

1 **ARIZONA COURT OF APPEALS**
2 **DIVISION ONE**

3 JIE CAO, et al.,

4 Plaintiffs/Appellants,

5 v.

6 PFP DORSEY INVESTMENTS,
7 LLC, et al.,

8 Defendants/Appellees.
9

Court of Appeals

Division One

Case No. 1 CA-CV 21-0275

Maricopa County Superior Court

Case No. CV2019-055353

10
11 **RESPONSE BRIEF TO AMICUS CURIAE OF**
12 **PACIFIC LEGAL FOUNDATION BY DEFENDANTS/APPELLEES**
13 **PFP DORSEY INVESTMENTS, LLC, AND DORSEY PLACE**
14 **CONDOMINIUM ASSOCIATION**

15 Shawna M. Woner, Esq. (SBN 012948)

16 Stephanie K. Gintert, Esq. (SBN 029640)

17 8767 E. Via de Ventura, Suite 201

18 Scottsdale, Arizona 85258

19 *Attorneys for Defendant PFP Investments, LLC*

20 Edith I. Rudder (SBN 020650)

21 Nicolas C. S. Nogami (SBN 029027)

22 CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP

23 1400 E. Southern Avenue, Suite 400

24 Tempe, Arizona 85282

25 Telephone: (480) 427-2800

26 Email: eadie.rudder@carpenterhazlewood.com

27 nicholas.nogami@carpenterhazlewood.com

28 minuteentries@carpenterhazlewood.com

Attorneys for Defendant/Appellee Dorsey Place Condominium Association

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

TABLE OF CITATIONSii

INTRODUCTION.....1

LEGAL ARGUMENT.....1

I. The Entire Condominium Was Sold, Not Individual Units.....1

II. As a Creature of Statute Created by a Contract, Appellants Agreed to be Bound by the Association’s Declarations and Bylaws.....2

III. The Sale of the Condominium Is Not an Unconstitutional Private Taking.....4

IV. Appellees Offered Just Compensation.....5

CONCLUSION.....8

TABLE OF CITATIONS

CASES

PAGE

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).....3

Ala. Ass’n of Realtors v. Dep’t of Health & Human Svcs., 141 S. Ct. 2485, 2489 (2021)
.....3

Siemsen v. Davis, 196 Ariz. 411, 415, 998 P.2d 1084,1088 (Ariz. Ct. App. 2000)...3

Bickel v. Hansen, 169 Ariz. 371, 374, 819 P.2d 957, 960 (Ariz. Ct. App. 1991).....3

Kelo v. City of New London.....4

State ex rel. Miller v. Filler.....5

168 Ariz. 147, 149, 812 P.2d 620, 622 (1991).....5

Monongahela Nav. Co. v. United States.....6

Meehan v. PNC Financial Services Group, Inc., 2019 WL 2479651 (E.D. Missouri, June 12, 2019).....7

PROCEDURAL RULES:

Arizona Rules of Civil Appellate Procedure, Rule 21, Article 13.....8

STATUTES:

A.R.S. § 33-1228.....1, 2, 5

A.R.S. § 33-1211.....2

A.R.S. § 32-5610.....6

A.R.S. §§ 12-1103, 33-420, and/or 12-341.01.....8

1 **INTRODUCTION**

2 Amicus Curiae does not provide any additional or supportive perspective to the
3 arguments that has already been provided by Appellants. Rather, it recites the same
4 arguments that Appellants have already presented to the Court, i.e., the sale of the
5 property is an improper taking because it is for private use without just compensation.
6 Appellees incorporate herein their prior arguments in their Answer Brief to refute
7 Appellants’ and Amicus Curiae’s arguments that A.R.S. § 33-1228 is
8 unconstitutional. As further reiterated, Appellants’ agreement to the Association’s
9 Declarations and Bylaws allows for the termination and sale of the Condominium,
10 with which Appellees strictly complied pursuant to the terms of agreement and
11 Arizona statute. Therefore, Appellants’ and Amicus Curiae’s constitutional
12 arguments have no merit in this case.
13
14
15
16
17

18 **LEGAL ARGUMENT**

19 **I. The Entire Condominium Was Sold, Not Individual Units.**

20 Amicus Curiae’s argument that Appellees only sold individual units during the
21 termination is false and mischaracterizes what occurred in this case. The entire
22 condominium was terminated and sold. As provided in the Termination Agreement,
23 “All interest in the Purchased Property shall be sold by the Association to PFP
24 promptly following termination of the Condominium.” [IR-51, Ex. 2 at 2, ¶ 5]. The
25 distribution of the proceeds from the sale of the entire condominium was then
26
27
28

1 calculated by determining the respective interests of the Unit Owners as outlined in
2 the Termination Agreement. [*Id.* at 2, ¶ 5(a)]. Amicus Curiae is conflating the
3 calculation of each Unit Owner’s respective interest as being a sale of each individual
4 unit to PFP. The Association properly terminated and sold the entire condominium
5 pursuant to the procedures defined under A.R.S. § 33-1228, which is constitutional.
6
7

8 **II. As a Creature of Statute Created by a Contract, Appellants Agreed to be**
9 **Bound by the Association’s Declarations and Bylaws.**

10 All condominiums are statutorily created and such statutes recognize the
11 condominium form of property ownership. *See* A.R.S. § 33-1211. In creating a
12 condominium, a declaration is created in which the members of the association agree
13 to be bound by the association’s declarations and bylaws. In this case, when
14 purchasing their Unit, Appellants agreed to be bound by the Association’s
15 Declarations and Bylaws. Under Article 12, Section 13.4 of the Declaration, the
16 members agreed that the Condominium may be terminated by agreement of at least
17 ninety percent of the Unit Owners. Further, the Plaintiffs agreed, pursuant to Section
18 6.1 of the Declaration, to be bound by the requirements of the Condominium Act,
19 which includes A.R.S. § 33-1228. [IR-51, Ex. 1 at 24]. Plaintiffs contractually
20 agreed to these procedures for terminating and selling the condominium as a condition
21 to obtaining ownership for the individual unit. Thus, the statute itself is not an
22 improper taking under the Constitution when the Plaintiffs agreed to these terms. The
23 statute provides the procedures and protections for terminating and selling a
24
25
26
27
28

1 condominium; Appellees complied with all of said procedures and protections. This
2 is not an unconstitutional deprivation of property rights when Appellants expressly
3 consented to be bound by these conditions. Appellants had the choice whether they
4 wanted to purchase their Unit and be part of the Association. By their express
5 agreement to abide by the Association’s Declarations and Bylaws, they were aware
6 termination and sale of their Unit was a possibility and thus, the subject termination
7 and sale of the Condominium was not “against their will.”
8
9

10
11 Further, Amicus Curiae cite numerous cases discussing an owner’s fundamental
12 right to possess property and exclude others from their property. *See, e.g., Cedar*
13 *Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (“The right to exclude is ‘one
14 of the most treasured’ rights of property ownership.”); *Ala. Ass’n of Realtors v. Dep’t*
15 *of Health & Human Svcs.*, 141 S. Ct. 2485, 2489 (2021) (This right is “of the most
16 fundamental elements of property ownership.”); *Siemsen v. Davis*, 196 Ariz. 411, 415,
17 998 P.2d 1084,1088 (Ariz. Ct. App. 2000) (quoting *Bickel v. Hansen*, 169 Ariz. 371,
18 374, 819 P.2d 957, 960 (Ariz. Ct. App. 1991) (“The owner’s “right to preserve and
19 protect their private property is also constitutional ‘and should not be lightly regarded
20 or swept away.’”). In this case, there is a detail that distinguishes the current situation
21 from the above-mentioned cases; the property owners entered into a contractual
22 agreement when purchasing the individual condominium unit that had a condition
23 describing the possibility of the owners needing to sell their unit given a certain
24
25
26
27
28

1 scenario. None of the other cases involved the parties signing a contract detailing a
2 scenario in which their ownership interest could be sold. Seeing as the individual unit
3
4 in this issue was sold under the exact conditions laid out in the contract to which the
5 owners agreed when purchasing the unit, the ownership rights discussed in the cases
6
7 in the Amicus Brief have no relevance.

8 **III. The Sale of the Condominium Is Not an Unconstitutional Private Taking.**

9 As a result of this contractual agreement, the Appellant's purely private use
10 argument based on *Kelo v. City of New London* and the Private Property Rights
11 Protection Act is not relevant. In this instance, two private parties, using property for
12 private use, both willingly entered into a contract that provides for circumstances,
13 supported by Arizona Statute, under which a sale may occur and just compensation
14 given. This is distinct from the situation in *Kelo*, as here, the sale was part of a
15 contractually agreed upon contingency to the termination of a condominium
16 agreement, as opposed to *Kelo*, where a government-initiated action transferred land
17 from one private owner to another private owner so it could be used as part of a
18 comprehensive redevelopment plan. In addition, Appellants cite a portion of the
19 Private Property Rights Protection Act that states that "a landowner is entitled to
20 compensation if 'the existing rights to use, divide, sell or possess private real property
21 are reduced by the enactment or applicability of any land use law enacted after the
22 date the property is transferred to the owner and such action reduces the fair market
23
24
25
26
27
28

1 value of the property.’” In the present case, the existing rights of the Appellants are
2 not reduced by the enactment or applicability of any land use law enacted after the
3 date the property was transferred to the Appellants. A.R.S. §33-1228 was in place
4 prior to the Appellants’ purchase of the individual unit and there is no showing that
5 this statute reduced the fair market value of the individual unit. As a result, the private
6 use argument advanced by Amicus Curiae is not relevant to the issue at hand.
7

8
9 **IV. Appellees Offered Just Compensation.**

10 Without any support, Amicus Curiae attempts to argue Appellants did not
11 receive just compensation for their Unit. However, A.R.S. § 33-1228(G) provides
12 protections to ensure the fair market value is provided to the unit owners under the
13 appraisal process. This was not an “insider sale” and it was not a “take-it-or-leave-it”
14 offer. Appellants cite *State ex rel. Miller v. Filler*, which states that when forcibly
15 deprived of property, the owner is at least entitled to fair market value and highlights
16 the fact that just compensation implies the full monetary equivalent of the loss
17 sustained by the owner whose land was taken or damaged. 168 Ariz. 147, 149, 812
18 P.2d 620, 622 (1991). In this case, the owners received the appraised value of their
19 Unit.¹ The appraised value should be the fair market value of the individual unit and if
20 it is not, A.R.S. § 33-1228(G) and the Dorsey Place Condominium Termination
21 Agreement, Section 5(a) provide a system that allows the Appellants to contest an
22
23
24
25
26
27

28 ¹ Appellees are holding monies in escrow that Appellants have not yet claimed.

1 appraisal value. If Appellants were dissatisfied with the original appraisal, they had
2 the right to seek a second appraisal.

3
4 In addition, Appellants cite *Monongahela Nav. Co. v. United States*, which
5 states that determination of just compensation is a judicial question and that there can
6 “be no doubt that the compensation must be a full and perfect equivalent for the
7 property taken”. 148 U.S. 312, 327 (1893). In this case, there is a process in place that
8 allows the owners of an individual unit to contest an appraisal valuation, and therefore
9 the sale price. As the Appellants have chosen not to follow this process, the only
10 allegation they have presented is that an appraisal valuation by a certified appraiser is
11 not just compensation. It is unclear why selling their unit for the appraised value is
12 somehow unjust. Under Arizona law, appraisers are required to follow the standards
13 laid out in the Uniform Standards of Professional Appraisal Practice (“USPAP”).
14 A.R.S. § 32-5610. USPAP is made up of nationally recognized standards that are
15 applicable to most appraisals in the United States.² Included in these standards are
16 requirements such as USPAP Standard 1 which states:
17
18
19
20
21

22 In developing a real property appraisal, an appraiser must
23 identify the problem to be solved, determine the scope of work
24 necessary to solve the problem, and correctly complete research
25 and analyses necessary to produce a credible appraisal.

26
27
28

² <https://www.appraisalinstitute.org/professional-practice/ethics-and-standards/standard-of-professional-practice/>

1 And USPAP Standards Rule 3-4 which states:

2 Each written or oral Appraisal Review Report must be
3 separated from the work under review and must:

4 (a) clearly and accurately set forth the appraisal review in a
5 manner that will not be misleading;

6 (b) contain sufficient information to enable the intended users
7 of the appraisal review to understand the [appraised property
8 that is the subject of the appraisal review report]...

9 *See Meehan v. PNC Financial Services Group, Inc.*, 2019 WL 2479651 (E.D.
10 Missouri, June 12, 2019).

11 USPAP also includes an Ethics Rule which states “an appraiser must promote
12 and preserve the public trust inherent in appraisal practice by observing the highest
13 standard of professional ethics,” a Competency Rule which represents pre-assignment
14 and assignment conditions for knowledge and experience, and a Record Keeping Rule
15 which establishes the work file requirements for appraisal and appraisal review
16 assignments.³ Overall, these standards and rules adopted by the State of Arizona
17 ensure that appraisals will be conducted in a competent, transparent, and ethical
18 manner and provide a system of review in the face of a challenge to an appraised
19 value. Appellants’ allegation that the sales price provided for the individual unit was
20 not for fair market value because it was based solely on an appraisal by Appellees has
21 no legal support and undermines the entire appraisal practice in the State of Arizona.

22 ///

1 **CONCLUSION**


2 There being no support for the Amicus Curiae’s arguments, Appellees
3 respectfully requests this Court to disregard its arguments and uphold the Trial
4 Court’s ruling in dismissing Appellants’ causes of action against Appellees in their
5 entirety for failure to state a claim upon which relief can be granted. Appellees
6 further request an award of their attorneys’ fees incurred on appeal pursuant to
7 Arizona Rules of Civil Appellate Procedure, Rule 21, Article 13 of the Declaration,
8 and A.R.S. §§ 12-1103, 33-420, and/or 12-341.01.
9
10
11

12 RESPECTFULLY submitted this 10th day of January 2022.

13 WONER HOFFMASTER PESHEK & GINTERT, PC
14

15 By /s/ Stephanie K. Gintert – with permission
16 Shawna M. Woner, Esq.
17 Stephanie K. Gintert, Esq.
18 8767 E. Via de Ventura, Suite 201
19 Scottsdale, Arizona 85258
20 *Attorneys for Defendant PFP Investments, LLC*

21 CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP
22

23 By 
24 Edith I. Rudder, Esq.
25 Nicolas C. S. Nogami, Esq.
26 1400 E. Southern Avenue, Suite 400
27 Tempe, Arizona 85282
28 *Attorneys for Defendant/Appellee Dorsey Place
Condominium Association*

3 <https://www.appraisalinstitute.org/professional-practice/ethics-and-standards/standard-of-professional-practice/>