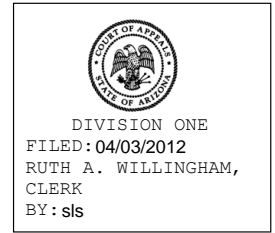


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STEPHEN RICHARD THOMPSON and ) No. 1 CA-CV 11-0358  
KATHLEEN ANN THOMPSON, Trustees )  
of the Thompson Family Trust ) DEPARTMENT D  
Created Under Declaration of )  
Trust Dated June 30, 1989 and as ) **MEMORANDUM DECISION**  
Amended January 13, 2004, ) (Not for Publication -  
 ) Rule 28, Arizona Rules of  
Plaintiffs/Appellees, ) Civil Appellate Procedure)  
 )  
v. )  
 )  
PAUL L. SUNDELL and KAREN )  
SUNDELL, husband and wife, )  
 )  
Defendants/Appellants. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Yuma County

Cause No. S1400CV201001115

The Honorable Andrew W. Gould, Judge

**AFFIRMED**

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Law Offices of Larry W. Suci, PLC ) Yuma  
By Barry L. Olsen )  
Attorneys for Plaintiffs/Appellees )

Torok Law Office P.L.L.C. ) Yuma  
By Gregory T. Torok )  
Attorneys for Defendants/Appellants )

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**S W A N N**, Judge

¶1 The neighbors of Paul and Karen Sundell ("the Sundells") sought a preliminary injunction to enforce the Conditions, Covenants, and Restrictions ("CC&Rs") that govern the Sundells' property. The Sundells appeal the trial court's grant of the injunction, which required them either to remove or modify a large metal building by a time not yet determined by the court. Because the trial court correctly found that the Sundells were not likely to prevail on the merits, we affirm its grant of the preliminary injunction.

*FACTS AND PROCEDURAL HISTORY*

¶2 This appeal follows an evidentiary hearing, and the following facts are not in dispute. In March 2007, the Sundells bought Lot 1 in the Fortuna Golf Subdivision ("the Fortuna subdivision") in Yuma, Arizona.<sup>1</sup> The property was improved with a new house; the builder who sold them the property gave them a warranty deed. The deed provided that the Sundells were taking the property subject to existing "taxes, assessments, covenants,

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<sup>1</sup> On appeal, the Sundells describe themselves as the retired operators of a family trucking business. In their October 17, 2010 memorandum to the trial court, they described themselves as "retired real estate professionals." They emphasize their relative lack of experience (they "sold one or two houses before quitting"), but admit that they obtained real estate licenses after retiring from trucking.

conditions, restrictions, rights of way and easements of record."<sup>2</sup>

¶13 After purchasing their property, the Sundells spent considerable sums of money finishing the interior and exterior of the house as well as adding improvements. In the summer of 2009, the Sundells hired a contractor to build a 42' by 40' metal building on the property to hold their motor home, ATVs and cars. During the construction, Jesse Gomez -- the principal of Fortuna De Oro, L.L.C, the company that created the Fortuna subdivision -- visited the property and asked the contractor what was being built and what it would look like when finished. When informed that it would be covered in metal, Gomez told the contractor that constructing "a barn" would violate the property's CC&Rs.<sup>3</sup>

¶14 The Sundells paused the construction, contacted their title company, and sought legal advice. Paul Sundell testified that the title company at first told him that no CC&Rs existed; he also said that it only found copies because he insisted that they "dig a little deeper." The company eventually found a copy

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<sup>2</sup> Additionally, the Sundells admitted that "there was mention of CC&Rs in their title policy."

<sup>3</sup> On appeal, the Sundells stand by the claim they made to the trial court: that Gomez's conversation with the contractor was the first time they actually learned about the CC&Rs on their property. They acknowledge in their opening brief, however, that they had effective legal notice of the CC&Rs.

of the CC&Rs and presented it to the Sundells. Their attorney at the time told the Sundells not to stop construction because that "would seem like an admission of wrongdoing." The Sundells finished the building.

¶15 The Declaration of CC&Rs on the Sundells' property was written and signed by Gomez as the managing member of Fortuna De Oro, L.L.C. Gomez signed the documents on December 27, 2004, and filed them with the Yuma County Recorder on January 27, 2005. The two provisions in the Declaration of CC&Rs relevant to the dispute are:

1. No building, fence, wall or other structure shall be commenced, erected or maintained upon the properties, nor shall any exterior addition to, change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height and materials and location of the same shall have been submitted to and approved in writing as to the harmony of external design and location in relation to surrounding structures and topography by an architectural committee composed of three (3) or more representatives appointed by the Declarant. In the event said committee or its designated agent fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this article will be deemed to have been fully complied with. The owners of lots shall elect three (3) new representatives to act as the committee. Once annually thereafter, three (3) new representatives shall be elected.

2. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached single family-dwelling [sic] complete with a minimum two-car (20' X 20') attached or detached garage. Further, all buildings, dwellings, structures, sheds and garages permitted on a lot shall be a design which is harmonious with each other.

¶16 The Declaration of CC&Rs applies by its terms to "Lots 1 through 6 inclusive." A map of the Fortuna subdivision shows that lots 1, 2 and 3 lie to the north; lots 4, 5 and 6 lie to the south; and the lots numbered 7B, 7C, 7D and 7E lie in the middle. Those middle lots are owned by Jesse Gomez and his children.

¶17 When asked whether the middle lots were part of the subdivision and, if so, why the CC&Rs had not been recorded on them, Gomez explained:

It was all part of the same subdivision when it all started, but when the title company recorded the CC&Rs we had already built our houses and we were out -- the county had put all four of them lots out of the subdivision for some reason, I don't know why, because we had already built probably or whatever.

Gomez insisted that, despite lacking the CC&Rs, the middle lots were part of the Fortuna subdivision: "They are part of the subdivision. . . . You're talking subdivision, we're not talking CC&Rs."

¶18 When asked if he could build whatever he wanted on those lots, Mr. Gomez at first said "no." But he then conceded: "I guess I could if I didn't follow CC&Rs, but that wasn't our decision to go in there and . . . just build anything we want to." He admitted that his compliance was technically voluntary and that, as things stood, future owners of those lots would not be encumbered by the CC&Rs. But he said that he intended to talk to his title company about including those lots in the CC&Rs because "they benefit all of our property."

¶19 Stephen Thompson, the Sundells' neighbor, testified about that benefit. He said that the Sundells' metal building impaired the value of all the properties in the subdivision: "[T]he first thing you see is that metal building in all these nice houses down that street." Thompson had seen other Yuma subdivisions with lots containing similar metal buildings. He and his wife bought their property in the Fortuna subdivision to avoid them. When they bought their property, they were aware that there was an architectural committee to enforce the CC&Rs.

¶10 That architectural committee has never consisted of anyone other than Jesse Gomez and his son Frank. All of the developed properties within the Fortuna subdivision that are subject to the CC&Rs have had their plans submitted to the architectural committee for approval. Even the original builder of the house on the Sundells' property submitted plans, which

did not contain a "metal structure" or "barn." And until the controversy over the Sundells' metal building, no one had objected to Jesse and Frank Gomez serving as the only members of the architectural committee.<sup>4</sup>

¶11 On October 1, 2009, counsel for Fortuna De Oro wrote the Sundells a letter. It notified the Sundells that to comply with the CC&Rs, their new building "would need to be stuccoed with a tile roof to match [their] residence." The Sundells contacted the engineers who had designed the building to see whether it could be "remediated." It would cost \$85,000 or more to make the building's roof "peaked" and therefore "harmonious" with the Sundells' house (the original cost of the building was approximately \$40,000). Paul Sundell testified that it would be possible to "put stucco on the outside." Eventually, Fortuna De Oro sent the Sundells another letter requesting that the situation with the metal building be resolved by June 1, 2010.

¶12 On September 10, 2010, the Thompsons filed a verified complaint against the Sundells for breach of contract, alleging that the metal building failed to comply with the CC&Rs. They also alleged that they had no adequate remedy at law. They requested injunctive relief "ordering [the Sundells] to immediately comply with the CC&Rs and remove their metal shed."

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<sup>4</sup> Thompson, testifying about his own experience of submitting plans to Jesse and Frank Gomez for approval, said that the process was not "difficult."

¶13 On September 13, the court ordered the Sundells to show cause why they were failing to comply with the CC&Rs. On April 21, 2011, after an evidentiary hearing, the trial court granted the Thompsons and Fortuna De Oro, L.L.C., a preliminary injunction.

¶14 The preliminary injunction directed the Sundells "to either remove the metal building on their property or modify the building to comply" with the CC&Rs. The court ordered the Sundells to take no action before a status hearing (scheduled for May 9), which would "determine a reasonable deadline for compliance with this Order and/or a date for trial." The Sundells timely appeal from the court's grant of the preliminary injunction. We have jurisdiction under A.R.S. § 12-2101(A)(5)(b).

#### STANDARD OF REVIEW

¶15 On appeal, both parties agree that they have no dispute about the relevant facts, and our review is therefore de novo. *Grosvenor Holdings L.C. v. City of Peoria*, 195 Ariz. 137, 139, ¶ 6, 985 P.2d 622, 624 (App. 1999) (citation omitted). The grant of a preliminary injunction "rests in the sound discretion of the trial court." *Fin. Assocs., Inc. v. Hub Props., Inc.*, 143 Ariz. 543, 545, 694 P.2d 831, 833 (App. 1984) (citations omitted). We review an order granting an injunction for "a clear abuse of judicial discretion." *Id.* The trial court



clearly abuses its discretionary power to grant an injunction if it misapplies the law to undisputed facts. *City of Phoenix v. Superior Court (Laidlaw Waste Systems, Inc.)*, 158 Ariz. 214, 217, 762 P.2d 128, 131 (App. 1988).

#### DISCUSSION

¶16 To obtain a preliminary injunction, a party must establish: "(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury not remediable by damages; (3) a balance of hardships in that party's favor; and (4) a public policy favoring the requested relief." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 280, 860 P.2d 1328, 1333 (App. 1993) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)).

¶17 The trial court found that all of the traditional criteria for issuing a preliminary injunction were met. First, it found that the CC&Rs were valid and enforceable, and observed that the Sundells did not dispute the noncompliance of their metal building with the CC&Rs. It therefore concluded that the Thompsons would likely succeed on the merits against the Sundells. Second, it found that if the building were to be maintained on the property, then the Thompsons would suffer an injury not remediable by damages. Third, it found that the balance of hardships favored the Thompsons, who relied on the CC&Rs to maintain their property's value. And fourth, it found

that, given that the Sundells completed the building after hearing about the CC&Rs from Gomez, it would be counter to public policy to allow the building to remain.

¶18 On appeal, the Sundells argue that the court erroneously concluded that the Thompsons are likely to succeed on the merits, because the CC&Rs in this case are not enforceable under Arizona law. Second, that the court's injunction was inappropriate because the nonexistence of a valid architectural committee put the Thompsons in "an impossible position." Finally, they contend that the court failed to require the plaintiffs to post security before it issued the injunction. We address each argument in turn.

I. *THE TRIAL COURT'S CONCLUSION THAT THE CC&RS ARE LIKELY ENFORCEABLE*

¶19 "Restrictive covenants which equity enforces among purchasers are those that have been imposed by a common vendor or the original owner of a tract of land in pursuance of a general plan for the development and improvement of the property." *Colonia Verde Homeowners Ass'n v. Kaufman*, 122 Ariz. 574, 576, 596 P.2d 712, 714 (App. 1979) (citing *Palermo v. Allen*, 91 Ariz. 57, 369 P.2d 906 (1962)). The Sundells claim that the undisputed facts and relevant law lead to the conclusion that their CC&Rs are not enforceable under this rule

because there is no "general plan" that their CC&Rs are "in pursuance of."

¶120 They argue, relying principally on *O'Malley v. Cent. Methodist Church*, 67 Ariz. 245, 194 P.2d 444 (1948), that the unrestricted middle lots create "an incoherent allocation of the CC&Rs" that precludes a court from finding a truly "general plan." But, as the trial court noted, *O'Malley* involved land that underwent a series of subdivisions over time, and at each subdivision different parcels were subjected to different kinds of restrictions. *Id.* at 247-49, 194 P.2d at 445-48. Further, the *O'Malley* court found that the unrestricted lots were not "improved in conformity with restrictions, but contrary thereto," and that noncompliance "was the general rule on such lots." *Id.* at 258, 194 P.2d at 453. Given the uneven distribution of the covenants and restrictions coupled with the lack of actual conformity in practice, the *O'Malley* court found that grantees could not enforce the covenants and restrictions among themselves because there really was no general plan. *Id.*

¶121 Here, even if the middle lots owned by the Gomez family have not been subjected to CC&Rs, the court was not required to conclude that the CCR&Rs would likely be unenforceable against the Sundells. Nothing in the record points to the total absence of a genuine general plan. Jesse

Gomez testified that the unrestricted lots were actually improved in conformity with the restrictions.

¶122 The record supports the conclusion that the Fortuna subdivision had "a general plan" that was "maintained from its inception" and "understood, relied on, and acted upon by all in interest." *Colonia Verde*, 122 Ariz. at 577, 596 P.2d at 715 (citation omitted). The court, therefore, did not abuse its discretion in concluding that the Thompsons would likely prevail against the Sundells on the merits.

## II. THE QUESTION OF THE ARCHITECTURAL COMMITTEE

¶123 The trial court based its ruling on the validity and enforceability of the CC&Rs. It explicitly declined to find whether the architectural committee strictly complied with the CC&Rs, or whether something less than strict compliance would affect the claim that the Sundells were in breach.

¶124 The Sundells argue that because the CC&Rs call for a three-member architectural committee, and because the Fortuna subdivision's architectural committee only ever had two members, no valid architectural committee existed to which they could submit their plans. To support their argument, the Sundells cite *Rohde v. Beztak of Ariz., Inc.*, 164 Ariz. 383, 793 P.2d 140 (App. 1990), for their proposition that "[w]hen an architectural committee is called for by CC&Rs but does not exist, the failure

to obtain approval from the committee is a breach of no consequence."

¶125 Nothing in *Rohde* indicates that the trial court misapplied the law. In fact, the *Rohde* court held that a builder "did indeed breach the CC & Rs" by not submitting plans to a nonexistent architectural committee. *Id.* at 388, 793 P.2d at 145. And though it upheld a judgment in favor of a builder who had started to build without a committee's approval, it did so because there was no evidence that "if the plans had been submitted, the committee would have rejected the plans because the house violates the common scheme for development of the subdivision." *Id.* Because the facts in this case run directly contrary to those in *Rohde*, we find the case inapposite.

¶126 Here, the trial court had ample evidence to conclude that if the Sundells had submitted their plan to an architectural committee -- whether comprised of two or three members -- the committee would have rejected it. According to the CC&Rs, the committee's responsibility is to determine whether a proposed building will be in "harmony" with existing structures. Not even the Sundells argue that the metal building meets this requirement.

### III. THE BOND ISSUE

¶127 Arizona Rule of Civil Procedure 65(e) provides that no "preliminary injunction shall issue except upon the giving of

security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined . . . ." The Sundells argue that the case needs to be remanded to the trial court because the court never required the Thompsons, as applicants for a preliminary injunction, to give security. This issue was not raised in the trial court, and we do not address issues raised for the first time on appeal. *Nat'l Broker Associates, Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 216, ¶ 30, 119 P.3d 477, 483 (2005) (citation omitted). Even if the issue had been preserved, we would conclude that this appeal renders it moot -- the Sundells were not "wrongfully enjoined."

*ATTORNEY'S FEES*

¶128 On appeal, both the Thompsons and the Sundells request attorney's fees under A.R.S. § 12-341.01(A). In the exercise of our discretion, we award the Thompsons their reasonable attorney's fees incurred as a result of this appeal, pending compliance with ARCAP 21(c).

*CONCLUSION*

¶129 We affirm the trial court's grant of the preliminary injunction.

/s/

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PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

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MICHAEL J. BROWN, Judge

/s/

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JON W. THOMPSON, Judge