use Regulation by Contract," Loyola Law School Legal Studies Paper No. 2009-51

Home Builders Association of Central Arizona v. City of Maricopa, 158 P.3d 869 (Ariz. 2007)

Cummings v. City of Waterloo, 683 N.E.2d 1222 (Ill. 1987).

Meegan v. Village of Tinley Park, 52 Ill.2d 354 (1972).

Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989)

Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 100 Cal. Rptr. 2d 740 (Cal. 2000).

Reserve at Woodstock, LLC v. City of Woodstock, 2011 IL App (2d) 100676 (2d Dist.).

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 191 Cal. App. 4th 435 (3d Dist. 2010).

Avco Community Developers, Inc. v. South Coast Regional Comm'n, 553 P.3d 546 (Cal. 1976)

VI. Curriculum Vitae

JULIE A. TAPPENDORF
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EXPERIENCE

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago, Illinois
Equity Partner
Co-Chair, Zoning and Land Use Practice Group
November 2007 – Present

- Serve as Village Attorney to the Villages of Gilberts, Lindenhurst, Campton Hills, Cary, and Wadsworth, City Attorney to the City of Park Ridge and counsel to other governments including Glencoe Police Pension Board, Schaumburg and Glenwood-Lynwood Libraries, Reaching Across Illinois Library System, and Library Integrated Network Consortium.

- Represent local governments and developers in all areas of local government law, with a focus on land use and zoning, economic development, zoning litigation, and social media. Advise government clients in all areas of general governance, including ethics, social media, elections, state and federal regulatory, licensing, and constitutional issues including First Amendment, RLUIPA, open meetings and records laws, and employment matters.

- Prepare and negotiate annexation, subdivision, and development agreements and zoning and development approvals, planned unit developments, zoning and subdivision codes, economic incentive agreements, special service area, business district, and TIF financing documents, and real estate contracts and leases. Advise clients on zoning and land use interpretations, development plan reviews, and ordinance enforcement matters.

- Represent municipalities and property owners and developers in zoning and other land use challenges in state and federal courts. Cases include, among others, the successful defense of a municipality in an action by property owners challenging the annexation of their property (affirmed by the Illinois appellate court) and in an action brought by a developer alleging equal protection violations by a municipality in denying its rezoning application for a student housing development. Obtained a dismissal of a First Amendment lawsuit brought by a property owner challenging a municipality's special event zoning ordinance.

Holland & Knight LLP, Chicago, Illinois
Partner, Land Use and Local Government Practice Group,
August 1997 – November 2007

Represent local government and developers in general municipal and local government matters, focusing in the areas of zoning, land use, and land development.

The John Marshall School of Law, Chicago, Illinois
Adjunct Professor, State and Local Government Law Class, January 2005 – May 2008

United States Army, Military Intelligence Branch
Korean Cryptologic Linguist, March 1988 – December 1995 (Active Duty & Reserves)

EDUCATION

William S. Richardson School of Law, University of Hawaii
J.D., 1997 (top 10%)

- Executive Editor of Research, University of Hawaii Law Review
- Recipient of the Michael J. Porter Award for Highest Class GPA, 1996
- CALI Awards for Highest Class Grade: Real Property I, Evidence, Family Law, State & Local Government, and Appellate Advocacy
- Rush Moore Craven Sutten Morry & Bey Award for Scholarly Excellence
- Dean's Scholar, 1994 & 1996
- West Book Award, 1997
- Research Assistant to Property and Land Use Professor (1995-1997)

Illinois State University, B.A., 1985, Comprehensive Social Sciences

SELECTED PUBLICATIONS

BOOKS

Development by Agreement: A Toolkit for Land Developers and Local Governments (ABA Press, 2012) (co-author)

Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities (ELI, July 2003) (co-author)

Handling the Land Use Case, 3d Edition (Thompson Reuters, 2016) (co-author, including authoring Chapter 36A, titled Development Agreements)

Planning and Control of Land Development: Cases and Materials, 9th Edition (Carolina Academic Press, 2016) (co-author, including authoring chapter on planned unit developments)

Land Use Law: Zoning in the 21st Century (Law Journal Press, 2015) (co-author, including authoring chapter on collaborative zoning process and the use of development agreements)

Social Media and Local Governments: Navigating the New Public Square (ABA Press, 2013) (co-author)

CHAPTERS

"Annexation Agreements and Development Agreements," *Trends in Land Use*

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"Subdivisions, Subdivision Controls, and Drainage," *IICLE Municipal Law Series Handbook* (2009, 2011, 2016) (co-author)

"From the Traditional to the More Creative: Incentives for Historic Preservations," *Current Trends and Practical Strategies in Land Use Law and Zoning* (ABA Press, 2004)

"Open Meetings and Records Laws," *Municipal Law Deskbook* (ABA Press, 2015)

"Illinois Freedom of Information Act and Open Meetings Act," *IICLE Municipal Law Series Handbook* (2016) (co-author)

"Turning Vacant Properties into Community Assets through Landbanking," *At the Cutting Edge*, (ABA Press, 2011)

ARTICLES

"Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities after *Nollan and Dolan*," 51 Case Western Reserve L. Rev. 663 (2001) (co-author)

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"Common Zoning Definitions Found Unconstitutional in *TLC v. Elgin,*" Planning & Env. L. Jour., Vol. 66, Issue 7 (2014)

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"Hard Times for Real Estate Developers and the Impact on Municipalities," *Illinois Municipal Review* (March 2008)

"Practical Guide to Drafting Architectural Design Regulations," *The Municipal Lawyer* (March/April 2003)

"Architectural Design Regulations: What Can A Municipality Do to Protect Against Unattractive, Inappropriate, and Just Plain Ugly Structures?" 34 Urban Lawyer 961 (Fall 2002)

"Communicating in an Electronic Age," *Planning Magazine* (APA 2014)

"Ending (Or Avoiding) Commission Wars," *Planning Magazine* (APA 2016)

"10 Guidelines from the PAC on the OMA's Public Comment Rule," *IML Review* (Sept. 2014)

"Religious Land Uses: Practice Pointers for Local Governments," Albany Law School Symposium (2008)

"Attorneys and Social Media: An Ethical Minefield or Professional Boon," *The Municipal Lawyer Magazine* (January/February 2013)

"The Legal Issues Relating to Online Social Networking," *The Reporter* (ILA, February 2013)

"Ethical Considerations in the Use of Social Media for the Land Use Practitioner and Government Lawyer, *The Practical Real Estate Lawyer*, Vol. 29, Number 5 (September 2013)

"To Tweet or Not to Tweet: Use of Social Networking in Land Use Planning and Regulation," Zoning & Planning Law Report (May 2011)

BLOG Author and creator of the blog Municipal Minute, providing updates on cases, laws, and other topics of interest to local governments. (established in 2011) (http://municipalminute.ancelglink.com)

PRESENTATIONS

Frequently present speeches, keynotes, and panel discussions on a variety of local government and land use topics at national and local conferences, including seminars hosted by the following organizations: American Planning Association, ALI-ABA Land Use Institute, the American Bar Association, Illinois Institute for Continuing Legal Education, Illinois City and County Managers' Association, International City/County Management Association, International Municipal Lawyers Association, Illinois Municipal League, Illinois Association of Park Districts, Illinois Library Association, GovTech, and Government Social Media Conference.

BAR AND COURT ADMISSIONS

Illinois State Courts
Northern and Central District Courts of Illinois
Seventh Circuit Court of Appeals
Ninth Circuit Court of Appeals

MEMBERSHIPS

- Faculty Member of the American Law Institute-Land Use Institute.
- Member of the American Planning Association and Serve on the Amicus Committee
- Associate Member of the International Municipal Lawyers Association
- Chair of the American Bar Association Committee on Historic Preservation
- Member of the Home Rule Attorneys' Committee, Illinois Municipal League
- Member of the Legacy Group Advancing Women in Municipal Government
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence,

Plaintiff,

v.

Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al.,

Defendants.

Florence Copper, Inc., fka Curis Resources (Arizona), Inc.,

Counterclaimant,

v.

Town of Florence,

Counterdefendant.

No. CV2015-000325

FCI'S CONTROVERTING STATEMENT OF FACTS

-AND-

SEPARATE STATEMENT OF FACTS IN SUPPORT OF RESPONSE TO THE TOWN'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

FCI's Separate Statement of Facts

1. This dispute involves a 1,182-acre parcel of real property in Florence, Arizona (the "Property") which is currently owned by Florence Copper, Incorporated ("FCI"). (Stipulated Facts, attached hereto as **Exhibit 1**.)

2. The Property sits atop a significant copper oxide deposit located approximately 400 to 1,200 feet below ground (the "Poston Butte deposit"). A current map showing the deposit's location is attached as **Exhibit 2**.

3. The Poston Butte deposit contains an estimated 1.7 billion pounds of recoverable copper. (Florence Copper Project NI 43-101 Technical Report (Mar. 28, 2013) ("FCI Technical Report") at 18, excerpts attached as **Exhibit 12**.)

4. For over forty years, the Property has supported mining exploration and activities. By early 2011, over $50 million had been spent to develop the Property for commercial copper mining. (Memo from Corolla Hoag to Robert Schafer (Sept. 25, 2006) ("Hoag Memo"), attached as **Exhibit 13**, at 3.) Over 800 drill holes totaling 795,480 feet have been drilled there. (FCI Technical Report, **Ex. 12** at 10.)

5. American Smelting & Refining Co. ("ASARCO") is credited with discovering the Poston Butte deposit in the 1960s. (Montgomery & Assocs. Technical Memorandum to Town of Florence (Aug. 31, 2011) (hereinafter "M&A Memo"), attached as **Exhibit 14**, at 5.)

6. Exploratory drilling revealed that the Poston Butte deposit held "very large reserves" of copper which were amenable to high-volume mining. (Conoco Phase III Feasibility Study ("Conoco Feasibility Study"), excerpts attached as **Exhibit 15**, at 2-2.)

7. Mining activities began in earnest in 1969 when Conoco obtained a land position and undertook an extensive exploratory drilling program of the Poston Butte deposit. (*See* Magma Copper Co. 1994 Pre-Feasibility Study ("Magma Feasibility

16. Although the pilot mine is closed, some of Conoco's processing equipment remains on the Property to this day. (FCI Technical Report, **Ex. 12** at 57.)

17. By Phase III, Conoco had invested over $27 million in developing the Florence Copper mining project, exclusive of acquisition costs. (Magma Feasibility Study, **Ex. 16** at 33.)

18. However, falling copper prices made the anticipated $504 million investment economically unfeasible and stopped Conoco from going forward with the project. (Magma Feasibility Study, **Ex. 16** at 34.)

19. Magma Copper Company ("Magma") became interested in developing the copper resources on the Property and purchased it from Conoco in July 1992 for $9 million dollars. (*See* FCI Technical Report, **Ex. 12** at 7.)

20. From 1992 to 1999, Magma and its successor, BHP Copper, Inc. ("BHP") spent another $26 million developing the Property for commercial mining. (Hoag Memo, **Ex. 13** at 3.)

21. Magma was particularly interested in mining the Property using a technique called in-situ copper recovery, or "ISCR," which is uniquely suited for water-heavy, highly fractured deposits that are difficult to mine with more traditional methods, like the Poston Butte deposit. (Magma Feasibility Study, **Ex. 16** at 34.)

22. ISCR is a minimally invasive mining technique that involves drilling holes into the ore deposit and injecting a leaching solution to dissolve the ore content, which is then pumped back to the surface. It allows for the extraction of metals from an ore body without the need for drill-and-blast, open-cut, or underground mining. (*See* FCI Technical Report, **Ex. 12** at 18-24.)

23. In January 1993, Magma began a two-year, $2.6 million pre-feasibility study to determine the best method for mining the Property. (FCI Technical Report, **Ex. 12** at 7.)

24. Magma built on the substantial work done by ASARCO and Conoco to evaluate the Property's potential for commercial-scale copper mining. (*See* Magma Feasibility Study, **Ex. 16** at 367-71 (maps showing locations of Conoco's drill holes, Magma's drill holes, and overlay of Magma's holes on Conoco's previous work).)

25. The results of the pre-feasibility study supported ISCR as the preferred method for mining the Property. (*See* FCI Technical Report, **Ex. 12** at 7.)

26. Based on the Property's positive pre-feasibility study, Magma decided to pursue a $191 million commercial ISCR project, with the goal of achieving full-scale production by January 1998. (*See* Magma Feasibility Study, **Ex. 16** at 13, 208-09.)

27. In January 1995, Magma began its final pre-feasibility study. (FCI Technical Report, **Ex. 12** at 2.)

28. The final study involved gathering the geological, hydrological, and geochemical information needed to permit and operate an in-situ leach mine, as well as obtaining all necessary environmental permits, evaluating and designing the in-situ production wellfield, producing engineering diagrams for the facilities, updating and refining mine plans and financial models, and educating the local community about the Florence Project. (FCI Technical Report, **Ex. 12** at 2, 75-77)

29. A map of Magma's proposed operations is attached as **Exhibit 4.** (*See also* Magma Feasibility Study, **Ex. 16** at 169-173.)

30. In January 1996, while the final pre-feasibility study was ongoing, Broken Hill Proprietary Company Limited of Australia acquired Magma and created BHP. (FCI Technical Report, **Ex. 12** at 7.)

31. That same month, Magma/BHP submitted formal permit applications for ISCR operations on the Property to the Arizona Department of Environmental Quality ("ADEQ") and the Environmental Protection Agency ("EPA"). (*See* ADEQ

103. Indeed, during this same period, Merrill continued to negotiate the sale of the Property to several mining companies. (*See* Merrill Depo, **Ex. 27** at 87:4-8, 98:24—99:6; Various Correspondence Between HDI and Merrill (2006-2007), attached as **Exhibit 37**, at FCI1303804 (proposing that Merrill have the option to repurchase the land after the in-situ copper extraction was complete); *see also id.* at FCI291553 (Merrill: "Let's figure out how to get it done so that we can all do *extremely* well! Then let's move on to 500 TO [sic] 1000 acres at Copper Mountain Ranch (now DesertColor) next to Asarco's huge copper mine.").)

104. As of 2008, when Merrill was in negotiations to sell the Property to HDI-Curis, Merrill thought that he had the option of either mining the Property or pursuing residential development. (*See id.*, **Ex. 37** generally and at FCI291553 ("These [stock options] are major considerations for us in deciding whether or not to go forward with Hunter Dickinson or rather to simply retain our property as high density residential"); Merrill Depo, **Ex. 27** at 58:11—59:5.)

105. In fact, Merrill affirmatively represented to FCI that mining could be conducted on the Property and the adjacent State Trust Land. (Affidavit of Robert Schafer ("Schafer Affidavit"), attached as **Exhibit 38**, at 3; Merrill Affidavit, **Ex. 33** at ¶ 8.)

106. On March 10, 2009, People's Bank foreclosed on Merrill's development holdings, including the Property. (*See* Curis Annual Information Form for year ending March 31, 2011, at 12 ("Curis Annual Information Form 2011"), excerpts attached as **Exhibit 39**.) However, Merrill continued to hold the mineral lease for the State Trust land adjacent to the Property.

107. Between 2003 and 2009 (when he lost the Property in foreclosure) Merrill believed that the Property could be used either for mining or for residential development. (Merrill Depo, **Ex. 27** at 79:12—80:3.)

Zoning Staff Report re: PZC-33-11-MGPA and PZC-32-11-MGPA, excerpts attached hereto as **Exhibit 46**.)

126. On October 20, 2011, Curis informed the Town that it was withdrawing its applications. (FCI1112140-42, Mike McPhie Letter to Mayor Kilvinger (Oct. 20, 2011) attached hereto as **Exhibit 47**; *see also* Magee Affidavit, **Ex. 40** at 4). The Town refused to allow Curis to withdraw its application to create a mining overlay, and subsequently voted to reject that application. (*See* Gallagher & Kennedy Letter to Town Attorney (Oct. 24, 2011) and Town Agenda (Nov. 7, 2011), both attached hereto as **Exhibit 48**.)

127. Since that time, the Town has taken repeated actions in an attempt to prevent Curis from exercising its common law, statutory and contractual rights to conduct mining operations on the Property, including an unlawful attempt to seize the Property through the power of eminent domain. (*See, e.g.*, Ordinance No. 538-12 (banning use of sulfuric acid in in-situ mining, but exempting agricultural uses of sulfuric acid); Ordinance No. 592-13 (purporting to authorize seizure of FCI's Property pursuant to powers of eminent domain), all attached as **Exhibit 49**.)

128. Nonetheless, as of today, the Property remains set up to proceed with commercial ISCR mining where BHP left off: it has buildings and offices, power and communications lines, a laydown yard, graded dirt roads, a core storage building, wells with flow-meters/controllers, pressure transducers and other wellhead equipment, fiber-optic communications to the control trailer, a high-density polyethylene (HPDE) lined solution pond that has remained in use since BHP's ownership, and a tank farm to store necessary chemicals. (Curis Annual Information Form 2011, **Ex. 39** at 20.)

129. FCI has spent over $50 million to date to further the ISCR project on the Property, and has obtained all updated regulatory permits, save for one that is

currently pending. (*See* Town of Florence, et al. v. ADEQ, No. CV-005-WQAB, Testimony of Dan Johnson (Apr. 14, 2014) at 121:4-8, attached as **Exhibit 50**.)

DATED this 8th day of August, 2016.

OSBORN MALEDON, P.A.

By /s/Hayleigh S. Crawford
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This document was electronically filed and copy served via eFiling system and hand-delivered this 8th day of August, 2016, to:

Honorable Roger Brodman
MARICOPA COUNTY SUPERIOR COURT
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Phoenix, Arizona 85003

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MEMORANDUM

To:	Robert Schafer.	
Copy to:		
From:	Corolla Hoag, R.G., Principal Geologist, SRK	
Date:	September 25, 2006	**Project Number:**
Subject:	**Brief Summary of Status of Florence Project**	

This memorandum is in response to a request for a brief summary of the status of the Florence In-Situ Leach Project with commentary on major issues to be considered going forward. SRK does not have in its possession all the documents necessary to verify all of the statements and observations stated herein. This summary is provided based on a limited number of available documents[1] and on personal knowledge for informational purposes only; the statements need to be verified by a thorough document review process. Verification of all technical aspects and a complete summary would be prepared in advance of preparing a scope of work for a final feasibility studies and is outside the scope of this memorandum. Vanguard Properties/Merrill Mining is the current owner of the property. A large number of documents prepared by previous owners of the property and by various environmental consultants are available on site for detailed review. Additional reports and records are available on file with the Arizona Department of Environmental Quality (ADEQ), U.S. Environmental Protection Agency (EPA), Arizona State Mine Inspectors Office (ASMIO), Arizona State Land Department (ASLD), and other governmental agencies.

1. INTRODUCTION

Previous owners Magma Copper Company (Magma) and BHP Copper Inc. (BHP) performed scientific, technical, environmental, engineering, mine planning, and permitting work on the project from 1995 to 1999. Complete descriptions of each aspect of the study can be found in the *BHP Copper Final Pre-Feasibility Study*. Not all of the volumes were finalized by the time BHP ceased operations in 1999, but draft digital versions exist for those that were not completed. The volumes include Volume I Executive Summary (draft only), Volume II Geology (completed), Volume III Environmental Permitting, Legal Affairs, and Community Relations (completed), Volume IV Hydrologic and Metallurgical Evaluations (completed), Volume V Engineering (draft only), Volume VI Mine Facility Design and Financial Analysis (analysis completed, draft text). An addendum report, *Field Test Results*, was in an incomplete draft stage at the end of October 1999 and was not finalized owing to the loss or reallocation of key BHP employees.

The text below is a slightly shortened version of the Executive Summary from the *Final Pre-Feasibility Study*. Section 12 provides conclusions and recommendations based on

[1] A large portion of this memorandum is taken directly from the draft Volume I Executive Summary from the BHP Copper *Final Pre-Feasibility Report*, which was originally co-authored by C. Hoag.

leaching, and (2) in-situ solution mining followed by solvent extraction and electrowinning (SX-EW) to produce copper cathode. The outcome of this study was that in-situ solution mining, followed by SX-EW processing, was the preferred operational method. The pre-feasibility study expended approximately $2.2 million. From 1992 to July 1999, $26 million (excluding acquisition costs) was spent to complete the final pre-feasibility studies, permit-related activities, and the leach test. After 1999, the primary costs have likely been the mineral lease rental fee, property taxes, site maintenance, and groundwater quality compliance monitoring and reporting costs.

1.4 RESULTS TO DATE

The geoscience work completed to date is sufficient to characterize the Florence deposit including geology, mineral resources, and ore body geometry. The hydrological tests were sufficient to produce an initial hydrologic model and provided technical data for the environmental permitting process and field test activities. Metallurgical column and field tests, designed to determine leaching characteristics, give an estimate of copper recovery on several ore types. All permits, licenses, and authorizations required by federal, state, and county agencies were (and probably still are) in place for the beginning of construction and operation. Some minor permits are still required and would be acquired during final engineering. Certified preliminary drawings by Fluor Daniel Wright (FDW) of Vancouver were prepared for the in-situ leach and solvent extraction and electrowinning production facilities at Florence. A financial analysis generated by BHP in 1999 using their integrated mining-processing shared infrastructure indicated that the project would generate a return-on-investment of more than 20 percent (owing to the low operating costs). There was (and likely still is) positive local support for the mine operation.

1.5 CONFIRMATION FIELD WORK

A multi-month, field optimization leach test was conducted in 1997-1998 to gather copper recovery and other technical data for final feasibility. The field test area was placed within the area proposed as the first mining block in the southwest portion of the deposit. The site was selected because it met numerous design criteria such as:

- typical depth of 400 feet to the top bedrock,
- typical ore thickness of approximately 400 feet,
- ore-type dominated by chrysocolla on fractures in highly fractured host rock,
- area where 40 gpm can be pumped from recovery wells, the injection rate is <0.75 psi/foot, and the area has above average conductivity (K > 0.25 ft/day), and
- location far from west graben edge, major faults, underground workings, archaeological ruins, canals, and other infrastructure.

Twenty wells were drilled in 1996 and 1997, and piping was installed to the plant facilities. The leach test consisted of four five-spot cells (four injection and one production wells), eight perimeter recovery wells, six observation wells, and two wells for monitoring geochemical reactions (Figure 1). The field test was a critical element in testing actual copper recovery, understanding of the nature of fluid flow at Florence, verifying hydraulic control, and developing experience and cost data on well construction and well spacing. All of these are important in developing a mine and engineering plan for the operation.

In The Matter Of:

In The Matter of the Application of Curis Resources

Peter Anthony Kelm

Vol. 1

May 22, 2013

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

IN THE MATTER OF THE APPLICATION OF CURIS RESOURCES (ARIZONA), INC. FOR THE PERPETUATION OF TESTIMONY BEFORE ACTION	No. CV 2013-00205

VIDEOTAPED DEPOSITION OF PETER ANTHONY KELM

VOLUME I

Florence, Arizona
May 22, 2013
1:26 p.m.

REPORTED BY:
PAMELA A. GRIFFIN, RPR, CRR
Certified Reporter
Certificate No. 50010

PREPARED FOR:
CONDENSED/ASCII

(Certified Copy)

I N D E X

E X H I B I T S

VIDEOTAPED DEPOSITION OF PETER ANTHONY KELM was taken on May 22, 2013, commencing at 1:26 p.m. at Florence Copper, 1575 West Hunt Highway, Florence, Arizona, before PAMELA A. GRIFFIN, a Certified Reporter in the State of Arizona.

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Mr. Dan Johnson
Curis Resources

Ms. Heather Harpest
Francis J. Slavin, PC
Paralegal

Mr. Craig Onuschak
Legal Video Specialists
Video Technician

Q. -- test facility?
A. Yes.
Q. Okay. The F -- and so you began working around, you think, Thanksgiving. And then at some point in time, my understanding is you were laid off?
A. Yes.
Q. And approximately when did that occur?
A. It -- from your data, approximately March of 1998.
Q. And do you recall the circumstances under which you were laid off by BHP Copper?
A. The price of copper dipped below 70 cents a pound, and BHP cut their losses and shut the money off for this project.
Q. And at that point in time, then, your job was eliminated; is that correct?
A. Yes.
Q. And then at some point in time, my understanding is you came back into the employment of BHP Copper at this particular site?
A. Yes.
Q. And approximately when did that happen?
A. Approximately the end of 1998, early 1999.
Q. And did you continue doing -- at that time, what work were you doing? Were you doing work in the test

Q. So Mr. -- and was Mr. Kline sort of the overall big boss?

A. He was the -- you would call him the project manager.

Q. Okay. And then Mr. McBroom worked under Mr. Kline?

A. Yes.

Q. And Mr. McBroom was in charge of basically the day-to-day operations both at the office and in the well field?

A. Yes.

Q. And then you in turn worked for Mr. -- or under the supervision of Mr. McBroom?

A. Yes.

Q. So after Mr. Sichling left and you were working on sort of the daily -- the daily monitoring and testing work, is that something that you continued to do until the property was sold to Merrill Mining or Vanguard Properties?

A. Yes.

Q. I think you testified that Mr. McBroom left BHP Copper sometime in December of 2001; right?

A. Yes.

Q. And after that period of time, after Mr. McBroom left and after Vanguard purchased the mining property,

were you hired by Vanguard to continue working on this project?

A. Yes.

Q. And -- and the activities that -- that you were hired to perform, were those similar to the activities that you were previously performing for BHP Copper?

A. The very same.

Q. And -- and you were paid by Vanguard for your services; correct?

A. Yes.

Q. And at some point in time, Vanguard lost the property to a foreclosure.

Do you recall that?

A. Yes.

Q. And up to the period of time when -- from December 2001 up to the period of time that Vanguard lost the property to foreclosure, were you continuously employed by Vanguard Properties here at the site to perform monitoring and testing?

A. Yes.

Q. And the -- after the foreclosure, did you continue to still perform your activities and your duties at the site?

A. To the best of my financial ability.

Q. And who -- who owned the property after Vanguard

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

IN THE MATTER OF THE APPLICATION OF CURIS RESOURCES (ARIZONA), INC. FOR THE PERPETUATION OF TESTIMONY BEFORE ACTION	No. CV 2013-00205

VIDEOTAPED DEPOSITION OF PETER ANTHONY KELM

VOLUME II
(Pages 160 - 255, inclusive.)

Florence, Arizona
May 23, 2013
1:03 p.m.

REPORTED BY:
PAMELA A. GRIFFIN, RPR, CRR
Certified Reporter
Certificate No. 50010

PREPARED FOR:
CONDENSED/ASCII

(Certified Copy)

I N D E X

E X H I B I T S

Deposition Exhibits:	Description	Page
(None marked)		

VIDEOTAPED DEPOSITION OF PETER ANTHONY KELM was taken on May 23, 2013, commencing at 1:03 p.m. at Florence Copper, 1575 West Hunt Highway, Florence, Arizona, before PAMELA A. GRIFFIN, a Certified Reporter in the State of Arizona.

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Ms. Heather Harpest
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Paralegal

Mr. Craig Onuschak
Legal Video Specialists
Video Technician

Q. Okay.
A. To the best of my -- you know, my memory.
Q. And Mr. Slavin also told you that your testimony could help establish the continuation of the legal nonconforming use; is that right?
A. Yes.
Q. And you were going to do that by verifying the logbooks?
A. Verify the entries in the logbooks, yes.
Q. Now, you don't have any independent opinion as to whether or not the use of the property for in-situ mining would be a legal nonconforming use, do you?
A. I -- I feel -- I feel that the nonconforming use has not been abandoned.
Q. Why do you feel that way?
A. Because I've been here all the time, and the -- the duties that I did never stopped until -- well, part of the duties stopped when I went to work for the Town of Florence. And then finally the last ones were on September the 20th, 2012.
Q. When was the last time there was any active in-situ mining occurring on this property?
MR. SLAVIN: Object to the form.
BY MR. KRAMER:
Q. You may answer.

A. Oh. If -- the -- everything that I was doing was part of an active use of the permit.

Q. Did anybody tell you to say that?

A. No.

Q. All right. It was part of what the permit required; correct?

A. Yes, it did.

Q. And you did the minimum that the permit required; correct?

A. Yes.

Q. And that would have been necessary regardless of the use that was being made of the properties; correct?

A. Yes.

Q. So in other words, if you wanted to build houses on this property, you would still have to comply with the requirements of the permit as far as testing and monitoring the wells; would you agree?

MR. SLAVIN: Object to form.

BY MR. KRAMER:

Q. You may answer.

A. You would have to continue to do the monitoring and testing until you closed the mine.

Q. When was the last time that any copper, pregnant copper solution was extracted from this property to the best of your knowledge?

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

Town of Florence, an Arizona municipal corporation, Plaintiff, vs. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation; RK Mine Finance Trust 1, a trust organized under the laws of the New South Wales, Australia; and Pinal County, Arizona. Defendants.	CIVIL ACTION NO. CV 2015-000325
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation, Counterclaimant, vs. Town of Florence, an Arizona municipal corporation, Counterdefendant.	

DEPOSITION OF
W. HARRISON MERRILL
OCTOBER 2, 2015
10:11 A.M.
Atlanta, Georgia

Job no. 264865

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Hugh Nowell, Esq.
Rita Maguire, Esq.
Ervin Farkas, Videographer

- - -

zoning of the property and we liked the larger properties that would be generational in nature. I have five kids so I was thinking generationally and we would get the best entitlements that we possibly could so that those entitlements would leave flexibility for different market conditions in the future.

Q. So by "generationally," you mean you're looking at developments that could play out over 15, 20, 30 years?

A. Yes.

Q. Okay. If you look at -- you'll see at the bottom right-hand corner there are some numbers that we call Bates numbers.

A. Yes, sir.

Q. So I'm on the page that has a Bates number 2224 and at the top it talks about 900 acres in Dynamite Mountain. That's the one.

A. Yes, sir.

Q. And if you look down at number five, number five talks about a 500-acre BHP Copper mine and it says that an affiliate of the Trust owns the 500-acre BHP Copper mine near Florence, Arizona which contains over one billion pounds of copper and then it talks about how the predecessor had developed that property

and that the Trust was planning to ultimately joint venture the development of the copper mine with a large copper mining company of the Trust. Now, copper mines are not master plan communities. How did you get into the copper mine ownership business?

A. Just one moment. Let me just read this.

Q. You can absolutely.

A. I would like to re-familiarize myself. Yes, sir. I can't remember. I think it was 2002, 5,500 acres that later became -- that this property was part of became available. Actually the property north of it became available. There were a number of different home building companies that were vying for it and it was -- the northern part of this property was already zoned as a master plan community. Not the way we wanted it zoned but it was already zoned and we were fortunate enough to be selected as the group to be able to buy that property so we bought the 5,000 acres which later became Merrill Ranch and then BHP Copper which owned it -- BHP had, as I recall, come into the United States and they bought a company called Magma Copper and Magma Copper ended up being a very poor investment I think. They put in 2 billion and lost 4 billion because of certain closure activities and other things. That's the way it was

recounted to me. Whether that's an exaggeration or not, I don't know. But we bought it from BHP. They had decided to get out of the copper business and maybe the mining business altogether in the United States. They wanted to sell the property. They were selling it I thought very reasonably and as I say, we were fortunate enough in a beauty contest to be selected rather than the other competitive bids. When we closed on the first 5,000 acres, they owned an additional 3,700 acres as I recall which this 500-acre tract would be part of and I went in and I told them I'd like to buy that property too to make a larger master plan community and over a period of nine to 12 months, we were able to get the assignment of a copper lease which took a long time with the state of Arizona and we bought the 3,700 acres so we had a total of 8,700 acres but this property we'll refer to, if you would, as the south portion which was the property that contained the copper.

Q. Okay. So on this list you have here -- on number 4, there is a thousand-acre Merrill Ranch master plan community adjacent to the 5,500-acre Roadrunner Estates Master Plan Community. So that was the portion of the property that BHP owned that was a master plan community.

A. The 5,500 acres was a master plan community. The thousand acres refers to the southern part of the property, a part of the southern -- part of the 3,700 acres. We then sold 700, 800 acres to an aggregate company.

Q. Okay.

A. So that we had a total of 8,000 acres but that thousand acres would refer to the property I think around the 500-acre copper mind.

Q. Okay. By an aggregate company, the southern part of the property I think has the Gila River, the dry riverbed running through. This was a sand and gravel company I think that purchased it.

A. Yes, sir.

Q. Okay. But at least on this document you break out the master plan community from the property that you refer to as the BHP Copper mine.

A. Right. Actually we divide it. Looks like in the three parts, one would be the 5,500 acres I mentioned at first which we purchased initially and then the thousand and the 500 referred to in 4 and 5 on that page would be part of the 3,700 hundred acres that we acquired.

Q. Okay.

A. I don't know what happened to the rest of

it. We sold 700 but it looks like there's still about 1,500 acres less than we owned.

Q. All right. Let's move a little further in the document and I want you to -- if you look down at the bottom right-hand page, I'm going to a document that's marked 2228.

A. Yes, sir.

Q. And this is just a schedule. We are trying to provide some estimate of the market value of an asset and what its net worth might be after the mortgages and I want you to look down here. You see you list the 1,500-acre Merrill Ranch and copper mine in Pinal County.

A. Yes, sir.

Q. You see that?

A. Yes, sir.

Q. And you have a market value of nineteen five, 19.5 million.

A. Yes, sir.

Q. A mortgage of 1.3 million and a net worth at 18.2.

A. Yes, sir.

Q. Okay. And then turn to the next page and again, you see you have the BHP Copper and I assume that's referring to all the land you purchased from

BHP Copper?

A. Yes, sir. That would be both tracts.

Q. Okay.

A. Again, the purchase was in two tracts even though it lists more tracts. One was the northern, the 5,500 acres and then the rest was the southern portion that included the copper.

Q. All right. And if you'll turn to the next page, this is actually going to be your curriculum vitae as of September 2003. Is that what it appears to be to you?

A. Yes, sir.

Q. And it sort of lists your background and the projects you are involved in as to that period of time, right?

A. Yes, sir.

Q. And you'll see in the second paragraph you indicated that you acquired significant amount of properties in metropolitan Phoenix and other urban areas making the Trust the largest single owner of entitled lots in Arizona.

A. Yes, sir.

Q. Okay. And you see you have some bullet points down there. The second from the bottom is the 500-acre BHP Copper site containing 1.1 billion

Q. Okay. I just wanted at this point to clarify just the corporate entities that were involved in the mining project and of course you have a large variety of entities because of the different projects but Florence Copper, do you recall that entity?

A. Yes, sir.

Q. And Florence Copper had the state mining lease.

A. Yes, sir.

Q. Did it hold any other property or just the state mining lease?

A. I believe just the state mining lease.

Q. And it was created just for that sole purpose?

A. Well, it already owned it and as I recall, we bought the stock in Florence Copper from BHP.

Q. All right. I'm with you. You had another entity called Merrill Mines and --

A. Merrill Mining.

Q. Merrill Mining?

A. Yes, sir.

Q. What was Merrill Mining created for?

A. It owned the stock in Florence Copper so Florence Copper owned the stock in the mine; Merrill

Mining owned the stock in Florence Copper.

Q. Okay.

A. Owned Florence Copper, might be a better way to put it.

Q. When your company acquired all this property from BHP, you also acquired a lot of -- I'm going to call it intellectual property but you acquired core samples, all their scientific information with respect to the pilot projects. Was that held in Merrill Mining or was that held in another entity?

A. No. Everything we acquired would have been held in Florence Copper and we just simply left it there and Merrill Mining owned Florence Copper.

Q. Okay. And then finally we have -- actually what might help you, if you turn to tab 8. Maybe we can just orientate. You spent a lot of time in Arizona and you were out on the Hunt Highway a fair amount, I take it?

A. I was.

Q. All right. So you're familiar with the area.

A. Yes.

Q. So Exhibit Number 8 just in terms of -- what is Exhibit Number 8? What area of property is

decided to close but I don't know that we carried through with it and we might have decided just to continue to monitor. Again, 2005 was kind of the -- late 2000 -- 2005 was the height of the market but it was also at the end of 2005 was the subtle beginning of the end of the fabulous market out in Phoenix.

Q. Okay.

A. Excuse the long answer to a short question. Did I answer your question?

Q. You did; you did.

A. Okay.

Q. Well, let me just ask you this. Do you recall that the mine never was closed?

A. Yes, sir. It was not closed.

Q. Let's turn to Exhibit 12. Exhibit 12 is a letter from Ms. Jan Dodson to Mr. Larry Quick, the planning director of the Town of Florence and do you recall what this letter was about?

A. If you don't mind, let me read it and see if I can recall.

Q. Please, go ahead.

A. I don't recall the letter specifically but it certainly brings up what was going on I think at that time.

Q. All right. Let me see if I can put it in

for a whole series of different things you were doing?

A. It was basically to refinance what we had. I believe it was a $50 million loan and it took it down to bank rates which was very advantageous to us and also to give us additional capital to be able to use in Merrill Ranch and other things.

Q. Okay. So this is in September of '06. I want you to turn to Exhibit 14.

A. Yes, sir.

Q. Okay. So Exhibit 14 is going to start a series of letters. It's going to go all the way to 2009 regarding discussions between Hunter Dickinson and Vanguard Properties, Inc., and Merrill Mining about buying the Florence Copper project.

A. Yes, sir.

Q. Okay. This particular letter is dated November 21st, 2006. Do you have any recollection of what started this communication with respect to buying the mine?

A. Either Adrain or I got a call from Hunter Dickinson. I don't know if it was Robert Schafer or not indicating an interest in the purchase of the mining property and this I think helps frame that time frame.

(Whereupon, the record was read by the court reporter as follows:

Question: "I don't think I thought about it much one way or the other. My feeling was that the -- let me express it a different way. My feeling was that the property could be mined. Whether or not it was a right or was something I thought that could be done in conjunction with the state lease, I didn't have much doubt about at all and Hunter Dickinson was in a much better position to determine that than I was.")

BY MR. CAMPBELL:

Q. All right. You had no doubt you could mine the land.

A. I felt like we could; yes, sir.

Q. You would agree with me that the ability to mine the land is a material fact with respect to a negotiation between you and Hunter Dickinson about their buying the land for mining purposes?

MR. KRAMER: Object to form.

THE WITNESS: Yes. I mean, they would not have bought the land from us if they didn't feel like they could mine it certainly.

BY MR. CAMPBELL:

Q. And if you had any concern whether you

A. Yes, sir.

Q. So what's your recollection of what led up to these enhanced entitlements in 2007?

A. As I recall, adjacent property -- the plan for the Town at least for Mayor Rankin who thought long term for the Town was that they would go through Merrill Ranch and annex as much additional property as it made sense for them to annex so that they would have a seat at the table for the Maricopa council or governments or whatever it was called and in that process, they annexed other property and actually gave that other property more density than they gave us so we went back and said hey, we need that density also to give us the flexibility that if the market demands then we've got the most density that we can reasonably develop on the property and you've given it to the others. Why don't you give it to us. And again, once we went through the process of the initial annexation with the Town, they were very reasonable. They listened to us. They could be stubborn. We could be stubborn but it was -- it was a good relationship, very communicative, and Adrain largely carried that burden for us and then when I would come out and it would be appropriate then I would meet with Mayor Rankin and sometimes with the

other folks and if they were frustrated, I'd also meet with them to see if we could break whatever logjam there was. So they ended up giving us -- they weren't required to do it but they ended up giving us the density that matched the density that they were giving the others and that was the genesis of the second pre-annexation or the first pre-annexation amendment. I don't know how many amendments there were but this, as you said, was the main one. Does that --

Q. It does.

A. Okay.

Q. So as the owner of the property, you gained some valuable stuff with this new planned unit development agreement.

A. Yes, sir.

Q. You got increased density, correct?

A. Yes, sir.

Q. What's the value -- what's CFD bonding capacity?

A. That's Communities Facility District bond capacity and authorization. It simply meant in our agreement that we got reimbursements for the dedicated public infrastructure that we dedicated to the CFD or Community Facility District. We got

ourselves. Now, Adrain may have had discussions with the Town but I doubt very seriously if I would have had.

Q. Fair to say that in your opinion nothing with respect to the July 2007 development plan affected your ability to continue negotiations with Hunter Dickinson for the sale of the mine?

A. I mean, we obviously continued negotiations so I don't see that it would have had any effect in our discussions with them.

Q. All right. Fair to say that you didn't think anything was done that took away your rights to sell the property as a mining property?

MR. KRAMER: Object to form.

THE WITNESS: As I said, we always thought that it could be mined and that if there was a problem, there wouldn't be a problem with the Town. We never thought that that would be an issue.

BY MR. CAMPBELL:

Q. All right. Now, let's put this book aside and go back to the other book. If you want to hand it to me, I'll put it down for you.

MR. KRAMER: And I don't mean to be rude but one thing I would like to just ask counsel

rights listed including mining. Do you recall that as well?

A. Yes, sir.

Q. Now, in 2007 the planned unit development or PUD was amended, correct?

A. There were two amendments. One of them was in 2007, yes, sir.

Q. And the other one was 2005 dealing with North Village, I believe?

A. I believe it was; yes, sir.

Q. Okay. And in the 2007 master development plan amending the 2003 PUD, all references to non-conforming uses including mining are deleted. Are you aware of that, sir?

A. Yes, sir. I was told of that.

Q. Do you know that of your own personal knowledge?

A. Again, when we got it, it wasn't really an issue from our perspective so there was really no discussion with the Town about whether it would be kept or it wouldn't be kept. It just -- we were looking for higher destiny. That was the focus of what we were doing and also flexibility.

Q. And higher density and flexibility would have been inconsistent with an in situ mining

part of the property north of Hunt Highway.

A. I think that it referred to the 5,500 acres which was the northern property.

Q. Okay. Now tab 4, the ordinance -- let's see if I can get the right one here. Are you on tab 4?

A. I've got it. Yes, sir.

Q. Okay. Twenty-three says the Town and the owner agree to work together in good faith to modify any applicable portions of the Merrill ranch development agreement that may be found to be in conflict with the PUD amendment approval. Do you see that?

A. Yes, sir.

Q. All right. Did the Town ever -- okay. Strike that. Realizing -- you realize the 2003 PADA recorded the 2003 property unit development agreement.

A. Yes, sir.

Q. Did the Town ever come to you and say we want to enter into negotiations with you to drop any of your rights to mining because we think it is inconsistent with the 2007 planned unit development agreement?

A. Well, I think as I've said before, I don't

think there was any discussion of that one way or the other.

Q. All right.

A. At any point that I can recall.

Q. Right. But the answer to my question would be yes, wouldn't it, that they never came to you and said we think there's an inconsistency between the 2007 master unit agreement and your right to mine and we want to enter into negotiations and resolve that. That never happened?

MR. KRAMER: Object to form.

THE WITNESS: No.

BY MR. CAMPBELL:

Q. No, it never happened?

MR. KRAMER: Object to form.

THE WITNESS: No discussions I think from day one all the way through now with the Town from my perspective.

BY MR. CAMPBELL:

Q. And you've heard the expression, If you believe that, I'll sell you the Brooklyn Bridge. Have you ever heard that expression before?

A. Yeah. I thought it was the London Bridge.

Q. The London Bridge. Okay.

A. There you go.

MERRILL MINING, LLC

PMB 315
3232 Cobb Parkway
Atlanta, Georgia 30339
404-495-9577 Fax: 404-495-9578

W. HARRISON MERRILL
PRESIDENT

July 26, 2001

LTF

VIA CERTIFIED MAIL

Mr. Eric Wilson
Manager, Mining Unit
ADEQ
Aquifer Protection Program
3033 North Central Avenue, 4th Floor
Phoenix, Arizona 85012

Re: Aquifer Protection Permit No. P-101704 - Request for a Permit Transfer

Dear Mr. Wilson:

This letter formally requests that ADEQ transfer Aquifer Protection Permit P-101704 from BHP Copper Inc. ("BHP") to Florence Copper Inc.

Currently, BHP's Florence Division operates the facility regulated by Permit No. P-101704. The facility is located at 14605 East Hunt Highway, Florence, Arizona. On or before August 30, 2001, BHP's Florence Division will transfer its assets and liabilities to Florence Copper Inc., a wholly owned subsidiary of BHP. After the transfer, Florence Copper Inc. will assume responsibility and liability for Permit No. P-101704. All specific conditions, permitted activities, discharge limitations, monitoring requirements, contingency plan requirements, and reporting requirements will remain unchanged. Concurrent with the transfer and consistent with the terms of an already executed Stock Purchase Agreement, BHP will transfer 100% of its stock in Florence Copper Inc. to Merrill Mining, L.L.C. ("Merrill"). To comply with A.A.C. R18-9-A212, this letter transmits:

1. A written agreement between BHP, Florence Copper Inc., and Merrill indicating that the parties intend to transfer all permit responsibility, coverage and liability on August 30, 2001, attached hereto as Exhibit 1.

2. A signed declaration by the new permittee that the permittee has reviewed the permit and agrees to be bound by its terms, attached hereto as Exhibit 2.

3. The applicable $1,000.00 fee set forth in A.A.C. R18-14-104, attached hereto as Exhibit 3.

4. A copy of the certificate of disclosure required by A.R.S. § 49-109, attached hereto as Exhibit 4.

5. A demonstration of technical capabilities, attached hereto as Exhibit 5.

6. A demonstration of financial capabilities, attached hereto as Exhibit 6.

To comply with the technical requirements of Permit No. P-101704, Merrill has contracted with Brown & Caldwell, a mining and environmental engineering firm familiar with the facility's operations and permit obligations. A copy of the contract is attached as Exhibit 5.

The documents attached to this letter as Exhibit 6 demonstrate that Florence Copper Inc. has the financial capability to perform the terms of Permit No. P-101704. Merrill, as the sole owner of the common stock of Florence Copper Inc., will enter into an agreement with Roadrunner Resorts, L.L.C. ("Roadrunner"). The terms of the agreement obligate Roadrunner to advance Merrill up to $6 million to cover the operating and closure costs of Florence Copper Inc. as set forth in the Aquifer Protection Permit, Mined Land Reclamation Plan and Underground Injection Control Permit. The agreement is secured by a Deed of Trust.

Merrill will provide the Arizona Department of Environmental Quality ("ADEQ") with a copy of the executed agreement and Deed of Trust on or before August 30, 2001. Merrill and BHP request that ADEQ release BHP's financial assurance upon receipt of the fully-executed agreement and Deed of Trust.

As previously mentioned, we would like this transfer and release of BHP's financial assurance to occur on or before August 30, 2001. To that end, we would appreciate if ADEQ could process this request as expeditiously as possible.

Should you have any questions regarding this request for a transfer or require any further information, please call Mr. Charles Taylor at (520) 498-4101 or Mr. Harrison Merrill at (404) 495-9577. Thank you for your cooperation on this matter.

Very truly yours,

MERRILL MINING, L.L.C.

W. Harrison Merrill
President

115716/313689.01

DiTullio, John D. (PHX)

From: Jan Dodson [jandodson@vanguardaz.com]
Sent: Thursday, February 22, 2007 10:41 AM
To: 'Mark Eckhoff'
Cc: 'Himanshu Patel'; 'James Mannato'; 'Gilbert Olgin'; jhagan@merrilltrust.com; DiTullio, John D. (PHX)
Subject: RE: RE: Merrill Ranch PUD Stipulations as of 2-15-07

Hello Mark,

We do want to go forward to Council on 3/19, and of course we want to talk through the remaining issues with Town staff as soon as possible. Let's please plan on the 3/19 Council meeting, and today or tomorrow we will discuss the latest revised stipulations with Harrison in detail, and then I will call you to let you know where he stands. From this point, we can decide whether a group meeting will be productive.

Also, I wanted to let the Town know that we have officially changed our company name to "Merrill Trust Communities and Resorts, LLC", so in future correspondence, submittals, etc. this is the company name that will appear.
Talk to you soon.

Jan

-----Original Message-----
From: Mark Eckhoff [mailto:marke@town.florence.az.us]
Sent: Wednesday, February 21, 2007 5:34 PM
To: jandodson@vanguardaz.com
Cc: Himanshu Patel; James Mannato; Gilbert Olgin; jhagan@merrilltrust.com; ditullioj@ballardspahr.com
Subject: RE: RE: Merrill Ranch PUD Stipulations as of 2-15-07

Jan-

We have not advertised for 3/19 and are running out of time to go that direction. I thought it would be good if we tried to work through these last few issues and then tried to get a favorable recommendation from the PZC. I would prefer not to advertise for either a PZC or TC meeting until we have had an opportunity to talk. However, if you would simply like to go to Council before we can make more progress, I'm sure we can accommodate that game plan as well.

The Master Plan for the project, a.k.a., the PUD development Guide is part of the Development Agreement. We are discussing major changes to the project and we should be working together to make this all work out. Remember this is a two-way effort in the mutual interest of the Town and the owner.

I can try and gather the group sooner than 3/14, but give me more insight on the direction you want to take and if we meet, let's make it productive.

Thanks.

Mark Eckhoff, AICP

Planning Director

Town of Florence

PO Box 2670

775 North Main Street

Florence, AZ 85232

(520) 868-7540

(fax) 868-7564

www.town.florence.az.us

-----Original Message-----
From: jandodson@vanguardaz.com [mailto:jandodson@vanguardaz.com]
Sent: Wednesday, February 21, 2007 5:14 PM
To: Mark Eckhoff
Cc: Himanshu Patel;James Mannato;Gilbert Olgin;jhagan@merrilltrust.com;ditullioj@ballardspahr.com
Subject: RE: RE: Merrill Ranch PUD Stipulations as of 2-15-07

Hello Mark,

I think we should really try to meet earlier, if we are going to be scheduled for the 3/19 Council Agenda. We have been shooting ourselves in the foot when we wait until a few days before the meetings to work through remaining issues. I know how busy everyone is on your end, and on our end as well, but this deserves more serious discussion, next week or early the following week if at all possible.

There are only a handful of stipulations left to work through, and the few that effectively change our approved and recorded Development Agreement with the Town are the sensitive ones. We feel that we shouldn't even be discussing changes to our DA while in the process of hearing our PUD Amendment application. The Town Staff, Council and Mayor were in agreement with our DA and Amendments to our DA at the time they were approved, so why are these issues coming up now, and why are they holding us back from getting our PUD Amendment processed as a stand alone zoning document? We have not made an application requesting any changes to our DA.

Let us know if you are able to find a time to meet within the next week or so, Mark. Thank you very much.

Jan

> From: "Mark Eckhoff" <marke@town.florence.az.us>
> Date: 2007/02/21 Wed PM 05:53:09 EST
> To: "jandodson@vanguardaz.com" <jandodson@vanguardaz.com>
> CC: "Himanshu Patel" <hpatel@town.florence.az.us>,
> "James Mannato" <jamesm@town.florence.az.us>,
> "Gilbert Olgin" <gilberto@town.florence.az.us>,
> "jhagan@merrilltrust.com" <jhagan@merrilltrust.com>,
> "ditullioj@ballardspahr.com" <ditullioj@ballardspahr.com>
> Subject: RE: RE: Merrill Ranch PUD Stipulations as of 2-15-07
>
> Jan-
>
> Would 3/14 at 1pm work for you and your group? If that is too late, we
> can
try and work in something earlier.
>
> Mark Eckhoff, AICP
>
> Planning Director
>
> Town of Florence
>
> PO Box 2670
>
> 775 North Main Street
>
> Florence, AZ 85232
>
> (520) 868-7540
>

> (fax) 868-7564
>
> www.town.florence.az.us
>
>
> -----Original Message-----
> From: jandodson@vanguardaz.com [mailto:jandodson@vanguardaz.com]
> Sent: Wednesday, February 21, 2007 12:10 PM
> To: Mark Eckhoff
> Cc: Himanshu Patel;James Mannato;Gilbert
Olgin;jhagan@merrilltrust.com;ditullioj@ballardspahr.com
> Subject: Re: RE: Merrill Ranch PUD Stipulations as of 2-15-07
>
> Mark - congratulations on the move. They are always better when they
> are
over!! Yes, we can meet the first week of March. Let us know which day works best on
your end. Thank you, Mark.
>
> Jan
>
> >
> > From: "Mark Eckhoff" <marke@town.florence.az.us>
> > Date: 2007/02/20 Tue PM 08:34:45 EST
> > To: "jandodson@vanguardaz.com" <jandodson@vanguardaz.com>
> > CC: "Himanshu Patel" <hpatel@town.florence.az.us>,
> >   "James Mannato" <jamesm@town.florence.az.us>,
> >   "Gilbert Olgin" <gilberto@town.florence.az.us>
> > Subject: RE: Merrill Ranch PUD Stipulations as of 2-15-07
> > >
> > Jan-
> > >
> > Maybe we can set up another meeting soon to go over the last
> > remaining
issues on the stipulations. It would be nice to iron these out and move forward on this.
> > >
> > In any case, my department is packing up and moving across the
> > street
this week and next. Planning is closed completely this Friday. If you and your team wish
to meet, perhaps we could do so the first or second week of March.
> > >
> > Thanks.
> > >
> > Mark Eckhoff, AICP
> > >
> > Planning Director
> > >
> > Town of Florence
> > >
> > PO Box 2670
> > >
> > 775 North Main Street
> > >
> > Florence, AZ 85232
> > >
> > (520) 868-7540
> > >
> > (fax) 868-7564
> > >
> > www.town.florence.az.us
> > >
> > >
> > -----Original Message-----
> > From: jandodson@vanguardaz.com [mailto:jandodson@vanguardaz.com]
> > Sent: Tuesday, February 20, 2007 6:18 PM
> > To: Mark Eckhoff
> > Subject: Re: Merrill Ranch PUD Stipulations as of 2-15-07
> > >

> > Mark - thank you for forwarding the revised Stipulations to us.
> > Talk to
you soon.
> >
> > Jan
> >
> > >
> > > From: "Mark Eckhoff" <marke@town.florence.az.us>
> > > Date: 2007/02/20 Tue PM 08:04:37 EST
> > > To: "DiTullio, John D. (PHX)" <DiTullioJ@ballardspahr.com>,
> > >   "jandodson@vanguardaz.com" <jandodson@vanguardaz.com>,
> > >   "Nick Gage" <NGage@jackjohnson.com>,
> > >   "Adam Shellenberger" <AShellenberger@jackjohnson.com>,
> > >   "Kay Bigelow" <kbigelow@gblaw.com>,
> > >   "Steve Tomita" <steve@omegams.com>
> > > CC: "Himanshu Patel" <hpatel@town.florence.az.us>,
> > >   "Gilbert Olgin" <gilberto@town.florence.az.us>,
> > >   "James Mannato" <jamesm@town.florence.az.us>
> > > Subject: Merrill Ranch PUD Stipulations as of 2-15-07
> > >
> > > Please see attached.
> > >
> > > Thanks.
> > > Mark Eckhoff, AICP
> > > Planning Director
> > > Town of Florence
> > > PO Box 2670
> > > 775 North Main Street
> > > Florence, AZ 85232
> > > (520) 868-7540
> > > (fax) 868-7564
> > > www.town.florence.az.us
> > >
> > >
> > >
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> > > - E-mail scanned by McAfee Anti-Virus
> > > - Website: http://www.historicflorence.com

In The Matter Of:

The Town of Florence v

Arizona Department of Environmental Quality

Reporter's Transcript of Proceedings - Day 19

April 14, 2014

Griffin & Associates Court Reporters

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www.arizonacourtreporters.com

602.264.2230

Original File TOF041414.txt

Min-U-Script® with Word Index

Q. So you believe you paid a premium because of the ore body?
A. Yes.
Q. How much has Florence Copper invested to date in getting the site ready for the PTF?
A. A little over 50 million at this point.
Q. And how much will it cost once the PTF is complete?
A. It would be between 72 to 75 million.
Q. Now, you're going to get some revenue out of the PTF; right? You are going to be pulling copper out of the ground; right?
A. Yeah.
Q. How much?
A. Sorry. About 1.5 million pounds of copper, which is going around 3.00 to 3.25 a -- a pound at this point. So around $5 million worth of copper.
Q. So it's a good thing you're not -- you're not an economist then. You're going to invest 72 to 75 million in order to recover 5 million?
A. Yes. Not a very good business decision if you look at it at face value. That's correct.
Q. That's why it's a test project; right?
A. That's correct.
MS. BEYERS: Your Honor, I -- I understand that the appellants have stipulated to the filing of a -- a

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TOWN OF FLORENCE, Plaintiff, vs. FLORENCE COPPER, INC., et al, Defendants.	No. CV2015-000325 **PLAINTIFF TOWN OF FLORENCE'S MOTION FOR SUMMARY JUDGMENT**
FLORENCE COPPER, INC., et al Counterclaimant, vs. TOWN OF FLORENCE, Counterdefendant.	(Assigned to the Hon. Roger E. Brodman)

Plaintiff, Town of Florence, pursuant to Rule 56 of the Arizona Rules of Civil Procedure, respectfully submits that the Town is entitled to judgment as a matter of law declaring that mining is illegal on the privately owned Florence Copper Property at issue in this case (the "Property") and no genuine issue of material fact remains for determination at trial.

First, it is undisputed that the Property was rezoned in 2007 to supersede the prior zoning, including all rights to mine. As a matter of law mining is illegal on the Property. The fact that the ***legislative*** exercise of the Town's inalienable police power in enforcing the

2007 zoning may constitute a breach of the Development Agreement, possibly affording a *judicial* remedy, does not and cannot invalidate the Town's legislative act in rezoning the property. Constitutional separation of powers requires the court to recognize and give effect to the Town's legislative actions regardless of whether those actions may give rise to a possible breach of contract.

Second, under the Florence Town Code, legal nonconforming uses are presumed abandoned if discontinued for a period of three months or more. Merrill has stated that no mining activities of any kind were conducted on the property during his ownership. Because the Pre Annexation Development Agreement could not and cannot change the Town Code or render it ineffective without following prescribed statutory procedures (including referendum), under the terms of the Town Code any nonconforming mining rights were abandoned before FCI even acquired the property.

This Motion is support by the attached Memorandum of Points and Authorities, and the Town's Separate Statement of Facts in Support of its Motion for Summary Judgment, the affidavits of Julie Tappendorf and Grady Gammage, and the Court's Ruling on the Cross-Motions for Summary Judgement previously filed in this case. For the latter reason, and to avoid unnecessary duplication, the Cross-Motions for Summary Judgment, Separate Statements of Facts, Objections and Motions to Strike, and associated briefing are also incorporated by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Property was rezoned in 2007, eliminating all previous references to mining.

In 2006, Merrill approached the Town and requested that the 2003 PUD zoning of his property, approximately 8,750 acres including the subject Property, be amended by substituting a new Development Plan, the 2007 PUD zoning. [Town's Separate Statement of Facts ("SSOF") ¶ 1] The 2007 Development Plan submitted by Merrill, as applied to the subject Property, eliminated the previous Light Industrial zoning, eliminated the "BHP Copper Mine" delineation, eliminated all references to "mining," and rezoned the Property as

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence,

Plaintiff,

v.

Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al.,

Defendants.

Florence Copper, Inc., fka Curis Resources (Arizona), Inc.,

Counterclaimant,

v.

Town of Florence,

Counterdefendant.

No. CV2015-000325

FLORENCE COPPER'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Roger Brodman)

39. Merrill testified that, during the rezoning process, the Town never asked him to give up his vested mining rights in exchange for increased residential densities. (Merrill Depo., **Ex. 3**, at 200:20–201:18 ("Q: Did the Town ever come to you and say we want to enter into negotiations with you to drop any of your rights to mining because we think it is inconsistent with the 2007 planned unit development agreement? A: Well, I think as I've said before, I don't think there was any discussion of that one way or the other."); ***id.*** at 211:23–212:5 (same).)

40. Merrill's representative, Jan Zobel (formerly Jan Dodson), also testified that mining restrictions were not discussed during the rezoning process. (Deposition Transcript of Janet Zobel ("Zobel Depo."), excerpts attached as **Exhibit 13**, at 42:19-25 ("Q: In all the work . . . leading up to the Master Development Plan in 2007, did anyone from the Town ever talk to you about Harrison Merrill giving up his mining rights? . . . A: No.").)

41. The Town's planning director, Mark Eckhoff, also testified that mining restrictions were not discussed with Merrill during the rezoning process. (Eckhoff Depo., **Ex. 9**, at 123:10-14 (Q: "[W]ere there any discussions at all between the Town and Harrison Merrill about mining at all during that 2007 process? A: To my knowledge, I'm not -- I'm not aware of any.").)

42. The Town's manager, Himanshu Patel, also testified that mining restrictions were not discussed with Merrill during the rezoning process. (Deposition Transcript of Himanshu Patel ("Patel Depo."), excerpts attached as **Exhibit 14**, at 46:5-10 ("Q: Did you ever have any discussions with anyone from Mr. Merrill's team or with Mr. Merrill himself regarding elimination of any right to conduct mining in the 2007 rezoning? . . . A: No."); ***id.*** at 70:1-11 (same).)

43. The Town's mayor, Tom Rankin, also testified that mining restrictions were not discussed with Merrill during the rezoning process. (Deposition Transcript of Tom Rankin ("Rankin Depo."), excerpts attached as **Exhibit 15**, at 26:4-10 ("Q: . . . So were there any discussions of mining during the 2007 rezoning process?

A: No, ma'am. Not that I remember. Q: Did you ever overhear anyone else from the Town discussing mining with Harrison Merrill or his representatives during the 2007 rezoning? A: No, ma'am."); ***id.*** at 27:11-16, 30:25–31:12 (same).)

44. Indeed, Rankin testified that, although he privately believed that the rezoning would eliminate Merrill's mining rights, he avoided discussing the subject with Merrill because he didn't want Merrill to "figure it out." (Rankin Depo., **Ex. 15**, at 32:17–33:10 ("Q: . . . [T]he topic of mining did not come up during the 2007 rezoning? . . . A: I didn't bring it up with Harrison, because I didn't want him to figure it out. Q: To figure what out? A: That he was probably giving up his mining deal.").)

45. Counsel for the Town confirmed during a deposition that "the Town does not intend to contradict Mr. Harrison Merrill's sworn testimony with respect to the course of negotiations that led to the 2007 PUD." (Eckhoff Depo., **Ex. 9**, at 125:1-5.)

46. The Town's attorney, James Mannato, testified that he recalled hearing Patel and Eckhoff discuss mining with Merrill's representatives. (*See* Deposition Transcript of James Mannato ("Mannato Depo."), excerpts attached as **Exhibit 16**, at 61:15–68:11.) But Mannato clarified that they "didn't really specifically talk about mining," but instead talked about "the utilization of that property that had once been used as a mining exploration project and what it could be used for in the future." Thus, they "weren't really talking about mining itself." (***Id.*** at 59:6-13.)

47. Mannato's clarification is consistent with the testimony of Patel and Eckhoff. Patel testified that he did *not* "tell anyone from Harrison Merrill's team" that "the right to conduct mining had to be removed. (Patel Depo., **Ex. 14**, at 70:8-22.) And Eckhoff testified that he did *not* recall "any" discussions about mining. (Eckhoff Depo., **Ex. 9**, at 123:10-14.)

48. Mannato's contrary testimony relied on his mistaken belief that the rezoning resulted in a switch from *heavy* industrial (which allowed mining) to light

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, an Arizona municipal corporation Plaintiff, vs. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation; RK Mine Finance Trust 1, a trust organized under the laws of the New South Wales, Australia; and Pinal County, Arizona Defendants.	No. CV 2015-000325 **FACT STIPULATIONS**

1. This dispute involves a 1,182-acre parcel of real property in Florence, Arizona (the "Property"), which is currently owned by Florence Copper, Incorporated ("FCI").

2. Part of the Property sits atop a copper oxide deposit located approximately 400 to 1,200 feet below ground (the "Florence Copper deposit").

3. The Property was originally held by American Smelting & Refining Co. ("ASARCO"). In the early 1960s, ASARCO geologists noted the presence of "live limonite" along the base of Poston Butte and drilled three holes, but were unsuccessful in locating the main deposit area.

4. In 1969, Conoco obtained a land position and undertook an exploratory drilling program of the Florence Copper deposit.

5. Exploratory drilling by Conoco indicated that a potential mineralized material body had been discovered, and showed cause to examine the deposit further.

6. Conoco conducted a multi-year feasibility study to evaluate the Florence Copper deposit for open-pit mining.

7. During the feasibility study, Conoco extracted over 50,000 tons of mineralized quartz monzonite from a single-level, underground pilot mine designed for metallurgical mining and geological testing.

8. During the feasibility study, Conoco invested over $27 million project studies, drilling, engineering designs, and constructions of the pilot plant and pilot underground mine.

9. In 1976, Conoco abandoned the Florence Copper mining project. The pilot mine shafts are now capped at the ground surface and the mine is flooded.

10. Magma Copper Company ("Magma") purchased the Property from Conoco in July 1992 for $9 million dollars.

11. From 1992 to 1999, Magma and its successor, BHP Copper, Inc. ("BHP") spent another $26 million to determine whether the Property was suitable for commercial mining.

12. In January 1993, Magma began a pre-feasibility study to determine the best method for mining the Property.

13. In January 1995, Magma began a feasibility study that would provide mineralized material reserves, permitting, detailed in-situ mine design, and facility engineering capable of advancing the project to the construction stage.

14. The feasibility study involved gathering the geological, hydrological, and geochemical information needed to permit and operate an in-situ leach mine, as well as obtaining all necessary environmental permits, evaluating and designing the in-situ production wellfield, producing engineering diagrams for the facilities, updating and refining mine plans and financial models, and educating the local community about the Florence Project.

15. In January 1996, while the feasibility study was ongoing, Broken Hill Proprietary Company Limited of Australia acquired Magma and created BHP. The feasibility study continued through this acquisition phase.

DATED: March 4, 2016

OSBORN MALEDON, P.A.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, Plaintiff, vs. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Defendants.	NO. CV2015-000325
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Counterclaimant, vs. Town of Florence, Counterdefendant.	

30(B)(6) DEPOSITION OF TOWN OF FLORENCE

VIDEOTAPED TESTIMONY OF MARK ECKHOFF

Phoenix, Arizona
May 23, 2016
9:01 a.m.

REPORTED BY:
KELLY SUE OGLESBY, RPR
Arizona CR No. 50178
Registered Reporting Firm R1012

PREPARED FOR:

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QUESTIONS INSTRUCTED NOT TO ANSWER

R E C E S S E S

30(B)(6) DEPOSITION OF TOWN OF FLORENCE,

VIDEOTAPED TESTIMONY OF MARK ECKHOFF, commenced at 9:01 a.m. on May 23, 2016, at the law offices of Osborn Maledon, P.A., 2929 North Central Avenue, 21st Floor, Phoenix, Arizona, before KELLY SUE OGLESBY, a Certified Reporter, CR No. 50178, in and for the County of Maricopa, State of Arizona, pursuant to the Rules of Civil Procedure.

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ALSO PRESENT:

Mary Onuschak, Legal Video Services

worked on, I don't recall Harrison Merrill or any of the folks that he worked with, Jan -- Jan Dodson or Jack Johnson, et cetera, either suggesting that they wanted to remove the facility that was there or to enlarge it or expand upon it or increase upon it. I really just, to my recollection is that the topic was very -- was very neutral, if anything.

Q. I understand and appreciate your answer with respect to your personal recollection, but speaking for the Town as a 30(b)(6) witness, were there any discussions at all between the Town and Harrison Merrill about mining at all during that 2007 process?

A. To my knowledge, I'm not -- I'm not aware of any.

Q. Is there anybody at the Town who might know if there were any such discussions? Whether or not still employed by the Town, is there anybody alive who might know about those?

A. Perhaps there -- there could have been. Perhaps either the Town attorney or the Town -- Town manager, but, you know, the zoning application part of it, while I may have missed the front end of it, coming into it and going through the process, I -- I just don't -- I don't have recollection of -- of those conversations.

Q. And you are the person who would be most

Affidavit of Harrison Merrill

Harrison Merrill, being first duly sworn upon his oath, does say:

1. Before and during 2003, Florence Copper, Inc. owned the state trust land mining lease and the adjacent private land on the south side of Hunt Highway. I served as the president of Florence Copper.

2. When Florence Copper purchased the private property there was a history of mining on both the adjacent state trust land and the private property. ASARCO, Conoco, Magma Copper and BHP, all previous owners of the property, are mining companies that did extensive testing for open pit and in-situ mining on the site. An in-situ pilot test facility was built by BHP. At the time Florence Copper purchased the private property, injection and recovery wells, buildings, and containment ponds for mining operations were still in place on the private property and the adjacent state trust land. The wells were monitored and reports made to state and federal agencies through a third party vendor, Brown & Caldwell. The wells were never closed under the legally-required process during Florence Copper's ownership of the private property.

3. When Florence Copper purchased the private property, it was aware of the mining opportunities on the property. To the best of my recollection there were no discussions or negotiations with the Town of Florence with respect to these mining rights.

4. In 2003, the Town of Florence wanted to expand its town limits to include, among other areas, the Florence Copper private land. Florence Copper (along with other related party land owners) entered into an agreement with the Town of Florence, known as a Pre-Annexation Development Agreement ("2003 PADA"). The 2003 PADA is a legal document that speaks for itself.

5. When the 2003 PADA was signed, there were no discussions between Florence Copper and the Town of Florence regarding the mining rights to the private land. The Planned Unit Development Agreement, exhibit B to the 2003 PADA that is incorporated into the PADA by reference, has language regarding the BHP Copper Overlay area, non-conforming legal uses, and copper mining.

6. In 2007, there was a change to the Merrill Ranch Master Development Plan. The zoning was changed to provide for residential and commercial development. At this time the private land adjacent to the state trust land was owned by WHM Merrill Ranch Investments, LLC, ("WHM Merrill") a related party. Regarding the 2007 rezoning, Florence Copper's and WHM Merrill's mining rights were never discussed with the Town of Florence with respect to either relinquishing or not relinquishing, or altering, or modifying these mining rights.

7. WHM Merrill nor Florence Copper ever entered into any amendment to the 2003 PADA that eliminated any rights to mining as referred to in the 2003 PADA.

8. From 2007 to 2009, WHM Merrill and Florence Copper had discussions with mining companies, including Canadian companies, who were interested in purchasing the private property and the adjacent state trust land to mine copper. WHM Merrill and Florence Copper would not have had these discussions if either believed that any agreements with the Town of Florence existed that extinguished the right to mine copper on the private property. .

9. In giving this affidavit I have not referred to or reviewed any documents and all of the information herein is given based on my best recollection of the events relating to the information contained herein.

FURTHER AFFIANT SAYETH NOT.

Dated this 12 day of January 2015.

Harrison Merrill

Subscribed and sworn before me
This 12 day of January 2015

Notary Public

SANDRA H. PRICE NOTARY PUBLIC DOUGLAS COUNTY GEORGIA EXPIRES JULY 10, 2017

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, Plaintiff, vs. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Defendants.	)	NO. CV2015-000325
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Counterclaimant, vs. Town of Florence, Counterdefendant.	)	

VIDEOTAPED DEPOSITION OF JANET LYNN ZOBEL

Phoenix, Arizona
May 13, 2016
9:05 a.m.

REPORTED BY:
KELLY SUE OGLESBY, RPR
Arizona CR No. 50178
Registered Reporting Firm R1012

PREPARED FOR:

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REQUESTS TO PRODUCE DOCUMENTS

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(None.)

QUESTIONS INSTRUCTED NOT TO ANSWER

Page Line
(None.)

R E C E S S E S

VIDEOTAPED DEPOSITION of JANET LYNN ZOBEL, commenced at 9:05 a.m. on May 13, 2016, at the law offices of Osborn Maledon, P.A., 2929 North Central Avenue, 21st Floor, Phoenix, Arizona, before KELLY SUE OGLESBY, a Certified Reporter, CR No. 50178, in and for the County of Maricopa, State of Arizona, pursuant to the Rules of Civil Procedure.

* * *

A P P E A R A N C E S

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ALSO PRESENT:

Chris Eichler, Legal Video Services

Q. (BY MR. CAMPBELL) In your conversations with Mr. Eckhoff, was mining ever discussed?

A. No.

Q. When you were in discussions with respect to the 2007 Master Development Agreement, did anyone from the Town ask -- ask you to talk to Harrison Merrill about giving up his mining rights?

MS. CURRY: Object; form.

THE WITNESS: No one from the Town ever discussed with me Harrison Merrill giving up his mining rights. But the way you referred to it, you called it the Master Development Agreement?

Q. (BY MR. CAMPBELL) I am trying to use the language on Exhibit No. 5. Let's turn to Exhibit No. 5, and what's it called? Master Development --

A. Master Development Plan.

Q. That's what I mean.

A. The PUD amendment, yes.

Q. In all the work --

A. Okay.

Q. -- leading up to the Master Development Plan in 2007, did anyone from the Town ever talk to you about Harrison Merrill giving up his mining rights?

MS. CURRY: Object to the form.

THE WITNESS: No.

In The Matter Of:

Town of Florence vs.

Florence Copper

Himanshu Arunbhai Patel

October 10, 2017

Videotaped

Griffin & Associates Court Reporters, LLC

2398 E. Camelback Road

Suite 260

Phoenix, AZ 85016

Original File HP101017.txt

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, an Arizona municipal corporation, Plaintiff, vs. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada Corporation; RK Mine Finance Trust 1, a trust organized under the laws of the New South Wales, Australia; and Pinal County, Arizona, Defendants.	No. CV 2015-000325
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation, Counterclaimant, vs. Town of Florence, an Arizona municipal corporation, Counterdefendant.	VIDEOTAPED DEPOSITION HIMANSHU ARUNBHAI PATEL

Florence, Arizona
October 10, 2017
9:02 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED
(CERTIFIED COPY)

I N D E X

E X H I B I T S

THE VIDEOTAPED DEPOSITION OF HIMANSHU ARUNBHAI PATEL was taken at 9:02 a.m., on October 10, 2017, at the location of FLORENCE COPPER, 1575 West Hunt Highway, Florence, Arizona, 85132 before CATHY J. TAYLOR, a Certified Reporter in and for the State of Arizona, County of Maricopa, pursuant to the Rules of Civil Procedure.

COUNSEL APPEARING:

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and Ms. Hayleigh S. Crawford
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For the Counterdefendant:

SIMS MURRAY
By: Mr. Jeffrey T. Murray
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Phoenix, Arizona 85004

Also present: Craig Onuschak, videographer

MR. MURRAY: Object to form.

THE WITNESS: Did they state it to me? No, but I was going off of what they re- -- requested to rezone.

BY MR. HAM:

Q. Did you ever have any discussions with anyone from Mr. Merrill's team or with Mr. Merrill himself regarding elimination of any right to conduct mining in the 2007 rezoning?

MS. CURRY: Object. Form.

THE WITNESS: No. No, because the discussions were all about the master planning of the project and the master-planned communities of Desert -- I think Desert something, Desert Color. It was -- it was intended to be a mixed-use project to have its own kind of mini downtown and change the entire dynamics of how that part of northern Florence would look.

BY MR. HAM:

Q. Were there any discussions prior to the 2007 rezoning as to how the monitoring requirements that we have previously talked about would be conducted under this -- what did you call it? A mini town?

MS. CURRY: Object. Form.

THE WITNESS: Well, they -- they called it Desert Color. I believe that's the -- the -- the name of that project. But it had -- in essence had a -- its own Main

In The Matter Of:

Town of Florence vs.

Florence Copper

Tom J. Rankin

November 7, 2017

Videotaped

Griffin & Associates Court Reporters, LLC

2398 E. Camelback Road

Suite 260

Phoenix, AZ 85016

Original File TR110717.txt

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, an Arizona municipal corporation, Plaintiff, vs. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada Corporation; RK Mine Finance Trust 1, a trust organized under the laws of the New South Wales, Australia; and Pinal County, Arizona, Defendants.	No. CV 2015-000325
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., a Nevada corporation, Counterclaimant, vs. Town of Florence, an Arizona municipal corporation, Counterdefendant.	VIDEOTAPED DEPOSITION TOM J. RANKIN

Florence, Arizona
November 7, 2017
9:04 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED
(CERTIFIED COPY)

I N D E X

E X H I B I T S

THE VIDEOTAPED DEPOSITION OF TOM J. RANKIN was taken at 9:04 a.m., on November 7, 2017, at the location of FLORENCE COPPER, 1575 West Hunt Highway, Florence, Arizona, 85132 before CATHY J. TAYLOR, a Certified Reporter in and for the State of Arizona, County of Maricopa, pursuant to the Rules of Civil Procedure.

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For the Counterdefendant:

SIMS MURRAY
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Phoenix, Arizona 85004

Also present: Craig Onuschak, videographer

A. And probably Mark Eckhoff too.
Q. But you can't recall having an explicit discussion with them about it?
A. I just remember bringing it up with them to make sure that the rezoning eliminated that possibility in the mine coming in.
Q. Do you recall specifically having a meeting with Himanshu Patel about that?
A. No specific meeting. There -- most of our conversation when I was mayor, I'd walk in, and I'd call him in. We'd sit down and talk about it, and that's it. And I told him -- you know, they knew how I stood on it, that I didn't want any mining out here, that it wasn't for the best interests of the Town of Florence.

As far as an actual meeting, a sit-down scheduled meeting, I doubt it.

Q. Okay. But in the meetings that you attended with Town staff or just personally you with Harrison Merrill or his representatives, the topic of mining did not come up during the 2007 rezoning?

MR. MURRAY: Object to form.

THE WITNESS: I didn't bring it up with Harrison.

MS. CURRY: Join.

(Next page, please.)

BY MS. CRAWFORD:

Q. Pardon?

A. I didn't bring it up with Harrison, because I didn't want him to figure it out.

Q. To figure what out?

A. That he was probably giving up his mining deal.

Q. What made you believe he was giving up his mining deal?

A. When we overlaid it. When we -- when we did the rezoning.

Q. So what about that made you believe that he was giving up his mining rights?

A. What made me believe that?

Q. Yes.

A. Because of the rezoning.

Q. What part of the rezoning?

A. The rezoning of the -- his property out here.

Q. Did -- was it anything that you were told that made you believe that? Was it somebody saying it to you using words that we're eliminating the mining by doing the rezoning?

A. I'm sure --

MS. CURRY: Object to form.

THE WITNESS: -- it was my assumption after meeting with Himanshu and Mannato, Jim.

Vanguard Properties, Inc.
Merrill Mining
3340 Peachtree Rd, NE
Suite 2200
Atlanta, GA 30326
404-495-9577

21 November 2006

Mr. Robert W. Schafer
Vice President, Business Development
Hunter Dickinson, Inc.
1020 – 800 West Pender Street
Vancouver BC Canada V6C 2V6

Subject: Florence In Situ Leach Copper Project

Dear Mr. Schafer:

Thank you for your recent proposal regarding the Florence Copper Project. We at Merrill Mining (Merrill) are interested in entering negotiations with Hunter Dickinson, Inc. (HDI) at the earliest possible date. However, we are concerned that your proposal does not reflect the studies and in-situ leach (field) test that will be required to demonstrate that the Poston Butte deposit can be mined and remediated in an economically viable and environmentally acceptable manner. We are also concerned that your proposal does not recognize the lost income that Merrill will experience during the testing program and after the testing program, assuming that the tests demonstrate that the deposit can be mined and remediated in an economically viable and environmentally acceptable manner.

As explained below, there were major disparities between the results of field tests and the assumptions regarding the copper recovery mechanisms and recovery rates that were used to justify the permits for, and the economic viability of, the Florence Copper Project. The disparities led BHP Copper to conclude that the field test results did not justify building a leach facility at Florence and that a new field test should be conducted, provided that certain conditions could be met. Until new field tests demonstrate adequate copper recovery and aquifer remediation, a reasonably grounded economic model for the Project cannot be developed and, without such a model, there can be no basis for determining fair royalty.

The following provides background information to help you understand Merrill's concerns about its property and about the scope of the required studies and field tests.

Property

Merrill owns all but 160 acres of the 350-acre facility site. The 160 acres is owned by the State of Arizona and the State's 160 acres is located within the in-situ mine site. The mine site, of course, is located within the facility boundaries. Merrill owns 1,800 acres that surround the facility site, south of Hunt Highway. Merrill also owns a strip of land immediately north of Hunt Highway. (See the enclosed Figure 1.) Merrill has three basic concerns with respect to the property described above.

- Uncertainties - Merrill is concerned that the time required for mining and closing the mine cannot now be reasonably estimated. As discussed below, recovery-related issues suggest that the time required to leach the copper and remediate the impacted aquifer will be much greater than originally estimated and could easily be two times the 15 years originally estimated. With the 15-year post-closure requirement, it is possible that the total time between start of operations and completion of post-closure monitoring and maintenance could exceed 45 years.

- Lost development opportunities - Merrill is concerned that it will not be able to develop the 1,800 acres surrounding the facility site until the facility closure has been completed. Merrill is also concerned that the market value of the land immediately north of Hunt Highway will be detrimentally affected at least until closure has been completed.

- Mine-induced subsidence - Merrill is concerned that the increased leach time mentioned above will increase the probability of mine-induced subsidence. Just the threat of subsidence could detrimentally affect future land use on Merrill's property.

Recovery-related issues

BHP Copper never finalized its report on the field tests that were conducted in 1997 and 1998. A Draft Field Test Report (Report) was prepared and shown to have been revised in October 1999. However, the Report apparently was never completed. The Report is of special significance because it discusses major disparities between the data that was produced during the field tests and the data used to justify the economic viability of the Project during the permitting of the facility in 1996 and 1997.

The most significant disparities discussed in the Report relate to the disparities between the recovery rates measured during the field tests and the recovery rates that were projected on the basis of laboratory tests. On page 109 of the Report, BHP Copper noted that a recovery curve had not been demonstrated and that "If the solution chemistry in the production well BHP-1 is, in fact, a result of water-rock reactions, in-situ leaching at Florence may not be possible. "

Based on the discussions in the Report, BHP Copper had based its recovery estimates and mine plan on the assumption that 67% of the total copper was in fractures easily accessible to the acidified leachate solution. However, the very low recovery rates obtained during the field test suggest that much longer leach times might be required. (Report, pp. 107 and 110.) This means that that the time required to recover copper at each well will be much greater than originally envisioned. The amount of copper recoverable using extended leach times is unknown. However, BHP Copper notes on page 107 of the Report that models suggest that copper recovery of 60% to 65% might be obtained with leach times of 6 to 8 years. The impacts that such long leach times would have on the water balance and mine block closure plans were not addressed in the Report.

Effect of transition

The shift to extended leach times will likely require major revisions to the facility design, mine operating plan, mine block closure plans, facility closure plans, and post-closure plans. Some, if not all, of the revisions will result in increased capital and operating costs. All will require major modifications of permits and it is very likely that the Arizona Department of Environmental Quality will require the modifications to be approved prior to the next field test. All of the above, plus the results of the next field test, will need to be reflected in the Project's economic model.

Additional studies and leach tests

On page 111 of the Report, BHP Copper concluded that a new leach test should be completed because the field test results were not sufficient to justify building an in-situ leach facility at Florence. BHP Copper cautioned that the new test should not be run under the same conditions as the first because the results would likely be the same. Instead, it recommended that additional wells be drilled so that the test would include multiple cells and that the test be conducted over a much longer period than the first field test. The creation of multi-cell test field will not only involve additional well costs, it will require a significant expansion of the existing water management system. Most importantly, BHP Copper recommended that there be an improved understanding of the geochemical and hydrogeological mechanisms at work before attempting the design of a new field test.

BHP Copper estimated that a leach test of at least 200 days would be required to better understand fracture flow. (Report, p. 102.) BHP also noted that the estimated recovery rates cannot be validated until a field-scale leach test is run to completion and that running such a test to completion would take years. (Report, p. 110.)

Remediation

Before suspending hydraulic control at the test field, Merrill had detailed analyses of the groundwater performed in order to comply with state and federal permits. The tests demonstrated that the groundwater within the zone impacted by the test had been restored to groundwater standards or to pre-test conditions as required by the permits. However,

the tests indicated that a significant decrease in pH could occur if leaching of the deposit proceeds as currently authorized by the permits. The methods discussed in the Report for increasing copper recovery would further exacerbate the low pH problem and could mobilize heavy metals and radiological elements. Merrill does not know how the low pH issue can be successfully addressed.

Schedules

For reasons discussed above, Merrill anticipates that 2 to 3 years will be required to obtain the permits and install the additional wells and equipment needed to conduct the next field test. The required length of the test will be determined later, but - based on information discussed above - injection would continue for at least 200 days and could be required to continue for several years. Also, the regulatory agencies will likely require some evidence that the zone impacted by long leach times can be remediated. The length of the required remediation test is, of course, unknown. Thus, it is not unreasonable to anticipate that it will be 3 to 6 years, minimum, before HDI will know whether a field test will show that the Poston Butte deposit can be mined and remediated in an environmentally acceptable manner. Only then can a reasonably grounded economic model of the Project be developed and the economic viability of the Project determined.

Mr. Schafer, I bring the foregoing to your attention so that you will understand why Merrill cannot enter into the option agreement that you proposed. If you wish to submit a more responsive proposal, please e-mail or fax it to me no later than COB December 6, 2006.

Please call me if you have questions.

Sincerely,

Roger L. Ames

Roger L. Ames, Registered Geologist

Adrain Taylor

Adrain Taylor, Senior Vice President

CC: Mike Rice, State Lands
Eric Mears, Brown and Caldwell

W. HARRISON MERRILL
PRESIDENT

July 9, 2008

Mr. Ronald W. Thiessen
CEO & President
Hunter Dickinson Acquisitions, Inc.
1020 – 800 West Pender Street
Vancouver BC Canada V6C 2V6
VIA E-MAIL: MarchandSnyman@hdgold.com

RE: INDICATIVE OFFER: ACQUISITION OF THE FLORENCE IN SITU LEACH COPPER PROJECT

Dear Mr. Thiessen:

Thank you very much for your letter of July 3, 2008. Hopefully by the time you receive this letter I will have been able to reach Mr. Snyman by telephone.

Although your offer is closer to my response of June 12 than your original offer of June 10, we still cannot consider your offer under the terms and conditions outlined in your letter of July 3, 2008. I will try to be a little more articulate than perhaps I was in my response of June 12 because there are certainly things that we just cannot do that you are asking us to do, and there are other things that we would expect more in line with my discussions with Mr. Snyman and Mr. Schafer at our Phoenix office.

Responses to your Transaction Outline

1. Merrill Trust is not in a position to guarantee the repurchase of the land at the Florence Copper Project, but would like the opportunity to repurchase the property for a specific amount of time if Hunter Dickinson determines that it is not feasible to get the copper at the Florence Copper Project. We also understand that we can buy the property back at a very nominal value after the project is completed over the next 15 to 20 years.

2. We would be amenable for Northcliff Exploration to acquire the 1,000 acres on a deferred purchase basis as indicated below.

3. We would sell the 1,000 acres for $30,000,000 payable $6,000,000 at closing and four additional $6,000,000 payments with interest at 8% on the deferred balance payable quarterly.

4. We agree that ownership in the 1,000 acres will only vest in Northcliff Exploration once Northcliff Exploration has made the full payment of principal and interest as provided in paragraph 3 above. Northcliff Exploration will have the option to "accelerate" the acquisition by making a full and final payment of the outstanding amount plus any accrued interest.

5. In exchange for the initial $6,000,000 payment Northcliff Exploration will acquire title to 40 acres agreed upon between Northcliff Exploration and Merrill Trust which would be required for the pilot plant site with the understanding that the 40 acres would only be used for the pilot plant site and would not be used for any other purpose including the ultimate mining of the copper unless or until Northcliff Exploration pays for the remaining 960 acres by making the required payments outlined in paragraph 3 above. If the remaining balance of the $30,000,000 is not paid, the 40 acres will be returned to Merrill Trust at no charge.

6. We understand that Northcliff Exploration is currently a private company and cannot provide listed shares as part consideration because at the current time there are no listed shares. Both Marchand and Bob explained to us that if this transaction was successful, we could make up to $175,000,000 on the transaction. This would require a large number of shares of Northcliff Exploration or whatever company owns and mines the Florence Copper Project when it goes public. We have reduced our expectations from the quoted $175,000,000 expectation to $100,000,000 in our counteroffer of June 12, 2008 with any remaining amount to be received over the $100,000,000 cash to be turned over to Hunter Dickinson. Therefore, we need an appropriate amount of shares at the $0.23 per share currently owned by Hunter Dickinson or others so that we can reach this minimum threshold of $100,000,000 if the mine is successful as we all hope it will be. We need to work out a non-dilutive arrangement for us so that we can reach this minimum expectation which is significantly less than the expectation discussed with Marchand and Bob. We are willing to take the lesser amount of $100,000,000 versus the greater amount of $175,000,000 only by making the $100,000,000 much more assured than the more speculative $175,000,000. You are a very creative company, and I hope that we can do this. Our understanding is that the first "go public" date would be in the first quarter of 2009 with the additional shares sold approximately a year to 18 months later.

7. Merrill Trust will irrevocably assign all licenses, permits and proprietary technologies that were assigned to Merrill Trust, or its predecessors, by BHP at the time of the completion of the sale of the Florence property at no additional cost with the understanding that the Merrill Trust will also get the stock which was discussed with Marchand and Bob.

Mr. Thiessen, I believe that we should be able to work out a mutually acceptable agreement with respect to the Florence Copper Project. However, please understand that our expectation for the stock plus the cash was in the $175,000,000 range based on our conversations with Mr. Snyman and Mr. Schafer. We would still like to have that opportunity, but we are willing to reduce that opportunity to $100,000,000 on a more "assured" basis. We do not have an interest in selling the property at $30,000 per acre because this is flat high-density property with an ultimate density of 8 units to 12 units

to the acre as a "receiving" property for density which we cannot use in the North Village (which is located north of Hunt Highway).

I would suggest another meeting with you, Marchand and/or Bob to try to resolve the outstanding issues. If we cannot resolve them, then we will have given it our best effort!

Thank you again for the interest and offer.

With warmest personal regards.

Sincerely,

W. Harrison Merrill/jb

W. Harrison Merrill

WHM/jb

P.S. If we can get through this agreement, we will also be interested in discussing some of our property in Copper Mountain Ranch which is adjacent to the huge ASARCO open pit mine. Bob Schafer is very familiar with this property. Perhaps we could even discuss both of these properties as one transaction which would allow for a much larger mining company with much larger capitalization.

cc: Hugh Nowell
Paul Demick
Bob McLean

Catherine M. Bowman (SBN #011713)
Of Counsel
SIMS MACKIN LTD
3031 North Central Avenue, Suite 870
Phoenix, Arizona 85012
cmbowman@simsmackin.com
Attorneys for Counterdefendant
Town of Florence

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, Plaintiff, v. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Defendants.	No. CV2015-000325 **Plaintiff/Counter-defendant Town of Florence's Response to Defendant/Counterclaimant Florence Copper, Inc.'s Application for Attorney Fees.** **Objection to Form of Judgment**
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., Counterclaimant, v. Town of Florence, Counterdefendant.	(Assigned to the Honorable Roger Brodman) **Oral Argument Requested**

Plaintiff/ Counter-defendant Town of Florence ("Town") hereby responds to Defendant/ Counterclaimant Florence Copper Inc.'s (hereinafter "FCI") Application for Attorneys' Fees (hereinafter "Application"). For the reasons stated in the accompanying Memorandum of Points and Authorities, the Town requests the Court reject FCI's claim for attorney fees its entirety. In the alternative, the Town requests the Court enter judgment consistent with the statutory requirements of A.RS. §12-348(E)(4), which limits FCI's recovery to $10,000 as a matter of law. The Town also objects to the form of judgment and reserves the right to submit a judgment that incorporates the Court's ruling on the pending motions.

> trying to do in my argument. The issue you identified in your minute entry is that there is a triable issue of fact whether Merrill consented in writing to a change in zoning that traded an unfettered right to mind (Sic) the property for increased residential zoning as designated, which would then require the Town's rezoning if the owner wanted to mine in the future, and I think I've stated that correctly.

Oral Argument June 29, 2018, p14:16-24. Count I is not an action arising in contract; this Court had no jurisdiction to award attorney fees.

D. **In the Unlikely Event the Court Awards Fees Under A.R.S. §12-341.01, the Court Should Substantially Reduce the Discretionary Award.**

1. Non-compensable Activities, Block Billing and Excessive Activity

If the Court determines that fees are recoverable in this case, A.R.S. §12-341B gives the Court discretion to award attorney fees to mitigate the burden of expense of the litigation to establish a just claim or defense. This discretionary award need not equal or relate to attorney fees actually paid or contracted. A substantial reduction from the fees claimed is justified because FCI's Application includes hundreds of thousands of dollars of time unrelated to any activity arguably arising out of contract. To assist the Court, the Town highlighted and stated an objection to activities that were obviously related to the condemnation action. (Exhibit 1 and 3) The objections are not inclusive because most of the entries are general and vague. The Town cannot object because it cannot tell from most entries the topic of a meeting or research or documents drafted. This is because FCI's attorneys, with the exception of Hayleigh Crawford and Eric Ottoson, block billed. "Block billing is the practice of lumping together multiple tasks without specifying how much time was spent on individual or discrete activities." Fee Manual, § 12.8. When attorneys employ block billing it is difficult to determine how much time was spent on individual activities making it nearly impossible to determine the reasonableness of the hours spent on a task. Id. citing ***Welch v. Metropolitan Life Ins. Co.***, 480 F.3d 942 (9th Cir. 2007); see also ***Moshir v. Aotomobili Lambroghini*** AM, LLC, 927 F. Supp. 2d 789, 799 (District of Arizona, 2013); ***In re Guardianship of***

Sleeth, 226 Ariz. 171, 178, 244 P.3d 1169, 1176 (App. 2010) (noting federal courts disapproval of block billing and directing the court on remand to consider whether each entry of block billing provided sufficient detail supporting award for that entry). A party does not meet its burden of proof that hours expended are reasonable where entries are block billed. *See Welch*, 480 F.3d at 948; see also *Lahiri v. Universal Music and Video Distribution Corp.*, 606 F.3d 1216, 1222-23 (9th Cir. 2010) (affirming district court's discretion to reduce requested fees based on block billing). In this case, block billing is particularly problematic because FCI's entries are comingled with entries that are simply not recoverable. See Exhibits 1 and 3(non-inclusive list of hundreds of block billed entries and examples of some tasks that are excessive: Eric Ottoson, spent over 39 hours drafting an internal memo; Attorney J. Whitacker spent 49.5 hours drafting a partial motion for summary judgment; and, Attorney Hayliegh Crawford spent 70.1 hours drafting a Reply in Support of a Motion for Summary Judgment). At a minimum FCI's attorneys' fees request should be substantially reduced since it is not possible to determine whether entries relate to a claim arising out of contract or are reasonable.

2. The Town's Claim had Merit

The Town's claim was meritorious, despite the Court's decision in FCI's favor. The Town was attempting to enforce its zoning that applied to the Property by Ordinance enacted at the request of, and drafted by, FCI's predecessor in interest. As recognized by the Court in its ruling filed August 16, 2017, paragraph 6 of Ordinance No. 460-07 states that the Master Development Plan adopted in the Ordinance "shall supersede any previously accepted development plan, Master Development Plan or PUD Development Guide for the Merrill Ranch PUD." Additionally, the Court found in its ruling filed January 3, 2019, page 9, that the Development Agreement and associated documents are not models of clarity and that both parties can find snippets of contract language which support their position. The Court concluded "the documents contain some ambiguities, allowing reasonable people to differ in their interpretations."

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Attorneys for Defendant/Counterclaimant Florence Copper, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Town of Florence, Plaintiff, v. Florence Copper, Inc., fka Curis Resources (Arizona), Inc., et al., Defendants.	No. CV2015-000325 **FLORENCE COPPER, INC.'S REPLY TO TOWN OF FLORENCE'S RESPONSE TO MOTION FOR DECLARATORY JUDGMENT ON CONTRACT INTERPRETATION AND REMEDY** (Assigned to the Honorable Roger Brodman)
Florence Copper, Inc., fka Curis Resources (Arizona), Inc., Counterclaimant, v. Town of Florence, Counterdefendant.	

Defendant Florence Copper, Inc. ("FCI") moved for an affirmative declaratory judgment on its behalf that it has the vested right under the Development Agreement to mine on the BHP copper overlay area and an available remedy is specific performance under the development agreement. The Town of Florence offers no cogent argument why the relief should not be granted.

(A) Affirmative Declaratory Judgment

The proposed affirmative declaratory judgment language was modest:

> The Court grants the following declaratory judgment as to the interpretation of the Development Agreement:
>
> > (a) Florence Copper, Inc., has a vested right to mine including the right to maintain and expand nonconforming uses or structures related to mining on property designated as the BHP Copper Mine Overlay area in the Development Agreement and incorporated documents dated December 3, 2003.
> >
> > (b) Florence Copper, Inc.'s vested right to mine runs with the land.
> >
> > (c) Florence Cooper, Inc.'s vested right to mine has not been lost by an amendment to the Development Agreement, or any mutual agreement to modify the vested right to mine, or by abandonment.
> >
> > (d) In the event of a breach of the Development Agreement, Florence Copper has the available election of judicial remedies for a breach of contract, specific performance or contract damages.

Proposed Judgment attached to Motion for Declaratory Judgment, filed 3/25/2019. The proposed affirmative declaration tracks the Court's Findings of Fact and Conclusions of Law. The proposed judgment also dismisses FCI's request for injunctive relief without prejudice.

The Town of Florence admits that a declaratory judgment can be either affirmative or negative in form. (Response at page 2, citing A.R.S. § 12-1831). The Town says there is no case or controversy because the case or controversy ended when the Town of Florence lost after a bench trial with the Court's ruling. This argument ignores that the judgment to be entered is based on the Court ruling, the Town never conceded these issues, and the Town is actually seeking to appeal the Court's ruling. There most certainly is a case or controversy.

(B) Affirmative Declaratory Judgment That Specific Performance Is a Remedy Under the Development Agreement

FCI is not seeking an injunction at this time, and asks to dismiss the claims for an injunction without prejudice. In lieu of an injunction, FCI is asking for an affirmative

declaratory judgment as to what remedies are available for a breach of the development agreement. Rule 57 of the Arizona Rules of Civil Procedure makes clear that a court cannot decline to enter a declaratory judgment merely because of the "existence of another adequate remedy." Federal civil cases on the parallel federal rule are illustrative. *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216, 219 (5th Cir. 1998) ("Rule 57 of the Federal Rules of Civil Procedure expressly states that the availability of an alternative remedy does not prevent the district court from granting a declaratory judgment."). *See also Tierney v. Schweicker*, 718 F.2d 449, 457 (D.C. Cir. 1983); *United States v. 0.35 of an Acre of Land, More or Less, Situated in Westchester Cnty., N.Y.*, 706 F. Supp. 1064, 1073 (S.D.N.Y. 1988); *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 2011 WL 4807901, at *6 (S.D. Tex. Oct. 11, 2011), modified, 2012 WL 1553045 (S.D. Tex. May 1, 2012) (all discussing the 1937 Federal Advisory Committee notes).

Contrary to the Town of Florence's arguments, FCI is not claiming an anticipatory breach of contract. If it were, FCI would ask for an injunction. FCI is asking for declaratory relief because a case or controversy exists as to whether the Town of Florence has the right to breach the development agreement pursuant to its police powers, and leave FCI to damages as its only remedy. This argument was made by the Town of Florence's counsel in the case, and it has not been disavowed by current counsel who is seeking to appeal the Court's rulings.

Indeed, in further support that there is a case or controversy about remedy, the Town of Florence argues in its response that specific performance is not a remedy for breach of the Development Agreement for a lack of mutuality. (Response at pages 3-4). The Town misunderstands the mutuality of remedy doctrine. It does not compel each party to have precisely the same remedies or obligations available against each other, rather they must have reciprocal obligations. Inasmuch as the Development Agreement and its Amendments imposes restrictions upon how residential property can be developed, and imposes monetary obligations on the developer, the argument that there

are not reciprocal duties or obligations, and therefore reciprocal remedies, fails. The Town can sue for specific performance of the Development Agreement too.

The Town of Florence also argues that a declaratory judgment is not an available remedy and should be denied as FCI has "unclean hands." The Town of Florence has presented no evidence of unclean hands, either at trial or by way of a separate statement of facts. But the Town of Florence misses the point. There is no actual request for an injunction pending before the Court. If circumstances develop where FCI has to move for an injunction of specific performance, the Court at that future time can determine whether particular circumstances at that time call for granting an injunction or not. What FCI is seeking is a declaratory judgment that specific performance is an available remedy, which the Town of Florence continues to deny.

DATED this 13th day of May, 2019.

OSBORN MALEDON, P.A.

By /s/Colin F. Campbell
Colin F. Campbell
Shane M. Ham
Hayleigh S. Crawford
Joshua M. Whitaker
2929 North Central Avenue, 21st Floor
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Attorneys for Defendant/Counterclaimant
Florence Copper, Inc.

This document was electronically filed
and copy delivered*/e-served via the
AZTurboCourt eFiling system this 13th day
of May, 2019, on:

Honorable Roger Brodman*
Maricopa County Superior Court
101 West Jefferson, ECB-413
Phoenix, Arizona 85003

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Attorneys for Counterdefendant Town of Florence

/s/Karen McClain
8056628

When recorded, return to:

Town Clerk
Town of Florence
775 North Main Street
Florence, AZ 85232

OFFICIAL RECORDS OF
PINAL COUNTY RECORDER
LAURA DEAN-LYTLE

DATE/TIME: 12/11/03 1433
FEE: $106.00
PAGES: 195
FEE NUMBER: 2003-086513

Town of Florence
Resolution No. 872-03

AN RESOLUTION APPROVING THE PRE-ANNEXATION AND DEVELOPMENT AGREEMENT WITH CMR/CASA GRANDE, L.L.C., FLORENCE COPPER, INC., EL EM, L.L.C., AND ROADRUNNER RESORTS, L.L.C. FOR DEVELOPMENT OF APPROXIMATELY 7,537 ACRES OF LAND AND AUTHORIZING EXECUTION OF SUCH PRE-ANNEXATION AND DEVELOPMENT AGREEMENT

WHEREAS, the Town of Florence is authorized pursuant to A.R.S. § 9-500.05 to enter into development agreements and generally is authorized to enter into contracts; and

WHEREAS, CMR/Casa Grande, L.L.C., Florence Copper, Inc., El Em, L.L.C. and Roadrunner Resorts, L.L.C. (the "Owners") are the owners of approximately 7,537 acres of land located as legally described on Exhibit A attached hereto (the "Property"), and desire to annex the Property into the town limits of Florence; and

WHEREAS, the proposed development of the Property and the Pre-Annexation and Development Agreement are consistent with the Town of Florence General Plan applicable to the Property as of the date of this Resolution; and

WHEREAS, the Pre-Annexation and Development Agreement provides for various matters relating to the development of the Property, including the approval of a development plan, duration of the Pre-Annexation and Development Agreement, the conditions, terms and requirements applicable to public services and infrastructure and the financing of same, the permitted uses of the Property and the density and intensity of such uses, the phasing over time of construction and development on the Property, and other matters related to the development of the Property.

THEREFORE, BE IT ORDAINED by the Mayor and Council of the Town of Florence, Arizona, as follows:

1. The Pre-Annexation and Development Agreement between the Town of Florence and the Owners, which sets forth a development plan and the terms and conditions for the annexation and development of approximately 7,537 acres of property is hereby approved, adopted, and made a part hereof as if fully set out in this Resolution. If the Town does not annex the Property immediately following adoption of the Pre-Annexation and Development Agreement, or if the Town rescinds the Resolution annexing the Property, the Town promptly and within thirty days of the adoption of this Resolution shall rescind this Resolution.

2. The Mayor of the Town of Florence is authorized to and shall execute the Pre-Annexation and Development Agreement.

PASSED AND ADOPTED by the Mayor and Council of the Town of Florence, Arizona this 1 day of December, 2003.

Patsy Williams, Mayor

ATTEST:
Lisa Garcia, Town Clerk

APPROVED AS TO FORM:
James E. Mannato, Town Attorney

MERRILL RANCH
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT
FLORENCE, ARIZONA

THIS DEVELOPMENT AGREEMENT for Merrill Ranch (this "Agreement") is entered into this 1 day of December, 2003 ("Effective Date") by CMR/CASA GRANDE, L.L.C., an Arizona limited liability company, FLORENCE COPPER, INC., a Delaware corporation, EL EM, L.L.C., an Arizona limited liability company, and ROADRUNNER RESORTS, L.L.C., an Arizona limited liability company (collectively, "Owner") and the TOWN OF FLORENCE, an Arizona municipal corporation (the "Town").

RECITALS

WHEREAS, Owner is the owner of certain property located in Pinal County, Arizona consisting of approximately 7,537 acres, legally described in Exhibit "A" attached hereto and incorporated herein by reference ("Property");

WHEREAS, Owner has submitted to Town for review and approval the documents known as the Planned Unit Development for Merrill Ranch dated November 7, 2003 ("Development Plan") as set forth in Exhibit "B";

WHEREAS, Owner and Town desire to facilitate the development of the Property as a part of the Town's growth and development. In furtherance of this aim, Owner and Town have cooperated in the preparation of this Agreement;

WHEREAS, Owner and the Town desire that the portions of the Property not already within the corporate limits of the Town be annexed into the corporate limits of the Town and be developed as an integral part of the Town. The annexation and development of the property pursuant to this Agreement and the Development Plan provides the Town with an opportunity for high-quality development in the area and to ensure orderly, controlled and quality growth in the Town.

WHEREAS, it is understood and agreed that the Property set forth in Exhibit "A" is included in this Agreement;

WHEREAS, pursuant to the provisions of Arizona Revised Statutes Annotated ("A.R.S.") §§ 9-500.05, et seq., Owner and Town are authorized to enter into this Agreement;

WHEREAS, this Agreement will facilitate the annexation, proper municipal zoning and development of the Property by establishing (i) conditions, terms, restrictions and requirements for the annexation of the unincorporated portions of the Property by the Town; (ii) the permitted uses for the Property; (iii) the density and intensity of such uses; (iv) the phasing over time of construction and development of the Property; (v)

conditions and requirements for the design, construction and installation of the infrastructure; (vi) Town's assurances to Owner in order to develop the Property; and (vii) other matters related to the development of the Property;

WHEREAS, the Town confirms that annexation and development of the Property pursuant to this Agreement is consistent with the Town's General Plan on the date of this Agreement.

WHEREAS, a blank annexation petition has been filed with Pinal County and meetings and hearings have been held in connection with the annexation of the Property into the Town. The Town agrees that the Planned Unit Development ("PUD") zoning designation is an appropriate designation for this Property and that the Development Plan is designed to establish proper and beneficial land use designations, regulations, procedures for administration and implementation of the Development Plan and other matters related to the development of the Property in accordance with the Development Plan and the PUD zoning district. Prior to its execution of this Agreement, the Town has held public hearings, received public comment, and has otherwise duly considered all such matters. Town and Owner acknowledge that the development of the Property pursuant to this Agreement is consistent with the Development Plan and will be of benefit to Town and Owner;

WHEREAS, Owner and Town acknowledge that Owner's development of the Property is a major undertaking for Owner and that the marketing, economic and investment conditions and magnitude of the development require the development to be constructed in phases over a period of years. Therefore, Owner requires certain assurances and protection of rights in order that Owner will be allowed to complete the development of the Property in accordance with the Development Plan over the period of years permitted by this Agreement. Likewise, Town requires assurances from Owner that the development of the Property will comply with the Development Plan, the General Plan, and the terms and conditions of this Agreement; and

WHEREAS, Town believes that the development of the Property pursuant to the Development Plan is in the best interest of the Town and the health, safety and welfare of its residents and will result in significant benefits to Town by, among other things, (i) providing for the acquisition, design, construction and installation of a system of roads and infrastructure as part of the development, (ii) increasing tax and other revenue to Town as a result of the improvements constructed on the Property, and (iii) the possible additional employment through the development of the Property.

WHEREAS, the Town recognizes the extent of the magnitude and cost of the services/infrastructure necessary to properly serve the development and that the Town's facilitation of various forms of Property based infrastructure financing is necessary to finance and construct such services and infrastructure.

WHEREAS, the Town confirms that prior to the execution of this Agreement, the Town has given all require public notice and has held all required public hearings to

receive comment, discuss and otherwise consider and approve the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions, it is agreed as follows:

1. **INCORPORATION OF DOCUMENTS AND RECITALS.** All documents and exhibits referred to in this Agreement are hereby incorporated by reference into this Agreement, and the Recitals stated above are hereby incorporated by reference into this Agreement.

2. **ANNEXATION.** The Town, having followed the statutory requirements, has, concurrently with its approval of this Agreement, duly considered and approved the Owner's request for annexation of the portions of the Land not already in the Town to the Town. As soon as reasonably possible after execution of this Agreement by the Town and Owner, Owner shall deliver to the Town an appropriate Petition for Annexation duly executed by all necessary property owners and satisfying the statutory requirements (the "Annexation Petition"). Upon receipt of the Annexation Petition, the Town agrees to comply with the provisions of A.R.S. § 9-471 *et seq.* and, if determined to be in the best interest of the Town, adopt the final ordinance annexing the Land into the corporate limits of the Town, which ordinance shall contain a provision requiring, upon Owner request, the immediate rescission of the annexation ordinance by the Town if: (a) any party files a verified referendum petition with the Town challenging the validity or approval of the annexation; (b) the Town does not approve at the same Town meeting the Planned Unit Development District designation and the Development Plan immediately following the annexation of the Land by the Town; (c) any party files a verified referendum petition with the Town challenging the Planned Unit Development District designation or the Development Plan; (d) any party files a verified referendum petition with the Town challenging the validity or approval of this Agreement; or (e) the Town does not at the same Town meeting approve the form of the community facilities district intergovernmental, financing, participation and development agreement as contained hereinafter in Exhibit C of this Agreement. The Town expressly acknowledges and agrees that the Annexation Petition and this Agreement will have been executed and delivered to the Town contingent on the Town's adoption of the ordinance described in the preceding sentence, including the rescission provisions. The Town also expressly acknowledges and agrees that it shall take all appropriate action to rescind this Agreement immediately if the Town does not adopt at the same Town meeting the final ordinance annexing the Land into the corporate limits of the Town immediately following approval of this Agreement. The Town also expressly acknowledges and agrees that it is the intent of the parties to this Agreement that the annexation of the Property into the Town be effective only after the passage of any referendum periods regarding the Agreement, the Development Plan and the Planned Unit Development District approvals and provided this Agreement and such approvals have been lawfully placed in effect.

3. **PLAN APPROVAL AND VESTED RIGHTS.** As of the execution date of this Agreement, Town, by and through its Mayor and Town Council (collectively, the "Council"), hereby grants to Owner, its successors and assigns, its approval of the Development Plan. For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and the Development Plan. The determinations of the Town in this Agreement and the assurances provided to Owner in this Agreement are provided pursuant to and as contemplated by A.R.S. § 9-500.05 and other applicable law.

4. **TERM AND EFFECTIVE DATE.** The Council grants to Owner, its successors and assigns, the right to implement development in accordance with the Development Plan under the terms and conditions of the Development Plan and this Agreement for a period of thirty-five (35) years at which time this Agreement shall automatically terminate as to the Property without the necessity of any notice, agreement, or recording by or between the parties. This Agreement shall become effective and the term shall commence after approval by the Town and full execution by the parties to this Agreement. The Town reserves the right to modify or otherwise change this Agreement if four thousand five hundred (4,500) residential units have not received final plat approval after the passage of fifteen (15) years from the commencement date of this Agreement or if four thousand five hundred (4,500) residential units have not been constructed after the passage of twenty-five (25) years from the commencement date of this Agreement. For good cause shown, Owner may request and Town may approve extensions of such time periods. The Town shall not unreasonably withhold approvals of such extension requests. At the request of the Town Manager, Owner shall meet with the Town Manager and provide the Town with annual status reports.

5. **RIGHTS RUN WITH THE LAND.** The rights established under this Agreement and the Development Plan are attached to and run with the Property. Upon the effective date of this Agreement, Owner and its successors are entitled to exercise the rights granted pursuant to this Agreement. This Agreement shall be interpreted and construed so as to preserve any vested and/or estoppel rights respecting the Owner and/or the Property existing under this Agreement and applicable law. Upon Owner obtaining in writing from its successor for delivery to Town, successor's acknowledgment and acceptance of this Agreement and agreement to comply with the obligations contained in this Agreement, Owner shall only be liable for performance of Owner's obligations under this Agreement during the period Owner owns the Property.

6. **DEVELOPMENT PLAN.**

(a) The development of the Property shall be in accordance with the Development Plan and this Agreement unless otherwise amended pursuant to this Agreement. Owner is authorized to implement the types and uses, zoning, variances, densities and intensities, location of uses, minimum size of proposed lots and residences and other standards of design as now set forth in the Development Plan and this Agreement. Town agrees to cooperate by processing, in a timely manner, applications for approval and issuance of plans, specifications or plats which are consistent with the

Development Plan and this Agreement, subject to the Owner having first complied with the ordinances and regulations applicable thereto and all platting, application, permit requirements and the Owner paying the then current applicable fees provided that such current applicable fees paid by Owner shall be no more than the lowest applicable fee payable by any other developer or builder in the Town. The Town and Owner agree that in addition to the types of uses and the densities and intensities of uses, the Town's General Plan and the Development Plan provide for, among other things, the establishment of golf courses, resorts and recreational facilities, sanitation and treatment facilities, residential, office and commercial activity centers, educational, worship and municipal facilities, and other facilities typically found in mixed-use master planned communities. The Town hereby acknowledges and agrees that the Development Plan may hereafter be amended to include alternative plans and land use designations that shall become applicable if Owner elects to include the Additional Property referenced in Paragraph 7.

(b) Owner expects that amendments to the Development Plan will be necessary from time to time since this is a phased project over a significant time period which must be able to adapt to changing markets and other events. The following changes shall be considered major amendments to the Development Plan and shall require Council approval 1) a change in the total number of acres devoted to commercial uses if the acreage devoted to these uses falls below 2% of the total acreage; 2) an upward change in residential classification of greater than one classification; and 3) an increase in the total number of residential units except as such increase may be authorized as part of any Additional Property as hereinafter defined in Paragraph 7. The Town shall not initiate any changes or modifications to the approved zoning except at the request of the owner of the portion of the Property for which such change is sought. The Town acknowledges and agrees that the Development Plan is the Owner's initial development concept for the Property and that the Owner shall be able, in its discretion, to relocate street layouts, the location of commercial, industrial and residential areas and parks and trails on the Property in response to changed market conditions and in conformance with the Town's General Plan. Such modifications shall not necessitate an amendment to this Agreement, but shall be provided to the Town Planning Director and retained in the Town's official file for the Property.

(c) Town, having reviewed and approved the Development Plan, agrees to fully cooperate in processing the approval and issuance of plans, specifications or plats that are consistent with the Development Plan. The issuance and approval of such permits, plans, specifications, or plats is subject to Owner complying with the ordinances applicable thereto and Owner paying the then current applicable fees. Town shall not adopt or change any ordinance, regulation or other control that are not uniform and that discriminate in their application against the Owner or the Property. Owner and Town agree that after this Development Plan has been approved, any and all subsequent zoning ordinances or requirements, zoning restrictions, addenda, and revisions adopted by the Town will not be applied to the Property except as may be required pursuant to Paragraph 6(f). The Town shall not impose or enact additional conditions, overlays, exactions, requirements, dedications, development or other fees,

rules or regulations applicable to or governing the development of the Property, including any requirement for the dedication of land or property, or the payment of fees or money for the planning, design, engineering, construction, acquisition, improvement, maintenance or provision of public services or infrastructure improvements to lessen, offset, mitigate, or compensate for the burdens of the development of the Property on the Town, the Town having acknowledged that all such burdens have been considered and are adequately accounted for by the conditions to development of the Property set forth in the Development Plan and this Agreement. The Town may implement development fees in accordance with state law for police, fire, and libraries in the future after the commencement date of this Agreement. To the extent the capital facility needs to serve development on the Property for these public services are not provided by the Owner or a community facilities district, the Town may assess development fees in accordance with state law for these capital facilities and improvements subject to applicable credits and reimbursements for Owner provided land, improvements, and other contributions provided such development fees are assessed in a uniform and consistent manner upon other development within the Town. The Town shall not take any action or position that would have the effect of subjecting the timing or development of the Property to procedures and limitations that may be part of a moratorium or any type of growth boundary except as may be required pursuant to Paragraph 6(f).

(d) Owner anticipates, at this time, completing development over a 35-year term in ten (10) phases. The time frames and physical boundaries for each of the phases are set forth in the Development Plan and are approximate and contingent upon market conditions, industry factors, business considerations and matters beyond the control of the Owner. Owner may adjust the physical boundaries of the various phases as well as the development schedule for each of the parcels in such a manner as Owner shall deem appropriate for the efficient development of the entire Property. The time frames for each of the Phases identified above are only approximate and one or more of the phases or a portion of those phases may be undertaken contemporaneously. Owner modifications shall not necessitate an amendment to this Agreement, but shall be provided to the Town Planning Director and retained in the Town's official file for the Property.

(e) Except as specifically provided in this Agreement, no surcharge, development or impact fee or imposition of any kind whatsoever for water, sewer, utilities, transportation systems, public services or any other infrastructure cost or expense shall be chargeable to Owner in any phase of the construction of the Development Plan. However, Owner will be required to pay the then applicable filing fees, plan review fees, permit fees and building fees provided that such then applicable fees paid by Owner shall be no more than the lowest applicable fee payable by any other developer or builder in the Town. Regardless of other Town requirements, Owner shall only be charged a $3,000 fee for any Planned Unit Development Amendment.

(f) The ordinances, rules, regulations, permit requirements, policies or other requirements of the Town applicable to the Property and the development of the Property shall be those that are now existing and in force for the

Town as of the date of the recording of the Agreement. Town shall not apply to the Property any legislative or administrative land use regulation adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan except as follows: 1) as specifically agreed to in writing by Owner; 2) future generally applicable ordinances, rules, regulations, and permit requirements (but excluding new development fees or exactions except as provided for in this Agreement) of the Town reasonably necessary to alleviate legitimate severe threats to public health and safety, in which any ordinance, rule, regulation, permit requirement or other requirement or official policy imposed in an effort to contain or alleviate such a legitimate severe threat to public health and safety shall be the most minimal and least intrusive alternative practicable and, except in a bona fide emergency, may be imposed only after public hearing and comment and shall not, in any event, be imposed arbitrarily or in a discriminatory fashion; 3) adoption and enforcement of zoning ordinance provisions governing nonconforming property or uses; 4) future land use ordinances, rules, regulations, permit requirements and other requirements and official policies of the Town enacted as necessary to comply with mandatory requirements imposed on the Town by county, state or federal laws and regulations, court decisions, and other similar superior external authorities beyond the control of the Town, provided that in the event any such mandatory requirement prevents or precludes compliance with this Agreement, if permitted by law, such affected provision of this Agreement shall be modified as may be necessary to achieve the minimum permissible compliance with such mandatory requirements; and 5) future updates of, and amendments to, existing building, plumbing, mechanical, electrical, and similar construction and safety related codes adopted by the Town which updates and amendments are generated by a nationally recognized construction/safety organization or by the county, state or federal governments, provided, such code updates and amendments shall be applied in the most minimal and least intrusive manner which is practicable under the circumstances. Nothing shall be interpreted as relieving Owner of any obligation that it may have with respect to laws and regulations enacted by the Federal government or the State of Arizona. Nothing in this Agreement shall alter or diminish the authority of the Town to exercise its eminent domain powers.

7. ADDITIONAL PROPERTY. The Town agrees to amend this Agreement, from time to time and solely at the request of Owner, to incorporate into this Agreement the whole or any portion of additional properties adjacent to or proximate to the Property (the "Additional Property") if and when Owner acquires such Additional Property up to a maximum of 25% of the acreage of the original Property. The Town and the Owner agree that if Owner elects to incorporate such Additional Property or portions thereof: (1) thereafter, such Additional Property shall be included in the Property and shall be subject to and shall benefit from all provisions of this Agreement applicable thereto and any reference herein to the Property shall include such Additional Property, which may at the time of its development increase the maximum number of units in the Property; however, the Additional Property will be approved for an overall density of three and a half units to the acre; (2) the Town and Owner shall cooperate in order for the Additional Property to receive the necessary land use approvals, including any necessary

amendment to the Development Plan; (3) the plans and land use designations approved for any Additional Property shall thereafter apply to the Property and the applicable Additional Property; and (4) the Town shall provide for the annexation of the Additional property into an existing community facilities district or shall form another community facilities district for the Additional Property governed by the intergovernmental, financing participation, and development agreement in the form as contained in Exhibit C as such may be amended over time.

8. **INFRASTRUCTURE PLANS.** Owner will submit for review and approval, the infrastructure plans as necessary and required for the Development Plan. The infrastructure plans shall include, but not be limited to, grading, drainage, sewer, water and roadway improvements ("Infrastructure Plans").

9. **INFRASTRUCTURE AND DESIGN STANDARDS.** The infrastructure and design standards, requirements and specifications identified in the Development Plan shall be applicable to the development of the Property. To the extent there is no identification of a particular standard, the existing Town design standards and specifications shall apply to the development of the Property. Town and Owner acknowledge that amendments to the Infrastructure Plans and/or the infrastructure and design standards and specifications for the Property may be necessary from time to time. If Town and Owner jointly determine that amendments are necessary to the Infrastructure Plans and infrastructure and design standards and specifications for the Property, Owner and the Town (through an authorized administrative official), to the extent permitted by applicable law, shall effectuate such amendment(s). Such Town administrative approval shall not be unreasonably denied and Owner shall have an appeal right to the Town Council.

10. **INFRASTRUCTURE CONSTRUCTION.** Construction of the infrastructure shall be performed in a workmanlike manner in compliance with applicable federal, state and local laws. To the maximum extent practical, the prior dedication of easements or rights-of-way shall not effect or proscribe Owner's rights to construct infrastructure improvements nor shall it effect the Owner's right to finance, construct and/or acquire such infrastructure improvements and/or real property interests through a to be formed community facilities district. Town shall assist Owner through the abandonment procedures of any and all unnecessary public rights-of-way and the establishment procedures of any and all necessary public rights-of-way. The Owner and its agents shall have the right to enter, remain upon and cross over Town easements or rights-of-way to the extent reasonably necessary to design and/or construct the water and sewer improvements and other improvements for the Property, provided that the Owner's use of such right does not materially impede or materially adversely affect the Town's use and enjoyment of the subject property and provided also that the Owner shall restore such easements and rights-of-way to substantially the same condition as existed prior to Owner's entry.

11. **INFRASTRUCTURE AND IMPROVEMENT FINANCING.** The parties acknowledge that a primary purpose of this Agreement is to provide for the

coordinated planning, design, engineering, construction and/or provision of the range of public services/infrastructure improvements necessary to serve new development as indicated in the Development Plan. The Town acknowledges and agrees that the services/infrastructure required to serve development on the Property as indicated in the Development Plan or as otherwise allowed by Arizona law shall be constructed, upon Owner request, through the community facilities district ("CFD") mechanism pursuant to ARS § 48-701 et seq. The Town shall adopt a resolution of intention and conduct such procedures as are necessary to form one or more CFDs pursuant to A.R.S. § 48-701 et seq. within 120 days of the execution of this Agreement. Owner shall provide all necessary information and shall pay all reasonable and customary Town costs in connection with CFD formation. Immediately upon formation and as a condition of formation of a CFD, the Town, Owner, and CFD shall enter into an intergovernmental, financing participation, and development agreement in the form as contained in Exhibit "C" and such agreement shall be the governing set of Town policies and procedures through the term of the Merrill Ranch Pre-Annexation Development Agreement. The Town agrees to assume responsibility for the ownership, operation and maintenance of completed public infrastructure financed, acquired and/or constructed by one or more CFDs. Any CFD shall cause to be levied a CFD operation and maintenance tax on properties within the district and Owner shall provide additional funds for CFD operation as provided for in Exhibit **"C."** With the exception of fifteen (15) acres of land to be dedicated to the Town for public service facility use (which may be in one or multiple acreage parcels totaling 15 acres), other dedications for any other public use as may be required in this Agreement, do not preclude a right of Owner, prior to any such dedication, to sell such land, rights-of-way, easements, etc. to a community facilities district and to have such dedication made by such community facilities district. Owner shall be consulted and approve, which approval shall not be unreasonably denied, of the location of the 15 acres chosen for public facility use referred to in the immediately preceding sentence so that the public facility siting has no undue or unreasonable impact on residential neighborhoods. The Town agrees to cooperate and pursue intergovernmental agreements with other public bodies, as applicable, to secure the ownership, operation and maintenance of completed public infrastructure acquired or constructed with CFD funds that are typically not owned, operated and maintained by the Town. The Owner may request that the Town and any community facilities district establish a means of collecting reimbursements from developers or other real property owners for the community facilities district's and/or developer's costs of financing, designing and installing public facilities that are of the size, length or capacity greater than that needed to serve or mitigate the impacts of development of the Property and which will serve other property in the Town.

12. ASSURANCES. Prior to issuing particular building permit(s) or permits for construction of infrastructure, Town may require Owner to provide assurances to Town where appropriate and necessary to assure the installation of infrastructure and improvements directly related to such building permit(s) or permits for construction that Owner undertakes. The Town agrees that within twenty (20) days from the Town's approval of the particular completed infrastructure or service improvement for which the Town has required such an assurance, the Town shall release (or, in the case of a

letter of credit, accept a substitute letter of credit) such infrastructure assurance, in whole or in part as may be appropriate under the circumstances. Owner may elect one of the following methods of assurance:

(a) Irrevocable letter of credit from a recognized financial institution acceptable to the Town, authorized and licensed to do business in the State of Arizona; or

(b) Cash or certified check;

(c) Corporate surety bond executed by a company acceptable to the Town and licensed to do business in the State of Arizona; or

(d) After approval of a final plat by the Council and the recording by the Planning Director of the final plat, withholding of the issuance of a certificate of occupancy until such time that all required subdivision improvements have been completed.

(e) Such other assurance mechanism agreed to by the parties to this Agreement.

(f) Other free and clear land owned by Owner.

13. STREETS. Except as such standards are identified in the Development Plan and as may be modified under Section 6(f), Owner shall construct the streets and roadways in compliance with Town subdivision and street regulations ("Subdivision Regulations") in existence as of the effective date of this agreement. Determination by Owner of whether interior subdivision streets will be dedicated to the public or remain private shall be made no later than the tentative subdivision plat stage for each platted subdivision. Naming of the streets and addressing of the properties will be pursuant to Florence ordinances except that Owner shall have the right to name private streets and any new public streets not a continuation of an already named public street. Such Owner named streets shall require review and approval of Town emergency service departments which approval shall not be unreasonably withheld. At the tentative plat stage, by mutual agreement of the specific alignment which agreement shall not be withheld unreasonably, Town may require some realignment of internal streets for the purpose of providing access to existing arterial roads. Town shall abandon public rights-of-way and/or reservations of such rights-of-way within the Property, including along section lines, if such rights-of-way are not shown to be dedicated as public rights-of-way in the Development Plan. Approval of a plat containing dedication of streets and roadways to the public shall not constitute or effect acceptance by Town of said streets and roadways into the Town maintenance system. Upon termination of construction truck travel, both in a particular platted subdivision and neighboring subdivisions, over the streets, if any, dedicated to the public in a particular platted

subdivision, the Town Engineer shall reasonably determine whether repairs are needed. Upon the Town Engineer's determination that repairs are needed, Owner shall repair said streets and roads of the subject platted subdivision to standards and specifications of the subdivision regulations. Upon the Town Engineer's acknowledgement that the streets and roadways that are dedicated to the public are fully completed to standards and specifications of the subdivision regulations, the dedicated streets may be accepted into the Town maintenance system in accordance with state and local law.

14. WASTEWATER TREATMENT. Owner shall provide a wastewater collection and treatment facility of such design, capacity and type as shall serve the reasonable needs of the Property and subsequent owners thereof, all in conformity with established federal, state and local laws. Except for the first development component of the Development Plan (which consists of Phase I, Phase II and some adjacent portions of land which shall be later determined through engineering and economic feasibility analyses), if the Town refuses to be the wastewater provider under any first right of refusal it may have, Owner may choose to form its own private company or utilize the services of other providers. Town shall reasonably cooperate by processing, in a timely manner, applications for any necessary Town franchise approvals or permits necessary to construct and operate a wastewater collection and treatment facility to serve the Property. If Owner wishes to form a sewer, wastewater, effluent or sanitary district as may be permitted by Arizona Revised Statutes, Town will cooperate and, at no cost to the Town, provide the necessary approvals. Owner may at its own expense or from other funding sources arrange for the design, engineering, construction, acquisition, installation, and/or permitting of in phases, effluent reuse/disposal facilities and a delivery system as part of the non-potable water system ("Effluent Facilities") that meets all applicable federal, state and local standards. Owner retains the right to use and/or sell all effluent generated by development on the Property, and, at its option, to seek and enter into an agreement for effluent service in the future from other private companies.

15. WATER COMPANY. Owner shall provide potable water for the reasonable needs of the Property and subsequent owners thereof, all in conformity with established federal, state, and local laws. Except for the first development component of the Development Plan (which consists of Phase I, Phase II and some adjacent portions of land which shall be later determined through engineering and economic feasibility analyses), if the Town refuses to be the water provider under any first right of refusal it may have, Owner may choose to form its own private water company or utilize the services of other providers. Town shall reasonably cooperate by processing, in a timely manner, applications for any necessary Town franchise approvals or permits necessary to construct water infrastructure and to operate a water company to serve the Property. If Owner wishes to form a water or irrigation service district as may be permitted by Arizona Revised Statutes, Town will cooperate and, at no cost to the Town, provide the necessary approvals. The Town agrees to cooperate with Owner, at no cost to the Town, to assist the Owner and its respective successors and assigns in obtaining a Certificate of Assured Water Supply from the Arizona Department of Water Resources

for the Property, or portions thereof, as the Property is developed in accordance with this Agreement.

16. SCHOOL SITE DEVELOPMENT. The Property is located in the Florence Unified School District No. 1 ("School District"). Owner shall work with the School District and reserve middle and upper school sites in accordance with state law. Owner shall reserve and dedicate land needed for elementary schools to serve the Property's new residents once the School District has obtained a binding commitment of funding for the construction of an elementary school on the land. Owner will hold such properties in reserve for an initial fifteen (15) year period, which shall automatically be extended for an additional fifteen (15) year period. If the School District does not commence construction before the expiration of such period or extended period, Owner shall be free to use such Property for all purposes including residential, commercial purposes, or sell in fee without any claim, right or privilege on the part of the School District or any other person or party.

17. DISPUTE RESOLUTION. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by non-binding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by Owner and the Town. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the Town and the Owner shall request the presiding judge of the Superior Court in and for the County of Pinal, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years experience in mediating or arbitrating disputes relating to land and property development. The cost of any such mediation shall be divided equally between the Town and the Owner. The results of the mediation shall be non-binding on the parties, and any party shall be free to initiate litigation subsequent to the reimbursement from the defaulting party of all sums expended in order to cure such default, together with interest on all such sums from the date said sums are expended. This section shall not apply to any legal rights of Owner which must be exercised within a certain number of days which is less than forty-five and shall not apply to the right of Owner to request a rescission of the annexation ordinance as provided for in Section 2.

18. COOPERATION. Town and Owner shall each designate a representative to act as a liaison between Town and its various departments and Owner ("Representatives"). The Representatives shall be available at all reasonable times to assist with the performance of the parties under this Agreement. The applicable party may change the representative by giving notice to the other party of the name, title, address, and telephone number of the replacement. If Owner desires to have the Town retain additional outside professionals and consultants in connection with expediting the development reviews for the Property, if Town is willing to do so, Owner shall reimburse Town for the reasonable fees for such consultant reviews.

19. NOTICES. All notices, filings, consents, approvals and other communications provided for herein or given in connection herewith shall be in writing and delivered personally or sent by United States Mail in a postage prepaid envelope addressed to the other to the address provided herein or as may changed in writing:

Town:
Florence Town Manager
Florence Town Hall
775 North Main Street
Florence, AZ 85232

Owner:
Harrison Merrill, President
AdrainTaylor, Senior Vice President
Vanguard Properties, Inc.
975 Johnson Ferry Road
Atlanta, GA 30342

Copy to:
John D. DiTullio, Esq.,
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, AZ 85016

Mason Cave, Controller
Vanguard Properties, Inc.
6263 N. Scottsdale Road
Scottsdale, AZ 85250

20. ESTOPPEL CERTIFICATE. Either party may request of the other party, and the requested party shall, within twenty-one (21) calendar days, respond and certify by written instrument to the requesting party that (a) the Development Plan is unmodified and in full force and effect, or if there have been modifications, that the Development Plan is in full force and effect as modified, stating the nature and date of such modification; (b) the existence of the default under the Development Plan and the scope and nature of the default; (c) the existence of any counterclaims which the requested party has against the other party; and (d) any other matters that may reasonably be requested in connection with the development of land, development of the Property or any material aspect of the Development Plan. In the event the Owner has not received an estoppel certificate within twenty-one (21) days from the date of the request, then in such event, Owner shall be entitled to prepare an estoppel certificate and deliver the certificate to Town and such estoppel certificate shall be binding upon Town.

21. WAIVER. No delay in exercising any right or remedy by either Town or Owner shall constitute a waiver thereof. Waiver of any of the terms of this Agreement of the Development Plan shall not be valid unless in writing and signed by all parties hereto. The failure of any part to enforce the provisions of the Agreement or the Development Plan or require performance of any of the provisions, shall not be construed

as a waiver of such provisions or affect the right of the party to enforce all of the provisions of this Agreement and the Development Plan. Waiver of any breach of this Agreement or the Development Plan shall not be held to be a waiver of any other or subsequent breach thereof.

22. BINDING EFFECT. This Development Plan shall be binding upon Town and Owner and their respective successors and assigns.

23. GOVERNING LAW. The laws of the State of Arizona shall be applied to all provisions of this Development Agreement.

24. CHOICE O F F ORUM. N otwithstanding A.R.S. § 12-408, any suit or action brought under this Agreement shall be commenced in Superior Court of the State of Arizona in and for the County of Pinal and may be removed therefrom only upon the mutual agreement of the Town and Owner.

25. EXERCISE OF AUTHORITY. It is understood and agreed that Owner shall not in any way exercise any portion of the authority or sovereign powers of Town and shall not make or contract or commit or in any way represent itself as an agent for Town. Nor shall anything in this Agreement be construed to create any partnership, joint venture or principal agency relationship between the parties.

26. INCORPORATION OF DOCUMENTS. All documents referred to herein and in the Development Plan are incorporated herein by reference.

27. RECORDATION. In order to provide notice to third parties, the Town shall record this Agreement in the official records of the Pinal County Recorder within ten (10) days after the full execution of this Agreement.

28. CONFLICT OF INTEREST. This Agreement is subject to the provisions of A.R.S. § 38-511.

29. SEVERABILITY OF PROVISIONS. Each term and provision of this Development Agreement shall be considered severable and if, for any reason, any term or provision of this Agreement be declared or be determined to be illegal, invalid, the validity of the remaining terms and provisions shall not be affected thereby, and said illegal or invalid term or provision shall not be deemed a part of this Agreement, notwithstanding any other provision of this Agreement to the contrary.

30. TIME OF THE ESSENCE. Time is of the essence to this Agreement and with respect to the performance required by each party hereunder.

31. ADDITIONAL ACTS AND DOCUMENTS. Each party hereto agrees to do all such things and take all such actions, and to make, execute and deliver such other documents and instruments, as shall be reasonably requested to carry out the provisions, intent and purpose of this Agreement. If any action or approval is required

of any party in furtherance of the rights under this Agreement, such approval shall not be unreasonably withheld.

32. AMENDMENTS. No amendment shall be made to this Agreement except by written document executed by Town and Owner. Within ten (10) days after the execution of any amendment by both parties, the amendment shall be recorded with the Pinal County Recorder, Pinal County, Arizona.

33. ENTIRE AGREEMENT. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject matter of the Development Plan, and contains all the covenants and agreements between the parties with respect to said matter.

34. COMPLETION OF CONSTRUCTION. The rights granted to Owner hereunder shall extend for the initial term and any extension thereof. If any permit has been issued before the date of termination of the term, the rights shall remain valid until the permit expires, but in no event longer than one (1) year thereafter. Upon expiration of the term, all principal structures for which footings or foundations have been completed may be finished under the Development Plan. Upon expiration of the Agreement, the development may continue based on valid building permits issued in accordance with the standards in effect at that time. Any unexpired permit issued for the Property as part of the Development Plan shall not expire nor shall it be revoked merely because the Agreement has expired.

35. HEADINGS. The headings for the paragraphs of this Agreement are for convenience and reference purposes only and in no way define, limit or describe the scope or intent of said paragraphs nor in any way affect this Agreement.

36. ATTORNEYS FEES. In the event it becomes necessary for a party to this Agreement to bring an action at law or other proceedings to enforce any of the terms or provisions of this Agreement, the successful party in any such action or proceeding may apply for attorney fees pursuant to A.R.S. § 12-341.01.

37. LOT SALE. It is the intention of the parties that although recorded, this Agreement shall not create conditions or exceptions to title or covenants running with any individual lots into which the Property is subdivided. Any title insurer can rely on this section when issuing any commitment to insure title to any individual lot or when issuing a title insurance policy for any individual lot. So long as not prohibited by law, this Agreement shall automatically terminate as to any individual lot (and not in bulk), without the necessity of any notice, agreement or recording by or between the parties, upon conveyance of the lot to a homebuyer by a recorded deed. For this section, "lot" shall be any lot upon which a home has been completely constructed that is contained in a recorded subdivision plat that has been approved by the Town.

38. ASSIGNMENT. Owner shall have the right to sell, transfer or assign part or all of the Property to any person or entity at any time during the duration of this Agreement.

39. LIEN FINANCING. Owner shall have the right at any time, and as often as it desires, to finance the Property and to secure the financing with a lien or liens against the Property.

40. COUNTERPARTS. This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall constitute one and the same instrument.

41. TOWN SERVICES. Town shall provide all Town services to the Property to the same extent and upon the same terms and conditions as those services are provided to other real properties in the Town, except as otherwise provided herein.

42. NO APPROVAL. If this Agreement, the annexation, the PUD zoning and the Development Plan are not approved by the Council or lose a referendum challenge, or is approved subject to conditions or stipulations not accepted by Owner, Town shall take immediate action to rescind any and all approvals within the thirty (30) day effectiveness period and Owner shall have no obligation to construct any of the improvements provided for in this Agreement, the PUD zoning or the Development Plan. If market conditions and/or development financing materially change the feasibility of the Development Plan, Owner may interrupt development until market conditions and/or development financing are again favorable, at which time continued development of the Property will be in accordance with the Development Plan and the PUD zoning.

43. TIMELY ACTION. The Town acknowledges and agrees that it is desirable for the Owner to proceed rapidly with the implementation of this Agreement and the development of the Property and that, accordingly, a timely review and construction inspection process is necessary. The parties agree that if any time the Owner believes an impasse has been reached with Town staff on any issue affecting the Property, the Owner shall have the right to immediately appeal to the Town Manager for an expedited decision pursuant to this paragraph. If the issue on which an impasse with Town staff is an issue where a final decision can be reached by Town staff, the Town Manager shall give the Owner a final decision within 15 days after the Owner's request for an expedited decision.

44. DEFAULT. Failure or unreasonable delay by either party to perform or otherwise act in accordance with any term or provision hereof shall constitute a breach of this Agreement and, if the breach is not cured within 30 days after written notice thereof from the other party (the "Cure Period"), shall constitute a default under this Agreement; provided, however, that if the failure is such that more than 30 days would reasonably be required to perform such action or comply with any term or provision thereof, then the party shall have such additional time as may be necessary to perform or comply so long as the party commences performance or compliance within said 30 day period and

diligently proceeds to complete such performance or fulfill such obligation. In the event a breach is not cured within the Cure Period, the non-defaulting party shall have all the rights and remedies that may be available under law or equity, including without limitation the right to specifically enforce any term or provision of this Agreement and/or the right to institute an action for damages.

45. GOOD STANDING; AUTHORITY. Each of the parties represents and warrants to the other a) that it is duly formed and validly existing; b) that it is a limited liability company or corporation qualified to do business in Arizona with respect to the Owner, or a political subdivision of the state with respect to the Town; and c) that the individuals executing this Agreement on behalf of their respective parties are authorized and empowered to bind the party on whose behalf each such individual is signing.

46. FORCE MAJEURE. The performance of either party and the duration of this Agreement shall be extended by any causes that are beyond the control of the party required to perform, such as an act of God, civil or military disturbance, labor or material shortage, or acts of terrorism.

47. NO MORATORIUM. The Parties hereby acknowledge that the Owner shall be protected from any moratorium action taken by the Town in the manner set forth in the Arizona Revised Statutes §9-463.06. Further, the Town shall not take any action or adopt any ordinance, resolution or other land use rule or regulation imposing a limitation on the conditioning, rate, timing or sequencing of the development of the Property or any portion thereof if such action shall have a material adverse impact on the development of the Property.

48. INDEMNIFICATION.

(a) Owner, or Owner's successors and assigns, agrees to defend, indemnify and hold harmless Town, its officers, officials and employees ("Indemnified Group") for liability from and against claims, damages, losses and expenses of any nature whatsoever (including but not limited to reasonable attorney fees, court costs, the costs of appellate proceedings, and all claim adjusting and handling expense), relating to, arising out of, resulting from or alleged to have resulted from Owner's or its successors' and assigns' acts, errors, mistakes or omissions relating to any action or inaction of the Owner, its successors or assigns under this Agreement, including but not limited to work or services in the performance of this Agreement by any subcontractor or anyone directly or indirectly employed by or contracting with the Owner or a subcontractor or anyone for whose acts any of them may be liable.

(b) If any claim, action or proceeding is brought against the Indemnified Group, by reason of any event that is the subject of Section 48(a) above, Owner, or its successors or assigns, (at its sole cost and expense) shall pay, resist or defend such claim or action on behalf of the Indemnified Group by the attorney of the Owner, or if covered by insurance, Owner's insurer, all of which must be approved by

Town, which approval shall not be unreasonably withheld or delayed. The Town shall cooperate with all reasonable efforts in the handling and defense of such claim.

(c) Any settlement of claims must fully release and discharge the Indemnified Group from any liability for such claims. The release and discharge shall be in writing and shall be subject to approval by the Town, which approval shall not be unreasonably withheld or delayed.

(d) The indemnity provisions of this Agreement shall survive the termination of this Agreement.

49. NOTICE OF CONVEYANCE OR ASSIGNMENT. The Owner shall give notice to the Town of any sale of the entire Property at least ten (10) days prior to the effective date of the sale.

50. EMERGENCY SERVICES SUBSIDY. In the early years of the Property's development, the extension of police, fire and emergency medical services (collectively, "Emergency Services") to service the Property may create a cost to the Town that is not covered by service fees, property taxes, transaction privilege (sales) taxes, construction taxes or other applicable fees and taxes generated from the value of land, structures and activity on the Property. Therefore, the Owner agrees to provide the Town with an Emergency Services operating deficit fund of one hundred thousand dollars ($100,000) per year for five (5) years. The initial funding date shall be the July 1st after the effective date of this Agreement. At the end of each year, Owner may request and shall receive from the Town, in a timely manner, reasonable explanatory and accounting information regarding expenditures from the Emergency Services operating deficit fund. To the extent any of the funds provided by Owner and expended by the Town for any Emergency Services operating deficit are reimbursable from any community facilities district on the Property, Owner shall have the option to seek such reimbursement.

IN WITNESS WHEREOF, the Council of Florence, Arizona, by its Chairman and its Clerk, duly authorized, have affixed hereunto their hand and caused its official seal to be affixed on this 15th day of December, 2003.

1128208v12/16455-0001jdd

TOWN OF FLORENCE, an Arizona municipal corporation

Patsy Williams
Mayor

Dated: 12-03-03

ATTEST:

Clerk/Deputy Clerk,
Dated: 12-03-03

Approval As To Form

By:
Town Attorney

STATE OF ARIZONA)
) SS.
COUNTY OF PINAL)

The foregoing Development Agreement for Merrill Ranch was acknowledged before me this 3rd day of December, 2003 by Patsy Williams, Mayor of the Town of Florence, an Arizona municipal corporation, and being authorized to do so, executed the foregoing instrument on behalf of the Town for the purposes therein stated.

OFFICIAL SEAL
MARIA ELARTON
NOTARY PUBLIC-ARIZONA
PINAL COUNTY
My Comm. Expires Sept. 22, 2006

Maria Elarton
Notary Public

My Commission Expires:
Sept. 22, 2006

CMR/CASA GRANDE, L.L.C., an Arizona limited liability company

By: Vanguard Properties, Inc., a Georgia corporation, Manager

By: _____
W. Harrison Merrill, President

Dated: 12-4-03

STATE OF ARIZONA)
) SS.
COUNTY OF PINAL)

The foregoing Development Agreement for Merrill Ranch was acknowledged before me this 4th day of December, 2003 by _____, a _____ of CMR/CASA GRANDE, L.L.C., an Arizona limited liability company, who being authorized to do so, executed the foregoing instrument on behalf of said entity for the purposes therein stated.

_____
Notary Public

My Commission Expires:
8/5/06

OFFICIAL SEAL
CARLA B. LEPAGE
Notary Public - Arizona
MARICOPA COUNTY
My Commission Expires
AUGUST 5, 2006

FLORENCE COPPER, INC., a Delaware corporation

By: _____
W. Harrison Merrill, President

Dated: 12-4-03

STATE OF ARIZONA)
) SS.
COUNTY OF PINAL)

The foregoing Development Agreement for Merrill Ranch was acknowledged before me this 4th day of December, 2003 by _____, a _____ of FLORENCE COPPER, INC., a Delaware corporation, who being authorized to do so, executed the foregoing instrument on behalf of said entity for the purposes therein stated.

_____
Notary Public

My Commission Expires:
8/5/06

OFFICIAL SEAL
CARLA B. LEPAGE
Notary Public - Arizona
PINAL COUNTY
My Comm. Expires Aug 5, 2006

EL EM, L.L.C., an Arizona limited liability company

By: Harrison Merrill Brittany Trust, Member
By: Harrison Merrill Harrison Jr. Trust, Member
By: Harrison Merrill Lindsay Trust, Member
By: Harrison Merrill Daniel Trust, Member
By: Harrison Merrill Tinsley Trust, Member

By: _____
Hugh O. Nowell, Trustee

Dated: 12-5-03

STATE OF ~~ARIZONA~~ Georgia)
) SS.
COUNTY OF ~~PINAL~~ Fulton)

The foregoing Development Agreement for Merrill Ranch was acknowledged before me this 5th day of December, 2003 by Hugh O. Nowell, a Trustee for members of EL EM, L.L.C., an Arizona limited liability company, who being authorized to do so, executed the foregoing instrument on behalf of said entity for the purposes therein stated.

KATHI J. DAVIDSON
Notary Public, Cherokee County, Georgia
My Commission Expires November 4, 2005

_____
Notary Public

My Commission Expires:

ROADRUNNER RESORTS, L.L.C., an Arizona limited liability company

By: HMEX, L.L.C., an Arizona Limited Liability Company, its Member
By: DMR, L.L.C., an Arizona limited liability company, its Member
By: North Phoenix, L.P. a Georgia limited partnership, its Member
By: Vanguard Properties, Inc., a Georgia corporation, General Partner

By: _____
W. Harrison Merrill, President

Dated: 12-4-03

STATE OF ARIZONA)
) SS.
COUNTY OF PINAL)

The foregoing Development Agreement for Merrill Ranch was acknowledged before me this 4th day of December, 2003 by _____, a _____ of ROADRUNNER RESORTS L.L.C., an Arizona limited liability company, who being authorized to do so, executed the foregoing instrument on behalf of said entity for the purposes therein stated.

_____
Notary Public

My Commission Expires:
8/5/06

OFFICIAL SEAL
CARLA B. LEPAGE
Notary Public - Arizona
MARICOPA COUNTY
My Commission Expires
AUGUST 5, 2006

EXHIBIT "A"

LEGAL DESCRIPTION

EXHIBIT A

The general property boundary description for the Merrill Ranch Planned Unit Development is as follows

Tract 1 – (Portion of Merrill Ranch within Annexation Boundary))

Tract-1-A

A portion of land lying within Sections 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, Township 4 South, Range 9 East of the Gila and Salt River Meridian, County of Pinal, Arizona, more particularly described as follows:

Beginning at the North Quarter Corner of said Section 18 (a 1 ½" aluminum capped rebar) from which the Northwest Corner of said Section 18 (1928 GLO Brass Cap) bears North 89°40'42" West a distance of 2643.00 feet;

Thence South 89°42'22" East a distance of 2628.00 feet to a point;
Thence South 89°42'48" East a distance of 2624.98 feet to a point;
Thence South 89°43'12" East a distance of 2625.97 feet to a point;
Thence South 89°58'12" East a distance of 2625.35 feet to a point;
Thence South 89°54'12" East a distance of 2625.94 feet to a point;
Thence South 89°31'44" East a distance of 212.30 feet to a point;
Thence South 67°30'35" East a distance of 1720.81 feet to a point;
Thence South 59°41'12" East a distance of 4046.60 feet to a point;
Thence South 59°42'54" East a distance of 3058.51 feet to a point;
Thence South 00°08'31" East a distance of 1109.97 feet to a point;
Thence South 00°03'02" East a distance of 5218.61 feet to a point;
Thence South 89°39'33" West a distance of 2616.00 feet to a point;
Thence North 89°41'25" West a distance of 2645.25 feet to a point;
Thence North 89°44'28" West a distance of 2642.19 feet to a point;
Thence South 00°33'41" West a distance of 1321.05 feet to a point;
Thence South 89°44'25" East a distance of 2641.14 feet to a point;
Thence South 00°34'05" West a distance of 1321.07 feet to a point;
Thence South 89°44'23" East a distance of 2640.50 feet to a point;
Thence South 00°35'27" West a distance of 1318.51 feet to a point;
Thence South 89°28'09" East a distance of 1316.20 feet to a point;
Thence South 00°29'31" West a distance of 1319.12 feet to a point;
Thence North 89°26'30" West a distance of 1317.81 feet to a point;
Thence North 89°48'06" West a distance of 2640.13 feet to a point;
Thence North 89°48'06" West a distance of 2640.13 feet to a point;
Thence South 00°06'34" East a distance of 1892.17 feet to a point;
Thence South 69°31'04" West a distance of 10.89 feet to a point;
Thence South 71°49'55" West a distance of 666.30 feet to a point;
Thence South 82°10'55" West a distance of 525.34 feet to a point;
Thence South 58°46'43" West a distance of 379.92 feet to a point;
Thence South 89°18'34" West a distance of 695.69 feet to a point;
Thence North 81°05'51" West a distance of 993.65 feet to a point;
Thence South 89°24'15" West a distance of 456.05 feet to a point;

Thence South 77°45'29" West a distance of 1257.34 feet to a point;
Thence South 66°19'44" West a distance of 434.74 feet to a point;
Thence South 67°29'38" West a distance of 1240.29 feet to a point;
Thence North 00°01'26" West a distance of 1026.64 feet to a point;
Thence South 90°00'00" West a distance of 1462.35 feet to a point;
Thence North 00°11'29" West a distance of 2138.44 feet to a point;
Thence North 00°06'53" East a distance of 1319.48 feet to a point;
Thence South 89°51'41" East a distance of 2617.94 feet to a point;
Thence South 89°53'47" East a distance of 5253.43 feet to a point;
Thence North 00°33'46" East a distance of 1321.36 feet to a point;
Thence North 89°54'40" West a distance of 2631.46 feet to a point;
Thence North 89°54'40" West a distance of 2554.70 feet to a point;
Thence North 00°12'27" West a distance of 2642.02 feet to a point;
Thence North 89°43'12" West a distance of 2749.47 feet to a point;
Thence South 01°21'33" East a distance of 2650.21 feet to a point;
Thence North 89°52'18" West a distance of 2580.60 feet to a point;
Thence South 00°08'42" West a distance of 2638.00 feet to a point;
Thence South 89°51'02" East a distance of 1274.81 feet to a point;
Thence South 00°08'55" East a distance of 1320.24 feet to a point;
Thence North 89°50'22" West a distance of 1308.92 feet to a point;
Thence North 89°46'13" West a distance of 2614.59 feet to a point;
Thence North 00°08'45" West a distance of 1320.32 feet to a point;
Thence North 89°43'02" West a distance of 2652.22 feet to a point;
Thence North 01°12'49" West a distance of 95.99 feet to a point;
Thence North 65°40'16" East a distance of 2942.13 feet to a point;
Thence North 89°42'26" West a distance of 2651.78 feet to a point;
Thence North 00°13'18" West a distance of 1320.09 feet to a point;
Thence North 00°11'51" West a distance of 2644.86 feet to a point;
Thence North 00°11'35" West a distance of 2646.78 feet to a point;
Thence North 00°11'16" West a distance of 2645.58 feet to a point;
Thence South 89°40'42" East a distance of 2599.94 feet to a point;
Thence North 00°19'18" East a distance of 5280.00 feet to the POINT OF BEGINNING.

Tract-1-B

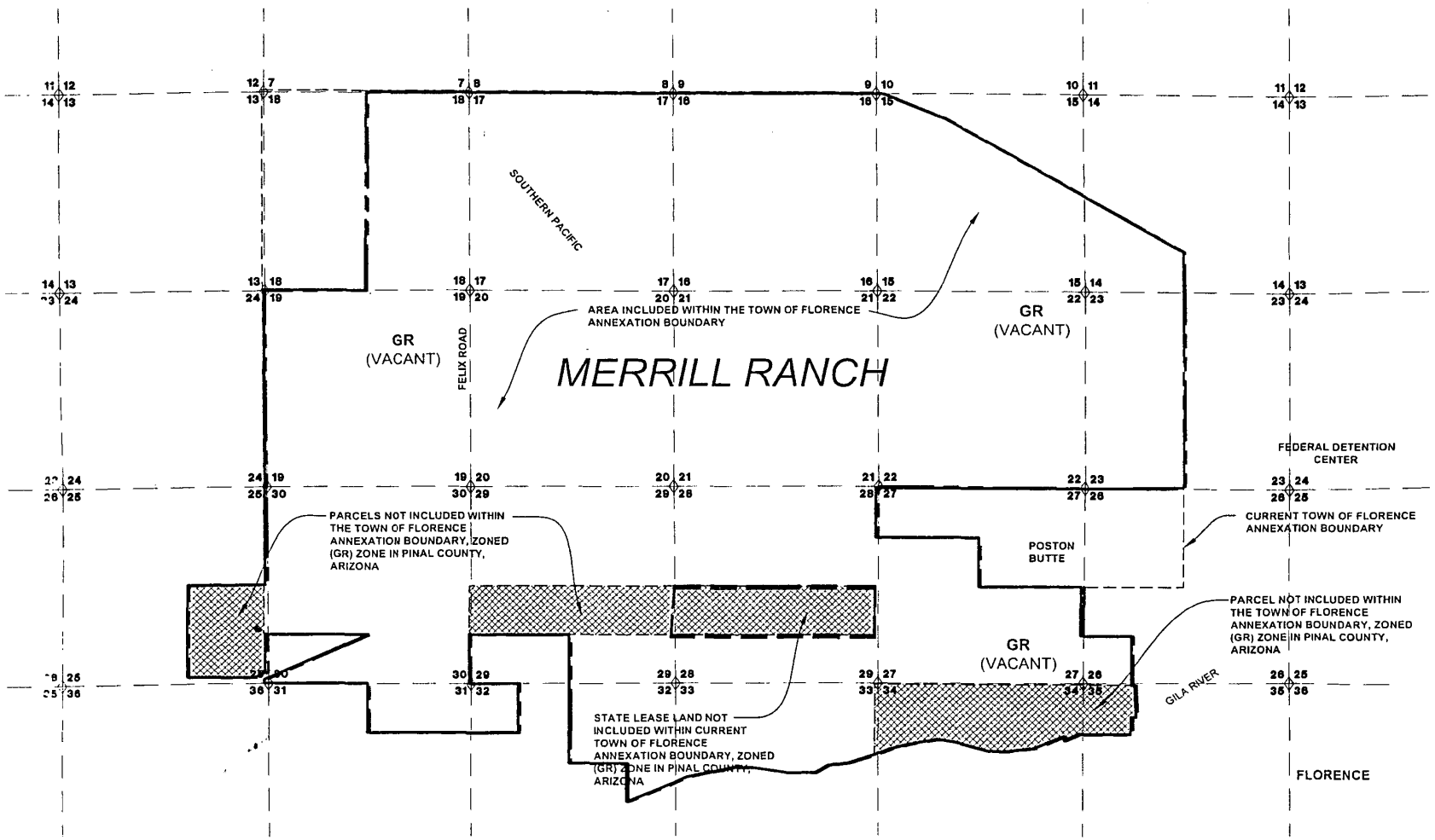
The Northeast Quarter of Section 29, Township 4 South, Range 9 East of the Gila and Salt River Base and Meridian, Pinal County, Arizona;

EXCEPT any portion thereof lying within the right-of-way of Hunt Highway; and

EXCEPT any portion of the Northeast Quarter lying within that certain parcel currently being assessed to Southern Pacific Transportation Company;

EXCEPT all oil and gas as reserved in the Patent.

Said description contains 7537 acres, more or less.



(GR) GENERAL RURAL ZONING IS A PINAL COUNTY, ARIZONA ZONE CLASSIFICATION

JACK JOHNSON COMPANY

EXHIBIT 1-4

-11-

NOT TO SCALE

MERRILL RANCH

TOWN OF FLORENCE, ARIZONA
PLANNED UNIT DEVELOPMENT
EXISTING CONDITIONS AND LAND USE
NOVEMBER 18, 2003

TOF021832

APP284

EXHIBIT "B"

DEVELOPMENT PLAN

REVISED

MERRILL RANCH

PLANNED UNIT DEVELOPMENT

Submitted To:
Town of Florence
Florence, Arizona

Prepared For:
Vanguard Properties, Inc.
6263 N. Scottsdale Road, Suite 205
Scottsdale, AZ 85250
(480) 596-0605

November 7, 2003

Prepared By:
Jack Johnson Company
5745 N. Scottsdale Road, Suite 130
Scottsdale, AZ 85250
(480) 214-0370

JACK JOHNSON COMPANY
Designing World Destinations

MERRILL RANCH
PLANNED UNIT DEVELOPMENT

Merrill Ranch is a community designed to capture the rural lifestyle and beauty of the northern Sonoran Desert. This primarily residential community will be a conventional neighborhood-based development centered around a network of open space, as well as more traditional park and neighborhood amenities.

Planned Unit Developments (PUD) provide one of the best structures for producing a unified and physically cohesive community. The PUD process results in a general master plan with built-in flexibility. Flexibility is essential for the development to grow and mature according to changing demographic and market trends over the entire life of the project.

Development of this Plan has been based on a thorough examination of various physical and social aspects of the Merrill Ranch planning area, including:

- Natural environment
- Transportation
- Population and Demographics
- Public Facilities and Services
- Land Use and Zoning
- Development Constraints and Opportunities

TABLE OF CONTENTS

APPENDICES

EXHIBITS

TABLES

MERRILL RANCH
PLANNED UNIT DEVELOPMENT

I. INTRODUCTION

A. SUMMARY

In 2000, planning for the areas to the east of Magic Ranch, Rancho Sendero and Johnson Ranch began. The result of this planning effort was the previously approved Road Runner Estates PAD. Since then, the Road Runner PAD has been removed and new ownership with additional contiguous property has been added for the 2003 planning of what is now to be known as Merrill Ranch. Located in the Town of Florence General Plan Study Area, Merrill Ranch is a community designed to capture the rural lifestyle and beauty of the northern Sonoran Desert. This primarily residential community will be a conventional neighborhood-based development centered around a network of open space as well as more traditional park and neighborhood amenities.

Planned Unit Developments provide one of the best structures for producing a unified and physically cohesive community. The PUD produces a general master plan with built-in flexibility. Flexibility is essential for the development to grow and mature according to changing demographic and market trends over the entire life of the project. It also simplifies the Town's administration of the PUD. The Merrill Ranch PUD is modeled after the Johnson Ranch PAD Amendment, approved in 1997, and a minor modification to the Road Runner PAD approved in 2000.

Development of this Plan has been predicated on a thorough examination and understanding of the various physical and social aspects of the Merrill Ranch planning area. Data has been collected and extrapolated for the following:

- Natural environment
- Transportation
- Population and Demographics
- Public Facilities and Services
- Land Use and Zoning
- Development Constraints and Opportunities

This comprehensive document will provide detailed provisions for each section of the Merrill Ranch PUD, which includes:

- The Development Plan. This includes the proposed land uses, intensities and phasing at the Merrill Ranch PUD. It includes provisions for hillside,

canyon and desert preservation and information regarding service and infrastructure.

- The Development Requirements. These specifically define the different residential, recreational, commercial and industrial development standards for the Merrill Ranch PUD. Zoning standards are established in this section.

- Implementation. This section outlines the procedures for the administration of the Merrill Ranch PUD including phasing, permit processing and amendments.

- The Design Guidelines. These establish the general desired character of future development within the Merrill Ranch PUD. They include landscape, signage and design guidelines.

APPROXIMATE DISTANCE FROM MERRILL RANCH TO:

FLORENCE	1/4 Mile
APACHE JNCT	20 Miles
COOLIDGE	7 Miles

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Regional Location Map

Exhibit I-1

B. PROJECT LOCATION and DESCRIPTION

The general property boundary description for the Merrill Ranch Planned Unit Development is as follows (see Exhibit 1-2):

Tract 1 – (Portion of Merrill Ranch within Annexation Boundary))

Tract-1-A

A portion of land lying within Sections 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, Township 4 South, Range 9 East of the Gila and Salt River Meridian, County of Pinal, Arizona, more particularly described as follows:

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Thence South 89°54'12" East a distance of 2625.94 feet to a point;
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Thence North 00°11'51" West a distance of 2644.86 feet to a point;
Thence North 00°11'35" West a distance of 2646.78 feet to a point;
Thence North 00°11'16" West a distance of 2645.58 feet to a point;
Thence South 89°40'42" East a distance of 2599.94 feet to a point;
Thence North 00°19'18" East a distance of 5280.00 feet to the POINT OF BEGINNING.

Tract-1-B

The Northeast Quarter of Section 29, Township 4 South, Range 9 East of the Gila and Salt River Base and Meridian, Pinal County, Arizona;

EXCEPT any portion thereof lying within the right-of-way of Hunt Highway; and

EXCEPT any portion of the Northeast Quarter lying within that certain parcel currently being assessed to Southern Pacific Transportation Company;

EXCEPT all oil and gas as reserved in the Patent.

Said description contains 7537 acres, more or less.

Tract 2 – (Future Annexation)

A parcel of land lying and being a part of the Southeast Quarter of Section 25, Township 4 South, Range 8 East of the Gila and Salt River Meridian, Pinal County, Arizona.

Lying North of the Hunt Highway (Per Fee No. 1998-03645, records of Pinal County Recorder) and lying North of that part of the Arizona Eastern Railroad Co. right-of-way conveyed in Book 43 of Deeds, Page 362, records of the Pinal County Recorder,

And Except, the West Half of the West Half of the Southeast Quarter of said Section 25, more particularly described as follows:

Commencing at the Southeast Corner of said Section 25:

Thence North 00°11'33" West, along the East line of Section 25, a distance of 283.18 feet to a point on the North Line of Arizona Eastern Railroad right-of-way, the True Point of Beginning; thence South 64°47'29" West, along the North Line of Arizona Eastern Railroad right-of-way, a distance of 303.73 feet to a point on the North right-of-way line of Hunt Highway; thence South 89°34'48" West along said right-of-way, a distance of 656.10 feet to a point of curvature to the right thru a central angle of 00°28'03", an arc distance of 199.60 feet to a point of tangency; thence North 89°57'09" West, a distance of 832.24 feet; thence North 00°07'39" West, a distance of 2479.72 feet, to a point on the East/West mid-section line; thence North 89°06'12" East, along said East/West Mid-Section Line, a distance of 1960.24 feet to the East Quarter Corner of said Section 25; thence South 00°11'33" East, a distance of 2360.22 feet, to the TRUE POINT OF BEGINNING.

Tract 3 – (Future Annexation)

The North Half of the South Half of Section 29, Township 4 South, Range 9 East of the Gila and Salt River Base and Meridian, Pinal County, Arizona;

EXCEPT any portion thereof lying within the right-of-way of Hunt Highway; and

EXCEPT any portion of the Northeast Quarter lying within that certain parcel currently being assessed to Southern Pacific Transportation Company;

EXCEPT all oil and gas as reserved in the Patent.

Tract 4 – (Future Annexation)

A portion of land lying within Sections 34 and 35, Township 4 South, Range 9 East of the Gila and Salt River Meridian, County of Pinal, Arizona, more particularly described as follows:

Beginning at the North Quarter Corner of said Section 18 (a 1 ½" aluminum capped rebar) from which the Northwest Corner of said Section 18 (1928 GLO Brass Cap) bears North 89°40'42" West a distance of 2643.00 feet;

Thence South 89°42'22" East a distance of 2628.00 feet to a point;
Thence South 89°42'48" East a distance of 2624.98 feet to a point;
Thence South 89°43'12" East a distance of 2625.97 feet to a point;
Thence South 89°58'12" East a distance of 2625.35 feet to a point;
Thence South 89°54'12" East a distance of 2625.94 feet to a point;
Thence South 89°31'44" East a distance of 212.30 feet to a point;
Thence South 67°30'35" East a distance of 1720.81 feet to a point;
Thence South 59°41'12" East a distance of 4046.60 feet to a point;
Thence South 59°42'54" East a distance of 3058.51 feet to a point;
Thence South 00°08'31" East a distance of 1109.97 feet to a point;
Thence South 00°03'02" East a distance of 5218.61 feet to a point;
Thence South 89°39'33" West a distance of 2616.00 feet to a point;
Thence North 89°41'25" West a distance of 2645.25 feet to a point;
Thence North 89°44'28" West a distance of 2642.19 feet to a point;
Thence South 00°33'41" West a distance of 1321.05 feet to a point;
Thence South 89°44'25" East a distance of 2641.14 feet to a point;
Thence South 00°34'05" West a distance of 1321.07 feet to a point;
Thence South 89°44'23" East a distance of 2640.50 feet to a point;
Thence South 00°35'27" West a distance of 1318.51 feet to a point;
Thence South 89°28'09" East a distance of 1316.20 feet to a point;
Thence South 00°29'31" West a distance of 1319.12 feet to the TRUE POINT OF BEGINNING;

Thence South 89°26'30" East a distance of 82.52 feet to a point;
Thence South 02°49'40" East a distance of 860.46 feet to a point;
Thence South 90°00'00" West a distance of 130.00 feet to a point;
Thence South 00°19'59" West a distance of 457.37 feet to a point;
Thence North 89°38'57" West a distance of 1319.42 feet to a point;
Thence South 67°00'30" West a distance of 435.83 feet to a point;
Thence North 00°24'15" East a distance of 108.30 feet to a point;
Thence South 69°44'04" West a distance of 197.09 feet to a point;
Thence South 66°53'43" West a distance of 614.90 feet to a point;
Thence South 83°20'44" West a distance of 755.35 feet to a point;
Thence North 88°33'38" West a distance of 465.82 feet to a point;
Thence North 74°21'30" West a distance of 831.78 feet to a point;
Thence North 80°00'11" West a distance of 472.78 feet to a point;
Thence South 80°17'03" West a distance of 725.42 feet to a point;
Thence South 75°07'18" West a distance of 528.29 feet to a point;
Thence South 69°31'04" West a distance of 435.81 feet to a point;
Thence North 00°06'34" West a distance of 1892.17 feet to a point;
Thence South 89°48'06" East a distance of 2640.13 feet to a point;
Thence South 89°48'06" East a distance of 2640.13 feet to a point;
Thence South 89°26'30" East a distance of 1317.81 feet to a point to the POINT OF BEGINNING.

1. Site History

This site is located on primarily desert scrublands, crossed by various minor drainage courses. There is a designated 100-year Federal Emergency Management Agency (FEMA) flood hazards on the site, which is to be verified by survey prior to development in this area. Hunt Highway runs east and west through the property with approximately 2,400 acres to the south of Hunt Highway. The Central Arizona Canal (CAP) borders the property on the north. The Southern Pacific Railroad runs through the property generally from the northwest to the southeast then along Hunt Highway. In addition, BHP has a proposed underground leaching permit area for a copper mine immediately south of Hunt Highway.

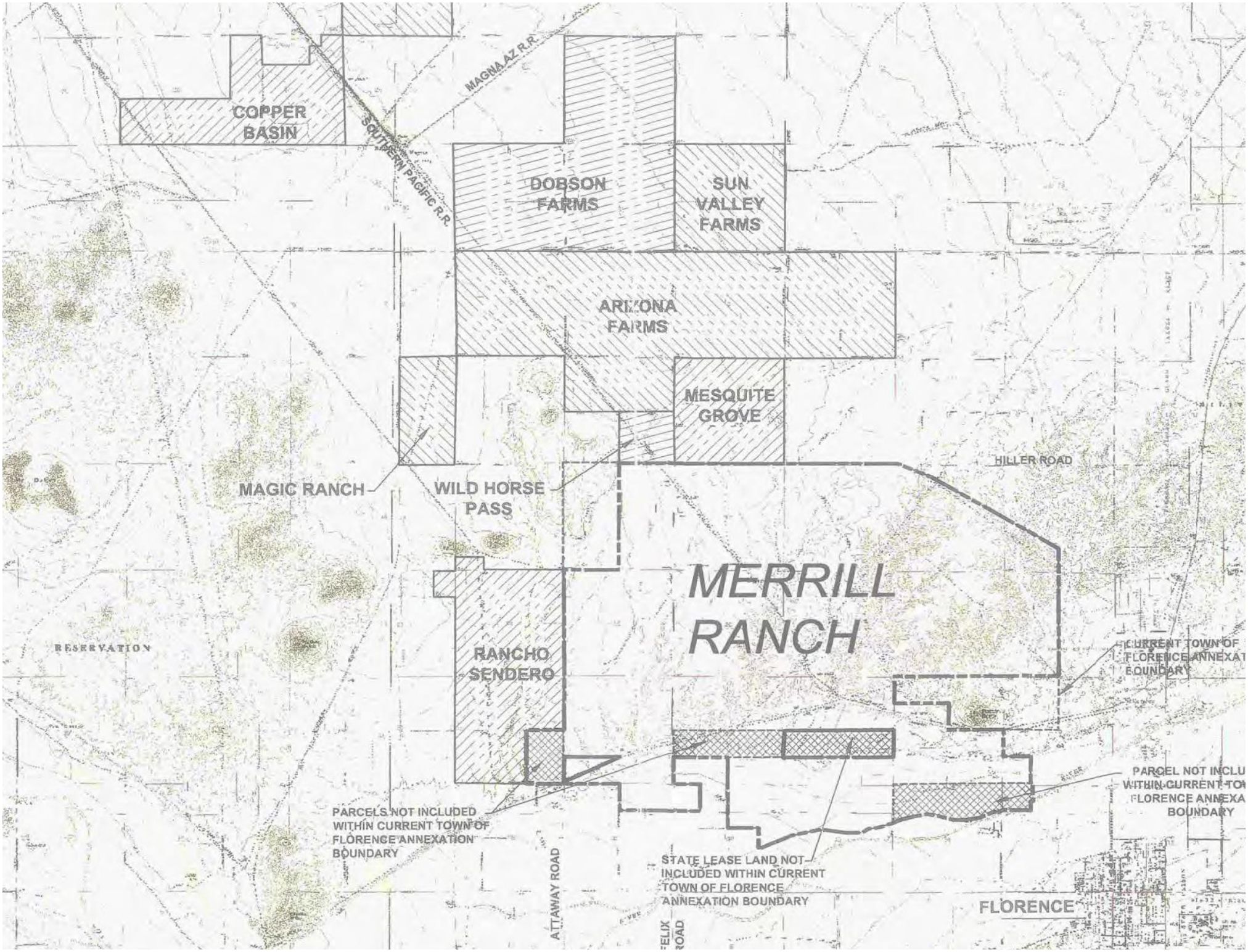
2. Existing Uses/Zoning

Current zoning is General Rural (GR).

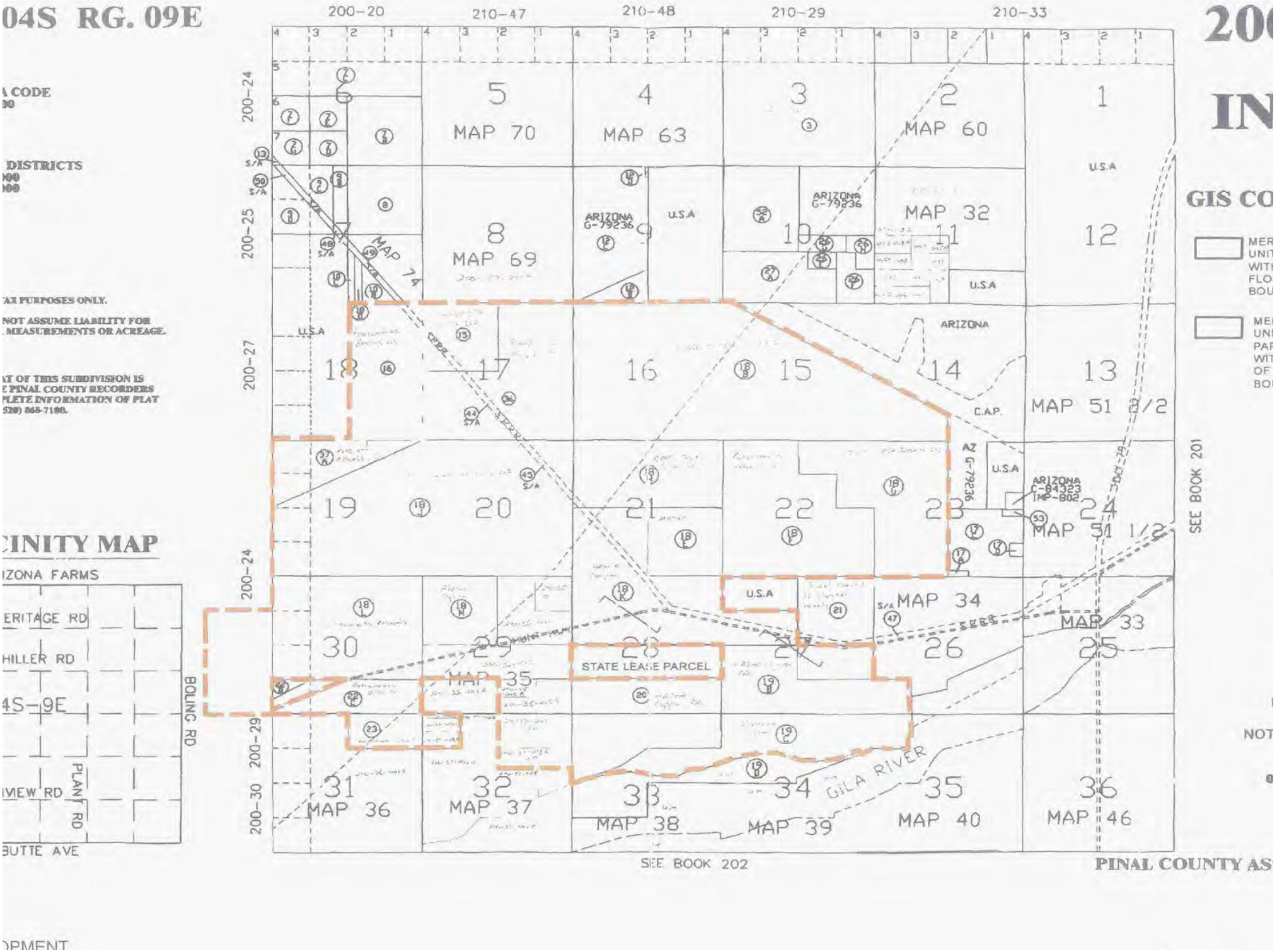
3. Surrounding Uses/Destinations

The Merrill Ranch development site was chosen for its location and accessibility to the major metropolitan areas of Phoenix and Tucson. Other favorable points are its gentle topography, nearness to the San Tan Mountain Regional Park and its proximity to historic destinations in eastern Arizona. The site is located approximately 4 miles northwest of downtown Florence and SR 287/SR 179 on Hunt Highway. Rancho Sendero PAD lies immediately west across the Attaway Road alignment. Felix Road provides north-south access to the site. These routes provide the necessary access to Florence, Apache Junction, Queen Creek and Coolidge.

Exhibit I-4 details the existing land uses and zoning on and around the site. The surrounding land is generally vacant, state-owned land, or has agricultural uses.


COPPER BASIN
SOUTHERN PACIFIC R.R.
MAGNA AZ R.R.
DOBSON FARMS
SUN VALLEY FARMS
ARIZONA FARMS
MESQUITE GROVE
MAGIC RANCH
WILD HORSE PASS
HILLER ROAD
MERRILL RANCH
RANCHO SENDERO
RESERVATION
CURRENT TOWN OF FLORENCE ANNEXAT BOUNDARY
PARCEL NOT INCLU WITHIN CURRENT TO FLORENCE ANNEXA BOUNDARY
PARCELS NOT INCLUDED WITHIN CURRENT TOWN OF FLORENCE ANNEXATION BOUNDARY
STATE LEASE LAND NOT INCLUDED WITHIN CURRENT TOWN OF FLORENCE ANNEXATION BOUNDARY
ATTAWAY ROAD
FLORENCE

04S RG. 09E



CINITY MAP

IZONA FARMS

ERITAGE RD

HILLER RD

4S-9E

MEW RD

PLANT RD

BUTTE AVE

A CODE
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DISTRICTS
00
00

AX PURPOSES ONLY.

NOT ASSUME LIABILITY FOR
MEASUREMENTS OR ACREAGE.

AT OF THIS SUBDIVISION IS
E PINAL COUNTY RECORDERS
PLETE INFORMATION OF PLAT
520) 868-7100.

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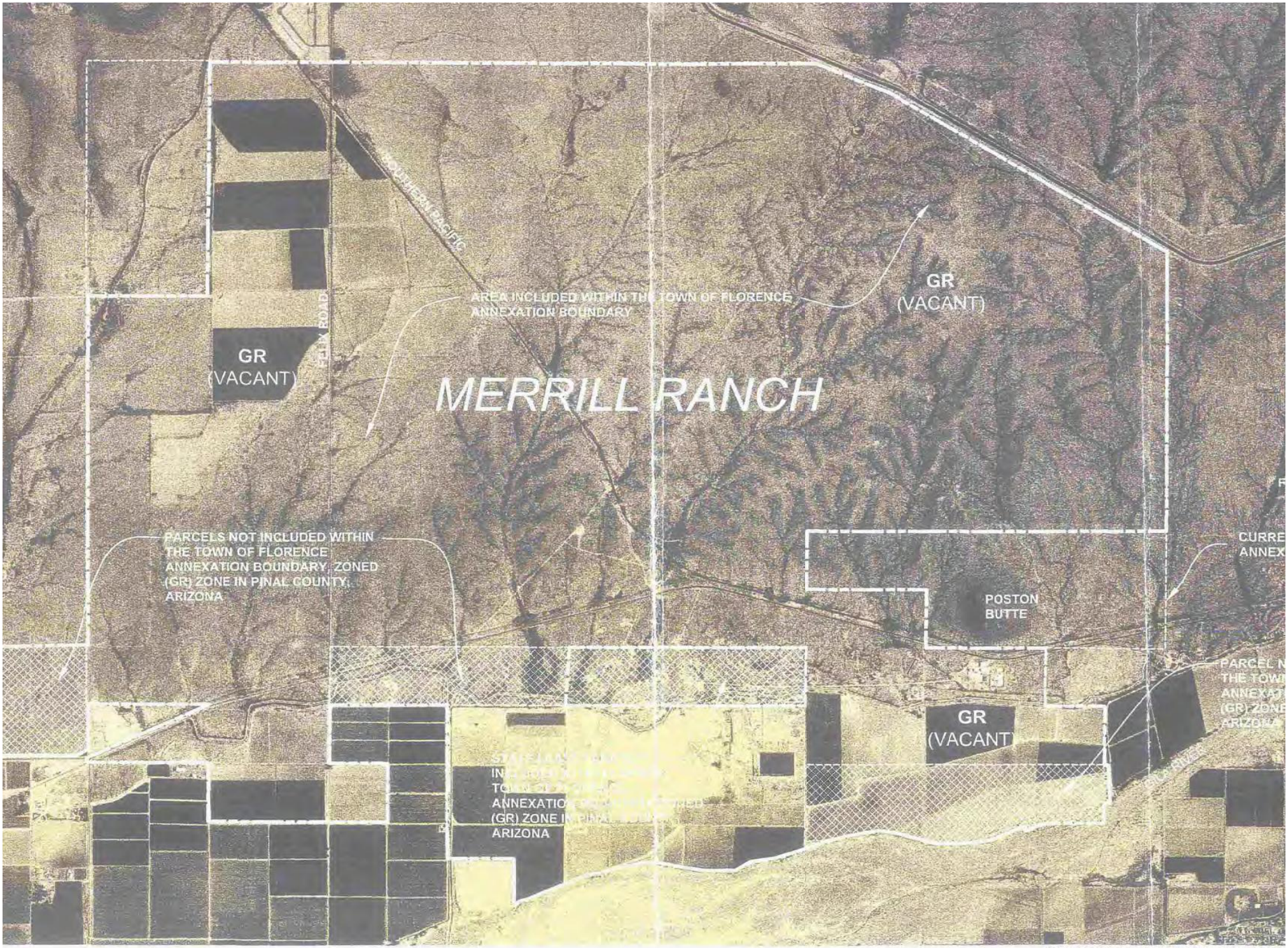
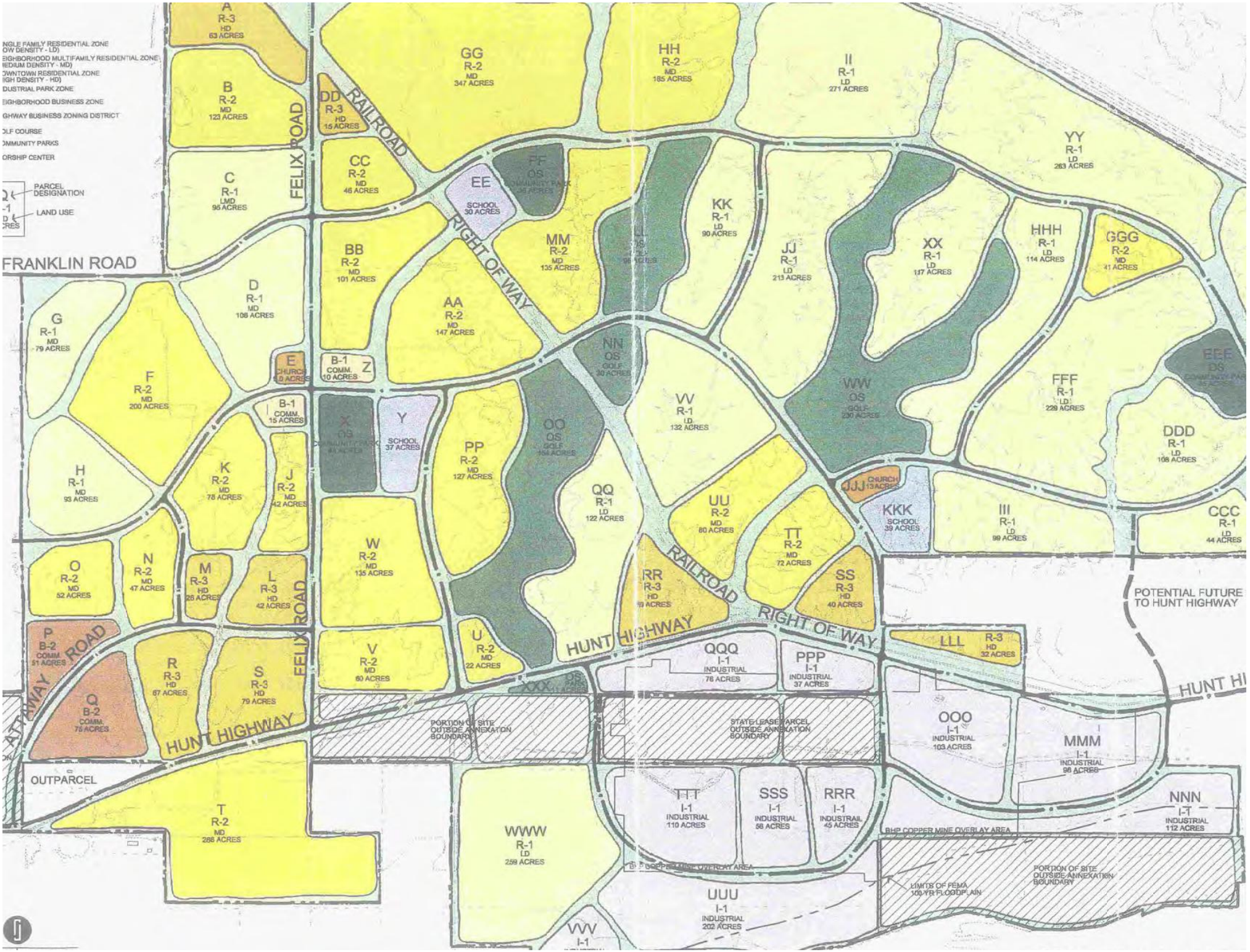


(GR) GENERAL RURAL ZONING IS A PINAL


NGLE FAMILY RESIDENTIAL ZONE
OW DENSITY - LD)
EIGHBORHOOD MULTIFAMILY RESIDENTIAL ZONE
IEDIUM DENSITY - MD)
OWNTOWN RESIDENTIAL ZONE
IGH DENSITY - HD)
DUSTRIAL PARK ZONE
EIGHBORHOOD BUSINESS ZONE
GHWAY BUSINESS ZONING DISTRICT
OLF COURSE
OMMUNITY PARKS
ORSHIP CENTER
PARCEL DESIGNATION
LAND USE
FRANKLIN ROAD
FELIX ROAD
RAILROAD
RIGHT OF WAY
HUNT HIGHWAY
POTENTIAL FUTURE TO HUNT HIGHWAY
OUTPARCEL
PORTION OF SITE OUTSIDE ANNEXATION BOUNDARY
STATE LEASE PARCEL OUTSIDE ANNEXATION BOUNDARY
BHP COPPER MINE OVERLAY AREA
LIMITS OF FEMA 100-YR FLOODPLAIN
A R-3 HD 63 ACRES
B R-2 MD 123 ACRES
C R-1 LMD 95 ACRES
D R-1 MD 108 ACRES
E CHURCH 3 ACRES
F R-2 MD 200 ACRES
G R-1 MD 79 ACRES
H R-1 MD 93 ACRES
J R-2 MD 42 ACRES
K R-2 MD 78 ACRES
L R-3 HD 42 ACRES
M R-3 HD 26 ACRES
N R-2 MD 47 ACRES
O R-2 MD 52 ACRES
P B-2 COMM 51 ACRES
Q B-2 COMM 75 ACRES
R R-3 HD 67 ACRES
S R-3 HD 79 ACRES
T R-2 MD 288 ACRES
U R-2 MD 22 ACRES
V R-2 MD 60 ACRES
W R-2 MD 135 ACRES
X OS COMMUNITY PARK 44 ACRES
Y SCHOOL 37 ACRES
Z B-1 COMM. 10 ACRES
AA R-2 MD 147 ACRES
BB R-2 MD 101 ACRES
CC R-2 MD 46 ACRES
DD R-3 HD 15 ACRES
EE SCHOOL 30 ACRES
FF OS COMMUNITY PARK 46 ACRES
GG R-2 MD 347 ACRES
HH R-2 MD 185 ACRES
II R-1 LD 271 ACRES
JJ R-1 LD 213 ACRES
KK R-1 LD 90 ACRES
LL OS GOLF 96 ACRES
MM R-2 MD 135 ACRES
NN OS GOLF 30 ACRES
OO OS GOLF 164 ACRES
PP R-2 MD 127 ACRES
QQ R-1 LD 122 ACRES
RR R-3 HD 39 ACRES
SS R-3 HD 40 ACRES
TT R-2 MD 72 ACRES
UU R-2 MD 80 ACRES
VV R-1 LD 132 ACRES
WW OS GOLF 230 ACRES
XX R-1 LD 137 ACRES
YY R-1 LD 263 ACRES
ZZ OS
B-1 COMM. 15 ACRES
AAA OS
BBB OS
CCC R-1 LD 44 ACRES
DDD R-1 LD 108 ACRES
EEE OS
FFF R-1 LD 229 ACRES
GGG R-2 MD 41 ACRES
HHH R-1 LD 114 ACRES
III R-1 LD 99 ACRES
JJJ CHURCH 13 ACRES
KKK SCHOOL 39 ACRES
LLL R-3 HD 32 ACRES
MMM I-1 INDUSTRIAL 96 ACRES
NNN I-1 INDUSTRIAL 112 ACRES
OOO I-1 INDUSTRIAL 103 ACRES
PPP I-1 INDUSTRIAL 37 ACRES
QQQ I-1 INDUSTRIAL 76 ACRES
RRR I-1 INDUSTRAIL 45 ACRES
SSS I-1 INDUSTRIAL 58 ACRES
TTT I-1 INDUSTRIAL 110 ACRES
UUU I-1 INDUSTRIAL 202 ACRES
VVV I-1
WWW R-1 LD 259 ACRES
XXX OS PARK

II. DEVELOPMENT PLAN

A. LAND USE PLAN

1. Proposed Uses and Densities

Merrill Ranch is an 7,537-acre mixed-use development featuring a range of low to medium-high density neighborhood housing, with several areas reserved for neighborhood business and commercial uses. An extensive trail network connecting the lineal park system and natural desert spaces and community parks are part of the Open Space System within Merrill Ranch. A wastewater treatment plant, buffered by open space, provides the necessary sewer services for Merrill Ranch. Land set aside as developed- or undeveloped-open space accounts for about 14% (or approximately 749 acres) of the total residential land area of Merrill Ranch. Future marketing studies shall determine the targeted demographic population for specific neighborhoods within Merrill Ranch. It is anticipated that Merrill Ranch will be a family-based community.

Planning areas have been designated to accommodate the envisioned development of Merrill Ranch Planned Unit Development site. A breakdown of proposed land uses by planning area is provided in Table II-1, along with gross acres and planned number of residential units per planning area.

Table II-2, the Land Use Summary Table, totals the number of dwelling units and gross acreage by proposed zoning and land use categories.

Table II-3, the Quantitative Development Table, summarizes the percentage of open space, acres of single-family housing and the average lot size within the PUD. Maximum overall density of the PUD is 3.5 dwelling units per gross acre.

The land use concept of the Planned Unit Development presents a balanced urban community. All of the land use elements are integrated for circulation, infrastructure, aesthetic and visual setting, development standards and guidelines.

2. Phasing Program

The Merrill Ranch Planned Unit Development will be developed in multiple phases. A summary of the proposed phasing sequence by planning area is provided on Table II-4 and shown on Exhibit II-2, Phasing Plan.

TABLE II-1
LAND USE TABLE – MERRILL RANCH

Parcel Designation	Proposed Zoning	Land Use	Dwelling Units per Acre			Gross Acreage	Anticipated Dwelling Units
			Low	Target	High		
A	R-3	High	8	10	18	63	630
B	R-2	Medium	4	4.4	8	123	539
C	R-1	Low	.5	3.8	4	95	361
D	R-1	Low	.5	3.8	4	106	403
E		Worship	-	-	-	9	-
F	R-2	Medium	4	4.4	8	200	877
G	R-1	Low	.5	3.8	4	79	302
H	R-1	Low	.5	3.8	4	93	353
I	B-1	Business	-	-	-	15	-
J	R-2	Medium	4	4.4	8	42	184
K	R-2	Medium	4	4.4	8	78	342
L	R-3	High	8	10	18	42	420
M	R-3	High	8	10	18	26	260
N	R-2	Medium	4	4.4	8	47	206
O	R-2	Medium	4	4.4	8	52	228
P	B-2	Commercial	-	-	-	51	-
Q	B-2	Commercial	-	-	-	75	-
R	R-3	High	8	10	18	67	670
S	R-3	High	8	10	18	79	790
T	R-2	Medium	4	4.4	8	286	1254
U	R-3	High	8	10	18	22	220
V	R-2	Medium	4	4.4	8	60	263
W	R-2	Medium	4	4.4	8	135	592
X		Open Space	-	-	-	44	-
Y		School	-	-	-	37	-
Z	B-1	Business	-	-	-	10	-
AA	R-2	Medium	4	4.4	8	147	644
BB	R-2	Medium	4	4.4	8	101	443
CC	R-2	Medium	4	4.4	8	46	202
DD	R-3	High	8	10	18	15	150
EE		School Site	-	-	-	30	-
FF		Open Space	-	-	-	36	-
GG	R-2	Medium	4	4.4	8	347	1521
HH	R-2	Medium	4	4.4	8	185	811
II	R-1	Low	.5	3.8	4	271	1030
JJ	R-1	Low	.5	3.8	4	213	809
KK	R-1	Low	.5	3.8	4	90	342
LL		Open Space/Golf	-	-	-	96	-
MM	R-2	Medium	4	4.4	8	135	592

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Land Use Table

Table II-1

Parcel Designation	Proposed Zoning	Land Use	Dwelling Units per Acre			Gross Acreage	Anticipated Dwelling Units
			Low	Target	High		
NN		Open Space/Golf	-	-	-	30	-
OO		Open Space/Golf	-	-	-	154	-
PP	R-2	Medium	4	4.4	8	127	557
QQ	R-1	Low	.5	3.8	4	122	463
RR	R-3	High	8	10	18	59	590
SS	R-3	High	8	10	18	40	400
TT	R-2	Medium	4	4.4	8	72	316
UU	R-2	Medium	4	4.4	8	80	351
VV	R-1	Low	.5	3.8	4	132	502
WW		Open Space/Golf	-	-	-	230	-
XX	R-1	Low	.5	3.8	4	117	
YY	R-1	Low	.5	3.8	4	263	445
ZZ	R-1	Low	.5	3.8	4	107	999
AAA	R-1	Low	.5	3.8	4	38	407
BBB	R-1	Low	.5	3.8	4	39	144
CCC	R-1	Low	.5	3.8	4	44	148
DDD	R-1	Low	.5	3.8	4	108	167
EEE		Open Space	-	-	-	35	410
FFF	R-1	Low	.5	3.8	4	229	870
GGG	R-2	Medium	4	4.4	8	41	180
HHH	R-1	Low	.5	3.8	4	114	433
III	R-1	Low	.5	3.8	4	99	376
JJJ		School Site	-	-	-	39	-
KKK	R-3	High	8	10	18	32	320
LLL		Worship Site	-	-	-	13	-
MMM	I-1	Industrial	-	-	-	98	-
NNN	I-1	Industrial	-	-	-	112	-
OOO	I-1	Industrial	-	-	-	103	-
PPP	I-1	Industrial	-	-	-	37	-
QQQ	I-1	Industrial	-	-	-	76	-
RRR	I-1	Industrial	-	-	-	45	-
SSS	I-1	Industrial	-	-	-	56	-
TTT	I-1	Industrial	-	-	-	110	-
UUU	I-1	Industrial	-	-	-	202	-
VVV	I-1	Industrial	-	-	-	45	-
WWW	R-1	Low	.5	3.8	4	259	984
XXX		Open Space	-	-	-	11	-
Misc.		R.O.W./ Open Space	-	-	-	371	
TOTAL						7,537	24,500

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Land Use Table

Table II-1, continued

TABLE II-2

LAND USE SUMMARY TABLE – MERRILL RANCH

Proposed Zoning	Land Use	D.U./Acre Low	D.U./Acre Target	D.U./Acre High	Gross Acreage	Anticipated Dwelling Units
R-1	Low	.5	3.8	4.0	2618	9948
R-2	Medium	4.0	4.4	8.0	2304	10102
R-3	High	8.0	10	18.0	445	4450
B-1	Neighborhood Business				25	
B-2	Commercial				126	
I-1	Industrial				884	
	Golf				510	
	Worship Sites				22	
	Parks				126	
	Schools				106	
	Right-of-ways				280	
	Miscellaneous Open Space Areas/Corridors				91	
Total					7,537	24,500

* Commercial uses shall have up to 750,000 square feet of retail sales floor area.

- Total acreage (7,537 acres) includes Hunt Highway R.O.W. Felix Road R.O.W., railroad R.O.W. and pipeline R.O.W. (± 273 acres)

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Land Use Summary Table Table II-2

TABLE II-3

QUANTITATIVE DEVELOPMENT TABLE – MERRILL RANCH

TOTAL GROSS AREA	7,537
AREA OF COMMERCIAL DEVELOPMENT	151
TOTAL GROSS AREA OF RESIDENTIAL DEVELOPMENT	5,345
TOTAL NUMBER OF DWELLING UNITS PROPOSED	24,500
AREA OF PUBLIC OPEN SPACE*	749 Acres 14%

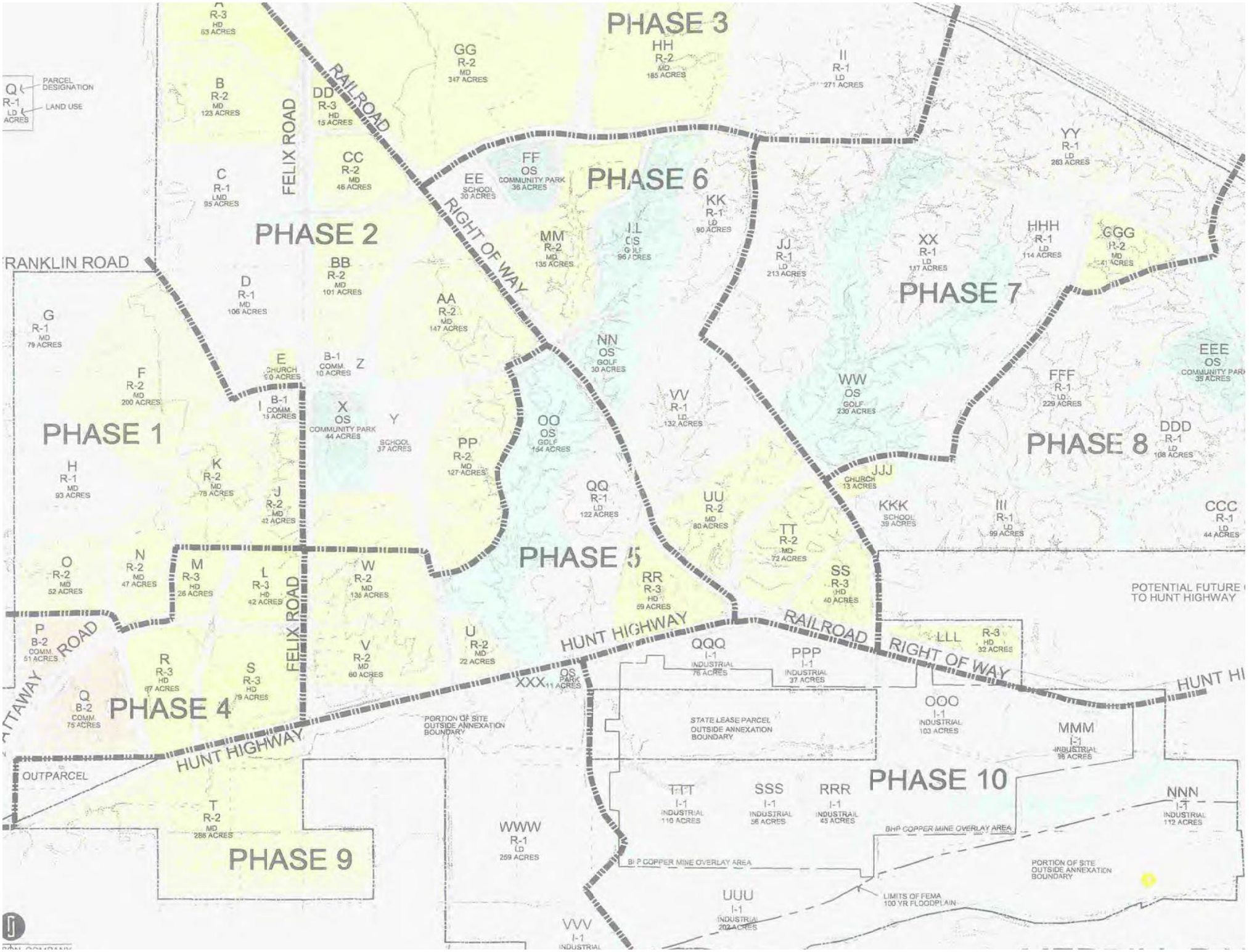
- See Exhibit II-4 for delineation of open space.
- Open space will be fulfilled through the community parks, greenbelt corridors and/or golf courses and open space within each of the residential parcels.

TABLE II-4
PHASING PLAN – MERRILL RANCH

Phase	Land Use	Gross Acres	Planned Units	Total Planned Units
1	B-1	15	--	
	R-1	172	655	
	R-2	41	1837	2492
2	MISC	90	--	
	B-1	10	--	
	R-1	291	764	
	R-2	611	2681	4225
	R-3	78	780	
3	R-1	271	1030	
	R-2	532	2332	3362
4	B-2	126	--	
	R-3	214	2140	2140
5	MISC	154	--	
	R-1	122	463	1832
	R-2	128	559	
	R-3	81	810	
6	MISC	192	--	
	R-1	222	844	2503
	R-2	287	1259	
	R-3	40	400	
7	MISC	230	--	
	R-1	707	2686	2866
	R-2	141	180	
8	MISC	87	--	
	R-1	664	2522	2842
	R-3	32	320	
9	MISC	11	--	
	I-1	45	--	2238
	R-1	259	984	
	R-2	286	1254	
10	I-1	839	--	--
	TOTALS			

*Acres not included are for R.O.W. for Felix Road, the railroad and the pipeline.

In preparing the phasing plan, certain assumptions have been made: 1) the rate of growth for the project will remain constant and as calculated; 2) the rate of growth of other regional projects which were used in assessing cumulative impacts on phased infrastructures and services will remain constant and as calculated; and 3) the market demand for proposed residential product type and mix will remain constant throughout the phasing intervals. These assumptions are necessary to establish a phasing plan for the Land Use Plan. However, should these assumptions become obsolete or invalid due to area growth dynamics during the build-out of Merrill Ranch, the Phasing Plan provides the flexibility to accommodate such growth dynamics. If, for example, the build-out rate in internal project accelerates, key infrastructure components may be re-phased.


PHASE 1
PHASE 2
PHASE 3
PHASE 4
PHASE 5
PHASE 6
PHASE 7
PHASE 8
PHASE 9
PHASE 10
PARCEL DESIGNATION
LAND USE
RANKLIN ROAD
FELIX ROAD
RAILROAD
RIGHT OF WAY
HUNT HIGHWAY
OUTPARCEL
PORTION OF SITE OUTSIDE ANNEXATION BOUNDARY
STATE LEASE PARCEL OUTSIDE ANNEXATION BOUNDARY
BHP COPPER MINE OVERLAY AREA
LIMITS OF FEMA 100 YR FLOODPLAIN
POTENTIAL FUTURE
TO HUNT HIGHWAY
A R-3 HD 63 ACRES
B R-2 MD 123 ACRES
C R-1 LD 95 ACRES
D R-1 MD 106 ACRES
E CHURCH 9.0 ACRES
F R-2 MD 200 ACRES
G R-1 MD 79 ACRES
H R-1 MD 93 ACRES
I B-1 COMM. 13 ACRES
J R-2 MD 42 ACRES
K R-2 MD 78 ACRES
L R-3 HD 42 ACRES
M R-3 HD 26 ACRES
N R-2 MD 47 ACRES
O R-2 MD 52 ACRES
P B-2 COMM. 51 ACRES
Q B-2 COMM. 75 ACRES
R R-3 HD 67 ACRES
S R-3 HD 79 ACRES
T R-2 MD 286 ACRES
U R-2 MD 22 ACRES
V R-2 MD 60 ACRES
W R-2 MD 135 ACRES
X OS COMMUNITY PARK 44 ACRES
Y SCHOOL 37 ACRES
Z B-1 COMM. 10 ACRES
AA R-2 MD 147 ACRES
BB R-2 MD 101 ACRES
CC R-2 MD 46 ACRES
DD R-3 HD 15 ACRES
EE SCHOOL 30 ACRES
FF OS COMMUNITY PARK 36 ACRES
GG R-2 MD 347 ACRES
HH R-2 MD 185 ACRES
II R-1 LD 271 ACRES
JJ R-1 LD 213 ACRES
KK R-1 LD 90 ACRES
LL OS GOLF 96 ACRES
MM R-2 MD 135 ACRES
NN OS GOLF 30 ACRES
OO OS GOLF 154 ACRES
PP R-2 MD 127 ACRES
QQ R-1 LD 122 ACRES
RR R-3 HD 59 ACRES
SS R-3 HD 40 ACRES
TT R-2 MD 72 ACRES
UU R-2 MD 80 ACRES
VV R-1 LD 132 ACRES
WW OS GOLF 230 ACRES
XX R-1 LD 147 ACRES
YY R-1 LD 283 ACRES
ZZ R-1 LD 213 ACRES
AAA R-1 LD 114 ACRES
BBB R-2 MD 41 ACRES
CCC R-1 LD 44 ACRES
DDD R-1 LD 108 ACRES
EEE OS COMMUNITY PARK 39 ACRES
FFF R-1 LD 229 ACRES
GGG R-2 MD 41 ACRES
HHH R-1 LD 114 ACRES
III R-1 LD 99 ACRES
JJJ CHURCH 13 ACRES
KKK SCHOOL 39 ACRES
LLL R-3 HD 32 ACRES
MMM I-1 INDUSTRIAL 98 ACRES
NNN I-1 INDUSTRIAL 112 ACRES
OOO I-1 INDUSTRIAL 103 ACRES
PPP I-1 INDUSTRIAL 37 ACRES
QQQ I-1 INDUSTRIAL 76 ACRES
RRR I-1 INDUSTRIAL 45 ACRES
SSS I-1 INDUSTRIAL 56 ACRES
TTT I-1 INDUSTRIAL 110 ACRES
UUU I-1 INDUSTRIAL 202 ACRES
VVV I-1 INDUSTRIAL
WWW R-1 LD 259 ACRES
XXX OS PARK 11 ACRES

3. Benefits and Advantages for the Town of Florence

The Merrill Ranch Planned Unit Development will help meet the need for new housing within the Town of Florence as Pinal County's population continues to grow. Growth within the Phoenix metropolitan area and Maricopa County has begun to impact these growth patterns in Pinal County. The rapid sales and development of the Johnson Ranch portrait this growth pattern. Growth and development tend to encourage and result in even more development. Shrinking development opportunities in Maricopa County, especially on the eastern side, will continue to impact housing needs in this area.

a.) Merrill Ranch will provide housing, recreation and employment opportunities for the residents of Pinal County. The development will increase the tax base without incurring large infrastructure costs for the Town.

b.) Merrill Ranch will provide a master-planned development with a variety of residential opportunities and some local commercial uses. This will allow the Town to continue to grow in a manner compatible with the Town of Florence's General Plan.

c.) Merrill Ranch is located adjacent to a major transportation corridor. This will allow for the efficient use of the existing transportation infrastructure.


0 - 5% SLOPES
5%- 10% SLOPES
10%-15% SLOPES
15%+ SLOPES
RANKLIN ROAD
FELIX ROAD
RAILROAD
RIGHT OF WAY
FELIX ROAD
RAILROAD
RIGHT OF WAY
HUNT HIGHWAY
HUNT HIGHWAY
HUNT
OUTPARCEL
PORTION OF SITE OUTSIDE ANNEXATION BOUNDARY
STATE LEASE PARCEL OUTSIDE ANNEXATION BOUNDARY
BHP COPPER MINE OVERLAY AREA
BHP COPPER MINE OVERLAY AREA
BHP COPPER MINE OVERLAY AREA
LIMITS OF FEMA 100 YR FLOODPLAIN
PORTION OF SITE OUTSIDE ANNEXATION BOUNDARY

B. HILLSIDE PRESERVATION

The project site has been analyzed for various slope categories. The analysis is based on five-foot contour interval mapping from Cooper Aerial Survey Company mapping. The areas shown on the Slope Analysis, Exhibit III-3, are summarized as follows:

Table II-5
Slope Analysis

Slope Category	Area (Ac)
0-5 percent	6,518
5-10 percent	993
10-15 percent	462
15+ percent	235
TOTAL	7,537

C. SERVICES AND INFRASTRUCTURE

1. Water

Water

There are various methods the developer may use to service the project – either private, public, or use of community facilities districts. The manner in which will be determined by the developer at a future date.

Water Demand

The water system infrastructure will be sized to accommodate peak water use.

Two pressure zones are planned for the water system. It is expected that static pressure will range from 35 to 85 psi with some minor variances. The water system will consist of wells, ground storage reservoirs, a booster station and distribution piping. The actual timing and sizing of the water system infrastructure will depend on the actual progress of the project's phased construction.

2. Wastewater

Wastewater Service Provider

There are various methods the developer may use to service the project – either private, public, or use of community facilities districts. The manner in which will be determined by the developer at a future date.

Wastewater Generation

Wastewater generation estimates for family and adult residential and commercial uses were derived from historic flows near this area. The wastewater system infrastructure will be sized to accommodate projected wastewater flows.

Wastewater Collection

Merrill Ranch will be served by gravity sewer mains where possible and force mains where needed. The actual timing and sizing of the wastewater collection system will depend on the phased construction of the project.

Wastewater Treatment Facility

The wastewater treatment facility will be constructed in phases. Initially, wastewater treatment will consist of the use of aerated lagoons. When wastewater flows approach the lagoon's capacity, a mechanical treatment plant is proposed. The wastewater effluent will be of the quality for effluent use on open space and landscaped areas.

The construction of the wastewater treatment facility and wastewater collection infrastructure will be phased in accordance with the growth of the project. Each phase of the Wastewater Treatment Facility will be constructed and operational before the capacity of the existing treatment facilities is exceeded. The wastewater facilities will be designed to allow orderly expansion to occur, as additional capacity is required.

Wastewater Reclamation

The wastewater will be treated to "open access" reuse standards. The treated effluent will be pumped by a reclaimed pump station to the Open areas for use.

3. Other Utilities and Services

The various public utilities and their respective provider are listed below:

Electric	Arizona Public Service
Gas	Southwest Gas
Telephone	Qwest
Cable Television	Central Arizona Communications
Police Protection	Town of Florence
Fire Protection/Ambulance Service	Town of Florence
Solid Waste Handling	Browning Ferris Industries or Central AZ Solid Waste

Most of the above mentioned providers already offer services in or near this area. Additional utility infrastructure required to serve Merrill Ranch will be constructed as part of the Merrill Ranch project.

4. Drainage

The Merrill Ranch property is currently undeveloped and vacant and has been fenced and utilized for grazing and other agricultural uses. The site topography varies from gently rolling land in the western and southern part to more rugged terrain in the east. The area has several 4-wheel drive trails to accommodate ranching activities. There are several washes that traverse the property in a general north-to-south direction. The washes terminate eventually in the Gila River, although they have been somewhat diverted from their original channels by construction of highways, railways, canals and agricultural use.

A master drainage report will be prepared to determine the peak discharges of watersheds entering and exiting the site and will accurately depict the floodplain limits for the washes. A detailed flood hazard map by the Federal Emergency Management Agency (FEMA) shows the majority of this site is in Zone "C", an area of minimal flooding.

Detention of offsite stormwater runoff will be achieved by utilizing the lineal park system, open areas and the golf courses. Additional detention/retention facilities will need to be constructed to satisfy additional retention or detention requirements, as determined by the Master Drainage Report. Retention/detention facilities will be designed based upon guidelines set forth by the Town of Florence. Basins will be used to intercept on-site stormwater runoff.

Portions of the washes may be considered 404 Jurisdictional and may be subject to the U.S. Army Corps of Engineers Nationwide Permitting for road and utility crossings, bank protection and determination of the maximum allowable area of disturbance. If more than one-half acre of jurisdictional wash are to be disturbed, an individual permit will be required. [Permitting requirements are subject to change.]

5. Traffic

Hunt Highway lies on the southern portion of the project and provides regional access to the north, east and west. Hunt Highway is a two-lane, undivided major collector, which is currently maintained by Pinal County. In the vicinity of Johnson Ranch, Hunt Highway continues north and east to Queen Creek, providing access along Ellsworth Road north to U.S. 60 (Superstition Freeway) and regional access to the Phoenix area. From the east side of the site, Hunt Highway extends in a southeasterly direction approximately ½ mile to S.R. 79 and the Town of Florence. Hunt Highway currently has a posted speed limit of 50 mph. Major intersecting roads within the site include Felix Road and Attaway Road.

Merrill Ranch, a 7,537-acre residential PUD development, is located just east of Mystic Ranch and along the north and south sides of Hunt Highway. At complete build-out conditions, Merrill Ranch is expected to have a total of 24,500 dwelling units, several schools, several commercial areas, community parks, a lineal park connected by an extensive trail system and natural open spaces. The residential units are anticipated to consist primarily of low and medium density single-family homes. The first houses within this development are expected to be sold in 2004, with sequential construction and a complete build-out of the site by the year 2039.

Internal circulation for Merrill Ranch will be provided by a series of arterial, collector and local streets. The proposed arterial section has an 80-foot right-of-way and optional 35-foot landscape easement each side and provides two through lanes in each direction along with a 12-foot median, which will accommodate left turn lanes. Pedestrian access is provided outside the curb on one side of the street. The major collector has a 60-foot right-of-way and provides a three-lane section at key intersections providing for left-turn movements, in addition to through movements. The local street section, with a 40-foot right-of-way, provides for two through lanes in each direction, with direct access to residential driveways.

A transportation study will be prepared to determine road designations throughout Merrill Ranch and to identify impacts to existing roadways.

6. Street Design

Street design standards from the current "Town of Florence Development Codes, June 20, 2000, Section 4-238 shall apply to this PUD unless other sections herein amend said design standards and revised as follows:

- Section 4-238(a)(2) Collector Streets may be a 60-foot right-of-way or wider.
- Section 4-238(d)(3) Regardless of radius size local roads only require a 50-foot tangent between reverse curves.
- Section 4-238(d)(b) Local streets intersecting a collector street or arterial route shall have a tangent section of centerline at least 100 feet in length measured from the right-of-way line of the arterial route or collector street to local street right-of-way.

7. Maintenance of Streets and Common Areas

The streets within the Merrill Ranch development are anticipated to be both public and private. Public streets will be constructed in accordance with the Town of Florence minimum standards with the right-of-way dedicated to the public. Upon acceptance by the Town of Florence, the town will be responsible for maintenance of the public streets. Private streets will be constructed in accordance with design standards established by the Town of Florence and this PUD and will be maintained by the Merrill Ranch Master Homeowners Association (HOA). The trails are private common areas to be maintained by the Merrill Ranch HOA. Public parks within the PUD shall be built and shall be maintained by the Merrill Ranch HOA until such time parks are dedicated and accepted by the Town.

8. Schools and Libraries

Schools

The Florence Unified School District consists of two K-8 and one high school with a new K-8 scheduled to open in the fall of 2004.

If additional school sites are needed within the district, a site or sites will be reserved as necessary for the district to be developed at the discretion of the school district authorities. In addition to reserving for an elementary school, the site will be dedicated to the district.

Table II-6, below, illustrates the estimated number of students generated per phase of development at Merrill Ranch PUD. School district staff recommends an average of 1.0 students per household as a generation factor to predict future enrollment within the district.

Table II-6
MERRILL RANCH PUD STUDENT GENERATION
FLORENCE UNIFIED SCHOOL DISTRICT

Project Phase	Years	Residential Units (*)	Students Generated
1	2004 – 2007	960	960
2	2008 – 2011	2922	2922
3	2012 – 2016	3362	3362
4	2017 – 2020	2140	2140
5	2021 – 2024	1832	1832
6	2025 – 2027	2503	2503
7	2028 – 2030	2866	2866
8	2031 – 2033	2848	2848
9	2034 – 2036	2238	2238
10	2037 – 2039	0	0
		Total	21,671

*Phase 1 and 2 exclude the anticipated units for an active adult age restricted neighborhood.

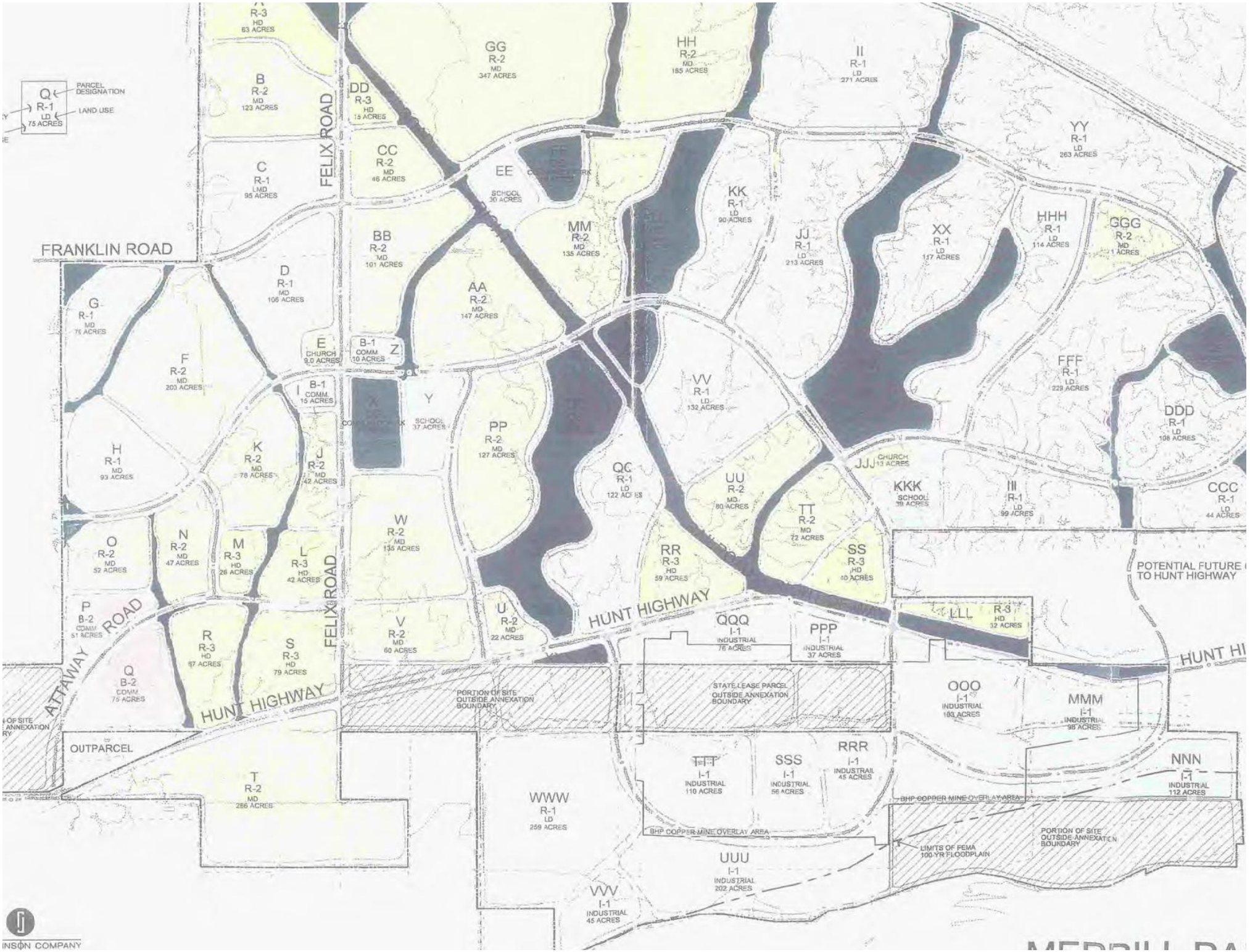
Libraries

Existing municipal libraries near Merrill Ranch include libraries in Florence, Apache Junction, Eloy, Superior and Coolidge. Five unincorporated communities have also formed libraries within the County. Libraries within the County receive part of their book acquisition funds from the Pinal County Library System. Operating expenses, including salaries, are largely funded through private donations, with libraries staffed by volunteers.

9. Parks and Open Spaces

The Merrill Ranch project will provide residents with a quality environment as well as a range of self-contained recreational activities. The intent of the Parks/Open Space Plan is to provide future residents with a variety of recreational opportunities. Many active recreational facilities will be developed and built, ranging from small neighborhood pocket parks to the larger local and regional parks connected through an extensive trail system into a Lineal Park System. Up to two golf courses will be the backdrop for many leisure opportunities. If needed, school playgrounds and athletic fields, when not servicing educational needs, will be available to community residents for passive or organized use. Recreation areas will provide linkages between communities, schools, parks and commercial areas through pedestrian (trail system) and bicycle corridors. The recreation and open space areas, besides providing areas of neighbor interaction, will provide physical separation, buffer zones and transitions between areas of urbanization. The undeveloped open space portion of the project is preserved to provide the communities with "passive" recreational opportunities and to maintain a visual barrier between adjacent uses. Exhibit II-4, Open Space Plan, illustrates some of the planned recreational opportunities on the Merrill Ranch site.

Depending on marketing and demographic studies, it is possible that the primary open space element for Merrill Ranch PUD may be two eighteen-hole golf courses. As such, this PUD allows for a Golf Course Study Overlay which overlays the Merrill Ranch PUD property east of Felix Road and in addition all property south of Hunt Highway. The study area allows for an administratively approved siting and permitting of the golf course.


Q
R-1
LD
75 ACRES
PARCEL DESIGNATION
LAND USE
A
R-3
HD
63 ACRES
B
R-2
MD
123 ACRES
C
R-1
LMD
95 ACRES
D
R-1
MD
106 ACRES
E
CHURCH
9.0 ACRES
F
R-2
MD
203 ACRES
G
R-1
MD
75 ACRES
H
R-1
MD
93 ACRES
I
B-1
COMM.
15 ACRES
J
R-2
MD
42 ACRES
K
R-2
MD
78 ACRES
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R-3
HD
42 ACRES
M
R-3
HD
26 ACRES
N
R-2
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47 ACRES
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52 ACRES
P
B-2
COMM
51 ACRES
Q
B-2
COMM
75 ACRES
R
R-3
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67 ACRES
S
R-3
HD
79 ACRES
T
R-2
MD
266 ACRES
DD
R-3
HD
15 ACRES
CC
R-2
MD
46 ACRES
BB
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MD
101 ACRES
B-1
COMM
10 ACRES
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X
Y
SCHOOL
37 ACRES
W
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MD
135 ACRES
V
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MD
60 ACRES
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R-2
MD
22 ACRES
GG
R-2
MD
347 ACRES
EE
SCHOOL
30 ACRES
AA
R-2
MD
147 ACRES
PP
R-2
MD
127 ACRES
HH
R-2
MD
185 ACRES
MM
R-2
MD
135 ACRES
QC
R-1
LD
122 ACRES
RR
R-3
HD
59 ACRES
UU
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MD
80 ACRES
VV
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LD
132 ACRES
II
R-1
LD
271 ACRES
KK
R-1
LD
90 ACRES
JJ
R-1
LD
213 ACRES
JJJ
CHURCH
13 ACRES
KKK
SCHOOL
39 ACRES
TT
R-2
MD
72 ACRES
SS
R-3
HD
60 ACRES
LLL
R-3
HD
32 ACRES
QQQ
I-1
INDUSTRIAL
76 ACRES
PPP
I-1
INDUSTRIAL
37 ACRES
OOO
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INDUSTRIAL
193 ACRES
MMM
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INDUSTRIAL
98 ACRES
NNN
I-1
INDUSTRIAL
112 ACRES
RRR
I-1
INDUSTRIAL
45 ACRES
SSS
I-1
INDUSTRIAL
56 ACRES
TTT
I-1
INDUSTRIAL
110 ACRES
WWW
R-1
LD
259 ACRES
VVV
I-1
INDUSTRIAL
45 ACRES
UUU
I-1
INDUSTRIAL
202 ACRES
YY
R-1
LD
263 ACRES
XX
R-1
LD
117 ACRES
HHH
R-1
LD
114 ACRES
GGG
R-2
MD
1 ACRES
FFF
R-1
LD
229 ACRES
DDD
R-1
LD
108 ACRES
III
R-1
LD
99 ACRES
CCC
R-1
LD
44 ACRES
FELIX ROAD
FRANKLIN ROAD
HUNT HIGHWAY
ATTAWAY ROAD
OUTPARCEL
PORTION OF SITE OUTSIDE ANNEXATION BOUNDARY
STATE LEASE PARCEL OUTSIDE ANNEXATION BOUNDARY
BHP COPPER MINE OVERLAY AREA
LIMITS OF FEMA 100-YR FLOODPLAIN
POTENTIAL FUTURE
TO HUNT HIGHWAY

III. DEVELOPMENT REQUIREMENTS

A. PURPOSE AND INTENT

The development regulations serve as the primary mechanism for implementation of the land use for the Merrill Ranch PUD. The regulations contained herein provide an appropriate degree of flexibility to anticipate future needs and afford compatibility among land uses. For the purpose of this PUD, the following types of land uses are hereby established:

Residential:

* Low.....R-1 Single Family Residence
* Medium ..... R-2 Single and Multi Family Residence
* High.....R-3 Multiple Residence Zone

Commercial:

* B-1..... Neighborhood Business
* B-2.....Downtown and Highway Business

Schools/Parks/Community Centers and Utility Zones:

Industrial:

* I-1 .....Industrial Development Standards

B. GENERAL PROVISIONS

1. All construction and development within the PUD area shall comply with applicable provisions of the Town of Florence Building Code and the various related mechanical codes, electrical codes, plumbing codes, fire codes, grading and excavation codes and the subdivision codes as currently adopted by the Town of Florence and the State of Arizona.

2. If specific development standards are not established or if an issue, condition, or situation arises or occurs that is not clearly addressed or understandable in the PUD, then those regulations and standards of the Town of Florence Development Code that are applicable for the most similar issue, condition, or situation shall apply as determined by the Town of Florence Planning Director.

3. This PUD may be amended by the same procedure as it was adopted, by ordinance. Each amendment shall include all sections or portions of the PUD that are affected by the change.

4. Any person, firm or corporation, whether a principal, agent, employee or otherwise, violating any provision of these regulations shall be prosecuted under the Town of Florence Development Code pertaining to misdemeanors; and compelled to comply with same.

5. Whenever a use has not specifically been listed as being a permitted use in a particular zone classification within the PUD, it shall be the duty of the Town of Florence Planning Director to determine if said use is: 1) consistent with the intent of the zone; and 2) compatible with other listed permitted uses. Any person aggrieved by the determination may appeal that decision with the Town of Florence Town Council.

6. Automotive vehicles or trailers of any type that have been abandoned shall not be parked or stored on any property within the PUD unless it is in a completely enclosed building.

7. Non-Conforming Uses of Land – Where, at the time of passage of this PUD, a lawful use of land exists which would not be permitted by the regulations imposed by this PUD, such use may continue so long as it remains otherwise lawful, provided:

   - No such non-conforming use shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this PUD.

   - No such non-conforming use shall be moved, in whole or in part, to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this PUD.

   - If any such non-conforming use of land ceases for any reason for a period of more than 180 days, any subsequent use of such land shall conform to the regulations specified by this PUD for the district in which such land is located, with the exception of the copper mining operations.

   - No additional structure not conforming to the requirements of this PUD shall be erected in connection with such non-conforming use of land.

8. Non-Conforming Structures – Where a lawful structure exists at the effective date of adoption or amendment of this PUD that could not be built under the terms of these regulations by reason of restrictions on area, height, yards, its location on the lot, or other requirements concerning the structure; such structure may be continued so long as it remains otherwise lawful, provided:

   - No such non-conforming structure may be enlarged or altered in a way, which increases its non-conformity, but any structure or portion thereof may be altered to decrease or have no effect on its non-conformity.

   - Should such non-conforming structure or non-conforming portion of structure be destroyed by any means to an extent of more than 50 percent of its replacement cost at time of destruction, it shall not be reconstructed except in conformity with the provisions of this PUD.

- Should such structure be moved for any reason for any distance whatsoever, it shall thereafter conform to the regulations for the district in which it is located after it is moved.

9. At the time of site plan review, all developments shall submit a plan detailing fencing, walls, landscaping, building placement and other details, which must be in conformance with the PUD design guidelines for residential and commercial structures.

10. Land Use Plan Provisions – Land use designations have been assigned to each area identified on the PUD (see Exhibit II-1). Land use provisions for the areas designated for development include planning area and land use designation, and proposed product type area in gross acres.

As designed for this project, gross acres means gross developable acres which may include some slope banks and interior streets, but excludes major highways and secondary highways.

To ensure the orderly growth of the community, designated planning areas within the PUD shall be developed at densities consistent with the dwelling counts allowed for each land use designation, except as provided in a density transfer. Minor modifications in the boundaries and acreage of planning areas or adjustments because of final road alignments or grading or hydrology hazards specified by the Town of Florence will occur during technical refinements in the tentative map process and shall not require an amendment to the PUD. Maximum dwelling units per cumulative planning area counts will not thereby be affected. The PUD residential dwelling unit maximum shall be 24,500 dwelling units.

A transfer of residential dwelling units from one residential planning area to another residential area shall be permitted in the PUD area in accordance with the following provisions:

In no case shall transfers of dwelling units result in:

1. Exceeding the overall plan capacity of 24,500 dwelling units;

2. A change in the density classification increasing planning area by more than one zoning category;

3. Exceeding the capacity of the circulation system or other public infrastructure systems as established for the PUD area.

At the time of approval of the respective plats by the Planning and Zoning Commission, a revised PUD Map and Planning Area Summary shall be submitted for all transfers of dwelling units. Said map and table shall also indicate the remaining number of units, if any, that may be accommodated. Said exhibit and table shall be dated accordingly. Transfers of density will be reviewed for conformance with this PUD.

11. Merrill Ranch Architectural Control Committee (MRACC) – The developer will establish the MRACC to be implemented through the project's Covenants, Conditions and Restrictions (CC&R's).

    All proposed land uses requiring a Special Use Permit shall be subject to review and approval by the MRACC. The Committee's purpose shall be to ensure conformance to the PUD Development Standards, Design Guidelines and General Objectives.

12. Drill sites – Drilling, mining or exploration for any minerals, oil, gas or other hydrocarbon substances shall be prohibited in the PUD area with the exception of that area indicated as the BHP Copper Mine until said mine is closed.

13. Agricultural uses have been permitted on certain specific areas of the property. Until such time as those specific parcels are platted, the final plat is recorded and improvements are constructed, that specific parcel shall be and may remain as agricultural-use land.

C. DEFINITIONS

For the Purpose of this PUD, certain words and terms used herein are defined as per the Town of Florence Development Codes, June 20, 2002 (Appendix A hereto).

D. RESIDENTIAL DEVELOPMENT STANDARDS

R-1 Single Family, Low-Density Residence Zone

For purposes of this PUD, Section 4-447 of the Town of Florence Development Code, June 20, 2000 (Appendix A hereto) shall govern except as modified below:

Additional Permitted Uses: Property designated in the PUD as Low-Density.

- Dwellings, single-family, age restricted, subject to the standards provided herein;

Additional Secondary Uses:

- Adult residential facilities, limited to six or fewer persons (facility which provides 24-hour-per-day non-medical care and supervision to adults);
- Foster family homes (residential facility providing 24-hour-per-day care for six or fewer foster children);
- Communication equipment buildings;
- Recreation facilities, planned neighborhood areas, not accessory to a principal use, including pool, Jacuzzi and comfort stations;

- Temporary activities sponsored by a non-profit organization or charitable use;
- Multi-use bike/pedestrian ways;
- Equestrian trails.

Property Development Standards:

- Units per gross acre: 0.5 – 4.0
- Minimum lot area: 4,950 square feet.
- Minimum lot width: 45 feet.

Yards for Primary Uses:

- Minimum front yard: 20 feet to front load garage doors; 15 feet to living space or side load garage.
- Minimum side yards: 5 feet each, except corner side yards shall be a minimum of 10 feet and except that a dwelling may be erected on the property line if there is a dwelling on the adjacent lot that has a 10-foot setback from the property line.
- Minimum parking required: Two-car garage or carport per dwelling unit.

Yards for Secondary Uses:

- Minimum distance to side lot line: 10 feet.
- Minimum distance to rear lot lines: 15 feet.

Additionally:

Accessory Uses: Property may be used for the following accessory uses:

- Accessory buildings and structures customarily used in conjunction with residences. Location and design of residential accessory buildings shall be subject to review and approval by the Merrill Ranch Architectural Control Committee.
- Storage of building materials used in the construction of a residence or residences, during construction and 90 days thereafter, including the contractor's temporary office, provided that any lot or parcel of land so used shall be part of the building project or on property adjoining the construction site. Contractor shall be responsible for properly securing and screening storage area. To enforce this provision, The Town of Florence authorities may withhold future building permits or Certification of Occupancy Permits until such time that the infraction is corrected by the responsible party or contractor.

Uses Subject to Permits: Property may be used for the following uses, provided a conditional or special use permit has first been obtained and while such permit is in full force and effect in conformity with the conditions of such permit for:

- Grading projects, offsite transport;
- Group homes, children (facility which provides 24-hour-per-day non-medical care and supervision to children in a structured environment);
- Adult day care facility (provides non-medical care and supervision to adults on a less than 24-hour-per-day basis);
- Small family homes, children (facility in licensee's family residence providing 24-hour-per-day care for six or fewer mentally or physically disabled children);
- Publicly-owned uses necessary to the maintenance of the public health, convenience or general welfare such as fire stations and libraries in addition to those specifically listed in this section;
- Temporary storage of materials and construction equipment used in construction or maintenance of streets and highways, sewers, storm drains, underground conduits, flood control works, pipelines and similar uses to be fenced and screened for a period not to exceed one year.

Development Standards for Single-Family Residences:

Development in the Low Density R-1 zone shall be in conformance with the development standards set forth in the PUD. Exhibits III-1 through III-2 illustrate minimum lot sizes and setbacks for single family housing in R-1 and R-2 zones. A conceptual layout of land use in a typical single-family zone is depicted in Exhibit III-4.

R-2 Single Family and Multi-Family, Medium Density Residence Zone

For purposes of this PUD, Section 4-448 of the Town of Florence Development Code, June 20, 2000, shall govern except as modified below:

Additional Permitted Uses:

- Residence, single family, age restricted; subject to the standards provided herein;
- Agriculture and Horticulture, flower and vegetable gardening, nursery or greenhouse used only for propagation and culture and not for retail sales;

Removed Permitted Uses:

- Multi-family dwelling units providing over four units per building.

Property Development Standards:

- Units per gross acre: 4.0 – 8.0
- Maximum building height: 30 feet, no exceptions
- Minimum single family/duplex lot width: 35 feet.

Minimum building setback requirements:

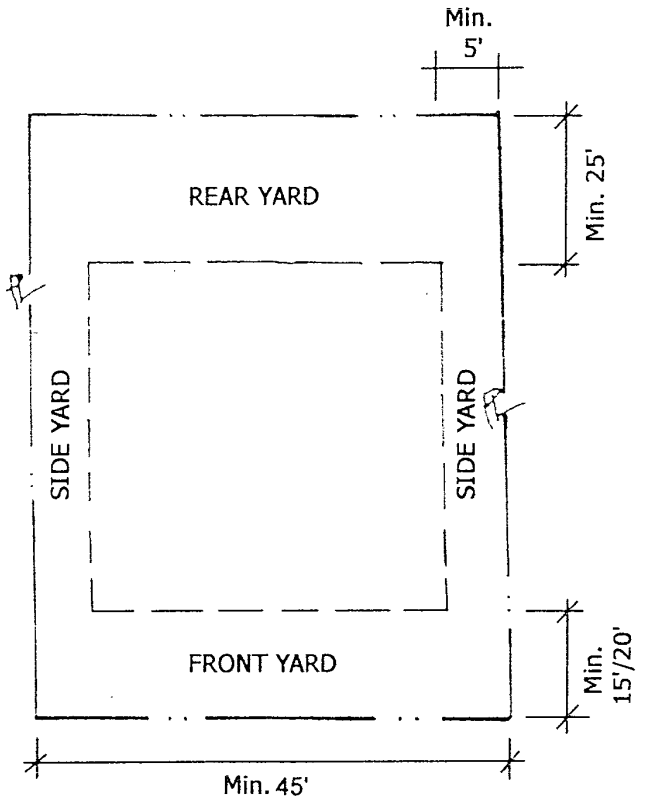
- Minimum single family/duplex front yard: 20 feet to front load garage doors; 10 feet to living area or side load garage.
- Minimum single family/duplex side yards: 5 feet each, except corner side yards shall be a minimum of 10 feet and except that a dwelling may be erected on the property line if there is a dwelling on the adjacent lot that has a 10-foot setback from the property line.
- Minimum single family/duplex rear yards: 20 feet.
- Minimum distance between main buildings: 10 feet.

Minimum Open Space Requirements:

- Only applies to a parcel development with buildings with units sold without private yards.
- Common open space, six (6) percent of the net lot area provided a community trail corridor or open space is adjacent o, or serves, the parcel.

Landscape and Screening Requirements:

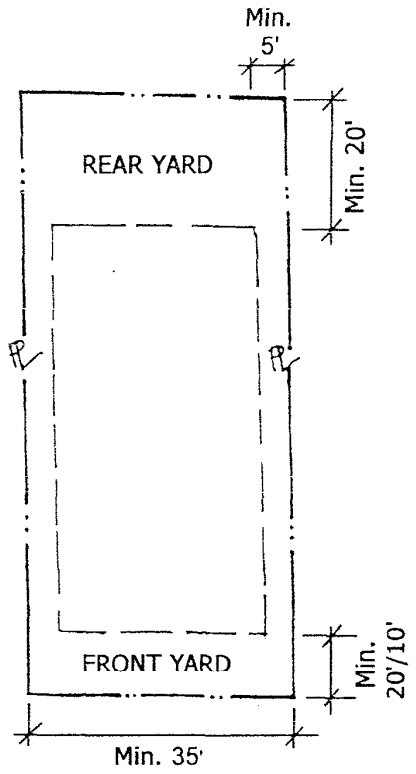
- Only applies to a parcel development with buildings with units sold without private yards.



MINIMUM LOT SIZE 4,950 S.F.

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Single Family R-1 Minimum Setbacks

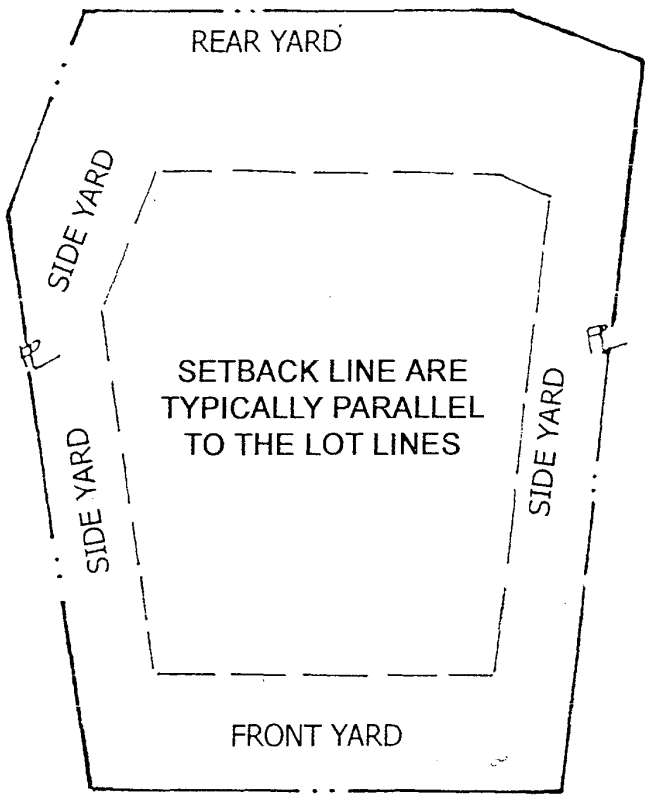
Exhibit III-1



MINIMUM LOT SIZE: 3500 S.F.

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Single Family R-2 Minimum Setbacks

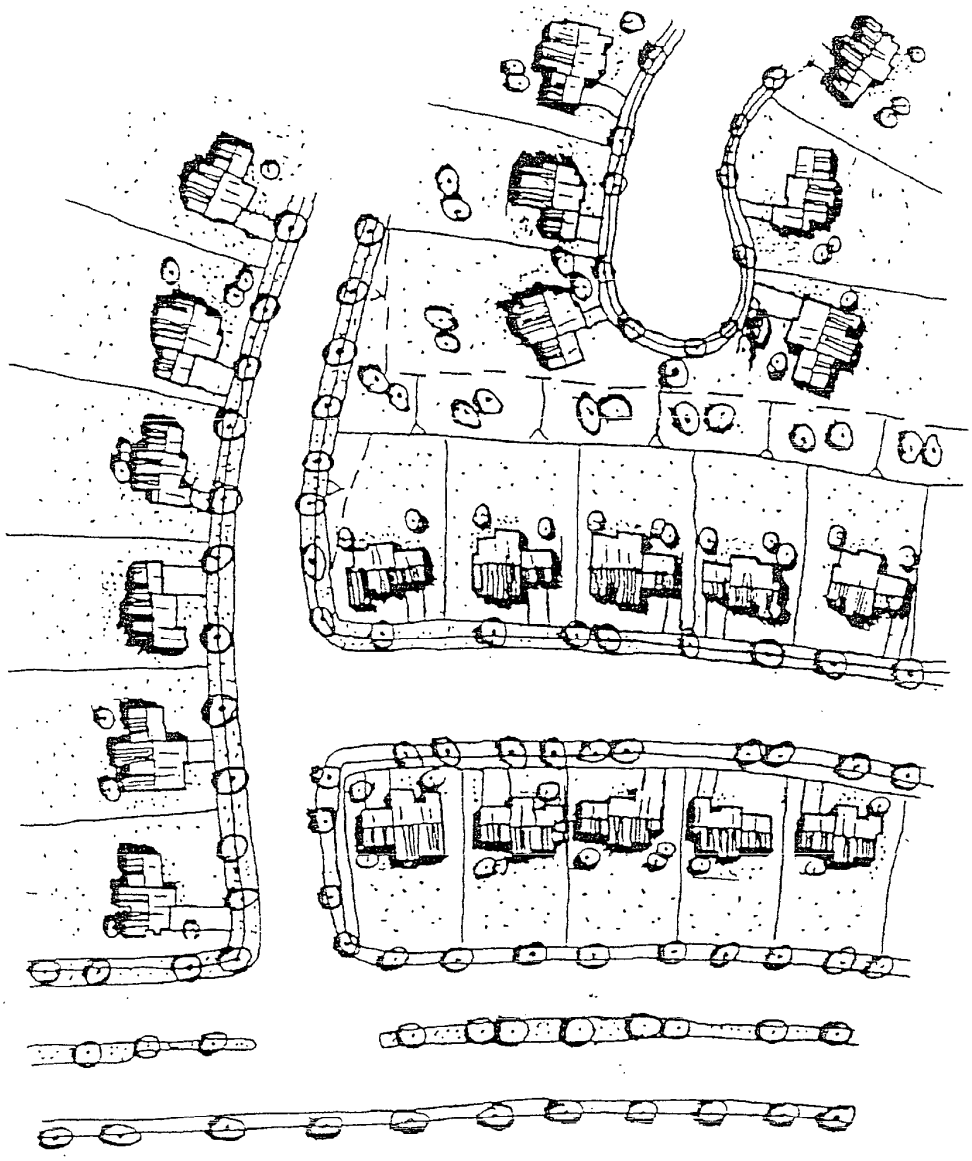
Exhibit III-2



IRREGULAR SHAPED LOTS

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Irregular Shaped Lot Measurement Guidelines

Exhibit III-3



MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Typical Single Family Residential Illustration

Exhibit III-4

R-3 Multiple Family, High Density Residence Zone

For purposes of this PUD, Section 4-451 of the Town of Florence Development Code, June 20, 2000, shall govern except as modified below:

Additional Permitted Uses:

- Age restricted dwellings.

Property Development Standards:

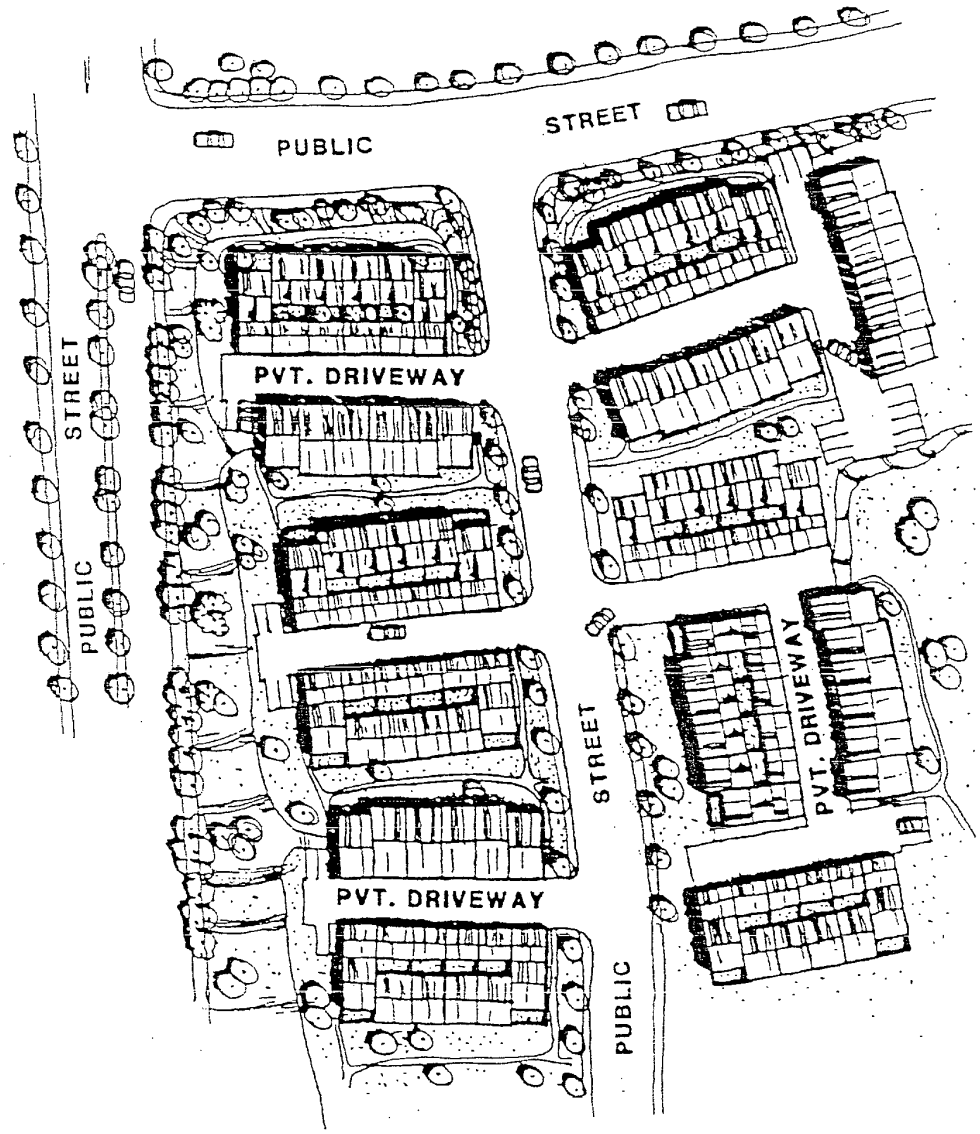
- Units per gross acre: 8.0 – 18.0
- Maximum building height: 42 feet, except that no building shall exceed one (1) story or fifteen (15) feet in height within seventy (70) feet of any R-1 zone boundary.

Minimum Open Space Requirements:

- Frontage open space, six (6) percent of the net lot area.
- Common open space, six (6) percent of the net lot area provided a community trail corridor or open space is adjacent to, or serves, the parcel.

Landscaping and Screening Requirements:

- Screening along property lines that abut R-1 zones, or that abut alleys that are adjacent to those zones.



MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Casitas Illustration

Exhibit III-5

TABLE III-1a
DEVELOPMENT STANDARD COMPARISON

R-1 PUD ORDINANCE
Low Density
(0.5 to 4.0 units per gross acre)

Primary Building	**Required** (by Town Ordinance)	**Proposed** (by PUD Ordinance)	**Difference**
Maximum Building Height	30 feet	30 feet	None
Minimum Lot Area (S.F.)	6,000	4,950	1,050 decrease
Minimum Lot Width	60 feet	45 feet	15 ft decrease
Minimum Front Yard	20 feet	20/15 feet	None/5 ft. decrease
Minimum Side Yard	6 feet	5 feet	1 ft. decrease
Minimum Rear Year	25 feet	25 feet	None

MERRILL RANCH
DEVELOPMENT REQUIREMENTS
R-1 – Low Density

Table III-1a

TABLE III-1b
DEVELOPMENT STANDARD COMPARISON

R-2 PUD ORDINANCE
Medium Density
(4.0 to 8.0 units per gross acre)

Primary Building	Required (by Town Ordinance)	Proposed (by PUD Ordinance)	Difference
Maximum Building Height	30 feet	30 feet	None
Minimum Lot Area	3,500	3,500	None
Minimum Lot Width (S.F./Duplex)	N/A	35 feet	N/A
Minimum Front Yard (S.F./Duplex)	20/10 feet	20/10 feet	None
Minimum Side Yard (S.F./Duplex)	12 feet	5 feet	7 foot decrease
Minimum Rear Year (S.F./Duplex)	20/12 feet	20 feet	None/8' increments

MERRILL RANCH
DEVELOPMENT REQUIREMENTS
R-2 – Medium Density

Table III-1b

TABLE III-1c
DEVELOPMENT STANDARD COMPARISON

R-3 PUD ORDINANCE
Medium High Density
(8.0 to 18.0 units per gross acre)

Primary Building	**Required** (by Town Ordinance)	**Proposed** (by PUD Ordinance)	**Difference**
Maximum Building Height	30 feet	42 feet	12 foot increase
Minimum Lot Area	1 acre	1 acre	None
Minimum Front Yard	25 feet	25 feet	None
Minimum Side Yard	12 feet	12 feet	None
Minimum Rear Year	12 feet	12 feet	None

MERRILL RANCH
DEVELOPMENT REQUIREMENTS
R-3 – High Density

Table III-1c

E. COMMERCIAL DEVELOPMENT STANDARDS

B-1 Neighborhood Business Zone

The Neighborhood Business Zone use category, B-1, is intended to serve the needs of the immediate residential community.

For purposes of this PUD, Section 4-452 of the Town of Florence Development Code, June 20, 2000, shall govern except as modified below:

Property Development Standards:

- Open space requirement. A minimum of 10 percent of the net property area. Areas of adjacent public sidewalk that are covered with permanent shade structures may be applied to this requirement.

B-2 Highway Business Zoning District

The Highway Business Zone use category, B-2, is intended to serve the needs of the community while providing for a broad range of commercial activities.

For purposes of this PUD, Section 4-453 of the Town of Florence Development Code, June 20, 2000, shall govern except as modified below:

F. SCHOOL/PARK/COMMUNITY CENTER AND UTILITY ZONE DEVELOPMENT STANDARDS

When a school site is needed, the developer working in conjunction with the Florence Unified School District, the State of Arizona Department of Education and (if applicable) the Town of Florence will develop appropriate standards to determine a final layout and site plan for the school site. Architectural and landscape themes appropriate to the PUD development will be addressed in this preliminary site plan review. Other issues to be addressed include parking requirements, landscaped transition areas, height limitations, circulation and residential setback requirements.

The design of the school or park site or other community structure shall be consistent with the design guidelines as developed by the MRACC.

Exhibit II-4, the Land Use and Open Space Plan, graphically locates several school/park areas within the PUD. The location of these zones may change in relation to the numbers of students generated within Merrill Ranch. Relocation, expansion, or removal of a School/Park/Community Center or Utility Zone shall be accomplished through direct negotiations between the development and the Florence Unified School District or the Town of Florence, whichever is applicable. If the relocation of the site is deemed necessary, it shall be located within an established residential zone. The previously designated location shall revert to a residential zone with all accompanying uses and restrictions. Relocation, expansion, or removal of a School/Park/Community Center or Utility Zone shall be allowed within this PUD and shall not require a PUD amendment.

G. INDUSTRIAL DEVELOPMENT STANDARDS

The Industrial Zone use category, I-1, is for those areas designated as the Wastewater Treatment Facility and other permitted uses.

For purposes of this PUD, Section 4-454 of the Town of Florence Development Code, June 20, 2000, shall govern except as modified below:

Property Development Standards:

- Minimum Front Yard: 30 feet

IV. IMPLEMENTATION

A. PURPOSE

Development of Merrill Ranch will be implemented in conformance with the regulations and guidance contained within the PUD. This section outlines the procedures for administration of the provisions contained herein and the phasing plan for the development of the proposed planning area. Other information covered in this section pertains to general administration, subdivision of parcels, administration procedures and the linkage between these elements. In addition to the PUD site plan review, the Merrill Ranch Planned Unit Development shall be implemented through the subdivision review process. Concurrent with site plan processing, will be submittal of preliminary plats where properties are to be separately financed, sold, leased or otherwise conveyed. The subdivision process will allow for the creation of lots as preliminary parcels/plats thereby providing for implementation of the project phasing.

B. PHASING PROGRAM

The primary intention of the phasing program is to relate infrastructure requirements to site development. A detailed discussion of Merrill Ranch phasing is presented by infrastructure type in Section II. While a project development/phasing program sequence is implied, there is nothing in the plan to preclude a different order of development or even a different combination of sub-phases, so long as the related infrastructure is adequately in place.

The Merrill Ranch PUD allows for flexibility in project phasing because the actual sequence of development may be affected by numerous factors not now predictable, including site plan modifications due to final engineering processes or changes in the economic market.

C. GENERAL ADMINISTRATION AND AMENDMENTS

The PUD shall be administered and enforced by the Town of Florence Planning Department, in accordance with the provisions of the Town of Florence Development Code.

Certain changes to explicit provisions in the Merrill Ranch PUD may be made administratively by the Planning Director, subject to appeal to the Planning and Zoning Commission and, subsequently, the Town Council.

- The addition of new information to the Merrill Ranch PUD maps or text that does not change the effect of any regulations or guidelines.

- The major B-2 Zoning area at Attaway Road and Hunt Highway may be relocated within the project if the major traffic corridor patterns anticipated shift to another

corridor. Such change shall not be considered a major amendment to the PUD. If/when the developer decides this is needed a revised land use plan will be submitted for county review.

- Changes to the community infrastructure, i.e., drainage, water, or sewer systems, which do not have the effect of increasing or decreasing development capacity in the Merrill Ranch PUD area nor change the concepts of the plan.

- The determination that a use be allowed which is not specifically listed as permitted but which may be determined to be similar in nature to those uses explicitly listed as permitted.

- The addition of contiguous parcels of land provided the area is added to the land use plan with an added density not to exceed 3.5 units per gross acre.

In addition to the above items, a public hearing shall be held on all site plan (preliminary plat) applications in accordance with the provisions of Section V of the Merrill Ranch PUD. The Planning and Zoning Commission may approve, conditionally approve, modify or deny said application.

The PUD shall be implemented through a method of site plan review by Planning and Engineering staff. A site plan review shall be required for all development within the Merrill Ranch PUD area requiring a building permit. Preliminary parcel and plats may be processed independent of the site plan review procedures. Site plan review will not be required for interior alterations where there is not significant square footage increase or significant use intensification. Site plan review would apply to commercial, industrial and multi-family attached.

All proposed projects within the Merrill Ranch PUD area shall be required to have an approved site plan prior to issuance of building permits or concurrent with subdivision, special use permits or any other permit for property. The site plan review procedure is necessary for the following reasons:

- To ensure consistency with the Merrill Ranch PUD, the Town Comprehensive Plan and all the implementing ordinances.

- To promote the highest contemporary standards of the site plan.

- To adapt to specific or special development conditions that occur from time to time while continuing to implement the Merrill Ranch PUD and conform development to the County Comprehensive Plan and implementing ordinances.

- To facilitate complete documentation of land use entitlements authorized and the conditions pertinent thereto.

- To adapt to changes that may occur with respect to the circumstances under which the project is undertaken.

Site plan review applies to commercial, industrial and multi-family attached.

Exemptions:

Following is a list of activities that are exempt from the site plan review process. This list is not all-inclusive. The Planning Director may exempt other special activities not covered by the example listing.

- All building interior changes, alterations, construction
- Repainting
- Re-glazing, new mullions
- Re-landscaping around existing structures
- Re-roofing with similar-style roofing materials
- Minor exterior repairs
- Demolition
- Exterior mechanical (heating, air conditioning, water heater, etc.)

Procedures:

The master drainage report, referred to in Section B.4 and the transportation study, referred to in Section B.5, will be submitted with the first preliminary plats for approval.

Site plans which contain plans, drawings, illustrations, designs, reports and other detailed information, as required herein, shall be submitted to the Town for review and comment. Applicants are encouraged to submit preliminary plans for review and comment by the Planning Department prior to final preparation of a site plan. Comment from other Town departments and service agencies shall be sought by the staff prior to preparing a recommendation on the finalized Merrill Ranch PUD site plan.

Applicants should ensure that they have obtained a copy of the design guidelines accompanying the PUD. This will assist the developer in achieving a quality project consistent with the Merrill Ranch PUD.

Upon determination by the Planning Director that a PUD site plan complies with the provisions of the Merrill Ranch PUD and the review factors described in the design guidelines, Town staff shall prepare a staff report to be submitted, along with the PUD site plan, to the Planning and Zoning Commission as an information item.

This plan may be amended as necessary in the same manner it was adopted; by ordinance. Said amendment(s) shall not require a concurrent Town Comprehensive Plan amendment unless it is determined by Town staff that the proposed item would substantially affect the Comprehensive Plan goals, objectives, policies or programs.

V. DESIGN GUIDELINES

A. PURPOSE

The Merrill Ranch Planned Unit Development design guidelines are statements expressing the desired character of future development within the project area. The guidelines are the design criteria to be used to plan each development proposal within the PUD. The criteria apply to four main topical issues: circulation, landscaping, architecture and signage. The developer and designers of each planning area and land use designation will draw from and expand upon these concepts to maximize the success of the development. The development will be designed to be consistent with market needs, aesthetic satisfaction and community goals.

The design guidelines are intended to be implemented at two levels. First, they are to establish general design statements and guidelines, which are applied project-wide to achieve consistent quality development. Included in this level are design standards for community features, streetscapes, appropriate building mass and scale and parameters for architectural design of residential and commercial structures. Second, differences exist between Planning Areas as a result of land use, access and location. The project Design Guidelines are to be used to analyze individual planning areas within the PUD, focusing on the special design considerations of each area. The final selection of project types and materials will be determined at PUD Site Plan Review based on the parameters set forth in the PUD.

The purposes of the Design Guidelines are as follows:

- To provide Town of Florence with the necessary assurance that the PUD area will develop in accordance with the quality and character proposed herein;
- To provide guidance to Town of Florence staff, Planning and Zoning Commission and the Town Council in the review of future development projects in the PUD area; and
- To include cost considerations and marketability factors to design guideline applications.

Under the authority of the CC&R's established for the Merrill Ranch development, the Merrill Ranch Architectural Control Committee (MRACC) will be empowered to develop the Design Guidelines and ensure that all future site development complies with the adopted guidelines.

The Merrill Ranch Design Guidelines will be formulated prior to the approval of any specific land development application on the Merrill Ranch site. The Design Guidelines will be reviewed by the Town of Florence and approved by the Town Planning and Zoning Commission. As appropriate, the PUD will be amended to incorporate the Design Guidelines at the time they are adopted by the Town.

The guidelines contained in this document reflect the design concepts currently envisioned for the Merrill Ranch PUD. These design concepts are general in nature and

are provided as an outline of what it is intended that the MRACC formulate as Design Guidelines.

- Areas Effected by Highway Corridors

Treatment for the planning areas along the major access roads will be different from the treatment within residential planning areas. To achieve an aesthetically acceptable view of areas adjacent to circulation corridors, such circulation corridors will be uniformly established with regard to plant materials, earth berming and fencing treatments. Parking prohibitions within these corridors dictate that parking shall be (when feasible) located on the side or rear of the structures closest to the circulation side of the planning areas. These parking areas will serve as a noise buffer while maintaining visual interest along the circulation corridor.

Commercial areas and parking zones will be screened by the use of fencing and landscaping as required in the Commercial Development Standards. The commercial structures, in accordance with PUD commercial regulations, will have varied height limits and building envelopes in order to provide visual relief from otherwise unbroken facades and roof lines. The heights of the residential structures adjacent to the major circulation corridors shall be varied to create offsets in height by requiring a maximum of 70 percent of the structures in this zone to be the permitted maximum height. Those structures within this zone also have setbacks, as measured from the road right-of-way.

- Areas Affected by Project Entries

Entrances to the project site and communities will be designed with accent plant material, groupings of plants and enhanced paving treatments to create major entry statements. To maintain the design integrity of the major entry zones, the placement of structures at these key community entrances shall be carefully designed. This can be achieved by creative use of landscaping with walls and fences to screen parking and service areas from street view. Landscaping compatible with entry statement plant materials is encouraged. Illustrative concepts for the main entry, typical secondary entry and typical community entry are provided in Exhibits IV-4, IV-5 and IV-6, respectively.

B. LANDSCAPE CONCEPT PLAN

A formal landscape plan will be included in the Design Guidelines. The purpose of the landscape concept plan will be to provide planning criteria and guidelines to insure the establishment of a safe and aesthetically appealing environment. The landscape concept strengthens the overall community theme and provides for a controlled transition between planned and indigenous open space areas.

The landscape guidelines are to be used by the Town of Florence and developers as a means of achieving the following project goals:

- Ensure that landscape design considerations include reclaimed water consumption and erosion control measures.

- Re-establish natural conditions where terrain is modified for circulation and development when possible.

- Enhance site improvement within view corridors, on-site and off-site.

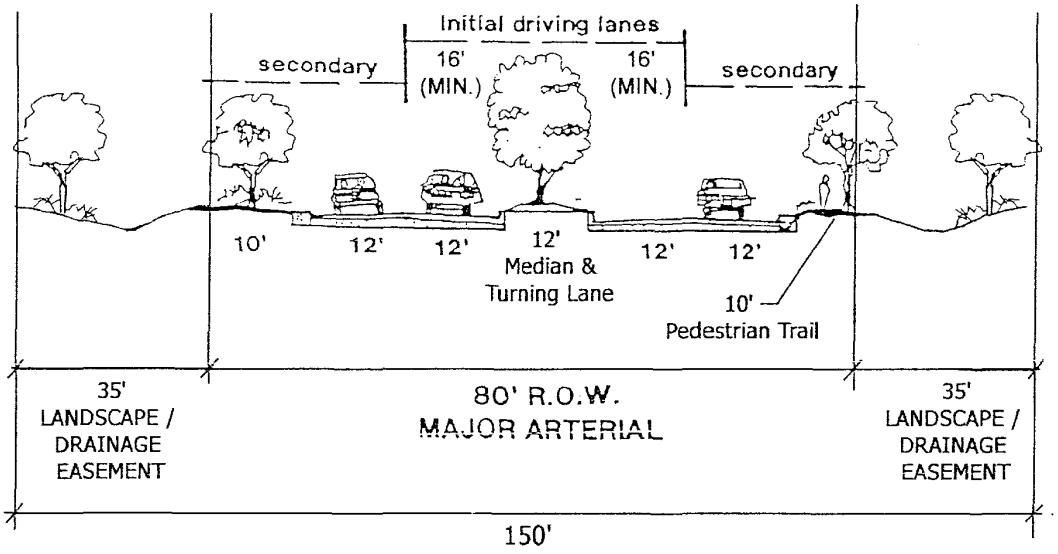
- Define and combine specific plant materials in varying combinations to achieve a community identity.

- Utilize plant materials to visually identify and separate development areas while blending them into the overall visual environment.

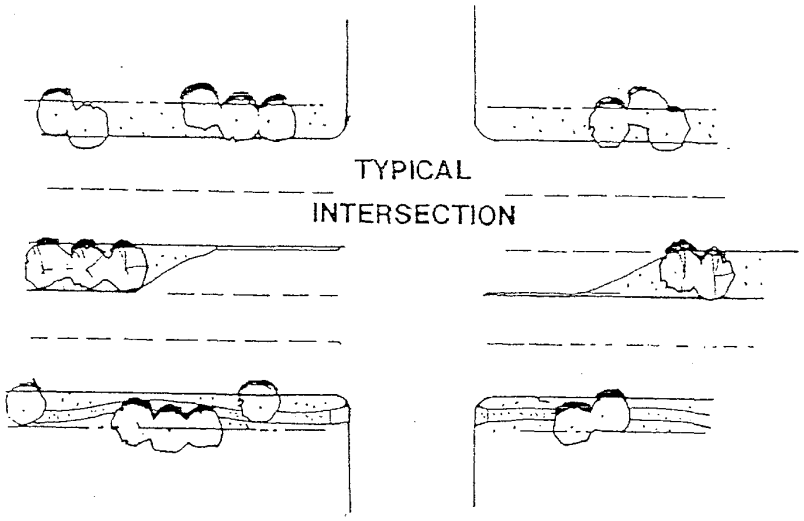
The landscape concept elements include circulation elements, open space/recreation elements and design guidelines to residential and commercial landscape applications and implementation.

C. CIRCULATION SYSTEM

The layout of traffic corridors within the PUD is specifically designed to unite residential, recreational and commercial areas into a coherent system. This system is planned to enhance visual continuity while allowing for aesthetic diversity. The roadway of the main entrance of Merrill Ranch is the most visually important area. The context and stature of the Merrill Ranch development evolves from the drive within this entry segment. Approach and entry need to be effectively designed to announce the transition in to the project residential zones. Points of entry need to break the linear disparity of streetscape planting announcing to the homeowner and visitor alike the beginning of a familiar or new experience. By using a variety of materials, accent plantings and accent masonry and by combining placement and scale, a fresh entry expression is achieved.

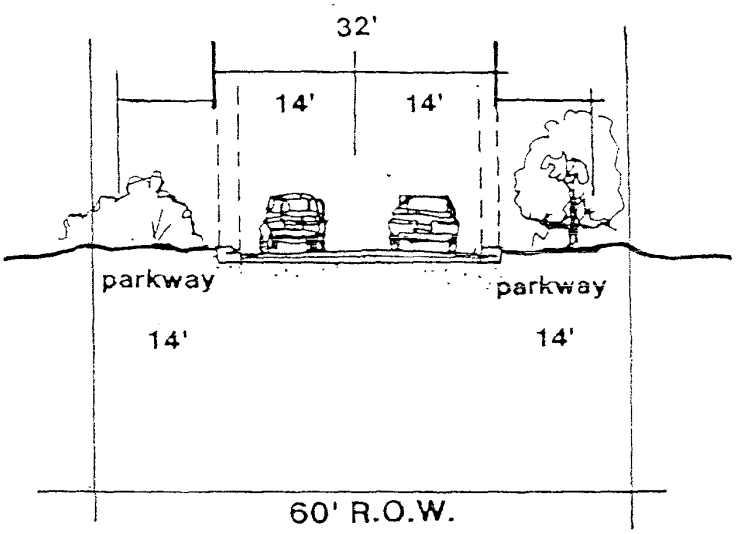


AS DEVELOPMENT DENSITIES INCREASE THE SECONDARY DRIVING LANES WILL BE ADDED AS NEEDED

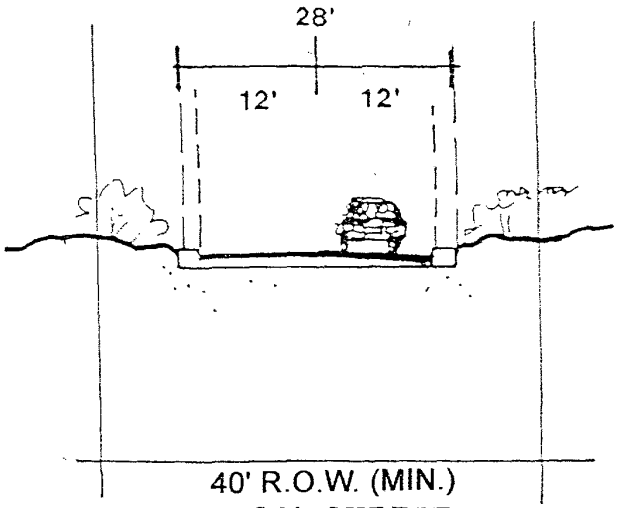


MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Major Arterial Section

Exhibit IV-1



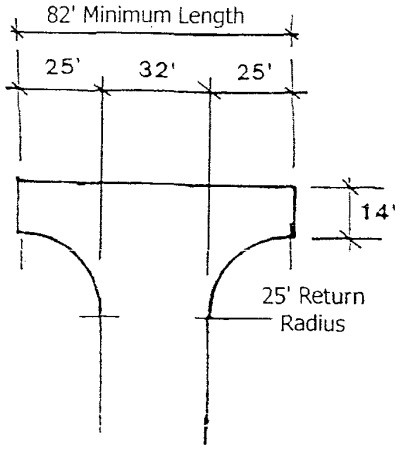
60' R.O.W.
MAJOR COLLECTOR



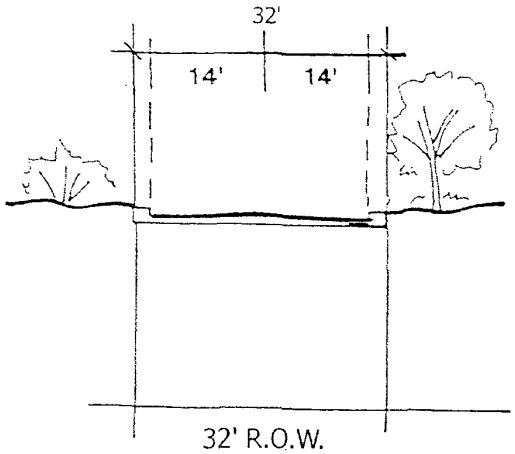
40' R.O.W. (MIN.)
LOCAL STREET

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Major Collector and Local Street Sections

Exhibit IV-2



T-TURN AROUND



32' R.O.W.
PRIVATE STREETS

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Private Street Section

Exhibit IV-3

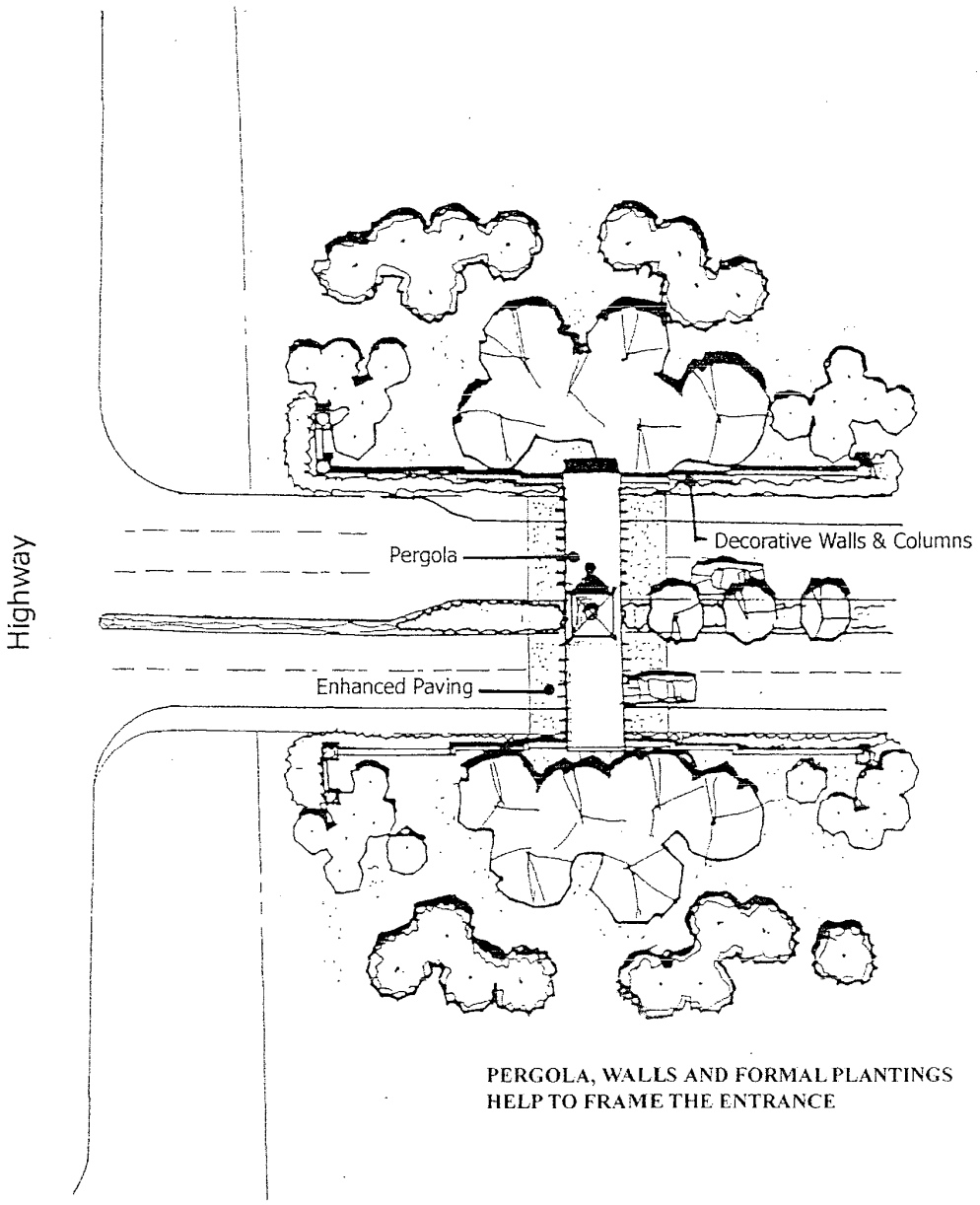
The major arterial corridors within the project area are reinforced by the incorporation of a variety of plant palettes, offering a balanced sense of continuity while maintaining a clear diversity. The specified plant palettes for the PUD project area are separated by circulation routes and entry points and by level of importance within the project.

Entry Statements:

Main Project Entry (see Exhibit IV-4, Main Entry Landscape Plan)

- Entry monuments and walls combined with accent trees and shrubs create a clear arrival point.

- Textured paving and concrete banding highlight driving surface.



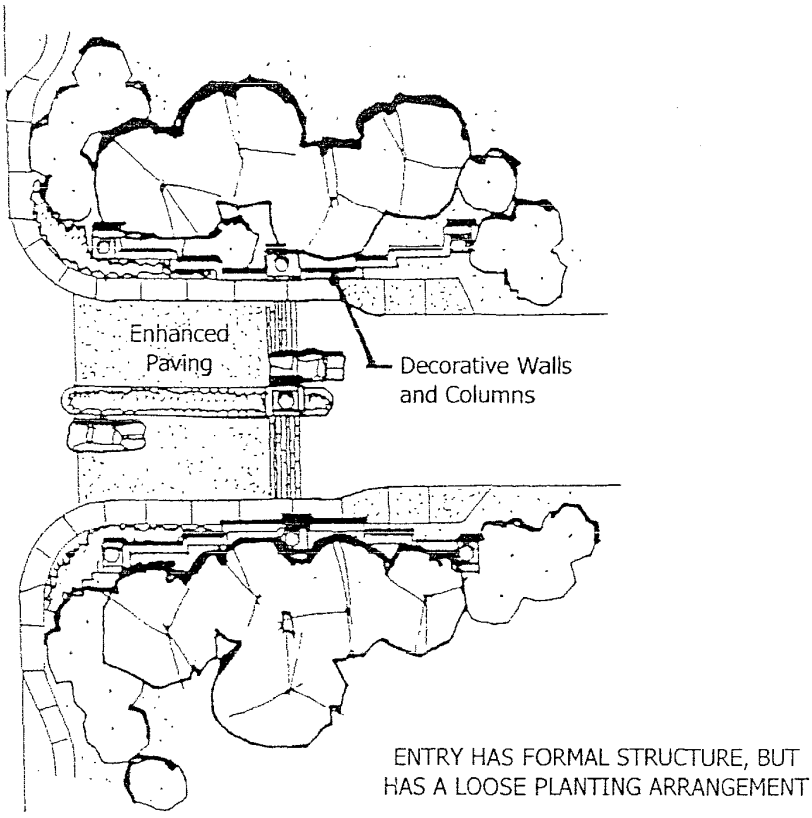
PERGOLA, WALLS AND FORMAL PLANTINGS
HELP TO FRAME THE ENTRANCE

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Main Entry Landscape Plan - Example

Exhibit IV-4

Secondary Entry (see Exhibit IV-5, Community Entry Landscape Plan)

- Decorative walls and pilasters identify these major intersections
- Medians carry flowering shrubs and ground cover
- Textured paving materials

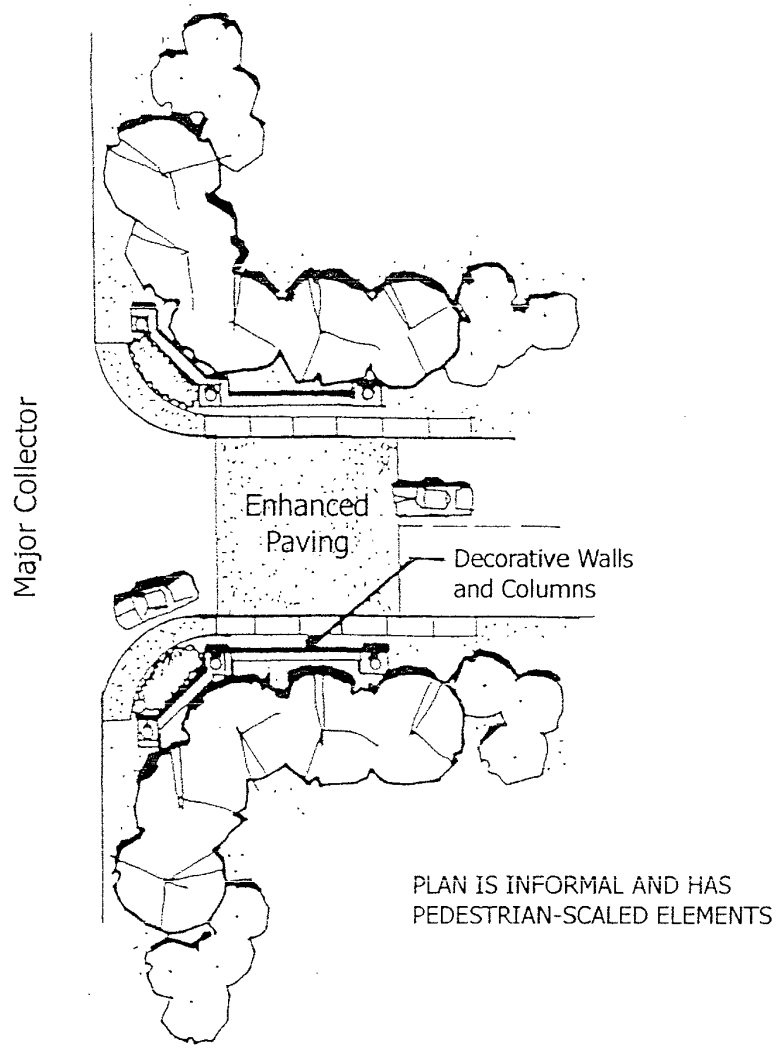


MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Community Entry Landscape Plan - Example

Exhibit IV-5

Community Entry (see Exhibit IV-6, Small Community Entry Landscape Plan)

- Low walls and signage
- Native trees and shrubs create backdrop for the signage



MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Small Community Entry Landscape Plan - Example

Exhibit IV-6

D. LANDSCAPE DEVELOPMENT GUIDELINES

To achieve a distinctive quality within the project environment, landscape concept plans for each planning area shall be required for the site plan review process. Single-family residential landscape concepts shall be aesthetically compatible with the PUD landscape concept in design and materials.

Landscape designs for street frontage areas shall be compatible with PUD streetscape improvements, indigenous growth conditions and offer opportunities for informal landscape treatments.

Landscape designs should recognize the important of pedestrian and bicycle use areas and incorporate treatments to enhance these particular experiences. Higher density zones, residential and commercial, acknowledging greater user intensity, require landscape concepts structured for durability and maintenance but retaining aesthetic appeal.

Designs for common residential situations need to address the problems of public gathering areas and recreation facilities. Pedestrian circulation systems should be laid out in such a manner as to permit free and safe access for all residents to amenities within the PUD areas. To insure a well-designed, high-quality project, the developer and homeowner should adhere to the following guidelines for selecting and installing essential landscape elements: plant materials, walls/fences, hardscape surfaces, irrigation equipment, lighting systems and outdoor furniture.

Plant Materials

To maintain a consistent PUD theme, the following plant materials list of trees, shrubs and ground covers should be adhered to by homeowners, school/park developers, multi-family parcel developers and commercial property developers.

This plant materials list is professionally selected for performance under the climatic conditions existing within the PUD area. This list provides ample opportunities for landscaping parcels within those limits.

Recommended Plant List:

Trees:

Acacia abyssinica	Abyssinian Acacia
Acacia aneuria	Mulga
Acacia cavenia	Cavenia Acacia
Acacia constricta	Whitethron Acacia
Acacia coriacea	- [none]
Acacia eburnia	Needle Acacia
Acacia erioloba	Camel Thorn
Acacia farnesiana	Sweet Acacia
Acacia greggii	Catclaw Acacia
Acacia millefolia	Santa Rita Acacia
Acacia occidentalis	Teso Acacia

Acacia pennatula	Pennatula Acacia
Acacia salicina	Wepping Wattle
Acacia schaffneri	Schaffner Acacia
Acacia smallii	Sweet Acacia
Acacia stenophylla	Shoestring Acacia
Acacia willardiana	Palo Blanco
Agonis flexuosa	West Australia Peppermint
Bauhinia congesta	Anacacho Orchid Tree
Brachychiton populneus	Bottle Tree
Brahea armata	Mexican Blue Palm
Brahea edulis	Guadalupe Palm
Bursera hindsiana	Copal
Bursera microphylla	Elephant Tree
Butia capitata	Jelly Palm
Caesalpinia cacalaco	Cascalote
Caesalpinia mexicana	Mexican Bird of Paradise
Caesalpinia platyloba	Bird of Paradise
Callistemon viminalis	Weeping Bottlebrush
Canotia holacantha	Crucifixion Thorn
Casuarina cunninghamiana	River She Oak
Casuarina equisetifolia	Horsetail Tree
Casuarina stricta	Coast Beefwood
Catalpa tashkentensis	Chiltapa
Celtis pallida	Desert Hackberry
Celtis reticulata	Netleaf (Western) Hackberry
Ceratonia siliqua	St. Johns Bread Tree, Carob Tree
Cercidium floridum	Blue Palo Verde
Cercidium microphyllus	Little Leaf Palo Verde
Cercidium praecox	Palo Brea
Cercidium sonorae	Sonoran Palo Verde
Chamaerops humilis	Mediterranean Fan Palm
Chilopsis linearis	Desert Willow
Citrus aurantifolia	Lime
Citrus lemoni	Lemon
Citrus paradisi	Grapefruit
Citrus reticalata	Tangerine
Citrus sinensis	Sweet Orange
Cupressus arizonica	Arizona Cypress
Cupressus sempervirens	Italian Cypress
Dalergia sissoo	Sissoo Tree
Eucalyptus erythrocorys	Red Cap Gum
Eucalyptus formanii	Forman's Eucalyptus
Eucalyptus leucoxylon	White Ironbark
Eucalyptus microtheca	Coolibah
Eucalyptus papuana	Ghost Gum
Eucalyptus populnea	Poplar-leaf Eucalyptus
Eucalyptus spathulata	Narrow-leaf-Gimlet
Eucalyptus torquata	Coral Gum
Forchameria watsonii	-[none]
Geijera parviflora	Australia Willow

Gleditsia triacanthos	Honey Locust
Holacantha emoryi (Castela emoryi)	Crucifixion Thorn
Leucaena retusa	Golden Ball Lead Tree
Lysiloma candida	Palo Blanco
Lysiloma microphyllum var. thornberii	Fern of the Desert
Olea europaea	Olive (Swan Hill and "Fruitless" only)
Olneya tesota	Ironwood
Parkinsonia aculeate	Mexican Palo Verde, Jerusalem Thorn
Phoenix canariensis	Canary Island Date Palm
Phoenix dactylifera	Date Palm
Pinus canariensis	Canary Island Pine
Pinus eldarica	Afgan Pine
Pinus halepensis	Aleppo Pine
Pinus pinea	Italian Stone Pine
Pinus roxburghii	Chir Pine
Pistacia Atlantica	Mt. Atlas Pistache
Pistacia chinensis	Chinese Pistache
Pithecellobium brevefolium	Ape's Earring
Pithecellobium flexicaule	Texas Ebony
Pithecellobium mexicanum	Palo Chino
Pithecellobium pallens	Ape's Earring
Pinosporum phylliraeoides	Willow Pittosporum
Prosopis alba	White Mesquite
Prosopis chilensis	Chilean Mesquite
Prosopis glandulosa	Texas Honey Mesquite
Prosopis pubescens	Freemont Screwbean
Prosopis velutina (julifora)	Honey Mesquite
Quercus suber	Cork Oak
Wuercus virginiana	Southern Live Oak
Rhus lancea	African Sumac
Rhus lanceolata	Prairie Flameleaf Sumac
Schinus molle	California Pepper Tree
Schinus terebinthifolius	Brazilian Pepper Tree
Sophora secundiflora	Texas Mountain Laurel, Mescal Bean
Tamarix aphylla	Athel Tree
Tipuana tipu	Tipu Tree
Ulmus parvifolia cv. "Sempervirens"	Evergreen Elm
Ungnadia speciosa	Mexican Buckeye
Vitex agnus-castus	Chaste Tree
Washingtonia filifera	California Fan Palm
Washingtonia robusta	Mexican Fan Palm
Xylosma congestum	Xylosma
Zizyphus jujuba	Chinese Jujube

Shrubs:

Abutilon palmeri	Superstition Mallow
Acacia angustissima	Fern Acacia
Acacia berlandieri	Guajillo
Acacia constricta	White Thorn Acacia

Acacia craspedocarpa	Leatherleaf Acacia
Acacia millefolia	Santa Rita Acacia
Acacia notabilis rigens	Needle Acacia
Acacia redolens	Prostrate Acacia
Acacia rigidula	Blackbrush Acacia
Aloysia gratissima	Bee Brush
Aloysia lycioides	White Brush, Bee Brush
Aloysia rnacrostachya	Sweet-stem
Aloysia wrightii	Oreganillo
Agave americana	Century Plant
Agave colorata	Mescal Ceniza
Agave huachucensis	Huachuca Agave
Agave vilmariniana	Octopus Agave
Ambrosia ambrosioides	Canyon Ragweed
Ambrosia deltoidea	Triangleleaf Bursage
Ambrosia dumosa	White Bursage
Anisacanthus andersonii	Anderson's Honeysuckle
Anisacanthus quadrifidus	Flame Honeysuckle
Anisacanthus thurberi	Desert Honeysuckle
Artemisia ludoviciana	White Sage
Asclepias linaria	Pine-leaf Milkweed
Asclepias subulata	Desert Milkweed
Atriplex canescens	Four Wing Salt Bush
Atriplex hymenelttra	Desert Holly
Atriplex lentiformis	Quail Bush
Baccaris hybrid	Desert Broom "Centennial"
Bauhinia congesta (lunarioides)	Anacacho
Bauhinia ramossisima	Orchid Tree
Bauhinia macaranthera	Orchid Tree
Berberis haematocarpa	Red Barberry
Buddleia rnarrubifolia	Wooley Butterfly Bush
Bursera microphylla	Elephant Tree
Caesalpinia gilliessi	Desert Bird of Paradise
Caesalpinia mexicana	Mexican Bird of Paradise
Caesalpinia pulcherrirna	Red Bird of Paradise
Caesalpinia Pumila	Copper Bird of Paradise
Calliandra californica	Fairy Duster
Calliandra eriophylla	False Mesquite
Calliandra peninsularis	Baja Red Fairy Duster
Calistemon citrinus	Lemon Bottlebush
Callistemon phoeniceus	Salt Resistant Bottlebush
Callistemon viminalis (cv. Capt. Cook)	Dwarf Bottlebrush
Calothamnus quadrifidus	-[none]
Calothamnus villosus	Wooley Netbrush
Cassis artemesioides	Feathery Cassia
Cassia biflora	Texas Cassia, Twin Flower Cassia
Cassia emoryi	Crucifixion Thorn
Cassia goldmannii	-[none]
Cassia nemophylla	Green Feathery Cassia
Cassia phyllodines	Silver-Leaf Cassia

Cassia wislizenii	Shrubby Cassia
Celtis pallida	Desert Hackberry
Cercocarpus montanus	Mountain Mahogany
Chrysothamnus nauseosus	Rabbit Brush
Cistus incanus (villosus)	Rockrose
Condalia lyciodes	Grey Thorn
Condalia globosa	Bitter Condalia
Convolvulus cneorum	Bush Morning Glory, Silverbush
Cordia boissieri	Anacahuita
Cordia parvifolia	Little Leaf Cordia
Dalea bicolor var. argyraea	Silver Dalea, Indigo Bush
Dalea formosa	Feather Dalea
Dalea frutescens	Black Dalea
Dalea pulchra	Indigo Bush
Dale spinosa	Smoke Tree
Dalea versicolor var. sessilis	Wislizenus Dalea
Dalea wislizenii	Indigo Bush
Dasylirion acrotriche	Green Desert Spoon
Dasylirion wheeleri	Sotol, Desert Spoon
Dodonaea viscose	Hopbush
Encelia farinose	Brittlebush
Ephedra nevadensis var. aspera	Boundary Ephedra
Ephedra triburoa	Mormon Tea
Eremaea beaufortioides	Eremea
Eremaea pauciflora	Snow Gum
Eremaea violaces	Violet Eremea
Eremophila glabra	Emu Bush
Ericameria laricifolia	Turpentine Bush
Ericameria linearifolia	Turpentine Bush
Eriogonum fasciculatum	California Buckwheat
Eriogonum farinose	California Buckwheat
Erythrina flabelliformis	Southwest Coralbean
Euphorbia antisyphilitica	Wax Plant, Candelilla
Euphorbia rigida	Euphorbia
Fallugia paradoxa	Apache Plume
Forestiera neomexicana	Desert Olive
Fouquieria splendens	Ocotillo
Genista hispanica	Spanish Broom
Grevillea rosmarinifolia	Rosemary Grevillea
Gutierrezia microcephala	Snakeweed
Hakea spp.	-[none]
Hamelia patens	Fire Bush
Haplopappus laricifolius	Turpentine Bush
Hesperaloe funifera	-[none]
Hesperaloe parviflora	Red/Coral Aloe
Hyptis emoryi	Desert Lavender
Jasminum mesnyi	Primrose Jasmine
Jatropha cardiophylla	Limberbush
Jatropha cinerea	Lomboy
Jatropha dioica	Leatherstem

Juniperus chinensis var.	Juniper
Justicia candicans	Firecracker Bush
Justicia californica	California Beloperone, Chuparosa
Justicia spicigera	Desert Honeysuckle
Justicia sonorae	Palm Desert Justicia
Krameria parvifolia	Ratany
Lantana camara	Bush Lantana
Larrea tridentate	Creosote Bush
Leucophyllum candidum	Silver Sage (cv. Silver Cloud, White Cloud, Compacta)
Leucophyllum fructescens	Texas Sage, Texas Ranger
Leucophyllum laevigatem	Chihuahuan Sage
Leucophyllum langmanniae	Sierra Madre Sage
Leucophyllum pruinosum	Fragrant Sage
Leucophyllus zygophyllum	Blue Ranger
Lippia aloysia	Mexican Oregano
Lotus rigidus	Rock Pea
Lycium andersonii	Anderson Thornbush
Lycium brevipes	Frutilla
Lycium fremontii	Wolfberry
Maytenus phyllanthoides	Mangle Dulce
Melaleuca spp.	Australian Myrtle
Mimosa biumcifera	Catclaw, Wait-a-Minute Bush
Mimosa dysocarpa	Velvet Pod Mimosa
Myrtus communis	True Myrtle, Roman Myrtle
Myrtus communis cv. "Boetica"	Twisted Myrtle
Myrtus communis cv. "Compacta"	Dwarf Myrtle
Nandina domestica	Heavenly Bamboo
Nerium oleander varieties	Oleander
Nolina bigelouii	Bigelow Nolina
Nolina microcarpa	Bear Gradd, Sacahuista
Penstemon species	Beard Tongue
Pervskia atriplieifolia cv. "Heavenly Blue"	Russian Sage
Plumbago scandens	Plumbago
Punica granatum varieties	Pomegranate
Pyracantha coccinea	Firethron
Quercus turbinella	Oak
Rhamnus californica	Coffee Berry
Rhamnus crocea	Redberry
Rhus choriophylla	Mearns Sumac
Rhus microphylla	Little Leaf Desert Sumac
Rhus ovata	Sugar Bush
Rhus trilobata	Skunk Bush
Rhus virens	Evergreen Sumac
Rosa banksiae	Lady Bank's Rose
Rosmarinus officinalis	Rosemary
Rosmarinus o. "Prostratus"	Trailing Rosemary, Dwarf Rosemary
Ruellia californica	Ruellia
Ruellia peninsularis	Ruellia
Salvia chamyorioides	Blue Sage

Salvia clevelandii	Chaparral Sage
Salvia dorrii	Desert Sage
Salvia farinacea	Mealy-Cup Sage
Salvia greggii	Texas Red Salvia, Autumn Sage
Salvia leucantha	Mexican Bush Sage
Salvia leucophylla	Purple Sage
Salvia splendens	Scarlet Sage
Simmondsia chinensis	Jojoba
Solanum xanti	Solanum
Sophora arizonica	Arizona Sophora
Sophora formosa	Sophora
Sophora secundifolia	Texas Mountain Laurel
Tamarix parvifolia	Flowering Salt Cedar
Tecoma stans	Arizona Yellow Bells
Tecomaria capensis	Cape Honeysuckle
Teucrium fruticans	Bush Germander
Tetracoccus hallii	Spurge
Thamnosma montana	Turpentine Broom
Thevtia peruviana	Yellow Oleander
Trixis californica	Trixis
Vauquelina californica	Arizona Rosewood
Vauquelina corymbosa	Narrow-leaf Rosewood
Viguiera,deltoidea	Golden Eye
Viguiera tomentosa	Golden Eye
Westringia romarinaformis	Westringia
Yucca aloifolia	Spanish Bayonet
Yucca baccata	Banana Yucca
Yucca brevifolia	Joshua Tree
Yucca elata	Soaptree Yucca
Zauschneria latifolia	Hummingbird Flower
Zizyphus obtusifolia	White Crucillo, Greythron
Zizyphus jujuba	Chinese Jujube

Ground Covers and Vines:

Acacia redolens	Prostrate Acacia, Trailing Acacia
Antigonon leptopus	Coral Vine, Queens Wreath
Asparagus densiflorus cv. "Sprengeri"	Sprenger Asparagus
Atriplex semibaccata	Australian Saltbush
Baccharis cv. "Centennial"	Centennial Baccharis, Desert Bloom
Baileya multiradiata	Desert Marigold
Bougainvillea spectabilis	Bougainvillea
Callaeum macropter	Yellow Orchard Vine
Campsis radicans	Common Trumpet Creeper
Carpobrotus edulis	Ice Plant, Hottentot-fig
Cephalophyllus cv. "Red Spike"	Red Spike Ice Plant
Cissus trifoliate	Grape Ivy
Clematis drummondii	Virgin's Bower
Clianthus formosus	Sturt's Desert Pea
Convolvulus mauritanicus	Ground Morning Glory

Dalea greggii	Trailing Indigo Bush
Dimorphotheca sinuate	African Daisy, Cape Marigold
Drosanthemum speciosum	Ice Plant, Dewflower
Dyssodia pentachaeta	Golden Fleece
Gazania regens	Treasure Flower, Trailing Gazania
Hardenbergia comptoniana	Wild Wisteria
Kennedi nigricans	Black Yellow Vine
Lantana montevidensis	Trailing Lantana
Macfadyena unguis-cati	Cat's Claw
Malephora crocea	Ice Plant
Mascagnia lilacina	Purple Mascagnia
Maurandya antirrhiniflora	Snapdragon Vine
Maurandya wislizeni	Snapdragon Vine
Melampodium leucanthum	Blackfoot Daisy
Merremia aurea	Yellow Morning Glory Vine
Mesembryanthemum spp.	Common Ice Plant
Oenothera berlandieri	Mexican Evening Primrose
Oenothera stubbei	Saltillo Primrose
Osteospermum fruiticosum	Trailing African Daisy
Pentzia incana	Karoo Bush
Phyla nodiflora	Lippia
Podranea risasoliana	Pink Trumpet Vine
Rhynchosia texana	Rosary Bead Vine
Rosa banksiae	Lady Bank's Rose
Rosmarinum o. "prostrates"	Trailing Rosemary
Salvia chamaedryoides	Blue Sage
Salvia farinacea	Mealy Cup Sage
Santolina chamaecyparissus	Lavender Cotton
Santollina virens	Green Santolina
Senicio cineraria	Dusty Miller
Sesuvium verrucosum	Sea Purslane
Solanum jasminoides	Potato Vine
Teucrium chamaedrys cv. "Prostrata"	Germander
Verbena bipinnatifida	Verbena
Verbena peruviana	Peruvian Verbena
Verbena tenera	Moss Verbena
Verbena rigida	Sandpaper Verbena
Wedelia trilobata	Yellow Dot

Succulents

Agave americana	Century Plant
Agave colorata	Mescal Ceniza
Agave murpheyi	Murphay's Agave
Agave parryi	Parry's Agave
Agave victorae – reginae	Royla Agave
Agave vilmoriniana	Octopus Agave
Aizozae spp.	Ice Plant Family
Aloe barbadensis (vera)	Medicinal Aloe
Aloe ferox	Tree Aloe

Aloe saponaria	Tiger Aloe
Aloe marlothii striata	Coral Aloe
Carnegiea gigantea	Saguaro
Cereus hildrnannianus	Hildmann's Cereus
Dasylirion acrotriche	Green Desert Spoon
Dasylirion wheeleri	Sotol, Desert Spoon
Echinocactus grusonii	Gold Barrel
Echinocereus engelmannii	Engelmann's Hedgehog
Ferocactus acanthodes	Compass Barrel
Ferocactus wislizenii	Fish Hook Barrel
Fouquieria macdougallii	Chunari
Fouquieria splendens	Ocotillo
Hesperaloe funifera	Red Hesparaloe
Hesperaloe parviflora	Red Yucca
Lophocereus schottii	Senita
Manfreda maculosa	Mandreda
Nolina matapensis	Tree Bear Grass
Nolina microcarpa	Bear Grass
Opuntia acanthocarpa	Buckhorn Cholla
Opuntia basilaris	Beavertail Prickly Pear
Opuntia bigelovil	Teddy Bear Cholla
Opuntia ficus-indica	Indian Fig
Opuntia violacea	Purple Princkly Pear
Pachycereus marginatus	Mexican Organ Pipe
Pedilanthus macrocarpus	Lady Slipper
Stenocereus thurberi	Arizona Organ Pipe
Trichocereus candicans	Argentine Tricocereus
Yucca aliofolia	Spanish Bayonet
Yucca baccata	Banana Yucca
Yucca brevifolia	Joshua Tree
Yucca elata	Soaptree Yucca
Yucca rigida	Blue Yucca
Yucca rostrata	Beaked Yucca

Annual Wildflowers

Abronia villosa	Sand Verbena
Argemone pleiacantha	Prickly Poppy
Camissonia brevipes	Yellow Cups
Camissonia cardiophylla	Heart-leaved Primrose
Catharanthus roseus	Madagascar Periwinkle
Centaurea rothrockii	Basket Flower
Cirsium neomexicanum	Thistle
Clarkia amoena	Farewell-to-Spring
Collinsia heterophylla	Chinese Houses
Coreopsis bigelovii	Desert Coreopsis
Cosmos bippinatus parviflorus suplhureus	Yellow Cosmos
Dimorphotheca sinnuata	African Daisy
Eriastrum diffusum	Prickly Stars
Eriophyllum lanosum	Wooly Daisy

Eriophyllum wallacel	Wooly Daisy
Eschscholzia californica	California Poppy
Euphorbia heterophylla	Painted Spurge
Gaillardia pulchella	Fire Wheel, Blanket Flower
Geraea canescens	Desert Sunflower
Gilia leptantha	Showy Blue Gilia
Gomphrena globosa	Globe Amaranth
Helianthus annuus	Wild Sunflower
Helichrysum bracteatum	Everlasting Daisy
Helipterum roseum	Pink Everlasting
Ipomoea leptotoma	Morning Glory
Kallistroemia grandiflora	Arizona Poppy
Lasthenia chrysostoma (Baeria chrysostoma)	Goldfield
Layia platyglossa	Tidy Tips
Lesquerella gordonii	Yellow Blanket
Linaria texana	Toadflax
Linaria pinnifolia	Toadflax
Linaria maroccans	Toadflax
Linum grandiflorum cv. "Rubrum"	Red Flax
Lupinus arizonicus	Arizona Lupine
Lupinus densiflorus	Lupine
Lupinus sparsiflorus	Desert Lupine
Lupinus succulentus	Arroyo Lupine
Machaeranthera canescens (Aster bigelovii)	Blue Aster
Machaeranthera tanacetifolia	Purple Aster, Tahoka Daisy
Matricaria grandiflora	Pineapple Weed
Matthiola longipetala cv. "Bicornis"	Evening Scented Stock
Mentzelia involucrate	Morning Stars
Mentzelia lindleyi	Blazing Stars
Mimulus bigelovii	Bigelow's Monkey Flower
Mohaves confertiflora	Ghost Flower
Monardo austromontana	Bee Balm
Monoptilon bellioides	Belly Flower
Nama demissum	Purple Mat
Nama hispidum	Purple Mat
Nemophila maculata	Five Spot
Nemophila menziesii	Baby Blue Eyes
Oenothera deltoids	Birdcage Evening Primrose
Orthocarpus purpurascens	Owl's Clove
Papaver rhoeas	Shirley Poppy
Pectis papposa	Chick Weed
Perityle emoryi	Rock Daisy
Phacelia campanularia	California Bluebell
Phacelia tanacetifolia	Scorpion Weed
Plantago insularis	Indian Wheat
Platystemon californicus	Cream Cups
Proboscidea parviflora	Devi's Claw
Rafinesquia neomexicana	Desert Chicory
Salvia columbariae	Chia
Sisymbrium ambiguum	Purple Rocket

Solanum xanti	Solanum
Tithonia rotundifolia	Mexican Sunflower
Ursinia calenduliflora	Ursinia
Ursinia chrysanthemoides speciosa	-[none]
Verbesina encelioides	Golden Crown Beard
Viguiera annua	Golden Eye

Perennial Wildflowers

Allionia incarnata	Trailing Windmills
Amsonia palmeri	Amsonia
Anigozanthos flavidus	Kangaroo Paw
Anigozanthos manglesii	Kangaroo Paw
Anigozanthos viridis	Kangaroo Paw
Anisondtea hypomandrum	African Mallow
Arctotis acaulis	African Daisy
Argemone platyceras	Prickly Poppy
Bahia absinthifolia	Bahia
Baileya multiradiata	Desert Marigold
Berlandiera lyrata	Chocolate Flower
Castilleja chromosa	Indian Paintbrush
Castilleja lanata	Indian Paintbrush
Datura inoxia	Sacred Datura, Jimsonweed
Delphinium amabile	Larkspur
Delphinium scaposum	Barestem Larkspur
Dichelostemma pulchellum	Bluedicks
Dyssodia acerosa	Dyssodia
Dyssodia pentachaeta	Dyssodia
Erigeron divergens	Spreading Fleabane
Evolvulus arizonicus	Arizona Blue Eyes
Guara lindheimeri	Desert Orchid
Hesperocallis undulagta	Ajo Lily
Hymenoxys acaulis	Angelita Daisy
Ipomopsis longiflora	Pale Blue Trumpets
Justicia sonorae	Sonoran Justicia
Linum lewisii	Blue Flax
Lotus rigidus	Desert Rock Pea
Machaeranthera tortifolia	Mohave Aster
Melampodium leucanthum	Blackfoot Daisy
Mirabilis multiflora	Desert Four O'Clock
Oenothera caespitosa	Tufted Evening Primrose
Penstemon baccarifolius	Rock Penstemon
Penstemon barbatus	Scarlet Penstemon
Penstemon palmeri	Palmer's Penstemon
Penstemon parryi	Parry's Penstemon
Penstemon pseudospectablis	Canyon Penstemon
Penstemon spectabilis	Royal Penstemon
Penstemon superbus	Superb Penstemon
Portulacaria afra	Elephants Food
Proboscidea altheaefolia	Devil's Claw

Psilostrophe cooperi	Paperflower
Ratibida columnaris	Mexican Hat, Coneflower
Romneya coulteri	Matilija Poppy
Senna covesii (Cassia covesii)	Desert Senna
Sphaeralcea ambigue	Glove Mallow
Stachys coccinea	Red Mint, Betony
Tagetes palmeri (lemmoni)	Mount Lemmon Marigold
Tagetes lucida	Mexican Mint Marigold
Verbena gooddingii	Goodding Verbena
Zephryanthes spp.	Rain Lily
Zinnia acerosa	Desert Zinnia
Zinnia grandiflora	Rocky Mountain Zinnia

Grasses

Aristida purpurea	Purple Three-awn
Bouteloua aristodoides	Six Weeks Grama
Bouteloua curipendula	Side Oaks Grama
Bouteloua gracillis	Blue Grama
Erioneuron pulchellum	Fluffgrass
Hilaria rigida	Big Galleta
Muhlenbergia capillaries	Gulf Muhly
Muhlenbergia dumosa	Giant Muhly
Muhlenbergia emersleyi	Bull Gradd
Muhlenbergia lindheimer	Lindheimer Muhly
Muhlenbergia porteri	Bush Muhly
Muhlenbergia rigida	Deer Grass
Muhlenbergia rigens	Deer Grass
Pennisetum setaceum cv. "Cupreum"	Purple Fountain Grass
Schismus barbatus	Mediterranean Grass
Setaria macrostachya	Plains Bristlegrass
Sporobolus cryptandrus	Sand Dropseed
Trichachne californica	Cotton-top

Wall/Fences

Walls and fences within the PUD area shall be consistent with the architectural theme of the planned area. This theme should be reflected in materials and design. The following are wall and fence height limits set for the project site.

- Within residential areas – six feet maximum (not within street setback requirements).
- Commercial and industrial areas – six feet minimum.
- Walls constructed at major community entry points and along community streets shall be consistent with the PUD theme area in materials and design.
- Project fencing within the separate planning areas shall reflect the architectural theme through consistent materials and design.

- Screen walls fronting on a street shall be designed using similar materials to appear as an integral part of the screened building. Said screen wall shall return away from the street for a distance of not less than three feet at intersections.

- Screen walls or fences of sheet or corrugated iron, steel, aluminum, asbestos or security chain-link fencing are specifically prohibited.

Hardscape (Paving)

The hardscape materials available for the paving of special activity areas – vehicular and pedestrian – are numerous in their choice of colors, patterns and textures. The use of interlocking brick pavers or textured concrete surfaces is encouraged. The appropriate selection of materials shall be based on the established architectural theme of the PUD area. Final approval regarding materials and consistency of these elements in accordance with the PUD shall be decided within the site plan review process.

Irrigation Equipment

The Merrill Ranch project will progressively develop the potential of reclaimed water for landscape irrigation. Irrigation of parks, schoolyards, streetscapes and manufactured slopes with reclaimed wastewater reduces the overall demand on potable water supplies.

A supply system separate from the domestic water supply system will transport reclaimed water throughout most of the PUD area. Reclaimed water will be available for landscaped open areas, recreation sites and public facilities via valve connections at the sidewalk.

- Irrigation elements, when adjacent to areas accessible and visible by pedestrians and/or vehicular traffic, shall be of a self-sealing, at-grade canister design.

  - Irrigation elements shall be of a non-reflective hardened plastic material.

  - Irrigation elements shall be dark brown, black or green in color to decrease visibility.

- Irrigation elements for transitional and manufactured slope areas shall be assembled to serve the designed use.

- Temporary irrigation for the maintenance of natural and manufactured slopes shall be specified as "brownline" construction for durability against severe ultraviolet degradation and to encourage visual blending of colors with slope vegetation.

Lighting

Street lighting may be used to unify the Merrill Ranch development. The goal of the Lighting Design Guidelines is to respond to the requirements of a variety of land uses and environmental conditions created by this development. Street, parking lot and structural lighting fixtures shall provide adequate illumination for the safety and comfort of vehicular and pedestrian traffic (see Exhibit IV-7, Lighting Design Guidelines).

All lighting in the PUD shall comply with the Town of Florence Development Code included as Appendix A.

The type of lighting elements may vary from one zone to the next, but levels of illumination should remain consistent in quality and clarity. The use of special lighting elements (i.e., accent and uplighting) is encouraged.

- Architectural lighting should be used to articulate structural design elements (i.e., uplighting, wall washing, etc.) and emphasize community focal points such as the community center.

- Pedestrian lighting should be used along walks, neighborhood parks and trails when independent of streets.

- The design of light fixtures should remain consistent throughout the PUD area and link elements of the park and open space areas with the development zones.

The following applications of lighting elements are permitted:

- On-site Street/parking lot light standards.

- Pedestrian sidewalks/transition zones (bollard/walkway lights).

- Landscape accent, spot or floodlights (concealed to reduce glare).

- Lighting for signage and monumentation (concealed to reduce glare – commercial zones).

- Architectural façade accent, spot or floodlights (concealed to reduce glare – commercial zones).

The following are standard requirements established to help resolve issues of safety and aesthetic lighting implementation:

- Height Maximums for PUD light standards:

    - Parking lot fixtures, 30 feet
    - Walkway lighting, 12 feet

- Lights shall not be placed or directed in a manner causing glare or excessive light to fall on adjacent sites.

- Bollards in pedestrian walkways shall be a minimum of 18 inches and a maximum of 3 feet 4 inches in height.

- A uniform light color, preferably high-pressure sodium, for security and energy savings, shall be used within PUD areas.

  - Levels of illumination should remain consistent throughout the PUD area.

  - Incandescent lighting is permitted for residential applications only.

  - Use of color lenses is prohibited (i.e., blue, green).

- The design of freestanding light standards and their accompanying structural supports shall be architecturally compatible with surrounding structures.

- Security lighting:

  - Security lighting fixtures shall not project above the fascia and/or roofline of the attached structure.

  - Fixtures will have shields that are painted and designed to be compatible with attached structure.

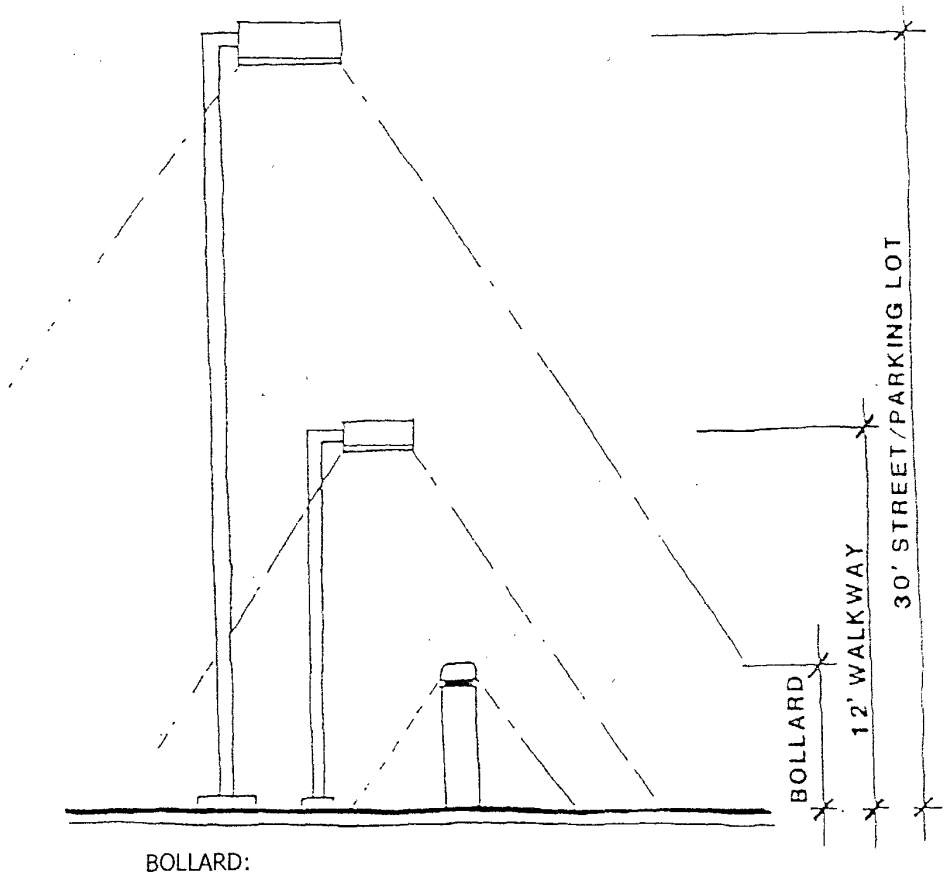
- All parking lot and driveway lights shall provide uniform illumination.

- Electrical connections or junction boxes shall be concealed either within the structure of the light or in a below-grade structure.

- Accent illumination is recommended to be located at key positions within each PUD area, such as entrances, exits, drives and loading zones.

  - Accent lights shall be positioned to be hidden from pedestrian view using plant material and a dark color scheme (dark brown or black).

  - The position of light thrown by accent lights shall be checked and adjusted at regular intervals to reduce glare thrown on adjacent traffic.



BOLLARD:
MAX. 3'4"
MIN. 1'4"
LIGHTING FOR PATHWAYS SHALL BE ADEQUATE FOR THE SAFETY AND COMFORT OF PEESTRIAN

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Lighting Design Guidelines

Exhibit IV-7

Furniture (Outdoor)

Street furniture can include trash receptacles, benches, bus shelters, planters, bicycle racks, bollards and information displays.

- The security, safety, comfort and convenience of the user, including the handicapped, should be considered.

- Street furniture should be conservative in use of sidewalk space and where possible, located to the edge of or off the sidewalk to maintain a clear width adequate to accommodate pedestrian flows.

- To the greatest extent possible, street furniture should be incorporated in park areas or landscape spaces and off-street areas.

- Street furniture should be constructed of longwearing, vandal resistant materials.

- Street furniture should be cost-efficient in terms of initial cost, expected lifetime and maintenance requirements.

- Street furniture should be simple in function and the design should reflect the character of the PUD area.

- Single-family mailboxes shall be clustered in a wall or pilaster in accordance with USPS regulations. Exposed mailboxes are discouraged. Multi-family developments shall have group mailboxes. In such cases, common mailbox structures shall be located near major entry or recreation areas. The structure should be of a design similar to the planning area in which it exists. Mailboxes and their standards shall be uniform in design, shape, size, color and address identification.

- Trash receptacles in attached housing areas shall be screened by an approved enclosure or landscaping and concealed from view of adjoining lots. Receptacles shall not be placed along street rights-of-way except on collection day.

- Above ground trash receptacles in attached housing project areas must be fully enclosed with masonry and stucco walls with wood doors on metal frames with landscaping on at least two sides.

- The purpose of bollards is to physically separate pedestrian and vehicular/traffic conflict areas. Their use should be limited to public gathering areas or commercial areas to safeguard children and adults, as well as to protect street furnishings or other elements within the streetscape.

- Any bollards for use adjacent to public streets should meet placement and design conventions of regulatory agencies.

- The design of bollards must be consistent within each planning area or in two or more areas if there is a continuity of bollard use. Along major streets, one bollard style is recommended.

- Proportions should be heavy or massive and suitable for the material used rather than tall and thin. Height should be adjusted to a level always visible to automobile drivers at the closest distance they will approach the bollards. In all cases, 18 inches is a minimum height and 3 feet 4 inches is the maximum height (see Lighting Plan).

The final selection of street furniture shall be based on appropriate materials and design and their consistency with adjacent architectural features. Approval regarding materials and consistency of these elements, in accordance with the PUD, shall be deferred to the Site Plan review process.

E. ARCHITECTURAL DESIGN GUIDELINES

The purpose of establishing Architectural Design Guidelines is to provide a reference for the planning and designing of residential, commercial, industrial, recreational and facility structures within the PUD area. The guidelines' intent is to facilitate the development of a specified architectural context and to help in the selection of materials and colors. Specifically, the guidelines are to be used to achieve project continuity and a standard of quality throughout the planned project and establish a greater visual identity. These guidelines are divided into residential and commercial criteria for the PUD.

1. Residential Design Guidelines

Layout

- The PUD area affords numerous viewshed opportunities. Long-term development should capitalize on viewshed corridors where possible, orienting development towards areas of natural scenic beauty and project landscape improvements.
- A clear distinction shall be maintained between private, residential, commercial properties, schools and recreational areas.
- An emphasis shall be given to creating units with a strong indoor/outdoor relationship.
- All mechanical equipment shall be screened from view of major streets and pedestrian areas using walls similar in design to the project architecture or a planting space adequate in size for proper screening of height and depth.
- Chimneys shall be compatible in materials to the accompanying structure.
- All antennas within residential areas shall be restricted to the attic or interior of the residence. Large satellite "dish" antennas are specifically prohibited on all lots, except lots over 15,000 square feet.
- All trash containers shall be screened from street view.
- Wherever possible within the PUD area, utilities will be located underground rather than overhead.

Design

- Each residential project area should convey its own blend of building forms.
- A particular style should not dominate the entire PUD area, but rather a cultivated theme should result in an integration of building designs and project areas, each with its own character.

- The architectural character of each planning area should be visually perceived from the street. The aim of the guidelines is to create interest through constancy in the use of architectural elements such as windows, doors, balconies and roofs.

- Residential structures and community features shall be coordinated in architectural materials, details and quality. Community features include bus stops, outdoor gathering places, recreation facilities and pedestrian access features.

- Building mass is arguably the most prominent design feature of a project. The design of a multi-family residential unit should avoid long, unbroken building faces without the use of offsets as an integral part of the façade design (see Residential Setback Plan, Exhibit IV-8 and Residential Setback Illustration, Exhibit IV-9).

- Interesting building massing can be achieved without superficial design elements through the use of the following features: two-story structures combined with one-story structures, the use of projecting balconies, recessed porches, entries and enclosures.

- The pitch and form of roofs is a very visible community feature. A range of roof forms and roof pitch adds an appealing visual context to the community and streetscape. An all-flat roof is unacceptable.

- Enclosed roof overhangs are encouraged as a response to climatic conditions, especially when used in combination with porch enclosures, balconies and recesses to decrease summer sun angles and reduce interior temperature fluctuations.

- All parking structures and decks, either freestanding or attached, shall incorporate the same design elements as the accompanying structure or dwelling.

Materials

- The roofing materials used for all residential structures shall be of a fire-retardant material.

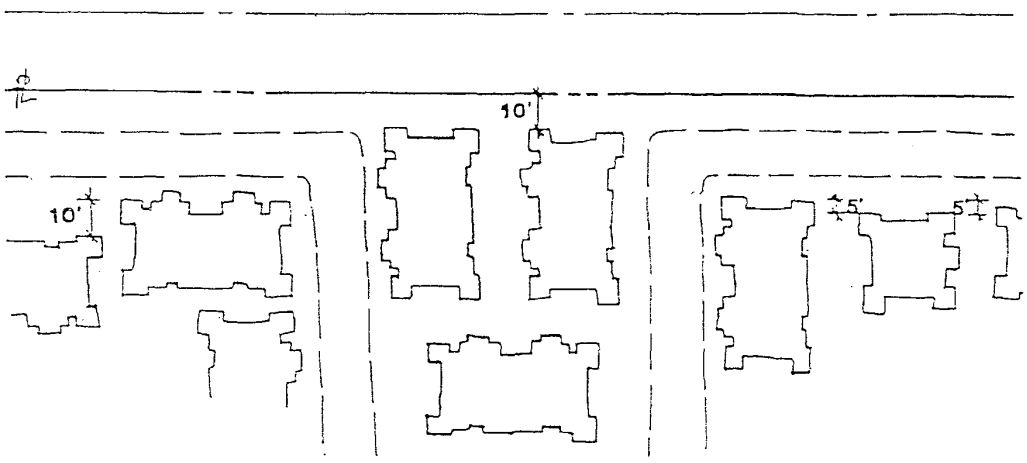
- Every single-family residence shall have a roof constructed of tile, concrete tile, or an asphalt composition in compliance with the Fire Safety Section of the Uniform Building Code.

BUILDINGS SHALL BE SET BACK FROM PROPERTY LINE A MINIMUM OF 10'.

NO MORE THAN 2 BUILDINGS THAT ARE SET BACK THE SAME DISTANCE SHALL BE ADJACENT TO ONE ANOTHER.

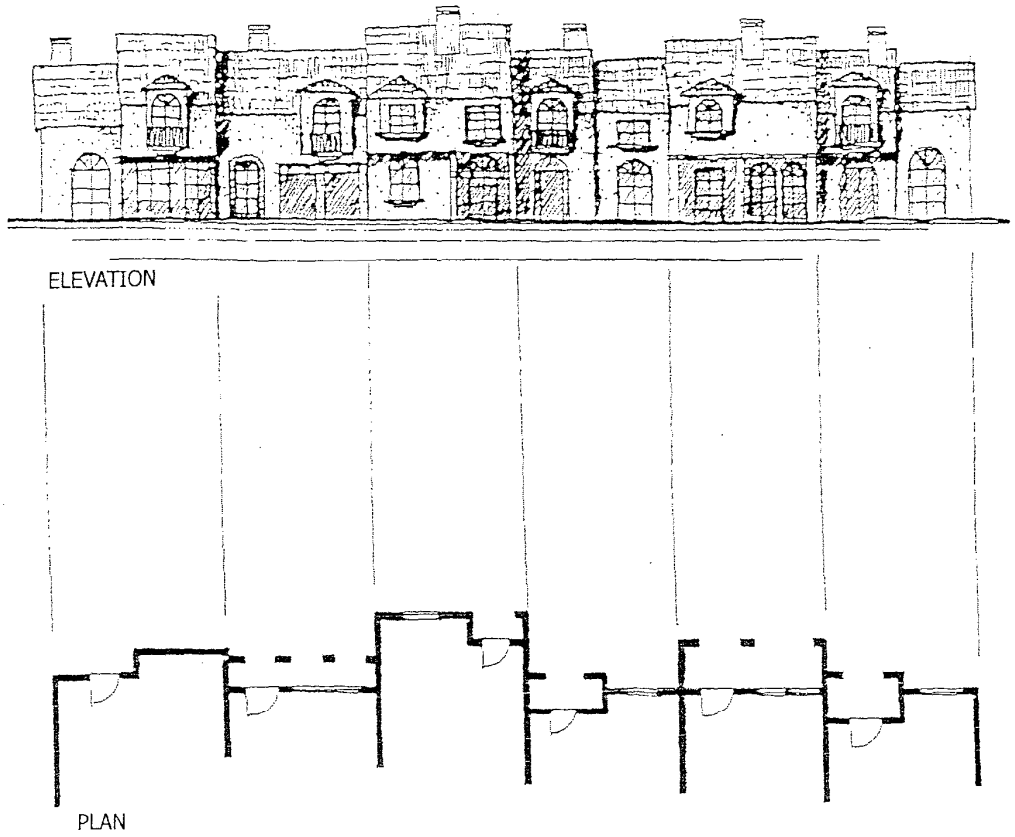
SETBACKS FROM ADJACENT BUILDINGS SHALL BE A MINIMUM OF 5' OR MORE.

(CONCEPTUAL LAYOUT ONLY)



MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Multi-Family Residential Setback Plan

Exhibit IV-8



RESIDENTIAL UNITS SHOULD INCORPORATE
A VARIETY OF SETBACKS TO AVOID LONG
EXPANSES OF SHEER, BLANK WALL

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Multi-Family Residential Setback Illustration

Exhibit IV-9

2. *Commercial Design Guidelines*

The purpose of establishing architectural design guidelines within commercial areas is to ensure quality development that reinforces a consistency throughout the PUD area. Recurring elements combine to create a visual and spatial expression that identify the area and give it a special character. All architecture is intended to appear as an integrated part of the overall site design concept. Buildings will be of a contemporary style and materials, employing appropriate massing, scale and proportion for design implementation. Designs for individual projects will be submitted as part of the Site Plan review procedures, as set forth in Section V, herein.

After a study of different architectural elements, the features selected for the PUD area will be judged to provide the highest probability of economic success, aesthetic satisfaction and flexibility in design for the life of build-out. The qualities and design elements for commercial buildings that are most actively encouraged are:

- Richness of surface and texture
- Play of light (shapes, shadows)
- Equal void to solid building wall ratios
- Multi-planed roofs
- High degree of variance in wall articulation

Conventional (contemporary) commercial architecture can be characterized by simple multi-story, geometric floor plate-type structures, typically faced with materials as listed below. These relatively low profile, simple shapes can convey a strong element of continuity throughout the area; with the materials, variations and fenestration details to provide the necessary variety. The major varietal elements to be addressed when designing structures are:

- Wall surfaces (textures, patterns)
- Openings (windows, balconies, pedestrian entrances)
- Graphics (colors, letter styles, clarity)

There is an overwhelming diversity of architectural products available for use by the project designer. The most desirable applications for the PUD area are:

Building Materials

- Masonry (concrete, glass or brick)
- Stucco
- Textured or exposed aggregate
- Pre-cast or tilt-up concrete

Stone

- Openings

- Recessed or projected entries
- Windows
- Landscape planters
- Arcades

Color Use

- Subtle, warm tones
- White
- Glass, dark with standard tints (not spandrel)
- Graphics
- Informative signage
- The Building Address
- Directional/location Signage
- Company name/logo

The following design elements should be explored when reviewing commercial architecture for the PUD area:

Layout

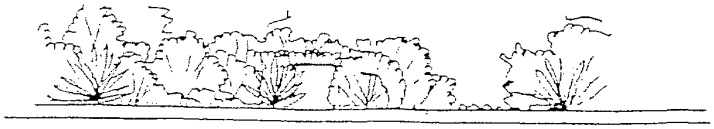
- Exterior components of plumbing, processing, heating, cooling and ventilating systems (including, but not limited to, piping, tanks, stacks, collectors, heating, cooling and ventilating equipment fans, blowers, duct-work, vents, louvers, meters, compressors, motors, incinerators, ovens, etc.) shall not be visible to an individual standing on the ground or ground-floor elevation from a distance of 500 feet, as illustrated on Exhibit IV-10.

- Exterior junction receptacles for electrical or irrigation purposes should be located in shrub bed areas and landscaped to screen from view, as shown on Exhibit IV-10 – Commercial Utilities Screening Illustration.

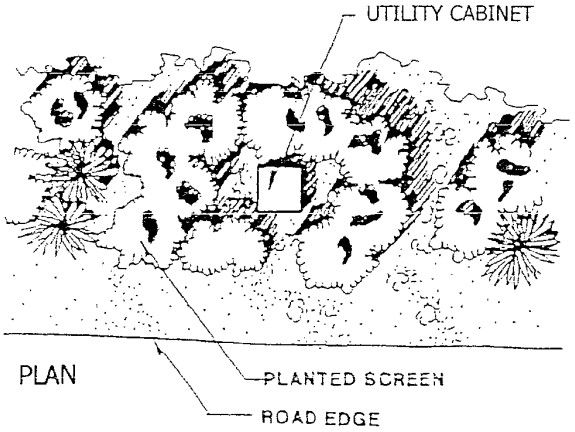
- Conceal all service areas and storage areas within the building, or screen those exterior areas with solid masonry or stucco stud walls of a single color or with architecturally coordinating trim.

- Whenever possible, do not place employee parking in the front setback. Parking should be located to the side or rear portion of the site. Walls and/or landscaping are encouraged to screen parking areas from street side views, as seen in Exhibit IV-11, Commercial Design Guidelines.

- Buildings should be sited in a manner that will complement the adjacent buildings and landscape. Look to the existing development around the subject site to establish a context in which to design. Building sites should be developed in a coordinated manner to provide order and diversity and avoid a confused street scene.

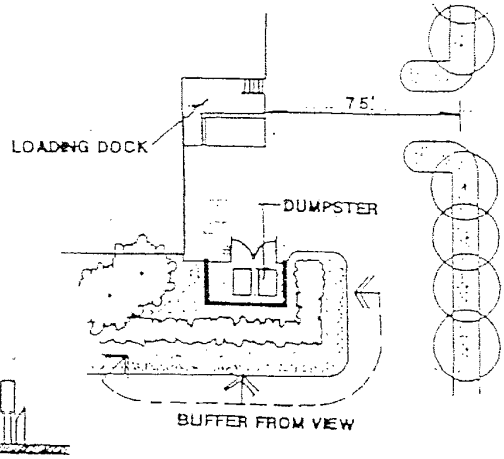


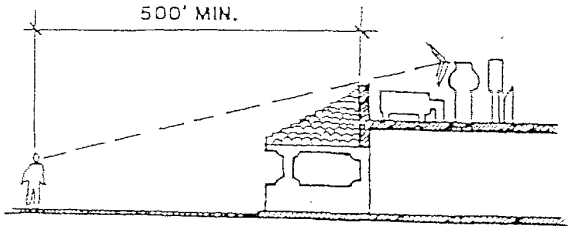
ELEVATION



PLAN

SCREEN MECHANICAL EQUIPMENT TO REDUCE VISUAL DISRUPTION OF LANDSCAPE THEME

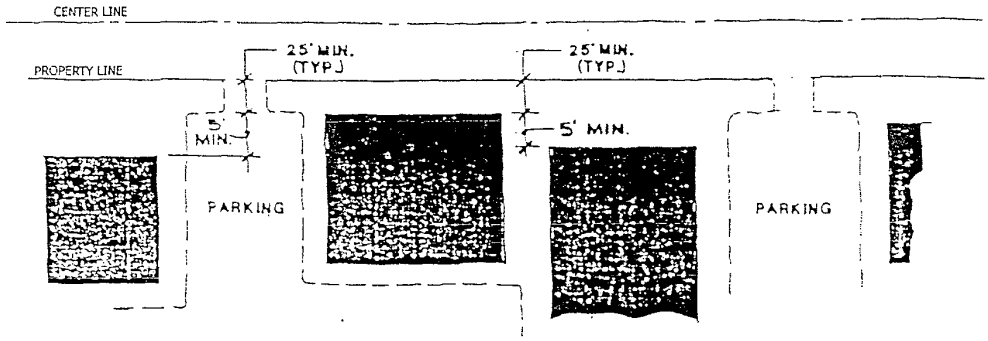




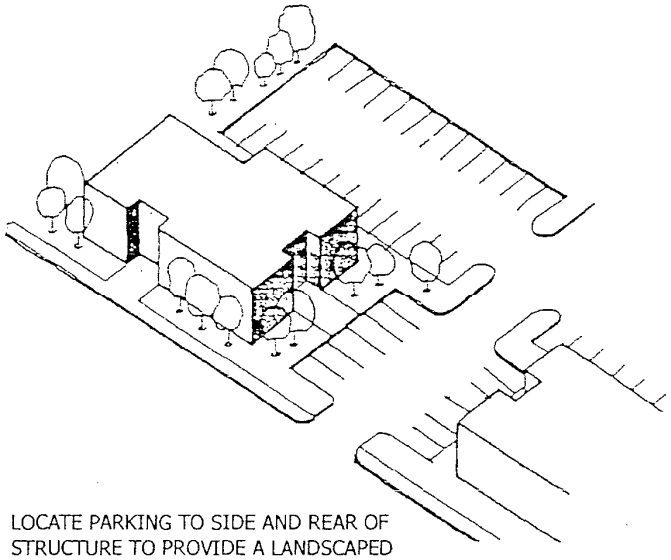
SCREEN ALL ROOFTOP SERVICE EQUIPMENT TO A MINIMUM 500' FROM ENTRY LEVEL

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Commercial Utilities Screening Illustration

Exhibit IV-10



VARIED SETBACKS WITH PARKING LOCATED TO THE SIDE AND REAR OF THE COMMERCIAL STRUCTURES



LOCATE PARKING TO SIDE AND REAR OF STRUCTURE TO PROVIDE A LANDSCAPED BUFFER FROM STREET

Design

- Avoid long, unarticulated building facades. Buildings with varietal front setbacks are strongly encouraged.

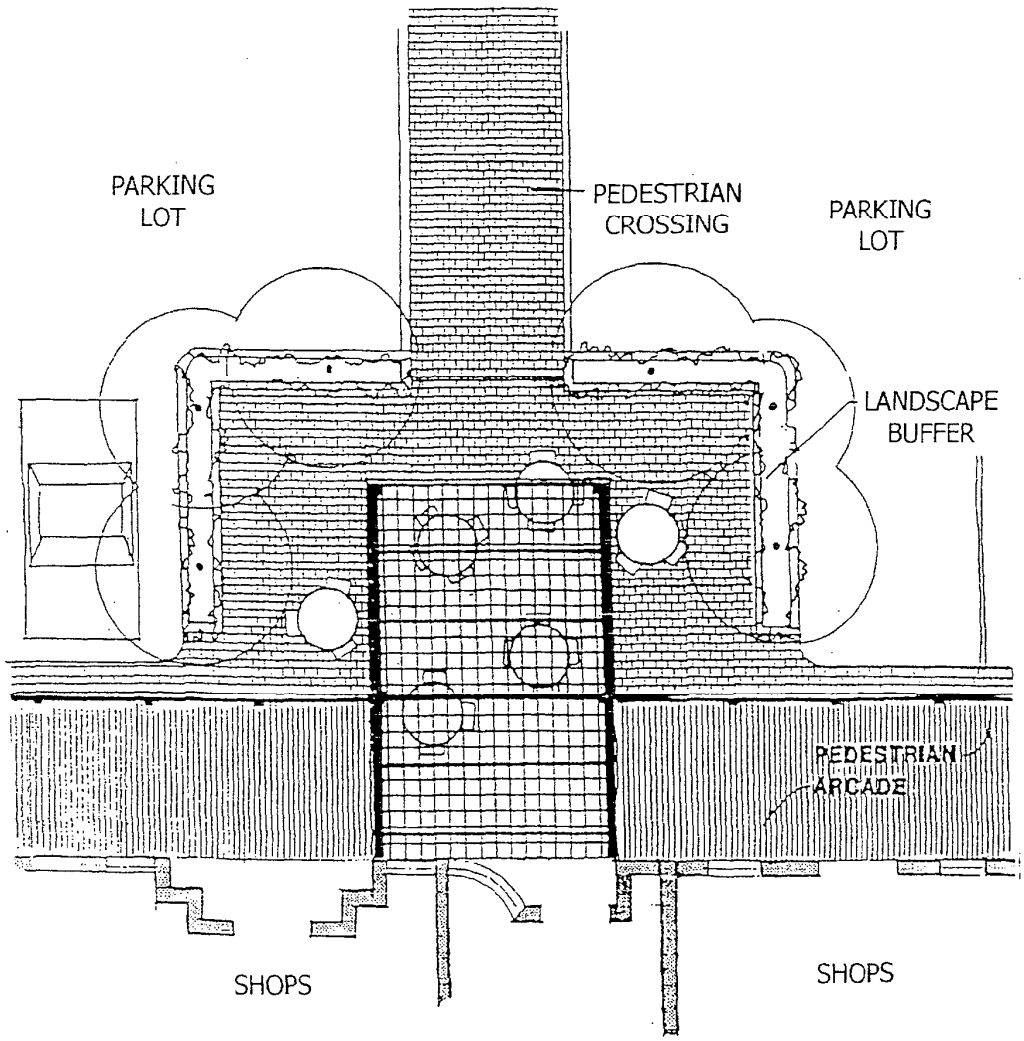
- Commercial developments should incorporate street furniture and pedestrian spaces where appropriate (see Exhibit IV-12, Commercial Design Concept). Pedestrian amenities should incorporate the overall commercial design scheme and be compatible in scale, form, materials and color with other architectural elements. Street furnishing should be simple in design and functional and be placed so as not to obstruct entrances, exits or pedestrian paths.

Materials

- The use of prefab, all-metal steel for sheathing of buildings is prohibited. This shall not preclude the use of finished metal details upon architecturally designed structures.

- Service utilities will be located underground within the PUD area, except for major power sources and connections with possible future substation facilities, as necessary.

- Building materials and landscaping should be consistent with adjacent, non-residential buildings to create a sense of unity of overall design.



MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Commercial Design Concept

Exhibit IV-12

F. SIGNAGE

1. Purpose and Intent

Signage is an essential design element within the structure of a planned community and provides a sense of identity and visual orientation. Signage reflects an image of cohesive quality while providing graphic communication for residents and visitors. Signs should inform and direct but, in addition, should be designed to remain consistent in both scale and style within the project area.

Each development area within the PUD area represents a small portion of a greater planned community, contributing significantly to the visual impact of the overall project. The signage guidelines and regulations contained herein shall apply to all developments within the PUD area. It is intended that the uniform application of these provisions shall provide the basis for an integrated visual character and continuity through all PUD phases. These signage guidelines are in addition to those issued in the Town of Florence Development Code (Appendix A).

Within the PUD, there are several different land use, categories and each requiring different signage controls. These categories can be identified as residential, commercial, model home complex/subdivision sales and other signage (such as directional, etc.)

Additional Exempt Signs:

- Traffic, directional, warning or information signs required or authorized by the public authority having jurisdiction.
- Mounts and stands made compatible with project signage with the approval of the Planning Director.
- Official signs used for emergency purposes only.
- Public utility signs, provided such signs do not exceed three square feet in area.

Additional General Provisions:

The following sign regulations will effectively regulate the placement, erection and maintenance of signage within the PUD. These regulations are intended to provide equitable standards for the protection of property values, visual aesthetic enjoyment and promotion of the public health, safety and general welfare and are in addition to those within Appendix A.

The following general regulations shall apply to all signage in any zone:

- All light sources, either internal or external, provided to illuminate signage shall be placed or directed away from public streets, highways, sidewalks, or adjacent premises so as not to cause glare or reflection that may constitute a traffic hazard or nuisance.

- Any sign located on vacant or unoccupied property that was erected for a business, which no longer exists, or any sign, which pertains to a time, event or purpose, which no longer exists, shall be removed within 90 days after the use has been abandoned.

- All signage shall be designed free of bracing, angle iron, guy wires, cables or similar devices.

- The exposed backs of all signs visible to the public shall be suitably covered, finished and property maintained.

- All signs shall be maintained in good repair including display surfaces, which shall be kept neatly painted or posted.

- Any sign, which does not conform, to the provisions contained herein shall be made to conform or shall be removed.

- The heights of all signs shall be measured from the highest point of the sign, exclusive of any part of the sign not included in the area calculations.

Additional Prohibited Signage:

The following signs shall be prohibited in all zones within the PUD area:

- Inflatable signs, balloons, symbols of animals.

- Rooftop signs.

- Portable signs.

- Signs on trailers or painted on the sides of disabled or parked vehicles.

- Signs advertising or displaying any unlawful act, business or purpose.

- Any signage, notice or advertisement affixed to any street right-of-way, public sidewalk, crosswalk, curb, lamp post, hydrant, tree, telephone pole, lighting system, upon any fixture of the fire or police alarm system of The Town of Florence.

- Any strings or pennants, banners or streamers, clusters of flags, strings of twirlers or propellers, flares, balloons and similar attention-getting devices, including noise-emitting devices, with the exception of the following:

  - Pennants, banners or flags used in conjunction with subdivision sales offices and tract entry points.

- National, state, local governmental, institutional or corporate flags properly displayed.

- Holiday decoration, in season, used for an aggregate period of 60 days in any one calendar year.

2. Design Guidelines

The overall goal for the PUD sign program is to achieve consistent sign usage throughout the community. The sign regulations establish maximum types and locations in permitted areas. The signage guidelines are designed specifically for this project to establish standard criteria to contribute to a well-integrated, high-quality project character. These standards provide a basis for both the developer and the PUD jurisdiction to design, pattern and regulate a consistent signage program.

Business Signage Within Commercial Zones

- Function – Signs for current places of business for the purpose of advertising and identification.

- Description – Individual business signage may be either freestanding, monument, wall signs, ground signs, projecting signs, awnings, attached signs or a combination of the above. Typography may include a commercial theme or style and should be consistent with the general vicinity.

- Attached Signs – Fascia signs may be used in addition to other types of signage. When several businesses are located within one building or when a certain theme is established for multi-tenants, the framing, lighting and positioning should be the same. Grouping such signs into a directory is encouraged.

- Projecting Signs – Projecting signs should be used when there is limited visibility or to add interest to a building. The support structure for such signage should complement the architectural style of the building.

- Awnings – Creative applications of awnings can be used as signage. All such awnings should complement the architectural theme and be of a consistent color and style for each building.

- Wall Signs – Wall signs may be used to complement a building or where other types of signage are not appropriate. Wall signs have the opportunity of adding visual interest to an expanse of wall. Wall signage utilizing individual letters mounted to a wall is encouraged. Support structures for attaching other wall signs should be made inconspicuous. Wall signs typically require more maintenance than other types of signage, so an effort should be made to keep their appearance clean and attractive.

- Monument Signs – Monument signs typically display messages at or below eye level and have a direct relationship to pedestrians and vehicles; therefore, the placement of monument signs is critical. Monument signage projects a feeling of permanency

and may be made from a variety of materials that are consistent with the structures they are identifying.

Exhibits IV-13 and IV-14 illustrate typical examples of appropriate signage for the PUD business zones.

Directional Signage

- Function – This type of signage identifies and directs vehicular and pedestrian traffic to various on-site destinations. They may be used on community trails or to display a destination, direction or location.

- Description:

  - Typically small scale signs, freestanding, consistent with community facility or amenity signs.

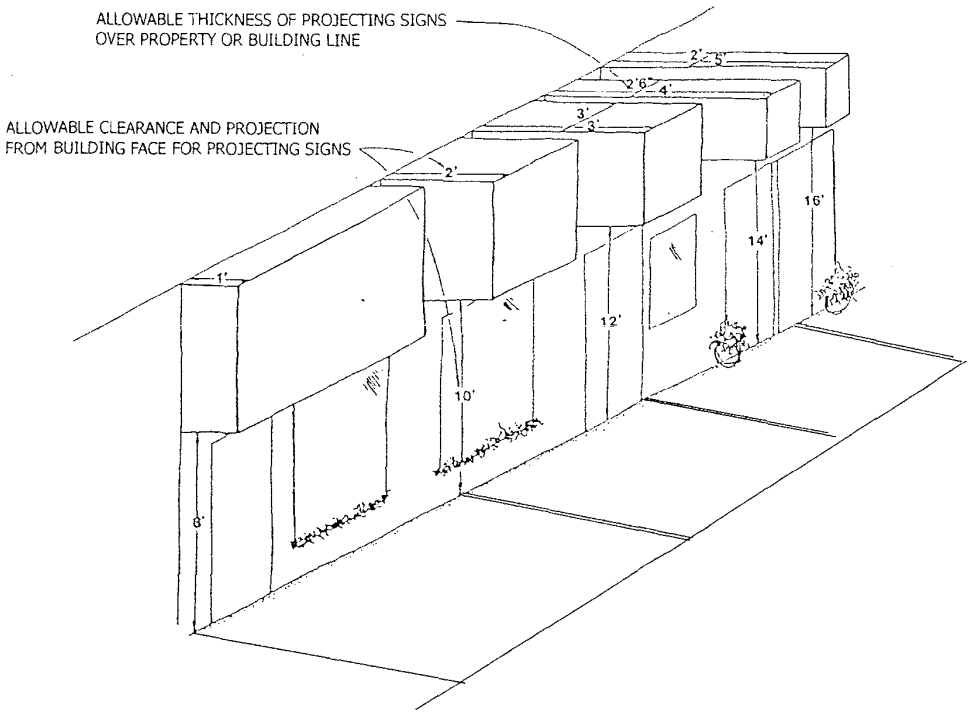
  - Sign materials and design should remain consistent with major community signage.

- Location – Located typically at entrances, exist and strategic locations along pedestrian and vehicular routes.

Project Monumentation

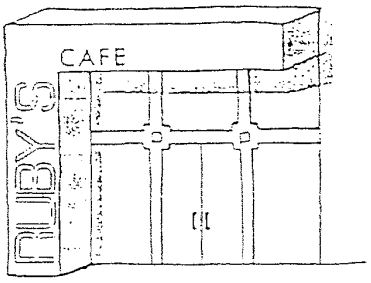
- Function – Signage that creates a major statement and informs the viewer through written and symbolic graphics that the planned community or project is being entered.

- Description – Entry signs should be large-scale, monument-type signs creating a sense of arrival. Materials used should be compatible with landscape treatment and street furniture. Entry signage should be illuminated. Signage may include community theme or project design theme (including logo, logotype and color scheme) and should be the same throughout the project.

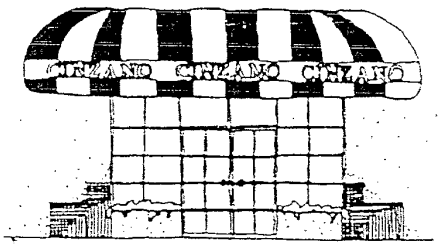


MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Design Guidelines Business Signage

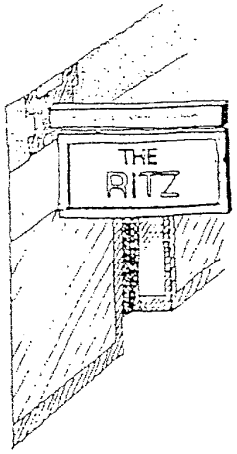
Exhibit IV-13



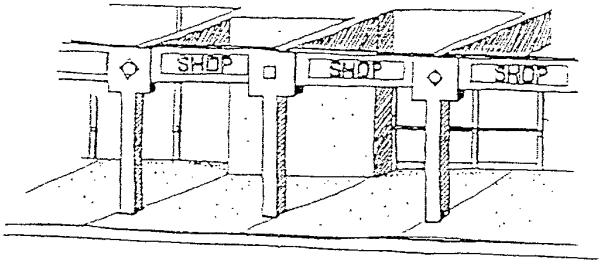
WALL SIGNAGE
EXAMPLE



AWNING SIGNAGE
EXAMPLE



PROJECTED SIGNAGE
EXAMPLE



ATTACHED SIGNAGE
EXAMPLE

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Design Guidelines Business Signage - Example

Exhibit IV-14

- Location – Major community entry points or project planning area entry points.

Sample Design Guidelines for Monument Signage are shown on Exhibit IV-15.

Community Facility Signage

- Function – A sign that informs the viewer through written and symbolic graphics of community facilities and amenities.

- Description:

These types of signs should be consistent within planning areas incorporating an area theme, logo, color or style in conjunction with the facility identification.

- Either freestanding or monument-type signage, single- or double- faced. Materials should be consistent with the thematic treatment for the major community signage.

- Location – Signage should be installed on the site of the facility or amenity and oriented toward the street.

Examples of Community Facilities Signage are provided on Exhibit IV-16.

Temporary Signage

- Function – Signage that identifies uses or activities temporary in nature. Typically includes real estate sales signs, subdivision sales signs, notification and other special feature signs.

- Description – Temporary signage should be located in close proximity to the use or uses identified. The design and theme of temporary signage should be consistent in scale and color with signs in the general vicinity.

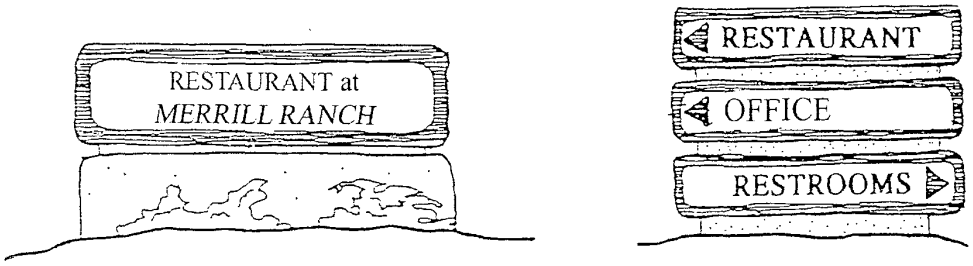
- Location – Temporary signage should be located in proximity to use or as permitted in the sign regulations contained herein.

Materials/Color Scheme

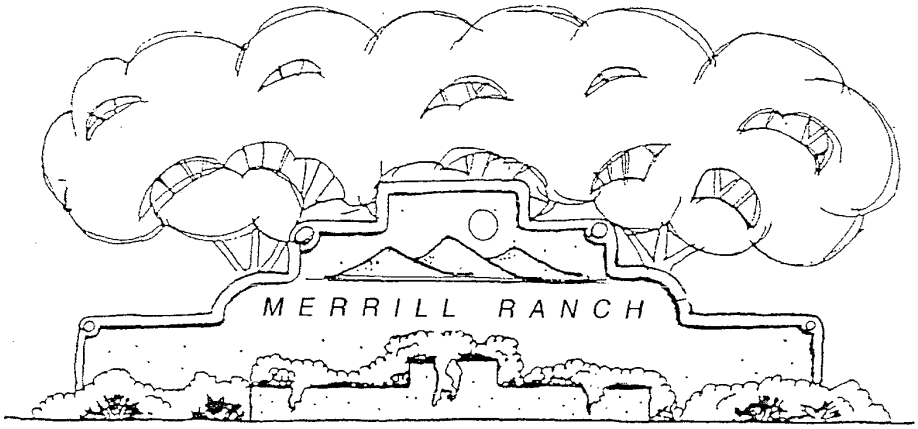
- An effort should be made to achieve consistency between building style and sign design. In all cases, signage generally should be compatible with the exterior treatment of the building or location identified. The message a sign conveys is affected by the materials and colors used in combination. Selecting signage material should be based on strength and durability with consideration toward safety and prolonged maintenance.

- Color schemes for signage should relate to other signs, graphics and color schemes in the vicinity to achieve an overall sense of project identity.

MONUMENT SIGNAGE
EXAMPLE



DIRECTIONAL SIGNAGE EXAMPLE

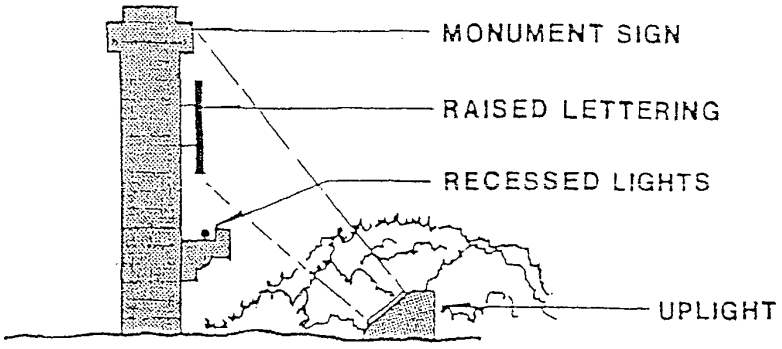


PROJECT MONUMENTATION
SIGNAGE EXAMPLE

MERRILL RANCH
PLANNED UNIT DEVELOPMENT
Design Guidelines Monument Signage

Exhibit IV-15

COMMUNITY FACILITY
SIGNAGE EXAMPLE



SIGNAGE LIGHTING
EXAMPLE

Lighting

The quality of signage lighting should relate to the character that is intended for the area. No sign illumination should cause a glare or illuminate unrelated adjacent sites. Signage may be illuminated by continuous and uniform internal lighting or external ground lighting sources. Signage that is either internally or externally illuminated shall follow these guidelines:

- Externally Lighted Signs
  - All external light sources should be adequately shielded to guide or direct the light toward the sign face and prevent glare or illumination of adjacent properties or structures
  - Light fixtures should be well integrated with the design and color scheme of the sign using appropriate design, color and lighting hardware.
- Internally Lighted Signs
  - Creative uses of internal lighting are encouraged when the color and intensity of light is well blended into the sign design.
  - Artistic applications of neon lighting in signs are acceptable when used for uses conducted after dark, such as restaurants.

VI. BIBLIOGRAPHY

Arizona Department of Water Resources, Phoenix Active Management Area; Low Water Using Plant List. February, 1997.

Johnson Ranch; Planned Area Development. October, 1997.

Town of Florence, Development Codes, June 20, 2002.

Florence Area, General Plan Update, April 9, 2003.

APPENDICES

EXHIBIT "C"

Merrill Ranch CFD District Development,
Financing Participation, and Waiver and Intergovernmental Agreement

DRAFT
02/13/03
06/12/03
11/13/03
11/24/03
11/26/03

[AREA RESERVED FOR RECORDING INFORMATION]

DISTRICT DEVELOPMENT, FINANCING PARTICIPATION, WAIVER AND INTERGOVERNMENTAL AGREEMENT
(MERRILL RANCH COMMUNITY FACILITIES DISTRICT)

THIS DISTRICT DEVELOPMENT, FINANCING PARTICIPATION; WAIVER AND INTERGOVERNMENTAL AGREEMENT (MERRILL RANCH COMMUNITY FACILITIES DISTRICT), dated as of _____ 1, 200_ (hereinafter referred to as this "*Agreement*"), by and among the Town of Florence, Arizona, a municipality duly incorporated and validly existing pursuant to the laws of the State of Arizona (hereinafter referred to as the "*Municipality*"); Merrill Ranch Community Facilities District, a community facilities district formed by the Municipality, and duly organized and validly existing, pursuant to the laws of the State of Arizona (hereinafter referred to as the "*District*"), and _____ _____ a _____ duly organized and validly existing pursuant to the laws of the State of Arizona and having an interest in certain property in the District (hereinafter referred to as "_____"), and _____, a _____ duly incorporated and validly existing pursuant to the laws of the State of _____ (hereinafter referred to as, collectively, the "*Owners*");

W I T N E S S E T H:

WHEREAS, pursuant to Title 48, Chapter 4, Article 6, Arizona Revised Statutes, as amended (hereinafter referred to as the "*Act*"), and Section 9-500.05, Arizona Revised Statutes, as amended, the Municipality, the District, certain of the Owners entered into this Agreement as a "development agreement" to specify, among other things, conditions, terms, restrictions and requirements for "public infrastructure" (as such term is defined in the Act) and the financing of public infrastructure and subsequent reimbursements or repayments over time; and

WHEREAS, with regard to the real property described in Exhibit "A" hereto (hereinafter referred to as the "*Property*") which makes up the real property included within the District and the Municipality, the District, the Owners determined to specify some of such matters in this Agreement, particularly matters relating to the construction or acquisition of certain public infrastructure by the District, the acceptance thereof by the Municipality and the reimbursement or repayment of the Owners with respect thereto, all pursuant to the Act, such public infrastructure being necessary for the Owners to develop the Property prior to the time at which the District can itself pay for the construction or acquisition thereof; and

WHEREAS, this Agreement as a "development agreement" is consistent with the "general plan" of the Municipality, as defined in Section 9-461, Arizona Revised Statutes, as amended, applicable to the Property on the date this Agreement is executed; and

WHEREAS, pursuant to an election to hereinafter be held in and for the District, questions authorizing the district board of the District (i) to issue certain general obligation bonds of the District, including to provide moneys for certain "public infrastructure purposes" (as such term is defined in the Act) described in the General Plan of the District heretofore approved by the Municipality and the District and in this Agreement (hereinafter referred to as the

"*General Obligation Bonds*") including the levy, assessment and collection of a debt service tax against all real and personal property in the District, unlimited as to rate or amount therefor, and (ii) to levy, assess and collect an operation and maintenance tax in an amount up to $0.30 per $100.00 of assessed valuation for all real and personal property in the District (hereinafter referred to as the "*O/M Tax*") to provide for amounts which become attributable to the operation and maintenance expenses of the District in the future are expected to be approved pursuant to the Act; and

WHEREAS, special assessment lien bonds of the District shall be issued before any of the General Obligation Bonds if certain conditions are met to provide moneys for certain public infrastructure purposes described in such General Plan (herein referred to as the "*Assessment Bonds*"); and

WHEREAS, the use of the proceeds of the sale of the General Obligation Bonds and the Assessment Bonds and amounts which will be collected with respect to the O/M Tax in the future is a subject of this Agreement; and

WHEREAS, pursuant to the Act, the District entered into this Agreement with the Owners with respect to the advance of moneys for public infrastructure purposes by the Owners and the repayment of such advances and to obtain credit enhancement for, and process disbursement and investment of proceeds of, the General Obligation Bonds and the Assessment Bonds; and

WHEREAS, specifically, pursuant to the procedures prescribed by Sections 48-576 through 48-589, Arizona Revised Statutes, as amended, as nearly as practicable, or such other procedures as the district board of the District provides, assessments of the costs of any public infrastructure purpose on any land in the District may be based on the benefit determined by such board to be received by such land, and, in that respect, the Owners have determined to waive certain matters and agree to certain other matters with respect thereto; and

WHEREAS, prior to the issuance of the Assessment Bonds, the District entered into this Agreement as a written agreement with the Owners as to the manner in which such assessments are to be allocated inasmuch as the portion of the Property upon which they are to be levied is to be divided into more than one parcel and assessments may be prepaid and reallocated; and

WHEREAS, pursuant to the Act and Title 11, Chapter 7, Article 3, Arizona Revised Statutes, as amended, the District and the Municipality entered into the specified sections of this Agreement as an "intergovernmental agreement" with one another for joint or cooperative action for services and to jointly exercise any powers common to them and for the purposes of the planning, design, inspection, ownership, control, maintenance, operation or repair of "public infrastructure," including particularly to provide for the acceptance by the

Municipality of certain public infrastructure constructed or acquired by the District;

NOW, THEREFORE, in the joint and mutual exercise of their powers, in consideration of the above premises and of the mutual covenants herein contained and for other valuable consideration, and subject to the conditions set forth herein, the parties hereto agree that:

ARTICLE I
DEFINED TERMS; MISCELLANEOUS MATTERS RELATING TO USE THEREOF

Section 1.1. (a) For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires, the terms defined in this Section have the meanings assigned to them in this Section and include, as appropriate, the plural as well as the singular:

"*Acquisition Infrastructure*" means that portion of the Infrastructure other than that which is the subject of a request of the Owners and approval of the District Manager described in Section 2.1.

"*Acquisition Project*" means each project which is a part of the Acquisition Infrastructure on a project-by-project basis.

"*Acquisition Project Construction Contract*" means a construction contract for an Acquisition Project.

"*Act*" means Title 48, Chapter 4, Article 6, Arizona Revised Statutes, as amended.

"*Agreement*" means this District Development, Financing Participation, Waiver and Intergovernmental Agreement (Merrill Ranch Community Facilities District), dated as of _____ 1, 200_, by and among the Municipality, the District, the Owners, as amended from time to time.

"*Assessed Property*" means the real property included within the District and hereinafter described in an amendment to this Agreement upon terms determined by the District Board.

"*Assessment Bond Acquisition Construction Contracts*" means the Construction Contracts for the Work.

"*Assessment Bonds*" means the series of special assessment lien bonds of the District authorized to be sold and issued by the District as described in this Agreement, payable from amounts collected from, among other sources, the Assessments.

"*Assessment Diagram*" means the assessment diagram to be prepared by the District Engineer and the Superintendent of Streets showing estimated maximum dollar amounts of benefits derived from the Work to be for each parcel of the Assessed Property and assessing against each such parcel the maximum proportionate share of costs and expenses of the Work to be shown in an exhibit to be provided by an amendment to this Agreement upon terms determined by the District Board.

"*Assessments*" means, as to be originally levied and as thereafter reallocated as described herein, the "not to exceed" proportionate share of costs and expenses of the Work levied against each parcel of the Assessed Property pursuant to Title 48, Chapter 4, Article 2, Arizona Revised Statutes.

"*Bonds*" means, as applicable, the Assessment Bonds or the General Obligation Bonds.

"*Certificate of the Engineers*" means a certificate of the Owners Engineer and the District Engineer in substantially the form of Exhibit "C" hereto.

"*Construction Contract*" means a construction contract for a Project.

"*Conveyance*" means a conveyance for a Segment in substantially the form of Exhibit "D" hereto.

"*Deposit Amount*" means the dollar amount equal to maximum annual debt service for any fiscal year of the District (including the amount necessary for any mandatory redemption of related term General Obligation Bonds) for a series of the General Obligation Bonds.

"*Disclosure Statement*" means the disclosure statement substantially in the form of Exhibit "E" hereto.

"*District*" means Merrill Ranch Community Facilities District, a community facilities district formed by the Municipality, and organized and existing, pursuant to the laws of the State.

"*District Board*" means the district board of the District.

"*District Budget*" means the budget of the District required for each Fiscal Year by the Act.

"*District Engineer*" means _____.

"*District Expenses*" means the reasonable expenses and costs of the operation and administration of the District including the reasonable expenses and costs incurred by the Municipality in connection with the formation of the District; its operations; its relationship with the Municipality; its issuance of the Assessment Bonds or the General Obligation Bonds or any similar matters and rea-

sonable fees and related costs and expenses of staff of the Municipality, financial advisors, engineers, appraisers, attorneys and other consultants and including any overhead incurred by the Municipality with respect thereto and specifically allocated to the District Expenses.

"*District Indemnified Party*" means the Municipality and each legislator, director, trustee, member, officer, official or employee thereof or of the District.

"*Engineers*" means, collectively, the Owners Engineer and the District Engineer; provided, however, that neither may be changed upon less than thirty (30) days written notice and, in the case of the Owners Engineer, without compliance with the other provisions hereof with respect to such change.

"*Estimate*" means the estimate of the Financeable Amount indicated in the First Report.

"*Financeable Amount*" means the total of amounts necessary (1) to pay the total of all amounts due pursuant to the Assessment Bond Acquisition Construction Contracts not otherwise paid from cash collections of the Assessments and (2) to pay (i) all other amounts indicated in this Agreement, (ii) all relevant issuance costs related to the Assessment Bonds, (iii) capitalized interest for a period not in excess of that permitted by the Act and described elsewhere herein and (iv) an amount necessary to fund a debt service reserve fund in an amount not in excess of that permitted by the Act and described elsewhere herein.

"*First Report*" means the first of the Reports, being the Report applicable to the Work.

"*Fiscal Year*" means the twelve (12) month period beginning on July 1 of any year and ending on June 30 of the following year.

"*Force Majeure*" means any condition or event not reasonably within the control of a party obligated to perform hereunder, including, without limitation, "acts of God"; strikes, lock-outs, or other disturbances of employer/employee relations; acts of public enemies; orders or restraints of any kind of the government of the United States or any state thereof or any of their departments, agencies, or officials, or of any civil or military authority; insurrection; civil disturbances; riots; epidemics; landslides; lightning; earthquakes; subsidence; fires; hurricanes; storms; droughts; floods; arrests; restraints of government and of people; explosion; and partial or entire failure of utilities. Failure to settle strikes, lock-outs and other disturbances of employer/employee relations or to settle legal or administrative proceedings by acceding to the demands of the opposing party or parties, in either case when such course is in the judgment of the party hereto unfavorable to such party, shall not constitute failure to use its best efforts to remedy such a condition or event.

"*General Obligation Bonds*" means the series of general obligation bonds of the District authorized to be sold and issued by the District as described in this Agreement.

"*Indemnified Party*" means the Municipality and the District and each legislator, director, trustee, partner, member, officer, official, independent contractor or employee thereof and each person, if any, who controls the Municipality and/or the District within the meaning of the Securities Act.

"*Infrastructure*" means, collectively, the public infrastructure described in Exhibit "B" hereto.

"*Intergovernmental Agreement Act*" means Title 11, Chapter 7, Article 3, Arizona Revised Statutes, as amended.

"*Initial Expenses*" means, prior to receipt of collections of the first levy of the O/M Tax, the reasonable expenses and costs of the operation and administration of the District including the reasonable expenses and costs incurred by the Municipality in connection with the formation of the District, its operations, its relationship with the Municipality, its issuance of the Assessment Bonds or the General Obligation Bonds or any similar matters and reasonable fees and related costs and expenses of staff of the Municipality, financial advisors, engineers, appraisers, attorneys and other consultants and including any overhead incurred by the Municipality with respect thereto and specifically allocated to the Initial Expenses.

"*Land Development Agreement*" means the _____ Agreement, entered into as of _____, 200_, by and between the Municipality and _____, and recorded _____, 200_, in Instrument No. _____, official records of Pinal County, Arizona, as amended from time to time.

"*Municipality*" means the Town of Florence, Arizona, a municipality incorporated and existing pursuant to the laws of the State.

"*O/M Expenses*" means the reasonable expenses and costs of the operation and maintenance of the Projects and for accumulating a Replacement Reserve Amount with respect to the Projects including any overhead incurred by the Municipality with respect thereto and specifically allocated to the O/M Expenses.

"*O/M Tax*" means an operation and maintenance tax in the amount up to $0.30 per $100.00 of assessed valuation for all real and personal property in the District.

"*Owners*" means, collectively, a corporation incorporated and existing pursuant to the laws of the State of _____.

"*Owners Engineer*" means any firm of professional engineers hired by the Owners after approval thereof by the District Manager to perform the services required therefrom for the purposes hereof.

"*Plans and Specifications*" means the plans and specifications for a Project which shall be prepared and reviewed in accordance with the requirements for plans and specifications for construction projects of the Municipality similar to the Project or the Acquisition Project, as applicable.

"*Project*" means each project which is a part of the Infrastructure on a project-by-project basis.

"*Property*" means the real property described in Exhibit "A" to this Agreement.

"*Replacement Reserve Amount*" means an amount calculated using reasonable accounting practices based on the useful life of the various assets composing the Projects established by the Internal Revenue Code of 1986, as amended, to be used to replace such assets.

"*Report*" means the study of the feasibility and benefits required by the Act for the applicable Project or Acquisition Project.

"*Securities Act*" means the Securities Act of 1933, as amended.

"*Segment*" means a completed, discrete portion of an Acquisition Project as determined by the District Engineer and the District Manager.

"*Segment Price*" means an amount equal to the sum of the amounts paid by the Owners for (1) design of the Segment (including the costs of the review of such design by the District Engineer), (2) construction of the Segment pursuant to the Acquisition Project Construction Contract for such Segment (such amount to be equal to the contract amount plus any increases to such contract amount approved as described in Section 3.5 less any change orders decreasing the contract amount), (3) inspection and supervision of performance under such Acquisition Project Construction Contract including an amount determined by the Engineers in the Certificate of Engineers for such Segment determined to be then commercially reasonable by them, but in no event less than five percent (5%) or more than ten percent (10%) of the amount described in clause (2) hereof for such Segment, for construction administration, (4) the fair market value of real property for rights of way, easements and any other interests in real property which are part of such Segment, (5) interest during the period starting after the Segment has been accepted by the Municipality for use but before the provisions of Section 7.1 hereof are effective with respect to such Segment until the Segment Price for such Segment can be paid, calculated at the rates of interest equal to the prime rate as reported in the West Coast Edition of The Wall Street Journal plus two percent (2%) from day to day on the amounts expended for

purposes of clause (1), (2) and (3) hereof during such period and (6) other miscellaneous costs for such Segment attributable to construction of the Segment approved by the Engineers as certified in the Certificate of the Engineers for that Segment.

"*State*" means the State of Arizona.

"*Total Debt Service*" means, collectively, amounts for debt service for the next succeeding tax year with respect to the General Obligation Bonds and for payment of the amounts described in Section 9.1 for such year.

"*Work Plans and Specifications*" means, for purposes of levying the Assessments, the descriptions of the Infrastructure in the First Report and the Plans and Specifications for the corresponding Acquisition Projects, which shall compose the Work.

"*Work*" means the portion of the Infrastructure described in an amendment to this Agreement upon terms determined by the District Board.

(b) All references in this Agreement to designated "Exhibits," "Articles," "Sections" and other subdivisions are to the designated Exhibits, Articles, Sections and other subdivisions of this Agreement as originally executed.

(c) The words "herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Exhibit, Article, Section or other subdivision.

ARTICLE II
CONSTRUCTION OF PROJECTS BY THE DISTRICT; ACQUISITION OF PLANS AND SPECIFICATIONS

Section 2.1. Upon a written request of the Owners and after approval by the District Manager prior to the construction bidding therefor, the District may cause any portion of the Infrastructure to be constructed pursuant to the Plans and Specifications in a fashion which, in the discretion of the District Manager, allows for development of the Property to proceed in accordance with the terms of the Land Development Agreement. (Underlying ownership of real property in and on which the Acquisition Infrastructure is to be built shall be determined in the final plat or final development plan process of the Municipality.)

Section 2.2. (a) The construction of the Infrastructure shall be bid, and the Infrastructure shall be constructed, in accordance with the requirements for bidding and constructing projects of the Municipality similar to the Projects.

(b) The Infrastructure (or any Project which is a part thereof) shall be bid in one or more parts by and in the name of

the District, and Construction Contracts shall be entered into with the bidders selected in accordance with the requirements for awarding contracts for projects of the Municipality similar to the Construction Contracts as specified in any procurement guidelines promulgated by the Municipality for such purpose.

Section 2.3. Neither the Owners nor any entity related to any of them have been nor shall be compensated by the Municipality or the District for any costs of any Project except as provided herein.

Section 2.4. Construction of a Project shall be financed at any time after the sale and delivery of the Bonds (and while there are remaining available, unrestricted proceeds of the sale of the Bonds) only pursuant to Section 5.1(b).

Section 2.5. [Reserved to Preserve Section Numbering.]

Section 2.6. Plans and Specifications for the Projects which are not Acquisition Projects shall be prepared by the Owners Engineer and shall be acquired by the District pursuant to Section 5.2(b) simultaneously with the financing of the construction of the related Project pursuant to Section 5.1(b). The District shall not be liable for any payment or repayment to the Owners with respect to the Plans and Specifications except as provided by this Agreement.

ARTICLE III
CONSTRUCTION OF ACQUISITION PROJECTS BY THE OWNER; CERTAIN MATTERS RELATED TO PLANS AND SPECIFICATIONS

Section 3.1. Subject to the terms of this Agreement including the obligation under the circumstances described herein to pay the Segment Price for a Segment as hereinafter provided, the Owners shall, at the sole cost and expense of the Owners, for which the Owners shall be liable, cause the remainder of the Infrastructure (i.e., the Acquisition Infrastructure) to be constructed pursuant to the Plans and Specifications on real property in which the Owners have an interest. (Underlying ownership of real property in and on which the Acquisition Infrastructure is to be built shall be determined in the final plat or final development plan process of the Municipality.)

Section 3.2. (a) The construction of the Acquisition Infrastructure and the preparation of the Plans and Specifications shall be bid pursuant to the provisions of Title 34, Chapter 2, Article 1, Arizona Revised Statutes, as amended, and in accordance with the requirements for construction projects and plans and specifications, respectively, of the Municipality similar to the Acquisition Projects and the Plans and Specifications as specified in any procurement guidelines promulgated by the Municipality for such purpose. Acquisition Project Construction Contracts shall be entered into with the bidders selected in accordance with the requirements for awarding contracts for projects of the Municipality similar to the Acquisition Project Construction Contracts as specified by such Code and guide-

lines, and contracts for preparation of the Plans and Specifications shall be entered into with the bidder selected in accordance with the requirements for awarding contracts for preparing plans and specifications of the Municipality similar to the Plans and Specifications as specified by such Code and guidelines. (Compliance with such requirements with respect to the Acquisition Projects shall be evidenced by a Certificate of the Engineers.)

(b) As between the Owners and the District, the Owners shall bear all risks, liabilities, obligations and responsibilities under each Acquisition Project Construction Contract and all risk of loss of or damage to any Acquisition Project (or any part thereof) occurring prior to the time of acquisition of such Acquisition Project (or part thereof) pursuant to Article IV.

(c) The Municipality and the District shall be named as an insured on any insurance policies required under a bid for an Acquisition Project and as a third party beneficiary with respect to all warranties, guarantees and General Obligation Bonds with respect thereto.

(d) An indication of final payment and contract closeout shall be provided to the District Manager before any acquisition pursuant to Article IV. If any liens are placed on any portion of an Acquisition Project which is the subject of an Acquisition Project Construction Contract or if litigation ensues between the Owners and any contractor with respect to an Acquisition Project Construction Contract, the District shall not acquire the Acquisition Project or any portion thereof until such liens are removed or such litigation is resolved.

Section 3.3. (a) Subsequent to the execution and delivery of this Agreement, any advertisement for bids for construction of any Acquisition Project or provision of any Plans and Specifications to be acquired shall clearly indicate that the Owners will be the "owner" for purposes of the Acquisition Project Construction Contract or contract for such Plans and Specifications and shall include the following language: **"THE WORK WHICH IS THE SUBJECT OF THE BID IS THE SUBJECT OF A DISTRICT DEVELOPMENT, FINANCING PARTICIPATION AND INTERGOVERNMENTAL AGREEMENT AMONG OWNER, THE TOWN OF FLORENCE, ARIZONA, AND MERRILL RANCH COMMUNITY FACILITIES DISTRICT PURSUANT TO WHICH SUCH WORK MAY BE ACQUIRED BY SUCH COMMUNITY FACILITIES DISTRICT. THE SUCCESSFUL CONTRACTOR WILL NOT HAVE RECOURSE, DIRECTLY OR INDIRECTLY, TO SUCH TOWN OR COMMUNITY FACILITIES DISTRICT FOR ANY COSTS UNDER ANY CONTRACT OR ANY LIABILITY, CLAIM OR EXPENSE ARISING THEREFROM."** (The Owners are "OWNER" for purposes of the foregoing.)

(b) Each Acquisition Project Construction Contract or contract for such Plans and Specifications shall provide that the respective contractors shall not have recourse, directly or indirectly, to the Municipality or the District for the payment of any costs pursuant to such Acquisition Project Construction Contract or contract for such Plans and Specifications or any liability, claim or

expense arising therefrom and that the Owners shall have sole liability therefor.

Section 3.4. The Owners shall provide for inspection of work performed under any Acquisition Project Construction Contract by the Engineers.

Section 3.5. Any change order to any Acquisition Project Construction Contract shall be subject to approval by the Engineers (which approval shall not be unreasonably withheld or delayed) and shall be certified to in the applicable Certificate of the Engineers; provided, however, that any change order expected to increase the amount of an Acquisition Project Construction Contract shall be the subject of the same approval requirements that a change order to increase the cost of a construction contract of the Municipality would be subject unless modified by action of the District Board and, specifically, the approval of the District Manager.

ARTICLE IV
ACQUISITION OF ACQUISITION PROJECTS FROM THE OWNER

Section 4.1. (a) Subject to the other terms of this Agreement, the Owners shall sell to the District, and the District shall acquire from the Owners, the Segments for the Segment Prices.

(b) Acquisition of a Segment shall be financed (1) at any time before the sale and delivery of the Bonds (or after there are no available, unrestricted proceeds of the sale of the Bonds remaining) only pursuant to Section 5.2(a) hereof and (2) at any time after the sale and delivery of the Bonds (and while there are available, unrestricted remaining proceeds of the sale of the Bonds) only pursuant to Section 5.2(b) hereof.

(c) The District shall not be liable for any payment or repayment to the Owners with respect to the Acquisition Infrastructure except as provided by this Agreement.

Section 4.2. The District shall pay the Segment Price for and acquire from the Owners, and the Owners shall accept the Segment Price for and sell to the District, each Segment as provided in Section 4.1 after the approval of the Report and within thirty (30) days after receipt by the District Manager of the following with respect to such Segment, in form and substance reasonably satisfactory to the District Manager:

(a) the Certificate of the Engineers;

(b) the Conveyance;

(c) evidence that public access to the Segment or the Acquisition Project, as applicable, has been or will be provided to the Municipality;

(d) the assignment of all contractors' and materialmens' warranties and guarantees as well as payment and performance bonds;

(e) an acceptance letter issued by the Municipality and by its terms subject specifically to recordation of the Conveyance which is the subject of such letter and

(f) such other documents, instruments, approvals or opinions as may reasonably be requested by the District Manager including, with respect to any real property related to the Acquisition Project, title reports, insurance and opinions and evidence satisfactory to the District Manager that such real property does not contain environmental contaminants which make such real property unsuitable for its intended use or, to the extent such contaminants are present, a plan satisfactory to the District Manager which sets forth the process by which such real property will be made suitable for its intended use and the sources of funds necessary to accomplish such purpose.

ARTICLE V
FINANCING OF COSTS OF PROJECTS AND PLANS AND SPECIFICATIONS

Section 5.1 (a) [Reserved to Preserve Section Numbering]

(b) (1) Any amounts due pursuant to any Construction Contract (including incidental costs relating thereto) after the sale and delivery of any of the Bonds (and while there are remaining, available, unrestricted proceeds of the sale of the Bonds) shall be provided for by the payment of such amounts from, and only from, the available, unrestricted proceeds of the sale of the Bonds to the extent only of the remaining amounts thereof (and, if applicable, cash collections, if any, from the Assessments). Proceeds of the sale of the Assessment Bonds shall only be applied for such purposes to amounts provided for the Work.

(2) Until the sale and delivery of the Bonds, the District shall not have any obligation to pay such amounts. Neither the District nor the Municipality shall be liable to the Owners (or any contractor or assigns under any Construction Contract) for payment of any such amount except to the extent available, unrestricted proceeds of the sale of the Bonds are available for such purpose, and no representation or warranty is given that the Bonds can be sold or that sufficient, available, unrestricted proceeds from the sale of the Bonds shall be available to pay such amounts.

Section 5.2. (a) (1) To provide for any acquisition of a Segment occurring before the sale and delivery of the Bonds and after there are no remaining, available, unrestricted proceeds of the

sale of the Bonds, the Segment Price of that Segment shall be advanced by the Owners pursuant to the terms of this Agreement and the Conveyance for that Segment.

(2) As soon as possible after the sale and delivery of the Bonds, the amount advanced by the Owners for the Segment Price of a Segment prior to the sale and delivery of the Bonds shall, subject to the requirements of Section 4.2, be paid to the Owners from, and only from, the available, unrestricted proceeds of the sale of the Bonds to the extent only of the remaining amounts thereof (and, if applicable, cash collections, if any, from the Assessments). Neither the District nor the Municipality shall be liable to the Owners (or any contractor or assigns under any Acquisition Project Construction Contract) for payment of any Segment Price except to the extent available, unrestricted proceeds of the sale of the Bonds (and, if applicable, cash collections, if any, from the Assessments) are available for such purpose, and no representation or warranty is given that the Bonds can be sold or that sufficient available, unrestricted proceeds from the sale of the Bonds shall be available to pay any Segment Price. Proceeds of the sale of the Assessment Bonds shall only be applied for such purposes to amounts advanced for the Work.

(3) Until the sale and delivery of the Bonds and after there are no available, unrestricted remaining proceeds of the sale of the Bonds, the District shall not have any obligation to repay the Owners for any advance made by the Owners to pay a Segment Price.

(b) (1) Any acquisition of a Segment occurring after the sale and delivery of the Bonds or of Plans and Specifications for a Project to be acquired which may occur only after sale and delivery of the Bonds (and while there are remaining, available, unrestricted proceeds of the sale of the Bonds) shall, subject to the requirements of Section 4.2, be provided for by the payment of the Segment Price for such Segment or of the costs of such Plans and Specifications as determined by the District Engineer and the District Manager based on actual amounts paid by the Owners to the Owners Engineer therefor from, and only from, the available, unrestricted proceeds of the sale of the Bonds to the extent only of the remaining amounts thereof (and, if applicable, cash collections, if any, from the Assessments). Proceeds of the sale of the Assessment Bonds shall only be applied for such purpose to amounts provided for the Work. (The District shall pay the costs of such Plans and Specifications to the Owners as provided in Section 2.6 after approval of the Report and within thirty (30) days after receipt by the District Manager of evidence of exclusive ownership of the architectural materials (including memorandums, notes and preliminary and final drawings) and the related intellectual property rights (including copyright, if any) related to such Plans and Specifications, in all media, including electronic, and that the District shall be held harmless and be free to use such Plans and Specifications in any way it determines, including particularly, but not by way of limitation, giving them to

another firm for the design of a similar structure in form and substance reasonably satisfactory to the District Manager.)

(2) Until the sale and delivery of the Bonds, the District shall not have any obligation to pay such Segment Price or such costs of such Plans and Specifications. Neither the District nor the Municipality shall be liable to the Owners (or any contractor or assigns under any Acquisition Project Construction Contract) for payment of any Segment Price or for the costs of such Plans and Specifications except to the extent available, unrestricted proceeds of the sale of the Bonds (and, if applicable, cash collections, if any, from the Assessments) are available for such purpose, and no representation or warranty is given that the Bonds can be sold or that sufficient, available, unrestricted proceeds from the sale of the Bonds shall be available to pay such Segment Price or such costs of such Plans and Specifications.

ARTICLE VI
MATTERS RELATING TO THE ASSESSMENT BONDS AND THE GENERAL OBLIGATION BONDS AND OTHER OBLIGATIONS OF THE DISTRICT

Section 6.1. (a) Upon dates established by the District Manager in his discretion at the request of the Owners, the District Board shall, from time to time, take all such reasonable action necessary for the District to issue and sell, pursuant to the provisions of the Act, an applicable amount of the General Obligation Bonds in an amount sufficient to repay advances for or to pay directly from the available, unrestricted proceeds thereof the total of all amounts due for the purposes of any Construction Contract for the Infrastructure and the Segment Prices for the Acquisition Infrastructure and costs of the Plans and Specifications for the Infrastructure to be acquired, established or reasonably expected to be established pursuant hereto plus all relevant issuance costs related thereto (except for such amounts due in those respects with regard to the Work which shall be provided for pursuant to Section 6.3). Upon a written request of the Owners and after approval by the District Board prior to construction bidding therefor, this Agreement shall be amended upon terms determined by the District Board to provide for the issuance and sale of additional special assessment lien bonds of the District, the proceeds of the sale of which shall be applied to repay such advances or to pay such amounts instead of from the proceeds of the sale of the General Obligation Bonds. To the extent the District is not otherwise prohibited from agreeing pursuant to applicable law, until such time as the Owners hold fee title to less than fifteen percent (15%) of the total acreage of the Property, the District shall not undertake the issuance of any of the General Obligation Bonds to finance costs of any public infrastructure other than the Infrastructure without written approval of the Owners. The District may at any time in its sole and absolute discretion undertake the financing of the Infrastructure if necessary in connection with development of the Property if the District Board then determines reasonably that the same is necessary.

(b) If the Assessment Bonds or the General Obligation Bonds, as applicable, are not issued or if the available, unrestricted proceeds of the sale of the Assessment Bonds or the General Obligation Bonds are insufficient to pay any or all of the amounts due described in Section 5.1(b) or all of the Segment Prices for the Acquisition Infrastructure and costs of the Plans and Specifications for the Infrastructure to be acquired, there shall be no recourse against the District or the Municipality for, and neither the District nor the Municipality shall have liability with respect to, such amounts so due or the Segment Prices for the Acquisition Infrastructure, except from the available, unrestricted proceeds of the sale of the Assessment Bonds or the General Obligation Bonds, if any and as applicable.

Section 6.2. (a) The District shall, subject to the other conditions of this Agreement, issue, in one series, the Assessment Bonds and, in one or more series in principal amounts to be determined by the District Board, the General Obligation Bonds at the sole discretion of the District Board. The District shall not issue the Assessment Bonds or any series of the General Obligation Bonds unless the Assessment Bonds or the corresponding series of the General Obligation Bonds, as applicable, shall receive one of the four highest investment grade ratings by a nationally recognized bond rating agency or shall be sold in other than a "public sale" (as such term is used in the Act) and with restrictions on subsequent transfer thereof under such terms as the District Board shall, in their sole discretion, approve.

(b) The total aggregate principal amount of all of the series of the General Obligation Bonds shall not exceed $400,000,000, leaving $133,000,000 aggregate principal amount of general obligation bonds to be approved at the election described in the recitals to this Agreement which are not controlled by the terms of this Agreement.

(c) A series of the General Obligation Bonds shall only be issued if the debt service therefor can be amortized with substantially equal amounts of annual debt service from amounts generated by a tax rate of not to exceed $3.25 per one hundred dollars of secondary assessed valuation of property within the boundaries of the District as indicated on the tax roll for the current tax year. For purposes of the foregoing, a delinquency factor for tax collections equal to the greater of five percent (5%) and the historic, average, annual, percentage delinquency factor for the District as of such Fiscal Year shall be assumed; all property in the District owned by the Owners or any entity owned or controlled (as such term is used in the Securities Act) by the Owners shall be assigned the last value such property had when categorized as "vacant" for purposes of secondary assessed valuation and the debt service for any outstanding series of the General Obligation Bonds theretofore issued shall be taken into account in determining whether such tax rate will produce adequate debt service tax collections; provided, however, that the first series of the General Obligation Bonds shall be issued no later than necessary to have the debt service tax costs therefor appear on

the first tax bill applicable to any single family residential dwelling unit to be located within the boundaries of the District to be owned by other than the Owners or any entity owned or controlled (as such term is used in the Securities Act) by the Owners or any homebuilder to whom the Owners or any entity owned or controlled (as such term is used in the Securities Act) by the Owners sells property within the boundaries of the District.

(d) If necessary in the discretion of the District Board, the "sale proceeds" of the sale of each series of the General Obligation Bonds shall include an amount sufficient to fund a reserve fund, which shall be a reserve to secure payment of debt service on that series of the General Obligation Bonds, in an amount equal to the maximum amount permitted by the Internal Revenue Code of 1986, as amended, and the Treasury Regulations applicable thereto.

Section 6.3. (a) Notwithstanding any provision hereof to the contrary, this Section shall apply to the Assessment Bonds to the exclusion of any conflicting provision herein. The District Board shall, from time to time and in its discretion, take all such reasonable action necessary for the District to issue and sell, pursuant to the provisions of the Act, the Assessment Bonds, in one series, in an amount not to exceed the Financeable Amount.

(1) (A) The Assessments shall be levied based on the Financeable Amount, but in any case shall, subject to Section 6.3(f)(1), not exceed $6,500 (adjusted from the date hereof by the Consumer Price Index promulgated by the United States Department of Commerce) per typical equivalent dwelling unit lot.

(B) The Assessments shall be levied pursuant to the procedures prescribed by Sections 48-576 through 48-589, Arizona Revised Statutes, as amended, as nearly as practicable and except as otherwise provided herein, upon all of the Assessed Property in an amount equal to the Financeable Amount based on the benefits to be received by and as allocated to the parcels into which the Assessed Property is or is to be divided, as determined by the District Board herein, and shall be collected pursuant to the procedures prescribed by Sections 48-599 and 600, Arizona Revised Statutes, as amended, as nearly as practicable.

(C) The Owners shall accept the Assessments which are in an amount not more than the Financeable Amount against the Assessed Property and have the Assessments allocated and recorded with the County Recorder of Pinal County, Arizona, by means of this Agreement against the various parcels comprising the Assessed Property; provided, however, that the District Board in its sole and absolute discretion may modify the Assessments after the Assessments have been legally assessed to correspond to subsequent changes in the development of the affected property but in no case shall the Assessments be reduced below a total necessary to provide for debt service for the corresponding Assessment Bonds.

(D) The Assessed Property shall receive benefits from the Work equal to not less than the Assessments as so allocated to the parcels into which the Assessed Property is or is to be divided and that the Assessments shall be final, conclusive and binding upon the Owners whether or not the Work is completed in substantial compliance with the Work Plans and Specifications.

(E) In the event of nonpayment of any of the Assessments, the procedures for collection thereof and sale of the applicable portion of the Assessed Property prescribed by Sections 48-601 through 48-607, Arizona Revised Statutes, as amended, shall apply, as nearly as practicable, except that neither the District nor the Municipality is required to purchase any of the Assessed Property at the sale if there is no other purchaser.

(F) To prepay in whole or in part the applicable portion of any of the Assessments, the following shall be paid in cash to the District: (I) the interest on such portion to the next date Bonds may be redeemed plus (II) the unpaid principal amount of such portion rounded up to the next highest multiple of $1,000 plus (III) any premium due on such redemption date with respect to such portion plus (IV) any administrative or other fees charged by the District with respect thereto less (V) the amount by which the reserve described in Section 4.3(f)(2) may be reduced on such redemption date as a result of such prepayment.

(G) The Owners hereby acknowledge that lenders and other parties involved in financing future improvements on the Assessed Property (including mortgages for single family residences) may require that liens associated with the Assessments (or applicable portions thereof) be paid and released prior to accepting a lien with respect to any such financing.

(2) (A) By an amendment hereto upon terms determined by the District Board, the Owners shall agree that they have reviewed the Estimate and the Work Plans and Specifications and approve the same.

(B) This Agreement shall be construed to be an express consent by the Owners that (I) the District may, with respect to the Assessed Property, incur costs and expenses necessary to complete the Work and (II) the District may levy and collect the Assessments in amounts sufficient to pay the Financeable Amount, including the Work, but not in excess of the Financeable Amount.

(C) The mailing to the governing body of the Municipality of the Estimate and the Work Plans and Specifications in the form of the First Report pursuant to Section 48-715, Arizona Revised Statutes, as amended, shall satisfy the filing requirements of Section 48-577, Arizona Revised Statutes, as amended, and the publication of the notice of hearing on the First Report pursuant to Section 48-715, Arizona Revised Statutes, as amended, shall satisfy

the publication and posting requirements of Section 48-578, Arizona Revised Statutes, as amended.

(3) Notwithstanding that Section 32-2181(I), Arizona Revised Statutes, as amended, may be construed to prevent any waiver of the right to appear before the District Board on any hearing required at or prior to the confirmation of the Assessments, the Owners instead hereby request that the District Board hold hearings on any protests with respect to the Work and objections to the extent of the Assessed Property (all of which is to be assessed) pursuant to Sections 48-579 and 580, Arizona Revised Statutes, as amended, any objections to award of applicable contracts with respect to the Work pursuant to Section 48-584, Arizona Revised Statutes, as amended, and any objections with respect to the Assessments or to any previous proceedings connected therewith or claim that the Work has not been performed according to any applicable contract or the Work Plans and Specifications pursuant to Section 48-590, Arizona Revised Statutes, as amended, should any protests or objections or any requests for hearings with respect thereto be made prior to the confirmation of the Assessments, the Owners hereby waive all formal requirements of notice (whether to be mailed, posted or published) and the passage of time prior to such hearings and further consents that hearings and proceedings may be consolidated and held by the District Board on the same day or days.

(4) The Owners, with full knowledge of the provisions, and the rights thereof pursuant to such provisions, of applicable law, shall waive the following in an amendment to the Agreement upon terms determined by the District Board as the same exist at the time of such amendment:

(A) any and all defects, irregularities, illegalities or deficiencies in the proceedings establishing the Assessed Property;

(B) any and all notices and time periods related thereto provided by Section 48-576, et seq., Arizona Revised Statutes, as amended, including, but not limited, to mailing, posting and publication, as applicable, of any notice required in connection with the adoption of the resolution of intention with respect to the Work, the noticing of proposed improvements with respect to the Work, the adoption of the resolution ordering the improvements with respect to the Work, the noticing of ordering of the improvements with respect to the Work, the noticing of award of applicable contracts with respect to the Work, the Assessments and any other procedural steps and related proceedings necessary in connection with the Work;

(C) any and all protests with respect to the Work and objections to the extent of the Assessed Property (all of which is to be assessed) and including any right to file a written protest or objection for such purpose and any right to any hearing on such matters;

(D) any and all defects, irregularities, illegalities or deficiencies in, or in the adoption by the District Board of, the Assessed Property (all of which is to be assessed), the Work Plans and Specifications, the Estimate and the Assessment Diagram, all of which provide for and effectuate the completion of the Work;

(E) any and all defects, irregularities, illegalities or deficiencies in, or in the awarding of, any contracts for or with respect to, the Work, including, but not limited to, any right to claim that any of the acts or proceedings relating to the Work are irregular, illegal or faulty pursuant to Section 48-584(E), Arizona Revised Statutes, as amended, any right to file a notice specifying in which respect the acts and proceedings are irregular, illegal or faulty and any right to any hearing in connection therewith;

(F) any and all actions and defenses against the Assessments or any of the Assessment Bonds, including, but not limited to, the judicial review granted by Section 48-721(A), Arizona Revised Statutes, as amended, as to whether the Property (all of which is to be assessed) is benefited by the Work;

(G) any right to object to the legality of any of the Assessments or to any of the previous proceedings connected therewith or claim that the Work has not been performed according to any applicable contract or the Work Plans and Specifications in each case as permitted pursuant to Section 48-590(G), Arizona Revised Statutes, as amended, and including any right to file a written notice specifying the grounds of such objection and any right to any hearing in connection therewith;

(H) any right to cash payment of Assessments per Section 48-590, Arizona Revised Statutes, as amended, except as may otherwise be ordered by the District Board; and

(I) any and all provisions of any collateral security instruments relating to the Assessed Property (all of which is to be assessed) which prohibit the establishment of the Assessed Property, designation of the boundaries of the Assessed Property (all of which is to be assessed), completion of the Work and levying and recording of the Assessments.

(5) By an amendment hereto upon terms determined by the District Board, the Owners shall agree that the Work is of more than local or ordinary public benefit and that the Assessed Property receives a benefit from the Work in an amount not less than the Assessment Diagram (as amended).

(6) Instead of the public bidding, bonding and contracting requirements set forth in Sections 48-581 and 584, Arizona Revised Statutes, as amended, the provisions therefor provided by this Agreement have been or will be complied with respect to the Work.

(d) The Owners shall execute all documents necessary, appropriate or incidental to the purposes of this Agreement, particularly as they relate to this Section thereof, as long as such documents are consistent with this Agreement and do not create additional liability of any type to the signers by virtue of execution thereof.

(e) This Agreement as it relates to the Owners and particularly as it relates to this Section shall be a covenant and agreement running with the Assessed Property and shall be recorded in the records of the County Recorder of Pinal County, Arizona, as a lien and encumbrance against the Assessed Property. In the event of any sale, transfer or other conveyance by the Owners of the right, title or interest of the Owners in the Assessed Property or any part thereof, the Property or such part thereof shall continue to be bound by all of the terms, conditions and provisions hereof; any purchaser, transferee or other subsequent owner shall take such property subject to all of the terms, conditions and provisions hereof and any purchaser, transferee or other subsequent owner shall take such property entitled to all of the rights, benefits and protections afforded the predecessor in interest thereof by the terms hereof. To the extent that the Assessments after levied remain unpaid, the Assessments shall constitute liens against the Assessed Property in the amounts indicated in the Assessment Diagram, as provided by, and pursuant to, this Agreement and the Act and shall be enforceable and collectable with the same force and effect originally provided to them.

(f) (1) At the time of sale of the Assessment Bonds, an appraisal prepared by an MAI appraiser must show that the bulk, wholesale value of the Assessed Property with all of the Infrastructure described in the First Report in place is worth at least three (3) times as much as the principal amount of the Assessment Bonds.

(2) If necessary in the sole discretion of the District Board, the "sale proceeds" of the sale of the Assessment Bonds shall include an amount sufficient to fund a reserve fund, which shall be a reserve to secure payment of debt service on the Assessment Bonds, in an amount equal to the maximum amount permitted by the Internal Revenue Code of 1986, as amended, and the Treasury Regulations applicable thereto. Payment from such reserve shall not effect a reduction in the amount of the Assessments, and any amount collected with respect to the Assessments thereafter shall be deposited to such reserve to the extent the Assessments are so paid therefrom.

(e) The proceeds of the sale of the Assessment Bonds shall include an amount sufficient to fund interest accruing on such series of the Bonds for a period of at least six (6) months but not more than three (3) years after the issuance thereof.

Section 6.4. Other than (1) this Agreement, (2) the Assessment Bonds and the General Obligation Bonds and (3) any obligations necessary in connection with either of the foregoing, the

District shall not incur, or otherwise become obligated with respect to, any other obligations.

ARTICLE VII
ACCEPTANCE BY THE MUNICIPALITY

Section 7.1. Simultaneously with the payment of the related Segment Price or completion of construction of a Project, the Segment of Acquisition Infrastructure or the Project constructed is hereby accepted (including for purposes of maintenance and operation thereof) by the Municipality, subject to the conditions pursuant to which facilities such as the Acquisition Projects and the Projects so constructed are typically accepted by the Municipality and thereafter shall be made available for use by the general public.

ARTICLE VIII
INDEMNIFICATION

Section 8.1. (a) The Owners (1) shall, jointly and severally, indemnify and hold harmless each Indemnified Party for, from and against any and all losses, claims, damages or liabilities, joint or several, arising from any challenge or matter relating to the formation, activities or administration of the District (including the establishment of the Assessed Property), or the carrying out of the provisions of this Agreement (but not for any matters which are related to infrastructure which is not part of the Infrastructure), including particularly but not by way of limitation for any losses, claims or damages or liabilities (A) related to any Acquisition Project Construction Contract or Project constructed pursuant to a Construction Contract including claims of any contractor, vendor, subcontractor or supplier, (B) to which any such Indemnified Party may become subject, under any statute or regulation at law or in equity or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or are based upon any untrue statement or alleged untrue statement of a material fact set forth in any offering document relating to the Bonds, or any amendment or supplement thereto, or arise out of or are based upon the omission or alleged omission to state therein a material fact required to be stated therein or which is necessary to make the statements therein, in light of the circumstances in which they were made, not misleading in any material respect and (C) to the extent of the aggregate amount paid in any settlement of any litigation commenced or threatened arising from a claim based upon any such untrue statement or alleged untrue statement or omission or alleged omission if such settlement is effected with the written consent of the Owners (which consent shall not be unreasonably withheld) and (2) shall reimburse any legal or other expenses reasonably incurred by any such Indemnified Party in connection with investigating or defending any such loss, claim, damage, liability or action; provided, however, that the foregoing shall not apply to any loss, claim, damage or liability relating to or arising from the activities or administration of the District with

respect to any portion of the Infrastructure that has been accepted by the Municipality pursuant to Section 7.1.

(b) Section 8.1(a) shall, however, not be applicable to any of the following:

(1) matters involving any gross negligence or willful misconduct of any Indemnified Party,

(2) any loss, claim, damage or liability for which insurance coverage is actually procured which names the District as an insured, in order to provide insurance against the errors and omissions of the District Board or the other representatives, agents or employees of the District and any loss, claim, damage or liability that is covered by any commercial general liability insurance policy actually procured which names the District as an insured (provided, however, that if the Owners also have insurance coverage for any such loss, claim, damage or liability, claims shall be made first against such coverage),

(3) any loss, claim, damage or liability arising from or relating to defects in any Infrastructure that are not known to the Owners and are discovered two (2) years or more following acceptance thereof by the Municipality pursuant to Section 7.1 or

(4) matters arising from or involving any breach of this Agreement by the District or any other Indemnified Party.

(c) An Indemnified Party shall, promptly after the receipt of notice of a written threat of the commencement of any action against such Indemnified Party in respect of which indemnification may be sought against the Owners, notify the Owners in writing of the commencement thereof and provide a copy of the written threat received by such Indemnified Party. Failure of the Indemnified Party to give such notice shall reduce the liability of The Owner by the amount of damages attributable to the failure of the Indemnified Party to give such notice to the Owners, but the omission to notify the Owners of any such action shall not relieve The Owner from any liability that any of them may have to such Indemnified Party otherwise than under this section. In case any such action shall be brought against an Indemnified Party and such Indemnified Party shall notify the Owners of the commencement thereof, the Owners may, or if so requested by such Indemnified Party shall, participate therein or defend the Indemnified Party therein, with counsel satisfactory to such Indemnified Party and the Owners (it being understood that, except as hereinafter provided, the Owners shall not be liable for the expenses of more than one counsel representing the Indemnified Parties in such action), and after notice from the Owners to such Indemnified Party of an election so to assume the defense thereof, the Owners shall not be liable to such Indemnified Party under this section for any legal or other expenses subsequently incurred by such Indemnified Party in connection with the defense thereof; provided, however, that

unless and until the Owners defend any such action at the request of such Indemnified Party, the Owners shall have the right to participate at their own expense in the defense of any such action. If the Owners shall not have employed counsel to defend any such action or if an Indemnified Party shall have reasonably concluded that there may be defenses available to it and/or other Indemnified Parties that are different from or additional to those available to the Owners (in which case the Owners shall not have the right to direct the defense of such action on behalf of such Indemnified Party) or to other Indemnified Parties, the legal and other expenses, including the expense of separate counsel, incurred by such Indemnified Party shall be borne by the Owners.

(d) The Owners shall not have any obligation to indemnify or hold harmless any Indemnified Party until such time that the Indemnified Party has exhausted all other insurance, risk retention or other indemnification options or remedies available to it. In the event that the insurance, risk retention or other indemnification options or remedies of the Indemnified Party are insufficient to reimburse the Indemnified Party for its actual losses, claims, damages or liabilities, then, and only then, shall the Indemnified Party have a right to indemnification from The Owner, and only to the extent that indemnification by the Owners will be secondary to, and in excess of, the primary insurance, risk retention or other indemnification options or remedies of the Indemnified Party.

Section 8.2. (a) To the extent permitted by applicable law, the District shall indemnify, defend and hold harmless each Indemnified Party for, from and against any and all liabilities, claims or demands for injury or death to persons or damage to property arising from in connection with, or relating to the performance of this Agreement. The District shall not, however, be obligated to indemnify the District Indemnified Parties with respect to damages caused by the negligence or willful misconduct of the District Indemnified Parties. The District shall not indemnify, defend and hold harmless the Municipality with respect to matters relating to public infrastructure owned by the Municipality.

ARTICLE IX
PAYMENT OF CERTAIN EXPENSES AND COSTS

Section 9.1. (a) To provide for expenses and costs for agents or third parties required to administer the General Obligation Bonds and the levy and collect *ad valorem* taxes for payment of the General Obligation Bonds and any purposes otherwise related to such activities of the District, amounts shall be budgeted by the District Board each Fiscal Year in the District Budget for such purposes and shall be paid from amounts available from the tax levy described in Section 6.2(d).

(b) To provide for the payment of expenses and costs for agents or third parties required to administer the

Assessment Bonds and the levy and collection of the Assessments and any purposes otherwise related to such activities of the District, amounts shall be budgeted by the District Board each Fiscal Year in the District Budget for such purposes and shall be paid from amounts collected for such purposes as a portion of the interest portion of the installments due with respect to the Assessments.

Section 9.2. To provide for the payment of the District Expenses and the O/M Expenses, the District Board shall levy all or a portion of the O/M Tax and shall apply the collections of the O/M Tax *first* to pay the District Expenses and *second* to pay the O/M Expenses. To the extent the collections of the O/M Tax are not sufficient to pay the District Expenses and the O/M Expenses, the Owners shall, to the extent of reasonable amounts necessary therefor, be liable and obligated to pay, jointly and severally, or, on a reasonable basis acceptable to the District Manager in his sole discretion, obligate a homeowner's or similar association to pay, to the District on July 1 of each fiscal year of the District the amount of any shortfall indicated in the District Budget with respect to the District Expenses and the O/M Expenses, including any amount required because of any shortfall in the prior Fiscal Year as provided in such District Budget and no matter how such shortfall was otherwise funded. The District shall only levy the O/M Tax in an amount necessary for the District Expenses and the O/M Expenses reflected in the District Budget for the Fiscal Year of the District and only in reasonable amounts therefor. The obligations of the Owners pursuant to this Section shall not exceed $50,000 per Fiscal Year beginning with the first full Fiscal Year after the execution and delivery hereof by the District [provided, however, that for any period prior thereto such obligations shall not exceed $50,000 times the number of full months remaining in such Fiscal Year divided by twelve (12)] and shall only be effective until the eighth full Fiscal Year after the execution and delivery hereof by the District; provided, however, that such amount shall not exceed $50,000 per Fiscal Year for the sixth, seventh and eighth full Fiscal Years after the execution and delivery hereof by the District if the District Manager in his sole discretion determines that additional amounts up to such amount are required for the purposes hereof for the sixth, seventh and eighth Fiscal Years.

Section 9.3. The Owners shall deposit $50,000 as a deposit on account to be applied by the Municipality in its sole and absolute discretion to pay Initial Expenses upon written demand by the District Manager. When $45,000 of the $50,000 deposit is expended, an accounting will be made to the Owners of all amounts incurred by the Municipality for the Initial Expenses to date, and the Owners shall be liable and obligated, jointly and severally, to provide additional funds as necessary for the Initial Expenses in an amount requested by the Municipality which must be paid forthwith and which shall thereafter be the subject of a similar accounting. Amounts paid pursuant to this Section by the Owners which may be reimbursed under applicable law to the Owners from the proceeds of the sale of the General Obligation Bonds shall, at the request of the Owners and to the extent of available amounts therefor, be included as part of the purpose of the

Assessment Bonds or the General Obligation Bonds. The obligations of the Owners pursuant to this Section shall only be effective until the first full Fiscal Year after the first Fiscal Year in which the O/M Tax is levied.

ARTICLE X
MISCELLANEOUS

Section 10.1. None of the Municipality, the District nor the Owners shall knowingly take, or cause to be taken, any action which would cause interest on any Bond to be includable in gross income for federal income tax purposes pursuant to Section 61 of the Internal Revenue Code of 1986, as amended.

Section 10.2. (a) To provide evidence satisfactory to the District Manager that any prospective purchaser of land within the boundaries of the District has been notified that such land is within the boundaries of the District and that the Bonds may be then or in the future be outstanding, the Disclosure Statement shall be produced by the Owners; provided, however, that the Disclosure Statement may be modified as necessary in the future to adequately describe the District and the Bonds and source of payment for debt service therefor as agreed by the District Manager and the Owners.

(b) The Owners shall or shall require that the Owners or each homebuilder to whom the Owners has sold land:

(1) cause any purchaser of land to sign the Disclosure Statement upon entering into a contract for purchasing such land;

(2) provide a copy of each fully executed Disclosure Statement to be filed with the District Manager and

(3) provide such information and documents, including audited financial statements to any necessary repository or depository, but only to the extent necessary for the underwriters of the Bonds to comply with Rule 15c2-12 of the Securities Exchange Act of 1934.

Section 10.3. This Agreement shall be binding upon and shall inure to the benefit of the parties to this Agreement and their respective legal representatives, successors and assigns; provided, however, that none of the parties hereto shall be entitled to assign its right hereunder or under any document contemplated hereby without the prior written consent of the other parties to this Agreement, which consent shall not be unreasonably withheld.

Section 10.4. Each party hereto shall, promptly upon the request of any other, have acknowledged and delivered to the other any and all further instruments and assurances reasonably requested or

appropriate to evidence or give effect to the provisions of this Agreement.

Section 10.5. This Agreement sets forth the entire understanding of the parties as to the matters set forth herein as of the date this Agreement is executed and cannot be altered or otherwise amended except pursuant to an instrument in writing signed by each of the parties hereto; provided, however, that such an amendment shall be effective against the Owners and the District only if such amendment does not amend Section 7.1 or 9.3 and shall be effective against the Owners, the District and the Municipality, as applicable, only if such amendment only amends Section 7.1 or 9.3 as it relates to the Municipality. This Agreement is intended to reflect the mutual intent of the parties with respect to the subject matter hereof, and no rule of strict construction shall be applied against any party.

Section 10.6. [Reserved to Preserve Section Numbering]

Section 10.7. This Agreement shall be governed by and interpreted in accordance with the laws of the State.

Section 10.8. The waiver by any party hereto of any right granted to it under this Agreement shall not be deemed to be a waiver of any other right granted in this Agreement nor shall the same be deemed to be a waiver of a subsequent right obtained by reason of the continuation of any matter previously waived under or by this Agreement.

Section 10.9. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed to be an original, but all of which taken together shall constitute one of the same instrument.

Section 10.10. The Municipality and the District may, within three years after its execution, cancel this Agreement, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the Municipality or the District, respectively, is, at any time while this Agreement is in effect, an employee or agent of the Owners in any capacity or a consultant to any other party of this Agreement with respect to the subject matter of this Agreement and may recoup any fee or commission paid or due any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the Municipality or the District, respectively, from the Owners arising as the result of this Agreement. the Owners have not taken and shall not take any action which would cause any person described in the preceding sentence to be or become an employee or agent of the Owners in any capacity or a consultant to any party to this Agreement with respect to the subject matter of this Agreement.

Section 10.11. The term of this Agreement shall be as of the date of the execution and delivery hereof by each of the parties

hereto and shall expire upon the earlier of the agreement of the District, the Municipality, the Owners to the termination hereof, _____ 1, 2064, and the date on which all of the Bonds are paid in full or defeased to the fullest extent possible pursuant to the Act.

Section 10.12. All notices, certificates or other communications hereunder (including in the Exhibits hereto) shall be sufficiently given and shall be deemed to have been received 48 hours after deposit in the United States mail in registered or certified form with postage fully prepaid addressed as follows:

If to the Municipality:

_____
_____, Arizona _____
Attention: Manager

If to the District:

_____
_____, Arizona _____
Attention: Manager

If to Owners:

_____
_____
_____
_____
_____
_____
_____

Any of the foregoing, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.

Section 10.13. If any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision thereof.

Section 10.14. The headings or titles of the several Articles and Sections hereof and in the Exhibits hereto, and any table of contents appended to copies hereof and thereof, shall be solely for convenience of reference and shall not affect the meaning, construction or effect of this Agreement.

Section 10.15. This Agreement does not relieve any party hereto of any obligation or responsibility imposed upon it by law; provided, however, that if the provisions of this Agreement conflict in any particular with those of the Land Development Agreement relat-

ing to the District, the provisions of this Agreement shall supersede and control those of the Land Development Agreement, as amended, in all respects.

Section 10.16. No later than ten (10) days after this Agreement is executed and delivered by each of the parties hereto, the Owners shall on behalf of the Municipality and the District record a copy of this Agreement with the County Recorder of Pinal County, Arizona.

Section 10.17. Unless otherwise expressly provided, the representations, covenants, indemnities and other agreements contained herein shall be deemed to be material and continuing, shall not be merged and shall survive any conveyance or transfer provided herein.

Section 10.18. If any party hereto shall be unable to observe or perform any covenant or condition herein by reason of *Force Majeure*, then the failure to observe or perform such covenant or condition shall not constitute a default hereunder so long as such party shall use its best efforts to remedy with all reasonable dispatch the event or condition causing such inability and such event or condition can be cured within a reasonable amount of time.

Section 10.19. Whenever the consent or approval of any party hereto, or of any agency therefor, shall be required under the provisions hereof, such consent or approval shall not be unreasonably withheld, conditioned or delayed unless specifically otherwise limited as provided herein.

Section 10.20. Notwithstanding any other provision of this Agreement to the contrary, the provisions of Sections 7.1, 8.1, 8.2, 9.3, 10.1, 10.3, 10.4, 10.5, 10.7, 10.8, 10.9, 10.10, 10.11, 10.12, 10.13, 10.14, 10.15, 10.17, 10.18, 10.19, 10.20 and 10.21 are the only provisions that are effective against the Municipality for purposes of the Intergovernmental Agreement Act and as the Intergovernmental Agreement Act is intended to be applied for purposes of this Agreement.

Section 10.21. (a) Notwithstanding any provision of this Agreement to the contrary, no act, requirement, payment, or other agreed upon action to be done or performed by the Municipality or the District which would, under any federal, state, or Town constitution, statute, charter provision, ordinance or regulation, require formal action, approval or concurrence by the Town Council or the District Board, respectively, shall be required to be done or performed by the Municipality or the District, respectively, unless and until said formal action of the Town Council or the District Board, respectively, has been taken and completed. This Agreement in no way acquiesces to or obligates the Municipality or the District to perform a legislative act.

(b) Failure or unreasonable delay by any party to perform or otherwise act in accordance with any term or provision of

this Agreement for a period of thirty (30) days (hereinafter referred to as the "Cure Period") after written notice thereof from any other party, shall constitute a default under this Agreement; provided, however, that if the failure or delay is such that more than thirty (30) days would reasonably be required to perform such action or comply with any term or provision hereof, then such party shall have such additional time as may be necessary to perform or comply so long as such party commences performance or compliance within said thirty (30) day period and diligently proceeds to complete such performance or fulfill such obligation. Said notice shall specify the nature of the alleged default and the manner in which said default may be satisfactorily cured, if possible. In the event such default is not cured within the Cure Period, any non-defaulting party shall have all rights and remedies that are set forth in the next subsection.

(c) Except as provided in subsection (b), the parties shall be limited to the remedies and the dispute resolution procedure set forth in this subsection and subsection (d). Any decision rendered by the Panel (as hereinafter defined) pursuant to the provisions of subsection (d) shall be binding on the parties unless and until a court of competent jurisdiction renders its final decision on the disputed issue, and if any party does not abide by the decision rendered by the Panel during the pendency of an action before the court of competent jurisdiction or otherwise (if no court action), any other party may institute an action for money damages on the issues that were the subject of the Panel's decision and/or any other relief as may be permitted by law.

(d) (1) If an event of default is not cured within the Cure Period, any non-defaulting party may institute the dispute resolution process set forth in this subsection (hereinafter referred to as the "Process") by providing written notice initiating the Process (hereinafter referred to as the "Initiation Notice") to the defaulting party.

(2) Within fifteen (15) days after delivery of the Initiation Notice, each involved party shall appoint one person to serve on an arbitration panel (herein referred to as the "Panel"). Within twenty-five (25) days after delivery of the Initiation Notice, the persons appointed to serve on the Panel shall themselves appoint one person to serve as a member of the Panel. Such person shall function as the chairman of the Panel.

(3) The remedies available for award by the Panel shall be limited to specific performance, declaratory relief and injunctive relief.

(4) Any party can petition the Panel for an expedited hearing if circumstances justify it. Such circumstances shall be similar to what a court would view as appropriate for injunctive relief or temporary restraining orders. In any event, the hearing of any dispute not expedited shall commence as soon as practicable, but in no event later than forty-five (45) days after selection

of the chairman of the Panel. This deadline can be extended only with the consent of all parties to the dispute or by decision of the Panel upon a showing of emergency circumstances.

(5) The chairman of the Panel shall conduct the hearing pursuant to the Center For Public Resources' Rules for Non-Administered Arbitration of Business Disputes then in effect. The chairman of the Panel shall determine the nature and scope of discovery, if any, and the manner of presentation of relevant evidence, consistent with the deadlines provided herein, and the parties' objective that disputes be resolved in a prompt and efficient manner. No discovery may be had of privileged materials or information. The chairman of the Panel upon proper application shall issue such orders as may be necessary and permissible under law to protect confidential, proprietary or sensitive materials or information from public disclosure or other misuse. Any party may make application to the Pinal County Superior Court (hereinafter referred to as the "Court") to have a protective order entered as may be appropriate to confirm such orders of the chairman of the Panel.

(6) The hearing, once commenced, shall proceed from business day to business day until concluded, absent a showing of emergency circumstances. Except as otherwise provided herein, the Process shall be governed by the Uniform Arbitration Act as enacted in the State.

(7) The Panel shall, within fifteen (15) days from the conclusion of any hearing, issue its decision. The decision shall be rendered in accordance with this Agreement and the laws of the State.

(8) Any involved party may appeal the decision of the Panel to the Court for a *de novo* review of the issues decided by the Panel, if such appeal is made within thirty (30) days after the Panel issues its decision. The remedies available for award by the Court shall be limited to specific performance, declaratory relief and injunctive relief. The decision of the Panel shall be binding on both parties until the Court renders a binding decision. If a non-prevailing party in the Process fails to appeal to the Court within the time frame set forth herein, the decision of the Panel shall be final and binding. If one party does not comply with the decision of the Panel during the pendency of the action before the Court or otherwise, then another party shall be entitled to exercise all rights and remedies that may be available under law or equity, including without limitation the right to institute an action for money damages related to the default that was the subject of the Panel's decision and the provisions of this subsection shall not apply to such an exercise of rights and remedies.

(9) All fees and costs associated with the Process before the Panel, including without limitation the fees of the Panel, other fees, and the prevailing party's attorneys' fees, expert witness fees and costs, shall be paid by the non-prevailing party or

parties. The determination of prevailing and non-prevailing parties, and the appropriate allocation of fees and costs, shall be included in the decision by the Panel. Similarly, all fees and costs associated with an appeal to the Court or any appellate court thereafter, including without limitation, the prevailing party's attorneys' fees, expert witness fees and costs, shall be paid by the non-prevailing party. The determination of prevailing and non-prevailing parties, and the appropriate allocation of fees and costs, shall be included in the decision by the Court.

* * *

IN WITNESS WHEREOF, the officers of the Municipality and of the District have duly affixed their signatures and attestations, and the officers of the Owners their signatures, all as of the day and year first written above.

TOWN OF FLORENCE, ARIZONA

By.....
_____, Mayor

ATTEST:

.....
_____, Town Clerk

Pursuant to A.R.S. Section 11-952(D), this Agreement has been reviewed by the undersigned attorney for the Municipality who has determined that this Agreement is in proper form and is within the powers and authority granted pursuant to the laws of this State to the Municipality.

.....
_____, Town Attorney

MERRILL RANCH COMMUNITY
FACILITIES DISTRICT

By.....
_____, Chairman,
District Board

ATTEST:

.....
_____, District Clerk

Pursuant to A.R.S. Section 11-952(D), this Agreement has been reviewed by the undersigned attorney for the District, who has determined that this Agreement is in proper form and is within the powers and authority granted pursuant to the laws of this State to the District.

.....
_____, District
Counsel

_____, a _____
_____ company

By _____
_____

By.....
Printed Name:.....
Title:.....

_____, a _____
corporation

By.....
Printed Name:.....
Title:.....

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

The foregoing instrument was acknowledged before me this ..... day of ....., 2003, by _____, as Mayor of the Town of Florence, Arizona, a municipal corporation under the laws of the State of Arizona.

.....
Notary Public

My commission expires:

.....

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

The foregoing instrument was acknowledged before me this ..... day of ....., 2003, by _____, as Chairman of the District Board of Merrill Ranch Community Facilities District, an Arizona community facilities district.

.....
Notary Public

My commission expires:

.....

STATE OF .....)
) ss.
COUNTY OF .....)

The foregoing instrument was acknowledged before me this .... of ....., 2003, by ....., the ..... of _____, a _____, _____ of the _____, an Arizona limited _____, on behalf of the limited liability company.

.....
Notary Public

My commission expires:

.....

STATE OF .....)
) ss.
COUNTY OF .....)

The foregoing instrument was acknowledged before me this .... of ....., 2003, by ....., the ..... of _____ , a _____ corporation.

.....
Notary Public

My commission expires:

.....

ATTACHMENTS:

EXHIBIT A	--	Legal Description Of The Property
EXHIBIT B	--	Description Of Infrastructure
EXHIBIT C	--	Form Of Certificate Of Engineers For Conveyance Of Segment Of Project
EXHIBIT D	--	Form Of Conveyance Of Segment Of Project
EXHIBIT E	--	Form Of Disclosure Statement

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY
TO BE INCLUDED IN THE DISTRICT

EXHIBIT B

DESCRIPTION OF INFRASTRUCTURE

EXHIBIT C

FORM OF CERTIFICATE OF ENGINEERS FOR CONVEYANCE OF SEGMENT OF ACQUISITION PROJECT

CERTIFICATE OF ENGINEERS FOR CONVEYANCE OF SEGMENT OF ACQUISITION PROJECT

(insert description of Acquisition Project/Segment)

STATE OF ARIZONA	)	
COUNTY OF PINAL	)	
TOWN OF FLORENCE	)	ss.
MERRILL RANCH COMMUNITY FACILITIES DISTRICT	)	

We the undersigned, being Professional Engineers in the State of Arizona and, respectively, the duly appointed District Engineer for Merrill Ranch Community Facilities District (hereinafter referred to as the "District"), and the engineer employed by _____ _____ (hereinafter referred to as "the Owners"), each hereby certify for purposes of the District Development, Financing Participation and Intergovernmental Agreement (Merrill Ranch Community Facilities District), dated as of _____ 1, 2003 (hereinafter referred to as the "Agreement"), by and among the District, the Town of Florence, Arizona and the Owners that:

1. The Segment indicated above has been performed in every detail pursuant to the Plans and Specifications (as such term and all of the other initially capitalized terms in this Certificate are defined in the Agreement) and the Acquisition Project Construction Contract (as modified by any change orders permitted by the Agreement) for such Segment.

2. The Segment Price as publicly bid and including the cost of approved change orders for such Segment is $.....

3. the Owners provided for compliance with the requirements for public bidding for such Segment as required by the Agreement (including, particularly but not by way of limitation, Title 34, Chapter 2, Article 1, Arizona Revised Statutes, as amended) in connection with award of the Acquisition Project Construction Contract for such Segment.

4. the Owners filed all construction plans, specifications, contract documents, and supporting engineering data for the construction or installation of such Segment with the Municipality.

5. the Owners obtained good and sufficient performance and payment bonds in connection with such Contract.

DATED AND SEALED THIS ..... DAY OF ....., 200..

By.....
District Engineer

[P.E. SEAL]

[P.E. SEAL]

By.....
Engineer for the Owners

[Confirmed for purposes of Section 3.5 of the Development Agreement by

.....
Manager for Merrill Ranch Community Facilities District*]

[THIS WILL BE REQUIRED FOR EVERY SEGMENT ACQUIRED WITH PROCEEDS OF THE SALE OF THE BONDS!!!]

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* To be inserted if the provisions of Section 3.5 hereof are applicable to the respective Segment of the Project

EXHIBIT D

FORM OF CONVEYANCE OF SEGMENT OF ACQUISITION PROJECT

CONVEYANCE OF SEGMENT OF ACQUISITION PROJECT

(Insert description of Acquisition Project/Segment)

STATE OF ARIZONA	)	
COUNTY OF PINAL	)	
TOWN OF FLORENCE	)	ss.
MERRILL RANCH COMMUNITY FACILITIES DISTRICT	)	

KNOW ALL MEN BY THESE PRESENTS THAT:

..... ("the Owners"), for good and valuable consideration received by the Owners from Merrill Ranch Community Facilities District, a community facilities district formed by the Town of Florence, Arizona (the "Municipality"), and duly organized and validly existing pursuant to the laws of the State of Arizona (the "District"), receipt of which is hereby acknowledged [, and the promise of the District to hereafter pay the amounts described in the hereinafter described Development Agreement*], does by these presents grant, bargain, sell and convey to the District, its successors and assigns, all right, title and interest in and to the following described property, being the subject of a District Development, Financing Participation and Intergovernmental Agreement (Merrill Ranch Community Facilities District), dated as of _____ 1, 2003, by and among the Owners, the Municipality and the District and more completely described in such Development Agreement:

[Insert description of Acquisition Project/Segment]

together with any and all benefits, including warranties and performance and payment bonds, under the Acquisition Project Construction Contract (as such term is defined in such Development Agreement) or relating thereto, all of which are or shall be located within utility or other public easements dedicated or to be dedicated by plat or otherwise free and clear of any and all liens, easements, restric-

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* Insert with respect to any acquisition financed pursuant to Section 5.2(a) hereof.

tions, conditions, or encumbrances affecting the same [, such subsequent dedications not affecting the promise of the District to hereafter pay the amounts described in such Development Agreement*], but subject to all taxes and other assessments, reservations in patents, and all easements, rights-of-way, encumbrances, liens, covenants, conditions, restrictions, obligations, leases, and liabilities or other matters as set forth on Exhibit I hereto.

TO HAVE AND TO HOLD the above-described property, together with all and singular the rights and appurtenances thereunto in anywise belonging, including all necessary rights of ingress, egress, and regress, subject, however, to the above-described exception(s) and reservation(s), unto the District, its successors and assigns, forever; and the Owners do hereby bind themselves, their successors and assigns to warrant and forever defend, all and singular, the above-described property, subject to such exception(s) and reservation(s), unto the District, its successors and assigns, against the acts of the Owners and no other.

The Owners bind and obligate themselves, their successors and assigns, to execute and deliver at the request of the District any other or additional instruments of transfer, bills of sale, conveyances, or other instruments or documents which may be necessary or desirable to evidence more completely or to perfect the transfer to the District of the above-described property, subject to the exception(s) and reservation(s) hereinabove provided.

This conveyance is made pursuant to such Development Agreement, and the Owners hereby agree that the amounts specified above and paid [or promised to be paid*] to the Owners hereunder satisfy in full the obligations of the District under such Development Agreement and hereby release the District from any further responsibility to make payment to the Owners under such Development Agreement except as above provided.

The Owners, in addition to the other representations and warranties herein, specifically make the following representations and warranties:

1. The Owners have the full legal right and authority to make the sale, transfer, and assignment herein provided.

2. The Owners are not a party to any written or oral contract which adversely affects this Conveyance.

3. The Owners are not subject to any bylaw, agreement, mortgage, lien, lease, instrument, order, judgment, decree, or other

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* Insert with respect to any acquisition financed pursuant to Section 5.2(a) hereof.

restriction of any kind or character which would prevent the execution of this Conveyance.

4. The Owners are not engaged in or threatened with any legal action or proceeding, nor is it under any investigation, which prevents the execution of this Conveyance.

5. The person executing this Conveyance on behalf of the Owners has full authority to do so, and no further official action need be taken by the Owners to validate this Conveyance.

6. The facilities conveyed hereunder are all located within property owned by the Owners or utility or other public easements dedicated or to be dedicated by plat or otherwise.

IN WITNESS WHEREOF, the Owners have caused this Conveyance to be executed and delivered this ..... day of ....., 200..

.....

By.....

By.....

Title:.....

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

This instrument was acknowledged before me on ....., 200.. by ....., of ....., a ....., on behalf of said corporation.

.....
Notary Public

.....
Typed/Printed Name of Notary

[NOTARY SEAL] My Commission Expires:.....

EXHIBIT I

TO

CONVEYANCE OF SEGMENT OF PROJECT

(Insert description of Project/Segment)

EXHIBIT E

FORM OF DISCLOSURE STATEMENT

MERRILL RANCH COMMUNITY FACILITIES DISTRICT
DISCLOSURE STATEMENT

_____, an _____ company (the "Developer"), in conjunction with the Town of Florence, Arizona (the "Town"), have established a community facilities district ("CFD") at the development known as "Merrill Ranch." The CFD has financed and, in the future, will finance certain public infrastructure improvements, which will result in a property tax liability and a separate special assessment lien liability for each property owner of Merrill Ranch resulting from being in the CFD.

BACKGROUND

On September 30, 1988, the Arizona Community Facilities District Act became effective. This provision in State law was created to allow Arizona municipalities to form CFDs for the primary purpose of financing the acquisition, construction, installation, operation and/or maintenance of public infrastructure improvements, including water and sewer improvements.

HOW THE CFD WORKS

On _____, 200__, the Mayor and Council of the Town formed the CFD which includes all of the residential and commercial property in _____. An election was held on ....., 2003, at which time the owners of the property within the CFD voted to authorize up to $___,000,000 of *ad valorem* tax bonds to be issued over time by the CFD to finance the acquisition or construction of _____ improvements. The proceeds of separate special assessment lien bonds will be used to finance acquisition or construction of _____ _____ improvements. Such improvements have been or will be dedicated to the Town after acquisition or construction of such public infrastructure by the District. The Town will operate and maintain such improvements.

WHAT WILL BE FINANCED?

The CFD has been established to finance up to $___,000,000 in public infrastructure improvements within _____ including financing costs related to such improvements. The initial bond issue is expected to be approximately $.....,000. The proceeds of this bond issue is currently expected to be utilized to finance the engineering, design and construction of ..... In addition, it is anticipated

that approximately $.....,000 in bonds will be issued over the next ..... years for future phases of infrastructure at Merrill Ranch.

BENEFITS TO RESIDENTS

The bond issues by the CFD will benefit all residents within Merrill Ranch by providing ..... improvements. This benefit was taken into account by the Developer in connection with establishing the price of the lot on which your home is to be located. Each resident of the CFD will participate in the repayment of the bonds in the form of an additional property tax to the current property taxes assessed by other governmental entities as well as a separate special assessment lien payable twice a year in addition to such taxes. The added tax is currently deductible for purpose of calculating federal and state income taxes.

PROPERTY OWNERS' TAX AND ASSESSMENT LIABILITY

The obligation to retire the bonds will become the responsibility of any property owner in the CFD through the payment of property taxes collected by the Pinal County Treasurer in addition to all other property tax payments and the collection of installments of such assessment liens by the CFD. **(PLEASE NOTE THAT NO OTHER AREA WITHIN THE BOUNDARIES OF THE TOWN IS SUBJECT TO A PROPERTY TAX OR AN ASSESSMENT LEVIED BY ANY OTHER COMMUNITY FACILITIES DISTRICT.)** Beginning in fiscal year 200_-0_, the CFD levied a not to exceed $____ per $100.00 of secondary assessed valuation tax rate to provide for repayment of the bonds and the payment of certain administrative expenses and of operation and maintaining the infrastructure it finances as well as a total assessment lien of $_____ in principal amount.

Although the level of the tax rate is not limited by law, the tax rate of the CFD is not expected to exceed $_____ per $100.00 of secondary assessed valuation for as long as the bonds are outstanding. **(There can be *no* guarantee tax rates will not be increased to provide for repayment in the future.)**

IMPACT OF ADDITIONAL CFD PROPERTY TAX AND ASSESSMENT

The following illustrates the additional annual tax liability imposed by the CFD, based on varying residential values within Merrill Ranch and a $____ tax rate:

Market Value of Residence	Estimated Annual Additional Tax Liability
$___,000	$
___,000	
___,000	
___,000	
___,000	
___,000	

*Assumptions:

1. Market value is not the same as full cash value as reported by the County Assessor, which is typically 85% of market value.
2. Assumes residential property assessment ratio will remain at 10%.
3. Tax amount is computed by multiplying the tax rate per $100 of assessed value by full cash value times the assessment ratio.

The following illustrates the annual assessment liability imposed by the CFD which is in addition to the foregoing:

Market Value of Residence	Estimated Annual Additional Tax Liability*
$___,000	$
___,000	
___,000	
___,000	
___,000	
___,000	

Additional information regarding the description of infrastructure improvements to be financed by the CFD, bond issue public disclosure documents and other documents and agreements (including a copy of this Disclosure Statement) are available for review in the Town of Florence Town Clerk's office.

Your signature below acknowledges that you have read this disclosure document at the time you made your decision to purchase property at Merrill Ranch and you signed your purchase contract and that you understand the property you are purchasing will be taxed and separately assessed to pay the CFD bonds described above.

.....	.....
Home Buyer(s) Signature/Date	Home Buyer(s) Printed Name(s)
.....	.....
Home Buyer(s) Signature/Date	..... Parcel No. ..... Lot No. .....

TOWN OF FLORENCE

ORDINANCE NO. 460-07

AN ORDINANCE OF THE TOWN OF FLORENCE AMENDING THE "TOWN OF FLORENCE ZONING MAP" BY AMENDING THE PUD ZONING FOR THE MERRILL RANCH DEVELOPMENT (PZ-6051-R).

WHEREAS, an amendment to the approved PUD Zoning has been proposed and appropriate public hearings have been held by the Planning and Zoning Commission; and

WHEREAS, said proposal has been considered by the Common Council and the recommended zoning classification has been found to be appropriate and thereby should be imposed, and further found to promote the health, safety and welfare of the residents of the Town and its orderly growth.

NOW, THEREFORE BE IT ORDAINED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF FLORENCE AS FOLLOWS:

The Zoning Map, Florence Arizona, is hereby amended by amending the PUD zoning for Merrill Ranch as depicted on EXHIBIT A attached hereto, subject to the following conditions:

1. Any property development standard in any zoning category may not exceed the limitations prescribed as set forth in the Merrill Ranch Master Development Plan (a.k.a., PUD) or, if not addressed in the PUD, may not exceed those development standards existing in the applicable section of the Florence Development Code at the time of the recordation of the Merrill Ranch Pre-Annexation & Development Agreement recorded on the Official Records of the Pinal County Recorder on December 11, 2003 with a Fee Number of 2003-086513, and as subsequently amended, including both amendments to the Development Agreement and the Merrill Ranch PUD.

2. All arterial-arterial, arterial-collector, and collector-collector intersections shall meet at 90 degree angles, or as may be approved by the Town Engineer in accordance with commonly accepted engineering guidelines/principles, and be engineered to Town standards and per the recommendations of the Town Engineer. The design configuration of the Hunt Highway and Attaway Road intersection shall be per the review and approval of the Town Engineer.

3. Felix Road shall transition into Attaway Road south of Hunt Highway to provide for a north-south arterial roadway through the adjacent property to the south per Roadway Alignment and Dedication Development Agreement among the Owner, the Town, and the owner of the adjacent property. The exact engineering design for this roadway connection shall be subject to the review and approval of the Town Engineer. The depiction of the road across the "Monterra" project shall be removed from the current Merrill Ranch Master Development Plan. Owner agrees that construction of Felix Road south of Hunt Highway shall commence concurrently with the construction of Felix Road through the adjacent property to the south, if not earlier, in accordance with the Roadway Alignment and Dedication Development Agreement among the Owner, the Town, and the owner of the adjacent property.

4. The Town Engineer reviewed and approved Traffic Study for the subject project and the recommendations of the Town Engineer shall determine ultimate major roadway designations and roadway cross-sections. Unless recommended by the approved Traffic Study for the subject project and approved by the Town Engineer, Plant Road shall be classified as a major arterial roadway. Cross-sections for roadways within approved improvement plans or Final Plats as of the effective day of this ordinance shall remain as designed and engineered, except where owner/developer and Town agree to make mutually acceptable modifications.

5. One local street cross-access shall be granted between Merrill Ranch and the adjacent proposed Heritage Creek Estates project at such time as the Merrill Ranch parcels adjacent to the Heritage Creek Estates project are developed.

6. The Merrill Ranch Master Development Plan, dated January 26, 2007, as may be amended to reflect the final stipulations of Town Council approval, shall supersede any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD.

7. Zero-lot line development shall not be permitted within any residential or non-residential zone within the PUD unless there are provisions for maintenance agreements/easements and the development is in compliance with all applicable building and fire safety codes.

8. Owner-occupied dwelling units within 200 feet of the railroad track shall be constructed with reasonable design features, such as increased insulation, dual pane windows, and/or other acceptable methods, to help mitigate sound and vibration impacts from the adjacent railroad.

9. All signage for the Merrill Ranch PUD shall be subject to the review and approval of Comprehensive Sign Guidelines reviewed and approved by the Planning and Zoning Commission.

10. Density transfers shall be permitted per the Merrill Ranch Development Agreement, as amended, except that density transfers resulting in an R-1 Zone being increased in density to an R-2 Zone, and an R-2 Zone being increased in density to an R-3 Zone shall be approved through a public PUD Amendment process if the resulting Zone Change area with increased density is adjacent to a subdivision that has approved building permits for a lesser Zone. It is the Owner's, Developer's and/or Builder's obligation to disclose the possibility of density transfers within the subject project in the Subdivision Public Reports for the project. Applicable Merrill Ranch Master Development Plan exhibits shall be modified to reflect all density transfers and provided to the Town Planning and Zoning Department.

11. Except for parcels 47-56 in the South Village Planning Area along Hunt Highway (parcels fronting the south side of Hunt Highway), the movement or transfer of CE-M, CE-R, CE-I and VMU Zones within the PUD, other than movement necessitated by standard engineering requirements approved by the Town, internal/external roadway re-alignments approved by the Town, changes to the regional transportation network that are approved by the Town or determined by ADOT (e.g., the North-South Freeway corridor) and approved residential density transfers, shall require a public PUD Amendment process if the changes result in a parcel having a higher and more intense use than as identified in the Merrill Ranch Master Development Plan. It is the Owner's, Developer's and/or Builder's obligation to disclose the possibility of Zone transfers/movements within the subject project in the Subdivision Public Reports for the project. Applicable Merrill Ranch Master Development Plan exhibits shall be modified to reflect/document all approved Zone transfers/movements and provided to the Town Planning and Zoning Department.

12. Residential land uses within the CE-R and CE-M zones shall be limited to R-3 Zone uses that are fully integrated, either horizontally or vertically, into mixed use master plans or mixed use developments so the residential components of these zones is complimentary to the primary intended non-residential usage of said Zones.

13. The standards for R-1 Single-Family Residential Zone shall be amended as follows:

    a. It shall be noted that a Casita shall not be allowed to be a second dwelling unit as defined by Town Code, applicable Building Codes, and as per the intent of the R-1 Single-Family Residential Zone;

    b. At least forty-five percent of the total R-1 lots shall be a minimum of 55' wide and 6,000 square feet in area. At least 25 percent of the total R-1 lots shall be a minimum of 70 feet wide and 8,000 square feet in area. Said provisions shall apply to typical lots within a subdivision and not only irregular lots within the R-1 Zone. Lots that have received Preliminary Plat approval as of the effective date of

this ordinance shall be exempt from these noted lot area and lot width requirements so long as the subject Preliminary Plat approvals remain valid and/or the subject areas receive and maintain Final Plat approval. Furthermore, it shall be the owner's/developer's/builder's obligation to maintain a lot width and area analysis for Merrill Ranch in order to show ongoing compliance with said requirements.; and

c. Side yard setbacks in the R-1 Zone shall be increased to 5'/10' for all lots in a subdivision where the minimum lot width is identified as being at least 70 feet.

14. The standards for R-2 Single-Family and Multi-Family Residential Zone shall be amended as follows:

    a. The minimum lot width and lot area for the Single-Family Detached homes category in the R-2 Zone shall be 45 feet and 4,000 square feet, respectively.

15. The standards for R-3 Multi-Family Residential Zone shall be amended as follows:

    a. The maximum building height within the R-3 Zone shall be reduced to 30 feet/2 stories for any building within 100 feet of a R-1 Zone or an R-2 Zone that is final platted for single-family detached homes.

16. Durations of subdivision plat approvals and civil plan approvals shall be as allowed per Town Code, except that any Preliminary Plat approvals granted by the Planning and Zoning Commission after the effective date of this ordinance shall be valid for two years from the date of Planning and Zoning Commission approval. Developer/Owner agree that the option of using a Certificate of Occupancy hold as a means of a construction assurance shall be restricted to the usage of homebuilders and commercial property developers that can provide documentation to the Town showing that said parties requesting this form of assurance are fiscally and professionally fit as determined by having a minimum net worth of five million dollars, a satisfactory development performance history and other factors all to be reasonably determined by the Town and approvals shall not be unreasonably withheld by the Town. No Final Plats shall be recorded without having a Town approved financial/construction assurance in place. Final Plat approvals shall be limited to a one year term with the right to request Town approvals of additional one year terms, which shall not be unreasonably withheld.

17. Developer/Owner shall work with Town staff to locate open space/parks adjacent to school sites.

18. Developer/Owner shall work with Town staff to appropriately locate and design community parks within the development that can be utilized by the public where

said parks are planned to be dedicated to the Town and/or Community Facilities District (CFD) for such purpose.

19. No single-family detached residential home within the subject project shall have a front facing garage door that exceeds more than 54 percent of the front plane of the subject home (for example, if a front facing garage door is 16 feet wide, the total width of the front plane of the home shall be no less than 30 feet).

20. Vehicular and pedestrian access shall be provided up to the boundary of the adjacent Poston Butte Park in a manner acceptable to the Town. Owner/Developer/Builder hereby agree to dedicate an appropriate amount of land not to exceed one half acre for the purpose of the creating a Town owned and developed trailhead for the adjacent Poston Butte Park. The precise amount of land to be dedicated shall be determined by the Town approved design of the trailhead, but shall not exceed one half acre. Owner/Developer/Builder also agree to work with the Town to establish public access to the trailhead and the dedication of the trailhead property in a prompt manner and no later than upon the development of parcels 41, 61, 62, 63 and/or 64 (parcels located adjacent to and north of the subject park site).

21. The standards for all CE Zones shall be amended as follows:

    a. When adjacent to R-1/R-2 Zones, the required minimum 25 foot wide landscape buffer shall include an appropriate mix of 24" and 36" box trees that will have vertical and horizontal growth patterns necessary to provide increased buffering of land uses. Tree types and quantities shall be subject to the review and approval of the Planning and Zoning Commission during the Design Review process.

22. The standards for CE – I Employment Zone shall be amended as follows:

    a. When adjacent to an R-1/R-2 Zone, the maximum building height within 75' to 200' shall be 35 feet.

    b. When adjacent to an R-1/R-2 Zone, buildings shall be designed to minimize building mass and break up roof lines to improve the architectural compatibility with adjacent residential areas.

23. Town and Owner agree to work together in good faith to modify any applicable portions of the Merrill Ranch Development Agreement that may be found to be in conflict with this PUD Amendment approval.

24. Developer/Owner agrees to waive claims for diminution in value pursuant to Proposition 207 [A.R.S. 12-1134] pursuant to the waiver attached hereto as Exhibit B.

25. A desert specimen tree and native cactus conservation and relocation plan, meeting the approval of the Town Planning Director and subject to compliance with all applicable Town and State laws and requirements, shall be submitted prior to the issuance of mass subdivision grading permits for the site. The plan shall, amongst other things, highlight methods that will be utilized towards the preservation of specific desert areas within the site and define how desert specimen trees and saguaro cacti will be relocated within the subject property. Approval of the subject plan by the Town Planning Director shall not be unreasonably withheld.

26. Any additional stipulations deemed necessary by the Town Council.

PASSED AND ADOPTED by the Mayor and Common Council of the Town of Florence this 4 day of June 2007.

Tom J. Rankin, Mayor

ATTEST:

Lisa Garcia, Town Clerk

APPROVED AS TO FORM:

James Mannato, Town Attorney

PARCEL 1

EXHIBIT A
PAGE 1

A parcel of land lying within the West Half of the Northwest Quarter, and the Southwest Quarter of Section 29, Section 30, Township 4 South, Range 9 East, and the North Half and Southwest Quarter of Section 25, Township 4 South, Range 8 East of the Gila and Salt River Meridian, Pinal County, Arizona, more particularly described as follows:

BEGINNING at the North Quarter corner (GLO Brass Cap) of said Section 30, from which point the Northeast Corner (GLO Brass Cap) of Section 30 bears S 89°55'22" E, a distance of 2622.99 feet;

Thence S 89°55'22" E along the north line of the Northeast Quarter of said Section 30, a distance of 2622.99 feet;

Thence N 89°54'02" E along the north line of the West Half of the Northeast Quarter of said Section 29, a distance of 1305.17 feet;

Thence S 00°03'48" E along the east line of said West Half of the Northwest Quarter of Section 29, a distance of 2641.60 feet;

Thence N 89°52'39" E along the south line of the Northwest Quarter of Section 29, a distance of 777.81 feet;

Thence S 75°16'07" W a distance of 2156.71 feet;

Thence S 00°00'12" W a distance of 56.88 feet to a point on the north right of way line of Hunt Highway, as described in Docket 370, Pages 561-563 of Pinal County Records;

Thence S 75°17'19" W along said right of way, a distance of 2492.40 feet;

Thence continuing along said right of way, 279.62 feet along the arc of a curve to the left, having a radius of 2634.60 feet, through a central angle of 06°04'52", a chord bearing S 72°14'53" W and a chord distance of 279.49 feet to a point on the north line of the South Half of the Southwest Quarter of said Section 30;
Thence leaving the north right of way of Hunt Highway, N 89°57'16" W along said north line of the South Half of the Southwest Quarter of Section 30, a distance of 2564.88 feet;

Thence S 00°25'47" E along the west line of said South Half of the Southwest Quarter of Section 30, a distance of 1038.51 feet to a point on the North line of the Arizona Eastern Railroad right of way, as described in Book 43 of Deeds, Page 362 of Pinal County Records;

Thence S 64°33'15" W along said northern right of way, a distance of 303.73 feet to a point on the north right of way of the Hunt Highway, as described in Docket 370, Pages 561-563 of Pinal County Records;

Thence S 89°20'34" W along said right of way, a distance of 656.10 feet;

EXHIBIT A
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Thence continuing along said right of way 199.60 feet along the arc of a curve to the right, having a radius of 24462.54 feet, through a central angle of 00°28'03", a chord bearing S 89°34'36" W and a chord distance of 199.60 feet;

Thence S 89°48'37" W along said right of way, a distance of 831.85 feet;

Thence leaving said north right of way N 00°21'54" W a distance of 2463.61 feet to a point on the North line of the Southeast Quarter of Section 25, Township 4 South, Range 8 East;

Thence N 88°51'55" E along the North line of said Southeast Quarter, a distance of 1960.14 feet, to a point on the West line of the south half of the Northwest Quarter of Section 30, Township 4 South, Range 9 East;

Thence N 00°25'23" W along said West line, a distance of 1322.50 feet;

Thence S 89°55'54" E along the North line of the South Half of the Northwest Quarter of said Section 30, a distance of 2641.33 feet to a point on the East line of said Northwest Quarter;

Thence N 00°07'42" W along said East line, a distance of 1321.66 feet, to the POINT OF BEGINNING;

INCLUDING:

PARCEL 2

A parcel of land lying within the Southwest Quarter of the Southwest Quarter of Section 26, Section 27, the North Half and the South Half of the South Half of Section 28, Section 29, the South Half of Section 30, the Northeast Quarter of Section 31, Section 32, Section 33, the North Half of Section 34, and the Northwest Quarter of Section 35, Township 4 South, Range 9 East of the Gila and Salt River Meridian, Pinal County, Arizona, more particularly described as follows:

BEGINNING at the Northwest Corner (GLO Brass Cap) of said Section 31, from which point the North Quarter Corner (GLO Brass Cap) of Section 31 bears S 89°57'24" E, a distance of 2620.62 feet;

Thence N 00°25'47" W a distance of 49.64 feet to a point on the south right of way of Hunt Highway, as described in Docket 370, Pages 561-563 of Pinal County Records;

Thence the following courses along said southerly right of way:

Thence 207.59 feet along the arc of a non-tangent curve to the left, having a radius of 1438.39 feet, through a central angle of 08°16'08", a chord bearing N 69°16'58" E and a chord distance of 207.41 feet, from which point the radius point bears N 16°34'58" W;

Thence N 65°08'54" E a distance of 2459.08 feet,

Thence 448.57 feet along the arc of a curve to the right, having a radius of 2534.60 feet, through a central angle of 10°08'25", a chord bearing N 70°13'06" E and a chord distance of 447.99 feet;

Thence N 75°17'19" E a distance of 2466.13 feet;

Thence N 75°16'07" E a distance of 7949.48 feet;

Thence 957.46 feet along the arc of a curve to the right, having a radius of 1859.92 feet, through a central angle of 29°29'42", a chord bearing S 89°59'02" E and a chord distance of 946.93 feet;

Thence S 75°14'54" E a distance of 5863.65 feet;

Thence 908.83 feet along the arc of a curve to the left, having a radius of 1958.99 feet, through a central angle of 26°34'52", a chord bearing S 88°32'20" E and a chord distance of 900.70 feet;

Thence N 78°10'14" E a distance of 583.81 feet to a point on the west line of the Southwest Quarter of said Section 26;

Thence leaving said southerly right of way, S 00°20'50" W along said west line of the Southwest Quarter of Section 26, a distance of 1216.96 feet;

Thence S 89°47'38" E along the north line of the Southwest Quarter of the Southwest Quarter of Section 26, a distance of 1316.15 feet;

Thence S 00°18'14" W along the east line of said Southwest Quarter of the Southwest Quarter of Section 26, a distance of 1317.28 feet;

Thence S 89°50'44" E along the south line of the Southwest Quarter of Section 26, a distance of 82.56 feet;

Thence S 03°05'50" E a distance of 860.42 feet;

Thence S 89°43'50" W a distance of 130.00 feet;

Thence S 00°03'49" W a distance of 457.38 feet;

Thence N 89°53'30" W a distance of 1318.79 feet;

Thence S 66°23'02" W a distance of 431.39 feet;

Thence S 73°21'11" W a distance of 208.28 feet;

Thence S 72°34'30" W a distance of 577.19 feet;

Thence S 83°46'33" W a distance of 757.58 feet;
Thence N 89°08'42" W a distance of 458.77 feet;

Thence N 73°55'49" W a distance of 840.74 feet;

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PAGE 4

Thence S 79°27'03" W a distance of 710.35 feet;

Thence S 71°39'18" W a distance of 985.19 feet;

Thence S 69°31'45" W a distance of 647.77 feet;

Thence S 80°06'31" W a distance of 597.69 feet;

Thence S 54°19'50" W a distance of 328.68 feet;

Thence N 88°54'33" W a distance of 719.02 feet;

Thence N 80°55'39" W a distance of 998.39 feet;

Thence S 89°08'42" W a distance of 458.77 feet;

Thence S 75°53'31" W a distance of 1263.64 feet;

Thence S 69°12'36" W a distance of 408.81 feet;

Thence S 68°44'03" W a distance of 1245.99 feet;

Thence N 00°01'26" W a distance of 1026.64 feet;

Thence S 90°00'00" W a distance of 1462.35 feet to a point on the west line of the Northeast Quarter of said Section 32;

Thence N 00°25'20" W along said west line of said Northeast Quarter of Section 32, a distance of 2138.04 feet;
Thence N 00°06'28" W along the east line of the South Half of the Southwest Quarter of said Section 29, a distance of 1320.86 feet;

Thence S 89°52'18" W along the north line of said South Half of the Southwest Quarter of Section 29, a distance of 2618.53 feet;

Thence S 00°00'12" W along the west line of said South Half of the Southwest Quarter of Section 29, a distance of 1321.13 feet;

Thence N 89°51'56" E along the south line of said South Half of the Southwest Quarter of Section 29, a distance of 1310.55 feet;

Thence S 00°26'03" E along the east line of the Northwest Quarter of the Northwest Quarter of Section 32, a distance of 1319.56 feet;

Thence S 89°53'14" W along the south line of the Northwest Quarter of the Northwest Quarter of Section 32, a distance of 1310.28 feet;

Thence N 89°59'26" W along the south line of the North Half of the Northeast Quarter of Section 31, a distance of 2612.50 feet;

Thence N 00°23'04" W along the west line of the North Half of the Northeast Quarter of Section 31, a distance of 1320.29 feet;

Thence N 89°57'24" W along the north line of the Northwest Quarter of Section 31, a distance of 2620.62 feet to the POINT OF BEGINNING;

Said Description contains 1988.8273 acres, more or less, including any easements of record.

EXCEPTING THEREFROM:
PARCEL 2 EXCEPTION:

A parcel of land lying within the North Half of the South Half of Section 28, Township 4 South, Range 9 East of the Gila and Salt River Meridian, Pinal County, Arizona, more particularly described as follows:
BEGINNING at the West Quarter Corner (GLO Brass Cap) of said Section 28, from which point the Southwest Corner (GLO Brass Cap) of Section 28 bears S 00°13'50" E, a distance of 2639.87 feet;

Thence N 89°50'47" E along the east-west mid section line of said Section 28, a distance of 5266.23 feet;

Thence S 00°19'15" W along the east line of the North Half of the South Half of Section 28, a distance of 1321.42 feet;

Thence S 89°51'21" W along the south line of said North Half of the South Half of Section 28, a distance of 5029.08 feet;

Thence S 90°00'00" W along the south line of said North Half of the South Half of Section 28, a distance of 224.44 feet;

Thence N 00°13'50" W along the west line of said North Half of the South Half of said Section 28, a distance of 1319.93 feet to the POINT OF BEGINNING;

Said Description contains 159.5016 acres, more or less.

AND INCLUDING:
PARCEL 3:

A parcel of land lying within the Southwest Quarter of Section 14, Section 15, Section 16, Section 17, the Northeast Quarter of Section 20, Section 21, Section 22, the West Half of Section 23, the Northwest Quarter of Section 27, and the North Half of Section 28, Township 4 South, Range 9 East of the Gila and Salt River Meridian, Pinal County, Arizona, more particularly described as follows:

BEGINNING at the Northwest Corner (GLO Brass Cap) of said Section 17, from which point the North Quarter corner (GLO Brass Cap) of Section 17 bears S 89°57'35" E, a distance of 2624.75 feet.

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Thence S 89°57'35" E along the north line of the Northwest Quarter of said Section 17, a distance of 2624.75 feet;

Thence S 89°57'52" E along the north line of the Northeast Quarter of Section 17, a distance of 2626.03 feet;

Thence N 89°47'22" E along the north line of the Northwest Quarter of said Section 16, a distance of 2625.24 feet;

Thence N 89°51'22" E along the north line of the Northeast Quarter of Section 16, a distance of 2625.94 feet;

Thence S 89°46'32" E along the north line of the Northwest Quarter of said Section 15, a distance of 212.52 feet;

Thence S 67°45'17" E a distance of 1728.38 feet;

Thence S 59°55'00" E a distance of 7098.59 feet to a point on the east line of the Southwest Quarter of said Section 14;

Thence S 00°22'45" E along said east line of the Southwest Quarter of Section 14, a distance of 1107.67 feet;

Thence S 00°17'40" E along the east line of the Northwest Quarter of Section 23, a distance of 2632.20 feet;

Thence S 00°17'33" E along the east line of the Southwest Quarter of Section 23, a distance of 2631.14 feet;

Thence N 89°36'18" W along the south line of said Southwest Quarter of Section 23, a distance of 2615.85 feet;

Thence N 89°55'44" W along the south line of the Southeast Quarter of said Section 22, a distance of 2645.13 feet;
Thence N 89°59'05" W along the south line of the Southwest Quarter of Section 22, a distance of 2642.21 feet;

Thence S 00°17'44" W along the west line of the North Half of the Northwest Quarter of said Section 27, a distance of 1321.14 feet;

Thence S 89°58'56" E along the south line of the North Half of the Northwest Quarter of said Section 27, a distance of 2640.87 feet;

Thence S 00°21'14" W along the east line of the South Half of the Northwest Quarter of Section 27, a distance of 903.29 feet to a point on the north right of way of the Union Pacific Railroad, as described in Docket 53, Page 526 of Pinal County Records;
Thence the following courses along said northerly right of way:

Thence N 75°14'48" W a distance of 4579.24 feet;

Thence N 75°14'10" W a distance of 262.08 feet;

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Thence 758.17 feet along the arc of a curve to the right, having a radius of 1850.00 feet, through a central angle of 23°28'52", a chord bearing N 63°29'44" W and a chord distance of 752.88 feet;

Thence N 51°45'18" W a distance of 1229.87 feet;

Thence 582.38 feet along the arc of a curve to the right, having a radius of 1030.00 feet, through a central angle of 32°23'46", a chord bearing N 35°33'27" W and a chord distance of 574.65 feet;

Thence N 19°21'34" W a distance of 1066.56 feet;

Thence 622.26 feet along the arc of a curve to the left, having a radius of 2235.00 feet, through a central angle of 15°57'07", a chord bearing N 27°20'07" W and a chord distance of 620.25 feet;

Thence N 35°18'41" W a distance of 2839.32 feet;
Thence 454.45 feet along the arc of a curve to the left, having a radius of 6828.00 feet, through a central angle of 03°48'48", a chord bearing N 37°13'05" W and a chord distance of 454.36 feet;

Thence N 39°07'29" W a distance of 7401.12 feet to a point on the north line of the Northeast Quarter of said Section 18;

Thence leaving said northerly right of way, S 89°56'54" E along said north line of the Northeast Quarter, a distance of 664.87 feet, to the POINT OF BEGINNING;

Said Description contains 3394.6062 acres, more or less, including any easements of record.

Total acreage for Parcels 1, 2, and 3, excepting the Parcel 2 exception is 5802.9605 acres, including any easements of record.

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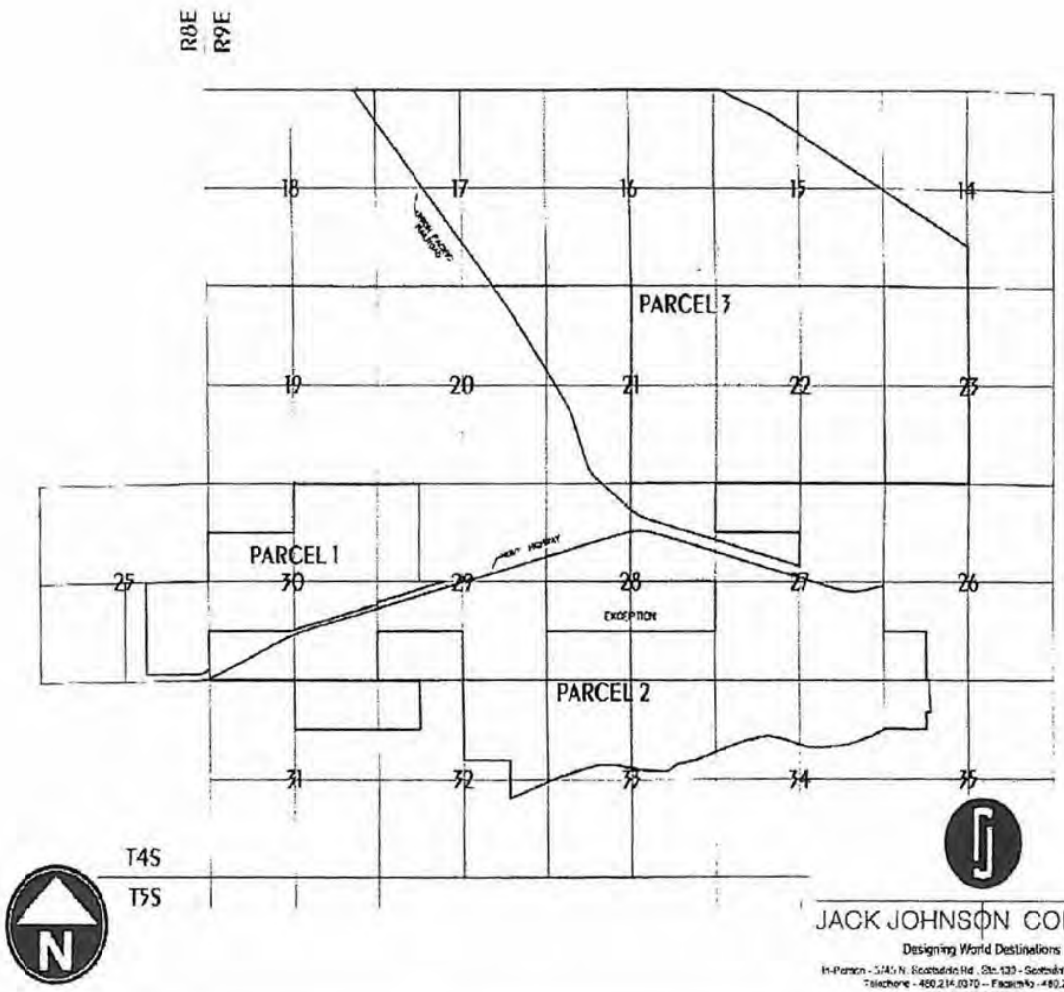

JACK JOHNSON COMPANY
Designing World Destinations

FLOR098675

APP458

EXHIBIT B

CONSENT TO CONDITIONS/WAIVER FOR DIMINUTION OF VALUE

The undersigned is/are the owner(s) of the subject land described in Exhibit A hereto that is the subject of PUD Rezoning Amendment Application PZ-6051-R ("Amendment PZ-6051-R"). By signing this document, the undersigned agrees and consents to all the conditions imposed by the Florence Town Council in conjunction with the approval of PUD Rezoning Amendment Application PZ-6051-R ("Conditions of Approval") and waives any right to compensation for diminution in value pursuant to Arizona Revised Statutes § 12-1134 that may now or in the future exist as a result of the approval of PUD Rezoning Amendment Application PZ-6051-R. Except as expressly set forth in Amendment PZ-6051-R and its Conditions of Approval, nothing herein shall constitute a waiver of any other of the undersigned's rights pursuant to the above-referenced statutes.

Dated this 21st day of March 2007.

Owner: **WHM Merrill Ranch Investments, LLC**

By: Hugh O. Nowell
Print Name

Hugh O Nowell
Signature

Its: Executive Vice President
Title

(Notary) KATHI J. MULLINS NOTARY PUBLIC CHEROKEE COUNTY, GEORGIA MY COMMISSION EXPIRES NOVEMBER 4, 2009

FLOR098676

M3-PN100137

ARCHITECTURE
ENGINEERING
CONSTRUCTION MANAGEMENT

Florence Copper Project

NI 43-101 Technical Report
Pre-Feasibility Study

Florence, Pinal County, Arizona

REVISION 0
Prepared For:

HDI CURIS

Effective Date of Report: 28 March 2013
Report Issue Date: 28 March 2013

Qualified Persons:
Richard Zimmerman, R.G., SME-RM
Michael R. Young, SME-RM
Corolla Hoag, C.P.G., SME-RM
Terence P. McNulty, P.E., SME-RM
Dennis Tucker, P.E.
Richard Frechette, P.E.

M3 Engineering & Technology Corporation ● 2051 West Sunset Road, Tucson, AZ 85704 ● 520.293.1488

1.2 INTRODUCTION

M3 and other specialist consultants were commissioned by Curis Arizona to prepare a Pre-Feasibility Study and technical report of the FCP that is compliant with NI 43-101. As primary author of this Pre-Feasibility Study, M3 was integral to development and engineering of copper extraction and processing facilities as well as capital and operating cost estimates for the FCP. The intent of this report is to provide the reader with a comprehensive review of the potential economics of this mining operation and related project activities, and to provide recommendations for future work programs to advance the Project.

The following other consultants have participated in work that supports the Pre-Feasibility Study: TP McNulty and Associates ("McNulty"), Haley & Aldrich, SRK Consulting USA, Inc. ("SRK"), ARCADIS U.S., Inc. ("ARCADIS") and Knight Piésold ("KP").

1.3 RELIANCE ON OTHER EXPERTS

In some cases, the authors have relied upon the work of others to describe the current status of the property and to provide the basis for cost estimates for significant components of the life-of-operations economic model. In the opinion of the authors, the Florence historical data, in conjunction with borehole assays conducted by Curis Arizona, are present in sufficient detail to prepare this report and are generally correlative, credible, and verifiable.

1.4 PROPERTY DESCRIPTION AND LOCATION

The FCP is located in Pinal County, Arizona. The property, including surface and subsurface rights, consists of private patented land totaling approximately 1,182 acres and a leased parcel of Arizona State Land of approximately 159.5 acres in size. The approximate latitude and longitude of the planned In-Situ Copper Recovery ("ISCR") area are 33° 02' 49.07" North and 111° 25' 47.84" West.

Curis Arizona owns 1,181.59 acres of surface and subsurface rights, including mineral rights, of patented land held in fee simple. This private property falls within the boundaries of the Town of Florence. Curis Arizona also leases under Arizona State Mineral Lease 11-26500 approximately 159.5 acres of surface and mineral rights on Arizona State Trust Lands, which is not subject to the jurisdiction of the Town of Florence. The State Trust Land overlies approximately 42% of the copper resource. In addition, Curis holds water rights for both pieces of land as described in Section 4.7.5. The site location is shown in Figure 1-1 and Figure 1-2.

1.5 ACCESSIBILITY, CLIMATE, LOCAL RESOURCES, INFRASTRUCTURE, AND PHYSIOGRAPHY

The project site is located in south-central Arizona, in the Sonoran Desert of the Basin and Range Lowlands physiographic province. The project area lies approximately one-half mile north of the Gila River, at an approximate elevation of 1,480 feet amsl. The river is dry much of the year and flows east to west in response to regional precipitation events. The project site is adjacent to Hunt Highway and is easily accessible by paved roads. The Town of Florence is

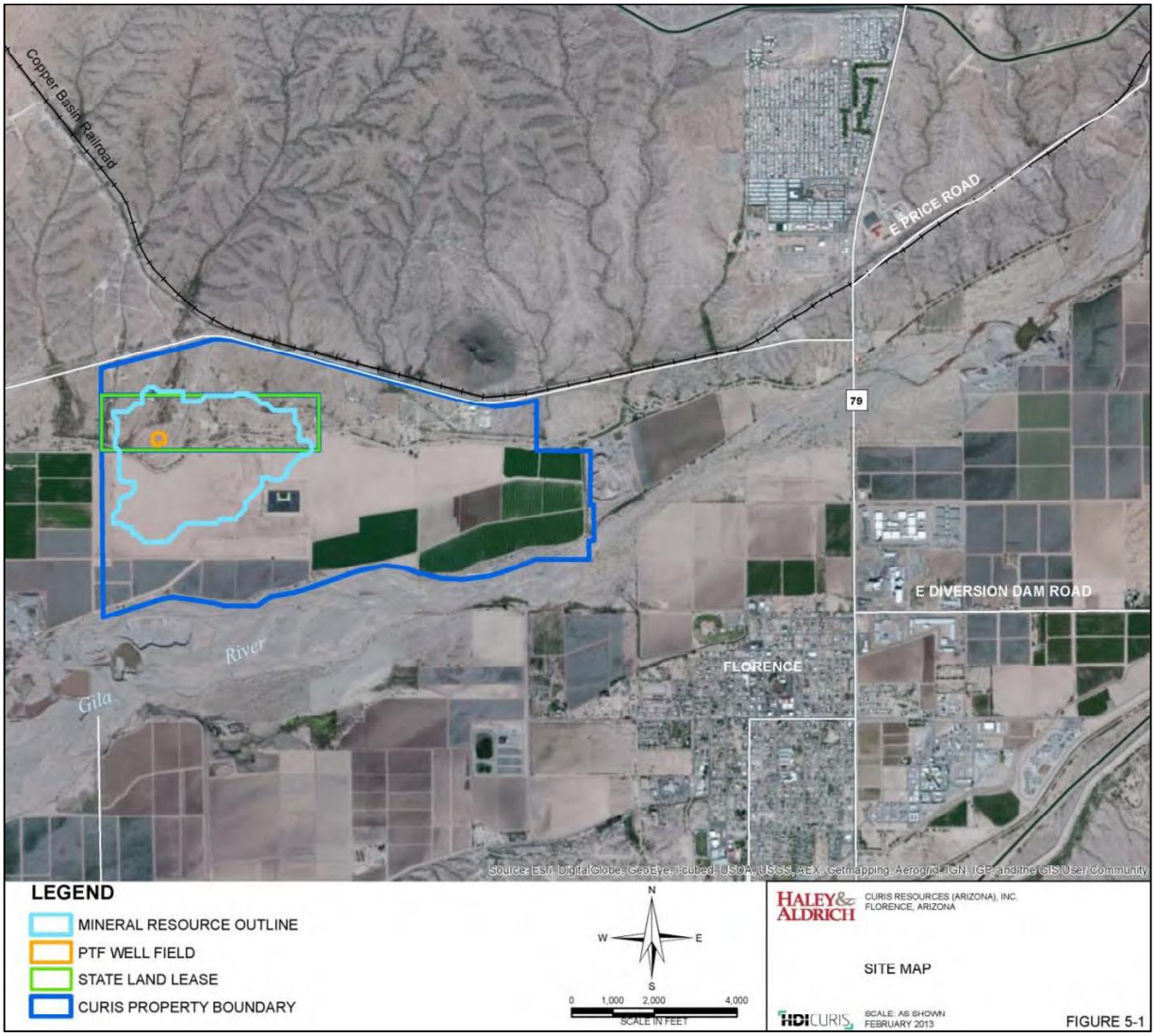

Figure 1-2: Florence Site Location Map

Note: PTF is an abbreviation for "Production Test Facility"

1.6 HISTORY

The project has had three previous owners whose primary business is exploration and mining development including Continental Oil Company ("Conoco"), Magma Copper Company ("Magma"), and BHP Copper Inc. ("BHP"). BHP conveyed the land constituting the FCP site to Florence Copper Inc. on May 26, 2000. Florence Copper Inc. was then sold to Merrill Mining LLC of Atlanta, Georgia, effective on December 5, 2001. The patented land owned by Florence Copper, Inc., including land forming part of the FCP, was acquired in July 2004 by Roadrunner Resorts, LLC, and in January 2006 by WHM Merrill Ranch Investments, LLC. On March 10, 2009, the patented land was conveyed in foreclosure proceedings to The Peoples Bank. On October 28, 2009, Merrill Ranch Properties, LLC acquired the patented land from The Peoples Bank. On December 17, 2009, Curis Arizona purchased the surface rights and all of the mineral

rights to the patented land constituting the FCP from Merrill Ranch Properties, LLC. On January 8, 2008, Felix-Hunt Highway, LLC acquired Florence Copper, Inc., the lessee under the Arizona State Mineral Lease 11-26500. On February 24, 2010, Curis Arizona obtained assignment of Arizona State Mineral Lease 11-26500. There has been no commercial production of copper from the FCP site historically.

Conoco discovered the Florence copper deposit in 1970 while executing an exploratory drilling program southwest of Poston Butte. In 1974, Conoco sunk a shaft and mined over 50,000 tons of mineralized quartz monzonite from a single-level, underground mine designed for metallurgical and geological testing. Metallurgical testing of the recovered material was performed using a small pilot plant built on the property. The pilot mine shafts are now capped at the ground surface and the mine is flooded.

Magma acquired the property from Conoco in July 1992 for $9 million and initiated a Pre-Feasibility Study in January 1993 to verify the Conoco work and to determine the most effective technology for extracting copper from the deposit. The results from copper resource modeling, metallurgical testing, material property testing, and financial analysis supported the conclusion that the application of in-situ leaching and solvent extraction/electrowinning ("SX/EW") to produce cathode copper was the preferred method to develop the Florence deposit.

In January 1996, Broken Hill Proprietary Company Limited of Australia acquired Magma and created BHP. The prefeasibility process started by Magma in January 1995 continued through the acquisition phase. In 1998, BHP conducted a multi-month, field optimization ISCR test to demonstrate hydraulic control, gather copper recovery and other technical data for final feasibility. The outcome of the study confirmed to regulatory agencies that production wells could be efficiently installed into the mineralized zone, hydraulic control of the injected and process solutions could be maintained and documented, and that the ISCR method was a viable method for copper extraction.

1.7 GEOLOGICAL SETTING AND MINERALIZATION

The Florence deposit formed approximately 62 million years ago ("Ma") when numerous dike swarms of Laramide granodiorite porphyry intruded Precambrian quartz monzonite near Poston Butte. The dike swarms were fed at depth by a large intrusive mass. Hydrothermal solutions associated with the intrusive dikes altered the host rock and deposited copper and iron sulfide minerals in disseminations and thin veinlets in the strongly faulted and fractured rocks. Hydrothermal alteration and copper mineralization is most intense along the edges and flanks of the dike swarms and intrusive mass (BHP, 1997a; SRK, 2010).

Mid-Tertiary Basin and Range extensional faults subsequently elevated and isolated much of the Florence deposit as a horst block. The horst block and the downthrown fault blocks were exposed to weathering and erosion. The center of the deposit was eventually eroded to a gently undulating surface. Coarse, poorly bedded conglomerate from the surrounding mountains filled the basin west of the Florence deposit and began to cover the eroded top of the horst block. River sand, silt, and gravel buried the entire deposit to a depth of approximately 425 feet. During this period of erosion and deposition, calcareous silty mud and clay layers were deposited

resources within the resource boundary. See Section 15 for a description on how the resources were converted into reserves.

Table 1-7: Probable Reserve Estimate at 0.05% TCu Cutoff (February 2013)

Tons	339,953,000
TCu Grade (%)	0.358
Contained Copper (lb)	2,435,400,000
Average Recovery (%)	69.7
Extracted Copper (lb)	1,698,000,000

1.16 MINING METHODS

ISCR, the mining method proposed for the FCP, is an extraction method used for selected mineral deposit conditions as an alternative to open pit or underground mine methods. ISCR is also used as a secondary recovery method for copper, typically coupled with open pit mining/heap leaching or underground mining. The ISCR process involves injection of a highly-diluted low pH lixiviant solution (consisting of over 99% water) into mineralized material and the dissolution of the copper, which is captured in surrounding recovery wells where the resulting PLS is pumped to the surface for collection and processing in the SX/EW plant.

The mining equipment used for this method includes wells, pumps and pipelines used to inject, recover and convey process solutions. The well installation sequence and description of well equipment are given in sections 16.2.1 and 16.2.2. The injection and recovery well design proposed by Curis Arizona is based on experience gained from the BHP pilot test, and is compliant with the Underground Injection Control (UIC) Permit issued to Florence Copper in 1997. Both the well design proposed by Curis Arizona and the well design employed by BHP incorporate a casing string that extends from ground surface, through the stratigraphy that overlies the Florence deposit, including the UBFU, MFGU, LBFU and at least 40 feet below the top of the Bedrock Oxide Unit that hosts the copper mineralization. The casing string will be composed of materials designed to withstand the proposed pressure and chemistry of the injected fluid. It will be cemented for its entire length and must pass a mechanical integrity test as defined by the USEPA. The proposed ISCR wells will be constructed with screened intervals located exclusively within the Bedrock Oxide Unit. A schematic well diagram is included as Figure 1-5.

An alternative design that includes an outer steel casing from land surface to 40 feet below the Bedrock Oxide Unit, as shown in Figure 1-6, will be used in the Phase 1 Production Test Facility well field. Contingency cost has been added to the initial capital of Phase 2 commercial operations to further evaluate this design, if necessary, pending the outcome of the Phase 1 well field testing.

The active ISCR well field will be surrounded by a network of perimeter wells that will be pumped to maintain positive hydraulic control. The perimeter wells will be surrounded by a network of observation wells that will be used to monitor hydraulic control at the edge of the

ISCR well field. The perimeter and observation wells will be constructed using a well design identical to the injection and recovery wells.

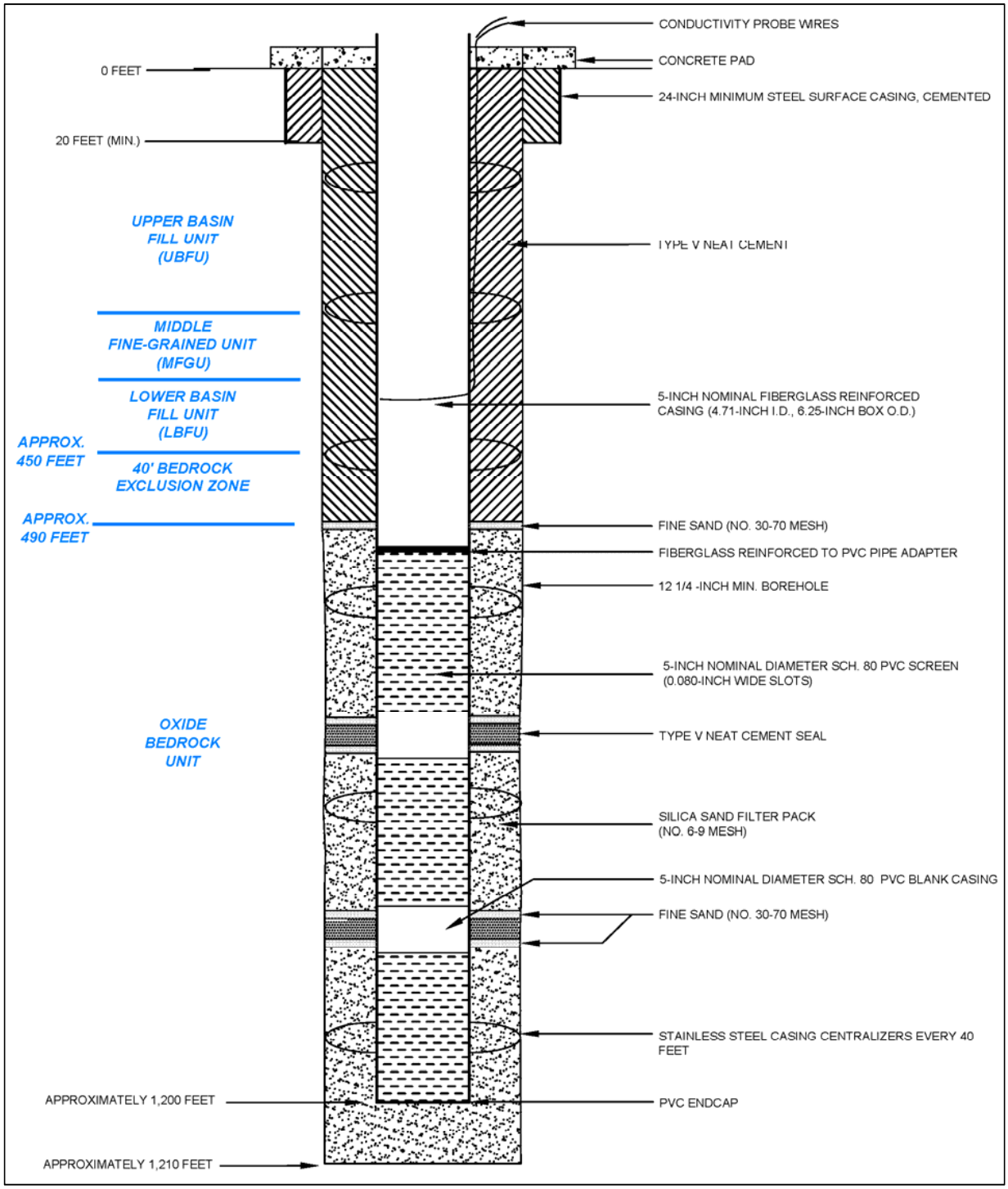

Figure 1-5: Phase II Injection and Recovery Well Design

(Source: Haley & Aldrich)

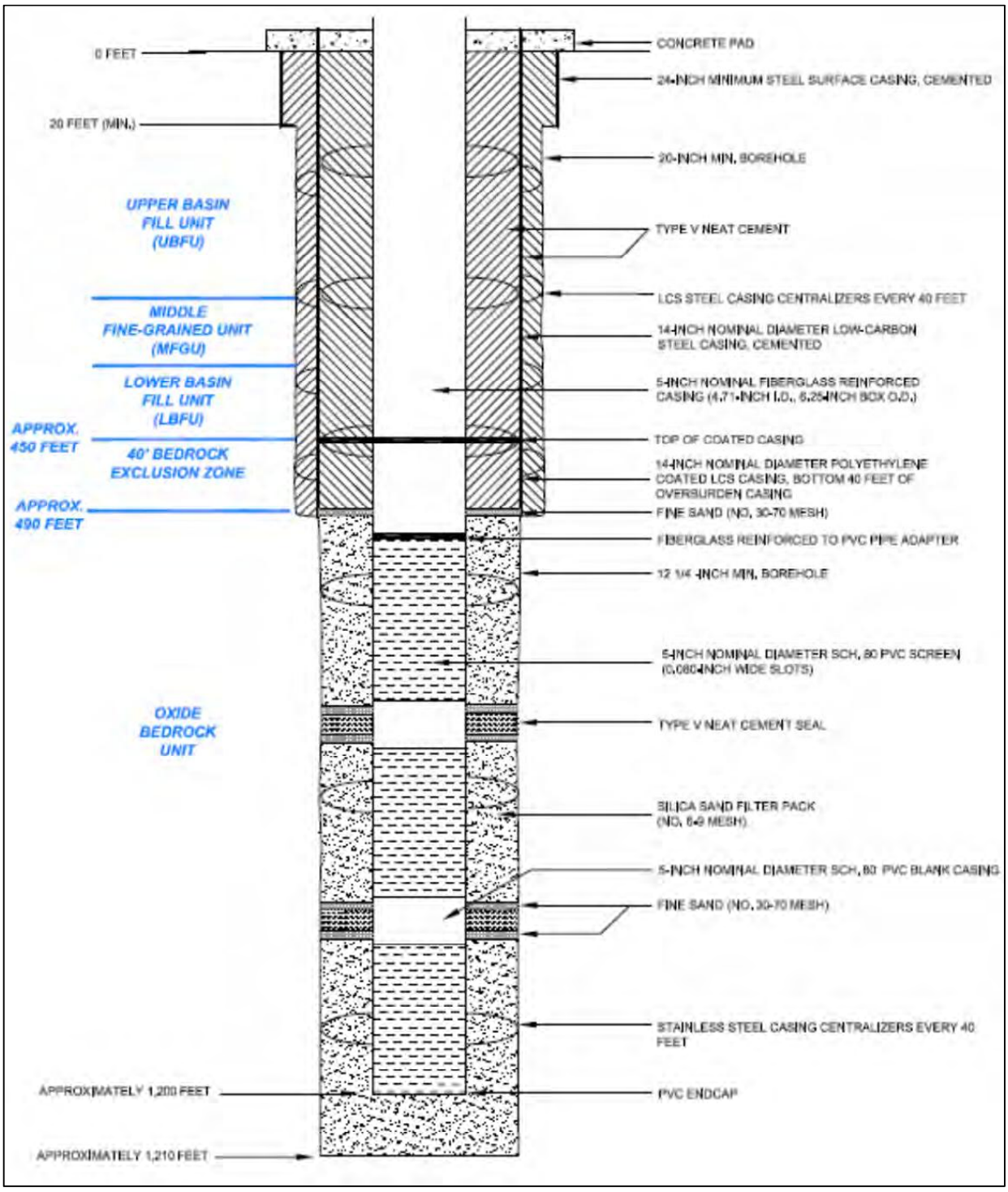

Figure 1-6: Phase I PTF Injection and Recovery Well Design

(Source: Haley & Aldrich)

The active ISCR well field will be surrounded by a network of non-production pumping (hydraulic control) and observation wells to ensure that acidified process solutions do not

migrate away from the leaching zone. The hydraulic control wells withdraw additional (non-production) water from the oxidized bedrock zone. Withdrawal of the non-production groundwater creates a depression in the piezometric surface around the active ISCR, which creates groundwater flow toward the ISCR well field in all directions. The BHP pilot test demonstrated that hydraulic control could be established and maintained within the FCP mineralized body. The results of their successful demonstration of hydraulic control were submitted to the Arizona Department of Environmental Quality ("ADEQ") in a memo dated April 6, 1998 (BHP, 1998).

The anticipated hydraulic control pumping rate is expected to range from 3% to 10% of the recovery pumping. When combined with other operationally required on-site groundwater pumping, net groundwater extraction is expected to be approximately 1,100 gpm. Groundwater will be extracted at the individual perimeter wells at rates ranging from 5 to 30 gpm to maintain hydraulic control. The sub-regional groundwater flow model developed by Curis Arizona (Brown and Caldwell, 2011) has demonstrated that sufficient groundwater resources exist within the Bedrock Oxide Unit and the overlying Lower Basin Fill Unit, or lower conglomerate, (the lower portion of the sedimentary fill overlying Precambrian bedrock) to easily support the net groundwater extraction rate of 1,100 gpm for the duration of the proposed ISCR operations.

A copper extraction forecast was developed for the FCP to produce a target copper production of approximately 55 million pounds per year (mppy) through Year 5 and approximately 85 mppy by Year 7. The initial commercial phase will have a nominal SX throughput of 7,400 gpm and the second commercial phase will increase the nominal throughput to 11,000 gpm. The copper extraction forecast was developed using the assumptions presented below:

- The extraction model is based on key physical properties provided in SRK's 500-foot by 500-foot blocks (Section 14).
- Copper recovery is based on the METCON recovery curve and a conservative sweep efficiency factor over a four-year recovery cycle (Section 13).
- The injection and recovery well flow rate is based on an average of 0.1 gpm per linear foot of well screen.

The injection and recovery well flow rate of 0.1 gpm per linear foot of well screen is a key parameter used in the copper extraction schedule. This flow rate is applied to the material thickness of each resource block to determine the flow rate per well. In Years 1 through 3 a factor of 0.15 gpm per linear foot of well screen was used due to the nature of the resource encountered in the initial years (i.e. less than average thickness seen in the typical Florence oxide zone).

The copper extraction sequence begins on the State Mineral Lease area at a rate of approximately 55 million pounds per year through Year 5 and is ramped up to approximately 85 million pounds per year by year 7. The initial production area is located north of the canal to facilitate piping arrangements in the ISCR field. The extraction sequence progresses in a southeast to northwest fashion.

There are 971 injection wells and 1,104 recovery wells projected for the ISCR area. Wells must be installed for the new blocks coming on line during each year of production. The forecast shows these wells installed in the year prior to the production start year of the block in which the wells are installed.

There are 206 permanent perimeter and 102 permanent observation wells projected for the ISCR area. The perimeter and observation wells are installed along the outer edge of the active ISCR area. When the active area is along the outside edge of the resource area, the perimeter and observation wells are considered permanent installations. The perimeter and observation wells installed when the outer edge of the active area is within the resource area are temporarily used for this function and are "repurposed" as injection and recovery wells when the active area expands beyond them.

Blocks that are depleted of economically extractable copper require rinsing to flush out the remaining leach solution and restore the groundwater quality to levels required by the APP permit. Rinse solution is injected into and recovered from areas of the ISCR that have completed the four-year leach cycle, using the existing wells and surface infrastructure. Rinse flow rates were forecast in accordance with the extraction plan and represent a concurrent and proactive reclamation approach. The volume of rinse solution required to achieve the water quality objectives was simulated by Schlumberger (Schlumberger, 2012) using a regulatory-approved geochemical numerical model. The geochemical model used sulfate concentration as a proxy for completion of the rinsing process to estimate the number of pore volumes needed to attain the water quality objectives. The rinse water is initially low in pH and high in total dissolved solids with sulfate as the primary constituent. Rinse water is neutralized, filtered, and treated by reverse osmosis in the water treatment plant (Section 20.2) before being returned to the well field to facilitate additional rinsing.

1.17 RECOVERY METHODS

Copper recovery for the FCP utilizes SX/EW technology to produce cathode copper from the copper-bearing leach solutions pumped from the ISCR well field. The SX/EW plant is initially designed to handle a flow of 7,400 gpm with a recovered copper concentration of 1.8 grams per liter (g/L). After five years, the SX/EW plant will be expanded to handle a flow of 11,000 gpm. The processing plant and associated infrastructure is in the northeast corner of the State Land parcel. The process fluids are piped to and from the process plant in lined trenches.

The process consists of the following elements:

- ISCR well field;
- Lined PLS and raffinate ponds;
- SX Plant with three mixer settlers, increasing to four in Year 5, for operation in Year 6;
- Tank Farm for handling process liquids;
- EW Tankhouse;
- Ancillary warehouse and maintenance facilities;
- Water treatment plant and water impoundment facilities; and
- Existing Administration office complex near the eastern side of the site.

The source of copper for this process is PLS extracted from the recovery wells, as described above. PLS is collected in a process pond with a double geomembrane liner system on the west side of the plant site. The PLS pond has a design capacity of 6,480,000 gallons, which provides a 14.6-hour residence time at 7,400 gpm and 9.8-hour residence time at the ultimate design flow rate of 11,000 gpm.

The PLS pond is adjacent to the raffinate pond (west) and receives PLS from the well field. The pond is equipped with two vertical turbine pumps and one spare to deliver PLS to the SX Plant. In Year 5, a third vertical turbine pump will be added to increase the capacity to 11,000 gpm to the SX Plant.

PLS is pumped to the SX Plant where it is mixed with an organic, petroleum-based liquid containing an extractant that selectively removes copper from the PLS. The SX Plant consists of three reverse-flow mixer-settlers in a parallel configuration. The PLS flow is split between two extraction settlers. In the extraction settlers the PLS is mixed with the organic to enable transfer of the copper to the organic phase. The "loaded" organic and aqueous solutions are allowed to separate in the settlers due to the density differences in the liquids. The loaded organic is directed to the stripping settler where it is mixed with the electrolyte solution, which has a high acid content. The "lean" electrolyte strips copper from the organic solution, which then become "rich" electrolyte. Organic stripped of its copper load circulates back through the extraction mixer-settlers, progressively loading it with copper as it flows through the extraction train, removing 90% of the copper load in solution.

A fourth mixer settler will be added in Year 5 to increase the capacity of the SX system to 11,000 gpm in Year 6. The system is converted to a series-parallel configuration. In this configuration, half of the PLS flows through two mixer settlers in order to enhance the transfer of copper to the organic phase prior to being "stripped" in the extraction settler.

The extraction units consist of primary, secondary, and tertiary mix tanks that thoroughly combine the organic and PLS. The contact time and agitation in the mixers facilitates transfer of copper from the PLS solution to the extractant in the organic. The settlers are 67 feet wide, 102 feet long and 4 feet deep. The reverse-flow settlers direct the mixed solutions along the side of the settlers and through turning vanes that direct the separating solutions to flow back toward the mixers where the solutions are separated. The rich electrolyte solution is routed through the Tank Farm to EW filters.

The raffinate pond, with the same construction as the PLS pond, receives the solution, now called raffinate. The raffinate passes through a pair of coalescers that assist in removing residual organic from the raffinate. The raffinate is acidified by an in-line static mixer south of the pond downstream from the coalescers and the SX Plant. The raffinate pond is equipped with two vertical turbine pumps and one spare with 360 feet of total dynamic head to deliver the 7,400 gpm flow rate to the well field with enough pressure to enable injection of leach solution to the injection well field. In Year 5, a third vertical turbine pump will be added to increase the capacity to 11,000 gpm to the well field.

The Tank Farm is located south of the SX settlers at lower elevation to enable solutions to flow into the tanks by gravity. The Tank Farm holds process tanks, filters, pumps, and heat exchangers associated with the SX/EW process. Solutions are pumped from the Tank Farm to the respective process areas to maintain the process flow. The Tank Farm is located in secondary containment in accordance with best available demonstrated control technology ("BADCT") standards.

Primary process equipment located in the Tank Farm includes filters and heat exchanger. Rich electrolyte is filtered to remove solids and organics. The rich electrolyte flows by gravity from the extraction settler to the electrolyte filter feed tank. The rich electrolyte is pumped through the electrolyte filters. Filtered electrolyte is then pumped through a heat exchanger to transfer heat from the lean electrolyte to the rich electrolyte, and then on to the electrolyte recirculating tank.

A system is installed in the Tank Farm to process "crud" from solvent extraction. "Crud" is defined by operators as the material which accumulates at the organic/aqueous interface in the SX settlers. This material is treated to recover the valuable organics. The crud is removed from the settlers via an air-operated pump and transferred to a crud decant tank. The crud is allowed to settle in the decant tank. If required, clay can be added to remove impurities in the organic. The upper organic in the decant tank is recovered and sent to the loaded organic tank. The sediment at the bottom of the tank is pumped thru a filter and the filter cake removed.

The EW Tankhouse is located west of the Tank Farm and the SX Plant and utilizes permanent cathode technology initially with 74 cells, increasing to 100 cells in Year 5, for operation in Year 6. Each cell in the Tankhouse contains 67 lead anodes and 66 stainless steel "mother" cathodes. The cathode washing and stripping machine is located on the south end of the Tankhouse building. The EW Tankhouse cells are arranged in two parallel banks of 37 (50) cells each. In the hydraulic circuit, all cells are arranged in parallel allowing each cell to have the same feed solution and discharge solution. Electrically, the cells are connected in series.

Direct electrical current is supplied by two rectifiers. Current flows from the rectifiers through a bus bar to the bank of cells. Each cell is equipped with intracell bus bars, 66 cathode plates and 67 anode plates arranged in parallel. Within each bank, direct electrical current flows from a bus bar to the anode and then through the electrolyte to the cathode plates. An intercell bus bar provides current to the next cell successively and finally returns to the rectifiers.

Heated, filtered, rich electrolyte flows from the Tank Farm heat exchangers into the electrolyte recirculation tank where it mixes with overflow from the lean electrolyte tank. The solution from this tank is pumped to the Tankhouse cells where copper in solution is plated onto the cathode plates.

As a result of the electrochemical reaction at the anode, oxygen evolves from the EW cells creating a mist. The EW cells are covered to contain the mist and a surfactant is used to reduce the quantity of mist produced. Cobalt sulfate is also added to passivize the anode, and guar (a bean powder) is added as a surface modifier for the cathode.

For sulfide material, Conoco operated a 50-ton-per-day conventional flotation circuit inside the process building. Following batch flotation, tailings from the concentrating process were transferred to an approximate 33,000-gallon thickener tank and subsequently discharged into a small unlined sulfide material tailings impoundment. The sulfide tailings are still located on the property, and although not required by law, the cost to reclaim the impoundment is included in the approved reclamation plan and financial assurance mechanism.

4.6.4 Chemical and Sanitary Pond

The Conoco facility reportedly utilized a small unlined pond for the disposal of treated sanitary waste and untreated process wastes pumped from the reagent mixing area in the process building. Sanitary waste was treated in a prefabricated aerobic digester before being pumped to the sanitary pond.

4.6.5 Pilot Plant Decommissioning

Subsequent to Magma's acquisition of the project, MP Environmental was retained to decommission the pilot plant. All process fluids, reagents, and process residues were removed from the facility and all tanks and process units were thoroughly decontaminated and cleaned. The equipment was eventually removed from the site for re-use at other Magma facilities, sold, or disposed at regulated landfills.

An inspection of the facility was conducted by BC in October 1995. Brown and Caldwell's ("BC") observations of the facility were documented in BC's Focused Facilities Investigation (Brown and Caldwell, 1996e).

4.6.6 Agricultural Impacts

The subject property also contains several large-diameter water production wells with electrically-powered vertical shaft pumps. The wells are poorly documented but they were generally constructed to support agricultural and livestock activities, housing, and facility operations on the property. A recent survey of these well locations indicated that several of these wells are no longer in service. Although ADWR regulations require that wells be properly abandoned once they are taken out of service, the wells are not considered to be part of the Project and cost of abandonment has not been addressed in the reclamation plan or financial assurance instrument.

4.6.7 Magma-BHP Test Facilities

The Magma-BHP test facilities consist of a small well field of injection, recovery, and observation wells, an evaporation pond, and a small process tank area adjacent to the evaporation pond. These facilities were used in BHP's hydraulic control test conducted in 1997/98. The test ran for approximately 90 days to demonstrate hydraulic control to the environmental agencies and was followed by a rinsing period of several years. ADEQ and United States Environmental Protection Agency (USEPA) allowed cessation of hydraulic control based on water quality samples following rinsing. Prior owners have not closed or remediated the facilities and the facilities exist today in approximately the same condition as when BHP terminated the hydraulic

detailed description of the results of these comparisons can be found in Magma's Pre-Feasibility report (Magma, 1994).

The Pre-Feasibility Study focused on identifying the most appropriate mining method for developing the oxide portion of the deposit. The methods evaluated were: (1) open pit mining followed by heap leaching and SX/EW, and (2) in-situ solution mining followed by SX/EW. Parallel studies were performed by Magma personnel and by Independent Mining Consultants (IMC) of Tucson, Arizona (contracted by Magma). Magma personnel evaluated the in-situ potential of the project while IMC evaluated the open pit scenario.

Magma also drilled 12 holes for material properties testing purposes (pumping tests), and two large-diameter (6-inch) holes for obtaining bulk samples for metallurgical testing; the large-diameter holes (MCC-533 and MCC-534) were completed during the early stages of the feasibility study. These additional holes were drilled into the central portion of the deposit for a total footage of 10,892 feet.

An exploration program was implemented to drill five holes (8,280 feet) in Section 22, located about 2 miles northeast of the Florence deposit. Land access issues had prevented drilling prior to this time. Near-surface outcrops and subcrops of acid soluble copper mineralization were the targets of this program. The geologic target was proposed to be a small, faulted segment of the large-scale Florence porphyry copper system. Drilling confirmed the presence of propylitic alteration and low-grade, erratic, copper sulfide mineralization. No copper mineralization of economic grade was encountered.

The Pre-Feasibility Study was completed in January 1995 (Magma, 1994) at an approximate cost of $2.2 million. The results from copper resource modeling, metallurgical testing, material property testing, and financial analysis supported the conclusion that the application of in-situ leaching and SX/EW to produce cathode copper was the preferred method to develop the Florence deposit. The lithologic, mineralogical, and structural features are all favorable to solution mining because of the low acid-consuming potential of the host rock, the presence of acid-soluble chrysocolla located along fractures and in argillized feldspars, and the intense fracturing of the rock which allows solution migration.

The recommendation was made to proceed with a feasibility study that would provide mineralized material reserves, permitting, detailed in-situ mine design, and facility engineering capable of advancing the project to the construction stage.

In January 1996, Broken Hill Proprietary Company Limited of Australia acquired Magma and created BHP. The feasibility study started by Magma in January 1995 continued through the acquisition phase. The study included a drilling program of 67 holes drilled into the deposit and surrounding area to serve as pumping, observation, and monitoring wells. These wells were drilled to provide hydrologic data for the Aquifer Protection Permit (APP) application and to characterize the aquifer in the hydrologic computer model. An additional 38 diamond drill holes were completed to confirm geologic resources in the deeper, western portion of the deposit and to gather material for geological and metallurgical tests.

In 1998, BHP conducted a multi-month field optimization ISCR test to gather copper recovery and other technical data for final feasibility. The outcome of the study confirmed that production wells could be efficiently installed into the mineralized zone, hydraulic control of the injected process solutions could be maintained and documented, and that the ISCR method was still the preferred method.

6.3 HISTORICAL MINERAL RESOURCE AND RESERVE ESTIMATES

The following section includes historic estimates of mineral reserves and resources provided as background information only. The source of information for historic resources includes an unpublished internal report with appendices prepared by Magma's internal Resource Development Technology Group (RDTG) in 1995. BHP prepared numerous memoranda documenting internal protocols and methods for generating the drill hole database, geology block model, and mineral resource estimation; much of these protocols, methods, and information including the declaration of mineral resources were compiled in an internal, unpublished report with appendices prepared in 1997. In addition, Curis Arizona is also in possession of the digital MineSight geology model, resource estimation routines, and resource model. The historical resources stated by Magma and BHP used the same resource categories (Measured, Indicated, and Inferred) that are used in the current declaration of mineral resources. See Section 14 for estimates of the current mineral resources.

The Magma 1994 Pre-Feasibility Study (Magma, 1994) reported an oxide resource of 368.16 million tons (333.98 million tonnes) of 0.34% TCu and 0.24% acid soluble copper (%ASCu) using a 0.1% ASCu cutoff grade.[1] Of this total, 323.49 million tons (87.8%) were classified as measured and indicated resources based on a composite-to-block distance of less than 250 feet. These figures were for a total resource within a 3.94 square mile area and were not constrained within any permit boundaries.

The BHP Pre-Feasibility Study (BHP, 1997a) reported the measured and indicated oxide mineral resource at 321.28 million tons (291.46 million tonnes) of 0.38% TCu and 0.23% ASCu grade at a 0.15% TCu cutoff (Table 6-1), containing 2.42 billion pounds of copper. These figures were for a resource within the APP and Underground Injection Control (UIC) Permit area, which is 1.04 square miles. A cutoff grade of 0.15% TCu was selected for the resource estimate because BHP initially assumed negligible copper production would likely occur below 0.15% TCu or in the high-iron leached cap owing to the presence of difficult-soluble minerals and relatively higher acid-consumption rates. BHP (1997c) stated there is some potential to extract copper from low-grade portions of the high-iron zone, so using a lower %TCu cutoff grade may be appropriate. They had insufficient metallurgical test work on material having a grade less than 0.15% TCu, so did not include it in the estimates of recoverable copper.

[1] The %ASCu component of the sample assay is an empirical measure of the percentage of total copper that is dissolved by dilute sulfuric acid under specified time and temperature conditions. For the Florence assays performed by Magma and BHP, the %ASCU values are the result of exposing 5 grams of sample pulp materials to a 15% concentration of sulfuric acid for 5 minutes in a water bath held at 73 degrees Celsius. The results allow for relative comparison of the ratio of TCu:ASCu in various rock materials in the deposit and do not reflect the ultimate copper recovery in oxidized materials under field leaching conditions

TOWN OF FLORENCE

ORDINANCE NO. 356-03

AN ORDINANCE OF THE TOWN OF FLORENCE AMENDING THE "TOWN OF FLORENCE ZONING MAP" BY CHANGING THE ZONING CLASSIFICATION OF A CERTAIN PARCEL OF LAND FROM AG AGRICULTURAL ZONE TO PUD (PLANNED UNIT DEVELOPMENT) MIXED USE ZONING.

WHEREAS, appropriate public hearings have been held by the Planning and Zoning Commission and the Commission has proposed a change in zoning classification; and

WHEREAS, the Planning and Zoning Commission has recommended said change; and

WHEREAS, said proposal has been considered by the Common Council and the recommended zoning classification found to by appropriate and thereby should be imposed, and further found to promote the welfare of the residents of the Town and its orderly growth.

NOW, THEREFORE BE IT ORDAINED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF FLORENCE AS FOLLOWS:

The Zoning Map, Florence Arizona, is hereby amended by changing the zoning classification of the parcel of land from AG Agricultural Zone to PUD (Planned Unit Development) Mixed Use Zoning as depicted on attached EXHIBIT A.

PASSED AND ADOPTED by the Mayor and Common Council of the Town of Florence this 15th day of December, 2003.

Patsy Williams, Mayor

ATTEST:

Lisa Garcia, Town Clerk

APPROVED AS TO FORM:

James Mannato, Town Attorney

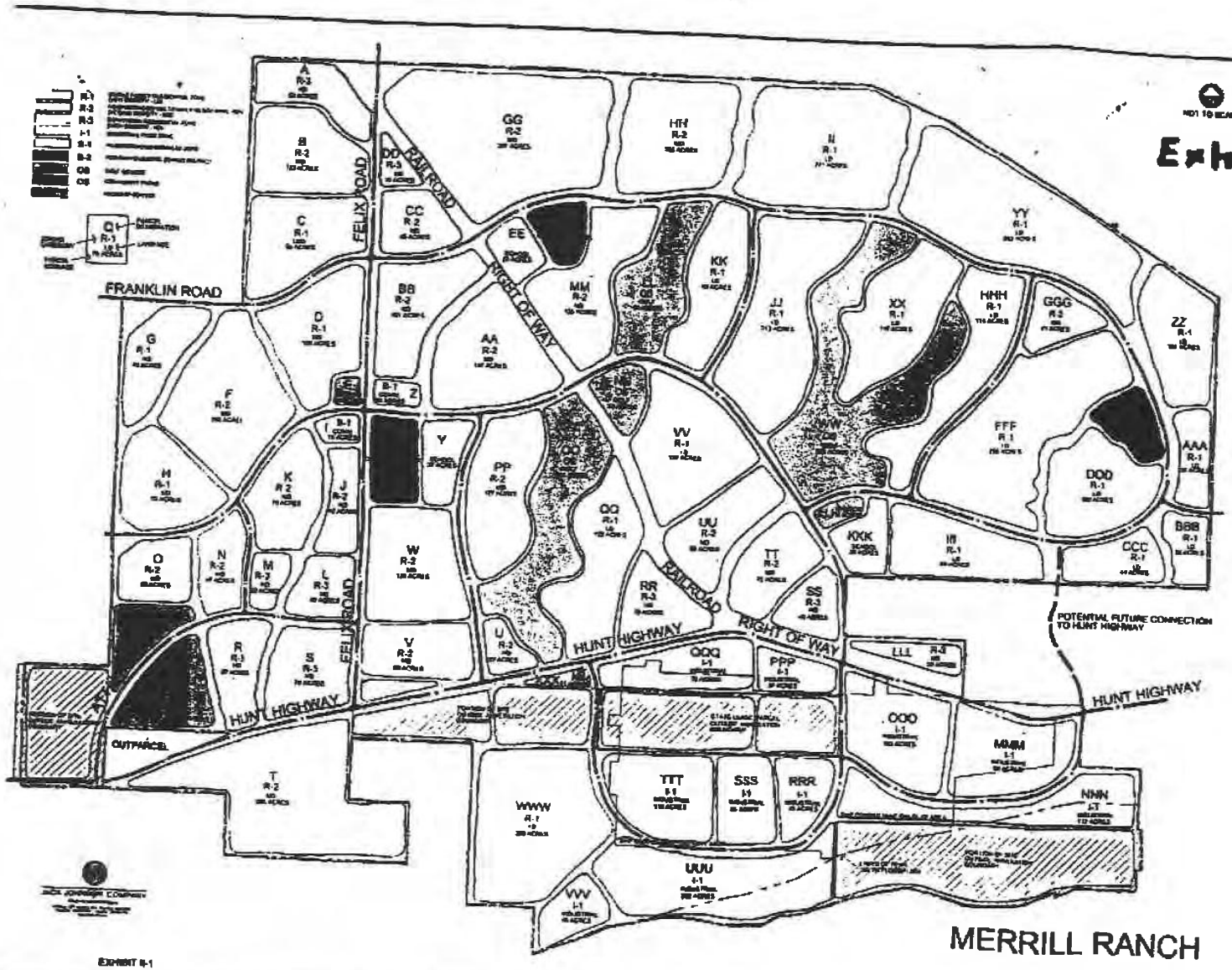
Exhibit A
FRANKLIN ROAD
FELIX ROAD
RAILROAD
RIGHT OF WAY
HUNT HIGHWAY
OUTPARCEL
POTENTIAL FUTURE CONNECTION TO HUNT HIGHWAY
MERRILL RANCH
EXHIBIT R-1

Affidavit of Harrison Merrill

Harrison Merrill, being first duly sworn upon his oath, does say:

1. Before and during 2003, Florence Copper, Inc. owned the state trust land mining lease and the adjacent private land on the south side of Hunt Highway. I served as the president of Florence Copper.

2. When Florence Copper purchased the private property there was a history of mining on both the adjacent state trust land and the private property. ASARCO, Conoco, Magma Copper and BHP, all previous owners of the property, are mining companies that did extensive testing for open pit and in-situ mining on the site. An in-situ pilot test facility was built by BHP. At the time Florence Copper purchased the private property, injection and recovery wells, buildings, and containment ponds for mining operations were still in place on the private property and the adjacent state trust land. The wells were monitored and reports made to state and federal agencies through a third party vendor, Brown & Caldwell. The wells were never closed under the legally-required process during Florence Copper's ownership of the private property.

3. When Florence Copper purchased the private property, it was aware of the mining opportunities on the property. To the best of my recollection there were no discussions or negotiations with the Town of Florence with respect to these mining rights.

4. In 2003, the Town of Florence wanted to expand its town limits to include, among other areas, the Florence Copper private land. Florence Copper (along with other related party land owners) entered into an agreement with the Town of Florence, known as a Pre-Annexation Development Agreement ("2003 PADA"). The 2003 PADA is a legal document that speaks for itself.

5. When the 2003 PADA was signed, there were no discussions between Florence Copper and the Town of Florence regarding the mining rights to the private land. The Planned Unit Development Agreement, exhibit B to the 2003 PADA that is incorporated into the PADA by reference, has language regarding the BHP Copper Overlay area, non-conforming legal uses, and copper mining.

6. In 2007, there was a change to the Merrill Ranch Master Development Plan. The zoning was changed to provide for residential and commercial development. At this time the private land adjacent to the state trust land was owned by WHM Merrill Ranch Investments, LLC, ("WHM Merrill") a related party. Regarding the 2007 rezoning, Florence Copper's and WHM Merrill's mining rights were never discussed with the Town of Florence with respect to either relinquishing or not relinquishing, or altering, or modifying these mining rights.

7. WHM Merrill nor Florence Copper ever entered into any amendment to the 2003 PADA that eliminated any rights to mining as referred to in the 2003 PADA.

8. From 2007 to 2009, WHM Merrill and Florence Copper had discussions with mining companies, including Canadian companies, who were interested in purchasing the private property and the adjacent state trust land to mine copper. WHM Merrill and Florence Copper would not have had these discussions if either believed that any agreements with the Town of Florence existed that extinguished the right to mine copper on the private property. .

9. In giving this affidavit I have not referred to or reviewed any documents and all of the information herein is given based on my best recollection of the events relating to the information contained herein.

FURTHER AFFIANT SAYETH NOT.

Dated this 12 day of January 2015.

Harrison Merrill

Subscribed and sworn before me
This 12 day of January 2015

Notary Public

SANDRA H. PRICE NOTARY PUBLIC DOUGLAS COUNTY GEORGIA EXPIRES JULY 10, 2017

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Attorneys for Florence Copper, Inc.

OSBORN MALEDON
A PROFESSIONAL ASSOCIATION ATTORNEYS AT LAW

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TOWN OF FLORENCE, an Arizona municipal corporation, Plaintiff, vs. FLORENCE COPPER, INC., fka CURIS RESOURCES (Arizona), INC., a Nevada corporation; RK MINE FINANCE TRUST 1, a trust organized under the laws of the New South Wales, Australia; and PINAL COUNTY, ARIZONA, Defendants.	No. CV2015-000325 **AFFIDAVIT OF SEAN MAGEE** Assigned to the Hon. Roger Brodman
FLORENCE COPPER, INC., fka CURIS RESOURCES (Arizona), INC., a Nevada corporation, Counterclaimant, vs. TOWN OF FLORENCE, an Arizona municipal corporation, Counterdefendant.	

Sean Magee, being first duly sworn upon his oath, does say:

1. I serve as Executive Vice President, Strategic Communication and Public Affairs for Hunter Dickinson, Inc. ("HDI") where I have been employed from October 2006 to present.

2. I took part in the business due diligence leading up to the negotiation and execution of the sale of the Florence Copper property (the "Property") to U1 Resources (a company associated with HDI, and predecessor-in-interest to Curis Resources, Inc.) during 2009. In this affidavit, I will use "Curis" and "U1 Resources" interchangeably.

3. Part of HDI's business due diligence for acquisition of a new project is assessing public, political, and stakeholder support for mineral projects, which often includes establishing contact with the local government that has jurisdiction over the location of the project. HDI believes that local governments are important long-term partners in mineral development projects, and works hard to demonstrate that HDI companies will comply with all laws and regulations established by the locality, as well as advance projects in a manner that addresses local issues and concerns, and provides benefits to local people and communities.

4. As HDI evaluates new project acquisitions, the company seeks to ensure that local governments and other stakeholders are open to and positively disposed toward responsible mineral development. While we do not expect unqualified support, we do want to be satisfied that the local government is at least willing to consider supporting mineral development projects that are designed and operated in a responsible way from a social and environmental perspective.

5. On December 14, 2009, I met with Himanshu Patel and Mark Eckhoff to discuss the potential purchase of the Property and the proposed ISCR mining project on the Property. The meeting lasted approximately two hours.

6. During that meeting, Mr. Patel and Mr. Eckhoff raised the issue of zoning and told me that the Property was zoned Residential. Mr. Patel and Mr. Eckhoff further

stated that rezoning and a General Plan Amendment would be required to conduct an ISCR operation on the Property. However, Mr. Patel and Mr. Eckhoff indicated that pre-development work and resource drilling on the Property could be supported by a Special Use Permit prior to any rezoning.

7. Because Curis was motivated to build and maintain a cooperative relationship with the Town as a long-term partner, and because we were still engaged in business-related due diligence information gathering, I did not engage in an argument with Mr. Patel and Mr. Eckhoff about their opinions on the necessity of rezoning. In light of the position expressed by the two Town staffers, it was clear that the company faced two alternatives: go along with the Town's demand for a Special Use Permit and rezoning, or face lengthy and expensive litigation against the Town. It was my expectation that Curis would not want to start out the relationship with the Town on a litigation footing.

8. Mr. Patel indicated that the Town staff would help facilitate Curis' efforts to achieve the zoning changes that he believed were necessary for the project to move forward.

9. Mr. Patel referred me to the 2003 PADA and the 2005 and 2006 amendments to the same signed by Harrison Merrill and the Town. I have no recollection of either Mr. Patel or Mr. Eckhoff mentioning a 2007 zoning ordinance.

10. Ultimately, Mr. Patel told me that, in his view, the Town was not averse to mining and that mining was a land use that would likely be supported by the Town, its residents, and elected officials so long as an environmentally sound and socially responsible project was advanced. Mr. Patel indicated that the Town would work in good faith with a responsible operator to move the project forward.

11. I communicated the representations made by the Town to others at HDI, and I did not raise any objections to the decision to proceed with both the acquisition of the land and a rezoning application.

12. At a subsequent meeting with Mr. Patel and Mr. Eckhoff, this time accompanied by some of my colleagues including Michael McPhie, then the CEO of Curis Resources, Inc., Town officials stated that another entity had recently met with them and had either purchased, or were in the process of purchasing, an adjacent parcel of land. Mr. Patel and Mr. Eckhoff provided enough information about the transaction for Curis to later determine that the adjacent buyer was Southwest Value Partners.

13. Contrary to our initial meeting in December 2009, it became clear in the spring of 2010 that Mr. Patel and Mr. Eckhoff were not as supportive as they had previously been; their statements were more guarded, less friendly, and offered no encouragement that the Town would support a responsible project. Instead, they tried to steer Curis toward initiating limited operations under a Special Use Permit.

14. Curis chose to forego the Special Use Permit the Town was encouraging in 2010 and instead decided to fulfill Town's December 2009 requests for a General Plan Amendment and rezoning of the property.

15. Curis worked with the Town and Mr. Eckhoff to conform these applications to the Town's wishes. Despite Curis' efforts, Mr. Eckhoff repeatedly recommended against Curis' applications.

16. Once it became clear that Curis' attempts to cooperate with the Town were futile because the Town was now hostile toward the project and was working with nearby landowners motivated to kill it, Curis chose to withdraw its amendment and rezoning applications and proceed with the project under the terms of the 2003 PADA.

Dated this 18th day of July, 2016.

Sean Magee

Subscribed and sworn before me this 18th day of July, 2016.

Jessica J Koloski
Notary Public

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Attorneys for Florence Copper, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TOWN OF FLORENCE, an Arizona municipal corporation, Plaintiff, vs. FLORENCE COPPER, INC., fka CURIS RESOURCES (Arizona), INC., a Nevada corporation; RK MINE FINANCE TRUST 1, a trust organized under the laws of the New South Wales, Australia; and PINAL COUNTY, ARIZONA, Defendants.	No. CV2015-000325 **AFFIDAVIT OF ROBERT SCHAFER** Assigned to the Hon. Roger Brodman
FLORENCE COPPER, INC., fka CURIS RESOURCES (Arizona), INC., a Nevada corporation, Counterclaimant, vs. TOWN OF FLORENCE, an Arizona municipal corporation, Counterdefendant.	

Robert Schafer, being first duly sworn upon his oath, does say:

1. I was the Executive Vice President of Business Development for Hunter Dickinson, Inc. ("HDI"), from February 2005 to May 2015.

2. HDI is a privately owned mineral exploration and development company incorporated under the laws of Canada.

3. Between 2006 and 2009, I participated in negotiations with Harrison Merrill and his agents regarding the sale of the Florence Copper property (the "Property") to Curis Resources (an affiliate of HDI).

4. I first learned about the site in early 2006 when attending an event at the University of Arizona as well as hearsay "on the street". I understood the property to be a former BHP in-situ mine, and that the current owner was interested in developing the land as a mine and then later as a residential development.

5. I also participated in negotiations with Harrison Merrill and his agents regarding the assignment of the mineral lease for the State Trust Lands adjacent to and surrounded by the Property, which was held by one of Mr. Merrill's companies.

6. HDI was interested in purchasing the Property for an in-situ copper recovery project (ISCR). The Property's owner, Mr. Merrill, knew that HDI wanted to purchase the Property for copper mining and negotiated the sale price of the Property based on its value as a copper mine.

7. HDI was also interested in obtaining assignment of the State Trust Lands Mineral Lease.

8. Between 2006 and 2009, Mr. Merrill and his agents consistently represented to HDI that the Property could be used for either mining or residential development, or possibly both with residential development coming after completion of mining activities.

9. Mr. Merrill and his agents further represented to HDI that mining could be conducted on the adjacent State Trust land.

10. At no time did Mr. Merrill or his agents suggest to HDI that mining was not currently allowed on the Property.

11. People's Bank foreclosed on Harrison Merrill's interest in the Property on March 10, 2009, while negotiations between HDI and Merrill were ongoing. However, Harrison Merrill continued to participate in negotiating the sale of the Property and assignment of the State Trust Land Mineral Lease to HDI after the foreclosure.

12. On December 17, 2009, HDI affiliate Curis Resources purchased the Property in the name of its subsidiary U1 Resources, Inc., (which later became Curis Resources (Arizona) and then Florence Copper, Inc.) for approximately $8.6 million. Shortly thereafter, Curis obtained assignment of the State Trust Land Mineral Lease from Mr. Merrill for an additional $3 million in cash plus other noncash consideration.

13. When it purchased the Property and assumed the State Trust Land Mineral Lease, Curis's intention to conduct ISCR mining on the Property and State Trust Land were widely known, including by People's Bank, Mr. Merrill, Bull Realty (the property sales agent for People's Bank), the Town of Florence, and the Property's neighboring landowners.

14. HDI carried out extensive due diligence in advance of the purchase transaction, including a meeting with the manager of the town of Florence. During the meeting the company's intentions to build a mine were clearly presented in a conversation with the Florence town manager. We were told that the Town would have no issues with any mining activity of the in situ leaching type that was discussed.

Dated this 19th day of July, 2016.

Robert Schafer

Subscribed and sworn before me this 19 day of JULY, 2016.

Notary Public

HALI HICKEN
Notary Public
State of Utah
Comm. No. 686464
My Comm. Expires Dec 23, 2019

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TOWN OF FLORENCE, Plaintiff, vs. FLORENCE COPPER, et.al., Defendants.	CV 2015-000325 1 CA-CV 19-0504

Phoenix, Arizona
May 29, 2019

BEFORE THE HONORABLE ROGER E. BRODMAN

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

PREPARED FOR:
COPY

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A P P E A R A N C E S

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ALSO PRESENT:

Clifford L. Mattice, Town of Florence

Rita Maguire, Florence Copper

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MS. BOWMAN: That's okay.

THE COURT: I meant Florence Copper. Is the Town's position that, in the event going down the line that there is a breach shown, Florence Copper's only available remedies are monetary damages, and specific performance is not available? Or is the Town saying, well, that is simply an issue that's going to be addressed at a later point in time?

MS. BOWMAN: If there is a breach of the contract, the remedies at law under the contract are available, which include specific performance. It specifically refers to specific performance. Now whether or not this is the type of case where specific performance can be awarded, that's a whole other issue, right, because usually it's, I bought widgets, you made widgets, I bought land, you sold land.

There's these mutuality of obligations and remedies in cases of specific performance, and I address that in my brief. It's very important, your Honor. You can't say, we're granting you specific performance of this generalized contract. What they are asking you to say is, really, make Florence Copper -- or make the Town of Florence leave us alone. That's really what they are trying to say. And that's not what specific performance is.

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 18th day of October, 2019.

/S/_____
MICHELE KALEY, RPR
CERTIFIED COURT REPORTER
CERTIFICATE NO. 50512