IN THE ARIZONA SUPREME COURT
STATE OF ARIZONA

CATALINA FOOTHILLS UNIFIED SCHOOL DISTRIT NO. 16 OF PIMA COUNTY, a political subdivision of the State of Arizona, Plaintiff / Appellee v. LA PALOMA PROPERTY OWNERS ASSOCIATION, INC., an Arizona non-profit corporation, Defendant / Appellant.	Arizona Supreme Court No. CV-16-0046-PR Court of Appeals Div. 1 No: 1CA-CV 2014-0838 Pima County Superior Court No: C20075114

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

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MOTION AND BRIEF OF AMICUS CURIAE

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure, Amicus Curiae, Community Associations Institute ("CAI"), respectfully requests leave of this Court to file the accompanying Brief of Amicus Curiae (the "Brief") in support of the Petition for Review ("Petition") filed by Defendant/Appellant La Paloma Property Owners Association ("Association") in the above-captioned appeal.

Counsel for CAI has contacted the attorneys for each of the parties. The Association consented in writing to the filing of the Brief; Plaintiff/Appellee Catalina Foothills Unified School District No. 16 (the "District"), withheld consent.

CAI is an international organization with more than 33,000 members and over 60 chapters in the United States. Its members include community and property owners' associations, homeowners and other property owners, developers, community managers and affiliated professionals and other service providers.

CAI principally provides information, education and resources to its members, community association constituents, and related parties, including community managers, volunteers, contractors, developers, attorneys and others who provide services to community associations.

CAI seeks leave to file the Brief in this matter because its interests include protecting the rights of community associations, and its members, to control private streets and common areas and, thereby, also preserving the integrity of planned communities.[1] This case involves important issues for community associations, planned communities and similar developments; its determination may have an impact on community associations, planned communities, the ability of developers to design subdivisions and common areas, and the ability of community associations to properly control and manage subdivision streets, common areas and entry statements. These issues are especially important in Arizona because local regulations in Maricopa County and Pima County, as well as other expanding areas, generally require developers to include school sites in planned communities.

[1] CAI's interests are also set forth in more detail in the Brief of Amicus Curiae, pages 3-5.

BRIEF OF AMICUS CURIAE

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INTEREST OF CAI AS AMICUS CURIAE

CAI is a national nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide for effective guidance for the creation and operation of community and homeowner associations. CAI is now an international organization with over 33,000 members and 60 chapters across the United States. Its members include community associations and board members, other property owner leaders, community managers and affiliated professionals and other service providers.

CAI regularly expresses its position on issues of potentially national concern, and advocates on behalf of community associations and their residents before legislatures, regulatory bodies and the courts. CAI also publishes a bimonthly magazine offering information on current issues affecting community associations, sponsors educational and training opportunities through seminars, workshops and conferences and maintains a searchable research library and the largest collection of resources available on community association management and governance.

A community association is generally a non-profit corporation, or similar entity, formed pursuant to covenants, conditions and restrictions recorded by a developer, or declarant and authorized pursuant to the Arizona Planned Community Act. The community association usually holds title to, exercises

control over, and maintains the private streets and common areas in the development for the benefit of the individual owners. The properties governed by community associations may be commercial, residential or mixed-use in nature.

The attractiveness of planned communities is based, in substantial part, on the fact that the development has been approved by appropriate governmental officials and that the uses of the properties within the planned community are specifically designated and restricted by recorded covenants. Of similar importance is the private nature of the common areas and the fact that a community association has authority to control and the duty to maintain the streets and other common areas consistent with the recorded covenants.

The taking of common areas, and especially subdivision streets, by a school district or other government entity negates the ability of community associations to properly control the streets or common areas and also disrupts the planned aspect of the community and defeats the reasonable expectations of the owners of property in the development.

In the present case, the classification of the subdivision street in La Paloma as school district buildings and grounds also creates substantial legal, practical and safety issues. The District's taking in this situation is contrary to both sound public policy and settled principles established by this Court.

ARGUMENTS

THE COURT OF APPEALS' DECISION IS CONTRARY TO ARIZONA LAW AND SOUND PUBLIC POLICY

The District's taking of La Paloma's subdivision street, Campo Abierto, should be given close scrutiny because of the potential impact of the Court of Appeals decision ("Opinion") on community associations, planned communities and property owners in such developments. The precedent established by the Opinion may have far reaching implications, and it is especially troubling because of the potential interference with the ability of community associations to properly control and maintain subdivision streets and other common areas.

Arizona law strictly construes the rights of condemnors, including school districts, to appropriate private property by eminent domain. *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133-134, 407 P.2d 91, 93 (1965). Such right must be granted expressly by the legislature. *Id*. The authority to use eminent domain is obviously fashioned by the legislature to fit within the functions served by, and the powers granted to, condemnors by statute.

In the present case, the taking of Campo Abierto is not consistent with either the functions or the statutory authority of the District. The District's taking of Campo Abierto creates substantial legal and safety issues and is contrary to sound public policy. These issues, in CAI's view, were not given adequate consideration

by the Opinion and its holding that the District's taking of Campo Abierto, as buildings and grounds, was necessarily authorized by the legislature.

In the trial court proceedings, the District argued that Campo Abierto was being taken as a driveway. However, this is at odds with the reality of Campo Abierto's use as a subdivision street.[2]

Subdivision streets are privately owned, however, they are used by members of the general public and are subject to local regulations and established safety standards, just like public streets. For example, subdivision streets are subject to Pima County's Subdivision and Development Street Standards. The District, on the other hand, is not bound by Pima County's standards or other safety regulations.[3]

As a result, the taking of Campo Abierto raises substantial safety issues for La Paloma and any other planned community in which a school district decides to take subdivision streets to expand the access points for a school site.[4] The short-

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[2] See Association's Opening Brief, pp. 4, 6, fn 8, 23. It is also at odds with any common understanding or technical definition of the term. Under Pima County's regulations, a driveway is a private access way that serves no more than four parcels. The obvious reason for this limitation is that driveways are not subject to public or subdivision road safety standards and are for a limited volume of traffic.

[3] Pima County controls only the access to its public streets from school sites.

[4] The District also created the safety issue it claims necessitates the use of Campo Alberto. When the District acquired its property, and promised not to use Campo Abierto, it was to be accessed only from Skyline Drive. The District later

term safety issues are illustrated, in the present situation, by the extraordinary number of accidents resulting from the District's creation of an intersection where none was planned or contemplated by the plat or configuration of La Paloma's subdivision streets. See Association's Reply Brief, pp. 8, 18-19.

The long-term impact, however, will likely be even more serious. The District, unlike counties, cities and towns are not granted authority to create, build or maintain roads for general public use.[5] It is also not granted authority to take private property by eminent domain for use as "roads, streets, or alleys." A.R.S. §12-1111(6) (such authority limited to "a county, city, town or village."). Thus, school districts are not created to properly maintain streets and roads used mainly by the general public. For example, school districts do not have engineers, or traffic or road experts on staff to insure a reasonable maintenance schedule or proper funding; they do not have road maintenance crews to guarantee a quick and reasonable response to repair issues; and they do not have administrators or

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added access from Sunrise Drive. It was this additional access point that created the District's justification for taking Campo Abierto.

[5] For example, the statutes governing counties include: A.R.S. § 11-251(4) (counties authorized to "[l]ay out, maintain, control and manage public roads"); 11-251(44) (county may "[a]cquire land for roads."); 11-3711 (county may issue bonds for "county streets and highways"); 11-561 (county engineer "shall be a competent civil engineer and road builder.").

employees tasked with routinely handling subdivision street or road maintenance issues.[6]

Consequently, there is simply no reasonable mechanism in place to insure that a subdivision street will comply with evolving safety standards, will be properly or routinely inspected or maintained, or, in the case of unexpected damages, repaired in a timely manner. In an era of ever tightening school district budgets, it is also reasonable to assume that maintenance and safety issues related to an off-site subdivision street, used mainly by non-district users, to access non-district properties, will be one of the first expenses to be cut.[7]

The taking of Campo Abierto, or other subdivision streets, for buildings and grounds also has substantial practical and legal implications for the residents of La Paloma. The Arizona legislature has adopted numerous statutes that control the types of activities that are proper on school grounds. Several of these statutes criminalize activities that are routinely engaged in on subdivision streets, by residents travelling to and from their homes, and by the general public on public

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[6] At the state level, the Arizona Department of Transportation is the only department authorized to condemn property for transportation purposes, including "rights-of-way for access" and "legal access to property." A.R.S. § 28-7093.

[7] This is also true as to the landscaping along Campo Abierto and La Paloma's entry statement at Sunrise Drive. These important aspects of the La Paloma development are also included in the District's taking. Association's Opening Brief, pp. 59, 61, 63.

streets. See, A.R.S. §§ 13-3102(A)(12) ("Possessing [within immediate control] a deadly weapon on school grounds."); § 36-798.03 ("Tobacco products are prohibited on school grounds") § 36-2802 (medical marijuana statute "does not prevent imposition of any civil, criminal or other penalties for . . . [possessing or engaging in the use of medical marijuana] on the grounds of any preschool or primary or secondary school"); § 13-3411 (possession of prescription drugs on school grounds); § 13-709 (enhanced punishment for crimes committed in proximity to school grounds); see also, 18 U.S.C. § 922(3)(A) (discharge of weapon on school grounds).

The District's Response to the Petition asserts that these statutes should be ignored because they will never be enforced against La Paloma's residents or other members of the public. This argument misses the point. The key issue in this case is whether the legislature, by enacting A.R.S. § 12-1111(3), intended to authorize the use of eminent domain for the taking of a subdivision street as "buildings and grounds," when it will continue to be used primarily as a subdivision street. These statutes are properly considered in interpreting A.R.S. § 12-1111(3) and determining legislative intent. 3D SUTHERLAND STATUTORY CONSTRUCTION, § 77.8 (statutes must be considered in light of "pre-existing common law, related enactments and case law.")

Contrary to the District's arguments, it is necessary, to assume that the legislature intended for these statutes to be enforced uniformly. The District also has no authority to control or speak for any law enforcement agencies; it also cannot require or order any other governmental entity to ignore a violation of the law.[8] Finally, it is improper for the District to suggest that this court ignore these statutes.

In light of these statutes and the practical realities of the situation, it seems highly unlikely that the legislature contemplated that "buildings and grounds" would include a subdivision street used mainly for access by the residents, guests and invitees of La Paloma, which is platted for more than 1,000 homes, with close to 400 residences north of Sunrise Drive.

[8] See, e.g. A.R.S. § 15-515: "All school personnel who observe a violation of section 13-3102, subsection A, paragraph 12 or section 13-3111 on school premises shall immediately report the violation to the school administrator. The administrator shall immediately report the violation to a peace officer. The peace officer shall report this violation to the department of public safety for inclusion in the statewide and federal uniform crime reports prescribed in section 41-1750, subsection A, paragraph 2."

THE DISTRICT'S FAILURE TO INCLUDE INDIVIDUAL PROPERTY OWNERS WAS IMPROPER AND CONTRARY TO ARIZONA'S CONSTITUTION

The Opinion approved the District's naming of only the Association as a defendant, even though compensable rights of the individual lot owners were also being taken. RESTATEMENT OF PROPERTY, § 566. The individual lot owners' right to enforce the recorded covenants as to Campo Abierto, as well as related rights, were extinguished by the District's taking. *Meredith v. Washoe County School Dist*, 84 Nev. 15, 19, 435 P.2d 750, 751 (1968). This ruling has a critical impact on both the proper role of a community association and the separate and individual rights of its members.

The owners of lots in La Paloma, each had easement rights and the right to restrict the use of Campo Abierto and compel its proper maintenance under the recorded covenants. Thus, they were entitled to recover severance damages in an amount equal to the diminution in value of their individual lots. *Meredith v. Washoe County School Dist*, 84 Nev. at 19, 435 P.2d at 751("since the value of a restrictive covenant cannot be in the abstract, we must look to the market value of the dominant tenement [individual lots] before and after the taking"); *U. S. v. Certain Land in City of Augusta*, 220 F. Supp. 696, 701 (D. Maine, 1963) (lot owners "are entitled to be compensated for the diminution in the value of their lots as a result of the extinguishment of the equitable servitude in the land taken by the

government"); see also, *So. Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 107 Cal. Rptr. 76, 507 P.2d 964 (1973).

While Arizona has not addressed the issue directly, other courts have held that individual subdivision lot owners are necessary parties in the taking of common area or restricted property in a residential subdivision. *Meredith v. Washoe County School Dist*, *supra*; *N. Carolina Dept. of Transp. v. Stagecoach Village*, 174 N.C.App. 825, 828, 622 S.E.2d 142, 145 (2005) (condemnation action "cannot be resolved without joinder of each lot owner in the development who has an easement property right of record.") This approach is appropriate because the larger parcel, for purposes of eminent domain, includes the individual lots. *Id*.; *Dept. of Transp. v. Fernwood Hill Townhouse Homeowners' Ass'n., Inc*., 185 N.C.App. 633, 637-42, 649 S.E.2d 433, 436-439 (2007). Moreover, the interests of the community association and the lot owners are not co-extensive and, in fact, are likely conflicting. *N. Carolina Dept. of Transp. v. Stagecoach Village*, 174 N.C.App. at 828, 622 S.E.2d at 145.[9]

Similarly, the interest of the individual owners necessarily vary greatly and also necessarily conflict. In addition, individual owners are familiar with the peculiarities of their property and the specific impact of the taking of subdivision streets are common areas on their properties. *N. Carolina Dept. of Transp. v.*

[9] Obviously, community associations may not favor the interests of one owner over another.

Stagecoach Village, 174 N.C. App. at 828, 622 S.E.2d at 145 (2005) ("Each individual lot owner's claim is not common with the entire membership and is not shared equally. . . . Individualized proof of each lot owner's damages will be necessary. The proper parties to provide that proof are the individual lot owners.") By contrast, it is impractical, if not impossible, for a community association to properly determine the specific impact of the taking on each and every individual parcel within a subdivision.

To require the Association to represent these varying and conflicting interests, collectively, is an improper burden to place on a community association and denies due process to the individual owners.

The Opinion apparently concludes that because some evidence was introduced concerning the impact of the taking on La Paloma, generally, joinder of the lot owners was not necessary. This conclusion ignores the Constitutional rights of the lot owners. *Redevelopment Agency v. Tobriner*, 153 Cal. App. 3d 367, 375, 200 Cal. Rptr. 364, 370 (App. 1984) ("whether they are called restrictive covenant, equitable servitudes, or easements, the interests at issue in this case are property interests in the constitutional sense.") The proper inquiry is whether the individual lots had a compensable right and, in turn, the right to properly present their claim for just compensation based on the particulars of their individual properties.

While it may have been more convenient for the District to name only the Association, this does not nullify the rights of the individual lot owners to recover just compensation.[10] *Meredith v. Washoe County School Dist,* 435 P.2d at 753 ("Procedural considerations should not determine the substantive question of whether there is a compensable property interest"). Moreover, naming the lot owners preserves the obvious legal distinction between the owners' collective interests in the common areas and subdivision streets and the owners' separate and distinct interests in their individual lots and appurtenant easements rights.

[10] It is also at odds with the legislative intent that a condemnor identify all interests being taken and join all those holding such interests, as required by A.R.S. §§ 12-1117(2) and 12-1116(H).

THE PETITION PRESENTS ISSUES OF BOTH GENERAL IMPORTANCE AND STATEWIDE CONCERN

The District, in its Response to the Petition, argues that review should be denied because this case does not involve issues of statewide concern or other meaningful importance. CAI strongly disagrees with the District's position. The impact on community associations and planned communities is certainly substantial and a matter of statewide importance. Moreover, the Opinion's extension of eminent domain authority to permit a subdivision street or any other private property, to be taken based on legal and logical contradictions is also a matter of both statewide concern and general importance. At the very least, the Opinion adopts an approach that is at odds with this Court's rule of strict construction of statutes granting the power to condemn.

The logical inconsistencies of the District's position, which was endorsed by the Opinion, is first illustrated by the conclusion that the legislature, in adopting A.R.S. §12-1111(3), necessarily authorized the taking of a subdivision street for use as school grounds. As already noted when confronted with related statutory provisions that contradict this conclusion, the District's response is that these other statutes should be ignored.

The District initially argued that Campo Alberto will be a driveway and, therefore, used as school grounds.[11] The evidence at trial, however, was that Campo Alberto was a publicly used subdivision street and, after the taking, will continue to be used as a subdivision street, mainly for access to properties other than the District's site. It defies logic, especially in light of the other relevant statutes, to conclude that §12-1111(3) was intended to authorize the taking of a subdivision street as school grounds, especially when the District, itself, contends Campo Abierto will continue to be used by the general public as a subdivision street. See Association's Brief, Addenda A and B.

Next, the District insists Campo Abierto is being taken in fee simple, as required by A.R.S. §12-1113(A). As noted in Association's Opening Brief (pp. 29-31), when an eminent domain statute, such as §12-1113(A), dictates that a taking be in fee simple, the taking must actually be in fee simple. The District argues the taking of any property interest in perpetuity satisfies this requirement. The District's position is both illogical and contrary to law. If the taking of any interest in perpetuity is considered to be fee simple, the taking of a perpetual easement would be in fee simple. This interpretation effectively renders meaningless the

[11] At trial, the District argued that Campo Abierto will continue to be used as a subdivision street. Association's Brief, Addenda A and B.

distinction between the taking of an easement and a taking in fee simple, as set forth in A.R.S. § 12-113.

The meaning of fee simple title, in the context of eminent domain, is also well settled. A taking in fee simple extinguishes all other rights and interests in the property taken, including easements and restrictive covenants. 3 NICHOLS ON EMINENT DOMAIN, §9.02 (Rev. 3d Ed.); see also, Association's Opening Brief, pp. 30-31. Thus, fee simple means a taking of the entirety of rights and interests in perpetuity, not the mere taking of any interest. *In Re Forsstrom*, 44 Ariz. 472, 495-96, 38 P.2d 878, 879 (1934) (fee simple is taking of property "in its entirety and as a perpetuity.")

The taking described in the District's Complaint and in the Judgment is not fee simple. The Complaint and the Judgment describe the taking as "subject to" perpetual easements and other rights and interests in Campo Abierto. Association Opening Brief, pp. 3-4, 28-31.

In order to avoid this issue, the District argues that it is actually taking fee simple title and the easement and other rights will actually be conveyed after the taking. This contention is critical to the lot owners in La Paloma. The District acknowledges that the rights of the individual lot owners in Campo Abierto will be fully extinguished by the taking. At the same time, the District argues that the lot owners are not proper parties and not entitled to severance damages for the taking

because any damages will be satisfied by the subsequent conveyance of a replacement easement.

Contrary to the District's inherently conflicting arguments, which were endorsed by the Opinion, severance damages may not be satisfied by a conveyance of a property interest after the taking. *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 540, 720 P.2d 513, 515 (App. 1986) (Arizona's Constitution "requires compensation for a taking to be made by a payment of money."); accord, A.R.S. § 12-1126(A) (just compensation must be paid before "final order of condemnation"). The logical extension of the District's contention would permit a condemning authority to effectively pay just compensation through the conveyance of substitute property, rather than in money. This may be permissible in a negotiated agreement, but such a conveyance may not be forced on a property owner in lieu of just compensation. Association's Opening Brief, pp. 36-37.

CONCLUSION

For the foregoing reasons, CAI urges this Court to carefully consider the broad legal and practical implications of the Opinion and to grant the Association's Petition and reverse and vacate the Opinion.