IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/14/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

BERYL CROPLEY; MARCIA FILE; GERALD A. KLAUS, CHARLES LESTER; NADINE E. MEIS; NANCY Q. SHOVLAIN, and all other similarly situated Viewpoint Lake Homeowners, Plaintiffs-Appellees, v. RECREATION CENTERS OF SUN CITY, INC., an Arizona non-profit corporation, Defendant-Appellant.	1 CA-CV 10-0034 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
EL DORADO OF SUN CITY CONDOMINIUMS HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation, Intervening Plaintiff-Appellant, v. RECREATION CENTERS OF SUN CITY, INC., an Arizona non-profit corporation, Defendant-Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-004740

The Honorable Edward O. Burke, Judge

AFFIRMED

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W E I S B E R G, Judge

¶1 The Recreation Centers of Sun City ("Recreation Centers") appeals from a grant of summary judgment to a class of Sun City homeowners seeking interpretation of a 1979 Agreement that allocated responsibility for the maintenance costs of Viewpoint Lake. In addition, El Dorado of Sun City Condominiums Homeowners Association ("El Dorado") appeals from a separate grant of summary judgment holding that a 1969 Declaration of Restrictions governing property surrounding Viewpoint Lake burdened El Dorado's land. For reasons that follow, we affirm the superior court's rulings.

BACKGROUND

¶2 Viewpoint Lake is in Sun City, Arizona. Around the lake are eighty-one single-family residential lots, Lakeview Recreation Center, the El Dorado of Sun City Condominiums, and a Sun Health Properties' medical facility. The lake is filled with water drawn from wells on nearby golf courses. Water is pumped from the lake for use on the golf courses, and then water from the wells replenishes the lake. Some of lake's water, however, is lost through evaporation and seepage.

¶3 In July 1969, Arizona Title Insurance and Trust Company ("Arizona Title"), as trustee to Sun City's developer, Del E. Webb Development Corporation ("Del Webb") recorded a "Declaration of Restrictions" governing Viewpoint Lake. The Declaration provided that its restrictions "shall be made an encumbrance on and an obligation of the real property adjacent to and contiguous with Tract A [the lake]." A number of provisions addressed maintenance of the lake, one of which stated that when Del Webb closed its model homes, lake maintenance would become the responsibility of the owners of lakefront property. Paragraph 5 provided:

> Commencing July 1, 1970 and so long as the source of water for the lake is . . . wells located on . . . a golf course in the vicinity of the lake, the owners of property fronting on the lake *shall be responsible for paying the actual cost of electricity used for pumping the amount of water*

> *required to replace water lost* as a result of evaporation and seepage.

(Emphasis added.) The 1969 Declaration did not clarify how maintenance costs would be allocated among the various owners of lakefront property. It was, however, binding for thirty years and was to be extended for successive ten-year periods unless amended by a "vote of the owner or owners of said Tract 'A,' Sun City Unit Sixteen, plus by a vote of the owner or owners of Tract 'B,' Sun City Unit Sixteen, along with a majority vote of the then owners of such encumbered property."[1]

¶4 The Declaration additionally provided for creation of a Viewpoint Lake Management Board ("Board").[2] The Declaration conferred various rights on the Board, including power "to levy assessments . . . against the property surrounding the lake" and to "pay for replacement of water lost through evaporation and seepage" upon a majority vote.

¶5 In 1975, Recreation Centers, a non-profit corporation organized under Arizona law, took title to Viewpoint Lake and several golf courses by agreement with Arizona Title (the "1975

[1]In 1971, the 1969 Declaration was amended to regulate the size of boats and boat docking facilities. The amendments were executed by Arizona Title as an owner of Tract C of Sun City Unit 16.

[2]Paragraph 8B required the Board to include "one (1) member selected by the owner of the lake, one (1) member elected by the owner of any lake front property used for community recreation facilities; and one (1) member elected by the owners of the lake front residential lots."

Agreement"). Arizona Title agreed to subsidize Recreation Centers' operation of certain Sun City facilities. In turn, Recreation Centers agreed "that as owner of the golf courses, it shall pay fifty percent (50%) of all maintenance costs of the lake. Such costs shall become part of the total expense for the operation of the golf course." Recreation Centers requires every owner of a Sun City residential unit who signs a Facilities Agreement or accepts a deed to pay an annual property assessment.

¶6 On March 1, 1977, the parties amended the 1975 Agreement. The 1977 Amendment struck Arizona Title's subsidy but left intact the requirement that Recreation Centers pay fifty percent of lake maintenance costs.

¶7 Disputes soon erupted over the respective liabilities of the residential landowners and Recreation Centers. In 1976 and 1977, some homeowners asserted that "maintenance" costs included "water losses due to seepage and evaporation," a position endorsed by the Board. In 1978, the dispute continued, and in 1979, Recreation Centers' counsel notified the Viewpoint Lake Homeowners Association ("the Association") President Jack B. Pearce that he would place liens on the property of those who declined to pay the additional amount to cover water lost through evaporation and seepage.

¶8 Board member and Recreation Centers' President James Wormsley appeared at an April 19, 1979 Board meeting. When Pearce proposed a flat assessment fee for the residential landowners, to be adjusted according to a cost index, Wormsley replied, "How about $95.00?"

¶9 In a bulletin sent to residential landowners dated July 17, 1979, Pearce reported that a new agreement had been reached between Del Webb, Recreation Centers, and the Association providing for a $95 assessment in 1979, subject in 1980 to increase based upon the increase in the Consumer Price Index. Board President C.D. Ferguson later confirmed this and added that "the agreement of last June settled only 1978 and 1979" and did not apply the 1977 billing which "stands . . . as it was before the June 1979 agreement."

¶10 The 1979 Agreement provided that all costs of lake maintenance, including the cost of pumping replacement water, were to be allocated so that in 1979, each lot owner would pay a fee of $95; Recreation Centers would "pay all remaining costs for maintenance . . . and for electricity" to pump replacement water; and the parties' respective shares would be adjusted annually based on the Consumer Price Index "for any succeeding year."

¶11 The 1979 Agreement also said that it was "to clarify and allocate among [the Association and Recreation Centers] all

costs and charges attributable to the maintenance and upkeep" of the lake in accordance with the 1969 Declaration and the 1975 Transfer Agreement. Contemporaneous correspondence stated that the 1979 Agreement resolved the parties' differences "once and for all" by a "permanent" and "equitable" formula. Pearce as President of the Association, Wormsley as President of Recreation Centers, and a Del Webb executive vice president signed the Agreement. It was not recorded.

¶12 From the date of signing until 2008, the residential landowners paid assessments levied by the Board pursuant to the Consumer Price Index formula. Recreation Centers continued to pay fifty percent as owner of the golf course, and the residential landowners paid approximately seventy percent of the remaining fifty percent of maintenance costs.[3]

¶13 In 2008, each residential landowner was assessed $302.10 for lake maintenance. On December 10, however, Recreation Centers' President Nichols informed Board Chairman Klaus that Recreation Centers would decrease its funding of lake maintenance after January 1, 2009. Nichols said that costs had increased and had not been fairly allocated and proposed future assessments based upon linear feet of lakeshore, which more than

[3]Responsibility for the remaining thirty percent is not at issue.

tripled the assessments of residential landowners. In February 2009, the Board billed each residential landowner $1,032.25.

¶14 Six owners[4] filed a class action for declaratory and injunctive relief. The Plaintiffs successfully moved to certify the class, which consisted of the owners of the eighty-one lakefront properties. El Dorado then intervened and filed a complaint contending that the Declaration imposed no burden on its tract, even though El Dorado had made voluntary maintenance payments for thirty years. The Class Plaintiffs and El Dorado each moved for summary judgment, and Recreation Centers filed cross-motions. The superior court granted judgment to the Class Plaintiffs and denied Recreation Centers' opposing cross-motion. It also denied El Dorado's motion and granted Recreation Centers' motion. Recreation Centers and El Dorado timely appealed.

DISCUSSION

Waiver of 1969 Declaration

¶15 We review a grant of summary judgment *de novo* and, in doing so, view the evidence in the light most favorable to the non-moving party. *Unique Equip. Co. v. TRW Veh. Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999). Summary judgment is warranted when there is no genuine issue of

[4]The plaintiffs are Beryl Cropley, Marcia File, Gerald A. Klaus, Charles Lester, Nadine E. Meis, and Nancy Q. Shovlain.

material fact in dispute. Ariz. R. Civ. P 56(c)(1). Interpretation of deed restrictions, *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513, ¶ 6, 123 P.3d 1148, 1150 (App. 2005), and of statutes poses legal questions subject to *de novo* review. *In re Estate of Friedman*, 217 Ariz. 548, 553, ¶ 13, 177 P.3d 290, 295 (App. 2008).

¶16 Recreation Centers contends that the trial court erred in failing to void the 1979 Agreement and in failing to find that the Agreement had not validly amended the 1969 Declaration. When a grantee accepts a deed with restrictions, he has assented to the restrictions. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 47, ¶ 19, 226 P.3d 411, 416 (App. 2010). Landowners, however, may amend or even eliminate restrictions if they follow prescribed procedures. *See La Esperanza Townhome Ass'n v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 239-40, 689 P.2d 178, 182-83 (App. 1984). An amendment is an action "to alter, extend, or revoke existing restrictions." *Riley v. Boyle*, 6 Ariz. App. 523, 525, 434 P.2d 525, 527 (1967). But amendments that do not comply with the stated procedures are null and void. *See Multari v. Gress*, 214 Ariz. 557, 560, ¶ 19, 155 P.3d 1081, 1084 (App. 2007) (private deed restrictions invalid for failure to comply with prior declaration); *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 46, ¶ 16, 75 P.3d 132, 136 (App.

2003) (noncompliance with amendment process meant modification never took effect).

¶17 The superior court held as a matter of law that the 1979 Agreement was a valid settlement agreement that prospectively governed the maintenance assessments. The court did not expressly address Recreation Centers' contention that to validly impose these terms required an amendment passed by a majority vote of property owners. We note, however, that the 1979 Agreement was not termed an amendment but instead stated that it was "to clarify and allocate" responsibility for lake maintenance assessments. The Class Plaintiffs respond that the 1979 Agreement simply supplied a term that was missing in the 1969 Declaration. We, however, need not resolve this debate because we conclude that Recreation Centers waived its right to challenge the validity of the 1979 Agreement by nearly thirty years of acquiescence and knowing conduct consistent with that Agreement. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996) (appellate court may affirm superior court ruling if correct for any reason).

¶18 A party's persistent failure to object to violations of a restrictive covenant may result in waiver and abandonment of the restriction. *Mackey v. Griggs*, 61 S.W.3d 312 (Mo. Ct. App. 2001) (waiver found from existence of widespread non-residential uses in subdivision). Waiver requires proof of the

intentional relinquishment of a known right. *Lyles v. BMI, Inc.*, 355 S.E.2d 282, 285 (S.C. 1987) (landlord's acceptance of base rent without demanding rent determined by gross sales resulted in waiver). In *Riley*, for example, the plaintiffs sought to enforce restrictions that allowed amendment by a 51 percent vote. 6 Ariz. App. at 524-25, 434 P.2d at 526-27. The trial court found an amendment that exempted one subdivision lot from the restrictions, passed by a 51 percent vote, valid. *Id.* at 525, 434 P.2d at 527. We found the amendment void but remanded for determination of whether the residents had waived or abandoned the restrictions by allowing others' homes to be built in violation of the restrictions. *Id*. at 525-26, 434 P.2d at 527-28. *See also Baldischwiler v. Atkins*, 864 S.W.2d 853, 855 (Ark. 1993) (right to modify restrictive covenants abandoned after five years of non-use). Given that Recreation Centers' knowing and repeated failure to object to the validity of the 1979 Agreement is undisputed, no remand is necessary here.

¶19 Analogous contract principles support our conclusion. When "an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in *without objection* is given great weight in the interpretation of the agreement." *Abrams v. Horizon Corp.*, 137 Ariz. 73, 79, 669 P.2d 51, 57 (1983) (quoting

Restatement (Second) of Contracts § 202(4) (1979)). Recreation Centers has waived any interpretation of the 1979 Agreement contrary to that adhered to by the parties over the years since that Agreement.

¶20 We therefore affirm rejection of Recreation Centers' claims that an alternative assessment formula should apply or that the 1979 Agreement failed to comply with necessary amendment procedures.[5] We next consider whether the 1979 Agreement resolves this dispute.

Possible Application of A.R.S. § 33-440

¶21 Recreation Centers argues that a private agreement cannot resolve the assessment dispute because A.R.S. § 33-440 (Supp. 2009) controls and precludes the 1979 Agreement. The statute provides:

> A. An owner of real property may enter into a private covenant regarding that real property and the private covenant is valid and enforceable according to its terms if all of the following apply:
>
> 1. The private covenant is not prohibited by any other existing private covenant . . . and does not violate any statute governing the subject matter of the private covenant that is in effect before the effective date of this section.

[5]In light of the waiver by Recreation Centers, we need not decide whether laches also would bar a challenge to the 1979 Agreement.

2. The owner of the real property affected by the private covenant . . . ha[s] consented to the private covenant.

3. Any consent requirements contained in . . . any existing private covenant . . . have been met.

B. A private covenant is deemed not to constitute an amendment to any existing private covenant . . . unless the private covenant expressly violates an express provision of the existing private covenant or declaration.

C. For purposes of this section:

1. "Declaration" has the same meaning prescribed in § 33-1802.

2. "Private covenant" means any uniform or nonuniform covenant, restriction or condition regarding real property that is contained in any deed, contract, agreement, or other recorded instrument affecting real property.

¶22 By law, "[n]o statute is retroactive unless expressly declared therein." A.R.S. § 1-244 (2002). Therefore A.R.S. § 33-440, which became effective on September 26, 2008, does not control here.

¶23 Even assuming arguendo that the statute applied, we would find no conflict between it and the 1979 Agreement. Although the 1979 Agreement predates the 2008 enactment, it is validated under the statute's express terms. Section 33-440(A)(1) provides for enforcement of a private covenant if it "is not prohibited by any other existing private covenant or

declaration affecting the real property." Thus, the statute provides for recognition and enforcement of pre-§ 33-440 covenants by precluding those post-§ 33-440 covenants inconsistent with them. *Id.*; *see also* § 33-440(A)(3) (enforcing consent requirements of existing private covenants). A private covenant includes any covenant regarding real property "contained in any . . . agreement . . . affecting real property." A.R.S. § 33-440 (C)(2). So viewed, the 1979 Agreement is a viable agreement affecting real property under § 33-440(C)(2) and expressly validated by § 33-440(A)(1).

¶24 Recreation Centers nevertheless contends that § 33-440 applies only to planned communities because § 33-1802 (3) and (4) state that a "declaration" includes "any instruments, however denominated, that establish a planned community" and that a planned community must include "a real estate development which includes real estate owned and operated by a nonprofit corporation . . . created [to] . . . manag[e] . . . the property and in which owners . . . are mandatory members and are required to pay assessments . . . ." Based on this language, Recreation Centers asserts that § 33-440 cannot apply because the Board owns no property.

¶25 We, however, do not read the statute so narrowly. Under § 33-440(A)(1), a private covenant must not be precluded by "*any* other existing private covenant *or* declaration affecting

the real property." (Emphasis added.) While the statute defines "declaration" in the context of planned communities, the definition of "private covenant" is not so limited. *See* § 33-440(C)(2). Therefore, even if it did apply, § 33-440(A)(1) would not invalidate the 1979 Agreement.[6]

Duration of the 1979 Agreement

¶26 We now consider whether the 1979 Agreement was a binding settlement of indefinite duration or a short-term agreement, which is a question of law. *See US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). Well established contract principles guide our interpretation, such as giving effect to the parties' intent, *id.*, and considering the language used in the context of the circumstances. *Potter v. U.S. Specialty Ins. Co.*, 209 Ariz. 122, 124, ¶ 7, 98 P.3d 557, 559 (App. 2004). We also would attempt to give reasonable, lawful, and effective meaning to all its terms. Restatement (Second) of Contracts § 203(a) (1981).

¶27 The Agreement stated that residential landowners' assessments would be adjusted according to a formula "for any succeeding year" and did not include a termination date. Recreation Centers argues that the Agreement was merely a temporary solution and cites Ferguson's 1980 letter, which said

[6]We do not consider Recreation Centers' alter ego argument because it was not addressed below and apparently did not shape the trial court's decision.

that the Agreement applied to 1978 and 1979. That letter, however, affirmed the "adjusted billing" described in Pearce's bulletin and that the 1977 and 1978 assessments were "settled." Although Ferguson insisted on using the prior method for the 1977 payment, he did not say that the prior method would apply after the 1979 Agreement.

¶28 Moreover, by including the Consumer Price Index formula in the Agreement, the parties clearly contemplated possible future increases and sought to resolve how to deal with those future increases. Recreation Centers argues that the lack of a termination date makes the Agreement terminable at will by either party.[7] But the Agreement was based upon the 1969 Declaration that was binding for thirty years and would be extended for successive ten-year periods unless amended by a vote of the owners of Tract A and Tract B and a "majority vote of the owners of the encumbered property." Given the Agreement's reference to the Consumer Price Index, and its

[7] *See* Restatement (Second) of Contracts § 33 (if a "contract calls for successive performances but is indefinite in duration, it is commonly terminable by either party, with or without a requirement of reasonable notice"). *See also* UCC § 2-309(2) ("If the contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party."). Comment 5 notes that "[w]hen the arrangement has been carried on by the parties over the years, the 'reasonable time' can continue indefinitely and the contract will not terminate until notice."

purpose, which was to resolve possible assessment disputes during the operation of the 1969 Declaration, its term can only be seen as being that of the underlying 1969 Declaration.

¶29 Furthermore, we are not persuaded that omission of the word "settlement" is significant. The Agreement was prepared after Recreation Centers threatened to sue landowners who had not paid the new assessments, and Wormsley then suggested $95 when the parties discussed adopting a flat fee subject to annual adjustments. Accordingly, the 1979 Agreement was adopted in settlement of a bona fide dispute, was enforceable, and was subject to the same term as the 1969 Declaration.[8]

Legal Capacity of the Association

¶30 Recreation Centers alternatively argues that the Association was not a legally constituted organization, that the 1979 Agreement was void, and that only the Board could allocate the maintenance assessments. Three parties executed the 1979 Agreement, including Pearce as the Association's president and Wormsley as Recreation Centers' president.

¶31 Whether the Association was legally constituted is not dispositive of its members' rights under the 1979 Agreement. "One who deals with an association as a legal entity capable of transacting business and who thus receives money or value from

[8]Given this conclusion, we need not consider whether Recreation Centers was estopped from terminating the Agreement.

that association, is estopped from denying the legality of its existence or right to contract." *Assoc. Students of Univ. of Ariz. v. Ariz. Bd. of Regents*, 120 Ariz. 100, 103, 584 P.2d 564, 567 (App. 1978) (quoting *State Farm Mut. Auto. Ins. Co. v. Mackechnie*, 114 F.2d 728 (8th Cir. 1940)); *accord Spurlock v. Santa Fe Pac. R.R.*, 143 Ariz. 469, 484, 694 P.2d 299, 314 (App. 1984) (parties who contract with an entity as a corporation are estopped in later lawsuit from denying its corporate existence). Therefore, because Recreation Centers treated the Association as an entity capable of entering the 1979 Agreement and certainly benefitted from assessments collected from Association members, Recreation Centers cannot now complain about the Association's status.

¶32 Although Recreation Centers cites *Wolf Corp. v. Rollin,* 17 Ariz. App. 250, 251, 497 P.2d 70, 71 (1972), for support, that case invalidated a contract entered by a foreign corporation that had not complied with corporate formalities or registered to do business pursuant as required by Arizona law. The Association is not a foreign corporation and does not face such a barrier.

¶33 Recreation Centers' alternative argument that the Association lacked authority to allocate assessments finds no support in the Declaration. The Declaration required lakefront landowners to pay for maintenance but provided no assessment

formula. The Declaration also authorized the Board to levy assessments but did not grant the Board exclusive power to determine the allocation of costs. *See* Restatement (Third) of Property (Servitudes) § 6.5(1)(a) (2000) (unless otherwise limited by statute or declaration, "a common-interest community" may raise reasonably necessary funds by levying assessments and charging fees for services or use of common property). We accordingly reject this argument and affirm summary judgment on the assessment issue. We next address El Dorado's contention that the 1969 Declaration did not burden its property.

The 1969 Declaration and El Dorado's Property

¶34 El Dorado challenges the superior court's conclusion that its property, which is within Tract C and borders Viewpoint Lake, is subject to the 1969 Declaration. In 1969, Del Webb owned both Tract A and C, and the 1969 Declaration stated:

> These restrictions shall be made an encumbrance on and an obligation of the real property adjacent to and contiguous with Tract "A," Sun City Unit Sixteen (16) by reference hereto in the Declaration of Restrictions recorded in connection therewith.
>
> The foregoing restrictions . . . run with the land and shall be binding on all persons owning the real property to which these restrictions are made an encumbrance . . . . Deeds of conveyance of said property . . . may contain the above restrictive covenants by reference to this document but whether or not such reference is made in such deeds . . ., each and all of such restrictive

> covenants shall be valid and binding upon the respective grantees.

El Dorado contends that this provision created a "subsequent filing requirement" as a condition to imposing the Declaration's burdens on lakefront property.

¶35 We will not construe a contractual provision as a condition precedent absent clear and unequivocal language requiring such a construction. *E.g., L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 182, 939 P.2d 811, 815 (App. 1997) (finding no condition precedent absent proof of intent to make payment only from one fund and not otherwise). No language in the 1969 Declaration reveals such an intent. Moreover, the 1971 amendment indicates that Del Webb and Arizona Title understood that Tract C was a burdened estate under the 1969 Declaration before any subsequent filing could occur.

¶36 El Dorado contends that the trial court's decision renders the subsequent filing language meaningless. To the contrary, a subsequent filing is required, but it is not a condition precedent to burdening Tract C with the 1969 Declaration.

¶37 El Dorado alternatively argues that the Declaration imposed no servitude because it cannot satisfy the statute of frauds. According to the Restatement, a writing "must identify the parties . . ., describe the burdened estate and it must set

forth the nature of the servitude, or the essential terms of the obligation." Restatement (Third) of Property: Servitudes § 2.7 cmt. f. The 1969 Declaration created restrictions with respect to Viewpoint Lake and parcels "adjacent to and contiguous with" the lake. El Dorado concedes that its property is contiguous with the lake. Furthermore, the 1971 Amendment defined Tract C as being in common ownership with Tract A and contiguous to it. Because paragraph 12 of the 1969 Declaration extended the restrictions and covenants to property adjacent to the lake, El Dorado's arguments fail.

¶38 El Dorado nonetheless cites *Dunlap Investors Ltd. v. Hogan*, 133 Ariz. 130, 650 P.2d 432 (1982), but that case held that a legal description "requires a certainty such that a surveyor can go upon the land and locate the easement from such description." *Id.* at 132, 650 P.2d at 434 (quoting *Vrabel v. Donahoe Creek Watershed Auth.*, 545 S.W.2d 53, 54 (Tex. Ct. Civ. App. 1977)). The deed described the servient estate as "any adjoining property owned by the Grantor . . . either by direct ownership or as beneficiary of a real estate trust." *Id*. at 131, 650 P.2d at 433. One could not determine from the description which parcels the grantor owned as beneficiary of a real estate trust. *Id*. at 132, 650 P.2d at 434. Moreover, the individual granting the easement to the adjoining property was not the property's record owner. *Id*.

¶39 Here, no specialized knowledge is needed to determine which parcels were subjected to the 1969 Declaration. The Declaration expressly encumbered Viewpoint Lake (Tract A) and all parcels adjacent to and contiguous with it (including Tract C). The 1971 Declaration also clarified that Tract C was contiguous to A. Therefore, it gave constructive notice by identifying the burdened property with reasonable certainty and by accurately stating its terms, purpose, and the nature of the right claimed. *See Villas at Hidden Lakes Condo. Ass'n v. Geupel Constr. Co., Inc.,* 174 Ariz. 72, 76-77, 847 P.2d 117, 121-22 (App. 1992) (recorded amendment incorrectly referred to revoked declaration but could impart notice because it identified its purpose and the property). As Recreation Centers observes, anyone tracing the ownership of Tract C would discover the 1969 Declaration, that Arizona Title beneficially owned Tracts A and C in July 1969, and that the property burdened by the 1969 Declaration included Tract A and all contiguous property.

¶40 Accordingly, the 1969 Declaration can be enforced against El Dorado's property and Tract C was burdened from the execution of the 1969 Declaration.

CONCLUSION

¶41 We affirm the grants of summary judgment. Pursuant to A.R.S. § 12-341.01(A)(2003), we award the Class Plaintiffs'

their reasonable attorneys' fees incurred on appeal as well as their costs subject to compliance with Arizona Rule of Civil Appellate Procedure 21. We also award Recreation Centers its reasonable attorneys' fees pursuant to the same statute but limit the fees and costs to those incurred in responding to El Dorado's appeal. *See Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983) (action to enforce deed restriction arose out of contract for purposes of fee award under § 12-341.01). El Dorado has not prevailed, and thus we decline its request for attorney's fees.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
DIANE M. JOHNSEN, Judge