

w/o

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

SEDONA GRAND, LLC, Plaintiff, vs. CITY OF SEDONA, Defendants.	Case No. V1300CV820080129 UNDER ADVISEMENT RULING ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT	FILED DATE: <u>FEB 24 2015</u> <u>1:40</u> O'clock <u>7</u> P.M. DONNA McQUALITY, CLERK J. HARSHMAN BY: _____ Deputy
HONORABLE JEFFREY G. PAUPORE DIVISION PRO TEM A		BY: Tiffany Kolar, Judicial Assistant DATE: February 23, 2015

The Court has read and considered Plaintiff's Motion for Partial Summary Judgment with the Statement of Facts, Defendant's Response with Controverting Statement of Facts, Plaintiff's Reply, Defendant's Cross Motion for Partial Summary Judgment with the Statement of Facts, Plaintiff's Response with Statement of Facts and Defendant's Reply.

In an Order dated December 18, 2014, the Arizona Court of Appeals determined an evidentiary hearing was necessary to develop a record. *Sedona Grand, LLC, v City of Sedona*, 229 Ariz. 37 (2012). An Evidentiary Hearing was scheduled for February 23, 2015.

At a January 14, 2015 Status Conference, the parties stipulated that all evidence supporting their respective Motions was included in their Briefs. The parties further stipulated that no additional evidence would be submitted at an Evidentiary Hearing. The parties requested the Court to rule on the pending Motions as submitted in spite of the Court of Appeals directive requiring an Evidentiary Hearing. The Evidentiary Hearing was vacated and the matter was taken Under Advisement.

Summary Judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff's Motion for Partial Summary Judgment seeks a Declaratory Judgment finding the 1995 Sedona Land Development Code ("SLDC") did not prohibit Options to Purchase ("Options"). If the SLDC did not prohibit Options, the Plaintiff claims it is entitled to damages for loss of use of its property.

SLDC is codified in §603 RS-35 Single-Family Residential District. Section 603.02(A) (1) states: "Rentals of single-family dwellings for periods of less than 30 consecutive days is prohibited." This law has not been amended and is still in effect today.

Plaintiff, Sedona Grand, LLC has owned the property at 20 Jasper Court, Sedona, AZ, since May 18, 2006. Scenic Sedona, LLC has owned 95 Mingus Mountain Road, Sedona, AZ, since May 18, 2006. Sedona Vista, LLC has owned 85 Mingus Mountain Road, Sedona, AZ, since December 4, 2006 ("Subject Properties"). Sedona Grand, LLC, Scenic Sedona, LLC, and Sedona Vista, LLC are limited liability companies owned by Robert and Liza Perdrizet.

Plaintiff argues SDLC short-term rental ban did not prohibit purchase option agreements. Defendant argues the SLDC prohibited short-term rentals since 1995 and Plaintiff's options were designed as an "end run around the City's ban on short-term rentals".

In July, 2006, Defendant sent notices to Plaintiff directing it to cease and desist short term rentals on the Subject Properties. Defendant's *Statement of Facts* ("SOF") Exhibit B.

On January 25, 2007, in reaction to the notices, Plaintiff's attorney advised Defendant they were utilizing an "Option to Purchase Real Property" ("Options") as tool for the sale of the Subject Properties due to the restrictive nature of the SLDC. Plaintiff's attorney stated his clients properties were listed for sale on MLS. Plaintiff's SOF Exhibit #7.

A typical Option identified the seller as Sedona Grand, LLC and the "Buyer". The property was described as 20 Jasper Court, Sedona, AZ. One particular Option was signed on June 11, 2007, and Buyer agreed to pay Seller \$7,450 for the right to purchase the property for the price of \$1,850,000. The Option had to be exercised between July 22, 2007 starting at 4:00 p.m., and August 3, 2007 by 11:00 a.m. Seller granted Buyer the exclusive right to inspect the property during the option period. The right to inspect included the right to occupy; there was no restriction limiting the number of occupants, vehicles, or use of the property during the option period. Buyer acknowledged the Option was non-exclusive. To exercise the Option, the Buyer was required to submit a copy of the Option with the sum of \$10,000.00 to a title company. Buyer's fee to inspect the property was not applied to the purchase price. The Option price varied based upon the time allowed for the inspection. The longer the inspection period, the higher the price of the Option. (Plaintiff's Exhibit 8).

In addition to the Option, the customer was required to fill out and sign "Payment Policy Information" which stated:

"We accept for payment personal check, MasterCard, Visa, Discover and American Express. A 30% deposit is required at the time of booking. The balance is due 45 days prior to arrival. No security deposit is required if paying by credit card. If paying by credit card we then require a signed agreement to which *tenant* would be responsible for any damage, missing items, excessive cleanup and stain or odor removal. If paying by check or debit card a refundable security deposit of \$500 is due 45 days prior to arrival..."

Defendant's Controverting Statement of Facts, Exhibit Q. (Emphasis added).

Exhibit Q contained 16 Options for Sedona Grand from May, 2007 through February, 2008. The forms had the reserved dates and the number of adults and children with contact information. Examples of the occupants ranged from 8 adults with 5 children, 12 adults with 4 children, 6 adults and no

children, 6 adults with 9 children, 8 adults with 5 children, 10 adults with 2 children, and so on. *Defendant's Controverting Statement of Facts, Exhibit Q.*

Declarations from 4 individuals who stayed at 20 Jasper Court stated they "did not rent the property with an interest in buying." *Defendant's Controverting Statement of Facts, Exhibit T.*

Plaintiff and Buyers executed numerous Options and Payment Policy forms. Defendant claims the purchase price of \$1,850,000 was 50% above the properties fair market value based upon a real estate appraisal. *Plaintiff's SOF Exhibit #8.*

In an online website for vacation rentals, 20 Jasper Court was described as having 5 bedrooms, a heated private pool, spa, and views. The residence was available monthly for \$15,000 and weekly for \$4,650 to \$4,950. The online listing included a calendar of available dates from April, 2007, through June, 2008. *Defendant's Controverting Statement of Facts, Exhibit M; Defendant's SOF, Exhibit B.*

Defendant received information from a citizen stating a wedding was held at 20 Jasper Court during a week in May, 2007. According to the citizen, at least 8 persons occupied the residence and 80-100 persons attended the wedding. *Defendant's SOF, Exhibit B.*

According to another citizen, from January, 2006 to April, 2007, 24 families, couples, and groups occupied the properties at 85 and 95 Mingus Mountain Road for periods of less than 7 days. The record is void of option agreements for 85 and 95 Mingus Mountain Road. *Defendant's SOF, Exhibit B.*

By its very nature, an Option is an instrument as to which time is of the essence. *Ernst v. Deister*, 42 Ariz. 379, 26 P.2d 648 (1933). Under the terms of an Option, it has to be exercised on or before a specific date. Plaintiff's Option contained the legal requirements for a binding contract to purchase 20 Jasper Court. There is no evidence a buyer exercised the Option, and the record is void of a bona fide purchaser for 20 Jasper Court.

When considering Plaintiff's online advertising of short term rentals; the calendar of available dates; the number of short term occupancies; the specific check in/out times; lack of restrictions on the occupants, vehicles, or use; the price for the property was significantly above fair market value; the language in the Payment Policy Information forms; declarations from 4 individuals and; the cost of the Option depended on the length of use, the Court concludes the Option could serve two distinct purposes. One purpose could be used as a legitimate Option contract to purchase real property. The other purpose could be used as a short term lease. Based upon the atmosphere between the parties and when the Option was implemented, Plaintiff's Option was used as a short term lease.

Plaintiff's Properties were regulated by the SLDC prior to purchase, and the use was restricted by the zoning law. The facts do not amount to a confiscation or taking of Plaintiff's Property. Article 2 § 17 of the Arizona Constitution.

THE COURT FINDS the 1995 Sedona Land District Code prohibited short term rentals of less than 30 days.

THE COURT FINDS the Option circumvented the ban on short term rentals in violation of the 1995 Sedona Land District Code.

THE COURT FINDS that Plaintiff purchased the Subject Properties after enactment of the 1995 Sedona Land District Code and property use was restricted as a short term rental when purchased.

THE COURT FINDS Plaintiff is not entitled to damages on its claim for loss of use under the Options because the short term rental use was prohibited prior to its purchase of the Subject Properties.

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In Defendant's *Motion for Partial Summary Judgment*, the City seeks Declaratory Judgment finding the purpose of the 2008 Ordinance ("the Ordinance") is to "safeguard the peace, safety, and general welfare of the residents of Sedona..." and therefore exempt under § 12-1134(B)(1) of Arizona's Private Rights Property Protection Act (A.R.S. § 12-1134(b) ("Act").

Plaintiff argues that Defendant has failed to establish the essential nexus between community health concerns and the Ordinance, and Defendant has not demonstrated the purported public problems were uniquely attributable to short-term occupancy.

In 2004, citizen's started complaining that Defendant was not enforcing the ban on short term rentals prohibited by SDLC. Citizens complained of loud parties, excess vehicles, parking problems, and online advertising of short term rental happening in plain view.

A homeowners association survey at #85 and #95 Mingus Mountain Road from January, 2006 to April, 2007, indicated occupancy from 3 to 7 days ranging from a single couple with a child, to multiple couples with children, and from 1-4 vehicles at a time. A letter from a different homeowners association complained of increased traffic, late night activity, parties, and trash collection issues from occupants of short-term rentals. *Defendant's SOF, Exhibit B.*

Defendant's Code Enforcement Personnel conducted field investigations and surveillance in the summer of 2007 at 20 Jasper Court. Code Enforcement described the difficulties of putting together a provable case against owners due to the reluctance of witnesses willing to testify in Court. Numerous "Notices of Violation" starting in 2004 through 2007 were mailed to property owners, Plaintiff's included, that were ignored. *Defendant's SOF, Exhibits B and C.*

Between 2006 and 2007 there were approximately 150 internet websites advertising short term rentals in Sedona. The SDLC did not regulate the advertising of short term rentals. Discussions at the two work studies and two meetings focused on the need to enhance Defendant's enforcement capabilities through the enactment of the Ordinance. The Minutes from the work sessions and open meetings did not discuss public health and safety facts connected to short term rentals. *Defendant's SOF, Exhibits B, D, E, and G.*

On January 22, 2008 Defendant enacted the Ordinance in an effort to strengthen SDLC. Under the Ordinance's Findings and Purpose, the law proclaims:

"The City of Sedona is committed to maintaining its small-town character, scenic beauty and natural resources that are the foundation of its economic strength and quality of life. (Sedona Community Plan, Section 9.2 Recommendations Goal 1.0.) The rental of private homes for temporary occupancy has been identified as a community concern due to the potential for increased traffic, noise, high occupant turnover and density in single-family residential neighborhoods. The number of occupants occupying such temporary rentals has the *potential* to exceed standards for the design capacity of such structures and to cause health and safety problems, and as such *may* constitute threats to the health and safety of neighbors and nearby properties." (Emphasis added).

The Ordinance makes "rentals" of residential property for less than 30 consecutive days to a "transient" a class one misdemeanor punishable by a fine up to \$2500, imprisonment, or both. Sedona, Ariz., Code §§ 5.25.020 to 5.25.060. The Court of Appeals concluded the Ordinance contained new restrictions on land use. To the extent those restrictions exceed the scope of the 1995 SLDC, the Court held that they are subject to evaluation under the Act. *Sedona Grand*, Supra.

A Court's primary goal in construing a statute is to determine and give effect to legislative intent. *State v. Getz*, 189 Ariz. 561, 944 P.2d 503 (1997). "To determine legislative intent, we consider the statute's context, the language used, the subject matter, the historical background, the statute's effects and consequences, and the statute's spirit and purpose." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). We look first to the statute's words and give them ordinary meanings unless the context or a statutory definition dictates otherwise. *Id.*

To prove a regulation's principal purpose is the protection of public health the government must demonstrate an essential nexus between the regulation and the protection of health and safety and that the regulation is roughly proportional to the identified problem.

A.R.S. § 9-500.12 (E) In all proceedings under this section the city or town has the burden to establish that there is an essential nexus between the dedication or exaction and a legitimate governmental interest and that the proposed dedication, exaction or zoning regulation is roughly proportional to the impact of the proposed use, improvement or development or, in the case of a zoning regulation, that the zoning regulation does not create a taking of property in violation of § 9-500.13. If more than a single parcel is involved this requirement applies to the entire property.

Other than unsolicited complaints, the record is void of statistics gathered by the Defendant on health or safety problems caused by short-term rentals. The street department did not report an increase in traffic. The sanitation department did not report trash collection problems. The police department did not report on an increase in traffic citations, parking violations, or disturbing the peace (loud music/parties). The fire department did not report safety hazards, and the zoning department did not

report safety concerns on short term rentals. The Ordinance lacks the essential nexus between the regulation and community health concerns.

The record contains facts that occupancy levels at 20 Jasper Court exceeded that of a single family for short periods of time. However, this residence has 5 bedrooms and 3 baths with over 3900 square feet of living space. It cannot be inferred from the record that the public health or safety was at risk during periods when more than one family occupied the residence.

The state or political subdivision must establish by a preponderance of the evidence that the law was enacted for the principal purpose of protecting the public's health and safety before the exemption can apply. *Sedona Grand, Supra*. The language used in the Ordinance talked of *potential* for increased traffic, noise, high occupant turnover, and density in single-family residential neighborhoods. What may occur in the future does not rescue this Ordinance from its primary purpose of enforcing the ban on short term rentals. There is no correlation in the record that short term rentals endanger the public health and safety.

THE COURT FINDS the primary purpose of the Ordinance was the enforcement of short term rentals.

THE COURT FINDS the legislative intent of the Ordinance fails to establish an essential nexus between short term rentals and the protection of the public's health, safety and welfare.

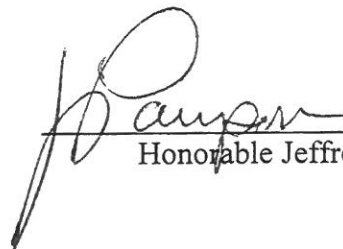
IT IS ORDERED denying Plaintiff's *Motion for Partial Summary Judgment*.

IT IS ORDERED denying Defendant's *Motion for Partial Summary Judgment*.

IT IS FURTHER ORDERED denying attorneys' fees to either party.

No further matters remain pending and this is a final judgment pursuant to Rule 54(c)

Dated: February 24, 2015.


Honorable Jeffrey G. Paupore

cc: Christina Sandefur/Jared Blanchard- Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute -(#)H
Jeffrey T. Murray/Kristin M. Mackin- Sims Murray, LTD. -(#)H