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

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

Case No. CV2014-051035

Plaintiffs,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

vs.

(The Hon. John R. Hannah, Jr.)

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

Defendant.

Findings of Fact

1. 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 Ahwatukee Lakes Golf Course (the "Ahwatukee Lakes Golf Course" or the "Property"), caused to be recorded as Instrument No. 86-568479 in the records of Maricopa County, Arizona, that certain deed restriction (the "Lakes Deed Restriction") covering the Ahwatukee Lakes Golf Course, the legal description of which was attached to the Deed Restriction.

2. The substance of the Lakes Deed Restriction 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.

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

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

7 5. On November 13, 1992, the Declarant caused to be recorded as Instrument
8 No. 92-646838 a Declaration of Covenants, Conditions, Restrictions and Easements (the
9 "1992 Covenants, Conditions and Restrictions") (Exhibit 4) regarding, in addition to
10 other real property, the Ahwatukee Lakes Golf Course.

11 6. Recital D of the 1992 Covenants, Conditions and Restrictions states as
12 follows:

13 Declarant desires to establish certain covenants, conditions, restrictions and
14 easements with respect to the Property for the mutual benefit of (i)
15 Declarant and all present and future owners or users of such portions of the
16 Property as remain subject to this Declaration; and (ii) any other owner of
17 property located within the Ahwatukee master planned community as
18 defined on Exhibit B attached hereto.

19 7. Recital E of the 1992 Covenants, Conditions and Restrictions states, in
20 pertinent part, as follows:

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

23 8. Recital F of the 1992 Covenants, Conditions and Restrictions states as
24 follows:

25 By recording this Declaration, the Declarant intends to comply with the
26 requirements and obtain the benefits of Arizona Revised Statutes Section
27 42-146 regarding the valuation and taxation of golf courses.

28 9. Paragraph 2 of the 1992 Covenants, Conditions and Restrictions states as
follows:

1 Declaration of Use Restriction. Declarant, for the benefit of those persons
2 or classes of persons described in Recital D above (hereafter, 'Benefitted
Persons'), hereby declares as follows:

3 The Property shall be used for no purposes other than golf courses and
4 such improvements and facilities (including without limitation,
5 clubhouses, restaurants, pro shops, overnight lodging facilities, resort and
6 connected recreational facilities, bars, parking areas and golf cart trails)
7 and uses as are reasonably related to, convenient for or in furtherance of
8 golf course use or the accommodation of golf course patrons and guests;
9 except that the Property may be further used for easements for ingress and
10 egress (vehicular and otherwise), pedestrian trails and walks, cables,
11 utilities, drainage and other similar easements and rights of way, and for
12 the construction and maintenance of walls, fences and other boundary
13 type protection, in each case reasonably related to the development and
14 use of the Ahwatukee project, together with improvements reasonably
15 related to said easements, uses and related services. No improvement
16 shall be made, constructed, installed or located on the Property that is not
reasonably related to, convenient for, or in furtherance of, the
aforementioned purposes. Declarant on its behalf and on behalf of its
successors and assigns, reserves 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 facilities related to the use of the Property for golf
courses, all at the discretion of the then-owner of the Property.

17 Neither Declarant nor its successors or assigns shall use the Property for
18 any purpose other than as stated above. Declarant, on behalf of itself and
19 its successors and assigns, agrees that the covenants and restrictions herein
may be enforced by Declarant or any Benefitted Person.

20 10. Pursuant to paragraph 6 of the 1992 Covenants, Conditions and
21 Restrictions, the term of the covenants, conditions and restrictions therein "shall be
22 appurtenant to and run with the land and shall be binding upon all present and future
23 owners, occupants and users of the Property or any portion thereof and all persons
24 claiming an interest in and to the Property in perpetuity".

25 11. Paragraph 6 of the 1992 Covenants, Conditions and Restrictions also
26 states, in part, as follows:

27 [I]f Declarant or Developer (including their successors or assigns)
28 determines that there has been a material change in conditions or

1 circumstances affecting the Property or the covenants, conditions,
2 restrictions and easements set forth herein, Declarant or Developer may
3 petition the Maricopa County Superior Court or any other court or
4 adjudicative body of competent jurisdiction for modification of this
5 Declaration.

6 12. Paragraph 4 of the 1992 Covenants, Conditions and Restrictions states as
7 follows:

8 Enforcement. In the event of any violation or breach of, or default under,
9 the provisions of this Declaration, Declarant, Developer or any Benefitted
10 Person entitled to enforce this Declaration may, in addition to any other
11 available remedies, seek injunctive relief against the then owners,
12 occupants or users of the Property causing the breach, default or violation
13 for the discontinuation of such breach, default or violation, and, if
14 Declarant, Developer or such Benefitted Person enforcing this Declaration
15 prevails, Declarant, Developer or such Benefitted Person shall be entitled to
16 reimbursement of all court costs and reasonable attorneys' fees from said
17 defaulting owner, occupants or users.

18 13. From approximately 1986 through May of 2013, different owners of the
19 property operated the Ahwatukee Lakes Golf Course on the Property.

20 14. In June 2006, Bixby Village Golf Course, Inc., Hiro Investment, LLC,
21 Nectar Investment, LLC and Kwang Co., LLC (collectively, "Bixby") purchased the
22 Ahwatukee Lakes Golf Course and the Ahwatukee Country Club for \$5.6 million.

23 15. Wilson Gee testified the ownership percentages of Bixby were: Nectar
24 Investment, LLC owned 31.66%, Hiro Investment, LLC owned 26.67%, Kwang Co.,
25 LLC owned 26.67% and Bixby Village Golf Course, Inc. owned 15%.

26 16. When Bixby purchased the Ahwatukee Lakes Golf Course and the
27 Ahwatukee Country Club, Hiro Investment, LLC, Nectar Investment, LLC and Kwang
28 Co., LLC (collectively, "Hiro, Nectar and Kwang") provided Bixby \$400,000.00 to
make improvements to golf courses. The majority of the \$400,000.00 was spent to
improve the Ahwatukee Country Club.

17. Mr. Gee testified that Bixby intended, at the time of purchase, to operate
the Ahwatukee Lakes Golf Course as a golf course. He denied that Bixby purchased the

1 property with the intent to develop it. This testimony was not entirely credible for a
2 number of reasons, some of which have to do with the structure of the transaction itself.

- 3 • Bixby structured the transaction as a section 1031 tax-free swap, suggesting that
4 the price Bixby was willing to pay depended at least in part on the amount of
5 money the company had to invest.
- 6 • Bixby allocated the lion's share of the purchase price (\$4 million of the \$5.6
7 million total) to the Ahwatukee Lakes Golf Course, but Mr. Gee never articulated
8 a good reason for that. He simply attributed the decision to his "comfort level."
9 No evidence was presented to indicate that the Property was worth \$4 million as a
10 golf course in 2006.
- 11 • As noted below, the "rent" paid by Mr. Gee's operating company, Ahwatukee
12 Golf Properties, LLC, was intended to provide a fixed return on investment to
13 Bixby's owners. It bore no apparent relationship to the market rental value of the
14 property.
- 15 • As noted below, Mr. Gee stood to receive a 30 percent bonus share of the net
16 proceeds if the property was sold at a profit.

17 18. In June 2006, Bixby and Ahwatukee Golf Properties, LLC ("AGP")
18 entered into a Lease Agreement ("AGP Lease") (Exhibit 5) under which AGP leased the
19 Ahwatukee Lakes Golf Course and the Ahwatukee Country Club from Bixby.

20 19. AGP is wholly owned by Wilson Gee and his wife.

21 20. The AGP Lease required AGP to pay Bixby annual rent of \$420,000.00.
22 Of that annual rent amount, \$280,000.00 was allocated as annual rent for the Ahwatukee
23 Lakes Golf Course.

24 21. Wilson Gee testified the \$280,000.00 was not a negotiated fair market
25 rental amount, but represented a seven percent (7%) return on the investment (based on
26 the income from the Ahwatukee Lakes Golf Course) to the four Bixby owners in
27 Bixby's purchase of the Ahwatukee Lakes Golf Course.

28

1 22. Paragraph 5 of the AGP Lease required AGP to maintain the Ahwatukee
2 Lakes Golf Course “in accordance with the standards of a high-quality privately-owned
3 public and semi-private golf course”; and paragraph 7 required AGP, at its own expense,
4 to provide all maintenance and repair work necessary or appropriate to maintain the
5 property and golf course “in the condition expected of a high-quality privately-owned
6 public and semi-private golf course at all times during the Term” of the AGP Lease.

7 23. Paragraph 14 of the AGP Lease provides that in the event of a sale of the
8 Ahwatukee Lakes Golf Course, AGP is entitled to be paid up to 30% of net sale price of
9 the property sold that exceeds \$4.2 million.

10 24. Wilson Gee testified that through 2006 (and the purchase of the
11 Ahwatukee Lakes Golf Course and the Ahwatukee Country Club), his investors¹ had
12 invested the principal amount of \$1.65 million in different golf courses that Bixby
13 purchased.

14 25. Another reason to doubt Mr. Gee’s testimony about Bixby’s plans for the
15 property is that, not later than 2008, Mr. Gee in fact began making efforts to redevelop
16 the Ahwatukee Lakes Golf Course. In the fall of 2008, Mr. Gee met with the
17 Ahwatukee Board of Management (“ABM”)² about redeveloping the Ahwatukee Lakes
18 Golf Course; and in 2009, Mr. Gee met with Phoenix City Councilman Sal DiCiccio
19 about redeveloping the Ahwatukee Lakes Golf Course. There was no evidence that the
20 golf course could not have been operated profitably in 2008.

21 26. The condition of the Ahwatukee Lakes Golf Course progressively
22 deteriorated between 2005 (one year before Bixby purchased the property) and 2017.
23 The photographs of the Ahwatukee Lakes Golf Course taken in 2005, 2013, 2014, 2015
24 and 2017 (Exhibits 17 – 22) show the deterioration. Mr. Gee denied that Bixby
25

26
27 ¹ Wilson Gee testified that his original investor was a gentleman from Japan; and when that
28 gentleman passed away, the man’s three sons became the investors. Those three sons formed
Hiro, Nectar and Kwang.

² The ABM is the homeowner association for the Ahwatukee master planned community.

1 intentionally failed to maintain the course, but the photographic evidence contradicted
2 his denial.

3 27. In May 2013, Bixby closed the operation of the Ahwatukee Lakes Golf
4 Course and placed a barbed wire fence around the perimeter of the golf course. The
5 course was stripped of items that had value, such as sod and irrigation equipment. One
6 year later, Bixby removed the fence and drained the lakes.

7 28. Bixby did not attempt to modify the 1992 Covenants, Conditions and
8 Restrictions at any time before or after Bixby closed the Ahwatukee Lakes Golf Course.
9 The evidence did not show that Bixby could not have operated the golf course
10 profitably, with adequate maintenance, at any point in time before Bixby closed the
11 course and stripped it.

12 29. After Bixby closed the Ahwatukee Lakes Golf Course, the course could
13 not be used for golfing or golfing practice by Swain, Breslin, the Benefitted Persons or
14 by the public.

15 30. In July 2013, Bixby entered into a Memorandum of Real Estate Purchase
16 and Sale Agreement (Exhibit 6) with Pulte Home Corporation, which intended to
17 develop the Ahwatukee Lakes Golf Course into a residential community.

18 31. After the Ahwatukee Lakes Golf Course was closed, The True Life
19 Companies, LLC, a Delaware limited liability company ("True Life Companies")
20 became aware that Ahwatukee Lakes Golf Course was available for purchase.

21 32. True Life Companies is the parent company of multiple affiliated
22 companies which are incorporated in each of the various states in which True Life
23 Companies operates.

24 33. True Life Companies is a real estate investment and community
25 development company that provides lots to home builders or is capable of developing
26 residential communities with its own residential construction division.

27 34. True Life Companies was interested in purchasing the Ahwatukee Lakes
28 Golf Course for purposes of redeveloping the land into a residential community.

1 35. True Life Companies never intended to reconstruct the Ahwatukee Lakes
2 Golf Course or to operate it as a stand-alone golf course.

3 36. In March of 2015, Bixby, AGP and True Life Companies entered into a
4 Real Estate Purchase and Sale Agreement (the "Purchase Agreement") (Exhibit 7).

5 37. The Purchase Agreement acknowledged the existence of the Lakes Deed
6 Restriction in Recital D (defined therein to be the "Declaration").

7 38. The Purchase Agreement provided for a feasibility contingency and study
8 period in paragraph 5. Paragraph 5(a) provided for a "Feasibility Period" that would
9 extend through May 8, 2015. That subparagraph stated, in part:

10 Seller hereby acknowledges that Buyer's determination of the feasibility for
11 the acquisition and development of the Property is a contingency to Buyer's
12 acquisition of the Property. Seller further acknowledges that Buyer may
13 invest substantial time, effort and resources in investigating the feasibility
14 and other matters including, without limitation, expenditure of funds on
15 engineering fees, architectural fees, soils analysis, environmental analysis,
16 research of relevant codes, ordinances, regulations and other issues during
17 its investigation of the Property.

18 39. Paragraph 5(c) of the Purchase Agreement required Bixby to provide
19 "Property Information" including, among other Property Information, "Buyer's ability to
20 secure the Entitlements (as defined in paragraph 37 below)". (Original emphasis).

21 40. Paragraph 6(f) of the Purchase Agreement stated, in part:
22 At the Closing, AGP and the other parties constituting Seller shall cause the
23 AGP Lease to be terminated. In this regard, any and all service contracts,
24 equipment leases, and maintenance agreements relating to the operation or
25 running of the Golf Course (collectively, 'Service Contracts') shall also be
26 terminated as of the Closing, and Buyer shall have no obligation as to any
27 such Service Contracts, nor will any such Service Contracts be assigned or
28 transferred to Buyer at such Closing. As to any such Service Contracts,
AGP covenants and agrees to legally terminate all Service Contracts as of
the Closing, and AGP shall indemnify, defend and hold Buyer harmless
from and against all costs, expenses and liabilities arising from or related to
any Service Contracts.

 41. Paragraph 10(b) of the Purchase Agreement stated:

1 Seller and Buyer acknowledge and agree that regarding the potential
2 development of the Real Property for residential purposes, Seller has
3 discontinued the use of the Real Property as a golf course. Such action may
4 constitute a violation of the Golf Course Restriction and subject the Real
5 Property to a penalty under A.R.S. Section 42-13154 in an amount equal to
6 the difference between the total amount of property taxes that would have
7 been levied on the Real Property for the preceding ten (10) years or the
8 period of time the Real Property was valued under A.R.S. Section 42-
9 13154, whichever period is shorter, if the Real Property has not been valued
10 under A.R.S. Section 42-13154, and the property taxes that were actually
11 paid for the same period (the 'Roll-Back Taxes'). (Original emphasis).

12 [* * *]

13 If the Roll-Back Taxes are not yet levied against the Real Property as of the
14 Closing Date, then the transactions contemplated by this Agreement shall
15 proceed, and in the event the Roll-Back Taxes are thereafter levied against
16 the Real Property after the Closing Date, then Buyer shall be fully
17 responsible for the full payment of all such Roll-Back Taxes, and Seller
18 shall have no obligation to pay all or any portion thereof.

19 42. The Purchase Agreement also acknowledged the pendency of this action in
20 paragraph 14(e)³ and paragraph 15(g).

21 43. Paragraph 37 of the Purchase Agreement defined "Entitlements" to include
22 the following:

23 (i) Removal of the use restriction contained in Paragraph 2 of the
24 Declaration, which limits the use of the Real Property to golf course use
25 and ancillary improvements and facilities and for no other purpose, as more
26 particularly described therein (the 'Use Restriction');

27 (ii) A minor General Plan Amendment permitting Buyer's proposed
28 development plan for the Real Property, in a form and substance, and
subject only to such conditions and stipulations, as are acceptable to Buyer
in Buyer's sole and absolute discretion (the 'General Plan Amendment');

(iii) An application to rezone the Real Property in accordance with
Buyer's proposed development plans, subject only to such conditions and

³ Among other information, paragraph 14(e) 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."

1 stipulations, as are acceptable to Buyer in Buyer's sole and absolute
2 discretion (the 'Rezoning');

3 (iv) One or more preliminary maps of dedication and/or plats for the
4 Real Property and all required preliminary engineered improvement plans
5 applicable to the preliminary maps and plats, in a form and substance, and
6 subject only to such conditions and stipulations, as are acceptable to Buyer
7 in Buyer's sole and absolute discretion (the 'Preliminary Plat'); and

8 (v) One or more final maps of dedication and/or plats for the Real
9 Property and all required preliminary engineered improvement plans
10 applicable to the preliminary maps and plats, in a form and substance, and
11 subject only to such conditions and stipulations, as are acceptable to Buyer
12 in Buyer's sole and absolute discretion (the 'Final Plat').

13 For purposes of this Agreement, the term 'Final Approval' relating to the
14 Final Plat shall mean that the City, the Maricopa County Flood Control
15 District, the ADWR and all other necessary governmental or quasi-govern-
16 mental entities and all necessary utility providers, but specifically excluding
17 any homeowner's association or property owner's association (individually,
18 a 'Governmental Authority' and collectively, the 'Governmental
19 Authorities') have approved or issued, as applicable, in accordance with
20 their required procedures, all statutory and regulatory approvals and are
21 otherwise bound to provide the approvals, and that any reconsideration,
22 protest, appeal, referendum or litigation periods applicable to such
23 approvals have expired without any reconsideration, protest, appeal,
24 referendum or litigation having been filed. As provided in Section 3(b)(ii),
25 the outstanding principal balance then due and owing under the Note shall
26 all be due and payable ninety (90) days after Final Approval by the City of
27 the Final Plat has occurred.
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44. On May 8, 2015 Bixby and True Life Companies extended the Feasibility
Period from May 8, 2015 to June 8, 2015.

45. On June 5, 2015 Bixby and True Life Companies extended the Feasibility
Period from June 8, 2015 to June 12, 2015.

46. Defendant, on its own behalf or through a contract with a third party,
invested time and effort before June 19, 2015 to determine the feasibility of the
acquisition and development of a residential community on the Ahwatukee Lakes Golf
Course property.

1 47. Defendant did not undertake or contract for a study before June 19, 2015
2 to determine the feasibility of a golf course being operated on the Property after June 19,
3 2015.

4 48. Defendant, on its own behalf or through a contract with a third party,
5 undertook an economic analysis of the Property before June 19, 2015.

6 49. Defendant, on its own behalf or through a contract with a third party,
7 inspected the Ahwatukee Lakes Golf Course before purchasing the Ahwatukee Lakes
8 Golf Course.

9 36. Prior to purchasing the Ahwatukee Lakes Golf Course, Defendant was
10 aware of the content of paragraph 2 of the 1992 Covenants, Conditions and Restrictions
11 related to the Property, and specifically that paragraph 2 states in part that “[t]he
12 Property shall be used for no purposes other than golf courses and such improvements
13 and facilities . . . and uses are reasonably related to, convenient for or in furtherance of
14 golf course use . . .”

15 50. Prior to purchasing the Ahwatukee Lakes Golf Course, Defendant was
16 aware the Property would need to be re-constructed if it were ever to be used as a golf
17 course after June 19, 2015.

18 51. When it purchased the Ahwatukee Lakes Golf Course, Defendant had no
19 intention of reconstructing the Property to put it back in the condition it was in as of
20 May of 2013 when the Sellers closed the operation of the golf course on the Property.
21 Defendant never intended, and does not now intend, to reconstruct the Ahwatukee Lakes
22 Golf Course or to operate it as a stand-alone golf course

23 52. Defendant purchased the Ahwatukee Lakes Golf Course for \$9 million
24 with the intention of developing the Property for residential or commercial use.

25 53. On June 19, 2015, Defendant paid Bixby \$750,000.00 as a down payment
26 and took fee title to the Ahwatukee Lakes Golf Course from Bixby; and Defendant
27 executed and delivered to Bixby a Deed of Trust and Assignment of Rents on the
28 Property.

1 54. True Life Companies, LLC is the sole member of Defendant.⁴

2 55. The \$750,000.00 down payment was paid by funds deposited directly into
3 escrow by True Life Companies on Defendant's behalf. Because Defendant did not yet
4 have a revenue generating business, all of the post-purchase funds necessary for
5 Defendant to carry out its plan to modify the 1992 Covenants, Conditions and
6 Restrictions were provided to Defendant directly by True Life Companies.⁵

7 56. The Deed of Trust and Assignment of Rents secured Defendant's
8 obligation to Bixby under the June 19, 2015, Non-Recourse Promissory Note Secured by
9 Deed of Trust (the "Promissory Note") (Exhibit 10) in the principal amount of \$8.25
10 million.

11 57. As a "non-recourse" instrument, the Promissory Note expressly provided
12 that in the event of Defendant's default under the terms of the Promissory Note, "the
13 Holder of this Note agrees that in any action or proceeding brought on this Note or on
14 the Deed of Trust or on any other instrument now or hereafter securing the indebtedness
15 secured hereby, the Holder will look solely to the property secured by the Deed of Trust
16 (the "Trust Property") and the Trust Property income, and, except in the case of fraud or
17 intentional misrepresentation, neither Maker nor any principal, officer, member or
18 manager of Maker, nor any successor or assign of Maker or principal, officer, member
19 or manager of Maker, shall have any personal liability for the indebtedness evidenced by
20 this Note or by reason of any obligations, covenants or agreements contained in the
21 Deed of Trust."

22 58. The Promissory Note expressly provided "no interest" was due on the
23 outstanding principal balance. The Promissory Note did provide for default interest of
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26 ⁴ Defendant is a single-purpose and single-asset entity.

27 ⁵ The funds which Defendant projected would be necessary to carry out its redevelopment plan
28 are listed in the "Ahwatukee Lakes-Business Plan" (Exhibit 32). From the "Deal Highlights –
TTLC Ahwatukee Lakes" portion of Exhibit 32, True Life Companies projected many millions
of dollars in profits to its investor, itself and any home builder that purchased lots.

1 12% per annum in the event Defendant failed to timely pay any monies due under the
2 terms of the Promissory Note.

3 59. The Promissory Note obligated Defendant to make three (3) annual
4 payments: (i) \$500,000.00 on June 19, 2016; (ii) \$500,000.00 on June 19, 2017; and, on
5 the sooner of June 19, 2018 or 90 days after the “Final Approval by the City of Phoenix
6 of the Final Plat of the Real Property”, whichever was sooner.⁶

7 60. Defendant took fee title to the Ahwatukee Lakes Golf Course by Special
8 Warranty Deed which expressly stated, in pertinent part, that Defendant took title
9 subject to, among other things, “all covenants, conditions, restrictions, reservations,
10 easements and declarations or other matters of record . . .”

11 61. By accepting the Special Warranty Deed granting fee title to the
12 Ahwatukee Lakes Golf Course, Defendant bound itself to comply with each of the
13 covenants, conditions and restrictions in the 1992 Covenants, Conditions and
14 Restrictions.

15 62. The 1992 Covenants, Conditions and Restrictions constitutes a contract by
16 and between, among others, Defendant as the current owner of the Ahwatukee Lakes
17 Golf Course and, as express third-party beneficiaries, the Benefitted Persons as defined
18 in the 1992 Covenants, Conditions and Restrictions.

19 63. As the owner of the Ahwatukee Lakes Golf Course since June 19, 2015,
20 Defendant has been, and continues to be while Defendant remains owner, obligated to
21 fully comply with each of the covenants, conditions and restrictions of the 1992
22 Covenants, Conditions and Restrictions.

23 64. At the time Defendant took fee title to the Ahwatukee Lakes Golf Course,
24 Defendant was aware that the former golf course had been closed and neglected to the

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⁶ In November 2015, Bixby and Defendant negotiated a modification to the loan documents (Exhibit 38) by which the first two anniversary installments of \$500,000.00 were waived and replaced by the payment of interest; and in June 2016, Bixby and Defendant negotiated another modification to the loan documents (Exhibit 39) by which further terms of the loan documents were implemented.

1 point that the golf course would have to be completely reconstructed to put it back in the
2 condition it was in as of May of 2013 when Bixby closed the operation of the golf
3 course.

4 65. At the time Defendant took fee title to the Property, Defendant was aware
5 that Bixby had shut down the well that supplied water to the lakes⁷, thus depleting the
6 water needed for irrigation. Bixby had previously removed all but obsolete irrigation
7 heads and shut off all power to the site including the clubhouse. The site, therefore, had
8 not had any water or electricity since May of 2013.

9 66. On June 19, 2015, Bixby and Defendant entered into a Well Sharing and
10 Easement Agreement (Exhibit 12) and a Lease of Type 2 Water Right in Phoenix AMA
11 (Exhibit 13). Pursuant to those documents, Defendant acquired the right to annually use,
12 at no cost, up 500 acre-feet of water to use on the Ahwatukee Lakes Golf Course.

13 68. Water pumped to the Ahwatukee Lakes Golf Course from the well on the
14 Ahwatukee Country Club would not cost Defendant anything other than the necessary
15 electricity to pump the water from the well to its golf course.⁸

16 69. Taber Anderson testified there was “no chance” Defendant would build a
17 stand-alone golf course on that property because Defendant did not purchase the
18 Ahwatukee Lakes Golf Course to be a stand-alone golf course. Defendant might create a
19 par-three course on a portion of the land and pay for it with the proceeds of the housing
20 development and assessments levied on the residential properties.

21 70. Aiden Barry testified Defendant went into the purchase of the Ahwatukee
22 Lakes Golf Course “with eyes wide open” to the challenges it faced in its effort to obtain
23 the property so Defendant could redevelop the property for residential use.

24
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26 ⁷ The well feeding the lakes on the Ahwatukee Lakes Golf Course was located on the
27 Ahwatukee Country Club property. There was an irrigation and pumphouse system which
brought the water from the well to Ahwatukee Lakes Golf Course.

28 ⁸ Defendant did not investigate what was necessary to turn on the electricity to the Ahwatukee
Lakes Golf Course.

1 71. Aiden Barry testified the \$9 million price Defendant agreed to pay for the
2 Ahwatukee Lakes Golf Course was not discounted in consideration of the risk of not
3 being able to successfully modify the 1992 Covenants, Conditions and Restrictions, but
4 was based on the value Defendant placed on the Property as a residential community site
5 (as reflected in the "Deal Highlights – TTLC Ahwatukee Lakes" portion of Exhibit 32).

6 72. Aiden Barry testified the non-recourse structure of the Promissory Note
7 was negotiated because of the risk of not being able to successfully modify the 1992
8 Covenants, Conditions and Restrictions and the costs incurred in the process.

9 73. Because Defendant did not intend to reconstruct and operate a stand-alone
10 golf course on the Ahwatukee Lakes Golf Course, the condition of the Ahwatukee Lakes
11 Golf Course when Defendant purchased the golf course was not a material consideration
12 from Defendant's point of view.

13 74. At the time Defendant took fee title to the Ahwatukee Lakes Golf Course,
14 Plaintiffs had already initiated this lawsuit against Bixby alleging that Bixby was in
15 violation of the 1992 Covenants, Conditions and Restrictions, which Plaintiffs asserted
16 required the owner of the Ahwatukee Lakes Golf Course to affirmatively operate a golf
17 course on the Property.

18 75. After Defendant took fee title to the Ahwatukee Lakes Golf Course from
19 Bixby, Plaintiffs amended their Complaint (the "Amended Complaint") to substitute
20 Defendant as the Defendant in this lawsuit.

21 76. In response to the Amended Complaint, Defendant filed a Motion to
22 Dismiss/Motion for Summary Judgment asserting the 1992 Covenants, Conditions and
23 Restrictions did not require the owner of the Property to affirmatively operate a golf
24 course on the Property, but instead could allow the Property to be unused.

25 77. Plaintiffs filed a Cross-Motion for Partial Summary Judgment on the issue
26 of whether the 1992 Covenants, Conditions and Restrictions affirmatively required the
27 owner of the Property to operate a golf course on the Property.
28

1 78. On July 11, 2016, this Court entered an Order denying Defendant's
2 Motion to Dismiss/Motion for Summary Judgment and granted Plaintiffs' Cross-Motion
3 for Partial Summary Judgment, ruling that the 1992 Covenants, Conditions and
4 Restrictions requires the operation of a golf course on the subject Property.

5 79. Defendant provided funds for and participated in a campaign to obtain the
6 approval of 51% of the Benefitted Persons for Defendant's proposed modification of the
7 1992 Covenants, Conditions and Restrictions. The campaign was unsuccessful. By
8 April 2017, Defendant had obtained approvals from approximately 2,000 of the 3,564
9 Benefitted Persons necessary for 51% approval.

10 80. When Defendant failed in its attempts to obtain 51% approval by
11 Benefitted Persons of Defendant's proposed 1992 Covenants, Conditions and
12 Restrictions modification, Defendant took the position that it had determined a material
13 change in conditions affecting the Ahwatukee Lakes Golf Course or the 1992
14 Covenants, Conditions and Restrictions allowed for a modification of those covenants.

15 81. The alleged material change was that, because of changes in the golf
16 market and the deteriorated condition of the Ahwatukee Lakes Golf Course, the original
17 purpose of the 1992 Covenants, Conditions and Restrictions could no longer be realized.
18 In other words, there was no longer a realistic possibility that a stand-alone golf course
19 could ever operate on the property.

20 82. Wilson Gee testified the Ahwatukee Lakes Golf Course was worth
21 approximately \$1 million (plus or minus) as a stand-alone golf course in its current
22 condition.

23 83. Defendant's proposed modification to the 1992 Covenants, Conditions and
24 Restrictions (Exhibit 46) applies only to the Ahwatukee Lakes Golf Course to the 1992
25 Covenants, Conditions and Restrictions and does not affect the Ahwatukee Country
26 Club.

27 84. Since the purchase of the Ahwatukee Lakes Golf Course, Defendant has
28 not complied with the 1992 Covenants, Conditions and Restriction.

1 and Restrictions), Swain is a Benefitted Person in accordance with the express
2 provisions of the 1992 Covenants, Conditions and Restrictions.

3 5. As a Benefitted Person, Swain is entitled to bring this action seeking
4 enforcement of each of the covenants, conditions and restrictions of the 1992 Covenants,
5 Conditions and Restrictions.

6 6. As an owner of the Sandia Residence (which is within the Ahwatukee
7 master planned community as defined on Exhibit B of the 1992 Covenants, Conditions
8 and Restrictions), Breslin is a Benefitted Person in accordance with the express
9 provisions of the 1992 Covenants, Conditions and Restrictions.

10 7. As a Benefitted Person, Breslin is entitled to bring this action seeking
11 enforcement of each of the covenants, conditions and restrictions of the 1992 Covenants,
12 Conditions and Restrictions.

13 8. The former owners of the Lakes Golf Course, Bixby, were contractually
14 obligated to comply with the each of the covenants, conditions and restrictions in the
15 1992 Covenants, Conditions and Restrictions.

16 9. The \$280,000.00 "annual rent" paid by AGP under the AGP Lease was a
17 7% return on investment to the owners of Bixby and not a "debt service" as such.

18 10. By closing the Ahwatukee Lakes Golf Course in May 2013, shutting off
19 the water and electricity, removing the irrigation heads from the irrigation system,
20 draining the lakes and failing to maintain the property so that it could be used for golfing
21 or golfing practice, Bixby breached its contractual obligations under the 1992 CC&Rs.

22 11. By accepting the Special Warranty Deed granting fee title to the
23 Ahwatukee Lakes Golf Course, Defendant bound itself to comply with each of the
24 covenants, conditions and restrictions in the 1992 Covenants, Conditions and
25 Restrictions.

26 12. As the owner of the Ahwatukee Lakes Golf Course since June 19, 2015,
27 Defendant has been, and continues to be while Defendant remain owner, obligated to
28

1 fully comply with each of the covenants, conditions and restrictions of the 1992
2 Covenants, Conditions and Restrictions.

3 13. By its refusal to reopen and operate a golf course on the Property after its
4 purchase of the Property from Bixby, Defendant breached the 1992 Covenants,
5 Conditions and Restrictions.

6 14. Because TTLC knowingly and voluntarily purchased the Lakes Golf
7 Course with the contractual obligation to operate a golf course on it for the benefit of
8 Plaintiffs, and others as described in the 1992 Covenants, Conditions and Restrictions as
9 Benefitted Persons, as the facts show above, they were bound to the promise of
10 operating a golf course. Because Defendant lacked the intent to operate a golf course
11 while knowing it had the contractual obligation, TTLC has breached its covenant of
12 good faith and fair dealing, which required them to not impair the rights of the other to
13 receive the benefits of the agreement.

14 15. In Arizona, interpretation of a contract is a question of law for the court.
15 *Rand v. Porsche Fin. Services*, 216 Ariz. 424, 167 P.3d 111, 121 (App. 2007);
16 *Grosvenor Holdings v. Figueroa*, 222 Ariz. 588, 592, 218 P.3d 1045, 1050 (App. 2009).
17 It has long been the rule that an interpretation which gives effective meaning to all
18 provisions of a contract is preferable to an interpretation which leaves a part of the
19 contract ineffective. *Reserve Insurance Co. v. Staats*, 9 Ariz. App. 410, 412, 453 P.2d
20 239, 241 (1969). *See also Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 158,
21 854 P.2d 1134, 1144 (1993) (a contract should not be interpreted to not render a
22 provision superfluous); *Allen v. Honeywell Retirement Earnings Plan*, 382 F.Supp.2d
23 1139, 1165 (D. Ariz. 2005) (rules of contract construction “disfavors constructions that
24 nullify a contract term or render a term superfluous or redundant”).

25 16. In interpreting restrictive covenants, the court reads the language used in
26 its ordinary sense, construing it in light of the circumstances surrounding its formulation,
27 and with the idea of carrying out its object, purpose, and intent. *Cypress on Sunland*
28 *Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 297, ¶ 31, 257 P.3d 1168, 1177 (App.

1 2011) (citing *Powell*, 211 Ariz. at 557, ¶ 16, 125 P.3d at 377). “We are not bound by the
2 ‘strict and technical meaning of the particular words’ in the declaration.” *Id.* (citing
3 *Powell*, 211 Ariz. at 556, ¶ 10, 125 P.3d at 376). Instead, “ ‘the function of the law is to
4 ascertain and give effect to the likely intentions and legitimate expectations of the
5 parties’ who create the covenants.” *Saguaro Highlands Cmty. Ass’n v. Biltis*, 224 Ariz.
6 294, 296, ¶ 6, 229 P.3d 1036, 1038 (App. 2010) (quoting *Powell*, 211 Ariz. at 556–57, ¶
7 13, 125 P.3d at 376–77)

8 17. The plain language of paragraph 6 allows for the owners of the “Property”
9 to file a petition with the Maricopa County Superior Court and request approval of what
10 the owners conclude constitutes a “material change.”

11 18. Under paragraph 6, the owner’s determination of “material change” is not
12 binding or even entitled to deference. By requiring the owner to petition the Maricopa
13 County Superior Court the drafters indicated their intention that the established legal
14 rules for modification of a restrictive covenant would apply. Had the drafters intended
15 for the court to employ some different standard of review, the document would offer
16 some guidance concerning what that standard might be. But the document provides no
17 such guidance.

18 19. If the intention of paragraph 6 of the 1992 Covenants, Conditions and
19 Restrictions was to vest the owner of the “Property” with the power to decide whether
20 there was a material change to the “Property” or to the 1992 CC&Rs, it could have
21 stated just that (i.e. that the owner’s determination was binding) and paragraph 6 would
22 not have needed to include the phrase “may petition the Maricopa County Superior
23 Court . . . for modification of the Declaration.”

24 20. *Tierra Ranchos HOA v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App.
25 2007), found the Restatement of Servitudes applied in determining the level of discretion
26 that a homeowner association has when making discretionary decisions. The *Tierra*
27 *Ranchos* court specifically held the Restatement of Servitudes is not used to adjudicate
28 interpretation of restrictive covenants.

1 21. Paragraph 6 of the 1992 Covenants, Conditions and Restrictions does not
2 provide for a discretionary decision by a representative of the homeowners who are
3 parties to the applicable restrictive covenants. *Tierra Ranchos HOA* therefore does not
4 apply.

5 22. In Arizona, equity will enforce terms of restrictive covenants unless
6 changes in surrounding areas are so fundamental or radically alters the original
7 commitment or frustrates its purpose. *Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d
8 609, 612 (1964).

9 23. Equitable remedies are a matter of grace and not a right, and should not be
10 used when claimants were clearly aware of the restrictions and expend large sums of
11 money on the gamble that the restrictions would not be enforced against them.
12 *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 26, 749 P.2d 930, 935
13 (App. 1987); *Decker v. Hendricks*, 97 Ariz. 36, 41-42, 396 P.2d 609, 612 (1964).

14 24. The equities surrounding the restrictive covenant on the Lakes Golf Course
15 do not favor defendant TTLC for the following reasons: (i) its voluntary purchase of the
16 Lakes Golf Course with knowledge that the Property was subject to a restrictive
17 covenant and in litigation over the issue; (ii) from its due diligence, TTLC could see for
18 itself that the Lakes Golf Course had been severely neglected; (iii) notwithstanding its
19 knowledge of (and that it was bound by) the restrictive use provision, TTLC represented
20 to the Court that it did not intend to operate the Lakes Golf Course; (iv) TTLC agreed to
21 pay \$9 million based on its due diligence economic study reflecting the profitability of a
22 residential development on the Lakes Golf Course; (v) TTLC purchased the golf course
23 with the knowledge that the Lakes Golf Course would have to be totally reconstructed if
24 Defendant was required to operate a golf course; (vi) TTLC had no intention of ever
25 reconstructing and operating a golf course (which the prior owner had shut off the water
26 and electricity to and cannibalized the hundreds of sprinkler heads); (vii) the non-
27 recourse structure of the Promissory Note was negotiated in consideration of the risk of
28 not being able to successfully modify the 1992 Covenants, Conditions and Restrictions

1 and the costs incurred in the process; (viii) although Defendant was bound to comply
2 with the 1992 Covenants, Conditions and Restrictions throughout the period it owned
3 the Ahwatukee Lakes Golf Course, it chose not to do so, but to resist its obligation to
4 comply with those restrictive covenants; (ix) TTLIC only turned to its "material change"
5 tactic after it failed to convince 51% of the Ahwatukee households to approve an earlier
6 proposed modification; and (x) if Defendant loses this action, it can escape its obligation
7 to Bixby through the non-recourse provision of the underlying promissory note.


8 25. The inequitable conduct of Bixby Properties, which largely created the
9 alleged hardship to the property owner, also cuts against equitable relief for Defendant.
10 At the very least, Defendant had reason to know that Bixby's actions substantially
11 contributed to the conditions that made restoration of the golf course economically
12 unfeasible. Bixby, not TTLIC, will bear most of the economic burden if the transaction
13 fails. That result, frankly, will not be unfair.

14 26. Arizona recognizes that restrictive covenants may be enforced by
15 injunctive relief. *Continental Oil Co. v. Fennemore*, 38 Ariz. 277, 281, 299 P. 132, 133
16 (1931).

17 27. Because paragraph 4 of the 1992 Covenants, Conditions and Restrictions
18 provide that a breach of the restrictive covenant can be remedied by injunctive relief,
19 Plaintiffs are entitled to injunctive relief to enforce the 1992 Covenants, Conditions and
20 Restrictions.

21 28. Under paragraph 4 of the 1992 Covenants, Conditions and Restrictions, in
22 an action to enforce those covenants, conditions and restrictions Benefitted Persons are
23 entitled to reimbursement of all court costs and reasonable attorneys' fees from any
24 defaulting owner, occupants or users.

25 Dated this 2nd day of January 2018.

26
27
28

John R. Hannah
Judge of the Superior Court