IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

DAVID AND JUDY WEST, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

HIGHROADS PROPERTY OWNERS ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; KEVIN LANGSTON AND JANE DOE LANGSTON, HUSBAND AND WIFE; JOHN KANTERAKIS AND JANE DOE KANTERAKIS, HUSBAND AND WIFE; TONY THOMPSON AND JANE DOE THOMPSON, HUSBAND AND WIFE,
Defendants/Appellees.

BAR SEVEN CATTLE COMPANY, LLC,
AN ARIZONA LIMITED LIABILITY COMPANY; AND
BONITA CATTLE, L.L.C., AN ARIZONA LIMITED LIABILITY COMPANY,
Plaintiffs in Intervention/Appellees,

v.

DAVID AND JUDY WEST, HUSBAND AND WIFE,
Defendants in Intervention/Appellants.

No. 2 CA-CV 2019-0033
Filed June 8, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Graham County
No. CV201600061
The Honorable Michael D. Peterson, Judge

VACATED AND REMANDED

COUNSEL

Munger, Chadwick & Denker P.L.C., Tucson
By Andrew H. Barbour, Thomas A. Denker, and David Ruiz
Counsel for Plaintiffs/Appellants

Carpenter, Hazlewood, Delgado & Bolen LLP, Tucson
By Jason Smith and Nicholas C. Nogami
Counsel for Defendants in Intervention/Appellants

Good Law P.C., Tucson
By Gregory E. Good
Counsel for Plaintiffs in Intervention/Appellees

Jones, Skelton & Hochuli P.L.C., Phoenix
By J. Gary Linder, Lori L. Voepel, and Justin Ackerman
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 David and Judy West appeal the trial court's grant of summary judgment in favor of Highroads Property Owners Association ("Highroads" or "the association"), Kevin Langston, John Kanterakis, and Tony Thompson ("Defendants") and partial summary judgment in favor of Bar Seven Cattle Company and Bonita Cattle Company ("Intervenors"). The Wests contend the court erred in upholding Defendants' cancellation of the Wests' variances, granting quiet title to Intervenors, and granting declaratory judgment in favor of the Intervenors. For the reasons stated below, we vacate certain portions of the court's judgment and remand.

Factual Background

¶2 For a complete understanding of the issues involved in this appeal, it is necessary to review the lengthy factual and procedural history of the case and interested parties in some detail.

Subdivision and Creation of CC & Rs

¶3 In 2006, Arizona Land & Ranches, Inc. ("AL&R") subdivided the land now known as Eureka Springs Ranch II ("Eureka Springs"). An easement was created in the record of survey at Note A, stating,

> A 30' (thirty foot) wide perpetual easement, for purposes of ingress/egress, livestock access, and utility line construction, maintenance and repair, shall be located along and immediately adjacent to all parcel lines shown hereon, entirely within the applicable parcels (except as noted and shown hereon).

The easement was granted to,

> 1) "Eureka Springs Property Owners Association," as appurtenant easements, for purposes of ingress/egress, roadway maintenance, repairs and improvements, all for the benefit of its members, (2) applicable utility providers, as easements in gross, for the purpose of utility line construction, maintenance and repairs, and 3) the "owner/lessee of the grazing rights" as easements in gross, for purposes of ingress/egress, grazing and transporting livestock and fence/facility maintenance and repairs, transferable only to any subsequent owner/lessee of the grazing rights.

¶4 In 2007, AL&R recorded a declaration of covenants, conditions, and restrictions ("CC & Rs") for Eureka Springs. The CC & Rs recognized the easement and grazing rights under Note A in sections 5.14, 5.15, 5.18, and 5.19.[1] Sections 5.14 and 5.15 mandate "any fences constructed on a Parcel shall not be closer than thirty . . . feet to any parcel line" and "no structure including fencing shall be constructed on the recorded easements as they are shown on the Record of Survey." Section 2.15 of the CC & Rs provides that variances to section five may be granted

[1] Although described as a "setback easement" throughout the litigation and on appeal, the record of survey creating the easement does not so define it.

when strict adherence to the restrictions would cause undue hardship or where association members would benefit from the variance. The Eureka Springs development is essentially split down the middle by Bonita-Klondyke Road.

Grazing Leases for East and West Sides of Eureka Springs

¶5 In October 2005, AL&R and 76 Ranch Cattle Company, owner of Lot 174, executed a "Grazing Lease Agreement" granting 76 Ranch grazing rights to "that portion of the Lease located on the East side" of Bonita-Klondyke Road. The lease agreement was made to "inure to the benefit of and be binding upon the heirs, executors, successors, and assigns of the parties."

¶6 Later, in 2007, AL&R recorded a Utility and Access Easement Agreement (UAEA) granting 76 Ranch

> a non-exclusive blanket easement over and across the Burdened Property for the purpose of grazing and feeding/watering of livestock and providing ingress to and egress for Grantee's livestock, its successors, assigns, employees and agents in transporting or relocating livestock. Individual owners of the Parcels succeeding to the interest of Grantor [that is, AL&R] within the Burdened Property (hereinafter "Owner" or "Owners") may fence their Parcel(s) in order to restrict Grantee and Grantee's livestock from crossing or grazing on Owner's Parcel or any portion thereof, at which time said blanket easement shall be extinguished as to the enclosed portion(s) of the Parcel.

¶7 In 2009, AL&R executed an agreement with Bar Seven Cattle Company titled "Assignment of Grazing Rights, Title and Interests," to "transfer and convey all of [AL&R's] rights, title and interests in the Grazing Rights" to certain lots in Eureka Springs, all lying on the west side only of Bonita-Klondyke Road. In 2010, 76 Ranch conveyed its interest in the Eureka Springs lot on which it operated its ranching business (Lot 174) to Bonita Cattle Company by special warranty deed. 76 Ranch elected not to perform an assignment of its grazing lease.

Actions of Property Owners Association

¶8 In September 2014, Highroads [2] circulated a letter to its members describing the process to be followed when requesting a variance. All variance requests were required to be in writing and delivered by hand, mail, or email. Moreover, all requests were to state the reason for the request. David and Judy West own Lots 177, 178, and 180 on the east side of Eureka Springs. On February 2, 2015, while a member of the Board of Directors of Highroads, David West attended and participated in a meeting during which he was granted a variance to sections 5.14, 5.15, and 5.19 of the CC & Rs, to erect fencing for the purpose of "rais[ing] cattle on" his property. Later that month, he lost his position as a board member of the association and new officers, Kevin Langston, John Kanterakis, and Tony Thompson, were elected. At a March 2015 meeting, the new board of directors unanimously voted to cancel the previously granted February 2, 2015 variances.

Procedural History

¶9 In 2016, David and Judy West filed suit against Highroads and the new board members, alleging violations of A.R.S. § 33-420(A), and (C), seeking to quiet title to their three lots, and claiming damages for breach of contract, and breach of the covenant of good faith and fair dealing. In September 2016, Bar Seven Cattle and Bonita Cattle moved to intervene in the lawsuit pursuant to Arizona Rule of Civil Procedure 24. They also filed a complaint in intervention against David and Judy West, seeking a declaratory judgment, quiet title to their claimed easements, and damages for tortious interference with an easement and intentional interference with a contract. Over the Wests' opposition, the trial court granted the motion to intervene in November 2016.

¶10 Also in November 2016, Intervenors filed a motion for partial summary judgment, seeking a declaration that their easement rights preceded and controlled the CC & Rs. Defendants joined in the motion for partial summary judgment and moved for summary judgment on their claims. The Wests then filed a response and cross-motion for summary

[2]Highroads Property Owners Association was established as the governing body for Eureka Springs. Its purposes include maintaining, repairing, and improving common roadways and areas in Eureka Springs, and enforcing the provisions of the CC & Rs.

judgment. The trial court, concluding there were "several genuine issues of material fact," denied all motions for summary judgment.

¶11 In April 2018, Intervenors again filed a motion for partial summary judgment. Defendants also filed a renewed motion for summary judgment. In response, the Wests agreed that summary disposition of the case was preferred. After oral argument, the trial court granted summary judgment for Defendants and Intervenors. The court reasoned that the variances had been improperly granted and were actually impermissible amendments to the CC & Rs. It thus concluded that the cancellation of the Wests' invalid variances by the new board was "justified and appropriate." The court thereafter granted Intervenors' motion to dismiss the remaining counts in their complaint in intervention.

¶12 In February 2019, the Wests filed a timely but premature notice of appeal. Later that month, the trial court entered a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P. In March 2019, the Wests filed an amended notice of appeal. Due to still pending motions, however, we suspended the appeal and revested jurisdiction in the trial court to rule on those matters. After the court denied the motions, jurisdiction was revested in this court. We have jurisdiction over the Wests' appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Summary Judgment in Favor of Defendants

¶13 In reviewing the grants of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, ¶ 4 (App. 2000). We review the evidence "in the light most favorable to the party against whom summary judgment was entered," in this case, the Wests. *TWE Ret. Fund Tr. v. Ream*, 198 Ariz. 268, ¶ 11 (App. 2000).

Interpretation of CC & Rs

¶14 The Wests first contend the trial court erroneously interpreted the CC & Rs in concluding their variances were improper. CC & Rs constitute a contract between the subdivision's property owners as a group and the individual lot owners. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000). As such, we interpret them to give effect to the intent of the parties and to carry out the purpose for which they were created. *Powell v. Washburn*, 211 Ariz. 553, ¶¶ 13-14 (2006). We look at the language of the instrument and the circumstances surrounding its creation. *Id.* When CC & Rs were created by a subdivision developer, we

attempt to discern the intent of that developer. *See Saguaro Highlands Cmty. Ass'n v. Biltis*, 224 Ariz. 294, ¶ 6 (App. 2010). The interpretation of CC & Rs is a question of law. *Powell*, 211 Ariz. 553, ¶ 8.

¶15 The trial court concluded the Wests' "'variances' at issue were . . . improper amendments per CCR § 6.3," reasoning that "the over-arching intent of all of the instruments drafted . . . is to create a working ranch and protect rancher's interests by prohibiting any attempt to 'change or negate' the rights reserved on behalf of the Ranchers." Section 6.3 prohibits amendments to §§ 5.18 and 5.19, which require compliance with the Note A easement. Section 2.15, however, permits the board to "grant reasonable variances to individual provisions set forth in Section 5." Unlike § 6.3, which specifically prohibits amendments to the sections concerning the grazing easements, § 2.15 provides no similar prohibition on variances that may affect those easements. The plain language of the CC & Rs therefore permits variances even where amendments are prohibited. And the developer's not having provided exceptions in § 2.15 demonstrates its intent to allow individual variances notwithstanding that amending those CC & R sections is expressly prohibited. *See Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277 (App. 1993) (Courts interpret contracts "so that every part is given effect, and each section of an agreement must be read in relation to each other to bring harmony, if possible, between all parts of the writing."); *see also Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, ¶ 45 (App. 2010) ("Our reading of one provision of a contract must not render a related provision meaningless.").

¶16 Defendants nevertheless argue the trial court correctly found the "circumstances surrounding the creation" of the CC & Rs should override their plain language because "[t]he intent of the exceptions to . . . [§] 6.3 was to ensure the grazing lease rights . . . would not be 'changed or negated' by amendment." They maintain this is especially true because the Note A easement "was created specifically to prevent a grazing lease owner from having the grazing lease and not being able to move his cattle," and "[i]t was intended that [such owners] would always have open corridors and move their cattle." The plain language of the CC & Rs, however, is a more specific guide to the intent of the subdivision drafters, and thus, the circumstances surrounding the creation of the CC & Rs provide little justification for the court's conclusion that the Wests' variance was an improper amendment. *See Powell*, 211 Ariz. 553, ¶ 13 ("servitude should be interpreted to give effect to the intention of the parties ascertained from *the language used in the instrument*, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created" (emphasis added) (quoting Restatement (Third) of Property (Servitudes)

§ 4.1(1) (2000))).[3] Moreover, the trial court may consider only evidence that would be admissible at trial and may not consider evidence which would violate the parol evidence rule. *Mason v. Bulleri*, 25 Ariz. App. 357, 359 (1975). Because the express unambiguous terms of the CC & Rs allow for variances to CC & R sections 5.18 and 5.19, the variances were proper under the CC & Rs. We therefore conclude the trial court erred in finding the variances invalid amendments.

Variance Process

¶17 The trial court also determined that the process by which the Wests obtained their variances was "contrary to the [association's] bylaws," a finding the Wests also challenge as erroneous. Below, Defendants asserted the deposition testimonies of David West and his fellow board members, Cinda Moreno and Richard Kelley, demonstrated violations of the bylaws, which state that board members must "declare a conflict of interest [concerning a variance] in an open meeting of the Board before the Board discusses or takes action on that issue." Defendants specifically cited Moreno's testimony that she met with the board members and saw West's written variance request "with [her] own eyes" and Kelley's testimony that he spoke with West and Moreno about their respective variance requests prior to a vote. Defendants also pointed to Kelley's testimony "it was a done deal" to show that the board members had decided on the Wests' variances prior to the February 2, 2015 vote.

¶18 The trial court agreed with Defendants, reasoning that the board members violated the bylaws when they "communicated in advance outside an open meeting" regarding the requested variances. The court further stated "it appears uncontroverted that the Board had made up their minds before granting [the Wests'] variances, that no reasons were given

[3] We note that commercial ranching interests are in conflict with those of residential owners in this case, and we consider this tension in harmonizing the Note A easement and the variance provision of the CC & Rs, while being cognizant of the broader view described in *Powell*, considering the language of the instrument or the circumstances surrounding the creation of the CC & Rs and their intended purpose. 211 Ariz. 553, ¶¶ 13-14. Even with that view, however, the deposition testimony of Renee Howes regarding an intent to prohibit variances to CC & R sections concerning the Note A easement does not demonstrate such intent when the clear language of the CC & Rs expressly permits variances to those sections without exception.

for [the] variances during the February 2, 2015 meeting, and that no debate took place before voting." The court added that the variances were "granted at a 'special meeting' by [the] board just days before an election in which all members were voted out of office."

¶19 The Wests advance a different factual background and set of circumstances. They contend "David West properly recused himself and the remaining directors did not deliberate or vote on the Wests' variances until after his recusal." The Wests highlight deposition testimony of Kelley and Moreno reflecting they "both testified that they did not deliberate or vote on the Wests' variances until after [David West] recused himself," and Moreno stated in her deposition "[t]here were reasons provided for why" the Wests needed the variances at the February 2 meeting. Further, Moreno testified that the board found hardship when considering the Wests' variance requests. Finally, the Wests cite testimony of some of the new board members who stated in their depositions that the process by which the Wests' obtained variances was proper and did not violate the CC & Rs or bylaws.

¶20 The conflicting testimony regarding the process by which the previous board granted the variances creates a factual question about the validity of the variances that is material to the resolution of this case. Because that issue was a dispositive one, the trial court erred in granting summary judgment on that basis. Accordingly, we vacate the court's order granting summary judgment in favor of Defendants and remand this issue for further proceedings consistent with this decision. *See Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37 (1991) (motion for summary judgment should be denied if any genuine issue of material fact); *Joseph v. Markovitz*, 27 Ariz. App. 122 (1976) (summary judgment inappropriate "if there is any doubt as to whether an issue of material fact exists").[4]

Motion to Intervene

¶21 Bar Seven and Bonita moved to intervene both as a matter of right and on a permissive basis pursuant to Rule 24 of the Arizona Rules of Civil Procedure. They argued their direct legal interest in the litigation was the easement right protected by the CC & Rs from which the Wests sought

[4]Because a genuine issue of material fact exists regarding the Wests' procurement of the variances in question, we need not reach the issue of whether the reconstituted Highroads Board lacked authority to revisit and revoke the Wests' variances pursuant to A.R.S. § 10-3304(A), (B)(3).

variances. They maintained that "[if] David West succeeds in this litigation, he will have effectively voided the cattle grazing easements and water rights as it relates to his lots." Alternatively, they argued the validity of their grazing rights and the variances were questions in common with the underlying suit.

¶22 The Wests opposed intervention, contending Bar Seven and Bonita did not have any interest in the case. Specifically, they argued the resolution of the central issue in the case—whether the HOA's recordation of the cancellations of the variances was lawful—"does not affect Bar Seven's or Bonita's interests in the Wests' properties because the variances determine only whether certain of the [CC & Rs] . . . are applicable to the Wests." The trial court granted intervention, although it did not specify whether intervention was permissive or a matter of right.

¶23 We review orders granting permissive intervention under Rule 24(b) for an abuse of discretion. *See Dowling v. Stapley*, 221 Ariz. 251, ¶ 57 (App. 2009). Rule 24(b)(1)(B) permits intervention when an applicant's claim or defense shares with an existing action a common question of law or fact. "Courts must first decide whether Rule 24(b)(1) or (2) have been satisfied before granting permissive intervention." *Dowling*, 221 Ariz. 251, ¶ 67. In determining whether permissive intervention is appropriate, courts consider "a number of factors such as the nature and extent of the intervenor's interest, his or her standing to raise relevant issues, legal positions the proposed intervenor seeks to raise, and those positions' probable relation to the merits of the case." *Id.* ¶ 68.

¶24 Intervenors argued that their cattle grazing and water rights were directly at issue because the Wests sought their variances to "avoid those cattle grazing and water rights" under the Note A easements. Intervenors' legal arguments focused on protecting their easements from being impaired by virtue of the Wests' variances, which they argued would prevent Intervenors' access to their previously established easement if upheld. These claims concern the land subject to both the Intervenors' easement and the Wests' variance and thus demonstrate a common question of law. While Intervenors' interest did not directly concern the CC & Rs, their claims demonstrate a sufficient interest in the outcome of the case to permit intervention pursuant to Rule 24(b).[5] Moreover, the Wests

[5] Because we uphold the trial court's grant of permissive intervention, we need not address whether the Intervenors satisfied the requirements for intervention of right under Rule 24(a).

have not demonstrated that the Intervenors' participation would unduly delay or prejudice the litigation. Accordingly, we see no abuse of discretion by the trial court in permitting intervention for Bar Seven and Bonita. *Cf. Dowling*, 221 Ariz. 251, ¶¶ 67-71 (upholding denial of permissive intervention when applicant "had minimal interest in the litigation at the time she filed her motion," "lacked standing," and "would have unduly delayed or prejudiced the litigation" with her intervention).

Partial Summary Judgment for Intervenors as to Easements

¶25 "We review a trial court's ruling on cross-motions for summary judgment de novo." *In re Estate of Gardner*, 230 Ariz. 329, ¶ 7 (App. 2012). The Wests contend the trial court erred when it granted summary judgment to Intervenors on their amended complaint. That complaint sought a declaratory judgment that "the Wests' variance was invalid" and asked to "[q]uiet title against the Wests to establish" their "superior rights to make use of the" easement area "and for 'ejectment' of the [Wests] from the easement areas."[6] The Wests argued in opposition that neither Bonita nor Bar Seven had established an interest in the Note A easement and therefore were not entitled to prevail on their claims. We first address that issue to resolve whether entry of summary judgment in favor of Intervenors was correct.

¶26 The party claiming the right to use another's land carries the burden of proof. *See Inch v. McPherson*, 176 Ariz. 132, 134 (1992). "Principles of contract interpretation apply to easements." *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, ¶ 16 (App. 2011). "[A]n easement is a right that one person has to use the land of another for a specific purpose." *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 208 (App. 1991). Easements are generally "created by express conveyance, typically by deed,

[6]The trial court erred to the extent its final order ejects the Wests from the easement property. An easement is the right to use the real property of another for a specific purpose. *Siler v. Ariz. Dep't of Real Estate*, 193 Ariz. 374, ¶ 45 (App. 1998). It does not, however, alter legal title to property except as to the limited character of the easement. *Id.* The Wests own their land subject to the thirty-foot Note A easement. To eject the Wests from that area would wrongfully dispossess the landowners of their land, giving it to easement holders, who do not maintain a possessory interest in the land. *See Clark v. New Magma Irrigation & Drainage Dist.*, 208 Ariz. 246, ¶ 12 (App. 2004); Restatement § 1.2(1) (easement is a nonpossessory right to enter and use land possessed by another).

but may come into being less explicitly, by implication, or against the will of the owner of the burdened estate, by prescription." *Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, ¶ 10 (App. 2013). Moreover, a complaint stating a claim for quiet title must, among other requirements, "[b]e under oath." A.R.S. § 12-1102.

¶27 As a threshold matter, the Wests contend, as they did below, that both Intervenors' quiet title claims are "procedurally flawed" because their first amended complaint, in which the quiet title claim was raised, was not under oath. Intervenors maintain they cured the deficiency by attaching the affidavit of Roger Warner, principal of Bar Seven, to their responsive filing. In that affidavit he swore Bar Seven was owner and lessee of grazing rights and entitled to use of the Note A easement across the West property. And without citation to the record, Intervenors contend the trial court "appropriately approved the cure" and "approved the amended pleading."

¶28 As to Bar Seven, we agree with the trial court's implicit conclusion under the specific facts of this case that Warner's affidavit served to verify Bar Seven's quiet title complaint as "under oath." *See Matter of Wetzel*, 143 Ariz. 35, 43 (1984) (affidavit is "a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true"); *cf. Smith v. Meyers*, 75 Ariz. 171, 174 (1953) (if a petition must be verified but is not, the petition should "be regarded as amendable"). It remains, however, that Bonita's quiet title claim was not originally made under oath, and Intervenors failed to put forth any evidence that Bonita's claim was subsequently cured by affidavit. Accordingly, the trial court erred by granting summary judgment in favor of Bonita on its quiet title claim. *See* A.R.S. § 12-1102.

¶29 We next address Bar Seven's ownership of easement rights, as well as Bonita's, notwithstanding our analysis under § 12-1102.

Bar Seven

¶30 The trial court concluded that Bar Seven "owns an interest in the real property at issue in this case" as owner of certain lots in Eureka Springs, as lessee of state grazing rights, as owner of the 2009 grazing rights from AL&R, as successor to AL&R's rights to Bar Seven's property, and as a Rancher as defined in the CC & Rs. The Wests challenge this conclusion, arguing it was not supported by the evidence. In response, Bar Seven contends "the totality of the assembled documents" demonstrates "the

over-arching intent of the instruments," including Bar Seven's ownership of the Note A easement over the Wests' properties.

¶31 As stated above, we apply principles of contract interpretation to easements. *IB Prop. Holdings, LLC*, 228 Ariz. 61, ¶ 16. The interpretation of a contract is a matter of law, not a question of fact. *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 328 (App. 1995). When contract terms are plain and unambiguous, they will be applied as written, and the court will not add something to the contract that the parties have not put there. *IB Prop. Holdings, LLC*, 228 Ariz. 61, ¶ 16. But when terms are ambiguous, extrinsic evidence is permitted to interpret those terms. *Id.*

¶32 The record of survey here created a thirty-foot-wide easement along all parcel lines, granted in gross to the "owner/lessee of the grazing rights" for ingress, egress, grazing, and transporting livestock. The term "grazing rights" was not defined in the record of survey. The trial court reasoned that because Bar Seven, pursuant to the 2009 grazing lease, was a lessee of a portion of grazing rights in the subdivision, it was entitled to use the Note A easements across the entire subdivision. The Wests, however, maintain that because the 2009 grazing lease only permits Bar Seven to graze on the west side of Bonita-Klondyke Road, it is entitled only to the easements on that side of Eureka Springs. And, at oral argument before this court, they argued that as a practical matter Bar Seven had no need to use the Note A easement on the Wests' property because its grazing rights are limited to the west side of Bonita-Klondyke Road. Such a limitation, however, is not expressed or implied in the record of survey.[7] Bar Seven was assigned, transferred, and conveyed "all of [AL&R's] rights, title and interests in its retained and reserved Grazing Rights."

¶33 Moreover, Bar Seven was defined as the "Rancher," and "shall enjoy all rights, powers, privileges and authorities reserved for or granted to the Rancher in the above referenced instruments," including the CC & Rs and the record of survey. The CC & Rs define "Rancher" as "any current person or entity owning the reserved Grazing Rights to the Property," and the Note A easement was for the benefit of any "owner/lessee of the grazing rights." We agree with the trial court's determination that, collectively, these documents give rise to Bar Seven's right to the Note A easement across the Wests' properties. Thus, the court

[7]Nor does that argument take into account that Bar Seven may own grazing rights to land not directly at issue in this case.

did not err in granting summary judgment in favor of Bar Seven on its quiet title claim.[8]

Bonita

¶34 Notwithstanding Bonita's failure to state its quiet title claim under oath, even assuming Bonita's complaint for quiet title were procedurally valid, we would still conclude the trial court erred by granting summary judgment to Bonita on this claim. Bonita's ownership of the Note A easement is predicated on whether Bonita is the successor in interest to 76 Ranch, the previous lessee of grazing rights. A successor in interest is one who follows another in ownership or control of property and retains the same rights as the original owner. *Home Builders Ass'n v. City of Maricopa*, 215 Ariz. 146, ¶ 18 (App. 2007).

¶35 76 Ranch was a lessee of the grazing rights to the portion of Eureka Springs to the east of Bonita-Klondyke Road pursuant to a 2005 lease and subsequent lease extension. In 2007, 76 Ranch and AL&R entered into a "Utility and Access Easement Agreement," granting 76 Ranch a non-exclusive "blanket easement" over the property covered by the already existing grazing lease agreement. Both the grazing lease assignment and the blanket easement agreement were binding to the benefit of the parties' successors and assigns.

¶36 Bonita argues that when it purchased Lot 174 from 76 Ranch, it became 76 Ranch's successor in interest, such that 76 Ranch's grazing rights under both the lease assignment and the blanket easement passed to Bonita. But the Note A easement is not appurtenant to the lot owned by 76 Ranch; it was granted in gross to the grazing rights lease holder, which, in 2006, was 76 Ranch. *Ammer*, 169 Ariz. at 208 ("An easement appurtenant is created to benefit the owner of the dominant tenement in the use of his land," while an easement in gross "is created to benefit its owner independently of his ownership or possession of specific land.").

¶37 There is no documentary evidence that Bonita's purchase of Lot 174 made it the successor in interest to 76 Ranch. That purchase did not include an assignment of 76 Ranch's grazing rights. The record contains no succession agreement between the parties, and the deed provided in

[8]To the extent the trial court relied on Renee Howes's testimony to support its conclusion, that testimony simply confirmed, and did not diverge from, the terms of the documents. We thus agree with the Wests that her testimony did not add anything new or not already provided.

support of Bonita's successor argument conveys only one parcel in Eureka Springs, Lot 174. Further, there is no clear evidence that 76 Ranch's grazing rights and the blanket easement were tied in any way to 76 Ranch's ownership of Lot 174. While true that the grazing lease agreement between AL&R and 76 Ranch was made to "be binding upon the heirs, executors, and assigns of the parties," Bonita did not demonstrate it is the successor to 76 Ranch pursuant to its deed of purchase. Therefore, while Bonita became successor to 76 Ranch as to any rights appurtenant to Lot 174, there has been no showing that the grazing rights and blanket easement were appurtenant to that lot.

¶38 Bonita also argued below and now on appeal that it is the successor in interest to 76 Ranch's grazing rights because it purchased "all of [76 Ranch's] equipment and a large quantity" of livestock used by 76 Ranch on Lot 174. Bonita contends these purchases "allowed Bonita to maintain the 'like part or character' of 76 Ranch," citing *Home Builders Ass'n*, 215 Ariz. 146, ¶ 18. In that case, this court defined a successor as "one who takes the place that another has left, and sustains the like part or character," of the previous interest holder, and we described a successor in interest as one "who follows another in ownership or control of property," retaining "the same rights as the original owner, with no change in substance." Bonita maintains that it "[took] the physical place of 76 Ranch by purchasing and occupying Lot 174" and "also sustained the like part and character of 76 Ranch by continuing to operate a cattle ranch" on the land with the same equipment and livestock previously used by 76 Ranch. But *Home Builders Association* does not stand for the proposition that the mere purchase of land and assets by one corporation from another makes the purchasing corporation a legal successor to the seller. *Id.* Rather, that case simply defined a "successor," as noted above, before concluding an incorporated city was the successor in interest to the county pursuant to legislative intent and was beholden to development agreements the county had entered into. *Id.* ¶¶ 18-20.

¶39 The evidence here does not establish Bonita is a successor to 76 Ranch. Although Bonita purchased certain ranching assets and the land on which 76 Ranch operated its ranch, it did not "take[] the place that [76 Ranch] has left" such that it may reap the benefit of agreements 76 Ranch had previously entered into. *Lake Havasu Resort, Inc. v. Commercial Loan Ins. Corp.*, 139 Ariz. 369, 374 (App. 1983) (quoting *H.K.H. CoAm. Mortgage Ins. Co.*, 685 F.2d 315, 318 (9th Cir. 1982)); *cf. A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 330-31 (App. 1992) ("substantial similarity of ownership and control" between entities insufficient to impose successor liability). Except for occupying the land that 76 Ranch formerly owned and

operating a similar cattle-ranching business, Bonita has not "stepp[ed] into the shoes" of 76 Ranch. *See Warne Investments, Ltd. v. Higgins*, 219 Ariz. 186, ¶ 54 (App. 2008). There is no evidence that any rights were transferred to Bonita from 76 Ranch, that Bonita has succeeded 76 Ranch in any other contract, or that others treat Bonita as an extension of 76 Ranch with "no change in substance." *Miller v. Hehlen*, 209 Ariz. 462, n.7 (App. 2005) (quoting *Black's Law Dictionary* 1473 (8th ed. 2004)). And, as noted above, there was no express successorship agreement, no transfer of grazing rights, no assignment of rights, and no agreement outside the purchase contract between 76 Ranch and Bonita. As such, Bonita failed to demonstrate its ownership of the grazing rights, and we reverse the trial court's entry of summary judgment to Bonita on its quiet title claim.[9]

Declaratory Relief for Intervenors

¶40 The Wests contend the trial court erred in granting summary judgment to Intervenors on their request for declaratory relief because the Highroads board members voted to terminate the CC & Rs before the court issued its ruling and the question raised in the request was therefore moot. Intervenors had sought a ruling that their ownership of Note A easements superseded the CC & Rs, including the Wests' variances thereto. After the CC & Rs were terminated, the Wests informed the court, and the parties offered to submit supplemental briefing on the effect of the termination. The trial court, however, declined to accept further briefing or argument on the subject.

¶41 "A declaratory judgment will be granted only when there is a justiciable issue between the parties." *Ariz. State Bd. of Dirs. for Junior Colls. v. Phoenix Union High Sch. Dist.*, 102 Ariz. 69, 73 (1967). "Declaratory relief should be based on an existing state of facts, not facts that may or may not arise in the future." *Thomas v. City of Phoenix*, 171 Ariz. 69, 74 (App. 1991). We agree with the Wests that any conflict between the parties on this issue was mooted with the termination of the CC & Rs. The trial court's ruling in favor of Intervenors was based on, and necessarily required, the continuing existence of the CC & Rs and the Wests' ability to obtain a

[9]Our resolution of this issue should not be read to foreclose the possibility of legal succession without an express or implied agreement. We only hold that on these specific facts, Bonita has not demonstrated its right to quiet title over its claimed easement area. *See Inch v. McPherson*, 176 Ariz. 132, 134 (App. 1992) (party claiming the right to use another's land carries the burden of proof).

variance from the CC & Rs' restrictions relating to the Note A easement. Neither of those bases existed at the time of the court's ruling, and the issues raised in the request for declaratory judgment were thus moot. We therefore vacate the court's ruling granting summary judgment in favor of the Intervenors on this count.

Attorney Fees Below and on Appeal

¶42 The trial court awarded attorney fees to Defendants and Intervenors, based on their prevailing on the claims involved herein; but we have reversed or vacated the court's rulings on many of those claims on appeal. We therefore vacate those awards to abide the outcome of any further proceedings in this case on remand,[10] consistent with this decision.

¶43 All parties have requested attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341, 12-341.01, 12-349, 12-1103, and 33-420. In our discretion, we decline to award fees under sections 12-341 and 12-341.01. *See Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164 (App. 1994) (appellate court's authority to award fees pursuant to § 12-341.01 discretionary). After considering all relevant factors under A.R.S. § 12-350, we also decline to award fees under § 12-349 for a lack of substantial justification. Further, in our discretion, we do not award fees under § 12-1103 and § 33-420 because although the Wests have succeeded in vacating in part the judgment of the trial court, they have not ultimately prevailed in the action. Accordingly, we deny their request for attorney fees at this time, but note that the ultimately prevailing party is not foreclosed from seeking its appellate fees in the trial court. *See A. Miner Contracting, Inc. v. Toho-Tolani Cty. Improvement Dist.*, 233 Ariz. 249, ¶ 45 (App. 2013). However, as the substantially prevailing party on appeal, the Wests are awarded their appellate costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

[10] We specifically vacate the attorney fees awarded to Bar Seven based on its quiet title claim. The trial court granted fees pursuant to A.R.S. § 12-341.01, but because A.R.S. § 12-1103(B) is the exclusive basis for attorney fees in a quiet title action, *Lange v. Lotzer*, 151 Ariz. 260 (App. 1986), and Bar Seven not having complied with the statute's requirements, the award is vacated.

Disposition

¶44 For the foregoing reasons, we vacate the trial court's judgment in part, reverse in part as noted above, and remand for further proceedings consistent with this decision.