

**DECLARATION OF COVENANTS, CONDITIONS,  
RESTRICTIONS AND EASEMENTS**

Bk 963 Pg 43

THIS DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS (the "Declaration") is made as of the 3<sup>rd</sup> day of OCT, 2000 (the "Effective Date") by SOUTHWEST LEISURE PROPERTIES, INC., a Maine corporation (the "Declarant"), having a mailing address c/o Ocean Properties, Ltd., 1000 Market Street, Building 1, Suite 300, Portsmouth, New Hampshire 03801 and RCI Realty, LLC, a Georgia limited liability company ("RCI")

WHEREAS, Declarant is the owner of that certain tract or parcel of real estate situate, lying and being in Otero County, New Mexico on which tract Declarant currently operates a hotel, such property being more particularly described on Exhibit "A" attached hereto and made a part hereof (the "Hotel Property"); and

WHEREAS, Declarant is the owner of that certain tract or parcel of real estate adjacent to the Hotel Property in Otero County, New Mexico on which tract or parcel Declarant has heretofore operated a restaurant, which parcel is more particularly described on Exhibit "B" attached hereto and made a part hereof (the "Restaurant Property") (the Hotel Property and the Restaurant Property are sometimes collectively referred to herein as the "Real Property"); and

WHEREAS, Declarant has contracted with RCI to sell the Restaurant Property, and pursuant to such agreement, Declarant will not sell the Restaurant Property unless the Restaurant Property is encumbered with certain covenants, conditions, restrictions and easements and RCI will not purchase the Restaurant Property unless the Hotel Property is encumbered with certain covenants, conditions, restrictions and easements; and

WHEREAS, Declarant and RCI agree that Declarant and RCI should execute this Declaration in order to render the Hotel Property and the Restaurant Property subject to the covenants, conditions, restrictions, and easements contained and set forth in this Declaration for the benefit of the Hotel Property and the Restaurant Property and to burden the Hotel Property and the Restaurant Property, and to cause this Declaration to be recorded in the public records of Otero County, New Mexico.

NOW, THEREFORE, in consideration of the premises, in consideration of the agreement by Declarant to sell the Restaurant Property to RCI, the agreement by RCI to purchase the Restaurant Property from Declarant, and for other good and valuable considerations, the receipt and sufficiency of which consideration is hereby acknowledged by the Declarant at and prior to the execution and recordation of this Declaration, the Declarant hereby declares that the Real Property shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the following covenants, conditions, restrictions and easements, all of which are for the purpose of protecting the value and desirability of the Real Property. The covenants, conditions, restrictions and easements set forth herein: (i) shall run with the title to the Real

Property or any portion thereof or interest therein and shall be binding upon and inure to the benefit of all persons having any right, title or interest therein, or any part thereof, their heirs, executors, administrators, personal representatives, successors and assigns; (ii) shall, without limiting the generality of the foregoing subparagraph inure to the benefit of Declarant and RCI and their successors in title to any portion of the Real Property and shall be binding upon Declarant and RCI and their successors in title to any portion of the Real Property and (iii) may be enforced by Declarant and RCI and their successors in title to any portion of the Real Property, including a mortgagee who has acquired the interest of Declarant or its successors in title or their respective successors in interest by foreclosure or by a deed in lieu of foreclosure.

**ARTICLE I**  
**EASEMENTS IN FAVOR OF THE HOTEL PROPERTY**

1. Access. Declarant hereby grants, reserves and establishes for Declarant, as the owner of the Hotel Property, and its successors in title to the Hotel Property, and to its licensees, invitees, grantees and lessees (the "Declarant Entities") a non-exclusive easement appurtenant for pedestrian and vehicular traffic over, through and across all pedestrian and vehicular accessways within the Restaurant Property, as may be constructed and relocated from time to time without interference to the Declarant, for the purposes of ingress and egress to the Hotel Property. The drive aisles on the Restaurant Property shall have a minimum width of twenty-four (24) feet and shall be located as shown on the site plan prepared by Calloway, Romero and Associates, a reduced copy of which is attached hereto as Exhibit C including but not limited to an easement having a minimum width of 24' for ingress and egress to the Hotel Property from White Sands Boulevard and running in a generally north south line parallel to the property line between Lot 1 and Lot 2 as shown on Exhibit C.
2. Sign. Declarant hereby grants, reserves and establishes for Declarant, as owner of the Hotel Property and to the Declarant Entities an easement to erect a sign acceptable to the Declarant on the Restaurant Property or on property which RCI leases from the State, such sign size and location to be reasonably agreeable to Declarant and the owner of the Restaurant Property.
3. Utilities. Declarant hereby grants, reserves and establishes for Declarant, as owner of the Hotel Property and to the Declarant Entities an easement for the installation, use, maintenance, repairs and replacement of water, sewer, fire safety, electric, telephone, cable, television and other utility lines located in or adjacent to the Restaurant Property.
4. Entrance. Declarant hereby grants, reserves and establishes for the Declarant as owner of the Hotel Property and to the Declarant Entities an easement to maintain the entranceway and canopy over and onto the Restaurant Property as it currently exists.

**ARTICLE II**  
**EASEMENTS IN FAVOR OF THE RESTAURANT PROPERTY**

1. Access. Declarant hereby grants, reserves and establishes for the owner of the Restaurant Property and its successors in title to the Restaurant Property and to its licensees, invitees, grantees and lessees (the "Restaurant Entities") a non-exclusive easement appurtenant for pedestrian and vehicular traffic over, through and across all pedestrian and vehicular accessways located within the Hotel Property, as may be constructed and relocated from time to time, for the purposes of ingress and egress to the Restaurant Property.

2. Parking. Declarant hereby grants, reserves and establishes for the owner of the Restaurant Property and for the Restaurant Entities a non-exclusive parking easement over, through and across the parking areas as are now or hereafter may be constructed, located and relocated on the Hotel Property. The owner of the Restaurant Property agrees that they will provide, at all times, without unreasonable interference, ingress and egress to the Hotel Property.

3. Utilities. Declarant hereby grants, reserves and establishes for the owner of the Restaurant Property and for the Restaurant Entities an easement for the installation, use, maintenance, repairs and replacement of water, sewer, fire safety, electric, telephone, cable, television and other utility lines located in or adjacent to the Hotel Property.

4. Construction. Declarant hereby grants, reserves and establishes for the owner of the Restaurant Property and for the Restaurant Entities a temporary construction easement over and across that portion of the Hotel Property as may be reasonably necessary to install the parking and utilities across and through the Hotel Property in order to serve the Restaurant Property. In addition, this construction easement shall be for the purpose of allowing the owner of the Restaurant Property to pave a portion of the Hotel Property and which area RCI agrees to pave in accordance with the terms of the First Amendment to Purchase and Sales Agreement between Declarant and RCI. The owner of the Restaurant Property agrees that they will provide, at all times, without unreasonable interference ingress and egress to the Hotel Property.

**ARTICLE III**  
**USE AND MAINTENANCE**

The owner of the Hotel Property shall be responsible to maintain the driveways and parking areas located on the Hotel Property in a neat, attractive and safe condition which maintenance shall include cleaning, restriping, repaving, repairing and resurfacing. The owner of the Restaurant Property shall be responsible to maintain the driveways and parking areas on the Restaurant Property in a neat, attractive and safe condition which maintenance shall include cleaning, repaving, restriping, repaving and resurfacing. All of the easements herein established shall be used in a manner so as to minimize disruption and interference with the use of the burdened property by the owner thereof or its licensees, invitees, grantees and lessees. . The owner of the Restaurant Property agrees that they will provide, at all times, without interference ingress and egress to the Hotel Property.

**ARTICLE IV**  
**RESTRICTIVE COVENANTS**

Declarant hereby covenants and agrees, and each successor in title to the Real Property or any portion thereof by acceptance of a deed to any portion of the Real Property, whether it shall be so expressed in such deed, is deemed to covenant and agree that the Real Property shall be subject to the following use restrictions:

1. Nuisance. No nuisance shall be allowed on any portion of the Real Property, nor shall any use or practice be allowed on any portion of the Real Property that is a source of annoyance

to either the Declarant Entities or the Restaurant Entities which interferes with the peaceful possession and use of the Hotel Property and the Restaurant Property by the Declarant Entities and the Restaurant Entities, respectively. All parts of the Real Property shall be kept in a clean and sanitary condition, and no rubbish, refuse or garbage shall be allowed to accumulate, nor any fire hazard or noxious odors allowed to exist. All trash, rubbish and/or garbage must be screened from the view of occupants and business invitees of the Real Property. No outdoor amplified music shall be allowed at the Real Property, unless Declarant grants prior written approval for such activity, which approval shall not be granted unless such amplified music does not interfere with the peaceful possession and use of the Real Property by the Declarant Entities and the Restaurant Entities. Without limiting the generality of the preceding sentence, no exterior speaker or other sound devices (other than security devices used exclusively for security purposes) shall be located, used or placed on any portion of the Real Property without the prior written approval of Declarant, which approval may be granted only if the noise level proposed in connection with such devices does not adversely impact the operations within the Hotel Property or the Restaurant Property in any material manner.

2. Plan Approval. No building, fence, wall or other structure or improvement (including landscaping, trees, shrubs, vegetation and ground cover) shall be commenced, removed, altered, painted, erected or maintained in or on the Real Property, nor shall any addition, change or alteration visible from the Hotel Property be made, nor shall any awning, canopy or shutter be attached to or placed upon outside walls or roofs of buildings or other improvements on the Real Property, until the conceptual drawings showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to, and approved in writing by Declarant, in its sole discretion reasonably exercised. Declarant shall approve plans and specifications submitted for its approval only if it deems that the construction, alterations, additions or use contemplated thereby in the locations indicated are in conformity with the stipulations, agreements, conditions and covenants set forth herein and that such construction, alterations, additions or use contemplated thereby in the locations indicated will not be detrimental to the Hotel Property or the Restaurant Property, and that the appearance of any structure affected thereby will be in harmony with the structures erected upon the Real Property; and is otherwise desirable. Declarant may condition its approval of plans and specifications as it deems appropriate, and may require submission of additional information prior to approving or disapproving material submitted. Declarant may require such detail in the conceptual drawings submitted for its review as is reasonable, including, without limitation, floor plans, site plans, drainage plans, elevation drawings and descriptions or samples of exterior materials and colors. Until receipt by Declarant of all required information, Declarant may postpone review of any plans and specifications submitted for approval. Declarant shall have thirty (30) days after its receipt of all required materials to approve or reject any such plans and specifications, and if Declarant seeks to disapprove such plans and specifications, any such disapproval shall state specific reasons for such disapproval. Failure by Declarant to respond within such thirty (30) day period shall be deemed to constitute approval of such plans and specifications. Declarant shall review and approve or disapprove all plans and specifications submitted to it for any proposed improvement, alteration or addition solely on the basis of aesthetic considerations and the overall benefit or detriment which would result to the Real Property. Declarant shall take into consideration the aesthetic aspects of the architectural designs, placement of buildings, landscaping, color schemes, exterior finishes and materials and similar features, but shall not be responsible for reviewing, nor shall its approval of any plan or design be deemed approval of, any plan or design from the standpoint of structural safety or conformance with building codes or other requirements of applicable governmental authorities.

3. Building Height. No building or other structure or improvement shall be constructed upon the Restaurant Property the height of which exceeds twenty-three (23) feet from grade.
4. Real Property Use Restrictions.
  - (a) Restaurant Property. The Restaurant Property shall be used for restaurant use and (i) must be operated under and pursuant to a franchise or license agreement between the owner of the Restaurant Property and a national or regional franchisor or licensor, (ii) shall not be operated as a drive-thru, fast food restaurant, and (iii) the method of operation must be one which is characterized by sales of alcoholic beverages which do not exceed forty-five (45%) percent of gross sales, all as verified by quarterly certifications of gross sales which breaks out sales of alcoholic beverages, which certifications shall upon request be furnished to Declarant. Declarant shall also have the right to audit the reports of gross sales by the owner of the Restaurant Property, at its expense and upon reasonable notice to the owner of the Restaurant Property.
  - (b) Real Property. In no event shall either the Hotel Property or the Restaurant Property be used as a bowling alley; skating rink; pawn shop; bar and grill in which sales of alcoholic beverages exceed forty-five (45%) percent of gross sales; amusement park; water slide attraction or facility; miniature golf course or facility; golf driving range; gasoline service station; oil change and lubrication facility; tire store; convenience store; carnival; meeting hall; entertainment facility; disco or other dance hall; video or other game parlor; pool hall; billiard parlor; amusement center; off-track betting establishment; flea market; massage parlor; auditorium; facility for the display of nudity and/or human sexuality; facility for the sale of pornographic objects or materials; sporting event or other sports facility; or any facility for the sale, repair or maintenance of new or used cars, trucks, recreational vehicles, multi-purpose vehicles, boats or mobile homes.

**ARTICLE V**  
**FIRST RIGHT OF REFUSAL**

If the owner of the Restaurant Property elects to sell directly or individually to an unaffiliated third party all or any part of the Restaurant Property, Declarant shall have a right of first offer to purchase the Restaurant Property in accordance with the provisions of this Article. The owner of the Restaurant Property shall give written notice to Declarant of its intent to sell the Restaurant Property which notice shall state (a) the all cash purchase price and other terms at which the owner of the Restaurant Property is willing to sell the Restaurant Property and (b) identify any third party who has offered to purchase the Restaurant Property and the terms and conditions of the offer. Declarant shall have ten (10) business days, from receipt of written notice to elect to purchase the Restaurant Property under the terms and conditions set forth in the offer with a closing on or before the earlier of the closing date set forth in the third party's offer or within one hundred and twenty (120) days after Declarant's election to purchase the Restaurant Property. In the event the Declarant does not exercise its right to elect to purchase the Restaurant Property or otherwise fails to respond to notice of any offer within ten (10) business days and the owner of the Restaurant Property closes the sale of the Restaurant Property to the third party,

then this first right of refusal shall be terminated and of no further force and effect. The Declarant agrees to execute such documentation as may be reasonably requested by the owner of the Restaurant Property in order to remove this right of first refusal. In addition, and notwithstanding any provision contained in this Article V, the foregoing right of first refusal shall not apply to (i) a transfer of the Restaurant Property to an entity which is affiliated with the owner of the Restaurant Property by similar or common ownership or management, (ii) a merger or consolidation of the owner of the Restaurant Property, (iii) a transfer of the Restaurant Property to the franchisor of the owner of the Restaurant Property (iv) a sale of the Restaurant Property which is made in conjunction with the sale by the owner of all of the restaurants or restaurant properties owned by such owner either in the State of New Mexico, the southwest region, or on a national basis, or (v) a sale of the Restaurant Property which is made in conjunction with a "sale-leaseback" transaction to a financing entity which leases the Restaurant Property back to the owner of the Restaurant Property, provided that in all of the foregoing exceptions, the Restaurant Property shall have been used and shall continue to be used for the operation of an Applebee's restaurant. In the event of a transfer pursuant to (i) through (ii) the transferee agrees to be bound by the First Right of Refusal of the Declarant in the event of a sale of the property.

#### **ARTICLE VI** **GENERAL PROVISIONS**

1. **Enforcement.** This Declaration may be enforced by Declarant or Declarant's successors in title to the Hotel Property or the Restaurant Property as follows:

(a) Breach of any of the covenants contained in this Declaration and the continuation of any such breach may be enjoined, abated or remedied by appropriate legal proceedings.

(b) The result of every act or omission whereby any of the covenants contained in this Declaration are violated in whole or in part is hereby declared to be and constitute a nuisance, and every remedy allowed by law or equity with respect to nuisances either public or private shall be applicable and may be exercised.

(c) After construction of the restaurant to be located on the Restaurant Property, and except in the case of a casualty or major renovation of the restaurant building, in the event the owner of the Restaurant Property ceases to conduct business for a period of one hundred and eighty (180) days or more out of any two hundred (200) day period, Declarant shall have the right (the "Repurchase Right") exercisable by written notice to the owner of the Restaurant Property to purchase all of the Restaurant Property for a price equal to the greater of the appraised value of the Restaurant Property ( as improved) or the outstanding principal balance of the acquisition and construction loans obtained by the owner of the Restaurant Property for the Restaurant Property. The Repurchase Right is only effective and exercisable as long as the restaurant has not operated on the Restaurant Property for one hundred and eighty (180) days out of any two hundred (200) day period and shall not apply if the restaurant is closed for major renovation or for repairs caused by a casualty. In the event the restaurant is closed for any period of time, the owner of the Restaurant Property agrees to keep the lights on in the parking area at all times.

(d) The remedies herein provided for breach of the covenants contained in this Declaration shall be deemed cumulative, and none of such remedies shall be deemed exclusive.

(e) The failure to enforce any of the covenants contained in this Declaration shall not constitute a waiver of the right to enforce the same thereafter.

2. Partial Invalidity. If any term, covenant or condition of this Declaration, or the application thereof, to any person or circumstances shall be invalid or unenforceable at any time or to any extent, as determined by a court of competent jurisdiction (the "Offending Provision") then the remainder of this Declaration, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby and each term, covenant and condition of this Declaration shall be valid and enforced to the fullest extent permitted by law; provided, however, that the parties affected by the Offending Provision shall endeavor in good faith, within sixty (60) days after the date such judicial determination is made to agree upon alternative provisions which shall have the same practical affect as the Offending Provision and upon any agreement being reached, the new provision shall be incorporated into and form a part of this Declaration.

3. Term. The easements established by this Declaration shall run with and bind the Real Property and shall be perpetual in duration. The covenants and restrictions of this Declaration shall run with and bind the Real Property and every part thereof and interest therein and shall inure to the benefit of and be enforceable by the owner or owners from time to time of the Hotel Property and the Restaurant Property and their respective successors and assigns, for a term of twenty (20) years from the Effective Date, after which time said covenants, conditions and restrictions shall be automatically extended for successive periods of ten (10) years, unless an instrument, approved by the record title holders of the Hotel Property and the Restaurant Property, in writing, has been recorded revoking said covenants, conditions and restrictions.

4. Interpretation. The provisions of this Declaration shall be liberally construed to effectuate its purpose. The article and section headings have been inserted for convenience only, and shall not be considered and referred to in resolving questions of interpretation or construction. Unless the context requires a contrary construction, the singular shall include the plural and the plural the singular, and the masculine, feminine and neuter genders shall each include the others. This Declaration shall be read as cumulative to and not in limitation of applicable declarations and all exhibits thereto, but in the event of any conflict therewith, this Declaration shall take precedence over all such declarations.

5. Constructive Notice and Acceptance. Every person who owns, occupies or acquires any right, title, estate or interest in or to any portion of the Real Property shall be conclusively deemed to have consented and agreed to every limitation, restriction, condition and covenant contained and set forth herein; whether or not any reference hereto is contained in the instrument by which such person acquired an interest in any portion of the Real Property. **RCI, by execution hereof, agrees to the terms and conditions set forth herein.**

IN WITNESS WHEREOF, the Declarant and RCI have caused this Declaration to be executed as of the Effective Date.

**SOUTHWEST LEISURE PROPERTIES, INC.,**

By: Michael Walsh  
Name: Michael Walsh  
Title: Pres.

STATE OF New Hampshire  
COUNTY OF Sherburne, ss

On this 3rd day of Sept, 2000, before me the undersigned Notary Public, personally appeared Michael Walsh of Southwest Leisure Properties, Inc., known to me to be an officer of the company that executed the Agreement and acknowledged the Agreement to be the free and voluntary act and deed of the company, and on oath stated that he or she is authorized to execute this Agreement and in fact executed the Agreement on behalf of the company.

By [Signature] Residing at Forburyth NH

Notary Public in and for the State of NH  
My Commission expires 9-18-01

**Lisa M. Grella**  
Notary Public  
My Commission Expires: 09/18/2001

**RCI REALTY, LLC**

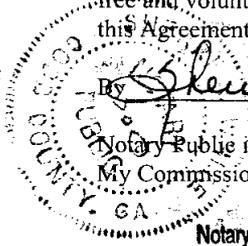
By: S.A. Grove  
Name: Stephen A. Grove  
Title: Manager

STATE OF Georgia  
COUNTY OF Cobb, ss

On this 25th day of Sept. 2000, before me the undersigned Notary Public, personally appeared S.A. Grove of Southwest Leisure Properties, Inc., known to me to be an officer of the company that executed the Agreement and acknowledged the Agreement to be the free and voluntary act and deed of the company, and on oath stated that he or she is authorized to execute this Agreement and in fact executed the Agreement on behalf of the company.

By Sherril A. White Residing at Woodstock, GA

Notary Public in and for the State of Georgia  
My Commission expires March 4, 2003



Notary Public, Cobb County, Georgia  
My Commission Expires March 4, 2003

**EXHIBIT A**

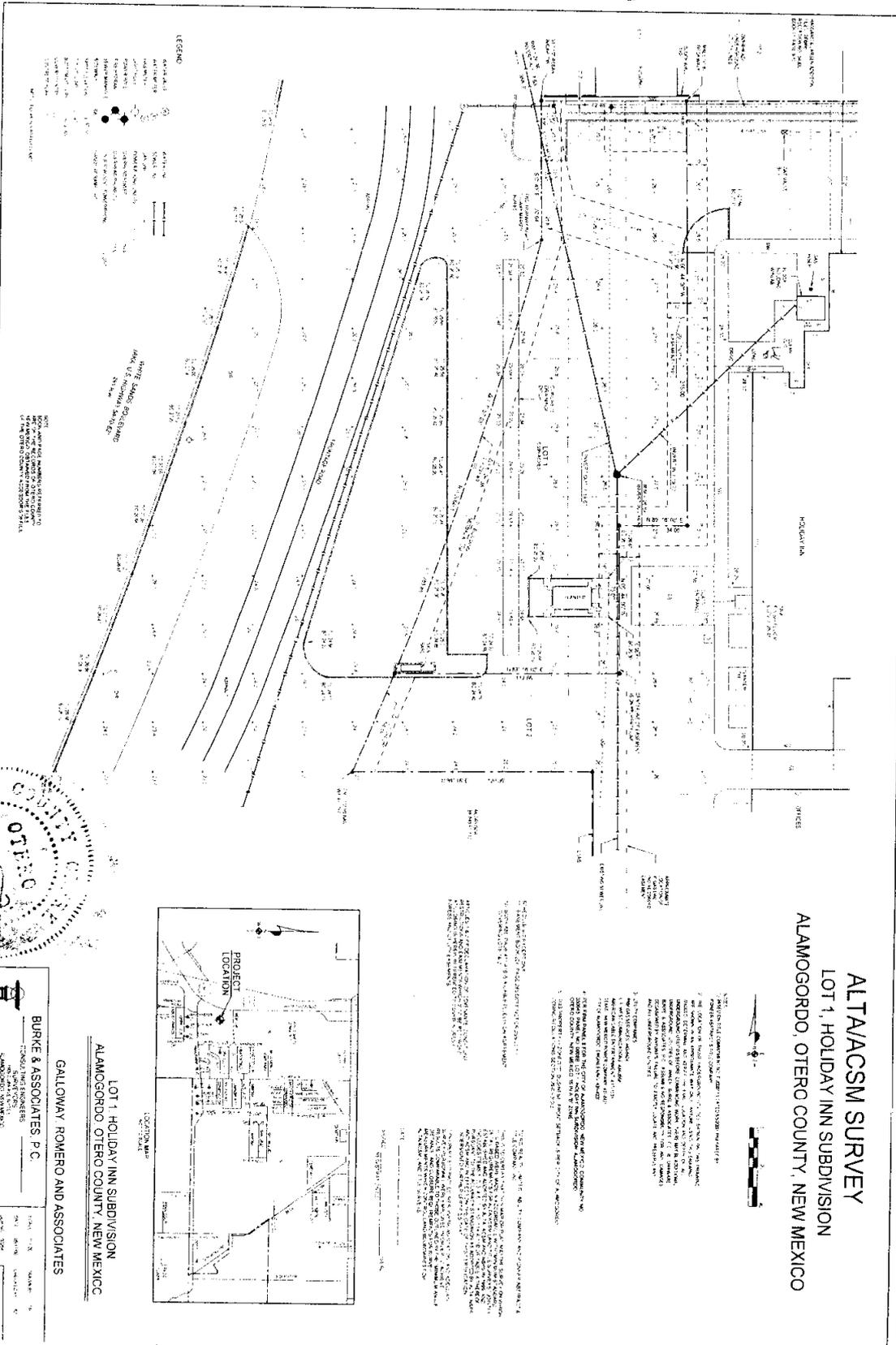
Lot (2) as shown on a plan entitled Holiday Inn  
Subdivision Otero County, New Mexico prepared by  
Burke & Associates, P.C.

**EXHIBIT B**

Lot (1) as shown on a plan entitled Holiday Inn

Subdivision Otero County, New Mexico prepared by

Burke & Associates, P.C.



STATE OF NEW MEXICO, County of Otero, ss, Filed for record in my office this 5 day of October, 2000, at 4:20 o'clock P.M. and duly recorded in Book 963 Page 43-53 of the Records of said county. Mary P. Quintana by Lynne Estrada County Clerk Deputy

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