SET NO. 6

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

COLLEGE BOOK CENTERS, INC. 401 PROFIT SHARING PLAN AND TRUST, A Trust dated October 14, 1994 with Trustee DAVID B. VANYO, Plaintiff/Appellee, vs. CAREFREE FOOTHILLS HOMEOWNERS' ASSOCIATION, Class Representative, Defendants/Appellants,	No. 1CA-CV 08-0450 (Notice of Appeal filed July 3, 2008) Maricopa County Superior Court No. CV2006-011927

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

On August 8, 2006, Appellee College Book Centers, Inc. 401 Profit Sharing Plan and Trustee, a Trust dated October 14, 1994 with Trustee David B. Vanyo ("Vanyo") filed a three-count Complaint arising out of the lack of access to his property in Carefree, Arizona, known as the Mamie Maude mining claim.[1] Index of Record on Appeal ("IRA") 1. The Complaint was filed as a putative class action against all present and future persons or entities asserting a property interest to lots within the Carefree Foothills subdivision ("Subdivision'). *Id.* Carefree Foothills Homeowners' Association ("HOA") was named as class representative. On behalf of the class members, the HOA agreed that certification of the class was appropriate. IRA 10. The trial court certified the class by Order dated November 2, 2006 and later approved a class action plan and notice to be sent to all class members. IRA 20, 22. HOA members John and Janet Dwyer opted out of the class and participated in the trial, but over Vanyo's objection were permitted to rejoin the class after trial. IRA 26, 174.

Both Vanyo and the HOA filed summary judgment motions, which were denied. IRA 36, 72, 91. The case proceeded to a jury trial, which concluded on November 20, 2007. After deliberating for less than an hour, the jury unanimously found that the Association and class members had waived their ability to enforce

[1] Throughout the Opening Brief the Association refers to the "Maime Maude" mining claim. The proper name is "Mamie Maude."

the single-family use restriction in the CC&Rs. IRA 125. Based on the verdict form, the jury did not reach the implied easement or private way of necessity claims. *Id.;* IRA 122.

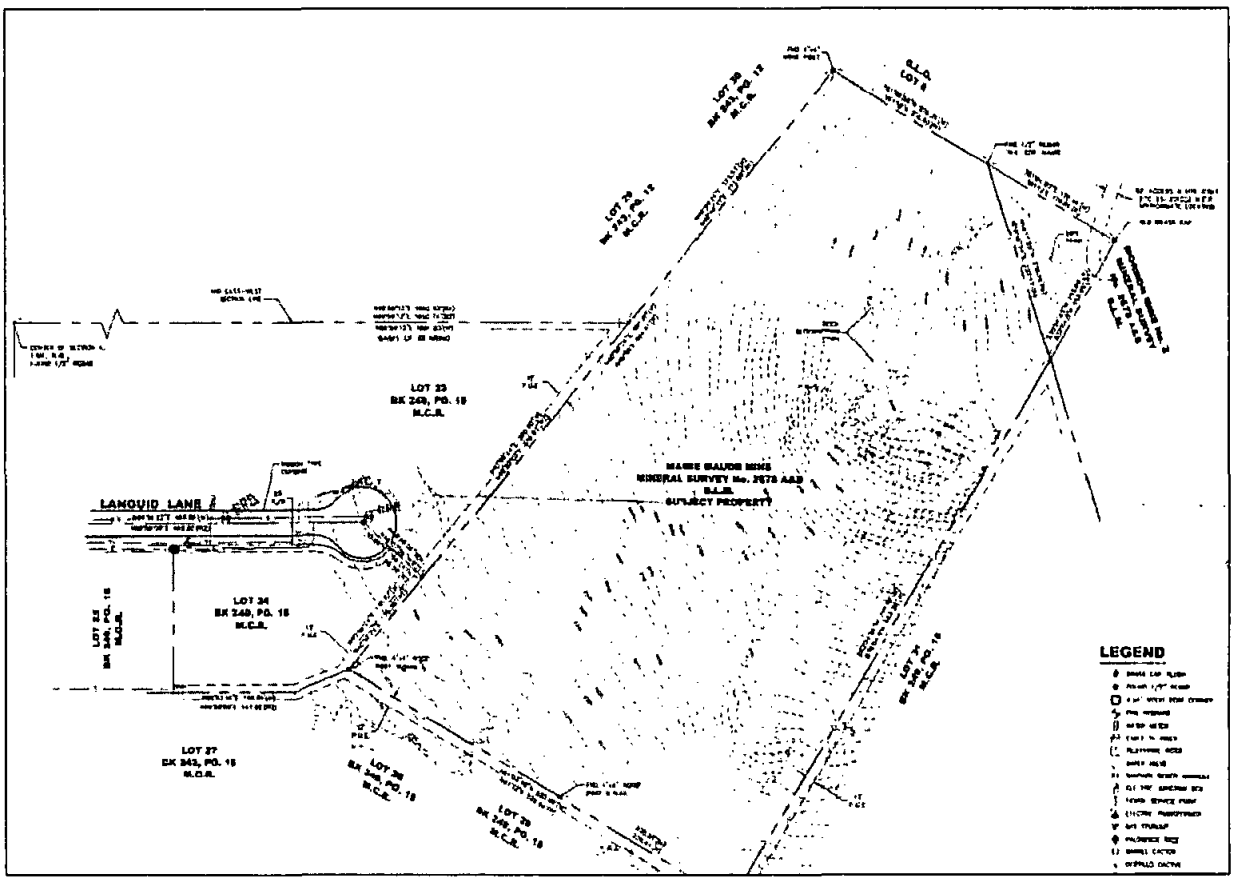
On April 17, 2008, Judgment was entered in Vanyo's favor and against the class, declaring that the HOA and class members had waived the right to enforce the single-family use restriction in the CC&Rs to prohibit the use of a lot in the Subdivision to access adjacent property. IRA 149. The Judgment also awarded Vanyo attorneys' fees in the amount of $100,000 pursuant to A.R.S. § 12-341.01, as the trial court found this action was one "arising out of contract, express or implied." *Id.*

On April 25, 2008, the HOA filed a Motion for New Trial/Motion for Judgment as a Matter of Law. IRA 151. The trial court denied the motion by Order dated June 24, 2008. IRA 170. The HOA also sought a stay of the Judgment pending appeal, which the trial court granted subject to a supersedeas bond in the amount of $425,000. IRA 173. The HOA filed a Notice of Appeal and supersedeas bond on July 3, 2008. IRA 158, 162. The HOA also challenged the amount of the bond in this Court, which was denied by Order of August 13, 2008.

STATEMENT OF FACTS

A. The Property.

Vanyo owns Lot 24 ("Lot 24"), in the 76-lot Subdivision. IRA 94, ¶ 1. Lot 24 is on a cul-de-sac street called Languid Lane. *Id.* Vanyo also owns a 9-acre parcel of land known as the Mamie Maude mining claim ("Mamie Maude"), which shares common boundaries with both Lot 24 and other lots in the Subdivision. *Id.* Lot 24 is within the Subdivision, but Mamie Maude is not. *Id.* ¶ 5. Mamie Maude is rectangular, with Lot 24 near its southwest corner:



Trial Exhibit ("Tr. Ex.") 16, attached as Appendix. Ex. 1; *see also* Tr. Ex. 1, 11.

Mamie Maude is bisected by a steep slope that runs across the northern one-third of the property in a roughly southeasterly direction. The slope divides the property into two development areas, the northern upper portion being higher in elevation than the southern lower portion. 11/14/07 Trial Transcript ("Tr.") (Vol. 2) at 7, 39-40, 46. There is sufficient room on the lower portion of Mamie Maude for at least four residential lots of about one-acre each. *Id.* at 11.

B. The Controversy.

In March 2005, Vanyo acquired Lot 24 and Mamie Maude on behalf of his pension plan, his employees and their families, from Valerie and Richard Biederbeck. Tr. Ex. 30; 11/14/07 Tr. (Vol. 2) at 5, 20. Vanyo, who had never developed vacant land, had assumed when he purchased the property that all property had a right of access. *Id.* at 5, 27. Prior to the purchase, Biederbeck told Vanyo that he would need to work something out with the HOA to access Mamie Maude over Lot 24. *Id.* at 8. At that time, Vanyo did not know that Biederbeck had submitted a proposal to the HOA to use Lot 24 to access Mamie Maude. *Id.* at 9. Vanyo also did not know until after his purchase that the HOA had denied Biederbeck's proposal based on a legal opinion that construction of a road over Lot 24 would violate the Covenants, Conditions and Restrictions for the Subdivision ("CC&Rs"), which prohibit a lot from being used other for a single-family residence. 11/14/07 Tr. (Vol. 2) at 9-10; Tr. Ex. 18 at 17.

As discussed below, there is no existing legal access to Mamie Maude from a public or private road. Therefore, Vanyo asked the HOA to permit construction of a driveway across Lot 24 to access Mamie Maude. 11/14/07 Tr. (Vol. 2) at 13. Mamie Maude is zoned for residential use, just like the other property being developed in the area, including other mining claims. Tr. Ex. 26 (zoning map). Vanyo proposed to develop Mamie Maude with less density than surrounding residential areas. *Id.* It did not matter to Vanyo whether access to Mamie Maude over Lot 24 would be private or public. 11/14/07 Tr. (Vol. 2) at 15. A road or driveway across Lot 24 would only be about 50 feet in length. *See* Tr. Ex. 16.

Vanyo and his attorney had a series of meetings with members of the HOA from December 2004 until after close of escrow to use Lot 24 to access Mamie Maude. 11/15/07 Tr. (afternoon) at 33-35. Ultimately, the HOA rejected Vanyo's request. *Id.* at 13-14. However, as Vanyo's former attorney testified, the HOA did not inform them of that decision until after closing. 11/15/07 Tr. (afternoon) at 45 ("at no point in time until the very end, well after closing, did I receive an indication from the home owners or their attorneys, that no, we're not going to deal with you anymore, this is what we believe and this is why we believe it").

C. Mamie Maude Is Landlocked.

The evidence presented at trial was undisputed that Mamie Maude is legally landlocked. The federal patent creating Mamie Maude as a mining claim did not

include an express right of access over the surrounding land that remained in the hands of the federal government. Tr. Ex. 12; IRA 94, ¶ 6. Vanyo testified that there were no roads from adjoining property to Mamie Maude. 11/14/07 Tr. (Vol. 2) at 28. The appraiser called by Vanyo, Donald Duncan, testified that there were no recorded documents granting access to Mamie Maude. *Id.* at 47. Vanyo's attorney, James Murphy, also testified that no recorded document created access to Mamie Maude. 11/15/07 Tr. (afternoon) at 20-21. The HOA's surveyor, Whitney Smelser, agreed there was no legal access to Mamie Maude. *Id.* at 69-70.

John Ratliff, the developer of a subdivision on the mountain above the Subdivision known as Carefree Vistas, offered to sell Vanyo a limited roadway and utility easement for $50,000. IRA 94, ¶ 7. The proposed agreement was for access and utilities to only one lot on the upper portion of Mamie Maude from a future road to the north of Mamie Maude known as Sentinel Rock Road. Tr. Ex. 47; 11/15/07 Tr. (morning) at 98-99. Mr. Ratliff testified to two reasons for this limit. First, the Town of Carefree would require the Carefree Vistas project to be redesigned if more lots were served. *Id.* at 98. Second, Mamie Maude is located on a steep slope, which would make access from the upper to the lower portions impossible. 11/15/07 Tr. (afternoon) at 8-9.

Vanyo did not enter into the easement agreement because he was not sure a developable lot existed on the upper portion of Mamie Maude, and he was

focusing on development of the larger, potentially four-lot lower portion. 11/14/07 Tr. (Vol. 2) at 11. He also did not have the $50,000 purchase price. *Id.* at 22-23. Furthermore, Mr. Ratliff was not prepared to deliver access. Mr. Ratliff was having difficulty with delivery of water and was not prepared to provide Mamie Maude with access and utilities until resolving the water issues. 11/15/07 Tr. (afternoon) at 31. Sentinel Rock Road has been bladed but is not paved, and remains rocky and difficult to negotiate. 11/15/07 Tr. (morning) at 94. Until recently, Sentinel Rock Road was available only to foot traffic. *Id.* at 5-6. Because of the economy, Mr. Ratliff does not know when he will develop Carefree Vistas and improve Sentinel Rock Road. *Id.* at 96; 11/15/07 Tr. (afternoon) at 8-9 ("Q. So maybe even roads may not go into Carefree Vista for some time? A. That's correct").

There was no question that even if Vanyo had purchased access to the upper portion of Mamie Maude, he could not access the lower portion. Vanyo presented uncontradicted evidence that the steep slope prevents the lower portion of Mamie Maude from being accessed with a roadway from the upper portion. As discussed above, the Carefree Vistas developer would not allow access to the upper portion to be used for more lots on the lower portion of Mamie Maude. Greg Gentsch, a licensed professional engineer with substantial road design experience, testified that the slope was too steep to build a road from the upper to lower portions of Mamie Maude within generally accepted engineering practices. 11/14/07 Tr. (Vol

2) at 35, 37. Mr. Gentsch testified that such a road also would be unsafe and would not comply with Town of Carefree standards, and that he had no reason to believe the Town would grant a variance. *Id.* at 36-39. A report from an engineering firm, which Vanyo had retained before the litigation to analyze the feasibility of access from the upper to the lower portions of Mamie Maude, reached the same conclusion. Tr. Ex. 17. Vanyo's former attorney also testified that the Town of Carefree would not allow access from the upper to the lower portions of Mamie Maude. 11/15/07 Tr. (afternoon) at 47 ("They told me that based on their current information . . . it would not be possible to build a road from the top portion of Mamie Maude to the bottom portion. They would not allow it"). The HOA presented no evidence to the contrary.

Mr. Duncan, a licensed appraiser, testified without expert rebuttal that a road from Lot 24 to four lots on Mamie Maude would not affect the value of any lot in the Subdivision, including Lot 24. 11/14/07 (Vol. 2) at 50-53; 11/15/07 Tr. (morning) at 17-20. He also testified without rebuttal that a home could be built on Lot 24 even with a road across it to Mamie Maude. 11/14/07 (Vol. 2) at 48-49.

D. The HOA Has Affirmatively Approved Roadways Across Other Subdivision Lots To Access Adjacent Property.

1. The Thiele Trust Easement.

On or about September 13, 1984, Carefree Foothills Corporation, the owner of Lots 7 and 8 in the Subdivision, granted to The Heinrich J. Thiele and Gertrude

A. Thiele Trust (the "Thiele Trust") a perpetual non-exclusive easement ("Thiele Trust Easement") for access and utilities over, under and across Lot 7 to the Thiele Trust's adjacent 5-acre parcel. Tr. Ex. 22, attached hereto as Appendix Ex. 2. The Thiele Trust parcel is not part of the Subdivision. *Id.* IRA 94, ¶ 12. The easement allows the Thiele Trust and its successors to construct and maintain a "roadway" with utilities across Lot 7. *Id.* There presently is a roadway across Lot 7 to the Thiele Trust parcel. *Id.* An aerial photograph of the Thiele Trust parcel and Lot 7, marked as Tr. Ex. 19, is attached as Appendix Ex. 3. Although the HOA calls the road a "driveway," the Thiele Trust Easement permits a "roadway" conforming to standards "consistent with existing roadways in the Carefree Foothills Subdivision." Tr. Ex. 22. In other words, the Thiele Trust Easement may be developed as a public street.

Like Lot 24, the 5-acre Thiele Trust parcel is zoned R1-35, which permits one residential unit per acre. Tr. Ex. 26 (zoning map); 11/14/07 Tr. (Vol. 2) at 49 (explaining R1-35 zoning of Lot 24); Tr. Ex. 19 (aerial photograph of Thiele Trust parcel). Therefore, the Thiele Trust parcel may be subdivided in the future into as many as five lots. The Thiele Trust Easement was recorded, providing constructive or actual notice to all lot owners within the Subdivision. Tr. Ex. 22.

The Thiele Trust Easement was granted by Ralph Applegate, president of Carefree Foothills Corporation, the original developer of the Subdivision and

owner of Lot 7. 11/15/07 Tr. (morning) at 55, 62. Mr. Applegate made the decision to adopt CC&Rs for the Subdivision, and he was responsible for developing the CC&Rs. *Id.* at 63-64 ("Well, the CC&R's, yes, we developed before we started construction in the Subdivision"). Mr. Applegate was in control of the Subdivision until he turned it over to the members of the HOA. *Id.* As the HOA has conceded, Mr. Applegate was the HOA at the time the Thiele Trust Easement was granted. IRA 151 at 8 ("At the time, the HOA was the developer"); 11/15/07 Tr. (morning) at 65.

Mr. Applegate testified that Heinrich Thiele requested the easement across Lot 7 because development of the Subdivision had landlocked the Thiele Trust parcel. *Id.* at 62-63, 66-67 ("at the time they were landlocked and there was no other available access and we were just in the process of constructing the road and they came and asked if we could do it, and since – rather than get in a litigation situation because he – it was all of – I don't know how many feet, but very, very close, and so we agreed to let him put a road there or put a driveway there"); IRA 94, ¶ 13. In fact, it is about 60-80 feet from the Subdivision road across Lot 7 to the Thiele Trust parcel, which is greater than the distance across Lot 24 to Mamie Maude. 11/15/07 Tr. (morning) at 68.

Mr. Applegate confirmed that the Thiele Trust Easement does not prevent the Thiele Trust from subdividing the 5-acre parcel or using the road to access

multiple lots. *Id.* at 69; *see also* Tr. Ex. 22. As he also conceded, the Thiele Trust Easement permits the owner of the 5-acre Thiele Trust parcel to construct a public road across Lot 7. 11/15/07 Tr. (morning) at 71-73; Tr. Ex. 22.

2. The Applegate Easements.

On January 21, 1987, the owners of Lots 42, 43 and 44 (including Mr. Applegate, who owned Lot 44) entered into a Mutual Ingress and Egress Agreement and Easement, which was recorded on April 2, 1987. Tr. Ex. 21 ("Applegate Easements"), attached as Appendix Ex. 4. The owner of Lot 43, Denton Ingle, was Mr. Applegate's partner and managed the Subdivision on behalf Mr. Applegate. 11/15/07 Tr. (morning) at 61. Mr. Ingle drafted the Thiele Trust Easement. *Id.* An aerial photograph and a diagram of the Applegate Easements, marked as Tr. Ex. 20 and 33, respectively, are attached as Appendix Ex. 5.

In the Applegate Easements, the parties gave each other reciprocal easements over Lots 42, 43 and 44 for access to each party's respective lot. *Id.* The Applegate Easements start at the end of Applegate Way, a cul-de-sac roadway within the Subdivision named for Mr. Applegate, and traverse over Lots 42, 43 and 44. *Id.*; Tr. Ex. 33. There is a roadway over the lots, all of which are now owed by Calver Capital, Ltd. Tr. Ex. 20. Calver Capital's principal, Jack Anderson, is the declarant under the CC&Rs in control of the HOA's Architectural Control Committee and was responsible for rejection of Vanyo's proposal. 11/15/07 Tr.

(afternoon) at 112. The Architectural Control Committee had asked for the legal opinion about whether Biederbeck's proposal violated the CC&Rs. 11/15/07 Tr. (morning) at 82.

As Mr. Applegate testified, the Applegate Easements across Lots 42, 43 and 44 give each lot owner "the availability to cross each other's property to get to their own lots." 11/15/07 Tr. (morning) at 60. Mr. Applegate testified that the parties granted each other reciprocal easements because it was easier to access their lots through adjoining lots than from the public road. *Id.* at 59-60, 74.

The use of the Thiele Trust Easement and Applegate Easements for access to other property has been open and obvious to all members of the HOA. IRA 9, ¶ 23. As the HOA has conceded, Mr. Applegate was the HOA at the time the easements were granted. IRA 151 at 8 ("At the time, the Association was the developer"); 11/15/07 Tr. (morning) at 65. The CC&Rs provide that no driveway may be constructed or maintained without approval of the HOA's Architectural Control Committee. Tr. Ex. 18 at 10, Art. IV § 3. The HOA and its members have never objected to the use of lots for the roadways by the Thiele Trust, the Applegate parties or Mr. Anderson. IRA 9, ¶ 24.

SUMMARY OF ARGUMENT

The HOA denied Vanyo's proposal to put a roadway over Lot 24 to access landlocked Mamie Maude on the grounds that use of a lot for a road to access adjacent land would violate the CC&Rs. Yet the HOA, through its developer who was the HOA at that time, approved the use of multiple lots in the Subdivision for precisely the same purpose – construction of roadways for access to other property. As the HOA has admitted, these approved uses have been open and obvious for the last 20 years. In fact, the HOA granted the Thiele Trust an easement for a public road over Lot 7 for access to the Thiele Trust's adjacent, unsubdivided 5-acre parcel. Why? Because the Thiele Trust parcel was being landlocked by the surrounding Subdivision. For all legal purposes, Vanyo's proposal to use Lot 24 to access landlocked Mamie Maude is indistinguishable from these prior approvals.

The trial court correctly instructed the jury that the HOA could waive rights under CC&RS by approving a similar use by other owners. The HOA focuses on a provision in the CC&Rs and case law to argue that the *failure* to enforce a violation of deed restrictions does not constitute waiver of the right to enforce other types of violations unless the violations have been so frequent that the CC&Rs have been abandoned. However, the HOA did *not* unwittingly fail to enforce other types of violations of the CC&Rs. The HOA knowingly and deliberately gave others the right to do exactly what Vanyo proposed to do and

permitted the uses to continue for over 20 years. In light of these intentional acts, the HOA cannot now deny Vanyo's similar use.

If the Court accepts the HOA's position, a homeowners' association could engage in discriminatory or arbitrary practices and hide behind a non-waiver provision to insulate itself from liability. The jury instruction on waiver avoids this inequitable and unfair result by recognizing that the HOA cannot approve some members' uses but deny another member's similar use. Indeed, the HOA has cited no case law permitting it to agree to give rights to one set of members but then disallow those same rights to another member.

The jury reasonably found that the HOA had approved similar uses when: (1) its founders, who were responsible for the creation of the very CC&Rs the HOA now seeks to enforce, gave the Thiele Trust permanent and irrevocable roadway and utility access over Lot 7 to multiple potential lots and granted each other mutual access rights over Lots 42, 43 and 44; and (2) the HOA and its members knowingly permitted the uses to continue for over 20 years. That verdict should be upheld. Because there are no grounds to revisit the remaining counts, the Judgment should be affirmed.

ARGUMENT

I. THIS COURT HAS NO REASON TO OVERTURN THE JURY'S VERDICT ON THE WAIVER CLAIM.

A. Standard of Review.

The test for the sufficiency of jury instructions is "whether, taken as a whole, they allow the jury to 'gather the proper rules to be applied in arriving at the correct decision.'" *State ex rel. Miller v. J.R. Norton Co.,* 158 Ariz. 50, 52, 760 P.2d 1099, 1101 (App.1988) (quoting *Kauffman v. Schroeder,* 116 Ariz. 104, 106, 568 P.2d 411, 413 (1977)). A "verdict will not be overturned as a result of improper jury instructions unless there is substantial doubt as to whether the jury was properly guided in its deliberations." *Id.*; *Crackel v. Allstate Ins. Co.,* 208 Ariz. 252, 270-71, 92 P.3d 882, 900-01 (App. 2004) ("Absent substantial doubt whether the jury was properly guided in its deliberations, we will not overturn a jury verdict because of jury instructions").

The HOA has requested a new trial on the waiver issue. In determining whether to grant a motion for new trial, it is not enough that the Court may disagree with the jury's verdict. The question that the Court must decide is "whether the jury verdict is so 'manifestly unfair, unreasonable, and outrageous as to shock the conscience.'" *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, 961 P.2d 449, 453 (1998). To obtain a new trial, the HOA must demonstrate both the existence of errors in the conduct of the trial *and* that it was "*affirmatively*

probable" that the alleged errors affected the jury's verdict. *Simpson v. Heiderich*, 4 Ariz. App. 232, 234, 419 P.2d 362, 364 (App. 1966) (emphasis added); Rule 59(a), Ariz. R. Civ. P. (requiring error "materially affecting" the party's rights). The HOA has failed to demonstrate any serious error in the jury instructions that, in all probability, materially affected their rights. *See also* Ariz. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

B. The Trial Court Correctly Instructed The Jury On Waiver.

The trial court gave the jury the following instruction regarding waiver: "A party may waive the right to enforce a deed restriction or provision in the CC&Rs by acquiescing to or approving a similar use by other owners of land in the subdivision." 11/20/07 Tr. (afternoon) at 18.

This instruction was correct. The CC&Rs, which were created by Ralph Applegate, the original developer of the Subdivision, were executed and recorded in 1983. In September 1984, Mr. Applegate granted to the Thiele Trust a perpetual access easement over Lot 7 for a roadway and utilities to serve property that is not within the Subdivision. Mr. Applegate granted the Thiele Trust the easement because the 5-acre parcel to be served by the roadway was landlocked by the Subdivision and the HOA wanted to avoid litigation. The Thiele Trust has been using Lot 7 for roadway access. In 1987, Mr. Applegate also authorized use of

Lots 42, 43 and 44 for access to each other. As with Vanyo's proposal, that roadway starts at the end of a cul-de-sac street within the Subdivision and crosses lots to reach other property. The HOA has admitted that use of Lots 7, 42, 43 and 44 for access to adjoining land has been open and visible, and that neither the HOA nor its members has objected to such use. IRA 9, ¶ 24.

As the HOA recognizes (but incorrectly applies), equitable principles underlie the waiver doctrine. Opening Brief at 30. As a matter of equity and contract, Vanyo is entitled to the same privileges as other property owners in the Subdivision. Whether by affirmative approval or knowing acquiescence, the HOA cannot give one set of property owners the permanent legal right to use their lots for access to other property but deny the very same right to Vanyo. *See Harrison v. Frye*, 307 P.2d 76, 78-79 (Cal. App. 1957) ("Where the complainant has failed to enforce a similar equitable servitude against third parties, he has debarred himself from obtaining equitable relief against the defendant for subsequent violations of the same character"); *Johnstone v. Bettencourt*, 16 Cal. Rptr. 6, 9 (Cal. App. 1961) ("the court properly found that plaintiffs waived any right that they may have had to enforce said restriction when they acquiesced to similar constructions by other owners of land in the subdivision").

The Idaho Supreme Court in *Smith v. Shinn*, 350 P.2d 348 (Idaho 1960), explained the common sense, equitable reasons for this rule:

> Another material reason is that if such proffered evidence discloses that respondents have knowingly and without objection permitted several other grantees within the subdivision to violate the restrictions which the here seek to enforce against appellants equity will not assist them in such enforcement. Such rule rests upon the equitable ground that, if any one who has a right to enforce the covenant and so preserve the conditions which said covenant was designed to keep unaltered shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them.

350 P.2d at 352.

Here, the HOA representatives responsible for the CC&Rs gave themselves and the Thiele Trust express written permission to engage in uses that the HOA later would claim violate the CC&Rs. The Applegate Easements provided access to three lots, and the Thiele Trust Easement provided access to a 5-acre parcel that could be subdivided in the future into multiple lots. The approval was granted in written, recorded, perpetual easements that run with the land and create transferable, enforceable and irrevocable property interests. Having approved roadway uses over Lots 7, 42, 43 and 44 despite the restriction against use of lots for road access to adjoining lots, the Association cannot equitably enforce the CC&Rs to deny Vanyo the same use of Lot 24.

The Association attempts to distinguish the Thiele Trust and Applegate Easements on the grounds that the access ways through each of the lots are private driveway. Opening Brief at 29-30. A road is a "structure" for purposes of a deed restriction precluding structures other than a single-family home. *Horton v.*

Mitchell, 200 Ariz. 523, 528, 29 P.3d 870, 875 (App. 2001). Whether public or private, driveway or road, gated or not, a paved access way to adjoining property is not a single-family home. In any case, it did not matter to Vanyo whether the access way to Mamie Maude was a public road or a private drive.

The Association also claims that private driveways across the various lots are no different than other driveways in the Subdivision. Opening Brief at 30. This is untrue on several levels. First, the Thiele Trust parcel is five acres that can be subdivided into multiple lots. Nothing prevents use of a road over Lot 7 to serve more than one lot. Second, the Thiele Trust Easement permits a "roadway" that can be converted into a public road no different than the public roads in the Subdivision. Indeed, the Thiele Trust Easement also permits installation of utilities under the road. Third, the road across Lot 7 provides access to property outside the subdivision. Even the Association concedes, "*Everyone agrees that the restriction prohibits a lot owner from building a road across the lot in order to give access to property outside the subdivision.*" Opening Brief at 2 (emphasis added). In fact, the restriction prohibits a lot owner from building a road across a lot to access any adjoining property, whether or not it is in the Subdivision. Finally, the roadway across Lots 7, 42, 43 and 44 are not driveways to homes on the lots, but serve as access to adjacent lots – exactly the type of use the HOA admits the CC&Rs prohibit. It was for the jury to determine whether the uses were similar.

There is no authority allowing the HOA to approve roadways over other lots to access adjoining land but to deny Vanyo the very same use of Lot 24. The HOA relies heavily on *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 87 P.3d 81 (App. 2004), for its argument that it has not waived its right to object to Vanyo's proposed road use. In *Burke*, Voicestream leased church property for a 50-foot cellular telephone tower. In response to neighbors' claims that the tower violated the "single-family residence" restriction in the CC&Rs, Voicestream argued that enforcement had been waived because the subdivision contained a barn and flagpoles, and the church property contained a church building, two bell towers, a flagpole and a 38-foot cross. 207 Ariz. at 398, 87 P.3d at 86. Voicestream never contended that the subdivision contained another 50-foot cellular tower.[2]

Vanyo is not arguing, as Voicestream did, that the HOA has waived the restriction preventing use of Lot 24 for access to Mamie Maude by permitting lots to be used for another type of use, such as a church or flagpole. Nor is Vanyo attempting to use Lot 24 for something other than single-family use – a road to Mamie Maude will still permit Lot 24 to be used for a home. Because the HOA

[2] The *Burke* court found it important that there was no homeowners' association. Thus, the court was concerned that the inaction of a homeowner on one side of a subdivision could result in waiver of a right of the homeowner on the other side of the subdivision to enforce CC&Rs as to an adjacent lot. 207 Ariz. at 398-399, 87 P.3d at 86-87. This concern is not present here, since the HOA intentionally approved the other roads, which have been open and obvious to all HOA members.

has allowed other owners to use their lots for the *same purpose* as the road use that Vanyo now seeks to make of Lot 24, *Burke* does not apply.

This distinction was implicitly acknowledged in another case cited by the HOA, *Condos v. Home Dev. Co.*, 77 Ariz. 129, 134, 267 P.2d 1069, 1071-72 (1954). In *Condos*, a party alleged that violations of deed restrictions involving the type of permissible building construction or non-liquor related uses waived the right to enforce a restriction against sale of liquor. In ruling that the violation of other restrictions did not waive the restriction on the sale of liquor, the court noted, "No claim is made that the covenant relating to intoxicating liquor has been violated." 77 Ariz. at 136, 267 P.2d at 1073. Thus, the court held that the owners of lots could enjoin the sale of alcohol despite violation of other restrictive covenants. 77 Ariz. at 134, 267 P.2d at 1072.

The HOA also cites *Donahoe v. Marston*, 26 Ariz. App. 187, 547 P.2d 39 (1976), to support the argument that the restriction sought to enforce against Vanyo has not been waived. In *Donahoe*, property owners alleged that the defendants had waived the ability to enforce deed restrictions requiring a minimum lot size of 2½ acres because defendants had lots smaller than 2½ acres and because they had permitted other unrelated violations, such as permitting business uses and failing to establish an owners committee. The court found that the defendants had *not* violated the 2½ acre restriction, and that the *other* violations did not destroy the

plan of development for the area. Vanyo's waiver claim is not based on other, non-roadway violations. Therefore, *Donahoe* is inapplicable.

In fact, no Arizona case the HOA cites involved the violation of the specific CC&Rs that the homeowners' association later attempted to enforce. Fundamental notions of equity prevent the HOA from treating Vanyo differently than the Thiele Trust or the Applegate parties with regard to the same road use. The trial court correctly disregarded the HOA's authorities in adopting the waiver jury instruction.

C. The Non-Waiver Provision In The CC&Rs Does Not Bar Vanyo's Waiver Claim.

The "non-waiver" provision upon which the HOA relies, Article VII, ¶ 1(b) of the CC&Rs, states that "the failure by an Owner" to enforce a restriction shall not be deemed a waiver of any provision of the CC&Rs. All of the cases the HOA cites from Arizona and other jurisdictions likewise involve the failure to enforce CC&Rs. Indeed, the *Burke* court specifically stated, "The non-waiver provision, by its plain language, is intended to prevent a waiver based on *prior inaction* in enforcing the Restrictions." *Burke*, 207 Ariz. at 398, 87 P.3d at 86 (emphasis added). In other words, the non-waiver provision is intended to protect the Association from unintentionally waiving its enforcement rights.

By its express terms, this provision does not apply. Vanyo's waiver claim is not based on inaction by the HOA, because the HOA did not unintentionally neglect to enforce the restriction against roads. Rather, the HOA affirmatively

approved perpetual easements allowing four lots to be used for access to adjacent property and permitted the roads to be constructed, and for over 20 years the HOA and its members have knowingly allowed the road use to continue without objection. The HOA's deliberate action in granting the Thiele Trust Easement and Applegate Easements and allowing roadways to be used for access to adjacent property goes far beyond the failure to enforce the single-family restriction.

Although Vanyo became bound by the CC&Rs when he purchased Lot 24, he agreed, at most, that the HOA's *inaction* would not act as a waiver. He never agreed that the HOA's *action* in allowing the same road uses the HOA later would deny to him could be protected by the non-waiver provision.

The non-waiver provision must be read in light of the contractual duties the HOA owes to its members. Restrictive covenants form a contract among the "property owners as a whole and the individual lot owners." *Arizona Biltmore Estates Ass'n. v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993). As such, there is an obligation of good faith and fair dealing implied in the CC&Rs. *United Dairymen of Arizona v. Schugg*, 212 Ariz. 133, 137, 128 P.3d 756, 760 (App. 2006) ("All contracts as a matter of law include the implied duties of good faith and fair dealing"). The essence of that duty is that neither party will impair the right of the other to receive the benefits which flow from their contractual relationship. *Rawlings v. Apodaca,* 151 Ariz. 149, 153, 726 P.2d 565,

569 (1986).

Under the HOA's theory, the non-waiver provision would not only protect discriminatory conduct, it would institutionalize discriminatory conduct. A homeowners' association would be utterly free to consent to any violation of the deed restrictions without fear of waiving the right to enforce the CC&Rs. The only boundary a homeowners' association could not cross would be the extreme outside limit – total abandonment of the deed restrictions. Unless it had reached that brink, the homeowners' association could act at will, confident that the non-waiver provision would shield it from liability and insulate its acts from challenge. For example, a homeowners' association could approve a fire engine red house on Lot 1 in violation of deed restrictions limiting colors to desert browns, and then deny the owner of Lot 2's identical request the next day. The law does sanction such inequitable conduct.

The HOA's cases establish a limited rule: if there is a provision in the CC&Rs preventing inaction from constituting a waiver, a party claiming waiver based on failure to act on other types of violations must prove total abandonment of the deed restrictions. However, our facts do not fit that rule. Although frequent violations may be necessary if a homeowners' association fails to act, equity demands that affirmative approval of a use that violates a restriction waives the future ability to enforce that particular restriction. *Burke* cannot be extended so far

as to allow the HOA to selectively permit some association members to use their lots for access to adjoining land, and then seek refuge behind a boilerplate "non-waiver" provision to deny the same use to another member. No notions of equity, and certainly no reasonable interpretation of the implied obligation of good faith inherent in the CC&Rs, can possibly justify that result. In this case, the trial court correctly instructed the jury that the HOA and its members could waive the restriction by approving similar uses.

D. Vanyo Presented Substantial Evidence Of Waiver By The HOA.

The HOA alleges that the present administration of the HOA was not a party to the easements granting access over Lots 7, 42, 43 and 44 because the agreements were executed by the developer of the Subdivision. As the trial court implicitly recognized by rejecting this argument before, during and after trial, this is beside the point. Mr. Applegate created and recorded the CC&Rs in 1983. The Thiele Trust Easement (drafted by Mr. Applegate's partner) was executed and recorded in September 1984. Mr. Applegate, through his corporation, owned Lot 7. The Applegate Easements for Lots 42, 43 and 44 were executed and recorded in 1987. Mr. Applegate granted all of these easements after he developed the CC&Rs and when he *was* the HOA. Therefore, the HOA, through Mr. Applegate, expressly authorized Lots 7, 42, 43 and 44 to be used for the same road purpose proposed by Vanyo. The HOA then permitted the roads to be constructed, which,

if they are considered driveways, required approval of the Architectural Control Committee. Tr. Ex. 18 at 10, Art. IV § 3.

The easements were recorded, which is notice to the world, including members of the HOA, of permission to use the lots as access to adjoining property. See A.R.S. § 33-416 ("The record of a grant, deed or instrument in writing . . . which has been duly acknowledged and recorded in the proper county, shall be notice to all persons of the existence of such grant, deed or instrument"). Since that time, use of lots for access to other properties has been open and obvious to all members of the HOA, and neither the HOA nor its members objected to such use. In fact, Jack Anderson, the present owner of Lots 42, 43 and 44, is declarant in control of the Architectural Control Committee and still is using Lots 43 and 44 to access Lot 42. 11/15/07 Tr. (afternoon) at 112; *see also* Tr. Ex. 20 (aerial photo).

Whether the HOA is bound by the acts of its creator or whether the HOA and its members have ratified the long-standing road uses through continued approval and knowing acquiescence, the right to enforce the same restriction against Vanyo's similar use has been waived. *See Simms v. Lakewood Village Property Owners' Ass'n*, 895 S.W.2d 779, 784-785 (Tex. App. 1995) (homeowners' association members who acquiesced in the association's acceptance of common areas ratified the association's actions).

Finally, even under the HOA's theory, the jury could have found the violations to be sufficiently "frequent." There is no bright line between frequent and infrequent. How many lots must have approved roads before the HOA will have waived the restriction? The answer clearly is a question of fact. Viewed in the light most favorable to upholding the verdict, the jury could have found that granting easements over multiple lots to serve as access for up to eight lots, and then continuing to permit the use for 20 years, was sufficient to abandon the restriction as to use of lots for access to other property. Consequently, the HOA has failed to meet its burden to show substantial doubt that the jury was properly guided in its deliberations or that the instruction materially affected its rights.[3]

II. THE HOA IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE IMPLIED EASEMENT CLAIM.

A. Standard of Review.

A post-verdict motion for judgment as a matter of law or for new trial should be viewed in a light most favorable to the non-moving party and to upholding the

[3] The HOA makes two other arguments that deserve footnote attention. First, the HOA argues that the instruction could have led the jury to find waiver based on one violation. Opening Brief at 34. As explained above, frequency is not an element of waiver when the HOA affirmatively approves a similar use. Nevertheless, the instruction referred in the plural to other "owners" of land in the subdivision, which the jury could have interpreted to mean more than one other similar use. Second, the HOA claims enforcement against the members would be inequitable. Opening Brief at 30. The relative equities were for the jury. Vanyo presented testimony from an appraiser that use of Lot 24 for a road would not impact the value of lots in the Subdivision, and the jury could have found that traffic from four lots on Mamie Maude would have an insubstantial impact.

jury verdict. *See Hutcherson*, 192 Ariz. at 53, 961 P.2d at 451; *Graber v. City of Peoria*, 156 Ariz. 553, 753 P.2d 1209 (App. 1988). This standard is a high one:

> It is proper for the court to grant a judgment notwithstanding the verdict only when there is no evidence or reasonable inferences which can be drawn from the evidence, which would support the verdict rendered by the jury. If the evidence considered in a light most favorable to the prevailing party is such that reasonable minds may differ as to the inferences to be drawn from the facts, it is error to grant a motion for judgment notwithstanding the verdict.

Huggins v. Deinhard, 127 Ariz. 358, 361, 621 P.2d 45, 48 (App. 1980).

In this case, the jury never got to the issues of implied easement or private way of necessity. Without a verdict, it is not appropriate for this Court to speculate on what the jury may have decided based on the evidence before it. Therefore, the HOA's arguments for judgment as a matter of law should be disregarded. If this Court decides to consider them, the evidence at trial more than adequately supports the trial court's denial of the HOA's request for judgment as a matter of law.

B. Elements Of An Implied Easement.

Where land is sold that has no outlet, the vendor by implication grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property. *Tobias v. Dailey*, 196 Ariz. 418, 421, 998 P.2d 1091, 1094 (App. 2000); Restatement (Third) of Property, Servitudes ("Restatement"), § 2.15. This implied right is a legal fiction arising from the presumption that a party conveying property conveys whatever is necessary for the

beneficial use of that property. *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 961 (App. 1991). All that is required for an implied way of necessity is that there is a reasonable necessity. *Id.*; *Chandler Flyers, Inc. v. Stellar Dev. Corp.*, 121 Ariz. 553, 554, 592 P.2d 387, 388 (App. 1979) ("Absolute necessity is not required. The owner need not show that without the easement there is no access whatsoever to the property"). An implied way of necessity is appurtenant to the land and may lie dormant through several transfers of title and yet pass with each transfer and be exercised at any time. *Bickel*, 169 Ariz. at 375, 819 P.2d at 961.

An implied way of necessity may arise when the federal government is the grantor. *Tobias,* 196 Ariz. at 421, 998 P.2d at 1094; s*ee also Kinscherff v. United States*, 586 F.2d 159, 161 (10th Cir. 1978) ("an implied easement may arise within the scope of the patent"); *Kellogg v. Garcia*, 125 Cal. Rptr. 2d 817, 826 (Cal. App. 2002) ("no reason exists why the conveyance by the federal government in this case should not be given the same presumption afforded other parties").

The rationale for implying an easement is twofold. First, since the 13th century courts have held that it is against public policy to deprive land of access rights that are necessary to use it. Second, courts have presumed that the parties to a transaction intended to grant access to the property that is conveyed. As the Restatement explains:

> The presumed intent of the parties justifies finding that the conveyance included rights necessary to avoid rendering the

> property useless. Parties to a conveyance would very rarely intend deliberately to render useless either property conveyed or retained by the grantor. Public policy also justifies the rule because it avoids the costs involved if the property is deprived of rights necessary to make it useable, whether the result is that it remains unused, or that the owner incurs the costs of acquiring rights from landowners who are in a position to demand an extortionate price because of their monopolistic position.

Restatement, § 2.15 cmt. a.

The archetypal model of an implied easement is illustrated in the Restatement, and applies perfectly to this case:

> O, the owner of two contiguous parcels, conveyed Blackacre to A, retaining Whiteacre. Blackacre would be landlocked by the conveyance if no servitude to cross Whiteacre were implied. The conveyance grants an implied servitude for rights of access to Blackacre across Whiteacre.

Id., cmt. b, ill. 1.

When Mamie Maude was conveyed by patent in 1912, the United States by implication reserved a right-of-way across the remainder of its property (now the Subdivision) for access to Mamie Maude. Put in the Restatement's terminology, when Blackacre (Mamie Maude) was conveyed by patent, the United States impliedly granted an easement across Whiteacre (the Subdivision).

C. There Was Sufficient Evidence From Which The Jury Could Have Found Reasonable Necessity For Access To Mamie Maude.

1. Mamie Maude Is Legally Landlocked.

A prerequisite for both the implied and private way of necessity claims is lack of access to Mamie Maude. However, Vanyo did not have to prove that

Mamie Maude had no access, just that any existing access was inadequate or inconvenient or there was "reasonable necessity" for access. *Solana Land Co. v. Murphey*, 69 Ariz. 117, 125, 210 P.2d 593, 598 (1949) (plaintiff does not need to show "that he has no outlet, but only that he has no adequate and convenient one" to prove "reasonable necessity"); *Bickel*, 169 Ariz. at 374, 819 P.2d at 960 ("All that is required is that there be a reasonable necessity" for an implied easement); *Siemsen v. Davis*, 196 Ariz. 411, 414, 998 P.2d 1084, 1087 (App. 2000) ("A landowner seeking to condemn a private way of necessity over the lands of another must show a 'reasonable necessity' for the taking").

The evidence at trial was undisputed that Vanyo has no existing access rights to Mamie Maude and that the parcel is legally landlocked. The witnesses at trial, including Mr. Duncan and Mr. Murphy, testified that no document created any access rights to Mamie Maude. Defendants' own expert witness, Mr. Smelser, confirmed that fact. 11/15/07 Tr. (afternoon) at 87 ("Did you find any document that created any legal access, right of access to Mamie Maude? A. No"). *See also* Tr. Ex. 41 at 2 (title insurance commitment noting lack of access); Tr. Ex. 16 (survey noting no access). There was no factual dispute that Mamie Maude is legally landlocked.

Undeterred by the undisputed lack of legal access, the HOA claims the evidence established the availability of access from Sentinel Rock Road, an

unpaved, rocky road to the north of Mamie Maude. To be clear, Sentinel Rock Road does not touch Mamie Maude. Although there was the possibility of access from Sentinel Rock Road, there was considerable testimony that Vanyo cannot presently obtain access from Sentinel Rock Road, and may not have access for some time. For example, Mr. Ratliff testified that his development was on hold due to the economy and that he had not arrived at a final price for the access. 11/15/07 Tr. (afternoon) at 8-9. And Mr. Murphy testified that Vanyo could not sign the agreement with Mr. Ratliff because of open questions related to water supply. *Id.* at 31. Under the reasonable necessity standard, the mere possibility of access perhaps being available sometime in the future, at an unknown price, is not a sufficient substitute for actual access.

2. The Lower Portion of Mamie Maude Is Landlocked By The Steep Slope.

The access Mr. Ratliff had offered Vanyo was to just one lot on the upper portion of Mamie Maude. There was no dispute that access from the north, even if it existed, could not reach the more buildable lower portion of Mamie Maude. Greg Gentsch, a civil engineer specializing in road design, testified to that fact. *See also* Trial Ex. 17 (report of DZ Engineering). Mr. Ratliff testified that the proposed agreement granted access to only one lot because "it was too steep for a road on the southern portion of Mamie Maude." *Id.* at 9. Mr. Murphy also testified without objection that he and Vanyo were told by the Town of Cave Creek

that they would not allow access from the top to the bottom of Mamie Maude. *Id.* at 46. The HOA introduced no contrary evidence.

When a parcel of land is divided into two by a natural obstruction, the owner may obtain an easement by necessity to a portion that is landlocked by the physical barrier even if there is access to another portion of the property. As explained above, one rationale for an implied easement is that the law favors profitable use of land, and that reasoning carries over into situations in which only part of land has access. An illustration in the Restatement is directly on point:

> O, the owner of two contiguous parcels of land, conveyed Blackacre to A. Blackacre was divided by a deep ravine that could only be bridged at a cost greater than the value of the land. The half of Blackacre contiguous to O's retained parcel, Whiteacre, had no access to a public road except across Whiteacre, or the land of strangers. The other half of Blackacre abutted a public road. Since O's conveyance of Blackacre would otherwise deprive half of it of access, without the expenditure of a disproportionate sum, the conveyance includes an implied servitude for access across Whiteacre.

Restatement, § 2.15, cmt. d, ill. 11. *See also Siemsen*, 196 Ariz. at 416, 998 P.2d at 1089 ("the mere existence of an alternative outlet will not defeat a private condemnation; the alternative must be reasonable; and an alternative may be so inconvenient as to establish the unreasonableness of an alternative route"); *Owens v. Brownlie*, 610 N.W.2d 860 (Iowa 2000) ("A natural obstruction can be so obtrusive that it essentially creates two separate tracts of land" for purposes of a way of necessity); *Daniel v. Fox*, 917 S.W.2d 106 (Tex. App. 1996) (granting

implied easement to portion of property separated by a stream from accessible portion); *Beeson v. Phillips*, 702 P.2d 1244 (Wash. App. 1985) (access to a portion of property does not preclude private condemnation of vehicular access to another portion of property because of steep slope); *Miller v. Schmitz*, 400 N.E.2d 488 (Ill. App.1980) (easement by necessity to portion of property separated by creek).

Whether the natural obstruction is a ravine, river or slope, the legal analysis is the same: "A natural obstruction can be so obtrusive that it essentially creates two separate tracts of land." *Owens*, 610 N.W.2d at 866. Even if the upper portion of Mamie Maude can get access, the lower area cannot, preventing entry into the most developable portion of the 9-acre parcel. The only way to access the lower portion of Mamie Maude is through the Subdivision. To avoid rendering the landlocked lower portion useless, a condition the law abhors, courts in similar situations have relied upon the presumption that there is an implied access easement. And the most convenient and least burdensome access to Mamie Maude is a 50 foot easement over Lot 24. Under the reasoning of the Restatement and the cases cited above, the undisputed inability to reach the lower portion of Mamie Maude warrants a finding of an implied easement to it.

The HOA cites two cases in which courts supposedly rejected the rule that an easement by necessity may arise when a portion of property is separated by access by a natural obstruction: *McLuggage v. Loomis*, 270 P.2d 248 (Kan. 1954);

and *Hollars v. Church of God*, 596 S.W.2d 73 (Mo. App. 1980). These cases involved state statutes authorizing condemnation of private ways of necessity. Both courts were constrained by the statutory language. *Hollars*, 596 S.W.2d at 74 ("Allowing a roadway of necessity here would, in effect, be changing the statutory language"); *McLuggage*, 270 P.2d at 253 ("The statute makes no provision for laying out a road over the land of another or others to a portion of a petitioner's land which is separated from the remainder of his land" by a natural obstruction).

In comparison, A.R.S. § 12-1202, our enabling statute for private ways of necessity, is quite broad: "An owner of or a person entitled to the beneficial use of land . . . which is so situated with respect to the land of another that it is necessary *for its proper use and enjoyment* to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity" (emphasis added). The statutory language is consistent with the Restatement and majority of states that allow implied easements or private ways of necessity to property that have access to only a portion of the developable area because of a physical constraint.

In fact, the HOA's cases were distinguished on these grounds by the Iowa Supreme Court in *Owens*, 610 N.W.2d at 867. The *Owens* court suggested that the cases on which the HOA now relies involved an "absolute necessity" standard.

The court in *Owens*, like our courts, rejected the "absolute necessity" standard and found an implied easement based on "reasonable necessity." As the court held in *Owens*, this standard is entirely consistent with the overwhelming majority of courts, and significantly the Restatement, that define "landlocked" to include lack of access to a portion of property by reason of a physical impediment. *E.g. Owens*, 610 N.W.2d at 866 ("A natural obstruction can be so obtrusive that it essentially creates two separate tracts of land"); Restatement § 2.15, cmt. d. ("Reasonable enjoyment of the property means use of all the normally useable parts of the property for uses that would normally be made of that type of property").

D. Vanyo Introduced Sufficient Evidence For The Jury To Find That Mamie Maude Lacked Access After Severance in 1912.

1. The Patent For Mamie Maude Did Not Create Access Rights.

The HOA argues that the evidence did not establish that severance of Mamie Maude left it landlocked or created the need for access. Prior to 1912, Mamie Maude and the Subdivision were both owned by the United States. On April 1, 1912, the United States issued a patent to Charles W. Cheney and F.H. Summeril for the Mamie Maude mining claim. Tr. Ex. 12. The patent for Mamie Maude did not include any express access rights. *Id.* The property within which the Subdivision is now located was the subject of two patents dated June 15, 1956. Tr. Ex. 13, 14. The land that was patented in 1956, including the Subdivision, is

adjacent to Mamie Maude. *Id.* From this evidence alone, the jury could have found that the need for access has existed since 1912.

2. Mamie Maude Had No Historic Access.

According to the HOA, Mr. Smelser testified that there was historic access to Mamie Maude from Sentinel Rock Road. However, Mr. Smelser's testimony is irrelevant to that issue, because there was undisputed evidence that there has been no *legal* access to Mamie Maude. Indeed, Mr. Smelser admitted that Vanyo had no legal right to use Sentinel Rock Road. *E.g.* 11/15/07 Tr. (afternoon) at 83 ("Q. . . . you agree that regardless of how long this road has been there, [ ] the owner of Mamie Maude does not have the legal right to use it, right? A. That's correct"). Nor could Mr. Smelser testify that Vanyo had prescriptive rights to get to Mamie Maude. *Id.* at 87-88.

In fact, Mr. Smelser never testified that there ever has been access to Mamie Maude. Rather, Mr. Smelser's testimony supported Vanyo. He agreed that there was no evidence Sentinel Rock Road ever had been located on Mamie Maude. *Id* at 66, 86. Indeed, Mr. Smelser did not know whether Sentinel Rock Road was even passable prior to 2007. *Id.* at 85. He also agreed that without access from Sentinel Rock Road, there was no access to Mamie Maude. *Id.* at 70.

The HOA points to an easement that gave owners of property surrounding Mamie Maude access to their parcels. Opening Brief at 8. However, Mr. Smelser

admitted that the easement, marked as Exhibit 37, did not create legal access to Mamie Maude. *Id.* at 75, 79 ("Q. But the plaintiff does not currently have the legal right to use the Sentinel Rock Road based on this Exhibit 37; is that correct? A. Yes, that is correct"); 83. In fact, Mr. Smelser was questioned extensively about the easement created by Exhibit 37, which was pointless since he admitted that Vanyo was not a party to or beneficiary of the easement. *Id.* His opinion was that the 25-foot easement area created by Exhibit 37 encroached 4.7 feet into Mamie Maude. He testified that he measured the 25 feet from a ditch on the property, but he did not know where the ditch was when the easement was created in 1983 or how recently the road had been bladed. *Id.* at 84-85. Without that information, the jury could have found that Mr. Smelser did not know exactly where the ditch was in 1983, and hence could not know whether the easement actually crossed onto Mamie Maude. And, in any case, Mr. Smelser knew of no evidence that the easement had ever been used to access Mamie Maude. *Id.* at 87.

Mr. Ratliff also testified that he knew of no regular use of Sentinel Rock Road to get to Mamie Maude since 1983, and that the road was impassible before he bladed it two or three years before trial. *Id.* at 5-6. As a result, the jury clearly could have believed there never had been historic access to Mamie Maude from Sentinel Rock Road. Without access from Sentinel Rock Road, even Mr. Smelser admitted that Mamie Maude was actually and completely landlocked.

The most Mr. Smelser could say was that Sentinel Rock Road had been used by someone at some indeterminate time to dig "discovery pits" on land *north* of Mamie Maude. 11/15/07 Tr. (afternoon at 92. The jury was not told whether the discovery pits were dug by the owner of Mamie Maude or by the owner of the property on which the pits were located. Thus, the discovery pits were not located on Mamie Maude, the road to get to the pits – Sentinel Rock Road – was not located on Mamie Maude, and there was no evidence the pits were dug by the owner of Mamie Maude. Further, Mr. Smelser could not testify that the pits had any connection to Mamie Maude; he could only "assume" that the mining lode sought by the discovery pits ran downhill to Mamie Maude (*id.* at 94), but there was no testimony that anyone had ever physically followed the lode onto Mamie Maude. To the contrary, Mr. Smelser saw no indication that there had ever been a road from Sentinel Rock Road to Mamie Maude. *Id.* at 86. Consequently, there was nothing in Mr. Smelser's testimony about any historic use of Sentinel Rock Road or any other access to Mamie Maude.[4]

Even if the jury accepted all of Mr. Smelser's testimony, they still could have concluded that, notwithstanding someone at some time may have used Sentinel Rock Road, which was not located on Mamie Maude, to dig pits that were

[4] In addition, Mr. Smelser could not say there has ever been access to the lower portion of Mamie Maude. Tr. 11/15/07 at 71. As discussed above, a physical obstruction may landlock and create a need for access to a portion of property.

not located on Mamie Maude, to search for a mining lode that may or may not have been located on Mamie Maude, there was a reasonable need for access in (and since) 1912, especially since the 1912 patent granted no express access rights.

3. Vanyo Was Not Required To Identify A Roadway Providing Access To Mamie Maude In 1912.

The HOA contends that Vanyo has failed to prove that Mamie Maude lacked access when it was patented in 1912. Opening Brief at 40. The HOA cites two cases, one from Montana and one from Florida, in support of their argument. *Griffin v. North*, 373 So.2d 96 (Fla. App. 1979); *Schmid v. McDowell*, 649 P.2d 431 (Mont. 1952). However, neither the Restatement nor Arizona courts have imposed that requirement.

Certainly the need for access existed to Mamie Maude at the time of severance in 1912. A mining claim would be useless without some way to get to it. *Kellogg*, 125 Cal. Rptr. 2d at 826 ("It would make no sense that the federal government would convey title to an active mine to a private party without intending to give the new owner access to the property"). And there is no question that in 1912 there were roads throughout the Valley. The fact that there may not have been documentary or testamentary evidence of access to an identifiable dedicated and improved road in 1912 cannot be grounds to deny Vanyo relief.

In *Kellogg*, the California court rejected the argument that the absence of a road precludes an easement by necessity, holding: "A way of necessity does not

rest on a pre-existing use but on the need for a way across the granted or reserved premises." 125 Cal. Rptr.2d at 828 (citation omitted). Because the plaintiffs' property was landlocked, the court held that a way of necessity could exist without proof that the property had access to a road at the time of severance from the surrounding property. The court based its holding on the presumption that the grantor had conveyed whatever was necessary for the property's beneficial use and the public policy favoring use of land, factors Arizona courts also have approved.

Indeed, the HOA's argument that Vanyo was required to prove that Mamie Maude historically had access to an identifiable public street[5] is inconsistent with the "reasonable necessity" standard. To advance the policy reason behind the implied easement doctrine to encourage use of land, the analysis must focus on reasonable necessity, not historic use. *See Bickel*, 169 Ariz. at 375, 819 P.2d at 961 ("a way of necessity does not rest on a preexisting use but on the need for a way across the granted or preserved premises").

If the HOA is correct, then any grant of rural property without express access that occurred prior to the advent of the automobile and expansion of the roadway system could never give rise to an implied easement. This is not the law. *Ghen v. Piasecki*, 410 A.2d 708, 713 (N.J. Super. 1980) ("a court may take into

[5]For this proposition, defendants cite *Bickel*, 169 Ariz. at 374, 819 P.2d at 960. However, the court in *Bickel* cited an Idaho case in support, and this statement was *dicta* that has not been relied upon by any subsequent Arizona court.

account changes from the time of the original severance, such as travel by automobile has replaced travel by horse, and may recognize some increase in activity on the landlocked parcel in determining rights"). Landlocked parcels in newer parts of the Valley could forever remain landlocked. That result would be directly at odds with the policy behind implied easements to prevent property from being rendered useless by lack of access. Restatement, § 2.15 cmt. a. ("The presumed intent of the parties justifies finding that the conveyance included rights necessary to avoid rendering the property useless"). *See also Cienega Cattle Co. v. Atkins*, 59 Ariz. 287, 294, 126 P.2d 481, 484 (1942) (private condemnation is "for the purpose of the development of the resources of the state as a whole, and tends to prevent a private individual from bottling up and rendering ineffective a portion of the resources of the state").

III. THE HOA IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON VANYO'S PRIVATE WAY NECESSITY CLAIM.

A. There Is No Question That Access To Mamie Maude Was A Reasonable Necessity

As with an implied easement, Vanyo was entitled to condemn a private way of necessity if there was a reasonable need for access to make beneficial use of Mamie Maude.[6] A.R.S. § 12-1202(A) ("An owner of or a person entitled to the beneficial use of land . . . which is so situated with respect to the land of another

[6]Of course, if the jury had found that Vanyo had an implied easement over Lot 24, they would not have had to reach the private way of necessity claim.

that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity"). The jury could have found that Mamie Maude was landlocked or, at the very least, required a private way of necessity "for its proper use and enjoyment."

B. The HOA Waived The Argument That Vanyo Had To Prove That He Could Build A Road On Lot 24.

The HOA argues, for the first time on appeal, that Vanyo's had to prove that he could build a road across Lot 24 to Mamie Maude. Opening Brief at 47. As support, the HOA cites one-line *dicta* from *Tovrea v. Trails End Imp. Ass'n*, 130 Ariz. 108, 109, 634 P.2d 396, 397 (App. 1981). The court in *Tovrea* did not cite any authority for this statement, and none can be found in any Arizona case or statute. Moreover, the HOA did not raise this argument at any time before trial or request a jury instruction to this effect, so it has been waived.

Even if there were authority for this proposition, and even if it had not been waived, there was evidence for the jury to draw that conclusion. First, Languid Lane has already been built, and the distance from the end of Languid Lane to Mamie Maude is a mere 50 feet. The jury also had a plan of development that depicted a road across Lot 24 to serve four homes on Mamie Maude. Trial Ex. 53. Second, Donald Duncan, the appraiser, testified that a road could be built without

affecting the developability of Lot 24 under the zoning regulations. 11/14/07 Tr. (Vol. 2) at 48-49. Third, Vanyo testified without objection or rebuttal evidence that the southern portion of Mamie Maude was "obviously very buildable." *Id.* at 11. The jury could have concluded from this unrebutted evidence that it was possible to construct a road from the end of Languid Lane to Mamie Maude.

C. At Most, Vanyo's Knowledge Was Just One Fact The Jury Could Have Considered.

The HOA spends considerable time arguing that Mr. Vanyo had knowledge of the access issues before he bought the property. Opening Brief at 47-48. Knowledge is only relevant if the party claiming the easement is seeking a more "convenient" access. *Siemsen*, 196 Ariz. at 417, 998 P.2d at 1090 (plaintiff's knowledge "would not defeat the condemnation of a private way of necessity where property had no alternative means of access, for in such a case, a condemnation would be necessary to prevent 'bottling up and rendering ineffective a portion of the resources of the state'") (citations omitted). Because Mamie Maude, or at least a significant portion of it, is legally landlocked, Vanyo has *no* alternative means of access. Therefore, *Siemsen* does not apply.

Even so, Vanyo's knowledge was just one factor for the jury to consider in their deliberations had they reached the issue. *Siemsen*, 196 Ariz. at 417, 998 P.2d at 1090 ("in a contest such as this that turns on the adequacy of a less convenient alternative, we deem it relevant to consider, as the trial court did, that Plaintiffs

purchased their property knowing the nature of their access"). Vanyo testified that Mr. Biederbeck did not explain the scope of the access issue prior to sale of the property. As Mr. Murphy testified, Vanyo approached the HOA in a series of meetings to resolve the access problem and was not told until after closing that the HOA would not deal with him. Yet when the HOA denied Vanyo's proposal, other lots in the Subdivision were being used for the same purpose without apparent harm to the HOA or its members. The jury could have found that a road over Lot 24 would have been only 50 feet and a very minor burden on the HOA members, who Mr. Duncan testified would not be financially harmed by the use. Under all of the circumstances, it would not have been error for the jury to award a private way of necessity to Vanyo regardless of what knowledge he may have had.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES.

A. Standard of Review.

The HOA alleges that the trial court erred in awarding fees to Vanyo. The trial court has broad discretion in determining an amount of attorneys' fees, and this Court reviews the decision for an abuse of discretion. *See Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 490, 167 P.3d 1277, 1285 (App. 2007). If there is any reasonable basis for the award, even if no explanation is given by the trial court, the ruling will not be overturned. *Fulton Homes Corp. v. BBP Concrete,* 214 Ariz. 566, 569, 155 P.3d 1090, 1093 (App. 2007).

B. This Action Arises Out Of An Express Or Implied Contract.

Vanyo was forced to bring this lawsuit to challenge the HOA's attempt to enforce a waived provision of the CC&Rs and thus, the action is one "arising out of a contract." *See Pinetop Lakes Ass'n v. Hatch,* 135 Ariz. 196, 659 P.2d 1341 (App. 1983) (action to enforce deed restrictions arises out of contract). Vanyo's claim – that the CC&Rs do not preclude his road use – easily falls within the purview of §12-341.01. *See Nolan,* 216 Ariz. at 490, 167 P.3d at 1285 ("a court may award fees to a defendant in a contract action if the defendant prevails on the basis that there is no contract or there has been no breach of the contract").

In other words, the claims against the HOA and class members would not have existed but for the HOA's attempt to invoke the CC&Rs. *See Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 6 P.3d 315 (App. 2000) (a tort claim will arise out of a contract "when the tort could not exist 'but for' the breach or avoidance of contract"); *Rutledge v. Arizona Bd. of Regents*, 147 Ariz. 534, 711 P.2d 1207 (App. 1985) (affirming fee award under §12-341.01 for two claims of intentional interference with contractual relations; "[c]learly, both claims . . . would not exist *but for* the alleged breach of contract") (emphasis in original). The HOA attempted to enforce the CC&Rs to prevent Vanyo's proposed use, and this action was necessary to validate Vanyo's right to proceed.

In addition, this case involved an implied easement arising out of the conveyance of Mamie Maude by the federal government in 1912. Actions involving express easements are subject to A.R.S. § 12-341.01. *Squaw Peak Community Covenant Church v. Anozira Dev. Inc.*, 149 Ariz. 409, 414, 719 P.2d 295, 300 (App. 1986) (party successfully prosecuting claim to enjoin housing development from obstructing its easement for ingress and egress entitled to fees). Because A.R.S. § 12-341.01 also permits fee awards in actions involving "implied" agreements, the implied easement count also gives rise to a claim for fees.

C. Vanyo Was The Prevailing Party.

Even though the jury did not have to reach the implied easement or private way of necessity claims, the one undisputable fact is that Vanyo was the successful party at trial. He obtained the relief he sought: access to Mamie Maude over Lot 24. *See also Sanborn v. Brooker & Wake Property Management, Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994) ("While the award of money is an important item to consider when deciding who is the prevailing party, the fact that a party does not recover the full measure of relief it requests does not mean that it is not the successful party"); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983).

D. The Trial Court Did Not Abuse Its Discretion.

1. Taking This Case To A Jury Trial Required Substantial Legal Work.

The issues presented in this case justify the trial court's award. For one thing, this case was in the unusual posture of a defendant class action, which required Vanyo to certify the class and provide certified mail notice to all owners of any property interests in the Subdivision. Identifying the owners and those with a beneficial interest (*e.*g. lienholders) alone took a significant amount of time. IRA 127, Ex. A, ¶ 2. Another difficulty was presented by the HOA's theory that access and ownership issues in 1912 were relevant. Tracing title back to 1912 to determine if any access had been granted in the past required significant work and analysis. The parties engaged in extensive briefing of cross-motions for summary judgment (including a Rule 56(f) motion) on somewhat novel legal issues, substantial discovery and a three-day jury trial with multiple expert witnesses.

At trial, the parties did not have the luxury of RAJIs, and the verdict form and most of the jury instructions had to be researched and drafted from scratch. Vanyo's counsel then faced the task of presenting a case involving technical legal theories of implied easement and private way of necessity. In light of the work necessary to prepare and take this case to trial, this Court cannot say the trial court abused its discretion.

2. Defendants Could Have Avoided Or Reduced The Expense Of This Litigation.

Defendants could have avoided this litigation even before the lawsuit was filed. *See Wilcox v. Waldman*, 154 Ariz. 532, 538, 744 P.2d 444, 450 (App. 1987) (award of attorneys' fees appropriate when party had various alternatives available to have avoided litigation). Over three years ago, Vanyo proposed to annex Mamie Maude into the HOA to allow the Architectural Control Committee to be able to approve the design of the road and houses. 11/15/07 Tr. (afternoon) at 34, 98. Vanyo renewed his offer in October 2005. These offers were rejected without a counter-offer. IRA 127, Ex. A. ¶ 5.

Later, counsel for the HOA and the Dwyers suggested that their clients *may* be willing to allow Mr. Vanyo to build two homes on the lower portion of Mamie Maude if he would agree to annex the property into the HOA and become subject to its control. However, neither the HOA nor the Dwyers ever made a formal settlement offer. IRA 142, Ex. 1, ¶¶ 2-6.

Even though the HOA refused to consider or propose settlement to avoid litigation, counsel for Vanyo still attempted to limit costs. IRA 127, Ex. A. After the Court denied the parties' cross-motions for summary judgment, counsel asked defendants' counsel to waive a jury given the large number of stipulated facts and the expense of a 3 to 4 day jury trial. *Id.* When defendants rejected this suggestion and insisted on a jury trial, Vanyo's counsel suggested a short or summary trial.

This offer also was rejected, and the HOA and the Dwyers insisted on nothing less than a full-blown jury trial. *Id.*

3. There Is No Undue Hardship To The HOA Or Its Members To Pay The Attorneys' Fees Award.

There is no undue hardship. In the first place, the attorneys' fee award has been paid by the HOA's insurer, which has posted a bond to cover the full amount of the award. IRA 163 at 2. Even if the insurer seeks indemnification from the HOA, the HOA and its members (unlike Vanyo) have many pockets from which to pay. The CC&Rs allow the HOA to assess the homeowners for their proportionate share of a fee award, which would be less than $2,000 per lot. The property owners certainly are not destitute – as the evidence at trial showed, they live in homes worth more than $1 million or own lots valued in excess of $500,000. *E.g.* Tr. 11/20/07 (morning) at 14. This litigation, which the HOA knowingly forced Vanyo to bring and which the members knowingly forced Vanyo to take to trial, will not cause any HOA member an *undue* financial hardship.

4. The Trial Court Did Not Abuse Its Discretion In Awarding Fees For The Contract Claims.

The HOA also complains that Vanyo's fee application did not apportion fees incurred on non-contract claims, which in this case was only the private way of necessity claim. Many issues in this case overlapped, particularly whether Mamie Maude was landlocked in whole or part. Therefore, it was difficult to isolate fees

incurred solely for the private way of necessity claim. However, because Vanyo achieved the result he sought, it was appropriate to award fees on all claims. *Schweiger*, 138 Ariz. at 189, 673 P.2d at 933 ("where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories").

Nevertheless, the trial court did not award Vanyo all of his fees. Vanyo requested a total fee award of $162,209.49, and the trial court awarded $100,000 without giving any reasons for the reduction. In determining whether the trial court abused its discretion, this Court should presume that there was an appropriate legal basis for the fee award.

5. Vanyo Did Not Waive His Right To Fees.

The HOA makes the absurd argument that Vanyo waived the right to request fees because of representations to the jury that he would not be asking for a dime from the Dwyers or the HOA. The HOA ignores the distinction between an award of monetary damages and the award of attorneys' fees. A jury does not award attorneys' fees, which is a legal issue to be resolved by the court. A.R.S. § 12-341.01(D) ("The court and not a jury shall award reasonable attorney fees under this section"). Therefore, telling the jury Vanyo was not seeking money damages had no bearing on the trial court's post-trial discretion to award attorneys' fees.

E. The Trial Court Did Not Abuse Its Discretion In Awarding Fees Against The Members Jointly And Severally.

This action was not just against the HOA. With the HOA's consent, this case was brought against all owners of any property interest in the Subdivision as a class, with the HOA in the role of class representative. Class certification is just a procedural mechanism; the members still were parties even though they were not named individually. As parties, there is nothing improper or unfair in holding them jointly and severally liable for the fee award, and the trial court did not abuse its discretion in doing so. *See United Bank of Arizona v. Sun Valley Door & Supply, Inc.*, 149 Ariz. 64, 69, 716 P.2d 433, 438 (App. 1986) (awarding fees jointly and severally against appellants pursuant to A.R.S. § 12-341.01).

The HOA, on behalf of its members and the class members, made the decision to force Vanyo to vindicate his rights at trial. This decision was made by the HOA and its membership after court-approved notice about the litigation was sent to the members. *See* "Important Notice to All HOA Members," IRA 142, Ex. 2. During the litigation, the members enjoyed the benefits of the class action, including being represented by a single attorney and avoiding the individual inconveniences and expenses that accompany being named parties in litigation. It is not unfair for the HOA and its members, who have been parties in this lawsuit from the beginning, albeit as a class, to bear the burden of the litigation, including joint and several liability for attorneys' fees.

In contrast, limiting Vanyo's recovery to the HOA or the class members on a *pro rata* basis would be extremely unfair. Vanyo has no power to force the HOA to pass a special assessment to pay the Judgment. Allowing the individual members to escape with only *pro rata* liability would force Vanyo to incur substantial additional costs to institute up to 76 different collection actions to collect $2,000 from each class member. To require this of Vanyo would defeat the purpose of A.R.S. § 12-341.01 to mitigate the successful party's litigation expense.

V. REQUEST FOR ATTORNEYS' FEES

As the trial court property found and as explained above, this case arises out of contract for purposes of A.R.S. § 12-341.01. Pursuant to Rule 21, ARCAP, Vanyo requests an award of attorneys' fees incurred in this appeal jointly and severally against the HOA and all members of the class.

VI. CONCLUSION.

For the foregoing reasons, the jury verdict should be upheld and the Judgment should be affirmed.

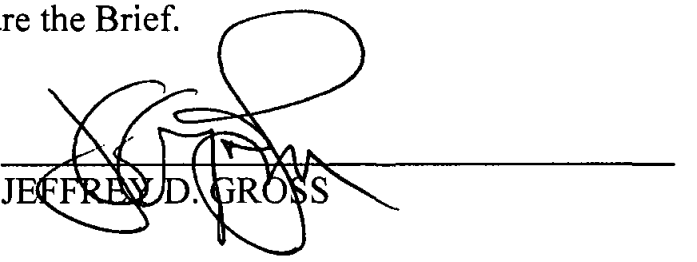
RESPECTFULLY SUBMITTED this 10th day of November, 2008.

GALLAGHER & KENNEDY, P.A.

By _____
Jeffrey D. Gross
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(b) of the Arizona Rules of Civil Appellate Procedure, the undersigned attorney for the Appellee hereby certifies that the foregoing Answering Brief (i) is, with the exception of headings, footnotes and block quotes, double spaced, (ii) uses proportionately spaced New Times Roman typeface, with a point size of 14, and (iii) contains 13,829 words according to the word count of the processing system used to prepare the Brief.

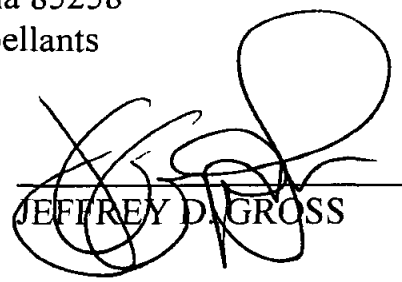


JEFFREY D. GROSS

PROOF OF SERVICE

Pursuant to Rule 4(c) of the Arizona Rules of Court Appellate Procedure, the undersigned attorney for the Appellee hereby certifies that two copies of the foregoing Answering Brief have been served this 10th day of November, 2008, by first class mail, postage prepaid, upon counsel for the parties at the following addresses:

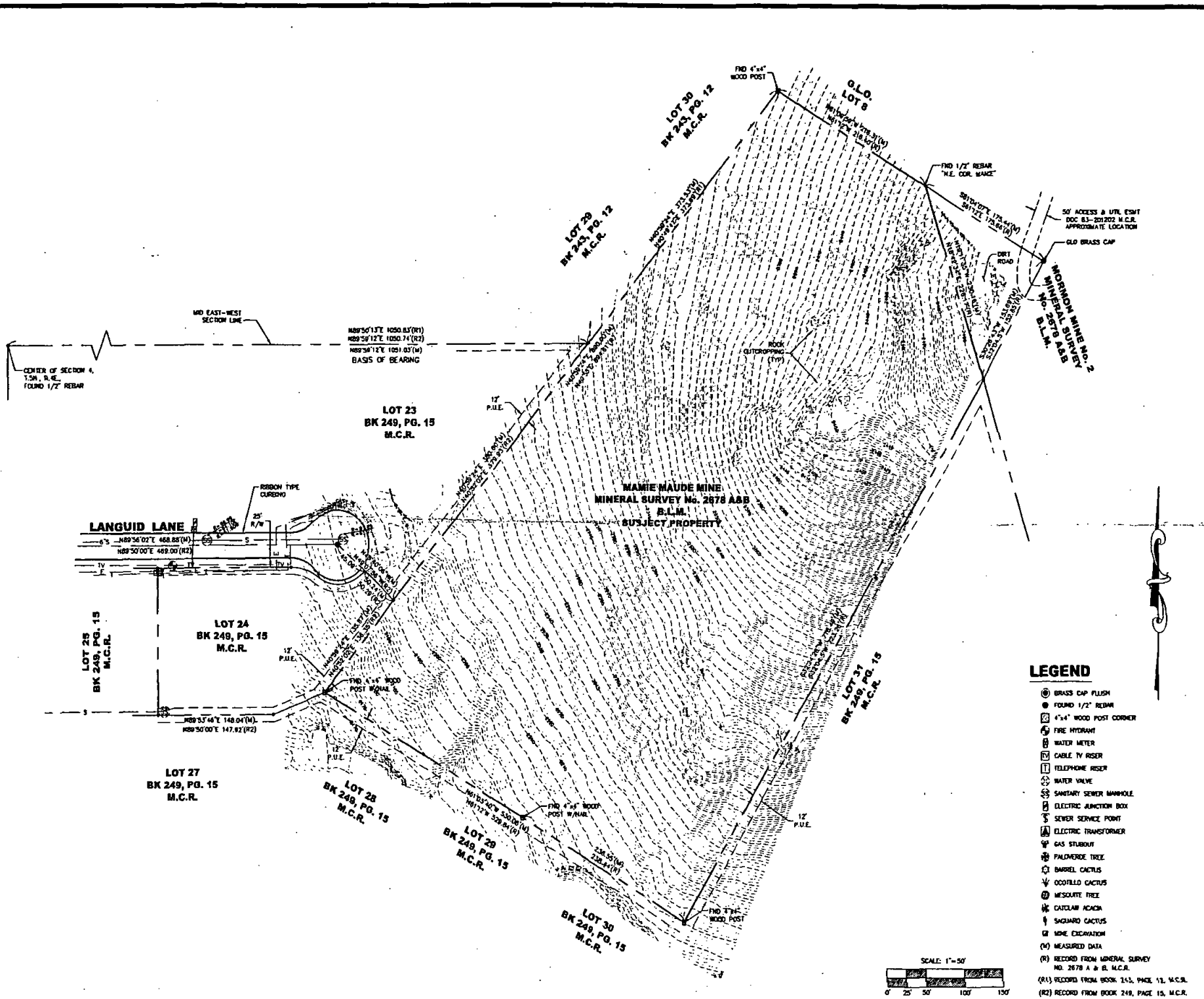
Kurt M. Zitzer
Kevin Minchey
Thomas H. Crouch
Meagher & Greer, PLLP
8800 N. Gainey Center Drive, Suite 261
Scottsdale, Arizona 85258
Attorneys for Appellants



JEFFREY D. GROSS

APPENDIX

TAB	DOCUMENT TITLE
1	Survey dated July 24, 2006
2	9/12/84 Access and Utility Agreement and Easement Use Agreement
3	Aerial Photograph – Thiele Trust parcel
4	1/21/87 Mutual Ingress and Egress Agreement and Easement
5	Aerial photograph – Calver Capital parcels and Driveway shown on Exhibit B, 87 200470 to Anderson's home located on Lot 42



SIG
SURVEY INNOVATION GROUP, INC
Land Surveying Services
16414 NORTH 91ST ST., STE 102
SCOTTSDALE, ARIZONA 85260
PHONE (480) 922-0780
FAX (480) 922-0781

ALTA/ACSM LAND TITLE SURVEY
MAIME MAUDE PROPERTY
CAREFREE, ARIZONA

REVISIONS:
1
2
3

DRAWING NAME: 6096-ALTA
JOB NO. 06096
DRAWN: KDD
CHECKED: JAS
DATE: 07/14/06
SCALE: 1"=50'
SHEET: 2 OF

DV0111

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SEP 25 '84 -10 22
BILL HENRY, COUNTY RECORDER
FEE 6.00 PGS 6 R.R.

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Charles K. Ayers
SNELL & WILMER
3100 Valley Bank Center
Phoenix, Arizona 85073

AGREEMENT

ACCESS AND UTILITIES AGREEMENT

AND EASEMENT USE AGREEMENT

GRANTOR: CAREFREE FOOTHILLS CORPORATION, an Arizona corporation

GRANTEE: THE HEINRICH J. THIELE and GERTRUDE A. THIELE TRUST

DATE: SEPTEMBER 12, 1984

RECITALS:

A. Grantor is the owner of those certain parcels of real property situated in Maricopa County, Arizona and described in Exhibit "A" attached hereto ("Grantor's Property"). Grantor is also the owner of that certain parcel of property, compromising a portion of Grantor's Property, and described in Exhibit "B" attached hereto (the "Easement Premises").

B. Grantee is the owner of a parcel of real property situated in Maricopa County, Arizona which abuts the southern and western boundaries of Grantor's Property as more particularly described in Exhibit "C" attached hereto (the "Grantee's Property").

C. Grantor desires to grant an easement to Grantee upon the Easement Premises as more particular hereinafter set forth and Grantee desires to accept such easement on the terms and conditions hereinafter set forth.

FOR A VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the Grantor and Grantee declare, covenant and agree as follows:

1. Grant of Easement. Grantor does hereby grant to Grantee, its successors and assigns, as an easement appurtenant to the Grantee's Property and every part thereof, a perpetual non-exclusive easement for ingress, egress, and access over, under, upon and across the Easement Premises, together with the right to construct, operate, maintain, alter and/or repair a roadway over, across and upon the Easement Premises. Grantor also hereby grants to Grantee its heirs and assigns a perpetual, non-exclusive easement over, under, upon and across the Easement Premises for the purpose of constructing, operating, maintaining, altering, repairing and removing, in whole or in part, at Grantee's sole expense, underground utility lines.

2. Disturbance and Restoration of Grantor's Property. In connection with the construction, operation, maintenance, repair, alteration or removal of roadway surfaces and/or utility lines, Grantee shall have the right to disturb the surface of the Easement

Premises and those portions of Grantor's Property in immediate proximity thereto. Provided however, that Grantee shall, at Grantee's sole expense, restore where at all practicable any portions of Grantor's Property disturbed thereby, including any improvements, paving or landscaping or existing desert vegetation thereon affected by such work, to the same conditions as existed prior to such work.

3. Roadway Construction at the Easement Premises. In the event Grantee exercises its right to construct a roadway over and upon the Easement Premises, such roadway shall be constructed to conform to standards consistant with existing roadways in the Carefree Foothills Subdivision to wit: two (2) inches of asphalt on six (6) inches of ABC, with a twelve (12) inch by eight (8) inch ribbon curb. Provided, however, that Grantee may construct such roadway to other standards if required to do so as a condition of approval or acceptance by any State, County or Municipal agency or instrumentality.

4. Running of Benefits and Burdens. All provisions of this instrument, including the benefits and burdens, run with the land and are binding upon and inure to the benefit of the heirs, personal representatives, successors and assigns of the parties hereto. Grantee shall have the right to assign the benefits and obligations of this easement, in whole or in part, without Grantor's consent, provided any such assignee agrees to be obligated and bound by Grantee's obligations hereunder.

5. Attorney's Fees. In the event of any action to enforce the provisions of this instrument, the prevailing party shall be entitled to receive its cost and attorneys' fees.

6. Termination of Liability. Whenever a transfer of ownership of all or any part of the Grantee's Property takes place the transferor shall not be liable for the breach, subsequent to such transfer, of any of the covenants contained herein.

7. Construction. This instrument shall be construed in accordance with the laws of the State of Arizona. The rule of strict construction shall not apply to this instrument. This instrument shall be given a reasonable construction so that the intention of the parties to confer a useable right of enjoyment upon Grantee is implemented.

8. Release of Easement. Grantee or Grantee's successors and assigns may terminate this Easement in whole or in part by recording a release in recordable form, at the Office of the Recorder of Maricopa County, Arizona, whereupon all rights, duties and liabilities hereby created shall terminate.

DATED the day and year first above written.

GRANTOR: CAREFREE FOOTHILLS CORPORATION, an Arizona corporation

BY _____
Its President

84 418049

GRANTEE: HEINRICH J. THIELE and
GERTRUDE A. THIELE TRUST

By _____
Co-Trustee

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 17 day of September, 1984, by Denton Eagle, the President of CACTREE FOOTHILLS CORPORATION, an Arizona Corporation.

_____
Notary Public

My commission expires:
10-14-84

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 20th day of September, 1984 by HEINRICH J. THIELE a Trustee of the HEINRICH J. THIELE and GERTRUDE A. THIELE TRUST.

_____
Notary Public

My commission expires:
My Commission Expires Aug. 5, 1988

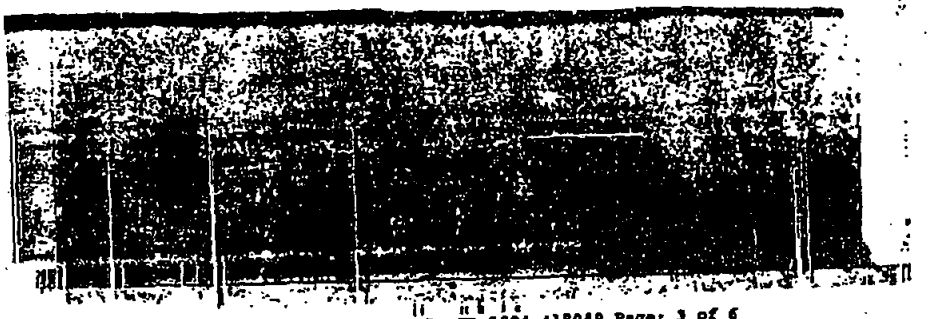

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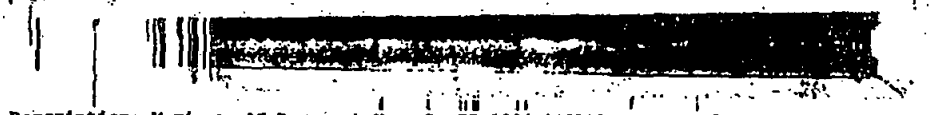
EXHIBIT "A"

Lots Seven (7) and Eight (8) of Carefree Foothills, a subdivision of a portion of the SE1/4, Section Four (4), Township Five (5) North, Range Four (4) East, G&SRB&M.



84 418049

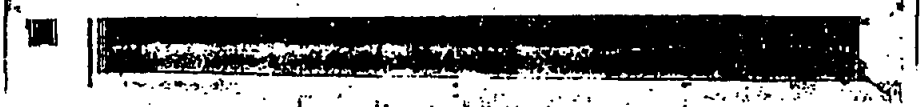
EXHIBIT "B"

The North Fifty (50) feet of Lot Seven (7) of Carefree Foothills, a subdivision of a portion of the SE1/4, Section Four (4), Township Five (5) North, Range Four (4) East, G&SRB&M.

EXHIBIT "C"

84 418049

The North 5 acres of that part of the Southwest quarter (SW1/4) of the Southeast quarter (SE1/4), lying West of the West line of the East 15 acres of the Southwest quarter (SW1/4) of the Southeast quarter (SE1/4) of Section Four (4), Township Five (5) North, Range (4) East of the G&SRB&M.



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Thelen Property

When recorded, return to:

Michael W. Margrave, Esq.
MARGRAVE, BRADY & ROYSDEN, P.A.
700 E. Jefferson, Suite 300
Phoenix, Arizona 85034

RECORDED IN OFFICIAL RECORDS
OF MARICOPA COUNTY, ARIZONA
APR 2 1987 -4 00
KEITH POLETIS, County Recorder
FEE 15.00 PGS 11 R.N.

MUTUAL INGRESS AND EGRESS AGREEMENT

AND EASEMENT

87 200470

This Mutual Ingress and Egress Agreement and Easement (the "Agreement") is made the date set forth hereinafter by and between the following parties who own the property stated below:

1. F. O. Buck and Deborah R. Buck, Husband and Wife as community property ("Owner of Parcel No. 1"), who owns in fee simple Lot 42, Carefree Foothills Subdivision, described in Exhibit A attached hereto ("Parcel No. 1");

2. Denton L. Ingle and Barbara L. Ingle, Husband and Wife ("Owner of Parcel No. 2"), who owns in fee simple Lot 43, Carefree Foothills Subdivision, described in Exhibit A attached hereto ("Parcel No. 2");

3. Ralph W. Applegate, Jr., Husband of Helen A. Applegate, as his sole and separate property ("Owner of Parcel No. 3"), who owns in fee simple Lot 44, Carefree Foothills Subdivision, described in Exhibit A attached hereto ("Parcel No. 3"); and

Galvez Martin Parcels

87 200470

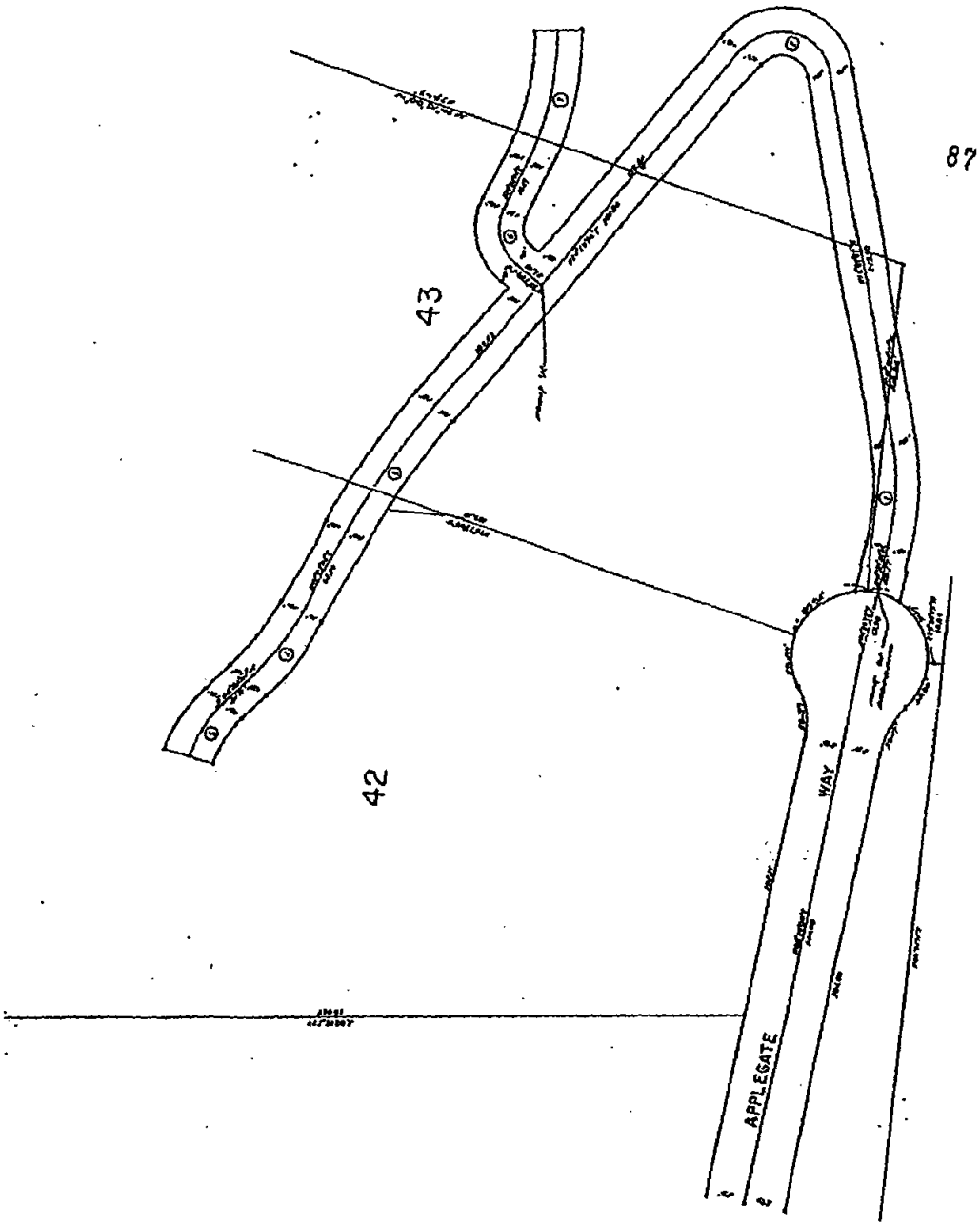

EXHIBIT B