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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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F.G. BUDNICK, a married man and  
TEMPO, INC., a Michigan corporation, )

No. CIV 04-1420-PHX-SMM

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Plaintiffs, )

**MEMORANDUM OF DECISION AND  
ORDER**

11

vs. )

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TOWN OF CAREFREE; et al., )

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Defendants. )

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Pending before the Court is Defendants' Motion for Summary Judgment [Doc. No. 18] and Motion to Strike Affidavit [Doc. No. 31]. On February 23, 2006, Plaintiffs also filed a Motion to Amend and Correct Complaint [Doc. No. 44]. After considering the arguments raised in the parties' briefs and asserted at oral argument, the Court issues the following Memorandum of Decision and Order.

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**BACKGROUND**

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On August 27, 2003, F.G. Budnick ("Budnick") and Tempo, Inc. ("Tempo" together with Budnick, "Plaintiffs") filed an application for Site Plan Approval and Special Use Permit with the Town of Carefree ("Carefree") to build the Residences at Carefree ("RAC").<sup>1</sup> Plaintiffs proposed to build the RAC on the following zoning districts: R1-10 (detached single family), R-3 (multiple family) and R1-35 (detached single family) in an

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<sup>1</sup> Plaintiffs concede that the proposed plan does not comply with the applicable zoning ordinances.

1 area where the surrounding properties are low density single family residences, residential  
2 neighborhoods and a small vacant C-3 (commercial) lot across the street.

3 In their Special Use Permit Narrative Report, Plaintiffs described the RAC as a  
4 "luxurious, age restricted senior retirement residential community" consisting "of upscale  
5 apartments (83), exclusive casitas (60) and opulent single family homes (18), primarily serving  
6 active and independent discerning senior populace." The Narrative Report also stated that the  
7 RAC would include 24 assisted living suites and 24 skilled nursing rooms and that some  
8 residents would be provided in home health care and assisted living care as necessary. A closer  
9 examination of the Record, however, reveals that only 10 units would be utilized for health care  
10 or nursing services (4 units for skilled nursing with six beds per unit and 6 units for assisted care  
11 with four beds per unit). In describing the ancillary nursing care facility, Plaintiffs also stated  
12 that the RAC will have "a small skilled nursing component consisting of 24 beds, 4 of which  
13 will be held in reserve for temporary acute needs."

14 The Record also demonstrates that the RAC as proposed, would include 44,500 square  
15 feet of amenities including a kitchen, two dining areas, salon, library, café, two pools and other  
16 recreation areas. In a letter dated November 26, 2003, Plaintiffs informed Carefree that "entry  
17 [will be] restricted to healthy, active independent seniors." Plaintiff Budnick also informed the  
18 Council that "[the RAC] would not be a nursing home but would be independent living...."  
19 Moreover, the Record establishes that potential residents would be required to take a physical  
20 prior to entry into the RAC.

21 On October 13, 2003, a public hearing was held on Plaintiffs' application for a  
22 Special Use Permit by the Carefree Planning and Zoning Commission (the "Commission").  
23 The Commission voted four to one to deny the Special Use Permit with another member  
24 abstaining.

25 On December 2, 2003, the Carefree Town Council (the "Council") held a public  
26 hearing on Plaintiffs' Application for a Special Use Permit. At the conclusion of the hearing,  
27 the Council voted four to three to deny the Special Use Permit based on their conclusion that  
28 Plaintiffs had not met their burden to show that the safety, health and welfare of Carefree

1 would be served by allowing Plaintiffs to build the RAC, which violated the existing  
2 residential zoning ordinances due to the project's height, attached dwellings and commercial  
3 nature.

4 On December 30, 2003, after both the Commission and Council had reviewed and  
5 denied Plaintiffs' application for a Special Use Permit, Plaintiffs sent a letter to the Mayor of  
6 Carefree, Edward Morgan (the "Mayor"), requesting, for the first time, a reasonable  
7 accommodation under the Fair Housing Act, 42 U.S.C. § 3601 ("FHA"). On January 29,  
8 2004, the Mayor, other Carefree officials, and interested neighbors, now aware that Plaintiffs  
9 were requesting an accommodation under the FHA, met with Plaintiffs and discussed  
10 possible modifications that would be necessary to accommodate any potential disabled  
11 individuals. An agreement was not reached.

12 In a letter (agreeing to the accommodation meeting) dated January 21, 2004,  
13 Defendants reference the possibility of reconsideration of Plaintiffs' application if progress  
14 was made during the negotiations. The Record, however, is devoid of any evidence that  
15 Plaintiffs requested the Commission or the Council to formally reconsider their decisions  
16 denying the Special Use Permit in light of Plaintiffs' belated request for an accommodation  
17 under the FHA. Instead, Plaintiffs filed a Complaint on July 12, 2004, seeking developers  
18 fees and injunctive relief and asserting the following claims: 1) Count I: Defendants are  
19 violating Plaintiffs' rights under the FHA; 2) Count II: Defendant Carefree is violating  
20 Plaintiffs' rights under the Americans with Disabilities Act, 42 U.S.C. §12101, et. seq.,  
21 ("ADA"); 3) Count III: Defendants, acting under color of law, have violated Plaintiffs' civil  
22 rights under 42 U.S.C. § 1983 ("§ 1983"); 4) Count IV: Defendant Carefree is violating  
23 Plaintiffs' rights under the Rehabilitation Act of 1973, 29 U.S.C. § 794, (the "Rehabilitation  
24 Act") and 5) Count V: Defendants have violated Plaintiffs' equal protection and due process  
25 rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

26 The Court will address Plaintiffs' Motion to Amend and Correct the Complaint [Doc.  
27 No. 44] before addressing Defendants' Motion for Summary Judgment and Motion to Strike  
28 Affidavit.

1 **I. MOTION TO AMEND**

2 STANDARD OF REVIEW

3 Leave to amend shall be freely given when justice so requires; however, the decision  
4 to grant or deny a motion to amend is within the sound discretion of the trial court. Fed. R.  
5 Civ.P. 15(a); Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). Courts  
6 frequently examine five factors in assessing a motion for leave to amend: 1) bad faith, 2)  
7 undue delay, 3) prejudice to the opposing party, 4) futility of amendment and 5) whether the  
8 plaintiff has previously amended his complaint. Id. "These factors, however, are not given  
9 equal weight." Bonin v. Caldron, 59 F.3d 815, 845 (9th Cir. 1995).

10 DISCUSSION

11 As a preliminary matter, the Court notes that Plaintiffs have failed to comply with  
12 LRCiv 15.1(a)(1) which requires a party moving for leave to amend to attach a copy of the  
13 proposed amended pleading to the motion demonstrating the differences between the  
14 amended and original pleading. Although this procedural deficiency justifies denying  
15 Plaintiffs' Motion, the Court also finds that the Motion is futile. See Bonin, 59 F.3d at 845  
16 ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.")

17 In their Motion, Plaintiffs argue that the Complaint should be amended to add "new"  
18 facts from the zoning ordinance and the May 28, 2005 deposition of Gary Neiss. The Court  
19 finds that Plaintiffs were aware of these facts by the end of July 2005 at the latest.<sup>2</sup>  
20 Accordingly, the Court finds that Plaintiffs have not discovered "new" facts. Rather,  
21 Plaintiffs are attempting to re-fashion existing and well known facts based on an  
22 unpublished decision from an Arizona Superior Court.<sup>3</sup> Relying on GP Properties,  
23 Plaintiffs seek to amend their Complaint to "allege that Defendants' failure to approve the  
24 RAC application, which complied with standards for approval set forth in the Special Use

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26 <sup>2</sup> Plaintiffs cite to the Neiss Deposition in their Statement of Facts filed on July 22, 2005, and  
Defendants attached the ordinance to their Statement of Facts filed on July 10, 2005.

27 <sup>3</sup> Plaintiffs cite to GP Properties Carefree Cave Creek L.L.C. v. Town of Carefree, et al., CV2004-  
28 022500 ("GP Properties").

1 Regulations, constitute [sic] another violation of due process." (Pls.' Mot. to Amend, p. 6).

2 The Court, however, finds that Plaintiffs' attempt to rely on an unpublished Arizona  
3 Superior Court decision to re-fashion facts that Plaintiffs have known since at least July  
4 2005 is improper. See Ninth Circuit Rule 36-3(a)-(b); Schmier v. U.S. Court of Appeals for  
5 Ninth Circuit, 279 F.3d 817, 819 (9th Cir. 2002) ("Circuit Rule 36-3 essentially states that  
6 neither parties nor courts in the Ninth Circuit may cite to an unpublished disposition as  
7 precedent."). Accordingly, Plaintiffs' Motion to Amend will be denied for failure to comply  
8 with LRCiv 15(a)(1) and because the amendment would be futile.

## 9 **II. MOTION FOR SUMMARY JUDGMENT**

### 10 STANDARD OF REVIEW

11 A court must grant summary judgment if the pleadings and supporting documents,  
12 viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue  
13 as to any material fact and that the moving party is entitled to judgment as a matter of law."  
14 Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v.  
15 Nev. Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which  
16 facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); see also Jesinger,  
17 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit under the  
18 governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at  
19 248. The dispute must also be genuine, that is, the evidence must be "such that a reasonable  
20 jury could return a verdict for the nonmoving party." Id.; see Jesinger, 24 F.3d at 1130.

21 A principal purpose of summary judgment is "to isolate and dispose of factually  
22 unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against  
23 a party who "fails to make a showing sufficient to establish the existence of an element essential  
24 to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322;  
25 see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party  
26 need not disprove matters on which the opponent has the burden of proof at trial. See Celotex,  
27 477 U.S. at 317. The party opposing summary judgment "may not rest upon the mere  
28 allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that

1 there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v.  
2 Zenith Radio, 475 U.S. 574, 585-88 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044,  
3 1049 (9th Cir. 1995).

## 4 DISCUSSION

### 5 **A. FHA Claim**

6 To establish a violation under the FHA, Plaintiffs must prove either: 1) intentional  
7 discrimination (disparate treatment); 2) disparate impact or 3) failure to make reasonable  
8 accommodations. Gamble v. City of Escondido, 104 F.3d 300, 305-07 (9th Cir. 1997).

#### 9 *a. Intentional Discrimination/Disparate Treatment*

10 The prima facie elements of a disparate treatment claim are: 1) plaintiff is a member of  
11 a protected class; 2) plaintiff applied for a conditional use permit and was qualified to receive  
12 it; 3) the conditional use permit was denied despite plaintiff being qualified; and 4) defendant  
13 approved a conditional use permit for a similarly situated party during a period relatively near  
14 the time plaintiff was denied its conditional use permit. Id. at 305. The Court will address these  
15 elements in order.

16 Plaintiffs contend that the Record before this Court contains evidence that disabled  
17 individuals will inhabit the RAC. Under 42 U.S.C. § 3602(d)(1),(2) and (3), a disability  
18 includes: "a physical or mental impairment which substantially limits one or more major life  
19 activities; a record of such impairment; or being regarded as having such an impairment." While  
20 the Record establishes Plaintiffs presented the Commission and Council with evidence that  
21 nursing and healthcare services would be available to some of the potential RAC residents, it  
22 also clearly shows that Plaintiffs did not request an accommodation under the FHA until after  
23 both entities had denied their application. In fact, Plaintiffs' application presented the RAC as  
24 a housing community (with available healthcare services) for active and independent seniors.  
25 Thus, the Court finds that the Commission and Council were not aware of Plaintiffs' request for  
26 an accommodation under the FHA when they denied Plaintiffs' application for a Special Use  
27 Permit.

28 While Plaintiffs concede that the RAC's potential residents would be required to pass

1 a physical and would have to be capable of independent living upon entry into the RAC, they  
2 also claim that the RAC would house disabled individuals due to the advanced age of the  
3 potential residents. Plaintiffs have also produced evidence that the RAC would provide  
4 healthcare and nursing services to at least some potential residents and that the RAC could  
5 qualify as a Continuing Care Retirement Community. Because this Court is required to draw  
6 all reasonable inferences in favor of Plaintiffs and view the Record in the light most favorable  
7 to Plaintiffs, the Court finds that Plaintiffs have presented sufficient evidence to create an issue  
8 of fact as to the first element of a prima facie claim for disparate treatment.

9 The Court also finds that (1) there is no evidence indicating Plaintiffs were not qualified  
10 applicants for a Special Use Permit, (2) Plaintiffs did in fact apply for a Special Use Permit and  
11 (3) Plaintiffs' application for a Special Use Permit was denied. Thus, the Court finds that  
12 Plaintiffs have produced evidence indicating that they meet the first three required elements of  
13 a disparate treatment claim.

14 To establish a prima facie claim for disparate treatment, however, Plaintiffs must also  
15 establish that Defendants approved a conditional use permit for a similarly situated party during  
16 a relatively close temporal period to the time Plaintiffs' permit was denied. Plaintiffs contend  
17 that the Record is replete with examples of Carefree granting Special Use Permits to other  
18 similarly situated individuals; however, a closer examination of the Record demonstrates that  
19 these cases have distinguishable characteristics including different zoning grades (Carefree  
20 Resort was zoned R-5, Carefree Villas zoned R-3 & R1-18 with no commercial uses<sup>4</sup>), creation  
21 before the town of Carefree existed (golf course expansion, condos, hangar and theater), or  
22 contemplation in the general plan (three churches).

23 While Plaintiffs have presented evidence that commercial services are provided by the  
24 Carefree Villas, Plaintiffs have failed to produce evidence suggesting that the Special Use  
25 Permits for Carefree Villas or any of the other allegedly similar projects occurred in close  
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27 <sup>4</sup> Defendants contend the Carefree Villas received a special use permit for a one foot height variance.  
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1 proximity to the denial of Plaintiffs' application. See Gamble, 104 F.3d at 305 (finding that mere  
2 allegations of other large structures in the vicinity are insufficient where neither the complaint  
3 nor the record "...informs [the court] of the dates on which permits for these structures were  
4 granted, or whether other factors, such as the composition of the city council or the related  
5 zoning ordinances had changed since the prior permits were granted"). Moreover, Plaintiffs  
6 concede that Defendants have denied two similar projects where the developers sought to place  
7 them in residential districts. Thus, Plaintiffs have not put forth sufficient evidence to create an  
8 issue of fact regarding whether Defendants granted a similarly situated party a Special Use  
9 Permit near the time Defendants denied their application for a Special Use Permit.

10 Even if Plaintiffs could produce sufficient evidence to create an issue of fact as to the  
11 existence of a prima facie claim for disparate treatment, a grant of summary judgement is still  
12 appropriate if Defendants can set forth a legitimate and nondiscriminatory reason for denying  
13 Plaintiffs' application for a Special Use Permit and Plaintiffs cannot prove by a preponderance  
14 of the evidence that the reasons asserted by Defendants are mere pretext. Gamble, 104 F.3d at  
15 305.

16 Zoning concerns are legitimate governmental goals and permit denials are rationally  
17 related to achieving zoning goals. Id. at 307 (citing Vill. of Euclid v. Ambler Realty Co., 272  
18 U.S. 365, 386-88 (1926)). Moreover, "concern for the character of the neighborhood, is  
19 legitimate and nondiscriminatory." Id. at 305.

20 Plaintiffs concede that the RAC as proposed did not comply with the zoning ordinances  
21 in existence when the Special Use Permit was submitted. Specifically, the RAC required a  
22 Special Use Permit because:

- 23 (a) the casitas will be attached dwelling units rather than detached; (b) the two-story  
24 apartment building will exceed the 30 foot height limitation from adjacent existing  
25 grade...; and (c) the provision of healthcare, meal, laundry, housekeeping and similar  
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1 services constitute a special use under the zoning ordinances.<sup>5</sup>

2 Under Carefree's Zoning Ordinance § 1601(4) and (5), Plaintiff bears the burden of  
3 demonstrating, "specific evidence and facts showing that the public health, safety and general  
4 welfare will be served and not adversely affected, ... and that necessary safeguards will be  
5 provided for the protection of adjacent property or the permitted use thereof."

6 While the Court finds that Plaintiffs did put forth evidence that the RAC would not have  
7 an adverse affect on traffic flow or impose a burden on the water or sewer system, the Record  
8 also demonstrates that the Commission and Council were not persuaded to grant the Special Use  
9 Permit on this evidence alone, but also considered other evidence, including comments from  
10 the community.

11 The citizens of Carefree expressed both support for and opposition to the RAC. Those  
12 supporting the RAC stated that the project would provide Carefree with a place for its citizens  
13 to stay when they could no longer live alone and would allow its citizens to stay in Carefree  
14 forever.

15 Those opposing the RAC expressed concern that the RAC was a commercial facility in  
16 a residential zone, and claimed that the RAC would lower property values and negatively impact  
17 the character of their neighborhood. The Record additionally demonstrates that some of the  
18 Council Members who voted against the RAC, including the Mayor, were concerned about the  
19 issues the citizens raised. The Record also contains the following statements, which Plaintiffs  
20 argue evidence Defendants' intent to discriminate: "we should focus on all the residents of  
21 Carefree not those who were affluent and would come to die at the Residence at Carefree" and  
22 "people won't come out here to see old people living in a home; they come out here to see the  
23 desert...." (Council Meeting Minutes, p. 7, Commission Meeting Minutes p. 11).

24 Plaintiffs contend these negative statements, combined with evidence that the Council  
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27 <sup>5</sup> In response to the question, "Why is the property in question not reasonably suited for use permitted  
28 under the present zoning district?," Plaintiffs responded: "(1) R1-10 Attached Units vs. Detached; (2) R-3 Minor  
Height Restriction Variances from Max. Allowed; (3) Special use request under zoning ordinance article XVI  
section 1601(g); other minor special use requirement as necessary."

1 was concerned about the opinion of the neighbors who resided in the area where the RAC would  
2 be constructed, establish that Defendants did not have a legitimate basis for denying their  
3 Special Use Permit.

4 The Record contains numerous comments reflecting concern about the effect the RAC  
5 would have on property values, the integrity of Carefree's zoning scheme and the character of  
6 the neighborhood where it would be built.

7 Moreover, Carefree's Zoning Ordinance § 1601 states: "...the Council shall hold a public  
8 hearing to determine whether granting the application would serve the public health, safety, and  
9 the welfare of the town." Viewing the Record in its entirety, the Court finds that the Council  
10 listened to all of the evidence and public comments presented and then rejected the project by  
11 a divided vote. Although the Record also contains statements from the general public that may  
12 not be appropriate, the Court finds that these statements do not, in and of themselves, establish  
13 any animus or bias against disabled people on the part of the Commission or the Council.  
14 Furthermore, even if the Court found the public's comments were discriminatory in nature  
15 (which it does not), Plaintiffs have failed to set forth evidence that the Council or Commission  
16 members were influenced by these particular statements, or that their respective decisions were  
17 based on an intent or motive to discriminate.

18 Accordingly, the Court finds that Defendants have presented sufficient evidence to meet  
19 their burden of establishing the denial of the Special Use Permit was based on concern for the  
20 character of the neighborhood and to uphold Carefree's zoning ordinances, both of which are  
21 legitimate and nondiscriminatory reasons. Moreover, Plaintiffs fail to create a genuine issue  
22 of fact as to whether Defendants' actions were pretextual, or the Commission and Council based  
23 their decisions on discriminatory motives. Thus, Plaintiffs' disparate treatment claim fails.

24 *b. Disparate Impact*

25 To establish a prima facie disparate impact case, Plaintiffs must establish: 1) the  
26 occurrence of certain outwardly neutral practices and 2) a significantly adverse or  
27 disproportionate impact on persons of a particular type produced by Defendants' facially neutral  
28 acts or practices. Gamble, 104 F.3d at 306. Plaintiffs need not prove intent but Plaintiffs must

1 prove the discriminatory impact at issue; raising an inference of discriminatory impact is  
2 insufficient. Id.

3 In Gamble, the Ninth Circuit found that the plaintiff failed to establish a prima facie case  
4 because he presented no statistics or other proof demonstrating that the city's permit practices  
5 had a significantly adverse or disproportionate impact on the physically disabled or elderly. Id.

6 Here, Plaintiffs have likewise failed to set forth statistics that indicate Defendants' permit  
7 practices have a significantly adverse or disproportionate impact on the disabled or elderly.  
8 Rather, Plaintiffs rely on Carefree's denial of two prior special use permits where the developers  
9 sought to place assisted living and skilled nursing facilities in residential zoning districts and  
10 argue that lack of these facilities results in a disproportionate impact on residential housing  
11 available for the physically disabled or elderly.

12 Like the plaintiff in Gamble, Plaintiffs argue that the lack of other facilities similar to the  
13 RAC is sufficient evidence of a disproportionate impact. The Ninth Circuit, however, has  
14 indicated that a community void and absence of like facilities alone is not actionable. Id. at 306.  
15 Moreover, even if a community void was actionable, the Heritage Healthcare facility (a 64-unit  
16 assisted living and skilled care facility) is currently operating in Carefree less than a mile from  
17 the proposed RAC site.<sup>6</sup>

18 Accordingly, the Court finds that Plaintiffs failed to produce sufficient evidence to create  
19 a material issue of fact as to whether the denial of the Special Use Permit had a disparate impact  
20 on Carefree's disabled population. Thus, Plaintiffs' disparate impact claim fails as a matter of  
21 law.

22 *c. Reasonable Accommodation*

23 The Ninth Circuit has held that a municipality commits discrimination under the FHA  
24 if it refuses "to make reasonable accommodations in rules, policies, practices, or services, when  
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26 <sup>6</sup> Notably, Plaintiff Budnick concedes that Carefree initially rejected the application for a Special Use  
27 Permit for Heritage Healthcare because the proposed site was in a residential neighborhood but subsequently  
28 granted the Special Use Permit on July 10, 1998, after the developer agreed to re-locate Heritage Healthcare to  
a mutually agreed upon site in an area zoned "Garden-Office."

1 such accommodations may be necessary to provide [the physically disabled] equal opportunity  
2 to use and enjoy a dwelling." Gamble, 104 F.3d at 307.

3 In Gamble, the Ninth Circuit found that a plaintiff was not entitled to an accommodation  
4 under the FHA because the building contained both (1) housing for fifteen disabled individuals  
5 and (2) an adult healthcare facility that would be utilized by the community, because the  
6 plaintiff failed to allege that the health care facility was required to house the disabled  
7 individuals. Id.

8 Plaintiffs contend Gamble is distinguishable because the community healthcare facility  
9 was a major facet of the proposed building in that case and here the RAC is designed solely to  
10 provide housing and healthcare services to its residents. While the Court recognizes that the  
11 present case is factually distinguishable because the RAC does not contain a large health care  
12 facility to be utilized by the community at large, the Court finds the Ninth Circuit's rationale in  
13 Gamble applicable here because the RAC's proposed amenities are analogous to the community  
14 healthcare facility in Gamble.

15 The proposed RAC will contain approximately 44,000 square feet of amenities,  
16 including 18,900 square feet of dining facilities, 7,100 square feet of lobbies and offices, and  
17 a 1,000 square foot hair salon. Like the plaintiff in Gamble, Plaintiffs in the case *sub judice*,  
18 have failed to produce any evidence suggesting that amenities of this size and magnitude are  
19 required to house disabled individuals. Moreover, Plaintiffs have failed to produce evidence  
20 that they requested a reasonable accommodation before either the Commission or the Council  
21 reviewed and denied their application for a Special Use Permit.

22 Although the Court concludes that Plaintiffs have failed to produce evidence that  
23 creates an issue of fact as to whether they are entitled to a reasonable accommodation under  
24 the FHA, the Court notes that after the RAC application was denied, Plaintiffs and  
25 Defendants met and discussed possible alternative sites for the RAC, possible alternative  
26 locations for the commercial amenities, and the possible restructuring of the commercial  
27 amenities to reduce their size. However, these discussions were not successful. The Ninth  
28 Circuit has held that a city need not make a fundamental or substantial change to

1 accommodate the handicapped; only reasonable accommodation is required. Sanghvi v.  
2 City of Claremont, 328 F.3d 532, 538 (9th Cir. 2003) (finding that there was no evidence  
3 from which the jury could conclude that the accommodation was required and therapeutic to  
4 Alzheimer's patients and not an economic concern to plaintiffs).

5 Accordingly, the Court finds that Plaintiffs failed to put forth sufficient evidence that the  
6 RAC's amenities are necessary or required to house the physically disabled. As a result,  
7 Plaintiffs' claim that Defendants failed to reasonably accommodate their request to build the  
8 RAC under the FHA fails as a matter of law.

### 9 **B. ADA Claim**

10 To show a violation of the ADA, Plaintiffs must show: 1) they are individuals with  
11 disabilities, 2) they are otherwise qualified to participate in or receive a public benefit; 3) they  
12 were denied a public benefit and 4) such denial or discrimination was by reason of Plaintiffs'  
13 disability. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). The parties concede that the  
14 analysis applicable to Plaintiffs' ADA claim is similar to their FHA claim. See Coons v. Sec'y  
15 of the U.S. Dept. of the Treasury, 383 F.3d 879, 887 (9th Cir. 2004) (noting in the employment  
16 discrimination context under the ADA that once the plaintiff establishes a prima facie case, the  
17 defendant has the burden to present legitimate reasons for its actions and then the plaintiff must  
18 present evidence that a genuine issue of material fact exists as to whether the reasons  
19 promulgated by defendant are mere pretext to defeat summary judgment).

20 Plaintiffs allege that Defendants discriminated against them by denying and otherwise  
21 making residency at the RAC unavailable to potential residents because such potential residents  
22 may be disabled. Initially, the Court finds that Plaintiffs have produced evidence that they were  
23 qualified applicants for a special use permit and that their application was denied, thereby  
24 satisfying the second and third elements of a prima facie ADA claim.

25 As discussed previously, supra at 7, because the Court is required to view the evidence  
26 in the light most favorable to Plaintiffs, the Court also finds that Plaintiffs have put forth  
27 evidence that the RAC would house some disabled individuals. However, because the evidence  
28 shows that Plaintiffs presented the RAC as a housing community (with available healthcare

1 services) for active and independent seniors and requested an accommodation under the FHA  
2 only after the Commission and Council denied their application, they cannot show that the  
3 Commission or Council were aware that disabled persons would reside in the RAC when the  
4 application was denied. Accordingly, the Court finds that while Plaintiffs have raised an issue  
5 of fact as to whether disabled people would inhabit the RAC, Plaintiffs have failed to present  
6 evidence that either the Commission or Council were aware of this fact when they denied  
7 Plaintiffs' application for a Special Use Permit.

8 Even if Plaintiffs could produce sufficient evidence to create an issue of fact as to the  
9 existence of a prima facie case under the ADA, the Court finds that Defendants have presented  
10 sufficient evidence to meet their burden by establishing that the denial of the Special Use Permit  
11 was based on concern for the character of the neighborhood and the integrity of Carefree's  
12 zoning ordinances and Plaintiffs have failed to put forth evidence that creates an issue of fact  
13 as to whether Defendants' actions were mere pretext. Accordingly, Plaintiffs have failed to  
14 produce sufficient evidence to create an issue of fact on their ADA claim.

### 15 **C. Fourteenth Amendment Claim**

16 Plaintiffs contend that Defendants violated their right to equal protection of law  
17 guaranteed by the Fourteenth Amendment by enacting zoning ordinances that arbitrarily deny  
18 groups of disabled persons the same housing opportunities as groups of non-disabled persons.

19 "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause  
20 of the Fourteenth Amendment a plaintiff must show that defendants acted with an intent or  
21 purpose to discriminate against the plaintiff based upon membership in a protected class." Lee  
22 v. City of Los Angeles, 250 F.3d 669, 686-87 (9th 2001). Moreover, "[w]here the challenged  
23 governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable  
24 group can satisfy the intent requirement only if it tends to show that some invidious or  
25 discriminatory purpose underlies the policy." Id. Under the Fourteenth Amendment, the  
26 physically disabled are not a protected class for purposes of equal protection. City of Cleburne  
27 v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985). Accordingly, rational basis scrutiny  
28 is appropriate. Gamble, 104 F.3d at 307.

1 Plaintiffs have not alleged, nor have they produced any evidence indicating, that  
2 Carefree's zoning ordinances discriminate against disabled individuals on their face. Thus, the  
3 Court finds that the zoning ordinances at issue are facially neutral. The Court must now  
4 determine whether Defendants' denial of Plaintiffs' application for a Special Use Permit was  
5 rationally related to a legitimate government goal.

6 The United States Supreme Court has recognized that zoning concerns are legitimate  
7 government goals. Village of Euclid, 272 U.S. at 386-88. Plaintiffs concede that the RAC, as  
8 proposed, did not comply with Carefree's zoning ordinances and therefore required a Special  
9 Use Permit. Accordingly, the Court finds that Defendants have a rational basis for denying the  
10 Plaintiffs' application for a Special Use Permit and that Plaintiffs have failed to set forth  
11 sufficient evidence to create an issue of fact as to whether Defendants acted with an "invidious  
12 or discriminatory" purpose. See Lee, 250 F.3d at 686. Thus, the Court finds that even when the  
13 facts are construed in the light most favorable to Plaintiffs, Plaintiffs have failed to set forth  
14 sufficient evidence to create an issue of fact as to whether Defendants' conduct violated the  
15 Equal Protection Clause.

16 Plaintiffs also contend that Defendants violated their right to due process of law  
17 guaranteed by the Fourteenth Amendment by applying their zoning ordinances and procedural  
18 regulations so as to arbitrarily and irrationally deny Plaintiffs and the RAC's potential residents  
19 the residential opportunities afforded to non-disabled persons. The Court finds that rational  
20 basis scrutiny is also the appropriate standard to analyze Plaintiffs' due process claim. Gamble,  
21 104 F.3d at 307.

22 The Ninth Circuit has held that a threshold requirement to a substantive or procedural  
23 due process claim is a showing by Plaintiffs that they have a liberty or property interest  
24 protected by the Constitution. Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 62  
25 (9th Cir. 1994). "A protected property interest is present where an individual has a reasonable  
26 expectation of entitlement deriving from 'existing rules or understandings that stem from an  
27 independent source such as state law.'" Id. (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577  
28 92 S.Ct. 2701, 2709 (1972)). Under Arizona law, a land developer does not have a property



1 interest in an application for a special use permit. Aegis of Ariz., L.L.C., v. Town of Marana,  
2 81 P.3d 1016, 1028 (Ariz. Ct. App. 2003). Accordingly, the Court finds that Plaintiffs cannot  
3 allege that they have a liberty or property interest in the application for the Special Use Permit  
4 protected by the Constitution, nor have produced evidence of such an interest. Even if Plaintiffs  
5 had a property interest in their application for a Special Use Permit, Plaintiffs must still produce  
6 evidence that creates an issue of fact as to whether their Due Process rights were violated.

7 The Ninth Circuit Court of Appeals has not addressed whether the "shocks the  
8 conscience" standard applicable to other substantive due process claims also applies to a land  
9 use claim by a developer. Accordingly, the Court must look to other jurisdictions for guidance.

10 The Third Circuit Court of Appeals has held that the shocks the conscience standard  
11 applies in land use cases because "[a]pplication of the 'shocks the conscience' standard in this  
12 context prevents [courts] from being cast in the role of a 'zoning board of appeals.'" United  
13 Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 401-02 (3rd Cir. 2003);  
14 See also Aegis, 81 P.3d 1016 at 1028 (relying on United Artists Theatre for the proposition that  
15 the "shocks the conscience" standard applies in land use cases in Arizona). Recognizing that  
16 every appeal from a disappointed developer based on an adverse ruling from a local planning  
17 board involves some claim that the board violated or exceeded its legal authority, the First  
18 Circuit Court of Appeals has stated, "[i]t is not enough simply to give these state law claims  
19 constitutional labels such as due process or equal protection in order to raise a substantial  
20 federal question under [section] 1983." Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833  
21 (1st Cir. 1982). While the Court recognizes that this authority is not binding, the rationale  
22 contained in these opinions is persuasive.

23 To establish that Defendants' conduct shocks the conscience, Plaintiffs rely on evidence  
24 that: (1) Defendants denied similar projects, (2) Plaintiffs relied on prior indications of support  
25 by the Mayor for the project, and (3) Plaintiffs invested substantial amounts of money in the  
26 RAC. The Court finds this evidence is insufficient to create an issue of fact as to whether  
27 Defendants' conduct shocks the conscience. See Estabrook, 680 F.2d at 833 (recognizing that  
28 even where officials are planning to "clearly violate, much less 'distort' the state scheme under

1 which they operate" a planning dispute would not implicate the Constitution absent a  
2 "fundamental procedural irregularity" or "racial animus").

3 The Court notes that Defendants imposed a super-majority voting requirement at the  
4 Council meeting approximately four hours before the meeting occurred and Plaintiffs have  
5 produced evidence that a dispute exists as to whether Carefree had timely received a sufficient  
6 number of written objections from residents living within 150 feet of the project to properly  
7 impose the super-majority requirement. The Record, however, also establishes that a close legal  
8 question existed as to whether the super-majority voting requirement was required, that  
9 Defendants addressed this issue with legal counsel, and that Defendants subsequently relied on  
10 the advice they received from their counsel in deciding to implement the super-majority voting  
11 requirement. Accordingly, the Court finds that Defendants' reliance on legal counsel's advice,  
12 even if Plaintiffs had established that the advice was wrong (which they have not), is not  
13 behavior that "shocks the conscience."<sup>7</sup> Thus, Plaintiffs have failed to produce sufficient  
14 evidence to create an issue of fact as to whether Defendants' conduct violated the due process  
15 clause of the Fourteenth Amendment, in addition to failing to produce evidence that Plaintiffs  
16 possessed a protected property right.

#### 17 **D. Rehabilitation Act Claim**

18 Plaintiffs allege that Defendants utilized Carefree's zoning ordinances and methods of  
19 enforcing those codes to subject Plaintiffs and the RAC's future residents to discrimination  
20 solely on the basis of the future residents' disabilities.

21 To successfully assert a claim under the Rehabilitation Act, Plaintiffs must prove: 1) the  
22 plaintiff is a handicapped person under the Act; 2) the plaintiff is "otherwise qualified" for  
23 participation in the program; 3) the plaintiff is being excluded from participation in, being  
24 denied benefits of, or being subjected to discrimination under the program solely by reason of  
25 his handicap; and 4) the relevant program or activity is receiving federal financial assistance.

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26  
27 <sup>7</sup> The Court also finds that the implication of the super-majority requirement was not outcome  
28 determinative as Plaintiffs failed to get the four votes that are needed to constitute an ordinary majority.

1 Landefeld v. Marion Gen. Hosp., Inc., 994 F.2d 1178, 1180-81 (6th Cir. 1993); Pushkin v.  
2 Regents of Univ. of Colo., 658 F.2d 1372, 1384 (10th Cir. 1984).

3 Plaintiffs concede that they cannot identify the specific program that receives federal  
4 funds, and the Court finds that they have not presented any evidence that Carefree does in fact  
5 receive federal funds. Instead, Plaintiffs attempt to rely on a conclusory assertion based upon  
6 "information and belief." This assertion fails because the Mayor's affidavit clearly states that  
7 Carefree receives no grants of federal funds from the United States Government.

8 Accordingly, the Court finds that Plaintiffs have failed to set forth sufficient evidence  
9 to create an issue of fact as to whether Defendants have violated the Rehabilitation Act.

#### 10 **E. 42 U.S.C. § 1983 Claim**

11 Plaintiffs also allege that Defendants have violated their civil rights under § 1983 by  
12 utilizing their zoning ordinances and methods of administering the ordinances for purposes of  
13 subjecting the Plaintiffs and the RAC's residents to discrimination on the basis of their disability  
14 and denying Plaintiffs and the RAC's potential residents their equal protection and due process  
15 rights under the Fourteenth Amendment.

16 "[I]n any § 1983 action the initial inquiry must focus on whether the two essential  
17 elements to a § 1983 action are present: (1) whether the conduct complained of was committed  
18 by a person acting under color of state law; and (2) whether this conduct deprived a person of  
19 rights, privileges, or immunities secured by the Constitution or laws of the United States."  
20 Paratt v. Taylor, 451 U.S. 527, 535 (1981).

21 "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause  
22 of the Fourteenth Amendment a plaintiff must show that defendants acted with an intent or  
23 purpose to discriminate against the plaintiff based upon membership in protected class." Lee,  
24 250 F.3d at 686-87. "Where the challenged governmental policy is 'facially neutral,' proof of  
25 its disproportionate impact on an identifiable group can satisfy the intent requirement only if  
26 it tends to show that some invidious or discriminatory purpose underlies the policy." Id.

27 Plaintiffs concede that because the RAC, as proposed, did not comply with Carefree's  
28

1 zoning ordinances they were required to apply for a special use permit. The Court finds that  
2 Defendants held two public meetings, and that both the Commission and Counsel reviewed  
3 Plaintiffs' application before denying it based on concerns for the welfare of the neighborhood  
4 and its concern for the integrity of Carefree's zoning ordinances. The Court also finds that  
5 Plaintiffs have failed to set forth sufficient evidence that Defendants acted with an "invidious  
6 or discriminatory" purpose. Id. at 686.

7 Plaintiffs also allege that Defendants have deprived them of their due process rights  
8 under the Fourteenth Amendment in violation of § 1983. In the Ninth Circuit, "[a] threshold  
9 requirement to a substantive or procedural due process claim is the plaintiffs' showing of a  
10 liberty or property interest protected by the Constitution." Wedges/Ledges, 24 F.3d at 62.

11 Plaintiffs concede, and Arizona law confirms, that they do not have a property or liberty  
12 interest in their application for a special use permit. Aegis, 81 P.3d at 1028. The Court has also  
13 found that Plaintiffs failed to set forth sufficient evidence to create an issue of fact as to whether  
14 Defendants' conduct shocks the conscience. Supra at 17. Accordingly, the Court finds that  
15 Plaintiffs also failed to set forth sufficient facts to create an issue of fact regarding their § 1983  
16 claim for a violation of due process.

17 Having found that Plaintiffs have failed to put forth sufficient evidence to create an issue  
18 of fact as to their FHA, ADA, and Rehabilitation Act claims, the Court also finds that Plaintiffs  
19 have failed to produce sufficient evidence to create an issue of fact as to whether Defendants'  
20 conduct has deprived them of their rights, privileges or immunities secured by the Constitution  
21 or laws of the United States. Thus, Plaintiffs' § 1983 claim fails as a matter of law. **III.**

## 22 **MOTION TO STRIKE**

23 Defendants have filed a Motion to Strike Paul Gordon's Affidavit. Having found that  
24 Defendants' Motion for Summary Judgment should be granted, the Court also finds that  
25 Defendants' Motion to Strike is moot and will refrain from addressing it at this time.

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27  
28

**CONCLUSION**

1  
2 Plaintiffs admit that the RAC, as proposed, did not comply with Carefree's zoning  
3 ordinances as they existed when their application for a Special Use Permit was filed. The  
4 Record establishes that Plaintiffs marketed the RAC as a community for active and  
5 independent seniors and that the first mention of accommodating disabled individuals  
6 occurred almost one month after Defendants denied their Special Use Permit. The Court  
7 concludes that the denial of Plaintiffs' Special Use Permit was based on valid and non-  
8 discriminatory reasons; thus Plaintiffs' attempts to transform it into a discriminatory and  
9 malfeasant act fail as a matter of law.

10 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Amend and Correct  
11 Complaint [Doc. No. 44] is **DENIED**.

12 **IT IS FURTHER ORDERED** that Defendants' Motion for Summary Judgment  
13 [Doc. No. 18] is hereby **GRANTED**.

14 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike [Doc. No. 31] is  
15 hereby **DENIED** as moot.

16 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment in  
17 accordance with this Order.

18 DATED this 31st day of March, 2006.  
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23 Stephen M. McNamee  
24 Chief United States District Judge  
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