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David A. McEvoy  
ASB No. 007599 PCC No. 37524  
McEVOY, DANIELS & DARCY, P.C.  
4560 East Camp Lowell Drive  
Tucson, Arizona 85712  
520-326-0133

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

NEW TUCSON UNIT NO. 8 HOMEOWNERS )  
ASSOCIATION, INC., an Arizona non-profit )  
corporation, )  
  
Plaintiff, )  
  
vs. )  
  
PIMA COUNTY, a political subdivision of the )  
State of Arizona, )  
  
Defendant. )

**C20041194**  
Case No.: \_\_\_\_\_

COMPLAINT AND APPLICATION  
FOR ORDER TO SHOW CAUSE

(Declaratory Relief)

Assigned to the Honorable

**JANE L. EIKLEBERRY**

Plaintiff, by and through its attorneys, alleges as follows:

1. Plaintiff is an Arizona non-profit corporation duly organized and operating in Pima County, Arizona.
2. Defendant is a political subdivision of the State of Arizona.
3. This Court has jurisdiction over the subject matter of this controversy, and venue is appropriate in Pima County, Arizona.
4. At all material times herein, Plaintiff was and is the residential community association with respect to and having jurisdiction over that certain residential real property subdivision located in Pima County, Arizona, known as New Tucson Unit No. 8 ("Subdivision").

1           5.       The Subdivision originally was subject to that certain New Tucson Unit No. 8  
2 Declaration of Restrictions, as recorded on September 24, 1964, in Book 2336, commencing  
3 at page 108, in the official records of Pima County, Arizona, as amended by that certain New  
4 Tucson Unit No. 8 Amended Declaration of Restrictions, as recorded on or about September  
5 30, 1964, in Book 2347, commencing at page 155, in the official records of Pima County,  
6 Arizona (collectively, "Original CC&Rs"). Among other things, the Original CC&Rs  
7 provided that they were established to create "a general plan for the improvement . . . of the  
8 above described property, . . . and may be revised or amended at any time by the vote of the  
9 owners of a majority of the lots situate in NEW TUCSON NO. 8." A copy of the Original  
10 CC&Rs is attached hereto as Exhibit "A" and is incorporated herein by this reference.

11           6.       Pursuant to the Original CC&Rs and after Plaintiff had complied with all  
12 applicable notice to lot owners and other due process requirements, the owners of more than  
13 a majority of the lots within the Subdivision voted to approve amendments to the Original  
14 CC&Rs, which amendments are contained in that certain Second Amended Declaration of  
15 Covenants, Conditions and Restrictions for New Tucson Unit No 8 Lots 1-454 and Common  
16 Area being a Subdivision Recorded at Book 17 Page 84 of Maps and Plats in the Office of  
17 the Pima County Recorder, Pima County, Arizona, as recorded on November 1, 2002, in  
18 Docket 11918, commencing at page 92, in the official records of Pima County, Arizona  
19 ("New CC&Rs"). Among other things, the New CC&Rs provide that Plaintiff and its  
20 representatives, assigns and agents shall have the right to enter upon each lots "for the  
21 purpose of performing any engineering or the construction of any on or offsite improvement  
22 or improvements . . . ." Section 10.2, page 18 of the New CC&Rs. That right is granted to  
23 Plaintiff in recognition that "[o]ne of the primary purposes of this Declaration is to provide  
24 for engineering, construction, improvement and maintenance of roadways, utilities,  
25 drainageways, equestrianways, easements and any necessary improvements to the residential  
26 Lots and Common Area of the property, as well as development, sale, maintenance,

1 preservation and architectural control of residential Lots and Common Area within the Real  
2 Property." Section 10.1, pages 17 and 18 of the New CC&Rs. Moreover, the New CC&Rs  
3 expressly state that Plaintiff "will: (1) construct, improve and maintain roadways,  
4 thoroughfares, alleys and equestrianways within and without the Real Property; (2) install,  
5 construct and improve utilities, including, but not limited to, sewer systems, water systems,  
6 electrical, telephone, natural gas and cable within and without the Real Property; (3) install,  
7 construct, improve and maintain drainageways, retention/detention basins, drainage control  
8 structures or devices and any improvements necessary for the provision of adequate drainage  
9 within and without the Real Property; (4) construct, improve and maintain any  
10 landscape/drainage easements, certain drainage structures, certain easements, and certain  
11 rights-of-way; (5) establish, levy, collect and disburse the Assessments and other charges  
12 imposed hereunder; and (6) as the agent and representative of the Members of the  
13 Association and Residents of the Real Property, administer and enforce all provisions hereof  
14 and enforce use and other restrictions imposed on the Real Property; and . . . ." A copy of the  
15 New CC&Rs is attached hereto as Exhibit "B" and is incorporated herein by this reference.  
16 The New CC&Rs completely replace the Original CC&Rs, constitute an enforceable contract  
17 under Arizona law and encumber the Subdivision

18         7. Plaintiff is the "Association" defined in the New CC&Rs, in such capacity, has  
19 the responsibility and authority to perform the engineering and construction activities  
20 contemplated by the New CC&Rs.

21         8 In that regard, Plaintiff submitted to Defendant certain documents and  
22 information requesting that Defendant issue required governmental permits to allow Plaintiff  
23 to engage in such construction activities authorized by the New CC&Rs. A copy of Plaintiff's  
24 February 24, 2004, letter to Defendant is attached hereto as Exhibit "C" and is incorporated  
25 herein by this reference.  
26

1           9. In response to that request by Plaintiff, Defendant wrote a letter to Plaintiff dated  
2 March 2, 2004, indicating that Defendant would not issue the requested governmental  
3 permits unless all, and not merely a majority, of the owners of lots within the Subdivision  
4 were to make such request by signing Plaintiff's permit application, and inviting Plaintiff to  
5 seek and obtain a declaration from this Court that Plaintiff, in fact, has the required authority  
6 to proceed on behalf of the lot owners as the New CC&Rs provide. A copy of Defendant's  
7 March 2, 2004, letter to Plaintiff is attached hereto as Exhibit "D" and is incorporated herein  
8 by this reference

9           10. Plaintiff hereby incorporates all allegations set forth above.

10           11. Plaintiff is entitled to an order issued by this Court declaring that the relevant  
11 provisions of the New CC&Rs are valid and enforceable, as written, and accordingly that  
12 Plaintiff has the required authority to proceed on behalf of the lot owners in connection with  
13 the planned engineering and construction activities.

14           WHEREFORE, Plaintiff respectfully requests that this Court immediately issue an  
15 Order ordering Defendants to appear before it on a date and time certain, then and there to  
16 show cause, if any, why judgment should not be entered against them and in favor of Plaintiff  
17 as follows:

18           A. That this Court declare that the relevant provisions of the New CC&Rs are  
19 valid and enforceable, as written, and accordingly that Plaintiff has the required authority to  
20 proceed on behalf of the lot owners in connection with the planned engineering and  
21 construction activities.

22           B. For such other and further relief as this Court deems just and appropriate  
23 under the circumstances.  
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DATED this 5<sup>th</sup> day of March, 2004.

McEVOY, DANIELS & DARCY, P.C.

By:   
David A. McEvoy  
Attorney for Plaintiff

VERIFICATION

STATE OF ARIZONA        )  
                                  ) ss.  
COUNTY OF PIMA        )

Jeffrey S. Utsch, being first duly sworn upon oath, deposes and says:

1. I am the President of New Tucson Unit No. 8 Homeowners Association, Inc.,  
the Plaintiff herein.

2. I have read the foregoing Complaint, and know the contents thereof; that the  
same is true of my personal knowledge, except as to those statements therein made upon  
information and belief, and as to those, I believe them to be true.

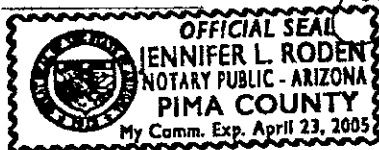
DATED this 4<sup>th</sup> day of March, 2004

  
\_\_\_\_\_  
Jeffrey S. Utsch

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of March, 2004, by  
Jeffrey S. Utsch.

My Commission Expires:

  
\_\_\_\_\_  
Notary Public



**New Tucson Unit No. 8 Homeowners Association**

1147 N. Howard Boulevard

Tucson, Arizona 85719

520.545 0108

Facsimile 520.545 0113

February 24, 2004

Mr. Carmine DeBonis  
Director - Pima County Development Services  
210 North Stone Avenue  
Tucson, Arizona 85701

RE: New Tucson Unit 8 - Phase 1

Dear Carmine:

At your request I am resubmitting a package dated July 30, 2003, which includes a letter from Jeffrey Neff the attorney for New Tucson Unit 8 Homeowners Association and a full copy of the CC&R's. In addition, we have prepared an ownership list and map for your review.

Please note that Section 10.2 of the Second Amended CC&R's specifically designates the Association as agent for governmental permit purposes and also provides the Association a right of entry onto the individual lots to construct the improvements. These CC&R's have been duly ratified and adopted by a majority of the lot owners at a meeting of all lot owners. Mr. Neff sent all the lot owners notice of the meeting, and the meeting was held almost a year and a half ago on August 7, 2002. The CC&R's were adopted overwhelmingly.

Since that time, there have been numerous meetings of the Board of Directors of the Association and three (3) general meetings of all the lot owners of the Association. The first general meeting was on February 19, 2003 when the Association ratified the engineering and legal contracts needed to improve the property, the second meeting was on October 21, 2003 when the Association ratified (i.) the \$500,000 cost to extend "offsite" water and sewer lines to Unit 8, and (ii.) approved a Special Assessment to fund the cost of these improvements, and the third general meeting was on February 17, 2004 when the Association ratified a \$22,000 per lot Special Assessment to fund the cost of improving the lots. These Special Assessment were equally levied on all 454 lots in the Association. So you will know, the "offsite" improvements are now complete, paid for by the Association, and accepted by PCWW and Tucson Water.

We are very close to completing the reviews necessary to begin grading the property. As you know, I have worked very hard on behalf of the Association to accommodate the

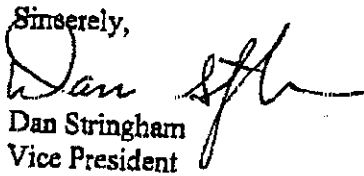
Page 2.

wishes of the County, and truly believed that we had resolved this issue of the Association's authority last summer.

The New Tucson Unit 8 Homeowners Association is the entity that has the legal authority to improve the lots, and the lot owners are anxious to begin the improvements so that they can finally use their lots after 40 years.

In closing, I would appreciate your assistance in taking what steps are necessary to quickly put this issue finally to rest. The Board of Directors of the Association is prepared to sign a construction contract with a major contractor before the end of the month.

Sincerely,

  
Dan Stringham  
Vice President

Cc: Jim Mazzocco with attachments





**PIMA COUNTY  
DEVELOPMENT SERVICES DEPARTMENT**

201 N. Stone Avenue, 1<sup>st</sup> Floor  
Tucson, AZ 85701-1207

**CARMINE DEBONIS, JR.**  
Director

Phone: (520) 740-6800  
Fax: (520) 623-5411

March 2, 2004

Dan Stringham, Vice President  
New Tucson Unit No. 8 Homeowners Association  
1147 N. Howard Boulevard  
Tucson, AZ 85719

Dear Mr. Stringham:

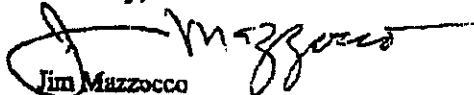
I am writing in response to your letter of February 24, 2004 addressed to Carmine DeBonis, Director of the Pima County Development Services Department in connection with your assertion that the New Tucson Unit No. 8 Homeowners Association (the "HOA") has authority to apply for permits on behalf of all the lot owners in New Tucson Unit No. 8.

I have reviewed the CC&R's enclosed with your letter and see that Section 10.2 states that the HOA has authority to act on behalf of all the owners in connection with applications for permits. However, your letter states that not all lot owners voted in favor of those CC&R's. Therefore, it is not clear whether all lot owners have really delegated authority to the HOA to act on their behalf in this regard. All that is clear is that the HOA is asserting it has such authority.

The Pima County Development Services Department must assure itself that all lot owners have approved the application. To that end, your proposal for permits to construct on-site and off-site improvements for New Tucson Unit 8 will have to be signed by the owners of all lots within the subdivision. The only other option I can think of is that you could submit a declaration by a Court ruling that the HOA has actual legal authority to act on behalf of all the lot owners. (I am informed that there is an expedited process available to obtain declaratory relief from the Superior Court.)

Please call if you have any questions.

Sincerely,

  
Jim Mazzocco  
Pima County Planning Official  
cc  
C. DeBonis

JEFF UTSCHE  
JEFF NGFF  
DAVID McEVON 326-5938

Post-It™ brand fax transmittal memo 7671		# of pages > 1
To	Glenn Ketschke	From
Co.	DAWSTRINGHAM	Co.
Dept.		Phone #
Fax #	881-7571	Fax #

FILED  
PATRICIA A. NOLAND  
CLERK, SUPERIOR COURT

04 APR -6 PM 4:16

BY: E. BRADFORD,  
DEPUTY

1 BARBARA LAWALL  
2 PIMA COUNTY ATTORNEY  
3 CIVIL DIVISION  
4 By: *Amelia Craig Cramer*  
5 Deputy County Attorney  
6 32 N. Stone, Suite 2100  
7 Tucson, Arizona 85701  
8 Telephone: (520) 740-5750  
9 Facsimile: (520) 620-6556  
10 Pima Co. Computer No. 65201  
11 State Bar No. 018297  
12 Attorney for Pima County

13 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
14 **IN AND FOR THE COUNTY OF PIMA**

15	NEW TUCSON UNIT NO 8 HOMEOWNERS )	NO. C20041194
16	ASSOCIATION, INC., an Arizona non-profit )	
17	corporation, )	<b>MOTION FOR JOINDER</b>
18	Plaintiff, )	(Assigned to: <i>Hon. Jane L. Eikleberry</i> )
19	vs )	
20	PIMA COUNTY, a political subdivision of the State )	
21	of Arizona, )	
22	Defendant. )	
23	_____ )	

24 Defendant Pima County hereby moves pursuant to Rule 19(a), Ariz. R. Civ. P., for an  
25 order requiring Plaintiff to join as parties to this proceeding all owners of property in the  
26 subdivision known as New Tucson Unit No. 8 for the reasons set forth in the following  
27 memorandum of points and authorities.

28 **Memorandum of Points and Authorities**

29 The Plaintiff in this case is New Tucson Unit No. 8 Homeowners Association, Inc.  
30 ("Homeowners Association"). The Homeowners Association asserts authority to bind all owners  
31 of property in the subdivision known as New Tucson Unit No. 8 ("property owners") in  
32 connection with applying for permits and constructing improvements on their property based upon

1 provisions set forth in Second Amended Declaration of Covenants, Conditions, and Restrictions  
2 recorded November 1, 2002 ("Second Amended CCRs"). Whether the Homeowners  
3 Association has such authority as a matter of law is the substantive issue to be decided in this  
4 case.

5 Pima County takes no position with respect to that substantive issue. However, Pima  
6 County has reason to believe that one or more of the property owners might take a position  
7 contrary to that of the Homeowners Association and is concerned that none of those property  
8 owners has been joined as a party.

9 The improvements proposed by the Homeowners Association for which permits have  
10 been sought from Pima County would include mass grading of the entire New Tucson Unit No. 8  
11 subdivision, including the lots belonging to all property owners, as well as areas set aside for  
12 public roads, drainageways and utilities. Pima County routinely requires as a condition of permit  
13 approval that all property owners within a subdivision jointly apply for a permit that would affect  
14 them all. Here, the Homeowners Association has not presented to Pima County any document  
15 containing the signatures of all the property owners expressly consenting to the Homeowners  
16 Association applying on their behalf for the requested permits. Instead, the Homeowners  
17 Association has asserted that it has legal authority to serve as a representative of all the property  
18 owners by virtue of the Second Amended CCRs approved by a majority of the property owners.  
19 While Pima County takes no position with respect to this ultimate substantive legal issue, it is  
20 aware that not all the property owners approved the Second Amended CCRs and is concerned  
21 that one or more of the individual property owners, particularly those who voted against the  
22 Second Amended CCRs, may wish to take a position contrary to that of the Homeowners  
23 Association. Accordingly, Pima County believes that those property owners are necessary parties  
24 who should be joined pursuant to Rule 19(a), Ariz. R. Civ. P., which provides as follows:

25 A person who is subject to service of process and whose joinder  
26 will not deprive the court of jurisdiction over the subject matter of

1 the action shall be joined as a party in the action if (1) in the  
2 person's absence complete relief cannot be accorded among  
3 those already parties, or (2) the person claims an interest relating  
4 to the subject of the action and is so situated that the disposition of  
5 the action in his absence may (i) as a practical matter impair or  
6 impede the person's ability to protect that interest (ii) leave any of  
7 the persons already parties subject to a substantial risk or  
8 incurring double, multiple, or otherwise inconsistent obligations by  
9 reason of the claimed interest. If the person has not been so  
10 joined, the court shall order that the person be made a party.

11 For all the foregoing reasons, Pima County respectfully requests that this Court order  
12 Plaintiff Homeowners Association to join as parties all the property owners in the New Tucson  
13 Unit No. 8 subdivision, or at least those property owners in the subdivision who did not vote in  
14 favor of adopting the Second Amended CCRs.

15 DATED this 6<sup>th</sup> day of April, 2004.

16 BARBARA LAWALL  
17 PIMA COUNTY ATTORNEY

18 By: 

19 Amelia Craig Cramer  
20 Deputy County Attorney

21 A copy of the foregoing hand-delivered  
22 this 6<sup>th</sup> day of April, 2004 to:

23 *Hon. Jane L. Eikleberry*  
24 Pima County Superior Court  
25 110 W. Congress  
26 Tucson, Arizona 85701

FILED  
PATRICIA A. NOLAND  
CLERK OF SUPERIOR COURT

04 APR -9 PM 1:55

BY: E. BRADFORD,  
DEPUTY

David A. McEvoy  
ASB No. 007599 PCC No. 37524  
McEVOY, DANIELS & DARCY, P.C.  
4560 East Camp Lowell Drive  
Tucson, Arizona 85712  
520-326-0133

Attorney for Plaintiff

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF PIMA**

NEW TUCSON UNIT NO. 8 HOMEOWNERS )  
ASSOCIATION, INC., an Arizona non-profit )  
corporation, )

Case No.: C20041194

Plaintiff, )

PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION FOR  
JOINDER

vs. )

(Hearing April 12, 2004, 1:30 P M )

PIMA COUNTY, a political subdivision of the )  
State of Arizona, )

Assigned to the Honorable Jane L.  
Eikleberry, Division 11

Defendant. )

Plaintiff, by and through its attorneys, opposes Defendant's Motion for Joinder for the reasons set forth below.

**1. EXECUTIVE SUMMARY**

It is burdensome and legally unnecessary to require Plaintiff to sue its members (who number about 100) in order to proceed with this case because:

A. Plaintiff is a Homeowners Association representing 454 lots in New Tucson. No roads or utilities were ever put in despite 40 years having passed since the plat was approved and recorded. The lots are vacant.

B. Plaintiff is expressly authorized by the New CC&Rs to obtain the subject permits from Defendant and pursue the grading, road and utility installation within the

1 Subdivision. Rule 19 does not require the joinder of the Plaintiff's members to  
2 establish this legal authority.

3 C. The New CC&Rs were adopted in July of 2002 in conformance with Arizona  
4 law, in accord with nationally accepted legal authorities and consistent with the  
5 intent of the original CC&Rs. Fairness and due process standards were fully  
6 observed with notice being given to all owners and open membership meetings  
7 being held and minutes of those meetings being mailed to the lot owners  
8 thereafter.

9 D. No owner has sued Plaintiff to set aside the New CC&Rs since their adoption in  
10 July of 2002.

11 E. To the contrary, Plaintiff's members have held three additional meetings and  
12 voted to impose additional special assessments based on the New CC&Rs for  
13 roads, utilities and grading. The sum of \$500,000 already has been expended by  
14 Plaintiff to complete construction of the sewer and water lines to the boundary of  
15 Unit 8 in March of 2004. These special assessments have been overwhelmingly  
16 approved at noticed and open membership meetings.

17 F. The intent of the Original CC&Rs was "a general plan for the improvement,  
18 development, ownership, use, and sale" of the Subdivision.

19 G. The Subdivision cannot be so improved or developed without entry thereon for  
20 mass grading of the lots.

21 H. Plaintiff and, by extension, the lot owners, risk incurring substantial additional  
22 costs by virtue of contractor bids expiring unless the permits are issued promptly.

23 **2. APPLICATION OF RULE 19(a)**

24 Rule 19(a) provides, in relevant part, that "[a] person . . . shall be joined as a party in  
25 the action if (1) in the person's absence complete relief cannot be accorded among those  
26 already parties, or (2) the person claims an interest relating to the subject of the action and is

1 so situated that the disposition of the action in his absence may (i) as a practical matter  
2 impair or impede the person's ability to protect that interest (ii) leave any of the persons  
3 already parties subject to a substantial risk of incurring double, multiple, or otherwise  
4 inconsistent obligations by reason of the claimed interest." The State Bar Committee Note  
5 that precedes the Rule confirms the core concern: "... parties must be joined where this is  
6 required by 'equity and good conscience.'" [Citations omitted]

7 The issue raised by Defendant's Motion is whether all owners of property within the  
8 Subdivision or at least those owners of lots within the Subdivision who voted against the  
9 New CC&Rs are indispensable parties who must be included in this action. The answer to  
10 that question is determined by the validity of the New CC&Rs. If the New CC&Rs were  
11 legally adopted, no owner of any lot (including any owners who voted against the New  
12 CC&Rs) has standing to claim that Defendant should not issue the requested governmental  
13 permits to Plaintiff, which permits are necessary to allow Plaintiff to perform the  
14 development activities contemplated in the New CC&Rs. The standards of Rule 19(a) then  
15 would be satisfied for the following reasons:

- 16 A. If such owners were not made parties to this action, "complete relief" still could  
17 "be accorded" between Plaintiff and Defendant since the only persons who are  
18 parties to the permit process are Plaintiff, the permit applicant, and Defendant, the  
19 permit issuer.
- 20 B. No such owner claims "an interest relating to the subject of the action" since only  
21 Plaintiff and Defendant are parties to the permit process.
- 22 C. No such owner "is so situated that the disposition of the action in his absence may  
23 ... impair or impede the person's ability to protect that interest" since the New  
24 CC&Rs allow Plaintiff to conduct such development activities within the  
25 Subdivision and, therefore, no such owner has the right to prohibit Plaintiff from  
26 doing so.

1 D. If such owners were not made parties to this action, that would not "leave any of  
2 the persons already parties subject to a substantial risk of incurring double,  
3 multiple, or otherwise inconsistent obligations by reason of the claimed interest"  
4 since the fundamental issue in this action simply is whether Defendant should  
5 issue the permits to Plaintiff.  
6

7 In, *Board of Directors of By the Sea Council of Co-Owners, Inc. v Sondock*, 644 S W 2d  
8 774 (Tex. App. 1982), the issues were whether (1) all owners within the condominium must be  
9 joined as parties in the lawsuit challenging the authority of the condominium association,  
10 pursuant to the newly amended condominium declaration, to enter upon the individual  
11 condominium units to remove the carports, and (2) the amendment to the condominium  
12 declaration so authorizing the condominium association to do so was valid. The amendment  
13 provision in the condominium declaration required at least 66 and 2/3% of the unit owners to  
14 approve an amendment. The requisite percentage for approval was obtained for the subject  
15 amendment, and certain owners sued alleging that all owners would be required to consent to the  
16 amendment, claiming that the carports were a "property right" The court ruled that the trial  
17 court erred in holding that joinder of all owners was required. The court also held that the  
18 amendment to the condominium declaration was valid, since the condominium declaration  
19 "expressly states that the Declaration can be amended if the appropriate written consents are  
20 obtained". Moreover, the court found that, since the amendment required the removal of  
21 carports from all of the units, "[n]o owner has obtained an advantage over any other owner; and  
22 no owner has lost his percentage share in the common elements."

23 In this case, the original CC&Rs contemplated "a general plan for the improvement,  
24 development, ownership, use, and sale of the above described property". Both the Old and New  
25 CC&Rs apply uniformly to all lots within the Subdivision, and it is not necessary to join all of  
26 the owners in this action to determine the validity of the New CC&Rs



### 3. THE NEW CC&RS ARE VALID

The analysis of that fundamental issue and whether the New CC&Rs are valid begins with the amendment provision in the Original CC&Rs, which provided that they "may be revised or amended at any time by the vote of the owners of a majority of the lots situate in NEW TUCSON NO. 8." The Original CC&Rs were recorded on or about September 30, 1964, which was soon after the final plat for the Subdivision was approved (July 1964) and recorded, creating Lots 1 through 455 within the Subdivision. Therefore, the owners of lots within the Subdivision acquired title to their lots subject to the Original CC&Rs.

Arizona law long has held that CC&Rs are a contract among the lot owners. See *Shamrock v. Wagon Wheel Park Homeowners Association*, 407 Ariz. Adv. Rep. 11, 408 Ariz. Adv. Rep. 16, 75 P.3d 132 (App. August 26, 2003, as amended September 5, 2003) ("Such a restriction constitutes 'a contract between the subdivision's property owners as a whole and the individual lot owners.' [Citations omitted.]"); *Johnson v. The Pointe Community Association, Inc.*, 205 Ariz. 485, 73 P.3d 616 (App. 2003) ("In Arizona, a recorded declaration that contains restrictive covenants common to all properties in a development forms a contract between 'the [development's] property owners as a whole and the individual lot owners' [Citation omitted.]"); *Ahwatukee Custom Estates Management Association, Inc. v. Turner*, 196 Ariz. 631, 2 P.3d 1276 (App. 2000) ("CC&Rs constitute a contract between the subdivision's property owners as a whole and the individual lot owners [Citation omitted.]"); *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 909P.2d 393 (App. 1995) ("Restrictive covenants, such as those encumbering the subdivision lots in this case, constitute a covenant running with the land forming a contract between the subdivision's property owners as a whole and the individual lot owners [Citation omitted.]"; and *Arizona Biltmore Estates Association v. Tezak*, 177 Ariz. 447, 868 P.2d 1030 (App. 1993) ("The deed restrictions in this case constitute a covenant running with the land forming a contract

1 between the subdivision's property owners as a whole and the individual lot owners  
2 [Citation omitted ]").

3 Moreover, Arizona law also upholds the right of the lot owners to amend CC&Rs in  
4 accordance with the amendment process set forth in the CC&Rs being amended. See  
5 *Camelback Del Este Homeowners Association v Warner*, 156 Ariz. 21, 749 P.2d 930 (App.  
6 1987); *La Esperanza Townhome v Title Sec Agency*, 142 Ariz. 235, 689 P.2d 178 (App.  
7 1984); *Hueg v Sunburst Farms (Glendale) Mutual Water and Agricultural Company*, 122  
8 Ariz. 284, 594 P.2d 538 (App. 1979).

9 In *Riley v. Boyle*, 6 Ariz. App. 523, 434 P.2d 525 (1967), the court considered the  
10 validity of an amendment to CC&Rs which contained the following amendment provision:

11 "The owner or owners of 51% of the lots in this subdivision shall have the right to  
12 amend or change these conditions, reservations and restrictions for the beneficial  
13 improvement and interest of WESTRIDGE ESTATES." *Id*

14 The court found that the subject amendment had been signed by at least 51% of the lot  
15 owners and therefore was valid, stating that "[p]aragraph 19 of the restrictions, as stated  
16 above, gives the power to 51 per cent of the lot owners to change completely the restrictions  
17 applicable to the entire subdivision . . ." *Id*

18 Similarly, in *Evergreen Highlands Association v West*, 73 P.3d 1, 2003 Colo. LEXIS  
19 493 (Colo. 2003), the Colorado Supreme Court considered the validity of an amendment to  
20 CC&Rs which added a new provision requiring all lot owners to be members of and pay  
21 assessments to the association. A lot owner challenged the validity of the amendment. As in  
22 our case, the original CC&Rs in the *Evergreen Highlands* case provided "that a majority of  
23 lot owners may agree to modify the covenants . . ." The provision used the words "change  
24 or modify" and the court determined that those words "are expansive enough to allow for the  
25 addition of the new covenant. We hold that the 1995 amendment to the Evergreen Highlands  
26 covenants, approved by the requisite majority of lot owners, is valid and binding on all lot

1 owners in Evergreen Highlands." In our case, the Original CC&Rs used the words "revised  
2 or amended" which are synonymous with "change or modify "

3 In *Arizona Biltmore Estates Association v. Tezak, supra*, the court held that "the  
4 cardinal principle in construing restrictive covenants is that the intention of the parties to the  
5 instrument is paramount . . . [and] it is well settled that a covenant should not be read in such  
6 a way that defeats the plain and obvious meaning of the restriction. [Citations omitted]"  
7 Here, the Original CC&Rs clearly contemplate the possibility and ability of amendments to  
8 them subject only to the requirement that a majority of the lot owners must approve, by a  
9 vote, such amendments. Any other interpretation would defeat the "plain and obvious  
10 meaning" of the Original CC&Rs

11 Once a non-profit corporation, such as Plaintiff, is created and incorporated under  
12 Arizona law, it has those powers expressly conferred upon it by the Articles of Incorporation  
13 including the power to engage in any lawful activity and to do any act not inconsistent with  
14 the law. A.R.S. §§ 10-3301 and -3302. In addition to express powers, non-profit  
15 corporations also have the implied authority to carry out their mandate. *Lurie v. Arizona*  
16 *Fertilizer & Chem Co.*, 101 Ariz. 482, 421 P.2d 187 (1966); *Trico Electric Cooperative v*  
17 *Ralston*, 67 Ariz. 358, 196 P.2d 470(1948); C.J.S. (Corporations) §§ 554, 558, 560.

18 *Orme v. Salt River Valley Ass'n*, 25 Ariz. 324, 217 P. 935 (1923) provides an early  
19 example of the courts' recognition of broad incidental and implied powers derived from a  
20 corporation's governing documents. The issuance of bonds as a means to pay for  
21 construction of the dam was challenged on the grounds that Salt River's articles of  
22 incorporation did not authorize the issuance of bonds. *Id.* at 944. The court found that "even  
23 though the articles did not confer this authority, the power to incur an indebtedness for  
24 corporate purposes would exist as an implied one." *Id.* at 944. The court further found that  
25 the power to issue bonds is "likewise implied where there are no restrictions in its articles of  
26 incorporation or the statute." *Id.* at 944. The court deemed the power to issue bonds "a

1 necessary result or *incident* of the power to contract a debt.” *Id.* The incidental power  
2 doctrine was later affirmed by *Trico Elec. Coop v Ralston, supra*

3 Similarly, the intent of the Original CC&Rs was for the improvement and  
4 development of the Subdivision, and the Subdivision cannot be so improved or developed  
5 without entry thereon for mass grading of the lots.

6 **4. DUE PROCESS COMPLIANCE AND OVERWHEMING SUPPORT**  
7 **OF OWNERS**

8 The process of amending the Original CC&Rs and the adoption of the New CC&Rs  
9 complied with required notice and due process formalities as to all lot owners within the  
10 Subdivision. At a membership meeting held on August 7, 2002, the vote to approve the  
11 amendment to the Original CC&Rs and to adopt the New CC&Rs was overwhelming in  
12 favor of the change – 249 for and only 15 against. Therefore, approximately 95% of those  
13 voting approved the change. Attached are copies of the Affidavits of Mailing<sup>1</sup>, Notice of  
14 Meeting, Proxy and voting results letter dated August 19, 2002, collectively as Exhibit “A”.  
15 Moreover, the 249 lot owners who voted in favor of the New CC&Rs constitute a majority –  
16 55% -- of all lot owners, as required by the Original CC&Rs. After the New CC&Rs were  
17 duly approved by the lot owners, three additional membership meetings have been held by  
18 Plaintiff at which two very significant actions were taken and approved by the requisite  
19 percentage of lot owners pursuant to Section 5.4 of the New CC&Rs: (a) a sewer and water  
20 assessment of \$1,115.00 that was placed on the property (the work for which received  
21 Defendant’s approval, was fully completed and such cost was nearly \$500,000.00 in total)  
22 with only one dissenting vote, and (b) an additional special assessment for the full  
23 improvement of the lots (and totaled \$22,000 per lot) passed also with only one dissenting  
24 vote. Therefore, it is burdensome to the vast majority of the owners who voted for the  
25

26 <sup>1</sup> A second mailing was sent to three owners because the first mailing to them was returned to sender due to bad addresses

1 additional assessment to go back and re-visit the assessment, which would result from a  
2 determination that the New CC&Rs are invalid.

### 3 5. PLAINTIFF'S AUTHORITY UNDER NEW CC&RS

4 As set forth in the Complaint, the New CC&Rs provide, among other things, that  
5 Plaintiff and its representatives, assigns and agents shall have the right to enter upon each lots  
6 "for the purpose of performing any engineering or the construction of any on or offsite  
7 improvement or improvements . . . ." Section 10.2, page 18 of the New CC&Rs That right is  
8 granted to Plaintiff in recognition that "[o]ne of the primary purposes of this Declaration is to  
9 provide for engineering, construction, improvement and maintenance of roadways, utilities,  
10 drainageways, equestrianways, easements and any necessary improvements to the residential  
11 Lots and Common Area of the property, as well as development, sale, maintenance,  
12 preservation and architectural control of residential Lots and Common Area within the Real  
13 Property." Section 10.1, pages 17 and 18 of the New CC&Rs. Moreover, the New CC&Rs  
14 expressly state that Plaintiff "will: (1) construct, improve and maintain roadways,  
15 thoroughfares, alleys and equestrianways within and without the Real Property; (2) install,  
16 construct and improve utilities, including, but not limited to, sewer systems, water systems,  
17 electrical, telephone, natural gas and cable within and without the Real Property; (3) install,  
18 construct, improve and maintain drainageways, retention/detention basins, drainage control  
19 structures or devices and any improvements necessary for the provision of adequate drainage  
20 within and without the Real Property; (4) construct, improve and maintain any  
21 landscape/drainage easements, certain drainage structures, certain easements, and certain  
22 rights-of-way; (5) establish, levy, collect and disburse the Assessments and other charges  
23 imposed hereunder; and (6) as the agent and representative of the Members of the  
24 Association and Residents of the Real Property, administer and enforce all provisions hereof  
25 and enforce use and other restrictions imposed on the Real Property; and . . . ."

26

1 Although there is no requirement in the law that the New CC&Rs contain provisions  
2 consistent with the Original CC&Rs, the Original CC&Rs provided that were established to  
3 create "a general plan for the improvement . . . of the above described property, . . ."  
4 Therefore, the contemplated development of the Subdivision by Plaintiff pursuant to the New  
5 CC&Rs is consistent with the general intent expressed in the Original CC&Rs.

6 In *Windemere Homeowners Association, Inc. v. McCue et al*, 990 P 2d 769 (Mont.  
7 1999), the Montana Supreme Court considered an analogous set of facts. In 1997, 74% of the  
8 lot owners approved an amendment to the CC&Rs, which had been previously amended to  
9 allow for amendments with the approval of at least 65% of the lot owners and the original  
10 CC&Rs provided for amendments by a "super-majority" of the lot owners. The court held  
11 that the establishment of 65% as the standard was consistent with the super-majority standard  
12 in the original CC&Rs. That 1997 amendment "created the Windemere Homeowners  
13 Association, Inc., and made the Association responsible for necessary maintenance, repair,  
14 reconstruction, and snow removal on Windemere Drive . . . [and] further granted the  
15 Association the authority to reimburse the parties who had paid for the paving of Windemere  
16 Drive in 1996 and to assess tract owners for the costs of such reimbursement." The court  
17 wrote:

18 "Under the broad powers of amendment discussed above, it is unnecessary that  
19 amendments to the restrictive covenants be connected to a provision of the original restrictive  
20 covenants."

21 After finding that "the Association mailed to the Appellants copies of the proposed  
22 Amendment, together with ballots soliciting their approval," the court concluded "that the  
23 1997 Amendment is valid and binding upon the Appellants' parcels."

24 In our case, the New CC&Rs, which were properly adopted, authorize Plaintiff to  
25 conduct development activities in the Subdivision and assess the lot owners for the cost  
26

1 thereof. The goal of such work is to create improvements to the Subdivision that will increase  
2 the fair market value of the lots for the lot owners.

3 **6. PRACTICAL PROBLEMS OF JOINDER OF OWNERS**

4 In addition to the foregoing, there are other reasons to deny Defendant's Motion:

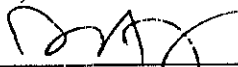
- 5 A. Under principles of corporate democracy and due process, there is no need to  
6 join as parties defendant owners of property within the Subdivision since the  
7 New CC&Rs were adopted by the affirmative vote of 95% of those owners  
8 who appeared in person or by proxy and voted.
- 9 B. Requiring Plaintiff to sue its own members and force those members to incur  
10 legal expenses does not serve the interests of justice in this case, particularly  
11 where the New CC&Rs were properly and overwhelmingly adopted pursuant  
12 to law and the provisions of the Original CC&Rs.
- 13 C. Substantial expense (including legal service of process) and time delays would  
14 result from such joinder of owners, neither of which is in the best interests of  
15 the owners who, by their assessments paid and to be paid to Plaintiff would  
16 ultimately bear the burden of such expense and delays.
- 17 D. There is a time urgency to the planned improvements to be constructed, since  
18 Plaintiff likely will lose contractor bids. That time urgency creates a  
19 substantial risk to the lot owners, and would defeat the purpose and intent of  
20 95% of the lot owners who voted in favor of the New CC&Rs.
- 21 E. Taking the position of Defendant to its logical conclusion, each homeowner's  
22 association within Defendant's jurisdiction would be required to file a lawsuit  
23 in which it sued its members in order to obtain a court order approving the  
24 issuance of building permits for the homeowners association, for example, to  
25 replace roofs or install yard improvements in a townhome community in  
26 which the CC&Rs require the homeowners association to do such things. Such

1 a burdensome process would defeat the purpose of the CC&Rs that, by law,  
2 constitute a legally binding contract, upon which all parties should be entitled  
3 to rely.

4 Plaintiff respectfully requests that this Court deny Defendant's Motion, and to grant  
5 the relief requested in the Complaint.

6 DATED this 9th day of April, 2004.

7 McEVOY, DANIELS & DARCY, P.C.

8 By:   
9 David A. McEvey  
Attorney for Plaintiff

10 **Original** of the foregoing delivered  
11 this 9th day of April, 2004, to:

12 Clerk of the Pima County Superior Court  
13 110 West Congress Street  
Tucson, Arizona 85701

14 Copy of the foregoing delivered this  
15 9th day of April, 2004, to:

16 Hon. Jane L. Eikleberry  
17 Division 11  
18 110 West Congress Street  
Tucson, Arizona 85701

19 Amelia C. Cramer, Esq.  
20 Civil Division  
21 Office of the Pima County Attorney  
22 32 North Stone Avenue, Suite 2100  
Tucson, Arizona 85701-1412  
Attorney for Defendant

23   
24 \_\_\_\_\_  
25  
26



LAW OFFICE OF  
**JEFFREY M. NEFF**  
6375 EAST TANQUE VERDE, SUITE 130  
TUCSON, ARIZONA 85715-3863  
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**JEFFREY M. NEFF**  
Certified Real Estate Specialist  
Arizona Board of Legal Specialization

**GABRIELLE A. SHINOHARA**  
Of Counsel

August 19, 2002

Lot Owner  
New Tucson Unit No. 8

RE: Meeting of August 7, 2002  
New Tucson Unit No. 8 Homeowners Association

Dear Lot Owner:

The votes from the meeting on August 7, 2002 have been tallied. The results are as follows:

First Motion: That the lot owners present at this meeting ratify the incorporation of the New Tucson Unit No. 8 Homeowner's Association, as presented in the Articles of Incorporation filed with the Arizona Corporation Commission on July 18, 2002, and the By-laws as presented here.

YES	251	NO	13
-----	-----	----	----

Second Motion: That the lot owners present at this meeting authorize the Board of Directors of the New Tucson Unit No. 8 Homeowner's Association modify and amend the CC&R's, as presented, incorporating in their discretion the items discussed at this meeting.

YES	249	NO	15
-----	-----	----	----

Third Motion: Regarding listing the lots acquired by the HOA with a third party broker.

YES	198	NO	0
-----	-----	----	---

Consequently, the formation and incorporation of the Homeowners Association has been ratified, the By-Laws adopted and the CC&Rs will be finalized by the Board of

New Tucson lot owners

August 19, 2002

Page 2

Directors, incorporating the above, third motion as well as the other considerations raised by various lot owners at the meeting.

Copies of the initial engineering report discussed at the meeting are available at a cost of \$18.00. Should you be interested in obtaining a copy of that report, please call this office.

Sincerely,

Jeffrey M. Neff

JMN/gas

FILED  
PATRICIA A. NOLAND  
CLERK OF COURT

04 APR 15 PM 4:46

BY: J. WHITNELL, DEPUTY

1 BARBARA LAWALL  
2 PIMA COUNTY ATTORNEY  
3 CIVIL DIVISION  
4 By: *Amelia Craig Cramer*  
5 Deputy County Attorney  
6 32 N. Stone, Suite 2100  
7 Tucson, Arizona 85701  
8 Telephone: (520) 740-5750  
9 Facsimile: (520) 620-6556  
10 Pima Co. Computer No 65201  
11 State Bar No 018297  
12 Attorney for Pima County

13 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
14 IN AND FOR THE COUNTY OF PIMA

15	NEW TUCSON UNIT NO. 8 HOMEOWNERS )	NO. C20041194
16	ASSOCIATION, INC., an Arizona non-profit )	
17	corporation, )	OBJECTION TO PROPOSED FORM
	)	OF JUDGMENT
18	Plaintiff, )	
	)	
19	vs )	(Assigned to: <i>Hon Jane L Eikleberry</i> )
	)	
20	PIMA COUNTY, a political subdivision of the State )	
21	of Arizona, )	
	)	
22	Defendant. )	
23	_____ )	

24 Pima County objects, pursuant to Rule 58(d), Ariz. R. Civ. P., to the proposed form of  
25 Judgment submitted on April 13, 2004 by Plaintiff New Tucson Unit No. 8 Homeowners  
26 Association, Inc. on the following ground:

27 This is solely a declaratory relief action. Yet, the proposed form of order would impose  
28 an injunction by "order[ing] Defendant [Pima County] to process and issue to Plaintiff [New  
29 Tucson Unit No. 8 Homeowners Association] immediately the construction or building permits  
30 requested by Plaintiff in connection with such construction activities." Such relief is beyond the  
31 scope of this action and is unwarranted.

1        There has been no demonstration that Plaintiff has met all the requisite criteria for obtaining  
2 permits, nor has that issue even been presented to the Court. The only issue presented to the  
3 Court is whether Plaintiff has authority to apply on behalf of all the Lot Owners in the subdivision  
4 for grading and building permits. Assuming arguendo the Court were to find in Plaintiff's favor that  
5 it has authority to apply for permits and to undertake development on behalf of all the Lot  
6 Owners, the Court should limit its order to a declaration to that effect. The Court should not  
7 order Pima County to issue permits. Once a permit application is accepted, it must be reviewed  
8 carefully for compliance with floodplain regulations, native plant regulations, grading regulations,  
9 zoning and building codes, etc. There is no basis whatsoever for the Court in this case to  
10 determine that such regulations have been complied with or that a permit must be issued.

11        Nor is there any basis to suggest that Pima County would withhold a permit if all requisite  
12 criteria were met. Accordingly, an injunction is not authorized in this case under A.R.S. § 12-  
13 1801 (limiting Superior Court authority to grant writs of injunction to cases where restraint of  
14 some act prejudicial to the applicant is required, where a party is doing or threatening an act in  
15 violation of the applicant's rights which would tend to render the judgment ineffectual, or where  
16 the principles of equity so require)

17        The only issues presented are Plaintiff's request for a declaration from this Court that the  
18 Homeowners Association has legal authority to apply on behalf of all Lot Owners for permits to  
19 mass grade the subdivision and Pima County's request that all the Lot Owners be joined as  
20 parties. These are the only issues upon which the Court should rule.

21        For all the for all the foregoing reasons, even if the Court rules in favor of the Plaintiff in  
22 connection with Pima County's motion for joinder and on the substantive issue presented, it  
23 should not enter judgment in the form proposed by Plaintiff.

24        Pima County is informed that the Plaintiff intends to lodge a revised or substitute proposed  
25 form of judgment in the form attached hereto. Pima County has no objection to this revised form,

1 assuming arguendo the Court were to rule in favor of the Plaintiff. (Nevertheless, Pima County  
2 maintains its position that joinder of the Lot owners is necessary ) This was communicated to  
3 Judge Eikleberry's J A A. this morning during a conference call by counsel for both parties.

4 DATED this 5<sup>th</sup> day of April, 2004.

5 BARBARA LAWALL  
6 PIMA COUNTY ATTORNEY

7 By: 

8 Amelia Craig Cramer  
9 Deputy County Attorney

10 A copy of the foregoing hand-delivered  
11 this 15<sup>th</sup> day of April, 2004 to:

12 *Hon. Jane L. Eikleberry*  
13 Pima County Superior Court  
14 110 W. Congress  
15 Tucson, Arizona 85701

16 A copy of the foregoing mailed  
17 this 15<sup>th</sup> day of April, 2004, to:

18 David A. McEvoy, Esq.  
19 *McEvoy, Daniels & Darcy, P.C.*  
20 4560 East Camp Lowell Drive  
21 Tucson, Arizona 85712  
22 *Attorney for Plaintiff*

APR 16 2004

FILED  
PATRICIA A. NOLAND  
CLERK, SUPERIOR COURT  
April 16, 2004 (9:54 a.m.)  
By: Kitty Vroman

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JANE L. EIKLEBERRY

CASE NO. C-20041194

COURT REPORTER: NONE

DATE: April 16, 2004

NEW TUCSON UNIT NO. 8 HOMEOWNER'S  
ASSOCIATION, INC.,

Plaintiff,

vs.

PIMA COUNTY, a political subdivision of the  
State of Arizona,

Defendant.

---

**MINUTE ENTRY**

---

**UNDER ADVISEMENT RULING RE: ORDER TO SHOW CAUSE, PLAINTIFF'S  
COMPLAINT FOR DECLARATORY RELIEF AND DEFENDANT'S MOTION FOR JOINDER**

The Court has considered the pleadings and legal memoranda, together with the oral arguments of counsel, and the exhibit admitted into evidence.

The Court finds that the relevant portions of the New CC&Rs are valid and enforceable and that plaintiff has the legal authority to apply on behalf of all lot owners for permits and hereby grants declaratory relief to the plaintiff. Given that the homeowner's association has the authority to act, the lot owners are not necessary parties to this action. Accordingly, the defendant's motion for joinder is hereby denied. Although defendant objected to the first proposed form of judgment submitted which ordered the county to process and issue the requested permits, it did not object to the second judgment submitted which omitted that language. The Court signs the second form of judgment submitted.

Kitty Vroman, Deputy Clerk  
by George Hofmeister, J.A.A.

4-16-04

FILED  
PATRICIA A. NOLAND  
CLERK OF THE COURT

04 APR 16 PM 4:26

BY: J. WHITHELL, DEPUTY

David A. McEvoy  
ASB No. 007599 PCC No. 37524  
McEVOY, DANIELS & DARCY, P.C.  
4560 East Camp Lowell Drive  
Tucson, Arizona 85712  
520-326-0133

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

NEW TUCSON UNIT NO. 8 HOMEOWNERS )  
ASSOCIATION, INC., an Arizona non-profit )  
corporation, )  
Plaintiff, )  
vs. )  
PIMA COUNTY, a political subdivision of the )  
State of Arizona, )  
Defendant. )

Case No.: C20041194

JUDGMENT

Assigned to the Honorable Jane L.  
Eikleberry, Division 11

THE COURT FINDS after reading Defendant's Motion for Joinder and Plaintiff's  
Opposition to Defendant's Motion for Joinder and conducting a hearing on said Motion and  
Opposition, that Judgment be entered in favor of Plaintiff and against Defendant, and  
specifically that this Court (1) declares that the relevant provisions of that certain Second  
Amended Declaration of Covenants, Conditions and Restrictions for New Tucson Unit No 8  
Lots 1-454 and Common Area being a Subdivision Recorded at Book 17 Page 84 of Maps  
and Plats in the Office of the Pima County Recorder, Pima County, Arizona, as recorded on  
November 1, 2002, in Docket 11918, commencing at page 92, in the official records of Pima  
County, Arizona ("Amended Declaration"), are valid and enforceable, as written, and  
accordingly that Plaintiff has the required authority to proceed on behalf of the Lot Owners  
with the planned engineering and construction activities on the Lots and other portions of the

1 Property, as those terms are defined in the Amended Declaration, and (2) denies Defendant's  
2 Motion for Joinder.

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the material  
4 allegations of the Complaint are true, that there is no just reason for delay in entry of  
5 judgment, and orders and directs that judgment as set forth above, be entered forthwith  
6 against Defendant and in favor of Plaintiff

7 DATED this 15<sup>th</sup> day of April, 2004.

8  
9  
10   
11 HON JANE L. EIKLEBERRY

12 **Original** of the foregoing delivered  
13 this \_\_\_\_\_ day of April, 2004, to:

14 Clerk of the Pima County Superior Court  
15 110 West Congress Street  
16 Tucson, Arizona 85701

17 Copy of the foregoing mailed this  
18 \_\_\_\_\_ day of April, 2004, to:

19 Amelia C. Cramer, Esq.  
20 Civil Division  
21 Office of the Pima County Attorney  
22 32 North Stone Avenue, Suite 2100  
23 Tucson, Arizona 85701-1412  
24 Attorney for Defendant  
25  
26