IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LINDA W. SWAIN, an individual; and EILEEN T. BRESLIN, an individual,

Plaintiffs/Counterdefendants/Appellees,

vs.

TTLC AHWATUKEE LAKES INVESTORS, LLC, an Arizona limited liability company,

Defendant/Counterclaimant/Appellants

BIXBY VILLAGE GOLF COURSE, INC., a California corporation; HIRO INVESTMENT, LLC, an Arizona limited liability company; NECTAR INVESTMENT, LLC, an Arizona limited liability company; KWANG CO., LLC, an Arizona limited liability company; AHWATUKEE GOLF PROPERTIES, LLC, an Arizona limited liability company,

Former Defendants/Appellants.

Court of Appeals
Division One
No. 1 CA-CV 18-0397

Maricopa County
Superior Court
No. CV2014-051035

ANSWERING BRIEF OF APPELLEES LINDA W. SWAIN AND EILEEN T. BRESLIN

Timothy H. Barnes (SBN 003373)
Timothy H. Barnes, P.C.
428 E. Thunderbird Road, #150
Phoenix, Arizona 85022
(602) 492-1528
tim@thbpc.com
Attorneys for Appellees

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STATEMENT OF THE CASE

This matter arises out of concerns Plaintiffs/Appellees Linda Swain and Eileen Breslin ("Plaintiffs" or "Appellees") had to a deed restriction ("Lakes Deed Restriction") originally placed on real property known as the Ahwatukee Lakes Golf Course ("Golf Course" or "Property"). The Golf Course was originally developed as an adjunct to the Ahwatukee development, and as that community grew from the early 1970's, the importance of that property as a golf course and as a life amenity to the Ahwatukee village grew in importance not only for its residents and neighbors, but for other reasons such as flood control. Through time, recognition of Golf Course's importance to Ahwatukee homeowners was documented through a series of amendments to the Lakes Deed Restriction that culminated in an enlarged Declaration of Covenants, Conditions and Restrictions in 1992 ("1992 CC&Rs") identified third-party beneficiaries, including Appellees, and is a covenant between the owner of the Golf Course and Appellees and other Ahwatukee residents based on compliance with A.R.S. 42-125.01[1] – Arizona's golf course valuation statutes.

The 1992 CC&Rs incorporated the prior deed restrictions on both the Golf Course and the Ahwatukee Country Club. The 1992 CC&Rs also contain a covenant

[1] This statute is part of Arizona's statutory scheme for the valuation and taxation of golf courses. A.R.S. §42-125.01 was later renumbered by the Legislature to be A.R.S. §42-146. In 1997, A.R.S. §42-146 was repealed and its substance was moved to A.R.S. §42-13151, *et seq*. as Arizona's valuation and taxation of golf courses.

by the owner, on its own behalf and on behalf of "all present and future owners or users of such portion of the Property as remain subject to this Declaration," affirming its intention "to comply with the requirements and obtain the benefits of Arizona Revised Statutes Section 42-146 regarding the valuation and taxation of golf courses."[2]

This action was brought by a Complaint filed by Plaintiffs/Appellees to enforce the 1992 CC&Rs against the then Property owners Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co and Ahwatukee Golf Properties, LLC (collectively, "Former Defendants" or "Bixby"). Electronic Index of Record ("EIR") 1. In June 2015, the Former Defendants sold the Property to TTLC Ahwatukee Lakes Investors, LLC ("Defendant" or "TTLC").[3] By Stipulation, the Former Defendants were, except for attorneys' fees claims between those parties, dismissed from this action with prejudice. (EIR 47.) Plaintiffs filed their First Amended Complaint against Defendant with claims for breach of contract, breach of the covenant of good faith and fair dealing and for injunctive relief. (EIR 45.)

[2] Trial Exhibit 4, Recital F.

[3] Collectively, the Former Defendants and Defendant shall be referred to as "Appellants".

In response to the First Amended Complaint, Defendant filed a Motion to Dismiss/Motion for Summary Judgment asserting the 1992 CC&Rs did not require the owner of the Property to affirmatively operate a golf course on the Property, but instead allowed the Property to be unused. (EIR 59.) The trial court entered an Order (EIR 76) denying Defendant's Motion to Dismiss/Motion for Summary Judgment and granted Plaintiffs' Cross-Motion for Partial Summary Judgment (EIR 64), ruling the 1992 CC&Rs requires the operation of a golf course on the Property.

At the oral argument of the parties' cross-summary judgment motions, Defendant argued the 1992 CC&Rs allowed the Property's owner to use the Golf Course as either a golf course or "it's not being used for any other purpose." May 10, 2016, Transcript of Proceedings, 8:12-18. Defendant further argued the trial court must follow the Restatement (3rd) of Property (Servitude) ("Restatement Servitude") §1.3 in interpreting the 1992 CC&Rs. *Id*. at 4:24 to 5:18; 8:22 to 9:12. The trial court interpreted the 1992 CC&Rs following Arizona case law regarding interpretation of contracts. Findings of Fact and Conclusions of Law[4], CL ¶¶15, 16 (EIR 112).

[4] Each of the fact findings in the trial court's Findings of Fact and Conclusions of Law entered on January 2, 2018, shall be referred to as "FF ¶ __"; and each of the trial court's conclusions of law shall be referred to as "CL ¶ __".

When Defendant's attempts to dismiss this action and, following a nearly 2-year campaign which started after the June 2015 purchase of the Golf Course, obtain 51% approval by Benefitted Persons of Defendant's proposed 1992 CC&Rs modification failed, in April 2017 Defendant switched its position and then contended it had determined a material change in conditions affecting the Golf Course or the 1992 CC&Rs allowed for a modification of those covenants. FF ¶80 (EIR 112). Defendant filed an Amended Answer and Counterclaim seeking to modify the 1992 CC&Rs. (EIR 83 – 85).

The parties' Joint Pretrial Statement included, among other information, 47 stipulated facts and 21 agreed issues of fact and law. (EIR 98). The case went to a 4-day bench trial. (EIR 105 – 106 & 109). The trial court issued its verdict ruling in Plaintiffs' favor on all counts – on their breach of contract, breach of covenant of good faith and fair dealing and injunction claims, as well as on Defendant's Counterclaim. (EIR 113).

The trial court issued extensive Findings of Fact and Conclusions of Law. (EIR 112). Plaintiffs filed their Application for Award of Attorneys' Fees and Costs Against Defendant (EIR 118 – 123), their Application for Award of Attorneys' Fees and Costs Against Former Defendants (EIR 124 – 127) and lodged forms of Judgment (EIR 116, 117 & 128). Following Defendant's objections to Plaintiffs' attorneys' fees request and form of judgment (EIR 129 – 131), the trial court entered

its Final Judgment and Order for Permanent Injunction (EIR 144). Defendant and Former Defendants filed timely notices of appeal. (EIR 146 & 147).

STATEMENT OF FACTS[5]

On October 16, 1986, Chicago Title Agency of Arizona, Inc. (the "Declarant"), as the sole owner in trust for the benefit of The Presley Companies ("Developer") of the 18-hole executive golf course known as Golf Course, recorded as Instrument No. 86-568479 in the records of Maricopa County, Arizona, the Lakes Deed Restriction covering the Golf Course. FF ¶1 (EIR 112).

The substance of the Lakes Deed Restriction (Trial Exhibit 1) stated as follows:

> Chicago Title Agency of Arizona, Inc., an Arizona corporation, as owner in trust of the real property situated in the County of Maricopa, State of Arizona, described in Exhibit A attached hereto and incorporated herein by reference, hereby makes this deed restriction pursuant to A.R.S. §42-125.01, restricting the use of said property to use as a golf course, facilities and improvements related thereto, for ten (10) years. This restriction constitutes a covenant between the county assessor and the owner of subject real property and is not for the benefit of the surrounding properties or any third party. This restriction may be amended, revoked or extended for any time at the discretion of the then owner of the property, subject to the provisions of A.R.S. §42-125.01.

FF ¶2 (EIR 112).

[5] Appellants' Statement of Facts is insufficient because it does not include all facts relevant to the trial court proceeding.

On September 11, 1987, the Declarant recorded as Instrument No. 87-570515 an amendment to the Lakes Deed Restriction extending the term of the deed restriction for one (1) additional year. FF ¶3 (EIR 112).

On December 27, 1988, the Declarant recorded as Instrument No. 88-624742 an amendment to the Lakes Deed Restriction extending the term of the deed restriction for five (5) additional years. FF ¶4 (EIR 112).

On November 13, 1992, the Declarant recorded as Instrument No. 92-646838 a Declaration of Covenants, Conditions, Restrictions and Easements (Trial Exhibit 4) regarding, in addition to other real property, the Golf Course. FF ¶5 (EIR 112).

Recital E of the 1992 CC&Rs states, in pertinent part, as follows:

> By this Declaration, Declarant desires to amend and restate the Lakes Deed Restriction . . .

FF ¶7 (EIR 112).

Pursuant to ¶6 of the 1992 CC&Rs, the term of the covenants, conditions and restrictions therein "shall be appurtenant to and run with the land and shall be binding upon all present and future owners, occupants and users of the Property or any portion thereof and all persons claiming an interest in and to the Property in perpetuity". FF ¶10 (EIR 112).

In June 2006, the Former Defendants purchased the Golf Course and the Ahwatukee Country Club for $5.6 million. FF ¶14 (EIR 112). Wilson Gee (the owner of Bixby Village Golf Course, Inc.) testified the ownership percentages of Bixby were: Nectar Investment, LLC owned 31.66%, Hiro Investment, LLC owned 26.67%, Kwang Co., LLC owned 26.67% and Bixby Village Golf Course, Inc. owned 15%. FF ¶15 (EIR 112).

When Bixby purchased the Golf Course and the Ahwatukee Country Club, the Bixby investors provided $400,000.00 to make improvements to golf courses. The majority of the $400,000.00 was spent to improve the Ahwatukee Country Club. FF ¶16 (EIR 112).

Mr. Gee testified Bixby intended, at the time of purchase, to operate the Golf Course as a golf course. He denied Bixby purchased the property with the intent to develop it. The trial court found his testimony was not entirely credible for several reasons, some of which have to do with the structure of the transaction itself:

- Bixby structured the transaction as a section 1031 tax-free swap, suggesting the price Bixby was willing to pay depended at least in part on the amount of money the company had to invest.
- Bixby allocated the lion's share of the purchase price ($4 million of the $5.6 million total) to the Golf Course, but Mr. Gee never articulated a good reason for that. He simply attributed the decision to his "comfort level." No evidence

was presented to indicate the Property was worth $4 million as a golf course in 2006.

- As noted below, the "rent" paid by Mr. Gee's operating company, Ahwatukee Golf Properties, LLC, was intended to provide a fixed return on investment to Bixby's owners. It bore no apparent relationship to the market rental value of the property.
- As noted below, Mr. Gee stood to receive a 30 percent bonus share of the net proceeds if the property was sold at a profit.

FF ¶17 (EIR 112).

In June 2006, Bixby and Ahwatukee Golf Properties, LLC ("AGP") entered into a Lease Agreement ("AGP Lease") (Trial Exhibit 5) under which AGP leased the Golf Course and the Ahwatukee Country Club from Bixby. FF ¶18 (EIR 112). AGP is wholly owned by Mr. Gee and his wife. FF¶ 19 (EIR 112).

The AGP Lease required AGP to pay Bixby annual rent of $420,000.00. Of that annual rent amount, $280,000.00 was allocated as annual rent for the Golf Course. FF ¶20 (EIR 112). Mr. Gee testified the $280,000.00 was not a negotiated fair market rental amount but represented a seven percent (7%) return on the investment (based on the income from the Golf Course) to the four Bixby owners in Bixby's purchase of the Golf Course. FF ¶21 (EIR 112).

Paragraph 5 of the AGP Lease required AGP to maintain the Golf Course "in accordance with the standards of a high-quality privately-owned public and semi-private golf course"; and ¶7 required AGP, at its own expense, to provide all maintenance and repair work necessary or appropriate to maintain the property and golf course "in the condition expected of a high-quality privately-owned public and semi-private golf course at all times during the Term" of the AGP Lease. FF ¶22 (EIR 112). Paragraph 14 of the AGP Lease provides in the event of a sale of the Golf Course, AGP is entitled to be paid up to 30% of net sale price of the property sold that exceeds $4.2 million. FF ¶23 (EIR 112).

The trial court found another reason to doubt Mr. Gee's testimony about Bixby's plans for the property is that, not later than 2008, Mr. Gee began making efforts to redevelop the Golf Course. In the fall of 2008, Mr. Gee met with the Ahwatukee Board of Management ("ABM")[6] about redeveloping the Golf Course; and in 2009, Mr. Gee met with Phoenix City Councilman Sal DiCiccio about redeveloping the Golf Course. There was no evidence the golf course could not have been operated profitably in 2008. FF ¶25 (EIR 112).

The condition of the Golf Course progressively deteriorated between 2005 (one year after Bixby purchased the property) and 2017. The photographs of the

[6] The ABM is the homeowner association for the Ahwatukee master planned community.

Golf Course taken in 2005, 2013, 2014, 2015 and 2017 (Trial Exhibits 17 – 22) show the deterioration of the Golf Course. Mr. Gee denied Bixby intentionally failed to maintain the course, but the photographic evidence[7] contradicted his denial. FF ¶26 (EIR 112).

In May 2013, Bixby closed the Golf Course, placed a barbed wire fence around its perimeter; and one year later drained the lakes on which the reputation of the course, and its name, literally depended. FF ¶27 (EIR 112). The evidence did not show Bixby could not have operated the golf course profitably, with adequate maintenance, at any point in time before Bixby closed the course and stripped it. FF ¶28 (EIR 112).

After the Golf Course was closed, The True Life Companies, LLC, a Delaware limited liability company ("True Life Companies" or "TTLC Parent") was aware the Golf Course was available for purchase. FF ¶31 (EIR 112). True Life Companies is a real estate investment and community development company that provides lots to home builders or can develop residential communities with its own residential construction division. FF ¶33 (EIR 112). True Life Companies does business throughout several states in the western United States.[8]

[7] Trial Exhibits 17 – 22.
[8] Trial testimony of Aiden Berry, October 26, 2017, 64:1-8.

True Life Companies was interested in purchasing the Golf Course because of its location in Ahwatukee and it gave True Life Companies the opportunity to redevelop the Golf Course into a residential community.[9] FF ¶34 (EIR 112). True Life Companies never intended to reconstruct the Golf Course or operate it as a stand-alone golf course. FF ¶35 (EIR 112).

In March of 2015, Bixby, AGP and True Life Companies entered into a Real Estate Purchase and Sale Agreement (the "Purchase Agreement") (Trial Exhibit 7). FF ¶36 (EIR 112). The Purchase Agreement acknowledged the existence of the Lakes Deed Restriction in Recital D and was informed of the pendency of this action in ¶14(e). FF ¶ 37 (EIR 112). Paragraph 15(g) of the Purchase Agreement (Trial Exhibit 7, pg. 24) required, among other things, the Former Defendants to prepare and file a summary judgment motion in favor of the Former Defendants and against Appellees. The Former Defendants filed a Motion for Summary Judgment (EIR 26) on April 15, 2015, raising essentially the same arguments as made in TTLC's Motion to Dismiss/Motion for Summary Judgment (EIR 59).

[9] "Defendant purchased the Property for the purpose of developing the Property for residential or commercial use" is Stipulated Fact 28 in the Joint Pretrial Statement (EIR 98).

Paragraph 6(f) of the Purchase Agreement required Bixby to terminate the AGP Lease and all service contracts, equipment leases, and maintenance agreements relating to the operation or running of the Golf Course. FF ¶40 (EIR 112).

Paragraph 10(b) of the Purchase Agreement included, "Seller and Buyer acknowledge and agree that regarding the potential development of the Real Property for residential purposes, Seller has discontinued the use of the Real Property as a golf course." FF ¶41 (EIR 112). The Purchase Agreement also acknowledged the pendency of this action in ¶14(e) and ¶15(g). FF ¶41 (EIR 112).

Defendant invested time and effort before June 19, 2015 to determine the feasibility for the acquisition and development of the Golf Course. FF ¶46 (EIR 112). Defendant did not undertake a study before June 19, 2015 to determine the feasibility of a golf course being operated on the Property after June 19, 2015. FF ¶47 (EIR 112).

Prior to purchasing the Golf Course, Defendant was aware of the content of ¶ 2 of the 1992 CC&Rs stated in part "[t]he Property shall be used for no purposes other than golf courses and such improvements and facilities . . . and uses are reasonably related to, convenient for or in furtherance of golf course use . . ." FF ¶36 (EIR 112).[10] Prior to purchasing the Golf Course, Defendant was aware the Property

[10] This was also Stipulated Fact ¶33 of the parties' Joint Pretrial Statement (EIR 98).

would need to be re-constructed if it were ever to be used as a golf course after June 19, 2015. FF ¶50 (EIR 112). [11]

When it purchased the Golf Course, Defendant had no intention of reconstructing the Property to put it back in the condition it was in as of May of 2013 when the Sellers closed the operation of the golf course on the Property. Defendant never intended, and does not now intend, to reconstruct the Golf Course or to operate it as a stand-alone golf course. FF ¶51 (EIR 112).[12]

On June 19, 2015, Defendant paid Bixby $750,000.00 as a down payment and took fee title to the Golf Course from Bixby; and Defendant executed and delivered to Bixby a Deed of Trust and Assignment of Rents on the Property. FF ¶53 (EIR 112).

TTLC Parent is the sole member of TTLC.[13] FF ¶54 (EIR 112). The $750,000.00 down payment was paid by funds deposited directly into escrow by TTLC Parent on TTLC's behalf. Because TTLC did not yet have a revenue generating business, all the post-purchase funds necessary for TTLC to carry out its plan to modify the 1992 CC&Rs were provided to TTLC directly by TTLC Parent. FF ¶55 (EIR 112).

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[11] This was also Stipulated Fact ¶34 of the parties' Joint Pretrial Statement (EIR 98).
[12] This was also Stipulated Fact ¶35 of the parties' Joint Pretrial Statement (EIR 98).
[13] Defendant is a single-purpose and single-asset entity.

The Deed of Trust and Assignment of Rents secured TTLC's obligation to Bixby under the June 19, 2015, Non-Recourse Promissory Note Secured by Deed of Trust (the "Promissory Note") (Trial Exhibit 10) in the principal amount of $8.25 million. FF ¶56 (EIR 112). As a "non-recourse" instrument, the Promissory Note expressly provided in the event of TTLC's default under the terms of the Promissory Note, "the Holder of this Note agrees that in any action or proceeding brought on this Note or on the Deed of Trust or on any other instrument now or hereafter securing the indebtedness secured hereby, the Holder will look solely to the property secured by the Deed of Trust (the 'Trust Property') and the Trust Property income . . ." FF ¶57 (EIR 112).

By accepting the Special Warranty Deed granting fee title to the Golf Course, TTLC bound itself to comply with each of the provisions in the 1992 CC&Rs. FF ¶61 (EIR 112). As the owner of the Golf Course since June 19, 2015, TTLC has been obligated to fully comply with each of the covenants, conditions and restrictions of the 1992 CC&Rs. FF ¶63 (EIR 112).[14]

At the time Defendant took fee title to the Golf Course, Defendant was aware the former golf course had been closed and neglected to the point the golf course would have to be completely reconstructed to put it back in the condition it was in

[14] This was also Stipulated Fact ¶37 of the parties' Joint Pretrial Statement (EIR 98).

as of May of 2013 when Bixby closed the operation of the golf course. FF ¶64 (EIR 112).[15]

Defendant employee Taber Anderson testified when Defendant purchased the Golf Course there was "no chance" Defendant would build a stand-alone golf course on that property because Defendant did not purchase the Golf Course to be a stand-alone golf course. FF ¶69 (EIR 112). Defendant employee Aiden Barry testified Defendant went into the purchase of the Golf Course "with eyes wide open" to the challenges it faced in its effort to obtain the property, so Defendant could redevelop the property into a residential use. FF ¶70 (EIR 112).

Aiden Barry testified the $9 million price Defendant agreed to pay for the Golf Course was not discounted in consideration of the risk of not being able to successfully modify the 1992 1992 CC&Rs but was based on the value Defendant placed on the Golf Course to redevelop the property into a residential community. FF ¶71 (EIR 112). Aiden Barry testified the non-recourse structure of the Promissory Note was negotiated in consideration of the risk of not being able to successfully modify the 1992 CC&Rs and the costs incurred in the process. FF ¶72 (EIR 112). Because Defendant did not intend to reconstruct and operate a stand-alone golf course on the Golf Course, the condition of the Golf Course when

[15] This was also Stipulated Fact ¶19 of the parties' Joint Pretrial Statement (EIR 98).

Defendant purchased the golf course was not a material consideration from the Defendant's point of view. FF ¶73 (EIR 112).

Defendant provided funds for and participated in a major campaign to obtain approval by 51% of the Benefitted Persons of Defendant's proposed modification of the 1992 CC&Rs. The nearly 2-year campaign, which began after purchasing the Golf Course in June 2015, was unsuccessful. By April 2017, Defendant obtained approvals from approximately 2,000 of the required 3,564 Benefitted Persons necessary to reach 51% approval. FF ¶79 (EIR 112).

When Defendant's attempts to dismiss this action and obtain 51% approval by Benefitted Persons of Defendant's proposed 1992 CC&Rs modification failed, Defendant then took the position it had determined a material change in conditions affecting the Golf Course or the 1992 CC&Rs allowed for a modification of those covenants. FF ¶80 (EIR 112).

Defendant's alleged material change was, because of changes in the golf market and the deteriorated condition of the Golf Course, the original purpose of the 1992 CC&Rs could no longer be realized. In other words, there was no longer a realistic possibility a stand-alone golf course could ever operate on the property. FF ¶81 (EIR 112).

Defendant's proposed modification to the 1992 CC&Rs (Trial Exhibit 46) apply only to the Golf Course to the 1992 CC&Rs and does not affect the

Ahwatukee Country Club. FF ¶83 (EIR 112). Since the purchase of the Golf Course, Defendant has not complied with the 1992 CC&Rs. FF ¶84 (EIR 112).

STATEMENT OF ISSUES

1. Whether the trial court correctly interpreted the 1992 CC&Rs by determining the parties' intent based upon the language in the 1986 Lakes Deed Restrictions together with the 1987, 1988 and 1992 amendments to the Lakes Deed Restrictions?

2. Whether the trial court correctly granted a permanent injunction based upon the provisions of the 1992 CC&Rs and the equities as found by the trial court supporting the issuance of a permanent injunction?

3. Whether the Thirteenth Amendment protects a party who willingly entered a commercial contract binding that party to comply with the requirements of a restrictive covenant?

4. Whether the trial court correctly determined ¶ 6 of the 1992 CC&Rs did not grant TTLC sole discretion to determine whether there was a material change in conditions affecting the Golf Course or the 1992 CC&Rs?

5. Whether the trial court correctly determined TTLC failed to establish there was a radical and fundamental change to the Golf Course sufficient to modify the 1992 CC&Rs?

6. Whether the trial court correctly awarded Appellees' attorneys' fees pursuant to ¶ 4 of the 1992 CC&Rs?

ARGUMENT

I. Introduction

Appellants, who have not challenged any of the trial court's substantial facts contained in its Findings of Fact and Conclusions of Law[16] and cannot challenge any of its stipulated facts in the Joint Pretrial Statement, base certain of their arguments (regarding the interpretation of the 1992 CC&Rs and its claimed entitlement to a modification due to an alleged "material change") on factual assertions which are supported by neither the trial court's findings of fact nor their stipulated facts. The essential facts underlying TTLC's purchase of the Golf Course undercut Appellant's basic legal arguments underlying this appeal.

This appeal results from the 2015 sale of the Golf Course by Bixby, in the throes of Plaintiffs' action against them, to a real estate investment and community development company that provides lots to home builders or that can develop residential communities with its own residential construction division company. In an admitted gamble, TTLC purchased the Property during this action for the purpose of, if its gamble to obtain 51% approval of Ahwatukee households to approve its

[16] Even if Appellants had challenged any of the trial court's facts, findings of fact made pursuant to Rule 52(a), Arizona Rules of Civil Procedure, "will not be set aside on appeal unless they are clearly erroneous or not supported by substantial evidence". *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, 88 P.3d 1165 (App. 2004). Appellants have not asserted any facts are either clearly erroneous or not supported by substantial evidence.

plan to amend the 1992 CC&Rs succeeded, developing the Golf Course for residential or commercial use. TTLC undertook a feasibility study for the acquisition and development of the Golf Course but performed no study to determine the feasibility of a golf course being operated on the Property.

Prior to its purchase, TTLC was made aware of the use restriction in the 1992 CC&Rs. TTLC was aware the former golf course had been closed and neglected to the point the golf course would have to be completely reconstructed. But TTLC had no intention of reconstructing the Property back to a golf course, even though, at the time it took title, TTLC was obligated to fully comply with each of the covenants, conditions and restrictions of the 1992 CC&Rs. TTLC employee Taber Anderson testified there was "no chance" TTLC would build a stand-alone golf course on that property because TTLC did not purchase the Golf Course to be a stand-alone golf course.

Because TTLC did not intend to reconstruct and operate a stand-alone golf course on the Golf Course, the condition of the Golf Course when it purchased the golf course was not a material consideration from TTLC's point of view. TTLC employee Aiden Barry testified TTLC went into the purchase of the Golf Course "with eyes wide open" to the challenges it faced in its effort to obtain the property, so TTLC could redevelop the property into a residential use. According to Aiden Barry, the non-recourse structure of the Promissory Note was negotiated in

consideration of the risk of not being able to successfully modify the 1992 CC&Rs and the costs incurred in the process.

Given its willingness to gamble on obtaining 51% approval to amend the 1992 CC&Rs, these facts reflect TTLC's attitude that the 1992 Covenant, Conditions and Restrictions were superfluous and a mere hurdle to clear so TTLC could get on with the business of redeveloping the Golf Course. This conclusion, based on its senior principals' testimony, is indisputable and explains the only reason why TTLC bought the Property. TTLC initially threw significant funds into an all-out effort to convince 51% of Ahwatukee master planned households to allow a modification of the 1992 CC&Rs. When that effort failed, TTLC, then just two months before the scheduled final trial management conference, rolled the dice and asserted a counterclaim contending there was a material change which allowed it to unilaterally declare TTLC's right to modify those covenants, conditions and restrictions.

II. The trial court correctly interpreted the 1992 CC&Rs

A. As with all contracts, the determination of the intent of the 1992 CC&Rs must be gleaned from the language in the 1986 Lakes Deed Restriction, the 1987 and 1988 amendments and the 1992 CC&Rs

The Arizona Supreme Court's decision in *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006), settled the way restrictive covenants, which the Supreme Court held are contracts, are to be interpreted in Arizona. In *Powell v. Washburn*, the Arizona Supreme Court was confronted with the question of whether the doctrine of

strict construction is too restrictive when applied to restrictive covenants, because they are contracts (which are not subject to the "strict construction" doctrine). The Arizona Supreme Court noted it accepted review of the case because of the widespread use of restrictive covenants in planned communities and the accompanying need for a clear statement of how to interpret such covenants. The Supreme Court stated in Arizona, the traditional rule has been when a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties. *Id*. at 556, at P.3d 376. However, the Court noted Arizona courts have also posited a countervailing principle of interpreting restrictive covenants when a court perceives a restrictive covenant is ambiguous or does not expressly prohibit a particular use of the property, and several opinions state a court must strictly construe the terms of the restrictive covenant in favor of the free use of land and against the restriction. *Id*.

The Supreme Court went on to note "the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements." In reaching its conclusion, the Supreme Court relied upon §4.1 of the Restatement Servitude, its Introductory Note to Ch. 4, at 494 (2000) and *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993) ("When interpreting a contract ... it is fundamental a court attempt to 'ascertain and give

effect to the intention of the parties at the time the contract was made if at all possible.'"). *Id*. Therefore, the Arizona Supreme Court made clear in *Powell v. Washburn* Arizona will follow the Restatement Servitude rule in §4.1 that a servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

The Arizona Supreme Court's *Powell v. Washburn* decision addresses the analysis for Arizona courts to interpret restrictive covenants. Justice Ryan noted, "the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements." *Powell v. Washburn*, at Ariz. 556, at P.3d 376. In *College Book Centers, Inc. v. Carefree Foothills Homeowners' Association*, 225 Ariz. 533, 241 P.3d 898, 904 (App. 2010), this Court explained *Powell v. Washburn* "clarified that ambiguities in restrictive covenants are not to be decided in favor of free use and enjoyment of property, but rather, *in accordance with the contractual intent of the parties as inferred from the language and circumstances surrounding creation of the CC&R provision*." *Id*. (emphasis supplied).

The interpretation methodology in *Powell v. Washburn* is premised on the interpretation of contracts, which includes restrictive covenants, servitudes or

covenants, conditions and restrictions. *Id*. at Ariz. 556, at P.3d 377. "Because a restrictive covenant is a contract, [citation omitted] the doctrine of strict construction has been criticized as being too restrictive." *Id.* Interpretation of a contract is a question of law for the court. *Rand v. Porsche Fin. Services*, 216 Ariz. 424, 167 P.3d 111, 121 (App. 2017). *Grosvenor Holdings v. Figueroa*, 222 Ariz. Ariz. 588, 592, 218 P.3d 1045, 1050 (App. 2009). It has long been the rule an interpretation that gives effective meaning to all provisions of a contract is preferable to an interpretation which leaves part of the contract ineffective. *Reserve Insurance Co. v. Staats*, 9 Ariz. App. 410, 412, 453 P.2d 239, 241 (1969); *Taylor v. State Farm Mut. Auto. Ins. Co.*, at Ariz. 153, at P.2d 1139 (a contract should not be interpreted to render a provision superfluous*); Allen v. Honeywell Retirement Earnings Plan*, 382 F.Supp. 2d 1139, 1165 (D. Ariz. 2005) (rules of contract construction "disfavors constructions that nullify a contract term or render a term superfluous or redundant).

In interpreting restrictive covenants, the court reads the language used in its ordinary sense, construing it considering the circumstances surrounding its formulation and with the idea of carrying out its object, purpose and intent. *Cypress on Sunland Homeowners' Ass'n v. Orlandini*, 227 Ariz. 288, 297, 257 P.3d 1168, 1177 (App. 2011). "We are not bound by the 'strict and technical meaning of particular words' in the declaration." *Id.* Instead, "'the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the

parties who wrote the covenants." *Saguaro Highlands Cmty. Ass'n v. Biltis*, 224 Ariz. 294, 296, 229 P.3d 1036, 1038 (App. 2010) (quoting *Powell v. Washburn*).

B. Based on the Language of the 1986 Lakes Deed Restriction, the Subsequent Amendments and the 1992 CC&Rs, All Read Together, the 1992 CC&Rs Require Compliance With the Arizona Golf Valuation Statutes

To give effect to the intention of the parties from the language used in the 1992 CC&Rs, the Court must start with the language of the 1986 Lakes Deed Restriction because ¶1 of the 1992 CC&Rs expressly states it is an amendment to the Lakes Deed Restriction.[17] On October 16, 1986, Chicago Title Agency of Arizona, Inc. as the sole owner of the Golf Course, recorded the "Lakes Deed Restriction", stating, in part:

> Chicago Title Agency of Arizona, Inc., an Arizona corporation, as owner in trust of the real property situated in the County of Maricopa, State of Arizona, described in Exhibit A attached hereto and incorporated herein by reference, hereby makes this deed restriction pursuant to A.R.S. §42-125.01, restricting the use of said property to use as a golf course, facilities and improvements related thereto, for ten (10) years. This restriction constitutes a covenant between the county assessor and the owner of subject real property and is not for the benefit of the surrounding properties or any third party. This restriction may be amended, revoked or extended for any time at the discretion of the then owner of the property, subject to the provisions of A.R.S. §42-125.01.

[17] That same ¶1 also states it is amending the Ahwatukee Country Club Deed Restrictions. The 1992 CC&Rs combined the Lakes Deed Restriction and the Country Club Deed Restriction into a single instrument.

These three sentences stand out as significant. First, the Lakes Deed Restriction states the Declarant "hereby makes this deed restriction pursuant to A.R.S. §42-125.01, restricting the use of said property to use as a golf course, facilities and improvements related thereto, for ten (10) years". This sentence could not be clearer in its pronouncement that the Lakes Deed Restriction is based entirely on the Arizona golf valuation statutes. Second, the covenant allows the property owner to amend the restriction as necessary, however any amendment must be "subject to the provisions of A.R.S. §42-125.01." This provision ties any amendment of the Lakes Deed Restriction directly to Arizona's golf valuation statutes. Third, the covenant was originally between the county assessor and the owner of the Property – reinforcing the significance of Arizona's golf valuation to the Golf Course.

The Lakes Deed Restriction was amended in 1987 and 1988 extending the 10-year term of the restriction for a period of an additional six years. The 1992 CC&Rs, in Recital E, amended *and restated* the Lakes Deed Restriction and, in ¶6, provided the restrictions run with the land and the term of the restrictions would extend "in perpetuity". Recital F reiterated the substance of the 1986 Lakes Deed Restriction by Declarant's stated intention to comply with the requirements and obtain the benefits of A.R.S. §42-146. As required by 1986 Lakes Deed Restriction, all amendments must be "subject to the provisions of A.R.S. §42-125.01". The

language in the 1986 Lakes Deed Restriction reflects the original intent the Golf Course would comply with Arizona's golf course valuation and taxation statutes. The language in the progression of the 1987, 1988 and 1992 amendments reflects original intent remained constant.

Appellants' Opening Brief completely ignores the existence, much less the substance and legal effect, of the 1986 Lakes Deed Restriction and the 1987 and 1988 amendments. Appellants also ignore the existence and legal effect of Recital E and ¶1 of the 1992 CC&Rs stating the 1992 CC&Rs amend the earlier versions of the Lakes Deed Restriction. For Appellants to relegate the 1986 Lakes Deed Restriction and the 1987 and 1988 amendments as inconsequential to the interpretation of the 1992 Declaration ignores the directive in *Powell v. Washington* to abide by the parties' original intent. Appellants' position also eviscerates the original and consistently expressed intent of the series of restrictive covenants and is contradictory to (i) the express language of the 1992 CC&Rs and (ii) Arizona law regarding interpretation of deed restrictions.

Appellants argue the trial court misapplied *Powell v. Washington* because, they argue, "a court must look to both the meaning of particular words and the circumstances surrounding the creation of the servitude to determine the purpose and intent of the restriction. Appellants' Opening Brief, pg. 30. Because, as Appellants

correctly point out[18], neither party offered extrinsic evidence of the parties' intent in drafting the 1992 CC&Rs, the Court is left with language of the 1992 CC&Rs and the 1986 Lakes Deed Restriction and its 1987 and 1988 amendments[19] to discern "the likely parties' intentions and legitimate expectations of the parties who create servitudes, as it does with other contractual arrangements". *Id*. at Ariz. 576, at P.3d 376.

Appellants point the Court to only certain of the language of the 1992 CC&Rs in suggesting how the Court should interpret that contract. Appellants' approach is only partially correct because the only way to comply with *Powell v. Washburn* is to look to the parties' intent in creating the 1986 Lakes Deed Restriction and its 1987, 1988 and 1992 amendments. The only way to understand "the general purpose of the restrictions" is to follow the language used in 1986 Lakes Deed Restriction and its 1987, 1988 and 1992 amendments. Because the 1992 CC&Rs is a continuation of the earlier 1986 – 1988 versions, those earlier versions must be part of the determination of the parties' original intent.

The original language of the 1986 Lakes Deed Restriction, as well as the language in each of the subsequent instruments restricting the use of the Golf Course

[18] Appellants' Opening Brief, pgs. 21 and 40.
[19] Because no extrinsic evidence was offered, there was no evidence offered at trial of, as suggested by *Powell v. Washburn*, "the manner in which they have been interpreted by the property owners". *Id*. at Ariz. 556, at P.3d 376.

up to and including the 1992 CC&Rs, were specifically written to meet the requirements of Arizona's statutory taxation scheme to promote the use of golf courses throughout the state. That statutory scheme requires the present ability for golf to be played (or practiced) on the Golf Course, which is why the entire history of instruments limited the use of the Property to the use as a golf course and prohibited any other use.

Arizona's valuation and taxation of golf course statutory scheme was enacted "[i]n recognition of the importance of the open space and economic benefits of golf courses" and accordingly mandated "county assessors shall value all golf courses uniformly based on guidelines prescribed by the [Arizona Department of Revenue]." A.R.S. §42-13152(A). In *PhxAz LP v. Maricopa County*, 192 Ariz. 490, 967 P.2d 1026 (App. 1998), this Court interpreted the meaning of "golf course" as used in A.R.S. §42-146[20] in determining whether the special valuation method under that statute applied in establishing the tax rate on two golf courses.

In that case, developers obtained zoning for golf courses in two planned areas and requested the Maricopa County Assessor value each as a "golf course" as that phrase is defined in A.R.S. §42-146(G) for purposes of determining the tax rate. The Maricopa County Assessor found because the golf courses were still under

[20] See footnote 1 above for legislative history of this statute.

construction, they did not meet the A.R.S. §42-146(G) definition of "golf course" and were not entitled to the special valuation method. After the State Board of Equalization agreed with the Maricopa County Assessor, the developer taxpayers appealed to the Maricopa County Superior Court Tax Court, who ruled in favor of the developer taxpayers. The county then appealed to this Court.

In overturning the trial court's ruling, this Court focused on the definition of "golf course" in A.R.S. §42-146(G). That statute provided:

> As used in this section, 'golf course' means substantially undeveloped land, including amenities such as landscaping, irrigation systems, paths and golf greens and tees, which may be used for golfing and golfing practice by the public or by members and guests of a private club but not including commercial golf practice ranges operated exclusive of golf courses valued under this section, clubhouses, pro shops, restaurants or similar buildings as associated with the golf course which are generally used by the public or by members and guests entitled to use the golf course.[21]

Id. at Ariz. 494, at P.2d 1030. Then Judge Ryan noted, "[t]he essence of a 'golf course' under subsection G is it be 'substantially undeveloped land . . . [that] may be used for golfing or golfing practice by the public or members and guests of a private club." The Court of Appeals concluded if the golf courses could not be used for "golfing or golfing practice by the public or by members and guests of a private club", the golf courses did not qualify as "golf courses" under A.R.S. §42-146. *Id*.

[21] While the format of the definition of "golf course" in A.R.S. §42-13151 is slightly different from §42-146, the substance of the two definitions are identical.

The *PhxAz LP v. Maricopa County* holding squarely supports the trial court's interpretation of the 1992 CC&Rs that a golf course would be operated on the Property. First, the 1986 Lakes Deed Restriction states the Declarant "hereby makes this deed restriction [is made] pursuant to A.R.S. §42-125.01, restricting the use of said property to use as a golf course, facilities and improvements related thereto" and requires any amendment be made pursuant to A.R.S. §42-125.01. Second, the 1992 CC&Rs states the Declarant intends to comply with the requirements and obtain the benefits of A.R.S. §42-146 "regarding the valuation and taxation of golf courses" and it also states it is an amendment to the Lakes Deed Restriction. The effect of these provisions of the 1986 Lakes Deed Restriction and the 1992 CC&Rs is indisputable – the parties' original intent was compliance with Arizona's golf course valuation and taxation statutes. To qualify as such, the Golf Course must be capable of being used for "golfing or golfing practice by the public or by members and guests of a private club".

C. In interpreting restrictive covenants, the Arizona Supreme Court has adopted §4.1 of the Restatement Servitude, not §1.3 as argued by Appellants

Focusing on a phrase in one sentence of the use restriction provisions of ¶2 of the 1992 CC&Rs, Appellants would have the Court parse out whether restricting the Property to be "used for no purposes other than golf courses" is a "negative or restrictive covenant" or an "affirmative covenant". Appellants' Opening Brief, pgs.

22-25. Appellants, citing the Restatement Servitude §1.3 (2000), argue a restrictive covenant such as, Appellants' argue, the use restriction in ¶2 of the 1992 CC&Rs that the Property must be used for no purposes other than golf courses, does not compel that use. *Id.* at pgs. 22-23. However, as discussed below, Appellants' negative-affirmative covenants analysis has not been adopted in Arizona.

Appellants' reliance on the §1.3 of the Restatement Servitude argument regarding "restrictive" or "negative covenants" and "affirmative covenants" is misplaced based on, among other reasons[22], the Arizona Supreme Court in *Powell v. Washburn*. As discussed in more detail above, the Supreme Court noted "the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements." The Supreme Court did not rely on §1.3 as argued by Appellants, but on §4.1 of the Restatement Servitude and *Taylor v. State Farm*. Therefore, the Arizona Supreme Court made clear in *Powell v. Washburn*

[22] Appellants "restrictive covenant" / "affirmative covenant" dichotomy was rejected in *Shalimar Association v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 45-46, 688 P.2d 682 (App. 1984). In that case, this Court noted the "majority of courts enforce both negative and affirmative covenants which run with the land." Contrary to Appellants' position, the *Shalimar* court viewed the land use restriction as an affirmative obligation. Moreover, the land owners in the *Shalimar* case did not have a recorded deed restriction restricting the land use to be a golf course as Appellants do in this action. The *Shalimar* court decided, in spite of the harsh economic realities of trying to run a golf course, a promise (even by implication) the community is benefitted by a golf course must be upheld.

Arizona will follow the Restatement Servitude rule in §4.1[23] that a servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

D. Paragraphs 2 and 5 of the 1992 CC&Rs do not allow the Golf Course to be "essentially undeveloped property" as asserted by Appellants

Appellants point to just two provisions of the 1992 CC&Rs in support of their argument the document allows the Golf Course to be used for "essentially undeveloped property". Appellants' Opening Brief, pg. 26. Appellants cite to the use restriction language in ¶2 and the "No Rights or Privileges" language of ¶5. As Appellants' concede[24], those two provisions cannot be read in a vacuum without considering other parts of the 1992 CC&Rs, but for argument's sake even considering just those provisions[25], Appellants' argument does not prevail.

The more significant of Appellants' two chosen clauses is ¶2, the use restriction provision. In that paragraph, Appellants' focus on the phrase, "except the Property may further be used for easements for ingress and egress . . . pedestrian

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[23] "[T]he Restatement's approach [in §4.1] mirrors the contemporary judicial trend of recognizing the benefits of restrictive covenants." *Id*. at Ariz. 557, at P.3d 377.
[24] "[T]he Court must interpret the 1992 CC&Rs in the context of all the provisions in the contract". Appellants' Opening Brief, pg. 25.
[25] Which, for the reasons explained above in Argument II(B), the 1992 CC&Rs must be interpreted in the context of the 1986 Lakes Deed Restriction and the 1987, 1988 and 1992 amendments.

trails and walks, cables, utilities, drainage and other similar easements and rights of way . . .” in making their “essentially undeveloped property” use argument. Appellants’ so-called “additional uses” described as “pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way” do not equate to “essentially undeveloped property”. The emphasized “additional uses” phrase is referred to various means of access to or through the golf course. That language cannot be stretched to allow the golf course to go fallow. Moreover, Appellants’ highlighted “additional uses” phrase on Appellants’ Opening Brief pg. 26 ends with the qualification, “in each case reasonably related to the development and use of the Ahwatukee project, together with improvements reasonably related to said easements, uses and related services.” The latter qualification makes it clear the “additional uses” are referred to as “easements, uses and related services” – which does not qualify as “essentially undeveloped property”.

Appellants also argue a second clause of the second sentence of the ¶2 use restriction grants Appellants the discretion to “demolish and cease the use of the golf course improvements and essentially leave the Property undeveloped.” Appellants’ Opening Brief, pg. 27. That “demolish” clause in the ¶2 use restriction gives the owner “the right to redesign or reconfigure the golf courses at the Property or remove, modify, alter, relocate, replace, expand, abandon, demolish, cease the use of or rebuild any of the improvements or the facilities related to the use of the

Property for golf courses, all at the discretion of the then-owner of the Property." Appellants' broad interpretation of that demolish phrase cannot be read in the vacuum of just that phrase but must be read in the context of the entirety of ¶2 and within the context of the entirety of the 1992 CC&Rs.

Appellants' Opening Brief (pg. 27) quotes only a portion of the "demolish" clause without putting it in the full context of that last sentence of the ¶2 use restriction. In full context, that last sentence in ¶2 requires any improvements to the Property to "reasonably related to, convenient for, or in furtherance of, the aforementioned purposes" – referring to ¶2's mandate the "Property shall be used for no purposes other than golf courses". In the context of that requirement, the authority to remove any such improvements does not express an intention to empower the owner to fully remove the entire golf course. Instead, the "demolish" clause relates to improvements or facilities within the golf course, not the entire golf course. Appellants home in on individual words and phrases in the last sentence of ¶2 without considering the thrust of the entirety of that paragraph.

The opening phrase of the second sentence of ¶2 unequivocally states, "The Property shall be used for no purposes other than golf courses" and improvements "reasonably related to, convenient for or in furtherance of golf course use". The middle "additional uses" phrase of ¶2 requires such uses be "reasonably related to the development and use of the Ahwatukee project". The closing phrase of ¶2

requires the improvements or changes to improvements be "reasonably related to, convenient for, or in furtherance of, the aforementioned purposes" and any "demolishing" to be to improvements or facilities within the golf course, not the entire golf course.

The substance of ¶2 must also be considered in the context of the 1992 CC&Rs. That includes the Recital E amendment of the Lakes Deed Restriction (which states it is made "pursuant to A.R.S §42-125.01" and any amendments must be "subject to the provisions of A.R.S §42-125.01"), the Recital F stated intention to comply with A.R.S. §42-146, the ¶ 1 formal Lakes Deed Restriction amendment, the ¶2 use restriction language noted above, the "Enforcement" provision of ¶4 and the "No Waiver" provisions of ¶7.

With Appellants' reliance on ¶5 (Appellants' Opening Brief, pg. 27) supporting their argument the Golf Course can be "essentially undeveloped property", they acknowledge other paragraphs within the 1992 CC&Rs affect the interpretation of the intent of that document. While ¶5 in fact states nothing in the 1992 CC&Rs grants Benefitted Persons any rights or privileges, other provisions of the 1992 CC&Rs express an intention to grant certain rights and provide rights to Benefitted Persons. Recital D states the Declarant is establishing the 1992 CC&Rs "for the mutual benefit of Declarant [and any future owner of the Property]" and "any other owner of property located within the Ahwatukee master planned

community" – defined as "Benefitted Persons" in the first sentence of ¶2 of the 1992 CC&Rs. Paragraph 4 of the 1992 CC&Rs grants Plaintiffs (and other Benefitted Persons) the right to enforce the contract if it is not being followed.

Appellants' argument regarding ¶¶2 and 5 of the 1992 CC&Rs conveniently disregards its acknowledgement that "[t]he Court must interpret the 1992 CC&Rs in the context of all the provisions in the contract". The 1992 CC&Rs can only be interpreted by considering all the provisions in the contract. The case cited by Appellants, *Elm Retirement Center v. Callaway*, 226 Ariz. 287, 290, 246 P.3d 938, 941 (App. 2010), stands for reading contract provisions together is required "to bring harmony, if possible, between all parts of the writing." Furthermore, in *Taylor v. State Farm Mut. Auto. Ins. Co.*, at Ariz. 153, at P.2d 1139, the Arizona Supreme Court held, "When interpreting a contract ... it is fundamental a court attempt to 'ascertain and give effect to the intention of the parties at the time the contract was made if at all possible". To interpret the 1992 CC&Rs, Arizona requires determining the parties' intent for the 1992 CC&Rs which, as a matter of law, requires considering the language of the 1986 Lakes Deed Restriction and each of the 1987 and 1988 amendments.

III. Appellees are entitled to injunctive relief

In arguing Appellees are not entitled to an injunction and the trial court abused its discretion, Appellants disregard the "Enforcement" provision in ¶4 of the 1992 CC&Rs specifically affords injunctive relief in the event of a breach.

> In the event of any violation or breach of, or default under, the provisions of this Declaration, Declarant, Developer or *any Benefitted Person entitled to enforce this Declaration may,* in addition to any other available remedies, *seek injunctive relief against the then owners,* occupants or users of the Property causing the breach, default or violation for the discontinuance of such breach, default or violation . . .

(Emphasis supplied). Moreover, Arizona has long recognized violations of restrictive covenants may be enforced by injunctive relief. *Continental Oil Co. v. Fennemore*, 38 Ariz. 277, 281, 299 P. 132, 133 (1931). The enforcement of restrictive covenants "is by means of injunction, in which the trial court has the power to structure the remedy so as to do equity between the parties." *Heritage Heights Homeowners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 2010 (App. 1977).

More importantly, however, TTLC is disingenuous in its arguments because, based on pre-purchase information it possessed, TTLC decided nonetheless to proceed with purchasing the Golf Course. Before it purchased the Property, TTLC had a copy of the 1992 CC&Rs and therefore knew before it purchased the Property a violation of the 1992 CC&Rs could result in an injunction. TTLC also had full

knowledge this action pending, and Plaintiffs were seeking, among other relief, an injunction against the Former Defendants.[26] TTLC's cavalier attitude that the 1992 Covenant, Conditions and Restrictions were superfluous and a mere hurdle to clear so TTLC could get on redeveloping the Golf Course undermines TTLC's argument to this Court that Appellees' injunction is an inequitable remedy.

Appellants argue the trial court's issuance of a permanent injunction is inequitable because it is essentially "an equitable determination requiring specific performance of the enormous burden of requiring the owner of the Property to operate a golf course business, especially at a financial loss." Appellants' Opening Brief, pgs. 33-34. Appellants' "financial loss" assertion is contrary to the trial court's specific findings of fact (which Appellants' have not challenged). The trial court found the evidence presented at trial did not show Bixby could not have operated the golf course profitably, with adequate maintenance, at any point in time

[26] In fact, ¶14(e) of the March 2015 Purchase Agreement between TTLC and Bixby describes this lawsuit as one "wherein Plaintiffs, individual property owners, have alleged that Seller has breached certain restrictive covenants and conditions because of Seller's discontinuance of the operation of the golf course. Buyer acknowledges that a full and complete copy of such complaint has been delivered to Buyer and included in the Property Information." FF ¶42 (EIR 112). Moreover, ¶15(g) of the Purchase Agreement contained a specific provision requiring Bixby to submit a motion for summary judgment in the trial court. FF ¶42 (EIR 112). Bixby filed such a motion on April 15, 2015 (EIR 22-26), raising essentially the same issues as were contained in TTLC's Motion to Dismiss/Motion for Summary Judgment filed on January 21, 2016 (EIR 59).

before Bixby closed the course and stripped it. Even setting that finding to one side, TTLC has no room to argue inequities given its stipulated facts surrounding the circumstances of its decision to purchase the Golf Course.[27]

TTLC's argument that, based on Appellants' Thirteenth Amendment arguments[28], Arizona prohibits injunctive relief in the case of a "contract for personal services" (because Arizona courts will not grant specific enforcement for personal services contracts) fails for the very reason its Thirteenth Amendment argument fails. Before it purchased the Golf Course, TTLC was aware of, among other related information, the substance of the 1992 CC&Rs – which are covenants which run with the land it was purchasing. Because it was fully familiar with the substance of the 1992 CC&Rs, TTLC voluntarily agreed to comply with those provisions.

TTLC's assertion "the trial court's injunction would require the owner of the Property to invest at least $5 million to reconstruct the golf course"[29] overlooks TTLC stipulated in the Joint Pretrial Statement that, before it purchased the Property, TTLC was aware the former golf course had been closed and neglected to the point the golf course would have to be completely reconstructed. As the trial court found, because TTLC did not intend to reconstruct and operate a stand-alone golf course on

[27] See footnotes 9 – 12 and 14 – 15.
[28] Appellants' Opening Brief, pg. 34.
[29] Appellants' Opening Brief, pgs. 34-35.

the Golf Course, the condition of the Golf Course when it purchased the golf course was not a material consideration from TTLC's point of view.

TTLC purchased the Golf Course with a full understanding of what it was buying – namely a strong deed restriction and a pending lawsuit to enforce that deed restriction – and nonetheless decided to purchase the Property betting on the opportunity for a development.[30] In the face of those circumstances, TTLC willingly made the economic choice to enter into the Purchase Agreement and thereby voluntarily took its chances on whether the trial court would issue an injunction. TTLC cannot say with any credibility a hardship has been imposed on it by reason of its own business decision to agree to pay $9 million and take on the issues in this action. That decision was a calculated roll of the dice gamble by TTLC – not a hardship imposed by the trial court or the 1992 CC&Rs.

TTLC's assertion that it "lacks the financial ability to comply with the [injunction] order" is likewise disingenuous. TTLC Parent is the sole member of TTLC (which is a single-purpose, single-asset entity). The $750,000.00 down payment was paid by funds deposited by TTLC Parent directly into escrow on TTLC's behalf. Because TTLC did not yet have a revenue generating business, all

[30] TTLC employee Aiden Barry testified the non-recourse structure of the Promissory Note was negotiated in consideration of the risk of not being able to successfully modify the 1992 Covenants, Conditions and Restrictions and the costs incurred in the process.

the post-purchase funds necessary for TTLC to carry out its plan to modify the 1992 CC&Rs – including the extensive campaign looking for 51% of the Benefitted Persons to approve TTLC's plan – were provided to TTLC directly by TTLC Parent.

The trial court looked to various factors listed in Restatement Servitude §8.3 in determining whether to issue an injunction. The trial court considered "the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public." Given the trial court's substantial fact findings[31] which reflect multiple facts evidencing the various §8.3 factors considered by the trial court, the issuance of the injunction was not a "clear abuse of discretion". *Mahar v. Acuna*, 230 Ariz. 530, 534, 287 P.3d 824, 828 (App. 2012). "A trial court abuses its discretion if it commits an error of law or if it "reaches a conclusion without considering the evidence... or 'the record fails to provide substantial evidence to support the trial court's finding."" *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz., 172, 181 P.3d 219, 236 (App. 2008). The trial court correctly noted, "The finding that the golf course property owners have not acted in good faith, by itself, would be sufficient to justify a far-reaching, detailed

[31] *See* Findings of Fact, ¶¶37, 42-43, 46 to "36", 64-65, 69-74 and 79.

injunction." Appellants have not shown the trial court committed an error at law in issuing the injunction or was without substantial evidence supporting its findings.

IV. Appellants' Thirteenth Amendment argument fails because Appellants voluntarily agreed to abide by and comply with the 1992 CC&Rs

In what amounts to shameless audacity, Appellants' argues the 1992 CC&Rs violate the Thirteenth Amendment. Appellants were forced to do nothing: each freely agreed to purchase the Golf Course which they knew was subject to the 1992 CC&Rs. To compare an intentional business decision to involuntary servitude is a contrived legal argument. In fact, TTLC's decision to purchase the Property goes beyond a voluntary decision because it connived with the Former Defendants[32] by, among other things, requiring a summary judgment motion be filed in their favor three months before TTLC even closed on the purchase of the Property.

TTLC's full knowledge of circumstances going into the transaction and its intention to acquire the Golf Course to profitably develop the Property precludes it

[32] With ¶15(g) (entitled "Swain Lawsuit") of the Purchase Agreement between the Former Defendants and TTLC (Trial Exhibit 7), also including a "confidentiality" clause in the Purchase Agreement, Appellants refused to produce any purchase documents. Upon a subpoena being served on TTLC, the Former Defendants filed a Motion to Quash Subpoena And / Or For Protective Order (EIR 31) which TTLC joined (EIR 30). The motion to quash, unsuccessfully, argued, "The Subpoena requests the confidential commercial/financial records of the Owner [*continued*] Defendants and of non-party TTLC. This Motion is necessary to protect the Owner Defendants and TTLC from annoyance, oppression and undue burden and because justice so requires. Simply put, Plaintiffs have no legitimate interest in obtaining the confidential commercial information of the Owner Defendants and TTLC."

from seriously arguing the Thirteenth Amendment applies. TTLC was fully aware of the provisions of the 1992 CC&Rs (and it would be obligated to comply once TTLC owned the Property), of the pendency of this action and the former golf course had been closed and neglected to the point the golf course would have to be completely reconstructed. TTLC chose the risk of having to reconstruct the Golf Course, evidently confident no one would compel them to do so.[33]

The Thirteenth Amendment "was adopted with reference to conditions existing since the foundation of our government, and the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce undesirable results." *Butler v. Perry*, 240 U.S. 328, 332 (1916). "[T]he phrase 'involuntary servitude' was intended ... 'to cover those forms of compulsory labor akin to African slavery[.]'" *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

"Modern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement." *Steirer v. Bethlehem Area*

[33] Because TTLC did not intend to reconstruct and operate a stand-alone golf course on the Golf Course, the condition of the Golf Course when it purchased the golf course was not a material consideration from TTLC's point of view. TTLC went into the purchase of the Golf Course "with eyes wide open" to the challenges it faced in its effort to obtain the property, so TTLC could redevelop the property into a residential use. The non-recourse structure of the Promissory Note was negotiated in consideration of the risk of not being able to successfully modify the 1992 CC&Rs and the costs incurred in the process.

Sch. Dist., 987 F.2d 989, 999 (3d Cir.1993). There are narrow circumstances where involuntary servitude has been applied to circumstances not directly related to African slavery; however, the modern day equivalents are akin to the abhorrent practice. A recent example is *United States v. Booker*, 655 F.2d 562, 563, 566 (4th Cir.1981), where a migrant labor camp held farm workers in involuntary servitude, forbade them from leaving without paying their debts, and enforced the rule with threats of physical harm, actual physical injury, and by kidnapping and returning to the farm workers who attempted to leave.

In *Herndon by Herndon v. Chapel Hill–Carrboro City Bd. of Educ.*, 89 F.3d 174, 181 (4th Cir.1996), the Fourth Circuit held a community service requirement was "in no way comparable to the horrible injustice of human slavery" and, thus, did "not violate the Thirteenth Amendment prohibition of involuntary servitude". Similarly, willingly entering into a contract that could require operating a golf course is by no measure comparable to the practice of slavery that has scared the Nation's soul. To argue otherwise would be to obscure the history of slavery in this country and the point of the Thirteenth Amendment to end it.

V. The trial court correctly denied TTLC's requested modification of the 1992 CC&Rs

A. Paragraph 6 of the 1992 CC&Rs does not vest TTLC with sole discretion to determine if there has been a material change in conditions affecting the Golf Course or the 1992 CC&Rs

Based on the modification language of ¶6 of the 1992 CC&Rs, TTLC, as the former owner of the Golf Course[34], asserts it had the sole discretion under ¶6 of the 1992 CC&Rs to determine if there has been a material change in conditions or circumstances affecting the Golf Course or the 1992 CC&Rs. Appellants' Opening Brief, pg. 40 – 42. If adopted, TTLC's interpretation would have the Court discount Arizona's well-developed case authority regarding the modification of restrictive covenants[35] and reduce the Court's role in the modification process to performing the superfluous ministerial act of blessing TTLC's determination. TTLC focuses on the ¶6 phrase "if Declarant or Developer (including their successors or assigns) determines . . ." to mean TTLC's determination is binding even though the provision goes on to state TTLC "may petition the Maricopa County Superior Court . . . for modification of the Declaration".

TTLC's interpretation of the modification provision in ¶6 would mean any time the owners of the "Property" subject to the 1992 CC&Rs decide there is a material change, they would have the *unfettered* ability to modify those restrictive covenants notwithstanding the original intent in adopting the restrictive covenants *or* the 1992 CC&Rs were intended to be in effect "in perpetuity" *or* the Benefitted

[34] Appellants' Statement of the Case acknowledges TTLC's interest in the Golf Course was foreclosed by a Trustee's Sale on May 14, 2018. The Golf Course is no longer owned by either Bixby or TTLC, but by a third party entity.
[35] Discussed in section V(B) immediately following this section.

Persons' ability to enforce the provisions of the restrictive covenants. Relying on *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, 165 P.3d 173, 179 (App. 2007), TTLC takes the position the Court can approve its proposed modification to the 1992 CC&Rs if TTLC's "decision is made within the scope of the declarant's authority and in good faith" in proposing the modification. Appellants' Opening Brief, pg. 44.

TTLC's argument is premised on, first, whether it is afforded discretion under the language of the 1992 CC&Rs. If TTLC is granted discretion, then the second issue is whether TTLC was acting in good faith in exercising its discretion. TTLC's reliance on *Tierra Ranchos Homeowners Ass'n v. Kitchukov*[36] is misplaced. The *Tierra Ranchos Homeowners Ass'n v. Kitchukov* case specifically held the declarant in a restrictive covenant is not entitled to any deference *regarding the interpretation of the restrictive covenant*. *Id*. at P.3d 177. Citing *to Johnson v. Pointe Community Ass'n, Inc.*, 205 Ariz. 485, 73 P.3d 616 (App. 2003), this Court rejected the notion of a declarant's deference in the interpretation of a restrictive covenant because, as with other contracts, that is a question of law for the courts – not for one of the parties to the contract to decide its interpretation. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, at P.3d 177.

[36] In that case, the restrictive covenant expressly gave "the Architectural Committee broad discretion to approve or disapprove proposed modifications". *Id*. at P.3d 175.

The *Tierra Ranchos* case discussed whether a restrictive covenant declarant is entitled to deference on matters regarding decisions by a declarant's architectural committee. *Id*. at P.3d 177-78. On that issue, this Court stated:

> Notwithstanding our determination that deference is inappropriate in a case involving the *interpretation of restrictive covenants*, we left open the possibility that a different analysis might apply in a case involving a challenge to an architectural committee's discretion concerning exterior appearance modifications.

(Court's emphasis). This Court observed no Arizona courts had expressly determined that deference issue, prompting the Court to analyze the issue in accordance with the Restatement Servitude §6.13. *Id*. at P.3d 179 -80. However, the Court's ruling affects only a declarant's "discretionary decisions concerning modifications or improvements to property". *Id*. at P.3d 179.

The issue in this matter does not involve an architectural committee's decision regarding modifications or improvements to property but involves the interpretation of the 1992 CC&Rs. Therefore, TTLC must look to the courts for interpretation of ¶6 of the 1992 CC&Rs to determine if "there has been a material change in conditions or circumstances affecting the Property or the covenants, conditions, restrictions and easements".

Even if TTLC was vested with discretion it could exercise regarding the

"material change" issue, TTLC, as pointed out in Appellants' Opening Brief[37], would also have to establish it acted in "good faith" in the exercise of its discretion. TTLC did not assert the "material change" issue until after it its original plan to modify the 1992 CC&Rs failed.[38] Under its original plan, TTLC sought to obtain fifty-one percent (51%) approval of the Ahwatukee households for TTLC's first proposed modification (as allowed under ¶10(b) of the 1992 CC&Rs). It was only after TTLC failed in its efforts over nearly 2 years to obtain 51% approval of the Ahwatukee households that TTLC decided to seek a modification of the 1992 CC&Rs.

If the intention of ¶6 of the 1992 CC&Rs was to vest the owner of the "Property" with the sole determination of whether there was a material change to the "Property" or to the 1992 CC&Rs, it could have stated just that (i.e. the owner's determination was binding) and ¶6 would not have needed to include the phrase "may petition the Maricopa County Superior Court . . . for modification of the Declaration". However, ¶6 does not state the owner's determination is binding, and it conditions the modification of the 1992 CC&Rs on petitioning the Maricopa County Superior Court. TTLC's argument that the latter is simply a ministerial act renders the act of petitioning the court superfluous – which is not consistent with

[37] See Appellants' Opening Brief, pgs. 44 – 46.
[38] Confirmed by TTLC principal Aiden Barry in testimony cited in footnote 31.

Arizona law for interpreting contracts

As noted above, the interpretation of a contract is a question of law for the court. The plain language of ¶6 allows for the owners of the "Property" to file a petition with the Maricopa County Superior Court and request approval of what the owners concluded constitutes a "material change". However, the verbiage of ¶6 does not allow for the owners of the Property to override the intended purpose of the carefully drafted 1992 CC&Rs without the Maricopa County Superior Court passing on whether those owners have met Arizona's standard for modifying restrictive covenants.

B. TTLC cannot claim radical and fundamental change has occurred to vitiate the Lakes Deed Restriction when since taking fee title to the Golf Course nothing has changed and claiming unprofitability was not proven at the trial or accepted under Arizona law

Arizona courts have held when seeking to vitiate a restrictive covenant it must be shown a change in conditions occurred that fundamentally or radically alters the original commitment or frustrates its purpose, otherwise, equity will enforce the terms of the restrictive covenant. *See Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d 609, 612 (1964) (Equity will enforce terms of restrictive covenants unless changes in surrounding areas are so fundamental or radical that original purposes of restrictions are defeated or frustrated) and *Federoff v. Pioneer Title & Tr. Co. of Arizona,* 165 Ariz. 249, 253, 798 P.2d 387, 391 (App. 1990) , vacated in

part, 166 Ariz. 383, 803 P.2d 104 (1990), citing *Decker v Hendricks*. In *Decker*, the appellants plead the trial court erred by refusing to admit evidence of rapid and radical changes in the character of the neighborhood adjacent to the restricted property. *Decker v Hendricks* at 40. While this Court noted appellants proffered a litany of examples where commercial enterprise buttressed the residential-only restriction of the property at issue, they failed to show how those changes show a radical or fundamental change that would frustrate the original purpose of the restriction. *Id*. at 40, 41. The *Decker v. Hendricks* court went on to observe, "Stated in another way, the test is *whether or not the conditions have changed so much that it is impossible to secure in a substantial degree the benefits intended to be secured by the covenants*. *Id*. (emphasis supplied.)

Appellants attempt to distinguish the *Decker v. Hendricks*, arguing that case did not involve a situation where the restrictive covenant provided the owner with "the right to determine whether a material change in circumstances had occurred." Appellants' Opening Brief, pg. 42. As noted above, 1992 CC&Rs ¶6 allows for the owners of the "Property" to file a petition with the Maricopa County Superior Court and request approval of what the owners concluded constitutes a "material change". That is very different from what Appellants are describing. Regardless of Appellants' argument, the Court must first interpret the 1992 CC&Rs ¶6 to determine if Appellants' or Appellees' interpretation is correct.

Other Arizona cases involving modification of restrictive covenants include *Shalimar Ass'n v. D.O.C. Enterprises, Ltd*., at Ariz. 45, at P.2d 691 ("such changes must frustrate and defeat the original purpose of the restrictions in order to warrant voiding them") and *Lacer v. Navajo County*, 141 Ariz. 396, 687 P.2d 404 (App. 1983) (if conditions have so changed since the making of the promise as to make it impossible to secure in a substantial degree the benefits intended to be secured by the performance of the promise).

TTLC can meet neither standard, whether (i) a radical and fundamental change has occurred that would frustrate the original purpose of the restrictive covenant – an operating golf course or (ii) change in conditions have changed so impossible to secure the intended benefit. In March 2015, Bixby and TTLC entered into the Purchase Agreement, where, among other provisions, the Purchase Agreement acknowledged the existence of the deed restriction on the Golf Course. By March 2015, TTLC was aware of this litigation and, in its Purchase Agreement with Bixby, TTLC required Bixby to file a motion for summary judgment challenging the enforceability of the restrictive use provision in the 1992 CC&Rs.

On June 19, 2015, TTLC took fee title to the Golf Course and at the time it took fee title to the Golf Course, the former golf course had been closed and neglected to the point the golf course would have to be completely reconstructed. TTLC made its intentions plain by representing to the trial court it did not intend

to operate the Golf Course as a golf course. From the time TTLC entered into the Purchase Agreement, undertook its due diligence from late March to early June 2015, TTLC was focused only on purchasing property to develop into a residential project. Nothing has changed.

TTLC now claims a material change has occurred and seeks to vitiate the restrictive use provision in the 1992 CC&Rs. TTLC claims a stand-alone golf course is no longer realistic for lack of profitability and the apparent inability to attract investors or obtain a loan to re-construct. The trial court found the evidence did not show Bixby could not have operated the golf course profitably, with adequate maintenance, at any point in time before Bixby closed the golf course and stripped it. The lack of future profitability in operating a golf course on the property is a function of the $9 million price TTLC agreed to pay to purchase the Golf Course.[39]

However, here we are, with TTLC being just that: an entity that took fee title to the Golf Course knowing full well the obligation owed under the 1992 CC&Rs and the state of the neglected property by the former owners who plainly breached

[39] Although TTLC agreed to pay $9 million for the Golf Course, other than the $750,000 down payment, Defendant has, to date, only paid interest on the unpaid principal. TTLC has since defaulted and, because the underlying promissory note is "non-recourse", Bixby had to "look solely to the property secured by the Deed of Trust".

their contractual obligation to the Benefitted Persons. TTLC is citing the deteriorated condition of the Golf Course it intentionally accepted at the time it took fee title as the material change necessary to vitiate the restrictive use provision in the 1992 CC&Rs. Since TTLC has taken fee title to the Golf Course nothing has changed – except, as the trial court observed during closing arguments, the Golf Course now looks like a "moonscape"[40]. The neglected Golf Course has stayed neglected; and (as the evidence at trial demonstrated and the trial court found) has only further deteriorated.

Given the circumstances – TTLC's conscious decision to purchase the Golf Course (i) with a binding use restriction (which was in litigation when purchased), (ii) in a deteriorated condition, (iii) for which TTLC agreed to pay $9 million (based on a due diligence analysis of the profit from selling residences) and (iv) knowing if it lost the court battle it could turn on its heel and walk away under the non-recourse provision of the underlying promissory note – TTLC did not establish the condition at its purchase of the Golf Course constituted a "material change".

C. TTLC was fully cognizant of the Lakes Deed Restriction and the neglected state of the Golf Course, and equity should not reward a wrongdoer.

Equitable remedies are a matter of grace and not a right and should not be

[40] November 1, 2017, Transcript of Proceedings, 40:19 to 41:25.

used when claimants were clearly aware of the restrictions and expend large sums of money on the gamble the restrictions would not be enforced against them. *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 26, 749 P.2d 930, 935 (App. 1987) and *Decker v. Hendricks*, at Ariz. 41–42, at P.2d 612 (Equitable remedies are a matter of grace and not of right and equitable discretion should not be used to protect an intentional wrongdoer.).

In *Camelback Del Este Homeowners*, subdivision residents brought action against developer to enforce restrictive covenants. *Id.* at Ariz. 22. The developer was aware of the deed restrictions at the time he purchased the properties. *Id* at Ariz. 23. Despite the knowledge, the developer proceeded to violate the deed restrictions and proceed to construct buildings in violation of the restrictions. *Id*. The developer claimed, among others, if the deed restrictions are enforced as the trial court held, he would suffer economic loss between $350,000 and $400,000 based on expenditures already outlaid. *Id*. at 26. However, the court held against this claim stating the evidence clearly established he was aware of the restrictions in the subdivision before most of the expenditures were incurred, as well as the intention of at least some homeowners to enforce the covenants. *Id*. Thus held, it would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble the restrictions would

not be enforced against him and then claim enforcement of the restrictions works a hardship on him. *Id*.

Just as in *Camelback Del Este Homeowners Ass'n,* TTLC was fully aware of the use restriction on the Golf Course. TTLC was likewise fully aware of the neglected state of the Golf Course. It was also fully aware of Plaintiffs' ligation against Bixby. As the Court in *Camelback Del Este Homeowners Ass'n* stated, TTLC took a gamble, funded by TTLC Parent for all the expenses to take the gamble, while fully cognizant of the limitations and value of the property it was buying. Equitable remedies are a matter of grace and not right and should not reward a fully cognizant wrongdoer.

There is no basis for equity supporting TTLC's position on the material change issue. The circumstances under which TTLC bought the Golf Course lend TTLC no entitlement to equity: (i) its voluntary purchase of the Golf Course which TTLC knew was subject to a restrictive covenant and in litigation over the issue; (ii) from its due diligence, TTLC could see for itself the Golf Course had been severely neglected; (iii) notwithstanding its knowledge of (and it was bound by) the restrictive use provision, TTLC represented to the Court it did not intend to operate the Golf Course; (iv) it agreed to pay $9 million based on its due diligence economic study reflecting the profitability of a residential development on the Golf Course; (v) it purchased the golf course with the knowledge the Golf Course would have to be

totally reconstructed if TTLC was required to operate a golf course; (vi) it had no intention of ever reconstructing and operating a golf course (which the prior owner had shut off the water and electricity to and cannibalized the hundreds of sprinkler heads); (vii) TTLC only turned to its "material change" tactic after it failed to convince 51% of the Ahwatukee households to approve an earlier proposed modification; and (vii) if TTLC loses this action, it can escape its obligation to Bixby through the non-recourse provision of the underlying promissory note. *One must give equity to receive equity*[41] *and TTLC has utterly failed to give any equity*!

VI. Trial court's award of attorneys' fees

Paragraph 4 of the 1992 CC&Rs authorized the trial court to award Appellees their reasonable attorneys' fees against the Appellants. The trial court did not abuse its discretion in awarding Appellees their reasonable attorneys' fees.

VII. Request for attorneys' fees on appeal

In accordance with Rule 21(a), Arizona Rules of Civil Appellate Procedure, and should the Court rule in their favor, Plaintiffs hereby give notice of their claim for attorneys' fees against Appellants pursuant to the "Enforcement" provisions in ¶4 of the 1992 CC&Rs which allows Plaintiffs "reimbursement of all court costs and reasonable attorneys' fees from said defaulting owners, occupants or users."

[41] *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Association*, 95 Ariz. 98, 100, 387 P.2d 801 (1963).

Additionally, Plaintiffs and Bixby entered a Stipulation, approved by the trial court, preserving their respective claims for attorneys' fees against each other.

VIII. Conclusion

For all the reasons set forth herein, Appellees respectfully urge the Court to affirm the trial court's verdict and Final Judgment and Order for Permanent Injunction as entered by the trial court.

Respectfully submitted this 4th day of January 2019.

TIMOTHY H. BARNES, P.C.

By: /s/ Timothy H. Barnes (SBN 003373)
Timothy H. Barnes
428 East Thunderbird Road, #150
Phoenix, Arizona 85022
Attorneys for Appellees Linda W. Swain and Eileen T. Breslin