

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

1 CA-CV 2016-0455

LYNNE A. FISHER, APPELLANT

v.

TURTLE ROCK III HOMEOWNERS ASSOCIATION, APPELLEE

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Appellant, Lynne Fisher (hereinafter “Ms. Fisher” or “the Appellant” is the defendant in a lawsuit filed by her homeowners’ association in the Maricopa County Superior Court. The Turtle Rock III Homeowners Association (hereinafter “the Association” or “the Appellee”)’s complaint principally sought equitable relief regarding the condition of Ms. Fisher’s home and the landscaping of her property [See the Association’s Complaint at Record on Appeal (“ROA”), #1]. Specifically, in its complaint, the Association sought to enforce its recorded deed restrictions (hereinafter “CC&Rs”) by requiring that Ms. Fisher complete the following repairs at her home: 1) install a gate; 2) repair a gate; 3) clean up the yard; 4) replace her garage door; 5) replace blinds in her front window; 6) remove visible items in home; and 7) cease using the home as storage [ROA #1]. Further, the Association asked that it be awarded monetary penalties for Ms. Fisher’s non-compliance with the CC&Rs [ROA #1]. The Association asked for a consolidation of the trial on the merits pursuant to Rule 65(a)(2), *Ariz.R.Civ.P.* [ROA, #4].

The judge was changed as a matter of right and the consolidated trial was set for April 8, 2016. At the hearing, the Association presented argument and evidence with regard to both the injunctive relief issues and the award of monetary penalties. As to the former, the Court made its ruling on April 19, 2016 regarding

injunctive relief and reserved its decision on an award of penalties and attorney fees until a later date [ROA, #30].

That same lower court ruling allowed the Association to pursue its monetary claim for an award of penalties and an award of legal fees and costs [ROA, #30]. The Association then filed its application for an award of the monetary penalties [ROA, #31] and for an award of its legal fees and costs [ROA, #33]. Ms. Fisher objected to both the award of monetary penalties and the request for fees [ROA, #36].

The Association was awarded its final Order and Judgment on June 8, 2016 and it is from this Order and Judgment that Ms. Fisher now appeals [ROA, #41 and #42].

STATEMENT OF FACTS

Ms. Fisher is the record owner of a real property located in the Turtle Rock III Homeowners Association [ROA, #1, ¶ 3 and ROA, #15, ¶1]. She purchased her property in the Association in March 2007 [ROA, #34, Exhibit 2]. Her property is subject to a recorded set of deed restrictions (“CC&Rs”) and her ownership entitles her to membership in the Association [ROA, #34, Exhibit 1 and ROA, #15, ¶1].

In early 2014, the Association began sending Ms. Fisher demand letters regarding the condition of the exterior of her property, including a damaged garage

door, an exterior door, the lawn maintenance, etc. [ROA, #34, Exhibits 3 and 4]. In addition to demanding compliance with the CC&Rs with regard to exterior property maintenance, the Association demanded that Ms. Fisher cure alleged violations with regard to the interior of her home [Id.]. After more than a year of demands and monetary penalties [ROA, #34, Exhibit 3], the Association engaged the services of its attorney. In September 2015, the attorney sent Ms. Fisher a demand letter seeking her compliance with the governing documents and for payment of nearly \$7,000 in assessments and penalties [ROA, #1, Exhibit A]. The letter also demanded that Ms. Fisher pay legal fees and costs to the Association as those unawarded fees had already been (and continued to be) posted on her ledger.¹

There was some communication between the Association's attorney and Ms. Fisher after that correspondence, and then in November 2015, the Association filed

¹ Curiously, Article XIII, Section 2 provides for an award of such fees and costs when the Association pursues enforcement of the restrictions. However, that language is qualified by a "reasonableness" requirement [ROA, #34, Exhibit 1]. Under Arizona law, such charges for attorneys fees (here totaling in the thousands) prior to the award of those fees is unlawful:

... even when fees are awarded pursuant to an express contractual agreement, rather than statute, the prevailing party is not entitled to its fees unless a court has already determined that the specific amount that party seeks is reasonable. *See Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (Ct. App. 1985) ("[T]he contract contained a provision that 'the prevailing party shall be entitled to reasonable attorneys fees . . . from the party adjudged against.' The determination of the reasonable amount of attorney fees was peculiarly within the discretion of the trial court." (ellipsis in original)); *First Fed. Sav. & Loan Ass'n of Phx. v. Ram*, 135 Ariz. 178, 181, 659 P.2d 1323, 1326 (Ct. App. 1982) ("In the present case both the mortgage note with Catalina and the installment contract and deed of trust with First Federal contained contract clauses providing for an award of attorney's fees. . . .").

Here, the law firm's demand and the Association's ledger evidencing the charges, threatened Ms. Fisher with a parade of legal catastrophes should she not immediately pay the balance due.

this lawsuit [ROA, #1]. On that same day, Ms. Fisher paid the outstanding regular assessments due the Association in the amount of \$1,291.50 [ROA, #34, Exhibit 3]. Prior to the court hearing in early 2016, Ms. Fisher also cured many of the alleged violations (i.e. the garage door, lawn maintenance, etc.) leaving only the issue of the rear door and the issues regarding the interior of her home [ROA, #30]. The evidentiary hearing resulted in the order and judgment described herein. It is from that order and judgment that Ms. Fisher now appeals.

STATEMENT OF ISSUES PRESENTED

1. Did the lower court properly interpret the contractual CC&Rs with regard to enjoining the interior maintenance and condition of Ms. Fisher's home?
2. Did the lower court abuse its discretion in awarding the Association an injunction against the Ms. Fisher with regard to the activities and personal property conditions inside her home?
3. Did the lower court abuse its discretion in awarding fines and penalties to the Association when there was no evidence that such fines were levied in compliance with either the contractual CC&Rs and/or Arizona's state statutes?

4. Does the Court's award of monetary penalties in light of the Association's violation of both the law and the contractual CC&Rs violate Ms. Fisher's procedural due process rights?

STANDARD OF REVIEW

The standard of review for the superior court's granting (or denial) of an injunction is an abuse of discretion. *See Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App.2000) (decision to grant injunctive relief in trial court's discretion). Further, a lower court abuses its discretion when "it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or "the record fails to provide substantial evidence to support the trial court's finding." *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 156 P.2d 1149 (Ariz. App. 2007) *citing Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982).

As to the interpretation of the contractual deed restrictions here at issue, the Court of Appeals reviews such lower court interpretations *de novo*. *See College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 537, 241 P.3d 897, 901 (App. 2010) ("The interpretation of a restrictive covenant is generally a matter of law, which we review *de novo*.").

ARGUMENT

I. Introduction

This is a straightforward case of an Association seeking to enforce its governing documents with regard to violations of the deed restrictions regarding property condition. The basic facts of the property condition have not been in dispute. In fact, Ms. Fisher took actions to bring her property into compliance before the hearing was held on April 18, 2016. Therefore, this case came down to whether or not the lower court should issue an injunction regarding an exterior door on Ms. Fisher's home and the goings-on regarding furniture and blinds inside her home. In addition, the matter also revolved the Association's request for an award of monetary penalties against Ms. Fisher.

In Arizona, deed restrictions are contracts that run with the land. The interpretation of such contractual provisions is a matter of law. *See Powell v. Washburn*, 211 Ariz. 553, 554, 555, ¶ 8, 125 P.3d 373, 374, 375 (2006). With such restrictive covenants, it is the function of the law to “ascertain and give effect to the likely intentions and legitimate expectations of the parties” who created the covenants. *See id.* at 556-57, ¶ 13, 125 P.3d at 376-77 (noting that the Restatement (Third) of Property: Servitudes § 4.1(1) (2000) recommends that a “servitude should be interpreted to give effect to the intention of the parties ascertained from

the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created”).

In addition, “Restrictive covenants are to be strictly construed against persons seeking to enforce them and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions.” *Duffy v. Sunburst Farms East Mutual Water & Agricultural Co., Inc.*, 124 Ariz. 413, 417, 604 P.2d 1124, 1128 (1980) (quoting *Grossman v. Hatley*, 21 Ariz.App. 581, 583, 522 P.2d 46, 48 (1974) (citations omitted).

In this case, the lower court’s review and interpretation of the Turtle Rock deed restrictions in light of the Association’s pursuit of Ms. Fisher’s compliance (and the lower court’s awarding of that injunction and the accompanying monetary penalties) is out of line with the rulings and reasoning of the case law cited above. The lower court did not properly interpret the documents and ignored key provisions of Arizona law with regard to the proper procedure for awarding monetary penalties against a homeowner living in a planned community. Ultimately, Ms. Fisher does not dispute the language or the requirements of the injunction with regard to the exterior maintenance issues at her home, but does dispute the Court’s ruling with regard to the interior maintenance along with the improper award of monetary penalties. These decision of the lower court should not be allowed to stand.

II. The Lower Court's Awarding of the Injunction With Regard to Require Ms. Fisher to Take Action Regarding the Interior Condition of Her Property Was Not Supported by the Express Language of the Contractual Deed Restrictions

The lower court's April 19 award of an injunction required Ms. Fisher to take action with regard to an exterior door and the maintenance of her yard. At the evidentiary hearing, the Association presented testimony and evidence regarding the various exterior issues and those orders largely followed the language and requirements of the CC&Rs. However, there was also testimony and evidence offered about the interior blinds and other interior personal property inside Ms. Fisher's home. The Association's key witness presented testimony (albeit conclusory and lacking any basis in the contract) that the interior condition was not in compliance with the CC&Rs. As such, the lower court found and ordered as follows:

IT IS FURTHER ORDERED that Defendant is to remove the sun screen placed on the front window and replace the dilapidated blinds with blinds that close properly so as not to permit view into the interior of the residence.

IT IS FURTHER ORDERED if there are items in the interior of the residence that prevent the blinds from closing properly or operating in their normal manner, those items are to be removed or pulled back from proximity of the blinds.

[ROA #30]. The April 2016 order largely appears to be narrowly tailored and specific in its requirements. However, as to lower court's orders regarding the interior of Ms. Fisher's home and detailed above, the CC&Rs contain no such

contractual requirements with regard to the interior maintenance of a Turtle Rock III homeowner's property.

The CC&Rs at Article VI, Section 1 do require that a homeowner such as Ms. Fisher to maintain her property as follows:

... the Owner of each Lot shall maintain all improvements on said Lot in a clean and attractive condition... the Owner shall keep said lot free from all rubbish, litter, and noxious weeds; install, maintain, cultivate and keep in good condition and repair: shrubs, trees, grass, lawns, plantings, and other landscaping located, or from time to time placed, upon the side and rear yards of said Lot, including front yard landscaping trim and restrain all trees, shrubs, or plantings of any kind so that they shall not be allowed to overhang... maintain in good condition and repair and adequately paint or otherwise finish all improvements and structures, located, or from time to time placed, upon such Lot; and maintain all walkway surfaces and keep them clean, reasonably dry and free of oil and other extraneous matter.

[ROA, #24, Exhibit 1]. Further, Article 1, Section 11 defines a "lot" as "any plot of land shown upon any recorded subdivision map of the properties, with the exception of the common area" Improvements are defined at Article 1, Section 10 as "buildings, garages, carports, private driveways, walkways, parking areas, fences, walls, porches, planters, swimming pools, spas, and all other structures of every kind." [Id. Emphasis added.].

Curiously, there is nothing in the express language of Article VI of the CC&Rs with regard to maintenance of the furnishings and personal property inside Ms. Fisher's home. The CC&Rs (and the other portions of the lower court's injunction) required the specific exterior maintenance (which has now been

completed at the Fisher home), but Article VI, Section 1 and the related definitions do not mandate or otherwise guide a homeowner as to the interior condition of an owner's property.

The CC&Rs do later discuss window coverings and prohibit foil or other reflective material (See CC&Rs Article VI, Section 4). The use restrictions prohibit noise nuisances or offensive activities (See CC&Rs Article XII). But those documents do not prohibit or otherwise regulate how Ms. Fisher places or uses her furnishings. Any such provision is simply absent from the restrictions.

Therefore, the lower court's injunctive relief requirements regarding the interior issue were granted in error for one principal reason: there was no evidence or testimony offered of breach regarding the interior issues. Without a breach, the injunctive relief on the issue of the interior furnishings and blinds must fail. In Arizona, "an injunction is an equitable remedy which allows the court to structure the remedy so as to promote equity between the parties." *See Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331, 909 P.2d 393, 398 (1995) (supplemental opinion); *see also Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (1977). In addition, enforcing deed restrictions such as these is governed by equitable principles and the lower court should have reviewed and analyzed the relative hardships and injustice; the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other

remedies. See *McRae v. Lois Grunow Memorial Clinic*, 14 P.2d 478 (Ariz. 1932); see also Restatement (Third) of Property: Servitudes § 8.3 (Tentative Draft No. 7, 1998). Further, Arizona courts have held that a mandatory injunction should only enforce a requirement of formal approval when approval has been arbitrarily and unreasonably withheld. *Donoghue v. Prynwood Corp.*, 356 Mass. 703, 255 N.E.2d 326, 329 (1970) (mandatory injunctive relief should not issue in support of arbitrary enforcement of restriction); see also *Kennedy v. Morrow*, 77 Ariz. 152, 155, 268 P.2d 326, 329 (1954) ("Equity regards the substance rather than the form."); *Arizona Coffee Shops v. Phoenix Downtown Parking*, 95 Ariz. 98, 100, 387 P.2d 801, 802 (1963) ("One who seeks equity must do equity.").

According to the case law, the lower court should never have enjoined Ms. Fisher regarding anything on the inside of her home as the CC&Rs do nothing to address or restrict such behaviors. In *McRae*, the Arizona Supreme Court incorporated the following requirements related to the enforcement of restrictive covenants through equitable means:

Within the rule permitting the enforcement of a restrictive covenant as to the use of land, when buildings or structures have been erected in breach of covenant, their removal may be ordered, unless the right is barred by some conduct on the part of plaintiff such as laches, acquiescence, waiver, or estoppel, or a substantial breach of the building restrictions by him. **However, the breach must be very clear to justify a mandatory injunction. The court will not ordinarily take into consideration the relative amount of inconvenience or injury to be suffered by the parties in case the injunction is granted or refused, except in cases where the damage caused by the breach is minute (Emphasis added).**

McRae citing 32 *Corpus Juris* 215, § 334. Simply put: where's the breach? The CC&Rs at Turtle Rock do not regulate Ms. Fisher's interior furnishings and the issue of the blinds is not a breach of the specific language regarding window coverings. There is no restriction as to how much furniture, what size or what style she can keep. The house could be vacant or over furnished. The interior of the home is simply not the purview of the CC&Rs and therefore, the lower court's mandatory injunction on that issue was on that legal basis.

Not only does contract law belie the Association (and the lower court's) authority to regulate the goings on and furnishings inside the Fisher home, but also our country was founded on centuries of principles related to such real property rights. The idea of home is nearly an impenetrable one and viciously protected on many fronts.² The lower court's ruling on the injunction related to the inside of Ms. Fisher's home must be overturned.

² ... [we] hold to the "centuries-old principle of respect for the privacy of the home," *Wilson v. Layne*, 526 U.S. 603, 610 (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people," *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown," *Miller v. United States*, 357 U.S. 301, 307 (1958) (internal quotation marks omitted) (See *Georgia v. Randolph*, 547 U.S. 103 (2006)).

III. The Lower Court's Awarding of Fines Ignored the Express Language of the Restrictions and Arizona Law

A. Arizona Law Required the Association to Provide Ms. Fisher with Notice and Opportunity To Be Heard Before Levying Monetary Penalties Against Her

At the evidentiary hearing in this matter, the Association's presented no evidence that it had complied with the following:

After notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association... Notice pursuant to this subsection shall include information pertaining to the manner in which the penalty shall be enforced.

Emphasis added. See *A.R.S.* §33-1803(B). In fact, the Association's evidence at trial showed that no such notice was provided the Defendant before the fines were imposed. The Association's ledger is littered with penalties. Taking a closer look at these charges and the letters that levied them, it is obvious that the fines and penalties appeared on the ledger before Ms. Fisher was given any opportunity to be heard and (or at least simultaneous to) any notice [Id]. By way of example, the entry for the penalty on February 21, 2014 for a \$25 fine (garage door disrepair) was issued on the exact same date as the Association sent out its fine letter [ROA #34, Trial Exhibit 3, Page 1 and ROA #34, Exhibit 4, Letter dated February 21, 2014]. The "INITIAL MONETARY PENALTY" letter clearly states that the fine "has been assessed" simultaneously to the notice [Id.]. The ledger clearly shows

that there was no time between the notice and the levying of the penalty. Further, the letter allows Ms. Fisher 10 days to ask for a hearing but the fine was not issued after that 10-day period. The statutory requirements were clearly ignored and the remaining (all) demand letters levying more fines followed the same pattern. The lower court should not have ignored the statutory requirement and all of the fines presented should have been invalid based upon this issue alone.

B. The Association's Demands Were Internally Inconsistent With Its Fine Practices and Its Own Deed Restrictions

Not only was the statutory mandate ignored, but also the Association's Board of Directors ignored its own warnings to Ms. Fisher when it levied the fines, bypassing the notice requirement of the deed restrictions. The Association's contractual deed restrictions require that an owner be given 30 days notice prior to levying a fine. Article VI, Section 3 provides as follows:

In the event any Owner of any Lot shall fail to maintain any portion of their Lot... the Board will notify the Owner in writing of the unsatisfactory condition... If such Owner fails to remedy such lack of compliance within thirty (30) days from receipt of such notice... the Association or its authorized agents shall have the right to fine the Owner for the violation.

[ROA, #34, Exhibit 1, Page 9]. Other than this provision regarding notice prior to fining the homeowner, there is no other written policy or authority upon which the Association has relied to ignore this 30-day notice requirement. In fact, the

Court's own order indicated that the Association presented no such evidence regarding a written fine policy other than Article VI, Section 3 language above:

With regard to the Rules and Regulations, counsel for Defendant is correct that no written evidence has been presented to support the fine schedule. However, the Court finds Ms. Curtiss' testimony sufficient under the circumstances to support as a matter of evidence the fine assessment of \$25.00 per day.

IT IS ORDERED directing Plaintiff to provide Defendant with a copy of the Rules and Regulations that sets out the fine assessment of \$25.00 per day.

[ROA, #30]. When the Association filed its Application for Monetary Penalties, it did nothing other than regurgitate the previously plead and presented fines [ROA, #31]. The Association did not provide the lower court with any policy or schedule of monetary penalties. (other than the 30 day notice period discussed above in the CC&Rs)[ROA #31]. The evidence showed that it was the Association's habit was to send a second notice to Ms. Fisher prior to the expiration of the required 30-day notice [ROA, #34, Trial Exhibit 1]. Then, at the time of the second notice (day 20 of the 30 day notice period), the fine would be imposed and added to her account ledger [ROA, #34, Trial Exhibit 3]. This consistent habit and practice did not comply with the law and the documents and should work to invalidate any and all such penalties. For the lower court to ignore the clear language of the contractual deed restrictions in favor of the "board member said so" standard is unacceptable. The duty and role of the Association and its directors is to enforce the express

language of the restrictions, not to justify its actions when acting in direct contravention of those same restrictions. In fact, enforcement of CC&Rs is mandatory, even where the CC&Rs, by their own terms, make their enforcement discretionary. *See Johnson v. Pointe*, 205 Ariz. 485, 73 P.3d 616 (App. 2003). The lower court wrongfully deferred to the discretion of the board member witness (as the April 19, 2016 order indicates [ROA, #30]) to the exclusion of the express language of the contract. Such an interpretation and application that altogether avoids the application of the CC&R language is without a legal basis and should have been sufficient to deny the Association's request for an award of any monetary penalties.

C. There Was No Legal Basis, Contractual or Otherwise, for the Association to Levy Daily Fines Against Ms. Fisher

Not only did Ms. Fisher suffer at the hand of improper notices, denying her rights to comply and ask for a hearing, the Association also began to levy daily fines [ROA, #34, Trial Exhibit 3]. Those fines were likewise problematic for the notice reasons cited herein, but also because the daily charges have no basis in the governing documents. Without any such contractual provision or fine policy regarding daily fines, Arizona law would hold such a decision to levy fines in this case as patently unreasonable. As the Court of Appeals held in *Villas at Hidden Lakes Condo Association v. Geupel*:

Although the Association by Declaration and by statute has the power to impose charges for late fees, it cannot abuse its discretion or exercise its power unreasonably. We hold that because the Association had not adopted a schedule of penalties for late payments at the time the Developer's assessments became delinquent; the retroactive imposition of monetary penalties on such assessments was unreasonable. 174 Ariz. at 80, 847 P.2d at 125.

174 Ariz. 72, 847 P.2d 117 (Ariz. App. 1992). Without a contractual basis for the daily or weekly recurring fines and without any policy evidencing authority for the same, these recurring and compounding fines are patently unreasonable. For the lower court to be awarded such fines is contrary to the law and the lower court's decision should be reversed. The lower court suggests that the testimony was sufficient [ROA, #31], however, the case states that apart from a written schedule, such charges are unreasonable and likewise inconsistent with the notice and reasonableness requirements of §33-1803(A).

In addition, the levying of the daily or weekly penalty is akin to awarding of a punitive damage. While there is no such decision in Arizona, there are other cases in other states in which the courts have held that daily, recurring fines are unreasonable and punitive in nature. *See Kalenka v. Taylor*, 896 P.2d 222 (Alaska 1995) (punitive damages not available for violation of covenants; contract claim cannot be transmuted into tort claim by alleging that defendants' violation was willful and with reckless disregard of interests of other lot owners; "automatic" penalty of \$1,000 per day for unapproved construction until approval is received is

invalid as impermissible liquidated-damages provision because it fails to distinguish among degrees of violations). The issue before this Court regarding the Association's recurring fines points to the punitive nature of the Association's treatment of Ms. Fisher and should be unavailable to the Association. This is even more troubling when considering such fines are not authorized by the restrictions in any way.

D. The Statutory Violation and the Breach Regarding the Levying of Fines Denied Ms. Fisher Due Process

The only other issue with regard to the unlawful and unreasonable manner in which the Association levied (and was ultimately awarded) fines and penalties against Ms. Fisher is to inquire as to why the procedural issues regarding fines and penalties matter. The problem is when denied notice and a hearing opportunity, a homeowner such as Ms. Fisher is denied her procedural due process rights. There is no case law on this issue with regard to a community associations and the protections afforded a homeowner pursuant to A.R.S. §33-1803(A). However, the "notice and opportunity to be heard" language is prominent in other statutes in other areas of law in Arizona, and when the state is involved, such language affords a citizen her procedural due process rights. In *Salas v. Arizona Dept. of Economic Sec.*, the Court of Appeals held that to deny Mr. Salas his notice and hearing right was indeed a procedural due process right. 893 P.2d 1304, 182 Ariz. 141 (Ariz. App. Div. 1, 1995). Specifically:

[I]f a state deprives a person of a protected entitlement it must do so with due process of law." *Herrera v. Jamieson*, 124 Ariz. 133, 134, 602 P.2d 514, 515 (App.1979). Procedural due process includes the right to notice and opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 1994, 32 L.Ed.2d 556 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011 1020, 25 L.Ed.2d 287 (1970).

Id. at 1306. Here, the same magic language appears in both Arizona's planned communities and condominium acts (A.R.S. §33-1257(A)), and if the community association or condo boards were a state actors, to deny a homeowner notice and hearing rights would infringe on the homeowner's rights. The language and the spirit of the protections that should have been afforded Ms. Fisher in this case are akin to those afforded other citizens in administrative, criminal, licensing, and other types of cases. And, like those other types of cases, the failure of the due process should be a bar to the Association collecting those monetary penalties at issue. The lower court abused its discretion as discussed herein and in ignoring Ms. Fisher's rights (like procedural due process rights), the lower court's award of fines and penalties should not stand.

CONCLUSION

This court has long held that there is a legal significance to the express language of a set of recorded deed restrictions. *Continental Oil* and its progeny have long guided the Courts and litigants on this front, but in this case, the express

language of the documents was ignored. The CC&Rs provided a procedure and substantive guidance about how and when the Association could impose monetary penalties, and the lower court's ruling on the evidence even recognized the problem with the Association disregarding a contractual 30-day notice. The lower court highlighted the language along with the Association's lack of compliance, but yet still ruled in the Association's favor with regard to the failed notices.

Likewise, the lower court ignored the plain language of Arizona statute that should have afforded Ms. Fisher proper notice and an opportunity to be heard before initiating its enforcement action and imposing penalties. While one could argue that this is of little consequence as she did not comply with the notice, which is not the point. The homeowner's protections in the statute are to prevent a situation exactly as this: a homeowner being denied her due process rights and succumbing to the will of the Association as it appeared that a hearing was useless. She had already lost and the fine had been imposed.

In sum, the Association presented no tangible evidence of any express authorization to impose monetary penalties when such penalties were imposed contrary to the contractual deed restrictions and in violation of Arizona law. There is nothing reasonable about the Association's actions and the lower court's order and judgment on these issues must be overturned. The lower court's ruling awarding the Association monetary penalties must be reversed.

In addition, Ms. Fisher is requesting an award of her fees and costs on appeal pursuant to Rule 21, *Ariz.R.Civ.App.P.*

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Date

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