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## Can an Association Regulate the Installation of Solar Energy Devices?

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What can an association do, if anything, about regulating the installation of solar energy devices ("SEDs")? The Arizona legislature and courts have weighed in on the issue of the regulation of SEDs in associations.

Arizona Revised Statute (A.R.S.) §33-1816 provides specifically that a planned community association may not prohibit the installation and use of an SED. However, an association may adopt reasonable rules regarding the placement of the SED. Although A.R.S. §33-1816 has not yet been tested in the courts so that there is a published appellate decision, it appears to make it difficult even to have enforceable rules. The statute specifically states that while an association may adopt reasonable rules regarding the placement of an SED, associations cannot "prevent the installation, impair the functioning... or restrict its use or adversely affect the cost or efficiency." This language is extremely broad, and is very similar to the language in the federal laws governing satellite dishes, where nothing can impair receiving a signal, create installation delay, or cost the resident additional money. With satellite dishes, virtually all associations can do is publish "preferred locations" in their rules. The SED statute has a similar effect.

A.R.S. §33-439(A), an earlier statute addressing SEDs that still exists, provides that deed restrictions (such as CC&Rs) which "effectively prohibit" the installation or use of an SED are void and unenforceable. This means that no provision of the association's CC&Rs, on their face, or in their application, can prohibit the installation or use of SEDs.

The Arizona Court of Appeals addressed the SED issue in the community association context, under the foregoing statute, before the specific planned community association statute (§33-1816) was enacted in 2007. In Garden Lakes Community Ass'n v. Madigan, 204 Ariz. 238, 62 P.3d 983 (Ct. App. 2003), the Court of Appeals set forth a ten factor balancing test to determine whether CC&Rs or other restrictions "effectively prohibit" the installation or use of SEDs at a property. These factors include:

1. Content and language of restrictions or guidelines;
2. Conduct of homeowners' association in interpreting and applying restrictions;
3. Whether architectural requirements are too restrictive to allow solar energy devices as a practical matter;
4. Whether feasible alternatives using solar energy are available;

5. Whether alternative design will be comparable in cost and performance;
6. Feasibility of making required modifications;
7. Extent to which property is amenable to required changes;
8. Whether decisions previously made by homeowner or prior owner are responsible for limiting or precluding installation of solar energy devices;
9. Location; and
10. Whether restrictions impose too great a cost in relation to what typical homeowners are willing to spend.

How these ten factors for evaluating CC&R provisions will be used in conjunction with the newer planned community statute is unknown. Presumably, they could be applied to determining whether planned community association rules regarding placement of SEDs are reasonable.

Although restrictions on SEDs are theoretically permissible, associations must be particularly careful in both adopting and applying those restrictions and rules. If an association is to adopt rules regarding the installation of SEDs, we recommend that the association adopt the above ten criteria into their guidelines, or at a bare minimum, make certain that those factors are weighed whenever a homeowner requests architectural approval for a SED.

If you need assistance with reviewing or drafting rules, please contact our office.

*Carpenter Hazlewood is excited to announce the opening of its Tucson office. Tucson attorneys Adam and Andrea Watters have joined us and we now offer our full slate of association legal services to southern Arizona's community associations. Learn more about our Tucson office and all about Adam and Andrea Watters.*