EXHIBIT A

Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

April 3, 2020

RE: LINDA SWAIN et al v BIXBY VILLAGE et al
Arizona Supreme Court No. CV-19-0255-PR
Court of Appeals, Division One No. 1 CA-CV 18-0397
Maricopa County Superior Court No. CV2014-051035

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 3, 2020, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees and Costs (Appellants Bixby Village et al) = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees and Costs (Appellees Swain et al) = GRANTED.

Janet Johnson, Clerk

TO:
Timothy H Barnes
Daniel D Maynard
Douglas C Erickson
Chris R Baniszewski
Amy M Wood
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EXHIBIT B

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

LINDA W. SWAIN, et al., *Plaintiffs/Appellees,*

v.

BIXBY VILLAGE GOLF COURSE INC, et al., *Defendants/Appellants.*

No. 1 CA-CV 18-0397
FILED 9-19-2019

Appeal from the Superior Court in Maricopa County
No. CV2014-051035
The Honorable John R. Hannah, Judge

AFFIRMED

COUNSEL

Timothy H. Barnes PC, Phoenix
By Timothy H. Barnes
Counsel for Plaintiffs/Appellees/Counter-Defendants

Maynard, Cronin, Erickson, Curran & Reiter PLC, Phoenix
By Daniel D. Maynard
Counsel for Defendants/Appellants

Warner, Angle, Hallam, Jackson & Formanek PLC, Phoenix
By Chris R. Baniszewski
Counsel for Defendant/Appellant/Counter-Claimant

OPINION

Presiding Judge Randall M. Howe delivered the opinion of the Court, in which Judge Jennifer M. Perkins and Judge David D. Weinzweig joined.

H O W E, Judge:

¶1 TTLC Ahwatukee Lakes Investors, LLC ("TTLC") appeals a final judgment granting a permanent injunction enforcing a covenant requiring the operating of a golf course on particular property. TTLC contends, among other arguments, that because the covenant was restrictive rather than affirmative, it should be interpreted to permit, but not require, the operating of a golf course on the property in question.

¶2 The Arizona Supreme Court has made clear in *Powell v. Washburn*, 211 Ariz. 553 (2006), however, that whether a covenant is deemed restrictive or affirmative, it must be interpreted according to its enactors' intent. In this case, the circumstances surrounding the creation of the covenant and the covenant's language demonstrate that its enactors intended to require the operation of a golf course on the property. Because this Court rejects TTLC's argument and the other arguments discussed below, this Court affirms the trial court's ruling granting the injunction.

FACTS AND PROCEDURAL HISTORY

¶3 Ahwatukee is a "master planned community" in Phoenix, Arizona, composed of some 5,200 homes built around the Ahwatukee Country Club Golf Course and the now-closed Ahwatukee Lakes Golf Course. Several of the homes either border or feature prominent views of at least one of the golf courses. Linda W. Swain and Eileen T. Breslin each own property abutting the Lakes Golf Course.

¶4 Chicago Title Agency of Arizona, Inc. (the "Declarant"), was the original owner of the Lakes Golf Course and at some point, acquired the Country Club Golf Course. In 1986, it recorded a deed restriction on the Lakes Golf Course. The deed restriction was made "pursuant to A.R.S.

§ 42-125.01[1], restricting the use of [the] property to use as a golf course, facilities, and improvements thereto, for ten (10) years[.]" The restriction further recited that it could be "amended, revoked or extended for any time at the discretion of the then owner of the property, subject to the provisions of A.R.S. § 42-125.01." Pursuant to this provision, the Declarant recorded two amendments to the deed restriction. The First Amendment extended the deed restriction's term one more year and the Second Amendment extended it five more years.

¶5 In November 1992, the Declarant recorded a Declaration of Covenants, Conditions, Restrictions and Easements covering both golf courses. The Declaration restated the 1986 deed restriction, along with the First and Second Amendments. It also stated that the Covenants, Conditions, and Restrictions ("CC&Rs") were established for the mutual benefit of the "Declarant and all present and future owners" and "any owner of property located within the Ahwatukee master planned community"—the "Benefitted Persons." It stated that "[b]y recording [the] Declaration, the Declarant intends to comply with the requirements and obtain the benefits of Arizona Revised Statute 42-146"—a tax valuation statute that applied a special valuation method to any property that constituted a "golf course." The Declaration provided that the property could be developed for purposes other than a golf course only if 51% of the 5,200 Ahwatukee homeowners approved of removing the deed restriction or if a court found a "material change in conditions or circumstances" that justified removing the restriction.

¶6 In June 2006, Bixby Village Golf Course, Inc.—with Wilson Gee as its president—and a group of investors purchased both golf courses for $5.6 million. Around this same time, Bixby leased the two properties to Ahwatukee Golf Properties, LLC ("AGP")—a limited liability company Gee and his wife owned. The lease agreement required AGP to operate the golf courses. It also provided, however, that Gee would receive a 30% bonus share of any net proceeds if the Lakes Golf Course sold for more than $4.2 million. With an eye to redeveloping the Lakes Golf Course, Gee met with the umbrella homeowner association for the Ahwatukee master-planned community—the Ahwatukee Board of Management ("ABM")—in fall 2008, and with a Phoenix City Councilman the following year.

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1 In 1987, A.R.S. § 42-125.01 was renumbered to A.R.S. § 42-146. 1987 Ariz. Sess. Laws, ch. 134, § 20. In 1997, section 42-146 was repealed and its substance was moved to A.R.S. §§ 42-13151 through -13154. 1997 Ariz. Sess. Laws, ch. 150, § 172.

¶7 In May 2013, Bixby closed and dismantled the Lakes Golf Course. It placed a barbed-wire fence around the perimeter, drained the lakes, shut off all power, stripped the sod off the greens, and removed hundreds of irrigation heads. Because of these actions, Swain and Breslin sued Bixby in October 2014, claiming that closing the course violated the CC&Rs.

¶8 While the lawsuit was pending, Bixby entered a contract to sell the Lakes Golf Course property to TTLC in March 2015. The contract conditioned the sale on the successful completion of a feasibility study into converting the golf course property to a residential community. Satisfied by its study, TTLC completed the transaction in June 2015, buying the property for $9 million, the value it placed on the property without the deed restriction. Under the terms of the contract, TTLC paid Bixby a $750,000 down payment and executed a non-recourse promissory note, promising to pay Bixby the remaining $8.25 million on the earlier of June 19, 2018, or 90 days "after Final Approval by the City of the Final Plat of the Real Property." The parties negotiated a non-recourse loan to protect TTLC from any substantial monetary liability if the deed restriction was not removed. The contract acknowledged that Bixby had stopped using the property as a golf course and that a lawsuit about that decision was pending.

¶9 Thereafter, Swain, Breslin, and Bixby stipulated to dismiss Bixby from the case. The trial court consequently dismissed all claims against Bixby—except for an attorneys' fees claim—without prejudice. Swain and Breslin then amended their complaint to name TTLC as the defendant and to add claims for injunctive relief, breach of contract, and breach of the covenant of good faith and fair dealing.

¶10 TTLC immediately moved for summary judgment, asserting that the Declaration did not require the owner of the Lakes Golf Course to affirmatively operate a golf course on the property. Swain and Breslin opposed the motion and cross-moved for partial summary judgment, countering that the Declaration did require a golf course. At the hearing on the motions, TTLC not only reiterated its argument that the Declaration's plain language did not require it to operate a golf course, but added that interpreting the Declaration's language to so require would violate the Thirteenth Amendment's prohibition against slavery. The court denied TTLC's motion and granted Swain and Breslin's cross-motion, finding that the Declaration requires the operation of a golf course for the benefit of those the Declaration described as Benefitted Persons and that the covenant did not violate the Thirteenth Amendment. The court also ruled that it

would conduct an evidentiary hearing to determine whether injunctive relief was appropriate.

¶11 Meanwhile, having failed to persuade the court to accept its interpretation of the Declaration, TTLC sought to persuade the Ahwatukee homeowners to modify the Declaration to eliminate the golf course requirement. TTLC proposed eliminating the golf course and redeveloping the property into "a residential community" with "30 percent open space" and "a community supported farm in conjunction with [a] school." TTLC launched a "CC&R amendment campaign" to convince the Benefitted Persons to accept the plan. It sent multiple mailings, distributed fliers, held outdoor events, and hired "professional door knockers." After campaigning for nearly two years, however, TTLC obtained approval from only 28 percent of the homeowners, far short of the 51 percent necessary.

¶12 Having failed to persuade the Ahwatukee homeowners to modify the Declaration, TTLC returned to court, filing a counterclaim alleging that it was entitled under Paragraph 6 of the CC&Rs to petition the Maricopa County Superior Court to modify the Declaration if "a material change in conditions or circumstances" to the property had occurred. It argued that such a change had occurred because maintaining a stand-alone golf course would not be profitable. It also argued that it had the discretion to decide whether a material change had occurred and that, in its exercise of that discretion, it would build a new residential community and a 9-hole par 3 golf course on the former Ahwatukee Lakes Golf Course.

¶13 The court held an evidentiary hearing to determine whether injunctive relief was appropriate and whether TTLC was entitled to have the Declaration modified to remove the covenant. During the hearing, the court heard testimony from several witnesses about the condition of the property and feasibility of operating a golf course on it. The court also received several exhibits, showing the once lush green landscape of the property now barren with overgrown weeds.

¶14 TTLC's expert asserted that restoring the golf course on the subject property would cost at least $14 million, with no certainty of ever making a profit. Swain and Breslin's expert, Buddie Johnson, disagreed. He testified that restoration would cost between $4 million and $6 million and that, based on the area's demographics, a shorter, less difficult "executive" golf course was highly likely to prosper. He explained that the property was in a "highly feasible environment" and was a "perfect site" for an executive golf course. He elaborated that the site was amid a "dense affluent

population" that would have "very easy and quick access to the golf course."

¶15 Johnson added that the golf course "should not have failed" under Bixby's control; it failed only because it was "very poorly operated" and "not appropriately marketed[.]" He noted that, in the last two and a half years, at least five "substantial [and] capable" buyers had expressed a "strong interest" to him in purchasing the Lakes Golf Course property as a stand-alone golf course.

¶16 Swain and Breslin also testified. Swain testified that she had bought her home because it "overlooked a lush green fairway and had a view of the Superstition Mountains and Four Peaks." She also testified that, at the time, "[t]here was a $26,000 premium" on the lot that she purchased because it "had a beautiful view." She recounted how that the Lakes Golf Course had progressively deteriorated in appearance since 2006; the grass had withered and died, and the lakes became so drained that the wildlife began to perish. She explained further the property began emitting an "overwhelming" stench. She also noted that the condition of the property was "very upsetting" to her and her neighbors because they had "put their money into their dream retirement home" and they were now seeing the property "deteriorating" and "looking at that view from a chain link fence."

¶17 Breslin testified that she was aware of the CC&Rs when she had purchased her home. She also recalled Gee, in 2008, "proposing to build some more housing developments in the area." She further recalled the day that the Lakes Golf Course was "finished off," describing it as "a very sad day because they put up these horrible chain link fences and it felt like we were in prison." She also noted that the condition of the property had worsened since the golf course's closing. She described the once-illustrious property behind her home as a dead, desolate "wasteland."

¶18 In May 2018, the trial court declared that TTLC was not entitled to modify the Declaration's deed restriction and entered a mandatory injunction ordering TTLC to restore and operate a golf course on the property. The court found that TTLC had breached both the CC&Rs and the implied covenant of good faith and fair dealing, "which required [it] to not impair the rights of the other to receive benefits of the agreement." The court further found that by accepting fee title to the property, TTLC had bound itself to comply with the Declaration's provisions. The court noted in addition that TTLC's determination of a "material change" was not binding or entitled to deference. The court found that the evidence did not show that Bixby was unable to operate the golf course profitably, with

adequate maintenance, at any point in time before it closed the course. TTLC timely appealed.

DISCUSSION

1. Interpretation of the 1992 Deed Restriction

¶19 TTLC argues that the trial court erred in granting Swain and Breslin's cross-motion for summary judgment and ruling that the Declaration requires the owner of the Lakes Golf Course to affirmatively operate a golf course on the property. We review de novo a trial court's grant of summary judgment, viewing the facts in the light most favorable to the party against which summary judgment was entered. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140 ¶ 26 (App. 2006). We also review the interpretation of restrictive covenants and other contracts de novo. *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 537 ¶ 11 (App. 2010).

¶20 The covenant in Paragraph 2 of the Declaration provides in pertinent part that

> [t]he Property shall be used for no purposes other than golf courses and such improvements and facilities (including without limitation, clubhouses, restaurants, pro shops, overnight lodging facilities, resort and connected recreational facilities, bars, parking areas and golf cart trails) and uses as are reasonably related to, convenient for or in furtherance of golf course use or the accommodation of golf course patrons and guests[.]

TTLC contends that this is a "restrictive covenant" that restricts activity rather than an "affirmative covenant" that imposes an affirmative duty on the owner to actively operate a golf course on the property. According to TTLC, the covenant's terms allow it to choose to maintain a golf course or to let the property remain "idle." Practically speaking, this would mean that the property may be left barren and overgrown with weeds, emitting what Swain and Breslin characterize as an "overwhelming stench," yet comply with the covenant.

¶21 TTLC's argument, however, runs counter to the principles governing the interpretation of restrictive covenants in Arizona. Although earlier Arizona decisions stated that restrictive covenants must be strictly construed in favor of free use of the land and against any restriction, the Arizona Supreme Court held in *Powell* that restrictive covenants should be

construed "to give effect to the intentions 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." 211 Ariz. at 556–57 ¶¶ 12–13 (quoting Restatement (Third) of Property: Servitudes § 4.1(1)). This rule is consistent with "long-standing Arizona case law holding that enforcing the parties' intent is the 'cardinal principle' in interpreting restrictive covenants," *id.* (quoting *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449 (1993)), and recognizes the benefits of restrictive covenants, *id.* at 557 ¶ 16. Applying the *Powell* rule to this case, the covenant must be interpreted to require the owner of the Lakes Golf Course property—TTLC in this case—to maintain and operate a golf course on the property.

¶22 The circumstances surrounding the covenant's creation and the covenant's language show that the covenant was intended to require the continuous operation of a golf course on the property. The Lakes Golf Course was a part of the original development of Ahwatukee from the 1970s and was an important amenity for Ahwatukee homeowners. Its importance was documented in 1986, when the Declarant created a restriction on the property's deed limiting the use of the property to a golf course for 10 years. The Declarant amended the restriction twice, first adding one year to the restriction's time period and then adding five more years to it. In 1992, the Declarant included the restriction as a term of the CC&Rs of the property. These circumstances show the original owner intended that a golf course should be maintained on the property.

¶23 The covenant's language confirms its twin purposes: first, to maintain the property so that it qualifies for the tax benefits under A.R.S. §§ 42-125.01 and 42-146, and second, to protect the Benefitted Persons' interest in living next to, or having views of, a golf course. As for the tax benefits, the 1986 document specifically created the deed restriction "pursuant to A.R.S. § 42-125.01" and imposed the requirement that any amendment to the restriction be made "subject to the provisions of A.R.S. § 42-125.01[.]" The Declaration further provides that "the Declarant intends to comply with the requirements and obtain the benefits of Arizona Revised Statutes Section 42-146 regarding the valuation and taxation of golf courses." This purpose can be achieved only if golf can be played or practiced on the property. *See Phxaz Ltd. P'ship v. Maricopa Cty.*, 192 Ariz. 490, 494 ¶¶ 20–22 (App. 1998) (finding that land is not a "golf course" within the meaning of section 42-146 if golf cannot be practiced or played on the property on the valuation date).

¶24 As for protecting the Benefitted Persons' interest in living next to a golf course, the Declaration states that the CC&Rs were created in part for the benefit of the Benefitted Persons and that those individuals could affirmatively enforce the CC&Rs. The Benefitted Persons thus have the right to ensure that they have a golf course next to, or within view of, their homes. Interpreting the covenant to allow the current owner to leave the property "idle" completely frustrates this purpose. TTLC presents the options neutrally, as between a golf course or no golf course. But the option of no golf course does not leave the property merely without a golf course, but—as Swain and Breslin testified—a dead, desolate "wasteland" with overgrown weeds, ringed by a chain-link fence. The choice of such an alternative destroys the covenant's purpose and could not be within the original owner's intention in creating the covenant.[2]

¶25 TTLC argues, however, that certain language in Paragraph 2 specifically grants it the right to cease operating a golf course. One clause of Paragraph 2 states that the Declarant reserves the right to redesign or reconfigure the golf course or "remove, modify, alter, relocate, replace, expand, abandon, demolish, cease the use of or rebuild any of the improvements or facilities related to the use of the [p]roperty for golf courses[.]" But this clause does not support TTLC's argument. The first part gives TTLC the right to abandon, demolish or cease to use any of the improvements or facilities related to the use of the property as a golf course, not the course itself. The second part then confirms the point, giving TTLC the right only to "redesign or reconfigure" the golf course, not to remove it. Accordingly, in context of that language, the authority to cease use of improvements or facilities on the property does not empower TTLC to completely cease using the entire property as a golf course.

¶26 TTLC next argues that Paragraph 2 also expressly provides for an "exception" to the restriction, granting it the right to leave the property "essentially undeveloped property." The phrase on which TTLC focuses provides that the property may be used for "easements[,] . . . pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way[.]" Nothing in this language, however,

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2 TTLC also argues that, because the Benefitted Persons do not have the right to use the property for golf, "it only makes sense" that they cannot compel the owner to provide a golf course. This argument fails because the issue is not whether the homeowners play golf on the golf course, but whether they have the right to have a golf course next to or within view of their homes.

suggests that the property may remain "essentially undeveloped property."

¶27 Under the *Powell* rule, the circumstances surrounding the creation of the covenant and the covenant's language itself demonstrate that covenant must be interpreted to require the owner of the Lakes Golf Course property to operate a golf course on the property. The trial court thus correctly granted Swain and Breslin's cross-motion for partial summary judgment and denied TTLC's motion for summary judgment.

2. Modification of the Declaration

¶28 TTLC argues that the trial court erred in finding that TTLC's determination that a "material change" existed was neither binding nor entitled deference. TTLC asserts that, as a successor to the Declarant, Paragraph 6 to the Declaration gives it unfettered discretion to determine whether a "material change in conditions or circumstances" has occurred and that the court must defer to its determination and then evaluate its proposed modification under a reasonableness standard. Paragraph 6 provides in pertinent part that

> if Declarant or Developer (including their successors or assigns) determines that there has been a material change in conditions or circumstances affecting the Property or the [CC&Rs] . . . Declarant or Developer may petition the Maricopa County Superior Court or any other court or adjudicative body of competent jurisdiction for modification of this Declaration.

¶29 TTLC's interpretation of the provision is incorrect because it would make the court's role in the modification process superfluous. Had the drafters of the provision intended for the property owners' discretion to be absolute, they would not have required that the party seeking modification petition the court to request approval of what it determined to be a "material change" in conditions or circumstances. Moreover, the provision's language implies that the original drafters intended that the established common law rules for modifying a restrictive covenant apply. Had the drafters intended that the court apply a different standard of review, they would have said so or otherwise explicitly provided unfettered discretion to the property owner or a definition for "material change." TTLC's determination about whether a "material change" existed is therefore not entitled deference.

¶30 TTLC argues that if this Court holds that it is not entitled to absolute deference in its determination of a "material change" of circumstances, this Court should adopt the deferential standard of review articulated in *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195 (App. 2007). That decision adopted the rule from the Restatement (Third) of Property: Servitudes § 6.13 that requires challengers to a proposed action establish that the action is unreasonable. *Id.* at 201 ¶¶ 26–27. But *Tierra Ranchos* is inapposite because it involved a CC&R that explicitly provided a community association "sole and absolute discretion[]" to determine whether a proposed modification to property "violates any provision of [the] Declaration [] Guidelines" or "is unsatisfactory or aesthetically unacceptable." *See id.* at 197 ¶ 5. The provision here, however, does not grant the declarant, developer, or successor absolute discretion to determine whether a "material change" exists or to modify the Declaration. Moreover, *Tierra Ranchos* involved the discretionary decisions of community associations concerning modifications to property, while the issue here involves a successor's decision regarding modification to a covenant. *See id.* at 201 ¶ 23 (noting that the issue before the court was "what deference, if any, should be given to a community association's discretionary decisions concerning modifications or improvements to property.").

¶31 To obtain relief from the covenant, then, TTLC needed to prove that changes occurred that were "so fundamental or radical" that they "defeat[ed] or frustrate[d]" the covenant's purposes. *Decker v. Hendricks*, 97 Ariz. 36, 41 (1964). The trial court correctly found that no such changes had occurred. TTLC argued that economic conditions made operating a stand-alone golf course unprofitable. Even if that were true, TTLC could not rely on that fact because the alleged unprofitability was a fact known when TTLC bought the property. TTLC cannot buy a business already failing because of economic conditions and then claim that its unprofitability is a "material change" in circumstances justifying the vitiation of a covenant on the property.

¶32 Even if TTLC could be allowed to so claim, however, the evidence does not support that a material change had occurred. TTLC did present expert testimony that operating a stand-alone golf course would be unprofitable. But Swain and Breslin presented their own expert who testified that a golf course would be profitable. The trial court weighed the conflicting evidence and found that Swain and Breslin's evidence was more credible, and we defer to the trial court's factual findings, *see FL Receivables Trust 2002-A v. Ariz. Mills, L.L.C.*, 230 Ariz. 160, 166 ¶ 24 (App. 2012), and will not "reweigh the credibility of expert testimony on appeal," *A*

Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty., 222 Ariz. 515, 535 ¶ 59 (App. 2009). The trial court did not err in declining to modify the covenant.

3. Grant of Permanent Injunction

¶33 TTLC argues that the trial court erred in granting Swain and Breslin a permanent injunction because restoring the golf course is economically unfeasible. We review the trial court's grant of an injunction for an abuse of discretion. *Cheatham v. DiCiccio*, 240 Ariz. 314, 317 ¶ 8 (2016). If substantial evidence supports an injunction, we will not substitute our judgment for the trial court's. *Wood v. Abril*, 244 Ariz. 436, 438 ¶ 6 (App. 2018). Whether a covenant should be enforced depends on equitable considerations, such as the parties' relative hardships, the parties' misconduct, public interest, and adequacy of other remedies. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47 ¶ 10 (App. 2007).

¶34 The trial court did not abuse its discretion in enforcing the covenant. The evidence showed that Swain and Breslin would continue to suffer considerable hardship if the injunction were denied. Swain and Breslin had purchased their homes relying on the fact that the owner of the Lakes Golf Course property would maintain and operate it as a golf course. By affirmatively destroying the golf course and refusing to rebuild it, Bixby and its successor, TTLC, have replaced Swain's and Breslin's views of grass and lakes with a barren stench-filled "wasteland" of overgrown weeds ringed by a chain-link fence. And no remedy but an injunction will protect Swain and Breslin from the continuation of this harm.

¶35 The hardship TTLC suffers from the covenant's enforcement, in contrast, does not compare. TTLC argues that forcing it to rebuild and maintain a golf course is inequitable because a golf course is not economically viable. Mere economic struggles, however, cannot serve as a basis for abrogating a restrictive covenant and rendering its enforcement inequitable. *See Shalimar Ass'n v. D.O.C. Enters., Ltd.*, 142 Ariz. 36, 45 (App. 1984). And in any event, TTLC did not establish that a golf course on the property would be economically unviable. *See supra* at ¶ 32.

¶36 Moreover, whatever hardship will come from requiring the rebuilding of the golf course TTLC brought upon itself. As the trial court found, TTLC knowingly violated the covenant. TTLC purchased the property with the sole intent to redevelop it into a lucrative residential development and allowed the property to further deteriorate while pursuing that goal. TTLC knew before it purchased the property that

several homeowners opposed any changes to the restriction. In fact, it was entirely aware of a pending lawsuit to enforce the deed restriction. Nevertheless, TTLC took a calculated risk when it decided to buy the property and wage a costly and aggressive campaign to modify the Declaration. Permitting TTLC to now claim that an enforcement of the restriction works a hardship on it would indeed be inequitable: "[N]o court will allow the perpetrator of a wrong to rely upon the contention of relative hardship." *Decker*, 97 Ariz. at 41. TTLC acted at its peril, and its inequitable conduct in the face of opposition supports the granting of the injunction.

¶37 Enforcing the deed restriction through a permanent injunction also preserves public policy and is in the public interest. The ABM community has about 5,200 homes, and many of those homeowners relied on the continued enforcement of the covenants and restrictions. Moreover, Arizona's public policy is to protect those who have purchased property relying on restrictions from the invasion of those who attempt to break down the guaranties of home enjoyment under the guise of business necessities. *Cont'l Oil Co. v. Fennemore*, 38 Ariz. 277, 286 (1931). The trial court therefore did not abuse its discretion in requiring that TTLC restore and operate a golf course on the property.

¶38 In a related argument, TTLC asserts that an injunction would violate the Thirteenth Amendment to the United States Constitution. The Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist, and the term "involuntary servitude" was intended to cover those forms of compulsory labor akin to "African slavery[.]" *Butler v. Perry*, 240 U.S. 328, 332 (1916).

¶39 We reject TTLC's Thirteenth Amendment argument. TTLC voluntarily entered a contract to purchase the Lakes Golf Course property, with full knowledge of the risks involved in the transaction. Moreover, despite its voluntary choice to purchase the encumbered property, its argument fails because a covenant—whether affirmative or negative—is enforceable against subsequent purchasers who take their ownership with notice of the restriction. *See Shalimar*, 142 Ariz. at 43–44 (enforcing by mandatory injunction an implied covenant to maintain property as a golf course, despite its purported unprofitability). The trial court's ordering an injunction therefore did not violate the Thirteenth Amendment.

4. Attorneys' Fees

¶40 Because we do not reverse the trial court, we need not vacate its award of attorneys' fees. Both parties, however, request an award of

attorneys' fees and costs incurred on appeal. Generally, we enforce a contractual attorneys' fees and costs provision according to its terms. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13 ¶ 17 (App. 2011). The Declaration provides, in relevant part:

> In the event of any violation or breach of, or default under, the provisions of this Declaration, . . . any Benefitted Person entitled to enforce this Declaration may . . . seek injunctive relief against the then owners, occupants or users of the [p]roperty causing the breach, default or violation . . . and[] if . . . such Benefitted Person enforcing this Declaration prevails, . . . such Benefitted Person shall be entitled to reimbursement of all court costs and reasonable attorneys' fees from said defaulting owner, occupants or users.

Because the Benefitted Persons have prevailed in this appeal, Swain and Breslin may recover reasonable attorneys' fees and taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶41 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: pjl

EXHIBIT C

SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

LINDA W. SWAIN, an individual; and EILEEN T. BRESLIN, an individual, Plaintiffs vs. TTLC AHWATUKEE LAKES INVESTORS, LLC, an Arizona limited liability company, Defendant.	Case No. CV2014-051035 **FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION** (Assigned to Hon. John R. Hannah, Jr.)

JUDGMENT AGAINST TTLC AHWATUKEE LAKES INVESTORS, LLC

Partial summary judgment was entered in this matter, in favor of plaintiffs Linda W. Swain and Eileen T. Breslin ("Plaintiffs") and against defendant TTLC Ahwatukee Lakes Investors, LLC ("Defendant"), in a formal order issued on July 11, 2016. The matter then came on for a bench trial on the remaining issues in the First Amended Complaint and the issues in Defendant's Counterclaim filed against Plaintiffs.

Based on the evidence presented at trial and the Court's Findings of Fact and Conclusions of Law, the Court finds in favor of Plaintiffs and against Defendant on Plaintiffs' First Claim for Relief that Defendant breached the terms of the Declaration of Covenants, Conditions, Restrictions and Easements recorded November 11, 1992 by Maricopa County Recorder as Instrument No. 92-646838) (the "1992 Covenants, Conditions and Restrictions"), on Plaintiffs' Second Claim for Relief that Defendant breached the covenant of good faith and fair dealing implied in the 1992 Covenants, Conditions and Restrictions, and on Plaintiffs' Third Claim for Relief that Plaintiffs are

entitled to injunctive relief. The Court further finds in favor of Plaintiffs (Counter-defendants) and against Defendant (Counterclaimant) on Defendant's Counterclaim seeking declaratory relief requesting a modification of the 1992 Covenants, Conditions and Restrictions. The Court further finds Plaintiffs are eligible for an award of attorneys' fees and court costs. Accordingly,

IT IS HEREBY ORDERED that the owners of the Ahwatukee Lakes Golf Course (legally described on Exhibit A (pages 11-17) to the 1992 Covenants, Conditions and Restrictions) are permanently enjoined to and shall operate a golf course on the subject property, for the benefit of those described in the 1992 Covenants, Conditions and Restrictions as Benefitted Persons, in conformity with the "Declaration of Use Restriction" set forth in paragraph 2 of the 1992 Covenants, Conditions and Restrictions.

IT IS FURTHER ORDERED that the owners of the Ahwatukee Lakes Golf Course shall provide information concerning the restoration of the golf course to the plaintiffs, their attorneys and representatives and to any other Benefitted Persons, upon reasonable request, sufficient to allow the plaintiffs and Benefitted Persons to determine whether the property owners are complying with the permanent injunction.

IT IS FURTHER ORDERED that TTLC Ahwatukee Lakes Investors, LLC shall take nothing on their claim for modification of the 1992 Covenants, Conditions and Restrictions, and the request for modification is denied.

IT IS FURTHER ORDERED awarding judgment in favor of Linda W. Swain and Eileen T. Breslin and against TTLC Ahwatukee Lakes Investors, LLC for Plaintiffs' reasonable attorneys' fees in the amount of $128,819.50, with interest at the legal rate of 5.75% per annum from the date this Judgment is entered until paid in full.

IT IS FURTHER ORDERED awarding judgment in favor of Linda W. Swain and Eileen T. Breslin and against TTLC Ahwatukee Lakes Investors, LLC for Plaintiffs' taxable costs in the amount of $2,798.62, with interest at the legal rate of 5.75% per annum from the date this Judgment is entered until paid in full.

/ / / / /

JUDGMENT AGAINST FORMER DEFENDANTS

Pursuant to the Stipulation between Plaintiffs and Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co., LLC and Ahwatukee Golf Properties, LLC (collectively, "Former Defendants") entered herein on January 5, 2016, and the Order approving the Stipulation entered herein on January 12, 2016, and for the reasons in the Findings of Fact and Conclusions of Law entered herein on January 2, 2018, the Court finds Plaintiffs is entitled to recover their attorneys' fees and taxable court costs against the Former Defendants. Therefore,

IT IS ORDERED awarding judgment in favor of Linda W. Swain and Eileen T. Breslin and against Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co., LLC and Ahwatukee Golf Properties, LLC, jointly and severally, for reasonable attorneys' fees in the amount of $42,000.00 with interest at the legal rate of 5.75% per annum from the date this Judgment is entered until paid in full.

IT IS FURTHER ORDERED awarding judgment in favor of Linda W. Swain and Eileen T. Breslin and against Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co., LLC and Ahwatukee Golf Properties, LLC, jointly and severally, for taxable costs in the amount of $ 824.03 with interest at the legal rate of 5.75% per annum from the date this Judgment is entered until paid in full.

RULE 54(C)

No further matters remain pending in this case. This Judgment is entered pursuant to Rule 54(c) of the Arizona Rules of Civil Procedure.

Dated 5·31·18

John R. Hannah, Jr., Judge
Maricopa County Superior Court

EXHIBIT D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LINDA W. SWAIN, an individual; and EILEEN T. BRESLIN, an individual, Plaintiffs, vs. TTLC AHWATUKEE LAKES INVESTORS, LLC, an Arizona limited liability company, Defendant.	Case No. CV2014-051035 **FINDINGS OF FACT AND CONCLUSIONS OF LAW** (The Hon. John R. Hannah, Jr.)

Findings of Fact

1. On October 16, 1986, Chicago Title Agency of Arizona, Inc. (the "Declarant"), as the sole owner in trust for the benefit of The Presley Companies ("Developer") of the 18 hole executive golf course known as Ahwatukee Lakes Golf Course (the "Ahwatukee Lakes Golf Course" or the "Property"), caused to be recorded as Instrument No. 86-568479 in the records of Maricopa County, Arizona, that certain deed restriction (the "Lakes Deed Restriction") covering the Ahwatukee Lakes Golf Course, the legal description of which was attached to the Deed Restriction.

2. The substance of the Lakes Deed Restriction stated as follows:

> Chicago Title Agency of Arizona, Inc., an Arizona corporation, as owner in trust of the real property situated in the County of Maricopa, State of Arizona, described in Exhibit A attached hereto and incorporated herein by reference, hereby makes this deed restriction pursuant to A.R.S. § 42-125.01, restricting the use of said property to use as a golf course, facilities and improvements related thereto, for ten (10) years. This restriction constitutes a covenant between the county assessor and the owner of subject real property and is not for the benefit of the surrounding properties or any third party. This restriction may be amended, revoked or extended for any time at the discretion of the then owner of the property, subject to the provisions of A.R.S. § 42-125.01.

3. On September 11, 1987, the Declarant caused to be recorded as Instrument No. 87-570515 an amendment to the Lakes Deed Restriction extending the term of the deed restriction for one (1) additional year.

4. On December 27, 1988, the Declarant caused to be recorded as Instrument No. 88-624742 an amendment to the Lakes Deed Restriction extending the term of the deed restriction for five (5) additional years.

5. On November 13, 1992, the Declarant caused to be recorded as Instrument No. 92-646838 a Declaration of Covenants, Conditions, Restrictions and Easements (the "1992 Covenants, Conditions and Restrictions") (Exhibit 4) regarding, in addition to other real property, the Ahwatukee Lakes Golf Course.

6. Recital D of the 1992 Covenants, Conditions and Restrictions states as follows:

> Declarant desires to establish certain covenants, conditions, restrictions and easements with respect to the Property for the mutual benefit of (i) Declarant and all present and future owners or users of such portions of the Property as remain subject to this Declaration; and (ii) any other owner of property located within the Ahwatukee master planned community as defined on Exhibit B attached hereto.

7. Recital E of the 1992 Covenants, Conditions and Restrictions states, in pertinent part, as follows:

> By this Declaration, Declarant desires to amend and restate the Lakes Deed Restriction . . .

8. Recital F of the 1992 Covenants, Conditions and Restrictions states as follows:

> By recording this Declaration, the Declarant intends to comply with the requirements and obtain the benefits of Arizona Revised Statutes Section 42-146 regarding the valuation and taxation of golf courses.

9. Paragraph 2 of the 1992 Covenants, Conditions and Restrictions states as follows:

Declaration of Use Restriction. Declarant, for the benefit of those persons or classes of persons described in Recital D above (hereafter, 'Benefitted Persons'), hereby declares as follows:

The Property shall be used for no purposes other than golf courses and such improvements and facilities (including without limitation, clubhouses, restaurants, pro shops, overnight lodging facilities, resort and connected recreational facilities, bars, parking areas and golf cart trails) and uses as are reasonably related to, convenient for or in furtherance of golf course use or the accommodation of golf course patrons and guests; except that the Property may be further used for easements for ingress and egress (vehicular and otherwise), pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way, and for the construction and maintenance of walls, fences and other boundary type protection, in each case reasonably related to the development and use of the Ahwatukee project, together with improvements reasonably related to said easements, uses and related services. No improvement shall be made, constructed, installed or located on the Property that is not reasonably related to, convenient for, or in furtherance of, the aforementioned purposes. Declarant on its behalf and on behalf of its successors and assigns, reserves the right to redesign or reconfigure the golf courses at the Property or remove, modify, alter, relocate, replace, expand, abandon, demolish, cease the use of or rebuild any of the improvements or facilities related to the use of the Property for golf courses, all at the discretion of the then-owner of the Property.

Neither Declarant nor its successors or assigns shall use the Property for any purpose other than as stated above. Declarant, on behalf of itself and its successors and assigns, agrees that the covenants and restrictions herein may be enforced by Declarant or any Benefitted Person.

10. Pursuant to paragraph 6 of the 1992 Covenants, Conditions and Restrictions, the term of the covenants, conditions and restrictions therein "shall be appurtenant to and run with the land and shall be binding upon all present and future owners, occupants and users of the Property or any portion thereof and all persons claiming an interest in and to the Property in perpetuity".

11. Paragraph 6 of the 1992 Covenants, Conditions and Restrictions also states, in part, as follows:

[I]f Declarant or Developer (including their successors or assigns) determines that there has been a material change in conditions or

circumstances affecting the Property or the covenants, conditions, restrictions and easements set forth herein, Declarant or Developer may petition the Maricopa County Superior Court or any other court or adjudicative body of competent jurisdiction for modification of this Declaration.

12. Paragraph 4 of the 1992 Covenants, Conditions and Restrictions states as follows:

> Enforcement. In the event of any violation or breach of, or default under, the provisions of this Declaration, Declarant, Developer or any Benefitted Person entitled to enforce this Declaration may, in addition to any other available remedies, seek injunctive relief against the then owners, occupants or users of the Property causing the breach, default or violation for the discontinuation of such breach, default or violation, and, if Declarant, Developer or such Benefitted Person enforcing this Declaration prevails, Declarant, Developer or such Benefitted Person shall be entitled to reimbursement of all court costs and reasonable attorneys' fees from said defaulting owner, occupants or users.

13. From approximately 1986 through May of 2013, different owners of the property operated the Ahwatukee Lakes Golf Course on the Property.

14. In June 2006, Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC and Kwang Co., LLC (collectively, "Bixby") purchased the Ahwatukee Lakes Golf Course and the Ahwatukee Country Club for $5.6 million.

15. Wilson Gee testified the ownership percentages of Bixby were: Nectar Investment, LLC owned 31.66%, Hiro Investment, LLC owned 26.67%, Kwang Co., LLC owned 26.67% and Bixby Village Golf Course, Inc. owned 15%.

16. When Bixby purchased the Ahwatukee Lakes Golf Course and the Ahwatukee Country Club, Hiro Investment, LLC, Nectar Investment, LLC and Kwang Co., LLC (collectively, "Hiro, Nectar and Kwang") provided Bixby $400,000.00 to make improvements to golf courses. The majority of the $400,000.00 was spent to improve the Ahwatukee Country Club.

17. Mr. Gee testified that Bixby intended, at the time of purchase, to operate the Ahwatukee Lakes Golf Course as a golf course. He denied that Bixby purchased the

property with the intent to develop it. This testimony was not entirely credible for a number of reasons, some of which have to do with the structure of the transaction itself.

- Bixby structured the transaction as a section 1031 tax-free swap, suggesting that the price Bixby was willing to pay depended at least in part on the amount of money the company had to invest.
- Bixby allocated the lion's share of the purchase price ($4 million of the $5.6 million total) to the Ahwatukee Lakes Golf Course, but Mr. Gee never articulated a good reason for that. He simply attributed the decision to his "comfort level." No evidence was presented to indicate that the Property was worth $4 million as a golf course in 2006.
- As noted below, the "rent" paid by Mr. Gee's operating company, Ahwatukee Golf Properties, LLC, was intended to provide a fixed return on investment to Bixby's owners. It bore no apparent relationship to the market rental value of the property.
- As noted below, Mr. Gee stood to receive a 30 percent bonus share of the net proceeds if the property was sold at a profit.

18. In June 2006, Bixby and Ahwatukee Golf Properties, LLC ("AGP") entered into a Lease Agreement ("AGP Lease") (Exhibit 5) under which AGP leased the Ahwatukee Lakes Golf Course and the Ahwatukee Country Club from Bixby.

19. AGP is wholly owned by Wilson Gee and his wife.

20. The AGP Lease required AGP to pay Bixby annual rent of $420,000.00. Of that annual rent amount, $280,000.00 was allocated as annual rent for the Ahwatukee Lakes Golf Course.

21. Wilson Gee testified the $280,000.00 was not a negotiated fair market rental amount, but represented a seven percent (7%) return on the investment (based on the income from the Ahwatukee Lakes Golf Course) to the four Bixby owners in Bixby's purchase of the Ahwatukee Lakes Golf Course.

22. Paragraph 5 of the AGP Lease required AGP to maintain the Ahwatukee Lakes Golf Course "in accordance with the standards of a high-quality privately-owned public and semi-private golf course"; and paragraph 7 required AGP, at its own expense, to provide all maintenance and repair work necessary or appropriate to maintain the property and golf course "in the condition expected of a high-quality privately-owned public and semi-private golf course at all times during the Term" of the AGP Lease.

23. Paragraph 14 of the AGP Lease provides that in the event of a sale of the Ahwatukee Lakes Golf Course, AGP is entitled to be paid up to 30% of net sale price of the property sold that exceeds $4.2 million.

24. Wilson Gee testified that through 2006 (and the purchase of the Ahwatukee Lakes Golf Course and the Ahwatukee Country Club), his investors[1] had invested the principal amount of $1.65 million in different golf courses that Bixby purchased.

25. Another reason to doubt Mr. Gee's testimony about Bixby's plans for the property is that, not later than 2008, Mr. Gee in fact began making efforts to redevelop the Ahwatukee Lakes Golf Course. In the fall of 2008, Mr. Gee met with the Ahwatukee Board of Management ("ABM")[2] about redeveloping the Ahwatukee Lakes Golf Course; and in 2009, Mr. Gee met with Phoenix City Councilman Sal DiCiccio about redeveloping the Ahwatukee Lakes Golf Course. There was no evidence that the golf course could not have been operated profitably in 2008.

26. The condition of the Ahwatukee Lakes Golf Course progressively deteriorated between 2005 (one year before Bixby purchased the property) and 2017. The photographs of the Ahwatukee Lakes Golf Course taken in 2005, 2013, 2014, 2015 and 2017 (Exhibits 17 – 22) show the deterioration. Mr. Gee denied that Bixby

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[1] Wilson Gee testified that his original investor was a gentleman from Japan; and when that gentleman passed away, the man's three sons became the investors. Those three sons formed Hiro, Nectar and Kwang.

[2] The ABM is the homeowner association for the Ahwatukee master planned community.

intentionally failed to maintain the course, but the photographic evidence contradicted his denial.

27. In May 2013, Bixby closed the operation of the Ahwatukee Lakes Golf Course and placed a barbed wire fence around the perimeter of the golf course. The course was stripped of items that had value, such as sod and irrigation equipment. One year later, Bixby removed the fence and drained the lakes.

28. Bixby did not attempt to modify the 1992 Covenants, Conditions and Restrictions at any time before or after Bixby closed the Ahwatukee Lakes Golf Course. The evidence did not show that Bixby could not have operated the golf course profitably, with adequate maintenance, at any point in time before Bixby closed the course and stripped it.

29. After Bixby closed the Ahwatukee Lakes Golf Course, the course could not be used for golfing or golfing practice by Swain, Breslin, the Benefitted Persons or by the public.

30. In July 2013, Bixby entered into a Memorandum of Real Estate Purchase and Sale Agreement (Exhibit 6) with Pulte Home Corporation, which intended to develop the Ahwatukee Lakes Golf Course into a residential community.

31. After the Ahwatukee Lakes Golf Course was closed, The True Life Companies, LLC, a Delaware limited liability company ("True Life Companies") became aware that Ahwatukee Lakes Golf Course was available for purchase.

32. True Life Companies is the parent company of multiple affiliated companies which are incorporated in each of the various states in which True Life Companies operates.

33. True Life Companies is a real estate investment and community development company that provides lots to home builders or is capable of developing residential communities with its own residential construction division.

34. True Life Companies was interested in purchasing the Ahwatukee Lakes Golf Course for purposes of redeveloping the land into a residential community.

35. True Life Companies never intended to reconstruct the Ahwatukee Lakes Golf Course or to operate it as a stand-alone golf course.

36. In March of 2015, Bixby, AGP and True Life Companies entered into a Real Estate Purchase and Sale Agreement (the "Purchase Agreement") (Exhibit 7).

37. The Purchase Agreement acknowledged the existence of the Lakes Deed Restriction in Recital D (defined therein to be the "Declaration").

38. The Purchase Agreement provided for a feasibility contingency and study period in paragraph 5. Paragraph 5(a) provided for a "Feasibility Period" that would extend through May 8, 2015. That subparagraph stated, in part:

> Seller hereby acknowledges that Buyer's determination of the feasibility for the acquisition and development of the Property is a contingency to Buyer's acquisition of the Property. Seller further acknowledges that Buyer may invest substantial time, effort and resources in investigating the feasibility and other matters including, without limitation, expenditure of funds on engineering fees, architectural fees, soils analysis, environmental analysis, research of relevant codes, ordinances, regulations and other issues during its investigation of the Property.

39. Paragraph 5(c) of the Purchase Agreement required Bixby to provide "Property Information" including, among other Property Information, "Buyer's ability to secure the Entitlements (as defined in paragraph 37 below)". (Original emphasis).

40. Paragraph 6(f) of the Purchase Agreement stated, in part:

> At the Closing, AGP and the other parties constituting Seller shall cause the AGP Lease to be terminated. In this regard, any and all service contracts, equipment leases, and maintenance agreements relating to the operation or running of the Golf Course (collectively, 'Service Contracts') shall also be terminated as of the Closing, and Buyer shall have no obligation as to any such Service Contracts, nor will any such Service Contracts be assigned or transferred to Buyer at such Closing. As to any such Service Contracts, AGP covenants and agrees to legally terminate all Service Contracts as of the Closing, and AGP shall indemnify, defend and hold Buyer harmless from and against all costs, expenses and liabilities arising from or related to any Service Contracts.

41. Paragraph 10(b) of the Purchase Agreement stated:

> Seller and Buyer acknowledge and agree that regarding the potential development of the Real Property for residential purposes, Seller has discontinued the use of the Real Property as a golf course. Such action may constitute a violation of the Golf Course Restriction and subject the Real Property to a penalty under A.R.S. Section 42-13154 in an amount equal to the difference between the total amount of property taxes that would have been levied on the Real Property for the preceding ten (10) years or the period of time the Real Property was valued under A.R.S. Section 42-13154, whichever period is shorter, if the Real Property has not been valued under A.R.S. Section 42-13154, and the property taxes that were actually paid for the same period (the 'Roll-Back Taxes'). (Original emphasis).
>
> [* * *]
>
> If the Roll-Back Taxes are not yet levied against the Real Property as of the Closing Date, then the transactions contemplated by this Agreement shall proceed, and in the event the Roll-Back Taxes are thereafter levied against the Real Property after the Closing Date, then Buyer shall be fully responsible for the full payment of all such Roll-Back Taxes, and Seller shall have no obligation to pay all or any portion thereof.

42. The Purchase Agreement also acknowledged the pendency of this action in paragraph 14(e)[3] and paragraph 15(g).

43. Paragraph 37 of the Purchase Agreement defined "Entitlements" to include the following:

> (i) Removal of the use restriction contained in Paragraph 2 of the Declaration, which limits the use of the Real Property to golf course use and ancillary improvements and facilities and for no other purpose, as more particularly described therein (the 'Use Restriction');
>
> (ii) A minor General Plan Amendment permitting Buyer's proposed development plan for the Real Property, in a form and substance, and subject only to such conditions and stipulations, as are acceptable to Buyer in Buyer's sole and absolute discretion (the 'General Plan Amendment');
>
> (iii) An application to rezone the Real Property in accordance with Buyer's proposed development plans, subject only to such conditions and

[3] Among other information, paragraph 14(e) describes this lawsuit as one "wherein Plaintiffs, individual property owners, have alleged that Seller has breached certain restrictive covenants and conditions because of Seller's discontinuance of the operation of the golf course. Buyer acknowledges that a full and complete copy of such complaint has been delivered to Buyer and included in the Property Information."

stipulations, as are acceptable to Buyer in Buyer's sole and absolute discretion (the 'Rezoning');

(iv) One or more preliminary maps of dedication and/or plats for the Real Property and all required preliminary engineered improvement plans applicable to the preliminary maps and plats, in a form and substance, and subject only to such conditions and stipulations, as are acceptable to Buyer in Buyer's sole and absolute discretion (the 'Preliminary Plat'); and

(v) One or more final maps of dedication and/or plats for the Real Property and all required preliminary engineered improvement plans applicable to the preliminary maps and plats, in a form and substance, and subject only to such conditions and stipulations, as are acceptable to Buyer in Buyer's sole and absolute discretion (the 'Final Plat').

For purposes of this Agreement, the term 'Final Approval' relating to the Final Plat shall mean that the City, the Maricopa County Flood Control District, the ADWR and all other necessary governmental or quasi-governmental entities and all necessary utility providers, but specifically excluding any homeowner's association or property owner's association (individually, a 'Governmental Authority' and collectively, the 'Governmental Authorities') have approved or issued, as applicable, in accordance with their required procedures, all statutory and regulatory approvals and are otherwise bound to provide the approvals, and that any reconsideration, protest, appeal, referendum or litigation periods applicable to such approvals have expired without any reconsideration, protest, appeal, referendum or litigation having been filed. As provided in Section 3(b)(ii), the outstanding principal balance then due and owing under the Note shall all be due and payable ninety (90) days after Final Approval by the City of the Final Plat has occurred.

44. On May 8, 2015 Bixby and True Life Companies extended the Feasibility Period from May 8, 2015 to June 8, 2015.

45. On June 5, 2015 Bixby and True Life Companies extended the Feasibility Period from June 8, 2015 to June 12, 2015.

46. Defendant, on its own behalf or through a contract with a third party, invested time and effort before June 19, 2015 to determine the feasibility of the acquisition and development of a residential community on the Ahwatukee Lakes Golf Course property.

47. Defendant did not undertake or contract for a study before June 19, 2015 to determine the feasibility of a golf course being operated on the Property after June 19, 2015.

48. Defendant, on its own behalf or through a contract with a third party, undertook an economic analysis of the Property before June 19, 2015.

49. Defendant, on its own behalf or through a contract with a third party, inspected the Ahwatukee Lakes Golf Course before purchasing the Ahwatukee Lakes Golf Course.

36. Prior to purchasing the Ahwatukee Lakes Golf Course, Defendant was aware of the content of paragraph 2 of the 1992 Covenants, Conditions and Restrictions related to the Property, and specifically that paragraph 2 states in part that "[t]he Property shall be used for no purposes other than golf courses and such improvements and facilities . . . and uses are reasonably related to, convenient for or in furtherance of golf course use . . ."

50. Prior to purchasing the Ahwatukee Lakes Golf Course, Defendant was aware the Property would need to be re-constructed if it were ever to be used as a golf course after June 19, 2015.

51. When it purchased the Ahwatukee Lakes Golf Course, Defendant had no intention of reconstructing the Property to put it back in the condition it was in as of May of 2013 when the Sellers closed the operation of the golf course on the Property. Defendant never intended, and does not now intend, to reconstruct the Ahwatukee Lakes Golf Course or to operate it as a stand-alone golf course

52. Defendant purchased the Ahwatukee Lakes Golf Course for $9 million with the intention of developing the Property for residential or commercial use.

53. On June 19, 2015, Defendant paid Bixby $750,000.00 as a down payment and took fee title to the Ahwatukee Lakes Golf Course from Bixby; and Defendant executed and delivered to Bixby a Deed of Trust and Assignment of Rents on the Property.

54. True Life Companies, LLC is the sole member of Defendant.[4]

55. The $750,000.00 down payment was paid by funds deposited directly into escrow by True Life Companies on Defendant's behalf. Because Defendant did not yet have a revenue generating business, all of the post-purchase funds necessary for Defendant to carry out its plan to modify the 1992 Covenants, Conditions and Restrictions were provided to Defendant directly by True Life Companies.[5]

56. The Deed of Trust and Assignment of Rents secured Defendant's obligation to Bixby under the June 19, 2015, Non-Recourse Promissory Note Secured by Deed of Trust (the "Promissory Note") (Exhibit 10) in the principal amount of $8.25 million.

57. As a "non-recourse" instrument, the Promissory Note expressly provided that in the event of Defendant's default under the terms of the Promissory Note, "the Holder of this Note agrees that in any action or proceeding brought on this Note or on the Deed of Trust or on any other instrument now or hereafter securing the indebtedness secured hereby, the Holder will look solely to the property secured by the Deed of Trust (the "Trust Property") and the Trust Property income, and, except in the case of fraud or intentional misrepresentation, neither Maker nor any principal, officer, member or manager of Maker, nor any successor or assign of Maker or principal, officer, member or manager of Maker, shall have any personal liability for the indebtedness evidenced by this Note or by reason of any obligations, covenants or agreements contained in the Deed of Trust."

58. The Promissory Note expressly provided "no interest" was due on the outstanding principal balance. The Promissory Note did provide for default interest of

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[4] Defendant is a single-purpose and single-asset entity.

[5] The funds which Defendant projected would be necessary to carry out its redevelopment plan are listed in the "Ahwatukee Lakes-Business Plan" (Exhibit 32). From the "Deal Highlights – TTLC Ahwatukee Lakes" portion of Exhibit 32, True Life Companies projected many millions of dollars in profits to its investor, itself and any home builder that purchased lots.

12% per annum in the event Defendant failed to timely pay any monies due under the terms of the Promissory Note.

59. The Promissory Note obligated Defendant to make three (3) annual payments: (i) $500,000.00 on June 19, 2016; (ii) $500,000.00 on June 19, 2017; and, on the sooner of June 19, 2018 or 90 days after the "Final Approval by the City of Phoenix of the Final Plat of the Real Property", whichever was sooner.[6]

60. Defendant took fee title to the Ahwatukee Lakes Golf Course by Special Warranty Deed which expressly stated, in pertinent part, that Defendant took title subject to, among other things, "all covenants, conditions, restrictions, reservations, easements and declarations or other matters of record . . ."

61. By accepting the Special Warranty Deed granting fee title to the Ahwatukee Lakes Golf Course, Defendant bound itself to comply with each of the covenants, conditions and restrictions in the 1992 Covenants, Conditions and Restrictions.

62. The 1992 Covenants, Conditions and Restrictions constitutes a contract by and between, among others, Defendant as the current owner of the Ahwatukee Lakes Golf Course and, as express third-party beneficiaries, the Benefitted Persons as defined in the 1992 Covenants, Conditions and Restrictions.

63. As the owner of the Ahwatukee Lakes Golf Course since June 19, 2015, Defendant has been, and continues to be while Defendant remains owner, obligated to fully comply with each of the covenants, conditions and restrictions of the 1992 Covenants, Conditions and Restrictions.

64. At the time Defendant took fee title to the Ahwatukee Lakes Golf Course, Defendant was aware that the former golf course had been closed and neglected to the

[6] In November 2015, Bixby and Defendant negotiated a modification to the loan documents (Exhibit 38) by which the first two anniversary installments of $500,000.00 were waived and replaced by the payment of interest; and in June 2016, Bixby and Defendant negotiated another modification to the loan documents (Exhibit 39) by which further terms of the loan documents were implemented.

point that the golf course would have to be completely reconstructed to put it back in the condition it was in as of May of 2013 when Bixby closed the operation of the golf course.

65. At the time Defendant took fee title to the Property, Defendant was aware that Bixby had shut down the well that supplied water to the lakes[7], thus depleting the water needed for irrigation. Bixby had previously removed all but obsolete irrigation heads and shut off all power to the site including the clubhouse. The site, therefore, had not had any water or electricity since May of 2013.

66. On June 19, 2015, Bixby and Defendant entered into a Well Sharing and Easement Agreement (Exhibit 12) and a Lease of Type 2 Water Right in Phoenix AMA (Exhibit 13). Pursuant to those documents, Defendant acquired the right to annually use, at no cost, up 500 acre-feet of water to use on the Ahwatukee Lakes Golf Course.

68. Water pumped to the Ahwatukee Lakes Golf Course from the well on the Ahwatukee Country Club would not cost Defendant anything other than the necessary electricity to pump the water from the well to its golf course.[8]

69. Taber Anderson testified there was "no chance" Defendant would build a stand-alone golf course on that property because Defendant did not purchase the Ahwatukee Lakes Golf Course to be a stand-alone golf course. Defendant might create a par-three course on a portion of the land and pay for it with the proceeds of the housing development and assessments levied on the residential properties.

70. Aiden Barry testified Defendant went into the purchase of the Ahwatukee Lakes Golf Course "with eyes wide open" to the challenges it faced in its effort to obtain the property so Defendant could redevelop the property for residential use.

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[7] The well feeding the lakes on the Ahwatukee Lakes Golf Course was located on the Ahwatukee Country Club property. There was an irrigation and pumphouse system which brought the water from the well to Ahwatukee Lakes Golf Course.

[8] Defendant did not investigate what was necessary to turn on the electricity to the Ahwatukee Lakes Golf Course.

71. Aiden Barry testified the $9 million price Defendant agreed to pay for the Ahwatukee Lakes Golf Course was not discounted in consideration of the risk of not being able to successfully modify the 1992 Covenants, Conditions and Restrictions, but was based on the value Defendant placed on the Property as a residential community site (as reflected in the "Deal Highlights – TTLC Ahwatukee Lakes" portion of Exhibit 32).

72. Aiden Barry testified the non-recourse structure of the Promissory Note was negotiated because of the risk of not being able to successfully modify the 1992 Covenants, Conditions and Restrictions and the costs incurred in the process.

73. Because Defendant did not intend to reconstruct and operate a stand-alone golf course on the Ahwatukee Lakes Golf Course, the condition of the Ahwatukee Lakes Golf Course when Defendant purchased the golf course was not a material consideration from Defendant's point of view.

74. At the time Defendant took fee title to the Ahwatukee Lakes Golf Course, Plaintiffs had already initiated this lawsuit against Bixby alleging that Bixby was in violation of the 1992 Covenants, Conditions and Restrictions, which Plaintiffs asserted required the owner of the Ahwatukee Lakes Golf Course to affirmatively operate a golf course on the Property.

75. After Defendant took fee title to the Ahwatukee Lakes Golf Course from Bixby, Plaintiffs amended their Complaint (the "Amended Complaint") to substitute Defendant as the Defendant in this lawsuit.

76. In response to the Amended Complaint, Defendant filed a Motion to Dismiss/Motion for Summary Judgment asserting the 1992 Covenants, Conditions and Restrictions did not require the owner of the Property to affirmatively operate a golf course on the Property, but instead could allow the Property to be unused.

77. Plaintiffs filed a Cross-Motion for Partial Summary Judgment on the issue of whether the 1992 Covenants, Conditions and Restrictions affirmatively required the owner of the Property to operate a golf course on the Property.

78. On July 11, 2016, this Court entered an Order denying Defendant's Motion to Dismiss/Motion for Summary Judgment and granted Plaintiffs' Cross-Motion for Partial Summary Judgment, ruling that the 1992 Covenants, Conditions and Restrictions requires the operation of a golf course on the subject Property.

79. Defendant provided funds for and participated in a campaign to obtain the approval of 51% of the Benefitted Persons for Defendant's proposed modification of the 1992 Covenants, Conditions and Restrictions. The campaign was unsuccessful. By April 2017, Defendant had obtained approvals from approximately 2,000 of the 3,564 Benefitted Persons necessary for 51% approval.

80. When Defendant failed in its attempts to obtain 51% approval by Benefitted Persons of Defendant's proposed 1992 Covenants, Conditions and Restrictions modification, Defendant took the position that it had determined a material change in conditions affecting the Ahwatukee Lakes Golf Course or the 1992 Covenants, Conditions and Restrictions allowed for a modification of those covenants.

81. The alleged material change was that, because of changes in the golf market and the deteriorated condition of the Ahwatukee Lakes Golf Course, the original purpose of the 1992 Covenants, Conditions and Restrictions could no longer be realized. In other words, there was no longer a realistic possibility that a stand-alone golf course could ever operate on the property.

82. Wilson Gee testified the Ahwatukee Lakes Golf Course was worth approximately $1 million (plus or minus) as a stand-alone golf course in its current condition.

83. Defendant's proposed modification to the 1992 Covenants, Conditions and Restrictions (Exhibit 46) applies only to the Ahwatukee Lakes Golf Course to the 1992 Covenants, Conditions and Restrictions and does not affect the Ahwatukee Country Club.

84. Since the purchase of the Ahwatukee Lakes Golf Course, Defendant has not complied with the 1992 Covenants, Conditions and Restriction.

85. Linda W. Swain ("Swain") is an owner of the real property located at 12815 S. 41st Street, Phoenix, Maricopa County, Arizona (the "41st Street Residence").

86. As an owner of the 41st Street Residence (which is within the Ahwatukee master planned community as defined on Exhibit B of the 1992 Covenants, Conditions and Restrictions), Swain is a Benefitted Person in accordance with the express provisions of the 1992 Covenants, Conditions and Restrictions.

87. Eileen T. Breslin ("Breslin") is an owner of the real property located at 4229 E. Sandia, Phoenix, Maricopa County, Arizona (the "Sandia Residence").

88. As an owner of the Sandia Residence (which is within the Ahwatukee master planned community as defined on Exhibit B of the 1992 Covenants, Conditions and Restrictions), Breslin is a Benefitted Person in accordance with the express provisions of the 1992 Covenants, Conditions and Restrictions.

89. As Benefitted Persons, Swain and Breslin are entitled to bring this action seeking enforcement of each of the covenants, conditions and restrictions of the 1992 Covenants, Conditions and Restrictions.

90. Plaintiffs did not unreasonably delay bringing this action. To the extent there was delay, it did not materially affect the rights of Defendant.

Conclusions of Law

1. The 1992 Covenants, Conditions and Restrictions constitute a contract between the owner of the Property and the Benefitted Persons described in the 1992 Covenants, Conditions and Restrictions.

2. The intention of the 1992 Covenants, Conditions and Restrictions was that a golf course would be operated on the Property.

3. The 1992 Covenants, Conditions and Restrictions require the operation of a golf course on the Property.

4. As an owner of the 41st Street Residence (which is within the Ahwatukee master planned community as defined on Exhibit B of the 1992 Covenants, Conditions

and Restrictions), Swain is a Benefitted Person in accordance with the express provisions of the 1992 Covenants, Conditions and Restrictions.

5. As a Benefitted Person, Swain is entitled to bring this action seeking enforcement of each of the covenants, conditions and restrictions of the 1992 Covenants, Conditions and Restrictions.

6. As an owner of the Sandia Residence (which is within the Ahwatukee master planned community as defined on Exhibit B of the 1992 Covenants, Conditions and Restrictions), Breslin is a Benefitted Person in accordance with the express provisions of the 1992 Covenants, Conditions and Restrictions.

7. As a Benefitted Person, Breslin is entitled to bring this action seeking enforcement of each of the covenants, conditions and restrictions of the 1992 Covenants, Conditions and Restrictions.

8. The former owners of the Lakes Golf Course, Bixby, were contractually obligated to comply with the each of the covenants, conditions and restrictions in the 1992 Covenants, Conditions and Restrictions.

9. The $280,000.00 "annual rent" paid by AGP under the AGP Lease was a 7% return on investment to the owners of Bixby and not a "debt service" as such.

10. By closing the Ahwatukee Lakes Golf Course in May 2013, shutting off the water and electricity, removing the irrigation heads from the irrigation system, draining the lakes and failing to maintain the property so that it could be used for golfing or golfing practice, Bixby breached its contractual obligations under the 1992 CC&Rs.

11. By accepting the Special Warranty Deed granting fee title to the Ahwatukee Lakes Golf Course, Defendant bound itself to comply with each of the covenants, conditions and restrictions in the 1992 Covenants, Conditions and Restrictions.

12. As the owner of the Ahwatukee Lakes Golf Course since June 19, 2015, Defendant has been, and continues to be while Defendant remain owner, obligated to

fully comply with each of the covenants, conditions and restrictions of the 1992 Covenants, Conditions and Restrictions.

13. By its refusal to reopen and operate a golf course on the Property after its purchase of the Property from Bixby, Defendant breached the 1992 Covenants, Conditions and Restrictions.

14. Because TTLC knowingly and voluntarily purchased the Lakes Golf Course with the contractual obligation to operate a golf course on it for the benefit of Plaintiffs, and others as described in the 1992 Covenants, Conditions and Restrictions as Benefitted Persons, as the facts show above, they were bound to the promise of operating a golf course. Because Defendant lacked the intent to operate a golf course while knowing it had the contractual obligation, TTLC has breached its covenant of good faith and fair dealing, which required them to not impair the rights of the other to receive the benefits of the agreement.

15. In Arizona, interpretation of a contract is a question of law for the court. *Rand v. Porsche Fin. Services*, 216 Ariz. 424, 167 P.3d 111, 121 (App. 2007); *Grosvenor Holdings v. Figueroa*, 222 Ariz. 588, 592, 218 P.3d 1045, 1050 (App. 2009). It has long been the rule that an interpretation which gives effective meaning to all provisions of a contract is preferable to an interpretation which leaves a part of the contract ineffective. *Reserve Insurance Co. v. Staats*, 9 Ariz. App. 410, 412, 453 P.2d 239, 241 (1969). *See also Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 158, 854 P.2d 1134, 1144 (1993) (a contract should not be interpreted to not render a provision superfluous); *Allen v. Honeywell Retirement Earnings Plan*, 382 F.Supp.2d 1139, 1165 (D. Ariz. 2005) (rules of contract construction "disfavors constructions that nullify a contract term or render a term superfluous or redundant").

16. In interpreting restrictive covenants, the court reads the language used in its ordinary sense, construing it in light of the circumstances surrounding its formulation, and with the idea of carrying out its object, purpose, and intent. *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 297, ¶ 31, 257 P.3d 1168, 1177 (App.

2011) (citing *Powell*, 211 Ariz. at 557, ¶ 16, 125 P.3d at 377). "We are not bound by the 'strict and technical meaning of the particular words' in the declaration." *Id.* (citing *Powell*, 211 Ariz. at 556, ¶ 10, 125 P.3d at 376). Instead, " 'the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties' who create the covenants." *Saguaro Highlands Cmty. Ass'n v. Biltis*, 224 Ariz. 294, 296, ¶ 6, 229 P.3d 1036, 1038 (App. 2010) (quoting *Powell*, 211 Ariz. at 556–57, ¶ 13, 125 P.3d at 376–77)

17. The plain language of paragraph 6 allows for the owners of the "Property" to file a petition with the Maricopa County Superior Court and request approval of what the owners conclude constitutes a "material change."

18. Under paragraph 6, the owner's determination of "material change" is not binding or even entitled to deference. By requiring the owner to petition the Maricopa County Superior Court the drafters indicated their intention that the established legal rules for modification of a restrictive covenant would apply. Had the drafters intended for the court to employ some different standard of review, the document would offer some guidance concerning what that standard might be. But the document provides no such guidance.

19. If the intention of paragraph 6 of the 1992 Covenants, Conditions and Restrictions was to vest the owner of the "Property" with the power to decide whether there was a material change to the "Property" or to the 1992 CC&Rs, it could have stated just that (i.e. that the owner's determination was binding) and paragraph 6 would not have needed to include the phrase "may petition the Maricopa County Superior Court . . . for modification of the Declaration."

20. *Tierra Ranchos HOA v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007), found the Restatement of Servitudes applied in determining the level of discretion that a homeowner association has when making discretionary decisions. The *Tierra Ranchos* court specifically held the Restatement of Servitudes is not used to adjudicate interpretation of restrictive covenants.

21. Paragraph 6 of the 1992 Covenants, Conditions and Restrictions does not provide for a discretionary decision by a representative of the homeowners who are parties to the applicable restrictive covenants. *Tierra Ranchos HOA* therefore does not apply.

22. In Arizona, equity will enforce terms of restrictive covenants unless changes in surrounding areas are so fundamental or radically alters the original commitment or frustrates its purpose. *Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d 609, 612 (1964).

23. Equitable remedies are a matter of grace and not a right, and should not be used when claimants were clearly aware of the restrictions and expend large sums of money on the gamble that the restrictions would not be enforced against them. *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 26, 749 P.2d 930, 935 (App. 1987); *Decker v. Hendricks*, 97 Ariz. 36, 41–42, 396 P.2d 609, 612 (1964).

24. The equities surrounding the restrictive covenant on the Lakes Golf Course do not favor defendant TTLC for the following reasons: (i) its voluntary purchase of the Lakes Golf Course with knowledge that the Property was subject to a restrictive covenant and in litigation over the issue; (ii) from its due diligence, TTLC could see for itself that the Lakes Golf Course had been severely neglected; (iii) notwithstanding its knowledge of (and that it was bound by) the restrictive use provision, TTLC represented to the Court that it did not intend to operate the Lakes Golf Course; (iv) TTLC agreed to pay $9 million based on its due diligence economic study reflecting the profitability of a residential development on the Lakes Golf Course; (v) TTLC purchased the golf course with the knowledge that the Lakes Golf Course would have to be totally reconstructed if Defendant was required to operate a golf course; (vi) TTLC had no intention of ever reconstructing and operating a golf course (which the prior owner had shut off the water and electricity to and cannibalized the hundreds of sprinkler heads); (vii) the non-recourse structure of the Promissory Note was negotiated in consideration of the risk of not being able to successfully modify the 1992 Covenants, Conditions and Restrictions

and the costs incurred in the process; (viii) although Defendant was bound to comply with the 1992 Covenants, Conditions and Restrictions throughout the period it owned the Ahwatukee Lakes Golf Course, it chose not to do so, but to resist its obligation to comply with those restrictive covenants; (ix) TTLC only turned to its "material change" tactic after it failed to convince 51% of the Ahwatukee households to approve an earlier proposed modification; and (x) if Defendant loses this action, it can escape its obligation to Bixby through the non-recourse provision of the underlying promissory note.

25. The inequitable conduct of Bixby Properties, which largely created the alleged hardship to the property owner, also cuts against equitable relief for Defendant. At the very least, Defendant had reason to know that Bixby's actions substantially contributed to the conditions that made restoration of the golf course economically unfeasible. Bixby, not TTLC, will bear most of the economic burden if the transaction fails. That result, frankly, will not be unfair.

26. Arizona recognizes that restrictive covenants may be enforced by injunctive relief. *Continental Oil Co. v. Fennemore*, 38 Ariz. 277, 281, 299 P. 132, 133 (1931).

27. Because paragraph 4 of the 1992 Covenants, Conditions and Restrictions provide that a breach of the restrictive covenant can be remedied by injunctive relief, Plaintiffs are entitled to injunctive relief to enforce the 1992 Covenants, Conditions and Restrictions.

28. Under paragraph 4 of the 1992 Covenants, Conditions and Restrictions, in an action to enforce those covenants, conditions and restrictions Benefitted Persons are entitled to reimbursement of all court costs and reasonable attorneys' fees from any defaulting owner, occupants or users.

Dated this 2nd day of January 2018.

John R. Hannah
Judge of the Superior Court