SUMMARY
June 1, 2023

2023COA48

No. 22CA0700, *802 East Cooper v. Z-GKids* — Real Property — Common Interest Communities — Floor Area Ratio (FAR)

In this case, a division of the court of appeals determines whether development rights associated with unallocated floor space are severable from ownership of a condominium unit in Aspen, Colorado. The division concludes that where the applicable land use code is silent, but the condominium association's declaration links property rights to ownership of a condominium unit, an entity that has sold its condominium unit cannot retain a reserved right in the development of unallocated floor space.

Accordingly, the division affirms the judgment of the district court.

COLORADO COURT OF APPEALS **2023COA48**

Court of Appeals No. 22CA0700
Pitkin County District Court No. 21CV30069
Honorable Christopher G. Seldin, Judge

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802 East Cooper, LLC, a Colorado limited liability company,

Plaintiff-Appellant,

v.

Z-GKids, LLC, a Colorado limited liability company; Original Street Condominiums Inc., a Colorado non-profit corporation; Mona Hayles Long, as Trustee of the Mona Hayles Long Trust; Kimberly A. Raymond; Rickey Wark; and Cynthia Wark,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE DAILEY
Grove and Berger*, JJ., concur

Announced June 1, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 In this dispute over development rights in a condominium association, plaintiff, 802 East Cooper, LLC, appeals the district court's judgment dismissing its complaint against defendants, Z-GKids, LLC (Z-G); Original Street Condominiums Inc. (OSC); Mona Hayles Long, as Trustee of the Mona Hayles Long Trust (Long Trust); Kimberly A. Raymond; and Rickey and Cynthia Wark. We affirm.

I. Background

¶ 2 This case concerns the severability and ownership of development rights associated with unallocated floor area for four OSC condominium units in Aspen, Colorado.

¶ 3 The City of Aspen, through its Land Use Code (LUC), limits the amount of floor area that can be developed for buildings on residential lots within the city. *See* LUC § 26.104.100. The LUC has established a formula — the floor area ratio (FAR) — for calculating the allowable floor area for buildings on a residential lot. *See id.*; LUC §§ 26.575.020(d), 26.710.050. FAR is defined as the

"total floor area of all structures on a lot divided by the lot area."

LUC § 26.575.020(d)(2)(a)(v).[1]

> FAR regulates the amount of floor space on any given lot, by specifying a mathematical relationship between the area of that lot and the amount of floor space permitted on that lot. For example, a floor area ratio of 1.0 would permit the same number of square feet of floor space on a lot as there are square feet of lot area. Apart from other controls (which are of course necessary, particularly in residential districts), an FAR of 1.0 would therefore permit either a one-story building covering the entire lot, or a two-story building covering 50 percent of the lot, or a ten-story building covering 10 percent of the lot.

Norman Williams, Jr. & John M. Taylor, 1 *American Land Planning Law* § 38:1, Westlaw (rev. ed. database updated July 2021) (footnote omitted).[2]

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[1] LUC section 26.575.020(c) explains that a "property's development rights are derived from Net Lot Area." And net lot area is "[t]he total horizontal area contained within the lot lines of a lot or other parcel of land less those areas of the property affected by certain physical or legal conditions. (Also see Section 26.575.020, Calculations and Measurements)." LUC § 26.104.100. Thus, LUC section 26.710 uses net lot area to calculate the relevant FAR and establish the limitations on allowable floor area for the buildings on lots.

[2] Thus, in the City of Aspen, FAR strictly controls the size and amount of permissible expansion of a building on any given lot.

¶ 4 OSC's condominium declaration (the Declaration) went into effect before FAR was adopted as part of the LUC. The plan envisioned by the Declaration was for (1) "ownership in fee simple of real property estates consisting of the area or space contained in each of the apartment units in the building improvement"; and (2) "the co-ownership by the individual and separate owners thereof as tenants in common, of all the remaining real property (hereinafter defined and referred to as the 'General Common Elements')."[3] Consistent with this "plan," the Declaration (1) defined a "condominium unit" as "an apartment together with an undivided interest in the Common Elements appurtenant to such apartment"; and (2) provided that "[e]ach unit and the undivided interest in the General Common Elements and the Limited Common Elements, if any, appurtenant thereto, shall be inseparable and may be conveyed, leased, encumbered, devised, or inherited only as a condominium unit."

[3] Pursuant to the Declaration, the Unit 1 owner received a 50% ownership share of the common elements, the Unit 2 owner 23%, the Unit 3 owner 15.5%, and the Unit 4 owner 11.5%.

¶ 5 Z-G, the Long Trust, Raymond, and the Warks are the current owners of the four condominium units; 802 East Cooper is the former owner of Unit 1.

¶ 6 When 802 East Cooper sold its condominium interest to the Warks in 2019, it purported to reserve unto itself ownership of the development rights in unused floor space attributable to Unit 1. Further, 802 East Cooper required that the Warks obtain 802 East Cooper's written approval before agreeing to any modification of the condominiums' common elements.

¶ 7 In 2021, without having approved or received any notice of any development, 802 East Cooper learned that Z-G intended to use a portion of the OSC's unallocated floor space to expand its unit. 802 East Cooper then initiated the present action against defendants, asserting claims to quiet title as well as for declaratory judgment, conversion, injunctive relief, civil theft, unjust enrichment, and breach of contract.

¶ 8 Pursuant to C.R.C.P. 12(b)(5), defendants moved to dismiss all of 802 East Cooper's claims for failure to state a claim upon which relief could be granted. The district court granted the motion, concluding that development rights in unallocated floor area were

part of the common elements and inseverable from ownership of the condominium units themselves.

¶ 9 802 East Cooper now appeals.

II. Standard of Review

¶ 10 We review de novo a district court's ruling granting a C.R.C.P. 12(b)(5) motion to dismiss. *Giduck v. Niblett*, 2014 COA 86, ¶ 34.

¶ 11 Under the "plausibility standard" for determining whether a plaintiff has stated a claim upon which relief can be granted, "the factual allegations of the complaint must be enough to raise a right to relief 'above the speculative level'" and "state a claim for relief that is plausible on its face." *Warne v. Hall*, 2016 CO 50, ¶¶ 1, 9 (first quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); and then quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

¶ 12 In evaluating a C.R.C.P. 12(b)(5) motion to dismiss, a court may consider only the facts alleged in the complaint, documents attached as exhibits to or referenced in the complaint, and matters of which the court may take judicial notice, such as certain public records. *See Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents attached or

referenced in the complaint). We accept all averments of material fact in the complaint as true, *Giduck*, ¶ 34; and we view the allegations of the complaint in the light most favorable to the plaintiff. *Id.* However, "we are not required to accept as true legal conclusions that are couched as factual allegations." *Id.* (quoting *Fry v. Lee*, 2013 COA 100, ¶ 17).

¶ 13 A district court may dismiss a complaint if the substantive law does not support the claims asserted. *Defend Colo. v. Polis*, 2021 COA 8, ¶ 39.

III. The District Court Properly Dismissed the Complaint

¶ 14 802 East Cooper contends that the district court erred by dismissing its complaint. The court did so, 802 East Cooper argues, as a result of erroneously (1) interpreting the LUC's and Declaration's silence regarding FAR to mean that FAR must be treated as a common element even though FAR does not satisfy any of the Declaration's definitions of a common element; (2) adding a new term to the Declaration, treating FAR as a common element, inseverable from individual unit ownership; and (3) failing to recognize that other unit owners had used unallocated FAR, apart

from common ownership and for their own expansion projects. We disagree.

¶ 15 It is true that the LUC does not require that FAR be treated as a common element. But neither does it prohibit it from being treated as such.

¶ 16 It is also true that the Declaration does not specifically address how FAR should be treated; how could it, since the Declaration was created prior to the creation of the FAR concept in the LUC?

¶ 17 But these circumstances do not inevitably point to FAR being a severable interest apart from condominium ownership. Whether FAR is or isn't a severable interest depends on an interpretation of the contents of the LUC and Declaration.

¶ 18 As the parties acknowledge, the current version of the LUC does not contain any "content" pertinent to the question.[4] But defendants assert, and we agree, that the Declaration does, and

[4] There is no language in the LUC that indicates if, and if so, how, FAR is allocated between multiple residences existing in a single parcel. Instead, the LUC allocates FAR to the property as a whole.

that the issues on appeal thus turn on an interpretation of the Declaration's language.

¶ 19 We review the district court's interpretation of a covenant or other recorded instrument de novo. *Pulte Home Corp. v. Countryside Cmty. Ass'n*, 2016 CO 64, ¶ 23.

¶ 20 We apply principles of contract interpretation, construing the instrument as a whole and "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Id.* (quoting *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009)).

¶ 21 Our goal in interpreting a recorded instrument is to ascertain and give effect to the intentions of the party or parties who created the instrument. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235 (Colo. 1998). We ascertain the parties' intent primarily from the language of the instrument itself. *Gagne v. Gagne*, 2014 COA 127, ¶ 51 (interpreting contracts). "[W]e give words and phrases their common meanings and will enforce such documents as written if their meaning is clear." *Pulte Home Corp.*, ¶ 23.

¶ 22 If the language of a recorded instrument "accurately and unambiguously reflects the intentions of the parties," we must "give

effect to the language" of the instrument. *Lazy Dog Ranch*, 965 P.2d at 1236. If, however, the meaning of the document on which the case turns is ambiguous (that is, susceptible of more than one reasonable interpretation), a district court should deny the Rule 12(b)(5) motion to dismiss and give the plaintiff a chance to present its case on the merits. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 915-16 (Colo. 1996).

¶ 23 "[D]isagreement between the parties 'regarding the interpretation of the [document] does not itself create an ambiguity in the [document].'" *Filatov v. Turnage*, 2019 COA 120, ¶ 10 (quoting *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997)).

¶ 24 Here, we perceive no ambiguity in the Declaration.

¶ 25 The Declaration establishes

> a plan for the ownership in fee simple of real property estates consisting of the area or space contained in each of the apartment units in the building improvement and the co-ownership by the individual and separate owners thereof, as tenants in common, of all the remaining real property.

¶ 26 The Declaration also states that "the following terms, covenants, conditions, easements, restrictions, uses, limitations,

and obligations shall be deemed to run with the land" as a burden and benefit to any person "acquiring or owning interest in the real property and improvements."

¶ 27 The Declaration says that, unless the context "expressly provide[s] otherwise," the following definitions apply:

- Per paragraph 1(c), "'Condominium Unit' means an apartment together *with* the undivided interest in the Common Elements appurtenant to such apartment." (Emphasis added.)
- Per paragraph 1(g), "Common Elements" means:

> (1) The real property upon which the building is located.
>
> (2) The foundation, columns, girders, beams, supports, main walls, and roof as shown on the Map.
>
> (3) Such partly or entirely enclosed air spaces as are provided for community or common use.
>
> (4) *All other parts of the property* necessary or convenient to its existence, maintenance and safety or normally in common use.

(Emphasis added.)[5]

- And per paragraph 1(j), "'Property' means and includes the land, the building, all improvements and structures thereon, and all rights, easements and appurtenances belonging thereto."

¶ 28 The Declaration then identifies two types of ownership: (1) ownership of condominium units (in, as noted above, fee simple); and (2) ownership of "common elements" (in, as also noted above, undivided interests as tenants in common).

¶ 29 As the LUC indicates, FAR — or allowable floor area — is a development right that belongs to the entire property. *See Vill. at Treehouse, Inc. v. Prop. Tax Adm'r*, 2014 COA 6, ¶ 22 ("[T]ransferable development rights . . . 'are appropriately viewed as one of the fractional interests in the complex bundle of rights

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[5] The Declaration breaks down the "common elements" into "limited" and "general" common elements: per paragraph 1(h), "General Common Elements" are "those parts of the Common Elements not designated as 'Limited Common Elements'"; and per paragraphs 1(i) and 4, "Limited Common Elements" are "those parts of the Common Elements reserved for the exclusive use of the Owners of less than all of the Condominium Units in the building," consisting of "the grounds and improvements (other than the units) . . . associated and used with the apartment unit to which each such Exclusive Use area is assigned on the Map."

arising from the ownership of land.'" (quoting *Mitsui Fudosan (U.S.A.), Inc. v. County of Los Angeles*, 268 Cal. Rptr. 356, 357-58 (Ct. App. 1990)). And by its very nature, a development right in unallocated FAR would not apply to the established condominium units, but, rather, only to ownership interests in "common elements." This conclusion is supported by the Declaration's definitions of "common elements" (which includes "*other [unidentified] parts of the property*") and "property" (which includes "all *rights*, easements and appurtenances" belonging to "the land, the building, and all improvements and structures thereon"). (Emphasis added.)

¶ 30 And the inseparability of FAR, as a common element "property right," from the ownership of a condominium unit itself is made clear by Declaration paragraphs 5 and 9, which provide, respectively, that (1) "[e]ach unit and the undivided interest in the General Common Elements and the Limited Common Elements, if any, appurtenant thereto shall be inseparable and may be conveyed . . . only as a condominium unit"; and (2) "[t]he Common Elements shall be owned in common by all of the owners of the condominium units and shall remain undivided." The plain language of these

provisions expressly forbids precisely what 802 East Cooper hoped to accomplish: cleaving an interest in an undeveloped, common element — here, FAR rights — from the actual condominium itself. *See B.B. & C. P'ship v. Edelweiss Condo. Ass'n*, 218 P.3d 310, 316 (Colo. 2009) (holding an agent of the condominium association could not sell the parking space to a noncondominium owner in direct contradiction of the plain language of the association's declaration).

¶ 31 Finally, we reject, as misplaced, 802 East Cooper's reliance on the prior conduct of other condominium owners in interpreting the Declaration. So far as we can discern, the parties' prior conduct did not relate to the issue raised in this case (i.e., whether FAR is severable from condominium ownership).[6] And parties' prior conduct may be considered in interpreting an ambiguous term, *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 625 (Colo. App. 2004), but not when, as here, "the language of the [document] is

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[6] The prior conduct relates to a 2011-2012 expansion project in which two OSC unit owners (who are parties to this suit) allegedly used unallocated FAR without approval or consent from the other OSC owners (one of whom was 802 East Cooper's predecessor in interest).

clear and unequivocal and subject to only one interpretation." *T. W. Anderson Mortg. Co. v. Robert Land Co.*, 480 P.2d 109, 110-11 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)).[7]

¶ 32 Because unallocated FAR is a right belonging to all of the condominiums as a common element and the plain language of the Declaration prohibits severing interests in the common elements from ownership of the condominium units, the Declaration unambiguously precluded 802 East Cooper from retaining any rights to unallocated FAR following the sale of Unit 1. And because (as confirmed by 802 East Cooper's counsel at oral argument) all of 802 East Cooper's claims are premised on ongoing ownership in unallocated FAR, the district court properly dismissed 802 East Cooper's complaint.

IV. Appellate Attorney Fees

¶ 33 We reject defendants' request for an award of appellate attorney fees.

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[7] We note that, in its opening brief, 802 East Cooper summarily contends in a footnote that defendants' past conduct effected a waiver of the argument that FAR is a common element. Because 802 East Cooper did not make that contention in the district court or properly develop it on appeal, we do not address it. *See Cikraji v. Snowberger*, 2015 COA 66, ¶ 21 n.3.

> If attorney fees are recoverable for the appeal, the principal brief of the party claiming attorney fees must include a specific request, and explain the legal and factual basis, for an award of attorney fees. Mere citation to this rule or to a statute, without more, does not satisfy the legal basis requirement.

C.A.R. 39.1.

¶ 34 In their brief, defendants recite, in total, as the "legal and factual basis" for an award "the reasons set forth in . . . [their] pending motions" in the district court. They cite no specific reason or authority for their pending motions; they only incorporate arguments made to the district court. That doesn't work on appeal. *See Cikraji v. Snowberger*, 2015 COA 66, ¶ 22 ("Because these defendants failed to state a legal basis for their request, they are not entitled to appellate attorney fees."); *Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006) (incorporating by reference arguments made in the trial court improperly "attempts to shift — from the litigants to the appellate court — the task of locating and synthesizing the relevant facts and arguments").

V. Disposition

¶ 35 The judgment is affirmed.

JUDGE GROVE and JUDGE BERGER concur.