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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CENTEX HOMES, a Delaware corporation; JOHNSON RANCH HOLDINGS, L.L.C., a Delaware limited liability company; LDR-SWC HUNT HWY & GC, L.L.C., an Arizona limited liability company; and PULTE HOME CORPORATION, a Michigan corporation, Plaintiffs/Appellees, v. PINAL COUNTY, a political subdivision of the State of Arizona, Defendant/Appellant.	2 CA-CV 2010-0100 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200802028

Honorable William J. O'Neil, Judge

REVERSED AND REMANDED

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E S P I N O S A, Judge.

¶1 In this contract action, we consider whether the trial court correctly ruled that, as a matter of law, contract terms prohibited Pinal County from assessing development fees on a development project. Because we conclude the contract's language is reasonably susceptible to more than one interpretation, we reverse the court's grant of summary judgment in favor of plaintiffs Centex Homes; Johnson Ranch Holdings, L.L.C.; Pulte Home Corporation; and LDR-SWC Hunt Hwy & GC, L.L.C. (Developers) and remand for further proceedings.

Factual Background and Procedural History

¶2 Although the relevant facts in this case are essentially undisputed, "[o]n appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in its favor." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In November 1997, Pinal County (County) entered into a development agreement (Agreement) with Developers' predecessor-in-interest (Initial Land Owner), who wished to develop approximately 2,014 acres into a master planned community pursuant to a previously submitted development plan (Development Plan). In the Agreement, entitled "Agreement for / Phased Protected Development Rights Plan / Johnson Ranch and Pinal County, Arizona," the County acknowledged its desire to facilitate the improvement of the property because it would benefit the County with increased employment, tax revenue, and infrastructure. In consideration, the County, through its Board of Supervisors, granted Initial Land Owner the right to "undertake the

development and use of the Property under the terms and conditions of the development" for ten years, with the possibility of a ten-year extension. The parties also agreed the development of the property would be accomplished in four phases, each projected to take approximately five years to complete.

¶3 Central to the current dispute, the Agreement contained the following paragraph:

> Except as specifically provided in this Development Agreement, no surcharge or impact fees or impositions of any kind whatsoever for water, sewer, utilities, transportation systems, public services or any other infrastructure cost or expense shall be chargeable to Developer in any phase of the construction of the Development Plan.[1]

Additionally, the Agreement provided that the only ordinances applicable to the development would be those existing on the date the Agreement was recorded, December 2, 1997.

¶4 Several years later, the development changed owners, and Developers and the County signed an addendum to the Agreement (Addendum).[2] The Addendum reiterated that the development of the property was in the best interest of the County and that the County would benefit from the installed infrastructure and increased tax revenue. The Addendum also provided that, at the County's request, public infrastructure and

[1] "The terms 'impact fees' and 'development fees' are used interchangeably." *Home Builders Ass'n of Central Ariz. v. City of Maricopa*, 215 Ariz. 146, n.2, 158 P.3d 869, 871 n.2 (App. 2007).

[2] The parties do not dispute that Developers are successors-in-interest to the Agreement.

services to be provided by Developers would be completed ahead of schedule, that such infrastructure and services would "facilitate and support the ultimate development of the larger land area," and that Developers were willing to accelerate this work "only with the County's assurances that [they would] be able to complete development of the Property as provided for in the Agreement."[3]

¶5 In 2006, the County adopted Pinal County Ordinance No. 101806-DF, which permits the County to assess development fees on new building permits issued after January 2007. Developers thereafter sought an extension of the Agreement for an additional ten-year term, but the County denied the request.[4] After issuing its denial, the County began imposing on Developers the development fees authorized by the ordinance.

¶6 Developers sued the County raising numerous claims, and thereafter filed a motion for summary and declaratory judgment on the sole issue of whether the Agreement and Addendum precluded the County from assessing the fees. In their motion they argued that the Agreement's fee waiver provision extended beyond the Agreement's ten-year term provisions, lasting until all phases of the development were completed. In its opposition, the County contended the fee waiver terminated at the end of the initial ten-year term of the

[3]It is unclear whether the Addendum required additional infrastructure or only the expedited completion of infrastructure that Developers already had agreed to complete. However, this issue is not material to our decision.

[4]After their request for an extension was denied, Developers requested that the Board of Supervisors review its decision. Following a hearing, part of which was conducted by the Board in a closed session, the County affirmed its denial.

Agreement and, because the County had refused to extend the Agreement, the fee assessments were appropriate.

¶7 The trial court granted Developers' motion in part based on its determination that, pursuant to its specific language, the Agreement's fee waiver, unlike other provisions of the Agreement, was "not limited to a term of ten years," but instead lasted through all four phases of the development. It concluded the County had "breached the Development Agreement when [it] assessed impact fees against Plaintiffs' property prior to the completion of all phases of the development." The court also held the County's application of the ordinance to the development was a breach of Section 2(i) of the Agreement, which provided that the County ordinances applicable to the property would be limited to those in effect as of the date of the Agreement. The County now appeals. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶8 The County contends the trial court erred in granting summary judgment in favor of Developers. The entry of summary judgment is appropriate "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). "In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Tierra*

Ranchos Homeowners Ass'n v. Kitchukov, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007).

¶9 The County argues the trial court erroneously interpreted the duration of the Agreement's fee waiver and maintains that it does not extend through all four phases of the development because it is subject to the ten-year term and renewal option. We review de novo issues of contract interpretation. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5, 104 P.3d 193, 196 (App. 2005). And, central to our analysis here, "whether a contract is reasonably susceptible to more than one interpretation is a question of law, which we review de novo." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009).

¶10 Developers maintain that, as the trial court found, because the Agreement's fee waiver provision explicitly provides that no development fees "shall be chargeable to Developer in any phase of the construction of the Development Plan," the fee waiver necessarily survived the Agreement's ten-year term.[5] Language immediately preceding this section supports this interpretation, stating that the Development Plan has four phases, each estimated to last approximately five years.[6]

[5] The parties agree the development could proceed regardless of whether the Agreement was renewed.

[6] The Agreement provides, "Developer and County understand that this is a Development Plan with four phases, Phase I Construction, 0-5 years[;] Phase II Construction[,] 6-10 years[;] Phase III Construction, 11-15 years and Phase IV Construction[], 16-20 years."

¶11 On the other hand, the County argues the language "[e]xcept as specifically provided in this Development Agreement" in the fee waiver provision limits the waiver to the ten-year term contained both in the Agreement's introductory section and several other provisions of the Agreement. Under that interpretation, the language "in any phase" is subject to the Agreement's ten-year term and possible extension, which is incorporated into the fee waiver by the "[e]xcept as specifically provided" language. Developers point out that this limiting language could be construed to exclude only express, non-durational exceptions to the fee waiver provision, such as a clause permitting the County to demand "[i]nfrastructure [a]ssurances."[7] That may be a reasonable interpretation, but so is the County's. Both proposed interpretations of the fee waiver provision are supportable by reference to specific terms and reasonable inferences arising therefrom; we therefore conclude the Agreement is reasonably susceptible to more than one interpretation.[8]

¶12 "'[W]hen parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written.'" *Grosvenor Holdings*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050, *quoting Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). However, "[l]anguage in a contract is ambiguous . . . when it can reasonably be construed

[7]This provision allows the County to require Developers to deliver a letter of credit, cash, or certified bank funds or else file a surety bond in order to "assure the installation of infrastructure and improvements directly related to . . . building permits."

[8]We reach the same conclusion with regard to Section 2(i) concerning the applicability of ordinances to the development project because, similar to the fee waiver provision, this section begins with "[e]xcept as expressly provided in this Development Agreement."

to have more than one meaning." *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005). Because the Agreement's fee waiver provision is reasonably susceptible to more than one interpretation, *see Grosvenor Holdings*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050, the trial court incorrectly determined as a matter of law that this provision barred the County from imposing development fees during any phase of the development. *See State v. Mabery Ranch, Co.*, 216 Ariz. 233, ¶ 28, 165 P.3d 211, 219 (App. 2007) ("Where contract language is susceptible to more than one interpretation, the matter should be submitted to the jury."). Accordingly, the trial court erred in granting summary judgment.

Disposition

¶13 The trial court's grant of summary judgment is reversed and the case is remanded for further proceedings consistent with this decision. Although the County has requested an award of its attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01, the propriety of such an award shall abide the final outcome of this litigation and the discretion of the trial court.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Richard Gordon
RICHARD GORDON, Judge*

*A judge of the Pima County Superior Court authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed November 3, 2010.