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11 Attorneys for Defendants Apache Wells
12 Homeowners Association, Inc., Johnson,
13 Stoll, Wood, Pasula, Larson, Bonnell,
14 Gregory, Ressel, St. John, Miller and Finger

15 **SUPERIOR COURT OF THE STATE OF ARIZONA**
16 **COUNTY OF MARICOPA**

17 KEN DOSHIER and DOROTHY DOSHIER,
18 husband and wife; DOUG W. HENDERSON
19 and MARIAM HENDERSON, husband and
20 wife; JAY HOWLETT and KITTY L.
21 HOWLETT, husband and wife; WILLY
22 FERNANDEZ, an unmarried man;
23 HARRIETT JACKSON, an unmarried
24 woman; KAREN OLSEN, an unmarried
25 woman; RICHARD G. JAMES, an unmarried
26 man; DWANE SEELE, an unmarried man;
DENNIS O'CONNOR, an unmarried man;
RICK EICHER, an unmarried man; RAY
FITZGERALD, a married man; LARRY L.
WALSTON, a married man; ROBERT
TEAGUE and JUDI TEAGUE, husband and
wife; GEORGE W. FUGMAN and ELSIE M.
FUGMAN, husband and wife; LAVINA M.
JUNG, a married woman; DOLORES M.
MILLER, an unmarried woman; DENNIS M.
LANG and JOICE A. LANG, husband and
wife; CHARLES E. KILGORE and LORNA
KILGORE, husband and wife;
MARGUERITTE CURIN, an unmarried
woman; CHRISTINE KNIGHT, a married
woman; RONALD KNIGHT, an unmarried
man; RICHARD SWINGLE and CORA
SWINGLE, husband and wife; GARY
FRANCHER and BARBARA FRANCHER,
husband and wife; RITA TAYLOR, an
unmarried woman; JESSIE E. BENNETT, an

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JUN 26 2007

CHEIFETZ IANNITELLI
MARCOLINI, P.C.

NO. CV2007-005085

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND CROSS-
MOTION FOR SUMMARY
JUDGMENT**

(Assigned to the Honorable Bethany G.
Hicks)

Calendared By JE Date 6-26-07
Cal for SWG, SFG, MCM, JRC 2330-3
REPLY 7-16-07
RESPONSE 7-30-07

1 unmarried woman; GENE R. KRZYCKI and
2 MARJORIE KRZYCKI, husband and wife;
3 ED WHITE and TERRI WHITE, husband and
4 wife; DARLENE STEINER, a married
5 woman; DORA RICH, an unmarried woman;
6 LEW HANDELAND, an unmarried man;
7 CLARENCE LAMERS and SHARI
8 LAMERS, husband and wife; JANICE
9 CHRISTO, a married woman; OSCAR R.
10 FLORES, an unmarried man; JENNIAL
11 MARTIN, an unmarried woman;
12 GEORGIEANNA LANCUCKI, an unmarried
13 woman; JOAN PETERSON, a married
14 woman; DORA REED, an unmarried woman;
15 MARYANNE MILLER, an unmarried
16 woman; DALE ADAM and THERESE
17 ADAM, husband and wife; JAMES J.
18 KIRKPATRICK, an unmarried man; EMILE
19 DUFFY, a married woman; CHARLES LAIR
20 and LELA LAIR, husband and wife; MARGIE
21 STOCK, a married woman; JOHN
22 CORMACK, a married man; LEE WALTER,
23 a married man; WALTER STROMME, a
24 married man; DEVERE STEVENSON and
25 LOIS L. STEVENSON, husband and wife;
26 BONNIE WILCOX, a married woman; ROY
NELSON, a married man; SHARON ANTES,
a married woman; DONALD L. HILL and
NORMA L. HILL, husband and wife; ROGER
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STOWE, husband and wife; LEROY
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PEARSON, husband and wife; BILL
VERNON and DORIS VERNON, husband
and wife; HARVEY BELL, an unmarried man;
WILLIAMS SCHUMACHER and LUCY
SCHUMACHER, husband and wife; JAMES
MASCORELLA and LOISMASCORELLA,
husband and wife; GERALD LENKA and
MARCY LENKA, husband and wife,

Plaintiffs,

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v.

APACHE WELLS HOMEOWNERS ASSOCIATION, INC., an Arizona non-profit corporation; APACHE WELLS COUNTRY CLUB, INC., an Arizona non-profit corporation; BRIAN JOHNSON and Susan JOHNSON, husband and wife; THOMAS H. FINGER, an unmarried man; MARVIN A. STOLL and MARY E. STOLL, husband and wife; GORDON WOOD and LINDA WOOD, husband and wife; TONY PASULA and VAL PASULA, husband and wife; MARVIN A. LARSON and RUTH J. LARSON, husband and wife; JAMES BONNELL and JOCILLE BONNELL, husband and wife; WILLIAM F. GREGORY and JOANNE GREGORY, husband and wife; ROBERT RESSETT and BERNYCE RESSETT, husband and wife; IRV ST. JOHN and PAT ST. JOHN, husband and wife; and L.J. MILLER and JOYCE MILLER, husband and wife,

Defendants.

Defendants, through counsel undersigned, hereby submit this Opposition and Cross-Motion for Summary Judgment regarding Plaintiffs' Motion for Partial Summary Judgment regarding the validity of the February 21, 2007 Special Election, in which the homeowners of the Apache Wells Homeowners Association voted in favor of a Special Assessment. It is undisputed that 644 votes were cast in favor of the Special Assessment. Furthermore, it is undisputed that 594 votes were cast against the Special Assessment. The parties agree on the applicable provisions of the CC&Rs and Bylaws. The applicable Bylaw states that a special assessment requires a majority of the votes cast at a special election in order to pass. That is precisely what happened on February 21, 2007. Accordingly, Defendants request this Court grant them summary adjudication on the issue of the validity of the Special Election.

1 I. FACTS.

2 Plaintiffs' Motion for Partial Summary Judgment is full of allegations and
3 color commentary, all of which should be stricken from the record. The majority of the
4 factual allegations contained in Plaintiffs' Motion are not even relevant to the question put
5 before the Court on this Motion for Partial Summary Judgment.

6 The Apache Wells Homeowners Association ("AWHA") consists of 1412
7 lots. Plaintiffs and Defendants agree that AWHA is governed by CC&Rs dated March 7,
8 1987 (See Exhibit "B" to Plaintiffs' Statement of Facts). Furthermore, the parties agree
9 that AWHA is also governed by Bylaws last amended January 13, 1998. (*Id.*)

10 Again, Plaintiffs' Motion is full of allegations regarding improper conduct
11 and an "overzealous spending plan". Clearly, Plaintiffs voted no on the Special
12 Assessment. In reality, once all of the unsupported allegations and unrelated arguments
13 are peeled back, a very straight forward question is posed to the Court in this Motion for
14 Summary Judgment. The single question is: How many votes were required at the
15 February 21, 2007 Special Election in order for the Special Assessment in question to
16 pass?

17 Fortunately, everything except for the interpretation of the applicable bylaw
18 provision is undisputed. Plaintiffs do not dispute that a properly noticed Special Election
19 took place on February 21, 2007. Plaintiffs do not dispute that Section 4 of the CC&Rs
20 applies to the Special Election, which states that:

21 **A. Any such special assessment shall require the**
22 **affirmative vote of at least two-thirds (2/3) of the**
23 **Company's Board of Directors at a duly called meeting, at**
24 **which a quorum is present, and**

25 **B. Ratified by a majority of the owners in the manner**
26 **and pursuant to the procedure as set forth in the bylaws**
 of the Company.

1 Plaintiffs further agree that the applicable bylaw provision states:

2 **(1) Special Assessments shall be approved by a two-**
3 **thirds (2/3) vote of the Board at a duly called meeting at**
4 **which a quorum is present, and by the majority vote of the**
5 **residential unit owners at a special election called and**
6 **publicized for that specific purpose.**

7 Plaintiffs allege that 644 votes were cast in favor of the Special Assessment
8 at the Special Election. Furthermore, Plaintiffs allege that 594 votes were cast against.
9 Defendants do not dispute the count, therefore, the actual results of the election are an
10 undisputed fact. In fact, one of the Plaintiffs, Delores Miller, was in charge of the
11 counting of the votes. Ms. Miller testified that she oversaw the vote counting and that the
12 votes were counted correctly. (See Deposition of Delores Miller, 59:19-25).

13 **II. LEGAL ARGUMENT.**

14 **A. THE ENGLISH LANGUAGE CLEARLY DEMONSTRATES**
15 **THE SPECIAL ASSESSMENT IS VALID.**

16 This entire Motion rests on the reading of one, very clear and specific
17 sentence. "Special Assessments shall be approved by a two-thirds (2/3) vote of the
18 Board...and by the majority vote of the residential unit owners at a special election...".
19 The sentence needs no emphasis added. The sentence requires no paraphrasing. The
20 undisputed Bylaw states that a Special Assessment passes if the majority of unit owners
21 vote for the Special Assessment at the Special Election. That is exactly what happened. It
22 is undisputed that 644 of the 1238 votes cast (52%) were in favor of the Special
23 Assessment.

24 Plaintiffs cite several Arizona cases regarding interpretation of contracts and
25 CC&Rs. The Arizona Supreme Court recently set forth how Arizona Courts interpret
26

1 restrictive covenants in *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006) as
2 follows:

3 **A servitude should be interpreted to give effect to the intention of**
4 **the parties ascertained from the language used in the instrument,**
5 **or the circumstances surrounding creation of the servitude, and**
6 **to carry out the purpose for which it was created.**

7 *Id.* at 557. Plaintiffs' argument is somewhat unique with respect to typical
8 land use disputes. Typically, as in *Powell*, the Association seeks to restrict the use of the
9 land. Plaintiffs argued that since the specific restriction was not in the CC&Rs, the Court
10 should adhere to the plain language of the CC&Rs and find that the Association does not
11 have the right to prohibit the use of the land. Here, Plaintiffs request the Court ignore the
12 plain language of the applicable CC&Rs and Bylaws. Plaintiffs want to re-write the
13 contract, so that their 48% opposing vote can prevent the Special Assessment. Plaintiffs
14 are free to attempt to modify the governing documents of the Association, however, that
15 vote has not been conducted.

16 Contrary to Plaintiffs' assertion, the plain language of both the CC&Rs and
17 bylaws requires a majority vote at the special election in order for a special assessment to
18 pass.¹ It is undisputed that is exactly what happened on February 21, 2007.

19 **B. THE BYLAW IS CONSISTENT WITH ALL**
20 **GOVERNING DOCUMENTS.**

21 Plaintiffs' arguments regarding other provisions of the CC&Rs and Bylaws
22 actually support the literal translation that "at the special election" means "at the special
23 election". Plaintiffs argue that since the Bylaws state "present and voting" for votes
24 involving the modification of Bylaws or expansion of services, the term "at the special
25 election" must actually mean "majority of all of the unit owners".

26 ¹ Pursuant to A.R.S. §33-1812(B), votes cast via absentee ballot are cast "at the special election."

1 Arguably, the most drastic measure an Association can take is the
2 modification of the governing documents, such as the Bylaws. A change in the Bylaws
3 modifies the contractual rights of the residents of the Association. Plaintiffs correctly
4 point out that the AWA Bylaws can only be amended with a two-thirds vote of those
5 present and voting. Accordingly, the biggest decision the Association could make does
6 not require a majority vote of all unit owners. Using Plaintiffs' interpretation of the
7 CC&Rs and Bylaws, no special assessment could pass unless at least half of the
8 Association voted in the Special Election, however, no such quorum requirement exists.

9 Quite frankly, Defendants do not understand Plaintiffs' argument that the
10 Association's interpretation of the Bylaws renders the express term 'present and voting'
11 meaningless. Defendants respectfully submit that it is entirely possible, and proper, to say
12 the same thing using different words. Some provisions say "present and voting". The
13 Bylaw for special assessment says "majority vote of residential unit owners at a special
14 election". The provisions mean the same thing. That does not mean either provision is
15 invalid.

16 Plaintiffs cite *Shamrock v. Wagon Wheel Park Homeowners Association*,
17 claiming that the holding of *Shamrock* somehow supports Plaintiffs' interpretation of the
18 Bylaw. The quoted portion of the CC&Rs from the *Shamrock* case bears no resemblance
19 to the case at hand. The *Shamrock* Court found that a "a vote of the majority of the then
20 owners of said lots" means majority of the owners of said lots. The *Shamrock* holding is
21 consistent with essentially every other case cited by Plaintiffs that hold that words in a
22 contract "generally bear their usual and common signification", Williston on Contracts
23 (cited by Plaintiffs on page 9 of Plaintiffs' Motion for Summary Judgment).


24 III. CONCLUSION

25 The Association's interpretation of the applicable Bylaw is the *only*
26 interpretation that makes sense. Plaintiff has provided no other interpretation that is based

1 on anything other than Plaintiffs' desire to have this Court declare the vote invalid.
2 Defendants respectfully request this Court grant their Cross-Motion for Summary
3 Judgment and declare the February 21, 2007 Special Election passing the Special
4 Assessment valid.

5 DATED this 25th day of June, 2007.

6 JONES, SKELTON & HOCHULI, P.L.C.

7
8 By 
9 J. Gary Linder
10 2901 North Central Avenue, Suite 800
11 Phoenix, Arizona 85012
12 Attorneys for Defendants Apache Wells
Homeowners Association, Inc., Johnson,
Stoll, Wood, Pasula, Larson, Bonnell,
Gregory, Ressel, St. John, Miller and
Finger

13 Original/Copy of the foregoing filed
14 this 25th day of June, 2007 to:

15 Clerk of the Court
16 Maricopa County Superior Court
201 W. Jefferson
Phoenix, Arizona 85003

17 The Honorable Bethany G. Hicks
18 101 W. Jefferson, Suite 811
Phoenix, Arizona 85003

19 Copy of the foregoing mailed
20 this 25th day of June, 2007 to:

21 Steven W. Cheifetz
22 Stewart F. Gross
CHEIFETZ LANNTELLI MARCOLINI, P.C.
1850 North Central Avenue, 19th Floor
Phoenix, Arizona 85004
23 Attorneys for Plaintiffs

24 
25
26

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SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

11 KEN DOSHIER and DOROTHY DOSHIER,
12 husband and wife; DOUG W. HENDERSON
13 and MARIAM HENDERSON, husband and
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23 FITZGERALD, a married man; LARRY L.
24 WALSTON, a married man; ROBERT
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SWINGLE, husband and wife; GARY
FRANCHER and BARBARA FRANCHER,
husband and wife; RITA TAYLOR, an
unmarried woman; JESSIE E. BENNETT, an

NO. CV2007-005085

DEFENDANTS'
CONTROVERTING STATEMENT
OF FACTS AND SEPARATE
STATEMENT OF FACTS IN
SUPPORT OF CROSS MOTION
FOR SUMMARY JUDGMENT

(Assigned to the Honorable Bethany G.
Hicks)

1 unmarried woman; GENE R. KRZYCKI and
2 MARJORIE KRZYCKI, husband and wife;
3 ED WHITE and TERRI WHITE, husband and
4 wife; DARLENE STEINER, a married
5 woman; DORA RICH, an unmarried woman;
6 LEW HANDELAND, an unmarried man;
7 CLARENCE LAMERS and SHARI
8 LAMERS, husband and wife; JANICE
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10 FLORES, an unmarried man; JENNIAL
11 MARTIN, an unmarried woman;
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16 woman; DALE ADAM and THERESE
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20 and LELA LAIR, husband and wife; MARGIE
21 STOCK, a married woman; JOHN
22 CORMACK, a married man; LEE WALTER,
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25 LOIS L. STEVENSON, husband and wife;
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NELSON, a married man; SHARON ANTES,
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WILLIAMS SCHUMACHER and LUCY
SCHUMACHER, husband and wife; JAMES
MASCORELLA and LOISMASCORELLA,
husband and wife; GERALD LENKA and
MARCY LENKA, husband and wife,

Plaintiffs,

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v.

APACHE WELLS HOMEOWNERS ASSOCIATION, INC., an Arizona non-profit corporation; APACHE WELLS COUNTRY CLUB, INC., an Arizona non-profit corporation; BRIAN JOHNSON and Susan JOHNSON, husband and wife; THOMAS H. FINGER, an unmarried man; MARVIN A. STOLL and MARY E. STOLL, husband and wife; GORDON WOOD and LINDA WOOD, husband and wife; TONY PASULA and VAL PASULA, husband and wife; MARVIN A. LARSON and RUTH J. LARSON, husband and wife; JAMES BONNELL and JOCILLE BONNELL, husband and wife; WILLIAM F. GREGORY and JOANNE GREGORY, husband and wife; ROBERT RESSETT and BERNYCE RESSETT, husband and wife; IRV ST. JOHN and PAT ST. JOHN, husband and wife; and L.J. MILLER and JOYCE MILLER, husband and wife,

Defendants.

Defendants, through counsel undersigned, hereby submit this Controverting Statement of Facts and Separate Statement of Facts in Support of Defendants' Cross Motion for Summary Judgment.

- 1. Admit.
- 2. Admit.
- 3. Defendants admit that Apache Wells is located next to a Golf Course.

On information and belief, the course is open to the public at certain dates and times.

- 4. The majority of the members of the elected Board of the Association also belong to the Country Club. The exact makeup of prior Boards has not been the subject of discovery in this lawsuit.

- 5. Deny. The action of the Board were well known to the members of the Association. The remaining allegations in Statement of Fact number 5 are not based

1 on any undisputed fact, and have no relevance to the Motion before the Court.

2 6. The Special Assessment that passed on February 21, 2007 is going to
3 be used to pay for the new Community Center. The Association voted in favor of the
4 Special Assessment. The assessment was not imposed by the Board.

5 7. Admit that 644 votes were cast in favor of the Special Assessment.
6 The applicable Bylaw requires a majority of the votes cast at the special election. The
7 remainder of Statement of Fact Number 7 is denied.

8 8. Statement of Fact Number 8 is not a Statement of Fact, rather, it is
9 nothing more than another allegation.

10 **SEPARATE STATEMENT OF FACTS**

11 1. Plaintiff Delores Miller was in charge of the counting of the votes of
12 the Special Election in question. She has testified that the votes were counted properly.
13 (See Deposition of Delores Miller, 59:19-25. attached as Exhibit "A")

14 DATED this 25th day of June, 2007.

15 JONES, SKELTON & HOCHULI, P.L.C.

16
17 By J. S. Linder
18 J. Gary Linder
19 2901 North Central Avenue, Suite 800
20 Phoenix, Arizona 85012
21 Attorneys for Defendants Apache Wells
Homeowners Association, Inc., Johnson,
Stoll, Wood, Pasula, Larson, Bonnell,
Gregory, Resset, St. John, Miller and
Finger

22 Original Copy of the foregoing filed
23 this 25th day of June, 2007 to:

24 Clerk of the Court
25 Maricopa County Superior Court
26 201 W. Jefferson
Phoenix, Arizona 85003

1 The Honorable Bethany G. Hicks
101 W. Jefferson, Suite 811
2 Phoenix, Arizona 85003

3 Copy of the foregoing mailed
this ~~25~~ day of June, 2007 to:

4 Steven W. Cheifetz
5 Stewart F. Gross
CHEIFETZ LANTELLI MARCOLINI, P.C.
6 1850 North Central Avenue, 19th Floor
Phoenix, Arizona 85004
7 *Attorneys for Plaintiffs*


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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

KEN DOSHIER and DOROTHY DOSHIER,)
husband and wife; et al.,)

Plaintiffs,)

vs.)

No. CV2007-005085

APACHE WELLS HOMEOWNERS ASSOCIATION,)
INC., an Arizona non-profit)
corporation; APACHE WELLS COUNTRY)
CLUB, INC., an Arizona non-profit)
corporation; et al.,)

Defendants.)

DEPOSITION OF DOLORES MARILYN MILLER

Phoenix, Arizona
June 11, 2007
1:38 p.m.

REPORTED BY:
PAMELA J. MAYER, RMR-CRR
Certified Reporter
Certificate No. 50207

PREPARED FOR:
JAMES GARY LINDER, ESQ.

(Copy)



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1 my watch? I only -- I was -- I was only doing the voting
2 on one day. The absentee ballots and the walk-in ballots
3 that come into the office are done by the office manager.

4 BY MR. LINDER:

5 Q. Excellent.

6 Do you think there was any ballot box stuffing
7 in any of the three elections that you -- the last three
8 that you've overseen?

9 A. No.

10 Q. Okay. Do you think that there was any fraud or
11 cheating with respect to the voting that occurred over
12 the last three elections?

13 A. I can't answer that honestly. I just was quite
14 disturbed that the ballots were not going into the ballot
15 box and we had not a board member in there while Enga,
16 our office manager, was gone for three days, we had one
17 of the leaders of the long-range planning committee in
18 there working, and it was not her job.

19 Q. All right, Dee. Well, I think I'll ask the
20 question again, which is, do you think there was any
21 fraud or improper conduct that occurred that had an
22 effect on the outcome of the count of the vote?

23 A. As far as the ballots were concerned, they were
24 counted correctly.

25 Q. Okay.