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## Real Estate Update: Court Invalidates Dispute Resolution Provision in Development Agreement.

By Douglas C. Northup and Scott J. Shelley

In negotiating and executing development agreements and similar contracts between public entities and private parties, certain Arizona municipalities have for several years insisted on the inclusion of dispute resolution provisions that: (1) require the private party to submit any disputes under the agreement to the municipality for initial resolution; and (2) provide that the sole means of challenging a municipality's decision consists of the filing of an action for review of an administrative decision under the Administrative Review Act, A.R.S. §§ 12-901 et seq. (the "ARA"). Because of the extremely deferential standard of review applicable to actions brought under the ARA, such provisions significantly reduce the chances of prevailing in an action challenging a municipality's decisions relating to the interpretation or enforcement of development agreements and similar contracts. However, on October 22, 2009, Division Two of the Arizona Court of Appeals in *Grosvenor Holdings, L.C. v. Figueroa*, No. 2 CA-SA 2009-0050, issued a published opinion invalidating provisions attempting to restrict review to an action under the ARA.

*Grosvenor* involved a development agreement entered into between a developer and Pinal County that featured a dispute resolution provision that required any disputes under the agreement to be submitted to the County for initial resolution, and then purported to restrict any challenge to a County decision to an action for review of an administrative decision under the ARA. A dispute arose between the County and the developer regarding the County's refusal to extend the term of the development agreement, and at a review hearing the County Board of Supervisors formally denied the developer's request for an extension. The Developer, along with two homebuilders that had purchased lots on reliance on the terms of the development agreement ("Plaintiffs") filed suit against the County in Pinal County Superior Court for breach of contract. The County denied Plaintiffs' allegations, and further argued that Plaintiffs' complaint must proceed under the ARA and its extremely deferential standard of review, and could not proceed as a regular civil action.

Plaintiffs filed a motion for partial summary judgment seeking a ruling that the ARA did not apply to Plaintiffs' claims. Plaintiffs argued that the ARA applies only to decisions of an "administrative agency," that the ARA does not therefore apply to municipal decisions because of the ARA's specific exclusion of municipalities from the definition of "administrative agency," and that the trial court therefore lacked subject-matter jurisdiction to review Plaintiffs' claims under the ARA. In response the County argued that the ARA only excludes municipalities from the mandatory application of the ARA, and does not preclude municipalities from voluntarily submitting their decisions to review under the ARA by contract. The Pinal County Superior Court ruled in favor of the County, holding that counties may voluntarily submit their decisions to review under the ARA.

Plaintiffs filed a petition for special action requesting that the Court of Appeals vacate the trial court's order and rule that Plaintiffs' action must proceed as a regular civil action under the Arizona Rules of Civil Procedure. Plaintiffs argued that review under the ARA is possible only where a statute specifically authorizes review, that no

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statute or other law authorizes review of municipal decisions regarding contract disputes, and that the trial court therefore lacked jurisdiction to proceed under the ARA. The Court of Appeals agreed and held that Plaintiffs' claims must proceed as a regular civil action. In so doing, the Court of Appeals held that the provision requiring review under the ARA was "void," stating that "[t]here is no statutory authority supporting the portion of [the development agreement] that provides for judicial review of the Board's decision pursuant to the ARA. Absent such authority, the County and Grosvenor could not agree to confer such jurisdiction on the superior court."

Because review under the ARA is highly deferential to the decision of the government entity, and involves restrictive evidentiary, discovery, and procedural rules, the Court's decision in *Grosvenor* will significantly improve a private party's chances in prevailing on a breach of contract claim involving an agreement that features dispute resolution provisions similar to those at issue in *Grosvenor*. Accordingly, developers, homebuilders, and other private parties that have entered into agreements with municipalities should examine their contracts for such provisions, and consider the effect of *Grosvenor* in determining whether to bring suit against a city or county. In addition, parties should be alert to the decision in *Grosvenor* in negotiating new municipal contracts so that valid and appropriate dispute resolution provisions can be drafted.

Mr. Northup and Mr. Shelley were counsel for the Plaintiffs in *Grosvenor Holdings, L.C. v. Pinal County*, No. 2 CA-SA 2009-0050 (October 22, 2009). It is not known whether the County intends to file a petition for review in the Supreme Court of Arizona.

*Mr. Northup chairs Fennemore Craig's Commercial Litigation Practice Group. He focuses his practice on complex commercial litigation, including real estate development disputes. He co-chairs the Commercial Litigation Committee for the Council on Litigation Management and is recognized by Best Lawyers in America and Super Lawyers. Mr. Northup earned his B.A. (1984) from New Mexico State University and his J.D. (1991) from Oklahoma City University (summa cum laude).*

*Mr. Shelley is an associate in Fennemore Craig's Commercial Litigation Practice Group. He focuses his practice in the area of general commercial litigation, with special emphasis in the areas of constitutional litigation, real-estate litigation, attorney malpractice defense, and civil appeals. He earned his B.A. (1999) from the University of Arizona (magnum cum laude) and his J.D. (2002) from the University of Arizona, James E. Rogers College of Law (summa cum laude, order of the coif).*



Douglas C. Northup  
Director  
602.916.5362  
dnorthup@fclaw.com



Scott Shelley  
Associate  
602.916.5397  
sshelley@fclaw.com