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Attorneys for Plaintiffs

SUPERIOR COURT OF ARIZONA

YAVAPAI COUNTY

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; and WHISPERING CANYON DEVELOPMENT, LLC, an Arizona limited liability company,

Plaintiffs,

v.

INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; GENE LEASURE, District Board Member; CHARLIE TURNEY, District Board Member; and DAYNE TAYLOR, District Board Member,

Defendants.

No.

COMPLAINT

(Arizona Property Rights Protection Act; Special Action; Breach of Contract; Breach of the Covenant of Good Faith and Fair Dealing)

For their complaint, Harvard Simon I, LLC, The Preserve at the Ranch, LLC, Old Capitol Investments, LLC and Whispering Canyon Development, LLC (collectively, "Plaintiffs") state the following:

JURISDICTION, PARTIES AND VENUE

1. Harvard Simon I, LLC ("Harvard") is an Arizona limited liability company doing business in Yavapai County and owns or controls land within the boundary of the Inscription Canyon Ranch Sanitary District (the "District") which it has developed for the purpose of selling residential lots in a project known as Talking Rock.

2. The Preserve at the Ranch, LLC (the "Preserve") is an Arizona limited liability company doing business in Yavapai County and owns land within the boundary of the District which it has developed for the purpose of selling residential lots in a project known as The Preserve at the Ranch.

3. Old Capitol Investments, LLC ("Old Capitol") is an Arizona limited liability company doing business in Yavapai County and owns or controls land within the boundary of the District which it has developed for the purpose of selling residential lots in a project known as Whispering Canyon.

4. Whispering Canyon Development, LLC ("Whispering Canyon") is an Arizona limited liability company doing business in Yavapai County and owns or controls land within the boundary of the District.

5. The District is an Arizona sanitary district established under A.R.S. § 48-2001 *et seq.*

6. Upon information and belief, Gene Leasure is the chairperson of the District's Board of Directors (the "Board"). Mr. Leasure is a defendant in his capacity as a Member of the Board.

7. Upon information and belief, Charlie Turney is a member of the District's Board. Mr. Turney is a defendant in his capacity as a Member of the District's Board.

8. Upon information and belief, Dayne Taylor is a member of the District's Board. Mr. Taylor is a defendant in his capacity as a Member of the District's Board.

9. Venue is proper in Yavapai County pursuant to A.R.S. § 12-401.

10. If judgment is entered by default, Plaintiffs are entitled to attorneys' fees in an amount not to exceed $20,000.

GENERAL ALLEGATIONS

The Parties

11. The District operates a wastewater treatment plant (the "Existing Plant") that currently provides services to approximately 450 occupied residential lots in four communities within the District's annexed service area in Yavapai County including Talking Rock, Whispering Canyon, The Preserve, and Inscription Canyon Ranch.

12. Plaintiffs are real estate developers that developed certain of the above referenced communities to which the District provides services and who wish to develop additional residential lots for sale within the District.

13. The development efforts to date have varied by Plaintiff, but included land acquisition, planning, design, permitting and construction of the Existing Plant, backbone infrastructure for the delivery of raw sewage, lift stations, water wells, water transmission mains and distribution lines, pump stations, street improvements, golf-course, clubhouse and related facilities and dry utilities.

14. Plaintiffs collectively incurred well over two hundred million dollars ($200,000,000) in cost for the development efforts described above.

15. Plaintiffs have approximately 225 platted lots within the District boundaries that are currently awaiting sale and will be used for the purposes of constructing residences by homebuilders or individual lot buyers. In addition, Plaintiffs have planning approvals for the development of approximately 1,090 more lots within the District's boundary.

16. A substantial portion of the value of the Plaintiffs' property is based on the Plaintiffs' ability to sell the platted lots for the future construction of new homes and recapture the costs for the referenced infrastructure improvements.

17. Plaintiffs' ability to sell lots for the construction of new homes is contingent upon the availability of sewer service which is not presently available due to the actions of the District's Board.

The District's Obligations To Provide Sewer Service

18. The District has a duty to provide sewer service to constituents owning land within its annexed boundary, including Plaintiffs.

19. Specifically, pursuant to A.R.S. § 48-2001, the District was formed for the sole and express purpose of "regulating, purchasing, establishing, constructing and operating a sewage system."

20. The District was formed because the Yavapai County Board of Supervisors made a legislative determination that the "public health, convenience, necessity or welfare will be promoted by the establishment of the ICR Sanitary District" and that the property "included within the ICR Sanitary District will be benefited by creation of the District." *See* Order of Establishment ICR Sanitary District, attached as Exhibit 1.

21. Consistent with that delegation of authority by Yavapai County, the District expressly agreed to provide unconditional service to Plaintiffs through its execution of various Sewer Service Agreements. *See* District's Sewer Service Agreements for various phases of Plaintiffs' respective developments, attached as Exhibit 2.

22. The Sewer Service Agreements expressly require the District to unconditionally "provide sewer service to each and every lot in accordance with the design shown on the attached plats of the [relevant] subdivision ... and upon completion shall be responsible for maintaining and operating the system."

23. In reliance on the District's execution of the Sewer Service Agreements, Yavapai County issued numerous Approvals to Construct and/or Operate the infrastructure for the various platted phases of the respective developments. *See* Yavapai County Approvals to Construct, attached as Exhibit 3.

24. In reliance on the various Yavapai County approvals, Plaintiffs expended millions of dollars to construct the authorized infrastructure and other improvements. The anticipated return on that investment was to be derived from the sale of developed lots benefitting from the infrastructure.

25. To their detriment, Plaintiffs are now unable to obtain any such return on their investment because the District has disavowed its commitment to serve through the adoption of a sewer connection moratorium.

The District Enacted An Illegal Moratorium Prohibiting Additional Hook-Ups To The Existing Plant

26. In 2008, the District adopted an ordinance stating "[a]ny building within the District inhabited or used by human beings that discharges wastewater shall be connected to the District's wastewater system" (the "2008 Compulsory Connection Ordinance"). *See* District Resolution 2008-01, Section 204, attached as Exhibit 4. This ordinance precludes the utilization of septic systems within the District.

27. On December 9, 2009, in violation of the Open Meeting Law, the District purported to approve a sewer moratorium through Resolution 2009-01 (the "Moratorium"). *See* District Resolution 2009-01, attached as Exhibit 5.

28. The Moratorium prohibits any new sewer hook-ups for property within the District's annexed boundaries.

29. Recognizing the violation of the Open Meeting Law, the District attempted to ratify its adoption of the Moratorium on January 6, 2010 and again on January 13, 2010. Both times, however, the District engaged in further violations of the Open Meeting Law rendering the Moratorium invalid and illegal.

30. The stated justification for the Moratorium was a claim that the District was owed money by certain developers, that the Existing Plant was exceeding its hydraulic capacity and its Biochemical Oxygen Demand ("BOD") capacity and that the number of

platted lots, if built on, will exceed the available capacity.

31. The Existing Plant has a hydraulic design capacity of 62,500 gallons per day ("GPD") and operates pursuant to Arizona Department of Environmental Quality ("ADEQ") Aquifer Protection Permit ("APP") No. P103119. *See* ADEQ APP dated December 31, 2002, attached as Exhibit 6.

32. The APP contemplates and authorizes expansion of the Existing Plant in four phases up to 455,000 GPD. Further, the APP incorporates reference to a design report for the Existing Plant which included a phasing schedule setting forth a schedule for the start of construction of the next phase when monthly average flows reach 53,125 GPD. *See* Exhibit 6 including Santec Design Calculations For Multi-Phase System Operations dated September 4, 2002.

33. The Existing Plant is currently operating at approximately 50 percent of its existing hydraulic design capacity as documented by average monthly flow records filed with ADEQ as a requirement of the APP.

34. As recently as June 1, 2009, the District acknowledged in a District published newsletter that the Existing Plant was operating below 60 percent of its hydraulic capacity. *See* District Letter to Members dated June 1, 2009, attached as Exhibit 7.

35. Likewise, there is no evidence that the Existing Plant has exceeded its BOD capacity either at the time the District adopted the Moratorium or now.

36. ADEQ has never issued a notice of violation to the District relative to capacity issues of any kind.

37. Thus, there is no legitimate basis for the Moratorium.

38. Notably, the District adopted a similar moratorium in 2006 evidencing a disturbing pattern of behavior.

39. Due to the severe and harmful nature of such moratoriums, the legislature

has set forth specific provisions that must be followed by a city before it can impose a moratorium on any construction or land development. *See* A.R.S. § 9-463.06.

40. Importantly, a Sanitary District has the same powers, privileges and immunities generally granted to cities. A.R.S. § 48-2001.

41. Further, even if the District followed the requirements set forth in A.R.S. § 48-2001 (which it did not), it must face the consequences of enacting the Moratorium, including providing Plaintiffs with just compensation.

42. In light of the 2008 Compulsory Connection Ordinance, the Moratorium destroys Plaintiffs' rights to use, divide, sell or possess private property, thereby substantially diminishing the value of Plaintiffs' properties.

43. Yavapai County has continued to issue building permits that would allow construction in the event homeowners were willing to design, construct and utilize expensive interim septic systems that would have to be abandoned after the Moratorium is lifted.

44. Regardless, the District asserts that its 2008 Compulsory Connection Ordinance has priority over any Yavapai County issued permit and has declared it will fine any homeowners who fail to connect to its sanitary sewer system $500.00 per day. *See* Prescott Daily Courier News Article dated November 8, 2010, attached as Exhibit 8.

45. Plaintiffs believe the available platted but unsold lots in their respective approved subdivisions prior to the Moratorium were worth in excess of $36,000,000.

46. Following the imposition of the Moratorium, Plaintiffs contend the platted but unsold lots are unsuitable for sale and thus essentially worthless for residential purposes.

47. On March 18, 2010, Plaintiffs submitted to the District a notice of claim seeking compensation for diminution in the value of their properties caused by the Moratorium. *See* Letter to District dated March 18, 2010, attached as Exhibit 9. To date,

no response has been received.

The Development Agreement Between The District and Harvard

48. Prior to the construction of the Existing Plant, the District and Harvard entered into a Development Agreement and Order to Extend the Boundaries of the ICR Sanitary District dated December 8, 2000 (the "Agreement"), which was later amended by the parties on May 11, 2001 (the "Amended Agreement" and collectively the "Development Agreement"). A true and accurate copy of the Development Agreement is attached as Exhibit 10.

49. The primary covenant of Harvard under the Development Agreement is its commitment to construct the Existing Plant and other facilities so that influent wastewater flows from customers within the District's boundaries can be treated at the Existing Plant.

50. In this regard, the Development Agreement provides that Harvard will "construct and install, or shall cause to be constructed and installed, the Facilities, which may generally consist of collector sewers and collection and transmission mains, manholes, catch basins, pumps, lift stations, septic tanks, wastewater treatment plant, and all other related items, both on-site and off-site, as determined to be necessary to extend sewer service to each lot, building, or other customer within the Property . . . ." *See* Exhibit 10 at § 2(a) (Development Agreement).

51. The District acknowledged and agreed that "[Talking Rock] may be developed in separate phases and that [Harvard] may construct and install the Facilities in phases in a manner that will allow for the provision of sewer utility services to each phase as necessary and in a timely manner." *See* Exhibit 10 at § 2(a) (Development Agreement).

52. In return, the District's primary covenant under the Development Agreement was to annex land owned by Harvard into its boundaries and to serve the annexed property.

53. Beyond these primary covenants, the District held additional obligations under the Development Agreement.

54. For instance, pursuant to the Development Agreement, upon completion, testing and final inspection of the Existing Plant and/or Facilities, the District was obligated to issue a written notice of acceptance of the Existing Plant and/or Facilities to Harvard. *See* Exhibit 10 at § 6(a) (Development Agreement).

55. The Development Agreement further provides the "District shall not unreasonably withhold or delay acceptance of the Facilities." *See* Exhibit 10 at § 5 (Development Agreement).

56. Upon information and belief, the Existing Plant was completed on April 4, 2003, start-up testing occurred on April 16, 2003 and operator training was completed on May 21, 2003.

57. Following the completion of operator training, the District began operating and maintaining the Existing Plant.

58. To date, however, the District has refused to accept the Existing Plant or any of Harvard's constructed sewer collection system. Thus, while the District owns the land on which the Existing Plant sits and has hired and controls the operator of the Plant, it does not own the Existing Plant.

59. In fact, the Chairman of the District Board has stated that the only way the District will assume ownership of the Existing Plant would be through "coercion." *See* Excerpt of Deposition of Gene Leasure, attached as Exhibit 11.

60. The APP issued for the Existing Plant identifies the District as the permitee. A recent ADEQ investigation noted the failure of the District to assume ownership of the Existing Plant as presenting responsible party issue and a potential violation of the APP. *See* Letter from ADEQ to District dated August 6, 2009, attached as Exhibit 12.

61. Moreover, Section 10 of the Development Agreement requires the District,

upon acquisition of the Facilities, to refund Harvard an "amount equal to fifteen percent (15%) of the gross annual operating revenues from the provision of sewer utility services to bona fide customers of District within the [District boundaries]" for a period of twenty (20) years. *See* Exhibit 10 at § 10 (Development Agreement).

62. Section 10 of the Development Agreement additionally requires that the District's refunds must commence in the calendar year immediately following the "earlier of either (1) 3 years from the date of conveyance of title to the Facilities to District by Harvard or (2) the District's satisfaction of its repayment obligations as set forth in certain promissory notes, copies of which are attached to the [Development Agreement]." Exhibit 10 at § 10 (Development Agreement).

63. Because the District has expressly refused to accept the Existing Plant, the District has denied Harvard the opportunity for a refund of its engineering and construction costs and Harvard has incurred other substantial expenses in connection with the operation of the Existing Plant.

64. The Development Agreement further provides that treated effluent will be made available for purchase by Harvard for use on the Talking Rock golf course and common and/or other areas on the property related thereto. *See* Exhibit 10 at § 14 (Development Agreement).

65. The District derives a benefit from the discharge of effluent on the Talking Rock golf course and such effluent discharge is mandated by the APP for the Existing Plant.

66. Pursuant to Section 14 of the Development Agreement, the "price to be paid for such effluent shall be mutually agreed upon between the District and [Harvard and/or Harvard's] successors and assigns, from time to time." *See* Exhibit 10 at § 14 (Development Agreement).

67. The rates charged for effluent used for irrigation should be reasonably

related to a cost of service or not otherwise exceed the cost Harvard would incur on its own if it had to operate its own irrigation well.

68. To date, the District and Harvard have not mutually agreed upon a reasonable price for effluent and the District has charged Harvard above market rates far beyond the cost of service or costs Harvard would incur on its own operating irrigation wells. Harvard agreed to pay the excessive charges subject to continued good faith negotiation with the District which terminated upon the adoption of the Moratorium. *See* Letter from Harvard to District dated August 15, 2006, attached as Exhibit 13.

69. The District has also improperly profited from its breach of the Development Agreement by subjecting lot owners to the payment of a hook-up fee for the establishment of sewer service in violation of the terms of the Amended Agreement. *See* Exhibit 10 at Recital C (Agreement) and § 1 (Development Agreement).

70. Upon information and belief, the District has charged lot owners and home builders who have purchased lots from Plaintiffs fees that are prohibited in violation of the Development Agreement.

71. Upon information and belief, various home builders and lot owners have paid the unauthorized fees.

COUNT ONE

(Arizona Property Rights Protection Act against the District)

72. Plaintiffs incorporate the above allegations as if fully set forth herein.

73. In November 2006, the voters of Arizona enacted by citizen initiative Proposition 207, the Arizona Property Rights Protection Act, which is codified at A.R.S. § 12-1131, *et seq.*

74. A.R.S. § 12-1134(A) provides, "if the existing rights to use, divide, sell or possess private property are reduced by the enactment and applicability of any land use law ... and such action reduces the fair market value of the property the owner is entitled

to just compensation from ... the political subdivision of this state that enacted the land use law."

75. The Moratorium directly regulates Plaintiffs' land by prohibiting new sewer connections, thereby precluding Plaintiffs from constructing homes on their land.

76. A substantial portion of the value of the Plaintiffs' property is based on the Plaintiffs' ability to construct new homes on their properties. Because no new homes may be constructed and occupied (as no sewer service is available), the Moratorium significantly reduces the value of Plaintiffs' property.

77. The Moratorium is a "land use law" within the meaning of A.R.S. § 12-1136(3).

78. The Moratorium was enacted after the date Plaintiffs took ownership of their property.

79. The Moratorium reduces Plaintiffs' rights to use, divide sell or possess private property, thereby substantially diminishing the value of those properties.

80. The Moratorium does not fall within any of the exceptions set forth in A.R.S. § 12-1134(B).

81. On March 18, 2010, pursuant to A.R.S. § 12-1134(E), Plaintiffs submitted to the District a claim letter seeking compensation for diminution in the value of their properties caused by the Moratorium.

82. As of the date of this filing, the Moratorium continues to apply thus ripening the cause of action in accordance with A.R.S. § 12-1134(E).

83. For the foregoing reasons, Plaintiffs have a right to just compensation under the Arizona Property Rights Protection Act.

COUNT TWO

(Special Action Relating to the District's Failure to Provide Sewer Services)

84. Plaintiffs incorporate the above allegations as if fully set forth herein.

85. The District has a non-discretionary duty to provide sewer services to the Plaintiffs, as evidenced by A.R.S § 48-2001, the Sewer Service Agreements and the Development Agreement.

86. The District failed to perform this duty by imposing the Moratorium.

87. Plaintiffs are owners of platted lots within the District's boundaries that were previously approved for sewer service.

88. Plaintiffs are therefore a party beneficially interested in procuring the enforcement of this public duty pursuant to mandamus relief.

89. Plaintiffs are entitled to an expeditious ruling by this Court that the District failed to perform a non-discretionary duty by enacting the Moratorium.

90. Plaintiffs have no equally plain, speedy, and adequate remedy in this matter.

COUNT THREE

(District Breach of Contract)

91. Plaintiffs incorporate the above allegations as if fully set forth herein.

92. The Development Agreement is a binding contract between Harvard and the District.

93. Harvard has fulfilled all of the terms and conditions of the Development Agreement.

94. The District's failure to issue a written notice of acceptance to Harvard upon completion, testing and final inspection of the Existing Plant and Harvard's sewer collection facilities is a breach of the Development Agreement.

95. The District's failure to refund Harvard an "amount equal to fifteen percent (15%) of the gross annual operating revenues from the provision of sewer utility services to bona fide customers of the District within the [District boundaries]" is a breach of the Development Agreement.

96. The excessive rate the District has charged Harvard for treated effluent is a

breach of the Development Agreement.

97. The District charging home builders and lot owners who have purchased lots from the Plaintiffs prohibited hook up fees is a breach of the Development Agreement.

98. Harvard suffered damages as a direct and proximate cause of the District's breach of the contract in an amount to be proven at trial.

99. The District is liable to Harvard for all damages suffered as the consequence of the District's breach of the contract.

100. Harvard is entitled to pre-judgment and post-judgment interest.

101. There are no set-offs, offsets, or defenses to the amounts owing to Harvard.

102. Harvard is entitled to costs and attorneys' fees pursuant to A.R.S. §§ 12-341 and 12-341.01 and the parties' contract.

COUNT FOUR

(District Breach of Covenant of Good Faith and Fair Dealing)

103. Plaintiffs incorporate the above allegations as if fully set forth herein.

104. In Arizona, every contract contains an implied duty of good faith and fair dealing.

105. The District has impaired Harvard's right to receive the benefits that flow from the Development Agreement between the District and Harvard.

106. The District has breached its duty of good faith and fair dealing implied in the contract by, among other things, failing to perform their obligations under the Development Agreement.

107. Harvard is entitled to damages in an amount to be proven at trial.

108. The District is liable to Harvard for all damages suffered as a consequence of the District's breaches.

109. Harvard is entitled to pre-judgment and post-judgment interest.

110. There are no set-offs, offsets, or defenses to the amounts owing to Harvard.

111. Harvard is entitled to costs and attorneys' fees pursuant to A.R.S. §§ 12-341 and 12-341.01 and the parties' contract.

WHEREFORE, Plaintiffs request that the Court award the following relief:

A. Judgment against the District for direct and consequential damages in an amount to be proven at trial;

B. Costs and attorney fees pursuant to A.R.S. §§ 12-341.01 and 12-349 and the parties' contract;

C. Pre-judgment and post-judgment interest; and

D. Such other and further relief as justice and equity require and the Court deems appropriate.

DATED this 16th day of November, 2010.

FENNEMORE CRAIG, P.C.

By _____
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