

ARIZONA SUPREME COURT

CENTEX HOMES, a Delaware corporation, JOHNSON RANCH HOLDINGS, L.L.C., a Delaware limited liability company; PULTE HOME CORPORATION, a Michigan corporation; LDR-SWC HUNT HWY& GC, L.L.C., an Arizona limited liability company,

Appellees,

v.

PINAL COUNTY, a political subdivision of the State of Arizona; PINAL COUNTY BOARD OF SUPERVISORS, a political subdivision of the State of Arizona;

Appellants.

Arizona Court of Appeals No. 2 CA-CV2010-0100

**Pinal County
Superior Court
No. CV2008-02028**

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ARIZONA COURT OF APPEALS
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**PETITION FOR REVIEW OF MEMORANDUM
DECISION OF COURT OF APPEALS**

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PRELIMINARY STATEMENT

Appellees Centex Homes; Johnson Ranch Holdings, LLC; Pulte Home Corporation; and LDR-SWC Hunt Hwy & GC, LLC (“Landowners”) hereby petition the Supreme Court of Arizona to review the Court of Appeals’ Memorandum Decision (the “Decision”), in which it reversed the Trial Court’s judgment, in favor of Appellees, finding that the development agreement at issue (the “Agreement”)¹ is “reasonably susceptible to more than one interpretation.” [Appendix A, Memorandum Decision, ¶ 12].

The Decision should be reversed because the Court of Appeals failed to construe the Agreement “in a way that gives meaning to all its material terms.” *Miller v. Hehlen*, 209 Ariz. 462, ¶ 11, 104 P.3d 193, 197 (App. 2005). Giving meaning to all of the Agreements’ terms results in a single interpretation and affirmation of the Trial Court’s judgment.

The Decision should also be reversed because the Court of Appeals improperly considered whether the Agreement was susceptible to more than one meaning when both parties asserted that the agreement is not ambiguous.

¹ The proper title of the Agreement is: “Agreement for Phased Protected Development Right Plan, Johnson Ranch and Pinal County, Arizona.”

Finally, the Decision should be reversed because it concerns issues of state-wide importance, namely: 1) the source of a county's authority to waive development fees in exchange for public infrastructure; and 2) the impact of the Decision on other agreements with Pinal County. As such, the Supreme Court should accept review of this Petition and affirm the Trial Court's ruling.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals, as a matter of law, properly interpreted the Agreement and its addendum so as to give meaning to all of its material terms.
2. Whether the Court of Appeals properly considered whether the Agreement was susceptible to more than one meaning when both parties asserted that the agreement is not ambiguous.
3. Whether, under A.R.S. § 11-1101, *et. seq.*, Arizona counties are authorized to waive development fees for a period of time longer than allowed for a protected development right, as defined in A.R.S. § 11-1201, *et seq.*

FACTUAL AND PROCEDURAL BACKGROUND

I. BACKGROUND

A. The Agreement

On November 26, 1997, Pinal County (the “County”) entered into the Agreement with Appellees’ predecessor-in-interest (the “Initial Land Owner”). The Agreement concerns the development of approximately 2,014 acres (the “Property”) pursuant to a previously submitted Development Plan. [Appendix A, Memorandum Decision, ¶ 2].²

In the Agreement, the County acknowledged its desire to facilitate the improvement of the Property because it would benefit the County with increased employment, tax revenue, and infrastructure. In consideration, the County, through its Board of Supervisors, granted the Initial Land Owner the right to “undertake the development and use of the Property under the terms and conditions of the development” for ten years, with the possibility of a ten-year extension. [Appendix A, Memorandum Decision, ¶ 2]. In the Agreement, the County also agreed to waive development fees for the Property, as reflected in the three key sections of the Agreement.

² As the facts are essentially undisputed, the factual recitation in the Court of Appeals’ Memorandum Decision is largely repeated herein.

In Section 2(f) of the Agreement, the parties acknowledged that development of the Property would be completed in “four phases,” with each phase projected to take approximately five years. [Appendix C, Agreement, § 2(f)]. Based on this “phased” development, the Initial Land Owner and the County agreed:

Except as specifically provided in this Development Agreement, **no surcharge or impact fees or impositions of any kind whatsoever** for water, sewer, utilities, transportation systems, public services or any other infrastructure cost or expense **shall be chargeable to Developer in any phase of the construction of the Development Plan.**

[Appendix C, Agreement, § 2(g) (emphasis added)].

Moreover, in Section 2(i) of the Agreement the parties contracted:

Except as expressly provided in this Development Agreement, **the ordinances, rules regulations, permit requirements, or other requirements of the County applicable to the Property and the development project shall be those which are now existing and in force for the County as of the date of the recording of the Agreement,** except for UBC changes.

[Appendix C, Agreement, § 2(i) (emphasis added)].

B. Addendum to the Agreement

In 2000, ownership of the development transferred to Appellees. Thereafter, Landowners and the County signed an addendum to the Agreement (the “Addendum”), which reiterated that the development of the Property was in the best interest of the County and that it would benefit from the installed

infrastructure and increased tax revenue. The Addendum also provided that, at the County's request, additional public infrastructure and services would be provided by the Landowners. The parties further acknowledged that this additional infrastructure would be completed prior to the time the infrastructure was needed, prior to the time Landowners would have contributed to same, and that the Landowners were willing to accelerate this work "only with the County's assurances that [they would] be able to complete development of the Property as provided for in the Agreement." [Appendix A, Memorandum Decision, ¶4; Appendix D, Addendum § D (emphasis added)].

C. The County's Breach

In 2006, the County adopted Ordinance No. 101806-DF (the "Fee Ordinance"), which permits the County to assess development fees on new building permits. Under the terms of the Agreement, the County could not assess development fees on the Property. However, as the County advised that it intended to impose development fees after November 26, 2007, Landowners sought an extension of the Agreement or an acknowledgment by the County that it would not impose development fees on the Property. The County denied Landowners' request and began imposing development fees. [Appendix A, Memorandum Decision, ¶5; Appendix E, Ordinance No. 101806- DF].

II. PROCEDURAL BACKGROUND

A. The Lawsuit

The Landowners sued the County raising numerous claims. After initial procedural issues were resolved, the Landowners filed a motion for summary and declaratory judgment on the issue of whether the Agreement and Addendum precluded the County from assessing development fees on the Property. The Landowners contended that the Agreement's fee waiver provision extended beyond the agreement's ten-year term provision, lasting until all phases of the development were completed, and that the Addendum prohibited the County from imposing development fees until development of the Property was complete. [Appendix A, Memorandum Decision, ¶6].

In opposition, the County contended the fee waiver terminated at the end of the initial ten-year term of the Agreement. As part of its argument, the County also asserted that the fee waiver was a "protected development right" and that, pursuant to A.R.S. § 11-1203, the County had no authority to grant a protected development right lasting more than ten years. In reply, Landowners asserted that the authority to waive development fees and grant protected development rights are derived from different statutes, namely A.R.S §§ 11-1101, *et seq.* and 11-1201, *et seq.* and that under A.R.S. § 11-1101(B), counties are authorized to enter into agreements, without a temporal limit on duration concerning the conditions, terms, restrictions,

financing, and requirements for public infrastructure for the development of real property. [Appendix B, Draft Memorandum Decision, ¶ 6].

After extensive briefing and oral argument, Judge William O'Neil of the Pinal County Superior Court granted Landowners' motion, ruling:

A county has the authority to enter into a development agreement under A.R.S. § 11-1101 and to waive development fees within such an agreement. *Home Builders Assoc. of Central Arizona vs. City of Maricopa*, 215 Ariz. 146, 158 P.3d 869 (App. 2007). A.R.S. § 11-1101(B) provides that the development agreement may specify the duration of the agreement and the conditions, terms, restrictions, financing and requirements for public infrastructure as well as any other matters relating to the development of the Property.

It is clear to the Court that the waiver of impact fees within the agreement is not a protected development right with a limited term of ten years under A.R.S. § 11-1203... [T]he language of the agreement indicates that the waiver of fees is not limited to a term of ten years. The agreement provides for four phases of development, each five years in length, for a total of 20 years of development. Section 2(g) of the agreement addresses the waiver of impact fees and states that no impact fees shall be chargeable to the developer in any phase of the development. **When the County began charging the developer impact fees prior to the completion of all phases of the development, the County was in breach of Section 2(g) of the Agreement.**

Additionally, Section 2(i) of the Development Agreement states that the ordinances of the County applicable to the Property and the development project shall be those which were in effect as of the date of the recording (1997).... Because Ordinance No. 101806-DF was not in effect at the time of the Agreement, **any imposition of**

impact fees by this ordinance against the developer is a breach of Section 2(i) of the Development Agreement.

[Appendix F, Superior Court Ruling (emphasis added)].

B. The Memorandum Decision

On Appeal, the County raised several arguments, including that the Agreement's waiver of development fees was a protected development right and was limited to ten (10) years by A.R.S. § 11-1201, *et seq.* Notably, at no point in its briefs, or at oral argument, did the County assert that the Trial Court erred because of an ambiguity in the Agreement. Instead, the County stressed that the Agreement's terms are unambiguous but must be construed in its favor.

Notwithstanding the County's position, the Court of Appeals ruled that the Agreement is subject to more than one interpretation. Such a finding constitutes error on the part of the Court of Appeals which warrants review by this Court.

ARGUMENT

I. REVIEW SHOULD BE GRANTED

Rule 23(c)(3) of the Rules of Civil Appellate Procedure provides that a petition for review may be granted if, *inter alia*, no Arizona decision controls the point of law in question, a decision of the Supreme Court should be overruled or qualified, or if important issues of law have been incorrectly decided. ARIZ.R.CIV.APP.P. 23(c)(3). In this case, Arizona decisions control the points of

law. However, the Court of Appeals failed to apply established precedent, resulting in an important issue of law being decided incorrectly.

II. ANALYSIS

A. Giving Meaning To All Provisions Of Agreement And Addendum Results In Single Interpretation And No Ambiguity

When “parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written.” *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, 218 P.3d 1045, 1050 (App. 2009), citing *Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C. LLC*, 213 Ariz. 83, 138 P.3d 1210 (App. 2006). To determine if a contract’s language is clear, the “controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable.” *Chandler Medical Building Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993). Indeed, the “intent of the parties, as ascertained by the language used, must control the interpretation of the contract.” *Goodman v. Newzona Investment Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966).

Whether contract language is clear and unambiguous “is a question of law for the court.” *In Re Estate of Lamparella*, 210 Ariz. 246, 250, 109 P.3d 959, 963 (App. 2005). However, “[l]anguage in a contract is ambiguous **only** when it can reasonably be construed to have more than one meaning” and is “not ambiguous just because the parties ... disagree about its meaning.” *Lamparella*, at 250, 963 (emphasis added).

Thus, when evaluating whether a contract is ambiguous, a court must determine the intent of the parties using the language of the agreement. In order to determine such intent, a court must give meaning to all of a contract's terms, rendering none superfluous. *Miller, supra*. Indeed, courts must construe contracts "so that every part is given effect" in "light of the other parts" so as to bring harmony "between all parts of the writing." *Chandler Medical*, at 277, 791; see also *C&T Land & Development Company v. Bushnell*, 106 Ariz. 21, 470 P.2d 102 (1970). Moreover, courts cannot "construe one provision in a contract so as to render another provision meaningless." *Chandler Medical*, at 277, 791; see also *Norman v. Recreation Centers of Sun City, Inc.* 156 Ariz. 425, 752 P.2d 514 (App. 1988). Courts must also reconcile any apparent conflict in a contract "by any reasonable interpretation." *U.S. Insulation, Inc. v. Hilro Construction Company*, 146 Ariz. 250, 259, 705 P.2d 490, 499 (App. 1985).

Utilizing this framework, it is clear that the Court of Appeals failed to apply established precedent in interpreting the Agreement and Addendum. The Agreement's fee waiver provision, Section 2(g), provides that no development fees can be "chargeable to Developer in any **phase** of the construction of the **Development Plan**." Section 2(f) of the Agreement states that the Development Plan has four phases, each estimated to last approximately five (5) years.

Notwithstanding these terms, the Court of Appeals found that the fee waiver language which provides "[e]xcept as specifically provided in this Development Agreement," could be interpreted to limit the fee waiver provision of the

Agreement to the general ten (10) year term contained in other sections of the Agreement. Such an interpretation would render meaningless the provision “**in any phase of the construction of the Development Plan.**” Such language is not mere surplusage. Instead, it clearly provides that the waiver of development fees is tied to the phased development of the property rather than the ten (10) year term contained in other sections of the Agreement. As courts must acknowledge that the “language used was placed in the contract for a specific purpose,” and not “construe one provision in a contract so as to render another provision meaningless,” the only reasonable interpretation of the Agreement is that found by the Trial Court – that the waiver of development fees is measured by its consumption through the phases of development. *Tucker v. Byler*, 27 Ariz.App. 704, 707, 558 P.2d 732, 735 (App. 1976); *Chandler Medical*, at 277, 791.³

The Court of Appeals determination that the fee waiver provision is ambiguous was also in error because of the clear language of the Addendum, in which the parties agreed that Landowners would provide additional infrastructure to the County, prior to the time Landowners could have been required to contribute same, “only with the County’s assurances that [the Landowners would] be able to

³ The Court of Appeals determination that the fee waiver provision is ambiguous because of the “[e]xcept as specifically provided” language is also flawed because the adverb “specifically” limits the application of an exception to the fee waiver provision. The Agreement contains such an exception in Section 8, which requires Landowners to post a letter of credit, funds or bond, “to assure the installation of infrastructure and improvements directly related to ... building permit(s).” [Appendix C, Agreement, § 8].

complete development of the Property as provided for in the Agreement.” [Appendix A, Memorandum Decision, ¶ 4; Appendix D, Addendum § D (emphasis added)]. Again, this language is not superfluous. It demonstrates the clear intent of the parties that, in exchange for the accelerated provision of infrastructure, Landowners would be allowed to **complete** development of the Property. The Court of Appeals failed to consider this language and any other interpretation would render the Addendum’s language meaningless.

Construing the Agreement and Addendum so that “every part is given effect” in “light of the other parts,” makes clear that Judge O’Neil’s interpretation is the only one that brings harmony “between all parts of the writing” and does not render any of the terms meaningless. *Chandler Medical*, at 277, 791. As such, the Court of Appeals determination that the Agreement and Addendum is susceptible to more than one interpretation is in error, which results in an important issue of law being decided incorrectly.

B. Parties Did Not Raise Issue of Ambiguity

The Court of Appeals determination that the Agreement is “reasonably susceptible to more than one interpretation” is also incorrect in light of the fact that neither Landowners nor the County asserted that the Agreement was ambiguous. In its Opening or Reply Brief, the County did not assert that the Agreement is ambiguous. Its only argument as to issues of fact concerned whether it should have been permitted to develop facts concerning its Gift Clause and public policy arguments. [Appellant’s Opening and Reply Brief]. This theme continued at oral

argument where counsel for the County stressed that the County did not believe the Agreement was ambiguous. The transcript of the oral argument provides:

Male Voice (Judge Gordon): Are you making any argument that this agreement is uh, inconsistent internally, and that it uh, uh, needs to be interpreted in some way, or that it is clear on its face?

Mr. Sillyman: We have not argued that it's ambiguous.

Male Voice (Judge Gordon): Should the court have had a trial on that?

Mr. Sillyman: On... no. I think the contract can be interpreted. I think the Judge interpreted it incorrectly.

[Appendix G, Transcript of Oral Argument, 11-12; 13-14].

In light of the County's insistence that the Agreement was not ambiguous, and Landowners' concurrence therewith, it was improper for the Court of Appeals to make such a determination. Such error is clear in light of Arizona law which provides that opening briefs must present arguments, supported by authority, setting forth an appellant's position. An appellant's failure to argue a claim in its opening brief constitutes abandonment and waiver of that claim. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (Ariz.,1989); *see also County of Cochise v. Faria*, 221 Ariz. 619, 624, 212 P.3d 957, 962 (App. 2009) (holding that because the parties did not dispute an issue before the trial court, or in their opening brief, that the argument was waived); *General Motors Corp. v. Arizona Dept. of*

Revenue, 189 Ariz. 86, 102, 938 P.2d 481, 497 (App.1996), *abrogated on other grounds by Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 959 P.2d 1256 (1998) (holding that by not raising an issue in their opening brief, Appellants waived the issue on appeal).

In light of the County's failure to assert that the Agreement is ambiguous, it was error for the Court of Appeals to determine that the Agreement is subject to more than one interpretation.

C. Authority For Waiver Of Development Fees

Central to the County's argument on appeal was its assertion that the Trial Court incorrectly determined that a waiver of development fees is governed by A.R.S. § 11-1101, et. seq. (the "Development Fees Statutes"), rather than A.R.S. § 11-1201, et seq. (the "Protected Development Rights Statutes"). The Development Fee Statutes address agreements, development fees, infrastructure issues, and development financing. The Protected Development Rights Statutes primarily deal with land entitlement issues. Nevertheless, the County argued that the County's authority to waive development fees arises from the Protected Development Rights Statutes, and that any such waiver must be governed by the ten (10) year limitation prescribed for such Protected Development Rights.

Conversely, Landowners argued, and the Trial Court agreed, that the waiver of development fees arises from Development Fees Statutes, which authorize a

County to entered into agreements, and waive development fees, in exchange for a developers' contribution to infrastructure. A.R.S. § 11-1101 (B)(7); *Home Builders Ass'n of Central Ariz. v. City of Maricopa*, 215 Ariz. 146, 158 P.3d 869 (App. 2007).

At both oral argument and in its Decision, the Court of Appeals did not address the source of authority for a County's waiver of development fees. As the source of that authority both defines the relevant term for which the parties could have waived development fees, and provides evidence of the intent of the parties in entering into the Agreement and Addendum, the failure to address this issue was an error by the Court of Appeals.

Moreover, in light of the County's arguments with respect to the Protected Development Rights Statutes and Development Fees Statutes, review by this Court of the scope and source of a county's authority to waive development fees in exchange for infrastructure is an issue of state-wide importance that warrants review by this Court.

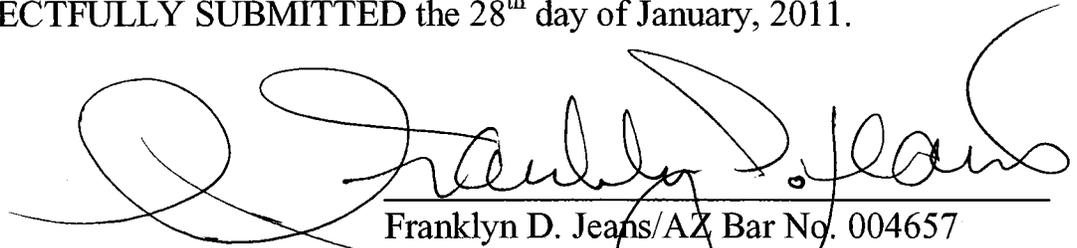
The Decision should also be reviewed because of its potential impact on numerous other development agreements executed by the County. Appellees are aware of a significant number of development agreements which contain development fee waiver provisions that are substantially similar to the fee wavier in the Agreement. Accordingly, this Court's review of the Court of Appeals'

Decision is an issue of state-wide importance and will further the interests of judicial economy.

CONCLUSION

Based on the foregoing, Appellees' respectfully requests that this Court review and reverse the Court of Appeals' Decision and find affirm the Trial Court's ruling.

RESPECTFULLY SUBMITTED the 28th day of January, 2011.



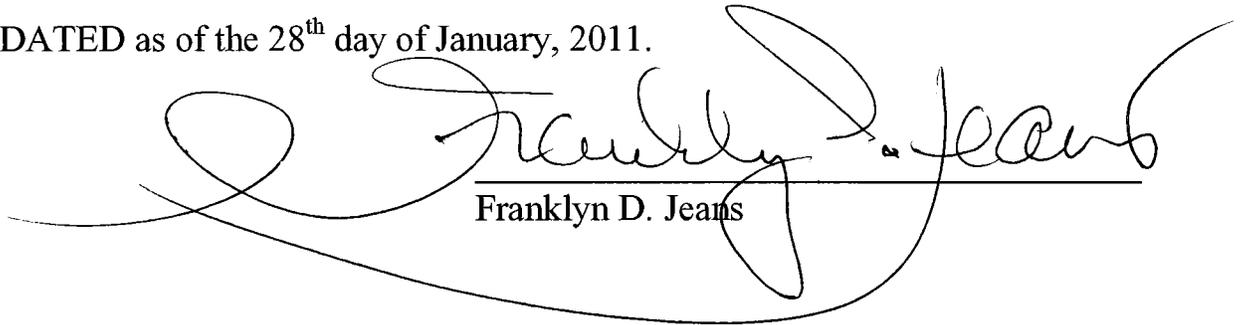
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Counsel for Appellee

CERTIFICATE OF COMPLIANCE

Franklyn D. Jeans, counsel for Appellee in the above-entitled matter, hereby certifies that the foregoing Petition for Review of Memorandum Decision of Court of Appeals was prepared pursuant to and in compliance with the Arizona Rules of Civil Appellate Procedure Rules 6(c) and 23(c). The Petition contains a total of 3,460 words and was formatted in Times New Roman, 14-point typeface.

Franklyn D. Jeans declares under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

DATED as of the 28th day of January, 2011.



Franklyn D. Jeans

PROOF OF SERVICE

The undersigned hereby declares:

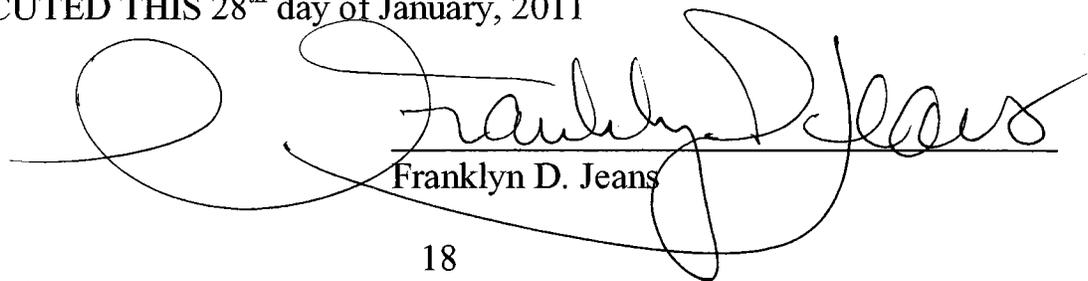
I am over eighteen years of age and not a party to the above action. My business address is 4800 North Scottsdale Road, Suite 6000, Scottsdale, Arizona 85251.

On the date set forth below, I caused the original and seven (7) copies of the Petition and an original and two (2) copies of the Appendix to be addressed to the Clerk of the Arizona Court of Appeals, Division One, 1501 West Washington, Phoenix, Arizona 85007 and picked up or delivered to the U.S. Postal Service in accordance with ARCAP 15(a). Further, two (2) copies of the Petition were mailed in a properly addressed and sealed envelope via first class mail in the United States Post Office to the following Interested parties:

Michael W. Sillyman
Vanessa R. Brown
KUTAK ROCK, LLP
8601 N. Scottsdale Road, Suite 300
Scottsdale, Arizona 85253-2742
Attorneys for Appellant

I declare under the penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

EXECUTED THIS 28th day of January, 2011


Franklyn D. Jeans

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
DEC 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CENTEX HOMES, a Delaware corporation; JOHNSON RANCH HOLDINGS, L.L.C., a Delaware limited liability company; LDR-SWC HUNT HWY & GC, L.L.C., an Arizona limited liability company; and PULTE HOME CORPORATION, a Michigan corporation,
Plaintiffs/Appellees,
v.
PINAL COUNTY, a political subdivision of the State of Arizona,
Defendant/Appellant.

2 CA-CV 2010-0100
DEPARTMENT A
MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200802028

Honorable William J. O'Neil, Judge

REVERSED AND REMANDED

Beus Gilbert, PLLC
By Franklyn D. Jeans, Cory Broadbent, and
Cassandra J. Ayres

Scottsdale
Attorneys for Plaintiffs/Appellees

Kutak Rock, LLP
By Michael W. Sillyman and Vanessa R. Brown

Scottsdale
Attorneys for Defendant/Appellant

ESPINOSA, Judge.

¶1 In this contract action, we consider whether the trial court correctly ruled that, as a matter of law, contract terms prohibited Pinal County from assessing development fees on a development project. Because we conclude the contract's language is reasonably susceptible to more than one interpretation, we reverse the court's grant of summary judgment in favor of plaintiffs Centex Homes; Johnson Ranch Holdings, L.L.C.; Pulte Home Corporation; and LDR-SWC Hunt Hwy & GC, L.L.C. (Developers) and remand for further proceedings.

Factual Background and Procedural History

¶2 Although the relevant facts in this case are essentially undisputed, “[o]n appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in its favor.” *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In November 1997, Pinal County (County) entered into a development agreement (Agreement) with Developers’ predecessor-in-interest (Initial Land Owner), who wished to develop approximately 2,014 acres into a master planned community pursuant to a previously submitted development plan (Development Plan). In the Agreement, entitled “Agreement for / Phased Protected Development Rights Plan / Johnson Ranch and Pinal County, Arizona,” the County acknowledged its desire to facilitate the improvement of the property because it would benefit the County with increased employment, tax revenue, and infrastructure. In consideration, the County, through its Board of Supervisors, granted Initial Land Owner the right to “undertake the

development and use of the Property under the terms and conditions of the development” for ten years, with the possibility of a ten-year extension. The parties also agreed the development of the property would be accomplished in four phases, each projected to take approximately five years to complete.

¶3 Central to the current dispute, the Agreement contained the following paragraph:

Except as specifically provided in this Development Agreement, no surcharge or impact fees or impositions of any kind whatsoever for water, sewer, utilities, transportation systems, public services or any other infrastructure cost or expense shall be chargeable to Developer in any phase of the construction of the Development Plan.^[1]

Additionally, the Agreement provided that the only ordinances applicable to the development would be those existing on the date the Agreement was recorded, December 2, 1997.

¶4 Several years later, the development changed owners, and Developers and the County signed an addendum to the Agreement (Addendum).² The Addendum reiterated that the development of the property was in the best interest of the County and that the County would benefit from the installed infrastructure and increased tax revenue. The Addendum also provided that, at the County’s request, public infrastructure and

¹“The terms ‘impact fees’ and ‘development fees’ are used interchangeably.” *Home Builders Ass’n of Central Ariz. v. City of Maricopa*, 215 Ariz. 146, n.2, 158 P.3d 869, 871 n.2 (App. 2007).

²The parties do not dispute that Developers are successors-in-interest to the Agreement.

services to be provided by Developers would be completed ahead of schedule, that such infrastructure and services would “facilitate and support the ultimate development of the larger land area,” and that Developers were willing to accelerate this work “only with the County’s assurances that [they would] be able to complete development of the Property as provided for in the Agreement.”³

¶5 In 2006, the County adopted Pinal County Ordinance No. 101806-DF, which permits the County to assess development fees on new building permits issued after January 2007. Developers thereafter sought an extension of the Agreement for an additional ten-year term, but the County denied the request.⁴ After issuing its denial, the County began imposing on Developers the development fees authorized by the ordinance.

¶6 Developers sued the County raising numerous claims, and thereafter filed a motion for summary and declaratory judgment on the sole issue of whether the Agreement and Addendum precluded the County from assessing the fees. In their motion they argued that the Agreement’s fee waiver provision extended beyond the Agreement’s ten-year term provisions, lasting until all phases of the development were completed. In its opposition, the County contended the fee waiver terminated at the end of the initial ten-year term of the

³It is unclear whether the Addendum required additional infrastructure or only the expedited completion of infrastructure that Developers already had agreed to complete. However, this issue is not material to our decision.

⁴After their request for an extension was denied, Developers requested that the Board of Supervisors review its decision. Following a hearing, part of which was conducted by the Board in a closed session, the County affirmed its denial.

Agreement and, because the County had refused to extend the Agreement, the fee assessments were appropriate.

¶7 The trial court granted Developers' motion in part based on its determination that, pursuant to its specific language, the Agreement's fee waiver, unlike other provisions of the Agreement, was "not limited to a term of ten years," but instead lasted through all four phases of the development. It concluded the County had "breached the Development Agreement when [it] assessed impact fees against Plaintiffs' property prior to the completion of all phases of the development." The court also held the County's application of the ordinance to the development was a breach of Section 2(i) of the Agreement, which provided that the County ordinances applicable to the property would be limited to those in effect as of the date of the Agreement. The County now appeals. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶8 The County contends the trial court erred in granting summary judgment in favor of Developers. The entry of summary judgment is appropriate "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). "In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Tierra*

Ranchos Homeowners Ass'n v. Kitchukov, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007).

¶9 The County argues the trial court erroneously interpreted the duration of the Agreement's fee waiver and maintains that it does not extend through all four phases of the development because it is subject to the ten-year term and renewal option. We review de novo issues of contract interpretation. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5, 104 P.3d 193, 196 (App. 2005). And, central to our analysis here, "whether a contract is reasonably susceptible to more than one interpretation is a question of law, which we review de novo." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009).

¶10 Developers maintain that, as the trial court found, because the Agreement's fee waiver provision explicitly provides that no development fees "shall be chargeable to Developer in any phase of the construction of the Development Plan," the fee waiver necessarily survived the Agreement's ten-year term.⁵ Language immediately preceding this section supports this interpretation, stating that the Development Plan has four phases, each estimated to last approximately five years.⁶

⁵The parties agree the development could proceed regardless of whether the Agreement was renewed.

⁶The Agreement provides, "Developer and County understand that this is a Development Plan with four phases, Phase I Construction, 0-5 years[;] Phase II Construction[,], 6-10 years[;] Phase III Construction, 11-15 years and Phase IV Construction[,], 16-20 years."

¶11 On the other hand, the County argues the language “[e]xcept as specifically provided in this Development Agreement” in the fee waiver provision limits the waiver to the ten-year term contained both in the Agreement’s introductory section and several other provisions of the Agreement. Under that interpretation, the language “in any phase” is subject to the Agreement’s ten-year term and possible extension, which is incorporated into the fee waiver by the “[e]xcept as specifically provided” language. Developers point out that this limiting language could be construed to exclude only express, non-durational exceptions to the fee waiver provision, such as a clause permitting the County to demand “[i]nfrastructure [a]ssurances.”⁷ That may be a reasonable interpretation, but so is the County’s. Both proposed interpretations of the fee waiver provision are supportable by reference to specific terms and reasonable inferences arising therefrom; we therefore conclude the Agreement is reasonably susceptible to more than one interpretation.⁸

¶12 “[W]hen parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written.” *Grosvenor Holdings*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050, quoting *Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). However, “[l]anguage in a contract is ambiguous . . . when it can reasonably be construed

⁷This provision allows the County to require Developers to deliver a letter of credit, cash, or certified bank funds or else file a surety bond in order to “assure the installation of infrastructure and improvements directly related to . . . building permits.”

⁸We reach the same conclusion with regard to Section 2(i) concerning the applicability of ordinances to the development project because, similar to the fee waiver provision, this section begins with “[e]xcept as expressly provided in this Development Agreement.”

to have more than one meaning.” *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005). Because the Agreement’s fee waiver provision is reasonably susceptible to more than one interpretation, *see Grosvenor Holdings*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050, the trial court incorrectly determined as a matter of law that this provision barred the County from imposing development fees during any phase of the development. *See State v. Mabery Ranch, Co.*, 216 Ariz. 233, ¶ 28, 165 P.3d 211, 219 (App. 2007) (“Where contract language is susceptible to more than one interpretation, the matter should be submitted to the jury.”). Accordingly, the trial court erred in granting summary judgment.

Disposition

¶13 The trial court’s grant of summary judgment is reversed and the case is remanded for further proceedings consistent with this decision. Although the County has requested an award of its attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01, the propriety of such an award shall abide the final outcome of this litigation and the discretion of the trial court.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Richard Gordon
RICHARD GORDON, Judge*

*A judge of the Pima County Superior Court authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed November 3, 2010.