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THE SUPERIOR COURT OF ARIZONA

COUNTY OF NAVAJO

Gordon Gross and Liliana Gross, husband and wife *et al.*, Plaintiffs, vs. The Shores at Rainbow Lake Community Association, an Arizona nonprofit corporation, Defendant.	Case No.: S0900CV202200042 **RESPONSE TO PRELIMINARY INJUNCTION**

The Court should deny the Motion for Preliminary Injunction because the business interests of a tiny minority of owners (7 of 188) is not a valid reason to grant a second bite at the apple after they participated in a year-long procedure resulting in an super-majority of the owners (greater than 126/188) approving an amendment to the Declarations. The Board was required by contract and by statute to record the Amendment. Plaintiffs therefore lack "a strong likelihood of success," fail to show "the possibility of irreparable harm" and fail to show "public policy favors" granting the injunction.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

Defendant is a not-for-profit corporation with its members being the 188 owners of residential property in the planned community[1] known as The Shores at Rainbow Lake Community. This is a private gated community in Show Low, Arizona and is governed by a Board of Directors, who are elected by the 188 owner/members.

Plaintiffs comprise a tiny (3.7%) fraction of the 188 members. Plaintiffs all agreed to comply with the Declarations "as it may be *further amended* from time to time." Plaintiffs alleged and Defendant admits the Amendment received approval by the proper number of members. Plaintiffs contractually required the Defendant to record the Amendment. *See* Complaint, Ex. 2, p. 40 (any amendment receiving the proper approval "shall be signed by the President . . . and shall be recorded with the County Recorder"). The Arizona legislature set public policy for Planned Communities and required the Amendment be recorded. *See* A.R.S. § 33-1817(A)(3) (Board must upon receipt of sufficient consents "prepare, execute and record a written instrument setting forth the amendment.").

Plaintiffs seek the Court's order requiring Defendant to disobey the statutory mandate and the mandatory requirement of the contract (the Declarations).

A. The High Bar to Meet to Obtain Injunctive Relief.

The party requesting a preliminary injunction must show:

> (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive

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[1] A "planned community" is a development that includes real estate owned and operated by a non-profit corporation such as an HOA. *See* A.R.S. § 33-1802. The legislature regulates planned communities under the Planned Communities Act, A.R.S. §§ 33-1801 1818. Similar statutes regulate condominiums. A.R.S. §§ 33-1201-1270.

> relief. To meet this burden, the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party. This is a sliding scale, not a strict balancing of factors. The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger.

Fann v. State, 251 Ariz. 425, 432, ¶ 16 (2021) (internal quotation marks and citations omitted).

Injunctive relief is available only where the possibility of irreparable injury is "not remediable by damages." *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990) (explaining that a party must show "[t]he possibility of irreparable injury . . . if the requested [injunctive] relief is not granted" (citations omitted)).

[T]he party seeking an injunction must show a possibility of irreparable injury 'not remediable by [monetary] damages'" (quoting *Shoen*, 167 Ariz. at 63)). *See IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 65, ¶ 10 (App. 2011) Plaintiffs' Complaint expressly alleges monetary damages and Plaintiffs did not establish why the alleged monetary damages are inadequate to remedy the alleged breach. Plaintiffs fail to show the alleged act of recording an Amendment passed by greater than a 2-1 majority relates to the alleged irreparable harm.

Plaintiffs' contract with the Defendant expressly directed and required Defendant's Board to record an Amendment consented to by more than 67% of the owners/members. The Defendant's Board was mandated by statute to record an Amendment that passed by the required number of owners/members. As discussed below, Plaintiffs do not present a "strong likelihood of success."

B. General purpose of Declarations and other Restrictions

The Community has always been subject to a set of restrictive covenants and declarations (the "Declarations"). The Community is also subject to a set of Association

Rules which the Board "may adopt, amend and repeal" and that "may restrict and govern the use of any area by any Member, Lessee or Resident." Plaintiffs' agreed these Rules "shall have the same force and effect as they were set forth in and were part of this Declaration." Complaint, Ex. 2 (Amended, Restated Declarations), p. 22. The Declarations and Rules comply with the Planned Community Property Act.

C. **Prior Existing Restrictions on Rentals**.

Since the passage and approval of the 2001 Amended and Restated Declarations, a member's/owner's use of their property was limited to use by a "Single Family[2]" "devoted exclusively to Single Family residential use." Complaint, Ex. 2, p. 12. Although the 2001 Declarations allowed a member/owner to lease property, the tenant is likewise limited to a Single Family and the use of a lot is always restricted "exclusively to Single Family residential use." *Id.* The number of guests allowed has also been subject to restriction. *See* Complaint, Ex. 2, p. 19 ("The Board shall have the right to limit the number of guests and invitees[.]"

If property is leased, the owner/member/landlord is required to notify the Association and provide "the commencement date and termination date of the lease and the names of each lessee or other person who will be occupying the Lot during the term of the lease." *Id.* at p. 16. During the time of the lease the tenant has the right to use common areas, but the member/owner/ landlord "shall have no right to use the Common Area until the termination or expiration of such lease." *Id.* at p. 18-19.

The required information regarding leases allows the Board to measure if the tenant is a "Single Family," if they are using the property as their residence and if they are inviting more guests than should be allowed.

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[2] Defined as "a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of persons not all so related, who maintain a common household in a Residential Unit."

The 2001 Amended and Restated Declarations specify that "business" and "nonresidential use" shall have their "ordinary, generally accepted meanings." *See* Complaint, Ex. 2, p. 12, Section 2.18. The 2001 Amended and Restated Declarations stated "The leasing of a residency by the Owner thereof shall not be considered a trade or business within the meaning of this section."

Plaintiffs expressly agreed that any of these restrictions may "be amended by the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership." *Id*. at p. 40.

The Arizona legislature defines "transient lodging" and "online transient lodging" to be the lease of property for less than 30 days. *See* A.R.S. § 42-5070 (F)("For the purposes of this section, "transient" means any person who either at the person's own expense or at the expense of another obtains lodging space or the use of lodging space on a daily or weekly basis, or on any other basis for less than thirty consecutive days." *See also* A.R.S. § 42-5076 (defining "Online transient lodging transaction" as defined in section 42-5070, i.e., less than 30 days).

Other jurisdictions draw a distinction between use of property for transient housing and use as "residential use". *See McEwan v. Bd. of Supervisors of the Cty. of Fairfax Va.*, 103 Va. Cir. 238 (Cir. Ct 2019) ("The Court agrees that a house rented through Airbnb for less than 30 days is excluded from the definition of 'dwelling' because it is an 'accommodation used for more or less transient occupancy.'"); *City of New York v. Big Apple Mgmt*., 2019 N.Y. Misc. LEXIS 1804 ; 2019 WL 1744268 (Supreme Ct, of New York 2019) (describing property advertised on Airbnb as constituting the "conversion of the Subject Buildings from residential to transient use.").

The 2001 Declarations did not include an express duration for when leases to a Single Family would be considered "residential." Although the 2001 Declarations

stated "The leasing of a residency by the Owner thereof shall not be considered a trade or business within the meaning of this section," this statement is subject to refinement or even change by amendment approved by 67% of the members.

D. Plaintiffs' Revolution and the Push toward 2021 Amendment.

In Plaintiffs' Motion, Plaintiffs describe the growth of on-line rental platforms as having "revolutionized" the vacation rental industry. *See* Motion, p. 6, lines 4-5. In less than 10 years, Airbnb grew to be worth more than $30 billion by serving over 150 million guests through its on-line rental platform. *See* "About Us," AIRBNB, *https://www.airbnb.com/about/about-us* [*https://perma.cc/UWX4-95H5*], *see also* "Airbnb Is Now Worth $ 30 Billion," Business Insider (Aug. 6, 2016), *http://www.businessinsider.com/airbnb-raises-850-million-at-30-billion-valuation-2016-8* [*https://perma.cc/KWD5-8XKY*].

As with any revolution, the change brought by billion dollar companies like Airbnb can cause problems, which cities have addressed by revising their zoning ordinances to specifically limit transient guests in residential neighborhoods. Examples of such include Austin, Texas[3], and Santa Monica, California.[4]

1. Arizona allows planned communities to restrict lease durations.

The Arizona legislature regulates the large property associations. *See* A.R.S. 33-1260.01 and 33-1806.01 (governing condominiums and residential property associations). The Arizona legislature states it is good public policy that Associations in planned communities *can* prohibit rentals and *can* restrict rental time periods by stating an owner in a planned community can use their property:

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[3] *See, e.g.,* § 25-2-795 – Occupancy Limits for Short-term rentals, at https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT25LADE_CH25-2ZO_SUBCHAPTER_CUSDERE_ART4ADRECEUS_DIV2COUS_S25-2-807SPUSHIDI

[4] Santa Monica, Cal., Municipal Code ch. 6.20 (2015), http://www.qcode.us/codes/santamonica

> ". . . as a rental property *unless prohibited in the Declaration* and shall use it in accordance with *the Declaration's rental time period restrictions*."

A.R.S. § 33-1806.01(A). The "Declarations" are defined to include any amendments. *See* A.R.S. § 33-1802(3) (defining "declaration" to include any amendments).

In this case, owner/members of The Shores at Rainbow Lake complained that the "revolution" caused by daily rentals advertised by commercial enterprises like Airbnb were causing unwanted problems. In 2020 the Defendant's Board conducted a straw poll to ask its members/owners to provide the Board with direction on how best to serve the general purpose of the Association, which includes "protecting the value and desirability" of the properties and restricting nonresidential, transient lodging.

An overwhelming majority of the owners/members believed limiting transient lodging within the gated community by including "*rental time period restrictions*" was appropriate, which they did by redefining a lease that already must be "exclusively to Single Family [for] residential use" to be a lease of 30 days or longer. This 30-days or longer requirement adopted by the members/owners mirrors the definition of transient lodging, which is defined to be less than 30 days. *See* A.R.S. § § 42-5070 (F) and 42-5076. The Arizona legislature expressly allowed a planned community to limit duration of leases. A.R.S. § 33-1806.01(A).

2. The owners/members consented to an Amendment.

In December 2020, the Board provided its members/owners with a proposed Amendment. While the member/owners were indicating their preference, one of the owners who used his property as vacation rental wrote a persuasive opinion column in the local newspaper and expressed his hope that other members/owners would join him in withholding consent to the proposed amendment. *See* Ex. No. 1, hereto, (copy of White Mountain Independent letter to editor titled "Short term rentals no ruining neighborhood"). His letter was in response to an opinion column submitted by another

owner, who believed transient lodging caused unwanted problems. *See* Ex. 2 (copy of White Mountain Independent opinion/editorials column titled "Short-term rental battle in Lakeside neighborhood").

The number of consents of members/owners kept rolling in. When the Association received consents from more than 67% of the members, the Board was contractually obligated to record the Amendment. *See* Complaint, Ex. 2, p. 40 (any amendment receiving the proper approval "shall be signed by the President . . . and shall be recorded with the County Recorder[;]") *see also* A.R.S. § 33-1817(A)(3) (Upon receive of sufficient written consents Board "shall prepare, execute and record a written instrument setting forth the amendment.").

After the voting period was over, 7 of the 188 members/owners were sore losers, unwilling to comply with the super-majority's approval and now ask the Court to overturn what was a year-long process in amending the Declarations.

II. Legal Analysis

The Declarations attached as Ex. 2 to the Complaint are *Amended* and Restated Declarations passed by the required number of approvals in 2001. As a matter of contract and a matter of law, Plaintiff knew there were prior amendments and agreed there could be further amendments. The very definition of the "Declaration" is the Declarations "as it may be *further amended* from time to time." Complaint, Ex. 2, p. 4, para. 1.17; *see also* A.R.S. § 33-1802(3) (defining "declaration" to include any amendments).

The Declarations at Complaint, Ex. 2, p. 40, para. 9.2, allows further amendments be approved in a certain manner, with some amendments subject to approval by the Board without member consent and all other amendment be subject to:

> "the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership."

The Arizona legislature likewise recognizes it is good public policy to allow a planned community to self-govern, including by passing amendments. A.R.S. § 33-1817(A)(1) provides:

> A. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
>
> 1. The declaration may be amended by the association, if any, or, if there is no association or board, the owners of the property that is subject to the declaration, by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.

Here, Amended and Restated Declarations were amended in 2021 "by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration." Defendant's Board then did what the statute required, which was to "prepare, execute and record a written instrument setting forth the amendment." *See* A.R.S. § 33-1817(A)(3).

Because the Declarations once stated "The leasing of a residency by the Owner thereof shall not be considered a trade or business within the meaning of this section," then every Owner knew that definition could be redefined, changed or modified by amendment.

A. Contracts and Statutes Required the Recording of the Amendment.

The Declarations are a contract "between the subdivision's property owners as a whole and individual lot owners," *Ahwatukee Custom Ests.*, 196 Ariz. 631, ¶ 5, and are interpreted "to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding [its] creation . . . and to carry out the purpose for which it was created," *Powell v. Washburn*, 211 Ariz. 553, ¶ 13 (2006). To determine intent, the Declarations are read at as a whole and the Courts apply the

settled principle that "a covenant should not be read in such a way that defeats the plain and obvious meaning." *Ariz. Biltmore Ests. Ass'n v. Tezak*, 177 Ariz. 447, 449 (App. 1993); *Town of Marana v. Pima County*, 230 Ariz. 142, ¶ 21 (App. 2012) (a court must "give effect to the agreement as written"). It is the presumption that "private parties are best able to determine if particular contractual terms serve their interests," *1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 202, ¶ 8 (2008).

The societal benefits arising from the freedom of parties to contract are high. The Arizona Supreme Court warned that courts must therefore be "hesitant to declare contractual provisions invalid on public policy grounds." *Id.* The Court further stated ""[o]ur law generally presumes . . . that private parties are best able to determine if particular contractual terms serve their interests." Public policy exceptions to enforcing contracts are limited by the following test:

> [A]bsent legislation specifying that a contractual term is unenforceable, courts should rely on public policy to displace the private ordering of relationships only when the term is contrary to an otherwise identifiable public policy that clearly outweighs any interests in the term's enforcement.

Id., citing Restatement (Second) of Contracts § 178 (1981).

In this case, there is no legislation "specifying that a contractual term is unenforceable." To the contrary, the Arizona legislature expressly allows Associations of planned communities to provide in their Declarations a limit on the duration of a rental. *See* A.R.S. § 33-1806.01(A). The Arizona legislative public policy requires amendments be adopted "by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration." A.R.S. § 33-1817(A)(1). The Arizona legislature required Associations to record Amendments if the Amendment received the required number of consents. *Id* at (A)(3).

Defendant followed the policy the legislature adopted for planned communities. *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 54, 839 P.2d 1093, 1099 (1992) ("We also construe a statute in a manner that 'will best serve the legislature's purposes, policies, and goals' apparent from the whole body of relevant law. *Tracy v. Superior Court*, 168 Ariz. 23, 31, 810 P.2d 1030, 1038 (1991).") Plaintiffs' request that the Court ignore the statutory requirements would not "serve the legislature's purposes, policies and goals" and is therefore against public policy. *Id*.

B. Public Policy Favors Enforcement of Contracts.

One of the most important "public policies" to consider is the public policy in favor of enforcement of contracts. *Balt. & O. S. R. Co. v. Voigt*, 176 U.S. 498, 505-06 (1900). In this 122 year-old opinion, Justice George Shiras stated:

> At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir. George Jessel, *M.R., in Printing Co. v. Sampason, L.R.* 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider -- that you are not lightly to interfere with this freedom of contract."

[Emphasis supplied].

The public policy behind enforcing contracts and complying with legislature policy led to the Court of Appeals enforcing a planned community's amendment that

defines residential leasing as a lease greater than 30 days. *See e.g.,* *Nicdon 10663, LLC v Desert Mountain Master Association*, 2021 WL 1691532, 2021 Ariz. App. Unpubl LEXIS 489 (April 29, 2021) *pet. for rev. denied* January 4, 2022 (affirming amendment to limit vacation rentals by requiring leases of 30 days or longer). The Amendment in this action likewise requires leases to be 30 days or longer.

C. Equity Follows the Law.

The Community's super-majority's consent to the Amendment complied with the statutory scheme set forth in the Arizona Planned Communities Act. A.R.S. §§ 33-1801-1818. Under these statutes, the Community members can rent their property "unless prohibited in the declaration" or subject to "the declaration's rental time period restrictions." A.R.S. § 33-1806.01. The "Declarations" are defined to include any amendments. A.R.S. § 33-1802(3)(defining "declaration" to include any amendments).

The Declarations may be amended by the "number of . . . eligible voters specified in the declaration." § 33-1817(A)(1). The Amendment, on its face, applies to all 188 lots. This satisfies the requirement of uniform application. *See La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 237-39, 689 P.2d 178 (App. 1984) (invalidating restriction for non-uniform application where amendment specifically excluded some property).

Plaintiffs are not entitle to equitable relief such as an injunction because equity follows the law. *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 473, (1966) ("Newzona complains that appellants are seeking a harsh remedy and that such an interpretation of the contract is inequitable and therefore should not be adopted as the law of the case. But equity follows the law").

D. Plaintiffs' Offer No Public Policy Exception to Enforcement.

Plaintiffs may direct the Court's attention to the recent decision *of Kalway v. Calabria Ranch HOA, LLC*, -- Ariz. -- (2022). They may assert the *Kalway* decision does

not permit a super-majority of owners at the Planned Community of The Shores at Rainbow Lake to redefine, change or alter the limits previously in place for residential rentals within the gated community. However, *Kalway* did not consider the issues present in this action.

Kalway involves five lots covered by a restrictive covenant. In *Kalway*, if a *simple majority* of the five lot owners approved an amendment, the amendment passed. The restrictive covenants in *Kalway* were not subject to legislative regulation because the five owners were not in a Planned Community and not subject to the Planned Community Act. The *Kalway* Court never considered the legislative requirements under the Planned Community Act.

In this action, The Shores at Rainbow Lake is a Planned Community. The Shores at Rainbow Lake are run by a Board elected by the 188 members. The Shores at Rainbow Lake have always regulated and defined permissible rentals. An amendment to the Declarations in The Shores at Rainbow Lake require a super-majority of more than 67%. For a Planned Community, the legislature set public policy and required an amendment is valid if approved "number of . . . eligible voters specified in the declaration." § 33-1817(A)(1), as occurred here. If the number of required voters approved an amendment, the legislature requires the Board "prepare, execute and record a written instrument setting forth the amendment." *See* A.R.S. § 33-1817(A)(3), as occurred here. The Arizona Supreme Court would follow legislative public policy for Planned Communities. *Collier v. O'Neil*, 63 Ariz. 320, 322-23 (1945) ("Courts do not make the law. That function of our government is left to the legislature.")

Moreover, the *Kalway* decision simply stands for the rule that under contract law (but not necessarily under the Planned Community Act), an amendment to a contract is allowed as long as "The original declaration must give sufficient notice of the

possibility of a future amendment; that is, amendments must be reasonable and foreseeable." *Kalway*, para. 10.

Even if the Planned Community Act did not set the public policy on how planned communities can pass amendments, the amendment here would be valid under *Kalway*. First, the *Amended* and Restated Declarations by its own title gives notice of "possibility of a future amendment," and so the Amended and Restated Declarations. *See* Complaint, Ex. 2, p. 40. Second, the 2001 *Amended* and Restated Declarations restricted rentals to Single Families and then only if "devoted exclusively to Single Family residential use." The Declarations further allowed restrictions on "invitees" of tenants. *See* Complaint, Ex. 2, p. 19 ("The Board shall have the right to limit the number of guests and invitees[.]" Third, the 2001 Amended and Restated Declaration specified the leasing would not be considered non-residential use, a definition that was equally subject to redefinition, modification or change.

In *Kalway*, the Court affirmed as valid the amended definition of garage because garage was mentioned in the original restrictive covenants. Here, the *Kalway* Court would likewise find the 2001 Amended and Restated Declarations mentioned, limited and defined what was considered proper residential leasing – and therefore would find as valid the redefinition, modification or change to what is considered proper residential leasing. This explains *Desert Mountain Master Association*, 2021 WL 1691532, 2021 Ariz.App. Unpubl LEXIS 489 (April 29, 2021) *pet. for rev. denied* January 4, 2022 (affirming amendment to limit vacation rentals by requiring leases of 30 days or longer The *Desert Mountain* decision applied the Planned Community Act, as this Court must.

III. CONCLUSION

A super-majority of greater than 67% of the members approved a refinement to the existing Amended and Restated Declarations. Rentals are still permitted but only if to Single Families, only if "devoted exclusively to Single Family residential use," and

now only if 30 days or longer. In compliance with the terms of the Declarations and in compliance with the requirements of the Planned Community Act, if greater than 67% of the members approve an amendment, the amendment is valid. In compliance with the terms of the Declarations and in compliance with the requirements of the Planned Community Act, the Board was required to record the Amendment.

Plaintiffs participated in the approval process. If they "won," they would have accepted the result but because over 67% approved the amendment, they want the Court to interfere in a statutorily approved method of amending a Declaration. This Court should not approve an injunction.

If the Court believes Plaintiff established a right to an injunction, then Defendant requests to be heard separately on the subject of the required surety bond. The bond must be sufficient to cover damages suffered to the Community, which in this case is restitutionary damages.

DATED this 28th day of March 2022.

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