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March 24, 2017

VIA HAND-DELIVERY
AND E-MAIL (ecutro@paradisevalleyaz.gov)

Eva Cutro, Director and Zoning Administrator
Community Development Department
Town of Paradise Valley
6401 East Lincoln Drive
Paradise Valley, AZ 85253

Re: Response to Notice of Appeal Filed on December 29, 2016, by Francis Slavin (“Notice of Appeal”) from the Letter from the Town of Paradise Valley (the “Town”) dated November 29, 2016, Regarding the Application by TMS Ventures, LLC (“TMS”) for Hillside Building Committee Review for Property Located at 5507 East San Miguel, Paradise Valley, Arizona 85253 (the “TMS Property”)¹

Dear Ms. Cutro:

We represent TMS, which submitted an application (the “TMS Application”) to the Town’s Hillside Building Committee for approval of plans for a residence on the TMS Property. The Town’s Hillside Building Committee held a concept review meeting on September 8, 2016, and TMS’s formal Hillside Building Committee submittal was made on February 16, 2017.² On November 29, 2016, the Town of Paradise Valley sent a letter (the “Town’s At-Risk Letter”)³ to Andrew Abraham and me, as lawyers for TMS, to let us know that the Town would continue to process the TMS Application during the pending litigation between TMS and several neighbors regarding access to the TMS Property.⁴ The Town’s At-Risk Letter made clear that the TMS Application should be seen as “at risk” for two reasons:

1. First, the Town will “insist that a final order or final settlement of the Pending Litigation on the form of legal access be provided to the Town staff prior to the issuance of any building permit for the TMS Property.”

¹ The Maricopa County Assessor Parcel No. for the TMS Property is 172-47-078D.

² The February 13, 2017 narrative from the formal TMS Application is attached as Exhibit 1, along with pages from the Town’s Action Report and Hillside Building Committee Minutes for the September 8, 2016 meeting.

³ See Exhibit 2. TMS reserves all legal rights and arguments with respect to the Town’s At-Risk Letter.

⁴ TMS Ventures, LLC, v. Zachariah, et al., Maricopa County Superior Court Case No. CV2016-005381 (the “Pending Litigation”).

2. Second, based on the court's determination of the form of legal access, "any prior Hillside Committee approval may be inapplicable or void and another application may need to be processed."

Although the Town's At-Risk Letter simply provided notice that the TMS Application would be allowed to proceed and deferred the Town's decision regarding other applications and requirements that might apply to the TMS Property, Mr. Slavin filed the Notice of Appeal on December 29, 2016,⁵ on behalf of certain neighbors⁶ and Save Camelback Mountain, a non-profit corporation. The Notice of Appeal asserts that the Town's At-Risk Letter was a "decision to waive enforcement of the Town zoning and Subdivision ordinances regarding the TMS Application." This letter is written in response to the Notice of Appeal. We ask that you provide copies of this response to the Board of Adjustment.

I. SUMMARY OF ARGUMENTS

1. The Town's At-Risk Letter is not a "decision" that can be appealed to the Board of Adjustment. Instead, it is simply a notice that the Town will defer a decision regarding which of the Town's processes will apply to the TMS Property until after the Pending Litigation is decided.

2. TMS is not required to establish that the TMS Property (3.44 acres) is a "Lot" because the TMS Property became a legal lot in 1970 at the latest, prior to the State of Arizona's adoption of enabling legislation that would allow the Town to regulate subdivisions.

3. The Easement is not subject to the Town's conditional use permit requirement for private roadways because it is not being established in conjunction with the vacation of a public roadway or in conjunction with the creation of a lot.

4. TMS is not required to obtain subdivision approval for the TMS Property because the TMS Property became a legal lot in 1970, prior to the State of Arizona's adoption of enabling legislation that would allow the Town to regulate subdivisions.

5. No variances are required for the TMS Property because:

- a. No variances from the Town's conditional use permit requirements applicable to private roadways are required for the Easement because access is not being established in conjunction with the vacation of a public roadway or with the creation of a lot.

⁵ See Exhibit 3 for a copy of the Notice of Appeal without exhibits. TMS reserves all legal rights and arguments with respect to the Notice of Appeal and exhibits, including without limitation Mr. Slavin's September 20, 2016 letter to the Town's Hillside Building Committee.

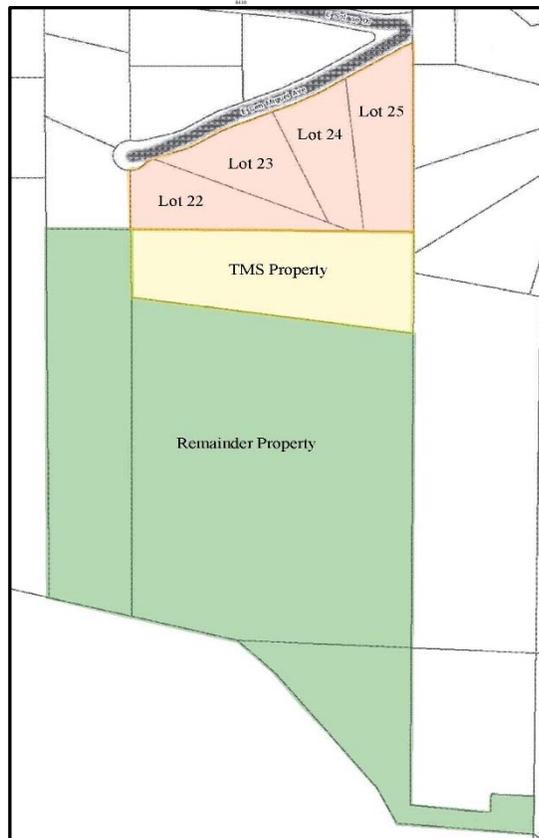
⁶ These neighbors are Teresa and Joe Zachariah, owners of Lot 22 of Stone Canyon East; Rosanne Appel, owner of Lot 23 of Stone Canyon East; and Ingrid and Alfred Harrison, Trustees of the Ingrid Lenz Harrison Revocable Trust Under Agreement Dated November 19, 1999, owner of Lot 24 of Stone Canyon East.

- b. No variances from the Town’s Subdivision Code are required for the TMS Property because the TMS Property is already a legal lot.
- c. No variances from the Town’s Hillside Development Regulations are required because the offsite roadway is not subject to the Town’s Hillside Development Regulations.

II. BACKGROUND

On November 16, 2012, TMS purchased the TMS Property, which lies adjacent to a subdivision known as Stone Canyon East. The TMS Property and Stone Canyon East are located within Tract 4 of a much larger subdivision called O’Brien’s Camelback Lands.⁷ In 1958, the TMS Property (along with another piece of property extending to the south and east shown in Figure 1 below as the “Remainder Property”) and the property to become Stone Canyon East were transferred to Phoenix Title and Trust Company (“Phoenix Title”).⁸

Figure 1

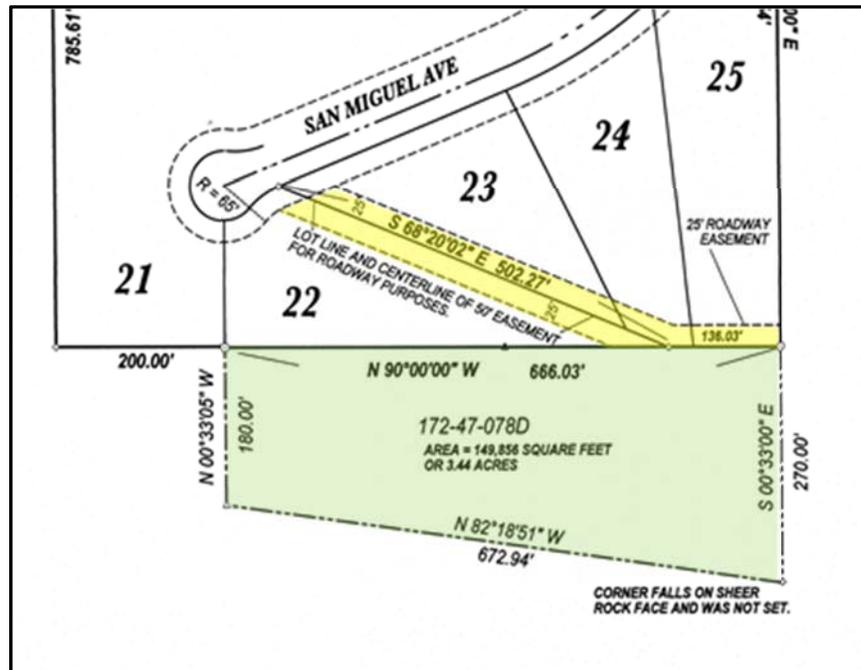


⁷ The plat for O’Brien’s Camelback Lands was recorded on April 24, 1928 at Book 18, page 36 with the Maricopa County, Arizona Recorder (“M.C.R.”); see Exhibit 4.

⁸ The Warranty Deed from Jack Harris and Cramer Supply Corporation to Phoenix Title was recorded on December 3, 1958 at Docket 2676, page 77 M.C.R.; see Exhibit 5.

Phoenix Title recorded the plat for Stone Canyon East on February 27, 1959.⁹ On March 1, 1960, Phoenix Title recorded the Easement for Roadway (the “Easement”),¹⁰ which increased the width of San Miguel Avenue as shown on the plat of Stone Canyon East (by an additional 25-feet on each side) and provided for another roadway not shown on the plat of Stone Canyon East. This other roadway runs along the lot line between Lots 22 and 23 of Stone Canyon East and then extends along the southern lot lines of Lots 24 and 25 of Stone Canyon East as shown on Figure 2 below, providing the only means of access to the TMS Property.

Figure 2



After it recorded the Easement in 1960, Phoenix Title conveyed Lot 25 on March 30, 1961,¹¹ the TMS Property and the Remainder Property on October 25, 1961,¹² Lot 24 on March 15, 1962,¹³ Lot 22 on June 5, 1964,¹⁴ and Lot 23 on March 10, 1966.¹⁵

⁹ The plat for Stone Canyon East was recorded on February 27, 1959 at Book 81, page 34 M.C.R.; see Exhibit 6.

¹⁰ The Easement was recorded on March 1, 1960 at Docket No. 3178, page 402 M.C.R.; see Exhibit 7.

¹¹ The Special Warranty Deed from Phoenix Title to Ben B. and Marian Dale Cheney for Lot 25 was recorded on March 30, 1961 at Docket 3641, page 516 M.C.R. The subsequent Warranty Deed from the Cheneys to Carl E. and Mildred I. Mellen, recorded on July 26, 1963, at Docket 4668, page 160 M.C.R., specifically referred to the “Easement and rights incident thereto for roadway over said premises, as set forth in instrument recorded March 1, 1960, in Docket 3178, page 402.” See Exhibit 8.

¹² The Special Warranty Deed from Phoenix Title to six individuals for the TMS Property and Remainder Property was recorded on October 25, 1961 at Docket 3895, page 476 M.C.R.; see Exhibit 9.

¹³ The Special Warranty Deed from Phoenix Title to Ralph and Georgiana Jane Luikart for Lot 24 was recorded on March 15, 1962, at Docket 4065, page 584 M.C.R; this Special Warranty Deed specifically referred to the “Easement for roadway as granted to County of Maricopa by instrument rec. in Docket 3178, page 402.” See Exhibit 10.

¹⁴ The Special Warranty Deed from Phoenix Title to Stone Canyon East Properties for Lot 22 was recorded on June 5, 1964, at Docket 5080, page 25 M.C.R; see Exhibit 11. It is worth noting that when the Zachariahs acquired Lot

Stone Canyon East and the TMS Property (and the Remainder Property) became part of the Town when the Town was incorporated in 1961. In 1970, the then-owner of the TMS Property and the Remainder Property deeded the Remainder Property to the City of Phoenix, but kept the TMS Property.¹⁶ As noted above, TMS acquired the TMS Property in 2012 and since that time has been working to design a residence that would meet the requirements of the Town's Hillside Development Regulations.

III. THE TOWN'S AT-RISK LETTER DOES NOT WAIVE ENFORCMENT OF THE TOWN'S ZONING ORDINANCE OR SUBDIVISION CODE AND, IN FACT, DEFERS MAKING A DECISION UNTIL THE CONCLUSION OF THE PENDING LITIGATION. AS THE DECISION HAS BEEN DEFERRED, THERE IS NO DECISION BY THE ZONING ADMINISTRATOR TO APPEAL.

The Zoning Administrator is "charged with responsibility for enforcement of the zoning ordinance."¹⁷ The Board of Adjustment is authorized to "[h]ear and decide appeals in which is its alleged that there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance...."¹⁸ The Board of Adjustment can "[r]everse or affirm, in whole or in part, or modify the order, requirement or decision of the zoning administrator appealed from, and make the order, requirement, decision or determination as necessary."¹⁹ The Board of Adjustment reviews a Zoning Administrator's decision *de novo* after conducting a hearing and taking evidence.²⁰

Here, the Town's At-Risk Letter did not contain a "decision" made by the zoning administrator that is reviewable on appeal.²¹ Despite Mr. Slavin's assertions, the Town's At-Risk Letter did not say that any approvals were waived by the Town or would not be necessary. Instead, the Town simply provided notice of the following risks to TMS if the TMS Application proceeds concurrently with the Pending Litigation: (i) "additional or different development

22 in 2010, they tried to negotiate a lower purchase price after they discovered before closing that the Easement existed. See page 8 of the Verified Second Amended Complaint, which was filed in the Pending Litigation on August 19, 2016, and is attached as Exhibit 12 (without exhibits).

¹⁵ The Special Warranty Deed from Phoenix Title to Warren O. and Dolores Wolf for Lot 23 was recorded on March 10, 1966 at Docket 5953, page 202 M.C.R.; see Exhibit 13.

¹⁶ The Warranty Deed from Camelback Mountain Properties to the City of Phoenix was recorded on April 10, 1970, at Docket 8083, page 449 M.C.R.; see Exhibit 14.

¹⁷ See ARIZ. REV. STAT. § 9-462.05(C); Town Code § 2-5-3(C)(1).

¹⁸ See ARIZ. REV. STAT. § 9-462.06(G)(1); Town Code § 2-5-3(C)(1).

¹⁹ ARIZ. REV. STAT. § 9-462.06(G)(3).

²⁰ *Murphy v. Town of Chino Valley*, 163 Ariz. 571, 574-75, 789 P.2d 1072, 1075-76 (App. 1989)(finding that the board of adjustment's review is *de novo* and noting that the board of adjustment acts in a quasi-judicial capacity).

²¹ See ARIZ. REV. STAT. § 9-462.06(C)(stating that a board of adjustment shall hear and decide appeals from the **decisions** of the zoning administrator (emphasis added)); *Canyon del Rio Investors, L.L.C., v. City of Flagstaff*, 227 Ariz. 336, 343, 258 P.3d 154, 161 (App. 2011)(noting (in the context of Section 1983 claims) that if a decision does not conclusively determine an issue, but instead leaves open the possibility that it is subject to change, then it is not final or ripe for review).

requirements may apply” depending on the outcome of the Pending Litigation and (ii) no building permits will be issued until the final resolution of the Pending Litigation. Without a final decision by the zoning administrator to appeal from, Mr. Slavin’s Notice of Appeal is effectively asking the Board of Adjustment to act outside of its jurisdiction by issuing an advisory opinion.²² Because the Town’s At-Risk Letter does not make the decision complained of in the Notice of Appeal, the Board of Adjustment has no jurisdiction to hear this appeal.

Additionally, the Town’s Subdivision Code is not part of the Town’s Zoning Ordinance. Neither the Town’s Zoning Administrator nor the Board of Adjustment is authorized to interpret, enforce, or hear appeals regarding the Town’s Subdivision Code. Instead, subdivision review and approval falls under the authority of the Town’s Planning and Zoning Committee and the Town Council.²³ To the extent that the Notice of Appeal relates to the interpretation or enforcement of the Town’s Subdivision Code, the Board of Adjustment lacks jurisdiction.²⁴

If the Board of Adjustment decides to hear any or all of the issues raised in the Notice of Appeal, we provide the following substantive response.

IV. TMS IS NOT REQUIRED TO ESTABLISH THAT THE TMS PROPERTY IS A LEGAL LOT BECAUSE THE TMS PROPERTY BECAME A LEGAL LOT IN 1970 AT THE LATEST, BEFORE THE STATE ENACTED LEGISLATION ENABLING MUNICIPALITIES TO REGULATE SUBDIVISIONS.

The Notice of Appeal argues that TMS is required to establish that the TMS Property is a “‘Lot’ having adequate frontage on a public or private street.”²⁵ However, as Mr. Slavin knows, “[i]n Arizona, the powers of the municipality to plan, zone and regulate the subdivision of real property arise solely from enabling statutes.”²⁶ When the Remainder Property was deeded to the

²² See ARIZ. REV. STAT. § 9-462.06(C)(stating that a board of adjustment shall hear and decide **appeals** from the decisions of the zoning administrator (emphasis added)); *Franco v. Wheelock*, 750 A.2d 957, 960 (R.I. 2000)(holding that where the zoning enforcement officer is authorized in the first instance to provide a zoning determination or interpretation, the board of review has no authority to render advisory opinions but can only act to hear appeals within the scope of authority expressly conferred by statute); *Barron v. Gemick*, 107 A.D.2d 1017, 1018 (N.Y. App. Div. 1985)(holding that the zoning board of appeals had no jurisdiction to hear a matter where no determination had been made by the administrative official charged with interpreting the zoning ordinance); 4 AM. LAW OF ZONING § 40:5 (2016)(noting that a board of appeals is without authority to render an advisory opinion).

²³ See ARIZ. REV. STAT. § 9-463.01(A); Town Code § 6-2-3.

²⁴ See ARIZ. REV. STAT. § 9-462.06(G)(1)(stating that a board of adjustment shall hear and decide appeals in which it is alleged there is an error in a decision made by the zoning administrator in the enforcement of a **zoning ordinance** (emphasis added)); *Arkules v. Bd. of Adjustment of Town of Paradise Valley*, 151 Ariz. 438, 440, 728 P.2d 657, 659 (App. 1986)(noting that a board of adjustment has no powers except those granted by statute and must act in accordance with the law or is without jurisdiction).

²⁵ See page 2 of the Notice of Appeal attached as Exhibit 3.

²⁶ Expert Opinion of Francis J. Slavin dated July 15, 2016, page 2, filed in *ZarCalRes Tempe, LLC, v. Mill Avenue Apartments Limited Partnership, et al.*, Maricopa County Superior Court Case No. CV2015-004114, excerpts of which are attached as Exhibit 15; see *Jachimek v. Superior Court*, 169 Ariz. 317, 318, 819 P.2d 487, 488 (1991)(noting that because municipal authority comes from the state, the power must be exercised within the limits and in the manner granted); *Bella Vista Ranches, Inc. v. City of Sierra Vista*, 126 Ariz. 142, 143, 613 P.2d 302, 303

City of Phoenix in 1970, Arizona had not yet enacted enabling legislation authorizing a municipality to regulate the subdivision of land within its territorial limits.²⁷ Therefore, the Town lacked authority to regulate the subdivision of property when TMS Property became a lot in 1970.²⁸ As noted in the Town's letter of August 3, 2016 to Louis Lopez,²⁹ the requirement for access to a public street or private road included in the Town's definition of "Lot"³⁰ can be applied prospectively to new lots, but not to lots such as the TMS Property that already existed prior to Arizona's enactment of subdivision enabling statutes, the Town's enactment of the Zoning Ordinance's current definition of "Lot" in 1999, or the definition of "Lot" included in the Town's Hillside Development Regulations adopted in 1984.³¹

V. THE EASEMENT IS NOT SUBJECT TO THE CONDITIONAL USE PERMIT REQUIREMENT APPLICABLE TO PRIVATE ROADWAYS BECAUSE IT IS NOT BEING ESTABLISHED IN CONJUNCTION WITH THE VACATION OF A PUBLIC ROADWAY OR THE CREATION OF A LOT.

Section 1103.2 of the Town Code requires a conditional use permit for private roadways. A "private roadway" is defined as:

A roadway not dedicated to or maintained by the Town of Paradise Valley that provides access to properties. A private roadway shall be established **only** in conjunction with the vacation of a public roadway or in conjunction with the creation of a lot or lots and shall provide access to such lot (emphasis added).

Here, the Easement was created in 1960 by Phoenix Title and the TMS Property has been a legal lot since at least 1970. See Section IV above. The Easement is not being established "in conjunction with the vacation of a public roadway," nor is it being established "in conjunction with the creation of a lot or lots." Therefore, the conditional use permit for private roadways does not apply to the Easement.

(App. 1980)(stating that a municipal corporation has no inherent police power and therefore its power to regulate zoning must exist by virtue of delegated power).

²⁷ See *Bella Vista Ranches*, 126 Ariz. at 143, 613 P.2d at 303 (holding that the first enabling legislation delegating regulatory authority over subdivisions to municipalities became effective January 1, 1974); ARIZ. REV. STAT. § 9-463, et seq.

²⁸ Under Article 6-1 of the Town's current Subdivision Code, a "Subdivision" is defined to include the division of property into two lots (*i.e.*, the TMS Property and the Remainder Property) only "if a new street is involved" or if the boundaries of the property have been fixed by a recorded plat. Under Article 6-1, "Street" is defined to include an "easement for access." Here, even if TMS Property had not become a legal lot in 1970, the Subdivision Code does not apply to the TMS Property because no "new street" is involved – the Easement was recorded in 1960; alternative legal theories of implied easement or common law dedication set forth in the Verified Second Amended Complaint, which was filed in the Pending Litigation and attached as Exhibit 12, date back to when the TMS Property and Lots 22, 23, 24, and 25 were transferred by Phoenix Title in the 1960s, so would also not involve a "new street."

²⁹ See Exhibit 16.

³⁰ See Zoning Ordinance § 201.

³¹ The Town's current definition of "Lot" in Section 201 of the Zoning Ordinance was adopted by the enactment of Ordinance No. 477 in 1999. The Town's current definition of "Lot" included in the Hillside Development Regulations was adopted in 2003 by the enactment of Ordinance No. 533.

Additionally, even if the conditional use permit requirement did apply, the creation of the Easement and the establishment of the TMS Property as a legal lot predates the Town's conditional use permit requirement for private roadways,³² so no such permit can be required. But even if it applied and was required, the Zoning Ordinance does not mandate that the conditional use permit be approved prior to Hillside Building Committee approval or that Hillside Building Committee approval cannot be contingent on the applicant receiving any conditional use permit or other approvals that may be required by the Town. Finally, any conditions that the Town places on access to the TMS Property are subject to Arizona Statutes, including Section 33-2401, which states: "Notwithstanding any other law, reasonable access to private property shall not be denied by this state or any political subdivision of this state."³³

VI. TMS IS NOT REQUIRED TO OBTAIN SUBDIVISION PLAT APPROVAL BECAUSE THE TMS PROPERTY IS ALREADY A LEGAL LOT, CREATED IN 1970 BEFORE THE STATE ENACTED LEGISLATION ENABLING MUNICIPALITIES TO REGULATE SUBDIVISIONS.

The Notice of Appeal argues that "the TMS Property was unlawfully subdivided from a larger property in 1970 after becoming part of the original incorporated area of the Town in 1961," referencing the Town's subdivision regulations adopted in 1962.³⁴ However, as noted in Section IV above, the powers of a municipality to plan, zone, and regulate the subdivision of real property arise solely from enabling statutes.³⁵ The first enabling legislation authorizing a municipality to regulate the subdivision of land within its territorial limits was not passed until 1973 and became effective January 1, 1974.³⁶ When the Town passed Ordinance 16 to regulate subdivisions in 1962, it had no authority under Arizona law to do so. In the absence of enabling statutes, Ordinance 16 was ultra vires and void.³⁷ Because the Town had no authority to regulate subdivisions in 1970, the TMS Property became a legally established lot, at the latest, when the then-owners deeded the Remainder Property to the City of Phoenix.³⁸

³² The Town required a special use permit for private roadways beginning in 1971 with the adoption of Ordinance No. 71. In 2005, the Town adopted Ordinance No. 564, which made private roadways subject to conditional use permits instead of special use permits.

³³ ARIZ. REV. STAT. § 33-2401. Attached as Exhibit 17 is a letter from TMS to the Town regarding the impact of access on the value of the TMS Property.

³⁴ See page 2 of the Notice of Appeal attached as Exhibit 3.

³⁵ See *Jachimek*, 169 Ariz. at 318-19, 819 P.2d at 488-89; *Bella Vista Ranches*, 126 Ariz. at 143, 613 P.2d at 303.

³⁶ See ARIZ. REV. STAT. § 9-463, et seq.; see *Bella Vista Ranches*, 126 Ariz. at 143, 613 P.2d at 303.

³⁷ *Bella Vista Ranches*, 126 Ariz. at 144, 613 P.2d at 304 (finding that Sierra Vista's subdivision ordinance adopted in 1966 was void because Sierra Vista's power to control subdivisions did not become operative until it enacted its 1976 Code pursuant to the legislative grant of power); see *Dresner v. Carrara*, 353 A.2d 505, 507 (N.J. 1976)(noting that the absence of an enabling act is fatal to the argument that municipal powers exist and holding that off-street parking requirements could not be imposed on an existing property seeking a certificate of occupancy when no subdivision or change in use was sought); *Bd. of Supervisors of Augusta Cnty. v. Countryside Investment Co.*, 522 S.E.2d 610, 504 (Va. 1999)(noting that the powers of a municipality must be exercised pursuant to an express grant and holding that provisions in a subdivision ordinance not authorized by statute were void).

³⁸ Under Section 2 of Ordinance No. 16, "Subdivision" was defined to include the division of property into two or more lots (*i.e.*, the TMS Property and the Remainder Property) only "if a new street is involved" or if the boundaries of the property have been fixed by a recorded plat, and "Street" was defined to include an "easement for access." Here, even if Ordinance No. 16 had been authorized by enabling statutes, it would not have applied to the TMS

VII. TMS IS NOT REQUIRED TO OBTAIN THE VARIANCES LISTED IN THE NOTICE OF APPEAL BECAUSE THEY DO NOT APPLY TO THE TMS PROPERTY.

In the Notice of Appeal, Mr. Slavin argues that TMS is required to obtain eight separate variances from various provisions of the Town Code and Zoning Ordinance before the Town can process the TMS Application.³⁹ However, the variances listed in the Notice of Appeal do not apply to the TMS Property for the following reasons:

1. A variance from Section 1103.2.B.3.b.i of the Zoning Ordinance does not apply to the TMS Property because this section relates to the paved roadway width applicable to private roadways established pursuant to conditional use permits. For the reasons stated in Section V above, the requirement to obtain a conditional use permit for private roads does not apply to the TMS Property or the Easement because there is no road being established in conjunction with the vacation of a public roadway or the creation of a lot.

2. Variances from Section 6-7.C.4, Section 6-7.C.3, Section 6-7.C.7, Section 6-7.C.8, and Section 6-7.C.15 of the Town Code do not apply to the TMS Property because these sections relate to the design standards for roads within new subdivisions. For the reasons stated in Sections IV and VI above, subdivision approval does not apply to the TMS Property because the TMS Property is already a legally established lot, created in 1970 prior to the enactment of enabling legislation authorizing municipalities to regulate subdivisions.

3. Variances from Zoning Ordinance Section 2207.VI.C.1.a (relating to the maximum height and length of retaining walls allowed under the Hillside Development Regulations) do not apply because the offsite roadway is not subject to the Town's Hillside Development Regulations.⁴⁰

Property because no "new street" was involved in 1970 – the Easement was recorded in 1960; alternative legal theories of implied easement and common law dedication set forth in the Verified Second Amended Complaint, which was filed in the Pending Litigation and is attached as Exhibit 12, date back to when the TMS Property and Lots 22, 23, 24, and 25 were transferred by Phoenix Title in the 1960, so would also not involve a "new street."

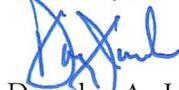
³⁹ Mr. Slavin does not cite a provision of Arizona Statutes or the Town's Code or Zoning Ordinance that requires any applicable variance be approved in advance of Hillside Building Committee review or that forbids the Hillside Building Committee from approving an application conditioned on obtaining any other approvals that may be required by the Town. Additionally, any arguments raised in the Notice of Appeal that pertain to offsite improvements (such as the portion of the driveway located on the Easement) are irrelevant because they are not subject to the Town's Hillside Development Regulations. See pages from the Town's Action Report and Hillside Building Committee Minutes for the September 8, 2016 meeting attached as Exhibit 1.

⁴⁰ See pages from the Town's Action Report and Hillside Building Committee Minutes for the September 8, 2016 meeting attached as Exhibit 1.

VIII. CONCLUSION

Based on the foregoing, we respectfully request that the Board of Adjustment refuse to hear the Notice of Appeal based on a lack of jurisdiction because the decision complained of in the Notice of Appeal has not been made by the Zoning Administrator. Alternatively, we request that the Board of Adjustment affirm the decision of the Zoning Administrator for the reasons set forth above and allow the TMS Application to proceed "at risk," contingent upon the final outcome of the Pending Litigation.

Sincerely,



Douglas A. Jorden

DAJ/ea

Enclosures

cc (w/encl.): Kevin Burke, Town Manager (kburke@paradisevalleyaz.gov)
Andrew Miller, Town Attorney (amiller@paradisevalleyaz.gov)
Duncan Miller, Town Clerk (dmiller@paradisevalleyaz.gov)
Francis Slavin (b.slavin@fjslegal.com)
Terry Scali (via e-mail)
Andy Abraham (aabraham@bcattorneys.com)

EXHIBIT 1



CANDELARIA

P 602 604 2001

P 602 604 2002

February 13th, 2017

Subject: Scali Residence (5507 East San Miguel Avenue) Project Narrative

The Scali Residence is a new home for an existing lot located on the north slope of Camelback Mountain in the Hillside District of Paradise Valley, Arizona.

The home is constructed on a 3.44 acre site thus the allowed disturbed area given the site slope is 13,037 sf. The design of this home is under the allowed disturbed area as the home has been literally designed using the features and characteristic of the site as the inspiration for the design. The topography of the site forces the design to be very linear and thin in nature to comply with the 24' and 40' height limits. In addition, the house has been designed to allow historic natural sheet flow of any surface water during storms to run under the home and natural washes have been maintained by spanning the house over these existing features.

The home and drive have been designed and will be constructed in compliance with the hillside ordinance and local, state and international codes and no variances are required. Special care will be taken in regards to existing boulder stabilization, and water drainage as affected by the construction of the home and driveway. The home will be contemporary in style with a combination of stone, exposed colored concrete, steel and glass all meeting required Hillside LRV and height requirements. All lighting and landscaping will be in accordance with Hillside Ordinance requirements. We appreciate your consideration of our design for this spectacular property.

If you have any questions please call me at 602-604-2001 extension 7102 or email me at vivian@candelariadesign.com

Sincerely,

Vivian Ayala, Associate
Mark B. Candelaria, Principal
Candelaria Design Associates, L.L.C.

enhancing your lifestyle

ARCHITECTURE LIFESTYLE RETAIL 6900 EAST CAMELBACK ROAD SUITE 400 SCOTTSDALE, ARIZONA 85251
www.candelariadesign.com



Action Report

File #: 16-280

TO: Hillside Building Committee

DATE: September 8, 2016

FROM: George Burton, Planner

SUBJECT: Concept Review for TMS Ventures LLC Residence - 5507 E. San Miguel Ave (APN: 172-47-078D). Application to construct a new Single Family Residence, Driveway, Retaining Wall and Pool.

The owner of the property located at 5507 E. San Miguel Avenue submitted an application to construct a new residence. The property is undeveloped and this project consists of constructing a new house, driveway, retaining wall, and pool.

Background

The subject property is located in Tract 4 of O'Briens Camelback Lands subdivision. This subdivision was platted in 1928 and annexed into the Town in 1985. Per Docket 3178 Page 402, there is a roadway easement on the neighboring/southern lots which provides access to the subject property. The roadway easement is located on Lots 22, 23, 24 and 25 of the Stone Canyon East subdivision (5505, 5511, 5519 and 5525 E San Miguel Ave properties). The applicant represents that the private roadway by easement is the only means of ingress/egress to the subject property (which is the subject of currently litigation). However, the private roadway by easement is not part of the Hillside Committee review. The development of the roadway by easement will be reviewed for building code compliance during the building permit process.

New Single Family Residence

The subject property is a vacant lot that has never been developed. The property is zoned R-43 Hillside and is 149,856 square feet in size (3.44 acres). The lot is rectangular in shape, has a slope of approximately 53%, and is accessible via the private roadway by easement on the neighboring properties to the south. The driveway on the property will count as disturbed area (with 25% credit given for decorative driveways such as pavers or colored concrete). The private roadway by easement is not included in the disturbance calculation since it not located on the subject lot and since roads are exempt from the disturbed area calculation per Section 2207.III.G of the Town Zoning Ordinance. The proposed home will have a total floor area of 10,806 square feet, which results in a floor area ratio of 7.2% (the maximum allowable floor area ratio is 25%). According to the plans, the allowable disturbed area is 13,037 square feet and the proposed disturbance is 6,660 square feet.

Retaining Wall and Driveway

A retaining wall will be placed on the north side of the driveway. The retaining wall is 8' tall and 90' in length. Also, the driveway varies in width and slope, from 12' wide to 42' wide and from a 5% slope to a 30% slope.



PARADISE VALLEY
HILLSIDE BUILDING COMMITTEE MINUTES
September 8, 2016

1. CALL TO ORDER

The Hillside Building Review Committee met on Thursday, September 8, 2016, at Town Hall, 6401 East Lincoln Drive, Paradise Valley, Arizona, 85253. Committee Members present included Planning Commissioners Dolf Strom and Tom Campbell, Scott Jarson (Chair) and Scott McPherson. Planning Commissioner Rick Mahrle was absent. Staff present: Planner George Burton, Senior Planner Paul Michaud, Public Safety Manager Robert Lee, Engineering Technician Richard Edwards, Town Engineer Woody Scoutten, Town Manager Kevin Burke, Town Attorney Andrew Miller, and Executive Assistant/Deputy Town Clerk Natalie Montenegro. Chair Jarson called the meeting to order at 8:04 a.m.

2. EXECUTIVE SESSION

Chair Jarson stated that at certain points throughout the meeting they may need to go into executive session if needed to clarify certain points.

3. STAFF REPORTS

Town Manager Kevin Burke gave a PowerPoint presentation on the Expenditure Limit Base Adjustment, explaining why Prop. 499 will be on the November ballot.

4. APPLICATION REVIEW

A. Concept review for a new single family residence at 5507 East San Miguel Avenue (APN 172-47-078D).

Planner George Burton presented the application for construction of a single family home located at 5507 E. San Miguel Avenue. He gave a brief history of the lot. He stated this hillside lot is on Camelback Mountain on the south side of San Miguel Avenue in the Stone Canyon East subdivision. The lot is zoned R-43 Hillside and is 3.44 acres in size with a building pad slope of 53%. The rectangular lot is accessible by a private roadway easement on the neighboring properties to the south. The private roadway easement is not part of the Hillside Committee review but will be reviewed for building code compliance during the building permit process.

The property is undeveloped and this project consists of constructing a new house, driveway, retaining wall, and pool. The proposed home meets all setback requirements and the floor area ratio is well below the 25% allowable. The pool will be placed at the front of the house and may require a barrier. An 8 foot by 90 feet long retaining wall will be at the north side of the driveway. The driveway varies from 12 feet to 42 feet wide, with a slope of 5% to 30%. The driveway on the property will count as disturbed area and may be given a 25% credit if pavers or colored concrete is used.

The private roadway by easement is not included in the disturbance calculation since it not located on the subject lot and since roads are exempt from the disturbed area calculation.

A new pool is proposed in front of the house and will meet all setbacks. More detailed information will be provided with the formal hillside review. The pool barrier must maintain a minimum openness of 80%.

The preliminary grading and drainage plan shows the house being constructed on a series of buttresses spanning two washes. The proposed drainage will allow storm water to pass under the residence. To the extent possible, on-site retention will be required to address run off from the roof and driveway. A detailed drainage plan and report will be required and fully reviewed at the formal review. Also, the applicant will need to address general construction methods (such as excavating for the buttresses and construction of the driveway) at the formal review.

Chair Jarson said this is a significant location and has questions on how the home will affect the site. He stated his concerns on the necessity of the house spanning two washes. He said boulder removal might have an effect on the way water will flow on the property. He said there is potential for scarring and stabilization are other concerns. He would like to see how these concerns will be handled at the formal review.

Commissioner Tom Campbell described the construction and geotechnical sequence. He said it is a 10 stage process on stabilizing the boulders before construction. He said he would like to speak with the engineer who will be responsible for stabilizing the site. In Stage 2, there is a preliminary recommendation of stability with a 90% confidence. He asked if that means 10% of the boulders might still come down.

Mr. Jeff Bann, the geotechnical engineer for the project, said that as of now the boulder stability analysis has not been completed. He said once the study is done, it will jack up to 95/99%. Commissioner Campbell said he would encourage it to be at 99% rather than 95%, and 99.9% rather than 99%. He does not want to see any boulders come down and would encourage the highest level of confidence. Mr. Bann concurred.

Commissioner Campbell asked Mr. Bann to describe the first fence that will be installed. Mr. Bann stated boulder stability in this area is a prime issue. There is a sequence of installing 2 fences, one downslope and one upslope. They both have prime importance of protecting adjoining properties. They involve anchorage of a unique fencing type. The

EXHIBIT 2



November 29, 2016

Doug Jorden
Jorden, Hiser & Joy, P.L.C.
5080 North 40th Street, Suite 245
Phoenix, AZ 85018

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

Re: Application by TMS Ventures, LLC for Hillside Building Committee Review for
Property Located at 5507 East San Miguel, Paradise Valley, Arizona ("TMS
Property")

Dear Mr. Jorden and Mr. Abraham:

The Town staff has been made aware of the pending litigation between TMS Ventures and the four property owners neighboring the TMS Property (that is, Joe and Teresa Zachariah, Roseanne Appel, Alfred and Ingrid Harrison, and Jerry Smith, collectively, the "Four Neighbors"), including having been supplied copies of some of the pleadings in that litigation (Maricopa County Superior Court Case No. CV2016-005381, the "Pending Litigation"). Further, the Town Hillside Committee has been sent a detailed letter dated September 20, 2016 from attorney Francis Slavin, representing three of the Four Neighbors, with many new historical facts and legal assertions (the "Slavin Letter"). Given the Pending Litigation and new factual and legal issues raised by the Slavin Letter, we wanted to communicate to you the Town staff's position on the processing of the Application for Hillside Building Committee Review for the TMS Property (the "TMS Application"), namely, that the processing of the TMS Application should be seen as "at risk" at this time, for the reasons noted below.

First, given the Pending Litigation, the Town staff will insist that a final order or final settlement of the Pending Litigation on the form of legal access be provided to the Town staff prior to the issuance of any building permit for the TMS Property. Second, based on the determination by the courts of the form of legal access to the TMS Property (or possibly that there is no legal access at all), any prior Hillside Committee approval may be inapplicable or void and another application may need to be processed.

The Town staff fully believes and intends that the TMS Property access issues are a private matter to be resolved by the parties to the Pending Litigation. Further, depending on the court's resolution of other issues that have been raised in the Pending Litigation and in the Slavin Letter, additional or different development requirements may apply.

The Town wants to be sure that you are aware that the existing uncertainties may impact the Town's development requirements and the review and approval processes for the TMS Property. At this time, the Town intends to continue to process the TMS Application as requested by your client, but this is "at risk" to your client and, as noted above, the Town's development and processing requirements are dependent upon the final outcome of the Pending Litigation. Further, the Town's issuance of a building or other construction permits will be contingent upon final resolution of the Pending Litigation.

Sincerely,



Andrew Miller
Town Attorney



Eva Cutro
Community Development Director

cc: Hillside Building Committee Members
Kevin Burke, Town Manager
Duncan Miller, Town Clerk

EXHIBIT 3

FRANCIS J. SLAVIN
JOSEPH J. MORITZ, JR.*
ELLEN B. DAVIS
DANIEL J. SLAVIN
HEATHER N. DUKES

*CERTIFIED SPECIALIST, REAL ESTATE LAW

EMAIL: b.slavin@fjslegal.com

December 29, 2016

VIA HAND-DELIVERY

Eva Cutro, Director and Zoning Administrator
Community Development Department
TOWN OF PARADISE VALLEY
6401 East Lincoln Drive
Paradise Valley, Arizona 85253

Mr. Richard Chambliss, Chairman
Board of Adjustment
TOWN OF PARADISE VALLEY
6401 East Lincoln Drive
Paradise Valley, Arizona 85253

RE: Notice of Appeal of Zoning Administrator's Enforcement Decision dated November 29, 2016 (the "ZA Decision") to the Town of Paradise Valley (the "Town") Board of Adjustment (the "Board") regarding the TMS Ventures, LLC ("TMS") Hillside Building Committee Application Case No. 16-280 (the "TMS Application") for a proposed residential development on an approximate 3.44-acre property assigned Assessor's Parcel No. 172-47-078D (the "TMS Property").

Dear Zoning Administrator Cutro and Chairman Chambliss:

Pursuant to Ariz. Rev. Stat. Sections 9-462.05 and 9-462.06 and Town Code Section 2-5-3.C.1, on behalf of aggrieved persons Teresa and Joe Zachariah, Terry Appel, Alfred and Ingrid Harrison, and Save Camelback Mountain, an Arizona non-profit corporation (collectively "Appellants"), our firm hereby submits this notice of appeal to the Town's Zoning Administrator and Board of Adjustment appealing the Zoning Administrator's November 29, 2016 decision to waive enforcement of the Town Zoning and Subdivision ordinances regarding the TMS Application.

I. **BASIS OF APPEAL TO BOARD OF ADJUSTMENT**

Pursuant to Ariz. R. Stat. § 9-462.05, the Town of Paradise Valley is required to establish the office of Zoning Administrator who is charged with the responsibility for enforcement of the Zoning Ordinance. This appeal of the ZA Decision is being filed for the purpose of obtaining an order from the Board of Adjustment that the Zoning Administrator erred in the enforcement of the Town's Zoning Ordinance and Subdivision Code by deciding that the Hillside Building Committee may process, consider and decide the TMS Application "at-risk" without TMS first complying with the following Town code and ordinance requirements:

1. TMS is required to establish that the TMS Property is a "Lot" having adequate frontage on a public or private street prior to submitting plans for Hillside Building Committee review and approval. See Town Zoning Ordinance §§ 2206.I.B, 2206.II, and 2203 definition of "Lot". The private roadway depicted in the plans submitted as part of the TMS Application is the subject of a lawsuit which is currently pending in Maricopa County Superior Court. TMS filed a lawsuit against Appellants Zachariah, Appel and Harrison (owners of Stone Canyon East ("SCE") Lots 22 – 24) and Jerry Smith (owner of SCE Lot 25) asking a Court to enter judgment granting legal access to the TMS Property. TMS has alleged 5 alternative counts in the lawsuit seeking a judgment establishing legal access in the form of either public right-of-way or a private roadway. Thus, TMS must submit to the Town a copy of a final court judgment establishing legal access to the TMS Property before the Town may proceed with the TMS Application.

2. TMS is also required to obtain approval of a conditional use permit from the Town's Planning Commission and Town Council (on appeal) for the proposed private roadway depicted in the plans submitted as part of the TMS Application. See Town Zoning Ordinance §§ 1101.B, 1103.2.B, and 1103.4.C.

3. TMS is also required to obtain subdivision plat approval from the Town Mayor and Council inasmuch as the TMS Property was unlawfully subdivided from a larger property in 1970 after becoming part of the original incorporated area of the Town in 1961. See Section 2 of the Town's 1962 Subdivision Regulations adopted by Town Ordinance No. 16; see also current Town Zoning Ordinance §§ 2202 and 2203; see also Town Subdivision Code Article 6-1.

4. Before the Town may accept and process the TMS Application for approval by the Hillside Building Committee, TMS is also required to obtain variances from the strict application of the Town Zoning Ordinance and Subdivision Code. In our firm's letter dated September 20, 2016 (referred to as the "Slavin Letter" in the ZA Decision), the following

variances were disclosed to the Hillside Building Committee and the Zoning Administrator as being required:

A. Variance to reduce the required width of a driving surface for a private roadway providing access to one (1) or two (2) residences from 16 feet to 12 feet. See Town Zoning Ordinance § 1103.2.B.3.b.i.

B. Variance to reduce the required paved surface width for a private roadway providing: (i) access to 2 lots from 15 feet to 12 feet and (ii) access to 3 lots from 20 feet to 12 feet. See Town Subdivision Code Article 6-7.C.4.

C. In the alternative, a variance to reduce the required pavement width for a public roadway from 20 feet to 12 feet. See Town Subdivision Code Article 6-7.C.3.

D. In the alternative, a variance to increase the allowable grade for a public roadway from 15 percent to 30 percent. See Town Subdivision Code Article 6-7.C.3.

E. Variance to increase the maximum length of any continuous retaining wall from 100 linear feet to 115 linear feet. See Town Zoning Ordinance § 2207.VI.C.1.a.

F. Variance to increase the maximum height of a retaining wall to a height greater than 8 feet. See Town Zoning Ordinance § 2207.VI.C.1.a; see also Town Subdivision Code Article 6-7.C.15.

G. Variance to increase the amount of land devoted to public rights of way or private roads approved by Special Use Permit [sic] from 10 percent of the gross parcel area to approximately 19 percent. See Town Subdivision Code Article 6-7.C.7.

H. Variance to increase the percentage of the total area subject to cut and fill for purposes of private and public roads to a percentage greater than 5 percent of the gross parcel area. See Town's Subdivision Code Article 6-7.C.8

The Zoning Administrator has erred by allowing TMS to continue to process the TMS Application "at risk" and to obtain a decision by the Hillside Building Committee without first obtaining the necessary approvals required by the Town's Zoning Ordinance and Subdivision Code, as set forth in our September 20, 2016 letter. The Zoning Administrator has no authority under state statutes or the Town's codes and ordinances to waive enforcement of the Zoning Ordinance and Subdivision Code requirements in order to allow the TMS Application to be processed at-risk and prematurely decided by the

Hillside Building Committee. An “at-risk” application is not authorized or implied under State enabling legislation or the Town’s codes and ordinances.

Furthermore, the TMS Application and plan of development greatly depends upon the outcome of the TMS lawsuit. The counts set forth in the TMS Complaint and our clients’ Counterclaim could result in a judgment that the TMS Property is served by: (1) no legal access, (2) legal access in the form of a public easement across SCE Lots 22-25, (3) legal access via a private easement across SCE Lots 22-25, or (4) legal access resulting from a private way of necessity and the condemnation of a roadway in a location determined by the court. Until a final judgment is entered, the Town has no way of knowing which roadway standards and requirements from the Zoning Ordinance and Subdivision Code to apply when evaluating the TMS development plans. Similarly, the Town is unable to impose certain variance requirements for approval of the TMS Application until the roadway location and type of roadway (public vs. private) is determined by the court. Different sets of variances will be required depending on the court’s ruling. Therefore, it is impractical and erroneous for the Zoning Administrator to allow TMS to process the TMS Application at risk before the Hillside Building Committee prior to the Town receiving evidence of the court’s ruling in the TMS lawsuit.

II. JURISDICTION OF BOARD OF ADJUSTMENT

The Town Board of Adjustment has jurisdiction to hear this appeal of the Community Development Director’s erroneous decision to waive enforcement of the Town’s Zoning Ordinance. The jurisdiction of the Board to hear appeals of this nature has been established by statute pursuant to the following sections of Ariz. Rev. Stat. § 9-462.06:

C. **A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator**, shall exercise other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

...

D. **Appeals to the board of adjustment may be taken by persons aggrieved** or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds of the appeal.

...

G. A board of adjustment shall:

- 1. Hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance adopted pursuant to this article.**

Emphasis added.

The Town's Community Development Director performs the duties of the Zoning Administrator. See Town Code § 2-5-3.C.1. As the Zoning Administrator, decisions by the Community Development Director regarding the enforcement of the Town's Zoning Ordinance may be appealed to the Board of Adjustment. *Id.* Thus, the enforcement decisions made by Director Cutro, as Zoning Administrator, in the ZA Decision may be appealed to the Board of Adjustment by the Appellants as aggrieved persons owning adjacent properties and a non-profit corporation having an interest in the preservation of Camelback Mountain.

III. STAY OF ALL PROCEEDINGS

As required by Ariz. R. Stat. § 9-462.06(E), the TMS Application as well as any new applications relating to the development of the TMS Property are automatically stayed by this appeal to the Board of Adjustment. Ariz. R. Stat. § 9-462.06(E) states as follows:

E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in the zoning administrator's opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property. . . .

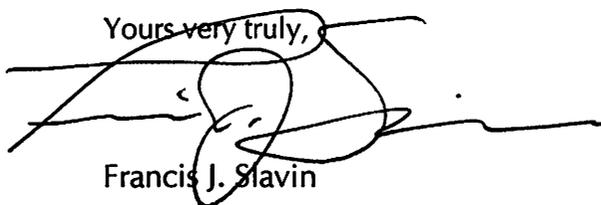
In this case, a stay of the TMS Application and all related development applications for the TMS Property would not cause imminent peril to life or property. Thus, all proceedings in this matter, including applications, hearings, reviews, and decisions relating to the TMS Property, are stayed until the Board of Adjustment hears and issues a final decision on this appeal.

IV. SUBMITTAL OF SUPPLEMENTAL NARRATIVE AND EXHIBITS IN ADVANCE OF BOA HEARING

Pursuant to Subsection E of the "Procedures for Board Meetings" section set forth in the Town of Paradise Valley Board of Adjustment Rules & Regulations revised on August 6, 1997 and the Town's Board of Adjustment Appeal Process Guide and Submittal

Ms. Eva Cutro, Community Development Director and Zoning Administrator
Mr. Richard Chambliss, Board of Adjustment Chairman
TOWN OF PARADISE VALLEY
December 29, 2016
Page 6 of 6

Requirements handout, Appellants provide notice to the Board that Appellants intend to file with the Board and the Zoning Administrator a supplemental narrative together with exhibits, demonstratives, statements, and/or proposed findings of fact and conclusions of law at least 21 calendar days prior to the Board hearing scheduled in this matter. Thank you in advance.

Yours very truly,

Francis J. Slavin

Enclosures

1. Letter dated September 20, 2016 from Francis J. Slavin, P.C. to Scott Jarson, Chairman of the Town's Hillside Building Committee, with revised page 21 to correct error in demonstrative depicting "Sections of Private Roadway Serving More Than One (1) Lot."

2. Letter dated November 29, 2016 from Eva Cutro, Director and Zoning Administrator of Town Community Development Department, and Andrew Miller, Town Attorney, to Attorneys Andrew Abraham and Douglas Jorden, counsel for TMS Ventures, LLC.

Cc: Catherine Kauffman, Town BOA Member (via hand-delivery w/ attachments)
Emily Kile, Town BOA Member (via hand-delivery w/ attachments)
Eric Leibsohn, Town BOA Member (via hand-delivery w/ attachments)
Robert Nagle, Town BOA Member (via hand-delivery w/ attachments)
Jon Newman, Town BOA Member (via hand-delivery w/ attachments)
Hope Ozer, Town BOA Member (via hand-delivery w/ attachments)
Kevin Burke, Town Manager (via hand-delivery w/ attachments)
Andrew Miller, Town Attorney (via hand-delivery w/ attachments)
Duncan Miller, Town Clerk (via hand-delivery w/ attachments)
Andrew Abraham, Esq., Counsel for TMS Ventures, LLC (via hand-delivery w/ attachments)
Douglas Jorden, Esq., Counsel for TMS Ventures, LLC (via hand-delivery w/ attachments)

EXHIBIT 4

EXHIBIT 5

11-17-58

STATE OF ARIZONA, County of Maricopa; ss.

DEED 168347

Phoenix Title & Trust Co.

I do hereby certify that the within instrument was filed and recorded at request of

on DEC 3 '58 8:00AM at M., Docket 2643

Page 77-78, Records of Maricopa County, Arizona.

WITNESS my hand and official seal the day and year first above written.

N. C. KELLY, MOORE, County Recorder,
By *Alvin R. Anderson* Deputy.

Phoenix Title & Trust Co.

WARRANTY DEED

Trust No. 2643

For the consideration of Ten Dollars, and other valuable considerations, I or we,

JACK HARRIS, husband of TERESA HARRIS, dealing with his sole and separate property, and CRAMER SUPPLY CORPORATION, a Pennsylvania corporation,

do hereby convey to Phoenix Title and Trust Company, an Arizona Corporation, as Trustee, to hold, sell and convey, mortgage or pledge the property hereby conveyed and hereinafter described, or otherwise to handle the said property in the same manner as though the Phoenix Title and Trust Company held the said property in fee simple and not as Trustee; including therein full power and authority to plat into blocks, lots, tracts, parks, streets, and alleys or otherwise, the property hereby conveyed and hereinafter described, and to dedicate portions thereof as parks, streets and alleys, or otherwise, to the public use; and including full power to sell and convey the property hereby conveyed and hereinafter described, or any part thereof upon such terms as said Trustee shall designate; and to make, execute and deliver deeds therefor, in the name of said Phoenix Title and Trust Company, Trustee; and to do all further acts and things necessary or incidental for the carrying out of the above purposes, all that property situate in Maricopa County, State of Arizona, and described as follows, to-wit:

PARCEL NO. 1: The South 954 feet of the North 1200 feet of the West 666 feet of the East 1000 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18, of Maps, page 36.

PARCEL NO. 2: The South 750 feet of the North 996 feet of the West 19 feet of the East 334 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18 of Maps, page 36.

PARCEL NO. 3: The East 1000 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18 of Maps, page 36;

EXCEPT the North 1200 feet; and
EXCEPT the East 334 feet thereof.

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

PARCEL NO. 5: The South 100 feet of the East 100 feet of Tract Four (4), O'BRIEN'S CAMELBACK LANDS, according to the plat of record in the office of the Maricopa County Recorder in Book 18 of Maps, page 36.

SUBJECT TO: All taxes and assessments chargeable against said property levied subsequent to December 31, 1958;

The liabilities and obligations imposed on said land by reason of inclusion within Verde River Irrigation and Power District, a municipal corporation;

Restrictive covenants as contained in instrument recorded in Book 235 of Deeds, page 573, which purports to restrict all of the land and lots in O'BRIEN'S CAMELBACK LANDS;

Rights of way for canals, laterals and ditches;

All recording data refers to the records of the County Recorder of Maricopa County, Arizona;

Reservations and Exceptions in Patents.

DKT 2070 PAGE 77

DAI 2010 PAGE 13

It is understood and agreed by and between the parties hereto that this conveyance of the legal title to the grantee herein as Trustee shall not operate to extinguish any mortgage or mortgages on said property that the Phoenix Title and Trust Company or the Phoenix Title and Trust Company, Trustee, now holds or may hereafter acquire; but that such mortgage shall remain in force as a valid lien on said premises until released of record.

And I or we do warrant the title against all persons whomsoever, subject to the matters above set forth.

Dated this 17th day of November, 1958.

JACK HARRIS

CRAMER SUPPLY CORPORATION

By Edward J. Coker

Attest James B. Murray

STATE OF Arizona)
County of Maricopa) ss.

This instrument was acknowledged before me this 25 day of November, 1958, by Jack Harris.

STATE OF Arizona)
County of Maricopa) ss.

James B. Murray
Notary Public

Commission Expires: 4-29-62

Unofficial Document

On this the 25 day of November, 1958, before me, the undersigned officer, personally appeared Albert J. Murray and Edward J. Coker who acknowledged themselves to be the Treasurer and President respectively, of CRAMER SUPPLY CORPORATION, a Pennsylvania corporation, and that they as such officers, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation, by Themselves as such officers, respectively.

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

James B. Murray
Notary Public

My Commission Expires: 4-29-62

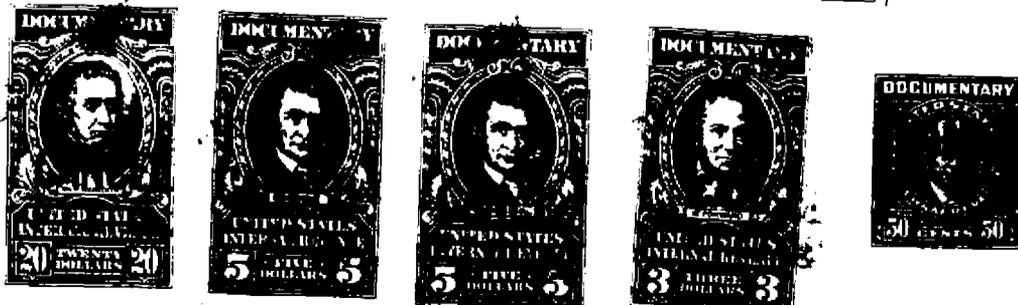
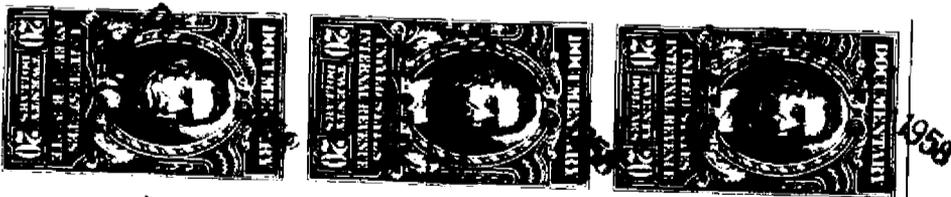
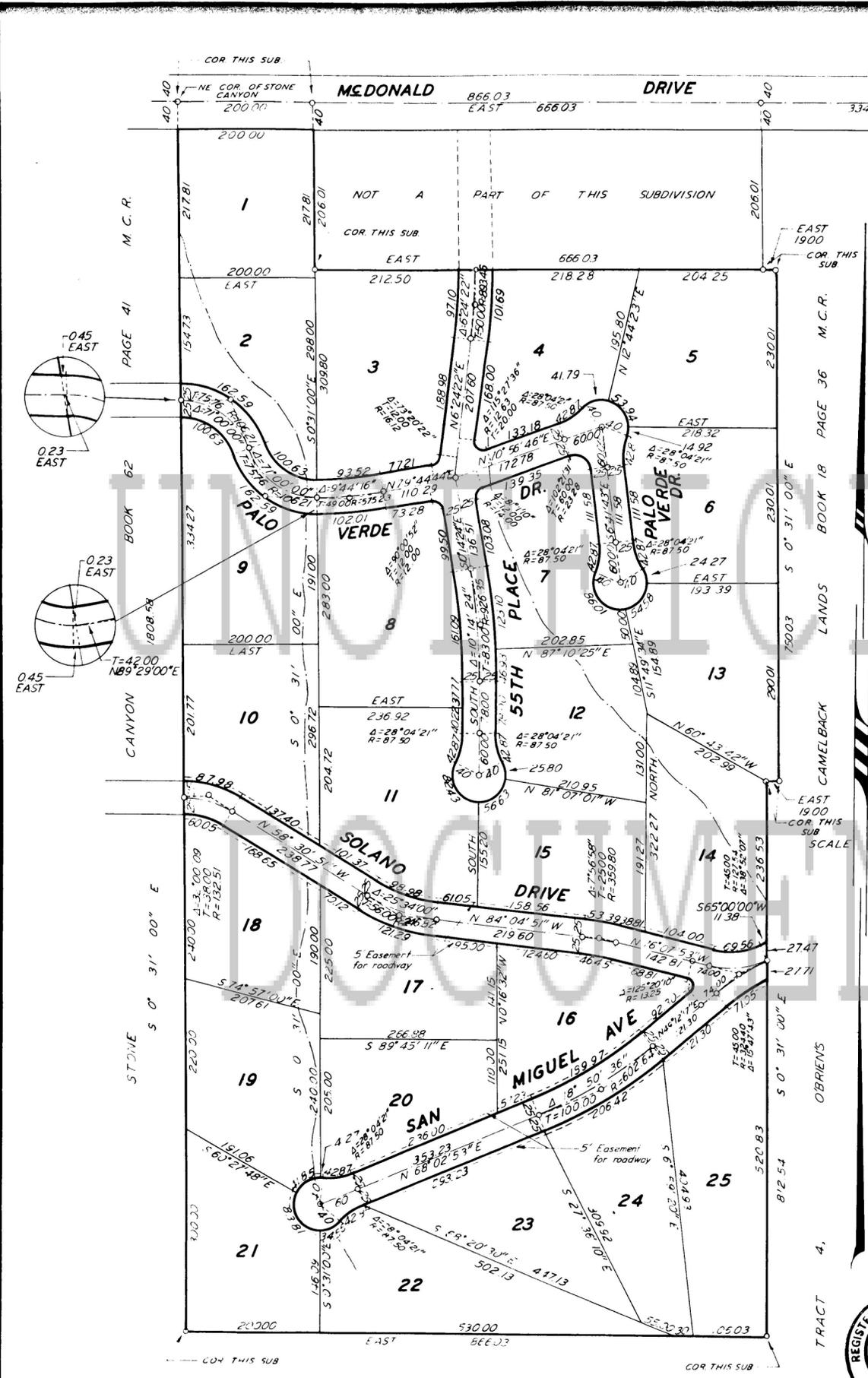


EXHIBIT 6



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 its corporate name to be signed and their corporate seal to be affixed and the same to be attested by the signatures of their officers thereunto duly authorized.

PHOENIX TITLE AND TRUST COMPANY — TRUSTEE
 BY: [Signature] ASST. VICE PRESIDENT ATTEST: [Signature] ASSISTANT SECRETARY

ACKNOWLEDGEMENT

STATE OF ARIZONA
 COUNTY OF MARICOPA
 On this the 28 day of Jan, 1959, before me the undersigned officer, personally appeared J. S. Hill and Bernard A. Ditsch, 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.
[Signature]
 NOTARY PUBLIC

APPROVAL

Approved by the Board of Supervisors of Maricopa County Arizona this 26 day of January, 1959.
 BY: [Signature] CHAIRMAN ATTEST: [Signature] CLERK
 Approved: [Signature] SECRETARY CITY OF PHOENIX PLANNING COMM. DATE: 1/22/59
 Approved: [Signature] MAYOR OF SCOTTSDALE DATE: 1/24/59
 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.
[Signature]
 REGISTERED LAND SURVEYOR

Collar, Williams & White Engineering, Inc.

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



EXHIBIT 7

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

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.

Unofficial Document

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



PHOENIX TITLE AND TRUST COMPANY, an Arizona corporation, TRUSTEE

By [Signature] Assistant Vice President

ATTEST: [Signature] ~~Trustee~~ Assistant Secretary

STATE OF ARIZONA ss COUNTY OF MARICOPA

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

Assistant 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

DKT 3178 PAGE 403

[Signature] Notary Public

STATE OF ARIZONA, County of Maricopa; ss.

I do hereby certify that the within instrument was filed and recorded at request of Phoenix Title & Trust Co. on 2/24/60

Page 403 DEED M. Docket 3178

Records of Maricopa County, Arizona. 35826

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

EXHIBIT 8

STATE OF ARIZONA

DKT 3641 PAGE 516

ss. I hereby certify that the within instrument was filed a

COUNTY OF MARICOPA

DKT 3641 PAGE 516

and indexed in DEEDS

MAR 30 '61 - 8 00 AM

In DOCKET

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

When recorded, mail to:

Ben B. Cheney
P. O. Box 1620
Tacoma, Washington

Witness my hand and official seal.

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

By *[Signature]* Deputy Recorder

Compared
Photostated
Fee:

1 75

Escrow No. 359727
Trust No. 2643-18

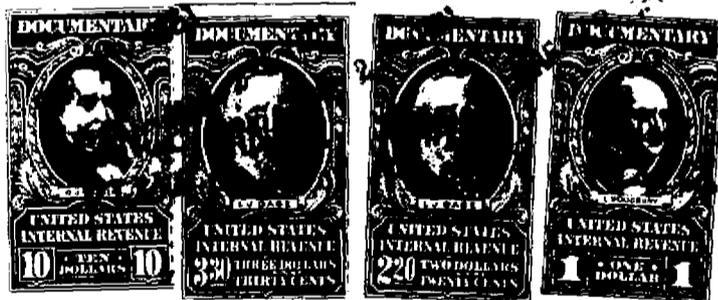
Special Warranty Deed

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

BEN B. CHENEY and MARIAN DALE CHENEY, his wife

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

Lot twenty-five (25), **SICAL 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 RESERVATIONS IN PATENTS AND ALL EASEMENTS, RIGHTS OF WAY, ENCUMBRANCES, COVENANTS, CONDITIONS AND RESTRICTIONS AS MAY APPEAR OF RECORD.

And the Grantor hereby binds itself and its successors to warrant and defend the title, as against all acts of the Grantor herein and do 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 21st day of March A. D., 19 61.

PHOENIX TITLE AND TRUST COMPANY, as Trustee

By *Virginia Quackenbush*
Trust Officer

STATE OF ARIZONA

County of Maricopa

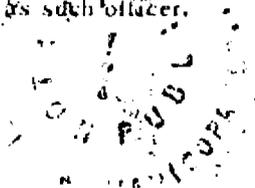
ss.

Before me this 22nd day of March, 19 61, personally appeared **VIRGINIA QUACKENBUSH**,

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

My commission will expire: 3/22/64

FORM 300-1



[Signature]
Notary Public

DKT 4668 PAGE 160

STATE OF ARIZONA }
COUNTY OF MARICOPA }

ss. I hereby certify that the within instrument was

JUL 26 1963-8 00 AM
at the request of

in DOCKET 4,668 PAGE and indexed in D
160-161

LAWYERS TITLE OF PHOENIX

When recorded, mail to:
Carl E. Mellen
601 Greenwood Avenue
Waukegan, Ill.

Witness my hand and official seal.

N. C. "KELLY" MOORE, County Recorder

By

E. Scudder
Deputy Recorder

Compared

Photostated

Fee: 2 50

Escrow No. 117,190 JC

Warranty Deed

For the consideration of Ten Dollars, and other valuable considerations, I or we, BEN B. CHENEY and MARIAN DALE CHENEY, his wife

do hereby convey to CARL E. MELLEN and MILDRED I. MELLEN, his wife,

the following real property situated in Maricopa County, Arizona:

Lot twenty-five (25), STONE CANYON EAST, according to the plot of record in the office of the County Recorder of Maricopa County, Arizona, in Book 81 of Maps, page 34.

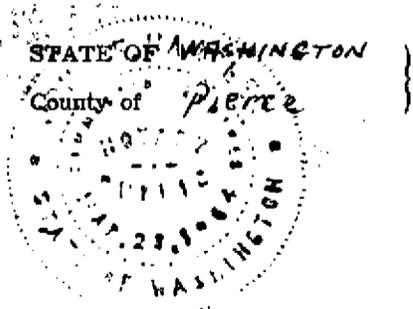
Subject to the following:

1. Taxes for the year 1963 a lien, but not yet payable.
2. Easement for roadway over said premises, as shown on plat recorded in Book 81 of Maps, page 34.
3. Easement and rights incident thereto for utilities over said premises, as set forth in instrument recorded March 6, 1959, in Docket 2778, page 412.
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.
5. Restrictions contained in instrument recorded March 3, 1959, in Docket 2774, page 27.
6. Reservations contained in United States Patent record July 5, 1923, in Book 177 of Deeds,

page 150, reading as follows: "Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognised and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, (see attached) And I or we do warrant the title against all persons whomsoever, subject to the matters above set forth.

Dated this 18 day of July, 1963

B. Cheney
Marian Dale Cheney



This instrument was acknowledged before me this 18 day of July, 1963 by

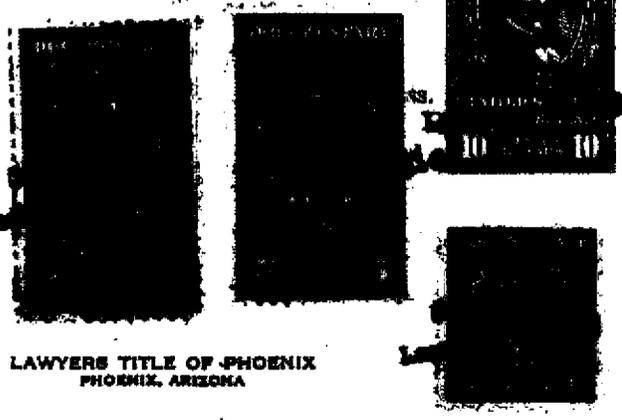
BEN B. CHENEY and Marian Dale Cheney.

John J. Harrel
Notary Public

My commission will expire Nov. 28, 1964.

This instrument was acknowledged before me this ___ day of ___, 19___ by

Notary Public
My commission will expire



LAWYERS TITLE OF PHOENIX
PHOENIX, ARIZONA

mine and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916. (39STAT., 862)."

Unofficial Document

EXHIBIT 9

DKT 3895 PAGE 476

STATE OF ARIZONA

ss. I hereby certify that the within instrument was filed

COUNTY OF MARICOPA
OCT 25 '61 - 8 00 AM

DKT 3895 PAGE 476 and indexed in DEEDS
In DOCKET

at the request of Phoenix Title & Trust Co.

Witness my hand and official seal.

When recorded, mail to:
Theodore A. Rehm
P.O. Box 367
Scottsdale, Ariz.

N.C. "KELLY" MOORE, County Recorder,
[Signature] Deputy Recorder

Compared
Photostated
Fee: 1 15

Special Warranty Deed

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

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

EXCEPT therefrom the East 334 feet thereof.

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

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

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

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

IN WITNESS WHEREOF, the PHOENIX TITLE AND TRUST COMPANY, as Trustee, has caused its corporate name to be signed and its corporate seal to be affixed by the undersigned officer thereunto duly authorized this 20th day of October A. D., 1961.

Deed from Trustee to Cestui que Trust
No Internal Revenue Stamps Required

PHOENIX TITLE AND TRUST COMPANY, as Trustee

By Virginia Quackenbush
Trust Officer

STATE OF ARIZONA

County of Maricopa

Before me this 20th day of October, 1961, personally appeared Virginia Quackenbush

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

My commission will expire: 6-15-63

Georgia M. Peet
Notary Public

EXHIBIT 10

STATE OF ARIZONA

ss. I hereby certify that the within instrument was filed

COUNTY OF MARICOPA

MAR 15 '62 - 8 00 AM DOCKET

and indexed in DEEDS

at the request of Phoenix Title & Trust Co.

Witness my hand and official seal.

When recorded, mail to:

Dr. RALPH LUIKART
5400 Grand Ave., Medical Arts Bldg.
Omaha, Nebraska

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

Compared
Photostated
Fee: 12

Escrow #357778 RVL:c

Special Warranty Deed

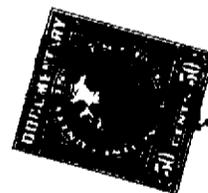
For the consideration of Ten Dollars, and other valuable considerations, the undersigned PHOENIX TITLE AND TRUST COMPANY, an Arizona corporation, as Trustee, the Grantor herein, does hereby convey to

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

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 Ware
Notary Public

EXHIBIT 11

STATE OF ARIZONA

COUNTY OF MARICOPA

ss. I hereby certify that the within instrument was fil

JUN 5 '64-3 00 In DOCKET **5080** PAGE **25** and indexed in DEED

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

When recorded, mail to:

STONE CANYON EAST PROPERTIES, INC.
7401 East Chaparral Rd.

Scottsdale, Arizona 85251

Witness my hand and official seal.

~~N. C. KELLY MOORE~~, County Recorder,
Clifford H. Ward
By *[Signature]* Deputy Recorder

01-DEED
Compared
Photostated
Fee: *[Signature]*

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

Special Warranty Deed

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

STONE CANYON EAST PROPERTIES, an Arizona corporation

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

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

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

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

Dated this 19th day of May, 19 64.

Deed from Trustee to Beneficiary:

PHOENIX TITLE AND TRUST COMPANY, as Trustee

No Internal Revenue Stamps Required.

By *[Signature]*
Trust Officer

STATE OF ARIZONA

County of Maricopa

ss.

Before me this 20th day of May, 19 64, personally appeared **ALFRED GANTER**

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

My commission will expire: 7/9/65

Form 100-9 REV 2/62

pd

DKT **5080** PAGE **25**

[Signature]
Notary Public

EXHIBIT 12

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 Plaintiffs

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

TMS VENTURES, LLC, an Arizona
limited liability company,

Plaintiff / Counterdefendant,

vs.

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

Defendants / Counterclaimant.

No.: CV2016-005381

**VERIFIED SECOND AMENDED
COMPLAINT**

(Quiet Title / Declaratory Judgment /
Injunction)

(Assigned to the Honorable Randall
Warner)

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

1 **PARTIES & JURISDICTION**

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

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

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

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

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

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

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

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

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

25

26

GENERAL ALLEGATIONS

1
2 10. Plaintiff is the owner of residential real property located at 5507 E. San
3 Miguel Lane, Paradise Valley, Arizona 85253 (APN 172-47-078D) (the “Property”).
4 The Property is located on the North side of Camelback Mountain and is currently a
5 vacant lot.

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

8 12. This lawsuit seeks a determination as to the validity of and Plaintiff’s right
9 to use that certain easement titled “Easement for Roadway” and recorded on March 1,
10 1960 at Docket 3178, Page 402, in the Maricopa County Recorder’s Office (the
11 “Easement”). A true and correct copy of the Easement is attached hereto as Exhibit A.

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

14 14. The Stone Canyon East subdivision plat was recorded on February 27,
15 1959 at Book 81 of Maps, Page 34, Maricopa County Recorder’s Office (the “Plat”). A
16 true and correct copy of the subdivision plat is attached hereto as Exhibit B.

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

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

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

26

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

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

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

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

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

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

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

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

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

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

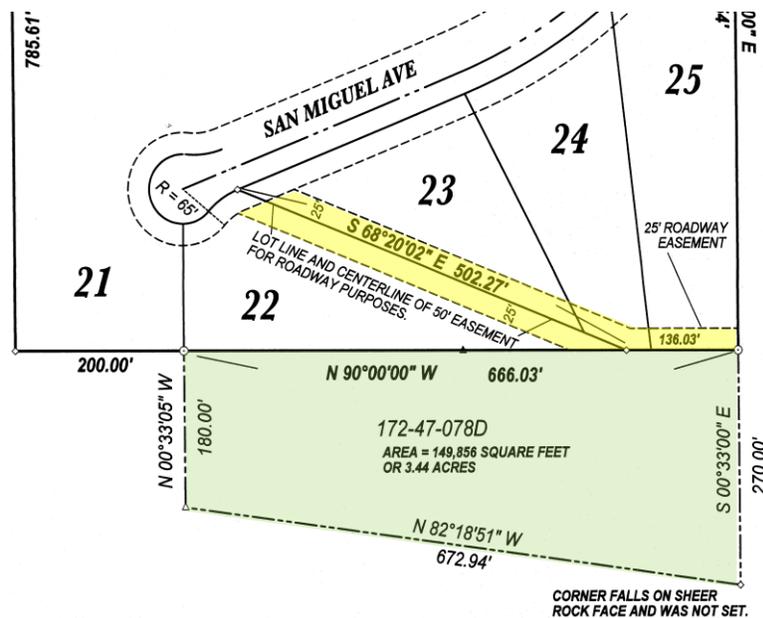
16 **[...] A strip of land 25’ wide along the N. side**
17 **and a strip of land 25’ wide along the S. line**
18 **of the lot line separating Lots 22 and 23, and**
 25’ wide N. of the S. border of said
 subdivision in Lots 24 and 25.

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

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

25

26



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

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

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

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

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

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

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

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

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

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

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

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

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

22 **COUNT I**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **COUNT II**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26

1 **COUNT VI**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1
2
3 ORIGINAL of the foregoing filed
this 19th day of August, 2016 with:
4 Clerk of the Superior Court
5

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

8 Francis J. Slavin
9 Heather N. Dukes
FRANCIS J. SLAVIN, P.C.
10 2198 East Camelback Road, Suite 285
11 Phoenix, Arizona 85016
12 b.slavin@fjslegal.com
h.dukes@fjslegal.com
13 *Attorneys for Defendants/Counterclaimants*

14 /s/ Troy Redondo
15
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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 13

STATE OF ARIZONA

COUNTY OF MARICOPA

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

Fee No.

MAR 10 1966-8 00AM DOCKET DKT 5953 FACE 202 and indexed in DEEDS

at the request of Phoenix Title & Trust Co.

When recorded, mail to:

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

Witness my hand and official seal

CLIFFORD H. YARRO

By *Jessie Choate*
County Recorder
Deputy Recorder

46633

01-DEED

Photostated

Fee

1.75

escrow no. 16000894-1

Special Warranty Deed

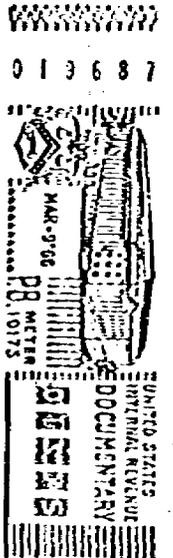
(JOINT TENANCY)

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

WARREN G. WOLF and DOLORES WOLF, his wife

not as tenants in common and not as a community property estate but as joint tenants with right of survivorship, the Grantor, the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

Lot 23, STONE CANYON EAST, according to Book 81 of Maps, page 34, records of Maricopa County, Arizona.



13 75

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

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

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

Dated this 17 day of Feb., 1965.

ACCEPTED AND APPROVED:

PHOENIX TITLE AND TRUST COMPANY, as Trustee

x Warren G. Wolf
Warren G. Wolf

By *Virginia Quackenbush*
Trust Officer

x Dolores Wolf
Dolores Wolf

STATE OF ARIZONA

County of Maricopa

Before me this 21st day of February, 1965, personally appeared VIRGINIA QUACKENBUSH who acknowledged himself to be a Trust Officer of the PHOENIX TITLE AND TRUST COMPANY and that he as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the Corporation as Trustee, by himself as such officer.

Richard Renda
Notary Public

My Commission will expire: 3/22/68

STATE OF Maricopa

This instrument was acknowledged before me this 19 day of

County of Maricopa

Feb, 1965, by
Warren G. Wolf and Dolores Wolf

My Commission will expire:

My Commission Expires May 15, 1963

Robt. Martin
Notary Public

EXHIBIT 14

DKT 8083 PAGE 449

269754

WARRANTY DEED
64398 01-DEED

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

PARCEL "M-2"

PART NO. 1:

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

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

PART NO. 2:

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

PART NO. 3:

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

SUBJECT TO:

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

8083 PAGE 450

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

DATED this 6 day of April, 1970.

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

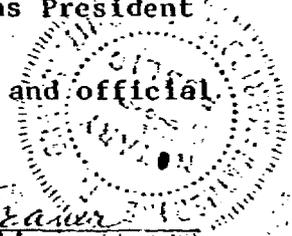
By John D. Ratliff
John D. Ratliff, President

STATE OF ARIZONA }
County of Maricopa } ss.

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

IN WITNESS WHEREOF, I have ^{Unofficial Document} hereunto set my hand and official seal.

Richard J. Graver
Notary Public



My Commission Expires:

~~My Commission Expires Feb. 23, 1974~~

STATE OF ARIZONA }
County of Maricopa } ss.

I hereby certify that the within instrument was filed and recorded at request of

ARIZONA TITLE

APR 10 70-2 40
in Docket 8083
on page 449-450

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

Paul M. Manton

By Paul M. Manton
County Recorder
Deputy Recorder

100

EXHIBIT 15

FRANCIS J. SLAVIN
JOSEPH J. MORITZ, JR.*
ELLEN B. DAVIS
DANIEL J. SLAVIN
HEATHER N. DUKES

*CERTIFIED SPECIALIST, REAL ESTATE LAW

EMAIL: b.slavin@fjslegal.com

July 15, 2016

Colin F. Campbell, Esq.
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793

RE: ZarCalRes Tempe, LLC v. Mill Avenue Apartments Limited Partnership and City of Tempe; Maricopa County Superior Court Case No. CV2005-004114 (the "Lawsuit"); Lots 1, 2 and 3 of Centerpoint Plaza Three subdivision plat recorded April 25, 2006 at Book 832 of Maps, page 18, Instrument No. 2006-0549473, Official Records of Maricopa County Recorder (collectively the "Property")

Dear Mr. Campbell:

Osborn Maledon has requested our firm to provide an opinion as to the application of the 2004 Development Agreement entered into by and between the City of Tempe and Tempe Land Company, as amended and modified, to the acts of the Defendant City of Tempe (the "City" or "Tempe"), and Defendant Mill Avenue Apartments Limited Partnership ("Mill Avenue Apartments") abandoning a 25-foot wide public ingress/egress easement dedicated over Lots 2 and 3 on the Centerpoint Plaza Three subdivision plat. Osborn Maledon has also requested our firm to render an opinion regarding the unilateral act of the City of Tempe purporting to terminate a 2006 Parcel Agreement and Building Code Compliance Covenant.

A copy of the undersigned's current resume is attached hereto.

The Lawsuit involves 4.7 acres of land in downtown Tempe and the rights and obligations of the Plaintiff and Defendants obtaining under, *inter alia*, a 2004 Development Agreement entered into between the City of Tempe and Tempe Land Company, a former owner of the Property, and two Amendments, one Addendum, one Assumption Agreement, three Modification Agreements, and one Amended and Restated Development Agreement. The Development Agreement, as amended, modified, assumed and restated, was entered into in order to implement planned area development/zoning approvals issued by the City of Tempe for development of the Property. These documents are complex and are not easily understood upon first flush review.

To assist the factfinder, albeit a jury or the Court, to understand the significance of a development agreement under A.R.S. § 9-500.05, we are providing a brief explanation of the planning and zoning functions of Arizona municipalities and development agreements. For purposes of this opinion, we have reviewed the documents and reports listed on **Exhibit A**. The parties to the Lawsuit are presently engaged in a course of discovery. In the event new materials or information become available, we reserve the right to modify this opinion accordingly.

Planning and Zoning

In Arizona, the powers of the municipality to plan, zone and regulate the subdivision of real property arise solely from enabling statutes. A.R.S. § 9-461.01 (Planning), § 9-462.01 (Zoning), and § 9-463.01 (Subdivision); *see also Jachimek v. Superior Court In and For County of Maricopa*, 169 Ariz. 317, 318-319, 819 P.2d 487, 488-489 (1991). These powers are commonly referred to as “police powers” based upon the recognition that Arizona and its cities and towns have the responsibility to protect and promote the health, safety, welfare, and morals of their citizens. Each municipality is required to adopt a general plan which designates the land uses, growth patterns, policies and goals to guide and direct the use and enjoyment of the land in the municipality. The municipality may periodically amend its general plan and is required to update its general plan every 10 years and submit the updated plan to the electorate for ratification. A.R.S. § 9-461.01(K) and (M). All rezoning approvals and zoning ordinances or regulations are required to be consistent with and conform to the municipality’s adopted general plan. A.R.S. § 9-462.01(F).

Arizona has what is referred to as “Euclidean form” zoning laws. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Each parcel of land lying within the corporate boundaries of a municipality is required to be assigned a specific zoning district, e.g., agricultural, industrial, commercial and residential. Zoning districts are established through zoning ordinances adopted by the municipalities. Each zoning district sets forth the permitted uses, e.g., retail, office, residential, and development standards, e.g., height, setback and lot coverage, for that district. Allowed uses must be uniform as to all land having the same zoning district. A.R.S. § 9-462.01(C). For example, all uses permitted under a zoning ordinance in a commercial retail district are allowed to be conducted on all land bearing that same commercial zoning district. *See Jachimek*, 169 Ariz. at 320, 819 P.2d at 490.

A municipality’s zoning ordinance consists of both a zoning ordinance text and various zoning maps. Each parcel of land lying within the municipality’s corporate boundaries is required to be set forth on a zoning map together with the zoning district adopted by the governing body of the municipality for that parcel. *See Figure 1* below.

EXHIBIT 16



August 3, 2016

Mr. Louis Lopez
Moyes, Sellers & Hendricks
1850 N. Central Avenue, Suite 1100
Phoenix, AZ 85004

Re: 5507 E. San Miguel Avenue, Paradise Valley, AZ - TMS Ventures, LLC v. Teresa C. Zachariah and Joe Zachariah, et al.; Maricopa County Superior Court No. CV2016-005381 (the "Lawsuit") – Application for a Building Permit to Construct a Residence in the Hillside Development Area recently filed by TMS Ventures

Dear Mr. Lopez,

This letter is in response to your letters of July 15, 2016 and July 22, 2016 to Andrew Miller and Kevin Burke, respectively, regarding the above-referenced matter. Because the two letters touch upon similar facts and requests, we are jointly responding to both of your letters in this letter.

First, thank you for forwarding the pleadings with regard to the Lawsuit. As you may know, TMS Ventures (or "TMS") first approached the Town staff in 2013 regarding its purchase of the property at 5507 E. San Miguel (the "TMS Property"). The Town staff was asked whether they recognized the TMS Property as a pre-existing lot that was platted prior to the Town's annexation of the Property. Staff advised that it did recognize the TMS Property as a pre-existing lot.

Staff was also asked about the "Easement for Roadway" that was granted to Maricopa County on February 29th, 1960 (Exhibit A to the Lawsuit complaint that you forwarded to me, the "Easement") and whether the staff recognized that as a public road or as an access easement. Staff sent this request to the Town Attorney to review. The Town Attorney did not find any indication that either Maricopa County or the Town accepted the Easement as a public dedication, nor did the Town show it as a "public road" on its Town road maps. Additionally, recognizing the Easement as a "public roadway" would be inconsistent with the Town's prior approvals of the hillside home building permits for the properties adjoining the Easement area, and in particular, the homes currently owned by the Zachariahs and Ms. Appel. TMS's attorney was advised of this position and asked whether the Town would still recognize it as an existing easement, which the Town did not recognize as a public easement, leaving it to TMS and the four affected property owners as to whether the Easement for Roadway document created a private easement.

TMS' attorney advised that based on his research he believed that an implied way of necessity existed in favor of the TMS Property and asked whether the Town would recognize this access if TMS submitted an application for construction of a home on the TMS Property. Staff recognized that one goal of good governance is to not create landlocked property (that is, a lot that has no legal access) and that a private way of necessity likely existed or would be granted by a court if challenged. The Town Attorney requested that the attorney for TMS put forth in writing the arguments that TMS had regarding its legal claim to access to the TMS Property and the location of said access. The Town staff also advised TMS that before taking any steps to recognize the TMS access claim notice to the Paradise Valley property owners directly affected by the private way of necessity should first be contacted to see if they objected to the private way of necessity. A letter dated August 5, 2013 was sent by TMS' attorney to the Town; and that letter was sent by the Town Attorney on August 13, 2013 (by registered mail) to the four affected property owners. The Town Attorney asked for the four affected property owners (or their attorneys) to advise whether they objected to the position set forth in the August 5, 2013 letter from TMS' attorney, but the Town Attorney received no responses. Accordingly, the Town Attorney sent a response letter to the TMS attorney advising that the Town Attorney would recognize the implied way of necessity for access to the TMS Property, as set forth in the August 5, 2013 letter. The first time that the Town heard any objection to the private way of necessity was during the Board of Adjustment proceedings in 2016; and most clearly when you stated to the Board that you believed the TMS Property did not enjoy access in the Easement area and that it could obtain access by other means.

Please recognize that the Town has attempted to be as transparent as possible on the question of TMS' claim to legal access and that the Town does not prefer to take part in the litigation between the parties on the issue of legal access to the Property. Please also note that the letter that was sent on August 13, 2013 by the Town Attorney was sent so that the four affected Paradise Valley property owners and TMS could discuss and attempt to resolve any conflicts regarding TMS access easement claims early on and prior to the submittal of a request by TMS to obtain a building permit. The Town does not know if such discussions took place, but based on the filing of the Lawsuit, it does not appear they have. We are sure you can agree that the Town is now placed in a difficult position as a denial by the Town of the TMS's right to have a building permit application reviewed and processed could result in a claim by TMS that the Town has denied TMS its rights to apply for a building permit, due process, and other possible damage claims.

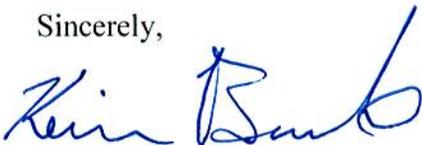
The access dispute really should be between the parties involved in the Lawsuit, and not the Town. However, given the position of your clients (that the Town should delay review of TMS's applications) and TMS's position (that the Lawsuit should not impede review of TMS' application), the likelihood is that the Town will either be sued by either your clients or TMS. We believe that it is possible for your clients to request an injunction (on the filing of an application for a Hillside Committee review or a building permit application) solely against TMS itself, as opposed to suing and enjoining the Town. Such injunction request would be similar to your past experience in being able to obtain an injunction prohibiting the City of Phoenix from

building a waterline on Jack Daniels' hillside property here in Paradise Valley—and the Town was not a necessary party to that suit. In the event that you may disagree and feel compelled to add the Town to the Lawsuit for the limited purpose of requesting an injunction, we can advise that the Town's position will be neutral. As the Town Attorney advised you during your conversation of July 22nd, the Town would (as it has done in similar suits in the past) not take part in any briefing on the issue of the access claims made by TMS and simply advise that court that if it issues a preliminary injunction (or restraining order), the Town would abide by the court's order until it is either made permanent or removed at the conclusion of the Lawsuit.

In response to the position raised in your July 22nd letter that the Town Zoning Ordinance Code requires that a property owner must show that it has access to either a public street or a private road prior to the Town being able to issue a building permit, the Town staff does not believe that the Zoning Ordinance speaks to this issue at all. The requirement for access to a public street or a private road (as such is defined by the Zoning Ordinance; see definition of "Lot" in §201) is a requirement for the creation of new lots in the Town, but it has not been made a requirement for the issuance of building permits for lots that already exist and which were created prior to the enactment of the new definition of "Lot" (that new definition was enacted on February 25, 1999 by Ordinance No. 477). There are many lots in Paradise Valley that were created in Maricopa County prior to annexation or by way of private easements prior to the Town's enactment of the public street or private road access requirements; and none of these lots are prohibited from requesting a building permit. In fact, to take a contrary position would subject the Town to some very substantial legal claims, which we are sure you can understand. Consequently, unless enjoined by a court order, the Town will continue to process the TMS application consistent with its Town Code and available scheduling. Issuance of the building permit is a separate action from approval of the application by the Hillside Building Committee. While the approval of the Committee is a pre-requisite, Town staff may require additional submittals to ensure all Town codes are fulfilled in addition to the Hillside Code prior to the issuance of a building permit.

We trust that this joint response fully responds to your request and your queries on what the Town staff will do with respect to the TMS application for Hillside Committee review of its building permit application and with respect to the Lawsuit. The Town does not believe that your clients need to add the Town to the existing Lawsuit in order to pursue a restraining order or an injunction, thus we would suggest and request any injunction sought be done privately between the parties to the Lawsuit and not involve the Town. You may contact Town Attorney Andrew Miller if you have any questions.

Sincerely,



Kevin Burke
Town Manager



Andrew M. Miller
Town Attorney

EXHIBIT 17

February 29, 2016

Town of Paradise Valley
Board of Adjustment
6401 E. Lincoln Drive
Paradise Valley, AZ 85253-4399

Re: **5507 E. SAN MIGUEL AVENUE**
Variance Case No. BA-16-1
Owner: TMS Ventures LLC (Terry Scali)

Dear Members of the Board of Adjustment:

Please allow me to describe the importance of the one requested variance from my perspective, as the Owner/Representative of the lot at 5507 E. San Miguel Avenue in Paradise Valley. With the requested variance, I will be able to build a beautiful home on this platted lot, which home will be sensitive to its surroundings. Without this variance, I will not be able to build any home on this lot, such that the lot will be essentially worthless, in my opinion as the owner.

I have extensive personal experience in real estate, including residential real estate. I have been a realtor in Arizona for more than 30 years. I have been a resident of the Town of Paradise Valley for 21 years, and I currently own three properties in the Town.

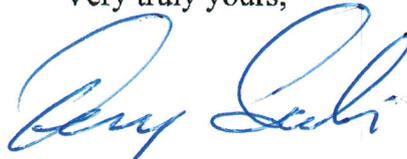
In my opinion, as the Owner/Representative of the subject lot, the lot has a current fair market value in the seven figures. The lot is platted as part of a subdivision, with a right to access. If the requested variance is not granted, then there will be no actual access to the lot and building on the lot will not be possible. Then, the lot will be essentially worthless, in my opinion, as Owner and additionally in light of my background in real estate.

I am aware, for example, of a lot on the north side of Mummy Mountain in the Town of Paradise Valley on Glen Drive, which is currently listed for \$3.0 million. I believe my lot on San Miguel is a better lot because of its northern exposure on Camelback Mountain.

If the requested variance is not granted, and a house cannot be built on this lot, then expenses for taxes, insurance, and lot maintenance would continue. Also, there would be continuing exposure for a variety of liability issues, even with insurance to cover or mitigate most of those liability issues. In that sense, the lot would have a negative value, without the ability to build a house there. Because the lot still might have an extremely low market value as "open space", my conclusion and opinion of value as an Owner/Expert is that the lot may have a nominal value (despite the continuing expenses for taxes, insurance and maintenance), but that nominal value would make the lot essentially worthless.

In sum, I hope and expect that the Board will grant the requested variance at the upcoming hearing on March 2nd, so that I can build a beautiful home on this lot. If that is not the case, and a home cannot be built on the lot, then the significant value of the lot will have been destroyed.

Very truly yours,



Terry Scali