

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-011927

10/01/2007

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT
C. Castro
Deputy

DAVID B VANYO

JEFFREY D GROSS

v.

CAREFREE FOOTHILLS HOMEOWNERS
ASSOCIATION, et al.

KURT M ZITZER

GARY L BIRNBAUM

MINUTE ENTRY

Courtroom 704 – Central Court Building

3:01 p.m. This is the time set for oral argument. Plaintiff is represented by Jeffrey D. Gross. Defendant is represented by counsel, Kurt M. Zitzer.

A record of the proceedings is made by CD/videotape in lieu of a court reporter.

Oral argument is presented.

IT IS ORDERED taking this matter under advisement.

4:13 p.m. Matter concludes.

LATER:

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Oral argument on the parties' cross motions for summary judgment (filed on April 6, 2007 and August 13, 2007) were held in this matter on October 1, 2007 and both motions were taken under advisement at that time. The Court has reviewed the entirety of the briefing and has considered the arguments of counsel.

The question central to the parties' respective positions is whether Plaintiff has an implied "way of necessity" easement which would allow him to build a road across lot 24 to the parcel he owns adjacent to the Defendant's subdivision. All concede that on its face such a road would violate the subdivision CC & R's.

The parties disagree concerning whether the property in question is "landlocked." They also disagree as to whether and to what extent the property could be developed if Plaintiff gains access to the property from the north. They disagree as to whether a road could be built which would connect the north and south halves of the property. They disagree as to whether the Defendant has waived the relevant CC & R provision. This last is a mixed question of fact and law.

Finally, the parties dispute whether Plaintiff can muster sufficient evidence to meet its burden to prove all the factual elements to establish an implied way of necessity.

While the Court recognizes that many of the issues remaining turn on legal rulings (e.g. the precise state of Arizona law regarding whether a way of necessity can ever be recognized where the Plaintiff has access to some part of the land in question), material factual disputes predominate here and must be determined by the trier of fact.

Both motions are denied.