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11 **THE SUPERIOR COURT OF ARIZONA**  
12 **COUNTY OF NAVAJO**

13 Gordon Gross and Liliana Gross,  
14 husband and wife *et al.*,

15 Plaintiffs,

16 vs.

17 The Shores at Rainbow Lake  
18 Community Association, an Arizona  
19 nonprofit corporation,

20 Defendant.

Case No.: S0900CV202200042

**RESPONSE TO MOTION FOR  
SUMMARY JUDGMENT**

**CROSS-MOTION FOR SUMMARY  
JUDGMENT ON SAME ISSUES**

21 Defendant requests the Court deny Plaintiff's Motion for Partial Summary  
22 Judgment and grant this Cross-Motion because (1) the 2021 Amendment passed with  
23 the 67% majority required by the Declarations, (2) the Amendment passed in  
24 compliance with the Planned Community Act, (3) the [Dreamland](#) and [Kalway](#) opinions  
25 do not address amendments passed by a supermajority or in compliance with the  
26 Planned Community Act and (4) even if those opinions apply to associations regulated  
by the Planned Community Act, the amendment fully satisfies the non-statutory  
requirements stated in [Dreamland](#) and [Kalway](#).

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction.

3 In their motion, Plaintiff's claim the 2020 Court of Appeals Opinion in Dreamland  
4 as adopted by the Arizona Supreme Court's 2022 Opinion in Kalway, prohibits virtually  
5 any amendment to a set of Declarations unless next to each provision in the original  
6 Declarations appears a warning stating, "this specific provision is subject to further  
7 amendment." Plaintiff's analysis of Dreamland and Kalway is flawed.

8 Neither Dreamland nor Kalway considered a highly regulated Planned  
9 Community (i.e., where the Association owns common areas and must consider the  
10 cost of maintaining and repairing common areas based on how each Owner's use may  
11 impact the common areas). See Arizona Planned Communities Act, A.R.S. §§33-1801 et  
12 seq. Both Dreamland and Kalway dealt with amendments that passed by a mere 51%  
13 majority and not the 67% supermajority required in this case. However, applying  
14 Dreamland and Kalway to the facts at hand requires one conclusion; namely, the 2021  
15 Amendment that excluded transient lodging from the type of leases within the Shores  
16 at Rainbow Lakes Community considered to be "devoted exclusively to Single Family  
17 residential use" is valid.

18 In Kalway, the Court discussed an aspect of the proposed amendment pertaining  
19 to garages. Concerning the amendment about garages, the Kalway Court stated:

20 Although "Garage" was not defined in the original declaration we find its  
21 inclusion permissible because § 3.3 of the original declaration referenced a  
22 "garage." Thus, a later amendment defining the term was reasonably  
23 foreseeable.

24 In this matter, because the 2001 Amended and Restated Declarations reference leases,  
25 lessees, and tenants many, many times, if Kalway applies to communities regulated by  
26 the Planned Community Act, the Arizona Supreme Court would therefore conclude:

"Thus, a later amendment defining the term was reasonably foreseeable."

1 **II. Legal Analysis**

2 **A. The Many Pre-Existing Restrictions on Leasing.**

3 Plaintiffs claim there were virtually no pre-existing restrictions on leasing and  
4 therefore they had no notice that any restrictions could be changed by an amendment.  
5 But that is not correct and not what the Court of Appeals will say.

6 In Plaintiffs' Complaint, p. 11, paragraph 70, Plaintiffs refer to the unreported  
7 decision of *Horton v. Hartsook*, a 2009 decision considering the virtually identical  
8 Declarations (see *Horton*, footnote 1) of Defendant and its sub-community called the  
9 Cove. In that dispute between two private owners, the Court of Appeals recognized  
10 the Declarations in 2009 (before the 2021 Amendment at issue in this action) mentioned,  
11 restricted, and defined the leasing by stating as follows:

12 It is undisputed the Declaration allows owners to lease their units; leasing is  
13 expressly permitted in section 5.28. **The Declaration restricts leasing** in some  
14 ways, such as, **the requirement that leases be in writing and that an owner**  
15 **notify the HOA of a commencement date and termination** date for the lease.  
16 However, there is no restriction on the duration of a lease. The Declaration does  
17 not distinguish between short-term and long-term leasing, but allows leasing in  
18 general. In addition, the Declaration's definition of "**single family residential**  
19 **use**" does not limit the duration of use or occupancy. The Declaration also  
20 **exempts leasing** from consideration as a **prohibited business or trade** under  
21 section 5.1

22 [Emphasis supplied.] *Horton v. Hartsook*, [2009 WL 2244503](#), [2009 Ariz. App. Unpub.](#)  
23 [LEXIS 974](#) (App. 2009). Although the unreported *Horton* decision may not be  
24 controlling, this Court should reach the conclusion that the pre-Amendment  
25 Declarations expressly define, permit, restrict, limit, and govern leasing and tenants'  
26 use of the Lots and common areas within the exclusive gated community.

Under the 2001 Restated and Amended Declarations, the term "lease" is first  
referenced in [Section 1.29](#). [Section 1.36](#) further states a lessee or tenant is not considered  
an "Owner" under the Declarations. [Section 2.18](#) provides the "leasing of a residence  
by an Owner thereof shall not be considered a trade or business within the meaning of

1 this section [2.18],” but, any Owner or tenant is governed by the requirement that any  
2 use of a Lot “shall be . . . devoted exclusively to Single Family residential use.” See  
3 [Section 2.18](#). (Excerpts from Declarations attached as pp. 18-22, hereto).

4 The term “Single Family” is defined at [Section 1.47](#) in the 2001 Declarations and  
5 can be redefined in the 2021 Amendment. However, what is considered “residential  
6 use” is not defined in the 2001 Declarations, leaving that term subject to interpretation  
7 regarding if “residential use” includes or excludes transient lodging (statutorily  
8 defined as a lease for less than 30 days).<sup>1</sup> Because the Declarations “reference” the term  
9 “residential use” and excludes leasing from the definition of “a trade or business,” a  
10 “later amendment defining the term was reasonably foreseeable.” *Kalway*.

11 The 2001 Restated and Amended Declarations limit the right to lease for “Single  
12 Family residential use” to the lease of not less than the entire Lot, and requires owners  
13 to “promptly notify the Association of the commencement date and termination date  
14 of the lease and names of each lessee or other person who will be occupying the Lot  
15 during the term of the lease. See [Section 2.30](#). The Court of Appeals in *Nicdon v. Desert*  
16 *Mountain Master Association* discussed similar provisions when approving a Planned  
17 Community’s amendment limiting vacation rentals by prohibiting transient lodging  
18 under the Planned Community Act. See pages 8-10, below.

19 [Section 3.0](#) of the 2001 Restated and Amended Declarations prohibits an Owner  
20 from using the common areas while a tenant is leasing the Lot. [Section 3.3\(E\)](#) grants  
21 the Association an easement “for inspection of the Lots, parcels and Neighborhood  
22 Common Area in order to verify that the provisions of the Project Documents are being

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24 <sup>1</sup> See [A.R.S. § 42-5070\(F\)](#) (“ . . . “transient” means any person who either at the person’s  
25 own expense or at the expense of another obtains lodging space or the use of lodging space on a  
26 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).

1 complied with by \*\*\* tenants, invitees and other occupants of the Lot[.]” [Section 4.2](#)  
2 allows the Association to adopt rules that “have the same force and effect as if they  
3 were set forth and were a part of this Declaration.”

4 The Association's Board of Directors' effort and cost of monitoring the length of  
5 a lease and the comings and goings by tenants is necessary because the Association  
6 owns, controls, maintains, and repairs the common areas such as the streets, boat docks,  
7 trails, and parklands. These are facts not present in [Dreamland](#) or [Kalway](#).

8 The public policy established by Arizona Legislature expressly permits  
9 Associations in Planned Communities to include “rental time period restrictions” as a  
10 way to control common area usage. [A.R.S. § 33-1806.01\(A\)](#). This statute is not  
11 mentioned or considered in [Dreamland](#) or [Kalway](#).

12 **B. The Amendment Satisfies the Declarations.**

13 Plaintiffs allege and agree the 2001 Amended and Restated Declarations govern  
14 the 188 Lots and common areas within the gated community. Complaint, ¶ 14. The  
15 2001 Amended and Restated Declarations describe on page No. 1 that the Amended  
16 and Restated Declarations had “been approved by the written approval or the  
17 affirmative vote, or any combination thereof, of Owners representing not less than  
18 sixty-seven percent (67%) of the votes in each class of membership.”

19 The 2021 Amendment was passed and recorded following the same contractual  
20 and statutory procedure used when the 2001 Restatement and Amended Declarations  
21 were passed and recorded. The 2021 Amendment states on its face how owners  
22 representing not less than sixty-seven (67%) of the Owners of each class provided their  
23 written consent to the 2021 Amendment. *See* 2021 Amendment, p. 1. As Plaintiffs  
24 concede the 2001 Amended and Restated Declarations are controlling, so too are the  
25 2021 Amendment passed by the same procedure and same 67% super-majority.

1           **C. The Amendment Satisfies the Planned Communities Act.**

2           The Planned Communities Act is found at A.R.S. [§ 33-1801](#) to [§ 33-1818](#). A  
3 “Planned Community” is a development that includes common areas owned and  
4 operated by an Association or other non-profit created for the purpose of managing,  
5 maintaining, or improving the property and in which the Owners are mandatory  
6 members. [A.R.S. § 33-1802](#). The Association’s duties and the Declaration’s restrictions  
7 extend from how each Owner uses their Lot to how each Owner’s use impacts the use  
8 of the common areas and the costs associated with maintenance and repairs.

9           The Arizona legislature regulates how Associations of Planned Communities  
10 can “impose reasonable monetary penalties on members for violations of the  
11 declaration, bylaws and rules of the association,” and what open meeting rules must  
12 be followed. *See* A.R.S. §§ [33-1803](#), [33-1804](#). The Association’s financial records are  
13 governed by [A.R.S. § 33-1805](#). Information the Association must supply upon the sale  
14 of a Lot is mandated in [A.R.S. § 33-1806](#). Rental property is subject to the provisions of  
15 [A.R.S. § 33-1806.01](#), which provides in part:

16           A member may use the member’s property as a rental property unless  
17 prohibited in the declaration and *shall use it in accordance with the  
18 declaration’s rental period restrictions.*

18           The term “declaration” as used therein expressly includes “any amendments.” [A.R.S.](#)  
19 [§ 33-1802\(3\)](#). This is the legislature’s determination that Associations in Planned  
20 Communities may by Declaration or Amendment impose “rental period restrictions.”

21           Amendments to Declarations are statutorily regulated under [A.R.S. § 33-1817](#),  
22 which provides in part:

23           The declaration may be amended by the association, if any, or, if there is no  
24 association or board, the owners of the property that is subject to the  
25 declaration, *by an affirmative vote or written consent of the number of owners or  
26 eligible voters specified in the declaration, including the assent of any  
individuals or entities that are specified in the declaration.*

1 The provisions of the Planned Communities Act expressly “applies to all  
2 planned communities” other than a community “created or incorporated before  
3 January 1, 1974, and that does not have authority to enforce covenants[.]” [A.R.S. § 33-](#)  
4 [1801\(A\)](#). The Shores at Rainbow Lakes is governed by the Planned Communities Act.

5 The Arizona legislature established public policy by expressly allowing  
6 Associations of Planned Communities to provide in their Declarations a limit on the  
7 duration of a rental. See A.R.S. §§ [33-1817](#) and [33-1806.01\(A\)](#).

8 Defendant followed the policy the legislature adopted for Planned Communities.  
9 [Achen-Gardner, Inc. v. Superior Court](#), 173 Ariz. 48, 54 (1992) (“We also construe a statute  
10 in a manner that ‘will best serve the legislature’s purposes, policies, and goals’ apparent  
11 from the whole body of relevant law. [Tracy v. Superior Court](#), 168 Ariz. 23, 31, 810 P.2d  
12 1030, 1038 (1991).”)

13 Plaintiffs’ hope the Court will ignore the statutory requirements stated in the  
14 Planned Communities Act. But, ignoring these statutes would not “best serve the  
15 legislature’s purposes, policies and goals” and would be directly contrary to public  
16 policy. *Id.* The Court should find follow the Declarations and statutes.

17 **D. Dreamland and Kalway Do Not Apply.**

18 In [Dreamland](#) the Court found it “noteworthy that there were no common areas  
19 within Dreamland Villa.” In this case, this Court should find “noteworthy” that there  
20 *are* common areas within The Shores at Rainbow Lake. The [Dreamland](#) Court stated the  
21 issue presented in its 2010 appeal as follows:

22 The question here is whether deed restrictions for a community *without*  
23 *common areas*, containing only restrictive covenants pertaining to each lot  
24 owner’s personal residence, can be amended by majority vote of lot owners  
to require membership in an association and the imposition of assessments.

25 [Emphasis supplied.] [Dreamland Villa Cmty. v. Raimey](#), 224 Ariz. 42, ¶ 30 (App. 2010).

1 The question in this case involving The Shores at Rainbow Lake is much  
2 different. A red-line version of the [Dreamland](#) question illustrates the difference as  
3 follows:

4 The question here for The Shores at Rainbow Lake is whether deed  
5 restrictions for a community with ~~without~~ common areas, containing only  
6 restrictive covenants pertaining to each lot owner's personal residence and  
7 how each owner's use impacts the use and cost of maintaining and  
8 repairing the common areas, can be amended by a 67% super-majority vote  
9 of lot owners passed in compliance with the Planned Communities Act to  
10 further define "residential use" to exclude transient lodging and to further  
11 restrict the type of allowed leasing within the gated community-require  
12 membership in an association and the imposition of assessments.

13 Because the question in this action is different from [Dreamland](#), a different  
14 answer is expected. The different answer is found in *Nicdon v. Desert Mountain Master*  
15 *Association*, [2021 WL 1691532](#), [2021 Ariz.App. Unpubl LEXIS 489](#) (April 29, 2021) *pet. for*  
16 *rev. denied* January 4, 2022,

17 In the 2021 [Desert Mountain Master Association](#) decision, the Court of Appeals  
18 considered the following issues, which are identical to the issues in this action:

- 19 • An Association that owned, controlled, and maintained common areas.
- 20 • Declarations that could be amended only by a 67% super-majority vote.
- 21 • An Association regulated by the Planned Communities Act where time  
22 restrictions on rentals are permitted under the Act at [A.R.S. § 33-1806.01\(A\)](#).

23 When presented with *this* set of issues, the [Desert Mountain](#) Court recognized:

24 First, adoption of the Amendment complied with the statutory scheme set  
25 forth in the Arizona Planned Communities Act. A.R.S. §§ 33-1801 to –  
26 1818. Those provisions allow members of a planned community to rent  
their property "unless prohibited in the declaration" and subject to "the  
declaration's rental time period restrictions." § [33-1806.01](#); see § [33-1802\(3\)](#)  
(defining "declaration" to include any amendments). In general, the  
statutory framework defers to the requirements of a community's

1 governing documents: A declaration may be amended by the "number of .  
2 . . eligible voters specified in the declaration." [§ 33-1817\(A\)\(1\)](#).

3 The [Desert Mountain](#) Court concluded the Amendment that restricted rentals to 30 days  
4 or longer, which was passed in compliance with the Planned Communities Act sections  
5 cited above, was a valid Amendment.

6 The [Desert Mountain](#) Court expressly distinguished the [Dreamland](#) opinion that  
7 answered a question *different* than what was at issue in this case or in [Desert Mountain](#)  
8 by stating:

9 In [Dreamland](#), homeowners purchased their lots with restrictive covenants  
10 relating only to their personal residences. *Id.* at 43, ¶ 4. Later, a nonprofit  
11 corporation that provided recreation to the community attempted to  
12 amend the covenants to compel all lot owners to become dues-paying  
13 members of their association.

14 See [Desert Mountain](#), ¶ 23. In [Desert Mountain](#), the Covenants related to common areas  
15 and not "only to [the owners'] personal residences." The Court also rejected arguments  
16 based upon the Restatement or other common law theories because "Here, the  
17 governing statutes and caselaw are decisive[.]" *Id.* at paragraph 26.

18 The Court of Appeals would likewise find that The Shores at Rainbow Lake  
19 adopted an amendment that addressed common area usage and complied with the  
20 statutory scheme set forth in the Planned Communities Act and find the 30-day  
21 restriction on residential leases to be enforceable. The Court of Appeals would likewise  
22 conclude "Here, the governing statutes and caselaw are decisive[.]"

23 In [Kalway v Calabria Ranch HOA, LLC](#), 252 Ariz. 532 (2022), there is again no  
24 mention of common areas and the amendment was passed by a simple majority. The  
25 [Kalway](#) Court was faced with a similar set of facts described in [Dreamland](#), and answered  
26 the question by adopting [Dreamland](#).

1 This is compared to when an Association owns common areas, the amendment  
2 passed by a super-majority of 67% and the legislature regulates the owners and  
3 Association under the Planned Community Act. Under *that* set of facts, the Arizona  
4 Supreme Court *allowed* the amendment to stand, *denied* review and *awarded* the  
5 Association additional attorney fees and costs. *Nicdon 10663 LLC v. Desert Mt. Master*,  
6 No. CV-21-0123-PR, [2021 WL 1691532](#), [2022 Ariz. LEXIS 20](#), at \*1 (Jan. 4, 2022).

7 **E. The Amendment Satisfies *Dreamland* and *Kalway*.**

8 The [Desert Mountain](#) Court declined to decide if [Dreamland](#) applied to a Planned  
9 Community “because the Amendment at issue here withstands scrutiny under  
10 *Dreamland*.” This Court will reach the same conclusion in this litigation. In adopting  
11 *Dreamland* the Court in [Kalway](#) stated at ¶¶ 16-17 the following rule:

12 To determine whether the original declaration gave sufficient notice of a  
13 future amendment, we must look to the original declaration itself. “Because  
14 covenants originate in contract, the primary purpose of a court when  
15 interpreting a covenant is to give effect to the original intent of the parties”  
16 with any doubts resolved against the validity of a restriction. [Armstrong v.](#)  
17 [Ledges Homeowners Ass’n](#), 633 S.E.2d 78, 85 (N.C. 2006) (emphasis omitted).  
18 We apply an objective inquiry to determine whether a restriction gave  
19 notice of the amendments at issue. *See 1 Williston on Contracts* § 3:4 (4th ed.  
20 2021) (“Whether there is mutual assent to the terms of a contract is  
determined by an objective test, rather than the subjective intentions of the  
parties.”).

21 The restriction itself does not have to necessarily give notice of the  
22 particular details of a future amendment; that would rarely happen.  
23 Instead, it must give notice that a restrictive or affirmative covenant exists  
24 and that the covenant can be amended to refine it, correct an error, fill in a  
25 gap, or change it in a particular way. *See Armstrong*, 633 S.E.2d at 87. But  
26 future amendments cannot be “entirely new and different in character,”  
untethered to an original covenant. [Lakeland Prop. Owners Ass’n v. Larson](#),

1 459 N.E.2d 1164, 1167 (Ill. App. Ct. 1984). Otherwise, such an amendment  
2 would infringe on property owners' expectations of the scope of the  
covenants.<sup>2</sup>

3 In this action, Plaintiffs claim the 2001 Amended and Restated Declarations did  
4 not "give notice of the particular details of a future amendment." However, the *Kalway*  
5 Court recognized "that would rarely happen."

6 As discussed below, the 2001 Restated and Amended Declarations include  
7 restrictive or affirmative covenants covering leases and tenants. The Declarations also  
8 provide notice that the covenants can be amended.

9 **1. A restrictive or affirmative covenant exists.**

10 As concluded in the 2009 unreported decision of *Horton* and as described on  
11 pages 3-4, above, the 2001 Amended and Restated Declarations contains many  
12 restrictive or affirmative covenants regarding leases, leasing, and tenants. The 2001  
13 Amended and Restated Declarations allow owners to lease their units but requires all  
14 leases be in writing and that an owner notify the HOA of a commencement date and  
15 termination date for the lease. Declarations, [Section 2.30](#). The 2001 Declaration did not  
16 distinguish between short-term and long-term leasing, but did limit the use to  
17 exclusively single family residential use. Although the 2001 Declarations state leasing  
18 was not considered a business or trade under [Section 2.18](#), the 2001 Declarations did  
19 not provide leases for transient lodging would be considered for "exclusively single  
20 family residential use." *Id.*

21  
22  
23 <sup>2</sup> In *Armstrong*, cited in *Kalway*, the Court notes: "Here, petitioners purchased lots in a  
24 small residential neighborhood with public roads, no common areas, and no amenities. \* \* \*  
25 Given the nature of this community, it makes sense that the Declaration itself did not contain  
26 any affirmative covenants authorizing assessments." *Armstrong* at n. 560. In *Lakeland* cited in  
*Kalway*, the Court notes: "The Association, a not-for-profit corporation, which began as a  
voluntary group and became active in the subdivision's affairs," did as established did not collect  
dues, fines or penalties and had no common areas to maintain or repair.

1 The use or possible over-use of the common areas is addressed in the 2001  
2 Declarations, which exclude the Owner from the common areas during the term of any  
3 lease. Declarations, at [Section 3.0](#). The more rapid the turn-over of vacation renters,  
4 the greater the impact is on the common areas.

5 **2. Notice exists that the covenant can be amended.**

6 In [Kalway](#) the Declarations could be amended “at any time by an instrument  
7 executed and acknowledged by the [m]ajority [v]ote of the owners” under the general-  
8 amendment-power provision. [Kalway](#), ¶ 3. The Court found this was adequate notice  
9 of future amendments and the [Kalway](#) Court found the amendment regarding garages  
10 was valid and enforceable.

11 The general amendment clause in The Shores at Rainbow Lake’s Declarations is  
12 every bit as clear as the clause in [Kalway](#) and states in [Section 9.2\(A\)](#):

13 A) Except for amendments made pursuant to Subsection (B) of this Section,  
14 the Declaration or the Project Plat may only be amended by the written  
15 approval or the affirmative vote, or any combination thereof, of Owners  
16 representing not less than sixty-seven percent (67%) of the votes in each  
class of membership.

17 The applicable Declarations further describe in great complication and detail the  
18 Voting Rights for Class A and Class B members and the Voting Procedure in [Section](#)  
19 [4.6](#) and [Section 4.7](#). Plaintiffs agreed the Declarations could also be amended by a  
20 simple change to the Rules. See [Section 4.2](#). Just like [Kalway](#), the 2001 Restated and  
21 Amended Declarations provide notice that the Declarations can “be amended to refine  
22 it, correct an error, fill in a gap, or change it in a particular way.”

23 In the 2009 [Horton](#) unreported decision discussed at p. 3, above, the Court  
24 considered the pre-Amendment Declarations and concluded: “By not including  
25 language restricting lease duration, we find the Declaration does not exclude short-  
26

1 term leases.” In reaching this result, the [Horton](#) Court signaled its belief that the  
2 exclusion of transient lodging would require an Amendment to the Declarations.

3 The 2021 Amendment redefined allowed residential leasing to exclude transient  
4 lodging.<sup>3</sup> That amendment is allowed because the phrase “exclusively to Single Family  
5 residential use” was otherwise referenced in the original Declarations and “a later  
6 amendment defining or redefining the term was reasonably foreseeable.” [Kalway](#), see  
7 also [Nicdon v. Desert Mountain Master Association](#), [2021 WL 1691532](#), [2021 Ariz.App.](#)  
8 [Unpubl LEXIS 489](#) (April 29, 2021) *pet. for rev. denied* January 4, 2022.

9 **3. The 2021 Amendment is not “untethered to an original covenant”.**

10 Although [Kalway](#) holds “an amendment would infringe on a property owners’  
11 expectations of the scope of the covenants” if an amendment was “untethered to an  
12 original covenant,” Plaintiffs’ Motion never claims or mentions that the 2021  
13 Amendment was “untethered to an original covenant.” Plaintiffs’ failure to address the  
14 issue may be viewed as an admission by Plaintiffs that the 2021 Amendment was  
15 sufficiently “tethered” to the 2001 Amended and Restated Declarations. See [Bulova](#)  
16 [Watch v. Super Department Stores of Arizona](#), 4 Ariz.App. 553, 556 (1967) (failure to  
17 include discussion of the issue presented constitutes a confession of reversible error).

18 The 2001 Amended and Restated Declarations required Owners to report to the  
19 Association the start date and end date of each rental period. *Id.*, at [Section 2.30](#). The  
20 Association monitors and has an interest in the length of the rental period. Acting upon  
21

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22  
23 <sup>3</sup> Some courts consider transient lodging as non-residential. See [Schwarz v. City of Treasure](#)  
24 [Island](#), 544 F.3d 1201, 1214 (11th Cir. 2008)(defining “residence” as \* \* \* distinguished from a  
25 place of *temporary sojourn or a transient visit.*”); [City of New York v. Big Apple Mgmt.](#), 2019  
26 N.Y. Misc. LEXIS 1804; [2019 WL 1744268](#) (Supreme Ct., New York 2019) (describing property  
advertised on Airbnb as constituting the “conversion of the Subject Buildings from residential to  
*transient use.*”).

1 that lease duration data to recommend restrictions to lease durations of less than 30  
2 days is not “untethered to the original covenants.”

3 The 2001 Amended and Restated Declarations allow the Association to monitor  
4 the tenants’ use of the common areas, and exclude an Owner from using common areas  
5 during the time the Lot is leased. *Id.* at [Section 3.0](#) and [Section 3.3](#). Limiting the number  
6 of times the Association must be watching for Owners’ use of common areas during a  
7 rental period to lease durations of greater than 30 days is not “untethered to the original  
8 covenants.

9 The 2001 Amended and Restated Declarations defined “Single Family” and  
10 limited tenants’ use to “exclusively to Single Family residential use.” See [Section 2.18](#).  
11 The 2021 Amendment re-defining Single Family and excluding transient lodging from  
12 what is considered residential use is not “untethered to the original covenants.”

13 The Association is granted an easement to inspect and confirm proper usage of  
14 the property. *Id.* at [Section 3.3](#). In addition, the Arizona Legislature established as a  
15 matter of public policy that Associations in Planned Communities can include “rental  
16 time period restrictions.” [A.R.S. § 33-1806.01\(A\)](#).<sup>4</sup> Leasing and tenants’ use was  
17 sufficiently “referenced.” See pages 3-4, *supra*. Further definitions, restrictions or  
18 requirements are (1) in compliance with [A.R.S. § 33-1806.01\(A\)](#) and (2) are not  
19 “untethered to the original covenants.”

### 20 **III. CONCLUSION.**

21 The 188 Lots and Owners (including the 7 Plaintiffs) in the exclusive gated  
22 community at The Shores at Rainbow Lakes are subject to a comprehensive set of  
23 Declarations and governed by a Board of Directors elected by the Owners. The 2001

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24 <sup>4</sup> The legislature’s public policy decision to allow Planned Communities to impose “rental  
25 time period restrictions” is compared to the legislature’s public policy decision to prohibit cities  
26 from doing the same. See [A.R.S. § 9-500.39](#). That is because Associations in Planned  
Communities own and must maintain control over the areas used by the short-term tenants.

1 Amended and Restated Declarations are 44 pages long. The gated community is also  
2 regulated by the Arizona Planned Communities Act, a set of statutes running from  
3 [A.R.S. § 33-1801 to §33-1818](#). This degree of regulation compelled the [Desert Mountain](#)  
4 [Master Association](#) Court to conclude “Here, the governing statutes and caselaw are  
5 decisive[.]” *Id.* at ¶ 26. This Court should reach the same conclusion.

6 Because the Association owns the common areas such as streets, boat docks,  
7 trails, and parkland, the Association is interested in not just how each Owner uses their  
8 Lot, but also in how each Owner's use impacts the common areas and thus impacts all  
9 other Owners' use of the common areas. This presents a significantly different set of  
10 facts from the facts considered in the [Dreamland](#) or [Kalway](#) opinions and is also different  
11 from the decisions [Kalway](#) court cited when discussing common-law limits on a  
12 contractual right to amend by a simple-majority vote.

13 Even if the rules discussed in [Dreamland](#) as adopted by [Kalway](#) apply to the  
14 heavily regulated Planned Communities, the 2001 Restated and Amended Declarations  
15 contain sufficient definitions, restrictions, and requirements on leasing and the tenants'  
16 use of property within the gated community to put Owners on notice that future  
17 amendments could change the current Declarations.

18 When the "revolutionary" (*see* Complaint, ¶ 33) change to how vacation rentals  
19 allowed transient lodgers to impact the use of Owners of their Lots and the use of the  
20 common areas, the Association was empowered to react. It first conducted a straw poll  
21 and then provided a proposed amendment for approval by 67% of the Owners. What  
22 was previously stated as a Tenant's use “shall be . . . devoted exclusively to Single  
23 Family residential use” (*see* [Section 2.18](#)) is now further defined to exclude transient  
24 lodging from “residential use.” The term “Single Family” was also re-defined. This  
25 amendment was a foreseeable reaction, and is how other Planned Community  
26 Associations and other municipalities have reacted, such as Austin, Texas, or Santa

1 Monica, California. *See, e.g.*, § 25-2-795 – Occupancy Limits for Short-term rentals<sup>5</sup>; and  
2 Santa Monica, Cal., Municipal Code ch. 6.20 (2015)<sup>6</sup>.

3 By the terms of the Declarations and the requirements of the Planned  
4 Communities Act, when approvals of more than the required number of Owners were  
5 received, the Association was required by law to record the 2021 Amendment. To do  
6 otherwise would be to violate the [Section 9.2\(C\)](#) of the Declarations and violate [A.R.S.](#)  
7 [§ 33-1817\(A\)\(3\)](#)(stating the Board “shall prepare, execute and record a written  
8 instrument setting forth the amendment.”)

9 Plaintiffs’ Motion purposefully ignores many of the pre-Amendment restrictions  
10 on leasing and tenants’ use of common areas. Plaintiffs’ Motion does not address the  
11 broad control the Arizona legislature has under the Planned Communities Act, or  
12 explain why Plaintiffs’ concede the 2001 Amended and Restated Declarations were  
13 validly passed by approval of more than 67% of the Owners, but the 2021 Amendment  
14 passed by the same approval is invalid.

15 Defendants on the other hand ask the Court to conclude that (1) compliance with  
16 the voting procedure of the Declarations and (2) compliance with the Planned  
17 Communities Act is decisive. Because the seven Plaintiffs (out of 188 Owners) did not  
18 find support from a 34% minority of the Owners, the seven Plaintiffs are just sore losers  
19 asserting post-election complaints about how the election turned out.

20 Defendant respectfully requests the Court deny Plaintiffs’ Motion re Validity of  
21 Amendment, find the 2021 Amendment to be valid and in compliance with the  
22 Declarations and the Planned Communities Act, and enter partial summary judgment  
23

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24 <sup>5</sup> [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT25LADE](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT25LADE)  
25 [CH25-2ZO SUBCHAPTER CUSDERE ART4ADRECEUS DIV2COUS S25-2-](#)  
26 [807SPUSHIDI](#)

<sup>6</sup> <http://www.qcode.us/codes/santamonica>

1 in favor of Defendant in that regard. Defendant also requests and award of costs and  
2 attorney fees be imposed against Plaintiffs, jointly and severally, as allowed under  
3 [A.R.S. § 12-341.01](#) and *Nicdon 10663 LLC v. Desert Mt. Master*, No. CV-21-0123-PR, [2021](#)  
4 [WL 1691532](#), [2022 Ariz. LEXIS 20](#), at \*1 (Jan. 4, 2022) (Arizona Supreme Court awards  
5 Association its attorney fees).

6 DATED this 31st day of May 2022.

7 JENNINGS HAUG KELEHER MCLEOD LLP

8 /s/ James L. Csontos

9 Jack R. Cunningham

10 James L. Csontos

11 Attorneys for The Shores at Rainbow Lake

12 Community Association,

13  
14 Copy of the foregoing mailed  
15 and emailed this 31st day of May 2022, to:

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**EXCERPTS FROM**  
**2001 AMENDED AND RESTATED DECLARATIONS**

**Section 1.29.**

1.29. "Lessee" means the lessee or tenant under a lease, oral or written, of any Lot or Parcel including an assignee of a lease.

**Section 1.36**

1.36. "Owner" means the record owner, whether one or more Persons, of beneficial or equitable title (and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest of a Lot or Parcel. **Owner shall not include** (i) Persons having an interest in a Lot or Parcel merely as security for the performance of an obligation, or (ii) a **lessee or tenant** of a Lot or Parcel. Owner shall include a purchaser under a contract for the conveyance of real property, a contract for deed, a contract to convey, an agreement for sale or any similar contract through which a seller has conveyed to a purchaser equitable title in a Lot or Parcel under which the seller is obligated to convey to the purchaser the remainder of seller's title in the Lot or Parcel, whether legal or equitable, on payment in full of all monies due under the contract. Owner shall not include a purchaser under a purchase contract and receipt, escrow instructions or similar executory contracts which are intended to control the rights and obligations of the parties to the executory contracts pending the closing of a sale or purchase transaction. In the case of Lots or Parcels the fee simple title to which is vested in a trustee pursuant to Arizona Revised Statutes, Section 33-801, et seq., the Trustor shall be deemed to be the Owner. In the case of the Lots or Parcels the fee simple title to which is vested in a trustee pursuant to a subdivision trust agreement or similar agreement the beneficiary of any such trust who is entitled to Possession of the trust property shall be deemed to be the Owner.

**Section 1.47**

1.47. "Single Family" means 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.

1 **Section 2.18**

2 2.18. Residential Use. All Lots and Parcels shall be used, improved and devoted  
3 **exclusively to Single Family residential use. No** gainful occupation, profession, trade,  
4 **business or other nonresidential use shall be conducted** on any Lot or Parcel or in or  
5 from any residence, except that an Owner or other resident or a residence may conduct  
6 a business activity within a residence so long as: (i) the existence or operation of the  
7 business activity is not apparent or detectable by sight, sound or smell from outside the  
8 residence; (ii) the business activity conforms to all applicable zoning ordinances or  
9 requirements for the property; (iii) the business activity does not involve persons  
10 coming onto the lot or the door-to-door solicitation of owners or other residents in the  
11 property; and (iv) the business activity is consistent with the residential character of the  
12 property and does not constitute nuisance or a hazardous or offensive use or threaten  
13 security or safety of other residents in the property, as may be determined from time  
14 to time in the sole discretion of the board. The terms "gainful occupation," "profession,"  
15 "trade," "business" and "nonresidential use" as used in this section shall be construed to  
16 have ordinary, generally accepted meanings, and shall include, without limitation, any  
17 occupation, work or activity undertaken on an ongoing basis which involves the  
18 provision of goods or services to persons other than the provider's family and for which  
19 the provider receives a fee, compensation or other form of consideration, regardless of  
20 whether: (a) such activity is engaged in full or part time; (b) such activity is intended or  
21 does generate a profit; or (c) a license is required for such activity. **The leasing of a  
22 residence by the Owner thereof shall not be considered a trade or business within  
23 the meaning of this section.** Property classified as "Detached Residential Use" under  
24 this Declaration or a Tract Declaration may be used only for the construction and  
25 occupancy of Detached Residential Units and typical residential activities incidental  
26 thereto, such as the construction and use of a family swimming pool, and no structure  
whatever, other than one private Detached Residential Unit, together with a private  
garage for not more than three (3) cars, a guest house or servant quarters, shall be  
erected, placed or permitted to remain on any such Lot.

1 **Section 2.30**

2 2.30. Leasing of Lots. **No Owner may lease less than his entire Lot.** Upon leasing his  
3 Lot, an Owner shall promptly notify the Association of the commencement date and  
4 termination date of the lease and the names of each lessee or other person who will  
5 be occupying the Lot during the term of the lease.

6 **Section 3.0 (B) and (C)**

7 (B) If a Lot or Parcel is leased or rented by the Owner thereof, the Lessee and the  
8 members of his family residing with such Lessee shall have the right to use the  
9 Common Area during the term of the lease, and the Owner of such Lot or Parcel shall  
10 have no right to use the Common Area until the termination or expiration of such  
11 lease.

12 (C) The guest and invitees of any Member or other person entitled to use the Common  
13 Area pursuant to this Declaration may use the Common Area provided they are  
14 accompanied by a Member or other person entitled to use the Common Area pursuant  
15 to this Declaration. **The Board shall have the right to limit the number of guests and  
16 invitees who may use the Common Area** at any one time and may restrict the use of  
17 the Common Area by guests and invitees to certain specified times.

18 **Section 3.3(E)**

19 3.3. Easement in Favor of Association. The Lots, Parcels and Neighborhood Common  
20 Area are hereby made subject to the following easements in favor of the Association  
21 and its directors, officers, agents, employees and independent contractors:

22 \* \* \*

23 (E) For inspection of the Lots, Parcels and Neighborhood Common Area in order to  
24 verify that the provisions of the Project Documents are being complied with by the  
25 Owners, their guests, tenants, invitees and the other occupants of the Lot, Parcel or  
26 Neighborhood Common Area.

1 **Section 4.2**

2 4.2. The Association Rules. The Board may, from time to time and subject to the  
3 provisions of this Declaration, adopt, amend and repeal rules and regulations to be  
4 known as the Association Rules. The Association Rules may restrict and govern the use  
5 of any area by any Member, Lessee or Resident, by the family of such Member, Lessee  
6 or Resident and by the guests and invitees of a Member, Lessee or Resident; provided,  
7 however, that the Association Rules shall not unreasonably discriminate among  
8 Members and shall not be inconsistent with this Declaration, the Articles and Bylaws.  
9 Upon adoption, **the Association Rules shall have the same force and effect as if they  
10 were set forth in and were a part of this Declaration.**

11 **Section 4.5**

12 4.5. Members. Every Owner of a Lot or Parcel **shall automatically be a Member** of the  
13 Association.

14 **Section 4.6**

15 4.6. Voting Rights. The Association shall have two classes of Members:  
16 Class A. Class A Members shall be all Owners of Lots or Parcels restricted by this  
17 Declaration or a Tract Declaration to Cluster Residential Use. Each Class A Member  
18 shall be entitled to the following votes;  
19 (i) One vote for each Lot owned by the Member which is restricted to **Cluster  
20 Residential Use**;  
21 (ii) In the case of a Parcel restricted to **Cluster Residential Use**, one vote for each  
22 Residential Unit permitted upon the Parcel under the zoning ordinances of  
23 Navajo County or the municipality having jurisdiction over such Parcel, the  
24 number of such Residential Units to be determined on the assumption that the  
25 number of Residential Units within the density classification under the zoning  
26 ordinances will be spread evenly over all land within the density classification,  
if a plat, condominium map or other instrument creating Lots is recorded  
covering less than all of the Parcel, the number of votes attributable to such Parcel  
shall be reduced by the number equal to the number of Lots shown on the  
recorded plat.

1 Class B. Class B Members shall be all Owners of Lots or Parcels restricted by this  
2 Declaration or a Tract Declaration to **Detached Residential Use**. Each Class B Member  
3 shall be entitled to the following votes:

4 (i) One vote for each Lot owned by the Member which is restricted to **Detached  
5 Residential Use**;

6 (ii) In the case of a Parcel restricted to **Detached Residential Use**, one vote for  
7 each Residential Unit permitted upon the Parcel under the zoning ordinances of  
8 Navajo County or any municipality having jurisdiction over such Parcel, the  
9 number of such Residential Units to be determined on the assumption that the  
10 number of Residential Units within the density classification under the zoning  
11 ordinances will be spread evenly over all land within the density classification,  
12 if a plat, condominium map or other instrument creating Lots is recorded  
13 covering less than all of the Parcel, the number of votes attributable to such Parcel  
14 shall be reduced by the number equal to the number of Lots shown on the  
15 recorded plat.

#### 13 **Section 4.7**

14 4.7. Voting Procedures. No change in the ownership of a Lot or Parcel shall be effective  
15 for voting purposes unless and until the Board is given actual written notice of such  
16 change and is provided satisfactory proof thereof. The vote for each such Lot or Parcel  
17 must be cast as a unit, and fractional votes shall not be allowed. In the event that a Lot  
18 or Parcel is owned by more than one person or entity and such Owners are unable to  
19 agree among themselves as to how their vote or votes shall be cast, they shall lose their  
20 right to vote on the matter in question. If any Member casts a vote representing a certain  
21 Lot or Parcel, it will thereafter be conclusively presumed for all purposes that he was  
22 acting with the authority and consent of all other owners of the same Lot or Parcel  
23 unless objection thereto is made at the time the vote is cast. In the event more than one  
24 vote is cast by a Class A Member for a particular Lot or Parcel, none of the votes shall  
25 be counted and all of the votes shall be deemed void.  
26

1 **Section 9.2**

2 9.2. Amendments.

3 (A) Except for amendments made pursuant to Subsection (B) of this Section, the  
4 Declaration or the Project Plat may only be amended by the written approval or the  
5 affirmative vote, or any combination thereof, **of Owners representing not less than**  
6 **sixty-seven percent (67%) of the votes in each class of membership.**

7 (B) The Board may amend this Declaration or the Project Plat, without obtaining the  
8 approval or consent of any Owner or First Mortgagee, in order to conform this  
9 Declaration or the Project Plat to the requirements or guidelines of the Federal National  
10 Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal  
11 Housing Administration, the Veterans Administration or any federal, state or local  
12 governmental agency whose approval of the Project, the Project Plat or the Project  
13 Documents is required by law or requested by the Board.

14 (C) Any amendment approved pursuant to Subsection (A) above or by the Board  
15 pursuant to Subsection (B) above **shall be signed by the President** or Vice President of  
16 the Association and **shall be recorded with the County Recorder of Navajo County,**  
17 Arizona. Any such amendment shall certify that the amendment has been approved as  
18 required by this Section.  
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