

**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  
No. 1 CA-CV 21-0275

Maricopa County  
Superior Court  
No. CV2019-055353

**SUPPLEMENTAL BRIEF OF PLAINTIFFS/APPELLANTS  
JIE CAO AND HAINING "FRAZER" XIA**

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**I. The owners did not agree to forced sales.**

**A. The Declaration does not reflect consent to A.R.S. § 33-1228 via incorporation by reference.**

The Court's order focuses on whether the owners "agree[d] to it through a private agreement—purchase of a property subject to CC&R." (3/17/2022 Order.) The threshold question is *what* the parties agreed to, which requires examining the Declaration's text.

The Declaration does not reflect consent to incorporate A.R.S. § 33-1228 by reference. A document is not incorporated unless it is "*clearly and unambiguously* incorporated by reference." *United Cal. Bank v. Prudential Ins. Co. of Am.*, [140 Ariz. 238, 268](#) (App. 1983) (emphasis in original). "[T]he reference must be *clear and unequivocal* and must be called to the attention of the other party, [and] he must consent thereto . . . ." *Id.* (emphasis in original) (citation omitted).

The Declaration does not "clearly and unambiguously" incorporate the Condominium Act. The Declaration *refers* to the Act, but "a mere reference to another document is not sufficient to incorporate that other document into a contract." [17A C.J.S. Contracts § 419](#). Instead, "if a written contract refers to another writing for a particularly designated purpose, the

other writing becomes a part of the contract only for the purpose specified.”

*Id.*

Under the Declaration, “[t]he Association shall have such rights, powers and duties as are prescribed by the Condominium Act [and] other applicable laws and regulations . . . .” [IR-51 at 24 (APP121).] This reference gives one specific entity – the Association – powers given to condominium associations under the Act. Nothing more. The reference becomes part of the Declaration “only for the purpose specified.” [17A C.J.S. Contracts § 419](#). As explained below, the Act does not give *condominium associations* (as distinct from unit owners) power to authorize the sale of property. The owners, therefore, did not incorporate A.R.S. § 33-1228 by reference and did not consent to forced sales.

**B. The Declaration does not give *unit owners* the power to sell someone else’s property.**

The owners agreed, via the Declaration, that “[t]he *Association* shall have such rights, powers and duties as are prescribed by the Condominium Act [and] other applicable laws and regulations . . . .” [IR-51 at 24 (APP121) (emphasis added).] This section gives only specified powers, and only to the *Association*.

A.R.S. § 33-1228 gives associations specific, delineated powers to carry out a sale approved by unit owners:

- Power to “contract for the sale of real estate,” but only with approval of the unit owners.
- Powers “to effect the sale.”
- Power “as trustee” over title and sale proceeds.
- Power to select the appraiser.

A.R.S. § 33-1228(D), (F), (G)(1).

An association has no power to vote to terminate the condominium or to vote to sell property. The Act vests that power solely in the unit owners:

“a condominium may be terminated only by agreement of *unit owners*,” and only the owner-approved agreement may provide for selling property.

A.R.S. § 33-1228(A)-(C) (emphasis added). The Act therefore gives separate roles to unit owners and associations. Unit owners *authorize* the sale; an association *carries out* the sale.

Here, neither the Declaration nor the Act gives the Dorsey Place *Association* any power to choose to sell someone else’s property. The Declaration gives the *Association* – not unit owners – the powers of the Act. The Association may carry out a sale only if the sale is valid and lawful. Because the Declaration does not authorize the unit owners to sell other

people's property, the Declaration does not constitute consent to a forced sale. Instead, in effecting a sale, the Association must rely on the *statutory* power in § 33-1228, which authorizes the "unit owners" to vote to sell property. But that is the central problem. The Takings Clause prohibits the legislature from granting that power to unit owners. The legislature cannot authorize one person to sell someone else's property.

For this reason, the Dorsey Place unit owners did not consent to a forced sale. They did not agree to allow the owners to sell each other's property. They did not even agree to give unit owners any powers under the Act. They merely agreed to give the *Association* the powers under the Act, but those powers cannot authorize a forced sale.

Tellingly, the Declaration's authors knew how to give power to unit owners. Declaration § 13.4 gives unit owners the power to *terminate* the condominium. [IR-51 at 49 (APP146) ("the Condominium may be terminated only by the agreement of *Unit Owners*" (emphasis added)).] But termination merely converts the property to tenancy in common. Nothing in the Declaration authorizes unit owners to sell someone else's property.

In the alternative, even if § 6.1 justifies the *Association's* actions, it does not let *Dorsey Investments* off the hook. This appeal involves two separately

represented defendants, with different conduct. Declaration § 6.1 does not give consent for Dorsey Investments to do anything, so the Court should reverse at least as to Dorsey Investments.

**C. The owners' reasonable expectations did not include unlawful applications of the statutory power.**

The Declaration also does not constitute consent to an otherwise-unconstitutional forced sale because that falls outside the reasonable expectations of the owners.

The Supreme Court recently held that “[a]lthough contracts are generally enforced as written, in special types of contracts, we do not enforce unknown terms which are beyond the range of reasonable expectation. CC&Rs are such contracts.” *Kalway v. Calabria Ranch HOA, LLC*, \_\_ Ariz. \_\_, ¶ 14, [No. CV-20-0152-PR](#) (Ariz. Mar. 22, 2022) (quotation marks and citations omitted). Accordingly, “we interpret such restrictions to reflect the reasonable expectations of the affected homeowners.” *Id.* ¶ 1.

Here, the owners’ “reasonable expectations” do not include unconstitutional applications of A.R.S. § 33-1228. A contractual grant of statutory powers necessarily includes only the *lawful* powers. Otherwise, the Association would have more power under Declaration § 6.1 than it does

under the statute. That would make no sense, and would make a derivative power broader than the principal. (Reply Br. at 32-35.)

Consider a contract with a police officer for off-duty security for a party at a private home. The legislature gave law enforcement officers the power to conduct unconscious blood draws. [A.R.S. § 28-1321\(C\)](#). This power is unconstitutional. *See State v. Havatone*, [241 Ariz. 506, 508, ¶ 1](#) (2017). If the security contract gives the officer “all powers given to officers under Arizona law,” does that mean that the homeowner consented to an unconscious blood draw? No. A person can consent to an unconscious blood draw, but merely delegating statutory power does not suffice when the statutory power itself is unconstitutional. A contractual delegation of *statutory* powers includes only the *lawful* statutory powers.

This principle applies with even more force to the Declaration, which is a CC&R—a “special type[] of contract[]”. *Kalway*, [¶ 14](#). For this special contract, only actions within the “reasonable expectations” of the owners are authorized. *Id.* [¶ 1](#). The owners reasonably expect that § 6.1’s delegation of the Condominium Act’s powers includes the Act’s *lawful* powers. Exercising an unconstitutional power is “beyond the range of reasonable expectation.”

*Id.* [¶ 14](#).

This is why even though every contract automatically incorporates Arizona's statutes, that extends only to "valid" statutes, not invalid ones. *See Banner Health v. Med. Sav. Ins. Co.*, [216 Ariz. 146, 150, ¶ 15](#) (App. 2007) ("a *valid* statute is automatically part of any contract affected by it" (emphasis added)).

Another part of the same sentence in the Declaration illustrates the point. The Declaration gives the Association the powers of "other applicable laws and regulations." [IR-51 at 24 (APP121).] This phrase includes every statute, ordinance, and regulation. But reasonable owners would not think that this gives the Association statutory powers from all statutes that have been ruled unconstitutional.

Indeed, the "reasonable expectation" of the owners is that the Dorsey Place Association has no greater power than any other condominium association, because *every* association has the powers of the Condominium Act by operation of law. *See* [A.R.S. § 33-1201](#). In other words, a buyer would reasonably expect that the Dorsey Place Association would not have greater powers than any other condominium association.

"The framers of our Constitution understood that one of the basic responsibilities of government is to protect private property interests."

*Bailey v. Myers*, 206 Ariz. 224, 227, ¶ 11 (App. 2003). The ability to keep private property is one of the most fundamental rights in Arizona and is part of the reasonable expectations of real-estate purchasers. The Court should not hunt in the shadows to find consent to an unconstitutional taking. To the contrary, a waiver of the Takings Clause “must contain clear, unambiguous, unmistakable, and conspicuous language.” *Missouri v. Muslet*, 213 S.W.3d 96, 99 (Mo. Ct. App. 2006); see also *State v. Rickman*, 148 Ariz. 499, 503 (1986) (“Courts therefore are to indulge every reasonable presumption against waiver of fundamental constitutional rights.”).

Big picture, the defendants want the Court to find that Dorsey Place unit owners knowingly consented to being kicked out of their homes. Although parties *can* consent to that, the consent must be clear and unambiguous; it must be unmistakable and conspicuous. Consenting to being forced out of one’s home, in violation of the fundamental protection of the Constitution, must be in big, bold letters, not buried in a short phrase that merely gives the Association powers it already had by operation of law.

Perhaps § 13.4, which gives the power to terminate, could have said, “The termination agreement may provide for the sale of all the common elements and units.” Or perhaps it could have said, “The unit owners hereby

consent to the termination and sale process under A.R.S. § 33-1228.” But it did not. Instead, the only source of power derives from statute, which is limited by the Arizona Constitution. The generic invocation of the entire Condominium Act does not place a forced sale within the “reasonable expectations,” nor is it sufficiently clear and unambiguous to waive a constitutional protection.

These principles have always been true in Arizona. As the Reply Brief explained (at 35-38), Arizona requires that CC&Rs that alter fundamental property rights must be specific enough to put purchasers on notice. In *Kalway*, the Supreme Court reaffirmed these principles, holding that because CC&Rs are “special types of contracts,” a broad, general provision in CC&Rs is not sufficiently specific to be enforceable, even if “the plain language” would otherwise permit a particular action. *Kalway*, ¶¶ 14-15, 18-19.

The Xias did not consent to this forced sale.

**II. In the alternative, the Xias did not consent to a transaction under the 2018 version, which is not incorporated by reference.**

**A. Incorporation by reference does not incorporate amendments.**

As explained above, the Declaration does not incorporate the Condominium Act by reference; it merely gives one actor (the Association)

the powers given to associations under the Act. But even if the Declaration incorporated the Act, it does not incorporate amendments.

“Generally, in the absence of a provision expressly incorporating future amendments to statutes, the parties to a contract will not be bound by such changes.” 17 C.J.S. *Contracts* § 40; accord *Peterson v. D.C. Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 667 (D.C. 1996) (same). “Laws enacted subsequent to the execution of an agreement are not part of the contract unless the contract clearly provides that it was the intention of the parties to incorporate subsequent changes in the law.” 17 C.J.S. *Contracts* § 40.<sup>1</sup>

Here, the Declaration does not expressly incorporate subsequent statutory amendments, so the 2018 amendments fall outside the parties’ agreement. This rule makes sense. The parties have no knowledge of or

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<sup>1</sup> No Arizona opinion addresses whether incorporation of a *statute* by reference incorporates amendments. In the arbitration context, a dictum stated, “reference to a set of rules in an arbitration agreement effectively incorporates into the agreement those rules in their entirety, including any amendments enacted prior to the arbitration.” *Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 366, ¶ 19 (App. 2003). This dictum, which addressed private arbitration rules (not public statutes), deviates from the consensus in other jurisdictions. Moreover, the authority cited in *Brake Masters* does not support that assertion.

control over subsequent amendments. There could not have been a meeting of the minds over unknown, future items unless the parties knowingly and expressly agreed to include them.

This rule has particular force here. The defendants have not defended the constitutionality of A.R.S. § 33-1228 on the merits. The Arizona legislature had no power to allow one party to forcibly sell the property of another. The defendants' argument about incorporation by reference relies on concluding that the Xias *consented* to the forced sale process in § 33-1228. But even if the Xias consented to the 1986 version, they did not consent to the legislature adjusting the forced sale process when the legislature has no constitutional power to do so in the first place. A waiver of constitutional rights does not lurk in the shadows; it must be clear and unambiguous.

**B. The Xias did not consent to a transaction under the 2018 version of the statute.**

Here, the Declaration contains no indication that the parties intended to include subsequent amendments. The record likewise contains no evidence that the Declaration was ever amended to incorporate the 2018 amendments. Consequently, the owners never consented to a transaction based on the 2018 version of the statute.

Consider a counterfactual hypothetical where the Condominium Act did not allow for any termination or sale until 2018. In that scenario, Dorsey Place buyers could not have consented to a forced sale merely by giving the Association the powers of the Condominium Act.

The Court “must look to the original declaration itself” because that is all the owners agreed to. *Kalway*, ¶ 16. The Xias did not consent to the procedures under the 2018 version, so a transaction under that version violates the Takings Clause.

### **III. The Association breached its fiduciary duties.**

#### **A. The contours of the fiduciary duty.**

The Court’s order asks, “Assuming that the 1986 version applies, have appellees breached their fiduciary duty?” The answer is yes. Showing why requires analyzing the contours of the Association’s fiduciary obligations.

The fiduciary obligations imposed when selling property are well settled. The trustee (here, the Association) owes “a fiduciary duty to [the] trust’s beneficiaries.” *76 Am. Jur. 2d Trusts § 334*. Here, the beneficiaries are the unit owners *in their capacity as unit owners*.

The same person can have different roles at the same time. Consider siblings Jack and Jill, beneficiaries to their parents’ estate. If they want to sell

their parents' house, they each have a *seller* role. If Jack also wants to buy the house, then he also has a *buyer* role. These roles conflict. As sellers, both siblings want to maximize the sale price. As a buyer, Jack wants to minimize it. The trustee, however, owes its fiduciary duties to the beneficiaries *in their capacity as beneficiaries*.

In the Jack-and-Jill example, the beneficiaries are selling property, so the trustee must consider their interests in their capacities as *sellers*. The trustee should give no weight to Jack's interest as a potential *buyer*, which conflicts with the children's interests in their capacity as beneficiaries.<sup>2</sup> The trustee can sell the house to Jack, but only if Jack offers the best terms. *See, e.g., Orud v. Groth*, [708 N.W.2d 72, 78](#) (Iowa 2006) ("If [trustee] were allowed to sell the property to one beneficiary below market value, the purchasing beneficiary would in effect receive a larger share of the otherwise available proceeds at the expense of the other beneficiaries.").

This rule has even greater force if Jack also serves as the trustee. In his role as trustee, he must favor the interests of all beneficiaries *in their capacity*

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<sup>2</sup> Setting aside peculiar interests such as an express desire to keep the house in the family.

*as beneficiaries*. He cannot favor his own interests over those of his sister, particularly if his interests arise in a non-beneficiary capacity such as his role as a potential buyer. If he favors his own interests as a potential buyer, then he engages in self-dealing, which violates his fiduciary duties. If a trustee bids on property, “it would be for his personal advantage . . . to have as few bidders and as low bids as possible.” [Restatement \(Second\) of Trusts § 170](#), cmt. b (1959). “As seller and fiduciary the trustee’s duty would be to secure the largest sum possible for the property . . . ; as buyer the trustee, acting as an individual, would seek to secure the property for the lowest possible price . . . .” [Bogert’s Law of Trusts and Trustees § 543](#).

Said another way, “[w]hen the trustee ‘wears two hats’, as it did here, and the transaction involved affects the res of the trust, it cannot escape its fiduciary duties by claiming it was acting in its non-trustee capacity.” *Seven G Ranching Co. v. Stewart Title & Tr. of Tucson*, [128 Ariz. 590, 592](#) (App. 1981).

This rule extends to selling property to an entity closely affiliated with the trustee. See [Restatement \(Second\) of Trusts § 170](#), cmts. c-d (trustee “cannot properly sell trust property to another corporation” with overlapping directors or other close relationships).

The fiduciary duty when selling property is blackletter law: “A trustee has a duty to sell a trust’s property for the highest price possible.” [76 Am. Jur. 2d Trusts § 525](#). As part of this duty, the trustee ordinarily should not “close[] the sale without endeavoring to obtain better bids.” *Id.*

Here, Dorsey Investments had multiple roles. First, it had a role as a potential buyer. But the Association could give Dorsey Investment’s interest as a buyer no weight because this role did not arise from its role as a beneficiary.

Second, Dorsey Investments had control of the Association (via owning 90 of 96 units). But in carrying out the sale, the Association had to act as trustee and favor the interests of the beneficiaries *in their capacity as beneficiaries* (here, as sellers). This is particularly true because the substantial overlap between the Association and Dorsey Investments created “a substantial temptation” to favor the interests of the closely related company. [Restatement \(Second\) of Trusts § 170](#), cmt. d.

Third, theoretically Dorsey Investments could have a role as a seller (and therefore a beneficiary). Under the Xias’ view of the statute, Dorsey Investments *should* have had a role as a seller because all the units had to be sold. Here, that did not happen, so Dorsey Investments had none of its own

units at stake and therefore had no role as a seller. Consequently, Dorsey Investments *had no role as a beneficiary* and the Association should not have considered its interests at all. The interests of Dorsey Investments and the beneficiaries “are completely antagonistic. The one group is interested in obtaining the highest possible selling price while the other group, the majority, wants the lowest.” *Flynn v. La Salle Nat. Bank*, [137 N.E.2d 71, 75](#) (Ill. 1956).

The Association instead owed fiduciary duties to the beneficiaries *in their capacity as sellers* (here, the owners of the six units up for sale). Consequently, it had to try to sell the property on the best possible terms, which typically includes trying to obtain better bids, if possible. [76 Am. Jur. 2d Trusts § 525](#); *see also Law of Trusts and Trustees § 745* (trustee “should use reasonable care and expense to bring to the attention of possible buyers the fact that the property is in the market”).

The Association did not do so, so it violated its fiduciary obligations and the sale was invalid. The defendants’ statutory interpretation, which allows the supermajority to take the minority’s units at a fixed price without considering any competing bids, cannot be correct because it would violate the trustee obligations imposed by statute.

These fiduciary duties do not create a minority-rights regime. They merely enforce the rule that the trustee must act in the interests of the beneficiaries. Like the Jack-Jill example above, if Jack is the trustee, he cannot favor his own interests (or those of a closely-affiliated company) above the other beneficiaries.

This rule does not require Dorsey Investments to set aside its interests in all capacities. For example, when casting a vote as a unit owner on whether to terminate and sell, it acts solely on its own behalf. It can vote “yes” in its own interest, without considering anyone else’s interests.

Things change when Dorsey Investments acts through the Association, performing tasks that trigger the Association’s fiduciary duties. At that point, Dorsey Investments cannot favor its own interests. The Association likewise cannot favor the interests of Dorsey Investments, which had no role as a beneficiary, and which was closely related to the Association.

**B. Under the 1986 version, the Association breached its fiduciary duties.**

The Court’s order regarding fiduciary duties focuses on A.R.S. § 33-1228(G). But that subsection addresses only how to divide the money among the unit owners.

The principal fiduciary violation occurred much earlier—when the Association assumed that Dorsey Investments was the only possible buyer, and made no effort to solicit other offers.

The Association's incorrect assumption threw everything off the rails and led to the problem with subsection (G). Assuming that Dorsey Investments was the only possible buyer led the Association to incorrectly assume that the purchase price would merely be the appraised values. But the 1986 version of subsection (G) demonstrates why this approach was wrong.

The 1986 version works proportionally. The Association must distribute the proceeds of the sale “in proportion to the respective interests.” A.R.S. § 33-1228(D) (1986). “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.” § 33-1228(G)(1) (1986). The appraised values are only the *inputs* to the formula. A unit owner will almost never receive exactly the appraised value, unless by sheer coincidence the “proceeds of the sale” happen to equal the sum of all the appraised values.

That math is unnecessary if a unit owner simply receives the appraised value. The legislature simply would have said that the buyer must pay the appraised value for each unit.

There's a good reason the legislature did not say that. If the owners simply got the appraised values, then what would happen if the appraisals were too high and no one would pay that much? The money would run out and the transaction would fail, rendering illusory the whole point of terminating and selling.

And what would happen if the appraisals were too low and potential buyers were willing to pay more? There would be excess money. Or the Association would pick a buyer, who would get a fantastic deal at the expense of the unit owners. Which in turn invites precisely the type of self-dealing that occurred here.

Another example drives this home. Imagine a condominium next to a shopping mall. To expand, the mall must acquire the condominium property. The appraisals would not value the units collectively as part of a shopping mall; they would value them as individual residential units. The mall would pay more than the appraised values. The 1986 version would require distributing the proceeds of that sale proportionally, using the

appraisals to determine the *relative* size of each slice of the pie. Under the defendants' view of the statute, however, the Association could simply sell to the supermajority owner at the sum of the appraised values, even though selling to the mall would yield more to *everyone*. And then the supermajority owner could even flip the property and sell to the mall for a tidy profit, all at the expense of the other owners. By failing to solicit other offers and failing to sell at the best possible price, the Association violates its fiduciary duties.

A few months ago, the Texas Court of Appeals interpreted a statute ([Tex. Prop. Code § 82.068](#)) substantively identical to the 1986 version of Arizona's statute. See *Green v. Villas on Town Lake Owners Ass'n, Inc.*, [2021 WL 4927414](#) (Tex. App. Oct. 22, 2021). There, a 58-unit condominium was sold for \$50,850,000. The Association's appraiser valued the units of one owner (the Greens) at \$1,093,612. *Id.* \*2. But that is not what the Greens got. Instead, they had a 3.92% interest in the proceeds (based on dividing the appraisal of their units by the sum of all appraisals). *Id.* They were entitled to \$1,993,320 (3.92% of the \$50,850,000 purchase price). The \$1,993,320 payout is 82% *more* than the \$1,093,612 appraisal. This case shows how the statute is supposed to work. It works proportionally, and the unit owners

can recover far more than the appraised values (\$900,000 more for the Greens).

The framework in the 1986 version of subsection (G) shows that the Association cannot simply sell off units at their appraised values. It must instead conduct a bona fide sale, and then distribute the proceeds of the sale proportionally based on the appraisals.<sup>3</sup>

**C. The 2018 version requires the same analysis.**

The 2018 amendments do not fundamentally change this analysis. Between 1986 and 2018, the legislature protected individual condominium owners *more*, not less. The legislature added a 5% bonus for owner-occupied units (at the expense of rented or vacant units). Laws 2018, Ch. 235, § 1. As relevant here, the legislature also inelegantly added the opportunity for a second appraisal. *Id.* In so doing, the legislature sought to add protections, not remove them.

In the inartful amendments, the legislature deleted the mathematical instructions for calculating the proportional interests. But the statute

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<sup>3</sup> Even if the Association had complied with subsection (G) (whichever version applies), that does not address the taking problem. [Article 2, § 17](#) prohibits *all* takings for private purposes – even if there is just compensation.

nevertheless works the same way post-2018 as it did before—i.e., proportionally. The only subsection that actually specifies how to distribute money (subsection D) still specifies that “Proceeds of the sale shall be distributed to unit owners . . . *in proportion* to the respective interests of unit owners as provided in subsection G of this section.” (Emphasis added.) This subsection remains materially unchanged. The money getting distributed is the “Proceeds of the sale,” not the appraisal values, and it gets distributed “in proportion,” even post-2018.

The second sentence of subsection (G)(1) does not change this. Although the 2018 amendment clumsily says that “[a]n independent appraiser selected by the association shall determine the total fair market values,” the introductory clause of subsection G confirms that everything still works proportionally. That introductory clause (materially unchanged since 1986) says, “The *respective interests* of unit owners referred to in subsections D, E and F of this section are as follows:” (emphasis added). The entire subsection (G) expressly defines the “respective interests” (as used in subsection (D)).

The same is true for the equally awkward phrase about the arbitration setting “the final sale amount.” That phrase is still subject to the unchanged

introductory clause of subsection (G), meaning that it still defines the “respective interests.” This has to be true. If the arbitration fixed the *payout* amount, there would be either a surplus or deficit after paying everybody from the “proceeds of the sale.” If the arbitration fixes the *proportional* interest (as the introductory phrase to subsection (G) states), then the amount distributed to the owners will exactly equal the “proceeds of the sale,” as it must.

The 2018 amendments do not change the Association’s fiduciary duties, nor do they allow a fixed-price sale at an appraised value. Fundamentally, the 2018 amendments do not authorize the self-dealing that occurred here.

**D. The Court may apply the 1986 version of the statute.**

The arguments the Xias have made apply with full force to both the 1986 and 2018 versions of the statute, so there is no waiver.

If the Court disagrees, then it may rely on the 1986 version. Waiver “is procedural, not substantive, however, and may be suspended at an appellate court’s discretion.” *Torres v. JAI Dining Services (Phoenix), Inc.*, [\\_\\_ Ariz. \\_\\_, ¶ 13, No. 1 CA-CV 19-0544](#) (App. Mar. 29, 2022). The Court “may exercise this discretion when an issue is of statewide importance, of constitutional

dimension, or when the public interest is better served by having the issue considered rather than deferred.” *Id.* These factors apply here. As the numerous media articles show, the abusive practice of forcing people out of their homes has statewide importance and the public is better served by having the issue addressed now. This is also a constitutional case at the heart of the Takings Clause of the Arizona Constitution.

Courts also consider new issues after giving both sides “the opportunity to file supplemental briefs on th[e] issue.” *Evenstad v. State*, 178 Ariz. 578, 582 n.2 (App. 1993); accord *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9 (1995) (Court “received supplemental briefing”). Here, the opportunity for these four supplemental briefs on the 1986 version eliminates any unfair surprise.

Fundamentally, “[i]f application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for [the Court] to consider the issue.” *Evenstad*, 178 Ariz. at 582. This is an issue of statutory interpretation, and “when we are considering the interpretation and application of statutes, we do not believe we can be limited to the arguments made by the parties if that would cause us to reach an incorrect result.” *Id.*

Condominium owners around the State of Arizona deserve to have their rights clarified. Not all condominium owners can afford legal representation. The Court can clarify their rights now, when both parties have competent counsel.

RESPECTFULLY SUBMITTED this 15th day of April, 2022.

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