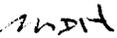


OCT 25 2007

MEMO TO: Mayor and City Council

THRU: Michael D. House, City Attorney 

FROM: James R. Cairns III, Assistant City Attorney 

SUBJECT: Resolution No. 4136 determining that acquisition of a city utility services easement on real property located near the southeast corner of Germann Road and McQueen Road is a matter of public necessity; approving an agreement to fund acquisition of the easement; and authorizing condemnation proceedings to acquire the easement and to obtain immediate possession of the easement area.

DATE: October 17, 2007

RECOMMENDATION: Staff recommends approval of Resolution No. 4136.

BACKGROUND/DISCUSSION: Finrich, LLC is developing property near the southeast corner of Germann Road and McQueen. A condition of development is that public water service be extended to the site and other properties in the vicinity. The extension required as a condition of development will complete a looped water line and enhance water pressure in the public water line system. Public Works staff has determined that a portion of the line necessary to complete the water line loop needs to run through a utility easement located on private land along Blue Bird Drive just east of McQueen Road. The easement is approximately 21 sq. ft. The easement will be for the purpose of all of the city-provided public utility services, including water, sewer, and reclaimed water. The size of the easement is sufficient to allow for the utility lines and access to the lines.

Finrich, LLC has been unable to obtain the easement by purchase from the owner of the underlying land. The easement is necessary because utility services need to be extended to the property being developed by Finrich, LLC. The easement location is reasonable and does not appear to have any significant, adverse impact on the remaining property. To meet its development obligations, Finrich, LLC is willing to fund the cost of the City acquiring the easement.

This resolution authorizes the City to proceed with acquisition of the easement through condemnation. However, before condemnation is initiated, legal staff will tender to the landowner a written purchase offer accompanied by an appraisal. If accepted, the matter will be placed in escrow and condemnation will not be necessary, except, perhaps, if immediate possession of the site is needed prior to the close of escrow.

This resolution also approves a written agreement with Finrich, LLC for funding the cost of the acquisition. Execution of the agreement is the first step in the City acquiring the easement. Even though Finrich, LLC is providing the funding, the City will be the easement holder and the utility lines will be maintained as public improvements of the City.

FINANCIAL IMPLICATIONS: All costs are the responsibility of Finrich, LLC. The fair value of the easement will not be known until an appraisal is completed.

PROPOSED MOTION: Move to adopt Resolution No. 4136 to determine that acquisition of a city utility services easement on real property located near the southeast corner of Germann Road and McQueen Road is a matter of public necessity; approving an agreement to fund acquisition of the easement; and authorizing condemnation proceedings to acquire the easement and to obtain immediate possession of the easement area.

JRC/

Attachments: Vicinity Map

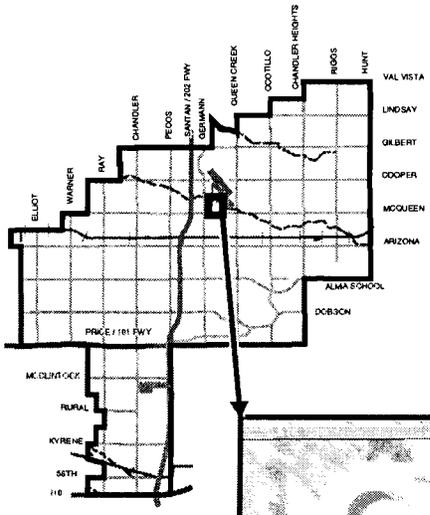
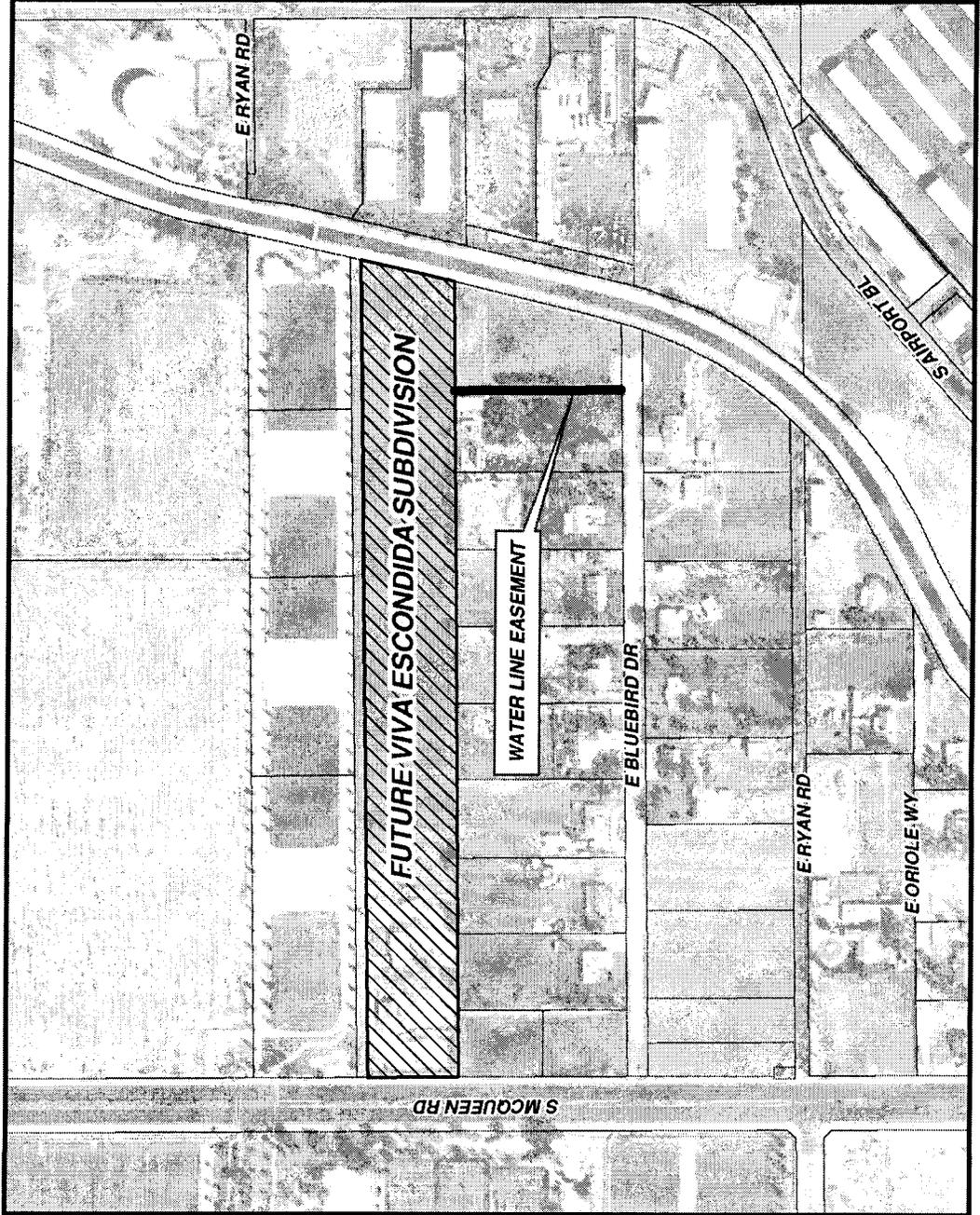
Resolution 4136

Copy of proposed form of funding agreement

WATER LINE EASEMENT FOR VINA ESCONDIDA



-  FUTURE VIVA ESCONDIDA SUBDIVISION
-  WATER LINE EASEMENT



RESOLUTION NO. 4136

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CHANDLER, ARIZONA, DETERMINING THAT ACQUISITION OF A CITY UTILITY SERVICE EASEMENT ON PROPERTY AT THE SOUTHEAST CORNER OF GERMANN ROAD AND MCQUEEN ROAD IS A MATTER OF PUBLIC NECESSITY; APPROVING AN AGREEMENT TO FUND ACQUISITION OF THE EASEMENT; AND AUTHORIZING CONDEMNATION PROCEEDINGS TO ACQUIRE THE EASEMENT AND TO OBTAIN IMMEDIATE POSSESSION OF THE EASEMENT AREA.

WHEREAS, Finrich, LLC is developing property near the southeast corner of Germann Road and McQueen Road in Chandler, Arizona (the "Vina Escondida Site"), and

WHEREAS, as a condition of the development approvals for the Vina Escondida Site, an easement to extend lines for city-provided water, sewer and reclaimed water services to the Vina Escondida Site is needed from a portion of the nearby private property located along Blue Bird Drive just east of McQueen Road; and

WHEREAS, Finrich, LLC, has not been able to acquire the easement from the owner of the nearby private property; and

WHEREAS, the easement is located in a manner which will be most compatible with the greatest public good and the least private injury; and

WHEREAS, Finrich, LLC, is agreeable to funding the cost incurred by the City in acquiring the easement; and

WHEREAS, the City needs to acquire the easement and obtain immediate possession of the easement area as soon as possible so that both the City and Finrich, LLC, can be assured that all public utility services will be available to the Vina Escondida Site at or before construction and development of the site; and

WHEREAS, the City is authorized by law to acquire through condemnation such real property as is needed for public utility purposes;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Chandler, Arizona as follows:

Section 1. It is hereby determined that the acquisition of an easement for city-provided utility services, including water, sewer and reclaimed water, from that portion of the nearby private property along Blue Bird Drive just east of McQueen Road that is described and depicted in Exhibit "A", attached hereto and incorporated herein by reference, and the obtaining of immediate possession of such portion of the nearby private property, is a matter of public necessity, is for a public and necessary purpose, and is in the best interest of the citizens of the City of Chandler.

Section 2. The City of Chandler is hereby authorized to enter into an agreement with Finrich LLC for the funding of the acquisition of the easement, which agreement shall be substantially in the form accompanying this resolution, subject to final approval as to form by the Chandler City Attorney.

Section 3. The City Attorney of the City of Chandler is hereby authorized and directed to commence condemnation (eminent domain) proceedings as needed to acquire the easement, and to secure immediate possession of the above-described property, for the public purpose of extending certain public utility service, and is further directed to do and to perform all acts necessary in furtherance of the acquisition of the easement and the obtaining of immediate possession of the easement area.

Section 4. The Mayor of the City of Chandler is authorized to execute the aforementioned funding agreement and to execute such other documents as may be necessary to secure the easement.

PASSED AND ADOPTED by the City Council of the City of Chandler, Arizona, this ___ day of _____, 2007.

ATTEST:

CITY CLERK

MAYOR

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Resolution No. 4136 was duly passed and adopted by the City Council of the City of Chandler, Arizona, at a regular meeting held on the ___ day of _____, 2007, and that a quorum was present thereat.

CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY

**AGREEMENT
(Public Water Facilities)**

This Agreement is made and entered into this 10 day of Oct, 2007, by and between the CITY OF CHANDLER, an Arizona municipal corporation ("City"), and GARY L. FINLINSON as Trustee of the Gary Finlinson Living Trust and IRON MOUNTAIN INVESTMENT LLC, a Utah limited liability company ("Developers"), whose business address is 4852 East Baseline Road, Suite, 105, Mesa, Arizona, 85206.

RECITALS

- A. Developers are the owners and developers of that certain real property located at and near the southeast corner of Germann Road and McQueen Road in Chandler, Arizona (the "Developer's Property"), which Developers are developing as Viña Escondida (the "Project").
- B. As a condition of the development approvals given by City for the Project, Developers are required (i) to construct an underground looped public water line, and above-ground structures and appurtenances related thereto, sufficient to extend public water service to the Project (the "public water facilities"), and (ii) to provide, at Developer's sole expense, by dedication or otherwise, one or more easements deemed necessary by City for the Construction and subsequent use and operation of the public water facilities.
- C. City has determined that the public water facilities need to run to the Developer's Property through an easement to be acquired from nearby private property located along Blue Bird Drive just east of McQueen Road (the "Utility Easement"). This private property is owned by a third-party landowner ("Landowner"), who has not been willing to reach any agreement with Developers to grant the Utility Easement to City.
- D. City has determined that the extension of water service to the Developer's Property is a public use; that the acquisition of the Utility Easement through the property owned by Landowner is a matter of public necessity; and that City is willing to exercise its power of eminent domain to acquire the Utility Easement provided that Developers pay the full cost and expense of the acquisition.
- E. Developers are willing to pay the full cost associated with the acquisition of the Utility Easement in order to meet its responsibility for providing property needed for constructing the public water facilities.

NOW, THEREFORE, it is mutually agreed between the parties as follows:

1. City shall undertake condemnation proceedings to acquire the Utility Easement provided that Developers pay the full cost of the property acquisition. City shall use its in-house legal staff to prosecute any such condemnation proceeding and to

otherwise acquire the Utility Easement. Developers may request in writing that City use private legal counsel, rather than in-house legal staff, in connection with the condemnation proceedings and acquisition of the Utility Easement, provided that Developers therein acknowledge and agree that it will pay all fees and costs charged for such private legal services. In such event, City shall endeavor to retain private legal counsel mutually acceptable to both City and Developers, but if the parties cannot agree on a private legal counsel acceptable to both parties, then City shall retain private legal council of its choice. Prior to such private legal counsel being retained by City, Developers shall provide assurance to City in a form and amount satisfactory to the Chandler City Attorney to assure that all costs and attorney's fees incurred by City of the services of said private legal counsel are reimbursed by Developers.

2. Developers agree to pay the full cost of City's acquisition of the Utility Easement, which costs may include, without limitation, the following:

- a. Cost of written appraisal report ("Appraisal") in form or format acceptable to City to be obtained from an appraiser of City's choice.
- b. Cost of condemnation/litigation guarantee title report, with vesting deed and all underlying documents of record, and, at City's option, title insurance, which will be obtained from a title company acceptable to City.
- c. Any litigation costs, including any filing fees, service charges, publication costs, witness fees, and recording fees that may be incurred. Please note that City is normally not required to pay a filing fee and the use of expert witness testimony may not be required in the event a default is taken.
- d. The money damages assessed against City for the acquisition of the Utility Easement, including any taxes to be paid in connection therewith.
- e. Any attorney's fees that may be awarded against City as part of the condemnation. Normally, attorneys' fees are not awarded in a condemnation action. Also, since the acquisition of the easement property will be for City and within the scope of the City Attorney's general responsibilities, there will be no charge for the time spent by the City Attorney's office in connection with the condemnation action.
- f. Costs associated with any out of court settlement, whether such settlement is reached prior to or during the condemnation proceeding. This includes the amount to be paid to Landowner as part of any settlement as well as related escrow, insurance and recording costs.

3. Developers shall pay the sum of \$5,000.00 as an advance against Developer's total monetary obligation under this Agreement. Payment will be kept in a separate account to be used solely for payment of expenses incurred in connection with the condemnation. Upon receipt of the payment, and subject to Paragraph 8 below,

City will order the title report and Appraisal. Following receipt of the title report and Appraisal, City will tender a written purchase offer to Landowner at an amount at least equal to the value stated in the Appraisal, a copy of which will also be delivered to Landowner with the purchase offer. Landowner will be given no less than twenty (20) days to accept the offer or otherwise negotiate the sale of the easement interest.

4. Upon filing the condemnation action, City will request an additional payment from Developer over and above the aforementioned advance, which shall be in an amount equal to the value set forth in the Appraisal, plus \$5,000.00. Payment of this amount shall be made by Developer by means of a certified check no later than ten (10) days prior to the scheduled hearing date for the Order of Immediate Possession, which hearing date is usually requested when the condemnation action is filed.

- a. It is acknowledged by the parties that the amounts stated above are based on City estimates made prior to any appraisal of the easement property being obtained and may be more or less than the value of the easement property as appraised, ultimately determined in the action, or ultimately reached in settlement.
- b. If the actual expense of the litigation, including damages, turns out to be greater than the amount of the estimate, Developer shall pay the difference at or before City obtains the Final Order of Condemnation or, if settlement is reached, at the time of closing of escrow in connection with the settlement.
- c. If the actual expense of the litigation, including damages, turns out to be less than the amount of the estimate, City will refund Developer within fifteen (15) days from the date of the Final Order of Condemnation or, if settlement is reached, fifteen (15) days from the escrow closing date.

5. City will periodically notify Developer of the status of the condemnation action. Developer may recommend a title company to be used by City in this matter and City will provide a copy of the Appraisal to Developer prior to a written purchase offer being tendered to Landowner. However, any decision in these matters lies in the sole discretion of City.

6. Time is of the essence in this Agreement.

7. Upon legal possession of the easement property being obtained, Developer shall undertake and complete the construction for the public water facilities in accordance with any development approval requirements and/or Public Works requirements.

8. This Agreement is also expressly made subject to the Chandler City Council authorizing condemnation of the easement property. City will not arrange for a

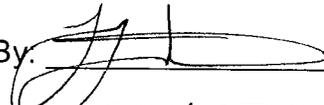
title report and /or appraisal until such authorization has been given. In the event no such authorization is given, this Agreement shall be deemed rescinded, any funds that may have been paid by Developers shall be returned and neither the City nor Developers shall have any further obligation to acquire the Utility Easement pursuant to this Agreement.

9. This Agreement may be executed in any number of counterparts, whether by original, copy or facsimile signature and each counterpart so executed shall, taken together, constitute one and the same original Agreement. Each person executing this Agreement personally represents and warrants that he or she has the full power and authority to bind the party being signed for to the terms of this Agreement.

CITY OF CHANDLER, an Arizona
municipal corporation

GARY L. FINLINSON, as Trustee of the
Gary Finlinson Living Trust

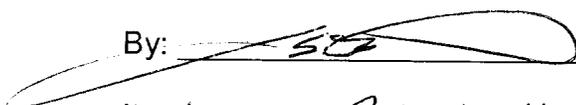
By: _____

By:  _____

Its: _____

Its: TRUSTEE _____

IRON MOUNTAIN INVESTMENTS,
LLC, a Utah limited liability company

By:  _____

Its: LANCE S. Richards Managing Member

APPROVED AS TO FORM:



City Attorney