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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 PLAINTIFFS'  
STATEMENT OF FACTS and**

**DEFENDANT'S SEPARATE  
STATEMENT OF FACTS**

21 For the purposes of the pending cross-motions for summary judgment,  
22 Defendant The Shores at Rainbow Lake Community Association accepts Plaintiffs'  
23 Statement of Facts. However, because Plaintiffs presented and discussed only one  
24 section of the Declarations that describe limits on leases, tenants and the use of  
25 properties within the Association, Defendant provides this additional Statement of  
26 Fact.

1 12. Prior to the 2021 Amendment, in addition to section 2.30 mentioned in  
2 Plaintiffs' Statement of Facts, the pre-existing 2001 Amended and Restated Declarations  
3 contained numerous sections describing and restricting the use of property for leases,  
4 and the use of the Common Areas when a Lot was leased, amendments to the  
5 Declarations and the voting method to employ when amending the Declarations,  
6 including the following [emphasis supplied in the following]:

7  
8 **Section 1.29.**

9 1.29. "Lessee" means the lessee or tenant under a lease, oral or written, of any Lot  
10 or Parcel including an assignee of a lease.

11 **Section 1.36**

12 1.36. "Owner" means the record owner, whether one or more Persons, of  
13 beneficial or equitable title (and legal title if the same has merged with the  
14 beneficial or equitable title) to the fee simple interest of a Lot or Parcel. **Owner**  
15 **shall not include** (i) Persons having an interest in a Lot or Parcel merely as  
16 security for the performance of an obligation, or (ii) a **lessee or tenant** of a Lot or  
17 Parcel. Owner shall include a purchaser under a contract for the conveyance of  
18 real property, a contract for deed, a contract to convey, an agreement for sale or  
19 any similar contract through which a seller has conveyed to a purchaser  
20 equitable title in a Lot or Parcel under which the seller is obligated to convey to  
21 the purchaser the remainder of seller's title in the Lot or Parcel, whether legal or  
22 equitable, on payment in full of all monies due under the contract. Owner shall  
23 not include a purchaser under a purchase contract and receipt, escrow  
24 instructions or similar executory contracts which are intended to control the  
25 rights and obligations of the parties to the executory contracts pending the  
26 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

1 trust who is entitled to Possession of the trust property shall be deemed to be the  
2 Owner.

3  
4 **Section 1.47**

5 1.47. "**Single Family**" means a group of one or more persons each related to the  
6 other by blood, marriage or legal adoption, or a group of persons not all so  
7 related, who maintain a common household in a Residential Unit.

8 **Section 2.18**

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

1 construction and occupancy of Detached Residential Units and typical  
2 residential activities incidental thereto, such as the construction and use of a  
3 family swimming pool, and no structure whatever, other than one private  
4 Detached Residential Unit, together with a private garage for not more than three  
5 (3) cars, a guest house or servant quarters, shall be erected, placed or permitted  
6 to remain on any such Lot.

7 **Section 2.30**

8 2.30. Leasing of Lots. **No Owner may lease less than his entire Lot.** Upon leasing  
9 his Lot, an **Owner shall promptly notify the Association of the commencement**  
10 **date and termination date of the lease and the names of each lessee or other**  
11 **person who will be occupying the Lot** during the term of the lease.

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

13 (B) If a Lot or Parcel is leased or rented by the Owner thereof, the Lessee and the  
14 members of his family residing with such **Lessee shall have the right to use the**  
15 **Common Area** during the term of the lease, and **the Owner of such Lot or Parcel**  
16 **shall have no right to use the Common Area until the termination or expiration**  
17 **of such lease.**

18 (C) The guest and invitees of any Member or other person entitled to use the  
19 Common Area pursuant to this Declaration may use the Common Area provided  
20 they are accompanied by a Member or other person entitled to use the Common  
21 Area pursuant to this Declaration. **The Board shall have the right to limit the**  
22 **number of guests and invitees who may use the Common Area** at any one time  
23 and may restrict the use of the Common Area by guests and invitees to certain  
24 specified times.

25 **Section 3.3(E)**

26 3.3. Easement in Favor of Association. The Lots, Parcels and Neighborhood  
Common Area are hereby made subject to the following **easements in favor of**  
**the Association** and its directors, officers, agents, employees and independent  
contractors:

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

5 **Section 4.2**

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

16 **Section 4.5**

17 4.5. Members. Every Owner of a Lot or Parcel **shall automatically be a Member**  
18 of the Association.

19 **Section 4.6**

20 4.6. Voting Rights. The Association shall have two classes of Members:  
21 Class A. Class A Members shall be all Owners of Lots or Parcels restricted by this  
22 Declaration or a Tract Declaration to Cluster Residential Use. Each Class A  
23 Member shall be entitled to the following votes;

24 (i) One vote for each Lot owned by the Member which is restricted to  
25 **Cluster Residential Use;**

26 (ii) In the case of a Parcel restricted to **Cluster Residential Use,** one vote  
for each Residential Unit permitted upon the Parcel under the zoning  
ordinances of Navajo County or the municipality having jurisdiction over  
such Parcel, the number of such Residential Units to be determined on the

1 assumption that the number of Residential Units within the density  
2 classification under the zoning ordinances will be spread evenly over all  
3 land within the density classification, if a plat, condominium map or other  
4 instrument creating Lots is recorded covering less than all of the Parcel,  
5 the number of votes attributable to such Parcel shall be reduced by the  
6 number equal to the number of Lots shown on the recorded plat.

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

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

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

#### 22 **Section 4.7**

23 4.7. Voting Procedures. No change in the ownership of a Lot or Parcel shall be  
24 effective for voting purposes unless and until the Board is given actual written  
25 notice of such change and is provided satisfactory proof thereof. The vote for  
26 each such Lot or Parcel must be cast as a unit, and fractional votes shall not be  
allowed. In the event that a Lot or Parcel is owned by more than one person or  
entity and such Owners are unable to agree among themselves as to how their  
vote or votes shall be cast, they shall lose their right to vote on the matter in  
question. If any Member casts a vote representing a certain Lot or Parcel, it will  
thereafter be conclusively presumed for all purposes that he was acting with the  
authority and consent of all other owners of the same Lot or Parcel unless

1 objection thereto is made at the time the vote is cast. In the event more than one  
2 vote is cast by a Class A Member for a particular Lot or Parcel, none of the votes  
3 shall be counted and all of the votes shall be deemed void.

4 **Section 9.2**

5 9.2. Amendments.

6 (A) Except for amendments made pursuant to Subsection (B) of this Section, the  
7 Declaration or the Project Plat may only be amended by the written approval or  
8 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.**

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

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

19  
20 DATED this 31st day of May 2022.

21 JENNINGS HAUG KELEHER MCLEOD LLP

22  
23 /s/ James L. Csontos

24 Jack R. Cunningham

25 James L. Csontos

26 Attorneys for The Shores at Rainbow Lake

Community Association,

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