IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

AZ DEVELOPERS, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Plaintiff/Appellant,

v.

SUN VALLEY FARMS PROPERTY OWNERS ASSOCIATION OF QUEEN CREEK, AN ARIZONA NONPROFIT CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2021-0016
Filed October 5, 2021

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NOT FOR PUBLICATION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 Pinal County
No. S1100CV201901365
The Honorable Stephen F. McCarville, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 AZ Developers LLC appeals from the trial court's grant of summary judgment in favor of the Sun Valley Farms Property Owners Association of Queen Creek ("the Association"). AZ Developers contends that the court erred in finding the Association's then-current Declaration of Conditions, Covenants and Restrictions to be valid, in its interpretation that they prohibited the construction of multi-family dwellings, and in its award of attorney fees. We affirm.

Factual and Procedural Background

¶2 "In reviewing a grant of summary judgment, we view the evidence and reasonable inferences 'in the light most favorable to the party opposing the motion.'" *TDB Tucson Grp., LLC v. City of Tucson*, 228 Ariz. 120, ¶ 2 (App. 2011) (quoting *Cannon v. Hirsch Law Office, PC*, 222 Ariz. 171, ¶ 7 (App. 2009)). In June 2018, AZ Developers purchased a parcel of land within the community of Sun Valley Farms ("The Parcel"). The land in the Sun Valley Farms community and its uses are subject to the Declaration of the Conditions, Covenants and Restrictions for Sun Valley Farms Unit VII ("CC&Rs") and amendments to it made from time to time. The original CC&Rs were first recorded with the Pinal County Recorder in May 1984 and then amended and recorded in November 1984. The Third Amended Declaration of Conditions, Covenants and Restrictions ("Third Amended CC&Rs"), which are at issue in this case, were recorded in February 1996.

¶3 AZ Developers purchased the Parcel with the intent of building a multi-family apartment complex ("Ocotillo Crossings"). It hired an architectural firm to design preliminary site and building plans for the complex, but before more could be done, the zoning and land-use designations of the Parcel needed to be changed. When purchased, it was zoned as "SR (Suburban Ranch)" and "CB-2 (General Business)," and its land-use designations were for "Moderate Low Density Residential" and "Rural Living"/"Suburban Neighborhood." AZ Developers proposed to

change the zoning designation to "MR (Multiple Residence)" and the land-use designations to "High Density Residential" and "Urban Center."

¶4 AZ Developers held a community meeting about its proposed zoning and land-use changes. The president of the Association attended the community meeting and left a comment card for AZ Developers, asking for a representative to call her. According to the president, AZ Developers had not communicated with the Association regarding the CC&Rs and whether Ocotillo Crossings would be permitted. In relevant part, Section 10.4 of the Third Amended CC&Rs discusses the residential use of the property and states that "[t]here shall be not more than one single-family residence . . . per parcel." The president also emailed AZ Developers, asking how it planned to address the CC&Rs but received no substantive response.

¶5 AZ Developers ultimately sued the Association for a declaratory judgment that 1) the Third Amended CC&Rs do not prohibit multi-family units; 2) the Association cannot prohibit or interfere with the plans to build such units; and 3) that Section 10.4 of the Third Amended CC&Rs is "too vague to prohibit purchasers . . . from constructing multi-family units." AZ Developers also argued below that the Third Amended CC&Rs were invalid and unenforceable because it did not follow the proper procedures to amend the CC&Rs. The Association filed a motion for summary judgment, arguing that "no justiciable controversy exist[ed]" or alternatively, if there were a justiciable controversy, that the trial court should find the Third Amended CC&Rs prohibit multi-family units. AZ Developers filed a cross-motion for summary judgment.

¶6 The trial court granted the Association's motion for summary judgment and denied AZ Developers' cross-motion. Regarding whether the Third Amended CC&Rs prohibited multi-family units, the court determined that "[t]he only interpretation of the Association's CC&R's is that [AZ Developers] is not entitled to [build multi-family housing]." And, as to whether the Third Amended CC&Rs were valid, the court concluded it had been "duly adopted by the [Association] and recorded," and was thereby enforceable. Following AZ Developer's motions for reconsideration, which the court denied, the Association filed its application for attorney fees and costs. The court issued a final judgment in favor of the Association in which it awarded the Association attorney fees and costs. AZ Developers appealed the judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Analysis

¶7 AZ Developers argues the trial court erred in granting the Association's motion for summary judgment and request for fees. We review a grant of summary judgment de novo. *See Jackson v. Eagle KMC LLC*, 245 Ariz. 544, ¶ 7 (2019). "We review an award of fees under [A.R.S. § 12-341.01(A)] for an abuse of discretion, and will affirm unless there is no reasonable basis for the award." *Hawk v. PC Village Ass'n*, 233 Ariz. 94, ¶ 19 (App. 2013).

Motion for Summary Judgment

Validity of the Third Amendment

¶8 AZ Developers argues, as it did below, that the Third Amended CC&Rs are invalid and unenforceable because they did not comply with the amendment procedures in Section 13 of the CC&Rs. "CC&Rs constitute a contract between the subdivision's property owners as a whole and individual lot owners," and "[c]ontract interpretation presents questions of law, which we resolve independently of the trial court." *Ahwatukee Custom Ests. Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000).

¶9 Section 13 of the CC&Rs requires the written consent of "the owners of record of at least seventy-five percent (75%) of the acreage." The amendment is not effective until the "proper instrument in writing, reflecting the required consents, has been executed, acknowledged and recorded in the office of the Pinal County Recorder." AZ Developers argues that each owner's signature needed to be acknowledged (i.e. notarized) and recorded to fully comply with Section 13. AZ Developers offers no authority in support of its position and we disagree. The language of Section 13 only requires the required consents be *reflected* in a writing that is "executed, acknowledged and recorded." It does not require the written consents themselves or any individual owner's signature be acknowledged, notarized, executed, or recorded.

¶10 The written instrument, i.e. the Third Amended CC&Rs, states that "the undersigned owners of record of at least seventy-five percent (75%) of the acreage of Sun Valley Farms Unit VII . . . do hereby amend Paragraph 10 of said Declaration of Conditions, Covenants and Restrictions." The amendment was then signed by a representative of Tri West Investments, successor to Sun Valley Farms, Inc., and Fred Mortensen, on behalf of the Association, and was notarized and recorded. Therefore, although improperly executed amendments to CC&Rs never become

effective, *see La Esperanza Townhome Ass'n v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 239 (App. 1984), the Third Amended CC&Rs here were properly executed. Because the recorded writing reflected the required consent of at least seventy-five percent of the owners, it complied with Section 13 and the trial court was correct in finding it a valid and enforceable amendment.

Interpretation of Section 10.4

¶11 AZ Developers asserts on appeal, as it did below, that Section 10.4 does not prohibit the construction of multi-family residences like apartments because "[i]f the homeowners had actually intended to prohibit multi-family housing within the community they would have and should have stated so in the CC&Rs." It argues that the trial court erred in concluding otherwise.

¶12 As discussed above, CC&Rs are contracts, and we review matters of contract interpretation de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9 (App. 2009). In interpreting restrictive covenants, as with other contractual provisions, we give "effect to the intention of the parties as determined from the language, as well as the circumstances and purposes relating to its creation." *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, ¶ 11 (App. 2010) (discussing Restatement (Third) of Property (Servitudes) § 4.1(1)).

¶13 Section 10.4 of the Third Amended CC&Rs states that "[t]here shall not be more than one single-family residence . . . per parcel." This restriction permits also "one accessory and auxiliary garages, guest houses and servant quarters, barns and tack-rooms as incidental to single family residential use." The trial court determined that while the Third Amended CC&Rs did not expressly prohibit or permit multi-family residences, "the plain intent and purpose of the restrictions was to limit any housing to single-family residences." We agree. Simply because the term "multi-family residences" was not used and such structures were not explicitly prohibited, does not mean the Association's intent was to permit multi-family structures on the land. That single-family residences are the only type of residences discussed and regulated reasonably indicates that other residential forms are prohibited. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (Thomson/West ed., 2012) ("The expression of one thing implies the exclusion of others (expressio unius est exclusio alterius)."). Certainly a multi-family structure—such as a condominium complex or apartment building—is not "incidental to single family residential use." The plain reading of the language of 10.4

limits residential structures in the community and on the Parcel to single-family homes and incidental structures.

¶14 If there were any question about the meaning of the words used—or not used—and the intent of the adopters of the Third Amended CC&Rs, the surrounding circumstances and the entirety of the CC&Rs evidence an intent to limit residences to single-family homes. Although ambiguities in restrictive covenants "should be resolved in favor of the free use and enjoyment of the property," *Ariz. Biltmore Ests. Ass'n v. Tezak*, 177 Ariz. 447, 449 (App. 1993)(quoting *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 417 (1980)), the "cardinal principle in construing restrictive covenants is that the intention of the parties . . . is paramount," *id.* And "it is well settled that a covenant should not be read in such a way that defeats the plain and obvious meaning of the restriction." *Id.* The testimony of Association board members was undisputed that single-family housing has been the only form of housing in the community, "[t]he Association has never permitted multi-family housing of any type within Sun Valley Farms," and there currently "is no multi-family housing within Sun Valley Farms." While not dispositive, this further supports the Association's interpretation of Section 10.4.

¶15 We can also consider the entirety of the CC&Rs when determining the intent of any disputed section. *See id.* ("To determine . . . intent, we construe the document as a whole."). Sections 10.8 and 10.9 of the Third Amended CC&Rs only refer to single-family residences when discussing the minimum livable area requirements and the commencement of construction. Had the Association intended to permit multi-family residences on the land, it would have discussed the minimum livable area requirements for those buildings and it likely would have similarly discussed the number of permissible units. It would not have permitted multi-family housing to be built with no restrictions while setting restrictions for single-family housing. By the same logic, the Association would not require approval and construction to begin on single-family homes before a garage or barn be built on the parcel, but say nothing about the procedures to commence construction of multi-family housing.

¶16 Our supreme court addressed this issue in *Powell v. Washburn*, 211 Ariz. 553 (2006). In *Powell*, the CC&Rs listed three permissible types of single-family residences—mobile homes, constructed homes, and hangar-houses—and provided specific limitations as to the size and appearance of the residences. *Id.* ¶ 20. The supreme court noted that there was no catch-all language requiring other types of residences to conform to the stated limitations for mobile homes, constructed homes, and hangar-houses. *Id.*

¶ 22. If other types of residences were permitted, they would be unrestricted in their appearance and, the court reasoned, it was "quite unlikely that the parties to the CC&Rs, having carefully specified how certain types of expressly permitted residences must be configured, would allow all other types of residences with no requirements whatsoever." *Id.* The court concluded that, although the relevant CC&Rs did not expressly permit or prohibit RV homes as residences, the language in the CC&Rs and their purpose indicated an intent to prohibit RVs. *Id.* ¶ 18. Allowing RV homes as residences solely because they were not expressly addressed in the CC&Rs, the supreme court stated, would be "contrary to the intent and purpose of the CC&Rs" which was to "limit the type of single family residences permitted." *Id.* ¶¶ 19, 28. To allow apartment complexes here would similarly run counter to the CC&Rs.

¶17 Finally, as discussed above, AZ Developers proposed that the Parcel's existing zoning designations—"CB-2 (General Business)"and "SR (Suburban Ranch)"—be changed to "MR (Multiple Residence),"and the county land-use designations be changed from "Moderate Low Density Residential" and "Rural Living"/"Suburban Neighborhood" to "High Density Residential" to accommodate Ocotillo Crossings. That such changes were needed in the first instance to accommodate a multi-family structure is fully consistent with the limitations of the CC&Rs.

¶18 Therefore, we affirm the trial court's interpretation.

Attorney Fees & Costs

¶19 Finally, AZ Developers argues that the trial court erred in awarding the Association its attorney fees and costs. Section 12-341.01(A), A.R.S., permits an award of reasonable attorney fees to the successful party in "any contested action arising out of a contract." AZ Developers argues the Association should not have been awarded its attorney fees and costs because its application for fees and costs was untimely and because the Association's bylaws do not provide for an award of fees.[1]

¶20 The judgment was entered by the trial court on November 9, 2020, giving the Association until November 29 to satisfy the twenty-day

[1]AZ Developers also argues that "if the Court overrules the trial court on any of the first two questions presented then it must reverse the award of fees and award them to Appellant as the prevailing party." Because we affirm the trial court's decision on the first two issues, we need not address this argument.

deadline to file the application for fees and costs. Ariz. R. Civ. P. 54(g)(2). The Association filed its application on December 1. Although the Association argues that Rule 6(c), Ariz. R. Civ. P., applied and its deadline was extended by five days, Rule 6(c) explicitly states it "does not apply to the clerk's distribution of notices—including notice of entry of judgment under Rule 58(c)." However, regardless of whether the application was untimely, it is within the trial court's discretion to grant untimely applications for attorney fees where no prejudice otherwise exists. *See Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, ¶¶ 61-62 (App. 2010). AZ Developers does not claim any prejudice; only that the application was untimely.

¶21 As to AZ Developers' argument that the Association was not entitled to fees and costs because its Bylaws do not provide for it, we do not agree. Although the Bylaws here specify that the Association may recover attorney fees in an enforcement action where a homeowner is in violation of the Bylaws or CC&Rs – and no violation has yet occurred here — they do not bar recovery of attorney fees under other circumstances. Our supreme court has determined that, even when a contract provides for an award of attorney fees only in limited circumstances, attorney fees may still be awarded under § 12-341.01 so long as there is no conflict between the contract and the statute. *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, ¶ 14 (2017). AZ Developers has demonstrated no conflict between the Bylaws and A.R.S. § 12-341.01, and we see none. Consequently, the Association was entitled to seek, and the trial court was permitted to award, reasonable attorney fees in this action. And, because there is no dispute that this matter arises under contract or that the Association was the prevailing party below, the court did not abuse its discretion in awarding fees to the Association.

Attorney Fees and Costs on Appeal

¶22 AZ Developers requests its attorney fees and costs for both the trial court proceedings and on appeal pursuant to § 12-341.01. Because we affirm the court's rulings, we deny AZ Developers' request. The Association also requests its attorney fees and costs on appeal pursuant to Rule 21(a), Ariz. R. Civ. App. P., and A.R.S. §§ 12-341 and 12-341.01. In our discretion, we award the Association its reasonable attorney fees and costs incurred on appeal, upon its compliance with Rule 21, Ariz. R. Civ. App. P. *See Coll. Book Ctrs., Inc.*, 225 Ariz. 533, ¶ 42.

Disposition

¶23 For the foregoing reasons, we affirm.