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2018 Real Property Appellate Case Law Year in Review

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Clouded Title

Baumgartner v. Timmins, ___ Ariz. ___, 429 P.3d 567 (App. 2018)

Holding: Recorded affidavits alleging various properties were in violation of CC&Rs were not "encumbrances" for the purposes of A.R.S. § 33-420.

Various individuals who owned property in a community in Apache County (the "Property Owners") sued the Timminses for alleged violation of the community's voluntary CC&Rs. In response, Ann Timmins recorded affidavits alleging that the Property Owners and their properties violated the CC&Rs. The Property Owners brought a second suit under A.R.S. § 33-420, arguing that the recorded affidavits constituted groundless encumbrances against their properties. The trial court agreed with the Property Owners, ruled in their favor, and assessed damages, attorney fees, and costs to the Property Owners.

On appeal, the Court of Appeals specified that § 33-420 only applies to "encumbrances," and held that affidavits did not claim or purport to be encumbrances. The Court defined an encumbrance as a "non-ownership interest in property." The Court concluded that an action for clouded title under § 33-420 could only be brought where the recorded, at-issue document purports to create or claim a right or liability against the property. Because the affidavits that Ann Timmins filed did not purport to create a legal right or liability against the property, the Court held that they did not fall within the ambit of § 33-420.

Collection Actions Against Real Property

Andra R Miller Designs LLC v. US Bank NA, 244 Ariz. 265 (App. 2018)

Holdings: (1) Purchaser of real property at an execution sale under A.R.S. § 12-1622 has standing to raise statute of limitations defense under A.R.S. § 33-816; (2) creditor may unilaterally revoke acceleration of debt by an affirmative act that it communicates to the debtor; and (3) recording a notice of cancellation of a trustee's sale may accomplish both if it contains a statement revoking acceleration.

In 2006 a borrower executed an adjustable rate note that was secured by a deed of trust on real property and that contained an acceleration clause. In 2008, the borrower defaulted, and the lender sent notice referencing the acceleration clause. In January 2009, a notice of trustee's sale was recorded, but no sale occurred. In 2012, the trustee recorded a cancellation notice with an acceleration revocation clause. In February 2013, the homeowner's association (HOA) governing the property obtained a judgment and decree of foreclosure and order of sale for unpaid assessments and other costs. Again, no sale occurred. In May, the trustee recorded a new notice of trustee's sale. In January 2014, the lender sent notice that it could accelerate the debt if the default were not cured. In June the lender recorded another cancellation notice, again with the same acceleration revocation language. In December the trustee recorded yet another notice of trustee's sale.

In February 2015, Miller purchased the HOA's judgment and, in March, purchased the property at a sheriff's sale. Miller then filed to enjoin US Bank, who had become trustee, from foreclosing its lien and forcing a trustee's sale. Both sides moved for summary judgment and the trial court ruled for Miller, finding the bank's claim for acceleration of the debt accrued in 2009 and was barred by the six-year statute of limitations.

On appeal, the bank first argued Miller lacked standing to raise the statute of limitations defense because it was not in privity to the note, to the deed, or with the borrower. The court looked to § 12-1622, which states that when real property is sold at public auction, "the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto." Thus, the court determined that having purchased the property from a junior lien-holder's foreclosure sale, Miller owned the property subject to the senior lien-holder's interest, giving it a sufficient basis to invoke the limitation period in an *in rem* action.

Next, the bank argued that by recording notices of cancellation and issuing right to cure notices, the bank had cancelled the acceleration, resetting the statute of limitations. The court agreed. First the court noted that a creditor can unilaterally revoke the acceleration of a debt, provided it takes some affirmative act and communicates the revocation to the debtor. It then clarified that cancellation of a trustee's sale is only enough to revoke acceleration if it contains a clause stating that acceleration has been withdrawn. The court also determined that recordation provided sufficient notice. Accordingly, it reversed the decision of the trial court and remanded for further proceedings.

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Pacific Western Bank v. Castleton, 807 Ariz. Adv. Rep. 4 (App. Dec. 27, 2018)

Holding: A judgment creditor cannot attach a judgment lien to homestead property but must instead execute on its judgment via forced sale under A.R.S. § 33-1105. A sale to a third party which occurs before a § 33-1105 sale prevents the judgment lien from attaching.

The Sepics purchased their home in 2002. In 2007, they took out two loans. First, they took out a $937,500 loan secured by deed of trust on their home (Home Loan). Second, they borrowed money to purchase an apartment complex (Apartment Loan). The Home loan was later assigned to Chase Bank, while the Apartment Loan was later assigned to Pacific Western Bank (PWB).

The Sepics first defaulted on the Apartment Loan, and PWB sued and obtained a default judgment for $5.2 million. PWB recorded the judgment and renewed it. The Sepics later defaulted on the Home Loan and negotiated a short sale with Chase. As a result of the short sale, their residence was conveyed to a Revocable Family Trust, which then sold the home to the Castleton Trust, for $535,000.

Three years later, PWB still sought to execute its unpaid judgment based on the Apartment loan. They sued the Castleton Trust for declaratory relief and quiet title, seeking to enforce the judgment against the Home as a valid lien. PWB sought a writ of general execution and noticed a sale of the home. The Castleton Trust sought and successfully obtained injunctive relief, staying the sale. PWB appealed.

The Court of Appeals began their opinion by interpreting the relationship between the judgment lien statutes, A.R.S. § 33-961 to 33-964, and the homestead and homestead exemption statutes, A.R.S. § 33-1102 to 33-1105. The Court recognized the general rule that a recorded judgment does not become a lien on homestead property under § 33-964. Instead, homestead property is held free and clear of any judgment liens.

As an exception to that general rule, however, the Court recognized that a judgment creditor may reach excess equity using A.R.S. § 33-1105. Section 33-1105 allows a party to force a sale of property to a bidder who offers a sum exceeding the homestead exemption plus the value of any consensual liens with priority. As such, PWB could not attach its judgment lien to the home.

PWB argued, however, that § 33-1103(A)(4) created an exception that allowed a judgment lien to attach. But the Court clarified that § 33-1103(A)(4) does allow a judgment creditor to satisfy their judgment from property that is subject to a

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homestead, but only though the forced-sale procedure in § 33-1105. The Court concluded that, because PWB did not effectuate a forced sale while the property was still owned by the Sepics, their judgment did not attach to the home, and therefore did not run with the land and was unenforceable against the Castleton Trust. The Court also held that the Sepics did not abandon their homestead exemption by selling the property.

Eminent Domain

City of Tucson v. Tanno, ___ Ariz. ___, 431 P.3d 202 (App. 2018)

Holding: In an eminent domain action, real-property owners properly precluded from presenting evidence that a similar, long-abandoned project of another governmental entity had depressed the value of their property because the projects were sufficiently distinct.

In 2015, the City of Tucson filed an eminent domain action to condemn certain real property owned by the Tannos for its "Downtown Links" project. The sole issue at trial was the value of the property, which the jury found to be $365,910. The Tannos challenged several evidentiary rulings, most notably, the trial court's decision to preclude evidence of a similar project ADOT had announced and then abandoned in the 1980s. The Tannos argued the market value on their property the date of the City's 2015 summons was inadequate compensation because the property's value had been depressed ever since ADOT first announced their plans in the 1980s. The trial court rejected the Tanno's argument, finding that although the projects were similar, the City's Downtown Links project was distinct from the project ADOT announced and abandoned decades earlier.

On review the court of appeals evaluated and dismissed Tanno's arguments in turn. First, the court affirmed the determination that the City's project was distinct from ADOT's project because they were the initiatives of distinct entities separated by decades. The court, however, was careful to point out that review the trial court's evidentiary rulings was limited to whether substantial evidence supported its determinations, not whether, it would have arrived at the same conclusion had it considered the question de novo.

Next, the Tannos argued they should have been permitted to present evidence of the best use of their property. The court of appeals also affirmed the decision to preclude evidence that the property could have been assembled with adjacent parcels because the Tannos had failed to meet their burden to show assemblage

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was reasonably probable at any time in the foreseeable future or that the value would have been any different if assembled with others.

The Tannos also argued they should have been allowed to testify not only to the value of the property, but to the value of investments had the property been sold during certain negotiations with the City in 1993 and the proceeds invested in the market. The court of appeals affirmed the decision to preclude such evidence because it was not an owner's testimony about the value of his or her own land, which generally receives considerable latitude, but was hypothetical and speculative.

Finally, the Tannos challenged certain motions in limine because they constituted "improper[] . . . dispositive relief" and should have been brought as motions for summary judgement. The court of appeals, however, determined that the Tannos did not establish that their theories of calculating just compensation for which evidence was precluded constituted either claims or defenses. Instead, the court reasoned that the rulings at issue merely limited the evidence that could be introduced in support of a claim. The court also disposed of challenges to certain rulings on jury instructions for failure develop a legal argument.

Burns v. City of Tucson, 804 Ariz. Adv. Rep. 15 (App. Nov. 23, 2018)

Holding: Arizona's relocation assistance statutes do not imply a private right of action entitling a displaced person to challenge a benefit award in the superior court; instead, such person must petition for special action.

In 2015, after the City of Tucson condemned property belonging to Burns, an agent for the city notified him he was entitled to $38,284.72 in relocation-assistance benefits pursuant to Arizona's relocation-assistance statutes. *See* A.R.S. § 11-963. Dissatisfied with the award, Burns sought review with the Project Manager of the City's Real Estate program, who affirmed the award. Burns brought suit against the City seeking judicial review of the award including a claim under the statute as well as a claim for negligence arguing the statute imposed a duty the City breached by offering an inadequate award. Burns also brought a due process claim. The trial court granted the City's motion to dismiss, finding the relocation-assistance statute did not provide a private right of action.

On appeal, Burns argued the relocation-assistance statutes imply a private right of action, enabling a displaced person to challenge an award in the superior court. He also refreshed his negligence claim.

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Addressing the implied right claim first, the Court of Appeals noted that the plain language of the statute neither expressly granted nor foreclosed a private right of action. Accordingly, the court considered "the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." (*quoting Chavez v. Brewer*, 222 Ariz. 309, ¶ 24 (App. 2009)). In determining the legislature had not implied a private right of action, the court considered statutory language that "strongly" indicated that any review would be limited to "the chief executive officer of the acquiring agency *whose decision shall be final*." (*quoting* A.R.S. § 11-967) (emphasis added). In the end, this outweighed other considerations; particularly, that an award inures only to the benefit of a displaced person and questions about the effectiveness of the limited review the statute affords. Nevertheless, the court reasoned that when the state creates wholly new rights against itself, it is free to limit review thereof. It also noted that a displaced person aggrieved by an award could still obtain judicial review by special action in the superior court. *See* A.R.S. § 12-201; Ariz. R. P. Spec. Act. 1.

The court also rejected Burns's negligence claim based on the relocation-assistance statutes on the basis of governmental immunity. That is, the state has only waived sovereign immunity for injuries a person may suffer if it had been inflicted by a private person. *See* A.R.S. § 12-820(2). The court reasoned that the relocation assistance statutes place no duty on any private person and therefore, Burn's could not sustain a negligence claim against the City. Finally, the court declined to remand the case with instructions for the superior court to characterize Burns's complaint as a special action because Burns had forfeited the argument by failing to raise it below.

Forcible Entry and Detainer /Eviction Actions

Bank of New York Mellon v. Dodev, 804 Ariz. Adv. Rep. 6 (App. Nov. 20, 2018)

Holding: (1) the pendency of an appeal from a previous dismissal without prejudice did not divest the superior court of jurisdiction; (2) Rule 41, Ariz. R. Civ. P., is not incorporated into the Rule of Procedure for Eviction Actions 9(h) and the two dismissal rule does not apply; (3) the superior court properly found impracticability for the purposes of alternative service; (4) the superior court properly determined that it had personal jurisdiction over Dodev and properly entered a default judgment for failure to answer; (5) A.R.S. § 12-1178 provides an independent basis for awarding attorney fees in forcible entry and detainer actions; and (6) notwithstanding § 12-1178's provision for attorney fees, § 12-1182 does not provide for attorney fees on appeal.

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This case involved a home in Gilbert acquired by Dodev in 2004. Dodev defaulted on his mortgage in 2008, but as of 2018, still remained in the Property due to numerous legal actions intended to delay foreclosure and a trustee's sale. In 2016, the Bank of New York Mellon ("Bank") acquired the property through trustee sale and immediately brought a forcible detainer action. After a significantly byzantine procedural history involving multiple dismissals, an attempted removal to federal court, and various motions, the Bank obtained a default judgment against Dodev in 2017.

On appeal Dodev first argued that the prior case doctrine precluded the superior court's jurisdiction. The Court of Appeals ruled that, even though Dodev had appealed an earlier ruling dismissing the Bank's FED action without prejudice, both to the Court of Appeals and to the Arizona Supreme Court, the superior court retained jurisdiction because neither appellate court accepted or had appellate jurisdiction.

Second, the Court held that the two dismissal rule of Rule 41, Ariz. R. Civ. P., had not been incorporated into the eviction rules, and Rule 9(h) of the eviction rules allow the filing of a motion to voluntarily dismiss an unserved complaint even up to two times, as was the case there.

Third, the Court held that Dodev had not waived his objection to personal jurisdiction by participating in the case but held that the trial court properly found service through an alternative means after the Bank presented an affidavit of non-service which explained that the bank had attempted service five days in a row, and that further attempts would be impracticable. The Court of Appeals noted that the impracticability requirement under Ariz. R. Civ. P. 4.1(k).

Fourth, the Court held that because Dodev did not answer because he believed the Court did not have jurisdiction over him, and where Dodev had an ample opportunity to answer, it was proper to enter a default judgment when he failed to properly answer.

Fifth, the Court expressly recognized that a party to an FED action can be granted their attorney fees and costs under A.R.S. § 12-1178. And finally, Sixth, the Court found that § 12-1182 did not provide for attorney fees on appeal.

Homeowners Associations

Bocchino v. Fountain Shadows Homeowners Association, 244 Ariz. 323 (App. 2018)

Holding: Notwithstanding provision in CC&Rs that an HOA may recover all attorney fees, those fees must be awarded by a qualified tribunal.

Following a series of confrontations at HOA meetings, Fountain Shadows HOA applied to justice court and obtained an injunction against workplace harassment against Bocchino. The CC&Rs provided that

> [i]n the event, the Association employs an attorney . . . to enforce compliance with . . . the terms and condition of [the CC&Rs], the Owner . . . against whom the action is brought shall pay all attorneys' fees . . . thereby incurred by the Association in the event the Association prevails in any such action.

For unspecified reasons, the HOA but did not request attorney fees from the justice court; instead it directly assessed Bocchino for $3887.28 in attorney fees through her HOA account. When Bocchino sold her home, the HOA notified the title company of the assessment, which remitted that amount to the HOA. Bocchino filed suit and the Superior Court granted summary judgment in favor of Bocchino, invalidating the injunction as unconstitutionally vague and overbroad. The court then determined the HOA could not have been the prevailing party and overturned the "award" of fees. The HOA appealed.

On review, the court of appeals avoided the constitutional question relying on the principle that courts should avoid constitutional issues, if possible. The HOA argued that its authority to unilaterally impose the fees derived from the CC&Rs while Bocchino argued the statute provided the "exclusive basis" for any such award. The court examined both grounds and determined the "award" was improper.

First, the court examined A.R.S. § 12-1810(O), which provides that a court may provide fees when the party seeking them provides "notice to the affected party *and* after a hearing, the *court* . . . enter[s] an order that requires [the] party to pay the costs of the action, including reasonable attorney fees." The court determined that the HOA waived its opportunity to request fees under the statute because it did not request them from the justice court.

Turning to the CC&Rs, the court rejected the HOA's claim that it could unilaterally assess attorney fees because the CC&Rs permitted recovery of "all" fees, not just judicially approved, reasonable fees. On policy grounds, the court noted that courts routinely review claims for attorney fees, reducing claims that are "clearly

excessive" ("Courts play a significant role in assessing and awarding attorney fees incurred in judicial proceedings"). Moreover, the court noted that the HOA cited no authority supporting the notion that an HOA could assess fees without first receiving an award from a court.

Property Bonds

Starr Pass Resort Developments v. Harrington, ___ Ariz. ___, 431 P.2d 209 (App. 2018)

Holding: A.R.S. § 12-2108 and Rule 7, Ariz. R. Civ. App. P., permits a party to post a property bond as an alternative to a cash bond while a matter is pending on appeal.

In August 2017, Judge Harrington of the Pima County Superior Court entered judgment against Starr Pass et. al in favor of U.S. Bank et. al, the real parties in interest. Two of the parties against whom judgment was entered requested leave to post a property bond in lieu of a cash bond while the matter was pending on appeal. U.S. Bank argued that since legislature amended A.R.S. § 12-2108 and the Supreme Court amended Rule 7, Ariz. R. Civ. App. P., to remove critical language the court of appeals had relied on in an earlier case to determine a party could post a property bond, *see Salt River Sand & Rock Co. v. Dunevant*, 222 Ariz. 102 (App. 2009), any such bond must now be in cash. The court agreed and denied the motion.

On special-action review, the court of appeals rejected U.S. Bank's argument after examining the language of the statute and rule. In particular, the court noted that § 12-2108 requires the amount of a bond to stay execution of a judgment while a civil action is on appeal is the lesser of: (1) the total damages (excluding punitive damages); (2) half the appellant's net worth; or (3) twenty-five million dollars. A.R.S. § 12-2108(A). It also authorizes the court to increase or decrease the bond if clear and convincing evidence suggests the appellant will either dissipate its assets to avoid the judgment or will cause it to suffer substantial economic harm, respectively. § 12-2108(B), (C). The court also relied on language in Rule 7(a)(2) that permits a court to "enter any further order, in lieu of or in addition to the bond, which may be appropriate to preserve the status quo or the effectiveness of the judgment," and in Rule 7(a)(5), which allows the court to consider any other security. This final clause, it reasoned, "necessarily permits consideration of non-cash bonds." Accordingly, the court determined that statute and rule permit a property bond as an alternative to a cash bond while a matter is pending on appeal.

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Quiet Title

Cook v. Grebe, ___ Ariz. ___, 429 P.3d 1161 (App. 2018)

Holding: The prevailing party entitled to an award of fees in a quiet title action under A.R.S. § 12-1103(B) is controlled by who prevails on the quiet title claim regardless of the outcome of other claims.

Cook and Grebe are neighbors, owning adjacent parcels. Cook filed an action for adverse possession arguing he used and maintained Grebe's property for over fifteen years and that Grebe's failure to maintain and secure it caused a private nuisance. Grebe counter-claimed for quiet title, conversion, unjust enrichment, and trespass. The court found for Cook as a matter of law on Grebe's conversion and unjust enrichment claims, and the jury found for Cook on his private nuisance and Grebe's trespass claims but found for Grebe on her quiet title and Cook's adverse possession claims. Because Grebe prevailed on the adverse possession and quiet title claims, the court awarded her partial attorney fees in the amount of $50,000.

Cook argues Grebe was not the prevailing party because he prevailed on four of the six claims. The court disagreed, explaining that awards of attorney fees are governed by statute and § 12-1103(B) makes clear that for the purposes of a fee award thereunder, the prevailing party is the one who succeeds on a quiet-title action. Because the jury unambiguously quieted title in Grebe's favor, the court properly determined she was entitled to an award of fees.

Cook also argued the fee award was unreasonable insofar as the court's reduction of fees did not properly account for the number of claims upon which he prevailed. The court rejected Cook's arguments finding "broad assertions" insufficient and lacking in specificity. Finding no abuse of discretion, it affirmed the award.

Timeshares

Zwicky v. Premiere Vacation Collection Owners Association, 244 Ariz. 228 (App. 2018):

Holding: (1) Inspecting books to protect one's interest is a proper purpose under A.R.S. § 33-2209; (2) in a contested motion, a trial court must review information subject to a protective order before releasing them from such order; and (3) Notifying members of an association of a contemplated action with an attorney's

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contact information does not advance "legitimate association business" under A.R.S. § 33-2210.

In 2004, Zwicky acquired an interest in a Timeshare. After a certain corporation acquired a substantial interest in the Timeshare, assessments increased, rendering Zwicky's interest "essentially worthless." Zwicky filed suit to enforce his right to inspect the books. In discovery, which had been limited under orders of confidentiality, Zwicky moved the court for permission to use disclosed documents as the basis for a class action suit, and to order the Timeshare to notify members of both the contemplated action as well as the contact information of Zwicky's attorney. The Timeshare sought permission to brief the court about why certain documents should remain confidential. The court denied the Timeshare's request and granted Zwicky's motions.

On appeal, the court considered three issues. First, the Timeshare argued Zwicky had not complied with A.R.S. § 33-209 when requesting to inspect Timeshare records. After reviewing the record, the court determined Zwicky had complied with the statute and, in particular, that he had acted "in good faith and for a proper purpose," as required. As Zwicky stated below, he requested the records to "determine whether the [Timeshare]'s Board acted reasonably and in good faith in calculating and approving the assessments in question" and to determine whether the corporation-shareholder had been paying a fair, equitable share. The court approved of this purpose explaining that deriving information to protect one's interest is proper.

Second, the Timeshare argued the trial court had erred by modifying the protective order to allow Zwicky to use the documents in a separate complain without giving it the opportunity to submit argument and evidence showing why they should be kept confidential. On this point, the court saw nothing in the record to suggest that the superior court reviewed the confidential records to determine whether they should remain subject to the protective order. Accordingly, the court of appeals vacated that portion of the order and remanded the case to the trial court for it to determine whether any of the documents should remain subject to the protective order.

Finally, the Timeshare argued the court erred by ordering it to notify members of a contemplated class action suit along with the contact information of Zwicky's attorney. The court examined A.R.S § 33-2210 and determined such notice did not constitute "legitimate association business" as contemplated in the statute. Instead, the court determined such notice was for the benefit of Zwicky and his

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lawyer in their effort to amass a class of plaintiffs. Accordingly, the court vacated that part of the order.

Water

Silver v. Pueblo del Sol Water Co., 244 Ariz. 553 (2018):

Holding: When evaluating whether a developer has an adequate water supply to subdivide property, A.R.S. § 45-108 does not require ADWR to consider unquantified federal reserved water rights.

In 1972, the Pueblo del Sol Water Company ("Pueblo del Sol") formed after obtaining a certificate of convenience and necessity ("CC&N"). In 1988, Congress established the San Pedro Riparian National Conservation Area ("Area") around the San Pedro River, reserved water rights therefor, and delegated management to the Secretary of the Interior. At no time, however, has the Secretary quantified an amount of water to be reserved for conservation of the Area.

In 2013, a developer applied to the Arizona Department of Water Resources ("ADWR") for a determination that Pueblo del Sol had an adequate, 100-year water supply to serve a proposed Cochise County subdivision. Over the Secretary's objection that increased groundwater pumping would affect the river's flow, ADWR approved the subdivision. The Secretary sought review in the superior court which vacated ADWR's decision. The court of appeals then vacated the superior court's decision.

As additional background, the Federal government has petitioned for the recognition of a 44,000 annual acre-foot allotment of water for the Conservation Area. Whether it receives that allotment is a matter to be decided within the Gila River stream water adjudication, which has been pending in Maricopa County since 1974.

On review of ADWR's determination regarding Pueblo del Sol, the Secretary challenged whether Pueblo del Sol's water supply was "adequate" for at least one hundred years as is required by A.R.S. § 45-108(I). This demonstration is met by a two-prong showing, including that the provider could demonstrate a financial ability to construct water facilities to deliver a water supply to the proposed use and a demonstration that water was "continuously, legally, and physically available." Plaintiffs argued Pueblo del Sol could not make this showing in light of the unquantified Federal water right reserved for the Area.

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First, the court agreed with the parties that the court of appeals had erred by directing ADWR to consider the unquantified right in terms of physical availability. Having determined that Pueblo del Sol unquestionably established physical availability (or alternatively that Plaintiffs did not challenge a demonstration of physical availability), the court turned to legal availability.

In examining legal availability, the court began with the text of the statute itself. Finding ambiguity in the meaning of "legally available" the court considered the range of possible meaning from "every conceivable water right that might someday affect [the] right to pump groundwater" on the one hand, to the meaning consistent with the process of obtaining a CC&N. The source of this interpretation was the legislature's adoption of ADWR's prior definition of the adequacy of a water supply, which ultimately for Pueblo del Sol was a recognition that it had obtained a CC&N. The court set aside any other interpretation of § 45-108 as requiring ADWR to engage in speculation to quantify the Federal right, or possibly, engage in a task beyond its authority—the statutory term "legally available" could not be limited by an unquantified federal reservation. Ultimately, the court reinforced the distinctions between Arizona's surface and groundwater law (although acknowledging their interrelatedness), and determined that because groundwater was at issue, groundwater rules governed. With respect to groundwater, a property owner is limited only to reasonable use. Accordingly, so long as Pueblo del Sol's intended use was reasonable, water would be legally available.

Finally, the court reiterated that ADWR had conceded that if a quantified right were at issue, it would have been bound to consider it.

In dissent, Chief Justice Bales, joined by Justice Pelander, argued that ADWR need not precisely quantify the federal right, but only consider the potential impact of such rights. Also dissenting, Justice Bolick, joined by Justice Pelander, argued the majority's interpretation rendered "legally available" meaningless because it did not account for a right that, if exercised, may deprive the subdivision of sufficient water. Writing for himself, Justice Pelander invited the legislature to clarify the statute.

Zoning/Takings/Administrative Hearings

American Furniture Warehouse Co. v. Town of Gilbert, 245 Ariz. 156 (App. 2018)

Holding(s): (1) A generally applicable, legislatively imposed development fee imposed by the Town of Gilbert was not an unconstitutional taking under the

Dolan/Nollan line of cases where that development fee was restricted by statute; and (2) the application of a development fee contained discretionary aspects where the building was mixed-use, and as such the developer was entitled to an administrative appeal hearing.

American Furniture Warehouse (AFW) sought to develop a 630,290 square foot building that would be comprised of a retail showroom, a warehouse and loading dock, a mezzanine, and a maintenance area. AFW chose a site in Gilbert for this building. According to a city ordinance, the developer of any new commercial structures were required to pay a traffic signal System Development Fee (SDF). The SDF was assessed based on square footage, at rates that varied based on the use of the commercial structure. The rates are significantly different, such that retail use buildings are close to three times as expensive as office and industrial uses. Gilbert classified the entirety of AFW's building as retail use, and assessed them a more than $1 million SDF.

AFW protested the SDF, arguing that it was not reasonably related to Gilbert's costs, and that their building was actually primarily industrial in use. AFW also requested a statutory exaction appeals hearing under A.R.S. § 9-500.12(A)(1). Gilbert denied the protest finding that the main purpose of the building was to sell furniture and ship furniture to customers and was therefore retail in use. It further argued that the land use and not the trip counts to the business determined the SDF. Gilbert further found that because the ordinance that imposed the SDF was a legislative act, AFW had no right to appeal and had no right to a statutory exaction administrative appeals hearing.

Proceedings began in the trial court, and two rounds of summary judgment motions were briefed and ruled upon. The trial court found that the SDF was a legislative action with a presumption of validity and found that the appeal hearing claims should have been brought as a special action. The trial court further found that Gilbert's denial of the protest was supported by evidence and Gilbert's Town Code, and was not otherwise arbitrary, capricious, or an abuse of discretion. AFW appealed.

On appeal, the Court of Appeals found that the traffic signal SDF was a generally applicable legislatively imposed fee under the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) line of cases. *Nollan/Dolan* created the test to determine whether a government-imposed requirement for developing property is a taking. Specifically, a Court should look at the "essential nexus" of the legitimate state interest and the permit condition exacted by the city. The connection between the legitimate state interest

and the permit condition must be "roughly proportional." This line of cases distinguishes between "generally applicable zoning regulations" on the one hand, with "adjudicative decisions to condition development on a particular parcel" in order to determine which party has the burden.

Applying those tests, the Court of Appeals found that the SDF was legislative rather than adjudicative in nature, and therefore AFW had the burden. In so reasoning, the Court explained that under the ordinance, the SDF was applicable to all development based on a fee schedule. The Court noted that the requirement to pay the SDF was not the product of an adjudicative decision to impose an exaction conditioned on the circumstances of AFW's particular case. Further, the Court noted that the SDF was restricted by statute to result in a beneficial use to the project such that the assessment not exceed a proportionate share of the costs needed to provide services to the development. A.R.S. § 9-463.05. Because the developer failed to demonstrate an unconstitutional application of the SDF to the development, the taking was not unconstitutional.

After determining that the SDF was constitutionally proper, the Court of Appeals turned to the issue of the Right to an exaction administrative appeals hearing. A party is entitled to an administrative appeal under A.R.S. § 9-500.12 except where the administrative agency or official has no discretion as to the nature or extent of the exaction. Here where the AFW development was a mixed-use building, Gilbert exercised discretion in 'fitting' the development within the categories of uses created by the SDF. That discretion included whether the development fit into a single category (as Gilbert decided) or whether and the extent to which the use could have been split into multiple categories. Because Gilbert exercised discretion in classifying the development within the rubric of the SDF, the trial court erred in granting summary judgment that Gilbert had no discretion under the SDF (i.e., the trial court should have ordered Gilbert to appoint a hearing officer to hold an Exaction Hearing that would result in an administrative determination of the development's classification within the SDF framework).

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