COURT OF APPEALS, DIVISION ONE

STATE OF ARIZONA

GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit corporation, Plaintiff/Appellant, v. K. HOVNANIAN AT GALLERY, LLC, et al. Defendants/Appellees,	Case No. 1 CA-CV 23-0375 Maricopa County Superior Court No. CV2020-008714

APPELLANT'S REPLY BRIEF

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INTRODUCTION TO REPLY BRIEF

The homebuilder responsible for the defective construction in this case is on a quixotic crusade to get the courts to do what the political branches have refused to do—deny a "planned community" association the ability to carry out its reasonably expected authority and responsibility to homeowners under the community declaration by pursuing construction defect claims on property the association either owns or maintains for the owners at their shared expense.

The Court should decline the invitation. Appellees fail to cite *any* authority for the central, statutory argument on which their entire crusade rides—that the legislature has *failed to enact* a uniform law extending statutory standing to both types of associations—likely because the authorities strongly reject their position, warning against relying on legislative silence or inaction in drawing inferences about legislative intent.

Far from signifying an intent to preclude defect actions, the Arizona statutes in fact confirm that, as far as the legislature is concerned, both condo and planned community associations are proper parties to pursue implied warranty claims in appropriate cases, i.e., where the association is able to satisfy the statutory and any declaration-imposed conditions, A.R.S. §§ 12-1361 *et seq.*, 33-2001 *et seq.*, and otherwise has "standing," i.e., a personal stake in the outcome.

In addition to having proprietary standing as the current owner of the property entitled to assert the *Powercraft* warranty covering the common area improvements—as well as associational standing to pursue its members' claims in a purely representative capacity under *Armory Park Neighborhood Ass'n* (to the extent such individual claims are valid and exist as to each type of property, a thorny question the Court need not reach)—Gallery HOA has standing as a fiduciary manager of the property, also in a proprietary capacity (not as a mere agent subject to owner control). Under well-settled authority, such a fiduciary has standing to bring claims against third parties for damaging or otherwise causing latent defects in property it is responsible for maintaining, whether it "owns" that property or not—which is the same argument Gallery HOA raised below, i.e., it was not waived.

In short, the association's discharge of its discretionary authority and obligation to maintain and repair defectively constructed property—by bringing suit to protect its members' interests in the property and hence its own proprietary interests—is an independent, personal benefit that supports the HOA's independent standing to sue in its own name as a real party in interest. Holding formal legal title is one way to establish standing, but it is not the only way to obtain a sufficient "personal stake" in the outcome to establish standing. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(c).

The trial court's contrary ruling—that planned community associations lack the explicit statutory authorization that condo associations have and therefore may not enforce the implied warranties arising from construction of purchasers' commonly managed property and its own common area property—was incorrect and should be reversed.

I. Gallery HOA Has a Fiduciary Relationship with Owners as to Both Its Own Common Area Property and Portions of the Separately Owned Townhomes.

In our opening brief, we showed that the particular legal regime Appellee K. Hovnanian at Gallery, LLC ("KHov Gallery"), as declarant, chose for its 18-lot Gallery Townhome Community—a modified "planned community" model[1] that makes the homeowners' association responsible for maintaining not only its own property, but also portions of the owners' separately owned townhomes—resulted in three distinct types of property under the Declaration for purposes of establishing who has authority and standing to bring claims regarding that property.

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[1]A.R.S. § 33–1802(4) defines a planned community, in pertinent part, as "a real estate development that includes real estate owned and operated by a nonprofit corporation . . . created for the purpose of managing, maintaining or improving the property and in which . . . the owners of separately owned lots . . . are mandatory members and . . . are required to pay assessments to the association for these purposes." The "Association" of a planned community is defined as "a nonprofit corporation . . . created pursuant to a declaration to own and operate portions of a planned community and that has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration." A.R.S. § 33-1802(1).

1. Common area property. The common area property consists of the property and improvements the HOA itself owns, having received fee simple title by quit-claim deed in accordance with the Declaration and the owners' purchase contracts. [Declaration §§ 1.8, 1.12, 3.5, App. 50, 57] The HOA is required to hold title to and maintain the common area, over which the owners acquired nonexclusive easements of use and enjoyment appurtenant to their lots, assessing the owners equally for any expenses incurred in performing its management duties. [*Id.* § 3.1, 6.1, 6.2, 6.7.1, 8.2.3, App. 57, 61, 78]

The Declaration defines the common area as all property not within the 18 lots. [*Id.* § 1.12, App. 50] The common area thus includes the pool cabana and staircase walls lying outside the lot lines, both alleged to have material deficiencies reasonably likely to result in unexpected maintenance and repair costs. [Complaint ¶ 5, 32-36, App. 35, 38] Unless the HOA is able to recover the cost to ameliorate the defective conditions from Appellees as the responsible parties, those costs will be borne directly by the HOA and indirectly by the owners through higher assessments.

2. Separately owned property maintained by HOA. This property consists of the separately owned exterior walls, roofs, and staircases of the four residential buildings situated on the 18 lots, which the HOA does not own but nevertheless is authorized and obligated in the Declaration to manage and maintain for the benefit

of the owners and each of them, also funded by equal owner assessments. The HOA's fiduciary management obligation over this property was admitted in the Answer [IR-20 ¶ 5] and, in any event, is apparent from the Declaration's terms, both express *and* necessarily implied. [*See* Op. Br. at 25-27, 38-39, 43-46]

In addition to the common area defects, Gallery HOA has alleged defects in some of the areas of the separately owned townhomes it is required to maintain. As with the common area defects, unless the HOA is able to recover the cost to address the defects in the separately owned property from Appellees, those costs will be borne directly by the HOA and indirectly by all the owners through higher assessments.

3. Separately owned property not maintained by HOA. This property consists of those portions of the townhomes the HOA neither owns nor has a fiduciary responsibility for maintaining or repairing. It consists of the homes' interiors and any interior deficiencies or property damage unrelated to defects in HOA-managed property.

Gallery HOA from the outset, when it gave its required notice of claim under the Purchaser Dwelling Act, A.R.S. § 33-1361 *et seq*., has been clear it is not alleging

defects in any property it is not responsible for maintaining under the Declaration.[2] [IR-187-93 ¶ 11 & Ex. G] Instead, this case involves whether a planned community HOA is a proper party to sue for construction defects in the first two types of property—property the HOA itself owns and those portions of the separately owned townhomes that, like the common areas, the HOA has a fiduciary duty to maintain and otherwise manage for the owners.

Although Appellees quibble (at 26-27) over the precise language imparting discretionary fiduciary authority and responsibility on the HOA to maintain and bring claims regarding the separately owned townhomes, that is the plain import of the language in context. The Declaration states it establishes "obligations with respect to the proper . . . maintenance of the Property" (including the townhomes). [App. 49] And it gives discretionary authority and responsibility to the HOA to maintain and repair the buildings' exteriors, and simultaneously deprives owners of the same authority.

Specifically, the HOA is authorized to act "[w]ithout the Owners' approval" in "its sole and absolute discretion" as to the common area property and "any other

[2] Because property of the third type is not involved in this case, the Court need not decide whether a planned community HOA would also have standing in some capacity to sue for defects in property the HOA neither owns nor is responsible for maintaining (e.g., defects in countertop materials or installation).

area placed under its jurisdiction." [*Id.* § 8.1.7, 8.2.3, 8.2.3.2, App. 70, 78-79] Thus, the HOA has the authority, "as it may determine appropriate," to "repair, maintain and replace the exterior walls, stucco, façade, roofs or other surfaces." [*Id.* §§ 8.1.7, 8.2.3, 8.2.3.2, App. 70, 78-79] And the owners may make "[n]o improvement, alteration, landscaping, repair, excavation or other work which in any way alters the exterior appearance." [*Id.* § 8.1.5, App. 69]

In Arizona, the touchstone for establishing a fiduciary relationship is "great intimacy, disclosure of secrets, [or] intrusting of power." *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 24 (App. 1996) (quoting *Rhoads v. Harvey Pubs., Inc.,* 145 Ariz. 142, 148-49 (App. 1984)). "In a fiduciary relationship, the fiduciary holds 'superiority of position' over the beneficiary." *Id.* "This superiority of position may be demonstrated in material aspects of the transaction at issue by a 'substitution of [the fiduciary's] will.'" *Id.* (internal citations omitted).

Here, there is no serious question that the Declaration gives the HOA authority and discretion—"[w]ithout the Owners' approval"—to maintain and repair both the common area improvements and the exterior aspects of the separately owned townhomes. The owners have ceded that discretionary authority and responsibility to the HOA in the Declaration.

Contrary to Appellees' argument (at 26-29), the Declaration need not state in specific terms that a fiduciary relationship exists or was created, or that the association is authorized to bring construction defect claims in a fiduciary capacity. The existence of a fiduciary relationship can be inferred from the nature of the relationship created by the Declaration, including the nature and extent of the authority imparted and duties imposed. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 224 (1983) ("[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.").

In short, the scope of an HOA's fiduciary authority and responsibility must be determined in light of the relationships established by the Declaration. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.13 cmt. a (acknowledging an HOA's duties to owners "grow out of the relationship created by servitudes between individually owned property and a common-interest community").

When all the terms of the Declaration are properly read together—and proper weight is given to the owners' reasonable expectations in light of the Declaration's

language but also the surrounding circumstances and the HOA's basic purpose of governing and representing the community on matters of common interest—the Declaration is properly interpreted as creating a fiduciary relationship between the HOA and the owners regarding the maintenance and repair of both types of property.

II. Gallery HOA Is A Proper Party to Enforce the Owners' Implied Warranty Rights in Commonly Managed Property In Both A Proprietary and Associational Capacity.

As the opening brief explained, the HOA is a proper party to bring both types of defect claims primarily because of its close, trustee-like *fiduciary* relationship with its member-owners with respect to each type of property.

The HOA is further entitled to sue in its own name for the common area defects, also in a proprietary capacity, because it is the owner of the common area property, and public policy compels recognizing an HOA's right, as the intended transferee and owner of the common area improvements, to enforce the *Powercraft* implied warranty arising from construction of the improvements without the need for formal assignments (no different than subsequent purchasers in *Powercraft*).

Finally, to the extent its members are not able to rely on the HOA to sue in its own right to protect their identical interests, the HOA, for many of the same fairness and efficiency reasons, would also have standing to assert the claims of its members

in a representative capacity under *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.* 148 Ariz. 1, 6 (1985).

Contrary to Appellees' argument, Gallery HOA has never disclaimed or waived associational standing in a representative capacity. Rather, it has consistently maintained it has authority and standing to bring claims, in whatever capacity, on property it has a legal obligation under the Declaration to maintain, including the exterior components of the shared townhome buildings. [App. 175-180; IR-187-93, Ex. G, Letter dated 2/21/20][3] Further, the relief the HOA sought in its implied warranty claim included both its own damages and damages sustained by its members [Complaint ¶ 36, App. 38]—which amount to the same thing, since each owner would be entitled to recover only its pro rata share of the HOA's repair costs.]

[3] Contrary to Appellees' waiver argument (at 7, 17-19), Gallery HOA has never stated it was not representing the homeowners in a representative capacity for the elements of the buildings that fall under the HOA's maintenance and repair responsibilities. Rather, Paragraph 5 of the complaint makes clear the lawsuit was brought to recover for defects in the "Association property" the HOA was obligated to maintain, including "the exterior walls, stucco, façade, roofs or other surfaces of the 'Dwelling Units' as defined in the Declaration." [App. 35] Thus, there was no express waiver. What was undisputed is that the HOA was not bringing claims on behalf of the owners for issues unrelated to the portions of the buildings that fall within the HOA's responsibilities (i.e., countertops, carpeting). This was made clear in the letter from the HOA referenced by Appellees, which explains the HOA's position that it is not representing the individual owners for items the individuals are responsible to maintain. [IR-187-93, Ex. G]

Parties are entitled to raise arguments on appeal that merely expand on their basic claim and support the same remedy, which is all Gallery HOA is doing. *See State v. Fulminante,* 193 Ariz. 485, 503, ¶ 64, 975 P.2d 75, 93 (1999) ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy.").

However, even if the HOA should have made its arguments more clearly below, the rule against raising new arguments "is procedural not substantive," and "given this [is a] recurring issue," the Court may exercise its discretion to address the issue. *See Cullum v. Cullum*, 215 Ariz. 352, 355 (App. 2008); *see also In re MH 2008-002659*, 224 Ariz. 25, 27-28 (App. 2010) (addressing issue not preserved because it "raises a pure legal issue," the "failure to object at trial did not prejudice the State because there are no additional facts that could have been presented to address this purely legal question," and "[a]ddressing appellant's argument on its merits aid effective administration and judicial efficiency by allowing us to provide guidance on . . . an issue of statewide importance"); *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18 (App. 2007) ("[W]e are not necessarily limited to the arguments made by the parties if that would cause us to reach an incorrect result.") (cleaned up).

Appellees do not dispute that standing in Arizona raises only "questions of prudential or judicial restraint," *Armory Park Neighborhood Ass'n*, 148 Ariz. at 6, to ensure "courts do not issue mere advisory opinions, that the case is not moot, and that the issues will be fully developed by true adversaries." *All. Marana v. Groseclose*, 191 Ariz. 287, 289 (App. 1997). These standing requirements are met so long as "each party possess an interest in the outcome" in either a personal or representative capacity. *Armory Park Neighborhood Ass'n*, 148 Ariz. at 6.

A. Gallery HOA Has Proprietary Standing

Gallery HOA satisfies these standing requirements, first, as a fiduciary manager of the defectively constructed property and, second, because the HOA is the owner of the common area property, and even assuming privity is lacking between the HOA and the homebuilder defendants, such a lack of privity is not a defense to claims by the current owner of residential property against the builder and seller for breach of their implied warranty of defect-free construction.

1. Gallery HOA is entitled to bring defect claims as a fiduciary manager of the common area and separately owned improvements.

In support of Gallery HOA's fiduciary standing, we cited authority, including on-point Restatement provisions and commentary which the answering brief ignores, that a fiduciary has implied authority and standing to fulfill its management

responsibilities—and to protect its own proprietary interests—by bringing suit to protect its beneficiaries' rights and interests in the property it is responsible for maintaining, thereby binding owners to the outcome. *See* Op. Br. at 42-43, citing, *inter alia*, RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(a)-(c) (addressing fiduciary standing and nonparty preclusion).

This Restatement provision, which has long been cited and followed in Arizona, supports the independent standing of fiduciaries to bring claims in their own name to fulfill their obligations to beneficiaries. *See Oyakawa v. Gillet*, 175 Ariz. 226, 229 (App. 1993) (citing as authoritative Restatement § 41(1)(c)'s rule regarding "other fiduciaries"); *Citibank (Ariz.) v. Miller & Schroeder Fin., Inc.*, 168 Ariz. 178 (App. 1990) (holding trustee with fiduciary duty to safeguard bonds had sufficient personal interest to confer standing to sue to recover improperly distributed funds).

Other more recent authority confirms that fiduciary standing is the accepted rule in federal court as well. *See Fund Liquidation Hldgs. LLC v. Bank of Am. Corp.*, 991 F.3d 370, 381-82 (2d Cir. 2021) ("[T]he minimum requirement for an injury-in-fact is that the plaintiff have *legal title to or a proprietary interest* in, the claim.") (citing, *inter alia*, *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288–89 (2008)); *see also Sprint Commc'ns Co.* 554 U.S. at 288–89 (Roberts, C.J., dissenting) ("Trustees hold legal title to the assets in the trust estate and have an independent

fiduciary obligation to sue to preserve those assets. The trustee's discharge of its legal obligation is an independent, personal benefit that supports the trustee's standing to sue in federal court.").

Contrary to Appellees' argument, this standing principle is not limited to formal trust relationships, and the opening brief did not suggest, as Appellees seem to argue, that Gallery HOA must be a formal "trustee" of a "trust" that satisfies the strict common law requirements in order to have fiduciary standing. To the contrary, as this Court has acknowledged: "Fiduciary authority and responsibility for management of interests of others may repose in relationships other than a trust." *Oyakawa*, 175 Ariz. at 229 (quoting RESTATEMENT § 41 cmt. b); *see also Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008) ("Representative suits with preclusive effect on nonparties include . . . suits by trustees, guardians, *and other fiduciaries*") (citing Restatement § 41) (emphasis added).

> [T]he representative may be constituted as such through some transaction antedating the litigation wherein the representative is given authority to manage and safeguard interests of a beneficiary, for example in the appointment of an executor or administrator for an estate or the creation of a trust or agency relationship. In such circumstances, the authority and responsibility to represent the beneficiary in litigation is a concomitant of the representative's general managerial authority and responsibility for the matter entrusted to him.

RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d) cmt. a.

Such implied authority to bring claims in the fiduciary's own name logically extends to a planned community HOA asserting and enforcing the implied warranty rights of owners whose property the HOA is responsible for maintaining. *See* Paul S. Jacobson, *Standing of Condominium Associations to Sue: One For All or All for One?,* 13 Hamline L. Rev. 15, 20-23 (1990) (citing authorities finding common law standing to sue); *see also River's Side at Washington Square Homeowners Ass'n v. Superior Court*, 305 Cal. Rptr. 3d 532, 550 (Cal. Ct. App. 2023) (upholding HOA standing based on "considerations of necessity, convenience and justice"); *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535 (Utah 1983).

True, the Declaration does not *expressly* grant authority to assert construction defect claims, but Appellees have not shown it *needed* to. Under a separate Restatement provision governing community associations' duties to their members, which was adopted in *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201 (App. 2007), an association has authority to exercise whatever powers are reasonably necessary to effectuate the obligations imposed on it, consistent with owners' reasonable expectations. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.13 (association must "act reasonably in the exercise of its discretionary powers"); *see also id.* cmt. a (noting that a reasonableness test is

"intended to protect the legitimate expectations of members of common-interest communities").

Here, the authority to bring claims is directly inferable from the obligation to maintain and repair the property as a common expense. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. b ("The person or persons standing in the position of managerial authority have a correlative representational status in litigation concerning the interests for which they are responsible."); *Citibank (Ariz.)*, 168 Ariz. at 183 (having a fiduciary duty necessitates "the ability to remedy situations which interfere with those duties," and "this ability, which includes the right to maintain an action . . . , arises naturally as part of the duties described").

The Declaration here imparts authority on the HOA to maintain and repair both the common area improvements and the separately owned building exteriors. The Declaration does not specify *how* the association is to act, just that it should. And it denies individual owners the right to make repairs or otherwise alter the appearance of their building's exterior. It is thus not unreasonable for owners to expect the HOA would have the further discretionary authority—if not the obligation—to timely assert defect claims on property the association is required to maintain and repair. *See* RESTATEMENT (SECOND) OF PROPERTY: SERVITUDES § 6.13 cmt. a ("[L]egitimate expectations of purchasers include the association's

responsibility to carry out its property-management functions with due care to provide for its continued utility throughout the life of the project").

Further, since owners may look to their association, funded by owner assessments, to deal with problems in their own portions of the buildings' exteriors, it is not unreasonable for owners to expect the HOA to have authority to pursue litigation involving *any* or *all* of the buildings' exteriors, and to do so at the owners' shared expense. Even if its own property is not involved, each owner understands it will be required to bear its pro rata share of the common expense.

This makes the HOA responsible to owners to safeguard their investments in their homes by taking discretionary actions the owners could reasonably expect the HOA to take in fulfilling its obligation to preserve and protect the commonly managed aspects of their homes and common area property. *See id.* ("Where common property includes roofs and walls, the dependence of the individual's property values on the association's management and on members' willingness to pay assessments is particularly apparent.").

In sum, Gallery HOA not only has a duty to take appropriate corrective action by making reasonably necessary repairs, but also the reasonably expected implied authority and responsibility not to assess owners more than necessary by recovering its expense from the responsible builder and vendor through litigation if necessary.

2. Gallery HOA is entitled to bring defect claims as owner of the common area improvements.

The HOA is also entitled to sue in its own name for the common area defects in a proprietary capacity because the HOA owns the common area improvements. Such ownership is sufficient to give the HOA a personal stake in the outcome, and thus standing, to sue for defects under the reasoning of *Powercraft* and *Lofts*. Appellees never seriously argue to the contrary. They cite no authority for the proposition that the owner of improved residential property, such as an HOA, has no standing to sue a builder and vendor for defective construction performed on that owner's property.[4]

Just as a formal assignment of the residential implied warranty is not required to effectuate its transfer to subsequent purchasers, *see Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242 (1984), an assignment is not necessary to transfer the implied warranty over the common area improvements to the HOA, which is also a subsequent owner of that property. The same public policy concerns giving rise to the *Powercraft* warranty compel recognizing an HOA's right, as the current owner of

[4] Although Gallery HOA acknowledges that neither the HOA nor individual owners have privity of contract with the builder, Appellee K. Hovnanian Arizona Operations, LLC ("KHov Arizona"), Gallery HOA does not concede a lack of privity with the vendor, KHov Gallery. To the contrary, KHov Gallery, as declarant, had an obligation under the Declaration and the owners' purchase contracts to construct and transfer the common area improvements to the HOA.

the property, to enforce the *Powercraft* implied warranty in the common area improvements without formal assignments. After all, the warranty "arises from the *construction* of a new home," *Lofts at Fillmore Condo. Ass'n v. Reliance Com. Constr.*, 218 Ariz. 574, 577 ¶ 11 (2008), and planned community HOAs are the intended transferees of the common area improvements, just as subsequent purchasers are reasonably anticipated transferee owners of their homes. *See Richards*, 139 Ariz. at 245 ("Home builders should anticipate that the houses they construct will eventually, and perhaps frequently, change ownership.").

The position such HOAs find themselves in is no different than that of subsequent purchasers in *Powercraft* and the condo owners in *Lofts*. Planned community HOAs are equally reliant on the vendor and builder to properly design and construct the improvements. If there is defective construction on its property, the HOA has sustained injury. *How* the HOA formally took title to the property is not important. *See Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E.2d 363 (1983) (association holding title to common areas for benefit of townhouse owners holding easements of enjoyment had standing to sue developer for breach of warranty for defective storm-drainage system; method of separating the ownership of building and common lands should not be allowed to undercut public policy protecting purchasers of new houses against latent defects).

Appellees' quit-claim-deed argument, by contrast, elevates form over substance and would have the practical effect of disclaiming the implied warranty in the common area improvements altogether, which is not allowed. *See Zambrano v. M&RC II LLC,* 254 Ariz. 53, 61, ¶¶ 16, 24-27 (2022). Are individual homeowners really going to bear the expense of bringing their own lawsuits to repair common area defects for the benefit of all the owners? Would such homeowners even have valid claims since they only hold easement rights in the common area? And even if owners do have valid claims, would they be entitled to recover the full repair costs or only their pro rata share, since each owner's own damages would be limited to that amount?

Fundamentally, Appellees ignore that the HOA's role in taking title to and managing the common area property was a central component of the plan called for in the Declaration and was incorporated into each purchase agreement. Put differently, the HOA's ownership and management of the common area property was part of the consideration inducing owners to purchase their homes in the first place, and it is thus reasonable for owners to expect the HOA would manage any defect litigation reasonably necessary to protect their interests in the property.

Appellees cite no authority for the proposition that an HOA cannot assert a warranty claim because it never "purchased" the common area property—because

there is none. Appellees did not build these common improvements gratis and do not dispute that the townhome owners paid for them in the purchase price of their townhomes. The requirement that the HOA directly purchase the property in order to have an implied warranty claim runs afoul of the ruling in *Powercraft*, which specifically held that "privity is not required to maintain an action for breach of the implied warranty of workmanship and habitability." 139 Ariz. at 244.[5]

At the end of the day, whether Gallery HOA may enforce purchasers' implied warranty rights in the common area improvements in a fiduciary capacity, or whether the HOA itself "holds" the implied warranty rights by virtue of being the current owner of the property analogous to subsequent purchasers in *Powercraft*, or whether the HOA qualifies as an intended third-party beneficiary entitled to enforce the

[5] Some jurisdictions have dealt with the privity objection by holding that HOAs may be intended third-party "donee" beneficiaries of the owners' purchase contracts and thus entitled to enforce the implied promises to owners of defect-free construction. *See, e.g., Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 213 (Mo. Ct. App. 1987) ("The purchasers of the lots, as part of the consideration for entering into the sales contract, had a promise from Developer to render a stated performance to Association. . . . The purchasers intended to confer these benefits upon the Association of which they would automatically be members."). Such an approach would be consistent with Arizona law. *See Matter of Noel R. Shahan Trust*, 188 Ariz. 74 (App. 1996) (holding trust beneficiary had standing as intended third-party beneficiary of customer agreement between trust and broker to compel broker to arbitrate beneficiary's breach of fiduciary duty claim).

implied warranty arising from the owners' purchase agreements, would appear to be academic. Any of these grounds would suffice to establish a personal stake in the litigation's outcome necessary to support the HOA's standing. The trial court's contrary ruling deviates from the strong Arizona policy to protect homeowners from construction defects.

3. HOA standing is especially warranted given the substantial obstacles hindering individual homeowner lawsuits.

As alluded to above, the substantial hindrances individual owners would face in protecting their own interests, and the likelihood that such hindrances would impede assertion of valid claims leaving owners' implied warranty rights unenforced—thereby making shoddy workmanship more profitable (and thus more likely)—further support the need to recognize an HOA's standing. As does the judicial policy favoring resolving a potential multiplicity of suits in one action.

Simply put, the HOA is the most logical plaintiff in this case. If a roof in one of the four buildings leaks, who is in a better position to bring the claim than the HOA? Do we expect only the four lot owners to sue, even though all 18 homeowners are responsible for their pro rata share of the repair costs? Or must all 18 owners join in the suit or coordinate a class action brought by one of them? What if the leak occurs only in the roof above a single unit but results in water damage to other units? Do both owners need to sue? Only the owner whose "own" roof had the defect?

Having created the common law right at stake, courts have a special interest and responsibility in ensuring that the legal structures developers employ to construct and sell (or otherwise transfer) their improvements to purchasers (or their associations) do not hinder current owners of the property from holding builders and sellers accountable for their implied promises to original purchasers. *See Zambrano,* 254 Ariz. at 61, ¶¶ 16, 24-27 ; *Lofts at Fillmore*, 218 Ariz. at 577 ¶ 16-17.

In *Lofts*, for example, the supreme court recounted the history of the implied warranty and ruled that the law should not impose obstructions on home purchasers' ability to recover damages for latent defects and substandard work. In reflecting on the strong public policy to protect homebuyers, the court noted that the model used for sales of homes

> . . . should not affect the homebuyer's ability to enforce the implied warranty against the builder. Innocent buyers of defectively constructed homes should not be denied redress on the implied warranty simply because of the form of the business deal chosen by the builder and vendor.

Id. at 577, ¶ 17. Here, even though the development in question has many attributes of a condominium project (common walls and roofs, common areas) [*see especially* Declaration § 3.2, App. 56], the Appellees chose the planned community form of business model. Their choice of that model instead of the condo model should not insulate Appellees from the strong public policy protecting homebuyers from defective construction.

In short, whether an HOA can bring the action so that its members are not required to act to protect their own interests implicates the likelihood the substantive right at stake will be asserted and thus enforced. *See, e.g., Miller v. Albright*, 523 U.S. 420, 447-50 (1998) (upholding third-party standing where there is "some hindrance to the third party's ability to protect his or her own interests").

The outcome here also implicates whether an HOA will be allowed to govern itself on matters affecting both individually owned property and the collective interest of all owners. For example, requiring joinder of owners or assignments of claims would, by permitting holdouts, be contrary to the system of governance set up in the Declaration to decide matters of common interest.

In sum, the Court should permit HOA standing because the reasons which underlie the rule denying standing to raise another's rights are outweighed by the need to recognize and protect the important common law implied warranty rights, fiduciary relationships, and community governance rules set up in the Declaration to decide matters of common interest—each of which would be undermined by a ruling that planned community HOAs lack the ability to assert the implied warranty rights of their member-owners in commonly managed property. *See Miller*, 523 U.S. at 450.

B. Gallery HOA Has Associational Standing

To the extent individual homeowners possess their own valid claims to recover their respective share of the damages resulting from the construction deficiencies, then Gallery HOA would also have standing to assert these claims in a representative associational capacity under *Armory Park Neighborhood Ass'n*.

In fact, the case for Gallery HOA's associational standing is even stronger than in *Armory Park* because membership in Gallery HOA is mandatory (not voluntary as in that case), and a central purpose for which the HOA was created in the first place was to represent and protect its owners' interests on matters of common concern (i.e., areas placed under the HOA's "jurisdiction" funded by assessing all owners equally), which necessarily includes addressing defective conditions in property the HOA has a duty to maintain at the owners' expense.

Moreover, neither participation by individual owners nor individualized quantification of damages is necessary in this case. Appellees do not contest that expert testimony will establish the claims and that individual homeowners will not need to testify. Appellees also do not contest that the HOA Board, in its fiduciary capacity, not the individual owners, will receive and direct how any litigation proceeds are spent. A successful recovery will thus benefit the HOA directly because in order to fulfill its fiduciary duties to individual owners, the HOA would otherwise

have to spend its own funds to fix the problems or repair the damage caused by the defective construction. Each owner, in turn, indirectly benefits by not having to pay for the repairs through higher owner assessments.

The Court, however, need not reach the question whether the owners themselves would be entitled to assert their own claims such that the HOA could assert those individual claims in a representative capacity. As shown, the HOA has standing in a proprietary capacity to pursue these claims, and there is no question that the owners are not *necessary* (much less indispensable) parties.

Owners are not necessary parties because the HOA, as a fiduciary, shares and is adequately representing and protecting the same interests, and because Gallery HOA has been duly authorized to bring the action by the owners, acting through the Board at a properly noticed member meeting after all required disclosures to members were made. Under these circumstances, the owners, as nonparties in privity with the HOA, will be bound by the final judgment under settled principles of non-party preclusion. *See Hall v. Lalli*, 194 Ariz. 54, ¶ 8 (1999) (to find "[p]rivity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship' . . . in which the interests of the non-party are presented and protected by the party in the litigation").

The important components of Gallery HOA's standing and status as a real party in interest in this case, which have never been seriously disputed, are:

(1) Gallery HOA and the homeowners, by virtue of their fiduciary-beneficiary relationship with respect to the property at issue, share the same interest in maintaining the property and avoiding unexpected repair costs from deficient construction,

(2) The owners, represented by and acting through the HOA Board under the system of community governance set up by the developer, authorized the filing of this action at a properly noticed meeting of members, satisfying all the necessary statutory conditions and due process requirements to bind them to the outcome, and

(3) Appellees have offered no reason why the HOA, as the fiduciary-manager of the property, will not adequately present and protect the interests and rights of the owners at stake here; and the owners, as nonparties in privity with the HOA, will thus be bound by the resulting judgment under *res judicata*. *Id.*

We challenged Appellees in the opening brief to offer a good reason why, in these circumstances, the HOA should be prevented from bringing the suit in either a proprietary or associational capacity. Appellees failed the challenge.

III. Gallery HOA Does Not Need Independent Statutory Authorization To Maintain the Breach of Implied Warranty Claims.

Appellees' only real effort to defend the ruling below is to argue that, because

planned community HOAs have not been authorized to assert the rights of their members in litigation in the same manner as condo associations, planned community HOAs are not entitled to maintain defect actions involving their member-owners' homes. That argument reads far too much into the legislature's inaction. And it cannot be reconciled with the extensive statutory scheme governing construction defect actions.

While it is true Gallery HOA has not been expressly authorized by statute to enforce its member-owners' rights, Appellees fail to show that such independent statutory authorization is necessary. Courts, not the legislature, created the implied warranty as a common law right, and courts, not the legislature, typically decide how, and by whom, such rights may be enforced in court (i.e., standing), at least in the absence of a statute affirmatively granting or denying statutory standing.

In any event, Appellees' statutory argument has been repeatedly rejected as a valid method of statutory interpretation: "Silence on an issue is not an expression of legislative intent." *Bunker's Glass Co. v. Pilkington plc*, 202 Ariz. 481, 490-91 (App. 2002), *aff'd*, 206 Ariz. 9 (2003); *see also Ontiveros v. Borak*, 136 Ariz. 500, 512 (1983) ("We are unable to find an expression of legislative intent in the absence of any legislative action."); *Rader v. Greenberg Traurig, LLP*, 237 Ariz. 433, 436-37 (App.

2015) (citing authority rejecting a "presumption that mere silence on a particular subject necessarily indicates legislative disapproval in all cases").

Other courts reason that, at most, statutes not explicitly addressing an issue are ambiguous and therefore courts "must consult other sources to determine which of the two interpretations is more in line with legislative intent." *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 104 (1993) ("Silence in and of itself, in the absence of any indication that the legislature has considered the [issue], is not instructive."); *see also State v. Luviano*, 255 Ariz. 225, 226, ¶ 10 (2023) ("Ambiguity arises when the language is reasonably susceptible to differing interpretations.").

And where, as here, a party's ability to assert a common law damages action is at issue, the courts "will not interpret a law to deny, preempt, or abrogate common-law damage actions unless the statute's text or history shows an explicit legislative intent to reach so severe a result." *Napier v. Bertram*, 191 Ariz. 238, 240 (1998). "It is, after all, easy enough for the legislature to state that a certain statute does or does not create, preempt, or abrogate a private right of action." *Id.*; *see also L. v. Superior Ct. In & For Maricopa Cnty.*, 157 Ariz. 147, 156 (1988) (refusing to "transmogrify legislative inaction on a common law damage issue into legislative intent").

Not only does Appellees' statutory argument lack support, but it cannot be reconciled with Arizona's "dwelling action" statutes. Indeed, the PDA and HADA statutes directly undermine Appellees' argument. The PDA statute and its pre-suit notice and opportunity-to-repair requirements, which must be satisfied as a condition of filing a "dwelling action," were specifically made applicable to both types of associations. *See* A.R.S. § 33-2003(B). And the HADA statute expressly permits the filing of "dwelling actions" by both types of associations as long as certain prerequisites are met, including making certain disclosures to members about the suit and how any proceeds will be spent, and a vote of the HOA board authorizing the suit on behalf of the members. A.R.S. § 33-2002.

Further, section 12-1361(6) specifically defines a "dwelling" as including "common areas and improvements that are owned *or maintained* by an association." In other words, exclusive ownership of the property is not required for an HOA to maintain a "dwelling action." And since such construction defect litigation maintained by an association is specifically authorized by the statutes, it is nonsensical to suggest the legislature authorized HOAs to bring "dwelling actions" on common areas and improvements it owns or maintains but precluded the HOA from using the public policy-imposed *Powercraft* warranty.

These statutes offer a far better indication of the legislature's intent and understanding of the rights of HOAs to pursue defect claims than speculating about why the legislature failed to enact a model law that would have extended express statutory standing to planned community associations.

In short, neither the Declaration nor Arizona statutes preclude Gallery HOA from pursuing these defect claims, whether as owner, fiduciary manager, or an association asserting its members' individual claims. Rather, the statutes expressly presume HOAs may be proper parties to bring such construction defect actions, at a minimum, on property the HOA owns or has an obligation to maintain and repair. So, whether such an HOA has the ability to enforce its members' rights in any given case is up to the judiciary to decide based on traditional standing and real-party-in-interest concepts. And in this case, as shown, those concepts compel recognizing Gallery HOA's standing to sue as a real party in interest.

CONCLUSION

Having been granted both ownership of the common area property and a fiduciary responsibility to manage both the common area property and the exterior portions of the owners' separately owned property, the HOA necessarily has the implied authority and obligation under the Declaration to bring claims to remedy construction defects in both types of property. Such a fiduciary relationship is

sufficient to make the HOA a real party in interest with both authority and standing to assert the implied warranty rights of purchasers and to obtain a judgment that will be binding on the owners under *res judicata*. Accordingly, the HOA is a proper party to bring this action.

For the foregoing reasons and those stated in the opening brief, the judgment should be reversed and the case remanded for trial on Gallery HOA's implied warranty-based defect claims.

DATED this 4th day of January, 2024.

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