

DISTRICT COURT, PARK COUNTY COLORADO 300 – 4 th Street Fairplay, Colorado 80440	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/>
<p>Plaintiffs: ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado corporation; KATHRYN WELLS; THE PAUL VASTOLA AND SUZANNE G. NELSON LIVING TRUST, U/A; ROBERT W. PHELPS; and KEVIN O’CONNELL</p> <p>Defendants: VERA B. DUNWODY and DRAYTON D. DUNWODY, and FARM CREDIT OF SOUTHERN COLORADO, ACA, an agricultural credit association</p> <p>Plaintiffs in Intervention: PETER J. BRAUN and RENAE J. BRAUN</p>	
Victor F. Boog, No. 2561 Amanda B. Cruser, No. 30601 Boog & Cruser, P.C. 3333 S. Wadsworth Blvd., Suite D201 Lakewood, CO 80227 303-986-5769 Fax 303-985-3297 <i>Attorneys for Defendants Vera B. Dunwody and Drayton D. Dunwody</i>	Case Number: 2010 CV 65 Div.: 1
DEFENDANTS’ SUPPLEMENTAL MOTION TO JOIN PERSONS NEEDED FOR A JUST ADJUDICATION UNDER C.R.C.P. 105	

Defendants, Vera B. Dunwody and Drayton D. Dunwody (hereinafter the “Dunwodys”), pursuant to C.R.C.P. 19(a), 19(c), and C.R.C.P. 105, respectfully submit this supplemental motion to join persons needed for a just adjudication of rights under C.R.C.P. 105. In support thereof, said Defendants state as follows:

1. C.R.C.P. 19(a) states in pertinent part that

a person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to

the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff.

2. Numerous paragraphs in the Plaintiffs' Amended and Restated Complaint (the "Amended Complaint") indicate that the Elk Falls Property Association (the "EFPOA") is an association made up of homeowners who are residents of Blocks 1, 2, and 3 of the Elk Falls subdivision who have allegedly used the Disputed Roads to access their homes. (See, *e.g.*, paragraphs 11, 16, 17, 26, 27, 28, 29, 35, 38, 41, 43, 44, 46, 48, 50, 51, 52, 53, 54, 55, 56, 57 and 58).

3. Paragraph 67 of the Amended Complaint demands a complete adjudication not only of the Plaintiffs' right, title, and interest in and to the Disputed Roads, but a determination that

all homeowners have the right to use these access roads as easements granted or created for the benefit of the Plaintiffs and all residents of Elk Falls, by virtue of prescriptive use, necessity, preexisting use, and estoppel or that these are easements granted specifically or by inference by virtue of the recorded subdivision plats.

4. The prayer in the Amended Complaint further states that

Plaintiffs, seek a permanent injunction requiring that the Dunwodys remove each of the aforementioned obstructions they placed on the Disputed Roads, and that they be enjoined from blocking the Disputed Roads or taking other steps to threaten or intimidate the Plaintiffs and **other homeowners** from exercising their rights to use the Disputed Roads (emphasis added).

5. C.R.C.P. 19(a) contemplates the joinder of all persons who may claim rights with respect to real property. Furthermore, C.R.C.P. 19(c) provides that

[a] pleading asserting a claim for relief **shall** state the names, if known to the pleader, of any persons as described in subsections (a)(1) . . . who are not joined and the reasons why they are not joined.

6. Case law confirms that section (a) of Rule 19 is mandatory and that persons having a joint interest in the subject matter of litigation which may conveniently be settled therein are proper parties and should be joined in the action, if feasible. *Potts v. Gordon*, 34 Colo. App. 128, 525 P.2d 500 (1974); *Woodco v. Lindahl*, 152 Colo. 49, 380 P.2d 234 (1963).

7. Here, joinder is feasible since the other residents of the Elk Falls subdivision are subject to service of process, their joinder will not deprive the Court of jurisdiction, and they have no valid objection to venue of this Court.

8. Case law further confirms that joinder of all residents in Blocks 1, 2, and 3 of the Elk Falls subdivision as parties in this action is proper notwithstanding the appearance of the EFPOA. In *Dunne v. Shenandoah Homeowners Association, Inc.*, 12 P.3d 340 (Colo. App. 2000), the trial court required all of the property owners within the development be brought into the action as indispensable parties pursuant to C.R.C.P. 19, C.R.C.P. 57(j); and section 13-51-115, C.R.S. (1999); and the trial court's ruling was upheld on appeal. Among the factors cited in support of the trial court's decision were avoidance of multiplicity of suits, the danger of inconsistent decisions, and the reluctance of a court to render a decision which will not finally settle the controversy before it. *Davis v. Maddox*, 169 Colo. 433, 457 P.2d 394 (1969). The Court of Appeals also noted that members of the Association had potentially conflicting interests with each other and with the Association itself. The same is true here, as some owners of property in Block 2, Elk Falls subdivision have no interest in pursuing the claims asserted by the EFPOA. Such owners object to assessments being levied against them by the EFPOA to fund this litigation. See Affidavit of Sam Shapiro filed herewith. See also the Disclaimers of Interest filed in support hereof.

9. C.R.C.P. 105 also contemplates adjudication of all the rights of the parties in interest. See *Merth v. Hobart*, 129 Colo. 546, 551, 272 P.2d 273, 275 (1954); *Hopkins v. Board of County Commissioners*, 193 Colo. 230, 236, 564 P.2d 415, 420 (1977).

10. Although Plaintiffs make no express claim for declaratory judgment under C.R.C.P. 57(j) or section 13-51-115, C.R.S., such rule and statute dictate the same result, namely, "all persons **shall** be made parties who have or claim any interest which would be affected by the declaration" (Emphasis added.)

WHEREFORE, the Dunwodys respectfully move this Court to order the joinder of all lot owners within the Elk Falls subdivision as Plaintiffs in this action.

Respectfully submitted this 17th day of September, 2010.

BOOG & CRUSER, P.C.

*/s/ Victor F. Boog – original signature on file
at the offices of Boog & Cruser, P.C.*

Victor F. Boog, No. 2561

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2010, a true and correct copy of the foregoing **DEFENDANTS' SUPPLEMENTAL MOTION TO JOIN PERSONS NEEDED FOR A JUST ADJUDICATION UNDER C.R.C.P. 105** was sent electronically via LexisNexis File and Serve, properly addressed to:

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*/s/ Bonnie J. Cowell – original signature on file
at the offices of Boog & Cruser, P.C.*
