

IN THE  
**COURT OF APPEALS**  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 03/17/2022  
AMY M. WOOD,  
CLERK  
BY: AJA

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

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**ORDER FOR ADDITIONAL BRIEFING**

The court, Presiding Judge Paul J. McMurdie, Vice Chief Judge David B, Gass, and Chief Judge Kent E. Cattani, has reviewed the briefing and considered the arguments. On the court's motion, the court has determined that added briefing may help the court.

The court has considered appellants' argument that A.R.S. § 33-1228 authorized an unconstitutional taking of appellants' property and appellees' argument that the authority to sell instead arose out of contract—through the CC&R. A forced sale under A.R.S. § 33-1228 is likely unconstitutional, but only if the owners did not agree to it through a private agreement—purchase of a property subject to CC&R. In January 2018, appellants bought their condominium subject to the Declaration, which gives the Association the "rights, powers and duties as are prescribed by the Condominium Act."

Both parties apply the version of the Condominium Act enacted by Laws 2018, ch. 235, § 1, effective from August 3, 2018, to August 26, 2019 (2018 version). When appellees took ownership of their unit in January 2018, the effective version of the statute was enacted by Laws 1985, ch. 192, § 3, effective from January 1, 1986, to August 2, 2018 (1986 version).

Subsection (G) (1) of the 1986 version states:

[T]he 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 percent 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.

Subsection (G) (1) of the 2018 version states:

[T]he respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination and an additional five percent of that total amount for relocation costs for owner-occupied units. An independent appraiser selected by the Association shall determine the total fair market values. The determination of the independent appraiser shall be distributed to the unit owners and becomes final unless disapproved within sixty days after distribution to the unit owner. Any unit owner may obtain a second independent appraisal at the unit owner's expense and, if the unit owner's independent appraisal amount differs from the Association's independent appraisal amount by five percent or less, the higher appraisal is final. If the total amount of compensation owed as determined by the second appraiser is more than five percent higher than the amount determined by the Association's appraiser, the unit owner shall submit to arbitration at the Association's expense and the arbitration amount is the final sale amount. An additional five percent of the final sale amount shall be added for relocation costs for owner-occupied units.

The court has the following questions:

- (a) If a private agreement—the purchase agreement of a condominium—incorporates a statute by reference, are subsequent statutory amendments incorporated into the agreement?
- (a) In this case, were the CC&R ever amended to incorporate the 2018 amendments?
- (a) If the private agreement did not include the 2018 statutory amendment, would its application violate the private takings prohibition?

(a) Appellees argue that they did not breach their fiduciary duty to appellants because they strictly complied with the 2018 version of A.R.S. § 33-1228(G). Assuming that the 1986 version applies, have appellees breached their fiduciary duty?

(a) Have Appellants waived any assertion that the 1986 version of the statute applies?

**IT IS ORDERED** that the parties file simultaneous supplemental briefs on the questions raised no later than April 15, 2022. The briefs will be limited to 5000 words. Requests for extensions of time or word count will not be entertained. The parties may raise subsidiary issues only related to the court's questions.

**IT IS FURTHER ORDERED** that the parties may file a supplemental reply brief no later than May 2, 2022. Any reply brief will be limited to 3000 words. Requests for extensions of time or word count will not be entertained.

/s/

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PAUL J. McMURDIE, Presiding Judge

A copy of the foregoing  
was sent to:

Eric M Fraser  
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Shawna M Woner  
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