Planning and Development Department

DATE: **August 4, 2022**

TO: Planning & Zoning Commission

FROM: Martin Martell, Planner

SUBJECT: **DMP2021001 & Z202105 – White Tank Foothills Phase 3**

Since the publishing of the staff report for the above cases, staff received three letters of opposition to the cases from area residences. The opposition letters oppose the proposed density of 645 new residences and fear that these new homeowners will increase traffic to an unsafe level, negatively impact homeowners' property values, overextend fire protection, law enforcement and negatively impact area schools. The letters have been attached to this handout.

Attachments:
8-1-22 Opposition Letter (1 page)
8-2-22 Opposition Letter (2 pages)
8-2-22 Opposition Letter (8 pages)

To Planning & Development Department

As the one of the 900 owner of property in the White Tank Foothills, I am dismayed by the recent changes that are being pushed by the builder of Phase 3 of our subdivision. I purchased my home with my VA benefits planning for a long term investment based on the CC&R's provided to me at the time of purchase March 2009. I realize that the builder is trying to maximize their profits as it is in their best interest to do so. Yet by allowing them to maximize their profits you are impacting the potential profits of every homeowner in the White Tank Foothills and surrounding communities. I would respectfully ask that you consider honoring the original CC&R's that set the cap for the total number of dwellings at 1381.

1. If you so vote to honor the original planning and zoning agreements in the original CC&R's that would be preferred
2. If not then I would reluctantly support the new proposal from the builders attorney at the community meet.

Respectfully
Steven E. Boles
SCPO USCG Retired
602-881-927

Maricopa County Planning and Zoning Commission

Mr. Martin Martell

August 4, 2022 Meeting

During the June 8, 2022, Maricopa County Board of Supervisors Meeting the Board of Supervisors accepted Mr. Brennan Ray's request to defer Burch & Cracchiolo presentation on behalf of Northern Citrus LLC to August 4, 2022. Supervisor Hickman, during this meeting, advised Mr. Brennan and Burch & Cracchiolo to reach out to the White Tank Foothills Community to work at finding a more acceptable solution in the development of WTF Phase 3.

Subsequently, Mr. Brennan Ray and Mr. Ed Bull of Burch & Cracchiolo scheduled a meeting for the evening of July 27, 2022, at a local school inviting homeowners that live within 300' of the proposed building sights to attend. This should have been extended to the entire WTF community since the CC&R's that govern the development of Phase 3 impacts the entire WTF community.

The July 27, 2022 meeting consisted of Mr. Brennan reiterating the June 8, 2022 presentation material submitted to the Board of Supervisors. Mr. Brennan and Mr. Bull took time to promote how their client has acquiesced to the WTF requested changes. Unfortunately, they did not take heed of the sizeable majority of attendees who are insisting on a reduction in the number of homes to be built from the proposed 645. During the presentation the attendees quickly determined there is no intent on the developer's part to discuss reducing the number of lots within Phase 3 from the proposed 645. So much for Mr. Hickman's advice to Burch & Cracchiolo to work with the WTF Community. Using this 'take it or leave approach' by Burch & Cracchiolo the parties are at an impasse.

Due to the disingenuous and surreptitious manipulation of the WTF Phase 3 Plan by Northern Citrus LLC, using an 'Anchoring' scheme, a large group of homeowners retained an attorney to challenge the unlawful attempt to amend the WTF Community Association CC&R's. (Reference challenge letter submitted to Planning and Zoning). The specious discussions/negotiations with the homeowners conducted by Burch & Cracchiolo law firm have been to distract the homeowners from the egregious number of increased lots within Phase 3.

From previous conversations with Maricopa County representatives, the WTF homeowners clearly understand that Maricopa County "does not care" what the HOA CC&R's state. Regrettably, this callous disregard by Maricopa County for the CC&Rs, (a legal binding contract between WTF Community Association and the WTF homeowners) encourages the Northern Citrus LLC and its representatives to proceed in an attempt to unlawfully change the CC&R's and obtain planning and zoning changes under cases Z2021050/DMP2021001.

The majority of WTF homeowners still contend additional homes will increase traffic to an unsafe level, negatively impact homeowners' property values, overextend fire protection and law enforcement. We substantiated that fire protection will not be adding additional staff in support of all the growth in the area, we have corroborated that the schools are already at max capacity.

The Northern Trust LLC and its representatives are using a traffic study from 2001 and have extrapolated the submitted numbers from the 20-year-old study. Maricopa County should be requiring a new comprehensive traffic study to include Waddell and surrounding area, areas west of 303 including South Surprise, west of Glendale and west of Litchfield Park from Cactus to Camelback.

The White Tank Foothills Community want you to be fully informed of the current state of discussions with Burch & Cracchiolo legal representatives prior to the next Maricopa County Planning and Zoning Commission Meeting. We look forward to addressing the WTF Phase 3 rezoning request at the August 4th Planning and Zoning Commission Meeting.

Dean Schwab

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Waddell, AZ 85355

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Hello Martin,

You know I and many White Tank Foothills homeowners have been opposed to this rezoning request from the start over a year ago. Initially it was due to the disruption of the transition of density from the planned 175-foot wide (1-acre) lots adjacent to Northern Avenue to the 80 & 75-foot wide R1-8 and 65-foot wide R1-7 lots approaching Seldon Lane to the North. Phase 3 of the WTF Master Planned Community is the last Phase to be built and it should be built consistent with the lot sizes in Parcels 9 and 10 immediately to the North of Phase 3 as was told to many homeowners and partially responsible for their decision to purchase a home in White Tank Foothills.

White Tank Foothills is unique with mid-size lots offering room for ramadas, pergolas, pools, and other amenities. We are not a high-density community like various developments in the city of Surprise, Avondale, and El Mirage like Marley Park or Verrado with community club style amenities.

There are thousands of small lot homes for sale and rentals being planned and built across the areas surrounding White Tank Foothills and there is no reason except for greed to not complete Phase 3 as recently approved in 2013 and as far back as 2003. We have tried to work with Brennan Ray and Ed Bull to reduce the number of lots to the already approved number and have even offered to discuss offering more lots to them, if they come to an agreement to lower the number of lots with compromise discussions. **They refuse to participate.**

I believe Brennan and Ed have always known their bottom number is 645 as opposed to the 773 number of lots in their initial proposal verses the approved 390 plus 10% per our CC&Rs. They are highly successful using a ruse as you may be aware of known as "Channeling" where they put out a proposal for a high number of lots on a plot of land expecting opposition then reduce the number to what they really planned in the first place. Brennan has done this with Phase 3 and also with the small lot development Zanjero Pass at the corner of Olive and Citrus and I'm sure with others. In both cases he reduced the number of lots by 16 to 18 percent. He is very good at his job by using this disingenuous technique.

Attached is a copy of the Challenge Letter we delivered timely describing what we and our attorney believe to be the illegality of the CC&R amendment put forth to allow the developer to plan for more than what is allowed under Article 2.4 of our CC&Rs. There is legal precedent for our challenge based on the recent Arizona State Supreme Court decision in Kalway vs Calabria Ranch HOA and other cases cited. Also, I believe you are aware in Arizona, CC&Rs are considered a contract and cannot be unilaterally changed without notice to the respective parties. This amendment by the developer was completed secretly and intentionally without notice to homeowners who could object and challenge it. So far, they have not responded to our Challenge Letter.

We purposely did not organize an opposition campaign to the Planning department for your August 4th meeting because we know Planning and Zoning rarely if ever deny a

developer's rezoning request. No need to get homeowners hopes of success up for something we believe will be a rubber stamp as happened last year The homeowners in WTF will make their objections known for the Board of Supervisors meeting on September 28th.

Please read the Challenge Letter attached and previously submitted to Planning and Zoning to understand by your approval of the rezoning request, you are approving and participating in the developer's illegal activity and ultimately wasting your departments time and energy. **We are asking you to deny this request at least until the conclusion of the legal proceedings related to our challenge**. It is the honest and moral thing to do for your constituents in White Tank Foothills.

Please make sure this email gets distributed to all of the Planning and Development board members.
Thank you.

Respectfully,
Frank Scaglione

Clark Hill

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July 22, 2022

VIA HAND-DELIVERY
Brad Clough, President
White Tank Foothills Community Assn.
1600 W. Broadway Rd., Ste. 200
Tempe, AZ 85282

VIA HAND-DELIVERY
Amanda Shaw, Statutory Agent
White Tank Foothills Community Assn.
1600 W. Broadway Rd., Ste. 200
Tempe, AZ 85282

VIA HAND-DELIVERY
Brad Clough, President
Hinton Financial Services, Inc.
General Partner of Northern Citrus, LLP
1850 N. Central Ave., Ste. 1400
Phoenix, AZ 85004

VIA HAND-DELIVERY
Richmond American Homes of Arizona, Inc.
c/o CT Corporation System
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Phoenix, AZ 85012

VIA FEDERAL EXPRESS
Brad Clough, President
Hinton Financial Services, Inc.
General Partner of Northern Citrus, LLP
10218 – 111th Street
Edmonton, AB T5K 1K9
Alberta, Canada

Re: Notice of Challenge to the Validity of the Second Amendment to Declaration of Covenants, Conditions, and Restrictions for White Tank Foothills, dated August 13, 2021; and Notice of Claim.

Dear Sirs:

Clark Hill represents a group of homeowners in the White Tank Foothills Development who are members of the White Tank Foothills Community Association. This letter is written on their behalf and constitutes their written challenge to the validity of the Second Amendment to the Declaration of Covenants, Conditions, and Restrictions for the White Tank Foothills, recorded August 13, 2021, on the grounds set forth hereinbelow.

It is not clear from the terms of the Declaration of Covenants, Conditions, and Restrictions for White Tank Foothills, recorded May 24, 2006 (the "CCR's"), whether this challenge also constitutes a "Claim" within the meaning of CCR Sect. 9.1(c). To the extent that the issues raised by this challenge may be deemed to constitute a Claim, this letter also constitutes the homeowners' Notice of Claim pursuant to CCR Sect. 9.4, and their initiation of the dispute resolution procedures provided for under the CCR's.

This Challenge and Notice of Claim is being delivered to you as the signatories to the Second Amendment to the Declaration of Covenants, Conditions, and Restrictions for the White Tank Foothills recorded on August 13, 2021 (the "2nd CCR Amendment") at your last known addresses. If any of you are represented by counsel in connection with this matter, please forward this letter to your attorney(s). If you have transferred your interest in the White Tank Foothills Development or the CCR's to another person or entity since the recordation of the 2nd CCR Amendment, please forward this letter to the current holder(s) of those interests.

NOTICE OF CLAIM

A. Nature of the Claim

The 2nd CCR Amendment purports to delete Sect. 2.4 of the CCR's in its entirety. As you know, Sect. 2.4 imposes a density "cap" on development within the White Tank Foothills Development such that the total number of units in the development can never be increased by more than 10%.

The density cap of Sect. 2.4 was a material, express promise made by your predecessor in interest, Citrus & Northern, LLC, upon which the homeowners who purchased lots in the White Tank Foothills Development prior to August 13, 2021, had relied in making those investment decisions, and the density cap constituted a fundamental feature of the development that could not be unilaterally changed, even by majority vote. Therefore, the 2nd CCR Amendment is void, and the density provisions of Sect. 2.4 are still in full force and effect.

B. Factual & Legal Basis of the Claim

As you know, development of the White Tank Foothills project began in 2002 when the Maricopa County Board of Supervisors approved your predecessor's request for a Development Master Plan to develop approximately 640 acres at the southwest corner of Citrus Avenue and Olive Avenue into low-density residential housing. The site was planned to be developed in three phases. One of the conditions to that approval was that "[t]he total number of dwelling units for the White Tanks Foothills Development Master Plan shall not exceed 1,286."

On May 24, 2006, your predecessors recorded the CCR's, which confirmed the low-density nature of the development via the provisions of Sect. 2.4, which states:

> Notwithstanding any other provision of this Declaration to the contrary, the Declarant, with the approval of the County but without obtaining the consent of any other Owner or Person, shall have the right to make changes or modifications to the development plan with respect to any property owned by the Declarant in any way which the Declarant desires including, but not limited to, changing the density of all or any portion of the property owned by such Declarant or changing the nature or extent of the uses to which the property may be devoted;

> **provided, however, that the change or modification shall not increase or decrease the number of lots permitted under the existing Development Plan by more than ten percent (10%).** (Emphasis added.)

In 2014, developer's predecessor requested an amendment to its Development Master Plan to add an additional 95 dwelling units to the project. That request was approved, with the condition that the total number of dwelling units in the development would not exceed 1,381. As CCR Sect. 2.4 was not amended or revised at that time, those additional 95 units counted as part of the additional 10% permitted under Sect.2.4.

Over the past decade and a half, Phases 1 and 2 of the White Tank Foothills Development have been fully built out, and those residential units sold to more than 900 private individuals. Those purchases were made subject to, and in reliance upon, the original CCR's, including Sect. 2.4 of that document.

Homes in Phases 1 and 2 of the White Tank Foothills Development were sold with the promise and understanding that the low-density character of the development would not and could not be changed by the build-out of later phases. The low-density nature of the project was assured by Article 2.4 of the CCR's.

CCR Sect. 11.3 provides that the Declaration may be amended at any time by the affirmative vote or written consent of Owners holding not less than two-thirds (2/3) of the Eligible Votes in the Association. However, it is a well-established rule of Arizona law that, even when the majority of owners technically have the power to amend a Declaration, the common law prohibits them from exercising that power to make fundamental changes in the CCR's, unless the language of the CCR's themselves gave fair notice that the particular amendment might occur. *Kalway v. Calabria Ranch HOA, LLC,* 252 Ariz. 532, 506 P.3d 18 (2022), which states:

> [The power to amend CCR's] does not displace the common law, which prohibits some amendments even if passed by a majority vote. The original declaration must give sufficient notice of the possibility of a future amendment; that is amendments must be reasonable and foreseeable.

A general CCR provision giving the majority the power to amend the Declaration from time to time is not sufficient to empower the majority to enact amendments not reasonably foreshadowed by the language of the original CCR's. As stated by the Court, "even a broad grant of authority to amend an original declaration is insufficient to allow the majority of property owners to adopt and enforce restrictions on the minority without notice." Otherwise, owners who had already purchased lots in reliance upon the existing CCR's would be deprived of the benefits of their reasonable expectations at the time of purchase. As also noted by the Court:

> The notice requirement relies on a homeowner's reasonable expectations based on the declaration in effect at the time of purchase – in this case, the original declaration. Under general

> contract law principles, a majority could impose any new restriction on the minority because the original declaration provided for amendments by a majority vote. But allowing substantial, unforeseen, and unlimited amendments would alter the nature of the covenants to which the homeowners originally agreed. (252 Ariz., at 538, ¶15.)

In order for an amendment to be valid and enforceable, the original covenant itself "must give notice that … the covenant can be amended to reframe it, correct an error, fill in a gap, or change it any particular way. (Citations omitted.) But future amendments cannot be 'entirely new and different in character,' untethered to an original covenant. (Citations omitted.) Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants." (252 Ariz., at 539, ¶17.)

Your purported alteration of the CCR's via the 2nd CCR Amendment is even more egregious than the situation addressed by the Supreme Court in *Kalway v. Calabria Ranch*, in which the majority owners sought to add new restrictions on issues as to which the original CCR's had been silent. By contrast, CCR Sect. 2.4 didn't simply fail to give notice that it might someday be eliminated so as to allow building to any desired density; Sect. 2.4 expressly promised purchasers that density in the development would **never** be increased by more than 10%. The developer's attempt to surreptitiously relieve itself of that obligation is unlawful and void.

Arizona law in this regard reflects the general rule that the developer of a common-interest community cannot change the game for its own enrichment after homeowners have invested in a development. As stated in § 6.21 of the *Restatement (3rd) of Property (Servitudes)*:

> A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the declaration fairly apprises purchasers that the power could be used for the kind of change proposed.

The CCR's constitute a contract between the developer and each of the individual homeowners. *Dreamland Villa Community Club v. Raimey*, 224 Ariz. 42, 47, ¶ 19, 226 P.3d 411, 416 (App. 2010). As with all contracts, the CCR's impose a duty of good faith and fair dealing that prohibits the parties from taking actions that would deprive the other of the expected benefits of the transaction, even if those actions may not directly violate the terms of the agreement. *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, ¶59, 38 P.3d 12, 28 (2002).

The directors of a homeowners' association also have duties of loyalty and fairness that obligate them to operate the association in the best interests of the entire community and to refrain from taking actions for their own benefit at the expense of the community as a whole. A.R.S. § 10-3830(A); *Restatement (3rd) of Property (Servitudes)*, § 6.14. That duty is particularly fraught here, as White Tank Foothills is still under Declarant Control, and the Declarant's successor appointed the directors of the HOA, who are all members or

employees of the Declarant. As a result, the homeowners have been deprived of what should be a crucial safeguard of their rights and interests, and every action of the HOA's directors is tainted with conflicts of interest that create the presumption that they have violated those duties of loyalty and fairness.

Those breaches are epitomized by the manner in which the 2nd CCR Amendment was adopted. Not only did the 2nd CCR Amendment purport to unlawfully deprive the homeowners of the benefits of Sect. 2.4's density cap, the amendment was adopted and recorded in secret, using the special voting powers given the Declarant by CCR Sect.'s 5.6 and 5.7, and without any notice to the homeowners that this fundamental change was being made. Moreover, this was apparently done to take advantage of the one-year limitation on challenges imposed by CCR Sect. 11.3, so that the homeowners' rights might be lost before they even learned of the deprivation.

The purported deletion of CCR Sect. 2.4 materially changed the low-density character of White Tank Foothills and burdens the existing community members with decreased property values, loss of views, and increased traffic and congestion. The developer's attempt to unilaterally relieve itself of these density restrictions for its own financial benefit not only constitute a breach of contract, but also violations of the developer's and the HOA's duties of loyalty and fairness to the homeowners.

In addition, CCR Sect. 11.3 also provides that "notwithstanding any other provision of this Declaration to the contrary, this Declaration may not be amended to conflict with the conditions of approval of the Plat by the County … unless the Plat is abandoned."

One of the conditions imposed upon approval of the Development's current Plat is that the number of units not exceed 1,381. The attempt to rewrite the CCR's to allow building beyond that density is clearly contrary to the conditions of Plat approval and constitutes an additional and alternative basis upon which the 2nd CCR Amendment is void and of no effect.

The homeowners also believe that the 2nd CCR Amendment may not have been approved by the requisite two-third majority of Eligible Votes and may be invalid for this reason as well. However, the homeowners do not yet have sufficient information regarding the ownership of parcels in the Development as of August 13, 2021, to make that determination, and reserve the right to assert this alternative ground of invalidity once such information becomes available to them.

C. **Resolution of the Claim**

This Claim can only be resolved by the clear and unequivocal annulment of the 2nd CCR Amendment and the equally clear and unequivocal recognition and affirmation that CCR Sect. 2.4 is still in full force and effect and governs the current and future development of the White Tank Foothills Development.

We believe that this resolution can best be accomplished in three steps:

First, the White Tank Foothills Community Association should immediately pass and record a Resolution declaring the 2nd CCR Amendment to be null and void; and affirming that CCR Sect. 2.4 is still in full force and effect and governs the current and future development of the White Tank Foothills Development.

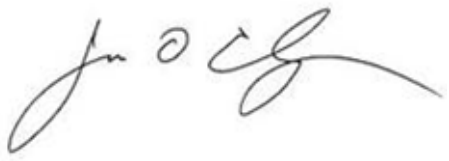
Second, as soon as possible, a Third and Clarifying Amendment to the CCR's should be voted upon and recorded, with the Declarant's affirmative support and approval, to the same effect.

Third, this necessarily means that the maximum number of lots/home sites that can be built in White Tank Foothills Phase 3 is limited to a total of 424, consisting of the 390 allowed under the Plat plus the remaining 34 permitted by the 10% provision of CCR Sect. 2.4; and the developer must publicly acknowledge this limitation and withdraw the requests to the Maricopa County Board of Supervisors and Maricopa County Planning & Zoning Commission for an amended Development Master Plan and/or zoning reclassifications that would permit any greater density, including, but not limited to Cases #DMP2021001 and #Z2021050.

The homeowners are open to other potential methods of resolution of this Claim that would achieve the same goal of clearly and unequivocally annulling the 2nd CCR Amendment and reinstating CCR Sect. 2.4.

Sincerely,

CLARK HILL



James Ehinger

JE:rmm

CC: Maricopa County Board of Supervisors
Clint L. Hickman, Supervisor, District 4