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Talking Rock Land, LLC

8
9 SUPERIOR COURT OF ARIZONA
10 YAVAPAI COUNTY

11 TALKING ROCK LAND, LLC, an
Arizona limited liability company,
12
Plaintiff,
13
v.
14 INSCRIPTION CANYON RANCH
SANITARY DISTRICT, an Arizona
15 sanitary district; DAVID BARREIRA,
District Board Member,
16
Defendants.

No.
COMPLAINT
(Breach of Contract; Breach of the Implied
Covenant of Good Faith and Fair Dealing)

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18
19 Plaintiff Talking Rock Land, LLC (“Talking Rock”) for its Complaint against
20 Inscription Canyon Ranch Sanitary District and David Barreira (collectively, the
21 “District”) alleges as follows:

22 **PARTIES, JURISDICTION, AND VENUE**

- 23 1. Talking Rock is an Arizona limited liability company doing business in
24 Yavapai County and owns and controls land within the boundary of the District.
25 2. The District is an Arizona sanitary district established under A.R.S. § 48-
26 2001 *et seq.*

1 largest Sterling Ranch Lots to market (the “Sterling Ranch Sales Campaign”).

2 11. The Sterling Ranch Sales Campaign involved more than two years of active
3 real estate development, which has included substantial engineering and site development
4 work.

5 12. The Sterling Ranch Sales Campaign also involved an elaborate marketing
6 initiative involving national television advertising, web and social media platforms, and
7 direct customer outreach.

8 13. The purpose of the media effort was to create client goodwill and gain
9 momentum ahead of the commencement of public sales which was scheduled for June 2,
10 2018.

11 14. Talking Rock’s Sterling Ranch Sales Campaign was imperiled by the
12 improper and illegal actions of the District, which is the sanitary sewer service provider
13 for Talking Rock.

14 15. The District refused to execute the required Yavapai County forms
15 evidencing its intent to provide sanitary sewer service to the Sterling Ranch Lots.

16 16. The District’s refusal to grant the necessary approvals constituted an illegal
17 moratorium in violation of state law.

18 17. The actions of the District prevented Talking Rock from timely obtaining
19 plat and public report approvals necessary for offering the Sterling Ranch Lots for public
20 sale as scheduled on the heavily marketed June 2 date.

21 18. Talking Rock was unable to offer the Sterling Ranch Lots for sale on June 2,
22 2018 consistent with the Sterling Ranch Sales Campaign, which caused significant
23 damage to Talking Rock.

24 19. Due to the District’s implementation of an illegal moratorium, Talking Rock
25 has suffered significant damage to both its reputation and customer goodwill.

26 20. In addition, Talking Rock has suffered significant damages in connection

1 with its Sterling Ranch Sales Campaign.

2 21. Unfortunately, the District's wrongful refusal to provide service is simply
3 the most current example of the District's ongoing pattern and practice of enacting
4 moratoriums on sewer service without the legal authority to do so.

5 **II. Yavapai County Superior Court Declared the District's 2009 Moratorium**
6 **Void and Unenforceable.**

7 22. In December of 2009, the District unlawfully adopted a resolution imposing
8 a sewer moratorium on all property within the District's annexed boundaries (the "2009
9 Moratorium").

10 23. An affiliate owner of Talking Rock, Harvard Simon I, LLC ("Harvard"),
11 was negatively affected by the 2009 Moratorium.

12 24. In January of 2010, Harvard and a coalition of developers affected by the
13 2009 Moratorium filed a lawsuit against the District in the Yavapai County Superior
14 Court alleging violations of Arizona's Open Meeting Laws, arbitrary and capricious
15 action, and inaccurate capacity assumptions. The other plaintiffs in that case were the
16 owners of other master planned communities served by the District.

17 25. In 2011, the Court granted the developers' motion for partial summary
18 judgment, and declared the 2009 Moratorium null and void as a violation of Arizona's
19 Open Meeting Laws.

20 26. Specifically, the Court found that the District unlawfully imposed a
21 moratorium "outside of and apart from any properly agendized open meeting."

22 27. The Court simultaneously denied the District's motion as to their assertions
23 that: (1) the District has police power to regulate sewage treatment capacity and
24 connections; (2) the moratorium adopted by the District is presumed valid; (3) the
25 standard of review of the moratorium is whether it was fraudulent or adopted in bad faith;
26 and (4) the District must not allow additional hookups until lot buyers are assured that the

1 treatment capacity they purchased is presently available at a constructed treatment plant or
2 financial guarantees have been provided by plaintiffs for construction of a plant to treat
3 that capacity.

4 28. Notably, the Court denied the District’s motion as to its assertion that the
5 proper standard of review of the moratorium was “whether it was fraudulent or adopted in
6 bad faith.”

7 29. In rejecting the standard purported by the District, the Court cited the proper
8 standard as follows, “if the actions of a municipality are arbitrary, capricious and in error
9 with prevailing law, mandamus and/or special action injunctive relief will lie” *See id.*

10 **III. The Arizona Legislature Enacted A.R.S. § 48-2033 to Combat the Adoption of**
11 **Unlawful Moratoriums by Sanitary Districts.**

12 30. In direct response to the unlawful actions taken by the District in adopting
13 the 2009 Moratorium, the legislature enacted A.R.S. § 48-2033 in order to prevent
14 sanitary districts from adopting moratoriums without first adhering to explicit procedural
15 requirements. *See* A.R.S. § 48-2033.

16 31. Pursuant to A.R.S. § 48-2033(A),

17 A. A sanitary district shall provide continuous service and shall not adopt a
18 moratorium on construction or land development unless the board of
directors of the district first:

- 19 1. Provides notice to the public that is published once in a newspaper
20 of general circulation in the community at least thirty days before a
21 final public hearing is held to consider the adoption of the
moratorium.
- 22 2. Makes written findings justifying the need for the moratorium as
provided for in subsection B of this section.
- 23 3. Holds a public hearing on the adoption of the moratorium and the
24 findings that support the moratorium.

25 32. The statute provides that a moratorium may only be justified by
26 demonstration of a need to prevent a shortage of essential public facilities that would

1 otherwise occur during the effective period of the moratorium.

2 33. The statute further provides that the required demonstration must include at
3 least the following findings: (1) the actual capacity of the existing essential public
4 facilities based on current use; (2) the extent of need beyond the estimated capacity of
5 existing essential public facilities expected to result from construction or new land
6 development, including identification of any essential public facilities currently operating
7 beyond capacity and the portion of this capacity already committed to development; (3)
8 the moratorium is reasonably limited to those areas of the sanitary district where a
9 shortage of essential public facilities would otherwise occur and on property that has not
10 received development approvals based on the sufficiency of existing essential public
11 facilities; and (4) the housing and economic development needs of the area affected have
12 been accommodated as much as possible in any program for allocating any remaining
13 essential public facility capacity.

14 34. A.R.S. § 48-2033(G) defines a “moratorium on construction or land
15 development” as “engaging in a pattern or practice of delaying or stopping issuance of
16 permits, authorizations or approvals necessary for a subdivision and partitioning of,
17 construction on, or provision of sewer service to, any land in the district.”

18 35. The statute expressly provides that a landowner aggrieved by a sanitary
19 district’s adoption of a moratorium may file an action in the superior court, and that such
20 action must be given preference on the Court calendar on the same basis as condemnation
21 matters.

22 36. A.R.S. § 48-2033(F) provides an express statutory basis for the award of
23 reasonable attorney fees to a plaintiff aggrieved by an unlawful moratorium.

24 **IV. The District Is Contractually Bound to Not Withhold Sewer Service**
25 **Approvals for Any Reason.**

26 37. In addition to promoting the enactment of A.R.S. § 48-2033, Talking Rock

1 and the other Developers entered into an Amended and Restated Development Agreement
2 with the District in 2012 (the “Development Agreement”).

3 38. The Development Agreement was intended, among other things, to
4 “establish . . . clear procedures for the expansion of sewer capacity when needed in the
5 future” and “a protocol or approving future phases of Developers property”

6 39. The Development Agreement provides that future expansions to provide
7 additional constructed capacity “will commence when the average monthly flow rate into
8 the Waste Water Treatment Plant exceeds 85% of design capacity for a period of two
9 consecutive months.”

10 40. The Development Agreement expressly provides that it is the District’s
11 obligation to “determine appropriate modifications for capacity and or efficiency
12 enhancements,” and that “[a]ll permitting, design and construction will be undertaken by
13 the District.”

14 41. Accordingly, it is the District’s obligation to plan for and build additional
15 capacity when the “85% of design capacity for two months” threshold is reached.

16 42. A central feature of the Development Agreement is the District’s promise
17 that it will not withhold sewer service approvals for any reason whatsoever:

18 As consideration for the Developer’s covenants in Sections
19 5(a), 9(b), (c) and (d), the **District agrees it will not withhold**
20 **approval of any Sewer Service Agreement (or future**
21 **Yavapai County equivalent requirement) for Talking Rock**
or Whispering Canyon **plat approval for any reason or no**
reason.

22 (Emphasis added).

23 43. Unfortunately, as described below, the District has as little regard for its
24 contractual obligations to its landowner constituents as its disregard for its statutory
25 obligations.

26 . . .

1 **V. The District Enacted an Illegal Moratorium Without Abiding by the**
2 **Procedural Mandates Set Forth in A.R.S. § 48-2033, in Violation of the**
3 **Development Agreement, and the Implied Covenant of Good Faith and Fair**
4 **Dealing.**

5 44. The District owns and operates a sewer plant and associated collection
6 facilities that services the Talking Rock master planned community and three surrounding
7 master planned communities.

8 45. The Inscription Canyon Wastewater Treatment Plant (“WWTP”) has a
9 permitted capacity of 455,5550 gallons per day (“GPD”) and was built to be expanded in
10 phases.

11 46. Only Phase I of the WWTP has been constructed.

12 47. The industry standard is to commence construction of additional capacity
13 when actual average daily flows reach 85% of capacity for a sustained period.

14 48. Yavapai County Development Services requires three specific forms be
15 signed by the sanitary service provider before the County will approve a plat for
16 recordation which forms are called: (i) Notice of Intent to Discharge for a Sewage
17 Collection System Type 4.01 General Aquifer Protection Permit; (ii) Sewage Collection
18 System Capacity Assurance; and (iii) Sewage Treatment Facility Capacity Assurance
(collectively, the “Capacity Assurance Approvals”).

19 49. In an effort to address the District’s stated concerns over potential capacity
20 constraints, Talking Rock met with the District numerous times during March of 2018.

21 50. During the course of those meetings, Talking Rock made an offer at the time
22 to vacate previously approved capacity assurances for three large phases comprised of a
23 total of 115 lots, in exchange for approval for the 45 Sterling Ranch Lots (resulting in an
24 overall reduction of 70 approved lots).

25 51. The District Chair and District Manager were agreeable to granting the
26 requested approvals for the Sterling Ranch Lots in light of what would be an overall

1 reduction of 70 approved lots, and requested a letter from Talking Rock memorializing
2 Talking Rock's commitment to vacate the previously approved capacity assurances for the
3 three large phases prior to the District Board's public session on March 30, 2018.

4 52. Pursuant to the District's request, Talking Rock memorialized its previous
5 commitment in a letter to Mr. David Barreira, the District Chair, on March 29, 2018.

6 53. On March 30, 2018, the District held an open meeting placing the approval
7 of the Sterling Ranch Lots on the agenda.

8 54. During the March 30, 2018 meeting, the District's representatives went into
9 executive session purportedly to discuss the Capacity Assurance Approvals for the
10 Sterling Ranch Lots.

11 55. Upon the adjournment of the executive session, the District Board stated
12 that the Capacity Assurance Approvals "would not be signed at this time" and passed a
13 motion "that the board proceed as advised in executive session by legal counsel."

14 56. Bob Hilb, a former board member present at the March 30, 2018 meeting
15 who has since been reelected to the board, expressed his belief "that the motion did not
16 satisfy the requirements of the Open Meeting Laws without the board saying what they
17 were doing."

18 57. The District failed to fulfill any of the requirements of A.R.S. § 48-2033(A)
19 or (B) prior to the adoption of a "moratorium on construction or land development" as
20 defined in A.R.S. § 48-2033(G)(2).

21 58. The refusal by the District to provide the Capacity Assurance Approvals for
22 the Sterling Ranch Lots constituted an illegal moratorium on construction or land
23 development in violation of A.R.S. § 48-2033.

24 59. Thereafter, the District Board went into executive session on at least two
25 more occasions, on April 16 and 24, 2018, to consult with counsel concerning the
26 District's refusal to provide the Capacity Assurance Approvals for the Sterling Ranch

1 Lots.

2 60. In both instances, upon reconvening from executive session, the District
3 failed to withdraw its illegal moratorium.

4 61. Also in both instances, the District perpetuated its failure to fulfill any of the
5 requirements of A.R.S. § 48-2033(A) or (B) prior to the adoption of a “moratorium on
6 construction or land development” as defined in A.R.S. § 48-2033(G)(2).

7 62. Without the Capacity Assurance Approvals, Talking Rock was precluded
8 from offering the Sterling Ranch Lots for sale with sewer service.

9 63. This conduct by the District was a clear replication of their actions taken in
10 enacting the 2009 Moratorium, evidencing a disturbing pattern and practice of unlawful
11 conduct.

12 64. As set forth above, the District agreed in the Development Agreement that it
13 would not withhold approval of sewer service for Talking Rock for any reason
14 whatsoever, or for no reason.

15 65. The District’s enactment of the moratorium, during which it withheld its
16 approval of the required Capacity Assurance Forms for a provision of sewer service to
17 Talking Rock’s Sterling Ranch Lots, constituted a breach the Development Agreement by
18 enacting an unlawful Moratorium during which it withheld its approval of the required
19 Capacity Assurance Forms for a provision of sewer service to Talking Rock’s Sterling
20 Ranch Lots.

21 66. The District’s 2018 Moratorium is, in effect, a repudiation of the District’s
22 obligations to Talking Rock, and an effort to preclude Talking Rock from enjoying the
23 benefits of the Development Agreement.

24 67. By impairing the rights of Talking Rock to receive the benefits flowing from
25 the Development Agreement, while simultaneously enjoying the benefits that the District
26 receives under the contract, the District’s 2018 Moratorium is a breach of the covenant of

1 good faith and fair dealing that is implied in every contract in Arizona.

2 **VIII. Talking Rock Has Suffered Immense Damages As a Result of the**
3 **District's Implementation of the Unlawful Moratorium and the**
4 **Significant Delays Caused by the District in Refusing to Lift the**
5 **Moratorium and Execute the Necessary Approvals.**

6 68. A substantial portion of the value of the Sterling Ranch Lots was based on
7 Talking Rock's ability to initiate sale of the Sterling Ranch Lots on the highly-advertised
8 June 2, 2018 launch date.

9 69. The District's actions in refusing to lift the moratorium and causing
10 significant delay, including by demanding an unnecessary evidentiary hearing, caused
11 Talking Rock to suffer injury in connection with the Sterling Ranch Marketing Campaign.

12 70. In accordance with Talking Rock's multiyear marketing campaign, buyers
13 were expecting the sales launch of the Sterling Ranch properties to take place on the
14 highly-advertised June 2, 2018 date.

15 71. Talking Rock was unable to meet buyer expectations due to the moratorium
16 imposed by the District, which has placed the sale of the Sterling Ranch Lots and future
17 construction of home-sites in jeopardy.

18 72. In this highly-competitive environment, if buyer expectations are not met, or
19 if there is uncertainty or doubt with respect to the stability of utility service, potential
20 customers simply move on to other development projects that are free of such stigma.

21 73. The District's unlawful moratorium not only placed the sale of the Sterling
22 Ranch Lots in jeopardy, it cast a dark cloud over the balance of the Talking Rock master
23 planned community and future phases of development.

24 74. Talking Rock has been damaged as a direct result of the District's unlawful
25 moratorium.

26 . . .

1 COUNT ONE

2 **(Breach of Contract)**

3 75. Talking Rock re-alleges and incorporates by reference each and every
4 preceding allegation of this Complaint.

5 76. Talking Rock and the District, along with the other Developers, entered into
6 the Development Agreement in 2012, therefore, the relationship between Talking Rock
7 and the District is contractual in nature.

8 77. In the Development Agreement, the District expressly promised that it
9 would not withhold sewer service approvals for any reason whatsoever, or for no reason:

10 As consideration for the Developer's covenants in Sections
11 5(a), 9(b), (c) and (d), the **District agrees it will not withhold**
12 **approval of any Sewer Service Agreement (or future**
13 **Yavapai County equivalent requirement) for Talking Rock**
or Whispering Canyon **plat approval for any reason or no**
reason.

14 *Id.* at § 8 (emphasis added).

15 78. The District breached the Development Agreement by enacting an unlawful
16 moratorium during which it withheld its approval of the required Capacity Assurance
17 Forms for the provision of sewer service to Talking Rock's Sterling Ranch Lots.

18 79. Talking Rock has suffered damages as a consequence of the District's
19 breach of contract. Talking Rock is entitled to a judgment in its favor for all damages
20 incurred as a result of the breach, including, without limitation, an award of any and all
21 consequential damages flowing from the District's breach.

22 80. Talking Rock has been damaged as a direct and proximate result of the
23 District's breaches in an amount to be proven at trial.

24 81. Pursuant to applicable law, including, without limitation, A.R.S. §§ 12-
25 341.01, 12-341, 48-2033(F), and the Development Agreement, Talking Rock is entitled to
26 an award of its attorneys' fees and costs incurred in this action.

1 COUNT TWO

2 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

3 82. Talking Rock re-alleges and incorporates by reference each and every
4 preceding allegation of this Complaint.

5 83. Arizona law implies a covenant of good faith and fair dealing in every
6 contract.

7 84. The covenant of good faith and fair dealing creates a duty that prohibits each
8 party from acting to impair the right of the other to receive the benefits that flow from
9 their agreement and contractual relationship.

10 85. Talking Rock and the District entered into the Development Agreement,
11 which contains an implied covenant of good faith and fair dealing.

12 86. The District breached the implied covenant of good faith and fair dealing by
13 enacting the unlawful Moratorium thereby depriving Talking Rock the benefits and
14 protections that flow from the Development Agreement, including, but not limited to: (a)
15 causing Talking Rock to be unable to offer the Sterling Ranch Lots for sale with sewer
16 connections on the highly marketed June 2 date; (b) forcing Talking Rock to proceed to
17 litigation of this matter to assert its express rights under the Development Agreement; and
18 (c) forcing Talking Rock to endure significant delay in offering the Sterling Ranch Lots
19 for sale with sewer connections due to the District's refusal to execute the necessary forms
20 and the District's request for an unnecessary evidentiary hearing.

21 87. Talking Rock has suffered damages as a consequence of the District's
22 breach of the implied covenant of good faith and fair dealing. Talking Rock is entitled to
23 a judgment in its favor for all damages incurred as a result of the breach, including,
24 without limitation, an award of any and all consequential damages flowing from the
25 District's breach.

26 88. As a direct and proximate result of the District's breach of the implied

1 covenant of good faith and fair dealing, Talking Rock has been damaged in an amount to
2 be proven at trial.

3 89. Pursuant to applicable law, including, without limitation, A.R.S. §§ 12-
4 341.01, 12-341, 48-2033(F), and the Development Agreement, Talking Rock is entitled to
5 an award of its attorneys' fees and costs incurred in this action.

6 **WHEREFORE**, Talking Rock prays for judgment in its favor and against the
7 District, including, but not limited to, the following relief:

- 8 A. Compensatory damages in an amount to be proven at trial;
- 9 B. An award of the reasonable attorneys' fees and costs incurred in bringing
10 this action pursuant to applicable law and the Development Agreement; and
- 11 C. An award of pre- and post-judgment interest on all damages and amounts at
12 the maximum legal rate from the earliest date provided by law;
- 13 D. Such other and further relief as this Court deems just and proper.

14 DATED this 29th day of March, 2019.

15 FENNEMORE CRAIG, P.C.

16
17 By /s/ Sean Hood
18 Sean Hood
19 Dawn Meidinger
20 Taylor Burgoon
21 *Attorneys for Plaintiff*
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