SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

HARVARD SIMON I, LLC, an Arizona limited liability company; THE PRESERVE AT THE RANCH, LLC, an Arizona limited liability company; OLD CAPITOL INVESTMENTS, LLC, an Arizona limited liability company; WHISPERING CANYON DEVELOPMENT, LLC, an Arizona limited liability company, Plaintiffs, v. INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; GENE LEASURE and SHIRLEY LEASURE, husband and wife; CHARLIE TURNEY and MICHELLE TURNEY, husband and wife; DAYNE TAYLOR and MARLESS TAYLOR, husband and wife; JOHN and JANE DOES I-X, Defendants.	**Case No.** P1300CV201000036 **UNDER ADVISEMENT RULING**	**FILED** APR 29 2011 **DATE:** _____ 3 **O'Clock** P **.M.** **JEANNE HICKS, CLERK** **BY:** SHEETAL PATEL **Deputy**

HONORABLE KENTON D. JONES	**BY:** Kathleen Cartier, Judicial Assistant
DIVISION 4	**DATE:** April 29, 2011

THIS MATTER comes before the court on Defendants' Motion for Partial Summary Judgment, with Plaintiffs' Response and Defendants' Reply timely filed in regard, thereto, oral argument having been heard and the matter thereafter, taken under advisement.

THE COURT finds that the six (6) issues Defendants seek the Court grant summary Judgment in regard to are:

1. That the District has police power authority under Arizona statutes to regulate sewage treatment and capacity and connections.

2. That the moratorium adopted by the District is presumed valid.

3. That the standard of review of the moratorium is whether it was fraudulent or adopted in bad faith.

4. That the Arizona Department of Environmental Quality statutes and regulations are applicable to the district's determination of adequacy of wastewater capacity in the District.

5. That the District must not allow additional hookups until lot buyers are assured that the treatment capacity they purchased is presently available at a constructed treatment plant or financial guarantees have been provided by Plaintiffs for construction of a plant to treat that capacity.

6. That ARS § 12-348 is not a basis for awarding any attorneys' fees against Defendants.

I. IN REGARD TO DEFENDANTS' ASSERTION THAT THE DISTRICT HAS POLICE POWER TO REGULATE SEWAGE TREATMENT CAPACITY AND CONNECTIONS.

ARS § 48-2001D, as cited by Defendants, clearly states:

> "...A sanitary district established under this chapter is a body corporate with the powers, privileges and immunities generally granted to municipal corporations by the constitution and laws of this state for the purposes prescribed by this chapter."

The Arizona Courts, in *City of Bisbee v Arizona Water Co.,* 214 Ariz. 368, 153 P.3d 389 (App. 2007), recognized that municipalities may validly exercise their police powers to control sewage in the interest of public health and safety. In *Hamilton v City of Mesa*, 185 Ariz. 420, 425, 916 P.2d 1136 (App. 1995), the Court stated:

> "...We start by noting that municipal corporations have no inherent police power, and that their powers are delegated to them by the constitution or laws of the state..."

As such, while municipalities may validly exercise their police powers to control sewage in the interest of public health and safety, those police powers are not a part of the inherent powers of the municipality, but are a part of the powers that inure to the municipality pursuant to the constitution and statutes of the state. As a sanitary district is a body corporate with the powers, privileges and immunities generally granted to municipal corporations by the constitution and laws of this state for the purposes prescribed in Title 48, Chapter 14, Arizona Revised Statutes, the sanitary district has those same powers.

Therefore, and consistent with the above-referenced language of *City of Bisbee v Arizona Water Co.,* the sanitary district has the police powers to enforce those specific provisions of ARS § 48-2011. However, nothing within either the applicable statute (ARS § 48-2011), generally, or the numbered provisions specifically addressed by Defendants within their Motion (§§ (1), (10), (11), (12), and (18)), specifically addresses a sanitary district's ability to "regulate sewage treatment capacity" as referenced without authority within Defendants' Motion.

THEREFORE, and in regard to the specific issue for which Defendants ask that the Court grant summary judgment as a matter of law; i.e., that:

> "...The District has police power authority under Arizona Statutes to regulate *sewage treatment capacity*..."

Defendants' Motion for Summary Judgment seeks for this Court to decide as a matter of law matters which are the subject of material facts in dispute, and Defendants' Motion is **DENIED.**

II. IN REGARD TO DEFENDANTS' ASSERTION THAT THE MORATORIUM ADOPTED BY THE DISTRICT IS PRESUMED VALID.

This issue has been addressed within the Court's decision in regard to Plaintiffs' Motion for Summary Judgment and need not be addressed further here.

THEREFORE, in regard to the issue of the validity of the moratorium, Defendants' Motion for Summary Judgment is **DENIED.**

III. IN REGARD TO DEFENDANTS' ASSERTION THAT THE STANDARD OF REVIEW OF THE MORATORIUM IS WHETHER IT WAS FRAUDULENT OR ADOPTED IN BAD FAITH.

The action before the Court is one for mandamus. Mandamus is authorized pursuant to ARS § 12-2021, *et.seq*. Mandamus is a discretionary writ and a trial court's decision to grant or deny mandamus will be sustained on appeal absent a showing of abuse of the trial court's discretion in granting or denying mandamus. *Garcia v City of South Tucson*, 135 Ariz. 604, 606, 663 P.2d 596 (App. 1983).

ARS § 12-2021, states:

> "A writ of mandamus may be issued by the supreme or superior court to any person, inferior tribunal, corporation or board, though the governor or other state officer is a member thereof, on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

Defendants' cited authorities in support of their proposition for the standard of review; i.e., that deference must be given to the governing body in exercising judgment to protect the public and environment, are both contract cases. In *City of Phoenix v Landrum*, 71 Ariz. 382, 227 P.2d 1011 (Sup.Ct. 1951), the Court stated that;

> "...In considering these objections it must be kept in mind that one attacking the validity of a contract made by a municipality has the burden of showing that such a contract was so improvident that it amounts to a palpable abuse of discretion..."

Id., at 388.

In *Sulphur Springs Val. Elec. Corp. v City of Tombstone*, 99 Ariz. 110, 407 P.2d 76 (Sup.Ct. 1965), the Court held;

> "...Unquestionably, there is an area of discretion lodged in city officials in carrying out transactions for the benefit of the city and its inhabitants. In the absence of fraud or bad faith, the validity of their actions will not be entertained by courts..."

Id., at 113.

The contract standard is not applicable to a Mandamus action. In fact, "...if the actions of a municipality are arbitrary, capricious and in error with prevailing law, mandamus and/or special action injunctive relief will lie...." *Town of Paradise Valley v Gulf Leisure Corp.,* 27 Ariz.App. 600, 611, 557 P.2d 532 (App. 1976).

THEREFORE, and in regard to Defendants' assertion that the standard of review of the moratorium is whether it was fraudulent or adopted in bad faith, Defendants' Motion for Summary Judgment is **DENIED**.

IV. IN REGARD TO DEFENDANTS' ASSERTION THAT THE ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY STATUTES AND REGULATIONS ARE APPLICABLE TO THE DISTRICT'S DETERMINATION OF ADEQUACY OF WASTEWATER CAPACITY IN THE DISTRICT.

To the extent Defendants provide support for their position in this regard it is contained within their Reply, while their Motion, itself, relies largely on hearsay, with even their separate statement of facts on several occasions relying upon nothing but the unsupported assertion itself. (See SOF numbers 10, 20, 23, 25, and 27). However, when this issue is reduced to its basic and limited assertion, and disregarding whether such is applicable or relevant to this mandamus action, it is the case that the Arizona Department of Environmental Quality statutes and regulations *regarding* determinations of the adequacy of wastewater capacity in a District are applicable to a District's determination of such.

THEREFORE, THE COURT FINDS that the Arizona Department of Environmental Quality statutes and regulations regarding determinations of the adequacy of wastewater capacity in a District are applicable to a District's determinations of such, and solely to that extent, Defendants' Motion in that regard is **GRANTED.**

V. IN REGARD TO DEFENDANTS' ASSERTION THAT THE DISTRICT MUST NOT ALLOW ADDITIONAL HOOKUPS UNTIL LOT BUYERS ARE ASSURED THAT THE TREATMENT CAPACITY THEY PURCHASED IS PRESENTLY AVAILABLE AT A CONSTRUCTED TREATMENT PLANT OR FINANCIAL GUARANTEES HAVE BEEN PROVIDED BY PLAINTIFFS FOR CONSTRUCTION OF A PLANT TO TREAT THAT CAPACITY.

This assertion is rife with material questions of fact which are in dispute and, therefore, Defendants' Motion for Summary Judgment is **DENIED.**

VI. IN REGARD TO DEFENDANTS' ASSERTION THAT ARS § 12-348 IS NOT A BASIS FOR AWARDING ANY ATTORNEYS' FEES AGAINST DEFENDANTS.

Defendants' request for the granting of summary judgment in regard to any claim of Plaintiff to entitlement of an award of attorneys' fees against Defendants pursuant to ARS § 12-348 is **GRANTED.**

cc: Andrew Federhar/Dawn Meidinger — FENNEMORE CRAIG, PC,
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