

CITY OF ALBUQUERQUE



*Office of the City Attorney
David Tourek, City Attorney
PO Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500 ~ Fax (505) 768-3817*

July 21, 2014

Garret Price
Pulte Homes of New Mexico, Inc.
7601 Jefferson, NE Suite 180
Albuquerque, New Mexico 87109

Re: Easement Agreement, Mirehaven Arroyo

Dear Mr. Price:

PO Box 1293

Please find the original signed and recorded Easement Agreement for Mirehaven Arroyo that was emailed to you on Friday, July 18, 2014.

Albuquerque

If you have any questions please feel free to contact me.

Sincerely,

New Mexico 87103

www.cabq.gov

Tony Stephens
Paralegal to Kevin J. Curran
(505) 768-4500



EASEMENT AGREEMENT

(Mirehaven Arroyo)

THIS EASEMENT AGREEMENT ("Agreement") is entered into as of the date that this Agreement is recorded in the Bernalillo County, New Mexico real estate records by and between, **PULTE HOMES OF NEW MEXICO, INC.**, a Michigan corporation ("Pulte") and the **CITY OF ALBUQUERQUE**, a New Mexico municipal corporation (the "City").

BACKGROUND INFORMATION:

A. Pulte is the owner of the following described property located in Bernalillo County, New Mexico ("Property"):

Tract M, as shown and described on the Plat of Watershed Subdivision filed in the Bernalillo County, New Mexico real estate records on June 9, 2005, in Book 2005C, Page 198 as Document No. 2005082503;

and

Tract N-2, as shown and described on the Correction Plat of Tracts N-1 & N-2 Watershed Subdivision, filed in the Bernalillo County, New Mexico real estate records on May 9, 2012, in Book 2012C, Page 58, as Document No. 2012047202

B. Pulte's predecessor owner of the Property, Westland Development Co., Inc., a New Mexico corporation ("Westland") granted to the Albuquerque Metropolitan Arroyo Flood Control Authority ("AMAFCA") the following temporary easements (the "Temporary Easements"):

Temporary Flood Plain Easement granted to AMAFCA on pages 8 and 9 of the Bulk Land Plat of Westland North filed in the Bernalillo County, New Mexico real estate records on December 27, 2000, in Book 2000-C, Page 316;

And

Temporary AMAFCA Drainage Easement as shown on the document filed in the Bernalillo County, New Mexico real estate records on September 9, 1996, in Book 96-C, Page 302

C. AMAFCA has assigned to the City the Temporary Easements;

D. Pulte intends to develop the Property into residential subdivisions ("Pulte Project"). Pulte intends to encumber the Pulte Project with covenants, conditions and restrictions (the "CC&R's") which, among other things, will mandate that the owners of lots within the Pulte Project shall automatically be members of an incorporated association of property owners (the "Homeowners' Association") and shall be obligated to pay mandatory assessments to fund, among other things, the maintenance obligations of the Agreement. All or portions of the Pulte Project are intended to be a gated community;

E. The Temporary Easements are to accommodate the storm drainage flows for the Mirehaven Arroyo through the Property ("Arroyo");

F. In conjunction with the development of the Pulte Project, Pulte has caused Bohannon-Huston, Inc. ("BHI") to prepare a drainage plan for the Permanent Easement (as defined below), a copy of which plan is attached hereto as Exhibit "A" ("Drainage Plan"). Pulte, and its successors and assigns, will substantially comply with the Drainage Plan;

G. The construction of the drainage improvements identified in the Drainage Plan will obviate the need for the Temporary Easements, which Temporary Easements have been partially vacated by the City's Development Review Board ("DRB") on December 31, 2013, in DRB Case No. 13DRB-70751/Project Number 1006864 conditioned upon: (i) the vacated easement being shown on an approved re-plat, and

(ii) the granting of a replacement permanent flood plain easement which is substantially conforms to the approved Drainage Plan ("Permanent Easement"). All, or portions, of the Permanent Easement will be gated for private use.

H. The Permanent Easement will be for the portions of the Property: (i) required for the construction of the Drainage Improvements, as hereinafter defined, to channelize the Arroyo pursuant to the Drainage Plan ("Channel") and to operate and maintain the drainage improvements; (ii) access ramps and maintenance roads adjacent to the Channel ("Maintenance Roads"), providing adequate space for ingress, egress, and turning movements for large machinery and semi-trailer trucks; and (iii) for private recreational uses by the homeowners within the Pulte Project ("Arroyo Amenities"). A conceptual design for City ingress, egress, and turning movements, including the Maintenance Roads, is attached hereto as Exhibit "B" (the "Access Exhibit"). If necessary for the City to access the Easement Area to maintain the Drainage Improvements, the City shall have the right to use the private streets within the Pulte Project as shown on the Construction Plans as hereinafter defined. The improvements detailed in construction drawings for the Drainage Plan, the Channel, Maintenance Road and the Arroyo Amenities shall collectively be known as the "Drainage Improvements". The area covered by the Permanent Easement is referred to herein as the "Easement Area". The Easement Area is defined in Exhibit "C".;

I. The Drainage Improvements shall cause the historical flows from the Arroyo to be accommodated within the Easement Area. The Easement Area is less than the area encumbered with the Temporary Easements. Therefore, portions of the Arroyo encumbered by the Temporary Easements will not be required for flood control

purposes and will become part of the lots, amenity areas and common areas within the Pulte Project ("Adjacent Pulte Area").

J. Pulte shall construct the Drainage Improvements pursuant to the terms hereof.

K. Pulte intends to assign this Agreement to the Homeowners' Association; following which the Homeowners' Association shall own and manage the Adjacent Pulte Area common areas, pursuant to the terms hereof, and the Homeowners' Association shall assume Pulte's responsibilities for maintenance of the Drainage Improvements, as described herein.

NOW, THEREFORE, for good and valuable consideration, the parties agree as follows:

1. Background Information. The Background Information is incorporated herein.

2. Definitions. The following terms have the following meanings:

A. Level One Maintenance means:

i. removal from the Easement Area of garbage and debris including, but not limited to, paper, cans and bottles;

ii. pruning of vegetation, removal of dead and dying plant material and thinning of vegetation to prevent choking or congestion of the Easement Area;

iii. at Pulte's sole discretion, enhancement of vegetation through the addition of specimens native to the vicinity of the Easement Area, provided however, that: (a) the vegetation is in accordance with the Landscaping Plan element of the Site Development Plan for the Pulte Project approved by the City, from time to time; and (b)

the addition of such native specimens will not be in such a manner which reduces or restricts flows, or redirects flows to cause damage. In general, most specimens, especially woody varieties, will only be allowed on the sides of or in vegetated "islands" in the middle of the Easement Area which will not impair flows or induce bank erosion;

iv. removal and control of pests and rodents; and

v. maintenance of trails and paths within and roadways and crossings for vehicle and pedestrian use, intended primarily to preserve or enhance the aesthetic values and recreational use of the Easement Area, without restricting flows.

B. Level Two Maintenance means:

i. repair of minor erosion of Easement Area banks (generally two feet high or less) by hand or machine grading, in order to:

a. fill in steep banks which are enticements for digging by children or others;

b. correct hazardous bank conditions which could lead to unexpected falls and injury; and

c. arrest the potential for a significant change of course by the flows;

ii. cleaning of culverts and culvert entrances;

iii. construction of minor erosion control measures, using primarily native materials, along Easement Area banks, at drainage outfalls to the Easement Area, at water harvesting structures, below culverts and road crossings, at utility crossings of the Easement Areas, and at any other place where continued neglect could or would lead to Level Three Maintenance or higher;

iv. reseeding of disturbed areas, using native seed mix and/or native plants/bushes. Provided however, that, plantings will not be made which obstruct Channel flows or direct Channel flows in a manner or direction which can cause harmful erosion or damage; and

v. other measures intended to preserve the capacity and flow path of the Channel and flows, and to correct safety hazards.

C. Level Three Maintenance means:

i. repair of major erosion of Easement Area banks (over two feet high) by machine grading or filling, including the hauling in and placing of fill against the banks and including the storage of sediment within the limits of the Easement Area (the Easement Area includes area for sediment stock-pilling). Sediment storage in areas outside the limits of the Easement Area may be negotiated between the City and Pulte or the Homeowners' Association, who will reasonably cooperate with the demands of City maintenance ;

ii. stabilization of the Easement Area horizontal or vertical migration by repair of the Drainage Improvements;

iii. repair of permanent scour protection below culverts, dip crossings, or other points where flow has been concentrated;

iv. emergency protection of utility crossings of the Easement Area as the City deems necessary pending installation of permanent erosion protection by the responsible utility or entity;

v. other measures intended to preserve and protect the 100 Year Design Storm Capacity (defined below) of the Easement Area and/or any of its Drainage Improvements.

D. Level Four Maintenance means:

i. measures taken to protect public safety and prevent property damage, generally immediately after a significant flood event, when such measures clearly dominate over such considerations as aesthetics and preservation of flora and fauna. This includes the temporary storage of sediment within the limits of the Easement Area;

ii. restoration or preservation of the Drainage Improvements within the Easement Area, both by short term or permanent measures;

iii. restoration or repair of any Drainage Improvements; and

iv. any measures deemed by the City to be urgent or an emergency, intended to restore the 100 Year Design Storm (defined below) capacity of the Easement Area and which, if not performed, are likely to lead to threats to life or property.

E. It is understood that the City's maintenance responsibilities extend to the limits of the Easement Area and not to the Adjacent Pulte Area and performance of those responsibilities is at the sole discretion of the City. However, the City may utilize the Adjacent Pulte Area for access to perform its maintenance obligations under this Agreement. Pulte and/or the Homeowners' Association shall be responsible for the Adjacent Pulte Area. Subject to typical governmental agency approvals, Pulte and/or

the Homeowners' Association may use the Adjacent Pulte Area for any purpose it deems appropriate.

F. Drainage Improvement is defined as the flood control facilities which have been identified in the Drainage Plan and have been analyzed and designed by using acceptable engineering standards and the 100 Year Design Storm criteria, and which shall be constructed of materials expected to have a design life of 50 years or more before replacement or major rehabilitation is required. Within the Permanent Easement Area, any Drainage Improvement will, to the extent possible, be constructed of soil cement, concrete, rip rap, or other materials of equivalent durability, stability, and longevity. Rip rap will be covered with an earth layer sufficient to sustain plant growth and discourage rodents. Other materials will be covered, to the extent possible, with a similar earth layer. Structural concrete, if exposed, will be treated to make its color similar to the surrounding earth, either by concrete additives, or by appropriate surface treatment. Texturing of the structural concrete will also be considered.

3. Grant of Drainage Easement; Purpose; Reserved Rights. Pulte grants to the City the exclusive Permanent Easement over and across the Easement Area for the primary purpose of surface storm drainage and gives the City the right to construct, operate, maintain, reconstruct, temporarily store sediment and perform other functions necessary for drainage and flood control as specified herein. Pulte, and its assignee, will have and expressly reserves the following rights and easements to be exercised at the discretion of Pulte, and its assignee, (the "Reserved Rights") except as otherwise provided:

A. The right to use and maintain the Easement Area consistent with the purpose of the Permanent Easement and permitted uses within the scope of the Permanent Easement;

B. The right to establish hiking, biking and trails, the right to maintain such trails, and the right to grant trail and other path easements. The City approves the trails shown on the Access Exhibit and/or the Construction Plans for Mirehaven Arroyo Improvements, the cover page of which is attached as Exhibit "D" (DRB Project No. 1006964/City Project No. 650382) (the "Construction Plans"). Any other trails shall be subject to prior approval from the City, such approval not to be unreasonably withheld, and issuance of an encroachment license by the City;

C. The right to use portions of the Easement Area as rights-of-way for private streets as shown on the Access Exhibits and/or the Construction Plans. Any other streets shall be subject to prior written approval from the City, such approval not to be unreasonably withheld;

D. The right to grant subordinate perpendicular easements as shown on the Access Exhibit and/or the Construction Plans. Any other easement shall be subject to prior written approval from the City and City indemnification and insurance requirements, such approval not to be unreasonably withheld.

All of the Reserved Rights are subordinate to the Permanent Easement and the City shall not be responsible for damage done to Pulte's improvements within the Easement Area resulting from the City's exercise of its rights set out herein.

4. Construction of Drainage Improvements. Pulte shall construct the Drainage Improvements, and upon inspection and acceptance by the City, Pulte shall dedicate the Drainage Improvements to the City and the City shall accept the Drainage Improvements for maintenance to the extent as provided for herein.

5. Maintenance Obligations of the City. Level Three and Level Four Maintenance of the Permanent Easement will be the responsibility of the City. The need for, and timing of, such maintenance will be determined at the sole discretion of the City. The City will bear all costs, responsibilities and liabilities related to such maintenance, except as otherwise stated herein. These maintenance obligations will remain in full force and effect as long as this Permanent Easement exists and may only be assigned to and assumed by a person or entity capable of performing such obligations

6. Easement; Maintenance Obligations of Pulte. Pulte will be responsible for Level One and Level Two Maintenance of the Permanent Easement. Pulte will bear all costs, responsibilities and liabilities related to such maintenance. Should Pulte desire to undertake measures outlined under Level Three or Level Four Maintenance, it may do so at its own expense, subject to prior written approval from the City of both the engineering aspects and the financial ability to finance such measures, such approval not to be unreasonably withheld.

7. Operation, Maintenance and Inspection: Procedures and Records.

A. An operation, maintenance and inspection file (the "File") will be created and maintained by Pulte or the Homeowners' Association, which will be available for review by the City at any time. Pulte and the Homeowners' Association will cooperate with the City in the creation and maintenance of the File. The File will be the

result of the joint efforts of the City, Pulte and the Homeowners' Association. The File will include, at a minimum, the following:

- i. copy of this Permanent Easement and any modification;
- ii. copy of any easement documents;
- iii. photographs of the Temporary Easements in its condition contemporaneous with the date of this Agreement, such photographs to be taken by Pulte or the Homeowners' Association. These photographs will comprise a visual baseline for evaluating appropriateness of planned maintenance measures, and for ensuring the flood-carrying capacity of the Easement Area are not diminished;
- iv. operation, maintenance and inspection records, as outlined below;
- v. correspondence; and
- vi. other records deemed appropriate or necessary.

B. Operation records of the Easement Area will be kept as follows:

i. Operation records of flood events, that may have any degree of formality and that may include such records as telephonic reports of rainfall, floods and visual observations, photographs, video recordings, measurements of depth and width of flows, and engineering estimates of flow will be maintained.

ii. Pulte or the Homeowners' Association will maintain quarterly operation records of the amount of any material removed from the Permanent Easement.

iii. Pulte and/or the Homeowners' Association will notify the City during or after significant storm events that create a need for Level Two Maintenance or

higher, and will provide as much information as possible for purposes of maintaining operating records.

iv. The City may perform engineering analyses regarding flow events at the City's sole discretion.

C. Maintenance records of the Easement Area will be maintained as follows:

i. Reports of maintenance performed, with an associated estimate of costs, will be maintained, including a breakdown of all Level 2 Maintenance performed and an estimate of the cost of each level of maintenance performed.

ii. Either Pulte and/or the Homeowners' Association will provide reports to the City and the File, immediately after maintenance is performed.

iii. Reports will include information on what maintenance was performed, location of maintenance activities, and estimated costs. Photographs and sketches may be added, as appropriate.

D. Inspection records of the Easement Area will be maintained as follows:

i. Pulte and/or the Homeowners' Association will cause the Arroyo to be inspected at least once annually, during the period October 1 to March 31, and after each significant storm event which creates a need for Level Two Maintenance or higher. The primary purposes of the inspection are to identify problems needing correction and to serve as a work order for maintenance to be done by either Pulte and/or the Homeowners' Association.

ii. Inspections will be performed by a person or team with sufficient knowledge and experience to determine when and what maintenance is required, which

team will include a registered professional engineer competent in hydrology and hydraulics selected by Pulte and/or the Homeowners' Association. The City will, to the extent possible, participate in the inspection, at mutually agreed upon times.

iii. Reports of each inspection will be made on a form developed by the City, in consultation with Pulte and/or the Homeowners' Association.

iv. The City personnel, will be permitted to access the common areas of the Pulte Project (including the amenity center property) using the Maintenance Road shown on Exhibit "B" in order to gain access to the Easement Area for inspections and maintenance. Provided, however, that such crossing will be done in a manner to limit and minimize any damage to the common areas of the Pulte Project (including the amenity center property), and will not be excessive.

8. Liability and Responsibility; Insurance; Contingency Reserve.

A. Each party will be responsible and liable for its actions, according to New Mexico state law. The liability of the City shall in all cases be subject to the immunities and limitations of the New Mexico Tort Claims Act § 41-4-1 NMSA 1978 as amended.

B. Pulte and/or the Homeowners' Association will carry general liability insurance in the amount of not less than \$1,000,000, naming the City as additional named insured and with a copy of the policy provided to the City annually, or upon each renewal.

9. Assignment.

A. Upon the creation of the Homeowners' Association, Pulte shall assign to the Homeowners' Association all of its right, title and interest in this Agreement and the Homeowners' Association shall assume all of Pulte's right, title, interest and obligations

pursuant to this Agreement and the City shall consent to the assignment to the Homeowners' Association. Upon the assignment to the Homeowners' Association, Pulte shall not be released from its obligations hereunder and shall remain as a surety to the City for the Homeowners' Associations' obligations hereunder until such time as the Homeowners' Association has a segregated reserve account in the amount of \$50,000.00 or more earmarked solely for the purpose of fulfilling its obligations hereunder. Until such time as Pulte is released from its obligations hereunder, Pulte will either (i) perform all of the maintenance obligations of the Homeowners' Association under this Agreement, or (ii) ensure that the Homeowners' Association has the financial ability to perform all of its maintenance obligations under this Agreement.

B. Pulte will cause the Homeowners' Association, within ten years of the date of this Agreement, to establish a contingency reserve (the "Reserve"), dedicated solely to fulfill its obligations hereunder.

i. The Reserve will be funded to an amount equal to 125% of the estimated costs incurred for annual Levels One and Two Maintenance as estimated by a company or engineer or landscape architect with appropriate credentials and experience in the Level One and Two Maintenance. The Reserve will be the separate reserve that will apply only to this Agreement.

ii. The Reserve will be maintained in a financial institution selected by the Homeowners' Association, and acceptable to the City, acting reasonably.

iii. The Reserve will be used by the Homeowners' Association solely for (i) Level One or Level Two Maintenance types of activities, following Level Three or Level Four Maintenance activities by the City, (ii) extraordinary amounts of Level One or

Level Two Maintenance activities at any time when mutually agreed upon by the City, and the Homeowners' Association, or (iii) Level Three or Level Four Maintenance activities performed by the Homeowners' Association when mutually agreed upon by the City and the Homeowners' Association. The Reserve may not be used for other purposes without the prior written approval of the City. If the Reserve is depleted, it will be restored within an amount of time proportional to the amount of depletion up to a five year period (e.g., 20% depletion replaced in one year; 100% depletion replaced in five years).

iv. The amount of the Reserve may be modified after the tenth year by mutual agreement, based upon accumulated experience.

v. Notwithstanding anything herein to the contrary, in the event of dissolution or insolvency of the Homeowners' Association, the individual lot owners of the Pulte Project shall be jointly and severally liable to the City for the maintenance obligations of the Homeowners' Association. Pulte shall include in the CC&R's for the Pulte Project an express provision that acknowledges the joint and several liability of the individual lot owners for the maintenance obligations in the event of dissolution or insolvency of the Homeowners' Association. Prior to taking any legal action against any individual lot owners, the City will allow one-hundred-twenty (120) days for the lot owners, or any subsequent entity standing in for the Homeowners' Association, to cure the maintenance deficiencies.

10. Other Easements. The City accepts the Permanent Easement as an exclusive easement subject to other easements existing at the time of the recording of this Agreement.

11. Recordation. Pulte will timely record this Agreement in the real estate records of Bernalillo County, New Mexico and any other place of recordation if the City deems it is necessary to preserve its rights.

12. Notices. Any notice required under this Agreement will be sent by first class mail, postage prepaid:

If to City: City of Albuquerque
Attn.: _____
P.O. Box 1293
Albuquerque, New Mexico 87103

If to Pulte: Pulte Homes of New Mexico, Inc.
7601 Jefferson, NE, Suite 180
Albuquerque, New Mexico 87109

13. Binding Effect. This Agreement will inure to the benefit of and bind the successors and assigns of the City, Pulte and will continue as a servitude running in perpetuity with the Easement Area.

14. Governing Law. This Agreement will be governed by and interpreted in accordance with the laws of the State of New Mexico.

15. Amendment. This Agreement may be amended or modified by the mutual agreement in writing of the City and Pulte or their successors or assigns. Such writing will be filed for public record with reference to this Agreement and previous amendments thereto, if any.

16. Liberal Construction and Interpretation. This Agreement will be liberally construed. If any provision of this Agreement is found to be ambiguous, an interpretation consistent with the purpose of this Agreement that would render the

provision valid will be favored over an interpretation that would render it invalid. If any provision of this Agreement is determined by a court of competent jurisdiction to be void, invalid, illegal or unenforceable, that portion will be severed from this Agreement and the remaining parts will remain in full force as though the invalid, illegal, or unenforceable portion had never been a part of this Agreement.

17. Integration. This Agreement contains or expressly incorporates by reference the entire agreement of the parties with respect to the matters contemplated by this Agreement and supersedes all prior negotiations.

18. No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Pulte, or its assignee, title to the Property in any respect.

19. No Rights Granted or Conferred. This Agreement is not intended to and does not grant or confer rights to any utilities or the general public for unauthorized use except those rights specifically granted and conferred herein.

20. Flood Control Standards; Future Easements. It is understood and the parties agree that:

A. the community standard in Albuquerque, New Mexico for flood protection is the 100 Year Design Storm as defined in the City of Albuquerque and Bernalillo County Drainage Ordinances as of the date of this Agreement and that damage resulting from a storm exceeding the 100 Year Design Storm will not be attributed to any party to this Agreement, nor will any such party be liable for such damage;

B. this Agreement granted is based on the Channel design to handle a single 100 Year Design Storm and 30 years of average annual flow. All parties will

work to preserve and protect the ability of the Channel to convey the 100 Year Design Storm; and

C. The Drainage Improvements will be designed and built to withstand the 100 Year Design.

21. Resolution of Disputes and Appeals.

A. Matters of a technical nature may be appealed by any party with standing to the City's Technical Standards Committee.

B. Except as otherwise provided herein, non-technical decisions made by the City staff may be appealed to the City Council.

22. Miscellaneous. The headings used in this Agreement are for convenience only and will be disregarded in interpreting the substantive provisions of this Agreement. Time is of the essence of each term of this Agreement.

Dated 7/10, 2014.

CITY OF ALBUQUERQUE, a New Mexico municipal corporation

By: [Signature]

Robert J. Perry
Chief Administrative Officer

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

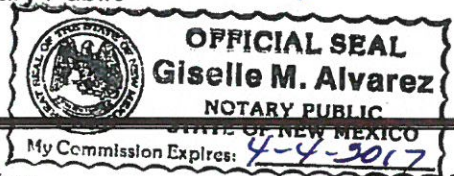
for This instrument was acknowledged before me on July 10, 2014, by Robert J. Perry, Chief Administrative Officer of the City of Albuquerque, a New Mexico municipal corporation. By John Soladay

[Signature]
Notary Public

My commission expires:

4-4-2017

Mirehaven Arroyo Easement Agreement
between City of Albuquerque and Pulte Homes of NM, Inc.



PULTE HOMES OF NEW MEXICO, INC., a Michigan corporation

By: *Garret R. Price*
Garret R. Price
Vice President – Land

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

This instrument was acknowledged before me on June 27, 2014, by Garret R. Price, Vice President – Land of Pulte Homes of New Mexico, Inc., a Michigan corporation.

Polly E. Lydens
Notary Public

My commission expires:
10/18/15

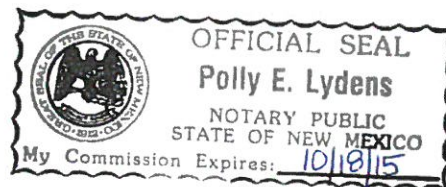


Exhibit "A"

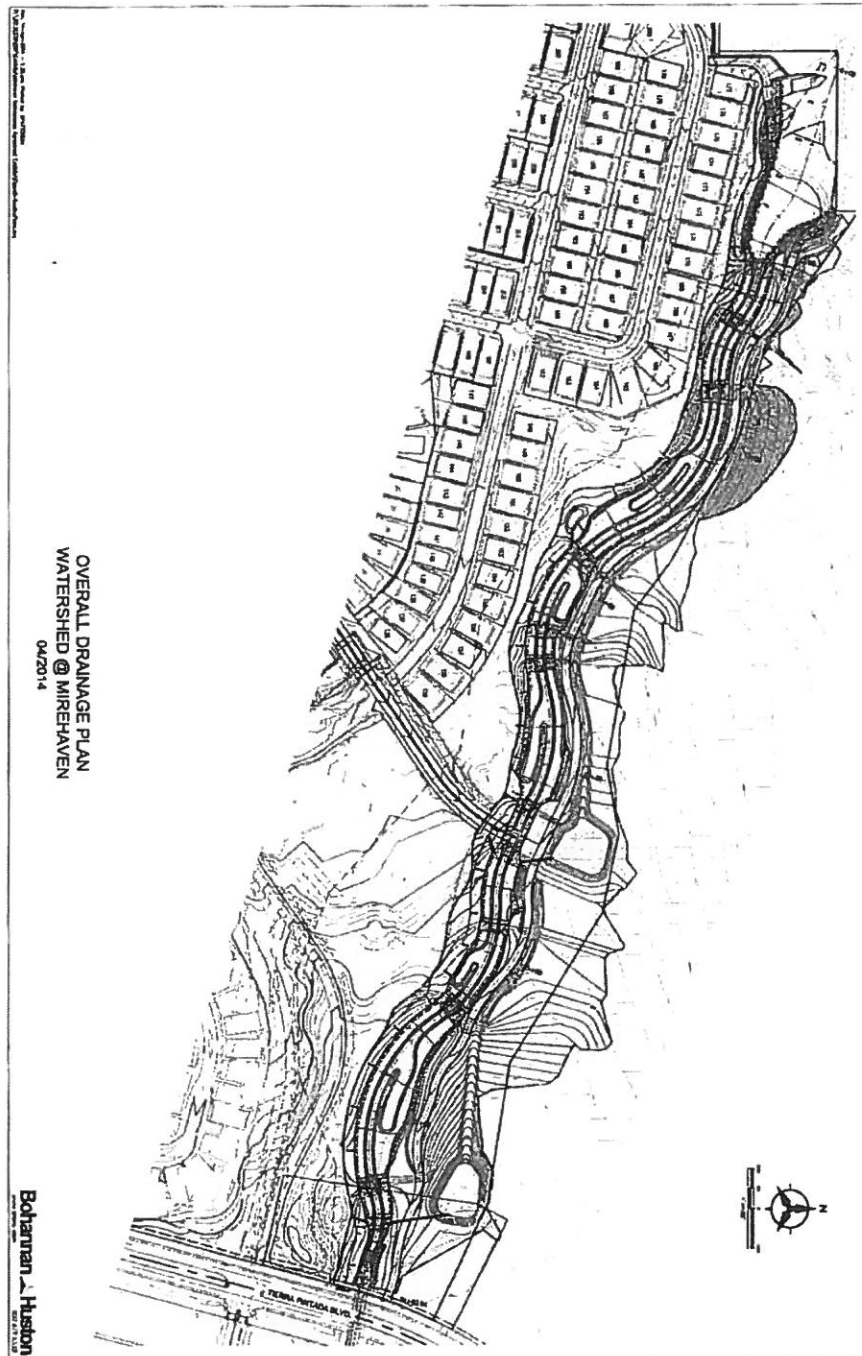


Exhibit "B"

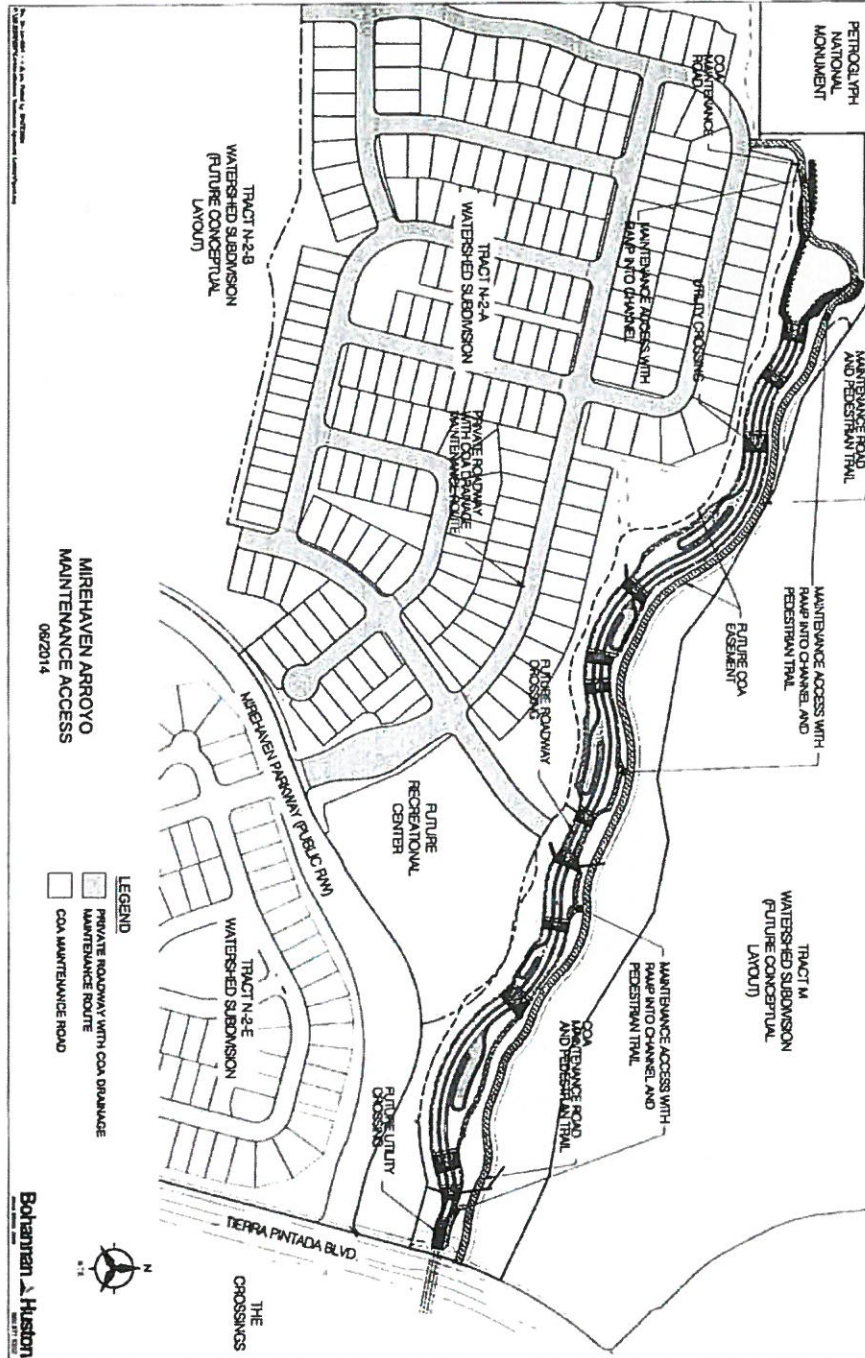
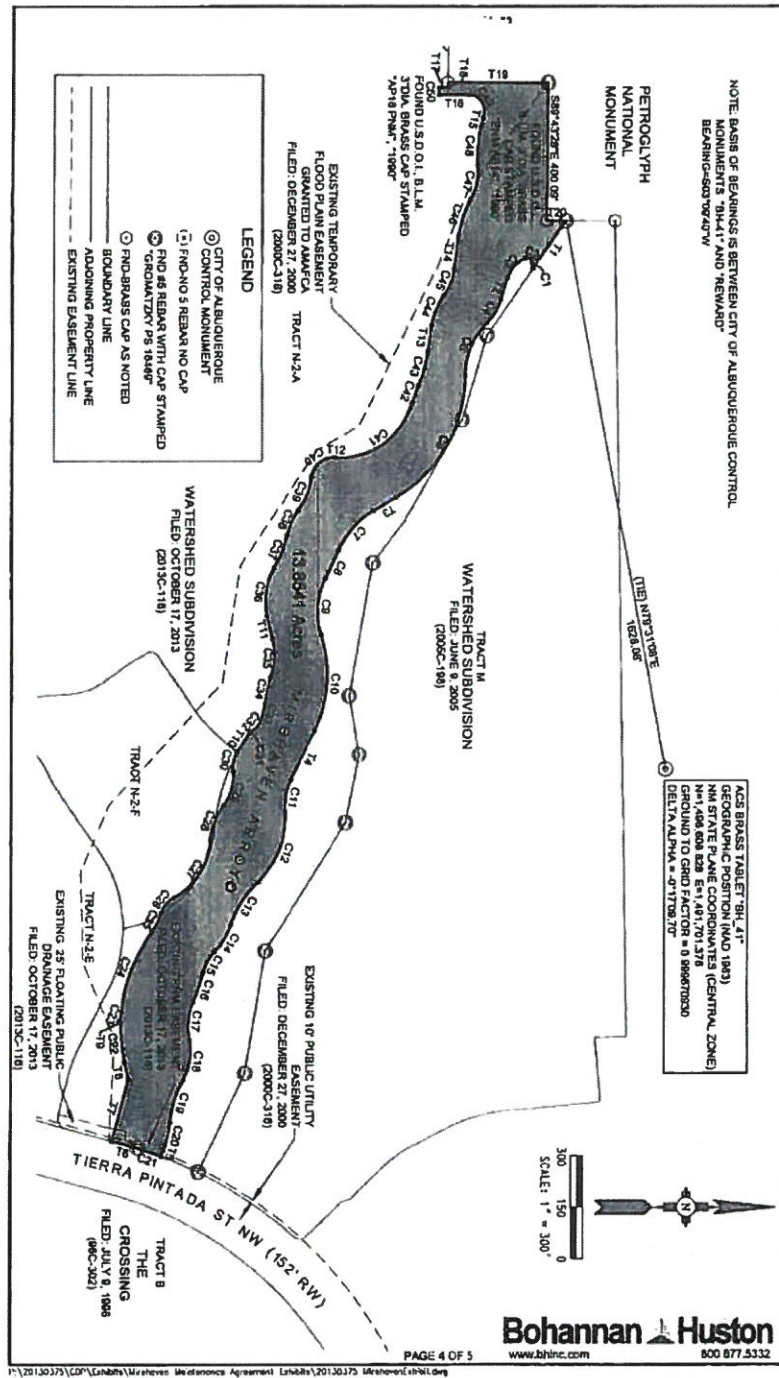


Exhibit "C"



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