IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BARTON PRIEVE, INDIVIDUALLY AND AS TRUSTEE OF
THE BARTON GERALD PRIEVE TRUST DATED JUNE 11, 2014,
Plaintiff/Appellee,

v.

FLYING DIAMOND AIRPARK, LLC,
AN ARIZONA LIMITED LIABILITY COMPANY,
Defendant/Appellant.

No. 2 CA-CV 2020-0175
Filed October 13, 2021

Appeal from the Superior Court in Pima County
No. C20200241
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

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OPINION

Presiding Judge Espinosa authored the opinion of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

E S P I N O S A, Presiding Judge:

¶1 Flying Diamond Airpark LLC ("Flying Diamond") appeals from the grant of summary judgment in favor of Barton Prieve and denial of its cross-motion for summary judgment, arguing the trial court erred in determining its managers lacked authority to take certain actions within the planned community. Flying Diamond also challenges the court's award of attorney fees. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 On review of a grant of summary judgment, we view the facts, which are undisputed here, in the light most favorable to the non-moving party. *See McCleary v. Tripodi*, 243 Ariz. 197, ¶¶ 1-2 (App. 2017). Flying Diamond is a planned-community association that operates the Flying Diamond Airpark ("Airpark"). Property within the Airpark is subject to recorded covenants, conditions and restrictions (CC&Rs). Flying Diamond was formed to maintain the easements and roadways and to enforce the CC&Rs and is further governed by its operating agreement pursuant to Article V, paragraph 3 of the CC&Rs. Though all property owners in the Airpark are members of Flying Diamond, five managing members carry out its "[n]ormal day-to-day management" pursuant to the operating agreement.

¶3 Running through the center of the Airpark is a thirty-five foot wide paved runway for the takeoff and landing of small private aircraft. The runway sits upon two easements that extend 120 feet in each direction off the centerline of the runway ("Runway Easements"). Prieve, through a trust, owns a parcel whose northern boundary is roughly on the center line of the runway such that its northern 120 feet is subject to a Runway Easement. On Prieve's property, a little over twenty-five feet from the edge of the paved runway, is an area of native vegetation containing various desert plants and trees, "some or all of which predate[]" the Airpark.

¶4 At a Flying Diamond membership meeting in October 2019, the managers proposed to clear all vegetation from the Runway Easements

as part of a five-year plan, which included paving "run-up pads" on each end of the runway, grading the taxiway along the runway with an eye toward eventual paving, and road improvements. The proposal was approved despite the lack of a required quorum, and Flying Diamond began clearing vegetation from the Runway Easements the following month.

¶5 Prieve obtained a preliminary injunction enjoining the clearing of vegetation and sued Flying Diamond, seeking declarative relief that the vote to clear vegetation was deficient under the Arizona Planned Communities Act for lack of notice and improper use of proxies. Prieve also initially sought a declaration that regardless of the vote, Flying Diamond "lack[ed] the authority . . . to clear vegetation" from the Runway Easements.[1] Prieve moved for summary judgment, and Flying Diamond responded, admitting that the October meeting violated the Arizona Planned Communities Act, but arguing "the issue of clearing the easement is a [m]anager decision, rather than a membership decision" and the "[m]anagers have the right to clear the easement whether such vote was valid or not" pursuant to the CC&Rs and the operating agreement. Flying Diamond cross-moved for summary judgment on that issue.

¶6 Following oral argument on the motions, the trial court ruled the October vote was ineffective and did not "authorize anything" and granted Prieve's motion for summary judgment. The court denied Flying Diamond's cross-motion for summary judgment, finding "as a matter of law . . . the clear-cutting at issue here is not . . . normal day-to-day maintenance" and therefore not authorized under the governing documents. The court granted Prieve's request for attorney fees and costs, noting the dispute arose out of a contract, "specifically the underlying Operating Agreement and corresponding CC&Rs." The court granted Prieve a reduced amount of $175,000 in attorney fees, final judgment was entered, and Flying Diamond appealed.

Jurisdiction

¶7 As a threshold issue, we address Prieve's contention that we lack jurisdiction to consider this appeal. Because our jurisdiction is defined

[1]Prieve's subsequent amended complaint omitted this separate claim for declarative relief but maintained that Flying Diamond "lacks the authority to clear vegetation from the portion of his property" within the Runway Easements.

by statute, *see* A.R.S. §§ 12-120.21, 12-2101, we are obligated to consider our jurisdiction over an appeal, *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, ¶ 6 (App. 2016). Prieve argues Flying Diamond's notice of appeal "is null and void" because the association failed to conduct an open meeting on the issue of whether to file it. Prieve relies on *Johnson v. Tempe Elementary School District No. 3 Governing Board*, in which we found the appeal "invalid" because the appellant school board had not complied with open meeting laws in deciding to file a notice of appeal. 199 Ariz. 567, ¶ 17, n.1 (App. 2000). Absent ratification, decisions by public bodies in violation of open meeting laws are null and void pursuant to statute. *Id.* ¶ 17; A.R.S. § 38-431.05(A). But the statutes governing planned communities like Flying Diamond contain no similar provision. *See* A.R.S. §§ 33-1801 to 33-1818. While Prieve could have filed an action to stop the appeal, *see* A.R.S. § 10-3304(B)(2), we have found no basis to declare void the notice of appeal filed here. Accordingly, we have jurisdiction pursuant to §§ 12-120.21(A)(1) and 12-2101(A)(1).[2]

Authority to Clear Vegetation

¶8 Flying Diamond contends the trial court erred as a matter of law in finding the managers unauthorized to clear vegetation from the Runway Easements, arguing the CC&Rs and the operating agreement grant them that authority. When interpreting CC&Rs, as with any contract, we give effect "to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the [contract], and to carry out the purpose for which it was created." *Powell v. Washburn*, 211 Ariz. 553, ¶ 13 (2006) (quoting Restatement (Third) of Property (Servitudes) § 4.1(1) (2000)). "When 'the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.'" *IB Prop. Holdings, LLC*

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[2] A trial court's denial of a motion for summary judgment is ordinarily not appealable even after final judgment is entered. *See Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, ¶ 11 (App. 2001). But the denial of Flying Diamond's cross-motion for summary judgment was essentially a rejection—as a matter of law—of an affirmative defense that was incorporated into Flying Diamond's pleadings. In any event, the ruling here was dispositive of the action and was made on a point of law. *See id.*

v. Rancho Del Mar Apts. Ltd. P'ship, 228 Ariz. 61, ¶ 16 (App. 2011) (quoting *Emps. Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, ¶ 24 (2008)).

¶9 Article I of the CC&Rs states,

> The purpose of these restrictions is to prevent nuisances or damage to the inherent beauty and attractiveness of the property, to maintain the character of the area, and to secure for each owner the full benefit and enjoyment of his property with no greater restriction on the free and undisturbed use of his property than is necessary to insure the same advantages to other owners.

Article III, paragraph 11 prohibits the removal of certain-sized trees "unless absolutely necessary" for the construction of certain structures and similarly prohibits the removal or destruction of "[o]ther native vegetation" except as is necessary to clear space for construction. The CC&Rs also provide that the Runway Easements "shall be used in any and all lawful ways which are necessary or convenient to the construction, establishment, maintenance, and operation of an airstrip or airport, as well as all other activities normally related or incident to such use."

¶10 As noted above, Flying Diamond is made up of all the Airpark's property owners and is governed by its operating agreement. The agreement states, "Normal day-to-day management of [Flying Diamond] will be carried out by one or more of the managing members," and it sets forth procedures regarding the election of managers, semiannual meetings, and special meetings. At semiannual meetings, the managers must review activities arising from the previous semiannual meeting, review the budget, "and raise any substantive issues which should be the purview of the entire membership to discuss and vote upon." The operating agreement further directs the duties of managers as follows: "The managers shall be responsible for the day-to-day management of Flying Diamond . . . . Each manager is empowered to make decisions and to cause expenditure of funds within the calendar year's programmed budget."

¶11 Flying Diamond argues that the Airpark "has a duty and right to maintain the Runway Easement[s], including removing vegetation," and "maintenance of the easements is exclusively left to the Managers" as a "day-to-day" operation. While it is true that the Airpark has "the right and

privilege of doing whatever may be necessary in" the easements to carry out the purposes of the easements and Flying Diamond is the body charged with the maintenance of the Runway Easements pursuant to paragraphs 1 and 2 of Article V, that does not resolve whether the *managers* have the authority under the governing documents to undertake the particular action proposed here—clearing all vegetation from the Runway Easements.[3] We disagree with Flying Diamond's bare assertion that the managers have the exclusive authority to undertake all rights and powers not specifically reserved to the membership.[4] The plain language of the CC&Rs and operating agreement imposes express limitations on the scope of the managers' authority. Specifically, the managing members are authorized to carry out "[n]ormal day-to-day management." *See IB Prop. Holdings, LLC*, 228 Ariz. 61, ¶ 16 (court applies plain language of contract "as written" and will not "add something . . . which the parties have not put there").

¶12 The relevant question is thus whether the managers' proposed removal of vegetation, or as expressed by Prieve and the trial court, "clear-cutting" the landscape, is a matter of "day-to-day management." Our decision in *Kirchof v. Friedman*, 10 Ariz. App. 220 (1969), is instructive. In that case, the plaintiffs were hired to manage a restaurant, and the employment contract provided that the general policies of operation were to be set by the defendant-employer but the "day to day"

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[3] In its briefing and at oral argument before this court, Flying Diamond made much of "the safety issue" posed by the vegetation on the Runway Easements. Flying Diamond acknowledged, however, that such concerns are premised on a non-binding Federal Aviation Administration "Advisory Circular." In any event, as noted above, this argument misses the mark on the specific relevant inquiry before the court.

[4] At oral argument, Prieve pointed out that the only authority Flying Diamond cited for this proposition, Restatement § 6.16, was raised for the first time in its reply brief, arguing we should find the argument waived. We agree. *See Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, n.7 (App. 2007). And, even were it not waived, § 6.16 would not change our analysis because it states, "Except as otherwise provided by statute or the governing documents, an association . . . is governed by a board elected by its members. The board is entitled to exercise all powers of the community except those reserved to the members." The operating agreement here expressly limits the powers of the managing members, and the Restatement's general rule therefore does not apply.

management of the business was under the plaintiffs' control. *Id.* at 221. A dispute arose over whether certain decisions fell under the "day to day" operation of the business or rather were matters affecting policy under the defendant-employer's purview. *Id.* at 222. We explained that there were no general principles as to when control is a matter of general policy or a matter of day-to-day operation, "each individual situation being determined by the particular facts involved." *Id.* In a restaurant setting,

> the question of whether or not to serve steaks or pork chops on a particular day may very well be a matter of "day to day" operation. However, the overall type of menu presented by a restaurant certainly influences the atmosphere or image which the restaurant wishes to convey. The same may be said for the type of advertising a restaurant uses. This is also true of the hiring of other employees in the restaurant—the hiring and firing of a busboy or dishwasher having no effect on the overall operation of the business, while the employment of a chef or a hostess meeting the public would affect that operation. Probably no single function sets the tone of a restaurant-bar establishment more than the type of entertainment offered—a jazz band would attract a certain type of clientele, while a Western band would attract another, although the decision as to when this entertainment might be presented could be in the area of "day to day" operation.

Id. at 223; *see also LNYC Loft, LLC v. Hudson Opportunity Fund I, LLC*, 57 N.Y.S.3d 479, 483-84 (App. Div. 2017) (appointment of special litigation committee is "major decision" rather than one of "day-to-day management"); *Erickson v. Civ. Serv. Comm'n*, 704 N.E.2d 522, 522 (Mass. App. Ct. 1999) (deploying new police cruisers within executive policy-making authority, outside of police chief's day-to-day management of department); *Reddick v. Jones*, 304 S.E.2d 389, 391 (Ga. 1983) (terminating pastor's employment outside scope of "day-to-day management" per church bylaws); *Molasky Enters., Inc. v. Carps, Inc.*, 615 S.W.2d 83, 87 (Mo. Ct. App. 1981) ("day-to-day management" is "limited to the transaction of the corporation's regular business and for the benefit of the corporation").

¶13 Here, the decision whether to clear all vegetation over a large area of land, impacting the long-established landscape of the Airpark and directly altering the property of multiple owners, is outside the scope of "day-to-day management." Several factors lead us to this conclusion. First, the project was proposed as part of a five-year plan, and the managers presented the proposal at a meeting for the entire membership and sought member approval. While that may not have been legally binding on the scope of their authority, it certainly weighs in favor of a finding that the project exceeded such scope. Indeed, one manager recognized that the managers' authority is limited to "the day-to-day activities, enforce the CC&Rs, . . . put together teams to do cleanup projects, stuff like that," but that the vegetation removal project "is a big decision" and they "got a lot of pushback." And in contrast with "day-to-day" decisions, the operating agreement directs that "any substantive issues which should be the purview of the entire membership" are to be raised by the managers for membership to "discuss and vote upon." Removing native mature vegetation from various properties aligns more closely with such issues.[5]

¶14 Second, unlike changing the daily specials on a restaurant menu, the managers' decision to clear the Runway Easements of native vegetation—and an expressed purpose of the CC&Rs being to prevent damage to the inherent beauty of the property and maintain the character of the area—is more akin to the shift from nightly jazz to a country western band: a thematic transformation to the establishment. *See Kirchof*, 10 Ariz. App. at 223. In contrast to the managers' decision to clear the Runway Easements, day-to-day decisions might include, for example, determining when and how the removal of vegetation is accomplished, whether to hire contractors, and how much those contractors are to be paid, subject to the operating agreement provision regarding expenditure approvals.

¶15 Finally, at oral argument in this court, Flying Diamond candidly acknowledged that clearing the vegetation from the Runway Easements would be a "sea change" and "a necessary first step" to achieve

[5] The trial court's ruling was limited to whether the managers' proposed action to remove vegetation from the Runway Easements was within the scope of "day-to-day" management and did not decide "the issue of whether the governing documents authorize the clear-cutting through some other format, for example, member voting." Our decision is likewise so limited. *See Stonecreek Bldg. Co. v. Shure*, 216 Ariz. 36, n.3 (App. 2007) (appellate courts do "not give advisory opinions").

the larger vision contemplated by the five-year plan. We conclude the trial court did not err in finding that the clearing of vegetation exceeded the scope of the managers' day-to-day management duties and was not authorized by the association's governing documents.

Attorney Fees

¶16 Flying Diamond also challenges the trial court's award of attorney fees to Prieve. As noted above, the court awarded Prieve $175,000,[6] finding the lawsuit arose out of a contract and, further, that the CC&Rs contain a mandatory fee provision. Section 12-341.01(A), A.R.S., provides that in an action "arising out of a contract . . . the court may award the successful party reasonable attorney fees." We review the grant of attorney fees pursuant to that statute de novo. *See Sunland Dairy LLC v. Milky Way Dairy LLC*, 251 Ariz. 64, ¶ 23 (App. 2021).

Entitlement to Fees

¶17 We agree with the trial court that this action arose out of a contract. The CC&Rs were not, as Flying Diamond appears to suggest, simply an unrelated contract between Prieve and Flying Diamond. Although Prieve's complaint did not plead a claim for breach of contract, he alleged Flying Diamond's proposed vegetation removal would violate Article III, paragraph 11 of the CC&Rs and sought an injunction to prevent such violation. And resolution of the central issue in the case—whether the managers had authority to undertake their proposed action—necessarily required the court to interpret the CC&Rs and its attendant operating agreement, an express contract among and between the property owners and Flying Diamond. *See Ahwatukee Custom Ests. Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000) (CC&Rs constitute contract). Moreover, Flying Diamond agreed below that the interpretation of the documents was the "central issue" in the dispute.

¶18 The trial court further found it was required to award fees pursuant to Article III, paragraph 25 of the CC&Rs, which provides in relevant part, "[w]here an action, suit or other judicial proceeding is instituted or brought for the enforcement of these protective restrictions and easements, the losing party in such litigation shall pay all expenses,

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[6]The trial court reduced Prieve's requested amount of attorney fees, pursuant to Flying Diamond's detailed objection below, by more than $75,000.

including a reasonable attorney's fee, incurred by the other party in such legal proceeding."[7] Flying Diamond argues that provision is meant to be read in conjunction with its preceding paragraph (stating civil actions may be brought against property for violations of the restrictions and easements) such that it does not apply to Prieve's lawsuit. We agree that the fee provision is limited to actions brought to enforce the protective restrictions, but conclude Prieve's lawsuit falls within that provision. Although the resolution of the claims ultimately turned on whether the managers had authority under the operating agreement, Prieve's lawsuit was brought, at bottom, to enforce by injunction the restriction in the CC&Rs, cited by Prieve below, prohibiting the unnecessary clearance of native vegetation. And because the fee provision is not limited only to actions brought against other property owners, we agree with the trial court that it is broad enough to encompass Prieve's lawsuit and he was therefore entitled to a mandatory fee award.[8] Thus, the court did not abuse its discretion by awarding attorney fees to Prieve. *See* § 12-341.01(A); *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18 (App. 2004) ("An award of attorney fees is left to the

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[7]Prieve argues we need not address this issue because the trial court found his action arose out of contract. Section 12-341.01(A) gives the trial court discretion to award attorney fees, whereas the CC&Rs provision makes attorney fees mandatory. Thus, if the trial court erred by concluding the CC&Rs provision applied, then it was not required to award Prieve his attorney fees and may have exercised its discretion to decline Prieve's request. We therefore address this argument.

[8]We reject Flying Diamond's suggestion that Prieve is not entitled to attorney fees because his demand letter was sent by first-class mail rather than certified mail per Article III, paragraph 25 of the CC&Rs. That provision requires notice of a breach of the CC&Rs to be delivered by certified mail prior to bringing a "civil action against the property upon which such violation exists." It therefore does not apply to Prieve's action against Flying Diamond and in any event is not a prerequisite to the recovery of attorney fees. Moreover, even if the certified-mail requirement did apply, Flying Diamond waived it by responding to Prieve's initial demand letter and engaging in litigation without raising any objection to the sufficiency of his notice until the objection to attorney fees. *See Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55 (1980) (waiver by conduct established by "evidence of acts inconsistent with an intent to assert the right"); *cf. Nat'l Homes Corp. v. Totem Mobile Home Sales, Inc.*, 140 Ariz. 434, 437-38 (App. 1984) (defendant waived insufficiency-of-process defense by subjecting itself to jurisdiction of court).

sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.").

Amount of Fee Award

¶19 Flying Diamond also contests the amount of attorney fees the trial court awarded to Prieve, claiming "none of Prieve's fees incurred prior to [Flying Diamond's] Cross-Motion for Summary Judgment were related to the Airpark's argument, which the trial court deemed as arising out of a contract." But this argument ignores that the "fundamental dispute" in the litigation was the managers' authority, and the court deemed Flying Diamond's answer as "amended to incorporate the cross-motion's arguments." We reject the suggestion that the litigation preceding Flying Diamond's cross-motion for summary judgment was unrelated. Flying Diamond contested the claims in Prieve's amended complaint, predictably resulting in further litigation. Moreover, Flying Diamond's failure to raise its affirmative defense before the summary judgment stage does not render the costs Prieve incurred before then unnecessary—Prieve promptly moved for summary judgment after Flying Diamond filed its answer. *See* Ariz. R. Civ. P. 56(b)(1)(A) (claimant may move for summary judgment only after date when responsive pleading due from defendant). The court's inclusion of the previous litigation was not an abuse of its discretion. *See Orfaly*, 209 Ariz. 260, ¶ 18.

Attorney Fees and Costs on Appeal

¶20 Pursuant to the mandatory fee provision of the CC&Rs, Prieve is entitled to his reasonable attorney fees and costs on appeal upon his compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. §§ 12-341; 12-341.01(A).

Disposition

¶21 For the foregoing reasons, the trial court's judgment is affirmed.