

Margaret L. Thum, Esq.
PO Box 117683
Burlingame, CA 94011

Received at 4/18/2011
MPWMD Board Meeting
Item 18

April 18, 2011

Monterey Peninsula Water Management District
5 Harris Court, Bldg. G
Monterey, CA 93942-0085

**Re: Second Supplemental Letter Supporting Appeal of Decision of
Non-Compliance upon Final Inspection for Permit 30234
Property Address: 951 Coral Dr., Pebble Beach, CA 93953 (the "Property")
APN: 007-254-005-000**

Dear Monterey Peninsula Water Management District Board:

This letter is in response to the report from Mr. Darby Fuerst, General Manager of the Monterey Peninsula Water Management District (the "District"), and is supplemental to the letters dated July 28, 2010 and March 25, 2011, in which Richard and Sharlene Thum (collectively, "we," "us," or "our") respectfully requested this Board to review the facts and findings of the above-referenced matter and reverse the District's decision of non-compliance with Permit 30234.

All Exhibits, District rules, regulations, ordinances, documents provided as part of the California Public Records Request Act ("CPRA") request, and correspondence between the parties related to this appeal and the CPRA request are incorporated in this letter by reference.

Before discussing our response to the District's report, this Board should be aware that the District report does not mention, address, or otherwise refute any of the arguments or issues we raised in our letter dated March 25, 2011.

We respectfully request this Board to consider the following points before making its decision:

1. *Prior Board Precedent.* The District states its recommendation to require a water permit for the two water fixtures at issue would be consistent with prior Board decisions. This is not correct. The District does not provide any support for its conclusion, and moreover, the District fails to make any mention of the reference in our letter dated March 25, 2011, to the appeal decided by this Board in May 2002 (Ken and Sharlene Virnig, Appellant; Murray Smith, Applicant) (the "Smith appeal"). The Smith appeal addressed the issue, similar to ours, of whether water fixtures in a home recently purchased by Mr. Smith were in the home at the time of purchase. The prior owner, Mr. John Frederiksen, confirmed that the fixtures were in the house when it was sold to Mr. Smith. This Board agreed, and permitted Mr. Smith to keep those fixtures that were in the house at the time he purchased the house from Mr. Frederiksen.

2. *We Relied on District's Inspection of its Water Fixture Count from August 2007 and Subsequent Actions.* When we filed our application for Permit 30234 and signed the associated deed restriction, we relied on the District's water fixture count from its inspection in August 2007. Our process for completing the permit application is as follows: (i) Mr. Anatoly Ostretsov of the architect firm IDG requested the latest inspection report from the District, which was the inspection report from August 2007, (ii) he called the District for it to explain any issues with the inspection report, e.g., getting a credit for instant hot water, etc., and (iii) he prepared the water release form, also known as the permit application, based on the District's inspection report from August 2007

and its comments during the conversation with the District. Our permit application only increased the fixture count by the number of fixtures we were adding to the bathroom. In our attempt to provide truthful answers to the District's request for a count of water fixtures at the Property, we asked the District if we needed to include the sink in the outside bar-b-que (not built, but part of the plans for Permit 30234), and the District said "no."

Moreover, from August 2007 to January 2010, when Permit 30234 was issued, the District was notified of at least three opportunities to inspect the Property to verify water fixture counts as calculated under its rules. These instances are: (i) January 2008, when the District granted final approval of Permit 24754 (see Rule 23-A-1-o), (ii) June 2009, when we purchased the Property from the Filice's (see Rule 144-D and Exhibit A, which indicates on the District form that certification is verified by "MPWMD inspection"), and (iii) January 2010 when it issued us Permit 30234 (see Rule 24-A-1-c). The District did not take any of these opportunities to inspect the Property to count water fixtures.

As mentioned in the points described in our prior letters, and more fully discussed below, the District's rules for counting water fixtures are arbitrary, vague and unclear, and we have no familiarity with them. After pursuing this appeal for many months, we still do not understand what is to be counted and why – and we are not alone. Other citizens with whom we have spoken have universally made the same remarks. The District is the only entity that can navigate its rules, and thus it should either make its rules more clear and comprehensible for others to follow, or understand that citizens are forced to rely on District records when applying for District permits.

3. *Bathroom Water Fixtures Remain Unaltered.* We purchased the Property in June 2009 and have not altered any of the bathroom water fixtures that were in the Property at the time of purchase. The only changes to bathroom fixtures are the ones that were added with the new bathroom constructed pursuant to Permit 30234.

4. *District Does Not Dispute Photographs of Water Fixtures.* Upon the District's request in September 2010, we provided photographs of the two bathroom water fixtures at issue. The District asserts four years later that its August 2007 inspection is correct, and it does not dispute the water fixtures in the photographs we sent in September 2010 as being different than the fixtures it inspected in August 2007. The District's actions, therefore, support our position that the water fixtures installed today are the same ones it inspected in August 2007.

Although we could not find a provision in the District's rules that states this, apparently if the two hand held faucets at issue included a diverter, then the District's count of water fixtures from its August 2007 inspection report would be correct. The only way to determine if a diverter exists is to turn on the showerhead, handheld faucet, and tub spout at the same time and see if water comes out of all fixtures. If the District performed only a visual inspection of the water fixtures in August 2007, it would have missed the fact that there are not diverters for the handheld faucets at issue. When the District performed its inspection in July 2010, it turned on the handheld faucets and the showerheads at the same time (although it did not also turn on the tub spout), and discovered that a diverter does not exist.

The water fixtures in the downstairs bathroom are very unique – all of the controls are outside of the tiled wall. Because the District remembers so clearly its inspection from August 2007, it certainly would remember this unique fixture. See Exhibit B. On Friday, April 15, 2011, we inquired with the manufacturer to see if there is/was a diverter model available back in 2007. We spoke with Mr. Lennart Caspersen, General Manager of Herbeau (the French manufacturer of the shower/tub combination fixture in the downstairs bathroom). Mr. Caspersen said that the only

shower/tub combination in the Royale line, which is the line installed in our Property, does not and never has come with a diverter (Model 3401). In fact, all three fixtures – the showerhead, handheld faucet, and tub spout can operate at the same time. Thus, even if the Filice's wanted to switch out a diverter model for the Herbeau shower/tub fixture with a non-diverter model, they could not have done so - a diverter model is not available.

5. *We did not prepare the deed restriction.* The District's report states that we prepared the deed restriction, and thus are responsible for the water fixture count listed in the deed restriction. This is not correct. The District prepared the deed restriction and sent it to us in Texas for signature. We were not the party requesting a deed restriction – the District demanded the deed restriction. As a result, the District should be responsible for ensuring that the water fixture count is correct in the deed restrictions that it is imposing. Based on what we know now, the District's arbitrary application of its rules (e.g., see item 10 below) we are concerned that the deed restriction will be interpreted differently, and unfavorably against us, in the future.

6. *We did not have notice of the 2000 Deed Restriction nor copies of the 2000 Architect Plans.* The District report infers that we had notice of the 2000 deed restriction it placed on the property, and as such we are responsible for limiting the water fixtures at the Property to those listed in the 2000 deed restriction. The District should remember that it removed this deed restriction in April 2007 – more than two years before we purchased the property. See Exhibit C. We never had notice of the 2000 deed restriction.

In addition, the District references architect plans from 2000 as support for its position that only certain water fixtures may be installed at the Property. We have never seen those plans. Moreover, those plans were prepared seven years before the Property was completely constructed and the District performed its inspection in August 2007. It seems odd that the District would put weight on plans from 2000, when it inspected the property seven years later. In addition, building plans may change slightly over time. For example, in our case our plans for Permit 30234 indicated that we were installing a multiple shower fixtures, and we only installed one showerhead.

7. *August 2007 Inspection Is Key, not Inspections in 1992 and 2000.* The District's recommendation states that there is no evidence to support a finding that the two additional showerheads were installed and operational on the site when it documented water fixtures in 1992 and 2000. That is likely true, because the water fixtures weren't installed until approximately 2007, when the Property remodel was completed. With a complete inspection, these fixtures would have been properly documented by the District in August 2007.

8. *We should not be Penalized for the District's Error.* The District report lists five remedies to resolve this dispute. As mentioned throughout our correspondence, we constructed the bathroom pursuant to District Permit 30234, and under the doctrines of vested rights and equitable estoppel, we are not required to perform conditions after receiving such Permit. Moreover, the five remedies listed in the District report all require additional costs that we did not budget or are impossible to perform (can't add a diverter to the Herbeau fixture). In addition, if the District requires us to remove the two water fixtures at issue, the District would be taking our property and has not offered to provide just compensation. If the District is willing to justly compensate us for taking our water fixtures and requiring the imposition of the deed restriction limiting the number and location of water fixtures in the Property, we request it provide a written offer of compensation with its decision in this hearing. The District should be aware that the Herbeau fixture is approximately \$10,000, and the fixtures in the upstairs bathroom made by Waterworks cost approximately the same. This does not include the time for removal and reconstruction of the bathrooms.

9. *Government Regulations Must Be Narrowly Tailored.* As mentioned in our letter dated March 25, 2011, the District, like all government agencies, must select the course of action that is narrowly tailored to respect the rights of all citizens, especially when the sanctum of the home is involved. If estimating water use capacity is critical to the District, then a more narrowly tailored approach would be to obtain water meter readings or water usage reports from California American Water Company – this approach would avoid the District from intruding into homes to count and limit water fixtures and would be more accurate. We suspect the District does not want to take this more narrow approach for many reasons, including that it would then not be able to restrict household water use, which it is attempting to do with its current water fixture scheme. By counting and limiting water fixtures, the District is able to obfuscate the Legislature's intent that the District does not have the right to restrict household uses of water.

10. *District Rules are Arbitrary, Vague, Unclear and Are Unconstitutional.* In addition to the arguments set forth in our March 25th letter, we point out that District rules are so arbitrary that only it has the secret code to determine what is being counted. A key point is the District rules do not count all water fixtures in a home. Here are just a few examples:

- There are two handheld water fixtures in the master bathroom – they are virtually identical, except for a small piece of porcelain on one of the handles. See Exhibit D-1 & D-2. One fixture is in the master shower, and apparently is counted for purposes of the District's water fixture counting rules. Exhibit D-1. The other fixture is used with the master bath, and is not counted under the District's water fixture counting rules. Exhibit D-2.
- The District is contesting two fixtures in a couple of our showers. However, we have two fixtures over each of the sinks in our kitchen, and despite multiple District inspections of our Property, the District has never raised these two fixtures as an issue.
- Some water fixtures are not counted at all, such as pot fillers.
- In our attempt to truthfully answer the District's questions about water fixtures in our Property, we asked the District if we needed to include in our fixture count the sink in the bar-b-que area outside (not built, but part of the plans for Permit 30234), and the District said no, we did not need to include that fixture.

Furthermore, despite the District's reference in the notice for this hearing and its July 2010 inspection report that the two fixtures at issue are showerheads, they are not. By the District's own definition, the fixtures at issue are not showerheads, but possibly "body spray nozzles." We have referenced these in our correspondence as handheld faucets, and sometimes they are referred to as body spray wands or personal showers. The District rules state that "[a] Body Spray Nozzle shall have the same fixture unit count as a Showerhead," but the rules do not state that a body spray nozzle is a showerhead. Rather, a body spray nozzle is different than a showerhead, although they each have the same fixture unit count under the District rules.

So, when the District asserts we lied in our permit application that we had two extra showerheads, we did not lie and were not trying to skirt the District's rules. Rather, we were earnestly attempting to provide truthful answers to the District's questions. We consider a showerhead to be a water fixture that is permanently affixed to the wall or ceiling of a shower stall or above a bathtub. Handheld faucets do not fit this description.

The US Supreme Court has stated that laws are valid only if a person of average intelligence can decipher them. See *City of Chicago v Morales*, (1999) 527 U.S. 41. It is not reasonable that a person of average intelligence would be able to decipher what is included in the District's water fixture count, because not all fixtures are counted, and it is not reasonable that a person of ordinary intelligence would translate a handheld faucet or body spray nozzle to mean a

showerhead – even the District's own rules do not define a body spray nozzle as a showerhead. Thus, if the District is interested in counting handheld faucets, then it should indicate this where appropriate, such as on Table 1 of Rule 24, its inventory form of water fixtures and its permit applications. Because it did not, and because a body spray nozzle is not what a person of ordinary intelligence would consider to be a showerhead, the District's rules in this instance are vague and void as a matter of law. Thus, they are unenforceable in our case.

In addition, as mentioned in our March 25, 2011 letter, the District's rules violate multiple provisions of the US and California Constitutions, including (without limitation) due process, because the District's rules are arbitrary (some fixtures are included in the District's count, others are not), irrational (it is not clear what exactly the District is trying to calculate, as it has stated in Ordinance 98 that it recognizes that people, not fixtures, use water, but the District refuses to use meter readings as a measure of water use), vague (what is meant by showerhead?) and unclear.

11. *Scope of Search in Home Must Be Narrowly Tailored.* While the District does not have the authority to enter homes to count faucets as set forth in our March 25, 2011 letter, if it did have authority, any search must be limited in scope according to the protections afforded under the Fourth Amendment to the US Constitution and Article 1, Section 13 of the California Constitution. Both Constitutions provide the highest protection for citizens against unreasonable government intrusions into homes, and any reasonable government search must be narrowly tailored in scope to that which is absolutely necessary. The Monterey County Building Department understands this – they only inspected the bathroom being constructed pursuant to its Permit BP091600 – when it entered our Property.

12. *We request the Board to Respond to the Claims in our Letter Dated March 25, 2011.* The Staff report fails to provide a recommendation on any of the claims set forth in our letter dated March 25, 2011. We respectfully request this Board to provide its response to each of our claims with the correspondence informing us of its decision on Permit 30234.

13. *We Reserve the Right to Pursue Damages under 42 U.S.C 1983 ("Section 1983).* In our letter dated March 25, 2011, we identified multiple constitutional violations with the District's practice of regulating residential water by counting and limiting water fixtures. Section 1983 "provides a remedy against 'any person' who under color of state law, deprives another person of the rights protected by the Constitution." *Collins v. Harker Heights* (1992) 503 U.S. 115, 120. We reserve our rights to make a claim under Section 1983.

If the District Board has any questions, please feel free to contact me at 650-218-1937. Please note that this letter is written without prejudice to our rights, all of which are hereby expressly reserved.

Very truly yours,



Margaret L. Thum, Esq.

Attachments

MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
WATER CONSERVATION CERTIFICATION

Transfer of Title/Ownership

Property Address 951 Coral Drive City Pebble Beach

Assessor's Parcel Number (APN) 007.254.005

I, Paul Filice am the seller (circle one) of the property located at the above address. I hereby certify that the above property is in compliance with the Monterey Peninsula Water Management District's Water Conservation Law as summarized on the reverse side of this form.

This certification is verified by the following (check all that apply).

- a. MPWMD inspection (Attach copy of report)
- b. Exemption for _____
Granted by: _____
(Attach copy of exemption approval by MPWMD)
- c. Extension for _____ days. (Max. 120 Days)
- d. Owner Certification - Attach itemized receipts for purchase of plumbing fixtures and/or installation services-(Note: An MPWMD inspection may be required for verification.)

2. Is a water well located on the property? Yes No

If yes, I certify that the well or wells have been properly registered with the Monterey Peninsula Water Management District, and a water meter has been installed. (See reverse side for well registration and reporting requirements.)

I declare under penalty of perjury that the information stated above is true and complete to the best of my knowledge.

Paul Filice 6.19.09 ()
 Buyer/Seller/Owner Date Daytime Phone
Paul Filice
 Print or Type Name

NEW OWNER'S ACKNOWLEDGMENT OF
WATER CONSERVATION REQUIREMENTS

I, Richard and Sharlene Thum, acknowledge receipt of this report regarding permanent water conservation requirements that may affect my property. I further understand that if an MPWMD inspection has not been performed prior to the transfer of ownership, a verification inspection may be requested by the District at a future date.

Richard and Sharlene Thum ()
 Signature Daytime Phone
Richard and Sharlene Thum
 Print or Type Name

Mailing Address _____

EXHIBIT B





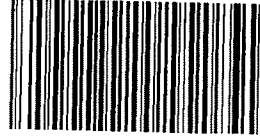
**MONTEREY PENINSULA
WATER MANAGEMENT DISTRICT**

5 HARRIS COURT, BLDG. G
POST OFFICE BOX 85
MONTEREY, CA 93942-0085 • (831) 658-5601
FAX (831) 644-9560 • <http://www.mpwmd.dst.ca.us>

Stephen L. Vagnini
Monterey County Recorder
Recorded at the request of
Filer

CRNOEMI
4/12/2007
14:15:50

DOCUMENT: **2007029609**



Titles: 1/ Pages: 2

Fees...	11.00
Taxes...	
Other...	2.00
AMT PAID	\$13.00

Recording Requested by:

Monterey Peninsula Water Management District

When Recorded, Mail to:

Monterey Peninsula Water Management District
Post Office Box 85
Monterey, CA 93942
Telephone (831) 658-5601

NOTICE OF REMOVAL OF DEED RESTRICTION

THIS DOCUMENT SUPERSEDES PREVIOUSLY RECORDED MPWMD DOCUMENT

NOTICE IS GIVEN that the Monterey Peninsula Water Management District (hereinafter referred to as the Water Management District), duly formed as a water district and public entity pursuant to the provisions of law found at Statutes of 1977, Chapter 527, as amended (found at West's California Water Code Appendix, Chapters 118-1 to 118-901), finds the real property referenced below as "Subject Property" to be in compliance with the Water Management District rules and regulations.

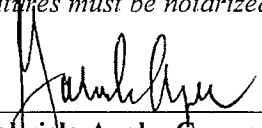
NOTICE IS FURTHER GIVEN that the real property affected by this Notice of Removal is situated in the **County of Monterey**:

**951 CORAL DR, PEBBLE BEACH CA 93953-2540
(MONTEREY PENINSULA COUNTRY CLUB 1 LOT 3 BLK 24)
ASSESSOR'S PARCEL NUMBER 007-254-005-000**

This real property is hereinafter referred to as the "Subject Property." The Subject Property is located within the jurisdiction of the Water Management District. **Paul G. Filice** is record Owner of the Subject Property.

NOTICE IS FURTHER GIVEN that based upon information obtained by the undersigned within the scope and course of his/her official duties and employment with the Water Management District, it has been determined that the Subject Property has complied with Water Management District laws, rules and regulations. This document shall rescind, nullify and void the prior and specific **Notice and Deed Restriction Regarding Limitation on Use of Water on a Property, Document 2000048957, recorded August 1, 2000** on the Subject Property described above.

(Signatures must be notarized)

By: 
**Gabriela Ayala, Conservation Representative
Monterey Peninsula Water Management District**

Dated: 4-10-07

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

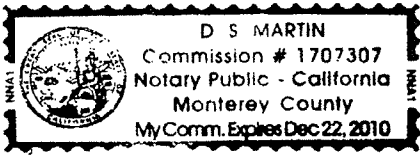
County of Monterey

On April 10, 2007 before me, Debra Martin, Notary Public

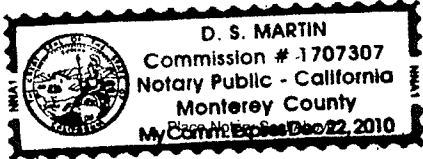
personally appeared Gabriela Ayala

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.



WITNESS my hand and official seal.

[Signature]
Signature of Notary Public

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

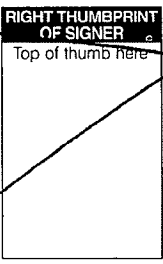
Title or Type of Document: Notice of Removal of Deed Restriction

Document Date: 4-10-2007 Number of Pages: 1

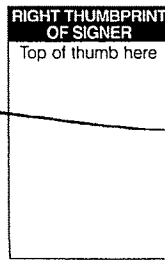
Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____
 Individual
 Corporate Officer — Title(s): _____
 Partner — Limited General
 Attorney in Fact
 Trustee
 Guardian or Conservator
 Other: _____
Signer Is Representing: _____



Signer's Name: _____
 Individual
 Corporate Officer — Title(s): _____
 Partner — Limited General
 Attorney in Fact
 Trustee
 Guardian or Conservator
 Other: _____
Signer Is Representing: _____



END OF DOCUMENT



**MONTEREY PENINSULA
WATER MANAGEMENT DISTRICT**

5 HARRIS COURT, BLDG. G
POST OFFICE BOX 85
MONTEREY, CA 93942-0085 • (831) 658-5601

Recording Requested by: www.mpwmd.dst.ca.us

And When Recorded Mail To:
Monterey Peninsula Water Management District
Post Office Box 85
Monterey, California 93942-0085

Joseph F. Pitta
Monterey County Recorder
Recorded at the request of
Filer

CRKATHLEEN
8/01/2000
14:41:58

DOCUMENT: **2000048957**



#2000048957#

Titles: 1 / Pages: 4

Fees	17 00
Taxes	
Other	1 00
AMT PAID	18 00

**NOTICE AND DEED RESTRICTION
REGARDING LIMITATION ON USE
OF WATER ON A PROPERTY**

NOTICE IS HEREBY GIVEN that the real property situated in the County of Monterey:

**951 CORAL DRIVE {L3 B24/MONTEREY PENINSULA COUNTY CLUB 1}
ASSESSORS PARCEL NUMBER 007-254-005,**

hereinafter referred to as the "subject property," is located within the jurisdiction of the Monterey Peninsula Water Management District, a public agency formed and operating within the provisions of law found at Statutes of 1977, Chapter 527, as amended found at West's California Water Code Appendix, Chapters 118-1 to 118-901. **Paul G. & Mary L. Filice**, (hereinafter referred to as Owner(s)), is the record owner(s) of the subject property. Owner(s) and the Monterey Peninsula Water Management District each acknowledge that the installation and maintenance of an ultra low-flow washing machine, manufactured with no wash cycle capable of using greater than 28 gallons of water, two-two liter maximum ultra low-flush toilets, two dishwashers with no complete wash cycle capable of using greater than 7.66 gallons of water, and an instant-access hot water system capable of supplying hot water at any access point within six seconds, are permanent requirements of the property. The permitted water use at the subject property is to supply the potable water requirements for a single-family dwelling consisting of:

- 3 ultra low-flush toilets (2:2 liter maximum, 1: 1.6 gallons-per-flush)
- 4 wash basins (2.2 gallons-per-minute maximum flow)
- 2 kitchen sinks (2.2 gallons-per-minute maximum flow) and two dishwashers (7.66 gallons maximum on all cycles)
- 1 washing machine (28 gallons maximum on all cycles)
- 2 shower stalls (2.5 gallons-per-minute maximum flow showerheads)
- 1 oversize bathtub (over 55 gallon overflow capacity, may have showerhead above)
- 1 standard bathtub (under 55 gallon overflow capacity, may have showerhead above)
- Reasonable outdoor water use as needed and as allowed by District Rules.

Owner(s) acknowledges that the condition requiring the installation and maintenance of the ultra-low flow appliances referenced above has been voluntarily accepted as a condition of Water Permit No. 18570 and is permanent and irrevocable, unless amended by the filing of a less restrictive deed restriction.

OWNER(S) agrees to record this Notice and Deed Restriction in the Recorder's Office of the County of Monterey, and by such recordation accepts unconditionally the terms and conditions stated herein.

By: Gabriela Ayala
Gabriela Ayala
Conservation Representative
Monterey Peninsula Water Management District

Dated: 7/24/2000

The undersigned Owner(s) request and consent to recordation of this Notice and Deed Restriction Regarding Limitation on Use of Water on a Property. *(Signature: must be notarized).*

By: Paul G. Filice
Paul G. Filice

Dated: 7-31-00

By: Mary L. Filice
Mary L. Filice

Dated: 7-31-00



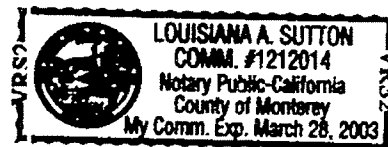
STATE OF California }
 } ss.
COUNTY OF Monterey }

On July 31, 2000 before me, Louisiana A. Sutton
personally appeared Paul G. Filice and Mary L. Filice

~~/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/their~~ signature(s) on the instrument the person(s) or
the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Louisiana A. Sutton



(This area for official notarial seal)

Title of Document: Notice and Deed Restriction Regarding Limitation on Use of
Water on a Property
Date of Document: 7/24/2000 No. of Pages: 3
Other signatures not acknowledged: Gabriela Ayala

END OF DOCUMENT

3008-SM (1/94)(General)
First American Title Insurance Company

EXHIBIT D-1



