

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2012-018098

08/29/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT  
K. Ballard  
Deputy

DONALD D HOLMES

MATTHEW ALLEN KLOPP

v.

SUN CITY WEST PROPERTY OWNERS AND RESIDENTS ASSOCIATION  
MICHAEL J CHILDERS

HEARING

**Courtroom: ECB-512**

8:54 a.m. This is the time set for oral argument regarding Plaintiff's April 9, 2013 Motion for Summary Judgment and Defendant's May 14, 2013 Cross-Motion for Summary Judgment. Plaintiff is represented by Counsel Matthew Allen Klopp. Defendant is represented by Counsel Christopher J. Bork (appearing in place of Michael J. Childers).

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Oral argument is presented.

**IT IS ORDERED** taking this matter under advisement.

9:25 a.m. Matter concludes.

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**Later:**

The main issue before the court is a legal one: absent express authority in statute, the CC&R's or some other applicable governing document, does a homeowners' association have the inherent power to enforce fines on homeowners within its area?

The material facts are undisputed. Plaintiff Donald Holmes bought his home in Sun City West in 2004. The home was built in the 1970's, and the original CC&R's (as well as a subsequent amendment) prohibit hedges over six feet tall. Defendant Sun City West Property Owners and Residents Association ("PORA") has cited Mr. Holmes and fined him for having oleander hedges over six feet tall. Mr. Holmes brought this declaratory and injunctive lawsuit to challenge PORA's authority to fine him.

The CC&R's for this home (as amended in 1986) contemplate not one, but two homeowners' associations. The first is an entity called Recreation Centers of Sun City West, Inc. ("Recreation Centers"), which owns community amenities like swimming pools, golf courses and recreation centers. Under the CC&R's, Mr. Holmes is a member of Recreation Centers by virtue of his home ownership, and he is required to pay assessments to Recreation Centers.

The second association is PORA. As PORA describes its own function, it is to enforce restrictions in the CC&R's. Unlike Recreation Centers, however, membership in PORA is not automatic or mandatory and the CC&R's do not require payment of assessments to PORA. Mr. Homes is not a member of PORA.

Both Recreation Centers and PORA have the express power to enforce restrictions in the CC&R's. Article VIII of the amended CC&R's (assuming the amendment is valid, an issue the court need not decide) describes this power, which includes the power to seek injunctive relief in court or seek money damages. Nothing in the CC&R's, however, authorizes PORA to levy or enforce fines, or obligates homeowners to pay fines to PORA.

PORA argues that the authority to enforce fines is implied. Under the Third Restatement of Property, it argues, PORA is acting on behalf of a "common-interest community" and therefore has the inherent authority to impose fines on homeowners within its area irrespective of any express authority. *See Restatement (Third) of Property (Servitudes) §§ 6.2, 6.4, 6.8 (2000).*

This is the dispositive legal issue, but before addressing it, it is important to clarify what is not at issue. First, it is undisputed that the CC&R's give PORA no express authority to levy fines. Second, although there is much discussion in the briefs about whether the 1986 amendment to the CC&R's is valid, it is unnecessary to decide that issue because, even if it is, it

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still does not state that PORA has the authority to levy fines. Third, PORA does not argue that it has the statutory authority to levy fines. As Mr. Homes correctly argues in his Motion, PORA does not qualify as an "association" under the Arizona statute authorizing associations to impose penalties for violations of the CC&R's. *See* A.R.S. §§ 33-1802(1), 1803(B).

An argument based on the Restatement is necessarily a common law argument. Restatements are articulations of what the common law is (hence the name, "Restatement"), though sometimes they articulate what the drafters believe the common law should evolve towards. No Arizona case has adopted as common law the Restatement principles on which PORA relies, so the question is whether Arizona should.

The Restatement defines a "common-interest community" as follows:

(1) A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

(a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or

(b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

Restatement (Third) of Property (Servitudes) § 6.2(1) (2000). The development in which Mr. Homes lives is arguably a "common-interest community." Under the Restatement, a common-interest community has "the powers reasonably necessary to manage the common property, administer the servitude regime, and carry out other functions set forth in the declaration." Restatement (Third) of Property (Servitudes) § 6.4 (2000). These powers may be exercised through an association, which the Restatement defines as "an organization created to manage the property or affairs of a common-interest community." Restatement (Third) of Property (Servitudes) § 6.2(3) (2000). The Restatement further provides:

[T]he association may adopt reasonable rules and procedures to encourage compliance and deter violations, *including the imposition of fines*, penalties, late fees, and the withdrawal of privileges to use common recreational and social facilities.

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Restatement (Third) of Property (Servitudes) § 6.8 (2000) (emphasis added).

Taken together, these provisions seem to say that an association formed to enforce CC&R's on behalf of a common-interest community can do so by adopting rules and regulations that include the imposition of fines to deter violations. To the extent this is a "restatement" of how most community associations work, it is accurate. But if it means that community associations have a common law, inherent power to enforce fines absent contractual or statutory authority, then it is something altogether new in Arizona law.

The essence of common law is evolution, that is, small changes in the law that come from applying or expanding existing principles to new circumstances. But PORA points to no existing principle of Arizona law from which its theory would arise. To adopt PORA's argument would require the court to adopt an entirely new legal principle.

The court is unwilling to do so. Whether, as PORA argues, public policy favors giving all community associations the power to fine is a question best left to the legislative branch. Indeed, the Legislature has already enacted legislation governing this subject matter; had it wanted to give associations like PORA the authority to impose fines, it would have said so. *See* A.R.S. § 33-1801 et seq.

As a matter of law, PORA does not have the power to enforce fines against homeowners for violating the CC&R's. Based on this ruling, it is unnecessary to decide the many other issues raised in the Motion and Cross-Motion.

The Complaint seeks injunctive as well as declaratory relief. But there is no evidence that PORA has taken any action to enforce its fines against Mr. Homes. And at oral argument, Mr. Holmes conceded that if summary judgment is granted on his declaratory claim, the injunctive claim is moot. This ruling, therefore, is case-dispositive.

**IT IS ORDERED** granting Mr. Holmes's Motion for Summary Judgment as to the declaratory claim and declaring that PORA does not have the power to enforce fines against Mr. Holmes.

**IT IS FURTHER ORDERED** denying PORA's Cross-Motion for Summary Judgment.

**IT IS FURTHER ORDERED** dismissing the injunctive claim as moot.

**IT IS FURTHER ORDERED** that Mr. Holmes shall lodge a form of final judgment within **30 days** of this order.

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**ALERT:** The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.