

# AGENDA MATERIAL

DATE 5-21-19

ITEM NO. RA33

## STUBBS & SCHUBART, P.C.

ATTORNEYS AND COUNSELLORS AT LAW  
340 NORTH MAIN AVENUE  
TUCSON, AZ 85701

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\*Also admitted in Pennsylvania

May 15, 2019

SENT VIA EMAIL

Julie Castañeda, Clerk  
Pima County Board of Supervisors  
130 W. Congress, 5th Floor  
Tucson, AZ 85701

email: [cob\\_mail@pima.gov](mailto:cob_mail@pima.gov)

Re: Appeal of P19CU00001 Lin – N. Quartz Hill Place  
(AT&T Mobility / Bechtel – Applicant)  
(Paul and Kim Lin – Owner)  
Type I Conditional Use – Wireless Communication Facility

**RESPONSE AND OPPOSITION TO MARCH 29, 2019 APPEAL BY  
ROCKCLIFF HOMEOWNERS ASSOCIATION, INC.**

Dear Clerk:

This firm represents AT&T Mobility and Bechtel Infrastructure and Power Corporation (collectively “AT&T”) regarding the above-referenced appeal (the “Appeal”) by Rockcliff Homeowners Association, Inc. (“Rockcliff”). AT&T opposes the appeal from the Zoning Administrator’s Findings and Decision (the “Decision”) approving the placement of new and upgraded equipment at the existing cell facility located on property owned by Paul and Kim Lin (“Property”).

The Appeal principally challenges the Decision based on the meritless contention that the Property does not have “suitable access.” The other issues raised by the appeal are similarly without legal or factual support; the issues raised do not even begin to satisfy the required showing that the Decision is arbitrary, capricious and clearly unreasonable.<sup>1</sup> The Appeal is also properly rejected because Appellant is estopped to now complain about the continued use of the Property as a cell facility.

<sup>1</sup> The Appeal also does not provide any basis for rejecting the well-considered Decision of the Zoning Administrator as required by overriding Federal regulations, discussed *infra*.

MAY 15 19 03 05 PC CLK OF PD

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PIMA COUNTY BOARD OF SUPERVISORS

Re: Appeal of P19CU00001 Lin – N. Quartz Hill Place

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**DISCUSSION**

It is important, before discussing the specific issues raised by the Appeal, to clarify the proper standard of review of the Zoning Administrator's Decision. The Appeal is first governed by the general rule that because zoning ordinances are in derogation of common law property rights any uncertainty will be construed in favor of the free use of the Property. *City of Scottsdale v. Scottsdale Associated Merchants, Inc.*, 120 Ariz. 4, 583 P.2d 891 (1978); *Hart v. Bayless Investment & Trading Co.*, 86 Ariz. 379, 346 P.2d 1101 (1959); *Phoenix City Council v. Canyon Ford, Inc.*, 12 Ariz. App. 595, 473 P.2d 797 (1970). The review is also subject to the settled principle that the construction of zoning regulations by the appropriate official will be adopted unless clearly unreasonable, arbitrary, or capricious. *Kubby v. Hammond*, 68 Ariz. 17, 198 P.2d 134 (1948) (great weight must be given to construction of ordinance by proper officials); *Peabody v. City of Phoenix*, 14 Ariz. App. 576, 485 P.2d 565 (1971). Review of the Decision is also subject to overriding Federal law and regulations discussed below. See generally, 47 U.S.C. § 332.

I. The Decision complies with the procedural and substantive requirements of the Pima County Zoning Code, Section 18.07.030(H)(4)(g), that: "Towers shall be located with access to a publicly maintained road."

The Appeal acknowledges that an easement over Quartz Hill Place (the "Easement") was granted in favor of the Property in 1992.<sup>2</sup> The Appeal contends that the Property is without access to a publicly maintained road and that Lin may not assign the right to use the Easement. These contentions are without merit. The Property has access to at least two public ways. As depicted on the following map, the Property adjoins Rockcliff Road and also has an easement for access to Snyder Road. Contrary to the Appeal, it also has an unrestricted right to use Quartz Hill Place ("Quartz Hill").

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<sup>2</sup> The Easement, executed by Rockcliff, was unrecorded. However, it is unquestionably enforceable against Rockcliff. A.R.S. § 33-412(B) ("Unrecorded instruments, as between the parties . . . shall be valid and binding.").

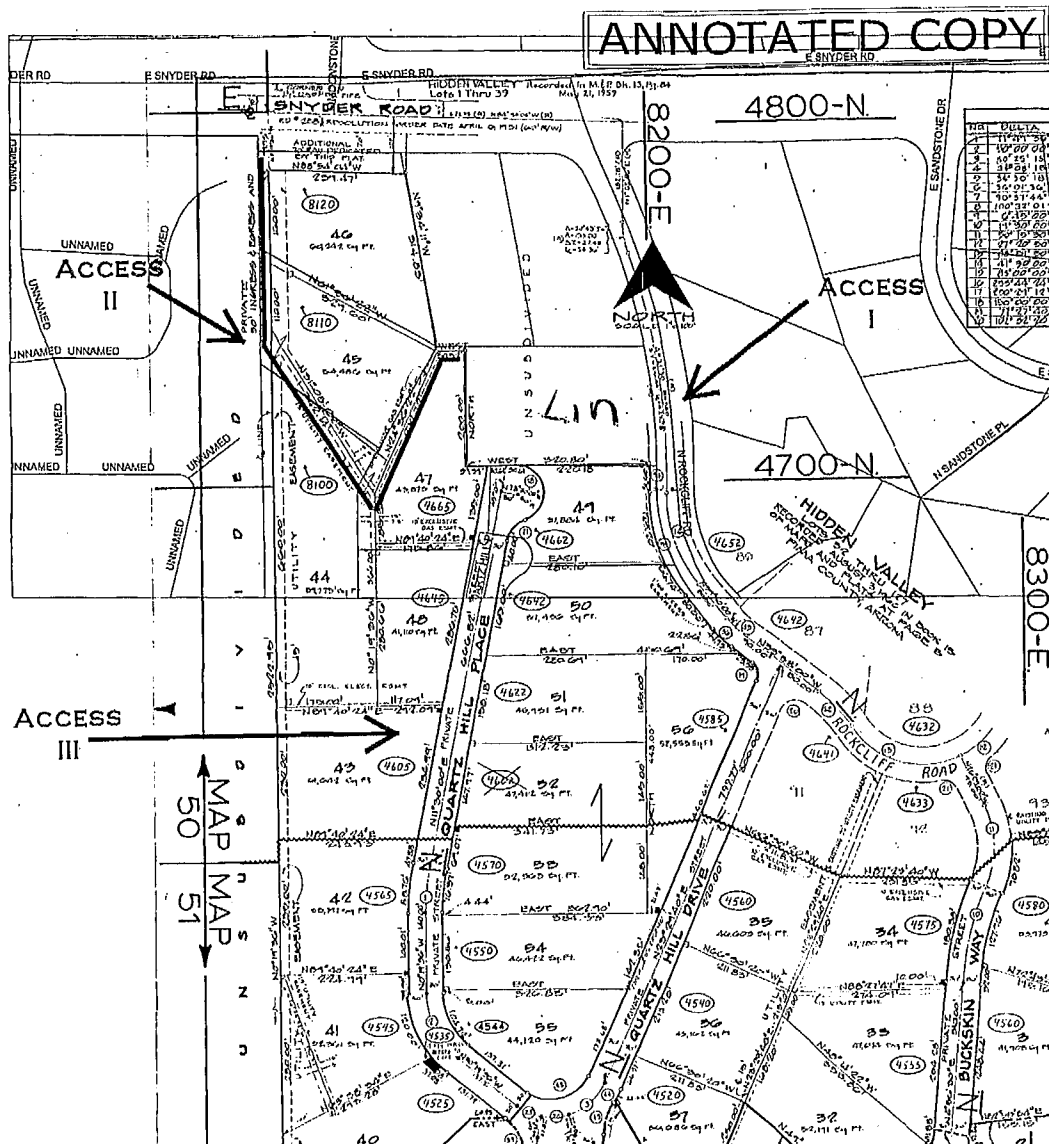
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ACCESS POINT I: A Subdivision Plat, MAP 50, a Plat of Hidden Valley  
Lots 52-127 (EXHIBIT A) dedicated "to the public forever all streets and easements

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designated on the Plat.” North Rockcliff Road is so designated and adjoins the east boundary of the Property. The Appellant is not within this subdivision. Adequacy of access to a public road is, therefore, beyond dispute.

ACCESS POINT II: Separately, from the platted Rockcliff Subdivision roads, the Plat also grants this easement to and from Snyder Road for “Private Ingress and Egress” and utilities:

Dedication:

\* \* \*

In addition, said private streets and utility easements, shall be dedicated for the installation and maintenance of public sewers and utilities.

\* \* \*

General Notes, continued

\* \* \*

24. Easements for power lines, water lines, & ingress and egress currently exist over undefined portions of this subdivision and are recorded in Docket Book 65, Page 280, Book 65, Page 276, Book 2693 Page 34, Book 3234 Page 181, Book 3237 Page 285, Book 3760 Page 321, Book 1878 Page 6, and Book 3303 Page 248 thereof.

Rockcliff Plat, MAP 51.

ACCESS POINT III: The Appeal acknowledges the Easement over Quartz Hill but contends it is limited to “residential use only.” Contrary to this contention, there is no language to support such a limitation. The Easement states:

1. Easement for Ingress and Egress. Rockcliff hereby grants, gives and conveys to Rudnick, and their successors and assigns, a non-exclusive irrevocable and perpetual easement subject to the conditions set forth below, over, upon and across the Subdivision Roadways

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for the sole, exclusive and limited purpose of motor vehicles, pedestrian and other access to the Rudnick Property across the Subdivision Roadways from the public and county maintained roadways which are contiguous to the Subdivision Roadways.

7/21/92 Declaration of Easement (**EXHIBIT B**). Thus, there is no restriction on the use of the Property or a prohibition of commercial use.

The interpretation of an easement is governed by the same rules of construction applicable to contracts. 28 CJS EASEMENTS §146; *City of Elk v. Coffey*, 562 P.2d 160 (Okla. App. 1977). Under Arizona law, the cardinal principle governing the construction of such instruments is that the scope of an easement is determined by reviewing the instrument, as a whole, and construing it with reference to all its terms. *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 868 P.2d 1030, 1032 (App. 1993). *United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 681 P.2d 390, 410- 11 (App. 1983). Because easements are generally “favored” in Arizona, the determination of the scope and uses permitted require that, “all presumptions [are] in favor of the easement owner.” *Busby v. State ex rel. Herman*, 2 Ariz. App. 451, 409 P.2d 735, 737 (1966).

In addition, and even more important here, the Property has been used for 18 years as a cell facility, without objection or protest by the Appellants. Arizona law is settled that the actions of parties and historic use of an easement is relevant to clarify, and generally defines, the nature and extent of the easement granted:

The construction or interpretation given to the agreement as evidenced by the acts and conduct of the parties, with knowledge of the terms and prior to any controversy as to meaning arises, is entitled to great weight and when reasonable will be adopted and enforced by the court. [Citations omitted.] The acts of the parties [to an instrument], before disputes arise, are the best evidence of the meaning of doubtful contractual terms.

*United California Bank v. Prudential Ins. Co. of America*, *supra*, 681 P.2d at 418 (App. 1983).

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Here, the Easement acknowledges that the Property is outside the subdivision and is, therefore, not subject to the use restrictions applicable to lots within the subdivision.

At the time of the original Rudnick Grant, 1992, the Property enjoyed CR-1 Zoning under the Agua Caliente-Sabino Creek Zoning Plan.<sup>3</sup> CR-1 provides a number of significantly more intensive uses than a single residential home as argued by the Appellant. In addition to permitting a guest house, other uses, such as college or governmental structures, community service agencies, library and museums, are all permitted uses. Section 18.21.010(A)(1) also allows for churches and schools. Additional conditional uses include clubs or lodges, group homes, childcare centers, and assisted living, among others. In other words, it is logically and legally impossible to limit the use to a single-family residence. Lin's expansive and assignable right, consistent with the Decision, is supported by the plain language of the Easement, by the Zoning Code in place at the time of the Easement's creation (reflecting the intention of the parties), and by the law of easements.

The Appeal's contention that benefit of the Easement may not be enjoyed by a tenant of the Property is also without merit. An easement is for the beneficial use of the designated property. It is not limited to use by only the record owners, it may be used for guests, invitees, tenants, and others authorized by the owner. In other words, because the proposed facility is on the Property, the fact that such use is pursuant to an agreement or lease is irrelevant.

In addition, the Easement expressly protects the Applicant assignee as a "third party beneficiary" and provides:

4. Transfer of Ownership. . . . **any transferee** or grantee thereof shall automatically assume and be bound by the burdens and obligations hereunder (including any past due assessments) and **shall be entitled to benefit from the same**.

\* \* \*

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<sup>3</sup> See Zoning Plan attached as EXHIBIT C.

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7. No Third Party Beneficiary. This Easement shall be solely for the benefit of the parties hereto and their successors and assigns, and no other person or entity shall have any right of action to enforce the terms of this Easement. No person or entity **other than** a party hereto or a **successor or assignee** of a party hereto, **shall be deemed a third party beneficiary of this Easement.** (emphasis added)

A) Estoppel and Waiver

The prior use of the Property as a cell facility not only precludes Rockcliff's strained interpretation of the Easement, it also estops it from now claiming that the continued use of Quartz Hill exceeds the Easement's scope. As previously noted, the Property has been used as a cell facility for 18 years without any objection or assertion of impropriety. AT&T relied on this fact in obtaining the right to use the Property and its decision to proceed with the proposed minor expansion of the facility. This reliance precludes Appellant from ignoring its past conduct, and inaction, to now claim that the Easement may not be used to service a cell facility.

Estoppel is "an age old principle of equity." *First National Bank of Portland v. Dudley*, 231 F.2d 396, 400 (9th Cir. 1956). It is founded on "basic precepts of common honesty, ordinary fairness and good conscience, in dealing with the rights of those whose conduct has been prompted by reasonable good faith reliance upon the knowing acts or omissions of others." *Id.* at 401 (*citing, inter alia*, Pomeroy, *Equity Jurisprudence* 189-192, sections 804-805 (5th ed. 1941)). Estoppel applies when a party, in this case AT&T, has reasonably and in good faith relied on the conduct or omissions of others and will suffer harm as a result of another party taking a new position or claiming rights not previously asserted.

B) The Decision is also consistent with both the separate provisions of the Pima County Code regarding exemptions for utilities.

First, the Pima County Code, 18.07.040 **Land Use Exceptions** (emphasis in Code) provides:

B. Public Utilities Permitted. Except as provided in Chapter 18.57 [Airports]:

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1. **Nothing in this code shall prevent the location, erection, alteration or maintenance of pipes, poles, wires, and similar installations necessary to distribute public facilities;**

2. In addition to other provisions of this code, the uses of this subsection shall be permitted in any zone .

\* \* \*

4. **Telephone, telegraph or power substations:**

\* \* \*

2) Appropriate screen planting **along any street frontage**, which planting and any necessary fencing shall be set at a distance not closer **to a street lot line** than the minimum front and side yards of the zone. (emphasis added)

This separate Code provision effectively exempts regulation of telephone “substations.”<sup>4</sup> Access is not confined to “public” streets but instead references “any street”. Simply, this is not a zoning code enforcement matter, but instead a private dispute between the parties to the Easement, i.e. the dominant estate (the Applicant) and servient estate (the Appellant).

C) Federal Law and Requirements

While zoning decisions are ordinarily the province of local governments, in the Telecommunications Act of 1996 (“Act” or “TCA”) Congress placed several express limitations on the ability of local governments to deny requests to place “personal wireless service facilities.” Among other things, Congress required that local governments act promptly upon requests to place wireless facilities, and required that decisions denying such requests “shall be in writing and supported by substantial evidence contained in a written record.” 47 U.S.C. § 332(c)(7)(B).

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<sup>4</sup> Definition of substation: a subsidiary or branch station.



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Under Federal law, a written denial must “contain a sufficient explanation of the reasons for the . . . denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons.” *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 722 (9<sup>th</sup> Cir. 2005) (quoting *S.W. Bell Mobil Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1<sup>st</sup> Cir. 2001)).

In this context, “[m]ere speculation and arbitrary conclusions are not substantial evidence.” *City of Tucson v. Citizens Utils. Water Co.*, 17 Ariz. App. 477, 481, 498 P.2d 551, 555 (1972); *Vera-Villegas v. I.N.S.*, 330 F.3d 1222, 1231 (9<sup>th</sup> Cir. 2003) (“[C]onjecture is not a substitute for substantial evidence[.]”). Thus, objections to a proposed wireless facility “based upon conjecture or speculation . . . lack probative value and will not amount to substantial evidence.” *Petersburg Cellular P’ship v. Bd. of Supervisors of Nottoway County*, 205 F.3d 688, 695 (4<sup>th</sup> Cir. 2000); see also *California RSA*, 332 F. Supp. 2d at 1308 (“[S]peculation or generalized expressions of concern for aesthetics have been held not to constitute substantial evidence.”).

For example, the courts have held that “generalized expressions about . . . decreases in property values” do “not rise to the level of substantial evidence required under the [Act].” *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 390 (3<sup>rd</sup> Cir. 2007). See also *Pine Grove Township*, 181 F.3d at 409 (same); *New Par v. City of Saginaw*, 301 F.3d 390, 399, n.4 (6<sup>th</sup> Cir. 2002) (same). Similarly, several courts have deemed such “not in my backyard” sentiments to be synonymous with the kind of “generalized expressions” about aesthetics that do not constitute substantial evidence. See, e.g., *Verizon Wireless (VAW) LLC v. Douglas County*, 544 F. Supp. 2d 1218, 1249 (D. Kansas 2008) (objections by neighbors that facility would be “unsightly” and “an eyesore” are “generic ‘not in my backyard’ complaints,” and “[s]uch generalized ‘not in my backyard’ opposition does not, as a matter of law, constitute substantial evidence on which to deny a proposed wireless telecommunications facility on aesthetics grounds”); *USOC of Greater Iowa, Inc. v. City of Bellevue*, 279 F. Supp. 2d 1080, 1086 (D. Neb. 2003) (“Eight layperson residents spoke in opposition to the tower, expressing only generalized concerns about aesthetics and property values,” and “[t]hese ‘NIMBY’ (not in my backyard) concerns do not constitute substantial evidence.”); *Sprint Spectrum, L.P. v. County of St. Charles*, 2005 WL 1661496, at \*6 (E.D.Mo. July 6, 2005) (“A ‘not in my backyard’ generalized objection does not constitute substantial evidence to support the denial of a tower permit.”).

In the present situation, there is no evidence, much less substantial evidence, to support a denial of AT&T’s request. As set forth in the decision, the Application satisfies the County’s Code requirements. In addition, this request involves

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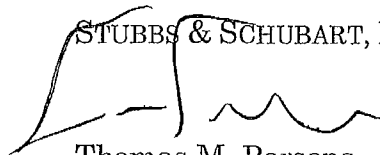
unmanned facilities that will generate minimal traffic and will be incorporated into replicas of desert vegetation.

**CONCLUSION**

The adequacy of access finding is supported by substantial evidence and cannot be disturbed under Federal Law in the absence of a finding by this body that the finding is arbitrary and capricious or clearly unreasonable. Moreover, the Appellant is estopped from denying the impact of this historic use of the Easement or to interfere with the continued use of Quartz Hill for the cell facility, which is located on the Property specifically benefitted by the Easement. Finally, two other access points, neither contested by Appellant, satisfy (H)(4)(g) independently. The Board is asked to affirm the Zoning Administrator's Decision.

Sincerely,

STUBBS & SCHUBART, P. C.



Thomas M. Parsons

TMP/jd

Enclosures:

Exhibit A - MAP 50

Exhibit B - Declaration of Easement

Exhibit C - Agua Caliente-Sabino Creek Zoning Plan

cc: T. Drzazgowski (w/encls.) (via email)

# HIDDEN VALLEY

MP 15005

RECORDED: AUGUST 3, 1960

\*\*\* THE FOLLOWING PLAT IS AN ANNOTATED  
VERSION OF THE ORIGINAL DOCUMENT. IT HAS  
BEEN ALTERED BY PIMA COUNTY DEVELOPMENT  
SERVICES TO SHOW ADDITIONAL INFORMATION.  
ORIGINAL COPIES MAY BE OBTAINED FROM THE  
PIMA COUNTY RECORDER\*\*\*

8300-E.

HIDDEN VALLEY  
LOTS 1 TO 39  
Book 13, Page 84  
May 21, 1959

4900-N.

8300-E.

CURVE DATA			
NO.	ANGLE	S.T.	LENGTH
1	41°24'24"	30'	18.90'
2	90°	25'	30.27'
3	82°16'15"	25'	22.45'
4	78°11'32"	25'	20.50'
5	104°02'15"	25'	30.80'
6	21°07'30"	25'	25.82'
7	84°50'51"	25'	27.31'
8	16°09'12"	25'	22.01'
9	68°24'12"	25'	35.55'
10	65°42'15"	25'	26.04'
11	34°06'35"	25'	22.56'
12	77°27'20"	25'	26.61'
13	102°32'10"	25'	42.58'
14	74°25'15"	25'	32.48'
15	0°42'15"	200'	16.70'
16	27°00'15"	200'	129.82'
17	34°42'37"	293.01'	31.27'
18	90°	320'	502.43'
19	0°32'15"	290'	20.25'
20	23°04'	80.00'	78.46'
21	12°21'35"	581.27'	57.53'
22	48°36'34"	43.5'	218.63'
23	25°53'04"	48.5'	62.10'
24	18°19'04"	481.35'	54.20'
25	17°12'	481.35'	72.86'
26	30°41'50"	150'	41.10'
27	41°12'40"	150'	56.15'
28	19°17'10"	315'	58.52'
29	20°23'20"	315'	56.65'
30	10°40'14"	150'	161.95'
31	20°45'54"	150'	27.48'
32	21°38'	114.00'	216.44'
33	41°30'	23.5'	89.03'
34	14°18'	150'	12.85'
35	37°40'10"	23.5'	44.63'
36	65°01'50"	150'	134.79'
37	27°20'20"	150'	36.19'
38	51°20'20"	210'	106.95'
39	65°55'54"	156.63'	107.16'
40	35°51'10"	413.23'	135.52'
41	71°04'	300'	55.58'
42	50°15'30"	170'	78.74'

E. 8400

UNSUBDIVIDED

8500-E.

4900-N.

4800-N.

8400-E.

CERTIFICATION

I hereby certify that this plat represents a survey made under my direction and that all monuments do exist as shown herein.

MAP 50  
ZONE CR-1  
H.D.Z. - 12

NOTES

1. Set 3/4" iron pipe at P.C., P.T. & P.R.C. of all property line curves.
2. Set 5/8" steel pins at all lot corners.
3. — indicates survey monuments set.
4. Bearings established from Hidden Valley, Book 13, Page 84, May 21, 1959.
5. No natural drainage ways shall be disturbed or changed without the approval of the Pima County Board of Supervisors.
6. (C) indicates curve, see curve data.
7. It is not the intention of the developer to pave the streets within this subdivision.

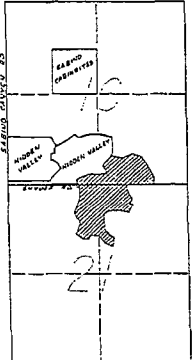
APPROVALS

I hereby certify that this plat was approved by the Board of Supervisors, Pima County, Arizona on the 24th day of August, 1960.

Edward J. Thomas 8-23-60  
Clerk, Board of Supervisors Date

Walter A. Bess 7-27-60  
County Engineer Date

J. C. M. Davis 8-2-60  
Exec. Secy, County P. & Z. Comm. Date

LOCATION PLAN  
SECTIONS 16, 21, 7, 13, 8, 15-E  
NO SCALE

DEDICATION

We the undersigned owners of the land shown on this plat hereby consent to the subdivision of the said land in the manner shown hereon and hereby dedicate to the use of the public forever all streets and easements so designated on this plat.

PHOENIX TITLE AND TRUST COMPANY  
an Arizona corporation as Trustee under Trust agreement No. 6045.By F. H. Benecke  
F. H. Benecke, Vice PresidentAttest: Willard S. Fleming  
Willard S. Fleming, Asst. SecretarySTATE OF ARIZONA S.S.  
COUNTY OF PIMA

This instrument was acknowledged before me this 24th day of August, 1960 by F. H. Benecke as Vice President and Willard S. Fleming as Asst. Secretary of the Phoenix Title and Trust Company, as Trustee.

Willard S. Fleming  
Notary Public

My commission expires 8-21-62

RECORD DATA

ANNOTATED  
COPY

HIDDEN VALLEY

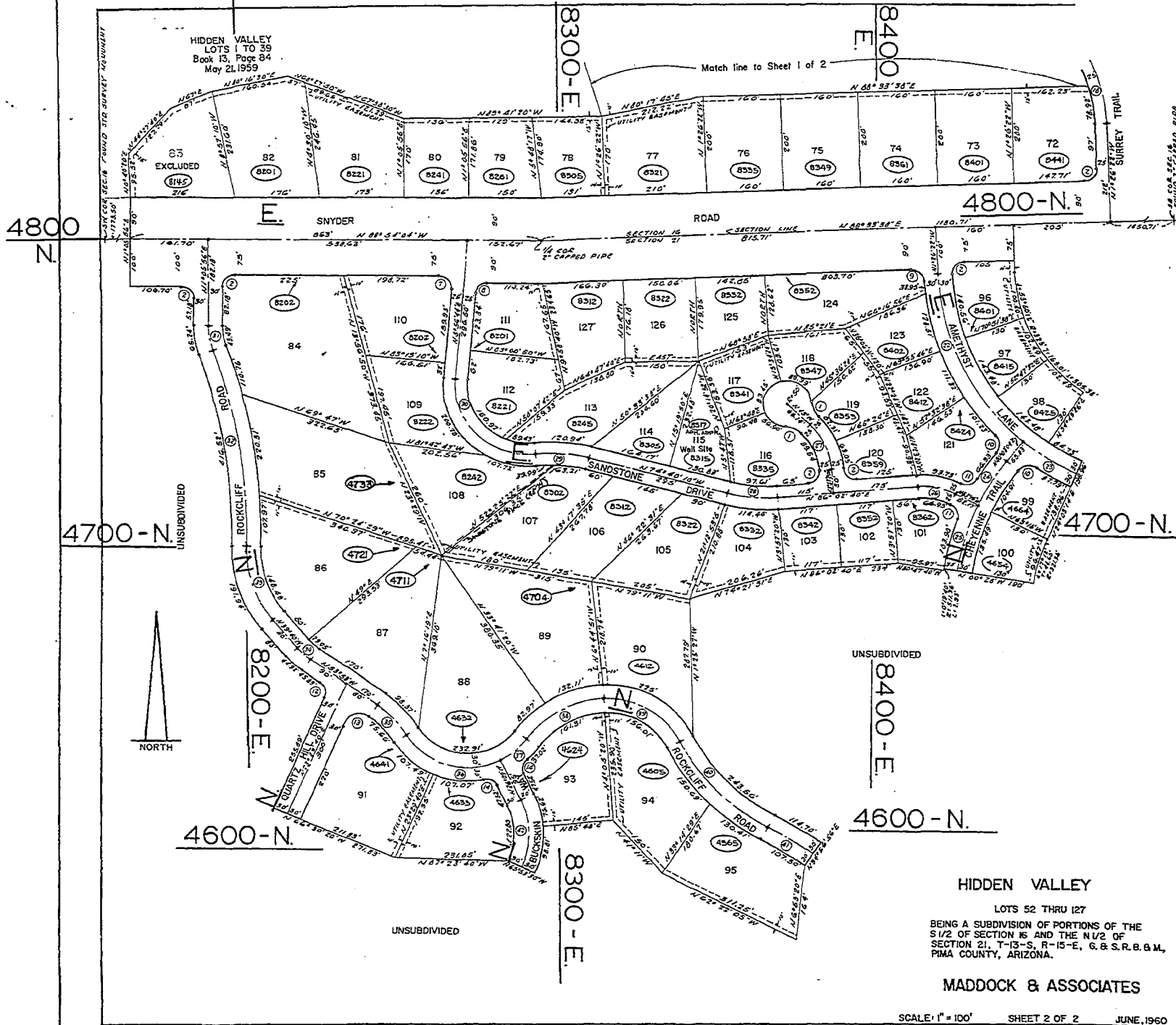
LOTS 52 THRU 127

BEING A SUBDIVISION OF PORTIONS OF THE S 1/2 OF SECTION 16 AND THE NW 1/2 OF SECTION 21, T-13-S, R-15-E, G &amp; S.R.B.M., PIMA COUNTY, ARIZONA.

MADDOCK &amp; ASSOCIATES

C12-60-53 SCALE: 1"=100' SHEET 1 OF 2 JUNE, 1960

# ANNOTATED COPY



JUN-10-12 12:12

FROM-

*Ken*

T-241 P.001/007 F-800

COPY

DECLARATION OF EASEMENT

This Declaration of Easement ("Easement") is made as of the 21st day of July, 1992 by and between ROCKCLIFF HOMEOWNERS ASSOCIATION, INC., an Arizona nonprofit corporation ("Rockcliff"), and LEONARD W. RUDNICK and SANDRA JO RUDNICK, husband and wife (together, "Rudnick"), with reference to the recitals of facts and intentions and for the purpose of confirming the covenants hereinafter set forth.

R E C I T A L S

A. Rockcliff is the owner of the private streets and improved roadways commonly known as Santana Place, Buckskin Way, Quartz Hill Drive and Quartz Hill Place lying within, and as shown on the plat of subdivision of, Rockcliff, Book 24, Page 67, Maps and Plats, Records of Pima County, Arizona (collectively, "subdivision Roadways").

B. Rudnick are the owners of that certain parcel of real estate located in Pima County, Arizona which is contiguous to said subdivision and legally described on Exhibit "A" attached hereto and made a part hereof ("Rudnick Property").

C. Pursuant to the terms of that certain Declaration of Easements, Rights and Agreements Running With the Land dated \_\_\_\_\_, 1992 and recorded in docket \_\_\_\_\_, commencing at page \_\_\_\_\_, in the Office of the Recorder of Pima County, Arizona ("Declaration"), Rudnick received an easement from the Rockcliff Homeowners Association, Inc., an Arizona nonprofit corporation, for ingress and egress (among other uses) over and across the "Driveway Area" LOCATION lined therein which is legally described on Exhibit "B"

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EXHIBIT B

attached hereto and made a part hereof. In addition, Rudnick received an easement for utility hook-ups to the Rudnick Property.

D. Rudnick desires to obtain an easement over and across the subdivision Roadways to permit access to and from the Rudnick Property (by way of the Driveway Area) and the public and county maintained roadways which are contiguous to the Subdivision Roadways. Rockcliff desires to convey such easement to Rudnick on the terms and conditions set forth below.

#### C O V E N A N T S

In consideration of the foregoing recitals, which are incorporated herein by this reference, and other valuable consideration, the receipt of which is hereby acknowledged, the parties hereto grant, convey, covenant and agree as follows:

1. Easement for Ingress and Egress. Rockcliff hereby grants, gives and conveys to Rudnick, and their successors and assigns, a non-exclusive, irrevocable and perpetual easement subject to the conditions set forth below, over, upon and across the Subdivision Roadways for the sole, exclusive and limited purpose of motor vehicles, pedestrian and other access to the Rudnick Property across the Subdivision Roadways from the public and county maintained roadways which are contiguous to the Subdivision Roadways.

2. Contribution towards Expenses. Upon thirty (30) days written notice from Rockcliff, Rudnick shall pay Rockcliff Homeowners their normal annual or special assessment (same the same as is charged to each of Lots 49 through 54. Rudnick shall not be

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responsible for the payment of any dues or assessments, except where those dues or assessments are used for liability insurance, security or maintenance or repair of the roadways. Failure to pay the assessments within thirty (30) days after received will terminate Rudnick's right to use the ingress and egress until the amount is paid. The parties hereto acknowledge and confirm that Rudnick is not a member of Rockcliff and by this easement does not become a member of Rockcliff. Accordingly, Rudnick shall have no rights relating to the membership in Rockcliff.

3. Running with the Land. All of the terms and provisions of this Easement, including the benefits and burdens contained herein, shall run with the land and real property described herein and shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, subject to the conditions set forth below.

4. Transfer of Ownership. Upon the transfer of ownership of any portion of the property described herein, the liability hereunder of the transferor shall automatically terminate with respect to such parcel or portion as to future assessments and any transferee or grantee thereof shall automatically assume and be bound by the burdens and obligations hereunder (including any past due assessments) and shall be entitled to benefit from the same.

5. Interpretation. The rule of strict construction shall not apply to the grants and provisions contained herein. The grants and provisions contained herein shall be given reasonable construction to carry out the intentions of the parties hereto to

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confer a usable right of enjoyment.

6. Notices. All notices and other communications required or desired to be given pursuant to this Easement shall be in writing and shall be deemed served if delivered in person to the party to whom it is addressed or two (2) days after being deposited in the United States mail as indicated by the postmark thereon if sent postage prepaid, registered or certified mail, return receipt requested, addressed as follows:

If to Rockliff:

c/o Charles King, Esq.  
KING, FRISCH & ALLEN, P.C.  
6245 East Broadway, #510  
Tucson, Arizona 85711

If to Rudnick:

Leonard Rudnick  
5081 N. Sabino Canyon Road  
Tucson, Arizona 85715

Any party may change the name of the person or address to which notices or other communications are to be given by so notifying the other parties hereto.

7. No Third Party Beneficiary. This Easement shall be solely for the benefit of the parties hereto and their successors and assigns, and no other person or entity shall have any right of action to enforce the terms of this Easement. No person or entity, other than a party hereto or a successor or assignee of a party hereto, shall be deemed a third party beneficiary of this Easement.

8. Amendment/Modification. This Easement may be amended, modified or supplemented only by an instrument in writing, signed and acknowledged by Rudnick and Rockliff and properly recorded in the office of the Recorder of Pima County, Arizona.

9. Section Titles/ Gender. The titles of the sections

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contained herein are for convenience only and shall in no way affect, control or limit the meaning or application thereof. Words and expressions used herein shall be applicable according to their context and without regard to the number or gender of such words or expressions.

10. Governing Law. This Easement and the rights and duties of the parties hereto shall be construed and enforced in accordance with the laws of the State of Arizona, both statutory and decisional.

11. No Waiver. No delay or omission on the part of any party hereto to assert or attempt to enforce any right or privilege hereunder shall be deemed to be a waiver of such right or privilege or any other right or privilege for any purpose or to any extent whatsoever. No provision hereof shall be or shall be deemed or considered to have been waived by any party hereto unless such waiver is in writing and executed by the party sought to be charged with such waiver; and no waiver of any provision hereof with respect to any instance, matter or circumstance shall be deemed or considered to be a waiver of such provision with respect to any other instance, matter or circumstance or a waiver of any other provision hereof.

12. Authority. The parties hereto represent and warrant to each other that they are fully authorized and empowered to enter this Easement and that entering into this Easement does not breach or violate the terms or provision of, or result in a default under, any other agreement, document or instrument to which any the

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parties hereto may be bound or a party.

13. Non-Payment. In the event Rudnik or their successors or assigns fail to pay any assessment within thirty days from notice as provided in paragraph 6 sent by Rockcliff, then this assessment shall extinguish and all rights and liabilities shall terminate.

14. Attorney's Fees. In the event it becomes necessary to employ an attorney to enforce the terms hereof, the prevailing party shall be entitled to their reasonable attorney's fees.

IN WITNESS WHEREOF, the parties hereto have executed this Easement as of the date first set forth above.

ROCKCLIFF HOMEOWNERS  
ASSOCIATION, INC., an Arizona  
nonprofit corporation

By: [Signature]  
Title: Pres.

[Signature]  
LEONARD W. RUDNICK

[Signature]  
SANDRA JO RUDNICK

STATE OF ARIZONA )  
COUNTY OF PIMA ) SS.

SUBSCRIBED, SWORN TO and ACKNOWLEDGED before me this 21st day  
of July, 1992 by Arthur Gendler  
the President of ROCKCLIFF HOMEOWNERS ASSOCIATION,  
INC., an Arizona nonprofit corporation.

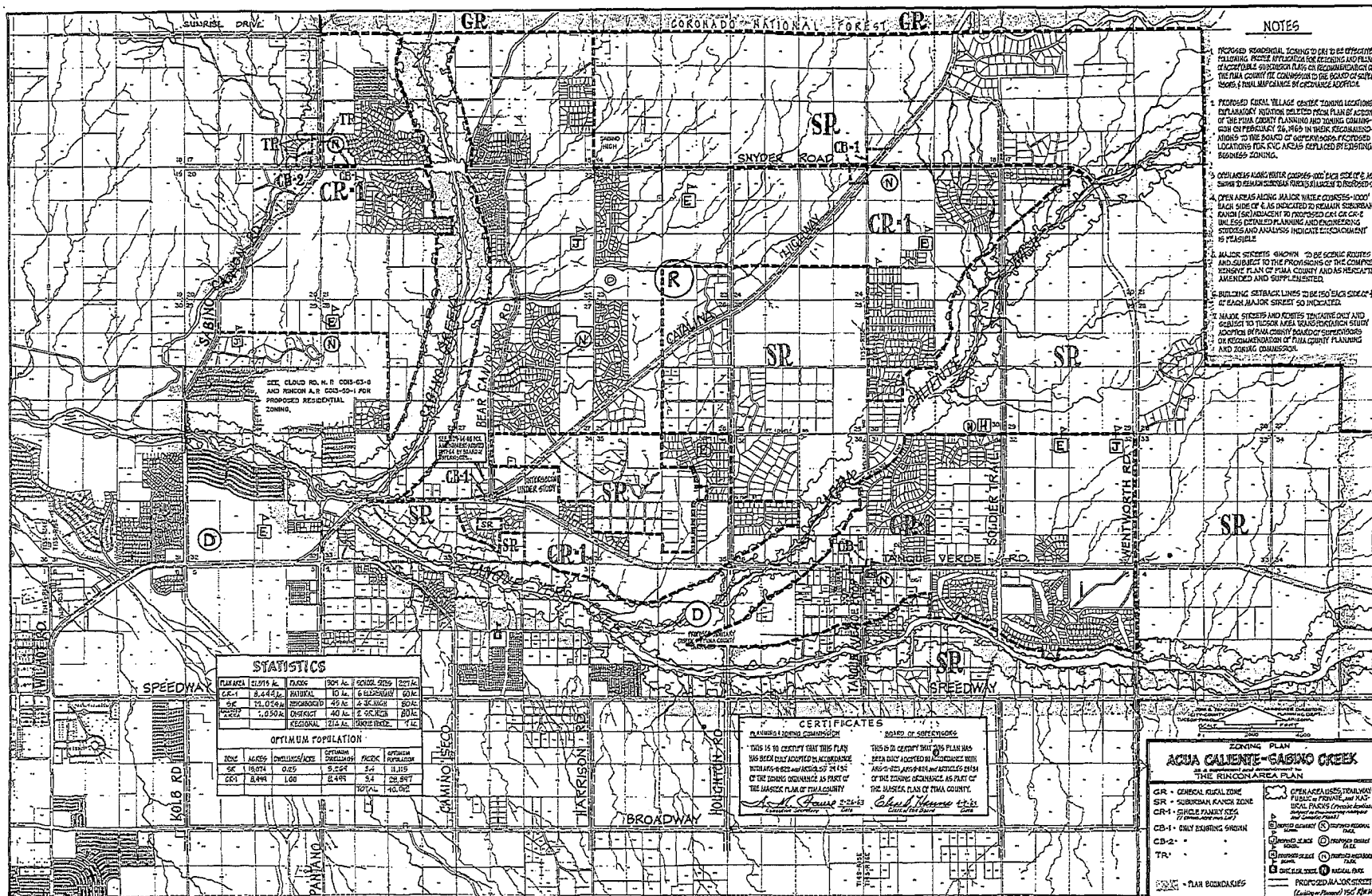
[Signature]  
Notary Public

My commission expires:  
Sept. 22, 1992

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CITY-COUNTY PLANNING DEPT. (10-20-62) J.R. C19-61-15 Agua Caliente-Gabino Creek Community Plan (Amended 4/21/74)

# NOTES

PROPOSED ZONING TO BE EFFECTIVE FOLLOWING PUBLIC HEARING AND ADOPTION OF THE PLAN BY THE BOARD OF SUPERVISORS OF THE COUNTY OF PIMA, ARIZONA, ON OR BEFORE JANUARY 24, 1969, IN THEIR REGULAR SESSIONS TO THE BOARD OF SUPERVISORS, LOCATIONS FOR NEW AREAS REPLACED BY EXISTING BUSINESS ZONING.

PROPOSED RURAL VILLAGE CENTER ZONING LOCATIONS EXISTING RURAL VILLAGE CENTER ZONING LOCATIONS ON FEBRUARY 24, 1969, IN THEIR REGULAR SESSIONS TO THE BOARD OF SUPERVISORS, LOCATIONS FOR NEW AREAS REPLACED BY EXISTING BUSINESS ZONING.

OPEN AREAS ALONG MAJOR WATER COURSES - 100' EACH SIDE OF & AS INDICATED TO REMAIN SUBURBAN RURAL (SR) UNLESS DETAILED PLANNING AND ENGINEERING STUDIES AND ANALYSIS INDICATE OTHERWISE IS FEASIBLE.

MAJOR STREETS SHOWN TO BE SCENIC ROUTES AND SUBJECT TO THE PROVISIONS OF THE COMPREHENSIVE PLAN OF PIMA COUNTY AND AS HEREIN AMENDED AND SUPPLEMENTED.

BUILDING SETBACK LINES TO BE 150' EACH SIDE OF EACH MAJOR STREET SO INDICATED.

MAJOR STREETS AND ROUTES INDICATED ONLY AND SUBJECT TO TUCSON AREA TRANSPORTATION STUDY ADOPTED BY PIMA COUNTY BOARD OF SUPERVISORS ON RECOMMENDATION OF PIMA COUNTY PLANNING AND ZONING COMMISSION.

## EXHIBIT C AGUA CALIENTE-GABINO CREEK THE RINCON AREA PLAN

GR - GENERAL RURAL ZONE  
SR - SUBURBAN RURAL ZONE  
CR-1 - SINGLE FAMILY RES.  
CR-2 - ONLY EXISTING GROWN  
TR -

PLAN BOUNDARIES

480  
485  
490  
495

OPEN AREAS ALONG MAJOR WATER COURSES - 100' EACH SIDE OF & AS INDICATED TO REMAIN SUBURBAN RURAL (SR) UNLESS DETAILED PLANNING AND ENGINEERING STUDIES AND ANALYSIS INDICATE OTHERWISE IS FEASIBLE.