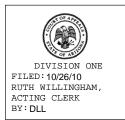
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION ONE



RIVER SPRINGS RANCH PROPERTY OWNERS ASSOCIATION, an Arizona)	1 CA-CV 09-0560
non-profit organization,		DEPARTMENT D
Plaintiff/Appellee,)	MEMORANDUM DECISION
V.)	(Not for Publication - Rule 28, Arizona Rules of
LOUIS LAURIDHUM. MARIN HEN)	Civil Appellate Procedure)
LOUIS L'HEUREUX; KATHLEEN MATTISON,)	
Defendants/Appellants.)))	

Appeal from the Superior Court in Apache County

Cause No. CV2007025

The Honorable Donna J. Grimsley, Judge

AFFIRMED

Louis L'Heureux
and

Kathleen Mattison
Defendants/Appellants

Ekmark & Ekmark, L.L.C.
By Curtis S. Ekmark
Penny L. Koepke
Nicole A. Miller

Attorneys for Plaintiff/Appellee

W I N T H R O P, Presiding Judge

This case arises from a claim by the River Springs **¶1** Association ("the Association" Ranch Property Owners "RSRPOA") that Louis L'Heureux and Kathleen Mattison ("Appellants"), owners of Lot 181 within the River Springs Ranch community, were operating a commercial dog breeding business their property in violation of the Association's from Declaration of Covenants, Conditions, and Restrictions ("the Declaration").1 After a bench trial, the court found that Appellants were violating the Declaration by operating a commercial dog breeding business and because the numerous dogs on the lot caused a nuisance and annoyance to other Association property owners. The trial court granted the Association's request for a permanent injunction ordering Appellants to cease operating the commercial dog breeding business and to limit the number of dogs on the property. Appellants appeal the decision. For the following reasons, we affirm.

The record indicates that, in May 2007, Appellants executed a warranty deed transferring L'Heureux's interest in Lot 181 to Mattison. L'Heureux remained a party to the complaint, however.

FACTS AND PROCEDURAL HISTORY

- ¶2 Appellants own Lot 181 in the community known as River Springs Ranch, Unit V. Appellants and Lot 181 are subject to the Declaration for River Springs Ranch, Unit IV. 2
- ¶3 Article I, Section 1, of the applicable Declaration states in pertinent part:

All parcels shall be used for recreational and residential purposes only. No . . . business of any kind, . . . shall ever be erected or permitted upon any of the parcels, or any part thereof, and no business or commercial venture or enterprise of any kind or character whatever shall be conducted in or from any residence on the parcels.

Article I, Section 5, of the Declaration nonetheless authorizes the use of the property for ranching purposes "provided the parcel has been fenced in as set forth in the Purchase Agreement, including a reasonable number of horses and cattle." That section of the Declaration, however, prohibits the presence of "stockyards, dairy cows, horseback riding stables or any other commercial activity which would create excessive dust, noise or obnoxious odors." In addition, Article I, Section 6, of the Declaration states in pertinent part:

No noxious or offensive activities shall be carried on upon any parcel nor shall anything be done thereon which may be or may become an annoyance or a nuisance.

3

Unit V was made subject to the Declaration of Unit IV by the Declaration of Annexation for River Springs, Unit V.

The Declaration specifically provides in Article XI, Section 1, that "[f]ailure to enforce any of the Restrictions herein contained shall not in any event be construed to be a waiver thereof, or a consent to any further succeeding breach or violation hereof." Article XII of the Declaration also provides:

In the event of any violation . . . by any owner, then the Association, Declarant, or any owner may, at its option, have the following rights against the (1) An action at law to recover for damages; and (2) an action in equity to enforce performance on the part of the owner; and/or (3) an action in equity for such equitable relief as may be necessary under the circumstances, including injunctive relief. Failure to maintain such an action at law or in equity shall not constitute a waiver of the violation or any other violations.

¶4 In a letter to Appellants dated January 2, 2005, Todd Palmerton, President of the RSRPOA on behalf of the Association's Board of Directors explained that the Board had received letters from Appellants' neighbors complaining about the presence of numerous dogs on Lot 181 that were being used for breeding puppies for profit. The letter expressed the Board's position that Appellants were "in clear violation" of Article I, Sections 1 and 6, of the Declaration. The Board demanded that, by February 15, 2005, Appellants cease any commercial activity and halt any noxious or activities, and specifically demanded that Appellants remove all dogs used for breeding puppies for sale and any puppies bred for

- sale. The letter warned that the Board was prepared to take legal action.
- In July 2006, counsel for the Association sent a letter to Appellants advising them that the Association had authorized legal action unless they ceased commercial activity on their lot, removed the animals used for commercial purposes, allowed a representative of the Association to enter the property to confirm that the activities had ceased, and agreed to allow entry onto the property in the event of future complaints.
- In February 2007, the Association filed suit against Appellants for breach of contract, seeking a permanent injunction ordering Appellants to cease the operation of the dog breeding business on the property, to remove all animals used for commercial purposes, to limit the number of dogs to those for personal enjoyment, to keep the property in compliance with deed restrictions, and to allow the Association to enter their property to confirm compliance and to recover any amounts necessary to remedy any found violations.
- In a joint pretrial statement, the parties stipulated that Appellants were subject to the terms of the Declaration, that they bred and kenneled up to 132 dogs on Lot 181 at a given time, and that they sold dogs and puppies that were kenneled or housed on Lot 181. The parties disputed whether the dogs kept

on Lot 181 constituted a nuisance and annoyance to other owners in the Association, whether the activities involving the dogs fell within the meaning of the term "ranching" as used in and permitted by the Declaration, and whether the activities, even if considered ranching, created excessive dust, noise, or obnoxious odors such that they should be prohibited. The parties also disputed whether the Association had an adequate remedy at law.

¶8 A bench trial was held over two days in May 2009; in July, the trial court granted the Association's request for an injunction.³ In pertinent part, the court found as follows:

In direct contravention of the Declaration, Defendants are currently conducting the operation of a commercial dog breeding business on Lot 181.

In direct contravention of the Declaration, Defendants have in the past conducted the operation of a commercial dog breeding business on other lots within the Association.

In direct contravention of the Declaration, the numerous dogs kept by Defendants on Lot 181 continue to cause tremendous noise which are, and have been, a nuisance and annoyance to other owners within the Association.

The court further finds that the Association does not have an adequate remedy at law.

The court therefore issues a permanent injunction ordering Defendants to remedy the above listed deed violations on Lot 181 on or before September 1, 2009. The court further orders Defendants to cease and

No transcript of the trial has been provided as part of the record on appeal.

desist the operation of the dog breeding business on their property; remove all animals on their property used for commercial purposes, including any dogs used for the purpose of breeding puppies for sale, and any puppies that are the result of such breeding; limit the number of dogs, including puppies to only those for personal enjoyment; and allow the Association or an agent hired on its behalf the right to go upon Defendants' property upon 72 hours notice for the purpose of confirming compliance with the provisions of this injunction. This inspection is limited to two (2) times per year.

The court notes that it is hesitant to put an exact numerical limit on the number of dogs that may be maintained for personal pleasure. In light of the clear nuisance caused by the barking of the large number of dogs in the past, the court notes that it is reasonable to limit the number to 15.

¶9 The court entered a judgment consistent with ruling and subsequently awarded attorneys' fees and costs to the Association in of \$53,740.47 the amounts and \$973.20, respectively. Appellants filed a timely notice of appeal. jurisdiction pursuant to Arizona Revised have Statutes ("A.R.S.") section 12-2101(F)(2) (2003).

ANALYSIS

¶10 A declaration of covenants, conditions, and restrictions is a contract between a subdivision's owners collectively and the individual lot owners. Ahwatukee Custom Estates Mgmt. Ass'n v. Turner, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). Enforcement of deed restrictions is effected through an injunction. Heritage Heights Home Owners

Ass'n v. Esser, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App. 1977). A plaintiff seeking a permanent injunction must show:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (citations omitted). An injunction is an equitable remedy, which allows the trial court to fashion a remedy that is equitable between the parties; the discretion lies with the trial court, not the reviewing court. Scholten v. Blackhawk Partners, 184 Ariz. 326, 331, 909 P.2d 393, 398 (App. 1995) (supplemental opinion). The trial court's decision to grant injunctive relief is reviewed for an abuse of discretion. County of Cochise v. Faria, 221 Ariz. 619, 621, ¶ 6, 212 P.3d 957, 959 (App. 2009). A trial court abuses its discretion if it makes a mistake of law or clearly errs in finding the facts or applying them to the legal criteria for granting an injunction. See Shoen v. Shoen, 167 Ariz. 58, 62, 804 P.2d 787, 791 (App. 1990). We review de novo the interpretation of a contract and whether a party has an adequate remedy at law. The Power P.E.O., Inc. v. Employees Ins. of Wausau, 201 Ariz. 559, 562-63, ¶¶ 15, 22, 38 P.3d 1224, 1227-28 (App. 2002).

- Appellants argue that the letters sent to them in January 2005 and July 2006 did not comply with A.R.S. § 33-1803, which outlines the procedures to be followed by a homeowners' association when notifying a member of a violation. See A.R.S. § 33-1803 (2007). They contend that the violation, in itself, requires dismissal of the Association's complaint. They also argue that two Association officials who took action against them had conflicts of interest and that the Association conducted an "emergency" Board meeting at an improper location and improperly solicited complaint letters regarding Lot 181. In response, the Association contends, among other things, that Appellants have waived these arguments because they did not raise them in the trial court.
- This court does not consider on appeal issues and arguments not first presented to the trial court. See Scottsdale Princess P'ship v. Maricopa County, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995). The record before us does not support finding that these specific issues were raised in the trial court; accordingly, they are waived on appeal. The joint pretrial statement includes no reference to these issues and affirmatively states that "the Parties do not believe that there are any other issues of fact and law that are material or applicable." Additionally, Appellants acknowledged in their notice of appeal that their argument with respect to § 33-1803

was not presented at trial. As for their argument with respect to the allegedly improper conduct of the Association's Board and its members, Appellants have directed us to nothing in the record showing they presented these arguments to the trial court. Further, because no transcript of the trial has been provided on appeal, we cannot determine whether they presented the argument at that time. See generally Baker v. Baker, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (recognizing that the appellant has the burden of ensuring that this court has before it the portions of the record necessary to consider the issues raised on appeal). Because Appellants cannot demonstrate that they raised these issues in the trial court, we do not consider them now.

- Appellants also argue that the injunction order contains no enforcement provisions and therefore is improper under A.R.S. § 12-1802(5) (2003), which provides that an injunction shall not be granted "[t]o prevent breach of a contract, the performance of which would not be specifically enforced."
- Appellants misconstrue the provision, which permits the granting of an injunction to enforce a contract that can be specifically enforced, but not a contract that cannot be specifically enforced, as with a personal services contract. See, e.g., Engelbrecht v. McCullough, 80 Ariz. 77, 79, 292 P.2d

- 845, 846-47 (1956) ("A contract for personal services will not be specifically enforced." (citation omitted)). The Association sought an injunction to enforce the provisions of the Declaration; Appellants have offered no argument that those provisions cannot be specifically enforced. We therefore reject their argument that the injunction is improper under § 12-1802.
- Appellants also argue that Article I, Section 5, of the Declaration limits the restriction on commercial activity to only those activities that create excessive dust, noise, or obnoxious odors, that it does not prohibit kennels or exclude ranching of any animal other than swine and dairy cows, and that the provision is therefore vague and should be interpreted in favor of the free use of land.
- **¶16** previously noted, we As have review the we interpretation of a contract de novo. Rand v. Porsche Fin. Servs., 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007). advocated by Appellants of interpreting The approach restrictive covenant in favor of the free use of land is supported only by dicta in Arizona decisions and has otherwise been rejected by our supreme court. See Powell v. Washburn, 211 Ariz. 553, 557, ¶ 15, 125 P.3d 373, 377 (2006). We instead interpret restrictive covenants to give effect to the intention of the parties as shown by the language used and the surrounding circumstances and to carry out the purpose of the restrictions.

- Id. at 556-57, ¶¶ 13-14, 125 P.3d at 376-77. If the contract language is reasonably susceptible to an interpretation proposed by a party, the court may consider extrinsic evidence to determine the intent of the parties. Taylor v. State Farm Mut. Auto. Ins. Co., 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993).
- ¶17 Appellants suggest that the language in Article I, Section 5, authorizing ranching allows for commercial use of the parcels except for those uses that create excessive dust, noise, or odors.
- The general prohibition against commercial use found in Article I, Section 1. The language in Section 5, however, allowing ranching but precluding "stockyards, dairy cows, horseback riding stables or any other commercial activity which would create excessive dust, noise or obnoxious odors" is susceptible to the interpretation that the Declaration permits a limited exception to the prohibition against commercial use. Under this interpretation, parcels could be used for commercial ranching, with the specified exceptions, including a reasonableness requirement on the number of horses or cattle. The provision could also be interpreted, however, as holding that, although ranching for personal use was permitted, the keeping of animals for commercial purposes such as stockyards, dairy cows,

horseback riding stables, or any other commercial activity was not permitted.

- Appellants argue not only that Article I, Section 5, permits commercial ranching, but also that the definition of ranching includes their operation of the dog breeding business. They note that Section 5 does not clearly preclude the operation of "kennels" or exclude ranching of any animal other than swine or dairy cows. The Association argues that the ordinary understanding of the term "ranching" is a farm for raising horses, beef cattle, and sheep and does not include pets such as dogs.
- The term "ranch" has been defined both as "an establishment maintained for raising livestock under range conditions," and as "a farm or ranchlike enterprise that raises a single crop or animal." Random House Webster's College Dictionary 1091 (2d ed. 1999). In their joint pretrial statement, the parties identified as a contested issue whether the term "ranching" as used in the Declaration encompassed raising dogs.
- The interpretation of words in a contract depends on the intent of the parties. Arc Elec. Co. v. Esslinger-Lefler, Inc., 121 Ariz. 501, 504, 591 P.2d 989, 992 (App. 1979). The language of Article I, Section 1, establishes that the overall purpose of the Declaration is to ensure that the parcels in

River Springs Ranch are to be "used for recreational and residential purposes only." The parties had the opportunity to present to the trial court evidence of their intent under the Declaration regarding whether commercial ranching was exception to the general prohibition on commercial use and, if so, whether "ranching" encompassed raising dogs. As we have noted, despite having the burden of ensuring that this court have the portions of the record necessary to consider the issues raised on appeal, see Baker, 183 Ariz. at 73, 900 P.2d at 767, Appellants have not provided a transcript of the trial proceedings. In the absence of the necessary portions of the record, this court assumes that the missing items would support the trial court's conclusions. Id. Based on its July 2009 ruling, the trial court apparently concluded that Article I, Section 1, precluded all forms of commercial activity, including ranching. In the absence of the transcript, we must conclude that the evidence supported that finding.

Moreover, even were we to find that the commercial ranching of dogs was permitted by Article I, Section 5, the trial court also found that Appellants' activities caused "tremendous noise" and constituted "a nuisance and annoyance to other owners within the Association" in violation of Article I, Section 6. Although Appellants mention this provision of the

Declaration in their opening brief, they offer no argument that the trial court clearly erred in this factual finding.

Appellants also generally assert that the Association **¶23** not prove the elements required for entitlement did injunctive relief. They do not, however, present any argument regarding which element or elements lacked sufficient proof. Having failed to state with particularity why the court erred in concluding that the criteria had been met, Appellants have abandoned the issue. See Modular Sys., Inc. v. Naisbitt, 114 Ariz. 582, 587, 562 P.2d 1080, 1085 (App. 1977) (concluding that arguing the court erred is not the same as arguing the issue; consequently, the issue is abandoned). This court is not obligated to develop an argument for a party. See Nationwide Res. Corp. v. Massabni, 134 Ariz. 557, 565, 658 P.2d 210, 218 (App. 1982). Given the record before us, we find that the trial court did not abuse its discretion in granting a permanent injunction prohibiting Appellants from operating a dog breeding business from Lot 181 and limiting the number of dogs that can remain on the property to fifteen dogs for personal enjoyment.4

To the extent that Appellants raise any other arguments, such as their apparent contention that the Association's application of the Declaration is inconsistent with an approach taken by an adjoining property owners' association, such arguments have not been properly developed and are therefore waived. See Nationwide, 134 Ariz. at 565, 658 P.2d at 218; Modular Sys., 114 Ariz. at 587, 562 P.2d at 1085. Additionally, to the extent that Appellants attempt to raise and develop

¶24 Both sides request costs and attorneys' fees Appellants are not the successful party, and their The Association requests an award of request is denied. attorneys' fees pursuant to the Declaration and A.R.S. § 341.01 (2003). This court enforces a contractual provision for attorneys' fees according to its terms. First Fed. Sav. & Loan Ass'n v. Ram, 135 Ariz. 178, 181, 659 P.2d 1323, 1326 (App. 1982). Article XI, Section 1, of the Declaration states that when a provision of the Declaration is breached, "anyone owning land . . . subject to similar Restrictions may bring action in a court . . . to enjoin . . . said violation or to recover damages due to the breach thereof, along with the recovery of reasonable attorneys' fees and costs." Although this section authorizes a plaintiff to seek an award of attorneys' fees, it does not make of such fees mandatory. Section 12-341.01(A) authorizes the court in its discretion to award reasonable attorneys' fees to the successful party in a contested matter arising out of a contract. In this case, we grant Association its costs and, in our discretion, its request for an award of reasonable attorneys' fees upon compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

arguments for the first time in their reply brief, we note that issues not clearly raised and argued in the opening brief are waived. See Jones v. Burk, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990).

CONCLUSION

¶25 The trial court did not abuse its discretion in granting the Association's request for a permanent injunction against Appellants, requiring them to cease their commercial dog breeding business and limiting the number of dogs on their property to fifteen. The trial court's decision is affirmed.

	/S/						
	LAWRENCE	F.	WINTHROP,	Presiding	Judge		
CONCURRING:							
/S/							
PATRICIA K. NORRIS, Judge							
/S/							
PATRICK IRVINE, Judge							