

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

<p>TALKING ROCK LAND, LLC, an Arizona limited liability company,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; DAVID BARREIRA, District Board Member; BILL DICKRELL, District Board Member; AL POSKANZER, District Board Member,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. P1300CV201800380</p> <p style="text-align: center;">UNDER ADVISEMENT RULING AND ORDER</p>	<p style="text-align: center;">FILED</p> <p>DATE: 11/09/2018 8:47 O'Clock <u>A</u> . M.</p> <p style="text-align: center;"><i>DONNA MCQUALITY, CLERK</i></p> <p>BY: <u>K. DARGIE</u> Deputy</p>
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<p>HONORABLE JOHN NAPPER</p> <p>DIVISION 2</p>	<p>BY: Felicia L. Slaton, Judicial Assistant</p> <p>DATE: November 6, 2018</p>
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The Court has received and reviewed Plaintiff’s Application for Attorneys’ Fees and Costs, the Response and the Reply. The Court also heard oral argument on the pleadings. Based on this record, the Court finds Plaintiff is entitled to reasonable attorney’s fees incurred for its preparation for and conducting the evidentiary hearing in this case.

Procedural History and Facts

How the Dispute Started

Plaintiff owns a master planned community within the service area of the Defendants. Defendants are the only providers of sewer service within its district. The Plaintiff plans to phase in a new area of development (hereinafter “Sterling Ranch”). This included a sales campaign intended to generate sales of the lots prior to building. In order to achieve this goal, it submitted requests to the Defendants seeking evidence of their intent to provide sanitary service to Sterling Ranch.

Plaintiff submitted what it believed were the necessary documents to the Defendants for their review and approval. These documents included the Capacity Assurance Approval forms (hereinafter “CAA”). These forms include a certification that the additional flow resulting from the development will not exceed the input flow limits and a certification that the treatment facility could accept and treat the increased flows. The signing of these forms was required for Sterling Ranch to go forward and directly impacted the market value of its lots.

The Board put the Sterling Ranch CAAs on its agenda for consideration. At the meeting, the Board went into executive session to discuss the CAAs. At the conclusion of the executive session, the Board went back into public session and declared the documents “would not be signed at this time.” No public debate occurred, and no reasons were provided for why the CAAs “would not be signed at this time.”

Plaintiff then filed the Complaint currently before the Court. The Complaint alleged Defendants unlawfully enacted a moratorium in violation of A.R.S. §48-2033 and that the District was required to lift the moratorium. Plaintiff also filed an Application for Order to Show Cause seeking expedited declaratory relief.

The Positions of the Parties

The Court set a hearing and ordered the Defendants to file a response to the Application for Order to Show Cause. In its response, the Defendants argued it refused to sign the CAAs because they contained material errors. Specifically, the Defendants accused the Plaintiff of mispresenting “the serious problem it knows the district has concerning accommodating additional sewage flows into the existing treatment plant.” (*Resp.* pp. 4) The Defendants further argued, “The Plaintiff’s Complaint totally ignores the known fact that the existing treatment plant’s current capacity is in danger of being exceeded.” *Id.* at 5. The Defendants also alleged they were not in receipt of all the necessary forms to allow them to fully vet the CAAs. (*Id.* at 4 ln. 13-16).

The Court held the first hearing on the Order to Show Cause. The Court outlined the issue before the Court as: whether or not the Defendants were appropriately refusing to sign the forms due to inaccuracies in the forms. (*Rep. Trans.* 5/9/2018 pp. 6). The Defendants agreed this was the issue before the Court. The Court specifically identified the need for an evidentiary hearing on whether Defendants properly refused to sign the CAAs due to a lack of capacity. *Id.*

The Plaintiff argued to the Court that an evidentiary hearing was unnecessary. It argued the Defendants were simply using the wrong definition for a term in one of the ACCs. In response, the Defendants assured the Court, “there is a question, which I think militates toward an evidentiary hearing of whether or not we can sign those forms at all because of the current capacity of the plant.” *Id.* at 19. The Court specifically asked if the capacity issue was the only issue “not remediable” without a hearing. The Defendant responded, “Yes, your Honor. That is the issue. The issue related to how this situation is operating now, and what the dangers are of over topping the plant.” *Id.* at 20.

During the hearing, the Defendants also continued to urge they had not received the appropriate documents to evaluate the CAAs regardless of the capacity issue. During the hearing, the Court asked the Defendants what forms were needed for the Board to complete its review of the CAAs. *Id.* at 19. The Defendants provided information about what documents were needed. Plaintiff agreed to provide any information needed immediately.

Ultimately, the Court set the matter for an evidentiary hearing. *Id.* at 54. The Court warned the parties that if the hearing ultimately proved to be unnecessary, an award of attorney’s fees was a possibility. The Court specifically stated that an unneeded evidentiary hearing may “subject your clients to pay an award of damages that they would not be subject to now.” *Id.*

Prior to the evidentiary hearing, the Defendants filed a motion to vacate the evidentiary hearing. The motion alleged five reasons to vacate the hearing. Nowhere in the pleading were the Defendants abandoning their claim that the plant lacked the capacity to service Sterling Ranch. Accordingly, the Court denied the motion.

The Evidentiary Hearing

At the evidentiary hearing, the Plaintiff called several witnesses addressing the capacity issue. One of the witnesses was an operator of wastewater facilities. *Rep. Trans.* 6/19/2018 pp. 71. He also worked with the engineer that built the Defendant's plant. This witness testified there was plenty of capacity left to accommodate Sterling Ranch. *Id.* at 81. During cross-examination, the witness testified that the capacity number the Defendants were relying on in refusing to sign the CAAs was set artificially low. The accurate numbers were found in the Defendants' own documents. *Id.* at 92-94.

In response, the Defendants called Mr. Barreira. *Id.* at 111. He is the chairman of the Board for the District. *Id.* at 112. Mr. Barreira testified he could not sign the CAAs because it was his belief "that with these additions to the plant, we would be in extreme jeopardy of affecting the quality because we would stand the potential of not having the ability to process that volume." *Id.* at 115. His opinion was based on the District's reliance on the artificially low number. He also testified he would refuse to sign any CAAs provided to the Board due to issues of capacity. *Id.* at 121. He also testified he had previously signed CAAs with identical capacities numbers used on the forms in this case. *Id.* at 130.

The Aftermath

After hearing this evidence, the Court agreed to allow the Defendants 30 days to hire an expert to make a final determination on the CAAs. This additional time was provided to allow the Defendants to review the additional required forms that had been recently provided by the Plaintiff. The Court was clear that it found there was no issue as to the capacity of the plant to accommodate Sterling Ranch.

The Court specifically found the District had set an artificially low number for capacity and these could be increased without any capacity concerns. *Id.* at 153. It also stated, the District had "decided not to sign a single request from anybody, and if that isn't a moratorium, I don't know what is." *Id.* The Court further ordered the Board to consider the CAAs within the context of the Plaintiffs disclosure of the additional forms and decide whether they could be signed. If the Board refused to sign the forms based on capacity, they were to specifically state their reasons in an open meeting.

The Board signed the CAAs at the very next meeting.

Current Litigation

Moratorium

Plaintiff argues this litigation is governed by A.R.S. §48-2033, a statute outlining the requirements for a sanitary district to declare a moratorium. The statute defines a moratorium as: "engaging in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for a subdivision and partitioning of, construction on, or provision of sewer service to, any land in the district." *A.R.S. §48-2033(G)(a)*. This definition does not include "denial or delay of permits or authorization because they are inconsistent with applicable statutes, rules or ordinances." *A.R.S. §48-2033(G)(b)*. The statute also allows a landowner "aggrieved by a sanitary district's adoption of a moratorium" to file a complaint with the Superior Court. *A.R.S. §48-2033(F)*. The statute grants the Court the authority to award "reasonable attorney fees" to the "prevailing party" in the "appeal and trial." *Id.*

The Court finds the District's actions prior to signing the CAAs was a moratorium. The testimony of the Chairman of the Board could not have been clearer. He testified he would not have signed any CAAs provided by any person due to his erroneous concerns about capacity. By any standards, this meets the definition of "engaging in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for a subdivision." The Defendants' arguments to the contrary are entirely without factual support.

The District also adopted this moratorium without following any of the statutory requirements of A.R.S. §48-2033. The Board failed to provide public notice and a hearing prior to imposing the moratorium. *A.R.S. §48-2033(A)(1)*. It failed to issue written findings to justify its decision to impose the moratorium. *A.R.S. §48-2033(A)(2)*. It also failed to hold a public hearing on the adoption of the moratorium or the findings supporting its adoption. *A.R.S. §48-2033(A)(3)*. The District failed to make one finding required by subsection B of the statute to justify any form of moratorium. It simply decided to stop signing CAAs based on unverified assumptions about capacity. These are the very actions A.R.S. §48-2033 is specifically designed to prevent.

Prevailing Party

The Defendants argue Plaintiff is not the prevailing party. This argument rests on the fact that a judgment was never entered by the Court; and therefore, the statute does not allow the Court to grant an award of attorney's fees. The Court disagrees.

The Court specifically found the District had improperly initiated a moratorium. (*See, Rep. Trans. 6/19/2018 pp. 157 ln. 1-25.*) The Court concluded its finding by stating, "[the Defendants] have refused to sign anything, and I cannot think in my mind of a clearer definition of moratorium and, by the way, that's the description of a moratorium in the code." *Id.* at ln. 21-25. This was clearly a finding of the Court and the Court reaffirms that finding with this Order.

The Court did not enter judgment based on this finding because the Plaintiff had only recently provided the remaining needed forms to the Defendants. The Defendants sought additional time to review the documents. The Plaintiff had no objection to this request. The Court granted the Defendants an additional 30 days to review the documents, have them reviewed by an engineer, ask any questions needed of the Plaintiff and sign the CAAs. The Court specifically ordered if the District did not sign the CAAs at the next Board meeting "we'll take up what *remedy* is appropriate at that time." *Id.* at 162. The Court was discussing a remedy based on the finding of a violation of A.R.S. §48-2033.

In its Complaint, the Plaintiff alleged the Defendants improperly imposed a moratorium. This was proved to the Court at the evidentiary hearing requested by the *Defendant*. Therefore, the Court found and finds the Plaintiff was the prevailing party in the litigation. The Defendants' last-minute signing of the CAAs does nothing to invalidate this finding. As the prevailing party, the Plaintiff is entitled to an award of reasonable attorney's fees.

The Missing Papers

Throughout the litigation, the Defendants have argued they did not sign the CAAs because they did not have all of the needed information from the Plaintiff. These documents were provided by the Plaintiff just prior to the evidentiary hearing. Accordingly, Defendants argue the Board could not have signed the CAAs prior to

the submission and review of these documents. Therefore, the Plaintiff was not the “prevailing party” on the moratorium issue.

The Court finds this argument unpersuasive as it was directly repudiated by the testimony of the Chairman of the Board. The Chairman was asked if he had made up his mind not to sign the CAAs before he even saw the additional documents. His answer was “yes.” *Rep. Trans.* 6/19/2018 pp. 132. The Defendants, even if they had received the proper forms, would have continued to refuse to sign any CAAs from *anyone*. This is important because the Plaintiff could, and did, remedy the lacking paperwork without Court involvement. However, they could not remedy the imposition of an improper moratorium absent litigation.

Reasonable Fees

While the missing papers argument does not impact the Court’s finding that Plaintiff is the prevailing party, it does affect what the Court finds to be reasonable fees. The entirety of this litigation would have been severely curtailed had the Defendants told the Court the only reason the CAAs had not been signed was the missing papers. In fact, this very issue was addressed at the initial hearing on the Order to Show Cause. The Defendants told the Court they were still in need of certain documents and the Plaintiff agreed to provide whatever the Defendants needed. This would have reasonably concluded the litigation.

However, this was not the path chosen by the Defendants. Instead, counsel for the Defendants stated, “there is a question, which I think militates toward and evidentiary hearing of whether or not we can sign those form at all because of the current capacity of the plant.” *Rep Trans.* 6/19/2018 pp. 19. Counsel told the Court receiving the missing forms was insufficient and stated, “I think this is where this goes to an evidentiary hearing, even if we correct the form on sewage treatment capacity for the plant, we’re concerned whether we could sign that form at all because of the current situation at the plant, and the way it’s been operating.” *Id.* at 20. Defense counsel continued to urge the Court to set such a hearing so they “could explain this better” as to “why this situation is critical and why [the CAAs] obligate us to do something that this facility cannot do.” *Id.* at 46.

Contrary to the urging of the Plaintiff, the evidentiary hearing was set. The Court decided to set the hearing because the Defendants “have a due process right to be heard and present evidence.” *Id.* at 46. The Court warned the parties that attorney’s fees would be awarded at the end of the hearing. *Id.* at 47, 54. The Court also told the parties that if there was an unneeded evidentiary hearing “you have the potential to subject your clients to pay an award of damages that they would not be subject to now.” *Id.* at 54.

As noted above, there was no evidence produced at the hearing that Sterling Ranch created a capacity issue for the plant. Further, the witnesses called by the *Defendants* proved the District did not know the capacity of the plant and that they were refusing to sign any and all CAAs produced by anyone. The Defendants produced absolutely no evidence in support of their defense and instead proved what the Plaintiff had been claiming all along. Again, this was done at a hearing *requested by the Defendants* and over the objection of the Plaintiff.

This evidentiary hearing was unnecessary. The Defendants attempted to justify its refusal to sign the CAAs on an unsupportable claim related to plant capacity. It also attempted to deny it had created a *de facto* moratorium when its actions clearly fell within the definition of moratorium contained in the statute. The Plaintiff was obligated to expend significant resources in the trial of this matter to the Court. Pursuant to the statute, they are entitled to reasonable fees incurred for this trial.

Orders of the Court

IT IS THEREFORE ORDERED, Plaintiff is the prevailing party in this litigation and is entitled to an award of attorney's fees. These fees are limited to the actual time spent preparing for the evidentiary hearing and conducting the evidentiary hearing. The application shall be limited to the work performed by only two attorneys and one paralegal.

IT IS FURTHER ORDERED, the Plaintiff shall file an application for this award of attorney's fees within 15 days of this Order. The Defendants shall have 15 days to file a response to the application. The Plaintiff shall have 10 days to file a reply to the response.

cc: Sean Hood/Dawn Meidinger/Taylor Burgoon- Fennemore Craig, P.C. (e)
J. Andrew Jolley- Prescott Law Group, PLC (e)
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