

COURT OF APPEALS, DIVISION ONE
Civil Appeals Docket

1 CA-CV 00-0570

DEPT B
COURT AST JCG NF

CONSOLIDATED:

SHORT CAPTION: GARDEN LAKES V. MADIGAN
COUNTY: MARICOPA
COUNTY NOS: CV 97-004796/CV 97-005359
JUDGE: David Talamante
TRANSFER NOS:
CITATION-1: 62 P.3D 983
CITATION-2:
Date Stayed:
Trans: Place Reinst:
Transfer:

Record Rec:	19-Dec-00	N/A Timely	Y	Bond: N
X Filed:	N	X/Timely:		
Class:	Breach of Contract;	Injunctive Relief		
Notice To Counsel:	3-Jan-01			
Rec Filed:	29-Dec-00			
Open1 Due:	15-Mar-01	Open1 Filed:	21-Feb-01	
Open2 Due:		Open2 Filed:		
ANS1 Due:	9-Apr-01	ANS1 Filed:	6-Apr-01	
ANS2 Due:		ANS2 Filed:		
Reply1 Due:	1-May-01	Reply1 Filed:	1-May-01	
Reply2 Due:		Reply2 Filed:		
Ans/XOpen Due:		Ans/XOpen Filed:		
Reply/XAns Due:		Reply/XAns Filed:		
X/Reply Due:		X/Reply Filed:		
Issue:	1-May-01	Issue List No:	01173	
Oral:	Y	Calendared:	6-Sep-01	
Date:	7-Mar-01	O/A Time:	9:30	
Conf:	N	Under Advisement:	6-Sep-01	
Decision:	18-Feb-03	Decision Type:	OP	
Result:	AF	Percuriam:		
Author:	JCG	Concur:	AST,NF	
Costs Filed:	3-Mar-03	Dissent:		
MR Due:	5-Mar-03	MR Filed:		
Resp MR Due:		Resp MR Filed:		
MR Order	G	MR Order Date:	24-Apr-03	
Cost Obj Due:	17-Mar-03	Cost Obj Filed:	11-Mar-03	
Cost Reply Due:	24-Mar-03	Cost Reply Filed:		
Cost Order:		Cost Order Date:		
Decision Sup:		Date:		
PR Due:	20-Mar-03	PR Filed:	19-Mar-03	
X PR Due:		X PR Filed:		
PR Order:	D	PR Order Date:	2-Jul-03	
Mandate:	22-Jul-03	Terminate:		
Tick1:	MO STAY - WRIT CERT 7/17/03			
Tick2:	RESP AMIC BRF FLD 9/18/01 (GL)			
Comment - 1:	AMIC BRF FLD 8/10/01 (SCGCA); PR TO ASC, 3/21/03			
Comment - 2:	ASC #CV-03-0091-PR;APLEES RESP AMIC BRF FLD 9/5/01			

COURT OF APPEALS
DIVISION ONE

DOCKET ENTRIES

1 CA-CV 00-0570

- 12/29/2000 FILED:RECEIPT, #0002229, \$140.00, Check #1513, Appellant filing fee paid by Beth Mulcahy for Appellant Garden Lakes Comm. Assn.
- 12/29/2000 FILED:INDEX OF RECORD
- 12/29/2000 FILED:FIRST LETTER
- 01/03/2001 FILED:NOTICE TO COUNSEL
- 01/03/2001 FILED:ORDER - This appeal has been selected for assignment to a settlement conference before Appellate Mediator Bruce E. Meyerson on 2/8/01 at 8:30 a.m. in the State Courts Building 1501 West Washington Street, Phoenix, AZ 85007. The Conference shall not exceed two hours in length, IT IS ORDERED that each separately represented party shall submit a completed settlement statement form in an envelope marked "confidential" on/ before 10 days from date of this order. FURTHER, staying the briefing schedule until further order. FURTHER, that each party or representative who is authorized to enter into a binding settlement agreement shall either attend the settlement conference in person or, with the authorization of the settlement judge on good cause shown, be immediately available to participate by telephone. FURTHER, attorney's FAILURE TO APPEAR WITH CLIENT WILL RESULT IN SANCTIONS (Judge Noyes)
- 01/03/2001 FILED:NOTICE OF ASSOCIATION OF COUNSEL (Neal B. Thomas)
- 01/05/2001 FILED:REPORTER'S TRANSCRIPTS (4 vols., 1/11/00, 1/12/00, 1/13/00, 1/14/00)
- 01/05/2001 FILED:NOTICE OF SERVICE OF TRANSCRIPT (Appellant)
- 01/09/2001 FILED:NOTICE OF CHANGE OF ADDRESS (Hyung S. Choi) (Appellees)
- 01/17/2001 FILED:RECEIPT, #0100087, \$70.00, Check #2249, Appellee filing fee paid by Hyung S. Choi for Madigan/Speak
- 01/17/2001 FILED:NOTICE OF FILING SETTLEMENT STATEMENT (Appellees)
- 02/13/2001 FILED:ORDER - that this appeal is returned to the court's docket for resumption of the normal appellate process. FURTHER, that the opening brief is due on/before 3/15/01. (Judge Voss)
- 02/21/2001 FILED:OPENING BRIEF OF APPELLANT GARDEN LAKES
- 03/07/2001 FILED:REQUEST FOR ORAL ARGUMENT (Appellant)
- 04/06/2001 FILED:ANSWERING BRIEF OF DEFENDANTS-APPELLEES MADIGAN AND SPEAK
- 04/11/2001 FILED:ORDER - the clerk of Maricopa County Superior Court has to/ including 4/26/01, to transmit the record on appeal. (Judge Voss)
- 04/26/2001 FILED:RECORD ON APPEAL (Instruments/Minute Entries [11 vols, CV 97-04796; 1 vol, CV 97-05359]; Deposition's [10 vols, John Gilchrist; Tom Brantner; Donald LaMontague; James Howard Barnes; Robert Hammond; Walter M. Mikitowicz; Bruce Bartley; Kelly Dancer; William Madigan; Michael Neary]; Exhibit's [list #1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35,36,37,38,39,40,41,42,43,44,45,46,47,49,54,55,56,57,58,59,64,65,66,68,71,73,74,75,77,78,84,86,87,88,89,96,97,106,107,108,109,110,113,114,115,118,119,120,121,122,123,124,134,135,140,141,147,148,149,150,152,153,154,155,156,162,163,164,165,166,167,168,169,170,175,176,177,178 in small white box])

1 CA-CV 00-0570 DOCKET ENTRIES ... Continued

05/01/2001 FILED:REPLY BRIEF OF APPELLANT GARDEN LAKES
06/05/2001 FILED:ORDER - granting the request for oral argument. (Judge Noyes)
07/23/2001 CLNDR:ORAL ARGUMENT, Dept B, 9-6-01, 9:30 a.m., Courtroom 1, each side 20 mins.
07/31/2001 FILED:NOTICE OF ORAL ARGUMENT - Dept, B, Courtroom 1, 9/6/01 @ 9:30 a.m. Each side has 20 minutes.
08/02/2001 FILED:RECEIPT OF ORAL ARGUMENT, 9/6/01, (signature illegable), paralegal signed 8/1/01.
08/07/2001 FILED:RECEIPT OF ORAL ARGUMENT, 9/6/01, (signature illegible), signed 8/1/01.
08/10/2001 FILED:APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE (Sun City Community Assoc.)
08/10/2001 FILED:AMICUS BRIEF (Sun City Grand Community Assoc.)
08/10/2001 FILED:CERTIFICATION OF FILING (Sun city Grand Community Assoc.)
08/14/2001 FILED:ORDER - approving the Application to file brief as Amicus Curiae. (Dept. B, J. Gemmill, Associate Presiding Judge)
08/14/2001 FILED:RECEIPT OF ORAL ARGUMENT, 9/6/01, Jill D. Hilsinger signed for Gerald A. Pollock, 8/1/01.
08/15/2001 FILED:REQUEST TO PARTICIPATE IN ORAL ARGUMENT (Applicant Sun City)
08/16/2001 FILED:NOTICE OF NO OPPOSITION TO REQUEST TO PARTICIPATE IN ORAL ARGUMENT (Appellees)
08/17/2001 FILED:REQUEST TO RESPOND TO AMICUS CURIAE BRIEF (Appellant)
08/17/2001 FILED:ORDER - denying the Request. (Dept. B, J. Gemmill, Associate Presiding Judge)
08/17/2001 FILED:LETTER, 8/17/01, to R. Maggianetti, COS, RE: We are forwarding the attached document to you as it was inadvertently filed within the record transmitted to the Court of Appeals. Div. 1, Index item #158 "Defendant Carilyn Elmer's Statement of Material Facts in Support of Her Motion for Summary Judgment" (MARICOPA CV 98-09065). (G. Clark, Clerk)
08/20/2001 FILED:ORDER - denying the Request (to respond to amicus curiae brief). (Dept. B, A. Timmer, Presiding Judge)
08/24/2001 FILED:SUPPLEMENTAL CITATION OF LEGAL AUTHORITY (Appellant)
09/05/2001 FILED:NOTICE OF FILING DEFENDANT-APPELLEES' RESPONSE TO AMICUS BRIEF (Appellees)
09/05/2001 FILED:DEFENDANTS-APPELLEES' RESPONSE TO AMICUS BRIEF
09/06/2001 FILED:ORDER - that Appellant may respond to the amicus curiae brief filed by Sun City Grand Community Association, Inc. on/before 9/20/01. (Dept. B, A. Timmer, Presiding Judge)
09/06/2001 FILED:APPEARANCE LIST - ORDER - Under Advisement (Dept. B, A. Timmer J. Gemmill, N. Fidel, Judges)
09/18/2001 FILED:RESPONSE TO AMICUS CURIAE BRIEF OF SUN CITY GRAND COMMUNITY ASSOCIATION, INC.
09/21/2001 FILED:MOTION TO STRIKE APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF (Appellees)
09/26/2001 FILED:RESPONSE TO MOTION TO STRIKE APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF (Appellant)
10/04/2001 FILED:REPLY IN SUPPORT OF MOTION TO STRIKE APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF (Appellees)
10/09/2001 FILED:ORDER - granting in part Appellees' Motion to Strike Appellant's Response to Amicus Curiae Brief. This Court will consider only those portions of Appellant's responsive brief which address issues directly raised in the Amicus Brief. FURTHER, a copy of this Order shall be affixed to the original and each copy of the Response to Amicus Curiae Brief of Sun City Grand Community Association, Inc, filed 9/18/01.

(Dept. B, J. Gemmill, Judge)

- 12/19/2002 FILED:NOTICE OF CHANGE OF ADDRESS (Appellee)
- 02/18/2003 FILED:DHL RECEIPT #867-0259-194
- 02/18/2003 FILED:ORDER - OPINION (AFFIRMED) (Dept. B, Judge Gemmill,
CONCURRING: Judge Timmer, Judge Fidel)
- 02/18/2003 FILED:LETTER, 2/18/03, to Mead Data Central, RE: OPINION filed
2/18/03
- 02/18/2003 FILED:LETTER, 2/18/03, to West Publishing Company, RE: OPINION
filed 2/18/03
- 02/18/2003 FILED:FEDEX RECEIPT, #835848833886, to West Publishing Corp.
- 02/18/2003 FILED:GENERAL DISTRIBUTION LIST
- 03/03/2003 FILED:APPLICATION FOR ATTORNEY FEES (Appellant)
- 03/03/2003 FILED:STATEMENT OF COSTS AND ATTORNEY'S FEES and MEMORANDUM SUPPORT
OF THE STATEMENT (Appellant)
- 03/11/2003 FILED:RESPONSE TO STATEMENT OF COSTS AND ATTORNEYS' FEES (Appellant)
- 03/14/2003 FILED:REPLY IN SUPPORT OF APPELLEES' STATEMENT OF COSTS AND
ATTORNEYS' FEES and SUPPLEMENTAL STATEMENT OF COSTS
(Appellees)
- 03/19/2003 FILED:RECEIPT, #0300516, \$140.00, Check #9431, Petition for Review,
paid by THOMAS & ELARDO, P.C., for Appellant, Garden Lakes
Community.
- 03/19/2003 FILED:APPELLANT'S PETITION FOR REVIEW
- 03/19/2003 FILED:APPENDICES TO APPELLANT'S PETITION FOR REVIEW
- 03/21/2003 FILED:LETTER, 3/21/03, Petition and Appendices for Review to ASC
- 04/23/2003 FILED:ASC ORDER, 4/23/03, Honorable Noel Fidel is appointed to serve
as judge pro tempore and is authorized to participate and sign
decisions on 1 CA CV 00-0570
- 04/24/2003 FILED:ORDER - awarding Appellees their attorney's fees and cost as
follows: Attorneys fees, Choi & Rhee, PLLC \$18,138.38
Attorneys fees, Gerald Pollock \$1,746.00 Costs, Choi & Rhee,
PLLC \$139.67 for total of \$20, 024.05 (Dept. B, Judge J.
Gemmill)
- 07/02/2003 FILED:RESPONSE IN OPPOSITION TO PETITION FOR REVIEW, filed 4/18/03
in ASC.
- 07/02/2003 FILED:APPENDICES TO APPELLEES' RESPONSE IN OPPOSITION TO PETITION
FOR REVIEW, filed 4/18/03 in ASC.
- 07/02/2003 FILED:MOTION FOR LEEAVE OF COURT TO FILE AMICUS CURIAE BRIEF, filed
6/11/03 in ASC.
- 07/02/2003 FILED:ASC ORDER, 7/1/03, #CV-03-0091-PR, ORDERED: motion for leave
of court to file amicus brief = DENIED, FURTHER Appellant's
Petition for Review = DENIED. 6/30/03, FURTHER Request for
Attorneys' Fees [Plaintiff-Appellant Garden Lakes] = DENIED.
FURTHER Request for Attorneys' Fee [Defendant-Appellee Madigan
et at] = GRANTED. Record returned to Court of Appeals Div.
One, Phoenix, 7/1/03.
- 07/22/2003 FILED:LETTER, 7/22/03, Original MANDATE, Copy of Opinion, and Record
returned to Clerk, Maricopa County Superior Court.
- 07/22/2003 FILED:LETTER, 7/22/03, The Bureau of national Affairs, INC. RE:
Case Mandated on 7/22/03, from the Court of Appeals, Division
One, Phoenix.
- 07/22/2003 FILED:LETTER, 7/22/03, Mead Data Central, RE: Opinion filed 2/18/03.
Petition for Review DENIED on 7/2/03 by ASC #CV-03-0091-PR.
- 07/22/2003 FILED:LETTER, 7/22/03, West Publishing Company, RE: Opinion filed
2/18/03. Petition for Review DENIED on 7/2/03 by ASC,
#CV-03-0091-PR.

1 CA-CV 00-0570 DOCKET ENTRIES ... Continued

07/22/2003 FILED:DHL RECEIPT, #7658661931, to Lexis Nexis
07/22/2003 FILED:FEDEX RECEIPT, #841380668950, to West Group

Page 2

1 CA-CV 00-0570

July 23, 2003
MARICOPA COUNTY
SUPERIOR COURT
CV 97-004796/CV 97-005359

A true copy of the foregoing
order was mailed
July 23, 2003 to:

Mr. Neal B. Thomas
THOMAS & ELARDO, P.C.
Suite 800
2700 North Central Avenue
Phoenix, AZ 85004-1112
Co Counsel for Plaintiff-Appellant

Ms. Beth Mulcahy
MULCAHY LAW FIRM, P.C.
Suite 1200
3003 North Central Avenue
Phoenix, AZ 85012
Co Counsel for Plaintiff-Appellant

Mr. Gerald A. Pollock
LAW OFFICE OF GERALD A. POLLOCK
Suite 100
714 East Rose Lane
Phoenix, AZ 85014-1935
Co Counsel for Defendants-Appellees

Mr. Hyung S. Choi
CHOI & RHEE, PLLC
Suite 210
401 West Baseline Road
Tempe, AZ 85283
Co Counsel for Defendants-Appellees

Mr. Curtis S. Ekmark
EKMARK & EKMARK, L.L.C.
Suite 261
6720 North Scottsdale Road
Scottsdale, AZ 85253
Attorneys for Applicant Sun City
Grand Community Association, Inc.

Page 3

1 CA-CV 00-0570

Honorable David M. Talamante, Judge
MARICOPA COUNTY SUPERIOR COURT
Suite 301
125 West Washington Street
Phoenix, AZ 85003

Mr. Michael K. Jeanes, Clerk
MARICOPA COUNTY SUPERIOR COURT
Central Court Building
201 West Jefferson Street
Phoenix, AZ 85003

Philip G. Urry , Clerk
By

Deputy Clerk

FILED FEB 18 2003

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GLEN D. CLARK, CLERK

By R. DeLeon

GARDEN LAKES COMMUNITY ASSOCIATION,) 1 CA-CV 00-0570
INC., an Arizona non-profit)
corporation,) DEPARTMENT B
)
Plaintiff-Appellant,) O P I N I O N
)
v.)
)
WILLIAM E. MADIGAN and JOAN M. MADIGAN,)
husband and wife; HENRY T. SPEAK and)
LAVONNE M. SPEAK, husband and wife,)
)
Defendants-Appellees.)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV 97-004796 and CV 97-005359

The Honorable David M. Talamante, Judge

AFFIRMED

Thomas & Elardo, P.C.	Phoenix
By Neal B. Thomas	
and	
Mulcahy Law Firm, P.C.	Phoenix
By Beth Mulcahy	
Attorneys for Appellant	
Law Office of Hyung S. Choi	Tempe
By Hyung S. Choi	
and	
Law Offices of Gerald Pollock	Phoenix
By Gerald Pollock	
Attorneys for Appellees	
Ekmark & Ekmark, L.L.C.	Scottsdale
By Curtis S. Ekmark	
Attorneys for Amicus Curiae Sun City Grand Community Association, Inc.	

G E M M I L L, Judge

¶1 Homeowners in the Garden Lakes subdivision in Avondale, Arizona are members of the homeowners association known as the Garden Lakes Community Association, Inc. ("Association"). The Association issued architectural restrictions governing the construction and appearance of solar energy devices on homes within the subdivision. The appellee homeowners claimed that the restrictions were unenforceable under Arizona Revised Statutes ("A.R.S.") section 33-439(A)(2000) because the restrictions "effectively prohibited" the homeowners from installing or using solar energy devices. The trial court found in favor of the homeowners. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 William and Joan Madigan and Henry and LaVonne Speak owned homes in the Garden Lakes subdivision. To provide a general plan for the use and enjoyment of the planned community, the Association recorded a Declaration of Covenants, Conditions, Restrictions and Easements for Garden Lakes ("Declaration"). The Declaration applies to all owners of property within Garden Lakes who purchased a lot after the Declaration was recorded on January 28, 1986. The Madigans and the Speaks purchased their lots thereafter and accepted their deeds subject to the following provision in the Declaration:

No improvements, alterations . . . or other work which in any way alters the exterior appearance of any property or improvements thereon . . . shall be made or done . . . unless and until the Architectural Review Committee has, in each such case, reviewed and approved the nature of the proposed work, alteration, structure or grading and the plans and specifications therefor.

The Association established an architectural review committee ("ARC") and architectural review guidelines ("guidelines").

¶3 Guidelines were issued regarding the construction and appearance of solar panels and equipment:

1. All solar energy devices Visible from Neighboring Property or public view must be approved by the Architectural Review Committee prior to installation.

2. 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). Roof mounted hot water storage systems must not be Visible from Neighboring Property. Tracker-type systems will be allowed only when not Visible from Neighboring Property.

3. The criteria for screening set forth in Section III(M) "Machinery and Equipment", shall apply to solar panels and equipment.

(Original capitalization preserved). Under the "Machinery and Equipment" section, the guidelines provided:

[S]creening or concealment shall be solid and integrated architecturally with the design of the building or structure, shall not have the appearance of a separate piece or pieces of machinery, fixtures or equipment, and shall be

constructed and positioned in such a manner so it is level and plumb with vertical building components and shall be structurally stable in accordance with sound engineering principles.

¶4 The Madigans and the Speaks installed solar energy devices ("SEDs") on the roofs of their respective homes without ARC or Association approval. These SEDs included solar panels to collect and transfer heat to their swimming pools. The Association sued the Madigans and the Speaks in separate actions, alleging failure to comply with the guidelines and breach of the Declaration. The Association sought permanent injunctions compelling the removal of the SEDs, monetary penalties, and attorneys' fees and costs. The Madigans and Speaks defended on the basis of A.R.S. § 33-439, arguing that subsection (A) rendered the guidelines void and unenforceable:

Any covenant, restriction 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 § 44-1761¹ is void and unenforceable.

Ariz. Rev. Stat. ("A.R.S.") § 33-439(A) (2000) (emphasis added).

¹ "Solar energy device" is defined as "a system or series of mechanisms designed primarily to provide heating, to provide cooling, to produce electrical power, to produce mechanical power, to provide solar daylighting or to provide any combination of the foregoing by means of collecting and transferring solar generated energy into such uses either by active or passive means." A.R.S. § 44-1761(4) (Supp. 2000).

¶5 The two actions were consolidated. Prior to trial, the Association waived the estimated \$100,000 in fines allegedly owed by the Madigans and the Speaks. Also, William Madigan died before trial and Joan Madigan had the solar equipment removed from the roof of her home. The case was tried to the court with an advisory jury. The court was not asked to make findings of fact and conclusions of law.

¶6 During trial, the court granted judgment as a matter of law in favor of the Madigans. The Association's case against the Speaks was submitted to the advisory jury with special interrogatories.²

¶7 After post-trial briefing, the trial court entered judgment in favor of the Speaks and Madigans. The court found that the Association's guidelines, combined with the Association's conduct, "effectively prohibited" the Speaks from placing solar energy devices on their residence. The court therefore concluded that, based on A.R.S. § 33-439(A), the Association was not entitled

² In response to the interrogatories, the advisory jury found that (1) the Speaks accepted the deed to their property subject to the Declaration; (2) the Speaks did not obtain approval of the ARC prior to installing solar panels on the roof of their home; (3) the Association's guidelines do not effectively prohibit the use of solar energy devices; (4) the Association's guidelines regarding solar energy devices are not reasonable and unambiguous; and (5) there were no viable options available to the Speaks for the installation and use of solar energy. Although finding number (3) appears to favor the Association, the trial court in reaching its final determination reasoned that this finding was based on an inartfully worded interrogatory that was confusing to the jury and further that the jury findings were not binding.

to an injunction enforcing the guidelines regarding solar energy devices. The court also awarded attorneys' fees and costs to the Speaks and Madigans.

¶8 The parties agree that the homeowners did not comply with the architectural guidelines of the Association and did not have the approval of the Association or its ARC for installation of their SEDs. The Association on appeal makes several arguments in support of its fundamental position that the trial court erred in concluding that the guidelines were unenforceable under A.R.S. § 33-439(A). Before addressing the substantive issues presented, we first identify the applicable standards for our review.

STANDARDS OF REVIEW

¶9 Neither side requested that the court make specific findings of fact and conclusions of law pursuant to Arizona Rule of Civil Procedure 52(a), and the court did not, *sua sponte*, make detailed findings. Accordingly, we presume that the trial court found every fact necessary to support its judgment and we will affirm if any reasonable construction of the evidence justifies it. *Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977); *In re CVR 1997 Irrevocable Trust*, 202 Ariz. 174, 177, ¶ 16, 42 P.3d 605, 608 (App. 2002). Although an advisory jury heard the evidence and answered special interrogatories, it is the findings and judgment of the court that are presumed to be correct rather than the jury's answers to the interrogatories. See Ariz. R. Civ. P. 39(n) ("The

answers shall be only advisory to the court."); see also *Merryweather v. Pendleton*, 91 Ariz. 334, 338, 372 P.2d 335, 338 (1962); *Carrillo v. Taylor*, 81 Ariz. 14, 19, 299 P.2d 188, 191 (1956).

¶10 The Association sought an injunction against the Madigans and Speaks. We apply an abuse of discretion standard when reviewing the denial of injunctive relief. *Horton v. Mitchell*, 200 Ariz. 523, 526, ¶ 12, 29 P.3d 870, 873 (App. 2001). However, to the extent that we are called upon to construe A.R.S. § 33-439(A), our review is *de novo*. See *Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz. 610, 614, 925 P.2d 751, 755 (App. 1996).

¶11 With these principles in view, we address the issues raised in this appeal.

ANALYSIS

¶12 The Declaration constitutes a contract between "the subdivision's property owners as a whole and the individual lot owners." *Horton*, 200 Ariz. at 525, ¶ 8, 29 P.3d at 872 (citing *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993)). The Madigans and Speaks purchased their homes subject to the restrictions in the Declaration and the guidelines issued pursuant to the Declaration. See *Duffy v. Sunburst Farms East Mut. Water & Agric. Co.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979). Restrictive covenants and architectural guidelines that are clear and unambiguous are

generally enforceable against the individual homeowners within the association. *Id.* at 416-417, 604 P.2d 1127-28. The Arizona legislature has carved out an exception to the enforceability of these contracts, however, for restrictions that "effectively prohibit" the installation or use of solar energy devices. A.R.S. § 33-439(A).

¶13 The Association argues that § 33-439(A) essentially means that covenants, restrictions, and conditions in deeds, along with guidelines promulgated under them, must lead to the "inevitable preclusion" of the installation of solar energy devices to render such limitations void and unenforceable. The Association contends that the Speaks had the burden of proving that the Declaration and guidelines "inevitably precluded" the installation of their solar heating unit and that they failed to meet that burden of proof. The Speaks respond that the evidence showed that the Association's requirements for installation of the solar heating device either could not be met or added so much cost to the installation that any homeowner would forego solar energy and opt instead for a gas or electric pool heater.

¶14 To decide this case, we must interpret A.R.S. § 33-439(A). Our goal in interpreting statutes is to fulfill the intent and purpose of the legislature. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996); *State v. Christian*, 202 Ariz. 462, 463, ¶ 5, 47 P.3d 666, 667 (App. 2002). We look first to the

plain language of the statute as the most reliable indicator of its meaning. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). To assist in determining the legislative intent, we may also consider the statute's context, language, subject matter, historical background, effects and consequences, spirit and purpose. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

¶15 The Arizona legislature's enactment of laws encouraging the use of solar energy dates back to at least 1974. In that year, the legislature passed a bill allowing amortized deductions for expenditures incurred in the acquisition of any solar energy device designed to produce heat or electricity. 1974 Ariz. Sess. Laws, ch. 165, § 2. In 1977, the legislature added a tax credit for Arizona taxpayers who install solar energy devices. 1977 Ariz. Sess. Laws, ch. 81, § 4.³

¶16 The statute at issue here, A.R.S. § 33-439(A), was enacted in 1980.⁴ The enactment of § 33-439(A) and other solar energy statutes reveals that the legislature sought to encourage the use of solar energy by offering incentives and limiting

³ Currently, Arizona taxpayers can qualify for a tax credit equal to twenty-five percent of the cost of a solar energy device up to a maximum of \$1,000. A.R.S. § 43-1083(A) and (B) (Supp. 2000).

⁴ See 1980 Ariz. Sess. Laws, ch. 39, §§ 2, 13. This statute does not apply to deed restrictions in effect at the time of its enactment. A.R.S. § 33-439(B).

disincentives for the use of SEDs. The legislative history, however, does not reveal the precise meaning and application of the crucial phrase "effectively prohibits."

¶17 While it might be desirable to have a bright-line rule or formula to determine precisely whether a particular restriction effectively prohibits the installation or use of solar energy devices, the legislature has not chosen to provide guidance beyond the phrase "effectively prohibits." The legislature has instead adopted a practical, flexible standard that permits the many variations of restrictions and effects to be considered on a case-by-case basis. See *Palos Verdes Homes Ass'n v. Rodman*, 182 Cal.App.3d 324, 328, 227 Cal.Rptr. 81, 83 (1986) (explaining that whether the homeowners association guidelines were, under the California statute, a "reasonable restriction" on the installation of solar energy units was a question of fact to be determined by the trier of fact).

¶18 We disagree with the Association's argument that "effectively prohibit" must be interpreted as meaning that any restrictions on SEDs must "inevitably preclude" them before the restrictions should be deemed unenforceable. We decline the invitation to provide a new or alternative definition for the phrase "effectively prohibits." Whether a restriction effectively prohibits SEDs is a question of fact to be decided on a case-by-case basis.

¶19 To determine whether a deed restriction effectively prohibits the installation or use of an SED, numerous factors may be relevant. These factors include the content and language of the restrictions or guidelines; the conduct of the homeowners association in interpreting and applying the restrictions; whether the architectural requirements are too restrictive to allow SEDs as a practical matter; whether feasible alternatives utilizing solar energy are available; whether any alternative design will be comparable in cost and performance; the feasibility of making the required modifications; the extent to which the property at issue is amenable to the required changes; 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; the location, type of housing, and value of the homes in the community; and whether the restrictions impose too great a cost in relation to what typical homeowners in the community are willing to spend. By providing this list of potentially relevant factors and by the comments that follow, we do not intend to predetermine relevancy in any particular case. We do intend, however, to provide general guidance to trial courts and parties involved in or anticipating litigation over restrictions affecting SEDs.

¶20 The Association correctly asserts that the burden of proof was on the homeowners to prove that the Declaration and

guidelines effectively prohibited them from installing and using a solar energy device. The "party seeking a right or benefit under a statute bears the burden of proving that he comes within the ambit of the statute." *Harvest v. Craig*, 195 Ariz. 521, 524, ¶ 15, 990 P.2d 1080, 1083 (App. 1999). Applying the applicable standards of review including the required presumption that the trial court found all facts necessary to support the judgment, *supra* ¶¶ 9-10, we conclude that the homeowners met their burden of proof.

¶21 Much of the testimony at trial focused on two alternative designs that the Association argues were feasible and would comply with the guidelines. The Association produced expert testimony supporting the alternatives of constructing a patio cover on the Speaks' home and placing the solar panels on the top of the patio roof or building a screening wall around the existing panels on the roof.

¶22 Regarding the patio cover alternative, the evidence revealed two impediments. First, the Speaks' expert testified that a patio cover large enough to hold the Speaks' solar panels would have to be at least thirteen feet by forty feet. The Speaks' pool is about six feet from the back of their house. The proposed patio cover thus would cover part of the pool. Evidence was introduced that the City of Avondale does not allow patios to encroach into pool setback areas. Second, the Association's construction expert testified that the cost of building a patio cover for the Speaks

would be nearly \$5,000. The cost of installing the solar panels on the patio roof would be an additional expense.

¶23 The other solution suggested by the Association would require the building of an aesthetic screen forty-eight feet long by five feet high on the tile roof to hide the solar panels. The Association's expert opined that the screen could be constructed using louvers -- analogous to venetian blinds -- that could be adjusted to allow the sun to hit the panels. Even with the louvers, however, at some times of the year the screen would cause some shading on the solar panels, thereby decreasing solar efficiency. The vertical supports and other bracing materials would be constructed of wood painted to match the colors in the subdivision and the roof tile.

¶24 The Association's expert admitted that he had never seen this type of screening device on a residential roof. Two other witnesses testified that they had never seen a screen wall of the proposed size built on a residence. Also, a member of the Association's ARC testified that he did not like the idea of screening walls and that to meet the guidelines the screen would have to match the stucco of the house.

¶25 The court was entitled to consider the increased cost in reaching its conclusions. The Association argues that cost should not be considered because to do so would create a varying standard for homeowners desiring to install solar energy devices. According

to the Association, extra installation requirements might be deemed to be within the reach of a wealthy homeowner while the same requirements might be deemed to effectively prohibit a less affluent homeowner from installing the solar devices.

¶26 The cost necessary to comply with aesthetic and architectural restrictions is not, standing alone, dispositive. Because the cost of complying with some restrictions may be so expensive as to effectively prohibit SEDs, however, we conclude that cost is a factor to be considered. The focus of this part of the overall inquiry should be on the motivation of the average homeowner within the association community to install SEDs given the financial burden and potential loss of solar efficiency imposed by the restrictions. The location, type of housing, and value of the homes in the community may be relevant in this inquiry.

¶27 We believe that evidence of cost was properly presented in this case. A distributor of solar pool heaters in Arizona testified that in the Phoenix and Tucson markets, most people will not buy a solar system that costs more than \$4,500. He explained that because solar systems generally cost more than gas and electric heating devices, solar companies must show consumers that they can recoup the difference in three to five years when the fuel costs for the other methods are considered. If the recoupment

period goes beyond five years, most people will not purchase a solar system.⁵

¶28 We conclude that substantial evidence supported the trial court's finding that the Association's guidelines effectively prohibited the installation and use of SEDs. The evidence is sufficient to support a finding that the patio cover was not a viable option for the Speaks because the added expense would have dissuaded homeowners in the community from undertaking the project and the size of the patio cover would have violated applicable city restrictions. The evidence also supports a finding that the proposed screen was no more than an idea that would not work in execution. The decreased solar efficiency and additional cost of the screening provide further support for the court's conclusion.

¶29 Apart from evidentiary issues, the Association argues that we should follow the results in *Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*, 878 P.2d 1275 (Cal. 1994), holding that the condominium association's restriction against keeping cats, dogs, and other animals in the development was enforceable; *O'Buck v. Cottonwood Village Condominium Ass'n, Inc.*, 750 P.2d 813 (Alaska 1988), holding that the condominium association could reasonably

⁵ We emphasize that cost alone should not be dispositive. For example, if the increased cost of complying with the architectural restrictions was \$7500 but the homes in the subdivision ranged in value from \$500,000 to \$1,000,000, the trier of fact might conclude that the increased cost did not effectively prohibit the installation of SEDs.

ban rooftop antennas; and *Dunlap v. Bavarian Village Condominium Ass'n, Inc.*, 780 P.2d 1012 (Alaska 1989), holding that the association's regulation against stored vehicles was reasonable and enforceable. These cases, however, are readily distinguishable because no state law established a public policy preference for allowing homeowners to keep animals, have rooftop antennas, or store old vehicles. In contrast, here we must consider the application of a specific statute, § 33-439(A), that nullifies enforcement of deed restrictions that effectively prohibit the installation and use of SEDs.

¶30 Section 33-439(A) does not eliminate the power of a homeowners association to impose aesthetic and architectural restrictions on the installation and use of SEDs. But SEDs may not be explicitly prohibited or "effectively prohibited" by the guidelines of an association or by an association's interpretation and application of its guidelines.


¶31 Because there was substantial evidence supporting the trial court's ruling that the Association's restrictions effectively prohibited the installation and use of solar energy devices in violation of A.R.S. § 33-439(A), the restrictions as applied in this case are unenforceable and the Association is not entitled to relief. Accordingly, we affirm the judgment in favor of the homeowners.

¶32 The homeowners request an award of their attorneys' fees incurred in defending this appeal. The trial court granted an award of attorneys' fees to the homeowners under A.R.S. section 12-341.01(A) (Supp. 2000). We likewise, in our discretion, award fees to the homeowners under this statute. The amount of the award of fees and costs will be determined after the homeowners comply with Arizona Rule of Civil Appellate Procedure 21(c).




JOHN C. GEMMILL, Judge

CONCURRING:



ANN A. SCOTT TIMMER, Presiding Judge



NOEL FIDEL, Judge

50

RECEIVED
APR 18 2003
CLERK SUPREME COURT

**IN THE SUPREME COURT
STATE OF ARIZONA**

FILED
APR 18 2003
NOEL K. DESSANT
CLERK SUPREME COURT
BY *[Signature]*

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

[Handwritten mark]

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
Cases	ii
Codes	ii
INTRODUCTION	1
STATEMENT OF MATERIAL FACTS	1
1. <u>Background Information on Solar Pool Heaters</u>	1
2. <u>The Association's Restriction on Solar Panels</u>	2
3. <u>The Madigans' Solar Panels</u>	3
4. <u>The Speaks' Solar Panels</u>	4
5. <u>Alternative Solar Panel Designs Proposed by the Association</u>	5
ARGUMENT	7
1. <u>Introduction</u>	7
2. <u>The Court of Appeals Correctly Interpreted</u>	8
<u>A.R.S. § 33-439(A)</u>	12
3. <u>The Trial Court Did Not Abuse Its Discretion</u>	10
CONCLUSION	12
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

Cases	Page
<u>Berryhill v. Moore,</u> 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App.1994)	1
<u>Palos Verdes Homes Association v. Rodman</u> 182 Cal. App.3d 324, 227 Cal. Rptr. 81 (1986)	8, 9
<u>Schabel v. Deer Valley Unified School District</u> 186 Ariz. 161, 165, 920 P.2d 41, 45 (App. 1996)	10
<u>Valley Medical Specialists v. Farber</u> 194 Ariz. 363, 366, 982 P.2d 1277, 1280 (1999)	10
 Codes	
ARIZ. R. CIV. P. 52(a)	1
ARIZ. R. CIV. APP. P. 6(c)	11
A.R.S. § 33-439(A)	1, 5, 7, 8, 10
A.R.S. § 44-1761	8
A.R.S. §12-341.01	12

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. Mikitowicz 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.

///

///

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

AST 2601, MF

Supp

ORIGINAL

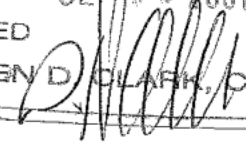
DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

COURT OF APPEALS STATE OF ARIZONA DIVISION ONE

SEP 05 2001

FILED

GLEN D. CLARK, CLERK

By: 

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

DEFENDANTS-APPELLEES' RESPONSE TO AMICUS BRIEF

Hyung S. Choi, State Bar 015669
3910 South Rural Road, Suite B-2
Tempe, Arizona 85282
(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

✓
Rwoks

**COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

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

**DEFENDANTS-APPELLEES'
RESPONSE TO AMICUS BRIEF**

Hyung S. Choi, State Bar 015669
3910 South Rural Road, Suite B-2
Tempe, Arizona 85282
(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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	1
III. STATEMENT OF FACTS	1
IV. ISSUES PRESENTED FOR REVIEW	2
V. ARGUMENT	2
a. The Trier of Fact Must Decide Whether an Effective Prohibition Occurred	2
b. Factors to Consider	3
c. HOA Boards' Decisions Do Not Merit Deference	8
VI. CONCLUSION	9
CERTIFICATE OF COMPLIANCE	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

Case Law	Page
<i>Ahwatukee Custom Estates Mgmt Ass'n v. Turner</i> , 196 Ariz. 631, 635, 2 P.3d 1276, 1280 (App. 2000)	4, 8
<i>Berenter v. Gallinger</i> , 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992)	9
Code	
A.R.S. §§ 12-901 to 12-914	9
A.R.S. §§ 41-1001 to 41-1092.12	9

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. The Trier of Fact Must Decide Whether an Effective Prohibition Occurred.

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. Factors to Consider

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

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

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

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 unprecedented 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.



Hyung S. Choi, State Bar 015669
3910 South Rural Road, Suite B-2
Tempe, Arizona 85282
Attorneys for Defendants/Appellees

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:


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

and two copies of this Brief were mailed to:

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

Mulcahy Law Firm
Beth Mulcahy
3003 North Central Avenue, Suite 1200
Phoenix, AZ 85012-2915
Counsel for Plaintiff-Appellant

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



Hyung S. Choi - #015669

Update

1 Neal B. Thomas, Esq. (#011336)
2 THOMAS & ELARDO, P.C.
3 2700 North Central, Suite 1500
4 Phoenix, Arizona 85004
5 (602) 274-8289 File No. 597-39
6 Attorneys for Plaintiff-Appellant

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

AUG 17 2001
FILED
GLENDA W. GLENK

COURT OF APPEALS

DIVISION ONE

9 GARDEN LAKES COMMUNITY)
10 ASSOCIATION, INC., an Arizona non-profit)
11 corporation,)

11 Plaintiff-Appellant,

12 v.

13 WILLIAM E. MADIGAN AND JOAN M.)
14 MADIGAN, husband and wife; HENRY T.)
15 SPEAK and LAVONNE M. SPEAK, husband)
16 and wife,)

16 Defendants-Appellees.

1 CA-CV 00-0570

Maricopa County Superior Court
No. CV1997-004796
CV 97-005359
(Consolidated)

**REQUEST TO RESPOND TO AMICUS
CURIAE BRIEF**

17
18 Plaintiff/Appellant Garden Lakes Community Association, Inc. did not object to the filing
19 of the Amicus Curiae Brief proposed by Sun City Grand Community Association, Inc., with the
20 following caveat. Sun City Grand Community Association, Inc. does not speak for all the
21 associations and does not speak for Appellant. Consequently, this court should understand that
22 Garden Lakes Community Association, Inc. desires the opportunity to respond to the Amicus
23 Curiae Brief.

24 Garden Lakes Community Association, Inc., recognizes that oral argument is two weeks
25 from the filing of this response and does suggest that the filing of the Amicus Curiae Brief is some
26 what late for an appropriate reasoned response and request that any response to Sun City Grand
27 Community Association, Inc.'s position be scheduled for after the oral argument in this matter.
28

1 Dated this 17th day of August, 2001.

2 THOMAS & ELARDO, P.C.

3
4 By: 

5 Neal B. Thomas
6 2700 N. Central, Suite 1500
7 Phoenix, Arizona 85004
8 Attorneys for Appellant Garden
9 Lakes Community Association, Inc.

10 Original and four copies of the
11 foregoing filed this 17th day of
12 August, 2001 with The Arizona Court
13 of Appeals, Division One.

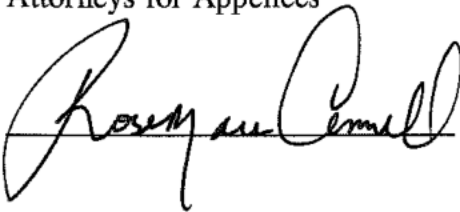
14 Copy of the foregoing mailed
15 this 17th day of August, 2001, to:

16 Curtis S. Ekmark
17 Ekmark & Ekmark
18 6720 North Scottsdale Road
19 Suite 261
20 Scottsdale, Arizona 85253
21 Attorney for Applicant Sun City Grand
22 Community Association, Inc.

23 Beth Mulcahy
24 Mulcahy Law Firm, P.C.
25 3003 North Central Avenue
26 Suite 1200
27 Phoenix, Arizona 85012-2915
28 Attorneys for Appellant Garden Lakes

Hyung S. Choi, Esq.
Law Offices of Hyung S. Choi
3910 South Rural Road, Suite B-2
Tempe, AZ 85282
Attorneys for Appellees

Gerald Pollack
714 East Rose Lane, Suite 100
Phoenix, Arizona 85014
Attorneys for Appellees



1
Key

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED

MAR 19 2003

STATE OF ARIZONA

PHILIP G. URRY, CLERK
By [Signature]

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)

CV-03-0091-PR

FILED
MAR 21 2003
NOEL K. DESSAINT
CLERK SUPREME COURT
BY [Signature]

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*

[Handwritten mark]

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF MATERIAL FACTS. 2

ARGUMENT 4

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

CASES:

<u>Ahwatukee Custom Estates Management Association, Inc. v. Bach</u> , 193 Ariz. 401, 973 P.2d 106 (1999)	12
<u>Arizona Biltmore Estates Association v. Teak</u> , 177 Ariz. 477, 868 P.2d 103 (App. 1993)	7
<u>Cohen v. Kitehill Community Association</u> , 142 Cal.App.3d 642, 191 Cal.Rptr. 209 (1988)	7
<u>Duffy v. Sunburst Farms East Mutual Water & Agricultural Co.</u> , 124 Ariz. 413, 604 P.2d 1124 (1979)	7
<u>Dunlap v. The Pavilion Village Condominium Association</u> , 780 P.2d 1012 (Alaska 1989)	7
<u>Gfeller v. Scottsdale Vista North Townhouse Association</u> , 193 Ariz. 52, 909 P.2d 658 (1988)	7
<u>Horton v. Mitchell</u> , 200 Ariz. 523, 29 P.3d 870 (App. 2001)	7
<u>Hughes v. Jorgenson</u> , ____ Ariz. ____, 50 P.3d 821 (2002)	5
<u>McDonald v. Thomas</u> , 202 Ariz. 35, 40 P.2d 819 (2002)	4
<u>O'Buck v. Cottonwood Village Condominium Association</u> , 750 P.2d 813 (Alaska 1988)	7
<u>R.L. Augustine Construction Company, Inc. v. Peoria Unified School District No. 11</u> , 188 Ariz. 368, 936 P.2d 554 (1997)	4
<u>Scheele v. Justices of Supreme Court of Arizona</u> , ____ Ariz. ____, 57 P.3d 379 (2002)	5

STATUTES:

A.R.S. § 12-321.01(A)	12
A.R.S. § 33-349(A)	1, 4, 8, 10
A.R.S. § 33-439(A)	1, 5

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 Property² 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

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

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

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 to 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

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 Associations 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

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.

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

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 the 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



RECEIVED

FEB 19 2002

THOMAS & ELARDO, PC

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

597-194

FILED FEB 18 2003

GLEN D. CLARK, CLERK

By R. Deenham

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

O P I N I O N

Appeal from the Superior Court in Maricopa County

Cause Nos. CV 97-004796 and CV 97-005359

The Honorable David M. Talamante, Judge

AFFIRMED

Thomas & Elardo, P.C.
By Neal B. Thomas

Phoenix

and
Mulcahy Law Firm, P.C.
By Beth Mulcahy
Attorneys for Appellant

Phoenix

Law Office of Hyung S. Choi
By Hyung S. Choi

Tempe

and
Law Offices of Gerald Pollock
By Gerald Pollock
Attorneys for Appellees

Phoenix

Ekmark & Ekmark, L.L.C.
By Curtis S. Ekmark
Attorneys for Amicus Curiae Sun City Grand
Community Association, Inc.

Scottsdale

G E M M I L L, Judge

¶1 Homeowners in the Garden Lakes subdivision in Avondale, Arizona are members of the homeowners association known as the Garden Lakes Community Association, Inc. ("Association"). The Association issued architectural restrictions governing the construction and appearance of solar energy devices on homes within the subdivision. The appellee homeowners claimed that the restrictions were unenforceable under Arizona Revised Statutes ("A.R.S.") section 33-439(A)(2000) because the restrictions "effectively prohibited" the homeowners from installing or using solar energy devices. The trial court found in favor of the homeowners. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 William and Joan Madigan and Henry and LaVonne Speak owned homes in the Garden Lakes subdivision. To provide a general plan for the use and enjoyment of the planned community, the Association recorded a Declaration of Covenants, Conditions, Restrictions and Easements for Garden Lakes ("Declaration"). The Declaration applies to all owners of property within Garden Lakes who purchased a lot after the Declaration was recorded on January 28, 1986. The Madigans and the Speaks purchased their lots thereafter and accepted their deeds subject to the following provision in the Declaration:

No improvements, alterations . . . or other work which in any way alters the exterior appearance of any property or improvements thereon . . . shall be made or done . . . unless and until the Architectural Review Committee has, in each such case, reviewed and approved the nature of the proposed work, alteration, structure or grading and the plans and specifications therefor.

The Association established an architectural review committee ("ARC") and architectural review guidelines ("guidelines").

¶3 Guidelines were issued regarding the construction and appearance of solar panels and equipment:

1. All solar energy devices Visible from Neighboring Property or public view must be approved by the Architectural Review Committee prior to installation.

2. 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). Roof mounted hot water storage systems must not be Visible from Neighboring Property. Tracker-type systems will be allowed only when not Visible from Neighboring Property.

3. The criteria for screening set forth in Section III(M) "Machinery and Equipment", shall apply to solar panels and equipment.

(Original capitalization preserved). Under the "Machinery and Equipment" section, the guidelines provided:

[S]creening or concealment shall be solid and integrated architecturally with the design of the building or structure, shall not have the appearance of a separate piece or pieces of machinery, fixtures or equipment, and shall be

constructed and positioned in such a manner so it is level and plumb with vertical building components and shall be structurally stable in accordance with sound engineering principles.

¶4 The Madigans and the Speaks installed solar energy devices ("SEDs") on the roofs of their respective homes without ARC or Association approval. These SEDs included solar panels to collect and transfer heat to their swimming pools. The Association sued the Madigans and the Speaks in separate actions, alleging failure to comply with the guidelines and breach of the Declaration. The Association sought permanent injunctions compelling the removal of the SEDs, monetary penalties, and attorneys' fees and costs. The Madigans and Speaks defended on the basis of A.R.S. § 33-439, arguing that subsection (A) rendered the guidelines void and unenforceable:

Any covenant, restriction 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 § 44-1761¹ is void and unenforceable.

Ariz. Rev. Stat. ("A.R.S.") § 33-439(A) (2000) (emphasis added).

¹ "Solar energy device" is defined as "a system or series of mechanisms designed primarily to provide heating, to provide cooling, to produce electrical power, to produce mechanical power, to provide solar daylighting or to provide any combination of the foregoing by means of collecting and transferring solar generated energy into such uses either by active or passive means." A.R.S. § 44-1761(4) (Supp. 2000).

¶5 The two actions were consolidated. Prior to trial, the Association waived the estimated \$100,000 in fines allegedly owed by the Madigans and the Speaks. Also, William Madigan died before trial and Joan Madigan had the solar equipment removed from the roof of her home. The case was tried to the court with an advisory jury. The court was not asked to make findings of fact and conclusions of law.

¶6 During trial, the court granted judgment as a matter of law in favor of the Madigans. The Association's case against the Speaks was submitted to the advisory jury with special interrogatories.²

¶7 After post-trial briefing, the trial court entered judgment in favor of the Speaks and Madigans. The court found that the Association's guidelines, combined with the Association's conduct, "effectively prohibited" the Speaks from placing solar energy devices on their residence. The court therefore concluded that, based on A.R.S. § 33-439(A), the Association was not entitled

² In response to the interrogatories, the advisory jury found that (1) the Speaks accepted the deed to their property subject to the Declaration; (2) the Speaks did not obtain approval of the ARC prior to installing solar panels on the roof of their home; (3) the Association's guidelines do not effectively prohibit the use of solar energy devices; (4) the Association's guidelines regarding solar energy devices are not reasonable and unambiguous; and (5) there were no viable options available to the Speaks for the installation and use of solar energy. Although finding number (3) appears to favor the Association, the trial court in reaching its final determination reasoned that this finding was based on an inartfully worded interrogatory that was confusing to the jury and further that the jury findings were not binding.

to an injunction enforcing the guidelines regarding solar energy devices. The court also awarded attorneys' fees and costs to the Speaks and Madigans.

¶8 The parties agree that the homeowners did not comply with the architectural guidelines of the Association and did not have the approval of the Association or its ARC for installation of their SEDs. The Association on appeal makes several arguments in support of its fundamental position that the trial court erred in concluding that the guidelines were unenforceable under A.R.S. § 33-439(A). Before addressing the substantive issues presented, we first identify the applicable standards for our review.

STANDARDS OF REVIEW

¶9 Neither side requested that the court make specific findings of fact and conclusions of law pursuant to Arizona Rule of Civil Procedure 52(a), and the court did not, *sua sponte*, make detailed findings. Accordingly, we presume that the trial court found every fact necessary to support its judgment and we will affirm if any reasonable construction of the evidence justifies it. *Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977); *In re CVR 1997 Irrevocable Trust*, 202 Ariz. 174, 177, ¶ 16, 42 P.3d 605, 608 (App. 2002). Although an advisory jury heard the evidence and answered special interrogatories, it is the findings and judgment of the court that are presumed to be correct rather than the jury's answers to the interrogatories. See Ariz. R. Civ. P. 39(n) ("The

answers shall be only advisory to the court."); see also *Merryweather v. Pendleton*, 91 Ariz. 334, 338, 372 P.2d 335, 338 (1962); *Carrillo v. Taylor*, 81 Ariz. 14, 19, 299 P.2d 188, 191 (1956).

¶10 The Association sought an injunction against the Madigans and Speaks. We apply an abuse of discretion standard when reviewing the denial of injunctive relief. *Horton v. Mitchell*, 200 Ariz. 523, 526, ¶ 12, 29 P.3d 870, 873 (App. 2001). However, to the extent that we are called upon to construe A.R.S. § 33-439(A), our review is de novo. See *Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz. 610, 614, 925 P.2d 751, 755 (App. 1996).

¶11 With these principles in view, we address the issues raised in this appeal.

ANALYSIS

¶12 The Declaration constitutes a contract between "the subdivision's property owners as a whole and the individual lot owners." *Horton*, 200 Ariz. at 525, ¶ 8, 29 P.3d at 872 (citing *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993)). The Madigans and Speaks purchased their homes subject to the restrictions in the Declaration and the guidelines issued pursuant to the Declaration. See *Duffy v. Sunburst Farms East Mut. Water & Agric. Co.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979). Restrictive covenants and architectural guidelines that are clear and unambiguous are

generally enforceable against the individual homeowners within the association. *Id.* at 416-417, 604 P.2d 1127-28. The Arizona legislature has carved out an exception to the enforceability of these contracts, however, for restrictions that "effectively prohibit" the installation or use of solar energy devices. A.R.S. § 33-439(A).

¶13 The Association argues that § 33-439(A) essentially means that covenants, restrictions, and conditions in deeds, along with guidelines promulgated under them, must lead to the "inevitable preclusion" of the installation of solar energy devices to render such limitations void and unenforceable. The Association contends that the Speaks had the burden of proving that the Declaration and guidelines "inevitably precluded" the installation of their solar heating unit and that they failed to meet that burden of proof. The Speaks respond that the evidence showed that the Association's requirements for installation of the solar heating device either could not be met or added so much cost to the installation that any homeowner would forego solar energy and opt instead for a gas or electric pool heater.

¶14 To decide this case, we must interpret A.R.S. § 33-439(A). Our goal in interpreting statutes is to fulfill the intent and purpose of the legislature. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996); *State v. Christian*, 202 Ariz. 462, 463, ¶ 5, 47 P.3d 666, 667 (App. 2002). We look first to the

plain language of the statute as the most reliable indicator of its meaning. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). To assist in determining the legislative intent, we may also consider the statute's context, language, subject matter, historical background, effects and consequences, spirit and purpose. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

¶15 The Arizona legislature's enactment of laws encouraging the use of solar energy dates back to at least 1974. In that year, the legislature passed a bill allowing amortized deductions for expenditures incurred in the acquisition of any solar energy device designed to produce heat or electricity. 1974 Ariz. Sess. Laws, ch. 165, § 2. In 1977, the legislature added a tax credit for Arizona taxpayers who install solar energy devices. 1977 Ariz. Sess. Laws, ch. 81, § 4.³

¶16 The statute at issue here, A.R.S. § 33-439(A), was enacted in 1980.⁴ The enactment of § 33-439(A) and other solar energy statutes reveals that the legislature sought to encourage the use of solar energy by offering incentives and limiting

³ Currently, Arizona taxpayers can qualify for a tax credit equal to twenty-five percent of the cost of a solar energy device up to a maximum of \$1,000. A.R.S. § 43-1083(A) and (B) (Supp. 2000).

⁴ See 1980 Ariz. Sess. Laws, ch. 39, §§ 2, 13. This statute does not apply to deed restrictions in effect at the time of its enactment. A.R.S. § 33-439(B).

disincentives for the use of SEDs. The legislative history, however, does not reveal the precise meaning and application of the crucial phrase "effectively prohibits."

¶17 While it might be desirable to have a bright-line rule or formula to determine precisely whether a particular restriction effectively prohibits the installation or use of solar energy devices, the legislature has not chosen to provide guidance beyond the phrase "effectively prohibits." The legislature has instead adopted a practical, flexible standard that permits the many variations of restrictions and effects to be considered on a case-by-case basis. See *Palos Verdes Homes Ass'n v. Rodman*, 182 Cal.App.3d 324, 328, 227 Cal.Rptr. 81, 83 (1986) (explaining that whether the homeowners association guidelines were, under the California statute, a "reasonable restriction" on the installation of solar energy units was a question of fact to be determined by the trier of fact).

¶18 We disagree with the Association's argument that "effectively prohibit" must be interpreted as meaning that any restrictions on SEDs must "inevitably preclude" them before the restrictions should be deemed unenforceable. We decline the invitation to provide a new or alternative definition for the phrase "effectively prohibits." Whether a restriction effectively prohibits SEDs is a question of fact to be decided on a case-by-case basis.

¶19 To determine whether a deed restriction effectively prohibits the installation or use of an SED, numerous factors may be relevant. These factors include the content and language of the restrictions or guidelines; the conduct of the homeowners association in interpreting and applying the restrictions; whether the architectural requirements are too restrictive to allow SEDs as a practical matter; whether feasible alternatives utilizing solar energy are available; whether any alternative design will be comparable in cost and performance; the feasibility of making the required modifications; the extent to which the property at issue is amenable to the required changes; 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; the location, type of housing, and value of the homes in the community; and whether the restrictions impose too great a cost in relation to what typical homeowners in the community are willing to spend. By providing this list of potentially relevant factors and by the comments that follow, we do not intend to predetermine relevancy in any particular case. We do intend, however, to provide general guidance to trial courts and parties involved in or anticipating litigation over restrictions affecting SEDs.

¶20 The Association correctly asserts that the burden of proof was on the homeowners to prove that the Declaration and

guidelines effectively prohibited them from installing and using a solar energy device. The "party seeking a right or benefit under a statute bears the burden of proving that he comes within the ambit of the statute." *Harvest v. Craig*, 195 Ariz. 521, 524, ¶ 15, 990 P.2d 1080, 1083 (App. 1999). Applying the applicable standards of review including the required presumption that the trial court found all facts necessary to support the judgment, *supra* ¶¶ 9-10, we conclude that the homeowners met their burden of proof.

¶21 Much of the testimony at trial focused on two alternative designs that the Association argues were feasible and would comply with the guidelines. The Association produced expert testimony supporting the alternatives of constructing a patio cover on the Speaks' home and placing the solar panels on the top of the patio roof or building a screening wall around the existing panels on the roof.

¶22 Regarding the patio cover alternative, the evidence revealed two impediments. First, the Speaks' expert testified that a patio cover large enough to hold the Speaks' solar panels would have to be at least thirteen feet by forty feet. The Speaks' pool is about six feet from the back of their house. The proposed patio cover thus would cover part of the pool. Evidence was introduced that the City of Avondale does not allow patios to encroach into pool setback areas. Second, the Association's construction expert testified that the cost of building a patio cover for the Speaks

would be nearly \$5,000. The cost of installing the solar panels on the patio roof would be an additional expense.

¶23 The other solution suggested by the Association would require the building of an aesthetic screen forty-eight feet long by five feet high on the tile roof to hide the solar panels. The Association's expert opined that the screen could be constructed using louvers -- analogous to venetian blinds -- that could be adjusted to allow the sun to hit the panels. Even with the louvers, however, at some times of the year the screen would cause some shading on the solar panels, thereby decreasing solar efficiency. The vertical supports and other bracing materials would be constructed of wood painted to match the colors in the subdivision and the roof tile.

¶24 The Association's expert admitted that he had never seen this type of screening device on a residential roof. Two other witnesses testified that they had never seen a screen wall of the proposed size built on a residence. Also, a member of the Association's ARC testified that he did not like the idea of screening walls and that to meet the guidelines the screen would have to match the stucco of the house.

¶25 The court was entitled to consider the increased cost in reaching its conclusions. The Association argues that cost should not be considered because to do so would create a varying standard for homeowners desiring to install solar energy devices. According

to the Association, extra installation requirements might be deemed to be within the reach of a wealthy homeowner while the same requirements might be deemed to effectively prohibit a less affluent homeowner from installing the solar devices.

¶26 The cost necessary to comply with aesthetic and architectural restrictions is not, standing alone, dispositive. Because the cost of complying with some restrictions may be so expensive as to effectively prohibit SEDs, however, we conclude that cost is a factor to be considered. The focus of this part of the overall inquiry should be on the motivation of the average homeowner within the association community to install SEDs given the financial burden and potential loss of solar efficiency imposed by the restrictions. The location, type of housing, and value of the homes in the community may be relevant in this inquiry.

¶27 We believe that evidence of cost was properly presented in this case. A distributor of solar pool heaters in Arizona testified that in the Phoenix and Tucson markets, most people will not buy a solar system that costs more than \$4,500. He explained that because solar systems generally cost more than gas and electric heating devices, solar companies must show consumers that they can recoup the difference in three to five years when the fuel costs for the other methods are considered. If the recoupment

period goes beyond five years, most people will not purchase a solar system.⁵

¶28 We conclude that substantial evidence supported the trial court's finding that the Association's guidelines effectively prohibited the installation and use of SEDs. The evidence is sufficient to support a finding that the patio cover was not a viable option for the Speaks because the added expense would have dissuaded homeowners in the community from undertaking the project and the size of the patio cover would have violated applicable city restrictions. The evidence also supports a finding that the proposed screen was no more than an idea that would not work in execution. The decreased solar efficiency and additional cost of the screening provide further support for the court's conclusion.

¶29 Apart from evidentiary issues, the Association argues that we should follow the results in *Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*, 878 P.2d 1275 (Cal. 1994), holding that the condominium association's restriction against keeping cats, dogs, and other animals in the development was enforceable; *O'Buck v. Cottonwood Village Condominium Ass'n, Inc.*, 750 P.2d 813 (Alaska 1988), holding that the condominium association could reasonably

⁵ We emphasize that cost alone should not be dispositive. For example, if the increased cost of complying with the architectural restrictions was \$7500 but the homes in the subdivision ranged in value from \$500,000 to \$1,000,000, the trier of fact might conclude that the increased cost did not effectively prohibit the installation of SEDs.

ban rooftop antennas; and *Dunlap v. Bavarian Village Condominium Ass'n, Inc.*, 780 P.2d 1012 (Alaska 1989), holding that the association's regulation against stored vehicles was reasonable and enforceable. These cases, however, are readily distinguishable because no state law established a public policy preference for allowing homeowners to keep animals, have rooftop antennas, or store old vehicles. In contrast, here we must consider the application of a specific statute, § 33-439(A), that nullifies enforcement of deed restrictions that effectively prohibit the installation and use of SEDs.

¶30 Section 33-439(A) does not eliminate the power of a homeowners association to impose aesthetic and architectural restrictions on the installation and use of SEDs. But SEDs may not be explicitly prohibited or "effectively prohibited" by the guidelines of an association or by an association's interpretation and application of its guidelines.

¶31 Because there was substantial evidence supporting the trial court's ruling that the Association's restrictions effectively prohibited the installation and use of solar energy devices in violation of A.R.S. § 33-439(A), the restrictions as applied in this case are unenforceable and the Association is not entitled to relief. Accordingly, we affirm the judgment in favor of the homeowners.


¶32

The homeowners request an award of their attorneys' fees incurred in defending this appeal. The trial court granted an award of attorneys' fees to the homeowners under A.R.S. section 12-341.01(A) (Supp. 2000). We likewise, in our discretion, award fees to the homeowners under this statute. The amount of the award of fees and costs will be determined after the homeowners comply with Arizona Rule of Civil Appellate Procedure 21(c).

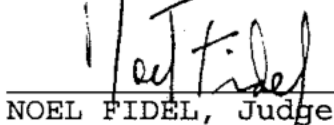


JOHN C. GEMMILL, Judge

CONCURRING:



ANN A. SCOTT TIMMER, Presiding Judge



NOEL FIDEL, Judge