

IN THE ARIZONA COURT OF APPEALS

DIVISION ONE

Desert Mountain Club, )  
 ) No. 1 CA-CV 17-0100  
 Plaintiff/Appellee, )  
 ) Maricopa County Superior Court  
 vs. ) No. CV2014-015333  
 ) CV2014-015334  
 Eric Graham, et al., ) CV2014-015335  
 )  
 Defendants/Appellants. )  
 \_\_\_\_\_ )

**APPELLANTS' REPLY BRIEF**

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## I. THE RIGHT TO RESIGN IS INCLUDED IN THE BYLAWS

Valid statutes are automatically a part of a contract, regardless of whether the statutes are expressly mentioned.<sup>1</sup> Contractual language must be interpreted in light of existing law. The club's bylaws are a contract.<sup>2</sup> A.R.S. § 10-3620 is a valid Arizona statute that states, “[a] member may resign at any time, except as set forth in or authorized by the articles of incorporation or bylaws.” So the right to resign is a part of the bylaws by operation of law.<sup>3</sup> In fact, the club does not dispute that this statute is automatically part of the bylaws.

The statutory right of a member of a non-profit corporation to resign is also unrestricted because the bylaws do not limit resignation or provide for a process that resembles resignation. Resign is defined as “to give up one’s office or position: quit.”<sup>4</sup> Synonyms of resign include abnegate, cede, relinquish, renounce, abdicate, step aside, step down, and surrender.<sup>5</sup> Neither the definition nor the synonyms suggest

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<sup>1</sup>*Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, 163 P.3d 1096, 1100 (App. 2007).

<sup>2</sup>*See Rowland v. Union Hills Country Club*, 157 Ariz. 301, 304, 757 P.2d 105, 108 (App. 1988).

<sup>3</sup>*Banner Health*, 216 Ariz. at 150, 163 P.3d at 1100.

<sup>4</sup>*Resign*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/resign>.

<sup>5</sup>*Id.*

that obligations continue after a resignation or that a resignation is anything like a transfer or sale of a membership.

In contrast, the club requires transfers or sales of memberships that are no longer wanted only through the club according to sale-through-the-club/transfer-fee provisions in the bylaws.<sup>6</sup> The bylaws require members to surrender their membership to the club and continue to pay dues, fees, charges, and assessments until their membership is reissued.<sup>7</sup> This sale-through-the-club procedure is not a resignation. Otherwise, one who just wanted out of the club would be, in essence, an economic slave to the club because such a member would be required to keep paying until the membership was sold; in essence, the member would be buying his or her freedom.

The presence of mechanisms to transfer or sell a membership does not nullify the right to resign, a right that is part of the bylaws automatically.

Even if, as the club argues, the bylaws can modify the right to resign, they can only modify the timing of resignation. The except-as-set-forth language in A.R.S. § 10-3620 that is set apart by a comma only modifies the antecedent immediately prior in the pertinent sentence of the statute. No cases have interpreted this statute and its legislative history does not provide guidance. So, this court should rely on the rules

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<sup>6</sup>Record on Appeal (hereafter “RA”) 48 at 2:12–14 (CV2014-015333).

<sup>7</sup>RA 48 at 2:25–26, 3:1-2 (CV2014-015333).

of statutory interpretation. Courts use the last-antecedent rule to interpret otherwise ambiguous statutes that are subject to more than one interpretation.<sup>8</sup> The last-antecedent rule requires a qualifying phrase to be applied to the word or phrase immediately preceding it, so long as there is no contrary intent indicated.<sup>9</sup> The antecedent here is *at any time*. That means the bylaws can only modify the time when members can resign. The bylaws cannot abolish the statutory right to resign.

The club and the trial court equated resignation with the complicated member resale, transfer, or surrender process detailed in the club's bylaws without regard to the fact that, ignoring the inclusion of the statute allowing resignation, the club's bylaws do not mention resignation or even a process that resembles resignation. Courts cannot unilaterally insert a cannot-resign provision in the contract.<sup>10</sup> The court must look at the agreement as it was written.<sup>11</sup> Moreover, courts may not interpret statutes so that the phrase *a member may resign* is superfluous or meaningless if

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<sup>8</sup>*Pawn 1st, LLC v. City of Phx.*, 231 Ariz. 309, 311–12 294 P.3d 147, 149–50 (App. 2013).

<sup>9</sup>*Phx. Control Sys., Inc. v. Ins.e Co. of N. Am.*, 165 Ariz. 31, 34, 796 P.2d 463, 466 (1990).

<sup>10</sup>*Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966).

<sup>11</sup>*Smith v. Melson, Inc.*, 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983).

another construction gives the phrase meaning.<sup>12</sup> The only interpretation that gives meaning to all of the statute's language is if the bylaws can only modify the timing of resignation. The trial court's interpretation read the bylaws as saying something they do not. That is wrong. The trial court impermissibly changed the bylaws and did so in violation of the statutory right of a member to resign.

Notably, the trial court "decline[d] to engraft a new provision to allow equity members to resign and stop paying dues when such a provision is nowhere suggested in the bylaws."<sup>13</sup> But the trial court did what it said it would not do by engrafting a new provision providing for resignation while ignoring A.R.S. § 10-3620. This statute is part of the bylaws as a matter of law. So the bylaws allow members to resign.

The club misconstrues the appellants' argument by claiming that the appellants take issue with the bylaws not using the word *resign*.<sup>14</sup> That is inaccurate. The appellants argument is that A.R.S. § 10-3620, a valid Arizona statute that provides

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<sup>12</sup>*City of Phx. v. Phx. Emp't Relations Bd.*, 207 Ariz. 337, 340-41, 86 P.3d 917, 920-21 (App. 2004).

<sup>13</sup>RA 54 at 4 (CV2014-015334).

<sup>14</sup>Answering Brief at 27.

for resignation, is a part of the club's bylaws. So the bylaws allow its members to resign.

## II. THE CLUB EXPANDS THE PURPOSE OF THE BYLAWS

The purpose that bylaws serve is defined by statute. Bylaws can “contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.”<sup>15</sup> The bylaws affect “the members as between themselves and in their relation to the association in all matters affecting its internal government and the management of its affairs.”<sup>16</sup> These are procedural matters, such as, the management of the company or voting rights. Clubhouse hours or golf course maintenance, *etc.* An unrestricted power to modify substantive rights via contract in the bylaws is wrong.<sup>17</sup>

The bill summary for A.R.S. § 10-3206 states that the legislature drafted the Nonprofit Corporation Act to “conform[] the regulatory and procedural aspects of nonprofit corporations. . . to those applicable to business and professional corporations so that the same procedures continue to apply to all corporations in

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<sup>15</sup>A.R.S. § 10-3206.

<sup>16</sup>*Savoca Masonry Co. v. Homes and Son Constr. Co.*, 112 Ariz. 392, 395, 542 P.2d 817, 820 (1975).

<sup>17</sup>Answering Brief at 49-50.



Arizona.”<sup>18</sup> To that effect, the bylaws of a corporation cannot force shareholders to remain shareholders. The bylaws must be construed consistently with corporate law; such a construction is consistent when Arizona law gives members the right to resign by statute.

### III. THE CLUB’S ANSWERING BRIEF DIVERGES FROM THE NARROW ISSUE ON APPEAL

The club raises arguments about the business-judgment rule and the potential destabilization of the club, but those arguments have no place in this appeal. This appeal concerns a narrow legal issue; whether a valid Arizona statute is part of the bylaws of a non-profit corporation. Neither party disputes that the bylaws are the applicable contract so far as the right to resign is concerned. The issue is whether the right to resign is part of the bylaws.

The club ignores the issue on appeal to spend a significant portion of its brief explaining how resignation of members will destabilize the club by reduction of revenue. These arguments are irrelevant red herrings. Apparently, the club thinks that if the bylaws must permit resignation, which they must by statute, none of its members will use the surrender/transfer/resale mechanism to transfer their memberships through the club and the club, like many businesses, will go out of

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<sup>18</sup>S., 1 Sess., Fact Sheet for S.B. 1355 (Ariz. 1997).

business. Courts are not guarantors of successful businesses. If a provision in a contract that made sense when the contract was formed is rendered meaningless as a result of changed economic circumstances, that has no bearing on interpreting the contract.<sup>19</sup> The club's equitable arguments addressing the changed circumstances are not relevant.

#### IV. CONCLUSION

Contracts must conform with the law and include valid statutes that affect them even if the statute is not mentioned in the contract. A.R.S. § 10-3620 is a valid statute that affects non-profit corporations. The club is a non-profit corporation. Its bylaws, without regard to the statute, do not modify or mention anything about resignation. But bylaws allow resignation because the statute does.

Besides, the bylaws could only modify the timing of resignation if the bylaws addressed resignation. But the bylaws do not modify the timing of resignation or even mention a process resembling resignation.

*Resignation* has meaning. *Resignation* means the end of any further obligations. Resignation is both the ability to check out of the Hotel California and to actually be able to leave. It is not a transfer or sale, for which there is a convoluted procedure under the bylaws. But this convoluted procedure does not impact the right to resign.

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<sup>19</sup>See *Miller v. Hehlen*, 209 Ariz. 462, 466, 104 P.3d 193, 197 (App. 2005).

The appellants had the right to resign from the club. Accordingly, the appellants ask this court to reverse the summary judgment in favor of the club and direct entry of summary judgment in the appellants' favor.

Dated this 14th day of July 2017.

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