

# Commercial Lot Committee Position Paper

## May 2019

### **Introduction:**

Since the formation, our Tonto Hills community has gone through cycles of growth and change. Currently the community is experiencing the most extensive growth cycle in its history. This growth includes renewed interest in the development of the designated commercial area. This rapid growth and change has put pressure on the current Declaration of Restrictions (DoRs) as an effective governing document. The Tonto Hills Improvement Association (THIA) Board of Directors (BoD) formed the Commercial Lots Committee to develop a set of recommendations for the BoD's consideration. This position paper covers background information, discussion of the issues and recommended options to the THIA BoD.

### **Background:**

The Tonto Hills community was established in 1960. Early development was governed by the Articles of Incorporation (later the DoRs) and Arizona state statutes for 20 years. The members of the community recognized the Articles, as a governing document, had severe limitations. As a consequence, the THIA was formed, the original DoRs were approved in September 1980, and the first Board of Directors elected. Records of meeting minutes leading to those events document the difficulty creating the original DoRs.

The main issue that confronted the original members, was how restrictive the Association's DoRs should be. Reading through the history archive, from the articles of incorporation, early meeting minutes, and initial drafts of the DoRs, three principles stand out:

- 1. No action by a property owner shall negatively impact the value of other properties.**
- 2. Revisions to the DoRs were intentionally made very difficult.**
- 3. Restrictions on private property should be minimized.**

These principals were captured in the DoRs but to do so, some of the document language is subjective or implied. While some of the restrictions are explicit, i.e. **Paragraph 6**

*No residence shall be erected which provides less than two thousand (2,000) square feet of living space area, exclusive of open porches, pergolas, patios, stables, carports, or garages.*

Other paragraph statements are subjective, i.e. **Paragraph 17**

*The area of Tonto Hills within the section created by lots 201 and 223 inclusive is designed, planned and laid out as a high class business section and to that end is particularly restricted as to its use and enjoyment as hereinafter set out that the business district will present a pleasing and harmonious appearance.*

### **Discussion:**

The committee has reviewed the existing documents which include the THIA DoRs, Bylaws, and Maricopa County Zoning Ordinance C-0 thru C-2 Commercial Zoning Ordinance of approved business uses. The committee reviewed the county's zoning list of approved business uses allowed in the

comical area of Tonto Hills. A committee majority agreed on a subset of the County list (see Attachment 1). All on the Committee, the BoD, and many residents recognize the DoRs limitations because of the subjective wording in the document. The committee subsequently discussed possible mitigation options for the BoD and considered each options probability of success, impacts, and risks. Those options include;

- 1. The status quo option - utilize the current DoRs as the governing document to manage development and growth in the commercial area.**
- 2. DoR Amendment(s) - amendment the DoRs to include specific restrictions on commercial business uses of the commercial area.**
- 3. Amend the Maricopa County Zoning - petition Maricopa County to revise the zoning designation for the Tonto Hills commercial area.**
- 4. Negotiation - find common ground with the commercial property owners and reach an agreement on types of business uses.**

### **1. Status Quo Option**

This option is both the simplest albeit most complicated and has some risk. It is simple because no action is required. It is complicated because, for this option to be viable, a comprehensive knowledge and understanding of past BoD and ACC decisions are needed. The past decisions create a precedence which must be considered in all future decisions. Interpreting the subjective DoR wording requires the past and the present Boards and the ACC to apply a set of test questions to each DoR based issue to ensure consistent decisions.

- Is this decision supported by the language in the D of Rs?
- Is this decision consistent with past decisions?
- Is this decision appropriate not only now but looking toward the future?

These questions are central to the integrity of the Association. They must be answered correctly to retain the respect and confidence of the members. Answer them incorrectly and suffer at least the perception of bias and risk legal action.

The ‘consistency test’ should continue to be a key decision metric when considering development of commercial properties. What has been approved in the past, is the model for what should be allowed in the future. While the DoRs do not provide specificity on commercial area development, it does states the intent. Refer back to the previous reference of Para 17 **“designed, planned and laid out as a high class business section”** and Para 17f **“business district will present a pleasing and harmonious appearance”** as well as references to business types be of ‘artistic’ in nature.

It is an open question whether the existing language in the DoRs are sufficiently ‘more restrictive’ in constraining the type of business uses in Tonto Hills compared to the Maricopa County zoning ordinance. The impact is all Association Board members and property owners need to be knowledgeable of the DoR language and how the language supports subsequent BoD decisions. The risk, as always, is the possibility of legal challenges. However this is the same risk that the Association has faced since the original DoRs were adopted.

### **2. DoR Amendment(s)**

This option requires amendment(s) to the DoRs. Specific language which supports the original stated intent for development in the commercial area would restrict certain business uses by editing the business uses permitted under Maricopa County Zoning Ordinance dated May 2017 for C0 thru C2 (see Attachment 1). This would reduce the number is uses for the commercial lots. Draft wording of an amendment is in attachment 2.

It is not clear if amending the DoRs with the addition of the new language which supports the original intent can a). be supported legally, b). would be found sufficiently ‘more restrictive’ in constraining the type of business uses in Tonto Hills and, c). did not violate rights of property owners who purchased commercial property prior to the amendment. The initial impact to the THIA Bod and residents is the cost required to construct legally sound amendments and the concerted effort needed to gain approval from the members of the amendment(s). The risk is the almost certain legal challenges that might ensure. However, this is probably is the same risk the Association faces with challenges to the existing DoRs interpretations.

### **3. Amend the Zoning Ordinances**

This option requires the Association to petition Maricopa County to amend the zoning statutes for the Tonto Hills commercial area to restrict certain business uses to such as those listed in C0 and perhaps a portion of C1 and C2 (See Attachment 1). The Association could site the language in the DoRs which states the intended business uses (artistic endeavor) and how that conflicts with the current zoning category. The impact to the THIA and members is the cost of legal counsel required to construct appropriate wording of the petition and defend the petition before the County Board of Supervisors. This is the most straight forward approach but also is the least likely to succeed. The risk of future legal action to the Association would be low.

### **4. Negotiation**

This option would require the Association to negotiate with all business property owners to create a list of approved business uses that would alleviate the concerns of residents and provide business opportunities for commercial property owners. There clearly are some business uses that would be detrimental to other business’s success and thus, for both parties ‘win - win’ opportunities may be found. What are they? Would ‘low density single family housing’ be an option compatible to all? This is another straight forward approach but also the likelihood of success may be low. The risk of legal action to the THIA would be lower assuming a majority of business owners agreed with the agreed-upon set of business uses.

### **Recommendations**

**First, the status quo needs to be maintained until decisions are made as to what approach(s) the BoD chooses.** The existing wording and intent of the DoRs must continue to be enforced. Perhaps a development moratorium should be imposed on the commercial area until the issue of what appropriate use is settled?

Additionally, buyers must be mindful that when a commercial lot was purchased, owners were aware, either actually or constructively, of the governing documents of the Association and the specific restrictions and the intended uses described in the DoRs. No one can neither legally nor logically claim any surprise by the existence of these rules, restrictions, and intended uses. All owners in the Tonto Hills community bought their property fully aware of the rules. The potential effort by one or more commercial property owners to expand the allowable uses of the commercial lots under the less restrictive county ordinance will undeniably result in the significantly diminished value of residential properties. Commercial lots with the many potential uses allowed in the zoning ordinances inherently poses greater impact to residential property values than uses as stated in the DoRs.

Under the current DoRs, it is not an adequate answer to suggest that these limitations on commercial uses would reduce the value of the commercial properties. These properties were purchased with full knowledge of the allowable commercial uses. Any attempt to expand uses of the commercial lots beyond the DoR limits i.e. as set forth in the zoning ordinance would be a violation of the DoRs.

A contract is a contract. The contract between the commercial owners and the THIA permitted all commercial zoned uses that are in compliance under the DoRs. The action of commercial owners choosing to ignore the more restrictive DoR compare to zoning ordinances would allow commercial lot owners to change the contract to their advantage while disadvantaging the residential lot owners.

The status quo, agreed to by all parties when purchasing their lots, must be maintained. Any other course is fraught with legal complications and risks, as well as being fundamentally unfair. We must have respect for the rule of the law, and more importantly, all property rights.

**Second, expert legal advice should be sought concerning the probability of success, cost, and specific wording of amendments that would support the intent of the original documents and resolve the potential future conflicts.** Before the amendment option is undertaken, the BoD needs to recognize that all property owners have the right to use their property as they see fit under the rules of the DoRs. Amendments to the DoRs which do not clarify and support the original intent but simply impose more restrictive language carries the greatest risk of legal action against the THIA

**Third, expert legal advice should be sought concerning the probability of success, cost, and specific wording necessary to petition Maricopa County to amend the business uses permitted under the C1 or at least the C2 category (See Attachment 1).** The goal would be to allow uses that are supported by the DoRs intent for the commercial area and include uses that most closely conform to that intent.

**Fourth, engage in discussions with all commercial property owners to find common ground.** A ‘Win - win’ solution is always the best path to resolving conflicts. Some business uses, particularly in the C2 category of the zoning statutes would seem to be inherently less beneficial to the business area as a whole. Identifying business uses that are acceptable to all property owners should be the goal. Perhaps changing the zoning for the remaining undeveloped commercial lots from C-0 to C-2 to R5 ‘low density single family housing’ would be an option that provides a good investment return for commercial property owners and alleviates the impact to residential properties from some of the C-0 to C-2s permitted uses.

In summary, the committee recommends all the options outline above be fleshed out to understand the implications and best course of action.

Additionally, the committee suggests the following specific actions be taken to advance the Board’s and community’s knowledge of the commercial development issues and how best to manage future development.

- Schedule meeting(s) with the Commercial Lot owners to inform them of recommendations being consider limiting uses for the commercial lots.
- The Committee recommends that the BoD include the Committee members when meeting with the TH community.
- Develop a survey with questions to gage the desire of all THIA lot owners/residents to have commercial lot uses limited as recommended by this Committee in Appendix A.
- BoD needs to find and engage legal counsel with expertise in commercial property development and associated litigation. This is not the Mulcahy Law Firm P.C.
- BoD needs to prepare Agenda and schedule Town Hall style meetings with the TH community to discuss results of Survey, background of DoR’s, DoR’s intent for commercial lots’ usage as a high class business section “artist community”, plan to engage legal counsel with expertise to

provide recommendations and guidance if BoD proceeds with a DoR amendment, and development of draft DoR Amendment to limit uses for commercial lots.

- Discuss with the TH community the idea to place a moratorium on development for commercial lots until a decision is made on uses.
- The BoD should consider the possible impact of the ‘low density single family housing’ in the commercial.

## Attachment 1

### Maricopa County Zoning Ordinances Section 802 (May 2017)

MC Zoning Ordinances (May 2017) - Table 1		
Zone Reference	Allowable Business Use	Comm Scores
<b>SECTION 802</b>	<b>C-O Commercial Office Zoning District</b>	<b>= or &gt;4</b>
<b>ARTICLE 802.1.</b>	<b>PURPOSE:</b> The principal purpose of this zoning district is to provide for well designed and attractive business and professional office facilities on sites in appropriate locations while encouraging sustainable building practices. This zoning district would constitute a transition between other commercial land uses and residential neighborhoods. Principal uses in this zoning district include professional, semi-professional and business office uses.	
<b>ARTICLE 802.2</b>	<b>USE REGULATIONS:</b> A building or premise shall be used only for the following purposes:	
1	Any business office in which chattels or goods, wares or merchandise are not commercially created, repaired, sold or exchanged.	
2	Offices for accountant, architect, chiropodist, chiropractor, dentist, engineer, lawyer, minister, naturopath, osteopath, physician, surgeon, surveyor, optometrist, geologist, insurance broker, public stenographer, real estate broker, stock broker, advertising agency, talent agency, private employment agency, labor union, marriage counselor, private detective, telephone message service, professional membership organization, business association, collection agency, homeowners associations and other similar professional and semi-professional work.	
3	Banks, building and loan associations, savings and loan associations, title insurance companies, trust companies, credit unions, finance companies and investment companies.	4
4	Studios for photography, fine or commercial arts or other professional work.	6
5	Medical and clinical laboratories.	
6	Post office.	4
7	Pharmacy, when in conjunction with a medical center consisting of offices occupied by <b>five or more doctors</b> provided that there shall be no outside entrance for business purposes, and that no sign or display be located so as to be visible from a public thoroughfare or adjacent property.	
8	Service to the public of water, gas, electricity, telephone and cable television and sewage including wastewater treatment plants. The foregoing shall be deemed to include attendant facilities and appurtenances to these uses, including without limitation, distribution, collector and feeder lines, pumping or booster stations along	
9	Emergency housing - Temporary shelter required due to a natural disaster or fire or other circumstances determined to constitute an emergency by the zoning inspector.	
10	Temporary construction administrative offices/yard complex – which may include a security office or residence for a security guard provided that the following conditions are met:	
11	Renewable energy systems are not permitted as a primary use but may be permitted as an accessory use as set forth in Section 1206 of this ordinance. Where renewable energy systems involve the generation or storage of electricity, only grid-connected or off-grid systems are permitted.	
12	Gardens and community gardens as defined in Chapter 2.	5

MC Zoning Ordinances (May 2017) - Table 1 continued

Zone Reference	Allowable Business Use	Comm Scores
<b>SECTION 803</b>	<b>C-1 Neighborhood Commercial Zoning District</b>	
<b>ARTICLE 803.1.</b>	<b>PURPOSE:</b> The principal purpose of this zoning district is to provide for smaller shops and services in convenient locations to meet the daily needs of families in the immediate residential neighborhoods while encouraging sustainable building practices. Principal uses permitted in this zoning district include food markets, drugstores and personal service shops.	
<b>ARTICLE 803.2</b>	<b>USE REGULATIONS:</b> A building or premise shall be used only for the following purposes:	
1	Antique shops	7
2	Arcades	
3	Art galleries	7
4	Automobile parts and supplies	
5	Bakery shops, including baking on the premises for on-site sales only.	5
6	Banks	
7	Barber and beauty shops	
8	Book, stationery and gift shops except adult oriented facilities as defined under Chapter 7	5
9	Business schools (such as: real estate, secretarial, data processing), but not including trade schools	
10	Candy shops, including manufacturing of candy on the premises for on-site sales only.	5
11	Churches and houses of worship, including accessory columbariums provided that the building area of the columbarium shall not exceed <b>10%</b> of the total building area of the church building(s).	
12	Cleaning agencies, laundry agencies, pressing establishments and self-service laundries, including self-service dry cleaning machines, provided there is no cleaning of clothes on the premises.	
13	Clock and watch repair shops	6
14	Clothing and dry good shops, including clothing and costume rental.	5
15	Craft and hobby shops, with incidental craft or hobby instruction only.	6
16	<del>Day nurseries and nursery schools, including a playground and playground equipment</del>	
17	Delicatessen shops	5
18	Dress shops	5
19	Drugstores and soda fountains	4
20	Privately owned or operated stations for fire protection, police or security service, ambulance or other emergency service providers	
21	Florist shops	6

22	Gasoline service stations, provided all incidental repair work is conducted wholly within a completely enclosed building and space required for such repair work does not constitute more than <b>60%</b> of the floor area.	
23	Grocery stores and meat markets, provided there is no slaughtering of animals or poultry on the premises	4
24	Hardware shops	
25	Household appliance shops	
26	Ice cream shops, including manufacturing of ice cream on the premises for on-site sales only	5
27	Interior decorator shops	4
28	Jewelry shops	5
29	Key, locksmith or gun shops	
30	Liquor stores limited to retail sales of package goods for off-site consumption.	
31	Offices	5
32	Photographer's and artist's studios	7
33	Precision, optical and musical instrument repair shops	4
34	Private clubs and fraternal organizations.	
35	Private schools operated as a commercial enterprise, except trade schools.	
36	Public facilities such as libraries, museums, parks, playgrounds, community buildings including police stations, post offices and other community service buildings used for non-commercial non-profit purposes.	4
37	Public schools; elementary, high school and college	
38	Radio and television shops, including repair	
39	Restaurants and cafes, including drive-through but not including those having dancing or shows, or drive-in car service. The sale of alcoholic beverages for on-site consumption only may be permitted as an accessory use if the kitchen facilities in the restaurant do not exceed 20% of the floor area. Patios, cocktail lounges and outside dining and drinking areas shall be limited to a space serving no more than 50 patrons, and no entertainment or music shall be audible off site.	
40	Secretarial or answering services	
41	Service to the public of water, gas, electricity, telephone, cable television and sewage including wastewater treatment plants. The foregoing shall be deemed to include attendant facilities and appurtenances to these uses, including, without limitation, distribution, collector and feeder lines, pumping or booster stations along pipelines, and	
42	Shoe repair shops	5
43	Tailor shops	5
44	Variety or notion stores	4
45	Video rental stores	
46	Any use permitted in the R-5 Multi-Family Residential Zoning District.	

47	Accessory buildings and uses customarily incidental to the above uses. Renewable energy systems are not permitted as a primary use but may be permitted as an accessory use as set forth in Section 1206 of this Ordinance. Where renewable energy systems involve the generation or storage of electricity, only grid-connected or off-grid systems	
48	Emergency housing - Temporary shelter required due to a natural disaster or fire or other circumstances determined to constitute an emergency by the zoning inspector	
49	Temporary construction administration offices/yard complex – which may include a security office or residence for a security guard provided that the following conditions are met:	
50	Gardens and community gardens as defined in Chapter 2	6

MC Zoning Ordinances (May 2017) - Table 1 continued

Zone Reference Number	Allowable Business Use	Comm Scores
<b>SECTION 804</b>	<b>C-2 Intermediate Commercial Zoning District</b>	
<b>ARTICLE 804.1.</b>	<b>PURPOSE:</b> The principal purpose of this zoning district is to provide for the sale of commodities and the performance of services and other activities in locations for which the market area extends beyond the immediate residential neighborhoods while encouraging sustainable building practices. Principal uses permitted in this zoning district include automobile sales and services, furniture stores, hotels and motels, travel trailer parks, restaurants, and some commercial recreation and cultural facilities such as movies and instruction in art and music. This zoning district is designed for application at major street intersections.	
<b>ARTICLE 804.2</b>	<b>USE REGULATIONS:</b> A building or premise shall be used only for the following purposes:	
1	Any use permitted in the C-1 Zoning District subject to all the regulations specified in the use regulations for such C-1 Zoning District unless the use is otherwise regulated in this Section.	
2	Adult oriented facilities as defined under Chapter 2, subject to the following conditions:	
3	Art metal and ornamental iron shops.	
4	Automobile laundries, provided steam cleaning is confined to a building.	
5	Automobile repair shops and garages, including an outside vehicle storage area to be used for vehicles under repair which shall be completely screened from any street or surrounding property, and further provided all repair operations are conducted within a building.	
6	New and used, automobile and golf cart sales, and rentals provided all sales, service, and repair activities are conducted within a building.	
7	Awning and canvas stores.	
8	Bars, including retail sales of package goods for off-site consumption, provided that there is no entertainment or music audible offsite.	
9	Health spas and public gyms.	4
10	Blueprint, photostat and reproduction (copy) services.	
11	Boat sales, including an outside display area, providing all sales and repair activities are conducted within a building.	
12	Cabinet and carpenter shops.	
13	Catering establishments not utilizing any manufacturing process or outside storage of materials or vehicles.	
14	Conservatories or studios: Art, dancing or music.	4
15	Department stores.	
16	Drive-in restaurants and refreshment stands.	
17	Electrical fixtures and appliance sales, repair and service.	
18	Feed stores, inside storage only.	
19	Funeral homes, mortuaries and chapels.	
20	Furniture stores including: New, used, finished or unfinished merchandise.	

21	Gas (butane or propane), retail sales of.	
22	Hospitals	
23	Hotels, resorts, motels.	
24	Laboratories, medical or dental.	
25	Farm animal (horse, cattle and other farm animal) medical clinics and surgical hospitals	
26	Liquor stores.	
27	Nurseries, flower and plant sales, provided all incidental equipment and supplies including fertilizer and empty cans, are kept within a completely enclosed building or within an area enclosed on all sides by a solid fence or wall at least <b>six feet</b> in height and no goods, materials or objects are stacked higher than the fence or wall so erected.	
28	Paint and wall paper stores.	
29	Parking lots and public garages, subject to parking standards in Chapter 11, Section 1102	
30	Pet shops, including the treatment or boarding of cats, dogs or other small animals.	
31	Plumbing shops.	
32	Pool halls or billiard centers.	
33	Radio and television broadcasting stations and studios, but not including transmitter towers and stations	4
34	Rental services: Household, lawn, garden, sickroom or office equipment.	
35	Restaurants and cafes, including patios, cocktail lounges, and outside dining and drinking areas, provided there is no amplified entertainment or music audible off-site	4
36	Retail stores.	
37	Taxidermists.	
38	Theaters, but not including a drive-in theater and adult oriented facilities as defined under Chapter 2	
39	Tinsmith shops.	
40	Trade schools.	
41	Upholstery shops.	
42	Veterinary hospitals, clinics and kennels for dogs, cats and small animals.	
43	Self-storage facilities.	
44	Accessory buildings and uses customarily incidental to the above.	
45	Medical Marijuana Dispensary Facilities as defined in Chapter 2 of this Ordinance subject to all rules adopted by the Arizona Department of Health Services and to the following conditions:	

Notes:

- 1 Comm Scores = or > 4 denotes Committee members cumulative score of 4 member's votes or greater for a specific Use
- 2 Zoning Uses with a score of 4 or greater, from a scale of 0 - 7 votes, will be discussed by the Committee for recommendation to THIA BOB



**Attachment 2**  
**Draft D of R Amendment**

Tonto Hills Improvement Association  
Draft Amendment to the  
Declaration of Restrictions

**Paragraph 1**

Insert new subparagraph 1a and reindex existing subparagraphs in ascending order.

**Draft Paragraph 1a**

The commercial area of Tonto Hills, designated as lots 201 through 223 and Tracts F, G, H, and J shall be restricted in use and purpose to the following under Maricopa County Zoning Ordinance dated May 2017;

- 1a.i Maricopa County zoning Section 802 (C-0)., Use Regulations  
Article 802.2.3 and 802.2.4, 802.2.6, and 802.2.12
- 1a.ii Maricopa County zoning Section 803 (C-1)., Use Regulations  
Article 803.2.1, 803.2.3, 803.2.5, 803.2.8 and 803.2.10  
Article 803.2.13 through 803.2.15, and 803.2.17 through 803.2.19  
Article 803.2.21, 803.2.23, 803.2.26 through 803.2.28  
Article 803.2.31 through 803.2.33, and 803.2.36  
Article 803.2.42 through 803.2.44 and 803.2.50

No commercial use and purpose described in Maricopa County zoning Section 804 (C-2) shall be permitted.