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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-003577 03/23/2021

HONORABLE ANDREW J. RUSSELL

CLERK OF THE COURT
S. Motzer
Deputy

CLUB WEST CONSERVANCY FRANCIS J SLAVIN

v.

FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION, et al. CARLOTTA L TURMAN

COMM. RUSSELL

UNDER ADVISEMENT RULING

Pending before the Court are the following items:

- Defendant's Motion for Partial Summary Judgment, filed August 19, 2020
  - Plaintiff's Response, filed November 5, 2020
  - Defendant's Reply, filed December 11, 2020
- Plaintiff's Cross-Motion for Summary Judgment, filed November 5, 2020
  - Defendant's Response, filed December 11, 2020
  - Plaintiff's Reply, filed January 11, 2021.

The Court has reviewed and considered these filings, as well as the parties' respective statements of fact, the arguments made by counsel at the January 22, 2021 Oral Argument, and the record in this matter.

In his October 30, 2020 Ruling, this Court's predecessor delineated the facts that gave rise to this litigation:

In 1989, UDC-Foothills Limited Partnership ("UDC FLP") caused to be recorded a Declaration of Covenants, Conditions and Restrictions (the "Master Declaration") for a master planned community located south of South Mountain Park in Phoenix. Joint Pre-Hearing Statement ("JPS") at p. 2 ¶¶ 1-2. *See also* Exhibit 1. In the Master Declaration, UDC FLP identifies itself as "the owner … and the master developer of" real property to be developed "as a planned area development" known as "Foothills Club West." Exhibit 1 at p. MCR 7 of 85. The name of the association formed pursuant to the Master Declaration is the "Foothills Club West Community Association." JPS at p. 2 ¶¶ 3-4. *See also* Exhibit 1 at pp. MCR 7 of 85, MCR 9 of 85, MCR 10 of 85.

Paragraph 11.2 of the Master Declaration provides that, with limited exceptions, it cannot be amended without the approval of 75% of Foothills Club West lot owners. Exhibit 1 at p. MCR 59 of 85, § 11.2 ("Except as otherwise provided herein…this Declaration may be amended only by the affirmative vote…or written consent of Members owning at least seventy-five percent (75%) of all Lots.").

In 1993, UDC Homes, Inc., ("UDC Homes") and its wholly-owned subsidiary, REA Acquisition Corporation ("REA"), caused to be recorded a Declaration of Covenants, Conditions and Restrictions (the "Golf Course Declaration") for the Foothills Club West Golf Course (the "Golf Course"). JPS at p. 2 ¶¶ 5, 8. *See also* Exhibit 2. At the time of the recordation of the Golf Course Declaration, REA owned the property described therein as the "Golf Course Property." JPS at p. 2 ¶ 6. UDC Homes was the Declarant under the Golf Course Declaration. Exhibit 2 at p. MCR 2 of 57.

The recitals to the Golf Course Declaration provide in part that the owner, REA, and the Declarant, UDC Homes, believe

> that the development of Foothills Club West for residential purposes will be enhanced by the development, operation, and maintenance of the Golf Course Property as a golf course and intend that the Golf Course Property be known as developed as Foothills Club West Golf Course.

Exhibit 2 at p. MCR 2 of 57. The Golf Course Declaration contains the following "use restriction" provision:

> 1.1 Golf Course Usage. At all times on or prior to December 31, 2008, the Golf Course Property and all portions thereof shall be used exclusively for the operation of a public golf course and driving range, recreational facilities related thereto, a golf pro shop, and a clubhouse facility; the use of the Golf Course Property other than for said purposes during such time shall be prohibited. At all times after December 31, 2008, the Golf Course Property and all portions thereof shall be used exclusively for the operation of a golf course and driving range, recreational facilities related thereto, a golf pro shop, and a clubhouse facility; the use of the Golf Course Property other than for said purposes during such time shall be prohibited.

Exhibit 2 at p. MCR 3 of 57. The Golf Course Declaration goes on to provide,

> 4.1 Maintenance of Improvements. The Golf Course Property and the improvements thereto shall be maintained in a first class manner and at a level equal to or exceeding the maintenance level of other upscale, high-end, daily fee, public golf courses in Maricopa County, Arizona.

Exhibit 2 at p. MCR 5 of 57.

Section 6.2 of the Golf Course Declaration provides in part that the Declarant "shall be entitled to release or cancel all or any portion of the Declaration with respect to all or any portion of the Golf Course Property at any time without the consent or approval of any other party." Exhibit 2 at p. MCR 8 of 57, § 6.2.

In September 2010, Defendant Foothills Club West Community Association (the "Association"), through its then-President, Paul Moroz, signed a document entitled "Assignment of Declarant Rights," which was subsequently recorded. *See* Exhibit 8. This document identifies Shea Homes

Limited Partnership ("Shea Homes") as the successor-in-interest to the original Declarant, UDC Homes, and states that Shea Homes "desires to assign to the Association, and the Association desires to accept, all of the rights and obligations of the Declarant" under the Golf Course Declaration. *Id*. at p. FCWREV000315. The document concludes that, "[b]y its execution hereof, the Association accepts all [such] rights and obligations." *Id*.

In October 2018, the Association, through its then (and current) President, Michael Hinz, signed a document entitled "First Amendment to Declaration of Covenants, Conditions and Restrictions for Foothills Club West Golf Course" (the "First Amendment"), which was subsequently recorded. *See* Exhibit 9. The First Amendment purports to amend the Golf Course Declaration by adding a new paragraph ("New Paragraph 6.2") which establishes a mechanism for a vote of the Association's members to amend Paragraph 1.1 of the Golf Course Declaration to authorize a change, to a non-golf use, of the Golf Course Property. Specifically, the First Amendment reads in pertinent part:

> Now, therefore, [the] Association amends the [Golf Course Declaration] as follows:
>
> 1. Article 6, paragraph 6.2 shall be amended to add the following new second paragraph therein:
>
> In the event of any proposed amendment to this Declaration to change, modify or amend Article 1, paragraph 1.1 to allow the use of the Golf Course Property to be other than used exclusively for the operation of a public golf course and driving range, recreational facilities related thereto, a golf pro shop and a clubhouse facility (including a restaurant), no such proposed change, modification or amendment of article 1, paragraph 1.1 shall be effective unless each of the following two conditions are met. First, a majority of the Association's Board of Directors who are physically present at a meeting of the Board of Directors for such purpose vote to approve the amendment of Article 1, paragraph 1.1 to allow the use of the Golf Course Property to be other than used exclusively for the

> operation of a public golf course and driving range, recreational facilities related thereto, a golf pro shop and a clubhouse facility (including a restaurant). In the event the first condition is met, second, at an annual meeting or duly noticed special meeting of the Association's Owners (as defined in Article 1, paragraph 1.37 of the [Master Declaration]) in which thirty-one percent (31%) of the total Association Owners shall constitute a quorum, fifty percent (50%) of the Owners, plus one additional Owner, vote, in accordance with the provisions of Article 3 of the [Master Declaration], to allow the use of the Golf Course Property to be other than used exclusively for the operation of a public golf course and driving range, recreational facilities related thereto, a golf pro shop and a clubhouse facility (including a restaurant).

Exhibit 9 at p. MCR 1 of 27.

Both sides now seek summary judgment. Specifically, Defendant seeks summary judgment as to whether Defendant had the right to become the "Declarant" under the Golf Course Declaration. Defendant claims the Golf Course Declaration itself provides that the Declarant can transfer its rights, and "further provides that the declarant and its successors and assigns under the Golf Course Declaration have standing and power to enforce the provisions of the Golf Course Declaration." *See* Motion for Partial Summary Judgment, page 4, lines 5-7. Defendant then argues that it validly accepted transfer of the Declarant rights, and thus now acts as the Declarant. *See id*., § C.

Plaintiff responds that, even if the Golf Course Declaration allows transfer of the Declarant's rights, the CC&Rs governing Defendant (the "Master CC&Rs") do not allow Defendant to accept those rights. Becoming Declarant of the Golf Course property equates with annexing additional property, which according to Plaintiff requires a member vote, not just a Board vote. Plaintiff further argues that even if Defendant had the right to become Declarant of the Golf Course property, the steps toward attaining that role all occurred during executive session, which violates Arizona law. This Court's predecessor focused on this argument in the October 30, 2020 Minute Entry.

Summary judgment is appropriate where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(a). When

ruling on a request for summary judgment, the Court must view the evidence, and all reasonable inferences that such evidence will permit, in the way most favorable to the party opposing summary judgment, and that Court must assume the truth of that party's allegations. *See Esplendido Apartments v. Olsson*, 144 Ariz. 355, 361, 697 P.2d 1105, 1111 (App. 1985); Airfreight Express Ltd v. Evergreen Air Center, Inc., 215 Ariz. 103, 106, ¶ 2, 158 P.3d 232, 235 (App. 2008).

Defendant Improperly Annexed the Golf Course Property

Whether Defendant can validly accept the transfer of the Declarant's rights under the Golf Course Declaration and become the Declarant thereunder involves a two-part analysis. First, does the Golf Course Declaration allow the original Declarant to transfer its rights? Second, assuming that answer is "yes," can Defendant legally accept that transfer? Put another way – do the Master CC&Rs authorize Defendant to take on this new role over this new property?

The Golf Course Declaration clearly answers the first question in the affirmative. Section 6.8 of that Declaration provides

> Any or all of the rights of the Declarant may be transferred to other persons or entities, provided that that transfer shall not reduce an obligation nor enlarge a right beyond that contained herein, and provided, further, that no such transfer shall be effective unless it is in a written instrument signed by the Declarant and duly recorded.

See Golf Course Declaration, § 6.8. Several other provisions of the Golf Course Declaration make reference to the Declarant and "its successors and assigns." *See* Golf Course Declaration, §§ 2.1, 6.6. Thus, the drafters of the Golf Course Declaration anticipated that the original Declarant could assign its interest to another person/entity.

Plaintiff focuses its argument on the second question. Per Plaintiff, when Defendant accepted transfer of the Declarant's rights under the Golf Course Declaration, Defendant effectively annexed additional property. The Master CC&Rs include provisions for such annexations, but, according to Plaintiff, Defendant failed to abide by those provisions in accepting the Declarant's rights under the Golf Course Declaration.

Defendant counters that accepting the Declarant's rights under the Golf Course Declaration does not equate with annexing the actual Golf Course property into the Association. *See* Defendant's Reply in Support of Motion for Partial Summary Judgment and Response to Plaintiff's Cross-Motion for Summary Judgment, page 4, lines 4-6 (noting "the Master Declaration does not contain language requiring annexation of the Golf Course in order for the Association to accept declarant rights under the Golf Course Declaration"). Even if one viewed such annexation as having occurred, the Master CC&Rs do not require a member vote in order for Defendant to annex so-called "Annexable Property."

The Court disagrees. While Defendant is correct in noting that nothing in Arizona law or the Master CC&Rs expressly prohibits Defendant from becoming Declarant under the Golf Course Declaration, doing so necessarily results in additional property coming under Defendant's control. The Golf Course, previously separate land controlled by a separate entity, became part of the Association, under Defendant's control. Indeed, that was the whole point of the transfer – so Defendant could control and improve the Golf Course property, rather than leaving it "as a barren piece of land." *See* Defendant's Reply, page 3, liens 3-9. By accepting the Declarant's rights under the Golf Course Declaration, Defendant effectively brought additional property (the Golf Course) into the Association, thereby annexing that property.

Several provisions of the Master CC&Rs provide avenues for Defendant to annex property, but each has specific requirements to effectuate such annexation. Section 6.1 of the Master CC&Rs allows Defendant to annex all or part of certain "Annexable Property" (generally, property within five-miles of the community) without a member vote. There is no dispute that the Golf Course falls within the boundaries of the defined "Annexable Property." However, by its express terms, § 6.1 only applies during the 20-year period following recordation of the Master CC&Rs. That period expired before the events at issue in this case, and as a result, the Court views the annex provisions of § 6.1 as inapplicable.

Section 6.2 also discusses annexation of property, but is limited to "additional property not included with the Annexable Property." Annexation under § 6.2 requires a 2/3 vote of the members. As noted, the Golf Course falls within the boundaries of the "Annexable Property," meaning § 6.2 would not apply to its annexation.

So how can Defendant annex the Golf Course (or other property within the definition of "Annexable Property") now that the aforementioned 20-year period has ended? It appears that the only method would require amendment of the Master CC&Rs

themselves. Section 11.2 provides a method for such amendment, and expressly notes that its procedures would be required for "addition or annexation of property to, or withdrawal of property from, the Property, or addition or annexation of any property to, or withdrawal, removal or deletion of any property from, the Common Area." *See* Master CC&Rs, § 11.2.7. That provision includes a "carve out" for annexations permitted without member approval under § 6.1, but as the Court found earlier, § 6.1 no longer applies.

Defendant notes that interpreting § 6.1 as only allowing annexation of the Annexable Property during that 20-year period, while allowing annexation of other, more distant properties at any time, makes no sense. Similarly, because amending the Master CC&Rs requires a 75% member vote but annexing property under § 6.2 only requires a 2/3 member vote, requiring amendment of the Master CC&Rs to annex the Annexable Property at this time is more difficult than annexing non-annexable property. The Court agrees that this makes little sense, but the Court did not draft the Master CC&Rs. The most logical interpretation is that the original Declarant under the CC&Rs intended to encourage annexation of Annexable Property during the following 20 years. After that, any annexation would require a member vote.

IT IS ORDERED denying Defendant's Motion for Partial Summary Judgment.

Defendant's Actions in Accepting Transfer of the Declarant's Rights Violated Arizona Law

Homeowners' associations, like Defendant, are governed by their CC&Rs and by various provisions of Arizona law. One of those provisions requires that "all meetings of the members' association and the board of directors, and any regularly scheduled committee meetings, are open to all members of the association…." *See* A.R.S. § 33-1804(A). A review of the statutes applicable to such associations (and, for that matter, to governmental entities as well) makes clear that Arizona intends governmental and quasi-governmental business to occur in public, not behind closed doors.

That said, the board may choose to hear certain types of matters in an "executive session" closed to the public. Such closed sessions are limited, however, to issues involving (a) legal advice from the association's attorney, (b) litigation, (c) personal information of an association member, (d) certain employment-related topics, and (e) appeals of violations or fines (although an association member may request such discussion occur in public). *See* A.R.S. § 33-1804(A)(1-5).

There is no dispute that the actions taken by Defendant in becoming Declarant under the Golf Course Declaration and in subsequently enacting amendments to that Declaration occurred in executive session. Defendant argues that such actions could occur behind closed doors because they involved obtaining legal advice from an attorney. "On final resolution of any matter for which the board received legal advice . . . the board may disclose information about that matter in an open meeting…." *See* A.R.S. § 33-1804(A)(1). According to Defendant, the "'final resolution' involved taking action, including the Board's acceptance of the 2010 Assignment, and the Board's execution of the First and Fifth Amendments to the Golf Course Declaration." *See* Defendant's Reply, page 12, lines 14-16.

Under Defendant's analysis, a board could vote on all issues in executive session, provided the board had their lawyer present. This is obviously contrary to § 33-1804, which limits those issues a board can consider in executive session. None of the authorized subjects for executive sessions include voting or otherwise taking action. Rather, executive sessions are only authorized for receiving legal advice, or discussing certain topics. Arizona law seeks to maximize public involvement, and allowing votes or final action in an executive session is directly contrary to that goal.

There are no genuine issues of material fact in dispute regarding Defendant's actions in accepting transfer of the Declarant's rights under the Golf Course Declaration, or in purportedly enacting amendments to that Declaration. Plaintiff is entitled to judgment as a matter of law.

IT IS ORDERED granting Plaintiff's Cross-Motion for Summary Judgment filed November 5, 2020.