

SET NO. 6

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

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COLLEGE BOOK CENTERS, INC.
401 PROFIT SHARING PLAN AND
TRUSTEE, a Trust dated October 14,
1994 with Trustee DAVID B. VANYO,

Plaintiff-Appellee,

v.

CAREFREE FOOTHILLS
HOMEOWNERS' ASSOCIATION,

Defendant-Appellant

No. 1 CA-CV08-0450

Maricopa County Superior Court, Case
No. CV2006-011927

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Vanyo's waiver claim fails as a matter of law.

Enforcing CC&Rs is nothing more than holding parties to their contract. Here, the CC&Rs prohibit Vanyo from building a road on his lot. But Vanyo invokes "waiver" to avoid the contract. He sued all of the other Carefree Foothills owners, contending that they had waived the right to enforce the single-family use provision against him. Vanyo sums up his waiver claim as follows:

Yet the HOA, through its developer who was the HOA at that time, approved the use of multiple lots in the Subdivision for precisely the same purpose – construction of roadways for access to other property.

(Appellee's Brief p. 13) Because of these alleged prior similar uses, Vanyo argues that the right to enforce the CC&Rs has been waived. The problem with this argument is that it is unsupported by the facts and contrary to the law.

a. **The waiver claim fails as a matter of law under *Burke*, and Vanyo's effort to distinguish that decision is without merit.**

As demonstrated in Appellant's Opening Brief, even frequent violations of the CC&Rs are insufficient to establish waiver where, as here, the CC&Rs have a non-waiver provision. The decision in *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393, 87 P.3d 81 (App. 2004), is controlling on this point. Under that decision, the non-waiver clause in the Carefree Foothills CC&Rs forecloses Vanyo from invoking waiver. *Burke* makes it clear that non-waiver clauses will be enforced unless the landowners have so completely abandoned the CC&Rs that the

fundamental character of the neighborhood has been destroyed. *Id.* at 399, 87 P.3d at 87. There is not a shred of evidence that the Carefree Foothills homeowners have completely abandoned the CC&Rs. In fact, Vanyo has never even attempted to prove a complete abandonment.

Instead, Vanyo sets out to distinguish *Burke*. He contends that *Burke* is distinguishable because that case involved “prior inaction in enforcing Restrictions” whereas in the present case “the HOA affirmatively approved * * * and permitted the roads to be constructed” and the homeowners “knowingly allowed the road use to continue without objection.” (Appellee’s Brief pp. 22-23) Vanyo explains further that “the non-waiver provision is intended to protect the Association from unintentionally waiving its enforcement rights” and that it is inapplicable here “because the HOA did not unintentionally neglect to enforce the restriction against roads.” (*Id.* p. 22)

To put it bluntly, this argued distinction is nonsense. It is illogical to suggest that *Burke* announced a rule that non-waiver clauses are intended to apply only to prevent “unintentional” waivers. Not only does *Burke* say no such thing, it would never do so in light of the existing law on waiver. Under Arizona law, there is no such thing as an unintentional waiver. A person waives a right only if he or she “intentionally” relinquishes it. *Goglia v. Bodnar*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987). Thus, intent is an indispensable element of the doctrine of

waiver. *Burke* plainly does not hold that non-waiver clauses apply only to preclude “unintentional” waivers. For this reason alone, Vanyo’s effort to distinguish *Burke* fails.

In any event, there is no distinction between *Burke* and this case. *Burke* involved allegations that similar non-complying structures had been constructed and allowed to exist without objection by local neighbors. Vanyo makes the identical allegation here, contending that a waiver exists because the owners in Carefree Foothills “knowingly allowed the road use to continue without objection.” (Appellee’s Brief. p. 23) There is simply no distinction whatsoever between what Vanyo alleges here and what was alleged – and rejected – in *Burke*. That case is controlling. The non-waiver clause in the applicable CC&Rs requires dismissal of Vanyo’s waiver claim as a matter of law.

- b. Vanyo attempts to create an impression of frequent CC&R violations, but his evidence boils down to a pair of violations, which is insufficient as a matter of law to establish waiver.**

Even aside from the non-waiver clause, Vanyo has completely failed to prove waiver by showing the existence of frequent CC&R violations. No matter how one cuts it, the evidence Vanyo cites in support of his waiver claim boils down to a pair of prior instances where an allegedly similar non-compliant use has been allowed to exist. His entire case rests on two alleged prior violations of the CC&Rs. Because Lot 7 has a driveway that leads to a single-family home outside

the subdivision, and because Lots 42, 43, and 44 share a common driveway, Vanyo claims that the owners of the other 75 lots in Carefree Foothills have demonstrated the clear intent to waive the single-family use restriction. Although these driveways (Vanyo likes to call them roads) do not present a use similar to what Vanyo seeks for his lot, the court need not even reach the issue.¹ That is because, as a matter of law, two prior instances of alleged CC&R violations do not establish a waiver. They do not remotely demonstrate the clear intent by the other lot owners to relinquish their right to enforce the CC&Rs.

Vanyo's brief attempts to create an impression that there have been frequent similar CC&R violations in the Carefree Foothills subdivision. For example, he says the Association "expressly authorized Lots 7, 42, 43 and 44 to be used for the same road purposes." (Appellee's Brief, p. 25) He says "use of lots for access to other properties has been open and obvious" and the Association "has ratified long-standing road uses through continued approval and knowing acquiescence." (Id.) He suggests that easements exist "over multiple lots to serve as access for up to eight lots." (Id. at 27)

¹ The court could certainly choose to reach the issue, and doing so would lead to the same conclusion that the waiver claim fails as a matter of law. As demonstrated in Appellant's Opening Brief, the two driveways to single-family homes do not violate the CC&Rs, and are materially different from building a road that would service four or five homes outside the subdivision.

But Vanyo is playing fast and loose with his word choice. He is attempting to create an illusion that CC&R violations are rampant throughout Carefree Foothills. But no matter how many times Vanyo's brief loosely refers to "multiple" violations, the undisputed facts cannot be hidden. Viewing all of the evidence most favorably to Vanyo, his waiver claim boils down to the existence of a pair of driveways. This evidence does not remotely show the required clear intent by landowners in Carefree Foothills to relinquish the right to enforce the single-family use restriction.

As a matter of law, two prior violations do not establish a waiver. Arizona law, at a minimum, requires frequent and pervasive violations before one can find the required intent to waive enforcement rights. *Burke*, 207 Ariz. at 393, 87 P.3d at 87; *Riley v. Stoves*, 22 Ariz. App. 223, 229-30, 526 P.2d 747, 753-54 (1974); *Donahue v. Martson*, 26 Ariz. App. 187, 190-91, 547 P.2d 39, 42-43 (1976). Indeed, Vanyo has ignored case law from various jurisdictions, which held that no waiver occurred where only a few violations existed. *Sterling Cotton Mills v. Vaughan*, 212 S.E.2d 199 (N.C. App. 1975) (no waiver based on four violations); *Pebble Beach Property Owners' Association v. Sherer*, 2 S.W.3d 283 (Tx. App. 1999) (no waiver based on 14 violations); *Raintree of Albemarle Homeowners Association, Inc. v. Jones*, 413 S.E.2d 340 (Va. 1992) (no waiver based on two violations).

In short, Vanyo cannot escape the fact that his waiver claim rests solely on two instances of alleged violations of the CC&Rs. Even viewing those instances most favorably to Vanyo – for example, ignoring clear differences that exist between those driveways and what Vanyo wants to build on Lot 24 – the waiver claim fails as a matter of law. That would be true even in the absence of the non-waiver clause.

c. Vanyo’s argument that he need not show frequent violations to establish waiver is contrary to Arizona law.

Vanyo suggests that because his waiver claim is based on the Association’s “affirmative approval” of non-conforming structures, he does not have to show frequent violations in order to establish waiver. In particular, he states “frequency is not an element of waiver when the HOA affirmatively approves a similar use.” (Appellee Brief, p. 27, fn 3). Vanyo is unable to point to a single Arizona case that adopted such a rule. Indeed, contrary to his argument, Arizona cases (for example, *Burke*, *Riley*, and *Donahue*) have held that waiver is shown by “frequent” violations or a complete “abandonment” of the CC&Rs.

Moreover, Vanyo’s argument that a different rule somehow applies where there is an “affirmative approval” of CC&R violations is directly contrary to *Donahue*. In that case, the court found that the defendant land owners had not waived deed restrictions “either by condoning or committing the violations cited by plaintiffs.” *Donahue*, 26 Ariz. App. at 191, 547 P.2d at 43 (emphasis added).

This statement clearly shows that the same waiver rules apply regardless whether the waiver claim is based on inaction (condoning) or action (committing). Thus, there is no legal support for Vanyo's argument that the "frequency" requirement can be discarded.

Vanyo nevertheless seeks to bolster his case by arguing that it should be discarded so as to avoid selective or discriminatory enforcement of the CC&Rs. (Appellee's Brief at 24-25) But this exact argument was rejected in *Burke*. The parties asserting waiver in *Burke* argued that enforcing the CC&Rs against them, despite the existence of prior violations, would "lead to the entirely selective, random, arbitrary, capricious, and potentially discriminatory enforcement" of the CC&Rs. *Burke*, 207 Ariz. at 398, 87 P.3d at 86. The court rejected the argument. The court chose to instead enforce the CC&Rs as written, including the non-waiver clause, noting the importance of "upholding the sanctity of written contracts." *Id.* (citation omitted). Thus, Vanyo's argument that he need not show frequent violations is contrary to Arizona law.

d. Vanyo is flatly wrong when he states that the Association "affirmatively approved" construction of the two driveways.

Vanyo's brief repeatedly states that the Association affirmatively approved the two driveways. Representative of such statements is the following: "The HOA has affirmatively approved roadways across other subdivision lots to access adjacent property." (Appellee's Brief p. 8) It is mystifying why Vanyo makes

such bold statements, given the absence of any evidence to support them. Vanyo never offered a single document or a single witness' testimony showing that any governing board or any committee ever took any action in connection with the two driveways at issue. He presented no board or committee minutes showing any action by the Association to approve the driveways.

Equally mystifying is Vanyo's statement that "the HOA granted the Thiele Trust an easement for a public road on Lot 7." (Appellee's Brief p. 13) The record is undisputed that the easement granted to the Thiele Trust was by the owner of Lots 7 and 8, which was the Carefree Foothills Corporation.² (App. 48) Vanyo's statement that the HOA granted the easement is particularly misleading, given that the Association did not even exist at the time the easement was granted. The easement agreement is dated September 12, 1984 and was recorded on September 25, 1984. (App. 48) But the Association was not even created until August 1986. (Trial Exhibit 27, p. 1; Trial Exhibit 29, p. 1) Thus, Vanyo is, again, flatly wrong when he states that the Association granted the easement.

² The Carefree Foothills Corporation should not be confused with the separate entity known as the Carefree Foothills Homeowners' Association, which is the designated class representative of all lot owners in the subdivision. It is undisputed that the Association was not a party to the easement agreement. The person executing the agreement expressly acted on behalf of Carefree Foothills Corporation. (See App. 49)

Vanyo's argument that the Association affirmatively approved and granted easements for the driveways is based solely on the fact that the original person who developed Carefree Foothills – Ralph Applegate – was involved in granting the easements that resulted in these two driveways. But it is difficult to understand why Vanyo would say that this means the Association affirmatively approved the driveways. As just noted, when Applegate caused his corporation to grant the Thiele Trust an easement across Lot 7, the Association did not even exist. Thus, he was plainly not somehow acting on behalf of the yet-to-be-formed Association.

Moreover, the very evidence Vanyo relies upon – the two easement agreements – shows that only the owners of the relevant lots were granting easement rights. Neither the Association nor the other Carefree Foothills lot owners were involved.³ Thus, in no sense can it be said that the Association or the other Carefree Foothills land owners “affirmatively approved” the driveways at issue. The most that can be said – and, indeed, Vanyo actually says it – is that the owners of the rest of the lots in Carefree Foothills did not object to the driveways after they were constructed. But under *Burke* that is insufficient to show waiver.

³ The signature lines on the easement agreement relating to the common driveway on Lots 42, 43, and 44 clearly identify the executing parties as “owners” of their respective Lots. (App. 60-61) Ralph Applegate did not purport to be acting on behalf of all owners in Carefree Foothills when he signed the easement agreement.

e. The equities favor the other Carefree Foothills owners, not Vanyo.

Vanyo's effort to spin the equities in his favor is highly misleading. He informs this court that he did not know that the Association had rejected the Biederbeck's proposal for a road across Lot 24. (Appellee's Brief p. 4) He also states that he was not informed that the Association rejected his proposal until after the closing. (Id. p. 5) Vanyo apparently wants to leave the impression that he was somehow misled when he purchased Lot 24 and Maime Maude.

But that is not remotely the case. Vanyo was represented by an experienced transaction attorney. His attorney conducted research and learned that there were CC&Rs applicable to Lot 24. (T. 11/15/07 afternoon session, p. 20) He also learned that there was no "recorded" document giving access to Maime Maude. (Id. pp. 39-40) His attorney also conceded that, before closing, he learned of the legal opinion that the CC&Rs prohibited Lot 24 from being used as a road for access to Maime Maude. (Id. pp. 42-44) Moreover, prior to closing – while Vanyo had the right to cancel the purchase – his attorney sent a letter to the owner of the property to the north of Maime Maude, stating that Vanyo was purchasing the property in reliance upon that owner's agreement to grant an access easement on Sentinel Rock Road. (Trial Exhibit 45, App. 73)

Thus, to the extent Vanyo seeks to portray the equities as favoring him, his argument is grossly unfair. The equities favor the owners of the other lots in the

Carefree Foothills subdivision. Scores of them have purchased their property over the years with the knowledge and understanding that all owners were bound by the CC&Rs. The equities plainly favor them. They have waived nothing. The contract represented by the CC&Rs should be enforced according to its terms. All owners agreed to be bound by them when they voluntarily decided to purchase a lot in the Carefree Foothills subdivision.

II. Vanyo has no legal support for his erroneous jury instruction on waiver.

Vanyo argues that the lower court correctly instructed the jury that a party may waive the right to enforce the CC&Rs by approving “a similar use by other owners.” (Appellee’s Brief p. 16) But a review of the entire section of Vanyo’s brief devoted to this issue does not reveal a single Arizona case supporting such wording. As shown in Appellant’s Opening Brief, this instruction, which states that a waiver can be based merely on “a similar use” is fundamentally contrary to the Arizona case law stating that a waiver requires “frequent” violations that have been allowed to exist. In addition, it fails to instruct the jury on the need for a “complete abandonment” where, as here, the CC&Rs contain a non-waiver clause. Vanyo has failed to explain why an instruction that is contrary to the waiver rules established by existing Arizona case law can nevertheless be a correct statement of law. It obviously cannot be.

As support for his “a similar use” instruction, Vanyo continues to cite two California decisions. (Appellee’s Brief p. 17) He cites *Harrison v. Frye*, 148 Cal.App.2d 626, 307 P.2d 76 (1957), and *Johnstone v. Bettencourt*, 195 Cal.App.2d 638 (1961), both of which involved multiple instances of other violations. Neither case supports instructing the jury that “a similar use” is sufficient to find a waiver. Indeed, California case law plainly does not find a waiver based on only a single prior violation. See *Kapner v. Meadowlark Ranch Association*, 116 Cal.App.4th 1182, 1190 (2004) (“one or a few waivers will not suffice”).⁴

Vanyo appears to place reliance on the instruction’s use of the plural form of the word “owner.” He suggests that the jury in this case could have “interpreted” the reference to “owners” to mean that more than one other similar use was required. (Appellee’s Brief p. 27, fn 3) But this ignores the three preceding words in the instruction – “a similar use.” Such language is a flatly erroneous statement of the law to the extent it suggests that a waiver can be based on a single prior violation. And the word “owners” utterly fails to reflect the “frequent” or “complete abandonment” requirement found in Arizona case law.

⁴ Vanyo also cites *Smith v. Shinn*, 350 P.2d 348 (Idaho 1960), which likewise involved “several” violations of restrictions. That case does not support an instruction indicating that a single prior violation is enough to establish waiver.

In short, Vanyo is unable to show how his proffered jury instruction was a correct statement of law. It was plainly contrary to Arizona law. It was highly misleading, because it suggested the exact opposite of what Arizona law requires for a waiver. Moreover, had the jury been properly instructed, it would never have found a waiver. Indeed, for reasons explained above, Vanyo's waiver claim fails as a matter of law. Thus, although the jury instruction was fundamentally erroneous and prejudicial, there is no need to order a new trial. The court should remand with instructions that Vanyo's waiver claim be dismissed with prejudice.

III. Vanyo failed to prove his alternative claims for implied easement and private way of necessity; thus, the Association is entitled to judgment as a matter of law.

Vanyo urges the court not to consider his alternative claims. But he provides no reason not to. The record is fully developed, and the arguments were fully raised below in motions for judgment as a matter of law. Reviewing the denial of those motions presents an issue of law. This court can therefore properly review whether the Association was entitled to judgment as matter of law. Indeed, the Arizona case law addressing these claims generally resolves them as a matter of law. This court should do so, and remand with instructions that they be dismissed.

- a. The implied easement claim failed because rather than meeting his burden to prove the absence of access to Maime Maude in 1912, Vanyo's own evidence actually showed there was access.**

To establish a *prima facie* case for an implied easement (also called “implied way of necessity”), Vanyo had to prove the absence of access to Maime Maude (the dominant estate) when it was severed from common ownership of what is now Carefree Foothills Lot 24 (the servient estate). Though quoted in Appellant’s Opening Brief, Arizona’s test for an implied easement bears repeating here:

Under the common law, where land is sold that has no outlet, the vendor by implication of the law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property. Establishment of an implied way of necessity is dependent on a unity of ownership of the dominant and servient estates, followed by a severance thereof. * * * All that is required is that there be a reasonable necessity, * * * and a way of necessity can be implied only when the necessity existed **at the time of the original severance** of the estates.

Bickel v. Hansen, 169 Ariz. 371, 375, 819 P.2d 957, 961 (App. 1991) (citations omitted) (emphasis added). Thus, it was Vanyo’s burden to prove the absence of an outlet at the time common ownership was severed.

There is no dispute that the “unity of ownership” of Maime Maude and Carefree Foothills rested with the U.S. Government. It is equally clear that the severance thereof occurred in 1912. Vanyo certainly proved that. But from that point, Vanyo completely failed to meet his burden.

Arizona law plainly required him to prove that, at the time of the 1912 severance, Maime Maude had no reasonable “outlet.” *Bickel*, 169 Ariz. at 375, 819 P.2d at 961. As pointed out in Appellant’s Opening Brief, neither Vanyo nor

his other two witnesses provided any testimony that no reasonable outlet existed at the time of the 1912 severance. Vanyo has no rebuttal to that point.

Instead, Vanyo's brief merely refers to testimony that there was no "recorded" document showing "legal" access to Maime Maude. But the absence of a recorded document reflecting the legal right of access does not establish the absence of any outlet at the time of severance in 1912. Indeed, in every case involving a claim for an implied easement, there will be no "recorded" document granting access, because the implied easement claim would not be made if there were such a recorded document. Thus, proving the absence of a recorded "legal" right of access does not prove anything. Quite obviously, if there were a road providing access to Maime Maude at the time of its severance in 1912, an outlet would exist regardless whether the legal right to use the road was recorded at the County Recorder's Office.

Thus, the testimony of the three witnesses put on in Vanyo's case did not establish a *prima facie* case for an implied easement, because their testimony simply did not establish the absence of such outlet in 1912. The only other evidence pointed to by Vanyo is Trial Exhibits 12, 13, and 14. In fact, Vanyo goes so far as to say that these exhibits "alone" provide sufficient evidence to permit a jury to conclude that "the need for access has existed since 1912." (Appellee's

Brief p. 36-37) But these three exhibits provide no support whatsoever for Vanyo, when it comes to proving the absence of access upon severance in 1912.

Trial Exhibit 12 is the original patent issued by the U.S. Government, severing a parcel called Mamie⁵ Maude Lode Claim, along with several other described parcels. Trial Exhibits 13 and 14 are merely documents reflecting the conveyance by the U.S. Government of what is now the land occupied by the Carefree Foothills subdivision. All this evidence does is (1) demonstrate unity of ownership with the U.S. Government, and (2) fix 1912 as the time at which such unity of ownership was severed. Thus, these exhibits merely establish that 1912 is the time at which Vanyo must demonstrate that no reasonable outlet existed for Maime Maude. They plainly do not provide any evidence that would allow a jury to conclude that no outlet existed in 1912.

But not only did Vanyo's evidence fail to show the absence of access, it actually showed that an outlet did exist. The very evidence Vanyo refers to in his appellate brief actually establishes the opposite of what he sought to prove. The trial exhibits submitted by Vanyo himself establish that the Maime Maude parcel purchased by Vanyo does not have the exact same boundaries that existed when it

⁵ The original patent created a four-sided parcel referred to by the word "Mamie." Later documents reflecting the five-sided parcel purchased by Vanyo refer to the parcel by the word "Maime." For example, plaintiff's own Trial Exhibit 16 is a survey that uses the spelling "Maime."

was severed in 1912. A comparison of two of Vanyo's own trial exhibits irrefutably shows this.

Vanyo's Trial Exhibit 12 has a specific description of the Maime Maude parcel that was severed by the U.S. Government and delivered to the original grantees. That description shows that Maime Maude, when originally severed in 1912, was a four-sided parcel. In particular, it describes a parcel with one side (called the "first course") totaling 392.06 feet in length, the next side (second course) totaling 876.11 feet, the next side (third course) totaling 529.84 feet, and the final side (fourth course) totaling 894.61 feet. (Trial Exhibit 12, p. 2) That is obviously a four-sided parcel.

By the time Vanyo purchased Maime Maude, it was no longer configured with four sides. Vanyo's Trial Exhibit 16 shows that Maime Maude had become a five-sided parcel when Vanyo purchased it. But Vanyo's Trial Exhibit 16 – which is reproduced in Appellee's Appendix at Tab 1 – shows much more than that. It also shows the original four-sided configuration of Maime Maude when it was originally severed in 1912.⁶ As can plainly be seen in Exhibit 16, there is something very significant about the triangular section in the northeast corner that

⁶ Just to demonstrate that there is no doubt that Trial Exhibit 16 shows the original four-sided configuration of Maime Maude in 1912, a comparison of the total measurements of each of the four sides of the parcel depicted in that exhibit shows exactly the same measurements of the four sides described in the 1912 patent (Exhibit 12).

was originally part of the 1912 severance, but was not part of the five-sided parcel that Vanyo purchased. What is shown, of course, is that Sentinel Rock Road rested within that triangular section of Maime Maude. Vanyo's own evidence – Exhibits 12 and 16 – demonstrates the existence of a road that led directly onto Maime Maude as originally configured in 1912. Thus, his own evidence shows access to Maime Maude at the time of the 1912 severance.

The significance of this was not lost on Vanyo's counsel. At trial, when one of the defense witnesses (Mr. Smelser) was about to call the jury's attention to this very fact, Vanyo's counsel objected. (T. 11/15/07, pp. 62-64) Although the objection was initially sustained for technical reasons, the court later permitted Mr. Smelser to testify on redirect that Sentinel Rock Road historically provided access to that corner of Maime Maude under its original configuration. Specifically, Mr. Smelser testified:

Q: Do you have reason to believe that Mamie Maude historically was served by Sentinel Rock Road?

A: Well, in its current configuration, no. However, Mamie Maude was – has been split up and when its original configuration, when it was a load mining claim –

[Vanyo's counsel objects, but the Court overrules the objection.]

The Court: You may answer.

The Witness: Historically, in its original configuration, Mamie Maude was served by this road for mining purposes.

(T. 11/15/07, pp. 91-92) Mr. Smelser went on to explain the reasons for his answer, including the fact that there was evidence of mining activity along the road, which indicated that the road had historically been used for that mining activity. (Id. pp. 92-95) There was no rebuttal to this testimony.

Thus, Vanyo did not put in any evidence that the 1912 severance left Maime Maude with no outlet. His proof of the “absence” of an outlet was completely lacking. Moreover, the evidence he did place in the record – specifically, Exhibits 12 and 16 – showed that Mamie Maude was a four-sided parcel when originally severed in 1912. And Vanyo’s own Exhibit 16 actually showed that Sentinel Rock Road rested on the corner of Maime Maude as originally configured. That was all demonstrated by Vanyo’s own evidence.

What all this shows is that when Vanyo rested his case at trial, he had completely failed to prove a required element of his implied easement claim. He had to prove that when Maime Maude was originally severed, it had no outlet. But his evidence actually showed the contrary. It showed that a road actually lead to Maime Maude upon that severance. It is certainly true that by the time Vanyo purchased Maime Maude the corner upon which Sentinel Rock Road rested had been severed from the rest of it. Thus, the road does not currently provide direct access to Vanyo’s property. But under *Bickel*, to establish an implied easement Vanyo had to show the absence of access in 1912, when the unity of ownership in

Lot 24 (the servient property) and Maime Maude (the dominant property) was severed. And on that issue, Vanyo's own proof showed there was access.

At the conclusion of Vanyo's own case at trial, the lower court erred in failing to grant judgment as a matter of law to the Association on the implied easement claim. And the deficiency in Vanyo's case only became clearer when Mr. Smelser testified in the defendant's case. As noted above, he testified that Sentinel Rock Road historically provided access to Maime Maude during its mining days. Vanyo never offered any contrary evidence. The trial court therefore erred again when it denied the Association's motions for judgment as a matter of law at the conclusion of the trial and after the jury's verdict.

On appeal, Vanyo has merely attempted to create an illusion that he met his burden of proof. The relevant section of his brief begins with a heading that states, "Vanyo introduced sufficient evidence for the jury to find that Mamie Maude lacked access after severance in 1912." (Appellee's Brief p. 36) But a careful review of the pages that follow is quite telling. The first two pages (Id. pp. 36-37) refer only to Trial Exhibits 12, 13, and 14. As shown above, they do not establish the absence of access in 1912. The next several pages (Id. pp. 37-40) cite the testimony of Mr. Smelser. But, as just explained, Mr. Smelser was the Association's expert witness. He was not part of Vanyo's case. Thus, when

Vanyo's brief purports to lay out the evidence he introduced, he refers to almost no part of his case at all. The deficiency in his evidence is obvious.

Vanyo's brief devotes several pages to Mr. Smelser's testimony. (Appellee's Brief pp. 37-40). Quite amazingly, he begins his extensive discussion of Mr. Smelser's testimony with a heading that states, "Mamie Maude had No Historical Access." (Id. p. 37) But it is difficult to understand why Vanyo would make that his heading, given Mr. Smelser's actual testimony. The testimony quoted above plainly shows that Mr. Smelser testified that Sentinel Rock Road did historically provide access to Maime Maude. All Vanyo's brief does is refer to testimony that such access was not shown in any "recorded" document. But, again, the absence of a recorded document showing a legal right to access the property does not prove anything. The question is whether Maime Maude had an outlet in 1912, and the only evidence on that issue showed that it did. Vanyo's own case certainly provided no evidence to the contrary.

Vanyo's claim fails for the other reasons explained in Appellant's Opening Brief. For example, Vanyo never proved that Lot 24 provided access to a public roadway at the time common ownership with Maime Maude was severed in 1912. Without such proof, it is impossible to imply that the grantor intended to convey an implied easement across what is now Lot 24.

Indeed, given the presence of Sentinel Rock Road, which provided access directly to Maime Maude at the time of its 1912 severance, there is only one legal conclusion that can be drawn. Under applicable implied easement law, the original grantor – the U.S. Government – conveyed an implied easement to use Sentinel Rock Road in order to access Maime Maude when it originally severed the property in 1912. That implied easement carries through to today. That is the only conclusion that can be drawn from the undisputed evidence in this case.

- b. Vanyo’s claim for private way of necessity likewise failed because, among other reasons, he could not prove the absence of an alternative access.**

For the reasons set forth in Appellant’s Opening Brief, Vanyo’s claim for private way of necessity (*i.e.*, private condemnation under A.R.S. § 12-1202(A)) likewise failed as a matter of law. On appeal, Vanyo again fails to appreciate what his burden of proof required him to establish. He ignores the legal requirement that he prove the absence of any alternative access, including access through the existence of an implied easement. *Bickel*, 169 Ariz. at 375, 819 P.2d at 961 (“Because the Bickels are charged with proving reasonable necessity, the burden of proof includes proof that no implied easement of necessity existed”).

As demonstrated above, Maime Maude was historically served by Sentinel Rock Road. The law required Vanyo to prove the absence of a common law easement to use that road. Vanyo never even attempted to prove that no such

implied easement existed. Indeed, Vanyo is foreclosed from establishing his private condemnation claim for exactly the same reason that the court rejected such claim in *Bickel*.

In that case, the claimant wanted to privately condemn a way across another's land, even though a forest service road could potentially provide alternative access. The court ruled that the claimant had to prove the absence of an implied easement on that road, and failed to do so. It rejected the claimant's argument that it needed to condemn a private way because the forest service road was "twice as long, was meandering, and would cost more." *Id.* at 374, 819 P.2d at 960. Vanyo has likewise failed to show that no implied easement exists to use Sentinel Rock Road. Moreover, to use the court's words in *Bickel*, "[w]hile it may be convenient and advantageous to obtain [a road on Lot 24], such reasons cannot form the basis for the taking of private property." *Id.* See also, *Siemsen v. Davis*, 196 Ariz. 411, 415, 998 P.2d 1084, 1088 (App. 2000) (holding that private condemnation claim failed as a matter of law, where an alternative road was passable even though it was "arduous, unkept, lengthy and burdensome").

Vanyo tries to avoid having to prove the absence of an implied easement on Sentinel Rock Road by arguing that Maime Maude should be treated as two parcels divided by a natural obstruction. He says that because he could not build a road from the northern to the southern part of Maime Maude, he needs additional access

besides Sentinel Rock Road. As support for this argument, Vanyo cites foreign cases and an illustration from a Restatement of Law section. (Appellee's Brief pp. 32-34) But no Arizona case has ever adopted the Restatement section cited by Vanyo, and other jurisdictions have not followed such reasoning. *See Hollars v. Church of God of the Apostolic Faith, Inc.*, 596 S.W.2d 73 (Mo. App. 1980); *McCluggage v. Loomis*, 270 P.2d 248 (Kan. 1954).

Moreover, Vanyo's argument is directly contrary to *Chandler Flyers, Inc. v. Stellar Development Corp.*, 121 Ariz. 553, 592 P.2d 387 (App. 1979). In that case, the claimant sought to condemn a private way of necessity so that he could use his property for an aircraft business. His property was adjacent to a taxiway leading to a runway. But restrictive covenants prohibited him from using the taxiway. He therefore sought to privately condemn an easement so that aircraft could use certain land to reach his property. The court rejected the claim, stating: "At best, the record reflects that the property cannot be used for the particular purpose desired by the appellant without such access, but that showing is not sufficient to justify imposition of an easement of necessity." *Id.* at 554, 592 P.2d at 388.

Here, Vanyo has access to Mamie Maude via a common law implied easement to use Sentinel Rock Road. The fact that he might not be able to use his property in a particular manner, such as building several homes on various parts of it or driving a vehicle all around it, is insufficient to justify the private taking of

property. As this court noted in *Chandler Flyers*, “courts have denied easements of necessity where there was reasonable access to the property even in situations where denial of the easement caused considerable hardship.” *Id.* Thus, to the extent Vanyo believes that he cannot put his property to all the uses he would like, that is insufficient to justify a private condemnation.

Of course, Vanyo does not even face considerable hardship. When he made his purchase of the property, he obtained Lot 24, which itself has significant value and a home can be built upon it. He also secured plans for building a home on the northern portion of Mamie Maude, and the evidence submitted at trial included testimony from another developer who plans to sell similar lots on adjacent land for one million dollars or more. Thus, Vanyo faces no hardship at all.

In short, this court should reject Vanyo’s invitation to treat Maime Maude as two parcels. Doing so would be contrary to existing Arizona law, which holds that a way of necessity cannot be justified merely by an owner’s desire to use land for a particular purpose found to be more advantageous. Where, as here, the parcel plainly has access through an implied easement on Sentinel Rock Road, Vanyo’s claim for private way of necessity fails.

It also fails for the additional reasons set forth in Appellant’s Opening Brief. Most significant among those are Vanyo’s awareness of all the relevant facts relating to access to Maime Maude when he acquired it, and his failure to present

any evidence showing that the Town of Carefree would permit him to build a road on Lot 24.⁷ Vanyo has no answer to these additional reasons why his claim fails.

IV. This court should reverse the award of attorney fees to Vanyo, and instead award attorney fees to the Association.

The lack of merit to the attorney fee arguments in Appellee's Brief is, for the most part, addressed in Appellant's Opening Brief. But a couple of Vanyo's comments demand a response. In particular, Vanyo portrays himself as the victim of litigation, suggesting that the Association "forced" him to bring this suit. He also leaves the impression that the Association made no attempt to accommodate him. This is an outrageously unfair portrayal.

Vanyo hired experienced counsel to represent him in connection with purchasing the property. Through counsel, he learned that the property was subject to CC&Rs with a single-family use restriction. His attorney learned that the Association had already obtained a legal opinion that, under Arizona law, the CC&Rs foreclose building a road on the lot. Vanyo has always conceded the accuracy of that opinion. Moreover, Vanyo's counsel knew of the absence of a recorded right of access to the property, and sent a letter to the developer of property to the north, expressly stating that Vanyo was proceeding to purchase the

⁷ Vanyo says the Association is raising for the first time on appeal his failure to present evidence that his road would be approved. (Appellee's Brief p. 43) Vanyo is flatly wrong. The Association made the precise argument in the court below. (R. 62, p. 7 "Plaintiff has failed to prove that he would even be allowed to build a road across Lot 24").

property in reliance on that developer's agreement to grant an easement for access via Sentinel Rock Road. All of this knowledge was obtained before closing, when Vanyo could have cancel the deal for any reason.

Thus, Vanyo entered the transaction with full knowledge of all relevant facts. He voluntarily chose to purchase a Carefree Foothills lot, knowing that by doing so he was contractually binding himself to restrictions set forth in the CC&Rs. Nevertheless, Vanyo then decided to try to "force" the other owners in Carefree Foothills to give up their contractual rights. He commenced this litigation in an attempt to force them to give up their rights. And contrary to Vanyo's portrayal, the Association made every reasonable effort to compromise with him and avoid litigation; yet Vanyo never made any efforts in return. (R. 137, 147)

Vanyo's only contract-based claim is the one seeking a declaration of a waiver under the CC&Rs, which constitute a contract. As so plainly demonstrated, Vanyo's waiver claim fails as a matter of law under the *Burke* decision. The court should reverse Vanyo's award of attorney fees, and instead award fees to the Association. The Association requests its fees incurred in the court below and on this appeal, pursuant to A.R.S. § 12-341.01.

CONCLUSION

As representative of the class of owners in Carefree Foothills, the Association respectfully asks this court to do what the undisputed facts and the

controlling Arizona authorities require – reverse the judgment entered below, remand with instructions that each of Vanyo’s three claims be dismissed with prejudice, and award attorney fees to the Association.

Respectfully submitted this 5th day of December, 2008.

MEAGHER & GEER, P.L.L.P.

By



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Appellant/Defendant Carefree Foothills Homeowners Association's Reply Brief was mailed to counsel of record on this 5th day of December 2008 as follows:

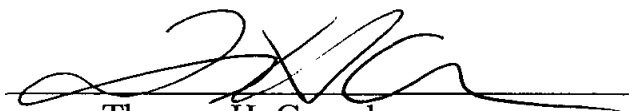
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(b), A.R.C.A.P., I certify that the Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6844 words.

DATED this 5th day of December 2008.


Thomas H. Crouch

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