SUPREME COURT OF ARIZONA

TMS VENTURES LLC, Plaintiff/Appellee/ Cross-Appellant, v. TERESA C. ZACHARIAH, et al., Defendants/Appellants/ Cross-Appellees.	Arizona Supreme Court No. CV-21-0103-PR Court of Appeals Division One No. 1 CA-CV 18-0712 1 CA-CV 19-0388 (Consolidated) Maricopa County Superior Court No. CV2016-005381

DEFENDANTS/APPELLANTS/CROSS-APPELLEES' RESPONSE TO PETITION FOR REVIEW AND CROSS-PETITION

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INTRODUCTION

TMS Ventures LLC's petition for review does not bear any of the hallmarks of a case warranting this Court's review. The petition merely asks for error correction of two fact-bound issues that are unlikely to recur. Moreover, this case presents a poor vehicle for review because even resolving the legal issues in TMS's favor would not alter the outcome.

BACKGROUND

In 1959, Phoenix Title recorded the subdivision plat for Stone Canyon East, a neighborhood high on Camelback Mountain. Decision ¶ 2. The plat included San Miguel Avenue, which provided roadway access to every lot on the plat. A year later, Phoenix Title recorded an "Easement for Roadway" purporting to grant Maricopa County a roadway easement. [Tr. Ex. 1 (APP142).] The document also purported to grant the County a separately described and separately delineated easement to provide access to a separate parcel even higher up the mountain (the TMS Property).

Neither easement was on the plat. [Tr. Ex. 239 (APP157).] They were "wildcat" easements, meaning neither Maricopa County nor Paradise Valley accepted them.

When Phoenix Title sold Lots 22 and 23, it did not reference the Easement in the deeds. Decision ¶ 4. The deed to Lot 24 did reference the Easement. *Id.*

Defendants/Appellants ("the neighbors") later purchased homes in the neighborhood. The Zachariahs, Appels, and Harrisons own Lots 22, 23, and 24, respectively. *Id.*

In 2012, Plaintiff/Appellee TMS bought the TMS Property, a 3.44-acre undeveloped parcel directly above these lots. *Id.* ¶ 5. The TMS Property has no street access. The City-owned mountain preserve surrounds three sides, with Lots 22-25 on the fourth side. TMS bought the parcel knowing it had no street access. [7/30/2018 Transcript at 139:5-18 (APP165).]

TMS nevertheless demanded access through the private, locked, gated driveway over other people's private property. TMS first tried to get the government to accept the Easement, and threatened to sue "all parties including the town." [Tr. Ex. 281 at 2 (APP160).] When that failed, TMS demanded that the neighbors sign quitclaim deeds giving it an easement. When they refused, TMS sued its new neighbors. Decision ¶ 5. The neighbors counterclaimed.

Most of TMS's claims failed. But the superior court found in TMS's favor on (1) common-law dedication, and (2) implied way of necessity, and awarded TMS attorneys' fees. Both sides appealed. The court of appeals reversed as to common-law dedication.

REASONS TO DENY REVIEW

TMS raises two issues, both of which merely ask for fact-bound error correction. The petition does not raise important issues of law of statewide concern. *Cf.* ARCAP 23(d)(3).

I. The common-law dedication doctrine.

A. Common-law dedication allows a private landowner to donate land to establish public roads, public parks, and public plazas.

When the public needs land owned by private citizens, the government typically acquires the land via a market transaction or eminent domain. A private owner may also voluntarily dedicate land to public use. "Dedication is the intentional appropriation of land by the owner to some proper public use." *City of Chandler v. Ariz. Dep't of Transp.*, 224 Ariz. 400, 403, ¶ 9 (App. 2010) (citation omitted).

Dedication comes in two forms, statutory and common law. Here, for instance, Phoenix Title's 1959 plat presumably satisfied the statutory

requirements to create San Miguel Avenue. But the wildcat 1960 Easement did not. This case therefore involves common-law dedication.

B. Common-law dedication is not valid unless the public has accepted the dedication.

"An effective dedication of private land to a public use has two general components: [1] an offer by the owner of land to dedicate and [2] acceptance by the public." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 423-24, ¶ 21 (2004) (citations omitted); Decision ¶ 15. This case involves the second element (acceptance by the public). Without public acceptance, a dedication is invalid regardless of any intent to dedicate.

The public may accept a dedication in three ways. First, the government may accept, either formally or informally. *See* Decision ¶ 17; *Evans v. Blankenship*, 4 Ariz. 307, 316 (1895) (government acceptance).

Second, the "sale of lots referencing a recorded plat containing the dedication" can also satisfy the requirements, *Pleak*, 207 Ariz. at 424, ¶ 23, although this method of acceptance is not universally accepted.

Third, in certain limited circumstances, courts have also recognized public acceptance when the general public has used the dedication. *See* § III.B, below.

C. Because common-law dedication involves an irrevocable forfeiture of fundamental property rights, courts place the burden on the party seeking to establish a dedication.

Common-law dedication *forever* forfeits a fundamental property right—the right to exclude. *See Chandler*, 224 Ariz. App. at 403, ¶ 9 (perfected dedication is "irrevocable"). "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use." *City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 150 (1968) (citation omitted). "Dedications being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing. . . ." *Id.* (citation omitted).

An easement on the property does not create a presumption of public dedication. Indeed, this Court expressly rejected the position that "a private road becomes public whenever the property through which the road runs is subject to an easement." *Kadlec v. Dorsey*, 224 Ariz. 551, 553, ¶ 10 (2010) ("But no Arizona case has so held.").

II. Lot 24 does not raise an issue warranting review.

A. Granting review on this issue would accomplish nothing.

TMS's first issue concerns Lot 24. But TMS does not contend that the court of appeals got the law wrong. Instead, TMS apparently argues that

(1) the existing factual findings demonstrate acceptance; and (2) Lot 24's owners waived the issue.

Neither argument warrants review. The Decision barely mentions Lot 24 at all, and no future litigant will be concerned about the disposition of Lot 24 in particular. TMS essentially asks for error correction of the narrowest sort.

Moreover, the way the court of appeals ruled completely undermines TMS's issue. The court of appeals correctly recognized that "[t]he superior court did not find partial acceptance[, but] instead based its ruling on evidence that the Zachariahs and Appel knew about the Easement for Roadway when they purchased their lots." Decision ¶ 20. The court of appeals then held that *notice* cannot constitute acceptance. *Id.* ¶¶ 20-21.

The consequence of this holding is that reversing as to only the Zachariahs and Appels (Lots 22 and 23) invalidates the superior court's acceptance ruling as a whole, including as to Lot 24. In other words, once the court of appeals ruled that *actual* notice by the Zachariahs and Appels did not constitute acceptance, then the superior court's holding of *constructive* notice as to Lot 24 fails, too, legally and logically. Whether the Harrisons challenged the legally irrelevant factual findings about them—

that the 1962 deed to Lot 24 referenced the Easement, thereby giving them constructive notice—does not alter the legal consequence of the court of appeals' ruling that even actual notice will not do.

TMS's petition does not confront this aspect of the Decision. But the court of appeals' ruling that notice cannot substitute for public acceptance means there was no public acceptance, period. Consequently, the Court should deny review on this issue because granting review would accomplish nothing.

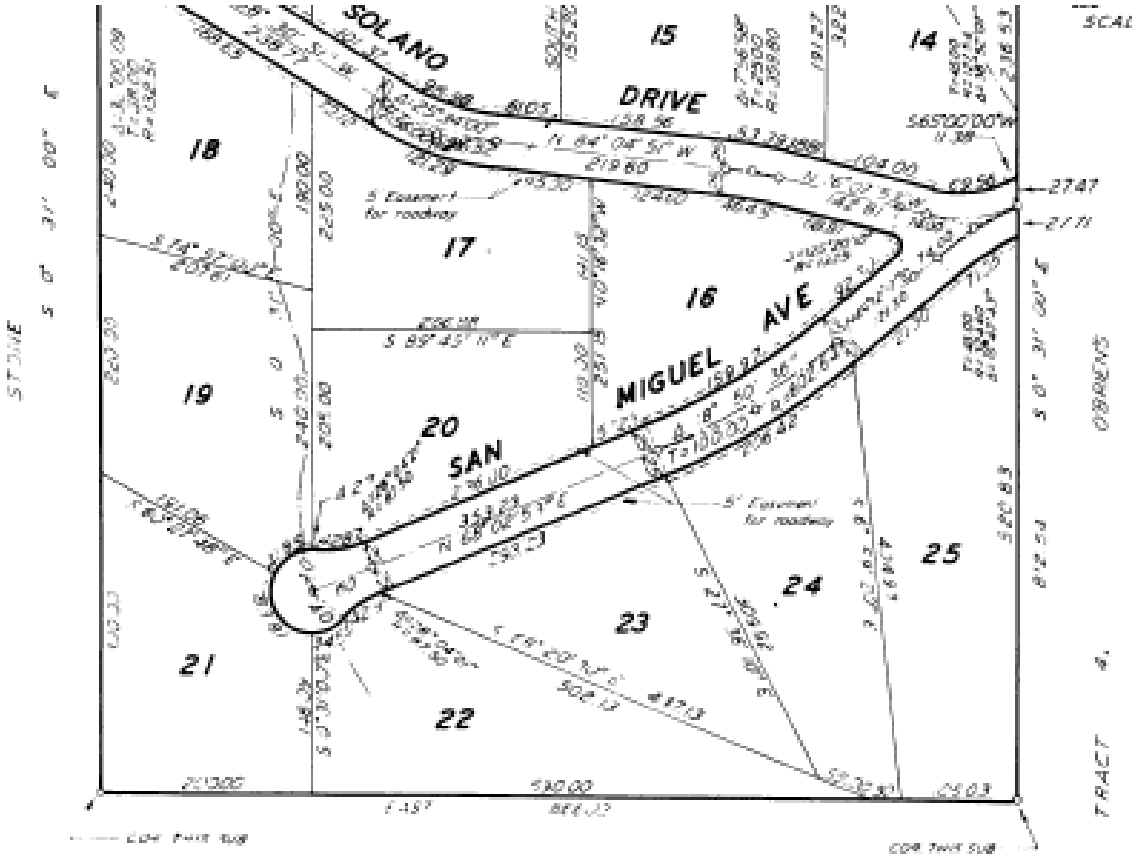
To top it off, TMS does not contend that this issue is likely to recur. The petition cites no other case where anyone has even tried to contend that a private party's constructive notice of an easement triggers public acceptance of an inchoate common-law dedication. Even if the issue were properly presented, it still would not justify review.

B. In any event, TMS's argument on Lot 24 is wrong on the law.

TMS contends (at 11-12) that the superior court's unchallenged factual findings are sufficient to find public acceptance. TMS's only basis for public acceptance for Lot 24 is that a 1963 deed in the chain of title referenced the Easement. [Tr. Ex. 4 (APP144).] But contrary to TMS's suggestion, the 1963 deed is not sufficient for *public acceptance*. TMS claims (at 11) that under

Pleak, a dedication is accepted "by deed providing notice of a document (recorded or not) establishing a road." Not so. *Pleak* held that "the sale of lots referencing a recorded *plat* containing the dedication" constituted acceptance. 207 Ariz. at 424, ¶ 23 (emphasis added). *Pleak* therefore applies only when the neighborhood *plat* contains the dedication.

This principle does not apply to this case because the recorded plat unquestionably did not contain or reference the Easement:



[Tr. Ex. 239 (APP157).] Nothing in *Pleak* suggests that a deed referencing some other instrument (not a *plat*) constitutes public acceptance. And TMS does not cite any case from anywhere that has adopted TMS's novel theory.

The *plat* requirement makes good sense because the law requires acceptance by the *public*. Common-law dedication does not create a private easement between two parties; it creates rights and obligations vis-à-vis the *general public*. The plat contains every lot in the subdivision. Every person who purchases a lot in the subdivision will purchase based on the plat. This makes the plat inherently public. To the extent this doctrine is valid at all, it requires that the *plat* contain the dedication.[1] Otherwise, developers could do what Phoenix Title did here, and create a "wildcat" easement by slipping it in after the subdivision had already been platted.

TMS also suggests (at 12) that the Harrisons waived this issue. TMS does not explain why fixing an alleged waiver would warrant this Court's attention. In any event, the Harrisons had no reason to challenge this

[1] The neighbors think the Court should overturn plat-based acceptance, and will pursue this point if the issue arises. But it is not necessary to resolve this issue because (1) this plat does not contain or reference the Easement, and (2) in this case no court relied on any plat.

method of acceptance because the superior court did not rely on it. Below, TMS claimed that the 1963 deed gave the Harrisons *constructive notice*. The superior court initially found this insufficient for acceptance: "common law easement requires acceptance, not just notice." [IR-61 at 2 (APP065).] After a rotation, a new judge reversed course and found that the 1963 deed triggered "constructive notice," and therefore acceptance. [IR-228, ¶¶ 34, 45 (APP080, APP082).]

The neighbors squarely challenged the premise that mere notice constitutes acceptance. The court of appeals reversed on this basis, holding that even "actual knowledge of the Easement for Roadway does not constitute acceptance by deed." Decision ¶ 21. The neighbors had no reason to challenge plat-based acceptance because the superior court did not rely on that acceptance method. The Court should deny review on the first issue.

III. Lots 22 and 23 do not raise an issue warranting review.

As to Lots 22 and 23, TMS arises two arguments. First, TMS contends (at 13-14) that notice constituted public acceptance. Second, TMS contends (at 14-19) that by using bits and pieces of a width-expansion easement, the public also accepted the separately recorded and separately delineated easement up to the TMS property. Neither sub-issue warrants review.

A. The court of appeals correctly found that notice cannot substitute for public acceptance.

TMS asserts that the Easement was accepted because the Appels and Zachariahs had notice (through a purchase agreement addendum and a title insurance policy).

Arizona law recognizes only three methods for acceptance: (1) government acceptance, (2) plat-based, and (3) public use. No court has recognized "notice" as a valid public-acceptance method.

TMS tries to shoehorn "notice" into the second method. But again, the plat does not contain the Easement. [Tr. Ex. 239 (APP157).] On top of that, none of the deeds for Lots 22 or 23 refer to the Easement. Decision ¶ 19. Subsequent purchasers of Lots 22 or 23 might have no notice. *Cf. Lowe v. Pima Cty.*, 217 Ariz. 642, 647, ¶ 19 (App. 2008) (requiring express reference to public dedication in chain of title "ensures that when a *subsequent* purchaser buys part or all of the property, he or she will have notice of the public dedication impacting the land" (emphasis added)).

After all, "a dedication, once perfected, is irrevocable." *Chandler*, 224 Ariz. App. at 403, ¶ 9. Establishing a public dedication would bind future purchasers of Lots 22 and 23, regardless of whether they have notice, and

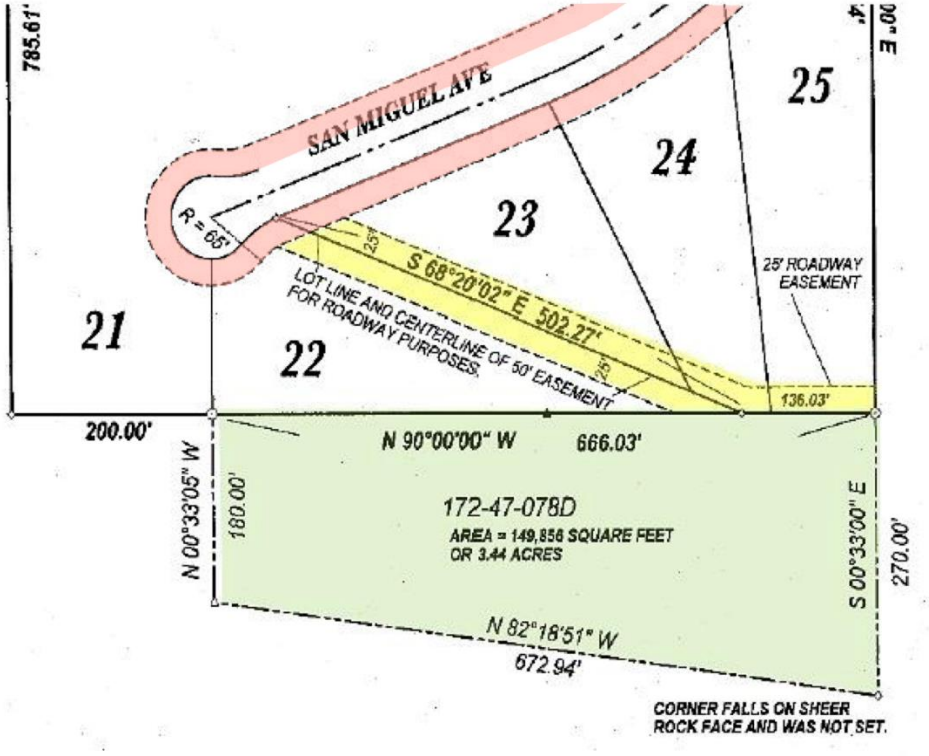
even though their chains of title include no easement. For these reasons, the court of appeals correctly held that "actual knowledge of the Easement for Roadway does not constitute acceptance by deed." Decision ¶ 21.

In its petition, TMS cites no legal authority from *anywhere* that allows notice to constitute public acceptance. TMS cites (at 14) *Federoff v. Pioneer Title & Trust Co.*, 166 Ariz. 383, 386 (1990), and *Hall v. World Sav. & Loan Ass'n*, 189 Ariz. 495, 501 (App. 1997). But neither case addresses common-law dedication. They merely discuss "notice" in other contexts. The neighbors do not dispute that the Appels and Zachariahs had notice. The question is what is the legal consequence of that notice? For common-law dedication purposes, the answer is *none*. This issue presents no conflicting decisions, no issue of statewide importance, and no recurring issue that warrants the Court's review.

B. The court of appeals correctly ruled that private use of a driveway is not acceptance by the general public.

The court of appeals considered all the evidence of use of the Easement. As shown in the image below (using TMS's version), the evidence falls into two categories: (1) the neighbors' use of their own locked, gated, private driveway (the yellow area below), and (2) use of bits and pieces of a

separately described and separately delineated easement to expand the width of a public road (the pink area below).



[IR-150 at 4 (APP138) (pink highlighting added).]

As to the first category, the court of appeals correctly observed that the use must be "actual use by the *general public*," and therefore "use by a 'limited class' of the public generally is not enough." Decision ¶ 22 (emphasis added). Following longstanding precedent, the court of appeals held that "We see no reasonable interpretation of the law under which the use of a shared driveway to access one's own property would constitute general public use." *Id.* ¶ 23. TMS does not appear to contest this holding.

As to the second category, the question is whether using bits and pieces of the width-expansion easement constitutes public acceptance of a separately described and separately delineated easement through the neighbors' locked, gated, private driveway. The Decision surveyed law from multiple states and secondary sources. It identified two approaches.

Under one approach, "several courts have held that acceptance by use applies to those portions of the proposed dedication where there has been established public use." *Id.* ¶ 25. The neighbors unquestionably prevail if this standard applies, and TMS does not argue otherwise.

Under the other approach, "use of only part of the dedicated land can constitute acceptance of an entire dedication but only if the use evinces a purpose to accept the ***entire*** dedication." *Id.* (emphasis in original). The court of appeals did not need to decide which approach applies in Arizona because even under the second approach, "no such purpose is evident in this record." *Id.* ¶ 26. TMS does not acknowledge this limitation in the doctrine, nor does the petition identify any evidence from which any court could find that by using the paved public road, the public also intended to accept the entire dedication, including the area behind the locked, gated, private driveway.

Thus, under either of the accepted approaches to the question, TMS's claim fails and TMS has not challenged sufficient holdings to prevail. This case is thus a bad vehicle for review.

Instead, TMS implicitly argues that even without any evidence of intent to accept the entire dedication, any public use of any portion of an easement automatically constitutes public acceptance of a separately defined and separately delineated easement. But TMS does not cite a single case or other authority from anywhere in the country that has adopted such a rule.

TMS argues (at 15-16) that Arizona law is different because the government does not have an obligation to maintain this type of road. But Arizona courts have never deviated from the longstanding and universal rule that an offer to dedicate is invalid without public acceptance, nor should it.

TMS notes (at 16) that the property has not been developed and is high up on Camelback Mountain, suggesting that public use is unlikely. If public use is unlikely, a landowner has other options, such as government acceptance (which TMS tried and failed). A dedication cannot be accepted *via public use* if the public has not used it.

TMS also cites several cases (at 16-18). As the neighbors explained below, none of them support the missing legal proposition: that public use of bits and pieces of an easement constitutes public acceptance of the whole easement, let alone a separately defined and separately delineated easement. (*See* Court of Appeals Reply Br. at 33-36.)

FEES

As explained in the cross-petition, the neighbors do not believe these claims are fee-eligible under A.R.S. § 12-1103. If the Court disagrees, however, then the neighbors request fees under § 12-1103 for the petition and cross-petition.

CONCLUSION

The Court should deny TMS's petition.

CROSS-PETITION

CROSS-PETITION INTRODUCTION

A.R.S. § 12-1103 allows a court to award attorneys' fees to a successful quiet-title plaintiff, but only if the defendant refuses to execute a quitclaim deed transferring the interest in land the plaintiff ultimately obtains via the quiet-title claim. Despite the Legislature specifying the very narrow circumstances under which § 12-1103 applies, the lower courts have improperly expanded the statute to allow general fee-shifting in cases involving property interests. The Court should grant review to clarify the scope of this important statute—a statutory interpretation question of statewide concern.

CROSS-PETITION ISSUES

1. Is A.R.S. § 12-1103 limited to quiet-title claims as its text, structure, and purpose all indicate?

2. Does A.R.S. § 12-1103 require that the plaintiff obtain the property interest proffered in the quitclaim deed as its text and purpose indicate?

CROSS-PETITION BACKGROUND

This case began when TMS knowingly bought land without any road access. [7/30/2018 Transcript at 139:5-18 (APP165).] TMS then hired lawyers to send letters to its four new neighbors demanding that they execute and return quitclaims deed giving TMS a permanent easement. [IR-24 (APP109).]

When the neighbors refused, TMS sued, advancing six claims. Two claims were quiet-title claims to which A.R.S. § 12-1103(B) might apply. [IR-22 (APP092).] But TMS abandoned those claims. [IR-207 at 3 (APP070).] TMS then prevailed on two other non-quiet title claims (an implied way of necessity and common-law dedication).

Despite abandoning its quiet-title claims, TMS sought attorneys' fees under A.R.S. § 12-1103(B) and the neighbors objected. [IR-249 at 2; IR-267 at 2-5.] Without explanation, the superior court awarded fees under § 12-1103. [IR-275 at 2 (APP089).]

The neighbors appealed, challenging the common-law dedication ruling and fee award. The court of appeals reversed as to common-law dedication, but affirmed as to fees. Decision ¶ 28, 31.

REASONS TO GRANT REVIEW

I. The Court should grant review to clarify the scope of a frequently cited statute.

The proper interpretation of A.R.S. § 12-1103 is a pure legal issue of statewide importance. This statute drives litigation decisions in one of Arizona's key resources (real property). Litigants frequently invoke § 12-1103—Westlaw reports over 880 citing references. Yet despite more than 150 appellate decisions citing § 12-1103, the appellate courts have never fully clarified the statute's scope.

Nor has this Court. Indeed, it has interpreted the statute's scope only once, in a three-sentence footnote where the Court rejected a fee request in a dedication case:

> The Pleaks seek attorneys' fees pursuant to A.R.S. § 12–1103(B). This statute, which allows for recovery of costs in actions to quiet title if the defendant refuses upon request to execute a quit claim deed to the plaintiff, does not apply to this case. As noted above, a common law dedication of a roadway easement to public use leaves fee title to the roadway in the landowner, and Entrada therefore properly refused in this case to issue a quit claim deed to the Pleaks.

Pleak v. Entrada Prop. Owners' Ass'n, 207 Ariz. 418, 425 n.6 (2004). Although *Pleak* provided *some* guidance, it left several major questions unresolved (i.e., the questions presented in this Cross-Petition).

Because our courts have interpreted so few aspects of this frequently invoked statute, it is being applied inconsistently, with outcomes that no one would predict from the relevant text. Moreover, the stakes are high. Real-property disputes get heavily litigated, meaning the attorneys' fees at issue often dwarf the actual stakes of the case.

This Court should grant review to clarify A.R.S. § 12-1103. *See, e.g.*, *State v. Waggoner*, 144 Ariz. 237, 238 (1985) ("We granted review to clarify the meaning of the statute at issue."); *May v. Ellis*, 208 Ariz. 229, 230, ¶ 6 (2004) ("We granted review of this purely legal question because the issue is one of first impression and is of statewide importance.").

II. The lower courts have misinterpreted A.R.S. § 12-1103.

Since *Pleak*, the court of appeals has cited § 12-1103 more than a hundred times, yet never precisely explained its scope. Perhaps for this reason, courts have continued to misapply the statute and issue conflicting decisions. In so doing, the courts have improperly expanded the reach of § 12-1103 well beyond what the Legislature intended.

A. The lower courts have ignored the statutory requirement of a quiet-title action.

1. The text, structure, and purpose all indicate that § 12-1103(B) applies only to quiet-title claims.

Arizona has a specific statutory scheme for quiet-title actions. Title 12, Chapter 8, Article 1 specifies the requirements and procedures for such quiet-title actions. The text, structure, and purpose of A.R.S. § 12-1103(B) all show that it applies only to the quiet-title claims brought under Article 1.

"We start with the statutory language." *Stambaugh v. Killian*, 242 Ariz. 508, 510, ¶ 10 (2017). The fee-shifting subsection consists of a single sentence, starting with "the action to quiet title" and ending with the fee-shifting provision:

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

A.R.S. § 12-1103(B) (emphases added).[2]

Under any reasonable interpretation, the fee-shifting provision at the end of the sentence necessarily refers to the "quiet title" action at the beginning of the same sentence. It is, after all, a single sentence discussing only a single claim.

The title of Article 1—"Action to Quiet Title"—likewise confirms that Article 1 (including § 12-1103) concerns quiet-title claims, not other types of claims involving real property like those covered by other articles in Chapter 8 (e.g., lis pendens (Article 5), private way of necessity (Article 6), etc.). *See State v. Super. Ct.*, 128 Ariz. 535, 537 (1981) (Although titles are not part of the law, "we can nevertheless refer to titles and captions in the legislative bills for indications of legislative intent.").

The statute's structure and surrounding statutes likewise show that it applies only to quiet-title claims. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019) ("We interpret statutory language in view of the entire text,

[2] This petition uses "claim" and "action" interchangeably. As with other fee-shifting statutes that use the word "action" (e.g., A.R.S. § 12-341.01), the statute does not justify awarding fees on claims that are not otherwise fee-eligible merely because they are included in the same lawsuit.

considering the context and related statutes on the same subject.") (Quoting Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 167 (2012) (a statute should be read "to consider the entire text, in view of its structure and of the physical and logical relation of its many parts")). A.R.S. § 12-1101 defines the parties to "quiet title" actions. A.R.S. § 12-1102 specifies the required allegations for quiet-title actions. A.R.S. § 12-1104 concerns specific types of allegations in "quiet title" actions. Section 12-1103, nestled in between those sections, likewise relates only to quiet-title claims.

The purpose of the statute also confirms this. As this Court explained, the statute "allows for recovery of costs *in actions to quiet title* if the defendant refuses upon request to execute a quit claim deed to the plaintiff . . . ." *Pleak*, 207 Ariz. at 425 n.6 (emphasis added). This purpose makes sense because the plaintiff, if successful, will end up with the very thing sought via quitclaim deed—quiet title. It does not make sense for other types of claims, where the plaintiff could seek other forms of relief (e.g., declaratory judgment).

2. The lower courts have repeatedly ignored that § 12-1103 requires a quiet-title claim.

The lower courts have nevertheless repeatedly awarded fees on non-quiet-title claims. Here, for example, TMS did not prevail on any quiet title claims. TMS initially asserted two quiet-title claims, but later abandoned them. [IR-22 at 7-10 (Count I, Count II) (APP098-APP101); IR-207 at 3 (APP070) ("Plaintiff has abandoned its claims of express easement and implied easement alleged in Counts 1 and 2 . . . .").] Although TMS presumably had its own strategic reasons for abandoning its quiet-title claims, doing so took this case out of the realm of A.R.S. § 12-1103.

TMS ultimately obtained only a declaratory judgment concerning an implied way of necessity. As the plaintiff, TMS could choose which types of claims to pursue. For the implied way, *and unlike other claims in the case*, TMS deliberately chose not to assert a quiet-title claim under Title 12, Chapter 8, Article 1. [IR-22 at 14 (Count IV) (APP105).] TMS and the superior court consistently maintained the distinction between the quiet-title claims (which TMS abandoned) versus the non-quiet-title claims. [*See* IR-150 at 2 (APP136) (joint pretrial statement) (distinguishing between types of claims); IR-207

at 1 (APP068) (summary judgment ruling) (summarizing and characterizing claims).]

Moreover, in connection with the implied way of necessity, TMS did not seek the type of relief required for the statutory quiet-title claim. A quiet-title claim brought under Article 1 must "Pray for establishment of plaintiff's estate and that defendant be barred and *forever estopped* from having or claiming any right or title to the premises adverse to plaintiff." A.R.S. § 12-1102 (emphasis added). TMS did not do so, nor could it. With a private way of necessity, the neighbors are not "forever estopped" from anything—the private way of necessity is "temporary because [its] existence is dependent on the necessity that created [it]." 28A C.J.S. Easements § 161.

Instead of analyzing which claims the plaintiff brought, as the statute requires, the court of appeals instead focused on whether TMS *could have* asserted a quiet-title claim. The court relied on the fact that quiet-title claims "may be brought by anyone having or claiming an interest in the subject property," and that "[e]very interest in the title to real property, whether legal or equitable, may be determined in a quiet title action." Decision ¶ 31 (citations, quotation marks, and alterations omitted). But these statements are irrelevant under § 12-1103.

The question is not whether a litigant *could have* asserted a quiet-title claim, but rather whether the litigant *in fact* asserted and prevailed on such a claim. Here, TMS's ability to seek fees under § 12-1103 evaporated when TMS abandoned the two quiet-title claims. Regardless of whether it *could have* sought an implied way of necessity via a quiet-title claim, TMS did not do so.

The court of appeals also cited *Dabrowski v. Bartlett*, 246 Ariz. 504, 517, ¶ 40 (App. 2019), for the proposition that one may recover fees by proving the *absence* of an easement. Decision ¶ 31. But the plaintiffs in *Dabrowski* actually "sued for quiet title" and prevailed on that claim. 246 Ariz. at 517, ¶ 40. Proving the *absence* of an easement is a classic quiet-title action because the result actually quiets the title. Here, by contrast TMS did not succeed on a quiet-title claim and did not obtain quiet title, which should have ended the inquiry.

By instead focusing on whether TMS could have asserted a quiet-title claim, the court of appeals improperly expanded § 12-1103. Under the court of appeals' holding, § 12-1103 shifts attorneys' fees whenever a plaintiff *could have* filed a quiet-title claim, regardless of whether the litigant in fact

followed the requirements of the statutory cause of action under Title 12, Chapter 8, Article 1.

This is not the first time lower courts have ignored the Legislature's requirement that the statute apply only to quiet-title claims. In *Hammon v. Unit II Phase 2 Funding LLC*, 1 CA-CV 19-0190, 2019 WL 6918492, ¶ 19 (Ariz. App. Dec. 19, 2019), the court of appeals awarded fees to a defendant with no quiet-title claims. Likewise, in *Park v. Wells Fargo Bank NA*, CV-20-00746-PHX-SMB, 2020 WL 7059560, at *3 (D. Ariz. Dec. 2, 2020), the court awarded fees to a defendant bank which had asserted no apparent quiet-title claims against the plaintiff debtor.

In addition, in *Sunburst Minerals, LLC v. Emerald Copper Corp.*, 3:15-CV-8274 JWS, 2019 WL 11704045, at *1 (D. Ariz. July 8, 2019), *aff'd*, 818 F. App'x 604 (9th Cir. 2020), the court awarded fees even though "neither party [had] strictly speaking any legal title" at all, but rather the claims concerned only which party had superior *possessory* rights from unpatented mining rights. Although the lawsuit was (incorrectly) filed as a quiet-title action, the court held that "the legal standards of a quiet title action did not apply," but nevertheless awarded fees. *Id.*

In these cases, like here, the courts treated § 12-1103 as a general fee-shifting statute for disputes about real property. The Legislature never intended this interpretation. The Court should grant review.

B. The lower courts have ignored the statutory requirement of obtaining title equivalent to the proffered quitclaim deed.

1. The statute is designed to incentivize people to sign and return quitclaim deeds.

Lower courts have also ignored the significance of the required quitclaim deed under the statute. A.R.S. § 12-1103(B) has a simple purpose: to incentivize resolving title disputes without judicial intervention by encouraging people to sign over property to which a claimant is entitled. Under the statute, the plaintiff may tender $5.00 and request that someone execute a quitclaim deed. "[I]f such person refuses or neglects to comply," the plaintiff may sue and recover attorneys' fees.

But a property owner has no obligation to execute a deed to which the plaintiff is not entitled. The one time this Court discussed the statute, the Court suggested in dicta that § 12-1103 does not apply if a property owner "properly refused . . . to issue a quit claim deed" to the plaintiff. *Pleak*, 207 Ariz. at 425 n.6.

Limiting § 12-1103 to cases where the plaintiff secures the property interest sought in the proffered deed makes perfect sense. If the plaintiff secures something different, then the property owner was justified in refusing to sign the deed. It would be absurd to penalize someone who *properly* refuses to give something up to which the claimant is not entitled. Awarding fees against the property owner under those circumstances would undermine Arizona's strong protection for property rights and disregard the Legislature's carefully constructed statute.

2. The lower courts have repeatedly awarded fees to parties who did not obtain what they demanded in their deeds.

Nevertheless, the lower courts have not limited fee awards to cases in which the plaintiff obtains the result demanded in the quitclaim deed.

Here, the neighbors justifiably refused to sign the proffered deeds because they sought more than TMS was entitled to. The quitclaim deed demanded a *permanent* express easement. [IR-24 (APP109).] But TMS ended up with only a temporary implied way of necessity. 28A C.J.S. Easements § 161 (an implied way is "temporary because [its] existence is dependent on the necessity that created [it].").

TMS also did not obtain the full geographic scope it demanded. TMS demanded a 25-foot-wide easement across all four lots. The implied way of necessity TMS obtained, however, excludes all of Lot 25 and part of the demanded area of Lot 24. [IR-228 at 2-4, 14-15 (APP074-76, APP086-87).] Once again, had the neighbors signed TMS's proffered deeds, they would have given TMS more than it was entitled to. Because they properly refused to execute the proffered quitclaim deeds, § 12-1103(B) does not apply.

The lower courts have repeatedly misinterpreted the statute on this point. In *Jones v. Burk*, 164 Ariz. 595, 597-98 (App. 1990), the court of appeals affirmed a fee award even though, like here, the plaintiff obtained a judgment for less land than demanded in the quitclaim deed. The court reasoned by "logic" (not statutory text) that "[c]laiming more than one is entitled to would be counterproductive because it would be tantamount to inviting a lawsuit." *Id.* But affirming fees in this circumstance creates incentives to do just that because fee-shifting under § 12-1103(B) operates unilaterally. The landowner has no legal obligation to sign over more than the plaintiff was entitled to, yet faces fees by not relinquishing. The court of appeals also explained that the defendant could quitclaim a lesser interest. *Id.* But the court of appeals just made that up. Section 12-1103(B) places the

burden on the plaintiff, not the defendant. That makes sense, given the unusually lopsided operation of the statute.

The court of appeals did the same thing in *State v. Robinson Cattle*, LLC, 2 CA-CV 2010-0222, 2011 WL 2695774, ¶¶ 27-28 (App. June 15, 2011), relying on *Jones* to justify affirming a fee award when the plaintiff obtained less than what it demanded. And in *Park v. Wells Fargo Bank NA*, CV-20-00746-PHX-SMB, 2020 WL 7059560, at *3 (D. Ariz. Dec. 2, 2020), the court said nothing about the statutory quitclaim requirement but nevertheless awarded fees to the party without an apparent quiet-title claim.

The quitclaim-deed requirement serves an important purpose. It encourages a plaintiff not to demand more than it is entitled to, and encourages a defendant to hand over the interest to which the claimant is entitled. But if the claimant asks for more than it is entitled to and the property owner therefore properly refuses to sign the quitclaim deed, that property owner should not be penalized by having to pay his adversary's fees. *Jones*, *Robinson Cattle*, *Park*, and now this case violate that core statutory principle and create perverse incentives.

III. This one-way fee-shifting statute requires particular care because it can create dangerous unintended consequences.

Under the American rule for attorneys' fees, each side bears its own fees. In A.R.S. § 12-1103(B), the Legislature departed from that rule in a particularly strange way. It works unilaterally, allowing fee awards to plaintiffs claiming an interest in property but not to defendants who successfully defend their property rights. *See* A.R.S. § 12-1103 ("the court may allow plaintiff . . . an attorney's fee"). Unilateral fee-shifting provisions are extraordinarily rare in disputes between private parties and should be narrowly construed to avoid weaponizing them.

Unfortunately, attorneys' fees often dwarf the amount in controversy in a lawsuit, particularly in property disputes. Here, for example, TMS bought the property for $725,000. [Ex. 118 at 1, § 1c (APP145).] Yet it spent $653,380.25 in fees through the superior court proceedings, and more on appeal. [IR-249.] TMS has surely spent more on fees than it did to acquire the land in the first place.

Moreover, the possibility of recovering attorneys' fees in general increases the expected expenditures on litigation. *See* John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. Legal Stud. 157,

174 (1989). This effect on litigation decisions is particularly pronounced with a fee-shifting provision such as § 12-1103 because it operates unilaterally. This gives a plaintiff strong incentives to spend more on litigation because the plaintiff may be able to recover fees yet faces no risk of having to pay the defendant's fees. *See* Ronald Braeutigam, et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 L. & Contemp. Probs. 173, 180 (1984) (plaintiff-only fee-shifting statutes "encourage plaintiffs to spend more on their cases"). The statute should therefore be construed narrowly and confined to the limited circumstances specified by the Legislature.

By failing to do this, the lower courts have invited mischief by instead treating § 12-1103(B) as a general fee-shifting provision for real-property disputes. Whereas the Legislature intended the statute to incentivize someone to sign the tendered quitclaim deed if the person making the claim is entitled to it, the lower courts have interpreted the statute in a way that forces property owners to consider signing over rights to which the claimant is not entitled, under the threat of fees. That weaponization of the statute makes no sense.

Indeed, no one reading the statute would anticipate that absurd result. *Cf. United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("[S]tatutes must give

people 'of common intelligence' fair notice of what the law demands of them."). Here, for example, TMS asked for more than it was entitled to, and the neighbors properly rejected that request. Although TMS then claimed fees under § 12-1103 in the complaint, it later abandoned all quiet-title claims long before trial. The neighbors should have been able to rely on this development to safely conclude that no remaining claims were fee-eligible. But the lower courts' confusion on this statute merely sowed uncertainty.

The Court should grant review to ensure that lower courts apply the law as written, rather than treating § 12-1103(B) as a general-purpose fee-shifting statute.

CROSS-PETITION CONCLUSION

This case exemplifies what has gone wrong with A.R.S. § 12-1103(B) and why the Court should grant review. TMS tendered a quitclaim deed demanding the neighbors give it property rights to which it was not entitled. The neighbors said no, and successfully fended off the bulk of TMS's claims, leaving it with far less than it demanded. Under any sensical view, the neighbors prevailed yet now must pay TMS's fees even though they had no obligation to comply with TMS's demands. The Court should grant review and clarify that A.R.S. § 12-1103(B) does not permit such absurd results.

RESPECTFULLY SUBMITTED this 16th day of July, 2021.

OSBORN MALEDON, P.A.

By /s/ Eric M. Fraser

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128.	MOTION IN LIMINE TO EXCLUDE TERRENCE MANNING AS AN EXPERT IN LEGAL ACCESS TRIAL	Jun. 7, 2018
129.	MOTION IN LIMINE TO EXCLUDE DAVID DEATHERAGE AS EXPERT IN LEGAL ACCESS TRIAL	Jun. 7, 2018
130.	MOTION IN LIMINE TO EXCLUDE STEVEN D NOWACZYK AS EXPERT IN LEGAL ACCESS TRIAL	Jun. 7, 2018
131.	MOTION IN LIMINE TO EXCLUDE EVIDENCE OF ANTICIPATORY NUISANCE IN LEGAL ACCESS TRIAL	Jun. 7, 2018

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No.	Document Name	Filed Date
132.	EMERGENCY MOTION TO STRIKE PLAINTIFF'S MAY 24, 2018 MOTION FOR PARTIAL SUMMARY JUDGMENT FILED IN VIOLATION OF THIS COURT'S SCHEDULING ORDER AND UNAUTHORIZED BY ARIZ.R.CIV.P. RULE 56(B)(3)	Jun. 8, 2018
133.	PLAINTIFF'S RESPONSE TO DEFENDANTS' EMERGENCY MOTION TO STRIKE PLAINTIFF'S MAY 24, 2018 MOTION FOR PARTIAL SUMMARY JUDGMENT	Jun. 8, 2018
134.	**ME: RULING [06/08/2018]**	**Jun. 11, 2018**
135.	**ME: CASE STATUS MINUTE ENTRY [06/08/2018]**	**Jun. 11, 2018**
136.	NOTICE OF FIRST EXTENSION OF TIME TO FILE REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS/ COUNTERCLAIMANTS MOTION FOR PARTIAL SUMMARY JUDGMENT	Jun. 13, 2018
137.	REPLY TO PLAINTIFF'S SEPARATE CONTROVERTING STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	Jun. 18, 2018
138.	DEFENDANTS/ COUNTERCLAIMANTS REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT	Jun. 18, 2018
139.	(PART 1 OF 2) ADDITIONAL STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS'/ COUNTERCLAIMANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT	Jun. 18, 2018
140.	(PART 2 OF 2) ADDITIONAL STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS'/ COUNTERCLAIMANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT	Jun. 18, 2018
141.	STIPULATION REGARDING PRE-TRIAL DEADLINES	Jun. 21, 2018
142.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE DAVID DEATHERAGE AS AN EXPERT IN LEGAL ACCESS TRIAL	Jun. 21, 2018
143.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE TERRENCE MANNING AS AN EXPERT IN LEGAL ACCESS TRIAL	Jun. 21, 2018
144.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE STEVEN D. NOWACZYK AS AN EXPERT IN LEGAL ACCESS TRIAL	Jun. 21, 2018
145.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE EVIDENCE OF ANTICIPATORY NUISANCE IN LEGAL ACCESS TRIAL	Jun. 21, 2018
146.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE LOUIS SCHMITT AS AN EXPERT IN LEGAL ACCESS TRIAL	Jun. 21, 2018

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147.	NOTICE OF FIRST EXTENSION OF TIME TO FILE REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: NUISANCE COUNTERCLAIM	Jun. 25, 2018
148.	STIPULATED FACTS FOR TRIAL	Jun. 25, 2018
149.	DEFENDANTS'/ COUNTERCLAIMANTS' PROPOSED FINDINGS OF FACT	Jun. 25, 2018
150.	(PART 1 OF 4) JOINT PRETRIAL STATEMENT	Jun. 25, 2018
151.	(PART 2 OF 4) JOINT PRETRIAL STATEMENT	Jun. 25, 2018
152.	(PART 3 OF 4) JOINT PRETRIAL STATEMENT	Jun. 25, 2018
153.	(PART 4 OF 4) JOINT PRETRIAL STATEMENT	Jun. 25, 2018
154.	DEFENDANTS'/ COUNTERCLAIMANTS' PROPOSED CONCLUSIONS OF LAW	Jun. 25, 2018
155.	PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	Jun. 25, 2018
156.	ORDER	Jun. 27, 2018
157.	DEFENDANTS' / COUNTERCLAIMANTS' MOTION FOR ADDITIONAL TRIAL TIME	Jun. 27, 2018
158.	DEFENDANTS' / COUNTERCLAIMANTS' MOTION FOR ADDITIONAL TRIAL TIME	Jun. 27, 2018
159.	**ME: PRETRIAL CONFERENCE SET [06/28/2018]**	**Jul. 2, 2018**
160.	ORIGINAL DEPOSITION OF ANDREW JASON PLATT TAKEN ON 04/03/2018	Jul. 3, 2018
161.	NOTICE OF SECOND EXTENSION OF TIME TO FILE REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: NUISANCE COUNTERCLAIM	Jul. 6, 2018
162.	MOTION FOR COURT TO INSPECT THE PREMISES	Jul. 6, 2018
163.	NOTICE OF THIRD EXTENSION OF TIME TO FILE REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: NUISANCE COUNTERCLAIM	Jul. 9, 2018
164.	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: NUISANCE COUNTERCLAIM	Jul. 10, 2018

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165.	STATEMENT OF FACTS IN SUPPORT OF PLAINTIFF'S REPLY MOTION FOR SUMMARY JUDGMENT RE: NUISANCE AND RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF FACTS	Jul. 10, 2018
166.	DEFENDANTS' / COUNTERCLAIMANTS' REQUEST TO SCHEDULE COURT REPORTER FOR TRIAL	Jul. 11, 2018
167.	MOTION IN LIMINE TO EXCLUDE NEWSPAPER ARTICLES	Jul. 17, 2018
168.	SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE TERRENCE MANNING AS AN EXPERT IN LEGAL ACCESS TRIAL	Jul. 17, 2018
169.	MOTION IN LIMINE TO EXCLUDE EXPERTS STEVEN NOWACZYK AND/OR DAVID DEATHERAGE IN LEGAL ACCESS TRIAL	Jul. 17, 2018
170.	MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 18, 2018
171.	RESPONSE TO MOTION FOR COURT TO INSPECT THE PREMISES	Jul. 18, 2018
172.	(PART 1 OF 2) RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 19, 2018
173.	(PART 2 OF 2) RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 19, 2018
174.	SUPPLEMENTAL RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE FRED FLEET AS EXPERT WITNESS IN LEGAL ACCESS TRIAL	Jul. 20, 2018
175.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE NEWSPAPER ARTICLES	Jul. 20, 2018
176.	RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE EXPERTS STEVEN D. NOWACZYK AND/OR DAVID DEATHERAGE IN LEGAL ACCESS TRIAL	Jul. 20, 2018
177.	RESPONSE IN OPPOSITION TO SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE TERRENCE MANNING AS AN EXPERT IN LEGAL ACCESS TRIAL	Jul. 20, 2018
178.	**ME: MATTER UNDER ADVISEMENT [07/19/2018]**	**Jul. 25, 2018**
179.	**ME: HEARING [07/23/2018]**	**Jul. 25, 2018**

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180.	DEFENDANTS' DEPOSITION DESIGNATION REGARDING JEFFRY D. VANN	Jul. 25, 2018
181.	PLAINTIFF'S DEPOSITION DESIGNATIONS TO BE USED AT TRIAL	Jul. 27, 2018
182.	(PART 1 OF 2) NOTICE OF FILING AMENDED TRIAL EXHIBIT LIST AND WITNESS LIST	Jul. 27, 2018
183.	(PART 2 OF 2) NOTICE OF FILING AMENDED TRIAL EXHIBIT LIST AND WITNESS LIST	Jul. 27, 2018
184.	PLAINTIFF'S BENCH MEMORANDUM RE: LEGAL ACCESS	Jul. 30, 2018
185.	ORIGINAL DEPOSITION OF JEFFRY D. VANN TAKEN ON 04/05/2018	Jul. 30, 2018
186.	ORIGINAL DEPOSITION OF JEFFRY D. VANN TAKEN ON 04/05/2018	Jul. 30, 2018
187.	ORIGINAL DEPOSITION OF J. DAVID DEATHERAGE, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
188.	ORIGINAL DEPOSITION OF J. DAVID DEATHERAGE, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
189.	ORIGINAL DEPOSITION OF FRED EVERETT FLEET, P.E., F. ASCE TAKEN ON 04/20/2018	Jul. 30, 2018
190.	ORIGINAL DEPOSITION OF FRED EVERETT FLEET, P.E., F. ASCE TAKEN ON 04/20/2018	Jul. 30, 2018
191.	ORIGINAL DEPOSITION OF TERRENCE MICHAEL SCALI TAKEN ON 03/09/2018	Jul. 30, 2018
192.	ORIGINAL DEPOSITION OF TERRENCE MICHAEL SCALI TAKEN ON 03/09/2018	Jul. 30, 2018
193.	ORIGINAL DEPOSITION OF PETER JOSEPH MARTORI TAKEN ON 03/07/2018	Jul. 30, 2018
194.	ORIGINAL DEPOSITION OF PETER JOSEPH MARTORI TAKEN ON 03/07/2018	Jul. 30, 2018
195.	ORIGINAL DEPOSITION OF STEVEN D. NOWACZYK TAKEN ON 04/17/2018	Jul. 30, 2018
196.	ORIGINAL DEPOSITION OF JOHN T. LOTARDO, J.D. TAKEN ON 03/06/2018	Jul. 30, 2018

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197.	ORIGINAL DEPOSITION OF TERENCE A. MANNING, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
198.	ORIGINAL DEPOSITION OF TERENCE A. MANNING, P.E. TAKEN ON 04/19/2018	Jul. 30, 2018
199.	ORIGINAL DEPOSITION OF ANDREW JASON PLATT TAKEN ON 04/03/2018	Jul. 30, 2018
200.	ORIGINAL DEPOSITION OF PAUL GERALD JOHNSON, MAI, CRE TAKEN ON 03/15/2018	Jul. 30, 2018
201.	ORIGINAL DEPOSITION OF GERRY LEE JONES TAKEN ON 04/09/2018	Jul. 30, 2018
202.	ORIGINAL DEPOSITION OF JOHN KENNEDY GRAHAM TAKEN ON 03/13/2018	Jul. 30, 2018
203.	ORIGINAL DEPOSITION OF DAVID BRUCE APPEL TAKEN ON 02/20/2018	Jul. 30, 2018
204.	ORIGINAL DEPOSITION OF MARK B. CANDELARIA, AIA TAKEN ON 04/13/2018	Jul. 30, 2018
205.	(PART 1 OF 2) ORIGINAL DEPOSITION OF MARK B. CANDELARIA, AIA TAKEN ON 04/13/2018	Jul. 30, 2018
206.	(PART 2 OF 2) ORIGINAL DEPOSITION OF MARK B. CANDELARIA, AIA TAKEN ON 04/13/2018	Jul. 30, 2018
207.	**ME: UNDER ADVISEMENT RULING [07/30/2018]**	**Jul. 31, 2018**
208.	ORIGINAL DEPOSITION OF ALFRED HARRISON TAKEN ON 02/20/2018	Jul. 31, 2018
209.	ORIGINAL DEPOSITION OF TERESA CAROL ZACHARIAH, M.D. TAKEN ON 07/17/2017	Jul. 31, 2018
210.	**ME: TRIAL [07/30/2018]**	**Aug. 1, 2018**
211.	(PART 1 OF 2) DEFENDANTS'/ COUNTERCLAIMANTS' BENCH MEMORANDUM REGARDING LEGAL ACCESS	Aug. 5, 2018
212.	(PART 2 OF 2) DEFENDANTS'/ COUNTERCLAIMANTS' BENCH MEMORANDUM REGARDING LEGAL ACCESS	Aug. 5, 2018

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

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232.	RESPONSE TO DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO AMEND FINDINGS OF FACT	Oct. 20, 2018
233.	PROPOSED ORDER	Oct. 22, 2018
234.	**ME: MATTER UNDER ADVISEMENT [10/19/2018]**	**Oct. 23, 2018**
235.	SUPPLEMENTAL CITATION TO LEGAL AUTHORITY	Oct. 29, 2018
236.	NOTICE OF APPEAL	Oct. 29, 2018
237.	DEFENDANTS'/ COUNTERCLAIMANTS' REPLY IN SUPPORT OF THEIR MOTION TO AMEND FINDINGS OF FACT	Oct. 31, 2018
238.	MOTION TO STRIKE DEFENDANTS' SUPPLEMENTAL CITATION TO LEGAL AUTHORITY	Nov. 2, 2018
239.	DEFENDANTS'/ APPELLANTS' NOTICE OF TRANSCRIPT ORDER	Nov. 13, 2018
240.	COURT OF APPEALS RECEIPT	Dec. 4, 2018
241.	ELECTRONIC INDEX OF RECORD	Dec. 4, 2018
242.	**ME: RULING [12/03/2018]**	**Dec. 5, 2018**
243.	COURT OF APPEALS APPELLATE CLERK NOTICE DATED 12/05/2018	Dec. 5, 2018
244.	COURT OF APPEALS RECEIPT	Dec. 10, 2018
245.	AMENDED NOTICE OF APPEAL	Dec. 14, 2018
246.	**ME: UNDER ADVISEMENT RULING [12/17/2018]**	**Dec. 20, 2018**
247.	COURT OF APPEALS RECEIPT	Dec. 26, 2018
248.	AMENDED ELECTRONIC INDEX OF RECORD	Dec. 26, 2018
249.	(PART 1 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
250.	(PART 2 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019
251.	(PART 3 OF 5) PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Jan. 9, 2019

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

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

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APPEAL COUNT: 2

RE: CASE: UNKNOWN

DUE DATE: 05/03/2019

CAPTION: TMS VENTURES LLC VS ZACHARIAH, ET AL

EXHIBIT(S): ALREADY AT COURT OF APPEALS

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

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

TRANSCRIPT(S): NONE

COMPILED BY: rivasf on May 24, 2019; [2.5-17026.63]
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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.

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

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

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/31/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005381 03/29/2017

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al. FRANCIS J SLAVIN

UNDER ADVISEMENT RULING

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

1. Background.

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

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

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MARICOPA COUNTY

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

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

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

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

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

2. <u>Common Law Dedication</u>.

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

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

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

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

3. Private Easement.

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

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

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

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

4. Implied Way of Necessity.

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

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

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

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

5. Adverse Possession.

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

6. Order.

Based on the foregoing,

IT IS ORDERED denying the Motion.

Chris DeRose, Clerk of Court
*** Electronically Filed ***
07/31/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005381 07/30/2018

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

CORY LEON BROADBENT

UNDER ADVISEMENT RULING

The court reviewed and considered Defendants/Counterclaimants' Motion for Partial Summary Judgment, Plaintiff's Response to Defendants/Counterclaimants' Motion for Partial Summary Judgment, and Defendants' Reply. The court also considered the parties' arguments at the July 19, 2018 oral argument.

Defendants seek summary judgment of the following claims set forth in Plaintiff's August 19, 2016 Verified Second Amended Complaint:

- Count 1 - Quiet Title/Declaratory Judgment – Express Easement;
- Count 2 – Quiet Title/Declaratory Judgment as to Implied Easement;
- Count 3 - Declaratory Judgment – Common Law Dedication;
- Count 4 – Private Way of Necessity (A.R.S. §12-1201, et seq.); and
- Count 6 – Implied Way of Necessity.

Plaintiff TMS Ventures, LLC owns undeveloped property located on the north side of Camelback Mountain (referred to herein as "the TMS Property"). Defendants own residential

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MARICOPA COUNTY

CV 2016-005381 07/30/2018

properties, referred to as Lots 22, 23, 24, and 25 of the Stone Canyon East subdivision, that are either adjacent to or in close proximity to the TMS Property.

In December 1958, Phoenix Title and Trust Company ("Phoenix Title") owned the TMS Property and all of the land that would later become the Stone Canyon East subdivision. In February 1959, Phoenix Title recorded a plat for a subdivision known as Stone Canyon East. The plat created several lots, including Lots 22, 23, 24, and 25. The plat also dedicated several streets to the public, including San Miguel Avenue, which provides access to Lots 22, 23, 24, and 25.

On March 1, 1960, prior to the sale of the TMS Property, Phoenix Title recorded an "Easement for Roadway" for public roadway and public utilities ("the Easement for Roadway"). The Easement for Roadway states that it grants "to the County of Maricopa, State of Arizona, an easement for roadway purposes" and that it is "a public way for vehicular and foot traffic thereon." The Easement for Roadway has two stated purposes: 1) "to increase the width of San Miguel Avenue as shown on said plat"; and, 2) "to provide for another roadway not shown on said plat." As such, the stated intent of the Easement for Roadway was to expand the dedicated area of San Miguel Avenue by 25-feet on either side of the road and dedicate a 50-foot easement from San Miguel Avenue to the TMS Property. Portions of the easement are on Lots 22, 23, 24, and 25.

Subsequent to the recordation of the Easement for Roadway, Phoenix Title sold Lots 22, 23, 24, and 25 along with other properties within the subdivision. The original deed for Lot 24 expressly references the Easement for Roadway. The original deed for Lot 25 does not, although a subsequent conveyance did refer to the Easement for Roadway. No deed conveying Lots 22 or 23 references the Easement for Roadway, but the owners of Lots 22 and 23 allegedly had actual notice of the easement. Phoenix Title sold the TMS Property on October 25, 1961.

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

Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, ¶15, 132 P.3d 825, 829 (2006); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482 ¶14, 38 P.3d 12, 20 (2002); *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(a).

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MARICOPA COUNTY

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Count 1 - Quiet Title/Declaratory Judgment – Express Easement
Count 2 – Quiet Title/Declaratory Judgment as to Implied Easement

Plaintiff has abandoned its claims of express easement and implied easement alleged in Counts 1 and 2 of Plaintiff's August 19, 2016 Verified Second Amended Complaint. Therefore, the court denies Defendants' Motion for Partial Summary Judgment as to Counts 1 and 2 as moot.

Count 3 - Declaratory Judgment – Common Law Dedication

A common law dedication requires: (1) an offer by the owner of land to dedicate the easement; and, (2) acceptance by the general public. *See Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 423-24, 87 P.3d 831, 836-37 (2004). This court previously denied a motion for summary judgment regarding Count 3, finding a question of fact existed on whether there was acceptance by the general public.

Now, Defendants seek judgment as a matter of law on Count 3, claiming the offer by the owner of the land to dedicate the easement was invalid. Specifically, Defendants argue that after recordation of the plat, no one had legal right to amend the subdivision plat unilaterally to add new public roadways without obtaining approval from the Maricopa County Board of Supervisors, the Mayor of the City of Scottsdale, or the City of Phoenix Planning Commission; therefore, Phoenix Title's Easement for Roadway was an impermissible and potentially criminal effort to dodge the requirements of Article 7, Chapter 4, Title 9 of the Arizona Revised Statutes.

To support their argument that Phoenix Title's Easement for Roadway was an impermissible attempt to avoid the statutory approval process, Defendants claim that Phoenix Title "knew at the time of platting, and before seeking its necessary approval from Maricopa County, that the County had a firm policy not to approve subdivision plats for residential lots above 1,600 feet in elevation on Camelback Mountain." *See* Motion for Partial Summary Judgment at 3. Plaintiff claims that Defendants' argument is inconsistent with the evidence, including Maricopa County's decision to approve the plat for the Stone Canyon East subdivision, which included "no less than four lots that were above 1,600 feet." *See* Response at 9.

Plats are legal instruments and thus, the "court's task in interpreting a plat is to discern and give effect to the intent of the party creating it." *Smith v. Beesley,* 226 Ariz. 313, 318 ¶15, 247 P.3d, 548, 553 (App. 2011); *see also Pleak*, 207 Ariz. at 421, 87 P.3d at 834. Although the trial court previously stated that Phoenix Title's 1960 recording evinces an intent to dedicate a roadway easement through Lots 22, 23, 24, and 25, the court finds that the intent of the party creating a plat and the subsequent Easement for Roadway, as well as acceptance by the general public are disputed questions of fact and thus, summary judgment is not justified.

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MARICOPA COUNTY

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Count 4 – Private Way of Necessity (A.R.S. §12-1201, et seq.)

Section 12-1202(A) of the Arizona Revised Statutes provides that "[a]n owner of or a person entitled to the beneficial use of land . . . , which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity." A.R.S. §12-1202(a). "[F]or a landowner to condemn a right-of-way across intervening land to a public road, he need not show that he has no outlet, but only that he has no adequate and convenient one. In other words the condemnor need not show an absolute necessity for the taking, a reasonable necessity being sufficient." *Solana Land Co. v. Murphey*, 69 Ariz. 117, 125, 210 P.2d 593, 598 (1949) (citations omitted).

Defendants claim they are entitled to judgment as a matter of law regarding Count 4, Private Way of Necessity, because, according to Defendants, Phoenix Title's act of voluntarily "orphaning" the TMS Property precludes a subsequent owner of the TMS Property from seeking a private way of necessity under A.R.S. § 12-1202. Defendants cite *Gulotta v. Triano*, 125 Ariz. 144, 145, 608 P.2d 81, 82 (App. 1980), for the proposition that a "landowner may not acquire a way of necessity over another's property after he has voluntarily cut off an alternate means of access to his own property." In *Gulotta*, the plaintiffs sought to acquire a private way of necessity over another's property after the landowner voluntarily cut off an alternative means of access to his own property. The court of appeals in *Gulotta* analyzed the terms of the agreement at issue and found that the plaintiffs appreciated the danger of losing access to the property they retained, but decided voluntarily to limit their right to ingress and egress to complete the sale and thereafter seek access from a different party. *Id.* The court of appeals found that under the set of circumstances present in *Gulotta*, the plaintiff was not entitled to the remedy afforded by A.R.S. § 12-1202. Here, the court finds that the undisputed facts do not provide a basis to grant Defendants' Motion for Partial Summary Judgment as to Count 4.

Count 6 - Implied Way of Necessity

To establish the existence of an implied way of necessity, Plaintiff must prove: (1) common ownership of the parcels; (2) severance of the claimed dominant parcel from the claimed servient parcel; (3) at the time of severance, the dominant parcel had no outlet; and (4) reasonable necessity for access existed at the time of severance. *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 541, ¶30, 241 P.3d 897, 905 (App. 2010).

In the trial court's March 29, 2017 decision, the court found that the first three elements were satisfied. *See* Minute Entry dated 3/29/17 at 4. The trial court previously denied summary

judgment, finding that there were fact disputes respecting the fourth element of proof, whether "reasonable necessity for access existed at the time of severance." In its ruling, the court noted that whether the TMS Property can be (or could have been at the time of severance) reasonably developed given its topography was a disputed genuine issue of material fact. *Id.*

Plaintiff's Response reminds the court that the ability to build a home on the property at the time of severance is not an essential element in evaluating the existence of an implied way of necessity. *See also Chandler Flyers, Inc. v. Stellar Development Corp.*, 121 Ariz. 553, 554, 592 P.2d 387, 388 (App. 1979)("The standard set forth in the Restatement, Property, § 476, p. 2984, is that an easement of necessity will be implied if 'without it the land cannot be effectively used.'"). However, reasonable developability at the time of severance is relevant in assessing the parties' intent and evaluating whether Phoenix Title intentionally deprived the property of the rights necessary to reasonable enjoyment of the land. *See* Restatement (Third) of Property (Servitudes) § 2.15 (2000)("A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, *unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights*.")(emphasis added). The court finds that a genuine issue of material fact exists that precludes summary judgment on the issue of implied way of necessity.

IT IS ORDERED denying Defendants/Counterclaimants' May 3, 2018 Motion for Partial Summary Judgment.

Chris DeRose, Clerk of Court
*** Filed ***
9.28.2018 8:00am

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005381

09/24/2018

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

CORY LEON BROADBENT
DOCKET-CIVIL-CCC

JUDGMENT
(UNDER ADVISEMENT RULING)

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

1. Plaintiff TMS Ventures, LLC is the owner of undeveloped property consisting of approximately 3.44 acres, located on the north side of Camelback Mountain in the Town of Paradise Valley, Arizona. *See* Stipulated Facts for Trial ¶1. The property is referred to herein as "the TMS Property."

2. Defendants own residential properties, known as Lots 22 through 25 of the Stone Canyon East subdivision, which are either adjacent to or in close proximity to the TMS Property. *Id.* ¶¶3-4.

3. Plaintiff purchased the TMS Property on November 16, 2012. *Id.* ¶2.

4. Defendants Teresa C. and Joe Zachariah ("Zachariahs") purchased Lot 22 of the Stone Canyon East subdivision on June 25, 2010. *Id.* at ¶6.

5. Defendant Roseanne T. Appel ("Appel") purchased Lot 23 of the Stone Canyon East subdivision on August 31, 2009. *Id.* at ¶7.

6. Defendants Ingrid Lenz and Alfred Harrison, as Trustees of the Ingrid Lenz Harrison Revocable Trust Under Agreement Dated November 19, 1999, as amended ("Harrisons"), purchased Lot 24 of the Stone Canyon East subdivision on June 12, 2009. *Id.* at ¶8.

7. Defendant Jerry D. Smith, Trustee of the JDS Trust dated August 22, 2005 ("Smith") purchased Lot 25 of the Stone Canyon East subdivision on June 19, 2006. *Id.* at ¶9.

8. Plaintiff plans to build a home on the TMS Property.

9. The TMS Property is bounded on the West, South and partially on the East by land owned by the City of Phoenix. *Id.* at ¶5.

10. Turning back in time, in December 1958, Phoenix Title and Trust Company ("Phoenix Title") acquired title to land that contains the TMS Property (the "Remainder Parcel") and all of the land that later became the Stone Canyon East subdivision. *Id.* at ¶10.

11. On February 27, 1959, Phoenix Title caused the Stone Canyon East subdivision plat (the "Plat") to be recorded. *Id.* at ¶11. The Plat included Lots 1 through 25. *See* Exhibit 2.

12. The Plat dedicated San Miguel Avenue and the other streets shown in the Plat to the public. *See* Stipulated Facts for Trial at ¶12. The Plat indicated that San Miguel Avenue has a total dedication width of 50 feet (25 feet on each side of the centerline). *See id.* at ¶13.

13. San Miguel Avenue is a public roadway, maintained by the Town of Paradise Valley. *Id.* at ¶14.

14. On March 1, 1960, Phoenix Title recorded a document entitled "Easement for Roadway" in Docket 3178, Page 402, Maricopa County Recorder's Office (hereinafter referred to as "the Easement" or "Easement for Roadway"). *Id.* at ¶15.

15. The Easement for Roadway stated that Phoenix Title "does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes" and that it is "a public way for vehicular and foot traffic thereon." *See* Exhibit 1.

16. The Easement for Roadway included two stated purposes: "to increase the width of San Miguel Avenue as shown on said plat and to provide for another roadway not shown on said plat." *Id.*

17. The Easement for Roadway set forth the dedicator's intent to expand the dedicated area of San Miguel Avenue by an additional 25 feet on both sides of the road "so that the roadway is increased a total width of 50 [feet] over the width shown in the plat of said Stone Canyon East." *Id.*

18. The Easement for Roadway also stated that it grants a 50-foot easement for roadway purposes leading from San Miguel Avenue to the TMS Property, legally described as:

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

Id.

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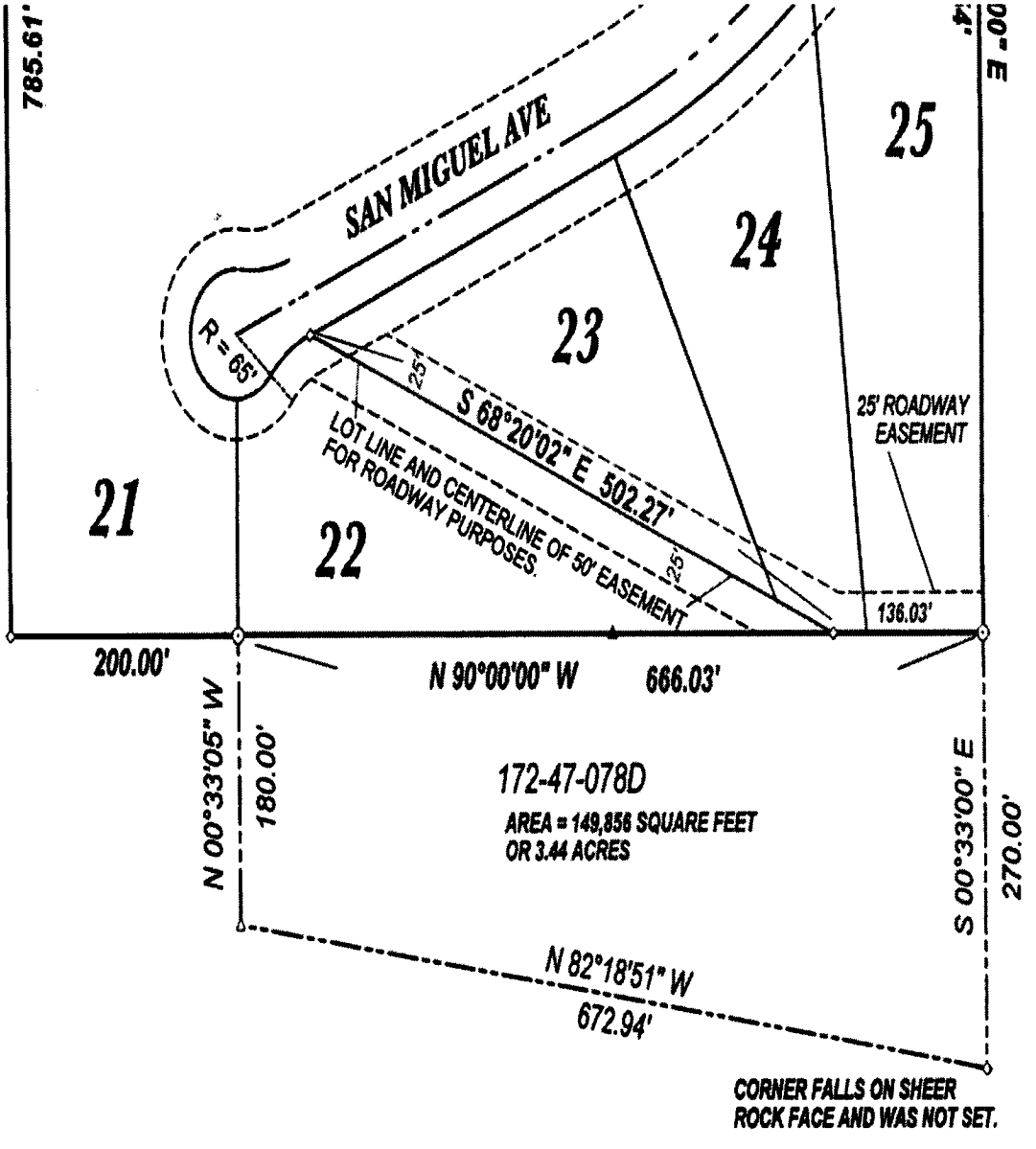
19. The Easement for Roadway area of the new roadway extended from San Miguel Avenue to the TMS Property.



20. The Easement for Roadway intended to burden Lots 16, 19, 20, 21, 22, 23, 24, and 25. *Id.*

21. At the time of recordation of the Easement for Roadway, Phoenix Title owned Lots 16, 19, 20, 21, 22, 23, 24, 25, and the Remainder Parcel, including the TMS Property. *See* Stipulated Facts for Trial ¶16; *see also* Exhibits 3, 4, 164, 165, 176, 186, and 188. After recordation of the Plat but prior to recordation of the Easement for Roadway, Phoenix Title sold seven Stone Canyon East Lots; however, none of the Lots sold prior to the March 1, 1960 were burdened by the Easement for Roadway. S*ee* Exhibits 157 through 163.

22. The Remainder Parcel was not landlocked by the recordation of the Plat because Phoenix Title continued to own the platted lots in the subdivision that could be used to access the Remainder Parcel, which included the TMS Property.

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

    a. Special Warranty Deed from Phoenix Title for Lot 25 recorded on March 30, 1961 at Document Number 1961-0118063, Maricopa County Recorder's Office. *See* Exhibit 176.

    b. Special Warranty Deed from Phoenix Title conveyed the TMS Property and other property South of the Stone Canyon East subdivision to Frank and Catherine D. Riley (1/3 interest), Theodore A. and Marianna Rehm (1/3 interest) and C. Tim and Mildred Jane Rodgers (1/3 interest) on October 25, 1961. *See* Exhibit 3. This conveyance severed Phoenix Title's common ownership of the Remainder Property from Lots 22, 23, and 24.

    c. Special Warranty Deed from Phoenix Title to Ralph Luikart and Georgiana Jane Luikart for Lot 24 recorded on March 15, 1962 at Document No. 1962-0075189, Maricopa County Recorder's Office. *See* Exhibit 187.

    d. Special Warranty Deed from Phoenix Title for Lot 22 recorded on June 5, 1964 at Document Number 1964-0213434, Maricopa County Recorder's Office. *See* Exhibit 164.

e. Special Warranty Deed from Phoenix Title for Lot 23 recorded on March 10, 1966 at Document Number 1966-0035783, Maricopa County Recorder's Office. *See* Exhibit 165.

24. Besides the Easement for Roadway, no other recorded means of access existed for ingress and egress to the TMS Property.

25. The Easement for Roadway also provided for subsurface utilities, as follows:

> [I]t is specifically agreed that the said County may itself or grant to others the right to place under the surface of the property described above, any type of public utility facilities so long as said facilities do not show above the surface in any manner whatsoever.

See Exhibit 1.

26. On or about March 31, 2016, Plaintiff, through counsel tendered to Defendants written demands to acknowledge the Easement for Roadway, together with a quitclaim deed and $5.00 cash pursuant to A.R.S. § 12-1103(B).

COMMON LAW DEDICATION

27. Plaintiff seeks a declaration in Count 3 of its Second Amended Complaint that the Easement is enforceable based on common law dedication.

28. A common law dedication requires (1) an offer by the owner of land to dedicate the easement;[1] and, (2) acceptance by the general public. *Pleak v. Entrada Prop.*

[1] The trial court finds that it is not bound by Judge Warner's prior determination that Phoenix Title clearly intended to dedicate a roadway easement through Lots 22, 23, 24, and 25. Therefore, the findings set forth herein are based on the evidence and testimony presented at trial. The court maintains fidelity to the law of the case when appropriate. However, the assessment of intent as set forth in Judge Warner's March 29, 2017 decision was not dispositive. This court finds that in issuing the March 29, 2017 ruling, Judge Warner did not comprehensively address the merits of whether Plaintiff proved that the owners intended to dedicate an easement. *See Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993) ("[W]e will not apply law of the case if the prior decision did not actually decide the issue in question, if the prior decision is ambiguous, or if the prior decision did not address the merits."). Therefore, the court finds that the limitations of law of the case do require this judicial officer to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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

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

29. "No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice." *Id.* at 424, 87 P.3d at 837 (citation omitted).

30. Based on the credible evidence and testimony presented at trial, the court finds that the unambiguous language of the Easement for Roadway and the act of recording the Phoenix Title's 1960 Easement for Roadway demonstrates a clear intent of the donor to dedicate a 50-foot easement for roadway purposes leading from San Miguel Avenue to the TMS Property, legally described as:

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

31. The Easement for Roadway did not include use restrictions. Moreover, the Easement for Roadway did not attempt to restrict usage to the public by failing to extend the easement to the boundary of the relevant properties. Instead, the express language of the Easement for Roadway stated the donor's intent to grant "an easement for roadway purposes" that is "a public way for vehicular and foot traffic thereon." *See* Exhibit 1.

32. The court finds that the first element of common law dedication, i.e., an offer by the owner of the land to dedicate the easement, is satisfied.

B. Acceptance by the general public

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

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

'knowledge of the dedication can be imputed to the title holder.'").

34. In this case, Phoenix Title conveyed Lot 24 on March 15, 1962 by a Special Warranty Deed. The Special Warranty Deed included an express reference to the Easement for Roadway. *See* Exhibit 4.

35. On July 26, 1963, Ben and Marian Dale Cheney conveyed Lot 25 by Warranty Deed that made specific reference to the Easement for Roadway. *See* Exhibit 5.[2]

36. Although not expressly included in the conveyance document, unlike the plaintiffs in *Lowe v. Pima County,* at the time the Zachariahs and Ms. Appel purchased Lots 22 and 23, each Defendant had actual knowledge of the recordation of the Easement for Roadway. 217 Ariz. at 647, ¶20, 177 P.3d at 1219; *.cf Neal v. Hunt,* 112 Ariz. 307, 311, 541 P.2d 559, 563 (1975)("Constructive and actual knowledge have the same effect.")(citation omitted).

37. Prior to purchasing Lot 23 on August 31, 2009, Ms. Appel obtained a title insurance policy in July 2009 that expressly identified the Easement for Roadway as an exception to coverage. *See* Exhibit 14.[3]

38. Like Ms. Appel, prior to purchasing their property, the Zachariahs were aware of the recorded Easement for Roadway, which expressly dedicated an easement across Lot 22 for the benefit of the TMS Property. In fact, in a proposed, signed addendum to their purchase contract, the Zachariahs expressly acknowledged the existence of the Easement for Roadway, stating:

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

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

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

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

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

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

40. The court finds that the Zachariahs knew about the existence of the Easement for Roadway prior to purchasing Lot 22, and they understood that a purchaser of the TMS Property could attempt to use the easement to access the TMS Property from San Miguel Avenue even though the Town of Paradise Valley did not intend to build and maintain a public roadway on the Easement. In purchasing Lot 22 with actual knowledge of the Easement for Roadway, the Zachariahs accepted the dedication.

41. Communications between Plaintiff and Defendant Teresa Zachariah further corroborate her awareness of the easement. When Plaintiff mentioned the easement as the basis for his request to use the Zachariah property to access the TMS Property, the response was not, "What are you talking about; what easement?" Instead, the dialogue was a respectful, cordial neighborly discussion about facilitating access to protect the privacy of the Zachariahs and allow access to the TMS Property.

42. After purchase, Dr. Teresa Zachariah even discussed the process for allowing continuous access to the TMS Property across the easement area, stating "as you get to the point access is needed on continuance basis, [I] can leave the gate to . . . . remain open set hours and set to close at night – [I] would think this would be best all around." *See* Exhibit 212; *see also* Exhibits 30-31.

43. Hoping that the easement did not really exist is insufficient to outweigh the credible evidence and testimony regarding actual knowledge of the easement.

44. The post-purchase conduct of the Zachariahs and Appels further supports that the Zachariahs and Ms. Appel bought their property knowing of the existence of the dedicated easement across their respective property. In 2012, Drs. Teresa and Joseph Zachariah along with other Defendant neighbors attempted to purchase the TMS Property for $600,000.00 to donate the land to the Phoenix Mountain

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

45. Phoenix Title expressed its intent to dedicate the easement for public use and prior to purchase each Defendant had actual or constructive notice of the offer to dedicate and through purchase accepted the offer.

46. The court finds that Plaintiff proved the Easement for Roadway was accepted by the general public.

47. The court also addresses use as a means of proving acceptance by the public. *See Lowe,* 217 Ariz. at 647, 117 P.3d at 1219. The owners of Lots 20, 23, and 25 built driveways on the easement and freely use the easement to cross their neighbor's property without payment or permission. The owner of Lot 23 accesses her property by using the shared driveway on the portion of the easement located on Lot 22. Moreover, the prior owner of Lot 22 built a paved turn-around area benefitting Lot 22 that extends onto Lot 23. Also of note, the owner of Lot 20 built a driveway located within the Easement area across Lot 16, and the public uses a paved portion of San Miguel Avenue that was constructed outside the dedicated portion of the Plat but within the Easement area. *See* Exhibit 48.

48. Dr. Teresa Zachariah admitted that she has the legal right to use the portion of her driveway on Lot 23 and the Appels have the legal right to use the driveway in the easement across her property. Further, she acknowledged that she would violate the Appels' property rights if she chained off the portion of the Appels' driveway crossing Lot 22 through the easement area. *See also Evans v. Blankenship,* 4 Ariz. 307, 316, 39 P. 812, 813 (Ariz. Terr. 1895)("'Acceptance may be presumed if the gift is beneficial, and use [ ] is evidence that it is beneficial.'") *quoting Abbott v. Cottage City,* 10 NE 325, 329 (Mass. 1887); *Allied Am. Inv. Co. v. Pettit,* 65 Ariz. 283, 290, 179 P.2d 437, 441 (1947) ("The use by the purchasers of lots and the general public constitutes a sufficient acceptance.").

49. The court finds that Plaintiff proved the Easement for Roadway was accepted by use.

50. Based on the credible evidence and testimony presented at trial, the court finds

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

C. Recordation of the Plat

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

D. A.R.S. §9-474 et seq.

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

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MARICOPA COUNTY

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E. Declaration of Restrictions

53. Defendants claim that the Declaration of Restrictions against Lots 22 through 25 prevented Phoenix Title from granting the Easement for Roadway because the easement from San Miguel Avenue to the TMS Property benefitted non-Stone Canyon East Properties. *See* Defendants'/Counterclaimants' Bench Memorandum Regarding Legal Access filed 8/9/18 at 6-9. The court does not find that any specific provision of the Declaration of Restrictions prevented Phoenix Title on March 1, 1960 from granting the easement across Lots 22, 23, 24, and 25.[4]

IMPLIED WAY OF NECESSITY

54. Plaintiff alternatively seeks a declaration in Count 4 of its Second Amended Complaint that if the Easement for Roadway is not enforceable as a common law dedication it may be enforced as an implied way of necessity. Although unnecessary, to ensure completeness of the record, the court enters the following findings and conclusions of law related to implied way of necessity.

55. To establish that an easement exists as an implied way of necessity Plaintiff must prove the following elements: (1) the dominant property and servient property were under common ownership; (2) severance of common ownership; (3) no outlet for the dominant property at the time of severance; and (4) access across the servient property was reasonably necessary when severance occurred. *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 541, 241 P.3d 897, 905 (Ct. App. 2010); *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d

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

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

56. Plaintiff asserts that severance of common ownership of Lots 22, 23, 24, and the TMS Property occurred on October 25, 1961 when Phoenix Title conveyed the TMS Property to Frank and Catherine D. Riley (1/3 interest), Theodore A. and Marianna Rehm (1/3 interest), and C. Tim and Mildred Jane Rodgers (1/3 interest).

57. The court agrees.[5] *See Siemsen v. Davis,* 196 Ariz. 411, 414-15, ¶14, 998 P.2d 1084, 1087-88 (App. 2000) ("factual predicates . . . are original unity of title and subsequent severance"); *Tobias v. Dailey,* 196 Ariz. 418, 421, ¶13, 998 P.2d 1091, 1094 (Ct. App. 2000) ("[f]ormer unity of title and subsequent separation are factual predicates"); Restatement (Third) of Property (Servitudes) § 2.15, comment c (an implied way of necessity "arises only when the conveyance severs interests held in a single ownership").

58. At the time of severance on October 25, 1961, no outlet for the TMS Property existed.

59. Citing *Gulotta v. Triano*, 125 Ariz. 144, 145, 608 P.2d 81, 82 (App. 1980), Defendants contend that Phoenix Title intentionally landlocked the TMS Property when it recorded the Plat for the Stone Canyon East subdivision.

60. However, the court finds that the credible evidence and testimony revealed that Phoenix Title did not intentionally landlock the TMS Property; instead, Phoenix Title attempted to provide access by recording the Easement for Roadway.

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

61. Defendants also argue that the October 25, 1961 transfer of the TMS Property from Trustee to Cestui que Trust did not sever common ownership for purposes of an implied way of necessity. The court disagrees.

62. The court finds that the first three elements of implied way of necessity have been satisfied.

63. Next the court turns to whether Plaintiff proved that access across the servient property was reasonably necessary when severance occurred. The court finds based on the credible evidence and testimony that access across the servient property was reasonably necessary in or around October 25, 1960. In support of this conclusion, the court finds that the TMS Property was reasonably developable in 1960. Developing the property would have been expensive and complex; however, the court finds based on the credible testimony of multiple experts that the TMS Property was reasonably developable in 1960.

64. The court finds that neither the language nor the circumstances of the conveyance established an intent to deprive the TMS Property of rights to access.

65. The court further finds that the best location for the implied way of necessity is within the area over Lots 22, 23, and 24 described in the 1960 Easement for Roadway.

66. The court concludes that even if a common law dedication was not proven (which it was), Plaintiff also proved, in the alternative, the existence of an implied way of necessity over Lots 22, 23, and 24.

67. Given the findings set forth above, the court does not address statutory private way of necessity.

CONCLUSION

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

1. Plaintiff is entitled to enforce the Easement for Roadway as a common law dedication.

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

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23, and 24 as an implied way of necessity.

3. Defendants' counterclaims are dismissed with prejudice, excepting Count 8, which will be tried separately.

4. Plaintiff is entitled to recover its attorneys' fees and costs pursuant to A.R.S. § 12-1103.[6]

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

JUDGE OF THE SUPERIOR COURT

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

Grant with New Order
See eSignature page

Clerk of the Superior Court
*** Electronically Filed ***
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Attorneys for Plaintiff/Counterdefendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited liability company,

Plaintiff,

v.

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

Defendants.

TERESA C. ZACHARIAH AND JOE ZACHARIAH, et al.

Counterclaimants,

v.

TMS VENTURES, LLC, an Arizona limited liability company,

Counterdefendant.

Case No. CV2016-005381

AMENDED JUDGMENT

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

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

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

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

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting in favor of Plaintiff TMS Ventures, LLC and jointly and severally against Defendants Teresa C. Zachariah and Joe Zachariah husband and wife, Roseann T. Appel, Ingred Lenz Harrison and Alfred Harrison, as Trustees of The Ingrid Lenz Harrison Revocable Trust Under Agreement Dated November 19, 1999, an award of attorneys' fees in the amount of $369.410.25 and costs in the amount of $4,466.43 for work performed by Burch & Cracchiolo, P.A. and costs in the amount of $8,947.42 for work performed by Beus Gilbert PLLC.

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

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

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

HONORABLE PAMELA GATES
Judge of the Superior Court

eSignature Page 1 of 1

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

Grant with New Order

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

ENDORSEMENT PAGE

CASE NUMBER: CV2016-005381 SIGNATURE DATE: 4/12/2019

E-FILING ID #: 10349404 FILED DATE: 4/15/2019 8:00:00 AM

CASEY SCOTT BLAIS

CORY LEON BROADBENT

FRANCIS J SLAVIN

Michael K Jeanes, Clerk of Court
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited liability company, Plaintiff / Counterdefendant, vs. TERESA C. ZACHARIAH and JOE ZACHARIAH, wife and husband; ROSANNE T. APPEL, a married woman as her sole and separate property; INGRID LENZ HARRISON and ALFRED HARRISON, or their successors, as Trustees of The Ingrid Lenz Harrison Revocable Trust Under Agreement Dated November 19, 1999, as amended; JERRY D. SMITH, Trustee of the JDS Trust Dated August 22, 2005; JOHN DOES I-Z, JANE DOES I-X; ABC CORPORATIONS I-X; BLACK AND WHITE PARTNERSHIPS I-X; and XYZ LIMITED LIABILITY COMPANIES I-X; Defendants / Counterclaimant.	No.: CV2016-005381 **VERIFIED SECOND AMENDED COMPLAINT** (Quiet Title / Declaratory Judgment / Injunction) (Assigned to the Honorable Randall Warner)

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

PARTIES & JURISDICTION

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

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

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

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

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

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

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

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

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

. . . .

. . . .

GENERAL ALLEGATIONS

10. Plaintiff is the owner of residential real property located at 5507 E. San Miguel Lane, Paradise Valley, Arizona 85253 (APN 172-47-078D) (the "Property"). The Property is located on the North side of Camelback Mountain and is currently a vacant lot.

11. The Property is primarily surrounded by park and recreation area owned by the City of Phoenix (along the East, West and South boundaries of the Property).

12. This lawsuit seeks a determination as to the validity of and Plaintiff's right to use that certain easement titled "Easement for Roadway" and recorded on March 1, 1960 at Docket 3178, Page 402, in the Maricopa County Recorder's Office (the "Easement"). A true and correct copy of the Easement is attached hereto as Exhibit A.

13. Defendants are the owners of Lots 22, 23, 24, and 25 in the Stone Canyon East subdivision.

14. The Stone Canyon East subdivision plat was recorded on February 27, 1959 at Book 81 of Maps, Page 34, Maricopa County Recorder's Office (the "Plat"). A true and correct copy of the subdivision plat is attached hereto as Exhibit B.

15. Defendants' property (Lots 22, 23, 24, and 25) are adjacent to the Property owned by Plaintiff.

16. The Property is not located within the Stone Canyon East subdivision.

17. Defendants Teresa C. Zachariah and Joe Zachariah, wife and husband, are the owners of Lot 22 of the Stone Canyon East subdivision, commonly known as 5505 E. San Miguel Avenue, Paradise Valley, Arizona 85253. They acquired title to their property by virtue of a Special Warranty Deed recorded on June 25, 2010 at Document No. 2010-0542481, M.C.R.. A true and correct copy of said deed is attached as Exhibit C and incorporated by this reference.

. . . .

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

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

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

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

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

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

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

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

26. The Easement created a roadway easement across the Defendants' properties:

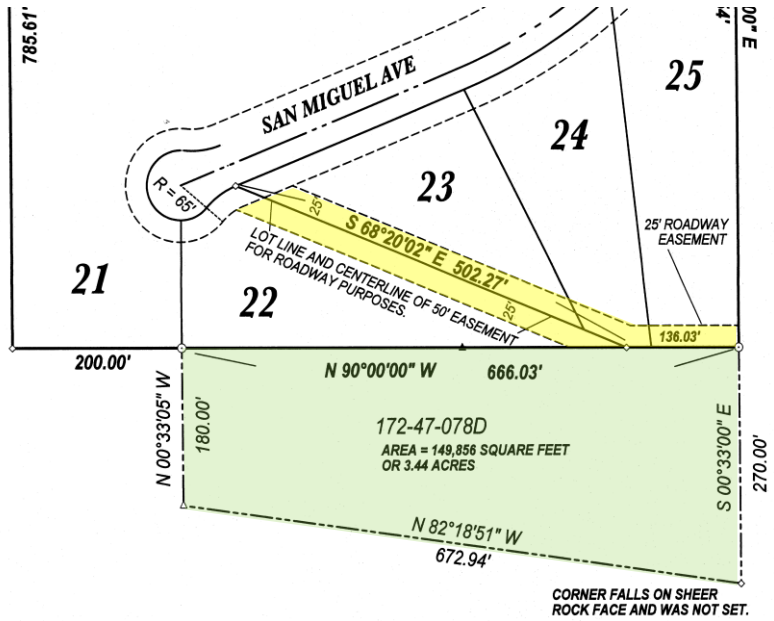
> **NOW, THEREFORE … Phoenix Title and Trust Company … does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes … as contained herein and as set forth below, said easement to be over the following described premises:**
>
> > **[…] A strip of land 25' wide along the N. side and a strip of land 25' wide along the S. line of the lot line separating Lots 22 and 23, and 25' wide N. of the S. border of said subdivision in Lots 24 and 25.**

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

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

. . . .

. . . .



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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT I

(Quiet Title / Declaratory Judgment – Express Easement)

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

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

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

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

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

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

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

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

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

WHEREFORE, Plaintiff requests the following relief against all Defendants:

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

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

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

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

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

COUNT II

(Quiet Title/Declaratory Judgment as to Implied Easement)

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

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

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

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

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

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

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

57. Without an easement, the Property would be landlocked on Camelback Mountain.

58. In the event the recorded Easement is deemed ineffective, the common grantor created an implied way of necessity to provide access to and from San Miguel Avenue to the Plaintiff's Property.

59. The area of the implied easement should be in the same area as designated in the "Easement for Roadway..

WHEREFORE, Plaintiff requests the following relief against all Defendants:

A. For a declaratory judgment establishing an implied easement for ingress and egress from San Miguel Avenue to the Plaintiff's Property and quieting title to the same in favor of and benefitting Plaintiff;

B. For an order permanently and perpetually enjoining defendants from interfering in any manner with Plaintiff's use of said easement;

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

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

COUNT III

(Declaratory Judgment – Common Law Dedication)

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

61. The Easement for Roadway constituted an offer to dedicate public roadways, including the roadway area leading from San Miguel Avenue to the Property.

62. Upon information and belief, the public or the municipal body has accepted the offer to dedicate the roadways.

63. The roadways contained in the Easement have been dedicated for public use.

64. Plaintiff is entitled to use the Easement for ingress and egress to the Property.

WHEREFORE, Plaintiff requests the following relief against all Defendants:

A. For a declaratory judgment establishing a public roadway for ingress and egress from San Miguel Avenue to the Plaintiff's Property pursuant to the terms of the Easement;

B. For an order permanently and perpetually enjoining defendants from interfering in any manner with Plaintiff's use of said public roadway;

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

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

COUNT IV
(Private Way of Necessity – A.R.S. § 12-1201, et seq.)

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

66. As an alternative count, Plaintiff is entitled to a private way of necessity as provided for under A.R.S. § 12-1201, et. seq.

67. Plaintiff is the owner of Property and is entitled to the beneficial use of said property.

68. Ingress and egress is necessary for the proper use and enjoyment of the Property.

69. The Property is so situated that the only possible access point would be across Defendants' property to San Miguel Avenue because the Property is surrounded on the remaining boundary lines by property owned by the City of Phoenix.

70. Plaintiff is entitled to condemn that portion of Defendants' property which is reasonably necessary to construct and maintain the private way of necessity.

WHEREFORE, Plaintiff requests the following relief against all Defendants:

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

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

COUNT V

(Injunction---TRO, Preliminary and Permanent)

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, Plaintiff requests the following relief against all Defendants:

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

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

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

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

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

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

. . . .

COUNT VI

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

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

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

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

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

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

WHEREFORE, Plaintiff requests the following relief against all Defendants:

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

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

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

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

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

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

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

DATED this 19th day of August, 2016.

BURCH & CRACCHIOLO, P.A.

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

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

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

Clerk of the Superior Court

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

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

/s/ Troy Redondo

VERIFICATION

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

1. That I am a resident of Arizona;

2. That I am competent and authorized to make this Verification;

3. That I have read the foregoing "Verified Second Amended Complaint" and know the contents thereof; and

4. That the allegations contained therein are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to those matters I believe them to be true.

DATED this 18th day of August, 2016.

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

Exhibit J

BURCH & CRACCHIOLO

ANDREW ABRAHAM
DIRECT LINE: 602.234.9917
DIRECT FAX: 602.343.7917
AABRAHAM@BCATTORNEYS.COM

March 31, 2016

VIA FIRST CLASS MAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Jerry D. Smith, Trustee of JDS Trust
5525 E. San Miguel Avenue
Paradise Valley, Arizona 85253

Re: **DEMAND TO QUIET TITLE FOR EASEMENT PURPOSES**
Property: 5507 E. San Miguel Lane, Paradise Valley, Arizona 85253 (APN 172-47-078D) (the "Property")

Dear Mr. Smith:

Our firm has been retained by TMS Ventures, LLC as it relates to the above-referenced Property located in Paradise Valley, Arizona. This letter is written to you as the owner of Lot 25. Your property is encumbered by the access easement leading to the Property.

TMS Ventures has an easement for ingress and egress to the Property. As discussed herein, there are actually numerous, alternative bases under Arizona law that establish the existence of said easement. Demand is hereby made pursuant to A.R.S. § 12-1103(B) that you acknowledge the access easement to the Property by signing the enclosed Quit Claim Deed (For Easement Purposes Only).

I. Background

The Property is adjacent to a subdivision to the North, known as Stone Canyon East. Your property is one such "Lot" within Stone Canyon East. The Property and Stone Canyon East are located within Tract 4 of a much larger subdivision called O'Brien's Camelback Lands.[1] All of Tract 4 was once owned by Lulu Avis and Morrough W. O'Brien. After a series of transfers of Tract 4 O'Brien's Camelback Lands, the Property and the land area to become Stone Canyon East were conveyed to Jack Harris and Cramer Supply Corporation in 1956.[2] Then, in

[1] The plat for O'Brien's Camelback Lands was recorded on April 24, 1928 at Book 18, Page 36, M.C.R.

[2] In 1956, two deeds were used to convey title to the Property and the land to become Stone Canyon East. First, the Special Warranty Deed from Arizona Title Guarantee & Trust Company to Jack Harris and Cramer Supply Corporation for part of the property to become Stone Canyon East was recorded on June 27, 1956 at Docket 1933, Page 542, M.C.R. Second, the Warranty Deed from Allen Chase to Jack Harris and Cramer Supply Corporation for the Property and other parts of the property to become Stone Canyon East (and other portions of Tract 4) was recorded on June 27, 1956 at Docket 1933, Page 543, M.C.R.

1958, Jack Harris and Cramer Supply Corporation transferred the Property and the property to become Stone Canyon East to Phoenix Title and Trust Company ("Phoenix Title").[3] Phoenix Title was holding the property as a subdivision trust. Phoenix Title recorded the subdivision plat for Stone Canyon East in 1959.[4] The plat for Stone Canyon East does not identify the access easement to the Property. However, in 1960, Phoenix Title recorded an access easement to the Property, as discussed below.

From 1958 to 1961, Phoenix Title owned the entirety of the Property and the property to become Lots 22, 23, 24, and 25 of the Stone Canyon East subdivision. In 1961, Phoenix Title conveyed the Property to a group of six individuals.[5] Between 1961 and 1966, Phoenix Title conveyed Lots 22, 23, 24, and 25.[6] Thus, Phoenix Title was the owner of Lots 22, 23, 24, and 25 at the time it recorded the Easement in 1960.

Our client TMS Ventures, LLC purchased the Property in November 2012 from LaFamilia Management, LLLP.[7]

II. The Property Has an Express (Recorded) Easement.

In 1960, Phoenix Title (which still held title to the Property and Lots 22, 23, 24, and 25 of Stone Canyon East) recorded an "Easement For Roadway" (the "Easement"). A copy of the Easement is enclosed herewith. As stated therein, the Easement was recorded to (i) "increase the width of San Miguel Avenue" and (ii) "provide for **another roadway** not shown in said plat."

The Easement provides for a new roadway that extends from San Miguel Avenue up to the subject Property, as stated in relevant part:

> **NOW, THEREFORE ... Phoenix Title and Trust Company ... does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes and for no other purpose ... as contained herein and as set forth below, said easement to be over the following described premises:**

---

[3] On December 3, 1958, the Warranty Deed from Jack Harris and Cramer Supply Corporation to Phoenix Title was recorded at Docket 2676, Page 77, M.C.R.

[4] The plat for Stone Canyon East was recorded on February 27, 1959 at Book 81, Page 34, M.C.R.

[5] The Special Warranty Deed from Phoenix Title to the six individuals was recorded on October 25, 1961 at Docket 3895, Page 476, M.C.R.

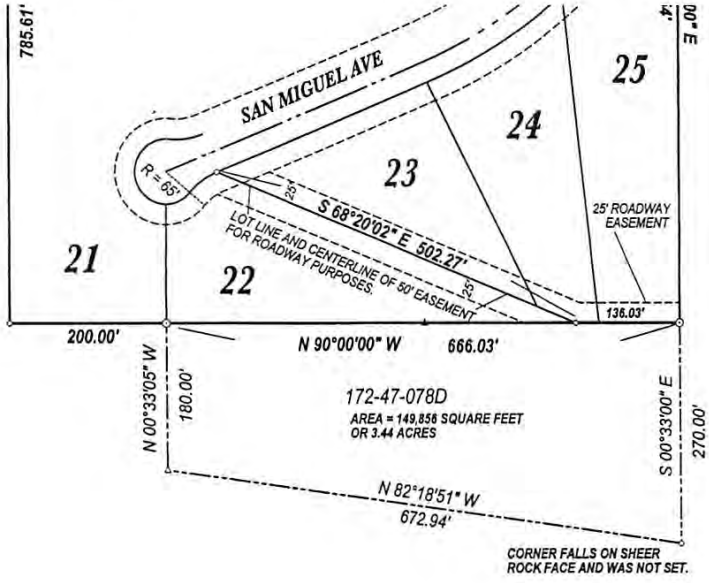
[6] Lot 22 was conveyed by Special Warranty Deed from Phoenix Title to Stone Canyon East Properties as recorded on June 5, 1964 at Docket 5080, Page 25, M.C.R.; Lot 23 was conveyed by Special Warranty Deed from Phoenix Title to Warren and Dolores Wolf as recorded on March 10, 1966 at Docket 5953, Page 202, M.C.R.; Lot 24 was conveyed by Special Warranty Deed from Phoenix Title to Ralph and Georgiana Luikart as recorded on March 15, 1962 at Docket 4065, Page 584, M.C.R.; Lot 25 was conveyed by Special Warranty Deed from Phoenix Title to Ben and Marian Cheney as recorded on March 30, 1961 at Docket 3641, Page 516, M.C.R.

[7] The Warranty Deed from LaFamilia Management, LLLP to TMS Ventures, LLC was recorded on November 16, 2012 at Recording No. 2012-1046521, M.C.R.

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

Thus, the Easement provides for a roadway 50 feet in total width (which extends 25' on each side of the boundary line between Lot 22 and Lot 23 and also 25' along the southern boundary lines of Lots 24 and 25).

In November 2012, a land survey was conducted by Don Miller, showing the boundaries of the Easement as follows:



A copy of the Survey is enclosed. The recorded Easement constitutes an express easement providing legal access from San Miguel Avenue to the Property.

III. The Property Has an Implied Way of Necessity.

TMS Ventures has an alternative legal basis for an easement to the Property by way of an implied way of necessity. Under Arizona law, there is a presumption that "whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property."[8] This is known as an "implied way of necessity." Arizona law is well established that where land is conveyed out of a larger parcel held in common ownership, the grantor "by implication of the

[8] *Bickel v. Hansen,* 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991); *Tobias v. Dailey,* 196 Ariz. 418, 422, 998P.2d 1091, 1095 (App. 2000) (citing the Restatement).

law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property." [9]

All of the requirements of an implied easement are met. In 1961, at the time the Property was severed and sold to the six individuals, the Property and the adjacent property (Lots 22, 23, 24, and 25) were owned by a common owner – Phoenix Title. Thus, there was unity of title. The easement for ingress and egress is necessary and beneficial to the Property. The size and location of the implied way of necessity should be the same width and location as the recorded Easement for Roadway. It is very clear that Phoenix Title intended to provide legal access to the Property and along the boundaries set forth in the recorded Easement.

For the foregoing reasons, **I hereby request that you acknowledge the easement rights across your property and in favor of the Property owned by TMS Ventures**. Specifically, I requestthat you sign and return the enclosed Quit Claim Deed (For Easement Purposes Only) to confirm the rights established in the recorded Easement. I am enclosing with this letter a Quit Claim Deed and $5.00 in accordance with A.R.S. § 12-1101, *et seq.* and, in particular, A.R.S. §12-1103. Please sign and return the original notarized Quit Claim Deed within 20 days of the date of this letter.

Should you fail to return the signed Quit Claim Deed within 20 days, and if it becomes necessary for our client to bring a legal action to establish their easement rights, then we will seek reimbursement of our reasonable attorneys' fees and court costs as allowed by A.R.S. § 12-1103(B).

I trust that you will give this letter your most immediate attention. All rights and remedies are necessarily reserved.

Very truly yours,

Andrew Abraham
For The Firm

AA/csb
Enclosures

[9] *Bickel v. Hansen,* 169 Ariz. at 374, 819 P.2d at 960.

When Recorded, Return to:

Andrew Abraham, Esq.
Burch & Cracchiolo, P.A.
702 East Osborn Road, Suite 200
Phoenix, AZ 85014

QUIT CLAIM DEED
(FOR EASEMENT PURPOSES ONLY)

EXEMPT pursuant to A.R.S. §11-1134(A)(4)

For and in consideration of Five Dollars ($5.00), and other valuable consideration, **Jerry D. Smith, Trustee of the JDS Trust dated August 22, 2005** ("Grantor"), hereby quit claims to **TMS Ventures, LLC, an Arizona limited liability company** ("Grantee") the following real property situated in the Town of Paradise Valley, Maricopa County, Arizona, together with all rights and privileges appurtenant thereto:

> **An Easement for ingress and egress that is 25 feet in width over and across Lot 25, as indicated in the Survey attached hereto as Exhibit A. Said Easement shall be in favor of the real property identified as Maricopa County Assessor's Parcel No. 172-47-078D.**

IN WITNESS WHEREOF, Grantor hereby executes this Quit Claim Deed using a notary public.

GRANTOR:

_____
Jerry D. Smith, Trustee of the JDS Trust dated August 22, 2005

STATE OF ARIZONA)
) ss.
County of Maricopa)

Before me, a Notary Public, for and within the County of Maricopa, State of Arizona, the _____ day of_____, 2016, personally appeared **Jerry D. Smith** known to me to be the person named above and who executed the above Quit Claim Deed.

My commission expires: _____
Notary Public

EXHIBIT "A"
EASEMENT SURVEY

RESULTS OF SURVEY

That part of the East 1200 feetof Tract 4, O'BRIENS CAMELBACK LANDS, according to Book 18 of maps, Page 38, records of Maricopa County, Arizona and lying within the Northeast quarter of Section 17, Township 2 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona described as follows:

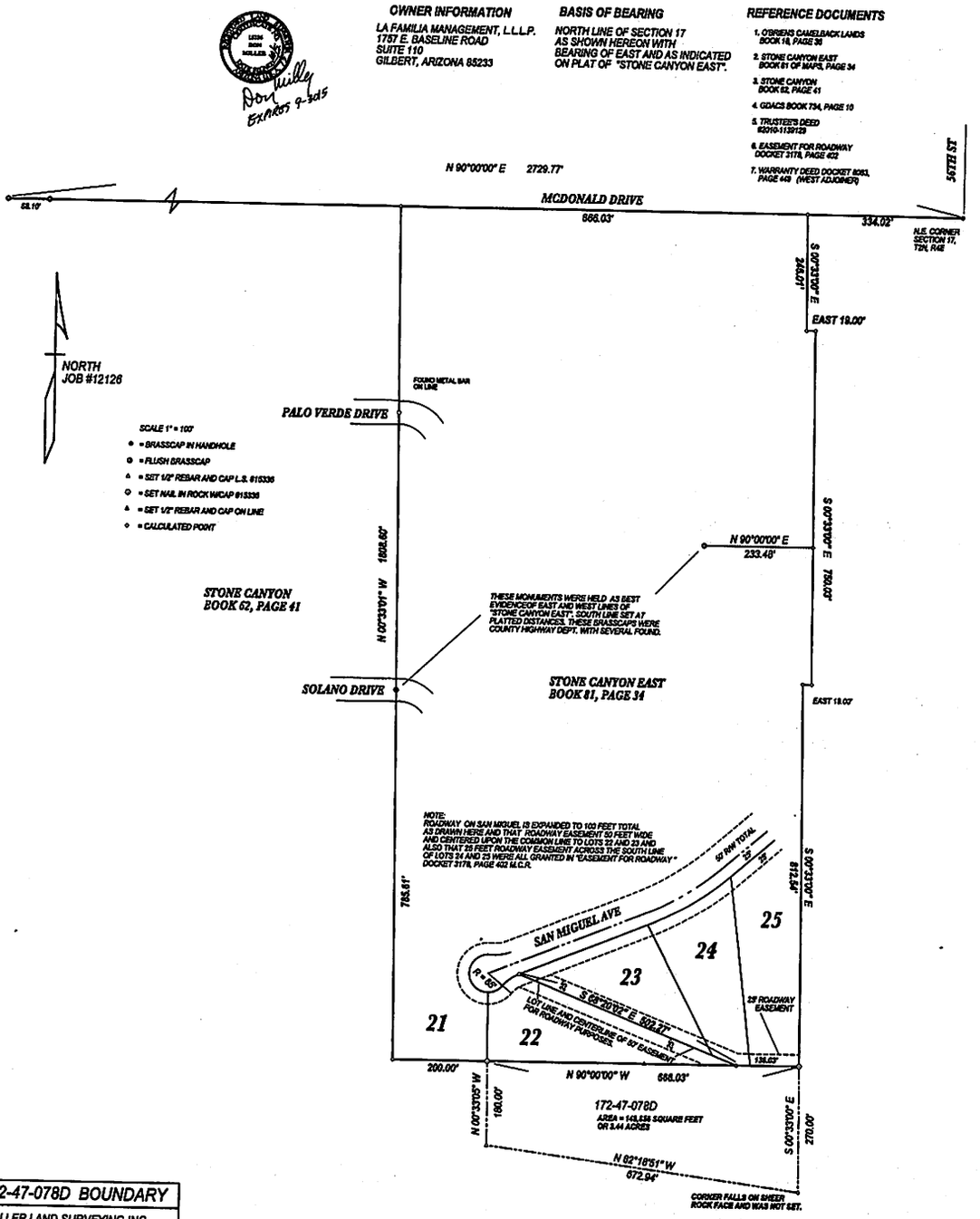
BEGINNING at the Southeast corner of STONE CANYON EAST, according to Book 81 of Maps, Page 34, records of Maricopa County, Arizona;
Thence Southerly parallel with and 334 feet West of the East line of said Tract 4 a distance of 270 feet;
Thence Northwesterly to a point on the West line of the East 1000 feet of said Tract 4 which is 180 feet Southerly of the Southwest corner of Lot 22 of said STONE CANYON EAST;
Thence Northerly along said West line to said Southwest corner;
Thence East along the South line of STONE CANYON EAST to the Point of Beginning.

AS SURVEYED BY DON MILLER, R.L.S. #15336 IN NOVEMBER, 2012

OWNER INFORMATION
LA FAMILIA MANAGEMENT, L.L.L.P.
1737 E. BASELINE ROAD
SUITE 110
GILBERT, ARIZONA 85233

BASIS OF BEARING
NORTH LINE OF SECTION 17
AS SHOWN HEREON WITH
BEARING OF EAST AND AS INDICATED
ON PLAT OF "STONE CANYON EAST".

REFERENCE DOCUMENTS
1. O'BRIENS CAMELBACK LANDS BOOK 18, PAGE 38
2. STONE CANYON EAST BOOK 81 OF MAPS, PAGE 34
3. STONE CANYON BOOK 62, PAGE 41
4. GDACS BOOK 734, PAGE 10
5. TRUSTEE'S DEED #2010-1139129
6. EASEMENT FOR ROADWAY DOCKET 3178, PAGE 402
7. WARRANTY DEED DOCKET 8083, PAGE 449 (WEST ADJOINER)



172-47-078D BOUNDARY	
MILLER LAND SURVEYING INC.	
131 S. 20TH ST. PHOENIX,AZ 85034 (602) 243-7193	
REVISIONS:	
DRAWN BY: DON MILLER	FILE #: 12126

BURCH & CRACCHIOLO

ANDREW ABRAHAM
DIRECT LINE: 602.234.9917
DIRECT FAX: 602.343.7917
AABRAHAM@BCATTORNEYS.COM

March 31, 2016

VIA FIRST CLASS MAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Rosanne T. Appel
5511 E. San Miguel Avenue
Paradise Valley, Arizona 85253

Re: **DEMAND TO QUIET TITLE FOR EASEMENT PURPOSES**
Property: 5507 E. San Miguel Lane, Paradise Valley, Arizona 85253 (APN 172-47-078D) (the "Property")

Dear Mrs. Appel:

Our firm has been retained by TMS Ventures, LLC as it relates to the above-referenced Property located in Paradise Valley, Arizona. This letter is written to you as the owner of Lot 23. Your property is encumbered by the access easement leading to the Property.

TMS Ventures has an easement for ingress and egress to the Property. As discussed herein, there are actually numerous, alternative bases under Arizona law that establish the existence of said easement. Demand is hereby made pursuant to A.R.S. § 12-1103(B) that you acknowledge the access easement to the Property by signing the enclosed Quit Claim Deed (For Easement Purposes Only).

I. Background

The Property is adjacent to a subdivision to the North, known as Stone Canyon East. Your property is one such "Lot" within Stone Canyon East. The Property and Stone Canyon East are located within Tract 4 of a much larger subdivision called O'Brien's Camelback Lands.[1] All of Tract 4 was once owned by Lulu Avis and Morrough W. O'Brien. After a series of transfers of Tract 4 O'Brien's Camelback Lands, the Property and the land area to become Stone Canyon East were conveyed to Jack Harris and Cramer Supply Corporation in 1956.[2] Then, in

[1] The plat for O'Brien's Camelback Lands was recorded on April 24, 1928 at Book 18, Page 36, M.C.R.

[2] In 1956, two deeds were used to convey title to the Property and the land to become Stone Canyon East. First, the Special Warranty Deed from Arizona Title Guarantee & Trust Company to Jack Harris and Cramer Supply Corporation for part of the property to become Stone Canyon East was recorded on June 27, 1956 at Docket 1933, Page 542, M.C.R. Second, the Warranty Deed from Allen Chase to Jack Harris and Cramer Supply Corporation for the Property and other parts of the property to become Stone Canyon East (and other portions of Tract 4) was recorded on June 27, 1956 at Docket 1933, Page 543, M.C.R.

1958, Jack Harris and Cramer Supply Corporation transferred the Property and the property to become Stone Canyon East to Phoenix Title and Trust Company ("Phoenix Title").[3] Phoenix Title was holding the property as a subdivision trust. Phoenix Title recorded the subdivision plat for Stone Canyon East in 1959.[4] The plat for Stone Canyon East does not identify the access easement to the Property. However, in 1960, Phoenix Title recorded an access easement to the Property, as discussed below.

From 1958 to 1961, Phoenix Title owned the entirety of the Property and the property to become Lots 22, 23, 24, and 25 of the Stone Canyon East subdivision. In 1961, Phoenix Title conveyed the Property to a group of six individuals.[5] Between 1961 and 1966, Phoenix Title conveyed Lots 22, 23, 24, and 25.[6] Thus, Phoenix Title was the owner of Lots 22, 23, 24, and 25 at the time it recorded the Easement in 1960.

Our client TMS Ventures, LLC purchased the Property in November 2012 from LaFamilia Management, LLLP.[7]

II. The Property Has an Express (Recorded) Easement.

In 1960, Phoenix Title (which still held title to the Property and Lots 22, 23, 24, and 25 of Stone Canyon East) recorded an "Easement For Roadway" (the "Easement"). A copy of the Easement is enclosed herewith. As stated therein, the Easement was recorded to (i) "increase the width of San Miguel Avenue" and (ii) "provide for **another roadway** not shown in said plat."

The Easement provides for a new roadway that extends from San Miguel Avenue up to the subject Property, as stated in relevant part:

> **NOW, THEREFORE … Phoenix Title and Trust Company … does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes and for no other purpose … as contained herein and as set forth below, said easement to be over the following described premises:**

---

[3] On December 3, 1958, the Warranty Deed from Jack Harris and Cramer Supply Corporation to Phoenix Title was recorded at Docket 2676, Page 77, M.C.R.

[4] The plat for Stone Canyon East was recorded on February 27, 1959 at Book 81, Page 34, M.C.R.

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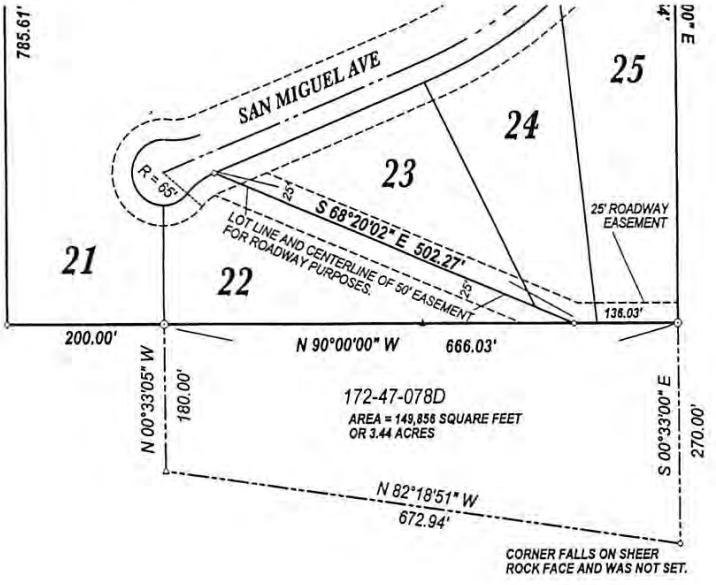
[6] Lot 22 was conveyed by Special Warranty Deed from Phoenix Title to Stone Canyon East Properties as recorded on June 5, 1964 at Docket 5080, Page 25, M.C.R.; Lot 23 was conveyed by Special Warranty Deed from Phoenix Title to Warren and Dolores Wolf as recorded on March 10, 1966 at Docket 5953, Page 202, M.C.R.; Lot 24 was conveyed by Special Warranty Deed from Phoenix Title to Ralph and Georgiana Luikart as recorded on March 15, 1962 at Docket 4065, Page 584, M.C.R.; Lot 25 was conveyed by Special Warranty Deed from Phoenix Title to Ben and Marian Cheney as recorded on March 30, 1961 at Docket 3641, Page 516, M.C.R.

[7] The Warranty Deed from LaFamilia Management, LLLP to TMS Ventures, LLC was recorded on November 16, 2012 at Recording No. 2012-1046521, M.C.R.

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

Thus, the Easement provides for a roadway 50 feet in total width (which extends 25' on each side of the boundary line between Lot 22 and Lot 23 and also 25' along the southern boundary lines of Lots 24 and 25).

In November 2012, a land survey was conducted by Don Miller, showing the boundaries of the Easement as follows:



A copy of the Survey is enclosed. The recorded Easement constitutes an express easement providing legal access from San Miguel Avenue to the Property.

III. The Property Has an Implied Way of Necessity.

TMS Ventures has an alternative legal basis for an easement to the Property by way of an implied way of necessity. Under Arizona law, there is a presumption that "whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property."[8] This is known as an "implied way of necessity." Arizona law is well established that where land is conveyed out of a larger parcel held in common ownership, the grantor "by implication of the

[8] *Bickel v. Hansen,* 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991); *Tobias v. Dailey,* 196 Ariz. 418, 422, 998P.2d 1091, 1095 (App. 2000) (citing the Restatement).

law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property." [9]

All of the requirements of an implied easement are met. In 1961, at the time the Property was severed and sold to the six individuals, the Property and the adjacent property (Lots 22, 23, 24, and 25) were owned by a common owner – Phoenix Title. Thus, there was unity of title. The easement for ingress and egress is necessary and beneficial to the Property. The size and location of the implied way of necessity should be the same width and location as the recorded Easement for Roadway. It is very clear that Phoenix Title intended to provide legal access to the Property and along the boundaries set forth in the recorded Easement.

For the foregoing reasons, **I hereby request that you acknowledge the easement rights across your property and in favor of the Property owned by TMS Ventures**. Specifically, I requestthat you sign and return the enclosed Quit Claim Deed (For Easement Purposes Only) to confirm the rights established in the recorded Easement. I am enclosing with this letter a Quit Claim Deed and $5.00 in accordance with A.R.S. § 12-1101, *et seq.* and, in particular, A.R.S. §12-1103. Please sign and return the original notarized Quit Claim Deed within 20 days of the date of this letter.

Should you fail to return the signed Quit Claim Deed within 20 days, and if it becomes necessary for our client to bring a legal action to establish their easement rights, then we will seek reimbursement of our reasonable attorneys' fees and court costs as allowed by A.R.S. § 12-1103(B).

I trust that you will give this letter your most immediate attention. All rights and remedies are necessarily reserved.

Very truly yours,

Andrew Abraham
For The Firm

AA/csb
Enclosures

[9] *Bickel v. Hansen,* 169 Ariz. at 374, 819 P.2d at 960.

When Recorded, Return to:

Andrew Abraham, Esq.
Burch & Cracchiolo, P.A.
702 East Osborn Road, Suite 200
Phoenix, AZ 85014

QUIT CLAIM DEED
(FOR EASEMENT PURPOSES ONLY)

EXEMPT pursuant to A.R.S. §11-1134(A)(4)

For and in consideration of Five Dollars ($5.00), and other valuable consideration, **Rosanne T. Appel, a married woman as her sole and separate property** ("Grantor"), hereby quit claims to **TMS Ventures, LLC, an Arizona limited liability company** ("Grantee") the following real property situated in the Town of Paradise Valley, Maricopa County, Arizona, together with all rights and privileges appurtenant thereto:

> **An Easement for ingress and egress that is 25 feet in width over and across Lot 23, as indicated in the Survey attached hereto as Exhibit A. Said Easement shall be in favor of the real property identified as Maricopa County Assessor's Parcel No. 172-47-078D.**

IN WITNESS WHEREOF, Grantor hereby executes this Quit Claim Deed using a notary public.

GRANTOR:

_____
Rosanne T. Appel

STATE OF ARIZONA)
) ss.
County of Maricopa)

Before me, a Notary Public, for and within the County of Maricopa, State of Arizona, the _____ day of_____, 2016, personally appeared **Rosanne T. Appel** known to me to be the person named above and who executed the above Quit Claim Deed.

_____
My commission expires: Notary Public

EXHIBIT "A"
EASEMENT SURVEY

RESULTS OF SURVEY

That part of the East 1200 feetof Tract 4, O'BRIENS CAMELBACK LANDS, according to Book 18 of maps, Page 38, records of Maricopa County, Arizona and lying within the Northeast quarter of Section 17, Township 2 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona described as follows:

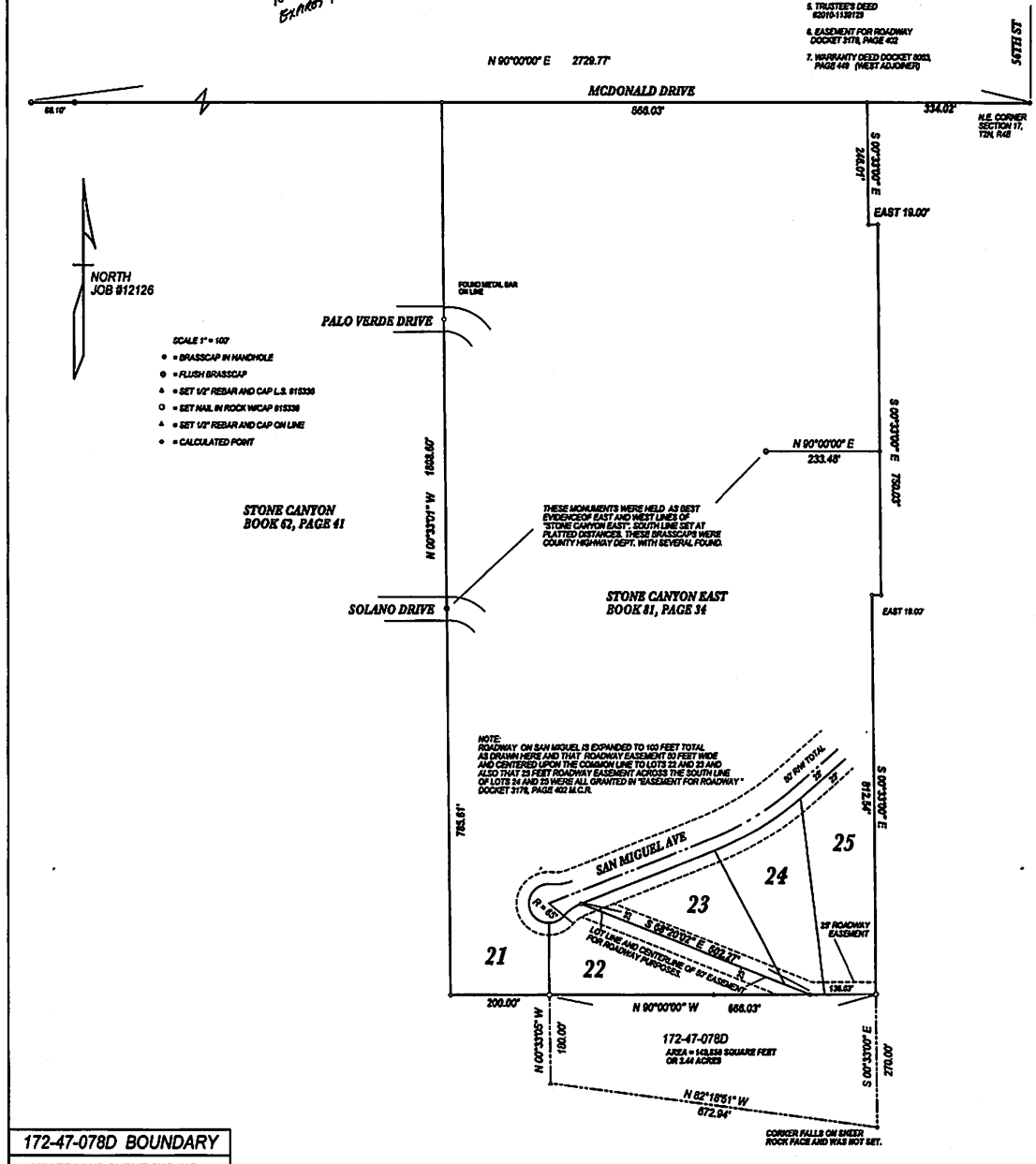
BEGINNING at the Southeast corner of STONE CANYON EAST, according to Book 81 of Maps, Page 34, records of Maricopa County, Arizona;
Thence Southerly parallel with and 334 feet West of the East line of said Tract 4 a distance of 270 feet;
Thence Northwesterly to a point on the West line of the East 1000 feet of said Tract 4 which is 180 feet Southerly of the Southwest corner of Lot 22 of said STONE CANYON EAST;
Thence Northerly along said West line to said Southwest corner;
Thence East along the South line of STONE CANYON EAST to the Point of Beginning.

AS SURVEYED BY DON MILLER, R.L.S. #15336 IN NOVEMBER, 2012

OWNER INFORMATION
LA FAMILIA MANAGEMENT, L.L.L.P.
1757 E. BASELINE ROAD
SUITE 110
GILBERT, ARIZONA 85233

BASIS OF BEARING
NORTH LINE OF SECTION 17
AS SHOWN HEREON WITH
BEARING OF EAST AND AS INDICATED
ON PLAT OF "STONE CANYON EAST".

REFERENCE DOCUMENTS
1. O'BRIENS CAMELBACK LANDS BOOK 18, PAGE 38
2. STONE CANYON EAST BOOK 81 OF MAPS, PAGE 34
3. STONE CANYON BOOK 62, PAGE 41
4. GDACS BOOK 734, PAGE 10
5. TRUSTEE'S DEED 82010-1139129
6. EASEMENT FOR ROADWAY DOCKET 3178, PAGE 402
7. WARRANTY DEED DOCKET 8053, PAGE 449 (WEST ADJOINER)



172-47-078D BOUNDARY	
MILLER LAND SURVEYING INC.	
131 S. 20TH ST. PHOENIX,AZ 85034 (602) 243-7193	
REVISIONS:	
DRAWN BY: DON MILLER	FILE #: 12126

BURCH & CRACCHIOLO

ANDREW ABRAHAM
DIRECT LINE: 602.234.9917
DIRECT FAX: 602.343.7917
AABRAHAM@BCATTORNEYS.COM

March 31, 2016

VIA FIRST CLASS MAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Ingrid Lenz Harrison Revocable Trust
5519 E. San Miguel Avenue
Paradise Valley, Arizona 85253

Re: **DEMAND TO QUIET TITLE FOR EASEMENT PURPOSES**
Property: 5507 E. San Miguel Lane, Paradise Valley, Arizona 85253 (APN 172-47-078D) (the "Property")

Dear Mrs. & Mr. Harrison:

Our firm has been retained by TMS Ventures, LLC as it relates to the above-referenced Property located in Paradise Valley, Arizona. This letter is written to you as the owner of Lot 24. Your property is encumbered by the access easement leading to the Property.

TMS Ventures has an easement for ingress and egress to the Property. As discussed herein, there are actually numerous, alternative bases under Arizona law that establish the existence of said easement. Demand is hereby made pursuant to A.R.S. § 12-1103(B) that you acknowledge the access easement to the Property by signing the enclosed Quit Claim Deed (For Easement Purposes Only).

I. Background

The Property is adjacent to a subdivision to the North, known as Stone Canyon East. Your property is one such "Lot" within Stone Canyon East. The Property and Stone Canyon East are located within Tract 4 of a much larger subdivision called O'Brien's Camelback Lands.[1] All of Tract 4 was once owned by Lulu Avis and Morrough W. O'Brien. After a series of transfers of Tract 4 O'Brien's Camelback Lands, the Property and the land area to become Stone Canyon East were conveyed to Jack Harris and Cramer Supply Corporation in 1956.[2] Then, in

[1] The plat for O'Brien's Camelback Lands was recorded on April 24, 1928 at Book 18, Page 36, M.C.R.

[2] In 1956, two deeds were used to convey title to the Property and the land to become Stone Canyon East. First, the Special Warranty Deed from Arizona Title Guarantee & Trust Company to Jack Harris and Cramer Supply Corporation for part of the property to become Stone Canyon East was recorded on June 27, 1956 at Docket 1933, Page 542, M.C.R. Second, the Warranty Deed from Allen Chase to Jack Harris and Cramer Supply Corporation for the Property and other parts of the property to become Stone Canyon East (and other portions of Tract 4) was recorded on June 27, 1956 at Docket 1933, Page 543, M.C.R.

1958, Jack Harris and Cramer Supply Corporation transferred the Property and the property to become Stone Canyon East to Phoenix Title and Trust Company ("Phoenix Title").[3] Phoenix Title was holding the property as a subdivision trust. Phoenix Title recorded the subdivision plat for Stone Canyon East in 1959.[4] The plat for Stone Canyon East does not identify the access easement to the Property. However, in 1960, Phoenix Title recorded an access easement to the Property, as discussed below.

From 1958 to 1961, Phoenix Title owned the entirety of the Property and the property to become Lots 22, 23, 24, and 25 of the Stone Canyon East subdivision. In 1961, Phoenix Title conveyed the Property to a group of six individuals.[5] Between 1961 and 1966, Phoenix Title conveyed Lots 22, 23, 24, and 25.[6] Thus, Phoenix Title was the owner of Lots 22, 23, 24, and 25 at the time it recorded the Easement in 1960.

Our client TMS Ventures, LLC purchased the Property in November 2012 from LaFamilia Management, LLLP.[7]

II. The Property Has an Express (Recorded) Easement.

In 1960, Phoenix Title (which still held title to the Property and Lots 22, 23, 24, and 25 of Stone Canyon East) recorded an "Easement For Roadway" (the "Easement"). A copy of the Easement is enclosed herewith. As stated therein, the Easement was recorded to (i) "increase the width of San Miguel Avenue" and (ii) "provide for **another roadway** not shown in said plat."

The Easement provides for a new roadway that extends from San Miguel Avenue up to the subject Property, as stated in relevant part:

> **NOW, THEREFORE ... Phoenix Title and Trust Company ... does hereby grant to the County of Maricopa, State of Arizona, an easement for roadway purposes and for no other purpose ... as contained herein and as set forth below, said easement to be over the following described premises:**

---

[3] On December 3, 1958, the Warranty Deed from Jack Harris and Cramer Supply Corporation to Phoenix Title was recorded at Docket 2676, Page 77, M.C.R.

[4] The plat for Stone Canyon East was recorded on February 27, 1959 at Book 81, Page 34, M.C.R.

[5] The Special Warranty Deed from Phoenix Title to the six individuals was recorded on October 25, 1961 at Docket 3895, Page 476, M.C.R.

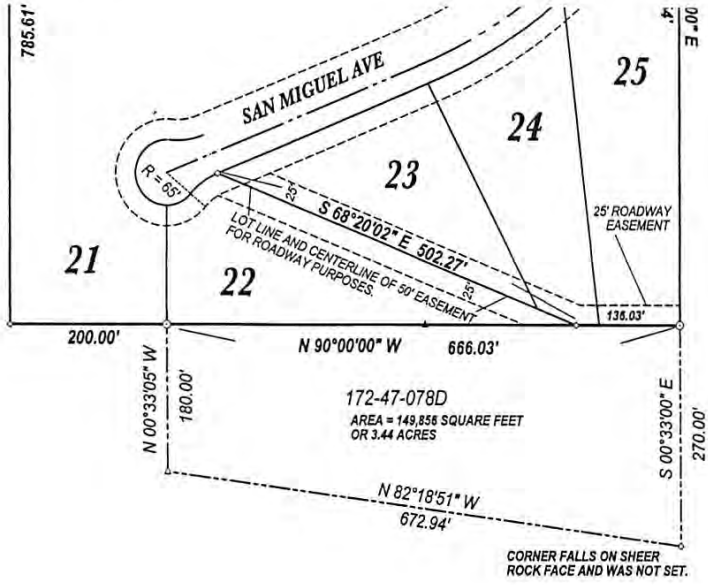
[6] Lot 22 was conveyed by Special Warranty Deed from Phoenix Title to Stone Canyon East Properties as recorded on June 5, 1964 at Docket 5080, Page 25, M.C.R.; Lot 23 was conveyed by Special Warranty Deed from Phoenix Title to Warren and Dolores Wolf as recorded on March 10, 1966 at Docket 5953, Page 202, M.C.R.; Lot 24 was conveyed by Special Warranty Deed from Phoenix Title to Ralph and Georgiana Luikart as recorded on March 15, 1962 at Docket 4065, Page 584, M.C.R.; Lot 25 was conveyed by Special Warranty Deed from Phoenix Title to Ben and Marian Cheney as recorded on March 30, 1961 at Docket 3641, Page 516, M.C.R.

[7] The Warranty Deed from LaFamilia Management, LLLP to TMS Ventures, LLC was recorded on November 16, 2012 at Recording No. 2012-1046521, M.C.R.

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

Thus, the Easement provides for a roadway 50 feet in total width (which extends 25' on each side of the boundary line between Lot 22 and Lot 23 and also 25' along the southern boundary lines of Lots 24 and 25).

In November 2012, a land survey was conducted by Don Miller, showing the boundaries of the Easement as follows:



A copy of the Survey is enclosed. The recorded Easement constitutes an express easement providing legal access from San Miguel Avenue to the Property.

III. The Property Has an Implied Way of Necessity.

TMS Ventures has an alternative legal basis for an easement to the Property by way of an implied way of necessity. Under Arizona law, there is a presumption that "whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property."[8] This is known as an "implied way of necessity." Arizona law is well established that where land is conveyed out of a larger parcel held in common ownership, the grantor "by implication of the

[8] *Bickel v. Hansen,* 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991); *Tobias v. Dailey,* 196 Ariz. 418, 422, 998P.2d 1091, 1095 (App. 2000) (citing the Restatement).

law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property." [9]

All of the requirements of an implied easement are met. In 1961, at the time the Property was severed and sold to the six individuals, the Property and the adjacent property (Lots 22, 23, 24, and 25) were owned by a common owner – Phoenix Title. Thus, there was unity of title. The easement for ingress and egress is necessary and beneficial to the Property. The size and location of the implied way of necessity should be the same width and location as the recorded Easement for Roadway. It is very clear that Phoenix Title intended to provide legal access to the Property and along the boundaries set forth in the recorded Easement.

For the foregoing reasons, **I hereby request that you acknowledge the easement rights across your property and in favor of the Property owned by TMS Ventures**. Specifically, I requestthat you sign and return the enclosed Quit Claim Deed (For Easement Purposes Only) to confirm the rights established in the recorded Easement. I am enclosing with this letter a Quit Claim Deed and $5.00 in accordance with A.R.S. § 12-1101, *et seq.* and, in particular, A.R.S. §12-1103. Please sign and return the original notarized Quit Claim Deed within 20 days of the date of this letter.

Should you fail to return the signed Quit Claim Deed within 20 days, and if it becomes necessary for our client to bring a legal action to establish their easement rights, then we will seek reimbursement of our reasonable attorneys' fees and court costs as allowed by A.R.S. § 12-1103(B).

I trust that you will give this letter your most immediate attention. All rights and remedies are necessarily reserved.

Very truly yours,

Andrew Abraham
For The Firm

AA/csb
Enclosures

[9] *Bickel v. Hansen,* 169 Ariz. at 374, 819 P.2d at 960.

When Recorded, Return to:

Andrew Abraham, Esq.
Burch & Cracchiolo, P.A.
702 East Osborn Road, Suite 200
Phoenix, AZ 85014

QUIT CLAIM DEED
(FOR EASEMENT PURPOSES ONLY)

EXEMPT pursuant to A.R.S. §11-1134(A)(4)

For and in consideration of Five Dollars ($5.00), and other valuable consideration, **Ingrid Lenz Harrison and Alfred Harrison, or their successors, as Trustees of the Ingrid Lenz Harrison Revocable Trust dated November 19, 1999, as amended** ("Grantor"), hereby quit claims to **TMS Ventures, LLC, an Arizona limited liability company** ("Grantee") the following real property situated in the Town of Paradise Valley, Maricopa County, Arizona, together with all rights and privileges appurtenant thereto:

> **An Easement for ingress and egress that is 25 feet in width over and across Lot 24, as indicated in the Survey attached hereto as Exhibit A. Said Easement shall be in favor of the real property identified as Maricopa County Assessor's Parcel No. 172-47-078D.**

IN WITNESS WHEREOF, Grantor hereby executes this Quit Claim Deed using a notary public.

GRANTOR:

_____
Ingrid Lenz Harrison, Trustee

_____
Alfred Harrison, Trustee

STATE OF ARIZONA)
) ss.
County of Maricopa)

Before me, a Notary Public, for and within the County of Maricopa, State of Arizona, the _____ day of_____, 2016, personally appeared **Ingrid Lenz Harrison** known to me to be the person named above and who executed the above Quit Claim Deed.

My commission expires: _____
Notary Public

STATE OF ARIZONA)
) ss.
County of Maricopa)

Before me, a Notary Public, for and within the County of Maricopa, State of Arizona, the _____ day of_____, 2016, personally appeared **Alfred Harrison** known to me to be the person named above and who executed the above Quit Claim Deed.

My commission expires: _____
Notary Public

EXHIBIT "A"
EASEMENT SURVEY

RESULTS OF SURVEY

That part of the East 1200 feetof Tract 4, O'BRIENS CAMELBACK LANDS, according to Book 18 of maps, Page 38, records of Maricopa County, Arizona and lying within the Northeast quarter of Section 17, Township 2 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona described as follows:

BEGINNING at the Southeast corner of STONE CANYON EAST, according to Book 81 of Maps, Page 34, records of Maricopa County, Arizona;
Thence Southerly parallel with and 334 feet West of the East line of said Tract 4 a distance of 270 feet;
Thence Northwesterly to a point on the West line of the East 1000 feet of said Tract 4 which is 180 feet Southerly of the Southwest corner of Lot 22 of said STONE CANYON EAST;
Thence Northerly along said West line to said Southwest corner;
Thence East along the South line of STONE CANYON EAST to the Point of Beginning.

AS SURVEYED BY DON MILLER, R.L.S. #15336 IN NOVEMBER, 2012

LS336 DON MILLER

Don Miller Exp 6-30-15

OWNER INFORMATION

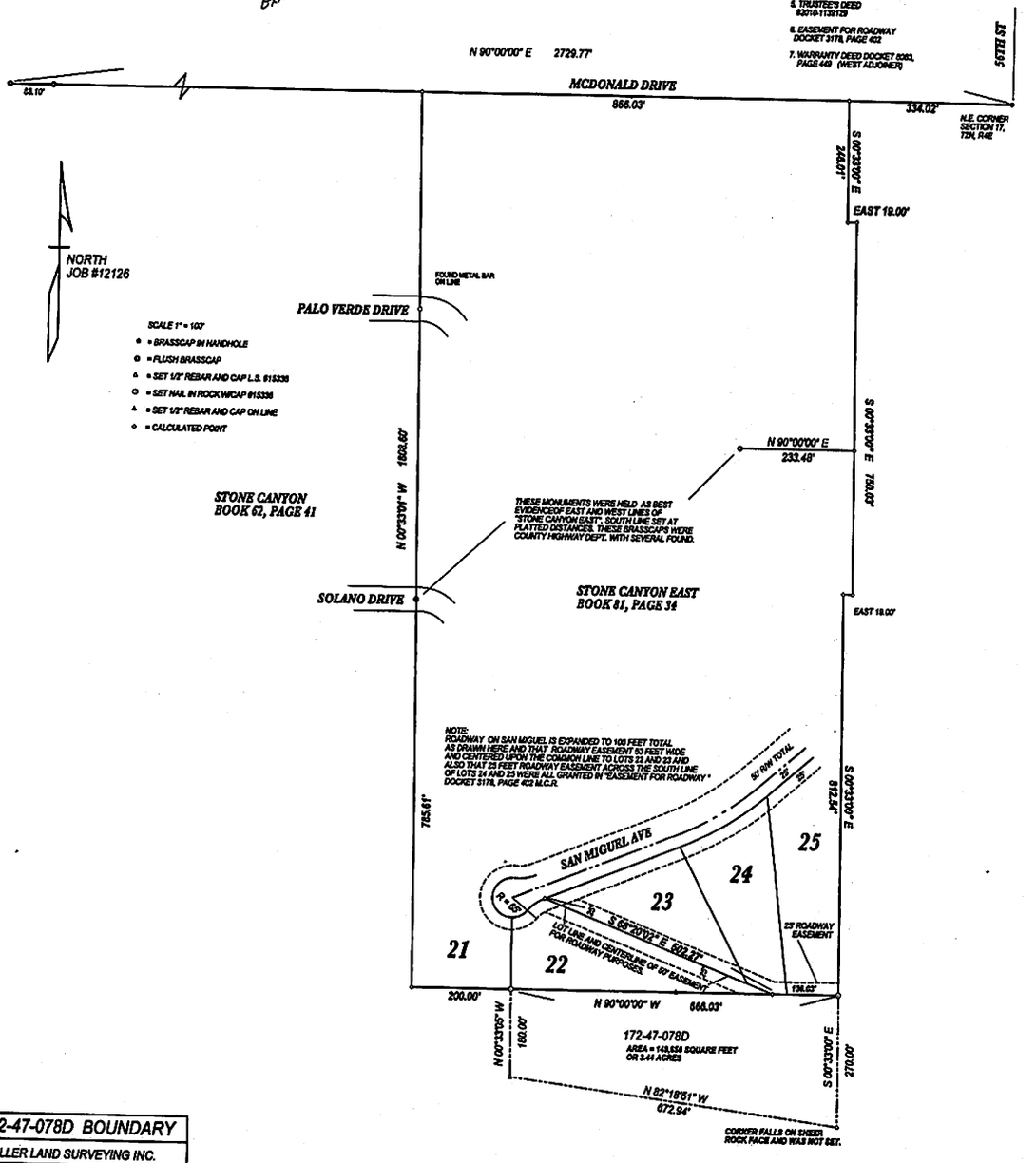
LA FAMILIA MANAGEMENT, L.L.L.P.
1757 E. BASELINE ROAD
SUITE 110
GILBERT, ARIZONA 85233

BASIS OF BEARING

NORTH LINE OF SECTION 17 AS SHOWN HEREON WITH BEARING OF EAST AND AS INDICATED ON PLAT OF "STONE CANYON EAST".

REFERENCE DOCUMENTS

1. O'BRIENS CAMELBACK LANDS BOOK 18, PAGE 38
2. STONE CANYON EAST BOOK 81 OF MAPS, PAGE 34
3. STONE CANYON BOOK 62, PAGE 41
4. GDACS BOOK 734, PAGE 10
5. TRUSTEE'S DEED 92010-1139129
6. EASEMENT FOR ROADWAY DOCKET 3178, PAGE 402
7. WARRANTY DEED DOCKET 6063, PAGE 449 (WEST ADJOINER)



172-47-078D BOUNDARY	
MILLER LAND SURVEYING INC.	
131 S. 20TH ST. PHOENIX,AZ 85034 (602) 243-7183	
REVISIONS:	
DRAWN BY: DON MILLER	FILE #: 12126

BURCH & CRACCHIOLO

ANDREW ABRAHAM
DIRECT LINE: 602.234.9917
DIRECT FAX: 602.343.7917
AABRAHAM@BCATTORNEYS.COM

March 31, 2016

VIA FIRST CLASS MAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Teresa C. Zachariah and Joe Zachariah
5505 E. San Miguel Avenue
Paradise Valley, Arizona 85253

Re: **DEMAND TO QUIET TITLE FOR EASEMENT PURPOSES**
Property: 5507 E. San Miguel Lane, Paradise Valley, Arizona 85253 (APN 172-47-078D) (the "Property")

Dear Mrs. & Mr. Zachariah:

Our firm has been retained by TMS Ventures, LLC as it relates to the above-referenced Property located in Paradise Valley, Arizona. This letter is written to you as the owner of Lot 22. Your property is encumbered by the access easement leading to the Property.

TMS Ventures has an easement for ingress and egress to the Property. As discussed herein, there are actually numerous, alternative bases under Arizona law that establish the existence of said easement. Demand is hereby made pursuant to A.R.S. § 12-1103(B) that you acknowledge the access easement to the Property by signing the enclosed Quit Claim Deed (For Easement Purposes Only).

I. Background

The Property is adjacent to a subdivision to the North, known as Stone Canyon East. Your property is one such "Lot" within Stone Canyon East. The Property and Stone Canyon East are located within Tract 4 of a much larger subdivision called O'Brien's Camelback Lands.[1] All of Tract 4 was once owned by Lulu Avis and Morrough W. O'Brien. After a series of transfers of Tract 4 O'Brien's Camelback Lands, the Property and the land area to become Stone Canyon East were conveyed to Jack Harris and Cramer Supply Corporation in 1956.[2] Then, in

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From 1958 to 1961, Phoenix Title owned the entirety of the Property and the property to become Lots 22, 23, 24, and 25 of the Stone Canyon East subdivision. In 1961, Phoenix Title conveyed the Property to a group of six individuals.[5] Between 1961 and 1966, Phoenix Title conveyed Lots 22, 23, 24, and 25.[6] Thus, Phoenix Title was the owner of Lots 22, 23, 24, and 25 at the time it recorded the Easement in 1960.

Our client TMS Ventures, LLC purchased the Property in November 2012 from LaFamilia Management, LLLP.[7]

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In 1960, Phoenix Title (which still held title to the Property and Lots 22, 23, 24, and 25 of Stone Canyon East) recorded an "Easement For Roadway" (the "Easement"). A copy of the Easement is enclosed herewith. As stated therein, the Easement was recorded to (i) "increase the width of San Miguel Avenue" and (ii) "provide for **another roadway** not shown in said plat."

The Easement provides for a new roadway that extends from San Miguel Avenue up to the subject Property, as stated in relevant part:

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---

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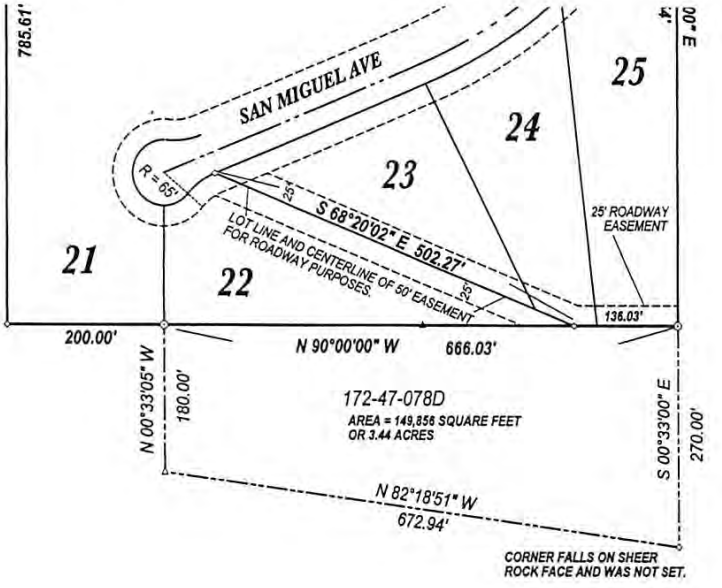
> **[…] A strip of land 25' wide along the N. side and a strip of land 25' wide along the S. line of the lot line separating Lots 22 and 23, and 25' wide N. of the S. border of said subdivision in Lots 24 and 25.**

Thus, the Easement provides for a roadway 50 feet in total width (which extends 25' on each side of the boundary line between Lot 22 and Lot 23 and also 25' along the southern boundary lines of Lots 24 and 25).

In November 2012, a land survey was conducted by Don Miller, showing the boundaries of the Easement as follows:



A copy of the Survey is enclosed. The recorded Easement constitutes an express easement providing legal access from San Miguel Avenue to the Property.

III. The Property Has an Implied Way of Necessity.

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is conveyed out of a larger parcel held in common ownership, the grantor "by implication of the law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property."[9]

All of the requirements of an implied easement are met. In 1961, at the time the Property was severed and sold to the six individuals, the Property and the adjacent property (Lots 22, 23, 24, and 25) were owned by a common owner – Phoenix Title. Thus, there was unity of title. The easement for ingress and egress is necessary and beneficial to the Property. The size and location of the implied way of necessity should be the same width and location as the recorded Easement for Roadway. It is very clear that Phoenix Title intended to provide legal access to the Property and along the boundaries set forth in the recorded Easement.

For the foregoing reasons, **I hereby request that you acknowledge the easement rights across your property and in favor of the Property owned by TMS Ventures**. Specifically, I requestthat you sign and return the enclosed Quit Claim Deed (For Easement Purposes Only) to confirm the rights established in the recorded Easement. I am enclosing with this letter a Quit Claim Deed and $5.00 in accordance with A.R.S. § 12-1101, *et seq.* and, in particular, A.R.S. §12-1103. Please sign and return the original notarized Quit Claim Deed within 20 days of the date of this letter.

Should you fail to return the signed Quit Claim Deed within 20 days, and if it becomes necessary for our client to bring a legal action to establish their easement rights, then we will seek reimbursement of our reasonable attorneys' fees and court costs as allowed by A.R.S. § 12-1103(B).

I trust that you will give this letter your most immediate attention. All rights and remedies are necessarily reserved.

Very truly yours,

Andrew Abraham
For The Firm

AA/csb
Enclosures

[9] *Bickel v. Hansen,* 169 Ariz. at 374, 819 P.2d at 960.

When Recorded, Return to:

Andrew Abraham, Esq.
Burch & Cracchiolo, P.A.
702 East Osborn Road, Suite 200
Phoenix, AZ 85014

QUIT CLAIM DEED
(FOR EASEMENT PURPOSES ONLY)

EXEMPT pursuant to A.R.S. §11-1134(A)(4)

For and in consideration of Five Dollars ($5.00), and other valuable consideration, **Teresa C. Zachariah and Joe Zachariah, wife and husband** ("Grantor"), hereby quit claims to **TMS Ventures, LLC, an Arizona limited liability company** ("Grantee") the following real property situated in the Town of Paradise Valley, Maricopa County, Arizona, together with all rights and privileges appurtenant thereto:

> **An Easement for ingress and egress that is 25 feet in width over and across Lot 22, as indicated in the Survey attached hereto as Exhibit A. Said Easement shall be in favor of the real property identified as Maricopa County Assessor's Parcel No. 172-47-078D.**

IN WITNESS WHEREOF, Grantor hereby executes this Quit Claim Deed using a notary public.

GRANTOR:

_____
Teresa C. Zachariah

_____
Joe Zachariah

STATE OF ARIZONA)
) ss.
County of Maricopa)

Before me, a Notary Public, for and within the County of Maricopa, State of Arizona, the _____ day of_____, 2016, personally appeared **Teresa C. Zachariah** known to me to be the person named above and who executed the above Quit Claim Deed.

My commission expires: _____ Notary Public

STATE OF ARIZONA)
) ss.
County of Maricopa)

Before me, a Notary Public, for and within the County of Maricopa, State of Arizona, the _____ day of_____, 2016, personally appeared **Joe Zachariah** known to me to be the person named above and who executed the above Quit Claim Deed.

My commission expires: _____ Notary Public

EXHIBIT "A"
EASEMENT SURVEY

RESULTS OF SURVEY

That part of the East 1200 feetof Tract 4, O'BRIENS CAMELBACK LANDS, according to Book 18 of maps, Page 36, records of Maricopa County, Arizona and lying within the Northeast quarter of Section 17, Township 2 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona described as follows:

BEGINNING at the Southeast corner of STONE CANYON EAST, according to Book 81 of Maps, Page 34, records of Maricopa County, Arizona;
Thence Southerly parallel with and 334 feet West of the East line of said Tract 4 a distance of 270 feet;
Thence Northwesterly to a point on the West line of the East 1000 feet of said Tract 4 which is 180 feet Southerly of the Southwest corner of Lot 22 of said STONE CANYON EAST;
Thence Northerly along said West line to said Southwest corner;
Thence East along the South line of STONE CANYON EAST to the Point of Beginning.

AS SURVEYED BY DON MILLER, R.L.S. #15336 IN NOVEMBER, 2012

OWNER INFORMATION
LA FAMILIA MANAGEMENT, L.L.L.P.
1757 E. BASELINE ROAD
SUITE 110
GILBERT, ARIZONA 85233

BASIS OF BEARING
NORTH LINE OF SECTION 17 AS SHOWN HEREON WITH BEARING OF EAST AND AS INDICATED ON PLAT OF "STONE CANYON EAST".

REFERENCE DOCUMENTS
1. O'BRIENS CAMELBACK LANDS BOOK 18, PAGE 36
2. STONE CANYON EAST BOOK 81 OF MAPS, PAGE 34
3. STONE CANYON BOOK 62, PAGE 41
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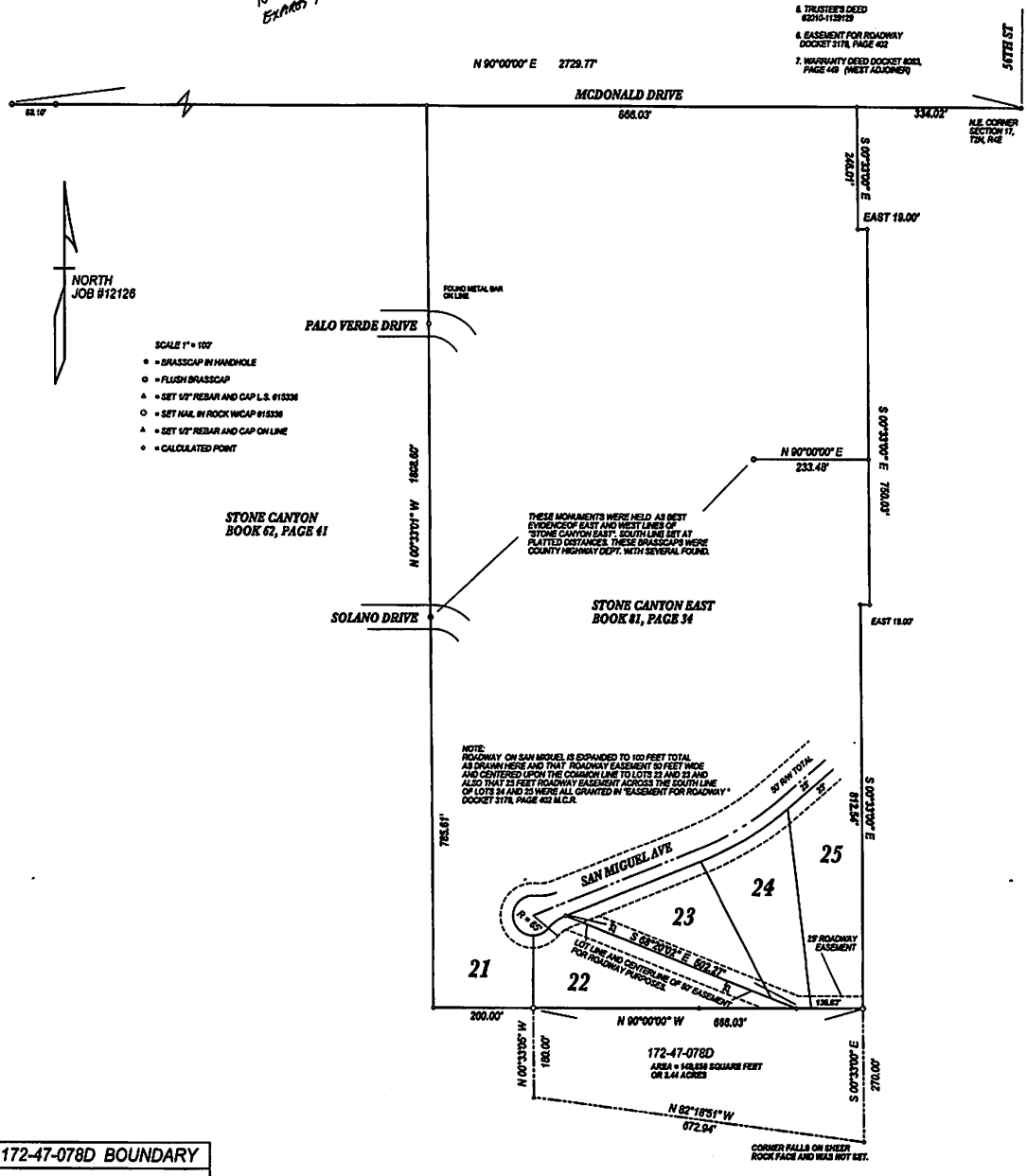


172-47-078D BOUNDARY	
MILLER LAND SURVEYING INC.	
131 S. 20TH ST. PHOENIX, AZ 85034 (602) 343-7193	
REVISIONS:	
DRAWN BY: DON MILLER	FILE #: 12126

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

BURCH & CRACCHIOLO, P.A.
702 EAST OSBORN ROAD
PHOENIX, ARIZONA 85014
TELEPHONE (602) 274-7611
Andrew Abraham, SBA # 007322, aabraham@bcattorneys.com
Bryan F. Murphy, SBA # 006414, bmurphy@bcattorneys.com
Casey S. Blais, SBA # 026202, cblais@bcattorneys.com
Attorneys for Plaintiff/Counterdefendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC, an Arizona limited liability company,

Plaintiff,

v.

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

Defendants.

TERESA C. ZACHARIAH AND JOE ZACHARIAH, et al.

Counterclaimants,

v.

TMS VENTURES, LLC, an Arizona limited liability company,

Counterdefendant.

Case No. CV2016-005381

JOINT PRETRIAL STATEMENT

(Complex Civil Case)

(Assigned to the Hon. Pamela Gates)

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

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

1. List of Claims

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

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

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

2. List of Trial Witnesses

See Witness List attached hereto as Exhibit A.

3. The Parties' Trial Exhibits

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

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

4. Deposition Designations

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

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

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

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

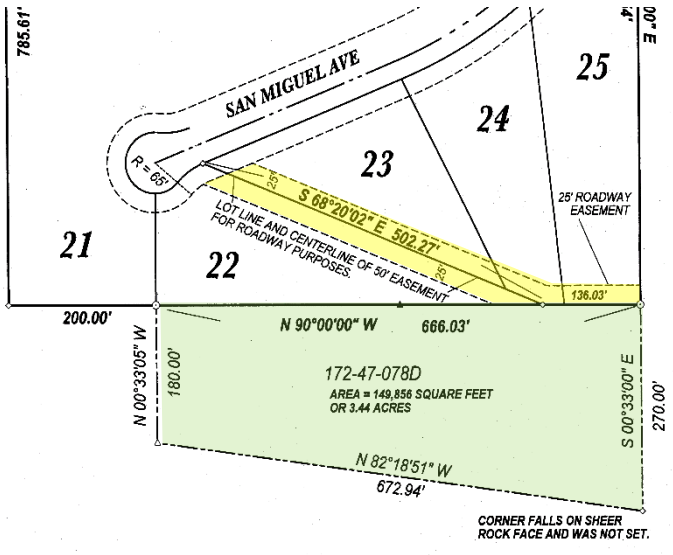
Defendants object to Plaintiff's use of the deposition designations for any purpose other than impeachment. Defendants do not intend to offer any proposed deposition summaries or designations of deposition testimony at trial, other than for impeachment

purposes.

5. Brief Statement of the Case

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

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



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

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

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

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

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

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

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

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

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

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

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

6. Requested Technical Equipment

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

7. Requested Interpreters

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

8. Invocation of Rule 615

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

9. Settlement Efforts

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

DATED this 25th day of June, 2018.

BURCH & CRACCHIOLO, P.A.

By: /s/ *Andrew Abraham*
Andrew Abraham
Bryan F. Murphy
Casey S. Blais
702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
Attorneys for Plaintiff/ Counterdefendant

FRANCIS J. SLAVIN, P.C.

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

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

Honorable Randall Warner
MARICOPA COUNTY SUPERIOR COURT

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

By: */s/ Casey S. Blais*

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

Trust Nos. 2643 & 2644

DKT 3178 PAGE 402

EASEMENT FOR ROADWAY

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

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

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

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

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

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

Also the following:

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

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

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

PHOENIX TITLE AND TRUST COMPANY,
an Arizona corporation,
TRUSTEE

By R. Brehmer
Assistant Vice President

ATTEST: B. A. Vitek
Assistant Secretary

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

On this the 29th day of February 1960 before me the undersigned officer personally appeared R. Brehmer and B. A. Vitek who acknowledged themselves to be the Vice President and Assistant Secretary respectively of the PHOENIX TITLE AND TRUST COMPANY a corporation, and that they as such officers respectively being authorized so to do executed the foregoing instrument for the purposes therein contained by signing the name of the corporation as Trustee by themselves as such officers respectively.

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

My Commission Expires 4/2/60

Helen Ware
Notary Public

DKT 3178 PAGE 403

STATE OF ARIZONA, County of Maricopa; ss.
I do hereby certify that the within instrument was filed and recorded at request of Phoenix Title & Trust Co.
on MAR 1 - 60 - 8 00 AM at DEED M., Docket 3178
Page 402-403 Records of Maricopa County, Arizona.
WITNESS my hand and official seal the day and year first above written.
N. O. "KELLY" MOONEY, County Recorder,
By Deputy.

2/24/60
35826
1.50

51-12

STATE OF ARIZONA
ss.
COUNTY OF MARICOPA

DKT 4065 PAGE 584

4-20-62

I hereby certify that the within instrument was filed and recorded

MAR 15 '62-8 00 AM DOCKET DKT 4065 PAGE 584 and indexed in DEEDS

at the request of Phoenix Title & Trust Co

Fee No. 01-DEED 45472

When recorded, mail to:
Dr. RALPH LUIKART
Medical Arts Bldg.
Omaha, Nebraska

Witness my hand and official seal.

N. C. "KELLY" MOORE, County Recorder,
By A. O. Smith Deputy Recorder

Compared
Photostated
Fee: 1.75

Escrow #357778 RVL:c

Special Warranty Deed

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

RALPH LUIKART and GEORGIANA JANE LUIKART, his wife

the Grantee, the following real property situated in Maricopa County, Arizona:

Lot Twenty-four (24), STONE CANYON EAST, according to the plat of record in the office of the Maricopa County Recorder in Book 81 of Maps, page 34.

SUBJECT TO: 1960 and all subsequent taxes, which the Grantees herein assume and agree to pay; Restrictions, conditions and covenants contained in instrument rec. in Docket 2774, page 27; Restrictions, conditions and covenants contained in instrument rec. in Book 235 of Deeds, page 573, which purports to restrict all of the land and lots in O'Brien's Camelback Lands; Easement for roadway as granted to County of Maricopa by instrument rec. in Docket 3178, page 402; Easement for roadway as granted to County of Maricopa by instrument rec. in Docket 3178, page 402; Easement to all public utilities serving said subdivision, for the erection, installation, continued operation, maintenance and repair of electric transmission, distribution and telephone lines, domestic and irrigation water lines, gas, sewage and other public utility facility as set forth in instrument rec. in Docket 2778, page 412; Easement for roadway as shown on the rec. plat of said subdivision; Inclusion within Verde River Irrigation and Power District; Rights of way for canals, laterals and ditches; and Reservations and exceptions in patents. All recording data refers to the records in the office of the County Recorder of Maricopa County, Arizona.

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

IN WITNESS WHEREOF, the PHOENIX TITLE AND TRUST COMPANY, as Trustee, has caused its corporate name to be signed and its corporate seal to be affixed by the undersigned officer thereunto duly authorized this 20th day of April A. D., 19 60.

PHOENIX TITLE AND TRUST COMPANY, as Trustee

By Jack K. Brigham
Trust Officer

STATE OF ARIZONA
ss.
County of Maricopa

Before me this 20th day of May, 19 60, personally appeared Jack K. Brigham, who acknowledged himself to be a Trust Officer of the PHOENIX TITLE AND TRUST COMPANY and that he as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation as Trustee, by himself as such officer.

My commission will expire: April 2, 1964

Helen Wore
Notary Public

FORM 100-9

50 States Realty

VACANT LAND/LOT
PURCHASE CONTRACT

If subdivided land (less than 36 acres) or unsubdivided land (36 acres to 160 acres) is being sold by a subdivider, i.e., a person who owns 6 or more lots, a public report will generally be required and an Addendum regarding subdivided or unsubdivided land must be executed by the Seller and Buyer.

The printed portion of this contract has been approved by the ARIZONA ASSOCIATION OF REALTORS® ("AAR"). This is intended to be a binding contract. No representation is made as to the legal validity or adequacy of any provision or the tax consequences thereof. If you desire legal, tax or other professional advice, consult your attorney, tax advisor, insurance agent or professional consultant.

1. PROPERTY

1a. 1. BUYER: TMS VENTURES, LLC OR N Entity LLC to be formed
BUYER'S NAME(S)

2. SELLER: _____ or ☒ as identified in Section 9c.
SELLER'S NAME(S)

3. Buyer agrees to buy and Seller agrees to sell the real property with all improvements, fixtures, and appurtenances thereon
4. or incidental thereto, if any, plus the personal property described herein (collectively the "Property").

1b. 5. Property Address: 5507 E. SAN MIGUEL AVE Zoning: R42

6. Assessor's #: 172-47-078-D /

7. City: PARADISE VALLEY County: MARICOPA AZ, Zip Code: 85253

8. Legal Description: O'BRIENS CAMELBACK LANDS P+TR 01 or ☐ see attached legal description.

1c. 9. $ 725,000 -- Full Purchase Price, paid as outlined below

10. $ 25,000 -- Earnest money

11. $ 700,000 -- CASH AT CLOSE OF ESCROW

12. $

13.

1d. 14. **Incidental Improvements:** Buyer is purchasing the Property as vacant land. Any improvements, fixtures and appurtenances
15. thereon are incidental thereto, plus any personal property on the Property are merely incidental, are being transferred in their
16. existing condition ("AS IS") and Seller makes no warranty to Buyer, expressed or implied, as to their condition.

1e. 17. **Close of Escrow:** Close of Escrow ("COE") shall occur when the deed is recorded at the appropriate county recorder's office.
18. Buyer and Seller shall comply with all terms and conditions of this Contract, execute and deliver to Escrow Company all
19. closing documents, and perform all other acts necessary in sufficient time to allow COE to occur on
20. NOVEMBER (MONTH) 16th (DAY), 2012 (YEAR) ("COE Date"). If Escrow Company or recorder's office is closed on
21. COE Date, COE shall occur on the next day that both are open for business.

22. Buyer shall deliver to Escrow Company a cashier's check, wired funds or other immediately available funds to pay any down
23. payment, additional deposits or Buyer's closing costs, and instruct the lender, if applicable, to deliver immediately available funds
24. to Escrow Company, in a sufficient amount and in sufficient time to allow COE to occur on COE Date.

1f. 25. **Possession:** Seller shall deliver access to keys and/or means to operate all locks, mailbox, and all common area facilities, subject to
26. the rights of tenants under existing leases, to Buyer at COE or ☐ _____. Broker(s) recommend that the parties seek appropriate
27. counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post-possession of the Property.

1g. 28. **Addenda Incorporated:** ☐ Assumption/Carryback ☐ Buyer Contingency ☐ Domestic Water Well ☐ H.O.A.
29. ☐ Additional Clause ☐ On-site Wastewater Treatment Facility ☐ Addendum to Vacant Land

30. ☐ Other: _____

31. **IF THIS IS AN ALL CASH SALE, GO TO SECTION 3.**

50 States Realty 10640 N 28th Dr #C-102 Phoenix, AZ 85029
Phone: (602)403-2778 Fax: Marcella Scali

Scali EXHIBIT 1
DATE 3-9-18
Colette E. Ross
CR No. 50658

2. FINANCING

(If financing is to be other than new financing, see attached addendum.)

2a. **Loan Status Report:** The AAR Vacant Land/Lot Loan Status Report ("LSR") with, at a minimum, the Buyer's Loan Information section completed, describing the current status of the Buyer's proposed loan, is attached hereto and incorporated herein by reference.

2b. **Financing: This sale ☐ is ☐ is not contingent upon Buyer obtaining a satisfactory financing commitment within Financing Commitment Contingency Period. (If sale is not contingent on a financing commitment, go to Section 2g.)**

2c. **Financing Commitment Contingency Period:** If the sale is contingent upon Buyer obtaining a satisfactory financing commitment, Buyer shall have thirty (30) days or ☐ _____ days after the Contract acceptance ("Financing Commitment Contingency Period") to obtain a financing commitment satisfactory to Buyer in Buyer's sole discretion, for a loan to purchase the Property or Buyer may cancel this Contract and receive a refund of the Earnest Money. **PRIOR TO THE EXPIRATION OF THE FINANCING COMMITMENT CONTINGENCY PERIOD, BUYER SHALL DELIVER TO SELLER AND ESCROW COMPANY NOTICE THAT BUYER HAS NOT RECEIVED SUCH SATISFACTORY FINANCING COMMITMENT OR BUYER SHALL BE DEEMED TO HAVE WAIVED THE FINANCING COMMITMENT CONTINGENCY AND ANY RIGHT TO CANCEL DUE TO FINANCING.**

2d. **Financing Application:** Unless previously completed, within ten (10) days or ☐ _____ after Contract acceptance, Buyer shall submit a formal loan application to a lender of Buyer's choice. Buyer and Seller shall promptly provide to such lender all materials and documents lender deems appropriate to facilitate such lender's processing of such loan application. Buyer instructs the lender to provide loan status updates to Broker(s) and Seller. The AAR Loan Status Update Form is available for this purpose.

2e. **Appraisal Contingency:** Buyer's obligation to complete this sale is contingent upon an appraisal of the Property by an appraiser acceptable to lender for at least the sales price during the Financing Commitment Contingency Period.

2f. **Loan Costs:** Buyer shall pay all costs of obtaining the loan, except as provided herein.

Discount points shall be paid by: ☐ Buyer ☐ Seller ☐ Other _____

Discount points shall not exceed: _____ total points (Does not include loan origination fee)

A.L.T.A. Lender Title Insurance Policy shall be paid by ☐ Buyer ☐ Seller

Loan Origination Fee (Not to exceed _____ % of loan amount) shall by paid by ☐ Buyer ☐ Seller

Appraisal Fee, when required by lender, shall be paid by ☐ Buyer ☐ Seller ☐ Other _____

2g. **Partial Release:** Buyer and Seller agree that any partial releases will be addressed under Additional Terms and Conditions or attached Addendum.

2h. **Subordination:** If applicable, Seller carryback financing ☐ is ☐ **is not** to be subordinated to a construction loan. If Seller agrees to subordination, such subordination shall only be allowed if the Seller Carryback financing is not in default and if the Seller approves the terms and conditions of the construction loan to be recorded as a senior loan. Approval will not be unreasonably withheld. **IF SELLER SUBORDINATES THE SELLER CARRYBACK FINANCING TO A SENIOR LOAN, THE SELLER ACKNOWLEDGES THAT IN ORDER TO PROTECT THE SELLER CARRYBACK FINANCING, THE SELLER MAY HAVE TO MAKE PAYMENTS ON THE SENIOR LOAN IF THE SENIOR LOAN IS IN DEFAULT.**

3. TITLE AND ESCROW

3a. **Escrow:** This Contract shall be used as escrow instructions. The Escrow Company employed by the parties to carry out the terms of this Contract shall be:

OLD REPUBLIC — (602-996-4301)
"ESCROW/TITLE COMPANY" — PHONE

602-996-4506 — Sfiler@ortc.com
FAX — EMAIL

PHX, AZ — Ste A-120
ADDRESS

3b. **Title and Vesting:** Buyer will take title as determined before COE. Taking title may have significant legal, estate planning and tax consequences. Buyer should obtain legal and tax advice.

3c. **Title Commitment and Title Insurance:** Escrow Company is hereby instructed to obtain and deliver to Buyer and Seller directly, addressed pursuant to 8s and 9c or as otherwise provided, a Commitment for Title Insurance in sufficient detail for the issuance of an Extended Owner's Title Insurance Policy together with complete and legible copies of all documents that will

remain as exceptions to Buyer's policy of Title Insurance ("Title Commitment"), within fifteen (15) days after Contract acceptance. Buyer shall have five (5) days after receipt of Title Commitment and after receipt of notice of any subsequent exceptions to provide notice to Seller of any items disapproved. Buyer shall be provided at Seller's expense a Standard Owner's Title Insurance Policy showing the title vested in Buyer. Buyer may acquire extended coverage(s) at Buyer's own additional expense.

Seller shall convey title by general warranty deed or ☐_____ deed.

3d. **Additional Instructions:** (i) Escrow Company shall promptly furnish notice of pending sale that contains the name and address of the Buyer to any homeowner's association in which the Property is located. (ii) If the Escrow Company is also acting as the title agency but is not the title insurer issuing the title insurance policy, Escrow Company shall deliver to the Buyer and Seller, upon deposit of funds, a closing protection letter from the title insurer indemnifying the Buyer and Seller for any losses due to fraudulent acts or breach of escrow instructions by the Escrow Company. (iii) All documents necessary to close this transaction shall be executed promptly by Seller and Buyer in the standard form used by Escrow Company. Escrow Company shall modify such documents to the extent necessary to be consistent with this Contract. (iv) Escrow Company fees, unless otherwise stated herein, shall be allocated equally between Seller and Buyer. (v) Escrow Company shall send to all parties and Broker(s) copies of all notices and communications directed to Seller, Buyer and Broker(s). (vi) Escrow Company shall provide Broker(s) access to escrowed materials and information regarding the escrow. (vii) If an Affidavit of Disclosure is provided, Escrow Company shall record the Affidavit at COE.

3e. **Prorations, Expenses and Adjustments:**
Taxes: Real property taxes payable by the Seller shall be prorated through COE, based upon the latest tax bill available. The parties agree that any discrepancy between the latest tax bill available and the actual tax bill when received shall be handled as a Post Closing Matter and Buyer or Seller may be responsible for additional tax payments to each other.
Insurance: If Buyer takes an assignment of the existing casualty and/or liability insurance that is maintained by Seller, the current premium shall be prorated through COE.
Rents, Interest and Expenses: Rents; interest on existing notes, if transferred; utilities; and operating expenses shall be prorated through COE. The Parties agree to adjust any rents received after COE as a Post Closing Matter.
Deposits: All deposits held by Seller pursuant to rent/lease agreement(s) shall be credited against the cash required of Buyer at COE or ☐ paid to Buyer by Seller at COE.

3f. **Post Closing Matters:** The parties shall promptly adjust any item to be prorated that is not determined or determinable at COE as a Post Closing Matter by appropriate cash payment to the other party outside of the escrow when the amount due is determined. Seller and Buyer agree that Escrow Company and Broker(s) are relieved of any responsibility for said adjustments.

3g. **Release of Earnest Money:** In the event of a dispute between Buyer and Seller regarding any Earnest Money deposited with Escrow Company, Buyer and Seller authorize Escrow Company to release Earnest Money pursuant to the terms and conditions of this Contract in its sole and absolute discretion. Buyer and Seller agree to hold harmless and indemnify Escrow Company against any claim, action or lawsuit of any kind, and from any loss, judgment, or expense, including costs and attorney fees, arising from or relating in any way to the release of Earnest Money.

3h. **Insurance:** Buyer shall ensure that any fire, casualty, or other insurance desired by Buyer, or required by any Lender, is in place at COE. Buyer specifically releases Broker(s) from any obligations relating to such insurance.

3i. **Assessment Liens:** The amount of any assessment, other than homeowner's association assessments, that is a lien as of the COE shall be: ☒ paid in full by Seller ☐ prorated and assumed by Buyer ☐ paid in full by Buyer. Any assessment that becomes a lien after COE is the Buyer's responsibility.

3j. **IRS and FIRPTA Reporting:** Seller agrees to comply with IRS reporting requirements. If applicable, Seller agrees to complete, sign, and deliver to Escrow Company a certificate indicating whether Seller is a foreign person or a non-resident alien pursuant to the Foreign Investment in Real Property Tax Act (FIRPTA). Buyer and Seller acknowledge that if the Seller is a foreign person, the Buyer (or Escrow Company, as directed by Buyer) must withhold a tax equal to 10% of the purchase price, unless an exemption applies.

3k. **Agricultural Foreign Investment Disclosure Act:** If applicable, Buyer and Seller shall comply with the Agricultural Foreign Investment Disclosure Act and make the required disclosures to the U.S. Department of Agriculture.

3l. **TAX DEFERRED EXCHANGE:** Seller and Buyer are advised to consult a professional tax advisor regarding the advisability of a tax-deferred exchange pursuant to I.R.C. §1031 or otherwise. Seller and Buyer agree to cooperate in a tax deferred exchange provided that COE is not delayed. All additional costs in connection with any such tax deferred exchange shall be borne by the party requesting the exchange. The non-requesting party and Broker(s) shall be indemnified and held harmless from any liability that may arise from participation in the tax deferred exchange.

4. DISCLOSURES

4a. **Vacant Land/Lot Seller Property Disclosure Statement ("VLSPDS"):** Seller shall deliver a completed AAR VLSPDS form to the Buyer within five (5) days after Contract acceptance. Buyer shall provide notice of any SPDS items disapproved within the Inspection Period or five (5) days after receipt of the SPDS, whichever is later.

4b. **Additional Seller Disclosures and Information:** Seller shall provide to Buyer the following disclosures and information pertinent to the Property within five (5) days after the Contract acceptance: (i) any information known to Seller that may adversely affect the Buyer's use of the Property, (ii) any known pending special assessments, association fees, claims, or litigation, (iii) articles of incorporation; by-laws; other governing documents; and any other documents required by law, (iv) financial statements, current rent rolls, lists of current deposits, personal property lists, leases, rental agreements, service contracts, (v) soils, Phase I, or other environmental reports in Seller's possession, (vi) the most recent survey, if available, and (vii) any and all other agreements, documents, studies, or reports relating to the Property in Seller's possession or control provided, however, that Seller shall not be required to deliver any report or study if the written contract that Seller entered into with the consultant who prepared such report or study specifically forbids the dissemination of the report to others.

4c. **Road Maintenance Agreement:** Seller shall provide to Buyer, within five (5) days after the Contract acceptance, a copy of any known road maintenance agreement affecting the Property.

4d. **Seller's Obligations Regarding Wells:** If a well is located on the Property, or if the Property is to be served by a shared well, the AAR Domestic Water Well Addendum is attached hereto and incorporated by reference. At COE, if applicable, Seller shall assign, transfer and convey to the Buyer all of the water rights, or claims to water rights, if any, held by Seller that are associated with the Property.

4e. **No Seller or Tenant Bankruptcy, Probate or Insolvency Proceedings:** Seller represents that Seller has no notice or knowledge that any tenant on the Property is the subject of a bankruptcy, probate or insolvency proceeding. Further, Seller is not the subject of a bankruptcy, insolvency or probate proceeding.

4f. **Seller's Notice of Violations:** Seller represents that Seller has no knowledge of any notice of violations of City, County, State, or Federal building, zoning, fire, or health laws, codes, statutes, ordinances, regulations, or rules filed or issued regarding the Property.

4g. **Environmental Disclosure:** Seller has only not knowingly caused or permitted the generation, storage, treatment, release or disposal of any hazardous waste or regulated substances at the Property except as otherwise disclosed.

4h. **Affidavit of Disclosure:** If the Property is located in an unincorporated area of the county, and five or fewer parcels of property other than subdivided land are being transferred, the Seller shall deliver a completed Affidavit of Disclosure in the form required by law to the Buyer within five (5) days after Contract Acceptance. Buyer shall provide notice of any Affidavit of Disclosure items disapproved within the Inspection Period or five (5) days after receipt of the Affidavit of Disclosure, whichever is later.

4i. **H.O.A. / Condominium / Planned Community:** The Property ☐ is ☒ is not located within a homeowners' association/condominium/planned community. If yes, the HOA addendum is attached hereto and incorporated by reference.

4j. **Changes During Escrow:** Seller shall immediately notify Buyer of any changes in the Property or disclosures made herein, in the SPDS, or otherwise. Such notice shall be considered an update of the SPDS. Unless Seller is already obligated by Section 5a, or otherwise by this Contract or any amendments hereto, to correct or repair the changed item disclosed, Buyer shall be allowed five (5) days after delivery of such notice to provide notice of disapproval to Seller.

5. WARRANTIES

5a. **Seller Warranties:** Seller warrants and shall maintain and repair the Property so that at the earlier of possession or COE the Property and any personal property included in the sale, will be in substantially the same condition as on the date of Contract acceptance; and all personal property not included in the sale and all debris will be removed from the Property.

5b. **Warranties that Survive Closing:** Seller warrants that Seller has disclosed to Buyer and Broker(s) all material latent defects and any information concerning the Property known to Seller, excluding opinions of value, which materially and adversely affect the consideration to be paid by Buyer. Prior to the COE, Seller warrants that payment in full will have been made for all labor, professional services, materials, machinery, fixtures, or tools furnished within the 150 days immediately preceding the COE in connection with the construction, alteration, or repair of any structure on or improvement to the Property. Seller warrants that the information regarding connection to a sewer system or on-site wastewater treatment facility (conventional septic or alternative) is correct to the best of Seller's knowledge.

5c. **Buyer Warranties:** Buyer warrants that Buyer has disclosed to Seller any information that may materially and adversely affect the Buyer's ability to close escrow or complete the obligations of this Contract. At the earlier of possession of the Property or COE, Buyer warrants to Seller that Buyer has conducted all desired independent inspections and investigations and accepts the Property. **Buyer warrants that Buyer is not relying on any verbal representations concerning the Property except disclosed as follows:** _____

_____

6. DUE DILIGENCE

6a. **Inspection Period:** Buyer's Inspection Period shall be fifteen (15) days or 21 days after the Contract acceptance. During the Inspection Period, Buyer, at Buyer's expense, shall: (i) conduct all desired physical, environmental, and other types of inspections and investigations to determine the value and condition of the Property; (ii) make inquiries and consult government agencies, lenders, insurance agents, architects, and other appropriate persons and entities concerning the feasibility and suitability of the Property for the Buyer's intended purpose and the surrounding area; (iii) investigate applicable building, zoning, fire, health, and safety codes including applicable swimming pool barrier regulations to determine any potential hazards, violations or defects in the Property; and (iv) verify any material multiple listing service ("MLS") information. If the presence of sex offenders in the vicinity or the occurrence of a disease, natural death, suicide, homicide or other crime on or in the vicinity is a material matter to the Buyer, it must be investigated by the Buyer during the Inspection Period. Buyer shall keep the Property free and clear of liens, shall indemnify and hold Seller harmless from all liability, claims, demands, damages, and costs, and shall repair all damages arising from the inspections. Buyer shall provide Seller and Broker(s) upon receipt, at no cost, copies of all inspection reports concerning the Property obtained by Buyer. If Buyer cancels this Contract, Buyer shall return all documents provided by the Seller and provide Seller with copies of all reports or studies generated by Buyer, provided, however, that Buyer shall not be required to deliver any such report or study if the written contract that Buyer entered into with the consultant who prepared such report or study specifically forbids the dissemination of the report or study to others. Buyer is advised to consult the Arizona Department of Real Estate *Buyer Advisory* provided by AAR to assist in Buyer's due diligence inspections and investigations.

6b. **Square Footage/Acreage: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE/ACREAGE OF THE PROPERTY, BOTH THE REAL PROPERTY (LAND) AND IMPROVEMENTS THEREON IS APPROXIMATE. IF SQUARE FOOTAGE/ACREAGE IS A MATERIAL MATTER TO THE BUYER; IT MUST BE INVESTIGATED DURING THE INSPECTION PERIOD.**

6c. **Flood Hazard:** Flood hazard designations or the cost of flood hazard insurance shall be determined by Buyer during the Inspection Period. If the Property is situated in an area identified as having any special flood hazards by any governmental entity, the lender may require the purchase of flood hazard insurance. Special flood hazards may also affect the ability to encumber or improve the Property.

6d. **Sewer or On-site Wastewater Treatment System:** The Property ☐ **does** ☒ **does not** contain an on-site wastewater treatment system. If the Property is served by a septic or alternative system, the AAR On-site Wastewater Treatment Facility Addendum is incorporated herein by reference.

IF A SEWER CONNECTION, OR THE AVAILABILITY OF A SEWER CONNECTION, IS A MATERIAL MATTER TO THE BUYER, IT MUST BE INVESTIGATED DURING THE INSPECTION PERIOD.

(BUYER'S INITIALS REQUIRED) _____ _____
BUYER BUYER

6e. **Site/Soil Evaluation:** A site/soil evaluation (which may include percolation or other tests) ☒ **shall** ☐ **shall not** be performed to determine the suitability of the Property for installation of an on-site wastewater treatment facility.

If site/soil evaluation is to be performed, ☐ Seller ☒ Buyer shall complete site/soil evaluation within Inspection Period or ☐ _____ days after Contract acceptance and the cost of the site/soil evaluation shall be paid by ☐ Seller ☒ Buyer or ☐ Other: _____.

Buyer and Seller are aware that the site/soil evaluation is intended to determine whether an on-site wastewater treatment facility can be installed on the Property in accordance with state laws, rules and regulations, however, the site/soil evaluation is not binding on the State-delegated County agency in any future permitting decision as to the suitability of the design or type of facility for the Property. Buyer shall have five (5) days after receipt of the site/soil evaluation report to provide notice of disapproval to the Seller.

6f. LAND DIVISIONS: LAND PROPOSED TO BE DIVIDED FOR PURPOSES OF SALE OR LEASE IS SUBJECT TO STATE, COUNTY AND MUNICIPAL LAWS, ORDINANCES AND REGULATIONS. IF STATE, COUNTY AND MUNICIPAL REQUIREMENTS RELATING TO THE DIVISION OR SPLITTING OF THE PROPERTY ARE A MATERIAL MATTER TO THE BUYER, THEY MUST BE VERIFIED BY BUYER DURING THE INSPECTION PERIOD. BROKER(S) HAVE MADE NO REPRESENTATIONS, EXPRESS OR IMPLIED, REGARDING THE ABILITY TO DIVIDE OR SPLIT THE PROPERTY.

(BUYER'S INITIALS REQUIRED) _____ BUYER _____ BUYER

6g. ROADS: IF ROADWAYS, COST AND RESPONSIBILITY FOR ROAD MAINTENANCE, IMPROVEMENTS OR ACCESS IS A MATERIAL MATTER TO BUYER, IT MUST BE INVESTIGATED BY BUYER DURING INSPECTION PERIOD.

6h. Survey: A survey ☐ shall ☒ shall not be performed. If yes, the survey shall be performed by a licensed surveyor within the Inspection Period or _____ days after Contract acceptance.

Cost of the survey shall be paid by ☐ Seller ☐ Buyer ☐ Other: _____.

The survey shall be performed in accordance with the Arizona State Board of Technical Registration's "Arizona Land Boundary Survey Minimum Standards".

6i. Survey Instructions are:

☐ A boundary survey and survey plat showing the corners either verified or monumentation.

☐ A survey certified by a licensed surveyor, acceptable to Buyer and the Title Company, in sufficient detail for an American Land Title Association ("ALTA") Owner's Policy of Title Insurance with boundary, encroachment or survey exceptions and showing all improvements, utility lines and easements on the Property or within five (5) feet thereof.

☐ Other survey terms: _____

Buyer shall have five (5) days after receipt of results of survey or map to provide written notice of disapproval to the Seller.

(BUYER'S INITIALS REQUIRED) _____ BUYER _____ BUYER

6j. WELL WATER/WATER RIGHTS: IF WELL WATER/WATER RIGHTS IS/ARE A MATERIAL MATTER TO THE BUYER, IT MUST BE VERIFIED BY BUYER DURING THE INSPECTION PERIOD.

6k. BUYER ACKNOWLEDGMENT: BUYER RECOGNIZES, ACKNOWLEDGES AND AGREES THAT BROKER(S) ARE NOT QUALIFIED, NOR LICENSED, TO CONDUCT DUE DILIGENCE WITH RESPECT TO THE PROPERTY OR THE SURROUNDING AREA. BUYER IS INSTRUCTED TO CONSULT WITH QUALIFIED LICENSED PROFESSIONALS TO ASSIST IN BUYER'S DUE DILIGENCE EFFORTS. BECAUSE CONDUCTING DUE DILIGENCE WITH RESPECT TO THE PROPERTY AND SURROUNDING AREA IS BEYOND THE SCOPE OF THE BROKERS EXPERTISE AND LICENSING, BUYER EXPRESSLY RELEASES AND HOLDS HARMLESS BROKER(S) FROM LIABILITY FOR ANY DEFECTS OR CONDITIONS THAT COULD HAVE BEEN DISCOVERED BY INSPECTION OR INVESTIGATION.

(BUYER'S INITIALS REQUIRED) _____ BUYER _____ BUYER

6l. **Inspection Period Notice:** Prior to expiration of the Inspection Period, Buyer shall deliver to Seller a signed notice of any items disapproved. The AAR Vacant Land/Lot Buyer's Inspection Notice and Seller's Response Form is available for this purpose. Buyer shall conduct all desired inspections and investigations prior to delivering such notice to Seller and all Inspection Period items disapproved shall be provided in a single notice.

6m. **Buyer Disapproval:** If Buyer, in Buyer's sole discretion, disapproves of item(s) as allowed herein, Buyer shall deliver to Seller notice of the items disapproved and state in the notice that Buyer elects to either:

(1) immediately cancel this Contract and all Earnest Money shall be released to Buyer, or

(2) provide the Seller an opportunity to correct the items disapproved, in which case:

(a) Seller shall respond in writing within five (5) days or _____ days after delivery to Seller of Buyer's notice of items disapproved. Seller's failure to respond to Buyer in writing within the specified time period shall conclusively be deemed Seller's refusal to correct any of the items disapproved.

(b) **If Seller agrees in writing to correct item(s) disapproved, Seller shall correct the items, complete any repairs in a workmanlike manner and deliver any paid receipts evidencing the corrections and repairs to Buyer three (3) days or _____ days prior to COE Date.**

(c) If Seller is unwilling or unable to correct any of the items disapproved, Buyer may cancel this Contract within five (5) days after delivery of Seller's response or after expiration of the time for Seller's response, whichever occurs first, and all Earnest Money shall be released to Buyer. If Buyer does not cancel this Contract within the five (5) days as provided, Buyer shall close escrow without correction of those items that Seller has not agreed in writing to correct.

VERBAL DISCUSSIONS WILL NOT EXTEND THESE TIME PERIODS. Only a written agreement signed by both parties will extend response times or cancellation rights.

BUYER'S FAILURE TO GIVE NOTICE OF DISAPPROVAL OF ITEMS OR CANCELLATION OF THIS CONTRACT WITHIN THE SPECIFIED TIME PERIOD SHALL CONCLUSIVELY BE DEEMED BUYER'S ELECTION TO PROCEED WITH THE TRANSACTION WITHOUT CORRECTION OF ANY DISAPPROVED ITEMS.

6n. **Inspection(s):** Seller grants Buyer and Buyer's inspector(s) reasonable access to conduct inspection(s) of the Property for the purpose of satisfying Buyer that any corrections agreed to by the Seller have been completed and that the Property is in substantially the same condition as on the date of Contract acceptance. If Buyer does not conduct such inspection(s), Buyer releases Seller and Broker(s) from liability for any defects that could have been discovered.

7. REMEDIES

7a. **Cure Period:** A party shall have an opportunity to cure a potential breach of this Contract. If a party fails to comply with any provision of this Contract, the other party shall deliver a notice to the non-complying party specifying the non-compliance. If the non-compliance is not cured within three (3) days after delivery of such notice ("Cure Period"), the failure to comply shall become a breach of Contract.

7b. **Breach:** In the event of a breach of Contract, the non-breaching party may cancel this Contract and/or proceed against the breaching party in any claim or remedy that the non-breaching party may have in law or equity, subject to the Alternative Dispute Resolution obligations set forth herein. In the case of the Seller, because it would be difficult to fix actual damages in the event of Buyer's breach, the Earnest Money may be deemed a reasonable estimate of damages and Seller may, at Seller's option, accept the Earnest Money as Seller's sole right to damages. An unfulfilled contingency is not a breach of Contract.

7c. **Alternative Dispute Resolution ("ADR"):** Buyer and Seller agree to mediate any dispute or claim arising out of or relating to this Contract in accordance with the REALTORS® Dispute Resolution System, or as otherwise agreed. All mediation costs shall be paid equally by the parties. In the event that mediation does not resolve all disputes or claims, the unresolved disputes or claims shall be submitted for binding arbitration. In such event, the parties shall agree upon an arbitrator and cooperate in the scheduling of an arbitration hearing. If the parties are unable to agree on an arbitrator, the dispute shall be submitted to the American Arbitration Association ("AAA") in accordance with the AAA Arbitration Rules for the Real Estate Industry. The decision of the arbitrator shall be final and nonappealable. Judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, either party may opt out of binding arbitration within thirty (30) days after the conclusion of the mediation conference by notice to the other and in such event either party shall have the right to resort to court action.

7d. **Exclusions from ADR:** The following matters are excluded from the requirement for ADR hereunder: (i) any action brought in the Small Claims Division of an Arizona Justice Court (up to $2,500) so long as the matter is not thereafter transferred or removed from the small claims division; (ii) judicial or nonjudicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or agreement for sale; (iii) an unlawful entry or detainer action; (iv) the filing or enforcement of a mechanic's lien; or (v) any matter that is within the jurisdiction of a probate court. Further, the filing of a judicial action to enable the recording of a notice of pending action ("lis pendens"), or order of attachment, receivership, injunction, or other provisional remedies shall not constitute a waiver of the obligation to submit the claim to ADR, nor shall such action constitute a breach of the duty to mediate or arbitrate.

7e. **Attorneys Fees and Costs:** The prevailing party in any dispute or claim between Buyer and Seller arising out of or relating to this Contract shall be awarded their reasonable attorney fees and costs. Costs shall include, without limitation, attorney fees, expert witness fees, fees paid to investigators, and arbitration costs.

8. ADDITIONAL TERMS AND CONDITIONS

8a. TMS VENTURES, LLC IS REPRESENTED BY IT'S MANAGER MEMBER: TERRENCE M. SCAL WHO IS A LICENSED AZ REALTOR.

8b. **Risk of Loss:** If there is any loss or damage to the Property between the date of Contract acceptance and COE or possession, whichever is earlier, by reason of fire, vandalism, flood, earthquake, or act of God, the risk of loss shall be on the Seller, provided, however, that if the cost of repairing such loss or damage would exceed ten percent (10%) of the purchase price, either Seller or Buyer may elect to cancel the Contract.

8c. **Permission:** Buyer and Seller grant Broker(s) permission to advise the public of this Contract.

8d. **Arizona Law:** This Contract shall be governed by Arizona law and jurisdiction is exclusively conferred on the State of Arizona.

8e. **Time is of the Essence:** The parties acknowledge that time is of the essence in the performance of the obligations described herein.

8f. **Compensation:** Seller and Buyer acknowledge that Broker(s) shall be compensated for services rendered as previously agreed by separate written agreement(s), which shall be delivered by Broker(s) to Escrow Company for payment at COE, if not previously paid. If Seller is obligated to pay Broker(s), this Contract shall constitute an irrevocable assignment of Seller's proceeds at COE. If Buyer is obligated to pay Broker(s), payment shall be collected from Buyer as a condition of COE. COMMISSIONS PAYABLE FOR THE SALE, LEASING, OR MANAGEMENT OF PROPERTY ARE NOT SET BY ANY BOARD OR ASSOCIATION OF REALTORS®, OR MULTIPLE LISTING SERVICE, OR IN ANY MANNER OTHER THAN BETWEEN THE BROKER AND CLIENT.

8g. **Copies and Counterparts:** A fully executed facsimile or electronic copy of the Contract shall be treated as an original Contract. This Contract and any other documents required by this Contract may be executed by facsimile or other electronic means and in any number of counterparts, which shall become effective upon delivery as provided for herein. All counterparts shall be deemed to constitute one instrument, and each counterpart shall be deemed an original.

8h. **Days:** All references to days in this Contract shall be construed as calendar days and a day shall begin at 12:00 a.m. and end at 11:59 p.m.

8i. **Calculating Time Periods:** In computing any time period prescribed or allowed by this Contract, the day of the act or event from which the time period begins to run is not included and the last day of the time period is included. Contract acceptance occurs on the date that the signed Contract (and any incorporated counter offer) is delivered to and received by the appropriate Broker. Acts that must be performed three days prior to the COE Date must be performed three full days prior (i.e., if COE Date is Friday the act must be performed by 11:59 p.m. on Monday).

8j. **Entire Agreement:** This Contract, and any addenda and attachments, shall constitute the entire agreement between Seller and Buyer, shall supersede any other written or oral agreements between Seller and Buyer and can be modified only by a writing signed by Seller and Buyer. The failure to initial any page of this Contract shall not affect the validity or terms of this Contract.

8k. **Subsequent Offers:** Buyer acknowledges that Seller has the right to accept subsequent offers until COE. Seller understands that any subsequent offer accepted by the Seller must be a backup offer contingent on the cancellation of this Contract.

8l. **Cancellation:** A party who wishes to exercise the right of cancellation as allowed herein may cancel this Contract by delivering notice stating the reason for cancellation to the other party or to the Escrow Company. Cancellation shall become effective immediately upon delivery of the cancellation notice.

8m. **Notice:** Unless otherwise provided, delivery of all notices and documentation required or permitted hereunder shall be in writing and deemed delivered and received when: (i) hand-delivered; (ii) sent via facsimile transmission; (iii) sent via electronic mail, if email addresses are provided herein; or (iv) sent by recognized overnight courier service, and addressed to Buyer as indicated in Section 8q, to Seller as indicated in Section 9a and to the Escrow Company indicated in Section 3a.

8n. **Earnest Money:** Earnest Money is in the form of: ☐ Personal Check ☒ Other BUSINESS CHECK
If applicable, Earnest Money has been received by Broker named in Section 8q and upon acceptance of this offer will be deposited with: ☒ Escrow Company ☐ Broker's Trust Account

8o. **RELEASE OF BROKER(S): SELLER AND BUYER HEREBY EXPRESSLY RELEASE, HOLD HARMLESS AND INDEMNIFY BROKER(S) IN THIS TRANSACTION FROM ANY AND ALL LIABILITY AND RESPONSIBILITY REGARDING FINANCING, THE CONDITION, SQUARE FOOTAGE/ACREAGE, LOT LINES, BOUNDARIES, VALUE, RENT ROLLS, ENVIRONMENTAL PROBLEMS, SANITATION SYSTEMS, ABILITY TO DIVIDE OR SPLIT THE PROPERTY, BUILDING CODES, GOVERNMENTAL REGULATIONS, INSURANCE OR ANY OTHER MATTER RELATING TO THE VALUE OR CONDITION OF THE PROPERTY.**
(BUYER'S INITIALS REQUIRED) _____ BUYER _____ BUYER

8p. **Terms of Acceptance:** This offer will become a binding Contract when acceptance is signed by Seller and a signed copy delivered in person, by mail, facsimile or electronically, and received by Broker named in Section 8q by October 24th, 2021 at 5:00 ☐ a.m. / ☒ p.m., Mountain Standard Time. Buyer may withdraw this offer at any time prior to receipt of Seller's signed acceptance. If no signed acceptance is received by this date and time, this offer shall be deemed withdrawn and the Buyer's Earnest Money shall be returned.

THIS CONTRACT CONTAINS TEN PAGES EXCLUSIVE OF ANY ADDENDA AND ATTACHMENTS. PLEASE ENSURE THAT YOU HAVE RECEIVED AND READ ALL TEN PAGES OF THIS OFFER AS WELL AS ANY ADDENDA AND ATTACHMENTS.

8q. 390. **Broker on behalf of Buyer:**

391. Terrence M. Scali | Tscli | 50 States Realty | FIRM CODE
PRINT SALESPERSON'S NAME | AGENT CODE | PRINT FIRM NAME

392. 10640 N. 28th Dr | Phoenix | AZ | 85029
FIRM ADDRESS | STATE | ZIP CODE

393. 602-403-2778 | 602-957-2340 | tmscali@aol.com
TELEPHONE | FAX | EMAIL

8r. 394. **Agency Confirmation: The Broker named in Section 8q above is the agent of (check one):**
395. ☒ **the Buyer** ☐ **the Seller or** ☐ **both the Buyer and Seller**

8s. 396. **The undersigned agree to purchase the Property on the terms and conditions herein stated and acknowledge receipt of a**
397. **copy hereof including the Buyer Attachment.**

398. Terrence M. Scali 11/23/12 | | MO/DA/YR
BUYER'S SIGNATURE | BUYER'S SIGNATURE

399. ADDRESS | ADDRESS

400. CITY, STATE, ZIP CODE | CITY, STATE, ZIP CODE

9. SELLER ACCEPTANCE

9a. 401. **Broker on behalf of Seller:**

402. PRINT SALESPERSON'S NAME | AGENT CODE | PRINT FIRM NAME | FIRM CODE

403. FIRM ADDRESS | STATE | ZIP CODE

404. TELEPHONE | FAX | EMAIL

9b. 405. **Agency Confirmation: The Broker named in Section 9a above is the agent of (check one):**
406. ☐ **the Seller or** ☐ **both the Buyer and Seller**

9c. 407. **The undersigned agree to sell the Premises on the terms and conditions herein stated, acknowledge receipt of a**
408. **copy hereof and grant permission to Broker named in Section 9a to deliver a copy to Buyer.**

409. ☒ Counter Offer is attached, and is incorporated herein by reference. Seller should sign both this offer and the Counter Offer.
410. If there is a conflict between this offer and the Counter Offer, the provisions of the Counter Offer shall be controlling.

411. [signature] 10/24/12 | | MO/DA/YR
SELLER'S SIGNATURE | SELLER'S SIGNATURE

412. La Familia Management LLP | SELLER'S NAME PRINTED
SELLER'S NAME PRINTED

413. ADDRESS | ADDRESS

414. CITY, STATE, ZIP CODE | CITY, STATE, ZIP CODE

415. ☐ **OFFER REJECTED BY SELLER:** _____ (MONTH) _____ (DAY) _____ (YEAR) (SELLER'S INITIALS)

For Broker Use Only:
Brokerage File/Log No. _____ Manager's Initials _____ Broker's Initials _____ Date _____ MO/DA/YR

I have read, understand and agree to the above, acknowledge receipt of a copy of your Privacy Policy Notice, and further acknowledge that the title company named herein may not disburse funds received in this escrow except in accordance with the provisions set forth in Arizona Revised Statutes Section 6-843.

Seller:

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

By:_____
Jeffrey M. Andersen, Vice President

Address: _____

_____

Received: Old Republic Title Agency

By _____

Buyer:

TMS Ventures, LLC, an Arizona limited liability company

By:_____
Terrence M. Scali, Managing Member

Address: 8201 N. HAYDEN RD
SCOTTSDALE, AZ 85258

Date 11/15/12

I have read, understand and agree to the above, acknowledge receipt of a copy of your Privacy Policy Notice, and further acknowledge that the title company named herein may not disburse funds received in this escrow except in accordance with the provisions set forth in Arizona Revised Statutes Section 6-843.

Seller:

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

By:_____
Jeffrey M. Andersen, Vice President

Address: _____

_____

Received: Old Republic Title Agency

By _____

Buyer:

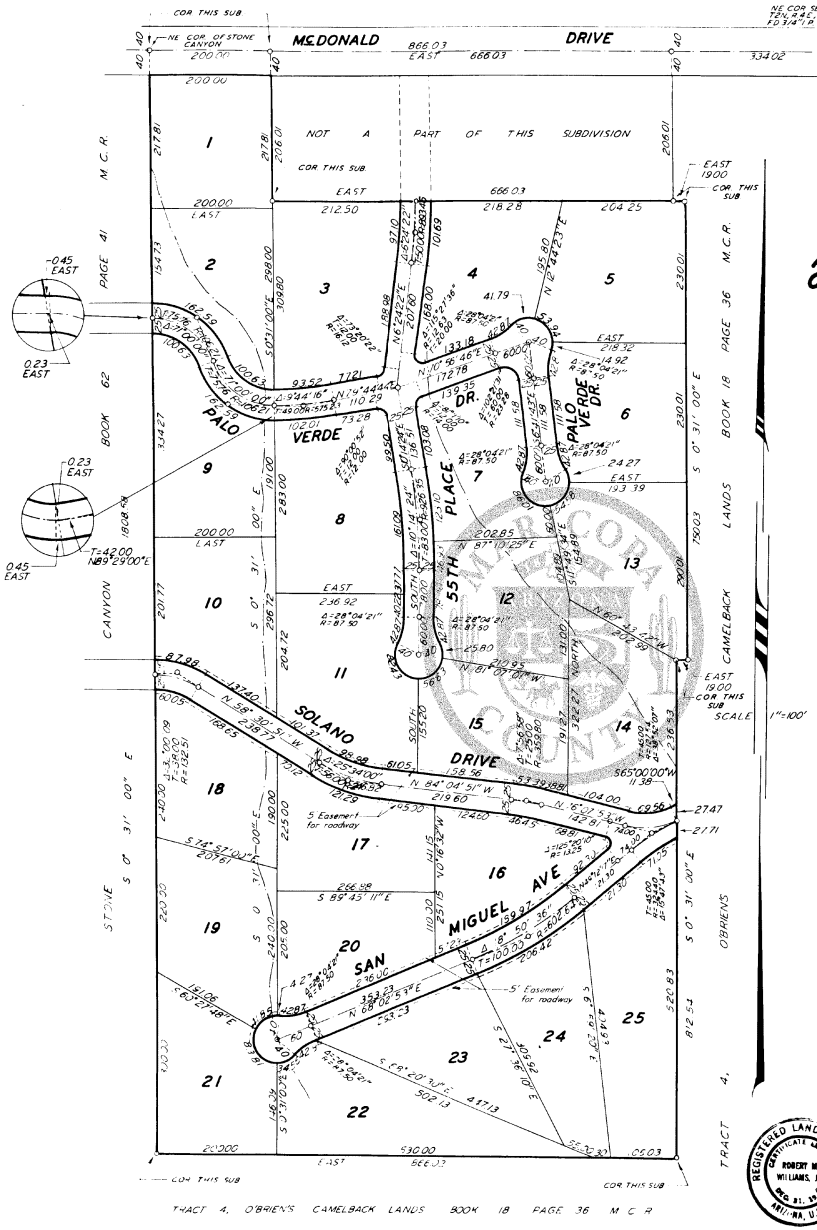
TMS Ventures, LLC, an Arizona limited liability company

By: _____
Terrence M. Scali, Managing Member

Address: 8201 N. HAYDEN RD
SCOTTSDALE AZ 85258

Date 11/15/12

81-34



STONE CANYON EAST

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

DEDICATION

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

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

PHOENIX TITLE AND TRUST COMPANY — TRUSTEE

BY _____ ASST. VICE PRESIDENT ATTEST _____ ASSISTANT SECRETARY

ACKNOWLEDGEMENT

STATE OF ARIZONA
COUNTY OF MARICOPA

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

IN WITNESS WHEREOF I hereunto set my hand and official seal
My commission expires — Jan. 3, 1960. _____ NOTARY PUBLIC

APPROVAL

Approved by the Board of Supervisors of Maricopa County, Arizona this 26 day of February 1959.

BY _____ CHAIRMAN ATTEST _____ CLERK

Approved _____ SECRETARY CITY OF PHOENIX PLANNING COMM. DATE 1-22-59

Approved _____ MAYOR OF SCOTTSDALE DATE 1/29/59

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

Approved _____ MARICOPA COUNTY HEALTH DEPT. DATE

CERTIFICATE

This is to certify that the survey and subdivision of the premises described and platted hereon was made under my direction during the month of January, 1959

_____ REGISTERED LAND SURVEYOR

Indicates center line of wash

REGISTERED LAND SURVEYOR CERTIFICATE NO. 8219 ROBERT M. WILLIAMS, JR. ARIZONA, U.S.A.

Collar, Williams & White Engineering, Inc.

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

RMW

19590136061
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
ADRIAN FONTES

The foregoing instrument is an **electronically prepared** full, true and correct copy of the original record in this office.
Attest: 07/06/2018 01:15:02 PM
By _____ Recorder

To Verify this purchase visit
http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=202909

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

Scali EXHIBIT 33
DATE 3-9-18
Colette E. Ross
CR No. 50658

Doug,

I hope you had a great Father's Day!

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

Speak to you soon.

Regards,

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

----- Forwarded Message -----
From: "tmscali@aol.com" <tmscali@aol.com>
To: pdembow@paradisevalleyaz.gov; tmscali@aol.com
Sent: Saturday, June 15, 2013 1:19 PM
Subject: Roadway Easement issue

Paul,

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

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

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

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

Sincerely,

Terry Scali
.602-403-2778

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

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

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

CHICAGO TITLE AGENCY

Where Experience Equals Excellence

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

Thx

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

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

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

CHICAGO TITLE AGENCY

Where Experience Equals Excellence

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

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

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

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

Please let me know if not.

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

CHICAGO TITLE AGENCY

Where Experience Equals Excellence

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

Doug,

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

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

Terry

Terrence M. Scali
CEO NFP Property & Casualty Insurance Services, Inc.
8201 N Hayden Rd, Scottsdale AZ 85258
P: 480-947-3556 | F: 480-947-6699 | tscali@nfp.com | www.laprescali.com

NFP Property and Casualty Services, Inc.

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

---

From: Mark Vanderlinde [mailto:MarkV@VRealtyAdvisors.com]
Sent: Monday, June 03, 2013 5:11 PM
To: doug.hodges@ctt.com
Cc: Scali, Terry; Maria Enget; Allison Babij
Subject: Fwd: Property History

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

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

Regards,

Mark Vanderlinde
Private Client Advisor
Luxury Residential Sales and Development
The V'ella Group &
Sotheby's International Realty

Mobile: 602-619-6195
MarkV@TheVellaGroup.com
www.TheVellaGroup.com

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Russ Lyon Sotheby's

Begin forwarded message:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TMS VENTURES, LLC., Plaintiff, vs. TERESA C. ZACHARIAH, et.al., Defendants.	CV 2016-005381

Phoenix, Arizona
July 30, 2018

BEFORE THE HONORABLE PAMELA GATES

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Trial)

PREPARED FOR:
COPY

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

A P P E A R A N C E S

FOR THE PLAINTIFF/COUNTER-DEFENDANT:

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

FOR THE DEFENDANTS/COUNTER-CLAIMANTS:

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

ALSO PRESENT:

Ladonna Gaut
Assistant to Messrs. Murphy and Abraham

Rami Burbar
Technical Assistant to Mr. Slavin

***

Q. BY MR. F. SLAVIN: Getting back to Exhibit 119, which Mr. Abraham questioned you about, sir. Rami, I'd like you to go to line or box 52 on this one, right where it says, "use." Do you see that?

Okay. Now this is Seller's Property Disclosure Statement, which are regularly used in closing real estate transactions, correct?

A. Yes.

Q. And you're not a stranger to sellers property disclosure statements, are you?

A. No.

Q. Here, this states: Are you aware of any problem of legal or physical access to the property?

And then the statement says here: Current road may not physically touch property which may prevent physical access.

You saw that part, right?

A. Yes.

Q. And so you knew and understood that, even by going out and looking at the property, that the current road -- and here, my sense is this current road means the private or, excuse me, the driveway that's on the Zachariah property, correct?

A. I presume it could mean either that or the road, San Miguel, either or both.

C E R T I F I C A T E

I, MICHELE KALEY, do hereby certify that the proceedings had upon the hearing of the foregoing matter are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED this 9th day of September, 2018.

/S/_____
MICHELE KALEY, RPR
CERTIFIED REPORTER
CERTIFICATE NO. 50512

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

TMS VENTURES LLC, *Plaintiff/Appellee/Cross-Appellant*,

v.

TERESA C. ZACHARIAH, et al., *Defendants/Appellants/Cross-Appellees*.

No. 1 CA-CV 18-0712
No. 1 CA-CV 19-0388
(Consolidated)
FILED 4-15-2021

Appeal from the Superior Court in Maricopa County
No. CV2016-005381
The Honorable Pamela S. Gates, Judge

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART

COUNSEL

Burch & Cracchiolo, P.A., Phoenix
By Daryl Manhart, Andrew Abraham, Bryan F. Murphy, Casey S. Blais
Co-Counsel for Plaintiff/Appellee/Cross-Appellant

Beus Gilbert McGroder, PLLC, Phoenix
By Cory L. Broadbent, Cassandra H. Ayres
Co-Counsel for Plaintiff/Appellee/Cross-Appellant

Osborn Maledon, P.A., Phoenix
By Eric M. Fraser, Jeffrey B. Molinar
Co-Counsel for Defendants/Appellants/Cross-Appellees

Francis J. Slavin PC, Phoenix
By Francis J. Slavin, Daniel J. Slavin, Jessica L. Dorvinen
Co-Counsel for Defendants/Appellants/Cross-Appellees

MEMORANDUM DECISION

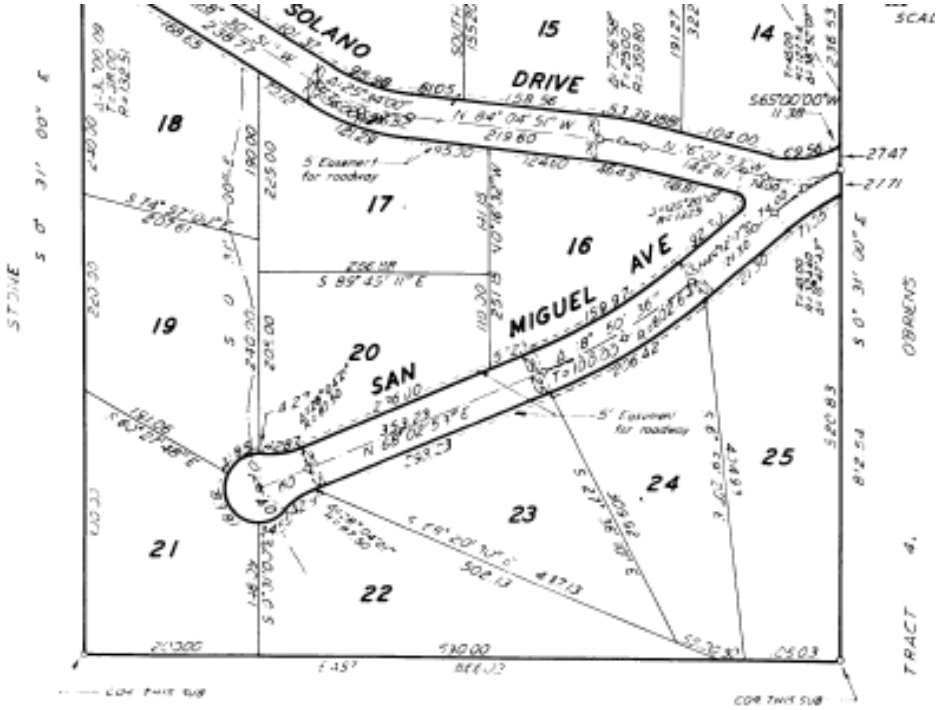
Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Chief Judge Peter B. Swann joined.

W I L L I A M S, Judge:

¶1 Appellants Teresa and Joseph Zachariah, Ingrid and Alfred Harrison as trustees of the Ingrid Lenz Harrison Revocable Trust, and Roseanne Appel (collectively, "the Neighbors") appeal the superior court's ruling that Appellee TMS Ventures, LLC ("TMS") established a common law dedication of an easement traversing portions of their properties to reach its property. TMS cross-appeals the court's later ruling declining to award attorney fees for prevailing on summary judgment on the Neighbors' anticipatory nuisance counterclaim. For reasons set forth below, we reverse on common law dedication and vacate the attorney fees and cost award to TMS. Because the Neighbors do not challenge the court's alternative ruling that TMS also established an implied way of necessity, we remand to allow the court to address attorney fees on that claim.

FACTUAL AND PROCEDURAL BACKGROUND

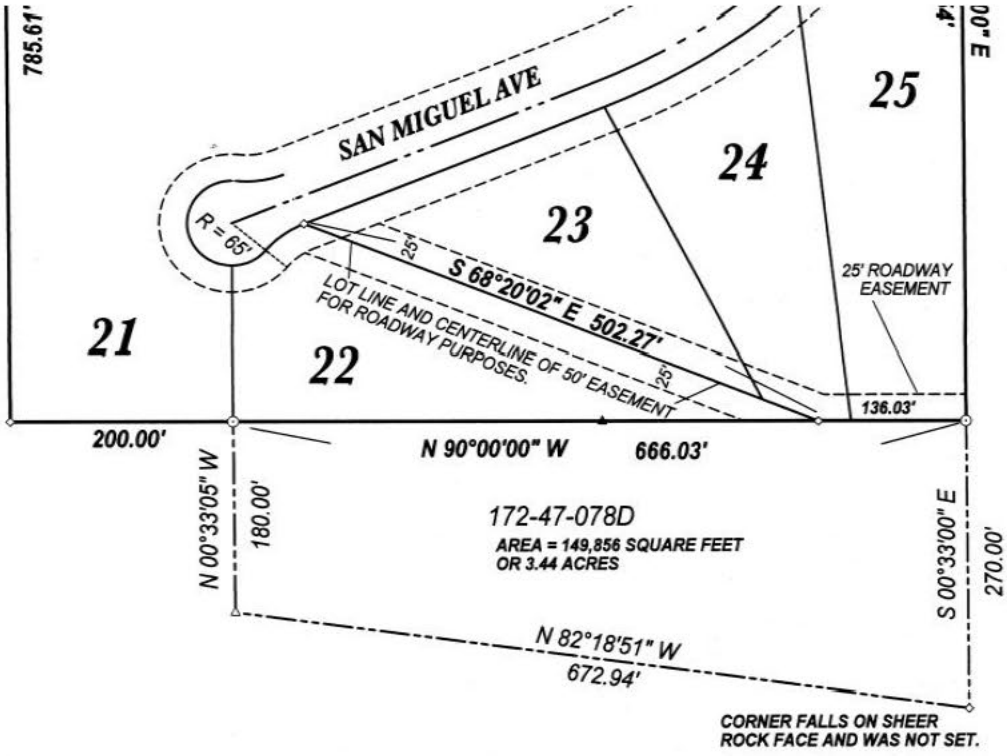
¶2 In 1959, Phoenix Title and Trust Company ("Phoenix Title") recorded a subdivision plat for the Stone Canyon East subdivision, the relevant portion of which appears below:

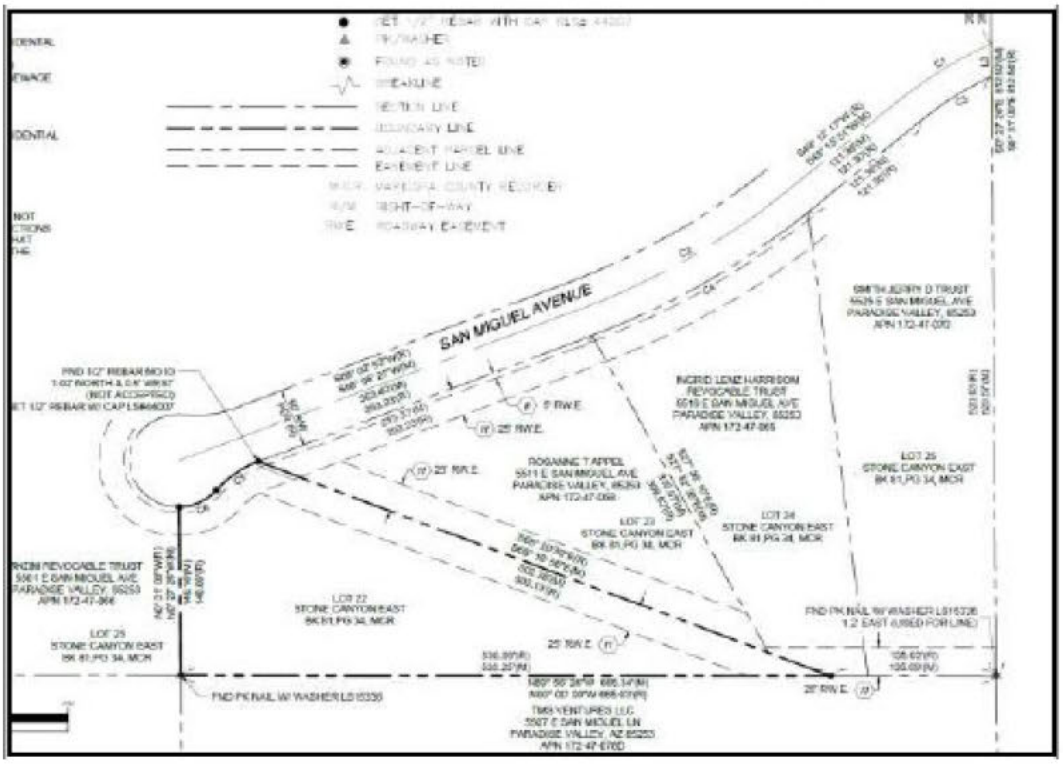


¶3 One year later, Phoenix Title recorded an "Easement for Roadway" which pronounced "it is now desired to increase the width of San Miguel Avenue as shown on [the 1959] plat and to provide for another roadway not shown in said plat." The easement allowed Maricopa County to increase the width of San Miguel Avenue to fifty feet and granted to the county:

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

The parties dispute the exact parameters of these grants, depicting them as follows:





Although the Easement for Roadway did allow for underground utility facilities, the two-part, single easement grant was expressly intended "for

roadway purposes only . . . to maintain a public way for vehicular or foot traffic thereon."

¶4 Phoenix Title expressly referred to the Easement for Roadway in its deed conveying Lot 24, but not in its deeds conveying Lots 22 or 23. The Zachariahs, Appel, and the Harrisons purchased Lots 22, 23, and 24, respectively, between 2009 and 2010. There is an approximate 12-foot wide driveway from the East San Miguel cul-de-sac serving the Zachariahs' home on Lot 22, depicted below:

Appel uses a portion of this driveway to access her home on Lot 23. Part of the driveway is located on Lot 23, and the entire driveway is located within the area described in the Easement for Roadway. The driveway has been gated since 1987, and the Zachariahs currently control access.

¶5 TMS purchased the property immediately south of the land depicted above (the "TMS Property") in 2012. The TMS Property is bordered on the west, south and partially on the east by city-owned land. On March 31, 2016, TMS wrote to the Neighbors demanding that they acknowledge the easement depicted in the Easement for Roadway to enable construction of a driveway to the TMS Property. When the Neighbors refused, TMS sued them seeking to quiet title to the Easement for Roadway and for declaratory and injunctive relief.[1] The Neighbors counterclaimed

[1] TMS also sued the owner of Lot 25, Jerry D. Smith as Trustee of the JDS Trust Dated August 22, 2005. Smith agreed to be bound by the outcome of the litigation and is not a party to this appeal.

for, among other things, anticipatory nuisance based on "noise, vibration, dust and odor" and "damage to the footings, foundation, walls, roofs and other structural parts of their homes" that could result from future construction of a driveway to the TMS Property.

¶6 On TMS' motion, the superior court bifurcated trial, ordering a "bench trial on the claims which concern access to the property and a separate jury trial on the [Neighbors'] counterclaim for nuisance." Following the bench trial, the court ruled TMS had established a common law dedication of the Easement for Roadway and, alternatively, an implied way of necessity within the Easement for Roadway. It subsequently granted summary judgment to TMS on the Neighbors' anticipatory nuisance counterclaim.

¶7 TMS applied to recover $653,380.25 in attorney fees and $14,859.01 in costs. TMS apportioned its claim over three law firms who had represented them during the litigation as follows: $385,756.75 in attorney fees and $5,911.59 in taxable costs incurred by Burch & Cracchiolo, P.A. "for the quiet title claims and defending the quiet title counterclaims"; $234,488.50 in attorney fees and $8,947.42 in costs incurred by Beus Gilbert PLLC "for defending the anticipatory nuisance counterclaim"; and $33,135.00 in attorney fees incurred by Berry Riddell, LLC "for initially defending the non-covered counterclaims (before referring the matter to Beus Gilbert)." The court awarded $369,410.25 in attorney fees and $4,466.43 in costs "for work performed by Burch & Cracchiolo, P.A.," $8,947.42 in costs but no fees "for work performed by Beus Gilbert PLLC," and no fees for work performed by Berry Riddell, LLC.

¶8 The Neighbors timely appealed from the final judgment. TMS timely cross-appealed the court's fee award. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

DISCUSSION

I. The Neighbors' Appeal

¶9 After a bench trial, we review the court's legal conclusions de novo but defer to its findings of fact unless clearly erroneous. *Town of Marana v. Pima County*, 230 Ariz. 142, 152, ¶ 46 (App. 2012). A finding of fact is not clearly erroneous if it is supported by substantial evidence even if there is substantial conflicting evidence. *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51–52, ¶ 11 (App. 2009).

¶10 On appeal, the Neighbors limit their arguments to "the superior court's legal rulings, not the superior court's findings of fact." Nonetheless, we must consider the evidence presented at trial in the light most favorable to upholding the court's rulings. *Town of Marana*, 230 Ariz. at 152, ¶ 46.

A. The Neighbors' Limited Challenge Is Not Moot

¶11 The Neighbors do not challenge the court's ruling finding an implied way of necessity within the area described in the Easement for Roadway; they only challenge the court's finding of a public dedication. As access to the TMS Property is not at issue, we first consider whether the distinction the Neighbors seek is meaningful or purely theoretical. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548 (App. 1985) ("It is not an appellate court's function to declare principles of law which cannot have any practical effect in settling the rights of litigants.").

¶12 A landowner can dedicate land to a proper public use. *Pleak v. Entrada Property Owners' Ass'n*, 207 Ariz. 418, 421, ¶ 8 (2004) (citing Restatement (Third) of Prop.: Servitudes § 2.18(1) (2000)). Under common law dedication, the public acquires an easement to use the dedicated property for the specified purposes but fee title remains with the dedicator.[2] *Id.* Once perfected, a common law dedication is irrevocable. *City of Chandler v. Ariz. Dep't of Transp.*, 224 Ariz. 400, 403, ¶ 9 (App. 2010).

¶13 In contrast, an implied way of necessity only grants access to the owner of the landlocked parcel. *Dabrowski v. Bartlett*, 246 Ariz. 504, 514, ¶ 26 (App. 2019). And it only grants whatever access is necessary for the beneficial use of the landlocked parcel. *Bickel v. Hansen*, 169 Ariz. 371, 374 (App. 1991). Moreover, unlike a common law dedication, an implied way of necessity is appurtenant to the parcel it serves. *College Book Ctrs., Inc. v. Carefree Foothills Homeowners Ass'n*, 225 Ariz. 533, 541, ¶ 29 (App. 2010).

¶14 As such, there are meaningful and relevant differences between a common law dedication of the Roadway for Easement and an implied way of necessity within the Roadway for Easement. *Cf. Kadlec v. Dorsey*, 224 Ariz. 551, 553, ¶ 10 (2010) (noting that private roads located within easements do not automatically become public). We therefore consider the merits of the Neighbors' appeal.

---

[2] Dedication of roadways also may be accomplished by statute. A.R.S. § 9-254. That method is not at issue in this case.

B. Common Law Dedication

¶15 An effective dedication of private land for public use has two components—the landowner's offer to dedicate and the general public's acceptance. *Pleak*, 207 Ariz. at 423–24, ¶ 21. The party asserting dedication bears the burden of proof. *Kadlec*, 224 Ariz. at 552, ¶ 8. "Dedication is not presumed nor does a presumption of an intent to dedicate arise unless it is clearly shown by the owner's acts and declarations." *City of Phx. v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 386 (1951). "No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice." *Pleak*, 207 Ariz. at 424, ¶ 21.

¶16 The Neighbors concede the Easement for Roadway constituted an offer to dedicate. They contend, however, that the offer was never accepted. Under Arizona law, "[a]nything which fully demonstrates the intention of the donor and the acceptance by the public works the effect." *City of Chandler*, 224 Ariz. at 403, ¶ 10 (quoting *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283, 287 (1947)); *see also Allied*, 65 Ariz. at 287 ("Words are unnecessary if the intent can be gathered from other sources."). Our caselaw discusses three general methods of establishing acceptance, which we address below.

1. Acceptance By the Government

¶17 The public recipient, whether it be the state, a county, or a municipality, can accept an offer of dedication either formally or by taking steps to maintain the dedicated land. *See City of Chandler*, 224 Ariz. at 403, ¶ 11 (finding acceptance where "the County properly accepted the roadway dedications for the public benefit"); *Evans v. Blankenship*, 4 Ariz. 307, 316 (1895) (city council's direction to street and alley committee to "clear up the plaza" constituted "a sufficient and timely acceptance" of the plaza). The parties agree that neither Maricopa County nor the Town of Paradise Valley accepted the Easement for Roadway.

2. Acceptance By Reference In a Deed of Sale

¶18 Acceptance also can arise if a deed of sale expressly refers to the deed of dedication, giving the buyer notice of the dedication. *Lowe v. Pima Cnty.*, 217 Ariz. 642, 647, ¶ 21 (App. 2008); *see also Pleak*, 207 Ariz. at 424, ¶ 23 (finding acceptance because "the lots in Entrada were sold after recordation of the Survey and . . . the conveyance documents specifically referred to the Survey").

¶19 Here, while the deeds for the Harrison and Smith lots referenced the Easement for Roadway, the deeds for the Zachariah and Appel lots did not. In *Lowe*, we placed the burden on the original owner to "expressly refer[] to the deed of dedication in the deeds to the parcels they later sold so that buyers would have had notice of the dedication." 217 Ariz. at 647, ¶ 21. If Phoenix Title wanted to complete a public dedication of the Easement for Roadway, it could have referenced the Easement in the deeds of sale for each burdened lot. For reasons not apparent in the record, it did not do so. *See City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 151 (1968) (requiring "clear, satisfactory and unequivocal proof that there was an intent by the platter to dedicate for a proper public purpose, either expressed or implied").

¶20 Neither side addresses whether an offer of dedication may be partially accepted when some of the relevant chains of title reference the relevant deed of dedication or recorded plat and some do not. The superior court did not find partial acceptance; it instead based its ruling on evidence that the Zachariahs and Appel knew about the Easement for Roadway when they purchased their lots.[3] The court did not, however, cite any authority suggesting actual knowledge of a proposed dedication is an adequate substitute for express notice in the deed of sale, and we are not aware of any. It instead cited *Neal v. Hunt*, 112 Ariz. 307, 311 (1975), for the proposition that "constructive and actual knowledge have the same effect." There, our supreme court held that a party who "acted reasonably under the circumstances by searching the Mohave County recorder's office" but found "nothing to confirm the existence" of a prior water rights agreement did not have constructive notice of the agreement. *Id.*

¶21 *Neal* is not a common law dedication case and did not address whether a purchaser accepts a common law dedication of an easement by learning that the easement exists. Rather, in *Lowe*, we held that landowners who knew their deed excluded the northernmost thirty feet of the

[3] The Neighbors contend this ruling violated the law of the case because a previously assigned judge ruled that "a common law easement requires acceptance, not just notice." The court made this statement in a minute entry denying summary judgment; it thus was not binding for law of the case for horizontal appeal purposes. *See Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465 (App. 1997) ("A denial of a motion for summary judgment is an intermediate order deciding simply that the case should go to trial."); *Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II*, 176 Ariz. 275, 279 (App. 1993) ("[W]e will not apply law of the case if the prior decision did not actually decide the issue in question.").

purchased parcel still were not obligated "to search for a recorded deed dedicating property that they were not purchasing." 217 Ariz. at 647, ¶ 21. Likewise, the Zachariahs and Appel were not obligated to search deeds for other nearby lots they did not intend to purchase. Their actual knowledge of the Easement for Roadway does not constitute acceptance by deed. *See Pleak*, 207 Ariz. at 424, ¶ 23 (quoting *Cnty. of Yuma v. Leidendeker*, 81 Ariz. 208, 213 (1956) ("[T]he sale of lots referencing a recorded plat containing the dedication constitutes an 'immediate and irrevocable' dedication.").

3. Acceptance By Use

¶22 Acceptance also may be premised on actual use by the general public. *Drane v. Avery*, 72 Ariz. 100, 102 (1951), *overruled in part on other grounds by Chadwick v. Larsen*, 75 Ariz. 207 (1953); *Allied*, 65 Ariz. at 290 (1947); *see also* Restatement (Third) of Prop.: Servitudes § 2.18 cmt. d. While what constitutes general public use varies based on "the location, size, and settlement patterns of the community[,] . . . [t]he use must . . . be of such character as to indicate the intention to accept the property for the particular purpose to which it has been dedicated." 23 Am. Jur. 2d *Dedication* § 50 (2020). As such, use by "a limited class" of the public generally is not enough. *Mocho*, 8 Ariz. App. at 151.

¶23 TMS contends the Zachariahs and Appel became "part of the public" when using the portion of the driveway that encroached on the other's lot. We see no reasonable interpretation of the law under which the use of a shared driveway to access one's own property would constitute general public use. *See id.* at 150 (internal quotation marks omitted) ("[T]here can be no dedication to private uses, or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public."). TMS also presented evidence that it "used the easement as . . . a prospective purchaser and . . . for its contractors and professionals to access the TMS Property," but conceded these uses were with the Zachariahs' permission. Permissive use does not constitute general public use. *See Sons of Union Veterans of Civil War, Dep't of Iowa v. Griswold Am. Legion Post 508*, 641 N.W.2d 729, 734 (Iowa 2002) (quoting *Culver v. Converse*, 224 N.W. 834, 836 (1929) ("Mere permissive use of a way, no matter how long continued, will not amount to a dedication.").

¶24 TMS also relies on the superior court's findings that the Neighbors and other lot owners on San Miguel Avenue "freely use the easement to cross their neighbor's property without payment or permission." It also cites evidence that "[t]he Town and public used the easement-widened portions of San Miguel Avenue that were paved" and

that various lot owners "used the easement for driveways or utilities." These uses were of the proposed width expansion of San Miguel Avenue, not the portion of the easement reaching the TMS Property.

¶25 While Arizona has not addressed the question, several courts have held that acceptance by use only applies to those portions of the proposed dedication where there has been established public use. *Sweeten v. Kauzlarich*, 684 P.2d 789, 792 (Wash. Ct. App. 1984); *see also Chalkley v. Tuscaloosa Cnty. Comm'n*, 34 So. 3d 667, 674 (Ala. 2009) (quoting 23 Am. Jur. 2d *Dedication* § 43 (2002) ("[T]he law on the subject generally is that '[a]n offer of dedication need not be accepted in its entirety; the property offered for dedication may be accepted in part and the remainder rejected.'"); *A & H Corp. v. City of Bridgeport*, 430 A.2d 25, 30 (Conn. 1980) (quoting *Meshberg v. Bridgeport City Trust Co.*, 429 A.2d 865, 869 (Conn. 1980) ("[I]f the actions of the public . . . are such as to show an intention to accept all rather than a part they will be construed as having that effect, but . . . acceptance of a part is not necessarily an acceptance of all."); *Baugus v. Wessinger*, 401 S.E.2d 169, 172 (S.C. 1991) (reversing summary judgment where there was "undisputed acceptance of the Nel La Lane roadway from Lake Tide Drive westerly across V.I.P. Estates" but "a serious dispute . . . as to whether the portion of the roadway on H. Wessinger's land has been accepted"). Others have found use of only part of the dedicated land can constitute acceptance of an entire dedication but only if the use evinces a purpose to accept the ***entire*** dedication. *See, e.g., Smith v. State*, 282 S.E.2d 76, 82 (Ga. 1981).

¶26 Even assuming Arizona would follow the latter path—an issue we need not decide—no such purpose is evident in this record, as the only uses shown of the proposed roadway were (1) the Zachariahs and Appel accessing their own properties and (2) TMS and third parties accessing the TMS Property with the Zachariahs' permission. *See Biagini v. Beckham*, 163 Cal. App. 4th 1000, 1013–14 (Cal. Ct. App. 2008) ("Where . . . the use of property is consistent with a private easement, there is no basis for finding an implied acceptance of an offer of dedication by public use."); *Sons of Union Veterans*, 641 N.W.2d at 734.

¶27 TMS also relies on *Pleak*, where we rejected "a proposed rule [that] would require proof of actual use by the public before finding an effective dedication of a common law roadway easement" because it "would inevitably result in detailed case-by-case inquiries regarding whether and how the public had used a particular roadway." 207 Ariz. at 425, ¶ 26. There, however, it was undisputed that the lots at issue "were sold after recordation of the Survey and that the conveyance documents

specifically referred to the Survey." *Id.* at 424, ¶ 23. *Pleak* therefore rejected the argument that express notice in the conveyance ***and*** actual public use are required to trigger a common law dedication, *id.* at 424–25, ¶¶ 23–26, a position the Neighbors do not take. For the same reason, TMS' reliance on *Hunt v. Richardson*, 216 Ariz. 114 (App. 2007), is misplaced. *Id.* at 119, ¶ 15 ("It is undisputed that the Richardsons, Hunts, and Transitional Living purchased their properties with reference to the Survey, thus constituting sufficient acceptance of the common law dedication.").

¶28 In summary, while "[a]nything which fully demonstrates . . . the acceptance by the public works the effect," no such demonstration appears in this undisputed record. *City of Chandler*, 224 Ariz. at 403, ¶ 10 (quoting *Allied*, 65 Ariz. at 287). We therefore reverse the superior court's ruling finding a common law dedication of the Easement for Roadway.

C. Implied Way of Necessity

¶29 As noted, *supra* ¶ 11, the superior court found the existence of an implied way of necessity "within the area over Lots 22, 23, and 24 described in the . . . Easement for Roadway." The Neighbors do not contest this finding, informing that "they are not challenging the ruling as to an easement by implied way of necessity." Consequently, we do not address it.

D. Attorney Fees and Taxable Costs in Superior Court

¶30 The Neighbors also challenge the attorney fees and cost award to TMS. Because we reverse on common law dedication, we vacate the fees and cost award on that claim. We consider the Neighbors' specific arguments against the award to provide guidance on remand.

¶31 The Neighbors contend TMS cannot recover attorney fees under A.R.S. § 12-1103(B) because an implied way of necessity does not transfer title to any part of the property, citing *Dabrowski*, 246 Ariz. 504. There, we held that parties who successfully proved the absence of any express or implied easement over their property could recover fees under § 12-1103(B). *Id.* at 516–17, ¶¶ 38–40. We see no reason why a party who successfully proves the existence of an implied way of necessity should be treated differently. *See* A.R.S. § 12-1101(A) (quiet title action "may be brought by anyone having or claiming an interest" in the subject property); *Chantler v. Wood*, 6 Ariz. App. 134, 138 (1967) ("[E]very interest in the title to real property, whether legal or equitable, may be determined in [a quiet title] action.").

¶32 The Neighbors also contend the superior court improperly awarded TMS nontaxable costs incurred by Beus Gilbert. A party cannot recover litigation expenses as costs without statutory authorization. *Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 392, ¶ 6 (2001). Taxable costs include:

> 1. Fees of officers and witnesses.
>
> 2. Cost of taking depositions.
>
> 3. Compensation of referees.
>
> 4. Cost of certified copies of papers or records.
>
> 5. Sums paid a surety company for executing any bond or other obligation therein, not exceeding, however, one per cent on the amount of the liability on the bond or other obligation during each year it was in force.
>
> 6. Other disbursements that are made or incurred pursuant to an order or agreement of the parties.

A.R.S. § 12-332(A). We review whether expenditures are taxable costs de novo. *Reyes v. Frank's Service and Trucking, LLC*, 235 Ariz. 605, 608, ¶ 6 (App. 2014). But we review the amount awarded for an abuse of discretion. *Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 11 (App. 2016).

¶33 The Neighbors challenge several items listed in Beus Gilbert's "Costs and Expenses" for "Photocopy Expense," "Expert Witness Fee," "Color Copies," "United Parcel Service," "Outside Messenger Service," "Scanned Documents," "Delivery Service," "Meal Expense," "Parking," and "Travel Expense." While some of these items are not taxable costs, it is unclear whether TMS claimed that they were. *See RS Indus., Inc. v. Candrian*, 240 Ariz. 132, 137, ¶ 16 (App. 2016) (denying recovery of expenses incurred for "photocopying, facsimiles, shipping and travel expenses"); *Newman v. Select Specialty Hosp.-Ariz., Inc.*, 239 Ariz. 558, 567, ¶ 42 (App. 2016) (denying recovery for "faxes, copies and postage," "expert witness fees and travel expenses," and "other amounts for miscellaneous expenses (such as his counsel's parking and lunch during trial)"). Indeed, TMS claimed only $8,947.42 of Beus Gilbert's $17,913.49 of "Costs and Expenses." And TMS offers a calculation on appeal under which the court could have reached the awarded amount by allowing only court reporter fees, opposing expert witness fees, process server fees, subpoena fees, and electronic court filing fees. *See RS Indus., Inc.*, 240 Ariz. at 137, ¶ 16 (noting that a party may

recover "costs it incurs in deposing an opposing party's expert witness" as taxable costs). On this record, we cannot say the court abused its discretion in determining an appropriate cost award.

II. TMS' Cross-Appeal

¶34 TMS also challenges the fees and cost award in its cross-appeal, contending the superior court improperly declined to award any fees it incurred in defending against the Neighbors' anticipatory nuisance counterclaim. TMS contends it could recover fees on the anticipatory nuisance counterclaim under A.R.S. § 12-341.01(A) because the counterclaim was "intertwined" with other contract-based claims. *See Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 17 (App. 2000) ("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."). But it does not appear the court awarded any fees under § 12-341.01(A). Upon granting summary judgment on anticipatory nuisance, the court invited TMS to file a proposed form of judgment and "leave blank spaces for an award [of] attorney's fees and taxable costs previously awarded pursuant to A.R.S. § 12-1103." And its post-trial ruling stated that TMS "is entitled to recover its attorneys' fees and costs pursuant to A.R.S. § 12-1103."

¶35 Even if we were to assume the court awarded fees under § 12-341.01(A), we would find no abuse of discretion. *See City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 194 (App. 1994) ("The [superior] court has discretion to determine . . . where a successful claim is intertwined with one for which fees are not awardable."). Claims are intertwined for purposes of a fee award under A.R.S. § 12-341.01(A) if they are based on the same set of facts and involve common allegations that require the same factual and legal development. *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, 369, ¶ 52 (App. 2015). Such is not the case here, as TMS acknowledged the anticipatory nuisance counterclaim did not arise from the same set of facts in its motion to bifurcate it from the remainder of the case. TMS instead stated that the counterclaim "allege[d] that [its] future construction activities will constitute a nuisance," while its claims and the Neighbors' other counterclaims involved "legal access." On those bases, TMS argued that "conducting two separate trials – one on legal access and the second on anticipatory nuisance – will expedite and economize the resolution of this case on the merits."

¶36 Moreover, the court granted summary judgment on the anticipatory nuisance counterclaim because it found the Neighbors could

not show "highly probable" injury resulting from future construction. *See McQuade v. Tucson Tiller Apartments, Ltd.*, 25 Ariz. App. 312, 315 (1975) ("The law is well settled that in order to enjoin an anticipated nuisance, the nuisance must be highly probable."). Whether the Neighbors could prove a high probability of damage to their properties has no bearing on TMS' legal access claims. We thus see no abuse of discretion.

III. Attorney Fees and Costs on Appeal and Cross-Appeal

¶37 TMS requests its attorney fees and costs incurred in this appeal and cross-appeal under A.R.S. §§ 12-1103 and 12-341.01(A). We decline because TMS is not the successful party in this court. *See* A.R.S. § 12-341.01(A) (authorizing a fee award to the "successful party"); *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215 (App. 1990) ("It is within the trial court's discretion to determine whether to award attorney's fees to a party who has prevailed in a quiet title action and otherwise complied with the provisions of section 12–1103(B)."). As the prevailing party on appeal, the Neighbors are entitled to their costs upon compliance with ARCAP 21.

CONCLUSION

¶38 We reverse the superior court's judgment finding a common law dedication of the Easement for Roadway. Because we reverse on common law dedication, we also vacate the attorney fees and cost award to TMS on that claim. We remand to allow the court to address attorneys' fees related to the implied way of necessity claim.

COURT OF APPEALS STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA