DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES PRICE and THERESA PRICE, husband and wife, Plaintiffs/Appellees, v. KENNETH KRAVITZ and KAREN GLASER KRAVITZ, husband and wife, Defendants/Appellants.	1 CA-CV 10-0889 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-023753

The Honorable Eileen S. Willett, Judge

AFFIRMED

Weinberger Law — Scottsdale
By Brian A. Weinberger
And
Jaburg & Wilk, PC — Phoenix
By Roger L. Cohen
And Kathi M. Sandweiss
Attorneys for Appellants

Mack Drucker & Watson, PLLC — Phoenix
By Daxton R. Watson
And Troy B. Stratman
Attorneys for Appellees

O R O Z C O, Judge

¶1 Kenneth and Karen Kravitz (Appellants) appeal the trial court's ruling that their newly built home violates their neighborhood's Declaration of Restrictions (Declaration) and the resulting judgment requiring them to remove the second story, the second story balcony, and an exterior staircase to the second story. For the following reasons, we affirm the trial court's ruling.

FACTS AND PROCEDURAL BACKGROUND

¶2 La Maza Villa Plat One is a subdivision that consists of ten lots south of Camelback Mountain. All lots in the subdivision are subject to the Declaration, which was recorded in 1953. Section IV of the Declaration states in relevant part: "No structure shall be erected, altered, placed or permitted to remain on any of said lots other than one detached single-family dwelling not to exceed one story in height." All of the original homes were one story, ranch-style homes and most of the homes in the neighborhood have remained that style.[1]

¶3 James and Theresa Price (Appellees) purchased Lot Two in La Maza Villa Plat One in April 2005. Appellees purchased Lot Two because of its location, private backyard, and views of

[1] The house on Lot Eight has a second story addition; however, that house is located south of Appellees' home, on a different street, and does not impact Appellees' privacy.

Camelback Mountain. Appellees' one story home is 18.35 feet in height.

¶4 In June 2007, Appellants purchased Lot Three, located immediately to the west of Lot Two, intending to build a new home on the property. Appellants demolished the existing structure, which was a one story, ranch-style home that was less than fifteen feet in height. Appellants received a copy of the Declaration when they purchased Lot Three.

¶5 Before construction began on the new home, Appellees and other concerned neighbors informed Appellants about the deed restrictions contained in the Declaration, and Appellants assured them they would not be building a two story structure. Appellants began construction in April 2008. In August 2008, Appellees confronted Appellants when it became apparent to them that Appellants were building a second story over a portion of the home. Thereafter, Appellees' counsel sent Appellants a cease-and-desist letter dated September 4, 2008. Despite the warnings, Appellants proceeded with construction, which was completed in November 2008. Appellants' new home stands 28.6 feet in height.

¶6 Appellees filed suit to enforce the one story restriction. Following a four-day bench trial, the trial court found that Appellants knowingly breached the restrictive covenant by building a two story home in violation of Section IV

of the Declaration. The court granted injunctive relief, ordering Appellants to remove the second story of their home, the second story balcony, and the exterior staircase to the second story room over the master bathroom. The court also awarded Appellees their reasonable attorney fees and costs.

¶7 Appellants filed a Combined Motion for New Trial and Motion to Alter or Amend Ruling. The trial court affirmed its original ruling and denied the Combined Motion. Thereafter, the trial court entered a judgment that incorporated its previous findings.

¶8 Appellants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.1 (2011).[2]

DISCUSSION

Interpretation and Enforcement of the Declaration

¶9 Appellants contend that the trial court incorrectly interpreted the Declaration. They argue that the trial court's interpretation of "one story in height" rendered the modifying phrase "in height" superfluous and was contrary to the intent of the Declaration, which Appellants claim was a height limitation, not a limitation on the number of stories. In addition, because the Declaration does not specify a maximum height limitation in

[2] We cite the current version of applicable statutes and ordinances when no revisions material to this decision have since occurred.

feet and inches, Appellants also argue that the trial court erred in failing to find the Declaration too ambiguous to enforce.

¶10 A restrictive covenant is a contract between the subdivision's property owners as a whole and the individual lot owners, the interpretation of which we review de novo. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000).

¶11 In *Powell v. Washburn*, 211 Ariz. 553, 554, ¶ 1, 125 P.3d 373, 374 (2006), the Arizona Supreme Court explicitly adopted the approach of the Restatement (Third) of Property: Servitudes for interpreting real property restrictive covenants. The court held that "restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created." *Id.* By adopting the Restatement approach, the court rejected the strict construction rule of interpreting ambiguous restrictive covenants in favor of the free use of land. *Id*. at 556-57, ¶¶ 12-14, 125 P.3d at 376-77.

¶12 The Declaration states in relevant part, "No structure shall be erected, altered, placed or permitted to remain on any of said lots other than one detached single-family dwelling not to exceed one story in height." Appellants argue that the

qualifying term "in height" means the drafters of the Declaration intended "one story in height" to constitute an overall height restriction, not a restriction on the number of stories a structure could have. They further contend that because no numeric height is specified, the restriction cannot be enforced against their home.[3]

¶13 We disagree with Appellants' interpretation. Although the Declaration does not expressly state the intent of the drafters, it is clear from the language used, the proximity of the neighborhood to Camelback Mountain, and the appearance of the other homes in the neighborhood that the purpose of the restriction is to protect the individual lot owners' privacy and quiet enjoyment. Therefore, under *Powell*, the Declaration must be interpreted in a manner consistent with that purpose.

¶14 The California Court of Appeals addressed this same issue in *King v. Kugler*, 17 Cal. Rptr. 504 (App. 1961). In that case the court interpreted a deed restriction that contained the same phrase at issue in this case: "one story in height." The court determined:

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[3] Appellants point to two out-of-state cases, *Allen v. Reed*, 155 P.3d 443 (Colo. App. 2006), and *Hiner v. Hoffman*, 977 P.2d 878 (Haw. 1999), which found height restrictions stated in terms of stories too ambiguous to enforce. However, both of those cases relied on the strict rule of construction that was rejected in *Powell*. *See Allen*, 155 P.3d at 445; *Hiner*, 977 P.2d at 880-81. Thus, we find those cases unpersuasive.

> The words "one story in height" in [the restrictive covenant] are simply and concisely used; construed in the light of the entire instrument and the general plan and appearance of existing structures established in the tract and given their plain, ordinary and popular meaning we can only conclude, as the trial court did, that a structure not to exceed "one story in height" neither encompasses nor contemplates defendants' proposed structure, which is to have a garage floor and ceiling and a room with a floor and ceiling above the garage.

Id. at 507 (internal citations omitted).

¶15 Similarly, reading the restriction contained in the Declaration in its ordinary and popular sense, in light of the instrument as a whole and taking into account the appearance of the surrounding structures, we find that "in height" as used in the Declaration is a phrase used to emphasize "one story," meaning that only "one story" structures are allowed. The Declaration therefore prohibits Appellants' second story, which in this cases consists of the two rooms Appellants call "finished attics": one room located above the garage and the other over the master bathroom. Accordingly, the trial court did not err by concluding that Appellants' home violates the one story limitation in the Declaration. Similarly, we find no

error in the trial court finding that the Appellants' "finished attics" is a second story.[4]

¶16 As previously stated, Appellants also argue that the Declaration is too ambiguous to enforce. However, we find the common usage of the term "one story in height" is sufficiently clear to permit enforcement. The word "story" is defined in the Merriam-Webster's Collegiate Dictionary as "the space in a building between two adjacent floor levels or between a floor and the roof." Merriam-Webster's Collegiate Dictionary 1231 (11th ed. 2003). The Phoenix Zoning Ordinance employs a similar definition for "story": "that portion of a building included between the surface of any floor and the surface of the next floor above it, or if there is no floor above it, then the space between the floor and the ceiling next above it." Phoenix, Ariz., Zoning Ordinance § 202 (2011).

¶17 The term "height" is likewise unambiguous. Merriam-Webster's defines "height" as, "the distance from the bottom to the top of something standing upright." Merriam-Webster's Collegiate Dictionary 577 (11th ed. 2003). Additionally, "building height" is defined in the Phoenix Zoning Ordinance as, "the vertical distance measured from the higher of the natural grade level or the finished grade level . . . to the highest

[4] Because we affirm the trial court's finding that Appellants built a two story home, we do not agree with their argument that the second story is a mezzanine.

level of the roof surface of flat roofs; or to the mean height between eaves and ridge of gable, gambrel, or hip roofs." Phoenix, Ariz., Zoning Ordinance § 202 (2011). Neither definition discusses height in terms of a specific numeric measurement.

¶18 Appellants argue that "height" is ambiguous because the Declaration fails "to proscribe, in feet or by some other numerical measure, the maximum 'height' of a 'story'". Applying *Powell*, we find that the intent of the drafters and purpose of the Declaration was to preserve the privacy and quiet enjoyment of the individual homeowners. As evidence of this intent, the original homes, most of which still exist today, were all one story in height. We agree with the trial court that the drafters intended the "one story in height" restriction to limit homes in the neighborhood to one story, as that term is commonly understood, not necessarily a specific numeric height.

Injunctive Relief

¶19 Finally, Appellants argue that the trial court's order to remove the second story of the residence is "grossly disproportionate to the harm" suffered by Appellees and results in "severe economic waste." The trial court exercises its discretion in granting injunctive relief, and its decision will not be reversed absent an abuse of that discretion. *Horton v. Mitchell*, 200 Ariz. 523, 526, ¶ 12, 29 P.3d 870, 873 (App.

2001). We defer to the trial court's factual findings unless they are clearly erroneous. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 189, ¶ 58, 181 P.3d 219, 236 (App. 2008).

¶20 Equitable considerations, such as relative hardships, public interest, misconduct of the parties, and adequacy of other remedies, govern the enforcement of restrictive covenants by injunction. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 10, 156 P.3d 1149, 1152 (App. 2007). The trial court does not err in refusing to balance the hardships when the defendant, with notice of the restrictive covenant and aware of opposition from neighbors, "expend[s] large sums of money on the gamble that the restrictions would not be enforced against him." *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 26, 749 P.2d 930, 935 (App. 1987); *see also Decker v. Hendricks*, 97 Ariz. 36, 41-42, 396 P.2d 609, 612 (1964) ("Equitable remedies are a matter of grace and not of right and equitable discretion should not be used to protect an intentional wrongdoer.").

¶21 The trial court found Appellants knowingly violated the Declaration, and the evidence at the hearing fully supports that finding. Appellants received a copy of the Declaration when they purchased Lot Three and had actual knowledge of the deed restrictions. Neighbors, including Appellees, advised Appellants of the deed restrictions before construction began in

April 2008. Appellants received complaints about the height of their house during construction. When Appellees realized that Appellants were building a second story, Appellees spoke to Appellants and through their counsel sent a cease-and-desist letter in September. Appellees then filed suit to enforce the Declaration, but Appellants continued construction. The trial court concluded that Appellants "were well aware of opposition from their neighbors and [Appellees] as to the construction of a second story" and "had actual knowledge of the deed restrictions and chose to build."

¶22 Because Appellants proceeded with construction in the face of opposition from neighbors and with knowledge of the deed restrictions contained in the Declaration, we find the trial court did not err in refusing to balance the relative hardships and granting injunctive relief. We agree with the trial court that "[t]his voluntary choice to expend money to complete second story rooms cannot now constitute a hardship."

Attorney Fees

¶23 Appellees requested attorney fees and costs incurred in connection with this appeal pursuant to A.R.S. § 12-341.01.A and Rule 21 of the Arizona Rules of Civil Appellate Procedure. Because Appellees are the successful parties, we award attorney fees and costs to Appellees upon their compliance with Rule 21. We deny Appellants' request for attorney fees.

CONCLUSION

¶24 For the reasons stated above, we affirm the trial court's judgment.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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DIANE M. JOHNSEN, Presiding Judge

/S/
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MARGARET H. DOWNIE, Judge