Jonathan A. Dessaules (019439) – jdessaules@dessauleslaw.com
Jacob A. Kubert (027445) – jkubert@dessauleslaw.com
Ashley C. Hill (032483) – ahill@dessauleslaw.com
DESSAULES LAW GROUP
5353 North 16th Street, Suite 110
Phoenix, Arizona 85016
Tel. 602.274.5400
Fax 602.274.5401

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

BOLTON and FLORENCE ANDERSON; SHARON ATWOOD; MICHAEL BAKER; DAVID and DAWNNA BARNES; JEAN BATTISTA; VIRGINIA BAUGHMAN; EDWARD BERGER; OLGA CARLSON; LAVINA DAWSON; CATHERINE FULLER; KENNETH GEGG; MARY GRANSDEN; JOANNE GREATHOUSE; REGINA HECK; RAY and LINDA HICKS; SHERRY JOHNSON-TRAVER, as Trustee of the Sherry Sue Johnson-Traver Trust; SHIRLEY KOERS; SUSAN MARSH; GEORGE and SHERYL MCCLAIN; ELIZABETH MERCER, as Trustee of the Elizabeth Scott Mercer Trust; ARLEF MOYER; JAMES NAPIER; ARTHUR NEAULT, as Trustee of the Arthur D. Neault Living Trust; DIANE PATRAKIS; PETUNIA LLC; CAROLE POPEROWITZ; PAUL and GLORIA RICHMAN; DONNA SIES; GAY SOUSEK; ANNE RANDALL STEWART, as Trustee of the Stewart Trust; THERESE TERRIS; WENDY and CHARLES WOOD; and ANGELO ZAPPELLA, individually and on behalf of the similarly situated,

Plaintiffs,

vs.

RECREATION CENTERS OF SUN CITY, INC., a nonprofit corporation,

Defendant.

No. CV2015-012458

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING APPLICABILITY OF THE PLANNED COMMUNITY ACT

Oral Argument Requested

(Assigned to the Honorable Roger Brodman)

DESSAULES LAW GROUP
5353 North 16th Street, Suite 110
Phoenix, AZ 85016
Tel. 602.274.5400 Fax. 602.274.5401

RECREATION CENTERS OF SUN CITY, INC., a nonprofit corporation,

Third-Party Plaintiff,

vs.

LINDA MOYER and RICHARD STEWART,

Third-Party Defendants.

Introduction

Defendant Recreation Centers of Sun City ("RCSC") objects to the applicability of the Planned Community Act (the "Act") primarily on two grounds. First, it does not want to impute the benefits of membership on all Sun City owners who, pursuant to deed restrictions, must pay assessments to RCSC under threat of foreclosure regardless if they use the facilities or not. Second, RCSC denies its articles of incorporation and Facilities Agreements, though both are recorded, can be among the instruments establishing a planned community. Neither these nor RCSC's other arguments are sufficient to overcome the undisputed facts and controlling law compelling the conclusion that RCSC is a mandatory membership association subject to the Act.

Argument

The Act applies "to all planned communities" and nonprofit corporations established to own and operate portions of a planned community through the imposition of assessments on its members. Sun City is a "planned community" and RCSC is a nonprofit corporation created to own and operate portions of Sun City through assessments that all Sun City owners must pay under the threat of foreclosure. These facts establish as a matter of law that RCSC is subject to the Act.

I. ALL SUN CITY OWNERS ARE MANDATORY MEMBERS OF RCSC.

Although RCSC argues it is not a homeowners association because it does not have mandatory members, RCSC then steps on and contradicts this argument in summarizing its early history:

> [Sun City Civic Association] encountered financial difficulties because membership was optional and fewer owners joined than expected. Del Webb's solution was to begin requiring all buyers to sign a Facilities Agreement that obligated them to pay assessments regardless of whether they qualified to join or did so. To perpetuate the assessment obligation, the contract included a provision requiring the owner to have his or her buyer sign a substitute Facilities Agreement.

In other words, Del Webb's solution to the problem posed by voluntary membership in Sun City Civic Association was to impose the burden of mandatory membership on all owners as a condition of owning property in Sun City. Del Webb accomplished mandatory membership on all Sun City owners in three ways:

- It required owners of Sun City properties and their successors in subdivisions that Sun City Town Hall Center serviced to sign Facilities Agreements as a condition of purchasing a property;
- It required owners in subdivisions that Sun City Civic Association serviced to sign Facilities Agreements as an express condition of the consolidation of Sun City Civic Association and Sun City Town Hall Center into what is now RCSC; and
- It required all purchasers of all Sun City properties after the consolidation of Sun City Civic Association and Sun City Town Hall Center to sign Facilities Agreements.

Thus, all Sun City owners and their successors have signed Facilities Agreements, most of which were then recorded, and therefore pay assessments to RCSC under the threat of foreclosure and abide by its governing documents. This is true for all owners, including those that RCSC considers ineligible for a Member Card. RCSC fails to identify even one such property that is exempt from the obligation to pay assessments to RCSC. All Sun City owners who are compelled to sign a Facilities Agreement, pay assessments, and abide by RCSC's governing documents are necessarily members of RCSC.

The Act does not define who is a "member." The definition of a "member" in the Restatement (Third) of Property (Servitudes) § 6.2(4) however, supports the above conclusion.[1]

[1] *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, 165 P.3d 173, 179 (App. 2007) ("Arizona courts look to the Restatement for guidance in the absence of controlling authority").

Although RCSC vainly tries to distinguish this definition, RCSC concedes that the § 6.2(1)(a) definition applies to a "real-estate development…in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal to pay dues or assessments to an association that provides services or facilities to the common property." RCSC, in other words, correctly observes that membership in an association is defined as a servitude to pay. RCSC cannot dispute that all, or virtually all, owners in Sun City are subject to an express and unavoidable servitude to pay assessments to RCSC.

The Homes Association Handbook (the "Handbook"), which RCSC never disclosed yet dedicates nearly eight pages discussing, further supports the conclusion that Sun City owners who are compelled to pay assessments to RCSC are its members. In contrast to the "members" of the "non-automatic associations" and "clubs" that RCSC describes in its response, Sun City owners cannot renounce their membership in RCSC to free themselves from assessments and fees as those obligations run with their land. RCSC clearly meets the Handbook's definition of an "automatic association" because the owners have no choice in their membership.

While RCSC regulates owners' rights and access to its facilities by declaring some of the owners "Members" entitled to the benefits of a "Member Card," RCSC's unilateral determination of Member Card eligibility has no bearing on whether it has "mandatory members" for purpose of the Act. RCSC's determination of whether someone is a "Member" turns on a variety of factors such as age, whether they own multiple properties, and whether they live more than 75 miles away. A "member" for purpose of the Act, by contrast, turns solely on whether the individual owns property within a planned community, by virtue of which he or she has an unavoidable obligation to pay assessments. In other words, a "Member" is not the same thing as a "member" under the Act.

RCSC also argues that Facilities Agreements omit any express reference to "mandatory membership," suggesting that a declaration must expressly invoke these words to constitute consent to membership as required in A.R.S. § 10-3601(B). This elevates form over substance.

RCSC requires owners to sign a Facilities Agreement and to pay, under the threat of foreclosure, assessments and fees as demanded by RCSC for the duration of time they own their Sun City property. They must also adhere to RCSC's governing documents, rules, and restrictions. Thus, though the term, "member," is not expressly used, an owner irrevocably consents to undertaking the burdens of membership by virtue of buying a Sun City home and, therefore, impliedly consents to membership.[2] By expressly agreeing to take on the burdens of membership, even if one is not guaranteed the *benefits* of membership, one impliedly consents to membership. Indeed, the Facilities Agreements expressly note that the burdens exist even if owners do not use the facilities or otherwise partake in the benefits of membership.

All Sun City owners are obligated to pay assessments that RCSC uses to defray the costs and expenses it incurs owning and operating recreational facilities in Sun City and, as such, are mandatory members of RCSC regardless whether RCSC has allowed them to be "Members."

II. THE "DECLARATION" IS COMPRISED OF RCSC'S ARTICLES OF INCORPORATION AND THE FACILITIES AGREEMENTS EXECUTED BY SUN CITY HOMEOWNERS.

The existence of an "association" requires the existence of a "declaration" pursuant to which the association is both created and empowered to impose assessments on its members. The "declaration" must also impose obligations on the association to own and operate portions of the planned community.

Though the Act defines the term "declaration" as "any instruments, *however denominated*, that establish a planned community and any amendment to those instruments," RCSC is intent on limiting the universe of instruments that may be constitute the declaration to those commonly referred to as declarations of covenants, conditions & restrictions ("CC&Rs"). RCSC refuses to acknowledge that, together, its articles of incorporation and facilities agreements achieve all objectives of a "declaration" under the Act.

[2] A.R.S. § 10-3601(B) ("Consent may be express or implied.").

RCSC's original articles of incorporation, recorded in Maricopa County Recorder's Office, satisfy the historical criteria of the declaration. Its articles of incorporation provide that RCSC was created pursuant to own and operate portions of Sun City, the recreational facilities developed therein. RCSC's reliance on *Shamrock v. Wagon Wheel Park Homeowners Ass'n* for the proposition that its articles of incorporation cannot be part of a "declaration" for purposes of the Act is unfounded. The *Shamrock* court held that the association's articles of incorporation "did not effect a change in the restrictions set forth in the 1980 Declaration."[3] The *Shamrock* court did not address whether the 1980 Declaration was one of the documents that generally constituted the association's "declaration" under A.R.S. § 33-1802(3). This was not the issue in *Shamrock* and the case is distinguishable on its face. *Shamrock*'s holding is limited to the well-worn proposition that the amendment of one document does not amend a different document.

Here, RCSC was created pursuant to its *recorded* articles of incorporation. This is and will always be the case, even if the articles of incorporation are later amended. No amendment could modify the terms under which RCSC was created. Its articles of incorporation must necessarily be included among the instruments that constitute its "declaration" for purposes of A.R.S. § 33-1802(3).

RCSC also argues that the recorded Facilities Agreements cannot be among the instruments constituting its "declaration" because a "declaration" under A.R.S. § 33-1802(3) is limited to instruments that are not "changeable" and (at 12) that "[t]reating the Facilities Agreement as part of the declaration would allow RCSC to amend the declaration without following its amendment procedures by simply revising the document." Nothing in A.R.S. § 33-1802(3) prohibits the amendment of declarations; on the contrary, the statute expressly provides that declarations include "any amendments to those instruments." Although RCSC apparently maintains that it has the ability to unilaterally change Facilities Agreements, a party to a contract

[3] *Shamrock*, 206 Ariz. 42, 46, 75 P.3d 132, 136 (App. 2003).

is not free to unilaterally alter contracts, regardless whether they are Facilities Agreements or the more traditional CC&Rs.[4] RCSC's arguments are unavailing for these reasons.

RCSC also relies on the Restatement (Third) of Property (Servitudes) § 6.2 cmt. *e* (2000). Notably, the comment observes that the declaration as "the recorded document *or documents* that contain the servitudes that create and govern the common-interest community, *regardless of label*." The comment also recognizes that declarations can be set forth in restrictions against individual lots, much in the same way Facilities Agreements run with the individual properties in Sun City.[5] Thus, the Restatement supports the conclusion that RCSC's articles of incorporation and Facilities Agreements comprise part of the "declaration" for purposes of A.R.S. § 33-1802(3).

As mentioned by RCSC, the Amended Declaration of Covenants, Conditions and Restrictions ("Amended CC&Rs") recorded against thousands of Sun City properties are among the additional instruments that serve to reinforce its status as an association in the Sun City planned community. For those properties subject to the Amended CC&Rs, paragraph 16 reinforces each owner's obligation to sign a Facilities Agreement. Regardless of whether a particular property is subject to the Amended CC&Rs, however, each owner has a preexisting obligation to sign a Facilities Agreement by virtue of a predecessor in title having signed a one obligating his successors in title to do the same.

Although there are other instruments that further reinforce RCSC's creation and its applicable powers and burdens, the articles of incorporation and facilities agreements adequately comprise the instruments that form RCSC's "declaration" as set forth in A.R.S. § 33-1802. These documents, among others, created RCSC to own and operate portions of Sun City,

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[4] *Yeazell v. Copins*, 98 Ariz. 109, 115, 402 P.3d 541, 545 (1965) ("A contract cannot be unilaterally modified nor can one party to a contract aler its terms without the assent of the other party").

[5] Restatement (Third) of Property (Servitudes) § 6.2 cmt. *e* (2000).

empowers RCSC to collect assessments from Sun City homeowners, and compels owners to pay those assessments under threat of foreclosure.

III. MEMBERS OF CONDOMINIUM ASSOCIATIONS WITHIN SUN CITY ARE INCLUDED, NOT EXCLUDED, FROM MEMBERSHIP IN A PLANNED COMMUNITY ASSOCIATION IN WHICH THE CONDOMINIUM EXISTS.

Relying on A.R.S. § 33-1802(4)'s statement that a planned community "does not include…a condominium that is governed by chapter 9 of this title," RCSC argues that members of a condominium association cannot also be members of a planned community association. While Plaintiffs agree that condominiums are not themselves planned communities, because they are subject to their own nearly-identical statutory scheme, RCSC ignores the reality that, though they are subject to the separate Condominium Act, condominiums can also be located within planned communities. One need to looks no further than many of the larger planned communities in Arizona for this obvious proposition (*e.g.*, Anthem, Sun Lakes). Sun City is no different.

In fact, Arizona's Condominium Act expressly recognizes that condominiums can be part of a planned community. A.R.S. § 33-1202(14)(e) defines the term "development rights" as "any right or combination of rights reserved or granted to a declarant in the declaration to do any of the following… make the condominium part of a larger condominium or planned community." The Act, therefore, does not expressly or even impliedly exclude the owners of units within a condominium from membership in a planned community association. When the Act is read in conjunction with the Arizona's Condominium Act, it is clear that condominiums can be stand-alone developments or part of a larger development within a larger condominium or a planned community. RCSC's argument is without merit.

IV. THE ACT APPLIES TO ALL PLANNED COMMUNITIES.

RCSC argues that it should not be subject to the Act because it existed before 1994 when the Act was enacted. RCSC contends (at 19) that the Act cannot apply to preexisting communities because it does not specifically declare that it applies to preexisting communities.

The Act does not distinguish between preexisting communities and new communities. Rather, A.R.S. § 33-1801(A) expressly states that "[t]his chapter applies to *all* planned communities."

Although RCSC's argument is legally unsupported, the converse finds support in the Condominium Act. The Condominium Act previously expressly applied only to condominiums "created after January 1, 1986" pursuant to the previous version of A.R.S. § 33-1201. In *Vales v. Kings Hill Condo. Ass'n*, therefore, the Court of Appeals held that the Condominium Act's unanimity requirement for certain amendments, as set forth in A.R.S. § 33-1227(D), did not apply because the Kings Hill Condominium Association was formed prior to January 1, 1986.[6] The Legislature amended the Condominium Act in 2009 to take out the date restrictive language. Since 2009, the Condominium Act has applied to "all condominiums created within this state without regard to the date the condominium was created."[7]

The Act similarly applies to "all planned communities."[8] Under RCSC's restrictive reading of A.R.S. § 33-1801, "all" in this statute would not mean all but rather only those planned communities created after 1994 yet "all" in A.R.S. § 33-1201 would mean all without regard to date. As the Condominium Act demonstrates, the Legislature had the ability to impose such limitations but did not in the case of the Act. RCSC's unsupported suggestion that it intended to impose such a date restriction in the Act is contrary to basic principles of statutory construction that the Legislature's choice of words has meaning, and a statute will be given retroactive intent if it clearly appears the Legislature so intended.[9]

In *Cheney v. Arizona Superior Court for Maricopa County*, the Supreme Court held that a statute that identified "a specific date on which [it] was to be effective" was not retroactive.[10]

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[6] *Vales v. Kings Hill Condo. Ass'n*, 211 Ariz. 561, 565-66, 125 P.3d 381, 385-86 (App. 2005).

[7] A.R.S. § 33-1201.

[8] A.R.S. § 33-1801.

[9] A.R.S. § 1-244.

[10] 144 Ariz. 446, 449, 698 P.2d 691, 694 (1985).

With respect to the Act at issue in this case, however, no such specific date was provided and the word "all" is used. All reflects an intent not to limit its application to only those planned communities that exist after a certain date. Here, there can be no greater indicia of intent other than the use of the word, "all," than the Condominium Act's express limitation at the time to condominiums "created after January 1, 1986." One can infer from the Legislature's use of the term "all" in two nearly-identical statutory schemes that the term was intended to have identical effect and meaning.[11] RCSC offers no legislature history or facts to suggest otherwise. All means "all;" it does not mean "all, except those that existed prior to 1994."

Finally, the Act does not impair any substantive right that would prohibit retroactive application. Although RCSC generically suggests (at 19) that applying the Act against it would "impair owners' substantive right to decline membership," Sun City homeowners have no substantive right to decline the burdens of RCSC membership. Statutes may be applied retroactively if it does not change or create any substantive right.[12] Here, RCSC has not identified any substantive right that it had prior to the enactment of the Act or how the Act changed any substantive right. As such, it can be applied retroactively even if the Court found that "all" does not mean "all."

V. RCSC IS ESTOPPED FROM DISPUTING THE APPLICABILITY OF THE ACT.

RCSC informs the Court (at 17) that its collection law firm, Maxwell & Morgan, has referred to RCSC as a "planned community" or cited to the Act in its filings but that it has "instructed the firm that the Act does not apply, but the firm has not consistently adhered to this admonition, especially when using forms." RCSC provides no evidence of such instruction and Maxwell & Morgan is acting as an agent of RCSC in expressly invoking the provisions of the Act when it suits RCSC's interests.

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[11] *Hughes v. Jorgenson*, 203 Ariz. 71, 73, 50 P.3d 821, 823 (2002) (where a statute's language is clear, courts apply it without reference to any tools of statutory construction, "assuming that the legislature has said what it means").

[12] A.R.S. § 1-244; *Bounldin v. Turek*, 125 Ariz. 77, 78, 607 P.2d 954, 955 (1979).

VI. RCSC IGNORES THE LAW WITH RESPECT TO THE "OWNERSHIP CLASS."

RCSC argues (at 1) that, by not moving to certify the "ownership class" described in Paragraph 64(A) of the Amended Complaint, Plaintiffs "no longer seek this declaration on a classwide basis, but only individually." This is not true and either demonstrates a fundamental misunderstanding of the law or a deliberate intent to misstate it.

A single member of an association is entitled to bring declaratory or injunctive relief against an association.[13] This obviously includes a declaratory judgment that the Act applies and an injunction against an association to conform its conduct to the strictures of the Act. If the Court finds RCSC is an association, any single plaintiff, or those plaintiffs who would have otherwise been in the ownership class, can challenge RCSC's acts. RCSC would also be similarly barred under collateral estoppel principles from denying the Act applied in a future case if this Court ruled against it on this issue.[14]

It is preposterous and contrary to the express dictates of A.R.S. § 12-3304(B)(2) to suggest that the only way to obtain a ruling that the Act applies is for every owner in Sun City to be named a party. Because any owner can bring such an action, Plaintiffs elected not to waste judicial or party resources with a futile gesture of certifying a class to litigate an issue that a single plaintiff or small group of plaintiffs can litigate.

Conclusion

It is beyond rational debate that RCSC is an association located in the planned community of Sun City. It owns and operates property for the benefit of Sun City homeowners, its mandatory members required to pay assessments, related to the cost and expense RCSC thereby incurs. The Court should grant summary judgment for Plaintiffs on Count One of the First Amended Complaint.

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[13] *See* A.R.S. § 12-3304(B)(2).

[14] *Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779 (1999).

DATED this 22nd day of June 2018.

DESSAULES LAW GROUP

By: /s/ Jonathan A. Dessaules
Jonathan A. Dessaules
Jacob A. Kubert
Ashley C. Hill
Attorneys for Plaintiffs

COPY of the foregoing electronically served through AZTurbo Court on this 22nd day of June 2018 to:

Richard G. Himelrick
Christopher A. LaVoy
Nora L. Jones
TIFFANY & BOSCO, PA
Seventh Floor Camelback Esplanade II
2525 E. Camelback Rd.
Phoenix, AZ 85016
rgh@tblaw.com
cal@tblaw.com
nlj@tblaw.com
Attorneys for Defendant/Third-Party Plaintiff

/s/ Hilary Narveson