

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2007-013188

12/19/2007

HONORABLE GLENN M. DAVIS

CLERK OF THE COURT  
L. Muhammad  
Deputy

ALAN ROSELL, et al.

MELANIE C MCKEDDIE

v.

WINFIELD OWNERS COMMUNITY  
ASSOCIATION

J ROGER WOOD

**UNDER ADVISEMENT RULING**

The Court has reviewed and considered the Plaintiff's Motion for Partial Summary Judgment, the Defendant's Response, and the Reply thereto. The Court has further reviewed the file, the pleadings, and the materials filed by the parties in support of their positions.

Based upon consideration of the foregoing and the arguments presented by counsel, the Court makes the following findings and enters the following Orders in this case.

The CC&Rs give the Board broad authority to change the use of any common area if such use is "for the benefit of the Members and Residents, as determined by the Board" and is consistent with deed, zoning, or other regulations. While there is another provision of the CC&Rs that "no machinery or equipment" shall be placed or operated on any lot, the CC&Rs make an exception for equipment that the Association requires "for the operation and maintenance of the Project."

Since the Board is given broad authority to determine the use of such areas by resolution, they have authority to commit the use of the area for the purpose of providing revenue for the operation and maintenance of the project. The CC&Rs do not prohibit the Board from using part of the land to produce revenue to be used for the operation and maintenance of the project.

More problematic is the issue of whether this long-term lease is an encumbrance of the common area that would require a two-thirds vote of members to approve, pursuant to the CC&Rs.

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The lease in question binds the Association for twenty-five years, since, although the lessee has an option not to renew after five years, there is no similar option provided for the Association not to renew it. If this lease were for a short term, five years or less, perhaps there would be less of an argument that it amounts to an encumbrance, which would be characterized by a "diminution" of the land's value, according to the Black's Law definition cited by both parties in the briefing. However, the twenty-five year term of this lease would be binding on the association, including future boards, far into the future.

The Association argues that this is not a use that in anyway impedes the use of the common areas, citing the fact that the equipment will be only visible disguised as some cacti. There is no certainty in the facts as to the nature the cacti or even whether there will be above ground equipment at all. The Association argues that even with the use contemplated by the lease, the members of the Association will still be able to use this area the same as before. No expert evidence was presented by either side on the issue of whether there would be a diminution in the value of the land based upon this use.

Summary Judgment is appropriate where there is (1) no genuine dispute as to any material fact, (2) only one reasonable inference can be drawn from those facts and (3) the moving party is entitled to judgment as a matter of law. *Ancell v. Union Station Associates, Inc.*, 166 Ariz. 457, 803 P.2d 438 (1990).

In considering a motion for summary judgment, the Court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Hohokam Irrigation and Drainage District v. Arizona Public Service Company*, 204 Ariz. 394, 64 P.3d 836 (2003).

Viewing the evidence and all reasonable inferences in favor of the party opposing the motion as the Court is required to do, the Court finds that there is a question of fact as to whether this use of the property would burden the property such that there is a diminution in the value of that area. If the trier-of-fact concludes that there was such a diminution in value, the twenty-five year lease in fact would amount to an encumbrance that would need a vote of the members to approve according to the terms of the CC&Rs. However, if the lease in fact has no real impact on the use of the area and results in no diminution in value, this lease would not be considered an encumbrance and the lease could be entered into without the approval of the members.

Thus, the issue of the impact of this lease on the value and use of the land is material to the ultimate determination of whether the Board had the authority to enter into this lease. Since there are material facts in dispute, summary judgment is not appropriate.

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Therefore,

IT IS ORDERED denying Plaintiff's Motion for Partial Summary Judgment.

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