IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10-28-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

GOLDFIELD CONCERNED CITIZENS' ASSOCIATION, an Arizona nonprofit corporation,	)	1 CA-CV 09-0642
	)	DEPARTMENT C
Plaintiff/Appellant,	)	**MEMORANDUM DECISION**
v.	)	Not for Publication - (Rule 28, Arizona Rules of Civil Appellate Procedure)
GOLDFIELD PROPERTY OWNERS ASSOCIATION, an Arizona nonprofit corporation,	)	
Defendant/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-016777

The Honorable Jeanne M. Garcia, Judge

REVERSED AND REMANDED

Polsinelli Shughart, P.C. — Phoenix
By Marty Harper
Andrew S. Jacob
Attorneys for Plaintiff/Appellant

Mariscal, Weeks, McIntyre & Friedlander, P.A. — Phoenix
By Timothy J. Thomason
Anne L. Tiffen
Sophia Varma
Attorneys for Defendant/Appellee

O R O Z C O, Judge

¶1 Goldfield Concerned Citizens' Association (GCCA) appeals the trial court's grant of summary judgment in favor of Goldfield Property Owners Association (POA) upholding an amendment to POA's recorded declarations reallocating voting rights. GCCA argues the amendment is void ab initio because it was not approved at a meeting, nor unanimously approved. For the reasons that follow, we agree and reverse and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Goldfield Ranch is a 5,000 acre development located in Maricopa County which is divided into five subdivisions known as Phases I, II, III, IV, and V. Each Phase is governed by a Declaration of Reservations (Declaration) requiring the formation of an association with authority to impose assessments for maintenance of Goldfield Ranch's roads. In each Declaration, the relevant language at issue is identical.[1] As of 1978,[2] each Declaration provided in pertinent part:

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[1] The record does not contain the Declaration for each Phase, however, the parties do not dispute the relevant language is the same in each Declaration. Accordingly, we cite to the Declaration of Phase III for the relevant language as was done in the trial court. Where the Declaration specifically references Phase III, we assume the other Declarations cite to the appropriate Phase therein.

[2] The Declaration for Phase I was initially recorded in 1977 and amended in 1978, adopting the language at issue on appeal. The remaining Declarations were apparently recorded in 1978.

B. MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION

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2. Voting Rights.

Members . . . shall be entitled to one (1) vote for each Goldfield Ranch – Phase III parcel as shown on the recorded plat for Phase III in which they hold the interest required for membership by sub-paragraph 1. of this Section B. . . . In the event a Goldfield Ranch parcel is re-subdivided, each Owner of a re-subdivided parcel shall also be entitled to one (1) vote for each parcel owned and each re-subdivided parcel shall be subject to the rights, powers, privileges and benefits of the Association . . . .

. . .

G. GENERAL PROVISIONS

. . .

3. Duration.

. . . The Reservations, Conditions, Covenants and Restrictions contained herein may be amended at any time by a vote of the Owners of a majority of all the Phases of Goldfield Ranch, except for paragraphs A through E inclusive, which require a 75% vote of all members of the Association.

¶3 POA is the association referred to in each Declaration and is a nonprofit corporation which was incorporated in 1984.[3] POA maintains roads and related facilities for all Goldfield Ranch Phases and is comprised of members who own parcels within Goldfield Ranch. GCCA is a nonprofit corporation and voluntary association formed in 2007 whose members own land within Goldfield Ranch Phases I through V.

¶4 On November 28, 1990, POA held a special meeting wherein members voted on a proposed amendment to the Declarations reallocating voting rights from one vote per parcel owned to one vote per acre owned. At the time of the meeting, POA had 159 members and 120 votes were needed to satisfy the seventy-five percent requirement. The proposed amendment did not pass at the meeting. Thereafter, POA solicited more votes by mail and eventually received 126 votes in favor of the proposed amendment. In August 1991, POA recorded the amendment for all Phases.[4]

¶5 In 2007, GCCA filed a complaint against POA seeking a declaratory judgment that the 1991 amendment was void for

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[3] Goldfield Phase I Property Owners Association was incorporated in 1977, but was administratively dissolved in 1982. POA was thereafter incorporated in 1984.

[4] The amendment deleted paragraph B, subsection 2 of the Declarations and provided instead, "Members, as defined in Subparagraph 1 of this Section B, shall be entitled to one (1) vote for each acre owned. Fractional acres shall be rounded to the nearest whole number for voting purposes. . . ."

several reasons. GCCA filed a motion for summary judgment arguing that under the Restatement (Third) of Property (Restatement), recorded declarations could not be amended without unanimous approval unless the Declarations gave clear and explicit notice of such right, which the Declarations at issue failed to do. POA responded and submitted a cross-motion for summary judgment, arguing the Declarations were clear by directing a seventy-five percent vote necessary to amend the relevant provision. In its response to the cross-motion, GCCA argued the voting procedures were invalid because the vote was conducted outside of a membership meeting in violation of Arizona Revised Statutes (A.R.S.) section 10-1095 (repealed 1999). The court granted POA's cross-motion for summary judgment, finding:

> [T]he Declaration expressly provides the percentage of votes necessary to make changes. Therefore, the Restatement has no applicability.
>
> . . . the language of the Declaration unambiguously states that 75% of the vote is required to change the allocation of votes. The modification is valid if 75% of the members agreed to modify from one vote per parcel to one vote per acre.

¶6 POA subsequently moved for attorneys' fees pursuant to A.R.S. § 12-341.01.A (Supp. 2009).[5] GCCA objected and filed a

[5] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

"second motion for partial summary judgment" arguing in part that mail ballots did not satisfy the membership meeting requirement and thus, were not a valid vote of the association under A.R.S. § 10-1095. After considering POA's response and holding oral argument, the court denied GCCA's motion.

¶7 The court subsequently entered final judgment in favor of POA and awarded POA attorneys' fees, over GCCA's objection that the action did not arise out of contract. GCCA timely appealed. We have jurisdiction pursuant to A.R.S § 12-2101.B. (2003).

DISCUSSION

¶8 GCCA argues the court erred by granting summary judgment in favor of POA. We review a grant of summary judgment de novo and view the evidence in the light most favorable to the party against whom summary judgment was entered. *L. Harvey Concrete, Inc. v. Argo Const. & Supply Co.,* 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Arizona Rule of Civil Procedure 56(c). Statutory interpretation and contract interpretation are questions of law we review de novo. *City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, 178, ¶ 5, 181 P.3d 219, 225 (App. 2008); *Rand v. Porsche Fin. Servs.,* 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007).

Applicability of non-profit corporation statutes

¶9 GCCA contends the amendment is void because it was adopted outside of a membership meeting without unanimous member consent in violation of A.R.S. § 10-1095.A.[6] In 1979, the Arizona Legislature enacted legislation (the Act) relating to nonprofit corporations.[7] *See* 1979 Ariz. Sess. Laws, ch. 65, § 2 (1st Reg. Sess.). Under the Act, "[a]ny act of the members or directors of a corporation may be taken without a meeting if a consent in writing setting forth the act is signed by all of the members entitled to vote with respect to the subject matter of the meeting or all of the directors." A.R.S. § 10-1095.A.[8]

¶10 The amendment at issue was recorded in 1991 based on actions occurring between 1990 and 1991. It is undisputed the amendment did not pass at the meeting where it was proposed in

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[6] Preliminarily, GCCA, citing 18 C.J.S. *Corporations* § 442 (2009), states under common law a corporation's members could act only at a properly convened meeting. Common law, however, is inapplicable because during the relevant time frame, when POA was incorporated in 1984, and when the amendment procedure took place between 1990 and 1991, Arizona had applicable statutes in effect. *See Ross v. Bumstead,* 65 Ariz. 61, 64, 173 P.2d 765, 767-68 (1946) (generally Arizona courts follow common law until changed by statute).

[7] The Act was renumbered on January 1, 1996 and repealed on January 1, 1999. *See* 1994 Ariz. Sess. Laws, ch. 223, § 15 (2d Reg. Sess.) (renumbering the Act); 1997 Ariz. Sess. Laws, ch. 205, § 4 (1st Reg. Sess.) (repealing the Act).

[8] This statute was renumbered A.R.S. § 10-2548 in 1996 and repealed in 1999. *See* 1994 Ariz. Sess. Laws, ch. 223, § 15 (2d Reg. Sess.); 1997 Ariz. Sess. Laws, ch. 205, § 4 (1st Reg. Sess.).

November 1990. It is also undisputed POA continued soliciting votes by mail after the meeting and subsequently received seventy-five percent approval for the amendment by August 1991. Based on the law in effect at that time, and specifically, A.R.S. § 10-1095, GCCA argues this procedure for voting and adopting the amendment was invalid.

¶11 GCCA contends A.R.S. § 10-1095 controlled POA's corporate actions. POA does not dispute A.R.S. § 10-1095 applied to corporate actions in 1990 and 1991. *See Hanks v. Borelli*, 2 Ariz. App. 589, 592, 411 P.2d 27, 30 (App. 1966) (a corporation is subject to the laws in effect at the time it is incorporated); *Trico Elec. Co-op. v. Ralston*, 67 Ariz. 358, 366, 196 P.2d 470, 475 (1948) (a corporation only has powers conferred by its charter and the charter is organized under the statutes and laws by which it is governed). Instead, POA argues amending the Declarations was an act of the property owners, not an act of the corporation. We disagree.

The Owner/Member distinction

¶12 The Declarations provide "The Reservations, Conditions, Covenants and Restrictions contained herein may be amended at any time by a vote of the *Owners* of a majority of all the Phases of Goldfield Ranch, *except for paragraphs A through E* inclusive, which require a 75% vote of all *members* of the Association." (Emphasis added.) The voting rights amended are

set forth in paragraph B of the Declarations. In the Declarations, "member" is defined as "those owners of parcels within Goldfield Ranch who are members of the Association as provided in Section B. 1. hereof." Section B. 1. provides:

> Every person or entity, including Declarant, who is a record owner of a fee or undivided fee interest in, or a contract purchaser of any parcel which is subject by covenants of record to assessment by the Association shall be a member of the Association . . . . No Phase of Goldfield Ranch shall be subject to the rights, powers, privileges or benefits of the Association nor shall the interest (in that Phase) of Declarant or its successor or assigns be eligible for membership in the Association or eligible to vote under the Articles of Incorporation and Bylaws of the Association until there is a sale to a third party, who shall then be a member. Thereafter all purchasers in that Phase shall be members and all parcels owned by Declarant or its successors or assigns . . . shall be eligible for membership in the Association . . . .

"Owner" is defined as the contract purchaser or the record owner, whether one or more persons or entities of any Phase III parcel . . . ." "Association" means "a non-profit corporation of which all parcel owners shall be members." Because the provision at issue was to be amended by members of the association, as opposed to owners, this was a corporate action governed by A.R.S. § 10-1095.

¶13 Although "members" and "owners" seemingly encompass the same people, there are slight differences. For instance,

owners include everyone who owns a parcel within a particular Phase, while membership in the association does not begin until there is a sale to a third party within a particular Phase. Additionally, owners specifically refer to those property owners within a particular Phase, while there is one association whose members include owners from all Phases collectively. Respecting this latter point, an act by the association affects Goldfield Ranch as a whole, whereas an act by the owners is limited in scope to the Phase in which the owners have an interest.

¶14 According to A.R.S. § 10-1095.A, "an act of the members" could be taken outside a meeting with unanimous consent of the members. An "act of the members" was defined as "an act adopted or rejected by a majority of the votes entitled to be cast by the class of members at a meeting at which a quorum is present," unless a greater number of votes is otherwise required. A.R.S. § 10-1002.3.[9] Voting on an amendment to the Declarations by members fits within the definition of an "act of the members." In this case, because there was no unanimous consent by the members, votes cast outside of the meeting rendered the voting procedure used to adopt the amendment invalid.

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[9] This statute was renumbered A.R.S. § 10-2301 in 1996 and repealed in 1999. *See* 1994 Ariz. Sess. Laws, ch. 223, § 15 (2d Reg. Sess.); 1997 Ariz. Sess. Laws, ch. 205, § 4 (1st Reg. Sess.).

¶15 We find support in two Utah cases. In *Levanger v. Vincent,* 3 P.3d 187 (Utah Ct. App. 2000), homeowners filed an action against their homeowners' association, a nonprofit corporation, seeking to set aside amendments to the association's covenants, conditions and restrictions (CC&Rs), which were approved via mail-in ballots rather than at a meeting. While the CC&Rs did not specify a voting procedure, the court determined the association was bound by Utah's Nonprofit Corporation statutes. *Id*. at 189. Under the relevant statutes, actions by members of a corporation were required to be taken at a meeting unless the members agreed unanimously by writing to act in absence of a meeting. *Id.* at 190 (citing Utah Code Ann. §§ 16-6-27, 16-6-33). Additionally, the association's bylaws required any action to be taken only at a meeting. *Id*. The voting procedures specified in the statutes were deemed mandatory, required strict compliance, and therefore, the court found the amendments invalid. *Id.* at 191.

¶16 Similarly, in *Park West Condominium Ass'n v. Deppe,* 153 P.3d 821 (Utah Ct. App. 2006), a condominium association received approval from a majority of its members to levy a special assessment via mail-in ballots. As in *Levanger,* the court determined the association, by incorporating into a homeowners association, was bound by Utah's Nonprofit Corporation statutes. *Park West*, 153 P.3d at 826. The court

concluded the relevant statute, requiring an act not taken at a meeting to be approved by unanimous consent, supersedes an inconsistent provision in a condominium declaration which authorized the mail-in ballot process. *Id.*

¶17 In this case, when the amendment at issue was made, A.R.S. § 10-1095 required an act of members of a corporation to be taken at a meeting, or without a meeting only by unanimous written consent of the members. While a vote can be held in a number of ways, *Heug v. Sunburst Farms (Glendale) Mut. Water and Agric. Co.,* 122 Ariz. 284, 289, 594 P.2d 538, 543 (App. 1979), and the Declarations are silent on the voting process, A.R.S. § 10-1095 governed and prescribed the voting method to be used. Because POA did not comply with § 10-1095, the amendment in this case is void. *See La Esperanza Townhome Ass'n. v. Title Sec. Agency of Ariz.,* 142 Ariz. 235, 240, 689 P.2d 178, 183 (App. 1984) (holding an attempted amendment to a declaration void because it did not receive the requisite approval of lot owners).

Exceptions to the meeting requirement

¶18 POA argues the Utah cases contradict Arizona case law finding a meeting is not mandatory. In *Orme v. Salt River Valley Water Users' Ass'n,* 25 Ariz. 324, 217 P. 935 (1923), the Arizona Supreme Court addressed the meeting requirement for amending a corporation's articles of incorporation to extend the

term of a corporation's existence. Under the relevant statute, a corporation's existence could be renewed "when three-fourths of the votes cast at any stockholders' meeting duly called and held for that purpose shall be in favor of such renewal." *Orme*, 25 Ariz. at 333, 217 P. at 938 (citing Revised Statutes of 1901, par. 771, § 11). There, the amendment was approved by the stockholders at a special election held on one day at several locations. *Id.* at 331, 217 P. at 938. The court construed the term "meeting" liberally, finding a meeting of all the stockholders, several thousand people, impractical. *Id.* at 334-35, 217 P. at 939. Further, the court noted an agreement of all the stockholders should be able to change the method of voting to accomplish the purpose of the statute, which gave stockholders preference on the question of renewal. *Id.* at 335-36, 217 P. at 939. Moreover, the court determined the association had been holding elections instead of meetings for over twenty years without any objection and thus, any objection was essentially waived. *Id.* at 337, 217 P. at 939-40. Finally, the articles of incorporation provided that actions by shareholders would be at an election, and there was no provision for a meeting.[10] *Id.* at 335, 217 P. at 939.

[10] In this case, POA notes that its bylaws do not require an action to be taken at a meeting; however, POA cites to GCCA's bylaws for this statement. POA's bylaws are not part of the record. Nevertheless, there is a reference to POA's bylaws

¶19 None of the exceptions discussed in *Orme* apply here. First, according to the record, the association had 159 members at the time voting took place, not several thousand like the corporation in *Orme*. Second, all of the stockholders in *Orme* agreed to the voting procedure by subscribing to the articles of incorporation which contained the procedure. 25 Ariz. at 335, 217 P. at 939. Here, the members did not unanimously consent to continue voting by mail. Third, *Orme* did not address A.R.S. § 10-1095.A. Finally, waiver was nearly decisive in *Orme*; an issue not raised here.

Declarations are silent regarding voting procedures

¶20 POA also argues the voting procedure conformed to the Declarations and therefore the amendment is valid. *See Shamrock v. Wagon Wheel Park Homeowners Ass'n,* 206 Ariz. 42, 46, ¶ 15, 75 P.3d 132, 136 (App. 2003) ("Owners of lots within a community may modify or extinguish deed restrictions" and the manner of making modifications is governed by the declaration in effect). The Declarations, however, do not contain a voting procedure; but only set forth requirements of how much approval is necessary to pass an amendment to the Declarations. Although we have discussed and upheld voting procedures without a meeting (or unanimous consent) in the past, those cases involved

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noting the bylaws require "100% written consent of membership . . . to take action without a meeting."

amendments made by property owners, not members of an association.

¶21 For example, in *Duffy v. Sunburst Farms East Mutual Water and Agricultural Co.*, 124 Ariz. 413, 604 P.2d at 1124 (1979), the Court upheld an amendment to a declaration made by a majority of homeowners. That declaration required a "vote of a majority of the then owners of lots" to amend or revoke the declaration. *Duffy*, 124 Ariz. at 414-15, 416, 604 P.2d at 1125-26, 1127. The declaration did not require a meeting and the Court determined the association's voting requirements in the bylaws did not need to be followed. *Id.* at 415, 417, 604 P.2d at 1126, 1128. Notably, the homeowners discussed the distinction between "members" and "owners" when addressing the contrasting voting requirements between the declaration and bylaws. *Id.* at 416, 604 P.2d at 1127. In the present case, however, members were required to amend the relevant provision of the Declarations, not owners. Thus, *Duffy* is distinguishable.

¶22 Similarly, in *Heug*, the Court mentioned "owners of a subdivision may impose restrictions by agreement and may likewise provide for the modification or extinguishment." 122 Ariz. at 288, 594 P.2d at 542. The Court declined to address whether an amendment to the declaration was a corporate matter because there was no majority vote of property owners on the

amendment at issue. *Id.* at 289-90, 594 P.2d at 543-44. Here, however, the Declarations provide that only members of the association could amend the voting procedures. By requiring that such an amendment could only be approved by members, the determination that this was a corporate action conforms to the Declarations.[11]

Satisfaction of the meeting requirement

¶23 Finally, POA argues even if a meeting was required, there was a meeting in this case. POA contends the corporate statutes did not specify a form for meetings and the fact that POA held a meeting is sufficient to uphold summary judgment. Under the relevant statutes, however, an "act of the members" was required to be taken at a meeting "at which a quorum is present." A.R.S. §§ 10-1002.3, -1095.A. Here, the "act of the members" was voting on the amendment. The amendment did not pass by the requisite number of members at the meeting, and thus, the act continued after the meeting without unanimous written consent from the members. That is, the amendment was

[11] Although *Shamrock* discussed modifying a declaration, that case is distinguishable because it primarily dealt with the lack of a formal amendment to the declaration. *Shamrock,* 206 Ariz. at 46, ¶ 16, 75 P.3d at 136. Similarly, although *Dreamland Villa Community Club, Inc. v. Raimey,* 224 Ariz. 42, 226 P.3d 411 (App. 2010) dealt with an amendment to a community's declaration, the issue in that case did not address voting procedures nor the relevant corporate laws. Accordingly, those cases are inapposite.

not passed while a quorum was present and thus, it was not passed at a meeting.

¶24 If an act is required to be taken at a meeting, it would be illogical to allow such act to continue after a meeting. Further, the purpose of the November 1990 meeting was to discuss and vote on the amendment. *See Orme*, 25 Ariz. at 334, 217 P. at 939 (noting one purpose of a meeting is to discuss any proposition). The amendment was discussed and did not pass. To then continue the vote and discussion with other members who chose not to attend the meeting or vote for the amendment contradicts the purpose of holding a meeting. Accordingly, we find this argument unpersuasive.[12]

¶25 Because the Declarations specifically require a vote of the members to amend the provision at issue, amending that provision of the Declarations constitutes a corporate action. The corporate statutes required an act of members to be taken at a meeting or outside of a meeting with unanimous written

[12] POA argues GCCA conceded property law controls instead of corporate law. In addition to its corporate argument, GCCA makes an argument on appeal concerning application of the Restatement to acts of property owners. GCCA states unlike its argument regarding A.R.S. § 10-1095, its Restatement argument analyzes the amendment as an action taken by owners instead of as members, and actions of owners are not controlled by corporate law. However, POA has not cited any authority prohibiting a party from making alternative arguments on appeal. *See Cullum v. Cullum,* 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts will not consider arguments posited without authority).

consent. Here, the voting procedure did not comply with the corporate statutes. Therefore, as a matter of law, the amendment is void. Accordingly, we reverse the grant of summary judgment in favor of POA and direct judgment for GCCA.[13] *See Roosevelt Sav. Bank v. State Farm Fire & Cas. Co.*, 27 Ariz. App. 522, 526, 556 P.2d 823, 827 (1976) (if we reverse a grant of summary judgment, we may direct judgment in favor of a party filing a cross-motion for summary judgment with identical legal issues that can be decided as a matter of law).

¶26 Because we reverse the trial court's grant of summary judgment we vacate the award of attorneys' fees to POA under A.R.S. § 12-341.01.A, as POA is no longer the successful party. *La Canada Hills Ltd. P'ship v. Kite*, 217 Ariz. 126, 130, ¶ 15, 171 P.3d 195, 199 (App. 2007). Accordingly, we need not address GCCA's argument on appeal that an award of attorneys' fees under A.R.S. § 12-341.01.A was erroneous.

¶27 GCCA does not request attorneys' fees on appeal, and therefore, we award none. As the prevailing party, however, we award GCCA its costs on appeal. *See* A.R.S. § 12-341 (Supp. 2009) (successful party in a civil action shall recover costs).

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[13] GCCA filed two motions for summary judgment, both containing other reasons for declaring the amendment void in addition to corporate law. Therefore, we direct entry of summary judgment in favor of GCCA declaring the amendment void solely on the basis discussed in this decision. We do not address the merits of the remaining arguments in GCCA's motions, including the Restatement argument made on appeal.

CONCLUSION

¶28 For the foregoing reasons, we reverse the trial court's grant of summary judgment to POA and on remand direct entry of summary judgment in favor of GCCA. We also vacate the award of attorneys' fees to POA and award GCCA its costs on appeal.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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MAURICE PORTLEY, Presiding Judge

/S/
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MARGARET H. DOWNIE, Judge