

F I L E D

04 MAR -5 PM 1:57

PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
BY *R. Noland*
DEPUTY

1 David A. McEvoy
2 ASB No. 007599 PCC No. 37524
3 McEVOY, DANIELS & DARCY, P.C.
4 4560 East Camp Lowell Drive
5 Tucson, Arizona 85712
6 520-326-0133

7 Attorney for Plaintiff

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

9 **IN AND FOR THE COUNTY OF PIMA**

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

C20041194

Case No. _____

13 Plaintiff,) COMPLAINT AND APPLICATION
14 vs.) FOR ORDER TO SHOW CAUSE
15 Defendant.)

(Declaratory Relief)

Assigned to the Honorable

JANE L. EIKLEBERRY

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

17 1. Plaintiff is an Arizona non-profit corporation duly organized and operating in
18 Pima County, Arizona.

19 2. Defendant is a political subdivision of the State of Arizona.

20 3. This Court has jurisdiction over the subject matter of this controversy, and
21 venue is appropriate in Pima County, Arizona.

22 4. At all material times herein, Plaintiff was and is the residential community
23 association with respect to and having jurisdiction over that certain residential real property
24 subdivision located in Pima County, Arizona, known as New Tucson Unit No. 8
25 ("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.

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.

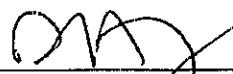
14 WHEREFORE, Plaintiff respectfully requests that this Court immediately issue an
15 Order ordering Defendants to appear before it on a date and time certain, then and there to
16 show cause, if any, why judgment should not be entered against them and in favor of Plaintiff
17 as follows:

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.

DATED this 5th day of March, 2004.

McEVOY, DANIELS & DARCY, P.C.

By: 

David A. McEvoy
Attorney for Plaintiff

VERIFICATION

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.

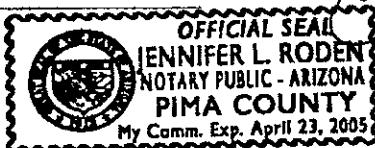
DATED this 4th day of March, 2004

Jeffrey S. Utsch

SUBSCRIBED AND SWORN to before me this 4th day of March, 2004, by

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

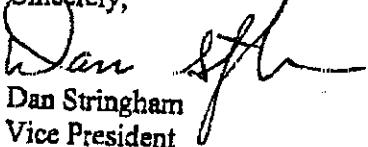
Page 2.

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,

A handwritten signature in black ink, appearing to read "Dan STH".

Dan Stringham
Vice President

Cc: Jim Mazzocco with attachments



PIMA COUNTY
DEVELOPMENT SERVICES DEPARTMENT
 201 N. Stone Avenue, 1st 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
 Jim Mazzocco
 Pima County Planning Official
 cc: Carmine DeBonis

JEFF UTSCH
 JEFF NEFT
 DAVID MC EVORY 326-5938

Post-It™ brand fax transmittal memo 7671		# of pages
To:	From:	
Glenn Ketske	Jim Mazzocco	
cc:	Pima Co. Dev Services	
Dept:	Phone# 740-6800	
Fax# 881-7571	Fax#	

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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

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
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,) MOTION FOR JOINDER
18 Plaintiff,) (Assigned to: *Hon. Jane L. Eikleberry*)
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.

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:

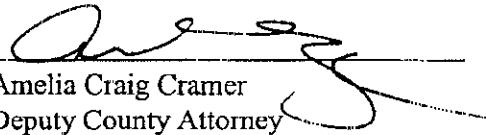
25 A person who is subject to service of process and whose joinder
26 will not deprive the court of jurisdiction over the subject matter of

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 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 10/4/04 day of April, 2004 to:

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

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

04 APR -9 PM 1:59

1 David A. McEvoy
2 ASB No. 007599 PCC No. 37524
3 McEVOY, DANIELS & DARCY, P.C.
4 4560 East Camp Lowell Drive
5 Tucson, Arizona 85712
6 520-326-0133

BY: E. BRADFORD,
DEPUTY

7 Attorney for Plaintiff

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

9 **IN AND FOR THE COUNTY OF PIMA**

10 NEW TUCSON UNIT NO. 8 HOMEOWNERS)
11 ASSOCIATION, INC., an Arizona non-profit) Case No.: C20041194
12 corporation,)
13 Plaintiff,) PLAINTIFF'S OPPOSITION TO
14 vs.) DEFENDANT'S MOTION FOR
15 PIMA COUNTY, a political subdivision of the) JOINDER
16 State of Arizona,) (Hearing April 12, 2004, 1:30 P M)
17 Defendant.) Assigned to the Honorable Jane L.
18 Plaintiff, by and through its attorneys, opposes Defendant's Motion for Joinder for the
19 reasons set forth below.
20 **1. EXECUTIVE SUMMARY**
21 It is burdensome and legally unnecessary to require Plaintiff to sue its members (who
22 number about 100) in order to proceed with this case because:
23 A. Plaintiff is a Homeowners Association representing 454 lots in New Tucson. No
24 roads or utilities were ever put in despite 40 years having passed since the plat
25 was approved and recorded. The lots are vacant.
26 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.

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

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

In this case, the original CC&Rs contemplated "a general plan for the improvement, development, ownership, use, and sale of the above described property". Both the Old and New CC&Rs apply uniformly to all lots within the Subdivision, and it is not necessary to join all of 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, 909 P.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 WEST RIDGE 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 Mailing¹, 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 ¹ 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 . . ."

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
14 Tucson, Arizona 85701

15 Copy of the foregoing delivered this
16 9th day of April, 2004, to:

17 Hon. Jane L. Eikleberry
18 Division 11
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
23 Attorney for Defendant

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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 THE COURT

04 APR 15 PM 4:48

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

BY: J. WHITNELL, DEPUTY

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**
18 Plaintiff,) **OF JUDGMENT**
19 vs)) (Assigned to: *Hon. Jane L. Eikleberry*)
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.

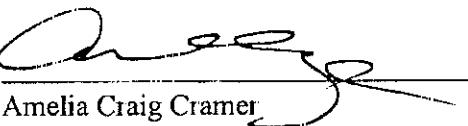
21 For all the for all the foregoing reasons, even if the Court rules in favor of the Plaintiff in
22 connection with Pima County's motion for joinder and on the substantive issue presented, it
23 should not enter judgment in the form proposed by Plaintiff.

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 15th day of April, 2004.

5
6 BARBARA LAWALL
7 PIMA COUNTY ATTORNEY

8 By: 
9 Amelia Craig Cramer
Deputy County Attorney

10 A copy of the foregoing hand-delivered
11 this 15th 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 15th 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

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON JANE L. EIKLEBERRY

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

COURT REPORTER: NONE

CASE NO. C-20041194

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.

FILED
PATRICIA A. NOLAND
CLERK OF THE COURT

04 APR 16 PM 4:26

1 David A. McEvoy
2 ASB No. 007599 PCC No. 37524
3 McEVOY, DANIELS & DARCY, P.C.
4 4560 East Camp Lowell Drive
5 Tucson, Arizona 85712
6 520-326-0133

BY: J. WHITNELL, DEPUTY

4
5 Attorney for Plaintiff

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF PIMA

8
9 NEW TUCSON UNIT NO. 8 HOMEOWNERS)
10 ASSOCIATION, INC., an Arizona non-profit) Case No.: C20041194
corporation,)
11 Plaintiff,) JUDGMENT
12 vs.)
13 PIMA COUNTY, a political subdivision of the) Assigned to the Honorable Jane L.
State of Arizona,) Eikleberry, Division 11
14)
15 Defendant.)
16

16 THE COURT FINDS after reading Defendant's Motion for Joinder and Plaintiff's
17 Opposition to Defendant's Motion for Joinder and conducting a hearing on said Motion and
18 Opposition, that Judgment be entered in favor of Plaintiff and against Defendant, and
19 specifically that this Court (1) declares that the relevant provisions of that certain Second
20 Amended Declaration of Covenants, Conditions and Restrictions for New Tucson Unit No 8
21 Lots 1-454 and Common Area being a Subdivision Recorded at Book 17 Page 84 of Maps
22 and Plats in the Office of the Pima County Recorder, Pima County, Arizona, as recorded on
23 November 1, 2002, in Docket 11918, commencing at page 92, in the official records of Pima
24 County, Arizona ("Amended Declaration"), are valid and enforceable, as written, and
25 accordingly that Plaintiff has the required authority to proceed on behalf of the Lot Owners
26 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 15th day of April, 2004.



8
9
10 HON JANE L. EIKLEBERRY

11 **Original** of the foregoing delivered
12 this _____ day of April, 2004, to:

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

15 Copy of the foregoing mailed this
16 _____ day of April, 2004, to:

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