MEMORANDUM

Date: November 23, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Lesher
County Administrator

Re: **Starr Pass Lawsuit**

In 1998, Pima County entered into a development agreement with Starr Pass Resort, LLC, concerning the development of the Starr Pass Report property. The development included an Environmental Enhancement Fee in the amount of two percent of the room rent and other charges, to be collected between 2005 and 2025, and shared between the County and the Developer. To date, this fee has generated $18.1 million in total, of which $9.2 million has been the County's share. The County has spent our share to expand Tucson Mountain Park, develop two trailheads, add trails, and to conduct invasive species management and mountain lion surveys.

Starting in 2012, the County withheld distributions to Starr Pass Resort, LLC, because Starr Pass Resort, LLC had failed to comply with development agreement requirements to convey certain property. The amount withheld totaled $3.8 million. During this time, the property was also in foreclosure and subject to litigation. In early 2020, a new owner acquired the resort property at a trustee's sale. On June 23, 2020, the Board of Supervisors approved a revised development agreement with the new owner whereby the new owner conveyed the required property to the County and the County paid the $3.8 million to the new owner. The prior owner, Starr Pass Resort, LLC, then sued the County alleging that the County should not have paid the $3.8 million to the new owner.

On November 17, 2022, Pima County Superior Court Judge Butler ruled in favor of the County and the other defendants (including the new owners). The Judge ruled on the Motion to Dismiss that Pima County filed and which the Court converted to a Motion for Summary Judgment. The ruling provides that Pima County wins; that the environmental enhancement fee was properly dispersed to the new owner and does not need to be paid instead to the prior owner of Starr Pass Resort.

A copy of the decision is attached.

JKL

Attachment

c: Carmine DeBonis, Jr., Deputy County Administrator
Francisco Garcia, MD, MPH, Deputy County Administrator & Chief Medical Officer
Steve Holmes, Deputy County Administrator
Nicole Fyffe, Senior Advisor, County Administrator's Office

FILED
GARY L. HARRISON
CLERK, SUPERIOR COURT
11/17/2022 10:24:16 AM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. MICHAEL BUTLER

CASE NO. C20212971

DATE: November 17, 2022

STARR PASS RESORT DEVELOPMENTS, L.L.C.
Plaintiff,

vs.

PIMA COUNTY, ET AL.
Defendant(s)

UNDER ADVISEMENT RULING

IN-CHAMBERS UNDER ADVISEMENT RULING

Pending before the Court is the Motion to Dismiss (the "Motion") filed by Defendants 3800 WSPB Buyer, LLC and CREF3 SP A Participation, LLC (the "Defendants"). After oral argument on August 1, 2022, the Court took the matter under advisement. However, after additional consideration of the pleadings and exhibits, the Court determined the Motion must be converted to a motion for summary judgment. The Court did so on August 25, 2022 and allowed additional briefing. All parties filed additional briefs, and the Court again took the matter under advisement. After careful consideration of the pleadings, exhibits and arguments, the Court rules as outlined below.

BACKGROUND FACTS

This case stems from rights and obligations arising from agreements created for the development of Starr Pass Resort (the "Resort").[1] In 1998, Pima County entered into an agreement with Starr Pass Resort, LLC (the "Development Agreement") outlining the terms, conditions, requirements and restrictions for the development of the Resort. The Development Agreement covered 197 acres of real property, 149 of which were to be conveyed to Pima County as part of the Development Agreement. Those 149 acres ultimately would be included in Tucson Mountain Park.

The critical provisions of the Development Agreement for this dispute relate to the Environmental Enhancement Fee, or "EEF." The Development Agreement provided for the collection

[1] The documentation relating to the development of the Resort is voluminous and complicated. The Court's outline here is intended to focus only on the portions of documents relevant to the Motion.

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Judicial Administrative Assistant

of two percent of charges for room, rent, goods and services by the Resort to be distributed to the Developer and Pima County, and the collected amounts are known as the EEF. The recitals of the Development Agreement state that the EEF would be collected to "defray" the costs of acquisition of property for a biological corridor, to cover the costs of managing and maintaining open space and trails, and to increase the size of Tucson Mountain Park. The EEF was to be collected and paid during for the first twenty years of the Resort's operation.

In February 2002, Starr Pass Resort, LLC and Pima County executed an amendment to the Development Agreement (the "2002 Amendment"). The parties established a Collection Agreement whereby the manager of the Resort would be required to collect the EEF from customers and pay it to a "Collection Agent." The Collection Agent was to be a bank acceptable to the parties. The Collection Agreement specified that "[t]he obligation of Manager to collect and pay" the EEF was to be secured by a covenant running with the land that "shall be prior to any liens securing financing on the Resort Property." Collection Agreement at 3-4.

Plaintiff here is the successor in interest to Starr Pass Resort, LLC.[2] Starr Pass Resort, LLC's rights and obligations as the developer under the Development Agreement were assigned to Plaintiff in April 2002. At that time, the Resort remained under construction. The Resort opened in 2005, and the manager began collecting the EEF as contemplated in the Development. Pima County distributed the EEF in accordance with the Development Agreement.

In 2006, Plaintiff obtained a loan for $145 million (the "Loan"), and the Loan was secured by a deed of trust (the "Deed of Trust") encumbering the Resort's 48 acres (the 48 acres out of the original 197 acres under the Development Agreement that were not earmarked to be conveyed to Pima County). The Deed of Trust encumbered all real property and improvements on the 48 acres, and it also encumbered Plaintiff's personal property relating to the real property and improvements. The Deed of Trust also encumbered "all rents, additional rents, hotel room rentals, and other hotel services revenue . . ." derived from the land and improvements. Deed of Trust at 3.

[2] Plaintiff's counsel suggested at oral argument that Plaintiff and Starr Pass Resort, LLC are affiliated. As a legal matter, they are separate.

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Plaintiff defaulted on the Loan in 2010, and a string of litigation ensued. A receiver took possession and control of the Resort in 2012. Although the EEF continued to be collected by the Resort, Plaintiff agreed to have its portion of the EEF held by Pima County. Plaintiff ultimately lost title to the Resort in 2019 as a result of a Trustee's Sale foreclosing on the Deed of Trust. Defendant 3800 WSPB Buyer, LLC was the highest bidder at the sale. CREF3 SP A Participation, LLC is the successor in interest to the original lender and holds a judgment against Plaintiff.

In 2020, the receiver sought court approval to be dismissed from its obligations and to assign all rights under the Development Agreement (as amended) to 3800 WSPB Buyer, LLC. Plaintiff objected to any assignment of the Development Agreement (including transfer of the EEF) because, in its opinion, the Trustee's Sale price was too low. The Court granted the receiver's request. All rights and obligations under the Development Agreement were assigned to 3800 WSPB Buyer, LLC.

Later in 2020, Defendants and Pima County entered into a Development Agreement Amendment (the "2020 Amendment") to resolve remaining issues relating to the conveyance of parcels of land that had been held up by the litigation surrounding the Resort. As part of the 2020 Amendment, the parties distributed the EEF amongst themselves that had been accumulating since 2012.

PROCEDURAL BACKGROUND

Plaintiff filed this lawsuit against Pima County on June 24, 2021 (the "Complaint"). Plaintiff alleges in the Complaint that Pima County violated its contractual obligations under the Development Agreement when it distributed the accumulated EEF to Defendants in accordance with the 2020 Amendment. Plaintiff also seeks an order requiring Pima County to distribute any future EEF for the developer under the Development Agreement to Plaintiff. Plaintiff alleges its rights to the EEF were not included in the rights that were transferred to Defendants by the Trustee's Sale; they instead remained vested in Plaintiff.

Pima County sought dismissal of the Complaint for many of the same reasons outlined in the Motion. The Court denied Pima County's motion to dismiss but required Plaintiff to amend the Complaint to include Defendants as necessary parties to the lawsuit. After being named as necessary parties, Defendants filed the Motion.

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At oral argument, Plaintiff clarified the allegations made in the Complaint as well as the arguments it has presented in opposition to all defendants' motions. Plaintiff asserts dismissal is not warranted at this time because no discovery has been completed. However, Plaintiff likewise has asserted that the allegations in the Complaint are based strictly on language in the various controlling documents, all of which are before the Court. Most importantly, Plaintiff's counsel admitted at oral argument for the first time that Plaintiff is not alleging any ambiguities exist in the provisions it relies on in its Complaint. Instead, Plaintiff states that the documents, as written and taken as a whole, support its claims.

By Plaintiff's own admissions, no parol evidence is necessary (or allowable) for consideration by the Court here. And due to the voluminous exhibits provided by the parties (for which Plaintiff has no foundational or other objections), the Court has everything before it to decide the issues in the Motion after its conversion to a motion for summary judgment. Additionally, because it became clear at the most recent oral argument that all issues may be resolved by referring to the unambiguous language in the relevant documents, the issues presented in Pima County's motion to dismiss may be appropriately reconsidered now.

APPLICABLE LEGAL STANDARD

The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(a), Ariz. R. Civ. P. A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). In determining whether a genuine issue of material fact exists, the court does not determine the credibility of the witnesses, weigh the quality of the evidence, or choose among competing inferences. *Orme School v. Reeves*, 166 Ariz. 301, 308-09, 802 P.2d 1000, 1009-10 (1990).

ANALYSIS

The parties do not dispute that the Development Agreement provides that the "provisions of [the] agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties." Development Agreement at Paragraph 12.7. The parties also acknowledge that, under Arizona statutory law, the burdens of development agreements are binding upon, and the benefits inure

to, "the parties to the agreement and to all of their successors in interest and assigns." A.R.S. §11-1101(E). Plaintiff's counsel acknowledged at oral argument that, without "specific provisions to the contrary," the rights and obligations of a development agreement run with the property.

Plaintiff argues that certain provisions in the relevant documents, when taken together, establish a "carve out" of Plaintiff's rights to the EEF from those transferred in the Trustee's Sale. Plaintiff relies on three provisions for its conclusion. First, Plaintiff suggests that the recitals in the Development Agreement regarding defraying the cost of acquiring property show an intent by the parties that the developer keep the EEF, even if all other rights were transferred to a successor or assignee. Second, Plaintiff argues that the provision in the Collection Agreement relating to the obligations of the Manager to collect and pay the EEF establish that Plaintiff's right to receive the EEF was not encumbered by the Deed of Trust. Third, Plaintiff points to Paragraph 12.7 of the Development Agreement, which states that the developer's rights and obligations may only be assigned by a written and recorded instrument "expressly assigning such rights and obligations." The Court will address these provisions in order.[3]

Although the recitals in the Development Agreement mention "defraying" the cost of acquisition of properties, no operative provision in the Development Agreement addresses separating the right to receive the EEF from all other rights and obligations in the Development Agreement. Additionally, the recitals contemplate other obligations by the developer in the future that may be necessary to complete the development for which the EEF may be used. The recitals cannot be reasonably interpreted to provide an affirmative right to receive EEF for the "reimbursement" of property, as Plaintiff argues.[4]

Next, the provision in the Collection Agreement providing that the obligations of the manager of the Resort to collect and pay the EEF shall be contained in a covenant that is "prior" to any loans is not relevant here. The Collection Agreement has no bearing on any party's right to receive the EEF; it is

[3] Plaintiff also mentions that the Deed of Trust only encumbers 48 acres of the original 197 acres. Plaintiff does not identify any provision in any document that suggests that the right to receive the EEF is a right that is segregated from the 48 acres on which the Resort is situated.

[4] Plaintiff ignores the fact that, even if its interpretation was correct, Plaintiff would not be entitled to the EEF. Plaintiff suggests that the recitals operate to retain the rights to the EEF in the original developer as reimbursement for property, even if all other rights and obligations under the Development Agreement are transferred. Plaintiff is not the original developer, and Plaintiff has presented nothing to establish that these unusually retained rights have been transferred to it.

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strictly limited to the procedure for collecting the EEF, paying it to the Collection Agent, and disbursing it. The document cannot reasonably be interpreted to conclude that Plaintiff's alleged right to receive EEF is not encumbered by the Deed of Trust.[5]

Finally, Plaintiff's argument that its right to receive the EEF was not transferred as part of the Trustee's Sale because Plaintiff did not assign the right in a written, recorded document is unavailing. Plaintiff argues that its rights as a developer are separate and apart from its obligations as a borrower under the loan. As its argument goes, Plaintiff believes its rights under the Development Agreement were not impacted by the Trustee's Sale because, in contravention to Paragraph 12.7 of the Development Agreement, a written document expressly assigning those rights was not recorded. But as noted by Defendants, the Trustee's Sale did not result in the assignment of any rights and obligations. Defendants are successors to Plaintiff's rights and obligations by operation of law as a result of the Trustee's Sale. Moreover, Plaintiff's interpretation of Paragraph 12.7 would eliminate the transfer of any rights or obligations under the Development Agreement as a result of the Trustee's Sale. Any such interpretation of Paragraph 12.7 is unreasonable.

Plaintiff's assertion that these provisions, taken together, support a finding that Plaintiff's right to receive the EEF is not a right that runs with the land is not supported. Plaintiff acknowledges that, absent a "specific provision to the contrary," rights under a development agreement run with the land. Here, Plaintiff cobbles together three isolated provisions (some of which are mere recitals or boilerplate), applies attenuated inferences to those provisions, and reaches the tortured conclusion that these provisions and inferences create a "specific provision" allowing the very unusual result that certain rights under the Development Agreement do not run with the land. In truth, no specific provision exists. No reasonable juror could conclude that Plaintiff's rights to the EEF were "carved out" of those rights and obligations transferred by the Trustee's Sale.

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[5] In fact, the relevant documents suggest that the parties intended the EEF to be included in the security for the loan. The Deed of Trust expressly encumbers any "hotel room rentals and hotel services revenue," which is the source of the EEF.

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For the reasons stated above, the Motion and Pima County's Motion to Dismiss are GRANTED. Defendants and Pima County shall file any applications for attorneys' fees and costs, along with proposed forms of judgment consistent with this ruling, within fifteen days from the date of this ruling.

/s/
HON. MICHAEL J. BUTLER
(ID: 3fbf6d25-7dda-4741-afff-2710993c8f7c)

cc: Alexander P Valentine, Esq.
Craig C Hoffman, Esq.
G Lawrence Schubart, Esq.
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Case Management Services - Civil
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