IN THE COURT OF APPEALS
ARIZONA COURT OF APPEALS
DIVISION ONE

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	**Court of Appeals** **Division One** **Case No. 1 CA-CV 21-0275** **Maricopa County Superior Court** **Case No. CV2019-055353**

ANSWERING BRIEF OF DEFENDANTS/APPELLEES PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATION

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INTRODUCTION

Appellees, PFP Dorsey Investments, LLC (hereinafter "PFP") and Dorsey Place Condominium Association (hereinafter the "Association") (collectively the "Appellees"), respectfully requests that this Court uphold the Trial Court's ruling in dismissing Appellants' Second Amended Complaint in its entirety against Appellees and awarding Appellees their attorneys' fees and costs.

This lawsuit arises out of the termination of the condominium known as Dorsey Place Condominiums, which is located in Tempe, Arizona. The allegations, taken in the light most favorable to Appellants, show Appellee strictly complied with the parties' contract and the statutory requirements under A.R.S. § 33-1228 in terminating and selling the condominium, thereby foreclosing any claims Appellants allege. The statutory history of A.R.S. § 33-1228 outlines how the statute provides an outlet for majority owners to terminate and buy a condominium while providing protective measures to the minority unit owners. Appellants' grievances regarding the alleged unfair processes of A.R.S. § 33-1228 are best suited for the Legislature and not this Court, as Appellants' constitutional arguments have no merit in this case.

As a preliminary matter, Appellees recognize that in their Opening Brief, Appellants cite to numerous extraneous information, by way of news articles, not developed before the trial court below. *See, e.g.,* Appellants' Opening Brief, pp. 13-

14; 59-61. Not only are these references irrelevant to the specific facts of this case, but this Court should disregard these extraneous references or arguments as the circumstances or applicability of those stories are unknown and have no bearing to the parties before this Court. *See Lewis v. Oliver*, 178 Ariz. 330, 338 (App. 1993) (finding the appellate court considers "only those matters in the record before us").

Furthermore, Appellees note that Plaintiff Stone Xia joined in the Notice of Appeal filed by Appellants; however, Stone Xia was not a named Appellant in their Opening Brief. This Court has previously ruled that if "an issue is not raised in an appellant's opening brief" that claim is deemed "abandoned or conceded." *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 208 Ariz. 176, 180, ¶17 (App. 2004). Therefore, Appellees respectfully request that this Court find Stone Xia's claims are deemed abandoned.

STATEMENT OF FACTS MATERIAL TO THE ISSUES

The following factual rendition is taken from the Appellants' Second Amended Complaint and treated as true only for the purposes of this appeal.

Appellants Haining Xia and Jie Cao were the owners of Unit 106 at Dorsey Place Condominiums prior to the termination of the condominium. [IR-40 at 2, ¶7 – OB APP78]. Defendant PFP also owned 90 of the 96 units at Dorsey Place Condominiums prior to the termination of the condominium [*Id.* at 5, ¶¶ 23-25]. Pursuant to the Bylaws for the Condo Association, each "Unit Owner shall be a Member of the Association. The membership of the Association shall, at all times, consist exclusively of the Unit Owners." [*Id.* at 5, ¶ 20]. Thus, Appellants and PFP, as Unit Owners, were members of the Association.

On April 4, 2019, the Association held a Meeting for the members of the Dorsey Place Condominium Association. [*Id.* at 5-7, ¶¶ 26, 34, 35]. Notice of the Meeting was provided in or around March 2019. [*Id.* at 5, ¶ 26]. Appellants were present at the Meeting. [*Id.* at 7, ¶ 34]. At the Meeting, termination of the condominium was discussed among the Unit Owners. [*Id.* at 5-7, ¶¶ 26, 29-32, 35]. Ultimately the Condominium Termination Agreement was entered into on April 9, 2019, wherein the Association on behalf of the Unit Owners agreed to sell to PFP all portions of and interests in Dorsey Place Condominium that were not already owned by PFP. [*Id.* at 7, ¶ 35; IR-51, Ex. 2 at 2; OB APP60]. Pursuant to the

Condominium Association's Declaration with Amendments, under Section 13.4, "the Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated. [IR-51, Ex. 1 at 49; OB APP146]. An agreement to terminate the Condominium must be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed by the requisite number of Unit Owners." [*Id.*]. The Agreement was ratified by 93.75% of the Unit Owners (90 out of the 96 Unit Owners). [IR-51, Ex. 2 at 8; OB APP168].

STANDARD OF REVIEW

Appellees agree with Appellants that the issues before this Court involve questions of law in which the appropriate standard of review is *de novo*. *See Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504, ¶ 7 (2018); *DeVries v. State*, 221 Ariz. 201, 204, ¶ 6 (App. 2009).

LEGAL ARGUMENT

I. APPELLEES STRICTLY COMPLIED WITH THE CONDOMINIUM DOCUMENTS AND A.R.S. § 33-1228.

Appellants erroneously argue that Appellees improperly terminated and sold the Condominium. However, Appellees strictly complied with all terms and conditions the Parties agreed to in the Association's Declaration as well as the requirements of A.R.S. § 33-1228.

The Arizona legislature enacted A.R.S. § 33-1228 in 1986, which provides specific requirements that must be met for a condominium to be terminated. The statute was amended in 2018, becoming effective on August 3, 2018. *See* 2018 Ariz. Legis. Serv., Ch. 235, § 1 (H.B. 2262). The statute was again amended in 2019 with an effective date of August 27, 2019. *See* 2019 Ariz. Legis. Serv., Ch. 233, § 1 (H.B. 2687). The subject Condominium Termination Agreement at issue was entered into on April 9, 2019; therefore, the statute amended in 2018 was the effective statute governing the subject condominium termination.[1]

A.R.S. § 33-1228 is very clear as to the procedures an Association must follow when terminating a condominium. Based upon Appellants' allegations in the Second Amended Complaint, Appellees have complied with every element of the

[1] A copy of the version of A.R.S. § 33-1228 effective at the time of the termination and sale of the Condominium in April, 2019 is attached to Appellants' Appendix at APPP067. Unless otherwise specified, when referencing A.R.S. § 33-1228, Appellee are referring to the 2018 version in effect in April, 2019.

statute and the parties' contractual terms, and thus, Appellants cannot state a claim against Appellees upon which relief may be granted.

A. Appellees Met the Requisite Votes and Manner for Termination.

Pursuant to A.R.S. § 33-1228 (A), a condominium may be terminated by agreement of the unit owners when at least 80% of the votes in the association agree, or any larger percentage that the declaration specifies. In this case, the Declaration requires at least 90% of the unit owners have to agree to terminate the condominium. [IR-40 at 5, ¶ 22; OB APP081]. Each Unit Owner is allocated one vote per unit owned. [*Id.* at 5, ¶ 21]. PFP is the owner of 90 units at Dorsey Place Condominiums and thus, had 90 votes. [*Id.* at 5, ¶¶ 23-25]. PFP casted all 90 of its votes to ratify the Condominium Termination Agreement. [IR-51, Ex. 2 at 8; OB APP168]. With 90 out of 96 votes agreeing to terminate the condominium, the Condominium Termination Agreement was ratified by 93.75% of the Unit Owners, meeting the requirements of the Declaration and A.R.S. § 33-1228(A). Although Appellants did not consent to the condominium termination, there is no dispute that 93.75% of the Unit Owners agreed to the termination.

The Declaration and A.R.S. § 33-1228(B) further requires that an agreement to terminate be evidenced by the execution or ratification of a termination agreement by the requisite number of unit owners required to terminate. "The termination agreement shall specify a date after which the agreement will be void unless it is

recorded before that date" and it "shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation." A.R.S. § 33-1228(B). There is no dispute these requirements have been met. Exhibit A of the Agreement is the ratification by PFP, as the Unit Owner for 90 units of Dorsey Place Condominiums. [IR-51, Ex. 2 at 8 – OB APP168]. Further, the Condominium Termination Agreement has been recorded with Maricopa County Recorder's Office with Recording Number 20190248170. [*Id.*, Ex. 2 at 1].

B. A.R.S. § 33-1228 Provides a Clear Mechanism for Allowing a Supermajority Owner to Purchase the Entire Condominium While Protecting Minority Owners' Interests.

Appellants attempt to convolute the statute in making it an "all or nothing" proposition in terms of whether it "protects minority unit owners or removes risk for investors." However, when construing the statute as a whole and specifically evaluating subsections (C), (D), and (E), A.R.S. § 33-1228 allows a supermajority owner to purchase the condominium while protecting the minority unit owner's interests.

"When construing a statute, [the] goal 'is to fulfill the intent of the legislature that wrote it.'" *City of Sierra Vista v. Dir., Ariz. Dep't of Envlt. Quality*, 195 Ariz. 377, ¶ 10 (App. 1999). A basic principle of statutory construction requires that we give words of a statute their ordinary meaning, unless the context of the statute suggests a different meaning. *State v. Schoner*, 121 Ariz. 528 (app. 1979). "If the

statute is clear and unambiguous, we apply the plain meaning of the statute." *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 7 (App. 2005). In this case, the clear and unambiguous language of A.R.S. § 33-1228 allows a majority unit owner, such as PFP, to purchase the condominium upon termination.

1. There is no requirement in the statute that the property has to be sold "on the open market."

Appellants attempt to add an additional requirement in the statute that the property has to be sold on the open market; however, no where in the statute does it state it has to be sold to a separate third-party non-unit owner or that the property needs to be placed on the open market. There is absolutely no legal support to allege A.R.S. § 33-1228 requires the Association to sell the condominium to someone that is not a current owner. Doing so would make the statute impractical as it is unrealistic for a third party who has no interest in a condominium to outright purchase the property. The process of terminating a condominium under A.R.S. § 33-1228 is to prevent a minority condominium owner from inhibiting the interests of the supermajority. If the statute was to only protect minority unit owners, then the statute would have required full 100% approval for termination of a condominium. Allowing for a reduced number or percentage of members to approve a termination and sale of condominium in and of itself supports the Legislature's intent to allow a supermajority unit owner to terminate and purchase the condominium.

Appellants' argument is further flawed in that their interpretation contravenes the requirements of A.R.S. § 33-1228(C). According to Appellants' "3-step process" (*see* Appellants' Opening Brief, p. 24-25), the members of the association would agree to terminate the condominium and sell all of the common elements and units of the condominium. After the agreement was made by the members of the association, the association would then sell the property on the open market. (*Id.*). However, this proposed procedure violates the statute's requirement that the minimum terms of the sale be provided in the termination agreement. A.R.S. § 33-1228(C). If the condominium is not marketed until after the termination agreement is entered into, the minimum terms of the sale would be unknown and cannot be stated in the termination agreement. Although the terminology "minimum terms" is not defined in the statute, the basics of contract law requires that there be an offer by a party, acceptance by a party, consideration, and sufficient specification of terms so that the obligations involved can be ascertained. *See Leflet v. Redwood Fire and Cas. Ins. Co.*, 226 Ariz. 297, 302, ¶ 22 (App. 2011). Under Appellants' scenario, if the property is not marketed until after the members agree to terminate the condominium, the members would not know who the buyer would be, the offer being made, or sufficient specifications of the terms such as timing of the sale. Further, what would happen if there was no buyer? Would that invalidate the termination agreement? Or if only one buyer made a low-ball offer, would an

association be required to sell to this buyer? The purpose of having the minimum terms of the sale in the termination agreement is for each unit owner to make an informed decision of whether to approve the termination and sale of the condominium to a specific buyer with specific information as to the minimum terms of the sale. Although Appellants' attempt to create an ideal 3-step process to their benefit, the statute does not contemplate these requirements and in effect, Plaintiffs' process would contradict the statute and be impractical. Instead, the statute allows for a supermajority to purchase the condominium while providing protections to the minority unit owner under A.R.S. § 33-1228(G).

2. Subsection (G) of A.R.S. § 33-1228 provides the necessary protective measures to the minority unit owner upon sale of the condominium through an appraisal process.

Throughout Appellants' argument that the statute's purpose is to protect minority unit owners and while improperly creating various mechanisms not written in the statute, Appellants remarkably omit the one express provision of the statute that is meant to protect the minority unit owner—the appraisal process under subsection (G). It is unclear why Appellants believe selling their unit for the appraised value is somehow unconscionable and unfair, and only beneficial to the buyer. A.R.S. § 33-1228(G) requires that an independent appraiser shall determine the total fair market values of the units and condominium. This is not a case where the buyer determines the price and makes a low-ball offer. An independent appraiser

determines the fair market value, which determines the sale price of the condominium. If a minority unit owner questions whether the appraisal is independent or accurate, the statute allows for any unit owner to obtain a second independent appraisal. A.R.S. § 33-1228(G). The statute further provides that if the difference is five percent or less, then the higher appraisal is final. If the difference is more than five percent, then the parties shall submit to arbitration in which the determined arbitration amount "is the final sale amount." *Id.* This appraisal process protects the minority unit owners to ensure they are obtaining a fair value of their property.

Appellants provide an extensive mathematical exercise[2] of how to calculate the respective interests of each unit owner and their portion of the sales price in contravention of subsection (G). (*See* Appellants' Opening Brief, pp. 32-35). It is difficult to follow Appellants' analysis and why this is necessary as the ultimate total in Appellants' calculation is the same as the appraised value of each unit. Appellants fail to recognize express language in the statute that the appraised value is "the total fair market values of their units, limited common elements and common element interests immediately before the termination," which is also the required

[2] It should be noted that some of Appellants' mathematical division and percent value of each unit owner comes from language found in the statute when originally enacted in 1986. *See* A.R.S. § 33-1228(G) (1986). The Legislature has since deleted this calculation in its revisions in 2018 in providing the current language in determining the fair market value of the unit through the appraisal process.

sale price under the statute. A.R.S. § 33-1228(G). That is why the statute expressly states that "the arbitration amount is the final **sale amount**." *Id.* (Emphasis added).

Further, Appellants make the allegation that somehow Appellees did not distribute the proceeds of the sale, but only the appraised value of the unit. It is not only untrue, as the Termination Agreement shows the proceeds of the sale were distributed to each unit owner (which included the appraisal value of the unit plus a proportionate share of the Association's assets), but it is unclear how this is a disadvantage to the Appellants. [IR-51, Ex. 2 at 11; OB APP172]. Typically, in a real estate transaction, there are transaction fees, commissions, and various deductions to effectuate the sale. All of this would have decreased Appellants' net sum of the proceeds. Rather, Appellees have given Appellants the fair market value of their unit as appraised plus their proportionate share of the Association's assets, without any deductions for fees. Appellants' argument in this respect is a red herring.

The appraisal process under A.R.S. § 33-1228(G) is not only for the benefit of the buyer, but it is a process for the benefit of all parties to ensure an equitable sale of the property at fair market value. Appellants provide a conclusory statement that only a majority owner would have the benefit of an appraisal; however, there is no reason why a third-party buyer who was interested in purchasing the property could not also obtain the necessary appraisals in making an offer. The appraisal

process is meant to facilitate a fair and equitable sale of the property to protect the unit owners. Appellants' conjured process of what they believe should be the equitable process is not written in the statute; respectfully the Court should not apply it. Appellants' process is something better suited to be lobbied to the Legislature, not this Court.

3. PFP bought all of the Condominium, satisfying A.R.S. § 33-1228(C).

Appellants attempt to create an issue about whether the Association must sell all or none of the Condominium by alleging only a portion of the Condominium was sold. However, PFP already owned 90 units; thus, it would be absurd to require PFP to repurchase the units it already owns, or worse, force a sale of those units to a third party. By purchasing the remaining six units in the Association, PFP became the owner of the entire Condominium, which satisfies the purpose of the statute; i.e., requiring all of the condominium to be sold. PFP also complied with what Appellants are arguing—that all of the real estate in the condominium is owned by one person. Appellants are trying to create an issue, but it is a distinction without a difference. PFP is the rightful owner of all the real estate that was once Dorsey Place Condominiums.

A.R.S. § 33-1228 specifically contemplates this type of sale—where a current owner buys all non-owned units so that all of the real estate in a condominium would be owned by a single person following the sale—under subsection (C), when it

states, "If, pursuant to the agreement, **any real estate in the condominium is to be sold** following termination, the termination agreement shall set forth the minimum terms of the sale." A.R.S. § 33-1228 (C) (emphasis added). The Legislature's use of the word "any" in the second sentence of subsection (C) indicate that a sale could occur where a supermajority unit owner is buying the remaining non-owned units in a condominium. The Legislature had the opportunity to use the word "all" in the second sentence, but did not and instead used the word "any." If the Legislature had intended to exclude sales of less than all of the real estate constituting the condominium, it could have expressly done so in this second sentence. Further, when describing a quantity, "any" means one or more to "indicate an undetermined number or amount." Merriam-Webster Online Dictionary, "Any," available at https://www.merriam-webster.com/dictionary/any (last visited Sept. 24, 2020); *see also In re Rowlands' Estate*, 73 Ariz. 337, 342 (1952) (finding "the word 'any' means one or more of a number"). Thus, "any" does not mean "all" and it is not necessary that "all" of the Condominium must be sold to a third-party or that PFP would be required to sell the units it already owns back to itself to satisfy the requirements of A.R.S. § 33-1228(C).

C. Appellants Misconstrue the Purpose of the Association Acting as a Trustee under the Statute.

Appellants argue that the Association acting as trustee cannot "merely hand[] over the property to the supermajority owner at a predetermined price without

considering whether any other buyers would offer better terms," (*see* Appellants' Opening Brief, pp. 29-32); however, Appellants completely disregard the fact that the Association does not become a trustee until after the condominium is terminated **and** the members agree to sell the condominium. Under Appellants' theory, if the Association is required to seek other buyers in the open market, the minimum terms of the sale cannot be provided in the termination agreement, which is in direct contravention of the requirements under A.R.S. § 33-1228(C). The Association does not become trustee unless the members agree to sell the condominium. Further, subsection (D) specifically dictates the purpose of the Association acting as trustee— "the association has all powers necessary and appropriate to effect the sale." A.R.S. § 33-1228(D). Under the statute's language, the Association is required to carry out the sale that the members of the Association agreed to when they agreed to terminate the condominium. Appellants misconstrue the purpose of the Association acting as a trustee under the statute and attempt once again to insert requirements that are not written into the statute.

D. The Statutory History of A.R.S. § 33-1228 Supports Appellees' Application of the Statute in Terminating the Dorsey Place Condominium and Selling to PFP.

In evaluating the changes that have been made to the statute by the Legislature, it is clear that a supermajority unit owner can purchase the condominium in the manner effectuated by the Appellees. A.R.S. § 33-1228 was

first enacted in 1986. The statute remained unchanged for over thirty years. In looking at the original language of the statute enacted in 1986, the Legislature allowed for termination of a condominium with only eighty percent of the votes in the association. *See* A.R.S. § 33-1228(A) (1986).[3] This minimum requirement has not changed since its original enaction. If the statute was meant to only protect the minority unit owners, then the statute would require one hundred percent approval. Instead, the statute was enacted to prevent a minority unit owner from holding out on the termination of a condominium. This is equally true in terms of selling the condominium. The Legislature does not require one hundred percent approval for the sale of the condominium. Only eighty percent (or any larger percentage the declaration specifies) of the votes in the association need to approve the sale of the condominium.

To ensure a fair process in the sale of the condominium, the Legislature amended A.R.S. § 33-1228(G) to include the appraisal process in allowing a unit owner to obtain a second appraisal and seek arbitration if the difference in value was over five percent. *Compare* A.R.S. § 33-1228(G) (1986), *with* A.R.S. § 33-1228(G) (2018). This is the mechanism that the Legislature enacted to protect the minority unit owners, not the requirements of selling in an open market.

[3] A copy of the 1986 version of the statute is attached in the Appendix at APP 027-028.

The requirements to terminate a condominium pursuant to A.R.S. § 33-1228 (2018) are clear and simple. Appellees have strictly complied with these requirements in properly terminating and selling the condominium. Appellants improperly attempt to create additional requirements or processes that are not in the statute or required by the Legislature. As such, the lower court properly dismissed Appellants' Second Amended Complaint for failure to state a claim against Appellees and Appellees respectfully request this Court affirm the lower court's ruling.

II. APPELLANTS' CONSTITUTIONAL CHALLENGE HAS NO MERIT.

A statute is presumed constitutional and the challenging party "bears the burden of establishing its invalidity." *State v. Brock*, 248 Ariz. 583, 588 ¶ 10 (App. 2020). Although Appellants allege they are making an as-applied challenge to A.R.S. § 33-1228, in reality, the challenge attacks the language of the statute that would affect all condominium unit owners subject to this statute; and thus, Appellants are making a facial challenge. As such, Appellants are subjected to the requirements of A.R.S. § 12-1841 and have failed to meet those requirements.

Even if Appellants' challenge can be limited to an as-applied challenge, the statute is not unconstitutional as it was created to ensure that the termination process of a condominium was fair and equitable for all condominium unit owners by ensuring a significant minimum percentage of owners agree to the termination and

sale and that sufficient appraisals are guaranteed to ensure a fair price is paid. That Appellants do not agree with the process provided in A.R.S. § 33-1228 and believe it is unfair, does not render the statute unconstitutional.

A. Appellants Are Making a Facial Challenge to the Statute and Have Not Met the Requirements of A.R.S. § 12-1841.

Appellants attempt to skirt around the additional requirements for making a facial challenge to a statute under A.R.S. § 12-1841 by claiming their challenge to A.R.S. § 33-1228 is on an "as applied" basis. However, in reviewing the actual arguments made by Appellants, Appellants are making a facial challenge and should be held to the requirements of A.R.S. § 12-1841.

"In general, a facial challenge is a constitutional challenge asserting that a statute is 'invalid on its face as written and authoritatively construed, when measured against the applicable substantive constitutional doctrine,' rather than against the facts or circumstances of a particular case." *Catherine Gage O'Grady, The Role of Speculation in Facial Challenges, 53 Ariz. L. Rev. 867, 871* (2011). Merely asserting that the statute is unconstitutional under the facts of a case is insufficient to define it as an as-applied challenge. Rather, if the challenge reaches beyond the particular circumstances of the Appellants, then it should be considered a facial challenge. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). In this case, Appellants are alleging "A.R.S. § 33-1228 authorized an impermissible traditional taking." There is nothing unique or particular about the termination or sale of the condominium in

this case that would not likewise encounter the same arguments in any other condominium termination and sale under A.R.S. § 33-1228. Appellants are attacking the language of A.R.S. § 33-1228 allowing for the condominium to be sold upon termination. As such, this Court should consider Appellants' challenge as a facial challenge and require Appellants to comply with A.R.S. § 12-1841.

Pursuant to A.R.S. § 12-1841, when a party challenges the constitutionality of a statute, the party challenging the statute—in this case Appellants—has the obligation to serve the attorney general, speaker of the house of representatives, and president of the senate with the pleadings containing the allegations at the same time the other parties in the action are served. A.R.S. § 12-1841(A). The purpose of this statute is to allow the State, which has an interest in a constitutional challenge of its statute, to be heard. *DeVries v. State*, 219 Ariz. 314, 316, ¶2 (App. 2008). Upon information and belief, Appellants have failed to serve the attorney general, speaker of the house of representatives, and president of the senate. This Court should require compliance with A.R.S. § 12-1841 before addressing Appellants' arguments. *See Merrill v. Merrill*, 238 Ariz. 467, 469 (2015) (vacated on other grounds) ("[T]he court can require compliance before addressing the constitutionality of a statute.").

B. Condominiums Are a Creature of Statute Created by a Contract in which Unit Owners Can Create, Terminate, and Sell the Condominium.

All condominiums are statutorily created and such statutes recognize the condominium form of property ownership. *See* A.R.S. § 33-1211. In creating a condominium, a declaration is created in which the members of the association agree to be bound by the association's declarations and bylaws. In this case, when purchasing their Unit, the Appellants agreed to be bound by the Association's Declarations and Bylaws. Under Article 13, Section 13.4 of the Declaration, the members agreed that the Condominium may be terminated by agreement of at least ninety percent of the Unit Owners. [IR-51, Ex. 1 at 50; OB APP147]. Further, the Appellants agreed, pursuant to Section 6.1 of the Declaration, to be bound by the requirements of the Condominium Act, which include A.R.S. § 33-1228. [IR-51, Ex. 1 at 24; OB APP121]. Appellants contractually agreed to these procedures for terminating and selling the condominium. Thus, the statute itself is not an improper taking under the Constitution when the Appellants agreed to these terms.

Furthermore, the Parties' contractual agreement, through the Declaration, is the mechanism that allows for the termination and sale of the Condominium. A.R.S. § 33-1228 in of itself does not authorize the sale of the condominium; rather, it dictates the process of terminating and selling a condominium, pursuant to the declaration, to ensure that if a termination and/or sale of the condominium would

occur, certain safeguards are followed by the association and members. The statute is permissive, not mandatory in allowing for termination and/or sale of a condominium. *See* A.R.S. § 33-1228(A) ("[A] condominium **may be** terminated); A.R.S. § 33-1228(C) ("A termination agreement **may provide** that all the commons and units of the condominium shall be sold following termination.") (emphasis added). The reason the statute is permissive is because a termination or sale cannot occur without a minimum percentage of unit owners agreeing to the termination and sale of the condominium, pursuant to the Declaration.

The cases cited by Appellants in their Opening Brief referencing statutes impermissibly authorizing one private party to take another private party's property are distinguishable from the facts of this case as those parties did not have a contractual agreement allowing for the sale or transfer of their property. *See Bailey v. Myers*, 206 Ariz. 224, 226 (App. 2003) (City filed condemnation action to take property to be used for private company); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (no contract between the cable company and landlord who contested the New York statute permitted cable companies to place wires on premises); *Kelo v. City of New London*, 545 U.S. 469 (2005) (condemnation action without any contract for transfer of property); *Gulf Power Co. v. U.S.*, 187 F.3d 1324 (11th Cir. 1999) (no contract between private cable companies and utility companies allowing for use of the telephone poles); *Cedar Point Nursery v. Hassid*, 141 S. Ct.

2063 (2021) (no contract between agricultural employees allowing access by union organizers to the premises on an agricultural employer). In these cases, the statute or regulation itself was the mechanism that allowed the taking. A.R.S. § 33-1228 is distinguishable in that it sets up the process for handling a termination and sale that was agreed upon by the members of the Association when each member purchased their respective property.

A.R.S. § 33-1228 is more analogous to statutes allowing for a foreclosure, a mechanic's lien sale, or enforcement based upon a special assessment. It is the agreement among the parties that allow for a foreclosure or sale of property and the statutes provide the process of enforcing the sale or foreclosure. These are not unconstitutional takings whereby the government is authorizing the sale of property. Parties are free to enter into contracts that allow for the sale, termination, or foreclosure of their property. These statutes are meant to safeguard the process and ensure a fair and equitable proceeding. In this case, the Declaration allowed for the sale and termination of the Condominium and Appellees strictly complied with the safeguards provided in A.R.S. § 33-1228. As such, the statute is not unconstitutional and this Court should respectfully uphold the Trial Court's ruling in dismissing Appellants' claims against Appellees.

NOTICE UNDER RULE 21(A) OF REQUEST FOR ATTORNEY FEES AND COSTS

Appellees, PFP and the Association, respectfully requests that they be awarded their attorneys' fees and costs incurred on appeal pursuant to Arizona Rules of Civil Appellate Procedure, Rule 21, Article 13 of the Declaration, and A.R.S. §§ 12-1103, 33-420, and/or 12-341.01 as this action is based in contract.

CONCLUSION

Appellees respectfully requests this Court to uphold the Trial Court's ruling in dismissing Appellants' causes of action against Appellees in their entirety for failure to state a claim upon which relief can be granted.

RESPECTFULLY submitted this 27th day of September 2021.

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Title 33. Property
Chapter 9. Condominiums (Refs & Annos)
Article 2. Creation, Alteration and Termination of Condominiums

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A.R.S. § 33-1228

§ 33-1228. Termination of condominium

Effective: [See Text Amendments] to August 2, 2018

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty per cent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution or ratifications of a termination agreement, in the same manner as a deed, by the requisite number of unit owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications of a termination agreement shall be recorded in each county in which a portion of the condominium is situated and is effective only on recordation.

C. A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections A and B. If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds of the sale distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection G. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

E. If the real estate constituting the condominium is not to be sold following termination, title to all the real estate in the condominium vests in the unit owners on termination as tenants in common in proportion to their respective interests as provided in subsection G, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

F. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units which were recorded before termination may enforce those liens in the same manner as any lienholder.

G. The respective interests of unit owners referred to in subsections D, E and F are as follows:

1. Except as provided in paragraph 2, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by an independent appraiser selected by the association. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which fifty per cent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

2. If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value of the unit or element before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

H. Except as provided in subsection I, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title may require from the association, on request, an amendment excluding the real estate from the condominium.

I. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, on foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

J. The provisions of subsections C through I do not apply if the original declaration, an amendment to the original declaration recorded before the conveyance of any unit to an owner other than the declarant or an agreement by all of the unit owners contain provisions inconsistent with such subsections.

Credits

Added by Laws 1985, Ch. 192, § 3, eff. Jan. 1, 1986.

A. R. S. § 33-1228, AZ ST § 33-1228

Current through the First Special Session of the Fifty-Fifth Legislature, and also includes legislation effective July 10, 2021 of the First Regular Session of the Fifty-Fifth Legislature (2021).

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