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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

TALKING ROCK LAND, LLC, an Arizona limited liability company,

Plaintiff,

v.

INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; DAVID BARREIRA, District Board Member; BILL DICKRELL, District Board Member; and AL POSKANZER, District Board Member,

Defendants.

Case No. P1300CV201800380

DEFENDANTS' MOTION TO RECONSIDER THE COURT'S UNDER ADVISEMENT RULING AND ORDER FILED NOVEMBER 9, 2018 AND MOTION TO DISMISS DEFENDANT AL POSKANZER

(The Honorable John D. Napper)

Defendants INSCRIPTION CANYON RANCH SANITARY DISTRICT ("ICRSD"), an Arizona sanitary district; DAVID BARREIRA, District Board Member;

and BILL DICKRELL, District Board Member (hereinafter collectively "the District"), respectfully request that the Court reconsider its Under Advisement Ruling and Order filed November 9, 2018. This motion is grounded in the simple fact that Plaintiff did not give Defendants all of the essential and necessary information for District to evaluate the three forms submitted by Plaintiff until June 19, 2018, by this Court's order, after which the Defendants approved the forms with significantly different information and submitted them twenty days later to Yavapai County Development Services ("YCDS"). Until June 19, 2018, Defendants had insufficient data to act upon, after which Defendants did act. As a matter of law, no de facto moratorium ever existed.

As a prefatory matter, Defendant Al Poskanzer moved out of the District, reregistered to vote and voted in the November 6, 2018 General Election, thereby vacating his office. A.R.S. § 38-291(5); *Kauzlarich v. Bd.of Trustees of Oak Creek Sch. Dist. No. 16, Yavapai County*, 78 Ariz. 267, 271, 278, P.2d 888, 891 (1955).

Since Mr. Poskanzer was a defendant only in his representative capacity, we urge the Court, in considering this motion, to separately dismiss this case as to Mr. Poskanzer because, as to him, the Court no longer has personal jurisdiction as to him in his representative capacity. A.R.Civ.P. Rule 25(d). There can be no substitute joined at this time until the vacancy is filled by the Board. A.R.S. § 48-2010(f).

Reasons to Reconsider the Court's Ruling and Order

1. There are significant factual errors in the Court's recitation of the Procedural History and Facts and Current Litigation.

2. There are significant errors of law in the Court's Ruling and Order, to-wit:

    a. The Court erred in finding the Capacity Assurance Approval forms ("CAAs") were a requirement for approval of the Sterling Ranch subdivision, approved

by the Board of Supervisors on June 6, 2018 without the signed forms, and the Court erred in finding market value impact without competent evidence in the record.

b. The Court erred by, in effect, finding that public debate and Board justification when the Board postpones action, as it did on March 30, 2018, are required by the Open Meeting Law.

c. The Court erred by failing to rule at the May 9, 2018 hearing that no moratorium could exist up to that point, Plaintiff having admitted that it had not provided the necessary documents prefatory to District Board decision-making concerning the Plaintiff's version of the three forms.

d. The Court erred by denying Defendants' Motion to Vacate Evidentiary Hearing, thereby penalizing Defendants for not abandoning a defense at a pre-discovery, pretrial phase of the proceeding before the Defendants had the information necessary to consider acting on the forms.

e. The Court erroneously found the establishment of a de facto moratorium when the District had no duty to act until provided the necessary documentation.

f. The Court erred, after finding this case moot, in denying Defendants' Motion to Dismiss.

g. The Court erred in finding Plaintiff the "prevailing party" while finding that Plaintiff got its sought-after practical result without Court action.

Factual Errors in the Court's Recitation of Procedural History and Facts

How the Dispute Started

1. ¶ 2. "Plaintiff submitted what it believed were the necessary documents to the Defendants for their review and approval."

Corrective Facts: Plaintiff's agents sent the District Capacity Assurance Forms and the Notice of Intent ("NOI") form on March 22, 2018 with uncorroborated numbers inserted, later shown to be erroneous. Plaintiff's Exhibits 47-49, Defendants' Exhibits 1, 64, all in evidence. Plaintiff's engineer did not seal (and presumably submit to Yavapai County Development Services ("YCDS")) its Sterling Ranch Subdivision Plan ("Plan") until March 30, 2018, the date of the hearing referred to in ¶ 3. The Plan was not given to the District at that time.

2. ¶ 2. "The signing of these forms was required for Sterling Ranch to go forward and directly impacted the market value of its lots."

Corrective Facts: The Board of Supervisors approved the subdivision on June 6, 2018, a matter subject to judicial notice herein. Additionally, the hearing and Plaintiff's witnesses' testimony was about plant capacity and there is no credible expert witness evidence in the record of diminution in value, lowering of offering price or other competent expert advice concerning the value of the lots at any time during this proceeding.

3. ¶ 3. "The Board put the Sterling Ranch CAAs on its agenda for consideration. At the meeting, the Board went into executive session to discuss the CAAs. At the conclusion of the executive session, the Board went back into public session and declared the documents 'would not be signed at this time.' No public debate occurred, and no reasons were provided for why the CAAs 'would not be signed at this time'."

Corrective Facts: While the Court is referencing the March 30, 2018 meeting, the Court is implying that a public body deciding not to take action on an agenda item has an affirmative duty to allow debate on it and a further affirmative duty to justify postponing action on the item in open session, neither of which are requirements of the Open

Meeting Law, while ignoring the admitted fact that the necessary documents to support the data inserted in the forms by Plaintiff's agents had not been provided to the District, a violation of the District Ordinances and a breach of the express provision of the Development Agreement, ¶ 1.c., Plaintiff's Exhibit 21.

The Positions of the Parties

4. ¶ 4. "During the hearing [OSC Hearing 5/9/18], the Defendants also continued to urge that they had not received the appropriate documents to evaluate the CAAs regardless of the capacity issue. During the hearing, the Court asked the Defendants what forms were needed for the Board to complete its review of the CAAs. Id. at 19. The Defendants provided information about what documents were needed. Plaintiff agreed to provide any information immediately."

Corrective Facts: The above statement totally ignores the fact that Plaintiff's counsel only provided the March 30 Plan and the May 16 Corrected Plan, as well as a second copy of the original flawed and rejected Water Quality Report to Defendants' counsel on June 7, 2018, nearly a month after the hearing. Plaintiff's Exhibit 43. The above statement also ignores the fact that Plaintiff's project engineering witness, Davin Benner, testified at the June 19, 2018 hearing using the flawed and rejected original Water Quality Report and admitted that he had not submitted the May 16, 2018 revised Water Quality Report to the District. Rep. Trans. 6/19/2018, p. 57-60. The above statement further ignores the fact that, recognizing the necessity for the Defendants to have the correct updated Water Quality Report, Id. at 142, lines 9-20, at 150, lines 11-18, at 153, lines 19-20, at 159, lines 22-23, the Court ordered the Plaintiff to produce it forthwith. Id. at 160-161. Indeed, Plaintiff's counsel admitted that the District had the right to receive and review the documents. Id. at 151, lines 22-25.

5. ¶ 6. The Court denied Defendants' Motion to Vacate the evidentiary hearing because Defendants did not abandon their defense of lack of capacity.

Corrective Facts: The Court ignored the fact that Defendants' Motion to Vacate was filed on June 1, 2018 and Defendants had still not received the necessary documents from Plaintiff. See Plaintiff's Exhibit 43 of June 7, 2018. The Court further ignored the admitted fact that the revised Water Quality Report was not provided to Defendants until after the June 19, 2018 evidentiary hearing pursuant to the Court's Order. Id. at 161-162. Thus, the Court did not address the reasons Defendants put forth for vacating the hearing nor acknowledge that the Plaintiff did a 180º turnabout, opposed vacating the hearing and requested the hearing take place, in effect making it the Plaintiff's hearing.

The Evidentiary Hearing

Corrective Facts: The Court's narrative totally ignores the fact that Plaintiff's engineering witness, Davin Benner, admitted on cross examination that the Water Quality Report in front of him was the original, rejected version and that he had never given the revised version to the Defendants, Id. at 57-60, causing the Court to order the Plaintiff to provide the revised version, Id. at 161-162, and acknowledge that Defendants needed that document prior to acting on the CAAs. Id. at 159-160. The Court also failed to address Plaintiff's failure to provide necessary documents as vitiating any finding that the District imposed a de facto moratorium to that date.

The Aftermath

Corrective Facts: The revised Water Quality Report was only provided to Defendants after the June 19, 2018 hearing pursuant to the Court's order at the hearing. Id. at 161-162. Moreover, David Barreira's testimony, as one member of the District Board, was not Board action establishing a de facto moratorium, an action that could only be taken

by the whole Board at a duly noticed open meeting of the Board. A statement such as Mr. Barreira's does not affect a record of a disputed fact that the Board acted when given the corrected documents. *Kahn v. Thompson*, 185 Ariz. 408, 411, note 4, 916 P.2d 1124, 1127, note 4 (App. Div. 2, 1996). Nor did the Court acknowledge that the District, not having been given the revised Water Quality Report until June 19, 2018 after the hearing per Court order, had no duty to act under the statute and state regulations or the Development Agreement, totally defeating Plaintiff's claim of a de facto moratorium. Id. This, in spite of the fact that the Court acknowledged at the hearing that the Defendants were entitled to and needed the revised Water Quality Report before acting on the forms. Id. at 159-160. And, while the Court later acknowledged that the District did approve the two CAA forms and the NOI form at the next Board meeting, the Court failed to recognize that the numbers in the three forms approved by the Board, signed by the Chairman and filed with YCDS were different from the ones submitted by Plaintiff's agents, resulting from post-hearing new engineering advice. Since the failure of the Board to approve the flawed forms was the sole purpose of the litigation, this oversight renders the Court's narrative here lacking in substantiation.

Current Litigation

Moratorium

Corrective Facts. The above recitations of facts in the record shows that the Court's finding of a de facto moratorium is unsupported by the record. The District did not receive the revised Water Quality Report until after the close of the June 19, 2018 hearing per this Court's order. Id. at 161-162. The Defendants had no duty to act until provided the necessary documents, as the Court acknowledged at the hearing. Id. at 159-160. Indeed, the state regulation governing this process fairly implies the

requirement to supply information in its directive to an applicant to obtain "statements" from the sanitary district. A.A.C.R. 18-9-307, 4.01(C)(1)a & (2). When the Defendants received the revised documents, the correct version of the forms, not the ones submitted by Plaintiff's agents, were duly approved, signed and filed with YCDS. Defendants' Exhibit 64. The period of time from June 19, 2018 to July 9, 2018 (20 days), during which this occurred, is well within the 30-day review period of the Development Agreement, ¶ 1.c. Plaintiff's Exhibit 21, and thus can form no basis for an allegation of de facto moratorium, much less a finding thereof.

The Missing Papers

6. ¶ 1. "Throughout the litigation, the Defendants have argued they did not sign the CAAs because they did not have all of the needed information from the Plaintiff. These documents were provided by the Plaintiff just prior to the evidentiary hearing. Accordingly, the Defendants argue the Board could not have signed the CAAs prior to the submission and review of these documents. Therefore, the Plaintiff was not the "prevailing party" on the moratorium issue."

Corrective Facts: Here the Court meets itself coming and going. The Court incorrectly states that the documents necessary for District review of the forms were provided by the Plaintiff "just prior to the evidentiary hearing." Were that accurate, the statement itself defeats the concept of a de facto moratorium up to that point. Moreover, the hearing was held well inside the 30-day window Plaintiff agreed by contract the District had to review the documents, only a portion of which were received by the Defendants on June 7, 2018. In reality, the June 19, 2018 hearing produced irrefutable evidence that Plaintiff had not, up to that point, provided the revised Water Quality Report, essential for Board consideration of the forms, to the Defendants and only did so under Court order after the

hearing. Id. at 161-162. It is inescapable that the Plaintiff has been its own worst enemy in this scenario and cannot blame the Defendants for its failure to follow agreed upon procedure in the Development Agreement. The only logical conclusion is that Plaintiff had no basis for filing the suit in the first place, let alone claiming "prevailing party" status, since its claim of de facto moratorium is refuted unequivocally by the admitted facts.

7. ¶ 2. The Court conflates David Barreira's testimony with (1) District Board action and (2) Plaintiff's responsibilities to provide necessary information to the District. The Court states: "The Defendants, even if they had received the proper forms, would have continued to refuse to sign any CAAs from anyone. This is important because the Plaintiff could, and did, remedy the lacking paperwork without Court involvement." Corrective Facts: As to Plaintiff's responsibilities, the Court acknowledges that Plaintiff was required to supply the necessary documents to Defendants to trigger their responsibility to consider the forms. That being so, no de facto moratorium could have been instituted before the May 9, 2018 hearing because, as the Court notes, Plaintiff admitted that it had not done so at that time. Under Advisement Ruling and Order, p.2, The Position of the Parties, ¶ 4. Furthermore, the original Plans and revised Plans were not sent to Defendants until June 7, 2018, not "immediately". Plaintiff's Exhibit 43. And the revised Water Quality Report was not sent to Defendants until after the Court ordered Plaintiff to do so at the end of the June 19, 2018 hearing. Query whether either of these submissions were without Court involvement? What was without Court involvement, as the Court noted at the July 10, 2018 hearing, was the Defendants voluntary consideration of new engineering advice, approval of signing, and filing of the

signed three forms in question with correct information prior to that hearing. Defendants' Exhibit 64; Rep. Trans. 7/10/2018, pp.4-6.

Curiously, the Court, in this Under Advisement Ruling and Order, totally ignores the July 10, 2018 hearing and the results of that hearing. Specifically, in that hearing, the Court stated that, after the District approved revised forms, the case was moot and counsel for both Plaintiff and Defendants agreed. Rep. Trans. 7/10/2018, p.11. The Court further opined that Plaintiff "obtained the relief that you wanted short of judicial order." Id. at 12, lines 4-5. The Court again called the moratorium issue moot, Id. at 15, and requested a motion to dismiss, Id. at 17.

We note at this point that the Complaint and the Order to Show Cause application sought declaratory relief, not injunctive relief, as the Court recognized. Under Advisement Ruling and Order, p.2, ¶ 1. Thus, the Plaintiff got the practical result it wanted, not the relief it sought, and "short of judicial order." That hardly rises to the status of "prevailing party." Indeed, the Plaintiff having failed to prove a de facto moratorium was created leads inexorably to the conclusion that the Defendants are the "prevailing party." No other conclusion on this evidence is possible.

Reasonable Fees

Seriatim: This portion of the Under Advisement Ruling and Order states conclusions from prior erroneous recitations of the facts as demonstrated above. The Court totally ignores the fact that Defendants filed their Motion to Vacate once it became obvious after the OSC hearing that Plaintiff had not complied with the law or the Development Agreement by not providing the necessary information to the Defendants. The Court also ignores the fact that Plaintiff opposed the motion and urged the Court to conduct the hearing. Thus, the hearing became the Plaintiff's hearing, not the Defendants'. Nor was

the hearing unnecessary, although it could have been much shorter had Plaintiff called its engineer, Davin Benner, as its first witness. His testimony produced the surprising result of having the witness admit that the version of the Water Quality Report he had in front of him was the original version rejected by YCDS, not the revised version resubmitted to YCDS. Nor had the revised version been disclosed by Plaintiff. Mr. Benner further testified that the had not given the revised version to Defendants, whereupon the Court ordered Plaintiff to do so. At that point, Plaintiff's de facto moratorium theory blew up in its face but the Court has failed to recognize this seminal event for what it is, a complete invalidation of the Complaint.

As to David Barreira's testimony, just as one swallow does not make a Spring, one opinion of one Board member at one hearing does not create a de facto moratorium. See: *Kahn v. Thompson*, supra, 185 Ariz. at 411, note 4, 916 P.2d at 1127, note 4. Neither Mr. Barreira nor the other Board members were, at this juncture, possessed of a duty to act because one of the key necessary documents had not been given to them. Without a duty to act, no cause of action had ever accrued. And none did, making this case perfectly appropriate for dismissal under Rule 12(b)(6), A.R.Civ.P. See: *Hopi Tribe v. Arizona Snowbowl Resort*, Az.S.Ct. No. CV-18-0057PR, ¶ 5, p.3, ¶ 37, p.13 (November 29, 2018).

Errors of Law in the Under Advisement Ruling and Order

1. Davin Benner's testimony shows that Plaintiff was designing the subdivision with septic tanks as an alternative to sewer collection system extension, Rep. Trans. 6/19/2018, pp.57-58, long before the suit was filed and even longer before the necessary documents were given by Plaintiff to Defendants. The subdivision was approved at a Board of Supervisors meeting on June 6, 2018. Thus, there was no "requirement" that

the CAAs be signed for subdivision approvals. Moreover, in seeking declaratory relief, Plaintiff did not call a valuation witness nor offer any other expert witness proof of market value impact, leaving the record devoid of competent evidence regarding that issue.

2. The Court, in effect, ruled that the Board's postponement of consideration of the CAAs after instructing counsel in Executive Session nevertheless required the Board to take testimony from the public and explain why it was postponing action in the public session. The Open Meeting Law requires no such action.

The Arizona Attorney General Agency Handbook provides,

> This provision [A.R.S. § 38-31.03(A)(4)] is unique in that it permits public bodies to "instruct" their attorneys. In these limited situations, the public body must be able to discuss and arrive at some consensus on its position before it instructs its legal counsel. Executive session minutes must contain an accurate description of all instructions given. A.R.S. § 38-431.01(C). **The best practice is for a public body, upon return to the open session, to vote to authorize its attorney to act "as instructed in the executive session."** After the attorney takes the action authorized and the need for confidentiality has passed, the public body must formally approve of the action in open session. *Arizona Attorney General Agency Handbook*, Ch. 7.9.7 (emphasis added).

3. At the May 9, 2018 OSC hearing, Plaintiff's counsel admitted that Plaintiff had not supplied the necessary documents to the Defendants but the Court nevertheless continued to pursue the case as if a de facto moratorium were in place. In fact, the Complaint was without support at that point since it alleged a de facto moratorium had been established based on prior conduct of Defendants. In other contexts in Arizona environmental statutes, failure to provide information is charged to the applicant, not the agency. A.R.S. §49-426(K); failure of the applicant to submit information creates consequences for the applicant, not the approving agency.

4. The Court's denial of Defendants' Motion to Vacate the evidentiary hearing on the basis that Defendants had not abandoned one of its defenses, lack of treatment plant capacity, was a fundamental error. Defendants were not required to choose from among the various theories of defense, any more than Plaintiff would be forced to choose among theories as to why it should get the declaratory judgment relief it sought. *Vinson v. Martin & Associates*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. Div. 1, 1988) ("A person cannot be forced to elect before the conclusion of trial the theory he will advance or the remedy he will seek.") Moreover, consideration of plant capacity at that juncture (June 19, 2018) was premature in any event because the Defendants did not have the necessary documents and therefore no duty to act. Were it otherwise, Plaintiff could have pursued a writ of mandamus but not on the basis of these facts. *Kahn v. Thompson*, 185 Ariz. 408, 411, 916 P.2d 1124, 1127 (App. Div. 2, 1996).

The motion brought all this to the Court's attention. Quixotically, Plaintiff reversed course and asked the Court to go forward with the hearing. Besides becoming Plaintiff's hearing, it served as a smoke screen for Plaintiff's failure to provide Defendants the necessary documents. When the smoke cleared, Plaintiff was left with egg on its face, having not supplied the revised Water Quality Report to Defendants and having only twelve days earlier supplied the revised Plan, well within the thirty-day review window plus ten days because of County action provided for in the Development Agreement. In sum, the Motion to Vacate was clearly appropriate. To the extent the Court wanted to explore, and Plaintiff urged the Court to explore, sewage treatment capacity, Defendants cannot be saddled going forward with the hearing as potentially wasted time and cost, let alone have the hearing be the basis for ruling on the merits of the OSC application. Nor can the result of the hearing, ordering Plaintiff to provide the

necessary documents to the Defendants, be the basis for an award of attorneys' fees and costs to Plaintiff. That bears no reasonable relationship to the concept of "prevailing party." *American Power Products, Inc. v. CSK Auto, Inc.*, No. CV16-0133-PR, March 23, 2017, WL-2473261, seriatim.

5. The Court found a de facto moratorium where none existed. Plaintiff's failure to provide the necessary documents is well documented in the record. Prior to June 19, 2018, Defendants had no duty to act. *Kahn v. Thompson*, supra, 185 Ariz. at 411, 916 P.2d at 1127. Once in possession of the necessary documents, obtained by the Court's order, Defendants considered them and acted upon them twenty days later, the first opportunity the Board had to give the public notice, meet and consider engineering advice it had commissioned at its meeting shortly after the hearing. Plaintiff had agreed in 2012 in the Development Agreement that the Defendants would have at least thirty days for such review, estopping it from claiming a de factor moratorium here. That the practical result of this litigation was that Plaintiff obtained the Board action it sought does not equate to Plaintiff getting a remedy in this action. Indeed, it only resulted in the case becoming moot if one is generous enough to say that that Complaint had merit when filed, which it did not. There is no basis in this record for a finding of fact or conclusion of law that the actions of Defendants at any time created a de facto moratorium.

6. The Court erred in denying Defendants' Motion to Dismiss as "premature." Rep. Trans. 9/11/2018, p.53, lines 22-24. A motion to dismiss is always proper when a case has clearly become moot. *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229, 696 P.2d 1376, 78 (App. 1985); *Mesa Mail Pub. Co. v. Board of Supervisors of Maricopa County*, 26 Ariz. 221, 224 P. 620 (1924). Here, the validity of

the Complaint ab initio is undermined by the record, let alone the status of the case after the Board's action on July 9, 2018. The Defendants' motion was well taken and even invited by the Court. Rep. Trans. 7/10/2018, p. 17. It should have been granted.

7. The Court erred in finding Plaintiff the "prevailing party." The Court expressly found that Plaintiff had achieved its practical result (signed forms) without Court action. Rep. Trans. 7/10/2018, p.12, lines 4-5. Thus, Plaintiff did not get the declaratory judgment it sought in the Complaint, let alone the expedited declaratory judgment it sought using the OSC process. Plaintiff did not "prevail" on anything in the proceeding. Rather, Defendants prevailed by proving that Plaintiff had not provided the necessary documents in a timely fashion, making both the Complaint and the OSC petition exercises in fiction. How can this record demonstrate anything other than that the Defendants prevailed in their defense and clearly meet the definition of prevailing party? It cannot. *American Power Products, Inc. v. CSK Auto, Inc.*, supra.

RESPECTFULLY SUBMITTED this 17th day of December, 2018.

ROBERT S. LYNCH &
ASSOCIATES

/s/ Robert S. Lynch
Robert S. Lynch
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Certificate of Service. On 12/17/18, the above document and its attachments, if any, were served as follows

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Under penalty of perjury, I certify the above Certificate of Service is true and correct.

/s/ Alyssa Osborn	Alyssa Osborn	12/17 /18
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