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**IN THE SUPREME COURT
STATE OF ARIZONA**

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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.)

) Supreme Court Case No.
) CV-03-0091-PR
)
) Court of Appeals Case No.
) **1 CA CV 00-0570**
)
) Maricopa County Superior Court
) Case No. CV97-004796
) Case No. CV97-005359
) (consolidated)
)
)
)

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED JUL 02 2003
EWING GIBBY, CLERK
By *[Signature]*

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

Hyung S. Choi, State Bar 015669
CHOI RHEE & FABIAN, PLC
401 West Baseline Road, Suite 210
Tempe, Arizona 85283
(480) 517-1400

Gerald Pollock, State Bar 000947
714 East Rose Lane, Suite 100
Phoenix, Arizona 85014-1935
(602) 230-2977

Attorneys for Defendants-Appellees

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INTRODUCTION

The Petition for Review should be denied. A.R.S. § 33-439(A) voids and makes unenforceable any deed restriction which “effectively prohibits” the installation or use of a solar energy device. Whether the Appellant Garden Lakes Community Association (“Association”) effectively prohibited solar energy use is a factual issue. The trial court found that the Association did effectively prohibit such use. The Court of Appeals correctly affirmed the trial court’s findings of fact.

The Court of Appeals also correctly interpreted the statute and provided sensible guidelines. The guidelines will encourage cooperation and minimize litigation over restrictions affecting solar energy use.

STATEMENT OF MATERIAL FACTS¹

1. Background Information On Solar Pool Heaters.

A typical solar pool heater collector panel is made of plastic. (Appendix 3, p. 68). The total size of the panel should roughly equal the surface area of the pool. (*Id.*) The panel must be in direct sunlight. (*Id.*, p. 59; Appendix 2, p. 59). The optimum angle is directly perpendicular to the sunlight. (Appendix 3, p. 69).

¹ Neither party asked the trial court to make a detailed finding of facts pursuant to Arizona Rules Civil Procedure 52(a). Therefore, any reasonable construction of facts supporting the trial court’s finding in favor of Homeowners should be used in this appeal. See Berryhill v. Moore, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App.1994).

During spring and fall, the sun is lower in the sky. (Id., p. 70). Therefore, a pitched surface such as a roof is the ideal location for solar panels. (Id.)

A typical solar pool heater system costs around \$4,000 to \$4,500. (Id., p. 30). The main competitors to solar systems are electric pool heating and gas pool heating. (Id., p. 28). At the price of \$4,000, a solar pool heating system will pay for itself in a period of two to three years. (Appendix 2, p. 109). The highest price consumers in the Phoenix area are willing to pay for a solar pool system is \$4,500. (Appendix 3, p. 29).

2. The Association's Restriction On Solar Panels

The Association has an Architectural Review Committee ("Committee") that reviews and approves modifications to the houses in the Association.

(Appendix 1, p. 73). The Committee uses the following written guidelines:

Roof-mounted solar panels and equipment must match the roof material. Panels must be an integrated part of the roof design and mounted directly to the roof plane. Solar units must not break the roof ridge line, must not be visible from public view and must be screened from neighboring property in a manner approved by the Board of Directors or its designee(s).

(Slip Op. ¶ 3). To meet the "integrated part of the roof design" requirement, the solar panels would have to be mounted inside the roof joists. (Appendix 2, p. 83).

The roof tiles must be removed and the solar panels must be mounted directly to

the roof. (Appendix 1, p. 113). This creates a high risk of water leaking between the collector and the roof joists. (Appendix 2, p. 82).

James Howard Barnes, the first chairman of the Committee, testified on behalf of the Association. (Appendix 3, p. 108). Mr. Barnes testified that the Committee used the “black and white” of the guidelines in deciding whether to approve or deny an application. (Id., p. 112). In considering homeowners’ applications, the Committee did not consider the cost of meeting the requirements. (Id., pp. 110 - 111). The Committee felt that cost was not a consideration. (Id., p. 111).

The Committee had never seen a solar panel that was not mounted on the roof. (Id., p. 113). The Committee never investigated to see if such a device was even available, nor did it feel it should have. (Id.) Mr. Barnes testified “since we can put a man on the moon, I’m sure there would be things we could do on the ground as far as heating pools without putting [solar panels] on the roof.” (Id.) Using this flawed logic, the Association has never approved a single solar panel installation. (Id., p. 110).

3. The Madigan’s Solar Panels

Appellees Madigan installed solar panels on their roof without approval.² After the Association sent a notice, the Madigans submitted an application for

² The Madigans did not know approval was needed.

approval. The Committee denied the application because the panels were not integrated into the roof design and were visible to the public. (Appendix 1, p. 87). The Committee suggested that the Madigans move the panels to the ground or use propane. (Id., p. 115). The Committee, however, did not know whether the Madigans' backyard could even accommodate the solar panels. (Id.)

Subsequently, the Madigans wrote a letter to the Association asking for information on solar panels that would meet the requirements. (Appendix 2, p. 39). The Association did not respond. (Id., p. 40). Instead, the Association filed this lawsuit.

4. The Speaks' Solar Panels

Plaintiff Henry Speak is 67 years old and suffers from arthritis. (Appendix 3, p. 43 - 46). Swimming allows him to exercise without pain. (Id.) Using the solar pool heater system, he is able to swim 12 months a year. (Id.)

The Speaks' house is a standard three-bedroom, two-bath, double garage type with a pool in the backyard. (Id., p. 42). The Speaks initially thought they could heat the pool with a pool cover. (Id., p. 47). The pool cover, however, did not work. (Id.) They investigated gas and electric heaters but found the options too expensive. (Id.) They then decided on a solar pool heater. (Id.) With the 25% tax credit, the actual cost of the Speaks' solar pool system came to \$2,620. (Id.)

The Speaks submitted an application to the Association. (Id., p. 50). The Association rejected the application because the panels were not integrated into the roof and were visible to public. (Appendix 1, p. 94). The Association suggested ground mounted solar panels. (Id., p. 95).

The Speaks decided to install the solar panels on the roof because they believed they had a right to do so under A.R.S. § 33-439(A). (Id., p. 51). The Speaks chose terra-cotta colored solar panels to match the red tile roof.

5. Alternative Solar Panel Designs Proposed By The Association

It is uncontested that a ground mounted solar system is not viable because the Speaks' backyard is too small. (Appendix 3, p. 75).

After filing the lawsuit, the Association hired Robert Hammond, a solar expert, to investigate solar pool heater designs which would meet its requirements. (Appendix 2, p. 72). Mr. Hammond came up with the following five designs which he felt would meet the Association's requirements:

1. Construct a patio cover and lay the panels flat on the patio cover;
2. Build a screening wall around the existing panels on the roof top;
3. Mount collectors (panels) on the south-facing wall;
4. Integrate collectors (panels) into dark-colored cool decking; and
5. Drip pool water over the roof tile and return it back to the pool.

(Appendix 4).

Mr. Hammond conceded that Options 3 - 5 were not viable. Much of the evidence presented at trial concerned the feasibility of Options 1 and 2.

Option 1 requires building a patio cover sized 40 feet wide and 14 feet deep. (Appendix 3, p. 73). The Speaks' pool is only six feet away from the house. (Id., p. 72). The proposed patio cover, therefore, would cover over eight feet of the swimming pool. The City of Avondale does not allow patios to encroach into pool setback areas. (Appendix 2, p. 175). Mr. Mikotowicz testified that the cost of building such a patio cover would be \$15.38 per square foot. (Id., p. 134). Thus, the cost of building a patio cover would amount to \$8,612.80 (560 square feet at \$15.38).

Option 2 requires building a vertical screen, 48 feet long by 5 feet high, on top of the tile roof. (Id., pp. 97 and 98). The screen would be made out of metal strips. (Id., p. 139). Although the strips would be arranged like venetian blinds, they would still cause some shading on the solar panels. (Id., p. 100). No one had ever seen such a screen built on a residential roof. Mr. Mikotowicz, the Association's construction expert, had never seen such a screen. (Id., p. 165). John Gilchrist, Appellees' solar expert who has been selling solar systems for 20 years, had never seen such a screen.³ (Appendix 3, p. 75). Mr. Barnes testified

³ Mr. Gilchrist did build a screen on the side and back (not the front as proposed by the Association's expert) of the solar collector to hide the mounting hardware. (Appendix 3, p. 90). Such a screen is very different from the screen in

that to meet the Association's requirements, the entire screen would have to match the stucco of the house. (Id.) Even then, he would not have approved the screen. (Id.) Mr. Mikitowicz estimated \$4,952.00 to build a 32-foot by 5-foot screen, or \$30.95 per square foot. (Appendix 2, pp. 140 and 161). Thus, a 48-foot by 5-foot screen (240 square feet) would cost \$7,428.00.

ARGUMENT

1. Introduction.

The Court of Appeals affirmed the trial court's conclusion that the Association was not entitled to an injunction. In making its decision, the Court of Appeals applied an abuse of discretion standard in reviewing the denial of the injunctive relief, and *de novo* review to the extent the Court of Appeals was required to construe A.R.S. § 33-439(A).

The Court of Appeals, in interpreting A.R.S. § 33-439(A), rejected the Association's paraphrasing of "effectively prohibit" as "inevitable preclusion." Noting that the legislature has adopted a practical, flexible standard that permits many variations of restrictions and effects to be considered on a case-by-case basis, the Court of Appeals provided a list of factors to consider. The Court of Appeals made it clear that its intent was not to predetermine relevancy in any particular case, but rather to provide general guidance.

front of the solar panels proposed by the Association.

The Court of Appeals found that substantial evidence supported the trial court's finding that the Association's restrictions effectively prohibited the installation and use of solar energy devices. The Court of Appeals agreed with the trial court's finding that the alternatives suggested by the Association were not viable. Accordingly, the Court of Appeals affirmed the judgment in favor of homeowners.

2. The Court of Appeals Correctly Interpreted A.R.S. § 33-439(A).

To encourage solar energy use, Arizona legislature has carved out an exception to the general rule that deed restrictions are enforceable contracts.

A.R.S. § 33-439(A) provides:

Any covenant, restrictions or condition contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of, or any interest in, real property which **effectively prohibits** the installation or use of a solar energy device as defined in § 44-1761 is void and unenforceable.

(Emphasis added). At the core of the dispute in this case is what factors are appropriate to consider in determining whether a deed restriction "effectively prohibits" solar energy device.

The Court of Appeals correctly noted that the term "effectively prohibit" does not provide a bright line test. The term, however, does provide a practical, flexible standard that must be considered on a case-by-case basis. See Palos Verdes Homes Association v. Rodman, 182 Cal. App.3d 324, 227 Cal. Rptr. 81

(1986). The factors provided by the Court of Appeals will allow the HOAs to have input while furthering the goal of encouraging the solar energy use.

The list of factors was not exhaustive as shown by use of the word “include” preceding the list of the factors. Thus, there may be other factors to consider in appropriate circumstances. However, the factors suggested by the Court of Appeals will provide guidance in helping the parties resolve disputes before litigation. Moreover, the factors will allow for the consideration of evolving technology and commercially available products as they are introduced.

The Association attacks the factors as “standardless, ineffective *ad hoc* house by house definition.” Petition, at 4. The Association takes particular issue with the inclusion of cost as a factor. However, the cost factor cannot be omitted in considering whether the Association’s restrictions “effectively prohibits” use and installation of a solar energy device. As the Association’s representative noted, we have the technology to put a man on the moon. Given enough money and resources, one could conceivably custom engineer and design a solar system which meets the Association’s requirements – but at what cost?

The evidence shows that a reasonable person would not buy a solar pool heater system if priced over \$4,500.00. Other options such as an electric heat pump system would become more economical. To comply with the Association’s requirements, the Speaks would have to spend an additional \$7,500.00, bringing

the total cost to over \$10,000.00. Such additional cost effectively prohibits solar energy use. The Court of Appeals correctly included the cost as one of the factors to consider.

The Association's argument that the Court of Appeals' opinion forces HOAs to pry into a particular homeowner's financial affairs typifies the Association's heavy-handed approach to simple neighborhood issues. Nowhere does the Court of Appeals opinion suggest that HOAs need to make such an inquiry. In fact, the Court of Appeals specifically noted that the focus of inquiry should be on the motivation of the "average homeowner" within an HOA.

3. The Trial Court Did Not Abuse Its Discretion.

The issuance of an injunction is a matter of judicial discretion, which is subject to reversal only for an abuse of that discretion. Valley Medical Specialists v. Farber, 194 Ariz. 363, 366, 982 P.2d 1277, 1280 (1999). The evidence in the record shows that the trial court's decision to deny the Association's request for a permanent injunction was the proper one.⁴ Such injunction, if granted, would have effectively prohibited the use of solar device in violation of A.R.S. § 33-439(A).

⁴ The Association did not challenge the dismissal of its claim against the Madigans. Issues not clearly raised and argued in a party's appellate brief are waived. Schabel v. Deer Valley Unified School District, 186 Ariz. 161, 165, 920 P.2d 41, 45 (App. 1996).

The trial court correctly denied the injunctive relief. It is undisputed that the Speaks' backyard is too small to accommodate solar panels. The only two design ideas suggested by the Association – the screen and patio cover – are cost prohibitive and impractical.

The Association's self-serving analysis of the factors as applied to this case ignores the evidence presented at the trial.⁵ The Association ignores the impossibility of meeting the "integrated part of the roof design" requirement of its restriction.⁶ Even with the massive structures, the solar panels still would not become an integrated part of the roof design. Thus, the Association's requirements simply cannot be met. The Association also ignores the fact that it filed this lawsuit without even investigating the feasibility of ground mounted systems. In fact, the Association admitted that the monetary fines were sought in the lawsuit with the intention of intimidating its members into compliance.

⁵ Because of the 12 page limitation, Appellees will not engage in item by item response. Appellees notes that the Association was only able to argue each factors because it ignored Rule 6(C) which requires proportionately spaced text to use a typeface of 14 points or more.

⁶ In response to questions by the Honorable Judge Alfred Rogers during a hearing at the early stage of this litigation, the Association asserted that it knew of "solar panel companies that can provide integrated roof designs" and that such designs would not increase the cost greatly. (Appendix 5). At the trial, however, the Association failed to present any evidence showing the availability of solar panels which are integrated part of roof design.

(Appendix 1, p. 18).⁷ The Association's complaint that the only the cost factor was considered is contrary to the evidence in the record.

Building a massive roof top screen or patio over the swimming pool to hide the panels is not practical, feasible or cost effective. The Court of Appeals correctly held that the trial court did not abuse its discretion in denying the injunctive relief sought by the Association.

CONCLUSION

The Court of Appeals correctly affirmed the trial court's denial of the Association's request for a permanent injunction. Accordingly, Appellees respectfully request that this Court deny the Petition for Review and award, pursuant to A.R.S. § 12-341.01, the Appellees their attorneys' fees and costs incurred in responding to the Petition for Review.

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⁷ The Association wasted much efforts to point out that the solar industry contributed a few thousand dollars for Speak's attorney's fees. Although not relevant to the legal issues presented here, it bears noting that the Association spent over \$75,000 in attorneys' fees which it then sought from the Appellees. (Appendix 6). The Association also sought over \$100,000 in monetary fines until the first day of trial. Speaks thus faced the prospect of losing their retirement home and sought assistance from the solar industry. Speaks, living on retirement income, sought and received comparatively minor assistance from the solar industry.

RESPECTFULLY SUBMITTED this 18th day of April, 2003.



Hyung S. Choi, State Bar 015669
CHOI RHEE & FABIAN, PLC
401 West Baseline Road, Suite 210
Tempe, Arizona 85283
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I, Hyung S. Choi, hereby certify that on the 18th day of April, 2003, an original and six copies of this Response were filed with:

Mr. Glen D. Clark, Clerk
ARIZONA COURT OF APPEALS
Division One
Room 203
1501 West Washington Street
Phoenix, Arizona 85007-3329

two copies of this Response were mailed to:

Neal B. Thomas, Esq.
Thomas & Elardo
2700 North Central Avenue, Suite 1500
Phoenix, AZ 85004

and one copy of this Brief was mailed to:

Beth Mulcahy, Esq.
Mulcahy Law Firm
3003 North Central Avenue, Suite 1200
Phoenix, AZ 85012-2915

Curtis S. Ekmark, Esq.
Ekmark & Ekmark, LLC
6720 North Scottsdale Road, Suite 261
Scottsdale, Arizona 85253

Gerald Pollock, Esq.
714 East Rose Lane, Suite 100
Phoenix, Arizona 85014-1935



Hyung S. Choi - #015669