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BOARD OF ADJUSTMENT
Tuesday, May 1, 2018 at 6:00 P.M.
200 Lincoln Ave. Santa Fe NM
City Council Chambers

- A. ROLL CALL
- B. PLEDGE OF ALLEGIANCE
- C. APPROVAL OF AGENDA
- D. APPROVAL OF MINUTES AND FINDINGS/CONCLUSION:
MINUTES: March 13, 2018

FINDINGS/CONCLUSIONS:

Case #2017-90. 504 Jose Street Variances.

- E. OLD BUSINESS
- F. NEW BUSINESS

1. **Case #2018-21. 2874 Industrial Road Variance.** Peter Joseph of J.A.K. Studios, LLC, Owner, requests approval of a variance to Table 14-8.6-1 "Parking and Loading Requirements" for a warehouse at 2874 Industrial Road. The property is approximately 0.143 acres and is zoned I-2 (General Industrial). (Margaret Ambrosino, AICP, Case Manager). **(TO BE POSTPONED INDEFINITELY)**
2. **Case #2018-01.** Appeal of Ellen Kleiner from the December 19, 2017 Final Decision of the Land Use Director to Issue Building Permit No. 17-3415 to William Herrmann to construct a fence at 130 E. Lupita Road. (Rick Word, Assistant City Attorney)

- G. STAFF COMMUNICATIONS
- H. MATTERS FROM THE COMMISSION
- I. ADJOURNMENT

NOTES:

New Mexico law requires the following administrative procedures be followed by zoning boards conducting "quasi-judicial" hearings. In "quasi-judicial" hearing before zoning boards, all witnesses must be sworn in, under oath, prior to testimony and will be subject to cross-examination. Witnesses have the right to have an attorney present at the hearing. The zoning board will, in its discretion, grant or deny requests to postpone hearings. Persons with disabilities in need of accommodations, contact the City Clerk's office at 955-6520, five (5) working days prior to meeting date.

**MINUTES OF THE MEETING OF THE
BOARD OF ADJUSTMENT**

200 Lincoln Ave. Santa Fe, NM

May 1, 2018

6:00 p.m.

A. CALL TO ORDER & ROLL CALL

Gary Friedman, Chair of the Board of Adjustment called the meeting to order at 6:11 p.m. held at the City Council Chambers. A quorum was established with roll call.

PRESENT:

Gary Friedman, Chair
Coleen Dearing
Daniel H. Werwath
Donna Reynolds
Douglas Maahs
Rachel L. Winston, Vice Chair

NOT PRESENT/EXCUSED:

Patricia Hawkins

OTHERS PRESENT:

Noah Berke, City Land Use
Rick Word, City Attorney's Office
→ Linda Vigil, Stenographer
Ellen Kleiner, Appellant
Sam Minner, Attorney for Appellant
Paul Helma
Ralph Scheuer, Attorney for Applicant

B. PLEDGE OF ALLEGIANCE

C. APPROVAL OF AGENDA

MOTION: Mr. Maahs moved to approve the agenda as presented with a second from Mr. Werwath which passed by voice vote.

**D. APPROVAL OF MINUTES OF MARCH 13, 2018 and
FINDINGS/CONCLUSIONS: Case #2017-90. 504 Jose Street Variance (See Exhibit
A)**

MOTION: Mr. Werwath moved to approve the minutes and findings of Case 2017-90 as presented with a second from Ms. Dearing which passed by voice vote.

E. OLD BUSINESS

There was not any old business to discuss.

F. NEW BUSINESS:

1. Case# 2018-21. 2847 Industrial Road Variance. Peter Joseph of J.A.K. Studios, LLC, Owner, requests approval of a variance to Table 14-8.6-1 "Parking and Loading Requirements" for a warehouse at 2874 Industrial Road. The property is approximately 0.143 acres and is zoned I-2 (General Industrial). (Margaret Ambrosino, AICP, Case Manager.) **(TO BE POSTPONED INDEFINITELY)**

2. Case#2018-01. Appeal of Ellen Kleiner from the December 19, 2017 Final Decision of the Land Use Director to Issue Building Permit No. 17-3415 to William Herrmann to construct a fence at 130 E. Lupita Road. (Rick Word, Assistant City Attorney)

Staff Report:

Mr. Word discussed his report and entire permit application (See Exhibit B) is part of the packet. Mr. Word gave the short version of the case, the permittee would like to build a coyote fence between the properties.

Appellant:

Mr. Sam Minner introduced himself as representing Ms. Kleiner the property owner and appellant. Mr. Minner explained there is a fence agreement that was signed by the property owners before the Callahan's and neighbors.

Mr. Minner disclosed that Mr. Scheuer worked with Vice Chair Winston and wanted that to be disclosed. Ms. Winston feels she can be impartial.

Mr. Minner explained the agreement was entered into with other neighbors as well. The agreement created was to make setbacks and restrictions. The permit would violate both the agreement and the easement.

Ms. Kleiner was sworn in. Ms. Kleiner described the shape of the lot. She has been there for 38 years. The surveyor put the plans and lots together. That is when the fence and set back agreement was made.

Ms. Kleiner purchased the lot in 1980 and has raised her kids there. She loves the property. Ms. Kleiner discussed the casita on the property which she depends on the income and has had many tenants over the years. There has never been an issue with the walkway. The lot was sold to some tenants *Christina Bronco Kraft and Mike Baker*, who were both realtors they co-owned. Ms. Bronco Kraft built on it and sold it to the Hermanns in 2013.

Ms. Kleiner explained how the parking was agreed upon was to keep the egress and ingress of the property. There is full access from the road and parking available.

Ms. Kleiner stated she has renovated the casita and maintains it for the occupant. To date, Ms. Kleiner has never met the Hermanns. They rarely visit the home.

Ms. Kleiner passed out some photos of the casita. (See Exhibits C & D) showing the front of the casita and the gate. The tenants have always had privacy, this area is for convenience for deliveries.

Ms. Kleiner discussed the gate and a portion of the wall she would like to get the stucco fixed on but cannot with the fence. The side gate should stay accessible for emergencies. There is a long dangerous narrow area like a crawl space which is cut off the west facing gate. The view would also be obscured.

Ms. Kleiner discussed the health of There is one there now who has a serious illness who needs medical attention EMT's carry her out. She needs access in that area. Ms. Kleiner has the surveyor come in November to inspect his caps and markers he confirmed the concerns are valid.

Ms. Kleiner states she is willing to retain in the fence agreement and set back she is willing to share any tax burden with the Hermanns if that will help.

Mr. Minner discussed the licensing agreement and the importance of the intent of the parties. Mr. Minner stated the duration of the rights is in the language of the decision in the deed. The deed is included in the packet. When the property was sold to the Herman's they were given notice and knew it existed.

Mr. Minner passed out a boundary survey to replace the one in the packet for the application. (See Exhibit E) It was recorded a day later with the correction.

Applicant:

Mr. Ralph Scheuer (123 East Marcy) representing the Hermann's discussed the question is this a license or an easement. It is not an ownership of land. It is too ambiguous to be recognized as an easement. The dotted line is not on record. It refers on the right to cross.

Mr. Scheuer states the word easement isn't mentioned, the word license is. It should be more specific, the Hermann's appreciate the interest Ms. Kleiner has in her home and casita. There is no loss of income, solitude, privacy, or safety they just want to build a fence they are not here often. This area where she wants for egress or ingress has a patio with furniture etc. Where there could be access there is a large flower bed that runs 8-10 feet.

Mr. Scheuer presented some photos (See Exhibits F-J) showing the casita and the fence stakes. The access can be made wider.

Chair Friedman the asked if the license agreement saying to the heirs and assigns and what does Mr. Scheuer make of it? Mr. Scheuer states if they would've said other things and explained the easement and the uses and proven an overburden an allowed purposes it would be different.

Mr. Scheuer cannot decipher the red dashed lines. Ms. Winston asked if this was subsequent to the agreement. Was it part if the public record and part of the deed.

Mr. Scheuer made reference to the easement with a telephone company throughout the City and County and no one has the courage to remove it from their deeds.

Chair Friedman asked if the parties have tried to work out an agreement. If not, it will likely go to the courts.

Mr. Werwath asked about the amended boundary. If it had been submitted with the application would that have been cause to not issue the permit?

Mr. Berke explained if this had been submitted they wouldn't have issued it. They cannot allow fences over easements because it blocks access. It is not a legal lot of record that usually asks for precise easements.

Mr. Werath asked if it was recorded correctly. Mr. Berke states it is recorded as a boundary survey.

Ms. Winston is concerned, she has been on this board for eleven years and there has never a private covenant issue brought here. It is not their role evaluate the code. What is the standard of interpreting the code?

Mr. Berke explained the City doesn't enforce private covenants. There was only one other case since he's been here. The City Attorney granted that appeal based on the language.

Mr. Word explains in the memo it is an appeal for the board. Staff made a decision before it had all the survey that referenced the agreement that is the reason they are here. The burden of proof is on the appellant. This is a case where a permit was issued, the appellant argues it violates the agreement. The code says the affected parties are tied to this board.

Chair Friedman asked what is the criteria and is it proper for the board to act. Mr. Word states in the memo it explains if the board agrees the agreement created the easement they can act.

Chair Friedman asked if the decision of the Land Use department was correct with their resources given to them. He also believes it is not in the Boards purview to make legal decisions whether it is an easement or a license. Perhaps they can rule on the decision of the land use administration, if it was correct or incorrect.

Ms. Dearing asked if the appeal was timely posted. Mr. Minner states his clients did not have notice of it. Until the day before they filed the appeal with the allotted time allowed.

Mr. Word addressed that in the memo. Cases like this are common they did get notice and were not denied the opportunity to appeal so it is moot.

Mr. Werwath asked if there is a clear definition for easement in the code. Mr. Berke states it is not in the code, however it is in the planners dictionary and is used where it is excepted with the industry. (See Exhibit K)

Mr. Word offered a definition in his memo that is recommended by the courts.

Ms. Kleiner in response to the comments of Mr. Scheuer there are not any windows that look out to the walkway. There is one table with 2 chairs for a tenant they can remove them. Ms. Kleiner presented several other photos (See Exhibit L).

Ms. Kleiner states that she felt it was right to make the appeal.

Mr. Paul Helma, partner to Ms. Kleiner (134 West Lupita) gave a background. There is an elaborate amount of fencing. They cannot see the property now. The construction will create a no man's land. The view the selling factors for renting the casita.

The fence will be 8 inches in front of the window. The current occupant has emergency personnel come up to three times a week for her needs. They need to have access it's a matter of life and death. It will create a time issue if they need to pass through their house to get to her. Mr. Helma explained when he delivered paperwork to Mr. Scheuer's office he spoke to him about the issue with the tenant.

Mr. Helmas states he met Mr. Hermann and he was told that no woman is going to tell him where he is going to build his fence. All attempts have fallen on deaf ears.

The casita tenant has difficulty walking once the construction was stopped it has left holes on the property. They could've worked it out to talk to them and they refused.

PUBLIC HEARING CLOSED

Ms. Winston asked staff what the options of the board are if they decline to rule on the private covenants.

Mr. Berke stated if the staff were incorrect in the submittal, the board's interpretations of enforcing then they don't have to rule if it's an easement or a license. It was in staff error.

Chair Friedman asked if this went to the City Attorney's Office before. Mr. Berke states they did not consult with the City Attorney's Office.

Ms. Winston thanked the appellant and agrees with the Chair it is seems like they could consider working it out on their own.

MOTION: Ms. Winston moves to deny the appeal of Case 2018-01 the decision based on evidence and that the Board not to rule on the interpretation of private covenant.

A brief discussion was held on the memo included in the packet.

AMENDED MOTION:

MOTION: Ms. Winston moves to deny the appeal of Case 2018-01 the decision based on evidence and that the Board not rule on the issue if it is an easement or a license. Ms. Dearing seconds the motion.

DISCUSSION:

Mr. Werwath expressed the process is clear that it was recorded and on a plat, the hinge of it is knowing it and at the time of it would they have granted a permit. That is what is asked to decide. The intent of the agreement is clear. It has ambiguity if it is revocable.

Make clear in denying the appeal it appears in bad faith and violation of the agreement.

ROLL CALL VOTE:

Opposed: Mr. Maahs, Ms. Reynolds

Abstain: Ms. Winston, Chair Friedman

In Favor: Ms. Dearing, Mr. Werwath

The motion did not pass.

DISCUSSION:

Ms. Dearing asked if Land Use had the drawing showing the dashed lines submitted with the proposal. Mr. Word states they had the one that is attached in the packet not the one with the lines.

Chair Friedman asked if it was recorded. Mr. Berke explained it was not included at all in the permit packet. They aren't normally included.

Mr. Word states the warranty deed contains an exhibit which is the agreement.

Chair Friedman asked if staff pulled it as it was referenced. Mr. Word states they did not.

NEW MOTION:

In regards to Case # 2018-01 in reference permit # 17-3415 at 130 E. Lupita Road Mr. Werwath moves to affirm the appeal of the appellant based on the fact the Land Use staff did not review the licensing agreement submitted in the warranty deed, Ms. Dearing seconds the motion which passed by voice vote. *Ms. Winston and Chair Friedman abstain from the vote.*

G. STAFF COMMUNICATIONS

Mr. Berke informed the Board that in the coming months the packets will be digitally submitted and able to review on an ipad. Land Use will try to implement it at a training or a special meeting. Other boards use them as well. As soon as the purchase orders are submitted and they are received, the software will be loaded through IT.

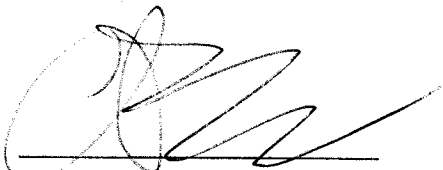
H. MATTERS FROM THE COMMISSION

Chair Friedman welcomed Mr. Word and thanked him for his work.

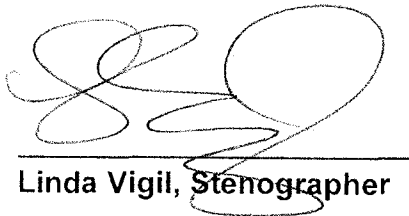
I. ADJOURNMENT

There being no further business the Board of Adjustment meeting was adjourned at 7:32 p.m.

SIGNATURES



Gary Friedman, Chair



Linda Vigil, Stenographer

City of Santa Fe
Board of Adjustment
Findings of Fact and Conclusions of Law

Case #2017-90

504 Jose Street

Applicants' Name- Mark and Martha Alexander

Agent's Name- Sibylle Mueller

THIS MATTER came before the Board of Adjustment (Board) for hearing on March 13, 2018 upon the application (Application) of Sibylle Mueller, agent for Mark and Martha Alexander (Applicants).

The Applicant requests approval of a variance from Santa Fe City Code (Code) Section 14-10.3(A). The property is located at 504 Jose Street and is zoned BCDWES (Business Capitol District – Westside Subdistrict).

After conducting a public hearing and having heard from staff and all interested persons, the Board hereby FINDS, as follows:

FINDINGS OF FACT

1. The Board heard reports from staff and received testimony and evidence from the Applicants. Two members of the public in attendance at the March 13, 2018 hearing offered testimony supporting the Application.
2. Code Section 14-2.4(C)(3) authorizes the Board to hear and decide a request for a variance under Code Section 14-3.16(C) when such a request is not required to be heard by the Planning Commission.
3. Code §14-3.1(F)(2)(a)(iv) requires an Early Neighborhood Notification (ENN) meeting, and Code Section 14-3.1(F)(4)-(6) establishes procedures for the ENN, including:
 - a. Compliance with the notice requirements of Code Section 14-3.1(H) [Code Section 14-3.1(F)(4)];
 - b. Timing for the ENN meeting and the principles underlying its conduct notice and public hearing requirements [Code Section 14-3.1(F)(5)]; and
 - c. Guidelines for the conduct of the ENN meeting [Code Section 14-3.1(F)(6)];
4. Notice was properly given in accordance with the notice requirements of Code Section 14-3.1(H)(1)(a)-(d).
5. An ENN meeting was held on November 17, 2017, at the Main Public Library.
6. The ENN meeting was attended by representatives of the Applicants, City staff and 7 interested persons and the discussion followed the guidelines set out in Code Section 14-5.3.1(F)(6). No concerns were raised.
7. The structure at issue is a single building of approximately 1842 square feet constructed along the south and east property lines. The building currently has little if any insulation.

~~XXXXXXXXXX~~ Exhibit A

8. The structure has existed on the lot since at least 1965 and has been used for a series of retail businesses and for commercial jewelry-making activity.
9. There is a zero lot line at the rear of the structure where it abuts the property located at 147 Daniel Street.
10. Building setback requirements for the BCDWES district were imposed many years after construction of the structure.
11. The building at issue is a legal nonconforming structure under Code Section 14-10.3 due to insufficient setbacks.
12. Code Section 14-10.3(A) provides: "A legal nonconforming structure shall not be enlarged or altered in a way that increases the degree or extent of nonconformity."
13. A majority of the properties in the same zoning district have one or more structures that do not comply with setback requirements.
14. The rearmost approximately 500 square feet of the building is covered by a roof that slopes downward towards the rear of lot. The height of the roof at the rear of the building is approximately 8 feet. The sloping roof results in a lowered ceiling in this portion of the building.
15. The building has a 1358 square foot basement.
16. The Applicants seek a variance to allow renovations to the structure to allow its use as a retail jewelry store.
17. The proposed repairs and renovations include raising the ceiling in the rear of the building where the current ceiling height restricts usage of approximately 500 square feet of floor space. In conjunction with raising the ceiling, Applicants propose raising the roof from its current height of 8' to at least 11' -6", and adding insulation to the entire roof and adding a parapet to give the building a unified height of 14' -0."
18. The Agent testified that the proposed repairs involve 60% of the building.
19. The proposed repairs and renovations would not alter the building's footprint or increase its total square footage, and would only minimally increase the interior volume of the building.
20. The neighbor residing to the rear of the structure, who is arguably most effected by the proposed extension of the roof line in the rear of the structure, testified she would prefer to see the proposed new stucco wall than the current sloping roof.
21. The proposed repairs and renovations involve more than fifty percent of the building and thus require compliance with provisions of the International Building Codes adopted by the City, including IEBC-2015, IBC-2015, and IECC-2009. Renovations or remodeling deemed to rise to Alteration Level 3 under the building codes require a minimum ceiling height of 7' -6" [IBC-2015] for occupied spaces and roof insulation that will add 12" to the roof height [IECC-209].
22. Code Section 14-3.16(B) authorizes the Board to approve, approve with conditions, or deny a variance based on the Application, input received at the public hearing and the approval criteria set forth in Code Section 14-3.16(C).
23. City Land Use Department staff reviewed the Application and related materials and information submitted by the Applicant for conformity with applicable Code requirements and provided the Board with a written report of its findings (Staff Report) and together with a recommendation that the Board deny the variance.
24. The information contained in the Staff Report and the testimony and evidence presented at the hearing are sufficient to meet the five approval criteria required under §14-3.16(C)

with respect to the Applicant's request for a variance from the requirements of Code Section 14-10.3(A). In order to grant a variance pursuant to §14-3.16(C), the Board must find that:

- (a) *special circumstances exist such as an inherent conflict in applicable regulations that cannot be resolved by compliance with the more restrictive provision [§14-3.16(C)(1)(c)].* The Application successfully identifies and the record supports a finding of an inherent conflict between Code Section 14-10.3(A) and the applicable requirements of the building codes, in particular the IBC-2015 and IECC-2009, regarding ceiling heights in occupied areas and insulation, respectively.
- (b) *the special circumstances make it infeasible, for reasons other than financial cost, to develop the Property in compliance with the Ordinance [§14-3.16(C)(2)].* The Application, testimony and other evidence introduced at the hearing establishes that it is infeasible for reasons other than financial cost to renovate the property in compliance with the standards of Chapter 14, including §14-10.3(A). Load bearing walls extend from the basement to the parapet. The walls at the rear of the building near or abutting the property line are essential to the structural integrity of the building and cannot be removed to permit the amount of setback currently required by the Code. The needed renovations trigger the application of building code provisions requiring minimum ceiling heights and insulation levels that cannot be met without raising the ceiling and roof heights of the rear of the building.
- (c) *the intensity of development will not exceed that which is allowed on other properties in the vicinity that are subject to the same relevant provisions of Chapter 14 §14-3.16(C)(3)].* Many if not most of the structures in the vicinity are also legal nonconforming structures due to inadequate setbacks. The requested variance to allow the Applicants to raise the ceiling and roof for the rear portion of the building and to slightly increase the roof height for the remainder will not result in an intensity of development exceeding what is allowed under the Code. If the building were otherwise conforming, the proposed increase in ceiling and roof heights would be allowed under applicable zoning standards. The proposed renovation would not increase the footprint of the building, and would not result in significantly larger numbers of employees or customers at the building.
- (d) *the variance is the minimum variance that will make possible the reasonable use of the land or structure §14-3.16(C)(4)].*
 - i. As noted, the performance of deferred, necessary maintenance on the building triggers the application of building code requirements regarding ceiling height and insulation. The applicants do not propose to increase the ceiling or roof heights more than is necessary to comply with building code requirements. As noted, the proposed work would not alter the footprint of the building. The request to raise the ceiling and roof for a portion of the building increases the degree or extent of nonconformity, if all, only minimally.
 - ii. Approval of the requested variance is consistent with the purpose and intent of Chapter 14 of the Code, with the applicable goals and policies of the general plan, and with the purposes and intent of Code Article 14-10.
- (e) *the variance is not contrary to the public interest §14-3.16(C)(5)].* The Staff Report and evidence adduced at the hearing establish that the requested variance would not cause a significant adverse effect on the public interest. Granting the requested

variance and allowing the proposed renovations will increase the energy efficiency of the building, improve its appearance, and result in a structure that is more harmonious with surrounding structures. The proposed increased parapet height will allow for screening of roof-mounted mechanical equipment. In addition, there is no neighborhood opposition stated to the proposal, and the neighbor most effected testified she would prefer to look onto a raised rear wall with a parapet than the current sloped roof.

CONCLUSIONS OF LAW

Under the circumstances and given the evidence and testimony submitted during the public hearing, the Board CONCLUDES as follows:

1. The Board has the authority under the Code to approve the variance requested for the Property.
2. The Application for a variance was properly and sufficiently noticed in accordance with Code requirements.
3. The ENN meeting complied with the requirements established under the Code.
4. The Applicant has met the criteria for the requested variance set forth in Code Section 4-3.16(C).

WHEREFORE, IT IS ORDERED ON THE __th OF APRIL 2018 BY THE BOARD OF ADJUSTMENT OF THE CITY OF SANTA FE:

That for the reasons set forth in the foregoing Findings of Fact and Conclusions of Law, the requested variance is approved as applied for.

Gary Friedman
Chairperson

Date:

FILED:

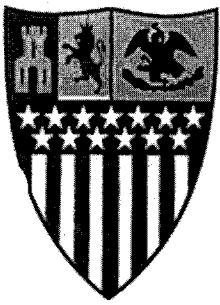
Yolanda Y. Vigil
City Clerk

Date:

APPROVED AS TO FORM:

Richard B. Word
Assistant City Attorney

Date:



City of Santa Fe, New Mexico

200 Lincoln Avenue, P.O. Box 909, Santa Fe, NM 87504-0909

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Alan Webber, Mayor

Councilors:

Signe I. Lindell, Mayor Pro Tem, District 1

Renee Villarreal, District 1

Peter N. Ives, District 2

Carol Romero-Wirth, District 2

Roman "Tiger" Abeyta, District 3

Chris Rivera, District 3

Mike Harris, District 4

JoAnne Vigil Coppler, District 4

Memorandum

To: Members of the Board of Adjustment (Board)

From: Rick Word, Assistant City Attorney *RBW*

Re: Appeal of Ellen Kleiner from the December 19, 2017 Decision of the Land Use Department to Issue Building Permit No. 17-3415 at 130 East Lupita Road. Case No. 2018-01.

Date: April 27, 2018 for the May 3, 2018 Meeting of the Board.

I. THE APPEAL

On January 2, 2018, Ms. Ellen Kleiner (Appellant) filed a Verified Appeal Petition (Petition) appealing the Decision of the Land Use Department to Issue Building Permit No. 17-3415 at 130 E. Lupita Road (the Permit). A copy of the Petition is provided as **Exhibit A**. A copy of the Department's Building Permit file, including the application and permit, is attached as **Exhibit B**. City Code Section 14-2.4(C)(1) provides that the Board has authority "to hear appeals of final actions of the land use director applying the provisions of Chapter 14, unless jurisdiction for such appeals is otherwise specifically reserved to another land use board". Jurisdiction over this appeal has not been reserved to another land use board and this appeal is thus properly before the Board.

Both the Appellant and the Applicants are represented by counsel who will appear at the hearing, present additional evidence, and argue their respective cases.

II. THE PROPERTY

Linda Hart Herrmann and William C. Herrmann (Applicant-Appellees) own the property at 130 E. Lupita, otherwise known as Lot 19 of Lovato Subdivision No. 3 in Santa Fe, New Mexico. The Herrmann's property is adjacent to and west of the property owned and occupied by Appellant, located at 134 E. Lupita, and identified as Lot 20 of Subdivision No. 3 of the Lovato Grant. Lots 19 and 20 are each approximately 0.5 acres. Ms. Kleiner's residence extends on an east-west axis to within approximately five feet of the lot line for Lot 19. A long-established flagstone walkway extends from a gravel drive located in Ms. Kleiner's front yard, around the western end of her

Exhibit B

house and across the eastern edge of Lot 19 before terminating at the back of her house near its western end. The pathway provides the most direct access to an apartment at the rear of Ms. Kleiner's house.

III. HISTORY OF THE CASE

Appellant originally owned both Lots 19 and 20. On December 14, 1993, Ms. Kleiner transferred all of Lot 19 by warranty deed to Kimberly and Thomas Callanan. A copy of this warranty deed is attached as **Exhibit C**. Lot 19 as then conveyed is shown on a Plat of Survey entitled "A Replat Showing Lot Line Adjustment Between Lot 19 Albert Replat and Lot 20 Subdivision No. 3 of the Lovato Grant by the Santa Fe Holding Company, City of Santa Fe, Santa Fe County, New Mexico." See **Exhibit B**. The warranty deed issued to the Callanans noted that the conveyance was subject to "restrictions, reservations and/or easements of record." On that same date as the issuance of the warranty deed, Kimberly and Thomas Callanan executed before a notary an agreement entitled "LICENSE and FENCE AGREEMENT" (the Agreement), a copy of which is attached as **Exhibit D**. The License and Fence Agreement stated that the Callanans, as owners of Lot 19:

[H]ereby grant to Ellen S. Kleiner, her heirs and assigns, owner of Lot 20, Lovato Subdivision No. 3, the right to cross the eastern portion of Lot 19, on foot, for access from the back yard of Lot 20 to Lupita Street. No permission is granted for vehicular traffic of any kind.

Kimberly Callanan and Thomas Callanan further agree that no fence shall be constructed on Lot 19 which is closer to Lot 20 than is shown on the red dashed line on the plat attached hereto as Exhibit A.

The License and Fence Agreement was recorded with the County Clerk on March 2, 1994, and is found at Book 1029, pages 589-90.

On February 4, 2005, the Callanans conveyed Lot 19 by warranty deed to Mike Baker and Cristina Branco. A copy of the warranty deed is attached as **Exhibit E**. The grant was expressly made subject to various restrictions and easements, including the License and Fence Agreement, noted as being recorded in Book 1029, Page 589 in the records of Santa Fe County. On April 2, 2013, Ms. Branco conveyed Lot 19 by warranty deed to the Applicant-Appellees, subject to matters described in an attached Exhibit A, which included a reference to a "License and Fence Agreement, recorded March 2, 1994, in Book 1029, Page 589, records of Santa Fe County." A copy of this warranty deed is attached as **Exhibit F**.

The Appellant rents out an apartment located in the western end of her home. Access to the apartment is through the rear of the home. Appellant and her tenant have utilized a flagstone path crossing the Applicant-Appellees' yard near the boundary of the two lots to access the apartment for many years. In doing so, Appellant has relied upon the License and Fence Agreement. As

authorized by the construction permit, the proposed coyote fence would be constructed along the east property line of the Applicant-Appellees' lot. Construction of such a fence would thus effectively prevent Appellant, her tenant, and any guests from accessing the apartment by means of the flagstone path.

On November 15, 2017, the Applicant-Appellees applied for a building permit to construct a 5'-11' foot high coyote fence along the east property line of their lot. As part of their Application, Applicant-Appellees submitted a site plan showing the proposed location of the fence, a survey plat, an Improvement Location Report showing the location of the flagstone walkway, and the warranty deed conveying the property to the Applicant-Appellees. The warranty deed included as an attachment a list of easements and restrictions on the use of the property, specifically referencing the License and Fence Agreement. City Staff reviewed the Application for compliance with the City Code and the granted Building Permit No. 17-3415 on December 19, 2017. See **Exhibit B**.

On January 2, 2018, Appellant filed her Verified Appeal Petition. On March 21, 2018 Appellant, through counsel, submitted a Memorandum Brief in Support of Appeal, attached as **Exhibit G**. The Memorandum Brief argues that the License and Fence Agreement created an easement appurtenant allowing her heirs and assigns to cross the eastern portion of applicant-Appellees' lot and also a restrictive covenant prohibiting Applicant-Appellees from building a fence on that portion of the lot. Appellant argues that her rights would be violated by the construction of the proposed fence. Applicant-Appellees, through counsel, have filed a Reply Memorandum Brief, attached as **Exhibit H**. Applicant-Appellees argue in their brief that the License and Fence Agreement created a license, not an easement, and that the Permit was thus properly granted.

IV. BASIS OF APPEAL

The Appellant claims that the Building Permit does not satisfy Chapter 14 requirements.

Claim #1: The building permit allowing Applicants to build a fence along the boundary of their property with Appellant violated her rights created by the Agreement, which include rights under an easement appurtenant which expressly prohibit the construction of a fence blocking her use of the easement.

Claim #2: The Applicant-Appellees failed to timely post the Notice of Application for Building Permit at the site. The Appellant contends that the Notice of Building Permit was not posted by the Applicant-Appellees until December 30, 2017.

V. RELIEF SOUGHT

The Appellant asks the Board to grant her appeal and reverse the decision of the Land Use Department, and deny the Applicant-Appellees' request for a building permit.

VI. ISSUES RAISED BY THE APPEAL: ANALYSIS

Code §14-3.17(A)(2) provides that an appeal can only be filed if:

- (1) the final action appealed from does not comply with Code Chapter 14 or §§3-21-1 through 3-21-14 NMSA¹ (the Statute);
- (2) Code Chapter 14 has not been applied properly; or
- (3) the decision appealed from is not supported by substantial evidence.

Claim #1: The License and Fence Agreement created an easement for the benefit of Appellant, and the Permit allowing Applicant-Appellees to construct the fence violates Appellant's rights under the easement.

Appellant argues that the License and Fence Agreement granting the right to cross the eastern portion of Lot 19 on foot created an easement appurtenant, and that allowing the construction of the proposed fence to run along the property line of Lot 19 would deprive her of her rights under the easement. Applicant-Appellees argue that the Agreement merely created a license which can be revoked at any time. The question before the Board is therefore whether the License and Fence Agreement executed by the Callanans in connection with their purchase of Lot 19 from the Appellant created an easement, or, as urged by the Applicant-Appellees, a license.

The New Mexico Supreme Court has ruled that “[a]n easement is the generic term for a liberty, privilege, right or advantage which one has in the land of another.” Martinez v. Martinez, 1979-NMSC-104, ¶ 11, 93 N.M. 673, 675, 604 P.2d 366, 368 (internal quotation marks and citation omitted). An easement “creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” City of Rio Rancho v. Amrep Sw. Inc., 2011-NMSC-037, ¶ 33, 150 N.M. 428, 260 P.3d 414, 424 (internal quotation marks and citations omitted). The easement holder's right to use the property is limited to the particular purpose for which the easement was created. Id. An “easement appurtenant” is an easement benefitting land abutting property burdened by the easement. See James W. Ely, Jr. & Jon W. Bruce, The Law of Easements & Licenses in Land: Division of Easements Appurtenant § 2:2 (2014). Courts have deemed an easement granted in order to allow convenient access to the grantee's land by means of crossing the land of the grantor an easement appurtenant. Luevano v. Group One, 1989-NMCA-061, ¶12, 108 N.M. 774, 777, 779 P.2d 552, 555.

In contrast, a license, in the context of real property, is defined as “the permission to do something on the land of another that, without permission, would be a trespass, a tort, or otherwise unlawful.”

¹ Section 3-21-8 B. NMSA 1978 provides in pertinent part: “Any aggrieved person...affected by a decision of an administrative...commission or committee in the enforcement of Sections 3-21-1 through 3-21-14 NMSA 1978 or ordinance, resolution, rule or regulation adopted pursuant to these sections may appeal to the zoning authority. ...”

Tarin's, Inc. v. Tinley, 2000-NMCA-048, ¶ 20, 129 N.M. 185, 193, 3 P.3d 680, 688. “The most salient feature of a license is its revocability.” Tarins, Inc. v. Tinley, ¶ 21. Significantly, a license “may be revoked at will no matter how long it has continued.” Id. (internal quotations and citations omitted).

In determining whether an easement has been created, and if created, its scope, New Mexico courts look to the intent of the parties. See Olson v. H & B Props. Inc., 1994-NMSC-100, ¶12, 118 N.M. 495, 498, 882 P.2d 536, 539. Skeen v. Boyles, 2009-NMCA-080, ¶¶ 17-24, 146 N.M. 627, 633–35, 213 P.3d 531, 537–39. When it is asserted that an easement was created by a written instrument or agreement, the intent of the parties is ascertained from the language used, viewed in light of the surrounding circumstances. Dethlefsen v. Weddle, 2012-NMCA-077, ¶12, 284 P.3d 453, Skeen v. Boyles, ¶18.

The scope of the Agreement in this case is clear: it allows Appellant to cross the Herrmanns’ property to access the rear of her home and the apartment maintained there, and prohibits blocking such access with a fence. The question before the Board is whether the Agreement created an easement, which is binding on Applicant-Appellees, or a license, which is revocable by them. When reviewing the Agreement to determine whether it created an easement or a license, there are several salient facts regarding the Agreement that should be considered. The following list, although perhaps not exhaustive, is illustrative. First, the parties to the Agreement at issue are Applicant-Appellees’ predecessors-in-interest, the Callanans, as grantors, and Appellant, as grantee. The Callanans executed the Agreement on the same day the deed transferring ownership of Lot 19 to them was executed by Appellant, and it would thus seem reasonable to assume it was part of the real estate transaction. The Agreement is titled “License and Fence Agreement”. The word “easement” is not used anywhere in the Agreement. The Agreement was recorded with the County Clerk so that it could be found and referenced in subsequent transfers. The Agreement states that the Callanans *grant* the right to cross the eastern portion of Lot 19 on foot for access from the back yard of Lot 20 to Lupita Street. The grant was made not only to Appellant, but also to *her heirs and assigns*. The Agreement contains no language suggesting the grantors retained any right to revoke the rights granted to the Appellant.

As recognized in Appellant’s Memorandum Brief, the New Mexico Court of Appeals decision in Skeen v. Boyles provides guidance as to how New Mexico courts review and interpret an instrument that is claimed to create an easement. In Skeen, the Court of Appeals reviewed a lower court finding that a well sharing agreement between two ranch families created a reciprocal easement appurtenant that ran with the land. The agreement at issue in that case granted each party the right to cross the other’s land to access water for livestock. The agreement did not use the word “easement” and was silent as to the rights of the parties’ heirs or assigns under the agreement. The Skeen court, relying on established New Mexico case law, held that no particular words are required to be included in an instrument for it to create an easement. Skeen, ¶18. The court held that “[a]ny words which clearly show intention to grant an easement are sufficient, provided the

language is certain and definite in its term.” *Id.* (citations omitted) The court in Skeen concluded that the District Court had properly found that an easement was created by an agreement that used the word “grant” to convey to one party a “right to go over and across” the other party’s land, when the agreement was made in the context of a land transaction between the two parties. Skeen, ¶21.

In their Reply Memorandum, Applicant-Appellees argue that Skeen can be distinguished because the agreement in that case was reciprocal, and the parties each codependent on water on the other’s property, noting that there is no reciprocity or codependency between the parties to this appeal. However, whether or not Skeen is distinguishable on its facts, Applicant-Appellees do not show that the analysis employed is invalid and should not guide the Board in this case. Applicant-Appellees also argue that had Appellant intended to create an easement, she could have included a reservation of the right to cross Lot 19 in the deed in which she conveyed that lot to Applicant-Appellees’ predecessors in interest. Although perhaps a more elegant and straightforward way to create an easement, there is no legal prohibition against the creation of an express easement by means of a separate agreement, as Appellant urges was done here. Indeed, that is how the easement at issue in Skeen was created.

Applicant-Appellees’ most obvious and compelling argument for construing the Agreement to create a license is the fact that instrument uses the word “license” in its title. However, when reviewing an instrument to determine whether it created an easement or some other interest, courts have tended to rely more on the contents of the agreement than the title given it by the parties. See: Baseball Pub. Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362, 119 A.L.R. 1518 (1938) (instrument titled “lease” found to create an easement); Millbrook Hunt, Inc. v. Smith, 249 A.D.2d 281, 282, 670 N.Y.S.2d 907, 908-909 (2d Dep’t 1998). The title given to the Agreement in this case is not by itself determinative. If the Board finds that the language of the Agreement, when taken as whole, indicates an intent to create an easement, it is justified in concluding an easement appurtenant was created.

Claim #2: The construction permit was not timely posted by Applicant-Appellees.

City Code Section 14-3.2(B)(5) provides: “A building permit shall be posted on the property for which it has been issued within 24 hours of its issuance. It shall be prominently displayed and visible from a public street. The permit shall remain in place until after the completion and final inspection of all work covered by the permit.”

The Appellant claims that the Permit was not posted in accordance with the foregoing requirements until December 30, 2017. But even if there were a deficiency in posted notice, the Appellant had actual notice of the Permit and was afforded an opportunity to appeal. “‘Actual notice’ refers to information that was communicated directly to or received by a party.” Pollock v. Ramirez, 117 N.M. 187 (Ct. App. 1994). “Actual notice... is sufficient and dispenses with statutory notice.” Acceptance Corp. of Sante Fe v. Valencia, 70 N.M. 307, 309 (1962). See also, Bennett v. City Council for City of Las Cruces, 1999-NMCA-015, 126 N.M. 619, 621 (“Our Supreme Court has

held that 'substantial compliance' with notice and publication is sufficient to satisfy statutory requirements. ...stating that while 'some courts have held that even a minor defect in notice will invalidate an action taken by the zoning authority, New Mexico does not take such a strict view...'" (citations omitted)

VII. CONCLUSION

The Appellant has alleged a valid basis for appeal under Code §14-3.17(A)(2), but still bears the burden of proof.

Option #1: If the Board concludes based on substantial evidence that the Appellant has established that the License and Fence Agreement created an easement across Applicant-Appellees' property and that construction of the proposed fence would infringe upon Appellant's rights under the easement, it should grant the Appeal and deny the building permit.

[MOTION: I move to grant Appellant's Appeal in Case No. 2018-01 and direct Staff to prepare for the Board findings of fact and conclusions of law reflecting our decision to deny the requested permit.]

Option #2: If the Board concludes based on substantial evidence on the record that the License and Fence Agreement created a license and not an easement, it should deny the Appeal and grant the building permit.

[MOTION: I move to deny Appellant's Appeal in Case No. 2018-01 and direct Staff to prepare for the Board findings of fact and conclusions of law reflecting that decision.]



LUD Use Only
 Time Filed: 11:07
 Fee paid: \$100.00
 Receipt attached:

(date stamp)
RECEIVED
 JAN 2 2018
 Land Use Dept.

Case # 2018-01
VERIFIED APPEAL
PETITION

****Two originals of this form must be filed. The Land Use Department Director or his/her designee will enter the date and time of receipt and initial both originals. See Section 14-3.17(D) SFCC 2001 for the procedure.****

Appellant Information

Name: Kleiner Ellen S
 Last First M.I.
 Address: 134 E. Lupita Rd.
 Street Address Suite/Unit #
Santa Fe NM 87505
 City State ZIP Code
 Phone: (505) 983-2649 E-mail Address: Ellen@blessingway.com
 Additional Appellant Names: _____

Correspondence Directed to: Appellant Agent Both

Agent Authorization (if applicable)

I/We: Ellen S. Kleiner
 authorize Sam W. Minner to act as my/our agent to execute this application.
 Signed: _____ Date: _____
 Signed: _____ Date: _____

Subject of Appeal

Project Name: Coyote Fence
 Applicant or Owner Name: William Herrmann
 Location of Subject Site: 130 E. Lupita Road
 Case Number: _____ Permit Number (if applicable): 17-3415

Final Action Appealed:

Issuance of Building Permit Other Final Determination of LUD Director

Final Action of Board or Commission (specify): Planning Commission Board of Adjustment BCD-DRC HDRB

Basis of Standing (see Section 14-3.17(B) SFCC 2001):

I am a person with a recognized interest under New Mexico law, as the proposed fence would infringe on my property rights.

Basis for Appeal: The facts were incorrectly determined Ordinances/laws were violated and/or misrepresented

Description of the final action appealed from, and date on which final action was taken:
 The posting of permit 17-3415 on the property in question on December 30. The permit was issued on December 19, but was not posted within the required 24 hour period after issuance.

Check here if you have attached a copy of the final action that is being appealed.

RECEIVED

JAN 2 2018

Land Use

EXHIBIT
A

Description of Harm

Describe the harm that would result to you from the action appealed from (attach additional pages if necessary):

The Proposed Fence would violate my right to cross a portion of lot 19 (130 E. Lupita) to access my own property. I entered into an agreement with a previous owner of Lot 19 that allows me to cross the eastern portion of the lot to access my back yard, and created a setback restriction for fencing on Lot 19. Lot 19 has been burdened by this agreement since 1993 and the current occupants of the property were given notice of the agreement when they took possession.

Explain the Basis for Appeal

Please detail the basis for Appeal here (be specific):

I am appealing the granting of the permit, as the decision to do so lacked substantial evidence to support it. The License and Fence Agreement, recorded in book 1029, page 589-590 in the County records, would be violated by the proposed fence. Also, the permit was not posted until December 30, ten days after the 24 hour period of time allowed.

Signature and Verification

I hereby certify that the documents submitted for review and consideration by the City of Santa Fe have been prepared to meet the minimum standards outlined in the Land Development Code, Chapter 14 SFCC 2001. Failure to meet these standards may result in the rejection or postponement of my application. I also certify that I have met with the City's Current Planning staff to verify that the attached proposal is in compliance with the City's zoning requirements.

Appellant Signature: Ellen Kleiner Date: 1/2/18
Agent Signature: [Signature] Date: 1/2/18

State of New Mexico)
) ss.
County of Santa Fe)

I/We Ellen Kleiner being first duly sworn, depose and say: I/We have read the foregoing appeal petition and know the contents thereof and that the same are true to my/our own knowledge.

Petitioner/s:

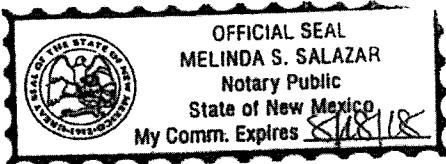
[Signature]
Signature

Signature

Ellen Kleiner
Print Name

Print Name

Subscribed and sworn to before me this 2nd day of January, 2018.



Melinda S. Salazar
NOTARY PUBLIC
My commission expires:
8/18/18

City of Santa Fe
 200 Lincoln Ave.
 Santa Fe, NM 87504
 505-955-4333

=====

Misc GL	1x	100.00	100.00
GL Number: 11001.432500...			

Payer Name: PAUL HILLMAN

=====

SubTotal:	100.00
Total:	100.00
=====	
Cash	100.00

01/02/2018 11:07 LorraineL
 #0540039 /3/1 ~ Thank You ~

Boundary Survey Plat for Mike Baker and Christina Branco Kraft

Lot 19, Subdivision No. 3
of the Lovato Grant, Santa Fe,
Santa Fe County New Mexico

580003



1365.94
CLASS OF SURVEY IS
SOUTH OF NEW MEXICO
I hereby certify that the bearings and distances are true to the best of my knowledge, information and belief, and that the same were measured in Santa Fe County, New Mexico, on the 1st day of February, 2005, at Santa Fe, New Mexico, Page 256 of the records of Santa Fe County.

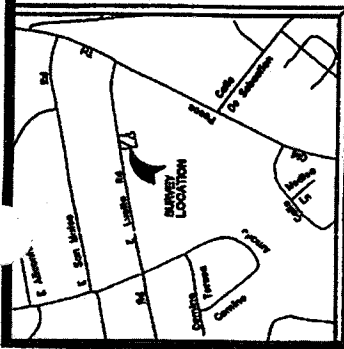
Witness My Hand and Seal of Office
David E. Cooper
Professional Surveyor
Santa Fe County, New Mexico

SERRA LAND SURVEYING, INC.	
1452 ST. FRANCIS DR.	SANTA FE, NM 865-983-5812
Project No. C-011-0203	DATE DEC 02 DTC
	FILE GPS BL 37
INDEXING INFORMATION FOR COUNTY CLERK	
NAME	LOCATION
Mrs Baker	Sec. 36 T.17 N. R.9 E. NO. 3 Lovato Grant

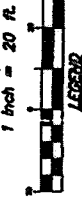
**CITY OF SANTA FE
PUBLIC NOTICE**
The City of Santa Fe, New Mexico, hereby certifies that the plat represents an actual survey made by the City of Santa Fe, New Mexico, and that the information contained herein is true and correct to the best of my knowledge, information and belief. This is a boundary survey of an existing tract or tracts and it is not a land division. Subdivision as defined by the New Mexico Subdivision Act.



CERTIFICATE
I, David E. Cooper, a duly registered Professional Surveyor in the State of New Mexico hereby certify that this plat represents an actual survey made of the field by me or under my direction, that it meets the Minimum Standards for Surveys in New Mexico and that the information contained herein is true and correct to the best of my knowledge, information and belief. This is a boundary survey of an existing tract or tracts and it is not a land division. Subdivision as defined by the New Mexico Subdivision Act.
David E. Cooper
February 1, 2005
P.S. No. 0032



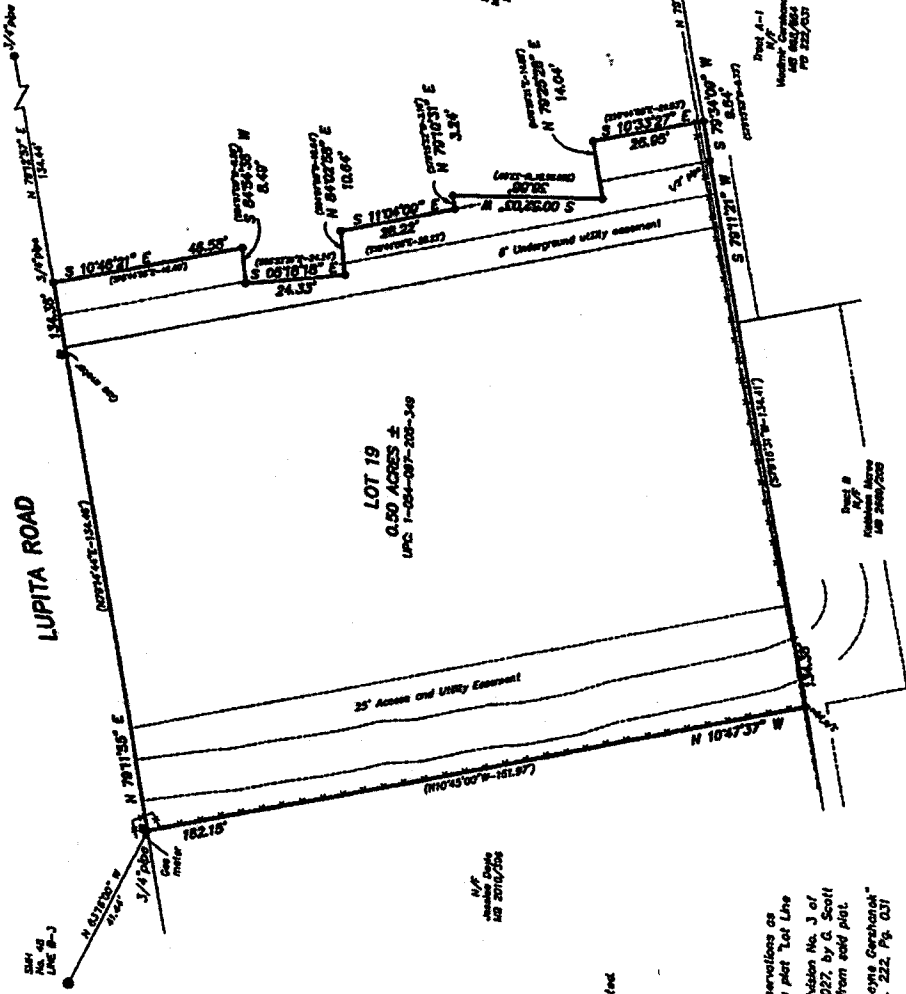
NEIGHBORHOOD MAP



- Existing sewer manhole.
- Capped iron pin 8123 unless other wise noted.
- 1/2" Capped iron pin set this survey.
- Utility poles and lines.
- Utility boxes.
- Fence.
- Mark.
- Concrete.

NOTES

- 1.) Basis of bearing for this survey taken from GPS observations as referenced along the south boundary as shown on a plat "Lot One Adjustment between Albert Rapier and Lot 20 Subdivision No. 3 of the Lovato Grant..." recorded in Plat Bl. 256, Pg. 027, by G. Scott Topor, P.S. 8123. Bearings and distances in () are from said plat.
- 2.) Reference Plats entitled "Madame Caraback and Shovels Caraback" by Mitchell K. Neuman, P.S. 4938, recorded in Plat Bl. 222, Pg. 021 and "Albert Rapier" recorded in Plat Bl. 63, Pg. 14.
- 3.) FIRM Panel No. 350070-0009-6, Zone "C".
- 4.) Subject to: Easements, restrictions and reservations of record.



LOT 19
0.50 ACRES ±
UPC 1-054-097-205-349

Lot 20
N.P.
Dist. 10027/25
Pg. 220/027

Plat 4-1
Madame Caraback
Dist. 663/664
Pg. 222/021

Plat 6
Madame Caraback
Dist. 2000/200

N.P.
Dist. 2010/205

Application Tracking # 17-3415

City of Santa Fe

BUILDING PERMIT APPLICATION

PLEASE USE A BALL POINT PEN (PRESS FIRMLY)

Type RESIDENTIAL Class 1 Accepted by [Signature] Date Accepted 12/13/17
 Amount Paid: Plan Check Fee \$ 146.63 Water Budget Fee \$ 0 Balance Due Permit Fee \$ 833.25
 Land Use Classification: Residential Floodplain Historical
 Type of Construction: Addition Alteration New Construction
 Occupancy Group: _____ Division: OFFICE 1030
 I II III IV V FR. thr. HT 1 A B E F H I M R S U 1 1.1 1.2 2 2.1 3 4 5 6 7
 Zone District: B3 Occupant Load _____

TO BE COMPLETED BY APPLICANT

SITE ADDRESS 130 E. Lupita Road Suite or Space # _____
 Subdivision Lovato Subdivision Number 3 Lot 19 Block _____

Lot Square Footage Total 21,791

PROPOSED WORK: (Check all that apply)

New Construction Walls/Fences Signs:
 Additions Grading/Utilities/Landscaping Free Standing Wall Mounted
 Exterior Alterations/Repairs Pools, Sheds Existing # _____ sq. ft. _____
 Interior Remodel Other Proposed # _____ sq. ft. _____
 Total _____

DESCRIPTION OF WORK: i.e. Bathroom addition, new 4 room residential addition, new 8 room residence, new commercial building, etc. (Note: Work listed herein must be depicted on accompanying plans and/or information if consideration of review requested)

Construction of new coyote fence with steel pipe support with double sided lattillas 5'-11" tall.

PROPOSED USE: describe what facility is to be used for i.e. new single family residence, new fast food restaurant, new time share residence, new grocery store, etc. Privacy fence and property enclosure.

Construction Valuation \$ <u>10,000.00</u>	SQUARE FOOTAGE		
	Existing	Proposed	Total
Heated	_____	_____	_____
Garage	_____	_____	_____
Patio /Porch	_____	_____	_____
Total Roofed	_____	_____	_____
Total Square Footage	_____	_____	_____
Number of Plumbing Fixtures Proposed			
Sinks _____	Showers _____	Tubs _____	Toilets _____

Type of Sewage Disposal

Public Sewer Private System

No. of buildings 0 No. of stories 0

Will the proposed construction result in an increase in the number of residential units?
 Yes No How many? _____

Will the proposed construction result in an increase in water use?
 Yes No

Urinals _____ Water Fountains _____ Other _____



Property Owner William Herrmann
 Mailing Address 130 E. Lupita
Santa Fe, NM 87505
 OWNER/BUILDER CONTRACTOR
 Daytime Telephone # 505-429-5674

Contractor Karma Works, Inc.
 Mailing Address HCR 73 Box 541 San Jose, NM
87565
 State License # 84822 City License # 17-00120602
 Daytime Telephone # 505-670-7600

I hereby certify that I am the duly appointed agent authorized to act on behalf of the property owner. I also certify that the information provided in this application is true and correct and it represents the current and proposed status of the subject property; that the plans submitted with this application are complete and in compliance with the building standards set forth in the Santa Fe City Code; and that the plans illustrate all public and private easements located on the property. I also certify that plans and submittals have been prepared in accord with the submittal checklist. I further understand that failure to follow submittal checklist will result in the delay or rejection of my application.

Contact Name Stuart Penny Address HCR 73 Box 541 San Jose, NM 87565
 Daytime Telephone 505-670-7600 Signature Applicant/Agent [Signature] Date 12/13/17

City of Santa Fe
200 Lincoln Ave.
Santa Fe, NM 87504
505-955-4333

SunGard Application
Appl-Permit Number: 17-00003415 1x 0.00 0.00
PC - Building Permit Residential
Appl-Permit Number: BLDR00 17-00003415 1x 90.63 90.63

Payer Name: KARMA WORKS, INC

SubTotal: 90.63
Total: 90.63
Check Number : 5108 90.63

12/13/2017 13:33 LorraineL
#0535054 /3/1
***** DUPLICATE #001 *****

12/13/2017 13:33 LorraineL
Thank You

City of Santa Fe
200 Lincoln Ave.
Santa Fe, NM 87504
505-955-4333

SunGard Application
Appl-Permit Number: 17-3415 1x 0.00 0.00
PF - Building Permit Residential
Appl-Permit Number: BLDR00 17-3415 1x 221.25 221.25
Archeological Fee
Appl-Permit Number: 17-3415 1x 10.00 10.00

Payer Name: KARMA WORKS INC

SubTotal: 231.25
Total: 231.25
Check Number : 5111 231.25

12/19/2017 11:51 LorraineL
#0536590 /3/1
***** DUPLICATE #001 *****

12/19/2017 11:52 LorraineL
Thank You

BP250U01

City of Santa Fe
Application Tracking Step Selection by Revision

12/14/17
17:02:33

Application number : 17 00003415
Address : 130 E LUPITA RD
UPC Code : - - - - -
Application type : FENCES/WALLS
County Assessor Acct Num . . . :
Tenant name, number : LOT 19, 0.50 AC LOT,

Type options, press Enter.

2=Change 4=Delete 5=View 6=Fast log 8=Action log maintenance
9=In/out maint

Opt	Agency description	Rev	Step	Req	Path	---- Key Dates ---	- Review Summary -
					In	Est Cmpl	Resulted Stat By
	ZONING2		A 01	Y		12/13/17 12/18/17	12/14/17 AP RAT
	GRADING & DRAINAGE		B 01	Y		12/13/17 12/18/17	12/14/17 AP MCG
	BUILDING		C 01	Y		12/13/17 12/18/17	12/14/17 AP RAV

F3=Exit F5=Land inquiry F6=Add F8=Misc info inquiry
F9=Corrections report F10=View 2 F11=Sort by agency F24=More keys

Bottom

WARRANTY DEED

PRIMA TITLE, LLC
FILE # 13-0168 Kew

Cristina Branco, an unmarried woman, for consideration paid, grant(s) to Linda Hart Herrmann and William C. Herrmann, wife and husband, as joint tenants, whose address is 730 E. Lapita Street, Santa Fe, NM 87505 the following described real estate in Santa Fe County, New Mexico:

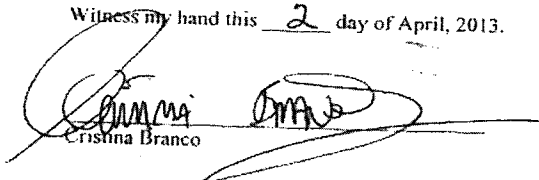
Lot 19, as shown and delineated on plat of survey entitled "Boundary Survey Plat for Mike Baker and Christina Branco Kraft Lot 19, Subdivision No. 3 of the Lovato Grant, Santa Fe, Santa Fe County, New Mexico", recorded February 8, 2005, in Plat Book 580, Page 003, # 1365941 and Amended on February 8, 2005, in Plat Book 580, Page 012, # 1366190, records of Santa Fe County, New Mexico.

SUBJECT TO: taxes and assessments for 2013 and subsequent years.

SUBJECT TO: matters described in Exhibit "A" attached hereto.

with warranty covenants.

Witness my hand this 2 day of April, 2013.


Cristina Branco

ACKNOWLEDGMENT FOR NATURAL PERSONS

STATE OF NEW MEXICO

COUNTY OF SANTA FE

This instrument was acknowledged before me on April 2, 2013 by Cristina Branco.

My Commission Expires: 1/8/17


Notary Public

COUNTY OF SANTA FE)
STATE OF NEW MEXICO) ss

WARRANTY DEED
PAGES: 2

I hereby certify that this instrument was filed for
Record on the 2nd Day of April, 2013 at 02:38:15 PM
and was duly recorded as Instrument # 1701270
of the Records of Santa Fe County.



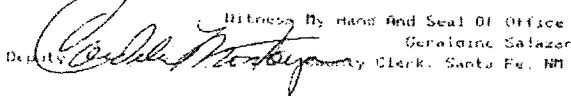

Witness My Hand And Seal Of Office
Germaine Salazar
Deputy County Clerk, Santa Fe, NM



EXHIBIT "A"

Easements and rights incident thereto as contained in Warranty Deed, in Book 401, Page 92, records of Santa Fe County, New Mexico.

Terms and conditions contained in Lovato Subdivision Number 3 Declaration of Building Restrictions, recorded in Misc. Book 34, Page 89; re-recorded in Misc. Book 39, Page 284; Modifications of Building Restrictions, recorded in Book 34, Page 225, in Book 897, Page 346, and in Book 1791, Page 519, records of Santa Fe County, New Mexico.

Easements and rights incident thereto, notes and all other matters affecting subject property, as shown and delineated on plat of survey entitled "Albert Replat", recorded May 8, 1978, in Plat Book 63, Page 14, records of Santa Fe County, New Mexico.

Easements and rights incident thereto, notes and conditions, as shown and delineated on plat of survey entitled "Lot Division of Tract "A" of the Albert Replat of Lot 19, Subdivision No. 3 of the Lovato Grant for Vladimir Gershanok and Sheyne Gershanok...within the City and county of Santa Fe, New Mexico", recorded May 10, 1991, in Plat Book 222, Page 031, # 736959, records of Santa Fe County, New Mexico.

Easements and rights incident thereto, notes and conditions, as shown and delineated on plat of survey entitled "A Replat Showing a Lot Line Adjustment between Lot 19 Albert Replat and Lot 20 of the Lovato Grant...City of Santa Fe Santa Fe County, New Mexico", recorded October 29, 1993, in Plat Book 258, Page 027, # 835934, records of Santa Fe County, New Mexico.

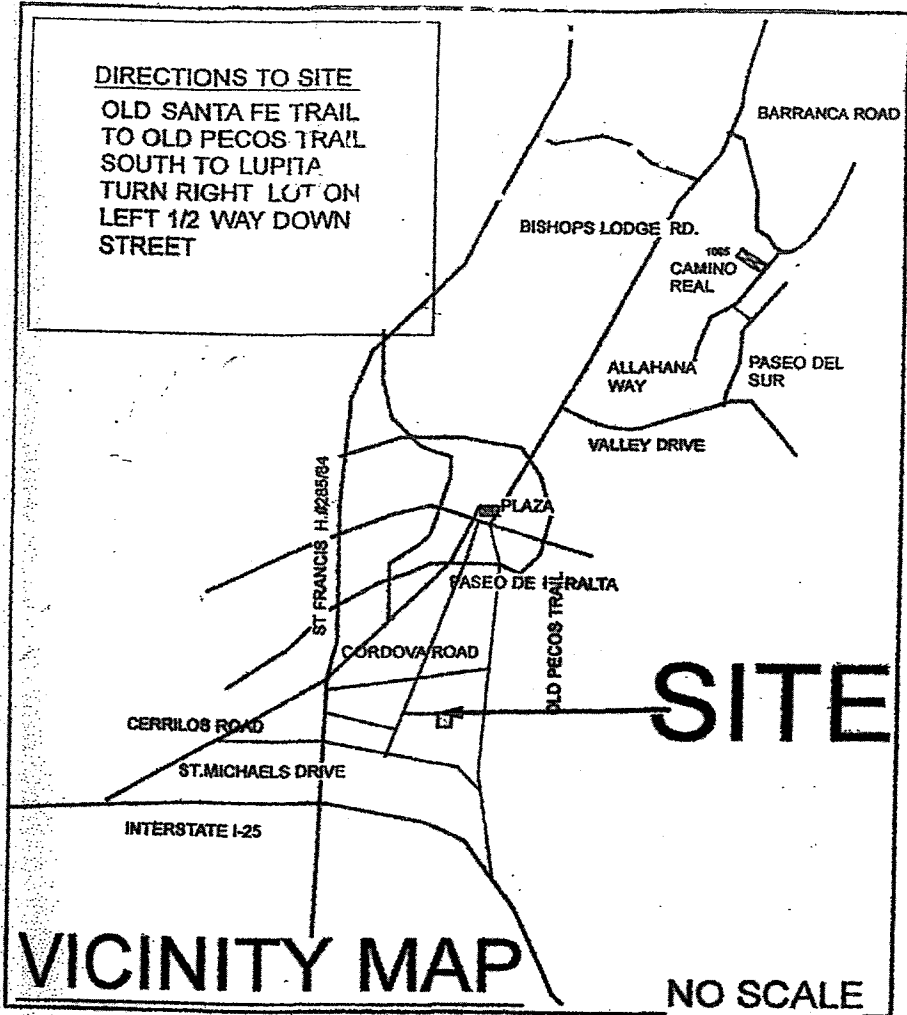
Deviation of fence from property line, rights of others in and to road crossing subject property, notes, easements and rights incident thereto, as shown and delineated on plat of survey entitled "Boundary Survey Plat for Mike Baker and Christina Branco Kraft Lot 19, Subdivision No. 3 of the Lovato Grant, Santa Fe, Santa Fe County, New Mexico", recorded February 8, 2005, in Plat Book 580, Page 003, # 1365941 and Amended on February 8, 2005, in Plat Book 580, Page 012, # 1366190, records of Santa Fe County, New Mexico.

Location of residence violates setback restrictions, encroachment of driveway and flagstone walkway lying to the east, encroachment of driveway edge onto access & utility easement and encroachment of fence onto underground utility easement, as shown and delineated on Improvement Location Report, prepared by Philip b. Wiegel, NMPS No. 9758, dated March 20, 2013 and bearing Surveyor's Project No. 13030160.

License and Fence Agreement, recorded March 2, 1994, in Book 1029, Page 589, records of Santa Fe County, New Mexico.

DIRECTIONS TO SITE

OLD SANTA FE TRAIL
TO OLD PECOS TRAIL
SOUTH TO LUPITA
TURN RIGHT LOT ON
LEFT 1/2 WAY DOWN
STREET



SITE

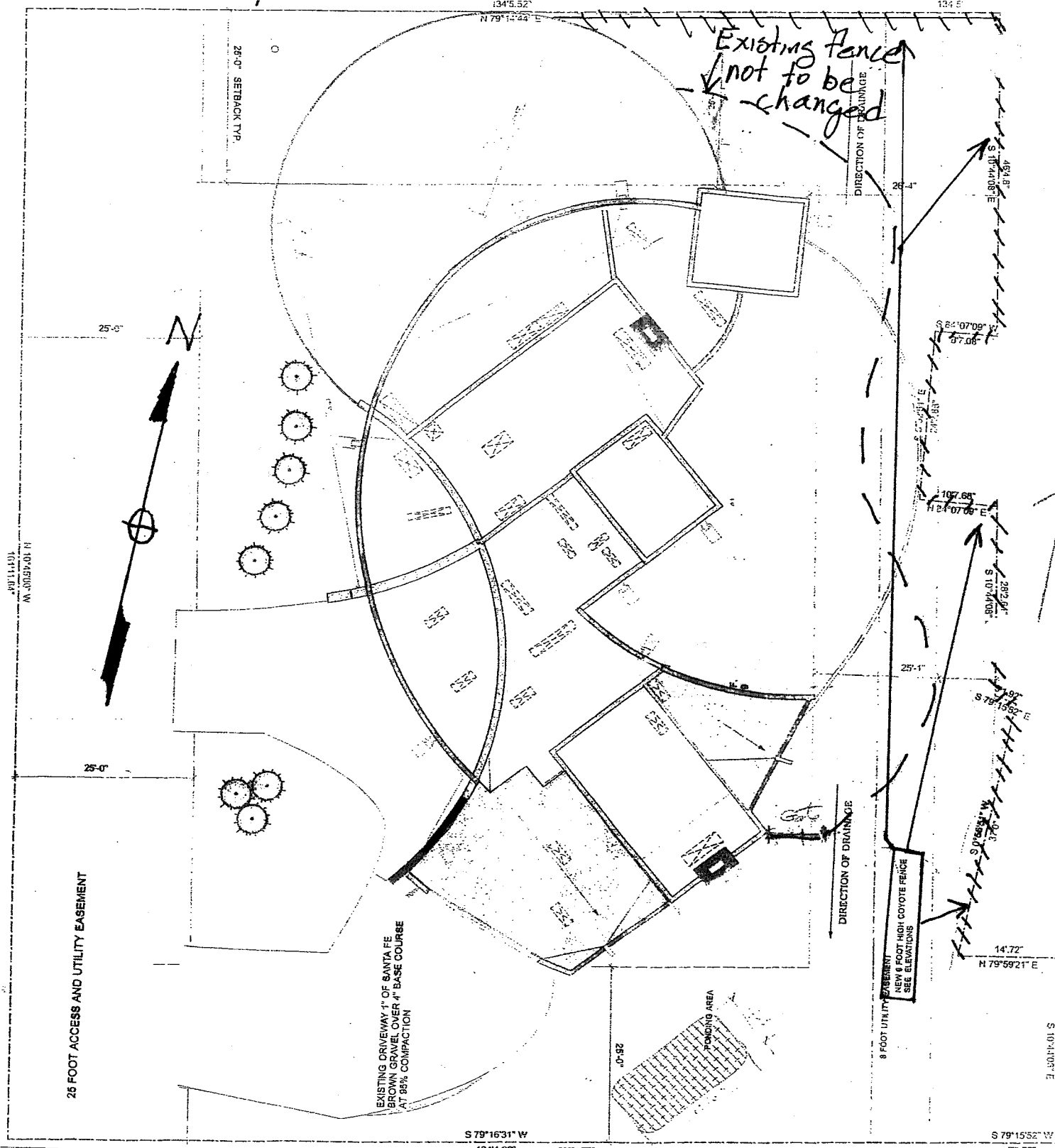
VICINITY MAP

NO SCALE

Site Plan

130 E. Lupita Santa Fe, NM 87505

← Lupita →

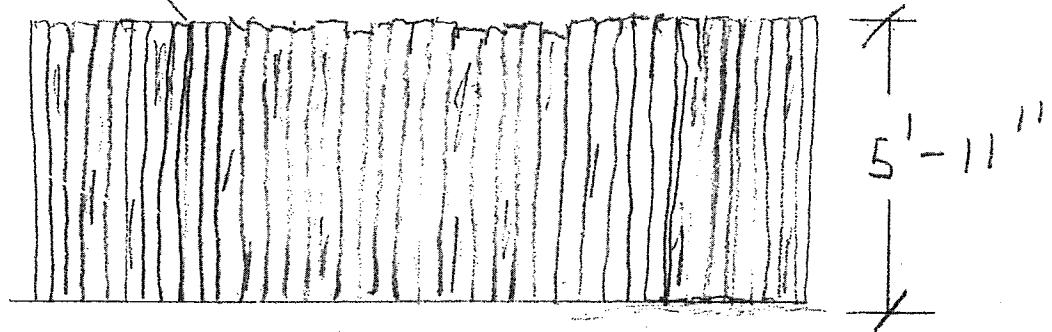


Lot area = 21,791 sq. ft.

11' = 20'

130 E - Lupita - double sided coyote fence.

3.5" Diam.
lattillas



wire double tie

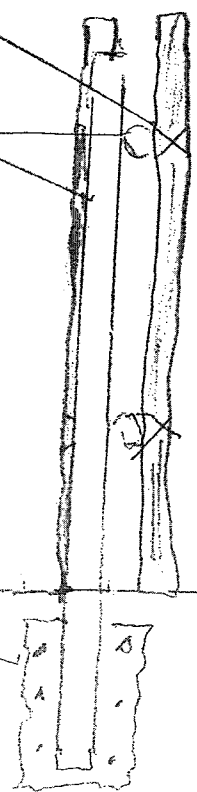
49" x

2'14 steel pipe
welded connection

5'-11"

Concrete 2,500 psi

18"



IMPROVEMENT LOCATION REPORT

Buyer: Linda Hart Herrmann and William C. Herrmann
 Seller: Cristina Branco
 Project: 13030160



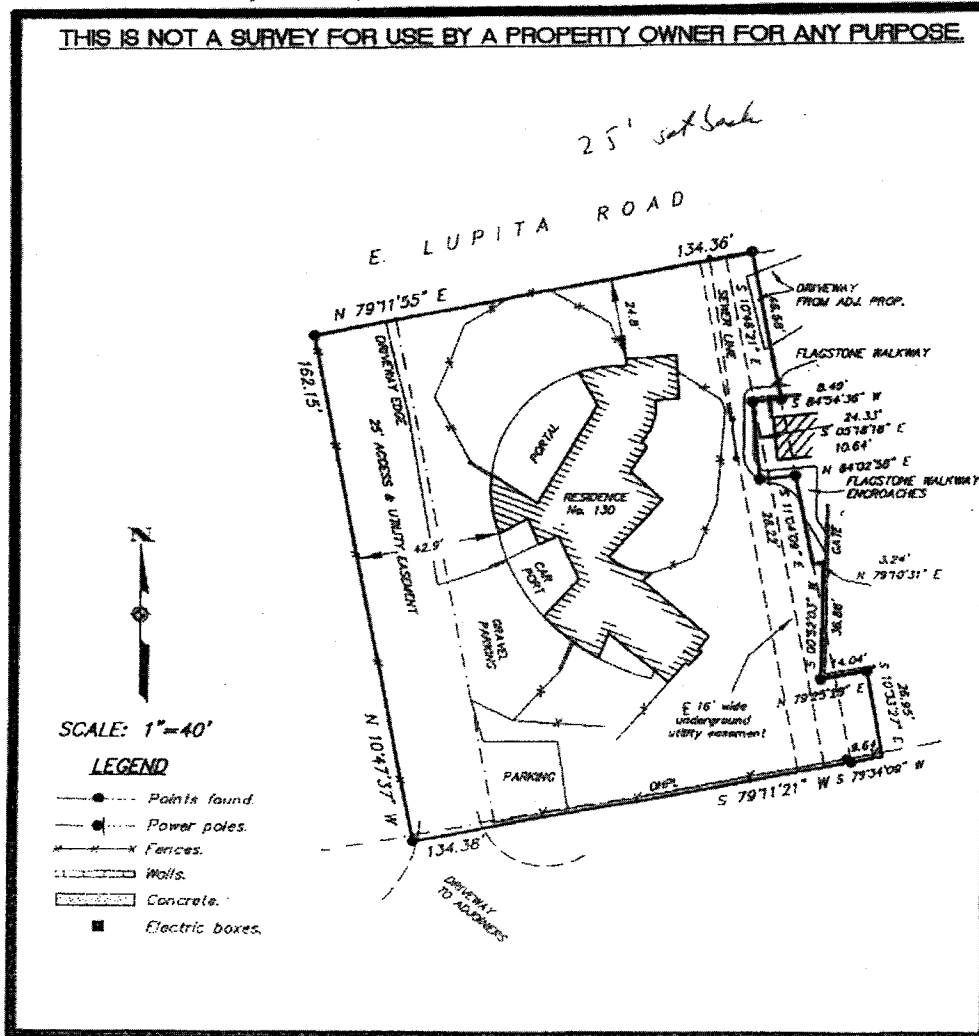
THIS IS TO CERTIFY TO:

Title Co.: <input checked="" type="checkbox"/>	Underwriter: <input type="checkbox"/>	Lender: <input type="checkbox"/>
Institution Name: <u>Prima Title, LLC</u>		
That on <u>March 20, 2013</u> , I made an inspection of the premises situated at: <u>130 E. Lupita Road, Santa Fe.</u> Santa Fe County, New Mexico, briefly described as: <u>Lot 19.</u>		

PLAT REFERENCE: Bearings, distances and/or curve data are taken from the following plat. "Boundary Survey Plat for Mike Baker and Christina Branco Kraft...", filed in Plat Book 580, Page 012, records of Santa Fe County, New Mexico.

NOTE: The error of closure is one foot for every 100,000 feet along the perimeter of the legal description as provided. Easements shown hereon are as listed in Title Commitment No. 13-0168 as provided by Title Company.

THIS IS NOT A SURVEY FOR USE BY A PROPERTY OWNER FOR ANY PURPOSE.



Improvement location is based on previous property surveys. No monuments were set. This tract is subject to all easements, restrictions and reservations of record which pertain. This report is not to be relied upon for the establishment of fences, buildings or other future improvements.

IMPROVEMENT LOCATION REPORT

I FURTHER CERTIFY as to the existence of the following at the time of my last inspection:

1. Evidence of rights of way, old highway or abandoned roads, lanes, trails or driveways, sewer, drains, water, gas or oil pipe lines on or crossing said premises; if none visible, so indicate. As shown.
2. Springs, streams, rivers, ponds or lakes located, bordering on or through said premises. None noted.
3. Evidence of cemeteries or family burial grounds located on said premises. None noted.
4. Overhead utilities, poles, anchors, pedestals, wires or lines overhanging or crossing said premises and serving other properties (show location). Utilities as shown.
5. Joint driveways or walkways, joint garages, party walls of rights of support, steps or roofs in common. As shown.
6. Apparent encroachments. If building projections or cornices thereof, or signs affixed thereto, fences or other indications of occupancy appear to encroach upon or overhang adjoining property, or the like appear to encroach upon or overhang inspected premises specify all such (show location). As shown.
7. Specific physical evidence of boundary lines on all sides. As shown.
8. Is property improved? Yes.
9. Indications of recent building construction, alterations or repairs. None noted.
10. Approximate distance of structure from at least two lot lines must be shown. Distances shown.
11. FIRM Panel No. 35049C-0412D.



Philip B. Wiegell
 PHILIP B. WIEGELL, SURVEYOR, NMPS No. 9758

This report is based on boundary information taken from previous survey documents and is prepared and issued to the Title, Abstract or Escrow Company or Lending Institution listed above and is for their exclusive use only. This report is not for use by a property owner for any purpose. This is not a boundary survey and may not be sufficient for the removal of the survey exception from an owner's title policy. It may or may not reveal encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate boundary survey.

This report has been prepared by: *Del Rio Surveys, Inc.*
 PO Box 22773
 Santa Fe, New Mexico 87502-2773
 Phone: (505) 820-9200
 FAX: (505) 820-1600
 Email: *drsurveys@qwestoffice.net*

15. Easements and rights incident thereto, notes and conditions, as shown and delineated on plat of survey entitled "A Replat Showing a Lot Line Adjustment between Lot 19 Albert Replat and Lot 20 of the Lovato Grant...City of Santa Fe Santa Fe County, New Mexico", recorded October 29, 1993, in Plat Book 258, Page 077, # 832936, records of Santa Fe County, New Mexico.
16. Deviation of fence from property line, rights of others in and to road crossing subject property, notes, easements and rights incident thereto, as shown and delineated on plat of survey entitled "Boundary Survey Plat for Mike Baker and Christina Branco Kraft Lot 19, Subdivision No. 3 of the Lovato Grant, Santa Fe, Santa Fe County, New Mexico", recorded February 8, 2005, in Plat Book 580, Page 003, # 1365941 and Amended on February 8, 2005, in Plat Book 580, Page 012, # 1366190, records of Santa Fe County, New Mexico.
17. Location of residence violates setback restrictions, encroachment of driveway and flagstone walkway lying to the east, encroachment of driveway edge onto access & utility easement and encroachment of fence onto underground utility easement, as shown and delineated on Improvement Location Report, prepared by Philip b. Wiegel, NMPS No. 9758, dated March 20, 2013 and bearing Surveyor's Project No. 13030160.
18. License and Fence Agreement, recorded March 2, 1994, in Book 1029, Page 599, records of Santa Fe County, New Mexico.

Standard exceptions 1, 2, 3, and or 4, may be deleted from any policy upon compliance with all provisions of the applicable rules, upon payment of all additional premiums required by the applicable rules, upon receipt of the required documents and upon compliance with the company's underwriting standards for each such deletion. Standard exception 5 may be deleted from the policy if the named insured in the case of an owner's policy, or the vestee, in the case of a leasehold or loan policy, is a corporation, a partnership, or other artificial entity, or a person holding title as trustee. Except for the issuance of a U.S. Policy form (NM7 or NM34), any policy to be issued pursuant to this commitment will be endorsed or modified in schedule B by the company to waive its right to demand arbitration pursuant to the conditions and stipulations of the policy at no cost or charge to the insured. The endorsement or the language added to schedule B of the policy shall read: "In compliance with Subsection D of 13.14.18.10 NMAC, the company hereby waives its right to demand arbitration pursuant to the title insurance arbitration rules of the American Land Title Association. Nothing herein prohibits the arbitration of all arbitrable matters when agreed to by both the company and the insured."

Countersigned
Prima Title, LLC

By 
Authorized Signatory

CITY OF SANTA FE, NEW MEXICO
P.O. BOX 909
SANTA FE, NEW MEXICO 87504-0909

* * * * * B U I L D I N G P E R M I T * * * * *

→ Application Number 17-00003415 Date 12/19
Application pin number 916600
Property Address 130 E LUPITA RD
Tenant nbr, name LOT 19, 0.50 AC LOT,
Application type description FENCES/WALLS
Subdivision Name
Property Zoning NOT AVAILABLE
Application valuation 10000

Owner Contractor

WILLIAM HERRMANN KARMA WORKS INC
130 E LUPITA RD HCR 73 BOX 541
SANTA FE, NM SAN JOSE NM 87565
SANTA FE NM 87505 (505) 421-3383
(505) 429-5674

--- Structure Information 000.000 6" COYOTE FENCE ALONG EAST PROPERTY LINE
Construction Type TYPE V-B
Occupancy Type RES. OCCUPANCIES/PERM
Flood Zone MIN. FLOODING/OUTSIDE 500
Fence Type COYOTE FENCE
Other struct info HEIGHT 6'-0"

Permit BUILDING PERMIT RESIDENTIAL
Additional desc
→ Phone Access Code 1345651
Permit pin number 1345651
Permit Fee 221.25 Plan Check Fee 90.63
Issue Date 12/19/17 Valuation 10000
Expiration Date 12/19/18

Special Notes and Comments
I, THE OWNER OR AGENT FOR THE OWNER HAVE

For permits issued AFTER 08/01/2009, you MUST use VIPS
for scheduling inspections! Call in by 3:00 PM for a next-
day inspection (based on availability). 955-6110
APPROVED BY [Signature] DATE 12-19-17
APPLICANT [Signature] DATE _____

By my signature above I hereby agree to abide with all the laws of the City of Santa Fe as well as with all the conditions stated above. I further state that I understand that this is not a permit to construct anything in violation of the codes adopted by the State of New Mexico. Further, I understand that this permit may be appealed within fifteen (15) days of its issuance (the "appeal period") pursuant to 14-3.17 SFCC (1987) and in the event an appeal is upheld this permit may be revoked. I hereby agree that any grading, building, alteration, repairing or any other construction done pursuant to this permit during this appeal period is done at my own risk and without reliance on the issuance of this permit. I also agree that in the event an appeal is upheld and this permit is revoked I may be required to remove any building, grading, altering, repairing or any other construction done during the appeal period. I hereby certify that I have read the foregoing and understand the same and by my signature assent to the terms stated herein.

CITY OF SANTA FE, NEW MEXICO
P.O. BOX 909
SANTA FE, NEW MEXICO 87504-0909

* * * * * B U I L D I N G P E R M I T * * * * *

Application Number 17-00003415 Page 2
Application pin number 916600 Date 12/19/17

Special Notes and Comments
RECEIVED THE FOLLOWING REVIEW SHEETS. I
UNDERSTAND I AM TO COMPLY WITH ALL
CONDITIONS INDICATED ON THE REVIEW
SHEETS. INITIALS *[Signature]*

Other Fees ARCHEOLOGICAL FEE 10.00

Fee summary	Charged	Paid	Credited	Due
Permit Fee Total	221.25	221.25	.00	.00
Plan Check Total	90.63	90.63	.00	.00
Other Fee Total	10.00	10.00	.00	.00
Grand Total	321.88	321.88	.00	.00



For permits issued AFTER 08/01/2009, you MUST use VIPS
for scheduling inspections! Call in by 3:00 PM for a next-
day inspection (based on availability) 955-6110

APPROVED BY *[Signature]* DATE 12/19/17
APPLICANT *[Signature]* DATE _____

signature above I hereby agree to abide with all the laws of the City of Santa Fe as well as with all the conditions stated above. I further state that I understand that this is permit to construct anything in violation of the codes adopted by the State of New Mexico. Further, I understand that this permit may be appealed within fifteen (15) days of its issuance (the "appeal period") pursuant to 14-3.17 SFCC (1987) and in the event an appeal is upheld this permit may be revoked. I hereby agree that any grading, building, alteration, repairing or any other construction done pursuant to this permit during this appeal period is done at my own risk and without reliance on the issuance of this permit. I also agree that in the event an appeal is upheld and this permit is revoked I may be required to remove any building, grading, altering, repairing or any other construction done during the appeal period. I hereby certify that I have read the foregoing and understand the same and by my signature assent to the terms stated herein.

CITY OF SANTA FE, NEW MEXICO
P.O. BOX 909
SANTA FE, NEW MEXICO 87504-0909

* * * * * B U I L D I N G P E R M I T * * * * *

Application Number 17-00003415 Page
Property Address 130 E LUPITA RD Date 12/19, ,
Tenant nbr, name LOT 19, 0.50 AC LOT,
Application description FENCES/WALLS
Subdivision Name
Property Zoning NOT AVAILABLE

Permit BUILDING PERMIT RESIDENTIAL

Additional desc
Phone Access Code 1345651
Permit pin number 1345651

Required Inspections

Seq	Phone Insp#	Insp Code	Description	Initials	Date
10	101	F001	FOOTING	_____	__/__/__
10	599	G002	GRADING & DRAINAGE, FINAL	_____	__/__/__
1000	199	C001	BUILDING, FINAL	_____	__/__/__

By my signature above I hereby agree to abide with all the laws of the City of Santa Fe as well as with all the conditions stated above. I further state that I understand that this is not a permit to construct anything in violation of the codes adopted by the State of New Mexico. Further, I understand that this permit may be appealed within fifteen (15) days of its issuance (the "appeal period") pursuant to 14-3.17 SFCC (1987) and in the event an appeal is upheld this permit may be revoked. I hereby agree that any grading, building, alteration, repairing or any other construction done pursuant to this permit during this appeal period is done at my own risk and without reliance on the issuance of this permit. I also agree that in the event an appeal is upheld and this permit is revoked I may be required to remove any building, grading, altering, repairing or any other construction done during the appeal period. I hereby certify that I have read the foregoing and understand the same and by my signature assent to the terms stated herein.

WARRANTY DEED

Ellen S. Kleiner, a single woman

for consideration paid, grant

to Tom Callanan and Kim Callanan, husband and wife

whose address is

1003662

the following described real estate in Santa Fe County, New Mexico:

All of Lot 19 as shown on Plat of Survey entitled "A REPLAT SHOWING A LOT LINE ADJUSTMENT BETWEEN LOT 19 ALBERT REPLAT AND LOT 20 SUBDIVISION NO. 3 OF THE LOVATO GRANT BY THE SANTA FE HOLDING COMPANY, CITY OF SANTA FE, SANTA FE COUNTY, NEW MEXICO", filed for record as Document Number 835,934, appearing in Plat Book 258 at page 27, records of Santa Fe County, New Mexico.

SUBJECT TO: Restrictions, reservations and/or easements of record.

WITNESS my hand and seal this 14th day of December, 19 93

Ellen S. Kleiner (Seal)

(Seal)

ACKNOWLEDGEMENT FOR NATURAL PERSONS

STATE OF NEW MEXICO } COUNTY OF Santa Fe } ss. This instrument was acknowledged before me on December 14th, 19 93

by Ellen S. Kleiner (name(s) of person(s))

My commission expires: 2-3-96 (Seal) Notary Public

For Recorder's Use Only

COUNTY OF SANTA FE } STATE OF NEW MEXICO } ss. I hereby certify that this instrument was filed for record on the 14th day of December, 1993, at 4:10 o'clock p.m. and was duly recorded in Book 10037, page 27 of the records of Santa Fe County. Witness my Hand and Seal of Office Santa Fe, New Mexico, December 14, 1993. J. G. Armijo Deputy Clerk Santa Fe County, NM

ACKNOWLEDGEMENT FOR CORPORATION

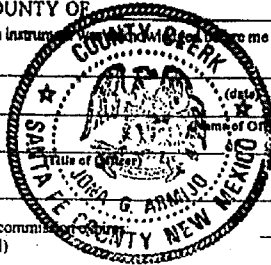
STATE OF NEW MEXICO } COUNTY OF } ss. This instrument was acknowledged before me on _____, 19 ____

by _____ (date)

(Name of Officer)

(Name of Corporation Acknowledging) _____ corporation, on behalf of said corporation.

My commission expires _____ (Seal) Notary Public



EXHIBIT

C

1029589

LICENSE and FENCE AGREEMENT

Kimberly Callanan and Thomas Callanan, owners of Lot 19, Lovato Subdivision NO. 3, hereby grant to Ellen S. Kleiner, her heirs and assigns, owner of Lot 20, Lovato Subdivision No. 3, the right to cross the eastern portion of Lot 19, on foot, for access from the back yard of Lot 20 to Lupita Street. No permission is granted for vehicular traffic of any kind.

Kimberly Callanan and Thomas Callanan further agree that no fence shall be constructed on Lot 19 which is closer to Lot 20 than is shown on the red dashed line on the plat attached hereto as Exhibit A.

Kimberly Callanan
Kimberly Callanan

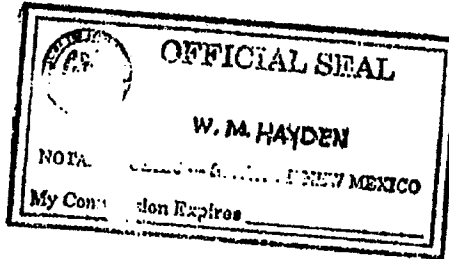
Thomas Callanan
Thomas Callanan

Subscribed, sworn to, and acknowledged before me the undersigned Notary Public this 14 day of December, 1993.

[Signature]
Notary Public

My commission expires:

4-3-94



COUNTY OF SANTA FE)
STATE OF NEW MEXICO)
I hereby certify that this instrument was filed)
for record on the 2 day of December, A.D.)
1993 at 11:37 o'clock a m.)
and was duly recorded in book 1029)
page 589-590 of the records of)
Santa Fe County.

Witness my Hand and Seal of Office
Jona G. Armijo
County Clerk, Santa Fe County, N.M.

Armonia Clayton
Deputy



EXHIBIT

D

tabbles

1919

BEARING ROAD

0656201

25' Access and Utility Easement

134.46

2' High Block/Suocco Wall

8' WIDE
Underground
Utility Easement

LOT 19
Area: 0.500 Ac.±
or 21,786 Sq. Ft.±

N 78°59'21" E
14.06'

N 79°53'52" E
31.6'

N 84°07'09" E
10.84'

S 05°52'51" E
24.24'

S 10°45' E 1520
S 10°44'08" E
46.40'

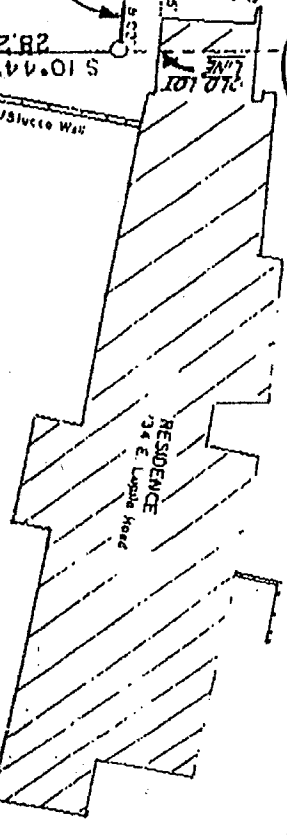
S 10°44'08" E
26.93'

M 15°59'00" S
37.00'

S 10°44'08" E
28.22'

S 82°07'09" W
10.5'

LOT 20
Area: 0.500 Ac.±
or 21,786 Sq. Ft.±



134.46

1919

CC73

WARRANTY DEED

Tom Callanan and Kimberly Smith Callanan, husband and wife
for consideration paid, grant
to Mike Baker and Cristina Branco Kraft, both unmarried persons
whose address is 126 Valley Drive, Santa Fe, NM 87501
the following described real estate in Santa Fe County, New Mexico:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

SFC CLERK 02/09/2005

with warranty covenants.

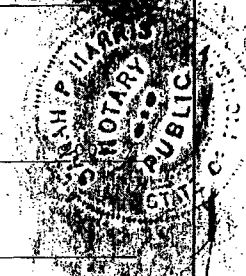
WITNESS our hand and seal this 4 day of February, 2005
Tom Callanan
Kimberly Smith Callanan

ACKNOWLEDGMENT FOR NATURAL PERSONS

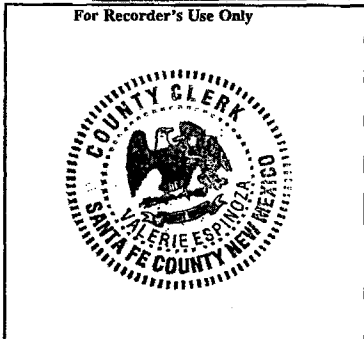
STATE OF NEW MEXICO MICHIGAN
COUNTY OF Santa Fe Kalamazoo County ss.
This instrument was acknowledged before me on February 8th
by Tom Callanan and Kimberly Smith Callanan

My Commission expires: SARAH P HARRIS
NOTARY PUBLIC STATE OF MICHIGAN
KALAMAZOO COUNTY
MY COMMISSION EXP. JULY 21, 2005

Sarah P Harris
Notary Public



ACKNOWLEDGMENT FOR CORPORATION



STATE OF NEW MEXICO
WARRANTY DEED
COUNTY OF SANTA FE)
STATE OF NEW MEXICO) ss
PAGES: 2
I Hereby Certify That This Instrument Was Filed for
Record On The 9TH Day Of February, A.D., 2005 at 15:19
And Was Duly Recorded as Instrument # 1366358
Of The Records Of Santa Fe County
Witness My Hand And Seal Of Office
Valerie Espinoza
Deputy County Clerk, Santa Fe, NM
Notary Public

56978DP

EXHIBIT E

EXHIBIT "A"

Lot 19, of Subdivision No. 3 of the Lovato Grant, as shown and delineated on "Boundary Survey Plat for Mike Baker, Lot 19, Subdivision No. 3 of the Lovato Grant, Santa Fe, Santa Fe County, New Mexico" by David E. Cooper, P.S. No. 9052 on February 1, 2005, filed February 8, 2005 as Document No. 1366190, and recorded in Plat Book 580, Page 012, in the records of Santa Fe County, New Mexico, being the same lot shown on the plat of Subdivision No. 3, filed July 16, 1974 as Document No. 86,013, in Plat Book 3, Page 405, and on plat filed for record on May 8, 1978, as Document No. 419,845, in Plat Book 63, Page 014, in the records of Santa Fe County, New Mexico.

SUBJECT TO:

Taxes for the year 2005 and thereafter; and:

1. Sewer and refuse assessments for the year 2005 and subsequent years.
2. Easements as shown and delineated on plat of survey entitled "Plat of Survey for Mary Esther Estate Within Subdivision No. 3 Lovato Grant...", prepared by Bernie A. Alarid, NMPLS No. 5338, dated November 29 and December 15, 1979; and as reserved in Warranty Deed recorded in Misc. Book 394, Page 275, in the records of Santa Fe County, New Mexico.
3. Lovato Subdivision Number 3 Declaration of Building Restrictions recorded in Misc. Book 34, Page 89; re-recorded in Misc. Book 39, Page 284; modification recorded in Misc. Book 34, Page 225; amendment recorded in Book 897, Page 330; amendment recorded in Book 897, Page 346; amendment recorded in Book 1791, Page 519, in the records of Santa Fe County, New Mexico. If any of the above contain a restriction based on race, color, religion, sex or national origin, that portion of the document is omitted from the exception unless a federal exemption is applicable.
4. Easements and notes; deviation of fence from westerly and southerly lot lines; rights of others in and to utility lines and poles, all as shown and delineated on plat of survey entitled "A Replat Showing a Lot Line Adjustment Between Lot 19 Albert Replat and Lot 20 Subdivision No. 3 of the Lovato Grant by the Santa Fe Holding Company City of Santa Fe, Santa Fe County, New Mexico", prepared by G. Scott Yager, NMPS No. 8123, filed October 29, 1993 as Document No. 835,934, and recorded in Plat Book 258, Page 27, in the records of Santa Fe County, New Mexico, and on "Boundary Survey Plat for Mike Baker..." by David E. Cooper, P.S. No. 9052 on February 1, 2005, filed February 4, 2005 as Document No. _____, and recorded in Plat Book _____, Page _____, in the records of Santa Fe County, New Mexico.
5. License and Fence Agreement recorded in Book 1029, Page 589, in the records of Santa Fe County, New Mexico.
6. A Twenty-five (25) foot access and utility easement along the westerly boundary of Lot 19, as shown on Plat of Survey entitled "Albert Replat", filed for record as Document No. 419845, in Plat Book 63, Page 014, in the records of Santa Fe County, New Mexico.
7. A Eight (8) foot underground utility easement crossing the easterly portion of insured premises, as shown on Plat of Survey for Vladiner Gershanok and Sheyne Gershanok, dated March 19, 1991, prepared by Mitchel K. Noonan, NMPLS 06998, recorded in Plat Book 222, Page 031, in the records of Santa Fe County, New Mexico.

SFC CLERK 02/09/2005

PRIMA TITLE, LLC
FILE # 13-0168 Ken

WARRANTY DEED

Cristina Branco, an unmarried woman, for consideration paid, grant(s) to Linda Hart Herrmann and William C. Herrmann, wife and husband, as joint tenants, whose address is 130 E. Lupita Street, Santa Fe, NM 87505 the following described real estate in Santa Fe County, New Mexico:

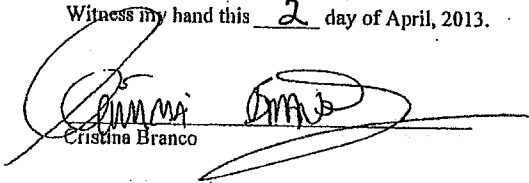
Lot 19, as shown and delineated on plat of survey entitled "Boundary Survey Plat for Mike Baker and Christina Branco Kraft Lot 19, Subdivision No. 3 of the Lovato Grant, Santa Fe, Santa Fe County, New Mexico", recorded February 8, 2005, in Plat Book 580, Page 003, # 1365941 and Amended on February 8, 2005, in Plat Book 580, Page 012, # 1366190, records of Santa Fe County, New Mexico.

SUBJECT TO: taxes and assessments for 2013 and subsequent years.

SUBJECT TO: matters described in Exhibit "A" attached hereto.

with warranty covenants.

Witness my hand this 2 day of April, 2013.


Cristina Branco

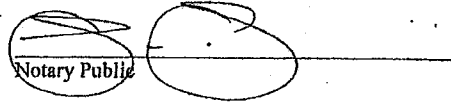
ACKNOWLEDGMENT FOR NATURAL PERSONS

STATE OF NEW MEXICO

COUNTY OF SANTA FE

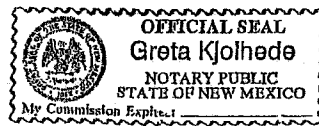
This instrument was acknowledged before me on April 2, 2013 by Cristina Branco.

My Commission Expires: 1/8/17


Notary Public

COUNTY OF SANTA FE) WARRANTY DEED
STATE OF NEW MEXICO) ss PAGES: 2

I Hereby Certify That This Instrument Was Filed for Record On The 2ND Day Of April, 2013 at 02:38:19 PM And Was Duly Recorded as Instrument # 1701270 Of The Records Of Santa Fe County



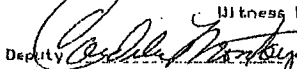
 Witness My Hand And Seal Of Office
Geraldine Salazar
Deputy County Clerk, Santa Fe, NM



EXHIBIT "A"

Easements and rights incident thereto as contained in Warranty Deed, in Book 401, Page 92, records of Santa Fe County, New Mexico.

Terms and conditions contained in Lovato Subdivision Number 3 Declaration of Building Restrictions, recorded in Misc. Book 34, Page 89; re-recorded in Misc. Book 39, Page 284; Modifications of Building Restrictions, recorded in Book 34, Page 225, in Book 897, Page 346, and in Book 1791, Page 519, records of Santa Fe County, New Mexico.

Easements and rights incident thereto, notes and all other matters affecting subject property, as shown and delineated on plat of survey entitled "Albert Replat", recorded May 8, 1978, in Plat Book 63, Page 14, records of Santa Fe County, New Mexico.

Easements and rights incident thereto, notes and conditions, as shown and delineated on plat of survey entitled "Lot Division of Tract "A" of the Albert Replat of Lot 19, Subdivision No. 3 of the Lovato Grant for Vladimir Gershanok and Sheyne Gershanok...within the City and county of Santa Fe, New Mexico", recorded May 10, 1991, in Plat Book 222, Page 031, # 736959, records of Santa Fe County, New Mexico.

Easements and rights incident thereto, notes and conditions, as shown and delineated on plat of survey entitled "A Replat Showing a Lot Line Adjustment between Lot 19 Albert Replat and Lot 20 of the Lovato Grant...City of Santa Fe Santa Fe County, New Mexico", recorded October 29, 1993, in Plat Book 258, Page 027, # 835934, records of Santa Fe County, New Mexico.

Deviation of fence from property line, rights of others in and to road crossing subject property, notes, easements and rights incident thereto, as shown and delineated on plat of survey entitled "Boundary Survey Plat for Mike Baker and Christina Branco Kraft Lot 19, Subdivision No. 3 of the Lovato Grant, Santa Fe, Santa Fe County, New Mexico", recorded February 8, 2005, in Plat Book 580, Page 003, # 1365941 and Amended on February 8, 2005, in Plat Book 580, Page 012, # 1366190, records of Santa Fe County, New Mexico.

Location of residence violates setback restrictions, encroachment of driveway and flagstone walkway lying to the east, encroachment of driveway edge onto access & utility easement and encroachment of fence onto underground utility easement, as shown and delineated on Improvement Location Report, prepared by Phillip b. Wiegell, NMPS No. 9758, dated March 20, 2013 and bearing Surveyor's Project No. 13030160.

License and Fence Agreement, recorded March 2, 1994, in Book 1029, Page 589, records of Santa Fe County, New Mexico.

Memorandum Brief in Support of Appeal No. 2018-001

Introduction

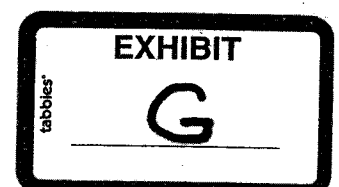
Appellant Ellen Kleiner, owner of Lot 20, Lovato Subdivision No. 3, opposes the planned construction of a fence on Lot 19, Lovato Subdivision No. 3, as it would violate the License and Fence Agreement (“Agreement”), recorded March 2, 1994, in Book 1029, Page 589, records of Santa Fe County, New Mexico, (attached as “Exhibit A”). The Agreement was entered into by Ms. Kleiner when she sold Lot 19 to Kimberly and Thomas Callanan. The Agreement created an easement appurtenant allowing ingress and egress over the eastern portion of Lot 19, and a setback restriction prohibiting the construction of a fence within the boundary specified in the Agreement. The fence that Bill and Linda Herrmann intend to construct would violate both of these rights granted to Ms. Kleiner by the Agreement, and must be disallowed.

The License and Fence Agreement created an easement appurtenant.

The first paragraph of the Agreement states that:

Kimberly Callanan and Thomas Callanan, owners of Lot 19, Lovato Subdivision NO. 3, hereby grant to Ellen S. Kleiner, her heirs and assigns, owner of Lot 20, Lovato Subdivision No. 3, the right to cross the eastern portion of Lot 19, on foot, for access from the back yard of Lot 20 to Lupita Street. No permission is granted for vehicular traffic of any kind.

In deciding if a right created is an easement or a license, “the intent of the parties is to be taken as the real determining factor.” *Paul v. Blakely*, 243 Iowa 355, 358, 51 N.W.2d 405, 407 (1952). In interpreting intent, courts have relied on factors such as: **whether the right is created through oral or written means, the nature of the right, the duration of the right, and the amount of consideration, if any, given for the right.** *Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land*, paragraph 1.03[2] at 1-8 (1988) (Emphasis added).



Conversely, the label used by the parties when the right is granted is not determinative of the right's legal effect. "To determine the true character of an interest, **a court must examine the nature of the right rather than the name given to it by the parties.**" *Millbrook Hunt, Inc. v. Smith*, 249 A.D.2d 281, 282, 670 N.Y.S.2d 907, 908 (1998).

Normandin's use of the word "license" is not dispositive where other evidence shows that his purpose as drafter, and grantor, was to convey something more. His actions here were clearly intended to help persuade the defendants to make a major purchase of real estate, and this is inconsistent with an intent to create a revocable interest... Accordingly, we hold that the defendants' right was in the nature of an unrecorded easement

Ouellette v. Butler, 125 N.H. 184, 189, 480 A.2d 76, 80 (1984) (Internal citations omitted).

The Boyles are correct that whether an easement has been created is determined according to the intent of the parties. See *Olson v. H & B Props. Inc.*, 118 N.M. 495, 498, 882 P.2d 536, 539 (1994) (stating that an easement should be construed according to the intent of the parties). The Boyles are also correct that the intentions of the parties can be revealed by the language contained in the Agreement. See *Camino Sin Pasada Neighborhood Ass'n v. Rockstroh*, 119 N.M. 212, 214, 889 P.2d 247, 249 (Ct.App.1994) (stating that "the intention of the parties is to be ascertained from the language employed, viewed in light of the surrounding circumstances")

Skeen v. Boyles, 2009-NMCA-080, ¶ 18, 146 N.M. 627, 633-34, 213 P.3d 531, 537-38

Whether the right is created through oral or written means

The Agreement conveys the rights contained therein through written means. While that fact alone is not dispositive, it does lend weight to the Agreement granting an easement, instead of a license. "An express easement must be in writing to satisfy the statute of frauds; a license may be, and usually is, given orally." *Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land*, paragraph 1.03[1] at 1-7 (1988). "It is to be noted that **the grant here was written**, and, since it was a part of the contract, was made for a consideration. **These are**

ordinarily attributes connected with easements rather than licenses, although not necessarily so.” *Paul v. Blakely*, 243 Iowa 355, 358, 51 N.W.2d 405, 407 (1952) (Emphasis added).

Similarly, the specific language contained in the Agreement gives credence to its status as an easement. “[W]hile specific language is not required, the words “grant” or “excepting and reserving” in a document transferring an interest in real property reveal an intent to create an easement.” *Skeen v. Boyles*, 2009-NMCA-080, ¶ 20, 146 N.M. 627, 634, 213 P.3d 531, 538.

The nature of the right

R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.1 (1984) states that the right being specific to a particular area of the burdened property indicates an easement. Here, the Agreement grants “the right to cross the eastern portion of Lot 19.” In a similar matter to the one at hand, the New Mexico Court of Appeals ruled:

Here, the nature of the right created the express language of the Agreement, and the surrounding circumstances indicate the creation of an express easement. The Agreement states that the Treats hereby grant “a right to go over and across” their property. This right is nearly identical to the “right of ingress and egress,” which was found to describe the easement in *Martinez*, 93 N.M. at 675, 604 P.2d at 368. Specifically, a “right to go over and across” describes a “liberty, privilege, right or advantage which one has in the land of another.” *Id.* (internal quotation marks and citation omitted). The Agreement is functionally indistinguishable from the instruments in *Martinez*, *Evans*, and *Kennedy*. The Agreement occurred in the context of a land transaction between the Treats and Skeens, wherein the Treats quitclaimed certain land to the Skeens, and the Skeens conveyed the interests they had in the Treats' property. In this context, the language “hereby grant” describes an express grant of an interest in land, in this case an easement. Given the express terms of the Agreement, together with the surrounding circumstances—the execution of a land transaction *635 **539—the district court could properly find that an easement had been created.

Skeen v. Boyles, 2009-NMCA-080, ¶ 21, 146 N.M. 627, 634–35, 213 P.3d 531, 538–39. If “a right to go over and across” is found to be nearly identical to a “right of ingress and egress,” then “the right to cross” must be as well.

Significantly, Ms. Kleiner was the owner of both Lot 19 and Lot 20 before the simultaneous conveyance to the Callanans and the enactment of the Agreement. The Supreme Court of New Mexico addressed a similar matter in *Martinez v. Martinez*:

At trial, there was testimony to the effect that appellant is not the only heir who received land which could not be reached by the middle road without crossing another of the heir's land. It is clear that the litigants' father did not intend that any of his heirs be landlocked. Their father knew the situation when he executed the will: that, regarding the land being devised, what is now appellant's northern tract could only be reached by crossing what is now appellee's land. The litigants' father stated in his will that the middle road was for the use of all of his heirs. And this intent was reiterated by his twelve children when they included in all of their deeds "rights of ingress and egress." Further, when a common ancestor simultaneously conveys, or when there is partition of a tenancy in common, the implication of an easement is stronger.

Martinez v. Martinez, 1979-NMSC-104, ¶ 14, 93 N.M. 673, 675, 604 P.2d 366, 368. Just as the father in *Martinez* knew the surrounding situation at the time the will was created, Ms. Kleiner knew the situation surrounding Lots 19 and 20. The walkway that would be encroached upon by the Herrmanns' fence was in place before the Agreement, and it is readily apparent that Ms. Kleiner intended to protect that walkway and her freedom to use it through the Agreement. Accordingly, just as the Supreme Court found in *Martinez*, there is a strong implication of an easement in the Agreement.

The duration of the right

A license is distinguished from an easement in that a license is merely a personal right to use the property of another for a specific purpose, is not an interest in the land and, therefore, **may not be assigned or conveyed**. *Tatum v. Dance*, 605 So. 2d 110, 112 (Fla. Dist. Ct. App. 1992), approved, 629 So. 2d 127 (Fla. 1993) *quoting* *Burdine v. Sewell*, supra [92 Fla. 375, 109 So. 648 (Fla.1926)]; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am.R. 19 (1882) (emphasis added).

[I]t is stated 'that it is the desire and intent of the parties hereto to permit said Joseph W. Moore to have access to said lands and that such access be further available to the grantees and assigns of Joseph W. **237 Moore; that said Ralph Moore agrees for himself, his grantees and assigns to permit such access * * *.' With this wording in the contract it clearly appears that it was the intention of both parties that a grant be effected, and with such an intention appearing in the contract, we hold that an easement rather than a revocable license has been created even though no words of grant are used therein.

Koubenec v. Moore, 399 Ill. 620, 625, 78 N.E.2d 234, 236–37 (1948). As explicitly stated in the first paragraph of the Agreement, the "right to cross the eastern portion of Lot 19" was not only granted to Ms. Kleiner, but "her heirs and assigns" as well. Although the Agreement is silent on its effect regarding the Callanans' heirs and assigns, they made their intention abundantly clear through their actions. In the deed granting Lot 19 to Mike Baker and Cristina Branco Kraft (attached as "Exhibit B"), the Callanans explicitly subjected to the property to the Agreement. Further, in granting Lot 19 to the Herrmanns, Cristina Branco made her understanding of the Agreement as a burden that would not be extinguished through sale of the property, as a license would be, by explicitly stating that the property was subject to the Agreement in the deed (attached as "Exhibit C").

The amount of consideration, if any, given for the right.

The sale of Lot 19 to the Callanans by Ms. Kleiner was consideration for the rights conveyed in the Agreement. "It is to be noted that the grant here was written, and, **since it was a part of the contract, was made for a consideration. These are ordinarily attributes connected with easements rather than licenses**, although not necessarily so." Paul v. Blakely, 243 Iowa 355, 358, 51 N.W.2d 405, 407 (1952) (Emphasis added). Under the Restatement (Second) of Contracts, § 202(2) multiple documents (separate contracts and/or documents)

executed at the same time; as part of the same transaction; by the same parties are construed together placing the documents under the "One Contract" rule. In the present case, the Agreement was part of the negotiation between Ms. Kleiner and the Callanans for the sale of Lot 19. This is evident by the fact that both the deed granting the property to the Callanans (Attached as "Exhibit D") and the Agreement were signed by both parties on the same day. Under the One Contract rule, these two documents must be construed together, making the conveyance of the property consideration for the Callanans' assent to the Agreement and the grant of rights contained therein.

If the License and Fence Agreement did initially create a license, it has since become an easement by estoppel

If the first paragraph of the agreement is found to have merely created a license at the Agreement's inception, then that license has become an irrevocable license, or as it is commonly known, and referred to by New Mexico courts, an easement by estoppel. "On some facts, long-standing use of a road coupled with inaction by the landowner may give rise to an easement by estoppel." *Luevano v. Maestas*, 1994-NMCA-051, ¶ 14, 117 N.M. 580, 584, 874 P.2d 788, 792. "Events occurring subsequent to the granting of a license may, in effect, change a license otherwise revocable at law into an easement enforced in equity." *Dailey's Chevrolet, Inc. v. Worster Realities, Inc.*, 312 Pa. Super. 275, 281, 458 A2d 956, 960 (1983). Licenses may become irrevocable due to expenditures by the licensee in reliance on the license, giving rise to the term "easement by estoppel."

In the case at hand, Ms. Kleiner has undertaken the expenditures involved in leasing a portion of her property to a tenant. This tenant is severely ill and requires frequent emergency medical attention and must be transported to the hospital several times a month. This transport

would be extremely impractical, if not downright impossible, if the Herrmanns' fence was constructed, as there would no longer be space for a stretcher or other medical necessities to reach her quickly. Due to the expenditures of Ms. Kleiner and the state of her tenant, it would be inequitable to allow the construction of the Herrmanns' fence. Further, as the Herrmanns had explicit notice of the Agreement, as evidenced by its inclusion in the deed conveying Lot 19 (Exhibit C), precluding them from revoking the easement by estoppel. *Tatum v. Dance*, 605 So. 2d 110, 112 (Fla. Dist. Ct. App. 1992), approved, 629 So. 2d 127 (Fla. 1993).

The License and Fence Agreement created a setback restriction.

The second paragraph of the agreement reads:

Kimberly Callanan and Thomas Callanan further agree that no fence shall be constructed on Lot 19 which is closer to Lot 20 than is shown on the red dashed line on the plat attached hereto as Exhibit A.

This portion of the Agreement is a restrictive covenant that creates a setback restriction, limiting where a fence may be constructed on Lot 19 of Lovato Subdivision No. 3. "For a restrictive covenant to run in equity the following requirements must be met: (1) the covenant must touch and concern the land; (2) the original covenanting parties must intend the covenant to run; and (3) the successor to the burden must have notice of the covenant." *Lex Pro Corp. v. Snyder Enterprises, Inc.*, 1983-NMSC-073, ¶ 7, 100 N.M. 389, 391, 671 P.2d 637, 639. In determining whether the covenant meets the first requirement, to "touch and concern the land," the Supreme Court of New Mexico stated:

The burden of the covenant touches and concerns the land "if the covenantor's legal interest in land is rendered less valuable by the covenant's performance. If, on the other hand, the covenantee's legal interest in land is rendered more valuable by the covenant's performance, then the benefit of the covenant satisfies the requirement that the covenant touch and concern land."

Id. By limiting where a fence can be constructed on the land, the Agreement rendered Lot 19 less valuable, and by ensuring that a fence could not encroach on the easement created by the first paragraph of the agreement, Lot 20 was rendered more valuable.

For the second factor, that the original covenanting parties must intend the covenant to run, the New Mexico Supreme Court ruled: “In addressing the requirement that the original parties intend the covenant to run, we note that the use of technical terms in the creation of a covenant is not necessary in order for the covenant to run.” *Id.* “Because the language of the deed does not specify that the covenant is to run with the land, we look to the circumstances surrounding the transaction and the object of the parties in making the restriction to determine whether that intent can be inferred.” *Id.* The Supreme Court went on to rule:

“The grantor-covenantee retained land adjacent to the property conveyed and the grantor's retained land derives a benefit from the agreement of the parties. These circumstances persuade us that it was the intent of the parties that the benefit of the covenant should run with the covenantee's interest in the land.”

Id. In addressing the covenantor's intent, the Court stated: A factor strongly favoring the inference that the burden was intended to run is “the permanent nature of the situation to be produced by the performance of the covenant. *Lex Pro Corp. v. Snyder Enterprises, Inc.*, 1983-NMSC-073, ¶ 12, 100 N.M. 389, 392, 671 P.2d 637, 640 *quoting* R. Powell, *The Law of Real Property* ¶ 673[2] (1981). “An owner of land who, upon its sale, seeks to protect property he or she retains by means of a restrictive covenant establishing a building setback line on the land conveyed intends to produce a situation that is permanent in nature.” *Id.*

Ms. Kleiner, the original party to the covenant for Lot 20, still resides on that property and clearly intended, and still intends, for the covenant to run with the land, as she is vehemently defending the setback restriction contained therein. Likewise, the Callanans, as the original parties to the covenant for Lot 19, demonstrated their intent for the covenant to run with the land by their inclusion of the Agreement in the deed conveying the property to Mike Baker and Cristina Branco Kraft (Exhibit B).

The Supreme Court addressed the third factor, that the successor to the burden must have notice of the covenant, ruling: “because the deed was recorded, the defendant had constructive notice of the covenant.” *Id.* “Constructive notice satisfies the notice requirement set forth above.” *Id.* In the present case, not only was the Agreement recorded, but the Agreement was referenced in the deeds conveying Lot 19 to all subsequent owners, including the Herrmanns (Exhibits B and C), and the 2005 Boundary Survey Plat (attached as “Exhibit E”), giving the Herrmanns explicit notice of the setback restriction. In light of the New Mexico Supreme Court’s ruling in the Lex Pro Corp. case and its close analogy to the facts at hand, the Agreement must be found to create a setback restriction that runs with the land and prohibits the Herrmanns from building a fence in violation of the Agreement.

Conclusion

The License and Fence Agreement created both an easement appurtenant, burdening Lot 19 and Serving Lot 20 of Lovato Subdivision No. 3, as well as a setback restriction that limits where a fence may be constructed on Lot 19. The fence that Bill and Linda Herrmann propose to build would violate both of these rights conveyed by the Agreement to Ellen Kleiner. Accordingly, the proposed fence should be disallowed by the City of Santa Fe.

Respectfully submitted:

CUDDY & McCARTHY, LLP

By: /s/ Sam W. Minner
SAM W. MINNER
Attorney for Appellant
Post Office Box 4160
Santa Fe, New Mexico 87502-4160
(505) 988-4476

**REPLY MEMORANDUM BRIEF
RELATED TO APPEAL NO. 2018-001**

Bill and Linda Herrmann, the owners of Lot 19 of Lovato Subdivision No. 3, desire to construct a fence on Lot 19. Appellant, Ellen Kleiner, the owner of adjoining Lot 20, opposes such construction, and has submitted a Memorandum Brief arguing that a certain License and Fence Agreement created an easement appurtenant or in the alternative, created an easement by estoppel, which the proposed fence would compromise. Mr. and Mrs. Herrmann disagree with Ms. Kleiner's position.

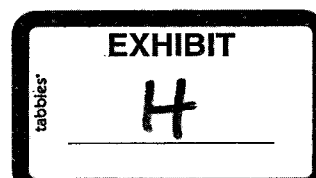
In her Memorandum Brief, Ms. Kleiner cites a License and Fence Agreement from 1994, and makes various arguments. However, each of her arguments actually supports the interpretation that the "License and Fence Agreement" in fact created only a revocable license and did not create an easement of any sort. The law, as cited by Ms. Kleiner, is very clear, that the intent of the parties at the time of the grant governs.

The License and Fence Agreement cited by Ms. Kleiner clearly indicates that it is a license, and not an easement. The word "easement" is never used. The word "license" is used in the title. The indicia of the granted right indicate a very limited usage, banning any sort of vehicular traffic.

If it was the intent of the parties at the time of the Agreement that an easement be created, the owner of Lot 19 could have easily signed a document titled "Easement". Alternately, if Ms. Kleiner had actually intended to reserve a easement when she conveyed away Lot 19, she could have readily reserved that easement in the deed she delivered to the purchaser of Lot 19. She chose not to do that. Ms. Kleiner's intention to create an easement and not a license could only have been more clearly expressed if the document affirmatively stated, in bold type, that "this document creates only an easement, and does not give a license". Efforts at this time by Ms. Kleiner to insert such language by implication, 24 years after the Agreement, cannot be supported.

Ms. Kleiner also urges that somehow this license has morphed into an easement by estoppel, indicating that she has somehow undertaken expenditures in leasing a portion of her property to a tenant. However, she fails to cite what, if any, expenditures she has actually made, or the amounts thereof.

Further, Ms. Kleiner maintains a substantial garden area between her home and the proposed fence, and there is also a pathway in the same area. After Mr. and Mrs. Herrmann's fence is constructed as proposed, Ms. Kleiner, her tenant, and any emergency personnel and equipment will have adequate space for access to the tenant's entryway.



Finally, Ms. Kleiner cites two New Mexico cases as authority for her position. Both of these cases are entirely distinguishable from the present circumstances, and each case actually provides substantial authority for the Herrmanns' position.

Martinez v. Martinez, 93 N.M. 673 (1979), resolved an intra-family dispute resulting from a deceased ancestor's devise of contiguous parcels of property to his children. The Court determined that each of the children had rights to use a particular access road. The Will was ambiguous as to who had the rights to use that road. The Supreme Court essentially found that the father did not intend any of his children to be landlocked and hence, each of them had the right to use the road in question. That case involved an easement of necessity, not the interpretation of a document between two consenting parties. In a dissent to the Supreme Court's opinion, the Court stated:

"The law is jealous of easement claims, and the burden is on the party asserting such a claim to prove it clearly. This you must do by showing a grant conferring an easement in express terms, or by necessary implication."

That quotation comes from a dissent and was not germane to the conclusion reached by the Court. It was not contradicted by any part of the majority decision published by the Court. However, it reflects the status of the law in New Mexico and in most other jurisdictions.

The other case cited by Ms. Kleiner is Skeen v. Boyles, 146 N.M. 627 (2009). This case arose out of a well sharing agreement whereby owners of adjoining properties each gave the other rights to water from wells located on their respective properties. The New Mexico Supreme Court determined that this reciprocal agreement created easements appurtenant to the real estate, rather than licenses. The Court's analysis stated that the parties' intentions drive the construction of the document. Because the parties were co-dependent on the water in this particular case, the Court concluded that appurtenant easements rather than mere licenses, were what the original parties intended. In the Kleiner/Herrmann disagreement, there is no co-dependency involved.

In conclusion, we believe that the License and Fence Agreement was intended to create a license, not an easement, and that Mr. and Mrs. Herrmann should be allowed to complete their fence construction.

Respectfully submitted,

SCHEUER & YOST

By: 

Ralph H. Scheuer
Attorney at Law
P.O. Box 9570
Santa Fe, New Mexico 87504
(505) 982-9911
rhs@santafelawyers.com

Attorneys for Bill and Linda
Herrmann



Exhibit C



Exhibit D

Boundary Survey Plat
for
Mike Baker
and
Christina Branco Kraft

580012

Lot 19, Subdivision No. 3
of the Lovato Grant, Santa Fe,
Santa Fe County New Mexico

**CITY OF SANTA FE
PUBLIC NOTICE**

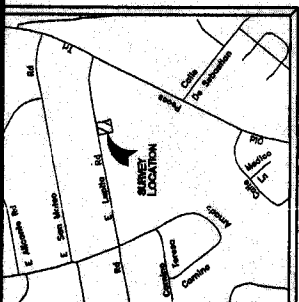
The City of Santa Fe has reviewed this plat of survey and the information contained herein. The City of Santa Fe Staff cannot guarantee the accuracy of the information contained herein. The City of Santa Fe Staff cannot be held liable for any errors or omissions. Any representation or liability is limited to the City of Santa Fe. Any representation or liability is limited to the City of Santa Fe.



COUNTY OF SANTA FE 1366190
I hereby certify that this instrument was filed for
recording in the County of Santa Fe, New Mexico,
on this 17th day of February, 2005, at 10:52 AM. The
instrument is recorded in Book 580, Page 002 of the
records of Santa Fe County.

Witness my hand and Seal of Office
at Santa Fe, New Mexico, this 17th day of February,
2005.
County Clerk, Santa Fe County, New Mexico
Hilary Dwell

SIERRA LAND SURVEYING, INC.	
1402 ST. FRANCIS DR.	SANTA FE, NM 87505-9632
Project No. C-011-0205A	DRG. DEC. GC. DTC
	FILE: GPS BR. 57
INDEXING INFORMATION FOR COUNTY CLERK	
NAME	LOCATION
Mike Baker	Sec. 36 T.17 N. 2.9 E. INC. 3 Lovato Grant



NEIGHBOR MAP



1 inch = 20 ft.

- LEGEND**
- Sanitary sewer, manhole
 - Coped iron pin #123, unless otherwise noted.
 - 1/2" Coped iron pin set this survey.
 - UTILITY poles and lines.
 - Fences.
 - M-10.
 - Concrete.

NOTES

- 1.) Basis of bearing for this survey taken from GPS observations as referenced along the south boundary as shown on a plat "Lot Line Adjustment between Albert Repich and Lot 20 Subdivision No. 3 of the Lovato Grant, Santa Fe County, New Mexico," recorded in Book 577, Page 027 of the records of Santa Fe County, New Mexico, dated February 14, 2005.
- 2.) Reference Plats entitled "Madam's Caramok and Shyras Caramok" by Michele C. Noonan, PS 8998, recorded in Plat Bl. 222, Pg. 031 and "Albert Repich" recorded in Plat Bl. 63, Pg. 14.
- 3.) FIRM Parcel No. 350070-0008-B, Zone "C".
- 4.) Subject to Easements, restrictions and reservations of record.

CERTIFICATE

I, David E. Cooper, a duly registered Professional Surveyor in the State of New Mexico, do hereby certify that this plat represents an accurate and correct to the best of my knowledge, information and belief, and that I am a duly licensed and qualified Surveyor in the State of New Mexico.

February 1, 2005

P.S. No. 9032



AMENDED CERTIFICATE

I, David E. Cooper, a duly registered Professional Surveyor in the State of New Mexico hereby certify that this plat represents an accurate and correct to the best of my knowledge, information and belief, and that I am a duly licensed and qualified Surveyor in the State of New Mexico.

February 8, 2005

P.S. No. 9032



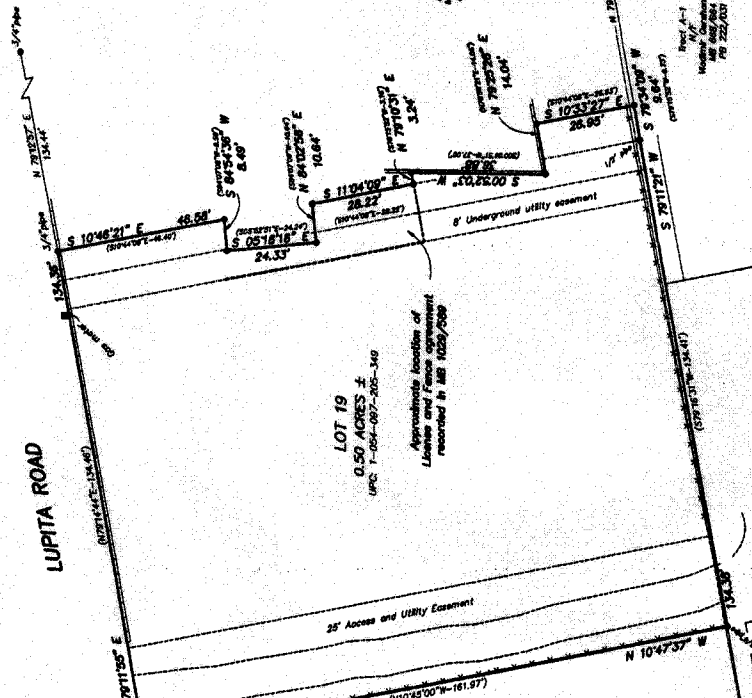
LUPITA ROAD
(N79°17'30"E-134.67')

LOT 19
0.50 ACRES ±
UPC 1-054-007-205-340

Approximate location of
Underground utility easement
recorded in 888 1025/008

25' Access and Utility Easement

8' Underground utility easement



Approximate location of
Underground utility easement
recorded in 888 1025/008

N/F
Subdiv. No. 20
1025/008

Lot 20
Subdiv. No. 20
1025/008

Block A-1
N/F
Subdiv. No. 20
1025/008

Block B
N/F
Subdiv. No. 20
1025/008

Approximate location of
Underground utility easement
recorded in 888 1025/008

N/F
Subdiv. No. 20
1025/008

Lot 20
Subdiv. No. 20
1025/008

Block A-1
N/F
Subdiv. No. 20
1025/008

Block B
N/F
Subdiv. No. 20
1025/008



Exhibit F

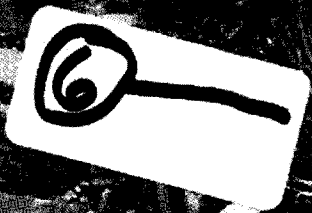


Exhibit 3



Exhibit H

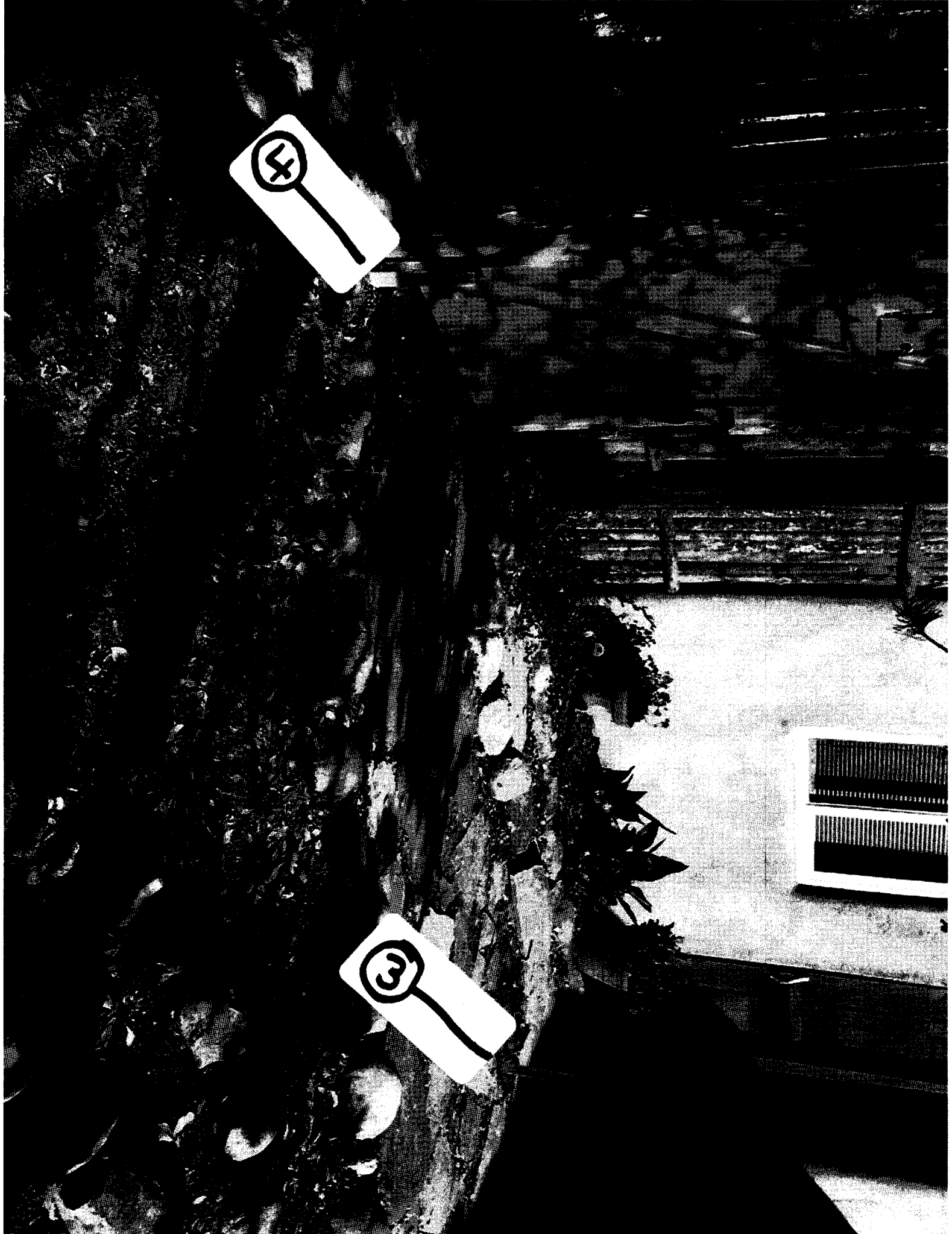


Exhibit I

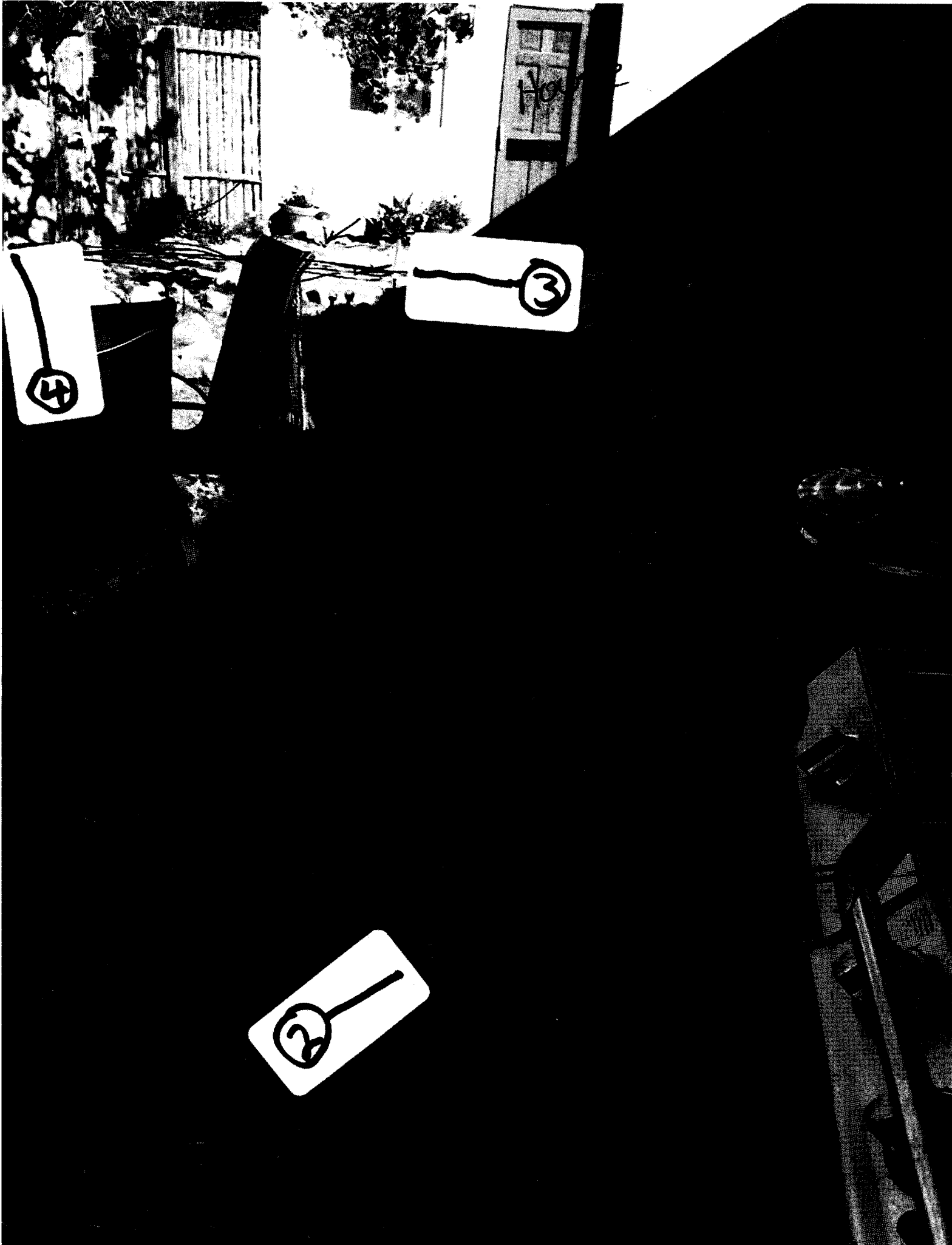


Exhibit J

e

■ **earth material** Any mineral, rock, natural soil, overburden, or fill, or combination of such materials. (*Boulder County, Colo.*)

■ **earthmoving** (*See also disturbed area; filling*) The removal, extraction, excavation, fill, or grading for any purpose of soil, sand, shell, limestone, dolomite, gravel, ore, rock, clay, peat, or any material by whatever process. (*Polk County, Fla.*)

■ **earth station** (*See also telecommunications definitions*) A facility that transmits and/or receives radio signals to and/or from a satellite. (*Tuscaloosa, Ala.*)

■ **easement** A grant by a property owner to the use of land by the public, a corporation, or persons for specific purposes as the construction of utilities, drainage ways, and roadways. (*St. Paul, Minn.*)

The right to use property owned by another for specific purposes or to gain access to another property. For example, utility companies often have easements on the private property of individuals to be able to install and maintain utility facilities. (*California Planning Roundtable*)

Authorization by a property owner for the use by another, and for a specified purpose, of a designated part of his or her property. (*Iowa City, Iowa*)

A right to use another person's real property for certain limited purposes. (*Wood River, Ill.*)

A legal interest in land, granted by the owner to another person, which allows that person(s) the use of all or a portion of the owner's land, generally for a stated purpose including but not limited to access or placement of utilities. (*Clarkdale, Ariz.*)

That portion of a lot or lots reserved for present or future use by a person or agency other than the legal fee owner(s) of the property. The easement may be for use under, on, or above said lot or lots. (*North Liberty, Iowa*)

A strip of land extending along a property line or across a lot, for which a limited right of use has been or is to be granted for a public or quasi-public purpose and within which the owner of the property shall not erect any permanent structures. (*Rock Hall, Md.*)

An interest in real property generally established in a real estate document or on a recorded plat to reserve, convey or dedicate the use of land for a specialized or limited purpose without the transfer of fee title. Such specified uses may include but are not limited to transportation facilities, utilities, access, stormwater drainage, and solar exposure. (*Golden, Colo.*)

■ **easement, access** An easement created for the purpose of providing vehicular or pedestrian access to a property. (*Renton, Wash.*)

A portion of land intended for the sole purpose of providing ingress/egress to a land-locked parcel. An easement of access shall not include land encumbered by a cross-access easement. (*Glen Ellyn, Ill.*)

■ **easement, access, private** A privately owned and maintained right-of-way that provides vehicular access to each of not more than four lots. A private access easement allows the creation of no more than four lots without street frontage, each with vehicular access on the easement. The area designated for the private access easement shall be excluded in computing minimum lot areas. A private access easement shall be a part of one or more lots. At the discretion of the director of public works, based on considerations described in the city planning commission guidelines, the street entrance portion of the private access easement may be located within the public right-of-way. Private access easements shall not be named. Addresses for the dwelling units served by the easement shall conform to the address range of the street upon which the easement abuts. (*Oakland, Calif.*)

■ **easement, affirmative** An easement that gives the holder a right to make some limited use of land owned by another. (*Iowa State University Extension Service*)

■ **easement, agricultural conservation** (*See also agricultural protection zoning, exclusive*) A legal agreement restricting development on farmland. Land subjected to an ACE is generally restricted to farming and open space use. (*American Farmland Trust*)

An easement intended to protect, preserve, and conserve farmland and which shall prohibit the development of said ground. (*Wayne County, Ohio*)

A negative easement in gross restricting residential, commercial, and industrial development of land for the purpose of maintaining its agricultural production capability. Such easement: (1) may permit the creation of not more than three lots that meet applicable county zoning and subdivision regulations; and (2) shall be perpetual in duration, provided that, at least 20 years after the purchase of an easement, a county may agree to reconvey the easement to the owner of the land for consideration, if the landowner can demonstrate to the satisfaction of the county that commercial agriculture is no longer practicable on the land in question. (*Concord, N.C.*)

■ **easement, appurtenant** An easement that runs with the land. (*Iowa State University Extension Service*)

■ **easement, aviation** (*See also air rights*) A right of use over property whereby an airport proprietor may operate over real property of another. (*Indian River County, Fla.*)

A document acknowledging airport proximity, limiting the height of structures and granting permission for the conditions arising from the overflight of aircraft in connection with the operation of an airport. (*Concord, N.C.*)

■ **easement, conservation** (*See also conservation definitions; land trust*) A nonpossessory interest in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open space values of real property; assuring its availability for agricultural, forest, recreational, or open space use; protecting natural resources; or maintaining air or water quality. (*Muskegon, Mich.*)

■ **level of service (LOS) standard** An indicator of the extent or degree of service provided by, or proposed to be provided by, a public facility based on and related to the operational characteristics of the facility. "Level of service" shall indicate the capacity per unit of demand for each public facility. (*Growing Smart Legislative Guidebook*)

The quality and quantity of existing and planned public facilities. . . . (*Jefferson County, Colo.*)

A measure of the relationship between service capacity and service demand for public facilities. (*Boise City, Idaho*)

An indicator of the extent or degree of service provided by, or proposed to be provided by, a facility based on, and related to, the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility. (*Loveland, Colo.*)

A measure of the operational performance of a road link or intersection based on a ratio of volume to capacity (V/C) of the facility as determined by the Intersection Capacity Utilization (ICU) method or seconds of delay determined by the Highway Capacity Manual. (*San Juan Capistrano, Calif.*)

A standard used by government agencies to measure the quality or effectiveness of a municipal service, such as police, fire, or library, or the performance of a facility, such as a street or highway. (*California Planning Roundtable*)

■ **level of service (LOS) standard, traffic** A scale that measures the amount of traffic that a roadway or intersection can accommodate, based on such factors as maneuverability, driver dissatisfaction, and delay. Level of Service A indicates a relatively free flow of traffic, with little or no limitation on vehicle movement or speed. Level of Service B describes a steady flow of traffic, with only slight delays in vehicle movement and speed. All queues clear in a single signal cycle. Level of Service C denotes a reasonably steady, high-volume flow of traffic, with some limitations on movement and speed, and occasional backups on critical approaches. Level of Service D designates the level where traffic nears

an unstable flow. Intersections still function, but short queues develop and cars may have to wait through one cycle during short peaks. Level of Service E represents traffic characterized by slow movement and frequent (although momentary) stoppages. This type of congestion is considered severe, but is not uncommon at peak traffic hours, with frequent stopping, longstanding queues, and blocked intersections. Level of Service F describes unsatisfactory stop-and-go traffic characterized by "traffic jams" and stoppages of long duration. Vehicles at signalized intersections usually have to wait through one or more signal changes, and "upstream" intersections may be blocked by the long queues. (*California Planning Roundtable*)

A quantitative measure of traffic congestion identified by a declining letter scale (A-F) as calculated by the methodology contained in the 1985 Highway Capacity Manual Special Report 209 or as calculated by another method approved by the department of public works. Level of Service (LOS) A indicates free flow of traffic with no delays, while LOS F indicates jammed conditions or extensive delay. (*King County, Wash.*)

■ **library** (*See also community facility; institutional use*) A public facility for the use, but not sale, of literary, musical, artistic, or reference materials. (*Redmond, Wash.*)

A public, nonprofit facility in which literary, musical, artistic, or reference materials such as but not limited to books, manuscripts, computers, recordings, or films are kept for use by or loaning to patrons of the facility, but are not normally offered for sale. (*Milwaukee, Wisc.*)

A room or building for exhibiting, or an institution in charge of, a collection of books; artistic, historical, or scientific objects. (*Concord, N.C.*)

A building containing printed information, electronic information, and pictorial material for the public use and purpose of study, reference, and recreation. (*Steamboat, Colo.*)

■ **license** (*See also certificate definitions; permit*) Any form of written permission given to any person, organization, or

agency to engage in any activity, as required by law or agency rule. A license includes all or part of an agency permit, certificate, approval, registration, charter, or plat approvals or rezones to facilitate a particular proposal. The term does not include a license required solely for revenue purposes. (*Renton, Wash.*)

■ **light, direct sunlight** Sunlight unobstructed by any improvement or tree within the solar access space. (*Jordan, Minn.*)

■ **light fixture, outdoor** An outdoor illuminating device, outdoor lighting or reflective surface, lamp or similar device, permanently installed or portable, used for illumination, decoration, or advertisement. Such devices shall include but are not limited to lights used for: (A) buildings and structures; (B) recreational areas; (C) parking lot lighting; (D) landscape lighting; (E) architectural lighting; (F) signs (advertising or other); (G) street lighting; (H) product display area lighting; (I) building overhangs and open canopies; (J) security lighting. (*Sedona, Ariz.*)

Outdoor artificial illuminating devices, lamps, and other devices, permanent or portable, used for illumination or advertisement. Such devices shall include but are not limited to search, spot, or flood lights for buildings and structures, recreational areas, parking lot lighting, landscape lighting, billboards and other signage, and street lighting. (*Concord, N.C.*)

■ **light pollution** (*See also nuisance*) Any adverse effect of man-made light. (*Sedona, Ariz.*)

■ **light-rail transit** (*See transit, light-rail*)

■ **light source** A single artificial point source of luminescence that emits measurable radiant energy in or near the visible spectrum. (*Myrtle Beach, S.C.*)

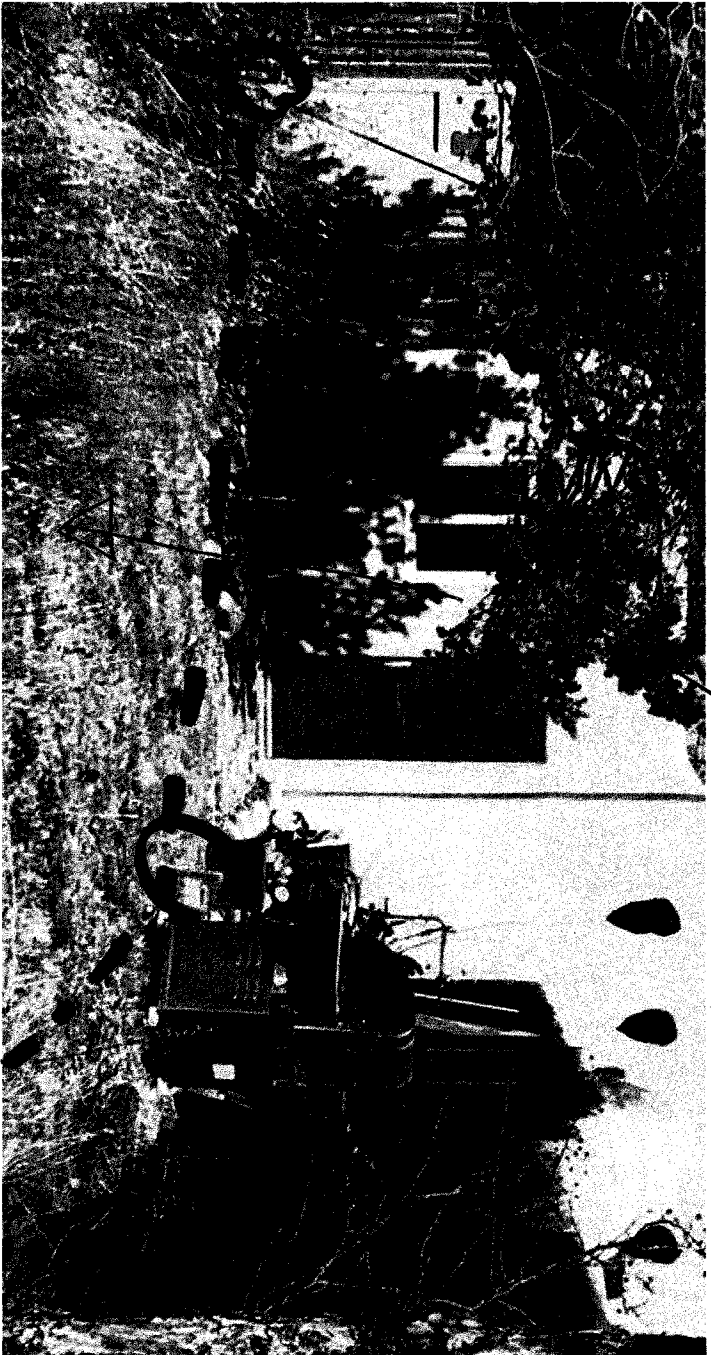
■ **light source, flashing illumination** (*See also sign, flashing*) A light source or other image which in whole or in part physically changes in light intensity or gives the appearance of such change. (*Tulsa, Okla.*)

■ **light trespass** (*See also nuisance*) Light spill falling over property lines that



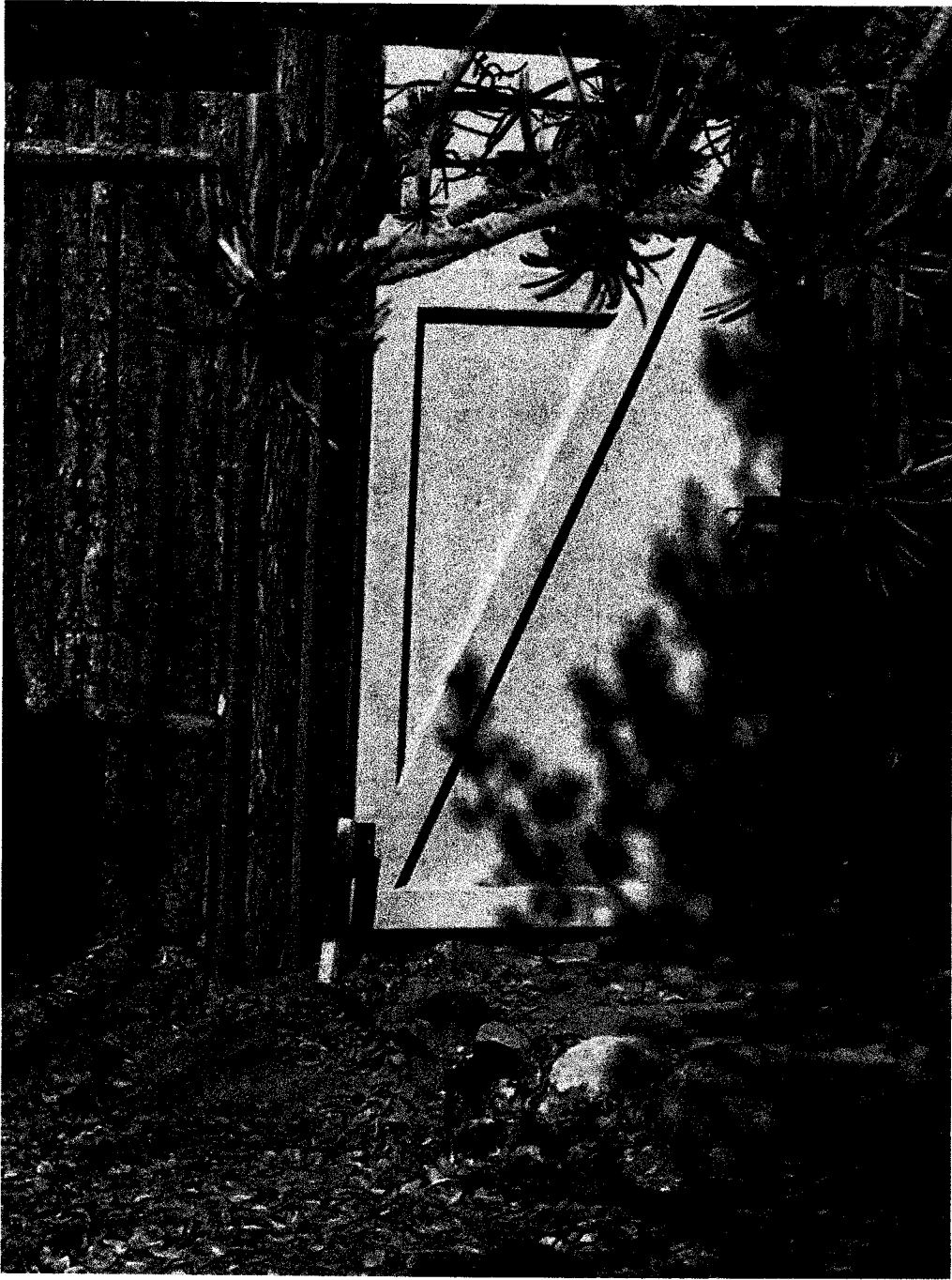
Exhibit L

120 FT. BEAUTIFUL VIEW
FROM BEDROOM OF WILD
FLOWERS, ETC...



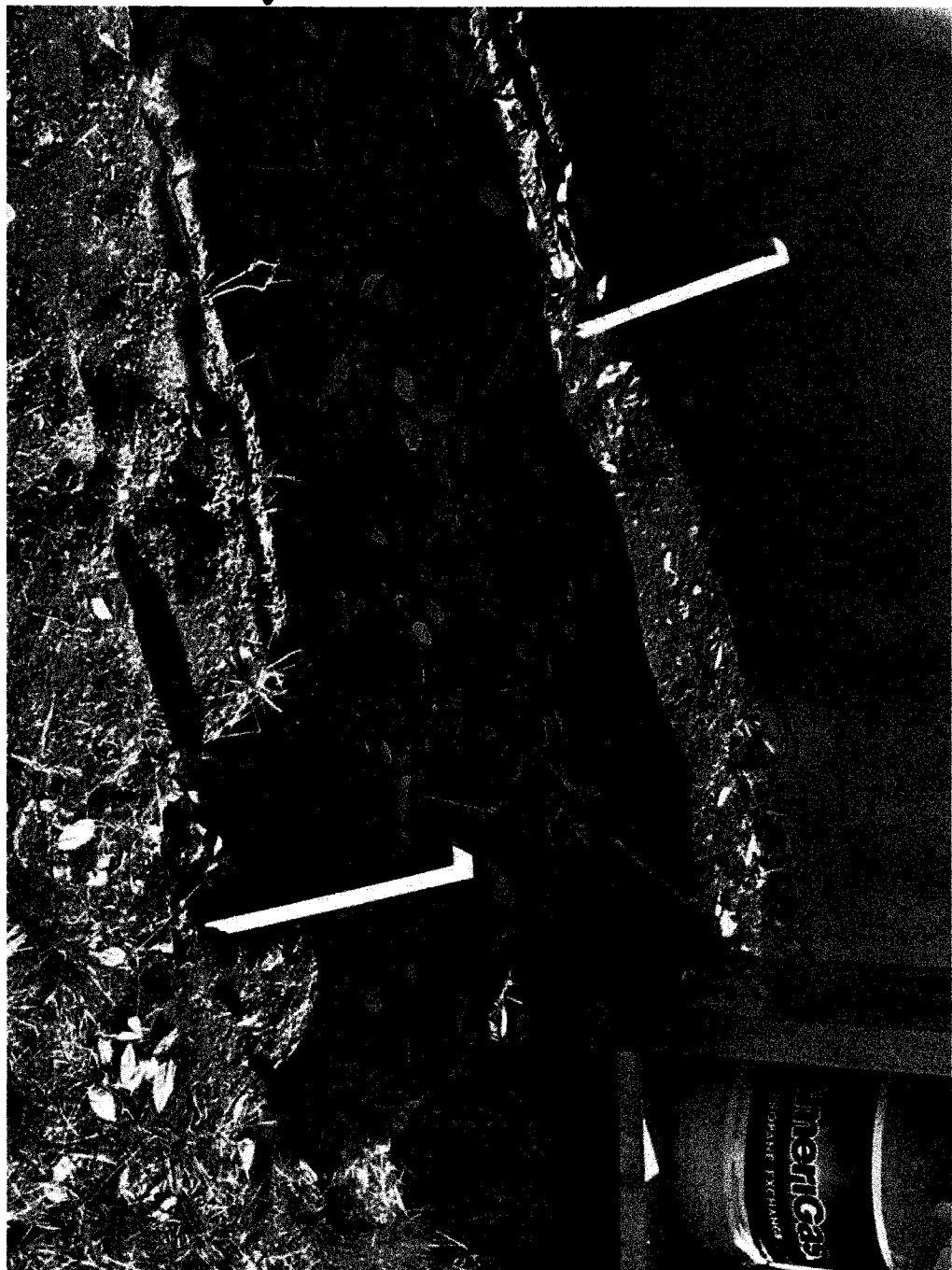
THE 6 FT TALL FENCE
will see the
New Bedroom
View



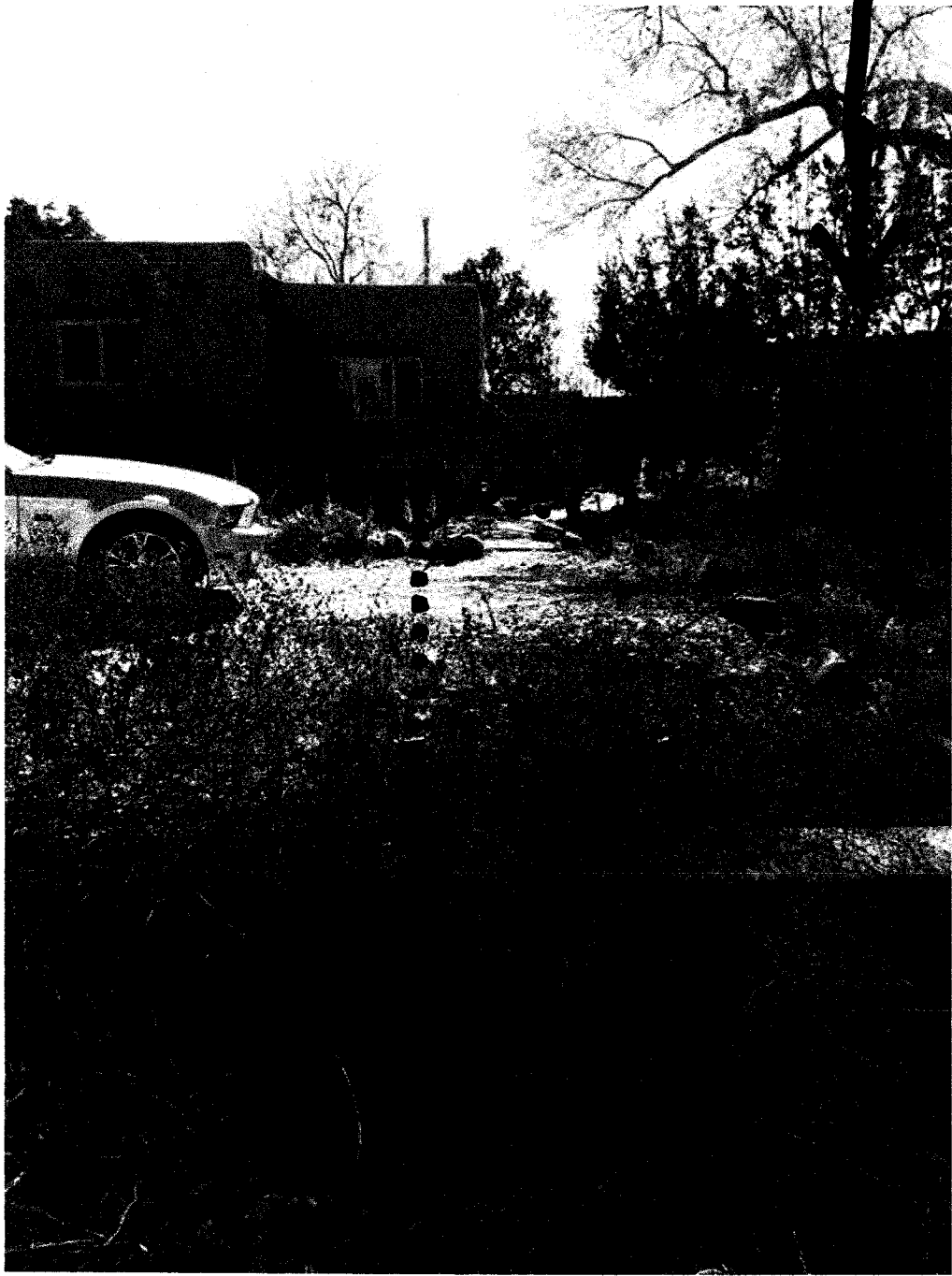








EXISTING FENCE



CREATES A
NO MANS
LAND

