

ARIZONA COURT OF APPEALS

DIVISION ONE

MOONSHADOW PROPERTIES, L.L.C.,
Plaintiff/Appellant,

v.

MASJID OMAR IBN AL-KHATTAB,
Defendant/Appellee.

Court of Appeals
Division One
No. 1 CA-CV 19-0790

Maricopa County
Superior Court
No. CV2016-091847

**DEFENDANT/APPELLEE'S COMBINED
ANSWERING BRIEF AND APPENDIX**

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INTRODUCTION

The plaintiff-appellant, Moonshadow, seeks an implied easement granting its Lot 1 the exclusive right to all but 9 parking spaces on Masjid's Lot 2. After a bench trial, the trial court issued a detailed opinion finding for Masjid on every disputed issue of fact and casting doubt on the credibility of Moonshadow's key witnesses. To prevail, Moonshadow must show that all of these careful findings were clearly erroneous. It cannot make that showing.

Moreover, one undisputed fact disposes of Moonshadow's case. An implied easement is an attempt to infer the intent of the parties. Moonshadow's entire case is premised on the claim that when it bought Lot 1 from TDMC, the parties intended (or, reasonable parties in their shoes would have intended) that Lot 1 would be allowed to park on Lot 2. But during the negotiations over the sale of Lot 1, Moonshadow requested a one-way easement allowing it to park on Lot 2, and TDMC rejected it. It simply cannot be that the parties impliedly intended (or that reasonable parties in their shoes would have expected) a right that TDMC expressly refused.

STATEMENT OF FACTS AND CASE*

I. Factual background

A. TDMC acquires Lots 1 and 2.

Moonshadow owns a medical building, the Generations Medical Center, in Tempe. The medical center is on land referred to as Lot 1. Masjid Omar Ibn Al-Khattab owns two lots adjacent to the medical center: a lot containing its Mosque, which is to the north of Lot 1; and Lot 2, which is to the east of Lot 1. [See, e.g., Exhibits 8, 10, 11 ([APP122](#), [124](#), [125](#)).]

In 2002, a group of doctors, TDMC Renovations, LLC, bought Lot 1. [Exhibit 6.] Originally, Lot 1 had the 197 parking spaces required to satisfy the Tempe's code. [Exhibit 53 at MASJID_000443.] However, a previous owner of Lot 1 sold the southern part of Lot 1. [*Id.*] As a result, Lot 1 had only 111 of the 197 parking spaces that it needed to satisfy the City's code requirements. [*Id.*]

* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., [APP089](#)), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number. "Exhibit" refers to the trial exhibits.

To deal with these parking issues, TDMC sought shared parking agreements with the neighboring Mosque and Catholic Church. [August 27, 2018 Trial Transcript (“Aug. 27 Tr.”) 74:20-24 ([APP198](#)).] The idea was that the demand for parking at the Mosque and the Church was highest on weekends (and, for the Mosque, at mid-day on Fridays), while the medical center’s demand for parking was highest on weekdays. [Exhibit 51; Exhibit 53 at MASJID_000446, MASJID_000452; Aug. 27 Tr. 75:19-76:5 ([APP199-200](#))]. This agreement remains in place, has worked well, and is not the subject of any dispute. [Aug. 27 Tr. 77:1-4 ([APP201](#)).]

However, when TDMC asked Tempe to recognize the agreement in 2003, the Church had not formally approved the agreement. [Exhibit 51; Exhibit 70 at MASJID_000473; Aug. 27 Tr. 76:12-25 ([APP200](#)).] As a result, Tempe refused to recognize the agreement.

In response, TDMC purchased Lot 2, which was vacant, to satisfy the parking requirements set by City code. TDMC then filed a request with the City for approval of its development plan for the medical center. [Exhibit 23 at MASJID_000492.] The plan purported to allocate 89 parking spaces from Lot 2 to Lot 1, thus providing Lot 1 with a total of 197 parking spaces. [*Id.*] Tempe approved the plan. [*Id.* at MASJID_000491.]

Soon after the plan was approved, TDMC filed a re-plat request. [Exhibit 8 ([APP122](#)).] The Final Plat reduced the size of Lot 2 and changed its name from “Lot 3,” as it was formerly known, to Lot 2, as it is called today. *Id.* The City approved the re-plat.

Later in, TDMC and an adjacent property owner, Sopris Mountain, LLC, signed an agreement which granted Sopris an easement to use up to 40 parking spaces on Lot 1. [Exhibit 107 at MASJID_000054; Aug. 27 Tr. 87:17-23 ([APP203](#)).]

In 2004, TDMC built a parking lot on Lot 2. At trial, Dr. Steven Linnerson, TDMC’s managing member and later the property manager for the Generations Medical Center, testified that neither employees nor patients of the medical building on Lot 1 have used the parking lot on Lot 2 much, if at all, nor have they used the parking available on the Mosque’s property or the Church’s property. Instead, those employees and patients have generally used only the parking spaces on Lot 1. [Aug. 27 Tr. 69:18-74:6 ([APP193-98](#)).] When asked whether the parking available on Lot 1 has been “sufficient” for Lot 1’s needs, Linnerson replied, “That’s correct.” [Aug. 27 Tr. 74:7-9 ([APP198](#)).]

B. Moonshadow purchases Lot 1.

In 2005 TDMC began to look into selling Lot 1. Ultimately, Moonshadow purchased Lot 1.

During the negotiations, Moonshadow's attorney, Greg Lake, proposed a one-sided parking easement that would have allowed users of Lot 1 to park on Lot 2. Victoria Longfellow, who represented TDMC, rejected the offer, telling Lake that she "didn't think my client would accept a one-sided easement." [Aug. 16, 2018 Trial Dep. of Victoria Longfellow ("Longfellow Trial Dep.") 8:1-15 ([APP169](#)), 10:15-18 ([APP170](#)).] Longfellow also emailed Linnerson to warn him that Lake "is not currently drafting [the parking agreement] as a reciprocal easement, and you need to be sure it does not cause you problems for any future development of the property." [Exhibit 91 ([APP145](#)).]

After Longfellow rejected the one-way easement on behalf of TDMC, Lake drafted an easement agreement that provided for reciprocal access. [See Longfellow Trial Dep. 10:15-18 ([APP170](#)).] That draft agreement did not purport to entitle Lot 1 to use any particular number of parking spaces on Lot 2. [See Exhibit 17.] Instead, it merely purported to establish "a nonexclusive, perpetual and reciprocal easement for reasonable access,

ingress, egress and parking over all paved driveways, roadways and walkways as presently or hereafter constructed and constituting a part of each Parcel.” [*Id.* at TDMC000101.]

Longfellow sent an email to Lake expressing her remaining concerns with the proposed reciprocal easement. Longfellow also noted that she had been “told” that Linnerson had signed the agreement. [Exhibit 18 at TDMC000445.] However, neither Longfellow nor Lake recalls ever seeing a signed copy of that agreement. [IR-103 at 10:24-11:1 (Lake); Longfellow Trial Dep. 21:17-22:15 ([APP171-72](#)).] Linnerson testified that he does not recall signing this document, has never seen a signed copy, and has not been able to find one. [Aug. 27 Tr. 96:3-17, 98:19-21, 100:5-20 ([APP210](#), [212](#), [214](#)).] No signed copy of this reciprocal easement agreement has been produced in this case.

At trial, Dr. Mikol Davis, Moonshadow’s principal, testified that, during the period when Moonshadow was conducting its “due diligence” prior to the purchase of Lot 1, he learned of the shared parking agreements between the medical center, the Church, and the Mosque and was satisfied that they satisfied Lot 1’s parking needs. [August 28, 2018 Trial Transcript (“Aug. 28 Tr.”) at 80:18-81:6 ([APP283](#)).]

TDMC wanted to sell both lots to Moonshadow, but Moonshadow did not want to purchase Lot 2. [Aug. 27 Tr. 91:25-92:9, 94:11-95:12 ([APP205](#), [APP208](#)); Aug. 28 Tr. 81:7-83:2 ([APP284](#)), 89:22-24 ([APP292](#)).]

On February 3, 2006, TDMC conveyed Lot 1 to Moonshadow by a Special Warranty Deed. [Exhibit 4.] That deed states that it conveys title to Lot 1 “SUBJECT ONLY TO the matters set forth on” the attachment thereto labelled “Exhibit B.” [*Id.* at MASJID_000205.] Neither the deed nor its Exhibit B refer to a parking easement on Lot 2. [*See id.*; Aug. 27 Tr. 103:3-16 ([APP217](#)).] Exhibit B refers by name to several recorded documents, but not the “Third Amended General Plan” that TDMC submitted to Tempe. [*See* Exhibit 4 at MASJID_000208 - MASJID_000209.]

At the time Moonshadow purchased Lot 1, Davis did not believe that Lot 1 had a parking easement on Lot 2. On the contrary, as Davis testified at trial, at the time Moonshadow purchased Lot 1, “I didn’t know about easements.” [Aug. 28 Tr. 83:5 ([APP286](#)).] When asked at deposition if Moonshadow had “any sort of formal agreement with TDMC over parking on Lot 2,” Davis replied, “I didn’t have any agreement.” [IR-104 at 29:17-22.]. At trial, Davis affirmed that this testimony is true. [Aug. 28 Tr. 53:3-7 ([APP271](#)).]

At trial, both Linnerson and Davis testified that, after Moonshadow purchased Lot 1 in 2006, neither TDMC nor Moonshadow took any action over the next five years to attempt to secure a parking easement between Lot 1 and Lot 2 or raised the subject of such an agreement. [Aug. 27 Tr. 100:21-101:19 ([APP214](#)); Aug. 28 Tr. 109:13-16 ([APP220](#)).]

Moonshadow took over the shared parking agreement that TDMC had with the Church and the Mosque. When asked at deposition how this shared parking agreement has worked for Moonshadow, Davis testified, “Outstanding,” adding, “We’ve never had a problem. There’s never been an issue whatsoever, either way.” [IR-104 at 30:15-31:4.] At trial, when asked whether the shared parking agreement was “more than sufficient” to meet Lot 1’s needs, Davis testified that “It worked, yes.” [Aug. 28 Tr. 109:20 ([APP220](#)).] He later testified that the medical center “didn’t use any of the spaces” on the Church property, thus making clear that the shared parking agreement provides Moonshadow with more parking spaces than it actually needs. [Aug. 28 Tr. 109:17-20 ([APP220](#)).]

At trial, Davis also claimed that users of Lot 1 have parked their vehicles on Lot 2, testifying, “I have pictures of it.” [Aug. 28 Tr. 101:23-25 ([APP215](#)).] He admitted, however, that he had never produced those

pictures in this case, stating, “No one ever asked me for that.” [Aug. 28 Tr. 102:6-8 ([APP216](#)).] The Court found that Davis’s testimony was not credible and lacked foundation. [IR-110 at 11, ¶ 44 ([APP099](#))] Instead, the Court accepted Linnerson’s testimony that employees and visitors to the medical center have parked primarily, if not exclusively, on Lot 1, and have rarely parked on Lot 2. [*Id.*]

C. Linnberg purchases Lot 2.

Later in 2006, TDMC conveyed Lot 2 to Linnberg, LLC, whose members were a subset of TDMC’s members and included Linnerson. [Aug. 27 Tr. 143:10-12 ([APP232](#)).] The deed did not include any easement allowing users of Lot 1 to park on Lot 2. [Exhibit 5; Aug. 27 Tr. 107:16-21 ([APP218](#)).]

Linnberg considered developing Lot 2 into an office building. The communications among Linnberg representatives in 2007 made clear that Linnberg did not believe that Lot 1 had a right to park on Lot 2. Linnberg’s attorney, Victoria Longfellow, who had previously represented TDMC, discussed possible terms for a “multi-party reciprocal parking agreement” between Lot 1, Lot 2, and the Church. [Exhibit 56 at Linnberg000124 ([APP142](#)).] Longfellow noted that “there is no formal agreement to allow [Lot 1] to use your land for parking.” [*Id.* at Linnberg000125 ([APP143](#)).]

Although she expressed the concern that Moonshadow may be able to assert a viable claim for parking rights on Lot 2 based on theories of “waiver,” “estoppel,” “misrepresentation of seller,” or “prescriptive easement,” she made no reference to an easement by implication or any other easement arising out of an agreement between the owners of Lot 1 and Lot 2. [*Id.*]

D. Masjid purchases Lot 2.

In 2011, Masjid contracted to buy Lot 2 from Linnberg for \$546,000. [Exhibit 19 at FATIC000469.] The parties eventually agreed to reduce the price to \$450,000 as a result of problems with the lot, including that water, sewer, and utility lines had not been brought in from the street. [Exhibit 20; Exhibit 21 at TDMC000270.] Linnerson and Rick Ridberg told the other members of Linnberg that Masjid would still be “overpaying” because “the land has a fair market value of around \$200,000 - \$225,000.” [Exhibit 21 at TDMC000270 ([APP130](#)); Aug. 27 Tr. 51:12-18 ([APP182](#)).]

During these negotiations, Linnerson knew that Masjid intended to use Lot 2 for a community hall, but he did not tell Masjid that Lot 2 lacked adequate parking for that use. [Aug. 27 Tr. 117:16-118:12, 119:3-6 ([APP224](#), [226](#)).]

As Linnerson and Rickberg reported to the other members of Linnberg Masjid was aware that “[a]n easement allowing cross access and cross parking between the owners of our building [Lot 1] and our lot [Lot 2] never got executed and recorded.” [Exhibit 21 at TDMC000270 ([APP130](#)).] Masjid requested that Linnberg get a cross-parking easement from Moonshadow before the close of escrow. Ridberg contacted Davis to let him know that “it was discovered that the cross easement had never been recorded” and, in fact, “no one can even locate the signed document.” [Exhibit 58 ([APP144](#)).] Ridberg asked for Davis’s “help in correcting this.” [*Id.*]

On April 13, 2011, Linnberg and Masjid agreed to extend the close of escrow to May 4, 2011 so that Masjid could obtain a “cross parking easement agreement,” which the parties also referred to as an “easement for shared ingress, egress and parking between Lot 1 and 2.” [Exhibits 28, 29.]

Longfellow sent a draft “Reciprocal Parking Easement” (also referred to as a Reciprocal Easement Agreement, or REA) to Moonshadow’s attorney, Lake. [Exhibits 44, 59.] However, Moonshadow did not timely respond, and Masjid instructed the escrow officer to close escrow “with out waiting for Easement agreement with Moonshadow.” [Exhibit 13 at FATIC000320.]

On May 6, 2011, after escrow had closed, Davis told Longfellow by email that he was unwilling to sign the “cross-parking agreement” because he needed “more information about the parking and the proposed easement.” [Exhibit 98 ([APP146](#)).] Karen Slater, Linnberg’s accountant, reminded Davis that “this easement agreement was something that Greg Lake proposed during the sale of TDMC Renovations to Moonshadow to protect you and [your wife].” [Exhibit 61.]

On May 26, 2011, Davis signed the Reciprocal Parking Easement. This agreement, which is almost identical to the agreement that Lake had sent Longfellow in 2006, provides for “a nonexclusive, perpetual and reciprocal easement for reasonable access, ingress, egress and parking” between Lots 1 and 2. [Exhibit 30 at MASJID_000259, ¶ 1 ([APP133](#)). Masjid did not sign the reciprocal easement. [Aug. 27 Tr. 131:1-3 ([APP229](#)).]

E. Moonshadow refinances its loan.

In late 2015, Moonshadow was wrapping up negotiations on a new loan. On December 2, 2015, Davis emailed Muhammed Zubair, a lay leader of the Masjid, writing that “[w]e are very happy with the current arrangement but we applied for a new loan” and “[t]he lender insists that we have a parking arrangement we cannot revoke” for “six years.” [Exhibit

100 (APP148).] Davis sent Zubair an agreement and said it could “be changed any way you desire after the loan closes.” [Id.] Davis apologized for the “inconvenience” and made clear that this was “all because they [the lender] insist.” [Id.]

Two days later, Davis’s property management company emailed Zubair a 10-year parking agreement. [Exhibit 101 (APP149).] The agreement would have (1) granted the owner of Lot 1 permission to use 41 parking spaces on Lot 2 from 7:00 a.m. to 5:30 p.m., Monday through Friday, except during the mosque’s Friday prayer hours (12:45 p.m. to 1:45 p.m.), and (2) granted the owner of Lot 2 permission to use 41 parking spaces on Lot 1 during the Friday prayer hours and after 7:00 p.m. each day. [Id.] Masjid declined the offer.

Several days later, Davis wrote to Zubair to persuade him that Masjid should enter into a parking agreement with Moonshadow. Davis told Zubair that “[i]f we did not have to get a loan, we would be perfectly happy with the reciprocal parking arrangement we have had between ourselves as good neighbors,” with which “there has never been a problem.” [Exhibit 102 at MASJID_000608 (APP156).] Davis blamed the lender for being “extremely stubborn about this” and Linnberg for “divid[ing] the parcels” and selling

“Lot 2 to you without” getting a “written and formal parking agreement.” [Id.] Davis added that “[w]e can’t go to the City and try to negotiate for a lower parking requirement” because “[w]e do not have the time now, as our loan is due shortly.” [Id. at MASJID_000609 ([APP157](#)).]

A day later, on December 11, 2015, Davis emailed Zubair to report, “I found out where we were both taken advantage [of],” because “the title company that processed your purchase SHOULD have caught the PROBLEM that by your purchasing the empty lot with parking, MY building immediately was illegally under parked...” [Exhibit 103 at MASJID_000621 ([APP159](#)).]

On December 29, 2015, Zubair told Davis by email that Masjid “has no need of” a reciprocal parking agreement with Lot 1 because it “has plenty of parking of its own,” and that “[w]e need Lot-2 parking for our own Lot2 development and for Friday 20 minutes parking if needed.” [Exhibit 104 at MASJID_000647 ([APP163](#)).] Zubair suggested that Masjid “‘may’ be able to lease Moonshadow 40 parking spots around [the] Mosque building for ten years.” [Id.]

Davis rejected Zubair’s proposal, stating, “[a]ny parking agreement has to be reciprocal.” [Exhibit 104 at MASJID_000646 ([APP162](#)).] Davis went

on to tell Zubair that, “[w]hen your congregation bought Lot 2 a legal error took place.” [Id.] Davis acknowledged that the parking issue is “not one that you created.” [Id.] Instead, “Linnberg created it.” [Id.] Although Davis recognized that Masjid did not create the problem, Davis insisted that “you and Dr. Linnerson must correct it asap.” [Id.] Zubair replied by expressing regret that “our offer is not useful for you going forward.” [Id.]

Significantly, in his December 29, 2015 email to Zubair, Davis never claimed that Lot 1 had a parking easement on Lot 2. [Id.] Although Davis claimed that a “covenant . . . existed before [Masjid] bought Lot 2,” the “covenant” in question “said that [Lot 2] should not be separated from Lot 1.” [Id. at MASJID_000646 (APP162).] He did not identify any “covenant” that entitled Lot 1 to use Lot 2 for parking purposes after separation of title. [Id.]

Moonshadow subsequently found another lender, Wells Fargo, which did not require a permanent parking agreement. [Aug. 28 Tr. 132:9-17 (APP301).] The loan was finalized by February 2016. [Aug. 28 Tr. 132:18-21 (APP301).]

At trial, Davis testified that he orally promised Wells Fargo that he would “get it [i.e., the parking issue] cleaned up.” [Aug. 28 Tr. 132:22-133:2

([APP301](#).)] However, as Davis conceded, no email or other document to that effect appears in the Wells Fargo loan file. [See Aug. 28 Tr. 133:5-135:6 ([APP302](#)); Exhibit 84.] Moreover, Davis did not testify that Wells Fargo has ever indicated what the consequence, if any, would be if no parking easement was acquired.

F. The trial court proceedings.

On March 28, 2016, *after* Moonshadow secured the loan to refinance Lot 1, Moonshadow sued Masjid. [IR-1.] The complaint sought declaratory relief stating that Lot 1 has an implied easement allowing its users to park on Lot 2. [IR-1 ¶¶ 22-29.] After a two-day bench trial, the trial court issued a detailed opinion in favor of Masjid. [IR-110 ([APP089](#)).] The Court also awarded fees to Masjid and denied Moonshadow's motion for new trial. [IR-127 ([APP115](#)); IR-161.] Moonshadow appealed. [IR-164.]

G. The variance proceedings.

The day before it filed its motion for new trial, Moonshadow filed a variance application to reduce its parking requirement to 158 spaces. [IR-148, Exhibit D]. Tempe's Board of Adjustment granted Moonshadow's variance application. Masjid's appeal is currently pending in the superior court.

STATEMENT OF THE ISSUES

1. An implied easement is an attempt to infer the actual intent of the parties. Based on the course of dealing and the parties' subsequent conduct, the trial court found that Moonshadow and TDMC did not intend to agree to a parking easement on Lot 2. Was that clear error?

2. An implied easement requires that the prior use be so long and continued as to show that it was meant to be permanent. The trial court found that Moonshadow did not use the parking on Lot 2 and that the parking lot existed for only two years prior to severance, which was not long enough. Was that clear error?

3. An implied easement must be reasonably necessary for the party seeking the easement. The trial court found that Moonshadow did not need the parking on Lot 2 because it had sufficient parking on its own lot and adequate alternatives to meet Tempe's zoning requirements. Was that clear error?

4. An implied easement will not be implied when it would severely limit the use of the servient estate. The trial court found that the implied easement would virtually destroy the value of Lot 2 by making it undevelopable. Was that clear error?

5. An easement is contractual in nature. The trial court held that a claim for an implied easement arises under contract. Was that error?

STANDARD OF REVIEW

The Court is bound by the trial court's factual findings unless they are clearly erroneous. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5 (App. 2000). Questions of law are reviewed de novo. *Id.*

ARGUMENT SUMMARY

The trial court correctly held that Moonshadow was not entitled to an implied easement to park on Lot 2. See [Argument § I](#). There were four bases for this holding, each of which is independently sufficient: Moonshadow and TDMC did not intend to create an easement, see [Argument § I.A](#); Lot 1 did not use Lot 2's parking in a long and continuous manner prior to severance, see [Argument § I.B](#); Moonshadow does not need an easement; see [Argument § I.C](#); and the easement would virtually destroy the value of Lot 2, see [Argument § I.D](#). These findings were not clearly erroneous.

The trial court also correctly awarded fees to Masjid because, as this Court has previously held, an easement is contractual in nature and a claim to enforce an easement arises under contract under [A.R.S. § 12-341.01](#). See [Argument § II](#).

ARGUMENT

I. The trial court correctly held that Moonshadow is not entitled to an implied easement to park on Lot 2.

“Arizona recognizes that one may acquire an interest in land by means of an implied easement.” *Koestel v. Buena Vista Pub. Serv. Corp.*, 138 Ariz. 578, 580 (App. 1984). “[A]n implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment.” *Id.* Thus, “[t]he creation of easements by implication is an attempt to infer the intention of the parties to a conveyance.” *Id.*

Although the law recognizes implied easements, it “does not favor” them. 28A C.J.S. *Easements* § 75. “Courts are reluctant to find easements by implication” because “depriving a person of the use of property by imposing a servitude by mere implication . . . fetters estates, retards buildings and improvements, and violates the policy of recording acts.” *Id.* Moreover, implied easements are “in derogation of the rule that written instruments speak for themselves.” *Boyd v. Sunflower Props., LLC*, 389 P.3d 626, 634 (Wash. App. 2016); see also 28A C.J.S. *Easements* § 75 (“Courts must be very careful before decreeing an easement upon one person's land in favor of

another without compensation; such an encumbrance as a way permanently impairs that person's dominion and ownership, which next to life and liberty, is the most valuable of rights inhering in the citizen.”); Jon W. Bruce and James W. Ely Jr., [The Law of Easements & Licenses in Land § 4:15](#) (implied easements “are not favorites of the law” because they “may impede development of the servient estate and run directly contrary to the purpose of the Statute of Frauds and the recording acts”).

In light of these serious concerns, courts require “clear[]” evidence to find an implied easement. *Porter v. Griffith*, [25 Ariz. App. 300, 302](#) (1975). “[A]ny ambiguities with respect to whether an easement was impliedly reserved are resolved in favor of the servient estate.” [25 Am. Jur. 2d Easements and Licenses § 22](#).

The elements of an implied easement are:

- (1) The existence of a single tract of land so arranged that one portion of it derives a benefit from the other, the division thereof by a single owner into two or more parcels, and the separation of title;
- (2) before separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency; and
- (3) the use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefitted.

Koestel, 138 Ariz. at 580 (citation omitted). The ultimate question is the intent of the parties. See *Id.* at 581 (considering what a party “actually intended”); *Porter*, 25 Ariz. App. at 302 (“Whether an easement arises by implication depends on the intent of the parties . . .”). “If existence of a servitude would severely limit the uses of the servient estate . . . a servitude was probably neither intended or expected.” Restatement (Third) of Property: Servitudes (“Restatement”) § 2.12 cmt. *h*.

The trial court rejected Moonshadow’s implied easement claim because it found that Moonshadow had presented “no evidence” on three of the required elements of proof. In particular, the trial court found “no evidence of any intent to create a parking easement on Lot 2,” “no evidence that Lot 1 made long and continued use of Lot 2 for parking purposes before the separation of title,” and “no evidence that Moonshadow cannot meet its parking needs without a parking easement on Lot 2.” [IR-110 at 20-22 (APP108-10).] The court also found that that an implied easement would “virtually destroy the value of Lot 2.” [IR-110 at 24 (APP112).]

To prevail on appeal, Moonshadow would have to show that *all* of these factual findings are clearly erroneous. It cannot make that showing.

A. The court's finding that there was no intent to create an easement was not clearly erroneous.

“Whether an easement arises by implication depends on the intent of the parties,” which must “clearly appear.” *Porter*, 25 Ariz. App. at 302.¹ The trial court found “no evidence of any intent to create a parking easement on Lot 2.” (IR-110 at 20 (APP108).) That finding was not clearly erroneous. To the contrary – it is inescapable.

1. TDMC's rejection of a one-way easement shows that the parties did not intend one.

The most important evidence is the negotiation between Moonshadow and TDMC over the sale of Lot 1 in 2006. Moonshadow now asserts that the parties impliedly agreed to an easement allowing users of Lot 1 to park on Lot 2. **But when Moonshadow proposed that easement in 2006, TDMC expressly rejected it.** [See Longfellow Trial. Dep. 8:1-15, 10:15-18 (APP169, APP170).] Moonshadow cannot explain how the parties impliedly agreed to an easement that one of them rejected.

¹ In the Westlaw version of *Porter*, “appear” has been incorrectly transcribed as “appeal.”

2. The parties' subsequent conduct shows that they understand that no implied easement existed.

Moreover, as the trial court found, the parties' subsequent communications and conduct "reflect[] their understanding that no parking easement involving Lot 1 and Lot 2 ever existed." [IR-110 at 20 ([APP108](#)).]

First, if the failure to mention the parking easement in the deed from TDMC to Moonshadow was a mere oversight, one would have expected the easement to be mentioned in the deed by which TDMC transferred Lot 2 to Linnberg later in 2006. But the Linnberg deed, like the Moonshadow deed, made no mention of a parking easement. [Exhibit 5.]

Second, the communications among Linnberg representatives in 2007 made clear that they did not believe that Lot 1 had a right to park on Lot 2. Longfellow told Linnberg's members that "there is no formal agreement to allow [Lot 1] to use your land for parking." Exhibit 56 at Linnberg000125 ([APP143](#)). In doing so, she did not suggest that there was any *informal* agreement to allow Lot 1 to park on Lot 2. *See id.* And there is no evidence that Linnerson or any other Linnberg member disagreed with Longfellow.

Third, the negotiations over the proposed *reciprocal* parking easement when Masjid bought Lot 2 shows that the parties understood that no *one-way*

easement existed. Instead, the communications reflect the parties' understanding that a reciprocal parking easement had been discussed but not finalized in 2006 and was the option on consideration in 2011. [Exhibit 21 at TDMC000270 ([APP130](#)) (email from Ridberg to Linnberg members, stating that "An easement allowing cross access and cross parking between the owners of our building [Lot 1] and our lot [Lot 2] never got executed and recorded."; Exhibit 58 ([APP144](#)) (email from Ridberg to Davis, stating that "it was discovered that the cross easement had never been recorded" and, in fact, "no one can even locate the signed document.").] Moreover, the reciprocal agreement that Longfellow drafted did not mention any pre-existing one-way easement. [Exhibits 30, 44, 59.] And Davis did not mention any pre-existing one-way easement when he initially rejected the reciprocal easement. [Exhibit 98 ([APP146](#)).] Instead, Davis explained that he needed "more information about the parking and the proposed easement." [*Id.*] As the trial court found, "Davis's communications to Longfellow in May 2011 are directly contrary to the position Moonshadow takes in these proceedings that, all along, Lot 2 has been burdened with an easement in favor of Moonshadow's lot." [IR-110 at 21 ([APP109](#)).]

Fourth, Davis's emails to Zubair in 2015 reveal that Davis did not believe that Lot 1 already had the right to park on Lot 2. If he had, he could have simply asked Masjid to recognize that right. The fact that he did not ask Masjid to recognize an existing right, but instead pleaded with it to enter into an agreement creating new rights, shows that Davis understood that Lot 1 had no legal right to park on Lot 2. His wife, attorney Carolyn Rosenblatt, reflected a similar understanding when she wrote to Tempe that "Masjid "need[s] an agreement from us" just as much as "we need one from them for parking." [Exhibit 42 at COT000158 ([APP141](#)).]

Fifth, as the trial court found, "[t]he fact that Moonshadow acquired Lot 1 in 2005, and it was not for another ten years that Davis first raised the issue of a parking easement on Lot 2, provides strong evidence that no such parking easement was intended or contemplated by Moonshadow or TDMC when the former acquired Lot 1 from the latter." [IR-110 at 21 ([APP109](#)).]

3. Moonshadow's contrary arguments are unpersuasive.

Moonshadow's primary response (at 63-76) is that the parties' intent does not matter, and that courts look only to what reasonable parties would have expected. There are three fundamental problems with this argument:

(1) it is waived, (2) it is wrong as a matter of law, and (3) it would not make a difference on the facts.

(a) Moonshadow waived the argument that the parties' intent is irrelevant by raising it for the first time in its motion for new trial.

A party “waive[s] [an] . . . issue by raising it for the first time in her motion for new trial.” *Kent v. Carter-Kent*, 235 Ariz. 309, 313, ¶ 20 (App. 2014). Moonshadow waived its argument that intent does not matter by first raising it in its motion for new trial.

At summary judgment and trial, Moonshadow did not argue that intent was irrelevant. To the contrary, it relied heavily on what it claimed was the parties' intent:

- In its motion for summary judgment, Moonshadow argued that “it was **TDMC's intent** that the parking lot would continue to serve the medical building permanently.” [IR-24 at 2 (emphasis added); *see also id.* at 4-5.]
- In its reply in support of its motion for summary judgment, Moonshadow argued that “we have clear evidence of the **actual intent of the parties** and the length of time and other circumstances merely provide **additional evidence of that intent.**” [IR–49 at 4 (emphasis added).]
- In its opening statement at trial, Moonshadow told the court that “[y]ou will hear testimony from [Dr. Linnerson] indicating that that was **his intent** that, you know, when he sold the property in 2006, **TDMC did not intend** to somehow make the medical building in violation of parking law -- the parking requirement.

And that **he intended** that the medical building benefit and use the parking permanently.” [Aug. 27 Tr. 9:19-24 ([APP179](#)) (emphasis added).]

- In its closing statement, Moonshadow argued that **“there’s two things you look at,” one of which is “the intent of the parties.”** [Aug. 28 Tr. 151:14-18 ([APP308](#)) (emphasis added).] Moonshadow also argued, “What was the intent of the parties? Exactly what they did.” [Aug. 28 Tr. 179:8-9 ([APP325](#)).] And Moonshadow extensively discussed Dr. Linnerson’s supposed intent in its closing statement. [Aug. 28 Tr. 152:15-22, 154:22-156:8, 157:18-19, 158:7-9, 166:4-25, 167:9-10 ([APP309](#), [311](#), [314](#), [315](#), [323](#), [324](#)).]

Because Moonshadow relied on the parties’ intent through trial, and did not argue that it was irrelevant until after trial, Moonshadow has waived that argument.

(b) This Court has already held that an implied easement depends on what the parties “actually intended.”

In any case, Moonshadow is wrong on the law. This Court has previously stated that “[w]hether an easement arises by implication *depends* on the intent of the parties,” which “must clearly appear to sustain an easement by implication.” *Porter*, [25 Ariz. App. at 302](#). Thus, courts consider what the parties “actually intended,” and an easement is “never” implied “where the evidence shows the absence of such intent.” *Koestel*, [138](#)

[Ariz. at 581](#). Here, TDMC rejected the one-way easement that Moonshadow proposed, which shows that it did not intend to create that easement.

Koestel shows that the trial court properly considered TDMC's actual intent. In *Koestel*, the plaintiff sought judicial declaration of an implied easement to pipe water across land he did not own (Lot 297) to land he did own (Lots 34 and 35). The Court explained that "[s]ince the implication of an easement from a pre-existing use is made in the supposed execution of the parties' intent, the implication is never made where the evidence shows the absence of such intent." *Id.* Applying the law to the facts, the Court found that summary judgment was inappropriate because there was a material issue of fact "as to whether Koestel actually intended that there be another method of supplying water to Lots 34 and 35." *Id.* In reaching this conclusion, the Court noted that Koestel had written letters "which seemed to indicate that Koestel never intended that there be an easement for the piping of water across Lot 297." [Id. at 582](#). Thus, under *Koestel*, actual intent matters.

Koestel is consistent with the Restatement, which states that implied easements do not arise if "a contrary intent is expressed or implied." [Restatement \(Third\) of Property \(Servitudes\) § 2.12](#). Here, TDMC expressed

a contrary intent. As the commentary states, an implied easement “does not arise if the facts or circumstances of the conveyance indicate that the parties did not intend to create a servitude to continue the prior use.” See *id.* cmt. (h).

Moonshadow cites three cases (at 64) which, it asserts, show that courts recognize prior-use easements even when the parties have not expressly stated their intent. Of course, inferring intent may be appropriate when the parties have been silent. But when a party has expressed its intent – in this case, by rejecting the proposed easement – it would make no sense to ignore that evidence and infer a contrary intent. As explained by a treatise on easements, which Moonshadow cites *passim*, the fact that courts refer “to the expectations of a reasonable grantee . . . does not mean that evidence of the grantee’s actual knowledge or intent should be ignored.” [The Law of Easements & Licenses in Land § 4:19](#). Rather, “evidence of the parties’ actual intent is significant.” *Id.* § 4.23 (collecting cases); see also *Bird v. Bidwell*, [209 P.3d 647, 649](#) (Idaho 2009) (trial court appropriately considered “subjective intent” because “there is no logical reason to base the decision solely upon the grantor’s presumed intent from prior use and to exclude other relevant evidence of that intent”).

The cases cited by Moonshadow are not to the contrary. Moonshadow first relies on *Bridge BLOQ NAC LLC v. Sorf*, 447 P.3d 1278 (Utah App. 2019), which held that the trial court properly allowed the jury to credit a grantor with an unexpressed intention despite his contrary statements in litigation. *Id.* at 1283, ¶ 28. But *Bridge* did not hold that the grantor’s intent was irrelevant. Instead, it held that his statements “are not to be considered in a vacuum.” *Id.* And, because the grantor was unaware of a key fact (the actual legal boundary between the two properties) at the time of severance, the jury was entitled “to credit [him] with an unexpressed intention that [he] probably would have had” if he was fully informed. *Id.* (citation omitted).

The other cases cited by Moonshadow also do not hold that courts should ignore evidence of the parties’ intent. One case, *Flax v. Smith*, 479 N.E.2d 183 (1985), is unusual because the land at issue was transferred involuntarily, when Boston took it for nonpayment of taxes. *Id.* at 185. The owner of the servient parcel argued that “the form in which title passed . . . precludes the creation of an implied easement,” because of “the importance of the grantor’s intent.” *Id.* The court disagreed, holding that an implied easement does not “require[] . . . an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based

upon the circumstances of the conveyance.” *Id.* In essence, the court chose, for policy reasons, to treat an involuntary conveyance like a voluntary conveyance in which the grantor was silent as to his intent, requiring the court to draw inferences from the circumstances.² But *Flax* does not require the finder of fact to blind itself to the parties’ actual intent, especially in a case such as ours involving a sale between a willing buyer and a willing seller.

The third case *Moonshadow* cites does not help it either. That case, *Mitchell v. Castellaw*, 246 S.W.2d 163 (Tex. 1952), recognized that courts will infer what the parties “must have intended.” *Id.* at 167. But like *Bridge* and *Flax*, *Mitchell* does not hold that courts should ignore evidence of actual intent. Instead, it recognizes that “various types of factual consideration may operate in a particular case to defeat the implication of intent to reserve the easement.” *Id.* at 168.

² There are sound policy reasons for this result. See *id.* (“The effectiveness of the tax title procedures as a means of producing municipal revenue would be hindered if members of the public bidding on property at tax title auctions were to receive fewer rights than ordinary grantees of the same property.”)

- (c) **Moonshadow’s argument is a red herring because no reasonable grantee would have expected to receive by implication a right that the grantor expressly rejected.**

At the end of the day, it does not matter whether the court considers the parties’ subjective intent. That is because TDMC, the grantor, expressly rejected the one-way easement that Moonshadow now seeks by implication. [See Longfellow Trial Dep. 8:1-15 ([APP169](#)), 10:15-18 ([APP170](#)).] No grantee in Moonshadow’s position would “reasonably expect” to receive that same right by implication. *Porter*, [25 Ariz. App. at 302](#).

Moonshadow appears to argue (at 67-72) that because TDMC acquired Lot 2 to satisfy Tempe’s parking requirements, no reasonable party could have expected the sale of Lot 1 to end that use. But of course they could have. TDMC had already gotten what it wanted out of Lot 2: approval to open its medical building. Apart from Moonshadow’s brief proposal of the one-sided parking easement, which TDMC rejected, there is little evidence that, at the time of sale, TDMC or Moonshadow were focused on ensuring the medical building’s *continued* compliance with Tempe parking code.

That may have been rational. There is no evidence that Tempe monitors every building within its boundaries to ensure continued

compliance with parking requirements. Nor is there any evidence that if, Tempe happens to learn that a building is out of compliance, it engages in punitive enforcement actions.

Instead, when a Tempe planning official was asked at trial what Tempe would do if TDMC sold its building without the parking that its permit relied on, he testified that Tempe would “[t]ry to remedy the situation, if there’s a new proposal.” [Aug. 27 Tr. 190:3-14 ([APP234](#)).] Without a “new proposal” from the landowner to consider, Tempe would not have done anything.

Indeed, although Moonshadow has been out of compliance with the code since 2006, Tempe has never issued Moonshadow a citation or told it to stop operating. [Aug. 28 Tr. 119:19-25 ([APP299](#)), 137:11-16 ([APP306](#)).] In 2015, it was Moonshadow that contacted Tempe about the parking issue, not the other way around. [Aug. 28 Tr. 39:14-23 ([APP269](#)).] And when Tempe learned of the problem from Moonshadow, it did not cite Moonshadow or take away its building permit; instead, it tried to help by “[p]roviding information.” [Aug. 28 Tr. 39:24-25 ([APP269](#)).] Since then, Tempe has not taken any enforcement action against Moonshadow.

Moonshadow relies on the self-serving testimony of Davis and Linnerson to argue (at 76) that, notwithstanding TDMC's rejection of a one-way easement, TDMC and Moonshadow did intend for Lot 1 to have an easement to park on Lot 2.³ But the trial court clearly did not credit that testimony, and Moonshadow has not shown that this decision was clear error.

The trial court was particularly skeptical of Davis's testimony, which was inconsistent with the documentary evidence and Davis's own conduct:

- At trial, Davis claimed that the medical center's employees and/or patients park their vehicles on Lot 2, testifying "I have pictures of it." But he admitted that he never produced such pictures during this litigation, because "No one ever asked me for that." [Aug. 28 Tr. 102:23-103:10 ([APP296](#)).] The trial court accordingly "reject[ed] Davis's testimony about the purported use . . . of Lot 2." [IR-110 at 11, ¶ 43 ([APP099](#)).]
- Davis testified that his lender required a parking agreement. The trial court was skeptical, noting that Moonshadow "disclosed no loan documents, emails, or other communications from its lender to support this contention." [(IR-110 at 17, ¶ 76 ([APP105](#))).]
- Davis testified that he made an oral promise to his new lender, Wells Fargo, that he would "get it [i.e., the parking issue] cleaned up." [Aug. 28 Tr. 132:25-133:2 ([APP301](#))]. Again, the trial court

³ Linnerson is now Davis's property manager, and he testified that Davis was upset with him about the parking issue and had implied that this litigation was all his fault. [Aug. 28 Tr. 65:10-21 ([APP274](#))].

was skeptical, noting that “[n]o email or other document to that effect appears [in] the Wells Fargo loan file. Moreover, Davis did not testify that Wells Fargo has ever indicated what the consequence, if any, would be if no parking easement was acquired.” [IR-110 at 20, ¶ 90 (APP108) (citing Exhibit 84).] Davis conceded that there was nothing in the Wells Fargo loan file about parking. [Aug. 28 Tr. 133:5-135:6 (APP302).]

- Davis told Zubair that he needed a parking agreement solely to satisfy his lender, but after he got the loan, he sued Masjid anyways. [Exhibits 100, 102 (APP148, 156); Aug. 28 Tr. 132:9-21 (APP301); IR-1.]

Meanwhile, Linnerson did not clearly testify that he intended Moonshadow to have the right it now seeks — an exclusive, one-way right to park on Lot 2. Instead, Linnerson testified that he intended to have a “*shared* parking agreement between Moonshadow and TDMC.” [Aug. 27 Tr. 40:8-11 (APP180).] In this litigation Moonshadow has sought a *one-way* easement, not a *reciprocal* easement. [See, e.g., IR-1 (Complaint) at 5 (requesting “an order confirming that Moonshadow has an implied easement for the continued use of the parking lot”); IR-96 (Joint Pretrial Statement) at 2-3 (stating the contested issues as “Does Plaintiff have an implied easement for parking” and “Does Plaintiff have an implied easement by map or plan”).] Thus, even if credited, Linnerson’s testimony would not show an intent to create the easement that Moonshadow now seeks.

(d) The trial court properly relied on subsequent events to infer intent.

Moonshadow also criticizes (at 66, 75) the trial court for relying on the parties' subsequent conduct and communications to infer their intent. That argument is ironic because Moonshadow itself relies on subsequent events (at 71).

In any case, courts commonly consider a person's subsequent conduct as evidence of his prior intent or understanding of events. *See, e.g., Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, [140 Ariz. 383, 393](#) (1984) (courts consider "[e]vidence on surrounding circumstances," including "subsequent conduct" to "determine the [contracting] parties' intent"); *State v. Edwards*, [136 Ariz. 177, 184](#) (1983) ("Evidence of an accused's resistance to arrest is also admissible as evidence of consciousness of guilt, and thus of guilt itself.").

Here, the parties' subsequent conduct reflected their understanding that no parking easement existed. *See* [Argument § I.A.2](#), above. Moonshadow never explains why it would make sense to ignore that evidence.

Moreover, the four cases Moonshadow cites do not support its conclusion that courts cannot consider subsequent events in inferring a party's intent. Three of those cases were not about intent at all – they were about the time frame for determining whether there is a reasonable necessity for the easement. *See Akers v. D.L. White Constr., Inc.*, [127 P.3d 196, 205](#) (Idaho 2005) (“When determining whether such ‘reasonable necessity’ existed, a court does not look to the present moment, but instead determines whether reasonable necessity existed at the time the dominant and servient estates were severed.”); *Proper v. Greager*, [827 P.2d 591, 594](#) (Colo. App. 1992) (“[N]ecessity is determined at the time of the severance, not at the time of the court hearing.”); *Olson v. Mullen*, [68 N.W.2d 640, 647](#) (Minn. 1955) (“A subsequent change of conditions will not defeat an easement, nor can it create one. The necessity at the time of the conveyance governs.”) (citation omitted). And the fourth case, *Boyd v. McDonald*, [408 P.2d 717](#) (Nev. 1965), concedes (in language Moonshadow omits) that subsequent events “might offer some indication of the owner’s intent at the time he sold the first parcel.” *Id.* at [721 n.6](#).

B. The court’s finding that there was no long and continued use of Lot 2’s parking was not clearly erroneous.

An implied easement also requires that “before separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency.” *Koestel*, 138 Ariz. at 580 (citation omitted). The trial court found that “there is no evidence that Lot 1 made long and continued use of Lot 2 for parking purposes before the separation of title.” [IR-110 at 21 ([APP109](#)).] That finding was not clearly erroneous.

1. Moonshadow was required to show that Lot 1’s use of Lot 2’s parking was long, continuous, and either obvious or manifest.

Moonshadow begins by arguing (at 77) that it did not need to show that the use was “long” and “continued.” But once again, Moonshadow waived this argument by making it for the first time in its motion for new trial. *Kent*, 235 Ariz. at 313, ¶ 20. In fact, Moonshadow previously insisted that its use was long and continuous.⁴

⁴ See IR-24 (Pl.’s Mot. for Summ. J.) at 4 (“Long before the parcel was divided into two lots, the Lot 2 portion was used for such parking”); IR-49 (Pl.’s Reply in Support of Mot. for Summ. J. at 3) (“Regardless, TDMC completed the parking lot more than two years before the severance.”); IR-96 (Joint Pretrial Statement) at 4, ¶ 7 (“Clients and employees at the medical center on Lot 1 have used parking spaces located on Lot 2 continuously since it was constructed in 2004.”).

Moreover, Moonshadow is wrong as a matter of law. Moonshadow argues that because *Koestel* used the phrase “long, continued, obvious or manifest,” [138 Ariz. at 580](#) (emphasis added), Moonshadow need only show one of these four elements. But that ignores the rest of *Koestel*, which holds that the use must have been “so long continued prior to the severance and so obvious as to show that it was meant to be permanent.” [138 Ariz. at 580](#) (citation omitted, emphasis added).

2. Moonshadow failed to show that Lot 1 used the parking on Lot 2.

The trial court found that “over the years, tenants of and visitors to Lot 1 have rarely made use of Lot 2 for parking” and that “the evidence presented at trial makes overwhelmingly clear that the parking available on Lot 1 is, and has always been, sufficient for Lot 1’s needs.” [IR-110 at 21-22 ([APP109-10](#)).]

These findings were amply supported by the evidence. Linnerson testified that neither employees nor patients of the medical building on Lot 1 have used the parking lot on Lot 2 much, if at all, nor have they used the parking available on the Mosque’s property or the Church’s property. [Aug. 27 Tr. 69:18-74:6 ([APP193](#)).] Instead, those employees and patients have

generally used only the parking spaces on Lot 1. [*Id.*] When asked at trial if the parking available on Lot 1 has been “sufficient” for Lot 1’s needs, Linnerson replied, “That’s correct.” [Aug. 27 Tr. 74:7-9 ([APP198](#)).]

Linnerson’s testimony was consistent with Zubair’s statement to Tempe that “[s]ince medical center opened, we rarely see any car on LOT-2. Even LOT-1 parking does not fill up to ~70% of capacity.” [Exhibit 15 at TEMPE000208 ([APP127](#)).] Linnerson agreed – when asked whether it was true that the parking on Lot 1 is “rarely filled up to seventy percent capacity,” he testified “I would estimate that that’s fairly accurate. There were some days where it was higher and almost totally fully.” [Aug. 27 Tr. 120:1-4 ([APP227](#)).]

As the trial court found, “[t]he statements of Linnerson and Zubair are corroborated by aerial photographs of the lots showing unused parking spaces on Lot 1.” [IR-110 at 22 ([APP110](#)) (citing Exhibits 10, 11 ([APP124](#), [125](#))).] When shown those aerial photographs, Linnerson agreed that they showed “no one parking” on Lot 2 and “plenty of parking in lot 1.” [Aug. 27 Tr. 66:9-67:7 ([APP190](#)), 68:21-69:7 ([APP192](#)).] He also agreed that the photographs showed plenty of parking on the Mosque and Church lots,

which Moonshadow is allowed to use under the parties' cross-parking agreements. [Aug. 27 Tr. 69:8-17 ([APP193](#)).]

Moonshadow argues (at 78, without citation to the record) that the court confused testimony about Lot 2 with testimony about parking on the Mosque lot. But it is Moonshadow's burden to show that the trial court erred in interpreting Linnerson's testimony, and Moonshadow cannot make that showing because its Opening Brief failed to even cite the part of the transcript that the court allegedly confused.

It is true that, after being confronted with his deposition testimony, Linnerson said he was "a little confused in the deposition as to lots number 1, 2, and 3." [Aug. 27 Tr. 73:7-10 ([APP197](#)).] But that confusion did not change his testimony that Lot 1 had adequate parking and did not need the parking on Lot 2.

Prior to a replatting, Lot 2 had been called Lot 3. Some of the deposition questions referred to Lot 2 and others referred to Lot 3. After these portions of his deposition were read to him at trial, Linnerson was asked whether they "refresh your recollection that visitors to the medical center did not use lot 2," and he answered "Yes." [Aug. 27 Tr. 73:7-10 ([APP197](#)).] He then added the remark that he was "a little confused in the

deposition as to lots number 1, 2, and 3.” [Aug. 27 Tr. 73:9-10 ([APP197](#)).] He clarified, however, that he was (correctly) “thinking of lot 2.” [Aug. 27 Tr. 73:14-18 ([APP197](#)).]

Linnerson further added, “I guess my testimony is that . . . the east park there [Lot 2] was very rarely used. So there was never an issue. . . . And that would have been either lot 2 or 3” .” [Aug. 27 Tr. 73:22-74:6 ([APP197](#)).] In case that was not clear enough, he was asked “[b]ut you didn’t need this lot because generally, almost all the time, lot 1 parking was sufficient.” He answered, “That’s correct.” [Aug. 27 Tr. 74:7-9 ([APP198](#)).] In sum, Linnerson testified unequivocally that Lot 1 had enough parking on its own and did not need any other lot.

Moonshadow also claims (at 78, citing Aug. 27 Tr. 60:1-25) that Linnerson testified that visitors and staff consistently parked on Lot 2. But that is not what the cited testimony says. On the page Moonshadow cites, the only question about the extent of parking was this: “Q. And is this an accurate depiction of what you might see on a typical day during the middle of the week? A. Yes.” [Aug. 27 Tr. 60:1-3 ([APP184](#)).] It is not at all clear from the record what image counsel was referring to when he asked Linnerson whether “this is an accurate depiction.” [*Id.*] And to the extent there is any

uncertainty in the record, or any inconsistency between Linnerson’s testimony, the trial court was free to credit Linnerson’s repeated testimony that Lot 1 had enough parking and did not use the parking on Lot 2. The court was also free to make that finding based on the aerial photographs, which Moonshadow does not even try to rebut. [See IR-110 at 22 ([APP110](#)); Exhibits 10 and 11 ([APP124, 125](#)).]

3. Lot 1’s “use” of Lot 2 for code compliance cannot form the basis for an implied easement.

Since trial, Moonshadow has said that it is not relying on Lot 1’s use of the physical parking spots on Lot 2, but its ability to count those spots toward its compliance with Tempe’s zoning code. That is a strange notion of “use” for which Moonshadow offers no legal authority. Easements are implied to allow property owners to continue actual uses – such as accessing a road or transmitting electricity, *see* [Restatement § 2.12](#) – not to meet zoning requirements, which are easily changed and therefore provide a poor basis for perpetual property rights.

The purpose of implied easements is to “do justice” and promote “the productive use of land.” [The Law of Easements & Licenses in Land § 4:1](#),

Moonshadow's theory would do neither. Instead, it would lead to absurd results.

Tempe's Zoning and Development Code sets out the parking requirements for a wide variety of uses, such as bars (1 space per 50 square feet), medical centers (1 space per 150 square feet), and office buildings (1 space per 300 square feet). *See* City of Tempe Zoning & Development Code § 4-603(E) (Table); Aug. 28 Tr. 27:19-28:7 (APP260).] Medical buildings require twice as much parking as bars, so if Moonshadow decided to turn its medical center into an office building, its parking requirement would decrease by half. *See* City of Tempe Zoning & Development Code § 4-603(E) (Table); Aug. 28 Tr. 30:3-6 (APP263).] But according to Moonshadow's logic, it would still have a perpetual right to use up almost all of Lot 2's parking, based on a prior use that had disappeared. *See, e.g., Akers, 127 P.3d at 205* (cited by Moonshadow, holding that the necessity for an implied easement is determined at the time of severance).

Similarly, Tempe could decide to reduce the amount of parking required to reflect changing transportation patterns (e.g., increased use of biking, public transportation, and ride-sharing). Once again, according to Moonshadow it would still have the perpetual and exclusive right to most

of Lot 2's parking spaces. Moonshadow cannot explain how this theory of property rights would make sense, do justice, or promote the productive use of land. See [The Law of Easements & Licenses in Land § 4:1](#).

4. Moonshadow failed to show a longstanding use.

To qualify for an implied easement, a use must be “longstanding . . . to a degree which shows permanency.” *Koestel*, [138 Ariz. at 580](#). The trial court found that “the parking lot existed for only two years before separation of title” and that this “period of time . . . falls short of establishing the requisite ‘longstanding’ use.” [IR-110 at 22 ([APP110](#)) (quoting *Koestel*, [138 Ariz. at 580](#)).]

Moonshadow does not disagree on the facts, and the trial court's decision was well-grounded in law. Cases from other jurisdictions confirm the trial court's common-sense conclusion that a two-year period of use is not enough to show “permanency.” See, e.g., *Lester v. Galambos*, [811 S.E.2d 661, 665](#) (N.C. App. 2018) (“The shortest time heretofore recognized as sufficient to imply an easement is thirteen years. However, the majority of cases finding an easement by prior use were cases with a use in excess of 30 years.”) (brackets, citation, and quotation marks omitted).

Moonshadow argues (at 78) that even a few months may be sufficient depending on the circumstances. But in the lone case it cites (which was decided on the basis of an implied easement by necessity, not prior use), the circumstances did much more to show permanency, because the easement concerned an access road that “existed and was used by [the prior owner] and his construction crew prior to the [plaintiff’s] purchase of the land.” *Cadwallader v. Scovanner*, 896 N.E.2d 748, 757, ¶ 25 (Ohio App. 2008).⁵

Here, by contrast, the evidence shows little if any parking on Lot 2 prior to severance. Moonshadow relies on the fact that TDMC recorded the plan of development it submitted to Tempe showing that it was using Lot 2 to fulfill its parking requirements. But Moonshadow never explains why the

⁵ *Koestel* is not to the contrary. There, a lengthy waterpipe was used to transport water from Lot 298 (which Koestel had long owned) through Lot 297 (which he did not own) to Lots 34 and 35 (which he had more recently acquired). 138 Ariz. at 579. The evidence showed that the pipe had been present for three years prior to severance. *Id.* at 581. The Court held that there was “nothing indicating that the pipe was temporary only,” so the permanency requirement of an implied easement was satisfied. *Id.* But because a pipe’s only use is to carry a liquid from one place to another, the court’s finding that the pipe’s *existence* was not meant to be temporary was equivalent to a finding that this particular use of the pipe was not meant to be temporary. Here, the question is not whether the parking lot’s *existence* was meant to be permanent—it clearly was—but whether the neighboring landowner’s *use* of the parking lot was meant to be permanent.

recording of a document necessarily means that the arrangements described in that document are intended to be permanent. As a Tempe planning official testified, plans of development are part of an older process that Tempe does not require anymore, and when they were in use, they could be amended and changed. [Aug. 27 Tr. 197:20-198:18 ([APP241](#)).] He also testified that Tempe could require a landowner to make covenants restricting the land, and had required TDMC to enter into a covenant regarding the maintenance of a setback area, but did not require a covenant regarding parking. [Aug. 27 Tr. 198:22-201:2 ([APP242](#)); Exhibit 74.]

C. The court's finding that Moonshadow does not need an easement was not clearly erroneous.

An implied easement also requires a showing that the claimed use is “essential to the beneficial enjoyment of the parcel to be benefitted.” *Koestel*, [138 Ariz. at 580](#) (citation omitted). The use need not be an “absolute” necessity, but it must be at least a “reasonable necessity” and more than “a mere temporary convenience.” *Id.*

1. Moonshadow does not need to park any cars on Lot 2.

The trial court held that “there is no evidence that Moonshadow cannot meet its parking needs without a parking easement on Lot 2.” [IR-

110 at 22 ([APP110](#)).] The extensive evidence supporting this conclusion is discussed in the section on intent, [Argument § I.A](#), above. In addition, as the trial court noted, “TDMC’s grant of an easement on Lot 1 to Sopris in October 2003 establishes that TDMC not only had sufficient parking at the time to meet its needs on property it owned, but had extra, unused parking spaces at its disposal, and thus no need to burden Lot 2 to meet its parking needs.” [IR-110 at 22 ([APP110](#)); *see also* Exhibit 107 at MASJID_000054; Aug. 27 Tr. 87:17-23 ([APP203](#)).]

Indeed, prior to this litigation, Davis never claimed that Moonshadow needed the right to park on Lot 2 in order to satisfy Lot 1’s parking needs or to stave off action by the City of Tempe. Instead, as the trial court found, Davis “claimed that Moonshadow needed a parking agreement simply to meet its lender’s requirements, and that, after Moonshadow had obtained its loan, Moonshadow would accept any modifications to the parking agreement document that Masjid wanted.” [IR-110 at 22 ([APP110](#)); Exhibits 100, 102 ([APP148, 156](#)).]

Moonshadow’s statements in support of its variance application further show that it does not need an implied easement to meet its actual parking needs. In a letter to the City of Tempe, Moonshadow’s attorney

wrote that “the existing development has functioned for many years with the existing amount of parking” and “this application is to ratify” that arrangement. [IR-156, Exhibit A at 1 ([APP337](#)); *see also id.* at 2 (“parking on this site has always functioned smoothly”).] And Davis informed an attorney for a neighboring property owner that he was applying for a variance because “our reciprocal parking agreements with our other neighbors, Holy Spirit Catholic Church and mosque adjacent to us are revocable, which lenders do not like.” [IR-156, Exhibit B ([APP350](#)); *see also id.* (“There is no practical problem, but a legal and technical one.”)]

2. Moonshadow does not need Lot 2 to meet the City’s parking requirements.

Moonshadow does not need Masjid’s parking to meet the City’s requirements because (1) a zoning requirement is not the kind of “use” for which implied easements are available, *see* [Argument § I.B.3](#), above, and (2) if a party has reasonable alternatives, it does not need an implied easement, and the trial court correctly found that Moonshadow has several alternatives to an implied easement.

(a) Arizona should adopt the majority rule that if a party has reasonable alternatives, it does not need an implied easement.

The majority rule is that if a party has reasonable alternatives, it does not need an implied easement. *See Griffeth v. Eid*, 573 N.W.2d 829, 832, ¶ 10 (N.D. 1998) (“[T]he term ‘necessary’ means that there can be no other reasonable mode of enjoying the dominant tenement without the easement.”) (quoting 25 Am.Jur.2d *Easements and Licenses* § 35 (1996)); *Cobb v. Daugherty*, 693 S.E.2d 800, 813 (W. Va. 2010) (same, quoting *Griffeth*); *Fourth Davis Island Land Co. v. Parker*, 469 So. 2d 516, 521-22 (Miss. 1985) (rejecting an implied easement because “an alternative would not involve disproportionate expense and inconvenience”); *O’Hara v. Chicago Title & Tr. Co.*, 450 N.E.2d 1183, 1190 (Ill. App. 1983) (rejecting an implied easement in part because plaintiff had alternatives that included to “contract with defendants for the use of” their parcel); *Ouellette v. Bolduc*, 440 A.2d 1042, 1046 (Me. 1982) (“And the test of necessity is whether the party claiming the easement can at reasonable cost on his own estate create a substitute.”); *Restatement* § 2.12 cmt. *e* (“Reasonable necessity usually means that alternative access or utilities cannot be obtained without a substantial expenditure of money or labor.”); 28A C.J.S. *Easements* § 78 (“The test of

necessity is whether the party claiming the right can, at reasonable cost, create a substitute on such party's own estate. Thus, if the dominant land can be used without an easement by a reasonable expenditure the factor of necessity is lacking.").

Moonshadow suggests that Arizona courts should adopt the minority rule, under which courts ignore whatever reasonable alternatives an easement-seeker may have to an implied easement. But this rule makes little sense and Moonshadow does not make a persuasive case for its adoption.

In fact, two of the cases Moonshadow cites do not make actually advocate the minority rule. In *Post Hill Homeowners Ass'n. v. Kennell*, [39 S.W.3d 508, 514](#) (Mo. App. 2000), the alternative was much worse because "[w]ithout the easement, the [homeowners] would not have access to their property from the front entrance," but only "through the garage," and "it would be unreasonable to deny them access to their units through their front door." In *S & G Associated Developers, LLC v. Covington Oaks Condo. Owners Ass'n, Inc.*, [361 S.W.3d 210](#) (Tex. App. 2012), the alternative route did not exist at the time of severance. See *id.* at [220](#) ("Although an easement by necessity terminates when the necessity ceases, this does not mean that the grantor has the authority to pick and choose which route the grantee can use.

Once the location of an easement by necessity is established, it cannot be changed without the consent of both parties.”) (citations omitted).

Moonshadow cites only two cases that adopt the minority rule that reasonable alternatives are not to be considered in an implied easement analysis. But these cases contain little reasoning for that rule, and Moonshadow does not explain why Arizona should adopt it. After all, the majority rule makes sense: if a plaintiff has a reasonable alternative to taking a neighbor’s property rights via an implied easement, then an implied easement is not necessary and existing property rights should not be disturbed.

Indeed, only the majority rule is consistent with the protection our law affords property rights and the corollary that “any ambiguities with respect to whether an easement was impliedly reserved are resolved in favor of the servient estate.” [25 Am. Jur. 2d Easements and Licenses § 22](#); see also [28A C.J.S. Easements § 75](#) (“Courts must be very careful before decreeing an easement upon one person's land in favor of another without compensation; such an encumbrance as a way permanently impairs that person's dominion and ownership, which next to life and liberty, is the most valuable of rights inhering in the citizen.”).

(b) The trial court correctly found that Moonshadow has several reasonable alternatives to an implied easement.

The burden is on the party seeking the easement to show that the alternatives are inadequate. *See Cobb*, 693 S.E.2d at 813. Moonshadow did not meet that burden. To the contrary, as the trial court found, there were “multiple other options available to Moonshadow could resolve any need it may have for additional parking.” [IR-110 at 24 (APP112.)] These options included:

- applying for a use permit or shared parking agreement [Aug. 27 Tr. 203:17-205:22 (APP247)],
- applying for a revised parking model [Aug. 28 Tr. 40:13-15 (APP270); Exhibit 77],
- building a parking structure [Aug. 27 Tr. 110:16-112:2 (APP221); Aug. 28 Tr. 33:18-24 (APP266), 35:3-16 (APP268), 40:16-19 (APP270); Exhibits 12, 24, 37],
- renting parking spaces [Exhibit 104 (APP162)], or
- applying for a variance [Aug. 27 Tr. 193:11-18 (APP237)].⁶ [*See generally* IR-110 at 23-24 (APP111-12); Exhibit 77].

⁶ After the trial, Moonshadow applied for a variance to reduce its parking requirement, which was granted. If that decision is upheld on appeal, Moonshadow will certainly not need the implied easement.

The trial court found that “Moonshadow has never made any effort to pursue” these options, and as a result “has failed to establish the requisite necessity for an easement on Lot 2.” [IR-110 at 24 ([APP112](#)).]

Moonshadow disputes (at 70-72, 80) the trial court’s factual findings that it failed to pursue these options. According to Moonshadow, it or its successor either tried or carefully considered and dismissed all of these options. But that is not what the evidence shows.

Neither Linnerson nor Davis testified that they had carefully considered building a parking structure. Instead, Linnerson testified that he “didn’t think of” building a parking structure. Although it might have solved all the problems, he “probably didn’t want to spend the money.” [Aug. 27 Tr. 110:16-112:2 ([APP221](#)).] Moonshadow (at 71) claims that Linnerson decided that a parking lot was not commercially justifiable, but the testimony it cites [Aug. 27 Tr. 155:12-23 ([APP233](#))] does not mention a parking structure at all. Nor do the sections of its brief that Moonshadow cross-references (its Statement of Facts, sections 18-19).

Davis similarly testified that Moonshadow never built a parking structure because “[w]e didn’t need one.” [Aug. 28 Tr. 66:1-7 ([APP275](#)).]

Davis did not contend that building a parking structure would be infeasible or unreasonably expensive.

Davis testified similarly when initially asked why he did not seek a variance, responding “We didn’t need it.” [Aug. 28 Tr. 63:18-21 ([APP272](#).)] His counsel later led him to testify that he did not think he could get a variance. [Aug. 28 Tr. 64:5-8 ([APP273](#)).] But Davis’s only basis for that conclusion “that there had been other attempts that had not been approved.” [Aug. 28 Tr. 64:9-13 ([APP273](#).)] Davis did not testify, and the evidence does not show, that before this litigation began TDMC or Moonshadow ever applied for a straightforward variance to reduce the number of parking spaces required for Lot 1. Moonshadow did apply for such a variance *after* the trial court rejected its claim for an implied easement, and the Board of Adjustment *granted* that application.

Moonshadow argues that a shared parking agreement was impossible because Masjid was not interested in one in 2015. But as Moonshadow itself has argued, the question is whether that was an option at the time of severance (in 2006), not in 2015. *See S & G Associated Developers*, [361 S.W.3d at 220](#) (necessity is determined at the time of severance). And Moonshadow has presented no evidence that its predecessor, TDMC, could not have made

the cross-parking agreement between Lot 1 and the Mosque lot irrevocable at that time. Nor has Moonshadow presented any evidence showing that it could not have executed the shared parking agreement between Lots 1 and 2 that it discussed with TDMC in 2006. Indeed, it appear that the parties would have executed that agreement if not for a lack of diligence. *See Statement of Facts, § I.B*, above.

As for the option of renting parking spaces, Moonshadow complains (at 81) that Masjid never tendered a formal offer. That misses the point. As the party seeking the implied easement, Moonshadow has the burden to show it lacks reasonable alternatives. Moonshadow did not meet that burden when it dismissed Masjid's rental suggestion out of hand. [Exhibit 104 ([APP162](#)).]

Moonshadow argues that the Court should ignore these alternatives because it should consider only the facts at the time title was severed (i.e., in 2006). But that point is irrelevant, because the alternatives discussed above existed in 2006. Indeed, at that time Moonshadow had another option that it failed to pursue: purchasing Lot 2 for value. [Aug. 27 Tr. 91:25-92:9 ([APP205](#)); Aug. 28 Tr. 81:7-83:2 ([APP284](#)), 89:19-24 ([APP292](#)).] Masjid should

not suffer because Moonshadow has been unwilling to spend money to solve the problem it created.

D. The court’s finding that an easement would virtually destroy the value of Lot 2 was not clearly erroneous.

“If existence of a servitude would severely limit the uses of the servient estate . . . a servitude was probably neither intended or expected.”

[Restatement § 2.12 cmt. h](#). The trial court correctly rejected Moonshadow’s claim for an implied because it found that the implied easement would “virtually destroy the value of Lot 2 by leaving it with only 9 parking spaces available for its use,” which would prevent Masjid from “develop[ing] the lot in any meaningful way.” [IR-110 at 24 ([APP112](#)).]

Moonshadow does not dispute the trial court’s legal premise. Nor does it dispute the trial court’s finding that if the easement were implied Lot 2 could not be meaningfully developed and would have barely any value.

Instead, Moonshadow argues (at 81) that Masjid was on notice that Lot 2 only had a legal right to nine parking spots. Not so. Although a Tempe planning employee, Diana Kaminski, wrote in an email to Zubair that “the ability for Lot 2 to develop as office or other use, is restricted by the disproportionate number of spaces required by the medical offices . . . on Lot

1,” Zubair disagreed, stating that, “at this time, there is no legal accesses between LOT-1 and LOT-2,” and that “LOT-2 can not even drive on LOT-1 and vice versa.” [Exhibit 15 at TEMPE000208 ([APP127](#)).] Zubair added that, “[s]ince medical center opened, we rarely see any car parked on LOT-2. Even LOT-1 parking does not fill up to ~ 70% of capacity (that is my personal observation).” [*Id.*]. As the trial court found, Zubair’s email “disputing Kaminski’s assertion” reflected Masjid’s “understanding that no such easement existed.” [IR-110 at 14, ¶ 60 ([APP102](#)), 21 ([APP109](#)).]

The price that Masjid paid for Lot 2 further supports the conclusion that it believed the lot had value. Ridberg and Linnerson told the other members of Linnberg that “the land has a fair market value of around \$200,000 - \$225,000.” [Exhibit 21 at TDMC000270 ([APP130](#)).] Masjid paid double that amount, \$450,000. [Exhibit 20.] Clearly, Masjid did not believe that the land was undevelopable.

Moonshadow also argues that Lot 2 cannot be developed and has no value because, without a cross-access agreement with Moonshadow, the lot lacks space for emergency and garbage vehicles to turn around. But

Moonshadow waived this argument by raising it for the first time in the post-trial briefing.⁷ See *Kent*, 235 Ariz. at 313, ¶ 20.

Moonshadow conceded that it had not previously raised this issue during oral argument on its motion for new trial:

THE COURT: All right. You indicated in your filings that you've made the argument that Lot 2 was undevelopable because of emergency vehicles can't get access, and that factors into the implied easement analysis. **That was not addressed in the joint pretrial statement, was it?**

MR. MANDEL: **No, it wasn't**, Your Honor.

THE COURT: So why wouldn't that be waived?

MR. MANDEL: Well, Your Honor, I mean, if Your Honor chooses to waive it . . . I mean, **I think Your Honor is certainly right that it wasn't raised before**, and I conceded that before I even made the point today.

...

THE COURT: Mr. Bendor said **there were no pretrial disclosures about that issue. Do you dispute that?**

MR. MANDEL: **I do not**, Your Honor.

⁷ In fact, Moonshadow did not even raise this argument in its Motion for New Trial, IR-132; instead, Moonshadow raised it in its Motion for Corrected Findings, IR-133, at 10-12. By contrast, Masjid properly disclosed its argument that an implied easement would virtually destroy the value of Lot 2. [IR-96 (Joint Pretrial Statement) at 18, ¶ 72.]

[Oct. 3, 2019 Tr. 20:5-24 ([APP332](#)) (emphasis added), 23:17-19 ([APP333](#)) (emphasis added).]

Although the trial court denied the motion for new trial from the bench and did not enter specific findings, it clearly concluded that Moonshadow had waived the issue:

THE COURT: . . . [I]f the issue of Lot 2 -- it seems to me that, if this were the critical issue you're depicting, that Lot 2 cannot be developed anyway, that's a position that should have been disclosed before trial and identified in the joint pretrial statement, so that the mosque had a fair opportunity to gather and present evidence in response, and they were denied that opportunity. So what would you like to say?

[Oct. 3, 2019 Tr. 33:14-22 ([APP334](#)).]

If this issue had been properly presented, Masjid could have shown that it does have enough space for emergency and garbage vehicles to turn around, *e.g.*, by offering contrary testimony; showing that it has cross-access rights under the Sopris agreement,⁸ other agreements, or as an easement created by necessity, *see* [Restatement § 2.15](#) & *cmt. b*; or showing that it could

⁸ The Sopris agreement, Exhibit 107, was executed on October 14, 2003, when Lots 1 and 2 were both owned by TDMC. In sections 4.1 and 4.2, TDMC and Sopris provided each other and their successors (which includes Masjid) an "easement to use the public and private roads and accessways" for "vehicular and pedestrian ingress and egress," thereby resolving the purported cross-access problem.

redesign its property to create the necessary turnaround space. And even if Lot 2 lacks the necessary turnaround space, that does not mean that it has no value – it simply means that Masjid will have to solve the problem, *e.g.*, by working with the City, redesigning its property to create the necessary space, or working with a neighbor.

II. The court correctly awarded fees to Masjid.

Masjid sought attorney’s fees under [A.R.S. §§ 12-341.01](#) and [12-349](#). The trial court agreed that Moonshadow’s claims arose out of contract and awarded Masjid fees under [§ 12-341.01](#). [IR-127 at 1-4 ([APP115-18](#)).] It therefore did not reach Masjid’s alternative claim for fees under [§ 12-349](#). [IR-127 at 4 ([APP118](#)).] On appeal, Moonshadow’s challenge to the fee award is limited to the argument that its claims did not arise under contract. Moonshadow does not claim that, if the claims arose out of contract, the decision to award fees or the amount awarded was inappropriate.

A. The trial court correctly awarded fees to Masjid because Moonshadow’s claims arose out of contract.

“In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.” [A.R.S. § 12-341.01](#). Litigation arises out of contract if the contract was “the origin

of” the claim, regardless of whether the contract was between the litigants. *Schwab Sales, Inc. v. GN Constr. Co., Inc.*, [196 Ariz. 33, 37, ¶ 13](#) (App. 1998).

In this case, Moonshadow asserted claims for an implied easement by (1) prior use (discussed in [Argument § I](#), above) and (2) by general plan (which Moonshadow abandoned on appeal). The trial court correctly held that both claims arose out of contract. [IR-127 at 1-4 ([APP115-18](#)).]

1. The claim for an implied easement by prior use arose out of contract.

An easement is contractual in nature. *See Scalia v. Green*, [229 Ariz. 100, 104, ¶ 19](#) (App. 2011) (“Applying the rules of contract construction to deeds granting rights in an easement, we give effect to the intent of the contracting parties.”) As a result, a claim to enforce an express easement arises out of contract under [§ 12-341.01](#). *Squaw Peak Cmty. Covenant Church of Phoenix v. Anozira Dev., Inc.*, [149 Ariz. 409, 410, 414](#) (App. 1986). And [§ 12-341.01](#) treats “express” and “implied” contractual terms the same. Accordingly, Moonshadow’s attempt to impose an implied easement arose out of contract.

Indeed, Moonshadow itself asserted that this action arose under contract when, in its Complaint, it asked that the Court award it “attorneys’ fees pursuant to . . . [§ 12-341.01](#).” [IR-1 (Complaint) at 5.]

Moonshadow argues (at 83) that a claim for an implied easement does not arise under contract because it is an “equitable remedy,” like promissory estoppel. Not so. Moonshadow’s claim for an implied easement asked the court to imply a term into its 2006 contract with TDMC based on the parties’ intent. That is a quintessentially contractual claim. Moreover, the rule governing implied easements is not remedial; it is a substantive rule for which “both legal and equitable remedies are available.” [Restatement § 1.4, cmt. a](#). And [§ 12-341.01](#) can apply to equitable claims. *See Schwab, 196 Ariz. at 37, ¶ 13* (unjust enrichment); *Nationwide Mut. Ins. Co. v. Granillo, 117 Ariz. 389, 394* (App. 1977) (declaratory relief).

Moonshadow also argues (at 84) that [§ 12-341.01](#) does not apply because an implied easement is an implied-in-law contract. Moonshadow relies on *Barmat v. John & Jane Doe Partners A-D, 155 Ariz. 519* (1987), which drew a distinction between contracts implied in fact—which are true contracts, based on intent, and eligible for fees under [§ 12-341.01](#)—and contracts implied in law, which are duties imposed by law without regard to intent, like a duty of care. *Id. at 521-523*. But under *Barmat’s* framework, an implied easement is an implied in fact contract because it is based on intent. *See Argument § I.A*, above. Indeed, Moonshadow’s contrary

argument is inextricably linked to its waived argument that implied easements do not depend on intent. See [Argument § I.A.3.a](#), above.

Moreover, Moonshadow fails to mention *Sirrah Enterprises, LLC v. Wunderlich*, [242 Ariz. 542](#) (2017), which holds that *Barmat* does not apply to “a claim for breach of a duty imputed by law as a term of an express contract.” See *id. at 546*, ¶ 17. *Sirrah* held that § 12-341.01 applies to breaches of the implied warranty of workmanship and habitability; although the warranty is “implied by law,” it is “as much a part of a contract as are the express terms.” *Id. at 546*, ¶ 18.

It is *Sirrah*, not *Barmat*, that governs here. Moonshadow alleged that when TDMC conveyed Lot 1 to Moonshadow, it intended to include in that conveyance an implied easement allowing the owner of Lot 1 to park on Lot 2. In other words, Moonshadow alleged that the easement was an implied term of the 2006 deed. Under *Sirrah*, that claim arises out of a contract – i.e., the deed – regardless of whether the implication was by law or fact.

2. The claim for an implied easement by general plan arose out of contract.

Moonshadow also claimed an implied easement by general plan. Masjid argued in its fee application that this too asserted a contractual right.

[IR-112 at 3.] Indeed, the Supreme Court has referred to an implied easement by general plan as a “contract.” *O’Malley v. Cent. Methodist Church*, 67 Ariz. 245, 251 (1948) (citation omitted). In addition, a general plan theory seeks to enforce mutually restrictive covenants, and § 12-341.01 applies in “an action to enforce restrictive covenants.” *Pinetop Lakes Ass’n v. Hatch*, 135 Ariz. 196, 198 (1983).

Moonshadow never responded to this argument. [See IR-120.] It therefore waived the issue and it cannot cure the waiver now. And even if it could, its half-hearted attempt (at 85-86), which does not cite any legal authority, would not succeed. Moonshadow simply cannot get around the fact that the seminal case on implied easements by general plan, *O’Malley*, states that they are “contractual” in nature. 67 Ariz. at 251.

B. In the alternative, the Court should award fees under A.R.S. § 12-349 or remand for the trial court to make that decision in the first instance.

Section 12-349 provides that a court “shall” award fees if a party “[b]rings or defends a claim without substantial justification,” i.e., if “the claim or defense is groundless and is not made in good faith.” A.R.S. § 12-349(A)(1), (F).

Moonshadow's claim was groundless because it presented no evidence of any intent to create a parking easement on Lot 2, no evidence that Lot 1 had used the parking on Lot 2 in a long and continued manner, and no evidence that it needed the easement. See [Argument § I](#), above. Indeed, Moonshadow's claim for an implied easement to park on Lot 1 was directly refuted by the fact that TDMC had rejected an express easement of the same nature.

Moonshadow's claim was also not made in good faith, as evidenced by its decision to litigate without pursuing the multiple alternatives available to it, its shifting explanations for the need for a permit, and the suspect nature of Davis's testimony.

Accordingly, if the Court holds that Moonshadow's claims did not arise under contract, it should award fees to Masjid under [A.R.S. § 12-349](#) or remand for the trial court to make that decision in the first instance.

REQUEST FOR ATTORNEYS' FEES AND INTEREST

Masjid requests an award of its fees on appeal pursuant to [ARCAP 21](#) and [§§ 12-341.01](#) or [12-349](#).

CONCLUSION

The judgment should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of July, 2020.

OSBORN MALEDON, P.A.

By /s/ Joshua D. Bendor
Colin F. Campbell
Joshua D. Bendor
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012

Attorneys for Defendant/ Appellee

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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

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3.	CIVIL COVERSHEET	Mar. 28, 2016
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17.	APPLICATION FOR DEFAULT; NOTICE OF DEFAULT	Aug. 29, 2016
18.	ME: 150 DAY MINUTE ENTRY [08/27/2016]	Aug. 31, 2016
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20.	NOTICE OF APPEARANCE	Sep. 7, 2016
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85.	DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO REFER CASE TO THE OFFICE OF ALTERNATIVE DISPUTE RESOLUTION FOR APPOINTMENT OF JUDGE PRO TEMPORE	Dec. 21, 2017
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157.	MOTION TO CONTINUE SEPTEMBER 17, 2019 ORAL ARGUMENT RE: RULE 52 AND RULE 59 POST-JUDGMENT MOTIONS DUE TO ILLNESS	Sep. 15, 2019
158.	ORDER	Sep. 20, 2019
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162.	NOTICE OF LODGING PROPOSED AMENDED JUDGMENT	Oct. 15, 2019
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164.	NOTICE OF APPEAL	Nov. 1, 2019

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 12/02/2019

CAPTION: MOONSHADOW PROP. VS MASJID OMAR IBN
AL-KHATTAB

EXHIBIT(S): HD 08/27/2018 LIST# 1 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17
18 19 20 21 23 24 27 28 29 30 31 32 33 34 37 40 42 43 44 45 48 51 53 56
58 60 61 67 69 70 74 76 77 79 84(SEALED) 86 91 97 98 99 100 101 102
103 104 107 108 109 IN MANILA ENVELOPE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

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

TRANSCRIPT(S): NONE

COMPILED BY: patrickj002 on November 27, 2019; [2.5-17026.63]
\\ntfsnas\c2c\C2C-6\CV2016-091847\Group_01

CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa
County, State of Arizona, do hereby certify that the above listed Index of
Record, corresponding electronic documents, and items denoted to be
transmitted manually constitute the record on appeal in the above-entitled
action.



MOONSHADOW PROP. VS MASJID OMAR IBN AL-KHATTAB

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-091847

10/24/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

MOONSHADOW PROPERTIES L L C

JOSEPH JAMES GLENN

v.

MASJID OMAR IBN AL-KHATTAB, et al.

JOSHUA D BENDOR
COLIN F CAMPBELL
JUDGE KILEY

UNDER ADVISEMENT RULING

Findings of Fact and Conclusions of Law

Conclusions of Law

1. "Arizona recognizes that one may acquire an interest in land by means of an implied easement." *Koestel v. Buena Vista Pub. Serv. Corp.*, 138 Ariz. 578, 580, 676 P.2d 6, 8 (App. 1984). "[A]n implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment." *Id.*
2. "Whether an easement arises by implication depends on the intent of the parties which must clearly appea[r] to sustain an easement by implication." *Porter v. Griffith*, 25 Ariz.App. 300, 302, 543 P.2d 138, 140 (1975). *See also* Restatement (3rd) of Property: Servitudes § 2.13, comment *h* ("Implication of a servitude under the rule stated in this section is based on what the parties probably intended or had reasonable grounds to expect. The implication does not arise if the facts or circumstances of the conveyance indicate that the parties did not intend to create a servitude to continue the prior use...");

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-091847

10/24/2018

Freeman v. Sorchych, 226 Ariz. 242, 245 n.7, 245 P.3d 927, 930 n.7 (App. 2011) (“[A] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.”) (citation and internal quotations omitted).

3. The elements of an implied easement are:
 - a. The existence of a single tract of land so arranged that one portion of it derives a benefit from the other, the division thereof by a single owner into two or more parcels, and the separation of title;
 - b. Before separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency; and
 - c. The use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefitted.

Koestel, 138 Ariz. at 580, 676 P.2d at 8 (citation and internal quotations omitted).

4. “It is the general rule...that creation of an easement by implication from a pre-existing use does not require an absolute but only a reasonable necessity, such as will contribute to the convenient enjoyment of the property, other than a mere temporary convenience.” *Koestel*, 138 Ariz. at 581, 676 P.2d at 9.
5. The use must be “[a]pparent or obvious,” which refers not to “actual visibility, but rather susceptibility of ascertainment on reasonable inspection by persons ordinarily conversant with the subject.” *Koestel*, 138 Ariz. at 581, 676 P.2d at 9.
6. The use must have been longstanding at the time the severance occurred, “to a degree which shows permanency.” *Koestel*, 138 Ariz. at 580, 676 P.2d at 8.
7. When determining “what the parties probably intended or had reasonable grounds to expect” the “[i]mplication of a servitude,” “[e]conomic consequences to both parties may be relevant indicators of their expectations. If existence of a servitude would severely limit the uses of the servient estate, and replacement of the utilities would not be very expensive, a servitude was probably neither intended or expected.” Restatement (3rd) of Property: Servitudes § 2.13, comment *h*.

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8. Alternatively, an easement or other servitude may be implied by a map or plan if the land is conveyed “by reference to a map” and “if a different intent is not expressed or implied by the circumstances.” Restatement (3rd) of Property: Servitudes § 2.13. “A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses.” *Id.* The map or plan must, however, establish with reasonable certainty that the servitude exists; “[s]ervitudes should not be implied on the basis of equivocal map labels or references.” *Id.*, cmt. a. Furthermore, “the reduction in value of the servient estate that would be occasioned by [the proposed servitude] may indicate that the parties did not intend to create a servitude.” *Id.*
9. “The impact of implying a servitude on the values of both the burdened and benefited properties may be factors bearing on the intent of the parties.” Restatement (3rd) of Property: Servitudes § 2.13 cmt. *b.* “The circumstance that the impact on the value of the burdened estate would be severe and the value to the benefited estate would be negligible, may indicate an intent that no servitude should be implied.” *Id.*
10. When only one lot in a subdivision is burdened by an easement, that easement cannot be said to have derived from a general plan. *See Smith v. Second Church of Christ, Scientist, Phoenix*, 87 Ariz. 400, 412, 351 P.2d 1104, 1112 (1960) (“[W]hen it appears there is no general scheme, or uniform plan of development, which is shown by the fact that not all of the lots were under restrictions, the covenant cannot be enforced.”) (citation and internal quotations omitted). “[E]quity will not enforce a covenant when to do so would be to encumber the use of the land, without at the same time achieving any substantial benefit to the covenantee.” *Id.* at 413, 351 P.2d at 1112 (citation and internal quotations omitted). *See also* Restatement (3rd) of Property: Servitudes § 2.14(2)(b) (“Unless the facts or circumstances indicate a contrary intent, . . . a conveyance by a developer that imposes a servitude on the land conveyed . . . creates an implied reciprocal servitude burdening all the developer’s remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude.”).
11. While Arizona law recognizes restrictive covenants “which are entered into with the design to carry out a general scheme for the improvement or development of real property,” *O’Malley v. Cent. Methodist Church*, 67 Ariz. 245, 250, 194 P.2d 444, 448 (1948), the grantor of such a covenant “must reference the recorded restriction in the deeds of original grantees to be enforceable amongst subsequent grantees.” *Federoff v. Pioneer Title & Tr. Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990). Without express language in a deed evincing intent to create a restriction, there is no meeting of

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the minds sufficient to create a covenant. *See O'Malley*, 67 Ariz. at 251, 194 P.2d at 448; *Federoff*, 166 Ariz. at 389, 803 P.2d at 110.

12. "To create a covenant at law . . . privity of estate must exist between the *original* grantor and the grantee at the time the covenant is made." *Choisser v. Eyman*, 22 Ariz. App. 587, 589, 529 P.2d 741, 743 (1974) (emphasis added).
13. "[H]e who comes into a court of equity seeking equitable relief must come with clean hands." *MacRae v. MacRae*, 57 Ariz. 157, 161, 112 P.2d 213, 215 (1941).

Findings of Fact

1. TDMC Renovation, L.L.C., ("TDMC") purchased real property ("Lot 1") located at the northeast corner of McClintock Drive and Guadalupe Road in Tempe by Special Warranty Deed dated August 29, 2002 and recorded August 30, 2002. Exhibit 6. Lot 1 included the then-vacant Thomas-Davis Medical Center Building, which TDMC intended to renovate and then reopen.
2. Originally, Lot 1 had, on site, the 197 parking spaces that were required to satisfy code requirements of the City of Tempe (the "City"). Exhibit 53 at p. MASJID_000443. Some of those parking spaces, however, were located on land to the south of and adjacent to current Lot 1. This land was subsequently split from Lot 1 and sold to a third party without a reciprocal parking agreement in place. The purchaser of the lot that was sold as a result of the lot split constructed an office building thereon that required the use of all of the parking spaces on that lot. *See id.* As a result of the sale of the lot to the south of and adjacent to Lot 1 and consequent loss of use of its parking spaces, Lot 1 had only 111 of the 197 parking spaces that it needed to satisfy the City's code requirements. *Id.*
3. In October 2002, TDMC applied to the City for a variance that would allow it to meet its parking requirement using off-site parking. Exhibit 79. This variance application was withdrawn the following month. Exhibit 69.
4. In order to secure the additional parking that the City required, TDMC sought parking agreements with its two neighbors: Defendant Masjid Omar ibn al-Khattab ("Masjid"), whose mosque (the "Mosque") sits on land contiguous to and directly north of Lot 1, and Holy Spirit Catholic Church (the "Church"), which was located across Libra Drive to the north of the Mosque.
5. TDMC commissioned a parking study (the "2003 Parking Study") "to investigate the feasibility of a shared parking program for the TDMC building, the mosque, and the

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church.” Exhibit 53 at p. MASJID_000442. The 2003 Parking Study, which is dated February 11, 2003, was intended to “support[]” TDMC’s “application for a parking-by-demand special use permit,” *i.e.*, a variance. *Id.*

6. The 2003 Parking Study expressly notes that “there are no reciprocal parking agreements between Lots 1 and 2.” Exhibit 53 at p. MASJID_000443.
7. The 2003 Parking Study concluded that, despite the absence of any parking agreement with Lot 2, “[t]here is sufficient parking available on the three sites [*i.e.*, Lot 1, the Mosque’s property, and the Church’s property] to accommodate the projected peak demand.” *Id.* at p. MASJID_000463. In reaching this conclusion, the study noted that the demand for parking at the Mosque and the Church was highest on weekends (and, for the Mosque, at mid-day on Fridays), while the medical center’s demand for parking was highest on weekdays. *Id.* at pp. MASJID_000446, MASJID_000452.
8. The 2003 Parking Study suggested that “[i]t would be desirable” for TDMC “to look into possible development of some additional parking” on Lot 2 which could be used “to serve overflow demand” from Lot 1, the Mosque, the Church, and the property to the south, “if that owner wishes to participate.” Exhibit 53 at p. MASJID_000463. The study did not, however, indicate that Lot 1 *required* the use of the adjacent, undeveloped lot then referred to as Lot 3, and now known as Lot 2, for parking. *See generally id.* On the contrary, the study found the parking already available to be “sufficient...to accommodate the projected peak demand.” *Id.* The 2003 Parking Study determined, in other words, that Lot 1 did not require the use of parking spaces on Lot 2 in order to meet Lot 1’s parking needs.
9. On December 4, 2002, TDMC entered into a parking agreement with Masjid which allowed TDMC to use 40 parking spaces on the Mosque’s property during business hours on weekdays while Masjid was allowed to use 75 parking spaces on Lot 1 after business hours and at mid-day on Fridays. Exhibit 45. This shared parking agreement between the medical center and the Mosque is still in effect.
10. TDMC’s managing member Dr. Steven Linnerson (“Linnerson”) testified at the trial in this matter that although employees who work at the medical center located on Lot 1 have been directed (and frequently reminded) to park in parking spaces on the Mosque’s parking lot so as to leave parking spaces closer to the medical building available for use by patients, the employees rarely comply. Instead, the medical building’s employees generally park on Lot 1. The medical building’s patients, too, rarely if ever park on the Mosque’s parking lot. Instead, the 40 parking spaces on the Mosque’s parking lot that are available for Lot 1’s use during daytime hours on weekdays generally remain unused.

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11. During the same time period, TDMC also sought a parking agreement with the Church that would have allowed it to use parking spaces on the Church's property during weekday business hours.
12. TDMC filed a request for a Special Use Permit with the City on February 11, 2003. In the Letter of Explanation it submitted on February 11, 2003, TDMC stated that it would meet the medical building's need for 197 parking spaces by combining 111 on-site parking spaces with 86 parking spaces that would be made available "[o]ff-site" pursuant to "agreements with [the] Mosque and [the] Church." *See* Exhibit 70 at p. MASJID_000473.
13. TDMC notified the City that the Church's parish council had not secured final approval for the parking agreement with TDMC from officials at the Roman Catholic Diocese of Phoenix. This lack of certainty was unacceptable to the City, which denied TDMC's application for a Special Use Permit. *See* Exhibit 108.
14. After TDMC's application for a Special Use Permit was denied, TDMC purchased the adjacent vacant lot, which was then referred to as Lot 3 and now known as Lot 2, for \$500,000. As noted in a 2011 memorandum drafted on behalf of TDMC by Rick Ridberg ("Ridberg") and Linnerson that addresses the "history of the land," TDMC originally purchased Lot 2 "to get the required parking to redevelop TDMC." Exhibit 21 at p. TDMC000270.
15. TDMC purchased Lot 2 by Warranty Deed dated March 28, 2003 and recorded April 4, 2003. Exhibit 33. The Warranty Deed provides that title to Lot 2 was being conveyed subject only to "[c]urrent taxes and other assessments, reservations in patents and *all easements*, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations, and liabilities *as may appear of record*." *Id.* at p. 1 (emphasis added).
16. On May 9, 2003, TDMC's architects filed a request with the City for approval of a Third Amended General Plan of Development for Thomas-Davis Medical Center (the "Third Amended General Plan"). *See* Exhibit 23 at p. MASJID_000492."
17. The Third Amended General Plan was approved by the City on July 17, 2003. Exhibit 23 at p. MASJID_000491. The Third Amended General Plan purports to allocate, to Lot 1, 89 parking spaces on what is now Lot 2, thus providing Lot 1 with a total of 197 parking spaces. Exhibit 23 at p. MASJID000492. Notably, however, the "Legal Description" of the property at issue as set forth in the Third Amended General Plan describes only Lot 1, and does not include Lot 2. *Compare* Exhibit 6 at p. TDMC000021 (legal description of

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Lot 1) *with* Exhibit 23 at p. MASJID_000495 (legal description of property that is subject to the Third Amended General Plan). Further, although the Third Amended General Plan contains references to easements for other purposes (*e.g.*, cross-access and sewer line easements), it contains no reference to any parking easements. *See* Exhibit 3.

18. Soon after the Third Amended General Plan was approved, TDMC filed a request to re-plot Lot 1 and Lot 2. *See* Exhibit 8. The Final Plat had the effect of reducing the size of Lot 2 and changing its name from “Lot 3,” as it was formerly known. *Id.* The Final Plat makes no reference to any restrictive covenant that runs with the land. *Id.* In 2005, the City approved the re-plot.
19. On October 14, 2003, TDMC entered into a Reciprocal Access, Parking and Drainage Easement and License Agreement (the “Sopris Agreement”) with Sopris Mountain, LLC (“Sopris”), the owner of adjacent property, pursuant to which TDMC granted Sopris an easement to use up to 40 parking spaces on Lot 1. Exhibit 107 at p. MASJID_000054.
20. On September 14, 2004, TDMC entered into a reciprocal parking agreement with the Church. The reciprocal parking agreement allows the owner of Lot 1 to use any parking spots on the Church property during weekday business hours except on religious holidays, and allows the Church to use parking on Lot 1 on weekends and religious holidays. *See* Exhibit 51 at p. TDMC000038. Like the shared parking agreement with the Mosque, the shared parking agreement between the medical center and the Church is still in effect.
21. As noted above, when TDMC purchased Lot 2 in 2003, it was vacant and contained no parking spaces. In 2004, TDMC improved Lot 2 by having a parking lot engineered and built. *See* Exhibit 21 at p. TDMC000270.
22. As Linnerson testified, neither employees nor patients of the medical building on Lot 1 have used the parking lot on Lot 2 much, if at all, nor have they used the parking available on the Mosque’s property or the Church’s property. Instead, those employees and patients have generally used only the parking spaces on Lot 1. When asked at trial if the parking available on Lot 1 has been “sufficient” for Lot 1’s needs, Linnerson replied, “That’s correct.”

A. Moonshadow purchases Lot 1

23. Within a few years of renovating and re-opening the medical center, TDMC began to look into selling Lot 1. Ridberg acted as TDMC’s real estate agent. Ultimately, Lot 1 was

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purchased by Plaintiff Moonshadow Properties, LLC (“Moonshadow”), whose principal was, and continues to be, Dr. Mikol Davis (“Davis”).

24. Prior to the close of escrow on Lot 1, J. Gregory Lake (“Lake”), Moonshadow’s attorney, proposed a parking agreement between Lot 1 and Lot 2, which was still owned by TDMC. *See* Exhibit 17. He communicated his proposal for a parking agreement to Victoria Longfellow (“Longfellow”), counsel for TDMC. No document setting forth this proposal has been located.
25. The proposal Lake communicated to Longfellow was one-sided in that it would have allowed visitors to Lot 1 to use Lot 2 for parking purposes, but would not have permitted visitors to Lot 2 to park on Lot 1.
26. Longfellow replied to Lake that the proposed easement agreement was unacceptable because it was not reciprocal. Lake then drafted an easement agreement that provided for reciprocal access, which he emailed to Longfellow on February 2, 2006. *See* Exhibit 17. The draft reciprocal easement agreement that Lake prepared did not purport to entitle Lot 1 to use any particular number of parking spaces on Lot 2. Instead, it merely purported to establish “a nonexclusive, perpetual and reciprocal easement for reasonable access, ingress, egress and parking over all paved driveways, roadways and walkways as presently or hereafter constructed and constituting a part of each Parcel.” *Id.* at p. TDMC000101. It expressly stated that “[t]he easements herein above granted shall be used and enjoyed by each Owner and its Permittees in such a manner so as not to unreasonably interfere with, obstruct or delay the conduct and operations of the business or any other Owner at any time conducted on its Parcel...” *Id.*
27. Longfellow still considered the proposed reciprocal easement agreement to be too one-sided. Upon learning, after the fact, that Linnerson had signed the proposed reciprocal easement agreement at closing notwithstanding her concerns, Longfellow sent an email to Lake on February 6, 2006 stating in part,

I am concerned that there is not enough flexibility in the document to enable TDMC to do what it chooses with the property. I am told that [Linnerson] went ahead and signed the document to move forward in good faith with the closing, but that your client agreed that in the event TDMC desires changes to the document to protect its rights with respect to the property (in keeping with the spirit of the easement as well), Dr. and Mrs. Davis would agree to such changes. I will talk to [Linnerson] regarding the changes to be made, and if he wants to go

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forward with it now, as opposed to later, I will forward you a proposed amendment to the Reciprocal Parking Easement for your review.

Exhibit 18 at p. TDMC000445.

28. There is no evidence that Longfellow followed up on her February 6, 2006 email by sending Lake the “proposed amendment to the Reciprocal Parking Easement” she referenced in that email. Her failure to do so suggests that Linnerson made an affirmative decision not to take any further action at that time to pursue a reciprocal parking easement agreement with Moonshadow. *See* Exhibit 18 at 18 at p. TDMC000445 (Longfellow promised to “forward” to Lake “a proposed amendment to the Reciprocal Parking Easement” after “talk[ing] to [Linnerson],” “*if [Linnerson] wants to go forward with it now*”) (emphasis added).
29. Although Longfellow indicated in her February 6, 2006 email that she had been told that Linnerson had signed the reciprocal easement agreement, she does not have a copy of that document bearing Linnerson’s signature, nor does she recall ever seeing a signed copy of that agreement. Linnerson himself testified at trial that he has no recollection of signing this document. No signed copy of this reciprocal easement agreement has ever been produced by anyone in this case.
30. At trial, when asked if he signed the reciprocal parking easement agreement on behalf of Moonshadow prior to closing, Davis replied, “I believe so.”
31. Although the reciprocal easement agreement may have been signed by Linnerson on behalf of TDMC (although Linnerson does not recall doing so), and although Davis testified that he signed that agreement on behalf of Moonshadow, no one has come forward with a signed copy of that agreement. Moreover, neither Lake nor Longfellow has any recollection of ever seeing a signed copy of that agreement. Transcript of March 1, 2017 Deposition of J. Gregory Lake at pp. 10-11; Transcript of August 16, 2018 Deposition of Victoria Longfellow at pp. 21-22.
32. At trial, Davis testified that, during the period when Moonshadow was conducting its “due diligence” prior to the purchase of Lot 1, he learned of the then-existing shared parking agreement between the medical center, the Church, and the Mosque, and that he was satisfied that this shared parking agreement satisfied Lot 1’s need for the 197 parking spaces that the City required Lot 1 to have.
33. TDMC conveyed Lot 1 to Moonshadow by Special Warranty Deed dated February 3, 2006 (the “Moonshadow Deed”). Exhibit 4. The Moonshadow Deed states that it conveys

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title to Lot 1 “SUBJECT ONLY TO the matters set forth on” the attachment thereto labelled “Exhibit B.” Exhibit 4 at p. MASJID_000205. Neither the Moonshadow Deed nor Exhibit B thereto make any reference to parking easement on Lot 2.¹ *See generally id.* Exhibit B to the Moonshadow Deed refers by name to several recorded documents, but does not mention the Third Amended General Plan. *See generally id.* at pp. MASJID_000208 - MASJID_000209.

34. After Moonshadow purchased Lot 1, it hired a property management company owned by TDMC’s managing member, Linnerson.
35. Davis testified at trial that, at the same time Moonshadow purchased Lot 1 from TDMC, it could have purchased Lot 2 as well, but that Davis was not interested in purchasing Lot 2.
36. At the time Moonshadow purchased Lot 1, Davis was not under the impression, understanding, or belief that Lot 1 had a parking easement on Lot 2. On the contrary, as Davis testified at trial, at the time Moonshadow purchased Lot 1, “I didn’t know about easements.”
37. When asked at Moonshadow’s 30(b)(6) deposition if Moonshadow had “any sort of formal agreement with TDMC over parking on Lot 2” at the time it purchased Lot 1, Davis replied, “I didn’t have any agreement.” Transcript of February 17, 2017 30(b)(6)Deposition of Moonshadow at p. 29. At trial, Davis affirmed that this testimony is true.
38. At trial, both Linnerson and Davis testified that, after Moonshadow purchased Lot 1 in 2006, neither TDMC nor Moonshadow took any action over the next five years to attempt to secure a reciprocal parking easement agreement between Lot 1 and Lot 2. They both further testified, that, between 2006 and 2011, Davis never raised the subject of a reciprocal parking easement agreement between Lot 1 and Lot 2 with TDMC or Linnerson.
39. Moonshadow took over the shared parking agreement that TDMC had with the Church and the Mosque. When asked at Moonshadow’s deposition how this shared parking agreement has worked for Moonshadow, Davis testified, “Outstanding,” adding, “We’ve

¹ Exhibit B to the Moonshadow Deed concludes with a reference to “[p]ossible reciprocal rights for curbing, parking, retention areas, landscaping area and block wall which runs between and over boundaries to the Northwest, Northeast and the South.” Exhibit 4 at p. MASJID_000209.

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never had a problem. There's never been an issue whatsoever, either way." Transcript of February 17, 2017 30(b)(6) Deposition of Moonshadow at pp. 30-31.

40. At trial, when asked whether the shared parking agreement with the Church and the Mosque proved to be "more than sufficient" to meet Lot 1's needs, Davis acknowledged, "It worked, yes." At a later point in his testimony, he reiterated that the medical center "didn't use any of the spaces" on the Church property, thus making clear that the shared parking agreement provides Moonshadow with more parking spaces than it actually needs.
41. Davis testified he has never heard complaints about insufficient parking available to the medical center on Lot 1.
42. Prior to 2015, Davis had never met nor communicated in any manner with any representative of the Mosque.
43. At trial, Davis claimed that the medical center's employees and/or patients have parked their vehicles on Lot 2, testifying, "I have pictures of it." He admitted, however, that he has never produced such pictures during these proceedings, stating, "No one ever asked me for that."²
44. For two reasons, the Court rejects Davis's testimony about the purported use, by the medical center's employees and/or patients, of Lot 2 for parking purposes. First, Davis failed to produce the pictures which, he claimed, are in his possession and could corroborate his testimony on this point. Second, Davis's testimony establishes that he lacks foundation to testify about the frequency with which the medical center's employees and visitors have made use of Lot 2 for parking. Davis resides in California, and admitted that he travels to the medical center only a few times per year. The Court therefore rejects Davis's testimony, and instead accepts Linnerson's testimony that, both prior to and after Moonshadow acquired Lot 1, employees and visitors to the medical center have parked primarily, if not exclusively, on Lot 1, and have rarely parked on Lot 2.

B. Linnberg purchases Lot 2

45. Linnberg, LLC, ("Linnberg") is a limited liability company whose members consist of some, but not all, of the members of TDMC.

² This testimony, if true, would establish that Moonshadow has breached its disclosure obligations under Ariz.R.Civ.P. 26.1.

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46. TDMC conveyed Lot 2 to Linnberg by Special Warranty Deed dated May 18, 2006 and recorded February 16, 2007 (the “Linnberg Deed”). *See* Exhibit 5.
47. The Linnberg Deed states that the conveyance is subject only to “current taxes and assessments, reservations, and *all easements*, rights of way, covenants, conditions, restrictions, liens and encumbrances *of record*.” Exhibit B at p. FATIC000531 (emphasis added).
48. After selling Lot 2 to Linnberg, TDMC distributed its profits and dissolved.
49. Linnberg looked into the possibility of developing Lot 2 by constructing an office building. Toward that end, Linnberg retained Heffernan & Associates (“Heffernan”), a transportation consultant, to evaluate the parking available to Lot 2. By letter dated July 10, 2007, Heffernan stated in part, “The 2003 development plan shows that your lot has only nine parking spaces available to apply to the proposed building’s code requirement, because all of the other parking spaces are already dedicated to meeting [Lot 1’s] code requirement.” Exhibit 24 at p. Linnberg000115. Heffernan proposed five options for development of Lot 2: (1) construct a small office building requiring only nine parking spaces; (2) construct “an office building on piers” that would offer additional parking spaces underneath the building; (3) join with the owner of Lot 1 in constructing a “parking deck” serving both lots, thereby increasing “the total parking supply” so as to “fully satisfy the sum of the code requirements for” both lots; (4) enter into “a formal agreement,” which could not be unilaterally “revoked or cancelled by either party,” to buy or lease parking spaces from the Church on the other side of Libra Drive; and (5) to “enter into a formal shared parking program” with the Church and the owner of Lot 1 that “would place all of their parking into a common pool” that would “last in perpetuity.” *Id.* at pp. Linnberg000115 – Linnberg000117.
50. Ultimately, Linnberg decided against developing Lot 2, and decided to sell it instead.
51. Communications among Linnberg representatives prior to Linnberg’s sale of Lot 2 makes clear that Linnberg did not believe or understand that Lot 1 had a right to park on Lot 2. In an October 27, 2007 email to Linnberg bearing the subject line, “Points for discussion with Dr. Davis today,” Longfellow discussed some possible terms of a “multi-party reciprocal parking agreement” among Lot 1, Lot 2, and the Church. Exhibit 56 at p. Linnberg000124. In the course of discussing a possible sharing of the cost of installing and maintaining common parking areas, Longfellow noted that “there is no formal agreement to allow [Lot 1] to use your land for parking.” *Id.* at p. Linnberg000125. Although she expressed the concern that Moonshadow may be able to assert a viable

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claim for parking rights on Lot 2 based on theories of “waiver,” “estoppel,” “misrepresentation of seller,” or “prescriptive easement³,” *id.*, she made no reference to an easement by implication, an easement by general plan, or any other easement arising out of a purported agreement between the owners of Lot 1 and Lot 2. *See generally id.*

C. Masjid purchases Lot 2

52. At some point, Masjid approached Linnberg about purchasing Lot 2.

53. In 2011, a Receipt for Deposit and Real Estate Contract for the sale of Lot 2 was signed by Linnerson on behalf of Linnberg and Muhammed Zubair (“Zubair”) on behalf of Masjid. *See Exhibit 19.* The document reflects that the purchase price was to be \$546,000. *Id.* at p. FATIC000469.

54. At some point after Linnberg offered to sell Lot 2 for \$546,000, Ridberg and Linnerson contacted the other members of Linnberg to identify certain “hurdles” that had been “encountered.” Exhibit 21 at p. TDMC000270. They explained, first, that it had been discovered that “[t]he water, sewer and utility lines” had not “been...brought to the PAD from the street” as originally thought. *Id.* As a result, the owner of Lot 2 would have to incur additional costs of “between \$55-\$65,000” in “construction and development fees” to develop the lot. *Id.* Additionally, they explained, “[a]n easement allowing cross access and cross parking between the owners of our building [*i.e.*, Lot 1] and our lot [*i.e.*, Lot 2] never got executed and recorded, which is essential to the Mosque.” *Id.* They reported that “[w]e are in the process of getting the Easement signed and recorded.” *Id.* Finally, they explained, “the value” of Lot 2 “has dropped dramatically” as a result of “the recession.” *Id.* Noting that Ridberg believes “the land has a fair market value of around \$200,000 - \$225,000 if a Buyer could be found” - - and adding, as an aside, that finding a new buyer “would be very difficult” due to Lot 2’s “parking and utility issues” - - Ridberg and Linnerson recommended accepting Masjid’s “modified offer” to purchase Lot 2 for a reduced price of \$450,000. *Id.* Even at that price, Ridberg and Linnerson stated, Masjid would be “overpaying.” *Id.* at p. TDMC000271. They explained that, even though the members of the Masjid community “know they are overpaying,” they “would rather do that than offend all of us, who have let them park on your property (Moonshadow’s) for five years without getting any real benefit for ourselves.” *Id.*

³ A claim based on easement by prescription is similar to one based on adverse possession. *Spaulding v. Pouliot*, 218 Ariz. 196, 203, 181 P.3d 243, 250 (App. 2008). “A party claiming an easement by prescription must establish that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and that the use was hostile to the title of the true owner.” *Id.* at 201, 181 P.3d at 248 (citations and internal quotations omitted).

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55. The purchase price was subsequently reduced to \$450,000, a reduction that was memorialized in the Second Addendum to the Receipt for Deposit and Real Estate Contract. *See* Exhibit 20.
56. Linnberg was well aware, throughout its negotiations with Masjid, that no parking agreement was in place that entitled Lot 1 users to park on Lot 2. Longfellow had informed Linnerson of that fact in no uncertain terms four years earlier, when she sent her October 27, 2007 email to Linnerson and Slater stating in part that “there is no formal agreement allowing GMC [*i.e.*, the medical center] to use your land for parking.” Exhibit 56 at p. Linnberg000125.
57. As Linnerson testified at trial, during Linnberg’s negotiations with Masjid, Linnerson became aware that Masjid intended to use Lot 2 for “a multi-purpose community hall.” There is no evidence that Linnberg ever told Masjid that Lot 2 had insufficient parking available to it for this intended use.
58. Masjid requested that Linnberg get a cross-parking easement from Moonshadow before the close of escrow.
59. On behalf of Linnberg, Ridberg contacted Davis on April 11, 2011, to let him know that, “[a]s part of the due diligence” relating to the pending sale to Masjid, “it was discovered that the cross easement had never been recorded” and, in fact, “no one can even locate the signed document.” Exhibit 58. Expressing concern about “the official lack of permission to cross properties, and use parking as necessary,” and emphasizing that “[t]his has become a very important issue with the Buyer,” Ridberg asked for Davis’s “help in correcting this.” *Id.* As discussed more fully below, Davis’s help was not forthcoming.
60. On April 28, 2011, Zubair emailed Diana Kaminski (“Kaminski”) at the City’s Planning Office to inform her that Masjid had “requested seller of Lot-2 (Linnberg) to enter into cross parking easement with Lot-1 (Moonshadow).” Exhibit 15 at p. TEMP000209. He forwarded a copy of the proposed cross-parking easement. Kaminski replied that the draft agreement “does not resolve the parking issues, as Lots 1 & 2 are already tied to parking, with a substantial portion of Lot 2 encumbered by Lot 1.” *Id.* Kaminski went on to state that “the ability for Lot 2 to develop as office or other use, is restricted by the disproportionate number of spaces required by the medical offices...on Lot 1.” *Id.* Zubair replied by disputing Kaminski’s assertion, stating that, “at this time, there is no legal accesses between LOT-1 and LOT-2,” and that “LOT-2 can not even drive on LOT-1 and vice versa.” *Id.* at p. TEMPE000208 [*sic*]. He added that, “[s]ince medical center opened,

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we rarely see any car parked on LOT-2. Even LOT-1 parking does not fill up to ~ 70% of capacity (that is my personal observation).” *Id.* [*sic*].

61. When asked at trial if he agreed with Zubair’s statement back in April 2011 to the effect that vehicles parked on Lot 1 rarely occupied more than 70% of the parking capacity of Lot 1, Linnerson admitted, “I would estimate that that’s fairly accurate. There were some days when it was higher, and almost totally full.” Linnerson did not testify that the parking available on Lot 1 has ever been insufficient to meet Lot 1’s needs.
62. The close of escrow was eventually extended to May 4, 2011 so that Masjid could obtain a “cross parking easement agreement to be recorded prior to close of escrow.” Exhibit 27, Amendment to Escrow Instructions and/or Purchase Contract. *See id.* (“The contingency period time for earnest money to become nonrefundable is hereby extended to on or before April 13, 2011,” and “the original executed easement for shared ingress, egress and parking between Lot 1 and Lot 2...shall record at or prior to close of escrow and become part of the schedule b exemptions on the title policies to be issued.”); Exhibit 28 (“Close of escrow is hereby extended to May 4, 2011” and “the Special Warranty Deed to be recorded at close of escrow shall set forth all schedule b exceptions which shall include the cross parking easement agreement to be recorded prior to close of escrow.”).
63. On May 20, 2011, Linnberg’s attorney, Longfellow, emailed a Reciprocal Parking Easement Agreement to Linnberg to be forwarded to Davis. Exhibits 43, 44. This Reciprocal Parking and Easement Agreement, which is almost identical to the agreement that Lake had sent Longfellow back in 2006, provides for “a nonexclusive, perpetual and reciprocal easement for reasonable access, ingress, egress and parking over all paved driveways, roadways and walkways as presently or hereafter constructed and constituting a part of each Parcel.” Exhibit 44 at pp. TDMC000301 - TDMC000302. It further states that “[t]he easements herein above granted shall be used and enjoyed by each Owner and its Permittees in such a manner so as not to unreasonably interfere at any time conducted on its Parcel...[*sic*].” *Id.* at p. TDMC000302. Unlike the version that Lake drafted in 2006, however, the Reciprocal Parking Easement Agreement that Longfellow sent on May 20, 2011, included a provision stating, “Nothing herein shall be intended to prevent the development and use of the Masjid Parcel.” *Id.*
64. When Linnberg’s attorney contacted Davis to ask him to sign the reciprocal parking easement agreement between Lot 1 and Lot 2, Davis did not respond until after escrow on Lot 2 had closed. When he finally did respond, he told Longfellow that he was unwilling to sign the agreement. *See* Exhibit 98.

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65. By email sent on May 4, 2011 - - the deadline for the close of escrow - - Zubair instructed escrow officer Kathy Covert to “Please Go Ahead and Close/Record this escrow today with out waiting for Easement agreement with moonshadow [*sic*].” Exhibit 13 at p. FATIC000320. Escrow therefore closed on Lot 2 on May 4, 2011 with no cross parking easement recorded.
66. Masjid obtained title to Lot 2 pursuant to a Special Warranty Deed dated April 29, 2011 and recorded May 5, 2011. *See* Exhibit 9.
67. Shortly after closing, Zubair sent Kaminski an email stating,
- Just wanted to share good news with you that [Masjid] did purchase LOT-2. We decided to purchase with out cross parking agreement with LOT-1. Moonshadow attorney was slow in responding and [Masjid] was under pressure from donors to not miss this opportunity at close approximity [*sic*].
- Exhibit 16 at p. TEMP000220.
70. When Linnberg let Longfellow know, on May 5, 2011, that the sale of Lot 2 had closed, Longfellow replied, “Does this mean it closed without the [Reciprocal Easement Agreement]? Greg Lake has gone dark, so perhaps Dr. Davis signed it without counsel???” Exhibit 60 at p. Linnberg000135. On behalf of Linnberg, Karen Slater (“Slater”) confirmed that “it closed with out [*sic*] the REA,” adding that she intended to “follow up with Dr. Davis today.” *Id.* at p. Linnberg000134.
71. As noted above, when Linnberg’s attorney contacted Davis to ask him to sign the reciprocal parking easement agreement between Lot 1 and Lot 2, Davis did not respond until after escrow had already closed on Lot 2. In the response he sent to Longfellow on May 6, 2011, Davis made clear he was unwilling to go forward at that time with a reciprocal cross-parking easement agreement. He began by stating, “I think we need more information about the parking and the proposed easement.” He went on, “We need to see a parking survey (nothing verbal) to really understand the impact to [Lot 1] of the...proposed easement...Right now, we seem to be operating in the dark.” He concluded by making clear he was unwilling, at least for the time being, to sign the Reciprocal Parking Easement Agreement that Longfellow had prepared, stating, “We want to wait on signing an agreement for the cross-parking easement until the parking plan is 100% clear to everyone. We await your parking survey.” Exhibit 98 at pp. Linnberg000012-Linnberg000013.

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72. On behalf of Linnberg, Slater replied to Davis's May 6th email on May 9th, telling Davis that "[t]he cross easement agreement protects both you and the Mosque" because it is "necessary to your tenants and their clients to cross over the contiguous access the Moonshadow Properties parcel and the vacant piece of land adjacent to your parcel [*sic*]." Exhibit 61. Slater told him that the easement agreement "really is a completely separate issue from any parking agreement and thus no parking study exists," and reminded him "that this easement agreement was something that Greg Lake proposed during the sale of TDMC Renovations to Moonshadow to protect you and [your wife]." *Id.*
73. Over a week later, Lake, on behalf of Davis, contacted Longfellow to ask again about a parking survey. He asked, "Did you or your client obtain a parking survey to identify the current and potential parking needs? Dr. Davis will be in town this weekend and would like to address the situation, if needed." Exhibit 99.
74. Davis finally signed the Reciprocal Parking Easement Agreement on May 26, 2011, three weeks after escrow closed on Lot 2. Exhibit 30 at p. MASJID000262.
75. On June 1, 2011, Longfellow sent Linnberg an email asking, "Did the easement get signed? If so, can you please provide me with an executed copy for my files...?" Exhibit 29. Slater replied on behalf of Linnberg stating, "We received signed and notarized copies from Dr. Davis yesterday," but that the easement agreement had not been signed by any representative of Masjid. *Id.*

D. Moonshadow refinances its loan

76. In November 2015, Davis was wrapping up negotiations on a new loan because a balloon payment was coming due on Moonshadow's original ten-year loan. Moonshadow has alleged in these proceedings that its lender conditioned the new loan on Moonshadow securing a parking easement over Lot 2, but Moonshadow has disclosed no loan documents, emails, or other communications from its lender to support this contention.
77. Davis testified that it was not until 2015 that he discovered that the easement agreement he claims to have signed in 2006 had never been recorded. This testimony is inconsistent with Davis's May 6, 2011 email to Longfellow in which he referred to the "*proposed* easement," thus making clear that he realized that no easement existed at the time, and in which Davis insisted on "wait[ing]" to sign any "cross-parking easement" until Linnberg provided him with a parking survey. Exhibit 98 (emphasis added). If, as Davis now claims, he thought a reciprocal easement agreement had been signed and recorded in 2006, why would Davis describe it nine years later as a "*proposed* easement"? And why

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would he express unwillingness to sign a “cross-parking easement” if, as he now claims, he thought he had already signed one?

78. Davis also testified that that it was not until 2015 that he learned that the easement agreement he signed on May 24, 2011 was never recorded, or even signed by Masjid.
79. Davis contacted the City to discuss and evaluate his options. Kaminski suggested three options: (1) try to obtain, from Linnerson or Masjid, “a recorded copy of the [reciprocal easement] agreement” from 2011; (2) if such an agreement “does not exist,” “enter into the same agreement” with Masjid now; and (3) if Masjid will not enter into that agreement now, “apply for a revised parking model to remove Lot 2 from the required allotment and incorporate another adjacent lot to share parking, and utilize a shared parking model with a recorded document between Lot 1 and another lot that meets the parking requirements based on use and time of day.” Exhibit 77.
80. Davis reached out to Masjid in pursuit of the second option suggested by Kaminski. On December 2, 2015, Davis emailed Zubair, assuring him that “[w]e are very happy with the current arrangement” but that “we applied for a new loan” and “[t]he lender insists that we have a parking arrangement we cannot revoke for longer than the term of the loan.” Exhibit 100. He went on, “The latest word is that it has to say six years. Is that ok?” *Id.* He assured Zubair that a document reflecting the bank’s proposed terms for a parking agreement was needed only to satisfy the bank’s requirements, and that, once the loan was refinanced, he would be willing to modify the signed parking agreement. As Davis put it, “I reviewed the letter they need according to what the lender’s lawyer asked for. It can be changed any way you desire after the loan closes.” *Id.* Davis’s statement on this point make clear that his request for a parking agreement was not based on Lot 1’s actual need for parking, but was instead simply intended to satisfy the bank’s requirements.
81. Two days later, Davis’s property management company emailed Zubair “two documents that need to be signed.” Exhibit 101. Masjid was no longer interested in a parking agreement of the type Davis was proposing, however, and so declined to sign the documents or agree to an easement.
82. Several days later, Davis wrote to Zubair in an effort to persuade him that Masjid should enter into a parking agreement with Moonshadow. Davis told him that he would not ask for a signed agreement “[i]f we did not have to get a loan,” and that, instead, “we would be perfectly happy” with the current parking arrangements, with which “there has never been a problem.” Exhibit 102 at p. MASJID_000608. A written agreement was required by the lender, who, Davis stated, was “extremely stubborn” about the issue because the

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lender is “concerned that if they ever had to take back the property, they would not be able to sell it because of the parking issue.” *Id.* He told Zubair that Lot 1 is “short some 41 spaces for parking,” and that Moonshadow’s lender “want[s] you to agree to let us use (your community owned) Lot 2 parking” for a minimum of “ten years.” *Id.* at pp. MASJID_000608-MASJID_00609.

83. A day later, on December 11, 2015, Davis emailed Zubair to report, “I found out where we were both taken advantage [of],” explaining that “the title company that processed your purchase SHOULD have caught the PROBLEM that by your purchasing the empty lot with parking, MY building immediately was illegally under parked...” Exhibit 103 at p. MASJID_000621.
84. At trial, Davis acknowledged that the current parking arrangements have always been sufficient to meet Lot 1’s needs. When asked about the sufficiency of the parking available to Lot 1, Davis testified, “There’s never been a problem.”
85. On December 29, 2015, Zubair emailed Davis to offer to assist Moonshadow with the parking issue that Davis said had been raised by Moonshadow’s lender. Zubair told Davis that Masjid “has no need of” a reciprocal parking agreement with Lot 1 because it “has plenty of parking of its own!.” Exhibit 104 at MASJID_000647. In an effort to accommodate its neighbor, however, Zubair suggested that Masjid “‘may’ be able to lease Moonshadow 40 parking spots around [the] Mosque building for ten years.” *Id.*
86. Davis replied by rejecting Zubair’s proposal, stating, “[a]ny parking agreement has to be reciprocal.” Exhibit 104 at MASJID_000646. Davis went on to tell Zubair that, “[w]hen your congregation bought Lot 2 a legal error took place.” *Id.* Davis acknowledged that that parking issue “is a legal matter” that is “not one that you created.” *Id.* Instead, Davis stated, “Linnberg created it.” *Id.* Although he recognized that Masjid did not create the problem, Davis insisted, “you and Dr. Linnerson must correct it asap.” *Id.* Zubair replied by expressing regret that “our offer is not useful for you going forward.” *Id.*
87. Significantly, in his December 29, 2015 email to Zubair, Davis never claimed that Lot 1 had a parking easement on Lot 2 at the time Masjid purchased Lot 2 from Linnberg. *See generally* Exhibit 46. Although Davis claimed that a “covenant...existed before [Masjid] bought Lot 2,” he explained that the “covenant” in question “said that [Lot 2] should not be separated from Lot 1.” *Id.* at p. MASJID_000646. He did not identify any “covenant” that entitled Lot 1 to use Lot 2 for parking purposes after separation of title. *See id.*
88. On January 29, 2016, Davis’s wife, Carolyn Rosenblatt (“Rosenblatt”), emailed Kaminski addressing Lot 1’s “parking problem,” which, she reported, “is still

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unresolved.” Exhibit 42 at p. COT000158. Rosenblatt complained that “[t]he duo of Drs. Linnerson and Ridberg apparently thought it would be fine to close escrow first and get the agreement for parking that affected us afterwards,” but that, after the close of escrow, Masjid “would not sign” a “permanent parking agreement.” *Id.* She asked the City to intervene with Masjid on Davis’s behalf, stating that Masjid’s members “appear to take direction from the City.” *Id.*

89. Davis subsequently found another lender who did not require a permanent parking easement to close on a loan. The loan was finalized in February 2016.
90. At trial, Davis testified that he made an oral promise to his lender, Wells Fargo, that he would “get it [*i.e.*, the parking issue] cleaned up.” No email or other document to that effect appears the Wells Fargo loan file. *See generally* Exhibit 84. Moreover, Davis did not testify that Wells Fargo has ever indicated what the consequence, if any, would be if no parking easement was acquired.
91. This action was commenced on March 28, 2016, *after* Davis succeeded in securing a loan to refinance Lot 1.

I. The Court Finds No Basis on Which to Conclude That Lot 2 is Subject to an Easement by Implication

As noted above, whether an easement arises by implication depends on the intent of the parties. *Porter*, 25 Ariz.App. at 302, 543 P.2d at 140. *See also Koestel*, 138 Ariz. at 580, 676 P.2d at 8 (“[A]n implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment.”). Here, the Court sees no evidence of any intent to create a parking easement on Lot 2. Nothing in the Special Warranty Deed by which Moonshadow acquired Lot 1 from TDMC makes any reference to a parking easement on Lot 2, or to the Third General Amended Plan. *See* Exhibit 4. Likewise, the Special Warranty Deed by which Linnberg LLC acquired Lot 2 from TDMC likewise makes no reference to a parking easement. *See* Exhibit 5. If, as Moonshadow now contends, the parties intended to create reciprocal easement obligations between Lots 1 and Lot 2 at the time the relevant transfers occurred, why didn’t they reflect that intention in the deeds by which TDMC transferred title to the two lots?

The communications of the relevant participants prior to the commencement of these proceedings reflects their understanding that no parking easement involving Lot 1 and Lot 2 ever existed. As discussed above, in May 2011, Longfellow contacted Davis to ask him to sign a reciprocal parking easement agreement. If, as Davis now claims, it was his understanding that an easement by implication existed all along, surely he would have said so in response to

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Longfellow's inquiry.⁴ Davis did not, however, respond to Longfellow by indicating that such an easement agreement was already in effect. On the contrary, by referring to the easement as a "proposed easement," *see* Exhibit 98 (emphasis added), Davis made clear his understanding that, at the time, no such easement existed. Davis's communications to Longfellow in May 2011 are directly contrary to the position Moonshadow takes in these proceedings that, all along, Lot 2 has been burdened with an easement in favor of Moonshadow's lot.

Not only did Davis indicate, in his May 2011 communications with Longfellow, that he believed no reciprocal parking easement agreement was in existence, he informed Longfellow that he was uncertain, even then, whether he would be willing to enter into such an agreement. He expressed the desire for "more information about the parking and the proposed easement," stating that he will "wait on signing an agreement for the cross-parking easement until the parking plan is 100% clear to everyone." Exhibit 98.

Prior to the commencement of these proceedings, Masjid, too, indicated its understanding that no such easement existed. In an April 28, 2011 email to the City, Zubair stated that, "at this time, there is no legal accesses between LOT-1 and LOT-2," and that "LOT-2 can not even drive on LOT-1 and vice versa." Exhibit 15 at p. TEMPE000208. The fact that the purchasers of Lot 1 and Lot 2 both indicated, four years before these proceedings commenced, that no parking easement existed between the two lots refutes Moonshadow's belated contention that such an agreement is already in effect, and has been in effect all along.

The fact that Moonshadow acquired Lot 1 in 2005, and it was not for another ten years that Davis first raised the issue of a parking easement on Lot 2, provides strong evidence that no such parking easement was intended or contemplated by Moonshadow or TDMC when the former acquired Lot 1 from the latter.

An easement by implication requires a showing that, before separation occurred, one portion of the property was used for the benefit of the other, and the use was "long, continued, obvious or manifest, to a degree which shows permanency." *Koestel*, 138 Ariz. at 580, 676 P.2d at 8. Here, there is no evidence that Lot 1 made long and continued use of Lot 2 for parking purposes before the separation of title. On the contrary, Linnerson's uncontroverted testimony establishes that, over the years, tenants of and visitors to Lot 1 have rarely made use of Lot 2 for parking, nor have they parked on the Mosque's property or the Church's property. Indeed,

⁴ Similarly, in her January 29, 2016 email to the City, Davis's wife Carolyn Rosenblatt spoke of "the need for a cross easement" between Lot 1 and Lot 2 and took the position that Masjid "need[s] an agreement from us" just as much as "we need one from them for parking." Exhibit 42 at COT000158. Rosenblatt did not, in other words, assert that Moonshadow *already had* parking rights on Lot 2, merely that Moonshadow wanted to acquire such rights, and sought to enlist the City's help in that effort.

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employees who work in the medical building on Lot 1 have not, by and large, parked on Lot 2 even when instructed by management to do so. Instead, those employees have continued to park on Lot 1. Likewise, patients visiting the medical building have rarely used Lot 2 for parking.

Linnerson's testimony to the effect that employees and visitors to Lot 1 have generally parked only on Lot 1 was consistent with Zubair's statement to the City that, "[s]ince medical center opened, we rarely see any car on LOT-2. Even LOT-1 parking does not fill up to ~ 70% of capacity (that is my personal observation)." Exhibit 15 at p. TEMPE000208. The statements of Linnerson and Zubair are corroborated by aerial photographs of the lots showing unused parking spaces on Lot 1. *See* Exhibits 10, 11. For the reasons discussed in Finding of Fact ¶ 44 above, the Court finds unpersuasive Davis's testimony to the contrary. The Court finds that the evidence presented at trial makes overwhelmingly clear that the parking available on Lot 1 is, and has always been, sufficient for Lot 1's needs.

To establish an easement by implication, the use must have been longstanding, "to a degree which shows permanency," at the time the severance occurred. *Koestel*, 138 Ariz. at 580, 676 P.2d at 8. The evidence presented establishes that TDMC built the parking lot on Lot 2 in 2003, and sold Lot 1 to Moonshadow two years later. Thus, the parking lot existed for only two years before separation of title, a period of time which, in the Court's view, falls short of establishing the requisite "longstanding" use "to a degree which shows permanency."

An implied easement also requires that the prior use be "essential to the beneficial enjoyment of the parcel to be benefitted." *Koestel*, 138 Ariz. at 580, 676 P.2d at 8 (citation and internal quotations omitted). Although this requirement has been interpreted to mean not "an absolute but only a reasonable necessity," the plaintiff must show more "than a mere temporary convenience." *Id.* at 581, 676 P.2d at 9. *See also Thompson v. E.I.G. Palace Mall, LLC*, 657 N.W.2d 300, 306 (S.D. 2003) ("At the least, a claimant must establish something more than mere convenience.").

Here, there is no evidence that Moonshadow cannot meet its parking needs without a parking easement on Lot 2. TDMC's grant of an easement on Lot 1 to Sopris in October 2003 establishes that TDMC not only had sufficient parking at the time to meet its needs on property it owned, but had extra, unused parking spaces at its disposal, and thus no need to burden Lot 2 to meet its parking needs. Since then, the shared parking agreements with the Mosque and the Church have proven to be more than sufficient to satisfy Moonshadow's parking needs.

In his communications with Masjid in 2015, Davis himself never claimed that Moonshadow needed a parking agreement with Masjid in order to satisfy Lot 1's parking needs. Instead, he claimed that Moonshadow needed a parking agreement simply to meet its lender's requirements, and that, after Moonshadow had obtained its loan, Moonshadow would accept any

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modifications to the parking agreement document that Masjid wanted. *See* Exhibit 100 (“I reviewed the letter they need according to what the lender’s lawyer asked for. It can be changed any way you desire after the loan closes.”). Davis’s expressed willingness to modify the parking agreement document in any way Masjid wanted after Moonshadow secured its loan makes clear that Moonshadow itself had no need for a parking agreement with Masjid to serve the needs of its tenants. Instead, Moonshadow’s request for such an easement was made solely to satisfy Moonshadow’s lender.

Although Moonshadow has asserted during the course of these proceedings that its lender would not refinance the mortgage without a parking easement agreement burdening Lot 2, subsequent events have demonstrated that Moonshadow was able to get a loan without such an agreement.

Moonshadow claims that it requires an implied easement to satisfy the City’s zoning requirements. The evidence presented at trial, however, establishes that Moonshadow has numerous alternatives available to it. *See O’Hara v. Chicago Title & Tr. Co.*, 450 N.E.2d 1183, 1190 (Ill.App. 1983) (rejecting a claim of an implied easement, in part because plaintiff had alternatives that included to “contract with defendants for the use of” their parcel). Masjid offered to lease 40 parking spaces to Moonshadow for ten years; Davis rejected this offer out of hand. Exhibit 104. Kaminski suggested several options that are available to Moonshadow, including applying for a revised parking model to remove Lot 2 from the required allotment. Exhibit 77. There is no evidence that Moonshadow made any attempt to pursue this option, nor has Moonshadow presented any evidence that this option would not be feasible or would be unreasonably expensive.

Further, as City planning official Ryan Levesque (“Levesque”) testified at trial, Moonshadow could apply to the City for a variance to reduce Lot 1’s parking requirement. Moonshadow has never applied for such a variance. As Davis testified at trial, Moonshadow never applied for a variance, explaining that he believes it to be unlikely that the City would approve a variance. He acknowledged, however, that Moonshadow has never even tried to obtain a variance because, in his words, “We didn’t need it.”

At trial, Linnerson acknowledged that any parking shortfall that Lot 1 may experience could be resolved by the construction of a parking structure on Lot 1.⁵ Linnerson’s testimony on this point was consistent with the testimony of Levesque, and with one of the options suggested by Kaminski in her March 24, 2011 email to Linnberg. *See* Exhibit 12 at p. MASJID_000002 (“Here are the options I can see with parking for Lot 1 and Lot 2...(2) Build a parking structure

⁵ In its July 10, 2007, letter, Heffernan suggested the construction of such a structure in discussing the available options for development of Lot 2. *See* Exhibit 24 at Linnberg000116.

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to provide all required 197 spaces on [Lot 1's] own site."). When he was asked why Moonshadow has never constructed a parking structure, Davis did not contend that the construction of a parking structure would not be feasible or would be unreasonably expensive. Instead, he replied that Moonshadow never constructed a parking structure on Lot 1 because "we didn't need one."

In light of the availability of multiple other options available to Moonshadow that could resolve any need it may have for additional parking - - options which Moonshadow has never made any effort to pursue - - the Court finds that Moonshadow has failed to establish the requisite necessity for an easement on Lot 2.

Finally, an easement by implication will not be found where such an easement would substantially limit the uses to which the servient estate may be put or otherwise substantially reduce its value. *See, e.g.*, Restatement (3rd) of Property: Servitudes § 2.13, comment *h* ("If existence of a servitude would severely limit the uses of the servient estate, and replacement of the utilities would not be very expensive, a servitude was probably neither intended or expected."). The Court finds that to find that an easement by implication has been created would be to virtually destroy the value of Lot 2 by leaving it with only 9 parking spaces available for its use. Masjid could not put the lot to the use that was intended when it acquired the lot - - construction of a community center - - or otherwise develop the lot in any meaningful way if it were determined that Lot 2 has virtually no parking available to it.

The Court finds that Moonshadow has failed to establish the elements of an easement by implication set forth in Section 2.13 of the Third Restatement of Property and *Koestel*.

II. The Court Finds No Basis on Which to Conclude That Lot 2 is Subject to an Easement by General Plan

As noted above, an easement may be implied by a map or plan if the land is conveyed "by reference to a map" and "if a different intent is not expressed or implied by the circumstances." Restatement (3rd) of Property: Servitudes § 2.13. The map or plan must, however, establish with reasonable certainty that the servitude exists; "[s]ervitudes should not be implied on the basis of equivocal map labels or references." *Id.*, cmt. a.

Moonshadow's "easement by general plan" claim relies entirely upon the Third Amended General Plan. Despite its title, this document cannot, in the Court's view, be considered a "general plan." Such a plan "normally" consists of "a declaration that sets forth the servitudes that will be imposed to implement the general plan." Restatement (3rd) Property: Servitudes § 2.14 cmt. a. "That declaration normally includes a description of the land covered by the plan, a description of the servitudes binding each lot, and a statement that the servitudes run with the

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land and run to the benefit of every lot in the plan.” *Id.* “The declaration becomes effective to create the reciprocal servitudes for the entire development when the first lot is conveyed subject to its terms.” *Id.*

Here, the document entitled “Third Amended General Plan” contains no words of restriction, declaration, dedication or easement. It contains no description of servitudes binding each lot, nor does it contain words to the effect that any restrictions on parking were to run with the land. Instead, the document simply states the number of parking spaces to be placed on the property and allocated on the lot. The document does not constitute a “general plan” of the type that could give rise to an easement by general plan.

An easement may be said to arise by general plan if a parcel’s “grantor exacts a covenant from his grantee, presumptively or actually, for the benefit and protection of contiguous or neighboring lands which the former retains.” *O’Malley*, 67 Ariz. at 250, 194 P.2d at 448. This circumstance does not apply here. There is no evidence that would support a finding that Linnberg exacted a parking easement from Masjid at the time of the conveyance of Lot 2. The deed conveying Lot 2 to Masjid contains no restrictive covenant or easement regarding parking. *See* Exhibit 5. In any event, Linnberg retained no contiguous or neighboring parcel when it sold Lot 2 to Masjid, and so language in *O’Malley* to the effect that an easement may arise when a grantor “exact[s] a covenant from his grantee...for the benefit and protection of contiguous or neighboring lands which the former retains,” *O’Malley*, 67 Ariz. at 250, 194 P.2d at 448, has no application in this case.

An easement may likewise be said to arise by general plan if “there are mutual covenants between the owners of adjoining lands, in which the restrictions placed upon each produce a corresponding benefit to the other.” *O’Malley*, 67 Ariz. at 251, 194 P.2d at 449 (citation and internal quotations omitted). “[I]n such a case[,] of course, either party or his assigns may invoke equitable aid to restrain a violation of the covenant.” *Id.* (citation and internal quotation omitted).

The deed conveying Lot 1 from TDMC to Moonshadow contains no restrictive covenant or easement regarding parking. Indeed, even though the deed lists Title B exceptions, the deed does not list—and specifically omits—the Third General Plan as a Title B exception. *See* Exhibit 4. As noted above, the deed conveying Lot 2 to Masjid likewise contains no such language. Exhibit 5. In the absence of such language in the deeds conveying the lots to their current owners, no easement by general plan can be said to have been created. *See Palermo v. Allen*, 91 Ariz. 57, 66, 369 P.2d 906, 912-13 (1962) (discussing case law holding that, where “there was no reference in the deeds to any general plan or mention of the fact that the restrictions were meant to inure to the benefit of the other lot owners,...the various lot owners were not entitled to enforce the covenants as against each other under a theory of a general plan”).

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10/24/2018

The conveyance of land may “create[] an implied reciprocal servitude burdening all the developer’s remaining land included in the general plan, if injustice can be avoided only by implying the general servitude.” Restatement (3rd) of Property: Servitudes § 2.14(2)(b). The Court finds this rule inapplicable here because implying a parking easement on Lot 2 is *not* necessary to avoid an injustice. On the contrary, the parking available on Lot 1 has always been sufficient to meet Lot 1’s needs, and Lot 1 therefore require no parking easement on Lot 2. As Davis testified at trial, “there’s never been a problem” with the current parking arrangements. Moreover, to imply such an easement on Lot 2 would work an injustice to Masjid by depriving Masjid of the ability to use Lot 2 for the purpose for which it was purchased, *i.e.*, as the site of a community center.

Over the years, Moonshadow has had numerous opportunities to acquire the right to park on Lot 2 in exchange for consideration, and has chosen not to do so. In 2006, Moonshadow passed up the opportunity to purchase Lot 2. In 2011, Moonshadow failed to enter into a reciprocal parking agreement before Masjid closed on Lot 2 that would have burdened Moonshadow’s lot as well as Lot 2. In 2015, Moonshadow rejected Masjid’s offer to lease parking spaces on Lot 2 to Moonshadow. Because Moonshadow has repeatedly passed up opportunities to acquire the right to park on Lot 2 in exchange for consideration, it would hardly be fair to now grant Moonshadow the right to park on Lot 2 in exchange for no consideration and with no corresponding benefit to Lot 2’s owner. The Court finds that Moonshadow has failed to establish the existence of an easement implied by general plan or map.

In accordance with the foregoing,

IT IS ORDERED granting judgment in favor of Defendant Masjid Omar ibn al-Khattab. Plaintiff Moonshadow Properties LLC shall take nothing on its Complaint.

SUPERIOR COURT OF ARIZONA
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03/08/2019

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

MOONSHADOW PROPERTIES L L C

JOSEPH JAMES GLENN

v.

MASJID OMAR IBN AL-KHATTAB, et al.

JOSHUA D BENDOR
COLIN F CAMPBELL
JUDGE KILEY

UNDER ADVISEMENT RULING

Defendant Masjid Omar Ibn al-Khattab (“Masjid”) seeks an award of attorney fees in the amount of \$145,495.50 pursuant to A.R.S. § 12-341.01 and A.R.S. § 12-349. Defendant’s Application for Attorneys’ Fees (“Fee Application”) at pp. 1, 7. Masjid also seeks an award of taxable costs in the amount of \$7,823.53 pursuant to A.R.S. § 12-332 and A.R.S. § 12-341. Defendant’s Statement of Taxable Costs (“Statement of Costs”) at p. 1. Plaintiff Moonshadow Properties, LLC, (“Moonshadow”) asserts that Masjid is entitled to no fee award because this case “is not an ‘action arising out of contract,’ as necessary for Masjid to invoke A.R.S. § 12-341.01” and was “anything but ‘without substantial justification,’ as necessary for Masjid to invoke A.R.S. § 12-349.” Plaintiff’s Response in Opposition to Defendant’s Application for Attorneys’ Fees (“Response”) at pp. 1, 2.

In this case, the parties disputed, *inter alia*, whether Masjid’s lot was subject to “an implied easement by map or plan.” Joint Pretrial Statement at p. 3. Case law recognizes that a claim to an implied easement by map or plan is contractual in nature because it seeks to enforce and give effect to mutual restrictive covenants. *See, e.g., Palermo v. Allen*, 91 Ariz. 57, 64, 369 P.2d 906, 911-12 (1962) (“If a general scheme or plan of development came into being..., then

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there must have been the joint intent of [grantor] and her grantees to that effect...It takes two to make a contract.”) (citation and internal quotations omitted); *O’Malley v. Central Methodist Church*, 67 Ariz. 245, 250-51, 194 P.2d 444, 448 (1948) (discussing three classes of restrictive covenants, one of which consists of “those which are entered into with the design to carry out a general scheme for the improvement or development of real property...In such cases the covenant is enforceable by any grantee as against any other, upon the theory that there is a mutuality of covenant and consideration, which binds each and gives to each the appropriate remedy.”) (citation and internal quotations omitted). Had Moonshadow prevailed on its claim, it would have been entitled to seek an award of fees pursuant to A.R.S. § 12-341.01. *See Pinetop Lakes Ass’n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983) (“[A]n action to enforce restrictive covenants is, in essence, as action to enforce the mutual contractual obligations assumed by the various grantees in the subdivision. We therefore hold that an action to enforce a restrictive covenant ‘arises out of contract’ pursuant to A.R.S. § 12-341.01 and attorney’s fees are awardable...”). The Court, however, found “that Moonshadow has failed to establish the existence of an easement implied by general plan or map.” Minute Entry of October 24, 2018 at p. 26. Because Masjid successfully defended a claim that was contractual in nature, Masjid is entitled to recover fees pursuant to A.R.S. § 12-341.01. *See, e.g., Lacer v. Navajo County*, 141 Ariz. 392, 394, 687 P.2d 400, 402 (App. 1984) (“A party is entitled to an award of its attorney’s fees under A.R.S. § 12-341.01 if judgment in its favor is based upon the absence of the contract sued upon by the adverse party.”).

As an alternative theory of relief, Moonshadow asserted that it had “an implied easement for parking [on Masjid’s lot] pursuant to *Koestel v. Buena Vista Pub. Serv. Corp.*, 138 Ariz. 578, 580, 676 P.2d 6, 8 (App. 1984)...” Joint Pretrial Statement at p. 2. *Koestel* holds that “an implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment,” 138 Ariz. at 580, 676 P.2d at 8, and that an easement will be implied “from a pre-existing use...in the supposed execution of the parties’ intent.” *Id.* at 581, 676 P.2d at 9. *Koestel*’s recognition that an easement will be implied only to give effect to the parties’ intent makes clear that an implied easement is, essentially, contractual in nature. *See Valley Forge Ins. Co. v. Sam’s Plumbing, LLC*, 220 Ariz. 512, 514, 207 P.3d 765, 767 (App. 2009) (“Contract law protects the expectation that the parties will receive the benefits of their bargain...”). Moreover, case law is clear that A.R.S. § 12-341.01 applies to a claim to enforce an *express* easement. *Squaw Peak Community v. Anozira Dev.*, 149 Ariz. 409, 414, 719 P.2d 295, 300 (App. 1986). Since, by its terms, A.R.S. § 12-341.01 applies to “implied” contracts as well as to “express” ones, *see* A.R.S. § 12-341.01(A), the Court sees no reason why A.R.S. § 12-341.01 should not apply to a claim to enforce an *implied* easement just as it applies to a claim to enforce an *express* one.

Citing case law for the proposition that “implied-in-law contracts do not qualify for awards of attorneys’ fees under § 12-341.01(A),” Moonshadow argues that A.R.S. § 12-341.01

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does not apply to implied easements because they are “implied-in-law as opposed to implied-in-fact.” Response at pp. 3, 4. In support of its assertion that “an easement by implication is, in effect, an easement created by law,” Moonshadow quotes language to that effect from the Nevada Supreme Court’s decision in *Boyd v. McDonald*, 81 Nev. 642, 408 P.2d 717 (1965), which was cited by the Arizona Court of Appeals in *Porter v. Griffith*, 25 Ariz.App. 300, 543 P.2d 138 (1975). See Response at p. 4. In *Porter*, however, the Arizona Court of Appeals did not hold that an implied easement is “implied-in-law.” On the contrary, *Porter* recognizes that “[w]hether an easement arises by implication depends on the intent of the parties which must clearly appear to sustain an easement by implication.” *Porter*, 25 Ariz.App. at 302, 543 P.2d at 140. Like *Koestel*, therefore, *Porter* stands for the proposition that an implied easement is implied to give effect to the parties’ intent. See *id.* Nothing in *Porter* is inconsistent with *Koestel*’s recognition that an implied easement is, essentially, contractual in nature. See *Koestel*, 138 Ariz. at 581, 676 P.2d at 9 (an easement will be implied “from a pre-existing use...in the supposed execution of the parties’ intent”).

In support of its contention that implied easements are implied-in-law and not implied-in-fact, Moonshadow cites *Koestel* for the proposition that implied easements may be found even where the parties “formed no intention” one way or the other because they simply gave no thought to the matter. Response at p. 4, quoting *Koestel*, 138 Ariz. at 580, 676 P.2d at 8. *Koestel* states, in pertinent part, that

[t]he creation of easements by implication is an attempt to infer the intention of the parties to a conveyance of land and the “inference drawn represents an attempt to ascribe an intention to parties who had not thought of or had not bothered to put the intention into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves.”

Koestel, 138 Ariz. at 580, 676 P.2d at 8, citing *Restatement of Property*, § 476, comment *a*. The quoted portion of the Restatement goes on to state that an implied easement

credit[s] the parties with an intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen from information available at the time of the conveyance.

Restatement of Property, § 476, comment *a*. Read together, *Koestel* and the Restatement make clear that an implied easement does not arise without regard to the intentions of the parties, but, instead, is intended to be consistent with the parties’ intentions. See *Koestel*, 138 Ariz. at 580, 676 P.2d at 8 (“[An implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use

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and enjoyment.”). An implied-in-law contract, by contrast, “exists regardless of the intention of the parties.” *Creative Learning Systems, Inc. v. State*, 166 Ariz. 63, 65, 800 P.2d 50, 52 (App. 1990). *See also Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987) (“Historically, contracts implied in law arose as a species of obligation created to achieve a just result in a case, even though there had been no expression of assent and *sometimes even against a clear expression of dissent.*”) (emphasis added, citation and internal quotations omitted). Because, unlike an implied-in-law contract, an implied easement does not arise without regard to the parties’ intentions, the Court finds that an implied easement is not implied-in-law, and therefore that the case law cited by Moonshadow holding that A.R.S. § 12-341.01 does not apply to implied-in-law contracts is inapposite.

Because the Court finds that A.R.S. § 12-341.01 entitles Masjid to the award of fees it requests, it is unnecessary to address Masjid’s alternative argument that A.R.S. § 12-349 also authorizes its requested fee award.

Masjid has supported its Fee Application with the declaration of its counsel and with billing records reflecting the services performed and the amount of time spent in performing them. *See* Declaration of Colin F. Campbell in Support of Defendant’s Application for Attorneys’ Fees and Exhibit 2 thereto, attached as exhibit to Fee Application. Moonshadow disputes the reasonableness of the fees claimed by Masjid, asserting that the billing records submitted by Masjid include charges that are “duplicative” and “unnecessary,” and/or that are not compensable because they “relate[] to technical software services.” Response at p. 15.

In some respects, the Court finds Moonshadow’s objections well-taken. The billing records submitted by Masjid reflect charges on October 13, 2016; December 20, 2016; December 21, 2016; December 28, 2016; January 5, 2017; January 9, 2017; January 13, 2017; January 20, 2017; and January 24, 2017 for services performed by “Tech. Services” personnel whose qualifications and credentials are not set forth in any affidavit but who do not appear to be legal professionals. *See generally* Exhibit A-2 to Fee Application. Although fees billed by non-legal professionals may, under appropriate circumstances, be recovered as non-taxable costs, Moonshadow has cited no authority to suggest that such fees may be claimed in an attorney fee application. In the absence of any authority for the proposition that fees billed by “Tech. Services” personnel may be awarded as attorney fees, the Court will disallow the fees, in the combined amount of \$1,194.50, that are associated with these time entries.

A time entry dated April 2, 2018, reflects that one paralegal spent .3 hours conferring with another “re taking over the case.” Exhibit A-2 to Fee Application at p. 26. Fees incurred in transitioning the file from one paralegal to another cannot properly be billed to the opposing party at the conclusion of the case, and so the Court will disallow the fees in the amount of \$57.00 associated with this time entry.

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Finally, a time entry dated August 24, 2017 reflects that one of Masjid's attorneys spent 1.8 hours performing the following services: "Review emails from client and research re same." Exhibit A-2 to Fee Application at p. 18. The Court finds this time entry to be so vague that Masjid cannot be said to have met its burden of establishing that the fees associated with this time entry were reasonably and necessarily incurred. *See Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (App. 1994) (affirming trial court's refusal to award fees requested by prevailing party in full, where "[t]he most cursory review of [counsel's] affidavit reveals inadequacies: in many instances the description of the services rendered [does] not adequately inform the court of the relevancy of the service."). The Court will therefore disallow the fees in the amount of \$378.00 associated with this time entry.

With those exceptions, however, the Court does not find Moonshadow's objection that Masjid's time entries reflect "duplicative" or "unnecessary" services to be well-taken. To be sure, a number of time entries reflect consultation among counsel. Consultation among counsel is not, however, "duplicative" or "unnecessary." On the contrary, as case law recognizes, "the synergistic effect of conferences between various members" of a firm is "[o]ne of the benefits of law firm representation." *S & R Properties v. Maricopa County*, 178 Ariz. 491, 505, 875 P.2d 150, 164 (App. 1993). Moreover, the billing records reflect the exercise of "billing judgment" to avoid duplication of expenses; the hourly rates of Moonshadow's lead counsel were substantially reduced, and Moonshadow's counsel wrote off all of the trial time spent by one of the two paralegals who attended the trial. *See* Exhibit A-2 to Fee Application at p. 37. *See also* Defendant's Reply in Support of Its Application for Attorneys' Fees ("Reply") at p. 8.

"[T]he number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate...is presumed to be the proper, reasonable fee." *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 336, 212 P.3d 17, 28 (App. 2009) (citation and internal quotations omitted). Here, the Court finds the hourly billing rates of Masjid's attorneys and paralegals to be reasonable, and Moonshadow has not suggested otherwise. Likewise, with the exceptions set forth above, the Court concludes, from a review of the billing records, that Masjid's counsel expended a reasonable amount of time in performing tasks that were necessarily performed in connection with Masjid's successful representation. The Court finds that Masjid has made a *prima facie* showing of its entitlement to its requested fee award, and that Moonshadow therefore has the burden of establishing that the fee request is unreasonable or otherwise improper. *See Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 491, 167 P.3d 1277, 1286 (App. 2007) ("Once a party establishes its entitlement to fees and meets the minimum requirements in its application and affidavit for fees, the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees."). With the exception of the time entries discussed above, Moonshadow has failed to meet that burden.

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A weighing of the factors set forth in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) favors granting Masjid's fee request. *Warner* counsels courts, when ruling on fee requests, to consider factors that include:

- (1) the merits of the unsuccessful party's claim;
- (2) whether the successful party's efforts were completely superfluous in achieving the ultimate result;
- (3) whether assessing fees against the unsuccessful party would cause extreme hardship;
- (4) whether the successful party prevailed with respect to all relief sought;
- (5) whether the legal question presented was novel or had been previously adjudicated; and
- (6) whether a fee award would discourage other parties with tenable claims from litigating.

Warner, 143 Ariz. at 570, 694 P.2d at 1184. No single factor is determinative, and a court should weigh all factors in deciding whether to award fees. *See id.*

As the Court has found, Masjid's defense to Moonshadow's claim was meritorious. It cannot be said that Masjid's litigation efforts were superfluous; on the contrary, there is no evidence, or even allegation, that the parties could have settled this case on terms comparable to the result obtained by Masjid at trial. Moonshadow does not assert that a fee award in this case would impose a hardship on it. Although the applicability of A.R.S. § 12-341.01 to implied easement claims may be considered novel, the underlying issues addressed at trial were not, and the parties do not contend otherwise. Finally, the Court sees no reason to believe that a fee award here would have the undesirable effect of discouraging the litigation of tenable claims. The Court finds that an analysis of the *Warner* factors weighs in favor of granting Masjid's request.

For the foregoing reasons, the Court will award Masjid attorney fees in the amount of \$143,866 (\$145,495.50 - \$1,194.50 - \$57 - \$378 = \$143,866).

Masjid seeks taxable costs in the amount of \$7,823.53, a request to which Moonshadow has not objected, or even responded. The Court finds Masjid's request to be supported by A.R.S. § 12-332 and A.R.S. § 12-341, and so will grant it in its entirety.

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Accordingly,

IT IS ORDERED awarding Defendant Masjid Omar Ibn al-Khattab attorney fees of \$143,866.00 and taxable costs of \$7,823.53.

IT IS FURTHER ORDERED that, no later than March 22, 2019, Defendant Masjid Omar Ibn al-Khattab shall lodge a proposed form of Final Judgment pursuant to Ariz.R.Civ.P. 54(c) that is consistent with the Court's rulings in this matter.

FINAL PLAT
FOR
"TDMC RENOVATIONS"
 BEING A RESUBDIVISION OF A PORTION OF THOMAS DAVIS MEDICAL CENTER
 AS RECORDED IN BOOK 664 OF MAPS, PAGE 17, M.C.R. AND LOCATED IN
 A PORTION OF THE SOUTHWEST QUARTER OF SECTION 1,
 TOWNSHIP 1 SOUTH, RANGE 4 EAST OF THE GILA & SALT RIVER BASE & MERIDIAN
 MARICOPA COUNTY, ARIZONA

DEDICATION

STATE OF ARIZONA }
 COUNTY OF MARICOPA } S.S.

KNOW ALL MEN BY THESE PRESENTS, THAT TDMC RENOVATIONS, L.L.C., THE OWNER OF THE PROPERTY SHOWN HEREON, HAS RESUBDIVIDED UNDER THE NAME OF "TDMC RENOVATIONS", A PORTION OF THE SOUTHWEST QUARTER OF SECTION 1, TOWNSHIP 1 SOUTH, RANGE 4 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, AS SHOWN PLATTED HEREON AND HEREBY PUBLISHES THIS PLAT AS AND FOR THE PLAT OF "TDMC RENOVATIONS" AND HEREBY DECLARES THAT SAID PLAT SETS FORTH THE LOCATION AND GIVES THE DIMENSIONS OF THE LOTS, STREETS AND EASEMENTS CONSTITUTING SAME, AND THAT EACH LOT, AND STREET SHALL BE KNOWN BY THE NUMBER, LETTER OR NAME GIVEN EACH RESPECTIVELY ON SAID PLAT AND THAT TDMC RENOVATIONS, L.L.C., AS OWNER HEREBY DEDICATES TO THE PUBLIC THE STREETS AND EASEMENTS AS SHOWN ON SAID PLAT AND INCLUDED IN THE ABOVE DESCRIBED PREMISES.

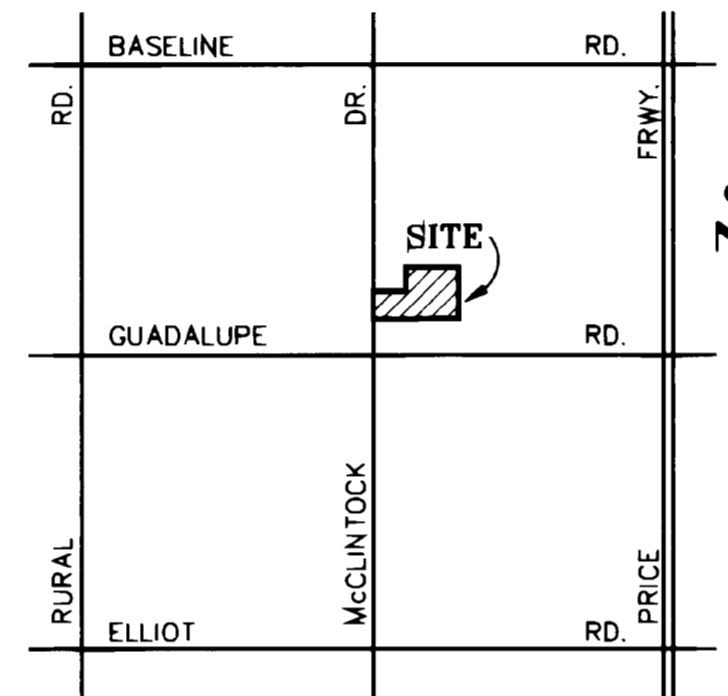
IN WITNESS WHEREOF, TDMC RENOVATIONS, L.L.C., A LIMITED LIABILITY COMPANY, HAS HEREUNTO CAUSED ITS NAME TO BE SIGNED AND THE SAME TO BE ATTESTED BY THE SIGNATURE OF ITS OFFICER THEREUNTO DULY AUTHORIZED TO DO SO.

TDMC RENOVATIONS, L.L.C.

BY: Steven Finerman MD
 (name)
 ITS: (position)

VICINITY MAP

N.T.S.



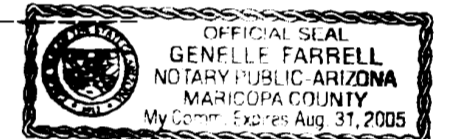
ACKNOWLEDGMENTS

STATE OF ARIZONA }
 COUNTY OF MARICOPA } S.S.

ON THIS 29th DAY OF June, 2005 BEFORE ME THE UNDERSIGNED PERSONALLY APPEARED, Steven Finerman MD WHO HEREBY EXECUTED THE FOREGOING INSTRUMENT FOR THE PURPOSES THEREIN CONTAINED BY SIGNING THE NAME OF TDMC RENOVATIONS, L.L.C., AND ACKNOWLEDGED THAT HE, AS SUCH OFFICER, BEING AUTHORIZED SO TO DO, EXECUTED THE FOREGOING INSTRUMENT FOR THE PURPOSE THEREIN CONTAINED.

IN WITNESS WHEREOF, I HEREUNTO SET MY HAND AND OFFICIAL SEAL.

NOTARY PUBLIC Genelle Farrell
 MY COMMISSION EXPIRES August 31, 2005



APPROVALS

APPROVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA ON THIS 30th DAY OF January, 2005.

APPROVED BY: [Signature] DATE 7/15/05

ATTEST: [Signature] DATE 7-15-05

APPROVED BY: [Signature] DATE 7/19/05

APPROVED BY: [Signature] DATE 7/25/05

DEVELOPMENT SERVICES



LEGAL DESCRIPTION (PRIOR TO SUBDIVISION)

LOTS 1 & 3, OF THOMAS DAVIS MEDICAL CENTER RECORDED IN BOOK 664 OF MAPS, PAGE 17, RECORDS OF MARICOPA COUNTY, ARIZONA, LYING WITHIN THE SOUTHWEST QUARTER OF SECTION 1, TOWNSHIP 1 SOUTH, RANGE 4 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA.

OWNER/DEVELOPER

TDMC RENOVATIONS, L.L.C.
 2204 S. DOBSON ROAD
 MESA, AZ
 PHONE NO.: 480-688-0751
 STEVE LINNERSON, M.D.

BOOK 764 PAGE 38

OFFICIAL RECORDS OF
 MARICOPA COUNTY RECORDER
 HELEN PURCELL
 2005-1045925

07/26/2005 11:28 AM



CERTIFICATION

THIS IS TO CERTIFY THAT THE SURVEY AND SUBDIVISION OF THE PREMISES DESCRIBED AND PLATTED HEREON WAS MADE UNDER MY DIRECTION DURING THE MONTH OF SEPTEMBER, 2004; THAT THE SURVEY IS TRUE AND COMPLETE AS SHOWN; THAT THE MONUMENTS SHOWN ACTUALLY EXIST OR WILL BE SET AS SHOWN; THAT THEIR POSITIONS ARE CORRECTLY SHOWN; AND THAT SAID MONUMENTS ARE SUFFICIENT TO ENABLE THE SURVEY TO BE REFERENCED.

Timothy M. O'Neill DATE 7/15/05
 TIMOTHY M. O'NEILL, R.L.S. #17403

BASIS OF BEARING

NORTH 90°00'00" EAST ALONG GUADALUPE ROAD PER THE RECORDED PLAT OF "REPLAT OF A PORTION OF TRACT 'F', CONTINENTAL EAST UNIT SIX" RECORDED IN BOOK 538 OF MAPS, PAGE 40, M.C.R.

LEGEND

- △ SUBDIVISION CORNER, SET 1/2" REBAR WITH CAP R.L.S. #17403 (U.N.O.)
- ◻ SUBDIVISION CORNER, SET BRASS CAP IN STREET RIGHT-OF-WAY (U.N.O.)
- SUBDIVISION BOUNDARY LINE
- PROPERTY LINE
- ⊙ FOUND MONUMENT
- PROPERTY CORNER
- FND. FOUND
- B.C.F.L. BRASS CAP FLUSH
- B.C.H.H. BRASS CAP IN HAND HOLE
- R/W RIGHT-OF-WAY
- U.N.O. UNLESS NOTED OTHERWISE
- COR. CORNER
- SEC. SECTION
- T. TOWNSHIP
- R. RANGE
- E. EAST
- S. SOUTH
- S.W. SOUTHWEST
- N.E. NORTHEAST
- DKT. DOCKET
- DOC. DOCUMENT
- NO. NUMBER
- PG. PAGE
- BK. BOOK
- ESMT. EASEMENT
- M.C.R. MARICOPA COUNTY RECORDS
- G.&S.R.B.&M. GILA AND SALT RIVER BASE AND MERIDIAN

O'NEILL ENGINEERING, INC.	Design: TMO
2001 West Camelback Road Suite 200 Phoenix, Arizona 85015 (602) 242-0020 FAX: (602) 242-5722 E-mail Address: drawings@oneilleng.com	Drawn: MGO
	Scale: NONE
	Job #: 3443

FINAL PLAT
"TDMC RENOVATIONS" N.E. CORNER GUADALUPE ROAD & McCLINTOCK DRIVE TEMPE, ARIZONA
Date: FEB, 2005
Sheet 1 OF 2

DSO41598 SBD-2004.93 RECO5001

DSO41598 SBD-2004.93 RECO5001



2015 Aerial View



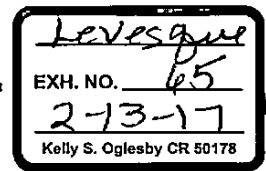
4/12/2017 9:23:29 AM



2016 Aerial View



4/12/2017 9:25:04 AM



From: Kaminski, Diana
Sent: Thursday, April 28, 2011 3:59 PM
To: 'zubair@cox.net'
Subject: RE: Sakeena Hall

Radio Stations require a use permit, public hearing process. I know ASU has one, I'm not sure of others, there may be, I'd have to do research. They might be more in industrial areas.

I just want to make sure before you purchase the property, that there is a solution to the parking issues, my concern is waiting and then not having a solution. Can you provide us with a drawing of all proposed uses that you envision on the Lot 2, with a parking layout, and some preliminary parking analysis to show how this might work?

Diana Kaminski
Senior Planner
Community Development Department
City of Tempe
480-858-2391
diana_kaminski@tempe.gov

-----Original Message-----

From: zubair@cox.net [mailto:zubair@cox.net]
Sent: Thursday, April 28, 2011 3:31 PM
To: Kaminski, Diana
Cc: Zubair@cox.net
Subject: RE: Sakeena Hall

Hi Diana,

Thank you.

OK. We will hold till Mosque takes ownership. Then, we will engage all parties.

Another question - Is current zoning will allow LOT-2 site to have an AM radio station? Is there any radio station in Tempe?

Best Regards,
Muhammed Zubair

---- "Kaminski wrote:

- > I am available any time from noon to 4pm Friday, let me know what works for you. But maybe we should wait until you have more information.
- > The submittal made did not show us the building or site layout. Lot 1 & Lot 2 have a requirement to share the spaces for the total number of spaces required by Lot 1. If a traffic analysis can be provided that shows the actual use of the

site, then the required parking could be modified based on a proposed parking model, certified by a professional engineer.

>

> If we are to meet, I think it would be best to have representatives of Lots 1 & 2, Moonshadow, Rick or Dr. Linnerson available also, so that I'm not having to repeat everything we discuss with someone separately. They need to understand what is required to make this site work between the different uses.

>

> Diana Kaminski
> Senior Planner
> Community Development Department
> City of Tempe
> 480-858-2391
> diana_kaminski@tempe.gov

>

>

> -----Original Message-----

> From: zubair@cox.net [mailto:zubair@cox.net]
> Sent: Thursday, April 28, 2011 12:45 PM
> To: Kaminski, Diana
> Cc: Abrahamson, Steve
> Subject: RE: Sakeena Hall

>

> Hi Diana,

>

> Thank you for quick feedback.

>

> We did submit plan document showing our intention to build multipurpose community Hall (not prayer hall or Mosque). We are thinking of a building ~ 8000 ft. That will require ~ 64 (8000/125) parking spots.

>

> As you know, at this time, there is no legal accesses between LOT-1 and LOT-2. LOT-2 can not even drive on LOT-1 and vice versa. Therefore, we are compelled to have this easement.

>

> Since medical center opened, we rarely see any car parked on LOT-2. Even LOT-1 parking does not fill up to ~ 70% of capacity (that is my personal observation). Mosque is hoping that Traffic engineer can do a actual ground study and we use that information to go back to City for Sakeena Hall proposal.

>

> Rick Ridberg is seller only. They have no interest after sale of LOT-2. LOT-1 belongs to Moonshadow (CA company) and LOT-2, if sale goes thru, will belong to local Mosque.

>

> I will be very glad to with you later today or tomorrow any time.

>

>

> Please advise.

>

>

> Thank you and Best Regards,

>

> Muhammed Zubair
> 480-246-0888 (cell)

> =====

>

>

>
>
>
>
>
>
>

> ---- "Kaminski wrote:

>> Hello Muhammed,

>> The document that you've provided does not resolve the parking issues, as Lots 1 & 2 are already tied to parking, with a substantial portion of Lot 2 encumbered by Lot 1. The statement in the document indicating the ability for Lot 2 to develop as office or other use, is restricted by the disproportionate number of spaces required by the medical offices open during the day on Lot 1. The shared parking must be with uses that are different, and open at different times of the day, such as a place of worship, like the Mosque or Catholic Church, not open during business hours during the week. I think the Mosque can hire a Traffic Engineer at any time to provide Parking Analysis, as this easement does not resolve the issue.

>>

>> I would be happy to meet w/ Mr. Linnberg and yourself to discuss how to resolve the parking needs of the existing and proposed uses. If you had a site plan showing us your proposed use of Lot 2, that would help facilitate the discussion.

>>

>> Thank you,

>>

>> Diana Kaminski

>> Senior Planner

>> Community Development Department

>> City of Tempe

>> 480-858-2391

>> diana_kaminski@tempe.gov

>>

>>

>> -----Original Message-----

>> From: zubair@cox.net [mailto:zubair@cox.net]

>> Sent: Thursday, April 28, 2011 11:37 AM

>> To: Kaminski, Diana

>> Cc: steve_abrahanson@tempe.gov

>> Subject: Re: Sakeena Hall

>>

>> Hi Diana,

>>

>> Based upon your feedback, Mosque requested seller of Lot-2 (LINNBERG) to enter into cross parking easement with Lot-1 (Moonshadow). Please see attached draft copy.

>>

>> Question

>>

>> After this easement gets recorded and Mosque becomes LOT-2 owner, can Mosque go ahead and hire Traffic Engineer to provide Parking Analysis?

>>

>> Please advise.

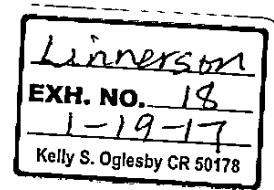
>>

>>

>> Best Regards,

>>

>> Muhammed Zubair
>> 480-246-0888 (cell)
>



Linnberg LLC Members,

As most of you are aware, Lot 2, the vacant lot we own, has been in escrow for sale for the last two months. The escrow and terms of the contract have needed to be changed, forcing multiple extensions of the "due diligence" period. We had voted unanimously to sell under the prior terms : %546,000 sale price. \$100,000 down payment; monthly payments for five years until paid off.

The following hurdles have been encountered.

The water, sewer and utility lines that were thought to have been buried and brought to the PAD from the street were not done originally. The cost for construction and development fees to do this would be between \$55-\$63,000.

An easement allowing cross access and cross parking between the owners of our building and our lot never got executed and recorded, which is essential to the Mosque.

Because of all the parking spaces required by code to park Generations, only nine parking stalls are freely open for use by that site, limiting the building size of a proposed building to less than 2,000 SF. The Mosque was planning a 5,000 SF Social Hall. .

The Mosque, which was involved in raising money from within, reevaluated the property's value, and requested that they would offer \$450,000, increase the initial payment to \$200,000, and shorten the payback period by at least one year. The Mosque has said that their goal is to own the building free and clear within 2-2 1/2 years despite the terms.

We are in the process of getting the Easement signed and recorded, leaving price as the only remaining deal breaker. The due diligence was extended to Friday, April 29, a the close of escrow to May 4. The Mosque has the money collected and is willing to add it to escrow right now.

Short history of land: The land was initially 58,000 SF bought to get the required parking to redevelop TDMC. for \$500,000. Another \$100,000 was raised initially to pay for expenses (property tax = \$12,000/yr, legal fees, maintenance, etc) It was re platted, with TDMC keeping 18,000 SF on their property, and leaving 40,000 SF for "Lot 2". The transfer of the land within TDMC was valued at this whole \$600,000, and new partners buying in (Glenda, Bonnie, and Karen) paid the full value of the capital accounts of the selling partners (then totalling over \$600,000) to obtain ownership.

Because of the recession, the value has dropped dramatically, from over \$8.50/sf at purchase to about \$3/SF as of February. In addition, the parking lot, lighting and landscape improvements, etc. cost another \$85,000. In Rick's opinion (our broker), the land has a fair market value of around \$200,000 - \$225,000 if a Buyer could be found. With the parking and utility issues that would be very difficult. Which leaves Linnberg's future development of the site as the remaining option. Rick does not believe

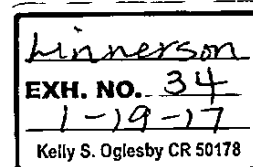
Tempe would allow any variances to parking, which would leave only nine usable spaces. They will not include the spaces we can use at either Holy Spirit or the Mosque, because they are off-site and subject to 30 day cancellation.

We now need to make the final determination, to either walk, or accept the modified offer. Rick has met with and talked to their leader, Muhammed Zubair, over 30 times throughout this process, and knows that the Mosque will not negotiate anymore because culturally, they do not want a confrontation with their neighbors, who they acknowledge have been wonderful to them. They know they are overpaying, but would rather do that than offend all of us, who have let them park on your property (Moonshadow's) for five years without getting any real benefit for ourselves.

I need to hear whether you are for the sale or against it, by Wednesday, April 20, 2011 by noon. We need all votes, and a 75% super-majority to continue on and close the escrow by May 4, 2011.

If you have any questions for Rick, Karen, or myself, please call or email any of us.

Thanks,



RETURN RECORDED DOCUMENT TO:

Lake & Cobb, PLC
1095 West Rio Salado Parkway
Suite 206
Tempe, Arizona 85281
Attn: J. Gregory Lake, Esq.

RECIPROCAL PARKING EASEMENT

THIS RECIPROCAL PARKING EASEMENT (the "Easement") is made and entered into this 16th day of May, 2011, by and between MOONSHADOW PROPERTIES, LLC, an Arizona corporation (hereinafter "Moonshadow"), and MASJID OMAR IBN AL-KHATTAB, an Arizona non-profit corporation (hereinafter "Masjid").

RECITALS

- A. Moonshadow is the owner of that certain real property situated in the City of Tempe, County of Maricopa, State of Arizona, more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference (the "Moonshadow Parcel").
- B. Masjid is the owner of that certain real property situated in the City of Tempe, County of Maricopa, State of Arizona, more particularly described on Exhibit "B" attached hereto and incorporated herein by this reference (the "Masjid Parcel").
- C. Moonshadow intends to continue to operate an office building on the Moonshadow Parcel.
- D. Masjid may develop or allow or cause the development of the Masjid Parcel as an office facility, a parking facility or other reasonable purpose approved by the City of Tempe.
- E. The Moonshadow Parcel and the Masjid Parcel may be referred to herein collectively as the "Parcels." Moonshadow and Masjid may be referred to herein as the "Owners." The parties hereto desire to impose certain easements upon the Parcels (hereinafter defined), and to establish certain covenants, conditions and restrictions with respect to the Parcels, for the mutual and reciprocal benefit and complement of the Parcels and the present and future owners and occupants thereof, on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the above premises and of the covenants herein contained, Moonshadow and Masjid hereby covenant and agree that the Parcels and all present and future owners and occupants of the Parcels shall be and hereby are subject to this Easement and, in connection therewith, the parties hereto on behalf of themselves and their respective successors and assigns covenant and agree as follows:

AGREEMENTS

1. Easements. Subject to any express conditions, limitations or reservations contained herein, the Owners hereby grant, establish, covenant and agree the Parcels shall be benefited and burdened by a nonexclusive, perpetual and reciprocal easement for reasonable access, ingress, egress and parking over all paved driveways, roadways and walkways as presently or hereafter constructed and constituting a part of each Parcel.

1.1 Each Owner having rights with respect to an easement granted hereunder shall indemnify and hold the Owner whose Parcel is subject to the easement harmless from and against all claims, liabilities and expenses (including reasonable attorneys' fees) relating to accidents, injuries, loss, or damage of or to any person or property arising from the negligent, intentional or willful acts or omissions of such Owner, its contractors, employees, agents, or others acting on behalf of such Owner.

1.2 The easements herein above granted shall be used and enjoyed by each Owner and its Permittees in such a manner so as not to unreasonably interfere at any time conducted on its Parcel, including, without limitation, public access to and from said business and the receipt or delivery or merchandise in connection therewith. No use of the easements by one Owner on the other Owner's Parcel shall cause the other Owner's Parcel to violate any law or ordinance.

1.3 Once commenced, any construction or other work undertaken in accordance with an easement granted herein or to facilitate the construction of facilities on an Owner's Parcel shall be diligently prosecuted to completion, so as to minimize any interference with the business of any other Owner. Except in cases of emergency, the right of any Owner to enter upon a Parcel of another Owner for the exercise of any right pursuant to the easements set forth, or to prosecute work on such Owner's own Parcel if the same interferes with utility or drainage easements or easements of ingress, egress or access to or in favor of another Owner's Parcel, shall be undertaken only in such a manner so as to minimize any interference with the business of the other Owner. In such case, no affirmative monetary obligation shall be imposed upon the other Owner, and the Owner undertaking such work shall with due diligence repair at its sole cost and expense any and all damage caused by such work and restore the affected portion of the Parcel upon which such work is performed to a condition which is equal to or better than the condition which existed prior to the commencement of such work. In addition, the Owner undertaking such work shall pay all costs and expenses associated therewith and shall indemnify and hold harmless the other Owner(s) and its Permittees from all damages, losses, liens or claims attributable to the performance of such work. Nothing herein shall be intended to prevent the development and use of the Masjid Parcel.

2. Maintenance.

2.1 General. Until such time as improvements are constructed on a parcel, the Owner thereof shall maintain the same in a clean and neat condition and shall take such measure as are necessary to control grass, weeds, blowing dust, dirt, litter or debris.

2.2 Utilities. Each Owner shall at all times during the term hereof construct, operate and maintain or cause to be constructed, operated and maintained, in good order, condition and repair, at its sole expense, any utility or other installations serving the Parcel of such Owner and from time to time existing on the Parcel of another Owner as may be required by the utility company or the City.

3. Construction of Improvements. Every building (including its appurtenant common area improvements, now or in the future constructed on any Parcel, shall be constructed, operated and maintained so that the same is in compliance with all applicable governmental requirements.

4. Taxes and Assessments. Each Owner shall pay all taxes, assessments, or charges of any type levied or made by any governmental body or agency with respect to its Parcel.

5. No rights in Public; No Implied Easements. Nothing contained herein shall be construed as creating any rights in the general public or as dedicating for public use any portion of the Parcels.

6. Remedies and Enforcement. Notwithstanding the foregoing to the contrary, no breach hereunder shall entitle any Owner to cancel, rescind, or otherwise terminate this Easement. No breach hereunder shall defeat or render invalid the lien of any mortgage or deed of trust upon any Parcel made in good faith for value, but the easements, covenants, conditions and restrictions hereof shall be binding upon and effective against any Owner of such Parcel covered hereby whose title thereto is acquired by foreclosure, trustee's sale, or otherwise.

7. Term. The easements, covenants, conditions and restrictions contained in this Declaration shall be effective commencing on the date of recordation of this Declaration in the office of the Maricopa County Recorder and shall remain in full force and effect thereafter in perpetuity, unless this Declaration is modified, amended, canceled, or terminated by written consent of all then record Owners of the Parcels.

8. Miscellaneous.

8.1 Attorneys' Fees. In the event a party institutes any legal action or proceeding for the enforcement of any right or obligation herein contained, the prevailing party after a final adjudication shall be entitled to recover its costs and reasonable attorneys' fees incurred in the preparation and prosecution of such action or proceeding.

8.2 No Waiver. No Waiver of any default of any obligation by an party hereto shall be implied from any omission by the other party to take any action with respect to such default.

8.3 Covenants to Run with Land. It is intended that each of the easements, covenants; conditions, restrictions, rights and obligations set forth herein shall run with the land and create equitable servitudes in favor of the real property benefited thereby, shall bind every person having any fee, leasehold or other interest therein and shall inure to the benefit of the respective parties and their successors, assigns, heirs, and personal representatives.

8.4 Time of Essence. Time is of the essence of this Easement

8.5 Entire Agreement. This Easement contains the complete understanding and agreement of the parties hereto with respect to all matters referred to herein, and all prior representations, negotiations, and understandings are superseded hereby.

8.6 Notices. Notices or other communication hereunder shall be in writing and shall be sent by certified or registered mail, return receipt requested, or by other national overnight courier company, or personal delivery. Notice shall be deemed given, upon receipt or refusal to accept delivery. Each party may change from time to time their respective address for

notice hereunder by like notice to the other party. The notice addresses of the Owners are as follows:

Moonshadow: Dr. Mikol Davis
Facsimile: (415) 250-7380
Email: Drmikol@comcast.net
nurselawyer@comcast.net

Masjid:

Attn: _____

8.7 Governing Law. The laws of the state of Arizona shall govern the interpretation, validity, performance and enforcement of this Easement.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties have executed this Declaration as of the date first written above.

Moonshadow Properties, LLC, an Arizona

Masjid Omar Al-Khattab, an Arizona non-profit corporation

Limited liability company

By: [Signature]
Its: Manager

By: _____
Its: _____

STATE OF ARIZONA)
)ss.
County of Maricopa)

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED before me this 26th day of May, 2011 by NIKOL PAUS, in his capacity as Manager of Moonshadow Properties, LLC, an Arizona limited liability company

My Commission expires: Feb. 10, 2015

Notary Public see attached Acknowledgment

STATE OF ARIZONA)
)ss.
County of Maricopa)

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED before me this _____ day of _____, 2011, by _____, in his capacity as _____ of Masjid Omar Ibn Al-Khattab, an Arizona non-profit corporation.

My Commission expires: _____

Notary Public _____

- Exhibit "A" -Legal Description of Moonshadow Parcel
- Exhibit "B" -Legal Description of Masjid Parcel

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

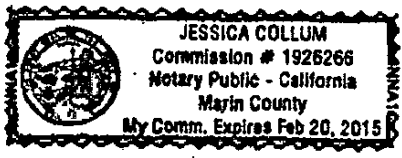
State of California

County of Marin

On May 26, 2011 before me, Jessica Collum Notary Public

personally appeared Mikol Steven Davis

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: [Handwritten Signature]

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Reciprocal Parking Easement

Document Date: 5/26/2011 Number of Pages: 7 including Ack.

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____ Signer's Name: _____

Corporate Officer -- Title(s): _____ Corporate Officer -- Title(s): _____

Individual Partner -- Limited General Individual Partner -- Limited General

Attorney in Fact Attorney in Fact

Trustee Trustee

Guardian or Conservator Guardian or Conservator

Other: _____ Other: _____

Signer Is Representing: _____ Signer Is Representing: _____

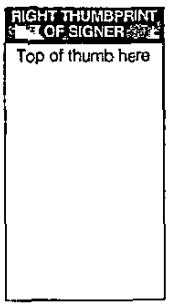
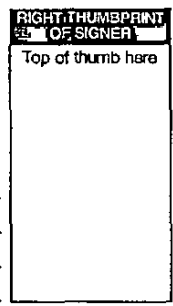
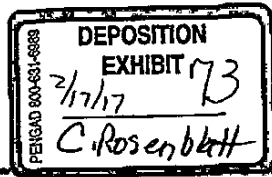


EXHIBIT "A"

**Lot 1, TDMC Renovations, a subdivision recorded in Book 764 of Maps, page 38,
Records of Maricopa County, Arizona.**

EXHIBIT "B"

Lot 2, TDMC Renovations, a subdivision recorded in Book 764 of Maps, page 38,
Records of Maricopa County, Arizona.



Nakagawara, David

From: Kaminski, Diana
Sent: Tuesday, March 22, 2016 9:04 AM
To: Nakagawara, David
Subject: FW: Linnberg's sale of lot to mosque in Tempe

I'll send you a few emails regarding this case fyi.

From: Levesque, Ryan
Sent: Tuesday, February 02, 2016 10:53 AM
To: Kaminski, Diana
Subject: RE: Linnberg's sale of lot to mosque in Tempe

We can only inform them of their prior obligations and approvals for the parking distribution Unless they want to seek modifications to any of the shared parking approvals (if any). If we required a cross access agreement than we can pursue that requirement, if not which I believe is the case for this site, then its up to them if they choose record cross access.

Ryan Levesque
Deputy Director - Planning
City of Tempe, Community Development

From: Kaminski, Diana
Sent: Monday, February 01, 2016 9:54 PM
To: Levesque, Ryan
Subject: RE: Linnberg's sale of lot to mosque in Tempe

This was required parking for the existing Thomas Davis Medical center when it was one lot, which we allowed to be subdivided by plat, then the doctor sold the lot with the parking to someone else and later sold his medical business to someone else. The existing medical center cannot meet it's required parking either by code or by reality without use of these spaces. The spaces were designated and built for the medical office use. When I showed this to you previously, you indicated that the platted vacant lot would not function without the agreement for cross access, because there is no room to turn around for fire or refuse, or drivers on the lot, without crossing onto the other property. If the medical center built a chain link fence across the platted property line, the vacant lot would not be able to be used. I don't know how the lot was platted with someone else's parking on it, but that is what has occurred, and now the owners of the medical center want their parking back. They can't get a loan without meeting the code and they need to refinance.

From: Levesque, Ryan
Sent: Monday, February 01, 2016 5:04 PM
To: Kaminski, Diana
Subject: RE: Linnberg's sale of lot to mosque in Tempe

Was this agreement, any obligation of prior entitlements or use of the site for parking requirements? If not, I am hesitant to provide anything in writing that would obligate the owners to additional access agreements. Unless it was required in the first place (result of the development or improvement).

Ryan Levesque
Deputy Director - Planning
City of Tempe, Community Development

From: Kaminski, Diana
Sent: Monday, February 01, 2016 8:44 AM

To: Levesque, Ryan
Subject: FW: Linnberg's sale of lot to mosque in Tempe

This sounds like a legal issue, or would it be a letter from the Zoning Administrator?
I am happy to draft a letter, but maybe this is best handled if she applies for a zoning verification on the lot owned by the Mosque, so there is something in writing that they can't make the site function without cross access as we discussed?
Thanks,
Diana

From: Carolyn Rosenblatt [mailto:]
Sent: Friday, January 29, 2016 3:47 PM
To: Kaminski, Diana
Cc: Mikol Davis
Subject: Linnberg's sale of lot to mosque in Tempe

Dear Diana:

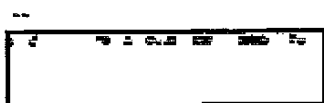
As you are aware, we have been struggling with the owners of the mosque, adjacent to Generations Medical, about a permanent parking agreement. Thus far, they have refused to sign. It was a very, very expensive problem for us and it cost us a favorable loan on our property as a permanent parking agreement was required by that lender. We now are working with a different lender. The parking problem still is unresolved.

Is there anything you can put in writing to the mosque that will inform them of the need for a cross easement with us for access to their back lot on the land adjacent to Generations Medical? As you discussed with me by phone, it was my understanding that emergency vehicles would have to be able to get to their lot, necessitating an easement for them from us if they ever want to develop their lot. That means they need an agreement from us as we need one from them for parking. Our need is more pressing and that is a problem. But they appear to take direction from the City.

I am certain that the mosque representative, Muhammed Zubair was well aware of the parking issue before the mosque bought the lot, as evidenced by his email to you on Dec. 10, 2015. In that, he indicates a willingness to sign the agreement because he says "after this easement gets recorded",,
I am working to get leverage here to accomplish what should have been accomplished in 2011. The duo of Drs. Linnerson and Ridberg apparently thought it would be fine to close escrow first and get the agreement for parking that affected us afterwards. They did not anticipate that the mosque having closed escrow, would not sign anything of the kind.

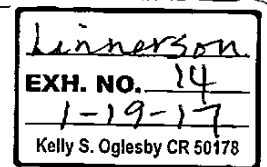
Are you able to draft a letter that spells out the emergency vehicle access issue and that they need an agreement with us? Please let us know. Thank you very much.

Carolyn Rosenblatt



Mary Lacey Murray, Longfellow Law Group PLLC

From: Victoria Longfellow [victoria@gvsw.com]
Sent: Saturday, October 27, 2007 10:47 AM
To: knkslater@cox.net; smlgolf@aol.com
Cc: Mary Lacey Murray, Longfellow Law Group PLLC
Subject: Points for discussion with Dr. Davis today



Dr. Linnerson and Karen:

For your discussions today regarding the reciprocal parking agreement and the creation of an association for the management of the common parking areas, the provisions of the agreement that you will want to keep in mind are as follows:

In order to meet code requirements, the agreement has to be non-revocable, perpetual and applicable to future owners of all three properties (and so recorded against all three properties). This is going to be an issue with the church, so you could propose an informal understanding with the church agreeing that if they ever wish to construct a school on their property, the respective other owners would agree to execute a document terminating the perpetual easement. Their attorneys will advise against it as it would be unenforceable in court, but if they don't believe their odds are great that they will build a school, they may be willing to bend on this (don't count on it). There are a couple of additional problems with that course:

1. The City will not approve of such an agreement or any formalized document to that effect as it defeats the purpose of their approvals and is directly contradictory to the shared parking affidavit (a sworn document) that will be required to be signed by the Church and Dr. Davis; and
2. If you can get past 1., and if the Church ever exercises it's right to terminate the easement agreement, you may have a building that you cannot use as it cannot be independently parked. A solution to this issue is to insure that the Church provide you with at least a year's notice of its intentions to give you time to build a parking facility between your property and GMC's property, and to be sure you construct your site (and deal with drainage, the placement of utilities, access, fire drives, etc.) as if you are planning to include such a parking structure so that you can proceed with such plans on short notice if pushed to do so.

If you can convince the Church to join in a non-revocable perpetual easement agreement and sign an affidavit that it is perpetual and non-revocable (regardless of any informal understanding you may have discussed with it), or if the City will approve subject to a stipulation that you build a parking structure if the document is ever revoked, then the following issues would need to be addressed with Dr. Davis and the Church as part of multi-party reciprocal parking agreement that you are contemplating:

- Cross access areas for vehicular and pedestrian traffic need to be identified and agreed upon;
- Construction access and obligations (presumably all your obligation, but a sharing of construction costs would be a topic of discussion as there is no formal agreement to allow GMC to use your land for parking* (further addressed below),
- An association would need to be formed and a representative from each of the three property owners would be identified. Typically, the association would be responsible for the following:
 - Maintenance of the "common" parking areas and vehicular and pedestrian access areas (either on a per site basis, with each owner responsible for maintaining its own site or the association hiring maintenance crews from time to time to maintain all three sites, with costs to be shared or absorbed by the heaviest users – some sort of allocation formula would have to be agreed upon);
 - Proper lighting of the areas and costs associated with installation and maintenance;
 - Insurance (property damage and comprehensive liability insurance) which would apply to all of the shared parking areas;
 - Enforcement rights (specific performance and damages in the event one of the parties decides to block access or fails to pay any shared costs, for example);
 - Mutual indemnifications
- Given #2, above, and assuming the Church will cooperate on a very informal basis with a hand-shake understanding that if they want to build a school that you and GMC (or its successors) will agree to build a

10/27/2007

Linnberg000124

APP142

parking facility and terminate the easement, you should put into place an agreement with GMC now that can be recorded later if that ever comes about which essentially agrees to the construction and access areas and plan approvals and all of the other issues you would need their agreement on if you are pushed into a corner, such as:

- Construction access and temporary staging areas on GMC property for construction materials
- Any cost sharing (for construction and later maintenance of the parking facility)
- Insurance
- Mutual indemnifications
- Location of the facility
- Joint use of private roads and access ways into a proposed building
- Cooperation terms re: turn-around times for necessary permit approvals
- Agreement re: inclusion of utility easements (for parking structure lighting), site drainage, etc.

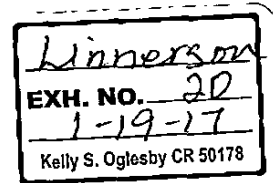
Essentially, it will be important for us to plan for both scenarios but proceed with the least expensive one for now. A meeting of the Church, GMC, yourselves and respective legal counsel should be scheduled to discuss the agreement. Once you know Dr. Davis's viewpoint, let's touch base and then I will talk to John O'Leary or the Church's counsel.

* While there is no formal agreement allowing GMC to use your land for parking, there are a couple of ways he can argue that he has rights:

1. Since he has been allowed the use of the parking thus far, he may argue waiver or estoppel or misrepresentation of seller;
2. Depending on how long you have (prior to sale to him) used the area for parking, there may be some "prescriptive easement" claims that he can try to enforce.

So – while you have some strength to argue that he should cooperate with you as there is no absolute right to the use of your land for parking, you should not take a hard-line approach until his position is fully evaluated.

10/27/2007



Karen Slater
EASEMENT
Apr 11, 2011, 11:12:12 AM
<drmikol@comcast.net>

Rick Ridberg
<smlgolf@aol.com>
Bonnie Goetz

Dr. Davis,
I am passing this along from Rick Ridberg.
Let me know if you have any questions.
Thank you,
Karen Slater

Dear Dr. Davis,

As you heard from Karen, I am in the midst of helping Linnberg, LLC in a sale of the vacant land, Lot 2.

As part of the due diligence, it was discovered that the cross easement had never been recorded, in fact, at this point, despite contacting everyone involved with the sale, no one can even locate the signed document.

I do have a memo from your attorney, Greg Lake, to TDMC's attorney, Victoria Longfellow, dated days before the closing, that outlines the final changes before approval, but the trail stops there.

I know Karen has forwarded a copy of the document to you. This has become a very important issue with the Buyer, because without it recorded, the City does not recognize private agreements, and they are very concerned about the official lack of permission to cross properties, and use parking as necessary.

Thank you for your help in correcting this.

If you have any questions for me or our attorney, please contact me at the locations listed below.

Thank you so much,
Rick Ridberg MD

Victoria Longfellow

From: Victoria Longfellow [vlongfellow@longfellowlaw.net]
Sent: Wednesday, February 01, 2006 2:50 PM
To: 'smlgolf@aol.com'
Subject: TDMC

Hi Steve: Rick called to ask me to let Greg Lake know that the assignment of the Catholic Church's parking agreement will have to happen post closing. I talked to Greg, and they are fine with that as long as we proceed. Please let me know if Rick is handling that or if you want me to proceed with the assignment document and communication with the Diocese. Also, and more of immediate urgency, is the parking agreement Greg is drafting for the empty lot. He is not currently drafting it as a reciprocal easement, and you need to be sure it does not cause you problems for any future development of the property. If you give up your parking rights – or even some of them, you may find that you will not have enough parking left to pass City requirements upon your request for plan approvals for development. Greg was not sure this issue had been addressed, so I highly recommend that you look into it with Rick and **confirm** that it will not be a problem. Let me know if you need any assistance.

Victoria

Victoria F. Longfellow
Longfellow Law Group, PLLC
5001 N. Granite Reef Road
Scottsdale, Arizona 85250
Telephone: (480) 994-5600
Facsimile: (480) 994-2240
vlongfellow@longfellowlaw.net

From: Mikol Davis [mailto:]
Sent: Friday, May 06, 2011 2:42 PM
To: [\[mailto: \]](#)
Cc: Carolyn Rosenblatt; Greg Lake; Ron Schooler
Subject: Moonshadow Properties, Generation Medical

Dear Victoria:

I think we need more information about the parking and the proposed easement. At this point we need to see a parking survey (nothing verbal) to really understand the impact to Generations Medical of the proposed sale of the land and proposed easement that presumably, is part of the agreement between buyer and seller. Right now, we seem to be operating in the dark.

Does the City of Tempe need to verify the proposed plan for the easement and the parking anticipated for the new owner of the parcel? We want to wait on signing an agreement for the cross-parking easement until the parking plan is 100% clear to everyone. We await your parking

survey.

Thanks very much.

--

Dr. Mikol Davis

10/20/2016

Dear Sir

From: "Dr Mikol Davis" <drmikol@gmail.com>
To: Zubair@cox.net
Date: 12/02/2015 08:27:01 GMT
Subject: Dear Sir

We are very happy with the current arrangement but we applied for a new loan which we must do. The lender insists that we have a parking arrangement we cannot revoke for longer than the term of the loan. The latest word is that it has to say six years. Is that ok? I revised the letter they need according to what the lender's lawyer asked for. It can be changed any way you desire after the loan closes. We have a deadline of two days! Anything you need about liability arising out of usage can be added as you wish.

Thank you very much for your help. Sorry to inconvenience you. This is all because they insist.

Dr. Mikol Davis

From: "Dalen Linnerson" <golfdml@aol.com>
To: zubair@cox.net
Date: 12/04/2015 07:47:45 GMT
Subject: Fwd: ANICO/Moonshadow Properties - Mosque parking agreement and Memorandum of Parking Agreement
Attachments: Part 1.1 (95KB), Mosque parking agreement (ANICO Moonshadow Properties) (2).pdf (45KB)

Sent from my iPad

Begin forwarded message:

From: Dalen Linnerson <golfdml@aol.com>
Date: December 4, 2015 at 12:42:46 PM MST
To: zubair@cox.net
Cc: Steve Linnerson <smlqolf@aol.com>, Dr Mikol Davis <drmikol@comcast.net>
Subject: Fwd: ANICO/Moonshadow Properties - Mosque parking agreement and Memorandum of Parking Agreement

Hello Muhammed,

Attached are the two documents that need to be signed. I will be at Generations by 130 and can meet anytime after that. Please confirm you received this email. See you soon.

Regards,

Dalen Linnerson
 DDL Property Management
 C: 480-347-5186

Begin forwarded message:

From: Dr Mikol Davis <drmikol@gmail.com>
Date: December 4, 2015 at 12:29:32 PM MST
To: Dalen Linnerson <golfdml@aol.com>, dlinnerson@swcwc.net
Subject: Fwd: ANICO/Moonshadow Properties - Mosque parking agreement and Memorandum of Parking Agreement

Dr. Mikol Davis

Begin forwarded message:

From: "Ripp, Michael" <mripp@rcalaw.com>
Date: December 4, 2015 at 11:26:37 AM PST
To: "Darryl Levy (dlevy@greerherz.com)" <dlevy@greerherz.com>, "Rollins, Mason (Mason.Rollins@AmericanNational.com)" <Mason.Rollins@AmericanNational.com>, "drmikol@comcast.net" <drmikol@comcast.net>, Greg Lake <lake@lakeandcobb.com>, "Summers, Dana @ Phoenix" <Dana.Summers@cbre.com>
Subject: ANICO/Moonshadow Properties - Mosque parking

Attached for everyone's review and approval are (1) a slightly revised parking letter agreement (I corrected the spelling of the mosque's name, inserted spaces in the time designations and inserted a counterpart notation), and (2) an initial draft of a Memorandum of Parking Agreement (which nobody except me has seen). A map identifying the 41 spaces on each parcel needs to be attached to the letter agreement.

I will be in a meeting from 1:00 to about 2:00 today (the time wasn't my idea, but it involves several people from out of town). I might not be in position to promptly respond to questions, but email is probably the best way to reach me during that time.

**Michael P. Ripp | Ryley Carlock &
Applewhite**

One N. Central Avenue, Suite 1200 | Phoenix,
AZ 85004
Phone: 602.440.4823 | Fax: 602.257.6923 |
mrripp@rcalaw.com

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Moonshadow Properties L.L.C.
Generations Medical Center
6301 S. McClintock Drive
Tempe, Arizona, 85283

December 4, 2015

Dear Muhammed Zubair:

This confirms and modifies our mutually beneficial agreement as to parking dated November 22, 2002, which allowed each of us to use the other's parking spaces at specified times. In order to update our records and at request of the lender on our building at 6301 S. McClintock Drive, we ask that you confirm and acknowledge the following.

TDMC Renovation, LLC was the originator of the arrangement with Masjid Omar Ibn Al-Khattab (the "Mosque"). Our building, as you know, was subsequently sold to Moonshadow Properties, LLC, and is currently owned by us in that name. It is now referred to as Generations Medical instead of Thomas Davis Medical Center.

The Mosque located at 6225 S. McClintock has permission to use 41 spaces marked in Attachment 1 hereto during the hours of 12:45 pm and 1:45 pm each Friday and after 7:00 pm daily. The Mosque is also given permission to use the parking spaces as needed on the Generations Medical lot, also known as Lot 2, TDMC Renovations (Book 764 of Maps, page 38), tax parcel number 305-01-515, during the celebration of Ramadan after the hour of 5:30 pm daily.

Moonshadow Properties, LLC, and any successor owner of the Generations Medical lot, has permission from the Mosque to use forty-one spaces so marked on Attachment 1 on the vacant lot known as Lot 2, TDMC Renovations (Book 764 of Maps, page 38), tax parcel number 305-01-516, during the hours of 7:00 am to 5:30 pm Mondays through Fridays with the exception of the Friday hours the Mosque needs its spaces, 12:45 pm to 1:45 pm specified above. The City of Tempe has confirmed that it would view our use of those spaces as in compliance with the Tempe parking code.

This agreement shall be ongoing and shall remain in place for ten years, beginning December 7, 2015 and concluding unless otherwise agreed until December 7, 2025. The cancellation right referenced in the November 22, 2002 agreement shall no longer apply, and any termination, amendment or revocation of this agreement will

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APP151

require the consent of the first lienholder on the Generations Medical lot in order to be effective. If either of us wishes to sell the property that includes the above parking spaces, we agree to cooperate with the proposed buyer and each other in submitting a shared parking agreement to the City of Tempe to provide for replacement parking. The terms of this agreement will bind and benefit our respective successors in title, and we agree to cooperate in recording a memorandum of this agreement with the Maricopa County Recorder and to disclose this agreement to any prospective buyer or lender of the parking areas in question.

Thank you for your continued cooperation. The arrangement has been working successfully since made initially and we anticipate it continuing the same way going forward for our mutual benefit.

Please sign below to confirm your agreement to these terms (each of us signing separate counterparts will be acceptable for this purpose).

Sincerely,

Dr. Mikol Davis, Managing Partner Moonshadow Properties, L.L.C.

Muhammed Zubair

_____ Date: _____
Authorized Representative of
Masjid Omar Ibn Al-Khattab
6225 S. McClintock Dr.
Tempe, AZ 85283

Dr. Mikol Davis

_____ Date: _____
Owner, Authorized Representative, Moonshadow Properties
Generations Medical
6301 S. McClintock Dr.
Tempe, AZ 85283

When recorded, return to:

Moonshadow Properties, L.L.C.
930 Irwin Street, Suite 215
San Rafael, CA 94901
Attention: Dr. Mikol Davis

MEMORANDUM OF PARKING AGREEMENT

THIS MEMORANDUM OF PARKING AGREEMENT is made as of this 4th day of December, 2015, by and between MASJID OMAR IBN AL-KHATTAB, an Arizona non-profit corporation ("Lot 2 Owner"), and MOONSHADOW PROPERTIES, L.L.C., an Arizona limited liability company ("Lot 1 Owner"). Lot 2 Owner is the owner of Lot 2, TDMC Renovations, as recorded in Book 764 of Maps, page 38, records of Maricopa County, Arizona ("Lot 2"), and Lot 1 Owner is the owner of Lot 1, TDMC Renovations, as recorded in Book 764 of Maps, page 38, records of Maricopa County, Arizona ("Lot 1").

1. **Reciprocal Parking Rights.** Pursuant to that certain letter agreement dated December 4, 2015, by and between the parties hereto ("the Parking Agreement"): (a) Lot 2 Owner has granted Lot 1 Owner and the successors in title thereto the right to use 41 vehicle parking spaces on Lot 2 during the hours of 7:00 a.m. to 5:30 p.m. Monday through Friday, with the exception of the Friday hours Lot 2 Owner needs its spaces (12:45 p.m. to 1:45 p.m.) as described in the following clause (b); and (b) Lot 1 Owner has granted Lot 2 Owner and the successors in title thereto the right to use 41 vehicle parking spaces on Lot 1 during the hours of 12:45 p.m. to 1:45 p.m. each Friday and after 7:00 p.m. each day.

2. **Term.** The term of the Parking Agreement is for ten years, commencing on December 7, 2015, and ending on December 7, 2025.

3. **Termination, Amendment or Sale of Property.** Any termination, amendment or revocation of the Parking Agreement or this Memorandum requires the consent of the then first lienholder on Lot 1 (American National Insurance Company as of the date this Memorandum is recorded) in order to be effective. If either party wishes to sell the property that includes any of the above parking spaces, the parties agree to cooperate with the proposed buyer and each other in submitting a shared parking agreement to the City of Tempe to provide for replacement parking.

4. **Successors and Assigns; Conflicts.** The terms of the Parking Agreement will bind and benefit the successors and assigns (including successors in title) of the parties hereto. In the event of a conflict between this Memorandum and the Parking Agreement, the Parking Agreement shall control.

5. **Counterparts.** This Memorandum may be executed and acknowledged in any number of counterparts, and all counterparts so signed and acknowledged may be attached to a single recordable original of this Memorandum to physically form one agreement.

**Lot 2 Owner Signature/Acknowledgment Page
to Memorandum of Parking Agreement**

Address:

6225 S. McClintock Dr.
Tempe, Arizona 85283

Masjid Omar Ibn Al-Khattab, an
Arizona non-profit corporation

By: _____
Muhammed Zubair
Authorized Representative

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing was acknowledged before me this ____ day of December, 2015, by Muhammed Zubair, an Authorized Representative of Masjid Omar Ibn Al-Khattab, an Arizona non-profit corporation, on behalf thereof.

Notary Public

**Lot 1 Owner Signature/Acknowledgment Page
to Memorandum of Parking Agreement**

Address:

930 Irwin Street, Suite 215
San Rafael, CA 94901
Attn: Dr. Mikol Davis

Moonsadow Properties, L.L.C., an Arizona
limited liability company

By: Mikol S. Davis and Carolyn L. Rosenblatt
Declaration of Trust dated April 5, 2000,
also known as Davis-Rosenblatt Family
Trust dated April 5, 2000, as Manager

By: _____
Mikol S. Davis, Trustee

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
) ss.
County of _____)

On the ___ day of December, 2015, before me, _____, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument, the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public

(Seal)

Moonshadow Properties LLC
Dr. Mikol Davis & Carolyn Rosenblatt
930 Irwin St., Suite 215
San Rafael, CA 94901
415 250-7380 (cell) 415 459-0413 (office)
drmikol@gmail.com

Dear Muhammed Zubair:

December 10, 2015

Thank you for speaking with me and for educating me about the history of the property. That helped us understand the overall picture.

I do understand also that with a 400 person congregation and several others besides you involved in decisions, this is a difficult thing for you to accomplish, getting a parking agreement signed.

If we did not have to get a loan, we would be perfectly happy with the reciprocal parking arrangement we have had between ourselves as good neighbors for as long as we have owned Generations Medical. You have always been cooperative and there has never been a problem. But now, we have to get a new loan. Our old loan is due in full and we are almost out of time. We got an one week extension already when the lender raised the parking issue and refused to close the new loan December 7, 2015.

The lender brought up the parking because they are concerned that if they ever had to take back the property, they would not be able to sell it because of the parking issue. They have been extremely stubborn about this. We both know when this problem started, which was when Lindberg corporation divided the parcels and sold **(your community owned)** Lot 2 to you without doing what the City required: get a written and formal parking agreement. But we are both left with the effect of that and we have to deal with it now. We are in a very bad and desperate situation because of that.

We are short some 41 spaces for parking for Generations Medical because of the separation of (Generations Medical Building) Lot 1, from **(your community owned)** Lot 2. That, in the lender's view, makes it mandatory that we have a rock-solid reciprocal parking agreement between us. They are demanding that the agreement pertain to Lot 2 only because there is nothing physically separating Lot 1 parking from Lot 2 parking. However, we hope to show them that the City is fine with the formal parking agreement for Lot 1 and the mosque, once it is signed, and that there is good access between your mosque parking area and Generations Medical parking area. They said before that it wasn't good enough, but they did not have anything from the City saying this Lot 1 access from the mosque parking was okay and there was safe access. Ms. Kaminski at the City says she will sign off on a statement that a formal reciprocal parking agreement between us, with Lot 1 and

the mosque lot as participants in it will be fine with the City. We are hopeful that the lender will agree that if it's fine with the city of Tempe, it should be fine with them.

We can't go to the City and try to negotiate for a lower parking requirement. We do not have the time now, as our loan is due shortly. We do not have the upper hand because of time. We started the loan process six months ago and the lender said okay. It was only a short time ago that they brought up the parking issue and said no.

Here are the points that the lender is insisting upon and they are laid out in the attached Memorandum of Parking Agreement.

1. **It absolutely must be for ten years.** They will not negotiate nor consider anything less.
2. **They want you to agree to let us use (your community owned) Lot 2 parking.** We are fine with a reciprocal agreement for that parking. I am not sure why you would not be. There is no benefit to waiting until you develop the property. That could be a long time from now. We could sell Generations Medical building any time or in a few years. A new owner could refuse to cooperate with you. If we lose our building because we don't have millions of dollars from our pocket to pay off the loan, the current lender would take back the property and they would have no motivation whatsoever to cooperate with you. They could refuse to grant you any right to park on Generations Medical Center Lot 1. If you sign an agreement for **(your community owned) Lot 2 parking** with us now, it is good for ten years and no one can take that away from you.

Because of the stubborn resistance of the lender, I am attaching two versions of the Memorandum of Parking Agreement for you to consider. In version A, the lender wrote this up exactly how they want it. They will accept this version for sure, but it is about **(your community owned) Lot 2** and you have hesitated on that.

Version B is the exact same agreement but it pertains to the mosque parking and Generations Medical Building Lot 1, which is the way we have it working right now. We respectfully ask that you reconsider what has been discussed at the mosque and explain the benefit and security you will get if you agree to let us have a reciprocal agreement now about **(your community owned) Lot 2**. If that is signed, we can get the loan for sure.

If that fails, we can only hope that getting the same Memorandum as to the mosque parking and Lot 1 will get the lender to change their minds. They already said "no" to that but we didn't have the attached Memorandum they wrote and we must try. We are frightened about this, as we could lose everything we have. We are nearly retired after many years of working and we were not prepared for this problem.

Thank you very much for your willingness to help us. I hope to remain good neighbors for the foreseeable future.

Sincerely,



Dr. Mikol Davis

12/10/2015

From: "Dr. Mikol Davis" <drmikol@gmail.com>
To: "Zubair" <zubair@cox.net>
Date: 12/11/2015 10:49:20 GMT
Subject: **Re: the documents we talked about tonight**
Attachments: [Version A- MEMORANDUM OF PARKING AGREEMENT.pdf \(70KB\)](#)

Ok Sir here it is.

As I told you this version of the agreement was NOT approved by the Lender.

Sir I found out where we were both taken advantage the title company that processed your purchase SHOULD have caught the PROBLEM that by your purchasing the empty lot with parking, MY building immediately was illegally under parked for the city of tempe. I unfortunately can not do anything about this in time to Save my building.

Dr Davis

Dr. Mikol S. Davis
[AgingInvestor.com](#) & [AgingParents.com](#)
 930 Irwin Street, Suite 215
 San Rafael, CA 94901
 tel 415-459-1203
drmikol@gmail.com

On Fri, Dec 11, 2015 at 2:19 PM, Zubair <zubair@cox.net> wrote:
 Please send draft contract with Mosque parcel located at 6225 South McClintock Drive if bank Okays it.

Sent from my iPhone

On Dec 11, 2015, at 2:38 PM, Dr. Mikol Davis <drmikol@gmail.com> wrote:

Hello Muhammed,

Thank you. Attached is the single page contract that you can forward to others. The contact was written by the lender's attorney. The only thing we changed was an error they made in writing it. In their version, they had described your mosque as being the owner of lot 1. We changed that in the attached to the correct description, that you are the owner of lot 2 (your congregation is the actual owner.)

You asked for a signature page in our phone conversation, with space for several signatures i attached here.

Please let me know how i can help you help me .

Dr Mikol Davis & Carolyn Rosenblatt

Dr. Mikol S. Davis
[AgingInvestor.com](#) & [AgingParents.com](#)
 930 Irwin Street, Suite 215
 San Rafael, CA 94901
 tel [415-459-1203](tel:415-459-1203)
drmikol@gmail.com

On Fri, Dec 11, 2015 at 1:02 PM, Zubair <zubair@cox.net> wrote:
 Hello Dr. Davis,

#1 please send me single page contract that I can forward to others.

#2 Please confirm that above contract is acceptable to your bank as final document.

I cannot make any promise but I intend to get back to you late Tuesday and let you know what is our community decision. Problem is we cannot get hold of people on short notice.

My best,

Sent from my iPhone

On Dec 10, 2015, at 11:46 PM, Dr. Mikol Davis <drmikol@gmail.com> wrote:

Dear Kind Sir

Can you let us know you received this email and the attached documents.

Please find the documents we talked about tonight. There are two versions A & B . Please let us know if we can answer any questions you or your community has. I will carry with me 24/7 my cell phone [415-250-7380](tel:415-250-7380). Both me and my wife would be happy to fly there to meet you and your community personally.

Please understand that if you can not get the signature we will need to default on our \$5.6 million dollar loan to the bank and a new owner will be found to be your new neighbor.

We unfortunately have no other options, the City of Tempe can not change the parking requirement in time.

P
Dr. Mikol S. Davis
Moonshadow Proerties, LLC
930 Irwin Street, Suite 215
San Rafael, CA 94901
tel [415-459-1203](tel:415-459-1203)
drmikol@gmail.com

<DocumentsForZubir.pdf>

<parkingAgreementLot2.PDF>

<SignaturePage.doc>

When recorded, return to:
Moonshadow Properties L.L.C.
930 Irwin St. Suite 215
San Rafael, CA 94901

MEMORANDUM OF PARKING AGREEMENT

THIS MEMORANDUM OF PARKING AGREEMENT is made as of this 11th day of December, 2015, by and between MASJID OMAR IBN AL-KHATTAB, an Arizona non-profit corporation ("Mosque Owner") and MOONSHADOW PROPERTIES L.L.C, an Arizona limited liability company ("Lot 1 Owner"). Mosque Owner is MASJID OMAR IBN AL-KHATTAB , APN: 301-01-473B as recorded in Book 764 of Maps, page 38, records of Maricopa County, Arizona ("Mosque Owner") and Lot 1 Owner is MOONSHADOW PROPERTIES, as recorded in Book 764 of Maps, page 38, records of Maricopa County, Arizona ("Lot 1").

1. **Reciprocal Parking Rights.** Pursuant to our prior written agreement of the last ten years and our letter agreement dated December eleventh, 2015, by and between the parties hereto ("the Parking Agreement"): (a) Mosque Owner has granted Lot 1 Owner and the successors in title thereto the right to use forty one vehicle parking spaces contiguous with the Mosque building on Mosque Owner's property during the hours of 7:00 am to 5:30pm Monday through Friday, with the exception of the Friday hours Lot 2 Owner needs its spaces (12:45pm to 1:45pm) as described in the following clause (b); and (b) Lot 1 Owner has granted Mosque Owner and the successors in title thereto the right to use forty one vehicle parking spaces on Lot 1 during the hours of 12:45pm to 1:45pm each Friday and after 7:00pm each day.
2. **Term.** The term of Parking Agreement is for ten years, commencing on December 11, 2015, and ending on December 11, 2025.
3. **Termination, Amendment or Sale of Property.** Any termination, amendment or revocation of the Parking Agreement or this Memorandum requires the consent of the then first lien holder on Lot 1 (American National Insurance Company as of the date this Memorandum is recorded) in order to be effective. If either party wishes to sell the property that includes any of the above parking spaces, the parties agree to cooperate with the proposed buyer and each other in submitting a shared parking agreement to the City of Tempe to provide for replacement parking.
4. **Successors and Assigns; Conflicts.** The terms of the Parking Agreement will bind and benefit the successors and assigns (including successors in title) of the parties hereto. In the event of a conflict between this Memorandum and the Parking Agreement, the Parking Agreement shall control.
5. **Counterparts.** This Memorandum may be executed and acknowledged in any number of counterparts, and all counterparts so signed and acknowledged may be attached to a single recordable original of this Memorandum to physically form one agreement.

From: "Zubair" <zubair@cox.net>
To: "Dr Mikol Davis" <drmikol@gmail.com>
Cc: zubair@cox.net
Date: 12/30/2015 06:43:11 GMT
Subject: Re: Update

Dr. Davis,

I am sorry our offer is not useful for you going forward. I hear you and we have already looked into and investigated concerns that you communicated to me via text or email and repeated below. We also considered them during purchase from Linnberg in 2011.

Anyway, you have our offer and we will help make it work for you to the best of our ability.

Thank you

Sent from my iPhone

On Dec 29, 2015, at 11:12 PM, Dr Mikol Davis <drmikol@gmail.com> wrote:

Any parking agreement has to be reciprocal. The City will require that it be permanent or no development will ever be possible no matter who owns Generations. When your congregation bought Lot2 a legal error took place. That error cannot be corrected now with a lease. The lending institution that wanted a 10 year agreement is no longer in this picture. Too late for that now. And it would be good for the mosque's lawyer to advise your congregation about the covenant that existed before you bought Lot 2. It said that the lot should not be separated from Lot 1. The permanent parking agreement for you folks to use our lot and for us to use yours (mosque as well as Lot 2) was required for a valid sale by Linnberg to your congregation. This issue has to be worked out for your sake and ours. It is a legal matter not one that you created or that we did. Linnberg created it and you and Dr. Linnerson must correct it asap. The error affects all of us.

Thank you for your continued efforts to be a good neighbor. We continue our prayers to heal our differences.
Good night.

Dr. Mikol Davis & Family

On Dec 29, 2015, at 9:45 PM, zubair@cox.net wrote:

Dr. Davis,

I had opportunity to discuss your request with Mosque Chairman. He shared following Chronology of TMDC, Linnberg and Moodshadow and Mosque Engagements and below are his thoughts going forward;

- 2001 Mosque was established with all city requirements in place. For Friday prayer, Mosque parked on Libra drive or in Church parking area if needed.
- 2002 TDMC requested 40 parking spots on Mosque property and offered 70 parking places on TDMC owned properties for Friday prayer. Even though Mosque was not required to have 70 additional spots for Friday 20 minutes prayer, Mosque signed agreement with "TDMC" anyway and used TDMC Lot2 for Friday parking if needed.
- In 2006, MoonShadow acquired TDMC Lot 1
- In 2007, Linnberg acquired TDMC Lot 2
- At this point TDMC ceased to exist. There is No transferable contract with Mosque.
- In 2011, Mosque acquired Lot2 from Linnberg. For Friday prayer, Mosque parked on its own Lot2.
- In 2011, Mosque signed a private agreement with Moon shadow to continue water and electricity on Lot2 for \$1500 a year till Mosque arranges its own utilities.
- In December 2015, MoonShadow approaches Mosque for reciprocal parking agreement?

RESPONSE TO YOUR PROPOSAL:

Mosque has plenty of parking of its own! Mosque has no need of reciprocal agreement with Lot-1. We purchased Lot-2 during deep recession in Tempe Commercial Real Estate. We need Lot-2 parking for our own Lot2 development and for Friday 20 minutes parking if needed.

SUGGESTED POSSIBLE WAY FORWARD;

We "may" be able to lease Moonshadow 40 parking spots around Mosque building for 10 years. It will involve our attorneys to check several non profit related concerns and will require Lot-1 owner to pay upfront for 10 year lease. End of the day, our community has to approve any document or agreement.

Thoughts?

10/20/2016

Re: Update

Please let me know directly.

My Best,

Muhammed,

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

Moonshadow Properties, LLC,)	
)	
Plaintiff,)	
)	No. CV2016-091847
v.)	
)	
Masjid Omar Ibn Al-Khattab,)	
)	
Defendant.)	
_____)	

VIDEOTAPED DEPOSITION OF VICTORIA LONGFELLOW

Phoenix, Arizona
August 16, 2018

Prepared by:

Meri Coash, RMR, CRR
Certified Reporter
Certification No. 50327

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1 VIDEOTAPED DEPOSITION OF VICTORIA LONGFELLOW
2 was taken on August 16, 2018, commencing at 9:07 a.m., at
3 the law offices of Osborn Maledon, PA, 2929 North Central
4 Avenue, Suite 2100, Phoenix, Arizona, before Meri Coash, a
5 Certified Reporter in the State of Arizona.

6
7 * * *

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602-640-9000

jbendor@omlaw.com

18 ccampbell@omlaw.com

19 Also present: Bruce Thurman, videographer
20
21
22
23
24
25

09:10:42 1 Q. And there were negotiations between TDMC and
09:10:49 2 Moonshadow regarding a parking easement. Is that right?
09:10:52 3 A. Yes.
09:10:52 4 Q. And do you recall how those negotiations started?
09:10:55 5 A. I don't.
09:10:56 6 Q. Do you remember who proposed the easement at
09:11:00 7 first?
09:11:01 8 A. My recollection is that Greg Lake proposed it.
09:11:04 9 Q. Okay. And do you remember what he proposed
09:11:06 10 originally?
09:11:06 11 A. My recollection is that it -- we felt it to be
09:11:10 12 one-sided.
09:11:10 13 Q. And what did you say to Mr. Lake about that?
09:11:13 14 A. Is that I didn't think that my client would
09:11:15 15 accept a one-sided easement.
09:11:17 16 Q. And did you also warn your client not to give up
09:11:22 17 the parking rights associated with Lot 2?
09:11:24 18 A. I asked them to look carefully at what their
09:11:27 19 intentions were with the lot and make sure that the --
09:11:30 20 what they were being asked to sign would not interfere
09:11:33 21 with that.
09:11:33 22 Q. Okay. I'll show you what will be Trial
09:11:39 23 Exhibit 91.
09:11:39 24 (Deposition Exhibit 91 was marked for
09:12:01 25 identification.)

09:13:09 1 reciprocal parking agreement?

09:13:11 2 A. Yes.

09:13:11 3 Q. And let me show you what will be Trial
09:13:30 4 Exhibit 17.

09:13:30 5 (Deposition Exhibit 17 was marked for
09:13:32 6 identification.)

09:13:32 7 BY MR. BENDOR:

09:13:32 8 Q. What is this?

09:13:33 9 A. This is that proposed Reciprocal Parking
09:13:37 10 Easement.

09:13:37 11 Q. Okay. And it's an email from Mr. Lake to you?

09:13:40 12 A. It is.

09:13:40 13 Q. And you received it?

09:13:42 14 A. Yes.

09:13:42 15 Q. Okay. And I gather Mr. Lake sent you this email

09:13:48 16 involving a reciprocal easement after you had told him

09:13:51 17 that your client wouldn't go for a one-way easement?

09:13:54 18 A. That's my recollection.

09:13:55 19 Q. And so after Mr. Lake sent you this proposed
09:14:06 20 reciprocal easement, you expressed some concerns to him.
09:14:10 21 Do you recall that?

09:14:11 22 A. To Mr. Lake?

09:14:12 23 Q. Uh-huh.

09:14:12 24 A. I don't recall, actually, whether or not I spoke
09:14:15 25 with Greg at that point.

09:27:52 1 Q. Okay. And in a closing transaction, documents
09:27:56 2 that are signed are -- are typically returned to who?

09:27:58 3 A. Well, to -- to whomever recorded them usually.

09:28:05 4 Q. And who was that, typically? Is it typically an
09:28:14 5 escrow agent?

09:28:14 6 (An off-the-record discussion ensued.)

09:28:14 7 BY MR. GLENN:

09:28:14 8 Q. Is it typically an escrow agent that signed
09:28:18 9 documents are returned to?

09:28:18 10 A. It might be or it might be the attorney if
09:28:20 11 they're handling the closing. I don't know.

09:28:20 12 Q. Okay.

09:28:22 13 A. Either way.

09:28:23 14 Q. And do you know if the 2006 transaction was
09:28:26 15 handled by an escrow agent?

09:28:27 16 A. I believe it was.

09:28:28 17 Q. Okay. And do you know if your client -- if
09:28:34 18 Dr. -- Dr. Linnerson delivered the signed reciprocal
09:28:38 19 easement agreement in 2006 to the escrow agent?

09:28:41 20 A. I have no idea.

09:28:41 21 Q. Do you know if he delivered it to Greg Lake?

09:28:44 22 A. I don't.

09:28:44 23 Q. Okay. Do you know if the -- And -- and you
09:28:52 24 don't know if Dr. Davis signed the 2006 easement either,
09:28:52 25 correct?

09:28:56 1 A. Well, I saw -- I see his signature on the
09:28:58 2 easement.

09:28:59 3 Q. Not -- On the 2006 version?

09:29:03 4 A. Oh, no. I don't -- I don't think he did. I
09:29:06 5 don't know, though. He may have delivered it to his own
09:29:08 6 attorney, but he -- I've never seen one.

09:29:10 7 Q. Okay. And you haven't seen one signed by your
09:29:12 8 client as well, correct?

09:29:14 9 A. Correct.

09:29:14 10 Q. Okay. So there are no copies of an easement
09:29:17 11 agreement from 2006 that you're aware of that are signed
09:29:21 12 by anybody, correct?

09:29:23 13 A. From the 2006?

09:29:24 14 Q. Yes.

09:29:25 15 A. Not that I'm aware of.

09:29:26 16 Q. Okay. And in your experience closing
09:29:30 17 transactions involving an escrow agent, who would likely
09:29:33 18 have received the signed documents?

09:29:36 19 A. Well, obviously, the escrow agent would be
09:29:38 20 responsible for recording them at closing.

09:29:41 21 Q. Okay. And is that typically who receives signed
09:29:45 22 documents necessary for closing?

09:29:46 23 A. Typically.

09:29:48 24 Q. Okay. Let me ask you --

09:30:29 25 MR. GLENN: Let's mark this --

09:51:09 1 regarding any of these discussions between May 18th and
09:51:13 2 May 26th?

09:51:13 3 A. No, I don't. I think the -- the response to that
09:51:17 4 was some confusion in that Dr. Davis might not have been
09:51:22 5 aware that it was -- that the document he was being asked
09:51:25 6 to sign was the document his own attorney had prepared.

09:51:28 7 Q. Okay. But it was -- Ultimately, after this
09:51:31 8 request, it was signed on May 26th, correct?

09:51:34 9 A. It appears to have been. I -- I wasn't involved
09:51:37 10 with the transaction at that point.

09:51:38 11 MR. GLENN: Okay. I don't have any further
09:51:41 12 questions.

09:51:42 13 MR. BENDOR: Neither do I.

09:51:47 14 THE WITNESS: Okay.

09:51:47 15 THE VIDEOGRAPHER: We are going off the
09:51:48 16 record. Time on the video monitor is 9:52 a.m. This ends
09:51:55 17 Volume 1, Media Number 1, and the deposition of Victoria
09:51:59 18 Longfellow.

19 (The deposition was concluded at 9:52 a.m.)

20

21 (Signature not requested)

22 _____
VICTORIA LONGFELLOW

23

24

25

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

MOONSHADOW PROPERTIES LLC,
Plaintiff,

No. CV 2016-091847

v.

MASJID OMAR IBN AL-KHATTAB, et
al.,

Defendants.

Phoenix, Arizona
August 27, 2018
9:36 a.m.

BEFORE THE HONORABLE DANIEL J. KILEY

TRANSCRIPT OF PROCEEDINGS

Trial Day 1

Proceedings recorded by electronic sound recording; transcript
produced by eScribers, LLC.

FRANKIE MILFRED
LISA FREEMAN
REBECCA GOSNELL
MICHAEL DRAKE
Transcriptionist



I N D E XAugust 27, 2016

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
Steven Mark Linnerson	19	62	142		
Ryan Levesque	158	186	206		162
<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>

None

M I S C E L L A N E O U S

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Defendant's Opening Statement	11



EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
1	Medical Building	21	21
3	Plan of development	34	34
4	Deed	39	39
5	Deed transferring lot to Linnberg, LLC	41	41
6	Deed	20	20
9	Not Identified	106	106
15	Email	118	118
16	Email	122	122
19	First amendment	51	51
20	Second amendment	50	50
21	Letter to Linnberg, LLC members	53	53
23	application	31	31
24	Letter from Heffernan & Associates	42	42
25	Letter	42	42
27	Amendment to escrow instructions	54	55
28	Extends contingency period	56	56
29	Email	129	129
31,32	Notes	163	163
33	Copy of deed	33	33
45	Parking agreement	27	27
48	Plan	185	185



EXHIBITS (Continued)

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
53	Parking analysis	29	29
69	Parking list	24	24
70	Variance application	29	29
76	Parking plan	178	178
79	Parking list	23	23

DEFENDANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
8	Plat document	90	90
10	Aerial survey	65	66
11	Aerial survey	65	66
17	Email	96	96
18	Email	98	98
51	Not Identified	106	106
56	Not Identified	109	109
60	Email	124	124
61	Email	126	126
97	Email	94	94
98	Email	153	153
107	Not Identified	88	88
108	Not Identified	105	105
109	Not Identified	105	105
74	Covenant agreement	199	199



APPEARANCES

August 27, 2018

Judge: Daniel J. Kiley

For the Plaintiff:

Joseph James Glenn

Witnesses:

Steven Mark Linnerson

Ryan Levesque

For the Defendants:

Colin F. Campbell

Joshua D. Bendor

Witnesses:

None



1 shows permanency. The use must be essential to the beneficial
2 enjoyment of the other parcel. It doesn't have to be an
3 absolute necessity but a mere -- a reasonable necessity such
4 that it's not just a temporary convenience. And the whole idea
5 of an implied easement is that when a party sells a property
6 they intend to or they do convey everything necessary with that
7 parcel for its beneficial enjoyment.

8 So we're not asking the Court to create an easement
9 or to give an easement that hasn't already existed since 2006.
10 We're merely seeking a declaration that yeah, since 2006
11 there's an implied easement for parking.

12 You will hear from Dr. Linnerson of TDMC regarding
13 the purchase, original purchase of the medical building and
14 renovation of it, their efforts to -- multiple efforts to
15 obtain variances with the City of Tempe, those failed efforts,
16 and ultimately their purchase of the adjacent parcel and the
17 allocation of the majority of the parking on that parcel to the
18 use of the medical building.

19 You will hear testimony from him indicating that that
20 was his intent that, you know, when he sold the property in
21 2006, TDMC did not intend to somehow make the medical building
22 in violation of parking law -- the parking requirement. And
23 that he intended that the medical building benefit and use the
24 parking permanently.

25 You will hear from Dr. Davis of Moonshadow Properties



1 fact executed a reciprocal parking easement, correct?

2 A Yes.

3 Q Okay. Do you know what happened with that reciprocal
4 parking easement?

5 A What do you mean what happened?

6 Q Do you know if it was recorded?

7 A I do not know.

8 Q But it was your intent that there be a shared parking
9 agreement between Moonshadow and TDMC when you sold the
10 property, correct?

11 A Absolutely.

12 Q And after selling the medical building to Moonshadow,
13 TDMC evaluates building something on that vacant lot, right?

14 A Correct.

15 Q Okay. And ultimately, TDMC did not build anything on
16 that lot, correct?

17 A Correct.

18 Q And why not?

19 A After going through finding out we could put a
20 smaller building and there be additional parking pressure, we
21 just decided to sit tight and do nothing.

22 Q Okay. What is Linnberg, LLC?

23 A The original partners that came together was TDMC
24 after selling the Lot 1 to Moonshadow, a portion of the
25 partners that were in TDMC wanted to be bought out. They



1 A Including those.

2 Q Now ultimately, the property didn't sell for
3 \$546,000, did it?

4 A No.

5 Q Do you recall what price it sold for?

6 A I believe 400,000.

7 Q Okay. And why was the price reduced?

8 A Why?

9 Q Yes.

10 A Simply because there was pushback initially, and we
11 felt the price was too high.

12 Q Okay. Let me ask you to look at Exhibit 20. Can you
13 tell me what Exhibit 20 is?

14 A Second amendment to the receipt deposit for the
15 contract.

16 Q Okay. And the price is reduced to what?

17 A 450,000.

18 Q Okay. Does that reflect -- refresh your recollection
19 as to the --

20 A Yes.

21 Q -- price?

22 MR. GLENN: I move to admit Exhibit 20.

23 MR. CAMPBELL: No objection.

24 THE COURT: Exhibit 20 is admitted. Did you also
25 intend to move for the prior exhibit?



1 (Plaintiff's Exhibit 20 Received)

2 MR. GLENN: Yes. Move to exhibit -- move to admit
3 Exhibit 19.

4 MR. CAMPBELL: No objection.

5 THE COURT: Exhibit 19's admitted, as well.

6 (Plaintiff's Exhibit 19 Received)

7 BY MR. GLENN:

8 Q Did you have to get approval from any other member of
9 Linnberg in order to lower the price?

10 A We had just a general conversation amongst the
11 partners.

12 Q Let me ask you to take a look at Exhibit 21. Exhibit
13 21 is a letter that was either written or dictated by you,
14 correct?

15 A Yes.

16 Q And in it, this is a letter to who? Who was this
17 addressed to?

18 A The Linnberg, LLC members.

19 Q Okay. And the letter addresses two specific issues.
20 Do you recall what those issues are?

21 A No.

22 Q Okay. If you look at the second paragraph, it says,
23 "The following hurdles have been encountered."

24 A Yes.

25 Q And then it lists something about water, sewer, and



1 utility lines, and then an easement allowing cross access and
2 cross parking never got executed and recorded, which is
3 essential to the mosque. Do you see that?

4 A Yes.

5 Q Okay. Do you recall that the reason the price was
6 reduced was because of these two issues?

7 A No, I don't recall that.

8 Q If you look at the last paragraph on this page, it
9 refers to those parking lot lighting and landscape improvements
10 and parking and utility issues that would be very difficult.
11 And then it talks about developing the property. Does this
12 refresh your recollection as to the reason the price was
13 reduced?

14 A Yes.

15 Q Okay. And that would include the fact that there
16 were additional costs for water, sewer, and utility lines, and
17 the fact that there were parking issues, correct?

18 A Correct.

19 Q And ultimately, the price was reduced, correct?

20 A Yes.

21 Q In it -- in that same Exhibit 21, the last four words
22 says, "Rick does not believe Tempe would allow any variances to
23 parking, which would leave only nine useable spaces." Did you
24 share that opinion?

25 A Yes.



1 Q And is this an accurate depiction of what you might
2 see on a typical day during the middle of the week?

3 A Yes.

4 Q Okay. And were there any significant changes in the
5 use of the parking from 2004 to 2006?

6 A No.

7 Q Okay. So the use of that parking would have been
8 consistent from 2004 to 2006 when you sold the building to
9 Moonshadow?

10 A Yes.

11 Q And how often were you at the property during that
12 time period?

13 A I was there Monday through Fridays.

14 Q So you were there every day during the week?

15 A Yes. Occasional weekends.

16 Q Okay. And after the sale to Moonshadow in 2006, did
17 that parking use remain the same?

18 A Yes.

19 Q Have there been any significant changes in the use,
20 actual use of the parking from 2004 through the present?

21 A No.

22 Q And how often are you currently at the property?

23 A I'm currently there now probably twice a week.

24 Q Okay. And that would be during the weekdays?

25 A Yes.



1 Q Okay. And to your, you know, your observations the
2 parking use has been the same?

3 A We're getting busier, so there's more cars now.

4 Q When did it become busier?

5 A Probably the last couple years.

6 Q So in your deposition, you talked -- you were asked
7 several questions about use and parking. And you referred to
8 asking your employees to park out here on this edge of the
9 property. Do you recall that testimony?

10 A Yes.

11 Q And what -- why did you ask your employees to park
12 out there?

13 A Patients come before employees. We have pregnant
14 ladies and older people. It's 120 and that's a hundred-yard
15 walk. And it's inconsiderate to the people you're serving to
16 make them walk that far.

17 Q Okay. So if your employees are parked right here,
18 the clients end up parking out here, correct?

19 A Very infuriating.

20 Q But it occurs, right?

21 A It does.

22 Q And you remind your employees from time to time, park
23 further away so that the clients can park closer?

24 A Did so last week.

25 Q But the use -- whether these are employees that are



1 parking on this lot or clients, there is consistently, since
2 2004, been a handful of cars that will park there, correct?

3 A That's correct.

4 Q And then, on Fridays when the mosque has their prayer
5 service this will be more filled in, correct?

6 A It's worked very well because all the medical
7 offices, doctors go to the hospital at lunch. And so they'll
8 slow down at 11:30. So by 12:00, most of the clients are gone
9 and that's when the mosque has their prayer service. And so
10 it'll fill in, and then at 1:00, usually, they're gone, and
11 patients don't start until 1:30. So it works very well.

12 MR. GLENN: I have no further questions.

13 THE COURT: Thank you.

14 Mr. Campbell.

15 CROSS-EXAMINATION

16 BY MR. CAMPBELL:

17 Q Who is Mr. Rydberg?

18 A It's Dr. Rydberg.

19 Q Who is Dr. Rydberg?

20 A He was my children's pediatrician when we started
21 practice. We started practice next to each other. He was a
22 pediatrician, so our group and their group shared. So he
23 became a personal friend of mine. And then somewhere, I can't
24 remember the exact date, he had a medical problem and he quit
25 medical practice and became a broker.



1 Q He had a problem with his eyesight, if I recall?

2 A He did.

3 Q And he's had deteriorating health, correct?

4 A Yes.

5 Q And he's the one person the judge won't hear about in
6 this case. What's his current medical condition?

7 A He is severely depressed and recluse and won't even
8 see me.

9 Q But he was the broker involved in all of these
10 transactions in this case for you, correct?

11 A Yes. Yes.

12 Q And in fact, when you formed the LLL Linnberg, the
13 Lin comes from you and the berg comes from him, right?

14 A Sure.

15 Q All right. Now you're a doctor, obstetrics?

16 A Yes.

17 Q And what's your group?

18 A Our group is Southwest Contemporary Women's Care,
19 SWCWC.

20 Q And you're the manager of that group?

21 A Yes.

22 Q You're the managing partner?

23 A Yes.

24 Q Do you do medicine anymore?

25 A No, sir.



1 Q And TDMC was an LLC, correct?

2 A Correct.

3 Q And it was formed to purchase this property and turn
4 it back into a medical office building, right?

5 A Yes.

6 Q And then the intention then was to flip it once you
7 had it filled up with lessors, true?

8 A True.

9 Q So it was -- this is a for-profit enterprise you're
10 involved in?

11 A Dr. Rydberg went to workman's business school.

12 Q Good for him. So you're the managing partner of TDMC
13 and a member?

14 A Correct.

15 Q Linnberg took ownership of the back lot. You're the
16 managing member of Linnberg, too, aren't you?

17 A Yes.

18 Q And have put MP for managing partner. And you also
19 run a property management company, don't you?

20 A Yes.

21 Q And what's the name of the property management
22 company?

23 A DDL.

24 Q Does that stand for anything?

25 A The two Ds are the initials of my children.



1 Q Okay. And you're a managing partner in that, too?

2 A Yes.

3 Q In fact, when TDMC sold the property to Mr. Davis,
4 you became the property manager of TDMC?

5 A Yes.

6 Q And DDL has been the management partner -- or excuse
7 me -- the property manager of TDMC from the time you sold it
8 until today, right?

9 A Correct.

10 Q So you're the agent for Mr. Davis as a property
11 manager?

12 A Yes.

13 Q And Mr. Davis is upset with you as the property
14 manager about this parking, true?

15 A Yes.

16 Q In fact, he's written letters to my client about this
17 is all your fault. Have you seen those letters?

18 A No.

19 Q Has he expressed that to you? That this is all your
20 fault?

21 A He's implied it, yes.

22 Q He's implied it. All right. Let's bring up Exhibit
23 Number 10. I admit Exhibit 10 and 11 into evidence. They're
24 both aerial surveys, Your Honor.

25 MR. GLENN: No objection.



1 THE COURT: Exhibits 10 and 11 are admitted.

2 (Defendants' Exhibits 10, 11 Received)

3 MR. CAMPBELL: Do you need it turned on? It does
4 have a printer available. Just switch the --

5 THE COURT: Can you turn on that ELMO for us?

6 MR. CAMPBELL: We don't need the ELMO, just the
7 electronics.

8 BY MR. CAMPBELL:

9 Q All right. So we have up on the screen here Exhibit
10 Number 10. And this is a 2015 aerial view of the property,
11 right?

12 A Yes.

13 Q And north is straight up. Where it says 2015 aerial
14 view is north, correct?

15 A Yes.

16 Q And then south is straight down. East -- east is
17 going to be where the dirt lot is, right?

18 A Yes.

19 Q Now you see the mosque? The mosque is in the upper
20 left-hand corner?

21 A Yes.

22 Q Okay. There's 40 parking spaces at the mosque?

23 A Yes.

24 Q They're virtually empty, true?

25 A True.



1 Q And then, the area that we've been calling lot 2 is
2 outlined by that yellow line there on the right side there,
3 correct?

4 A Correct.

5 Q And if you look all the way to the east, there's no
6 one parking along that, correct?

7 A Correct.

8 Q By the way, those two -- you see where your building
9 is, TDMC?

10 A Yes.

11 Q And you see that there's the two white --

12 A Yes.

13 Q -- things over the parking? That's covered parking,
14 right?

15 A Correct.

16 Q Is that for the doctors?

17 A Yes.

18 Q All right. Do you let pregnant women park there?

19 A No, but I've asked my partners to.

20 Q If pregnant women could park there, they could park
21 in the shade and walk right to your building, right?

22 A Can you turn to my next meeting?

23 Q Answer my question.

24 A Yes.

25 Q If pregnant women parked there, they could park in



1 the shade and go right into your building?

2 A Amen. Yes.

3 Q Now aside from the east side of the building where no
4 one is parking at all, if you look at the north side of lot 2,
5 it looks like there's four cars there?

6 A Yes.

7 Q Right. There's plenty of parking spots in lot 1 for
8 those four cars, right?

9 A Yes.

10 Q In fact, there's plenty of parking spots at the
11 mosque. You have a cross-sharing parking agreement for those
12 four cars?

13 A Yes.

14 Q And you don't have the slightest idea who those four
15 cars belong to or why they're parking there?

16 A No.

17 Q And even though you've told your employees, park away
18 from the building, they've disregarded that more often than
19 not, true?

20 A Yes.

21 Q All right. Let's go to 11. All right. So this is
22 an aerial view from 2016. Same area, right?

23 A Yes.

24 Q And you'll see that if you look at the very east side
25 of lot 2, again, there's no one parking there, correct?



1 A Correct.

2 Q And it looks like you have a few more cars on the
3 north side of lot 2, correct?

4 A Yes.

5 Q But there's plenty of parking in lot 1 to take care
6 of them; would you agree?

7 A Correct.

8 Q And there's also that cross-parking agreement with
9 the mosque that they could park. It doesn't seem like there's
10 hardly anyone parked there, correct?

11 A Correct.

12 Q And you don't know who those cars are or why they're
13 parked there?

14 A No.

15 Q And of course, across the street is Holy Spirit
16 Catholic Church, and there's plenty of parking there, right?

17 A Yes.

18 Q Now in your deposition, you testified that there was
19 plenty of parking on lot 1 to satisfy the building's needs,
20 correct?

21 A I don't recall if I testified to that.

22 Q Let's turn to your deposition at 21.

23 MR. CAMPBELL: So if you'd blow up the deposition,
24 page 21. Hand me your deposition. Rob, can you get it up on
25 the screen?



1 BY MR. CAMPBELL:

2 Q Now do you remember being deposed?

3 A Yes.

4 Q And you were put under oath?

5 A Yes.

6 Q And everything you testified to in your deposition
7 was the truth, right?

8 A Yes.

9 Q So let's blow up lines 2 through line 11. So you
10 were asked these questions and you gave these answers.

11 "Q So you had an agreement for cross-parking with
12 the mosque, but patients didn't park there.

13 "A Correct.

14 "Q It was mostly just staff, if at all?

15 "A Correct. But the idea to free up lot 1 for more
16 patients if it was going to be jammed, but we didn't
17 know what the volume was going to be. As I said
18 earlier, it worked out that the volume really wasn't
19 that bad, so most people ended up parking on lot 1."

20 Were you asked those questions, and did you give those
21 answers under oath?

22 A Yes.

23 Q Turn to page 34.

24 MR. CAMPBELL: Rob, can you bring page 34 up? Let's
25 blow up line 4 to line 11.



1 BY MR. CAMPBELL:

2 Q You were asked this question, and you gave this
3 answer:

4 "Q But your building never actually had a need for
5 all 197 spaces?

6 "A As I described, it was never a problem. None of
7 us ever ended up parking on each other's, other than
8 the church would park on ours on the weekend. And
9 the mosque would from 12 to 2 on Fridays park on
10 ours. But otherwise, we never parked anywhere else
11 to my knowledge."

12 Were you asked that question and did you give me that
13 question under oath?

14 A Yes.

15 MR. CAMPBELL: Bring up page 55. All right. Let's
16 blow up lines 2 to line 13.

17 BY MR. CAMPBELL:

18 Q Question, do you recall -- let me take a step back.

19 "Q Do you recall there being an issue with the
20 parking when you were selling the property to
21 Moonshadow?

22 "A No.

23 "Q Was it your understanding that the agreements
24 with the mosque and the church would continue to be
25 in place?



1 "A Yes.

2 "Q Okay. But so far as you know, there was no other
3 issue with the parking?

4 "A Correct."

5 Were you asked those questions, and did you give those
6 answers?

7 A Yes.

8 MR. CAMPBELL: Turn -- let's go to page 55 of your
9 deposition. Oh, that is 55. Let's go to page 92 of your
10 deposition. So let's blow up line 2 to line 17.

11 BY MR. CAMPBELL:

12 Q

13 "A So once things were full, it would overflow, but
14 this was usually adequate.

15 "Q Now there are some parking spots on lot 2, but to
16 your knowledge, those were never used by any of the
17 visitors to your medical center?

18 "A Correct.

19 "Q So did Linnberg -- I guess what I'm asking is did
20 anybody from Linnberg go to lot 3 to park? Would
21 there have been any reason for someone to visit that
22 lot by itself?

23 "A No.

24 "Q No.

25 "A So really, it was just an overflow lot for the



1 church and the mosque and medical center.

2 "Q The medical center?

3 "A Yes."

4 Were you asked those questions under oath, and did you
5 give those answers?

6 A Yes.

7 Q Does that refresh your recollection that visitors to
8 the medical center did not use lot 2?

9 A Yes. I was a little confused in the deposition as to
10 lots number 1, 2, and 3.

11 Q What was the confusion?

12 A I just always in my mind had lot 1 and lot 2, I
13 didn't remember about lot 3.

14 Q Well, when you purchased this lot, it was lot 3 and
15 it went from here all the way down and over; do you recall
16 that?

17 A Right. In my mind, at the time, I was thinking of
18 lot 2.

19 Q Well, because you replanted it and you named this lot
20 2.

21 A That's what I had forgotten.

22 Q All right. So you're telling me that under oath,
23 when you were deposed in this case when you -- you were talking
24 about lot 3, not lot 2?

25 A I guess my testimony is that we (indiscernible) -- we



1 never used the parking with the mosque because it wasn't
2 needed. But I always thought it was the best option because it
3 was very close to the door, again. And we -- the east park
4 there was very rarely used. So there was never an issue. That
5 park there. And that would have been either lot 2 or 3 in my
6 brain, depending on --

7 Q But you didn't need this lot because generally,
8 almost all the time, lot 1 parking was sufficient?

9 A That's correct.

10 Q All right. So I think we've already -- you purchased
11 the property. And when we say the property, you purchased lot
12 1 in 2002, right?

13 A Correct.

14 Q And Mr. Rydberg, your broker, said we don't have
15 enough parking?

16 A Correct.

17 Q The City required you to get more room to park,
18 right?

19 A Correct.

20 Q And Rydberg's suggestion was that you go to the
21 mosque, and you get an agreement to share their parking. And
22 you go to the church and you get an agreement to share their
23 parking. And everything's going to be fine.

24 A Yes.

25 Q And he was a real estate broker at the time?



1 A Yes.

2 Q Pretty good?

3 A I thought so.

4 Q One of your best friends?

5 A A good friend.

6 Q Okay. Let's bring Exhibit 50 out. Okay.

7 MR. CAMPBELL: Actually, I just want to move the
8 exhibits to Exhibit 50 that are attached. I don't care if the
9 whole motion comes in if that's your preference.

10 BY MR. CAMPBELL:

11 Q I want to go to Exhibit A of this motion. Actually,
12 you know what's better? Go to Exhibit 25. Exhibit 25's the
13 same one. It's already in evidence.

14 THE COURT: I'm sorry. Did you say 25 or 45?

15 MR. CAMPBELL: 45, 45.

16 THE COURT: All right.

17 BY MR. CAMPBELL:

18 Q Let's blow it up so we can read it, Tom (phonetic).

19 So this is dated November 22nd, 2002, and this is the
20 agreement with the mosque to share parking with the mosque,
21 correct?

22 A Yes.

23 Q And what that means is all these parking spaces, the
24 mosque has, they're going to let you use during the day,
25 correct?



1 A Yes.

2 Q And in return, you're going to let them use Lot 1
3 when they're doing their church services and need to park cars
4 there?

5 A Yes.

6 Q And this was achieved right away? You bought the
7 property in 2002, they did agree to it almost immediately it
8 sounds like?

9 A Yes.

10 Q Good neighbors, right?

11 A Very good neighbors.

12 Q Now, let's go to Exhibit Number 51. So Exhibit 51,
13 let's just go off the top. But this is the agreement with
14 Roman Catholic Church Holy Spirit, and this took longer to get.
15 This wasn't signed until September 11th, 2004. You see that?

16 A Yes.

17 Q Do you know why it took longer to get it?

18 A The bureaucracy of the Catholic Church.

19 Q You recall there was a -- you have any recollection
20 there was a change of bishops back in 2015?

21 A I -- I don't recall.

22 Q Okay. In any event, Rydberg wasn't able to get this
23 until 2004, and that's after you've already started building
24 the building, or going to be.

25 A Yes.



1 Q Right? But your shared parking agreement with the
2 mosque, and your shared parking agreement with the church are
3 still in effect to this day, right?

4 A Yes.

5 Q So, as the property manager of TDMC, you can tell
6 your own employees to park here or over here, right?

7 A That is correct.

8 Q Even though they appeared to be insubordinate to your
9 wishes, right?

10 A Yes.

11 Q All right. Let's turn to Exhibit Number 53. All
12 right. I would move -- this is the shared parking analysis.

13 Is this in evidence? It's in evidence already.

14 So this is the shared parking analysis, and on February
15 2003, by Heffernan & Associates, right?

16 A Yes.

17 Q And you've read this before?

18 A I've seen it before.

19 Q And let's go to the next page. And this really just
20 basically tells you what they're doing. You understand the
21 purpose of this parking sharing analysis was to go to Tempe and
22 get a different sort of parking requirement for your property.

23 A Yes.

24 Q You didn't want to have to buy this lot. You were
25 trying to just get sufficient parking from the mosque and the



1 church and you.

2 A Correct.

3 Q And you understood that if you had shared parking
4 among these people, and it satisfied the parking demand, you
5 didn't need to buy this lot.

6 A Correct.

7 Q And that's exactly what this report was meant to do.
8 Be used as a reason to go into Tempe and seek a variance for a
9 use permit.

10 A Yes.

11 Q All right. Let's go to the next page. Okay. Let's
12 take a look at the introductions. Let's just blow up the top
13 paragraph. All right. It tells us that the Thomas-Davis
14 Medical Clinic is a two-story medical office building. It's
15 been vacant for several years. But it was recently purchased
16 by a group of doctors. And that's what you were planning to
17 do. You were planning to buy it and renovate it, right?

18 A Yes.

19 Q Unfortunately, due to a lot split that occurred a few
20 years ago when the building was closed, the TDMC building no
21 longer has enough onsite parking to satisfy its code
22 requirement. Did you ask what that was about?

23 A Yes.

24 Q So this piece of property here is now owned by Sopris
25 right?



1 BY MR. CAMPBELL:

2 Q H. Turn to Exhibit H.

3 A All right.

4 Q So this is a reciprocal parking agreement you did
5 with Sopris, right?

6 A Yes.

7 Q All right. And this is dated the 14th day of
8 October, 2003, correct?

9 A Correct.

10 Q So you've already gotten your general plan and you're
11 building your renovation, right?

12 A Right.

13 Q And if I understand your testimony, you need a lot of
14 parking on Lot 3, and all the parking on Lot 1 to satisfy your
15 zoning requirements.

16 A That was my understanding.

17 Q All right. You understand you entered into an
18 agreement and gave 40 of your parking spaces to Sopris.

19 A Yes.

20 Q So despite all your concern about your parking, you
21 entered into an agreement with Sopris they could lease these
22 parking spaces from this lot that you need for TDMC, true?

23 A Yes.

24 MR. CAMPBELL: Judge, this is Exhibit H to Exhibit
25 50. I'd move into evidence.



1 Q Right. Has it come to your attention that since this
2 lawsuit has been initiated, that there's no restrictive
3 covenants in the general plan.

4 MR. GLENN: Objection. Foundation.

5 THE COURT: Overruled.

6 THE WITNESS: I don't know.

7 BY MR. CAMPBELL:

8 Q You don't know. Is there anything in the general
9 plan that dedicates property for a particular use as we
10 dedicate this to the City of Tempe for this use and perpetual.

11 A I don't know.

12 Q Let's go to Trial Exhibit 8. Trial Exhibit 8 is
13 going to be the final plat. This is the final document that
14 has to be filed before I could start building. Are you aware
15 of that?

16 A Yes.

17 Q All right. Have you seen this final plat before?

18 A Yes.

19 MR. CAMPBELL: I'd move it into evidence, Exhibit 8.

20 THE COURT: Exhibit 8 is admitted.

21 (Defendant's Exhibit 8 Received)

22 BY MR. CAMPBELL:

23 Q Those are the lots, correct? So you're locked on Lot
24 2.

25 A Correct.



1 Q Now sometimes you can put something on a plat and
2 it's got to run with the line. Do you see anything with
3 respect to parking on this plat?

4 A No.

5 Q There is no restrictive covenants in the general
6 plan, and there's no covenants or dedication on the final
7 plats, true?

8 A Correct.

9 Q Okay. So 2002/2004, you buy the property, you get
10 what you need to renovate it, and you do the renovation, right?

11 A Yes.

12 Q And then by -- when did you get it full up and you
13 wanted to sell it?

14 A Pardon me?

15 Q When did you have it filled up with less owners, that
16 you wanted to flip the building?

17 A The day we constructed it.

18 Q So it's starting in 2004 you're looking for a buyer?

19 A Yes.

20 Q And you finally found a buyer in Mr. Davis and his
21 wife, correct?

22 A Yes.

23 Q And you close with them on Lot 1 in 2006.

24 A Yes.

25 Q Now, actually, you wanted to sell to Mr. Davis Lot 1



1 and Lot 2.

2 A The subject came up, yes.

3 Q All right. But you wanted to do that. That's what
4 TDMC wanted to do.

5 A Yes.

6 Q And you approached him by Lot 1 and Lot 2.

7 A Yes.

8 Q And he refused to do it.

9 A He didn't want to do it.

10 Q He didn't want to do it. No matter how hard you
11 pressed, he didn't want to buy Lot 2.

12 A I don't recall pressing.

13 Q If he bought Lot 2, would you be here today?

14 A Probably not.

15 Q But he consciously, knowingly, decided not to buy Lot
16 2, correct?

17 MR. GLENN: Objection.

18 THE COURT: Sustained.

19 THE WITNESS: I don't know.

20 BY MR. CAMPBELL:

21 Q Rydberg handled the sale of the lot, right?

22 A Yes.

23 Q To the Davises?

24 A Yes.

25 Q Now, your testimony was that you never talked to Mr.



1 Davis at all at your close of the property, true?

2 A Yes.

3 Q You didn't talk to him before the sale at all?

4 A Not to my knowledge.

5 Q Didn't represent anything you had orally with respect
6 to parking, true?

7 A True.

8 Q And Victoria Longfellow was your lawyer for this
9 transaction, correct?

10 A I believe she was for the Linnberg transaction. I'm
11 not sure she was for TDMC. Rick may have talked to her,
12 though, at the time.

13 Q Right. You know what a 1031 exchange is?

14 A Yes.

15 Q What's a 1031 exchange?

16 A Where you take the profits out of the previous sales,
17 and then you have a period of time that you need to reinvest
18 that to avoid taxation.

19 Q Right. And Mr. Davis was actually trying to do a
20 1031 transaction here, correct?

21 A Yes.

22 Q So he had a certain time period to get this thing
23 closed, or he was going to lose his tax exempt status.

24 A Correct.

25 Q Let's go to Exhibit 97. Let's blow this up.



1 MR. CAMPBELL: First of all, I'll move in 97.

2 MR. GLENN: Objection. Relevance.

3 MR. CAMPBELL: This has to do with him trying to sell
4 Lot 2 to Mr. Davis.

5 THE COURT: All right. Overruled. Exhibit 97's
6 admitted.

7 (Defendant's Exhibit 97 Received)

8 BY MR. CAMPBELL:

9 Q All right. So this is an email you wrote; right Mr.
10 Linnerson?

11 Q You gave Rick instructions to try to sweeten the deal
12 and let the partners who wanted to take their money and go,
13 doesn't want to reinvest in the back lot, both have that
14 option. What they were able to work out is a \$10 million offer
15 including the land. Okay. With that self-acting, 50%
16 ownership in the land to do the group of partners who wanted to
17 develop land and work forward as a 50/50 joint venture. Do you
18 remember having those discussions with Mr. Davis?

19 A Yeah.

20 Q And you're the managing partner at TDMC, right?

21 A Yes.

22 Q And you're telling your partners that at the last
23 meeting, there seemed to be a sense of potentially not getting
24 enough money to make the building sale worth it; do you see
25 that?



1 A Yes.

2 A With whom?

3 Q With Mr. Davis?

4 A No.

5 Q What do you remember about this deal when Mr. Davis
6 was going to buy both lots for \$10 million and then sell back a
7 half interest in Lot 2 to some of your partners?

8 A I didn't have any direct conversations. Those
9 conversations would have been between him and Dr. Rydberg.

10 Q Okay. Well, it's your understanding is at the end of
11 the day, he rejected this, right?

12 A Correct.

13 Q All right. If he had gotten this deal, we wouldn't
14 be here today either, would we?

15 A No.

16 Q And then -- all right. Now, let's talk about when
17 you sell Lot 1 to Moonshadow, the lots are going to be split,
18 correct?

19 A Yes.

20 Q Now, when we took your deposition, you had no
21 recollections of discussions about a reciprocal easement at all
22 with Moonshadow, true?

23 A Yes.

24 Q And when we took your depositions, you said there
25 were cross parking agreements in place and you had no issues



1 with parking, true?

2 A Yes.

3 Q You were even showed the reciprocal easement in your
4 deposition, and you said you didn't remember it, true?

5 A Yes.

6 Q You said you did not recall any discussions about the
7 reciprocal easement, true?

8 A Yes.

9 Q You said you did not know if it was Sunlun
10 (phonetic), true?

11 A Yes.

12 Q And you had no recollection of signing the document,
13 true?

14 A Correct.

15 Q You did all those answers under oath at your
16 deposition, right?

17 A Yes.

18 Q All right. Let's go to Exhibit 17.

19 MR. CAMPBELL: I've moved Exhibit 17 in.

20 MR. GLENN: No objection.

21 THE COURT: Exhibit 17's admitted.

22 (Defendant's Exhibit 17 Received)

23 MR. CAMPBELL:

24 Q Let's blow it up. All right. So Victoria Longfellow
25 was your lawyer; is that correct?



1 A Yes.

2 Q And Gregory Lake of Lake & Cobb, Mr. Glenn's partner,
3 was the lawyer representing Moonshadow; do you recall that?

4 A Yes.

5 Q And this is Victoria Longfellow emailing him and
6 saying attached is the proposed reciprocal easement agreement,
7 please review the same and contact me as soon as possible.
8 This is linked to Victoria; do you see that?

9 A Yes.

10 Q I am simultaneously providing this to the buyer for
11 review. And the buyer would have been Mr. Davis, right?

12 A Yes.

13 Q This remains subject to his review. Thanks. Greg.
14 Okay. Do you remember? Does this refresh your recollection
15 about possession of a reciprocal easement?

16 A Yes.

17 Q And, again, when the lots are split, a reciprocal
18 agreement is going to preserve Lot 1's ability --

19 A Yes.

20 Q -- to back on Lot 2, correct?

21 A Yes. Yes.

22 Q And if that had been done, we have a reciprocal
23 parking agreement, recorded in the county recorder, where Lot 1
24 can park on Lot 2, we wouldn't be here today, right?

25 A Correct.



1 Q Okay. Let's bring up Exhibit 18.

2 MR. CAMPBELL: I'd move 18 in evidence.

3 MR. GLENN: No objection.

4 THE COURT: Exhibit 18's admitted.

5 (Defendant's Exhibit 18 Received)

6 MR. CAMPBELL: Let's blow up 18

7 BY MR. CAMPBELL:

8 Q This is Longfellow to Lake, Monday, February 6th.

9 "Hi Greg, did a computer issues. I just
10 received your email today. I'm concerned that
11 there's not enough flexibility in the documents to
12 enable TDMC to do what it chooses with the property.
13 I'm told that Steve went ahead and signed the
14 documents to move forward in good faith with a
15 closing."

16 So he's told by Sunlun that Steve would be you,
17 right?

18 A Yes.

19 Q But you have no recollection of signing the document
20 I thought?

21 A No. I don't.

22 Q But your client agreed that in the event TDMC desires
23 changes to the document, protect its rights with respect to the
24 property, keeping with the spirit of the easement as well. Dr.
25 and Mrs. Davis would agree to such changes. I'll call Dr.



1 Linnerson regarding the changes to be made and if he wants to
2 go forward with it now as opposed to later, I will forward you
3 a proposed amendment to the reciprocal parking easement for
4 your review.

5 I assume you have no recollection at all of your
6 conversation with Ms. Longfellow about this reciprocal parking
7 easement, true?

8 A True.

9 Q And you have no recollection of Dr. and Mrs. Davis
10 ever coming back and saying they wanted a reciprocal parking
11 easement, true?

12 A Correct.

13 Q Now, the reciprocal parking easement would put
14 burdens on their property, right?

15 A Yes.

16 Q And you have no idea whether they wanted to assume
17 those burdens or not in 2006, true?

18 A In 2006, correct.

19 Q Now, we do know that no reciprocal parking easement
20 has ever been recorded, agreed?

21 A Yes.

22 Q You're blaming your lawyers for them not paying the
23 reciprocal parking agreement recording?

24 A My broker.

25 Q You blame your broker. The one who can't testify



1 because he's --

2 A Well, but I mean that's who I blame.

3 Q Okay.

4 A Do your work.

5 Q You've never seen a signed reciprocal parking
6 agreement?

7 A No.

8 Q Your lawyers, Ms. Longfellow, has no copy of the
9 reciprocal parking agreement signed in her files, true?

10 A Correct.

11 Q And Mr. Glenn's firm, Lake and Cobb, has no copy of
12 any signed reciprocal parking agreement in their files, true?

13 A Not to my knowledge.

14 Q And you searched everything you have at your property
15 management company, because you're the property manager for
16 this property.

17 A Um-hum.

18 Q And you can't find any signed reciprocal parking
19 agreement, even in those files, right?

20 A Correct.

21 Q Just a minute. I want to get some time frame's here.
22 Mosque was going to buy in 2011, true?

23 A Yes.

24 Q From 2006 to 2011, you are the property manager for
25 TDMC?



1 A Yes.

2 Q And you are the owner of Linnberg?

3 A One of them.

4 Q One of them. You could have put a reciprocal parking
5 agreement on that property at any time for when you closed with
6 Moonshadow in 2006 until you closed with the mosque in 2011,
7 true?

8 A Yes.

9 Q And for that entire five-year period, you didn't do
10 anything to put a reciprocal parking agreement on Lot 1 and Lot
11 2, true?

12 A That's correct.

13 Q And Mr. Davis never came to you and said we want an
14 easement for parking between 2006 to 2011, right?

15 A Right.

16 Q But you were his property manager, right? You'd be
17 the one he'd talk to if he wanted a parking agreement recorded
18 with the county recorder, true?

19 A Correct.

20 Q Now, after you sold this lot, TDMC dissolved the LLC.
21 Right? You distributed the profits and it was done?

22 A That's correct.

23 Q Okay. Let's go to Trial Exhibit 5. Excuse me, Trial
24 Exhibit 4 first. Is 4 in evidence, Josh?

25 MR. BENDOR: Yes.



1 BY MR. CAMPBELL:

2 Q Let's blow this up.

3 A Can I correct my last answer?

4 Q No.

5 Q All right. I might ask you that question.

6 A Okay. Okay. So this is the special warranty deed,
7 right?

8 A Yes.

9 Q And TDMC conveys to Moonshadow Lot 1, correct?

10 A Yes.

11 Q Subject to matters set forth on Exhibit B, correct?

12 A Yes.

13 Q Now, do you know what a Schedule B is?

14 A A Schedule B?

15 Q Yeah.

16 A No.

17 Q All right. Are you familiar with title insurance?

18 A No.

19 Q Do you know that a Schedule B refers to exclusions on
20 a title insurance policy?

21 A No.

22 Q Okay. Let's go to the next -- let's go to, I think
23 it's going to be Exhibit B, but let's see. Go to the next
24 page. No, wait a minute. Let's see who signed it. Let's see.
25 Oh, you signed it. You signed this special warranty deed,



1 right?

2 A Yes.

3 Q Okay. Let's go to the next page. Next page. All
4 right. This is Exhibit B, right?

5 A Yes.

6 Q Let me blow it up a little bit. All right. This is
7 the first floor. Do you see anything in here about a third
8 general admitted plan?

9 Q So, in the deed you gave to Moonshadow, you didn't
10 reference the third amended general plan at all. Do you
11 remember that?

12 A No.

13 Q Go to the next page. Do you see anything from four
14 to nine on the third general admitted plan?

15 A No.

16 A No.

17 Q Okay. Is this something Mr. Rydberg did for you?

18 A Yes.

19 Q That would be a good time to break for lunch. Unless
20 you got a -- this is going to be the longest witness. The
21 other witnesses are much shorter.

22 THE COURT: Okay. All right. Let's take our recess
23 at this time and when we come back, will you be able to provide
24 the new exhibit list --

25 MR. CAMPBELL: Yes.



1 A Oh, I'm sorry. Yes. It is.

2 Q Okay. So as the general manager of TDMC, you would
3 deed it to yourself as the general manager of Linnberg --

4 A Yes.

5 Q Right? Okay. So let's go up to the language. Now,
6 this warranty deed, you prepared yourself. Your side prepared
7 yourself, right?

8 A I don't know who prepared it, I didn't.

9 Q Okay. Well you see in this deed, TDMC gives to
10 Linnberg Lot 2, right?

11 A Yes.

12 Q And there's no restrictions on it at all?

13 A Yes.

14 Q Correct?

15 A Correct.

16 Q You could have written the deed that said I'm going
17 to give Lot 2 to Linnberg, but Linnberg's going to hold these
18 parking spaces as easements for Lot 1, right?

19 A Yes.

20 Q But you didn't do that.

21 A I didn't.

22 Q Now, the same time you're the general manager of TDMC
23 and you're the general manager of Linnberg. You're also the
24 property manager for Davis?

25 A Yes.



1 Q Did you tell him you might have a conflict of
2 interest?

3 A I believe my lawyers did.

4 Q You believe your lawyers did.

5 A Don't know.

6 Q Did you tell them that you're not going to protect
7 his rights in any parking easement?

8 A No.

9 Q Okay. So they close in 2006, right? So you're at
10 TDMC is resolved, you're done with the bad project, right?

11 A Yes.

12 Q And then let's go to Trial Exhibit 24.

13 (Counsel confer)

14 BY MR. CAMPBELL:

15 Q So this is 2007, so it's one year after the close to
16 Moonshadow, right?

17 A Yes.

18 Q And Linnberg is looking at -- you're still interested
19 in developing the property, right?

20 A Yes.

21 Q So you go back to Heffernan & Associates and you want
22 to know what your options are; am I right?

23 A Yes.

24 Q And for purposes of what Heffernan & Associates are
25 looking at, they're just going to assume that the parking



1 applies to Lot 1.

2 MR. GLENN: Objection.

3 THE COURT: Sustained.

4 BY MR. CAMPBELL:

5 Q You know what assumptions Heffernan & Associates were
6 given?

7 A No.

8 Q Was it Rick Rydberg who dealt with them?

9 A Yes.

10 THE COURT: Sir, what exhibit number is this?

11 MR. CAMPBELL: This is 24. Trial Exhibit 24.

12 THE COURT: Oh, 24, okay. Thank you.

13 MR. CAMPBELL:

14 Q Okay. So let's blow it up and just sort of go
15 through it all. Okay. So it's a letter to you, right? Do you
16 remember getting a letter?

17 A No.

18 Q All right. But that's how you about a meeting they
19 had with Tempe, right?

20 A Yes.

21 Q And they talked about the parking demands at the
22 property, correct?

23 A Yes.

24 Q And they said let's look at the options that we
25 talked about.



1 A Yes.

2 Q Okay? Let's go to option number one. Option number
3 one is just to build a small office building, right?

4 A Yes.

5 Q Option number two is to put the building on stilts
6 and create more parking, correct?

7 A Yes.

8 Q Let's go to the next page. So let me ask you
9 something. Lot 1 has all this parking, right? And I'm point
10 at -- I'm looking at the property that's now --

11 A Those, not the ones below it.

12 Q Pardon? Not Sopris? You see the purple line there?
13 Did you have these parking spots above the purple line?

14 A That's correct.

15 Q And you have all these parking spots here.

16 A That's correct.

17 Q Why not build a garage?

18 A A garage?

19 Q Build it with a second story.

20 A I didn't think of it.

21 Q You didn't think of it?

22 A Nope.

23 Q That would solve all the problems, wouldn't it?

24 A Possibly, yeah.

25 Q So you don't need Lot 2 if you build a second deck on



1 with your parking.

2 A Probably didn't want to spend the money.

3 Q So you want my client's property because you don't
4 want to spend money.

5 MR. GLENN: Objection.

6 THE COURT: Overruled.

7 THE WITNESS: No, that's not how I thought of it.

8 BY MR. CAMPBELL:

9 Q Option three is this whole joint parking issue,
10 right?

11 A Yes.

12 Q Actually, look, it says now that I look at it, option
13 three, under this option, more parking would be added by
14 constructing a parking deck; you see that?

15 A Yeah, I do.

16 Q Well, a parking deck would be -- what would happen if
17 you build a second story over your parking, right?

18 A Correct.

19 Q So is it really true you never thought about it?

20 A I didn't read this. This was Rick reading it, giving
21 me his feelings and options.

22 Q Okay. But it's a letter to you. Do you remember
23 reading it?

24 A No.

25 Q Okay. So you would agree with me that one solution



1 to the problem is just to build a parking deck.

2 A Yes.

3 Q Let's go to Exhibit number 50. Let's just stop for a
4 second. There's no discussion in this letter about a
5 reciprocal parking easement having been recorded; do you recall
6 that?

7 A I don't recall it.

8 Q You knew in 2007, after you closed with Moonshadow,
9 that a reciprocal parking easement had not been recorded, true?

10 A Yes.

11 Q Did you go tell Mr. Davis that?

12 A No.

13 Q Did you tell Mr. Davis -- did you talk to him at all
14 about the fact that a reciprocal parking agreement was not in
15 force?

16 A Not Mr. Davis, Rick Rydberg was handling that and I'm
17 assuming he's passing on this information.

18 Q You're assuming that, but Rick Rydberg we can't
19 depose, because of his medical condition.

20 A But that's what happened at that time.

21 Q Okay. He told you that?

22 A Yes.

23 Q Let's go to Exhibit 56, which I believe in evidence.
24 This is 2007 again.

25 MR. BENDOR: This is not in there.



1 Q And you have no recollection of talking to him at all
2 in 2007?

3 A No.

4 Q Do you have any recollection of telling him that you
5 had a conflict of interest acting as his property manager at
6 the same time you were the owner of Linnberg (phonetic)?

7 A No.

8 Q Did you ever tell him that you weren't looking out
9 for his best interest?

10 A No.

11 Q All right. So 2011 you sell lot 2 to the mosque,
12 correct?

13 A Correct.

14 Q Did Rydberg handle the sale?

15 A Yes.

16 Q You don't recall having any conversation at all with
17 the mosque about parking, true?

18 A Correct.

19 Q Rydberg never told you that he had any conversations
20 with the mosque about parking, true?

21 A I don't recall.

22 MR. CAMPBELL: Let's bring his deposition up at page
23 68. I have -- page 68. I'm sorry. 6-8. Let's blow it up, 5
24 to 13.

25 BY MR. CAMPBELL:



1 Q Question, "Do you know if anybody working from
2 Linnberg or TDMC ever talked to Muhammed about the parking
3 issue?"

4 Answer, "Rick certainly must have."

5 Question, "Okay. But you don't -- you never had
6 conversations with him about it? Did Rick ever say anything to
7 you about a conversation that he had with the mosque about
8 parking?"

9 "Objection; form."

10 Witness, "I don't recall."

11 Do you remember giving those answers under oath?

12 A Yes.

13 MR. CAMPBELL: Exhibit Number 15. If you can just
14 bring up Exhibit Number 15.

15 And I'd move 15, Your Honor.

16 MR. GLENN: No objection.

17 THE COURT: Exhibit 15 is admitted.

18 (Plaintiff's Exhibit 15 Received)

19 MR. CAMPBELL: This is going to be an email chain
20 between Muhammed and Diana Kaminski of the City of Tempe. I
21 want to turn to the second page. And I want you to blow up the
22 bottom email there. All right.

23 BY MR. CAMPBELL:

24 Q So you see in this email, Muhammed is telling the
25 City of Tempe that they filed a plan document showing their



1 intention to build a multipurpose community hall. We're
2 thinking of a building approximately 8,000 feet.

3 Is that your recollection of what the mosque was
4 looking at when they were looking at the property?

5 A I knew they were looking at a multipurpose community
6 hall, yes.

7 Q All right. And then it goes on and says there's no
8 legal access between lot 1 and lot 2. Lot 2 cannot even drive
9 on lot 1 and vice versa. Therefore, we're compelled to have
10 this easement.

11 All right. Did you see that?

12 A Yes.

13 Q You're aware that the mosque, in its discussions
14 about purchasing the property, asked for a reciprocal parking
15 agreement?

16 A I don't know that.

17 Q You have no recollection of that?

18 A No. I just do the communications with them.

19 Q He then says since Medical Center -- we rarely see
20 any car parked on lot 2, even lot 1 parking is not filled up to
21 seventy percent of capacity, that's my personal observation,
22 mosque is hoping the traffic engineer can do an actual ground
23 study. And we use that information to go back to City for
24 seeking a hall proposal. Do you see that?

25 A Yes.



1 Q Is that true, lot 1 rarely filled up to seventy
2 percent capacity?

3 A I would estimate that that's fairly accurate. There
4 were some days where it was higher and almost totally full.

5 Q I think you indicated you're always at the property,
6 true?

7 A During those days, yes, Monday --

8 Q Your --

9 A -- through Friday.

10 Q Your medical group bought another medical group,
11 didn't it?

12 A Pardon me?

13 Q Didn't your medical obstetrics group buy another
14 medical obstetrics group?

15 A No. We had a merger with another medical group.

16 Q And when you merged, you went from one office to
17 three office locations?

18 A Yes.

19 Q And you moved your property management company
20 offsite?

21 A Yes.

22 Q And when did that happen?

23 A Probably at the time of that merger which is about
24 six years ago.

25 Q All right. And starting six years ago when you moved



1 your property management company offsite, you were not at the
2 property every day, true?

3 A Yes, I was. I was practicing clinical medicine.

4 Q When did you stop going to the practice every day?

5 A January of 2016.

6 Q And is that when you stopped practicing clinical
7 medicine?

8 A Yes.

9 Q So from 2016 to the present, you have not been at the
10 property every day?

11 A Twice a week.

12 Q Twice a week. Has the mosque put markings on its
13 parking spots?

14 A Yes.

15 Q What have they put on their parking spots?

16 A A name.

17 Q Indicating the lot belongs to them, right, or the
18 parking lot belongs to them?

19 A Yes.

20 Q They put up any signs?

21 A Not to my knowledge.

22 Q You haven't seen any no trespass signs?

23 A Not to my knowledge.

24 Q Has there been any problem with parking since you
25 left in 2016 to the present?



1 Q You do know the mosque did not sign the reciprocal
2 parking agreement?

3 A Yes.

4 Q And that was their right not to do so?

5 MR. GLENN: Objection.

6 THE COURT: Sustained.

7 BY MR. CAMPBELL:

8 Q So the mosque closed in 2011, February, right?

9 A Correct.

10 Q They go from 2011 to 2015 without anyone asking for a
11 reciprocal parking, right?

12 A Correct.

13 Q You're the property manager for Dr. Davis, correct?

14 A Yes.

15 Q Did he ever follow up and say you're my property
16 manager, make sure I get this reciprocal parking agreement?

17 A I don't recall.

18 Q You don't recall? You think you would have
19 remembered it if you asked him?

20 A During that time, I was working eighty hours a week.
21 And depending on what day it was and what time it was, I was
22 relying on my staff.

23 Q All right. Well, do you remember from the time you
24 purchased it in 2002, 2004 to the time -- or strike that --
25 from the time Moonshadow bought it in 2006 to 2011, no one had



1 asked for a reciprocal parking agreement, correct?

2 A Correct.

3 Q And now we go another four years without anyone
4 asking for a reciprocal parking agreement, correct?

5 A Correct.

6 Q And you know there is no formal agreement because
7 your lawyer told you there's no formal agreement that lot 1 can
8 use lot 2's parking, right?

9 A I had forgotten that.

10 Q What happened in 2015 that changed things?

11 A I don't know.

12 Q Are you aware that in 2015, Dr. Davis suddenly asked
13 that he wanted some sort of agreement for parking?

14 A I don't recall.

15 Q You're his property manager. Do you remember him
16 calling you and saying I'm having a problem with the property?

17 A No.

18 Q Did he call you and tell you I want to refinance my
19 loan but my lender wants to know what formal parking agreement
20 I have?

21 A Yes, he did do that.

22 Q You do remember that?

23 A Yes.

24 Q And tell me what you remember about it.

25 A That in order for them to qualify for the loan, they



1 would need the parking agreement signed. In my mind, I thought
2 it already had been signed.

3 Q So your recollection is that in 2015 -- do you
4 remember what time of the year it was?

5 A No.

6 Q Do you remember if it was November, December?

7 A I don't.

8 Q But he was trying to refinance it and needed
9 something with respect to parking? Do you recall that?

10 A Needed a parking agreement signed by the mosque.

11 Q Do you know what term of years he needed?

12 A Pardon me?

13 Q What terms of years he needed for parking agreement?

14 A No.

15 Q Well, when did he call and tell you this? What was
16 your role in the dealings?

17 A To get a parking -- to assist in getting a parking
18 agreement signed.

19 Q What did you do to assist to get a parking agreement
20 signed?

21 A I recall possibly trying to reach out to Muhammed at
22 the time and see -- and talk to him. I don't remember the
23 specifics of our conversation.

24 Q So you remember getting a call and you remember
25 reaching out to Muhammed, but you don't remember the specifics



1 Q Okay. And is that ownership different than Linnberg,
2 LLC?

3 A Yes.

4 Q Different people or owners?

5 A Yes.

6 Q Is that different from TDMC?

7 A Yes.

8 Q Different owners there again?

9 A Yes.

10 Q Okay. And as between Linnberg and TDMC, there's
11 different owners, correct?

12 A Correct. Linnberg is a subset of TDMC.

13 Q Okay. The partners who were in TDMC, some of those
14 partners formed Linnberg, LLC?

15 A Correct.

16 Q What is the scope -- what is your understanding of
17 the scope of services provided as a property manager?

18 A Once we take control is to -- you know, you have your
19 owner who is the person that you're responsible to and mostly
20 running day-to-day operations, keeping careful with the books,
21 watching CAM expenses for them, recording and repairing any of
22 the property issues that are ongoing while you're keeping the
23 tenants happy. So you're kind of playing between running it
24 efficiently, keeping tenants happy, and thus, you know, keeping
25 both parties satisfied with the deal that they have.



1 Davis discussing a parking agreement?

2 A I don't.

3 Q And ultimately, Linnberg decided not to develop the
4 vacant lot, correct?

5 A Correct.

6 Q And why was that?

7 A Just due to the fact that they didn't want to spend
8 the amount of money. The economy was down. The mosque had
9 been asking for two or three years do you want to purchase it.
10 I think people were tired of development and stuff, so we just
11 decided they've been good neighbors, let's let them have the
12 lot.

13 Q Okay, but in 2007, when you were evaluating
14 developing this lot, you -- you just mentioned cost. Cost of
15 what? What would it have cost to develop this lot for what you
16 wanted to use it for?

17 A I don't recall that number. But at the time, the
18 economy was going down and we didn't want to -- didn't want to
19 continue and invest money in another development that only had
20 nine parking places.

21 Q And now that was the reason, the cost would be
22 dealing with the nine -- the limit of the nine parking spaces?

23 A Right.

24 Q So just to make sure we're clear on this, in 2004,
25 well, this was purchased in 2002.



1 Q Okay. What do you do to the developer?

2 A We make them comply with any requirements.

3 Q Okay. Well, let me give you a hypothetical, okay.

4 TDMC tells you that to get their building permit, they're going
5 to have parking on Lot 1 and Lot 2, right.

6 A Yes.

7 Q After they got the building permit, after they got
8 the plan up, after they build it, five years later, they sell
9 it, without any restriction on parking.

10 A Correct.

11 Q So that they now do not have the required amount of
12 parking. What do you do to the developer?

13 A Try to remedy the situation, if there's a new
14 proposal.

15 Q All right. But you remedy the proposal with the
16 developer who made a promise to you, right?

17 A Possibly.

18 Q Possibly. Are you familiar with the Private Property
19 Protection Act?

20 A Yes.

21 Q Are you familiar that under the law, if the City
22 takes away a person's right to develop his property, by
23 proposing zoning on that property, that you could be sued for
24 taking away their property?

25 A Yes.



1 Q And that's a factor you considered, correct?

2 A Sure.

3 Q You're not a legal expert, I assume.

4 A Correct.

5 Q All right, so you don't know what rights this lot
6 would have under the Private Property Protection Act, if you
7 were to try to take away rights from this lot, correct?

8 A Correct.

9 Q And the rights to this lot are ultimately up to the
10 Court, right?

11 A Correct.

12 Q Do you still have Exhibit Number 48?

13 A Yes.

14 Q Let's put 48 up. Go to the second page. Okay. Go
15 to the next page. Blow up the section where it says, "What we
16 know at this time." Now, I think you told me you were involved
17 in drafting this?

18 A Yes.

19 Q And what were you drafting it for?

20 A For a request for clarification.

21 Q Request for clarification from whom?

22 A From your partner.

23 Q From my partner. So you say -- are these your bullet
24 point conclusions?

25 A Yes.



1 Q Over the years the City's staff has continually
2 identified the use of required parking for the existing medical
3 building to be located on TDMC Renovations' Lots 1 and 2. Do
4 you see that?

5 A Yes.

6 Q And that has to do with their getting their original
7 building permit saying this is how they were going to do it,
8 right?

9 A Correct.

10 Q Now this says here future development of the pad side
11 on Lot 2 will need to take into consideration the existing
12 parking allocation. What does that mean?

13 A They commit one of those parking spaces, or the
14 existing development.

15 Q Is it your opinion that the owner of Lot 2 cannot use
16 the property the way he wants?

17 A At the time it was requested, that current lot owner
18 allocated those parking spaces to Lot 1.

19 Q That was back in 2004, right?

20 A Correct.

21 Q And the property was split, correct?

22 A Correct.

23 Q In fact the City approved it and it was split. It
24 replatted it.

25 A Yes.



1 Q And the plat does not have any restrictions on Lot 2,
2 correct?

3 A Correct.

4 Q And then it was sold without any restriction to
5 Moonshine, correct?

6 MR. GLENN: Objection. Foundation.

7 THE COURT: Overruled.

8 BY MR. CAMPBELL:

9 Q It was sold without restrictions to Moonshine.

10 A That's my understanding.

11 Q Now, you're saying the parking requirements for
12 future development may be satisfied by, and let's go to the
13 last. A variance, right. What is a variance?

14 A It's a request by which one deviates from a standard.

15 Q Okay, so it contemplates that whatever the standard
16 is, on this particular property, we're going to change it,
17 right?

18 A Correct.

19 Q Where does the request for a variance go?

20 A To the hearing officer.

21 Q The hearing officer. And is this some city official?

22 A It's a contract employee.

23 Q A contract employee. And where does it go from the
24 hearing officer?

25 A It's appealable to the board of adjustments.



1 Q The Board of adjustments. And where does it go from
2 the Board of adjustments?

3 A Superior Court.

4 Q You can bypass the Marin Council?

5 A Yes.

6 Q So it goes right to the lower court of appeals
7 calendar, correct? Correct?

8 A Correct.

9 Q So you have the whole process for doing the hearings.
10 Assume -- assume a parking study is done on Lot 1. And you
11 know what a parking study is, right?

12 A Yes.

13 Q What happens in a parking study? An engineer comes
14 in and does what?

15 A Qualified professional to look analyzing projections,
16 utilization of parking.

17 Q So let's say a parking professional engineer came in,
18 and they're looking at what's happening in truth and in fact
19 with respect to parking on a day to day basis. And let's say
20 the parking professional determines that this was never used by
21 them, over time. Are you with me?

22 A Yeah.

23 Q And that all of the parking for this building are
24 actually satisfied by all the parking they have here. Are you
25 with me?



1 A Yes.

2 Q And you move for a parking variance.

3 A You mean you request a parking variance?

4 Q Yeah.

5 A Yes.

6 Q And you would do it based on your engineering study,
7 correct?

8 A Correct.

9 Q all right. And there are people that you can hire
10 that this is all they do, prepare engineering parking studies
11 for the City, correct?

12 A Yes.

13 Q And then that would not go to you?

14 A It would go to the Planning Division.

15 Q Oh, so there's another study. There's a Planning
16 Division study.

17 A Well, fill out an application for a variance. It
18 goes through the Community Development Planning Division.

19 Q That's you?

20 A Yes.

21 Q And what do you do?

22 A I oversee the staff responsible for reviewing the
23 applications.

24 Q What are you reviewing? Whether the engineer did a
25 correct analysis or not?



1 A Correct, yes. Professional.

2 Q So you look at it and the engineer is right. He
3 studied this piece of property for a month. And it's never
4 needed more parking than what you need on Lot 1. What do you
5 do then?

6 A We make a recommendation to the hearing officer.

7 Q You make a recommendation. And the hearing officer
8 is an outside employee, right?

9 A Yes.

10 Q And then if you're not happy with the hearing
11 officer, you go to the Board of Adjustments?

12 A Correct.

13 Q Who sits on the Board of Adjustments?

14 A It's seven appointed citizens, appointed by the Marin
15 Council.

16 Q Marin Council, so they're not engineers like our --
17 or planning people like you. These are ordinary citizens?

18 A Correct.

19 Q And I assume the assumption is they're going to use
20 some good practical sense.

21 A We hope.

22 Q You hope. And if they're not happy with that, you
23 can go Lower Court of Appeals Calendar in the Superior Court
24 and argue the City is being arbitrary and capricious, right?

25 A Yes.



1 Q Has Mr. Davis ever done a parking study of the actual
2 parking he needs on Lot 2, since he purchased the building in
3 2006?

4 A Not to my knowledge.

5 Q Has Mr. Davis, since he purchased the building in
6 2006, ever done a parking study and filed for a variance?

7 A No.

8 Q So he's never been through this process at all?

9 A Correct.

10 Q In fact, in your deposition, I believe you told me
11 that one of the things Mr. Davis could do is to apply for a
12 variance, right?

13 A Yes.

14 Q To reduce the parking lot?

15 A Right.

16 Q All right. Let's bring up Exhibit Number 6. Okay,
17 this is the third amended general plan of developer, Thomas
18 Davis Medical Center, right?

19 A Correct.

20 Q Now, when this was applied for, in what, 2004, the
21 City required you to file a plan of development for a PCC
22 Zoning Center, right?

23 A That's correct.

24 Q And that's an older process, correct?

25 A Correct.



1 Q You don't require it anymore?

2 A We do not.

3 Q And plans of development can be amended, true?

4 A Prior to 2005.

5 Q Prior to 2005. So plan of development filed before
6 2005 can be amended?

7 A Yes.

8 Q You don't do these types of forms anymore?

9 A Correct.

10 Q As I understand it, you can modify these for any
11 designated law?

12 A Yes.

13 Q All this is, is a snapshot in time, right?

14 A Yes.

15 Q It can be amended and changed?

16 A Correct.

17 Q You don't even require these to be recorded anymore?

18 A Correct.

19 Q And parking standards can change, they could be
20 modified?

21 A Yes.

22 Q You're aware that in certain filings, a party can
23 make promises to restrict their land; are you aware of that?

24 A Yes.

25 Q And sometimes the City can require an owner to make



1 that type of promise, right?

2 A Correct.

3 Q Let's go to Exhibit Number 74.

4 MR. CAMPBELL: I move Exhibit 74 into evidence.

5 MR. GLENN: No objection.

6 THE COURT: Exhibit 74 is admitted.

7 (Defendant's Exhibit 74 Received)

8 BY MR. CAMPBELL:

9 Q Let's blow this up. Well, this is called a covenant,
10 an agreement regarding maintenance of yards for an owner's
11 responsibility, right?

12 A Yes.

13 Q All right. And this is something that the City
14 requires from time to time?

15 A Specifically in buildings.

16 Q Okay, let's blow up -- let's go down to the -- blow
17 up the middle -- legal description down to Mr. Linnerson's
18 signature. All right. So this is actually -- this is what an
19 agreement between Mr. Linnerson and TDMC and the City of Tempe,
20 right?

21 A Correct.

22 Q And you'll see that in this agreement, well, first of
23 all, what's an oversized building?

24 A It's an agreement to meet the uniform building code.

25 Q Okay.



1 A Or separation.

2 Q If you have a certain sized building you want to do
3 some set-backs or something?

4 A Based on the building type. Building construction
5 type.

6 Q Well, apparently, this renovation of TDMC, the City
7 wanted something in terms of a restrictive covenant, right?

8 A Yes.

9 Q And if I look at this, it says they'll provide and
10 maintain on said property a yard of 40 feet in width,
11 unobstructed from ground to sky. They show the attached plot
12 plan. So that means you're going to have what, like a 40 foot
13 zone?

14 A Yeah, correct.

15 Q Covered on portions of the property.

16 A Yes.

17 Q And this says the back covenant is going to run with
18 the land, right?

19 A Yes.

20 Q Binding on all future owners, encumbrances, their
21 successors, heirs and assignees. Do you see that?

22 A Correct.

23 Q Did you require him to do a covenant that his parking
24 on Lot 2 would always be used just for parking for TDMC and
25 that it would run with the land, and be binding on all future



1 owners, encumbrances, successors, heirs and assignees?

2 A At the time we did not.

3 Q You did not.

4 Q And do you think the City of Tempe has the ability to
5 do that now?

6 A Possibly.

7 Q Possibly. Without paying for taking the land away?

8 A I cannot say.

9 Q Now, turn the page. The next one. This is another
10 covenant of all the property as one parcel. Do you see that?

11 A Yes.

12 Q Let's go down to the bottom. And you'll see that he
13 agrees to hold it as one parcel, and it's signed by him,
14 correct?

15 A Correct.

16 Q Go back to the top. This was never filed -- up top
17 where it says recorded. This was never recorded, right?

18 A Looks like there's a document recording at the right
19 top.

20 Q Right top?

21 A A header.

22 Q Blow it up. You think that's the document recording
23 number?

24 A It appears so.

25 Q There's no stamp on it that I can see, but it's been



1 recorded, right?

2 A I believe that's on the first page.

3 Q -- recorder is. What's the purpose of this document?

4 A To hold two lots together for the purposes of the
5 building code. To satisfy building code requirements.

6 Q All right. Then let's see. The uniform building
7 code applies to each lot, right?

8 A Correct.

9 Q By holding it as one property, the City can ignore
10 separate lots, and treat the whole property as one piece of
11 property under the Uniform Building Code?

12 A Correct.

13 Q Have nothing to do with parking, right?

14 A Correct.

15 Q Now aside from a variance, I think when I deposed
16 you, you mentioned to me you can also apply for a use permit.
17 Right?

18 A I vaguely recall.

19 Q Huh?

20 A I don't recall.

21 Q Okay, well, what's a use permit?

22 A Use permit is a request for specified uses.

23 Q And who does a use permit go to?

24 A That goes also to the hearing officer.

25 Q All right. And does it go to the hearing officer,



1 then to the board of investments, and then --

2 A No, then it goes to the Department of Review
3 Commission, appealable to the City council.

4 Q Okay. So it's -- let me get this right. The hearing
5 officer. Who do you go next?

6 A The development review commission.

7 Q That's a commission under the Marin Council?

8 A Yes.

9 Q And then it would go to the Marin Council?

10 A Correct.

11 Q So ultimately, a political body determines whether
12 you get a use permit or not?

13 A Correct.

14 Q And I take it, a political body sometimes takes into
15 account political considerations?

16 A It could.

17 Q Now do you remember when I deposed you, you told me
18 that you can grant a use permit that could reduce parking
19 requirements?

20 A I believe it had to do with the time of application
21 and if you submit for a park by demand.

22 Q Okay, well, let's pull up your deposition at page 33.
23 Let's just start at the top. Question. Is there a difference
24 between a use permit and a variance? Yes, different evaluation
25 criteria. One would be more -- use permits would be more



1 compatible with the surrounding areas and uses. The variance
2 again, was the test of hardship. And why would you need a use
3 permit if it was already compatible with the common areas? The
4 determination would need to be made through that process. The
5 way it's described here, because it says use permit one and use
6 permit two. Okay, so it looks like this is requesting two
7 different use permits? Answer, it looks like two different
8 components of the use permit. Okay, one at a contiguous lot
9 could be the Mosque and one on the non-contiguous lot which
10 would be the church. Yeah. If the City granted this use
11 permit and there 40 spaces designated at the Mosque and 92 at
12 the church, as it describes, would that reduce TDMC's on-site
13 parking requirement by 40 and by 92? Answer, yes, that would.
14 Do you remember this now?

15 A Yes. Yes, it's just a process we don't have
16 currently at this time.

17 Q Okay, but back in 2004, you did have that process?

18 A Correct.

19 Q And what happened to it?

20 A We've updated our codes, things change, processes
21 change.

22 Q So is there something else in place of use permits
23 now?

24 A We don't have a use permit department for the parking
25 reduction, no.



1 Q And back in 2004, you had park by demand standards?

2 A Yes.

3 Q That's where a parking engineer goes out and he does
4 a study and he says you can do shared parking agreements to
5 take care of the parking?

6 A Correct.

7 Q And that could be done by a use permit?

8 A Yes.

9 Q And ultimately back in 2004, the person that decided
10 that was the Marin Council?

11 A They could.

12 Q All right. So I assume this went to the planning
13 department?

14 A Yes.

15 Q First. And regardless of what the planning
16 department said, you can take the process to a hearing officer
17 in the development review committee, and the Marin Council,
18 right?

19 A Correct.

20 Q And if that would have been done and a use permit was
21 granted in 2004, we wouldn't even be here today, right?

22 A Correct.

23 Q This is a different overview. There's no covered
24 parking. TDMC could build a second story parking structure,
25 can't they?



1 A They could, yes.

2 Q That would take care of all of their parking
3 problems?

4 A Probably.

5 Q And would bring them into compliance with what they
6 promised you, right?

7 A Yes.

8 Q And that would just cost some money, correct?

9 A Correct.

10 MR. CAMPBELL: Those are all the questions I have,
11 Your Honor.

12 THE COURT: Thank you. Mr. Glenn.

13 REDIRECT EXAMINATION

14 BY MR. GLENN:

15 Q Mr. Levesque, you were asked some questions about
16 what your department does in connection with building permits.
17 Your department does not operate solely within a building
18 permit process, does it?

19 A Correct, it does not.

20 Q Okay, so if a property is not in compliance with some
21 City of Tempe requirement, even though they're not building
22 anything, the City of Tempe planning department could get
23 involved, correct?

24 A Through code compliance.

25 Q Okay, and what does -- what happens if somebody is



1 not in compliance?

2 A They get a citation.

3 Q Okay, and those citations can get recorded?

4 A Yes.

5 Q You were asked about the third amended general plan
6 of development that was recorded in 2004. Now that document
7 was recorded, right?

8 A Correct.

9 Q It was a matter of record in 2004?

10 A Yes.

11 Q So anybody that bought the property after that time
12 knew that that was the recorded plan of development?

13 A Correct.

14 Q And there were no amendments to that plan since that
15 time, correct?

16 A No.

17 Q You were also asked a question, let me ask you to
18 take a look at Exhibit 9. The question was presented to you
19 that when the Mosque purchased this property, they bought it
20 without any restrictions. Have you seen Exhibit 9 before?

21 A I have not.

22 Q Do you know if the Mosque purchased the property
23 subject to any restrictions?

24 MR. CAMPBELL: Objection, calls for a legal
25 conclusion, and has no foundation.



1 MR. GLENN: Okay.

2 MR. CAMPBELL: Judge, we have the same version as
3 this with a transcript.

4 MR. GLENN: You want to go ahead and play it.

5 MR. CAMPBELL: Judge, yeah, we'll play the same
6 version and we'll have the transcript.

7 THE COURT: Sure.

8 (Video played at 4:20 p.m.)

9 THE COURT: Would this be a good time for the evening
10 recess?

11 MR. CAMPBELL: Yes.

12 THE COURT: So let's pick-up where we left off,
13 unless you want to take another witness first thing in the
14 morning, and then we can resume with this later? Whatever
15 works with your schedules.

16 MR. GLENN: I think there is only another 35 minutes
17 left so probably be easiest just to finish.

18 THE COURT: All right. So we will be in recess until
19 tomorrow at 9:30. Is there anything we need to discuss before
20 then?

21 MR. GLENN: No.

22 THE COURT: All right. We'll see you at 9:30.

23 THE BAILIFF: All rise.

24 (Proceedings concluded at 4:33 p.m.)
25



CERTIFICATE

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/s/

FRANKIE MILFRED, CET-602
Transcriber

November 28, 2018

/s/

LISA FREEMAN
Transcriber

November 28, 2018



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/s/

REBECCA GOSNELL
Transcriber

November 28, 2018

/s/

MICHAEL DRAKE
Transcriber

November 28, 2018



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

MOONSHADOW PROPERTIES LLC,
Plaintiff,

No. CV 2016-091847

v.

MASJID OMAR IBN AL-KHATTAB, et
al.,

Defendants.

Phoenix, Arizona
August 28, 2018
9:35 a.m.

BEFORE THE HONORABLE DANIEL J. KILEY

TRANSCRIPT OF PROCEEDINGS

Trial Day 2

Proceedings recorded by electronic sound recording; transcript
produced by eScribers, LLC.

KAREN RAILE
LINDA FERRARA
NICOLE FERGUSON
NICOLE HORTON-ELLIS
Transcriptionist



I N D E XAugust 28, 2018

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
Diana Kaminski	8	24			
Kathleen Covert	44	50	51		
Mikol Davis	53	67	140		

<u>DEFENDANTS' WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
None					

M I S C E L L A N E O U S

	<u>PAGE</u>
Plaintiff's Rests	149
Defendant Rests	149
Plaintiff's Closing Argument	150
Defendant's Closing Argument	167
Matter Taken Under Advisement	181



EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
12	Email	18	18
14	Not Identified	7	7
34	Title commitment	45	45
37	Document	17	18
40	Not Identified	25	25
42	Email	24	24
43,44	Not Identified	7	7
58	Karen Slater email to Dr. Mikol Davis	57	57

DEFENDANTS' EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
30	Not Identified	6	6
67	ALTA land title survey	51	51
77	Email to Mikol from Kaminski	39	39
84	Wells Fargo business loan	134	134
86,91,99	Not Identified	6	6
100	Email	125	125
101	Emails	115	115
102	Letter	116	116
103	Email	126	126
104	Email	127	127



APPEARANCESAugust 28, 2018

Judge: Daniel J. Kiley

For the Plaintiff:

Joseph James Glenn

Witnesses:

Diana Kaminski

Kathleen Covert

Mikol Davis

For the Defendants:

Joshua D. Bendor

Colin F. Campbell

Witnesses:

None



Phoenix, Arizona

August 28, 2018

(The Honorable Daniel J. Kiley Presiding)

TRIAL DAY 2:

THE COURT: -- 2016-091847, Moonshadow Properties, LLC v. Masjid Omar Bin Al-Khattab. This is the continued trial. Appearances for the record, please.

MR. GLENN: Your Honor, Joseph Glenn on behalf of Plaintiff Moonshadow.

THE COURT: Good morning.

MR. CAMPBELL: Colin Campbell, Josh Bendor for the Defendant

THE COURT: Good morning. Anything we need to discuss before we resume?

MR. CAMPBELL: No, Judge. We will cue up the video. I think we have about another 30 minutes.

THE COURT: Okay.

MR. GLENN: One thing we would note is the next witness, Diana Kaminski, is here and the parties are fine with her sitting in for the end of this deposition.

THE COURT: All right. Thank you.

(Pause)

(Video played at 9:37 a.m., ending at 9:37 a.m.)

(Pause)

(Counsel confer)



1 MR. BENDOR: Your Honor, may I approach?

2 THE COURT: Certainly.

3 MR. BENDOR: May I approach, Your Honor?

4 THE COURT: Yes. Thank you.

5 BY MR. BENDOR:

6 Q Do you recognize what this is, Ms. Kaminski?

7 A It looks like Chapter 6 of our Zoning and Development
8 Code for parking.

9 MR. BENDOR: Your Honor, this is not marked as an
10 exhibit. It's part of the zoning code, as the witness has just
11 said. I'm happy to mark it as the next exhibit for the Court's
12 convenience if that would be helpful.

13 THE COURT: Mr. Glenn, do you have a preference?

14 MR. GLENN: No objection either way.

15 THE COURT: I think it's fine just to proceed --

16 MR. BENDOR: Very good.

17 THE COURT: -- without having it marked.

18 BY MR. BENDOR:

19 Q And Chapter 6 governs parking issues, is that right?

20 A Parking standards, yes.

21 Q Thank you. And if you look at Section A at the top,
22 it talks about the purpose of the standards, do you see that?

23 A Yes.

24 Q And it explains that each development has unique
25 parking needs and provides a -- that these standards provide a



1 flexible approach for determining parking space requirements.

2 A Yes.

3 Q Would you please go to page 6? Can you tell me what
4 this is?

5 A This is the chart that we use when we are calculating
6 parking requirements. So it's based on the use and the square
7 footage of this space.

8 Q So different uses have different parking
9 requirements.

10 A Yes.

11 Q So for example, because the medical center is a
12 medical center, it's required currently to have one spot for
13 every 150 square feet.

14 A Yes.

15 Q But if it became a childcare center, it would need
16 half those number of spots?

17 A Yes, there's different standards based on the use.

18 Q And if it were an amusement park, it would need even
19 fewer spots?

20 A I believe so, yes.

21 Q Would you go to page 8, please? There's been some
22 conversation about whether when shared parking is approved by
23 the City, parking offsite is allowable.

24 A Uh-hum.

25 Q And you see in Section A it says, "Parking may be



1 provided offsite with professional analysis, that the proximity
2 of the parking is acceptable." Is that right?

3 A Yes.

4 Q So you could potentially have offsite, noncontiguous
5 parking depending on that.

6 A Yes.

7 Q Turn the page, please. Section 4605 is entitled,
8 "Parking Affidavit."

9 A Yes.

10 Q Now when you were talking with Mr. Glenn, you were
11 talking about the requirements for a parking affidavit and you
12 mentioned "running with the land." Do you recall that?

13 A Yes.

14 Q Is this the paragraph you were referring to?

15 A "Transfer the rights to the unqualified availability,
16 specific number of spaces," yes.

17 Q And it doesn't actually use the words, "run with the
18 land," right?

19 A No.

20 Q And if that's a legal term of art, you might not
21 necessarily know if that's the same as what's discussed in this
22 paragraph, right?

23 A It's just a term we use, meaning it carries over from
24 one property onto the next.

25 Q And you see at the end of this paragraph where it



1 says, "As long as the spaces are required by this code."

2 A Yes.

3 Q So if the use of the medical center changed, then the
4 spots that it would need as required by the code, is that
5 right?

6 A Yes.

7 MR. BENDOR: Exhibit 3.

8 BY MR. BENDOR:

9 Q Do you recognize this document?

10 A Yes.

11 Q And you see it's the third amended general plan for
12 Thomas Davis Medical Center?

13 A Yes.

14 Q Go to the second page, please?

15 MR. BENDOR: And could you expand where it says Lot
16 3?

17 BY MR. BENDOR:

18 Q So you see that this third amended general plan
19 mentions some easements including that easement right there.

20 A The sewer line, yes.

21 MR. BENDOR: Rob, if you can go a little south of
22 there, between Lots 2 and Lot 3?

23 BY MR. BENDOR:

24 Q Can you see on the lower left, there's another
25 easement actually?



1 A Yes.

2 Q A cross access easement area?

3 A Yes.

4 MR. BENDOR: Can you close out of that please, Rob?

5 BY MR. BENDOR:

6 Q Tell me if we need to zoom in. There's another
7 easement, 15-foot easement for water line, sort of towards the
8 center, maybe upper left. Do you see that?

9 A Yes.

10 Q And there's another easement for electric, seven-foot
11 easement for electric in the lower left. Do you see that?

12 A Yes.

13 Q Do you see any easements for parking?

14 A No.

15 Q Let's go to Exhibit 6, please? Do you recognize
16 this?

17 A I recognize it's a project submittal application.

18 Q Do you see who it is from at the top there?

19 A Mike Hilgers (phonetic).

20 Q And the project name is Linnberg.

21 A Linnberg, yes.

22 Q Do you see that?

23 A Yes.

24 MR. BENDOR: Can we go to page 6, please?

25 BY MR. BENDOR:



1 Q What is page 6?

2 A This looks like a site plan that we would have marked
3 comments to the applicant to let them know about things that
4 would be related to their development.

5 Q Do you see there are a number of easements marked on
6 this site plan?

7 A Yes.

8 Q Do you see there's a buffer easement on the left?

9 A Yes.

10 Q And then to the right of that, there's an electric
11 easement.

12 A Uh-hum.

13 Q And on the southern end of the Lot, there's a cross-
14 access to the easement, do you see that?

15 A Label and dimension, the cross access easement, yes.

16 Q And you also have a question here that someone's
17 written, "What is this line? Is your refuge can in an
18 easement?" Do you see that?

19 A Yes.

20 Q Do you see any mention of a parking easement?

21 A No.

22 Q And the City of Tempe, including yourself made
23 various suggestions on this plan, is that right?

24 A Yes.

25 Q You didn't indicate that there ought to be a parking



1 easement on this plan, did you?

2 A No. There is reference to the bottom of the -- the
3 agreement to hold as one parcel, made mention of shared parking
4 with Holy Spirit Catholic Church, something at the bottom there
5 about parking but I don't see anything on this page, other than
6 that.

7 Q Let's look at Exhibit 37, please. Do you see this is
8 the project application for Sakina Hall (phonetic)?

9 A Yes.

10 Q Please go to page 3. Do you see this is the
11 chronology that you were talking about with Mr. Glenn that was
12 also in Exhibits 31 and 32?

13 A Yes.

14 Q Go two more pages, please? And you gave various
15 options to deal with what you understood to be a parking
16 situation here, right?

17 A Yes.

18 Q Could you look at the last bullet before the
19 conclusion? You suggested that one option would be to build a
20 parking structure on Lots 1 and 3 as medical offices in other
21 cities have done.

22 A Yes.

23 Q Did Moonshadow ever build a parking structure?

24 A Not that I am aware of.

25 Q Did they pursue that to your knowledge?



1 A Not that I am aware of.

2 Q Under the conclusion, you wrote that the current
3 owner of Lot 3, which is this Lot, right --

4 A Yes.

5 Q -- Knowingly designed, built and replotted the
6 property multiple times creating the condition on Lot 3 that
7 exists today. Do you see that?

8 A Yes.

9 Q This was in March 2011, is that right?

10 A I would have to go back and look at the beginning of
11 that.

12 Q We could go back to the first page for you.

13 A That's when they -- is that 11 or letter 18, I can't
14 tell.

15 MR. BENDOR: Can zoom in at the bottom?

16 THE WITNESS: 18. That would have been when they
17 made their application. So it would have been a couple of days
18 after that. It might be in the rest of this report document.

19 BY MR. BENDOR:

20 Q So the owner at the time was not the (indiscernible)?
21 Is that right?

22 A I don't know.

23 MR. BENDOR: Could we go Exhibit 12, please.

24 BY MR. BENDOR:

25 Q You were looking at this email with Mr. Glenn. Do



1 you recall that?

2 A Yes.

3 Q You were trying to give Mr. Ridberg certain options
4 about what to do with what you understood to be the parking
5 situation.

6 A Yes.

7 Q One of the options you gave him under Lot 1 options,
8 do you see that second one there?

9 A Yes.

10 MR. BENDOR: Do you have that in, Rob?

11 BY MR. BENDOR:

12 Q You suggested again that they could build a parking
13 structure, is that right?

14 A Yes.

15 Q But to your knowledge, they haven't done that or
16 tried to do it.

17 A Right.

18 Q You also gave some other options involving
19 contractual arrangements, is that right?

20 A Trying to look for options, yes.

21 Q To your knowledge they haven't pursued those
22 contractual arrangements.

23 A Not that I am aware of.

24 Q Let's go to Exhibit 67, please. Do you see what this
25 is?



1 forward to 2015.

2 MR. BENDOR: And I would move Exhibit 77 into
3 evidence.

4 MR. GLENN: No objection.

5 THE COURT: Exhibit 77 is admitted.

6 MR. BENDOR: Thank you.

7 (Defendant's Exhibit 77 Received)

8 BY MR. BENDOR:

9 Q What is Exhibit 77?

10 A This is an email to Dr. Mikol and a follow-up to a
11 phone call that he made to me.

12 Q And it's an email from you?

13 A Yes.

14 Q So in 2015, you had some conversations by email and
15 phone with Dr. Mikol Davis about parking on this property, is
16 that right?

17 A Yes.

18 Q Did you reach out to you originally or did he reach
19 out to you?

20 A No, he reached out to me.

21 Q So the City of Tempe didn't go to Dr. Davis and say
22 we have a problem?

23 A No.

24 Q You were trying to help him, right?

25 A Providing information, yes.



1 Q And in this email, you gave him some options about
2 how he could proceed.

3 A Yes.

4 MR. BENDOR: If you would blow up the top email, Rob?

5 BY MR. BENDOR:

6 Q And it looks like from the beginning of your email
7 that you didn't have as much time as you wanted to put together
8 this email, is that right?

9 A Correct.

10 Q But nonetheless, you gave him what options you could
11 at the time.

12 A Yes.

13 Q All right. One of those options was applying for a
14 revised parking level, right?

15 A Yes.

16 Q You didn't mention it in here but another option
17 would still be the parking structure that you suggested back in
18 2011.

19 A Yes.

20 MR. BENDOR: Let's go to the bottom paragraph, the
21 one that begins, "As I discussed."

22 BY MR. BENDOR:

23 Q In this paragraph, you explain to Dr. Davis what sort
24 of shared parking might work here, do you see that?

25 A Yes.



1 THE COURT: Sir, would you come forward please to be
2 placed under oath?

3 MIKOL DAVIS
4 called as a witness for the Plaintiff, having been duly sworn,
5 testified as follows:

6 THE COURT: Thank you. Would you please come around
7 to the witness stand?

8 DIRECT EXAMINATION

9 BY MR. GLENN:

10 Q Could you please state your name for the record?

11 A Dr. Mikol Davis.

12 Q Okay. And Dr. Davis, what is Moonshadow Properties
13 LLC?

14 A It is a single-purpose entity that was formed with
15 the sole purpose of buying Generations Medical Center.

16 Q And when you refer to Generations Medical Center,
17 you're referring to the building on -- the medical building on
18 Lot 1?

19 A Correct.

20 Q Okay. And are you the owner of Moonshadow
21 Properties?

22 A I am, along with my 96-year-old mother who is a part
23 of the ownership.

24 Q When did you purchase the medical building property?

25 A February of 2006.



1 attorney?

2 A She is an attorney.

3 Q And --

4 A She was an attorney.

5 Q -- what's her area of expertise?

6 A Personal injury, auto accidents.

7 Q Did she do anything with real estate?

8 A Never.

9 Q So when this issue arose, what did you do to try and
10 resolve it?

11 A I contacted the City of Tempe, explained the
12 situation. I contacted Zabair and explained to him that the
13 bank was requesting that a permanent arrangement be signed and
14 through numerous emails and phone calls back and forth, he
15 refused to sign a permanent agreement.

16 Q Okay. On behalf of the Mosque --

17 A On behalf of the Mosque.

18 Q -- refused. Yes. And there have been lots of
19 insinuations that maybe you should have sought a variance at
20 that point. Why did you not seek a variance?

21 A We didn't need it.

22 Q Did you have discussions with Diana Kaminsky or
23 anybody else about variances and other options?

24 A We did. We did have some discussion with her and
25 from what she explained, there was no compelling reason that



1 they would --

2 MR. BENDOR: Objection, hearsay.

3 THE COURT: Mr. Glenn?

4 BY MR. GLENN:

5 Q Did you get -- when you inquired as to a variance,
6 were you told -- did you get any kind of -- did you believe
7 that you could get a variance?

8 A No.

9 Q Okay. And had you reviewed prior attempts to get a
10 variance associated with this property?

11 A We had -- in December of 2015, we did a record
12 request with the City of Tempe and we saw that there had been
13 other attempts that had been not approved.

14 Q Okay. And after all these attempts had not been
15 approved and your discussions with Diana Kaminsky, what was
16 your conclusion?

17 A That --

18 MR. CAMPBELL: Objection to trying to get hearsay as
19 to that question.

20 MR. GLENN: I'm asking -- I'm merely trying to get
21 his intent --

22 THE COURT: Overruled.

23 MR. GLENN: -- and motive.

24 THE COURT: Overruled.

25 MR. GLENN: It's not hearsay.



1 BY MR. GLENN:

2 Q Go ahead.

3 A Could you repeat that again, please?

4 Q Yes. After reviewing all these failed efforts to get
5 a variance, your discussions with the City of Tempe, your
6 public records request reviewing all that, what did you believe
7 were the chances of getting a variance?

8 A From what I understood from Diane Kaminsky, on --

9 MR. CAMPBELL: Objection, hearsay.

10 THE COURT: Sustained.

11 THE WITNESS: I understood that it was unlikely that
12 we could get a variance.

13 BY MR. GLENN:

14 Q And that was based on what?

15 A From the record reviews that I had done independently
16 and saw that there had been prior efforts.

17 Q Included in those efforts were attempts to get a
18 permanent agreement with the Catholic church?

19 A Correct.

20 Q Did you understand that the Catholic church would not
21 agree to a permanent agreement?

22 A Yes.

23 Q And again, you reached out to the Mosque and they
24 refused.

25 A Correct.



1 Q Is there any reason why you didn't build a parking
2 structure at that point?

3 A We didn't need one.

4 Q And why is that?

5 A Because we were complying with what the City had
6 required. Nothing had changed from when we bought it in 2006
7 to 2015.

8 Q So what happened ultimately with that lender that you
9 had tried to refinance with?

10 A At the eleventh hour, they finally decided they would
11 not go through and that was December -- around the 15th of
12 December of 2015 which gave me 45 days before my balloon
13 payment was due and so after paying over \$50,000 in legal fees,
14 I had to scramble and get -- see if I could get another loan
15 and close in time.

16 Q Okay. And whose legal fees were those that you had to
17 pay?

18 A I had to pay the legal fees to the lender that
19 originally had committed to lending me the money.

20 Q And ultimately what happened? Were you able to get
21 another loan?

22 A I was.

23 Q Okay. And did the lender say anything about a
24 parking agreement?

25 MR. CAMPBELL: Objection, hearsay.



1 BY MR. GLENN:

2 Q Did that lender require anything in terms of a
3 parking easement?

4 A The lender was quite aware of the parking situation
5 of why we had originally come to the bank and they told us that
6 they believed that we would work out the agreement on the
7 parking as quickly as we could, which we promised we would do.

8 Q Okay.

9 MR. GLENN: I have no further questions.

10 THE COURT: Thank you.

11 Mr. Campbell?

12 CROSS-EXAMINATION

13 BY MR. CAMPBELL:

14 Q So, Mr. Davis, I understand you're a doctor. What
15 sort of doctor are you?

16 A I practice geriatric psychology. I deal with
17 depression and anxiety, sir.

18 Q All right. And depression and anxiety in respect to
19 elderly or with respect to the entire families?

20 A I've done it all from children to adults to elderly
21 but right now, I specialize in working with older people.

22 Q And where do you live, Dr. Davis?

23 A I live in California.

24 Q Where in California?

25 A In San Rafael, California.



1 something like that. I don't remember exact numbers.

2 Q Okay. So once you sold the Maryland Apartment, you
3 have to move quickly to get the money somewhere else, right?

4 A That's the plan, sir.

5 Q All right. And did that come into play -- well, what
6 was the property you identified to buy?

7 A A generations medical.

8 Q All right that's --

9 THE COURT: Mr. Campbell, we're going to need to take
10 our noon recess at this time.

11 MR. CAMPBELL: Thank you, Judge.

12 THE COURT: So we'll be in recess until 1:30.

13 Anything we need to discuss before we break?

14 MR. CAMPBELL: No, Judge.

15 THE COURT: All right. See you at 1:30.

16 THE BAILIFF: All rise.

17 (Recess at 12:01 p.m., recommencing at 1:33 p.m.)

18 THE COURT: This is CV-2016-091847; Moonshadow
19 Properties, LLC v. Masjid Omar Ibn Al-Khattab. This is the
20 continued trial; appearances for the record, please.

21 MR. GLENN: Yes, Your Honor. Joseph Glenn on behalf
22 of the Plaintiff, Moonshadow Properties.

23 THE COURT: Good afternoon.

24 MR. CAMPBELL: Colin Campbell and Josh Bendor for the
25 Defendants.



1 THE COURT: And good afternoon. Anything we need to
2 discuss before we resume?

3 MR. CAMPBELL: No, Judge.

4 THE COURT: No. All right. Sir, could you come back
5 to the witness stand? You've already been placed under oath.

6 CROSS-EXAMINATION CONTINUED

7 BY MR. CAMPBELL:

8 Q So Dr. Davis, I think when we broke we had talked
9 about you own Villa Pacifica and then you rolled that over into
10 the Maryland Apartments. And you're selling that in 2006 and
11 you're looking for a 1031 exchange, right?

12 A 2005.

13 MR. CAMPBELL: 2005. Could we go to his deposition,
14 page 18?

15 BY MR. CAMPBELL:

16 Q I just have a follow up question I wanted to ask you.
17 So if you look at page 18 --

18 MR. CAMPBELL: That must be the wrong page
19 (indiscernible). Hold on one moment. All right. Take 18
20 down.

21 BY MR. CAMPBELL:

22 Q So you identified the TDMC medical building as the
23 building you wanted to purchase, right?

24 A Correct.

25 Q And you have a broker, Mr. Scholler (phonetic),



1 correct?

2 A Correct.

3 Q Did he help you locate the building?

4 A Yes.

5 Q And you're rolling over about 6 million dollars, so I
6 assume you also have legal help with respect to this
7 transaction?

8 A Once we identified the property and were in escrow,
9 we did have a legal representative.

10 Q And who was your legal representative for the
11 purchase of the property?

12 A Greg Lake.

13 Q Greg Lake. And that's Lake & Cobb?

14 A Correct.

15 Q And that's the firm that Mr. Glenn works for, right?

16 A Yes.

17 Q Now, this was a sought after property, wasn't it?

18 A Yes, sir.

19 Q In fact, they had 27 people that had made full price
20 offers on the property, correct?

21 A That is -- yes, correct.

22 Q It's a leased up medical building, so it has multi
23 revenue coming in every month, correct?

24 A That's correct.

25 Q And it's in a real estate market that's rising?



1 A Yes.

2 Q How did you get the property out of those 27 that had
3 wanted to purchase it?

4 A We were told, after we were interviewed, that the
5 reason that they selected us was that the doctors found some
6 degree of humor in being able to make money on a lawyer, my
7 wife, and felt good about passing over the building to someone
8 that was a doctor.

9 Q Okay. What was the full purchase price offer that
10 was made?

11 A I think it was 9.4 million; something around there.

12 Q And then when you came down to be interviewed, you
13 were interviewed by Dr. Linnerson?

14 A And 21 other doctors.

15 Q Now, you were here when Dr. Linnerson testified?

16 A Yes.

17 Q And he also testified he's your property manager for
18 after you purchased the building

19 A Correct.

20 Q What's your relationship with him as a property
21 manager?

22 A It's okay.

23 Q What does he do for you?

24 A He collects the rent, he pays the bills. He keeps it
25 clean and, more important, he keeps all the doctors happy.



1 Q And he talks to you on a regular basis?

2 A He does, or his son is also involved in the
3 management.

4 Q And you discussed parking with Mr. Linnerson
5 frequently?

6 A No.

7 Q You do not talk to him about parking, frequently?

8 A No.

9 MR. CAMPBELL: Let's turn to -- can you put up his
10 deposition, page 17? Let's blow up line 1 down to line 11.

11 BY MR. CAMPBELL:

12 Q So you remember being deposed in this case?

13 A Uh-huh.

14 Q Yes?

15 A Uh-huh. Yes.

16 Q And you were under oath?

17 A Yes.

18 Q And there was no reason in your deposition that you
19 were -- there wasn't anything that prevented you from telling
20 me the truth?

21 A Correct.

22 Q You remember being asked,

23 "Q "Do these communications, sort of -- well, I
24 guess, if you discuss the parking arrangement in
25 these weekly communications with Dr. Linnerson --



1 A Frequently.

2 Q And what sorts of things have you discussed in
3 these weekly communications about parking?

4 A Whether or not there's enough parking spaced.
5 Whether or not one doctor versus another doctor seems
6 to have more patients, and that's causing some impact
7 on other tenants. Whether or not the parking lot is
8 being kept clean; those kinds of things."

9 Do you remember giving me those answers?

10 A Yes.

11 Q And would it be fair to say that you weekly discussed
12 parking with Dr. Linnerson?

13 A At times, we did; yes.

14 Q Okay. So you told me that you discussed him in
15 weekly communications about parking?

16 A We had weekly communications. It did not come up
17 every week we had conversations about parking. It was only
18 when doctors would have issues about the parking per se.

19 Q Now, with respect to purchasing the building, you
20 talked to Dr. Linnerson, right?

21 A Yes.

22 Q And you communicated with him over 50 times during
23 the course of the transaction, correct?

24 A I didn't count them, but I had many interactions with
25 him; yes.



1 Q All right.

2 MR. CAMPBELL: Let's go to the depo at 19. All
3 right. Blow up line 8 to line 10.

4 BY MR. CAMPBELL:

5 Q You remember being asked in your deposition, "How
6 often do you say you talked to Dr. Linnerson over the course of
7 the transaction?" And your answer was, "50 times"?

8 A I don't remember the question, but it did occur a
9 number of times prior to the close of escrow.

10 Q You were questioned under oath. You told me you had
11 spoken to him 50 times over the course of the transaction,
12 true?

13 A That was my best estimate at the time, I'm sure.

14 Q The deal was finalized in February of 2006?

15 A Correct.

16 Q You remember closing in February of 2006?

17 A Yes.

18 Q Do you remember that in the course of your due
19 diligence, some issues came up about parking?

20 A Yes.

21 Q And you were told that TDMC had a shared parking
22 arrangement with the (indiscernible) for its 40 parking spaces,
23 correct?

24 A Yes.

25 Q And you were told that TDMC had a shared parking



1 arrangement with Holy Spirit Catholic Church, for its parking?

2 A Correct.

3 Q And you were aware that Tempe required 197 parking
4 spots, and you were satisfied by the shared parking
5 arrangements?

6 A Correct.

7 Q Now, in your negotiations, you understand that the
8 doctors also owned this piece of property that we call lot 2?

9 A Yes.

10 Q And the doctors wanted to sell you lot 2, along with
11 lot 1, correct?

12 A Correct.

13 Q But you didn't want to buy it?

14 A Correct.

15 Q Why did you not want to buy it?

16 A My father disapproved.

17 Q And he just -- he didn't want to put that much money
18 in or --

19 A My father had held undeveloped land for 20 years that
20 he couldn't sell, and he didn't want to take that risk again.

21 Q All right. So you understand that the doctors owned
22 this lot, correct?

23 A Yes.

24 Q And they wanted to sell it to you, but you made a
25 conscious and willing decision, no, we're not going to buy it?



1 A Yes.

2 Q And when you made the decision not to buy it, it had
3 a big piece of just ground, and it had this parking lot on its
4 norther and its eastern ends, right?

5 A Correct.

6 Q And you understand you are not buying that parking
7 lot on the north and on the eastern ends?

8 A I understood I wasn't buying the empty lot, but the
9 actual --

10 Q This whole lot was empty, yes?

11 A Yes.

12 Q You were not buying these parking spots on the north
13 side of the lot, true?

14 A I wasn't clear about the parking all that I -- about
15 the situation at all.

16 Q Listen carefully to my question. By buying, I mean,
17 you're not paying money (indiscernible). Okay?

18 A Correct.

19 Q You did not buy this parking lot at the north end of
20 the lot, right?

21 A Correct.

22 Q You did not buy this parking lot at the east end of
23 the lot, true?

24 A Correct.

25 Q And you were fine with that; you didn't want to buy



1 it, true?

2 A Correct.

3 Q Now, at the time you bought lot 1, you were aware
4 that there were no easements that lot 1 had on lot 2?

5 A I didn't know about easements.

6 Q You didn't know about it. Let's go to your
7 deposition on 22 -- page 22.

8 MR. CAMPBELL: Okay. Go to the top. Let's blow up
9 from 1 down to 4.

10 BY MR. CAMPBELL:

11 Q I'm asking you, "Were you aware of any easements on
12 the property when you purchased it?" And you answered the
13 question, "No."

14 A And I see that.

15 Q So I guess the property you purchased was TDMC, and
16 you were aware that lot 2 had no easements on lot 1, right?

17 A Again, I don't really understand the concepts of the
18 easements from what we were looking at.

19 Q When we took your deposition and you were asked this
20 question, you didn't say, I don't understand the concept of an
21 easement; did you?

22 A No, but it is somewhat confusing to me, sir.

23 Q It's confusing?

24 A Yes.

25 Q Okay. You owned an apartment building and 15 units?



1 A Yes.

2 Q You rolled that over into an apartment building much
3 bigger?

4 A Yes.

5 Q And now you're rolling over into a piece of property
6 of 9 million dollars?

7 A Yes.

8 Q You have a broker?

9 A Yes.

10 Q And a lawyer, and you don't understand what an
11 easement is?

12 A Not really.

13 Q At the time you purchased TDMC, lot 1, you were not
14 aware there was even a general plan, true?

15 A Correct.

16 Q And when you bought lot 1, you understand there was
17 no formal agreement with TDMC over parking on lot 2, correct?

18 A When I bought it, that was an agreement -- that was
19 an assumed agreement that we were able to park on the lot that
20 the doctors owned, because that's the way it already -- always
21 been.

22 Q Listen to my question. When you purchased lot 1 --

23 A Uh-huh.

24 Q -- you understood you had no formal agreement to park
25 on lot 2; yes or no?



1 A No.

2 Q You thought you did have a formal agreement?

3 A No, I thought we had an agreement. I didn't know
4 about whether we had a formal or informal agreement. I assumed
5 since the doctors had been parking on the same lot that they
6 owned, that when I bought the building that they would still
7 park in it since they owned the parking still.

8 MR. CAMPBELL: Could you bring up --

9 THE WITNESS: And they were all my tenants.

10 MR. CAMPBELL: Could you bring up page 29 of his
11 deposition? And blow up lines -- actually, blow up line 1
12 through line 22.

13 BY MR. CAMPBELL:

14 Q Now, do you remember giving these answers to these
15 questions, under oath?

16 "Q And then there were parking around lot 2, which
17 is the lot that the Mosque purchased. Okay? A But
18 the arrangement -- the original arrangement, I
19 believe, was between Generations Medical and the
20 parking behind the Mosque not lot 2.

21 Because lot 2, when we bought generations, was
22 owned by TDMC. So there was no need for any kind of
23 agreement, or arrangement, or easement, of any of
24 that kind."

25 Did you give me those answers under oath, sir?



1 A Yes.

2 Q So when -- now, look at me.

3 A Yes.

4 Q When you purchased the lot --

5 A Yes.

6 Q -- you understood you were buying the building and
7 these parking spaces. And you understood that you were not
8 having any arrangement, agreement, or easement over lot 2,
9 correct?

10 A I understood that I was buying lot 1.

11 Q And you under -- well, sir, when I asked you this
12 question -- or when my associate asked you question in the
13 deposition, you said, did you not, "There was no need for any
14 kind of agreement, or arrangement, or easement, or any of that
15 kind over lot 2"?

16 A I'm certain I must have said that.

17 Q And then you were asked, "So there was no reason for
18 TDMC to have an agreement with lot 2 because it owned lot 2",
19 right?

20 A Correct.

21 Q And then you were asked, "Was there a need for you to
22 formalize an agreement with TDMC over parking once you
23 purchased lot 1?" And you answered, "No."

24 A Correct.

25 Q And then you were asked, "You did not have any sort



1 of formal agreement with TDMC over parking on lot 2 when you
2 purchased the medical center?" Answer, "I didn't have any
3 agreement. I didn't, correct."

4 A Okay.

5 Q All right.

6 A Yes, that's correct.

7 Q That's all true, isn't it?

8 A Yes, it's all true.

9 Q All right. What do you want the Judge to do for you
10 in this case?

11 A I want there to be an agreement that runs with my
12 land, which is originally when I purchased it in 2006, what I
13 have 197 spaces -- or whatever's required by the city. And
14 that they -- that the Judge honors that, because that's what
15 the original agreement was. And I didn't change that because
16 of the sale of the empty lot to the Mosque.

17 Q Mr. Davis, you could have purchased those 100
18 -- whatever number of parking spaces exist on lot 2 by just
19 buying the lot, true?

20 A I could have.

21 Q You could have made an arrangement when you bought
22 the property, in agreement, that you had an easement over this
23 property on lot 2, correct?

24 A I didn't believe that I needed anything.

25 Q You told me that you didn't have any sort of formal



1 agreement over parking, right?

2 A Correct.

3 Q And you were fine with that?

4 A Because I was told that the number of parking spaces
5 that were required, that that was -- that we were complying
6 with that requirement in purchasing the medical building; or I
7 wouldn't have bought it.

8 Q You were told that because of the 40 spaces with the
9 Mosque, and the spaces with Holy Spirit Catholic Church, true?

10 A Correct.

11 Q All right. Why don't you sue Mr. Ridberg (phonetic)
12 for fraud if he defrauded you?

13 A I don't understand.

14 Q Who told you that you had sufficient parking with the
15 Mosque or with Holy Spirit Catholic Church, like you testified
16 to in your deposition?

17 A That was established during the due diligence time
18 when my broker investigated the deal and saw that there was
19 some concerns about parking and identified that there was a
20 shared agreement, and that shared agreement complied with the
21 requirements of the city; or I wouldn't have gone forward the
22 sale -- or the purchase.

23 Q So your broker told you, you had sufficient parking
24 at the Mosque and the Holy Spirit Catholic Church, right?

25 A Correct.



1 Q And because your broker told you that, you saw no
2 need to get an easement on lot 2, correct?

3 A I didn't feel a need to do anything other than follow
4 his direct, which was --

5 Q That's correct.

6 A -- that I was complied.

7 Q And you want the Judge to correct for you what your
8 broker told you; is that right?

9 A No.

10 Q You want to go back in time --

11 A I want the original intent of the doctors when they
12 built the building and chose to build Generations Medical and
13 went through the process in 2002 and 2004 to build the building
14 and go through the requirements then, which were the 197
15 spaces. And their intent was to maintain that agreement, and
16 when they told the lot to the Mosque, they didn't choose to
17 undermine the agreement that they had originally established
18 with the city.

19 Q Mr. Davis, you made an agreement with TDMC to buy lot
20 1 and lot 1 only, true?

21 A Correct.

22 Q And you made a -- you specifically told them you
23 didn't want to buy lot 2, true?

24 A Correct.

25 Q And you specifically told them that, at least -- or



1 let me rephrase that. You didn't think at the time you did the
2 purchase that you needed any sort of arrangement with respect
3 to lot 2 and 1, correct?

4 A Correct.

5 Q Now, sir, let's -- at around the time this deal
6 closed -- and I believe it closed on February 5th of 2006; am I
7 right or -- do you remember the date of close?

8 A The close of when Generations Medical -- I think it
9 was February 3rd of 2006; sometime around early February.

10 MR. CAMPBELL: So let's bring up Exhibit number 17.
11 Let's blow it up.

12 BY MR. CAMPBELL:

13 Q So the close on February 3rd -- this is the date of
14 foreclosing, right? Correct?

15 A Uh-huh. Yes.

16 Q And Mr. Lake, that's your lawyer, right?

17 A Correct.

18 Q And he's (indiscernible) to Victoria Longfellow, that
19 is the TDOC's lawyer, right?

20 A Correct.

21 Q And he's sending them a parking easement?

22 A Correct, correct.

23 Q And she's providing -- he says, "I'm providing this
24 to the buyer review; thus, it remains subject to his review."
25 You're the buyer, right?



1 Mosque?

2 "A We used the spaces all over the lots, yes."

3 Q The spaces at the Mosque are these 40 spaces here,
4 correct?

5 A Yes, but I was confused at the time it was actually
6 referring to lot 2.

7 Q Were you in the courtroom when Dr. Linnerson
8 testified he was confused, too, sir?

9 A I believe so.

10 Q Was there some sort of confusion on your side of the
11 case?

12 A No. I think it's difficult between lot 2, and lot 1,
13 and the Mosque, and their parking. But what I --

14 Q Sir, you were asked in your deposition specifically
15 about the parking arrangements of the Mosque --

16 A Uh-huh.

17 Q -- parking arrangements for the church, and you
18 testified that was all you needed. It worked fabulously, it
19 was stellar, it was outstanding, true?

20 A Yes.

21 Q And between 2006 and 2011, you never came to the
22 Mosque and said, I need a written easement to use lot -- or you
23 never came to TDMC and said, I need a written formal
24 arrangement to use lot 2, correct?

25 A Correct.



1 Q You never went to TDMC and said, I want an easement
2 for parking in lot 2, correct?

3 A Correct.

4 Q Now, you said you talked weekly with Dr. Linnerson?

5 A I work -- I talked weekly with either Dr. Linnerson
6 directly, but primarily my contact for the last 12 years was
7 with Karen Slater, who did all the bookkeeping, and did all the
8 accounting, and had to go through me for the approval of any
9 kinds of cost, expenses, et cetera.

10 Q You were in the courtroom when Dr. Linnerson
11 testified, and you talked about how in 2007 he was discussing
12 with Victoria Longfellow that you had no formal arrangement for
13 parking in lot 2; do you remember that testimony?

14 A I do.

15 Q Did he ever tell you that you had no formal
16 arrangement for parking in lot 2?

17 A No, because we used the spaces. No, he never told me
18 that, and I didn't think there was any issue about that because
19 the doctors parked in lot 2 and around lot 2.

20 Q I thought you told me that you were in California and
21 only came over here three or four times a year?

22 A Four times a year for the last 12 years.

23 Q And you're telling me you saw people parking along
24 the east (indiscernible)?

25 A Oh certainly. I have pictures of it.



1 Q Were they produced in this case?

2 A No, but I could provide them.

3 Q You understand discovery has to be provided before we
4 go to trial, sir?

5 A Excuse me.

6 Q Did you ever give pictures to us prior to now, or
7 tell us about pictures you had prior to now about lot 2?

8 A No. No one ever asked me for that.

9 Q No one ever asked you?

10 A No.

11 Q Are you aware in Arizona there's a voluntary
12 obligation to turn over evidence? Do you understand that?

13 A I understand evidence, but I didn't understand that
14 there was any request that when I personally come to inspect my
15 building, I take pictures of my building, I take pictures of
16 the parking. I'm looking for any problems that need to be
17 repaired. I didn't know that --

18 Q Mr. Davis, listen to me. Are you aware that under
19 the Arizona Rules of Civil Procedure, you have an obligation to
20 turn over all evidence to the other side whether it is good
21 evidence or whether it is bad evidence?

22 A I'm not an attorney. I don't know the rules of
23 Arizona's law.

24 Q As I understand what you're testifying right now,
25 there's evidence in this case you have not turned over to us?



1 MR. GLENN: Objection.

2 THE COURT: Overruled.

3 THE WITNESS: I have pictures, as I explained to you,
4 sir, that I take when I come to view my property; which
5 includes the inside and the outside of the property, including
6 the parking lot. And at the time that I take these pictures,
7 there are cars that are parked in the parking lot, including
8 the space that is in lot 2.

9 MR. CAMPBELL: Bring up Exhibit 10 for the doctor.

10 BY MR. CAMPBELL:

11 Q This is -- you understand that there is -- there's a
12 company that overflights all property in Maricopa County once a
13 year and takes pictures?

14 A Okay.

15 Q All right. This is an aerial survey. It's in
16 evidence, and notice there's no cars parked along the east side
17 of the lot; do you see that?

18 A I see that.

19 MR. CAMPBELL: Go to Exhibit 11.

20 BY MR. CAMPBELL:

21 Q This is the next year, 2016; no cars parked on the
22 east side of the lot, true?

23 A On the east side I don't see any cars. I see some on
24 the north and the east.

25 Q During these five years, 2006 to 2011, you had no



1 Q Veronica was work -- Veronica Longfellow -- Victoria
2 Longfellow, was working with Greg Lake on that 2011 easement;
3 do you remember that?

4 A I understand that Linnberg contacted -- Linnberg's
5 lawyer, Victoria Long -- Linnberg's lawyer, Victoria
6 Longfellow, contacted Greg Lake in an effort to try to have
7 this easement signed. But I never hired Greg Lake in 2011. I
8 had no need for him; I wasn't involved in the negotiation, nor
9 did I know there was a negotiation.

10 Q Okay. Let me rephrase it. No one told you in 2011
11 the reciprocal easement was not recorded and filed, correct?

12 A Correct.

13 Q And you never followed up in the slightest, either in
14 2006 or 2011, to find out if a recorded easement had been
15 filed, true?

16 A Correct. Didn't felt that I needed one.

17 Q Because the shared parking at the Mosque and the
18 Catholic church was more than sufficient for your parking
19 needs, true?

20 A It worked, yes.

21 Q So we go five years from 2006 to 2011; four years
22 from 2011 to 2015; and during that whole time, your shared
23 parking agreement with the Mosque and the Catholic church was
24 fabulous, right?

25 A Correct.



1 Q And you were only concerned about the lender?

2 A I was only concerned about the lender?

3 Q Right.

4 A I was concerned about making sure that we had
5 adequate parking that was required by the city, and that the
6 shared agreement was an agreement that was necessary for the
7 city.

8 Q Dr. Davis, this is a letter you wrote on December
9 10th. Do you say anything about the city in that third
10 paragraph?

11 A No.

12 Q In fact, the only reason you're writing the letter is
13 because you're refinancing the loan, correct?

14 A Correct.

15 Q And you want to satisfy the lender; that's all you're
16 worried about?

17 A At this point, correct. Because there was no problem
18 up until that point, with the city or anyone else.

19 Q All right. Well, at least as of December 10th, the
20 city had never cited you for any parking violation, had they?

21 A Correct.

22 Q They had never come to you and say stop your business
23 because you don't own lot 2 or have the parking spaces on lot
24 2, correct?

25 A Correct.



1 A I said I don't know if I did it in an email, sir.

2 Q Okay. We have no email that you ever communicated to
3 the lender that the mosque could give you a ten-year lease?

4 A I didn't provide you with telephone conversations
5 that I had with their attorney and there were many, many
6 telephone conversations back and forth with the attorney for
7 the lender.

8 Q Sir, in your Rule 26.1 statement -- you understand
9 what a Rule 26.1 statement is?

10 A No, sir.

11 Q Okay. That's a statement you're required under the
12 Arizona Rules of Civil Procedure to give us that tells us your
13 theory of the case and all the facts good and bad with respect
14 to your case. Does that ring a bell?

15 A No, not necessarily.

16 Q Did you ever tell us in a Rule 26.1 statement that
17 the lender would not take a ten-year lease, to your
18 recollection?

19 A I don't recall.

20 THE COURT: Mr. Campbell, would this be a good time
21 for the afternoon recess?

22 MR. CAMPBELL: Yes, sir.

23 THE COURT: All right. We'll take the afternoon
24 recess at this time.

25 THE CLERK: All rise.



1 (Recess at 2:45 p.m., recommencing at 3:11 p.m.)

2 THE COURT: We're back on the record in CV 2016-
3 091847, Moonshadow Properties, LLC v. Masjid Omar Ibn Al-
4 Khattab. This is the continued trial. The record will reflect
5 the continued presence of counsel and the parties. Sorry for
6 the delay. There was an issue that came up in another case.

7 MR. CAMPBELL: Understood, Judge.

8 BY MR. CAMPBELL:

9 Q When we broke, we were talking about this American
10 company and your problems with getting a loan from them. You
11 were able to go to another lender and get a loan, correct?

12 A Yes.

13 Q And that was Wells Fargo?

14 A Correct.

15 Q And they gave you a business loan for \$5 million-
16 500,000?

17 A Correct.

18 Q And the loan date was January 26th, 2016?

19 A Correct.

20 Q And it matures in five years on February 5th, 2021?

21 A Correct.

22 Q So we're now what, nearly two and a half years into
23 the loan?

24 A Correct.

25 Q And they have never required any sort of parking lot?



1 A They required that I get it cleaned up. That was a
2 verbal agreement I made with the person that gave me the loan.

3 Q You say a verbal agreement?

4 A Yes.

5 Q As you understand, we subpoenaed all the Wells Fargo
6 records?

7 A I did know that.

8 Q All right. Well, this is Exhibit number 84. That's
9 your Wells Fargo business loan, right?

10 A Yes.

11 Q And attached to it, we asked them for all emails. If
12 you look through that exhibit, they gave us all your emails.
13 You see those?

14 A Um-hum.

15 Q That's a yes?

16 A Yes, I see emails with a banker, yes.

17 MR. CAMPBELL: I would move 84 into evidence, Your
18 Honor.

19 MR. GLENN: Your Honor. Objection in terms that they
20 are personal financial information.

21 BY MR. CAMPBELL:

22 Q Actually, I don't -- this document consists of your
23 business loan agreement and the emails, right?

24 A Yes.

25 Q Your application with your personal financial



1 information is not in that exhibit, is it?

2 A I would prefer my attorney to look that over and
3 decide that.

4 MR. GLENN: It looks like there's account numbers and
5 other things in here.

6 MR. CAMPBELL: Judge, I don't mind submitting it
7 under seal. It's a bench trial.

8 THE COURT: All right. Any objection to that?

9 MR. GLENN: Under seal is fine with us.

10 THE COURT: All right. So Exhibit 84 is admitted but
11 it will be filed under seal because of the personal financial
12 information contained in.

13 (Defendant's Exhibit 84 Received)

14 MR. CAMPBELL: Thank you.

15 BY MR. CAMPBELL:

16 Q You can hold on to that for the time being. There is
17 nothing in the terms of the agreement itself that require you
18 to do anything (indiscernible), right?

19 A Nothing written, correct.

20 Q Nothing written. And there's no email that was sent
21 to you by the bank -- that you sent to the bank that talks
22 about parking, right?

23 A I haven't looked through all these emails.

24 Q Well, why don't you take a moment and look at them?

25 A Okay.



1 (Pause)

2 THE WITNESS: It's got (indiscernible) information in
3 here so.

4 BY MR. CAMPBELL:

5 Q (Indiscernible).

6 A No, I don't see anything in there about parking.

7 Q Okay. But it's your testimony under oath that the
8 bank gave you five and a half million dollars and has an oral
9 promise for you to clean up the parking lot?

10 A Correct.

11 Q So let's talk about where we are today.

12 (Indiscernible) Well, first of all, we filed a lawsuit in this
13 case in March of 2016, right?

14 A Yes.

15 Q All right. And in this lawsuit, even though you've
16 owned the property since 2006, the first time you ever claimed
17 an implied easement in equity in lot 2 was in this lawsuit
18 filed in 2016, correct?

19 A I'm not sure I understand the question

20 Q The first time you ever told anyone that you were
21 claiming an implied easement in equity on lot 2 was when you
22 filed this lawsuit in March of 2016, true?

23 A Correct.

24 Q And the first time you ever told anyone that you
25 believe you have an easement by reason of a general is when you



1 filed this lawsuit in March of 2016, true?

2 A I don't understand the technical term that you just
3 used, sir.

4 Q That's fine. If you don't understand it, I'll take
5 it out. So as of today, August 2018, TDMC is still open?

6 A No. TDMC was a corporation that owned Generations.

7 Q Generations Medical --

8 A Correct

9 Q -- is still open, right?

10 A Generations Medical is open.

11 Q Fully leased up?

12 A Yes, sir.

13 Q Making money on it through your monthly rentals?

14 A They're paying me rent, that's all I care.

15 Q Your people park on lot 1?

16 A They park on lot 1. They park on lot 2.

17 Q Actually, the mosque has put up no trespassing signs
18 in lot 2; are you aware of that?

19 A No. I've never seen that.

20 Q The mosque mark each of its parking spot with the
21 name of the mosque. You're not aware of that?

22 A I saw that recently, but I didn't see something that
23 said no trespassing, sir.

24 Q You didn't see that?

25 A No, sir.



1 Q Do you have any knowledge that anyone from your
2 medical building is parking in the mosque lot on
3 (indiscernible)?

4 A I would assume they are.

5 Q You would assume they are?

6 A Correct.

7 Q But you don't know?

8 A Well, when I was there on my last visit, which I
9 think was about four months ago, I saw cars from my medical
10 building parked on those spaces.

11 Q All right. The City has not come in and shut you
12 down?

13 A No, sir.

14 Q The City has not even cited you for a building
15 violation?

16 A That's correct.

17 Q You have not sought a variance to reduce your parking
18 from the City?

19 A That's correct.

20 Q And you have done nothing to build a parking
21 structure that would take care of all your parking needs on
22 your property?

23 A I didn't believe I needed to do that.

24 Q All right. And the City is not forcing you to do it
25 either, true?



1 MR. CAMPBELL: We can, Your Honor.

2 MR. GLENN: Yes, Your Honor.

3 THE COURT: Okay. Mr. Glenn?

4 PLAINTIFF'S CLOSING ARGUMENT

5 MR. GLENN: Your Honor, in the opening statement I
6 made a couple of points. I explained the elements of an
7 implied easement, and explained that the facts regarding an
8 implied easement, or facts that are undisputed, they exist.
9 There's nothing we can do about it. But that you would hear a
10 lot of evidence about what happened after that, which is
11 entirely irrelevant to what an implied easement is, and whether
12 an easement is implied.

13 So what is an implied -- what's the purpose of an
14 implied easement? Pursuant to the Restatement (Third) of
15 Property Servitudes, section 2.12 comment a:

16 "If the transaction splitting the ownership is
17 properly handled the conveyances will spell out the
18 rights of each of the new parcels to use these
19 facilities. However, transactions are not always
20 properly handled, and all too often, a conveyance
21 severing the ownership is silent on the question
22 whether the new parcel is entitled to continue the
23 use of the other parcel for access, utilities, and
24 the likes."

25 The rules stated in this section is not based solely



1 on the presumed actual intent of the parties. It furthers the
2 policy of protecting reasonable expectations, as well as,
3 actual intent of the parties to the land transaction. It also
4 promotes efficient use of resources by avoiding the unnecessary
5 costs that would be involved in reestablishing entitlements to
6 make the prior uses for duplicating the facility.

7 So you heard lots of comments about why Moonshadow
8 should be blaming somebody else. Blame or fault is completely
9 irrelevant to an implied easement by prior use. You won't find
10 that element anywhere. You won't find that factor anywhere.
11 It's not in any case log, because it doesn't exist. Because
12 the rule exists for this very reason, that an easement gets
13 overlooked, it doesn't get reported, for whatever reason, it
14 doesn't happen. And there's two things you look at. What is
15 the intent of the parties, and there's the policy of promoting
16 efficient use of resources, avoiding unnecessary costs that
17 would be involved in reestablishing entitlement, make prior
18 uses, or duplicating the facilities.

19 We heard lots of suggestions that my client should
20 spend hundreds of thousands of dollars and engineer, design,
21 and build a parking deck on the parking lot. That my client
22 should appeal all the way to the Supreme Court of the US to get
23 a variance if the City of Tempe is unwilling to grant a
24 variance. If none of those things have anything to do with an
25 easement, and actually make the point that we are making.



1 So what are the elements of an implied easement?
2 Arizona recognizes that when they acquire an interest in land
3 by means of implied easement, the essential elements of an
4 implied easement are, the existence of a single track of land
5 so arranged that one portion of it derives benefit from the
6 other. In this case, TDMC, it's undisputed, owned both of
7 these lots as of 2003. It's undisputed that Lot 1 was
8 benefited by the vacant lot and its parking. And that was
9 consistent from 2004 when it was paved to 2006 through the
10 present; the division thereof by a single owner into two or
11 more parcels and a separation of title. TDMC, same owner, sold
12 to Moonshadow. That conveyance separated title. Before the
13 separation occurs the use must have been long continued obvious
14 or manifested to a degree which shows permanency.

15 This construction of a parking lot in and of itself
16 shows that it was **intended** to be permanent. Dr. Linnerson
17 testified that it was **intended** to be permanent. It was used --
18 it was built and used for approximately two years before the
19 property -- before Lot 1 was sold to Moonshadow. **Dr. Linnerson**
20 **testified, when he was asked did you intend that Moonshadow**
21 **have an easement to continue using the parking on Lot 2.** His
22 answer was absolutely. And he didn't just make this up out of
23 the air. We've got emails from Victoria Longfellow saying that
24 Dr. Linnerson signed the reciprocal parking agreement. I have
25 concerns about it, but he signed it. I understand the parties



1 are going to work together harmoniously in the future if there
2 are changes that need to be made.

3 The use of the claim easement must be essential to
4 the beneficial enjoyment of the parcel in the event. We've
5 heard the undisputed testimony from both Ryan Levesque and
6 Diana Kaminski from the city of Tempe that the use of this
7 parking by Lot 1 on Lot 2 is essential to comply with City of
8 Tempe requirements. And that that has happened since 2004
9 continuously through the present. That testimony was -- that
10 was same condition existed in February of 2006 when Moonshadow
11 purchased the property. And that case file was Koestel v.
12 Buena Vista, 138 Arizona 578. And then the necessity must
13 exist at the time of the conveyance. And that's People v.
14 Cook, 153 Arizona 246.

15 And at the time of the conveyance, February of 2006,
16 all those elements existed and they're all undisputed, all.
17 All this information and argument about what happened
18 afterwards, who told what, 2011, who said what in 2015, are
19 absolutely irrelevant, because the time that matters is the
20 time of the conveyance, when separation of titles occurs. And
21 those elements are all undisputed.

22 Next, it is the general rule, however, that creation
23 of an easement by implication from a pre-existing use is not
24 require an absolute, but only a reasonable necessity such as
25 will contribute to the convenient enjoyment of the property



1 other than a mere temporary convenience. This is not a
2 temporary convenience. It's reasonably necessary for the
3 property. We've heard the testimony from the city of Tempe
4 regarding their requirements. And this use of the parking on
5 Lot 2 is necessary for Lot 1's compliance of the City of Tempe
6 parking. And, in fact, it has been in compliance since 2004.
7 This is not a temporary convenience.

8 And we've heard lots of argument about absolute
9 necessity. Well, don't you have other options? Can't you
10 spend hundreds of thousands of dollars to build a parking
11 structure? Can't you go appeal the City of Tempe and get a
12 variance even though every variance has been rejected in
13 association with this lot? Shouldn't you do all those things?
14 It's not required. There's no requirement to do all those
15 things, because it's not an absolute necessity that's required.
16 It's only a reasonable necessity. And if you go back again to
17 what the restatement says about the whole purpose, it's to
18 avoid duplicating those efforts and avoid unnecessary costs
19 when you've got a preexisting use. So everything that happens
20 after February 6th -- after February 3rd, 2006, largely
21 irrelevant.

22 Next, the creation of easements by implication is an
23 attempt to infer the intention of the parties to a conveyance
24 of land. And an implied easement is based on the theory that
25 whenever one conveys property, he includes or intends to



1 include in the conveyance whatever is necessary for its
2 beneficial use and equipment. Whether an easement arrives by
3 implication depends on the intent of the parties. We've heard
4 uncontested testimony from Dr. Linnerson that he intended that
5 the property maintain compliance. We've heard uncontested
6 testimony from Dr. Linnerson saying that he intended for an
7 easement to continue to allow the use there. We've heard
8 testimony from Dr. Davis saying that it was his intent, that he
9 signed a reciprocal parking easement. And that's precisely the
10 situation why an implied easement exists as a matter of law,
11 because things happen. It didn't get recorded. Nobody could
12 find the signed document, but we know it was signed. We've got
13 email from Victoria Longfellow from that time period saying
14 that he signed it.

15 He also testified that he certainly didn't mean to --
16 had no intent to convey property and at that same time somehow
17 affects it's compliance with the City of Tempe parking
18 requirements and that he intended for the property to comply
19 with them. You want to look at other evidence of intent when
20 Linnberg went to go develop the property, Dr. Linnerson
21 testified, hey, we looked into it. We saw, and we remembered
22 that we had already allocated all the parking at Lot 2.

23 If that had not been their intent, they would have
24 been fighting and saying, hey, no. We're developing whatever
25 we want on here. There's no right to use this parking, but



1 they didn't. They said, we can't build what we want on it
2 because we've already allocated that parking and so we're not
3 going to build because we don't want -- what we want to build
4 can't be done. If the self-interest of the people involved is
5 not good evidence of what their **intent** is, and when they act
6 contrary to their self-interest and say, hey, we can't develop
7 this because we've already given away these parking spots, I
8 don't know what's better evidence.

9 Now, comment B to the Restatement of Third Property
10 Servitudes 2.2 states, "That a parcel who's severance gets
11 raised to creation of servitude is usually a single parcel
12 under a single ownership, however, two or more parcels may have
13 been united in a single ownership, in which case the same rule
14 applies when they are severed again."

15 The Defendant has argues that they -- these weren't
16 originally owned. That they were purchased by TDMC in two
17 separate transactions. Comment B says it doesn't matter. As
18 long as they're both owned by the same property owner at the
19 same time, the rule still applies.

20 Now, there's been some comments about whether the use
21 of the parking on Lot 2 have been consistent, whether it's just
22 only from time to time has been used. Illustration in 3 of the
23 Restatement section 2.12 states as follows,

24 "O, the owner of black acre built a rock road through
25 the length of black acre. The road was used



1 intermittently while O was blocking black acre. O
2 later subdivided black acre into four parcels. The
3 parcels were not landlocked, but alternative access
4 would have been expensive to construct. The logging
5 road ran through all four parcels connecting them to
6 a public highway abiding the fourth parcel. O
7 conveyed the first two parcels without mention of an
8 easement. Implications of an easements to use the
9 existing road would be justified even though the
10 prior use of the road was intermittent. The prior
11 use was neither temporary nor casual."

12 So intermittent use is completely adequate. They
13 don't have to use all those parking spaces every day for it to
14 be satisfied. The other point that this example makes was this
15 was a rough road that was built. Maybe somebody took a grader
16 out there and graded a rough road, didn't put much expense into
17 it. Here we're talking about engineered and built out parking
18 lot. **Again, showing the intent that TDMC intended for it to be**
19 **permanent.** This was not a temporary or casual use. And the
20 temporary or casual use I would not consider compliance with
21 the City of Tempe zoning requirements as temporary or causal.
22 That's an absolute requirement -- absolute requirement to
23 comply with the law.

24 Now, an easement implied by map or plan. Restatement
25 Third of Property section 2.13 states,



1 "That in conveyance or contract to convey in an
2 estate or land, description of the land conveyed by
3 reference to a map or boundary may imply creation of
4 a servitude. If the grantor has the power to create
5 the servitude and if a different intent is not
6 expressed or implied by the circumstances."

7 We know that a different intent was not implied,
8 because in this case, this was the intent. Dr. Linnerson
9 testified it was. He signed a reciprocal parking easement that
10 would have indicated the same thing. And the third amended
11 general plan specifically sets out that those parking spaces
12 were allocated to Lot 1. The circumstances, description of the
13 land conveyed that refers to a plat or map showing street ways
14 are open space (indiscernible) or other areas for common use or
15 benefits implies creation of fortitude restricting use of the
16 land on the map to the indicate uses to description of the land
17 conveyed that used a street or other way as a boundary implied
18 at the conveyance includes an easement to use the street
19 another way. Only a clear statement that the developer retains
20 the right to deviate from the uses shown on the map will
21 ordinarily be sufficient to prevent implication of servitude
22 under the rules stated in this section.

23 There is nothing on the third amended general plan
24 that indicates that TDMC reserved a right to change their mind
25 about how the property would redevelop. There's been some



1 arguments or insinuations that it's got to be plat. It can't
2 be a map. And in this case, it's a third amended general plan.
3 And let's move on to the next.

4 Section 2.14, again this is by map or plan, but it's
5 under a separate theory.

6 "Unless the facts or circumstances indicate a
7 contrary intent, conveyance of land pursuant to a
8 general plan of development."

9 In this case we have a general plan of development.
10 Implies the creation of servitudes as follows.

11 "2, implied burdens: language or condition that
12 creates a restriction or other obligation in order to
13 implement the general plan creates an implied
14 servitude imposing the same restriction or other
15 obligation."

16 The third amended general plan, which is obviously a
17 general plan development -- it says it is. Has language in
18 there indicating that Lot 1 has specific allocation of parking
19 spaces and Lot 2 has a specific allocation of parking spaces
20 and Lot 3 has a specific allocation of parking spaces. 2A
21 applies and there is an implied easement by map.

22 2B does not apply. And we'll show why. The argument
23 is is that the defendant argues that it would be in just to
24 allow an implied easement by map or plan based on 2B. But the
25 comments to the restatement show that this does not apply.



1 Section 2A refers to circumstances involving a
2 recorded general plan or decoration. 2B refers to situations
3 for the servitude is only referenced in the conveyance deed.
4 Where a general plan of development is recorded only section 2A
5 applies. Comment D to section 2.14 explains,

6 "Implication of a servitude under subsection 2A is
7 subjected to the lesser standard of subsection 1
8 rather than the injustice standard of subsection 2B,
9 because the circumstances giving rise to the
10 implication of the servitude under subsection 2A
11 clearly established that the parties intended to
12 burden the land with restriction. Like the cases
13 covered by subsection 1, impact of the permitted
14 implication is to grant additional parties the right
15 to enforce the restrictions. Unlike the cases
16 covered by subsection 2B the result is to not create
17 restrictions where the parties may not have intended
18 any."

19 So section 2A applies because we have a reported
20 general plan of development. There's no uncertainty that you
21 might get, if a developer was deeding property to different
22 people and in the deed says, oh, by the way, there's a
23 restriction on your lot. There's a restriction on your lot. I
24 forgot to put a restriction in this lot. I forgot to put a
25 restriction in this lot. And the restatement says there



1 there's a higher burden because you don't know if they're
2 trying to impose certain restrictions on some or if it's
3 supposed to be on all and there's too many fact questions. So
4 you've got to have a higher burden to prove it in that case.
5 Where we have a reported general plan of development, that
6 higher burden is not required.

7 Comment F of section 2.14 explains,

8 "In most cases the existence of the general plan is
9 clear. If the land is subdivided according to a
10 recorded plat and servitudes are imposed on each lot
11 whether by separation, restrictions in the plat, or
12 substantially similar restrictions in each deed, the
13 conclusion that a development occurred pursuant to a
14 general plan is easily reached. If difficult cases
15 involve subdivisions without a recorded plat or
16 without substantial uniform deed research."

17 Here we have a recorded general plan of development.

18 **There's no question as to what was intended because it's**
19 **recorded.** Under the Federoff case -- Federof v. Pioneer Title
20 at 166 Arizona 383, it says,

21 "Under the rules of constructive notices a successor
22 in interest is charged with notice of any equitable
23 covenant that is properly recorded in a prior
24 instrument in for which the successor is required to
25 search."



1 We know the recorded -- the third amended general
2 plan of development was recorded in February of 2004. The
3 Mosque did not purchase until 2011. We know the Mosque
4 received notice of this. They received a copy of this pursuant
5 to the schedule of acceptance. They accepted a warranty deed
6 accepting a third amended general plan of development. They
7 accepted a commitment with that accepted as well. And we know
8 as Diane Kaminski, from the City of Tempe testified, she warned
9 the Mosque. She had multiple conversations and emails from Mr.
10 Zubair, wherein she warned him that the property was limited
11 and specifically identified and explained the details of that
12 limitation. Not just that there was a third amended general
13 recorded plan of development, go look at it, and figure out
14 what you need to do. She said, look, your lot is limited to
15 nine spaces. You can't develop anything on it, unless you get
16 some sort of easement, or resolve something with Moonshadow.
17 And she warned him. Specifically said, I don't want you to go
18 -- I want to make sure you're all right, before you go forward
19 with this transaction, because I don't want it to result in a
20 bad situation. And the Mosque ignored her, and went forward
21 and closed the transaction.

22 We saw the documents from Kathy Covert, the escrow
23 officer. Wherein, the parties extended escrow multiple times
24 and said, let's get a reciprocal parking agreement. And the
25 Mosque knew that they needed one to be able to develop something



1 of -- I mean they can still develop their lot. They can build a
2 2,200 square foot office building that can use up to nine
3 parking spaces. But if they want to do something bigger, they
4 have to have something else, to get additional parking.

5 They knew that. They knew that when they were
6 purchasing the property. It was a matter of record. It was
7 provided to them. They had actual notice in detail and they
8 chose to waive that, as a condition of closing. And they closed
9 escrow, and took a warranty deed, subject to that specific
10 question. And now the Mosque wants you to say, no. They want a
11 ruling from the Court that says, no, we know we purchased a lot
12 that only had nine space available to it. We know that we
13 purchased a lot that we could not build a community hall on,
14 like we wanted to. We knew all that. But we want the Court to
15 say, no, all that is wrong, we can build whatever we want, and
16 we can restrict anybody from using those parking spaces.

17 Next, the Mosque has put forward the argument that
18 somehow *laches* should bar the -- should bar the relief
19 requested. And there's two reasons why this doesn't apply, is
20 because an easement implied by prior use is looked at as of the
21 -- as of the date of severance of filing. As of February 3rd,
22 2006, were those elements satisfied? If so, an implied easement
23 existed as of that day. We're not asking the Court to create an
24 easement that doesn't already exist. We're not asking the Court
25 to give something that doesn't already exist. All we're asking



1 for the Court is to confirm that as of February 3rd, 2006,
2 Moonshadow had an easement implied by prior use or by map or
3 plan, based on the fact that -- based on the prior use, based on
4 the intent of the parties, based on recorded documents, based on
5 the requirements of the City of Tempe. So the argument that
6 somehow *laches* precludes this doesn't apply because we're
7 talking about something that incurred in 2006, and that's the
8 time period that we're looking at.

9 But up the line, *laches* says "Equity, however, does
10 not encourage *laches*, and the doctrine may not be invoked to
11 defeat justice, only to prevent injustice. Mere delaying in
12 pursuing a claim is not enough to establish *laches*. And this is
13 Crodgy (phonetic) v. Town of Quartzsite, 231 Arizona, 431. A
14 Defendant must not only prove that a Defendant's delay
15 prejudiced the Defendant, the Court, or the public, but also
16 that Plaintiff acted unreasonably. *Laches* is a question not
17 merely of running up time, but also of the intervening change of
18 position of one of the parties, induced by the inaction of a
19 party against whom the Defense is raised. And that last case is
20 Elek (phonetic) v. Superior Court, 92 Arizona 247. What we know
21 is the Mosque had prior notice. They did not change their
22 position. They didn't rely on anything. They knew they had
23 knowledge -- actual implied recorded, that their ability to
24 develop the lot was limited. They did not change their position
25 in reliance on the lack of some sort of -- on the lack of the



1 existence of an easement. They knew that this situation was out
2 there, and they chose to waive it and move forward.

3 *Laches* requires a lack of diligence on the part of the
4 Plaintiff and injury or prejudice to the Defendant, due to lack
5 of such diligence. There has been no evidence that there's been
6 any injury to the Mosque. The Mosque did not present any kind
7 of witness, they didn't present any evidence of prejudice or
8 injury. Therefore, there's nothing upon which the defense of
9 *Laches*, can be based.

10 Furthermore, the idea that there must have been --
11 that that Plaintiff must have acted unreasonably, we've seen the
12 evidence. Every time that Moonshadow has been asked to execute
13 a reciprocal easement agreement, they've complied. They've done
14 what was necessary. They haven't objected, they haven't fought,
15 they haven't been unreasonable. There's been no unreasonable
16 conduct that has been identified.

17 The last defense that has been asserted by the
18 Defendant is unclean hands. The law in unclean hands. In
19 determining the applicability of the clean hands doctrine, it is
20 a moral intent for the party seeking relief, and not the actual
21 injury done that is controlling. That's Weiner v. Romney, 94
22 Arizona 40. The misconduct which will deprive a party of
23 equitable relief must be willful. There's been no evidence of
24 any willful or unclean hands, bad conduct of anybody. It should
25 be noted that for the doctrine of clean hands to apply to bar a



1 claim, it is necessary that the act of unconscionable conduct on
2 the part of Plaintiff related to the very activity that is the
3 basis of this claim.

4 In other words, you would have to find that in the
5 purchase in February of 2006, from which the implied easement
6 arises, that there was unconscionable conduct on the part of the
7 Plaintiff. There's been no evidence. In fact, the rule does
8 not go so far as to prohibit a court of equity from giving its
9 aid to a bad or faithless man, or a criminal. Smith vs. Ely, 93
10 Arizona 291. If he is not guilty of inequitable conduct for the
11 Defendant in that transaction, his hands are as clean as the
12 Court can require. Again, there's been no evidence of unclean
13 hands and unconscionable conduct.

14 And although perhaps the attorney might get you to be
15 confused about various parking agreements, and what their legal
16 effect is, what cannot be confused are matters of record,
17 contemporaneous emails, regarding what the parties did. We've
18 got all of that evidence that indicates, again, undisputed.
19 TDMC on both of these, in 2003 and in 2004, when they sold to
20 the medical center. Undisputed evidence that lot 1 was using
21 the parking on Lot 2, to comply with City of Tempe parking
22 requirements, and that was a matter of record. **Undisputed that**
23 **the intent would be permanent. And in fact, we've got evidence**
24 **from both of the parties to that transaction that that was their**
25 **intent.** Not something that they made up after the fact. But



1 emails from 2006 when this transaction occurred, that the
2 parties were executing an easement agreement. And it didn't get
3 recorded. And that's precisely why the law exists, on implied
4 easements by prior use. Because easements don't always get
5 recorded, and people don't always think about easements and the
6 law implies that a prior use will carry on to the new owner when
7 that property is severed. So we know it's undisputed that when
8 they sold it, they were the single owner in both of these lots.
9 **It was intended to be permanent. It was not intended to be**
10 **temporary. We know the intent of the parties** and the law has
11 the specific purpose of not requiring parties to incur expenses
12 that they shouldn't have to incur, based on a prior use. They
13 shouldn't have to build a parking deck. They shouldn't have to
14 appeal to the Supreme Court for parking variances.

15 And the rule specifically says that. And for those
16 reasons, we ask that the Court grant the relief requested by
17 Moonshadow and confirm that an implied easement existed as of
18 February 3rd, 2006. Thank you.

19 THE COURT: Thank you. Mr. Campbell?

20 MR. CAMPBELL: Judge, we filed a trial brief and we
21 just have a extra copy of it for you. This was filed. May I
22 approach?

23 THE COURT: Yeah, I have seen this.

24 MR. CAMPBELL: Judge, this is the first time I've
25 been called a crafty lawyer. And when he says that the facts



1 Tempe because they were all rejected. And if you recall, all
2 of these agreements, the 2002 agreement, the agreements with
3 the Catholic Church were submitted time and time again, by TDMC
4 to get a variance using those as a means of satisfying the
5 required parking and the City of Tempe rejected them. They
6 were all rejected or withdrawn. And ultimately they purchased
7 this lot and allocated those spaces to the use of Lot 1.

8 **What was the intent of the parties? Exactly what**
9 **they did.** There's a suggestion that somehow the parties
10 should have known better, or that they knew that an easement
11 wasn't recorded in 2006. And they're somehow lying or
12 misrepresenting to the Court that they didn't know that this
13 wasn't recorded. Yet we know in 2007 there were emails on the
14 Linnberg side saying, hey, wait a minute, we can't find that
15 easement anywhere. Did it not get recorded? Complete
16 surprise.

17 We heard the unequivocal testimony of the City of
18 Tempe indicating that these parking spaces were allocated to
19 the use of Lot 1. They've been allocated to the use of Lot 1
20 since 2004. That was that City of Tempe approved and required.
21 They required it in 2004, they required it in 2006, when the
22 property was sold. It requires it today, and those City of
23 Tempe parking requirements are met to this day because of the
24 allocation of those parking spaces.

25 Again, we heard argument that Dr. Davis doesn't want



1 to spend money. He doesn't want to go spend hundreds of
2 thousands of dollars on a parking structure. He hasn't applied
3 for a variance, even though he's seen documents, multiple
4 applications to the City of Tempe that have been rejected and
5 wouldn't work anyway, but it doesn't matter. Because none of
6 those efforts are required for an implied easement by prior
7 use. Reasonable necessity only. You don't have to prove
8 absolute necessity. And the specific of the -- the specific
9 purpose, if you go back to Comment A, of the restatement 2.12,
10 the specific purpose is people mess up. They don't record
11 easements when they should record them. And as a result, we're
12 going to imply what the parties intended, or what should have
13 been intended, or reasonably expected, that the prior use would
14 continue. There's no evidence anywhere that the parties, as of
15 February 3rd, 2006, intended to change this situation. There
16 is no amended general plan saying we're going to reallocate
17 these parking spaces now that this property is going to be
18 sold. Everything, all the evidence indicates that that will
19 continue. Nothing indicating a contrary intent.

20 Your Honor, the facts are absolutely clear. What
21 occurred in February of 2006, what was intended, what existed,
22 what was matters of record. We know that the Mosque has not
23 been damaged. They got what they -- they got what they bought,
24 what they knew they were buying. And their deed took
25 specifically subject to those restrictions. They received a



1 title commitment subject to those exceptions. There was a
2 recorded third amended general plan of development, as a matter
3 of law, that they take subject to, because it was recorded.

4 And the facts for an implied easement by prior use
5 are just undisputed. And you've heard lots of argument about a
6 lot of other things that aren't relevant. And for that reason,
7 we ask that the Court grant the judgment that Moonshadow is
8 requesting. Thank you.

9 THE COURT: All right. Thank you. Let's have the
10 Clerk read the exhibits that have been admitted, just to make
11 sure that there haven't been any that have been inadvertently
12 overlooked.

13 THE CLERK: Exhibit 1, 3 through 6, 8 through 21, 23,
14 24, 27 through 34, 37, 40, 42 through 44, 45, 48, 51, 53, 56,
15 58, 60, 61, 67, 69, 70, 74, 76, 77, 79, 84, 86, 91, 97 through
16 104, and 107 through 109.

17 THE COURT: So is that all of them? That's
18 everything?

19 MR. CAMPBELL: I think so, Your Honor.

20 THE COURT: Okay. I'll take this under advisement
21 and rule as soon as I can. Anything else?

22 MR. GLENN: No, Your Honor.

23 THE COURT: Thank you.

24 THE BAILIFF: All rise.

25 (Proceedings concluded at 4:31 p.m.)



CERTIFICATE

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eScribers has a current transcription contract with the Maricopa County Superior Court under contract # 13010-001, as such, eScribers is an "authorized Transcriber"

I, Karen Raile, Linda Ferrara, Rebecca Gosnell, Nicole Ferguson a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the electronic sound recording provided by Natalie Rodriguez in the above-entitled matter, to the best of my professional skills and abilities. The chain of custody was not preserved with respect to the original audio recording of the proceeding.

/s/

KAREN RAILE
Transcriber

November 28, 2018

/s/

LINDA FERRARA
Transcriber

November 28, 2018



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/s/

NICOLE FERGUSON
Transcriber

November 28, 2018

/s/

NICOLE HORTON-ELLIS
Transcriber

November 28, 2018



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

MOONSHADOW PROPERTIES L L C,)
)
Plaintiff,) CASE NO. CV2016-091847
)
v.)
)
MASJID OMAR IBN AL-KHATTAB,)
)
et al.,)
)
Defendants.)
_____)

Maricopa County Superior Court
Phoenix, Arizona

BEFORE THE HONORABLE DANIEL J. KILEY
SUPERIOR COURT JUDGE

TRANSCRIPT RE: ORAL ARGUMENT ON MOTIONS
October 3, 2019
10:11 a.m.

TRANSCRIPT PREPARED BY:
VERBATIM REPORTING & TRANSCRIPTION, LLC

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A P P E A R A N C E S

On Behalf of the Plaintiff:

Robert A. Mandel, Esq.
Joseph James Glenn, Esq.
Mandel Young, PLC
2390 East Camelback Road, Suite 318
Phoenix, Arizona 85016

On Behalf of the Defendants:

Joshua D. Bendor, Esq.
Osborn Maledon
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012

1 and explain what they actually understood the deal to be.
2 They chose not to do that. I think the wrong party is getting
3 punished for the fact that the mosque got a very bad deal.
4 Thank you.

5 THE COURT: All right. You indicated in your
6 filings that you've made the argument that Lot 2 was
7 undevelopable because of emergency vehicles can't get access,
8 and that factors into the implied easement analysis. That was
9 not addressed in the joint pretrial statement, was it?

10 MR. MANDEL: No, it wasn't, Your Honor.

11 THE COURT: So why wouldn't that be waived?

12 MR. MANDEL: Well, Your Honor, I mean, if Your Honor
13 chooses to waive it -- I think that, if an issue of that
14 importance comes up during the trial itself -- it's not a
15 matter, Your Honor, for example, motion practice during the
16 course of the trial, where a trial attorney raises an issue
17 the first time. This is an issue in which actual sworn
18 evidence has been presented to the Court that goes directly to
19 the elements of the claim that's being adjudicated. And I do
20 not believe that the Court, under those circumstances, is at
21 liberty to just disregard an element of that importance.

22 I mean, I think Your Honor is certainly right that
23 it wasn't raised before, and I conceded that before I even
24 made the point today. But it is in the record. It's not
25 uncommon for courts to deem pleadings amended to conform to

1 it was happening.

2 But the fact is that it did happen, it's in the
3 record, we appraised it. And it would be malpractice for me,
4 as counsel on post-judgment motions, to not put the issue into
5 the papers, as well as on appeal, if an appeal is necessary.
6 It's just clear evidence established during the trial.

7 And Your Honor, this will not be the first case that
8 I've taken up on appeal where evidence was developed in the
9 course of the trial that nobody knew about until the trial;
10 and, therefore, could not have gone into the joint pretrial
11 order. Now I appreciate the importance of having a joint
12 pretrial order and what it's intended to do, which is to
13 narrow the issues for trial to those that are most legitimate
14 and colorable. But here we have testimony that is -- I think
15 Your Honor would agree -- unquestionably important and
16 unequivocal.

17 THE COURT: Mr. Bendor said there were no pretrial
18 disclosures about that issue. Do you dispute that?

19 MR. MANDEL: I do not, Your Honor.

20 MR. BENDOR: Your Honor, if I may, I would like a
21 moment to --

22 THE COURT: No. Thank you.

23 Mr. Mandel, you did not make any response to the
24 request for attorneys' fees and the amount of the attorneys'
25 fees requested. Is there anything you have to say about that?

1 implied easement would ever be recognized in favor of
2 Moonshadow, in terms of parking, doesn't matter. That law
3 can't be developed.

4 It's going to sit there as a paved parking lot with
5 a vacant square of land in the middle in perpetuity. They are
6 not going to get an easement for Moonshadow. It's an
7 emergency vehicle issue. You can't build if emergency
8 vehicles can't get in and turn around. They're not going to
9 get an easement from any surrounding neighbor. The residences
10 aren't going to tear down their homes to the west. And the --
11 and there is no way to access their property with a fire
12 engine or a big garbage truck, except by crossing Moonshadow's
13 property.

14 THE COURT: Well, I certainly wouldn't say that I
15 "bought into" their argument; however, if the issue of Lot 2 -
16 - it seems to me that, if this were the critical issue you're
17 depicting, that Lot 2 cannot be developed anyway, that's a
18 position that should have been disclosed before trial and
19 identified in the joint pretrial statement, so that the mosque
20 had a fair opportunity to gather and present evidence in
21 response, and they were denied that opportunity. So what
22 would you like to say?

23 MR. MANDEL: Well, they had the opportunity to ask
24 Your Honor at that very moment to voir dire the witness, to
25 take a 30(b)(6) deposition. We could have recessed, if they

1 appealable.

2 MR. BENDOR: I have no objection.

3 THE COURT: All right. So I will sign the minute
4 entry and I'll include 54(c) language.

5 Anything else?

6 MR. MANDEL: No, thank you, Your Honor.

7 THE COURT: Thank you.

8 THE COURT OFFICER: All rise.

9 (Proceedings concluded at 11:02:56)

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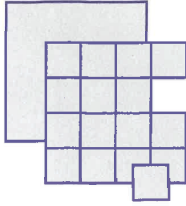
C E R T I F I C A T E

I, Coleen Rand, CET, certified electronic transcriber, do hereby certify that the foregoing pages 1 through 36, constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 20th day of December, 2019

/s/ Coleen Rand
Coleen Rand, CET
Certified Electronic Transcriber

EXHIBIT A



Pew & Lake, P.L.C.
Real Estate and Land Use Attorneys

W. Ralph Pew
Certified Real Estate Specialist
Sean B. Lake
Reese L. Anderson

August 7, 2019

Ms. Diana Kaminski
Senior Planner
Planning Division
City of Tempe

Tempe, Arizona, 85281

Dear Diana:

Attached to this letter is the revised Parking Analysis completed by CivTech, Inc. for Moonshadow Properties in evaluation of the medical office building located at 6301 South McClintock Drive. This analysis has been completed in support of the Moonshadow's request for a variance to allow for a reduction in the amount of code required parking on their property. It should be noted that the existing development has functioned for many years with the existing amount of parking and development and this application is to ratify with the City what has been working operationally for many years. The supporting study has been revised to reflect the square footage of the building on file with the City of Tempe Building Safety department, as you requested.

Also included with the study are:

1. The agreement between the then-owners of the Generations medical office building and the adjacent mosque giving each party permission to park on one-another's property. While we understand that the City does not provide much weight to this document, it is being provided to underscore the idea that since 2002 there has been a "meeting of the minds" between the mosque and Generations building owner that provides the foundation for what has historically been a cooperative parking agreement between the two properties. As has been previously noted many times, the parking in this area works on a day-to-day basis. There a few instances (major religious holidays) where parking flows on to the adjacent public streets, but even these rare instances have not led to complaints from adjacent property owners.
2. The agreement between the Catholic church and the then owners of Generations medical office building giving each party permission to park on one-another's property. This document is similar to functional agreement with the mosque.
3. The Reciprocal Access, Parking and Drainage Easement and License Agreement between the owners of the Generations office building and the building located at 1840 East Guadalupe Road.

Ms. Diana Kaminski
August 7, 2019
Page 2

While both property owners have changed since the agreement was made in 2003, the agreement was recorded. This document clearly outlines the notice, default and cure procedures.

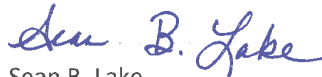
4. A letter dated July 8, 2019 from Moonshadow Properties to the legal representative of the owner of the 1840 East Guadalupe building, Nelson Ranch LTC/Anasazi Investments. This letter notified Nelson Ranch/Anasazi that they are in default of the above-referenced agreement. The notice further provides that should Nelson Ranch/Anasazi choose to cure the default, the total number of spaces available to them would be permanently reduced to 20. To date, Nelson Ranch/Anasazi has not responded to the letter, therefore they have not cured their default of the agreement within the 15 days as provided for in the 2003 document. Therefore, Generations is not obligated to any parking spaces to Nelson Ranch/Anasazi at this time. However, in fairness, the parking analysis completed by CivTech contemplates a 20-space allowance under the Agreement, even though Generations does not believe this obligation exists today.

You will note in the conclusions found in the parking analysis that:

1. Moonshadow is only asking for a 20% reduction in the amount of parking required at the Generations property.
2. During the observation period, a maximum of 125 spaces were occupied on the property.
3. The site provides a ratio of 1 space per 188 SF of Floor Area. This outperforms a Medical Office building as shown in the ITE Trip Generation Manual average parking requirement of 1 space per 310 SF.
4. Applying the ITE Trip Generation Manual's 85th Percentile rate to the Generations site would require 156 spaces. We are providing 158 spaces, which results in a surplus of two parking spaces.

Diana, thank you for your careful attention to the Parking Analysis and supporting documents. We encourage you to bear in mind, during your review, the input that we received at the neighborhood meeting—that parking on this site has always functioned smoothly and will continue to do so even if the variance request is approved by the Board of Adjustment. Please contact me or Vanessa if you have any questions or need further information during your review.

Sincerely,



Sean B. Lake
Pew & Lake, PLC

Attachments



August 7, 2019

Ms. Diana Kaminski, Senior Planner
Planning Division
City of Tempe
3 East Fifth Street
Tempe, Arizona 85281



**RE: Parking Analysis for Generations Medical Offices
6301 South McClintock Drive – Tempe, Arizona**

Dear Ms. Kaminski:

CivTech Inc. was engaged by Moonshadow Properties, L.L.C. (the Owner) to prepare this Parking Analysis for the existing Generations Medical Center, a medical office building (MOB) development at 6301 South McClintock Drive in the City of Tempe. The Owner has applied for a variance from the City’s parking requirements and engaged CivTech to prepare a parking analysis to be completed in conformance with City of Tempe guidelines and to determine if there is sufficient justification or support for such a variance. This version represents a 2nd Submittal that addresses several comments you made on the original submittal sealed on July 26, 2019.

BACKGROUND

The City of Tempe Building Safety department records indicate that the existing two-story MOB contains 29,675 gross square feet (SF). Per a review of a parking plan provided, CivTech understands that the site currently has 158 vehicular parking spaces (see **Exhibit A**) and that a variance is needed from the City because the required number of spaces per Chapter 6 of the City of Tempe’s *Zoning and Development Code* (ZDC) is 198 (at the City’s “Clinic” parking ratio of 1 space per 150 SF, as will be documented below) in the absence of permanent reciprocal parking agreements with Holy Spirit Catholic Church (across Libra Drive to the north) and the adjacent Majsid Omar Ibn Al-Khattab (“Majsid” is Arabic for “Mosque”).

To date, there have been separate written—but revocable—parking agreements between the owner and the Church and the owner and the Mosque that Generations’ patients could park in their parking lots, if need be. With the hours of use of these facilities for worship being outside the typical weekday business hours of the Generations tenants, the church and mosque are ideal, complementary uses with which Generations can share parking spaces and reports having successfully done so over the past approximately 15 years without any difficulty. CivTech notes that the mosque (which is physically located to the north of the Generations building on its own parcel and is not directly linked to the Generations site) owns an adjacent parcel to the northeast of the Generations building (the “Northeast Lot”) that is undeveloped except for a parking lot that has cross-accesses to the Generations lot as well as its own driveway on Libra Drive through which Generations’ traffic has a

right to pass via a permanent easement.¹ Since July, the owner has clarified/explained to CivTech that the staff of Generations has been instructed to park as far from the building as possible to leave as many spaces free as close to the Generations building as possible and that includes parking in the mosque-owned Northeast Lot. (While CivTech did not directly observe the comings and goings of Generations employees to/from the Northeast Lot, CivTech did observe several Generations employees parked near the eastern perimeter of the site, well away from the building.)

Another factor under consideration is the fact that there is an existing Reciprocal Access, Parking and Drainage Easement and License Agreement, (the "Agreement") between the Owner and the owner of the general office building to the south (at 1840 East Guadalupe Road, currently occupied by a regional office an on-line services company, Reputation.com) to allow reputation.com to park on the Generations lot in between zero (0) and forty (40) parking spaces. On July 8, 2019, notice was sent by the Owner to reputation.com notifying them that they are in default of the October 14, 2003 Agreement since their employees have been parking on the Generations property and payment as required by the Agreement had not been made since 2008. The notice of default was provided and the cure period has since expired. Therefore, Generations is not obligated to provide any parking spaces to reputation.com on the Generations parking lot. However, in fairness, this analysis contemplates a 20-space allowance under the Agreement.

CivTech also understands that there are several tenants in the Generations MOB and that there have been few, if any, documented instances of arriving patients not being able to find a parking space in the Generations lot² and that each tenant has provided some operational data that is used in the analysis described below.

EXISTING CONDITIONS

The Owner and CivTech each contacted the City. It was suggested that a parking space occupancy count should be conducted on the three parking lots (main lot, mosque satellite lot, and offices/ Reputation.com lot). CivTech recorded the parking occupancy of the three lots on Thursday, July 18, 2019. **Table 1** summarizes these counts with the highest occupancy levels highlighted.

A review of the results summarized in **Table 1** reveals that, on Thursday July 18, CivTech observed that the maximum parking occupancy on the Generations property at 6301 South McClintock Drive was 125 spaces, or an occupancy of 79% at 3 PM. At approximately the same time in the afternoon, all (100%) of the 79 parking spaces on the 1840 East Guadalupe property were being used. This being the case, CivTech was asked to observe cross-parcel parking activity in the parking area along the boundary separating the two properties at the beginning and end of a typical weekday. CivTech made these observations on the afternoon of Tuesday July 23 and the morning of Wednesday July 24. On Tuesday afternoon, Reputation.com employees were observed leaving their offices and entering 16 vehicles parked in Generations parking spaces, one of which was parked in a covered space reserved for Generations physicians. On Wednesday morning, 14 employees parked in

¹ CivTech understands that the owner's attorneys will provide these and other applicable documents.

² Not being able to find an ADA space or a desired parking space close to the building entrance are peripheral issues that cannot and will not be addressed in this study.

TABLE 1 – PARKING OCCUPANCY DATA (COLLECTED ON THURSDAY JULY 18, 2019)

Start of Hour	6301 S. McClintock Drive		1840 E. Guadalupe Road		NE Lot	
	158 Spaces		79 Spaces		50 Spaces	
	Occupied	% Occupied	Occupied	% Occupied	Occupied	% Occupied
8:00 AM	59	37%	37	47%	18	36%
9:00 AM	93	59%	61	77%	17	34%
10:00 AM	120	76%	76	96%	19	38%
11:00 AM	118	75%	71	90%	20	40%
12:00 PM	80	51%	62	78%	17	34%
1:00 PM	100	63%	63	80%	20	40%
2:00 PM	97	61%	79	100%	20	40%
3:00 PM	125	79%	61	77%	19	38%
4:00 PM	117	74%	39	49%	18	36%
5:00 PM	87	55%	22	28%	16	32%

Generations spaces and entered the Reputation.com building. As noted, the owners of both buildings currently have an agreement that allows tenants of the 1840 building access to twenty (20) uncovered parking spaces located within the Generations’ parcel. The results of CivTech’s observations are summarized in **Table 2**. From this second set of observations, it can be concluded that at least 15 of the 125 generations spaces occupied at 3 PM were employees of Reputation.com and that a maximum of 110 of the spaces were occupied by Generations patients and staff. That being the case, and now knowing that the 20 occupied spaces in the Northeast Lot are Generations employees, could lead to the reasonable conclusion that Generations warrants just 130 spaces (=125 – 15 + 20) of its own, or 28 fewer (or nearly 18% less) than it currently provides on its site. Another conclusion can also be reached: the office building housing Reputation.com does not currently provide a sufficient number of spaces since at least 94 spaces (its own 79 + Generations 15) were occupied during a period of the weekday afternoon.

TABLE 2 – CROSS-PARCEL PARKING ACTIVITY – SUMMARY OF OBSERVATIONS

Date	Day of Week	Time	Uncovered	Covered	Total
July 23, 2019	Tuesday	4:20-5:20 PM	15	1	16
July 24, 2019	Wednesday	7:35-8:35 AM	14	0	14

The results summarized in **Table 1** also seem to confirm certain data provided by the owner to CivTech. In May 2019, DDL Property Management of Chandler surveyed the four tenants of the Generations Medical Center. (See **Exhibit B**.) DDL surveyed the tenants for such information as the seasonality of their businesses (none was), their business hours (two tenants open as early as 7:30 AM and one closes as late as 6 PM), how many staff parking spaces are needed (from 18 to 25 with a total of 83 required when all employees have reported to work), which days of the week are typically busier (Tuesday through Thursday), and the maximum number of patients that might be seen in each practice over the course of a month (varies by staff size and specialty of the practice).

To further support the owner’s assertion that the four practices are not seasonal, Mesa Pediatrics (MPPA) reported that they are no busier during the school year than over the summer since there



are just as many illnesses and accident in the summer months as there are during the school year. In addition, none of the practices serves or is dependent on an elderly population or one based on winter visitors to the Valley, the vast majority of whom do not make Tempe their winter residence. Finally, none of the practices is geared toward Arizona State University’s college-age population.

CITY OF TEMPE PARKING REQUIREMENTS

The City of Tempe provides standard parking ratios for both bicycles and vehicles parking in Section 4-603 of Part 4, Chapter 6 of Tempe’s Zoning and Development Code (ZDC). The minimum ratios for off-street parking for both bicycles and motor vehicles are shown in Table 4-603E. For purposes of this study, only the requirements for motor vehicles will be considered.

Table 3 summarizes the motor vehicle parking space requirements per the City’s parking ratio applicable to the “Clinic (medical, dental, veterinary)” land use category into which the Generations Medical Center fits. A review of the results summarized in Column (1) of **Table 3** reveals that the minimum number of parking spaces for motorized vehicles required for the existing Generations Medical Center is 198 spaces (rounded up from 197.83). With 158 spaces, the site provides a ratio of 5.32 spaces per 1,000 SF of floor area or 1 space per 188 SF; however, the total of 158 spaces is still 40 spaces (20%) short of the 198 required by the City.

TABLE 3 – LAND USE AND PARKING SPACES REQUIRED

Project Data		(1) Motor Vehicle Spaces Required per Code		(2) Motor Vehicle Spaces per ITE Parking Generation Manual	
Land Use	Units*	Ratio	Spaces	Ratio ⁺	Spaces
Clinic (medical, dental, veterinary)	29.675 KSF*	1 per 150 SF	198	4.59 per 1,000 SF or 1 space per 218 SF	136
Existing Spaces			158		158
Excess(Deficit) #			(40)		22
Excess(Deficit) %			(20%)		16%

Notes: * KSF = 1,000 SF
⁺ Ratio is 85th percentile, not average (50th percentile)

To determine if the existing parking ratio of 1 parking space per 188 SF of floor area and, therefore, the number of existing spaces provided is sufficient, CivTech referred to the 2019 5th edition of the Institute of Transportation Engineers’ (ITE) *Parking Generation Manual*, an excerpt from which is included as **Attachment C**. CivTech selected Land Use Code (LUC) 720, Medical-Dental Office Building in a general urban/suburban setting, as the land use most similar to the Generations Medical Center. As can be seen in the attachment, the ITE average peak parking demand rate for this type of development is 3.23 spaces per 1,000 SF or 1 space per 310 SF with an 85th percentile average (50th percentile) rate of 4.59 spaces per 1,000 SF or 1 space per 218 SF. Therefore, the existing parking ratio of 1 parking space per 188 SF is nearly 65% greater than ITE’s weighted average parking demand of 1:310 and nearly 16% greater than ITE’s 85th percentile rate of 1:218.

As can be seen in Column (2) of **Table 3**, applying the ITE 85th percentile rate to Generations’ 29,675 SF (29.675 KSF) yields a requirement of 136 spaces. And, as noted previously, employees of the Reputation.com building are now assumed to be able to use up to 20 parking spaces. Assuming all

20 spaces are used by those employed in the Reputation.com building (only 14-16 were observed using Generations spaces during peak hours), Generations would require 156 spaces under ITE guidelines. Since 158 spaces are provided, there is still a surplus of 2 parking spaces.

CONCLUSIONS

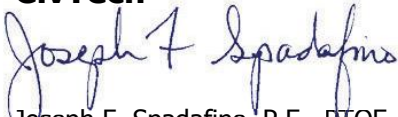
From the above, the following are CivTech's conclusions:

- The Owner of the existing Generations Medical Center, a 29,675 SF medical office building (MOB) development at 6301 South McClintock Drive in the City of Tempe, has applied to request/apply for a variance from the City's parking requirements because the site currently has 158 vehicular parking spaces and 198 spaces are required number of spaces per Chapter 6 of the City of Tempe's Zoning and Development Code at the City's "Clinic" parking ratio of 1 space per 150 SF. The owner would require a variance of 40 spaces, a 20% reduction from City requirements.
- On Thursday July 18, CivTech observed that the maximum parking occupancy on the Generations property at 6301 South McClintock Drive was 125 spaces, or an occupancy of 79% at 3 PM. Of these 125, at least 15 were occupied by the vehicles of employees of Reputation.com, which is a tenant of the adjacent office building, with which Generations has an agreement to provide up to 20 parking spaces.
- CivTech also observed on the afternoon of Tuesday July 23 and the morning of Wednesday July 24 Reputation.com employees leaving their offices and entering 16 vehicles parked in Generations parking spaces (one of which was parked in a covered space reserved for Generations physicians) and 14 employees parking in Generations spaces and entering the Reputation.com building. As noted, the owners of both buildings currently have an agreement that allows tenants of the 1840 (Reputation.com) building access to a maximum of twenty (20) uncovered parking spaces located within the Generations' parcel.
- With 158 spaces, the site provides a ratio of 1 space per 188 SF of floor area. Per the ITE *Parking Generation Manual*, a Medical-Dental Office Building in a general urban/suburban setting has an average peak parking demand rate of 1 space per 310 SF with an 85th percentile average rate of 1 space per 218 SF. Generations' existing parking ratio of 1 parking space per 188 SF is nearly 65% greater than ITE's weighted average parking demand of 1:310 and nearly 16% greater than ITE's 85th percentile rate of 1:218.
- Applying the ITE 85th percentile rate to Generations' 29,675 SF (29.675 KSF) yields a requirement of 136 spaces. Assuming the 20 spaces subject to the existing parking agreement between Generations and the 1840 building are used by those employed in the 1840 building, Generations would require 156 spaces under ITE guidelines. Since 158 spaces are provided, there is a surplus of 2 parking spaces. Thus, CivTech concludes that the Owner's request for a variance is supportable.

Thank you for allowing CivTech to assist you on this project. Please contact me with any questions you may have on this statement.

Sincerely,

CivTech



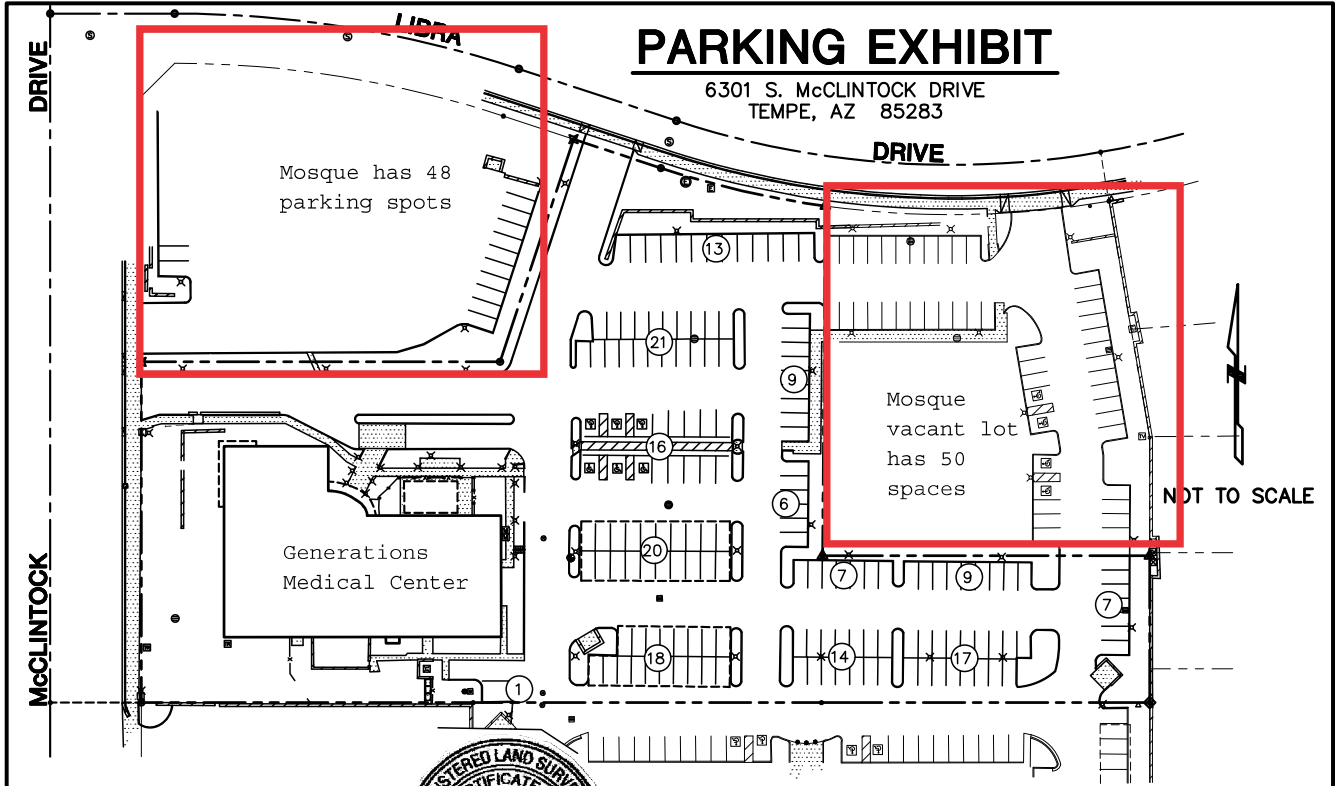
Joseph F. Spadafino, P.E., PTOE, PTP
Project Manager/Senior Traffic Engineer

Attachments

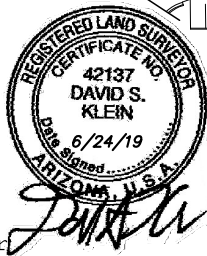
- A. Parking Space Plan
- B. DDL Property Management May 2019 Survey Results
- C. Excerpts from ITE Parking Generation Manual

PARKING EXHIBIT

6301 S. McCLINTOCK DRIVE
TEMPE, AZ 85283



The number of striped parking spaces on the subject property are as follows:
 Regular: 152
 Handicapped: 6
 Total: 158



SUPERIOR
SURVEYING SERVICES, INC.

2122 W. Lone Cactus Dr., Ste. 11
 Phoenix, AZ 85027
 623-869-0223 (office)
 623-869-0726 (fax)
 www.superiorsurveying.com
 info@superiorsurveying.com

DATE: 6/24/19

JOB NO.: 150934

Generations Medical Center

ATTACHMENT 24

Exhibit A

DDL PROPERTY MANAGEMENT

2545 W. FRYE Rd. Suite 9

Chandler AZ 85224

Fax: 480-820-7499

Generations Medical Building Parking Lot Study

May of 2019

Purpose – To evaluate the adequacy of parking for the Generations Medical Center (GMC)

Process : Question tenants on both medical and patient demand for parking, and the actual usage of used parking spaces along with location on Generations parking lot.

Collect data on the number of parked cars hourly and daily over two separate weeks in May 2019, Monday – through Friday during normal business hours

Raw Data

7 Questionnaire provided by the present medical tenants

	Internal Medicine	SWCWC	MPPA	CIC
1-Is parking a problem for your staff? Patients?	Yes if staff not in right spots	Yes if staff not in right spots	Yes if staff not in right spots	no
2-How many cars do your staff park? (Max)	25	20	20	18
3-What are your days and hours of operations? Lunch?	730am - 4 pm M- F	800am - 5pm M- F	730am- 6pm M-F, 800am-2pm Sat	900am - 5 pm M-F
4-Do you have different shifts of workers at your business?	no	no	no	yes
5-How many patient visits do you do per month? (Min to max)	1155-1323	1260-1420	1785-1890	420-525
6-Are there certain days that are busier than others?	no	Tues-Thurs	no	Fridays, "slow"
7-Is your business seasonal?	no	no	no	no



Parking Generation Manual
5th Edition



Exhibit C
Sheet 1 of 2

Land Use: 720 Medical-Dental Office Building

Description

A medical-dental office building is a facility that provides diagnoses and outpatient care on a routine basis but is unable to provide prolonged in-house medical and surgical care. One or more private physicians or dentists generally operate this type of facility. General office building (Land Use 710), small office building (Land Use 712), and clinic (Land Use 630) are related uses.

Time of Day Distribution for Parking Demand

The following table presents a time-of-day distribution of parking demand on a weekday at 27 study sites in a general urban/suburban setting and two study sites in a dense multi-use urban setting.

Hour Beginning	Percent of Weekday Peak Parking Demand	
	General Urban/Suburban	Dense Multi-Use Urban
12:00-4:00 a.m.	–	–
5:00 a.m.	–	–
6:00 a.m.	–	–
7:00 a.m.	12	–
8:00 a.m.	43	61
9:00 a.m.	88	62
10:00 a.m.	99	96
11:00 a.m.	100	56
12:00 p.m.	83	29
1:00 p.m.	74	67
2:00 p.m.	94	100
3:00 p.m.	93	82
4:00 p.m.	86	79
5:00 p.m.	54	71
6:00 p.m.	–	–
7:00 p.m.	–	–
8:00 p.m.	–	–
9:00 p.m.	–	–
10:00 p.m.	–	–
11:00 p.m.	–	–



Additional Data

Some of the study sites in the database are located within a hospital campus. The limited number of data points did not reveal a definitive difference in parking demand from stand-alone sites.

The average parking supply ratio for the 80 study sites with parking supply information is 4.3 spaces per 1,000 square feet GFA.

The sites were surveyed in the 1980s, the 1990s, the 2000s, and the 2010s in British Columbia (CAN), California, Connecticut, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Texas, and Washington.

Source Numbers

36, 37, 84, 86, 120, 121, 153, 161, 173, 217, 218, 224, 239, 308, 309, 310, 315, 416, 428, 433, 527, 530, 531, 532, 553, 555, 563, 564

**Medical-Dental Office Building
(720)**

Peak Period Parking Demand vs: 1000 Sq. Ft. GFA
 On a: Weekday (Monday - Friday)
 Setting/Location: General Urban/Suburban
 Peak Period of Parking Demand: 9:00 a.m. - 4:00 p.m.
 Number of Studies: 117
 Avg. 1000 Sq. Ft. GFA: 46

Peak Period Parking Demand per 1000 Sq. Ft. GFA

Average Rate	Range of Rates	33rd / 85th Percentile	95% Confidence Interval	Standard Deviation (Coeff. of Variation)
3.23	0.96 - 10.27	2.73 / 4.59	3.04 - 3.42	1.05 (33%)

Data Plot and Equation

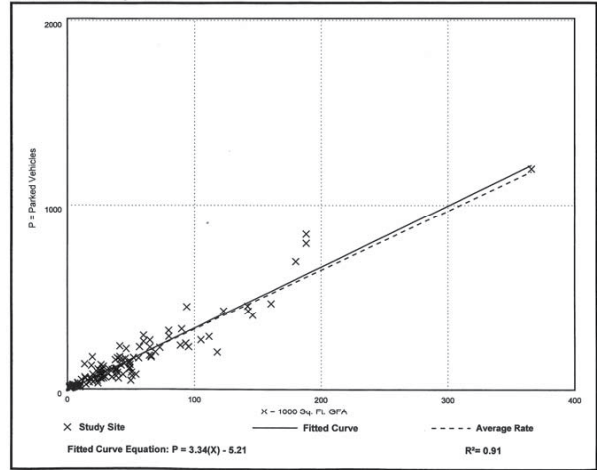


EXHIBIT B

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Re: Parking easement with Generations Medical

July 8, 2019

Dear Mr. Alleman:

To introduce ourselves, we are the owners of Generations Medical, formerly TDMC, located at 6301 South McClintock Dr., Tempe. It is our information that you represent the current owner of the property to the south of Generations Medical, Nelson Ranch LTC/Anasazi Investment.

As you are aware, we are applying for a variance from the City of Tempe's usual requirements for parking for a medical office building. This is due to the fact that our reciprocal parking agreements with our other neighbors, Holy Spirit Catholic Church and the mosque adjacent to us are revocable, which lenders do not like, and due to the fact that like variances have been granted to other similar buildings in Tempe.

Although the City of Tempe was initially satisfied with revocable parking agreements with TDMC's other neighbors, thereby allowing them to redevelop the abandoned building, they now fail to consider them sufficient. The burden to address this is on us as successors in interest to TDMC.

The parking agreements with the other neighbors remain in full effect at this time. There is no practical problem, but a legal and technical one.

As you also know, there is an existing permanent parking easement with the successors in interest to Sopris, whose representative signed the original easement. This affects both the current owner whom you represent as well as ourselves.

Paragraph 5.2 of that agreement requires that your client shall communicate to us a specific number of spaces it wishes to use and to pay to us a monthly rent for each space. These requirements have not been met. Your client is therefore in default.

Please consider this Notice of Default.

In the event that your client may wish in the future to cure the default, consider this your sixty-day notice of the agreement that the maximum number of spaces is hereby permanently reduced to twenty as deemed appropriate by us in accordance with Paragraph 5.4.

It is our further information that the current tenants in your client's building have been using Generations Medical spaces and no payment has been made since any of your client's tenants have parked there, confirmed to be in 2006 and beyond. Payment was received from Anasazi beginning February 2006 to June 2006. It then ended without notice. It resumed January, 2008, ceased again in February and March, 2008, and resumed only from April to November 2008. No payments were received after that date. The average payment was about \$650 per month. The average is for 20 spaces for a limited number of months.

Any effort to cure the default would require making up payments for the entire time our spaces have been used since failure to pay in November, 2008. It may be simpler if the tenant has sufficient parking, to simply terminate the parking part of the agreement, leaving the rest in effect. Many aspects of the original agreement were created for the purpose of getting approval from the City of Tempe for TDMC's redevelopment project. They did obtain all needed permits. Some of the conditions existing at that time no longer exist. For example, the lot was subdivided by TDMC's original owners and a parcel was sold to the mosque. Legally the mosque shares the obligations and potential benefits under the parking easement with your client, as it is also a successor in interest to TDMC. That is a changed condition from that which existed when the parking easement with Sopris was signed.

If there is any interest in re-examining the original parking agreement itself, that would be possible after cure of the default and only if reciprocity is a part of any discussion.

Thank you for your consideration of these matters.

Very truly yours,

A handwritten signature in cursive script that reads "Dr. Mikol S. Davis".

Dr. Mikol S. Davis

A handwritten signature in cursive script that reads "Carolyn L. Rosenblatt".

Carolyn L. Rosenblatt