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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

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IN THE MATTER OF THE APPLICATION OF PERKINS MOUNTAIN UTILITY COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. SW-20379A-05-0489

IN THE MATTER OF THE APPLICATION OF PERKINS MOUNTAIN WATER COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. W-20380A-05-0490

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Arizona Corporation Commission
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OPENING BRIEF OF PERKINS MOUNTAIN WATER COMPANY AND PERKINS MOUNTAIN UTILITY COMPANY ADDRESSING ISSUES SET FORTH IN THE COMMISSION'S JULY 31, 2006, PROCEDURAL ORDER

AUGUST 14, 2006

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INTRODUCTION

Pursuant to the Procedural Order dated July 31, 2006 (the "Procedural Order"), in the above-captioned dockets, applicants Perkins Mountain Water Company and Perkins Mountain Utility Company (collectively, the "Applicants") are filing their legal brief addressing the nine issues listed in the Procedural Order. The Applicants' responses are set forth below.

The Applicants note that Rhodes Homes Arizona, LLC, ("Rhodes Homes Arizona") is not a party to these consolidated cases and has not consented to the jurisdiction of the Arizona Corporation Commission ("Commission"). Statements contained herein pertaining to Rhodes Homes Arizona are the statements of the Applicants only, and should not be construed as a waiver of the position of Rhodes Homes Arizona regarding the Commission's jurisdiction over Rhodes Homes Arizona.

ISSUES

1. WHO IS THE APPLICANT IN THIS CASE, RHODES HOMES OR THE COMPANIES?¹

The applicants in this case are Perkins Mountain Water Company and Perkins Mountain Utility Company. Arizona Administrative Code ("A.A.C.") R14-3-103(B) defines an "Applicant" as "[a]ny person requesting a certificate, permit, other authority or any affirmative relief other than a complainant...." On July 7, 2005, Perkins Mountain Water Company filed an application for a certificate of convenience and necessity ("CC&N") to provide water service in Mohave County, Arizona, in Docket W-20380A-05-0490 and Perkins Mountain Utility Company filed an application for a CC&N to provide wastewater service in Mohave County, Arizona, in Docket SW-20379A-05-0489. On September 19, 2005, Utilities Division Staff ("Staff") filed letters in the respective dockets stating that each application had met the sufficiency requirements of the Arizona Administrative Code. Thus, under the definition in A.A.C. R14-3-103(B), Perkins Mountain Water Company and Perkins Mountain Utility Company are the applicants in these dockets.

¹ The reference to "Rhodes Homes" in this question is to "Rhodes Homes Arizona, LLC." The reference to the "Companies" in this question is to the Applicants, Perkins Mountain Water Company and Perkins Mountain Utility Company.

1 On July 3, 2006, James M. Rhodes, the sole shareholder of Perkins Mountain Water
2 Company and Perkins Mountain Utility Company, executed separate Stock Transfer Agreements
3 transferring all of his shares of stock in the two Applicants to Rhodes Homes Arizona. In a letter
4 to Administrative Law Judge Bjelland dated July 20, 2006, Commissioner Mayes asked whether
5 the transfer of Applicants' stock by Mr. Rhodes to Rhodes Homes Arizona "means that the
6 Applicant before the Commission will now be Rhodes Homes [Arizona], LLC, as Perkins no
7 longer exists as a separate entity." However, it is erroneous to state that Perkins Mountain Water
8 Company and Perkins Mountain Utility Company no longer exist as separate entities. The
9 transfer of Mr. Rhodes' stock in the Applicants to Rhodes Homes Arizona had no effect on the
10 legal status or the separate legal existence of the Applicants. Perkins Mountain Water Company
11 and Perkins Mountain Utility Company were the applicants in these dockets before the stock
12 transfer, and the stock transfer had no legal effect on their status as applicants in these dockets.
13 Rhodes Homes Arizona did not become the applicant as a result of the stock transfer.

14 The sale and transfer of stock does not change the identity or form of a corporation, nor
15 does it affect a dissolution of the corporation. *In re Traung*, 30 Cal. 2d 811, 813-814 (1947)
16 (holding that the sale of all capital stock in a corporation (or even selling all of its property) "does
17 not work a dissolution or liquidation of" the corporation); *see also Spurlock v. Santa Fe Pacific*
18 *Railroad Co.*, 143 Ariz. 469, 483 (Ariz. Ct. App. 1985) (holding that "the mere transfer of
19 corporate assets is not sufficient to work a dissolution"). Following an issuance of stock in a
20 corporation, the sale or transfer of outstanding shares between a shareholder and a purchaser is a
21 secondary transaction that impacts the shareholder's ownership interest but not the business
22 identity.²

23 Perkins Mountain Water Company and Perkins Mountain Utility Company are both
24 Nevada corporations registered as foreign corporations in Arizona. To affect a change in the
25 corporate form of an entity in either Nevada or Arizona, the shareholders must approve a plan for
26 merger or adopt articles of dissolution—the sole shareholder of the Applicants in these dockets
27

28 ² DAVID G. EPSTEIN, RICHARD D. FREER & MICHAEL J. ROBERTS, BUSINESS STRUCTURES 149, 411, 425
(West 2002).

1 has done neither of those things.³ The dissolution of a corporation is very different than a stock
2 transfer. It “denotes [the] complete destruction [of the corporation], and connotes the
3 liquidation and distribution of its assets.” *Farish v. Cieneguita Copper Co.*, 12 Ariz. 235, 242
4 (1909). There has been no dissolution of the Applicants.

5 Moreover, 100 percent ownership of a closely held corporation does not alter the character
6 or identity of the closely held subsidiary. *Arizona Public Service Company v. Arizona Corp.*
7 *Comm’n*, 155 Ariz. 263, 267 (Ariz. Ct. App. 1987) *rev’d in part on other grounds* 157 Ariz. 532
8 (1988). In *Arizona Public Service Company*, the Court of Appeals refused to extend “public
9 service corporation” status to the parent corporation of a wholly-owned and regulated subsidiary.
10 *See* 155 Ariz. at 265. The Court recognized that the preference is for observing the corporate
11 form, which should only be disregarded in limited circumstances, such as undercapitalization or
12 fraud. *See id.* (citing *Standage v. Standage*, 147 Ariz. 473, 475 (Ariz. Ct. App. 1985)); *see also*
13 *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (undercapitalization is “measured by the nature and
14 magnitude of the corporate undertaking”) (citations omitted). However, undercapitalization alone
15 without a showing of fraud or injustice to the aggrieved party “is not an absolute ground for
16 disregarding a corporate entity.” *Ize Nantan Bagowa, Ltd. v. Scalia*, 118 Ariz. 439, 443 (Ariz. Ct.
17 App. 1978).

18 There is no basis for disregarding the corporate identities of the Applicants as there has
19 been no showing—or even allegations—of fraud or undercapitalization on the part of the
20 Applicants. Although the Applicants have received requests for service from the landowners in
21 the proposed CC&N area, the Applicants will only provide service if the Commission approves
22 their pending applications for CC&Ns. Neither Applicant has entered into any contracts or
23 agreements with any customers.⁴ Thus, the Applicants' current levels of capitalization are
24 adequate to satisfy current business liabilities, which are minimal if not non-existent. In the event
25 the Commission approves the requested CC&Ns, then additional capital will be infused into the
26 Applicants to fund necessary construction and operating reserves. Applicants have also advised

27 ³ *See* A.R.S. §§ 29-752 (A), 29-781; NEV. REV. STAT. §§ 78A.130, 78A.180, 92A.250, 78.580.

28 ⁴ Affidavit of Kirk Brynjulson, President, Perkins Mountain Water Company and Perkins Mountain Utility
Company, a copy of which is attached as Exhibit A.

1 Staff that they will each obtain performance bonds in amounts deemed adequate by the
2 Commission to ensure compliance with the conditions of any CC&Ns issued by the Commission.

3 The transfer by Mr. Rhodes of his stock in Perkins Mountain Water Company and Perkins
4 Mountain Utility Company to Rhodes Homes Arizona affected a change of legal ownership of the
5 two corporations, but it did not affect a merger, consolidation or dissolution of the corporations.⁵
6 Neither the Applicants nor their shareholder executed a plan of merger or consolidation, nor have
7 they adopted articles of dissolution. Furthermore, no evidence suggests the corporate form of the
8 Applicants should be set aside because of undercapitalization or fraud.

9 To the extent there is any ambiguity regarding the intent of the Applicants in these
10 dockets, counsel undersigned affirms and avows that Perkins Mountain Water Company and
11 Perkins Mountain Utility Company desire to proceed as Applicants with the applications filed in
12 their respective dockets.

13 **2. IS RHODES HOMES ARIZONA ACTING AS A PUBLIC SERVICE CORPORATION BY**
14 **CONSTRUCTING WATER INFRASTRUCTURE THAT WILL SERVE GOLDEN VALLEY**
15 **SOUTH? IF YES, IS RHODES HOMES ARIZONA VIOLATING A.R.S. § 40-281?**

16 **A. RHODES HOMES ARIZONA IS NOT ACTING AS A PUBLIC SERVICE**
17 **CORPORATION BY CONSTRUCTING WATER INFRASTRUCTURE**
18 **THAT WILL SERVE GOLDEN VALLEY SOUTH.**

19 In determining whether an entity is a public service corporation subject to
20 regulation by the Commission, the Arizona courts conduct a two-part analysis. *See Southwest*
21 *Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz. 279 (Ariz. Ct. App. 1991). Part one of the
22 analysis is to determine whether the entity meets the constitutional definition of a "public service
23 corporation" set forth in Article 15, Section 2 of the Arizona Constitution, which is:

24 All corporations other than municipal engaged in furnishing gas, oil, or electricity
25 for light, fuel, or power; or in furnishing water for irrigation, fire protection, or
26 other public purposes; or in furnishing, for profit, hot or cold air or steam for
27 heating or cooling purposes; or engaged in collecting, transporting, treating,

28 ⁵ We note that the transfer of stock in Perkins Mountain Water Company and Perkins Mountain Utility
Company did not constitute the organization or reorganization of a public utility holding company
requiring notice to the Commission under A.A.C. R14-2-803 because neither corporation is a public
service corporation at this time within the meaning of Article 15, Section 2 of the Arizona Constitution.
Moreover, even if the two corporations were somehow deemed to be public service corporations, they
would still not be subject to A.A.C. R14-2-801 *et seq.* because neither meets the Class A utility definition
requiring annual jurisdictional revenues of \$5,000,000 or more.

1 purifying and disposing of sewage through a system, for profit; or in transmitting
2 messages or furnishing public telegraph or telephone service, and all corporations
3 other than municipal, operating as common carriers, shall be deemed public
4 service corporations. Ariz. Const. Art. 15, § 2.

5 If an entity meets the definition of a public service corporation set forth in the Arizona
6 Constitution, the courts then proceed with part two of the analysis—determining whether the
7 entity is “clothed with a public interest” by making “its rates, charges or methods of operations a
8 matter of public concern.” *Southwest Gas*, 169 Ariz. 286 (quoting *General Alarm v. Underdown*,
9 76 Ariz. 235, 238 (1953)); see also *Arizona Corp. Comm’n v. Nicholson*, 108 Ariz. 317, 321
10 (1972). In making this secondary determination, the courts consider eight factors which, when
11 taken together, indicate whether an entity is clothed with a public interest. The eight factors were
12 first enunciated in *Natural Gas Service Co. v. Serv-Yu Cooperative*, 70 Ariz. 235 (1950) (the
13 “*Serv-Yu* Factors”), and they are:

- 14 (1) What the corporation actually does;
- 15 (2) A dedication to public use;
- 16 (3) Articles of incorporation, authorization, and purposes;
- 17 (4) Dealing with the service as a commodity in which the public has been
18 generally held to have an interest;
- 19 (5) Monopolizing or intending to monopolize the territory with a public
20 service commodity;
- 21 (6) Acceptance of substantially all requests for service;
- 22 (7) Service under contracts and reserving the right to discriminate is not
23 always controlling; and
- 24 (8) Actual or potential competition with other corporations whose business is
25 clothed with public interest.

26 *Southwest Gas Corp.*, 169 Ariz. at 286 (quoting *Serv-Yu Cooperative*, 70 Ariz. at 237). Applying
27 the two part analysis to Rhodes Homes Arizona, it is clear that Rhodes Homes Arizona is not a
28 public service corporation.

1 entirely private—groundwater withdrawn from wells owned by Rhodes Homes Arizona is used
2 exclusively on property owned by Rhodes Homes Arizona for the private purposes of Rhodes
3 Homes Arizona.

4 If supplying water to one's self met the constitutional definition of "furnishing water for
5 irrigation, fire protection, or other public purposes," then countless Arizona water users would
6 become public service corporations including farmers, dairies, feedlots, private homeowners, golf
7 courses, sand and gravel operators, mines, cemeteries, private airports, developers, prisons and
8 others, to name a few. Clearly, this is not what the framers of the Arizona Constitution intended,
9 nor have the courts allowed. The Arizona Supreme Court has held that more is required than
10 simply meeting the bare definition in order to avoid making the definition of public service
11 corporation "so elastic as to fan out and include businesses in which the public might be
12 incidentally interested." *Nicholson*, 108 Ariz. at 321 (quoting *General Alarm*, 76 Ariz. at 238);
13 see generally *Van Dyke v. Geary*, 244 U.S. 39, 43-46 (1917).

14 The Arizona Supreme Court has also made clear that the jurisdiction of the Commission
15 may not be expanded to regulate businesses as public service corporations that are not defined as
16 such under the Arizona Constitution. *Rural/Metro Corp. v. Arizona Corp. Comm'n*, 129 Ariz.
17 116, 118, 629 P.2d 83, 85 (1981). Further, there is no presumption that a business activity is
18 within the regulation of the Commission and, in fact, the presumption is that it is not. *Arizona*
19 *Corp. Comm'n v. Continental Security Guards*, 103 Ariz. 410, 443 P.2d 406 (1968).

20 The installation of a transmission main and related appurtenances by Rhodes Homes
21 Arizona and/or its subcontractors does not make Rhodes Homes Arizona a public service
22 corporation. If the installation of water infrastructure was sufficient to meet the constitutional
23 definition of a public service corporation, then every contractor that installs utility infrastructure
24 in Arizona (which is a large number) would be subject to regulation as a public service
25 corporation. This Commission has never asserted such a position.⁷

26 The private use of water by Rhodes Homes Arizona on its private property does not meet
27 the constitutional definition of a public service corporation. Since Rhodes Homes Arizona does

28 _____
⁷ See the discussion set forth below under issue number 6 below.

1 not meet the definition—which is a threshold inquiry—an analysis of the *Serv-Yu* Factors is
2 unnecessary. However, even if one assumed that Rhodes Homes Arizona met the textual
3 definition of a public service corporation, it would still fail the second part of the analysis under
4 the *Serv-Yu* Factors.

5 **ANALYSIS PART TWO: RHODES HOMES ARIZONA IS NOT "CLOTHED WITH A**
6 **PUBLIC INTEREST" UNDER THE SERV-YU FACTORS.**

7 While satisfying the definition of a public service corporation is a prerequisite to finding
8 that an entity is a public service corporation, it is not dispositive standing alone. *Southwest Gas*
9 *Corp.*, 169 Ariz. at 286. In order to be "clothed with a public interest" there must be some public
10 component to the water use. Such a public component is completely lacking in the case of
11 Rhodes Homes Arizona under an analysis of the *Serv-Yu* Factors, which are listed and then
12 discussed below.

13 • **WHAT THE CORPORATION ACTUALLY DOES.**

14 Rhodes Homes Arizona acquires land and then plans, obtains zoning and constructs
15 master-planned developments. It is not in the water business under any interpretation of the facts
16 of this case, and it does not intend to enter the water business. Construction of water and
17 wastewater infrastructure by Rhodes Homes Arizona and/or its subcontractors is merely
18 incidental to the business of developing its property.

19 In *Nicholson*, 108 Ariz. 317, the Arizona Supreme Court considered the *Serv-Yu* Factors
20 when finding that the owner of a mobile home trailer park was not a public service corporation
21 subject to regulation by the Commission. Although the owner of the park provided water service
22 to tenants, the court held that the provision of water was only incidental to the owner's primary
23 business purpose of renting trailer spaces. *Id.* at 320. Arriving at its conclusion, the court
24 reasoned that the monthly charge for all services including water, as well as the fact that the park
25 was not open to all members of the public, precluded the owner from being characterized as a
26 public service corporation. *Id.* at 321.

27 If the owner of the mobile home park in *Nicholson* was not a public service corporation,
28 Rhodes Homes Arizona certainly cannot be a public service corporation. Rhodes Homes Arizona

1 has no water distribution system—only an unconnected transmission main. Rhodes Homes
2 Arizona has no tenants or customers. Rhodes Homes Arizona does not provide water to any third
3 party or entity. Rhodes Homes Arizona does not assess charges for water.

4 • **A DEDICATION TO PUBLIC USE.**

5 Rhodes Homes Arizona and/or its subcontractors have installed approximately 24,000
6 linear feet of 24-inch transmission main in anticipation of the development of the Golden Valley
7 South property. This transmission main conveys no water, is not currently connected to a storage
8 tank, and is not within the requested CC&N area of Perkins Mountain Water Company. There
9 has been no dedication of the transmission pipeline to a public use under any possible
10 interpretation of this factor. The fact that the transmission main will be dedicated to a public use
11 in the future does not subject Rhodes Homes Arizona to regulation as a public service
12 corporation.

13 • **ARTICLES OF INCORPORATION, AUTHORIZATION, AND PURPOSES.**

14 Rhodes Homes Arizona's Articles of Organization, as filed with the Commission,
15 do not list the provision of water and wastewater services as a stated purpose of the
16 entity. In fact, a resolution of the managers specifically includes the acquisition and
17 development of real property as a stated lawful business purpose.⁸

18 • **DEALING WITH THE SERVICE AS A COMMODITY IN WHICH THE PUBLIC
19 HAS BEEN GENERALLY HELD TO HAVE AN INTEREST.**

20 The term "service" is not defined in A.R.S. Title 40 or A.A.C. Title 14, Chapter 2.
21 However, there are definitions in the Commission's rules, which are instructive with
22 regard to the meaning of the term "service." A.A.C. R14-2-401(9) defines a "customer"
23 as "[t]he person or entity in whose name service is rendered, as evidenced by the
24 signature on the application or contract for that service, or by the receipt and/or payment
25 of bills regularly issued in his name regardless of the identity of the actual user of the
26 service." A.A.C. R14-2-401(26) defines "residential use" as "[s]ervice to customers
27 using water for domestic purposes such as personal consumption, water heating, cooking,

28 ⁸ Rhodes Homes Arizona, LLC, Articles of Amendment, November 17, 2005, a copy of which is attached
as Exhibit B.

1 and other residential uses and includes use in apartment buildings, mobile home parks,
2 and other multiunit residential buildings."

3 Rhodes Homes Arizona does not provide water service to any customer as
4 described in either A.A.C. R14-2-401(9) or 401(26). Specifically, Rhodes Homes
5 Arizona does not provide water to any third person or entity for personal consumption,
6 water heating, cooking or any other residential uses. Rhodes Homes Arizona has no
7 contracts or applications for service,⁹ and does not render bills for water service. Any use
8 of water by the public in the design homes (which is only in the bathrooms) owned by
9 Rhodes Homes Arizona is *de minimus* and purely incidental to the development business
10 of Rhodes Homes Arizona. Rhodes Homes Arizona is simply not in the business of
11 providing water service, and therefore, fails to meet this criteria under *Serv-Yu*.

12 • **MONOPOLIZING OR INTENDING TO MONOPOLIZE THE TERRITORY WITH**
13 **A PUBLIC SERVICE COMMODITY.**

14 Rhodes Homes Arizona has no intent to provide water service as a public service
15 corporation, and therefore, can have no intent to monopolize a water service territory.
16 Perkins Mountain Water Company was formed for the purpose of providing water service
17 to the Golden Valley South master planned development. Once certificated, Perkins
18 Mountain Water Company will be regulated by the Commission as a public service
19 corporation.

20 • **ACCEPTANCE OF SUBSTANTIALLY ALL REQUESTS FOR SERVICE.**

21 Rhodes Homes Arizona has had no requests for service from the public, nor
22 would Rhodes Homes Arizona entertain any requests for water service to any member of
23 the public. The Applicants have received requests from landowners to provide water and
24 wastewater service, and upon issuance of CC&Ns, intend to provide such services.

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28 ⁹ Perkins Mountain Water Company and Perkins Mountain Utility Company have received requests from the landowners within the Golden Valley South master-planned development to provide water and sewer service, which requests form the basis of the applications filed by the Applicants.

1 • **SERVICE UNDER CONTRACTS AND RESERVING THE RIGHT TO**
2 **DISCRIMINATE IS NOT ALWAYS CONTROLLING.**

3 This factor is not relevant to this analysis. Rhodes Homes Arizona has not entered
4 into any water or wastewater service contracts with anyone or held itself out as a water or
5 wastewater service provider to anyone. By way of information, neither Perkins Mountain
6 Water Company nor Perkins Mountain Utility Company have entered into contracts to
7 provide water or wastewater service to any potential customer.

8 • **ACTUAL OR POTENTIAL COMPETITION WITH OTHER CORPORATIONS**
9 **WHOSE BUSINESS IS CLOTHED WITH PUBLIC INTEREST.**

10 Perkins Mountain Water Company and Perkins Mountain Utility Company have
11 applied for CC&Ns to provide water and wastewater service to the Golden Valley South
12 development. Rhodes Homes Arizona has no intention to provide water or wastewater
13 service or to compete with Perkins Mountain Water Company or Perkins Mountain
14 Utility Company.

15 In summary, there is not a single *Serv-Yu* Factor which supports a finding that
16 Rhodes Homes Arizona is acting as a public service corporation.

17 **B. **RHODES HOMES ARIZONA IS NOT A PUBLIC SERVICE****
18 **CORPORATION, AND A.R.S. § 40-281 APPLIES ONLY TO PUBLIC**
19 **SERVICE CORPORATIONS.**

20 A.R.S. § 40-281 applies to public service corporations, and Rhodes Homes
21 Arizona is not a public service corporation. Therefore, the construction of water infrastructure by
22 Rhodes Homes Arizona cannot be a violation of A.R.S. § 40-281.

23 The Commission's power under A.R.S. § 40-281 is strictly construed. "State regulation of
24 private property can be had only pursuant to police power, and this power is wholly dependent
25 upon the dedication of private property to a public use with a public interest." *Nicholson*, 155
26 Ariz. at 320 (*citations omitted*). The Commission may only exercise those powers "derived from
27 a strict construction of the constitution and implementing statutes." *Rural/Metro Corp.*, 129 Ariz.
28 at 117 (quoting *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz. 14, 17 (1966)).
Accordingly, the Commission's jurisdiction is limited by the specific and exclusive reference, in

1 both Article 15 of the Constitution and the implementing statutes, to public service corporations.
2 *Arizona Public Service Company*, 155 Ariz. at 268 *reversed in part on separate grounds* (citing
3 generally A.R.S. §§ 40-201 to 40-464). As such, “[t]he statutes cannot be read as an attempt by
4 the legislature to expand the Corporation Commission’s jurisdiction to regulate non-public
5 service corporations.” *Arizona Public Service Company*, 155 Ariz. at 268. The statutes are
6 limited in scope, only affording the Commission the “power to govern the corporations over
7 which it possesses constitutional jurisdiction: public service corporations.” *Id.* at 268-69. Rhodes
8 Homes Arizona is a non-public service corporation.

9 In this instance, A.R.S. § 40-281 requires that public service corporations “shall not begin
10 construction of ... a line, plant, service or system, or any extension thereof, without first having
11 obtained from the commission a certificate of public convenience and necessity.” A.R.S. § 40-
12 281(A). A.R.S. § 40-281 applies exclusively to public service corporations, and “is
13 unconstitutional insofar as it attempts to expand the Commission’s jurisdiction to regulate
14 businesses as public service corporations although not defined as such under Article 15, § 2.”
15 *Rural/Metro*, 126 Ariz. 118. Since Rhodes Homes Arizona is not a public service corporation, it
16 is not subject to Commission regulation or penalty under A.R.S. § 40-281.

17 **3. ARE THE COMPANIES¹⁰ ACTING AS PUBLIC SERVICE CORPORATIONS? IF YES,**
18 **ARE THE COMPANIES VIOLATING A.R.S. § 40-281?**

19 Neither Perkins Mountain Water Company nor Perkins Mountain Utility Company are
20 public service corporations within the meaning of Article 15, Section 2 of the Arizona
21 Constitution. Perkins Mountain Water Company owns no wells, storage tanks, treatment
22 facilities, booster stations, water mains, real property, vehicles, or any other tangible assets.¹¹
23 Thus, it is physically impossible for Perkins Mountain Water Company to furnish “water for
24 irrigation, fire protection, or other public purposes.” Likewise, Perkins Mountain Utility
25 Company owns no wastewater treatment plant, collection lines, disposal facilities, real property,
26 vehicles, or any other tangible assets.¹² Thus, it is impossible for Perkins Mountain Utility

27 ¹⁰ The reference to the “Companies” in this question is to the Applicants Perkins Mountain Water
28 Company and Perkins Mountain Utility Company.

¹¹ Affidavit of Kirk Brynjulson, attached hereto as Exhibit A.

¹² Affidavit of Kirk Brynjulson, attached hereto as Exhibit A.

1 Company to engage in "collecting, transporting, treating, purifying and disposing of sewage
2 through a system, for profit." Of course, neither of the Applicants have any contracts to supply
3 water or wastewater service, including contracts or agreements with Rhodes Homes Arizona.¹³
4 Since neither Applicant meets the constitutional definition of a public service corporation—which
5 is a threshold inquiry—we will not go through and analysis of the *Serv-Yu* Factors.

6 It should also be noted that applying for a CC&N does not make an entity a public service
7 corporation. *See Southwest Gas Corp.*, 169 Ariz. 279; *see also Serv-Yu*, 70 Ariz. 235. In fact, the
8 Commission's rules specifically acknowledge a distinction between an applicant and a certificate
9 holder, referring to the applicant as a "proposed utility company," rather than a public service
10 corporation. *See A.A.C. R14-2-402(A)(2)(a) (emphasis added)*. In addition, there are cases
11 periodically in Arizona where two or more applicants apply for CC&Ns to serve the same
12 geographic area. If the filing of an application for a CC&N rendered the applicant a public
13 service corporation, then the filing of competing applications would create havoc for the
14 Commission, the public and the competing applicants. Thus, the filing of applications for
15 CC&Ns by Perkins Mountain Water Company and Perkins Mountain Utility Company did not
16 render the Applicants public service corporations.

17 A.R.S. § 40-281 applies only to public service corporations. Since neither Perkins
18 Mountain Water Company nor Perkins Mountain Utility Company are public service corporations
19 at this time, A.R.S. § 40-281 is inapplicable to either Applicant at this time. However, even if the
20 Applicants were somehow deemed to be public service corporations, they still have not violated
21 A.R.S. § 40-281 because neither has begun the "construction of a street railroad, a line, plant,
22 service or system, or any extension thereof."

23 **4. ARE EITHER RHODES HOMES ARIZONA OR THE COMPANIES¹⁴ ACTING AS**
24 **PUBLIC SERVICE CORPORATIONS BY SUPPLYING WATER TO THE DESIGN**
25 **HOMES?**

26 With respect to the Applicants, the premise of this question is fallacious. Neither Perkins
27 Mountain Water Company nor Perkins Mountain Utility Company are supplying water—directly

28 ¹³ Affidavit of Kirk Brynjulson, attached hereto as Exhibit A.

¹⁴ The reference to the "Companies" in this question is to the Applicants Perkins Mountain Water Company and Perkins Mountain Utility Company.

1 or indirectly—to the design homes.¹⁵ Rhodes Homes Arizona, the owner of the design homes,
2 has water hauled to the design homes in a tank truck.¹⁶ The water is then stored on-site in small
3 storage tanks that are also owned by Rhodes Homes Arizona. Water enters each design home via
4 a pipe that is connected to one of the storage tanks, and the water is used in bathrooms and for
5 outside landscaping. The design homes are not connected to any public water system. There are
6 no persons living in the design homes, which were built by Rhodes Homes Arizona to showcase
7 the type and quality of construction of Rhodes Homes Arizona.

8 Rhodes Homes Arizona has not applied—and does not intend to apply—to the
9 Commission to become a public service corporation. There are no doubt thousands of private
10 citizens and business owners in Mohave County and throughout Arizona who haul water for use
11 at their homes and businesses,¹⁷ and the Commission has never asserted jurisdiction over these
12 private citizens and businesses as public service corporations. According to an informational
13 brochure on Mohave County's website, “[w]ater system service in rural Mohave County is mostly
14 non-existent, except for the occasional supply of shared private sources of rarely treated domestic
15 water from community wells and authorized suppliers.”¹⁸ The publication continues:

16 There also may be places in the rural areas where it may be difficult to find water
17 at all. If that occurs, you may want to haul and store water on site, or join a
18 cooperative well service, if available.¹⁹

20 ¹⁵ Perkins Mountain Water Company owns no wells, storage tanks, treatment facilities, booster stations,
21 water mains, real property, vehicles or any other tangible assets. Thus, it is physically impossible for
22 Perkins Mountain Water Company to supply water to the design homes (or to any other person or entity);
23 Perkins Mountain Water Company is not supplying water to the design homes. Moreover, while Perkins
24 Mountain Water Company has made application for a CC&N to provide water service, the Commission
25 has not approved that application. Thus, Perkins Mountain Water Company has no legal authority at this
26 time to provide public utility service to any person or entity. Further, the design homes are located outside
27 of the requested CC&N area. Perkins Mountain Utility Company has applied for a CC&N to provide
28 wastewater service, and Perkins Mountain Utility Company does not—and will not—provide water
service.

¹⁶ Contrary to statements made at the July 31, 2006 Procedural Conference, Rhodes Homes Arizona
purchases water from an unaffiliated company and has it trucked to the private on-site storage tanks for
use at the design homes it owns. See Transcript (July 31, 2006) at 48, line 24 – 49, line 2. See Affidavit of
Kirk Brynjulson, attached hereto as Exhibit A.

¹⁷ See generally, McKinnon, “Hauling Water is a Way of Rural Life,” *Arizona Republic*, (June 27, 2005).

¹⁸ Welcome to Rural Mohave County, Mohave County Home Page,

<http://www.co.mohave.az.us/pw/PDF%20Files%20Main%20Pg/MC%20Brochure.pdf>.

¹⁹ *Id.*

1 Rhodes Homes Arizona does not offer water for sale to the public, and the fact that hauled
2 water is used in the four design homes which are open to the public is of no significance.
3 Although the bathrooms are functional at the design homes, they are not open to the public. The
4 faucets in the kitchens are operational but no drinking water is provided from the taps in the
5 design homes. Bottled water is available upon request at no charge²⁰. Hauled water is also used to
6 maintain the outside landscaping. Such uses of hauled water by Rhodes Homes Arizona do not
7 constitute "furnishing water for irrigation, fire protection, or other public purposes" under Article
8 15, Section 2 of the Arizona Constitution, nor are the uses of such a nature that they are "clothed
9 with a public interest" under the *Serv-Yu* Factors. Rather, the use of hauled water at the design
10 homes is a textbook example of a use which is "in support and incidental to [the] business" of
11 Rhodes Homes Arizona. *Nicholson*, 108 Ariz. at 320.

12 The mere fact that an entity deals in a commodity in which the public has an interest does
13 not, in and of itself, render service in connection with that commodity "a dedication to public
14 use." *Id.* In determining whether an entity has dedicated its "private property to a public use" so
15 as to be considered a public service corporation, the Arizona courts consider the entity's intent as
16 indicated by the circumstances. *Id.* Rhodes Homes Arizona has no intent to provide water
17 service as a public service corporation. Rather, as part of its business plan, Rhodes Homes
18 Arizona constructed four design homes,²¹ which incorporate two on-site storage tanks that hold
19 water for outside landscaping and interior bathrooms. Permitting the occasional invitee to use a
20 bathroom while touring a design home is not evidence of a "dedication of private property to a
21 public use." In fact, the "public use" in this instance is so small as to be virtually non-existent. No
22 person or entity relies on Rhodes Homes Arizona for water. Rhodes Homes Arizona does not
23 assess any charges to invitees in its design homes. The availability of water in the design homes
24 is purely incidental to the business of marketing homes.

25 Some jurisdictions provide a specific self-use exception, allowing an entity to serve itself
26 without obtaining a CC&N. *See* TEX. UTIL. CODE § 31.002(6)(J)(i) (electric utilities do not
27 include persons who furnish "an electric service or commodity only to itself, its employees or its

28 ²⁰ Affidavit of Kirk Brynjulson, attached hereto as Exhibit A.

²¹ Rhodes Homes Arizona is in the process of constructing two additional design homes, for a total of six.

1 tenants as an incidence of employment or tenancy, if that service is not resold to or used by
2 others”). Although Arizona does not have a statutory self-use exception, Arizona case law clearly
3 supports the concept of self-use without Commission regulation, and the exemption is more
4 lenient than the Texas statute referenced above. For example, even in cases where a person or
5 entity provides service to a small number of third parties, the courts have ruled that regulation is
6 not within the Commission’s authority where the service is not “clothed with a public interest” or
7 the service is merely incidental to the entity’s primary business purpose. *See Southwest Gas*
8 *Corp.*, 169 Ariz. 279; *Nicholson*, 108 Ariz. 317; *Quick Aviation Co. v. Kleinman*, 60 Ariz. 430
9 (1943) (holding transportation of insecticides was “merely incidental” to crop dusting);
10 *Killingsworth v. Morrow*, 83 Ariz. 23 (1957) (holding that tow truck service was incidental to the
11 business of servicing and repairing cars); *Visco v. State ex rel. Pickrell*, 95 Ariz. 154 (1963). In
12 fact, the courts are averse “to any extension of the power and scope of the corporation
13 commission to businesses not patently in need of the Commission’s control.” *Nicholson*, 108
14 Ariz. at 321 (quoting *Continental*, 103 Ariz. at 415 (holding that an armored car service was not a
15 public service corporation because providing the armored car was only “incidental to and part of
16 the main business of protecting money and securities.”)).

17 In *Southwest Gas Corp.*, the court applied the *Serv-Yu* Factors and upheld the
18 Commission’s decision not to regulate El Paso as a public service corporation. *See Southwest*
19 *Gas Corp.*, 169 Ariz. 279. Although El Paso dealt in a commodity in which the public ordinarily
20 has an interest—natural gas—the small number of direct sale customers, representing only 3-5
21 percent of total sales, “clearly” indicated there was no dedication of its property to public use. *Id.*
22 at 287. The court found that El Paso was not monopolizing, had no future plans to monopolize,
23 did not accept “substantially all requests for customers” and did not intend to add any new direct
24 sale customers. *Id.*

25 Similarly, in *Nicholson* the court held that the owner of a mobile home park was not a
26 public service corporation because its provision of water service was only incidentally related to
27 its primary business purpose of renting mobile home spaces. *Nicholson*, 108 Ariz. at 321. The
28 mobile home owner in that case furnished water to its tenants “by means of a well on the

1 premises." *Id.* at 319. The court reasoned that, since the water service fee was bundled with the
2 rental fee and the rental spaces were not open to all members of the public, the owner could not
3 be classified as a public service corporation. *Id.* at 321. The court reached this conclusion
4 despite the fact that the owner provided some level of water service to the tenants on the land. If
5 the owner of the mobile home park in *Nicholson* was not a public service corporation, there is
6 certainly no basis for finding that Rhodes Homes Arizona is acting as a public service
7 corporation.

8 **5. DOES THE CURRENT SET UP FOR PROVIDING WATER TO THE DESIGN HOMES**
9 **QUALIFY AS A WATER UTILITY SYSTEM?**

10 Rhodes Homes Arizona purchases water from an unaffiliated company and has it hauled
11 to four design homes in a tank truck. There are two design homes located adjacent to one another
12 at two separate locations.²² The hauled water is stored in two on-site storage tanks, with one tank
13 per pair of design homes. Water enters each design home via a buried pipe that is connected to
14 the on-site storage tank which serves the design home²³. Hauled water is used in bathrooms and
15 for outside landscaping, but not for drinking, cooking or bathing. The design homes are not
16 connected to any other water system²⁴. Thus, the sum total of the "water system" for each pair of
17 design homes is a small storage tank located on-site and a pipe connecting the storage tank to the
18 design home. No part of the "water system" is located outside the exterior boundaries of the lots
19 upon which the design homes are constructed (*i.e.*, no facilities are located in any public rights-
20 of-way). Rhodes Homes Arizona owns the four design homes, the two small storage tanks and
21 the pipes connecting the storage tanks to the design homes.

22 Based upon a review of the transcript of the July 31, 2006, procedural conference in these
23 dockets, Commissioner Mundell asked whether the above-described facilities are a "water system
24 under any rule or regulation" as opposed to a "water utility system" as stated in the question
25 contained in the July 31, 2006, Procedural Order. *See* Transcript (July 31, 2006) at page 74, lines
26 2-3. Counsel undersigned was unable to find any Arizona statute or rule which defines or

27 ²² Rhodes Homes Arizona is currently constructing two more design homes at a third location.

28 ²³ Affidavit of Kirk Brynjulson, attached hereto as Exhibit A.

²⁴ Affidavit of Kirk Brynjulson, attached hereto as Exhibit A.

1 discusses a "water utility system," and assumes that the use of the phrase "water utility system" in
2 the Procedural Order was in error.

3 A "water system," as defined in A.R.S. § 40-201(31), "includes all property used in
4 connection with the diversion, development, storage, distribution and sale of water for beneficial
5 uses for compensation." Although the term "water system" is defined, it is not used any place
6 else within Title 40. Thus, it is not known why the definition exists. Moreover, without any
7 context or application associated with the definition, it is not clear whether the facilities used by
8 Rhodes Homes Arizona at its design homes would constitute a "water system," or if they do, what
9 that means. However, since Rhodes Homes does not distribute water for "sale" or
10 "compensation" which are elements of the statutory definition, it is the Applicants' position that
11 the facilities used by Rhodes Homes Arizona at its design homes are not a "water system" within
12 the meaning of A.R.S. § 40-201(31).

13 Although there is a lack of clarity regarding the relevance of the term "water system"
14 under A.R.S. § 40-201(31), Arizona and federal statutes each use the term "public water system,"
15 which is a potable water system that provides water for human consumption through pipes or
16 other constructed conveyances and has at least fifteen service connections or regularly serves an
17 average of at least twenty-five persons daily for at least sixty days a year.²⁵

18 The storage tank that holds hauled water for each of the design homes is not a "public
19 water system" under State and Federal law. The water is not provided for human consumption,
20 but for landscape watering and bathrooms. Further, the facilities do not have at least fifteen
21 service connections, and they do not regularly serve an average of at least 25 persons daily for at
22 least 60 days a year.

23 The current "set up for providing water to the design homes" does not qualify as a "public
24 water system" under State or Federal law, nor does it qualify as a "water system" under A.R.S. §
25 40-201(31).

26
27
28 ²⁵ A.R.S. §49-352 (B) (1). Safe Drinking Water Act, 42 U.S.C. §300 (2005).

1 6. ARE THERE PRIOR EXAMPLES IN ARIZONA WHERE DEVELOPERS HAVE
2 CONSTRUCTED WATER INFRASTRUCTURE FOR A DEVELOPMENT BEFORE A
3 CERTIFICATE WAS ISSUED?

4 In 1997 Del Webb Corporation (“Del Webb”) accepted a proposal from Citizens Utilities
5 Company (“Citizens”) to provide water and wastewater service to the Villages at Desert Hills
6 master-planned development. *Testimony of Ray L. Jones on Behalf of Arizona-American Water*
7 *Company*, Docket No. WS-01303A-06-0403 at 2 (Jun. 16, 2006) (hereinafter “*Testimony of Ray*
8 *L. Jones*”); *see also* Decision No. 60975 (Jun. 19, 1998). In furtherance of the agreement,
9 Citizens and its affiliates filed a joint application for a CC&N on October 29, 1997. Decision No.
10 60975 at 2. Prior to Citizens obtaining the CC&N, Del Webb and Citizens entered a water and
11 wastewater infrastructure agreement (the “Citizens-Del Webb Agreement”), requiring Del Webb
12 to “specify, design, and construct all phases of the facilities needed to provide water and
13 wastewater service to community residents.” *Testimony of Ray L. Jones* at 3. Citizens entered
14 the Citizens-Del Webb Agreement after much of the construction was completed, and played only
15 a small role in the major planning and construction decisions. *Id.* at 5.

16 In early 1998, CH2M Hill began constructing the water and wastewater facilities, with
17 “significant water and wastewater planning and construction events” occurring “prior to Citizens
18 obtaining a CC&N from the Commission in June of 1998...” *Id.* at 5. As part of its effort to
19 proceed with the development, Del Webb constructed various on-site and off-site facilities,
20 including a 1.67 million gallon underground water storage reservoir with an above ground pump;
21 a one million gallon per day water treatment facility; looped potable, reclaimed and wastewater
22 pipelines; as well as mains, meters and services for the subdivisions. *Id.* at 13-16, 24-6. The total
23 cost was in excess of \$61.3 million. *Id.* On June 19, 1998, the Commission approved Citizen’s
24 CC&N Application, subject to several conditions, including a requirement that Citizen’s affiliate
25 file an Approval to Construct the backbone plant. Decision No. 60975 at 6. The Commission,
26 however, refrained from regulating the construction of infrastructure by Del Webb, even after
27 considering “the entire record ... and being fully advised in the premises....” *Id.* at 4.

28 The Arizona Gateway Development is located in Mohave County. The developer, AZ
 Gateway LLC, executed a Water Facilities Line Extension Agreement with Citizens

1 Communications Company (“Citizens Communications”) on July 28, 2000 for the purpose of
2 providing water and wastewater service to the development (“Citizens–Gateway Agreement”).
3 The terms of the Citizens-Gateway Agreement provided that the developer was to design,
4 construct and install all facilities necessary for Phases 1 and 2. The developer was to pay all costs
5 of installing and connecting the system, subject to refund by the utility. Building was to
6 commence *no later than* twelve months from the execution date.²⁶ The Arizona Department of
7 Environmental Quality issued Approvals to Construct for the water system to the developer of
8 Arizona Gateway Development on March 13, 2001.

9 It was not until May 17, 2001 when Citizens Communications filed an application to
10 extend its CC&N. The Arizona Gateway Development area was not located in or contiguous to
11 Citizens Communications CC&N area, therefore, Citizens Communications had to apply for
12 approval to extend its CC&N. The Commission’s decision approving Citizens Communications
13 Company’s application for extension of its CC&N was issued on September 18, 2001, more than
14 a year after the Citizens-Gateway Agreement was executed. As indicated by the Commission’s
15 order, the well drilling was already completed.²⁷ Based on discussions with former employees of
16 Arizona-American personnel, the water system was under construction by the developer prior to
17 issuance of the CC&N.²⁸

18 Applicants have cited two examples of situations where construction of utility
19 infrastructure has proceeded before the issuance of a CC&N for the area at issue. Applicants
20 believe that there are other examples of this practice in Arizona, and are continuing to research
21 the issue.

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27 ²⁶ See Application for Expansion of Certificate of Convenience and Necessity for Water and Wastewater
Service, Docket Nos. W-01032A-01-0417 and SW-01032A-01-0417, May 17, 2001.

28 ²⁷ Decision No. 64039, September 18, 2001 at p. 3, line 4.

²⁸ See Affidavit of Ray Jones, attached hereto as Exhibit C.

1 7. ARE THERE PRIOR EXAMPLES IN ARIZONA WHERE DEVELOPERS HAVE
2 CONSTRUCTED WATER INFRASTRUCTURE FOR A DEVELOPMENT BEFORE A
3 CERTIFICATE WAS ISSUED AND WHERE THERE WAS A PENDING CERTIFICATE
4 FOR THE DEVELOPMENT AREA?

5 All three of the projects listed above were pending before a CC&N for the development
6 area was issued. Counsel undersigned believes that there are other examples, but has not had
7 sufficient time to further research such cases.

8 8. WHAT IS THE STANDARD IN ARIZONA FOR PIERCING THE CORPORATE VEIL?

9 Piercing the corporate veil is defined in Black's Law Dictionary as follows:

10 Judicial process whereby court will disregard usual immunity of corporate
11 officers or entities from liability for wrongful corporate activities; e.g. when
12 incorporation exists for sole purpose of perpetrating fraud. The doctrine which
13 holds that the corporate structure with its attendant limited liability of
14 stockholders may be disregarded and personal liability imposed on stockholders,
15 officers and directors in the case of fraud or other wrongful acts done in name of
16 corporation. The court, however, may look beyond the corporate form only for
17 the defeat of fraud or wrong or the remedying of injustice. *Black's Law*
18 *Dictionary*, Abridged Sixth Edition, (1991).

19 Arizona follows the general rule that a corporation "will be treated as a separate entity
20 unless sufficient reason appears to disregard the corporate form." *Arizona Pub. Serv. Co. v.*
21 *Arizona Corp. Comm'n*, 155 Ariz. 263, 267, 746 P.2d 4, 8 (Ct. App. 1987); *See also Salt Lake*
22 *City Corp. v. James Constr., Inc.*, 761 P.2d 42, 46 (Utah Ct. App. 1988). Arizona courts have
23 established a two-part test which the party seeking to pierce the veil must meet before a court will
24 disregard the corporate form and attach personal liability upon shareholders (or upon a
25 corporation's parent entity). First, the corporation must be the "alter ego" of one or a few
26 individuals to whom liability is sought to be attached. Second, respecting the corporate form in
27 the particular case at issue, would work a fraud or promote injustice. *Gatecliff v. Great Republic*
28 *Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (1991); *see also Norman v. Murray First Thrift*
 & Loan Co., 596 P.2d 1028 (Utah 1979).

 Under this so-called "alter ego" theory, courts will look to whether the shareholders
 commingled personal and corporate funds, diverted corporate property for personal use,
 disregarded corporate formalities, or otherwise so closely "intermix[ed] their actions with those of
 the corporation such as to justify finding a merger of identity." *Honeywell, Inc. v. Arnold Constr.*

1 Co., 134 Ariz. 153, 158, 654 P.2d 301, 307; *see Standage v. Standage*, 147 Ariz. 473, 711 P.2d
2 612, 615 (Ct. App. 1985) (“‘alter ego’ status exists where there is such unity of interest and
3 ownership that the separate personalities of the corporation and owners cease to exist.”)

4 If a corporation is deemed to be an alter ego of a shareholder, then the claimant must also
5 show that the shareholder’s actions resulted in a fraud. Situations meeting the second part of the
6 test may occur where a corporation is intentionally undercapitalized such that it is unable to
7 satisfy the liabilities foreseeably resulting from the operation of its business, or any other instance
8 where use of the corporate form of business under the circumstances amounts to actual fraud, not
9 merely inequity. In such a case, an “injustice” resulting from fraud may be shown, allowing the
10 court to hold the responsible principals personally liable.

11 **9. IF THE COMMISSION WERE TO FIND THAT RHODES HOMES ARIZONA WAS NOT**
12 **ACTING AS A PUBLIC SERVICE CORPORATION, IS IT APPROPRIATE FOR THE**
13 **COMMISSION TO IMPLEMENT A.R.S. § 40-281 IN SUCH A WAY AS TO ALLOW THE**
14 **PUBLIC SERVICE CORPORATION TO SET UP AN AFFILIATE DESIGNED TO BYPASS**
15 **THE STATUTE?**

16 A.R.S. §40-281 simply does not apply in this matter. Any finding by the Commission that
17 Rhodes Homes Arizona is subject to this statute would be an erroneous application of the law.
18 Furthermore, as a prefatory comment, Perkins Mountain Water Company and Perkins Mountain
19 Utility Company object to the premise of this question to the extent that it presupposes that
20 A.R.S. §40-281 is applicable and that the Applicants attempted to bypass, in any way, compliance
21 with the statute. The Commission has not alleged that the Applicants or Rhodes Homes Arizona
22 have violated A.R.S. § 40-281. In addition, the Perkins Mountain Water Company and Perkins
23 Mountain Utility Company were each established after Rhodes Homes Arizona, and therefore,
24 could not have "set up" Rhodes Homes Arizona to bypass A.R.S. § 40-281.

25 Generally, “a regulatory agency may prohibit parent/subsidiary companies from evading
26 regulation or a parent corporation from doing by means of the subsidiary that which the parent
27 itself was prohibited from doing.” *Arizona Public Service Company*, 155 Ariz. at 267 (citations
28 omitted). However, if the Commission were to find that Rhodes Homes Arizona was not acting
as a public service corporation, and therefore lawful in its building of infrastructure, it would be
inappropriate for the Commission to implement A.R.S. § 40-281 in such a way as to deem the

1 company's actions unlawful. If Rhodes Homes Arizona's activities are not illegal, they do not
2 become unlawful by virtue of Rhodes' purchase of Perkins stock. Rhodes Homes Arizona was in
3 existence prior to the Applicants.

4 Even if the Applicants were deemed public service corporations, the Applicants did not
5 set up an affiliate for purposes of undertaking any illegal activity. On the contrary, the Applicants
6 came into existence *after* Rhodes Homes Arizona. As such, the Applicants cannot be charged
7 with setting up an affiliate. Indeed, as illustrated above each are operating lawfully within their
8 managerial prerogatives. The mere presence of an affiliate relationship, as is the case here, does
9 not in and of itself necessitate Commission action to enforce A.R.S. § 40-281, and the
10 Commission certainly may not act outside of its jurisdiction, which is limited exclusively to
11 regulating public service corporation. As established above, neither entity is a public service
12 corporation, even construing Perkins as a public service corporation does not signify an attempt
13 by either entity to circumvent statutory regulations.

14 In conclusion, Neither Perkins Mountain Water Company nor Perkins Mountain Utility
15 Company have attempted to bypass A.R.S. § 40-281. For the reasons set forth above, A.R.S. §
16 40-281 does not prevent the developer, Rhodes Homes Arizona, from installing utility
17 infrastructure prior to the Applicants obtaining CC&Ns.

18 RESPECTFULLY SUBMITTED this 14th day of August, 2006.

19
20 
21 Jeffrey W. Crockett
22 Kimberly A. Grouse
23 SNELL & WILMER
24 One Arizona Center
25 Phoenix, Arizona 85004-2202
26 (602) 382-6234
27 Attorneys for Perkins Mountain Utility
28 Company, LLC, and Perkins Mountain Water
Company, LLC

1 ORIGINAL and 15 copies filed this 14th day of August, 2006, with:

2 Docket Control
ARIZONA CORPORATION COMMISSION
3 1200 West Washington
Phoenix, Arizona 85007

4 COPY hand-delivered this 14th day of August, 2006, to:

5 Commissioner Jeff Hatch-Miller, Chairman
ARIZONA CORPORATION COMMISSION
6 1200 West Washington
7 Phoenix, Arizona 85007

8 Commissioner William A. Mundell
ARIZONA CORPORATION COMMISSION
9 1200 West Washington
10 Phoenix, Arizona 85007

11 Commissioner Mike Gleason
ARIZONA CORPORATION COMMISSION
12 1200 West Washington
13 Phoenix, Arizona 85007

14 Commissioner Kristin K. Mayes
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15 1200 West Washington
16 Phoenix, Arizona 85007

17 Commissioner Barry Wong
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19 Amy Bjelland, Administrative Law Judge
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1 Blessing Chukwu
2 Jim J. Dorf
3 Utilities Division Staff
4 ARIZONA CORPORATION COMMISSION
5 1200 West Washington
6 Phoenix, Arizona 85007

7 COPY mailed this 14th day of August, 2006, to:

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16 Boulder City, NV 89005

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EXHIBIT A

AFFIDAVIT OF KIRK BRYNJULSON

State of Arizona)
) ss.
County of Mohave)

I, Kirk Brynjulson, being duly sworn upon my oath, state as follows:

1. I am President of Perkins Mountain Utility Company and Perkins Mountain Water Company and Vice President of Operations for Rhodes Homes Arizona, LLC.
2. I am providing this affidavit in support of the Opening Brief of Perkins Mountain Utility Company and Perkins Mountain Water Company Addressing Issues Set Forth in the Arizona Corporation Commission's July 31, 2006 Procedural Order.
3. Perkins Mountain Water Company owns no wells, storage tanks, treatment facilities, booster stations, water mains, real property or any other tangible assets.
4. Perkins Mountain Utility Company owns no wastewater treatment plant, collection lines, disposal facilities, real property or any other tangible assets.
5. Perkins Mountain Water Company has not entered into any contracts for water service, including contracts or agreements with Rhodes Homes Arizona.
6. Perkins Mountain Utility Company has not entered into any contracts for wastewater service, including contracts or agreements with Rhodes Homes Arizona.
7. Rhodes Homes Arizona, LLC owns four wells: GV-1 ADWR Reg. #55-901789; GV-2 ADWR Reg. #55-902965; GV-3 ADWR Reg. #55-903903; and GV-4 ADWR Reg. #55-903904.
8. GV-1 is the only well that is currently operating and providing water via a water truck for dust suppression and grading within the Golden Valley South development, for turf-watering at the ball field owned by Rhodes Homes Arizona and for landscaping at the entrance of the Golden Valley South development.
9. Rhodes Homes Arizona purchases water from an unaffiliated company that trucks it to two storage tanks that supply the four design homes owned by Rhodes Homes Arizona.
10. Each design home is served by its own septic system.
11. Water enters each design home via a buried pipe connected to the on-site storage tank which serves the design home.
12. The design homes are not connected to any other water system.

13. Bathrooms are functional at the design homes but not used by the public.
14. The kitchen taps are operational but no drinking water is provided from the taps in the design homes. Bottled water is available upon request at no charge.


KIRK BRYNJULSON

Subscribed and sworn to before me this 14 day of August, 2006.


Notary Public

My Commission Expires:

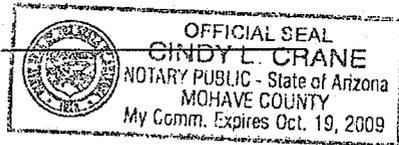


EXHIBIT B

DO NOT PUBLISH THIS SECTION

ARTICLE 1
The company name must contain an ending which may be "limited liability company," "limited company," or the abbreviations "LLC," "LC," "L.L.C." or "L.C." If you are the holder or assignee of a trademark or trade name, attach Declaration of Tradename Holder form.

ARTICLE 2
May be in care of the statutory agent.

ARTICLE 3
The statutory agent must provide both a physical and mailing address. If statutory agent has P.O. Box, then they must provide a physical description of their street address/location. The agent must sign the Articles or provide a consent to acceptance of appointment.

ARTICLES 4
Complete this section only if you desire to select a date or occurrence when the company will dissolve. If perpetual duration is desired, leave this section blank.

ARTICLE 5.a
Check which management structure will be applicable to your company.

AZ CORPORATION COMMISSION ARTICLES OF ORGANIZATION
FILED

"EXP"

OF

OCT 25 2004

ARIZONA LAND CONSERVANCY, LLC

DOCS. SUBJECT TO REVIEW (Arizona Limited Liability Company)

FILE NO. L-115994-0

1. Name. The name of the limited liability company is:
ARIZONA LAND CONSERVANCY, LLC

2. Registered Office. The address of the registered office in Arizona is: _____
c/o National Registered Agents, Inc., 1850 North Central Avenue, Suite 1160
Phoenix, AZ 85004
located in the County of Maricopa

3. Statutory Agent. (In Arizona) The name and address of the statutory agent of the company is: National Registered Agents, Inc.
1850 North Central Avenue, Suite 1160
Phoenix, AZ 85004

4. Dissolution. The latest date, if any, on which the limited liability company must dissolve is N/A

- 5.a. Management.
 - Management of the limited liability company is vested in a manager or managers. The names and addresses of each person who is a manager AND each member who owns a twenty percent or greater interest in the capital or profits of the limited liability company are:

 - Management of the limited liability company is reserved to the members. The names and addresses of each person who is a member are:



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DO NOT PUBLISH THIS SECTION

5.b.

L-1159941-0

Name: Joshua Choys, LLC
 member manager

Charles Sakura
 member manager

Address: 7491 Aardvard Walks,
City, State, Zip: Las Vegas, NV 89113

4800 N. Scottsdale Rd., Ste 1400
Scottsdale, AZ 85251

Name:
 member manager

member manager

Address:
City, State, Zip:

ARTICLE 5.b.
Depending upon your selection in 5.a., provide the names and addresses of the managers and members of the organization. Check the applicable title for each person. A member managed company cannot contain a manager or manager.

EXECUTED this 8th day of September, 2004

Jennifer Piaroz [Signature] *Charles Sakura* [Signature]

Jennifer Piaroz [Print Name Here] Charles Sakura [Print Name Here]

PHONE (800) 852-5896 FAX (916) 584-7900

The person(s) executing this document need not be member(s) of the company.

Your fax and phone number is optional.

The agent must consent to the appointment by executing the consent.

See A.R.S. §29-601 et seq. for more info.

Acceptance of Appointment By Statutory Agent

I National Registered Agents, Inc. _____, having been designated to act as Statutory Agent, hereby consent to act in that capacity until removed or resignation is submitted in accordance with the Arizona Revised Statutes.

Judy Culver [Signature] ASST. SEC.
Signature of Statutory Agent

Judy Culver - Authorized Agent
[Print name]

National Registered Agents, Inc.
[If signing on behalf of a company serving as statutory agent, print company name here]





STATE OF ARIZONA
CORPORATION COMMISSION

I hereby certify this to be a true
and complete copy of the document filed
in this office and admitted to record in
File No. 1-1139941-0

Ken J. [Signature]
Executive Director

Dated: 10-27-05 By: *[Signature]*

**ARIZONA CORPORATION COMMISSION
CORPORATIONS DIVISION
SUBMISSION COVER SHEET**

THIS DOCUMENT SUBJECT TO PUBLIC RECORD - Important: use a separate cover sheet for each document

Regarding (Name/proposed name for Corp./LLC):
Rhodes Homes Arizona, LLC

Please Check or Complete the Appropriate Sections:

- A. 1. NEW Entity Filing CHANGE to Existing Entity Re submission/Corrected Document
2. Domestic (from Arizona) Foreign (organized in another state or country)
3. Profit/Business Corporation (B) Nonprofit Corporation (NP) LLC Trust Other
4. Payment Check # _____ Cash MOD account # _____
Amount: \$ 60.00 No fee required See attached distribution of funds instructions
5. Processing Expedited (Priority service, \$35 Additional Fee Per Document)
Completed as soon as possible or visit www.cc.state.az.us/corp for current processing times.
- Regular Visit www.cc.state.az.us/corp for current processing times.

- B. Filing Type: (Check one only)
- | | |
|--|--|
| <input type="checkbox"/> Articles of Domestication | <input type="checkbox"/> Publication of _____ |
| <input type="checkbox"/> Articles of Incorporation | <input type="checkbox"/> Articles of Correction |
| <input type="checkbox"/> Articles of Organization | <input type="checkbox"/> Merger of (name): _____ |
| <input type="checkbox"/> Application to Transact Business(B) | Into: _____ |
| <input type="checkbox"/> Application to Conduct Affairs (NP) | _____ |
| <input type="checkbox"/> Application for New Authority | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Application for Registration | _____ |
| <input checked="" type="checkbox"/> Articles of Amendment | _____ |
| <input type="checkbox"/> Articles of Amendment & Restatement | _____ |

C. Special Instructions: _____

- D. Extras:
- | | |
|---|---|
| <input type="checkbox"/> Certified Copies _____ (Qty. @ \$5 ea. for corps or \$10 ea. for LLCs) | <input type="checkbox"/> Expedite Certified Copies (\$35 extra) |
| <input type="checkbox"/> Good Standing Certificate _____ (Qty. @ \$10 ea.) | <input type="checkbox"/> Expedite Good Standing (\$35 extra) |

E. RETURN DELIVERY VIA: Mail or Pick Up or Fax # (_____)

The following individual should be called to pick up completed documents:

Name: _____ Phone: (_____) _____

Pick-up by: _____	Date: _____
-------------------	-------------

Please respond promptly to phone messages. Documents will be mailed if they are not picked up in a timely manner - approximately two weeks. In that event, the documents should be mailed to the following address:

Name: Tracy L. Wills Firm: Rhodes Homes Arizona, LLC

Address: 2215 Hualapai Mountain Rd, Suite H

City, State, Zip: Kingman, Arizona 86401-8324

CFCVLR
REV 04/05

Exhibit A
Certificate of Amendment to Articles of Organization
of
Rhodes Homes Arizona, L.L.C.
(an Arizona Limited Liability Company)
File No. 1-1159941-0

Article 5.a. Management has been amended as follows:

- **Delete:**
Management of the limited liability company is vested in a manager or managers.
- **Add:**
Management of the limited liability company is reserved to the members.

Article 5.b. Management has been amended as follows:

- **Delete:**
Member Name: Joshua Choya, LLC
Member Address: 7491 Aardvard Walks
Las Vegas, NV 89113

Manager Name: Charles Sakura
Manager Address: 4800 North Scottsdale Road., Suite 1400
Scottsdale, AZ 85251
- **Add:**
Member Name: Sagebrush Enterprises, Inc.
Member Address: 4730 South Fort Apache Road, Suite 300
Las Vegas, NV 89147

Manager Name: None
Manager Address: None

ARTICLES OF AMENDMENT

1. The name of the limited liability company is:
Rhodes Homes Arizona, LLC
2. The Articles of Organization were originally filed with the Arizona Corporation Commission on the 25th day of October, 2004.
(Originally filed under the name Arizona Land Conservancy, LLC.)
3. Attached hereto as Exhibit A is the text of the amendment.

Dated this 10th day of May, 2005.

Signature: J m Rhodes

Print Name: James M. Rhodes

[Check One: Member Manager]

DO NOT PUBLISH THIS SECTION

The amendment must be executed by a manager if management of the limited liability company is vested in a manager, or by a member if management is reserved to the members.

EXHIBIT "A"
ARTICLES OF AMENDMENT
OF
RHODES HOMES ARIZONA, LLC

The current name of the limited liability company is: Rhodes Homes Arizona, LLC. (The limited liability company was formed under the name of Arizona Land Conservancy, LLC and was changed effective January 10, 2005)

The initial Articles of Organization were filed in the Office of the Corporation Commission for the State of Arizona on October 25, 2004.

The articles to be amended include:

Article 2:

The address of the registered office in Arizona should be changed to:
2215 Hualapai Mountain Road, Suite H, Kingman, Arizona 86401
which is located in the County of Mohave.

Article 5b:

Charles Sakura is to be removed as a manager and all of his rights, interests, and obligations in the LLC are hereby transferred to the following individuals as managers of the LLC:

James M. Rhodes, 4730 S. Fort Apache, Suite 300, Las Vegas, NV 89147; and
Paul D. Huygens, 4730 S. Fort Apache, Suite 300, Las Vegas, NV 89147.

These provisions were accepted and approved by the managers by a Consent in Lieu of Meeting of Managers dated December 29, 2004 and is attached hereto as Exhibit "B".

Joshua Choya, LLC is to be removed as a member after having assigned and transferred its entire interest to Sagebrush Enterprises, Inc. effective December 15, 2004. A copy of the assignment is attached hereto as Exhibit "C". The address for Sagebrush Enterprises, Inc. is 4730 S. Fort Apache, Suite 300, Las Vegas, NV 89147.

EXHIBIT "B"

ARIZONA LAND CONSERVANCY, LLC a Arizona limited liability company

Consent in Lieu of Meeting of Managers

The undersigned, representing all managers of Arizona Land Conservancy, LLC, an Arizona limited liability company (the "Company"), do hereby adopt the following resolutions and declare them to be in full force and effect as if adopted at a regularly scheduled meeting of the managers of the Company:

WHEREAS, pursuant to the laws of the State of Arizona, the managers have formed the Company effective upon the filing of the Articles of Organization of the Company with the Secretary of State of Arizona on or about October 25, 2004;

WHEREAS, the Company has been formed to engage in any lawful business purpose, except for banking or insurance operations, including but not limited to acquisition and development of real property;

(1) WHEREAS, the Company is 100% owned by Sagebrush Enterprises, and the Company has no assets or liabilities, and Charles Sakura is presently the only manager of the Company.

(2) WHEREAS, the Company has determined that it is in the Company's best interest that Charles Sakura no longer have any involvement in the Company.

(3) THEREFORE, in consideration of the transfer value of ONE DOLLAR (\$1.00), Charles Sakura hereby resigns all managerial duties in Arizona Land Conservancy LLC and James Rhodes and Paul Huygens are hereby appointed as managers with all rights, powers and interests associated therewith.

WHEREAS as managers, James Rhodes and Paul Huygens retain full legal authorization to bind the Company to any financial, legal, corporate, or other material Company documents regarding the Company's business subject to the MANDATORY TWO SIGNATURE check writing/banking limitation described in paragraph (4) below.

(4) The Managers may from time to time open, close and draw checks upon bank accounts in the Company's name and jointly shall be the signatories thereon. The Managers covenant and acknowledge that all checks drawn upon Company bank account require TWO SIGNATURES.

~~The Managers covenant and acknowledge that they shall not have authority to, and are not authorized by the Company to individually execute a check drawn on any Company account; rather, any and all checks drawn on Company accounts shall require the signature of at least two Managers.~~

Each Manager covenants and acknowledges that he/she shall be personally liable to remit to the Company the amount of any check drawn on any Company account individually executed by such Manager in violation of this mandatory two signature provision and such Manager shall indemnify, defend and hold the Company harmless from and against any and all losses, damages and liabilities incurred by reason of such Manager's unauthorized single signature execution of a check drawn on any Company account.

(5) All parties further agree that David Fitzgerald is named as a manager of the Company with the limited and sole authority to serve as a joint signatory on Company bank accounts (e.g. bank checks drawn against Company funds) and that David Fitzgerald's executed signature on Company checks may validly serve as one of the two mandatory manager signatures required for any and all Company checks.

(6) BE IT FURTHER RESOLVED, that all Company managers unanimously agree that the Company shall immediately take legal steps required to change the Company's name from Arizona Conservancy LLC to Rhodes Homes Arizona, LLC (or a substantially similar operating name) as soon as lawfully practicable with the State of Arizona and that by signing this agreement, that such name change is fully authorized.

BE IT THEREFORE RESOLVED, that the Company does hereby ratify all actions taken and all documents executed by Arizona Land Conservancy LLC.

FINALLY RESOLVED, that any acts of the Company's managers whose acts would have been authorized by the foregoing resolutions except that such acts that were taken prior to the adoption of such resolutions hereby are approved, ratified, affirmed and adopted as the duly authorized and valid acts of the Company.

The undersigned further certify that the foregoing resolutions are in full force and effect, and have not been modified or rescinded, as of the date set forth below.

Dated this 29th day of December 2004.

Approved By:

For: Arizona Land Conservancy, LLC

By: Charles Sakura
Charles Sakura, Manager

Approved By:

By: _____
James Rhodes, Manager

By: _____
Paul Huygens, Manager

By: David Fitzgerald
David Fitzgerald, Manager

ARIZONA LAND CONSERVANCY SANITARIUM RESOLUTION XXX

The undersigned further certify that the foregoing resolutions are in full force and effect, and have not been modified or rescinded, as of the date set forth below.

Dated this 29th day of December 2004.

Approved By:

For: Arizona Land Conservancy, LLC

By: _____
Charles Sakura, Manager

Approved By:

By: _____
James Rhodes, Manager

By: _____
Paul Huygens, Manager

By: _____
David Fitzgerald, Manager

EXHIBIT "C"

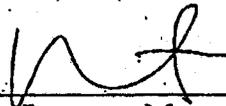
ASSIGNMENT OF LIMITED PARTNERSHIP INTEREST

Whereas Arizona^{LAND} Conservancy, LLC, ~~is~~ ^{is} one hundred (100%) owned by Joshua Choya, LLC and Arizona^{LAND} Conservancy LLC has no assets or liabilities, therefore Joshua Choya, LLC hereby assigns and transfers its entire interest in Arizona^{LAND} Conservancy, LLC. to Sagebrush Enterprises for the transfer value of ONE DOLLAR (\$1.00). This transfer of interest is effective ~~12/23/04~~, 2004.

December 15
~~AK~~ ^{AK}

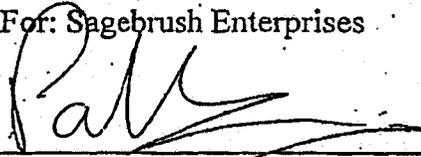
APPROVED BY:

For: Arizona Conservancy, LLC.
By: Joshua Choya LLC.


By: Matt Lawson, Managing Member

Date: 12/23/04

For: Sagebrush Enterprises


By: Paul Huygens, Secretary/Treasurer

Date: 12/23/04

STATE OF ARIZONA



Office of the
CORPORATION COMMISSION

CERTIFICATE OF GOOD STANDING

To all to whom these presents shall come, greeting:

I, Brian C. McNeil, Executive Director of the Arizona Corporation Commission, do hereby certify that

*****RHODES HOMES ARIZONA, L.L.C.*****

a domestic limited liability company organized under the laws of the State of Arizona, did organize on the 25th day of October 2004.

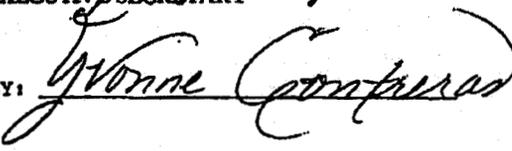
I further certify that according to the records of the Arizona Corporation Commission, as of the date set forth hereunder, the said limited liability company is not administratively dissolved for failure to comply with the provisions of A.R.S. section 29-601 et seq., the Arizona Limited Liability Company Act; and that the said limited liability company has not filed Articles of Termination as of the date of this certificate.

This certificate relates only to the legal existence of the above named entity as of the date issued. This certificate is not to be construed as an endorsement, recommendation, or notice of approval of the entity's condition or business activities and practices.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Arizona Corporation Commission. Done at Phoenix, the Capital, this 25th Day of October, 2005, A. D.




EXECUTIVE SECRETARY

BY: 

STATE OF ARIZONA



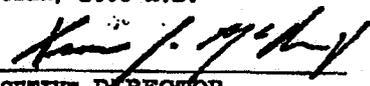
Office of the
CORPORATION COMMISSION

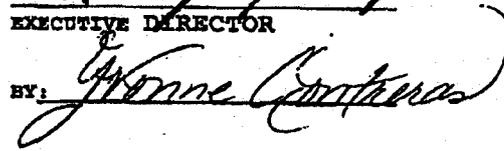
TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, BRIAN C. MCNEIL, EXECUTIVE DIRECTOR OF THE ARIZONA CORPORATION COMMISSION, DO HEREBY CERTIFY THAT THE FOLLOWING LISTED DOCUMENTS FOR, RHODES HOMES ARIZONA, LLC. HAVE BEEN FILED IN THE OFFICE OF THE ARIZONA CORPORATION COMMISSION, AS REQUIRED BY LAW, WITH THE EXCEPTION OF ANY DOCUMENTS THAT MIGHT BE IN THE PROCESS OF BEING FILED OR MICROFILMED.

10/25/2004 ARTICLES OF ORGANIZATION
01/10/2005 AMENDMENT
04/28/2005 AMENDMENT

IN WITNESS WHEREOF, I have hereunto
set my hand and affixed the official
seal of the Arizona Corporation
Commission. Done at Phoenix, the
Capital, this 25th Day of
OCTOBER, 2005 A.D.


EXECUTIVE DIRECTOR

BY: 



**AZ CORPORATION COMMISSION
FILED**

NOV 17 2005

ARTICLES OF AMENDMENT

FILE NO. L1159941-0

1. The name of the limited liability company is:
Rhodes Homes Arizona, L.L.C.
2. The Articles of Organization were originally filed with the Arizona Corporation Commission on the 25th day of October, 2004.
3. Attached hereto as Exhibit A is the text of the amendment.

Dated this 17th day of November, 2005

Signature: *Paul Huygens*

Print Name: PAUL HUYGENS on behalf of Segetrich Enterprises, Inc.
[Check One: Member Manager]

DO NOT PUBLISH THIS SECTION

The amendment must be executed by a manager if management of the limited liability company is vested in a manager, or by a member if management is reserved to the members.

TJ:0021
Rev: 0905

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209147

EXHIBIT A
ARTICLES OF AMENDMENT
OF
RHODES HOMES ARIZONA, L.L.C.
(An Arizona Limited Liability Company)

1. Article 5b is hereby amended as follows:

The sole member shall be changed

From:

Sagebrush Enterprises, Inc.

To:

The Rhodes Companies, LLC
4730 S. Fort Apache Road, Suite 300
Las Vegas, NV 89147

EXHIBIT C

AFFIDAVIT OF RAY L. JONES

STATE OF ARIZONA)
) ss.
County of Maricopa)
_____)

Ray Jones, upon his oath, says:

1. I am the principal of Aricor Water Solutions LC, consultant for the Perkins Mountain Water Company and Perkins Mountain Utility Company.
2. In my capacity as consultant, I am responsible for assisting and guiding Perkins Mountain Water Company and Perkins Mountain Utility Company through the various Arizona application and approval processes.
3. On or about August 3, 2006, I had discussions with former personnel of Arizona-American Water Company, predecessor to Citizens Communications Company, regarding the timing of the utility infrastructure build-out for the Arizona Gateway Development and determined that the infrastructure was under construction prior to the issuance of the CC&N for that area.

Ray L. Jones

RAY L. JONES

Subscribed and sworn to before me this 14th day of August, 2006.

[Signature]

Notary Public

My Commission Expires:

08/08/08

