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COURT OF APPEALS
STATE OF ARIZONA

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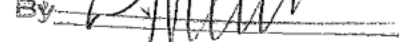

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GARDEN LAKES COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation, Plaintiff-Appellant, vs. WILLIAM E. MADIGAN and JOAN M. MADIGAN, husband and wife; HENRY T. SPEAK and LAVONNE M. SPEAK, husband and wife, Defendants-Appellees.	**1 CA CV 00-0570** Maricopa County Superior Court Case No. CV97-004796 Case No. CV97-005359 (consolidated) (Hon. David M. Talamante)

DEFENDANTS-APPELLEES' RESPONSE TO AMICUS BRIEF

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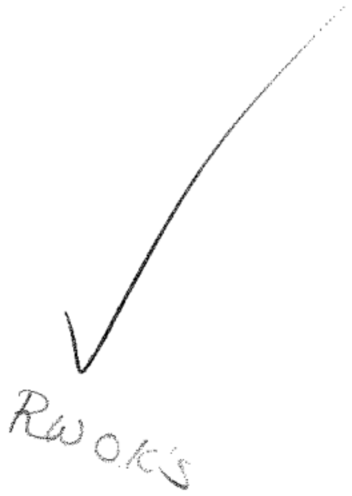

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I. INTRODUCTION

Defendants-Appellees agree that this dispute involves two conflicting interests – promoting the use of solar energy versus homeowners associations' ("HOA") desire to enforce deed restrictions. The State of Arizona, however, has considered the conflicting interests and enacted A.R.S. § 33-439(A) which voids any deed restriction which "effectively prohibits" use or installation of solar devices.

The only issue to be decided in this appeal is whether the trial court correctly determined that the Garden Lakes Community Association's architectural guidelines, as interpreted and enforced by the association, effectively prohibit the use or installation of solar panels in the Speaks' residence. This presents a question of fact and substantial evidence supports the decision of the trial court.

II. STATEMENT OF THE CASE

Defendants-Appellees have no response to Amicus' Statement of the Case.

III. STATEMENT OF FACTS

Defendants-Appellees deny that the solar industry alone financed this litigation. The solar industry contributed approximately six percent (6%) of Defendants-Appellees' legal fees and costs.

IV. ISSUES PRESENTED FOR REVIEW

The issue in this case is whether the trial court was correct in its factual determination that Garden Lakes Community Association effectively prohibited solar panels in the Speaks' home. A Guideline setting forth the factors to be considered certainly would be helpful in future disputes. Defendants-Appellees, however, request this Court make its decision based on the facts of this case as presented at trial.

V. ARGUMENT

A. <u>The Trier of Fact Must Decide Whether an Effective Prohibition Occurred.</u>

Defendants-Appellees agree with Amicus' analysis that the term "effectively prohibit" requires the trier of fact to examine the unique circumstances present in every case. Amicus, however, is wrong to characterize Arizona's "effectively prohibit" standard as more difficult to meet than other states which have adopted statutes promoting solar energy use.

Other states' solar statutes present similar question of fact. The following table shows the key terms used by states which have adopted a solar statute:

California, Colorado	effectively prohibits or restricts
Indiana	effect of prohibiting or unreasonably restricting
Maryland	unreasonable limitations
Massachusetts	forbid or unreasonably restrict

Nebraska	unduly restrict
Nevada	prohibits or unreasonably restricts
Oregon	prohibiting
Virgin Islands	prohibits or unreasonably limits
Wisconsin	prevent or unduly restrict

Some states (Indiana, Nevada, Virgin Islands, and California) have identified the cost, efficiency, and performance as factors to consider. California quantified the factors by prohibiting an association from enacting rules which would increase the cost by 20 % or decrease efficiency by 20%.

The Arizona Legislature, by not enumerating the specific factors to consider or quantifying the factors, left it for the trier of fact to decide what factors to consider. This does not mean that factors such as cost or efficiency cannot be considered. Rather, lack of specific factors show that the Arizona Legislature intended for the trier of fact to decide what appropriate factors are to consider. This Court is now asked to decide whether the trial court's decision is justified by any reasonable construction of the evidence presented at trial.

B. <u>Factors to Consider</u>

Defendants-Appellees agree that each case must be decided on a case by case basis. Defendants-Appellees, however, disagree with Amicus' position that certain factors should be dispositive on the analysis.

Amicus' argument that a homeowner who ignores the approval process should not prevail is without merit. The enforcement of restrictive covenants through an injunction is not a matter of right, but is governed by equitable principles. Ahwatukee Custom Estates Mgmt Ass'n v. Turner, 196 Ariz. 631, 635, 2 P.3d 1276, 1280 (App. 2000). Equitable considerations include the relative hardships and injustice; the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other remedies. Id. Whether a homeowner first sought approval, while relevant to the analysis, should not be the dispositive factor as suggested by Amicus.

Of course, it is desirable that homeowners and associations attempt to arrive at a mutually acceptable resolution without resorting to litigation. However, each case must be examined on its own merit. Some associations may deny the application without properly investigating the alternatives. For example, Garden Lakes Community Association insisted the Madigans move the panels to the ground without ever investigating whether the Madigans' backyard was sufficiently large to accommodate the panels. Some associations point to unproven alternative design products in denying the industry roof mounted panels.[1] Some associations may unreasonably delay the approval process. Some

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[1] There are numerous unproven solar products such as attic mounted pool heater referenced in footnote 1 of the Amicus Brief. The device is essentially a

homeowners simply may not know that permission is required. For example, Defendants-Appellees Madigan did not know that permission was required. After receiving the violation notification, Madigans attempted to work with the association to find solar panels which would meet the association's guidelines. The association refused to cooperate and instead instituted this lawsuit. Defendants-Appellees Speak submitted an application and were denied. Garden Lakes, with over 2000 homes, have never approved a solar installation.

The subjective desires of homeowners, standing alone, also should not be the dispositive factor. However, the reasons why a homeowner wants solar devices must be considered in the totality of circumstances. For example, Mr. Speak wants to heat the pool so he can exercise in water to alleviate pain. To that end, Mr. Speak uses the swimming pool year around, including the coldest months of December and January. Thus, the Speaks' solar panels must be mounted in a location with direct sun light in December and January – when the

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radiator mounted inside the attic. In theory, the warm attic air circulating through the radiator (containing pool water) will heat the pool water. Many HOAs point to this device as a viable alternative in denying roof mounted solar panels. The device, however, is prone to leaks due to corrosion caused by the pool chemicals. A corroded radiator can dump the entire content of a swimming pool inside the attic. In addition, Garden Lake Community Association's own expert, in his deposition, expressed skepticism regarding technical feasibility of the attic mounted pool heater. Therefore, the technical feasibility or the flood danger of such a design was never presented to the trial court.

sun is at its lowest. In contrast, someone who merely wants the heated pool for occasional recreational purpose may forego swimming in the coldest months of December and January. Thus, the subjective reasons may be critical on where the panels could be located.

Moreover, the Amicus' argument regarding a hypothetical owner who does not want a solar panels to replace a flower garden is equally flawed. In certain circumstances, solar panels, while on a suitable location for purposes of providing heat, may cover all of the windows on a side of the house.[2] In other cases, a recently moved homeowner may be forced to cut down all mature shade trees in the backyard (thereby removing energy saving shade in summertime) to accommodate solar panels. Whether forcing a homeowner to cover all of windows with opaque solar panels or cut down all shade trees in the yard to accommodate ground mounted solar panels constitutes an effective prohibition must be decided by the jury.

Amicus is also wrong regarding the importance of the cost and economic factors. The cost of using a solar product and designs (which meet the HOA's

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[2] In fact, Garden Lake Community Association's expert suggested mounting solar panels on the south facing outside wall of the Speaks' house. Such installation would have covered all of the south facing windows in the Speaks' home. The expert conceded, however, the panels still would be visible from the public area and therefore violate the architectural guidelines.

requirements) compared to other types of power must be considered. The main reason why consumers want to use solar power is the cost advantage. If the HOA's requirements drive up the costs of using solar energy higher than other types of power, then most consumers may make the economic decision to use other types of power. Such HOA requirements effectively prohibit solar energy. Or, at least, the jury should be allowed to decide whether the HOA requirements are effective prohibition.

The price that average consumers are willing to pay for solar products, standing alone, may not shed the light on whether a HOA effectively prohibit solar energy use. However, when other cost factors such as the cost of meeting HOA requirements (added to the price of the solar product), and the cost of using other energy sources, are combined, the price becomes relevant. For example, the cost of meeting the HOA requirements and the price of solar product, added together, may still be lower than the price average consumers are willing to pay for solar product or the cost of using other energy sources. In such a case, the trier of fact may be correct to decide that the HOA's requirements do not effectively prohibit the use of solar energy. In this case, however, the cost of meeting the Garden Lake Community Association's guidelines in the Speaks' home was far above the price average consumers are willing to pay for a solar

product. The trial court correctly decided that the guidelines effectively prohibited solar energy use in the Speaks' home.

Defendants-Appellees agree that individual economic circumstance should not be an important factor. But see Ahwatukee Custom Estates Mgmt Ass'n v. Turner, 196 Ariz. 631, 635, 2 P.3d 1276, 1280 (App. 2000) (equitable considerations include the relative hardships). The price of the homes in the neighborhood may be a factor that may assist the jury in determining whether the cost of meeting the HOA requirements is cost prohibitive.

It is virtually impossible to come up with an exhaustive list of factors to be considered. Each case must be examined individually. In this case, the trial court examined all the facts presented at the trial and decided that Garden Lakes Community Association effectively prohibited the use and installation of a solar energy device in the Speaks' home.

C. HOA Boards' Decisions Do Not Merit Deference.

Amicus makes a startling proposition that this Court adopt a rational basis or abuse of discretion standard in reviewing HOA boards' decisions. Such deference is unprecented and dangerous. Such broad deference would allow HOAs to enforce their own views of the federal and state statutes, regulations, CCRs with the guarantee of deferential treatment if challenged.

An abuse of discretion standard is used in an appeal from an administrative decision pursuant to the Administrative Review Act, A.R.S. §§ 12-901 to 12-914. See Berenter v. Gallinger, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992). The administrative decision, however, is subject to full procedural due process pursuant to the Administrative Procedures Act, A.R.S. §§ 41-1001 to 41-1092.12. No such safeguard exists for HOA boards' decisions. HOAs are not required to render a written decision. HOAs are not required to grant a hearing for homeowners to contest boards' decisions. There is no right to present evidence or cross-examine. There is no requirement that the boards' consideration be recorded or open to the members. There is simply no procedural requirements to safeguard homeowners' rights. Deference is not warranted.

VI. CONCLUSION

The issue in this case is whether the trial court was correct in its factual determination. The Arizona Legislature, in enacting the solar decision, did not enumerate specific factors or a quantitative bright line. Thus, the Legislature left it to the trier of fact to decide what factors to consider. Guidelines setting forth the factors to be considered certainly would be helpful to homeowners and 10,000 HOAs facing the conflicting interests of using renewable resources versus

enforcement of deed restrictions. However, Defendants-Appellees respectfully request this Court make its decision based on the evidence presented at trial.

RESPECTFULLY SUBMITTED this 4th day of September, 2001.

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CERTIFICATE OF COMPLIANCE

I, Hyung S. Choi, counsel for Defendants/Appellees, hereby certify, pursuant to Rule 14, Arizona Rules of Civil Appellant Procedure, that the foregoing Brief is double spaced except that headings and footnotes may be single spaced and quotes more than two lines long may be indented and single spaced, and that the typeface of the foregoing Brief is a proportionate typeface, Times New Roman, with a point size of 14 points, and consists of approximately 2,000 words excluding the table of contents, table of citations, certificate of service, certificate of compliance and any appendices as counted by the word processing system used to prepare this brief.

RESPECTFULLY SUBMITTED this 4th day of September, 2001.

Hyung S. Choi - #015669

CERTIFICATE OF SERVICE

I, Hyung S. Choi , hereby certify that on the 4th day of September, 2001, an original and six copies of this Brief were filed with:

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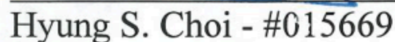

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