Opinion 11-02

OPINION OF: GARY K. KING Attorney General

February 5, 2011

BY: Seth T. Cohen, Assistant Attorney General

TO: The Honorable Mimi Stewart, New Mexico State Representative, 313 Moon Street NE, Albuquerque, New Mexico 87123

QUESTION:

Under Senate Bill 1031, which was enacted in 2007 and codified at NMSA 1978, Section 3-18-32, can a homeowners association require that members seek its approval before installing solar panels?

CONCLUSION:

Subsection (B) of Section 3-18-32 allows a homeowners association to regulate the installation or use of solar panels so long as the regulations do not "effectively prohibit" their installation or use. The phrase "effectively prohibit" includes restrictions on the installation or use of solar panels that make such installation or use unreasonably difficult or costly.

FACTS:

Subsequent to the enactment of Section 3-18-32, some homeowners associations continued to require homeowners to obtain the prior approval of the associations before placing solar collectors on rooftops. This led to concerns about the chilling effects of such requirements on the reduction of greenhouse gases into the atmosphere.

ANALYSIS:

Section 3-18-32(B) provides as follows:

> A covenant, restriction or condition contained in a deed, contract, security agreement or other instrument, effective after July 1, 1978, affecting the transfer, sale or use of, or an interest in, real property that effectively prohibits the installation or use of a solar collector is void and unenforceable.

(Emphasis added). In construing the language of this provision, courts will "giv[e] the words their ordinary meaning." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009 NMSC 13, ¶ 9, 146 N.M. 24, 206 P.3d 135.

To “prohibit” is ordinarily understood as “to forbid by authority” or “to prevent from doing something.” *Merriam-Webster Online Dictionary* (http://www.merriam-webster.com (November 18, 2010)). Although the legislature has not precisely indicated what the phrase “effectively prohibits” means, in this context, the phrase would clearly encompass those covenants, restrictions, or conditions that actually prohibit solar collectors. The question remains, however, as to when a covenant, restriction or condition that does not, on its face, prohibit solar collectors “effectively prohibits” the installation or use of solar collectors.

Because of its ambiguity, the construction of the phrase “effectively prohibits” is properly guided by reference to the broader legislative scheme in which Section 3-18-32(B) fits. *See, e.g., State v. Tafoya*, 2010-NMSC-19, ¶ 10. The overall legislative scheme relating to solar energy is a scheme expressly intended to encourage the development and use of solar energy in New Mexico. In the Solar Rights Act, the legislature made clear its determination that “the actual construction and use of solar devices” is an activity that “the law should encourage to be carried out, whenever practicable, by private enterprise.” NMSA 1978, Section 47-3-2 (1977). That Act goes on to declare that “the right to use the natural resource of solar energy is a property right, the exercise of which is to be encouraged and regulated by the laws of this state.” NMSA 1978, § 47-3-4(A).

Within a context in which the legislature clearly intends to promote the use of solar energy, the phrase “effectively prohibits” should be construed in a manner that provides the greatest support for the installation and use of solar collectors. Accordingly, the phrase “effectively prohibits” should be applied not only to those regulations or requirements that actually render impossible the installation or use of solar collectors, it should also be applied to those regulations or requirements that add cost or difficulty to the installation or use of solar collectors to a degree that would deter a reasonable consumer.

Although this construction provides general guidance as to its application, the statutory provision at issue does not establish a bright-line rule. As a consequence, determining whether a given restriction “effectively prohibits” the installation or use of a solar collector may require a case-specific analysis.

For example, a homeowners association’s imposition of a pre-approval requirement does not, by itself, “effectively prohibit” the installation of a solar collector in violation of the statute. If, on the other hand, the pre-approval process was consistently employed to deny approval for solar panels, it would violate the statute. Likewise, a violation of the statute would occur if the pre-approval process resulted in the imposition of conditions or requirements that made the installation of solar collectors unreasonably costly or difficult.

Arizona has a nearly identical provision to Section 3-18-32(B). Arizona law similarly makes “void and unenforceable” any “covenant, restriction, or condition” that affects “the transfer or sale of, or any interest in real property” and that “effectively prohibits the

installation or use of a solar energy device." Ariz. Rev. Stat. 33-439(A) (2000). The application of that provision by an Arizona Court of Appeals is therefore instructive here.

In *Garden Lakes Community Assoc. v. Madigan*, the Arizona Court of Appeals considered whether limitations imposed by a homeowners' association ran afoul of Arizona's bar on restrictions that "effectively prohibit" solar panels. 62 P.3d 983 (Ariz. Ct. App. 2003). The Court refused to interpret the phrase "effectively prohibit" to mean "inevitably preclude," and instead determined that the phrase establishes a "flexible standard that permits the many variations of restrictions and effects to be considered on a case-by-case basis." 62 P.3d at 987. As we discussed above with respect to the New Mexico statute, the Court's interpretation of the phrase "effectively prohibit" was informed by the larger legislative scheme in Arizona which "sought to encourage the use of solar energy." *Id.* at 986-87.

The Court went on to identify numerous potentially relevant factors to provide "general guidance" for determining whether a restriction "effectively prohibits" the installation or use of a solar panel in a specific case. *Id.* at 987. The factors identified by the Court include:

- Whether the requirements are too restrictive to allow solar panels as a practical matter;

- Whether the requirements or restrictions allow for feasible alternatives in the installation or use of solar panels; and

- Whether the restrictions impose too great a cost in relation to what typical homeowners in the community are willing to spend.

Id. These factors reflect what we believe to be the correct focus of the analysis: do the restrictions make it prohibitively difficult to install or use solar panels? Again, this analysis will often require case-by-case application.[1]

Other states in addition to Arizona have enacted similar provisions to limit restrictions on solar panels and have provided guidance as to their application. For example, Colorado law makes void and unenforceable any condition that "effectively prohibits or restricts installation or use of a renewable energy generation device." Colo. Rev. Stat. § 38-30-168(1)(a)(2010). Colorado law further provides, however, that "reasonable" aesthetic requirements are permissible if they do not "significantly increase the cost of the device; or significantly decrease its performance or efficiency." *Id*. at § (2)(a). California law contains similar language. *See* Cal. Civil Code § 714 (2010).

In sum, we conclude that a homeowners association's pre-approval requirement for the installation or use of a solar panel does not by itself violate Section 3-18-32(B). If, however, the imposition of that requirement can be shown to make the installation or use of solar panels prohibitively difficult or costly in a given case, the requirement would be void and unenforceable as a matter of law. Except for instances in which a

homeowners association requirement actually prohibits solar panels, the question of whether a given requirement “effectively prohibits” solar panels would likely require a case-specific evaluation.

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[1] The restrictions at issue in the *Garden Lakes* case provided that solar panels “must not be visible from public view and must be screened from neighboring property” in a manner consistent with standards set by the association. 62P.3dat 984. As applied in that case, the Court concluded that because such requirements could not be feasibly satisfied by the homeowner, they “effectively prohibited” the installation and use of solar panels and were therefore void and unenforceable.