IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

LOUIS M. DIDONATO, A MARRIED MAN;
NANCY A. CHIDESTER, SURVIVING SPOUSE
OF DALE H. CHIDESTER, DECEASED; AND
DENNIS P. KAUNZNER AND CAROL M. KAUNZNER,
HUSBAND AND WIFE,
Plaintiffs/Appellees,

v.

PUEBLO DEL SOL PROPERTY OWNERS ASSOCIATION,
AN ARIZONA NONPROFIT CORPORATION,
Defendant/Appellant.

No. 2 CA-CV 2016-0219
Filed July 12, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV201600007
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Stachel & Associates, P.C., Sierra Vista
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Counsel for Plaintiffs/Appellees

Carpenter, Hazlewood, Delgado & Bolen, PLC, Tucson
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Counsel for Defendant/Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Pueblo Del Sol Property Owners Association ("the Association") appeals from the trial court's grant of partial summary judgment in favor of Louis DiDonato, Dale and Nancy Chidester,[1] and Dennis and Carol Kaunzner, record owners of three lots in the Association (collectively "the Owners"). We affirm for the following reasons.

Factual and Procedural Background

¶2 The material facts are not in dispute. The Association is a planned community in Cochise County established in July 1972, when developers executed and recorded certain Covenants, Conditions, and Restrictions ("CC&Rs") binding all tracts within it. By their own terms, the CC&Rs were to expire on December 31, 2015, unless a supermajority of record owners, representing at least fifty-five percent of the total area, exercised an option to extend them through 2030. The CC&Rs specified that owners could demonstrate

[1]One month after the Association filed notice of this appeal, the Owners notified the trial court that Dale H. Chidester had died and that Nancy A. Chidester, survivor of the marital community, had become the sole owner of the subject property and would continue as a plaintiff.

their assent "by executing and acknowledging an instrument in writing to that effect which shall be duly recorded."[2]

¶3 In November 2015, the Association mailed a letter to owners notifying them the CC&Rs would expire on December 31, 2015 and enclosed a form asking owners whether they would consent to extending the CC&Rs through 2030. Of 346 total lots, the Association obtained 215 signed forms, representing 62.07 percent of the Association's acreage, approving the extension. On December 28, 2015, the president and secretary of the Association executed and acknowledged a notice of extension of the CC&Rs, which they recorded the next day. Although the consent forms bore signatures, those signatures were not acknowledged and the forms were not recorded.

¶4 In January 2016, the Owners brought this action seeking a declaratory judgment that the CC&Rs had expired on December 31, 2015. The court granted summary judgment in favor of the Owners, finding that the notice of extension was insufficient to extend the CC&Rs.[3] The Association timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

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[2]The original CC&Rs were to expire on December 31, 2000, but a sufficient quantum of owners elected to renew them through 2015 by executing and acknowledging written instruments that were duly recorded.

[3]The trial court also granted summary judgment in favor of the Owners on count two, a declaratory judgment that the CC&Rs had expired on December 31, 2015 because the 2004 amendment creating the option to extend the CC&Rs through 2030 was ineffective and void. The Association also appeals from this count; however, we need not reach it because the first count is a sufficient and independent basis upon which to affirm the trial court. *See Menendez v. Paddock*

Summary Judgment

¶5 The Association contends the trial court erred in granting summary judgment to the Owners, arguing that the executed, acknowledged, and recorded notice of extension supported by the signed consent forms was sufficient to extend the CC&Rs even though the forms themselves were neither acknowledged nor recorded. We review a grant of summary judgment de novo, "viewing the evidence and reasonable inferences in the light most favorable to the nonmoving party." *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003).

Plain Language of Section 16(a)

¶6 Arizona courts interpret CC&Rs according to their plain language. *See Saguaro Highlands Cmty. Ass'n v. Biltis*, 224 Ariz. 294, ¶ 14, 229 P.3d 1036, 1040 (App. 2010). "When the meaning of a covenant is reasonable and unambiguous . . . there is no need to seek further clarification outside its language." *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979). "[I]n the absence of ambiguity, restrictive covenants will be enforced according to their terms." *Id.* at 416-17, 604 P.2d at 1127-28.

¶7 Here, section 16(a) of the CC&Rs, as amended, states,

> At any time prior to December 31, 2015, *the owners of record* of lots in said tract, subject to this declaration, having an aggregate area equivalent to not less than fifty-five (55) percent of the total area of all of said property, may extend the term during which said covenants, conditions and restrictions shall bind and affect said

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Pool Constr. Co., 172 Ariz. 258, 272 n.17, 836 P.2d 968, 982 n.17 (App. 1991).

The trial court also granted summary judgment in favor of the Association on count three, slander of title, which ruling the Owners did not appeal.

> tract to 31 December 2030, *by executing and acknowledging an instrument in writing* to that effect *which shall be duly recorded* with the County Recorder of Cochise County, Arizona.

(Emphasis added.) Additionally, the CC&Rs define "owner," as "the person or entity holding the fee ownership of a lot." Thus, by the plain and unambiguous language of section 16(a), in order to extend the CC&Rs through 2030, the fee owners of tracts totaling at least fifty-five percent of the Association's acreage were required to execute and acknowledge written instruments to that effect, and those instruments were required to be recorded—all before December 31, 2015. Even assuming that section 16(a) is ambiguous as to whether "an instrument" requires a single instrument to be filed on behalf of all assenting owners or one instrument per subject tract, there is no ambiguity that each assenting owner was required to execute and acknowledge such an instrument.[4]

¶8 Although the Association obtained written, signed consent forms from owners representing over sixty-two percent of the acreage, it concedes those forms were neither acknowledged nor recorded. The Association has not advanced, either here or in the trial court, any argument that the notice of extension executed by the president of the Association was in actual compliance with section 16(a). Rather, the Association argues, as it did below, that substantial compliance is sufficient and that the Association substantially complied with the requirements to renew the CC&Rs, or, in the alternative, that the court has the power to excuse compliance. *See* Restatement (Third) of Property (Servitudes) § 6.12 (2000).

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[4]The CC&Rs also define "Association" as "the Pueblo Del Sol Property Owners' Association, or its successor," and "Board" as "the Board of Directors of the Association." As such, no ambiguity in the plain language exists, much less one that would permit the Association, Board, or its president to satisfy the acknowledgment and recording requirements on behalf of record owners.

Substantial Performance

¶9 We are not persuaded by the Association's argument that it substantially performed under section 16(a). The Association argues that even if the failure to obtain and record acknowledged signatures constitutes a breach of the CC&Rs, that breach was immaterial because the called-for performance was satisfied by recording the notice of extension after obtaining the approval of a sufficient quantum of owners.

¶10 Although we agree with the Association that "a deed containing a [CC&R] is a contract," *Powell v. Washburn*, 211 Ariz. 553, ¶ 8, 125 P.3d 373, 375 (2006), we do not agree the doctrine of substantial performance is the proper measure of compliance with section 16(a). When CC&Rs are clear and unambiguous, "restrictive covenants will be enforced according to their terms." *Duffy*, 124 Ariz. at 416-17, 604 P.2d at 1127-28. Additionally, "[t]he cardinal principle in construing restrictive covenants is that the intention of the parties to the instrument is paramount."[5] *Powell*, 211 Ariz. 533, ¶ 9, 125 P.3d at 376, *quoting Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449 (App. 1993). Here, the intent of the parties as expressed in section 16(a) is clear and unambiguous.

¶11 Moreover, the Association cites no binding authority applying the doctrine of substantial performance to an extension of CC&Rs and offers no sound policy reason why we should extend the

[5]Relying on *Powell*, 211 Ariz. 553, ¶ 9, 125 P.3d at 376, the Association argues that the governing intent of section 16(a) was merely that a supermajority signify assent in writing to extending the CC&Rs. The Association, however, fails to point to a meaningful ambiguity in section 16(a) permitting such an interpretation. *See id.* ¶¶ 17-18, 28 (whether limitation to "single family residence" in CC&Rs allowing recreational vehicles was ambiguous after county amended zoning ordinance to classify them as such in certain communities).

doctrine in this case.[6] Neither are we aware of any such authority or policy.

¶12 But even assuming arguendo that the doctrine of substantial performance applies to the extension of CC&Rs, we are not persuaded that it applies to the requirements of acknowledgment and recording in section 16(a). Substantial performance is intended for breaches not amounting to an "uncured material failure." Restatement (Second) of Contracts § 237 cmt. d (1981). We cannot say that the failure to obtain and record acknowledged instruments constitutes anything less than a material failure. Contrary to the Association's argument that the acknowledgment and recording requirements are mere "administrative technicalit[ies]," these practices are so common, if not integral, to our property laws that we would be imprudent to simply disregard them. *See, e.g.*, A.R.S. § 33-411(A)-(B) ("No instrument affecting real property gives notice . . . *unless recorded* . . . . An instrument shall not be deemed lawfully recorded unless . . . *acknowledged* . . . ") (emphasis added); *Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 399-401, 923 P.2d 863, 865-67 (App. 1996) (signed, recorded document conveying a right of first refusal for real property unenforceable under A.R.S. § 33-411 because it was not acknowledged). As the trial court observed, these requirements were "designed to make sure that the person signing . . . is who he or she claims to be, and that the instrument is available for review . . . in the event of any question about the identity or authority of the signer." *See* A.R.S. §§ 39-121; 41-311(1).[7] Accordingly, we cannot say the trial

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[6]The Association cites a Georgia case extending CC&Rs when "there has been a substantial compliance with the terms and conditions of the covenant permitting renewal and extension." *Bowman v. Walnut Mountain Prop. Owners Ass'n*, 553 S.E.2d 389, 393 (Ga. Ct. App. 2001). However, as the Owners correctly argue, the court only applied the doctrine in the face of an ambiguity; namely, the meaning of the word, "agreement." *Id.* at 392-93. No meaningful ambiguity exists in this case.

[7]The Association also urges it has fulfilled the purpose of the recording requirement because it has complied with A.R.S. § 33-1812(A)(7), which requires it to retain the written consents for at

court erred in ruling that the doctrine of substantial performance does not apply to section 16(a).

Section 6.12 of the Restatement (Third) of Property

¶13 With respect to the Association's argument that the trial court had the power to excuse, and should have excused, compliance under section 6.12 of the Restatement (Third) of Property, we are not persuaded. First, section 6.12 is discretionary; it states in pertinent part, "A court *may* excuse compliance with . . . a requirement that an amendment to the declaration be signed by members." Restatement (Third) of Property (Servitudes) § 6.12 (emphasis added). Second, section 6.12 requires the court to find that the provision to be excused "unreasonably interferes with the community's ability to manage the common property, administer the servitude regime, or carry out any other function set forth in the declaration." *Id*. Furthermore, the court must find that "compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests." *Id*. The Association, however, did not argue, much less produce evidence, that the requirement to obtain and record executed and acknowledged instruments "unreasonably interfere[d]" with its ability to operate or carry out its functions.

¶14 The Association and the Owners agree that the process of obtaining and recording acknowledged signatures when the CC&Rs were previously extended from 2001 through 2015 was "amazing, painstaking and time consuming." However, we see no indication that section 6.12 aims to relieve compliance with express terms merely because it would require substantial effort. *See* Restatement (Third) of Property (Servitudes) § 6.12 cmts. a-c.[8] Also,

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least one year. However, this is not equivalent to recording in a public office. *See Henderson v. Las Cruces Prod. Credit Ass'n*, 6 Ariz. App. 549, 554, 435 P.2d 56, 61 (1967). Further, under A.R.S. § 33-1812(A)(7), the Association would only be required to make the forms available to members, not to the public.

[8] Instead, the comments suggest courts should "sparingly" excuse compliance and do so in circumstances when "ignorance, inadvertence, reliance on poorly drafted forms, or lack of foresight"

that the Association previously extended the CC&Rs by complying with the specified process demonstrates it was capable of doing so. This fact counters any suggestion that doing so again would "unreasonably interfere[]" with the Association's ability to function. Accordingly, we cannot say the trial court erred in refusing to excuse compliance pursuant to section 6.12.[9]

Disposition

¶15 Viewing the facts in the light most favorable to the Association, we determine as a matter of law that it failed to comply with the plain and unambiguous language of section 16(a). Therefore, the trial court did not err by granting summary judgment and declaring the CC&Rs expired after December 31, 2015. For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of the Owners.

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in the declarations themselves "impair the ability of the community or its association to function over the long term." Restatement (Third) of Property (Servitudes) § 6.12 cmts. a, c. For example, compliance with quorum requirements may be excused when declarations require an "extraordinary vote" that makes it "practically impossible" to increase an "unrealistically low" cap on assessments. *Id.* cmt. b. Excusing compliance is also appropriate when "approval of groups who have no real interest in the matter is required, or where the required level of approval cannot be secured because of absent or uninterested owners." *Id.* cmt. c. However, "a court should be more reluctant to exercise this authority when there is substantial conflict within the common-interest community." *Id.*

[9]The trial court also reasoned that section 6.12 is in conflict with *La Esperanza Townhome Association v. Title Security Agency of Arizona*, 142 Ariz. 235, 689 P.2d 178 (App. 1984). The Association also challenges the trial court's "expansive" application of *La Esperanza* and urges us to clarify its holding. Because we conclude that section 6.12 would not apply under these facts, we need not address this issue.