IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

LINDA W. SWAIN, *et al.*, Plaintiff/Appellees, vs. BIXBY VILLAGE GOLF COURSE INC, *et al.*, Defendants/Appellants.	**No. 1 CA-CV 18-0397** **Maricopa County Superior Court No. CV2014-051035**

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

This appeal involves the interpretation and application of a recorded set of covenants, conditions and restrictions related to a parcel of property. The property is the former site of the Ahwatukee Lakes Golf Course (the property will be referred to herein as the "Property" or the "Golf Course") located in the Ahwatukee area of the City of Phoenix. In 1992, a "Declaration of Covenants, Conditions, Restrictions and Easements for Ahwatukee Country Club and Lakes Golf Course" was recorded with the Maricopa County Recorder's office related to the Property (Ex. 4)[1] (this document will be referred to herein as the "1992 Lakes Deed Restriction" although throughout the trial, this document was generally referred to as the "CC&Rs"). The case and this appeal involve the interpretation of Paragraph 2 of the 1992 Lakes Deed Restriction and the application of Paragraph 6.

Plaintiffs/Appellees, Linda W. Swain and Eileen R. Breslin (referred to herein collectively as "Swain" or "Plaintiffs"), originally filed the lawsuit on October 10, 2014 (R. 1, Complaint)[2] in the Maricopa County Superior Court. At the time of the original lawsuit, Appellants Bixby Village Golf Course, Inc.; Hiro Investment, LLC; Nectar Investment, LLC; Kwang Co.; and Ahwatukee Golf Properties, LLC (referred to herein as "Bixby") owned the Property (*Id.*). On June 19, 2015, during

[1] "Ex." references are to the Exhibits admitted into evidence and listed in the Electronic Index of Record on Appeal.
[2] "R." references are to the Electronic Index of Record on Appeal.

the pendency of the lawsuit, Appellant TTLC Ahwatukee Lakes Investors, LLC (referred to herein as "TTLC") took fee title to the Property pursuant to a Purchase and Sale Agreement with Bixby (Ex. 7, 10-12). On January 5, 2016, Swain filed a First Amended Complaint to name TTLC as the Defendant in the case and dismissed Bixby from the case (R. 49, First Amended Complaint).[3]

At the time Swain filed the original Complaint, Bixby had ceased operating the Golf Course on the Property, was not maintaining the Property as a golf course and was allowing the Property to return to its natural, undeveloped condition (R. 60, TTLC Separate Statement of Facts, p. 1, ¶ 2). When TTLC purchased the Property, it made clear that its intention was not to resume operation of the Golf Course (*Id*., p. 2, ¶ 7). Consequently, the First Amended Complaint alleged that TTLC was in breach of the 1992 Lakes Deed Restriction and in breach of the covenant of good faith and fair dealing for failing to operate a golf course on the Property (R. 49). In response to the First Amended Complaint, TTLC filed a Motion to Dismiss/Motion for Summary Judgment arguing that the 1992 Lakes Deed Restriction imposed a restrictive covenant on the Property and not an affirmative covenant (R. 59). Consequently, TTLC agreed that it could not use the Property for any purpose other

[3] At the time Bixby was dismissed from the case, Swain and Bixby agreed that if Swain was the successful party in the case, Swain would be entitled to request a fee award against Bixby for the time Bixby was involved in the case. Pursuant to that agreement, the trial court awarded Swain attorneys' fees against Bixby.

than a golf course, but argued that the 1992 Lakes Deed Restriction did not require it to affirmatively operate a golf course on the Property (*Id*.).

Swain filed a Response to TTLC's Motion to Dismiss/Motion for Summary Judgment and a Cross-Motion for Partial Summary Judgment arguing that the 1992 Lakes Deed Restriction not only prevented TTLC from using the Property for any purpose other than a golf course, but that it required TTLC to actually operate a golf course on the Property (R. 64). After the motions were fully briefed and the trial court held oral argument, the trial court ruled in favor of Swain that the "intention of the [1992 Lakes Deed Restriction] was that a golf course would be operated on the subject property" (R. 76, Order, p. 1). The trial court denied TTLC's Motion to Dismiss/Motion for Summary Judgment and granted Swain's Cross-Motion for Partial Summary Judgment "as to the interpretation of the [1992 Lakes Deed Restriction] and finding and declaring that the [1992 Lakes Deed Restriction] requires the operation of a golf course on the subject property for the benefit of those described in the document as Benefitted Persons" (*Id*., p. 2).

As a result of the trial court's ruling on the dispositive motions, the only issue that remained for trial was whether Swain was entitled to an injunction to force TTLC to rebuild and operate a golf course on the Property.[4] Prior to the trial, however, TTLC filed a counterclaim seeking a modification of the 1992 Lakes Deed

[4] Swain did not seek monetary damages, but only injunctive relief.

Restriction pursuant to Paragraph 6 of the 1992 Lakes Deed Restriction which states in part:

> [I]f Declarant or Developer (including their successors or assigns) determines that there has been a material change in conditions or circumstances affecting the Property or the covenants, conditions, restrictions and easements set forth herein, Declarant or Developer may petition the Maricopa County Superior Court or any other court or adjudicative body of competent jurisdiction for modification of this Declaration.

(R. 86, Amended Answer/Counterclaim; Ex. 4, p. 4).

Thus, the issues for trial were twofold: 1) whether Plaintiffs were entitled to injunctive relief to require TTLC to operate a golf course on the Property based upon the trial court's interpretation of the 1992 Lakes Deed Restriction; and 2) whether TTLC was entitled to a modification of the 1992 Lakes Deed Restriction pursuant to Paragraph 6. A bench trial was held following which the trial court issued a verdict in favor of Swain on all counts asserted in the First Amended Complaint, including injunctive relief, and ruled in favor of Swain on TTLC's counterclaim, thereby denying TTLC's request for a modification of the 1992 Lakes Deed Restriction (R. 113). The trial court issued Findings of Fact and Conclusions of Law with its decision (R. 112). The trial court then entered a formal Judgment against TTLC and Bixby on May 31, 2018 (R.144).

TTLC and Bixby filed timely notices of appeal from the Judgment entered against them. TTLC filed its notice of appeal on June 12, 2018 (R. 147) and Bixby

filed its notice of appeal on June 11, 2018 (R. 146). This Court has jurisdiction over TTLC's and Bixby's appeal from the Judgment entered by the trial court pursuant to Arizona Revised Statutes sections 12-2101(A)(1) and (A)(5)(b). Furthermore, pursuant to Rule 13(h) of the Rules of Civil Appellate Procedure, TTLC and Bixby are joining in this single brief.

There is one other issue the Court and opposing counsel should be aware of. Following the trial, TTLC did not make a required payment to Bixby under the Purchase and Sale Agreement between those two parties. As a result, Bixby noticed a Trustee's Sale on May 14, 2018. Prior to the Trustee's Sale, the Deed of Trust and Assignment of Rents between Bixby and TTLC was assigned from Bixby to ALCR, LLC. The Trustee's Sale then occurred on September 20, 2018, at which ALCR, LLC was the highest bidder (See Appendix, Ex. 1). Thus, ALCR, LLC is the current owner of the Property.

Because the trial court's Judgment is against TTLC and Bixby, those parties remain the proper Appellants and they are pursuing this appeal. ALCR, LLC is aware of the trial court's ruling, however, and understands that it would be subject to the trial court's injunction if the injunction is affirmed on appeal.

STATEMENT OF FACTS

I. THE 1992 LAKES DEED RESTRICTION

Although a few instruments were recorded against the Property relating to its use as a golf course prior to the 1992 Lakes Deed Restriction (Ex. 1-3), the resolution of this case centers on the interpretation of 1992 Lakes Deed Restriction.

The important provisions of the 1992 Lakes Deed Restriction relating to this Appeal are as follows:

1. Recital D:

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

2. Recital F:

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

3. Paragraph 2:

> ***Declaration of Use Restriction***. Declarant, for the benefit of those persons or classes of persons described in Recital D above (hereafter, "Benefitted Persons,") hereby declares as follows:
>
> The Property ***shall be used for no purposes other than golf courses*** and such improvements and facilities (including without limitation, clubhouses, restaurants, pro shops, overnight lodging facilities, resort and connected recreational facilities, bars, parking areas and golf cart trails) and uses as are reasonably related to, convenient for or in

furtherance of golf course use or the accommodation of golf course patrons and guests; except that the Property may be further used for easements for ingress and egress (vehicular and otherwise), pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way, and for the construction and maintenance of walls, fences and other boundary type protection, 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. No improvement 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.

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

4. Paragraph 4:

   Enforcement. 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 discontinuation of such breach, default or violation, and, if Declarant, Developer or such Benefitted Person enforcing this Declaration prevails, Declarant, Developer or such Benefitted Person shall be entitled to reimbursement of all court costs and reasonable attorneys' fees from said defaulting owner, occupants or users.

5. Paragraph 5:

No Right or Privilege. Nothing in this Declaration shall constitute, nor be deemed to constitute, ***a right or privilege for any Benefitted Person to enter upon or use the Property for any purpose***. (Emphasis added).

6. Paragraph 6:

Term. The covenants, conditions, restrictions and easements set forth herein 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; provided however, that ***if Declarant or Developer (including their successors or assigns) determines that there has been a material change in conditions or circumstances affecting the Property*** or the covenants, conditions, restrictions and easements set forth herein, Declarant or Developer may petition the Maricopa County Superior Court or any other court or adjudicative body of competent jurisdiction for modification of this Declaration. (Emphasis added).

7. Paragraph 10:

Amendment.

(a) Notwithstanding anything to the contrary in this Declaration, in order to make corrections to accomplish mathematical closures of legal descriptions or to resolve any error or conflicts between the legal descriptions of any lot or parcel in Ahwatukee and the legal description of the Property, Declarant at any time, or from time to time, may make deletions of or additions to the Property from this Declaration and the covenants, conditions, restrictions and easements contained herein by recording in the official records of Maricopa County, Arizona, an amendment hereto executed by Declarant (without the consent or approval of any Benefitted Person) describing the portion or portions of the Property deleted.

(b) Except as provided in subparagraph (a) above, this Declaration may be amended only by recording in the official records of Maricopa County, Arizona, an Amendment approved by the

> Declarant and the Developer (or their successors and assigns) and not less than fifty-one percent (51%) of the other Benefitted Persons.

(Ex. 4, 1992 Lakes Deed Restriction).

II. BIXBY'S PURCHASE AND OWNERSHIP OF THE PROPERTY

Since at least the mid 1980's, the Property was operated as a golf course known as the Ahwatukee Lakes Golf Course (R. 1, Complaint, ¶ 6). In June of 2006, Bixby purchased the Property (Tr. Day 2, Gee testimony, p. 6).[5] Bixby had owned the Bixby Village Golf Course in California. Bixby sold the Bixby Village Golf Course and used the money from that sale to purchase the Property, utilizing a 1031 tax exchange to defer the capital gains tax on the sale of the Bixby Village Golf Course (*Id*., pp. 49-50). Bixby was not a real estate development company. At the time of the purchase of the Property, its only interest was owning and operating golf courses (*Id*., pp. 50-51). Bixby purchased the Property with the intent of operating it as a golf course (*Id*., pp. 52-53).[6] At the time of trial, the only assets of Bixby were four golf course properties (*Id*., pp. 50-51).

When Bixby purchased the Property, it believed that the purchase was a "good deal" given the purchase price (*Id*., p. 53). Also, Bixby invested an additional $400,000 into the Golf Course to improve it (*Id*., p. 54). Initially, Bixby made a

[5] "Tr." references are to the Transcript of Proceedings.
[6] The trial court did not find Mr. Gee's testimony on this point "entirely credible" (R.112, Findings of Fact and Conclusions of Law, pp. 4-6).

profit operating the Golf Course (*Id*., p. 54). As early as 2007, however, the Golf Course started losing money and Bixby began using profits from the operation of its other golf courses to subsidize the operation of the Golf Course (*Id*., pp. 54-55).

In 2008, after the Golf Course had started losing money, Bixby explored options to redevelop the Property. When the homeowner's association and surrounding neighborhood indicated there was no interest in a redevelopment of the Property, Bixby discontinued any discussions about redevelopment (*Id*., p. 59). At some point, Bixby began efforts to sell the Property as a golf course property (*Id*., p. 59). The only interested purchasers, however, were development companies rather than entities interested in continuing to operate a golf course on the Property (*Id*., pp. 59-60).

Despite the fact that Bixby was losing money operating the Golf Course, it continued to operate the Golf Course until May of 2013 (*Id*., pp. 54; R. 60, TTLC Statement of Facts, p. 1, ¶ 2). At that time, Bixby's other golf courses were becoming less profitable and could no longer subsidize the operation of the Golf Course (Tr. Day 2, Gee testimony, pp. 58-59).

As a result of ceasing the operation of the Golf Course, Bixby placed a temporary fence around the Property in the fall of 2013, and in May of 2014 it drained the ponds on the Property. (R. 60, TTLC Statement of Facts, pp. 1-2, ¶¶ 3-

4). Bixby discontinued maintaining the Property as golf course and allowed it to remain idle (*Id*., p. 2; ¶ 2).

III. TTLC'S PURCHASE AND OWNERSHIP OF THE PROPERTY

A. TTLC's Attempt To Amend The 1992 Lakes Deed Restriction.

TTLC purchased the Property from Bixby in June of 2015 (R. 60, TTLC Statement of Facts, p. 2, ¶ 5). TTLC was fully aware of the pending litigation between Swain and Bixby when it purchased the Property (Tr. Day 3, Barry testimony, p. 47). TTLC was also aware that the former Golf Course would have to be completely reconstructed if the Property were to be used as a golf course again in the future (*Id*., p. 52).

Despite knowing that the 1992 Lakes Deed Restriction restricted the use of the Property to a golf course use, TTLC had no intention of owning and operating a stand-alone golf course on the Property (*Id*., p. 47). TTLC did not even believe that a stand-alone golf course was an economically viable option for the Property (*Id*., pp. 47-48; Tr. Day 3, Anderson testimony, pp. 133-34). Nevertheless, TTLC bought the Property with the idea that it could redevelop a failed golf course into something the community would like and solve a problem in the area (Tr. Day 3, Barry testimony, p. 48; Tr. Day 3, Anderson testimony p. 131-32). Although TTLC considered different options at the time it purchased the Property, a residential

component was to be at the core of any redevelopment (Tr. Day 3, Barry testimony, p. 50).

Because TTLC was aware of the use restriction in the 1992 Lakes Deed Restriction, it knew that it would have to get an amendment or modification to the 1992 Lakes Deed Restriction in order to redevelop the Property (*Id*., pp. 49-50). After purchasing the Property, TLC initially attempted to obtain an amendment to the 1992 Lakes Deed Restriction pursuant to Paragraph 10(b), which requires 51% of the Benefitted Persons to approve the amendment (*Id*., p. 54; Ex. 4, ¶ 10). The redevelopment concept TTLC used when seeking the amendment was a new residential community with thirty percent open space and a school with a community supported farm (Tr. Day 3, Barry testimony, pp. 54-55). The idea was to create a community hub that both the new development and the Benefitted Persons would benefit from (*Id*.).

Based upon the number of Benefitted Persons and the manner in which those parties held title to their properties, TTLC determined that there were 6,989 potential signatures that were available for its proposed amendment to the 1992 Lakes Deed Restriction. Consequently, TTLC needed 3,564 signatures from the Benefitted Persons to amend the 1992 Lakes Deed Restriction. Ultimately, TTLC obtained about 2,000 signatures (*Id*., pp. 55-56). When TTLC failed to obtain the number of signatures required to amend the 1992 Lakes Deed Restriction, and because this

lawsuit was already pending in the trial court, it amended its Answer to the lawsuit to assert a counterclaim and seek a modification of the 1992 Lakes Deed Restriction pursuant to Paragraph 6 (R. 86, Amended Answer). TTLC first sought an amendment to the 1992 Lakes Deed Restriction through the amendment process of Paragraph 10(b) instead of first seeking a modification under Paragraph 6 through court intervention because it hoped that it could garner support from the community by getting the broadest amount of buy-in to its redevelopment concept and be in a better position to obtain a zoning variance from the City of Phoenix (Tr. Day 3, Barry testimony, pp. 56-57).

B. The Change In Circumstances Justifying A Modification To The 1992 Lakes Deed Restriction.

Under Paragraph 6 of the 1992 Lakes Deed Restriction, if TTLC, as the successor in interest of the Declarant, "determines there has been a material change in conditions or circumstances affecting the Property or the covenants, conditions, restrictions and easements set forth herein, [TTLC] may petition the Maricopa County Superior Court for modification of this declaration" (Ex. 4, ¶ 6). According to Aidan Barry,[7] TTLC had determined that there was such a material change in circumstances to justify a modification to the 1992 Lakes Deed Restriction (Tr. Day 3, Barry testimony, pp. 57-59). Mr. Barry stated that the change in circumstance

[7] Mr. Barry is Senior Vice President of The True Life Companies, TTLC's managing member (Tr. Day 3, Barry testimony, p. 47).

was that the Property could not realistically operate as a stand-alone golf course again in the future. The reasons that the Property could not support a stand-alone golf course were threefold: 1) a golf course could not economically survive because it could not operate at a profit; 2) the cost to reconstruct the Property into a golf course was prohibitive; and 3) it would be impossible to obtain financing to reconstruct the golf course (*Id.*). Mr. Barry further testified that TTLC did not have the financial ability to reconstruct the Golf Course and operate it as a stand-alone golf course (*Id.*, p. 60). Wilson Gee, the principal of Bixby, also testified that if Bixby reacquired the Property, it also would not have the financial ability to reconstruct and operate a stand-alone golf course on the Property (Tr. Day 2, Gee testimony, p. 68).

Taber Anderson[8] provided additional testimony regarding the Property's inability to support a stand-alone golf course. Mr. Anderson testified that the golf courses he had been involved with developing had been amenities to much larger master planned communities (Tr. Day 3, Anderson testimony, p. 128).[9] As such, funding for the development of the golf courses was generated through the sale of

[8] Mr. Anderson has been in the land development business since 1987, he worked for The True Life Companies at the time TTLC purchased the Property, and was a real estate advisor to TTLC at the time of trial (Tr. Day 3, Anderson testimony, p.127).

[9] Mr. Anderson testified that he had developed golf course properties in several states and one in Scotland (Id., p. 128).

the homes and lots in the master planned community (*Id*., pp. 128-29). He also testified that based upon his experience and the testimony from the Plaintiffs regarding when they purchased their properties, the Golf Course was probably financed in the same way when it was originally constructed (*Id*., p. 129).

Mr. Anderson further testified as to why it would be impossible to fund a reconstruction of the Golf Course without selling homes around the Property. Mr. Anderson took all the assumptions Swain's expert made regarding the cost to reconstruct the Golf Course and the revenue it would generate once it was operational. Under those assumptions, which did not even include a cost to purchase the Property, Mr. Anderson concluded that it would take twenty-nine years for a person to recover the initial investment required to turn the Property into an operational golf course (*Id*., pp. 135-39; Ex. 48). Mr. Anderson testified that no investor would be interested in waiting that long to realize a profit on their investment. At most, an investor would expect to see a return on their capital in four to seven years (*Id*., p. 138). Mr. Anderson further testified that no bank would provide lending for such a project once such a business plan was reviewed (*Id*.). Also, Mr. Barry testified that investors would not be interested in funding a stand-alone golf course, nor would an owner of the Property be able to obtain a loan to fund the reconstruction of the Golf Course (Tr. Day 3, Barry testimony, pp. 58-59).

C. Expert Testimony Regarding The Viability Of A Stand-alone Golf Course On The Property.

Both Swain and TTLC presented expert testimony that centered on two issues: 1) the cost to reconstruct the Golf Course; and 2) the viability of operating a stand-alone golf course on the Property (Tr. Day 1-3, Johnson testimony; Tr. Day 3, Carter testimony). As to the first main issue, Swain's expert, Mr. Johnson, testified that it would cost approximately $5,000,000.00 to reconstruct the Golf Course (Tr. Day 1, Johnson testimony, p. 180; Ex. 23, p. 4). Mr. Carter, TTLC's, expert testified that it would cost approximately $14,000,000.00 to reconstruct the Golf Course (Tr. Day 3, Carter testimony, pp. 180, 190-94; Ex. 45, pp. 5-7).

The importance of the cost to reconstruct the Golf Course relates to the second main issue that was the subject of the experts' testimony – the viability of a stand-alone golf course operating on the Property. Swain's expert, Mr. Johnson, conceded that if a reconstructed golf course on the Property continued to generate the same average net operating income that the prior Golf Course generated during its last three full years of operation and the cost to reconstruct the Golf Course was $5,000,000.00, then it would take 108 years before the person or entity that funded the reconstruction would receive a return on its investment (Tr. Day 3, Johnson testimony, pp. 15-16; Ex. 23, p. 20). Mr. Johnson agreed that under such circumstances, operating a golf course on the Property was not a very good business

model (Tr. Day 3, Johnson testimony, p. 16).[10] Mr. Johnson testified that the type of owner he envisioned operating a golf course on the Property would be a family or small group of people that operated it themselves; sort of like a "mom and pop" operation (Tr. Day 1, Johnson testimony, p.196; Tr. Day 3, p. 22).

Mr. Carter testified as to his report, which provides a three-year operating *pro forma* relating to the net income a golf course on the Property would generate after it was reconstructed (Tr. Day 3, Carter testimony, pp. 202-03). In his opinion, such a golf course would continue to lose money (Ex. 45, Carter expert report, p. 12). Mr. Carter's report sums up the financial viability of a golf course on the Property as follows:

> Generally when facilities like Ahwatukee Lakes are developed, owners commonly recoup the construction cost of the golf course through the sale of homes. This opportunity does not exist for the current owners. Therefore, any return on investment falls squarely on the facility's ability to produce operational profitability which, as the enclosed financial projections show, is minimal at best. Given this fact, True Club Solutions does not believe that [the Golf Course] would be a viable business if developed as a golf course. If redeveloped, it would serve more as an amenity to the surrounding homeowners than as a sustainable business capable of producing enough cash flow to cover the cost of redevelopment and provide a fair return for the investment.

(*Id*., p. 13).

[10] While Mr. Johnson conceded this point, he nevertheless testified on direct examination that he believed it was possible for a stand-alone golf course to operate on the Property (Tr. Day 1, Johnson testimony, p. 197).

In addition to the experts' testimony on the issue of whether a stand-alone golf course could ever be operated on the Property, Mr. Gee, the principal of Bixby, testified that one of Bixby's other golf courses, Club West, also in Ahwatukee, was under contract to be sold at a price of $1.5 million (Tr. Day 2, Gee testimony, pp. 60-61). Club West is a full 18-hole championship style golf course in operational condition, unlike the Lakes Golf Course, which was an executive style golf course that was in a fallow condition. Mr. Gee testified that Club West had been listed for sale at $1.9 million, but at that price, he did not receive any offers (*Id*., p. 61). Finally, Mr. Gee testified that even if the Lakes Golf Course were in the condition it was in when Bixby purchased it in 2006, it could not be sold because there is not a market for executive golf courses (*Id*., p. 63).

D. TTLC's Requested Modification To The 1992 Lakes Deed Restriction.

As part of its request to have the 1992 Lakes Deed Restriction modified pursuant to Paragraph 6, TTLC introduced into evidence its proposed amendment/modification (Ex. 46, Proposed Amendment to 1992 Lakes Deed Restriction). The purpose of the Amendment was to allow a residential use on the Property in conjunction with a golf course (Tr. Day 3, Anderson testimony, p. 140). By the time of trial, TTLC had abandoned its prior plan for the Property and was committed to including a golf course with any redevelopment in the hope that it would be met with a positive reception (*Id*., p. 145).

Under the proposed Amendment, the future golf course would ultimately be conveyed to a new homeowners' association (*Id*., p. 141). The purpose for conveying the new golf course to a homeowners' association was to create a professional funding mechanism to prevent what happened to the previous golf course – to make sure there was a way to generate revenue in tough economic times (*Id*., pp. 141-42). The new homeowners' association would only be made up of the residents of the new residential community, not the existing Benefitted Persons (*Id*., pp. 142-43).

Also introduced into evidence was a conceptual plan of the proposed redevelopment (*Id*., p. 144; Ex. 47). The concept included a 9-hole golf course on the west side of the Property and a landscape "buffer zone" all around the boundary of the Property (*Id*., pp. 144-46). Mr. Anderson testified that under the 1992 Lakes Deed Restriction, which allows "overnight lodging facilities," TTLC's redevelopment concept would be permitted if, instead of houses, overnight lodging facilities were built as part of a resort-type golf course on the Property (*Id*., p. 150). He further testified, however, that even a resort-type redevelopment would cost too much without a residential component (*Id*., pp. 150-51).

ISSUES PRESENTED

1. Whether the trial court erred as a matter of law in ruling on Swain's cross-motion for summary judgment that the 1992 Lakes Deed Restriction requires the owner of the Property to affirmatively operate a golf course on the Property.

2. Whether the trial court abused its discretion in granting the Plaintiffs a permanent injunction requiring the owner of the Property to restore and operate a golf course on the property.

3. Whether the trial court erred as a matter of law in ruling that forcing the owner of the Property to affirmatively operate a golf course on the Property is not a violation of the Thirteenth Amendment to the United States' Constitution.

4. Whether the trial court erred as a matter of law in denying TTLC's requested modification to the 1992 Lakes Deed Restriction due to a material change in circumstances.

5. Whether the trial court abused its discretion in awarding attorneys' fees to Plaintiffs.

ARGUMENT

I. THE PROPER INTERPRETATION OF THE 1992 LAKES DEED RESTRICTION DEMONSTRATES THAT THE OWNER IS NOT REQUIRED TO OPERATE A GOLF COURSE ON THE PROPERTY.

A. Standard Of Review.

The trial court's ruling on the interpretation of the 1992 Lakes Deed Restriction was on the basis of cross-motions for summary judgment. On appeal, issues of summary judgment are reviewed *de novo*. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, 953 P.2d 168, 170 (Ariz. 1998). Furthermore, the interpretation of written CC&Rs is *de novo* when there is no extrinsic evidence of the drafter's intent. *Gfeller v. Scottsdale Vista North Townhomes Ass'n*, 193 Ariz. 52, 53, 969 P.2d 658, 659 (App. 1998). Neither party presented extrinsic evidence of the intent of the drafter of the 1992 Lakes Deed Restriction.

B. The 1992 Lakes Deed Restriction Is A Restrictive Covenant, Not An Affirmative Covenant.

A deed containing a restrictive covenant that runs with the land is a contract. *Ahwatukee Custom Estates Mgmt. v. Turner*, 196 Ariz. 631, 634, P5, 2 P.3d 1276, 1279 (App. 2000); *Ariz. Biltmore Estates Assn v. Tezak*, 177 Ariz. 447, 448, 868 P. 2d 1030, 1031 (App. 1993). The interpretation of a contract is generally a matter of law. *Hadley v. Sw. Props., Inc.*, 116 Ariz. 503, 506, 570 P. 2d 190, 193 (1977); *Biltmore Estates*, 177 Ariz. at 448, 868 P. 2d at 1031. Furthermore, the words of a restrictive covenant must be given their ordinary meaning. *Duffy v. Sunburst Farms*

East Mutual Water and Agricultural Company, Inc., 124 Ariz. 413, 604 P.2d 1124 (1980); *Riley v. Stoves*, 22 Ariz. App. 223, *526* P.2d 747 (1974). "The words themselves, within a restrictive covenant are the primary evidence of the meaning of such words." *Duffy*, at 416, 604 P.2d at 1127 (quoting *Parks v. Richardson*, 567 S.W.2d 465 (Tenn. App.), *cert. denied* (Tenn. Supreme Ct. Nov. 7, 1977). "When the meaning of the covenant is reasonable and unambiguous, however, there is no need to seek further clarification outside its language." *Duffy*, at 416, 604 P.2d at 1127.

The key language of the 1992 Declaration that must be interpreted in this case is found in Paragraph 2 and states:

> 2. ***Declaration of Use Restriction***.
>
> The Property shall be used for no purposes other than golf courses and such improvements and facilities . . . and uses as are reasonably related to, convenient for or in furtherance of golf course use or the accommodation of golf course patrons and guests. . . .
>
> Neither Declarant nor its successors or assigns ***shall use the Property*** for any purpose other than as stated above (emphasis added).

The language of Paragraph 2 is unambiguous and clearly restricts how the Property may be used, but it does not mandate a use or require the owner to operate a golf course. This restriction prohibits the owner of the Property from building houses, apartments or retail stores on the Property, but leaving the Property without a use is not a violation of the restriction. Simply put, failing to use the Property as a

golf course is not a breach of the restrictive covenant. In other words, restricting the use to certain purposes does not ***compel*** that use.

The Restatement (Third) of Property (Servitudes) (the "Restatement") distinguishes between affirmative covenants and negative covenants. *See* Restatement § 1.3 (2000). An "affirmative covenant" requires the covenantor to do something, such as pay money, supply goods or services, or perform some other act, either on or off land owned or occupied by the covenantor. *See id.* § 1.3(2), cmt. e. A "negative covenant", on the other hand, requires the covenantor to refrain from doing something. *See id.* § 1.3(2). A "restrictive covenant" is a type of negative covenant that limits the permissible uses of land. *Id.* § 1.3(3). As a use restriction, Paragraph 2 of the 1992 Lakes Deed Restriction is a restrictive covenant.

The Restatement contains the following illustration to demonstrate the distinction between affirmative covenants and use restrictions:

> The declaration of covenants for Sandy Acres Estates, which states that all covenants run with the land, requires lot owners to maintain yards in accord with landscape plans approved by the architectural-control committee and **prohibits use of any lot for other than single-family residential purposes**. The covenants to maintain yards are affirmative covenants and the **use restrictions are restrictive covenants**.

Restatement § 1.3, Ill. 5 (emphasis added). The ordinary meaning of the words used in Paragraph 2 unambiguously demonstrate that the 1992 Lakes Deed Restriction is a restrictive covenant, not an affirmative covenant.

To begin with, Paragraph 2 starts with the language "Declaration of Use Restriction." Consequently, the drafters of the 1992 Lakes Deed Restriction specifically identified the covenant as a use restriction, not an affirmative covenant. Second, Paragraph 2 states that the "Property shall be used for no purposes other than golf courses and such uses and facilities . . . and uses as are reasonably related to . . . golf course use." As in the Restatement example, such language prohibits any uses other than a golf course use, but does not compel that use, demonstrating a restrictive covenant. Finally, Paragraph 2, in the second sub-paragraph, again states that "[n]either Declarant or its successors or assigns shall use the Property ***for any purpose other than*** as stated above" (emphasis added). This language is almost identical to the language used in the Restatement example above. As such, it unambiguously prohibits certain uses, but does not create an affirmative obligation on the owner of the Property that an affirmative covenant would require.

Many residential subdivisions have use restrictions that restrict the use of the property to single family residences as in the Restatement example. The restriction might be stated as "the property shall be used for no purpose other than single family residences." Does such a restriction require the owner of the property to build a house on the property so that it may be used as single-family residence? Of course, it does not. There are subdivisions all over Arizona and across the country that have vacant lots with use restrictions that permit only single-family homes. The

developers and owners of those lots, however, are not required to build a house on those lots immediately because of the use restriction. A lot in such a subdivision may remain undeveloped forever and may even be sold multiple times before someone actually builds a house on it. The restriction prevents an owner from building a convenience store on the lot, but it certainly does not ***compel*** the owner to actually build a house.

Likewise, the Paragraph 2 Restriction does not compel the owner of the Property to build a golf course on the Property or use it for such purpose. The restriction is just that – a restriction that prevents any use contrary to the restriction, but not affirmatively requiring a particular use. Plaintiffs' and the trial court's interpretation of the use restriction would mean that all shopping centers, business parks, industrial parks and residential subdivisions with use restrictions would require the owners of undeveloped parcels within those properties to immediately build, maintain and keep in use improvements that satisfy the use restriction. Such an interpretation is not reasonable and is contrary to basic legal principles of restrictive covenants as set forth in the Restatement.

C. Additional Language In The 1992 Lakes Deed Restriction Supports The Interpretation That The Covenant Is A Use Restriction.

Pursuant to *Elm Retirement Center v. Callaway*, 226 Ariz. 287, 290, 246 P.3d 938, 941 (App. 2010), the Court must interpret the 1992 Lakes Deed Restriction in the context of all the provisions in the contract. In doing so, the Court must take into

consideration the other specific language in Paragraph 2 and the language in Paragraph 5.

Plaintiffs and the trial court completely downplayed two important clauses of paragraph 2. The first states:

> The Property shall be used for no purposes other than golf courses and such improvements and facilities . . . and uses as are reasonably related to, convenient for or in furtherance of golf course use or the accommodation of golf course patrons and guests; **except that the Property may further be used for easements for ingress and egress . . ., pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way, and for the construction and maintenance of walls, fences and other boundary type protection, 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. No improvement 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**. (Emphasis added)

The emphasized language expressly provides for an exception to the restriction that the Property shall be used for no purposes other than golf courses. Thus, the Property may be used for a golf course or it may be used for the other purposes listed in that clause; essentially undeveloped property, walking trails and various easements that benefit the "Ahwatukee project." Notably, the additional uses are not tied to the use of the Property as a golf course, but instead must be reasonably related to the development and use of the Ahwatukee project. Moreover, the last word of the emphasized language above is the plural word "purposes," clearly indicating that the Property could be used for more than the sole purpose of a golf course. Accordingly,

paragraph 2 expressly indicates that the owner is not required to operate a golf course on the Property because it has the specific right to use any or all of the Property for the other uses.

Paragraph 2 also states:

> 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 (emphasis added).

This clause of paragraph 2 should have been determinative of the proper interpretation of the covenant as a restrictive covenant. This unambiguous language gives the owner of the Property the unfettered discretion to demolish and cease the use of the golf course improvements and essentially leave the Property undeveloped. The trial court's interpretation that the Property must be used as a golf course is directly contrary to the owner's right to demolish and ***cease the use of*** any of the improvements which include the greens, tee boxes, fairways and other golf course improvements. Accordingly, ceasing the use of the golf course and leaving the Property undeveloped is specifically provided for in Paragraph 2.

Additionally, Paragraph 5 states that "[n]othing in this Declaration shall constitute, nor be deemed to constitute, a right or privilege for any Benefitted Person to enter upon or use the Property for any purpose." Consequently, Plaintiffs have no right to use the Property for golfing or any other purpose. As such, Paragraph 5

reinforces the interpretation that the owner is not compelled to operate a golf course. Because the Benefitted Persons do not have the right to use the Property for golfing, it only makes sense that they cannot compel the owner to provide a golf course for their use. The idea that the drafters of the 1992 Lakes Deed Restriction would state that the Benefitted Persons have no right to enter upon or use the Property for any purpose, but also require the owner to affirmatively operate a golf course for their benefit is completely incongruous. Clearly, the drafters of the 1992 Lakes Deed Restriction intended that the Property could only be used for the purposes stated in Paragraph 2, but such uses were not compelled.

D. The Trial Court Did Not Properly Apply *Powell v. Washburn*.

Following the oral argument on the cross-motions for summary judgment, the trial court stated: "the flaw in [TTLC's] argument is that, because [the 1992 Lakes Deed Restriction]'s worded a certain way, it has to mean that it has to be interpreted in a certain way. And that's the opposite of what *Powell v. Washburn* makes clear. That [sic] that's not how the Court is to interpret restrictive covenants. That it says the Court is to look beyond the words to the surrounding circumstances and the general purpose of the restriction" (Tr. dated May 10, 2016, Oral Argument, pp. 35-36).

In *Powell v. Washburn*, the Arizona Supreme Court stated that it accepted review of the case because of the need for a clear statement of how to interpret

restrictive covenants used in planned communities. *Powell v. Washburn*, 211 Ariz. 553, 555, 125 P.3d 373, 375 (2006). The court noted the seeming contradiction in prior Arizona cases which indicated that on the one hand courts should "consider not only the strict and technical meaning of the particular words of restriction, but also the surrounding circumstances, the general purpose of the restrictions, and the manner in which they have been interpreted by the property owners," but on the other hand that "a court must strictly construe the terms of the restrictive covenant in favor of the free use of land and against the restriction." *Id.* at 556, P.3d at 376. The court rejected the requirement to strictly construe restrictive covenants in favor of the free use of land. Instead, the Court went on to adopt the Restatement (Third) of Property (Servitudes) § 4.1 to hold that "restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created." *Id.* at 554, P.3d at 374. Consequently, a court may look to the circumstances surrounding the creation of the servitude to carry out the purpose for which it was created. *Id.* at 557, P.3d at 377; Restatement (Third) of Property: Servitudes § 4.1.[11]

[11] In *Powell v. Washburn*, the court was asked to determine whether a particular use of the property was prohibited under the restrictive covenant. In this case, Plaintiffs are arguing that a non-use of the Property is prohibited by the restrictive covenant – in effect, turning a restrictive covenant into an affirmative covenant. Such an issue was not raised in *Powell v. Washburn*.

As can be determined from the trial court's own statements, the trial court downplayed the actual words of the restriction in interpreting the 1992 Lakes Deed Restriction. Relying on *Powell v. Washburn*, the trial court rejected the argument that because the restriction is "worded in a certain way, it has to mean that it has to be interpreted in a certain way" (*Id.*). Under *Powell v. Washburn*, however, a court must look to both the meaning of particular words and to the circumstances surrounding the creation of the servitude to determine the purpose and intent of the restriction. *Id.* at 557, 125 P.3d at 377. Consequently, an interpretation that is contrary to the words of the covenant cannot be what the parties intended.

In this case, the clear intent and purpose of the 1992 Deed Restriction was to ***restrict*** the use of the Property to certain purposes, not to ***compel*** the owner to put the Property to a particular use. There is simply no language in the 1992 Lakes Deed Restriction that says that the owner must operate a golf course business on the Property for the benefit of the Benefitted Persons. To the contrary, Paragraph 5 specifically states that the Benefitted Persons do not have a right or privilege to enter upon or use the Property for any purpose. Moreover, if the drafters of the 1992 Lakes Deed Restriction really meant to say "the owner shall operate a golf course on the Property," saying instead that the "Property shall be used for no purposes other than golf courses" and "[n]either Declarant or its successors or assigns shall

use the Property for any purpose other than as stated above" was quite a peculiar way of saying it.

Of course, the drafters of the 1992 Lakes Deed Restriction did not say "the owner shall operate a golf course on the Property," because they were drafting a restrictive covenant, not an affirmative covenant. This clear intent from the language of the 1992 Lakes Deed Restriction was apparently lost on the trial court. Moreover, the manner in which the trial court interpreted the 1992 Lakes Deed Restriction places the Restatement (Third) of Property: Servitudes § 4.1 at odds with The Restatement (Third) of Property: Servitudes § 1.3. In other words, when the drafters of a servitude clearly intend to create a restrictive covenant under section 1.3 of the Restatement, a court cannot rely on supposed "circumstances surrounding the creation" of that servitude to interpret the servitude as an affirmative covenant. To do so, would allow section 4.1 of the Restatement to swallow and render meaningless the provisions of section 1.3. Rather, because the drafters unambiguously drafted a restrictive covenant under section 1.3, the "circumstances surrounding the creation" of the restrictive covenant under section 4.1 dictate that the servitude be interpreted as a restrictive covenant.

By drafting a restrictive covenant, the drafters of the 1992 Lakes Deed Restriction could not have intended to place an affirmative obligation on the owner of the Property to operate a golf course. Instead, the clear purpose of the restriction

was the same as any other restrictive use covenant – to prohibit any use other than as stated in the restriction. Accordingly, the only reasonable interpretation of the 1992 Lakes Deed Restriction is that it does not compel the owner to affirmatively operate a golf course business on the Property for the benefit of the Benefitted Persons.

II. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF.

A. Standard Of Review.

Granting or denying injunctive relief rests within the trial court's sound discretion. *Ahwatukee Custom Estates Management Ass'n v. Turner*, 196 Ariz. 631, 634, 2 P.3d 1276, 1279 (App. 2000). Thus, an appellate court reviews a trial court's order granting or denying an injunction for a clear abuse of discretion. *See Mahar v. Acuna*, 230 Ariz. 530, 534, 287 P.3d 824, 828 (App. 2012); *County of Cochise v. Faria*, 221 Ariz. 619, 621, 221 P.3d 957, 959 (App. 2009). Legal issues in connection with the injunction, however, are reviewed *de novo*. *See Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, 982 P.2d 1277, 1280 (1999); *Berry v. Foster*, 180 Ariz. 233, 235, 883 P.2d 470, 472 (App. 1994).

B. The Equities Weigh In Favor Of The Owner Of The Property.

"An injunction is an equitable remedy which allows the court to structure the remedy so as to promote equity between the parties." *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331 (App. 1995). The enforcement of restrictive covenants

through an injunction is not a matter of right but is governed by equitable principles. *McRae v. Lois Grunow Memorial* Clinic, 40 Ariz. 496, 505 (1932). These equitable considerations include the relative hardships and injustice; the public interest; misconduct of the parties; delay on the part of the plaintiff; and the adequacy of other remedies. *Ahwatukee Custom Estates Management Ass'n v. Turner*, 196 Ariz. 631, ¶ 9, 2 P.3d 1276, 1280 (App. 2000). "It is well settled that specific performance of a contract will not be granted when it will result in great hardship and injustice to one party without consideration, gain, or utility to the other, or in the case where the public interest would be prejudiced thereby." *McRae,* 40 Ariz. at 503, 14 P.2d at 478 (1932). Although the trial court made findings of fact to the effect that the "equities surrounding the restrictive covenant on the Lakes Golf Course do not favor TTLC," Bixby and TTLC submit that such a conclusion was an abuse of the trial court's discretion.[12]

Here, Plaintiffs' assertion that they have been damaged by "their inability to use the Ahwatukee Lakes Golf Course for golfing or golfing practice" is hardly sufficient to merit an equitable determination requiring specific performance of the enormous burden of requiring the owner of the Property to operate a golf course

[12] Obviously, the trial court's injunction will automatically be dissolved if the Court rules in favor of TTLC and Bixby on the issue of whether the 1992 Lakes Deed Restriction compels the owner of the Property to affirmatively operate a golf course on the Property. Thus, this issue only needs to be ruled upon if the Court rules in favor Swain on the meaning of the 1992 Lakes Deed Restriction.

business, especially at a financial loss. It is in no way equitable to find that the Plaintiffs' interest in playing golf at a particular golf course overrides the Property owner's right against involuntary servitude. Moreover, the 1992 Declaration itself states that, "[n]othing in this Declaration shall constitute, nor be deemed to constitute, a right or privilege for any Benefitted Person to enter upon or use the Property for any purpose." (Ex. 1992 Declaration, ¶5.) Consequently, Plaintiffs cannot compel the owner to operate a golf course for their benefit when Plaintiffs do not even have the contractual right to play golf on the Property.

Further, by statute, Arizona prohibits injunctive relief "to prevent breach of contract, the performance of which would not be specifically enforced." *A.R.S. section 12-1802(5).* A contract for personal services will not be specifically enforced. *Engelbrecht v. McCullough*, 80 Ariz. 77, 79, 292 P.2d 845 (1956); *Miller v. City of Phoenix*, 51 Ariz. 254, 75 P.2d 1033 (1938). As set forth more fully below, the Thirteenth Amendment of the United States Constitution prohibits involuntary servitude, which is what an injunction would require. Because a contract for personal services cannot be specifically enforced, the court cannot enjoin TTLC and require it to operate a business on the Property.

Moreover, the trial court's injunction would require the owner of the Property to invest at least $5 million to reconstruct the golf course. Despite Swain's expert's vague statement that a "mom and pop" owner would be interested in reconstructing

the golf course and operating it, he conceded that the economics do not create a very good business model. Nor did Swain ever contradict TTLC's testimony that it would be impossible to get investors to fund a reconstruction of the golf course or to get a loan for such purposes.[13] In other words, the trial court's injunction places an impossible burden on the owner of the Property, outside the pipe dream that some wealthy benefactor will plunk down the money necessary to reconstruct the golf course out of the benefit of their heart. Such a person would have to accept the fact that they would not receive a return on their investment for at least twenty-nine years at the earliest and almost 108 years at the latest. They would also have to accept the fact that they would be putting at least $5 million into a property that the evidence showed would be worth only $1.5 million after it is reconstructed. No reasonable person would do such a thing.

Given these realities, the trial court's injunction is likely to be ineffective in any event. The subject of an injunctive order cannot be held in contempt if the party lacks the financial ability to comply with the order. *S.E.C. v. Ormont Drug & Chemical Co., Inc.*, 739 F.2d 654, 657 (D.C. Cir. 1984); 43A *C.J.S.* Injunctions § 465 (2017). Here, neither TTLC, Bixby, nor any other realistic, potential owner of the Property will likely be able to comply with an order that effectively requires them

[13] Neither Plaintiffs nor their expert presented evidence as to exactly how a "mom and pop" owner would fund a reconstruction of the Golf Course.

to incur at least $5 million to reconstruct and operate a stand-alone golf course that failed in the past and has no real economic upside.

III. FORCING THE OWNER OF THE PROPERTY TO OPERATE A GOLF COURSE WOULD BE A VIOLATION OF THE THIRTEENTH AMENDMENT.

A. Standard Of Review.

The trial court ruled on this issue again on cross-motions for summary judgment. On appeal, issues of summary judgment are reviewed *de novo*. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, 953 P.2d 168, 170 (Ariz. 1998). Furthermore, this issue involves a pure question of law involving the interpretation of the United States' Constitution. Such issues are reviewed *de novo*. *See Cave Creek Unified Sch. Dist. V. Ducey*, 231 Ariz. 342, 347, 295 P.3d 440, 445 (App. 2013) (involving interpretation of the Arizona State Constitution).

B. The Trial Court's Injunction Requires The Owner Of The Property To Work For The Benefitted Parties.

To compel the owner of the Property to operate a business against its will constitutes involuntary servitude and peonage in violation of the Thirteenth Amendment of the United States Constitution and 42 U.S.C. § 1994. The Thirteenth Amendment of the United States Constitution states:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. *US Const. amend. XIII.*

Also, 42 U.S.C. § 1994 states:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or ***enforced***, or by virtue of which any attempt shall hereafter be made to establish, maintain or enforce directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debtor obligation, or otherwise, are declared null and void (emphasis added).

Involuntary servitude occurs where a person has "no available choice but to work or be subject to legal sanction." *United States v. Kozmiski*, 487 U.S. 931, 943, 108 S. Ct. 2751 (1988) *superseded by statute,* Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA 2000"), Pub. L. No. 106—386, 114 Stat. 1464. There are limited circumstances under which a person can be compelled to work in the United States and those circumstances require a compelling governmental interest and relate to the fulfillment of fundamental societal obligations, *see Hurtado v. United States*, 410 U.S. 578, 589, n. 11, 93 S. Ct. 1157 (1973) (upholding compelled jury service); *Selective Draft Law Cases*, 245 U.S. 366, 390, 38 S. Ct. 159 (1918) (upholding forced military service). Conversely, a contractual obligation is not of sufficient import to require compulsory labor. *Pollock v. Williams,* 322 U.S. 4, 64 S. Ct. 792 (1944); *Moss v. Ortiz*, 17 Cal. 4th 396, 950 P.2d 59 (1998). "Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no

indebtedness warrants a suspension of the right to be free from compulsory service." *Pollock*, 322 U.S. at pp. 17-18.

Here, the Plaintiffs' interest in attempting to compel the owner of the Property to build and operate a golf course can be, at best, stated as their personal interest in playing golf near their homes. This is hardly the class of interests such as national security and the fundamental right to a jury trial that courts have recognized to be so compelling as to justify the abrogation of such a basic human and Constitutional right as the right against involuntary servitude. Thus, this Court cannot compel the owner of the Property to build and run a golf course on the Property.

Further, this situation is analogous to a personal service contract which will not be specifically enforced in Arizona. *Engelbrecht v. McCullough*, 80 Ariz. 77, 79, 292 P.2d 45 (1956); *Miller v. City of Phoenix*, 51 Ariz. 254, 75 P.2d 1033 (1938). Requiring the owner of the Property to operate a golf course business will require a person to provide services, without pay, to the Plaintiffs and the Benefitted Persons, which is contrary to Arizona law.

The trial court stated that this issue is resolved by *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 45, 688 P.2d 682, 691 (App. 1984). There is virtually no discussion of this issue in *Shalimar*, however. The court simply states that "Appellants cite no authority for the assertion that it would be unconstitutional to require them to maintain their property as a golf course." *Id.* Here, Bixby and TTLC

do cite to authority. Moreover, the trial court in this case is requiring the owner of the Property to do much more than simply "maintain their property as a golf course" as stated in *Shalimar*. In this case, the trial court is actually requiring the owner of the Property to operate a business for the benefit of Plaintiffs and the Benefitted Persons – one that has historically been unprofitable to boot.

Clearly, affirmative covenants that require property owners to maintain their properties in a certain condition have been enforced for decades. *Id.* This case involves much more than simply requiring the owner of the Property to maintain its property. The trial court's judgment would require the owner to spend millions of dollars to reconstruct a golf course and then to operate a business on the Property. Operating a golf course business would require the owner to take down and manage tee times, to collect greens fees, to maintain the tee boxes, greens and fairways, to act as the course ranger, to maintain the books and records of the course, to generally manage the golf course and do all the other things necessary for the Property to operate as a golf course. To say in this case that the trial court is merely requiring the owner to maintain the Property is completely disingenuous. Accordingly, to resolve this issue, this Court is going to have to address this issue with much more earnest than the scant attention it received in *Shalimar*.

IV. TTLC IS ENTITLED TO A MODIFICATION OF THE 1992 LAKES DEED RESTRICTION PURSUANT TO PARAGRAPH 6.

A. Standard Of Review.

This issue required the trial court to both interpret the meaning of Paragraph 6 of the 1992 Lakes Deed Restriction and to apply the law as it relates to the proper interpretation of Paragraph 6. As previously stated, the interpretation of written CC&Rs is *de novo* when there is no extrinsic evidence of the drafter's intent. *Gfeller v. Scottsdale Vista North Townhomes Ass'n*, 193 Ariz. 52, 53, 969 P.2d 658, 659 (App. 1998). Neither party presented extrinsic evidence of the intent of the drafter of the 1992 Lakes Deed Restriction. Additionally, whether the trial court properly applied the law and whether its legal conclusions were correct are reviewed *de novo*. *See Pi'Ikea, LLC v. Williamson*, 234 Ariz. 284, 285, 321 P.3d 449, 450 (App. 2014), *Alliance TruTrus, L.L.C. v. Carlson Real Estate Co.*, 229 Ariz. 84, 85, 270 P.3d 911, 912 (App. 2012).

B. The 1992 Lakes Deed Restriction Specifically States That The Owner Determines Whether There Has Been A Change Of Circumstances To Justify A Modification Of The Restrictions.

Paragraph 6 of the 1992 Lakes Deed Restriction specifically provides that if the declarant or developer, including its successors, determines that there has been a material change in conditions or circumstances affecting the Property, the successor may have the Declaration modified by petitioning the court. Consequently,

Paragraph 6 of the 1992 Lakes Deed Restriction gives the owner the contractual right to determine whether there has been a change in conditions or circumstances to modify the restrictions. Once the owner has made that determination, it must then petition the court for the modification. Accordingly, Paragraph 6 raises two issues: 1) what amount of deference should the court give to the owner's determination that there has been a material change in conditions and 2) what is the court's role once the owner has made that determination and petitioned the court for a modification.

Despite the clear language in Paragraph 6 giving the owner the contractual right to determine whether there has been a material change in circumstances, the trial court gave it absolutely no meaning. The trial court's conclusion of law No. 18 states that the owner's determination of "material change" is not binding or even entitled to deference and that established legal rules for modification of a restrictive covenant apply (R. 112, Findings of Fact and Conclusions of Law No. 18, p. 20). If the drafters of the 1992 Lakes Deed Restriction wanted established legal rules for modification of a restrictive covenant to apply, they would not have given the owner the contractual right to determine whether there had been a material change in circumstances to justify a modification. Furthermore, rather than address what the court's role is once the owner has made the determination of a material change in circumstances, the court simply relied on *Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d 609, 612 (1964) (*Id*., p. 21, Finding No. 22). There was no provision in the

CC&Rs in *Decker*, however, that specifically gave an owner the right to determine whether a material change in circumstances had occurred. Consequently, TTLC and Bixby believe the issue raised here is a matter of first impression in Arizona. [14]

1. The Owner's Determination Of A Material Change In Circumstances Is Entitled To Deference.

Arizona courts look to the Restatement of Property for guidance in the absence of contrary authority. *Tierra Ranchos Homeowner's Ass'n v. Kitchukov*, 216 Ariz. 195, 201, 165 P.3d 173, 179 (App. 2007). Under the Restatement (Third) of Property (Servitudes) § 7.1, a servitude may be modified by agreement of the parties, *pursuant to its terms*, or under other rules set forth in the Restatement. As stated in Comment c to § 7.1 of the Restatement, "[c]hange may be effective on agreement of a specified percentage of the parties, *at the discretion of a single party (often the developer)*, or on occurrence of a condition" (emphasis added). The Restatement adds that "a modification or termination pursuant to such a provision is generally effective." *Id.*, Comment c. Consequently, pursuant to the terms of Paragraph 6, TTLC had the discretion to determine whether a change in circumstances had occurred to allow for a modification to the 1992 Lakes Deed Restriction. That determination should be "generally effective." *See id.*

[14] This case is also distinguishable from *Shalimar Association v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 688 P.2d 682 (App. 1984). In *Shalimar*, there were no CC&Rs that gave the developer or its successors the contractual right to determine if there had been a change in circumstances to allow for a modification to the CC&Rs.

TTLC, as the successor in interest to the Developer, determined in its discretion that a change in circumstances had occurred. Because the 1992 Lakes Deed Restriction gave TTLC the contractual right to make that decision, the Court must give considerable deference to TTLC's decision. *See* Restatement (Third) of Property (Servitudes) § 7.1. *See also, Tierra Ranchos Homeowner's Ass'n v. Kitchukov*, 216 Ariz. 195, 201, 165 P.3d 173, 179 (App. 2007). In *Tierra Ranchos*, the court considered when a homeowners' association's decisions were entitled to deference from the court. *Id.* at 199-201, 165 P.3d at 177-79. Although the court relied on the Restatement (Third) of Property (Servitudes) § 6.13 relating to common-interest community associations,[15] it specifically noted that it was not considering whether the authority given to the association by the CC&Rs to act in its "sole discretion" contractually imposed a deferential standard of review because the association did not make that contention. *Id.* at 200 n.1, 165 P.3d at 178 n.1. TTLC did assert in this case, however, that the 1992 Lakes Deed Restriction gave it the contractual right to determine whether there had been a change in circumstances and, therefore, the Court was required to give deference to that decision (R. 99,

[15] This case does not involve a common-interest community because Plaintiffs and the other "Benefitted Persons" under the 1992 Lakes Deed Restriction do not pay for the use of, or contribute to the maintenance of the golf course. *See* Restatement (Third) of Property (Servitudes) § 6.2(1) (definition of common-interest community).

TTLC's Pre-Trial Memorandum, p. 5). Such deference is in accord with the Restatement (Third) of Property (Servitudes) § 7.1.

In cases where the court gives deference to decisions of an association (or in this case, a declarant's successor), something similar to the business judgment rule applies. *Tierra Ranchos*, at 200-01, 165 P.3d at 178-79. So long as the decision is made within the scope of the declarant's authority and in good faith, the courts defer to the authority given to the declarant in the CC&Rs. *Id.*, citing *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 950 (Cal. 1999). Here, TTLC determined in good faith that a material change in conditions or circumstances affecting the Property or the covenants, conditions, restrictions and easements set forth in the 1992 Lakes Deed Restriction occurred. The material change that has occurred is that operating a stand-alone golf course on the Property is no longer a realistic possibility, precluding the original purpose of the 1992 Lakes Deed Restriction from being realized, which was true at the time TTLC obtained ownership of the Property.

Operating a stand-alone golf course on the Property is no longer a realistic possibility and cannot be realized because there is no financial incentive for any owner of the Property to spend the money necessary to reconstruct a golf course similar to the one that was previously there, particularly when the operation of a stand-alone golf course on the Property historically has not been and, would not in

the future, be profitable. Moreover, there is no funding mechanism to support the needed reconstruction. No owner could attract investors to invest in or obtain a loan to reconstruct a stand-alone golf course that has little hope of being financially viable. No reasonable owner of the Property would invest the money needed to reconstruct a stand-alone golf course simply to lose money operating the golf course and with no realistic opportunity to recover the investment in reconstructing the golf course.[16] The current condition of the Property precludes any realistic opportunity for a stand-alone golf course to be operated on the Property, demonstrating the change in conditions or circumstances that requires a modification to the 1992 Lakes Deed Restriction. Moreover, without a modification to the 1992 Lakes Deed Restriction, the Property is doomed to remain in its current fallow condition.

Accordingly, TTLC made a good faith determination that there has been a material change in conditions or circumstances affecting the Property or the covenants, conditions, restrictions and easements set forth in the 1992 Lakes Deed Restriction. That determination, therefore, must be given deference. *Id.*

[16] As previously stated, even under Plaintiffs' expert's analysis, it would take an investor 29 years just to cover the original investment required to reconstruct a stand-alone golf course based upon what he says it will cost to re-construct the golf course and the revenue a new course would generate. No reasonable investor/entrepreneur will likely make such an investment.

2. The Court's Role Once The Owner Has Determined That There Has Been A Material Change In Circumstances.

Paragraph 6 of the 1992 Lakes Deed Restriction states that once the declarant or its successor has determined that there has been a material change in circumstances or conditions affecting the Property, it may petition the court for a modification. The question thus becomes what standard should the Court use to evaluate the proposed modification. TTLC asserted below that there are two possibilities. First, the court can apply the business judgment rule and give TTLC the same deference it is entitled to in determining whether there is a material change in conditions and approve the modification if TTLC is acting in good faith. Second, the court can apply the standard of reasonableness as set forth in *Tierra Ranchos Homeowner's Ass'n v. Kitchukov*, 216 Ariz. 195, 201-02, 165 P.3d 173, 179-80 (App. 2007). In either event, the court below should have granted TTLC's proposed modification.

i. TTLC's proposed modification was entitled to deference.

The language of Paragraph 6 relating to a modification of the 1992 Lakes Deed Restriction contains a single sentence. Thus, the discretion the Paragraph gives to the declarant or its successor to determine whether a material change in conditions or circumstances has occurred under the business judgment rule also applies to the declarant's proposed modification. In other words, the language does not differentiate between the decision regarding the change in conditions or

circumstances and the proposed modification. The requirement that the declarant petition the court is to simply have the court verify that the declarant is acting in good faith in making the modification. As explained below, TTLC's proposed modification meets the reasonableness standard of *Tierra Ranchos*. Consequently, it must also meet the business judgment rule/good faith standard, which provides even more deference to TTLC's proposed modification.

ii. TTLC's proposed modification meets the reasonableness standard of *Tierra Ranchos*.

If TTLC's proposed modification to the 1992 Lakes Deed Restriction is not entitled to the business judgment rule standard, then it must be subject to the reasonableness standard set forth in *Tierra Ranchos*. In *Tierra Ranchos*, the court stated:

> Arizona courts have not expressly determined what deference, if any, should be given to a community association's discretionary decisions concerning modifications or improvements to property…. If the business judgment rule applies, we need only determine whether … Tierra Ranchos acted within the scope of its authority and in good faith. If a reasonableness standard is appropriate, on the other hand, we must determine … the reasonableness of the Architectural Committee's decision.[17]

[17] TTLC recognizes that *Tierra Ranchos* involved decisions of a homeowner's association related to modifications or improvements to property governed by CC&Rs and that this case involves the declarant's and/or its successors decisions regarding modifications to the CC&Rs. Nevertheless, *Tierra Ranchos* is the most similar situation that has arisen under Arizona law and the Restatement does not address the standard to be used when a declarant is required to petition the court for

Id. at 201, 165 P.3d at 179.

The court went on to review the Restatement approach as it applies to common-interest community associations. In adopting the Restatement approach, the court indicated that the Restatement "blends elements of the reasonableness rule and the business judgment rule." The court also stated that "unlike jurisdictions requiring the association to prove the reasonableness of its actions, the Restatement approach requires the member challenging the association to establish that its actions were unreasonable." *Id.* Accordingly, if the Court is to adopt the Restatement reasonableness standard as opposed to the deferential business judgment rule, Plaintiffs had to establish that TTLC's proposed modification was unreasonable.

TTLC's proposed modification, however, is reasonable given all the circumstances of this case. The Property is at serious jeopardy of remaining in its current fallow condition if a modification to the 1992 Lakes Deed Restriction is not permitted. In all reality, the likelihood that TTLC, Bixby or any other owner of the Property will ever have the ability to fund the reconstruction of the golf course is virtually non-existent. Again, even if this Court were to affirm the trial court's injunction, neither TTLC nor Bixby can magically make $5 million appear to fund

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a modification to the CC&Rs. Consequently, the analysis in *Tierra Ranchos* appears to be most applicable.

a reconstruction of the golf course that would comply with the injunction. Consequently, without a modification to the 1992 Lakes Deed Restriction, no golf course will be operated on the Property and it will remain in its fallow condition.

TTLC's proposed modification, however, changes that scenario. To begin with, TTLC's proposed modification provides the funding mechanism necessary to construct a golf course on the Property. Certainly, when the original golf course was constructed, it was funded by the sales of the homes surrounding it. Without a modification, there is no such funding mechanism. Neither TTLC, Bixby nor any other owner will find investors willing to invest in a stand-alone golf course that, at best, will take 29 years to simply generate enough income to return the original investment. Undoubtedly, no bank would make a loan for such a venture. Consequently, the only realistic funding mechanism for a new golf course on the Property is for a new golf course to be built in conjunction with a new home development.

Moreover, TTLC's proposed modification to the 1992 Lakes Deed Restriction fixes the problem that is currently plaguing the Property's golf course use. Under the 1992 Lakes Deed Restriction the financial success of the golf course is dependent solely upon the number of rounds played on the course and the sales of any merchandise, food and beverages. Given that the Property is only big enough to accommodate an executive type golf course, which can only charge a lesser green

fee as compared to a championship type golf course, greens fees and the sales of merchandise, food and beverages have not been sufficient, historically, to sustain the operation of the golf course. TTLC's proposed modification, however, will provide for the golf course to ultimately be owned by the residential development's homeowner's association ("HOA"). The proposed changes to the 1992 Lakes Deed Restriction provide that the HOA shall operate and maintain the golf course and give the HOA the ability to assess the members of the association (*i.e.*, the new homeowners) for the cost of the operation, maintenance and replacement of the golf course. Consequently, the viability of the new golf course will not depend solely on the number of paid rounds the public plays on it. Instead, the operation, maintenance and replacement of the new golf course will be supplemented by fees assessed to the new homeowners. In this way, the current situation plaguing the golf course use on the Property will not be repeated.

Undoubtedly, Plaintiffs and perhaps other of the Benefitted Persons under the 1992 Lakes Deed Restriction will complain that a new housing development in conjunction with a new golf course is not reasonable because it fundamentally changes the nature of the Property. They will assert that TTLC's proposed redevelopment plan will lessen the amount of open space, impact views and create a higher density use. All of those things, however, could occur under the existing 1992 Lakes Deed Restriction.

Paragraph 2 of the 1992 Covenants, Conditions and Restrictions allows for "overnight lodging facilities" and permits the owner of the Property to "redesign or reconfigure the golf course." Consequently, TTLC's proposed redevelopment plan would be permitted under the existing 1992 Lakes Deed Restriction if instead of homes, an owner built overnight lodging casitas and turned the Property into a resort. The effects on Plaintiffs and the Benefitted Persons would be the same or perhaps even worse. Mr. Anderson, however, testified that he does not believe that the Property is well suited for a resort and golf course given that the Property sits in the middle of a residential neighborhood. Instead, permitting some additional housing along with a golf course retains the residential nature of the Property and the surrounding area. Most of all, TTLC's proposed modifications and redevelopment plan is the only reasonable solution if the Property is to accommodate a golf course use in the future.

Accordingly, based upon the foregoing, TTLC's proposed modifications to the 1992 Lakes Deed Restriction are reasonable. Moreover, Plaintiffs failed to establish at trial that the proposed modification is unreasonable. The Court should, therefore, allow the proposed modifications to the 1992 Lakes Deed Restriction.

V. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES.

Paragraph 4 of the 1992 Lakes Deed Restriction clearly provides for a mandatory award of attorneys' fees to the prevailing party in any action to enforce

the terms of the 1992 Lakes Deed Restriction. TTLC and Bixby concede that Swain was the prevailing party in the trial court and that the trial court's award of attorneys' fees was within its discretion. Thus, TTLC and Bixby only challenge the trial court's award of attorneys' fees to Swain in the event that this Court reverses the trial court's ruling that the owner of the Property must affirmatively operate a golf course on the Property. In that event, it would obviously be an abuse of discretion to allow the trial court's award of attorneys' fees to stand.

VI. REQUEST FOR ATTORNEYS' FEES ON APPEAL.

Pursuant to Rule 21(a) of the Rules of Civil Appellate Procedure, TTLC and Bixby hereby submit their claim for attorneys' fees on appeal. Pursuant to Paragraph 8 of the 1992 Lakes Deed Restriction, if any owner of any portion of the Property is required to employ legal counsel to defend a claim brought by a Benefitted Person and prevails in such action, then the owner is entitled to an award of attorneys' fees. Accordingly, if the Court rules in TTLC's and Bixby's favor that the owner of the Property is not required to operate a golf course on the Property, an award of attorneys' fees to TTLC and Bixby would be required under Paragraph 8.

VII. CONCLUSION.

For all of the foregoing reasons, this Court should reverse the trial court's ruling that the 1992 Lakes Deed Restriction requires the owner of the Property to affirmatively operate a golf course on the Property and dissolve the injunction

entered by the trial court. Such a ruling would reverse the trial court's Judgment in favor of Swain on Counts I, II and III of the First Amended Complaint, and the award of attorneys' fees and costs to Swain. This Court should also reverse the trial court's Judgment in favor of Swain on TTLC's counterclaim and permit the requested modification to the 1992 Lakes Deed Restriction.

Dated this 11th day of October, 2018.

Respectfully submitted,

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