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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HAMRA JEWELERS, INC, *Plaintiff/Appellee*,

v.

EMBREY PARTNERS, LLC, *Defendant/Appellant*.

No. 1 CA-CV 22-0533
FILED 4-27-2023

Appeal from the Superior Court in Maricopa County
No. CV2022-002514
The Honorable Katherine Cooper, Judge

VACATED AND REMANDED

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MEMORANDUM DECISION

Judge Daniel J. Kiley delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge James B. Morse Jr. joined.

K I L E Y, Judge:

¶1 The Declaratory Judgments Act, A.R.S. § 12-1831 *et seq.* (the "Act"), authorizes courts to declare the respective rights and obligations of contracting parties, including owners of lots in a master planned community ("MPC") that is subject to restrictive covenants.[1] The question presented in this appeal is whether the Act authorizes a court to declare the future rights and obligations of prospective purchasers of neighboring lots in an MPC.

¶2 Because the Act makes declaratory relief available only to determine rights and obligations under existing facts, not those contingent on future events, we hold that the Act does not authorize relief here. Accordingly, we vacate the superior court's declaratory judgment.

FACTS AND PROCEDURAL HISTORY

¶3 Viewed in the light most favorable to sustaining the superior court's judgment, the evidence in the record establishes the following:

¶4 Kierland is an MPC located in Phoenix whose governing documents include a Master Declaration of Covenants, Restrictions and Development Standards ("Declaration") and a Reciprocal Easement Agreement ("REA").

¶5 The Declaration is, by its terms, intended to promote "the proper development and use" of real property within the Kierland MPC "in a manner that is consistent with the quality and integrity of the development of Kierland as a whole." Toward that end, the Declaration establishes the Kierland Design Review Committee ("KDRC") to "review and approve or disapprove plans and specifications for improvements

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[1] "Restrictive covenants are a contract between [a] subdivision's property owners as a whole and individual lot owners." *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 537, ¶ 11 (App. 2010) (cleaned up).

proposed to be installed within [Kierland]." The Declaration confers broad discretion on the KDRC, providing in part that

> [t]he process of reviewing and approving plans and specifications is one which necessarily requires that the KDRC be called upon from time to time to make subjective judgments. The KDRC is given full power and authority to make any such subjective judgments and to interpret the intent and provisions of this [Declaration] . . . in such manner and with such results as the KDRC, in its sole discretion, may deem appropriate, and such actions by the KDRC shall be final and conclusive in the absence of an adjudication by a court of competent jurisdiction to the contrary.

¶6 The Declaration further provides in part that no structures

> shall be erected, constructed, placed, altered, modified, demolished, remodeled, maintained or permitted to remain on a Parcel until plans and specifications therefor, in such form and detail as the KDRC may deem necessary, have been submitted to the KDRC and approved by it in writing.

¶7 The REA provides for nonexclusive access and parking easements in specified common areas for the shared use of those who own and occupy space in the MPC as well as their "customers, patrons, employees," and others. The REA provides that the easements "constitute equitable servitudes" that "run[] with the land" and bind future transferees. The REA further provides that its provisions are "intended to be subordinate to" the Declaration and notes that the KDRC retains "approval rights" for "the design, construction, reconstruction or location of" improvements constructed within the Kierland MPC.

¶8 Embrey Partners, LLC ("Embrey") and Hamra Jewelers, Inc. ("Hamra") contracted to purchase neighboring parcels—Parcel 4B-2 and Parcel 4B-3, respectively—in the Kierland MPC. Before either party completed its purchase, the parties met to discuss their plans for their respective parcels. Embrey told Hamra it intended to build a multistory luxury apartment complex on Parcel 4B-2 that would have a larger footprint than the then-existing retail store. As depicted on Embrey's site plan, the complex would block vehicle access to Parcel 4B-3 from the road to the north. Hamra expressed concern that the complex would impede access to the jewelry store it intends to open on Parcel 4B-3 and eliminate common

area parking for its customers. In response, Embrey expressed an unwillingness to modify its site plan.

¶9 Shortly thereafter, Hamra filed a complaint for declaratory relief against Embrey, alleging that Embrey intends to replace the retail store on Parcel 4B-2 with an apartment building that would encroach into a common area currently used for ingress and egress into the area. Hamra further alleged that, if Embrey "obtain[s] a zoning change" to allow "multifamily apartment dwellings" on Parcel 4B-2, the resulting "destruction of the easement of ingress and egress" would "severely diminish[] the value of [Parcel 4B-3] as well as its use . . . as a planned jewelry store." Asserting that the REA does not permit elimination of an easement without the consent of the owners of "each and every" affected parcel, Hamra sought a declaration that Embrey has "no right to destroy the purpose of the REA by encroaching into" the common areas of the development over the objection of Hamra or the owner of any other affected lot.

¶10 Embrey moved to dismiss the complaint, contending that Hamra "lacks standing to assert its declaratory judgment claim" and "fails to allege a justiciable controversy." Embrey explained that, although Hamra and Embrey "are currently under contract to purchase" adjoining lots, "neither have actually purchased, acquired, or closed on any" lot within the MPC. "What [Hamra] effectively seeks," Embrey argued, "is an advisory opinion for conduct that may happen in the future, which a [c]ourt cannot enter via declaratory judgment."

¶11 The superior court denied Embrey's motion to dismiss, finding "that a justiciable controversy exists regarding the reciprocal easement at issue and that [Hamra] is an interested person in the controversy."

¶12 After an expedited bench trial in April 2022, the superior court issued a declaratory judgment finding that, "[i]f constructed per its current design, [Embrey's] apartment building will . . . depriv[e] [Parcel 4B-3] of [its] right to [a] shared easement under the REA." The court accepted Hamra's interpretation of the REA, holding that, "to modify [Parcel 4B-3's] right to" use the access easement, Embrey "must obtain a written waiver from Hamra and any other Owner whose rights to the [easement] may be affected by [Embrey's] building project."

¶13 The superior court subsequently entered a judgment awarding Hamra attorney fees and costs of $161,308.73 pursuant to A.R.S.

§§ 12-332, -341.01, and the fee-shifting provision of the REA. Embrey timely appealed. We have jurisdiction under A.R.S. §§ 12-2101(A)(1) and 12-1837.

DISCUSSION

¶14 Whether a complaint states a cognizable claim for declaratory relief is a question of law we review *de novo*. *Samaritan Health Sys. v. Ariz. Health Care Cost Containment Sys. Admin.*, 198 Ariz. 533, 536, ¶ 13 (App. 2000); *see also Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 420, ¶ 10 (2022) ("[W]e review issues of jurisdiction, ripeness, and standing de novo as issues of law."). We defer to the superior court's findings of fact unless they are clearly erroneous and view the facts in the light most favorable to upholding the court's ruling. *Town of Florence v. Florence Copper Inc.*, 251 Ariz. 464, 468, ¶ 20 (App. 2021).

¶15 The Act authorizes "[c]ourts of record" to "declare rights, status, and other legal relations" between parties, with "such declarations" having "the force and effect of a final judgment or decree." A.R.S. § 12-1831. Used properly, a declaratory judgment is "an instrument of preventative justice," permitting a determination of the rights of parties to a dispute before a breach occurs and damages are incurred. *DeVries v. State*, 219 Ariz. 314, 320, ¶ 17 (App. 2008) (citation omitted); *see also Gulshan Enters., Inc. v. Zafar, Inc.*, 530 S.W.3d 298, 305 (Tex. App. 2017) ("A declaratory judgment, by its nature, is forward looking; it is designed to resolve a controversy and prevent future damages.") (citation omitted).

¶16 As courts have long recognized, however, a declaratory judgment action is subject to being misused in various ways, including as a means to solicit an advisory opinion, a tool of intimidation, or a vehicle for forum shopping. *See, e.g.*, *Thomas v. City of Phoenix*, 171 Ariz. 69, 74 (App. 1991) (recognizing that "cases that seek declaratory judgments" may request "advisory" rulings or present "moot or abstract questions"); *NGS Am., Inc. v. Jefferson*, 218 F.3d 519, 521-23 (6th Cir. 2000) (affirming dismissal of declaratory relief claim, noting that "permitting the action" could have "encourage[d] forum shopping, . . . needless litigation occasioning waste of judicial resources, . . . and misuse of judicial process to harass an opponent in litigation"). As a safeguard against misuse, a court must not entertain a claim for declaratory relief unless satisfied both that the plaintiff has standing to bring the claim and that a justiciable controversy exists. *Mills,* 253 Ariz. at 423, ¶ 25 (2022) ("Although [the Act] is remedial and therefore liberally construed, the standing and ripeness doctrines apply to complaints initiated under the [A]ct.").

¶17 Embrey argues that Hamra's status as a prospective purchaser of a lot in an MPC is insufficient to confer standing to assert claims under the MPC's governing documents and that no justiciable controversy exists because "Hamra and Embrey had no legal relationship" other than "mere potential buyers of adjacent parcels." In response, Hamra asserts that declaratory relief is appropriate here because, although "neither of the parties . . . owned fee title" to the parcels at issue, "both intended to proceed to do so," and Embrey "threatened" to then "buil[d]" an apartment building in a manner that would "encroach[]" onto a common area easement benefiting the parcel Hamra intended to buy.

¶18 For purposes of this appeal, we assume, without deciding, that the potential loss of Hamra's earnest money if it were to back out of the purchase of Parcel 4B-3 constitutes harm sufficient to confer standing on Hamra. Instead, we address whether Hamra's objection to Embrey's intended use of Parcel 4B-2 constitutes a justiciable controversy between the parties.

¶19 A "justiciable controversy" is "one that arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination." *Café Valley, Inc. v. Navidi*, 235 Ariz. 252, 255, ¶ 10 (App. 2014) (cleaned up). A declaratory judgment, in other words, must be based on "an existing state of facts, not those which may or may not arise in the future." *Land Dep't v. O'Toole*, 154 Ariz. 43, 47 (App. 1987).

¶20 Hamra based its claim for declaratory relief on Embrey's "threat" to build an apartment complex that encroaches on, and would virtually destroy, a common area easement benefitting the parcel Hamra contracted to buy. A plaintiff's apprehension of a future act or event is, however, an insufficient basis for declaratory relief. *Hunt v. Richardson*, 216 Ariz. 114, 125, ¶ 38 (App. 2007) ("[F]uture rights" cannot be determined in declaratory relief action "in anticipation of an event that may never happen.") (citation omitted); *see also Klein v. Ronstadt*, 149 Ariz. 123, 123-24 (App. 1986) (declaratory relief to determine constitutionality of DUI checkpoints not available to a plaintiff who "had never been stopped at a sobriety check point" and "failed to show that he ever would be"; "A declaratory judgment must be based on a real, not theoretical controversy [and] . . . will be based on an existing state of facts, not those which may or may not arise in the future.").

¶21 Hamra insists that Embrey made clear that it "*will*, not *might*, close on the purchase of Parcel 4B-2 and *will*, not *might*, build its apartment building" in a manner that encroaches on the common area easement.

(Emphasis added.) But a plaintiff's apprehension of harm from a future act cannot justify declaratory relief even if the defendant has expressed its intent to perform the future act in unequivocal terms. *Moore v. Bolin*, 70 Ariz. 354, 358 (1950) (rejecting claim for declaratory relief where allegations of complaint did not "show a present existing controversy" but "merely show[ed] an intent to do certain things in the future[,] all of which are dependent upon future events and contingencies"). The Act, after all, "speaks in the present tense," and so applies only when the parties' "rights [are] presently affected." *Town of Wickenburg v. State*, 115 Ariz. 465, 468 (App. 1977). Declaratory relief is not available, for example, merely because a property owner has expressed an intent to construct a building which, once built, will violate restrictive covenants. *See, e.g., Young v. Chesapeake Land Co., L.L.C.*, 211 P.3d 913, 914 (Okla. Civ. App. 2009) ("[T]he mere allegation a property owner intends to violate restrictive covenants in the future" fails "to state a justiciable controversy."); *Wendell v. Long*, 418 S.E.2d 825, 825-26 (N.C. Ct. App. 1992) (vacating declaratory judgment for lack of justiciable controversy where plaintiff property owners alleged that defendant property owners "intend[ed] to violate the restrictive covenants" but did not "allege that defendants have acted in violation of these covenants") (cleaned up).

¶22 The principle that declaratory relief cannot be predicated on a defendant's stated intention to perform a particular act in the future is particularly true where the defendant cannot complete the future act without first obtaining the approval of government bodies or other third parties. *See 1000 Friends of Or. v. Clackamas County*, 94 P.3d 160, 162 (Or. Ct. App. 2004) (dismissing declaratory judgment action challenging validity of county ordinance barring certain construction on plaintiff's land and holding that justiciable controversy "will arise only *if* the [plaintiff] requests a [building] permit, *and* the county" denies it).

¶23 Here, Embrey cannot construct its proposed multifamily housing project on Parcel 4B-2 without first obtaining a zoning change for the parcel, building permits to construct the project, and the design approval of the KDRC. Whether Embrey could obtain these approvals, whether municipal officials and/or the KDRC would condition approval on Embrey's modification of its plans, and whether Embrey would agree to proceed with the project despite any conditions that may be imposed are, as yet, unknown. These uncertainties and contingencies establish that the parties' dispute over the interpretation of Kierland's governing documents does not constitute a justiciable controversy based on existing facts. *See Hunt*, 216 Ariz. at 125, ¶ 38 ("A declaratory relief statute only justifies a declaration of rights upon an existing state of facts, not one upon a state of

facts which may or may not arise in the future.") (citation omitted); *see also Shaunnessey v. Monteris Med., Inc.*, 554 F. Supp. 2d 1321, 1324, 1326 (M.D. Fla. 2008) (dismissing, as non-justiciable, claim for declaration that defendant's medical device infringed on plaintiff's patent, where defendant had not yet submitted its device for FDA approval and approval process "may result in changes to the [disputed] device's design").

¶24 Hamra argues that uncertainty over whether municipal officials and the KDRC would approve Embrey's proposed construction does not render the parties' dispute non-justiciable because whether Kierland's governing documents bar Embrey from constructing its proposed apartment building is a legal question that neither municipal officials nor the KDRC can answer. But unless and until Embrey secures the requisite approvals from municipal officials and the KDRC, Embrey is unable to proceed with its construction project. Because Embrey has not even begun the approval application process, the parties' dispute over whether Embrey's proposed construction would, if approved and built according to current design plans, infringe on Hamra's property rights is a hypothetical, and therefore non-justiciable, question. *Hunt*, 216 Ariz. at 125, ¶ 38 ("[F]uture rights" will not "be determined in anticipation of an event that may never happen.").

¶25 In support of its position, Hamra cites *City of Surprise v. Arizona Corporation Commission*, 246 Ariz. 206 (2019). In *City of Surprise*, a utility that agreed to sell certain assets to a municipality was ordered by the Arizona Corporation Commission to submit an application to obtain the Commission's authorization to transfer the assets to the municipality. *Id.* at 208, ¶¶ 2-3. The municipality sought relief by special action, asserting that the Commission exceeded its statutory authority by interfering in the municipality's efforts to acquire the utility's assets. *Id.* at 208-09, ¶¶ 4-5. In response, the Commission asserted that the municipality lacked standing to challenge the order since the order was directed only at the utility. *Id.* at 209, ¶ 8. Our Supreme Court accepted jurisdiction and granted relief, holding that the Commission has no constitutional or statutory authority to regulate condemnations, and so had no authority to require the utility to seek the Commission's approval before transferring its assets to the municipality. *Id.* at 209-11, ¶¶ 5, 16. In finding that the municipality had standing to challenge the order, the Supreme Court analogized the municipality's special action to a claim for declaratory relief, citing case law for the proposition that declaratory relief is appropriate to resolve conflicting claims between public officials over their constitutional and statutory authority. *Id.* at 209-10, ¶ 9.

¶26 Because Hamra's disagreement with Embrey over the latter's intended use of Parcel 4B-2 involves no dispute between public officials over their constitutional or statutory authority, *City of Surprise* is wholly inapposite, providing no support for Hamra's position.

¶27 Faulting Embrey for its unwillingness to compromise in pre-litigation discussions, Hamra argues that Embrey "could absolutely construct its apartment building in such a way that [Hamra's] easement rights are preserved." According to Hamra, Embrey's proposed apartment building "could be built in a different configuration" that would "preserve the same density" without blocking vehicle access to Parcel 4B-3.

¶28 Hamra's assertions on this point only underscore why Hamra is not entitled to the declaratory relief it sought. For all anyone knows at this point, the KDRC may well share Hamra's view of Embrey's current plans for its proposed building project and require Embrey to redesign it. Until the approval process has run its course, the parties' differing interpretation of property owners' easement rights under Kierland's governing documents does not give rise to a justiciable controversy about existing facts that is ripe for declaratory relief. *See Young v. Rose*, 230 Ariz. 433, 439, ¶ 32 (App. 2012) ("Appellate courts should not render advisory opinions anticipative of troubles which do not exist; may never exist and the precise form of which, should they ever arise, we cannot predict.") (cleaned up). We therefore vacate the superior court's declaratory judgment and remand for dismissal without prejudice to either party's right to seek declaratory relief if and when the parties' disagreement over the proper interpretation of Kierland's governing documents ripens into a justiciable controversy. Because we vacate the superior court's judgment, we also vacate the court's award of attorney fees and costs to Hamra.

¶29 Embrey takes the position that A.R.S. § 12-341.01(A) does not apply to authorize a fee award in this matter because the parties are not property owners in the Kierland MPC, and so have no contractual relationship. Embrey nonetheless requests an award of fees under A.R.S. § 12-341.01(A), but "only if this Court determines fees are available in this matter, which Embrey disputes." We decline to consider such an equivocal request for fees unsupported by reasoned argument. *See Williams v. Baugh*, 214 Ariz. 471, 474, ¶ 13 (App. 2007) (declining to address contention "not sufficiently argued"). As the prevailing party on appeal, Embrey may recover its costs.

CONCLUSION

¶30 We vacate the declaratory judgment and remand with instructions to dismiss Hamra's complaint without prejudice.

AMY M. WOOD • Clerk of the Court
FILED: AA