DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

GARDEN LAKES COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation, Plaintiff/Appellant, v. 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** **Department B** Maricopa County Superior Court Nos. CV1997-004796 & CV1997-005359 (Consolidated)

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Appellant Garden Lakes Community Association

APPELLANT'S PETITION FOR REVIEW

THOMAS & ELARDO, P.C.
Neal B. Thomas, Esq. (#011336)
2700 North Central Avenue, Suite 800
Phoenix, Arizona 85004
602.604.7503

MULCAHY LAW FIRM, PC
Beth Mulcahy, Esq. (#017005)
3003 North Central Avenue, Suite 1200
Phoenix, Arizona 85012
602.241.1093
Attorneys for Appellant/Petitioner Plaintiff

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I. INTRODUCTION.

Petitioner, Garden Lakes Community Association, Inc. (the "Association") petitions this Court for review of the opinion issued by Division One of the Arizona Court of Appeals on February 18, 2003. The central issue to this Petition is whether the Architectural Review Committee (ARC) Guidelines "effectively prohibits" solar energy devices (SEDs) pursuant to A.R.S. § 33-349(A). While the Court of Appeals correctly concluded that the burden of proving "effective prohibition" falls upon a homeowner, the Court created a standardless, burdensome list of factors to define "effective prohibition" and then failed to apply the factors. It sets forth for the first time the parameters that are generally available to litigants and seeks to illustrate by way of this litigation how the it came to the conclusion that the trial court's decision should be upheld. Also, in doing so, the Court of Appeals completely forgot that the statute speaks to the restrictions imposed. A case-by-case basis analysis that should pertain to neighborhoods, is in reality a "house by house" evaluation.

Additionally, the factors lead to one dangerous conclusion. When evaluating such proposals by a homeowner, the Association must inquire as to the "wealth" of the homeowner. SED costs of installation must be compared to property value, and a typical homeowner's willingness to spend. This of course requires an ability to spend. The Association now has a heavy handed duty when considering SED installation and its cost.

II. STATEMENT OF THE ISSUES.

A. Issues decided by the Court of Appeals before this Court.

1. Whether the Association may, consistent with A.R.S. § 33-439(A), disallow the installation of solar energy devices and mandate their removal for non-compliance.
2. What does "effectively prohibit," pursuant to A.R.S. § 33-439(A), actually mean, or require as an appropriate standard?
3. Whether the undisputed evidence establishes an effective prohibition of the use of solar energy devices.

B. Issues not decided by the Court of Appeals that may need to be reviewed.

1. Whether this Court must give deference under the Business Judgment Rule for a reasoned, non-arbitrary decision based upon established guidelines.

III. STATEMENT OF MATERIAL FACTS.

A. General Background.

The Association is an Arizona non-profit corporation and the Speaks, as homeowners, are members of the Association. Homeowners that purchase property are provided with information about ARC approval being necessary for any exterior alterations. Homeowners are notified of a management office and the ability to obtain copies of ARC Guidelines from a property manager. The homes range in value from $150,000 to $250,000 (**Appendix 1,** pp. 25-26).

The Speaks submitted an application to the ARC on or about January of 1997. (**Appendix 2**).[1] During the submission period the Speaks submitted correspondence indicating that they would be installing the solar roof panels immediately. (**Appendix 3**). At this time the ARC notified the Speaks and strongly advised against the installation without approval, but Speaks nevertheless placed the solar roof panels on the roof before receiving any approval. (**Appendix 4,** pp.96-97). Thereafter, a finding of noncompliance because of visibility from neighboring properties, lack of screening and lack of integration was made by the Association (**Appendix 4**, p. 98). No variance was ever requested by the Speaks. (**Appendix 4**, p. 101).

B. The restrictions to and the process for the installation of solar panels.

The Speaks purchased their lots and accepted deed subject to a declaration providing that exterior appearance may not be altered unless an Architectural Committee has reviewed and approved the work (**Exhibit 1, Slip. op.,** pp. 2-3). In furtherance of this duty, the Association established an Architectural Review Committee (ARC) and Architectural Review Guidelines (Guidelines). The Guidelines addressed the appearance of solar panels and equipment establishing that SEDs Visible from Neighboring Property[2] or public view must be approved, panels should be integrated and mounted directly to a roof, appropriately screened, and that the criteria for screening must meet the Machinery and Equipment Provisions of the Guidelines (**Id,** p. 3). The Machinery

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[1] We omit any reference to the Madigans as they were dismissed after removing their SEDs before trial. (**Appendix 4**, p. 33).

[2] "Visible from Neighboring Property" is a term of art. The CC&Rs define this term to mean "with respect to any given object, that such object is or would be visible to a person six feet tall, standing at ground level on neighboring property." (Trial Exhibit 3, p.6).

and Equipment sections essentially provide that screening or concealment shall be integrated architecturally both vertically and horizontally with the design of the homes. (**Id**, p. 3).

C. The Solar Panels at Issue.

The Homeowners had solar energy devices installed on their roofs. Mr. Speak agreed that his panels are visible from the neighboring properties and public view and that they are in violation of the Guidelines. (**Appendix 3**, pp.55-56). Speak knew approval was needed but decided he was protected by the statute (**Id,** pp. 51, 55). Speak had heard about solar panels for heating his pool from a flyer. (*Id*., p.47). Speak did not consider patio covering for his property due to the expense, (*Id*., p.44-45), but did install a swimming pool near the time of purchase. (*Id*., p.45).

A persistent salesman convinced Speak to purchase a SED. (*Id.*, pp.48-49). Speak was told that the retailer would be responsible for some attorneys' fees, if needed. (*Id*., pp.52-53).[3] Attorneys' fees were also paid by another solar industry group. (*Id*., pp.52 and 57).

The Association provided expert testimony relating to solar collector options. (**Appendix 1,** pp. 43, 125). Robert Hammond, has twenty years of experience with solar energy and has installed solar modules and solar cells in addition to examining the Madigan and Speaks home. (*Id*., p.46). Hammond described two methods for installing solar energy devices on the properties. One such option includes constructing a patio roof with screening to preclude visibility. (*Id*., p.50). This is a typical way to meet the Guidelines. (*Id*., p.51). The second option was a screening wall on three sides. (*Id*., p.51).[4] Yet, another expert, a structural engineer, testified that SEDs on patio covers or roofs with screens were feasible. (*Id.,* pp. 126, 137, 144). The Association provided installation cost estimates for patio covers and screening walls for each residence ranging from $4,000 to $5,500 (*Id.,*pp. 134-135, 140-141). Speak in fact admitted he never considered any options whether they be a screening wall option or a patio cover options. (**Appendix 5**, p. 57).

The Court of Appeals all but ignored and failed to mention testimony presented by the homeowner's expert. (*See generally*, **Appendix 7**, p.62, *et seq*). Gilchrist was familiar with screens

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[3] In other words, this was a test case for the industry and Speak from its inception.

[4] The ARC has approved screening walls placed on roofs to screen swamp coolers that are linked aesthetically with the home and blends into the design of the home. (**Appendix 4,** pp.78, 102-103, *see also* Trial Exhibit 39).

installed on the top of a roof to conceal solar panels and had seen such a design before. (*Id.*, p.66). Gilchrist has successfully constructed a screen wall to conceal solar panels that pleased another homeowners association in Scottsdale (*Id.*, p.83), Gilchrist was familiar with solar panels used on a patio cover and had seen such an installation before. (*Id.*, p.68).

Additionally, Gilchrist agreed that the panels only extend the swimming period a couple of months from either end of the swimming season. (*Id.*, p.69). Consequently, Gilchrist was in agreement with Hammond that the temperature is too cold and there is never enough sunlight to effectively heat a pool during the months of December, January and February. (*Id.*, p.116). Gilchrist agreed that black panels are more efficient (*Id.*, p.84). He also agreed that if screens reduce efficiency either panels may be moved up a roof or more panels added to compensate. (*Id*).

Finally, Gilchrist agreed that solar collectors may be placed on patio covers and that a pool can be heated adequately by solar panels on a patio roof/cover. (*Id.*, pp. 84-85). **Gilchrist agreed that homeowners could install SEDs on top of the patio cover/roof so long as they had the appropriate budget**. (*Id.*, p.85).

IV. ARGUMENT.

A. The reasons this Petition for Review should be granted.

This Petition clearly meets the criteria set forth in Rule 23, A.R.C.A.P. for the acceptance of a petition for review. This is the first enunciation of the interpretation of A.R.S. § 33-349(A), and therefore no Arizona decision controls the point of law in question. More importantly, substantial issues of first impression and statewide importance are often granted by this Court. See, for instance, McDonald v. Thomas, 202 Ariz. 35, 40 P.2d 819 (2002); R.L. Augustine Construction Company, Inc. v. Peoria Unified School District No. 11, 188 Ariz. 368, 936 P.2d 554 (1997).

B. The Court of Appeals created a standardless, ineffective *ad hoc* house by house definition of effective prohibition, which should be rejected by this Court.

The Court of Appeals made no attempt to determine the meaning of "effective prohibition." Webster's Ninth Collegiate Dictionary (1987) defines "prohibit" as "to forbid by authority such as enjoined, or to prevent from doing such as to preclude" and defines "effective" as "producing a decided, decisive or desired effect." The Court of Appeals summarily rejected what this Court has stated repeatedly, that the plain meaning is to be employed when interpreting Arizona's statutory law. (See Scheele v. Justices of Supreme Court of Arizona, ____ Ariz. ____, 57 P.3d 379 (2002);

Hughes v. Jorgenson, ____ Ariz. ____, 50 P.3d 821 (2002)).

The definition of these two words can be summarized as inevitable preclusion, a desired prevention, or some other combination of words that means the deed restrictions "make it too difficult to have SEDs." That definition is not met by the homeowners' evidence. Moreover, to make matters worse, the Court of Appeals effectively "wrote a book" when suggesting that effective prohibition involves a factor analysis without any regard whatsoever to the words contained in the statute. Indeed, by rejecting a "new alternative definition" of effective prohibition, the Court of Appeals made it worse.

As we will later detail, the Court not only created an essentially standardless *ad hoc* house by house, as opposed to a restriction by restriction, standard, it also ignored the specific statutory directive. What this Court should understand is that no decision was made by the ARC that passed upon any attempt whatsoever to comply with the ARC Guidelines promulgated as a result of the CC&Rs specifically controlled by the limitation of A.R.S. § 33-439(A).

Incorrectly, the Court of Appeals is examining the evaluation of the statutory limitations suggesting that the trial court found that the ARC Guidelines combined with the Association's conduct effectively prohibited the Speaks from placing SEDs on their residences (Slip. Op., ¶ 7). This Court should be reminded that the Association was forced to go to court because the Speaks made no attempt whatsoever to comply with any aesthetic guidelines mandated by ARC. No aesthetic accommodation was even suggested by Speak. Under the facts of this case, effective prohibition is ignored and any homeowner may act with impunity.

While the Court of Appeals correctly concluded that the burden of establishing that the ARC Guidelines "effectively prohibited" the SED is the homeowners, (Slip. Op., ¶20), the Court of Appeals fell into the trap created and bolstered by the trial court decision relating to a cost analysis, giving lip service to the burden but completely ignoring the evidence. The words of opinion lead to no conclusion other than that the burdens of SED review and recommendation are placed not upon the homeowner, but upon the Association. There are thousands of homeowners associations in Arizona and apparently the Court of Appeals deems them to have solar energy expertise. Yet this Court completely ignored the fact that the homeowners' expert testified that the SED could meet the Guidelines of visibility and aesthetic integrity, except for budgetary concerns.

The Court of Appeals never suggested that the Guidelines as written effectively prohibit, inevitably preclude, or otherwise make it overwhelmingly difficult to further a stated policy encouraging the use of SEDs. Yet, the Court of Appeals overstates the statutory intent by noting tax incentives and a statute. The statute's words express the intent and it is clear that the homeowner has a high burden; a burden of "effective prohibition." As a simple matter of statutory interpretation and public policy evaluation, the Court of Appeals ignores the fact that legislation begins with the basic proposition that deed restrictions may at a minimum restrict and regulate solar energy devices.

Based upon the evidence offered by the homeowners' own expert, it is obvious that the Association clearly established that there are alternatives, albeit perhaps not perfect, on the record as recited by the Court of Appeals. Nevertheless, the homeowners and the solar industry, which supported the homeowners' litigation costs through payment of attorneys' fees, made absolutely no attempt whatsoever to establish any possible accommodation of the Guidelines.

To make matters worse, the Court of Appeals then suggests no less than ten factors that in reality becomes a "house by house" interpretation of the Guidelines. While each guideline will be discussed in turn as applicable to both this litigation and litigation in general, this Court should realize that the overriding principle to be interpreted is basically, when is the increased cost too much? In a time when homeowners associations are coming under ever increasing scrutiny, this decision virtually mandates that homeowners associations pry into the affairs of the homeowners to evaluate that the cost burden alleged to be unworkable by a particular homeowner. When is it too expensive for the homeowner (who may have the wherewithal to purchase an expensive sports utility vehicle, may possess appropriate liquid financial resources, or may have the ability due to the cost of and equity in the home to easily refinance) to say that the Guidelines regarding the SEDs are unworkable? On the other hand, does the relatively speaking "poor" homeowner (who may be in a less expensive subdivision, perhaps on a fixed income, or otherwise just intends to continue with miserly ways) stand to be told that they may or may not be permitted to use SEDs given the house by house factor analysis proposed by the Court of Appeals?

The Court of Appeals does its best to avoid the importance of cost. Yet the Speaks, over objection, were allowed to show fixed income, the amount a typical homeowner would spend and

bicker about the added costs. The Speaks chose this community and it has aesthetic Guidelines.[5] Those Guidelines are all but ignored.

Our courts have recognized the importance of the contractual relationship between a subdivision's property owners as a whole and individual landowners, when homes are subject to restrictions such as those before this Court, noting clear and unambiguous restrictions are generally enforceable. Duffy v. Sunburst Farms East Mutual Water & Agricultural Co., 124 Ariz. 413, 604 P.2d 1124 (1979); Horton v. Mitchell, 200 Ariz. 523, 29 P.3d 870 (App. 2001); and Arizona Biltmore Estates Association v. Teak, 177 Ariz. 477, 868 P.2d 103 (App. 1993). Other state's courts have recognized the need for aesthetic continuity and the legal support to be given deed restrictions. See O'Buck v. Cottonwood Village Condominium Association, 750 P.2d 813 (Alaska 1988); Dunlap v. The Pavilion Village Condominium Association, 780 P.2d 1012 (Alaska 1989).

In fact, Arizona has specifically recognized that homeowners associations must exercise their authority to approve or disapprove construction or improvement plans in conformity with deed restrictions as have courts in other states. See Gfeller v. Scottsdale Vista North Townhouse Association, 193 Ariz. 52, 909 P.2d 658 (1988) (duty to prevent any modification under CC&Rs, and Cohen v. Kitehill Community Association, 142 Cal.App.3d 642, 191 Cal.Rptr. 209 (1988) (homeowner sued homeowners association for not acting in accordance with CC&Rs and allowing alleged approval of non-conforming fence).

The Association suggests that the "factor analysis" unduly broadens and amplifies the term "effective prohibition," which on the one hand provides for *ad hoc* determinations, but on the other hand gives the power, and perhaps the duty, to homeowners associations to obtain (as part of their analysis as to whether particular SEDs are to be permitted) the intimate financial details of each homeowner seeking the installation of SEDs. If cost is to be a factor, such as the value of a home, then is not the wherewithal of every homeowner subject to the evaluation?

C. Applying these factors, the Association should prevail.

We evaluate the factors to demonstrate that not only was the Court of Appeals decision wrong, but the substitution of a number of factors for the definition that "effective prohibition" is

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[5] Attached hereto is the Avondale City Ordinance, Section 202(H)(2)(f), p.70. (Appendix 6). They are nearly identical.

unworkable. The opinion sets forth ten factors, which are addressed as follows. (See Slip. Op., ¶ 19).

1. The Content and language of restrictions or guidelines.

The Court of Appeals did not find, or suggest that this factor could militate in favor of finding an effective prohibition in this litigation. The Speaks did not suggest that aesthetic uniformity and, "visible to neighboring property" Guideline requiring integration, and/or screening, are unworkable. In a generic sense, A.R.S. § 33-349(A) specifically contemplates such restriction or guidelines. No attempt to procedurally or substantively comply was made by the Speaks.

2. Association conduct in interpreting and applying the restrictions.

This factor was similarly not questioned. While A.R.S. § 33-349(A) speaks solely to the deed restriction and effectively Applies to the appropriate guidelines. There is no question relating to the conduct of the Association in this instance. The submission process was not followed by the homeowners. Speak admitted he violated the guidelines. No attempt whatsoever to accommodate the restrictions was made, proposed or so much as thought of, as is obvious from both the conduct and resulting actions of Speaks.

3. Practically, are the architectural requirements too restrictive?

This factor is also defeated by undisputed testimony. Once again, the homeowners proposed no application to meet the ARC Guidelines and accordingly failed to meet their burden. Moreover, nothing within the case presented by the homeowners mandates any conclusion that the basic requirement of screening from view is too restrictive too allow SEDs as a practical matter.[6]

4. Whether feasible alternatives utilizing solar energy are available.

The Association proposed general solutions that exist and the amicus brief of Sun City Grand mentioned yet another option of solar attic systems.[7] Indeed, "as a practical matter," the only

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[6] The Court of Appeals interestingly discussed the opinion of a single committee member obtained through discovery relating to the feasibility of screening devices. While efficiency may have been reduced (and one committee member did not like the idea of a screening device on this home) the fact that the Association presented the opportunity establishes a willingness to work with SEDs. Indeed, while the screening structure may not have been desirable, it provided an appropriate and practical solution to permit the use of SEDs. Moreover, the homeowners' own expert testified that any deficiency could be resolved by appropriate spacing on the roof.

[7] Obviously, the technology is ever changing. In response to the amicus brief of Sun City Grand, the homeowners made unsupported allegations that such a system is unworkable for pool heating. There is no reason to believe that warm water generated from attic heat would be

suggestion that aesthetic uniformity could not be accommodated returns to the obvious factor downplayed by the words, but controlling, the result: incurring of costs to accommodate SEDs. This factor also merely suggests looking to the solar industry solutions. There are, put simply, accommodations that can be made. Both experts agree the Guidelines can be met.

5. Alternative design comparable in cost and performance.

This factor was not presented to the Court of Appeals by either party. The amicus did present an alternative attic installation. Indeed, this speaks loudly to the fact that the homeowners made no attempts to dispel the lack of an alternative design to meet their burden. The Association worked with the type of unit proposed by the Speaks. Is the Association to become a designer?

6. The feasibility of making the required modifications.

There is no evidence of non-feasibility, only of dissatisfaction. It does, however, raise the point of who becomes the expert with feasibility options. Are Asssociations to become experts on SEDs to counter-propose homeowners who bear the burden of establishing the effective prohibition? The Association thinks not. Obviously, homeowners can enlist the solar energy experts, experts who should have a strong interest in working with associations, to design to meet aesthetic continuity and integrity. Yet in this case, the opposite occurred. The solar energy community funded, in part, the litigation. The Speaks merely disagreed with the suggestions posed during litigation.

7&8. The extent to which the property at issue is amenable to the required changes; and whether decisions previously made by the homeowner or a prior owner are responsible for limiting or precluding the installation of SEDs rather than the restrictions themselves.

These factors raise the bar in this litigation. Standing alone and in conjunction, these factors render the analysis on a house by house, not an association restriction by association restriction, basis. For instance, in this case the fact that a pool had been placed on the property without consideration of SEDs created complications, particularly relating to the patio cover possibility. Indeed, in this particular litigation these two factors create difficulty for the homeowner and if the restrictions were to be evaluated without regard to any cost analysis, it would lead to one conclusion: SEDs are not appropriate for this particular property because of its particular history. These factors

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insufficient to heat a pool or that appropriate security or that appropriate automatic shutoff devices could not prevent water damage.

can only work in the favor of an association and in this case were ignored by the Court of Appeals.

9. The location, type of housing, and value of the homes in the community.

This factor raises a great many issues. While ostensibly attempting to downplay cost, which is the only true issue in this proceeding, the Court of Appeals actually raised the cost factor to new heights. In footnote 5 of the Opinion, the Court suggests that cost alone should not be dispositive, but suggests that if the cost of complying with the architectural restrictions was $7,500 and that amount was to be applied with home values in the range of $500,000 to $1 million, the trial court could conclude SEDs were not effectively prohibited. The direct imposition of property values and costs renders every conclusion by a trial court to be arbitrary and not subject to appellate court review due to the deference given to fact finders.[8] In this instance the value of the properties at the time ranged from $150,000 to $250,000. Part of the value must be buying in a neighborhood with appropriate aesthetic/visibility requirements.

As a general matter, this factor adds nothing to the analysis other than an arbitrary and capricious license to a trial court. The simple truth is that when cost is involved in the analysis, a comparative consideration is required. Indeed, this raises the question of whether the Association's power is increased to inquire as to financial wherewithal because financial wherewithal has everything to do with the ability of the homeowner to purchase a $250,000 or a $1 million home.

10. Whether the restrictions impose too great a cost in relation to what typical homeowners in the community are willing to spend.

This is far and away the most troubling factor enunciated by the Court of Appeals. Now, what a "typical homeowner in the community is willing to spend" for the appropriate installation of an SED is relevant. Over the Association's objection, the trial court permitted not only evidence of the cost of the SED, but also that the Speaks were on retirement income. Additionally, anecdotal evidence as to the amount homeowners were willing to spend for SEDs was admitted ($4,500), but no consideration was given to evidence of the cost to accommodate the SED. To suggest that such considerations further allow for arbitrary and capricious decision making is an understatement.

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[8] We note that it is unlikely that a jury would ever consider this issue because the statutory restrictions provided by A.R.S. § 33-349(A) would not generally mandate a jury trial because the right did not exist at common law.

Coupled with the Speaks being allowed, over written objection, to claim hardship because of retirement income, evidence permissible in the future should be bank account or spending habits of the homeowner.

Furthermore, the evidence of a "typical homeowner in a community" again raises issues of income status, financial wherewithal, and a host of issues. Moreover, the factor also restates the problem. The community itself, through the Association, determined the appropriateness of the cost factors. If the Association must make design suggestions that will bear a cost, then who can quibble over the suggestions of an ARC or Association. Collectively, they are a "typical homeowner."

11. The factors in sum.

Looking at these factors, it is readily apparent that cost was the only factor driving the litigation with the homeowners. Indeed, the homeowners did not present any evidence, or make any efforts to obtain or seek appropriate aesthetic/visibility accommodations as required by the Guidelines. In fact, the Court of Appeals stresses that cost alone is not to be a dispositive factor. Yet, for cost to have any relevance whatsoever, it must be compared to something.[9]

The foregoing factors enunciated by the Court of Appeals are both generally and specifically inapplicable here. The application of these "factors" in this litigation provides little or no support to the homeowners' claims. Indeed, the Slip. Opinion concludes at ¶ 30 with a determination that SEDs may not be explicitly or effectively prohibited by the guidelines of an association or by an association's interpretation and application of its guidelines. The Association had no such opportunity in this instance and, most importantly, the homeowners made no attempt to prove that the Association was in fact being uncooperative. Merely because the Association proposed alternatives which may provide some disagreement or difficulty, does not permit the conclusion of effective prohibition. The Homeowner's expert conceded as much, recognizing that the only problem was precisely what the Court of Appeals said would not be controlling—"cost."

V. CONCLUSION.

The plain language analysis required for statutory interpretation cannot lead to the conclusion

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[9] The Association concedes that cost in the abstract has some bearing on the issue Nevertheless, cost can only be considered when it would be the equivalent of shocking the conscious or in some respect similar to the axiom that while obscenity may be hard to articulate, it is generally recognized when presented. Here, there has been no such articulation, argument, or even suggestion.

that the heavy burden of effective prohibition has been established by the homeowners. To suggest that "cost alone" for installation of SEDs is never dispositive hides the fact that in order to evaluate cost at all there must be a comparison be it he financial wherewithal of the litigants, the value of the real estate, or the cost of the SEDs.

The Association has both the right and the duty to fairly administer the Guidelines. Here, the homeowners did nothing in furtherance of their obligations in accordance with the Guidelines to propose and engage in dialog regarding an appropriate system. This Court should enter the fray and state an appropriate and workable standard if it decides to ignore the plain meaning of the term "effective prohibition." Put simply, screening devices, slightly raised facades on patio covers, and perhaps even methods that do not involve aesthetic continuity (such as solar attic devices) exist. The ARC Guidelines are workable. The Speaks did not establish that the deed restrictions and the ARC Guidelines "effectively prohibit" SEDs.

Based upon the foregoing, the Association respectfully requests that this Court vacate the Court of Appeals and trial court decisions and enter judgment as a matter of law in favor of the Association. Alternatively, if the far-reaching criteria (especially considering the Speaks production of retirement income information) is to be accepted, fairness dictates that the Association be allowed to litigate the case under the new standard and a new trial should be ordered. In any event, should the Association prevail it respectfully requests an award of attorneys' fees pursuant to Section 7.1 of its CC&Rs, Ahwatukee Custom Estates Management Association, Inc. v. Bach, 193 Ariz. 401, 973 P.2d 106 (1999), and A.R.S. § 12-321.01(A).

RESPECTFULLY SUBMITTED this ______ day of March, 2003.

THOMAS & ELARDO, P.C.

By______________________________
Neal B. Thomas, Esq.
2700 North Central Avenue, Suite 800
Phoenix, Arizona 85004

MULCAHY LAW FIRM, PC
Beth Mulcahy, Esq.
3003 North Central Avenue, Suite 1200
Phoenix, Arizona 85012

Attorneys for Appellant /Petitioner/Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Rule 4, Rules of Civil Appellate Practice, the undersigned certifies that the foregoing Appellants' Answering Brief was filed and served on the 18th day of March, 2003 as follows:

FILED: **Original and six (6) copies delivered to:**

Clerk of the Court
COURT OF APPEALS – DIVISION ONE
1501 West Washington, Room 203
Phoenix, Arizona 85007-3329

SERVED: **Two (2) copies mailed to:**

Hyung S. Choi, Esq.
CHOI & RHEE, PC
401 West Baseline Road, Suite 210
Tempe, Arizona 85283
and
Gerald A. Pollock, Esq.
LAW OFFICE OF GERALD A. POLLOCK
714 East Rose Lane - Suite 100
Phoenix, Arizona 85014 - 1960
Attorneys for Appellees

SERVED: **One (1) copy mailed to:**

Curtis S. Ekmark, Esq.
Ekmark & Ekmark, LLC
6720 North Scottsdale Road - Suite 261
Scottsdale, Arizona 85253
Attorneys for Sun City Grand Community Association, Inc.

COURTESY COPY:

Beth Mulcahy, Esq.
MULCAHY LAW FIRM, PC
3003 North Central Avenue, Suite 1200
Phoenix, Arizona 85012